BOUVIER'S LAW DICTIONARY

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BOUVIER'S LAW DICTIONARY

A CONCISE

ENCYCLOPEDIA OF THE LAW

RAWLE'S REVISION

BOUVIER'S

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

BY JOHN BOUVIER

Ignoratis terminis ignoratur et ars.—Co. Litt. 2*a*

Je sais que chaque science et chaque art a ses termes propres, inconnus au commun des hommes.—Fleury

THIRD REVISION

(BEING THE EIGHTH EDITION)

BY FRANCIS RAWLE

OF THE PHILADELPHIA BAR

VOLUME I

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PREFACE

It has been the purpose of the Editor in preparing this his Third Revision to treat much more fully all encyclopædic titles, except those in which there has been no development in recent years, while adding many dictionary and other minor titles not found in the last Revision. These objects and the great changes since 1898, the date of the last Revision, in the questions which have occupied the courts, have required the extension of the work to three volumes. The titles of both State and Federal cases have for the first time been inserted, as well as the volumes of the different series of reports other than those of the official series. Titles of a statutory and changing nature have been treated less fully, so as to avoid purely ephemeral matter.

Judge Baldwin (Modern Political Institutions 241) quotes Jeremiah Mason as saying that the development of an American Jurisprudence can only be looked for from the courts of the National Government. The Editor has been guided by that thought and sees in it a hope of increasing uniformity of law, towards which the profession, in its work on uniform legislation, is making real progress. He has therefore constantly cited the decisions of the Supreme Court of the United States and very frequently those of the lower Federal Courts. Of course, on many of the questions now being passed upon by the State Courts, the decisions of the Supreme Court are of binding authority.

The Editor is indebted to George H. Bates for many important titles, such as Constitutional Law, Constitution of the United States, Restraint of Trade and Equity; to R. C. Wildes for valuable assistance throughout; to Charles G. Fenwick, Ph. D. (Johns Hopkins), author of the "Neutrality Laws of the United States," for revising and in many cases rewriting the titles relating to International Law; and to Norman B. Gwyn, M. D., for revising the titles relating to Medical Jurisprudence.

Francis Rawle.

Philadelphia, November 3, 1914.

PREFACE TO THE FIRST EDITION

To THE difficulties which the author experienced on his admission to the bar, the present publication is to be attributed. His endeavors to get forward in his profession were constantly obstructed, and his efforts for a long time frustrated, for want of that knowledge which his elder brethren of the bar seemed to possess. To find among the reports and the various treatises on the law the object of his inquiry, was a difficult task: he was in a labyrinth without a guide; and much of the time which was spent in finding his way out might, with the friendly assistance of one who was acquainted with the construction of the edifice, have been saved, and more profitably employed. He applied to law dictionaries and digests within his reach, in the hope of being directed to the source whence they derived their learning; but he was too often disappointed: they seldom pointed out the authorities where the object of his inquiry might be found. It is true such works contain a great mass of information, but, from the manner in which they have been compiled, they sometimes embarrassed him more than if he had not consulted them. They were written for another country, possessing laws different from our own, and it became a question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigor, and not fitted to the present times, nor calculated for present use, even in England. And there is a great portion which, though useful to an English lawyer, is almost useless to the American student. What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their births, their burials, their beer and ale houses, and a variety of similar subjects?

The most modern law dictionaries are compilations from the more ancient, with some modifications and alterations; and, in many instances, they are servile copies, without the slightest alteration. In the mean time the law has undergone a great change. Formerly the principal object of the law seemed to be to regulate real property, in all its various artificial modifications, while little or no attention was bestowed upon the rules which govern personal property and rights. The mercantile law has since arisen, like a bright pyramid, amid the gloom of the feudal law, and is now far more important in practice than that which refers to real estate. The law of real property, too, has changed, particularly in this country.

The English law dictionaries would be very unsatisfactory guides, even in pointing out where the laws relating to the acquisition and transfer of real estate, or the laws of descent in the United States, are to be found. And the student who seeks to find in the Dictionaries of Cowel, Manly, Jacobs, Tomlins, Cunningham, Burn, Montefiore, Pott, Whishaw, Williams, the Termes de la Ley, or any similar compilation, any satisfactory account in relation to international law, to trade and commerce, to maritime law, to medical jurisprudence, or to natural

law, will probably not be fully gratified. He cannot, of course, expect to find in them any thing in relation to our government, our constitutions, or our political or civil institutions.

It occurred to the author that a law dictionary, written entirely anew, and calculated to remedy those defects, would be useful to the profession. Probably overrating his strength, he resolved to undertake the task; and, if he should not fully succeed, he will have the consolation to know that his effort may induce some more gifted individual, and better qualified by his learning, to undertake such a task, and to render the American bar an important service. Upon an examination of the constitution and laws of the United States, and of the several states of the American Union, he perceived many technical expressions and much valuable information which he would be able to incorporate in his work. Many of these laws, although local in their nature, will be found useful to every lawyer, particularly those engaged in mercantile practice. As instances of such laws the reader is referred to the articles *Acknowledgment, Descent, Divorce, Letters of Administration* and *Limitation.* It is within the plan of this work to explain such technical expressions as relate to the legislative, executive, or judicial departments of the government; the political and the civil rights and duties of the citizens; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration; of the mode of acquiring and transferring property; to the criminal law, and its administration. It has also been an object with the author to embody in his work such decisions of the courts as appeared to him to be important, either because they differed from former judgments, or because they related to some point which was before either obscure or unsettled. He does not profess to have examined or even referred to all the American cases: it is a part of the plan, however, to refer to authorities, generally, which will lead the student to nearly all the cases.

The author was induced to believe that an occasional comparison of the civil, canon, and other systems of foreign law, with our own, would be useful to the profession, and illustrate many articles which, without such aid, would not appear very clear; and also to introduce many terms from foreign laws, which may supply a deficiency in ours. The articles *Condonation, Extradition,* and *Novation* are of this sort. He was induced to adopt this course because the civil law has been considered, perhaps not without justice, the best system of written reason; and as all laws are, or ought to be, founded in reason, it seemed peculiarly proper to have recourse to this fountain of wisdom: but another motive influenced this decision; one of the states of the Union derives most of its civil regulations from the civil law; and there seemed a peculiar propriety, therefore, in introducing it into an American law dictionary. He also had the example of a Story, a Kent, Mr. Angell, and others, who have ornamented their works from the same source. And he here takes the opportunity to acknowledge the benefits which he has derived from the learned labors of these gentlemen, and of those of Judge Sergeant, Judge Swift, Judge Gould, Mr. Rawle, and other writers on American law and jurisprudence.

In the execution of his plan, the author has, in the first place, defined and explained the various words and phrases, by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible; secondly, he has divided the subject in the manner which to him appeared the most natural, and laid down such principles and rules as belong to it; in these cases he has generally been careful to give an illustration, by citing a case whenever the subject

seemed to require it, and referring to others supporting the same point; thirdly, whenever the article admitted of it, he has compared it with the laws of other countries within his reach, and pointed out their concord or disagreement; and, fourthly, he has referred to the authorities, the abridgments, digests, and the ancient and modern treatises, where the subject is to be found, in order to facilitate the researches of the student. He desires not to be understood as professing to cite cases always exactly in point; on the contrary, in many instances the authorities will probably be found to be but distantly connected with the subject under examination, but still connected with it, and they have been added in order to lead the student to matter of which he may possibly be in pursuit.

To those who are aware of the difficulties of the task, the author deems it unnecessary to make any apology for the imperfections which may be found in the work. His object has been to be useful: if that has been accomplished in any degree, he will be amply rewarded for his labor; and he relies upon the generous liberality of the members of the profession to overlook the errors which may have been committed in his endeavors to serve them.

JOHN BOUVIER.

PHILADELPHIA, September, 1839.

REVIEW

OF BOUVIER'S LAW DICTIONARY AND "INSTITUTES OF AMERICAN LAW"

BY S. AUSTIN ALLIBONE, LL.D.
AUTHOR OF "THE DICTIONARY OF AUTHORS"

From the North American Review for July, 1861

THE author of these volumes taught lawyers by his books, but he taught all men by his example, and we should therefore greatly err if we failed to hold up, for the imitation of all, his successful warfare against early obstacles, his unconquerable zeal for the acquisition of knowledge, and his unsparing efforts to distribute the knowledge thus acquired for the benefit of his professional brethren. Born in the village of Codognan, in the department Du Gard, in the south of France, in the year 1787, at the age of fifteen he accompanied his father and mother—the last a member of the distinguished family of Benezet—to Philadelphia, where he immediately applied himself to those exertions for his own support which the rapid diminution of his father's large property had rendered necessary. In 1812 he became a citizen of the United States, and about the same time removed to West Philadelphia, where he built a printing-office, which still exists as an honorable monument of his enterprise. Two years later we find him settled at Brownsville, in the western part of Pennsylvania, where, in 1814, he commenced the publication of a weekly newspaper, entitled "The American Telegraph." In 1818, on Mr. Bouvier's removal to Uniontown, he united with it "The Genius of Liberty," and thenceforth issued the two journals in one sheet, under the title of "The Genius of Liberty and American Telegraph." He retained his connection with this periodical until July 18, 1820.

It was while busily engaged as editor and publisher that Mr. Bouvier resolved to commence the study of the law. He attacked Coke and Blackstone with the determination and energy which he carried into every department of action or speculation, and in 1818 he was admitted to practice in the Court of Common Pleas of Fayette county, Pennsylvania. During the September term of 1822 he was admitted as an attorney of the Supreme Court of Pennsylvania, and in the following year he removed to Philadelphia, where he resided until his death. In 1836 he was appointed by Governor Ritner Recorder of the City of Philadelphia, and in 1838 was commissioned by the same chief magistrate as an Associate Judge of the Court of Criminal Sessions. But the heavy draughts upon time and strength to which he was continually subjected had not been permitted to divert his mind from the cherished design of bestowing upon his profession a manual of which it had long stood in urgent need. While laboring as a student of law, and even after his admission to the bar, he had found his efforts for advancement constantly obstructed, and often frustrated, by the want of a conveniently arranged digest of that legal information which every student should have, and which every practising lawyer must have, always ready for immediate use. The English Law Dictionaries—based upon the jurisprudence of another country, incorporating peculiarities of the feudal law, that are to a great extent obsolete even in England, only partially brought up to the revised code of Great Britain, and totally omitting the distinctive features of our own codes—were manifestly insufficient for the wants of the American lawyer. A Law Dictionary for the profession on this side of the Atlantic should present a faithful incorporation of the old with the new,—of the spirit and the principles of the earlier codes, and

the "newness of the letter" of modern statutes. The Mercantile Law, with the large body of exposition by which it has been recently illustrated; the Law of Real Property in the new shape which, especially in America, it has latterly assumed; the technical expressions scattered here and there throughout the Constitution of the United States, and the constitutions and laws of the several States of the American Union,—all these, and more than these, must be within the lawyer's easy reach if he would be spared embarrassment, mortification, and decadence.

A work which should come up to this standard would indeed be an invaluable aid to the profession; but what hope could be reasonably entertained that the requisites essential to its preparation—the learning, the zeal, the acumen to analyze, the judgment to synthesize, the necessary leisure, the persevering industry, and the bodily strength to carry to successful execution—would ever be combined in one man? Mr. Bouvier determined that it should not be his fault if such a work was not at least honestly attempted. Bravely he wrought, month in and out, year in and out, rewarded for his self-denying toil by each well-executed article, and rejoicing, at rare and prized intervals, over a completed letter of the alphabet.

In 1839 the author had the satisfaction of presenting in two octavo volumes the results of his anxious toils to his brethren and the world at large; and the approving verdict of the most eminent judges—Judge Story and Chancellor Kent, for example—assured him that he had "not labored in vain," nor "spent his strength for naught." This was well; but the author himself was the most rigid and unsparing of his critics. Contrary to the practice of many writers, considering the success of the first and second editions as a proper stimulus to additional accuracy, fulness, and completeness in every part, in 1848, when the third edition was called for, the second having been published in 1843, he was able to announce that he had not only "remodelled very many of the articles contained in the former editions," but also had "added upwards of twelve hundred new ones." He also presented the reader with "a very copious index to the whole, which, at the same time that it will assist the inquirer, will exhibit the great number of subjects treated of in these volumes."

He still made collections on all sides for the benefit of future issues, and it was found after the death of the author, in 1851, that he had accumulated a large mass of valuable materials. These, with much new matter, were, by competent editorial care, incorporated into the text of the third edition, and the whole was issued as the fourth edition in 1852. The work had been subjected to a thorough revision,—inaccuracies were eliminated, the various changes in the constitutions of several of the United States were noticed in their appropriate places, and under the head of "Maxims" alone thirteen hundred new articles were added.

That in the ensuing eight years six more editions were called for by the profession, is a tribute of so conclusive a character to the merits of the work that eulogy seems superfluous. Let us, then, briefly examine those features to which the great professional popularity of the Law Dictionary is to be attributed. Some of these, specified as *desiderata,* have been already referred to with sufficient particularity. But it has been the aim of the author to cover a wider field than the one thus designated. He has included in his plan technical expressions relating to the legislative, executive, and judicial departments of the government; the political and the civil rights and duties of citizens; the rights and duties of persons, especially such as are peculiar to the institutions of the United States,—for instance, the rights of descent and administration, the mode of acquiring and transferring property, and the criminal law and its administration.

He was persuaded—and here as elsewhere he has correctly interpreted the wants of the profession—that an occasional comparison of the civil, canon, and other systems of foreign law with our own would be eminently useful by way of illustration, as well as for other purposes too obvious to require recital. We will barely suggest the advantage to the student of civil law or canon law of having at hand a guide of this character. And we would express our hope that the student of civil or of canon law is not hereafter to be that *rara avis* in the United States which, little to our credit, he has long been. He who would be thoroughly fur-

nished for his high vocation will not be satisfied to slake his thirst for knowledge even at the streams (to which, alas! few aspire) of Bracton, Britton, or Fleta; he will ascend rather to the fountains from which these drew their fertilizing supplies.

To suppose that he who draws up many thousands of definitions, and cites whole libraries of authorities, shall never err in the accuracy of statement or the relevancy of quotation, is to suppose such a combination of the best qualities of a Littleton, a Fearne, a Butler, and a Hargrave, as the world is not likely to behold while law-books are made and lawyers are needed. If Chancellor Kent, after "running over almost every article in" the first edition (we quote his own language), was "deeply impressed with the evidence of the industry, skill, learning, and judgment with which the work was completed," and Judge Story expressed a like favorable verdict, the rest of us, legal and lay, may, without any unbecoming humiliation, accept their *dicta* as conclusive. We say *legal and lay;* for the lay reader will make a sad mistake if he supposes that a Law Dictionary, especially *this* Law Dictionary, is out of "his line and measure." On the contrary, the Law Dictionary should stand on the same shelf with Sismondi's Italian Republics, Robertson's Charles the Fifth, Russell's Modern Europe, Guizot's Lectures, Hallam's Histories, Prescott's Ferdinand and Isabella, and the records of every country in which the influences of the canon law, the civil law, and the feudal law, separately or jointly, moulded society, and made men, manners, and customs what they were, and, to no small extent, what they still are.

In common with the profession on both sides of the water, Judge Bouvier had doubtless often experienced inconvenience from the absence of an Index to Matthew Bacon's New Abridgment of the Law. Not only was this defect an objection to that valuable compendium, but since the publication of the last edition there had been an accumulation of new matter which it was most desirable should be at the command of the law student, the practising lawyer, and the bench. In 1841 Judge Bouvier was solicited to prepare a new edition, and undertook the arduous task. The revised work was presented to the public in ten royal octavo volumes, dating from 1842 to 1846. With the exception of one volume, edited by Judge Randall, and a part of another, edited by Mr. Robert E. Peterson, Judge Bouvier's son-in-law, the whole of the labor, including the copious Index, fell upon the broad shoulders of Judge Bouvier. This, the second American, was based upon the seventh English edition, prepared by Sir Henry Gwillim and Messrs. C. E. Dodd and William Blanshard, and published in eight royal octavos in 1832. In the first three volumes Bouvier confines his annotations to late American decisions; but in the remaining volumes he refers to recent English as well as to American Reports.

But this industrious scholar was to increase still further the obligations under which he had already laid the profession and the public. The preparation of a comprehensive yet systematic digest of American law had been for years a favorite object of contemplation to a mind which had long admired the analytical system of Pothier. Unwearied by the daily returning duties of his office and the bench, and by the unceasing vigilance necessary to the incorporation into the text of his Law Dictionary of the results of recent trials and annual legislation, he laid the foundations of his "Institutes of American Law," and perseveringly added block upon block, until, in the summer of 1851, he had the satisfaction of looking upon a completed edifice. Lawyers who had hailed with satisfaction the success of his earlier labors, and those who had grown into reputation since the results of those labors were first given to the world, united their verdict in favor of this last work.

It is hardly necessary to remark that it was only by a carefully adjusted apportionment of his hours that Judge Bouvier was enabled to accomplish so large an amount of intellectual labor, in addition to that "which came upon him daily,"—the still beginning, never ending, often vexatious duties connected with private legal practice and judicial deliberation. He rose every morning at from four to five o'clock, and worked in his library until seven or eight; then left his home for his office (where, in the intervals of business, he was employed on his "Law Dictionary" or "The Institutes") or his seat on the bench, and after the labor of the day wrought in his library from five o'clock until an hour before midnight.

PARTIAL LIST OF WRITERS

WHO ASSISTED IN EDITING THE EDITION OF 1867

Affidavit; Codes; Ex Post Facto; Falcidian Law; Feudal Law; Fiction; Foreign Law, &c.	Austin Abbott, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Bankrupt Laws; Damages; Indorsement; Receipt, &c.	Benjamin Vaughan Abbott, Esq., of the New York Bar. Author of a "Collection of Forms and Pleadings in Actions;" "Reports of Cases in Admiralty;" "Practice Reports;" "Digest of Reports," &c.
Corporations	Hon. Samuel Ames, LL.D., Chief Justice of Rhode Island. Author of "Treatise on the Law of Private Corporations," &c. Editor of Ames's "Reports."
Parties, &c.	Hon. Oliver Lorenzo Barbour, Vice-Chancellor of New York. Author of a "Treatise on Chancery Practice;" "Set-Off;" "Criminal Law;" &c. Editor of Barbour's "Reports."
Articles upon Maritime Law	E. C. Benedict, Esq., New York City.
Rescission of Contracts; Specific Performance, &c.	Hon. William H. Battle, LL.D., of the Supreme Court of North Carolina; Professor of Law in the University of North Carolina.
Letters Testamentary; Probate of a Will, &c.	Hon. Alex. W. Bradford, LL.D., Ex-Surrogate of New York. Editor of Bradford's "Surrogate Reports," &c.
Abbreviations; Construction; Costs, &c.	F. C. Brightly, Esq., of the Philadelphia Bar. Author of an "Analytical Digest of the Laws of the United States;" "Treatise on the Law of Costs;" "Equity Jurisdiction of the Courts of Pennsylvania," &c.
Statute of Frauds, &c.	Causten Browne, Esq., of the Boston Bar. Author of a "Treatise on the Construction of the Statute of Frauds."
Ejectment, &c.	Hon. T. W. Clerke, LL.D., of the Supreme Court of New York. Author of a "Digest of Cases Determined in Supreme Court of New York." Editor of "Adams on Ejectment."

Slave; Slavery; Slave-Trade, &c. . .	Hon. T. R. R. Cobb, of Georgia. **Author of the "Law of Negro Slavery, &c. in the United States." Editor of "Cobb's Reports," Digests, &c.**
Abortion; Birth; Gestation; Infanticide; Medical Jurisprudence; Pregnancy, &c.	Amos Dean, LL.D., President of the Law Department of the Albany University. **Author of Dean's "Medical Jurisprudence," &c.**
Abatement; Attachment, &c.	Hon. Charles D. Drake, of the St. Louis Bar, United States Senator. **Author of "Drake on Attachments."**
Ancient Rights; Backwater; Bridge; Canal; Child; Chose in Action; Creek; Dam; Dedication; Father; Ferry; Fishery; Highway; Inundation; Master; River; Roads; Street; Thoroughfare; Tide; Tide-water; Turnpike; Water-way; Wharf; Wharfinger, &c.	Thomas Durfee, Esq., of Rhode Island. **Author of a "Treatise on the Law of Highways," &c.**
Crime; Deed; Deposition; Descent; Distribution; Husband; Marriage; Wife; Will, &c.	Hon. Henry Dutton, LL.D., of the Supreme Court of Connecticut, Kent Professor of Law in Yale College. **Author of a "Digest of Connecticut Reports," &c.**
Reports; Reporters, &c.	Hon. Theodore W. Dwight, LL.D., Professor of Law in Columbia College, New York.
Trusts; Trustees; Presumptive Trusts, &c.	Dorman B. Eaton, Esq., of the New York Bar.
Accessary; Bargain and Sale; Bidder; Conspiracy; Court-Martial; Escape; Fee; Foreign Laws; Gift; Habitual Drunkard; Hue and Cry; Labor; Letter of Attorney; Letters Rogatory; Misadventure; Misprision; Misrecital; Mistrial; Monument; Mute; Negative Pregnant; Nudum Pactum; Offer; Pamphlets; Party-Wall; Per Capita; Per Stirpes; Perpetuating Testimony; Poison; Provisions; Public Stores; Quack; Receiver.	Charles Edwards, Esq., of the New York Bar. **Author of a "Treatise on Receivers in Equity," &c.**
Bailee; Bailments, &c.	Isaac Edwards, Esq., of the Albany Bar. **Author of a "Treatise on the Law of Bailments, Bills," &c.**
Experts; Malpractice of Medical Men; Medical Evidence; Physicians; Surgeons, &c.	J. J. Elwell, M. D., of Cleveland, Ohio. **Author of "Medico-Legal Treatise on Malpractice," and "Medical Evidence."**
Computation; Fraction of a Day; Glossators; Jus; Negligence; Time, &c.	A. I. Fish, Esq., of the Philadelphia Bar. **Editor of the "American Law Register;" "Williams on Executors;" "Digest of Exchequer Reports," &c.**

Bar; Plea; Pleading, &c.	Hon. GEORGE GOULD, LL.D., of the Supreme Court of New York. Editor of "Gould on Pleading," &c.
Chancellor; Chancery, &c.	Hon. HENRY W. GREEN, LL.D., Chancellor of New Jersey.
Bottomry; Captain; Collision; Freight; Master; Mate; Respondentia; and many other articles relating to Admiralty and Maritime Law	Hon. NATHAN K. HALL, LL.D., Judge of the United States District Court for the Northern District of New York.
Articles relating to Criminal Law . .	F. F. HEARD, Esq., of the Middlesex Bar. Author of a "Treatise on Slander and Libel;" Editor of "Leading Criminal Cases;" "Precedents of Indictments," &c.
Witness, &c.	Hon. GEORGE S. HILLARD, LL.D., of the Boston Bar.
Torts, &c.	FRANCIS HILLARD, Esq., of New York. Author of "Treatises on Real Property;" "Mortgages;" "Sales;" "Torts," &c.
Conflict of Laws, &c.	Hon. MURRAY HOFFMAN, LL.D., Judge of the Superior Court of New York City and County. Author of a "Treatise on the Practice of the Court of Chancery," &c.
Extradition; Fugitive from Justice; Fugitive Slave; Habeas Corpus .	Hon. R. C. HURD, of Ohio. Author of a "Treatise on the Right of Personal Liberty," and on the "Writ of Habeas Corpus," &c.
Bondage; Freedom, &c.	J. C. HURD, Esq., of the New York Bar. Author of the "Law of Freedom and Bondage in the United States."
Actio; Actio Personalis; Advocati; Advocatus; Curia; Execution; Forum; Obligatio, &c.	W. A. INGHAM, Esq., of the Philadelphia Bar.
Alimony; Condonation; Divorce; Nullity of Marriage; Promise of Marriage; Separation a Mensa et Thoro	C. C. LANGDELL, Esq., of the New York Bar.
Absolutism; Aristocracy; Civil Liberty; Constitution; Construction; Democracy; Guerrilla Party; Hermeneutics; Interpretation; Liberty; Right; Self-Government; Sovereignty; and many other articles . . .	FRANCIS LIEBER, LL.D., Professor in Columbia College, New York. Author of "Civil Liberty," &c.
Executors, &c.	Hon. J. TAYLOE LOMAX, late Professor in the Law School of the University of Virginia. Author of a "Treatise on the Law of Executors," &c.

Prize; Salvage; Wreck; and other articles relating to Admiralty . .	Hon. WILLIAM MARVIN, Judge of the United States District Court for the Southern District of Florida. Author of a "Treatise on the Law of Wrecks and Salvage."
Limitations	J. WILDER MAY, Esq., of the Boston Bar. Editor of Angell on "Limitations."
Ancient Lights; Charities; Easements; Eminent Domain; Torture, &c. . .	Hon. WILLIAM CURTIS NOYES, LL.D., of the New York Bar.
Administrator, &c.; *Agreement; Appropriation of Payments; Condition; Consideration; Contract; Executor*	Hon. THEOPHILUS PARSONS, LL.D., Dane Professor of Law in Harvard University. Author of Treatises on the "Law of Contracts;" "Maritime Law;" "Mercantile Law;" "Promissory Notes," &c.
Agency; Bailment; Equity; Evidence, &c.	Hon. JOEL PARKER, LL.D., Royal Professor of Law in Harvard University.
Firm; Partners; Partnership; Profits; &c.	Hon. J. C. PERKINS, LL.D., Chief Justice of the Court of Common Pleas of Massachusetts. Editor of Collyer on "Partnership;" Jarman on "Wills," &c.
Guaranty; Suretyship	C. A. PHILIPS, Esq., of the Boston Bar.
Abandonment; Assignment; Assignee; Assignor; Assured; Barratry; and the principal articles relating to the law of Insurance	Hon. WILLARD PHILLIPS, LL.D., President of the New England Insurance Company. Author of Phillips on "Insurance," &c.
Idiocy; Imbecility; Insanity; and the articles relating to Insanity throughout the work	ISAAC RAY, M.D., LL.D., Superintendent of the Butler Insane Asylum, Providence, R. I. Author of the "Medical Jurisprudence of Insanity," &c.
Certiorari; Codicil; Common Carriers; Criminal Law; Devise; Legacy; Legatee; Mandamus; Railways; Revocation; Testament; Will, &c. . . .	Hon. ISAAC REDFIELD, LL.D., Chief Justice of Vermont. Author of "Treatises on the Law of Railways, Executors, Administrators, Wills," &c.
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New Definitions of Spanish Law-Terms throughout the book	GUSTAVUS SCHMIDT, Esq., of the New Orleans Bar. Author of the "Civil Law of Spain and Mexico."
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[DEDICATION OF THE FIRST EDITION]

TO THE HONORABLE

JOSEPH STORY, LL.D.

ONE OF THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES

THIS WORK IS, WITH HIS PERMISSION, MOST RESPECTFULLY DEDICATED, AS A TOKEN OF THE GREAT REGARD ENTERTAINED FOR HIS TALENTS, LEARNING, AND CHARACTER, BY THE AUTHOR

A

LAW DICTIONARY

AND

CONCISE ENCYCLOPEDIA

A TABLE OF ABBREVIATIONS WILL BE FOUND UNDER THE TITLE ABBREVIATION

A

A. The first letter of the alphabet.

It is used to distinguish the first page of a folio, the second being marked "*b*," thus: Coke, Litt. 114*a*, 114*b*. It is also used as an abbreviation for many words of which it is the initial letter. See ABBREVIATION.

In *Latin phrases* it is a preposition, denoting *from, by, in, on, of, at,* and is of common use as a part of a title.

In *French phrases* it is also a preposition, denoting *of, at, to, for, in, with.*

The article "a" is not necessarily a singular term, it is often used in the sense of "any," and is then applied to more than one individual object; National Union Bank v. Copeland, 141 Mass. 266, 4 N. E. 794; Snowden v. Guion, 101 N. Y. 458, 5 N. E. 322; Thompson v. Stewart, 60 Ia. 225, 14 N. W. 247; sometimes as *the;* 23 Ch. Div. 595.

Among the Romans this letter was used in criminal trials. The judges were furnished with small tables covered with wax, and each one inscribed on it the initial letter of his vote: A (*absolvo*) when he voted to acquit the accused; C (*condemno*) when he was for condemnation; and N L (*non liquet*), when the matter did not appear clearly, and he desired a new argument.

The letter A (i. e. *antiquo,* "for the old law") was inscribed upon Roman ballots under the *Lex Tabellaria,* to indicate a negative vote; Tayl. Civ. Law, 191, 192.

An abbreviation of *adversus* used for *versus,* indicating the parties to an action.

An adulteress among the Puritans was condemned to wear the initial letter "A" in red cloth on her dress.

A CONSILIIS. A counsellor. Spelm. Gloss.

A FORTIORI (Lat.). With stronger reason; much more.

A LATERE (Lat. *latus,* side). Collateral. Used in this sense in speaking of the succession to property. Bract. 20*b*, 62*b*.

From, on, or at the side; collaterally. *Hæredes a latere venientes,* heirs succeeding collaterally. *A latere ascendit (jus).* The right ascends collaterally.

In Civil Law and by Bracton, a synonym for *e transverso,* across; Bract. fol. 67*a*.

Applied also to a process or proceeding; Keilw. 159.

Out of the regular or lawful course; incidentally or casually. Applied to the acts of strangers, or persons having no legal interest; Bract. fol. 42*b;* Fleta, lib. 3, c. 15, § 13. *Confirmatio a latere facta,* a confirmation made by one having no legal interest (a non domino); Bract. fol. 58*a*.

At the side of a person; referring to or denoting intimacy of connexion. Justices of the *Curia Regis* are described as *a latere regis residentes,* sitting at the side of the King; Bract. fol. 108*a;* 2 Reeves Hist. Eng. L. 250.

From the side of; denoting closeness of intimacy or connexion; as a court held before auditors *specialiter a latere regis destinatis;* Fleta, lib. 2, c. 2, § 4.

Apostolic; having full powers to represent the Pope as if he were present. Du Cange, *Legati a latere;* 4 Bla. Com. 306.

A ME (Lat. *ego,* I). A term in feudal grants denoting direct tenure of the superior lord. 2 Bell, H. L. Sc. 133.

Unjustly detaining from me. He is said to withhold *a me* (from me) who has obtained possession of my property unjustly. Calvinus, Lex.

To pay *a me,* is to pay from my money.

A MENSA ET THORO (Lat. from table and bed, but more commonly translated, from bed and board). A kind of divorce, which is rather a separation of the parties by law, than a dissolution of the marriage. See DIVORCE.

A NATIVITATE. From birth. 3 Bla. Com. 332; Reg. Orig. 266*b*.

A POSTERIORI (Lat.). From the effect to the cause; from what comes after.

A PRENDRE (Fr. to take, to seize). Rightfully taken from the soil. 5 Ad. & E. 764; 1 N. & P. 172; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333.

Used in the phrase *profit à prendre* (q. v.) which differs from a right of way or other easement which confers no interest in the land itself. 5 B & C. 221; 2 Washb. R. P. 25.

A PRIORI (Lat.). From the cause to the effect; from what goes before.

A QUO (Lat.). From which. A court *a quo* is a court from which a cause has been removed. The judge *a quo* is the judge in such court. Clegg v. Alexander, 6 La. 339. Its correlative is *ad quem*.

A RENDRE (Fr. to render, to yield). Which are to be paid or yielded. *Profits à rendre* comprehend rents and services; Hammond, Nisi P. 192.

A RETRO (Lat.). In arrear. Fleta, lib. 2, c. 55, § 2; *id.* c. 62, § 14.

A RUBRO AD NIGRUM (Lat. from red to black). From the (red) title or rubric to the (black) body of the statute. It was anciently the custom to print statutes in this manner; Erskine, Inst. 1, 1, 49.

A. U. C. Lat. *ab urbe condita*. From the foundation of the city, Rome. The era from which Romans computed time, being assumed to be 753 years before the Christian Era.

A VINCULO MATRIMONII (Lat. from the bond of matrimony). A kind of divorce which is a dissolution of the marriage contract or relation. See DIVORCE.

AB ACTIS (Lat. *actus*, an act). A notary; one who takes down words as they are spoken. Du Cange, *Acta;* Spelm. Gloss. *Cancellarius*.

A reporter who took down the decisions or *acta* of the court as they were given.

AB ANTE (Lat. *ante*, before). In advance.

A legislature cannot agree *ab ante* to any modification or amendment to a law which a third person may make; Allen v. McKean, 1 Sumn. 308, Fed. Cas. No. 229.

AB ANTECEDENTE (Lat. *antecedens*). Beforehand. 5 M. & S. 110.

AB EXTRA (Lat. *extra*, beyond, without). From without. Lunt v. Holland, 14 Mass. 151.

AB INCONVENIENTI (Lat. *inconveniens*). From hardship; from what is inconvenient. An argument *ab inconvenienti* is an argument drawn from the hardship of the case.

AB INITIO (Lat. *initium*, beginning). From the beginning; entirely; as to all the acts done; in the inception.

An estate may be said to be good, an agreement to be void, an act to be unlawful, a trespass to have existed, *ab initio;* Plowd. 6a; 11 East 395; Sackrider v. M'Donald, 10 Johns. (N. Y.) 253; Hopkins v. Hopkins, *id.* 369; 1 Bla. Com. 440. See Ad. Eq. 186. Webb's Poll. Torts Wald's ed. 477. See TRESPASS; TRESPASSER.

Before. Contrasted in this sense with *ex post facto*, 2 Shars. Bla. Com. 308; or with *postea*, Calvinus, Lex., *initium*.

AB INTESTAT. Intestate. 2 Low. Can. 219. Merlin, Repert.

AB INTESTATO (Lat. *testatus*, having made a will). From an intestate. Used both in the common and civil law to denote an inheritance derived from an ancestor who died without making a will; 2 Shars. Bla. Com. 490; Story, Confl. L. 480.

AB INVITO (Lat. *invitum*). Unwillingly. See INVITUM.

AB IRATO (Lat. *iratus*, an angry man). By one who is angry. A devise or gift made by a man adversely to the interest of his heirs, on account of anger or hatred against them, is said to be made *ab irato*. A suit to set aside such a will is called an action *ab irato;* Merlin, Repert. *Ab irato*.

AB URBE CONDITA. See **A. U. C.**

ABACTOR (Lat. *ab* and *agere*, to lead away). One who stole cattle in numbers. Jacob, Law Dict. One who stole one horse, two mares, two oxen, two she-goats, or five rams. *Abigeus* was the term more commonly used to denote such an offender.

ABADENGO. Spanish Law. Lands, town, and villages belonging to an abbot and under his jurisdiction. All lands belonging to ecclesiastical corporations, and as such exempt from taxation; Escriche, Dicc. Raz.

Lands of this kind were usually held in mortmain, and hence a law was enacted declaring that no land liable to taxation could be given to ecclesiastical institutions (*"ningun Realengo non pase a abadengo"*), which is repeatedly insisted on.

ABALIENATIO (Lat. *alienatio*). The most complete method used among the Romans of transferring lands. It could take place only between Roman citizens. Calvinus, Lex., *Abalienatio;* Burr. Law. Dic.

ABAMITA (Lat.). The sister of a great-great-grandfather. Calvinus, Lex.

ABANDON. To relinquish; forsake; give up. The word includes the intention. And the external act by which it is carried into effect. See ABANDONMENT.

An *abandonee* is the person in whose favor the property or right is abandoned. 5 M. & S. 79.

ABANDONED AND CAPTURED PROPERTY ACT. The act of Congress of March 12, 1863, relating to certain property in the Confederate States. It expressly excludes from its operation property which had been used to carry on war against the United States. August 20, 1866, is, as to the operation of the act, the date of the end of the war.

Congress constituted the government trustee for so much of such property as belonged to the faithful Southern people; it was directed to be sold and the proceeds paid into the treasury, claimants having two years to bring suit in the Court of Claims; U. S. v. Anderson, 9 Wall. (U. S.) 56, 19 L. Ed. 615. It was the property which had been seized or taken from the enemy's possession by the United States forces; Bigelow v. Forrest, 9 Wall. (U. S.) 351, 19 L. Ed. 696.

ABANDONMENT. Relinquishment; renunciation; surrender.

Relinquishment of a right or of property with the intention of not reclaiming it or resuming its ownership or enjoyment. The relinquishment or surrender of rights or property by one person to another. This last definition was adopted in Hickman v. Link, 116 Mo. 123, 22 S. W. 472, and therefore it is deemed proper to leave it undisturbed, although it is not technically accurate as to all the sub-titles of Abandonment. This definition first appeared in the edition of 1867, in which the author of the title was Mr. Phillips, author of "Insurance," etc. Abandonment of rights or property generally cannot legally be made to a specified person. As used in Insurance Law, however, it does involve the relinquishment of the property insured to a specified person—the insurer. As Mr. Phillips was not only an able writer on Insurance Law but also president of an insurance company, he doubtless had the particular form of abandonment known in that branch of the law, most prominent in his mind, and it is not improbable that the definition was not intended as a general one, but only of those forms of abandonment to which it applied. This seems manifest from the fact that the term is correctly defined in the sub-titles with reference to their respective subject matters.

It is a matter of intention and consists in giving up a thing without reference to a particular person or purpose; there can be none to a definite person; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059; or for a consideration; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. As applied to property rights it consists of nonuser and intention; Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112. A transaction which fails as a sale cannot be converted into an abandonment; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. Abandonment implies a relinquishment to the public generally, or to the next comer —a surrender to a particular person not being an abandonment; Stephens v. Mansfield, 11 Cal. 363. Of two persons both interested in a water right, neither party can *abandon* to the other; Norman v. Corbley, 32 Mont. 195, 79 Pac. 1059.

In Civil Law. The act by which a debtor surrenders his property for the benefit of his creditors; Merlin, Repert. See ABANDONMENT FOR TORTS.

In Maritime Law. The act by which the owner of a ship surrenders the ship and freight to a creditor who has become such by contracts made by the master.

The effect of such abandonment is to release the owner from any further responsibility. The privilege in case of contracts is limited to those of a maritime nature; Pothier, Chart. Part. sec. 2, art. 2, § 51; Code de Commerce, lib. 2, tit. 2, art. 216. Similar provisions exist in England and the United States to some extent; 1 Par. Mar. Law, 395; Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274; American Transp. Co. v. Moore, 5 Mich. 368. Under the Act of Congress of 1851, March 3 (Rev. Stat. U. S. § 4285), the liability of the shipowners for a collision may be discharged by surrendering and assigning the vessel and freight to a trustee for the benefit of the parties injured, though these have been diminished in value by the collision; when they are totally destroyed, it would seem that the owners are discharged; Norwich Co. v. Wright, 13 Wall. (U. S.) 104, 20 L. Ed. 585; Wright v. Transp. Co., 8 Blatchf. 14, Fed. Cas. No. 18,087; overruling Walker v. Ins. Co., 14 Gray (Mass.) 288; Barnes v. Steamship Co., 6 Phila. 479, Fed. Cas. No. 1,021. This is not the case under the English statutes. 2 My. & Cr. 489; 15 M. & W. 391; 2 B. & Ad. 2.

Insurers notified that vessel is abandoned to them, after which owner and master take no steps to save vessel, does not relieve the insurers of liability on policy of insurance; The Natchez, 42 Fed. 169. A schooner was stranded and crew taken off by life-saving crew, the master expecting to return on board, and with no intention of abandoning her; a tug took schooner in tow to New York, and it was held that salvage service should be allowed; The S. A. Rudolph, 39 Fed. 331. A vessel is not abandoned unless its possession is voluntarily forsaken by its owner or master; The Mary, 2 Wheat. (U. S.) 123, 4 L. Ed. 200.

By Husband or Wife. The act of a husband or wife who leaves his or her consort willfully, and with an intention of causing perpetual separation. See DESERTION.

In Insurance. The transfer by an assured to his underwriters of his interest in the insured subject, or the proceeds of it, or claims arising from it, so far as the subject is insured by the policy, in order to recover as for a total loss.

"An abandonment is an act on the part of the assured, by which he relinquishes and transfers to the underwriters his insurable interest, or the proceeds of it, or the claims arising from it, so far as it is insured by the policy." 2 Phil. Ins. § 1490.

The term is used only in reference to risks in navigation; but the principle is applica-

ble in fire insurance, where there are remnants, and sometimes also under stipulations in life policies in favor of creditors; 2 Phil. Ins. §§ 1490, 1514, 1515; 3 Kent 265; Cincinnati Ins. Co. v. Duffield, 6 Ohio St. 200, 67 Am. Dec. 339; 6 East 72.

The doctrines which have obtained in marine insurance of constructive total loss and abandonment, salvage and general average, are not applicable in fire insurance; May, Ins. § 421 a; Hicks v. McGehee, 39 Ark. 264.

The object of abandonment being to recover the whole value of the subject of the insurance, it can occur only where the subject itself, or remains of it, or claims on account of it, survive the peril which is the occasion of the loss; 2 Phil. Ins. §§ 1507, 1516; 2 Pars. Mar. Ins. 120; 36 Eng. L. & Eq. 198; 3 Kent 321; 3 Bing. N. C. 266. In such case the assured must elect, immediately on receiving intelligence of a loss, whether to abandon, and not delay for the purpose of speculating on the state of the markets; 2 Phil. Ins. § 1667. He may have a reasonable time to inspect the cargo, but for no other purpose; 3 Kent 320. He must give notice promptly to the insurer of his intention; five days held too late; 5 M. & S. 47; see L. R. 5 C. P. 341. Notice of the abandonment of a vessel need not be given to insurers or reinsurers where there is a constructive total loss; 15 Q. B. D. 11; and delay in giving notice, if it does not prejudice the insurer, will not affect the rights of the insured; Young v. Ins. Co., 24 Fed. 279. In cases of actual total loss, notice of abandonment is unnecessary; Tyser, Mar. Ins. § 33.

In America, it appears that the right of abandonment is to be judged by the facts of each particular case as they existed at the time of abandonment; Peele v. Ins. Co., 3 Mas. 27, Fed. Cas. No. 10,905; 2 Phil. Ins. § 1536; Bradlie v. Ins. Co., 12 Pet. (U. S.) 378, 9 L. Ed. 1123. In England, the abandonment may be effected by subsequent occurrences, and the facts at the time of action brought determine the right to recover; 4 M. & S. 394; 2 Burr. 1198. But this rule has been doubted in England; 2 Dow 474; 3 Kent 324.

By the doctrine of constructive total loss, a loss of over one-half of the property insured, or damage to the extent of over one-half its value, by a peril insured against, may be turned into a total loss by abandonment; 2 Beach, Ins. § 948; Dwpuy v. Ins. Co., 3 Johns. Cas. (N. Y.) 182; Allen v. Ins. Co., 1 Gray (Mass.) 154. This does not appear to be the English rule; 9 C. B. 94; 1 H. of L. 513. See Forbes v. Ins. Co., 1 Gray (Mass.) 371.

The right is waived by commencing repairs; 2 Pars. Mar. Ins. 140; Humphreys v. Ins. Co., 3 Mas. 429, Fed. Cas. No. 6,871; Dickey v. Ins. Co., 3 Wend. (N. Y.) 658, 20 Am. Dec. 763; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; 4 App. Cas. 755; but not by temporary repairs; 2 Phil. Ins. § 1540; but is not lost by reason of the enhancement of the loss through the mere negligence or mistakes of the master or crew. It is too late to abandon after the arrival *in specie* at the port of destination; 2 Pars. Mar. Ins. 128; 4 H. of L. 24; Pezant v. Ins. Co., 15 Wend. (N. Y.) 453. See Peters v. Ins. Co., 3 S. & R. (Pa.) 25. An inexpedient or unnecessary sale of the subject by the master does not strengthen the right; 2 Phil. Ins. §§ 1547, 1555, 1570. But the fact that the master only takes steps for the safety or recovery of the thing insured, will not deprive the owners of the right to abandon; Tyser, Mar. Ins. § 28. See SALVAGE; TOTAL LOSS.

No notice of abandonment is necessary where owner loses his rights in a vessel by sale under decree of court of competent jurisdiction, in consequence of peril insured against; 13 App. Cas. 160.

Abandonment may be made upon information entitled to credit, but if made speculatively upon conjecture, it is null.

In the absence of any stipulation on the subject, no particular form of abandonment is required; it may be in writing or oral, in express terms or by obvious implication (but see 1 Campb. 541); but it must be absolute and unconditional, and the ground for it must be stated; 2 Phil. Ins. §§ 1678, 1679 *et seq.*; Bullard v. Ins. Co., 1 Curt. C. C. 148, Fed. Cas. No. 2,122; Bell v. Beveridge, 4 Dall. (U. S.) 272, 1 L. Ed. 830; Peirce v. Ins. Co., 18 Pick. (Mass.) 83, 29 Am. Dec. 567; see Macy v. Ins. Co., 9 Metc. (Mass.) 354; Citizens Ins. Co. v. Glasgow, 9 Mo. 416. Acceptance may cure a defect in abandonment, but is not necessary to its validity; 2 Phil. Ins. § 1689. Nor is the underwriter obliged to accept or decline. He may, however, waive it; 2 Phil. Ins. § 1698. But it is not subject to be defeated by subsequent events; 2 Phil. Ins. § 1704; Peele v. Ins. Co., 3 Mas. 27, 61, Fed. Cas. No. 10,905; Humphreys v. Ins. Co., 3 Mas. 429, Fed. Cas. No. 6,871; Rhinelander v. Ins. Co., 4 Cran. (U. S.) 29, 2 L. Ed. 540; Schieffelin v. Ins. Co., 9 Johns. (N. Y.) 21. See *supra*. And the subject must be transferred free of incumbrance except expense for salvage; Allen v. Ins. Co., 1 Gray (Mass.) 154; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431. The right to abandon being absolute under proper circumstances, no acceptance is necessary. It is only when the circumstances do not warrant abandonment that the question of the validity of acceptance arises. If there is an acceptance it must be by some distinct and unequivocal act; 29 N. B. 510; but the insurer is not bound to signify acceptance and his silence justifies the conclusion of non-acceptance; Peele v. Ins. Co., 3 Mas. 27, Fed. Cas. No. 10,905, per Story, J.,

whose ruling was followed in L. R. 6 P. C. 224, in preference to 3 Brod. & B. 97, where it was held that the insurer must elect within a reasonable time whether to accept. But if the insurer does not accept, either expressly or by some act amounting to it, he cannot hold the assured to the abandonment; Child v. Ins. Co., 2 Sandf. (N. Y.) 76; whether the insurer accepts is a matter of construction of his words and conduct; Richelieu & O. Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398; Badger v. Ins. Co., 23 Pick. (Mass.) 347; Singleton v. Ins. Co., 132 N. Y. 298, 30 N. E. 839. See note, 45 L. Ed. 1, where the subject is examined. There may be an acceptance though there was not strictly a right of abandonment; Copelin v. Ins. Co., 9 Wall. (U. S.) 461, 19 L. Ed. 739. It may be constructive and is implied from taking possession to raise and repair; Peele v. Ins. Co., 3 Mas. 27, Fed. Cas. No. 10,905; Gloucester Ins. Co. v. Younger, 2 Curt. 322, Fed. Cas. No. 5,487; but not from partial repairs and restoration of the property; Marmaud v. Melledge, 123 Mass. 173; Peele v. Ins. Co., 7 Pick. (Mass.) 254, 19 Am. Dec. 286; though in such case the return must be made in a reasonable time; *id.;* Reynolds v. Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727; Copelin v. Ins. Co., 46 Mo. 211, 2 Am. Rep. 504; Norton v. Ins. Co., 16 Ill. 235; Copelin v. Ins. Co., 9 Wall. (U. S.) 461, 19 L. Ed. 739; Young v. Ins. Co., 24 Fed. 279. The effect of a valid abandonment is to put the insurer in the place of the insured with no greater right but entitled to all that can be saved; Insurance Co. v. Gossler, 96 U. S. 645, 24 L. Ed. 863; and the owner becomes the agent of the underwriter and is bound to protect his interest; Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139, 7 L. Ed. 809; Richelieu & O. Nav. Co. v. Ins. Co., 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398. See TOTAL LOSS.

Of Public Highway. Non-user of public alley for over 40 years in connection with affirmative acts of abandonment, justifies a finding that it cease to be a public highway; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021, *id.*, 56 Hun 288, 9 N. Y. Supp. 381. Encroachment on public highway outside of traveled track and use thereof by a private party for 10 years did not necessarily show abandonment of the highway; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600.

Of Public Lands. Title from the state, under a patent, is not affected by the doctrine of abandonment, unless, in consequence, title is acquired by adverse possession; Kreamer v. Voneida, 213 Pa. 74, 62 Atl. 518. The title once passed is never revested by abandonment; *id.*, 24 Pa. Super. 347.

It has been held that the use of property for public purposes may be abandoned for so long a time as to prevent the assertion of a private proprietary interest as against an improving possessor; Collett v. Board of Com'rs, 119 Ind. 27, 21 N. E. 329, 4 L. R. A. 321. Failure to pay interest on school lands for 15 years with no assertion of ownership will prevent assertion of title as against subsequent purchaser from the state who has been in possession of property for 10 years; Richardson v. Doty, 25 Neb. 420, 41 N. W. 282.

Of Rights. The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon; 14 M. & W. 789; Dyer v. Sanford, 9 Metc. (Mass.) 395, 43 Am. Dec. 399; Dawson v. Daniel, 2 Flip. 309, Fed. Cas. No. 3,669. Mere non-user does not necessarily or usually constitute an abandonment; Emerson v. Wiley, 10 Pick. (Mass.) 310; Parkins v. Dunham, 3 Strobh. (S. C.) 224; Elliott v. Rhett, 5 Rich. (S. C.) 405, 57 Am. Dec. 750; Jewett v. Jewett, 16 Barb. (N. Y.) 150; see Tud. Lead. Cas. 130; 2 Washb. R. P. 83. There must be actual relinquishment and intention to abandon; Log-Owners' Booming Co. v. Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. (N. S.) 573; Fugate v. Pierce, 49 Mo. 441; Eisele v. Oddie, 128 Fed. 941; Foster v. Hobson, 131 Ia. 58, 107 N. W. 1101; Carroll County Academy v. Academy Co., 104 Ky. 621, 47 S. W. 617; Watts v. Spencer, 51 Or. 262, 94 Pac. 39. Intention may be shown by inferential proof; Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 S. W. 1156; United Shoe Mach. Co. v. Mach. Co., 197 Mass. 206, 83 N. E. 412. It cannot be inferred from *non-user* alone; Doty v. Gillett, 43 Mich. 203, 5 N. W. 89. Nor does it result from failure to take possession of land for a period less than would give title by adverse possession; Kreamer v. Voneida, 24 Pa. Super. 347; from failure to pay taxes; *id.;* or from mere temporary absence; Hurt v. Hollingsworth, 100 U. S. 104, 25 L. Ed. 569. But failure to pay taxes or exercise rights of ownership for over 20 years, coupled with possession of and improvement by another under color of title is evidence of abandonment; Timber v. Desparois, 18 S. D. 587, 101 N. W. 879; or coupled with other acts showing intention not to repossess himself; Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 93 Pac. 1112. For older cases see 5 L. R. A. 259, note.

Abandonment is properly confined to incorporeal hereditaments, as legal rights once vested must be divested according to law, though equitable rights may be abandoned; Great Falls Co. v. Worster, 15 N. H. 412; see Cringan v. Nicolson's Ex'rs, 1 Hen. & M. (Va.) 429; and an abandonment combined with sufficiently long possession by another party destroys the right of the original owner; Gregg v. Blackmore, 10 Watts (Pa.) 192;

Barker v. Salmon, 2 Metc. (Mass.) 32; Inhabitants of School Dist. No. 4 v. Benson, 31 Me. 381, 52 Am. Dec. 618. Fee simple title to real estate cannot be lost by abandonment; Barrett v. Coal Co., 70 Kan. 649, 70 Pac. 150; nor transferred by it; Sharkey v. Candiani, 48 Or. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791. But under Spanish Law it may be divested, although the question of fact is for the jury; Fine v. Public Schools, 30 Mo. 166.

There may be an abandonment of an easement; Pope v. Devereux, 5 Gray (Mass.) 409; Shelby v. State, 10 Humphr. (Tenn.) 165; Corning v. Gould, 16 Wend. (N. Y.) 531; Crain v. Fox, 16 Barb. (N. Y.) 184; 3 B. & C. 332; of a mill site; French v. Mfg. Co., 23 Pick. (Mass.) 216; Farrar v. Cooper, 34 Me. 394; Taylor v. Hampton, 4 McCord (S. C.) 96, 17 Am. Dec. 710; 7 Bingh. 682; an application for land; Com. v. Rahm, 2 S. & R. (Pa.) 378; of an improvement; Fisher v. Larick, 3 S. & R. (Pa.) 319; of a trust fund; Breedlove v. Stump, 3 Yerg. (Tenn.) 258; of an invention or discovery; Wyeth v. Stone, 1 Sto. 280, Fed. Cas. No. 18,107; Mellus v. Silsbee, 4 Mas. 111, Fed. Cas. No. 9,404; property sunk in a steamboat and unclaimed; Creevy v. Breedlove, 12 La. An. 745; a mining claim; Davis v. Butler, 6 Cal. 510; Paine v. Griffiths, 86 Fed. 452, 30 C. C. A. 182; a right under a land warrant; Emery v. Spencer, 23 Pa. 271. An easement acquired by grant is not lost by non-user; Butterfield v. Reed, 160 Mass. 361, 35 N. E. 1128.

The burden of proof rests on the party claiming abandonment of an easement; Hennessy v. Murdock, 137 N. Y. 317, 33 N. E. 330.

The question of abandonment is one of fact for the jury; 2 Washb. R. P. 82; Wiggins v. McCleary, 49 N. Y. 346; Banks v. Banks, 77 N. C. 186; Sample v. Robb, 16 Pa. 320.

The effect of abandonment when acted upon by another party is to divest all the owner's rights; Davis v. Butler, 6 Cal. 510; McGoon v. Ankeny, 11 Ill. 558.

It was the ancient law that the owner could, by abandoning a slave or animal which was a cause of damage, relieve himself of liability, and there is a trace of the application of this principle to inanimate things; the new owner became liable, under the doctrine *noxa caput sequitur*. The cause of offense was the slave, animal, or thing, and only as a means of getting at that was the liability of the owner considered; Dig. 9, 1, 1, sec. 12; Inst. 4, 8, sec. 5; Holmes, Com. L. 8.

Abandonment is to be distinguished from Dedication, Surrender, Waiver. See FINDER.

Consult 2 Washb. R. P. 56, 82, 85, 253. See also Curtis, Pat. § 381; Walk. Patents § 87; Ewell, Fixt.; Thomp. Homest.; Dicey, Dom. 90. As to Abandonment of Patents, see PATENTS.

ABANDONMENT FOR TORTS. In Civil Law. The relinquishment of a slave or animal who had committed a trespass to the person injured, in discharge of the owner's liability for such trespass or injury. If this were done, the owner could not be held to any further responsibility. Just. Inst. 4, 8, 9. A similar right exists in Louisiana; Fitzgerald v. Ferguson, 11 La. An. 396.

ABANDUM or ABANDONUM. Anything sequestered, proscribed or abandoned. Cunningham.

ABARNARE (Lat.). To discover and disclose to a magistrate any secret crime. *Leges Canuti*, cap. 10.

ABATAMENTUM (Lat. *abatare*). An entry by interposition. Co. Litt. 277. An abatement. Yelv. 151.

ABATARE. To abate. Yelv. 151.

ABATE (Fr. *abattre*, L. Fr. *abater*). To throw down, to beat down, destroy, quash. 3 Shars. Bla. Com. 168; Case v. Humphrey, 6 Conn. 140. See ABATEMENT AND REVIVAL.

ABATEMENT AND REVIVAL. In Chancery Practice. A suspension of all proceedings in a suit, from the want of proper parties capable of proceeding therein.

It differs from an abatement at law in this; that in the latter the action is entirely dead and cannot be revived; but in the former the right to proceed is merely suspended, and may be revived by a supplemental bill in the nature of a bill of revivor; 3 Bla. Com. 301; Boynton v. Boynton, 21 N. H. 246; Sto. Eq. Pl. § 20 n. § 354; Ad. Eq. 403; Mitf. Eq. Pl., by Jeremy 57; Brooks v. Jones, 5 Lea (Tenn.) 244; Clarke v. Mathewson, 12 Pet. (U. S.) 164, 9 L. Ed. 1041; Kronenberger v. Heinemann, 104 Ill. App. 156; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; where interest is transmitted by act of law, as to personal representative or heir a simple bill of revivor may be used; Story, Eq. Pl. § 364; Feemster v. Markham, 2 J. J. Marsh. (Ky.) 303, 19 Am. Dec. 131; Putnam v. Putnam, 4 Pick. (Mass.) 139; but where by virtue of act of party, as to devisee, an original bill in the nature of a bill of revivor must be used; Russell v. Craig, 3 Bibb (Ky.) 377; Wood v. Dummer, 3 Mas. 308, Fed. Cas. No. 17,944.

Generally speaking, if any property or right in litigation is transmitted to another, he is entitled to continue the suit, or at least have the benefit of it, if he be plaintiff; Talmage v. Pell, 9 Paige, Ch. (N. Y.) 410; or it may be continued against him, or at least perfected, if he be defendant; Story, Eq. Pl. §§ 332, 442; Sedgwick v. Cleveland, 7 Paige, Ch. (N. Y.) 290; Sinclair v. Realty Co., 99 Md. 223, 57 Atl. 664. See PARTIES.

Death of a trustee does not abate a suit, but it must be suspended till a new one is appointed; Shaw v. R. Co., 5 Gray (Mass.) 162; and the further proceedings must be by supplemental bill in the nature of a bill of revivor, setting forth the proceedings and requiring an answer by the new trustee; Greenleaf v. Queen, 1 Pet. (U. S.) 138, 7 L.

Ed. 85. And where there was a failure to perform duties of a fiduciary nature, carrying compensation, the remedy therefor survived; Warren v. Shoe Co., 166 Mass. 97, 44 N. E. 112.

The death of the owner of the equity of redemption abates a foreclosure suit; Wright v. Phipps, 58 Fed. 552; but the executor of complainant in a bill to redeem was held not entitled to prosecute it; Smith v. Manning, 9 Mass. 422; though now the right of an administrator to redeem is given by statute to an administrator; and in a late case it was held that the right to redeem under a deed absolute on its face, but in fact a mortgage, is based on failure to perform a duty of a fiduciary character and the right of action survives; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813.

There are some cases, however, in which a court of equity will entertain application notwithstanding the suit is suspended: thus, proceedings may be had to preserve property in dispute; Washington Ins. Co. v. Slee, 2 Paige, Ch. (N. Y.) 368; to pay money out of court where the right is clear; 6 Ves. 250; or upon consent of parties; 2 Ves. 399; to punish a party for breach of an injunction; Hawley v. Bennett, 4 Paige, Ch. (N. Y.) 163; to enroll a decree; 2 Dick. 612; or to make an order for the delivery of deeds and writings; 1 Ves. 185. On a bill to set aside a deed, the heirs at law or devisees of a deceased complainant, and not the executor (unless title is vested in him under the will), should file the bill of revivor; Webb v. Janney, 9 App. D. C. 41. The death of the complainant in a bill of discovery after answer abates it and the suit cannot be revived; its purpose is accomplished; Horsburg v. Baker, 1 Pet. (U. S.) 232, 7 L. Ed. 125.

Although abatement in chancery suspends proceedings, it does not put an end to them; a party, therefore, imprisoned for contempt is not discharged, but must move that the complaint be revived in a specified time or the bill be dismissed and himself discharged; Dan. Ch. Pr. (6th Am. ed.) *1543. Nor will a receiver be discharged without special order of court; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329. A suit in equity for relief against infringement of a patent does not abate by the death of the plaintiff; Illinois Cent. R. Co. v. Turrill, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. Ed. 154; nor does a suit in Admiralty for prize money; Penhallow v. Doane, 3 Dall. (U. S.) 54, 1 L. Ed. 507. The assignee of the rights of a complainant may proceed by bill of revivor in the old suit or begin a new one; Botts v. Cozine, 1 Hoffm. Ch. (N. Y.) 79.

In order to recover damages caused by injunction, it is unnecessary to revive a cause in which a preliminary injunction was issued, bond given, and judgment on demurrer for defendant who died; the remedy is by action on the bond; Grissler v. Stuyvesant, 1 Hun (N. Y.) 116, 3 Thomp. & C. 756.

All declinatory and dilatory pleas in equity are said to be pleas in abatement, or in the nature thereof; see Story, Eq. Pl. § 708; Bea. Eq. 55; Coop. Eq. Pl. 236. And such pleas must be pleaded before a plea in bar, if at all; Story, Eq. Pl. § 708; see Saltus v. Tobias, 7 Johns. Ch. (N. Y.) 214; Kendrick v. Whitfield, 20 Ga. 379. See PLEA.

Of Freehold. The unlawful entry upon and keeping possession of an estate by a stranger, after the death of the ancestor and before the heir or devisee takes possession. It is a species of ouster by intervention between the ancestor or devisor and the heir or devisee, thus defeating the rightful possession of the latter; 3 Bla. Com. 167; Co. Litt. 277*a.*; Cruise, Dig. B. 1, 60.

By the ancient laws of Normandy, this term was used to signify the act of one who, having an apparent right of possession to an estate, took possession of it immediately after the death of the actual possessor, before the heir entered. Howard, *Anciennes, Lois des Français*, tome 1, p. 539.

Of Legacies. The reduction of a legacy, general or specific, on account of the insufficiency of the estate of the testator to pay his debts and legacies.

When the estate of a testator is insufficient to pay both debts and legacies, it is the rule that the general legacies must abate proportionally to an amount sufficient to pay the debts; Towle v. Swasey, 106 Mass. 100; Appeal of Trustees of University of Pennsylvania, 97 Pa. 187. If the general legacies are exhausted before the debts are paid, then, and not till then, the specific legacies abate, and proportionally; 2 Bla. Com. 513 and note; Bacon, Abr. Leg. H; 2 P. Wms. 383; 1 Ves. Sen. 564; Brant v. Brant, 40 Mo. 280; Armstrong's Appeal, 63 Pa. 312. See LEGACY.

In Revenue Law. The deduction from, or the refunding of, duties sometimes made at the custom house, on account of damages received by goods during importation or while in store. See R. S. § 2894.

Of Nuisances. The removal of a nuisance. 3 Bla. Com. 5; Poll. Torts 210. See NUISANCE.

Of Actions at Law. The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, which defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way. Stephen, Pl. 47; Pepper, Pl. 15; Webb, Poll. Torts; 3 Bla. Com. 301; 1 Chit. Pl. (6th Lond. ed.) 446; Gould, Pl. ch. 5, § 65.

It has been applied rather inappropriately as a generic term to all pleas of a dilatory nature; whereas the word dilatory would seem to be the more proper generic term, and the word abatement applicable to a certain portion of dilatory pleas;

Com. Dig. Abt. B; 1 Chit. Pl. 440 (6th Lond. ed.); Gould, Pl. ch. 5, § 65. In this general sense it has been used to include pleas to the jurisdiction of the court. This usage, being technically inaccurate, results in some confusion in the use of the word by courts with respect to such pleas; Frohlich v. Glass Co., 144 Mich. 278, 107 N. W. 889; Bank of Valley v. Gettinger, 3 W. Va. 309; and by some approved digests and text writers. The distinction is however not lost sight of; Bishop v. Camp, 39 Fla. 517, 22 South. 735; Lewis v. Schwinn, 71 Ill. App. 265. See JURISDICTION; PLEA.

Matter in abatement *dehors* the record is properly presented by plea in abatement; Schofield v. Palmer, 134 Fed. 753.

AS TO THE PERSON OF THE PLAINTIFF AND DEFENDANT. It may be pleaded, as to the plaintiff, that there never was such a person *in rerum natura;* 1 Chit. Pl. (6th Lond. ed.) 448; Guild v. Richardson, 6 Pick. (Mass.) 370; Campbell v. Galbreath, 5 Watts (Pa.) 423; Doe v. Penfield, 19 Johns. (N. Y.) 308; Bolinger v. Fowler, 14 Ark. 27; Boston Type & Stereotype Foundry v. Spooner, 5 Vt. 93 (except in ejectment; Doe v. Penfield, 19 Johns. [N. Y.] 308); and by one of two or more defendants as to one or more of his co-defendants; Archb. C. P. 312. That one of the plaintiffs is a fictitious person, to defeat the action as to all; Com. Dig. Abt. E, 16; 1 Chit. Pl. 448; Archb. C. P. 304. This would also be a good plea in bar; 1 B. & P. 44. That the nominal plaintiff in the action of ejectment is fictitious, is not pleadable in any manner; 4 M. & S. 301; Jones v. Gardner, 10 Johns. (N. Y.) 269. A defendant cannot plead matter which affects his co-defendant alone; Bonzey v. Redman, 40 Me. 336; Harker v. Brink, 24 N. J. Law, 333; Ingraham v. Olcock, 14 N. H. 243; Shannon v. Comstock, 21 Wend. (N. Y.) 457, 34 Am. Dec. 262.

An action on contract by a copartnership, the avails of which have been assigned during its pendency to a third person, does not abate by death of one partner, but may be prosecuted to judgment without change on the record; Pennsylvania Fire Ins. Co. v. Carnahan, 19 Ohio Cir. Ct. R. 97. But when the suit involves an adjustment of equities between former partners and new ones, it should be revived as against the representatives of a new partner who died *pendente lite;* Hausling v. Rheinfrank, 103 App. Div. 517, 93 N. Y. Supp. 121.

Certain legal disabilities are pleadable in abatement, such as *outlawry;* Bac. Abr. Abt. B; Co. Litt. 128 *a; attainder* of treason or felony; 3 Bla. Com. 301; Com. Dig. Abt. E. 3; also *præmunire* and *excommunication;* 3 Bla. Com. 301; Com. Dig. Abt. E. 5. The law in reference to these disabilities can be of no practical importance in the United States; Gould, Pl. ch. 5, § 32.

Alienage. That the plaintiff is an alien friend is pleadable only in some cases, where, for instance, he sues for property which he is incapacitated from holding or acquiring; Co. Litt. 129 *b;* Stramburg v. Heckman, 44 N. C. 250. By the common law, although he could not inherit, yet he might acquire by purchase, and hold as against all but the sovereign. Accordingly he has been allowed in this country to sue upon a title by grant or devise; Sheaffe v. O'Neil, 1 Mass. 256; Fairfax v. Hunter, 7 Cranch (U. S.) 603, 3 L. Ed. 453; but see Siemssen v. Bofer, 6 Cal. 250; Wacker v. Wacker, 26 Mo. 426. The early English authority upon this point was otherwise; Bac. Abr. Abt. B, 3, Aliens D; Co. Litt. 129 *b.* He is in general able to maintain all actions relating to personal chattels or personal injuries; 3 Bla. Com. 384; Cowp. 161; Bac. Abr. Aliens D; 2 Kent 34; Co. Litt. 129 *b.* But an alien enemy can maintain no action except by license or permission of the government; Bac. Abr. Abt. B, 3, Aliens D; 46; 1 Ld. Raym. 282; 6 Term 53, 49; Russel v. Skipwith, 6 Binn (Pa.) 241; Sewall v. Lee, 9 Mass. 363; 3 M. & S. 533; Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Russel v. Skipwith, 1 S. & R. (Pa.) 310. This will be implied from the alien being suffered to remain, or to come to the country, after the commencement of hostilities without being ordered away by the executive; Clarke v. Morey, 10 Johns. (N. Y.) 69. See 28 Eng. L. & Eq. 319. But the disability occurring after suit brought simply suspends the right of action; Hutchinson v. Brock, 11 Mass. 119. The better opinion seems to be that an alien enemy cannot sue as administrator; Gould, Pl. ch. 5, § 44. That both parties were aliens is no ground for abatement of a suit on a contract made in a foreign country; Rea v. Hayden, 3 Mass. 24. See also Barrell v. Benjamin, 15 Mass. 354; Roberts v. Knights, 89 Mass. (7 Allen) 449.

Corporations. A plea in abatement is the proper manner of contesting the existence of an alleged corporation plaintiff; Methodist E. Church v. Wood, Wright (Ohio) 12; Proprietors of Kennebeck Purchase v. Call, 1 Mass. 485; President, etc., Hanover Sav. Fund Soc. v. Suter, 1 Md. 502; Rheem v. Wheel Co., 33 Pa. 356; Pitman v. Perkins, 28 N. H. 93; Yeaton v. Lynn, 5 Pet. (U. S.) 231, 8 L. Ed. 105. To a suit brought in the name of the "Judges of the County Court," after such court has been abolished, the defendant may plead in abatement that there are no such judges; Judges of Fairfield County v. Phillips, 2 Bay (S. C.) 519.

Where a general incorporation law provides for winding up the affairs of corporations by trustees, after dissolution, pending suits do not thereupon abate; Scott v. Oil Co., 142 Fed. 287; Gordon v. Pub. Co., 66 N. Y. Supp. 828; Platt v. Ashman, 32 Hun (N. Y.) 230; until the expiration of the period allowed for winding up; Dundee Mortg. & Trust Inv. Co. v. Hughes, 77 Fed. 855; or, if abated, they may be revived against the trustees; Shayne v. Pub. Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654. The annulment of a charter for non-

payment of taxes will not abate a suit properly brought and previously prosecuted to judgment before a referee; Pyro-Gravure Co. v. Staber, 30 Misc. 658, 64 N. Y. Supp. 520.

Public Officers. Where a commission created by state law is abolished during the pendency of a suit against it, the officers who are by law authorized to wind up its business are proper parties against whom there may be proceedings for revival; Hemingway v. Stansell, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. Ed. 245. A suit against a public officer in his official capacity does not as a general rule abate by reason of a change in the incumbent of the office; Murphy v. Utter, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070; Sheehan v. Osborn, 138 Cal. 512, 71 Pac. 622; Nance v. People, 25 Colo. 252, 54 Pac. 631; People v. Coleman, 99 App. Div. 88, 91 N. Y. Supp. 432; nor does a suit by a sheriff for conversion of goods levied by him; Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. Supp. 432; but a suit against the Secretary of the Interior to compel the issue of patents for public lands, does abate on his resignation; Warner Valley Stock Co. v. Smith, 165 U. S. 28, 17 Sup. Ct. 225, 41 L. Ed. 621; and so does a suit against a town treasurer if his successor is not made a party in due time; Saunders v. Pendleton, 19 R. I. 659, 36 Atl. 425.

A suit against a receiver does not abate by reason of his discharge; Baer v. McCullough, 176 N. Y. 97, 68 N. E. 129; Dougherty v. King, 165 N. Y. 657, 59 N. E. 1121; or his death; Pickett v. Fidelity & Casualty Co., 60 S. C. 477, 38 S. E. 160; nor of an order to return the property to the corporation owner; Cowen v. Merriman, 17 App. D. C. 186.

When, pending suit by a guardian, the heir comes of age, there is no abatement and no need of revival; the guardian may be discharged; Shattuck v. Wolf, 72 Kan. 366, 83 Pac. 1093.

Coverture of the plaintiff is pleadable in abatement; Com. Dig. Abt. E, 6; Bac. Abr. Abt. G; Co. Litt. 132; 3 Term 631; 1 Chit. Pl. 439; Hayden v. Attleborough, 7 Gray (Mass.) 338; though occurring after suit brought; 3 Bla. Com. 316; Bac. Abr. Abt. 9; Wilson v. Hamilton, 4 S. & R. (Pa.) 238; Newell v. Marcy, 17 Mass. 342; 6 Term 265; Gerard v. Pierce, 5 N. C. 161; Guphill v. Isbell, 1 Bailey (S. C.) 369; and see Hastings v. McKinley, 1 E. D. Sm. (N. Y.) 273; but not after plea in bar, unless the marriage arose after the plea in bar; Northum v. Kellogg, 15 Conn. 569; but in that case the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge, and his pleading it; McCoul v. Lekamp, 2 Wheat. (U. S.) 111, 4 L. Ed. 197; Swan v. Wilkinson, 14 Mass. 295; Templeton v. Clary, 1 Blackf. (Ind.) 288; Perry v. Boileau, 10 S. & R. (Pa.) 208; Lyman v. Albee, 7 Vt. 508; Gatewood v. Tunk, 3 Bibb (Ky.) 246. And it cannot be otherwise objected to if she sues for a cause of action that would survive to her on the death of her husband; 12 M. & W. 97; Perry v. Boileau, 10 S. & R. (Pa.) 208. An action for damages for assault by a female plaintiff does not abate on her marriage; Stevens v. Friedman, 58 W. Va. 78, 51 S. E. 132. Where she sues, not having any interest, the defence is one of substance, and may be pleaded in bar, by demurrer, or on the general issue; 4 Term 361; 1 H. Bla. 108; Cro. Jac. 644, whether she sues jointly or alone. So also where coverture avoids the contract or instrument, it is matter in bar; Steer v. Steer, 14 S. & R. (Pa.) 379.

Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after, marriage, the coverture is pleadable in abatement; 3 Term 626; and not otherwise; 9 M. & W. 299; Com. Dig. Abt. F, 2. If the marriage takes place pending the action, it cannot be pleaded; 2 Ld. Raym. 1525; Crockett v. Ross, 5 Greenl. (Me.) 445; City Council v. Van Roven, 2 McCord (S. C.) 469. It must be pleaded by the *feme* in person; 2 Saund. 209 *b*. Any thing which suspends the coverture suspends also the right to plead it; Com. Dig. Abt. F, 2, § 3; Co. Litt. 132 *b*; 1 B. & P. 358; Gregory v. Paul, 15 Mass. 31. Marriage of a female defendant in error after writ has been duly served, will not abate suit, but it will proceed as if she were still unmarried; United States Mut. Acc. Ass'n v. Weller, 30 Fla. 210, 11 South. 786.

Death of the plaintiff before purchase of the writ may be pleaded in abatement; 1 Archb. C. P. 304; Com. Dig. Abt. E, 17; Camden v. Robertson, 2 Scam. (Ill.) 507; Hurst v. Fisher, 1 W. & S. (Pa.) 438; Humphreys v. Irvine, 6 Smedes & M. (Miss.) 205; Alexander v. Davidson, 2 McMul. (S. C.) 49. So may the death of a sole plaintiff who dies pending his suit at common law; Bac. Abr. Abt. F; Archer v. Colly, 4 Hen. & M. (Va.) 410; Livingston v. Abel, 2 Root (Conn.) 57; Smith v. Manning, 9 Mass. 422; Drago v. Stead, 2 Rand. (Va.) 454; Ryder v. Robinson, 2 Greenl. (Me.) 127. Otherwise now by statute, in most cases, in most if not all the states, and in England since 1852. Under some statutes the right to revive depends upon the exercise of a sound discretion by the court; Hayden v. Huff, 62 Neb. 375, 87 N. W. 184; Beach v. Reynolds, 64 Barb. (N. Y.) 506.

The right to revive an action is solely a statutory right; Ashby v. Harrison's Committee, 1 Pat. & H. (Va.) 1. It is a question of right, not of procedure, and is governed by the *lex fori;* Martin's Adm'r v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Baltimore & O. R. Co. v. Joy, 173 U. S. 226,

19 Sup. Ct. 387, 43 L. Ed. 677; Martin v. R. Co., 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582; Sanders' Adm'x v. R. Co., 111 Fed. 708, 49 C. C. A. 565; Richardson v. R. Co., 98 Mass. 85; Mexican Cent. Ry. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778; Austin's Adm'r v. Ry. Co., 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756; Stratton's Independence v. Dines, 126 Fed. 968; Whitten v. Bennett, 77 Fed. 271.

It was held that the death of the sole complainant did not abate the suit if the cause of action survives; Keep v. Crawford, 92 Ill. App. 587; but, even where there is a statutory provision for revival all proceedings are suspended until it is complied with; King v. Mitchell, 83 Ill. App. 632, judgment affirmed 187 Ill. 452, 58 N. E. 310; Street v. Smith, 75 Neb. 434, 106 N. W. 472. Death of either party abates a divorce case; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; McCurley v. McCurley, 60 Md. 189, 45 Am. Rep. 717; In re Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874; L. R. 11 P. Div. 103. The personal representatives are usually authorized to act in such cases. The personal representatives of a deceased plaintiff are the proper parties to revive in replevin; Rexroad v. Johnson, 4 Kan. App. 333, 45 Pac. 1008; a suit to redeem property from a tax sale; Clark v. Lancy, 178 Mass. 460, 59 N. E. 1034; foreclosure of mortgage; Van Brocklin v. Van Brocklin, 17 App. Div. 226, 45 N. Y. Supp. 541 (but see Stancill v. Spain, 133 N. C. 76, 45 S. E. 466, where heirs at law or devisees were held necessary parties); on a delivery bond by a deputy sheriff (he having no official successor in office); Tucker v. Potter, 22 R. I. 4, 45 Atl. 741; ejectment, when the land was devised to the executor in trust to sell and dispose of the proceeds; Bell's Adm'r v. Humphrey, 8 W. Va. 1; an action on a sick benefit policy; Columbian Relief Fund Ass'n v. Walker, 26 Ind. App. 25, 59 N. E. 36; an action for personal injuries, commenced by the deceased, though assigned by him; McCafferty v. R. Co., 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690; suit under contract for service stipulating payment for passage back to France; Bethmont v. Davis, 11 Mart. O. S. (La.) 195; a suit by a married man against a railroad company for damages to homestead; Southern Ry. Co. v. Cowan, 129 Ala. 577, 29 South. 985; trespass by two, where one dies; Rowe v. Lumber Co., 133 N. C. 433, 45 S. E. 830; an action for damages to land, if permitted to survive at all (but see *infra*); Mast v. Sapp, 140 N. C. 533, 53 S. E. 350, 5 L. R. A. (N. S.) 379, 111 Am. St. Rep. 864, 6 Ann. Cas. 384; an action for rescission of contract to cut and remove timber; Isham v. Stave Co., 25 Oh. Cir. Ct. 167.

The heir at law or devisee is the proper party to revive in an action for injury to real estate; Texas & N. O. R. Co. v. Smith, 35 Tex. Civ. App. 351, 80 S. W. 247.

If the cause of action is such that the right dies with the person, the suit still abates. By statute 8 & 9 Wm. IV. ch. 2, sect. 7, which is understood to enact the common-law rule, where the form of action is such that the death of one of several plaintiffs will not change the plea, the action does not abate by the death of any of the plaintiffs pending the suit.

The death of both parties does not abate an action under a statute providing that no action shall abate if the cause of action survives; McNulta v. Huntington, 62 App. Div. 257, 70 N. Y. Supp. 897; or under one providing that actions for injury to property shall survive; Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N. E. 553, in cases meeting those conditions respectively.

A Code provision forbidding dismissal of a cause by plaintiff without consent of defendant, does not affect the right of revival by personal representatives of plaintiff after his death; Kinzie v. Riely's Ex'r, 100 Va. 709, 42 S. E. 872.

In some cases where an action is saved by statute from abatement on death of plaintiff, the court may permit the continuance of the action by his successor in interest; Overall v. Traction Co., 112 Mo. App. 224, 90 S. W. 402.

The death of the lessor in ejectment never abates the suit; Frier v. Jackson, 8 Johns. (N. Y.) 495; Ex parte Swan, 23 Ala. 193; Thomas v. Kelly, 35 N. C. 43; Hatfield v. Bushnell, 1 Blatchf. 393, Fed. Cas. No. 6,211; his heirs are properly substituted on defendant's petition; Ballantine v. Negley, 158 Pa. 475, 27 Atl. 1051.

In Wasserman v. United States, 161 Fed. 722, 88 C. C. A. 582, it was held that the fine of one found guilty of contempt, who had sued out a writ of error, but died before the submission of the case to the higher court, should be considered as a charge against the estate, and that the action did not abate by death.

On death of administrator bringing suit it may be revived by his administrator or by administrator *de bonis non;* Wood v. Tomlin, 92 Tenn. 514, 22 S. W. 206. In Missouri an action for personal injuries cannot be revived by the administrator after plaintiff's death; Davis v. Morgan, 97 Mo. 79, 10 S. W. 881; nor is such action impliedly saved in West Virginia by the statute giving a right of action after death to the personal representatives; Martin v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. In New York a statutory cause of action for death by negligence abates by the death of the wrongdoer; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. In Maryland an action by husband to recover damages for the killing of his wife, abates on his death; Harvey v. R. Co., 70 Md. 319, 17 Atl. 88; but in Texas a suit by a husband for personal injury to his wife may be continued by her after

his death; Mexican Cent. Ry. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778; and the remedy of a son for his own suffering caused by mutilation of his father's body, is by new action, and not by substitution of himself as plaintiff after the death of his mother in a suit begun by her for her own suffering; Jones v. Miller, 35 Wash. 499, 77 Pac. 811. On the death of a father suing for an injury causing the death of his daughter, her administratrix may revive; Meekin v. R. Co., 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

The death of a party pending an audit causes a mistrial and new parties must be brought in and the case tried *de novo*, Carroll v. Barber, 119 Ga. 856, 47 S. E. 181.

The death of plaintiff after judgment and pending motion for a new trial, does not abate the suit; Fowden v. S. S. Co., 149 Cal. 151, 86 Pac. 178; and a decree in equity in favor of husband and wife, after the death of the husband survives to the wife, though she was not a necessary party; Edgerton v. Muse, Dud. Eq. (S. C.) 179. Where a judgment on a cause of action which does not survive was recovered against a decedent and another, it abates as to the former; Hammond v. Hoffman, 2 Redf. (N. Y.) 92.

On the death of one of three partners plaintiff the remaining two may prosecute to final judgment in their own names; Davis v. Davis, 93 Ala. 173, 9 South. 736.

An action by two tenants in common, after the death of one who bequeathed to the survivor his interest in a pending action and made him executor, may be continued by him for damages sustained by both; McPhillips v. Fitzgerald, 177 N. Y. 543, 69 N. E. 1126. Under U. S. Rev. Stat. § 956, providing that an action may be continued by a surviving plaintiff against a surviving defendant without abatement, where the cause of action survives to the surviving plaintiff or against the surviving defendant, an administrator can neither continue nor defend the action; Fox v. Mackay, 1 Alaska 329.

The death of sole defendant pending an action abates it; Bac. Abr. Abt. F; anonymous, 2 N. C. 500; McKee v. Straub, 2 Binn. (Pa.) 1; Carter v. Carr, 1 Gilm. (Va.) 145; Farmer v. Frey, 4 McCord (S. C.) 160; Macker v. Thomas, 7 Wheat. (U. S.) 530, 5 L. Ed. 515; Nutz v. Reutter, 1 Watts (Pa.) 229; Mellen v. Baldwin, 4 Mass. 480; Merritt v. Lumbert, 8 Greenl. (Me.) 129; Petts v. Ison, 11 Ga. 151, 56 Am. Dec. 419; but not after a finding for the plaintiff; Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397; or because of the death of a party after verdict; Laidley v. Jasper, 49 W. Va. 526, 39 S. E. 169; but the death of defendant after decision, but before judgment, abates the suit; Fox v. Hopkinson, 19 R. I. 704, 36 Atl. 824. After abatement by reason of the death of defendant, the duty of instituting proceedings for revival rests upon the plaintiff and not on the other defendants; Wilkinson v. Vordermark, 32 Ind. App. 633, 70 N. E. 538; Jameson v. Bartlett, 63 Neb. 638, 88 N. W. 860. When the defendant dies before service, no jurisdiction has attached and the executor cannot be made a party; Connaway v. Overton, 98 Fed. 574; Crowdus' Adm'r v. Harrison, 9 Ky. L. Rep. 58.

An action against a surgeon for malpractice abates with the death of the defendant, whatever the form of the action; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

But where one of several co-defendants dies pending the action, his death is in general no cause of abatement, even by common law; Cro. Car. 426; Bac. Abr. Abt. F; Gould, Pl. ch. 5, § 93; Tucker v. Utley, 168 Mass. 415, 47 N. E. 198. If the cause of action is such as would survive against the survivor or survivors, the plaintiff may proceed by suggesting the death upon the record; Torry v. Robertson, 24 Miss. 192; Gould, Pl. ch. 5, § 93. Where one of several plaintiffs or defendants in error dies, the suit does not abate or require a revival in the Supreme Court; Prior v. Kiso, 96 Mo. 316, 9 S. W. 898. The inconvenience of abatement by death of parties was remedied by 17 Car. II, ch. 8, and 8 & 9 Wm. III. ch. 2, ss. 6, 7. In the U. S., on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them; Gould, Pl. ch. 5, § 95. The common law rule is that the right of action against a tort-feasor dies with him; Jones v. Barmm, 217 Ill. 381, 75 N. E. 505; Hedekin v. Gillespie, 33 Ind. App. 650, 72 N. E. 143; Stratton's Independence v. Dines, 135 Fed. 449, 68 C. C. A. 161; and such death should be pleaded in abatement; O'Conner v. Corbitt, 3 Cal. 370. Many exceptions to this rule exists by statute. When a party has been so long dead as to require consent to revive, which is refused, it abates; New Hampshire Banking Co. v. Ball, 57 Kan. 812, 48 Pac. 137.

As to the effect of death of parties on suit, see 5 L. Ed. 256, note. And as to the survival of personal actions after the death of the plaintiff, see ACTIO PERSONALIS MORITUR CUM PERSONA. As to the effect of the death of a party in suits for divorce, see that title.

Infancy is pleadable in abatement to the person of the plaintiff, unless the infant appear by guardian or *prochein amí;* Co. Litt. 135 *b*; 2 Saund. 117; 3 Bla. Com. 301; Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373; Hinman v. Taylor, 2 Conn. 357; Blood v. Harrington, 8 Pick. (Mass.) 552. He cannot appear by attorney, since he cannot make a power of attorney; 3 Saund. 212; Young v. Young, 3 N. H. 345; Blood v. Harrington, 8 Pick. (Mass.) 552; Smith v. Van Houten, 9 N. J. L. 381; Schemerhorn v. Jenkins, 7 Johns. (N. Y.) 373. The death of the next friend bringing suit for minors does not

abate suit, nor does the attainment of majority by minors; Tucker v. Wilson, 68 Miss. 693, 9 South. 898. Where an infant sues as co-executor with an adult, both may appear by attorney, for, the suit being brought *in autre droit*, the personal rights of the infant are not affected, and therefore the adult is permitted to appoint an attorney for both; 3 Saund. 212; Cro. Eliz. 542. At common law, judgment obtained for or against an infant plaintiff who appears by attorney, no plea being interposed, may be reversed by writ of error; 1 Rolle, Abr. 287; Cro. Jac. 441. By statute, however, such judgment is valid, if for the infant; 3 Saund. 212 (n. 5). A suit by a guardian to compel an accounting by a guardian *ad litem* does not abate by reason of the death of the guardian or the majority of the ward; Smith v. Mingey, 72 App. Div. 103, 76 N. Y. Supp. 194, order affirmed 172 N. Y. 650, 65 N. E. 1122.

Imprisonment. A sentence to imprisonment in New York, either of plaintiff or defendant, abates the action by statute; Graham v. Adams, 2 Johns. Cas. (N. Y.) 408; O'Brien v. Hagan, 1 Duer (N. Y.) 664; but see Davis v. Duffie, 8 Bosw. (N. Y.) 617.

Lunacy. A lunatic may appear by attorney, and the court will on motion appoint an attorney for him; Faulkner v. McClure, 18 Johns. (N. Y.) 134. But a suit brought by a lunatic under guardianship shall abate; Collard v. Crane, Brayt. (Vt.) 18; but it is held that a suit brought by the committee of an insane person may be revived by the administrator of the latter after his death; Straight v. Ice, 56 W. Va. 60, 48 S. E. 837. *Quære* whether suit against committee of an insane person may be revived against the administrators of such person; Paradise's Adm'rs v. Cole, 6 Munf. (Va.) 218.

Mandamus, when brought against a public officer, is a personal action which abates at his death or retirement from office, and his successor cannot be substituted without statutory authority; U. S. v. Butterworth, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. Ed. 873, citing the prior cases.

Misjoinder. The joinder of improper plaintiffs may be pleaded in abatement; Archb. C. Pl. 304; 1 Chit. Pl. 8. Advantage may also be taken, if the misjoinder appear on record, by demurrer in arrest of judgment, or by writ of error. If it does not appear in the pleadings, it would be ground of non-suit on the trial; 1 Chit. Pl. 66. Misjoinder of defendants in a personal action is not subject of a plea in abatement; Wooten & Co. v. Nall, 18 Ga. 609; Archb. C. Pl. 68, 310; Durgin v. Smith, 115 Mich. 239, 73 N. W. 361; otherwise where there is found to be no joint liability; Wright v. Reinelt, 118 Mich. 638, 77 N. W. 246. When an action is thus brought against two upon a contract made by one, it is a good ground of defence under the general issue; Clayt. 114; Anderson v. Henshaw, 2 Day (Conn.) 272; Diblee v. Best, 11 Johns. (N. Y.) 104; 1 Esp. 363; for in such case the proof disproves the declaration. If several are sued for a tort committed by one, such misjoinder is no ground of objection in any manner, as of co-defendants in actions *ex delicto*, some may be convicted and others acquitted; 1 Saund. 291. In a real action against several persons, they may plead several tenancy; that is, that they hold in severalty, not jointly; Com. Dig. Abt. F, 12; or one of them may take the entire tenancy on himself, and pray judgment of the writ; Com. Dig. Abt. F, 13. Misjoinder of action is waived unless taken before defence; Organ v. R. Co., 51 Ark. 235, 11 S. W. 96. Where a husband is improperly joined in an action concerning his wife's separate interest in land, the action should be abated; West v. Adams (Va.) 27 S. E. 496.

Misnomer of plaintiff, where the misnomer appears in the declaration, must be pleaded in abatement; Jewett v. Burroughs, 15 Mass. 469; Porter v. Cresson, 10 S. & R. (Pa.) 257; State v. Dines, 10 Humphr. (Tenn.) 512; Barnes v. Perine, 9 Barb. (N. Y.) 202; Proprietors of Sunapee v. Eastman, 32 N. H. 470; American Bank v. Doolittle, 14 Pick. (Mass.) 123; Trull v. Howland, 10 Cush. (Mass.) 109, 57 Am. Dec. 82; and he must disclose his true name and thereby enable the plaintiff to amend his writ; Com. v. Lewis, 1 Metc. (Mass.) 151; McCrory v. Anderson, 103 Ind. 12, 2 N. E. 211; and where parties were improperly joined in suit on covenants of indemnity and the only relief was in equity, under the statute, the action was abated as to them only; McIlvane v. Lumber Co., 105 Va. 613, 54 S. E. 473. It is a good plea in abatement that the party sues by his surname only; Chappell v. Proctor, Harp. (S. C.) 49; Labat v. Ellis, 1 N. C. 172; Seely v. Boon, 1 N. J. L. 138. A mistake in the Christian name is ground for abatement; Moss v. Flint, 13 Ill. 570; or where the initials merely are used; Smith v. Barrett, Morris (Ia.) 492; City of Menominee v. Lumber Co., 119 Mich. 196, 77 N. W. 704. In England the effect of pleas in abatement of misnomer has been diminished by statute 3 & 4 Wm. IV. ch. 42, s. 11, which allows an amendment at the cost of the plaintiff. The rule embodied in the English statute prevails in this country.

If the defendant is sued or declared against by a wrong name, he may plead the mistake in abatement; 3 Bla. Com. 302; 3 East 167; Bac. Abr. D; Louisville & N. R. Co. v. Hall, 12 Bush (Ky.) 131; and in abatement only, Thompson v. Elliott, 5 Mo. 118; Salisbury v. Gillett, 2 Scam. (Ill.) 290; Melvin v. Clark, 45 Ala. 285; Carpenter v. State, 8 Mo. 291; Com. v. Lewis, 1 Metc. (Mass.) 151; but one defendant cannot plead the misnomer of another, Com. Dig. Abt. F, 18; Archb. C. P. 312; 1 Nev. & P. 26. But if having been sued by the wrong name, he is served with process, and fails to plead the misnomer in

abatement, he will be bound by the judgment; Bloomfield R. Co. v. Burress, 82 Ind. 83. And a corporation setting up a misnomer in its answer, but failing to state its true name, will be bound by a judgment against it in the name by which it was sued; Louisville & N. R. Co. v. Hall, 12 Bush (Ky.) 131.

The omission of the initial letter between the Christian and surname of the party is not a misnomer or variance; Franklin v. Talmadge, 5 Johns. (N. Y.) 84. Since oyer of the writ has been prohibited, the misnomer must appear in the declaration; Williard v. Missani, 1 Cow. (N. Y.) 37. Misnomer of defendant was never pleadable in any other manner than in abatement; Thompson v. Elliott, 5 Mo. 118; Salisbury v. Gillett, 2 Scam. (Ill.) 290; Melvin v. Clark, 45 Ala. 285; Carpenter v. State, 8 Mo. 291; Com. v. Lewis, 1 Metc. (Mass.) 151. In England this plea has been abolished; 3 & 4 Wm. IV. ch. 42, s. 11. And in the states, generally, the plaintiff is allowed to amend a misnomer. The misnomer of one of two defendants, as to his Christian name, if material at all when sued as a firm, must be taken advantage of by plea in abatement; Whittier v. Gould, 8 Watts (Pa.) 485.

In criminal practice the usual pleas in abatement are for misnomer. If the indictment assigns to the defendant no Christian name, or a wrong one, no surname, or a wrong one, he can only object to this matter by a plea in abatement; 2 Gabb. Cr. L. 327. As to the evidence necessary in such case, see 1 M. & S. 453; 3 Greenl. Ev. § 221.

Non-joinder. If one of several joint tenants sue, Co. Litt. 180 *b*; Bacon, Abr. *Joint Tenants*, K; 1 B. & P. 73; one of several joint contractors, in an action *ex contractu*, Archb. C. P. 48, 53; one of several partners, Puschel v. Hoover, 16 Ill. 340; Bellas v. Fagely, 19 Pa. 273; one of several joint executors who have proved the will, or even if they have not proved the will; Newton v. Cocke, 10 Ark. 169; 1 Chit. Pl. 12, 13; one of several joint administrators; *id.* 13; the defendant may plead the non-joinder in abatement; Com. Dig. Abt. E; 1 Chit. Pl. 12. The omission of one or more of the owners of the property in an action *ex delicto* is pleaded in abatement; Chandler v. Spear, 22 Vt. 388; Weare v. Burge, 32 N. C. 169; Morley v. French, 2 Cush. (Mass.) 130; Reading R. R. v. Boyer, 13 Pa. 497; Edwards v. Hill, 11 Ill. 22. Dormant partners may be omitted in suits on contracts to which they are not privy; Clark v. Miller, 4 Wend. (N. Y.) 628; Wilson v. Wallace, 8 S. & R. (Pa.) 55; Lord v. Baldwin, 6 Pick. (Mass.) 352; Clarkson v. Carter, 3 Cow. (N. Y.) 85. A non-joinder may also be taken advantage of in actions *ex contractu*, at the trial, under the general issue, by demurrer, or in arrest of judgment, if it appears on the face of the pleadings; Armine v. Spencer, 4 Wend. (N. Y.) 409.

Non-joinder of a person as defendant who is jointly interested in the contract upon which the action is brought can only be taken advantage of by plea in abatement; 5 Term 651; 3 Campb. 50; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Hine v. Houston, 2 G. Greene (Ia.) 161; Johnson v. Ransom, 24 Conn. 531; Potter v. McCoy, 26 Pa. 458; Gove v. Lawrence, 24 N. H. 128; Merrick v. Bank, 8 Gill (Md.) 59; Henderson v. Hammond, 19 Ala. 340; Mershon v. Hobensack, 22 N. J. L. 372; Com. v. Davis, 9 B. Monr. (Ky.) 129; Beasley v. Allan, 23 Ga. 600; Prunty v. Mitchell, 76 Va. 169; unless the mistake appear from the plaintiff's own pleadings, when it may be taken advantage of by demurrer or in arrest of judgment; 1 Saund. 271; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227. Non-joinder of a co-tenant may be pleaded when the suit respects the land held in common; Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85; State v. Townsend, 2 Harring. (Del.) 277. When the contract is several as well as joint, the plaintiff is at liberty to proceed against the parties separately or jointly; and where one member of a firm is sued separately on an endorsement, the liability being joint and several, he may have the other partners made parties but cannot abate the suit for their non-joinder; Jameson v. Smith, 19 Tex. Civ. App. 90, 46 S. W. 864. In actions of tort the plaintiff may join the parties concerned in the tort, or not, at his election; 1 Saund. 291; 3 B. & P. 54; Gould, Pl. ch. 2, § 118. The non-joinder of any of the wrongdoers is no defence in any form of action; Buddington v. Shearer, 22 Pick. (Mass.) 427.

When husband and wife should be sued jointly, and one is sued alone, the non-joinder may be pleaded in abatement; Archb. C. P. 309. Non-joinder of co-executors or co-administrators may be pleaded in abatement; Com. Dig. Abt. F. The form of action is of no account where the action is substantially founded in contract; 6 Term 369. The law under this head has in a great measure become obsolete in many of the States, by statutory provisions making contracts which by the common law were joint, both joint and several.

Pendency of another action must be pleaded in abatement and not in bar; Mattel v. Conant, 156 Mass. 418, 31 N. E. 487; Central Railroad & Banking Co. v. Coleman, 88 Ga. 294, 14 S. E. 382; Danforth v. R. Co., 93 Ala. 614, 11 South. 60; and the judgment of the court below thereon is not subject to review; Stephens v. Bank, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. Ed. 399. But where two or more tribunals have concurrent jurisdiction on the same subject-matter between the same parties, a suit commenced in any one of them is a bar to an action for the same cause in any other; Shelby v. Bacon, 10 How. (U. S.) 56, 13 L. Ed. 326. The rule in equity is analogous to the rule at law; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737; but it is

no ground for abatement of an action at law, that a suit in equity is pending between the same parties for the same money where the result of the action at law may be required to perfect the decree in equity; Kittredge v. Race, 92 U. S. 116, 23 L. Ed. 488. Prior pendency of an action unless both are in the same jurisdiction is not cause for abatement; O'Reilly v. R. Co., 16 R. I. 388, 17 Atl. 171, 906, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983. It must be the same cause, founded on the same facts, between the same parties, for the same rights and the same relief; Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666; Marchand v. Frellsen, 105 U. S. 423, 26 L. Ed. 1057; Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482; Kansas City S. Ry. Co. v. Railroad Commission, 106 La. 583, 31 South. 131; Richardson v. Opelt, 60 Neb. 180, 82 N. W. 377. Pendency of suit in a state court is no ground for a plea in abatement to a suit upon same cause in a Federal court; Wilcox & Gibbs Guano Co. v. Ins. Co., 61 Fed. 199; Piquignot v. R. Co., 16 How. (U. S.) 104, 14 L. Ed. 863; and see Gordon v. Gilfoil, 99 U. S. 168, 25 L. Ed. 383; but see Wallace v. McConnell, 13 Pet. (U. S.) 136, 10 L. Ed. 95; Hunt v. Cotton Exchange, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. Ed. 821; Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515; Boatmen's Bank v. Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; City of Mankato v. Paving Co., 142 Fed. 329, 73 C. C. A. 439; Gamble v. City of San Diego, 79 Fed. 487; but the latter court will stay proceedings until the other suit is determined; Zimmerman v. So Relle, 80 Fed. 417, 25 C. C. A. 518; Bunker Hill & S. Mining & C. Co. v. Mining Co., 109 Fed. 504, 47 C. C. A. 200; or compel an election; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737. Pendency of prior suit in one state cannot be pleaded in abatement of suit for same cause and between same parties in another state; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; nor is a libel of a vessel, under the Chinese Exclusion Act, for smuggling opium, barred by a prior libel for similar offenses in another Federal Court; The Haytian Republic, 154 U. S. 118, 14 Sup. Ct. 992, 38 L. Ed. 930. Pendency of a suit in a foreign country between the same parties and for same cause would not bar or abate an action; Insurance Co. v. Brune, 96 U. S. 588, 24 L. Ed. 737; Stanton v. Embry, 93 U. S. 548, 23 L. Ed. 983, 42 L. R. A. 449, note; Crossman v. Rubber Co., 60 N. Y. Super. Ct. 68, 16 N. Y. Supp. 609; Harvey v. R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; North British Mercantile Ins. Co. v. Bank, 3 Tex. Civ. App. 293, 22 S. W. 992. A good answer to plea in abatement of pendency of prior suit, is that such action has been dismissed since trial of second action began; Moore v. Hopkins, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248; Nichols v. Clark, 45 Minn. 102, 47 N. W. 462; Warder v. Henry, 117 Mo. 530, 23 S. W. 776; Clark v. Comford, 45 La. Ann. 502, 12 South. 763.

Privilege of defendant from being sued may be pleaded in abatement; Marr v. Johnson, 9 Yerg. (Tenn.) 1; Bac. Abr. Abt. C. See PRIVILEGE. A peer of England cannot, as formerly, plead his peerage in abatement of a writ of summons; 2 Wm. IV. ch. 39. It is a good cause of abatement that the defendant was arrested at a time when he was privileged from arrest; Hubbard v. Sanborn, 2 N. H. 468; Legrand v. Bedinger, 4 T. B. Monr. (Ky.) 539; or that he was served with process when privileged from suits; Van Alstyne v. Dearborn, 2 Wend. (N. Y.) 586; Halsey v. Stewart, 4 N. J. L. 366; Greening v. Sheffield, Minor (Ala.) 276; but a statute allowing such plea applies not to persons improvidently arrested, but only to the privileged classes; Bank of Vergennes v. Barker, 27 Vt. 243. The privilege of defendant as member of the legislature has been pleaded in abatement; King v. Coit, 4 Day (Conn.) 129; but the privilege of a non-resident witness cannot be; Wilkins' Adm'r v. Brock, 79 Vt. 57, 64 Atl. 232.

For cases where the defendant may plead non-tenure, see Archb. C. P. 310; Cro. Eliz. 559; Manning v. Laboree, 33 Me. 343.

Where he may plead a disclaimer, see Archb. C. P.; Com. Dig. Abt. F, 15; Mills v. Peirce, 2 N. H. 10.

PLEAS IN ABATEMENT TO THE COUNT required oyer of the original writ; and, as this cannot now be had, these pleas are, it seems, abolished; 1 Chit. Pl. 405 (6th Lond. ed.); Saund. Pl. *Abatement.*

PLEAS IN ABATEMENT OF THE WRIT.—In general, any irregularity, defect, or informality in the terms, form, or structure of the writ, or mode of issuing it, is a ground of abatement; Gould, Pl. ch. 5, s. 132. Among them may be enumerated want of date, or impossible date; want of venue, or, in local actions, a wrong venue; a defective return; Gould, Pl. ch. 5, s. 133. Oyer of the writ being prohibited, these errors cannot be objected to unless they appear in the declaration, which is presumed to correspond with the writ; Campbell v. Chaffee, 6 Fla. 724; 3 B. & P. 399; 14 M. & W. 161. The objection then is to the writ through the declaration; 1 B. & P. 648; there being no plea to the declaration alone, but in bar; 2 Saund. 209. A variance between writ and declaration may properly be pleaded in abatement; Weld v. Hubbard, 11 Ill. 573; Pierce v. Lacy, 23 Miss. 193.

Such pleas are either to the form of the writ, or to the action thereof.

Those of the first description were formerly either for matter apparent on the face of

the writ, or for matter *dehors;* Com. Dig. Abt. H, 17.

Pleas in abatement to the form of the writ were formerly allowed for very trifling errors apparent on the face of the writ; 2 B. & P. 395, but since oyer has been prohibited, have fallen into disuse; Tidd, Pr. 636.

Pleas in abatement of the form of the writ are now principally for matters *dehors;* Com. Dig. Abt. H, 17; existing at the time of suing out the writ, or arising afterwards; such as misnomer of the plaintiff's or defendant's name; Tidd, Pr. 637.

Pleas in Abatement to the Action of the Writ are that the action is misconceived, as if assumpsit is brought instead of *account*, or trespass when case is the proper action; 1 Show. 71; Tidd, Pr. 579; or that the right of action had not accrued at the commencement of the suit; Cro. Eliz. 325; Com. Dig. *Action*, E, 1. But these pleas are unusual, since advantage may be taken for the same reasons on demurrer or under the general issue; Gould, Pl. ch. 5, s. 137; 1 C. & M. 492, 768.

Variance. Where the count varies from the writ, or the writ varies from the record or instrument on which the action is brought, it is pleadable in abatement; Cro. Eliz. 722; 1 H. Bla. 249; McNeill v. Arnold, 17 Ark. 154; Carpenter v. Hoyt, 17 Ill. 529; Smith v. Butler, 25 N. H. 521; and not otherwise; Lovell v. Doble, Quincy (Mass.) 88. If the variance is only in matter of mere form, as in time or place, when that circumstance is immaterial, advantage can be taken only by plea in abatement; Riley v. Murray, 8 Ind. 354; Cruikshank v. Brown, 5 Gilman (Ill.) 75; Latch 173; Gould, Pl. ch. 5, s. 97. But if the variance is in matter of substance, as if the writ sounds in contract and the declaration in tort, advantage may also be taken by motion in arrest of judgment; Pitman v. Perkins, 28 N. H. 90; Cro. Eliz. 722. Pleas under this head have been virtually abolished by the rule refusing oyer of the writ; and the operation of this rule extends to all pleas in abatement that cannot be proved without examination of the writ; Gould, Pl. ch. 5, s. 101. It seems that oyer of the writ is allowed in some of the states which retain the old system of pleading, as well as in those which have adopted new systems. In such states these rules as to variance are of force; Pitman v. Perkins, 28 N. H. 90; Carpenter v. Hoyt, 17 Ill. 529; Chapman v. Spence, 22 Ala. 588; Pierce v. Lacy, 23 Miss. 193; Riley v. Murray, 8 Ind. 354; Lary v. Evans, 35 N. H. 172; McNeill v. Arnold, 17 Ark. 154; Giles v. Perryman, 1 Harr. & G. (Md.) 164; White v. Walker, 1 T. B. Monr. (Ky.) 35; Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474; Garland v. Chattle, 12 Johns. (N. Y.) 430; President, etc., of Bank of New Brunswick v. Arrowsmith, 9 N. J. L. 284. See VARIANCE.

QUALITIES OF PLEAS IN ABATEMENT. The defendant may plead in abatement to part, and demur or plead in bar to the residue, of the declaration; 2 Saund. 210. The general rule is that whatever proves the writ false at the time of suing it out shall abate the writ entirely; 1 Saund. 286 (n. 7).

As this plea delays the ascertainment of the merits of the action, it is not favored by the courts; the greatest accuracy and precision are therefore required; and it cannot be amended; 2 Saund. 298; Co. Litt. 392; 13 M. & W. 474; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; 8 Bingh. 416; Getchell v. Boyd, 44 Me. 482; Mandel v. Peet, 18 Ark. 236; Anonymous, 1 Hemp. 215, Fed. Cas. No. 18,224; Roberts v. Heim, 27 Ala. 678. It must contain a direct, full, and positive averment of all the material facts; Morse v. Nash, 30 Vt. 76; Lary v. Evans, 35 N. H. 172; Ellis v. Ellis, 4 R. I. 110; Tweed v. Libbey, 37 Me. 49; Dinsmore v. Pendexter, 28 N. H. 18; Townsend v. Jeffries' Adm'r, 24 Ala. 329; Wales v. Jones, 1 Mich. 254. It must give enough so as to enable the plaintiff by amendment completely to supply the defect or avoid the mistake on which the plea is founded; 4 Term 224; 1 Saund. 274 (n. 4); Wadsworth v. Woodford, 1 Day (Conn.) 28; Rea v. Hayden, 3 Mass. 24; Burrow v. Sellers' Ex'rs, 2 N. C. 501; 2 Ld. Raym. 1178; 1 East 634.

It must not be double or repugnant; 3 M. & W. 607. It must have an apt and proper beginning and conclusion; 3 Term 186; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; Schoonmakers' Ex'rs v. Elmendorf, 10 Johns. (N. Y.) 49; 2 Saund. 209. The whole matter of complaint must be covered by the plea; 2 B. & P. 420. It cannot be pleaded after making full defence; 1 Chit. Pl. 441 (6th Lond. ed.).

A plea in abatement and a plea or answer in bar cannot be pleaded together; Southern Bldg. & Loan Ass'n v. Ins. Co., 23 Pa. Super. Ct. 88; Huntington Mfg. Co. v. Schofield, 28 Ind. App. 95, 62 N. E. 106; Trentman v. Fletcher, 100 Ind. 105; Carmien v. Cornell, 148 Ind. 83, 47 N. E. 216 (in Indiana there is a statute forbidding it; Field v. Malone, 102 Ind. 251, 1 N. E. 507); *contra*, Fisher v. Fraprie, 125 Mass. 472; O'Loughlin v. Bird, 128 Mass. 600; Parks v. Smith, 155 Mass. 26, 28 N. E. 1044; (where expressions otherwise in Pratt v. Sanger, 4 Gray [Mass.] 84 and Morton v. Sweetser, 12 Allen [Mass.] 134, are characterized as *obiter*); Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019; Templin v. Kimsey, 74 Neb. 614, 105 N. W. 89 (citing many intermediate cases and establishing the rule that a plea to the merits may be filed with one to the jurisdiction, when the latter sets up an objection *dehors* the record); and see Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317. See also Duke v. Duke, 70 N. J. Eq. 135, 62 Atl. 466; and a plea to the merits filed simultaneously with

a plea in abatement waives the latter; Putnam Lumber Co. v. Ellis-Young Co., 50 Fla. 251, 39 South. 193; City of Covington v. Limerick, 40 S. W. 254, 19 Ky. L. Rep. 330; Lassas v. McCarty, 47 Or. 474, 84 Pac. 76; Maupin v. Ins. Co., 53 W. Va. 557, 45 S. E. 1003; Crowns v. Land Co., 99 Wis. 103, 74 N. W. 546.

In some states this rule is changed by statute; Moffitt v. Chronicle Co., 107 Ia. 407, 78 N. W. 45; Little Rock Trust Co. v. R. Co., 195 Mo. 669, 93 S. W. 944; Thach v. Mut. Acc. Ass'n, 114 Tenn. 271, 87 S. W. 255; Pyron & Davidson v. Graef, 31 Tex. Civ. App. 405, 72 S. W. 101; or rule of court; National Fraternity v. Circuit Judge, 127 Mich. 186, 86 N. W. 540.

But this rule was held not to apply to a special plea denying partnership of the plaintiffs, filed under a statute requiring denial of the character in which the plaintiff sues in order to control it; Robinson v. Parker, 11 App. D. C. 132.

As to the form of pleas in abatement, see Harvey v. Hall, 22 Vt. 211; 1 Chit. Pl. (6th Lond. ed.) 454; Com. Dig. Abt. I, 19; 2 Saund. 1 (n. 2).

As to the time of pleading matter in abatement, it must be pleaded before any plea to the merits, both in civil and criminal cases, except in cases where it arises or comes to the knowledge of the party subsequently; Turns v. Com., 6 Metc. (Mass.) 224; University of Vermont v. Joslyn, 21 Vt. 52; Inhabitants of Plantation No. 9 v. Bean, 40 Me. 218; Butts v. Grayson, 14 Ark. 445; Hart v. Turk, 15 Ala. 675; Hatry v. Shuman, 13 Mo. 547; Ricker v. Scofield, 28 Ill. App. 32; and the right is waived by a subsequent plea to the merits; Sheppard v. Graves, 14 How. (U. S.) 505, 14 L. Ed. 518; Hart v. Turk, 15 Ala. 675; Smith v. State, 19 Conn. 493; Saum v. Bd. of Com's, 1 G. Greene (Ia.) 165; Chapman v. Davis, 4 Gill (Md.) 166; Cook v. Burnley, 11 Wall. (U. S.) 659, 20 L. Ed. 29. See PLEA PUIS DARREIN CONTINUANCE.

Demurrer to complaint for insufficiency of facts, waives all matter in abatement; Marx v. Croisan, 17 Or. 393, 21 Pac. 310.

Of the Affidavit of Truth. Every dilatory plea must be proven to be true, either by affidavit, by matter apparent upon the record, or probable matter shown to the court to induce them to believe it; 3 B. & P. 397; Holden v. Scanlin, 30 Vt. 177; White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561; Humphrey v. Whitten, 17 Ala. 30; Knowlton v. Culver, 1 Chand. (Wis.) 16; Bank of Tennessee v. Jones, 1 Swan (Tenn.) 391; Saum v. Bd. of Com's, 1 G. Greene (Ia.) 165. It is not necessary that the affidavit should be made by the party himself; his attorney, or even a third person, will do; 1 Saund. Pl. & Ev. 3 (5th Am. ed.). The plaintiff may waive an affidavit; 5 Dowl. & L. 737; Richmond v. Tallmadge, 16 Johns. (N. Y.) 307. The affidavit must be coextensive with the plea; 3 Nev. & M. 260, and leave nothing to be collected by inference; Say. 293. It should state that the plea is true in substance and fact, and not merely that the plea is a true plea; 3 Stra. 705; Day v. Hamburgh, 1 Browne (Pa.) 77; Rapp v. Elliot, 2 Dall. (Pa.) 184, 1 L. Ed. 341.

Plea in abatement on account of non-joinder of joint promisors need not be verified by oath, National Niantic Bank v. Express Co., 16 R. I. 343, 15 Atl. 763.

JUDGMENT ON PLEAS IN ABATEMENT. If issue be joined on a plea in abatement, a judgment for the plaintiff upon a verdict is final; 1 Str. 532; Moore v. Morton, 1 Bibb (Ky.) 234; McCartee v. Chambers, 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; Good v. Lehan, 8 Cush. (Mass.) 301; Dodge v. Morse, 3 N. H. 232; Haight v. Holley, 3 Wend. (N. Y.) 258; but judgment for plaintiff upon a demurrer to a plea in abatement is not final, but merely *respondeat ouster;* Ld. Raym. 699; Whitford v. Flanders, 14 N. H. 371; Lambert v. Lagow, 1 Blackf. (Ind.) 388. After judgment of *respondeat ouster*, the defendant has four days' time to plead, commencing after the judgment has been signed; 8 Bingh. 177. He may plead again in abatement, provided the subject-matter pleaded be not of the same degree, or of any preceding degree or class with that before pleaded; Com. Dig. Abt. I, 3; 1 Saund. Pl. & Ev. 4 (5th Am. ed.); Tidd, Pr. 641.

If the plea is determined in favor of the defendant either upon an issue of law or fact, the judgment is that the writ or bill be quashed; Yelv. 112; Bac. Abr. Abt. P; Gould, Pl. ch. 5, § 159; 2 Saund. 211 (n. 3).

See JUDGMENT.

As to abatement and revival of actions, the power and practice of United States courts are governed by the law of the state in which action is pending at death; Wilhite v. Skeleton, 149 Fed. 67, 78 C. C. A. 635.

ABATOR. One who abates or destroys a nuisance. One who, having no right of entry, gets possession of the freehold to the prejudice of an heir or devisee, after the time when the ancestor died, and before the heir or devisee enters. Litt. § 397; Perk. Conv. § 383; 2 Prest. Abs. 296, 300. See Ad. Ej. 43; 1 Washb. R. P. 225.

ABATUDA. Anything diminished; as *moneta abatuda;* which is money clipped or diminished in value. Cowell.

ABAVIA. A great-great-grandmother.

ABAVITA. Used for *abamita*, which see.

ABAVUNCULUS. A great-great-grandmother's brother. Calvinus, Lex.

ABAVUS. A great-great-grandfather, or fourth male ascendant.

ABBACY. The office of an abbot. The dignity of the office.

ABBAT, ABBOT. A spiritual lord or gov-

ernor having the rule of a religious house. Cunningham.

ABBEY. A monastery or convent for the use of an association of religious persons, having an abbot or abbess to preside over them.

ABBOT. They were prelates in the 13th century who had had an immemorial right to sit in the national assembly. Taylor, Science of Jurispr. 287.

ABBREVIATION. A shortened form of a word, obtained by the omission of one or more letters or syllables from the middle or end of the word.

The abbreviations in common use in modern times consist of the initial letter or letters, syllable or syllables, of the word. Anciently, also, contracted forms of words, obtained by the omission of letters intermediate between the initial and final letters were much in use. These latter forms are now more commonly designated by the term *contraction*.

Abbreviations are of frequent use in referring to text-books, reports, etc., and in indicating dates, but should be very sparingly employed, if at all, in formal and important legal documents. See 4 C. & P. 51; 9 Co. 43. No part of an indictment should contain any abbreviations except in cases where a *facsimile* of a written instrument is necessary to be set out. 1 East 130, n. The variety and number of abbreviations are as nearly illimitable as the ingenuity of man can make them; and the advantages arising from their use are, to a great extent, counterbalanced by the ambiguity and uncertainty resulting from the usually inconsiderate selection which is made.

As to how far a judicial record may contain abbreviations of English words without invalidating it, see Stein v. Meyers, 253 Ill. 199, 97 N. E. 297.

The following list is believed to contain all abbreviations in common use. Where a shorter and a longer abbreviation are in common use, both are given.

A. Alabama;—American, see Am.;—Anonymous;—Arkansas;—Abbott (see Abb.);—Annuals (Louisiana);—Atlantic Reporter.

A, a, B, b. "A" front, "B" back of a leaf.

A. B. Anonymous Reports at end of Benloe's Reports, commonly called New Benloe.

A. B. R. American Bankruptcy Reports.

A'B. R. J. N. S. W. A'Beckett's Reserved (Equity) Judgments, New South Wales.

A'B. R. J. P. P. A'Beckett's Reserved Judgments, Port Philip.

A. C. Appellate Court;—Case on Appeal;—Appeal Cases, English Chancery; Law Reports Appeal Cases.

A. C.

[1891] *A. C.* English Appeal Cases; Law Reports, 3d Series, 1891.

[1892] *A. C.* Same for 1892, etc.

A. C. C. American Corporation Cases (Withrow's).

A. C. R. American Criminal Reports.

A. D. American Decisions;—*Anno Domini;* in the year of our Lord;—Appellate Division, New York Supreme Court.

A. E. C. American Electrical Cases.

A. G. Attorney General.

A. G. Dec. Attorney General's Decisions.

A. G. Op. Attorney General's Opinions.

A. Ins. R. American Insolvency Reports.

A. K. Marsh. A. K. Marshall's Reports, Kentucky.

A. L. C. American Leading Cases.

A. L. J. Albany Law Journal.

A. Moo. A. Moore's Reports, in vol. 1 Bosanquet & Puller.

A. M. & O. Armstrong, Macartney & Ogle's Irish Nisi Prius Reports.

A. N. C. Abbott's New Cases, New York;—American Negligence Cases.

A. N. R. American Negligence Reports, Current Series.

A. P. B. or *Ashurst MSS. L. I. L.* Ashurst's Paper-books; the manuscript paper-books of Ashurst, J., Buller, J., Lawrence, J., and Dampier, J., in Lincoln's Inn Library.

A. R. American Reports;—*Anno Regni;* in the year of the reign;—Atlantic Reporter;—Appeal Reports, Ontario.

A. R. C. American Railway Cases.

A. R. R. American Railway Reports.

A. R. V. R. 22. Anno Regni Victoriæ Reginæ Vicesimo Secundo.

A. Rep. American Reports;—Atlantic Reporter (Commonly cited Atl. or A.).

A. S. Acts of Sederunt, Ordinances of the Court of Session, Scotland.

A. S. R. American State Reports.

A. & A. Corp. Angell & Ames on Corporations.

A. & E. Adolphus & Ellis's English King's Bench Reports;—Admiralty and Ecclesiastical.

A. & E. Corp. Ca. American and English Corporation Cases.

A. & E. Encyc. American and English Encyclopædia of Law.

A. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*

A. & E. R. R. C. American & English Railroad Cases.

A. & F. Fixt. Amos & Ferrard on Fixtures.

A. & H. Arnold & Hodges's English Queen's Bench Reports.

A. & N. Alcock & Napier's Irish King's Bench Reports.

Ab. Abridgment.

Ab. Adm. Abbott's Admiralty Reports.

Ab. App. Dec. Abbott's New York Court of Appeals Decisions.

Ab. Ct. App. Abbott's New York Court of Appeals Decisions.

Ab. Eq. Cas. Equity Cases Abridged, English Chancery.

Ab. N. Y. Ct. App. Abbott's New York Court of Appeals Decisions.

Ab. N. Y. Dig. Abbott's New York Digest.

Ab. N. Y. Pr. Abbott's Practice Reports, New York.

Ab. N. Y. Pr. N. S. Abbott's Practice Reports, New Series, New York.

Ab. Nat. Dig. Abbott's National Digest.

Ab. New Cas. Abbott's New Cases, various New New York courts.

Ab. Pl. Abbott's Pleadings under the Code.

Ab. Pr. Abbott's Practice Reports, New York.

Ab. Pr. N. S. Abbott's Practice Reports, New Series, New York.

Ab. Sh. Abbott (Lord Tenterden) on Shipping.

Ab. U. S. Abbott's Reports, United States Circuit Court.

Ab. U. S. Pr. Abbott's United States Courts Practice.

Abb. Abbott. See below.

Abb. Ad. or *Abb. Adm.* Abbott's Admiralty Reports.

Abb. App. Dec. Abbott's New York Court of Appeals Decisions.

Abb. Beech. Tr. Abbott's Report of the Beecher Trial.

Abb. C. C. Abbott's Reports, United States Circuit Court.

Abb. Ct. App. Abbott's New York Court of Appeals Decisions.

Abb. Dec. Abbott's New York Court of Appeals Decisions.

Abb. Dig. Abbott's New York Digest.

Abb. Dig. Corp. Abbott's Digest Law of Corporations.

Abb. Mo. Ind. Abbott's Monthly Index.

Abb. N. C. Abbott's New Cases, New York.
Abb. N. S. Abbott's Practice Reports, New Series.
Abb. N. Y. App. Abbott's New York Court of Appeals Decisions.
Abb. N. Y. Dig. Abbott's New York Digest.
Abb. Nat. Dig. Abbott's National Digest.
Abb. Pr. or *Abb. Prac.* Abbott's New York Practice Reports.
Abb. Pr. N. S. Abbott's New York Practice Reports, New Series.
Abb. Ship. Abbott (Lord Tenterden) on Shipping.
Abb. Tr. Ev. Abbott's Trial Evidence.
Abb. U. S. Abbott's United States Circuit Court Reports.
Abb. Y. Bk. Abbott's Year Book of Jurisprudence.
Abbott. Abbott's Dictionary.
Abdy's R. C. P. Abdy's Roman Civil Procedure.
A'Beck. Judg. Vict. A'Beckett's Reserved Judgments of Victoria.
Abr. Abridgment;—Abridged.
Abr. Case. Crawford & Dix's Abridged Cases, Ireland.
Abr. Case. Eq. Equity Cases Abridged (English).
Abr. Cas. Eq. or *Abr. Eq. Cas.* Equity Cases Abridged, English Chancery.
Abs. Absolute.
Acc. Accord or Agrees.
Act. Acton's Reports, Prize Causes, English Privy Council.
Act. Can. Monro's Acta Cancellariæ.
Act. Pr. C. Acton's Reports, Prize Causes, English Privy Council.
Act. Reg. Acta Regia.
Ad. Cas. Sales. Adams's Cases on the Law of Sales.
Ad. Con. Addison on Contracts.
Ad. E. Adams on Ejectment.
Ad. Eq. Adams's Equity.
Ad fin. Ad finem, at or near the end.
Ad. Jus. Adam's Justiciary Reports (Scotch).
Ad. Rom. Ant. Adams's Roman Antiquities.
Ad. Torts. Addison on Torts.
Ad. & E. or *Ad. & Ell.* Adolphus & Ellis's English King's Bench Reports.
Ad. & Ell. N. S. Adolphus & Ellis's Reports, New Series;—English Queen's Bench (commonly cited *Q. B.*).
Adams. Adams's Reports, vols. 41, 42 Maine;—Adams's Reports, vol. 1 New Hampshire.
Adams, Eq. Adams's Equity.
Adams, Rom. Ant. Adams, Roman Antiquities.
Add. Addison's Reports, Pennsylvania;—Addams's English Ecclesiastical Reports.
Add. Abr. Addington's Abridgment of the Penal Statutes.
Add. Con. Addison on Contracts.
Add. Eccl. Addams's Ecclesiastical Reports, English.
Add. Pa. Addison's Reports, Pennsylvania.
Add. Torts. Addison on Torts.
Addams. Addams's Ecclesiastical Reports, English.
Addis. Addison's Pennsylvania Reports.
Adj. Adjudged, Adjourned.
Adjournal, Books of. The Records of the Court of Justiciary, Scotland.
Adm. Admiralty.
Adm. & Ecc. Admiralty and Ecclesiastical;—English Law Reports, Admiralty and Ecclesiastical.
Admr. Administrator.
Admx. Administratrix.
Adol. & El. Adolphus & Ellis's Reports, English King's Bench.
Adol. & El. (N. S.). Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Adolph. & E. Adolphus & Ellis's Reports, English King's Bench.
Adolph. & E. N. S. Adolphus & Ellis's Reports, New Series, English Queen's Bench, commonly cited *Q. B.*
Ads. Ad sectam, at suit of.
Adv. Advocate.
Adye C. M. Adye on Courts-Martial.
Aelf. C. Canons of Aelfric.
Agn. Pat. Agnew on Patents.
Agn. St. of Fr. Agnew on the Statute of Frauds
Agra H. C. Agra High Court Reports, India.
Aik. Aikens's Vermont Reports.
Aikens (Vt.). Aikens's Reports, Vermont.
Ainsw. or *Ainsworth.* Ainsworth's Lexicon.
Al. Aleyn's Select Cases, English King's Bench;—Alabama;—Allen.
Al. Tel. Cas. Allen's Telegraph Cases, American and English.
Al. & Nap. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ala. Alabama;—Alabama Reports.
Ala. N. S. Alabama Reports, New Series.
Ala. Sel. Cas. Alabama Select Cases, by Shepherd, see Alabama Reports, vols. 37, 38 and 39.
Ala. St. Bar Assn. Alabama State Bar Association.
Alaska Co. Alaska Codes, Carter.
Alb. Arb. Albert Arbitration, Lord Cairns's Decisions.
Alb. L. J. or *Alb. Law Jour.* Albany Law Journal.
Alc. or *Alc. Reg.* or *Alc. Reg. Cas.* Alcock's Irish Registry Cases.
Alc. & N. Alcock & Napier's Reports, Irish King's Bench and Exchequer.
Ald. Alden's Condensed Reports, Pennsylvania.
Ald. Hist. Aldridge's History of the Courts of Law.
Ald. Ind. Alden's Index of U. S. Reports.
Ald. & Van Hoes. Dig. Alden & Van Hoesen's Digest, Laws of Mississippi.
Aldr. Cas. Cont. Aldred's Cases on Contracts.
Alex. Cas. Report of "Alexandra" case, by Dudley.
Alex. Ch. Pr. Alexander's Chancery Practice.
Alexander. Alexander's Reports, vols. 66-72 Mississippi.
Aleyn. Aleyn's Select Cases, English King's Bench.
Alis. Prin. Scotch Law. Alison's Principles of the Criminal Law of Scotland.
All. Allen's Massachusetts Reports.
All. N. B. Allen's New Brunswick Reports.
All. Ser. Allahabad Series, Indian Law Reports.
All. Sher. Allen on Sheriffs.
All. Tel. Cas. Allen's Telegraph Cases.
All. & Mor. Tr. Allen & Morris's Trial.
Allen. Allen's Massachusetts Reports;—Allen's Reports, New Brunswick;—Allen's Reports, Washington.
Allen (N. B.). Allen's Reports, New Brunswick Supreme Court.
Allen Tel. Cas. Allen's Telegraph Cases.
Alleyne L. D. of Mar. Alleyne's Legal Degrees of Marriage Considered.
Allin. Allinson, Pennsylvania Superior and District Court.
Alison Prac. Alison's Practice of the Criminal Law of Scotland.
Alison Princ. Alison's Principles of ditto.
Alln. Part. Allnat on Partition.
Am. America, American, or Americana.
Am. Bank. R. or *Am. B'kc'y Rep.* American Bankruptcy Reports.
Am. Bar Asso. American Bar Association.
Am. C. L. J. American Civil Law Journal, New York.
Am. Cent. Dig. American Digest (Century Edition).
Am. Ch. Dig. American Chancery Digest.
Am. Corp. Cas. Withrow's American Corporation Cases.
Am. Cr. Rep. American Criminal Reports.
Am. Crim. Rep. American Criminal Reports, by Hawley.
Am. Cr. Tr. American Criminal Trials. Chandler's.
Am. Dec. American Decisions.
Am. Dig. American Digest.
Am. Dig. Cent. Ed. American Digest (Century Edition).
Am. Dig. Dec. Ed. or *Am. Dig. Decen. Ed.* American Digest (Decennial Edition).

Am. El. Ca. or *Am. Elec. Ca.* American Electrical Cases.
Am. Ins. Rep. American Insolvency Reports.
Am. Insolv. Rep. American Insolvency Reports.
Am. Jour. Pol. American Journal of Politics.
Am. Jour. Soc. American Journal of Sociology.
Am. Jur. American Jurist, Boston.
Am. L. C. R. P. Sharswood and Budd's Leading Cases on Real Property.
Am. L. Cas. American Leading Cases (Hare & Wallace's).
Am. L. Elect. American Law of Elections.
Am. L. J. American Law Journal (Hall's), Philadelphia.
Am. L. J. (O.). American Law Journal, Ohio.
Am. L. J. N. S. American Law Journal, New Series, Philadelphia.
Am. L. M. American Law Magazine, Philadelphia.
Am. L. R. American Law Register, Philadelphia.
Am. L. Rec. American Law Record, Cincinnati.
Am. L. Reg. & Rev. American Law Register and Review, Philadelphia.
Am. L. Rep. American Law Reporter, Davenport, Iowa.
Am. L. Rev. American Law Review, St. Louis.
Am. L. T. American Law Times, Washington, D. C.
Am. L. T. Bank. American Law Times Bankruptcy Reports.
Am. L. T. R. American Law Times Reports.
Am. L. T. R. N. S. American Law Times Reports, New Series.
Am. Law Jour. American Law Journal (Hall's) Philadelphia.
Am. Law Jour. N. S. American Law Journal, New Series, Philadelphia.
Am. Law Mag. American Law Magazine, Philadelphia.
Am. Law Rec. American Law Record, Cincinnati.
Am. Law Reg. American Law Register, Philadelphia.
Am. Law Rep. American Law Reporter, Davenport, Iowa.
Am. Law Rev. American Law Review, St. Louis.
Am. Law Times. American Law Times, Washington, D. C.
Am. Lawy. American Lawyer, New York City.
Am. Lead. Cas. Hare & Wallace's American Leading Cases.
Am. Neg. Ca. or *Am. Neg. Cas.* American Negligence Cases.
Am. Neg. Rep. American Negligence Reports.
Am. Pl. Ass. American Pleader's Assistant.
Am. Pr. Rep. American Practice Reports, Washington, D. C.
Am. Prob. or *Am. Prob. Rep.* American Probate Reports.
Am. R. American Reports.
Am. R. R. Cas. American Railway Cases (Smith & Bates').
Am. R. R. Rep. American Railway Reports, New York.
Am. R. R. & C. Rep. American Railroad and Corporation Reports.
Am. Rail. Cas. Smith and Bates's American Railway Cases.
Am. Rail. R. American Railway Reports.
Am. Rep. American Reports (Selected Cases).
Am. Ry. Ca. American Railway Cases.
Am. Ry. Rep. American Railway Reports.
Am. St. P. American State Papers.
Am. St. Rep. American State Reports.
Am. St. Ry. Dec. American Street Railway Decisions.
Am. Them. American Themis, New York.
Am. Tr. M. Cas. Cox's American Trade Mark Cases.
Am. & Eng. Corp. Cas. American and English Corporation Cases.
Am. & Eng. Dec. in Eq. American and English Decisions in Equity.
Am. & Eng. Encyc. Law. American and English Encyclopædia of Law.
Am. & Eng. Pat. Ca. American and English Patent Cases.
Am. & Eng. Pat. Cas. American and English Patent Cases.
Am. & Eng. R. Cas. American and English Railroad Cases.
Am. & Eng. R. R. Ca. American and English Railroad Cases.
Am. & Eng. Ry. Ca. American and English Railway Cases.
Amb. or *Ambl.* Ambler's English Chancery Reports.
Amer. American;—Amerman, vols. 111-115 Pennsylvania.
Amer. Jur. American Jurist.
Amer. Law. American Lawyer, New York.
Amer. Law Reg. (N. S.). American Law Register, New Series.
Amer. Law Reg. (O. S.). American Law Register, Old Series.
Amer. Law Rev. American Law Review.
Amer. & Eng. Enc. Law. American & English Encyclopædia of Law.
Ames. Ames's Reports, vol. 4-7 Rhode Island;—Ames's Reports, vol. 1 Minnesota.
Ames Cas. B. & N. Ames's Cases on Bills and Notes.
Ames Cas. Par. Ames's Cases on Partnership.
Ames Cas. Part. Ames's Cases on Partnership.
Ames Cas. Pl. Ames's Cases on Pleading.
Ames Cas. Sur. Ames's Cases on Suretyship.
Ames Cas. Trusts. Ames's Cases on Trusts.
Ames, K. & B. Ames, Knowles & Bradley's Reports, vol. 8 Rhode Island.
Ames & Sm. Cas. Torts. Ames & Smith's Cases on Torts.
Amos Jur. Amos's Science of Jurisprudence.
Amos & F. or *Amos & F. Fixt.* Amos and Ferrard on Fixtures.
An. Anonymous.
And. Anderson's Reports, English Common Pleas and Court of Wards;—Andrews's Reports, vols. 63-72 Connecticut;—Andrews's English King's Bench Reports.
And. Ch. Ward. Anderson on Church Wardens.
And. Com. Anderson's History of Commerce.
Anders. or *Anderson.* Anderson's Reports, English Common Pleas and Court of Wards.
Andr. Andrews's Reports, English King's Bench. See also And.
Andr. Pr. Andrews's Precedents of Leases.
Ang. Angell's Reports, Rhode Island Reports.
Ang. Adv. Enj. Angell on Adverse Enjoyment.
Ang. Ass. Angell on Assignments.
Ang. B. T. Angell on Bank Tax.
Ang. Carr. Angell on Carriers.
Ang. Corp. Angell and Ames on Corporations.
Ang. High. Angell on Highways.
Ang. Ins. Angell on Insurance.
Ang. Lim. Angell on Limitations.
Ang. Tide Wat. or *Ang. Tide Waters.* Angell on Tide Waters.
Ang. Water C. or *Ang. Water Courses.* Angell on Water Courses.
Ang. & A. Corp. Angell and Ames on Corporations.
Ang. & D. High. Angell and Durfee on Highways.
Ang. & Dur. (R. I.) Angell & Durfee's Rhode Island Reports, vol. 1.
Ann. Queen Ann; as 1 Ann. c. 7.
Ann. C. Annals of Congress.
Ann. Cas. American & English Annotated Cases;—New York Annotated Cases.
Ann. de la Pro. Annales de la Propriété Industrielle.
Ann. de Leg. Annuaire de Legislation Estrangere, Paris.
Ann. Jud. Annuaire Judiciaire, Paris.
Ann. Reg. Annual Register, London.
Ann. Reg. N. S. Annual Register, New Series, London.
Ann. St. Annotated Statutes.
Annaly. Annaly's Edition of Hardwicke's Reports, English. Sometimes cited *Cas. temp. Hardw., Lee's Cas. temp. Hard.,* or *Rep. temp. Hard.*
Anne. Queen Anne (thus "1 Anne," denotes the first year of the reign of Queen Anne).
Annes. Ins. Annesly on Insurance.

Anon. Anonymous.
Ans. Contr. or *Anson, Cont.* Anson on Contracts.
Anst. or *Anstr.* Anstruther's Reports, English Exchequer.
Anth. Anthon's New York Nisi Prius Reports;—Anthony's Illinois Digest.
Anth. Abr. Anthon's Abridgment of Blackstone's Commentaries.
Anth. Ill. Dig. Anthony's Illinois Digest.
Anth. L. S. Anthon's Law Student.
Anth. N. P. Anthon's New York Nisi Prius Reports.
Anth. Prec. Anthon's Precedents.
Anth. Shep. Anthon's edition of Sheppard's Touchstone.
Ap. Justin. Apud Justinianum, or Justinian's Institutes.
App. Appeal; — Apposition; — Appendix; — Appleton's Reports, vols. 19, 20 Maine.
App. Cas. Appeal Cases, English Law Reports;—Appeal Cases, United States;—Appeal Cases of the different States;—Appeal Cases, District of Columbia.
[*1891*] *App. Cas.* Law Reports, Appeal Cases, from 1891 onward.
App. Cas. (D. C.). Appeal Cases, District of Columbia.
App. Cas. Beng. Sevestre and Marshall's Bengal Reports, India.
App. Cas. Rep. Bradwell's Illinois Appeal Court Reports.
App. Ct. Rep. Bradwell's Illinois Appeal Court Reports.
App. D. C. Appeal Cases, District of Columbia.
App. Div. Appellate Division, New York.
App. Ev. Appleton on Evidence.
App. Jur. Act 1876. Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59.
App. N. Z. Appeal Reports, New Zealand.
App. Rep. Ont. Appeal Reports, Ontario.
Appe. Bre. Appendix to Breese's Reports.
Appleton. Appleton's Reports, vols. 19, 20 Maine.
Appx. Appendix.
Ar. Arrêté.
Ar. Rep. Argus Reports, Victoria.
Arabin. Decisions of Seargeant Arabin.
Arbuth. Arbuthnot's Select Criminal Cases, Madras.
Arch. Court of Arches, England.
Arch. P. L. Cas. Archbold's Abridgment of Poor Law Cases.
Arch. Sum. Archbold's Summary of Laws of England.
Archb. B. L. Archbold's Bankrupt Law.
Archb. C. P. Archbold's Civil Pleading.
Archb. Civil Pl. Archbold's Civil Pleading.
Archb. Cr. L. Archbold's Criminal Law.
Archb. Cr. P. Archbold's Criminal Pleading.
Archb. Cr. P. by Pom. Archbold's Criminal Pleading, by Pomeroy.
Archb. Crim. Pl. Archbold's Criminal Pleading.
Archb. F. Archbold's Forms.
Archb. F. I. Archbold's Forms of Indictment.
Archb. J. P. Archbold's Justice of the Peace.
Archb. L. & T. Archbold's Landlord and Tenant.
Archb. Landl. & Ten. Archbold's Landlord and Tenant.
Archb. N. P. Archbold's Nisi Prius Law.
Archb. New Pr. or *Archb. N. Prac.* Archbold's New Practice.
Archb. Pr. Archbold's Practice.
Archb. Pr. by Ch. Archbold's Practice, by Chitty.
Archb. Pr. C. P. Archbold's Practice, Common Pleas.
Archb. Pr. K. B. Archbold's Practice, King's Bench.
Archb. Sum. Archbold's Summary of the Laws of England.
Archer. Archer's Reports, Florida Reports, vol. 2.
Arg. Arguendo, in arguing, in the course of reasoning.
Arg. Fr. Merc. Law. Argles (Napoleon), Treatise upon French Mercantile Law, etc.
Arg. Inst. Institution au Droit Français, par M. Argou.
Arg. Rep. Reports printed in Melbourne Argus, Australia.
Ariz. Arizona;—Arizona Reports.
Ark. Arkansas; — Arkansas Reports; — Arkley's Justiciary Reports, Scotland.
Ark. L. J. Arkansas Law Journal, Fort Smith.
Ark. Rev. Sts. Arkansas Revised Statutes.
Arkl. or *Arkley.* Arkley's Justiciary Reports, Scotland.
Arms. Br. P. Cas. Armstrong's Breach of Privilege Cases, New York.
Arms. Con. Elec. Armstrong's New York Contested Elections.
Arms. Elect. Cas. Armstrong's Cases of Contested Elections, New York.
Arms. M. & O. or *Arms. Mac. & Og.* Armstrong, Macartney & Ogle's Irish Nisi Prius Reports.
Arms. Tr. Armstrong's Limerick Trials, Ireland.
Arn. Arnold's English Common Pleas Reports;—Arnot's Criminal Trials, Scotland.
Arn. El. Cas. Arnold's Election Cases, English.
Arn. Ins. Arnould on Marine Insurance.
Arn. & H. or *Arn. & Hod.* Arnold & Hodges's English Queen's Bench Reports.
Arn. & H. B. C. Arnold and Hodges's English Bail Court Reports.
Arn. & Hod. B. C. Arnold & Hodges's English Bail Court Reports.
Arn. & Hod. Pr. Cas. Arnold & Hodges's Practice Cases, English.
Arnold. Arnold's Common Pleas Reports, English.
Arnot. Arnot's Criminal Cases, Scotland.
Arnot Cr. C. Arnot's Criminal Cases, Scotland.
Art. Article.
Artic. Cleri. Articles of the clergy.
Articuli sup. Chart. Articles upon the charters.
Ashe. Ashe's Tables to the Year Books (or to Coke's Reports;—or to Dyer's Reports).
Ashl. Cas. Cont. Ashley's Cases on Contracts.
Ashm. Ashmead's Pennsylvania Reports.
Ashton. Ashton's Reports, vols. 9-12 Opinions of the United States Attorneys General.
Ashurst MS. Ashurst's Paper Books, Lincoln's Inn Library;—Ashurst's Manuscript Reports, printed in vol. 2 Chitty.
Aso & Man. Inst. Aso and Manuel's Institutes of the Laws of Spain.
Asp. Aspinall, English Admiralty.
Asp. Cas. or *Asp. Rep.* English Maritime Law Cases, new series by Aspinall.
Asp. M. C. Aspinall's Maritime Cases.
Asp. Mar. L. Cas. Aspinall's Maritime Law Cases.
Ass. Book of Assizes;—Liber Assissarium, Part 5 of the Year Books.
Ass. de Jerus or *Ass. Jerus.* Assizes of Jerusalem.
Ast. Ent. Aston's Entries.
Atch. Atcheson's Reports, Navigation and Trade, English.
Ath. Mar. Set. or *Ath. Mar. Sett.* Atherly on Marriage Settlements.
Atk. Atkyn's English Chancery Reports.
Atk. Ch. Pr. Atkinson's Chancery Practice.
Atk. Con. Atkinson on Conveyancing.
Atk. P. T. Atkyn's Parliamentary Tracts.
Atk. Sher. Atkinson on Sheriffs.
Atk. Tit. or *Atk. M. T.* Atkinson on Marketable Titles.
Atl. Atlantic Reporter.
Atl. Mo. Atlantic Monthly.
Atl. R. or *Atl. Rep.* Atlantic Reporter.
Ats. At suit of.
Atty. Attorney.
Atty. Gen. Attorney-General.
Atty. Gen. Op. Attorney-Generals' Opinions, United States.
Atty. Gen. Op. N. Y. Attorney-Generals' Opinions, New York.
Atw. or *Atwater.* Atwater's Reports, vol. 1 Minnesota.
Auch. Auchinleck's Manuscript Cases, Scotch Court of Session.
Auct. Reg. & L. Chron. Auction Register and Law Chronicle.
Aul. Gel. Noctes Atticæ. Aulus Gellius, Noctes Atticæ.

Aus. Jur. Australian Jurist, Melbourne.
Aust. Austin's English County Court Cases;—Australia.
Aust. Jur. or *Aust. Juris.* Austin's Province of Jurisprudence.
Aust. Jur. Abr. Austin's Lectures on Jurisprudence, abridged.
Aust. L. T. Australian Law Times.
Austin (Ceylon). Austin's Ceylon Reports.
Austin C. C. or *Austin C. C. R.* Austin's English County Court Reports.
Austr. Jur. Australian Jurist, Melbourne.
Austr. L. T. Australian Law Times, Melbourne.
Auth. Authentica, in the authentic; that is, the Summary of some of the Novels in the Civil Law inserted in the Code under such a title.
Av. & H. B. Law. Avery and Hobb's Bankrupt Law of the United States.
Ayck. Ch. F. Ayckbourn's Chancery Forms.
Ayck. Ch. Pr. Ayckbourn's Chancery Practice.
Ayl. Pan. See Ayliffe.
Ayl. Pand. See Ayliffe.
Ayl. Par. See Ayliffe.
Ayliffe. Ayliffe's Pandects;—Ayliffe's *Parergon Juris Canonici Angelicani.*
Ayliffe Parerg. See Ayliffe.
Azuni Mar. Law. Azuni on Maritime Law.
B. Bancus; the Common Bench; the back of a leaf; Book.
B. B. Bail Bond; Bayley on Bills.
B. Bar. Bench and Bar, Chicago.
B. C. Bail Court;—Bankruptcy Cases;—Bell's Commentaries on the Laws of Scotland.
B. C. C. Bail Court Reports (Saunders & Cole);—Bail Court Cases (Lowndes & Maxwell);—Brown's Chancery Cases.
B. Ch. Barbour's Chancery Reports, New York.
B. C. R. or *B. C. Rep.* Saunders & Cole's Bail Court Reports, English;—British Columbia Reports.
B. D. & O. Blackham, Dundas & Osborne's Nisi Prius Reports, Ireland.
B. Ecc. Law. Burns's Ecclesiastical Law.
B. Just. Burns's Justice.
B. L. R. Bengal Law Reports.
B. L. T. Baltimore Law Transcript.
B. M. Burrow's Reports *tempore* Mansfield;—Ben Monroe's Reports, Kentucky;—Moore's Reports, English.
B. Mon. Ben Monroe's Reports, Kentucky.
B. Moore. Moore's Reports, English.
B. N. C. Bingham's New Cases, English Common Pleas;—Brooke's New Cases, English King's Bench;—Busbee's North Carolina Law Reports.
B. N. P. Buller's Nisi Prius.
B. P. B. Buller's Paper Book, Lincoln's Inn Library. See *A. P. B.*
B. P. C. Brown's Parliamentary Cases.
B. P. L. Cas. Bott's Poor Law Cases.
B. P. N. R. Bosanquet & Puller's New Reports, English Common Pleas.
B. P. R. Brown's Parliamentary Reports.
B. R. American Law Times Bankruptcy Reports;—*Bancus Regis;* the King's Bench;—Bankruptcy Reports;—Bankruptcy Register, New York;—National Bankruptcy Register Reports.
B. R. Act. Booth's Real Action.
B. Reg. Bankruptcy Register, New York.
B. R. H. Cases in King's Bench, *temp. Hardwicke.*
B. S. Upper Bench.
B. Tr. Bishop's Trial.
B. W. C. C. Butterworth's Workmen's Compensation Cases (Br. & Col.).
B. & A. Barnewall & Adolphus's English King's Bench Reports;—Barnewall & Alderson's English King's Bench Reports;—Baron & Arnold's English Election Cases;—Baron & Austin's English Election Cases;—Banning & Arden's Patent Cases.
B. & Ad. or *Adol.* Barnewall & Adolphus's English King's Bench Reports.
B. & Ald. Barnewall & Alderson's English King's Bench Reports.
B. & Arn. Barron & Arnold's Election Cases.
B. & Aust. Barron and Austin's Election Cases, English.
B. & B. Broderip & Bingham's English Common Pleas Reports;—Ball & Beatty's Irish Chancery Reports;—Bowler & Bowers, vols. 2, 3 United States Comptroller's Decisions.
B. & Bar. The Bench and Bar, Chicago.
B. & C. Barnewall & Cresswell's English King's Bench Reports.
B. & D. Benloe & Dalison, English.
B. & F. Broderip & Fremantle's English Ecclesiastical Reports.
B. & H. Blatchford & Howland's United States District Court Reports.
B. & H. Dig. Bennett & Heard's Massachusetts Digest.
B. & H. Lead. Cas. Bennett & Heard's Leading Cases on Criminal Law.
B. & I. Bankruptcy and Insolvency Cases.
B. & L. Browning & Lushington's Reports, English Admiralty.
B. & L. Prec. Bullen & Leake's Precedents of Pleading.
B. & M. or *B. & Macn.* Browne & Macnamara's Reports, English.
B. & P. Bosanquet & Puller's English Common Pleas Reports.
B. & P. N. R. Bosanquet & Puller's New Reports, English.
B. & S. Best & Smith's English Queen's Bench Reports.
B. & V. Beling & Vanderstraaten's Reports, Ceylon.
Ba. & Be. Ball & Beatty's Irish Chancery Reports.
Bab. Auc. Babington on Auctions.
Bab. Set-off. Babington on Set-off.
Bac. Abr. Bacon's Abridgment.
Bac. Aph. or *Bac. Aphorisms.* Bacon's (Sir Francis) Aphorisms.
Bac. Comp. Arb. Bacon's Complete Arbitration.
Bac. Dig. Bacon's Georgia Digest.
Bac. El. Bacon's Elements of the Common Law.
Bac. Gov. Bacon on Government.
Bac. Ir. Bacon (Sir Francis), Law Tracts.
Bac. Law Tr. Bacon's Law Tracts.
Bac. Lease. Bacon on Leases and Terms of Years.
Bac. Lib. Reg. Bacon's *Liber Regis, vel Thesaurus Rerum Ecclesiasticarum.*
Bac. M. or *Bac. Max.* Bacon's Maxims.
Bac. Read. Uses. Bacon (Sir Francis), Reading upon the Statute of Uses.
Bac. St. Uses or *Bac. U.* Bacon (Sir Francis). Reading upon the Statute of Uses.
Bac. Works. Bacon's (Sir Francis), Works.
Bach. Bach's Reports, vols. 19-21 Montana.
Bach. Man. Bache's Manual of a Pennsylvania Justice of the Peace.
Bacon. Bacon's Abridgment;—Bacon's Aphorisms;—Bacon's Complete Arbitrator;—Bacon's Elements of the Common Law;—Bacon on Government;—Bacon's Law Tracts;—Bacon on Leases and Terms of Years;—Bacon's Maxims;—Bacon on Uses.
Bag. C. Pr. Bagley's Chamber Practice.
Bage. Const. Bagehot on the English Constitution.
Bagl. Bagley's Reports, vols. 16-19 California.
Bagl. & H. Bagley & Harmen's Reports, California.
Bail. Bailey's Law Reports, South Carolina.
Bail Ct. Cas. Lowndes & Maxwell's English Bail Court Cases.
Bail Ct. Rep. Saunders & Cole's English Bail Court Reports;—Lowndes & Maxwell's English Bail Court Cases.
Bail. Dig. Bailey's North Carolina Digest.
Bail. Eq. Bailey's Equity Reports, South Carolina.
Bailey. Bailey's Law Reports, South Carolina.
Bailey Ch. or *Bailey Eq.* Bailey's Equity Reports, South Carolina.
Baill. Dig. Baillie's Digest of Mohammedan Law.
Bain. M. & M. or *Bainb. Mines.* Bainbridge on Mines and Minerals.
Bak. Bur. Baker's Law Relating to Burials.
Bak. Corp. Baker on Corporations.
Baker, Quar. Baker's Law of Quarantine.
Bald. Baldwin's United States Circuit Court Reports;—Baldus (Commentator on the Code);—Baldasseroni (on Maritime Law).

Bald. App. 11 Pet. Baldwin's Appendix to 11 Peters.
Bald. C. C. Baldwin's United States Circuit Court Reports.
Bald. Con. or *Bald. C. V.* Baldwin on the Constitution.
Baldw. Dig. Baldwin's Connecticut Digest.
Balf. Balfour's Practice of the Law of Scotland.
Ball Cas. Tort. Ball's Cases on Torts.
Ball. Lim. Ballantine on Limitations.
Ball & B. Ball & Beatty's Reports, Irish Chancery.
Balt. L. Tr. Baltimore Law Transcript.
Banc. Sup. Bancus Superior, or Upper Bench.
Bank. and Ins. R. Bankruptcy and Insolvency Reports, English.
Bank. Ct. Rep. Bankrupt Court Reports, New York;—The American Law Times Bankruptcy Reports are sometimes thus cited.
Bank. I. or *Bank Inst.* Bankter's Institutes of Scottish Law.
Bank. Reg. National Bankruptcy Register, New York.
Bank. Rep. American Law Times Bankruptcy Reports.
Bank. & Ins. or *Bank. & Ins. R.* Bankruptcy and Insolvency Reports, English.
Banker's Law J. Banker's Law Journal.
Banker's Mag. Banker's Magazine, New York.
Banker's Mag. (Lon.). Banker's Magazine, London.
Banks. Banks' Reports, vols. 1-5 Kansas.
Bann. Bannister's Reports, English Common Pleas.
Bann. Br. Bannister's edition of O. Bridgman's English Common Pleas Reports.
Bann. Lim. Banning on Limitation of Action.
Bann. & A. or *Bann. & A. Pat. Ca.* Banning and Arden's Patent Cases.
Bar. Barnardiston's English King's Bench Reports;—Barnardiston's Chancery;—Bar Reports in all the Courts, English;—Barbour's Supreme Court Reports, New York;—Barrows's Reports, vol. 18 Rhode Island.
Bar. Ch. or *Chy.* Barnardiston's English Chancery Reports.
Bar Ex. Jour. Bar Examination Journal, London.
Bar. Mag. Barrington's Magna Charta.
Bar. N. Barnes's Notes, English Common Pleas Reports.
Bar. Obs. St. Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Bar. & Ad. Barnewall & Adolphus's English King's Bench Reports.
Bar. & Al. Barnewall & Alderson's English King's Bench Reports.
Bar. & Arn. Barron & Arnold's English Election Cases.
Bar. & Aust. or *Au.* Barron & Austin's English Election Cases.
Bar. & Cr. Barnewall & Cresswell's English King's Bench Reports.
Barb. Barbour's Supreme Court Reports, New York;—Barber's Reports, vols. 14-24 Arkansas.
Barb. Abs. Barbour's Abstracts of Chancellor's Decisions, New York.
Barb. App. Dig. Barber's Digest, New York.
Barb. Ark. Barber's Reports, vols. 14-24 Arkansas.
Barb. Ch. Barbour's Chancery Reports, New York.
Barb. Ch. Pr. Barbour's Chancery Practice (Text Book).
Barb. Cr. P. Barbour's Criminal Pleadings.
Barb. Dig. Barber's Digest of Kentucky.
Barb. Grot. Grotius on War and Peace, Notes by Barbeyrac.
Barb. on Set-off. Barbour on Set-off.
Barb. Puff. Puffendorf's Law of Nature and Nations, Notes by Barbeyrac.
Barb. S. C. Barbour's Supreme Court Reports, New York.
Barbe. or *Barber.* Barber's Reports, Arkansas. See Barb. Ark.
Barc. Dig. Barclay's Missouri Digest.
Barl. Elect. Cas. Bartlett's Congressional Election Cases.
Barn. Barnardiston's English King's Bench Reports;—Barnes's English Common Pleas Reports;—Barnfield's Reports, vols. 19-20, Rhode Island.
Barn. Ch. Barnardiston's Chancery Reports, English.
Barn. No. Barnes's Note of Cases, English Common Pleas.
Barn. Sh. Barnes's Sheriff.
Barn. & A. Barnewall & Alderson's English King's Bench Reports.
Barn. & Ad. or *Barn. & Adol.* Barnewall & Adolphus' English King's Bench Reports.
Barn. & Ald. Barnewall & Alderson's English King's Bench Reports.
Barn. & C. or *Barn. & Cr.* or *Barn. & Cress.* Barnewall & Cresswell's English King's Bench Reports.
Barnard. Ch. Barnardiston's Chancery Reports.
Barnard. K. B. Barnardiston's King's Bench Reports.
Barnes. Barnes's Practice Cases, English.
Barnes, N. C. Barnes's Notes of Cases in Common Pleas.
Barnet. Barnet's Reports, vols. 27-29 English Central Criminal Courts Reports.
Barnf. & S. Barnfield and Stiness's Reports, vol. 20. Rhode Island.
Barnw. Dig. Barnwall's Digest of the Year Books.
Barr. Barr's Reports, vols. 1-10 Pennsylvania State;—Barrows's Reports, vol. 18 Rhode Island;—Barr Reports, in all the courts, English.
Barr. Ob. St. or *Barr. St.* Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Barr. Ten. Barry on Tenures.
Barr. & Arn. Barron & Arnold's Election Cases, English.
Barr. & Aus. Barron & Austin's Election Cases, English.
Barring. Obs. St. or *Barring. St.* Barrington's Observations upon the Statutes from Magna Charta to 21 James I.
Barron Mir. Barron's Mirror of Parliament.
Barrows. Barrows's Reports, vol. 18 Rhode Island.
Barry Ch. Jur. Barry's Chancery Jurisdiction.
Barry Conv. Barry on Conveyancing.
Bart. Conv. Barton's Elements of Conveyancing.
Bart. El. Cas. Bartlett's Congressional Election Cases.
Bart. Eq. Barton's Suit in Equity.
Bart. Prec. Barton's Precedents of Conveyancing.
Bat. Dig. Battle's Digest, North Carolina.
Bat. Sp. Per. Batten on Specific Performance.
Batem. Ag. Bateman on Agency.
Batem. Auct. Bateman on the Law of Auctions.
Batem. Comm. L. Bateman's Commercial Law.
Batem. Const. L. Bateman's Constitutional Law.
Batem. Ex. L. Bateman's Excise Laws.
Bates Ch. Bates's Chancery Reports, Delaware.
Bates Dig. Bates's Digest, Ohio.
Batt. or *Batty.* Batty's Irish King's Bench Reports.
Baum. Baum on Rectors, Church Wardens, and Vestrymen.
Bax. or *Baxt.* Baxter's Reports, vols. 60-68 Tennessee.
Bay. Bay's South Carolina Reports;—Bay's Reports, vols. 1, 2, and 5-8 Missouri.
Bay (Mo.). Bay's Reports, Missouri.
Bayl. Bill. Bayley on Bills.
Bayl. Ch. Pr. Bayley's Chancery Practice.
Bea. C. E. Beame's Costs in Equity.
Bea. Eq. Pl. Beame's Equity Pleading.
Bea. Ne Exeat. Beame on the Writ of *Ne Exeat.*
Bea. Ord. Beame's Orders in Chancery.
Bea. Pl. Eq. Beame's Pleas in Equity.
Beach. Rec. Beach on the Law of Receivers.
Beas. Beasley's Reports, New Jersey Equity.
Beat. or *Beatt.* or *Beatty.* Beatty's Irish Chancery Reports.
Beaum. B. of S. Beaumont on Bills of Sale.
Beaum. Ins. Beaumont on Insurance.
Beav. Beavan's Chancery Reports, English Rolls Court.
Beav. R. & C. Cas. English Railway and Canal Cases, by Beavan and others.

Beav. & Wal. Ry. Cas. Beavan & Walford's Railway and Canal Cases, England.

Beaw. or *Beaw. Lex Merc.* Beawes's Lex Mercatoria.

Beawes. Beawes's Lex Mercatoria.

Becc. Cr. Beccaria on Crimes and Punishments.

Beck. Beck's Reports, vols. 12-16 Colorado; also vol. 1 Colorado Court of Appeals.

Beck, Med. Jur. or *Beck's Med. Jur.* Beck's Medical Jurisprudence.

Bedell. Bedell's Reports, vols. 163-191 New York.

Bee. Bee's United States District Court Reports.

Bee Adm. Bee's Admiralty. An Appendix to Bee's District Court Reports.

Bee C. C. R. Bee's Crown Cases Reserved, English.

Beebe Cit. Beebe's Ohio Citations.

Bel. Bellewe's English King's Bench Reports *temp.* Richard II;—Bellasis's Bombay Reports;—Beling's Ceylon Reports;—Bellinger's Reports, vols. 4-8 Oregon.

Beling. Beling's Ceylon Reports.

Beling & Van. (Ceylon). Beling & Vander Straalen's Ceylon Reports.

Bell. Bell's Dictionary and Digest of the Laws of Scotland;—Bell's English Crown Cases Reserved;—Bell's Scotch Appeal Cases;—Bell's Scotch Session Cases;—Bell's Calcutta Reports, India;—Bellewe's English King's Bench Reports *temp.* Richard II;—Brooke's New Cases, by Bellewe;—Bellinger's Reports, vols. 4-8 Oregon;—Bellasis's Bombay Reports.

Bell Ap. Ca. or *Bell Ap. Cas.* or *Bell App. Cas.* Bell's Scotch Appeals.

Bell Cas. Bell's Cases, Scotch Court of Session.

Bell. Cas. t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bell. Cas. t. R. II. Bellewe's English King's Bench Reports (time of Richard II).

Bell C. C. Bell's English Crown Cases Reserved;—Bellasis's Civil Cases, Bombay;—Bellasis's Criminal Cases, Bombay.

Bell. C. Cas. Bellasis's Civil Cases, Bombay; Bellasis's Criminal Cases, Bombay.

Bell C. H. C. Bell's Reports, Calcutta High Court.

Bell Com. or *Bell Comm.* Bell's Commentaries on the Laws of Scotland.

Bell Cr. C. Bell's English Crown Cases;—Beller's Criminal Cases, Bombay.

Bell C. T. Bell on Completing Titles.

Bell. Del. U. L. Beller's Delineation of Universal Law.

Bell, Dict. Bell's Dictionary and Digest of the Laws of Scotland.

Bell Dict. Dec. Bell's Dictionary of Decisions, Court of Session, Scotland.

Bell El. L. Bell's Election Law of Scotland.

Bell fol. Bell's folio Reports, Scotch Court of Session.

Bell H. C. or *Bell H. C. Cal.* Bell's Reports, High Court of Calcutta.

Bell H. L. or *Bell, H. L. Sc.* Bell's House of Lord's Cases, Scotch Appeals.

Bell H. & W. Bell on Husband and Wife.

Bell Illus. Bell's Illustration of Principles.

Bell (In.). Bell's Reports, India.

Bell L. Bell on Leases.

Bell Med. L. J. Bell's Medico Legal Journal.

Bell Notes. Bell's Supplemental Notes to Hume on Crimes.

Bell Oct. or *8vo.* Bell's octavo Reports, Scotch Court of Session.

Bell. (Or.). Bellinger's Reports, Oregon.

Bell P. C. Bell's Cases in Parliament, Scotch Appeals.

Bell Prin. Bell's Principles of the Law of Scotland.

Bell Put. Mar. Bell's Putative Marriage Cases, Scotland.

Bell S. Bell on Sales.

Bell Sc. App. Bell's Appeals to House of Lords from Scotland.

Bell Sc. Dig. Bell's Scottish Digest.

Bell Ses. Cas. or *Bell Sess. Cas.* Bell's Cases in the Scotch Court of Session.

Bell Styles. Bell's System of the Forms of Deeds.

Bell T.D. Bell on the Testing of Deeds.

Bellas. Bellasis's Criminal (or Civil) Cases, Bombay.

Bellewe. Bellewe's English King's Bench Reports.

Bellewe Cas. Bellewe's Cases, *temp.* Henry VIII.; Brooke's New Cases; Petit Brooke.

Bellewe t. H. VIII. Brooke's New Cases (collected by Bellewe).

Bellinger. Bellinger's Reports, vols. 4-8 Oregon.

Bellingh. Tr. Report of the Bellingham Trial.

Belt Bro. Belt's edition of Brown's Chancery Reports.

Belt Sup. or *Belt Sup. Ves.* Belt's Supplement to Vesey Senior's English Chancery Reports.

Belt Ves. Sen. Belt's edition of Vesey Senior's English Chancery Reports.

Ben. Benedict's United States District Court Reports.

Ben. Adm. Benedict's Admiralty Practice.

Ben. Av. Benecke on Average.

Ben. F. I. Cas. Bennett's Fire Insurance Cases.

Ben. Ins. Cas. Bennett's Insurance Cases.

Ben. Just. Benedict on Justices of the Peace.

Ben Mon. Ben Monroe's Reports, Kentucky.

Ben. & Dal. Benloe & Dalison's English Common Pleas Reports.

Ben. & H. L. C. Bennett & Heard's Leading Criminal Cases.

Ben. & S. Dig. Benjamin & Slidell's Louisiana Digest.

Bench & B. Bench and Bar (periodical), Chicago.

Bendl. or *Bendloe.* Bendloe (see Benl.);—Bendloe's or New Benloe's Reports, English Common Pleas, Edition of 1661.

Bened. Benedict's United States District Court Reports.

Benet Ct. M. Benet on Military Law and Courts Martial.

Beng. L. R. Bengal Law Reports, India.

Beng. S.D. or *Beng. S. D. A.* Bengal Sudder Dewany Adawlut Reports, India.

Benj. Benjamin. New York Annotated Cases.

Benj. Chalm. Bills & N. Benjamin's Chalmer's Bills and Notes.

Benj. Sales. Benjamin on Sales.

Benl. Benloe's or Bendloe's English King's Bench Reports; Benloe's English Common Pleas Reports.

Benl. in Ashe. Benloe at the end of Ashe's Tables.

Benl. in Keil. Benloe or Bendloe in Keilway's Reports.

Benl. New. Benloe's Reports, English Common Pleas, Ed. of 1661;—Benloe's Reports, English King's Bench.

Benl. Old. Benloe's Reports, English Common Pleas, of Benloe & Dalison, Ed. of 1689.

Benl. & Dal. Benloe & Dalison's Common Pleas Reports.

Benn. Cal. Bennett's Reports, vol. 1 California.

Benn. (Dak.). Bennett's Dakota Reports.

Benn. Diss. Bennett's Dissertation on the Proceedings in the Master's Office in the Court of Chancery of England, sometimes cited *Benn. Prac.*

Benn. F. I. Cas. or *Benn. Fire Ins. Cas.* Bennett's Fire Insurance Cases.

Benn. (Mo.). Bennett's Reports, Missouri.

Benn. Prac. See *Benn. Diss.*

Benn. & H. Cr. Cas. Bennett & Heard's Leading Criminal Cases.

Benn. & H. Dig. Bennett & Heard's Massachusetts Digest.

Benne. Reporter of vol. 7, Modern Reports.

Bennett. Bennett's Reports, vol. 1 California;—Bennett's Reports, vol. 1 Dakota;—Bennett's Reports, vols. 16-21 Missouri.

Bennett M. See *Benn. Diss.*

Bent. Bentley's Reports, Irish Chancery.

Benth. Ev or *Benth. Jud. Ev.* Bentham on Rationale of Judicial Evidence.

Benth. Leg. Bentham on Theory of Legislation.

Bentl. Atty.-Gen. Bentley's Reports, vols. 13-19 Attorneys-General's Opinions.

Beor. Queensland Law Reports.

Ber. Berton's New Brunswick Reports.

Bern. Bernard's Church Cases, Ireland.

Berry. Berry's Reports, vols. 1-28 Missouri Court of Appeals.
Bert. Berton's Reports, New Brunswick.
Besson Prec. Besson's New Jersey Precedents.
Best Ev. Best on Evidence.
Best Pres. Best on Presumptions.
Best & S. or *Best & Sm.* Best & Smith's English Queen's Bench Reports.
Betts Adm. Pr. Betts's Admiralty Practice.
Bett's Dec. Blatchford and Howland's United States District Court Reports;—Olcott's United States District Court Reports.
Bev. (Ceylon). Beven's Ceylon Reports.
Bev. Hom. Bevill on Homicide.
Bev. Pat. Bevill's Patent Cases, English.
Bev. & M. Bevin & Mill's Reports, Ceylon.
Beven. Beven's Ceylon Reports.
Bibb. Bibb's Reports, Kentucky.
Bick. or *Bick. & H.* or *Bick. & Hawl.* Bicknell & Hawley's Reports, vols. 10-20 Nevada.
Bick. (In.). Bicknell's Reports, India.
Bick. & H. or *Bick. & Hawl. (Nev.).* Bicknell & Hawley's Nevada Reports.
Biddle Retro. Leg. Biddle on Retrospective Legislation.
Big. Bignell's Reports, India.
Big. Bills & N. Bigelow on Bills and Notes.
Big. Cas. Bigelow's Cases, William I. to Richard I.
Big. Eq. Bigelow on Equity.
Big. Estop. Bigelow on Estoppel.
Big. Frauds. Bigelow on Frauds.
Big. Jarm. Wills. Bigelow's Edition of Jarman on Wills.
Big. Lead. Cas. Bigelow's Leading Cases on Torts.
Big. L. I. Cas. or *Big. L. & A. Ins. Cas.* Bigelow's Life and Accident Insurance Cases.
Big. Ov. Cas. or *Big. Over-ruled Cas.* Bigelow's Over-ruled Cases.
Big. Plac. or *Big. Placita.* Bigelow's Placita Anglo-Normannica.
Bigelow, Estop. Bigelow on Estoppel.
Bigg Cr. L. Bigg's Criminal Law.
Bign. Bignell's Indian Reports.
Bilb. Ord. Ordinances of Bilboa.
Bill. Aw. Billing on the Law of Awards.
Bin. Binney's Pennsylvania Reports.
Bin. Dig. Binmore's Digest, Michigan.
Bing. Bingham's Reports, English Common Pleas.
Bing. Des. Bingham on Descent.
Bing. Inf. Bingham on Infancy.
Bing. Judg. Bingham on Judgments and Executions.
Bing. L. & T. Bingham on Landlord and Tenant.
Bing. N. C. Bingham's New Cases, English Common Pleas.
Bing. & Colv. Rents. Bingham & Colvin on Rents, etc.
Binn. Binney's Pennsylvania Reports.
Binn Jus. Binn's Pennsylvania Justice.
Bird Conv. Bird on Conveyancing.
Bird L. & T. Bird on Landlord and Tenant.
Bird Sol. Pr. Bird's Solution of Precedents of Settlements.
Birds. St. Birdseye's Statutes, New York.
Biret de l'Abs. Traite de l'Absence et de ses effets, par M. Biret.
Biret, Vocab. Biret, Vocabulaire des Cinq Codes, ou definitions simplifées des termes de droit et de jurisprudence exprimés dan ces codes.
Bis. Bissell's United States Circuit Court Reports.
Bish. Contr. Bishop on Contracts.
Bish. Cr. L. or *Bish. Cr. Law.* Bishop on Criminal Law.
Bish. Crim. Proc. or *Bish. Cr. Proc.* Bishop on Criminal Procedure.
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Bish. Mar. Wom. Bishop on Married Women.
Bish. St. Cr. or *Bish. St. Crimes.* Bishop on Statutory Crimes.
Bishop Dig. Bishop's Digest, Montana.
Bisp. Eq. or *Bisph. Eq.* Bispham's Equity.
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Biss. Est. or *Biss. Life Est.* Bissett on Estates for Life.
Biss. Part. Bissett on Partnership.
Bitt. or *Bitt. Chamb. Rep.* Bittleson's Chamber Reports, England.
Bitt. Pr. Cas. Bittleston's English Practice Cases.
Bitt. W. & P. Bittleson, Wise & Parnell's Reports, vols. 2, 3 New Practice Cases.
Bk. Black's United States Supreme Court Reports.
Bk. Judg. Book of Judgments by Townsend.
Bl. Black's United States Supreme Court Reports;—Blatchford's United States Circuit Court Reports;—Blackford's Indiana Reports;—Henry Blackstone's English Common Pleas Reports;—W. Blackstone's English King's Bench Reports;—Blackstone.
Bl. C. C. Blatchford's United States Circuit Court Reports.
Bl. Com. or *Bl. Comm.* Blackstone's Commentaries.
Bl. D. Blount's Law Dictionary.
Bl. Dict. Black's Dictionary.
Bl. D. & O. Blackham, Dundas & Osborne's Irish Nisi Prius Reports.
Bl. H. Henry Blackstone's English Common Pleas Reports.
Bl. Judgm. Black on Judgments.
Bl. Law Tracts. Blackstone's Law Tracts.
Bl. L. D. Blount's Law Dictionary.
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Bl. Pr. Ca. or *Bl. Prize* or *Bl. Pr. Cas.* Blatchford's Prize Cases.
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Bl. & H. Blatchford & Howland's United States District Court Reports;—Blake & Hedges's Reports, vols. 2-3 Montana.
Bl. & How. Blatchford & Howland's Admiralty Reports, U. S. Dist. Court, Southern Dist. of N. Y.
Bl. & W. Mines. Blanchard & Weeks's Leading Cases on Mines.
Bla. Ch. Bland's Maryland Chancery Reports.
Bla. Com. Blackstone's Commentaries.
Bla. H. Henry Blackstone's English Common Pleas Reports.
Bla. R. or *Bla. W.* Sir William Blackstone's Reports English King's Bench.
Black. Black's United States Supreme Court Reports;—Black's Reports, vols. 30-53 Indiana;—H. Blackstone's English Common Pleas Reports;—W. Blackstone's English King's Bench Reports;—Blackford's Indiana Reports.
Black. Cond. Rep. Blackwell's Condensed Illinois Reports.
Black, Const. Law. Black on Constitutional Law.
Black, Const. Prohib. Black's Constitutional Prohibitions.
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Black, Intox. Liq. Black on Intoxicating Liquors.
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Black. Jus. Blackerby's Justices' Cases.
Black. R. Black's United States Supreme Court Reports;—W. Blackstone's English King's Bench Reports. See Black.
Black. S. Blackburn on Sales.
Black Ship. Ca. Black's Decisions in Shipping Cases.
Black, Tax Titles or *Black T. T.* Black on Tax Titles.
Black. W. W. Blackstone's English King's Bench Reports.
Blackf. Blackford's Reports, Indiana.
Blackst. Com. Blackstone's Commentaries.
Blackst. R. Wm. Blackstone's Reports, English.
Blackw. Cond. Blackwell's Condensed Reports, Illinois.

Blak. Ch. Pr. Blake's Chancery Practice, New York.
Blake. Blake's Reports, vol. 1 Montana.
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Blan. Annu. Blaney on Life Annuities.
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Blanc. & W. L. C. Blanchard & Week's Leading Cases on Mines, etc.
Bland or *Bland's Ch.* Bland's Maryland Chancery Reports.
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Bleck. or *Bleckley.* Bleckley's Reports, vols. 34, 35 Georgia.
Bli. or *Bligh.* Bligh's Reports, English House of Lords.
Bli. N. S. or *Bligh N. S.* Bligh's Reports, New Series, English House of Lords.
Bliss. Delaware County Reports, Pennsylvania.
Bliss L. Ins. Bliss on Life Insurance.
Bliss N. Y. Co. Bliss's New York Code.
Bloom. Man. or *Bloom. Neg. Cas.* or *Bloomf. Manu. Cas.* or *Bloomf. N. Cas.* Bloomfield's Manumission (or Negro) Cases, New Jersey.
Blount. Blount's Law Dictionary.
Blount Tr. Blount's Impeachment Trial.
Boh. Dec. Bohun's Declarations.
Boh. Eng. L. Bohun's English Lawyer.
Boh. Priv. Lon. Bohun's Privilegia Lon dini.
Boil. Code N. Boileux's Code Napoléon.
Bomb. H. Ct. or *Bomb. H. Ct. Rep.* Bombay High Court Reports.
Bomb. L. R. Bombay Law Reporter.
Bomb. Sel. Cas. Bombay Select Cases.
Bomb. Ser. Bombay Series Indian Law Reports.
Bond. Bond's United States Circuit Reports.
Bone Prec. Bone's Precedents on Conveyancing.
Bonney Ins. Bonney on Insurance.
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Boor. or *Booraem.* Booraem's Reports, California.
Boote Ch. Pr. Boote's Chancery Practice.
Boote S. or *Boote, Suit at Law.* Boote's Suit at Law.
Booth Act. or *Booth R. A.* or *Booth, Real Act.* Booth on Real Actions.
Boothley Ind. Off. Boothley on Indictable Offences.
Bo. R. Act. Booth on Real Actions.
Borr. Borradaile's Reports, Bombay.
Borth. Borthwick on Libel and Slander.
Bos. Bosworth's New York Superior Court Reports.
Bos. & P. or *Bos. & P. N. R.* or *Bos. & Pul.* or *Bos. & Pul. N. R.* Bosanquet & Puller's New Reports, English Common Pleas.
Bost. Law Rep. Boston Law Reporter.
Bost. Pol. Rep. Boston Police Court Reports.
Bosw. Boswell's Reports, Scotch Court of Session;—Bosworth's New York Superior Court Reports.
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Bouch. Ins. Dr. Mar. Boucher, Institutes ou Droit Maritime.
Boulay Paty Dr. Com. Cours de Droit Commercial Maritime, par P. S. Boulay Paty.
Bould. Bouldin's Reports, vol. 119 Alabama.
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Bourke. Bourke's Reports, Calcutta High Court.
Bourke P. P. Bourke's Parliamentary Precedents.
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Bout. Man. Boutwell's Manuel of the Tax System of the U. S.
Bouv. or *Bouv. L. D.* Bouvier's Law Dictionary.
Bouv. Inst. Bouvier's Institutes of American Law.
Bouv. Inst. Th. Institutiones Theologicæ, auctore J. Bouvier.
Bouvier. Bouvier's Law Dictionary.
Bov. Pat. Ca. Bovill's Patent Cases.
Bow. Bowler & Bowers, vols. 2, 3, United States Comptroller's Decisions.
Bowen, Pol. Econ. Bowen's Political Economy.
Bowy. C. L. Bowyer's Modern Civil Law.
Bowy. Com. or *Bowy. P. L.* Bowyer's Commentaries on Universal Public Law.
Bowyer, Mod. Civil Law. Bowyer's Modern Civil Law.
Boyce Pr. Boyce's Practice in the U. S. Courts.
Boyd Adm. Boyd's Admiralty Law.
Boyd Sh. Boyd's Merchant Shipping Laws.
Boyle Char. Boyle on Charities.
Br. Bracton or *Bracton de Legibus et Consuetudinibus Angliæ;*—Bradford;—Bradwell;—Brayton;—Breese; — Brevard; — Brewster; — Bridgman; — Brightly; — British; — Britton; — Brockenbrough; — Brooke; — Broom; — Brown; — Brownlow; — Bruce. See below, especially under Bro.
Br. Abr. Brooke's Abridgment.
Br. Brev. Jud. Brownlow's Brevia Judicalia.
Br. C. C. British (or English) Crown Cases (American reprint);—Brown's Chancery Cases, England.
Br. Ch. C. Brown's Chancery Cases, English.
Br. Cr. Ca. British (or English Crown Cases).
Br. Fed. Dig. Brightly's Federal Digest.
Br. N. C. Brooke's New Cases, English King's Bench.
Br. P. C. Brown's English Parliamentary Cases.
Br. Reg. Braithwaite's Register.
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Br. & B. Broderip & Bingham, English Common Pleas.
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Br. & Gold. Brownlow & Goldesborough's English Common Pleas Reports.
Br. & L. or *Br. & Lush.* Brownlow & Lushington's English Admiralty Reports.
Br. & R. Brown & Rader's Missouri Reports.
Brac. or *Bract.* or *Bracton.* Bracton de Legibus et Consuetudinibus Angliæ.
Brack. L. Mis. Brackenbridge's Law Miscellany.
Brack. Trust. Brackenbridge on Trusts.
Brad. Bradford's Surrogate Reports, New York;—Bradford's Iowa Reports;—Bradwell's Illinois Appeal Reports;—Bradley's Reports, Rhode Island;—Brady's History of the Succession of the Crown of England.
Bradby Dist. Bradby on Distresses.
Bradf. Bradford's New York Surrogate Reports;—Bradford's Reports, Iowa.
Bradf. (Iowa). Bradford's Reports, Iowa.
Bradf. Sur. or *Bradf. Surr.* Bradford's Surrogate Court Reports, New York.
Bradl. (R. I.). Bradley's Rhode Island Reports.
Bradl. P. B. Bradley's Point Book.
Bradw. Bradwell's Reports, Illinois Appellate Courts.
Brady Ind. Brady's Index, Arkansas Reports.
Braithw. Pr. Braithwaite's Record and Writ Practice.
Brame. Brame's Reports, vols. 66-72 Mississippi.
Branch. Branch's Reports, Florida Reports, vol. I.
Branch Max. Branch's Maxims.
Branch Pr. or *Branch, Princ.* Branch's Principia Legis et Æquitatis.
Brand. Brandenburg's Reports, vol. 21, Opinions Attorneys-General.
Brand. F. Attachm. or *Brand. For. Attachm.* Brandon on Foreign Attachment.
Brande. Brande's Dictionary of Science.
Brandt Div. Brandt on Divorce Causes.
Brandt Sur. G. Brandt on Suretyship and Guaranty.
Brans. Dig. Branson's Digest of Bombay Reports.
Brant. Brantly's Reports, vols. 80-116 Maryland.
Brayt. Brayton's Reports, Vermont.
Breese. Breese's Reports, vol. 1 Illinois.
Brett Ca. Eq. Brett's Cases in Modern Equity.
Brev. Brevard's Reports, South Carolina.

Brev. Dig. Brevard's Digest.
Brev. Ju. Brevia Judicialia (Judicial Writs).
Brev. Sel. Brevia Selecta, or Choice Writs.
Brew. Brewer's Reports, vols. 19-26 Maryland.
Brew. or *Brews.* or *Brewst.* Brewster's Reports, Pennsylvania.
Brew. (Md.). Brewer's Reports, Maryland.
Brewst. Brewster's Pennsylvania Reports.
Brice Pub. Wor. Brice's Law Relating to Public Worship.
Brice U. V. Brice's Ultra Vires.
Brick. Dig. Brickell's Digest, Alabama.
Bridg. J. Bridgmore's Reports, English Common Pleas.
Bridg. Conv. Bridgman on Conveyancing.
Bridg. Dig. Ind. Bridgman's Digested Index.
Bridg. J. Sir J. Bridgman's English Common Pleas Reports.
Bridg. Leg. Bib. Bridgman's Legal Bibliography.
Bridg. O. Sir Orlando Bridgman's English Common Pleas Reports—(sometimes cited as Carter).
Bridg. Refl. Bridgman's Reflections on the Study of the Law.
Bridg. Thes. Jur. Bridgman Thesaurus Juridicus.
Bright. Brightly's Nisi Prius Reports, Pennsylvania.
Bright. C. Brightly on Costs.
Bright. Dig. Brightly's Digest, New York;—Brightly's Digest, Pennsylvania;—Brightly's Digest, United States.
Bright. Elec. Cas. or *Bright. Elect. Cas.* Brightly's Leading Election Cases.
Bright. Eq. Brightly's Equity Jurisprudence.
Bright. Fed. Dig. Brightly's Federal Digest.
Bright H. & W. Bright on Husband and Wife.
Bright. N. P. Brightly's Nisi Prius Reports, Pennsylvania.
Bright. (Pa.). Brightly's Nisi Prius Reports, Pennsylvania.
Bright. Purd. or *Brightly's Purd. Dig.* Brightly's Edition of Purdon's Digest of Laws of Pennsylvania.
Bright. T. & H. Pr. Brightly's Edition of Troubat & Haly's Practice.
Bright. U. S. Dig. Brightly's United States Digest.
Brisb. or *Brisbin (Minn.).* Brisbin's Minnesota Reports.
Brissonius. De verborum quæ ad jus civile pertinent significatione.
Brit. Britton's Ancient Pleas of the Crown.
Brit. Col. S. C. British Columbia Supreme Court Reports.
Brit. Cr. Cas. British (or English) Crown Cases.
Brit. Quar. Rev. British Quarterly Review.
Britt. Britton on Ancient Pleading.
Bro. See, also, Brown and Browne. Browne's Pennsylvania Reports;—Brown's Michigan Nisi Prius Reports;—Brown's English Chancery Reports;—Brown's Parliamentary Cases;—Brown's Reports, vols. 53-65 Mississippi;—Brown's Reports, vols. 80-136 Missouri.
Bro. A. & C. L. Browne's Admiralty and Civil Law.
Bro. A. & R. Brown's United States District Court Reports (Admiralty and Revenue Cases).
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Bro. Adm. Brown's United States Admiralty Reports.
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Bro. Ch. or *Bro. Ch. Cas.* or *Bro. Ch. R.* Brown's Chancery Cases, English.
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Bro. Div. Pr. Browne's Divorce Court Practice.
Bro. Ecc. Brooke's Six Judgments in Ecclesiastical Cases (English).
Bro. Ent. Browne's Book of Entries.
Bro. Insan. Browne's Medical Jurisprudence of Insanity.
Bro. Leg. Max. or *Bro. Max.* Broom's Legal Maxims.
Bro. M. N. Brown's Methodus Novissima.
Bro. M. & D. Browning on Marriage and Divorce.
Bro. N. C. Brooke's New Cases, English King's Bench.
Bro. N. P. Brown's Michigan Nisi Prius Reports;—Brown's Nisi Prius Cases, English.
Bro. N. P. Cas. Browne's National Bank Cases.
Bro. N. P. (Mich.). Brown's Nisi Prius Cases, Michigan.
Bro. Of. Not. Brooke on the Office of a Notary in England.
Bro. P. C. Brown's English Parliamentary Cases.
Bro. (Pa.). Browne's Pennsylvania Reports.
Bro. Read. Brooke's Reading on the Statute of Limitations.
Bro. R. P. L. Brown's Limitation as to Real Property.
Bro. Sales. Brown on Sales.
Bro. St. Fr. Browne on the Statute of Frauds.
Bro. Stair. Brodie's Notes and Supplement to Stair's Institutions of the Laws of Scotland.
Bro. Supp. Brown's Supplement to Morrison's Dictionary of the Court of Session, Scotland.
Bro. Syn. Brown's Synopsis of the Decisions of the Scotch Court of Session.
Bro. T. M. Browne on Trademarks.
Bro. V. M. Brown's Vade Mecum.
Bro. & F. or *Bro. & Fr.* Brodrick & Freemantle's Ecclesiastical Cases.
Bro. & G. Brownlow & Goldesborough's English Common Pleas Reports.
Bro. & Lush. Browning & Lushington's English Admiralty Reports.
Brock. or *Brock. C. C.* or *Brock. Marsh.* Brockenbrough's Reports of Marshall's Decisions, United States Circuit Court.
Brock. Cas. Brockenbrough's Virginia Cases.
Brock. & H. or *Brock. & Hol.* Brockenbrough & Holmes's Reports, Virginia Cases, vol. 1.
Brod. Stair. Brodie's Notes and Supplement to Stair's Institutes of the Laws of Scotland.
Brod. & B. or *Brod. & Bing.* Broderip & Bingham's English Common Pleas Reports.
Brod. & F. or *Brod. & Fr.* Brodrick & Freemantle's Ecclesiastical Cases.
Brooke or *Brooke (Petit).* Brooke's New Cases, English King's Bench.
Brooke Abr. Brooke's Abridgment.
Brooke Ecc. Brooke's Ecclesiastical Reports, English.
Brooke Eccl. Judg. Brooke's Six Ecclesiastical Judgments.
Brooke Lim. Brooke's Reading on the Statute of Limitations.
Brooke N. C. Brooke's New Cases, English King's Bench (Bellewe's Cases, *temp.* Henry VIII).
Brooke Not. Brooke on the Office of a Notary in England.
Brooke Read. Brooke's Reading on the Statute of Limitations.
Brooke Six Judg. Six Ecclesiastical Judgments of the English Privy Council, by Brooke.
Brooks. Brooks's Reports, vols. 106-119 Michigan.
Broom C. L. or *Broom Com. Law* or *Broom Comm.* Broom's Commentaries on the Common Law.
Broom Const. L. Broom's Constitutional Law.
Broom Leg. Max. or *Broom Max.* Broom's Legal Maxims.
Broom Part. Broom's Parties to Actions.
Broom & H. Com. or *Broom & H. Comm.* Broom & Hadley's Commentaries on the Laws of England.
Broun or *Broun Just.* Broun's Reports, Scotch Justiciary Court.
Brown. Brown's Reports, vols. 53-65 Mississippi;—Brown's English Parliamentary Cases;—Brown's English Chancery Reports;—Brown's Law Dictionary;—Brown's Scotch Reports;—Brown's United States District Court Reports;—Brown's U. S. Admiralty Reports;—Brown's Michigan Nisi Prius Reports;—Brown's Reports, vols. 4-25 Nebraska;—Brownlow (& Goldesborough's) English Common Pleas Reports;—Brown's Reports, vols. 80-136 Missouri. See, also, Bro. and Browne.
Brown, Adm. Brown's United States Admiralty Reports.

Brown A. & R. Brown's United States District Court Reports (Admiralty and Revenue Cases).
Brown Car. Brown on Carriers.
Brown Ch. or *Brown Ch. C.* or *Brown Ch. Cas.* or *Brown Ch. R.* Brown's Chancery Cases, English.
Brown, Civ. & Adm. Law. Brown's Civil and Admiralty Law.
Brown Comm. Brown's Commentaries.
Brown Dict. Brown's Law Dictionary.
Brown Ecc. Brown's Ecclesiastical Reports, English.
Brown Ent. Brown's Entries.
Brown Fixt. Brown on Fixtures.
Brown Lim. Brown's Law of Limitations.
Brown. M. & D. Browning on Marriage and Divorce.
Brown Novis. Brown's Method of Novissima.
Brown N. P. Brown's Michigan Nisi Prius Reports.
Brown N. P. Cas. Brown's Nisi Prius Cases, English.
Brown N. P. (Mich.). Brown's Nisi Prius Reports, Michigan.
Brown P. C. or *Brown, Parl. Cas.* Brown's Parliamentary Cases, English House of Lords.
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Brown Syn. Brown's Synopsis of Decisions of the Scotch Court of Session.
Brown V. M. Brown's Vade Mecum.
Brown. & Gold. Brownlow & Goldesborough's English Common Pleas Reports.
Brown & H. (Miss.). Brown & Hemingway's Reports, vols. 53-65 Mississippi.
Brown & L. or *Brown & Lush.* Brown's & Lushington's Reports, English Admiralty.
Browne. Browne's Pennsylvania Reports;—Browne's Reports, vols. 97-109 and 112-114 Massachusetts;—Browne, New York Civil Procedure. See also Bro. and Brown.
Browne Adm. C. L. Browne's Admiralty and Civil Law.
Browne Bank Cas. or *Browne Nat. B. C.* Browne's National Bank Cases.
Browne Car. Browne on the Law of Carriers.
Browne Civ. L. Browne on Civil Law.
Browne, Div. or *Browne Div. Pr.* Browne's Divorce Court Practice.
Browne Frauds. Browne on the Statute of Frauds.
Browne Insan. Browne's Medical Jurisprudence of Insanity.
Browne Mass. Browne's Reports, Massachusetts, vols. 97-109 and 112-114.
Browne N. B. C. Browne's National Bank Cases.
Browne, Prob. Pr. Browne's Probate Practice.
Browne T. M. Browne on Trademarks.
Browne Usages. Browne on Usages and Customs.
Browne & G. or *Browne & Gray.* Browne & Gray's Reports, Massachusetts, vols. 110-111.
Browne & Macn. Browne & Macnamara's English Railway and Canal Cases.
Browning Mar. & D. Browning on Marriage and Divorce.
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Brownl. or *Brownl. & G.* or *Brownl. & Gold.* Brownlow & Goldesborough's English Common Pleas Reports.
Brownl. Brev. Jud. Brownlow's Brevia Judiciala.
Brownl. Ent. or *Brownl. Rediv.* Brownlow's Redivivus or Entries.
Bru. or *Bruce.* Bruce's Reports, Scotch Court of Session.
Bruce M. L. Bruce's Military Law, Scotland.
Brun. Brunner's Collective Cases, United States.
Brunk. Ir. Dig. Brunker's Irish Common Law Digest.
Brunner Sel. Cas. Brunner's Selected Cases United States Circuit Courts.
Bt. Benedict's United States District Court Reports.
Buch. Buchanan's (Eben J. or James) Reports, Cape of Good Hope.
Buch. Cas. or *Tr.* Buchanan's Remarkable Criminal Cases, Scotland.
Buch. Ct. Ap. Cape G. H. Buchanan's Court of Appeals Reports, Cape of Good Hope.
Buch. E. Cape G. H. E. Buchanan's Reports, Cape of Good Hope.
Buch. E. D. Cape G. H. Buchanan's Eastern District Reports, Cape of Good Hope.
Buch. J. Cape G. H. J. Buchanan's Reports, Cape of Good Hope.
Buch. Rep. Buchanan's Reports, Cape of Good Hope.
Buck. Buck's English Cases in Bankruptcy;—Buck's Reports, vols. 7-8 Montana.
Buck Cas. Buck's Bankrupt Cases, English.
Buck. Co. Act. Buckley's Law and Practice under Companies Act.
Buck. Cooke. Bucknill's Cooke's Cases of Practice, Common Pleas.
Buck. Dec. Buckner's Decisions (in Freeman's Mississippi Chancery Reports).
Buff. Super. Ct. (N. Y.). Sheldon's Superior Court Reports, Buffalo, New York.
Bull. N. P. Buller's Law of Nisi Prius, English.
Bull. & C. Dig. or *Bull. & Cur. Dig.* Bullard & Curry's Louisiana Digest.
Bull. & L. Pr. Bullen & Leake's Precedents of Pleading.
Buller MSS. J. Buller's Paper Books, Lincoln's Inn Library.
Bulling. Eccl. Bullingbrooke's Ecclesiastical Law.
Bulst. Bulstrode's Reports, English King's Bench.
Bump Bkcy. Bump's Bankruptcy Practice.
Bump Fed. Proc. Bump's Federal Procedure.
Bump Fr. Conv. or *Bump Fraud. Conv.* Bump on Fraudulent Conveyances.
Bump Inter. Rev. L. Bump's Internal Revenue Laws.
Bump N. C. or *Bump Notes.* Bump's Notes on Constitutional Decisions.
Bump Pat. Bump's Law of Patents, Trademarks, etc.
Bunb. Bunbury's Reports, English Exchequer.
Buny. L. A. Bunyon on Life Insurance.
Bur. Burnett's Reports, Wisconsin;—Burrow's Reports, English King's Bench.
Bur. M. Burrow's Reports *tempore* Mansfield.
Burd. Cas. Torts. Burdick's Cases on Torts.
Burf. Burford's Reports, vols. 6-18 Oklahoma.
Burg. Dig. Burgwyn's Digest Maryland Reports.
Burge Col. Law. Burge on Colonial Law.
Burge Confl. Law. Burge on the Conflict of Laws.
Burge For. Law. Burge on Foreign Law.
Burge Mar. Int. L. Burge on Maritime International Law.
Burge Sur. Burge on Suretyship.
Burgess. Burgess's Reports, vols. 46-51 Ohio State.
Burke Tr. Burke's Celebrated Trials.
Burks. Burks's Reports, vols. 91-98 Virginia.
Burlam. Nat. Law or *Burlamaqui.* Burlamaqui's Natural and Politic Law.
Burlesque Reps. Skillman's New York Police Reports.
Burm. L. R. Burmah Law Reports.
Burn. Burnett's Reports, Wisconsin.
Burn. Cr. L. Burnett on the Criminal Law of Scotland.
Burn Dict. Burn's Law Dictionary.
Burn, Eccl. Law or *Burn Ec. L.* Burn's Ecclesiastical Law.
Burn Jus. Burn's Justice of the Peace.
Burnet. Burnet's Manuscript Decisions, Scotch Court of Session.
Burnett. Burnett's Wisconsin Reports;—Burnett's Reports, vols. 20-22 Oregon.
Burr. Burrow's Reports, English King's Bench *temp.* Mansfield.
Burr. Ass. Burrill on Assignments.
Burr. Circ. Ev. Burrill on Circumstantial Evidence.
Burr. Dict. Burrill's Law Dictionary.

Burr. Prac. Burrill's Practice.
Burr. S. C. or *Sett. Cas.* Burrows's English Settlement Cases.
Burr. Taxation. Burroughs on Taxation.
Burr Tr. Burr's Trial.
Burr Tr. Rob. Burr's Trial, reported by Robertson.
Burrill. Burrill's Law Dictionary.
Burrill, Circ. Ev. Burrill on Circumstantial Evidence.
Burrill, Pr. Burrill's Practice.
Burrow. Burrow's Reports, English King's Bench.
Burrow, Sett. Cas. Burrow's English Settlement Cases.
Burt. Bankr. Burton on Bankruptcy.
Burt. Cas. Burton's Collection of Cases and Opinions.
Burt. Parl. Burton's Parliamentary Diary.
Burt. R. P. or *Burt. Real Prop.* Burton on Real Property.
Burt. Sc. Tr. Burton's Scotch Trials.
Busb. Busbee's Law Reports, North Carolina Reports, vol. 44.
Busb. Cr. Dig. Busbee's Criminal Digest, North Carolina.
Busb. Eq. Busbee's Equity Reports, North Carolina.
Bush. Bush's Reports, Kentucky.
Busw. & Wal. Pr. Buswell & Walcott's Practice, Massachusetts.
Butl. Co. Litt. Butler's Notes to Coke on Littleton.
Butl. Hor. Jur. Butler Horæ Juridicæ Subsecivæ.
Butt's Sh. Butt's Edition of Shower's English King's Bench Reports.
Buxton. Buxton's Reports, vols. 123-129 North Carolina.
Byles, Bills. Byles on Bills.
Bynk. Bynkershoek on the Law of War.
Bynk. Jur. Pub. Bynkershoek Quæstiones Juris Publici.
Bynk. Obs. Jur. Rom. Bynkershoek, Observationum Juris Romani Libri.
Bynk. War. Bynkershoek on the Law of War.
Byth. Conv. Bythewood's Conveyancing.
Byth. Prec. Bythewood's Precedents.
C. Cowen's Reports, New York;—Connecticut;—California;—Colorado;—Canada (Province);—Codex Juris Civilis. Code. Chancellor. Chancery. Chapter. Case.
C. of S. Ca. 1st Series. Court of Session Cases, First Series. By Shaw, Dunlop & Bell. Ct. Sess. (Sc.).
C. of S. Ca. 2d Series. Court of Session Cases, Second Series. By Dunlop, Bell & Murray. Ct. Sess. (Sc.).
C. of S. Ca. 3d Series. Court of Session Cases, Third Series. By Macpherson, Lee & Bell. Ct. Sess. (Sc.).
C. of S. Ca. 4th Series. Court of Session Cases, Fourth Series. By Rettie, Crawford & Melville. Ct. Sess. (Sc.).
C. A. Court of Appeal; Court of Arches; Chancery Appeals.
C. B. Chief Baron of the Exchequer; Common Bench; English Common Bench Reports, by Manning, Granger & Scott.
C. B. N. S. English Common Bench Reports, New Series, by Manning, Granger & Scott.
C. B. R. Cour de Blanc de la Reine, Quebec.
C. C. Circuit Court; Chancery Cases; Crown Cases; County Court; City Court; Cases in Chancery, English; Civil Code; Civil Code Francais, or Code Napoleon; Cepi Corpus.
C. C. A. U. S. Circuit Court of Appeals Reports;—Circuit Court of Appeals, United States;—County Court Appeals, English.
C. C. C. Choice Cases in Chancery, English;—Crown Circuit Companion.
C. C. Chr. or *C. C. Chron.* Chancery Cases Chronicle, Ontario.
C. C. E. Caines's Cases in Error, New York;—Cases of Contested Elections.
C. C. L. C. Civil Code, Quebec.
C. Com. Code de Commerce.
C. C. P. Code of Civil Procedure.
C. C. R. City Courts Reports, New York City;—County Court Reports, Pa.;—Crown Cases Reserved.
C. Cr. P. Code of Criminal Procedure.
C. C. Supp. City Court Reports, Supplement, New York.
C. C. & B. B. Cepi Corpus and Bail Bond.
C. C. & C. Cepi Corpus et Committitur.
C. D. Commissioner's Decisions, United States Patent Office;—Century Digest;—Comyn's Digest.
C. d'Et. Conseil d'Etat.
C. E. Gr. C. E. Greene's New Jersey Equity Reports.
C. F. Code Forestier.
C. H. Rec. City Hall Recorder (Rogers), New York City.
C. H. Rep. City Hall Reporter (Lomas), New York City.
C. H. & A. Carrow, Hamerton & Allen's New Sessions Cases, English.
C. I. Constitutiones Imperiales.
C. Instr. Cr. Code Instruction Criminelle.
C. J. Chief Justice.
C. J. C. Couper's Justiciary Cases, Scotland.
C. J. Can. Corpus Juris Canonici.
C. J. Civ. Corpus Juris Civilis.
C. J. C. P. Chief Justice of the Common Pleas.
C. J. K. B. Chief Justice of the King's Bench.
C. J. Q. B. Chief Justice of the Queen's Bench.
C. J. U. B. Chief Justice of the Upper Bench.
C. L. Common Law. Civil Law.
C. L. Ch. Common Law Chamber Reports, Ontario.
C. L. J. Central Law Journal, St. Louis, Mo.;—Canada Law Journal, Toronto.
C. L. J. N. S. Canada Law Journal, New Series, Toronto.
C. L. N. Chicago Legal News.
C. L. P. Act. English Common Law Procedure Act.
C. L. R. Common Law Reports, printed by Spottiswoode;—English Common Law Reports.
C. M. R. Crompton, Meeson & Roscoe's Reports, English Exchequer.
C. N. Code Napoleon.
C. N. Conf. Cameron & Norwood's North Carolina Conference Reports.
C. N. P. Cases at Nisi Prius.
C. N. P. C. Campbell's Nisi Prius Cases, English.
C. O. Commons' Orders.
C. of C. E. Cases of Contested Elections, United States.
C. P. Code of Procedure;—Common Pleas;—Code Penal.
C. P. C. Code of Civil Procedure, Quebec;—Code de Procédure Civile;—Cooper's Practice Cases, English.
C. P. Coop. C. P. Cooper's Reports, English.
C. P. C. t. Br. C. P. Cooper's English Chancery Reports *tempore* Brougham.
C. P. C. t. Cott. C. P. Cooper's English Chancery Reports *tempore* Cottenham.
C. P. D. or *C. P. Div.* Common Pleas Division, English Law Reports (1875-1880).
C. P. Q. Code of Civil Procedure, Quebec.
C. P. Rep. or *C. P. Rept.* Common Pleas Reporter, Scranton, Pennsylvania.
C. P. U. C. Common Pleas Reports, Upper Canada.
C. Pr. Code of Procedure;—Code de Procédure Civile.
C. R. Chancery Reports;—Code Reporter, New York.
C. R. N. S. Code Reports, New Series, New York.
C. Rob. or *C. Rob. Adm.* Christopher Robinson's Reports on English Admiralty.
C. S. Court of Session, Scotland.
C. S. B. C. Consolidated Statutes, British Columbia.
C. S. C. Consolidated Statutes of Canada, 1859.
C. S. L. C. Consolidated Statutes, Lower Canada.
C. S. M. Consolidated Statutes of Manitoba.
C. S. N. B. Consolidated Statutes of New Brunswick.
C. S. U. C. Consolidated Statutes of Upper Canada, 1859.
C. S. & J. Cushing, Storey & Josselyn's Election

Cases. See vol. 1 Cushing's Election Cases, Massachusetts.

C. S. & P. (Craigie, Stewart &) Paton's Scotch Appeal Cases.

C. T. Constitutiones Tiberii.

C. Theod. Codex Theodosiani.

C. t. K. Cases *tempore* King (Macnaghten's Select Chancery Cases, English).

C. t. N. Cases *tempore* Northington (Eden's English Chancery Reports).

C. t. T. or *C. t. Talb.* Cases *tempore* Talbot, English Chancery.

C. W. Dud. C. W. Dudley's Law or Equity Reports, South Carolina.

C. W. Dudl. Eq. C. W. Dudley's Equity Reports, South Carolina.

C. & A. Cooke & Alcock's Reports, Irish King's Bench and Exchequer.

C. & C. Coleman and Caine's Cases, New York.

C. & D. Corbett & Daniel's English Election Cases;—Crawford & Dix's Abridged Cases, Irish.

C. & D. A. C. Crawford & Dix's Abridged Cases, Irish.

C. & D. C. C. Crawford & Dix's Irish Circuit Cases;—Crawford & Dix's Criminal Cases, Irish.

C. & E. Cababé & Ellis, English.

C. & F. Clark & Finnelly's Reports, English House of Lords.

C. & H. Dig. Coventry & Hughes's Digest.

C. & J. Crompton & Jervis's English Exchequer Reports.

C. & K. Carrington & Kirwan's Reports, English Nisi Prius.

C. & L. Connor & Lawson's Irish Chancery Reports.

C. & L. C. C. Cane & Leigh's Crown Cases.

C. & L. Dig. Cohen & Lee's Maryland Digest.

C. & M. Crompton & Meeson's English Exchequer Reports;—Carrington & Marshman's English Nisi Prius Reports.

C. & Marsh. Carrington & Marshman's Reports, English Nisi Prius.

C. & N. Cameron & Norwood's North Carolina Conference Reports.

C. & O. R. Cas. or *C. & O. R. R. C. Cas.* Carrow & Oliver's English Railway and Canal Cases.

C. & P. Carrington & Payne's English Nisi Prius Reports;—Craig & Phillips's Chancery Reports.

C. & R. Cockburn & Rowe's Reports, English Election Cases.

C. & S. Dig. Connor & Simonton's South Carolina Digest.

Ca. Case;—Placita;—Placitum;—Cases (see Cas.).

Ca. resp. Capias ad respondendum.

Ca. sa. Capias ad satisfaciendum.

Ca. t. Hard. Cases *tempore* Hardwicke.

Ca. t. K. Cases *tempore* King;—Cases *tempore* King, Chancery.

Ca. t. Talb. Cases *tempore* Talbot, Chancery.

Ca. temp. F. Cases *tempore* Finch.

Ca. temp. H. Cases *tempore* Hardwicke, King's Bench.

Ca. temp. Holt. Cases *tempore* Holt, King's Bench.

Cab. Lawy. The Cabinet Lawyer.

Cab. & E. or *Cab. & El.* Cababé & Ellis, English.

Cadw. Dig. Cadwalader's Digest of Attorney-Generals' Opinions.

Cadw. Gr. Rents. Cadwalader on Ground Rents.

Cai. Caines's Reports, Supreme Court, N. Y.;—Caines's Term Reports, New York Supreme Court.

Cai. Cas. or *Cai. Cas. Err.* Caines's New York Cases in Error.

Cai. Inst. Cail or Gail Institutiones.

Cai. Lex. Mer. Caines's *Lex Mercatoria.*

Cai. Pr. Caines's Practice.

Cai. T. R. Caines's Term Reports, New York Supreme Court.

Cai. Visig. Caines's *Visigothicum.*

Cain. or *Caines.* Caines, New York;—Caines's Reports, New York Supreme Court.

Caines Cas. Caines's Cases, Court of Errors, New York.

Cairn's Dec. Cairn's Decisions in the Albert Arbitration.

Cairns Dec. Cairns's Decisions, Reilly, English.

Cal. California;—California Reports;—Calthrop's English King's Bench Reports;—Caldecott's English Settlement Cases.

Cal. L. J. California Law Journal, San Francisco.

Cal. Leg. Adv. Calcutta Legal Advertiser, India.

Cal. Leg. Obs. Calcutta Legal Observer.

Cal. Leg. Rec. California Legal Record, San Francisco.

Cal. Prac. Hart's California Practice.

Cal. Rep. California Reports;—Calthrop's English King's Bench Reports.

Cal. S. D. A. Calcutta Sudder dewanny Adawlut Reports.

Cal. Ser. Calcutta Series Indian Law Reports.

Cal. Sew. Callis on Sewers.

Cal. W. R. Calcutta Weekly Reporter, India.

Calc. L. O. Calcutta Legal Observer.

Cald. Caldwell's Reports, vols. 25-36 West Virginia.

Cald. or *Cald. J. P.* or *Cald. M. Cas.* or *Cald. S. C.* Caldecott's English Magistrate's (Justice of the Peace) and Settlement Cases.

Cald. Arb. Caldwell on Arbitration.

Cald. Sett. Cas. Caldecott's Settlement Cases.

Call. Call's Reports, Virginia.

Call. Mil. L. Callan's Military Laws.

Call. Sew. Callis on Sewers.

Calth. Calthorpe's Reports, English King's Bench.

Calth. Copyh. Calthorpe on Copyholds.

Calvin. or *Calv. Lex.* or *Calvin. Lex. Jurid.* Calvinus Lexicon Juridicum.

Calv. Par. Calvert on Parties to Suits in Equity.

Cam. Cameron's Reports, Upper Canada Queen's Bench.

Cam. Crit. Camden's Britannia.

Cam. Duc. Camera Ducata, Duchy Chamber.

Cam. Op. Cameron's Legal Opinions, Toronto.

Cam. Scac. or *Cam. Scacc.* Camera Scaccaria (Exchequer Chamber).

Cam. Stell. Camera Stellata, Star Chamber.

Cam. & N. or *Cam. & Nor.* Cameron & Norwood's Reports, North Carolina Conference Reports, vol. 3.

Camd. Brit. or *Camden.* Camden's Britannia.

Camp. Camp's Reports, vol. 1 North Dakota;—Campbell's English Nisi Prius Reports;—Campbell's Reports, vols. 27-58 Nebraska. See also Campbell.

Camp. Dec. or *Campt. Dec.* Campbell's Reports of Taney's Decisions, U. S. Circuit Court;—Campbell's Decisions.

Camp. Ld. Ch. or *Camp. Lives Ld. Ch.* Campbell's Lives of the Lord Chancellors.

Camp. N. P. Campbell's Reports, English Nisi Prius.

Campbell. Campbell's English Nisi Prius Reports;—Campbell's Reports of Taney's United States Circuit Court Decisions;—Campbell's Legal Gazette Reports, Pennsylvania;—Campbell's Reports, vols. 27-58 Nebraska.

Camp. Neg. Campbell on Negligence.

Can. Canon. Canada.

Can. Exch. Canada Exchequer Reports.

Can. L. J. Canada Law Journal, Toronto.

Can. L. J. (L. C.). Lower Canada Law Journal, Montreal.

Can. L. T. Canadian Law Times, Toronto, Canada.

Can. Mun. J. Canadian Municipal Journal.

Can. S. C. Rep. Canada Supreme Court Reports.

Canad. Mo. Canadian Monthly.

Cane & L. Cane & Leigh's Crown Cases Reserved.

Cap. Capitulum. Chapter.

Cape Law J. Cape Law Journal, Grahamstown, Cape of Good Hope.

Car. Carolina;—Carolus; thus 13 Car. II., signifies the thirteenth year of the reign of King Charles II.

Car. Cr. L. Carrington's Criminal Law.

Car., H. & A. Carrow, Hamerton & Allen's New Sessions Cases, English.

Car. L. Jour. Carolina Law Journal, Charleston, S. C.

Car. L. Rep. Carolina Law Repository, Raleigh, N. C.

Car. O. & B. Carrow, Oliver & Bevan's English Railway and Canal Cases.

Car. & K. or *Car. & Kir.* Carrington & Kirwan's English Nisi Prius Reports.

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Car. & P. Carrington & Payne's Reports, English Nisi Prius.

Carl. Carleton, New Brunswick.

Carp. Carpenter's Reports, California.

Carp. P. C. Carpmael's English Patent Cases.

Carpenter. Carpenter's Reports, vols. 52-53 California.

Carr. Cas. Carran's Summary Cases, India.

Carr., Ham. & Al. Carrow, Hamerton & Allen's New Sessions Cases, English.

Carr. & K. Carrington & Kirwan.

Carrau. Carrau's Edition of "Summary Cases," Bengal.

Cart. Cartwright's Cases, Canada;—Carter's Reports, English Common Pleas.

Cart. (Ind.). Carter's Reports, Indiana.

Carta de For. Carta de Foresta.

Carter. Carter's English Common Pleas Reports, same as Orlando Bridgman;—Carter's Reports, vols. 1, 2, Indiana.

Carth. Carthew's Reports, English King's Bench.

Cartm. Trade M. Cas. Cartmell's Trademark Cases.

Cartw. Const. Cas. Cartwright's Constitutional Cases.

Cary. Cary's Reports, English Chancery.

Cary Part. Cary on Partnership.

Cas. Casey's Reports, vols. 25-36 Pennsylvania State.

Cas. App. Cases on Appeal to the House of Lords.

Cas. Arg. & Dec. Ch. Cases Argued and Decreed in Chancery, English.

Cas. B. R. Cases Banco Regis *tempore* William III. (12 Modern Reports).

Cas. B. R. Holt. Cases and Resolutions (of settlements; not Holt's King's Bench Reports).

Cas. Ch. Cases in Chancery, English;—Select Cases in Chancery;—Cases in Chancery (3 Modern Reports).

Cas. C. L. Cases in Crown Law.

Cas. Ch. 1, 2, 3. Cases in Chancery *temp.* Car. II.

Cas. Eq. Cases in equity, Gilbert's Reports;—Cases and Opinions in Law, Equity, and Conveyancing.

Cas. Eq. Abr. Cases in Equity Abridged, English.

Cas. F. T. Cases *tempore* Talbot, by Forrester, English Chancery.

Cas. H. L. or *Cas. H. of L.* Cases in the English House of Lords.

Cas. in C. Cases in Chancery;—Select Cases in Chancery.

Cas. in P. or *Cas. Parl.* Cases in Parliament.

Cas. K. B. Cases in King's Bench (3 Modern Reports).

Cas. K. B. t. H. or *Cas. K. B. t. Hardw.* Cases *temp.* Hardwicke, W. Kelynge's Reports, English King's Bench.

Cas. L. & Eq. Cases in Law and Equity (10 Modern Reports);—Gilbert's Cases in Law and Equity, English.

Cas. P. or *Cas. Parl.* Cases in Parliament.

Cas. Pr. Cases of Practice in the Court of the King's Bench, from Eliz. to 14 Geo. III.

Cas. Pr. or *Cas. Pr. C. P. (Cooke).* Cooke's Practice Cases, English Common Pleas.

Cas. Pr. K. B. Cases of Practice, English King's Bench.

Cas. R. Casey's Reports, Pennsylvania State Reports, vols. 25-36.

Cas. S. C. (Cape of G. H.). Cases in the Supreme Court, Cape of Good Hope.

Cas. Self Def. Cases on Self Defence, Horrigan & Thompson's.

Cas. Sett. Cases of Settlement, King's Bench.

Cas. Six Cir. Cases in the Six Circuits, Ireland.

Cas. t. Ch. II. Cases *temp.* Charles II., in vol. 3 of Reports in Chancery.

Cas. t. F. Cases *tempore* Finch, English Chancery.

Cas. t. Geo. I. Cases *tempore* George I., English Chancery, Modern Reports, vols. 8 and 9.

Cas. t. H. or *Cas. t. Hardwicke.* Cases *tempore* Hardwicke, English King's Bench (Ridgway, Lee, or Annaly);—West's Chancery Reports, *tempore* Hardwicke.

Cas. t. Holt or *Cas. t. H.* Cases *tempore* Holt, English King's Bench;—Holt's Reports.

Cas. t. K. Select Cases *tempore* King, English Chancery (edited by Macnaghten);—Moseley's Chancery Reports, *tempore* King.

Cas. t. Lee (Phillimore's). Cases *temp.* Lee, English Ecclesiastical.

Cas. t. Mac. Cases *tempore* Macclesfield, Modern Reports, vol. 10, Lucas's Reports.

Cas. t. Nap. Cases *tempore* Napier, by Drury, Irish Chancery.

Cas. t. North. Cases *temp.* Northington (Eden's English Chancery Reports).

Cas. t. Plunk. Cases *tempore* Plunkett, by Lloyd & Gould, Irish Chancery.

Cas. t. Q. A. Cases *tempore* Queen Anne, Modern Reports, vol. 11.

Cas. t. Sugd. Cases *tempore* Sugden, Irish Chancery.

Cas. t. Tal. Cases *tempore* Talbot, English Chancery, Forrester's Reports.

Cas. t. Wm. III. Cases *tempore* William III., Modern Reports, vol. 12.

Cas. Tak. & Adj. Cases Taken and Adjudged (first edition of Reports in Chancery).

Cas. Wm. I. Bigelow's Cases, William I. to Richard I.

Cas. w. Op. or *Cas. & Op.* Cases with Opinions of Eminent Counsel.

Casey. Casey's Reports, Pennsylvania State Reports, vols. 25-36.

Cass. Dig. Cassel's Digest, Canada.

Cass. Sup. C. Prac. Cassel's Supreme Court Practice, 2d edition by Masters.

Castle Com. Castle on Law of Commerce.

Cav. Money Sec. Cavanaugh's Law of Money Securities.

Cav. Deb. Cavendish's Debates, House of Commons.

Cawl. Cawley's Laws against Recusants.

Cay Abr. Cay's Abridgment of the Statutes.

Cel. Tr. Burke's Celebrated Trials.

Cent. Dict. Century Dictionary.

Cent. Dig. Century Digest.

Centr. Cr. C. R. Central Criminal Court Reports, English.

Centr. L. J. Central Law Journals, St. Louis, Mo.

Ceyl. Leg. Misc. Ceylon Legal Miscellany.

Ch.

[1891] *Ch.* English Chancery Cases; Law Reports, 1st Series, 1891.

[1892] *Ch.* Same for 1892, etc.

Ch. App. Cas. Chancery Appeal Cases, English Law Reports.

Ch. Burn J. Chitty Burn's Justice.

Ch. Cal. Chancery Calendar.

Ch. Cas. Cases in Chancery.

Ch. Cas. Ch. Choice Cases in Chancery.

Ch. Ch. or *Ch. Cham. (Ont.).* Chancery Chambers's Reports, Ontario.

Ch. Col. Op. Chalmers's Colonial Opinions.

Ch. D. Chancery Division English Law Reports.

Ch. Dig. Chaney's Digest, Michigan Reports.

Ch. Div. Chancery Division, English Law Reports.

Ch. J. Chief Justice. Chief Judge.

Ch. Pr. Chancery Practice.

Ch. Pre. or *Ch. Prec.* Precedents in Chancery.

Ch. R. or *Ch. Repts.* Reports in Chancery.

Ch. R. M. R. M. Charlton's Georgia Reports.

Ch. Rep. Reports in Chancery;—Irish Chancery Reports.

Ch. Sent. Chancery Sentinel, Saratoga, New York.

Ch. T. U. P. T. U. P. Charlton's Georgia Reports.

Ch. & Cl. Cas. Cripp's Church and Clergy Cases.

Chal. Op. Chalmer's Colonial Opinions.

Cham. or *Chamb.* Chamber Reports, Upper Canada.

Chamb. Ch. Jur. Chambers's Chancery Jurisdiction.

Chamb. Dig. P. H. C. Chambers's Digest of Public Health Cases.

Chamb. L. & T. Chambers on Landlord and Tenant.

Chamb. Rep. Chancery Chamber Reports, Ontario.
Chamber. Chamber Reports, Upper Canada.
Chan. Chaney's Reports, vols. 37-58 Michigan;—Chancellor;—Chancery (see Ch.).
Chanc. Chancery (see Ch.).
Chance. Chance on Powers.
Chand. Chandler's Reports, Wisconsin;—Chandler's Reports, vols. 20, 38-44 New Hampshire.
Chand. Cr. Tr. or *Chand. Crim. Tr.* Chandler's American Criminal Trials.
Chand. N. H. Chandler's Reports, New Hampshire, vols. 20 and 38-44.
Chaney. Chaney's Reports, vols. 37-58 Michigan.
Chapl. Cas. Crim. L. Chaplin's Cases on Criminal Law.
Char. Merc. Charta Mercatoria.
Charl. Pr. Cas. Charley's English Practice Cases (Judicature Act).
Charl. R. P. Stat. Charley's Real Property Statutes.
Charlt. R. M. R. M. Charlton's Georgia Reports.
Charlt. T. U. P. Charlton's Reports, Georgia.
Chase. Chase's Decisions by Johnson, U. S. 4th Circuit.
Chase Tr. Chase's Trial by the U. S. Senate.
Cher. Cas. Cherokee Case.
Chest. Cas. Case of the City of Chester, on Quo Warranto.
Chev. Cheves's Law Reports, South Carolina.
Chev. Ch. or *Chev. Eq.* or *Cheves.* Cheves's Chancery or Equity Reports, South Carolina.
Chic. L. B. Chicago Law Bulletin, Illinois.
Chic. L. J. Chicago Law Journal.
Chic. L. Rec. Chicago Law Record.
Chic. L. T. Chicago Law Times.
Chic. Leg. News. Chicago Legal News.
Chip. Chipman's Reports, New Brunswick.
Chip. Contr. Chipman on Contracts.
Chip. D. D. Chipman's Reports, Vermont.
Chip. MS. Reports printed from Chipman's Manuscript, New Brunswick.
Chip. N. N. Chipman's Reports, Vermont.
Chip. W. Chipman's New Brunswick Reports.
Chit. or *Chitt.* Chitty's English Bail Court Reports.
Chit. App. Chitty on Apprentices and Journeymen.
Chit. Arch. Pr. Chitty's Archbold's Practice.
Chit. B. C. Chitty's Bail Court Reports, English.
Chit. Bills. Chitty on Bills.
Chit. Bl. Comm. or *Chit. Bla. Com.* Chitty's Blackstone's Commentaries.
Chit. Burn's J. Chitty Burn's Justice.
Chit. Car. Chitty on Carriers.
Chit. Com. L. or *Chit. Com. Law.* Chitty on Commercial Law.
Chit. Cont. or *Chit. Contr.* Chitty on Contracts.
Chit. Cr. L. or *Chit. Crim. Law.* Chitty on Criminal Law.
Chit. Des. Chitty on the Law of Descent.
Chit. Eq. Dig. Chitty's Equity Digest.
Chit. F. Chitty's Forms.
Chit. G. P. or *Chit. Gen. Pr.* Chitty's General Practice.
Chit. Jr. Bills. Chitty, Junior, on Bills.
Chit. L. of N. Chitty's Law of Nations.
Chit. Med. Jur. Chitty on Medical Jurisprudence.
Chit. Pl. Chitty on Pleading.
Chit. Pr. or *Chit. Prac.* Chitty's General Practice.
Chit. Prec. Chitty's Precedents in Pleading.
Chit. Prer. Chitty's Prerogatives of the Crown.
Chit. Rep. Chitty's Reports, English Bail Court.
Chit. St. or *Chit. Stat.* Chitty's Statutes of Practical Utility.
Chitt. Chitty's Reports, English Bail Court.
Cho. Cas. Ch. Choice Cases in Chancery.
Chr. Pr. W. Christie's Precedents of Wills.
Chr. Rep. Chamber Reports, Upper Canada.
Chr. Rob. Christopher Robinson's English Admiralty Reports.
Christ. B. L. Christian's Bankrupt Laws.
Churchill & Br. Sh. Churchill and Bruck on Sheriffs.
Chute, Eq. Chute's Equity under the Judicature Act.
Cic. Frag. de Repub. Cicero, Fragmenta de Republica.
Cin. Law Bul. Cincinnati Law Bulletin, Cincinnati, Ohio.
Cin. Mun. Dec. Cincinnati Municipal Decisions.
Cin. Rep. or *Cinc. (Ohio).* Cincinnati Superior Court Reports.
Circ. Ct. in Eq. Circuit Court in Equity.
City C. Rep. or *City Ct. R.* City Court Reports, New York City.
City Hall Rec. Rogers's City Hall Recorder, New York.
City Hall Rep. Lumas's City Hall Reporter, New York.
City Rec. City Record, New York.
Civ. Code. Civil Code.
Civ. Code Prac. Civil Code of Practice.
Civ. Pro. or *Civ. Proc. R.* or *Civ. Proc. Rep. (N. Y.).* Civil Procedure Reports, New York.
Cl. App. Clark's Appeal Cases, English House of Lords.
Cl. Ass. Clerk's Assistant.
Cl. Ch. Clarke's Chancery Reports, N. Y.
Cl. Col. Clark's Colonial Law.
Cl. Cr. L. Clarke, Criminal Law.
Cl. Elec. Clark on Elections.
Cl. Extr. Clarke on Extradition.
Cl. Home. Clerk Home, Scotch Session Cases.
Cl. Home R. Clerk Home Scotch Reports.
Cl. Ins. Clarke on Insurance.
Cl. R. L. Clarke's Early Roman Law.
Cl. & F. or *Cl. & Fin.* Clark & Finnelly's Reports, English House of Lords.
Cl. & Fin. N. S. Clark & Finnelly's Reports, New Series, English House of Lords.
Clan. H. & W. Clancy on Husband and Wife.
Cl. & H. Clarke & Hall's Congressional Election Cases.
Clan. Mar. Wom. Clancy on Married Women.
Clar. Parl. Chr. Clarendon's Parliamentary Chronicle.
Clark. Clark's Appeal Cases, English House of Lords.
Clark (Ala.). Clark's Reports, Alabama Reports, vol. 58.
Clark Dig. Clark's Digest, House of Lords Reports.
Clark Lease. Clark's Inquiry into the Nature of Leases.
Clark (Pa.). Clark's Pennsylvania Law Journal Reports.
Clark & F. or *Clark & Fin.* Clark & Finnelly's Reports, English House of Lords.
Clark & Fin. N. S. Clark & Finnelly's Reports, New Series, English House of Lords.
Clarke. Clarke's New York Chancery Reports;—Clarke's edition of vols. 1-8 Iowa;—Clarke's Reports, vols. 19-22 Michigan;—Clarke's Notes of Cases, Bengal. See, also, Clark.
Clarke (Iowa). Clarke's Reports, vols. 1-8 Iowa.
Clarke (Mich.). Clarke's Reports, vols. 19-22 Michigan.
Clarke (N. Y.). Clarke's New York Chancery Reports.
Clarke Adm. Pr. Clarke's Admiralty Practice.
Clarke Bills. Clarke on Bills, Notes, and Checks.
Clarke Ch. or *Clarke Ch. R.* Clarke's New York Chancery Reports.
Clarke Cr. L. Clarke on Criminal Law, Canada.
Clarke Ins. Clarke on Insurance, Canada.
Clarke Not., or *Clarke Not. R. & O.* Clarke's Notes of Cases, in his Rules and Orders, Bengal.
Clarke Prax. Clarke's Praxis.
Clarke & H. Elec. Cas. Clarke & Hall's Cases of Contested Elections in Congress.
Clay. Conv. Clayton's Conveyancing.
Clayt. Clayton's Reports, English York Assize.
Cleir. Us et Cout. Cleirac, *Us et Coutumes de la Mer.*
Clem. Clemens's Reports, vols. 57-59 Kansas.
Clem. Corp. Sec. Clemens on Corporate Securities.
Clerk Home. Clerk Home's Decisions, Scotch Court of Session.

Clerke Dig. Clerke's Digest, New York.
Clerke Pr. Clerke's Praxis Admiralitatis.
Clerke Rud. Clerke's Rudiments of American Law and Practice.
Clev. Bank. Cleveland on the Banking System.
Clev. L. Rec. Cleveland (Ohio) Law Record.
Clev. L. Rep'r. Cleveland Law Reporter.
Clif. Clifford's United States Circuit Court Reports.
Clif. (South.) El. Cas. Clifford's Southwick Election Cases.
Clif. & R. Clifford & Richard's English Locus Standi Reports.
Clif. & Rick. Clifford & Rickard's English Locus Standi Reports.
Clif. & St. Clifford & Stephens's English Locus Standi Reports.
Cliff. Clifford's Reports, U. S. 1st Circuit.
Cliff. El. Cas. Clifford's Election Cases.
Clift Ent. Clift's Entries.
Clin. Dig. Clinton's Digest, New York Reports.
Clin. & Sp. Dig. Clinton & Spencer's Digest.
Clk. Mag. Clerk's Magazine, London;—Rhode Island Clerk's Magazine.
Clode. Clode's Martial Law.
Clow L. C. on Torts. Clow's Leading Cases on Torts.
Clusk. P. T. Cluskey's Political Text Book.
Co. County;—Company;—Coke's Reports, English King's Bench.
Co. B. L. Cooke's Bankrupt Law.
Co. Cop. Coke's Copyholder.
Co. Ct. Cas. County Court Cases, English.
Co. Ct. Ch. County Court Chronicle, English.
Co. Ct. Rep. County Court Reports, Pa.
Co. Cts. Coke on Courts (4th Inst.).
Co. Ent. Coke's Entries.
Co. G. Reports and Cases of Practice in Common Pleas *tempore* Anne, Geo. I., and Geo. II., by Sir G. Coke. (Same as Cooke's Practice Reports.)
Co. Inst. Coke's Institutes.
Co. Litt. The First Part of the Institutes of the Laws of England, or a Commentary on Littleton, by Sir Edward Coke.
Co. M. C. Coke's Magna Charta (2d Inst.).
Co. P. C. Coke's Pleas of the Crown (3d Inst.);—Coke's Reports, English King's Bench.
Co. Pal. County Palatine.
Co. Pl. Coke's Pleadings (sometimes published separately).
Co. R. (N. Y.). Code Reporter, New York.
Co. Rep. Coke's Reports, English King's Bench.
Co. R. N. S. Code Reporter, New Series.
Cobb. Cobb's Reports, vols. 4-20 Georgia;—Cobb's Reports, vol. 121 Alabama.
Cobb. Cas. Int. L. Cobbett's Cases on International Law.
Cobb. Parl. Hist. Cobbett's Parliamentary History.
Cobb. Pol. Reg. Cobbett's Political Register.
Cobb Slav. Cobb on Slavery.
Cobb. St. Tr. Cobbett's (afterwards Howell's) State Trials.
Cochr. Cochran's Nova Scotia Reports;—Cochrane's Reports, vols. 3-10 North Dakota.
Cock. Nat. Cockburn on Nationality.
Cock. Tich. Ca. Cockburn's Charge in the Tichborne Case.
Cock. & Rowe. Cockburn and Rowe's English Election Cases.
Cocke. Cocke's Reports, vols. 16-18 Alabama;—Cocke's Reports, vols. 14, 15 Florida.
Cocke (Fla.). Cocke's Reports, Florida Reports, vols. 14, 15.
Cocke Const. His. Cocke's Constitutional History.
Cocke Pr. Cocke's Practice in the U. S. Courts.
Cod. Codex Justiniani.
Cod. Jur. Civ. Codex Juris Civilis;—Justinian's Code.
Cod. Theodos. Codex Theodorianus.
Code. Criminal Code of Canada, 1892.
Code Civ. Code Civil, or Civil Code of France.
Code Civ. Pro. or *Code Civ. Proc.* Code of Civil Procedure.
Code Civil. Code Civil or Civil Code of France.
Code Comm. Code de Commerce.
Code Cr. Pro. or *Code Cr. Proc.* Code of Criminal Procedure.
Code de Com. Code de Commerce.
Code d'Instr. Crim. Code d'Instruction Criminelle.
Code F. Code Forestier.
Code I. Code d'Instruction Criminelle.
Code La. Civil Code of Louisiana.
Code N. or *Code Nap.* Code Napoléon, French Civil Code.
Code P. Code Pénal.
Code Pro. Code de Procédure Civile;—Code of Procedure.
Code Rep. Code Reporter, New York.
Code Rep. N. S. or *Code R. N. S.* Code Reports, New Series.
Cof. Dig. Cofer's Digest, Kentucky.
Coffey Prov. Dec. Coffey's Probate Decisions.
Cogh. Epit. Coghlan's Epitome of Hindu Law Cases.
Coke. Coke's English King's Bench Reports (cited by parts and not by volume).
Coke Inst. Coke's Institutes.
Coke Lit. Coke on Littleton.
Col. Colorado;—Colorado Reports;—Coldwell's Reports, Tennessee;—Coleman's Reports, vols. 99, 101-106, 110-142, Alabama;—Column.
Col. App. Colorado Appeals.
Col. Cas. Coleman's Cases (of Practice), New York.
Col. C. C. Collyer's English Chancery Cases.
Col. L. J. Colonial Law Journal, New Zealand.
Col. L. Rep. Colorado Law Reporter.
Col. Law Review. Columbia Law Review.
Col. & Cai. or *Col. & Cai. Cas.* Coleman & Caines's Cases, New York.
Colb. Pr. Colby's Practice.
Cold. or *Coldw.* Coldwell's Tennessee Reports.
Cole. Cole's edition of Iowa Reports;—Coleman's Reports, vols. 99, 101-106, 110-142 Alabama.
Cole. Cas. Pr. Coleman's Cases, New York.
Cole. Dig. Colebrooke's Digest of Hindoo Law.
Cole Eject. Cole's Law and Practice in Ejectment.
Cole Inf. Cole on Criminal Information.
Cole. & C. Coleman & Caines's Cases, New York.
Coll. Colles's Parliamentary Cases.
Coll. or *Coll. C. C.* Collyer's English Chancery Cases.
Coll. Caus. Cel. Collection des Causes Célèbres, Paris.
Coll. Contrib. Collier's Law of Contributories.
Coll. Id. Collinson on the Law Concerning Idiots.
Coll. Jur. Collectanea Juridica.
Coll. Min. Collier on Mines.
Coll. Part. Collyer on Partnership.
Coll. P. C. or *Coll. Parl. Cas.* Colles's English Parliamentary (House of Lords) Cases.
Coll. Pat. Collier on the Law of Patents.
Coll. & E. Bank. Collier and Eaton's American Bankruptcy Reports.
Colles. Colles's English Parliamentary Cases.
Collin. Lun. Collinson on Lunacy.
Colly. Collyer's English Vice Chancellors's Reports.
Colly. Partn. Collyer on Partnerships.
Colo. Colorado Reports.
Colq. Colquit's Reports (1 Modern Reports).
Colq. C. L. Colquhoun's Civil Law.
Colq. R. Colquit's Reports (1 Modern).
Colq. Rom. Civil Law. Colquhoun's Roman Civil Law.
Colt. Coltman, Reg. App. Cas.
Colt. Reg. Ca. or *Colt. Reg. Cas.* Coltman's Registration Cases.
Colum. Law T. Columbia Law Times.
Colvil. Colvil's Manuscript Decisions, Scotch Court of Session.
Com. Comyn's Reports, English King's Bench;—Comberbach's English King's Bench Reports;—Comstock's Reports, vols. 1-4 New York Court of Appeals;—Communes, or Extravagantes Communes;—Commissioner;—Commentary;—Blackstone's Commentaries.
Com. B. English Common Bench Reports, by Manning, Granger & Scott.
Com. B. N. S. English Common Bench Reports, New Series, by Manning, Granger & Scott.

Com. Cas. Commercial Cases, England.
Com. Cont. Comyn on Contracts.
Com. Dig. Comyn's Digest.
Com. Jour. Journals of the House of Commons.
Com. Law. Commercial Law;—Common Law.
Com. L. R. or *Com. Law R.* or *Com. Law Rep.* English Common Law Reports;—Common Law Reports, published by Spottiswoode.
Com. L. & T. Comyn on Landlord and Tenant.
Com. P. Div. Common Pleas Division, English Law Reports.
Com. Pl. Common Pleas, English Law Reports.
Com. Pl. Div. Common Pleas Division, English Law Reports.
Com. P. Reptr. Common Pleas Reporter, Scranton, Penna.
Com. U. Comyn on Usury.
Com. & Leg. Rep. Commercial and Legal Reporter, Nashville, Tenn.
Comb. Comberbach's Reports, English King's Bench.
Comp. Dec. Comptroller's Decisions.
Comp. Laws. Compiled Laws.
Comp. St. Compiled Statutes.
Coms. Comstock's Reports, New York Ct. of Appeals Reports, vols. 1-4.
Coms. Ex. Comstock on Executors.
Comst. Comstock's Reports, New York Court of Appeals, vols. 1-4.
Comyn. Comyn's Reports, English King's Bench and Common Pleas.
Comyns's Dig. Comyns's Digest, English.
Con. Conover's Reports, Wisconsin;—Continuation of Rolle's Reports (2 Rolle);—Connoly, New York Criminal.
Con. Cus. Conroy's Custodian Reports.
Con. Dig. Connor's Digest.
Con. Par. Connell on Parishes.
Con. & Law. Connor & Lawson's Reports, Irish Chancery.
Com. & Sim. Connor & Simonton's Equity Digest.
Cond. Condensed.
Cond. Ch. R. or *Cond. Eng. Ch.* Condensed English Chancery Reports.
Cond. Eccl. or *Cond. Ecc. R.* Condensed Ecclesiastical Reports.
Cond. Eng. Ch. Condensed English Chancery Reports.
Cond. Exch. R. or *Cond. Ex. R.* Condensed Exchequer Reports.
Cond. Rep. U. S. Peter's Condensed United States Reports.
Condy Mar. Marshall's Insurance, by Condy.
Conf. Cameron & Norwood's Conference Reports, North Carolina.
Conf. Chart. Confirmatio Chartarum.
Cong. El. Cas. or *Cong. Elect. Cas.* Congressional Election Cases.
Cong. Rec. Congressional Record, Washington.
Congr. Globe. Congressional Globe, Washington.
Congr. Rec. Congressional Record, Washington.
Conk. Adm. Conkling's Admiralty.
Conk. Jur. & Pr. or *Conk. Pr.* Conkling's Jurisdiction and Practice, U. S. Courts.
Conn. Connecticut;—Connecticut Reports;—Connoly, New York, Surrogate.
Connolly. Connolly, New York Surrogate.
Conover. Conover's Reports, vols. 16-153 Wisconsin.
Conr. Conroy's Custodian Reports, Irish.
Cons. del Mare. Consolato del Mare.
Cons. Ord. in Ch. Consolidated General Orders in Chancery.
Consist. or *Consist. Rep.* English Consistorial Reports, by Haggard.
Consolid. Ord. Consolidated General Orders in Chancery.
Const. Constitution;—Constitutional Reports, South Carolina, by Mill;—Constitutional Reports, South Carolina, by Treadway;—Constitutional Reports, vol. 1 South Carolina, by Harper.
Const. Hist. Hallam's Constitutional History of England.
Const. N. S. Constitutional Reports (Mill), South Carolina, New Series.
Const. Oth. Constitutiones Othoni (found at the end of Lyndewood's Provinciale).
Const. S. C. Treadway's Constitutional Reports, South Carolina.
Const. (N. S.) S. C. Mill's Constitutional Reports, New Series, South Carolina.
Const. U. S. Constitution of the United States.
Consuet. Feud. Consuetudines Feudorum, or the Book of Forms.
Cont. Contra.
Coo. & Al. Cooke & Alcock's Irish King's Bench Reports.
Cook V. Adm. Cook's Vice-Admiralty Reports, Nova Scotia.
Cooke. Cooke's Cases of Practice, English Common Pleas;—Cooke's Reports, Tennessee.
Cooke (Tenn.). Cooke's Reports, Tennessee.
Cooke Agr. T. Cooke on Agricultural Tenancies.
Cooke B. L. Cooke's Bankrupt Law.
Cooke Cop. Cooke's Law of Copyhold Enfranchisements.
Cooke Def. Cooke's Law of Defamation.
Cooke I. A. or *Cooke, Incl. Acts.* Cooke's Inclosure Acts.
Cooke Pr. Cas. Cooke's Practice Reports, English Common Pleas.
Cooke Pr. Reg. Cooke's Practical Register of the Common Pleas.
Cooke & Al. or *Cooke & Alc.* Cooke & Alcock's Reports, Irish King's Bench.
Cooke & H. Cooke & Harwood's Charitable Trust Acts.
Cooley. Cooley's Reports, vols. 5-12 Michigan.
Cooley Const. L. Cooley on Constitutional Law.
Cooley Const. Lim. Cooley on Constitutional Limitations.
Cooley Tax. Cooley on Taxation.
Cooley Torts. Cooley on Torts.
Coop. Cooper's Tennessee Chancery Reports;—Cooper's Reports, vols. 21-24 Florida;—Cooper's English Chancery Reports *tempore* Eldon;—Cooper's English Chancery Reports *tempore* Cottenham;—Cooper's English Chancery Reports *tempore* Brougham;—Cooper's English Practice Cases, Chancery.
Coop. (Tenn.). Cooper's Reports, Tennessee.
Coop. C. C. or *Coop. Cas.* Cooper's Chancery Cases *temp.* Cottenham.
Coop. C. & P. R. Cooper's Chancery and Practice Reporter, Upper Canada.
Coop. Ch. Cooper's Tennessee Chancery Reports.
Co-op. Dig. Co-operative Digest, United States Reports.
Coop. Eq. Pl. Cooper's Equity Pleading.
Coop. Inst. or *Coop. Jus.* Cooper's Institutes of Justinian.
Coop. Med. Jur. Cooper's Medical Jurisprudence.
Coop. Pr. Cas. Cooper's Practice Cases, English Chancery.
Coop. Sel. Cas. Cooper's Select Cases *tempore* Eldon, English Chancery.
Coop. t. Br. or *Coop. t. Brough.* Cooper's Reports *temp.* Brougham, English Chancery.
Coop. t. Cott. or *Coop. t. Cotten.* Cooper's Cases *tempore* Cottenham, English Chancery.
Coop. t. Eld. Cooper's Reports *temp.* Eldon, English Chancery.
Coop. Tenn. Ch. Cooper's Tennessee Chancery Reports.
Cooper. Cooper's Reports, English Chancery *temp.* Eldon.
Coote Adm. Coote's Admiralty Practice.
Coote Ecc. Pr. Coote's Ecclesiastical Practice.
Coote L. & T. Coote's Landlord and Tenant.
Coote Mort. Coote on Mortgages.
Coote Pro. Pr. or *Coote, Prob. Pr.* Coote's Probate Practice.
Coote & Tr. Coote & Tristram's Probate Court Practice.
Cop. Cop. Copinger on Copyright.
Cop. Ind. Pr. Copinger's Index to Precedents.
Cope. Cope's Reports, vols. 63-72 California.
Copp L. L. Copp's Public Land Laws.
Copp Land. Copp's Land Office Decisions.
Copp Land Off. Bull. Copp's Land Office Bulletin.
Copp Min. Dec. or *Copp U. S. Min. Dec.* Copp's United States Mining Decisions.

Copp U. S. Min. L. Copp's U. S. Mineral Land Laws.
Cor. Coram;—Coryton's Bengal Reports.
Corb. & Dan. Corbett & Daniel's Parliamentary Election Cases.
Cord Mar. Wom. Cord on Married Women.
Corn. D. Cornish on Purchase Deeds.
Corn. Dig. Cornwell's Digest.
Corn. Uses. Cornish on Uses.
Corn. Rem. Cornish on Remainders.
Cornw. Tab. Cornwall's Table of Precedents.
Corp. Jur. Can. Corpus Juris Canonici.
Corp. Jur. Civ. Corpus Juris Civilis.
Corry. Corryton's Reports, Calcutta.
Corvin. Corvinus's Elementa Juris Civilis.
Cory. Coryton's Reports, Calcutta.
Cory. Cop. Coryton on Copyright.
Cory. Pat. Coryton on Patents.
Cot. Abr. Cotton's Abridgment of the Records.
Cou. Couper's Justiciary Reports, Scotland.
Coul. & F. Waters. Coulston & Forbes on Waters.
Counsellor. The Counsellor, New York City.
County Ct. Rep. County Court Reports, English.
County Ct. Rep. N. S. County Court Reports, New Series, English.
County Cts. Ch. County Courts Chronicle, London.
County Cts. & Bankr. Cas. County Courts and Bankruptcy Cases.
Coup. or *Coup. Just.* Couper's Justiciary Reports, Scotland.
Court Cl. U. S. Court of Claim Reports.
Court J. & Dist. Ct. Rec. Court Journal and District Court Record.
Court Sess. Ca. or *Court Sess. Cas.* Court of Sessions Cases, Scotch.
Court. & Macl. Courteney and Maclean's Scotch Appeals (6-7 Wilson and Shaw).
Cout. Dig. Coutlée's Digest, Canada Supreme Court.
Cov. Ev. Coventry on Evidence.
Cow. Cowen's New York Reports;—Cowper's English King's Bench Reports.
Cow. Cr. Dig. Cowen's Criminal Digest.
Cow. Cr. or *Cow. Cr. Rep.* Cowen's Criminal Reports, New York.
Cow. Dic. Cowell's Law Dictionary.
Cow. Dig. Cowell's East India Digest.
Cow. Inst. Cowell's Institutes of Law.
Cow. Int. Cowell's Interpreter.
Cow. N. Y. Cowen's New York Reports.
Cowell. Cowell's Law Dictionary;—Cowell's Interpreter.
Cowp. Cowper's Reports, English King's Bench.
Cowp. Cas. Cowper's Cases (in the third volume of Reports in Chancery).
Cox. Cox's English Chancery Reports;—Cox's English Criminal Cases;—Cox's Reports, vols. 25-27 Arkansas.
Cox Am. Tr. M. Cas. Cox's American Trademark Cases.
Cox (Ark.). Cox's Reports vols. 25-27 Arkansas.
Cox C. C. Cox's English Criminal Cases;—Cox's Crown Cases;—Cox's County Court Cases.
Cox Ch. Cox's English Chancery Cases.
Cox Cr. Cas. Cox's English Criminal Cases.
Cox Cr. Dig. Cox's Criminal Law Digest.
Cox Elect. Cox on Ancient Parliamentary Elections.
Cox Eq. Cox's Reports, English Chancery.
Cox Gov. Cox's Institutions of the English Government.
Cox Inst. Cox's Institutions of the English Government.
Cox J. S. Cox on Joint Stock Companies.
Cox J. S. Cas. Cox's Joint Stock Cases.
Cox M. C. Cox's Magistrate Cases.
Cox, McC. & H. Cox, McCrae and Hertslett's County Court Reports, English.
Cox Mag. Ca. Cox's Magistrate Cases.
Cox Man. Tr. M. or *Cox Tr. M.* Cox's Manual of Trade-Mark Cases.
Cox Tr. M. Cas. Cox's American Trade-Mark Cases.
Cox & Atk. Cox & Atkinson, English Registration Appeal Reports.
Coxe. Coxe's Reports, New Jersey.
Coxe & Melm. Coxe & Melmoth MSS. Cases on Fraud, in May on Fraudulent Conveyances.
Cr. Craneh's Reports, United States Supreme Court;—Cranch's United States Circuit Court Reports;—Craig's Jus Feudale, Scotland.
Cr. or *Cr. C. C.* or *Cra.* or *Cra. C. C.* Cranch's Reports U. S. Circuit Court, Dist. of Columbia.
Cr. Cas. Res. Crown Cases Reserved, Law Reports.
Cr. Code. Criminal Code.
Cr. Code Prac. Criminal Code of Practice.
Cr. M. & R. Crompton, Meeson & Roscoe's English Exchequer Reports.
Cr. Pat. Dec. Cranch's Decisions on Patent Appeals.
Cr. S. & P. Craigie, Stewart & Paton's Scotch Appeal Cases (same as Paton).
Cr. & Dix. Crawford & Dix's Irish Circuit Court Cases.
Cr. & Dix Ab. Cas. Crawford & Dix's (Irish) Abridged Notes of Cases.
Cr. & Dix C. C. Crawford & Dix's Irish Circuit Court Cases.
Cr. & J. Crompton & Jervis.
Cr. & M. Crompton & Meeson's English Exchequer Reports.
Cr. & Ph. Craig & Phillips's English Chancery Reports.
Cr. & St. Craigie and Stewart, House of Lords (Sc.) Reports.
Cra. Cranch's Reports, U. S. Supreme Court.
Cra. C. C. Cranch's Reports, U. S. Circ. Court, Dist. of Col.
Crab. Crabbe's United States District Court Reports.
Crabb Com. L. or *Crabb Com. Law.* Crabb on the Common Law.
Crabb Conv. Crabb's Conveyancing.
Crabb. Dig. Crabb's Digest of Statutes from Magna Charta to 9 & 10 Victoria.
Crabb, Eng. Law. Crabb's History of the English Law.
Crabb Hist. or *Crabb Hist. Eng. Law.* Crabb's History of the English Law.
Crabb R. P. or *Crabb Real Prop.* Crabb on the Law of Real Property.
Crabb, Technol. Dict. Crabb's Technological Dictionary.
Crabbe. Crabbe's United States District Court Reports;—Crabbe's Reports, District Court of U. S., Eastern District of Penna.
Craig Pr. Craig's Practice.
Craig & P. or *Craig & Ph.* Craig and Phillip's English Chancery.
Craig. & St. Craigie, Stewart and Paton's English House of Lords, Appeals from Scotland.
Craigius, Jus Feud. Craigius Jus Feudale.
Craik or *Craik C. C.* Craik's English Causes Célèbres.
Cranch. Cranch's Reports, U. S. Supreme Court.
Cranch C. C. or *Cranch D. C.* Cranch's Reports, U. S. Circuit Ct., District of Columbia.
Cranch Pat. Dec. Cranch's Patent Decisions.
Crane. Crane's Reports, vols. 22-29 Montana.
Craw. Crawford's Reports, vols. 53-69, 72-101 Arkansas.
Craw. & D. Crawford and Dix's Reports, Irish Circuit Cases.
Craw. & D. Abr. C. Crawford and Dix's Abridged Cases, Ireland.
Creasy (Ceylon). Creasy's Ceylon Reports.
Creasy Col. C. Creasy's Colonial Constitutions.
Creasy Int. L. Creasy on International Law.
Cress. Ins. Cas. or *Cresswo. Ins. Cas.* Cresswell's English Insolvency Cases.
Crim. Con. Criminal Conversation, Adultery.
Crim. L. Mag. or *Crim. Law Mag.* Criminal Law Magazine, Jersey City, New Jersey.
Crim. L. Rec. Criminal Law Recorder.
Crim. L. Rep. Criminal Law Reporter.
Crim. Rec. Criminal Recorder, Philadelphia,—Criminal Recorder, London;—Criminal Recorder, vol. 1 Wheeler's New York Criminal Reports.
Cripp Ch. Cas. or *Cripp's Ch. Cas.* Cripp's Church Cases.
Cripp Ecc. L. Cripp's Ecclesiastical Law.
Critch. Critchfield's Reports, vols. 5-21 Ohio State.

Cro. Croke's English King's Bench Reports;—Keilway's English King's Bench Reports by Serj. Croke.
Cro. Car. Croke's Reports *temp.* Charles I. (3 Cro.).
Cro. Eliz. Croke's Reports *temp.* Elizabeth (1 Cro.).
Cro. Jac. Croke's English King's Bench Reports *tempore* James (Jacobus) I. (2 Cro.).
Crock. Notes. Crocker's Notes on Common Forms.
Crock. Sher. Crocker on Sheriffs.
Crockford. English Maritime Law Reports, published by Crockford.
Cromp. Star Chamber Cases by Crompton.
Cromp. Cts. Crompton on Courts.
Cromp. Exch. R. Crompton's Exchequer Reports, English.
Cromp. J. C. or *Cromp. Jur.* Crompton's Jurisdiction of Courts.
Cromp. M. & R. Crompton, Meeson and Roscoe's Reports, English Exchequer.
Cromp. R. & C. Pr. Crompton's Rules and Cases of Practice.
Cromp. & J. or *Cromp. & Jerv.* Crompton and Jervis's Reports, English Exchequer.
Cromp. & M. or *Cromp. & Mees.* Crompton & Meeson's Reports, English Exchequer.
Crosw. Pat. Ca. Croswell's Patent Cases.
Cross Lien. Cross on Liens.
Crounse. Crounse's Reports, vol. 3 Nebraska.
Crown C. C. Crown Circuit Companion.
Crowth. or *Crowther (Ceylon).* Crowther's Ceylon Reports.
Cruise Dig. or *Cruise R. P.* Cruise's Digest of the Law of Real Property.
Cruise Titles. Cruise on Titles of Honor.
Cruise Uses. Cruise on Uses.
Crump Ins. or *Crump Mar. Ins.* Crump on Marine Insurance.
Crumrine. Crumrine's Reports, vols. 116-146 Pennsylvania.
Ct. App. N. Z. Court of Appeals Reports, New Zealand.
Ct. Cl. or *Ct. of Cl.* Court of Claims, United States.
Ct. of App. Court of Appeals.
Ct. of Err. Court of Error.
Ct. of Gen. Sess. Court of General Sessions.
Ct. of Sess. Court of Session.
Ct. of Spec. Sess. Court of Special Sessions.
Cujacius. Cujacius, Opera, quæ de Jure fecit, etc.
Cul. Culpabilis, Guilty.
Cull. B. L. Cullen's Bankrupt Law.
Cum. C. L. Cumin's Civil Law.
Cum. & Dun. Rem. Tr. Cummins & Dunphy's Remarkable Trials.
Cummins. Cummins's Reports, Idaho.
Cun. or *Cunn.* Cunningham's Reports, English King's Bench.
Cun. Bills of Ex. Cunningham on Bills of Exchange.
Cun. Dict. Cunningham's Dictionary.
Cunn. or *Cunningham.* Cunningham's English Bench Reports.
Cur. Curtis' United States Circuit Court Reports;—Curia.
Cur. Adv. Vult. Curia Advisare Vult.
Cur. Can. Cursus Cancellariæ.
Cur. Com. Current Comment and Legal Miscellany.
Cur. Dec. Curtis's Decisions, United States Supreme Court.
Cur. Ov. Ca. Curwen's Overruled Cases, Ohio.
Cur. Phil. Curia Philippica.
Cur. Scacc. Currus Scaccarii.
Current Com. Current Comment and Legal Miscellany.
Curry. Curry's Reports, Louisiana Reports, vols. 6-19.
Curt. Curtis' United States Circuit Court Reports;—Curteis' English Ecclesiastical Reports.
Curt. Adm. Dig. Curtis' Admiralty Digest.
Curt. C. C. Curtis' United States Circuit Court Decisions.
Curt. Com. Curtis' Commentaries.
Curt. Cond. Curtis' (Condensed) Decisions, United States Supreme Court.
Curt. Cop. Curtis on Copyrights.
Curt. Dec. Curtis' United States Supreme Court Decisions.
Curt. Dig. Curtis' Digest, United States.
Curt. Ecc. Curteis' English Ecclesiastical Reports.
Curt. Eq. Prec. Curtis' Equity Precedents.
Curt. Jur. Curtis on the Jurisdiction of the U. S. Courts.
Curt. Mer. S. Curtis on Merchant Seamen.
Curt. Pat. Curtis on Patents.
Curtis. Curtis' United States Circuit Court Reports.
Curw. Curwen's Overruled Cases;—Curwen's Statutes of Ohio.
Curw. Abs. Tit. Curwen on Abstracts of Title.
Curw. L. O. Curwen's Laws of Ohio 1854, 1 vol.
Curw. R. S. Curwen's Revised Statutes of Ohio.
Cush. Cushing's Massachusetts Reports;—Cushman's Mississippi Reports.
Cush. Elec. Cas. Cushing's Election Cases in Massachusetts.
Cush. Man. Cushing's Manual.
Cush. Parl. L. Cushing's Parliamentary Law.
Cush. Trust. Pr. Cushing on Trustee Process, or Foreign Attachment.
Cushing. Cushing's Massachusetts Reports.
Cushm. or *Cushman.* Cushman's Reports, Mississippi Reports, vols. 23-29.
Cust. de Norm. Custome de Normandie.
Cust. Rep. Custer's Ecclesiastical Reports.
Cutl. Cutler on Naturalization.
Cutl. Ins. L. Cutler's Insolvent Laws of Massachusetts.
Cut. Pat. Cas. Cutler's Trademark and Patent Cases, 11 vols.
Cyc. Cyclopædia of Law and Procedure.
D. Decree. Décret. Dictum;—Digest, particularly the Digest of Justinian;—Dictionary, particularly Morison's Dictionary of the Law of Scotland;—Delaware;—Dallas's United States and Pennsylvania Reports;—Denio's Reports, New York;—Dunlop, Bell & Murray's Reports, Scotch Session Cases (Second Series);—Digest of Justinian, 50 books, never been translated into English;—Disney, Ohio;—Divisional Court;—Dowling, English;—Dominion of Canada.
D. B. Domesday Book.
D. C. District Court. District of Columbia.
D. C. L. Doctor of the Civil Law.
D. Chip. D. Chipman's Reports, Vermont.
D. Dec. Dix's School Decisions, New York.
D. F. & J. De Gex, Fisher, and Jones's Reports, English Chancery.
D. G. De Gex;—De Gex's English Bankruptcy Reports.
D. G. F. & J. De Gex, Fisher, & Jones's English Chancery Reports.
D. G. F. & J. B. De Gex, Fisher, & Jones's English Bankruptcy Reports.
D. G. J. & S. De Gex, Jones & Smith's English Chancery Reports.
D. G. J. & S. B. De Gex, Jones & Smith's English Bankruptcy Reports.
D. G. M. & G. De Gex, Macnaghten, & Gordon's English Chancery Reports.
D. G. M. & G. B. De Gex, Macnaghten, & Gordon's English Bankruptcy Reports.
D. J. & S. De Gex, Jones, and Smith's Reports, English Chancery.
D. M. & G. De Gex, Macnaghten, and Gordon's Reports, English Chancery.
D. N. S. Dowling's Reports, New Series, English Bail Court;—Dow, New Series (Dow & Clark, English House of Lords Cases);—Dowling's Practice Cases, New Series, English.
D. P. Domus Procerum, House of Lords.
D. P. B. Dampier Paper Book. See *A. P. B.*
D. P. C. Dowling's Practice Cases, Old Series.
D. Pr. Darling's Practice, Court of Session.
D. S. Deputy Sheriff.
D. S. B. Debit sans breve.
D. & B. or *D. & B. C. C.* Dearsly & Bell's English Crown Cases, Reserved.

D. & C. Dow and Clark's English House of Lords (Parliamentary Cases).

D. & C. or *D. & Ch.* or *D. & Chit.* Deacon and Chitty's Bankruptcy Cases, English.

D. & E. Durnford and East, English King's Bench Term Reports.

D. & J. De Gex and Jones's Reports, English Chancery.

D. & J. B. De Gex and Jones's English Bankruptcy Reports.

D. & L. Dowling and Lowndes's English Bail Court Reports.

D. & M. Davison and Merivale's Reports, English Queen's Bench.

D. & P. Dennison and Pearce's Crown Cases, English.

D. & R. Dowling and Ryland's Reports, English King's Bench.

D. & R. M. C. Dowling and Ryland's Magistrate Cases.

D. & R. N. P. or *D. & R. N. P. C.* Dowling & Ryland's English Nisi Prius Cases.

D. & S. Drewry & Smale's Chancery Reports;—Doctor and Student;—Deane and Swabey.

D. & Sm. Drew and Smale's English V. C. Reports.

D. & Sw. Deane and Swabey, English Ecclesiastical Reports.

D. & W. Drury & Walsh's Irish Chancery Reports;—Drury & Warren's Irish Chancery Reports.

D. & War. Drury and Warren's Reports, Irish Chancery.

Dag. Cr. L. Dagge's Criminal Law.

Dak. Dakota;—Dakota Territory Reports.

Dal. Dallas's United States Reports;—Dalison's English Common Pleas Reports (bound with Benloe);—Dalrymple's Scotch Session Cases.

Dal. Coop. Dallas's Report of Cooper's Opinion on the Sentence of a Foreign Court of Admiralty.

Dale. Dale's Reports, vols. 2-4 Oklahoma.

Dale Ecc. Dale's Ecclesiastical Reports, English.

Dale Leg. Rit. Dale's Legal Ritual (Ecclesiastical) Reports.

Dalison. Dalison's English Common Pleas Reports (bound with Benloe).

Dall. Dallas's Reports, U. S. Supreme Court and Pennsylvania Courts.

Dall. Dec. or *Dall. Dig.* Dallam's Texas Decisions, printed originally in Dallam's Digest.

Dall. L. Dallas's Laws of Pennsylvania.

Dall. in Keil. Dallison in Keilway's Reports, English King's Bench.

Dall. S. C. Dallas's United States Supreme Court Reports.

Dall. Sty. Dallas's Styles, Scotland.

Dall. (Tex.). Dallam's Texas Reports.

Dall. Tex. Dig. Dallam's Texas Digest.

Dallam. Dallam's Decisions, Texas Supreme Court

Dallas. Dallas's Pennsylvania and United States Reports.

Dalloz. Dictionnaire général et raisonné de législation, de doctrine, et de jurisprudence, en matière civile, commerciale, criminelle, administrative, et de droit public.

Dalr. Dalrymple's Decisions, Scotch Court of Session;—(Dalrymple of) Stair's Decisions, Scotch Court of Session;—(Dalrymple of) Hailes's Scotch Session Cases.

Dalr. Ent. Dalrymple on the Polity of Entails.

Dalr. F. L. or *Dalr. Feud. Pr.* or *Dalr. Feud. Prop.* Dalrymple on Feudal Property.

Dalr. Ten. Dalrymple on Tenures.

Dalrymple. (Sir Hew) Dalrymple's Scotch Session Cases;—(Sir David Dalrymple of) Hailes's Scotch Session Cases;—(Sir James Dalrymple of) Stair's Scotch Session Cases. See, also, Dal. and Dalr.

Dalt. Just. Dalton's Justice.

Dalt. Sh. Dalton's Sheriff.

Daly. Daly's Reports, New York Common Pleas.

Dampier MSS. Dampier's Paper Book, Lincoln's Inn Library.

D'An. D'Anvers's Abridgment.

Dan. Daniell's Exchequer and Equity Reports;—Dana's Kentucky Reports;—Danner's Reports, vol. 42 Alabama.

Dan. Ch. Pr. Daniel's Chancery Practice.

Dan. Neg. Inst. Daniel's Negotiable Instruments.

Dan. Ord. Danish Ordinance.

Dan. T. M. Daniels on Trademarks.

Dan. & Ll. or *Dan. & Lld.* Danson & Lloyd's Mercantile Cases.

Dana. Dana's Reports, Kentucky.

Dane Abr. Dane's Abridgment.

Daniel, Neg. Inst. Daniel's Negotiable Instruments.

Daniell, Ch. Pr. Daniell's Chancery Practice.

Dann. Dann's Arizona Reports;—Danner's Reports, vol. 42 Alabama;—Dann's California Reports.

Danner. Danner's Reports, Alabama Reports, vol. 42.

Dans. & L. or *Dans. & Lld.* Danson & Lloyd's English Mercantile Cases.

D'Anv. Abr. D'Anvers's Abridgment.

Darb. & B. Darby & Bosanquet on Limitations.

Darl. Pr. Ct. Sess. Darling, Practice of the Court of Session (Scotch).

Dart. Col. Cas. Report of Dartmouth College Case.

Dart Vend. Dart on Vendors and Purchasers.

Das. Dasent's Bankruptcy and Insolvency Reports;—Common Law Reports, vol. 3.

Dass. Dig. Dassler's Digest Kansas Reports.

Dauph. Co. Rep. Dauphin County Reporter, Pennsylvania.

Dav. Daveis's United States District Court Reports (now republished as 2 Ware);—Davy's or Davies's Irish King's Bench and Exchequer Reports;—Davies's English Patent Cases;—Davis's Reports (Abridgment of Sir Edward Coke's Reports);—Davis's Reports, vol. 2 Hawaii;—Davis's United States Supreme Court Reports.

Dav. Coke. Davis's Abridgment of Coke's Reports.

Dav. Con. or *Dav. Conv.* Davidson's Conveyancing.

Dav. Dig. Davis's Indiana Digest.

Dav. Eng. Ch. Can. Davis's English Church Canon.

Dav. Ir. or *Dav. Ir. K. B.* Davies's Reports, Irish King's Bench.

Dav. Jus. Davis's Justice of the Peace.

Dav. Pat. Cas. Davies's Patent Cases, English Courts.

Dav. Prec. or *Dav. Prec. Conv.* Davidson's Precedents in Conveyancing.

Dav. Rep. Davies's (Sir John) Reports, King's Bench, Ireland.

Dav. (U. S.). Daveis's Reports, U. S. Dist. of Maine (2d Ware).

Dav. & M. or *Dav. & Mer.* Davison & Merivale's Reports, English Queen's Bench.

Daveis. Daveis's United States District Court Reports (republished as 2 Ware).

Davidson. Davidson's Reports, vols. 92-111 North Carolina.

Davies. Davies's (or Davis's or Davys's) Irish King's Bench Reports.

Davis. Davis's Hawaiian Reports;—Davies's (or Davys's) Irish King's Bench Reports;—Davis's Reports, vols. 108-176 United States Supreme Court.

Davis (J. C. B.). Davis's United States Supreme Court Reports.

Davis Bldg. Soc. or *Davis Build.* Davis's Law of Building Societies.

Davis Rep. Davis's Reports, Sandwich Island.

Daw. Arr. Dawe on the Law of Arrest in Civil Cases.

Daw. Land. Pr. Dawe's Epitome of the Law of Landed Property.

Daw. Real Pr. Dawe's Introduction to the Knowledge of the Law on Real Estates.

Day. Day's Connecticut Reports;—Connecticut Reports, proper, reported by Day.

Day Elect. Cas. Day's Election Cases.

Day Pr. Day's Common Law Practice.

Dayt. Surr. Dayton on Surrogates.

Dayt. Term Rep. Dayton Term Reports, Dayton, Ohio.

De Bois. Halluc. De Boismont on Hallucinations.

De Burgh Mar. Int. L. De Burgh on Maritime International Law.

De Colyar's Quar. De Colyar's Law of Quarantine.

D'Ewes. D'Ewes's Journal and Parliamentary Collection.

De G. De Gex's Reports, English Bankruptcy.

De G. F. & J. De Gex, Fisher, & Jones' Reports, English Chancery.

De G. F. & J. B. App. or *De G. F. & J. By.* De Gex, Fisher, & Jones's Bankruptcy Appeals, English.

De G. J. & S. De Gex, Jones, & Smith's Reports, English Chancery.

De G. J. & S. Bankr. or *De G. J. & S. By.* De Gex, Jones, & Smith's Bankruptcy Appeals, English.

De G. M. & G. De Gex, Macnaghten, & Gordon's English Bankruptcy Reports;—De Gex, Macnaghten, & Gordon's English Chancery Reports.

De G. M. & G. Bankr. or *De G. M. & G. By.* De Gex, Macnaghten, & Gordon's Bankruptcy Appeals, English.

De G. & J. De Gex & Jones's Reports, English Chancery.

De G. & J. Bankr. or *De G. & J. By.* De Gex & Jones's English Bankruptcy Appeals.

De G. & Sm. De Gex & Smale's Reports, English Chancery.

De Gex. De Gex's English Bankruptcy Reports.

De Gex, M. & G. De Gex, Macnaghten & Gordon's Reports, English.

De H. M. L. or *De Hart, Mil. Law.* De Hart on Military Law.

De Jure Mar. Malloy's De Jure Maritimo.

De L. Const. De Lolme on the English Constitution.

Dea. Deady's United States District Court Reports.

Dea. & Chit. Deacon & Chitty's English Bankruptcy Reports.

Dea. & Sw. Deane & Swabey's Reports, English Ecclesiastical Courts;—Deane & Swabey's Reports, Probate and Divorce.

Deac. Deacon's Reports, English Bankruptcy.

Deac. Bankr. Deacon on Bankruptcy.

Deac. & C. or *Deac. & Chit.* Deacon & Chitty's English Bankruptcy Reports.

Deady. Deady's Reports, U. S. Dist. of Oregon.

Dean Med. Jur. Dean's Medical Jurisprudence.

Deane. Deane (& Swabey's) English Probate and Divorce Reports;—Deane's Reports vols. 24-26 Vermont.

Deane Conv. Deane's Conveyancing.

Deane Ecc. or *Deane Ecc. Rep.* Deane & Swabey's English Ecclesiastical Reports.

Deane N. Deane on Neutrals.

Deane & Sw. Deane & Swabey's English Ecclesiastical Reports.

Dears. or *Dears. C. C.* or *Dears. & B.* or *Dears. & B. C. C.* Dearsly's & Bell's English Crown Cases Reserved.

Deas & And. Deas & Anderson's Scotch Court of Session Cases.

Deb. Jud. Debates on the Judiciary.

Dec. Com. Pat. Decisions of the Commissioner of Patents.

Dec. Dig. American Digest, Decennial Edition.

Dec. Joint Com. Decisions of the Joint Commission.

Dec. O. Ohio Decisions.

Dec. t. H. & M. Decisions in Admiralty *tempore* Hay & Marriott.

Decen. Dig. American Digest, Decennial Edition.

Deft. Defendant.

Degge. Degge's Parson's Companion.

Del. Delaware; — Delaware Reports; — Delane's English Revision Cases.

Del. Ch. Delaware Chancery Reports, by Bates.

Del. Co. Delaware County Reports, Pennsylvania.

Del. Cr. Cas. Delaware Criminal Cases, by Houston.

Del. El. Cas. Delane's English Election (Revision) Cases.

Deleg. Court of Delegates.

Delehanty. Delehanty's New York Miscellaneous Reports.

De Lolme, Eng. Const. De Lolme on the English Constitution.

Dem. or *Dem. Surr.* Demarest's New York Surrogate Reports.

Demol. or *Demol. C. N.* Demolombe's Code Napoléon.

Den. Denio's New York Reports;—Denis's Reports, vols. 32-46 Louisiana Annual;—Denied.

Den. or *Denio.* Denio's Reports, New York.

Den. C. C. Denison's English Crown Cases.

Den. & P. Denison & Pearce's English Crown Cases, vol. 2 Denison.

Denio. Denio's New York Reports.

Denis. Denis's Reports, vols. 32-46 Louisiana.

Dens. Denslow's Notes to second edition, vols. 1-3 Michigan Reports.

Denver L. J. Denver Law Journal.

Denver L. N. Denver Legal News.

De Orat. Cicero, De Oratore.

Des., Dess., or *Dessaus.* or *Desaus. Eq.* Dessaussure's Reports, South Carolina.

Dest. Cal. Dig. Desty's California Digest.

Desty Com. & Nav. Desty on Commerce and Navigation.

Desty Fed. Const. Desty on the Federal Constitution.

Desty Fed. Proc. Desty's Federal Procedure.

Desty Sh. & Adm. Desty on Shipping and Admiralty.

Dev. Devereux's North Carolina Law Reports;—Devereux's Reports, United States Court of Claims.

Dev. C. C. or *Dev. Ct. Cl.* Devereux's Reports, United States Court of Claims.

Dev. Eq. Devereux's Equity Reports, North Carolina, vols. 16-17.

Dev. L. or *Dev. (N. C.).* Devereux's Law Reports, North Carolina, vols. 12-15.

Dev. & B. Eq. or *Dev. & Bat. Eq.* Devereux & Battle's Equity Reports, North Carolina.

Dev. & B. L. or *Dev. & Bat.* Devereux & Battle's Law Reports, North Carolina.

Dew. Dewey's Reports, vols. 60-70 Kansas;—Dewey's Kansas Court of Appeals Reports.

De Witt. De Witt's Reports, vols. 24-42 Ohio State.

Di. or *Dy.* Dyer's English Reports, King's Bench.

Dial. de Scac. Dialogus de Scaccario.

Dibb F. Dibb's Forms of Memorials.

Dice (Ind.). Dice's Reports, vols. 71-99 Indiana.

Dicey, Const. Dicey, Lectures Introductory to the Study of the Law of the English Constitution.

Dicey Dom. Dicey on Domicil.

Dicey Part. Dicey on Parties to Actions.

Dick. Dickens's English Chancery Reports;—Dickinson's Reports, vols. 46-59 New Jersey Equity.

Dick. Ch. Prec. Dickinson's Chancery Precedents.

Dick. Pr. or *Dick. Qr. Sess.* Dickinson's Practice of the Quarter and other Sessions.

Dickson Ev. Dickson's Law of Evidence.

Dict. Dictionary.

Dig. Digest;—Digest of Justinian;—Digest of Writs.

Dig. Proem. Digest of Justinian, Proem.

Digby R. P. Digby on Real Property.

Dil. or *Dill.* Dillon's United States Circuit Court Reports.

Dill. Mun. Corp. Dillon on Municipal Corporations.

Dirl. Dirleton's Decisions, Scotch Court of Session.

Dis. or *Disn.* Disney's Superior Court Reports. Cincinnati, Ohio.

Disn. Gam. Disney's Law of Gaming.

Dist. Rep. District Reports.

Div. Division, Courts of the High Court of Justice.

Div. & Matr. C. Divorce and Matrimonial Causes Court.

Doct. Pl. Doctrina Placitanda.

Doct. & Stud. Doctor and Student.

Dod. or *Dods.* Dodson's English Admiralty Reports.

Dod. Adm. Dodson's Reports, English Admiralty Courts.

Dods. Dodson's Reports, English Admiralty Courts.

Dom. or *Domat.* Domat on Civil Law.

Dom. Book. Domesday Book.

Dom. Proc. Domus Procerum. In the House of Lords.

Domat. Domat on Civil Law.

Domat Supp. au Droit Public. Domat, Les Lois Civiles, Le Droit Public, etc. Augmentée des 3e et 4e livres du Droit Public, par M. de Hericourt, etc.

Domes. or *Domesd.* or *Domesday.* Domesday Book.

Donaker. Donaker's Reports, vol. 154 Indiana.

Donn. Donnelly's Reports, English Chancery;—Donnelly's Irish Land Cases.

Dor. Q. B. or *Dorion (Quebec).* Dorion's Quebec Queen's Bench Reports;—(Dec. de la Cour D'Appel).

Dos Passos, Stock-Brok. Dos Passos on Stock-Brokers and Stock Exchanges.

Doug. Douglas's Michigan Reports;—Douglas's English King's Bench Reports;—Douglas's English Election Cases.

Doug. El. Ca. or *Doug. El. Cas.* Douglas's English Election Cases.

Dow. Dow's House of Lords (Parliamentary) Cases, same as Dow's Reports;—Dowling's English Practice Cases.

Dow N. S. Dow & Clark's English House of Lords Cases.

Dow P. C. Dow's Parliamentary Cases;—Dowling's English Practice Cases.

Dow & C. Dow & Clark's English House of Lords Cases.

Dow. & L. Dowling & Lowndes's English Bail Court Reports.

Dow. & Ry. Dowling & Ryland's English King's Bench Reports;—Dowling & Ryland's English Nisi Prius Cases.

Dow. & Ry. M. C. Dowling & Ryland's English Magistrates' Cases.

Dow. & Ry. N. P. Dowling & Ryland's English Nisi Prius Cases. (Often bound at end of vol. 1 Dowling & Ryland's King's Bench Reports.)

Dowl. Dowling's English Bail Court (Practice) Cases.

Dowl. N. S. Dowling's English Bail Court Reports, New Series.

Dowl. P. C. or *Dowl. Pr. C.* Dowling's English Bail Court (Practice) Cases.

Dowl. Pr. C. N. S. Dowling's Reports, New Series, English Practice Cases.

Dowl. & L. or *Dowl. & Lownd.* Dowling & Lowndes's English Bail Court and Practice Cases.

Dowl. & R. or *Dowl. & Ry.* or *Dowl. & Ryl.* Dowling & Ryland's English King's Bench Reports.

Dowl. & Ry. M. C. or *Dowl. & Ryl. M. C.* Dowling & Ryland's Magistrate Cases, English.

Dowl. & Ry. N. P. or *Dowl. & Ryl. N. P.* Dowling & Ryland's Nisi Prius Cases, English.

Down. & Lud. Downton & Luder's Election Cases, English.

Dr. Drewry's English Vice Chancellor's Reports;—Drury's Irish Chancery Reports *tempore* Sugden;—Drury's Irish Chancery Reports *tempore* Napier.

Dr. R. t. Nap. Drury's Irish Chancery Reports *tempore* Napier.

Dr. R. t. Sug. Drury's Irish Chancery Reports *tempore* Sugden.

Dr. & Sm. Drewry & Smale's English Vice Chancellors' Reports.

Dr. & Wal. Drury & Walsh's Irish Chancery Reports.

Dr. & War. Drury & Warren's Irish Chancery Reports.

Drake Att. or *Drake Attachm.* Drake on Attachments.

Draper. Draper's Upper Canada King's Bench Reports, Ontario.

Drew. Drewry's English Vice Chancellors' Reports;—Drew's Reports, vol. 13 Florida.

Drew. Inj. Drewry on Injunctions.

Drew. & S. or *Drew. & Sm.* or *Drewry & Sm.* Drewry & Smale's Reports, English Chancery.

Drewry. Drewry's Reports, English Chancery.

Drewry T. M. Drewry on Trademarks.

Drink. or *Drinkw.* Drinkwater's English Common Pleas Reports.

Drone Copyr. Drone on Copyrights.

Dru. or *Drury.* Drury's Irish Chancery Reports *tempore* Sugden.

Dru. t. Nap. Drury's Irish Chancery Reports *tempore* Napier.

Drury t. Sug. Drury's Irish Chancery Reports *tempore* Sugden.

Dru. & Wal. Drury & Walsh's Irish Chancery Reports.

Dru. & War. Drury & Warren's Reports, Irish Chancery.

Du C. or *Du Cange.* Du Cange's Glossarium.

Duane Road L. Duane on Road Laws.

Dub. Dubitatur. Dubitante.

Dub. Rev. Dublin Review, Dublin, Ireland.

Dud. or *Dud. Ga.* Dudley's Reports, Georgia.

Dud. Ch. or *Dud. Eq. (S. C.).* Dudley's Equity Reports, South Carolina.

Dud. L. or *Dud. S. C.* Dudley's Law Reports, South Carolina.

Duer. Duer's Reports, New York Superior Court, vols. 8-13.

Duer Const. Duer's Constitutional Jurisprudence.

Duer Ins. Duer on Insurance.

Duer Mar. Ins. Duer on Marine Insurance.

Duer Repr. Duer on Representation.

Dufresne. Dufresne's [Law] Glossary.

Dugd. Orig. Dugdale's Originales Juridiciales.

Dugd. Sum. Dugdale's Summons.

Duke or *Duke Uses.* Duke on Charitable Uses.

Dun. Duncan (see Dunc.);—Dunlap (see Dunl.).

Dun. & Cum. Dunphy & Cummins's Remarkable Trials.

Dunc. Ent. Cas. Duncan's Scotch Entail Cases.

Dunc. N. P. Duncombe's Nisi Prius.

Duncan's Man. Duncan's Manual of Entail Procedure.

Dungl. Med. Dict. Dunglison, Dictionary of Medical Science and Literature.

Dunl. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62).

Dunl. Abr. Dunlap's Abridgment of Coke's Reports.

Dunl. Adm. Pr. Dunlop's Admiralty Practice.

Dunl. B. & M. Dunlop, Bell, & Murray's Reports, Scotch Court of Session (Second Series, 1838-62).

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Dunl. Pr. Dunlop's Practice.

Dunlop or *Dunl. B. & M.* Dunlop, Bell & Murray's Reports, Second Series, Scotch Session Cases.

Dunn. Dunning's English King's Bench Reports.

Duponc. Const. Duponceau on the Constitution.

Duponc. Jur. Duponceau on Jurisdiction.

Dur. Dr. Fr. Duranton's Droit Français.

Durf. (R. I.). Durfee's Reports, vol. 2 Rhode Island.

Durie or *Durie Sc.* Durie's Scottish Court of Session Cases.

Durn. & E. or *Durnf. & E.* Durnford & East's English King's Bench Reports (Term Reports).

Dutch. Dutcher's Reports, New Jersey Law.

Duv. Duvall's Kentucky Reports;—Duval's Reports, Canada Supreme Court.

Duv. (Can.). Duvall's Canada Supreme Court Reports.

Duval. Duval's Reports, Canada Supreme Court.

Dwar. Dwarris on Statutes.

Dwar. St. Dwarris on Statutes.

Dwight. Dwight's Charity Cases, English.

Dy. or *Dyer.* Dyer's English King's Bench Reports.

E. Easter Term. King Edward;—East's Reports, English King's Bench.

E. B. Ecclesiastical Compensations or "Bots."

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E. B. & S. (Ellis) Best & Smith's English Queen's Bench Reports.

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E. E. R. English Ecclesiastical Reports.
E. I. Ecclesiastical Institutes.
E. I. C. East India Company.
E. L. & Eq. English Law and Equity Reports.
E. of Cov. Earl of Coventry's Case.
E. P. C. East's Pleas of the Crown.
E. R. East's King's Bench Reports;—Election Reports.
E. R. C. English Ruling Cases.
E. T. Easter Term.
E. & A. Ecclesiastical and Admiralty;—Error and Appeal;—Spink's Ecclesiastical and Admiralty Reports;—Upper Canada Error and Appeal Reports.
E. & A. R. Error and Appeal Reports, Ontario.
E. & A. W. C. Grant's Error and Appeal Reports, Ontario.
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E. & E. Ellis & Ellis's Reports, English Queen's Bench.
E. & I. English and Irish Appeals, House of Lords.
E. & Y. Eagle & Younge's English Tithe Cases.
Ea. East's English King's Bench Reports.
Eag. T. Eagle's Commutation of Tithes.
Eag. & Yo. Eagle & Younge's English Tithe Cases.
East. East's King's Bench Reports;—East's Notes of Cases in Morley's Indian Digest;—Eastern Reporter.
East N. of C. East's Notes of Cases (in Morley's East Indian Digest).
East, P. C. or *East, Pl. Cr.* East's Pleas of the Crown.
East. Rep. Eastern Reporter.
East's N. of C. East's Notes of Cases, India.
Ebersole. Ebersole's Reports, vols. 59-80 Iowa.
Ec. & Ad. Spink's Ecclesiastical and Admiralty Reports.
Eccl. Ecclesiastical.
Eccl. Law. Ecclesiastical Law.
Eccl. R. or *Eccl. Rep.* English Ecclesiastical Reports.
Eccl. Stat. Ecclesiastical Statutes.
Eccl. & Ad. Ecclesiastical and Admiralty;—Spink's Ecclesiastical and Admiralty Reports.
Ed. Edition. Edited. King Edward;—Eden's English Chancery Reports.
Ed. Bro. Eden's edition of Brown's English Chancery Reports.
Ed. Cr. Edwards's New York Chancery Reports.
Ed. et Ord. Edits et Ordonnances (Lower Canada).
Eden. Eden's Reports, High Court of Chancery, England.
Eden B. L. or *Eden, Bankr.* Eden's Bankrupt Law.
Eden Inj. Eden on Injunctions.
Eden Pen. L. Eden's Penal Law.
Edg. Edgar's Reports, Scotch Court of Session.
Edg. C. Canons enacted under King Edgar.
Edict. Edicts of Justinian.
Edin. L. J. or *Edinb. L. J.* Edinburgh Law Journal.
Edm. Exch. Pr. Edmund's Exchequer Practice.
Edm. Sel. Cas. Edmonds's Select Cases, New York.
Edw. Edwards's New York Chancery Reports;—Edwards's English Admiralty Reports;—Edwards's Reports, vols. 2, 3 Missouri;—King Edward; thus 1 Edw. I. signifies the first year of the reign of King Edward I.
Edw. Abr. Edwards's Abridgment of Cases in Privy Council;—Edwards's Abridgment of Prerogative Court Cases.
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Edw. Bail. Edwards on Bailments.
Edw. Bill. Edwards on Bills.
Edw. Ch. Edwards's Chancery Reports, New York.
Edw. Jur. Edwards's Juryman's Guide.
Edw. Lead. Dec. Edwards's Leading Decisions in Admiralty; Edwards's Admiralty Reports.
Edw. (Mo.). Edwards's Reports, Missouri.
Edw. Part. Edwards on Parties to Bills in Chancery.
Edw. Pr. Cas. Edwards's Prize Cases (English Admiralty Reports).
Edw. Pr. Ct. Cas. Edwards's Abridgment of Prerogative Court Cases.
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Edw. St. Act. Edwards on the Stamp Act.
Edw. (Tho.). Edwards's English Admiralty Reports.
Efird. Efird's Reports, vols. 45-61 South Carolina.
Eir. Lambert's Eirenarcha.
El. Queen Elizabeth;—Elchies's Decisions, Scotch Court of Session.
El. B. & E. Ellis, Blackburn, & Ellis's Reports, English Queen's Bench.
El. B. & S. Ellis, Best, & Smith's Reports, English Queen's Bench.
El. Cas. Election Cases.
El. Dict. Elchies's Dictionary of Decisions, Court of Session, Scotland.
El. & B. or *El. & Bl.* Ellis & Blackburn's Reports, English Queen's Bench.
El. & El. Ellis & Ellis's Reports, English Queen's Bench.
Elchie. or *Elchies's Dict.* Elchies's Dictionary of Decisions, Scotch Court of Session.
Elec. Cas. N. Y. New York Election Cases (Armstrong's).
Eliz. Queen Elizabeth.
Ell. Bl. & Ell. Ellis, Blackburn, & Ellis's English Queen's Bench Reports.
Ell. Deb. Ellis's Debates.
Ell. Dig. Minn. Eller's Digest, Minnesota Reports.
Ell. D. & Cr. Ellis on Debtor and Creditor.
Ell. Ins. Ellis on Insurance.
Ell. & Bl. Ellis & Blackburn's English Queen's Bench Reports.
Ell. & Ell. Ellis & Ellis's English Queen's Bench Reports.
Ellesm. Post N. Ellesmere's Post Nati.
Elliott, App. Proc. Elliott's Appellate Procedure.
Elm. Dig. Elmer's Digest, New Jersey.
Elm. Dilap. Elmes on Ecclesiastical and Civil Dilapidation.
Elmer, Lun. Elmer's Practice in Lunacy.
Els. W. Bl. Elsley's Edition of Wm. Blackstone's English King's Bench Reports.
Elsyn. Parl. Elsynge on Parliaments.
Elt. Ten. of Kent. Elton's Tenures of Kent.
Elton, Com. Elton on Commons and Waste Lands.
Elton, Copyh. Elton on Copyholds.
Elw. Med. Jur. Elwell's Medical Jurisprudence.
Emer. Ins. Emerigon on Insurance.
Emer. Mar. Loans or *Emerig. Mar. Loans.* Emerigon on Maritime Loans.
Emerig. Tr. des Ass. or *Emerig. Traite des Assur.* Emerigon, Traite des Assurances.
Enc. Encyclopædia.
Enc. Brit. Encyclopædia Britannica.
Enc. Forms. Encyclopædia of Forms.
Enc. Pl. & Pr. or *Encyc. Pl. & Pr.* Encyclopædia of Pleading and Practice.
Ency. Law. American and English Encyclopædia of Law.
Encyc. Encyclopædia.
Encyc. Pl. & Pr. Encyclopædia of Pleading & Practice.
Encycl. Encyclopædia.
Eng. English;—English's Reports, vols. 6-13 Arkansas;—English Reports by N. C. Moak.
Eng. Ad. English Admiralty;—English Admiralty Reports.
Eng. Adm. R. English Admiralty Reports.
Eng. C. C., or *Eng. Cr. Cas.* English Crown Cases (American reprint).
Eng. Ch. English Chancery;—English Chancery Reports;—Condensed English Chancery Reports.
Eng. C. L. or *Eng. Com. L. R.* English Common-Law Reports.
Eng. Ecc. R. English Ecclesiastical Reports.
Eng. Eccl. English Ecclesiastical Reports.
Eng. Exch. English Exchequer Reports.
Eng. Ir. App. English Law Reports, English and Irish Appeal Cases.
Eng. Jud. or *Eng. Judg.* Scotch Court of Session Cases, decided by the English Judges.
Eng. L. & Eq. or *Eng. L. & Eq. R.* English Law and Equity Reports.
Eng. Plead. English Pleader.
Eng. R. & C. Cas. English Railroad and Canal Cases.

Eng. Re. English Reports, Full Reprint.
Eng. Rep. Moak's English Reports;—English's Reports, vols. 6-13 Arkansas;—English Reports.
Eng. Rep. R. English Reports, Full Reprint.
Eng. Ru. Ca. English Ruling Cases.
Eng. Ry. & C. Cas. English Railway and Canal Cases.
Eng. Sc. Eccs. English and Scotch Ecclesiastical Reports.
Eng. & Ir. App. Law Reports, English and Irish Appeal Cases.
English. English's Reports, vols. 6-13 Arkansas.
Ent. Coke's Entries;—Rastell's Entries.
Entries, Ancient. Rastell's Entries (cited in Rolle's Abridgment).
Entries, New Book of. Sometimes refers to Rastell's Entries, and sometimes to Coke's Entries.
Entries, Old Book of. Liber Intrationum.
Eod. Eodem.
Eq. Equity.
Eq. Ab. or *Eq. Ca. Abr.* Equity Cases Abridged.
Eq. Cas. Equity Cases, vol. 9, Modern Reports.
Eq. Cas. Abr. Equity Cases Abridged (English).
Eq. Draft. Equity Draftsman (Hughes's).
Eq. Judg. Equity Judgments (by A'Beckett) New South Wales.
Eq. Rep. Equity Reports;—Gilbert's Equity Reports;—Harper's South Carolina Equity Reports;—Equity Reports, English Chancery and Appeals from Colonial Courts, printed by Spottiswoode.
Err. & App. Error and Appeals Reports, Upper Canada.
Ersk. Erskine's Institutes of the Law of Scotland;—Erskine's Principles of the Law of Scotland.
Ersk. Dec. Erskine's United States Circuit Court, etc., Decisions, in vol. 35 Georgia.
Ersk. Inst. Erskine's Institutes of the Law of Scotland.
Erskine, Inst. Erskine's Institutes of the Law of Scotland.
Ersk. Prin. Erskine's Principles of the Law of Scotland.
Escriche or *Escriche, Dic. Leg.* Escriche, Diccionario Razonado de Legislacion y Jurisprudencia.
Esp. or *Esp. N. P.* Espinasse's English Nisi Prius Reports.
Esp. Ev. Espinasse on Evidence.
Esp. N. P. Espinasse's Nisi Prius Law.
Esp. Pen. Ev. Espinasse on Penal Evidence.
Esprit des Lois. Montesquieu, Esprit des Lois.
Esq. Esquire.
Et al. Et alii, and others.
Eth. Nic. Aristotle, Nicomachean Ethics.
Euer. Euer's Doctrina Placitandi.
Eunom. Wynne's Eunomus.
Europ. Arb. European Arbitration, Lord Westbury's Decisions.
Ev. Evidence.
Ev. Tr. Evans's Trial.
Evans. Evans's Reports, Washington Territory.
Evans Ag. Evans on Agency.
Evans Pl. Evans on Pleading.
Evans Pothier. Evans's Pothier on Obligations.
Evans R. L. Evans's Road Laws of South Carolina.
Evans Stat. Evans's Collection of Statutes.
Evans Tr. Evans's Trial.
Ewell Fixt. Ewell on Fixtures.
Ewell Lead. Cas. Ewell's Leading Cases on Infancy, etc.
Ewell's Evans Ag. Ewell's Evans on Agency.
Ew. & H. Dig. (Minn.). Ewell and Hamilton's Digest, Minnesota Reports.
Ex. Exchequer Reports, English.
Ex. or *Exr.* Executor.
Ex. C. R. Exchequer Court of Canada Reports.
Ex. Com. Extravagantes Communes.
Ex. D. or *Ex. Div.* Exchequer Division, English Law Reports.
Exam. The Examiner.
Exch. Exchequer;—Exchequer Reports (Welsby, Hurlstone, & Gordon);—English Law Reports, Exchequer;—English Exchequer Reports.
Exch. Can. Exchequer Reports, Canada.
Exch. Cas. Exchequer Cases (Legacy Duties, etc.), Scotland.
Exch. Chamb. Exchequer Chamber.
Exch. Div. Exchequer Division, English Law Reports.
Exch. Rep. Exchequer Reports.
Exec. Execution. Executor.
Exp. Ex parte. Expired.
Expl. Explained.
Ex rel. Ex relatione.
Ext. Extended.
Exton Mar. Dicael. Exton's Maritime Dicaelogie.
Eyre. Eyre's Reports, English King's Bench, *temp.* William III.
F. Federal Reporter;—Fitzherbert's Abridgment;—Finalls;—Consuetudines Feudorum;—Fitzherbert's Abridgment.
F. Abr. Fitzherbert's Abridgment is commonly referred to by the other law writers by the title and number of the placita only, e. g. "coron, 30."
F. B. C. Fonblanque's Bankruptcy Cases.
F. B. R. Full Bench Rulings, Bengal.
F. B. R. N. W. P. Full Bench Rulings, Northwest Provinces, India.
F. C. Faculty of Advocates Collection, Scotch Court of Session Cases;—Federal Cases.
F. C. R. Fearne on Contingent Remainders.
F. Dict. Kames and Woodhouselee's Dictionary, Scotch Court of Session Cases.
F. N. B. Fitzherbert's Natura Brevium.
F. R. Forum Romanorum;—Federal Reporter.
F. & F. Foster and Finlason's Reports, English Nisi Prius.
F. & Fitz. Falconer and Fitzherbert's English Election Cases.
F. & J. Bank. De Gex. Fisher & Jones' English Bankruptcy Reports.
F. & S. Fox and Smith's Reports, Irish King's Bench.
F. & W. Pr. Freud and Ward's Precedents.
Fac. Col. Faculty of Advocates Collection, Scotch Court of Session Cases.
Fairf. or *Fairfield.* Fairfield's Reports, vols. 10-12 Maine.
Falc. Falconer's Reports, Scotch Court of Session.
Falc. & Fitz. Falconer and Fitzherbert's English Election Cases.
Fam. Cas. Cir. Ev. Famous Cases of Circumstantial Evidence, by Phillips.
Far. Farresley's Reports, English King's Bench, Modern Reports, vol. 7.
Far. or *Farr.* Farresley (see Farresley).
Farr Med. Jur. Farr's Elements of Medical Jurisprudence.
Farresley. Farresley's Reports, vol. 7 Modern Reports;—Farresley's Cases in Holt's King's Bench Reports.
Farw. Pow. Farwell on Powers.
Faw. L. & T. Fawcett's Landlord and Tenant.
Fearne Rem. Fearne on Contingent Remainders.
Fed. The Federalist;—Federal Reporter.
Fed. Ca. or *Fed. Cas.* Federal Cases.
Fed. Cas. No. Federal Case Number.
Fed. R. or *Fed. Rep.* The Federal Reporter, all U. S. C. C. & D. C. and C. C. A. Cases, St. Paul, Minn. District, Circuit and Circuit Court of Appeals Reports.
Fell Guar. Fell on Mercantile Guarantees.
Fent. (New Zealand). Fenton's New Zealand Reports.
Fent. Imp. Judg. Fenton's Important Judgments, New Zealand.
Fent. N. Z. Fenton's New Zealand Reports.
Fer. Fixt. or *Ferard, Fixt.* Amos and Ferard on Fixtures.
Ferg. or *Ferg. Cons.* Fergusson's Reports, Scotch Consistorial Court.
Ferg. M. & D. Fergusson on Marriage and Divorce.
Ferg. Proc. Ferguson's Common Law Procedure Acts, Ireland.
Ferg. Ry. Cas. Ferguson's Five Years' Railway Cases.
Fergusson. (Fergusson of) Kilgerran's Scotch Session Cases.

Fern. Dec. Decretos del Fernando, Mexico.
Ferr. Hist. Civ. L. Ferriere's History of the Civil Law.
Ferr. Mod. Ferriere's Dictionnaire de Droit et de Pratique.
Ferriere. Ferriere's Dictionnaire de Droit et de Pratique.
Fess. Pat. or *Fessen, Pat.* Fessenden on Patents.
Feud. Lib. The Book of Feuds. See this dictionary, *s. v.* "Liber Feudorum."
Ff. Pandectæ (Juris Civilis);—Pandects of Justinian.
Fi. fa. Fieri facias.
Field Com. Law. Field on the Common Law of England.
Field Corp. Field on Corporations.
Field Ev. Field's Law of Evidence, India.
Field Int. Code. Field's International Code.
Field Pen. L. Field's Penal Law.
Fil. Filiger's Writs.
Fin. Finch's English Chancery Reports;—Finlason (see Finl.).
Fin. Law. Finch's Law.
Fin. Pr. Finch's Precedents in Chancery.
Fin. Ren. Finlay on Renewals.
Finch. English Chancery Reports *tempore* Finch.
Finch Cas. Cont. Finch's Cases on Contract.
Finch Ins. Dig. Finch's Insurance Digest.
Finch L. C. Finch's Land Cases.
Finl. Dig. Finlay's Digest and Cases, Ireland.
Finl. L. C. Finlason's Leading Cases on Pleading, etc.
Finl. Mart. L. Finlason on Martial Law.
Finl. Rep. Finlason's Report of the Gurney Case.
Finl. Ten. Finlason on Land Tenures.
First pt. Edw. III. Part II of the Year Books.
First pt. H. VI. Part VII of the Year Books.
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Fish. Cas. Fisher's Cases, United States District Courts.
Fish. Cop. Fisher on Copyrights.
Fish. Dig. Fisher's Digest, English Reports.
Fish. Mort. or *Fish. Mortg.* Fisher on Mortgages.
Fish. Pat. or *Fish. Pat. Cas.* Fisher's United States Patent Cases.
Fish. Pat. Rep. Fisher's Patent Reports, U. S. Supreme and Circuit Courts.
Fish. Pr. Cas. or *Fish. Prize.* Fisher's Prize Cases, U. S. Courts, Penna.
Fitz. or *Fitz. Abr.* Fitzherbert's Abridgment (see F. & Fitz.).
Fitz. N. B. Fitzherbert's Natura Brevium.
Fitzg. Fitzgibbon's English King's Bench Reports.
Fitzh. Abr. Fitzherbert's Abridgment.
Fitzh. N. B. or *Fitzh. Nat. Brev.* Fitzherbert's New Natura Brevium.
Fl. Fleta;—Flanders (see Fland.);—*Commentarius Juris Anglicani.*
Fl. & K. or *Fl. & Kel.* Flanagan & Kelly's Irish Rolls Court Reports.
Fla. Florida;—Florida Reports.
Flan. & K. or *Flan. & Kel.* Flanagan and Kelly's Reports, Irish Rolls Court.
Fland. Ch. J. Flanders's Lives of the Chief Justices.
Fland. Const. Flanders on the Constitution.
Fland. Fire Ins. Flanders on Fire Insurance.
Fland. Mar. L. Flanders on Maritime Law.
Fland. Ship. Flanders on Shipping.
Fleta. Fleta, Commentarius Juris Anglicani.
Flip. or *Flipp.* Flippin's United States Circuit Court Reports.
Flor. Florida;—Florida Reports.
Foelix Dr. Int. Foelix's Droit International Privé.
Fogg. Fogg's Reports, vols. 32-37 New Hampshire.
Fol. Folio;—Foley's Poor Laws and Decisions, English.
Fol. Dict. Kames and Woodhouslee's Dictionary, Scotch Court of Session Cases.
Foley Poor L. Foley's Poor Laws and Decisions, English.
Folw. Laws. Folwell's Laws of the United States.
Fono. Eq. Fonblanque's Equity.
Fonb. Med. Jur. Fonblanque on Medical Jurisprudence.
Fonb. N. R. Fonblanque's New Reports, English Bankruptcy.
Fonbl. Fonblanque's Equity;—Fonblanque on Medical Jurisprudence;—Fonblanque's New Reports, English Bankruptcy.
Fonbl. Eq. Fonblanque's Equity.
Fonbl. R. Fonblanque's English Cases (or New Reports) in Bankruptcy.
Foote Int. Jur. Foote on Private International Jurisprudence.
For. Forrest's Exchequer Reports;—Forrester's Chancery Reports (Cases *tempore* Talbot).
For. Cas. & Op. Forsyth's Cases and Opinions.
For. de Laud. Fortescue's de Laudibus Legum Angliæ.
For. Pla. Brown's Formulæ Placitandi.
Foran C. C. P. Q. Foran's Code of Civil Procedure, Quebec.
Forb. Forbes's Decisions, Scotch Court of Session.
Forb. Inst. Forbes's Institutes of the Law of Scotland.
Form. Forman's Reports, Illinois.
Forman. Forman's Reports, Illinois.
Form. Pla. Brown's Formulæ Placitandi.
Forr. or *Forrest.* Forrest's English Exchequer Reports;—Forrester's English Chancery Cases (commonly cited, Cases *tempore* Talbot).
For. Cas. & Op. or *Fors. Cas. & Op.* Forsyth's Cases and Opinions on Constitutional Law.
Fors. Comp. Forsyth's Composition with Creditors.
Fors. His. Forsyth's History of Trial by Jury.
Fors. Trial by Jury. Forsyth's History of Trial by Jury.
Fort. or *Fortes.* Fortescue's English King's Bench Reports.
Fortes. de Laud. *Fortescue de Laudibus Legum Angliæ.*
Forum. The Forum, by David Paul Brown;—Forum (periodical). Baltimore and New York.
Forum L. R. Forum Law Review, Baltimore.
Foss, Judg. Foss's Judges of England.
Fost. Foster's English Crown Law or Crown Cases;—Foster's New Hampshire Reports, vols. 19, and 21-31;—Foster's Legal Chronicle Reports, Pennsylvania;—Foster's Reports, vols. 5, 6 and 8 Hawaii.
Fost. (N. H.). Foster's Reports, New Hampshire, vols. 19 and 21-31.
Fost. Cr. Law. Foster, Crown Law.
Fost. Elem. or *Fost. Jur.* Foster's Elements of Jurisprudence.
Fost. S. F. or *Fost. on Sci. Fa.* Foster on the Writ of *Scire Facias.*
Fost. & Fin. Foster and Finlason's Reports, English Nisi Prius Cases.
Foster. Foster's English Crown Law;—Legal Chronicle Reports (Pennsylvania), edited by Foster;—Foster's New Hampshire Reports.
Fount. Fountainhall's Reports, Scotch Court of Session.
Fowl. L. Cas. Fowler's Leading Cases on Collieries.
Fox. Fox's Decisions, Circuit and District Court, Maine (Haskell's Reports);—Fox's Reports, English.
Fox Reg. Ca. or *Fox Reg. Cas.* Fox's Registration Cases.
Fox & Sm. Fox & Smith's Reports, Irish King's Bench.
Fr. Fragment, or Excerpt, or Laws in Titles of Pandects;—Freeman's English King's Bench and Chancery Reports;—Fragment.
Fr. Ch. Freeman's English Chancery Reports; Freeman's Mississippi Chancery Reports.
Fr. E. C. Fraser's Election Cases.
Fr. Ord. French Ordinances.
Fra. Max. Francis's Maxims of Equity.
Fran. Char. Francis's Law of Charities.
Fran. Max. Francis's Maxims of Equity.
Franc. or *Franc. Judg.* Francillon's Judgments, County Courts.
France. France's Reports, vols. 8-11 Colorado.
Fras. Dom. Rel. Fraser on Personal and Domestic Relations.

Fras. El. Cas. or *Fras. Elec. Cas.* or *Fraser.* Fraser's English Cases of Controverted Elections.
Fraz. or *Fras. Adm.* Frazer's Admiralty Cases, Scotland.
Fred. Code. Frederician Code, Prussia.
Free. Freeman's English King's Bench Reports, vol. 1 Freeman's King's Bench Reports and vol. 2 Freeman's Chancery Reports. See also Freem.
Free. Ch. Freeman's English Chancery Reports;—Freeman's Mississippi Chancery Reports.
Freem. (Ill.). Freeman's Reports, Illinois.
Freem. C. C. or *Freem. Ch.* Freeman's Reports, English Chancery. (2d Freeman.)
Freem. Compar. Politics. Freeman, Comparative Politics.
Freem. Coten. & Par. Freeman on Cotenancy and Partition.
Freem. Ex. Freeman on Executions.
Freem. (Ill.). Freeman's Reports, Illinois.
Freem. Judg. Freeman on Judgments.
Freem. K. B. Freeman's Reports, English King's Bench. (1st Freeman.)
Freem. (Miss.). Freeman's Chancery Reports, Mississippi.
French. French's Reports, New Hampshire.
Fries Tr. Trial of John Fries (Treason).
Frith. Opinions Attorneys-General, pt. 2, vol. 21.
Fry Cont. Fry on the Specific Performance of Contracts.
Full B. R. Full Bench Rulings, Bengal (or Northwest Provinces).
Fuller. Fuller's Reports, vols. 59-105 Michigan.
Fult. or *Fulton.* Fulton's Reports, Bengal.
G. Gale's Reports, English Exchequer;—King George; thus 1 G. I. signifies the first year of the reign of King George I.
G. B. Great Britain.
G. Coop. or *Cooper.* G. Cooper's English Chancery.
G. Gr. George Greene's Reports, Iowa.
G. M. Dudl. G. M. Dudley's Reports, Georgia.
G. O. General Orders, Court of Chancery, Ontario.
G. S. General Statutes.
G. & D. Gale & Davison's Reports, English Exchequer;—Gale & Davison's English Queen's Bench Reports.
G. & G. Goldsmith & Guthrie, Missouri.
G. & J. Gill & Johnson's Maryland Reports;—Glyn & Jameson's English Bankruptcy Reports.
G. & T. Gould & Tucker's Notes on Revised Statutes of United States.
Ga. Georgia;—Georgia Reports.
Ga. Dec. Georgia Decisions, Superior Courts.
Ga. L. J. Georgia Law Journal.
Ga. L. Rep. Georgia Law Reporter.
Ga. Supp. Lester's Supplement, vol. 33 Georgia.
Gab. Cr. L. Gabbett's Criminal Law.
Gaii. Gaii Institutionum Commentarii.
Gaius. Gaius's Institutes.
Gal. Gallison's Reports, United States Circuit Courts.
Galb. Galbraith's Reports, Florida Reports, vols. 9-12.
Galb. & M. Galbraith & Meek's Reports, Florida Reports, vol. 12.
Galbraith. Galbraith's Reports, vols. 9-12 Florida.
Gale. Gale's Reports, English Exchequer.
Gale E. or *Gale, Easem.* Gale on Easements.
Gale Stat. Gale's Statutes of Illinois.
Gale & Dav. Gale & Davison's Queen's Bench Reports.
Gale & W. Gale and Whatley on Easements.
Gall. or *Gallis.* Gallison's Reports, United States Circuit Courts.
Gall. Cr. Cas. Gallick's Reports of French Criminal Cases.
Gall. Hist. Col. Gallick's Historical Collection of French Criminal Cases.
Gall. Int. L. Galiaudet on International Law.
Gamb. & Barl. Gamble & Barlow's Digest, Irish.
Gantt Dig. Gantt's Digest Statutes, Arkansas.
Gard. N. Y. Rept. Gardenier's New York Reporter.
Garden. or *Gardenhire.* Gardenhire's Reports, Missouri.
Gardn. P. C. or *Gardn. P. Cas.* Gardner Peerage Case, reported by Le Marchant.
Gaspar. Gaspar's Small Cause Court Reports, Bengal.
Gay. (La.). Gayarré's Louisiana Reports.
Gayarré. Gayarré's Reports, vols. 25-28 Louisiana Annual.
Gaz. B. or *Gaz. Bank.* Gazette of Bankruptcy, London.
Gaz. Dig. Gazzam's Digest of Bankruptcy Decisions.
Gaz. & B. C. Rep. or *Gaz. & Bank. Ct. Rep.* Gazette & Bankrupt Court Reporter, New York.
Gazz. Bank. Gazzam on Bankruptcy.
Geld. & M. Geldart & Maddock's English Chancery Reports, vol. 6 Maddock's Reports.
Geld. & O. or *Geld. & Ox. (Nova Scotia).* Geldert and Oxley's Decisions, Nova Scotia.
Geld. & R. Geldert & Russell, Nova Scotia.
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Gen. Arb. Geneva Arbitration.
Gen. Abr. Cas. Eq. General Abridgment of Cases in Equity (Equity Cases Abridged).
Gen. Dig. General Digest American and English Reports.
Gen. Laws. General Laws.
Gen. Ord. General Orders, Ontario Court of Chancery.
Gen. Ord. Ch. or *Gen. Ord. in Ch.* General Orders of the English High Court of Chancery.
Gen. Sess. General Sessions.
Gen. St. General Statutes.
Gen. Term. General Term.
Geo. Georgia;—Georgia Reports;—King George (as 13 Geo. II.).
Geo. Coop. George Cooper's English Chancery Cases, *temp.* Eldon.
Geo. Dec. Georgia Decisions.
Geo. Dig. George's Mississippi Digest.
Geo. Dig. George's Digest, Mississippi.
Geo. Lib. George on Libel.
George. George's Reports, Mississippi.
Ger. Real Est. Gerard on Titles to Real Estate.
Gib. Cod. Gibson's *Codex Juris Ecclesiastici Anglicani.*
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Gibb. D. & N. Gibbons on Dilapidations and Nuisances.
Gibbon, Rom. Emp. Gibbon, History of the Decline and Fall of the Roman Empire.
Gibbs. Gibbs's Reports, Michigan.
Gibbs Jud. Chr. Gibbs's Judicial Chronicle.
Gibs. Gibson's Decisions, Scotland.
Gibs. Camd. Gibson's [edition of] Camden's Britannia.
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Gif. or *Giff.* Giffard's English Vice-Chancellors's Reports.
Gif. & Fal. Gilmour & Falconer's Scotch Session Cases.
Giff. Giffard's Reports, English Chancery.
Giff. & H. Giffard and Hemming's Reports, English Chancery.
Gil. Gilfillan's Edition, vols. 1-20 Minnesota;—Gilman's Reports, vols. 6-10 Illinois;—Gilmer's Virginia Reports;—Gilbert's English Chancery Reports;—Gilbert's English Cases in Law and Equity.
Gilb. Gilbert's Reports, English Chancery.
Gilb. Cas. Gilbert's Cases in Law and Equity, English Chancery and Exchequer.
Gilb. Ch. Gilbert's Reports, English Chancery.
Gilb. Ch. Pr. Gilbert's Chancery Practice.
Gilb. C. P. Gilbert's Common Pleas.
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Gilb. Dev. Gilbert on Devices.
Gilb. Dist. Gilbert on Distress.
Gilb. Eq. Gilbert's English Equity or Chancery Reports.
Gilb. Ev. Gilbert's Evidence.
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Gilb. Exch. Gilbert's Exchequer.
Gilb. For. Rom. Gilbert's Forum Romanum.
Gilb. K. B. Gilbert's King's Bench.
Gilb. Lex Præ. Gilbert's Lex Prætoria.
Gilb. Railw. L. Gilbert's Railway Law.
Gilb. Rem. Gilbert on Remainders.

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Gill Pol. Rep. Gill's Police Court Reports, Boston, Mass.
Gill & J. or *Gill & Johns. (Md.).* Gill & Johnson's Reports, Maryland.
Gilm. Gilman's Reports, vols. 6-10 Illinois;—Gilmer's Reports, Virginia;—Gilmour's Reports, Scotch Court of Session.
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Gilm. (Va.). Gilmer's Reports, Virginia.
Gilm. & Fal. or *Gilm. & Falc.* Gilmour and Falconer's Reports, Scotch Court of Session.
Gilp. Gilpin's United States District Court Reports.
Gilp. Opin. Gilpin's Opinions of the United States Attorneys-General.
Gir. W. C. Girard Will Case.
Gl. Glossa; a gloss or interpretation.
Gl. & J. Glyn & Jameson's English Bankruptcy Reports.
Glan. Lib. Glanville, De Legibus et Consuetudinibus Angliæ.
Glanv. or *Glanvil.* Glanville, De Legibus et Consuetudinibus Angliæ.
Glanv. El. Ca. or *Glanv. El. Cas.* Glanville's Election Cases.
Glas. or *Glasc.* Clascock's Reports in all the Courts of Ireland.
Glassf. Glassford on Evidence.
Glenn. Glenn's Reports, Louisiana Annual.
Glov. Mun. Corp. Glover on Municipal Corporations.
Glyn & Jam. Glyn and Jameson's Bankruptcy Cases, English.
Go. Goebel's Probate Court Cases.
Godb. Godbolt's Reports, English King's Bench.
Godd. Eas. Goddard on Easements.
Godef. & S. Godefroi and Shortt on Law of Railway Companies.
Godo. Godolphin's Abridgment of Ecclesiastical Law;—Godolphin on Admiralty Jurisdiction;—Godolphin's Orphan's Legacy;—Godolphin's Repertorium Canonicum.
Godol. Ecc. Law or *Godolph.* Godolphin's Abridgment of Ecclesiastical Law.
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Grand Cou. or *Grand Cout.* Grand *Coutumier de Normandie.*
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Gravin. Gravina, Originum Juris Civilis.
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Gray Perp. Gray on Perpetuities.
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Greenw. & M. Greenwood & Martin's Police Guide.
Grein. Dig. Greiner's Digest, Louisiana.
Gren. or *Gren. (Ceylon).* Grenier's Ceylon Reports.
Gresl. Eq. Ev. Gresley's Equity Evidence.
Grey Deb. Grey's Debates in Parliament.
Grif. L. Reg. Griffith's Law Register, Burlington, New Jersey.
Grif. P. R. Cas. Griffith's English Poor Rate Cases.
Griff. Cr. Griffith on Arrangements with Creditors.
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Gro. or *Gro. B. et P.*, or *Gro. de J. B.* or *Grot.* or *Grot. de Jur. B.* Grotius, *De Jure Belli et Pacis.*
Grot. Dr. de la Guer. Grotius *Le Droit de la Guerre.*
Gude Pr. Gude's Practice on the Crown Side of the King's Bench.
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Guy, Med. Jur. Guy on Medical Jurisprudence.
Guy Réper. Guy's *Répertoire de la Jurisprudence.*
Guyot, Inst. Feod. Guyot, Institutes Feodales.
Gwil. Ti. Cas. or *Gwill.* Gwillim's Tithe Cases.
H. Howard's United States Supreme Court Reports;—Hill's New York Reports;—Hilary Term;—King Henry; thus 1 H. I. signifies the first year of the reign of King Henry I.
h. a. Hoc anno.
H. Bl. or *H. Bla.* Henry Blackstone's English Common Pleas Reports.
H. C. House of Commons.
H. C. R. High Court Reports, India.
H. C. R. N. W. P. High Court Reports, Northwest Provinces, India.
H. E. C. Hodgin's Election Cases, Ontario.
H. H. C. L. Hale's History of the Common Law.
H. H. P. C. Hale's History, Pleas of the Crown.
H. L. House of Lords.
H. L. C. or *H. L. Cas.* House of Lords Cases (Clark's).
H. L. F. Hall's Legal Forms.
H. L. Rep. Clark and Finnelly's House of Lords Reports, New Series.
H. P. C. Hale's Pleas of the Crown;—Hawkins' Pleas of the Crown.
H. T. Hilary Term.
h. t. Hoc titulum, or hoc titulo.
h. v. Hoc verbum, or his verbis.
H. W. Gr. H. W. Green's New Jersey Equity Reports.
H. & B. Hudson & Brooke's Irish King's Bench Reports.
H. & C. Hurlstone & Coltman's English Exchequer Reports.
H. & D. Lalor's Supplement to Hill and Denio's Reports, New York.
H. & Disb. Pr. Holmes and Disbrow's Practice.
H. & G. Harris & Gill's Maryland Reports;—Hurlstone & Gordon's English Reports.
H. & H. Horn & Hurlstone's English Exchequer Reports;—Harrison & Hodgin's Municipal Reports, Upper Canada.
H. & J. Harris & Johnson's Maryland Reports;—Hayes & Jones's Exchequer Reports, Ireland.
H. & J. Forms. Hayes and Jarman's Forms of Wills.
H. & J. Ir. Hayes and Jones's Reports, Irish Exchequer.
H. & M. Hening & Munford's Virginia Reports;—Hemming & Miller's English Vice-Chancellors' Reports.
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H. & R. Harrison & Rutherford's English Common Pleas Reports.
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H. & T. Hall and Twell's Reports, English Chancery.
H. & T. Self-Def. Horrigan & Thompson's Cases on the Law of Self-Defense.
H. & W. Harrison & Wollaston's English King's Bench Reports;—Hurlstone & Walmsley's English Exchequer Reports.
Ha. Hare's Chancery Reports;—Hall;—Haggard.
Ha. & Tw. Hall and Twell's Reports, English Chancery.
Hab. Corp. Habeas Corpus.
Hab. fa. poss. Habere facias possessionem.
Hab. fa. seis. Habere facias seisinam.
Had. Haddington;—Hadley's Reports, vols. 45-48 New Hampshire.
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Hadl. Hadley's Reports, vols. 45-48 New Hampshire.
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Hag. Ecc. Haggard's English Ecclesiastical Reports.
Hag. (Utah). Hagan's Utah Reports.
Hag. (W. Va.). Hagan's Reports, West Virginia.
Hagan. Hagan's Reports, vols. 1-2 Utah.
Hagans. Hagans's Reports, vols. 1-5 West Virginia.
Hagg. See Hag.
Hagg. Adm. Haggard's Admiralty Reports, English.
Hagg. Con. or *Hagg. Consist.* Haggard's Consistory Reports, English.
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Harr. Ch. Harrison's Chancery Reports, Michigan.

Harr. Ch. Pr. Harrison's Chancery Practice.

Harr. Con. La. R. Harrison's Condensed Louisiana Reports.

Harr. (Del.). Harrington's Reports, Delaware.

Harr. Dig. Harrison's Digest of English Common Law Reports.

Harr. Ent. Harris's Book of Entries.

Harr. (Ind.). Harrison's Reports, Indiana.

Harr. (Mich.). Harrington's Chancery Reports, Michigan.

Harr. (N. J.). Harrison's Reports, New Jersey Law, vols. 16-19.

Harr. (Pa.). Harris's Reports, Pennsylvania.

Harr. Proc. Harrison's Common Law Procedure Act.

Harr. & G. Harris and Gill's Reports, Maryland.

Harr. & Hodg. Harrison & Hodgin's Upper Canada Municipal Reports.

Harr. & J. Harris and Johnson's Reports, Maryland.

Harr. & McH. Harris and McHenry's reports, Maryland.

Harr. & R. or *Harr. & Ruth.* Harrison and Rutherford's Reports, English Common Pleas.

Harr. & S. or *Harr. & Sim.* Harris and Simrall's Reports, Mississippi, vols. 49-52.

Harr. & W. or *Harr. & Woll.* Harrison and Wollaston's Reports, English King's Bench.

Harring. Harrington's Delaware Reports;—Harrington's Michigan Chancery Reports.

Harris. Harris's Reports, vols. 13-24 Pennsylvania.

Harris Dig. Harris's Digest, Georgia.

Harris & Simrall. Harris & Simrall's Reports, vols. 49-52 Mississippi.

Harrison. Harrison's Reports, vols. 15-17 and 23-29 Indiana.

Hart. Hartley's Reports, vols. 4-10 Texas;—Hartley's Digest of Texas Laws.

Hart. Dig. Hartley's Digest of Laws, Texas.

Hartley. Hartley's Reports, vols. 4-10 Texas.

Hartley & Hartley. Hartley & Hartley's Reports, vols. 11-21 Texas.

Harv. Law Rev. Harvard Law Review.

Hask. Haskell's Reports, United States Courts, Maine (Fox's Decisions).

Hasl. Med. Jur. Haslam's Medical Jurisprudence.

Hast. Hastings's Reports, vols. 69, 70 Maine.

Hast. Tr. Sp. Speeches in the trial of Warren Hastings, Ed. by Bond.

Hats. Pr. Hatsell's Parliamentary Precedents.

Hav. Ch. Rep. Haviland's Chancery Reports, Prince Edward Island.

Hav. P. E. I. Haviland's Reports, Prince Edward Island.

Haw. Hawkins (see Hawk.);—Hawaiian Reports;—Hawley's Reports, vols. 10-20 Nevada.

Haw. Am. Cr. Rep. or *Haw. Cr. Rep.* Hawley's American Criminal Reports.

Haw. W. C. or *Haw. W. Cas.* Hawes's Will Case.

Hawaii or *Hawaiian Rep.* Hawaii (Sandwich Islands) Reports.

Hawk. Hawkin's Reports, Louisiana Annual.

Hawk. Abr. or *Hawk. Co. Litt.* Hawkins's Coke upon Littleton.

Hawk. P. C. or *Hawk. Pl. Cr.* Hawkins's Pleas of the Crown.

Hawk. W. Hawkins on Construction of Wills.

Hawkins. Hawkins's Reports, vols. 19-24 Louisiana Annual.

Hawks. Hawks's North Carolina Reports.

Hawl. Cr. R. Hawley's American Criminal Reports.

Hawl. or *Hawley (Nev.).* Hawley's Nevada Reports and Digest.

Hawley Cr. R. Hawley's American Criminal Reports.

Hay. Haywood's North Carolina Reports;—Haywood's Tennessee Reports (Haywood's Reports are sometimes referred to as though numbered consecutively from North Carolina through Tennessee);—Hayes's Irish Exchequer Reports. See also Hayes;—Hayes's Reports, Calcutta;—Hay's Scotch Decisions.

Hay Acc. or *Hay Dec.* or *Hay Acc. Cas.* Hay's Decisions on Accidents and Negligence.

Hay (Calc.). Hay's Reports, Calcutta.

Hay. Conv. Hayes's Conveyancer.

Hay Dec. Hay's Decisions on Accidents and Negligence.

Hay. Est. or *Hay. U. D. & T.* Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.

Hay. Exch. Hayes's Reports, Irish Exchequer.

Hay. Lim. Hayes on Limitations.

Hay P. L. Hay's Poor Law Decisions.

Hay. U. D. & T. Hayes on the Law of Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates.

Hay. & H. or *Hay. & Haz.* Hayward & Hazelton's United States Circuit Court Reports.

Hay. & J. Hayes and Jones's Reports, Irish Exchequer.

Hay. & J. Wills. Hayes and Jarman on Wills.

Hay & M. or *Hay & Marr.* Hay & Marriott's Admiralty Reports (usually cited, Marriott's Reports).

Hayes or *Hayes Exch.* Hayes's Irish Exchequer Reports.

Hayes Conv. Hayes on Conveyancing.

Hayes & Jo. or *Hayes & Jon.* Hayes & Jones's Irish Exchequer Reports.

Haynes Lead. Cas. Haynes's Students' Leading Cases.

Haynes, Eq. Haynes's Outlines of Equity.

Hays R. P. Hays on Real Property.

Hayw. Haywood's North Carolina Reports;—Haywood's Tennessee Reports (see Hay.).

Hayw. L. R. Hayward's Law Register, Boston.

Hayw. (N. C.). Haywood's Reports, North Carolina.

Hayw. (Tenn.). Haywood's Reports, Tennessee.

Hayw. & H. or *Hayw. & H. (D. C.).* Hayward & Hazelton's United States Circuit Court Reports.

Haz. Pa. Reg. Hazard's Pennsylvania Register.

Haz. U. S. Reg. Hazard's United States Register.

Haz. & Roch. M. War. Hazlitt and Roche on Maritime Warfare.

Head. Head's Reports, Tennessee.

Heard Civ. Pl. Heard's Civil Pleading.

Heard Cr. L. Heard's Criminal Law, Massachusetts.

Heard Cr. Pl. Heard's Criminal Pleading.

Heard L. & Sl. Heard on Libel and Slander.

Heath. Heath's Reports, Maine.

Heath Max. Heath's Maxims.

Heck. Cas. Hecker's Leading Cases on Warranty.

Hedges. Hedges's Reports, vols. 2-6 Montana.

Hein. Heineccius Opera.

Heinecc. Ant. Rom. Heineccius (J. G.) Antiquitatum Romanarum (Roman Antiquities.)

Heinecc. de Camb. Heineccius (J. G.) Elementa Juris Cambialis.

Heinecc. Elem. Heineccius (J. G.) Elementa Juris Civilis (Elements of the Civil Law.)

Heisk. Heiskell's Reports, Tennessee.

Helm. Helm's Reports, Nevada Reports.

Hem. Hempstead, United States;—Hemingway, Mississippi.

Hem. & M. or *Hem. & Mil.* Hemming & Miller's English Vice-Chancellors' Reports.

Heming. (Miss.). Hemingway's Mississippi Reports.

Hemp. Hempstead's United States Circuit Court Reports.

Hempst. Hempstead's Reports, U. S. 9th Circuit Ct. Reports.

Hen. King Henry; thus 1 Hen. I. signifies the first year of the reign of King Henry I.

Hen. Bl. or *Hen. Bla.* Henry Blackstone's English Common Pleas Reports.

Hen. For. Law. Henry on Foreign Law.

Hen. La. Dig. Hennen's Louisiana Digest.

Hen. Man. Cas. Henry's Manumission Cases.

Hen. Va. J. P. Hening's Virginia Justice of the Peace.

Hen. & M. or *Hen. & Mun. (Va.).* Hening & Munford's Virginia Reports.

Hepb. Hepburn's Reports, vols. 3, 4 California.

Her. Herne's Pleader.

Her. Char. U. Herne's Law of Charitable Uses.

Her. Estop. Herman on Estoppel.

Her. Ex. Herman on Executions.

Her. Hist. or *Her. Jur.* Heron's History of Jurisprudence.

Het. or *Hetl.* Hetley's English Common Pleas Reports.

Heyle Imp. D. Heyle's United States Import Duties.

Heyw. Ca. Heywood's Table of Cases, Georgia.

Heyw. El. Heywood on Elections.

Hibb. Hibbard's Reports, vol. 20 Opinions Attorneys-General;—Hibbard's Reports, vol. 67 New Hampshire.

Hig. Dig. Pat. Cas. Higgin's Digest of Patent Cases.

High. Bail. Highmore on Bail.

High Ct. or *High Ct. R.* High Court Reports, Northwest Provinces of India.

High Inj. High on Injunction.

High Leg. Rem. High on Legal Remedies.

High. Lun. Highmore on Lunacy.

High. Mortm. Highmore on Mortmain.

High Rec. High on Receivers.

Hight. Hight's Reports, vols. 57-58 Iowa.

Hil. T. Hilary Term.

Hildy M. Ins. Hildy on Marine Insurance.

Hill. Hill's New York Reports;—Hill's Law Reports, South Carolina.

Hill. Abr. Hilliard's Abridgment of the Law of Real Property.

Hill. Am. Jur. Hilliard's American Jurisprudence.

Hill. Am. Law. Hilliard's American Law.

Hill. B. & Ins. Hilliard on Bankruptcy and Insolvency.

Hill Ch. Hill's Chancery Reports, South Carolina.

Hill Ch. Pr. Hill's Chancery Practice.

Hill. Contr. Hilliard on Contracts.

Hill Eq. Hill's Equity, South Carolina Reports.

Hill Fixt. Hill on Fixtures.

Hill. Inj. Hilliard on Injunction.

Hill. Mort. Hilliard on Mortgages.

Hill. N. T. or *Hill. New Trials.* Hilliard on New Trials.

Hill (N. Y.). Hill's Reports, New York.

Hill. R. P. or *Hill. Real Prop.* Hilliard on Real Property.

Hill. Sales. Hilliard on Sales.

Hill S. C. Hill's South Carolina Reports (Law or Equity).

Hill. Tax. Hilliard on the Law of Taxation.

Hill. Tort. Hilliard on Torts.

Hill Tr. Hill on Trustees.

Hill. Vend. Hilliard on Vendors.

Hill & D. or *Hill & Den. (N. Y.).* Hill and Denio's New York Reports.

Hill & Den. Sup. or *Hill & Den. Supp.* Lalor's Supplement to Hill and Denio's Reports, New York.

Hillyer. Hillyer's Reports, California Reports.

Hilt. Hilton's Reports, Common Pleas, New York.

Hind. Pat. Hindemarch on Patents.

Hinde Ch. Pr. Hinde, Modern Practice of the High Court of Chancery.

Hines. Hines's Reports, vols. 83-93 Kentucky.

Ho. Lord Cas. House of Lords Cases (Clark's).

Hob. Hobart's Reports, English Common Pleas and Chancery.

Hod. Hodge's Reports, English Common Pleas.

Hod. Railw. Hodge on the Law of Railways.

Hodg. Hodges's English Common Pleas Reports.

Hodg. Can. Elec. Cas. or *Hodg. El. Cas. (Ont.).* Hodgin's Canada Election Cases.

Hoff. Hoffman's Land Cases, United States District Court;—Hoffman's New York Chancery Reports.

Hoff. Ch. Hoffman's New York Chancery Reports.

Hoff. Ch. Pr. Hoffman's Chancery Practice.

Hoff. Ecc. L. Hoffman's Ecclesiastical Law.

Hoff. Land or *Hoff. Land Ca.* or *Hoff. L. C.* Hoffman's Land Cases, U. S. Dist. Ct. of California.

Hoff. Lead. Ca. or *Hoff. Lead. Cas.* Hoffman's Leading Cases, Commercial Law.

Hoff. Leg. St. Hoffman's Legal Studies.

Hoff. Mas. Ch. or *Hoff. Mast.* Hoffman's Master in Chancery.

Hoff. or *Hoff. Ch. (N. Y.).* Hoffman's Chancery Reports, New York.

Hoff. Outl. Hoffman's Outlines of Legal Studies.

Hoff. Publ. Pap. Hoffman's Public Papers, New York.

Hoff. Ref. Hoffman on Referees.

Hoffm. Ch. Hoffman's New York Chancery Reports.

Hog. Hogan's Irish Rolls Court Reports;—(Hogan of) Harcarse's Scotch Session Cases.

Hog. St. Tr. Hogan's Pennsylvania State Trials.

Hogue. Hogue's Reports, Florida.

Holc. D. & Cr. Holcombe's Law of Debtor and Creditor.

Holc. L. Cas. Holcombe's Leading Cases of Commercial Law.

Holc. Dig. Holcombe's Digest.

Holc. Eq. Jur. Holcombe's Equity Jurisprudence.

Holc. Lead. Cas. Holcombe's Leading Cases on Commercial Law.

Hol. Inst. Holland's Institutes of Justinian.

Holl. Jur. Holland's Elements of Jurisprudence.

Holl. or *Hollinshead (Minn.).* Hollinshead's Minnesota Reports.

Holm. or *Holmes.* Holmes's United States Circuit Court Reports;—Holmes's Reports, vols. 15-17 Oregon.

Holt. Holt's English King's Bench Reports;—Holt's English Nisi Prius Reports;—Holt's English Equity Reports.

Holt Adm. or *Holt Adm. Cas.* Holt's Admiralty Cases. (Rule of the Road at Sea.)

Holt Ch. Holt's Equity V. C. Court.

Holt Eq. or *Holt Eq. Rep.* Holt's English Equity Reports.

Holt K. B. Holt's English King's Bench Reports.

Holt. L. Dic. Holthouse's Law Dictionary.

Holt N. P. Holt's Nisi Prius Reports, English Courts.

Holt R. of R. or *Holt Rule of R.* Holt's Rule of the Road Cases.

Holt Sh. Holt on Shipping.

Holthouse or *Holthouse Dic.* Holthouse's Law Dictionary.

Holtz. Enc. Holtzendorff, Encyclopädie der Rechtswissenschaft. (Encyclopedia of Jurisprudence.)

Home or *Home H. Dec.* Home's Manuscript Decisions, Scotch Court of Session. See also Kames.

Hood Ex. Hood on Executors.

Hook. or *Hooker.* Hooker's Reports, Connecticut.

Hoon. or *Hoonahan.* Hoonahan's Sind Reports, India.

Hop. & C. Hopwood & Coltman's English Registration Appeal Cases.

Hop. & Ph. Hopwood & Philbrick's English Registration Appeal Cases.

Hope. Hope (of Kerse) Manuscript Decisions, Scotch Court of Session.

Hope Min. Pr. Hope's Minor Practicks, Scotland.

Hopk. Hopkinson's Works.

Hopk. Adm. Hopkinson's Pennsylvania Admiralty Judgments.

Hopk. Adm. Dec. Admiralty Decisions of Hopkinson in Gilpin's Reports.

Hopk. Ch. Hopkins's Chancery Reports, New York.

Hopk. Judg. Hopkinson's Pennsylvania Admiralty Judgments.

Hopk. Mar. Ins. Hopkins on Marine Insurance.

Hopw. & C. or *Hopw. & Colt.* Hopwood and Coltman's English Registration Appeal Cases.

Hopw. & P. or *Hopw. & Phil.* Hopwood and Philbrick's English Registration Appeal Cases.

Hor. & Th. Cas. Horrigan & Thompson's Cases on Self-Defense.

Horn & H. Horn and Hurlstone's Reports, English Exchequer.

Horne Mir. or *Horne M. J.* Horne's Mirror of Justices.

Horner. Horner's Reports, vols. 11-23 South Dakota.

Horr. & Th. or *Horr. & T. Cas.* Horrigan & Thompson's Cases on Self-Defense.
Horw. Y. B. (Horwood's). Year-Books of Edward I.
Hoskins. Hoskins's Reports, vol. 2 North Dakota.
Houard Ang.-Sax. Laws. Houard's Anglo-Saxon Laws and Ancient Laws of the French.
Houard Dict. Houard's Dictionary of the Customs of Normandy.
Hough Am. Con. Hough on the American Constitution.
Hough C. M. Hough on Court Martial.
Hough C.-M. Cas. Hough's Court-Martial Case Book, London, 1821.
Houghton. Houghton's Reports, vol. 97 Alabama.
Hous. Houston's Delaware Reports.
Hous. Pr. Housman's Precedents in Conveyancing.
House of L. House of Lords, House of Lords Cases.
Houst. Houston's Reports, Delaware.
Houst. Cr. Cas. Houston's Criminal Cases, Delaware.
Houst. on St. in Tr. Houston on Stoppage in Transitu.
Hov. Hovenden on Frauds;—Hovenden's Supplement to Vesey, Jr.'s, English Chancery Reports.
Hov. Fr. Hovenden on Frauds.
Hov. Sup. or *Hov. Sup. Ves.* Hovenden's Supplement to Vesey, Jr.'s, English Chancery Reports.
Hoved. Hoveden, Chronica.
How. Howard's United States Supreme Court Reports;—Howard's Mississippi Reports;—Howard's New York Practice Reports;—Howell's Reports, vols. 22-26 Nevada.
How. App. or *How. App. Cas.* Howard's New York Court of Appeals Cases.
How. Cas. Howard's New York Court of Appeals Cases;—Howard's Popery Cases, Ireland.
How. Cr. Tr. Howison's Criminal Trials, Virginia.
How. (Miss.). Howard's Reports, Mississippi.
How. (N. Y.). Howard's Reports, N. Y. Court of Appeals.
How. N. S. Howard's New York Practice Reports, New Series.
How. Pop. Cas. Howard's Popery Cases, Ireland.
How. Pr. Howard's New York Practice Reports.
How. Pr. N. S. Howard's New York Practice Reports, New Series.
How. Prac. or *How. Pr. R. (N. Y.).* Howard's New York Practice Reports.
How. S. C. Howard's United States Supreme Court Reports.
How. St. Tr. or *How. State Tr.* Howell's English State Trials.
How. U. S. Howard's Reports, U. S. Supreme Court.
How. & Beat. Howell & Beatty's Reports, Nevada.
How. & Nor. Howell & Norcross's Reports, Nevada.
Howe Pr. Howe's Practice, Massachusetts.
Howell N. P. Howell's Nisi Prius Reports, Michigan.
Hu. Hughes's United States Circuit Court Reports;—Hughes's Kentucky Reports.
Hub. Leg. Dir. or *Hub. Leg. Direc.* Hubbell's Legal Directory.
Hub. Præl. J. C. Huber, Prælectiones Juris Civilis.
Hubb. Hubbard's Reports, Maine.
Hubb. Succ. Hubback's Evidence of Succession.
Hubbard. Hubbard's Reports, Maine.
Hud. & B. or *Hud. & Br.* Hudson and Brooke's Reports, Irish King's Bench.
Hud. & Will. Dig. (U. S.). Hudson and William's United States Digest.
Hugh. Hughes's United States 4th Circuit Court Reports;—Hughes's Kentucky Reports.
Hugh. Con. Hughes's Precedents in Conveyancing.
Hugh. Ent. Hughes's Book of Entries.
Hugh. Ins. Hughes on Insurance.
Hugh. (Ky.). Hughes's Reports, Kentucky.
Hugh. Wills. Hughes on Wills.
Hugh. Writs. Hughes on Writs.
Hughes. Hughes's United States Circuit Court Reports.
Hughs Abr. Hughs's Abridgment.
Hugo, Hist. du Droit Rom. Hugo, Histoire du Droit Romain.
Hum. (Tenn.). Humphrey's Tennessee Reports.
Hume. Hume's Decisions, Scotch Court of Session.
Hume Com. or *Hume Cr. L.* Hume's Commentaries on Criminal Law of Scotland.
Hume, Hist. Eng. Hume's History of England.
Humph. (Tenn.). Humphrey's Reports, Tennessee.
Humph. R. P. Humphrey on Real Property.
Hun. Hun's New York Supreme Court Reports, also Appellate Division Supreme Court, New York.
Hunt or *Hunt Ann. Cas.* Hunt's Collection of Annuity Cases.
Hunt Bound. Hunt's Law of Boundaries and Fences.
Hunt Cas. Hunt's Annuity Cases.
Hunt, Eq. Hunt's Suit in Equity.
Hunt Fr. Conv. Hunt on Fraudulent Conveyances.
Hunt Mer. Mag. Hunt's Merchants' Magazine, New York.
Hunt. Rom. L. or *Hunter, Rom. Law.* Hunter on Roman Law.
Hunter, Suit Eq. Hunter's Proceeding in a Suit in Equity.
Hur. Hurlstone (see Hurl.).
Hurd Hab. Corp. Hurd on Habeas Corpus.
Hurd Pers. Lib. Hurd on Personal Liberty.
Hurl. & C. or *Hurl. & Colt.* Hurlstone & Coltman's English Exchequer Reports.
Hurl. & Gord. Hurlstone & Gordon's Reports, vols. 10, 11 English Exchequer.
Hurl. & N. or *Hurl. & Nor.* Hurlstone & Norman's English Exchequer Reports.
Hurl. & Walm. Hurlstone & Walmsley's English Exchequer Reports.
Hurlst. & C. Hurlstone and Coltman's Reports, English Exchequer.
Hurlst. & G. Hurlstone and Gordon's Reports, English Exchequer.
Hurlst. & N. Hurlstone and Norman's Reports, English Exchequer.
Hurlst. & W. Hurlstone and Walmsley's Reports, English Exchequer.
Husb. Mar. Wom. Husband on Married Women.
Hust. L. T. Huston on Land Titles in Pennsylvania.
Hut. Hutton's Reports, English Common Pleas.
Hutch. Hutcheson's Reports, vol. 81 Alabama.
Hutch. Car. Hutchinson on Carriers.
Hutt. Hutton's English Common Pleas Reports.
Hux. Judg. Huxley's Judgments.
Hyde. Hyde's Reports, India.
I. Idaho;—Illinois;—Indiana;—Iowa;—Irish (see Ir.);—The Institutes of Justinian.
I. A. Irish Act.
I. C. C. Interstate Commerce Commission Reports.
I. C. L. R. Irish Common Law Reports.
I. C. R. Irish Chancery Reports;—Irish Circuit Reports.
I. E. R. Irish Equity Reports.
I. J. C. or *I. J. Cas.* Irvine's Justiciary Cases, Scotch Justiciary Court.
I. Jur. Irish Jurist, Dublin.
I. Jur. N. S. Irish Jurist, New Series, Dublin.
I. L. T. Irish Law Times, Dublin.
I. O. U. I owe you.
I. P. Institutes of Polity.
I. R. Irish Reports.
I. R. C. L. Irish Reports, Common Law Series.
I. R. Eq. Irish Reports, Equity Series.
I. R. R. Internal Revenue Record, New York.
I. T. R. Irish Term Reports, by Ridgway, Lapp and Schoales.
Ia. Iowa;—Iowa Reports.
Ib. or *Id. Ibidem* or *Idem,* The same.
Ida. or *Idaho.* Idaho;—Idaho Reports.
Iddings T. R. D. Iddings's Dayton Term Reports.
Il Cons. del Mar. Il Consolato del Mare. See Consolato del Mare, in the body of this work.
Ill. Illinois;—Illinois Reports.
Ill. App. Illinois Appellate Court Reports.
Imp. C. P. Impey's Practice, Common Pleas.
Imp. Fed. Imperial Federation, London.
Imp. K. B. Impey's Practice, King's Bench.
Imp. Pl. Impey's Pleader's Guide.

Imp. Pr. C. P. Impev's Practice in Common Pleas.
Imp. Pr. K. B. Impey's Practice in king's Bench.
Imp. Sh. Impey's Office of Sheriff.
In Dom. Proc. In the House of Lords. See *Dom. Proc.*
In f. In fine. At the end of the title, law, or paragraph quoted.
In pr. In principio. At the beginning of a law, before the first paragraph.
In sum. In summa. In the summary.
Ind. Indiana;—Indiana Reports;—India;—(East) Indian.
Ind. App. Law Reports, Indian Appeals;—Indiana Appeals.
Ind. App. Sup. or *Ind. App. Supp.* Indian Appeals Supplement, P. C.
Ind. Jur. Indian Jurist, Calcutta;—Indian Jurist, Madras.
Ind. L. Mag. Indiana Law Magazine.
Ind. L. R. (East) Indian Law Reports.
Ind. L. R. All. or *Ind. L. R. Alla.* Allahabad Series of Indian Law Reports.
Ind. L. R. Bomb. Indian Law Reports, Bombay Series.
Ind. L. R. Calc. Indian Law Reports, Calcutta Series.
Ind. L. R. Mad. Indian Law Reports, Madras Series.
Ind. L. Reg. Indiana Legal Register, Lafayette.
Ind. L. Rep. Indiana Law Reporter.
Ind. Rep. Indiana Reports;—Index Reporter.
Ind. Super. Indiana Superior Court Reports (Wilson's).
Ind. T. Indian Territory;—Indian Territory Reports.
Inder. Com. L. Indermaur's Principles of the Common Law.
Inder. L. C. Com. L. Indermaur's Leading Common Law Cases.
Inder. L. C. Eq. Indermaur's Leading Equity Cases.
Index Rep. Index Reporter.
Inf. Infra. Beneath or below.
Ing. Dig. Ingersoll's Digest of the Laws of the U. S.
Ing. Roc. Ingersoll's Roccus.
Ing. Ves. Ingraham's edition of Vesey, Jr.
Ingr. Insolv. Ingraham on Insolvency.
Inj. Injunction.
Ins. Insurance. Insolvency.
Ins. L. J. Insurance Law Journal, New York and St. Louis.
Ins. L. Mon. Insurance Law Monitor New York.
Ins. Rep. Insurance Reporter, Philadelphia.
Inst. Institutes; when preceded by a number denoting a volume (thus 1 Inst.), the reference is to Coke's Institutes; when followed by several numbers (thus Inst. 4, 2, 1), the reference is to the Institutes of Justinian.
1, 2, Inst. (1, 2) Coke's Inst.
Inst., 1, 2, 3. Justinian's Inst. lib. 1, tit. 2, § 3.
Inst., 1, 2, 31. Justinian's Institutes, lib. 1, tit. 2, § 31.
The Institutes of Justinian are divided into four books,—each book is divided into titles, and each title into paragraphs, of which the first, described by the letters *pr.*, or *princip.*, is not numbered. The old method of citing the Institutes was to give the commencing words of the paragraph and of the title; *e. g.*, § *si adversus, Inst. de Nuptiis.* Sometimes the number of the paragraph was introduced, *e. g.*, § 12, *si adversus, Inst. de Nuptiis.* The modern way is to give the number of the book, title, and paragraph, thus;—*Inst. 1.* 10, 12; would be read *Inst., Lib. 1.* tit. 10, § 12.
Inst. Cler. Instructor Clericalis.
Inst. Com. Com. Interstate Commerce Commission Reports.
Inst. Epil. Epilogue to [a designated part or volume of] Coke's Institutes.
Inst. Jur. Angl. Institutiones Juris Anglicani, by Doctor Cowell.
Inst. Procm. Proeme [introduction] to [a designated part or volume of] Coke's Institutes.
Instr. Cler. Instructor Clericalis.
Int. Case. Rowe's Interesting Cases, English and Irish.
Int. Com. Rep. Interstate Commerce Reports.
Int. Private Law. Westlake's Private International Law.
Int. Rev. Rec. Internal Revenue Record, New York.
Iowa. Iowa Reports.
Iowa Univ. L. Bul. Iowa University Law Bulletin.
Ir. Irish;—Ireland;—Iredell's North Carolina Law or Equity Reports.
Ir. Ch. or *Ir. Ch. N. S.* Irish Chancery Reports.
Ir. Cir. or *Ir. Cir. Rep.* Irish Circuit Reports.
Ir. C. L. or *Ir. Com. Law Rep.* or *Ir. L. N. S.* Irish Common Law Reports.
Ir. Eccl. Irish Ecclesiastical Reports, by Milward.
Ir. Eq. Irish Equity Reports.
Ir. Jur. Irish Jurist, Dublin.
Ir. L. Irish Law Reports.
Ir. L. N. S. Irish Common Law Reports.
Ir. L. R. Irish Law Reports;—The Law Reports, Ireland, now cited by the year.
Ir. Law Rec. Irish Law Recorder.
Ir. Law Rep. Irish Law Reports.
Ir. Law Rep. N. S. Irish Common Law Reports.
Ir. L. T. Irish Law Times and Solicitors's Journal, Dublin.
Ir. L. T. Rep. Irish Law Times Reports.
Ir. Law & Ch. Irish Law and Equity Reports, New Series.
Ir. Law & Eq. Irish Law and Equity Reports, Old Series.
Ir. R. C. L. Irish Reports, Common Law Series.
Ir. R. Eq. Irish Reports, Equity Series.
Ir. R. Eeg. App. Irish Reports, Registration Appeals.
Ir. R. Reg. & L. or *Ir. Reg. & Land Cas.* Irish Registry and Land Cases.
Ir. Rep. Reg. App. Irish Reports, Registration Appeals.
Ir. Rep. Reg. & L. Irish Reports, Registry and Land Cases.
Ir. St. Tr. Irish State Trials (Ridgeway's).
Ir. T. R. or *Ir. Term Rep.* Irish Term Reports (by Ridgeway, Lapp & Schoales).
Ired. Iredell's North Carolina Law Reports.
Ired. Dig. Iredell's Digest.
Ired. Eq. Iredell's Equity Reports, North Carolina.
Ired. L. Iredell's Law Reports, North Carolina.
Irv. Irvine's Justiciary Cases, Scotch Justiciary Court.
Iv. Ersk. Ivory's Notes on Erskine's Institutes.
Ir. R. 1894. Irish Law Reports for year 1894.
J. Justice;—Institutes of Justinian;—Johnson's New York Reports.
J. Adv. Gen. Judge Advocate General.
J. C. Johnson's Cases, New York Supreme Court;—Juris Consultus.
J. C. P. Justice of the Common Pleas.
J. Ch. or *J. C. R.* Johnson's New York Chancery Reports.
J. d'Ol. Les Jugemens d'Oleron.
J. et J. De Justitia et Jure.
J. Glo. Juncta Glossa.
J. H. Journal of the House.
JJ. Justices.
J. J. Mar. or *J. J. Marsh. (Ky.).* J. J. Marshall's Reports, Kentucky.
J. K. B. Justice of the King's Bench.
J. Kel. Sir John Kelyng's English Crown Cases.
J. P. Justice of the Peace.
J. P. Sm. J. P. Smith's English King's Bench Reports.
J. Q. B. Justice of the Queen's Bench.
J. R. Johnson's New York Reports.
J. S. Gr. (N. J.). J. S. Green's New Jersey Reports.
J. Scott. Reporter English Common Bench Reports.
J. U. B. Justice of the Upper Bench.
J. Voet, Com. ad Pand. Voet (Jan), Commentarius ad Pandectas.
J. & H. Johnson and Hemming's Reports, English Chancery.

J. & L. or *J. & La T.* Jones & La Touche's Irish Chancery Reports.

J. & S. Jones & Spencer's New York Superior Court Reports.

J. & S. Jam. Judah & Swan's Jamaica Reports.

J. & W. Jacob and Walker's Reports, English Chancery.

Jac. Jacobus;—Jacob's English Chancery Reports;—Jacob's Law Dictionary;—King James; thus 1 Jac. I. signifies the first year of the reign of King James I.

Jac. Dict. or *Jac. L. D.* Jacob's Law Dictionary.

Jac. Fish. Dig. Jacob's Fisher's Digest.

Jac. Int. Jacob's Introduction to the Common, Civil and Canon Law.

Jac. L. G. Jacob's Law Grammar.

Jac. Lex Mer. Jacob's Lex Mercatoria, or the Merchant's Companion.

Jac. Sea Law. Jacobsen's Law of the Sea.

Jac. & W. or *Jac. & Walk.* Jacob & Walker's English Chancery Reports.

Jack. Jackson's Reports, Georgia.

Jack. Tex. App. Jackson's Texas Court of Appeals Reports.

Jack. & G. Landl. & Ten. Jackson & Gross, Treatise on the Law of Landlord and Tenant in Pennsylvania.

Jackson. Jackson's Reports, vols. 43-66 Georgia;—Jackson's Reports, vols. 1-29 Texas Court of Appeals.

Jackson & Lumpkin (Ga.). Jackson & Lumpkin's Georgia Reports.

Jacob. Jacob's Law Dictionary.

James. James's Reports, Nova Scotia.

James. Const. Con. Jameson on Constitutional Conventions.

James (N. Sc.). James's Reports, Nova Scotia.

James Op. James's Opinions, Charges, etc., London, 1820.

James Sel. Cas. or *James Sel. Cases.* James's Select Cases, Nova Scotia.

James. & Mont. Jameson and Montagu's English Bankruptcy Reports (in 2 Glyn and Jameson).

Jan. Angl. Jani Anglorum.

Jar. Ch. Pr. Jarman's Chancery Practice.

Jar. Cr. Tr. Jardine's Criminal Trials.

Jar. Pow. Dev. Powell on Devises, with Notes by Jarman.

Jar. Prec. Bythewood and Jarman's Precedents.

Jar. Wills. Jarman on Wills.

Jard. Tr. Jardine's Criminal Trials.

Jarm. Ch. Pr. Jarman's Chancery Practice.

Jarm. Pow. Dev. Powell on Devises, with Notes by Jarman.

Jarm. Wills. Jarman on Wills.

Jarm. & By. Conv. Jarman and Bythewood's Conveyancing.

Jctus. Jurisconsultus.

Jebb or *Jebb C. C.* or *Jebb Cr. Cas.* or *Jebb Ir. Cr. Cas.* Jebb's Irish Crown Cases.

Jebb Cr. & Pr. Cas. Jebb's Irish Crown and Presentment Cases.

Jebb & B. Jebb and Bourke's Reports, Irish Queen's Bench.

Jebb & S. or *Jebb & Sym.* Jebb and Symes's Reports, Irish Queen's Bench.

Jeff. Jefferson's Reports, Virginia.

Jeff. Man. Jefferson's Manual of Parliamentary Law.

Jenk. or *Jenk. Cent.* Jenkins's Eight Centuries of Reports, English Exchequer.

Jenks. Jenks's Reports, vol. 58 New Hampshire.

Jenn. Jennison's Reports, vols. 14-18 Michigan.

Jer. Eq. Jur. or *Jeremy, Eq. Jur.* Jeremy's Equity Jurisdiction.

Jo. T. Sir T. Jones's Reports.

Jo. Juris. Journal of Jurisprudence.

Jo. & La T. Jones and La Touche's Reports, Irish Chancery.

John. Johnson's New York Reports;—Johnson's Reports of Chase's Decisions;—Johnson's Maryland Chancery Decisions;—Johnson's English Vice-Chancellors' Reports.

John. & H. Johnson and Hemming's Reports, English Chancery.

Johns. Johnson's Reports, New York Supreme Court;—Johnson's Reports of Chase's Decisions;—Johnson's Maryland Chancery Decisions;—Johnson's English Vice-Chancellors' Reports.

Johns. Bills. Johnson on Bills of Exchange, etc.

Johns. Cas. Johnson's Cases, New York Supreme Court.

Johns. Ch. Johnson's New York Chancery Reports;—Johnson's English Vice-Chancellors' Reports;—Johnson's Maryland Chancery Decisions;—Johnston's Reports, New Zealand.

Johns. Ch. Cas. Johnson's Chancery Reports, New York.

Johns. Ct. Err. Johnson's Reports, New York Court of Errors.

Johns. Dec. Johnson's Maryland Chancery Decisions.

Johns. Eccl. Law. Johnson's Ecclesiastical Law.

Johns. Eng. Ch. Johnson's English Chancery Reports.

Johns. H. & V. Johnson's English Chancery Reports.

Johns. (Md.). Johnson's Maryland Reports.

Johns. (New Zealand). Johnson's New Zealand Reports.

Johns. Pat. Man. Johnson's Patent Manual.

Johns. Rep. Johnson's Reports, New York Supreme Court.

Johns. Tr. Johnson's Impeachment Trial.

Johns. U. S. Johnson's Reports of Chase's United States Circuit Court Decisions.

Johns. V. C. or *Johns. V. Ch. Cas.* Johnson's Cases in Vice-Chancellor Wood's Court.

Johns. & H. or *Johns. & Hem.* Johnson & Hemming's English Chancery Reports.

Johnson. Johnson's Reports, New York;—Johnson's English Vice-Chancellors' Reports;—Johnson's Maryland Chancery Decisions.

Johnst. Inst. Johnston's Institutes of the Law of Spain.

Johnst. N. Z. Johnston's Reports, New Zealand.

Jon. Thos. Jones's Reports, English King's Bench and Common Pleas;—Wm. Jones's Reports, English King's Bench and Common Pleas.

Jon. (Ala.). Jones's Reports, Alabama, 62.

Jon. Bailm. Jones's Law of Bailments.

Jon. B. & W. Jones, Barclay, and Whittelsey's Reports, Missouri, vol. 51.

Jon. Corp. Sec. Jones on Corporate Securities.

Jon. Eq. Jones's Equity Reports, North Carolina.

Jon. Exch. Jones's Irish Exchequer Reports.

Jon. Inst. Jones's Institutes of Hindoo Law.

Jon. Intr. Jones's Introduction to Legal Science.

Jon. Ir. Exch. Jones's Reports, Irish Exchequer.

Jon. L. O. T. Jones on Land Office Titles.

Jon. (Mo.). Jones's Reports, Missouri.

Jon. (N. C.). Jones's Law Reports, North Carolina.

Jon. (N. C.) Eq. Jones's Equity Reports, North Carolina.

Jon. Mort. Jones on Mortgages.

Jon. (Pa.). Jones's Reports, Pennsylvania.

Jon. Railw. Sec. Jones on Railway Securities.

Jon. Salv. Jones on Salvage.

Jon. T. Thos. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 2 Jones.

Jon. (U. C.). Jones's Reports, Upper Canada.

Jon. W. Wm. Jones's Reports, English King's Bench and Common Pleas. Sometimes cited as 1 Jones.

Jon. & C. or *Jon. & Car.* Jones and Cary's Reports, Irish Exchequer.

Jon. & L. or *Jon. & La T.* Jones and La Touche's Reports, Irish Chancery.

Jon. & S. Jones and Spencer's Reports, New York City Superior Court, vols. 33-46.

Jones. Jones's Reports, vols. 43-48, 52-57, 61, 62 Alabama;—Jones's Reports, vols. 11, 12 Pennsylvania;—Jones's Reports, vols. 22-31 Missouri;—Jones's Law or Equity Reports, North Carolina;—Jones's Irish Exchequer Reports;—Jones's Upper Canada Common Pleas Reports;—Jones & Spencer's New York Superior Court Reports;—Sir Thomas Jones's Eng-

lish King's Bench Reports;—Sir William Jones's English King's Bench Reports;—See Jon.

Jones, Bailm. Jones's Law of Bailments.

Jones, Barclay & Whittelsey or *Jones, B. & W. (Mo.).* Jones, Barclay and Whittelsey's Reports, Missouri Supreme Court (31 Missouri).

Jones, Chat. Mortg. Jones on Chattel Mortgages.

Jones Eq. Jones's North Carolina Equity Reports.

Jones, French Bar. Jones's History of the French Bar.

Jones Ir. Jones's Irish Exchequer Reports.

Jones Law or *Jones N. C.* Jones's North Carolina Law Reports.

Jones (Pa.). Jones's Reports, vols. 11, 12 Pennsylvania.

Jones T. Sir Thomas Jones's English King's Bench Reports.

Jones U. C. Jones's Reports, Upper Canada.

Jones W. Sir William Jones's English King's Bench Reports.

Jones & C. Jones & Cary's Irish Exchequer Reports.

Jones & La T. Jones & La Touche's Irish Chancery Reports.

Jones & McM. (Pa.). Jones & McMurtrie's Pennsylvania Supreme Court Reports.

Jones & Spen. Jones & Spencer's New York Superior Court Reports.

Jord. P. J. Jordan's Parliamentary Journal.

Josephs. Josephs's Reports, vol. 21 Nevada.

Jour. Jur. (Sc.). Journal of Jurisprudence and Scottish Law Magazine, Edinburgh.

Jour. Jur. Journal of Jurisprudence (Hall's), Philadelphia.

Jour. Law. Journal of Law, Philadelphia.

Jour. Trib. Com. Journal des Tribunaux de Commerce, Paris.

Joy Chal. Joy on Challenge to Jurors.

Joy Ev. Acc. Joy on the Evidence of Accomplices.

Jud. Judgments. Judicial. Judicature;—Book of Judgments, English Courts.

Jud. Chr. Judicial Chronicle.

Jud. Com. of P. C. Judicial Committee of the Privy Council.

Jud. Repos. Judicial Repository, New York.

Jud. & Sw. (Jamaica). Judah and Swan's Reports, Jamaica.

Judd. Judd's Reports, vol. 4 Hawaii.

Jur. The Jurist Reports in all the Courts, London.

Jur. Eccl. Jura Ecclesiastica.

Jur. Mar. Molloy's De Jure Maritimo.

Jur. N. S. The Jurist, New Series, Reports in all the Courts, London.

Jur. (N. S.) Ex. Jurist (New Series) Exchequer.

Jur. N. Y. The Jurist or Law and Equity Reporter, New York.

Jur. Ros. Roscoe's Jurist, London.

Jur. Sc. Scottish Jurist, Court of Session, Scotland.

Jur. Soc. P. Juridical Society Papers, London.

Jur. St. Juridical Styles, Scotland.

Jur. Wash. D. C. The Jurist, Washington, D. C.

Jurisp. The Jurisprudent, Boston.

Jus Nav. Rhod. Jus Navale Rhodiorum.

Just. Dig. Digest of Justinian, 50 books. Never translated into English.

Just. Inst. Justinian's Institutes. See note following "Inst. 1, 2, 31."

Just. Itin. Justice Itinerant or of Assize.

Just. P. The Justice of the Peace, London.

Just. S. L. Justice's Sea Law.

Just. T. Justice of Trailbaston.

Juta. Juta's Cape of Good Hope Reports.

K. Keyes's New York Court of Appeals Reports;—Kenyon's English King's Bench Reports;—Kansas (see Kan.).

K. B. or *[1901] K. B.* Law Reports, King's Bench Division, from 1901 onward.

K. B. (U. C.). King's Bench Reports, Upper Canada.

K. C. King's Council.

K. C. R. Reports *tempore* King, English Chancery.

K. & B. Dig. Kerford's and Box's Victorian Digest.

K. & F. N. S. W. Knox & Fitzhardinge's New South Wales Reports.

K. & G. R. C. Keane & Grant's English Registration Appeal Cases.

K. & J. Kay & Johnson's English Vice-Chancellors' Reports.

K. & O. Knapp and Ombler's Election Cases, English.

Kam. or *Kam. Dec.* Kames's Decisions, Scotch Court of Session.

Kam. Eluc. Kames's Elucidations of the Law of Scotland.

Kam. Eq. Kames's Principles of Equity.

Kam. Ess. Kames's Essays.

Kam. Hist. L. Tr. or *Kam. L. T.* Kames's Historical Law Tracts.

Kam. Rem. Dec. Kames's Remarkable Decisions, Scotch Court of Session.

Kam. Sel. Dec. Kames's Select Decisions, Scotch Court of Session.

Kam. Tr. Kames's Historical Law Tracts.

Kames, Eq. Kames's Principles of Equity.

Kan. (or Kans.). Kansas;—Kansas Reports.

Kan. C. L. Rep. Kansas City Law Reporter.

Kan. L. J. Kansas Law Journal.

Kan. Univ. Lawy. Kansas University Lawyer, Lawrence.

Kans. App. Kansas Appeals Reports.

Kay. Kay's English Vice-Chancellors' Reports.

Kay Sh. Kay on Shipping.

Kay & J. or *Kay & Johns.* Kay and Johnson's Reports, English Chancery.

Ke. Keen's English Rolls Court Reports.

Keane & G. R. C. or *Keane & Gr.* Keane and Grant's English Registration Appeal Cases.

Keat. Fam. Sett. Keating on Family Settlements.

Keb. or *Keble.* Keble's Reports, English King's Bench.

Keb. J. Keble's Justice of the Peace.

Keb. Stat. Keble's Statutes of England.

Keen. Keen's Reports, English Rolls Court.

Keen. Cas. Qua. Cont. or *Keener, Quasi Contr.* Keener's Cases on Quasi Contracts.

Keil. or *Keilw.* Keilway's Reports, English King's Bench.

Kel. 1. Sir John Kelyng's English Crown Cases.

Kel. 2. William Kelynge's English Chancery Reports.

Kel. Ga. Kelly's Reports, Georgia Reports, vols. 1-3.

Kel. J. or *1 Kel.* Sir John Kelyng's Reports, English Crown Cases.

Kel. W. or *2 Kel.* W. Kelynge's Reports, English Chancery and King's Bench.

Kel. & C. Kelly and Cobb's Reports, Georgia.

Kelh. Norm. L. D. or *Kelham.* Kelham's Norman French Law Dictionary.

Kellen. Kellen's Reports, vols. 146-155 Massachusetts.

Kelly. Kelly's Reports, vols. 1-3 Georgia.

Kelly & C. or *Kelly & Cobb.* Kelly & Cobb's Reports, vols. 4, 5 Georgia.

Kelyng, J. Kelyng's English Crown Cases.

Kelynge, W. Kelynge's English Chancery Reports.

Kemble, Sax. Kemble, The Saxons in England.

Ken. Kentucky (see Ky.);—Kenyon English King's Bench Reports.

Ken. Dec. Kentucky Decisions, by Sneed.

Ken. L. Rep. Kentucky Law Reporter.

Kenan. Kenan's Reports, vols. 76-91 North Carolina.

Kenn. Gloss. Kennett's Glossary.

Kenn. Imp. Kennett on Impropriations.

Kenn. Par. Antiq. Kennett, Parochial Antiquities.

Kennett. Kennett's Glossary;—Kennett upon Impropriations.

Kennett, Gloss. Kennett's Glossary.

Kent or *Kent Com.* or *Kent Comm.* Kent's Commentaries on American Law.

Keny. Kenyon's Notes, English King's Bench.

Keny. C. H. (or 3 Keny.). Chancery Reports at the end of 2 Kenyon.

Kern. Kern's Reports, vols. 100-116 Indiana;—Kernan's Reports, vols. 11-14 New York Court of Appeals.

Kerr. Kerr's Reports, Indiana; — Kerr's New Brunswick Reports;—Kerr's Reports;—J. M. Kerr's Reports, vols. 27-29 New York Civil Procedure.
Kerr Act. Kerr on Actions at Law.
Kerr Anc. L. Kerr on Ancient Lights.
Kerr Disc. Kerr on Discovery.
Kerr Extra. Kerr on Inter-State Extradition.
Kerr Fr. Kerr on Fraud and Mistake.
Kerr Inj. Kerr on Injunction.
Kerr (N. B.). Kerr's Reports, New Brunswick.
Kerr Rec. Kerr on Receivers.
Kerse. Kerse's Manuscript Decisions, Scotch Court of Session.
Key. or *Keyes.* Keyes's Reports, New York Ct. of Appeals. Sometimes cited as vols. 40-43 N. Y.
Keyes F. I. C. Keyes on Future Interest in Chattels.
Keyes F. I. L. Keyes on Future Interest in Lands.
Keyes Rem. Keyes on Remainders.
Keyl. Keilwey's (or Keylway's) English King's Bench Reports.
Kilk. Kilkerran's Reports, Scotch Court of Session.
King. King's Reports, vols. 5, 6 Louisiana Annual.
King Cas. temp. Select Cases *tempore* King, English Chancery.
King's Conf. Ca. King's Conflicting Cases.
Kir. (Kirb. or *Kirby).* Kirby's Connecticut Reports.
Kirt. Sur. Pr. Kirtland on Practice in Surrogates' Courts.
Kitch. or *Kitch. Courts* or *Kitchin.* Kitchin on Jurisdictions of Courts-Leet, Courts-Baron, etc.
Kn. or *Kn. A. C.* or *Knapp* or *Knapp A. C.* Knapp's Appeal Cases (English Privy Council).
Kn. N. S. W. Knox, New South Wales Reports.
Kn. & M. or *Kn. & Moo.* or *Knapp & M.* Knapp and Moore's Reports, vol. 3 Knapp's English Privy Council.
Kn. & O. or *Knapp & Omb.* Knapp and Ombler's Election Cases.
Knapp. Knapp's Privy Council Reports, England.
Knowles. Knowles's Reports, vol. 3 Rhode Island.
Knox. Knox, New South Wales Reports.
Knox & Fitz. Knox & Fitzhardinge, New South Wales.
Kolze. Transvaal Reports by Kolze.
Kreider. Kreider's Reports, vols. 1-23 Washington.
Kress. Kress's Reports, vols. 166-194 Pennsylvania;—Kress's Pennsylvania Superior Court.
Kulp. Kulp's Luzerne Legal Register Reports, Pennsylvania.
Ky. Kentucky;—Kentucky Reports.
Ky. Dec. Kentucky Decisions, Sneed's Reports.
Ky. L. R. or *Ky. L. Rep.* Kentucky Law Reporter.
Kyd Aw. Kyd on the Law of Awards.
Kyd Bills. Kyd on Bills of Exchange.
Kyd Corp. Kyd on Corporations.
L. Lansing's Supreme Court Reports, New York;—Law. Loi. Liber.
L. A. Lawyers' Reports Annotated.
L. Alam. Law of the Alamanni.
L. Bajwar. or *L. Boior.* Law of the Bavarians.
L. C. Lord Chancellor;—Lower Canada;—Leading Cases.
L. C. B. Lord Chief Baron.
L. C. C. C. Lower Canada Civil Code.
L. C. C. P. Lower Canada Civil Procedure.
L. C. D. Lower Court Decisions, Ohio.
L. C. Eq. White and Tudor's Leading Cases in Equity.
L. C. G. Lower Courts Gazette, Toronto.
L. C. J. Lord Chief Justice.
L. C. J. or *L. C. Jur.* Lower Canada Jurist, Montreal.
L. C. L. J. Lower Canada Law Journal, Montreal.
L. C. R. Lower Canada Reports.
L. D. or *L. Dec.* Land Office Decisions, United States.
L. Ed. Lawyers' Edition Supreme Court Reports.
L. F. Leges Forestarum.
L. Fr. Law French.
L. H. C. Lord High Chancellor.
L. I. Legal Intelligencer, Philadelphia.
L. I. L. Lincoln's Inn Library.
L. J. House of Lords Journal;—Lord Justices Court;—The Law Journal, London.
L. J. or *L. J. O. S.* Law Journal Reports, in all the Courts.
L. J. Adm. Law Journal Reports, New Series, English Admiralty.
L. J. App. Law Journal Reports, New Series, English Appeals.
L. J. Bank. or *L. J. Bankr.* or *L. J. Bk.* Law Journal Reports, New Series, English Bankruptcy (1831 onward).
L. J. C. or *L. J. C. P.* Law Journal Reports, New Series, English Common Pleas.
L. J. C. C. R. Law Journal, New Series, Crown Cases Reserved.
L. J. Ch. Law Journal, New Series, English Chancery Division (1831 on).
L. J. Ch. (O. S.). Law Journal, Old Series, 1822, 1831.
L. J. Chan. Law Journal Reports, New Series, English Chancery Division (1831 on).
L. J. C. P. or *L. J. C. P. D.* Law Journal, New Series, Common Pleas Decisions.
L. J. D. & M. Law Journal, New Series, Divorce and Matrimonial.
L. J. Ecc. Law Journal Reports, New Series, Ecclesiastical (1831 on).
L. J. Ex. or *L. J. Exch.* Law Journal, New Series, Exchequer Division (1831 on).
L. J. H. L. Law Journal Reports, New Series, English House of Lords.
L. J. K. B. Law Journal, King's Bench.
L. J. L. C. Law Journal, Lower Canada.
L. J. L. T. Law Journal, Law Tracts.
L. J. M. C. Law Journal, New Series, Divorce and Matrimonial;—Law Journal, Magistrates' Cases.
L. J. M. P. A. Law Journal, Matrimonial, Probate and Admiralty.
L. J. (M. & W.). Morgan and William's Law Journal, London.
L. J. N. S. The Law Journal, New Series, London (1831 onwards).
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L. J. O. S. The Law Journal, Old Series, London (1822-1831).
L. J. P. or *L. J. P. C.* Law Journal, New Series, Privy Council;—Law Journal, Probate, Divorce and Admiralty.
L. J. P. D. & A. Law Journal Reports, New Series, English Probate, Divorce, and Admiralty.
L. J. P. & M. or *L. J. Prob.* or *L. J. Prob. & Mat.* Law Journal, New Series, Probate and Matrimonial (1831 onward).
L. J. Q. B. Law Journal Reports, New Series, English Queen's Bench (1831 on).
L. J. Rep. Law Journal Reports.
L. J. Rep. N. S. Law Journal Reports, New Series (1831 onward).
L. J. (Sm.). Smith's Law Journal, London.
L. J. U. C. Law Journal, Upper Canada.
LL. Laws.
L. L. Law Latin. Local Law;—Law Library, Philadelphia (reprint of English treatises).
L. L. N. S. Law Library, New Series.
L. Lat. Law Latin.
L. M. & P. Lowndes, Maxwell, and Pollock's Reports, English Bail Court.
L. Mag. Law Magazine, London.
L. Mag. & L. R. or *L. Mag. & R.* Law Magazine and Law Review, London.
L. N. Liber Niger, or the Black Book.
L. O. Legal Observer, London.
L. P. B. Lawrence's Paper Book. See *A. P. B.*
L. P. C. Lord of the Privy Council.
L. P. R. Lilly's Practical Register.
L. R. Law Reports (English);—Law Reporter (Law Times Reports, New Series) Law Review;—(Irish) Law Recorder, Reports in all the Irish Courts;—Louisiana Reports.
L. R. A. Lawyers' Reports Annotated.
L. R. A. & E. English Law Reports, Admiralty and Ecclesiastical (1866-1875).

L. R. App. or *L. R. App. Cas.* English Law Reports, Appeal Cases, House of Lords.

L. R. Burm. Law Reports, British Burmah.

L. R. C. C. or *L. R. C. C. R.* English Law Reports, Crown Cases Reserved (1866-1875).

L. R. C. P. English Law Reports, Common Pleas (1866-1875).

L. R. C. P. D. Law Reports, Common Pleas Division, English Supreme Court of Judicature.

L. R. Ch. English Law Reports, Chancery Appeal Cases (1866-1875).

L. R. Ch. D. or *L. R. Ch. Div.* Law Reports, Chancery Division, English Supreme Court of Judicature.

L. R. E. & I. App. or *L. R. E. & Ir. App.* English Reports, English and Irish Appeals.

L. R. Eq. English Law Reports, Equity (1866-1875).

L. R. Ex. or *L. R. Exch.* English Law Reports, Exchequer (1866-1875).

L. R. Ex. D. or *L. R. Ex. Div.* Law Reports, Exchequer Division, English Supreme Court of Judicature.

L. R. H. L. Law Reports, English and Irish Appeal Cases, House of Lords.

L. R. H. L. Sc. English Law Reports, House of Lords, Scotch and Divorce Appeal Cases (1866-1875).

L. R. Ind. App. English Law Reports, Indian Appeals.

L. R. Ir. Law Reports, Ireland (1879-1893).

L. R. Misc. D. Law Reports, Miscellaneous Division.

L. R. N. S. Irish Law Recorder, New Series.

L. R. N. S. W. Law Reports, New South Wales.

L. R. P. C. English Law Reports, Privy Council, Appeal Cases (1866-1875).

L. R. Q. B. Law Reports, Queen's Bench (1866-1875).

L. R. Q. B. Div. Law Reports, Queen's Bench Division.

L. R. P. Div. or *L. R. P. & D.* Law Reports, Probate, Divorce, and Admiralty Division, English Supreme Court.

L. R. P. & M. Law Reports, Probate and Matrimonial (1866-1875).

L. R. S. A. Law Reports, South Australia.

L. R. Sc. Div. App. Cas. or *L. R. Sc. & D.* English Law Reports, Scotch and Divorce Cases, before the House of Lords.

L. R. Sess. Cas. English Law Reports, Session Cases.

L. R. Stat. English Law Reports, Statutes.

L. Rep. (Mont.). Law Reporter (Montreal).

L. Repos. Law Repository.

L. Rev. & Quart. J. Law Review and Quarterly Journal.

L. Ripar. Law of the Riparians.

L. S. Locus sigilli, place of the seal.

L. Salic. Salic Law.

L. Stu. Mag. N. S. Law Student's Magazine, New Series.

L. T. The Law Times, Scranton, Pa.;—The Law Times, London.

L. T. B. American Law Times Bankruptcy Reports.

L. T. J. Law Times Journal.

L. T. N. S. or *L. T. R. N. S.* or *L. T. Rep. N. S.* Law Times (New Series) Reports, London;—American Law Times Reports.

L. T. O. S. Law Times, Old Series.

L. T. R. Law Times Reports, in all the Courts.

L. V. Rep. Lehigh Valley Reporter, Pennsylvania.

L. & B. Bull. Law and Bank Bulletin.

L. & B. Ins. Dig. Littleton and Blatchley's Insurance Digest.

L. & C. or *L. & C. C. C.* Leigh & Cave's English Crown Cases, Reserved.

L. & E. English Law and Equity Reports, Boston Edition.

L. & E. Rep. Law and Equity Reporter, New York.

L. & G. t. Plunk. Lloyd and Goold's Cases *tempore* Plunkett, Irish Chancery.

L. & G. t. Sug. Lloyd and Goold *temp.* Sugden, Irish Chancery.

L. & M. Lowndes & Maxwell's English Practice Cases, Bail Court.

L. & T. Longfield and Townsend's Reports, Irish Exchequer.

L. & W. or *L. & Welsb.* Lloyd and Welsby's Mercantile Cases, English Courts.

La. Lane's Reports, English Exchequer;—Louisiana;—Louisiana Reports;—Lane's English Exchequer Reports.

La. An. Louisiana Annual Reports;—Lawyers' Reports, Annotated.

La. Ann. Louisiana Annual Reports.

La Laure des Ser. Traité des Servitudes réelles, par M. La Laure.

La. L. J. or *La. L. J. (Schm.).* Louisiana Law Journal (Schmidt's), New Orleans.

La. T. R. Martin's Louisiana Term Reports, vols. 2-12.

La Thém. L. C. La Thémis (Periodical) Lower Canada.

Lab. Labatt's Reports, U. S. District Ct., California.

Lac. Dig. Ry. Dec. or *Lacey Dig.* Lacey's Digest of Railway Decisions.

Lack. Leg. R. Lackawanna Legal Record, Scranton, Pa.

Ladd. Ladd's Reports, vols. 59-64 New Hampshire.

Lal. R. P. Lalor on Real Property.

Lalor. Lalor's Supplement to Hill and Denio's Reports, New York.

Lalor, Pol. Econ. Lalor, Cyclopædia of Political Science, Political Economy, etc.

Lamar. Lamar's Reports, vols. 25-42 Florida.

Lamb. Lamb's Reports, Wisconsin.

Lamb. Arch. or *Lamb. Archai.* Lambard's Archaionomia.

Lamb. Const. Lambard, Duties of Constables, etc.

Lamb. Eir. or *Lamb. Eiren.* Lambard's Eirenarcha.

Lanc. B. The Lancaster Bar, Pennsylvania.

Lanc. L. Rev. Lancaster Law Review.

Land Com. Rep. Land Commissioners Reports, Ireland.

Land. Est. C. Landed Estates Court.

Lane. Lane's Reports, English Exchequer.

Lang. Eq. Pl. Langdell's Summary of Equity Pleading.

Lang. Lead. Cas. Langdell's Leading Cases on Contracts.

Lang. L. C. Sales. Langdell's Leading Cases on Sales.

Langd. Cont. Langdell's Leading Cases on Contracts;—Langdell's Summary of the Law of Contracts.

Lans. Lansing's Reports, New York Supreme Court Reports, vols. 1-7.

Lans. Ch. or *Lans. Sel. Cas.* Lansing's Select Chancery Cases, New York.

Laper. Dec. Laperriere's Speaker's Decisions, Canada.

Las Partidas. Las Sicte Partidas.

Lat. or *Latch.* Latch's Reports, English King's Bench.

Lath. Lathrop's Reports, vols. 115-145 Massachusetts.

Lauder. (Lauder of) Fountainhall's Scotch Session Cases.

Laur. H. C. Ca. Lauren's High Court Cases (Kimberly).

Laur. Prim. Laurence on the Law and Custom of Primogeniture.

Lauss. Eq. Laussat's Equity in Pennsylvania.

Law Bul. Law Bulletin, San Francisco.

Law Chron. Law Chronicle, London;—Law Chronicle, Edinburgh.

Law. Con. Lawson on Contracts.

Law Ex. J. Law Examination Journal, London.

Law Fr. & Lat. Dict. Law French and Latin Dictionary.

Law Int. Law Intelligencer.

Law J. Ch. Law Journal, New Series, Chancery.

Law J. I. B. Law Journal, New Series, English Queen's Bench.

Law J. P. D. Law Journal, Probate Division.

Law J. R., Q. B. Law Journal Reports, English Queen's Bench.

Law Jour. Law Journal. See *L. J.*
Law Jour. (M. & W.). Morgan and Williams's Law Journal, London.
Law Jour. (Smith's). J. P. Smith's Law Journal, London.
Law Jur. Law's Jurisdiction of the Federal Courts.
Law Lib. Law Library, Philadelphia (reprint of English treatises).
Law Lib. N. S. Law Library, New Series, Philadelphia.
Law Mag. Law Magazine, London.
Law News. Law News, St. Louis, Mo.
Law Pat. Dig. Law's Digest of Patent, Copyright and Trade-mark Cases.
Law. Pl. Lawes's Treatise on Pleading in Assumpsit.
Law Pr. Law's Practice in the Courts of the U. S.
Law Quart. Rev. Law Quarterly Review, London.
Law Rec. Law Recorder, Reports in all the Irish Courts.
Law Rep. Law Reporter, Boston;—Law Reports. See *L. R.*
Law Rep. A. & E. Law Reports, Admiralty and Ecclesiastical.
Law Rep. App. Cas. Law Reports, Appeal Cases.
Law Rep. C. C. Law Reports, Crown Cases.
Law Rep. C. P. or *Law Rep. C. P. D.* Law Reports, Common Pleas Division.
Law Rep. Ch. Law Reports, Chancery Appeal Cases.
Law Rep. Ch. D. Law Reports, Chancery Division.
Law Rep. Eq. Law Reports, Equity Cases.
Law Rep. Ex. or *Law Rep. Ex. D.* Law Reports, Exchequer Division.
Law Rep. H. L. Law Reports, House of Lords, English and Irish Appeal Cases.
Law Rep. H. L. Sc. Law Reports, Scotch and Divorce Appeal Cases, House of Lords.
Law Rep. Ind. App. Law Reports, Indian Appeals.
Law Rep. Ir. Law Reports, Irish.
Law Rep. Misc. D. Law Reports, Miscellaneous Division.
Law Rep. N. S. Monthly Law Reporter, Boston.
Law Rep. P. C. Law Reports, Privy Council, Appeal Cases.
Law Rep. P. & D. Law Reports, Probate and Divorce Cases.
Law Rep. Q. B. or *Law Rep. Q. B. D.* Law Reports, Queen's Bench Division.
Law Repos. Carolina Law Repository, North Carolina.
Law Rep. (Tor.). Law Reporter, Toronto.
Law Repos. Carolina Law Repository, North Carolina.
Law Rev. Law Review, London.
Law Rev. Qu. Law Review Quarterly, Albany, N. Y.
Law Rev. & Qu. J. Law Review and Quarterly Journal, London.
Law Stu. Mag. Law Students' Magazine, London.
Law Times or *Law Times N. S.* or *Law Times Rep. N. S.* Law Times Reports, New Series, English Courts, with Irish and Scotch Cases.
Law Times (Scranton). Law Times, Scranton, Pa.
Law Weekly. Law Weekly, New York.
Law & Mag. Mag. Lawyers' and Magistrates' Magazine, London.
Lawes C. Lawes on Charter Parties.
Lawes Pl. Lawes on Pleading.
Lawr. or *Lawrence.* Lawrence's Reports, vol. 20 Ohio.
Lawrence Comp. Dec. Lawrence's First Comptroller's Decisions.
Laws. Cas. Crim. L. Lawson's Leading Cases in Criminal Law.
Laws. Cas. Eq. Lawson's Leading Cases in Equity and Constitutional Law.
Laws. Lead. Cas. Simp. Lawson's Leading Cases Simplified.
Lawson Cont. Lawson on Contracts.
Lawson, Usages & Cust. Lawson on the Law of Usages and Customs.
Lawy. Mag. Lawyers' Magazine.
Lay. Lay's Reports, English Chancery.
Ld. Ken. Lord Kenyon's English King's Bench Reports.
Ld. Raym. Lord Raymond's English King's Bench Reports.
Le Mar. Le Marchant's Gardner Peerage Case.
Lea or *Lea B. J.* Lea's Tennessee Reports;—Leach.
Leach or *Leach C. C.* Leach's Crown Cases, English Courts.
Leach C. L. Leach, Cases in Crown Law.
Leach Cas. or *Leach Cl. Cas.* Leach's Club Cases, London.
Lead. Cas. Am. American Leading Cases, by Hare & Wallace.
Lead. Cas. Eq. White and Tutor's Leading Cases in Equity.
Leake. Leake on Contracts;—Leake's Digest of the Law of Property in Land.
Leake, Cont. or *Leake Contr.* Leake on Contracts.
Leç. El. Dr. Civ. Rom. or *Lec. Elm.* Leçons Elémentaries du Droit Civil Romain.
Le Droit C. Can. Le Droit Civil Canadian, Montreal.
Lee. Lee's English Ecclesiastical Reports;—Lee's Reports, vols. 9-12 California.
Lee Abs. Lee on Abstracts of Title.
Lee (Cal.). Lee's Reports, California.
Lee Cas. Ecc. Lee's Cases, English Ecclesiastical Courts.
Lee Cas. t. H. or *Lee & H.* Lee's Cases *tempore* Hardwicke, English King's Bench.
Lee, Dict. or *Lee Pr.* Lee's Dictionary of Practice.
Lee G. Sir George Lee's English Ecclesiastical Reports.
Leese. Leese's Reports, vol. 26 Nebraska.
Lef. Dec. Lefevre's Parliamentary Decisions, reported by Bourke.
Lefroy. Lefroy's English Railroad and Canal Cases.
Leg. Leges.
Leg. Adv. Legal Adviser, Chicago, Ill.
Leg. Alfred. Leges Alfredi (laws of King Alfred.)
Leg. Bibl. Legal Bibliography, by J. G. Marvin.
Leg. Burg. Leges Burgorum, Scotland.
Leg. Canut. Leges Canuti (laws of King Canute or Knut.)
Leg. Chron. or *Leg. Chron. Rep.* Legal Chronicle Reports, Pottsville, Pennsylvania.
Leg. Edm. Leges Edmundi (laws of King Edmund.)
Leg. Ethel. Leges Ethelredi.
Leg. Exam. Legal Examiner, London.
Leg. Exam. N. S. Legal Examiner, New Series, London.
Leg. Exam. & L. C. Legal Examiner and Law Chronicle, London.
Leg. Exam. & Med. J. Legal Examiner and Medical Jurist, London.
Leg. Exam. W. R. Legal Examiner, Weekly Reporter, London.
Leg. Exch. Legal Exchange, Des Moines, Iowa.
Leg. G. Legal Guide, London.
Leg. Gaz. or *Leg. Gaz. R.* or *Leg. Gaz. Rep. (Pa.).* Legal Gazette Reports, Pennsylvania.
Leg. H. 1. Laws of [King] Henry the First.
Leg. Inq. Legal Inquirer, London.
Leg. Int. Legal Intelligencer, Philadelphia.
Leg. News. Legal News, Montreal.
Leg. Obs. Legal Observer, London.
Leg. Oler. The Laws of Oleron.
Leg. Op. Legal Opinions, Harrisburg, Penna.
Leg. Out. Legge on Outlawry.
Leg. Rec. Rep. Legal Record Reports.
Leg. Rem. Legal Remembrancer, Calcutta High Court.
Leg. Rep. Legal Reporter, Nashville, Tenn.
Leg. Rep. (Ir.). Legal Reporter, Irish Courts.
Leg. Rev. Legal Review, London.
Leg. Rhod. Laws of Rhodes.
Leg. T. Cas. Legal Tender Cases.
Leg. Ult. The Last Law.
Leg. Wisb. Laws of Wisbuy.
Leg. Y. B. Legal Year Book, London.
Leg. & Ins. Rept. Legal and Insurance Reporter, Philadelphia.

Legg. Leggett's Reports, Sind, India.
Legge. Legge's Supreme Court Cases, New South Wales.
Legul. The Leguleian, London.
Lehigh Val. L. Rep. Lehigh Valley Law Reporter.
Leigh. Leigh's Reports, Virginia.
Leigh N. P. Leigh's Nisi Prius Law.
Leigh & C. Leigh and Cave's Crown Cases, English Courts.
Leigh & D. Conv. Leigh and Dalzell on Conversion of Property.
Leith R. P. St. Leith's Real Property Statutes, Ontario.
Le Mar. Le Marchant's Gardner Peerage Case.
Leo. or *Leon.* Leonard's Reports, English King's Bench.
Lest. P. L. or *Lest. P. L. C.* Lester's Decisions in Public Land Cases, U. S. 1860-70.
Lester. Lester's Reports, vols. 31-33 Georgia.
Lester Supp. or *Lest. & But.* or *Lester & B.* Lester & Butler's Supplement to Lester's 33d Georgia Reports.
Lev. Levinz's Reports, English King's Bench.
Lew. Lewin's English Crown Cases Reserved;—Lewis, Missouri;—Lewis's Reports, Nevada.
Lew. C. C. Lewin's Crown Cases, English Courts.
Lew. C. L. or *Lew. Cr. Law.* Lewis's Criminal Law of the U. S.
Lew L. Cas. or *Lew. L. Cas. on L. L.* Lewis's Leading Cases on Public Land Law.
Lew. L. T. in Phila. Lewis on Land Titles in Philadelphia.
Lew. Perp. Lewis on the Law of Perpetuities.
Lew. Pr. Lewis's Principles of Conveyancing.
Lew. Stocks. Lewis on Stocks, Bonds, etc.
Lew. Tr. Lewin on Trusts.
Lewis. Lewis's Reports, vols. 29-35 Missouri Appeals;—Lewis's Reports, vol. 1 Nevada;—Lewis's Kentucky Law Reporter.
Lewis, Perp. Lewis on the Law of Perpetuity.
Lex Cust. Lex Custumaria.
Lex. Jurid. Calvinus, Lexicon Juridicum Juris Cæsari simul et Canonici, etc.
Lex Man. Lex Maneriorum.
Lex Mer. or *Lex Mer. Red.* Lex Mercatoria, by Beawes.
Lex Mer. Am. Lex Mercatoria Americana.
Lex Parl. Lex Parliamentaria.
Lex Salic. Lex Salica.
Ley. Ley's English King's Bench Reports;—Ley's Reports, English Court of Wards and other Courts.
Lib. Liber (book);—Library.
Lib. Ass. *Liber Assisarum* (Part 5 of the Year Books).
Lib. Ent. Old Book of Entries.
Lib. Feud. *Liber Feudorum; Consuetudines Feudorum,* at end of *Corpus Juris Civilis.*
Lib. Intr. *Liber Intrationum:* Old Book of Entries.
Lib. L. & Eq. Library of Law and Equity.
Lib. Niger. *Liber Niger,* or the Black Book.
Lib. Pl. *Liber Placitandi,* Book of Pleading.
Lib. Reg. Register Books.
Lib. Rub. *Liber Ruber,* the Red Book.
Lib. Ten. *Liber Tenementum.*
Lieb. Civ. Lib. Lieber on Civil Liberty and Self-Government.
Lieb. Herm. Lieber's Hermeneutics.
Lieber Civ. Lib. Lieber on Civil Liberty and Self-Government.
Life & Acc. Ins. or *Life & Acc. Ins. R.* Life and Accident Insurance Reports (Bigelow's).
Lig. Dig. Ligon's Digest (Alabama).
Lil. Lilly's Reports or Entries, English Court of Assize.
Lil. Abr. Lilly's Abridgment.
Lil. Reg. Lilly's Practical Register.
Lind. Jur. Lindley's Jurisprudence.
Lind. Part. or *Lindl. Partn.* Lindley on Partnership.
Linn Ind. Linn's Index of Pennsylvania Reports.
Linn, Laws Prov. Pa. Linn on the Laws of the Province of Pennsylvania.
Lit. or *Litt.* Littell's Kentucky Reports;—Littleton's English Common Pleas and Exchequer Reports.
Lit. Sel. Ca. Littell's Select Kentucky Cases.
Lit. s. Littleton, section.
Lit. Ten. Littleton's Tenures.
Lit. & Bl. Dig. Littleton & Blatchley's Insurance Digest.
Litt. (Ky.). Littell's Reports, Kentucky.
Litt. Sel. Cas. Littell's Select Cases, Kentucky.
Litt. Ten. Littleton's Tenures.
Litt. & B. Littleton and Blatchley's Digest of Insurance Decisions.
Littell. Littell's Kentucky Reports.
Littleton. Littleton's English Common Pleas and Exchequer Reports.
Liv. *Livre,* Book.
Liv. Cas. Livingston's Cases in Error, New York.
Liv. Jud. Op. Livingston's Judicial Opinions, New York.
Liv. L. Mag. Livingston's Law Magazine, New York.
Liv. L. Reg. Livingston's Law Register, New York.
Liverm. Ag. Livermore on Principal and Agent.
Liverm. Diss. Livermore's Dissertation on the Contrariety of Laws.
Liz. Sc. Exch. Lizars's Scotch Exchequer Cases.
Ll. *Leges,* Laws.
Ll. & G. t. P. Lloyd & Goold's Irish Chancery Reports *tempore* Plunkett.
Ll. & G. t. S. Lloyd & Goold's Irish Chancery Reports *tempore* Sugden.
Ll. & W. or *Lloyd & W.* Lloyd & Welsby's English Mercantile Cases.
Llo. Ch. St. Lloyd's Chitty's Statutes.
Llo. T. M. Lloyd on Trademarks.
Llo. & G. t. P. Lloyd and Goold's Reports, *tempore* Plunkett, Irish Chancery.
Llo. & G. t. S. Lloyd and Goold's Reports, *tempore* Sugden, Irish Chancery.
Llo. & W., Lloyd & W., or *Llo. & W. Mer. Cas.* Lloyd and Welsby's Mercantile Cases, English King's Bench.
Loc. cit. Loco citato, in the place cited.
Loc. Ct. Gaz. Local Courts and Municipal Gazette, Toronto, Ont.
Locc. de Jur. Mar. Loccenius, de Jure Maritimo et Navali.
Lock. Rev. Ca. or *Lock. Rev. Cas.* Lockwood's Reversed Cases, New York.
Locus Standi. Locus Standi Reports, English.
Lofft. Lofft's Reports, English King's Bench.
Lofft, Append. Lofft's Maxims, appended to Lofft's Reports.
Log. Comp. Logan's Compendium of English, Scotch, and Ancient Roman Law.
Lois des Batim. Lois des Batiments.
Lom. C. H. Rep. Lomas's City Hall Reporter, New York.
Lom. Dig. Lomax's Digest of the Law of Real Property in the U. S.
Lond. London Encyclopedia.
Lond. Jur. London Jurist, Reports in all the Courts.
Lond. Jur. N. S. London Jurist, New Series.
Lond. L. Mag. London Law Magazine.
Long Q. or *Long Quint.* Long Quinto (Year Books, Part X).
Longf. & T. or *Long. & Town.* Longfield & Townsend's Irish Exchequer Reports.
Lor. Inst. Lorimer's Institutes.
Lor. & Russ. Loring & Russell, Election Cases, Massachusetts.
Lords Jour. Journal of the House of Lords.
Lorenz (Ceylon). Lorenz's Ceylon Reports.
Loring & Russell. Loring & Russell's Massachusetts Election Cases.
Lou. or *Louis.* Louisiana (see La.).
Louis. Code. Civil Code of Louisiana.
Love. Wills. Lovelass on Wills.
Low. or *Low. Dis.* Lowell's Decisions, U. S. Dist. of Massachusetts.
Low. Can. or *Low. Can. R.* Lower Canada Reports.
Low. Can. Jur. Lower Canada Jurist, Montreal.
Low. Can. L. J. Lower Canada Law Journal.
Low. Can. Repts. Lower Canada Reports.
Low. C. Seign. or *Low. Can. Seign.* Lower Canada Seignorial Reports.

Lowell. Lowell's United States District Court Reports.
Lown. Av. Lowndes on Average.
Lown. Col. Lowndes on Collisions at Sea.
Lown. Leg. Lowndes on Legacies.
Lown. M. & P. Lowndes, Maxwell and Pollock's Bail Court Reports, English.
Lown. & M. Lowndes and Maxwell's Bail Court Reports, English.
Lube Eq. Lube on Equity Pleading.
Luc. or *Lucas.* Lucas's Reports, Part X Modern Reports.
Lud. El. Cas. Luder's Election Cases, English.
Ludd. or *Ludden.* Ludden's Reports, vols. 43, 44 Maine.
Lum. Cas. or *Lum. P. L. Cas.* Lumley's Poor Law Cases.
Lum. Parl. Pr. Lumley's Parliamentary Practice.
Lum. Set. Lumley on Settlements and Removal.
Lumpkin. Lumpkin's Reports, vols. 59-77 Georgia.
Lush. or *Lush. Adm.* Lushington's Admiralty Reports, English.
Lush. P. L. Lushington on Prize Law.
Lush Pr. Lush's Common Law Practice.
Lut. Lutwyche's Reports, English Common Pleas.
Lut. Elec. Cas. Lutwyche's Election Cases, English.
Lut. Ent. Lutwyche's Entries.
Lut. R. C. Lutwyche's English Registration Appeal Cases.
Lutw. E. Lutwyche's English Common Pleas Reports.
Luz. L. J. Luzerne Law Journal.
Luz. L. T. Luzerne Law Times.
Luz. Leg. Ob. Luzerne Legal Observer, Carbondale, Pa.
Luz. Leg. Reg. Luzerne Legal Register, Wilkesbarre, Pa.
Lynd. Prov. Lyndwood's Provinciales.
Lyne. Lyne's Reports, Irish Chancery.
M. Massachusetts; — Maryland; — Maine; — Michigan; — Minnesota; — Mississippi; — Missouri;—Montana;—Queen Mary; thus 1 M. signifies the first year of the reign of Queen Mary;—Michaelmas Term. Mortgage;—Morison's Dictionary of Decisions, Scotch Court of Session;—Session Cases, 3d Series, Scotland (Macpherson);—See *Mc.*
M. A. Missouri Appeals.
M. Cas. Magistrates' Cases.
M. C. C. Moody's English Crown Cases, Reserved.
M. D. & D. or *M. D. & De G.* Montague, Deacon and DeGex's Reports, English Bankruptcy.
M. G. & S. Manning, Granger and Scott's Reports, English Common Pleas, Common Bench Reports, vols. 1-8.
M. L. Mercian Law.
M. L. J. Memphis Law Journal, Tennessee.
M. L. R. Maryland Law Record, Baltimore.
M. M. R. Mitchell's Maritime Register, London.
M. P. C. Moore's Privy Council Cases, English.
M. R. Master of the Rolls.
M. St. More's Notes on Stair's Institutes.
M. T. Michaelmas Term.
M. & A. or *M. & Ayr.* Montagu & Ayrton's English Bankruptcy Reports.
M. & B. Montagu and Bligh's Reports, English Bankruptcy.
M. & C. Mylne & Craig's English Chancery Reports;—Montagu & Chitty's English Bankruptcy Reports.
M. & C. Bankr. or *M. & Cht. Bankr.* Montagu and Chitty's Bankruptcy Reports, English.
M. & G. Manning & Granger's English Common Pleas Reports;—Maddock & Geldart's English Chancery Reports, vol. 6 Maddock's Reports.
M. & Gel. Maddock & Geldart's English Chancery Reports, vol. 6 Maddock's Reports.
M. & Gord. Macnaghten & Gordon's English Chancery Reports.
M. & H. Murphy and Hurlstone's Exchequer Reports.
M. & K. Mylne and Keen's Reports, English Chancery.
M. & M. Moody and Malkin's Reports, English Nisi Prius.
M. & McA. Montague and McArthur's Reports, English Bankruptcy.
M. & P. Moore and Payne's Reports, English Common Pleas and Exchequer.
M. & R. Manning & Ryland's English King's Bench Reports;—Moody & Robinson's English Nisi Prius Reports;—Maclean & Robinson's Scotch Appeal Cases.
M. & R. M. C. Manning and Ryland's Magistrate Cases, English King's Bench.
M. & Rob. Moody and Robinson's Nisi Prius Cases, English Courts.
M. & S. Maule & Selwyn's English King's Bench Reports;—Moore & Scott's English Common Pleas Reports;—Manning & Scott's Reports, vol. 9 Common Bench.
M. & Scott. Moore and Scott's Reports, English Common Pleas.
M. & W. Meeson and Welsby's Reports, English Exchequer.
M. & Y. Martin and Yerger's Reports, Tennessee.
Mac. Macnaghten's English Chancery Reports.
MacAr. MacArthur's District of Columbia Reports;—MacArthur's Patent Cases.
MacAr. Pat. Cas. MacArthur's Patent Cases.
MacAr. & M. or *MacAr. & Mackey.* MacArthur and Mackey, Reports of District of Columbia Supreme Court.
MacArth. or *MacArthur.* MacArthur's District of Columbia Reports;—MacArthur's Patent Cases.
MacArth. Pat. Cas. MacArthur, Patent Cases, District of Columbia.
Mac. N. Z. Macassey's New Zealand Reports.
Mac. Pat. Cas. Macrory's Patent Cases.
Mac. & G. Macnaghten & Gordon's English Chancery Reports.
Mac. & Rob. Maclean & Robinson's Scotch Appeal Cases.
Macas. Macassey's Reports, New Zealand.
Macc. Cas. Maccola's Breach of Promise Cases.
Maccl. Macclesfield's Reports, 10 Modern Reports.
Maccl. Tr. Macclesfield's Trial (Impeachment), London, 1725.
Maccles. Macclesfield's Reports (10 Modern).
Macd. Jam. Macdougall's Jamaica Reports.
Macf. or *Macfar.* Macfarlane's Reports, Jury Courts, Scotland.
Macf. Pr. Macfarlane's Practice of the Court of Session.
Mack. C. L. Mackeldey on Civil Law.
Mack. Cr. L. Mackenzie on the Criminal Law of Scotland.
Mack. Inst. Mackenzie's Institutes of the Law of Scotland.
Mack. Obs. Mackenzie's Observations on Acts of Parliament.
Mack. Rom. L. Mackenzie's Studies in Roman Law.
Mackeld. Mackeldey on Modern Civil Law;—Mackeldey on Roman Law.
Mackeld. Civil Law. Mackeldey on Modern Civil Law.
Mackeld. Rom. Law. Mackeldey on Roman Law.
Mackey. Mackey's Supreme Court Reports, District of Columbia.
Macl. McLean's United States Circuit Court Reports;—Maclaurin's Scotch Criminal Decisions.
Macl. Dec. Maclaurin's Decisions, Scotch Courts.
Macl. Sh. Maclachlan on Merchant Shipping.
Macl. & R. Maclean and Robinson's Scotch Appeals.
Macn. Macnaghten's Select Cases in Chancery *tempore* King;—W. H. Macnaghten's Reports, India.
Macn. C. M. Macnaghten on Courts Martial.
Macn. F. or *Macn. (Fr.).* Sir Francis Macnaghten's Bengal Reports.
Macn. N. A. Beng. Macnaghten's Nizamut Adawlut Reports, Bengal.
Macn. Nul. Macnamara on Nullities and Irregularities in the Practice of the Law.
Macn. S. D. A. Beng. (W. H.) Macnaghten's Sudder Dewanny Adawlut Reports, Bengal.
Macn. & G. Macnaghten and Gordon's Reports, English Chancery.
Macomb C. M. Macomb on Courts Martial.

Macph. Macpherson, Lee & Bell's (Third Series) Scotch Court of Session Cases.

Macph. Inf. Macpherson on Infancy.

Macph. Jud. Com. Macpherson, Practice of the Judicial Committee of the Privy Council.

Macph. Priv. Coun. Macpherson's Privy Council Practice.

Macq. Macqueen's Scotch Appeal Cases (House of Lords).

Macq. Deb. Macqueen's Debates on Life Peerage Question.

Macq. H. L. Cas. Macqueen's Scotch Appeal Cases (House of Lords).

Macq. H. & W. Macqueen on Husband and Wife.

Macq. M. & D. Macqueen on Marriage and Divorce.

Macr. P. Cas. Macrory's Patent Cases.

Macr. & H. Macrae and Hertslet's Insolvency Cases.

MacSwin. Mines. MacSwinney, Law of Mines, Quarries, and Minerals.

Mad. Maddock's English Chancery Reports;—Madras;—Maddox's Reports, vols. 9-19 Montana.

Mad. Exch. Madox's History of the Exchequer.

Mad. Form. Madox's Formulare Anglicarum.

Mad. H. C. or *Mad. H. Ct. Rep.* Madras High Court Reports.

Mad. Jur. Madras Jurist, India.

Mad. Papers. Madison's (James) Papers.

Mad. S. D. A. R. or *Mad. S. D. R.* Madras Sudder Dewanny Adawlut Reports.

Mad. Sel. or *Mad. Sel. Dec.* Madras Select Decrees.

Mad. Ser. Madras Series (East) India Law Reports.

Mad. & B. Maddox & Bach's Reports, vol. 19 Montana.

Mad. & Gel. Maddock & Geldart's English Chancery Reports, vol. 6 Maddock's Reports.

Madd. Maddock's English Chancery Reports;—Maddox's Reports, vols. 9-18 Montana.

Madd. Ch. Pr. Maddock's Chancery Practice.

Madd. & G. Maddock and Geldart's Reports, English Chancery (vol. 6, Maddock's Reports).

Mag. The Magistrate, London.

Mag. Cas. Magistrates's Cases, especially the series edited by Bittleston, Wise, & Parnell.

Mag. Char. Magna Carta or Charta. See Barrington's Revised Statutes of England, 1870, vol. 1, p. 84, and Coke's Second Institute, vol. 1, first 78 pages.

Mag. Dig. Magrath's South Carolina Digest.

Mag. Ins. Magen on Insurance.

Mag. (Md.). Magruder's Reports, Maryland, vols. 1-2.

Mag. Rot. Magus Rotulus (the Great Roll of the Exchequer).

Mag. & M. & P. L. Magistrate and Municipal and Parochial Lawyer.

Magr. or *Magruder.* Magruder's Reports, vols. 1, 2 Maryland.

Maine. Maine Reports.

Maine Anc. L. or *Maine Anc. Law.* Maine on Ancient Law.

Maine, Popular Govt. Maine, Popular Government.

Maine Vil. Com. Maine on Village Communities.

Maitland. Maitland's Manuscript Scotch Session Cases.

Mal. Malyne's Lex Mercatoria.

Mall. Ent. Mallory's Modern Entries.

Malloy. Malloy's Irish Chancery Reports.

Malone. Editor, vols. 6, 9, and 10, Heiskell's Tennessee Reports.

Man. Manning's Reports (English Court of Revision);—Manitoba;—Manning's Reports, vol. 1 Michigan;—Manuscript;—Manson's English Bankruptcy Cases.

Man. Cas. Manumission Cases in New Jersey, by Bloomfield.

Man. El. Cas. Manning's English Election Cases (Court of Revision).

Man. Exch. Pr. Manning's Exchequer Practice.

Man. Gr. & S. Manning, Granger and Scott's Reports, English Common Pleas.

Man. Int. Law. Manning, Commentaries on the Law of Nations.

Man. L. R. Manitoba Law Reports.

Man. & G. Manning and Granger's Reports, English Common Pleas.

Man. & R. or *Man. & Ry.* Manning and Ryland's Reports, English King's Bench.

Man. & R. Mag. Cas. or *Man. & Ry. Mag. Cas.* Manning and Ryland's Magistrate Cases, English King's Bench.

Man. & S. Manning & Scott's Reports, vol. 9 Common Bench.

Manb. Coke. Manby's Abridgment of Coke's Reports.

Manitoba. Armour's Queen's Bench and County Court Reports *tempore* Wood, Manitoba;—Manitoba Law Reports.

Manl. Fines. Manley on Fines.

Mann. Manning's Reports, Michigan Reports, vol. 1.

Mann. Com. Manning's Commentaries on the Law of Nations.

Manning. Manning's Unreported Cases;—Louisiana;—Manning's Reports, vol. 1 Michigan.

Manning, La. Unreported Cases, Louisiana.

Mans. Mansfield's Reports, vols. 49-52 Arkansas;—Manson, English Bankruptcy Cases.

Manson. Manson's English Bankruptcy Cases.

Manum. Cas. or *Manum. Cases.* Manumission Cases, New Jersey (Bloomfield's).

Manw. or *Manw. For. Laws.* Manwood's Forest Laws.

Mar. March's English King's Bench Reports;—Marshall's United States Circuit Court Reports;—Marshall's Kentucky Reports;—Martin's Louisiana Reports;—Martin's North Carolina Reports;—Marshall's Reports, Bengal;—Maryland;—Maritime.

Mar. Br. March's Translation of Brook's New Cases.

Mar. L. C. or *Mar. L. Cas.* or *Mar. L. Rep.* Maritime Law Cases (Crockford's), English.

Mar. L. C. N. S. or *Mar. L. Cas. N. S.* or *Mar. L. Rep. N. S.* Maritime Law Reports, New Series (Aspinall's), English.

Mar. La. Martin's Louisiana Reports.

Mar. N. C. Martin's North Carolina Reports.

Mar. N. S. Martin's Louisiana Reports, New Series.

Mar. R. English Maritime Law Reports.

Mar. Rec. B. Martin's Recital Book.

Mar. Reg. Mitchell's Maritime Register, London.

March. March's Translation of Brooke's New Cases, King's Bench.

March N. C. March's New Cases, English King's Bench.

Marine Ct. R. Marine Court Reporter (McAdam's), New York.

Mark. El. Markley's Elements of Law.

Marks & Sayre. Marks & Sayre's Reports, vol. 108 Alabama.

Marr. Marriott's English Admiralty Decisions;—Marrack's European Assurance Cases.

Marr. Adm. Marriott's Reports, English Admiralty.

Mars. Marsden's English Admiralty Reports.

Marsh. Marshall's United States Circuit Court Decisions;—Marshall's English Common Pleas Reports;—Marshall's Bengal Reports;—Marshall, Kentucky;—Marshall's Reports, vol. 4 Utah.

Marsh. (A. K.). A. K. Marshall's Kentucky Reports.

Marsh. Beng. Marshall's Reports, Bengal.

Marsh. C. P. Marshall's English Common Pleas Reports.

Marsh. Calc. Marshall's Reports, Calcutta.

Marsh. Ceylon. Marshall's Ceylon Reports.

Marsh. Dec. Marshall's United States Circuit Court Decisions (Brockenbrough);—Marshall on the Federal Constitution.

Marsh. Ins. Marshall on Insurance.

Marsh. J. J. J. J. Marshall's Reports, Kentucky.

Marsh. (Ky.) or *Marsh. A. K.* A. K. Marshall's Reports, Kentucky.

Marsh. Op. Marshall's (Chief Justice) Constitutional Opinions.

Mart. or *Mart. (La.).* Martin's Reports, Louisiana;—(see Martin).

Mart. Cond. La. Martin's Condensed Louisiana Reports.
Mart. Dec. United States Decisions in Martin's North Carolina Reports.
Mart. (Ga.). Martin's Reports, Georgia.
Mart. (Ind.). Martin's Reports, Indiana.
Mart. (La.). Martin's Louisiana Reports.
Mart. Law Nat. Martin's Law of Nations.
Mart. (N. C.). Martin's Reports, North Carolina.
Mart. N. S. or *Mart. (La.) N. S.* Martin's Reports, New Series, Louisiana.
Mart. O. S. (La.). Martin's Louisiana Reports, Old Series.
Mart. U. S. C. C. Martin's United States Circuit Court Reports.
Mart. & Y. or *Mart. & Yeag.* Martin and Yeager's Reports, Tennessee.
Marth. W. Ca. Martha Washington Case, see United States v. Cole, 5 McLean, 513, Fed. Cas. No. 14,832.
Martin. Martin's Louisiana Reports;—Martin's North Carolina Reports;—Martin's Reports, vols. 21-30 Georgia;—Martin's Reports, vols. 54-70 Indiana.
Martin Index. Martin's Index to Virginia Reports.
Marv. Marvel's Reports, Delaware.
Marv. Av. Marvin on General Average.
Marv. Leg. Bibl. Marvin's Legal Bibliography.
Marv. Salv. or *Marv. Wr. & S.* Marvin on Wreck and Salvage.
Maryland. Maryland Reports.
Mas. or *Mason (U. S.).* Mason's United States Circuit Court Reports.
Mass. Massachusetts;—Massachusetts Reports.
Mass. Dr. Com. Masse's Le Droit Commercial.
Mass. Elec. Ca. Massachusetts Election Cases.
Mass. L. R. Massachusetts Law Reporter, Boston.
Massey v. Headford. An Irish Criminal Conversation Case, 1804. Originally printed in Ireland and reprinted both in New York and Philadelphia.
Mast. Master's Reports, vols. 25-28 Canada Supreme Court.
Mat. Mathews.
Mat. Par. or *Paris.* Matthew Paris, Historia Minor.
Math. Ev. Matthews on Presumptive Evidence.
Mathews. Mathews's Reports, vols. 6-9 West Virginia.
Mats. or *Matson.* Matson's Reports, vols. 22-24 Connecticut.
Matth. (W. Va.). Matthews's Reports, West Virginia Reports, vol. 6.
Matth. Com. Matthews's Guide to Commissions in Chancery.
Matth. Dig. Matthews's Digest.
Matthews. Matthews's Reports, vol. 75 Virginia.
Mau. & Pol. Sh. Maude and Pollock's Law of Shipping.
Mau. & Sel. Maule & Selwyn's Reports, English King's Bench.
Maude & P. Mer. Shipp. Maude & Pollock's Law of Merchant Shipping.
Maude & P. Shipp. Maude & Pollock's Law of Merchant Shipping.
Maug. Lit. Pr. Maughan on Literary Property.
Maul. & Sel. or *Maule & S.* Maule & Selwyn's English King's Bench Reports.
Maur. Dec. Mauritius Decisions.
Max. Maxims.
Max. Dig. Maxwell's Nebraska Digest.
Maxw. Int. Sts. or *Maxw. Interp. St.* Maxwell on the Interpretation of Statutes.
May Const. Hist. May's Constitutional History of England.
May Crim. L. May's Criminal Law.
May Fr. Conv. May on Fraudulent Conveyances.
May Hist. May's Constitutional History of England.
May Ins. May on Insurance.
May. Merg. Mayhew on Merger.
May P. L. or *May, Parl. Law.* May's Parliamentary Law.
May, Parl. Pr. May's Parliamentary Practice.
Maymo Inst. Maymo's *Romani et Hispani Juris Institutiones.*
Mayn. Maynard's Reports, Edward II. (Year Books, Part I).
Mayne Dam. Mayne on Damages.
Mayo Just. Mayo's Justice.
Mayo & Moul. Mayo and Moulton's Pension Laws.
McAl. or *McAll.* McAllister's United States Circuit Court Reports.
McArth. McArthur's Reports, Dist. of Columbia.
McArth. C. M. McArthur on Courts Martial.
McBride. McBride's Reports, vol. 1 Missouri.
McCah. or *McCahon.* McCahon's Reports, Supreme Court of Kansas and U. S. Courts, Dist. of Kansas.
McCall Pr. McCall's Precedents.
McCar. or *McCart.* McCarter's New Jersey Equity Reports, vols. 14, 15;—McCarty's New York Civil Procedure Reports.
McCl. McClelland's English Exchequer Reports.
McCl. & Y. McClelland & Younge's English Exchequer Reports.
McClain Cas. Car. McClain's Cases on Carriers.
McClel. McClelland's Reports, English Exchequer.
McClel. Pro. Pr. McClellan's Probate Practice.
McClel. & Y. McClelland and Younge's Reports, English Exchequer.
McCook. McCook's Reports, vol. 1 Ohio State.
McCord. McCord's Law Reports, South Carolina.
McCord Ch. or *McCord Eq.* McCord's Equity Reports, South Carolina.
McCork. or *McCorkle.* McCorkle's Reports, North Carolina, vol. 65.
McCr. McCrary's United States Circuit Court Reports.
McCr. Elect. McCrary's American Law of Elections.
McCrary. McCrary, United States Circuit Court Reports.
McCul. Dict. McCullough's Commercial Dictionary.
McCul. Pol. Econ. McCulloch, Political Economy.
McCull. Dict. McCullough's Commercial Dictionary.
McDevitt. McDevitt's Land Commissioner's Reports, Ireland.
McDon. Inst. McDonall's Institutes of the Law of Scotland.
McFar. McFarlane's Reports (Scotch Jury Court).
McGill or *McGill Sc. Sess.* McGill's Manuscript Decisions Scotch Court of Session.
McGl. or *McGloin.* McGloin's Louisiana Reports.
McKinn. Jus. McKinney's Justice.
McKinn. Phil. Ev. McKinnon's Philosophy of Evidence.
McL. or *McLean.* McLean's United States Circuit Court Reports.
McL. & R. McLean & Robinson's Scotch Appeal Cases.
McM. Com. Dec. McMaster's Commercial Decisions.
McMas. R. L. McMaster's Railroad Law, New York.
McMul. or *McMull.* McMullan's South Carolina Law Reports.
McMul. Eq. or *McMull. Ch.* or *McMull. Eq.* McMullan's South Carolina Equity Reports.
McNagh. McNaghten (see Macn.).
McNagh. Elem. McNaghten's Elements of Hindoo Law.
McPherson. McPherson, Lee, & Bell's (Third Series) Scotch Session Cases.
McWillie. McWillie's Reports, vols. 73-76 Mississippi.
Md. Maryland;—Maryland Reports;—Harris & McHenry's Maryland Reports.
Md. Ch. Maryland Chancery Decisions, by Johnson.
Md. L. Rec. Maryland Law Record, Baltimore.
Md. L. Rep. Maryland Law Reporter, Baltimore.
Md. L. Rev. Maryland Law Review.
Me. Maine;—Maine Reports.
Means. Means's Kansas Reports.
Mechem. Ag. Mechem on Agency.
Mech. Cas. Ag. Mechem's Cases on Agency.
Med. Jur. Medical Jurisprudence.
Med. L. J. or *Med. Leg. J.* Medico Legal Journal, New York.

Med. L. N. Medico Legal News, New York.
Med. L. P. Medico Legal Papers, New York.
Medd. Meddaugh's Reports, vol. 13 Michigan.
Mees. & Ros. Meeson & Roscoe's English Exchequer Reports.
Mees. & W. or *Mees. & Wels.* Meeson & Welsby's English Exchequer Reports.
Meg. Megone's Company Case.
Meigs. Meigs's Reports, Tennessee.
Melv. Tr. Melville's Trial (Impeachment), London.
Mem. in Scacc. Memorandum or memoranda in the Exchequer.
Mem. L. J. Memphis Law Journal, Tennessee.
Menken. Menken's Reports, vol. 30 New York Civil Procedure Reports.
Menz. Menzies's Reports, Cape of Good Hope.
Mer. Merivale's Reports, English Chancery.
Merc. Cas. Mercantile Cases.
Merch. Dict. Merchant's Dictionary.
Meriv. Merivale's English Chancery Reports.
Merl. Quest. Merlin, Questions de Droit.
Merl. Répert. Merlin's *Répertoire de Jurisprudence.*
Met. or *Metc.* Metcalf's Massachusetts Reports;—Metcalfe's Kentucky Reports;—Metcalf's Reports, vol. 3 Rhode Island.
Metc. Contr. Metcalf on Contracts.
Metc. (Ky.). Metcalfe's Reports, Kentucky.
Metc. (Mass.). Metcalf's Reports, Massachusetts Reports, vols. 42-54.
Meth. Ch. Ca. or *Meth. Ch. Cas.* Report of Methodist Church Case.
Mich. Michigan;—Michigan Reports;—Michaelmas.
Mich. C. C. R. or *Mich. Cir. Ct. Rep.* Michigan Circuit Court Reporter, Marquette.
Mich. L. Michigan Lawyer, Detroit, Mich.
Mich. L. J. Michigan Law Journal, Detroit, Mich.
Mich. Lawyer. Michigan Lawyer, Detroit, Mich.
Mich. Leg. News. Michigan Legal News.
Mich. N. P. Michigan Nisi Prius Cases (Brown's).
Mich. Pol. Soc. Michigan Political Science Association.
Mich. Rev. St. Michigan Revised Statutes.
Mich. T. Michaelmas Term.
Mich. Vac. Michaelmas Vacation.
Middx. Sit. Middlesex Sittings at Nisi Prius.
Mil. Miles's Pennsylvania Reports;—Miller (see Mill.).
Miles. Miles's District Court Reports, City and County of Philadelphia, Pennsylvania.
Mill. Mill's South Carolina Constitutional Reports;—Miller's Reports, vols. 1-5 Louisiana;—Miller's Reports, vols. 3-18 Maryland;—Miller's Decisions, United States.
Mill. Civ. L. Miller's Civil Law.
Mill, Const. (S. C.). Mill's South Carolina Constitutional Reports.
Mill. Dec. or *Mill. Dec. (U. S.).* Miller's Decisions (Woolworth's Reports) United States Circuit Court;—Miller's Decisions United States Supreme Court Reports, Condensed (Continuation of Curties).
Mill. Ins. Miller's Elements of the Law of Insurances.
Mill. La. Miller's Reports, vols. 1-5 Louisiana.
Mill, Log. Mill's Logic.
Mill. Md. Miller's Reports, vols. 3-18 Maryland.
Mill. Op. Miller's Decisions, U. S. Circuit Court (Woolworth's Reports).
Mill. Part. Miller on Partition.
Mill, Pol. Ec. Mill's Political Economy.
Mill. & C. Bills. Miller and Collier on Bills of Sale.
Miller. Miller's Reports, vols. 1-5 Louisiana;—Miller's Reports, vols. 3-18 Maryland.
Mills Em. D. Mills on Eminent Domain.
Milw. or *Milw. Eccl.* Milward's Reports, Irish Prerogative, Ecclesiastical.
Min. Minor;—Minor's Alabama Reports.
Min. Dig. Minot's Digest, Massachusetts.
Min. Ev. Minutes of Evidence.
Min. Inst. Minor's Institutes Statute Law.
Minn. Minnesota;—Minnesota Reports.
Minn. Ct. Rep. Minnesota Court Reporter.
Minn. Law J. Minnesota Law Journal, St. Paul, Minn.

Minor. Minor's Alabama Reports;—Minor's Institutes.
Minshew. Minshew (John), "The Guide into the Tongues also the Exposition of the Terms of the Laws of this Land." (England.)
Mir. Jus. Horne's Mirror of Justices.
Mir. Parl. Mirror of Parliament, London.
Mir. Pat. Off. Mirror of the Patent Office, Washington, D. C.
Mirch. D. & S. Mirchall's Doctor and Student.
Mirr. Horne's Mirror of Justices.
Misc. R. or *Miscel.* Miscellaneous Reports, New York.
Miss. Mississippi;—Mississippi Reports;—Missouri.
Miss. Dec. Mississippi Decisions, Jackson.
Miss. St. Ca. or *Miss. St. Cas.* Mississippi State Cases.
Mister. Mister's Reports, vols. 17-32 Missouri Appeals.
Mitch. M. R. Mitchell's Maritime Register, London.
Mitf. Eq. Pl. Mitford on Equity Pleading.
Mitf. & Ty. Eq. Pl. Mitford and Tyler's Practice and Pleading in Equity.
M'Mul. Ch. (S. C.). M'Mullan's South Carolina Equity Reports.
M'Mul. L. (S. C.). M'Mullan's South Carolina Law Reports.
Mo. Missouri;—Missouri Reports;—Moore's English King's Bench Reports;—Moore's English Common Pleas Reports;—Moore's English Privy Council Reports;—Modern Reports, English;—English King's Bench, etc., (see Mod.);—Monthly;—Moore's Indian Appeal Cases;—J. B. Moore's Reports, English Common Pleas.
Mo. App. Missouri Appeal Reports.
Mo. App. Rep. Missouri Appellate Reporter.
Mo. Bar. Missouri Bar, Jefferson City.
Mo. (F.). Sir Francis Moore's English King's Bench Reports.
Mo. I. A. Moore's Indian Appeals.
Mo. (J. B.). J. B. Moore's English Common Pleas Reports.
Mo. Jur. Monthly Jurist, Bloomington, Ill.
Mo. Law Mag. Monthly Law Magazine, London.
Mo. Law Rep. Monthly Law Reporter, Boston.
Mo. Leg. Exam. Monthly Legal Examiner, New York.
Mo. P. C. Moore's English Privy Council Reports.
Mo. W. J. Monthly Western Jurist, Bloomington, Ill.
Mo. & P. Moore & Payne's English Common Pleas Reports.
Mo. & R. Moody & Robinson's English Nisi Prius Reports.
Mo. & S. Moore & Scott's English Common Pleas Reports.
Moak & Eng. Rep. Moak's English Reports.
Mob. or *Mobl.* Mobley, Contested Election Cases, U. S. House of Representatives, 1882-9.
Mod. Modern Reports, English King's Bench, etc.;—Modified.
Mod. Cas. L. & Eq. Modern Cases in Law and Equity (8 and 9 Modern Reports).
Mod. Cas. Modern Cases (6 Modern Reports).
Mod. Cas. per Far. or *t. Holt.* Modern Cases *tempore* Holt, by Farresley, vol. 7 Modern Reports.
Mod. Ent. Modern Entries.
Mod. Int. Modus Intrandi.
Mod. Rep. The Modern Reports, English King's Bench, etc.;—Modern Reports by Style (Style's King's Bench Reports).
Mol. or *Moll.* Molloy's Irish Chancery Reports.
Moly. Molyneaux's Reports, English Courts, *temp.* Car. I.
Mol. de J. M. or *Mol. de Jure Mar.* Molloy de Jure Maritimo et Navali.
Mon. Montana;—T. B. Monroe's Kentucky Reports;—Ben Monroe's Kentucky Reports;—Monaghan's Unreported Cases Supreme Court of Pennsylvania.
Mon. Angl. Monasticon Anglicanum.
Mon. B. Ben Monroe's Reports, Kentucky.
Mon. (T. B.). T. B. Monroe's Kentucky Reports.

Monagh. or *Monaghan.* Monaghan's Unreported Cases, S. C. of Pennsylvania;—Monaghan's Reports, vols. 147-165 Pennsylvania.

Monr. Monroe (see Mon.);—T. B. Monroe's Reports, Kentucky.

Mont. Montana;—Montana Reports;—Montagu's English Bankruptcy Reports;—Montriou's Bengal Reports.

Mont. B. C. or *Mont. Bank. Rep.* Montagu's Reports, English Bankruptcy.

Mont. Cas. Montriou's Cases in Hindoo Law.

Mont. Co. L. R. Montgomery County Law Reporter, Pennsylvania.

Mont. Comp. Montagu on the Law of Composition.

Mont. Cond. Rep. Montreal Condensed Reports.

Mont. D. & De G. Montagu, Deacon and De Gex's Reports, English Bankruptcy.

Mont. Dig. or *Mont. Eq. Pl.* Montagu's Digest of Pleadings in Equity.

Mont. Ind. Monthly Index to Reporters (National Reporter System).

Mont. Inst. Montriou's Institutes of Jurisprudence.

Mont. L. R. Montreal Law Reports, Queen's Bench;—Montreal Law Reports, Superior Court.

Mont. L. R. Q. B. Montreal Law Reports, Queen's Bench.

Mont. L. R. S. C. or *Mont. L. Rep. Super. Ct.* Montreal Law Reports, Superior Court.

Mont. Set-Off. Montagu on Set-Off.

Mont. & A. or *Mont & Ayr.* Montagu and Ayrton's Reports, English Bankruptcy.

Mont. & B. or *Mont. & Bl.* Montagu and Bligh's Reports, English Bankruptcy.

Mont. & C. Montagu and Chitty's Reports, English Bankruptcy.

Mont. & MacA. Montagu & MacArthur's English Bankruptcy Reports.

Montesq. or *Montesq. Esprit des Lois.* Montesquieu, Esprit des Lois.

Montg. Co. L. Rep. or *Montg. Co. Law Rep'r (Pa.).* Montgomery County Law Reporter.

Month. J. L. Monthly Journal of Law, Washington.

Montr. Montriou's Reports, Bengal;—Montriou's Supplement to Morton's Reports.

Montr. L. R. Montreal Law Reports.

Moo. Francis Moore's English King's Bench Reports. When a volume is given, it refers to J. B. Moore's Reports, English Common Pleas;—J. M. Moore's English Common Pleas Reports;—Moody's English Crown Cases.

Moo. A. Moore's Reports, English (1st Bosanquet and Puller's Reports, after page 470).

Moo. C. C. or *Moo. C. Cas.* or *Moo. Cr. C.* Moody's English Crown Cases Reserved.

Moo. C. P. J. B. Moore's Reports, English Common Pleas.

Moo. I. App. or *Moo. Ind. App.* Moore's Reports, English Privy Council, Indian Appeals.

Moo. J. B. J. B. Moore's Reports, English Common Pleas.

Moo. K. B. Moore's English King's Bench Reports.

Moo. P. C. or *Moo. P. C. Cas.* Moore's Privy Council Cases, Old and New Series.

Moo. P. C. Cas. N. S. Moore's Privy Council Cases, New Series, English.

Moo. Tr. Moore's Divorce Trials.

Moo. & M. or *Moo. & Mal.* Moody & Malkin's English Nisi Prius Reports.

Moo. & P. or *Moo. & Pay.* Moore and Payne's Reports, English Common Pleas.

Moo. & R. or *Moo. & Rob.* Moody and Robinson's Nisi Prius Cases, English Courts.

Moo. & Sc. Moore and Scott's Reports, English Common Pleas.

Mood. or *Moody.* Moody's English Crown Cases, Reserved.

Mood. & Malk. Moody & Malkin's English Nisi Prius Reports.

Mood. & R. or *Mood. & Rob.* Moody & Robinson's English Nisi Prius Reports.

Moody, Cr. Cas. Moody's English Crown Cases.

Moody & M. Moody & Mackin's English Nisi Prius Reports.

Moon. Moon's Reports, vols. 133-144 Indiana and vols. 6-14 Indiana Appeals.

Moore. Moore's English King's Bench Reports;—Moore's English Common Pleas Reports;—Moore's English Privy Council Reports;—Moore's Reports, vols. 28-34 Arkansas;—Moore's Reports, vol. 67 Alabama;—Moore's Reports, vols. 22-24 Texas.

Moore (A.). A. Moore's Reports in 1 Bosanquet & Puller, after page 470.

Moore (Ark.). Moore's Reports, Arkansas.

Moore C. P. Moore's English Common Pleas Reports.

Moore E. I. Moore's East Indian Appeals.

Moore G. C. Moore's Gorham Case (English Privy Council).

Moore K. B. Sir F. Moore's English King's Bench Reports.

Moore P. C. Moore's English Privy Council Reports.

Moore P. C. N. S. Moore's English Privy Council Reports, New Series.

Moore & P. Moore & Payne's English Common Pleas Reports.

Moore & S. Moore & Scott's English Common Pleas Reports.

Moore & W. or *Moore & Walker.* Moore and Walker's Reports, Texas, vols. 22-24.

Mor. Morison's Dictionary of Decisions in the Court of Session, Scotland;—Morris (see Morr.).

Mor. Dic. or *Mor. Dict. Dec.* Morison's Dictionary of Decisions, Scotch Court of Session.

Mor. Dig. Morley's Digest of the Indian Reports.

Mor. Ia. Morris' Iowa Reports.

Mor. Min. Rep. Morrison's Mining Reports.

Mor. Priv. Corp. Morawetz on Private Corporations.

Mor. St. Cas. Morris' Mississippi State Cases.

Mor. Supp. Supplement to Morison's Dictionary, Scotch Court of Session.

Mor. Syn. Morison's Synopsis, Scotch Session Cases.

Mor. Tran. Morrison's Transcript of United States Supreme Court Decisions.

More St. More's Notes on Stair's Institutes, Scotland.

Morg. Ch. A. & O. Morgan's Chancery Acts and Orders.

Morg. & W. L. J. Morgan and Williams's Law Journal, London.

Morl. Dig. Morley's East Indian Digest.

Morr. Morris's Iowa Reports (see, also, Morris and Mor.);—Morrow's Reports, vols. 23-36 Oregon;—Morrell's English Bankruptcy Reports.

Morr. (Bomb.). Morris's Reports, Bombay.

Morr. (Cal.). Morris's Reports, California.

Morr. Jam. (Jamaica). Morris's Jamaica Reports.

Morr. M. R. Morrison's Mining Reports, Chicago.

Morr. (Miss.). Morris's Reports, Mississippi.

Morr. Repl. Morris on Replevin.

Morr. St. Cas. Morris's State Cases, Mississippi.

Morr. Trans. Morrison's Transcript, United States Supreme Court Decisions.

Morrell. Morrell's Bankruptcy Cases.

Morris. Morris's Iowa Reports;—Morris's Reports, vol. 5 California;—Morris's Reports, vols. 43-48 Mississippi;—Morris's Jamaica Reports;—Morris's Bombay Reports;—Morrissett's Reports, vols. 80, 93 Alabama.

Morris & Har. Morris and Harrington's Sudder Dewanny Adawlut Reports, Bombay.

Morse Arb. & Aw. Morse on Arbitration and Award.

Morse Bk. Morse on Banks and Banking.

Morse Exch. Rep. Morse's Exchequer Reports, Canada.

Morse Tr. Morse's Famous Trials, Boston.

Mort. or *Morton.* Morton's Reports, Bengal.

Mos. Mosley's Reports, English Chancery.

Mos. Man. Moses on Mandamus.

Moult. Ch. or *Moult. Ch. P. (N. Y.).* Moulton's New York Chancery Practice.

Moy. Ent. Moyle's Book of Entries.
Moz. & W. or *Mozley & Whiteley.* Mozley & Whiteley's Law Dictionary.
MS. Manuscript, Manuscript Reports.
Mu. Corp. Ca. Withrow's Corporation Cases, vol. 2.
Mulford, Nation. Mulford, The Nation.
Mum. Jam. Mumford's Jamaica Reports.
Mumf. (Jamaica). Mumford's Jamaica Reports.
Mun. Municipal;—Munford's Virginia Reports.
Munf. Munford's Reports, Virginia.
Munic. & P. L. Municipal and Parish Law Cases, English.
Mur. Murphey's North Carolina Reports;—Murray's Scotch Jury Court Reports;—Murray's Ceylon Reports;—Murray's New South Wales Reports.
Mur. U. S. Ct. Murray's Proceedings in the United States Courts.
Mur. & H. or *Mur. & Hurl.* Murphy and Hurlstone's Reports, English Exchequer.
Murph. Murphy's Reports, North Carolina.
Murr. Murray's Scotch Jury Trials;—Murray's Ceylon Reports;—Murray's New South Wales Reports.
Murr. Over. Cas. Murray's Overruled Cases.
Murray. Murray's Scotch Jury Court Reports.
Murray (Ceylon). Murray's Ceylon Reports.
Murray (New South Wales). Murray's New South Wales Reports.
Mut. or *Mutukisna (Ceylon).* Mutukisna's Ceylon Reports.
Myer Dig. Myer's Texas Digest.
Myer Fed. Dec. or *Myers Fed. Dec.* Myer's Federal Decisions.
Myl. & C. or *Myl. & Cr.* Mylne & Craig's English Chancery Reports.
Myl. & K. or *Mylne & K.* Mylne & Keen's English Chancery Reports.
Myr. or *Myr. Prob.* or *Myrick (Cal.).* Myrick's California Probate Court Reports.
N. Nebraska;—Nevada;—Northeastern Reporter (properly cited N. E.);—Northwestern Reporter (properly cited N. W.);—The Novels or New Constitutions.
N. A. Non allocatur.
N. B. New Brunswick Reports;—Nulla bona.
N. B. Eq. Ca. New Brunswick Equity Cases.
N. B. Eq. Rep. New Brunswick Equity Reports.
N. B. N. R. National Bankruptcy News and Reports.
N. B. R. National Bankruptcy Register, New York;—New Brunswick Reports.
N. B. Rep. New Brunswick Reports.
N. B. V. Ad. New Brunswick Vice Admiralty Reports.
N. Bea. New Benloe's Reports, English King's Bench, Edition of 1661.
N. C. North Carolina;—North Carolina Reports;—Notes of Cases (English, Ecclesiastical, and Maritime);—New Cases (Bingham's New Cases).
N. C. C. New Chancery Cases (Younge & Collyer).
N. C. Conf. North Carolina Conference Reports.
N. C. Ecc. Notes of Cases, English Ecclesiastical and Maritime Courts.
N. C. L. Rep. North Carolina Law Repository.
N. C. Law Repos. North Carolina Law Repository.
N. C. Str. Notes of Cases, by Strange, Madras.
N. C. T. Rep. or *N. C. Term R.* North Carolina Term Reports.
N. Car. North Carolina;—North Carolina Reports.
N. Chip. or *N. Chip. (Vt.).* N. Chipman's Vermont Reports.
N. D. North Dakota;—North Dakota Reports.
N. E. New England;—New edition;—Northeastern Reporter.
N. E. I. Non est inventus.
N. E. R. Northeastern Reporter (commonly cited N. E.);—New England Reporter.
N. E. Rep. Northeastern Reporter.
N. Eng. Rep. New England Reporter.
N. F. Newfoundland;—Newfoundland Reports.
N. H. New Hampshire;—New Hampshire Reports.
N. H. R. New Hampshire Reports.
N. H. & C. English Railway and Canal Cases, by Nicholl, Hare, Carrow, etc.
N. J. New Jersey;—New Jersey Reports.
N. J. Ch. or *N. J. Eq.* New Jersey Equity Reports.
N. J. L. J. New Jersey Law Journal, Somerville, N. J.
N. J. Law. New Jersey Law Reports.
N. L. Nelson's Lutwyche, English Common Pleas Reports.
N. L. L. New Library of Law and Equity, English;—New Library of Law, etc., Harrisburg, Pa.
N. M. New Mexico;—New Mexico Reports.
N. M. St. Bar Ass'n. New Mexico State Bar Association.
N. Mag. Ca. New Magistrates' Cases.
N. Mex. New Mexico Territorial Courts.
N. of Cas. Notes of Cases, English Ecclesiastical and Maritime Courts;—Notes of Cases at Madras (by Strange).
N. of Cas. Madras. Notes of Cases at Madras (by Strange).
N. P. Nisi Prius. Notary Public. Nova Placita. New Practice.
N. P. C. Nisi Prius Cases.
N. P. R. Nisi Prius Reports.
N. R. New Reports (English, 1862-1865);—Bosanquet & Puller's New Reports;—Not Reported.
N. R. B. P. New Reports of Bosanquet & Puller.
N. S. New Series;—Nova Scotia;—Nova Scotia Reports.
N. S. Dec. Nova Scotia Decisions.
N. S. L. R. Nova Scotia Law Reports.
N. S. R. Nova Scotia Reports.
N. S. W. New South Wales Reports, Old and New Series.
N. S. W. Eq. Rep. New South Wales Equity Reports.
N. S. W. L. R. New South Wales Law Reports.
N. Sc. Dec. Nova Scotia Decisions.
N. T. Repts. New Term Reports, Q. B.
N. W. Law Rev. Northwestern Law Review, Chicago, Ill.
N. W. P. North West Provinces Reports, India.
N. W. R. or *N. W. Rep.* or *N. W. Reptr.* Northwestern Reporter.
N. W. T. or *N. W. T. Rep.* Northwest Territories Reports, Canada.
N. Y. New York;—New York Court of Appeals Reports.
N. Y. Ann. Ca. New York Annotated Cases.
N. Y. App. Dec. New York Court of Appeals Decisions.
N. Y. Cas. Err. New York Cases in Error (Caines's Cases).
N. Y. Ch. Sent. New York Chancery Sentinel.
N. Y. City H. Rec. New York City Hall Recorder.
N. Y. Civ. Pr. Rep. New York Civil Procedure Reports.
N. Y. Code Report. or *N. Y. Code Rept.* New York Code Reporter.
N. Y. Code Reports, N. S. or *N. Y. Code Repts. N. S.* New York Code Reports, New Series.
N. Y. Cond. New York Condensed Reports.
N. Y. Cr. New York Criminal Reports.
N. Y. Cr. R. or *N. Y. Cr. Rep.* New York Criminal Reports.
N. Y. Ct. App. New York Court of Appeals.
N. Y. Daily L. Gaz. New York Daily Law Gazette.
N. Y. El. Cas. or *N. Y. Elec. Cas.* New York Contested Election Cases.
N. Y. Jud. Rep. New York Judicial Repository, New York (Bacon's).
N. Y. Jur. New York Jurist.
N. Y. L. J. New York Law Journal, New York City.
N. Y. Law Gaz. New York Law Gazette, New York City.
N. Y. Law Rev. New York Law Review, Ithaca, N. Y.
N. Y. Leg. N. New York Legal News.
N. Y. Leg. Obs. New York Legal Observer, New York City (Owen's).
N. Y. Leg. Reg. New York Legal Register, New York City.
N. Y. Misc. New York Miscellaneous Reports.
N. Y. Mo. L. R. New York Monthly Law Reports.
N. Y. Mo. Law Bull. New York Monthly Law Bulletin, New York City.

N. Y. Mun. Gaz. New York Municipal Gazette, New York City.
N. Y. Op. Att.-Gen. Sickels's Opinions of the Attorney-General of New York.
N. Y. P. R. New York Practice Reports.
N. Y. Pr. Rep. New York Practice Reports.
N. Y. Rec. New York Record.
N. Y. Reg. New York Daily Register, New York City.
N. Y. Rep. New York Court of Appeals Reports.
N. Y. Reptr. New York Reporter (Gardenier's).
N. Y. S. New York Supplement;—New York State;—New York State Reporter.
N. Y. Spec. Term R. Howard's Practice Reports.
N. Y. St. Rep. New York State Reporter, 1886-1896.
N. Y. Sup. New York Supreme Court Reports;—New York Supplement, St. Paul, Minnesota.
N. Y. Sup. Ct. or *N. Y. Super. Ct.* New York Superior Court Reports.
N. Y. Supp. New York Supplement.
N. Y. Supr. or *N. Y. Supr. Ct. Repts.* New York Supreme Court Reports.
N. Y. Supr. Ct. Repts. (T. & C.). New York Supreme Court Reports, by Thompson and Cook.
N. Y. T. R. or *N. Y. Term R.* New York Term Reports (Caines's Reports).
N. Y. Them. New York Themis, New York City.
N. Y. Trans. New York Transcript, New York City.
N. Y. Trans. N. S. New York Transcript, New Series, New York City.
N. Y. Week. Dig. New York Weekly Digest, New York City.
N. Z. New Zealand;—New Zealand Reports.
N. Z. App. Rep. New Zealand Appeal Reports.
N. Z. Col. L. J. New Zealand Colonial Law Journal.
N. Z. Jur. New Zealand Jurist, Dunedin, N. Z.
N. Z. Jur. N. S. New Zealand Jurist, New Series.
N. Z. Rep. New Zealand Reports, Court of Appeals.
N. & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-7.
N. & Hop. Nott and Hopkins's Reports, U. S. Court of Claims Reports, vols. 8-29.
N. & M. Neville and Manning's Reports, English King's Bench.
N. & M. Mag. Neville & Manning's English Magistrates' Cases.
N. & Mc. or *N. & McC.* Nott & McCord's South Carolina Reports.
N. & P. Nevile & Perry's English King's Bench Reports.
N. & P. Mag. Nevile & Perry's English Magistrates' Cases.
Nal. St. P. Nalton's Collection of State Papers.
Nam. Dr. Com. Namur's Cour de Droit Commercial.
Nap. Napier.
Napt. or Napton. Napton's Reports, vol. 4 Missouri.
Narr. Mod. Narrationes Modernæ, or Style's King's Bench Reports.
Nas. Inst. Nasmith's Institutes of English Law.
Nat. B. C. or *Nat. Bk. Cas.* National Bank Cases, American.
Nat. B. R. or *Nat. Bank. Reg.* National Bankruptcy Register Reports.
Nat. Brev. Natura Brevium.
Nat. Corp. Rep. National Corporation Reporter, Chicago.
Nat. L. Rec. National Law Record.
Nat. L. Rep. National Law Reporter.
Nat. L. Rev. National Law Review, Philadelphia.
Nat. Reg. National Register, Edited by Mead, 1816.
Nat. Rept. Syst. National Reporter System.
Nat. Rev. National Review, London.
Nd. Newfoundland Reports.
Neal F. & F. Neal's Feasts and Fasts.
Neb. Nebraska;—Nebraska Reports.
Neg. Cas. Bloomfield's Manumission or Negro Cases, New Jersey.
Nel. Nelson's English Chancery Reports.
Nell (Ceylon). Nell's Ceylon Reports.
Nels. Nelson's Reports, English Chancery.
Nels. Abr. Nelson's Abridgment of the Common Law.
Nels. Fol. Rep. Reports *temp.* Finch, Edited by Nelson.
Nels. Lex Maner. Nelson's Lex Maneriorum.
Nels. Rights Cler. Nelson's Rights of the Clergy.
Nem. con. Nemine contradicente.
Nem. dis. Nemine dissentiente.
Nev. Nevada;—Nevada Reports.
Nev. & M. or *Nev. & Man.* Nevile & Manning's English King's Bench Reports.
Nev. & M. M. Cas. Neville and Manning's Magistrate Cases, English.
Nev. & M. R. & C. Cas. Neville and McNamara's Railway and Canal Cases.
Nev. & Mac. or *Nev. & Macn.* Neville & Macnamara's English Railway and Canal Cases.
Nev. & Man. Mag. Cas. Nevile & Manning's English Magistrate's Cases.
Nev. & P. Nevile & Perry's English King's Bench Reports.
Nev. & P. M. Cas. or *Nev. & P. Mag. Cas.* Neville and Perry's Magistrate Cases, English.
New. Newell, Illinois Appeal Reports.
New Ann. Reg. New Annual Register, London.
New B. Eq. Ca. New Brunswick Equity Cases.
New B. Eq. Rep. New Brunswick Equity Reports, vol. 1.
New Benl. New Benloe's Reports, English King's Bench, Edition of 1661.
New Br. New Brunswick Reports.
New Cas. New Cases (Bingham's New Cases).
New Cas. Eq. New Cases in Equity, vols. 8, 9 Modern Reports.
New Eng. Hist. New England Historical and Genealogical Register.
New M. Cas. or *New Mag. Cas.* New Magistrate Cases, English Courts (Bittleston, Wise & Parnell).
New Nat. Brev. New Natura Brevium.
New Pr. Cas. or *New Pr. Cases.* New Practice Cases, English Courts.
New Rep. New Reports in all the Courts, London;—Bosanquet & Puller's New Reports, vols. 4, 5 Bosanquet & Puller.
New Sess. Cas. Carrow, Hamerton and Allen's Reports, English Courts.
New So. W. New South Wales.
New Term Rep. New Term Reports;—Dowling & Ryland's King's Bench Reports.
New York. See *N. Y.*
New York Supp. New York Supplement.
Newb. or *Newb. Adm.* Newberry's United States District Court, Admiralty Reports.
Newbyth. Newbyth's Manuscript Decisions, Scotch Session Cases.
Newell. Newell's Reports, vols. 48-90 Illinois Appeals.
Newf. Newfoundland Reports.
Newf. Sel. Cas. Newfoundland Select Cases.
Newl. Contr. Newland on Contracts.
Newm. Conv. Newman on Conveyancing.
Nich. Adult. Bast. Nicholas on Adulterine Bastardy.
Nich. H. & C. or *Nicholl.* Nicholl, Hare and Carrow's English Railway and Canal Cases, vols. 1-2.
Nicholson. Nicholson's Manuscript Decisions, Scotch Session Cases.
Niebh. Hist. Rom. Niebuhr, Roman History.
Nient Cul. Nient culpable, Not guilty.
Nil. Reg. or *Niles Reg.* Niles's Weekly Register, Baltimore.
Nisbet. (Nisbet of) Dirleton's Scotch Session Cases.
Nix. F. Nixon's Forms.
No. Ca. Ecc. & Mar. or *No. Cas. Ecc. & M.* Notes of Cases in the English Ecclesiastical and Maritime Courts.
No. East. Rep. Northeastern Reporter (commonly cited N. E.).
No. N. Novæ Narrationes.
No. West. Rep. Northwestern Reporter (commonly cited N. W.).
Nol. M. Cas. or *Nol. Mag.* or *Nol. Just.* or *Nol. Sett. Cas.* Nolan's English Magistrates' Cases.
Nol. Sett. Nolan's Settlement Cases.

Non. Cul. Non culpabilis, Not guilty.
Nor. Fr. Norman French.
Nor. L. C. Inh. Norton's Leading Cases on Inheritance, India.
Norc. Norcross's Reports, vols. 23-24 Nevada.
Norr. Norris's Reports, vols. 82-96 Pennsylvania.
Norr. Peake. Norris's Peake's Law of Evidence.
North. Northington's Reports, English Chancery, Eden's Reports.
North. Co. Rep. Northampton County Reporter, Pennsylvania.
North W. L. J. Northwestern Law Journal.
North & G. North & Guthrie's Reports, vols. 68-80 Missouri Appeals.
Northam. Northampton Law Reporter, Pennsylvania.
Northum. Northumberland County Legal News, Pennsylvania.
Northw. Pr. Northwest Provinces, India.
Northw. Rep. or *Northwest. Rep.* Northwestern Reporter (commonly cited N. W.).
Not. Cas. Notes of Cases in the English Ecclesiastical and Maritime Courts;—Notes of Cases at Madras (Strange).
Not. Cas. Ecc. & M. Notes of Cases in the English Ecclesiastical and Maritime Courts.
Not. Cas. Madras. Notes of Cases at Madras (Strange).
Not. Dec. Notes of Decisions (Martin's North Carolina Reports).
Not. J. Notaries Journal.
Not. Op. Wilmot's Notes of Opinions and Judgments.
Notes of Ca. Notes of Cases, English.
Notes on U. S. Notes on United States Reports.
Nott Mech. L. L. Nott on the Mechanics' Lien Law.
Nott & H. Nott and Huntington's Reports, U. S. Court of Claims Reports, vols. 1-17.
Nott & Hop. Nott & Hopkins's United States Court of Claims Reports, vols. 3-29.
Nott & Hunt. Nott & Huntington's Reports, vols. 1-7 United States Court of Claims.
Nott & McC. Nott & McCord's South Carolina Reports.
Nott & McC. Nott and McCord's Reports, South Carolina.
Nouv. Den. Denizart Collection de Decisions Nouvelles.
Nouv. Rev. Nouvelle Revue de Droit Francais, Paris.
Nov. Novellæ. The Novels, or New Constitutions.
Nov. Rec. Novisimi Recopilacion de las Leyes de Espana.
Nov. Sc. Nova Scotia Supreme Court Reports.
Nov. Sc. Dec. Nova Scotia Decisions.
Nov. Sc. L. R. or *Nova Scotia L. Rep.* Nova Scotia Law Reports.
Noy. Noy's English King's Bench Reports.
Noy Max. Noy's Maxims.
Noyes Char U. Noyes on Charitable Uses.
Nye. Nye's Reports, vols. 18-21 Utah.
O. Ohio Reports;—Ontario;—Ontario Reports;—Oregon Reports;—Otto's United States Supreme Court Reports;—Ordonnance;—Ohio Reports. Otto's Reports, U. S. Supreme Court Reports, vols. 91-107.
O. B. Old Bailey;—Old Benloe;—Orlando Bridgman;—Session Papers of the Old Bailey.
O. B. S. Old Bailey's Sessions Papers.
O. B. & F. N. Z. Ollivier, Bell & Fitzgerald's New Zealand Reports.
O. Ben. or *O. Benl.* Old Benloe's Reports, English Common Pleas (Benloe, of Benloe and Dalison, Edition of 1689).
O. Bridg. Orlando Bridgman's English Common Pleas Reports;—Carter's Reports, *tempore* Bridgman's English Common Pleas.
O'Brien M. L. O'Brien's Military Law.
O. C. Orphans' Court;—Old Code (Louisiana Civil Code of 1808).
O. C. C. Ohio Circuit Court Reports.
O. C. C. N. S. Ohio Circuit Court Reports, New Series.
O. C. D. Ohio Circuit Decisions.
O. D. Ohio Decisions.
O. D. C. C. Ohio Decisions, Circuit Court (properly cited Ohio Circuit Decisions).
O. G. Official Gazette, U. S. Patent Office, Washington, D. C.
O. J. Act. Ontario Judicature Act.
O'Mal. & H. O'Malley and Hardcastle's Election Cases.
O. N. B. Old Natura Brevium.
O'Neal Neg. L. O'Neal's Negro Law of South Carolina.
O. R. Ontario Reports.
O. S. Ohio State Reports;—Old Series;—Old Series King's & Queen's Bench Reports, Ontario, (Upper Canada).
O. S. C. D. or *O. S. U.* Ohio Supreme Court Decisions, Unreported Cases.
O. St. Ohio State Reports.
O. S. & C. P. Dec. Ohio Superior and Common Pleas Decisions.
O. & T. Oyer and Terminer.
O'Brien. O'Brien's Upper Canada Reports.
O'Callaghan, New Neth. O'Callaghan's History of New Netherland.
Oct. Str. Octavo Strange, Select Cases on Evidence.
Odeneal. Odeneal's Reports, vols. 9-11 Oregon.
Off. Br. Officina Brevium.
Off. Ex. or *Off. Exec.* Wentworth's Office of Executors.
Off. Gaz. Pat. Off. Official Gazette, U. S. Patent Office, Washington, D. C.
Off. Min. Officer's Reports, Minnesota.
Officer. Officer's Reports, vols. 1-9 Minnesota.
Ogd. or *Ogden.* Ogden's Reports, vols. 12-15 Louisiana.
Ohio. Ohio;—Ohio Reports.
Ohio C. C. Ohio Circuit Court Reports.
Ohio L. J. Ohio Law Journal.
Ohio Leg. N. Ohio Legal News, Norwalk, Ohio.
Ohio N. P. Ohio Nisi Prius Reports.
Ohio Prob. Ohio Probate Court Reports.
Ohio R. Cond. Ohio Reports, Condensed.
Ohio St. Ohio State Reports.
Ohio Sup. & C. P. Dec. Ohio Superior and Common Pleas Decisions.
O'Keefe Ord. O'Keefe's Orders in Chancery, Ireland.
Oke Mag. Syn. Oke's Magisterial Synopsis.
Okla. Oklahoma Territorial Reports.
Ol. Con. Oliver's Conveyancing.
Ol. Prec. Oliver's Precedents.
Olc. or *Olc. Adm.* Olcott's Admiralty Reports, U. S. So. Dist. of N. Y.
Old Ben. Benloe in Benloe & Dalison, English Common Pleas Reports.
Old Nat. Brev. Old Natura Brevium.
Oliph. Oliphant on Law of Horses.
Oldr. Oldright's Reports, Nova Scotia.
Oliv. B. & L. Oliver, Beavan and Lefroy's Reports, English Railway and Canal Cases, vols. 5-7.
Oll. B. & F. or *Oll. B. & Fitz. (New Zealand).* Ollivier, Bell and Fitzgerald's New Zealand Reports.
Oll. Bell & Fitz. Sup. Ollivier, Bell and Fitzgerald (Supreme Ct. N. Z.).
O'Mal. & H. O'Malley & Hardcastle's English Election Cases.
Onsl. N. P. Onslow's Nisi Prius.
Ont. Ontario;—Ontario Reports.
Ont. App. R. or *Ont. App. Rep.* Ontario Appeal Reports, Canada.
Ont. El. Ca. Ontario Election Cases.
Ont. P. R. or *Ont. Pr.* or *Ont. Pr. Rep.* Ontario Practice Reports.
Op. Att. Gen. Opinions of the Attorneys General of the United States.
Op. Att.-Gen. N. Y. Opinions of the Attorney-Generals, New York (Sickels's Compilation).
Op. Att.-Gen. (U. S.). Opinions of the Attorney-Generals, United States.
Op. N. Y. Atty. Gen. Sickels's Opinions of Attorneys-General of New York.
Or. Oregon;—Oregon Reports.
Or. T. Rep. Orleans Term Reports, vols. 1, 2 Martin, Louisiana.
Ord. Ord on Usury.
Ord. Amst. Ordinance of Amsterdam.

Ord. Ant. Ordinance of Antwerp.
Ord. Bilb. Ordinance of Bilboa.
Ord. Ch. Orders in Chancery.
Ord. Cla. Lord Clarendon's Orders.
Ord. Copenh. Ordinance of Copenhagen.
Ord. Ct. Orders of Court.
Ord. de la Mar. or *Ord. Mar.* Ordonnance de la Marine de Louis XIV.
Ord. Flor. Ordinances of Florence.
Ord. Gen. Ordinance of Genoa.
Ord. Hamb. Ordinance of Hamburg.
Ord. Königs. Ordinance of Königsberg.
Ord. Leg. Ordinances of Leghorn.
Ord. Port. Ordinances of Portugal.
Ord. Prus. Ordinances of Prussia.
Ord. Rott. Ordinances of Rotterdam.
Ord. Swed. Ordinances of Sweden.
Ord U. Ord on the Law of Usury.
Ordr. Jud. Ins. Ordronaux on Judicial Aspects of Insanity.
Ordr. Med. Jur. Ordronaux's Medical Jurisprudence.
Oreg. Oregon;—Oregon Reports.
Orf. M. L. Orfila's Medecine Legale.
Orl. Bridg. or *Orl. Bridgman.* Orlando Bridgman's Reports, English Common Pleas.
Orl. T. R. Orleans Term Reports, vols. 1 and 2, Martin's Reports, Louisiana.
Orm. or *Ormond.* Ormond's Reports, vols. 12-15 Alabama.
Ort. Inst. Ortolan's Institutes of Justinian.
Ort. R. L. Ortolan's History of Roman Law.
Ot. or *Otto.* Otto's United States Supreme Court Reports.
Ought. Oughton's Ordo Judiciorum.
Out. Outerbridge's Reports, vols. 97-110 Pennsylvania State.
Over. or *Overton.* Overton's Tennessee Reports.
Ow. or *Owen.* Owen's English King's Bench and Common Pleas Reports;—New South Wales Reports.
Oxley. Young's Vice-Admiralty Decisions, Nova Scotia, edited by Oxley.
P. Easter (Paschal) Term;—Pennsylvania;—Peters;—Pickering's Massachusetts Reports;—Probate;—Pacific Reporter.
P. 1891, or *1891 P.* English Law Reports, Probate Division, from 1891 onward.
P. A. D. Peters's Admiralty Decisions.
P. C. Pleas of the Crown;—Parliamentary Cases;—Practice Cases;—Prize Cases;—Patent Cases;—Privy Council;—Prize Court;—Probate Court;—Precedents in Chancery;—Penal Code;—Political Code;—Procédure Civile.
P. C. Act. Probate Court Act.
P. C. App. Privy Council Appeals, English Law Reports.
P. C. C. Privy Cases;—Peters's Circuit Court Reports.
P. C. L. J. Pacific Coast Law Journal, San Francisco.
P. C. R. Parker's Criminal Reports, New York.
P. C. Rep. Privy Council Reports, English.
P. Cl. R. Parker's Criminal Reports, New York;—Privy Council Reports.
P. D. or *P. Div.* Probate Division, English Law Reports (1876-1890).
P. E. I. or *P. E. I. Rep.* Prince Edward Island Reports (Haviland's).
P. F. S. P. F. Smith's Reports, vols. 51-81½ Pennsylvania State.
P. Jr. & H. Patton, Jr., & Heath's Virginia Reports.
P. L. Pamphlet Laws. Public Laws. Poor Laws.
P. L. Com. Poor Law Commissioners.
P. L. J. Pennsylvania Law Journal;—Pittsburgh Legal Journal, Pa.
P. L. R. Pennsylvania Law Record, Philadelphia.
P. N. P. Peake's English Nisi Prius Cases.
P. O. Cas. Perry's Oriental Cases, Bombay.
P. O. G. Patent Office Gazette.
P. O. R. Patent Office Reports.
P. P. Parliamentary Papers.
P. P. A. P. Precedents of Private Acts of Parliament.
P. R. Parliamentary Reports;—Pennsylvania Reports, by Penrose & Watts;—Pacific Reporter;—Probate Reports;—Pyke's Reports, Canada.
P. R. C. P. Practical Register in Common Pleas.
P. R. Ch. Practical Register in Chancery.
P. R. U. C. Practice Reports, Upper Canada.
P. R. & D. Power, Rodwell and Dew's Election Cases, English.
P. S. C. U. S. Peters's United States Supreme Court Reports.
P. S. R. Pennsylvania State Reports.
P. W. or *P. Wms.* Peere Williams's Reports, English Chancery.
P. & B. Pugsley & Burbridge's Reports, New Brunswick.
P. & C. Prideaux & Cole's Reports, English Courts, vol. 4 New Session Cases.
P. & D. Perry & Davison's English Queen's Bench Reports;—Probate and Divorce.
P. & H. Patton, Jr., & Heath's Virginia Reports.
P. & K. Perry & Knapp's English Election Cases.
P. & M. Philip and Mary; thus 1 P. & M. signifies the first year of the reign of Philip & Mary;—Pollock and Maitland's History of English Law.
P. & R. Pigott and Rodwell's Election Cases, English.
P. & W. Penrose and Watt's Pennsylvania Reports.
Pa. Pennsylvania; — Pennsylvania Reports, by Penrose & Watts;—Pennsylvania State Reports;—Paine, United States.
Pa. Co. Ct. or *Pa. Co. Ct. R.* Pennsylvania County Court Reports.
Pa. Dist. or *Pa. Dist. R.* Pennsylvania District Court Reports.
Pa. L. G. or *Pa. Leg. Gaz.* Legal Gazette Reports (Campbell's), Pennsylvania.
Pa. L. J. Pennsylvania Law Journal Reports (Clark's);—Pennsylvania Law Journal, Philadelphia.
Pa. L. J. Rep. Pennsylvania Law Journal Reports (Clark's Reports).
Pa. L. Rec. or *Pa. La. Rec.* Pennsylvania Law Record, Philadelphia.
Pa. Law Jour. Pennsylvania Law Journal, Philadelphia.
Pa. Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's).
Pa. Law Rec. Pennsylvania Law Record, Philadelphia.
Pa. Law Ser. Pennsylvania Law Series.
Pa. N. P. Brightly's Nisi Prius Reports, Pennsylvania.
Pa. Rep. Pennsylvania Reports.
Pa. St. Pennsylvania State Reports.
Pa. St. Tr. Pennsylvania State Trials (Hogan's).
Pa. Super. Ct. Pennsylvania Superior Court.
Pac. Pacific Reporter.
Pac. Coast L. J. Pacific Coast Law Journal, San Francisco.
Pac. Law Mag. Pacific Law Magazine, San Francisco.
Pac. Law Reptr. Pacific Law Reporter, San Francisco.
Pac. R. or *Pac. Rep.* Pacific Reporter (commonly cited Pac. or P.).
Page Div. Page on Divorce.
Pai. Paine's United States Circuit Court Reports;—Paige's New York Chancery Reports.
Pai. Ch. or *Paige Ch.* Paige's New York Chancery Reports.
Paige Cas. Dom. Rel. Paige's Cases in Domestic Relations.
Paige Cas. Part. Paige's Cases in Partnership.
Paine or *Paine C. C.* Paine's United States Circuit Court Reports.
Pal. Ag. Paley on Agency.
Pal. Conv. Paley on Summary Convictions.
Paley, Prin. & Ag. Paley on Principal and Agent.
Palgrave. Palgrave's Proceedings in Chancery;—Palgrave's Rise and Progress of the English Commonwealth.
Palm. Palmer's English King's Bench Reports;—Palmer's Reports, vols. 53-60 Vermont.
Palm. Pr. Lords. Palmer's Practice in the House of Lords.

Palm. (Vt.). Palmer's Vermont Reports.
Pamph. Pamphlets.
Pand. Pandects.
Papy. Papy's Reports, vols. 5, 6 Florida.
Par. Paragraph;—Parker's English Exchequer Reports;—Parsons's Reports, vols. 65-66 New Hampshire;—Parker's New York Criminal Reports.
Par. Dec. Parsons's Decisions, Massachusetts.
Par. Eq. Cas. Parsons's Select Equity Cases, Pennsylvania.
Par. W. C. Parish Will Case.
Par. & Fonb. M. J. Paris and Fonblanque on Medical Jurisprudence.
Pard. or *Pard. Droit Commer.* Pardessus, Cours de Droit Commercial.
Pard. Lois Mar. Pardessus's Lois Maritimes.
Pard. Serv. Pardessus's Traités des Servitudes.
Pardessus. Pardessus, Cours de Droit Commercial; — Pardessus, Lois Maritimes; — Pardessus, Traités des Servitudes.
Park. Parker's New York Criminal Reports;—Parker's English Exchequer Reports.
Park. Cr. Cas. or *Park. Cr. Rep.* Parker's Criminal Reports, New York.
Park. Dig. Parker's California Digest.
Park Dow. Park on Dower.
Park. Exch. Parker's English Exchequer Reports.
Park. Hist. Ch. Parker's History of Chancery.
Park Ins. Park on Insurance.
Park. (N. H.). Parker's New Hampshire Reports.
Park. Pr. Ch. Parker's Practice in Chancery.
Park. Rev. Cas. Parker's English Exchequer Reports (Revenue Cases).
Park. Sh. Parker on Shipping and Insurance.
Parker. Parker's English Exchequer Reports;—Parker's New York Criminal Reports;—Parker's New Hampshire Reports.
Parker, Cr. Cas. or *Parker, Cr. R. (N. Y.).* Parker's New York Criminal Reports.
Parl. Cas. Parliamentary Cases. House of Lords.
Parl. Hist. Parliamentary History.
Parl. Reg. Parliamentary Register.
Paroch. Ant. Kennett's Parochial Antiquities.
Pars. Parsons (see Par.).
Pars. Ans. Parsons's Answer to the Fifth Part of Coke's Reports.
Pars. Bills & N. Parsons on Bills and Notes.
Pars. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Com. Parsons's Commentaries on American Law.
Pars. Con. or *Pars. Cont.* Parsons on Contracts.
Pars. Costs. Parsons on Costs.
Pars. Dec. Parsons's Decisions, Massachusetts.
Pars. Eq. Cas. Parsons's Select Equity Cases, Pennsylvania.
Pars. Essays. Parsons's Essays on Legal Topics.
Pars. Ins. Parsons on Marine Insurance.
Pars. Law Bus. Parsons's Law of Business.
Pars. Mar. Ins. Parsons on Marine Insurance.
Par. Mar. L. or *Pars. Mar. Law.* Parsons on Maritime Law.
Pars. Merc. L. Parsons on Mercantile Law.
Pars. Notes & B. Parsons on Notes and Bills.
Pars. Part. Parsons on Partnership.
Pars. Sh. & Adm. Parsons on Shipping and Admiralty.
Pars. Wills. Parsons on Wills.
Pas. Terminus Paschæ. Easter Term.
Pasch. Paschal's Reports, Texas.
Pasch. Ann. Const. Paschal's Annotated Constitution of the U. S.
Paschal. Paschal's Reports, vols. 28-31 Texas and Supplement to vol. 25.
Pat. Patent;—Paton's Scotch Appeal Cases;—Paterson's Scotch Appeal Cases;—Paterson's New South Wales Reports.
Pat. App. Cas. Paton's Scotch Appeal Cases (Craigie, Stewart & Paton);—Paterson's Scotch Appeal Cases.
Pat. Com. or *Pat. Comp.* Paterson's Compendium of English and Scotch Law.
Pat. Dec. Patent Decisions.
Pat. H. L. Sc. See *Pat. App. Cas.*
Pat. Law Rev. Patent Law Review, Washington, D. C.
Pat. Off. Gaz. Official Gazette, U. S. Patent Office, Washington, D. C.
Pat. St. Ex. Paterson's Law of Stock Exchange.
Pat. & H. Patton and Heath's Reports, Virginia.
Pat. & Mur. Paterson and Murray's Reports, New South Wales.
Pater. Paterson's Scotch Appeal Cases;—Paterson's New South Wales Reports.
Paters. App. Cas. Paterson's Scotch Appeal Cases.
Paters. Comp. Paterson's Compendium of English and Scotch Law.
Paters. St. Ex. Paterson's Law of Stock Exchange.
Paterson. Paterson's Compendium of English and Scotch Law;—Paterson on the Game Laws;—Paterson's Liberty of the Press;—Paterson on the Liberty of the Subject;—Paterson's Law and Usages of the Stock Exchange;—Paterson's Scotch Appeal Cases.
Paton. Craigie, Stewart, & Paton's Scotch Appeal Cases.
Patr. El. Cas. or *Patr. Elect. Cas.* Patrick's Election Cases, Upper Canada.
Patt. & H. or *Patton & H.* Patton, Jr., & Heath's Virginia Reports.
Paul Par. Off. Paul's Parish Officer.
Paulus. Julius Paulus, Sententiæ Receptæ.
Pay. Munc. Rights. Payne on Municipal Rights.
Pea. Peake's English Nisi Prius Reports.
Peach. Mar. Sett. Peachey on Marriage Settlements.
Peak. Peake's Nisi Prius Cases, English Courts.
Peak. Add. Cas. Peake's Additional Cases, Nisi Prius, English.
Peak. Ev. Peake on Evidence.
Peak. N. P. Cas. Peake's Nisi Prius Cases, English.
Peake Add. Cas. Peake's Additional Cases, vol. 2 of Peake.
Peake N. P. Peake's English Nisi Prius Cases.
Pear. Pearson's Reports, Pennsylvania.
Pearce C. C. Pearce's Reports in Dearsly's Crown Cases. English.
Pears. Pearson's Reports, Pennsylvania.
Peck. Peck's Tennessee Reports;—Peck's Reports, vols. 11-30 Illinois;—Peckwell's English Election Cases.
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Peck Tr. Peck's Impeachment Trial.
Peckw. or *Peckw. Eng. El. Cas.* Peckwell's English Election Cases.
Peeples. Peeples' Reports, vols. 78, 79 Georgia.
Peeples & Stevens. Peeples & Stevens's Reports, vols. 30-37 Georgia.
Peere Wms. or *Peere Williams.* Peere Williams's Reports, English Chancery.
Pemb. J. & O. Pemberton's Judgments and Orders.
Pen. Pennington's Reports, New Jersey Law.
Pen. Code. Penal Code.
Pen. N. J. Pennington's New Jersey Reports.
Pen. & W. Penrose & Watts's Pennsylvania Reports.
Penn. Pennsylvania;—Pennsylvania State Reports;—Pennypacker's Unreported Pennsylvania Cases;—Pennington's New Jersey Reports;—Pennewill's Delaware Reports.
Penn. Bla. Pennsylvania Blackstone, by John Reed.
Penn. Co. Ct. Rep. Pennsylvania County Court Reports.
Penn. Del. Pennewill's Delaware Reports.
Penn. Dist. Rep. Pennsylvania District Reports.
Penn. L. G. Pennsylvania Legal Gazette Reports (Campbell's).
Penn. L. J. Pennsylvania Law Journal, Philadelphia.
Penn. L. J. R. Pennsylvania Law Journal Reports (Clark's).
Penn. Law Jour. Pennsylvania Law Journal, Pennsylvania.

Penn. Law Jour. Rep. Pennsylvania Law Journal Reports (Clark's).

Penn. Law Rec. Pennsylvania Law Record, Philadelphia.

Penn. Leg. Gaz. Pennsylvania Legal Gazette Reports (Campbell's).

Penn. Pr. Pennsylvania Practice, by Troubat and Haly.

Penn. R. or *Penn. Rep.* Pennsylvania Reports.

Penn. St. or *Penn. St. R.* Pennsylvania State Reports.

Penna. L. R. Pennsylvania Law Record, Philadelphia.

Penning. Pennington's Reports, New Jersey.

Penny. Pennypacker's Unreported Pennsylvania Cases;—Pennypacker's Pennsylvania Colonial Cases.

Penr. & W. Penrose and Watts's Pennsylvania Reports.

Penrud. Anal. Penruddock's Analysis of the Criminal Law.

Peo. L. Adv. People's Legal Adviser, Utica, N. Y.

Per. Or. Cas. Perry's Oriental Cases, Bombay.

Per T. & T. Perry on Trusts and Trustees.

Per. & Dav. Perry & Davison's English King's Bench Reports.

Per. & K. El. Cas. or *Per. & Kn.* Perry and Knapp's Election Cases, English.

Perk. Perkins on Conveyancing;—Perkins on Pleading;—Perkins's Profitable Book (Conveyancing).

Perk. Prof. Bk. Perkins's Profitable Book.

Perp. Pat. Perpigna on Patents.

Perry. Sir Erskine Perry's Reports, in Morley's (East) Indian Digest;—Perry's Oriental Cases, Bombay.

Perry & D. Perry & Davison's English King's Bench Reports.

Perry & Kn. Perry & Knapp's English Election Cases.

Pet. Peters's United States Supreme Court Reports;—Peters's United States Circuit Court Reports;—Peters's United States District Court Reports (Admiralty Decisions);—Peters's Prince Edward Island Reports.

Pet. Ad. or *Pet. Adm.* Peters's United States District Court Reports (Admiralty Decisions).

Pet. Br. or *Pet. Brooke.* Petit Brooke *or* Brooke's New Cases, English King's Bench (Bellewe's Cases *temp.* Hen. VIII.).

Pet. C. C. Peters's United States Circuit Court Reports.

Pet. Cond. Peters's Condensed Reports, United States Supreme Court.

Pet. Dig. Peters's United States Digest;—Peticolas's Texas Digest.

Pet. S. C. Peters's United States Supreme Court Reports.

Peters. Peters's Reports, U. S. Supreme Court.

Peters Adm. Peters's United States District Court Reports (Admiralty Decisions).

Peters C. C. Peters's Reports, U. S. Circuit Court, 3d Circuit.

Petersd. Abr. Petersdorff's Abridgment.

Petersd. B. Petersdorff on the Law of Bail.

Petersd. L. of N. Petersdorff on the Law of Nations.

Petersd. Pr. Petersdorff's Practice.

Peth. Int. Petheram on Interrogatories.

Petit Br. Petit Brooke, or Brooke's New Cases, English King's Bench.

Ph. Phillips' English Chancery Reports;—Phillimore's English Ecclesiastical Reports (see Phil.).

Ph. Ch. Phillips's English Chancery Reports.

Ph. St. Tr. Phillipps's State Trials.

Phal. C. C. or *Phalen.* Phalen's Criminal Cases.

Phear W. Phear on Rights of Water.

Pheney Rep. Pheney's New Term Reports.

Phil. Phillips's English Chancery Reports;—Phillips's North Carolina Reports;—Phillips's English Election Cases;—Phillimore's English Ecclesiastical Reports;—Philadelphia Reports;—Phillips's Illinois Reports.

Phil. Eco. Judg. Phillimore's Ecclesiastical Judgments.

Phil. Eco. R. Phillimore's English Ecclesiastical Reports.

Phil. El. Cas. Phillips's English Election Cases.

Phil. Eq. Phillips's North Carolina Equity Reports.

Phil. Ev. Phillips on Evidence.

Phil. Fam. Cas. Phillipps's Famous Cases in Circumstantial Evidence.

Phil. Ins. Phillips on Insurance.

Phil. Law or *Phil. N. C.* Phillips's North Carolina Law Reports.

Phil. Pat. Phillips on Patents.

Phil. St. Tr. Phillipps's State Trials.

Phila. Philadelphia Reports, Common Pleas of Philadelphia County.

Phila. Law Lib. Philadelphia Law Library.

Phila. (Pa.). Philadelphia Reports, Common Pleas of Philadelphia County.

Philippine Co. Philippine Code.

Phill. Phillimore's Reports, English Ecclesiastical Courts;—Phillips (see Phil. and Phillips).

Phill. Copyr. Phillips on Copyright.

Phill. Cr. L. Phillimore's Study of the Criminal Law.

Phill. Dom. Phillimore on the Law of Domicil.

Phill. Eccl. Phillimore on Ecclesiastical Law.

Phill. Eccl. Judg. Phillimore's Ecclesiastical Judgments.

Phill. El. Cas. Phillips's Election Cases.

Phill. Eq. Phillips's Equity Reports, North Carolina.

Phill. Ev. Phillimore on Evidence;—Phillips on Evidence.

Phill. Fam. Cas. Phillipps's Famous Cases in Circumstantial Evidence.

Phill. Ins. Phillips on Insurance.

Phill. Insan. Phillips on Insanity.

Phill. Int. Phillimore on International Law.

Phill. Jur. Phillimore on Jurisprudence.

Phill. Law (N. C.). Phillips's Law Reports, North Carolina.

Phill. Mech. Liens. Phillips on Mechanics' Liens.

Phill. Prin. Jur. Phillimore's Principles and Maxims of Jurisprudence.

Phill. Priv. L. Phillimore's Private Law among the Romans.

Phill. Rom. L. Phillimore's Study and History of the Roman Law.

Phill. St. Tr. Phillips's State Trials.

Phillim. Phillimore's English Ecclesiastical Reports. See, also, Phil., Phill.

Phillim. Dom. Phillimore on the Law of Domicil.

Phillim. Ecc. Law. Phillimore's Ecclesiastical Law.

Phillips. Phillips's English Chancery Reports;—Phillips's North Carolina Reports, Law and Equity;—Phillips's Reports, vols. 152-187 Illinois.

Pick. Pickering's Reports, Massachusetts.

Pickle. Pickle's Reports, vols. 85-108 Tennessee.

Pierce R. R. Pierce on Railroads.

Pig. Rec. Pigott on Common Recoveries.

Pig. & R. Pigott and Rodwell's Registration Appeal Cases, English.

Pike. Pike's Reports, vols. 1-5 Arkansas.

Pin. or *Pinn.* Pinney's Wisconsin Reports.

Pist. or *Piston.* Piston's Reports, Mauritius.

Pitc. Crim. Tr. Pitcairn's Ancient Criminal Trials, Scotland.

Pitc. Tr. Pitcairn's Ancient Criminal Trials, Scotland.

Pitm. Prin. & Sur. Pitman on Principal and Surety.

Pitm. S. Pitman on Suretyship.

Pitts. L. J. or *Pitts. Leg. Jour.* Pittsburg Legal Journal, Pittsburg, Penn.

Pitts. Rep. or *Pitts. Repts.* Pittsburgh Reports, Pennsylvania Courts (reprinted from the Journal).

Pittsb. Leg. J. (O. S.). Pittsburg Legal Journal, Old Series.

Pittsb. R. (Pa.). Pittsburg Reports, Pennsylvania Courts (reprinted from the Journal).

Pl. Placiti Generalia;—Plowden's Commentaries or Reports, English King's Bench, etc.

Pl. C. Placita Coronæ (Pleas of the Crown).

Pl. Com. Plowden's Commentaries or Reports, English King's Bench.
Pl. U. Plowden on Usury.
Platt Cov. Platt on the Law of Covenants.
Platt Lease. Platt on Leases.
Pléb. Plébiscite.
Plff. Plaintiff.
Plow. or *Plowd.* or *Plowd. Com.* Plowden's English King's Bench Commentaries or Reports.
Plowd. Crim. Con. Tr. Plowden's Crim. Con. Trials.
Plum. Contr. Plumptre on Contracts.
Po. Ct. Police Court.
Pol. Pollexfen's English King's Bench Reports, etc.;—Police.
Pol. Code. Political Code.
Pol. Cont. Pollock on Contracts.
Pol. Sci. Quar. Political Science Quarterly.
Poll. Pollexfen's English King's Bench Reports.
Poll. C. C. Pr. Pollock's Practice of the County Courts.
Poll. Contr. Pollock on Contracts.
Poll. Dig. Part. Pollock's Digest on the Law of Partnership.
Poll. Doc. Pollox on Production of Documents.
Poll. Lead. Cas. Pollock's Leading Cases.
Poll. Part. Pollock on Partnership.
Poll. & Maitl. Pollock & Maitland's History of English Law.
Pollex. Pollexfen's English King's Bench Reports, etc.
Pols. Int. or *Pols. Law of Nat.* Polson on Law of Nations.
Pom. Con. L. or *Pom. Const. Law.* Pomeroy's Constitutional Law of the United States.
Pom. Contr. Pomeroy on Contracts.
Pom. Mun. L. Pomeroy's Municipal Law.
Pomeroy. Pomeroy's Reports, vols. 73-128 California.
Poore Const. Poore's Federal and State Constitutions.
Pop. Popham's English King's Bench Reports.
Pop. Sci. Mo. Popular Science Monthly.
Pope. (Pope) Opinions Attorney General, pt. 1, vol. 22.
Pope C. & E. Pope on Customs and Excise.
Pope, Lun. Pope on Lunacy.
Poph. Popham's Reports, English King's Bench.
Poph. (2). Cases at the end of Popham's Reports.
Port. (Ala.). Porter's Alabama Reports.
Port. (Ind.). Porter's Reports, Indiana.
Porter. Porter's Alabama Reports;—Porter's Reports, vols. 3-7 Indiana.
Posey. Unreported Commissioner Cases, Texas.
Post. Post's Reports, vols. 23-26 Michigan;—Post's Reports, vols. 42-64 Missouri.
Poste's Gaius Inst. Poste's Translation of Gaius.
Postl. Dict. Postlethwaite's Commercial Dictionary.
Pot. Dwar. Potter's Dwarris on Statutes.
Poth. Bail à Rente. Pothier, Traité du Contrat de Bail à Rente.
Poth. Cont. Pothier on Contracts.
Poth. Cont. de Change. Pothier, Traité du Contrat de Change.
Poth. Cont. Sale or *Poth. Contr. Sale.* Pothier, Treatise on the Contract of Sale.
Poth. de Change. Pothier, Traité du Contrat de Change.
Poth. de l'Usure. Pothier, Traité de l'Usure.
Poth. de Société App. Pothier, Traité du Contrat de Société.
Poth. du Depot. Pothier, Traité du Dépôt.
Poth. Œuv. Pothier's Œuvres.
Poth. Louage. Pothier, Traité du Contrat de Louage.
Poth. Mar. Cont. Pothier's Treatise on Maritime Contracts.
Poth. Mar. Louage. Pothier, Traité du Contrat de Louage.
Poth. Obl. Pothier, Traité des Obligations.
Poth. Pand. Pothier's Pandects.
Poth. Part. Pothier on Partnership.
Poth. Proc. Civ. or *Poth. Proc. Civil.* Pothier, Traité de la Procédure Civile.
Poth. Proc. Crim. Pothier, Traité de la Procédure Criminale.
Poth. Société. Pothier, Traité du Contrat de Société.
Poth. Traité de Change. Pothier, Traité du Contrat de Change.
Poth. Vente. Pothier, Traité du Contrat de Vente.
Pothier, Pand. Pothier, Pandectæ Justinianeæ, etc.
Potter. Potter's Reports, vols. 4-7 Wyoming.
Potter Corp. Potter on Corporations.
Potter's Dwar. St. Potter's Dwarris on Statutes.
Potts L. D. Potts's Law Dictionary.
Pow. Am. L. Powell's American Law.
Pow. Apr. Pr. Powell's Appellate Proceedings.
Pow. Con. Powell on Contracts.
Pow. Conv. Powell on Conveyancing.
Pow. Dev. Powell, Essay upon the Learning of Devises, etc.
Pow. Ev. Powell on Evidence.
Pow. Mort. or *Pow. Mortg.* Powell on Mortgages.
Pow. Powers. Powell on Powers.
Pow. Pr. Powell's Precedents in Conveyancing.
Pow. R. & D. Power, Rodwell and Dew's Election Cases, English.
Poyn. M. & D. Poynter on Marriage and Divorce.
Pr. Price's English Exchequer Reports;—*Principium* (the beginning of a title, law, or section);—Practice Reports (Ontario).
Pr. C. K. B. Practice Cases in the King's Bench.
Pr. Ch. Precedents in Chancery, by Finch;—Practice in the High Court of Chancery.
Pr. Ct. Prerogative Court.
Pr. Dec. Printed Decisions (Sneed's), Kentucky.
Pr. Div. Probate Division, Law Reports;—Pritchard's Divorce and Matrimonial Cases.
Pr. Exch. Price's Exchequer Reports, English.
Pr. Falc. President Falconer's Reports, Scotch Court of Session.
Pr. L. Private Law or Private Laws.
Pr. Min. Printed Minutes of Evidence.
Pr. R. Practice Reports.
Pr. Reg. B. C. Practical Register in the Bail Court.
Pr. Reg. C. P. Practical Register in the Common Pleas.
Pr. Reg. Ch. Practical Register in Chancery (Styles's).
Pr. St. Private Statutes.
Pr. & Div. Probate and Divorce, English Law Reports.
Pra. Cas. Prater's Cases on Conflict of Laws.
Pract. The Practitioner.
Prat. Cas. Prater's Cases on Conflict of Laws.
Prat. H. & W. Prater on the Law of Husband and Wife.
Pratt B. S. Pratt on Beneficial Building Societies.
Pratt C. W. Pratt on Contraband of War.
Pratt Cont. Cas. Pratt's Contraband-of-War Cases.
Preb. Dig. Preble Digest, Patent Cases.
Prec. Ch. Precedents in Chancery.
Pref. Preface.
Prel. Préliminaire.
Prer. Prerogative Court.
Pres. Abs. Preston on Abstracts.
Pres. Conv. Preston on Conveyancing.
Pres. Est. Preston on Estates.
Pres. Falc. President Falconer's Scotch Session Cases (Gilmour & Falconer).
Pres. Leg. Preston on Legacies.
Pres. Merg. Preston on Merger.
Pres. Shep. T. Preston's Sheppard's Touchstone.
Prest. Conv. Preston on Conveyancing.
Prest. Est. Preston on Estates.
Prest. Merg. Preston on Merger.
Pri. or *Price.* Price's Exchequer Reports.
Price Exch. Price's Reports, Exchequer, English.
Price Liens. Price on Liens.
Price Notes P. P. or *Price P. P.* Price's Notes of Points of Practice, English Exchequer Cases.
Price R. Est. Price on Acts Relating to Real Estate (Pa.).
Price & St. Price and Steuart Trade-mark Cases.
Prick. or *Prickett (Id.).* Prickett's Idaho Reports.
Prid. Chu. Gui. Prideaux's Churchwarden's Guide.

Prid. Prec. Prideaux's Precedents in Conveyancing.
Prid. & C. Prideaux and Cole's Reports, English, New Sessions Cases, vol. 4.
Prin. Principium. The beginning of a title or law.
Prin. Dec. Printed Decisions (Sneed's), Kentucky.
Prior Lim. Prior on Construction of Limitations.
Pritch. Ad. Dig. Pritchard's Admiralty Digest.
Pritch. M. & D. Pritchard on Marriage and Divorce.
Pritch. Quar. Sess. Pritchard, Quarter Sessions.
Priv. Counc. App. Privy Council Appeals.
Priv. Lond. Customs or Privileges of London.
Pro. L. Province Law.
Pro. quer. Pro querentem. For the plaintiff.
[*1891*] *Prob.* Law Reports, Probate Division, from 1891 onward.
Prob. Code. Probate Code.
Prob. Div. Probate Division, English Law Reports.
Prob. Rep. Probate Reports.
Prob. Rep. Ann. Probate Reports Annotated.
Prob. & Adm. Div. Probate and Admiralty Division, Law Reports.
Prob. & Div. Probate and Divorce, English Law Reports.
Prob. & Mat. or *Prob. & Matr.* Probate and Matrimonial Cases.
Proc. Ch. Proceedings in Chancery.
Proc. Pr. or *Proc. Prac.* Proctor's Practice.
Proff. Corp. Proffatt on Corporations.
Proff. Jury Tr. Proffatt on Jury Trials.
Proff. Not. Proffatt on Notaries.
Proff. Wills. Proffatt on Wills.
Prop. Lawyer N. S. Property Lawyer, New Series (periodical), England.
Proud. Dom. Pub. Proudhon's Domaine Public.
Proudf. Land Dec. (U. S.). Proudfit's United States Land Decisions.
Prouty. Prouty's Reports, vols. 61-68 Vermont.
Prt. Rep. Practice Reports.
Psych. & M. L. J. Psychological and Medico-Legal Journal, New York.
Puff. Puffendorf's Law of Nature and Nations.
Pugs. Pugsley's Reports, New Brunswick.
Pugs. & Bur. or *Pugs. & Burb.* Pugsley and Burbridge's Reports, New Brunswick.
Pull. Accts. Pulling's Law of Mercantile Accounts.
Pull. Attor. Pulling on the Law of Attorneys.
Pull. Laws & Cust. Lond. Pulling's Treatise on the Laws, Customs, and Regulations of the City and Port of London.
Pull. Port of London. Pulling, Treatise on the Laws, Customs, and Regulations of the City and Port of London.
Puls. or *Pulsifer.* Pulsifer's Reports, vols. 65-68 Maine.
Pult. Pulton de Pace Regis.
Pump Ct. Pump Court (London).
Punj. Rec. Punjab Record.
Purd. Dig. (Pa.). Purdon's Digest of Pennsylvania Laws.
Purd. Dig. (U. S.). Purdon's Digest of United States Laws.
Puter. Pl. Puterbauch's Pleading.
Pyke. Pyke's Lower Canada King's Bench Reports.
Q. Question; — Quorum; — Quadragesms (Year Books Part IV); — Quebec; — Queensland; — *Attach.* Quoniam Attachiamenta.
Q. B. Queen's Bench;—Queen's Bench Reports (Adolphus & Ellis, New Series, English);—English Law Reports, Queen's Bench (1841-1852);—Queen's Bench Reports, Upper Canada;—Queen's Bench Reports, Quebec;—English Law Reports, Queen's Bench Division, 1891.
[*1891*] *Q. B.* Law Reports, Queen's Bench Division, from 1891 onward.
Q. B. Div. or *Q. B. D.* Queen's Bench Division, English Law Reports (1876-1890).
Q. B. R. Queen's Bench Reports, by Adolphus & Ellis (New Series).
Q. B. U. C. Queen's Bench Reports, Upper Canada.
Q. C. Queen's Counsel.
Q. L. R. Quebec Law Reports;—Queensland Law Reports.
Q. P. R. Quebec Practice Reports.
Q. R. Official Reports, Province of Quebec.
Q. R. Q. B. Quebec Queen's Bench Reports.
Q. S. Quarter Sessions.
Q. t. Qui tam.
Q. v. Quod vide; Which see.
Q. Vict. Statutes of Province of Quebec (Reign of Victoria).
Q. War. Quo Warranto.
Qu. L. Jour. Quarterly Law Journal, Richmond, Va.
Qu. L. Rev. Quarterly Law Review, Richmond, Va.
Qua. cl. fr. Quare clausum fregit *(q. v.)*.
Quadr. Quadragesms (Year Books, Part IV).
Quart. Rev. Quarterly Law Review, Richmond, Virginia.
Queb. L. R. Quebec Law Reports, two series, Queen's Bench or Superior Court.
Queb. Q. B. Quebec Queen's Bench Reports.
Quebec L. Rep. Quebec Law Reports, two series, Queen's Bench or Superior Court.
Queens. L. J. Queensland Law Journal.
Queens. L. R. Queensland Law Reports.
Quin. or *Quincy.* Quincy's Massachusetts Reports.
Quinti, Quinto. Year Book, 5 Hen. V.
Quo War. Quo Warranto.
R. Resolved. Repealed. Revised. Revision. Rolls;—King Richard; thus 1 R. III. signifies the first year of the reign of King Richard III.;—Rawle's Reports, S. C. of Pennsylvania.
R. A. Regular Appeals. Registration Appeals.
Rc. Rescriptum;—Rolls of Court;—Record Commissioners;—Railway Cases;—Registration Cases;—Revue Critique, Montreal.
R. C. & C. R. Revenue, Civil and Criminal Reporter, Calcutta.
R. G. Regulæ Generales, Ontario.
R. I. Rhode Island;—Rhode Island Reports.
R. J. & P. J. Revenue, Judicial and Police Journal, Calcutta.
R. L. Roman Law;—Revised Laws;—Revue Legale.
R. L. & S. Ridgeway, Lapp and Schoales's Reports, Irish King's Bench.
R. L. & W. Roberts, Leaming and Wallis's County Court Reports, English.
R. M. Ch. or *R. M. Charlt.* R. M. Charlton's Georgia Reports.
R. P. C. Real Property Cases, English;—Reports Patent Cases.
R. P. Cas. Real Property Cases, English.
R. P. & W. (Pa.). (Rawle) Penrose and Watt's Pennsylvania Reports.
R. R. & Can. Cas. Railway and Canal Cases, English.
R. S. Revised Statutes.
R. S. L. Reading on Statute Law.
R. t. F. Reports *tempore* Finch, English Chancery.
R. t. H. Reports *tempore* Hardwicke (Lee) English King's Bench;—Reports *tempore* Holt (Cases Concerning Settlement).
R. t. Hardw. Reports *tempore* Hardwicke, English King's Bench.
R. t. Holt. Reports *tempore* Holt, English King's Bench.
R. t. Q. A. Reports *tempore* Queen Anne, vol. 11 Modern Reports.
R. & B. Cas. Redfield and Bigelow's Leading Cases on Bills and Notes.
R. & C. Cas. Railway and Canal Cases, English.
R. & C. N. Sc. Russell & Chesley's Reports, Nova Scotia.
R. & G. N. Sc. Russell & Geldert's Reports, Nova Scotia.
R. & H. Dig. Robinson & Harrison's Digest, Ontario.
R. & J. Dig. Robinson & Joseph's Digest, Ontario.
R. & M. Russell & Mylne's English Chancery Reports;—Ryan & Moody's English Nisi Prius Reports.
R. & My. Russell and Mylne's Reports, English Chancery.

R. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.
R. & M. Dig. Rapalje & Mack's Digest of Railway Law.
R. & M. N. P. Ryan and Moody's Nisi Prius Cases, English.
R. & R. C. C. Russell and Ryan's Crown Cases Reserved, English.
Ra. Ca. English Railway and Canal Cases.
Rader. Rader's Reports, vols. 138-163 Missouri.
Raff Pens. Man. Raff's Pension Manual.
Rail. & Can. Cas. English Railway and Canal Cases;—Railway and Canal Traffic Cases.
Railw. Cas. Railway Cases.
Railw. & C. Cas. Railway and Canal Cases, English.
Railw. & Corp. Law J. Railway and Corporation Law Journal.
Ram A. Ram on Assets.
Ram Cas. P. & E. Ram's Cases of Pleading and Evidence.
Ram F. Ram on Facts.
Ram Judgm. Ram on Science of Legal Judgment.
Ram Leg. Judgm. (Towns. Ed.). Ram's Science of Legal Judgment, Notes by Townshend.
Ram W. Ram on Exposition of Wills.
Ram. & Mor. Ramsey & Morin's Montreal Law Reporter.
Rand. Randolph's Virginia Reports;—Randolph's Reports, vols. 21-56 Kansas;—Randolph's Reports, vols. 7-11 Louisiana Annual;—Randall's Reports, vols. 52-71 Ohio State.
Rand. (Kan.). Randolph's Reports, Kansas.
Rand. (La.). Randolph's Reports, Louisiana Annual Reports, vols. 7-11.
Rand. Perp. Randall on Perpetuities.
Raney. Raney's Reports, vols. 16-20 Florida.
Rang. Dec. Sparks's Rangoon Decisions, British Burmah.
Rank. P. Rankin on Patents.
Rap. Fed. Ref. Dig. Rapalje's Federal Reference Digest.
Rap. Jud. Q. B. R. Rapport's Judiciaries de Quebec Cour du Banc de la Reine.
Rap. Jud. Q. C. S. Rapport's Judiciaries de Quebec Cour Superieure.
Rap. Lar. Rapalje on Larceny.
Rap. N. Y. Dig. Rapalje's New York Digest.
Rap. & L. or *Rap. & Law.* or *Rapal. & L.* Rapalje & Lawrence, American and English Cases.
Rast. Rastell's Entries and Statutes.
Ratt. L. C. Rattigan's Leading Cases on Hindoo Law.
Ratt. R. L. Rattigan's Roman Law.
Raw. or *Rawle.* Rawle's Pennsylvania Reports.
Rawle Const. Rawle on the Constitution.
Rawle, Cov. or *Rawle Covt.* Rawle on Covenants for Title.
Rawle Eq. Rawle's Equity in Pennsylvania.
Rawle Pen. & W. (Rawle) Penrose & Watts, Pennsylvania.
Ray Med. Jur. Ray's Medical Jurisprudence of Insanity.
Ray Men. Path. Ray's Mental Pathology.
Raym. or *Raym. Ld.* Lord Raymond's Reports, English King's Bench.
Raym. B. of Ex. Raymond on Bill of Exceptions.
Raym. Ch. Dig. Raymond's Chancery Digest.
Raym. Ent. Raymond's Book of Entries.
Raym. Sir T. or *Raym. T.* Sir Thomas Raymond's English King's Bench Reports.
Raymond. Raymond's Reports, vols. 81-89 Iowa.
Rayn. Rayner's English Tithe Cases, Exchequer.
Re-af. Re-affirmed.
Re. de J. Revue de Jurisprudence, Montreal.
Re. de L. Revue de Jurisprudence et Legislation, Montreal.
Real Est. Rec. Real Estate Record, New York.
Real Pr. Cas. Real Property Cases (English).
Rec. Records;—Recorder;—American Law Record.
Rec. Com. Record Commission.
Rec. Dec. Vaux's Recorder's Decisions, Philadelphia.
Red. Redfield's New York Surrogate Reports;—Reddington, Maine.
Red. Am. R. R. Cas. or *Red. Cas. R. R.* Redfield's Leading American Railway Cases.
Red. Cas. Wills. Redfield's Leading Cases on Wills.
Red. R. L. Reddie's Roman Law.
Red. R. R. Cas. Redfield's Leading American Railway Cases.
Red. & Big. Cas. B. & N. Redfield & Bigelow's Leading Cases on Bills and Notes.
Redes. Pl. Mitford's Chancery Pleading.
Redf. Redfield's Surrogate Court Reports, N. Y.
Redf. Am. Railw. Cas. Redfield's American Railway Cases.
Redf. Bailm. Redfield on Carriers and Bailments.
Redf. L. Cas. Wills. Redfield's Leading Cases on Wills.
Redf. Pr. Redfield's Practice, New York.
Redf. R. Cas. Redfield's American Railway Cases.
Redf. Railw. Redfield on Railways.
Redf. Railw. Cas. Redfield's American Railway Cases.
Redf. Sur. or *Redf. Surr. (N. Y.).* Redfield's New York Surrogate Court Reports.
Redf. Wills. Redfield's Leading Cases on Wills.
Redf. & Big. L. Cas. Redfield and Bigelow's Leading Cases on Notes and Bills.
Reding. or *Redington.* Redington's Reports, vols. 31-35 Maine.
Redm. Redman on Arbitrations and Awards.
Reed Fraud or *Reed Lead. Cas.* Reed's Leading Cases in Law of Statute of Frauds.
Reese. Reporter, vols. 5, 11 Heiskell's Tennessee Reports.
Reeve Des. Reeve on Descents.
Reeve Dom. R. Reeve on Domestic Relations.
Reeve, Eng. Law or *Reeve H. E. L.* or *Reeve, Hist. Eng. Law.* Reeve's History of the English Law.
Reeve Sh. Reeve on the Law of Shipping and Navigation.
Reg. The Daily Register, New York City.
Reg. App. Registration Appeals.
Reg. Brev. Register of Writs.
Reg. Cas. Registration Cases.
Reg. Deb. (Gales). Register of Debates in Congress, 1789-91 (Gales's).
Reg. Deb. (G. & S.). Register of Debates in Congress, 1824-37 (Gales and Seaton's).
Reg. Gen. Regulæ Generales.
Reg. Jud. Registæm Judiciale.
Reg. Lib. Register Book.
Reg. Maj. Books of Regiam Majestatem.
Reg. Om. Brev. Registrum Omnium Brevium.
Reg. Orig. Registrum Originale.
Reg. Pl. Regula Placitandi.
Reg. Writ. Register of Writs.
Reilly. Reilly's English Arbitration Cases.
Rem. Cr. Tr. Remarkable Criminal Trials.
Rem. Tr. Cummins & Dunphy's Remarkable Trials.
Rem. Tr. No. Ch. Benson's Remarkable Trials and Notorious Characters.
Remy. Remy's Reports, vols. 145-154 Indiana; also Indiana Appellate Court Reports.
Rep. Report; — Reports; — Reporter; — Repealed;—Wallace's The Reporters;—Répertoire. Coke's Reports, English King's Bench.
Rep. (1, 2, etc.). Coke's English King's Bench Reports.
Rep. Ass. Y. Clayton's Reports of Assizes at Yorke.
Rep. Cas. Eq. Gilbert's Chancery Reports.
Rep. Cas. Madr. Reports of Cases, Dewanny Adawlut, Madras.
Rep. Cas. Pr. Reports of Cases of Practice (Cooke's).
Rep. Ch. Reports in Chancery, English.
Rep. Ch. Pr. Reports on the Chancery Practice.
Rep. Com. Cas. Reports of Commercial Cases, Bengal.
Rep. Const. or *Rep. Const. Ct.* Reports of the Constitutional Court, South Carolina (Treadway, Mill, or Harper).

Rep. Cr. L. Com. Reports of Criminal Law Commissioners.
Rep. de Jur. Répertoire de Jurisprudence, Paris.
Rep. de Jur. Com. Répertoire de Jurisprudence Commerciale, Paris.
Rep. du Not. Répertoire du Notariæ, Paris.
Rep. Ec. C. C. Répétitions Ecrites sur le Code Civil.
Rep. Eq. Guilbert's Reports in Equity, English.
Rep. in Ch. Reports in Chancery, English.
Rep. (N. Y.). The Reporter, Washington and New York.
Rep. Q. A. Report *tempore* Queen Anne, vol. 11 Modern.
Rep. Sel. Cas. Ch. or *Rep. Sel. Cas. in Ch.* Kelynge's (W.) Reports, English Chancery.
Rep. t. Finch. Reports *tempore* Finch, English Chancery.
Rep. t. Hard. Lee's Reports *tempore* Hardwicke, English King's Bench Reports.
Rep. t. Holt. Reports *tempore* Holt, English King's Bench;—Reports *tempore* Holt (English Cases of Settlement).
Rep. t. O. Br. Carter's English Common Pleas Reports *tempore* O. Bridgman.
Rep. t. Q. A. Reports *tempore* Queen Anne (11 Modern).
Rep. t. Talb. Reports *tempore* Talbot, English Chancery.
Rep. (Wash.). The Reporter, Washington and New York.
Rep. Yorke Ass. Clayton's Reports of Assizes at Yorke.
Report or *Reports.* Coke's Reports, English King's Bench.
Reptr. The Reporter, Boston, Mass.
Res. Cas. Reserved Cases.
Ret. Brev. Retorna Brevium.
Rettie. Rettie, Crawford & Melville's Scotch Session Cases (4th Series).
Rev. Reversed. Revised. Revenue.
Rev. C. & C. Rep. Revenue, Civil, and Criminal Reporter, Bengal.
Rev. Cas. Revenue Cases.
Rev. Crit. La Révue Critique, Montreal.
Rev. Crit. de Leg. Révue Critique de Legislation, Paris.
Rev. de Leg. Révue de Legislation, Montreal.
Rev. Dr. Int. Révue de Droit International, Paris.
Rev. Dr. Leg. Révue de Droit Législation, Paris.
Rev. Laws. Revised Laws.
Rev. Leg. La Révue Légale, Sorel, Quebec.
Rev. Ord. N. W. T. Revised Ordinances, Northwest Territories (Canada) 1888.
Rev. St. or *Rev. Stat.* Revised Statutes.
Reyn. Reynolds's Reports, vols. 40-42 Mississippi.
Reyn. Steph. Reynolds's Stephens on Evidence.
Rho. L. Rhodian Law.
Rice. Rice's Law Reports, South Carolina.
Rice Ch. Rice's Equity Reports, South Carolina.
Rice. Dig. Pat. Rice's Digest of Patent Office Decisions.
Rice Eq. Rice's South Carolina Equity Reports.
Rich. Richardson's South Carolina Law Reports;—Richardson's Reports, vols. 2-5 New Hampshire.
Rich. Cas. Ch. or *Rich. Ch.* Richardson's South Carolina Equity Reports.
Rich. Ct. Cl. Richardson's Court of Claims Reports.
Rich. Eq. Richardson's South Carolina Equity Reports.
Rich. Eq. Cas. Richardson's South Carolina Equity Reports.
Rich. Law (S. C.). Richardson's South Carolina Law Reports.
Rich. (N. H.). Richardson's Reports, New Hampshire Reports, vols. 3-5.
Rich. N. S. Richardson's Reports, New Series, South Carolina.
Rich. P. R. C. P. Richardson's Practical Register, Common Pleas.
Rich. Pr. C. P. Richardson's Practice Common Pleas.
Rich. Pr. K. B. Richardson's Practice in the King's Bench.
Rich. Pr. Reg. Richardson's Practical Register, English Common Pleas.
Rich. & H. or *Rich. & Hook.* Richardson & Hook's Street Railway Decisions.
Rich. & W. Richardson & Woodbury's Reports, vol. 2 New Hampshire.
Ridg. Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridg. Ap. or *Ridg. App.* Ridgeway's Irish Appeal (or Parliamentary) Cases.
Ridg. Cas. Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridg. L. & S. Ridgeway, Lapp and Schoales's Reports (Irish Term Reports).
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Ridg. Rep. or *Ridg. St. Tr.* Ridgeway's (Individual) Reports of State Trials in Ireland.
Ridg. t. Hard. or *Ridg. & Hard.* Ridgeway's Reports *tempore* Hardwicke, Chancery and King's Bench.
Ridgew. Ridgeway (see Ridg.).
Ridley, Civil & Ecc. Law. Ridley's Civil and Ecclesiastical Law.
Ried. Riedell's Reports, vols. 68, 69 New Hampshire.
Ril. Riley's South Carolina Law Reports;—Riley's Reports, vols. 37-42 West Virginia.
Ril. Ch. or *Ril. Eq.* Riley's South Carolina Chancery Reports.
Ril. Harp. Riley's Edition of Harper's South Carolina Reports.
Riley. Riley's South Carolina Chancery Reports;—Riley's South Carolina Law Reports;—Riley's Reports, vols. 37-42 West Virginia.
Riley Ch. or *Riley Eq.* Riley's Chancery Reports, South Carolina.
Riner. Riner's Reports, vol. 2 Wyoming.
Riv. Ann. Reg. Rivington's Annual Register.
Rob. Robinson's Virginia Reports;—Robinson's Louisiana Reports;—Robinson's Reports, vols. 2-9 and 17-23 Colorado Appeals;—Robertson's New York Superior Court Reports;—Robinson's English Ecclesiastical Reports;—Chr. Robinson's English Admiralty Reports;—W. Robinson's English Admiralty Reports;—Robinson's Reports, English House of Lords Scotch Appeals;—Robertson's Scotch Appeal Cases;—Robinson's Reports, vol. 33 California;—Robinson's Reports, vols. 1-4 Louisiana Annual;—Roberts's Reports, vols. 29-31 Louisiana Annual;—Robards's Reports, vols. 12, 13 Missouri;—Robards's Conscript Cases, Texas;—Chr. Robinson's Upper Canada Reports;—J. L. Robinson's Upper Canada Reports;—Robertson's Reports, vol. 1 Hawaii;—Robinson's Reports, vol. 1 Nevada.
Rob. Adm. Chr. Robinson's English Admiralty Reports.
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Rob. Adm. & Pr. Roberts on Admiralty and Prize.
Rob. App. Robinson's Scotch Appeals, English House of Lords.
Rob. (Cal.). Robinson's Reports, California.
Rob. Car. V. Robertson's History of the Reign of the Emperor Charles V.
Rob. Cas. Robertson's Scotch Appeal Cases.
Rob. Chr. Chr. Robinson's English Admiralty Reports.
Rob. Chr. Adm. Chr. Robinson's Reports, English Admiralty.
Rob. Consc. Cas. or *Rob. Conscr. Cas.* Robard's Conscript Cases, Texas.
Rob. Ecc. Robertson's Ecclesiastical Reports, English.
Rob. Ent. Robinson's Entries.
Rob. Eq. Roberts's Principles of Equity.
Rob. Fr. Roberts on Frauds.
Rob. Fr. Conv. Roberts on Fraudulent Conveyances.
Rob. Gavelk. Robinson on Gavelkind.
Rob. (Hawaiian). Robinson's Hawaiian Reports.
Rob. Jr. or *Rob. Jun.* William Robertson's English Admiralty Reports.
Rob. Jus. Robinson's Justice of the Peace.
Rob. L. & W. Roberts, Leaming & Wallis's County Court Reports.

Rob. (La.). Robinson's Reports, Louisiana.
Rob. (La. Ann.). Robinson's Reports, Louisiana Annual, vols. 1-4.
Rob. Mar. (N. Y.). Robertson & Jacob's New York Marine Court Reports.
Rob. (Mo.). Robard's Reports, Missouri.
Rob. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
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Rob. S. I. Robertson's Sandwich Island (Hawaiian) Reports.
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Rob. Sr. Ct. Robertson's New York Superior Court Reports.
Rob. St. Fr. Roberts on the Statute of Frauds.
Rob. U. C. Robinson's Reports, Upper Canada.
Rob. (Va.). Robinson's Reports, Virginia.
Rob. Wills. Roberts on Wills.
Rob. Wm. or *Rob. Wm. Adm.* Wm. Robinson's Reports, English Admiralty.
Rob. & J. Robard and Jackson's Reports, Texas Reports, vols. 26-27.
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Robert. Robertson's Scotch Appeals, English House of Lords.
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Robin. App. Robinson's Scotch Appeal Cases.
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Robt. Robert;—Robertson.
Robt. (N. Y.). Robertson's Reports, New York City Superior Court Reports, vols. 24-30.
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Roc. Mar. L. Roccus on Maritime Law.
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Roccus, Ins. Roccus on Insurance.
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Roll. Roll of the Term;—Rolle's English King's Bench Reports.
Rolle. Rolle's Reports, English King's Bench.
Rolle Abr. Rolle's Abridgment.
Rolle R. Rolle's English King's Bench Reports.
Rolls Ct. Rep. Rolls Court Reports, English.
Rom. Romilly's Notes of Cases, English Chancery.
Rom. Cr. L. Romilly's Criminal Law.
Rom. Law. Mackeldy's Handbook of the Roman Law.
Root. Root's Reports, Connecticut.
Rop. H. & W. or *Rop. Husb. & Wife.* Roper on Husband and Wife.
Rop. Leg. Roper on Legacies.
Rop. Prop. Roper on Property.
Rop. Rev. Roper on Revocation of Wills.
Rorer Int. St. L. Rorer on Inter-State Law.
Rorer Jud. Sales. Rorer on Judicial Sales.
Rosc. Adm. Roscoe's Admiralty Jurisdiction and Practice.
Rosc. Bills. Roscoe on Bills and Notes.
Rosc. Civ. Ev. Roscoe on Civil Evidence.
Rosc. Cr. Ev. or *Rosc. Crim. Ev.* Roscoe on Criminal Evidence.
Rosc. Jur. Roscoe's Jurist, London.
Rosc. N. P. Roscoe on Nisi Prius Evidence.
Rosc. Pl. Roscoe on Pleading.
Rosc. R. Ac. or *Rosc. Real Act.* Roscoe on Real Actions.
Rosc. St. D. Roscoe on Stamp Duties.
Rose or *Rose B. C.* Rose's Reports, English Bankruptcy.
Rose Notes. Rose's Notes on United States Reports.
Rose W. C. Rose Will Case, New York.
Ross, Conv. Ross's Lectures on Conveyancing, etc., Scotland.
Ross Ldg. Cas. Ross's Leading Cases on Commercial Law.
Ross Lead. Cas. Ross's Leading Cases on Commercial Law.
Ross V. & P. Ross on Vendors and Purchasers.
Rot. Chart. Rotulus Chartarum.
Rot. Cur. Reg. Rotuli Curiæ Regis.
Rot. Flor. Rotæ Florentinæ (Reports of the Supreme Court, or Rota, of Florence).
Rot. Parl. Rotulæ Parliamentariæ.
Rouse Cop. Rouse's Copyhold Enfranchisement Manual.
Rouse Pr. Mort. Rouse on Precedents of Mortgages.
Rowe. Rowe's Reports, English Parliamentary and Military Cases.
Rowe Rep. Rowe's Reports (Irish).
Rowe Sci. Jur. Rowe's Scintilla Juris.
Rowell. Rowell's Contested Election Cases, U. S. House of Representatives, 1889-1891;—Rowell's Reports, vols. 45-52 Vermont.
Roy. Dig. Royall's Digest Virginia Reports.
Royle Stock Sh. Royle on the Law of Stock Shares, etc.
Rt. Law Repts. Rent Law Reports, India.
Rub. Rubric.
Rucker. Rucker's Reports, vols. 43-46 West Virginia.
Ruff. or *Ruff. & H.* Ruffin & Hawks's North Carolina Reports.
Ruffh. or *Ruffh. St.* Ruffhead's Statutes-at-Large of England.
Rules Sup. Ct. Rules of the Supreme Court.
Runn. Runnell's Reports, Iowa.
Runn. Stat. Runnington's Statutes-at-Large of England.
Runnells. Runnells's Reports, vols. 33, 56 Iowa.
Rus. Russell.
Rush. Rushworth's Historical Collection.
Russ. Russell's Reports, English Chancery.
Russ. Arb. Russell on Arbitrators.
Russ. Cr. or *Russ. Crimes.* Russell on Crimes and Misdemeanors.
Russ. Elect. Cas. Russell's Election Cases, Nova Scotia;—Russell's Election Cases, Massachusetts.
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Russ. Merc. Ag. Russell on Mercantile Agency.
Russ. N. Sc. Russell's Equity Cases, Nova Scotia.
Russ. t. Eld. Russell's English Chancery Reports *tempore* Elden.
Russ. & Ches. Russell and Chesley's Reports, Nova Scotia.
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Russ. & Geld. Russell and Geldert's Reports, Nova Scotia.
Russ. & M. Russell and Mylne's Reports, English Chancery.
Russ. & R. or *Russ. & Ry.* Russell and Ryan's Crown Cases Reserved, English.

Rutg. Cas. or *Rutger Cas.* Rutger-Waddington Case, New York City, 1784 (First of New York Reports).

Ruth. Inst. or *Ruth. Nat. L.* Rutherford's Institutes of Natural Law.

Ry. Cas. Reports of Railway Cases.

Ry. F. Rymer's Fœdera, Conventiones, etc.

Ry. Med. Jur. Ryan's Medical Jurisprudence.

Ry. & Can. Cas. Railway and Canal Cases, England.

Ry. & Can. Traf. Ca. Railway and Canal Traffic Cases.

Ry. & Corp. Law Jour. Railway and Corporation Law Journal.

Ry. & M. Ryan & Moody's Nisi Prius Reports, English.

Ry. & M. C. C. Ryan and Moody's Crown Cases Reserved, English.

Ry. & M. N. P. Ryan and Moody's Nisi Prius Reports, English.

Rymer. Rymer's Fœdera.

S. Shaw, Dunlop & Bell's Scotch Court of Session Reports (1st Series);—Shaw's Scotch House of Lords Appeal Cases;—Southeastern Reporter (properly cited S. E.);—Southwestern Reporter (properly cited S. W.);—New York Supplement;—Supreme Court Reporter;—Section.

S. A. L. R. South Australian Law Reports.

S. App. Shaw's Appeal Cases, Scotland.

S. Aust. L. R. South Australian Law Reports.

S. B. Upper Bench, or Supreme Bench.

S. C. South Carolina;—South Carolina Reports, New Series;—Same Case;—Superior Court;—Supreme Court;—Sessions Cases;—Samuel Carter (see Orlando Bridgman);—Senatus-Consulti.

S. C. A. Supreme and Exchequer Courts Act, Canada.

S. C. Bar Assn. South Carolina Bar Association.

S. C. C. Select Chancery Cases (part 3 of Cases in Chancery);—Small Cause Court, India.

S. C. Dig. Cassell's Supreme Court Digest, Canada.

S. C. E. Select Cases relating to Evidence.

S. C. R. South Carolina Reports, New Series;—Harper's South Carolina Reports;—Supreme Court Reports;—Supreme Court Rules;—Supreme Court of Canada Reports.

S. C. Rep. Supreme Court Reports.

S. Car. South Carolina;—South Carolina Reports, New Series.

S. Ct. Supreme Court Reporter.

S. D. South Dakota;—South Dakota Reports.

S. D. A. Sudder Dewanny Adawlut Reports, India.

S. Dak. South Dakota Reports.

S. D. & B. Shaw, Dunlop & Bell's Scotch Court of Session Reports (1st Series).

S. D. & B. Sup. Shaw, Dunlop & Bell's Supplement, containing House of Lords Decisions.

S. E. or *S. E. R.* or *S. E. Rep.* Southeastern Reporter.

S. F. A. Sudder Foujdaree Adawlut Reports, India.

S. J. Solicitors' Journal.

S. Just. Shaw's Justiciary Cases, Scotch.

S. L. Session Law;—Solicitor at Law;—Statute Law.

S. L. C. Smith's Leading Cases.

S. L. C. App. Stuart's Lower Canada Appeal Cases.

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S. L. Ev. Select Laws relating to Evidence.

S. L. J. Scottish Law Journal, Edinburgh.

S. L. R. Scottish Law Reporter, Edinburgh;—Southern Law Review, St. Louis.

S. P. Same Point;—Same Principle.

S. R. State Reporter, New York.

S. S. Synopsis Series of U. S. Treasury Decisions.

S. S. C. Sandford's New York City Superior Court Reports.

S. T. State Trials.

S. T. D. Synopsis Treasurer's Decisions.

S. Teind. or *S. Teinds.* Shaw's Teinds Cases, Scotch Courts.

S. V. A. R. Stuart's Vice-Admiralty Reports, Quebec.

S. W. Southwestern;—Southwestern Reporter.

S. W. L. J. Southwestern Law Journal, Nashville, Tenn.

S. W. Rep. Southwestern Reporter (commonly cited S. W.).

S. & B. Smith and Batty's Reports, Irish King's Bench.

S. & C. Saunders & Cole's English Bail Court Reports;—Swan & Critchfield, Revised Statutes, Ohio.

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S. & G. Smale & Giffard, English.

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S. & M. Shaw & Maclean's Appeal Cases, House of Lords;—Smedes & Marshall's Mississippi Reports.

S. & M'L. Shaw and Maclean's Appeal Cases, English House of Lords.

S. & Mar. Smedes and Marshall's Reports, Mississippi Reports, vols. 9-22.

S. & M. Ch. or *S. & Mar. Ch.* Smedes and Marshall's Chancery Reports, Mississippi.

S. & R. Sergeant and Rawle's Reports, Pennsylvania.

S. & S. Sausse & Scully's Irish Rolls Court Reports;—Simons & Stuart, English Vice-Chancellors' Reports;—Swan & Sayler, Revised Statutes of Ohio.

S. & Sc. Sausse and Scully's Reports, Irish Chancery.

S. & Sm. Searle and Smith's Reports, English Probate and Divorce Cases.

S. & T. Swabey and Tristram's Reports, English Probate and Divorce Cases.

Sal. Salinger's Reports, vols. 90-117 Iowa.

Salk. Salkeld's Reports, English Courts.

Salm. Abr. or *Salm. St. R.* Salmon's Abridgment of State Trials.

San Fr. L. J. San Francisco Law Journal, California.

San. U. Sanders on Uses and Trusts.

Sand. Sandford's New York Superior Court Reports.

Sand. Ch. Sandford's New York Chancery Reports.

Sand. Eq. Sands's Suit in Equity.

Sand. Essays. Sanders's Essays.

Sand. Inst. Sandars's Institutes of Justinian.

Sand. I. Rep. Sandwich Island (Hawaiian) Reports.

Sand. Jus. or *Sandars, Just. Inst.* Sandars's Edition of Justinian's Institutes.

Sand. U. & T. Sanders on Uses and Trusts.

Sandf. Sandford's New York Superior Court Reports.

Sandf. Ch. Sandford's Chancery Reports, New York.

Sandf. Ent. Sandford on Entails.

Sandl. St. Pap. Sandler's State Papers.

Sanf. (Ala.). Sanford's Reports, Alabama.

Sant. de Assec. Santerna de Assecurationibus.

Sar. Ch. Sen. Saratoga Chancery Sentinel.

Sau. & Sc. Sausse & Scully's Irish Rolls Court Reports.

Sauls. Saulsbury's Reports, vols. 5-6 Delaware.

Saund. Saunders's Reports, English King's Bench.

Saund. Bank. Pr. Saunders's Bankrupt Practice.

Saund. Neg. Saunders on the Law of Negligence.

Saund. Pl. Saunders on Civil Pleading.

Saund. Pl. & Ev. Saunders's Pleading and Evidence.

Saund. & C. Saunders and Cole's Reports, English Bail Court.

Saund. & Mac. Saunders & Macrae's English County Court Cases.

Sausse & Sc. Sausse & Scully's Irish Rolls Court Reports.

Sav. Savile's English Common Pleas Reports.

Sav. Dr. Rom. Savigny, Droit Romain.

Sav. His. Rom. L. Savigny's History of the Roman Law.

Sav. Obl. Savigny on Obligations.

Sav. Priv. Trial of the Savannah Privateers.

Sav. Priv. Int. L. Savigny on Private International Law.

Sav. Syst. Savigny, System des Heutigen Römischen Richts.

Saw. or *Sawy.* Sawyer's United States Circuit Court Reports.

Sax. or *Saxt.* or *Saxt. Ch.* Saxton's Chancery Reports, New Jersey Equity Reports, vol. 1.

Say. Sayer's Reports, English King's Bench.

Say. Costs. Sayer on Costs.

Say. Pr. Sayle's Practice in Texas.

Sayer. Sayer's English King's Bench Reports.

Sc. Scilicet (that is to say);—Scott's Reports, English Common Pleas;—Scotch;—Scammon's Reports, vols. 2-5 Illinois;—Liber Rubeus Scaccarii, Scottish.

Sc. Jur. Scottish Jurist, Edinburgh.

Sc. L. J. Scottish Law Journal, Glasgow.

Sc. L. M. Scottish Law Magazine, Edinburgh.

Sc. L. R. Scottish Law Reporter, Edinburgh.

Sc. N. R. Scott's New Reports.

Sc. Sess. Cas. Scotch Court of Session Cases.

Sc. & Div. App. Scotch and Divorce Appeals (Law Reports).

Scac. or *Scaccaria Curia.* Court of Exchequer.

Scam. Scammon's Reports, vols. 2-5 Illinois.

Scan. Mag. Scandalum Magnatum.

Sch. & Lef. Schoales and Lefroy's Reports, Irish Chancery.

Sch. & Lef. Schoales & Lefroy's Irish Chancery Reports.

Schalck or *Schalk (Jam.).* Schalck's Jamaica Reports.

Scheiff. Pr. Scheiffer's Practice.

Scher. Scherer, New York Miscellaneous Reports.

Schm. C. L. or *Schm. Civil Law.* Schmidt's Civil Law of Spain and Mexico.

Schm. L. J. Schmidt's Law Journal, New Orleans.

Schomberg, Mar. Laws Rhodes. Schomberg, Treatise on the Maritime Laws of Rhodes.

Schoul. Bailm. Schouler on Bailments, including Carriers.

Schoul. Dom. Rel. Schouler on Domestic Relations.

Schoul. Per. Pr. or *Shouler, Pers. Prop.* Schouler on Personal Property.

Schouler, Wills. Schouler on Wills.

Schuyl. Leg. Rec. Schuylkill Legal Record, Pottsville, Pa.

Sci. fa. Scire facias.

Sci. fa. ad dis. deb. Scire facias ad disprobandum debitum.

Scil. Scilicet, That is to say.

Sco. Scott's Reports, English Common Pleas.

Sco. Costs. Scott on Costs.

Sco. Int. Scott's Intestate Laws.

Sco. Nat. Scott on Naturalization of Aliens.

Sco. N. R. Scott's New Reports, English Common Pleas.

Sco. & J. Tel. Scott and Jarnigan on the Law of Telegraphs.

Scot. Scotland;—Scottish.

Scot. Jur. Scottish Jurist, Edinburgh.

Scot. L. J. Scottish Law Journal, Glasgow.

Scot. L. M. Scottish Law Magazine, Edinburgh.

Scot. L. R. Scottish Law Reporter, Edinburgh;—Scottish Law Review, Glasgow.

Scot L. T. Scot Law Times, Edinburgh.

Scott. Scott's English Common Pleas Reports;—Scott's New York Civil Procedure.

Scott J. Reporter, English Common Bench Reports.

Scott N. R. Scott's New Reports, English Common Pleas.

Scr. L. T. Scranton Law Times, Pennsylvania.

Scrat. Life As. Scratchley on Life Assurance.

Scrib. Dow. Scribner on Dower.

Scriv. Cop. Scriven on Copyholds.

Seab. V. & P. Seaborne on Vendors and Purchasers.

Searle & Sm. Searle and Smith's Reports, English Probate and Divorce.

Seat. F. Ch. Seaton's Forms in Chancery.

Seb. T. M. or *Seb. Trade-Marks.* Sebastian on Trademarks.

Sec. Section.

Sec. leg. Secundum legum (according to law).

Sec. reg. Secundum regulam (according to rule).

Secd. pt. Edw. III. Part 3 of the Year Books.

Secd. pt. H. VI. Part 3 of the Year Books.

Sedg. L. Cas. Sedgwick's Leading Cases on the Measure of Damages;—Sedgwick's Leading Cases on Real Property.

Sedg. Meas. D. Sedgwick on the Measure of Damages.

Sedg. St. L. or *Sedg. St. & Const. Law.* Sedgwick on Statutory and Constitutional Law.

Seign. or *Seign. Rep.* Seigniorial Reports, Quebec.

Sel. Cas. Select Cases in Chancery, English.

Sel. Cas. A. S. Law. Select Cases in Anglo-Saxon Law.

Sel. Cas. Ch. Select Cases in Chancery (part 3 of Cases in Chancery).

Sel. Cas. D. A. Select Cases, Sudder Dewanny Adawlut, India.

Sel. Cas. Ev. Select Cases in Evidence, English.

Sel. Cas. N. F. Select Cases, Newfoundland Courts.

Sel. Cas. N. W. P. Selected Cases, Northwest Provinces, India.

Sel. Cas. N. Y. Yates's Select Cases, New York.

Sel. Cas. t. Br. Cooper's Select Cases *tempore* Brougham.

Sel. Cas. t. King. Select Cases in Chancery *tempore* King.

Sel. Cas. t. Nap. (Drury's) Select Cases *tempore* Napier, Irish Chancery.

Sel. Cas. with Opin. Select Cases with Opinions, by a Solicitor.

Sel. Ch. Cas. Select Cases in Chancery, English.

Sel. Dec. Bomb. Selected Decisions, Sudder Dewanny Adawlut, Bombay.

Sel. Dec. Mad. or *Sel. Dec. Madr.* Selected Decrees, Suder Udawlut, Madras.

Sel. L. Cas. Select Law Cases.

Sel. Pr. Sellon's Practice.

Seld. or *Seld. (N. Y.).* Selden's Reports, New York Ct. of Appeals Reports, vols. 5-10.

Seld. Notes. Selden's Notes of Cases, New York Court of Appeals.

Seld. Tit. Hon. Selden's Titles of Honor.

Selden. Selden's Reports, New York Court of Appeals.

Self. Tr. Selfridge's Trial.

Sell. Pr. Sellon's Practice in the King's Bench.

Selw. N. P. Selwin's Nisi Prius.

Selw. & Barn. The First Part of Barnewall & Alderson's English King's Bench Reports.

Serg. Attach. Sergeant on Attachment Law, Pa.

Serg. Const. L. Sergeant on Constitutional Law.

Serg. Land L. or *Serg. Land Laws Pa.* Sergeant on the Land Laws of Pennsylvania.

Serg. Mech. L. L. Sergeant on Mechanics' Lien Law.

Serg. & Lowb. Rep. English Common Law Reports, American reprints edited by Sergeant & Lowber.

Serg. & R. or *Serg. & Rawle.* Sergeant & Rawle's Pennsylvania Reports.

Sess. Cas. Sessions Cases (English King's Bench Reports);—Scotch Court of Session Cases.

Sess. Cas. Sc. Session Cases, Scotch Court of Session.

Sess. Pap. C. C. C. Session Papers, Central Criminal Court.

Sess. Pap. O. B. Session Papers, Old Bailey.

Set. Cas. English Settlement and Removal Cases (Burrow's Settlement Cases).

Set. Dec. or *Set. F. Dec.* Seton's Forms of Equity Decrees.

Sett. Cas. Settlement Cases.

Sett. & Rem. Cas. English Settlement & Removal Cases (Burrow's Settlement Cases).

Sev. Sevestre's Reports, Calcutta.

Sev. H. C. Sevestre's High Court Reports, Bengal.

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Ship. Gaz. Shipping Gazette, London.

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Shortt Copy. Shortt on Copyrights.

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Stat. Statute.
Stat. at L. or *Stat. at L. U. S.* Statutes at Large.
Stat. Glo. Statute of Gloucester.
Stat. Marl. Statute of Marlbridge.
Stat. Mer. Statute of Merton.
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Story Eq. Pl. Story's Equity Pleading.
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Sup. Superseded;—Superior;—Supreme;—Supplement.
Sup. Ct. or *Sup. Ct. Rep.* Supreme Court Reporter of Decisions of United States Supreme Court.
Super. Superior Court;—Superior Court Reports.
Supp. Supplement;—New York Supplement Reports.
Supp. Ves. Jun. or *Supp. Ves. Jr.* Supplement to Vesey, Jr.'s Reports.
Supr. Supreme;—Superior Court Reports.
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Surr. Surrogate.
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Swinb. Spo. Swinburne on Spousals.
Swinb. Wills. Swinburne on Wills.
Swint. Swinton's Justiciary Cases, Scotland.
Syd. App. Sydney on Appeals.
Syme. Syme's Justiciary Cases, Scotland.
Syn. Ser. Synopsis Series of the U. S. Treasury Decisions.
T. Territory;—Tappan's Ohio Reports;—*Tempore;*—Title;—Trinity Term.
T. B. Mon. or *T. B. Monr.* T. B. Monroe's Kentucky Reports.
T. B. & M. Tracewell, Bowers & Mitchell, United States Comptroller's Decisions, 1898.
T. E. R. Tempore Regis Edwardi.
T. Jones or *2 Jones.* T. Jones's English King's Bench and Common Pleas Reports.
T. L. Termes de la Ley.
T. L. R. Times Law Reports.

T. R. Term Reports, Durnford & East;—Teste Rege;—Dayton Term Reports.
T. R. E. or *T. E. R.* Tempore Regis Edwardi.
T. R. (N. Y.). Caines's (Term) Reports, New York.
T. R. N. S. Term Reports, New Series (East's Reports).
T. Raym. T. Raymond's Reports, English King's Bench.
T. T. Trinity Term.
T. T. R. Tarl Town Reports, New South Wales.
T. U. P. Charlt. T. U. P. Charlton's Reports, Georgia.
T. & C. Thompson and Cook's Reports, New York Supreme Court.
T. & G. Tyrwhitt and Granger's Reports, English Exchequer.
T. & M. Temple & Mew's Crown Cases, English.
T. & P. Turner and Phillips's Reports, English Chancery.
T. & R. Turner and Russell's Reports, English Chancery.
Tait. Tait's Manuscript Decisions, Scotch Session Cases.
Tait Ev. Tait on Evidence.
Tal. or *Talb.* Cases *tempore* Talbot, English Chancery.
Tam. Tamlyn's English Rolls Court Reports.
Taml. Tamlyn's Reports, English Chancery.
Taml. Ev. Tamlyn on Evidence.
Taml. T. Y. Tamlyn on Term of Years.
Tan. or *Tan. Dec.* or *Taney.* Taney's Decisions, by Campbell, United States Circuit Court, 4th Circuit.
Tann. or *Tanner.* Tanner's Reports, vols. 8-14 Indiana;—Tanner's Reports, vols. 13-17 Utah.
Tap. Tappan's Nisi Prius Reports, Ohio.
Tap. C. M. Tapping's Copyholder's Manual.
Tap. Man. Tapping on the Writ of Mandamus.
Tapp. Tappan's Nisi Prius Reports, Ohio.
Tapp M. & C. Tapp on the Law of Maintenance and Champerty.
Tarl. Term R. Tarleton's Term Reports, New South Wales.
Tas.-Lang. Const. His. Taswell-Langmead's Constitutional History of England.
Taun. or *Taunt.* Taunton's English Common Pleas Reports.
Tax Law Rep. Tax Law Reporter.
Tay. Taylor (see Taylor);—Taylor's Reports, Ontario.
Tay. J. L. or *Tay. N. C.* J. L. Taylor's North Carolina Reports.
Tay. U. C. Taylor's Upper Canada Reports.
Tay. & B. Taylor & Bell's Bengal Reports.
Tayl. Bank. L. Taylor on the Bankruptcy Law.
Tayl. Civ. L. or *Tayl. Civil Law.* Taylor on Civil Law.
Tayl. Ev. Taylor on Evidence.
Tayl. Gloss. Taylor's Law Glossary.
Tayl. Gov. Taylor on Government.
Tayl. Hist. Gav. Taylor (Silas), History of Gavelkind.
Tayl. (J. L.). Taylor's Reports, North Carolina Term Reports.
Tayl. L. & T. Taylor on Landlord and Tenant.
Tayl. Law Glos. Taylor's Law Glossary.
Tayl. Med. Jur. Taylor's Medical Jurisprudence.
Tayl. Pois. Taylor on Poisons.
Tayl. (U. C.). Taylor's Reports, Upper Canada King's Bench.
Tayl. Wills. Taylor on Wills.
Taylor. Taylor's North Carolina Reports;—Taylor's Upper Canada Reports;—Taylor's Bengal Reports.
Taylor U. C. Taylor's King's Bench Reports, Upper Canada (now Ontario).
Tech. Dict. Crabb's Technological Dictionary.
Techn. Dict. Crabb's Technological Dictionary.
Tel. The Telegram, London.
Temp. *Tempore* (in the time of).
Temp. Geo. II. Cases in Chancery *tempore* George II.
Temp. & M. Temple & Mew's English Crown Cases.
Ten. Cas. Thompson's Unreported Cases, Tennessee;—Shannon's Cases, Tennessee.
Tenn. Tennessee;—Tennessee Reports (Overton's).
Tenn. Ch. Tennessee Chancery Reports (Cooper's).
Tenn. Leg. Rep. Tennessee Legal Reporter, Nashville.
Term. Term Reports, English King's Bench (Durnford and East's Reports).
Term N. C. Term Reports, North Carolina, by Taylor.
Term R. Term Reports, English King's Bench (Durnford & East's Reports).
Termes de la Ley. Les Termes de la Ley.
Terr. Territory;—Terrell's Reports, vols. 2-11 Texas.
Terr. & Wal. or *Terr. & Walk.* Terrell and Walker's Reports, Texas Reports, vols. 38-51.
Tex. Texas;—Texas Reports.
Tex. App. Texas Court of Appeals Reports (Criminal Cases);—Texas Civil Appeals Cases.
Tex. Civ. App. or *Tex. Civ. Rep.* Texas Civil Appeals Reports.
Tex. Cr. App. Texas Criminal Appeals.
Tex. Crim. Rep. Texas Criminal Reports.
Tex. Ct. Rep. Texas Court Reporter.
Tex. L. J. Texas Law Journal, Tyler, Texas.
Tex. Supp. Supplement to vol. 25, Texas Reports.
Tex. Unrep. Cas. Texas Unreported Cases, Supreme Court.
Th. Thomas (see Thom.);—Thomson (see Thom.);—Thompson (see Thomp.).
Th. B. & N. Thomson on Bills and Notes.
Th. Br. Thesaurus Brevium.
Th. C. Theodon Capitula et Fragmenta.
Th. C. C. Thacher's Criminal Cases, Massachusetts.
Th. C. Const. Law. Thomas's Leading Cases in Constitutional Law.
Th. Dig. Theloall's Digest.
Th. Ent. Thompson's Entries.
Th. & C. Thompson & Cook's New York Supreme Court Reports.
Thac. Cr. Cas. or *Thach. Cr. Cas.* Thacher's Criminal Cases, Massachusetts.
Thayer. Thayer's Reports, vol. 18 Oregon.
Thayer Cas. Ev. Thayer's Select Cases on Evidence.
Thayer Cont. L. Thayer's Cases on Constitutional Law.
The Rep. The Reporter;—The Reports (Coke's Reports).
Them. La Themis, Montreal, Quebec;—The American Themis, New York.
Themis. The American Themis, New York.
Theo. Pr. & S. Theobald on Principal and Surety.
Theo. Wills. Theobald on Construction of Wills.
Thes. Brev. Thesaurus Brevium.
Tho. Thomas (see Thom.);—Thomson (see Thom.);—Thompson (see Thomp.).
Thom. Thomson's Reports, Nova Scotia;—Thomas's Reports, vol. 1 Wyoming.
Thom. Bills. Thomson on Bills and Notes.
Thom. Co. Litt. Thomas's Edition of Coke upon Littleton.
Thom. Const. L. Thomas's Leading Cases on Constitutional Law.
Thom. Dec. 1 Thomson, Nova Scotia Reports.
Thom. L. C. Thomas's Leading Cases on Constitutional Law.
Thom. Mort. Thomas on Mortgages.
Thom. Rep. 2 Thomson, Nova Scotia Reports.
Thom. Sc. Acts. Thomson's Scottish Acts.
Thom. Sel. Dec. Thomson's Select Decisions, Nova Scotia.
Thom. U. Jur. Thomas on Universal Jurisprudence.
Thom. (Wy.). Thomas's Reports, Wyoming.
Thom. & Fr. Thomas & Franklin's Reports, Maryland Ch. Dec., vol. 1.
Thomas. Thomas's Reports, Wyoming Territory.
Thomas, Mortg. Thomas on Mortgages.
Thomp. B. B. S. Thompson on Benefit Building Societies.
Thomp. (Cal.). Thompson's Reports, California Reports, vols. 39-40.
Thomp. Car. Thompson on Carriers.
Thomp. Ch. Jury. Thompson on Charging the Jury.

Thomp. Cit. Thompson's Citations, Ohio;—Indiana.
Thomp. Corp. Thompson on Corporations.
Thomp. Ent. Thompson's Entries.
Thomp. High. Thompson on the Law of Highways.
Thomp. Home. & Exem. Thompson on Homestead and Exemption.
Thomp. Liab. Off. Thompson's Cases on Liability of Officers of Corporations.
Thomp. Liab. Stockh. Thompson on Liability of Stockholders.
Thomp. N. B. Cas. Thompson's National Bank Cases.
Thomp. (N. S.). Thompson's Reports, Nova Scotia.
Thomp. Neg. Thompson's Cases on Negligence.
Thomp. Rem. Thompson's Provisional Remedies.
Thomp. Tenn. Cas. Thompson's Unreported Tennessee Cases.
Thomp. & C. Thompson & Cook's New York Supreme Court Reports.
Thompson. Thompson's Reports, vols. 39, 40 California;—Thompson's Nova Scotia Reports.
Thor. Thorington's Reports, vol. 107 Alabama.
Thorn. Thornton's Notes of Cases Ecclesiastical and Maritime, English.
Thorn. Conv. Thornton's Conveyancing.
Thorpe. Thorpe's Reports, vol. 52 Louisiana Annual.
Thos. Thomas (see Thom.).
Throop Ag. or *Throop V. Ag.* Throop on Verbal Agreements.
Tich. Tr. or *Tichb. Tr.* Report of the Tichborne Trial, London.
Tidd. Tidd's Costs;—Tidd's Practice.
Tidd Pr. Tidd's Practice.
Tidd Pr. Tidd's Practice in the King's Bench.
Tiff. Tiffany's Reports, vols. 28-39 New York Court of Appeals.
Tiff. Tiffany's Reports, New York Court of Appeals Reports, vols. 28-39.
Tiff. & B. Tr. Tiffany and Bullard on Trusts and Trustees.
Tiff. & S. Pr. Tiffany and Smith's Practice, New York.
Tiffany. Tiffany's Reports, vols. 28-39 New York Court of Appeals.
Till. Prec. Tillinghast's Precedents.
Till. & Sh. Pr. Tillinghast and Shearman's Practice.
Till. & Yates App. Tillinghast and Yates on Appeals.
Tillman. Tillman's Reports, vols. 68, 69, 71, 73, 75 Alabama.
Times L. R. Times Law Reports.
Tinw. Tinwald's Reports, Scotch Court of Session.
Tit. Title.
To. Jo. Sir Thomas Jones's English King's Bench Reports.
Tobey. Tobey's Reports, vols. 9-10 Rhode Island.
Toll. Ex. Toller on Executors.
Tomk. Inst. or *Tomk. R. L.* Tompkins's Institutes of Roman Law.
Tomk. & J. R. L. Tompkins and Jeckens's Roman Law.
Tomkins & J. Mod. Rom. Law. Tomkins & Jencken, Compendium of the Modern Roman Law.
Toml. or *Toml. Cas.* Tomlins's Election Evidence Cases.
Toml. L. D. Tomlin's Law Dictionary.
Toml. Supp. Br. Tomlin's Supplement to Brown's Parliamentary Cases.
Tor. Deb. Torbuck's Reports of Debates.
Tot. or *Toth.* Tothill's English Chancery Reports.
Touch. Sheppard's Touchstone.
Toull. or *Toull. Dr. Civ.* or *Toull. Droit Civil Fr.* or *Toullier, Dr. Civ. Fr.* Toullier's Droit Civil Français.
Town. Sl. & L. Townshend on Slander and Libel.
Town. St. Tr. Townsend's Modern State Trials.
Town. Sum. Proc. Townshend's Summary Proceedings by Landlords against Tenants.
Townsh. Pl. Townshend's Pleading.
Tr. Translation;—Translator.
Tr. App. New York Transcript Appeals.
Tr. Ch. Transactions of the High Court of Chancery (Tothill's Reports).
Tr. Eq. Treatise of Equity, by Fonblanque.
Tr. & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tr. & H. Prec. Troubat and Haly's Precedents of Indictments.
Trace. & M. Tracewell and Mitchell, United States Comptroller's Decisions.
Traill Med. Jur. Traill on Medical Jurisprudence.
Train & H. Prec. Train and Heard's Precedents of Indictments.
Traité du Mar. Pothier, Traité du Contrat de Mariage.
Trans. App. Transcript Appeals, New York.
Trat. Jur. Mer. Tratade de Jurisprudentia Mercantil.
Trav. Tw. L. of N. Travers Twiss on the Law of Nations.
Tray. Lat. Max. or *Leg. Max.* Trayner, Latin Maxims and Phrases, etc.
Tread. or *Tread. Const. (S. C.).* Treadway's South Carolina Constitutional Reports.
Treb. Jur. de la Méd. Trebuchet, Jurisprudence de la Médecine.
Tred. Tredgold's Reports, Cape Colony.
Trem. Tremaine's Pleas of the Crown.
Trev. Tax. Suc. Trevor on Taxes on Succession.
Tri. Bish. Trial of the Seven Bishops.
Tri. E. of Cov. Trial of the Earl of Coventry.
Tri. per Pais. Trials per Pais.
Trib. Civ. Tribunal Civil.
Trib. de Com. Tribunal de Commerce.
Trin. or *Trin. T.* Trinity Term.
Tripp. Tripp's Reports, vols. 5-6 Dakota.
Tristram. Tristram's Supplement to vol. 4 Swabey & Tristram.
Trop. Dr. Civ. Troplong's Droit Civil.
Troub. Lim. Part. or *Troub. Lim. Partn.* Troubat on Limited Partnerships.
Troub. & H. Pr. Troubat and Haly's Practice, Pennsylvania.
Tru. Railw. Rep. Truman's Railway Reports.
True. Trueman's New Brunswick Reports and Equity Cases.
Tuck. Tucker's New York Surrogate Reports;—Tucker's Select Cases, Newfoundland;—Tucker's Reports, vols. 156-175 Massachusetts;—Tucker's District of Columbia Appeals Reports.
Tuck. Bla. Com. Blackstone's Commentaries, by Tucker.
Tuck. Lect. Tucker's Lectures.
Tuck. Pl. Tucker's Pleadings.
Tuck. Sel. Cas. Tucker's Select Cases, Newfoundland Courts.
Tuck. Surr. Tucker's Surrogate Reports, City of New York.
Tuck. & Cl. Tucker and Clephane's Reports, D. of Col., vol. 21.
Tud. Cas. Merc. Law. Tudor's Leading Cases on Mercantile Law.
Tud. Cas. R. P. Tudor's Leading Cases on Real Property.
Tud. Char. Tr. or *Tud. Char. Trusts.* Tudor on Charitable Trusts.
Tud. L. Cas. or *Tud. L. Cas. M. L.* Tudor's Leading Cases on Mercantile Law.
Tud. L. Cas. R. P. Tudor's Leading Cases on Real Property.
Tudor, Lead. Cas. Real Prop. Tudor's Leading Cases on Real Property.
Tup. App. Tupper's Appeal Reports, Ontario.
Tupper. Tupper's Reports, Ontario Appeals;—Tupper's Upper Canada Practice Reports.
Tur. Turner & Russell's English Chancery Reports.
Turn. Turner's Reports, vols. 99-101 Kentucky;—Turner's Reports, vols. 35, 48 Arkansas.
Turn. Anglo Sax. Turner, History of the Anglo Saxons.
Turn. (Ark.). Turner's Reports, Arkansas, vols. 35-48.
Turn. Ch. Pr. Turner on Chancery Practice.
Turn. Pr. Turnbull's Practice, New York.

Turn. & Ph. Turner and Phillip's Reports, English Chancery.
Turn. & R. or *Turn. & Rus.* or *Turn. & Russ.* Turner & Russell's English Chancery Reports.
Tutt. Tuttle's Reports, California.
Tutt. & Carp. Tuttle and Carpenter's Reports, California Reports, vol. 52.
Tuttle. Tuttle's Reports, vols. 23-32 and 41-52 California.
Tuttle & Carpenter. Tuttle & Carpenter's Reports, vol. 52 California.
Twiss L. of Nat. Twiss's Law of Nations.
Ty. Tyler.
Tyl. or *Tyler.* Tyler's Vermont Reports.
Tyler Bound. & Fences. Tyler's Law of Boundaries and Fences.
Tyler Ecc. Tyler on American Ecclesiastical Law.
Tyler Ej. Tyler on Ejectment and Adverse Enjoyment.
Tyler Fixt. Tyler on Fixtures.
Tyler Inf. Tyler on Infancy and Coverture.
Tyler Us. Tyler on Usury.
Tyng. Tyng's Reports, vols. 2-17 Massachusetts.
Tyr. or *Tyrw.* Tyrwhitt & Granger's English Exchequer Reports.
Tyr. & Gr. Tyrwhitt & Granger's English Exchequer Reports.
Tyrw. Tyrwhitt's Reports, English Exchequer.
Tyrw. & G. Tyrwhitt and Granger's Reports, English Exchequer.
Tytler, Mil. Law. Tytler on Military Law and Courts-Martial.
U. Utah;—Utah Reports.
U. B. Upper Bench.
U. B. Pr. or *U. B. Prec.* Upper Bench Precedents *tempore* Car. I.
U. C. Upper Canada.
U. C. App. Upper Canada Appeal Reports.
U. C. C. P. Upper Canada Common Pleas Reports.
U. C. Ch. Upper Canada Chancery Reports.
U. C. Cham. Upper Canada Chambers Reports.
U. C. Chan. Upper Canada Chancery Reports.
U. C. E. & A. Upper Canada Error and Appeals Reports.
U. C. Jur. Upper Canada Jurist.
U. C. K. B. Upper Canada King's Bench Reports, Old Series.
U. C. L. J. Upper Canada Law Journal, Toronto.
U. C. O. S. Upper Canada Queen's Bench Reports, Old Series.
U. C. P. R. Upper Canada Practice Reports.
U. C. Pr. Upper Canada Practice Reports.
U. C. Q. B. Upper Canada Queen's Bench Reports.
U. C. Q. B. O. S. Upper Canada Queen's (King's) Bench Reports, Old Series.
U. C. R. Queen's Bench Reports, Ontario.
U. C. Rep. Upper Canada Reports.
U. K. United Kingdom.
U. S. United States;—United States Reports.
U. S. Ap. United States Appeals Reports.
U. S. App. United States Appeals, Circuit Courts of Appeals.
U. S. C. C. United States Circuit Court;—United States Court of Claims.
U. S. C. S. United States Civil Service Commission.
U. S. Comp. St. United States Compiled Statutes.
U. S. Comp. St. Supp. United States Compiled Statutes Supplement.
U. S. Crim. Dig. United States Criminal Digest, by Waterman.
U. S. Ct. Cl. Reports of the United States Court of Claims.
U. S. D. C. United States District Court;—United States District of Columbia.
U. S. Dig. Abbott's United States Digest.
U. S. Eq. Dig. United States Equity Digest.
U. S. Jur. United States Jurist, Washington, D. C.
U. S. L. Int. United States Law Intelligencer (Angell's), Providence and Philadelphia.
U. S. L. J. United States Law Journal, New Haven and New York.
U. S. L. M. or *U. S. Law Mag.* United States Law Magazine (Livingston's), New York.
U. S. R. United States Supreme Court Reports.
U. S. Reg. United States Register, Philadelphia.
U. S. R. S. United States Revised Statutes.
U. S. Rev. St. United States Revised Statutes.
U. S. S. C. Rep. United States Supreme Court Reports.
U. S. St. at L. or *U. S. Stat.* United States Statutes at Large.
U. S. St. Tr. United States State Trials (Wharton's).
U. S. Sup. Ct. Rep. United States Supreme Court Reporter.
Ulm. L. Rec. Ulman's Lawyer's Record, New York.
Ulp. Ulpian's Fragments.
Underh. Torts. Underhill on Torts.
Up. Ben. Pre. Upper Bench Precedents, *tempore* Car. I.
Up. Can. Upper Canada (see U. C.).
Upt. Mar. W. & Pr. Upton on Maritime Warfare and Prize.
Url. Trust. Urling on Trustees.
Utah. Utah Reports.
V. Vermont;—Vermont Reports;—Virginia;—Virginia Reports;—Versus. Victoria. Victorian.
V. A. C. or *V. Adm.* Vice-Admiralty Court.
V. C. Vice-Chancellor. Vice-Chancellor's Court.
V. C. C. Vice-Chancellor's Court.
V. C. Rep. Vice-Chancellor's Reports, English.
V. L. R. Victorian Law Reports, Australia. (For Victorian see Vict.)
V. N. Van Ness's Prize Cases.
V. O. De Verborum Obligationibus.
V. R. Vermont Reports.
V. S. De Verborum Significatione.
V. & B. Vesey & Beames' English Chancery Reports.
V. & S. Vernon and Scriven's Reports, Irish King's Bench.
Va. Virginia;—Virginia Reports;—Gilmer's Virginia Reports.
Va. Bar Assn. Virginia State Bar Association.
Va. Cas. Virginia Cases (by Brockenbrough & Holmes).
Va. Ch. Dec. Chancery Decisions, Virginia.
Va. L. J. Virginia Law Journal, Richmond.
Va. R. Virginia Reports;—Gilmer's Virginia Reports.
Val. Com. Valen's Commentaries.
Vall. Ir. L. Vallencey's Ancient Laws of Ireland.
Van Hay. Eq. Van Haythuysen's Equity Draftsman.
Van Hay. Mar. Ev. Van Haythuyer on Maritime Evidence.
Van K. Van Koughnet's Reports, vols. 15-21 Upper Canada Common Pleas.
Van. L. Vander Linden's Practice, Cape Colony.
Van N. or *Van Ness.* Van Ness's Prize Cases, United States District Court New York.
Van Sant. Eq. Pr. Van Santvoord's Equity Practice.
Van Sant. Pl. Van Santvoord's Pleadings.
Van Sant. Prec. Van Santvoord's Precedents.
Vanderstr. Vanderstraaten's Ceylon Reports.
Vatt. Vattel's Law of Nations.
Vatt. Law Nat. (or Vattel). Vattel's Law of Nations.
Vaug. or *Vaugh.* or *Vaughan.* Vaughan's English Common Pleas Reports.
Vaux. Vaux's Recorder's Decisions, Philadelphia.
Vaz. Extrad. Vazelhes's Etude sur l'Extradition.
Ve. or *Ves.* Vesey's English Chancery Reports.
Ve. & B. or *Ves. & B.* Vesey & Beames's English Chancery Reports.
Veaz. or *Veazey.* Veazey's Reports, vols. 36-46 Vermont.
Vend. Ex. Venditioni Exponas.
Vent. or *Ventr.* Ventris's English Common Pleas Reports;—Ventris's English King's Bench Reports.
Ver. or *Verm.* Vermont Reports.
Vern. Vernon's Reports, English Chancery.
Vern. & Sc. or *Vern. & Scr.* or *Vern. & Scriv.* Vernon & Scriven's Irish King's Bench Reports.
Verpl. Contr. Verplanck on Contracts.
Verpl. Ev. Verplanck on Evidence.
Ves. Vesey, Senior's Reports, English Chancery.

Ves. Jr. or *Ves. Jun.* Vesey, Junior's Reports, English Chancery.

Ves. Jun. Supp. Supplement to Vesey, Jr.'s, English Chancery Reports, by Hovenden.

Ves. Sen. or *Ves. Sr.* Vesey, Sr.'s, English Chancery Reports.

Ves. & B. or *Ves. & Bea.* or *Ves. & Beam.* Vesey & Beames's English Chancery Reports.

Vet. Entr. Old Book of Entries.

Vet. N. B. or *Vet. Na. B.* Old Natura Brevium.

Vez. Vezey's (Vesey's) English Chancery Reports.

Vic. or *Vict.* Queen Victoria.

Vicat. or *Vicat. Voc. Jur.* Vocabularium jurisutrisque, ex variis editis.

Vict. Queen Victoria.

Vict. C. S. Victorian Consolidated Statutes.

Vict. L. R. Victorian Law Reports, Colony of Victoria, Australia.

Vict. L. R. Min. Victorian Mining Law Reports.

Vict. L. T. Victorian Law Times, Melbourne.

Vict. Rep. Victorian Reports, Colony of Victoria.

Vict. Rev. Victorian Review.

Vict. St. Tr. Victorian State Trials.

Vid. Entr. Vidian's Entries.

Vil. & Br. Vilas & Bryant's Edition of the Wisconsin Reports.

Vilas. Vilas's New York Criminal Reports.

Vin. Abr. Viner's Abridgment.

Vin. Supp. Supplement to Viner's Abridgment.

Vincens Leg. Com. Vincens's Legislation Commerciale.

Vinn. Vinnius.

Vint. Can. L. Vinton on American Canon Law.

Vir. Virgin's Reports, Maine.

Virg. Virginia (see Va.);—Virgin.

Virg. Cas. Virginia Cases.

Virg. L. J. Virginia Law Journal.

Virgin. Virgin's Reports, vols. 52-60 Maine;—Virginia (see Va.).

Viz. Videlicet, That is to say.

Vo. Verbo.

Voet, Com. ad Pand. Voet, Commentarius ad Pandectas.

Von Holst Const. His. Von Holst's Constitutional History of the U. S.

Voorh. Code. Voorhies's Code, New York.

Voorh. Cr. Jur. Voorhies on the Criminal Jurisprudence of Louisiana.

Vr. or *Vroom.* Vroom's Reports, New Jersey Law Reports, vols. 30-56.

Vroom (G. D. W.). G. D. W. Vroom's Reports, vols. 36-63 New Jersey Law.

Vroom (P. D.) P. D. Vroom's Reports, vols. 30-35 New Jersey Law.

Vs. Versus.

Vt. Vermont;—Vermont Reports.

W. King William; thus 1 W. I. signifies the first year of the reign of King William I.;—Wheaton's United States Supreme Court Reports;—Wendell's New York Reports;—Watts' Reports, Pennsylvania;—Weekly;—Wisconsin;—Wyoming;—Wright's Ohio Reports;—Statute of Westminster.

W. A. Western Australia.

W. Bl. or *W. Bla.* Sir William Blackstone's English King's Bench and Common Pleas Reports.

W. C. C. Washington's United States Circuit Court Reports.

W. Coast Rep. West Coast Reporter.

W. Ent. Winch's Book of Entries.

W. H. Chron. Westminster Hall Chronicle, London.

W. H. & G. Welsby, Hurlstone and Gordon's Reports, English Exchequer Reports, vols. 1-9.

W. J. Western Jurist, Des Moines, Iowa.

W. Jo. or *W. Jones.* Wm. Jones's Reports, English Courts.

W. Kel. Wm. Kelynge's Reports, English King's Bench and Chancery.

W. L. Gaz. Western Law Gazette, Cincinnati, O.

W. L. Jour. Western Law Journal, Cincinnati, O.

W. L. M. Western Law Monthly, Cleveland, O.

W. L. R. Washington Law Reporter, Washington, D. C.

W. N. Weekly Notes, London.

W. N. Cas. Weekly Notes of Cases, Philadelphia.

W. P. Cas. Wollaston's English Bail Court (Practice) Cases.

W. R. Weekly Reporter, London;—Weekly Reporter, Bengal;—Wendell's New York Reports;—Wisconsin Reports;—West's Reports (English Chancery).

W. R. Calc. Southerland's Weekly Reporter, Calcutta.

W. Rep. West's Reports *temp.* Hardwicke, English Chancery.

W. Rob. W. Robinson's English Admiralty Reports.

W. T. R. Weekly Transcript Reports, New York.

W. Ten. Wright's Tenures.

W. Ty. R. Washington Territory Reports.

W. Va. West Virginia;—West Virginia Reports.

W. W. & A'B. Vict. Wyatt, Webb & A'Beckett's Reports, Victoria.

W. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.

W. W. & H. Willmore, Wollaston and Hodge's Reports, English Queen's Bench.

W. & B. Dig. Walker & Bates's Digest, Ohio.

W. & Buh. West & Buhler's Collection of Futwahs, India.

W. & C. Wilson & Courtenay's Scotch Appeal Cases (see Wilson & Shaw).

W. & L. Dig. Wood & Long's Digest, Illinois.

W. & M. Woodbury & Minot's United States Circuit Court Reports;—William & Mary.

W. & S. Watts & Sergeant's Pennsylvania Reports;—Wilson & Shaw's Scotch Appeal Cases.

W. & S. App. Wilson and Shaw's Scotch Appeals, English House of Lords.

W. & T. Eq. Ca. or *W. & T. L. C.* White & Tudor's Leading Cases in Equity.

W. & W. White & Wilson's Texas Court of Appeals, Civil Cases.

W. & W. Vict. Wyatt & Webb's Victorian Reports.

Wa. Watts's Reports, Pennsylvania;—Wales.

Wadd. Dig. Waddilove's Digest of English Ecclesiastical Cases.

Wade Notice. Wade on the Law of Notice.

Wade Retro. L. Wade on Retroactive Laws.

Wait Act. & Def. Wait's Actions and Defence.

Wait Dig. Wait's Digest, New York.

Wait Pr. Wait's New York Practice.

Wait St. Pap. Wait's State Papers of the United States.

Wal. Wallace (see Wall.).

Wal. by L. Wallis's Irish Reports, by Lyne.

Wal. Jr. Wallace's (J. W.) United States Circuit Court Reports.

Wal. Sr. Wallace's (J. B.) United States Circuit Court Reports.

Walf. Railw. Walford on Railways.

Walk. Walker's Mississippi Reports;—Walker's Michigan Chancery Reports;—Walker's Reports, vols. 25, 72-88 Texas;—Walker's Reports, vols. 1-10 Texas Civil Appeals;—Walker's Reports, vols. 96, 109 Alabama;—Walker's Pennsylvania Reports.

Walk. Am. L. Walker's Introduction to American Law.

Walk. Bank. L. Walker on Banking Law.

Walk. Ch. or *Walk. Ch. Cas.* Walker's Chancery Cases, Michigan.

Walk. Com. L. Walker's Theory of the Common Law.

Walk. (Mich.). Walker's Reports, Michigan Chancery.

Walk. (Miss.). Walker's Reports, Mississippi Reports, vol. 1.

Walk. (Pa.). Walker's Pennsylvania Reports.

Walk. (Tex.). Walker's Reports, Texas Reports, vol. 25.

Walk. Wills. Walker on Wills.

Walker. Walker's Reports, vols. 96, 109, Alabama;—Walker's Michigan Chancery Reports;—Walker's Mississippi Reports;—Walker's Pennsylvania Reports;—Walker's Reports, vols. 25, 72-88 Texas;—Walker's Reports, vols. 1-10 Texas Civil Appeals.

Wall. Wallace's United States Supreme Court Reports;—Wallace's (Sr.) United States Circuit Court Reports;—Wallace's Philadelphia Reports;—Wallis's Irish Chancery Reports.

Wall. C. C. Wallace's United States Circuit Court Reports, Third Circuit.
Wall. Jr. or *Wall. Jun.* Wallace, Junior's, Reports, U. S. Circuit Court, 3d Circuit.
Wall. Pr. Wallace's Principles of the Laws of Scotland.
Wall. Rep. Wallace on the Reporters;—Wallace's United States Supreme Court Reports.
Wall. S. C. Wallace's United States Supreme Court Reports.
Wall. Sen. Wallace's (J. B.) United States Circuit Court Reports.
Wallis. Wallis's Reports, Irish Chancery.
Wallis by L. Wallis's Irish Chancery Reports, by Lyne.
Walsh. Walsh's Registry Cases, Ireland.
Ward. Warden's Reports, Ohio;—Warden & Smith's Reports, Ohio.
Ward, Leg. Ward on Legacies.
Ward Nat. Ward on the Law of Nations.
Ward. & Sm. Warden and Smith's Reports, Ohio State Reports, vol. 3.
Warden. Warden's Reports, vols. 2, 4 Ohio State.
Warden & Smith. Warden & Smith's Reports, vol. 3 Ohio State.
Ware. Ware's Reports, United States District Court, Maine.
Warr. Bla. Warren's Blackstone.
Warr. L. S. Warren's Law Studies.
Warth Code. West Virginia Code, 1899.
Warv. Abst. Warvelle on Abstracts of Title.
Wash. Washington State Reports.
Wash. Washington;—Washington's Reports;—Washington's United States Circuit Court Reports;—Washington's Virginia Reports;—Washburn's Reports, vols. 16-23 Vermont.
Wash. C. C. Washington's United States Circuit Court Reports.
Wash. L. Rep. Washington Law Reporter, Washington, D. C.
Wash. Ter. Washington Territory Reports.
Wash. Ter. N. S. Allen's Washington Territory Reports, New Series.
Wash. Ty. Washington Territory Reports.
Wash. (Va.). Washington's Reports, Virginia.
Wash. & Haz. P. E. I. Washburton & Hazard's Reports, Prince Edward Island.
Washb. Washburn's Reports, Vermont.
Washb. Cr. L. Washburn on Criminal Law.
Washb. Easem. Washburn on Easements and Servitudes.
Washb. R. P. or *Washb. Real Prop.* Washburn on Real Property.
Washburn. Washburn's Reports, vols. 16-23 Vermont.
Wat. Watkins;—Watson.
Wat. (C. G. H.). Watermeyer's Cape of Good Hope Supreme Court Reports.
Wat. Cr. Dig. Waterman's Criminal Digest, United States.
Wat. Cr. Proc. Waterman's Criminal Procedure.
Wat. Jus. Waterman's Justice.
Wat. Set-Off. Waterman on Set-Off, etc.
Wat. Tres. Waterman on Trespass.
Watermeyer. Watermeyer's Cape of Good Hope Supreme Court Reports.
Watk. Conv. Watkins's Conveyancing.
Watk. Copyh. Watkins's Copyholds.
Wats. Arb. Watson on Arbitration.
Wats. Cler. Law. Watson's Clergyman's Law.
Wats. Comp. or *Wats. Comp. Eq.* Watson's Compendium of Equity.
Wats. Const. Hist. Watson's Constitutional History of Canada.
Wats. Eq. Watson's Compendium of Equity.
Wats. Part. Watson on Partnership.
Wats. Sher. Watson on Sheriffs.
Watts. Watts's Pennsylvania Reports;—Watts's Reports, vols. 16-24 West Virginia.
Watts & S. or *Watts & Ser.* or *Watts & Serg.* Watts & Sergeant's Pennsylvania Reports.
Web. Pat. Webster on Patents.
Web. Pat. Cas. Webster's Patent Cases, English Courts.
Web. Tr. The Trial of Professor Webster for Murder.
Webb. Webb's Reports, vols. 6-20 Kansas;—Webb's Reports, vols. 11-20 Texas Civil Appeals.
Webb, A'B. & W. Webb, A'Beckett & Williams's Victorian Reports, Australia.
Webb, A'B. & W. Eq. Webb, A'Beckett and Williams's Equity Reports, Victoria.
Webb, A'B. & W. I. P. & M. Webb, A'Beckett and Williams's Insolvency, Probate and Matrimonial Reports, Victoria.
Webb, A'B. & W. Min. Webb, A'Beckett and Williams's Mining Cases, Victoria.
Webb. & D. or *Webb & Duval.* Webb & Duval's Reports, vols. 1-3 Texas.
Webs. Webster.
Webs. Pat. Cas. Webster's Patent Cases, English Courts.
Webst. Dict. or *Webster.* Webster's Dictionary.
Wedg. Gov. & Laws. Wedgwood's Government and Laws of the U. S.
Week. Reptr. Weekly Reporter, London;—Weekly Reporter, Bengal.
Week. Trans. Repts. Weekly Transcript Reports, New York.
Weekl. Cin. L. B. Weekly Cincinnati Law Bulletin.
Weekl. Dig. Weekly Digest, New York.
Weekl. Jur. Weekly Jurist, Illinois.
Weekl. L. Record. Weekly Law Record.
Weekl. L. Rev. Weekly Law Review, San Francisco, Cal.
Weekl. No. Weekly Notes of Cases, London.
Weekl. No. Cas. Weekly Notes of Cases, Philadelphia.
Weekl. Reptr. Weekly Reporter, London.
Weekl. Trans. Repts. Weekly Transcript Reports, New York.
Weeks Att. at Law or *Weeks, Attys. at Law.* Weeks on Attorneys at Law.
Weeks D. A. Inj. Weeks, Damnum Absque Injuria.
Weeks Dep. Weeks on the Law of Deposition.
Weight. M. & L. Weightman's Marriage and Legitimacy.
Weight. Med. Leg. Gaz. Weightman's Medico-Legal Gazette, London.
Wel. Welsh's Irish Registry Cases.
Welf. Eq. Pl. Welford on Equity Pleading.
Wells L. & F. Wells's Questions of Law and Facts.
Wells, Repl. Wells on Replevin.
Wells Res. Ad. & St. D. Wells on *Res Adjudicata* and *Stare Decisis.*
Wells Sep. Pr. of Mar. Wom. Wells on Separate Property of Married Women.
Wellw. Abr. Wellwood's Abridgment of Sea Laws.
Welsb., H. & G. or *Welsby, H. & G.* Welsby, Hurlstone & Gordon's Reports, English Exchequer Reports, vols. 1-9.
Welsh. Welsh's Registry Cases, Ireland;—Welsh's Irish Cases at Sligo;—Welsh's (Irish) Case of James Feighny, 1838.
Welsh Reg. Cas. Welsh's Irish Registry Cases.
Wend. Wendell's Reports, New York Supreme Court.
Wendt Mar. Leg. Wendt on Maritime Legislation.
Went. Ex. or *Went. Off. Ex.* Wentworth on Executors.
Went. Pl. Wentworth on Pleading.
Wenz. Wenzell's Reports, vols. 60- — Minnesota.
Wesk. Ins. Weskett on Insurance.
West. West's Reports, English Chancery, *tempore* Hardwicke.
West. West's Reports, English House of Lords;—West's Reports, English Chancery;—Western Tithe Cases;—Weston's Reports, vols. 11-14 Vermont.
West. Aus. Western Australia.
West Ch. West's English Chancery Cases.
West Co. Rep. West Coast Reporter.
West Coast Rep. West Coast Reporter.
West. Confl. Westlake on Conflict of Laws.
West H. L. West's Reports, English House of Lords.
West. Jur. Western Jurist, Des Moines, Iowa.
West. L. J. or *West. Law Jour.* Western Law Journal, Cincinnati, Ohio.
West. L. Mo. or *West. Law Mo.* Western Law Monthly, Cleveland, Ohio.
West. L. O. Western Legal Observer, Quincy, Ill.

West. L. T. Western Law Times.
West. Leg. Obs. Western Legal Observer, Quincy, Ill.
West. Rep. Western Reporter, St. Paul.
West Symb. West's Symboleographie.
West. T. Cas. Western's Tithes Cases.
West t. H. West's Reports, English Chancery *tempore* Hardwicke.
West Va. West Virginia;—West Virginia Reports.
Westl. Priv. Int. Law or *Westlake Int. Private Law.* Westlake's Private International Law.
Westm. Statute of Westminster.
Westm. Rev. Westminster Review.
Weston. Weston's Reports, vols. 11-14 Vermont.
Weth. (U. C.). Wethey's Upper Canada Reports, Queen's Bench.
Wh. Wheaton's United States Supreme Court Reports;—Wharton's Pennsylvania Reports;—Wheeler's New York Criminal Reports.
Wh. Cr. Cas. Wheeler's Criminal Cases, New York.
Wh. & T. L. C. or *Wh. & T. L. Cas.* White and Tudor's Leading Cases, Equity.
Whar. Wharton's Pennsylvania Reports.
Whar. Dig. Wharton's Digest, Pennsylvania.
Whar. St. Tr. Wharton's State Trials, United States.
Whart. Wharton's Reports, Pennsylvania.
Whart. Ag. Wharton on Agency and Agents.
Whart. Confl. Wharton on Conflict of Laws.
Whart. Conv. Wharton's Conveyancing.
Whart. Cr. Law or *Whart. Crim. Law.* Wharton's Criminal Law.
Whart. Ev. Wharton on Evidence in Civil Issues.
Whart. Hom. Wharton on Homicide.
Whart. Law Dic. or *Whart. Lex.* Wharton's Law Lexicon.
Whart. Neg. Wharton on Negligence.
Whart. (Pa.). Wharton's Pennsylvania Reports.
Whart. Prec. Wharton's Precedents of Indictments.
Whart. St. Tr. or *Whart. State Tr.* Wharton's State Trials of the United States.
Whart. & S. Med. Jur. or *Whart. & St. Med. Jur.* Wharton & Stillé's Medical Jurisprudence.
Wheat. Wheaton's United States Supreme Court Reports.
Wheat. Cap. & Pr. Wheaton on Maritime Captures and Prizes.
Wheat. Hist. L. of N. or *Wheat. Hist. Law Nat.* Wheaton's History of the Law of Nations.
Wheat. Int. L. or *Wheat. Int. Law.* Wheaton's International Law.
Wheel. Wheeler's New York Criminal Cases;—Wheelock's Reports, vols. 32-37 Texas.
Wheel. Abr. Wheeler's Abridgment.
Wheel. Br. Cas. Wheeling Bridge Case.
Wheel. Cr. C. or *Wheel. Cr. Cas.* or *Wheeler, Cr. Cas.* Wheeler's Criminal Cases, New York.
Wheel. Cr. Rec. Wheeler's Criminal Recorder, New York, vol. 1 Wheeler's Criminal Cases.
Whish. L. D. Whishaw's Law Dictionary.
Whishaw. Whishaw's Law Dictionary.
Whit. Eq. Pr. Whitworth's Equity Precedents.
Whit. Pat. Cas. Whitman's Patent Cases, United States.
Whit. War P. Whiting on War Powers under the Constitution.
Whitak. Liens. Whitaker on Liens.
White. White's Reports, vols. 10-15 West Virginia;—White's Reports, vols. 30-40 Texas Court of Appeals;—White, Scotch Justiciary Reports.
White, Coll. White's New Collection of the Laws, etc., of Great Britain, France and Spain.
White L. L. White's Land Law of California.
White, New Recop. or *White Nov. Recop.* See White, Recop.
White Rec. or *White, Recop.* White, New Recopilacion. A New Collection of Laws and Local Ordinances of Great Britain, France, and Spain, Relating to the Concessions of Land in Their Respective Colonies, with the Laws of Mexico and Texas on the Same Subjects.
White Supp. White on Supplement and Revivor.
White & T. L. Cas. White & Tudor's Leading Cases in Equity.
White & W. White & Willson's Reports, vol. 142 Texas Civil Appeals.
Whitm. Lib. Cas. Whitman's Massachusetts Libel Cases.
Whitm. Pat. Cas. Whitman's Patent Cases.
Whitm. Pat. L. Whitman's Patent Laws.
Whitm. Pat. Law Rev. Whitman's Patent Law Review, Washington, D. C.
Whitney. Whitney's Land Laws, Tennessee.
Whitt. Whittelsey's Reports, vols. 31-41 Missouri.
Whitt. Co. Whittaker's Codes, Ohio.
Wig. Disc. Wigram on Discovery.
Wig. Wills. Wigram on Wills.
Wight. or *Wightw.* Wightwick's English Exchequer Reports.
Wight El. Cas. Wight's Election Cases, Scotland.
Wil. Williams (see Will.);—Wilson (see Wils.).
Wilc. Wilcox's Reports, Ohio.
Wilc. Cond. Wilcox's Condensed Reports, Ohio.
Wilc. Mun. Corp. Wilcox on Municipal Corporations.
Wilcox. Wilcox's Reports, vol. 10 Ohio;—Wilcox, Pennsylvania.
Wilcox Cond. Wilcox, Condensed Ohio Reports.
Wild. Int. L. Wildman's International Law.
Wild. S. C. & P. Wildman on Search, Capture and Prize.
Wilde Sup. Wilde's Supplement to Barton's Conveyancing.
Wildm. Int. Law. Wildman's International Law.
Wilk. Wilkinson's Texas Court of Appeals and Civil Appeals;—Wilkinson's Reports, Australia.
Wilk. Leg. Ang. Sax. Wilkins's Leges Anglo-Saxonicæ.
Wilk. Lim. Wilkinson on Limitations.
Wilk. P. & M. Wilkinson, Paterson and Murray's Reports, New South Wales.
Wilk. Prec. Wilkinson's Precedents in Conveyancing.
Wilk. Pub. Funds. Wilkinson on the Law Relating to Public Funds.
Wilk. Repl. Wilkinson on Replevin.
Wilk. Ship. Wilkinson on Shipping.
Wilk. & Mur. or *Wilk. & Ow.* or *Wilk. & Pat.* Wilkinson, Owen, Paterson & Murray's New South Wales Reports.
Will. Willes's English Common Pleas Reports;—Willson's Reports, vols. 29-30 Texas Appeals, also vols. 1, 2 Texas Civil Appeals;—Williams on Executors;—See, also, Williams.
Will. Ann. Reg. Williams's Annual Register, New York.
Will. Auct. Williams on the Law of Auctions.
Will. Bankt. L. Williams on the Bankrupt Law.
Will.-Bund St. Tr. Willis-Bund's Cases from State Trials.
Will. Just. Williams's Justice.
Will. L. D. Williams's Law Dictionary.
Will. (Mass.). Williams's Reports, Massachusetts Reports, vol. 1.
Will. P. or *Will. (Peere).* Peere-Williams's English Chancery Reports.
Will. Per. Pr. Williams on Personal Property.
Will. Real As. Williams on Real Assets.
Will. Real Pr. Williams on Real Property.
Will. Saund. Williams's Notes to Saunders's Reports.
Will. (Vt.). Williams's Reports, Vermont.
Will., Woll. & Dav. Willmore, Wollaston & Davison's English Queen's Bench Reports.
Will., Woll. & Hodg. Willmore, Wollaston & Hodges, English Queen's Bench Reports.
Will. & Br. Adm. Jur. Williams and Bruce on Admiralty Jurisdiction.
Willard Eq. Willard's Equity.
Willard Ex. Willard on Executors.
Willard Real Est. & Con. Willard's Real Estate and Conveyancing.
Willc. Const. Willcock, The Office of Constable.
Willc. L. Med. Pr. Willcock's Law Relating to the Medical Profession.
Willc. Mun. Corp. or *Willcock, Mun. Corp.* Willcock on Municipal Corporations.
Willes. Willes's Reports, English King's Bench and Common Pleas.

Williams. Peere-Williams's English Chancery Reports;—Williams's Reports, vols. 27-29 Vermont;—Williams's Reports, vol. 1 Massachusetts;—Williams's Reports, vols. 10-12 Utah.

Williams, Common. Williams on Rights of Common.

Williams, Ex'rs. Williams on Executors.

Williams P. or *Williams, Peere.* Peere Williams's Reports, English Chancery.

Williams, Pers. Prop. Williams on Personal Property.

Williams, Saund. Williams's Notes to Saunders's Reports.

Williams, Seis. Williams on Seisin.

Williams & B. Adm. Jur. Williams & Bruce on Admiralty Jurisdiction.

Willis Eq. Willis on Equity Pleadings.

Willis Int. Willis on Interrogatories.

Willis Trust. or *Willis, Trustees.* Willis on Trustees.

Willm. W. & D. Willmore, Wollaston and Davison's Reports, English Queen's Bench.

Willm. W. & H. Willmore, Wollaston & Hodges's English Queen's Bench Reports.

Wills Cir. Ev. or *Wills, Circ. Ev.* Wills on Circumstantial Evidence.

Willson. Willson's Reports, vols. 29-30 Texas Appeals, also vols. 1, 2 Texas Court of Appeals, Civil Cases.

Wilm. or *Wilm. Op.* or *Wilm. Judg.* Wilmot's Notes of Opinions and Judgments, English King's Bench.

Wils. Wilson's Reports, English King's Bench and Common Pleas.

Wils. (Cal.). Wilson's Reports, California.

Wils. Ch. Wilson's Reports, English Chancery.

Wils. Ent. Wilson's Entries and Pleadings (same as vol. 3 Lord Raymond).

Wils. Exch. Wilson's Reports, English Exchequer.

Wils. Fines & Rec. Wilson on Fines and Recoveries.

Wils. (Ind.). Wilson's Indiana Superior Court Reports.

Wils. Ind. Gloss. Wilson, Glossary of Indian Terms.

Wils. K. B. Sergeant Wilson's English King's Bench Reports.

Wils. (Oreg.). Wilson's Reports, Oregon.

Wils. Parl. L. Wilson's Parliamentary Law.

Wils. Uses. Wilson on Uses.

Wils. & C. or *Wils. & Court.* Wilson and Courtenay's Reports, English House of Lords, Appeals from Scotland.

Wils. & S. or *Wils. & Sh.* Wilson and Shaw's Reports, English House of Lords, Appeals from Scotland (Shaw, Wilson & Courtenay).

Wilson. Wilson's English Common Pleas Reports;—Wilson's English Chancery Reports;—Wilson's English Exchequer Equity Reports;—Wilson's Indiana Superior Court Reports;—Wilson's Reports, vols. 1, 3 Oregon;—Wilson's Reports, vols. 48-59 Minnesota.

Win. Winston's Law Reports, North Carolina;—Winch's English Common Pleas Reports.

Win. Ent. Winch's Entries.

Win. Eq. Winston's Equity Reports, North Carolina.

Winch. Winch's Reports, English Common Pleas.

Wing. or *Wing. Max.* Wingate's Maxims.

Wins. Winston's Reports, North Carolina.

Wins. Eq. Winston's Equity Reports, North Carolina.

Winst. or *Winst. Eq.* Winston's Law or Equity Reports, North Carolina.

Wis. Wisconsin;—Wisconsin Reports.

Wis. Bar Assn. Wisconsin State Bar Association.

Wis. Leg. N. Wisconsin Legal News, Milwaukee.

With. Withrow's Reports, Iowa.

With. Corp. Cas. Withrow's American Corporation Cases.

Withrow. Withrow's Reports, vols. 9-21 Iowa.

Wkly. Notes Cas. (Pa.). Weekly Notes of Cases, Philadelphia, Pennsylvania.

Wm. Bl. William Blackstone's Reports, English Courts.

Wm. Rob. William Robinson's New Admiralty Reports, English.

Wms. Williams (see Will.).

Wms. Ann. Reg. Williams's Annual Register, New York.

Wms. Auct. Williams on the Law of Auctions.

Wms. Ex. Williams on Executors.

Wms. Just. Williams's Justice.

Wms. L. D. Williams's Law Dictionary.

Wms. (Mass.). Williams's Reports, Massachusetts Reports, vol. 1.

Wms. Notes. Williams's Notes to Saunders' Reports.

Wms. P. or *Wms. Peere.* Peere Williams's Reports, English Chancery.

Wms. Peere. Peere-Williams's English Chancery Reports.

Wms. Per. Pr. Williams on Personal Property.

Wms. Real As. Williams on Real Assets.

Wms. Real Pr. Williams on Real Property.

Wms. Saund. Williams's Notes to Saunders' Reports.

Wms. Vt. Williams's Reports, vols. 27-29 Vermont.

Wms. & Br. Adm. Jur. Williams and Bruce on Admiralty Jurisdiction.

Wol. Wollaston's English Bail Court Reports;—Wolcott's Reports, vol. 7 Delaware Chancery.

Wolf. Inst. Wolffius's Institutiones Juris Naturæ et Gentium.

Wolf. & B. Wolferstan and Bristow's Election Cases.

Wolf. & D. Wolferstan and Dew's Election Cases.

Wolff, Dr. de la Nat. Wolffius, Droit de la Nature.

Wolff. Inst. or *Wolff. Inst. Nat.* Wolffius, Institutiones Juris Naturæ et Gentium.

Wolffius or *Wolffius, Inst.* Wolffius, Institutiones Juris Naturæ et Gentium.

Woll. or *Woll. P. C.* Wollaston's English Bail Court Reports (Practice Cases).

Wood. Woods's United States Circuit Court Reports;—Wood's English Tithe Cases.

Wood Civ. L. Wood's Institutes of the Civil Law.

Wood Com. L. Wood's Institutes of the Common Law.

Wood Conv. Wood on Conveyancing.

Wood Decr. Wood's (Decrees in) Tithe Cases.

Wood Fire Ins. Wood on Fire Insurance.

Wood (H.). Hutton Wood's Decrees in Tithe Cases, English.

Wood, Ins. Wood on Fire Insurance;—Wood's Institutes of English Law.

Wood, Inst. or *Wood, Inst. Com. Law.* Wood's Institutes of the Common Law.

Wood Inst. Eng. L. Wood's Institutes of English Law.

Wood. Lect. Wooddeson's Lectures on Laws of England.

Wood Man. Wood on Mandamus.

Wood Mast. & St. Wood on Master and Servant.

Wood Mayne Dam. Wood's Mayne on Damages.

Wood Nuis. Wood on Nuisances.

Wood Ti. Cas. Wood's Tithe Cases.

Wood. & M. or *Woodb. & M.* Woodbury & Minot's United States Circuit Court Reports.

Woodd. Jur. Wooddeson's Elements of Jurisprudence.

Woodd. Lect. Wooddeson's Lectures on the Laws of England.

Woodf. Cel. Tr. Woodfall's Celebrated Trials.

Woodf. L. & T. or *Woodf. Landl. & Ten.* Woodfall on Landlord and Tenant.

Woodf. Parl. Deb. Woodfall's Parliamentary Debates.

Woodm. Cr. Cas. Woodman's Reports of Thacher's Criminal Cases, Massachusetts.

Woodm. & T. on For. Med. Woodman and Tidy on Forensic Medicine.

Woods or *Woods C. C.* Woods's Reports, United States Circuit Courts, 5th Circuit.

Woodw. Dec. Pa. Woodward's Common Pleas Decisions, Pennsylvania.

Wool. Woolworth's United States Circuit Court Reports;—Woolrych.

Wool. C. C. Woolworth's Reports, United States Circuit Courts, 8th Circuit (Fuller's Opinions).

Woolr. Com. Woolrych on Commons.

Woolr. Comm. L. Woolrych on Commercial Law.
Woolr. P. W. Woolrych on Party Walls.
Woolr. Sew. Woolrych on Sewers.
Woolr. Waters. Woolrych on Law of Waters.
Woolr. Ways. Woolrych on Law of Ways.
Woolr. Window L. Woolrych on Law of Window Lights.
Wools. Div. Woolsey on Divorce.
Wools. Int. L. Woolsey's International Law.
Wools. Pol. Science or *Woolsey, Polit. Science.* Woolsey's Political Science.
Woolw. Woolworth's United States Circuit Court Reports;—Woolworth's Reports, vol. 1 Nebraska.
Worcester. Worcester, Dictionary of the English Language.
Word. Elect. Wordsworth's Law of Election.
Word. Elect. Cas. or *Words. Elect. Cas.* Wordsworth's Election Cases.
Word. Min. Wordsworth on the Law of Mining.
Worth. Jur. Worthington on the Powers of Juries.
Worth. Prec. Wills. Worthington's Precedents for Wills.
Wr. Wright (see Wright);—Wright's Reports, vols. 37-50 Pennsylvania State.
Wr. Ch. Wright's Chancery Reports, Ohio.
Wr. Cr. Consp. Wright on Criminal Conspiracies.
Wr. N. P. Wright's Nisi Prius Reports, Ohio.
Wr. Ohio. Wright's Chancery Reports, Ohio.
Wr. Pa. Wright's Reports, Pennsylvania State Reports, vols. 37-50.
Wr. Ten. Wright on Tenures.
Wri. or *Wright.* Wright's Reports, vols. 37-50 Pensylvania State;—Wright's Ohio Reports.
Wright N. P. Wright's Nisi Prius Reports, Ohio.
Wright, Ten. Wright on Tenures.
Wy. Wyoming; — Wyoming Reports; — Wythe's Virginia Chancery Reports.
Wy. Dic. Wyatt's Dickens's Chancery Reports.
Wyatt P. R. Wyatt's Practical Register in Chancery.
Wyatt, W. & A'B. Wyatt, Webb and A'Beckett's Reports, Victoria.
Wyatt, W. & A'B. Eq. Wyatt, Webb and A'Beckett's Equity Reports, Victoria.
Wyatt, W. & A'B. I. P. & M. Wyatt, Webb and A'Beckett's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt, W. & A'B. Min. Wyatt, Webb and A'Beckett's Mining Cases, Victoria.
Wyatt & W. Wyatt and Webb's Reports, Victoria.
Wyatt & W. Eq. Wyatt and Webb's Equity Reports, Victoria.
Wyatt & W. I. P. & M. Wyatt and Webb's Insolvency, Probate and Matrimonial Reports, Victoria.
Wyatt & W. Min. Wyatt & Webb's Mining Cases, Victoria.
Wyatt & Webb. Wyatt & Webb's Reports, Victoria.
Wym. or *Wyman.* Wyman's Reports, India.
Wyn. or *Wynne.* or *Wynne Bov.* Wynne's Bovill's Patent Cases.
Wyo. Wyoming;—Wyoming Reports.
Wyo. T. Wyoming Territory.
Wythe or *Wythe Ch.* Wythe's Virginia Chancery Reports.
Y. Yeates's Pennsylvania Reports.
Y. B. Year Book, English King's Bench, etc.
Y. B. Ed. I. Year Books of Edward I.
Y. B. P. 1, Edw. II. Year Books, Part 1, Edward II.
Y. B. S. C. Year Books, Selected Cases, 1.
Y. L. R. York Legal Record.
Y. & C. Younge & Collyer's English Chancery or Exchequer Reports.
Y. & C. C. C. Younge and Collyer's Chancery Cases, English.
Y. & J. Younge & Jervis's English Exchequer Reports.
Y. & J. Younge and Jervis's Reports, English Exchequer.
Yale Law J. Yale Law Journal.
Yates Sel. Cas. Yates's New York Select Cases.
Yea. Yeates's Pennsylvania Reports.
Yearb. Year Book, English King's Bench, etc.
Yearb. P. 7, Hen. VI. Year Books, Part 7, Henry VI.
Yeates. Yeates's Reports, Pennsylvania.
Yel. or Yelv. Yelverton's English King's Bench Reports.
Yerg. Yerger's Tennessee Reports.
Yo. Young (see You.).
Yool Waste. Yool on Waste, Nuisance and Trespass.
York Ass. Clayton's Reports (York Assizes).
York Leg. Rec. York Legal Record.
You. Younge's English Exchequer Equity Reports.
You. & Coll. Ch. Younge & Collyer's English Chancery Reports.
You. & Coll. Ex. Younge & Collyer's English Exchequer Equity Reports.
You. & Jerv. Younge & Jervis's English Exchequer Reports.
Young. Young's Reports, vols. 31-47 Minnesota.
Young Adm. Young's Nova Scotia Admiralty Cases.
Young Adm. Dec. Young's Admiralty Decisions.
Young M. L. Cas. Young's Maritime Law Cases, English.
Young, Naut. Dict. Young, Nautical Dictionary.
Younge. Younge's English Exchequer Equity Reports.
Younge & Coll. Younge and Collyer's Reports, English Exchequer Equity.
Younge & Coll. Ch. Younge's & Collyer's English Chancery Cases.
Younge & Coll. Ex. Younge & Collyer's English Exchequer Equity Reports.
Younge & J. or *Younge & Jr.* Younge & Jervis, English Exchequer.
Yuk. Yukon Territory.
Zab. Zabriskie's New Jersey Law Reports.
Zach. Dr. Civ. Zachariae Droit Civil Français.
Zane. Zane's Reports, vols. 4-9 Utah.
Zinn Ca. Tr. Zinn's Select Cases in the Law of Trusts.
Zinn, L. C. Zinn's Leading Cases on Trusts.
Zouch Adm. Zouch's Admiralty Jurisdiction.

ABBREVIATORS. **Eccl. Law.** Officers whose duty it is to assist in drawing up the Pope's briefs, and reducing petitions into proper form, to be converted into Papal Bulls.

ABBROCHMENT. **Old Eng. Law.** The forestalling of a market or fair.

ABBUTTALS. See ABUTTALS.

ABDICATION. A simple renunciation of an office; generally understood of a supreme office.

James II. of England, Charles V. of Germany, and Christiana, Queen of Sweden, are said to have *abdicated.* When James II. of England left the kingdom, the Commons voted that he had *abdicated* the government, and that thereby the throne had become vacant. The House of Lords preferred the word *deserted;* but the Commons thought it not comprehensive enough, for then the king might have the liberty of returning.

It was also declared that abdication meant more than desertion and amounted to a forfeiture by acts and deeds of which the desertion was a part. In England, the constitutional relation between the crown and the nation being in the nature of a contract, the king cannot abdicate without the consent of parliament. The House of Lords finally assented to the word *abdicate.*

ABDITORIUM. An abditory or hiding place, to hide and preserve goods, plate or money. Jacob.

ABDUCTION. Forcibly taking away a man's wife, his child, or his ward. 3 Bla. Com. 139–141; State v. George, 93 N. C. 567.

The unlawful taking or detention of any female for purposes of marriage, concubinage, or prostitution. 4 Steph. Com. 84.

In many states this offence is created by statute and in most cases applies to females under a given age. The definitions of the crime differ in terms, but not in general results. They usually forbid the taking away or detaining or enticing of a female under a specified age, for purposes of concubinage or prostitution. In Minnesota the taking away for the purpose of marriage under the age of 15 is forbidden; and the statute is valid although some females are authorized by the law of that state to marry at that age; State v. Sager, 99 Minn. 54, 108 N. W. 812.

The important element of the offence is the taking for the unlawful purpose, which is accomplished when the female is removed from the custody of parents or others having control of her, by means of any device, enticement or persuasion; State v. Tucker, 72 Kan. 481, 84 Pac. 126. Unlawful detention and intention of having carnal knowledge are the necessary facts; Com. v. Littrell, 4 Ky. L. Rep. 251.

In some states the fact that a female taken for concubinage was not chaste is no defence; State v. Johnson, 115 Mo. 480, 22 S. W. 463; People v. Dolan, 96 Cal. 315, 31 Pac. 107; the law presumes a woman's previous life to have been chaste, and the burden of proof to show otherwise rests on the defendant; Slocum v. People, 90 Ill. 274; People v. Parshall, 6 Park. Cr. (N. Y.) 129; Carpenter v. People, 8 Barb. (N. Y.) 603; State v. Jones, 191 Mo. 653, 90 S. W. 465; State v. Bobbst, 131 Mo. 328, 32 S. W. 1149.

The offence is complete when there is a criminal intent at the time of the taking away, though there may be a subsequent purpose to marry; State v. Adams, 179 Mo. 334, 78 S. W. 588; State v. Sager, 99 Minn. 54, 108 N. W. 812.

Ignorance of the girl's age is no defence; Riley v. State (Miss.) 18 South. 117; Tores v. State (Tex. Cr. App.) 63 S. W. 880; nor is her request; Griffin v. State, 109 Tenn. 17, 70 S. W. 61; State v. Bussey, 58 Kan. 679, 50 Pac. 891; nor that he believed and with good reason that she was over the statutory age; L. R. 2 C. C. 154; Beckham v. Nacke, 56 Mo. 546; State v. Ruhl, 8 Ia. 447; nor the early abandonment of the relation and the return of the girl to her father with the man's assistance; State v. Neasby, 188 Mo. 467, 87 S. W. 468. It must appear that it was against her will; Hoskins v. Com., 7 Ky. L. Rep. 41; State v. Hromadko, 123 Ia. 665, 99 N. W. 560.

It is stated to be the better opinion, that if a man marries a woman under age, without the consent of her father or guardian, that act is not indictable at common law; but if children are taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, though the parties themselves consent to the marriage, such criminal means will render the act an offence at common law; 1 East, Pl. Cr. 458; 1 Rus. Cr. 962; Rosc. Cr. Ev. 260.

A mere attempt to abduct is not sufficient; People v. Parshall, 6 Park. Cr. (N. Y.) 129.

Solicitation or inducement is sufficient, and the taking need not be by force; People v. Seeley, 37 Hun (N. Y.) 190; Slocum v. People, 90 Ill. 274; People v. Carrier, 46 Mich. 442, 9 N. W. 487.

The remedy for taking away a man's wife was by a suit by the husband for damages, and the offender was also answerable to the king; 3 Bla. Com. 139.

See KIDNAPPING; ENTICE; and as to whether criminals abducted from another state may be prosecuted, see FUGITIVE FROM JUSTICE; EXTRADITION.

Civil Action. At common law the father had no right of civil action for the abduction of a child, except in case of the heir, in which case there was an action because of the interest in his marriage; Cro. Eliz. 770; but afterwards the right of action was sustained upon the theory of loss of services; 1 Wood. Lect. 270; 3 Bla. Com. 140; and on that ground it has been generally recognized in this country; Caughey v. Smith, 47 N. Y. 244; Wodell v. Coggeshall, 2 Metc. (Mass.) 89, 35 Am. Dec. 391; Hills v. Hobert, 2 Root (Conn.) 48; Plummer v. Webb, 4 Mas. 380, Fed. Cas. No. 11,233; Cutting v. Seabury, 1 Sprague 522, Fed. Cas. No. 3,521; Steele v. Thacher, 1 Ware (Dav. 91) 85, Fed. Cas. No. 13,348; Kirkpatrick v. Lockhart, 2 Brev. (S. C.) 276; and the action lies by one standing *in loco parentis*, as the grandfather of an illegitimate child who has assumed the care of it; Moritz v. Garnhart, 7 Watts (Pa.) 302, 32 Am. Dec. 762. The proper form of action is in some states held to be trespass on the case; Sargent v. Mathewson, 38 N. H. 54; Jones v. Tevis, 4 Litt. (Ky.) 25, 14 Am. Dec. 98; in others, trespass *vi et armis;* Vaughan v. Rhodes, 2 McCord (S. C.) 227, 13 Am. Dec. 713; Schoul. Dom. Rel. 354. Exemplary damages may be recovered; Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341; Stowe v. Heywood, 7 Allen (Mass.) 118; and mental pain inflicted on the child may be considered; Brown v. Crockett, 8 La. Ann. 30. It is no defence that the abducted girl and her whole family were of loose and immoral character; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679. The right of action of the mother after the death of the father has been doubted, but is said to be sustained by the better opinion; 13 Am. Dec. 716, n.; see also Com. v. Murray, 4 Bin. (Pa.) 487, 5 Am. Dec. 412; Coon v. Moffet, 3 N. J. Law 583, 4 Am. Dec. 405.

ABEARANCE. Behavior; as a recogni-

zance to be of good abearance, signifies to be of good behavior. 4 Bla. Com. 251, 256. See Penna. Register 377, where William Penn, sitting judicially, used the term.

ABEREMURDER. In Old Eng. Law. An apparent, plain, or downright murder. It was used to distinguish a wilful murder from chance-medley, or manslaughter. Spel.; Cowell; Blount.

ABET. To encourage or set another on to commit a crime. This word is always applied to aiding the commission of a crime. To abet another to commit a murder, is to command, procure, or counsel him to commit it. Old Nat. Brev. 21; Co. Litt. 475. See AIDING AND ABETTING.

ABETTOR. An instigator, or setter on; one who promotes or procures the commission of a crime. Old Nat. Brev. 21.

The distinction between abettors and accessaries is the presence or absence at the commission of the crime; Cowell; Fleta, *lib.* 1, *cap.* 34. Presence and participation are necessary to constitute a person an abettor; 4 Sharsw. Bla. Com. 33; Russ. & R. 99; 9 Bingh. N. C. 440; Green v. State, 13 Mo. 382; Connaughty v. State, 1 Wis. 159, 60 Am. Dec. 370; White v. People, 81 Ill. 333; Doan v. State, 26 Ind. 496; King v. State, 21 Ga. 220.

ABEYANCE (Fr. *abbayer*, to expect). In expectation, remembrance, and contemplation of law; the condition of a freehold when there is no person in being in whom it is vested.

In such cases the freehold has been said to be *in nubibus* (in the clouds), *in pendenti* (in suspension), and *in gremio legis* (in the bosom of the law). It has been denied by some that there is such a thing as an estate in abeyance; Fearne, Cont. Rem. 513. See also the note to 2 Sharsw. Bla. Com. 107; 1 P. Wms. 516; 1 Plowd. 29.

The law requires that the freehold should never, if possible, be in *abeyance*. Where there is a tenant of the freehold, the remainder or reversion in fee may exist for a time without any particular owner, in which case it is said to be in abeyance; Lyle v. Richards, 9 S. & R. (Pa.) 367; 3 Plowd. 29 *a*, *b*, 35 *a*; 1 Washb. R. P. 47.

It is a maxim of the common law that a fee cannot be in abeyance. It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it; Wallach v. Van Riswick, 92 U. S. 212, 23 L. Ed. 473.

A glebe, parsonage lands, may be in abeyance; Terrett v. Taylor, 9 Cra. (U. S.) 47, 3 L. Ed. 650; Weston v. Hunt, 2 Mass. 500; 1 Washb. R. P. 48; or a grant of land to charity; Town of Pawlet v. Clark, 9 Cra. (U. S.) 292, 332, 3 L. Ed. 735. So may the franchise of a corporation; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 691, 4 L. Ed. 629. So, too, personal property may be in abeyance or legal sequestration, as in case of a vessel captured at sea from its captors until it becomes invested with the character of a prize; 1 Kent 102; 1 C. Rob. Adm. 139; 3 *id.* 97, n.; or the rights of property of a bankrupt, pending adjudication; Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866. See Dillingham v. Snow, 5 Mass. 555; Jewett v. Burroughs, 15 Mass. 464.

ABIATICUS (Lat.). A son's son; a grandson in the male line. Spel. Sometimes spelled *Aviaticus*. Du Cange, *Avius*.

ABIDE. To accept the consequences of; to rest satisfied with. With reference to an order, judgment, or decree of a court, to perform, to execute. Taylor v. Hughes, 3 Greenl. (Me.) 433; Hodge v. Hodgdon, 8 Cush. (Mass.) 294; Jackson v. State, 30 Kan. 88, 1 Pac. 317; Petition of Griswold, 13 R. I. 125. Where a statute provides for a recognizance "to *abide* the judgment of the court," one conditioned "to *await* the action of the court" is not sufficient; Wilson v. State, 7 Tex. App. 38.

To abide by an award. To await the award without revoking the submission. It does not mean to "acquiesce in" or "not dispute," in the sense of not being at liberty to contest the validity of the award when made; Hunt v. Wilson, 6 N. H. 36; Quimby v. Melvin, 35 N. H. 198; Marshall v. Reed, 48 N. H. 36, 40.

To abide the decision. An agreement in a cause of partition "to abide the decision" of a suit in equity involving the title to the same lands did not mean to postpone the former suit until a final decree in the latter, but only that the partition should be in accordance with the title as determined by it; Hodges v. Pingree, 108 Mass. 585.

To abide and satisfy is used to express the execution or performance of a judgment or order by carrying it into complete effect; Erickson v. Elder, 34 Minn. 371, 25 N. W. 804.

ABIDING BY. In Scotch Law. A judicial declaration that the party abides by the deed on which he founds, in an action where the deed or writing is attacked as forged. Unless this be done, a decree that the deed is false will be pronounced. Pat. Comp. It has the effect of pledging the party to stand the consequences of founding on a forged deed. Bell, Dict.

ABIDING CONVICTION. A definite conviction of guilt derived from a thorough examination of the whole case. Hopt v. Utah, 120 U. S. 439, 7 Sup. Ct. 614, 30 L. Ed. 708.

ABIGEATORES. See ABIGEUS.

ABIGEATUS. The offence of driving away and stealing cattle in numbers. See ABIGEUS.

ABIGEI. See ABIGEUS.

ABIGERE. See ABIGEUS.

ABIGEUS (Lat. *abigere*). One who steals cattle in numbers.

This is the common word used to denote a stealer of cattle in large numbers, which latter circum-

stance distinguishes the *abigeus* from the *fur*, who was simply a thief. He who steals a single animal may be called *fur (q. v.)*; he who steals a flock or herd is an *abigeus*. The word is derived from *abigere*, to lead or drive away, and is the same in signification as *Abactor (q. v.), Abigeatores, Abigatores, Abigei*. Du Cange; Guyot, Rép. Univ.; 4 Bla. Com. 239.

A distinction is also taken by some writers depending upon the place whence the cattle are taken; thus, one who takes cattle from a stable is called *fur*. Calvinus, Lex, *Abigei*.

ABILITY. When the word is used in statutes, it is usually construed as referring to pecuniary ability, as in the construction of Lord Tenterden's Act (*q. v.*); 1 M. & W. 101.

A Wisconsin Act (1885), making a husband "being of sufficient ability" liable for the support of an abandoned wife, contemplates as well earning capacity as property actually owned; State v. Witham, 70 Wis. 473, 35 N. W. 934; a contrary view was taken in Washburn v. Washburn, 9 Cal. 475.

ABJUDICATIO (Lat. *abjudicare*). A removal from court. Calvinus, Lex. It has the same signification as *foris-judicatio* both in the civil and canon law. Co. Litt. 100 *b*. Calvinus, Lex.

Used to indicate an adverse decision in a writ of right: Thus, the land is said to be *abjudged* from one of the parties and his heirs. 2 Poll. & Maitl. 62.

ABJURATION (Lat. *abjuratio*, from *abjurare*, to forswear). A renunciation of allegiance, upon oath.

In Am. Law. Every alien, upon application to become a citizen of the United States, must declare on oath or affirmation before the court where the application is made, amongst other things, that he doth absolutely and entirely renounce and *abjure* all allegiance and fidelity which he owes to any foreign prince, state, etc., and particularly, by name, the prince, state, etc., whereof he was before a citizen or subject. Rawle, Const. 93; Rev. Stat. U. S. § 2165.

In Eng. Law. The oath by which any person holding office in England was formerly obliged to bind himself not to acknowledge any right in the Pretender to the throne of England; 1 Bla. Com. 368; 13 and 14 W. III, c. 6, repealed by 30 and 31 Vic. c. 59.

It also denotes an oath abjuring certain doctrines of the church of Rome.

In the ancient English law, it was a renunciation of one's country and taking an oath of perpetual banishment. A man who had committed a felony, and for safety fled to a sanctuary, might within forty days confess and take the oath of abjuration and perpetual banishment; he was then transported. This was abolished in 1624; Ayliffe, Pareg. 14; Burr. L. Dic., Abjuration of the Realm; 4 Bla. Com. 332.

But the doctrine of abjuration has been referred to, at least, in much later times; 4 Sharsw. Bla. Com. 56, 124, 332; 11 East 301; 2 Kent 156, n.; Termes de la Ley.

In medieval times, every consecrated church was a sanctuary. If a malefactor took refuge therein, he could not be extracted; he had a choice between *abjuring the realm* and submitting to trial. If he chose the former he left England, bound by his oath never to return. His lands were escheated, his chattels were forfeited, and if he came back he was an outlaw; 2 Poll. & Maitl. 588; *Réville, L'Abjuratio regni, Revue historique*. 7 Val. 50, p. 1. See SANCTUARY.

ABLE BODIED. An absence of those palpable and physical defects which evidently incapacitate a person from performing the ordinary duties of a soldier. Darling v. Bowen, 10 Vt. 148. Ability to perform ordinary labor is not the test. Town of Marlborough v. Sisson, 26 Conn. 57.

ABLEGATI. Papal ambassadors of the second rank, who are sent with a less extensive commission to a court where there are no nuncios. This title is equivalent to *envoy*, which see.

ABNEPOS (Lat.). A great-great-grandson. The grandson of a grandson or granddaughter. Calvinus, Lex.

ABNEPTIS (Lat.). A great-great-granddaughter. The granddaughter of a grandson or granddaughter. Calvinus, Lex.

ABODE. The place in which a person dwells. See Vanderpoel v. O'Hanlon, 53 Ia. 246, 5 N. W. 119, 36 Am. Rep. 216. It is the criterion determining the residence of a legal voter, and which must be with the present intention not to change it. Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698; Dale v. Irwin, 78 Ill. 181. See RESIDENCE; DOMICIL.

ABOGADO (Sp.). An advocate. See BOZERO.

ABOLITION (Lat. *abolitio*, from *abolere*, to utterly destroy). The extinguishment, abrogation, or annihilation of a thing.

In the Civil, French and German law, abolition is used nearly synonymously with pardon, remission, grace. Dig. 39. 4. 3. 3. There is, however, this difference: *grace* is the generic term; *pardon*, according to those laws, is the clemency which the prince extends to a man who has participated in a crime, without being a principal or accomplice; *remission* is made in cases of involuntary homicides, and self-defence. *Abolition* is different: it is used when the crime cannot be remitted. The prince then may, by leters of abolition, remit the punishment, but the infamy remains, unless letters of abolition have been obtained before sentence. *Encycl. de D'Alembert*.

As to abolition of slavery, see BONDAGE; SLAVE.

ABORDAGE (Fr.). The collision of vessels. See ADMIRALTY; CODE; COLLISION; NAVIGATION, RULES OF.

ABORTION. The expulsion of the fœtus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life.

The unlawful destruction, or the bringing forth prematurely, of the human fœtus before the natural time of birth; State v. Magnell, 3 Pennewill (Del.) 307, 51 Atl. 606.

Its natural and innocent causes are to be sought either *in the mother*—as in a nervous, irritable temperament, disease, malformation of the pelvis, immoderate veneral indulgence, a habit of miscarriage, plethora, great debility; or *in the fœtus* or its dependencies; and this is usually disease exist-

ing in the ovum, in the membranes, the placenta, or the fœtus itself.

The criminal means of producing abortion are of two kinds. *General*, or those which seek to produce the expulsion through the constitution of the mother, which are venesection, emetics, cathartics, diuretics, emmenagogues, comprising mercury, savin, and the *secale cornutum* (spurred rye, ergot), to which much importance has been attached; or *local or mechanical* means, which consist either of external violence applied to the abdomen or loins, or of instruments introduced into the uterus for the purpose of rupturing the membranes and thus bringing on premature action of the womb. The latter is the more generally resorted to, as being the most effectual. These local or mechanical means not unfrequently produce the death of the mother, as well as that of the fœtus.

At common law, an attempt to destroy a child *en ventre sa mere* appears to have been held in England to be a misdemeanor; Rosc. Cr. Ev. 4th Lond. ed. 260; 1 Russ. Cr. 3d Lond. ed. 671; 3 Co. Inst. 50; 1 Hawk. c. 13, s. 16; 1 Whart. Crim. L. § 392; though Green, C. J., in State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248, declares that he can find "no precedent, no authority, not even a dictum (prior to Lord Ellenborough's act, 43 Geo. III. c. 58) which recognizes the mere procuring of an abortion as a crime known to the law." It was said to be a misdemeanor only if the child were born dead, but if it were born alive and afterwards died, from injury received in the womb, it would be homicide; 1 Mood. C. C. 346; 3 Inst. 50; and this was true even if the child were still, at the time of death, attached to the mother by the umbilical cord; 1 C. & M. 650; 2 Mood. C. C. 260; see *infra*. In this country, it has been held that it is not an indictable offence at common law to administer a drug, or perform an operation upon a pregnant woman with her consent, with the intention and for the purpose of causing an abortion and premature birth of the fœtus of which she is pregnant, by means of which an abortion is in fact caused, unless, at the time of the administration of such drug or the performance of such operation, such woman was *quick* with child; Com. v. Wood, 11 Gray (Mass.) 85; Hatfield v. Gano, 15 Ia. 177; Evans v. People, 49 N. Y. 86; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248; Sullivan v. State, 121 Ga. 183, 48 S. E. 949; Barrow v. State, 121 Ga. 187, 48 S. E. 950; Mitchell v. Com., 78 Ky. 204, 39 Am. Rep. 227. In Idaho the common law rule is as stated, but by statute the crime may be committed before quickening; State v. Alcorn, 7 Ida. 599, 64 Pac. 1014, 97 Am. St. Rep. 252. But in Pennsylvania a contrary doctrine has been held; Mills v. Com., 13 Pa. 631; Com. v. Demain, 6 Pa. L. J. 29. Wharton supports the latter doctrine on principle; 1 Cr. L. § 592. See also Com. v. Boynton, 116 Mass. 343; Com. v. Brown, 121 Mass. 69; Com. v. Corkin, 136 Mass. 429. Under the Massachusetts statute forbidding the procuring of a miscarriage, it is not necessary to allege that the child was born alive or that the woman was "quick with child"; Com. v. Wood, 11 Gray (Mass.) 85; or whether she did or did not die; Com. v. Thompson, 108 Mass. 461. In other states it is held that the death of the mother is not a constituent element of the offence of abortion; Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506; Railing v. Com., 110 Pa. 100, 1 Atl. 314. See QUICKENING. The Iowa cases cited *supra* were civil suits by husband and wife for slander in charging the latter with having procured an abortion, and it was held that no crime was committed unless the woman was "quick with child."

The former English statutes on this subject, 43 Geo. III. c. 58, and 9 Geo. IV. c. 51, § 14, distinguished between the case where the woman was quick and was not quick with child; and under both acts the woman must have been pregnant at the time; 1 Mood. Cr. Cas. 216; 3 C. & P. 605. The terms of the act of 24 and 25 Vict. c. 100, s. 62, are, "with intent to procure the miscarriage of any woman whether she be with child or not." See 1 Den. Cr. Cas. 18; 2 C. & K. 293.

When, in consequence of the means used to secure an abortion, the death of the woman ensues, the offence is criminal homicide, and though the cases are not uniform as to the degree, the preponderance of authority is that the crime is murder; State v. Dickinson, 41 Wis. 309; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; 1 Hale P. C. 430; 1 East P. C. 230; People v. Sessions, 58 Mich. 594, 26 N. W. 291; Wilson v. Com., 60 S. W. 400, 22 Ky. Law Rep. 1251; State v. Moore, 25 Ia. 128, 95 Am. Dec. 776; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; Dears. & B. C. C. 288; Mood. C. C. 356; Commonwealth v. Keeper of Prison, 2 Ashm. (Pa.) 227; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815; but the defendant may be prosecuted under the special statute for procuring a miscarriage; *id.* Where the offence is held to be murder, it is usually of the second degree, as in State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312, where the defendant was convicted under an indictment specifically for that degree; so also in State v. Moore, 25 Ia. 128, 95 Am. Dec. 776, where Dillon, C. J., upon a careful examination of the authorities, sustained the indictment and held that the death of the mother was, at common law, murder, and under the Iowa statutes murder in the second degree. Conviction upon an indictment for manslaughter will be sustained; People v. Abbott, 116 Mich. 263, 74 N. W. 529; Yundt v. People, 65 Ill. 372; Dears. & B. C. C. 164; 7 Cox C. C. 404. The common law rule that homicide in an attempt to commit a felony is murder, and in the attempt to commit a misdemeanor is manslaughter, has been much discussed and was applied in Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 853, 84 Am. St.

Rep. 506, where an attempt to procure an abortion resulting in death was held manslaughter. Under the Pennsylvania act one causing the death of a woman in attempting to procure a miscarriage cannot be indicted for murder; Com. v. Railing, 113 Pa. 37, 4 Atl. 459. In Wisconsin it was held that from murder at common law, the crime was reduced to manslaughter by statute; State v. Dickinson, 41 Wis. 299, 309. A person may be convicted of manslaughter for causing the death of a woman in attempting an abortion, under a statute making it manslaughter to kill another in the performance of an unlawful act; the statute making the attempt to procure an abortion a misdemeanor does not take the offence out of the provisions of the other act; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902. Homicide in attempting an abortion may be either murder or manslaughter, but if the latter, it must be held to be voluntary, and not involuntary; People v. Com., 87 Ky. 487, 9 S. W. 509. Dr. Wharton suggests that where there was no intent to do the mother serious bodily harm, it is proper to indict separately for the manslaughter and the perpetration of the abortion; 1 Cr. L. 390. In North Carolina it was held a misdemeanor, and that a count for it may be joined with a count for murder; State v. Slagle, 82 N. C. 653. In New York, under a statute declaring it manslaughter to administer drugs, etc., to a pregnant woman with intent to destroy the child, an indictment in which the intent was not so alleged, but only to produce a miscarriage, was held not good as an indictment for manslaughter, but the jury could convict of misdemeanor; Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340.

In East P. C. 230, it is said that if death ensue it is murder, "though the original intent, had it succeeded, would not have been so but only a great misdemeanor," but the modern English decisions are by no means uniform. In a late edition of a book of great authority the annotator says: "And there appears to be considerable divergence of opinion amongst the judges as to the proper direction to the jury in these cases. See 33 L. J. Newsp. 546, 615;" Archb. Cr. Pl. & Pr. (23d Eng. Ed.) 798. A recent English case held that if the woman died as the result of the operation, it was murder, but if the jury were of the opinion that if the prisoner could not as a reasonable man have expected death to result, it was manslaughter; 62 J. P. 711. A note in 13 Harv. L. Rev. 51, criticizes a decision, then recent, remarking that the settled English rule holding that it is murder if death result from an attempt to procure an abortion, was not followed by Mr. Justice Dowling in a case at the Chester assizes, March 6, 1899.

Even if the wound or injury were not of itself sufficient to cause death, if it did so result, owing to the condition of the woman, it is to be treated as the cause of her death; Clark v. Com., 111 Ky. 443, 63 S. W. 740. See an exhaustive note on "Homicide in the Commission of or Attempt to Commit an Abortion"; 63 L. R. A. 902.

If a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, such person is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder; 2 C. & K. 784. Under statutes the offence of abortion is generally made punishable whether the woman be "quick with child," or no; Smith v. State, 33 Me. 48, 54 Am. Dec. 607; People v. Abbott, 116 Mich. 263, 74 N. W. 529; and in an indictment for causing death in an attempt to procure an abortion it is unnecessary so to allege; People v. Com., 87 Ky. 487, 9 S. W. 509. It is immaterial whether or not the woman was pregnant; Eggart v. State, 40 Fla. 527, 25 South. 144; the intent is the gravamen of the offence; State v. Jones, 4 Pennewill (Del.) 109, 53 Atl. 858.

The crime may be committed by one who, though prescribing medicine and giving directions, was not present when it was taken; McCaughey v. State, 156 Ind. 41, 59 N. E. 169; or by sending it through the mail; State v. Morthart, 109 Ia. 130, 80 N. W. 301; or if the pregnant woman consented to or urged the operation and the defendant was reluctant to do it; State v. Magnell, 3 Pennewill (Del.) 307, 51 Atl. 606; the consent of the woman is no defense; Barrow v. State, 121 Ga. 187, 48 S. E. 950; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; Peoples v. Com., 87 Ky. 487, 9 S. W. 509; even where the indictment charges force and violence and the evidence showed consent; People v. Abbott, 116 Mich. 263, 74 N. W. 529; nor is it an excuse that prior to the attempt the woman had tried to do it herself, unless such effort by her contributed to her death; State v. Glass, 5 Or. 73.

A child *en ventre sa mere* ["an unborn quick child"] is not a human being within the meaning of a statute providing that whoever kills any human being, with malice aforethought, is guilty of murder; Abrams v. Foshee, 3 Ia. 274, 66 Am. Dec. 77.

The woman who takes the drug or on whom the criminal operation is performed, to procure an abortion, is not an accomplice; Com. v. Boynton, 116 Mass. 343; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471; State v. Hyer, 39 N. J. L. 598; People v. McGonegal, 136 N. Y. 62, 75, 32 N. E. 616; and if she had lived would not have been indictable for that offense, her action constituted a different one; *id.*; nor is one who attempts to procure it on herself indictable under a statute providing "that any person who shall

administer to any pregnant woman, etc."; Hatfield v. Gano, 15 Ia. 177; Smith v. Gaffard, 31 Ala. 45.

In New York if a person advises a woman to take medicine to procure a miscarriage the crime of abortion is not complete unless the advice is acted on; People v. Phelps, 133 N. Y. 267, 30 N. E. 1012; *id.*, 61 Hun 115, 15 N. Y. Supp. 440; but in New Jersey it is by statute criminal to advise a woman to take a drug for the purpose and it is unnecessary either to allege or prove that the drug was actually taken; State v. Murphy, 27 N. J. L. 112; one furnishing a residence for a woman who procures an abortion is an accessory before the fact; 12 Cox C. C. 463. An offer of proof by physicians that it is the universal custom for unmarried women, illegitimately pregnant, to take any character of drug to procure a miscarriage was properly rejected; Clark v. Com., 111 Ky. 443, 63 S. W. 740. One who induces a woman to take a harmless drug is not guilty of inciting, but the woman who takes it believing that it will bring on an abortion is guilty of an attempt; 63 J. P. 790. See FŒTUS; PREGNANCY; EMMENAGOGUES; EN VENTRE SA MERE.

ABORTIVE TRIAL. A phrase used "when a case has gone off and no verdict has been pronounced, without the fault, contrivance, or management of the parties." Jebb & B. 51.

ABORTUS. The fruit of an abortion; the child born before its time, incapable of life. See ABORTION; BIRTH; BREATH; DEAD-BORN; GESTATION; LIFE.

ABOUT. Almost or approximately; near in time, quantity, number, quality or degree. The import of the qualifying word "about" is simply, that the actual quantity is a near approximation to that mentioned, and its effect is to provide against accidental variations; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. When there is a material and valuable variation, a court of equity upon a petition for specific performance will give the word its proper effect; Stevens v. McKnight, 40 Ohio St. 341.

In a charter party "about to sail" imports just ready to sail; [1893] 2 Q. B. 274.

ABOUTISSEMENT (Fr.). An abuttal or abutment. See Guyot. Répert. Univ. *Aboutissans.*

ABOVE. Higher; superior. As, court above, bail above, plaintiff or defendant above. *Above all incumbrances* means in excess thereof; Williams v. McDonald, 42 N. J. Eq. 395, 7 Atl. 866.

ABPATRUUS (Lat.). A great-great-uncle; or, a great-great-grandfather's brother. Du Cange, *Patruus.* It sometimes means uncle, and sometimes great-uncle.

ABRIDGE. To shorten a declaration or count by taking away or severing some of the substance of it. Brooke, Abr., Com., Dig. *Abridgment;* 1 Viner, Abr. 109.

To abridge a plaint is to strike out a part of the demand and pray that the tenant answer to the rest. This was allowable generally in real actions where the writ was *de libero tenemento,* as assize, dower, etc., where the demandant claimed land of which the tenant was not seized. See 1 Wms. Saund. 207, n. 2; 2 *id.* 24, 330; Brooke, Abr. *Abridgment*; Minor v. Bank, 1 Pet. (U. S.) 74, 7 L. Ed. 47; Stearns, Real Act. 204.

ABRIDGMENT. Condensation; contraction. An epitome or compendium of another and larger work, wherein the principal ideas of the larger work are summarily contained.

Abridgments of the law or digests of adjudged cases serve the very useful purpose of an index to the cases abridged; 5 Co. 25. Coke says they are most profitable to those who make them; Co. Litt., in preface to the table at the end of the work. With few exceptions, the old abridgments are not entitled to be considered authoritative. See AUTHORITY. See 2 Wils. 1, 2; 1 Burr. 364; 1 W. Bla. 101; 3 Term 64, 241; and an article in the North American Review, July, 1826, p. 8, for an account of the principal abridgments, which was written by the late Justice Story, and is reprinted in his "Miscellaneous Writings," p. 79; Warren, Law Stud. 778.

See COPYRIGHT.

ABROGATION. The destruction of or annulling a former law, by an act of the legislative power, or by usage.

A law may be abrogated, or only derogated from: it is abrogated when it is totally annulled; it is derogated from when only a part is abrogated; *derogatur legi, cum pars detrahitur; abrogatur legi, cum prorsus tollitur.* Dig. 50. 17. 1. 102. *Lex rogatur dum fertur* (when it is passed); *abrogatur dum tollitur* (when it is repealed); *derogatur idem dum quoddam ejus caput aboletur* (when any part of it is abolished); *subrogatur dum aliquid ei adjicitur* (when anything is added to it); *abrogatur denique, quoties aliquid in ea mutatur* (as often as anything in it is changed). Dupin, *Proleg. Jur.* art. iv.

Express abrogation is that literally pronounced by the new law either in general terms, as when a final clause abrogates or repeals all laws contrary to the provisions of the new one, or in particular terms, as when it abrogates certain preceding laws which are named.

Implied abrogation takes place when the new law contains provisions which are positively contrary to former laws, without expressly abrogating such laws; for it is a maxim, *posteriora derogant prioribus;* De Armas' Case, 10 Mart. O. S. (La.) 172; Bernard v. Vignaud, 10 Mart. O. S. (La.) 560; and also when the order of things for which the law has been made no longer exists, and hence the motives which have caused its enactment have ceased to operate; *ratione*

legis omnino cessante, cessat lex; Toullier, Dr. Civ. Fr. tit. prel. § 11, n. 151; Merlin, Répert. *Abrogation.*

As to the repeal of statutes by nonuser, see OBSOLETE.

ABSCOND. To go in a clandestine manner out of the jurisdiction of the courts, or to lie concealed, in order to avoid their process. Malvin v. Christoph, 54 Ia. 562, 7 N. W. 6. It has been held synonymous with conceal; Johnstone v. Thompson, 2 La. 411. See ABSCONDING DEBTOR.

ABSCONDING DEBTOR. One who absconds from his creditors. One who with intent to defeat or delay his creditors departs out of England, or being out, remains out. Bankcy. Act, 1883, § 4. The statutes of the various states and the decisions upon them have defined absconding debtors. A person who has been in a state only transiently, or has come into it without any intention of settling therein, cannot be treated as such; In re Fitzgerald, 2 Caines (N. Y.) 318; Dudley v. Staples, 15 Johns. (N. Y.) 196; nor can one who openly changes his residence; Dunn v. Myres, 3 Yerg. (Tenn.) 414; Fitch v. Waite, 5 Conn. 117; House v. Hamilton, 43 Ill. 185; In re Proctor, 27 Vt. 118; Mandel v. Peet, 18 Ark. 236. It is not necessary that the debtor should actually leave the state; Field v. Adreon, 7 Md. 209. If he depart from his usual place of abode secretly or suddenly, or retire or conceal himself from public view in order to avoid legal process; Bennett v. Avant, 2 Sneed (Tenn.) 152; Ives v. Curtiss, 2 Root (Conn.) 133; he is an absconder. It is essential that there should be an intention to delay and defraud creditors. The fact of converting a large amount of goods into money by auction sales, at a sacrifice and clandestinely, furnishes a reasonable presumption that the debtor intended to abscond to avoid service of process upon him; Ross v. Clark, 32 Mo. 296. It has been held to mean more than "absent debtor" and that to state that a debtor absents himself is not a compliance with a statute relating to absconding debtors; Conard v. Conard, 17 N. J. L. 154. See ABSENTEE.

ABSENCE. The state of being away from one's domicil or usual place of residence. It may mean non-appearance. L. R. 1 P. & D. 169; 14 L. T. 604; Strine v. Kaufman, 12 Neb. 423, 11 N. W. 867.

ABSENT. Being away from; at a distance from; not in company with. Paine v. Drew, 44 N. H. 306, where it was held that the word when used as an adjective referred only to the condition or situation of the person or thing spoken of at the time of speaking without any allusion or reference to any prior condition or situation of the same person or thing, but when used as a verb implies prior presence. It has also been held to mean "not being in a particular place at the time referred to," and *not* to import prior presence; [1893] A. C. 339; 62 L. J. C. P. 107; 62 L. T. 159. The term *absent defendants* does not embrace non-resident defendants but has reference to parties resident in the state, but temporarily absent therefrom; Wash v. Heard, 27 Miss. 400; Wheeler v. Wheeler, 35 Ill. App. 123. Although there is a difference between the act of "absenting oneself," which is purely voluntary, and the fact of "being absent," which is voluntary or involuntary as the case may be, yet the fact that a person is absent under some strong compulsion, which does not amount to physical necessity, does not necessarily negative the voluntary aspect of his act; [1901] 1 Ch. 728.

ABSENTE (Lat.). Being absent; used of one of the judges not present at the hearing of a cause. 2 Mod. 14. *Absente Reo* (Lat.). The defendant being absent.

ABSENTEE. A landlord who resides in a country other than that from which he draws his rents. McCulloch, Polit. Econ.; 33 British Quart. Rev. 455. One who has left his residence in a state leaving no one to represent him; Bartlett v. Wheeler, 31 La. Ann. 540; or who resides in another state but has property in Louisiana; Penn v. Evans, 28 *id.* 576. It has been also defined as one who has never been domiciled in the state and who resides abroad. Morris v. Bienvenu, 30 *id.* 878.

As to grant of administration upon property of persons long absent, see ADMINISTRATION.

ABSOILE. To pardon; to deliver from excommunication. Staunford, Pl. Cr. 72; Kelham. Sometimes spelled *assoile*, which see.

ABSOLUTE (Lat. *absolvere*). Complete; perfect; final; without any condition or encumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond; an absolute estate, one that is free from all manner of condition or incumbrance. See CONDITION.

A *rule* is said to be absolute when on the hearing it is confirmed and made final. A *conveyance* is said to be absolute, as distinguished from a mortgage or other conditional conveyance; 1 Powell, Mort. 125.

Absolute *rights* are such as appertain and belong to particular persons merely as individuals or single persons, as distinguished from relative rights, which are incident to them as members of society; 1 Sharsw. Bla. Com. 123; 1 Chit. Pr. 32.

Absolute *property* is where a man hath solely and exclusively the right and also the occupation of movable chattels; distinguished from a qualified property, as that of a bailee; 2 Sharsw. Bla. Com. 388; 2 Kent 347.

An *absolute* estate in land is an estate in

fee simple; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; Fuller v. Missroon, 35 S. C. 314, 14 S. E. 714; Columbia Water Power Co. v. Power Co., 172 U. S. 492, 19 Sup. Ct. 247, 43 L. Ed. 521.

In the law of insurance that is an *absolute interest* in property which is so completely vested in the individual that there could be no danger of his being deprived of it without his own consent; Hough v. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Reynolds v. Ins. Co., 2 Grant, Cas. (Pa.) 326; Washington Fire Ins. Co. v. Kelly, 32 Md. 452, 3 Am. Rep. 149; Columbia Water Power Co. v. Power Co., 172 U. S. 492, 19 Sup. Ct. 247, 43 L. Ed. 521.

It may be used in the sense of vested; Williams v. Ins. Co., 17 Fed. 65; Hough v. Ins. Co., 29 Conn. 20, 76 Am. Dec. 581.

ABSOLUTELY. Completely. *Absolutely void* means utterly void; Pearsoll v. Chapin, 44 Pa. 9. *Absolutely necessary* may be used to make the idea of necessity more emphatic; State v. Tetrick, 34 W. Va. 137, 11 S. E. 1002.

ABSOLUTION. In Civil Law. A sentence whereby a party accused is declared innocent of the crime laid to his charge.

In Canon Law. A juridical act whereby the clergy declare that the sins of such as are penitent are remitted. The formula of absolution in the Roman Church is absolute; in the Greek Church it is deprecatory; in the Reformed Churches, declaratory. Among Protestants it is chiefly used for a sentence by which a person who stands excommunicated is released or freed from that punishment. Encyc. Brit.

In French Law. The dismissal of an accusation.

The term *acquitment* is employed when the accused is declared not guilty, and *absolution* when he is recognized as guilty but the act is not punishable by law or he is exonerated by some defect of intention or will. Merlin, Répert.

ABSOLUTISM. In Politics. A government in which public power is vested in some person or persons, unchecked and uncontrolled by any law or institution.

The word was first used at the beginning of this century, in Spain, where one who was in favor of the absolute power of the king, and opposed to the constitutional system introduced by the Cortes during the struggle with the French, was called *absolutista*. The term Absolutist spread over Europe, and was applied exclusively to absolute monarchism; but absolute power may exist in an aristocracy and in a democracy as well. Dr. Lieber, therefore, uses in his works the term Absolute Democracy for that government in which the public power rests unchecked in the multitude (practically speaking, in the majority).

ABSQUE ALIQUO INDE REDDENDO (Lat. without reserving any rent therefrom). A term used of a free grant by the crown. 2 Rolle, Abr. 502.

ABSQUE HOC (Lat.). Without this. See TRAVERSE.

ABSQUE IMPETITIONE VASTI (Lat. without impeachment of waste). A term indicating freedom from any liability on the part of the tenant or lessee to answer in damages for the waste he may commit. See WASTE.

ABSQUE TALI CAUSA (Lat. without such cause). A form of replication in an action *ex delicto* which works a general denial of the whole matter of the defendant's plea of *de injuria*. Gould, Pl. c. 7, § 10.

ABSTENTION. In French Law. The tacit renunciation of a succession by an heir. Merlin, Répert.

ABSTRACT OF A FINE. A part of the record of a fine, consisting of an abstract of the writ of covenant and the concord; naming the parties, the parcel of land, and the agreement. 2 Bla. Com. 351.

ABSTRACT OF TITLE. An epitome, or brief statement of the evidences of ownership of real estate and its encumbrances. See Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Simon Safe Deposit Co. v. Chisholm, 33 Ill. App. 647; Heinsen v. Lamb, 117 Ill. 549, 7 N. E. 75.

An abstract should set forth briefly, but clearly, every deed, will, or other instrument, every recital or fact relating to the devolution of the title, which will enable a purchaser, or mortgagee, or his counsel, to form an opinion as to the exact state of the title. See 54 L. J. Ch. 466; Kane v. Rippey, 22 Or. 296, 23 Pac. 180.

In England this is usually prepared at the expense of the owner; 1 Dart, Vend. 279. The failure to deliver an abstract in England relieves the purchaser from his contract in law; *id.* 305. It should run back for sixty years; or, since the Act of 38 and 39 Vict. c. 78, forty years prior to the intended sale, etc.

In the United States, where offices for registering deeds are universal, and conveyancing much less complicated, abstracts are much simpler than in England, and are usually prepared at the expense of the purchaser, etc., or by his conveyancer. A person preparing the abstract must understand fully all the laws that can affect real estate; Banker v. Caldwell, 3 Minn. 94 (Gil. 46); and will be held to a strict responsibility in the exercise of the confidence reposed in him; Vallette v. Tedens, 122 Ill. 607, 14 N. E. 52, 3 Am. St. Rep. 502; Brown v. Sims, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308; Young v. Lohr, 118 Ia. 624, 92 N. W. 684; Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; but his liability is not that of a guarantor of the title; Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502; and will extend only to his employer; Symns v. Cutter, 9 Kan. App. 210, 59 Pac. 671; Equitable Building & Loan Ass'n v. Bank, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, 12 Ann. Cas. 467.

Where an abstract of title is made for a vendor, warranted to be true and perfect, the vendee refusing to take the property without it, the company making it was held liable for omissions in it; Dickle v. Abstract Co., 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616. It is not necessary to state that the descriptions of the premises in the various instruments are inconsistent; American Trust Inv. Co. v. Abstract Co. (Tenn. Ch. App.) 39 S. W. 877. Where the register of deeds records full satisfaction instead of a partial release on the margin of the mortgage record, an abstract maker relying on the marginal entry is guilty of negligence; Wacek v. Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502.

See Equitable Bldg. & L. Ass'n v. Bank, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, 12 Ann. Cas. 407; Ward. Abstr.; TITLE.

ABSURDITY. That which is both physically and morally impossible. State v. Hayes, 81 Mo. 574.

ABUSE. Everything which is contrary to good order established by usage. Merlin, Répert.

Among the civilians, abuse has another signification, which is the destruction of the substance of a thing in using it. For example, the borrower of wine or grain *abuses* the article borrowed by using it, because he cannot enjoy it without consuming it.

The word is used in statutes as applied to women with reference only to sexual intercourse, and imports an offence of that nature; 6 H. & N. 193; and is held synonymous with ravish; Palin v. State, 38 Neb. 862, 57 N. W. 743.

It has been held to include misuse; Erie & North-East R. Co. v. Casey, 26 Pa. 287; to signify to injure, diminish in value, or wear away by improper use; *id.;* to be synonymous with injure; Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754.

Abuse of a female child is an injury to the genital organs in an attempt at carnal knowledge, falling short of actual penetration; Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754. See RAPE.

Abuse of distress is such use of an animal or chattel distrained as makes the distrainer liable to prosecution as for wrongful appropriation.

Abuse of discretion. A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Murray v. Buell, 74 Wis. 14, 43 N. W. 549; and see People v. R. Co., 29 N. Y. 418.

Abuse of process. Intentional irregularity for the purpose of gaining an advantage over one's opponent.

ABUT. To reach, to touch.

In old law, the ends were said to abut, the sides to adjoin. Cro. Jac. 184.

To take a new direction; as where a bounding line changes its course. Spelman, Gloss. *Abuttare.* In the modern law, to bound upon. 2 Chit. Pl. 660.

In Hughes v. R. Co., 130 N. Y. 14, 28 N. E. 765, an abutting lot was defined as a lot bounded on the side of a public street in the bed or soil of which the owner of the lot has no title, estate, interest, or private right except such as are incident to a lot so situated. And see Abendroth v. R. Co., 122 N. Y. 1, 25 N. E. 496, 11 L. R. A. 634, 19 Am. St. Rep. 461. Though the usual meaning of the word is that the things spoken of do actually adjoin, "bounding and abutting" have no such inflexible meaning as to require lots assessed or improved actually to touch the improvement; Cohen v. Cleveland, 43 Ohio St. 190, 1 N. E. 589; 1 Ex. D. 336; *contra*, Holt v. City Council, 127 Mass. 408.

Bounding or abutting on a street will include the soil of a private road opening into the street; 7 Q. B. 183. Where a strip of ground from one side of a street is appropriated for the purpose of widening such street, the lots fronting on the opposite sides of the street at the part widened will be deemed to abut on the improvement, though the street intervenes between the abutting lots and the strip appropriated; Cincinnati v. Batsche, 52 Ohio St. 324, 40 N. E. 21, 27 L. R. A. 536; and where a sidewalk intervened between the street improvement and lots bounding on the sidewalk, such lots were subject, as "contiguous" to the proposed improvement, to special taxation to defray the expense of the latter; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 563, 27 N. E. 192, 29 Am. St. Rep. 334.

ABUTMENT. The walls of a bridge adjoining the land which support the end of the roadway and sustain the arches. See Board of Chosen Freeholders of Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Bardwell v. Town of Jamaica, 15 Vt. 438.

ABUTTALS (Fr.). The buttings or boundings of lands, showing to what other lands, highways, or places they belong or are abutting. Termes de la Ley.

It has been used to express the end boundary lines as distinguished from those on the sides, as "buttals and sidings"; Cro. Jac. 183.

ABUTTER. One whose property abuts, is contiguous or joins at a border or boundary, as where no other land, road or street intervenes.

ABUTTING OWNER. An owner of land which abuts or adjoins. The term usually implies that the relative parts actually adjoin, but is sometimes loosely used without implying more than close proximity. See EMINENT DOMAIN; HIGHWAY.

AC ETIAM (Lat. and also). The introduction of the statement of the real cause of action, used in those cases where it was

necessary to allege a fictitious cause of action to give the court jurisdiction, and also the real cause in compliance with the statutes. It was first used in the K. B., and was afterwards adopted by C. J. North in addition to the *quare clausum fregit* writs of his court upon which writs of *capias* might issue. He balanced for a time whether he should not use the words *nec non* instead of *ac etiam*. It is sometimes written *acetiam*. 2 Stra. 922. This clause is no longer used in the English courts. 2 Will. IV. c. 39. 3 Bla. Com. 288. See BILL OF MIDDLESEX.

AC ETIAM BILLÆ. And also to a bill. See AC ETIAM.

ACADEMY. An institution of learning. An association of experts in some particular branch of art, literature or science. See SCHOOL.

ACCEDAS AD CURIAM (Lat. that you go to court). An original writ issuing out of chancery and directed to the sheriff, for the purpose of removing a suit from a Court Baron before one of the superior courts of law. It directs the sheriff *to go to the lower court*, and enroll the proceedings and send up the record. See Fitzh. N. B. 18; Dy. 169.

ACCEDAS AD VICECOMITEM (Lat. that you go to the sheriff). A writ directed to the coroner, commanding him to deliver a writ to the sheriff, when the latter, having had a *pone* delivered him, suppressed it. Reg. Orig. 83.

ACCELERATION. The shortening of the time for the vesting in possession of an expectant interest. Wharton.

ACCEPTANCE (Lat. *accipere*, to receive). The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221. It is necessary that each party should do some act by which he will be bound; 3 B. & Ald. 680.

The element of receipt must enter into every acceptance, though receipt does not necessarily mean in this sense some actual manual taking. To this element there must be added an intention to retain. This intention may exist at the time of the receipt, or subsequently; it may be indicated by words, or acts, or any medium understood by the parties; and an acceptance of goods will be implied from mere detention, in many instances.

An acceptance involves very generally the idea of a receipt in consequence of a previous undertaking on the part of the person offering to deliver such a thing as the party accepting is in some manner bound to receive. It is through this meaning that the term acceptance, as used in reference to bills of exchange, has a relation to the more general use of the term. As distinguished from assent, acceptance would denote receipt of something in compliance with, and satisfactory fulfilment of, a contract to which assent had been previously given, and the word has been held to mean something more than receive; Hall v. Los Angeles County, 74 Cal. 502, 16 Pac. 312. See ASSENT.

Under the statute of frauds delivery and *acceptance* are necessary to complete an oral contract for the sale of goods, in most cases. In such cases it is said the acceptance must be absolute and past recall; 2 Exch. 290; McCulloch v. Ins. Co., 1 Pick. (Mass.) 278; Mahan v. United States, 16 Wall. (U. S.) 146, 21 L. Ed. 307. If an article is found defective, but is retained and used, it is a sufficient acceptance; Logan v. Apartment House, 3 Misc. Rep. 296, 22 N. Y. Supp. 776. If goods are delivered to a third person by order of the purchaser they are deemed to have been received and accepted by the latter through his agent; Schroder v. Hardware Co., 88 Ga. 578, 15 S. E. 327. Where a verbal contract was made for the sale of goods to be delivered at a specified point where purchaser was to pay freight for the seller, it was held that the acceptance by the carrier and possession of freight after reaching its destination, was not such an acceptance by purchaser as would take it out of the statute; Agnew v. Dumas, 64 Vt. 147, 23 Atl. 634. As to how far a right to make future objections invalidates an acceptance, see 3 B. & Ald. 680; 10 Q. B. 111; 6 Exch. 903. See DELIVERY; BAILMENT; SALE.

Of a Dedication. See that title.

Of Bills of Exchange. An engagement to pay the bill in money when due. 4 East 72; Byles, Bills 288.

An acceptance is said to be:

Absolute, which is a positive engagement to pay the bill according to its tenor.

Conditional, which is an undertaking to pay the bill on a contingency.

The holder is not bound to receive such an acceptance, but if he does receive it, must observe its terms; 4 M. & S. 466; Freeman v. Perot, 2 Wash. C. C. 485, Fed. Cas. No. 5,087; Dan. Neg. Inst. 411. For some examples of what do and what do not constitute conditional acceptances, see 6 C. & P. 218; 3 C. B. 341; Heaverin v. Donnell, 7 Smedes & M. (Miss.) 245, 45 Am. Dec. 302; Campbell v. Pettengill, 7 Greenl. (Me.) 126, 20 Am. Dec. 349; Swansey v. Breck, 10 Ala. 533; Hunton v. Ingraham, 1 Strob. (S. C.) 271; Tassey v. Church, 4 W. & S. (Pa.) 346; Cook v. Wolfendale, 105 Mass. 401; Marshall v. Clary, 44 Ga. 513; Ray v. Faulkner, 73 Ill. 469; Stevens v. Power Co., 62 Me. 498; Pope v. Huth, 14 Cal. 407; Palmer v. Rice, 36 Neb. 844, 55 N. W. 256; Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555; Gerow v. Riffe, 29 W. Va. 462, 2 S. E. 104.

Express or *absolute*, which is an undertaking in direct and express terms to pay the bill.

Implied, which is an undertaking to pay the bill inferred from acts of a character which fairly warrant such an inference.

Where one receives certain goods and sells them, knowing that a draft has been drawn on him for their price, the retaining of the proceeds is equivalent to an acceptance of the draft; Hall v. Bank, 133 Ill. 234, 24 N. E. 546.

If the payee writes upon a bill of exchange drawn upon him the words "payable the 15th day of May, 1883," and signs it, it constitutes a qualified acceptance; Vanstrum v. Liljengren, 37 Minn. 191, 33 N. W. 555.

Partial, which is one varying from the tenor of the bill.

An acceptance to pay part of the amount for which the bill is drawn, 1 Strange 214; Freeman v. Perot, 2 Wash. C. C. 485, Fed. Cas. No. 5,087; or to pay at a different time, 14 Jur. 806; Hatcher v. Stolworth, 25 Miss. 376; Molloy, b. 2, c. 10, § 20; or at a different place, 4 M. & S. 462, would be partial.

Qualified, which is either conditional or partial, and introduces a variation in the sum, time, mode, or place of payment; 1 Dan. Neg. Inst. 414.

Supra protest, which is the acceptance of the bill after protest for non-acceptance by the drawee, for the honor of the drawer or a particular indorser. See ACCEPTOR SUPRA PROTEST.

When a bill has been accepted *supra protest* for the honor of one party to the bill, it may be accepted *supra protest* by another individual for the honor of another; Beawes, Lex Merc. *Bills of Exchange*, pl. 52; 5 Camp. 447.

The acceptance must be made by the drawee or some one authorized to act for him. The drawee must have capacity to act and bind himself for the payment of the bill, or it may be treated as dishonored. See ACCEPTOR SUPRA PROTEST; 2 Q. B. 16.

The acceptance and delivery of negotiable paper on Sunday is void between the parties, but if dated falsely as of another day, it is good in the hands of an innocent holder; Harrison v. Powers, 76 Ga. 218.

It may be made before the bill is drawn, in which case it must be in writing; Wilson v. Clements, 3 Mass. 1; Goodrich v. Gordon, 15 Johns. (N. Y.) 6; Kendrick v. Campbell, 1 Bail. (S. C.) 522; Williams v. Winans, 14 N. J. L. 339; Vance v. Ward, 2 Dana (Ky.) 95; Read v. Marsh, 5 B. Monr. (Ky.) 8, 41 Am. Dec. 253; Howland v. Carson, 15 Pa. 453; Beach v. Bank, 2 Ind. 488; Lewis v. Kramer, 3 Md. 265; Coolidge v. Payson, 2 Wheat. (U. S.) 66, 4 L. Ed. 185; Cassel v. Dows, 1 Blatchf. 335, Fed. Cas. No. 2,502. It may be made after it is drawn and before it comes due, which is the usual course, or after it becomes due; 1 H. Bla. 313; Williams v. Winans, 14 N. J. L. 339; or even after a previous refusal to accept; 5 East 514; Mitchell v. Degrand, 1 Mas. 176, Fed. Cas. No. 9,661. It must be made within twenty-four hours after presentment, or the holder may treat the bill as dishonored; Chit. Bills, 212, 217. And upon refusal to accept, the bill is at once dishonored, and should be protested; Chit. Bills, 217.

It may be in writing on the bill itself or on another paper; 4 East 91; Nimocks v. Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268; and it seems that the holder may insist on having a written acceptance, and in default thereof consider the bill as dishonored; 1 Dan. Neg. Inst. 406; or it may be oral; 6 C. & P. 218; Leonard v. Mason, 1 Wend. (N. Y.) 522; Williams v. Winans, 14 N. J. L. 339; Walker v. Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 252; Edson v. Fuller, 22 N. H. 183; Pierce v. Kittredge, 115 Mass. 374; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Sturges v. Bank, 75 Ill. 595; 11 Moore 320 (by the Law Merchant; Poll. Contr. 164); an acceptance by telegraph has been held good; Coffman v. Campbell, 87 Ill. 98; Central Sav. Bank v. Richards, 109 Mass. 414; Garrettson v. Bank, 39 Fed. 163, 7 L. R. A. 428; In re Armstrong, 41 Fed. 381; Garrettson v. Bank, 47 Fed. 867; North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145; but must now be in writing in many states. The usual form is by writing "accepted" across the face of the bill and signing the acceptor's name; 1 Pars. Contr. 223; 1 Man. & R. 90; but the drawee's name alone is sufficient, or any words of equivalent force to accepted. See Byles, Bills 147; 1 Atk. 611; 1 Man. & R. 90; Parkhurst v. Dickerson, 21 Pick. (Mass.) 307; Orear v. McDonald, 9 Gill. (Md.) 350, 52 Am. Dec. 703. So if the drawee writes the word "accept" and signs his name; Cortelyou v. Maben, 22 Neb. 697, 36 N. W. 159, 3 Am. St. Rep. 284.

The drawee cannot make his acceptance after the bill has been delivered to the holder's agent, though it had not been communicated to the holder; Fort Dearborn Bank v. Carter, 152 Mass. 34, 25 N. E. 27. See Trent Tile Co. v. Bank, 54 N. J. L. 599, 25 Atl. 411.

Unless forbidden by statute, a parol promise upon sufficient consideration to accept a bill of exchange binds the acceptor; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Sturges v. Bank, 75 Ill. 595; 11 M. & W. 383; Neumann v. Schroeder, 71 Tex. 81, 8 S. W. 632; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158; Barney v. Worthington, 37 N. Y. 112; Bank of Rutland v. Woodruff, 34 Vt. 92; [1894] 2 Q. B. 885; *contra*, Haeberle v. O'Day, 61 Mo. App. 390; Erickson v. Inman, 34 Or. 44, 54 Pac. 949; but the Uniform Negotiable Instruments Act in force in nearly all the states (see NEGOTIABLE INSTRUMENTS) requires a written acceptance; see much learning in Walker v. Lide, 1 Rich. (S. C.) 249, 44 Am. Dec. 253; Allen v. Leavens, 26 Or. 164, 37 Pac. 488, 26 L. R. A. 620, 46 Am. St. Rep. 613; Lindley v. Bank, 76 Ia. 629, 41 N. W. 381, 2 L. R. A. 709, 14 Am. St. Rep. 254.

As to what law governs the mode of acceptance, see 61 L. R. A. 196, n., where the cases are examined and the conclusion reached that the weight of authority is in favor of the law of the place where the agreement to accept was made, rather than that of the place of payment.

Where the holder of an overdue bill of exchange agrees by parol to accept payment in instalments, the failure of acceptor to carry out his contract does not release the drawer; Trotter v. Phillips, 2 Pa. Dist. R. 279.

An acceptance made payable at a bank au-

thorizes its payment and charge to the acceptor's account; 18 L. J. Q. B. 218; Byles, Bills 198. But the acceptor is not liable unless he assented to its being so made payable; *id.* 188; 14 East 582; and he may prove that he was ready to pay at the place named; Green v. Goings, 7 Barb. (N. Y.) 652.

The acceptance of forged paper and its payment by the drawer to a *bona fide* holder gives no right of action to recover back the money; Hortsman v. Henshaw, 11 How. (U. S.) 177, 13 L. Ed. 653; so also of bills accompanied by a forged bill of lading; Hoffman & Co. v. Bank, 12 Wall. (U. S.) 181, 20 L. Ed. 366.

See CHECK. As to acceptance of offer, see OFFER.

See BILL OF EXCHANGE; PROTEST; ACCEPTOR.

ACCEPTILATION. In Civil Law. A release made by a creditor to his debtor of his debt without receiving any consideration. Ayl. Pand. tit. 26, p. 570. It is a species of donation, but not subject to the forms of the latter, and is valid unless in fraud of creditors. Merlin, Répert.

Acceptilation may be defined *verborum conceptio qua creditor debitori, quod debet, acceptum fert;* or, a certain arrangement of words by which, on the question of the debtor, the creditor, wishing to dissolve the obligation, answers that he admits as received what in fact he has not received. The acceptilation is an imaginary payment; Dig. 46. 4. 1. 19; Dig. 2. 14. 27. 9; Inst. 3. 30. 1.

ACCEPTOR. One who accepts a bill of exchange. 3 Kent 75.

The party who undertakes to pay a bill of exchange in the first instance.

The drawee is in general the acceptor; and unless the drawee accepts, the bill is dishonored. The acceptor of a bill is the principal debtor, and the drawer the surety. He is bound, though he accepted without consideration and for the sole accommodation of the drawer. By his acceptance he admits the drawer's handwriting; for before acceptance it was incumbent upon him to inquire into the genuineness of the drawer's handwriting; 3 Kent 75; 3 Burr. 1384; 1 W. Bla. 390; Levy v. Bank, 4 Dall. (U. S.) 234, 1 L. Ed. 814.

The drawee by acceptance only vouches for the genuineness of the signature of the drawer and not of the body of the instrument; White v. Bank, 64 N. Y. 316, 21 Am. Rep. 612; Young & Son v. Lehman, Durr & Co., 63 Ala. 519.

See ACCEPTANCE.

ACCEPTOR SUPRA PROTEST. One who accepts a bill which has been protested, for the honor of the drawer or any one of the endorsers.

Any person, even the drawee himself, may accept a bill *supra protest;* Byles, Bills *262, and two or more persons may become acceptors *supra protest* for the honor of different persons. A *general* acceptance *supra protest* is taken to be for the honor of the drawer; Byles, Bills *263. The obligation of an acceptor *supra protest* is not absolute but only to pay if the drawee do not; 16 East 391. See Schofield v. Bayard, 3 Wend. (N. Y.) 491; Baring v. Clark, 19 Pick. (Mass.) 220; Exeter Bank v. Gordon, 8 N. H. 66. An acceptor *supra protest* has his remedy against the person for whose honor he accepted, and against all persons who stand prior to that person. If he takes up the bill for the honor of the endorser, he stands in the light of an endorsee paying full value for the bill, and has the same remedies to which an endorsee would be entitled against all prior parties, and he can, of course, sue the drawer and endorser; 1 Esp. 112; 3 Kent 75; Chit. Bills 312. The acceptor *supra protest* is required to give the same notice, in order to charge a party, which is necessary to be given by other holders; Baring v. Clark, 19 Pick. (Mass.) 220.

If a bill is accepted and is subsequently dishonored, the acceptor cannot then accept for the honor of the endorser, as he is already bound; 13 Ves. Jr. 180.

See ACCEPTANCE.

ACCESS. Approach, or the means or power of approaching.

Sometimes by access is understood sexual intercourse; at other times, the opportunity of communicating together so that sexual intercourse may have taken place, is also called access.

In this sense a man who can readily be in company with his wife is said to have access to her; and in that case her issue are presumed to be his issue. But this presumption may be rebutted by positive evidence that no sexual intercourse took place; 1 Turn. & R. 141.

Parents are not allowed to prove non-access for the purpose of bastardizing the issue of the wife, whether the action be civil or criminal, or whether the proceeding is one of settlement or bastardy, or to recover property claimed as heir at law; Bull. N. P. 113; Bowles v. Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497; State v. Pettaway, 10 N. C. 623; Cross v. Cross, 3 Pai. Ch. (N. Y.) 139, 23 Am. Dec. 778; Mink v. State, 60 Wis. 584, 19 N. W. 445, 50 Am. Rep. 386; Bell v. Territory, 8 Okl. 75, 56 Pac. 853; State v. Lavin, 80 Ia. 555, 46 N. W. 553; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 266; Tioga County v. South Creek Township, 75 Pa. 436, where the common law rule was applied in an extreme case, and was held not to be affected by the statute abolishing the disqualification of parties by reason of interest. The rule has been held to be modified by statutes; Evans v. State, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 6 Ann. Cas. 813, 2 L. R. A. (N. S.) 619 (where the cases are collected in a note); State v. McDowell, 101 N. C. 734, 7 S. E. 785, which changes the rule as laid down in Boykin v. Boykin, 70 N. C. 263, 16 Am. Rep. 776.

Non-access is not presumed from the mere

fact that husband and wife lived apart; 1 Gale & D. 7. See 3 C. & P. 215; 1 Sim. & S. 153; 1 Greenl. Ev. § 28.

In Canon Law. The right to some benefice at some future time.

ACCESSIO (Lat.). An increase or addition; that which lies next to a thing, and is supplementary and necessary to the principal thing; that which arises or is produced from the principal thing. Calvinus, Lex.

A manner of acquiring the property in a thing which becomes united with that which a person already possesses.

The doctrine of property arising from accessions is grounded on the rights of occupancy. It is said to be of six kinds in the Roman law.

First. That which assigns to the owner of a thing its products, as the fruit of trees, the young of animals.

Second. That which makes a man the owner of a thing which is made of another's property, upon payment of the value of the material taken. See La. Civ. Code, art. 491. As where wine, bread, or oil is made of another man's grapes or olives; 2 Bla. Com. 404; Babcock v. Gill, 10 Johns. (N. Y.) 288.

Third. That which gives the owner of land new land formed by gradual deposit. See ACCRETION; ALLUVION.

Fourth. That which gives the owner of a thing the property in what is added to it by way of adorning or completing it; as if a tailor should use the cloth of B. in repairing A.'s coat, all would belong to A.; but B. would have an action against both A. and the tailor for the cloth so used. This doctrine holds in the common law; F. Moore 20; Poph. 38; Brooke, Abr. *Propertie* 23.

Fifth. That which gives islands formed in a stream to the owner of the adjacent lands on either side.

Sixth. That which gives a person the property in things added to his own so that they cannot be separated without damage. Guyot, Répert. Univ.

Accessio includes both accession and accretion as used in the common law.

An accessory obligation, and sometimes also the person who enters into an obligation as surety in which another is principal. Calvinus, Lex.

ACCESSION. Coming into possession of a right or office; increase; augmentation; addition.

The right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accessary, either naturally or artificially. 2 Kent 360; 2 Bla. Com. 404.

If a man hath raised a building upon his own ground with the material of another, or if a man shall have built with his own materials upon the ground of another, in either case the edifice becomes the property of him to whom the ground belongs; for every building is an accession to the ground upon which it stands; and the owner of the ground, if liable at all, is only liable to the owner of the materials for the value of them; Inst. 2. 1. 29, 30; 2 Kent 362. And the same rule holds where trees, vines, vegetables, or fruits are planted or sown in the ground of another; Inst. 2. 1. 31, 32.

The building of a rail fence on another's land vests the rails in the owner of the land; Wentz v. Fincher, 34 N. C. 297, 55 Am. Dec. 416. And see Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582.

If the materials of one person are united by labor to the materials of another, so as to form a single article, the property in the joint product is, in the absence of any agreement, in the owner of the principal part of the materials by accession; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Stevens v. Briggs, 5 Pick. (Mass.) 177; Glover v. Austin, 6 *id.* 209; Pulcifer v. Page, 32 Me. 404, 54 Am. Dec. 582, and note (where the whole subject is treated); Beers v. St. John, 16 Conn. 322; Inst. 2. 1. 26; Eaton v. Lynde, 15 Mass. 242; Wetherbee v. Green, 22 Mich. 311, 7 Am. Rep. 653; Ryder v. Hathaway, 21 Pick. (Mass.) 305; Stephens v. Santee, 49 N. Y. 35; Mack v. Snell, 140 N. Y. 193, 35 N. E. 493, 37 Am. St. Rep. 534. But a vessel built of materials belonging to different persons, it has been said, will belong to the owner of the keel, according to the rule, *proprietas totius navis carinæ causam sequitur;* 2 Kent 361; Glover v. Austin, 6 Pick. (Mass.) 209; Merritt v. Johnson, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; Johnson v. Hunt, 11 Wend. (N. Y.) 139; but see Coursin's Appeal, 79 Pa. 220. It is said to be the doctrine of the civil law, that the rule is the same though the adjunction of materials may have been dishonestly contrived; for, in determining the right of property in such a case, regard is had only to the *things joined,* and not to *the persons,* as where the materials are changed in species; Wood, Inst. 93; Inst. 2. 1. 25. And see ADJUNCTION.

The tree belongs to the owner of the land on which the root is, and its fruit is to the owner of the tree; 1 Ld. Raym. 737; although limbs overhang a neighbor's land; Hoffman v. Armstrong, 46 Barb. (N. Y.) 337. The original title to ice is in the possessor of the water where it is formed; State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224; Higgins v. Kusterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160; but the sale of ice in the water is a sale of personalty; *id.*

Where, by agreement, an article is manufactured for another, the property in the article, while making and when finished, vests in him who furnished the whole or the principal part of the materials; and the maker, if he did not furnish the same, has simply a lien upon the article for his pay; Jones v. Gardner, 10 Johns. (N. Y.) 268; Eaton v. Lynde, 15 Mass. 242; Worth v. Northam, 26 N. C. 102; Foster v. Warner, 49 Mich. 641, 14 N. W. 673; Eaton v. Munroe, 52 Me. 63.

The increase of an animal, as a general thing, belongs to the owner of the dam or mother; Arkansas Valley Land and Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854; Stewart v. Ball's Adm'r, 33 Mo.

154; Hanson v. Millett, 55 Me. 184; Hazelbaker v. Goodfellow, 64 Ill. 238; but, if it be let to another, the person who thus becomes the temporary proprietor will be entitled to its increase; Putnam v. Wyley, 8 Johns. (N. Y.) 435, 5 Am. Dec. 346; Inst. 2. 1. 38; Hanson v. Millett, 55 Me. 184; Stewart v. Ball's Adm'r, 33 Mo. 154; Kellogg v. Lovely, 46 Mich. 131, 8 N. W. 699, 41 Am. Rep. 151; though it has been held that this would not be the consequence of simply putting a mare to pasture, in consideration of her services; Heartley v. Beaum, 2 Pa. 166. The increase of a female animal held under a bailment or executory contract belongs to the bailor or vendor until the agreed price is paid; Allen v. Delano, 55 Me. 113, 92 Am. Dec. 573; Elmore v. Fitzpatrick, 56 Ala. 400. See note as to title to increase of animals; 17 L. R. A. 81. The Civil Code of Louisiana, following the Roman law, made a distinction in respect of the issue of slaves, which, though born during the temporary use or hiring of their mothers, belonged not to the hirer, but to the permanent owner; Inst. 2. 1. 37; and see Jordan v. Thomas, 31 Miss. 557; Seay v. Bacon, 4 Sneed (Tenn.) 99, 67 Am. Dec. 601; 2 Kent 361; Fowler v. Merrill, 11 How. (U. S.) 396, 13 L. Ed. 736. But the issue of slaves born during a tenancy for life belonged to the tenant for life; Bohn v. Headley, 7 Harr. & J. (Md.) 257.

If there be a sale, mortgage, or pledge of a chattel, carried into effect by delivery or by a recording of the mortgage where that is equivalent to a delivery, and other materials are added, afterwards, by the labor of the vendor or mortgagor, these pass with the principal by accession; Farwell v. Smith, 12 Pick. (Mass.) 83; Jenckes v. Goffe, 1 R. I. 511.

If, by the labor of one man, the property of another has been converted into a thing of different species, so that its identity is destroyed, the original owner can only recover the value of the property in its unconverted state, and the article itself will belong to the person who wrought the conversion, if he wrought it *believing the material to be his own.* Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine; Inst. 2. 1. 25; Silsbury v. McCoon, 4 Denio (N. Y.) 332; Year B. 5 H. VII. 15; Brooke, Abr. *Property* 23; or bricks out of clay; Baker v. Meisch, 29 Neb. 227, 45 N. W. 685.

But, if there be a mere change of form or value, which does not destroy the identity of the materials, the original owner may still reclaim them or recover their value as thus improved; Brooke, Abr. *Property* 23; F. Moore 20; Wright v. Douglass, 2 N. Y. 379; Frost v. Willard, 9 Barb. (N. Y.) 440. So, if the change have been wrought by a wilful trespasser, or by one who knew that the materials were not his own; in such case, however radical the change may have been, the owner may reclaim them, or recover their value in their new shape; Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, thus, where whiskey was made out of another's corn, Wright v. Douglass, 2 N. Y. 379; shingles out of another's trees, Chandler v. Edson, 9 Johns. (N. Y.) 362; coals out of another's wood, Curtis v. Groat, 6 Johns. (N. Y.) 168, 5 Am. Dec. 204; Riddle v. Driver, 12 Ala. 590; leather out of another's hides, Hyde v. Cookson, 21 Barb. (N. Y.) 92; in all these cases, the change having been made by one who knew the materials were another's, the original owner was held to be entitled to recover the property, or its value in the improved or converted state. And see Snyder v. Vaux, 2 Rawle (Pa.) 427, 21 Am. Dec. 466; Betts v. Lee, 5 Johns. (N. Y.) 348, 4 Am. Dec. 368; Williard v. Rice, 11 Metc. (Mass.) 493, 45 Am. Dec. 226.

An aerolite which is imbedded to a depth of 3 feet is the property of the owner of the land on which it falls, rather than of the person who finds it; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481.

In International Law. The absolute or conditional acceptance, by one or several states, of a treaty already concluded between other sovereignties. Merlin, Répert. *Accession.*

It may be of two kinds: *First*, the formal entrance of a third state into a treaty so that such state becomes a party to it; and this can only be with the consent of the original parties. The accession becomes itself a treaty, and is frequently invited or provided for in the original treaty, as in the Declaration of Paris and the Convention of Geneva, 1864, Art. 9, and that of 1868, Art. 15. To the first Geneva Convention the accession of Great Britain was signified Feb. 18, 1865. So the Declaration of St. Petersburg, 1868, relative to explosive bullets is said to have "been acceded to by all the civilized states of the world." Higgins, The Hague and Other Conferences 23. *Second*, a state may accede to a treaty between other states solely for the purpose of guarantee, in which case, though a party, it is affected by the treaty only as a guarantor. 1 Oppenheim, Int. L. sec. 532.

ACCESSORY. Any thing which is joined to another thing as an ornament, or to render it more perfect.

For example, the halter of a horse, the frame of a picture, the keys of a house, and the like, each belong to the principal thing. The sale of the materials of a newspaper establishment will carry with it, as an accessory, the subscription list; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109; but a bequest of a house would not carry the furniture in it, as accessory to it. Domat, Lois Civ. Part. 2, liv. 4, tit. 2, s. 4, n. 1. *Accessorium non ducit sed sequitur principale.* Co. Litt. 152, *a.*

See Accession; Adjunction; Appurtenances.

In Criminal Law. He who is not the

chief actor in the perpetration of the offence, nor present at its performance, but is some way concerned therein, either before or after the fact committed.

An accessory before the fact is one who, being absent at the time of the crime committed, yet procures, counsels, or commands another to commit it. 1 Hale, Pl. Cr. 615.

Any one who incites persons or commands another to commit a felony is an accessory before fact and punishable as the principal felon. An accessory is never present at the commitment of the crime; Odger, C. L. 132.

In some states an accessory before the fact is treated as a principal, as also in England by statute; 2 C. & K. 887; L. R. 1 C. C. R. 77.

With regard to those cases where the principal goes beyond the terms of the solicitation, the approved test is, "Was the event alleged to be the crime to which the accused is charged to be accessory, a probable effect of the act which he counselled?" 1 F. & F. Cr. Cas. 242; Rosc. Cr. Ev. 181. When the act is committed through the agency of a person who has no legal discretion or will, as in the case of a child or an insane person, the incitor, though absent when the crime was committed, will be considered, not an accessory, for none can be accessory to the acts of a madman, but a principal in the first degree; 1 Hale, Pl. Cr. 514; U. S. v. Gooding, 12 Wheat. (U. S.) 469, 6 L. Ed. 693. But if the instrument is aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the act is committed, is an accessory before the fact; 1 R. & R. Cr. Cas. 363; 1 Den. Cr. Cas. 37; 1 C. & K. 589; or if he is present, as a principal in the second degree; 1 Fost. Cr. Cas. 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.

An accessory after the fact is one who, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon; 4 Bla. Com. 37.

In England one who harbors a felon, knowing him to be a felon (unless it is a wife harboring her husband). This does not apply to a misdemeanant. In treason such person is deemed a principal traitor; Odger, C. L. 132.

No one who is a principal can be an accessory; but if acquitted as principal he may be indicted as an accessory after the fact; State v. Davis, 14 R. I. 283.

In certain crimes, there can be no accessories; all who are concerned are principals, whether they were present or absent at the time of their commission. These are treason, and all offences below the degree of felony; 4 Bla. Com. 35; 2 Den. Cr. Cas. 453; Com. v. McAtee, 8 Dana (Ky.) 28; Williams v. State, 12 Smedes & M. (Miss.) 58; Com. v. Ray, 3 Gray (Mass.) 448; Schmidt v. State, 14 Mo. 137; Sanders v. State, 18 Ark. 198; Com. v. Burns, 4 J. J. Marsh. (Ky.) 182; Stevens v. People, 67 Ill. 587; Griffith v. State, 90 Ala. 583, 8 South. 812; U. S. v. Boyd, 45 Fed. 851. Such is the English rule; but in the United States it appears not to be determined as regards the cases of persons assisting traitors; Sergeant, Const. Law 382; In re Burr, 4 Cr. 472, 501; U. S. v. Fries, 3 Dall. 515, 1 L. Ed. 701. See Charge to Grand Jury, 2 Wall. Jr. 134, Fed. Cas. No. 18,276; U. S. v. Hanway, 2 Wall. Jr. 139, Fed. Cas. No. 15,299; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; Hanauer v. Doane, 12 Wall. (U. S.) 347, 20 L. Ed. 439. That there cannot be an accessory in cases of treason, see Davis, Cr. L. 38. *Contra*, 1 Whart. Cr. L. § 224.

There can be no accessory when there is no principal; if a principal in a transaction be not liable under our laws, no one can be charged as a mere accessory to him; U. S. v. Libby, 1 Woodb. & M. 221, Fed. Cas. No. 15,597; Armstrong v. State, 28 Tex. App. 526, 13 S. W. 864. But see Searles v. State, 6 Ohio Cir. Ct. R. 331. This rule was changed by the Stat. 1 Anne, 2, c. 9, so that if the principal felon was delivered in any way after conviction and before attainder, as by pardon or being admitted to benefit of clergy, the accessory might be tried; and that rule is substantially enacted by the Ga. Penal Code § 49, but the common law is otherwise unchanged in this country; Smith v. State, 46 Ga. 298.

Where two persons are indicted, one as principal and the other as aider or abettor, the latter may be convicted as principal, where the evidence shows he was the perpetrator of the deed; Benge v. Com., 92 Ky. 1, 17 S. W. 146.

At common law, an accessory cannot be tried, without his consent, before the conviction of the principal; (unless they are tried together; Fost. Cr. Cas. 360; Com. v. Woodward, Thatch. Cr. Cas. (Mass.) 63; Baron v. People, 1 Park. Cr. Cas. (N. Y.) 246; State v. Groff, 5 N. C. 270; Whitehead v. State, 4 Humph. (Tenn.) 278; at least not without some special reason, recognized by law, why the principal has not been tried; Smith v. State, 46 Ga. 298). This is altered by statute in most of the states. This rule is said to have been the outcome of strict medieval logic. The trial of the accused being by sacred or supernatural processes, it would be a shame to the law if the principal were acquitted after the accessory had been hanged. 2 Poll. & Maitl. 508.

But an accessory to a felony committed by several, some of whom have been convicted, may be tried as accessory to a felony committed by these last; but if he be indicted and tried as accessory to a felony committed by them all, and some of them have not been proceeded against, it is error; Stoops v. Com., 7 S. & R. (Pa.) 491, 10 Am.

Dec. 482; Com. v. Knapp, 10 Pick. (Mass.) 484, 20 Am. Dec. 534. If the principal is dead, the accessory cannot, by the common law, be tried at all. Com. v. Phillips, 16 Mass. 423; State v. McDaniel, 41 Tex. 229.

If the principal has been tried and acquitted, a person charged as accessory should be discharged on motion, but if the former is not found the latter may by statute be tried and convicted; United States v. Crane, 4 McLean, 317, Fed. Cas. No. 14,888. The trial of an accessory may proceed where the principal enters a plea of guilty, and his withdrawal of it during the trial of the former does not affect the validity of a conviction.

One indicted as an aider and abettor of the crime of murder may be convicted and sentenced for that offence, notwithstanding the principal offender had been tried previously, and convicted and sentenced for manslaughter only; Goins v. State, 46 Ohio St. 457, 21 N. E. 476.

In offenses less than felony all are principals, and on information charging one as principal he may be convicted of aiding and abetting; [1907] 1 K. B. 40.

See ABETTOR; AIDING AND ABETTING; PRINCIPAL.

ACCESSORY ACTIONS. In Scotch Law. Those which are in some degree subservient to others. Bell Dict.

ACCESSORY CONTRACT. One made for assuring the performance of a prior contract, either by the same parties or by others; such as suretyship, mortgages, and pledges.

It is a general rule that payment or release of the debt due, or the performance of a thing required to be performed by the first or principal contract, is a full discharge of such accessory obligation; Pothier, Ob. 1, c. 1, s. 1, art. 2, n. 14; *id.* n. 182, 186; see 8 Mass. 551; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Blodgett v. Wadhams, Lalor's Supp. (N. Y.) 65; Ackla v. Ackla, 6 Pa. 228; Whittemore v. Gibbs, 24 N. H. 484; and that an assignment of the principal contract will carry the accessory contract with it; Donley v. Hays, 17 S. & R. (Pa.) 400; Jackson v. Blodget, 5 Cow. (N. Y.) 202; Ord v. McKee, 5 Cal. 515; Crow v. Vance, 4 Ia. 434; Whittemore v. Gibbs, 24 N. H. 484.

If the accessory contract be a contract by which one is to answer for the debt, default or miscarriage of another, it must, under the statute of frauds, be in writing, and disclose the consideration, either explicitly, or by the use of terms from which it may be implied; 5 M. & W. 128; 5 B. & Ad. 1109; Bickford v. Gibbs, 8 Cush. (Mass.) 156; Campbell v. Knapp, 15 Pa. 27; Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545; Spencer v. Carter, 49 N. C. 287; Schoch v. McLane, 62 Mich. 454, 29 N. W. 76. Such a contract is not assignable so as to enable the assignee to sue thereon in his own name; True v. Fuller, 21 Pick. (Mass.) 140; Lamourieux v. Hewit, 5 Wend. (N. Y.) 307. A pledge of property to secure the debt of another does not come within the statute of frauds; Smith v. Mott, 76 Cal. 171, 18 Pac. 260.

ACCIDENT (Lat. *accidere*,—*ad*, to, and *cadere*, to fall). An event which, under the circumstances, is unusual and unexpected. An event the real cause of which cannot be traced, or is at least not apparent. Wabash, St. L. & Pac. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193.

The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agency. The burning of a house in consequence of a fire made for the ordinary purposes of cooking or warming the house is an accident of the first kind; the burning of the same house by lightning would be an accident of the second kind; 1 Fonbl. Eq. 374, 375, n.; Morris v. Platt, 32 Conn. 85; Crutchfield v. R. Co., 76 N. C. 322; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484. An accident may proceed or result from negligence; McCarty v. Ry. Co., 30 Pa. 247; Schneider v. Ins. Co., 24 Wis. 28, 1 Am. Rep. 257; and see 11 Q. B. 347; but a misfortune in business is not an accident; Langdon v. Bowen, 46 Vt. 512. As to what the term includes see INSURANCE, *sub-tit. Accident Insurance.* See INEVITABLE ACCIDENT.

In Equity Practice. Such an unforeseen event, misfortune, loss, act, or omission as is not the result of any negligence or misconduct in the party. Francis, Max. 87; Story, Eq. Jur. § 78.

An occurrence in relation to a contract which was not anticipated by the parties when the same was entered into, and which gives an undue advantage to one of them over the other in a court of law; Jeremy, Eq. 358. This definition is objected to, because, as accidents may arise in relation to other things besides contracts, it is inaccurate in confining accidents to contracts; besides, it does not exclude cases of unanticipated occurrence resulting from the negligence or misconduct of the party seeking relief. See also 1 Spence, Eq. Jur. 628. In many instances it closely resembles MISTAKE, which see.

In general, courts of equity will relieve a party who cannot obtain justice at law from the consequences of an accident which will justify the interposition of a court of equity.

The jurisdiction which equity exerts in case of accident is mainly of two sorts: over bonds with penalties to prevent a forfeiture where the failure is the result of accident; 2 Freem. Ch. 128; 1 Spence, Eq. Jur. 629; Rives v. Toulmin, 25 Ala. 452; Garvin v. Squires, 9 Ark. 533, 50 Am. Dec. 224; Chase v. Barrett, 4 Paige, Ch. (N. Y.) 148; Price's Ex'r v. Fuqua's Adm'r, 4 Munf. (Va.)

68; Streeper v. Williams, 48 Pa. 450; as sickness; Jones v. Woodhull, 1 Root (Conn.) 298; Doty v. Whittlesey, 1 Root (Conn.) 310; or where a bond has been lost; Deans v. Dortch, 40 N. C. 331; but if the penalty be liquidated damages, there can be no relief; Merwin, Eq. § 409. And, second, where a negotiable or other instrument has been lost, in which case no action lay at law, but where equity will allow the one entitled to recover upon giving proper indemnity; 4 Price 176; 7 B. & C. 90; Savannah Nat. Bank v. Haskins, 101 Mass. 370, 3 Am. Rep. 373; Bisph. Eq. § 177. In some states it has been held that a court of law can render judgment for the amount, requiring the defendant to give a bond of indemnity; Bridgeford v. Mfg. Co., 34 Conn. 546, 91 Am. Dec. 744; Swift v. Stevens, 8 Conn. 431; Almy v. Reed, 10 Cush. (Mass.) 421. Relief against a penal bond can now be obtained in almost all common-law courts; Merwin, Eq. § 411.

The ground of equitable interference where a party has been defeated in a suit at law to which he might have made a good defence had he discovered the facts in season, may be referred also to this head; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 63; Pearce v. Chastain, 3 Ga. 226, 46 Am. Dec. 423; Brandon v. Green, 7 Humphr. (Tenn.) 130; Meek v. Howard, 10 Smedes & M. (Miss.) 502; Davis v. Tileston, 6 How. (U. S.) 114, 12 L. Ed. 366; see Pemberton v. Kirk, 39 N. C. 178, but in such case there must have been no negligence on the part of the defendant; Semple v. McGatagan, 10 Smedes & M. (Miss.) 98; Brandon v. Green, 7 Humphr. (Tenn.) 130; Miller v. McGuire, Morr. (Ia.) 150; Cosby's Heirs v. Wickliffe, 7 B. Monr. (Ky.) 120.

Under this head equity will grant relief in cases of the defective exercise of a power in favor of a purchaser, creditor, wife, child, or charity, but not otherwise; Bisph. Eq. § 182. So also in other cases, viz., where a testator cancels a will, supposing that a later will is duly executed, which it is not; where boundaries have been accidentally confused; where there has been an accidental omission to endorse a promissory note, etc.; *id.* § 183.

It is exercised by equity where there is not a plain, adequate, and complete remedy at law; Tucker v. Madden, 44 Me. 206; but not where such a remedy exists; Hudson v. Kline, 9 Gratt. (Va.) 379; Grant v. Quick, 5 Sandf. (N. Y.) 612; and a complete excuse must be made; English v. Savage, 14 Ala. 342.

See INEVITABLE ACCIDENT; MISTAKE; FORTUITOUS EVENT; NEGLIGENCE; INSURANCE; ACT OF GOD.

ACCIDENT INSURANCE. See INSURANCE.

ACCIDENTAL. Not according to the usual course of things; casual; fortuitous. United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

ACCIDENTAL DEATH. See DEATH; INSURANCE.

ACCOMENDA. A contract which takes place when an individual intrusts personal property with the master of a vessel, to be sold for their joint account.

In such case, two contracts take place: first, the contract called *mandatum*, by which the owner of the property gives the master power to dispose of it; and the contract of partnership, in virtue of which the profits are to be divided between them. One party runs the risk of losing his capital, the other his labor. If the sale produces no more than first cost, the owner takes all the proceeds: it is only the profits which are to be divided; Emerigon. Mar. Loans, s. 5.

ACCOMMODATION PAPER. Promissory notes or bills of exchange made, accepted, or endorsed without any consideration therefor.

Such paper, in the hands of the party to whom it is made or for whose benefit the accommodation is given, is open to the defence of want of consideration, but when taken by third parties in the usual course of business, is governed by the same rules as other paper; 2 Kent 86; 1 M. & W. 212; 33 Eng. L. & Eq. 282; Pierson v. Boyd, 2 Duer (N. Y.) 33; Farmers' & Mechanics' Bank v. Rathbone, 26 Vt. 19, 58 Am. Dec. 200; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Mosser v. Criswell, 150 Pa. 409, 24 Atl. 618.

Where an accommodation note is purchased from the payee at a usurious rate, it is void as against the accommodation maker, though it was represented as business paper; Whedon v. Hogan, 8 Misc. Rep. 323, 28 N. Y. Supp. 554.

An endorsement on accommodation paper may be withdrawn before it is discounted unless rights have in the meantime, for valuable consideration, attached to others; Berkeley v. Tinsley, 88 Va. 1001, 14 S. E. 842.

The Neg. Instr. Acts do not change the former rules as to who may become accommodation parties. Selover, Neg. Instr. 105.

ACCOMMODATUM. The same as *commodatum, q. v.;* Anders. Law Dict., quoting Sir William Jones. The word is not found in Kent, or in Edw. Bailments.

ACCOMPLICE (Lat. *ad* and *complicare—con*, with, together, *plicare*, to fold, to wrap, —to fold together).

In Criminal Law. One who is concerned in the commission of a crime.

"One who is in some way concerned in the commission of a crime, though not as a principal." Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

"One of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow criminals for the fur-

therance of justice, which might otherwise be eluded." Cross v. People, 47 Ill. 152, 95 Am. Dec. 474.

"One who being present aids by acts or encourages by words the principal offender in the commission of the offense," is erroneous as a definition; such person is a principal; Smith v. State, 13 Tex. App. 507. He must in some manner assist or participate in the criminal act, and by that connection he becomes equally involved in guilt with the other party; People v. Smith, 28 Hun (N. Y.) 626; Cross v. People, 47 Ill. 152, 95 Am. Dec. 474. The purchaser of liquor sold in violation of the law is not an accomplice; State v. Teahan, 50 Conn. 92; People v. Smith, 28 Hun (N. Y.) 626; nor is a minor child who is coerced into assisting in an unlawful act; People v. Miller, 66 Cal. 468, 6 Pac. 99; Beal v. State, 72 Ga. 200; nor one who does not immediately disclose the fact that a homicide has been committed; Bird v. U. S., 187 U. S. 118, 23 Sup. Ct. 42, 47 L. Ed. 100; nor one who joins in a game with others who are betting, but does not bet himself; Bass v. State, 37 Ala. 469.

The term in its fulness includes in its meaning all persons who have been concerned in the commission of a crime, all *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessaries before or after the fact; Fost. Cr. Cas. 341; 1 Russ. Cr. 21; 4 Bla. Com. 331; 1 Phil. Ev. 23; Merlin, Répert. *Complice.*

It has been questioned, whether one who was an accomplice to a suicide can be punished as such. A case occurred in Prussia where a soldier, at the request of his comrade, had cut the latter in pieces; for this he was tried capitally. In the year 1817, a young woman named Leruth received a recompense for aiding a man to kill himself. He put the point of a bistoury on his naked breast, and used the hand of the young woman to plunge it with greater force into his bosom; hearing some noise, he ordered her away. The man, receiving effectual aid, was soon cured of the wound which had been inflicted, and she was tried and convicted of having inflicted the wound. Lepage, *Science du Droit*, ch. 2, art. 3, § 5. The case of Saul, the King of Israel, and his armor-bearer (1 Sam. xxxi. 4), and of David and the Amalekite (2 Sam. i. 2), will doubtless occur to the reader.

It has been held, that, if one counsels another to commit suicide, he is principal in the murder; for it is a presumption of law that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise, as, for example, that it was received with scoff or manifestly rejected and ridiculed at the time; Commonwealth v. Bowen, 13 Mass. 359, 7 Am. Dec. 154.

It is now finally settled that it is not a rule of law but of *practice* only that a jury should not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law. The better practice is for the judge to advise the jury to acquit, unless the testimony of the accomplice is corroborated, not only as to the circumstances of the offence, but also as to the participation of the accused in the transaction; and when several parties are charged, that it is not sufficient that the accomplice should be confirmed, as to one or more of the prisoners, to justify a conviction of those prisoners with respect to whom there is no confirmation; 1 Leach 464; 31 How. St. Tr. 967; 7 Cox, Cr. Cas. 20; Com. v. Savory, 10 Cush. (Mass.) 535; Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; Flanagin v. State, 25 Ark. 92; People v. Jenness, 5 Mich. 305; Carroll v. Com., 84 Pa. 107. See 1 Fost. & F. 388; Com. v. Holmes, 127 Mass. 424, 34 Am. Rep. 391, 408.

Though the evidence of an accomplice uncorroborated is sufficient, if the jury are fully convinced of the truth of his statements; Linsday v. People, 63 N. Y. 143; Collins v. People, 98 Ill. 584, 38 Am. Rep. 105; it is the settled course of practice in England not to convict a prisoner, excepting under very special circumstances, upon the uncorroborated testimony of an accomplice; [1908] 2 K. B. 680; C. of Cr. App. In the federal courts the testimony of an accomplice need not necessarily be corroborated; Ahearn v. U. S., 158 Fed. 606, 85 C. C. A. 428; it should be received with caution; U. S. v. Ybanez, 53 Fed. 536; State v. Minor, 117 Mo. 302, 22 S. W. 1085; State v. Patterson, 52 Kan. 335, 34 Pac. 784.

This general statement is substantially the result of the cases in both countries as to the treatment of the testimony of an accomplice. As to the corroboration required, the cases may be divided into three classes, requiring corroboration—1. Of that part of the testimony which connects the prisoner with the crime. 2. Of a material part of the testimony. 3. Of any portion of the testimony. The cases may be found in an able note in 71 Am. Dec. 671.

An accomplice, upon making a full disclosure, has a just claim but not a legal right to recommendation for a pardon, which cannot however be pleaded in bar to the indictment; U. S. v. Ford, 99 U. S. 594, 25 L. Ed. 399; Ex parte Wells, 18 How. (U. S.) 307, 15 L. Ed. 421; but he may use it to put off the trial, in order to give him time to apply for a pardon; *id.;* Cowp. 331; 1 Leach 115.

An accomplice is not incompetent when indicted separately; State v. Umble, 115 Mo. 452, 22 S. W. 378.

See KING'S EVIDENCE; TROVER; ACCESSORY; ABORTION.

ACCORD AND SATISFACTION. An agreement between two parties to give and accept something in satisfaction of a right of action which one has against the other, which when performed is a bar to all actions upon this account; generally used in the phrase "accord and satisfaction." 3 Bla. Com. 15; Bacon, Abr. *Accord;* Franklin Fire Ins. Co. v. Hamill, 5 Md. 170. It may be pleaded to all actions except real actions; Bacon, Abr. *Accord* (B); Pulliam v. Taylor, 50 Miss. 257.

Though here correctly defined as now

recognized as "an agreement," it should be borne in mind that the acceptance of satisfaction for damages caused by a tort was recognized as a bar to a subsequent action long before the recognition of the validity of contracts. This is shown by Professor Ames in 9 Harv. L. Rev. 285, by authorities as far back as the time of Edward I. The recognition of an accord as a valid bilateral contract was a tardy one as shown by the early cases collected in 17 Harv. L. Rev. 459, though it may now be considered as a contract for the breach of which an action will lie; Very v. Levy, 13 How. (U. S.) 345, 14 L. Ed. 173; Savage v. Everman, 70 Pa. 319, 10 Am. Rep. 680; Schweider v. Lang, 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; White v. Gray, 68 Me. 579; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587; Chicora Fertilizer Co. v. Dunan, 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401; 15 Q. B. 677; 10 C. B. (N. S.) 259.

It must be *legal*. An agreement to drop a criminal prosecution, as a satisfaction for an assault and imprisonment, is void; 5 East 294; Smith v. Grable, 14 Ia. 429; Walan v. Kerby, 99 Mass. 1.

It must be *advantageous* to the creditor, and he must receive an actual benefit therefrom which he would not otherwise have had; Keeler v. Neal, 2 Watts (Pa.) 424; Davis v. Noaks, 3 J. J. Marsh. (Ky.) 497; Hutton v. Stoddart, 83 Ind. 539. Restoring to the plaintiff his chattels or his land, of which the defendant has wrongfully dispossessed him, will not be any consideration to support a promise by the plaintiff not to sue him for those injuries; Bacon, Abra. *Accord*, A; Jones v. Bullitt, 2 Litt. (Ky.) 49; Blinn v. Chester, 5 Day (Conn.) 360; Williams v. Stanton, 1 Root (Conn.) 426; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469. The payment of a part of the whole debt due is not a good satisfaction, even if accepted; 1 Stra. 426; 2 Greenl. Ev. § 28; 10 M. & W. 367; 12 Price, Ex. 183; Hardey v. Coe, 5 Gill (Md.) 189; Warren v. Skinner, 20 Conn. 559; Hayes v. Davidson, 70 N. C. 573; Foster v. Collins, 6 Heisk. (Tenn.) 1; Smith v. Bartholomew, 1 Metc. (Mass.) 276, 35 Am. Dec. 365; Hinckley v. Arey, 27 Me. 362; White v. Jordon, 27 Me. 370; Eve v. Mosely, 2 Strobh. (S. C.) 203; Williams v. Langford, 15 B. Monr. (Ky.) 566; Line v. Nelson, 38 N. J. L. 358; Gussow v. Beineson, 76 N. J. L. 209, 68 Atl. 907; Schlessinger v. Schlessinger, 39 Colo. 44, 88 Pac. 970, 8 L. R. A. (N. S.) 863; Hayes v. Davidson, 70 N. C. 573; Curran v. Rummell, 118 Mass. 482; Tucker v. Murray, 2 Pa. Dist. R. 497; otherwise, however, if the amount of the claim is disputed; Cro. Eliz. 429; 3 M. & W. 651; McDaniels v. Lapham, 21 Vt. 223; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Palmerton v. Huxford, 4 Denio (N. Y.) 166; Howard v. Norton, 65 Barb. (N. Y.) 161; Bull v. Bull, 43 Conn. 455; Tyler Cotton Press Co. v. Chevalier, 56 Ga. 494; McCall v. Nave, 52 Miss. 494; Childs v. Lus. Co., 56 Vt. 609; Brooks v. Moore, 67 Barb. (N. Y.) 393; Stimpson v. Poole, 141 Mass. 502, 6 N. E. 705; Perkins v. Headley, 49 Mo. App. 556; or contingent; Bryant v. Proctor, 14 B. Monr. (Ky.) 451; even if a favorable result of a suit could not have been predicted; Zoebisch v. Von Minden, 120 N. Y. 406, 24 N. E. 795; or there is a release under seal; Redmond & Co. v. Ry., 129 Ga. 133, 58 S. E. 874; Gordon v. Moore, 44 Ark. 349, 51 Am. Rep. 606; or a receipt in full upon payment of an undisputed part of the claim after a refusal to pay what is disputed; Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099 (citing a long line of cases); Tanner v. Merrill, 108 Mich. 58, 65 N. W. 664, 31 L. R. A. 171, 62 Am. St. Rep. 687; Ostrander v. Scott, 161 Ill. 339, 43 N. E. 1089; or the debtor is insolvent; Shelton v. Jackson, 20 Tex. Civ. App. 443, 49 S. W. 415; or even thought to be insolvent but found not to be; Rice v. Mortgage Co., 70 Minn. 77, 72 N. W. 826 (see criticism of the last two cases in 12 Harv. L. Rev. 515, 521); or in contemplation of bankruptcy; Melroy v. Kemmerer, 218 Pa. 381, 67 Atl. 699, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 888; or there are mutual demands; 6 El. & B. 691; and if the negotiable note of the debtor, 15 M. & W. 23, or of a third person, Brooks v. White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Bank of Montpelier v. Dixon, 4 Vt. 587, 24 Am. Dec. 640 (where the cases are collected); Boyd v. Hitchcock, 20 Johns. (N. J.) 76, 11 Am. Dec. 247; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Sanders v. Bank, 13 Ala. 353; 4 B. & C. 506; Brassell v. Williams, 51 Ala. 349; for part, be given and received, it is sufficient; or if a part be given at a different place, Jones v. Perkins, 29 Miss. 139, 64 Am. Dec. 136, or an earlier time, it will be sufficient; Goodnow v. Smith, 18 Pick. (Mass.) 414, 29 Am. Dec. 600; and, in general, payment of part suffices if any additional benefit be received; Bowker v. Harris, 30 Vt. 424; Rose v. Hall, 26 Conn. 392, 68 Am. Dec. 402; Keeler v. Salisbury, 27 Barb. (N. Y.) 485; Mathis v. Bryson, 49 N. C. 508; Cool v. Stone, 4 Ia. 219; Potter v. Douglass, 44 Conn. 541.

"The result of the modern cases is that the rule only applies when the larger sum is liquidated, and where there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it;" Chicago, M. & St. P. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. Ed. 1099, reversing 92 Fed. 968, 35 C. C. A. 120.

Acceptance by several creditors, by way of

composition of sums respectively less than their demands, held to bar actions for the residue; Murray v. Snow, 37 Ia. 410; and it makes no difference that one creditor refuses to sign, where the agreement is not upon condition that all should sign; Crawford v. Krueger, 201 Pa. 348, 50 Atl. 931. The receipt of specific property, or the performance of services, if agreed to, is sufficient, whatever its value; Reed v. Bartlett, 19 Pick. (Mass.) 273; Blinn v. Chester, 5 Day (Conn.) 360; Brassell v. Williams, 51 Ala. 349; provided the value be not agreed upon; Howard v. Norton, 65 Barb. (N. Y.) 161; but both delivery and acceptance must be proved; Maze v. Miller, 1 Wash. C. C. 328, Fed. Cas. No. 9,362; Sinard v. Patterson, 3 Blackf. (Ind.) 354; State Bank v. Littlejohn, 18 N. C. 565; Stone v. Miller, 16 Pa. 450; 4 Eng. L. & Eq. 185. See full notes in 20 L. R. A. 785; 11 L. R. A. (N. S.) 1018; 14 *id.* 954.

It must be *certain.* An agreement that the defendant shall relinquish the possession of a house in satisfaction, etc., is not valid, unless it is agreed at what time it shall be relinquished; Yelv. 125. See 4 Mod. 88; Bird v. Caritat, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433; Frentress v. Markle, 2 G. Greene (Ia.) 553; United States v. Clarke, 1 Hempst. 315, Fed. Cas. No. 14,812; Costello v. Cady, 102 Mass. 140.

It must be *complete.* That is, everything must be done which the party undertakes to do; Comyns, Dig. *Accord,* B, 4; Cro. Eliz. 46; Eng. L. & Eq. 296; Frentress v. Markle, 2 G. Greene (Ia.) 553; Clark v. Dinsmore, 5 N. H. 136; Watkinson v. Inglesby, 5 Johns. (N. Y.) 386; Bigelow v. Baldwin, 1 Gray (Mass.) 245; Frost v. Johnson, 8 Ohio 393; Woodruff v. Dobbins, 7 Blackf. (Ind.) 582; Bryant v. Proctor, 14 B. Monr. (Ky.) 459; Ballard v. Noaks, 2 Ark. 45; Cushing v. Wyman, 44 Me. 121; Reed v. Martin, 29 Pa. 179; Flack v. Garland, 8 Md. 188; Overton v. Conner, 50 Tex. 113; Young v. Jones, 64 Me. 563, 18 Am. Rep. 279; but this performance may be merely the substitution of a new undertaking for the old by way of novation if the parties so intended, whereby the original claim is extinguished; 2 B. & Ad. 328; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Gerhart Realty Co. v. Assurance Co., 94 Mo. App. 356, 68 S. W. 86; Brunswick & Western R. Co. v. Clem, 80 Ga. 534, 7 S. E. 84; Yazoo & Mississippi Val. R. Co. v. Fulton, 71 Miss. 385, 14 South. 271; Goodrich v. Stanley, 24 Conn. 613; Creager v. Link, 7 Md. 259; 16 Q. B. 1039.

The doctrine that payment by or with the money of a third person is not a discharge of the debtor was established in Cro. Eliz. 541, which was followed in the early American cases, but its doctrine was much limited in 9 C. B. 173, and 10 Exch. 845, where it was held that payment would be good if made either with previous authority or subsequent ratification of the debtor, and that the latter could be made at the trial. This view has prevailed in England and it is held that a plea of payment is sufficient ratification; L. R. 6 Exch. 124.

In this country the weight of authority is in favor of recognizing such payment as a defense, special recognition being accorded to facts showing that the payment was on behalf of the debtor and ratified by him; Snyder v. Pharo, 25 Fed. 398; Hartley v. Sandford, 66 N. J. L. 632, 50 Atl. 454, 55 L. R. A. 206. In New York the early case cited was followed in Bleakley v. White, 4 Paige (N. Y.) 654; Daniels v. Hallenbeck, 19 Wend. (N. Y.) 408; Atlantic Dock Co. v. Mayor, 53 N. Y. 64; but in Wellington v. Kelly, 84 N. Y. 543, the question was not decided, but passed with a reference to the limitation in England which had been followed in Clow v. Borst, 6 Johns. (N. Y.) 37, which had "not been authoritatively overruled, and we need not now determine whether it should any longer be regarded as authority." And see City of Albany v. McNamara, 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212; Windmuller v. Rubber Co., 123 App. Div. 424, 107 N. Y. Supp. 1095. In Kentucky the case cited *supra* from Stark's Adm'r v. Thompson's Ex'rs, 3 T. B. Monr. (Ky.) 302, stands without any subsequent ruling on the point.

The cases are collected in 23 L. R. A. 120, and 17 Harv. L. Rev. 472.

It is a question for the jury whether the agreement or the performance was accepted in satisfaction; Bahrenburg v. Fruit Co., 128 Mo. App. 526, 107 S. W. 440; 16 Q. B. 1039; and in some cases it is sufficient if performance be tendered and refused; 2 B. & Ad. 328. If, however, it was the performance of the accord which was to be the satisfaction, the creditor may sue on either the old cause of action or the accord; Babcock v. Hawkins, 23 Vt. 561; but if he sues on the original claim without giving time for performance, the debtor must not go into equity, but may have his action on the accord; Hunt v. Brown, 146 Mass. 253, 15 N. E. 587.

An accord with tender of satisfaction is not sufficient, but it must be executed; 3 Bingh. N. C. 715; Brooklyn Bank v. De Grauw, 23 Wend. (N. Y.) 342, 35 Am. Dec. 569; Simmons v. Clark, 56 Ill. 96; Cushing v. Wyman, 44 Me. 121; Hosler v. Hursh, 151 Pa. 415, 25 Atl. 52; Phinizy v. Bush, 129 Ga. 479, 59 S. E. 259; Clarke v. Hawkins, 5 R. I. 219; but where there is a sufficient consideration to support the agreement, it may be that a tender, though unaccepted, would bar an action; Story, Contr. § 1357; Coit v. Houston, 3 Johns. Cas. (N. Y.) 243. Satisfaction without accord is not sufficient; 9 M. & W. 596; nor is accord without satisfaction; 3 B. & C. 257.

The burden of proving accord and satisfaction is on him who alleges it; but it may

be established by conduct and circumstances, such as the silence of the debtor after notice that the creditor will not accept a tender in full payment; Bahrenburg v. Fruit Co., 128 Mo. App. 526, 107 S. W. 440.

A case of very frequent occurrence is where the amount is disputed or unliquidated and the debtor sends a check for part of the amount as in full if accepted, which the creditor retains and protests that it is received only in part payment. The weight of American authority now holds that there is an accord and satisfaction; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785; Nassoiy v. Tomlinson, 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695; Pollman & Bros. Coal & Sprinkling Co. v. City of St. Louis, 145 Mo. 651, 47 S. W. 563; McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038; Bingham v. Browning, 197 Ill. 122, 64 N. E. 317; Anderson v. Granite Co., 92 Me. 429, 43 Atl. 21, 69 Am. St. Rep. 522; Connecticut River Lumber Co. v. Brown, 68 Vt. 239, 35 Atl. 56; Potter v. Douglass, 44 Conn. 541; Talbott v. English, 156 Ind. 299, 59 N. E. 857; Hamilton & Co. v. Stewart, 108 Ga. 472, 34 S. E. 123; Neely v. Thompson, 68 Kan. 193, 75 Pac. 117; Cooper v. R. Co., 82 Miss. 634, 35 South. 162 (where a receipt in full was signed and a verbal protest made to the creditor's agent that no rights were waived); Hull v. Johnson & Co., 22 R. I. 66, 46 Atl. 182 (where the check was specifically marked good only if accepted in full, and those words were stricken out before cashing it). Some cases explicitly require the statement that the payment is in full or circumstances amounting to it in effect; Fremont Foundry & Mach. Co. v. Norton, 3 Neb. (Unof.) 804, 92 N. W. 1058; Whitaker v. Ellenberg, 70 App. Div. 489, 75 N. Y. Supp. 106; Van Dyke v. Wilder, 66 Vt. 579, 29 Atl. 1016.

One New York case requires separate notice. The indebtedness was for legal services and a check was sent for less than the amount named; plaintiff wrote that under no circumstances would he accept it in full but would apply it on account; having waited two days for a reply and received none, he collected the check; held no accord and satisfaction; Mack v. Miller, 87 App. Div. 359, 84 N. Y. Supp. 440. See 17 Harv. L. Rev. 272, 469.

In other states it is held to be no satisfaction, but only, as tendered, a payment on account; Krauser v. McCurdy, 174 Pa. 174, 34 Atl. 518; Louisville, N. A. & C. Ry. Co. v. Helm, 109 Ky. 388, 59 S. W. 323; Demeules v. Tea Co., 103 Minn. 150, 114 N. W. 733, 14 L. R. A. (N. S.) 954, 123 Am. St. Rep. 315; and with these courts is the English Court of Appeal; 22 Q. B. D. 610, where it was held that the keeping of the check sent in satisfaction of a claim for a larger amount was not in law conclusive, but that whether there was an accord and satisfaction was a question for the jury.

It must be *by the debtor or his agent;* Booth v. Smith, 3 Wend. (N. Y.) 66; Ellis v. Bibb, 2 Stew. (Ala.) 84; and if made by a stranger, will not avail the debtor in an action at law; Stra. 592; Stark's Adm'r v. Thompson's Ex'rs, 3 T. B. Monr. (Ky.) 302; Clow v. Borst, 6 Johns. (N. Y.) 37. His remedy in such a case is in equity; 3 Taunt. 117; 5 East 294. It is often difficult to distinguish whether an agreement for compromise is an accord without satisfaction or a novation. It is the tendency of the courts to construe a doubtful case as the latter, which extinguishes the old contract; see 16 Y. L. J. 133. It was held that an agreement to pay less than the amount contemplated in an unmatured and contingent obligation, for which the plaintiff had no cause of action, was a novation and that no recovery could be had on the original contract; Bandman v. Finn, 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134. The new undertaking may be executory; Morehouse v. Bank, 98 N. Y. 503; but if it appears directly or inferentially that it is accepted in satisfaction, the original cause of action is extinguished; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491; as also if the new contract is inconsistent with the old; Renard v. Sampson, 12 N. Y. 561; Stow v. Russell, 36 Ill. 18. The original claim need not have been valid, but must have been *bona fide;* Flegal v. Hoover, 156 Pa. 276, 27 Atl. 162; Wehrum v. Kuhn, 61 N. Y. 623. The cases are collected in Clark, Cont. 125. When the consideration is executory, the original obligation continues until the new agreement is executed; and if that fails, it is revived; Ramborger's Adm'r v. Ingraham, 38 Pa. 147. It is not the new agreement, but its execution, which discharges the old one; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13.

Where an accord and satisfaction is the substitution of a new contract for an old one, and the promise is accepted without performance, it is a novation; Harrison v. Henderson, 67 Kan. 194, 72 Pac. 875, 62 L. R. A. 760, 100 Am. St. Rep. 393. In case of a disputed claim, an agreement to pay part to a third person in satisfaction of the whole is a good consideration; Mitchell v. Knight, 7 Ohio Cir. Ct. R. 204.

Certain English rules are thus stated: Where there has been no performance and a right of action has accrued to one party, the other party may offer a different performance and other amends, which if accepted and executed will discharge his liability.

Where performance is to be the payment of a sum of money, payment of a smaller sum is not accord and satisfaction. There must be some other consideration. But if paid at an earlier date, or in a different place than that agreed, it is a discharge. A negotiable instrument for a less amount may be a sat-

isfaction if accepted for the purpose; Odger, C. L. 757.

Accord with satisfaction, when completed, has two effects: it is a payment of the debt; and it is a species of sale of the thing given by the debtor to the creditor, in satisfaction; but it differs from it in this, that it is not valid until the delivery of the article, and there is no warranty of the thing thus sold, except perhaps the title; for in regard to this it cannot be doubted that if the debtor gives on an accord and satisfaction the goods of another, there would be no satisfaction. But the intention of the parties is of the utmost consequence; Bowker v. Harris, 30 Vt. 424; Sutherlin v. Bloomer, 50 Or. 398, 93 Pac. 135; as the debtor will be required only to execute the new contract to that point whence it was to operate a satisfaction of the pre-existing liability.

An accord and satisfaction may be rescinded by subsequent agreement; Heavenrich v. Steele, 57 Minn. 221, 58 N. W. 982; Alexander v. R. Co., 54 Mo. App. 66; it may be avoided on account of fraud; Butler v. R. Co., 88 Ga. 594, 15 S. E. 668; Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443.

In America accord and satisfaction may be given in evidence under the general issue in *assumpsit*, but it must be pleaded specially in debt, covenant and trespass; 2 Greenl. Ev. (15th ed.) § 29. In England it must be pleaded specially in all cases; Rosc. N. P. 569. See PAYMENT; ACCEPTANCE; AGREEMENT; NOVATION.

ACCOUCHEMENT. The act of giving birth to a child. It is frequently important to prove the filiation of an individual; this may be done in several ways. The fact of the accouchement may be proved by the direct testimony of one who was present, as a physician, a midwife, or other person; 1 Bouvier, Inst. n. 314. See BIRTH.

ACCOUNT. A detailed statement of the mutual demands in the nature of debit and credit between parties, arising out of contracts or some fiduciary relation; Whitwell v. Willard, 1 Metc. (Mass.) 216; Blakeley v. Biscoe, 1 Hempst. 114, Fed. Cas. No. 18,239; Portsmouth v. Donaldson, 32 Pa. 202, 72 Am. Dec. 782; Turgeon v. Cote, 88 Me. 108, 33 Atl. 787.

A statement of the receipts and payments of an executor, administrator, or other trustee of the estate confided to him.

An *open* account is one in which some term of the contract is not settled by the parties, whether the account consists of one item or many; Sheppard v. Wilkins, 1 Ala. 62; Goodwin v. Hale, 6 Ala. 438; Dunn v. Fleming's Estate, 73 Wis. 545, 41 N. W. 707.

A form of action called also *account render*, in which such a statement, and the recovery of the balance which thereby appears to be due, is sought by the party bringing it.

In Practice. In Equity. Jurisdiction concurrent with courts of law is taken over matters of account; Post v. Kimberly, 9 Johns. (N. Y.) 470; Bruce v. Burdet, 1 J. J. Marsh (Ky.) 82; Nelson v. Allen, 1 Yerg. (Tenn.) 360; McLaren v. Steapp, 1 Ga. 376, on three grounds: mutual accounts; 18 Beav. 575; dealings so complicated that they cannot be adjusted in a court of law; 1 Sch. & L. 305; 2 H. L. Cas. 28; Hickman v. Stout, 2 Leigh (Va.) 6; Whitwell v. Willard, 1 Metc. (Mass.) 216; Cullum v. Bloodgood, 15 Ala. 34; Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Kaston v. Paxton, 46 Or. 308, 80 Pac. 209, 114 Am. St. Rep. 871; McMullen Lumber Co. v. Strother, 136 Fed. 295, 69 C. C. A. 433; Chase v. Phosphate Co., 32 App. Div. 400, 53 N. Y. Supp. 220; the existence of a fiduciary relation between the parties; 1 Sim. Ch. N. S. 573; Massachusetts General Hospital v. Assur. Co., 4 Gray (Mass.) 227; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. A bill for an account must show by specific allegations one of these grounds of equity; Walker v. Brooks, 125 Mass. 241; and it must appear in the stating part of the bill; a prayer for an account is not sufficient; Bushnell v. Avery, 121 Mass. 148.

In addition to these peculiar grounds of jurisdiction, equity will grant a discovery in cases of account on the general principles regulating discoveries; Knotts v. Tarver, 8 Ala. 743; Wilson v. Mallett, 4 Sandf. (N. Y.) 112; Walker v. Cheever, 35 N. H. 339; Sheridan v. Ferry Co., 214 Pa. 117, 63 Atl. 418; Sanborn v. Kittredge, 20 Vt. 632, 50 Am. Dec. 58; and will afterwards proceed to grant full relief in many cases; 6 Ves. 136; Rathbone v. Warren, 10 Johns. (N. Y.) 587; Fowle v. Lawrason, 5 Pet. (U. S.) 495, 8 L. Ed. 204. But "to say that whenever there is a right of discovery there must be an account allowed is rather reversing the thing. Discovery, on the contrary, is incident to the order to account. The two things are separate." 2 H. L. Cas. 28.

The remedy of part owners of a ship for adjustments of accounts between themselves is in equity; Milburn v. Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; State v. Watts, 7 La. 440, 26 Am. Dec. 507; and so it is when business is carried on upon joint account, whether as partners or not; Clarke v. Pierce, 52 Mich. 157, 17 N. W. 780; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147.

Equitable jurisdiction over accounts applies to the *appropriation of payments;* 1 Story, Eq. Jur. (8th Ed.) § 459; *agency;* Henderson v. McClure, 2 McCord, Eq. (S. C.) 469; including factors, bailiffs, consignees, receivers, and stewards, where there are mutual or complicated accounts; 9 Beav. 284; 2 H. L. Cas. 28 (where, however, it was held that the relation of banker and customer is not such fiduciary relation as to give jurisdiction; *id.* 35); Rembert v. Brown, 17 Ala. 667; *trustees' accounts;* 1

Story, Eq. Jur. § 465; 2 M. & K. 664; Scott v. Gamble, 9 N. J. Eq. 218; administrators and executors; Adams' Heirs v. Adams, 22 Vt. 50; Stong v. Wilkson, 14 Mo. 116; Fleming v. McKesson, 56 N. C. 316; Colbert v. Daniel, 32 Ala. 314; Guardians, etc.; Moore v. Hood, 9 Rich. Eq. (S. C.) 311, 70 Am. Dec. 210; Johnson v. Miller, 33 Miss. 553; *tenants in common*, joint tenants of real estate or chattels; 4 Ves. 752; 1 Ves. & B. 114; partners; Perkins v. Perkins' Ex'r, 3 Gratt. (Va.) 364; Carter v. Holbrook, 3 Cush. (Mass.) 331; Washburn v. Washburn, 23 Vt. 576; Hough v. Chaffin, 4 Sneed (Tenn.) 238; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; *directors of companies*, and similar officers; 1 Y. & C. 326; *apportionment* of apprentice fees; 2 Bro. C. C. 78; or rents; 2 P. Wms. 176, 501; see 1 Story, Eq. Jur. § 480; *contribution* to relieve real estate; 3 Co. 12; 2 Bos. & P. 270; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Taylor v. Porter, 7 Mass. 355; *general average;* 4 Kay & J. 367; Sturgess v. Cary, 2 Curt. 59, Fed. Cas. No. 13,572; between *sureties;* 1 Story, Eq. Jur. § 492; *liens;* Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182; Patty v. Pease, 8 Paige Ch. (N. Y.) 277, 35 Am. Dec. 683; *rents* and *profits* between landlord and tenant; 1 Sch. & L. 305; Livingston v. Livingston, 4 Johns. Ch. (N. Y.) 287, 8 Am. Dec. 562; in case of *torts;* Bacon, Abr. *Accompt*, B; a levy; 1 Ves. Sen. 250; 1 Eq. Cas. Abr. 285; and in other cases; McClandish v. Edloe, 3 Gratt. (Va.) 330; *waste;* 1 P. Wms. 407; 6 Ves. 88; *tithes* and *moduses;* Com. Dig. *Chancery* (3 C.), *Distress* (M. 13).

But equity will not entertain a suit for a naked account of profits and damages against an infringer of a patent; Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923; Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; nor will an account for infringing a trademark be ordered where the infringer acted in good faith, or the profits were small; Saxlehner v. Siegel-Cooper Co., 179 U. S. 42, 21 Sup. Ct. 16, 45 L. Ed. 77. Neither will an account be ordered merely to establish by testimony the allegations of the bill; Tilden v. Maslin, 5 W. Va. 377; nor when the accounts are all on one side and no discovery is needed; Graham v. Cummings, 208 Pa. 516, 57 Atl. 943.

On a bill for an account the right of the defendant to affirmative relief is as broad as that of complainant; Wilcoxon v. Wilcoxon, 111 Ill. App. 90; even if the answer contains no demand for it; Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. Supp. 52, affirmed 188 N. Y. 624, 81 N. E. 1162.

A decree for an accounting under a decree is not necessarily delayed or prevented by the fact that it may affect the interests of persons not then in being, as after-born children, and the latter may be bound by it; as in the case of trustees of land subject to a life tenancy; 2 Vern. 526; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; decrees of probate courts construing a will; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785; or distributing a decedent's estate; Rhodes v. Caswell, 41 App. Div. 232, 58 N. Y. Supp. 470.

Equity follows the analogy of the law in refusing to interfere with stated accounts; 2 Sch. & L. 629; 3 Bro. C. C. 639, n.; Lewis v. Baird, 3 McLean 83, Fed. Cas. No. 8,316; Robinson v. Hook, 4 Mas. 143, Fed. Cas. No. 11,956; Piatt v. Vattier, 9 Pet. (U. S.) 405, 9 L. Ed. 173. See ACCOUNT STATED.

Equity does not deal with accounts upon the principle of mercantile bookkeeping. It requires the items of charge and discharge; Langd. Eq. Pl. § 75, n. Producing books of account is not stating an account.

The approved practice is to enter an interlocutory decree for an account, but a failure to do so is not error; Hollahan v. Sowers, 111 Ill. App. 263; but see Silliman v. Smith, 72 App. Div. 621, 76 N. Y. Supp. 65; but the court has power to pass on the account without the intervention of a master; Glover v. Jones, 95 Me. 303, 49 Atl. 1104; Davis v. Hofer, 38 Or. 150, 63 Pac. 56; Darby v. Gilligan, 43 W. Va. 755, 28 S. E. 737. A reference will not be ordered to afford opportunity for evidence to support the bill; Beale v. Hall, 97 Va. 383, 34 S. E. 53; Ammons v. Oil Co., 47 W. Va. 610, 35 S. E. 1004.

At Law. The action lay against bailiffs, receivers and guardians, in socage only, at the common law, and, by a subsequent extension of the law, between merchants; 11 Co. 89; Sargent v. Parsons, 12 Mass. 149.

Privity of contract was required, and it did not lie by or against executors and administrators; 1 Wms. Saund. 216, n.; until statutes were passed for that purpose, the last being that of 3 & 4 Anne, c. 16; 1 Story, Eq. Jur. § 445.

In several states, the action has received a liberal extension; Curtis v. Curtis, 13 Vt. 517; Dennison v. Goehring, 7 Pa. 175, 47 Am. Dec. 505; Barnum v. Landon, 25 Conn. 137; Knowles v. Harris, 5 R. I. 402, 73 Am. Dec. 77.

In general it lies "in all cases where a man has received money as the agent of another, and where relief may be had in chancery"; Bredin v. Kingland, 4 Watts (Pa.) 421. It is said to be the proper remedy for one partner against another; Irvine v. Hanlin, 10 S. & R. (Pa.) 220; Beach v. Hotchkiss, 2 Conn. 425; Wiswell v. Wilkins, 4 Vt. 137; Kelly v. Kelly, 3 Barb. (N. Y.) 419; Young v. Pearson, 1 Cal. 448; for money used by one partner after the dissolution of the firm; Fowle v. Kirkland, 18 Pick.

(Mass.) 299; though equity seems to be properly resorted to where a separate tribunal exists; Calloway v. Tate, 1 Hen. & M. (Va.) 9; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305. The action lies for salary of an officer of a corporation; Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 S. E. 151; timber taken from land; Bernstein v. Smith, 10 Kan. 60; club dues; Elm City Club v. Howes, 92 Me. 211, 42 Atl. 392; for materials furnished and superintendence of work under an agreement existing for so long as both parties should see fit; Quin v. Distilling Co., 171 Mass. 283, 50 N. E. 637; commissions to a real estate agent on a sale; Reynolds-McGinness Co. v. Green, 78 Vt. 28, 61 Atl. 556; work and labor and money lent; Miller v. Armstrong, 123 Ia. 86, 98 N. W. 561; Horning v. Poyer, 18 Ohio Cir. Ct. R. 732; Hartsell v. Masterson, 132 Ala. 275, 31 South. 616; use and occupation of land; Ketcham v. Barbour, 102 Ind. 576, 26 N. E. 127; the price of land sold and conveyed; Curran v. Curran, 40 Ind. 473; money received by an attorney for his client; Bredin v. Kingland, 4 Watts (Pa.) 421.

In other states, reference may be made to an auditor by order of the court, in the common forms of actions founded on contract or tort, where there are complicated accounts or counter-demands; Pierce v. Thompson, 6 Pick. (Mass.) 193; King v. Lacey, 8 Conn. 499; Brewster v. Edgerly, 13 N. H. 275; Farley v. Ward, 1 Tex. 646; and see Cozzens v. Hodges, 1 R. I. 491. See AUDITOR. In the action of account, an interlocutory judgment of *quod computet* is first obtained; McPherson v. McPherson, 33 N. C. 391, 53 Am. Dec. 416; Lee v. Abrams, 12 Ill. 111, on which no damages are awarded except *ratione interplacitationis;* Cro. Eliz. 83; Gratz v. Phillips, 5 Binn. (Pa.) 564.

The account is then referred to an auditor, who now generally has authority to examine parties; Hoyt v. French, 24 N. H. 198 (though such was not the case formerly); before whom issue of law and fact may be taken in regard to each item, which he must report to the court; 2 Ves. 388; Thompson v. Arms, 5 Vt. 546; King v. Hutchins, 26 N. H. 139; Crousillat v. McCall, 5 Binn. (Pa.) 433; on their decision the auditors make up the account, report it and are discharged; *id.* Upon the facts reported by the auditor the court decides the law of the case; Matthews v. Tower, 39 Vt. 433. Only the controverted items need be proved in an action on a verified account; Shuford v. Chinski (Tex.) 26 S. W. 141.

A final judgment *quod recuperet* is entered for the amount found by him to be due; and the auditor's account will not be set aside except upon a very manifest case of error; Appeal of Stehman, 5 Pa. 413; Tourne v. Riviere, 1 La. Ann. 380. See AUDITOR.

In case of mutual accounts the statute of limitations commences to run from the date of the last item on either side; 2 Wood, Lim. 714; where the last item of a mutual running account is within six years from the commencement of a suit, the statute does not apply; McFarland v. O'Neil, 155 Pa. 260, 25 Atl. 756; Chadwick v. Chadwick, 115 Mo. 581, 22 S. W. 479; but in Vermont the debt runs from the date of the last credit, and not from the last debit; George v. Mach. Co., 65 Vt. 287, 26 Atl. 722.

If the defendant is found in surplusage, that is, is creditor of the plaintiff on balancing the accounts, he cannot in this action recover judgment for the balance so due. He may bring an action of debt, or, by some authorities, a scl. fa., against the plaintiff, whereon he may have judgment and execution against the plaintiff. See Palm. 512; 1 Leon. 219; 3 Kebl. 362; 1 Rolle, Abr. 599, pl. 11; Brooke, Abr. *Accord*, 62; 1 Rolle 87.

As the defendant could wage his law; 2 Wms. Saund. 65 *a;* Cro. Eliz. 479; and as the discovery, which is the main object sought; 5 Taunt. 431; can be more readily obtained and questions in dispute more readily settled in equity, resort is generally had to that jurisdiction in those states where a separate tribunal exists, or under statutes to the courts of law; Gay v. Rogers' Estate, 18 Vt. 345; Brewster v. Edgerly, 13 N. H. 275; King v. Lacey, 8 Conn. 499; Whitwell v. Willard, 1 Metc. (Mass.) 216.

The fact that one possesses an open account in favor of another is not presumptive evidence of the holder's ownership; Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936. In a statement of account it is not necessary to say "E. & O. E."; that is implied; 6 El. & Bl. 69.

ACCOUNT BOOK. A book kept by a merchant, trader, mechanic, or other person, in which are entered from time to time the transactions of his trade or business. Such books, when regularly kept, may be admitted in evidence; Greenl. Ev. §§ 115–118; Bicknell v. Mellett, 160 Mass. 328, 35 N. E. 1130; Kohler v. Lindenmeyr, 129 N. Y. 498, 29 N. E. 957.

See ORIGINAL ENTRIES, BOOK OF.

ACCOUNT CURRENT. An open or running account between two parties.

ACCOUNT RENDER. See ACCOUNT.

ACCOUNT STATED. An agreed balance of accounts. An account which has been examined and accepted by the parties. 2 Atk. 251.

An account cannot become an account stated with reference to a debt payable on a contingency; Tuggle v. Minor, 76 Cal. 96, 18 Pac. 131. Although an item of an account may be disputed, it may become an account stated as to the items admittedly correct; Mulford v. Cæsar, 53 Mo. App. 263.

In Equity. Acceptance may be inferred

from circumstances, as where an account is rendered to a merchant and no objection is made, after sufficient time; 1 Sim. & S. 333; Murry v. Toland, 3 Johns. Ch. (N. Y.) 569; Freeland v. Heron, 7 Cra. 147, 3 L. Ed. 297; Pratt v. Weyman, 1 McCord Ch. (S. C.) 156; Wood v. Gault, 2 Md. Ch. Dec. 433; Dows v. Durfee, 10 Barb. (N. Y.) 213. Such an account is deemed conclusive between the parties; 2 Bro. C. C. 62, 310; Desha v. Smith, 20 Ala. 747; Consequa v. Fanning, 3 Johns. Ch. (N. Y.) 587; Stiles v. Brown, 1 Gill. (Md.) 350; Farmer v. Barnes, 56 N. C. 109; to the extent agreed upon; Troup v. Haight, 1 Hopk. Ch. (N. Y.) 239; unless some fraud, mistake, or plain error is shown; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; Pratt v. Weyman, 1 McCord Ch. (S. C.) 156; and in such case, generally, the account will not be opened, but liberty to surcharge or falsify will be given; 9 Ves. 265; 1 Sch. & L. 192; Hutchins v. Hope, 7 Gill (Md.) 119. A consideration and legal liability for each item, aside from the stated account, is not essential to sustain an action for the balance; Patillo v. Commission Co., 131 Fed. 680, 65 C. C. A. 508.

At Law. An account stated is conclusive as to the liability of the parties, with reference to the transactions included in it; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; except in cases of fraud or manifest error; 1 Esp. 159; Goodwin v. Insurance Co., 24 Conn. 591; Martin v. Beckwith, 4 Wis. 219; White v. Walker, 5 Fla. 478. See Ogden v. Astor, 4 Sandf. (N. Y.) 311; Neff v. Wooding, 83 Va. 432, 2 S. E. 731.

Acceptance by the party to be charged must be shown; Bussey v. Gant's Adm'r, 10 Humphr. (Tenn.) 238; Lee v. Abrams, 12 Ill. 111. The acknowledgment that the sum is due is sufficient; 2 Term 480; though there be but a single item in the account; 13 East 249; 5 M. & S. 65.

The acceptance need not be in express terms; Powell v. R. R., 65 Mo. 658; Volkening v. De Graaf, 81 N. Y. 268. Acceptance may be inferred from retaining the account a sufficient time without making objection; Freeland v. Heron, 7 Cra. (U. S.) 147, 3 L. Ed. 297; Jones v. Dunn, 3 W. & S. (Pa.) 109; Dows v. Durfee, 10 Barb. (N. Y.) 213; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Patillo v. Commission Co., 131 Fed. 680, 65 C. C. A. 508; and from other circumstances; Berry v. Pierson, 1 Gill (Md.) 234.

If the parties had already come to a disagreement when the account is rendered, assent cannot be inferred from silence; Edwards v. Hoeffinghoff, 38 Fed. 635.

A definite ascertained *sum* must be stated to be due; Andrews v. Allen, 9 S. & R. (Pa.) 241.

It must be made *by a competent person*, excluding infants and those who are of unsound mind; 1 Term 40.

Husband and wife may join and state an account with a third person; 2 Term 483; 16 Eng. L. & Eq. 290.

An agent may bind his principal; Murray v. Toland, 3 Johns. Ch. (N. Y.) 569; but he must show his authority; Thallhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; Harvey v. Ry. Co., 13 Hun (N. Y.) 392. Partners may state accounts; and an action lies for the party entitled to the balance; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. Ed. 897; Lamalere v. Caze, 1 Wash. C. C. 435, Fed. Cas. No. 8,003; Kidder v. Rixford, 16 Vt. 169, 42 Am. Dec. 504.

The acceptance of the account is an acknowledgment of a debt due for the balance, and will support assumpsit. It is not, therefore, necessary to prove the items, but only to prove an existing debt or demand, and the stating of the account; Ware v. Dudley, 16 Ala. 742; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

Facts known to a party when he settles an account stated cannot be used later to impeach it; Marmon v. Waller, 53 Mo. App. 610; and it should not be set aside except for clear showing of fraud or mistake; Greenhow v. Edler, 51 Fed. 117; Marmon v. Waller, 53 Mo. App. 610.

On an account stated and a balance due, a promise is implied to pay this balance on demand; a subsequent promise differing therefrom is *nudum pactum*. Odger, C. L. 683.

ACCOUNTANT. One who is versed in accounts. A person or officer appointed to keep the accounts of a public company.

He who renders to another or to a court a just and detailed statement of the property which he holds as trustee, executor, administrator, or guardian. See 16 Viner, Abr. 155.

ACCOUNTANT GENERAL. An officer of the English Court of Chancery, by whom the moneys paid into court are received, deposited in bank, and disbursed. The office appears to have been established by an order of May 26, 1725, and 12 Geo. I. c. 32, before which time the effects of the suitors were locked up in the vaults of the Bank of England, under the care of the masters and two of the six clerks; 1 Smith, Ch. Pr. 22.

ACCOUNTANTS, CHARTERED. Persons skilled in the keeping and examination of accounts, who are employed for the purpose of examining and certifying to the correctness of accounts of corporations and others. The business is usually carried on by corporations. See AUDITOR.

ACCOUPLE. To unite; to marry.

ACCREDIT. In International Law. To acknowledge; send (an envoy) with credentials.

Used of the act by which a diplomatic agent is acknowledged by the government to which he is

sent. This at once makes his public character known and becomes his protection. It is used also of the act by which his sovereign commissions him. This latter use is now the accepted one.

ACCRESCERE (Lat.). To grow to; to be united with; to increase.

The term is used in speaking of islands which are formed in rivers by deposit; Calvinus, Lex.; 3 Kent 428.

It is used in a related sense in the common-law phrase *jus accrescendi*, the right of survivorship; 1 Washb. R. P. 426.

In Pleading. To commence; to arise; to accrue. *Quod actio non accrevit infra sex annos*, that the action did not accrue within six years; 3 Chit. Pl. 914.

ACCRETION (Lat. *accrescere*, to grow to). The increase of real estate by the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner. 3 Washb. R. P. (5th ed.) 50.

The term *alluvion* is applied to the deposit itself, while accretion rather denotes the act.

If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aquæ;* 3 Washb. R. P. 60; 2 Bla. Com. 261, n.; 3 Kent 428; Hargrave, Law Tracts 5; Hale, de Jur. Mar. 14; 3 Barn. & C. 91, 107; Ex parte Jennings, 6 Cow. (N. Y.) 537, 16 Am. Dec. 447; Ingraham v. Wilkinson, 4 Pick. (Mass.) 268, 16 Am. Dec. 342; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344.

"It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself;" Barney v. Keokuk, 94 U. S. 337, 24 L. Ed. 224; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481. As a general rule, such accretions do not belong to the riparian owner; City of Victoria v. Schott, 9 Tex. Civ. App. 332, 29 S. W. 681; Cox v. Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; but if, after an avulsion, an accretion forms within the original land line, it belongs to the riparian owner, though separated from the main land by a slough; Minton v. Steele, 125 Mo. 181, 28 S. W. 746. Land remade by accretion after it has been washed away belongs to the original proprietor; Ocean City Ass'n v. Shriver, 64 N. J. L. 550, 46 Atl. 690, 51 L. R. A. 425, n., which see as to the right of the owner to follow accretions across a division line previously submerged by the action of the water.

However accretions may be commenced or continued, the right of one who is the owner of uplands to follow and appropriate them ceases when the formation passes laterally the land of his conterminous neighbor; Mulry v. Norton, 100 N. Y. 425, 3 N. E. 581, 53 Am. Rep. 206, where a bar separated from the mainland by a lagoon was claimed as an accretion by the owner of the portion of the bar where the formation began. This bar merely replaced a formation which had been in part washed away, and the court said that the owner of the nucleus of the bar could not, even if the process of its extension was effected by accretion, claim beyond the point where such accretions began to be adjacent to the property of adjoining owners. See 51 L. R. A. 425, n.

An accretion formed on the other side of a public street which bounds the property of an individual belongs to the street, if the fee of that is in the public; Ellinger v. R. Co., 112 Mo. 525, 20 S. W. 800; City of St. Louis v. R. Co., 114 Mo. 13, 21 S. W. 202. A reliction formed by the gradual drying up of a lake belongs to the riparian owners; Poynter v. Chipman, 8 Utah, 442, 32 Pac. 690; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; but not one formed by artificial drainage; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571.

See AVULSION; ALLUVION; RIPARIAN PROPRIETOR; ISLAND; RELICTION.

ACCROACH. To attempt to exercise royal power. 4 Bla. Com. 76.

A knight who forcibly assaulted and detained one of the king's subjects till he paid him a sum of money was held to have committed treason on the ground of accroachment; 1 Hale, Pl. Cr. 80.

In French Law. To delay. Whishaw.

ACCRUAL, CLAUSE OF. A clause in a deed of settlement or a will providing that the share of one dying shall vest in the survivor or survivors.

ACCRUE. To grow to; to be added to; to become a present right or demand, as the interest accrues on the principal. *Accruing costs* are those which become due and are created after judgment; as the costs of an execution. See Johnson v. Ins. Co., 91 Ill. 95, 33 Am. Rep. 47; Strasser v. Staats, 59 Hun 143, 13 N. Y. Supp. 167.

To rise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has *accrued;* Scheerer v. Stanley, 2 Rawle (Pa.) 277; Braddee v. Wiley, 10 Watts (Pa.) 363; Bacon, Abr. Limitation of Actions (D, 3); Emerson v. The Shawano City, 10 Wis. 433. A cause of action *accrues* when suit may be commenced for a breach of contract; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228. It is distinguished from sustain; Adams v. Brown, 4 Litt. (Ky.) 7; and from owing; 6 C. B. N. S. 429; Gross v. Partenheimer, 159 Pa. 556, 28 Atl. 370; but see Cutcliff v. McAnally, 88 Ala. 507, 7 South. 331; Fay v. Holloran, 35 Barb. (N. Y.) 295.

ACCUMULATION, TRUST FOR. See PERPETUITY.

ACCUMULATIVE LEGACY. See LEGACY.

ACCUSATION. A charge made to a competent officer against one who has committed a crime, so that he may be brought to justice and punishment.

A neglect to accuse may in some cases be considered a misdemeanor, or misprision (which see); 1 Brown, Civ. Law 247; 2 *id.* 389; Inst. *lib.* 4, *tit.* 18.

It is a rule that no man is bound to accuse himself or testify against himself in a criminal case; 7 Q. B. 126. A man is competent, though not compellable, to prove his own crime; 14 Mees. & W. 256. See EVIDENCE; INTEREST; WITNESS.

ACCUSE. To charge or impute the commission of crime or immoral or disgraceful conduct or official delinquency. It does not necessarily import the charge of a crime by judicial procedure; State v. South, 5 Rich. (S. C.) 489, 493; Com. v. O'Brien, 12 Cush. (Mass.) 84; Robbins v. Smith, 47 Conn. 182; 1 C. & P. 479. See People v. Braman, 30 Mich. 460, where the court was divided as to the meaning of the term, Cooley, C. J., and Christiancy, J., holding that it meant any public accusation of crime as well as a formal complaint, and Graves and Campbell, JJ., *contra;* and Com. v. Cawood, 2 Va. Cas. 527 where, Barbour, J., dissenting, it was held that one is not *accused* until indicted.

ACCUSED. One who is charged with a crime or misdemeanor. See People v. Braman, 30 Mich. 468. The term cannot be said to apply to a defendant in a civil action; Castle v. Houston, 19 Kan. 417, 37 Am. Rep. 127; and see Mosby v. Ins. Co., 31 Gratt. (Va.) 629.

ACCUSER. One who makes an accusation.

ACCUSTOMED. Habitual; often used, synonymous with usual; Farwell v. Smith, 16 N. J. L. 133.

ACEQUIA. A canal for irrigation; a public ditch.

Where irrigation is necessary, as in New Mexico, there is much legislation respecting public ditches and streams, and those used for the purpose of irrigation are declared to be "public ditches or acequias"; Comp. L. N. Mex. tit. 1, ch. 1, § 6.

ACHAT, also ACHATE, ACHATA, ACHET. In French Law. A purchase.

It is used in some of our law-books, as well as *achetor*, a purchaser, which in some ancient statutes means purveyor. Stat. 36 Edw. III.; Merlin, Répert.

ACHERSET. An ancient English measure of grain, supposed to be the same with our quarter, or eight bushels.

ACKNOWLEDGMENT. The act of one who has executed a deed, in going before some competent officer or court and declaring it to be his act or deed.

The acknowledgment is certified by the officer or court; and the term acknowledgment is sometimes used to designate the certificate.

The function of an acknowledgment is two-fold: to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The same purposes may be accomplished by a subscribing witness going before the officer or court and making oath to the fact of the execution, which is certified in the same manner; but in some states this is only permitted in case of the death, absence, or refusal of the grantor. In some of the states a deed is void except as between the parties and their privies, unless acknowledged or proved.

Nature of. In some states the act is held to be a judicial or quasi-judicial one; Wasson v. Connor, 54 Miss. 351; Harmon v. Magee, 57 Miss. 410; Grider v. Mortgage Co., 99 Ala. 281, 12 South. 775, 42 Am. St. Rep. 58 (changing the rule of earlier cases); Thompson v. Mortgage Security Co., 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; Heilman v. Kroh, 155 Pa. 1, 25 Atl. 751; Murrell v. Diggs, 84 Va. 900, 6 S. E. 461, 10 Am. St. Rep. 893; while in others it is held to be a ministerial act; Lynch v. Livingston, 6 N. Y. 422; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; Ford v. Osborne, 45 Ohio St. 1, 12 N. E. 526; Learned v. Riley, 14 Allen (Mass.) 109.

Who may take. An officer related to the parties; Lynch v. Livingston, 6 N. Y. 422; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474. The presumption is that the officer took it within his jurisdiction; Morrison v. White, 16 La. Ann. 100; Rackleff v. Norton, 19 Me. 274; Bradley v. West, 60 Mo. 33; and that it was duly executed; Albany County Savings Bank v. McCarty, 71 Hun 227, 24 N. Y. Supp. 991.

In some states a notary cannot take acknowledgment in another county than the one within which he was appointed and resides; Utica & Black River R. Co. v. Stewart, 33 How. Pr. (N. Y.) 312; Rehkoph v. Miller, 59 Ill. App. 662; nor the attorney of record; Gilmore v. Hempstead, 4 How. Pr. (N. Y.) 153; Thurman v. Cameron, 24 Wend. (N. Y.) 91; Hughes v. Wilkinson's Lessee, 37 Miss. 482; Hedger v. Ward, 15 B. Mon. (Ky.) 106; nor if his term has expired; Gilbraith v. Gallivan, 78 Mo. 452; Carlisle v. Carlisle, 78 Ala. 542. In Pennsylvania, by statute, a notary may act anywhere within the state; Acts, 1893, p. 323.

Taking an acknowledgment is not public business such as may not be transacted on a legal holiday; Slater v. Schack, 41 Minn. 269, 43 N. W. 7.

One cannot take an acknowledgment of a deed in which he has any interest; Beaman v. Whitney, 20 Me. 413; Groesbeck v. Seeley, 13 Mich. 329; Wasson v. Connor, 54 Miss. 351; Brown v. Moore, 38 Tex. 645; Withers v. Baird, 7 Watts (Pa.) 227, 32 Am. Dec. 754. *Contra*, Davis v. Beazley, 75 Va. 491; Dail v. Moore, 51 Mo. 589; West v. Krebaum, 88 Ill. 263; Green v. Abraham, 43 Ark. 420.

Sufficiency of. Certificate need only substantially comply with the statute. The fact

of acknowledgment and the identity of the parties are the essential parts, and must be stated; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340; Morse v. Clayton, 13 Smedes & M. (Miss.) 373; Alexander v. Merry, 9 Mo. 514.

The general rule applied in cases of grammatical or clerical errors is that the courts will disregard obvious mistakes, and read into the acknowledgment the proper word, if such word can be easily ascertained; Merritt v. Yates, 71 Ill. 636, 23 Am. Rep. 128; Cairo & St. L. R. Co. v. Parrott, 92 Ill. 194; Durst v. Daugherty, 81 Tex. 650, 17 S. W. 388; McCardla v. Billings, 10 N. D. 373, 87 N. W. 1008, 88 Am. St. Rep. 729; Frostburg Mut. Bldg. Ass'n v. Brace, 51 Md. 508; Hughes v. Wright, 100 Tex. 511, 101 S. W. 789, 11 L. R. A. (N. S.) 643, 123 Am. St. Rep. 827; but it is held that important words omitted cannot be supplied by intendment; Jackway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Hayden v. Westcott, 11 Conn. 129; Newman v. Samuels, 17 Ia. 528; Wetmore v. Laird, 5 Biss. 160, Fed. Cas. No. 17,467.

In the following cases it was held that the statute must be strictly complied with; Buell v. Irwin, 24 Mich. 145; Rogers v. Adams, 66 Ala. 600; Myers v. Boyd, 96 Pa. 427; Wetmore v. Laird, 5 Biss. 160, Fed. Cas. No. 17,467; Tully v. Davis, 30 Ill. 103, 83 Am. Dec. 179; Ridgely v. Howard, 3 H. & McK. (Md.) 321. Where a notary takes the acknowledgment and attaches his seal, but fails to sign his name, it is not sufficient; Clark v. Wilson, 127 Ill. 429, 19 N. E. 860, 11 Am. St. Rep. 143.

Effect of. Only purchasers for value can take advantage of defects; Mastin v. Halley, 61 Mo. 196.

An acknowledged deed is evidence of seizin in the grantee, and authorizes recording it; Kellogg v. Loomis, 16 Gray (Mass.) 48.

An unacknowledged deed is good between the parties and subsequent purchasers with actual notice; Gray v. Ulrich, 8 Kan. 112; Kellogg v. Loomis, 16 Gray (Mass.) 48; Stevens v. Hampton, 46 Mo. 404; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Ryan v. Carr, 46 Mo. 483.

The certificate will prevail over the unsupported denial of the grantor; Lickmon v. Harding, 65 Ill. 505.

Identification of Grantor. An introduction by a common friend is sufficient to justify officer in making certificate; Carpenter v. Dexter, 8 Wall. (U. S.) 513, 19 L. Ed. 426. *Contra*, Jones v. Bach, 48 Barb. (N. Y.) 568; Nippel v. Hammond, 4 Col. 211. See ACQUAINTED.

A notary imposed upon by a personation is liable only for clear negligence. It is a legal presumption that he acted on reasonable information, and his absence of memory as to details of what occurred does not destroy that presumption; Com. v. Haines, 97 Pa. 228.

The certificate is not invalidated by want of recollection of the officer; Tooker v. Sloan, 30 N. J. Eq. 394; nor by mistake in, or omission of, the date; Huxley v. Harrold, 62 Mo. 516; Kelly v. Rosenstock, 45 Md. 389; Webb v. Huff, 61 Tex. 677; Yorty v. Paine, 62 Wis. 154, 22 N. W. 137.

It is always permissible to show that the party never appeared before the officer and acknowledged the deed; Donahue v. Mills, 41 Ark. 421; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622; but if he appeared, the recitals in the certificate of acknowledgment can only be impeached for fraud or imposition, with knowledge brought home to the grantee; Bouvier-Iaeger Coal Land Co. v. Sypher, 186 Fed. 660.

Correction. Where a notary fails to set forth the necessary facts, he may correct his certificate, and may be compelled by mandamus, but equity has no jurisdiction to correct it; Wannall v. Kem, 51 Mo. 150; Hutchinson v. Ainsworth, 63 Cal. 286; Merritt v. Yates, 71 Ill. 636, 23 Am. Rep. 128.

See paper by Judge Cooley, 4 Amer. Bar Assoc. 1881.

ACKNOWLEDGMENT MONEY. A sum paid by tenants of copyhold in some parts of England, as a recognition of their superior lords. Cowell; Blount. Called a fine by Blackstone; 2 Bla. Com. 98.

ACOLYTE. An inferior church servant, who, next under the sub-deacon, follows and waits upon the priests and deacons, and performs the offices of lighting the candles, carrying the bread and wine, and paying other servile attendance. Spelman; Cowell.

ACQUAINTED. Having personal knowledge of. Kelly v. Calhoun, 95 U. S. 710, 24 L. Ed. 544. Acquaintance expresses less than familiarity; In re Carpenter's Estate, 94 Cal. 406, 29 Pac. 1101. It is "familiar knowledge"; Wyllis v. Haun, 47 Ia. 614; Chauvin v. Wagner, 18 Mo. 531. To be "personally acquainted with," and to "know personally," are equivalent terms; Kelly v. Calhoun, 95 U. S. 710, 24 L. Ed. 544. When used with reference to a paper to which a certificate or affidavit is attached, it indicates a substantial knowledge of the subject-matter thereof. Bohan v. Casey, 5 Mo. App. 101; U. S. v. Jones, 14 Blatchf. 90, Fed. Cas. No. 15,491.

ACQUEREUR. **In French and Canadian Law.** One who acquires title, particularly to immovable property, by purchase.

ACQUEST. An estate acquired by purchase. 1 Reeves, Hist. Eng. Law 56.

ACQUETS. **In Civil Law.** Property which has been acquired by purchase, gift, or otherwise than by succession. Immovable property which has been acquired otherwise than by succession. Merlin, Répert.

The profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the prod-

uce of the joint industry of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both.

This is the signification attached to the word in Louisiana; La. Civ. Code 2371. The rule applies to all marriages contracted in that state, or out of it, when the parties afterward go there to live, as to acquets afterward made there. The acquets are divided into two equal portions between the husband and wife, or between their heirs at the dissolution of their marriage.

The parties may, however, lawfully stipulate there shall be no community of profits or gains; but have no right to agree that they shall be governed by the laws of another country; Bourcier v. Lanusse, 3 Mart. O. S. (La.) 581; Saul v. His Creditors, 5 Mart. N. S. (La.) 571, 16 Am. Dec. 212. See 2 Kent 153, n. See COMMUNITY; CONQUETS.

As to the sense in which it is used in Canada, see 2 Low. Can. 175.

ACQUIESCENCE. A silent appearance of consent. Worcester, Dict.

Failure to make any objections. 2 Phil. 117; 8 Ch. Div. 286; Scott v. Jackson, 89 Cal. 258, 26 Pac. 898. Submission to an act of which one had knowledge. See Pence v. Langdon, 99 U. S. 578, 25 L. Ed. 420. It imports full knowledge; 3 De G. F. & J. 58. Tacit assent to an *ultra vires* act, after knowledge of it, causing innocent third persons to assume positions of which they cannot be deprived without loss. Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Kent v. Mining Co., 78 N. Y. 159.

It is to be distinguished from avowed consent, on the one hand, and from open discontent or opposition, on the other. It amounts to a consent which is impliedly given by one or both parties to a proposition, a clause, a condition, a judgment, or to any act whatever.

It implies active, as distinguished from laches, which implies passive assent; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674.

When a party is bound to elect between a paramount right and a testamentary disposition, his acquiescence in a state of things which indicates an election, when he was aware of his rights, will be *prima facie* evidence of such election. See 2 Rop. Leg. 439; 1 Ves. 335; 12 *id.* 136; 3 P. Wms. 315. The acts of acquiescence which constitute an implied election must be decided rather by the circumstances of each case, than by any general principle; 1 Swans. 382, note, and the numerous cases there cited.

Acquiescence in the acts of an agent, or one who has assumed that character, will be equivalent to an express authority; 2 Kent 478; Story, Eq. Jur. § 255; U. S. v. Snyder, 4 Wash. C. C. 559, Fed. Cas. No. 16,351; Richmond Manuf'g Co. v. Starks, 4 Mas. 296, Fed. Cas. No. 11,802; Bell v. Cunningham, 3 Pet. (U. S.) 69, 81, 7 L. Ed. 606; Erick v. Johnson, 6 Mass. 193; Towle v. Stevenson, 1 Johns. Cas. (N. Y.) 110; Vianna v. Barclay, 3 Cow. (N. Y.) 281.

Mere delay in repudiating an agent's unauthorized contract will not ratify it, but is evidence from which the jury may so infer; Meyer v. Smith, 3 Tex. Civ. App. 37, 21 S. W. 995; but the disapproval must be within a reasonable time; Johnson v. Carrere, 45 La. Ann. 847, 13 South. 195; and if payment has been made to an agent after his authority has been revoked, the presumption is that he has accounted to the principal when there is long-continued silence on the latter's part; Long v. Thayer, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167.

See AGENCY; ESTOPPEL.

ACQUIETANDIS PLEGIIS. A writ of justices, formerly lying for the surety against a creditor who refuses to acquit him after the debt has been satisfied. Reg. of Writs 158; Cowell; Blount.

ACQUIRE (Lat. *ad*, for, and *quærere*, to seek). To make property one's own. To gain permanently.

It is regularly applied to a permanent acquisition. A man is said to obtain or procure a mere temporary acquisition. It has been held to include a taking by devise; Santa Clara Female Academy v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

ACQUISITION. The act by which a person procures the property in a thing.

The thing the property in which is secured.

Original acquisition is that by which a man secures a property in a thing which is not at the time he acquires it, and in its then existing condition, the property of any other individual. It may result from occupancy; 2 Kent 289; accession; 2 Kent 293; intellectual labor—namely, for inventions, which are secured by patent rights; and for the authorship of books, maps, and charts, which is protected by copyrights; 1 Bouv. Inst. 508, n.

Derivative acquisitions are those which are procured from others, either by act of law or by act of the parties. Goods and chattels may change owners by act of law in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy; or by act of the parties, as by gift or sale.

An acquisition may result from the act of the party himself, or those who are in his power acting for him, as his children while minors; Gale v. Parrot, 1 N. H. 28. See Dig. 41. 1. 53; Inst. 2. 9. 3.

ACQUITMENT. See ABSOLUTION.

ACQUITTAL. A release or discharge from an obligation or engagement.

According to Lord Coke, there are three kinds of acquittal, namely: by deed, when the party re-

releases the obligation; by prescription; by tenure; Co. Litt. 100 *a*.

The absolution of a party charged with a crime or misdemeanor.

The absolution of a party accused on a trial before a traverse jury. Shackleford v. Smith, 1 Nott & McC. (S. C.) 36; Teague v. Wilks, 3 McCord (S. C.) 461. Though frequently expressed as "by the jury," it is in fact by the judgment of the court; 7 M. & G. 481.

Acquittals in fact are those which take place when the jury, upon trial, finds a verdict of not guilty.

Acquittals in law are those which take place by mere operation of law; as where a man has been charged merely as an accessary, and the principal has been acquitted. Coke, 2 Inst. 364.

An acquittal is a bar to any future prosecution for the offence alleged in the first indictment.

If accused is placed upon trial under a valid indictment before a legal jury, and the latter is discharged by the court without good cause and without defendant's consent, it is equivalent to an acquittal; State v. Walker, 26 Ind. 346; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; Klock v. People, 2 Parker Cr. R. (N. Y.) 676. There may be an acquittal by reason of a discharge without a trial on the merits; Junction City v. Keeffe, 40 Kan. 275, 19 Pac. 735. Acquittal discharges from guilt, pardon only from punishment; Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791.

When a prisoner has been acquitted, he becomes competent to testify either for the government or for his former co-defendants; 7 Cox, Cr. Cas. 341. And it is clear, that where a married defendant is entirely removed from the record by a verdict pronounced in his favor, his wife may testify either for or against any other persons who may be parties to the record; 12 M. & W. 49; 8 Carr. & P. 284. See JEOPARDY; AUTREFOIS ACQUIT; AUTREFOIS CONVICT.

ACQUITTANCE. An agreement in writing to discharge a party from an engagement to pay a sum of money. It is evidence of payment, and differs from a release in this, that the latter must be under seal, while an acquittance need not be under seal. Pothier, Oblig. n. 781. See 3 Salk. 298; Co. Litt. 212 *a*, 273 *a*; Milliken v. Brown, 1 Rawle (Pa.) 391.

ACQUITTED. See ACQUITTAL.

ACRE. A quantity of land containing one hundred and sixty square rods of land, in whatever shape. Cro. Eliz. 476, 665; 6 Co. 67; Co. Litt. 5 *b*. The word formerly signified an open field; whence *acre-fight*, a contest in an open field. Jacob, Dict.

The measure seems to have been variable in amount in its earliest use, but was fixed by statute at a remote period. As originally used, it was applicable especially to meadowlands; Cowell. Originally a strip in the fields that was ploughed in the forenoon. Maitland, Domesday and Beyond 387.

ACRE RIGHT. "The share of a citizen of a New England town in the common lands. The value of the acre right was a fixed quantity in each town, but varied in different towns. A 10-acre lot or right in a certain town was equivalent to 113 acres of upland and 12 acres of meadow, and a certain exact proportion was maintained between the acre right and salable lands." Messages, etc., of the Presidents, Richardson, X, 230.

ACROSS. From side to side. Transverse to the length of. Hannibal & St. J. R. Co. v. Packet Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; but see Appeal of Bennett's Branch Imp. Co., 65 Pa. 242. It may mean over; Brown v. Meady, 10 Me. 391, 25 Am. Dec. 248. See Comstock v. Van Deusen, 5 Pick. (Mass.) 163, where a grant of a right of way *across* a lot of land was held not to mean a right to enter at one side, go partly across and come out at a place on the same side.

ACT (Lat. *agere*, to do; *actus*, done). Something done or established.

In its general legal sense, the word may denote something done by an individual, as a private citizen, or as an officer; or by a body of men, as a legislature, a council, or a court of justice; including not merely physical acts, but also decrees, edicts, laws, judgments, resolves, awards, and determinations. Some general laws made by the Congress of the United States are styled joint resolutions, and these have the same force and effect as those styled acts.

An instrument in writing to verify facts. Webster, Dict.

It is used in this sense of the published acts of assembly, congress, etc. In a sense approaching this, it has been held in trials for treason that letters and other written documents were *acts*; 1 Fost. Cr. Cas. 193; 2 Stark. 116.

In Civil Law. A writing which states in a legal form that a thing has been done, said, or agreed. Merlin, Répert.

Private acts are those made by private persons as registers in relation to their receipts and expenditures, schedules, acquittances, and the like. Nov. 73, c. 2; Code 7. 32. 6; 4. 21; Dig. 22. 4; La. Civ. Code art. 2231 to 2254; 8 Toullier, *Droit Civ. Francais* 94.

Acts under private signature are those which have been made by private individuals under their hands. An act of this kind does not acquire the force of an authentic act by being registered in the office of a notary; Marie Louise v. Cauchoix, 11 Mart. O. S. (La.) 243; Priou v. Adams, 5 Mart. N. S. (La.) 693; unless it has been properly acknowledged before the officer by the parties to it; Bullard v. Wilson, 5 Mart. N. S. (La.) 196.

Public acts are those which have a public

authority, and which have been made before public officers, are authorized by a public seal, have been made public by the authority of a magistrate, or which have been extracted and been properly authenticated from public records.

In Evidence. The act of one of several conspirators, performed in pursuance of the common design, is evidence against all of them. And see TREASON; PARTNER; PARTNERSHIP; AGENT; AGENCY.

In Legislation. A statute or law made by a legislative body; an approved bill.

The words *bill* and *law* are frequently used synonymously with *act*, but incorrectly; Sedgwick County Com'rs v. Bailey, 13 Kan. 600; a bill being only the draft or form of the act presented to the legislature but not enacted; Southwark Bank v. Com., 26 Pa. 446.

General or *public* acts are those which bind the whole community. Of these the courts take judicial cognizance.

Private or *special* acts are those which operate only upon particular persons and private concerns.

The recitals of public acts are evidence of the facts recited, but in private acts they are only evidence against the parties securing them; Branson v. Wirth, 17 Wall. (U. S.) 32, 21 L. Ed. 566.

Judicial Act. An act performed by a court touching the rights of parties or property brought before it by voluntary appearance, or by the prior action of ministerial officers; in short by ministerial acts. Flournoy v. Jeffersonville, 17 Ind. 173, 79 Am. Dec. 468; Union Pac. R. Co. v. U. S., 99 U. S. 700, 761, 25 L. Ed. 496.

See STATUTE; CONSTITUTIONAL; CONSTRUCTION; INTERPRETATION; PUNCTUATION.

Act in pais. An act performed out of court, and which is not a matter of record.

A deed or an assurance transacted between two or more private persons in the country, that is, according to the old common law, upon the very spot to be transferred, is matter in pais. 2 Bla. Com. 294.

ACT OF BANKRUPTCY. An act which subjects a person to be proceeded against as a bankrupt. See BANKRUPT; BANKRUPT LAWS; INSOLVENCY.

ACT OF GOD. Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains, and care reasonably to have been expected. L. R. 1 C. P. D. 423. See also L. R. 10 Ex. 255. The civil law employs, as a corresponding term, *vis major*.

The term generally applies, broadly, to natural accidents, such as those caused by lightning, earthquakes, and tempests; Story, Bailm. § 511; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. A severe snow-storm, which blocked up railroads, held within the rule; Ballentine v. R. Co., 40 Mo. 491, 93 Am. Dec. 315. So where fruit-trees were frozen, in transit, it was held to be by the act of God, unless there had been improper delay on the part of the carrier; Vail v. R. Co., 63 Mo. 230. Also where fruit is in transit; Swetland v. R. Co., 102 Mass. 276. The freezing of a canal or river held within the rule; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. Dec. 562; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Allen v. Ins. Co., 44 N. Y. 437, 4 Am. Rep. 700. A frost of extraordinary severity; 11 Ex. 781; and an extraordinary fall of snow; 28 L. J. Ex. 51; have been held to be the act of God. A sudden failure of wind has been held to be an act of God; Colt v. McMechen, 6 Johns. (N. Y.) 160, 5 Am. Dec. 200; but this case has been doubted; 1 Sm. L. C. Am. ed. 417; and Kent, Ch. J., substantially dissented; see also McArthur v. Sears, 21 Wend. (N. Y.) 190. Also a sudden gust of wind or tempest; Gillett v. Ellis, 11 Ill. 579; City of Allegheny v. Zimmerman, 95 Pa. 287, 40 Am. Rep. 649. Losses by fire have not generally been held to fall under the act of God; 1 T. R. 33; Miller v. Navigation Co., 10 N. Y. 431; Chicago & N. W. R. Co. v. Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Merchants' Dispatch Co. v. Smith, 76 Ill. 542 (the Chicago fire); though otherwise when the fire is caused by lightning; Parker v. Flagg, 26 Me. 181, 45 Am. Dec. 101; but where a distant forest fire was driven by a tornado, to where a carrier's cars were on the track awaiting a locomotive, their destruction was held to be by the act of God; Pennsylvania R. Co. v. Fries, 87 Pa. 234; but see Chevallier v. Straham, 2 Tex. 115, 47 Am. Dec. 639, *contra*. When a flood had risen higher than ever before, destruction of goods thereby was held to be by act of God; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, or where there is a flood; Long v. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; Livezey v. Philadelphia, 64 Pa. 106, 3 Am. Rep. 578. The bursting of a boiler does not come within the act of God; M'Call v. Brock, 5 Strob. (S. C.) 119. See Sherman v. Wells, 28 Barb. (N. Y.) 403; Fergusson v. Brent, 12 Md. 9, 71 Am. Dec. 582; Sprowl v. Kellar, 4 Stew. & P. (Ala.) 382; Hill v. Sturgeon, 28 Mo. 323. If water in a spring failed by reason of drouth, there is no breach of contract for its supply; Ward v. Vance, 93 Pa. 502. If a person is thrown from his horse and injured, the resulting illness was considered an act of God; People v. Tubbs, 37 N. Y. 586; so where a railroad engineer became insane; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128.

In 1 C. P. D. 34, 423, Cockburn, C. J., held, in an action for the loss of a horse on shipboard, that if a carrier "uses all the known

means to which prudent and experienced carriers usually have recourse, he does all that can be reasonably required of him, and if under such circumstances he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God." The accident, to come within the rule, must be due entirely to natural causes without human intervention; *ibid.*, also Mershon v. Hobensack, 22 N. J. L. 373; Backhouse v. Sneed, 5 N. C. 173; Ewart v. Street, 2 Bailey (S. C.) 157, 23 Am. Dec. 143; Smyrl v. Niolon, 2 Bailey (S. C.) 421, 23 Am. Dec. 146.

The term is sometimes defined as equivalent to inevitable accident; Neal v. Saunderson, 2 Sm. & M. (Miss.) 572, 41 Am. Dec. 609; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; but incorrectly, as there is a distinction between the two; although Sir William Jones proposed the use of inevitable accident instead of *Act of God;* Jones, Bailm. 104. See Story, Bailm. § 25; 2 Bla. Com. 122; 4 Dougl. 287; McArthur v. Sears, 21 Wend. (N. Y.) 190; Neal v. Saunderson, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609; Bolton v. Burnett, 5 Blackf. (Ind.) 222.

Where the law casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; *lex neminem cogit ad impossibilia;* 1 Q. B. D. 548; but where the party *by his own contract* engages to do an act, it is deemed to be his own fault that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is, in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident, or other contingency, although not foreseen by, nor within the control of, the party; 3 M. & S. 267; L. R. 5 C. P. 586; L. R. 4 Q. B. 134; Leake, Contr. 683.

As to goods destroyed after delay in transit, see Alabama G. S. R. Co. v. Quarles, 145 Ala. 436, 40 South. 120, 5 L. R. A. (N. S.) 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308; Green-Wheeler Shoe Co. v. R. Co., 130 Ia. 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45.

See BAILMENT; COMMON CARRIER; INEVITABLE ACCIDENT; PERIL OF THE SEA; SPECIFIC PERFORMANCE.

ACT OF GOVERNMENT. The usual name of Cromwell's Constitution vesting the supreme power in a Protector and two houses of Parliament, passed March 25, 1657.

ACT OF GRACE. A term sometimes applied to a general pardon or the granting or extension of some privilege at the beginning of a new reign or the coming of age or marriage of a sovereign.

ACT OF HONOR. An instrument drawn up by a notary public, after protest of a bill of exchange, when a third party is desirous of paying or accepting the bill for the honor of any or all of the parties to it.

The instrument describes the bill, recites its protest, and the fact of a third person coming forward to accept, and the person or persons for whose honor the acceptance is made. The right to pay the debt of another, and still hold him, is allowed by the law merchant in this instance, and is an exception to the general rule of law; and the right can only be gained by proceeding in the form and manner sanctioned by the law; Gazzam v. Armstrong's Ex'r, 3 Dana (Ky.) 554; Bayley, Bills.

ACT OF INDEMNITY. An act or decree absolving a public officer or other person who has used doubtful powers or usurped an authority not belonging to him from the technical legal penalties or liabilities therefor or from making good losses incurred thereby. Cent. Dict.

ACT OF INSOLVENCY. Within the meaning of the national currency act, an act which shows a bank to be insolvent; such as non-payment of its circulating notes, etc., failure to make good the impairment of capital or to keep good its surplus or reserve; any act which shows the bank is unable to meet its liabilities as they mature or to perform those duties which the law imposes for the purpose of sustaining its credit; In re Manufacturers' Nat. Bank, 5 Biss. 504, Fed. Cas. No. 9,051; Irons v. Bank, 6 Biss. 301, Fed. Cas. No. 7,068. See INSOLVENCY.

ACT OF PARLIAMENT. See STATUTE.

ACT ON PETITION. A form of summary proceeding formerly in use in the High Court of Admiralty, in England, in which the parties stated their respective cases briefly, and supported their statements by affidavit. 2 Dods. Adm. 174, 184; 1 Hagg. Adm. 1, note.

The suitors of the English Admiralty were, under the former practice, ordinarily entitled to elect to proceed either by act on petition, or by the ancient and more formal mode of "plea and proof;" that is, by libel and answer, and the examination of witnesses; W. Rob. Adm. 169, 171, 172.

ACT OF SETTLEMENT. In English Law. The statute of 12 & 13 Will. III. c. 2, by which the crown of England was limited to the present royal family. 1 Bla. Com. 128; 2 Steph. Com. 290. It excluded the sons and successors of James II. and all other Roman Catholics, entailed the crown on the Electoress Sophia of Hanover as the nearest Protestant heir in case neither William III. nor Anne (afterwards queen) should leave issue. The electoress was a daughter of Elizabeth, sister of Charles I. One clause of it made the tenure of judges' office for life or good behavior independent of the crown.

ACT OF STATE. See GOVERNMENTAL ACT.

ACT OF SUPREMACY. An act of 26 Hen. VIII. c. 1, which recognized the king as the only supreme head on earth of the Church of England having full power to correct all errors, heresies, abuses, offenses, contempts and enormities. The oath, taken

under the act, denies to the Pope any other authority than that of the Bishop of Rome.

ACT OF UNIFORMITY. An act for the regulation of public worship obliging all the clergy to use only the Book of Common Prayer; 13 & 14 Car. II. c. 4.

ACT OF UNION. The statutes uniting England and Wales, 27 Hen. VIII. c. 26, confirmed by 34 & 35 Hen. VIII. c. 26; England and Scotland, 5 Anne, c. 8; Great Britain and Ireland, 39 & 40 Geo. III. c. 67.

The act uniting the three lower counties (now Delaware) to the province of Pennsylvania, passed at Upland, Dec. 7, 1682, is so called.

ACTA DIURNA (Lat.). A formula often used in signing. Du Cange.

Daily transactions, chronicles, journals, registers. I do not find the thing published in the *acta diurna* (daily records of affairs); Tacitus, Ann. 3, 3; Ainsworth, Lex.; Smith, Lex.

ACTA PUBLICA (Lat.). Things of general knowledge and concern; matters transacted before certain public officers. Calvinus, Lex.

ACTING. Performing; operating. See Meyer v. Johnston, 64 Ala. 603, 665. When applied to a supervising executive, it designates, not an appointed incumbent, but merely a *locum tenens*. Fraser v. U. S., 16 Ct. Cl. 507. See AD INTERIM.

ACTIO. In Civil Law. A specific mode of enforcing a right before the courts of law: *e. g. legis actio; actio sacramenti.* In this sense we speak of *actions* in our law, *e. g.* the action of debt. The right to a remedy, thus; *ex nudo pacto non oritur actio;* no *right of action* can arise upon a naked pact. In this sense we rarely use the word action; 3 Ortolan, Inst. § 1830; 5 Savigny, System 10; Mackeldey, Civ. L. (13th ed.) § 193.

The first sense here given is the older one. Justinian, following Celsus, gives the well-known definition: *Actio nihil aliud est quam jus persequendi in judicio quod sibi debetur,* which may be thus rendered: An action is simply the *right* to enforce one's demands in a court of law. See Inst. Jus. 4. 6, *de Actionibus;* Pollock, Expansion of C. L. 92.

In the sense of a specific form of remedy, there are various divisions of *actiones.*

Actiones civiles are those forms of remedies which were established under the rigid and inflexible system of the civil law, the *jus civilis. Actiones honorariæ* are those which were gradually introduced by the prætors and ædiles, by virtue of their equitable powers, in order to prevent the failure of justice which too often resulted from the employment of the *actiones civiles.* These were found so beneficial in practice that they eventually supplanted the old remedies, of which in the time of Justinian hardly a trace remained. Mackeldey, Civ. L. § 194; 5 Savigny, System.

Directæ actiones, as a class, were forms of remedies for cases clearly defined and recognized as actionable by the law. *Utiles actiones* were remedies granted by the *magistrate* in cases to which no *actio directa* was applicable. They were framed for the special occasion, by analogy to the existing forms, and were generally fictitious; that is, they proceeded upon the assumption that a state of things existed which would have entitled the party to an *actio directa,* and the cause was tried upon this assumption, which the other party was not allowed to dispute. 5 Savigny, System § 215.

Again, there are *actiones in personam* and *actiones in rem.* The former class includes all remedies for the breach of an *obligation,* and are considered to be directed against the person of the wrong-doer. The second class comprehends all remedies devised for the recovery of property, or the enforcement of a right not founded upon a contract between the parties, and are therefore considered as rather aimed at the *thing* in dispute, than at the person of the defendant. Mackeldey, Civ. L. § 195; 5 Savigny, System, § 206; 3 Ortolan, Inst. § 1952.

In respect to their *object,* actions are either *actiones rei persequendæ causa comparatæ,* to which class belong all *in rem actiones,* and those of the *actiones in personam* which were directed merely to the recovery of the value of a thing, or compensation for an injury; or they are *actiones pœnales,* called also *actiones ex delicto,* in which a penalty was recovered of the delinquent, or *actiones mixtæ,* in which were recovered both the actual damages and a penalty in addition. These classes, *actiones pœnales* and *actiones mixtæ,* comprehended cases of injuries, for which the civil law permitted redress by private action, but which modern civilization universally regards as crimes; that is, offences against society at large, and punished by proceedings in the name of the state alone. Thus, theft, receiving stolen goods, robbery, malicious mischief, and the murder or negligent homicide of a slave (in which case an injury to property was involved), gave rise to private actions for damages against the delinquent. Inst. 4. 1. *De obligationibus quæ ex delicto nascuntur; id.* 2. *De bonis vi raptis; id.* 3. *De lege Aquilia.* And see Mackeldey, Civ. L. § 196; 5 Savigny, System § 210.

In respect to the mode of procedure; *actiones in personam* are divided into *stricti juris,* and *bonæ fidei actiones.* In the former the court was confined to the strict letter of the law; in the latter something was left to the discretion of the judge, who was governed in his decision by considerations of what ought to be expected from an honest man under circumstances similar to those of the plaintiff or defendant. Mackeldey, Civ. L. § 197 *a.*

In Savigny's System there are more than a hundred different species of *actio* mentioned, and even in the succinct treatise of Mackeldey nearly eighty are enumerated.

In addition to the works cited may be added the Introduction to Sandars' Justinian, which may be profitably consulted.

To this brief explanation of the most important classes of *actiones* we subjoin an outline of the Roman system of procedure. From the time of the twelve tables (and probably from a much earlier period) down to about the middle of the sixth century of Rome, the system of procedure was that known as the *actiones legis*. Of these but five have come down to us by name; the *actio sacramenti*, the *actio per judicis postulationem*, the *actio per condictionem*, the *actio per manus injectionem*, and the *actio per pignoris captionem*. The first three of these were actions in the usual sense of the term; the last two were modes of execution. The *actio sacramenti* is the best known of all, because from the nature of the questions decided by means of it, which included those of *status*, of property *ex jure Quiritium*, and of successions; and from the great popularity of the tribunal, the *centumviri*, which had cognizance of these questions, it was retained in practice long after the other actions had succumbed to a more liberal system of procedure. As the *actio sacramenti* was the longest-lived, so it was also the earliest, of the *actiones leges;* and it is not only in many particulars a type of the whole class, but the other species are conceived to have been formed by successive encroachments upon its field. The characteristic feature of this action was the *sacramentum*, a pecuniary deposit made in court by each party, which was to be forfeited by the loser. Subsequently, however, the parties were allowed, instead of an actual deposit, to give security in the amount required. Our knowledge of all these actions is exceedingly slight, being derived from fragments of the earlier jurisprudence preserved in literary works, laboriously pieced together by commentators, and the numerous gaps filled out by aid of ingenious and most copious conjectures. They abounded in sacramental words and significant gestures, and, while they were inflexibly rigid in their application, they possessed a character almost sacred, so that the mistake of a word or the omission of a gesture might cause the loss of a suit. In the nature of things, such a system could not maintain itself against the advance of civilization, bringing with it increased complications in all the relations of man to man; and accordingly we find that it gradually, but sensibly, declined, and that at the time of Justinian not a trace of it existed in practice. See 3 Ortolan, Justinian 467 *et seq.*

About the year of Rome 507 began the introduction of the system known as the procedure *per formulam*, or *ordinaria judicia*. An important part of the population of Rome consisted of foreigners, whose disputes with each other or with Roman citizens could not be adjusted by means of the *actiones leges*, these being entirely confined to questions of the strict Roman law, which could only arise between Roman citizens.

To supply the want of a *forum* for foreign residents, a magistrate, the *prætor peregrinus*, was constituted with jurisdiction over this class of suits, and from the procedure established by this new court sprang the formulary system, which proved so convenient in practice that it was soon adopted in suits where both parties were Roman citizens, and gradually withdrew case after case from the domain of the *legis actiones*, until few questions were left in which that cumbrous procedure continued to be employed.

An important feature of the formulary system, though not peculiar to that system, was the distinction between the *jus* and the *judicium*, between the magistrate and the judge. The magistrate was vested with the civil authority, *imperium*, and that jurisdiction over law-suits which in every state is inherent in the supreme power; he received the parties, heard their conflicting statements, and referred the case to a special tribunal of one or more persons, *judex, arbiter, recuperatores*. The function of this tribunal was to ascertain the facts and pronounce judgment thereon, in conformity with a special authorization to that effect conferred by the magistrate. Here the authority of the judge ended; if the defeated party refused to comply with the sentence, the victor must again resort to the magistrate to enforce the judgment. From this it would appear that the functions of the judge or judges under the Roman system corresponded in many respects with those of the jury at common law. They decided the question of fact submitted to them by the magistrate, as the jury decides the issue eliminated by the pleadings; and, the decision made, their functions ceased, like those of the jury.

As to the amount at stake, the magistrate, in cases admitting it, had the power to fix the sum in dispute, and then the judge's duties were confined to the simple question whether the sum specified was due the plaintiff or not; and if he increased or diminished this amount he subjected himself to an action for damages. In other cases, instead of a precise sum, the magistrate fixed a *maximum* sum, beyond which the judge could not go in ascertaining the amount due; but in most cases the magistrate left the amount entirely to the discretion of the judge.

The directions of the magistrate to the judge were made up in a brief statement called the *formula*, which gives its name to this system of procedure. The composition of the formula was governed by well-established rules. When complete, it consisted of four parts, though some of these were frequently omitted, as they were unnecessary in certain classes of actions. The *first* part of the formula, called the *demonstratio*, recited the subject submitted to the judge, and consequently the facts of which he was to take cognizance. It varied of course, with the subject-matter of the suit, though each class of cases had a fixed and appropriate form. This form, in an action by a vendor against his vendee, was as follows: *"Quod Aulus Agerius Numerio Negidio hominem vendidit;"* or, in case of a bailment, *"Quod Aulus Agerius apud Numerium Negidium hominem deposuit."* The *second* part of the *formula* was the *intentio:* in this was stated the claim of the plaintiff, as founded upon the facts set out in the *demonstratio*. This, in a question of contracts, was in these words: *"Si paret Numerium Negidium Aulo Agerio sestertium X milia dare oportere,"* when the magistrate fixed the amount; or, *"Quidquid paret Numerium Negidium Aulo Agerio dare facere oportere,"* when he left the amount to the discretion of the judge. In a claim of property the form was, *"Si paret hominem ex jure Quiritium Auli Agerii esse."* The *third* part of the complete *formula* was the *adjudicatio*, which contained the authority to the judge to award to one party a right of property belonging to the other. It was in these words: *"Quantum adjudicari oportet, judex Titio adjudicato."* The *last* part of the *formula* was the *condemnatio*, which gave the judge authority to pronounce his decision for or against the defendant. It was as follows: *"Judex, Numerium Negidium Aulo Agerio sestertium X milia condemna: si non paret, absolve,"* when the amount was fixed; or, *"Judex, Numerium Negidium Aulo Agerio dum-taxat X milia condemna; si non paret, absolvito"* when the magistrate fixed a *maximum;* or, *"Quanti ea res erit, tantam pecuniam, judex, Numerium Negidium Aulo Agerio condemna: si non paret, absolvito,"* when it was left to the discretion of the judge.

Of these parts, the *intentio* and the *condemnatio* were always employed: the *demonstratio* was sometimes found unnecessary, and the *adjudicatio* only occurred in three species of actions—*familiæ erciscundæ communi dividundo*, and *finium regundorum* —which were actions for division of an inheritance, actions of partition, and suits for the rectification of boundaries.

The above are the essential parts of the *formula* in their simplest form; but they are often enlarged

by the insertion of clauses in the *demonstratio*, the *intentio*, or the *condemnatio*, which were useful or necessary in certain cases: these clauses are called *adjectiones*. When such a clause was inserted for the benefit of the defendant, containing a statement of his defence to the claim set out in the *intentio*, it was called an *exceptio*. To this the plaintiff might have an answer, which, when inserted, constituted the *replicatio*, and so on to the *duplicatio* and *triplicatio*. These clauses like the *intentio* in which they were inserted, were all framed conditionally, and not, like the common-law pleadings, affirmatively. Thus: *"Si paret Numerium Negidium Aulo Agerio X milia dare oportere* (intentio); *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat* (exceptio); *Si non, etc.* (replicatio).

In preparing the *formula* the plaintiff presented to the magistrate his *demonstratio*, *intentio*, etc., which was probably drawn in due form under the advice of a jurisconsult; the defendant then presented his *adjectiones*, the plaintiff responded with his replications and so on. The magistrate might modify these, or insert new *adjectiones*, at his discretion. After this discussion *in jure, pro tribunali*, the magistrate reduced the results to form, and sent the *formula* to the judge, before whom the parties were confined to the case thus settled. See 3 Ortolan, Justinian, §§ 1909 *et seq.*

The procedure *per formulam* was supplanted in course of time by a third system, *extraordinaria judicia*, which in the days of Justinian had become universal. The essence of this system consisted in dispensing with the judge altogether, so that the magistrate decided the case himself, and the distinction between the *jus* and the *judicium* was practically abolished. This new system commenced with usurpation by the magistrates, in the extension of an exceptional jurisdiction, which had existed from the time of the *leges actiones*, to cases not originally within its scope. Its progress may be traced by successive enactments of the emperors, and was so gradual that, even when it had completely undermined its predecessor, the magistrate continued to reduce to writing a sort of formula representing the result of the pleadings. In time, however, this last relic of the former practice was abolished by an imperial constitution. Thus the formulary system, the creation of the great Roman jurisconsults, was swept away, and carried with it in its fall all those refinements of litigation in which they had so much delighted. Thenceforth the distinctions between the forms of actions were no longer regarded, and the word *actio*, losing its signification of a *form*, came to mean a *right, jus persequendi in judicio quod sibi debetur*.

See Ortolan, Hist. no. 392 *et seq.*; *id.* Instit. nos. 1833-2067; 5 Savigny, System § 6; Sandars, Justinian, Introduction; Gaius, by Abdy & Walker.

The English "formulary system" of actions is "distinctively English but also in a certain sense very Roman." It was not "invented in one piece by some all-wise legislator," but "grew up little by little." The age of its rapid growth was between 1154 and 1272. The similarity between the Roman and English formulary systems is so patent that it has naturally aroused the suggestion that one must have been the model for the other, and it is very true that between 1150 and 1250, or thereabouts, the old Roman law in its medieval form exercised a powerful influence on some of the English rules. But the differences in the system were as remarkable as the resemblances. Thus the *Prætor* heard both parties before he composed his formula, while the chancellor issues the writ before he hears the defendant's story. It is usually "as of course." The English forms of action were therefore not mere rubrics, but were institutes of the law. There were in common use some thirty or forty actions between which there were large differences. 2 Poll. & Maitl. 556.

See JUS AD REM.

ACTIO ÆSTIMATORIA, ACTIO QUANTI MINORIS. In the civil law two names of an action which lay on behalf of a buyer to reduce the contract price proportionately to the defects of the object, not to cancel the sale; the *judex* had power, however, to cancel the sale; Hunter, Rom. Law 505.

ACTIO ARBITRARIA. An action depending on the discretion of the judge. In this, unless the defendant makes amends to the plaintiff at the judge's discretion, he must be condemned; Hunter, Rom. Law 987.

ACTIO BONÆ FIDEI (Lat. an action of good faith). A class of actions in which the judge might at the trial take into account any equitable circumstances affecting either of the parties to the action. 1 Spence, Eq. Jur. 210.

ACTIO CALUMNIÆ. An action to restrain the defendant from prosecuting a trumped up charge against the plaintiff. Hunter, Rom. Law 1020. An action for malicious prosecution. So. Afr. Leg. Dict.

ACTIO CIVILIS. A civil as distinguished from a criminal action.

ACTIO COMMODATI CONTRARIA. An action by the borrower against the lender, to compel the execution of the contract. Pothier, *Prêt à Usage* n. 75.

ACTIO COMMODATI DIRECTA. An action by a lender against a borrower, the principal object of which is to obtain a restitution of the thing lent. Pothier, *Prêt à Usage* nn. 65, 68.

ACTIO COMMUNI DIVIDUNDO. An action for a division of the property held in common. Story, Partn. Bennett ed. § 352.

ACTIO CONDICTIO INDEBITATI. An action by which the plaintiff recovers the amount of a sum of money or other thing he paid by mistake. Pothier, *Promutuum* n. 140; Merlin, Rép.

ACTIO EX CONDUCTO. An action which the bailor of a thing for hire may bring against the bailee, in order to compel him to re-deliver the thing hired. Pothier, *du Contr. de Louage* n. 59; Merlin, Rép.

ACTIO CONFESSORIA. An affirmative petitory action for the enforcement of a servitude. Hunter, Rom. Law 425.

ACTIO EX CONTRACTU. See ACTION.

ACTIO DAMNI INJURIA. The name of a general class of actions for damages.

ACTIO EX DELICTO. See ACTION.

ACTIO DEPOSITI CONTRARIA. An action which the depositary has against the depositor, to compel him to fulfil his engagement towards him. Pothier, *Du Dépôt* n. 69.

ACTIO DEPOSITI DIRECTA. An action which is brought by the depositor against the depositary, in order to get back the thing deposited. Pothier, *Du Dépôt* n. 60.

ACTIO DIRECTA. A direct action; an action founded on strict law and conducted

according to fixed forms founded on certain legal obligations.

ACTIO DE DOLO MALO. An action of fraud. It lay for a defrauded person against the defrauder and his heirs who had been enriched by the fraud, to obtain restitution of the thing of which he had been fraudulently deprived with all its accessions, or, where this was not practicable, for compensation in damages; Black, citing Mackeldy, Rom. Law § 227.

ACTIO EMPTI. An action to compel a seller to perform his obligations or pay compensation; also to enforce any special agreements by him embodied in a contract of sale. Hunter, Rom. L. 505.

ACTIO EXERCITORIA. An action against the *exercitor* or employer of a vessel. Black L. Dict.

ACTIO AD EXHIBENDUM. An action instituted for the purpose of compelling the person against whom it was brought to exhibit some thing or title in his power.

It was always preparatory to another action, which lay for the recovery of a thing movable or immovable; 1 Merlin, *Quest. de Droit* 84.

ACTIO IN FACTUM. An action adapted to the particular case which had an analogy to some *actio in jus* which was founded on some subsisting acknowledged law. 1 Spence, Eq. Jur. 212. The origin of these actions is strikingly similar to that of actions on the case at common law. See CASE.

ACTIO FAMILIÆ ERCISCUNDÆ. An action for the division of an inheritance. Inst. 4. 6. 20; Bracton 100 *b*.

ACTIO FURTI. An action of theft. Just. 4, 1, 13–17. This could only be brought for the penalty attached to the offence, and not to recover the thing stolen, for which other actions were provided. Just. 4, 1, 13. An appeal of larceny. The old process by which a thief can be pursued and the goods vindicated. 2 Holdsw. Hist. Eng. L. 202.

ACTIO HONORARIA. An honorary or prætorian action. Dig. 44, 7, 25, 35.

ACTIO JUDICATI. An action instituted, after four months had elapsed after the rendition of judgment, in which the judge issued his warrant to seize, first, the movables, which were sold within eight days afterwards; and then the immovables, which were delivered in pledge to the creditors, or put under the care of a curator, and if, at the end of two months, the debt was not paid, the land was sold. Dig. 42. 1; Code, 8. 34.

According to some authorities, if the defendant then utterly denied the rendition of the former judgment, the plaintiff was driven to a new action, conducted like any other action, which was called *actio judicati*, and which had for its object the determination of the question whether such a judgment had been rendered. The exact meaning of the term is by no means clear. See Savigny, Syst. 305, 411; 3 Ortolan, Just. § 2033.

ACTIO LEGIS AQUILIÆ. In Civil Law. An action under the Aquilian law to recover damages for maliciously injuring in any way a thing belonging to another. Dropsie's Mackeldey's Rom. Law, § 486.

ACTIO EX LOCATO. An action which a person who let a thing for hire to another might have against the hirer. Dig. 19, 2.

ACTIO MANDATI. An action founded upon a mandate. Dig. 17. 1.

ACTIO MIXTA. A mixed action for the recovery of a thing, or compensation for damages and also for the payment of a penalty partaking of the nature of an action *in rem* and *in personam*. Hunter, Rom. L. 340.

ACTIO NON. In Pleading. The declaration in a special plea "that the said plaintiff ought not to have or maintain his aforesaid action thereof against" the defendant (in Latin, *actionem non habere debet*).

It follows immediately after the statement of appearance and defence; 1 Chit. Plead. 531; 2 *id.* 421; Stephens, Plead. 394.

ACTIO NON ACCREVIT INFRA SEX ANNOS (Lat.). The action did not accrue within six years.

A plea of the statute of limitations, by which the defendant insists that the plaintiff's action has not accrued within six years. It differs from *non assumpsit* in this: *non assumpsit* is the proper plea to an action on a simple contract, when the action accrues on the promise; but when it does not accrue on the promise, but subsequently to it, the proper plea is *actio non accrevit*, etc.; Lawes, Plead. 733; Meade v. M'Dowell, 5 Binn. (Pa.) 200, 203; 2 Salk. 422; 2 Saund. 63 *b*.

ACTIO NON ULTERIUS. A name given in English pleading to the distinctive clause in the plea to the further maintenance of the action; introduced in place of the plea *puis darrein continuance*. Steph. Pl. 64, 65, 401; Black, Law Dict.

ACTIO DE PECULIO. An action concerning or against the *peculium* or separate property of a party.

ACTIO DE PECUNIA CONSTITUTA. An action for money due under a promise. Campbell, Rom. L. 150.

ACTIO PERSONALIS. A personal action. The proper term in the civil law is *actio in personam*. See that title and ACTIO.

ACTIO PERSONALIS MORITUR CUM PERSONA (Lat.). A personal action dies with the person.

In Practice. A maxim which expressed the law in regard to the surviving of personal actions.

This maxim does not apply in case of the civil death of either persons or corporations; Shayne v. Publishing Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654.

To render the maxim perfectly true, the expression "personal actions" must be restricted very much within its usual limits. In the most extensive sense, all actions are *personal* which are neither *real* nor *mixed*, and in this sense of the word personal the maxim is not true. A further distinction, moreover, is to be made between personal actions actually commenced and pending at the death of the plaintiff or defendant, and causes of action upon which suit might have been, but was not, brought by or against the deceased in his lifetime. In the case of actions actually commenced, the old rule was that the suit abated by the death of either party. In re Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. Ed. 1134; Macker's Heirs v. Thomas, 7 Wheat. (U. S.) 530, 5 L. Ed. 515. But the inconvenience of this rigor of the common law has been modified by statutory provisions in England and the states of this country, which prescribe in substance that when the *cause of action* survives to or against the personal representatives of the deceased, the suit shall not abate by the death of the party, but may proceed on the substitution of the personal representatives on the record by *scire facias*, or in some states by simple suggestion of the facts on the record. See Green v. Watkins, 6 Wheat. (U. S.) 260, 5 L. Ed. 256.

CONTRACTS.—It is clear that, in general, a man's personal representatives are liable for his breach of contract on the one hand, and, on the other, are entitled to enforce contracts made with him. This is the rule; but it admits of a few exceptions; Stimpson v. Sprague, 6 Greenl. (Me.) 470; Wright v. Eldred, 2 D. Chipm. (Vt.) 41.

No action lies against executors upon a covenant to be performed by the testator in person, and which consequently the executor cannot perform, and the performance of which is prevented by the death of testator; 3 Wils. Ch. 99; Cro. Eliz. 553; Howe Sewing Mach. Co. v. Rosensteel, 24 Fed. 583; as if an author undertakes to compose a work, or a master covenants to instruct an apprentice, but is prevented by death. See Wms. Exec. 1467. But, for a breach committed by deceased in his lifetime, his executor would be answerable; 1 M. & W. 423, *per* Parke, B.; Dickinson v. Calahan's Adm'rs, 19 Pa. 234.

As to what are such contracts, see 2 Perr. & D. 251; 10 Ad. & E. 45; 1 M. & W. 423; Dempsey v. Hertzfield, 30 Ga. 866; Siler v. Gray, 86 N. C. 566. But whether the contract is of such a nature is a mere question of construction, depending upon the intention of the parties; Cro. Jac. 282; 1 Bingh. 225; unless the intention be such as the law will not enforce; Dickinson v. Calahan's Adm'rs, 19 Pa. 233.

Under a statute recognizing as surviving causes of action those which survived at common law, a cause of action, on a covenant on which a decedent might have been sued, may be enforced against his representatives, and it was held that the rule of common law that a suit abated though the cause of action survived, was modified by the statute, and a suit pending against decedent on a covenant did not abate; Sprague v. Greene, 20 R. I. 153, 37 Atl. 699.

Again, an executor, etc., cannot maintain an action on a promise made to decedent where the damage consisted entirely in the personal suffering of the deceased without any injury to his personal estate, as a breach of promise of marriage; 2 M. & S. 408; Smith v. Sherman, 4 Cush. (Mass.) 408; Hovey v. Page, 55 Me. 142; L. R. 10 C. P. 189; Lattimore v. Simmons, 13 S. & R. (Pa.) 183; Miller v. Wilson, 24 Pa. 115; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Grubb's Adm'r v. Sult, 32 Grat. (Va.) 203, 34 Am. Rep. 765. But in Louisiana the action survives if there has been a default, on the ground that the obligation to fulfill the engagement is merged in the obligation to respond in damages for the default; Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722.

Upon the question whether the action survives where there is not only personal injury but damage to property also—where the latter is the chief element of the damages sought, the action survives; 2 M. & S. 409; Lattimore v. Simmons, 13 S. & R. (Pa.) 183; Hovey v. Page, 55 Me. 142; but when the damages to the property are incidental merely to the personal injury there is less certainty. That the action survives is the inclination of English cases; L. R. C. P. 189; 30 L. T. Rep. N. S. 765; S. C. 32 *id.* 36; so also in Lattimore v. Simmons, 13 S. & R. (Pa.) 183; Hovey v. Page, 55 Me. 142; at least to the extent of damage to property; Hegerich v. Keddie, 99 N. Y. 269, 1 N. E. 787, 52 Am. Rep. 25; Vittum v. Gilman, 48 N. H. 416; Cravath v. Plympton, 13 Mass. 454. To the contrary are Smith v. Sherman, 4 Cush. (Mass.) 408; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250, which, however, was for breach of promise of marriage, and therefore, *sui generis;* and on this ground it is distinguished in Cregin v. R. Co., 75 N. Y. 192, 31 Am. Rep. 459, where an action by a husband against a carrier for personal injuries to his wife was held to survive as for a wrong to property rights or interests. Nor will an action of breach of promise of marriage survive against the executor of the promisor where no special damage to property is alleged; Chase v. Fitz, 132 Mass. 359;

Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146; Larocque v. Conheim, 42 Misc. 613, 87 N. Y. Supp. 625; and this rule is not changed by statutes providing that actions for personal injuries shall not abate; Wade v. Kalbfleisch, 58 N. Y. 282, 17 Am. Rep. 250; Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723; Smith v. Sherman, 4 Cush. (Mass.) 408; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757. This action does not survive the death of either party; French v. Merrill, 27 App. Div. 612, 50 N. Y. Supp. 776. See Johnson v. Levy, 118 La. 447, 43 South. 46, 9 L. R. A. (N. S.) 1020, 118 Am. St. Rep. 378, 10 Ann. Cas. 722.

Nor does a right of action against a surgeon for malpractice survive his death; Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Vittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532; Wolf v. Wall, 40 Ohio St. 111; Best v. Vedder, 58 How. Pr. (N. Y.) 187.

But a right of action for work and labor survives against one who induced plaintiff to marry and live with him on the false representation that he was a widower; Higgins v. Breen, 9 Mo. 497; as also the right to recover as for goods sold and delivered for goods transferred in consideration of a promise of marriage; Frazer v. Boss, 66 Ind. 1. And as to the right of an executor or administrator to sue on a contract broken in the testator's lifetime, where no damage to the personal estate can be stated, see 2 Cr. M. & R. 588; 5 Tyrwh. 985, and the cases there cited. The right to redeem survives; Clark v. Seagraves, 186 Mass. 430, 71 N. E. 813; and so does the statutory right of action for money paid on purchase or sale of securities with intention of no actual delivery; Anderson v. Stock Exchange, 191 Mass. 117, 77 N. E. 706; and the statutory action by a married woman for damages from sale of liquor to her husband survives after the death of the saloon keeper; Garrigan v. Huntimer, 20 S. D. 182, 105 N. W. 278.

Divorce proceedings being a personal action, death of either of the parties before decree abates the proceedings; Ewald v. Corbett, 32 Cal. 493; Pearson v. Darrington, 32 Ala. 257; Danforth v. Danforth, 111 Ill. 236; Swan v. Harrison, 2 Cold. (Tenn.) 534; and the court will not require the executor to become a party in order to answer the wife's demand for additional allowance for counsel fees; McCurley v. McCurley, 60 Md. 185, 45 Am. Rep. 717. But defendant's death after trial but before judgment, will not abate the suit; Danforth v. Danforth, 111 Ill. 236.

The fact whether or not the estate of the deceased has suffered loss or damage would seem to be the criterion of the right of the personal representative to sue in another class of cases, that is, where there is a breach of an implied promise founded on a *tort*. For where the action, though in form *ex contractu*, is founded upon a *tort to the person*, it does not in general survive to the executor. Thus, with respect to injuries affecting the life and health of the deceased; all such as arise out of the unskilfulness of medical practitioners; or the imprisonment of the party occasioned by the negligence of his attorney, no action, generally speaking, can be sustained by the executor or administrator on a breach of the *implied promise* by the person employed to exhibit a proper portion of skill and attention; such cases being in substance actions for injuries to the person; 2 M. & S. 415; 8 M. & W. 854; Jenkins v. French, 58 N. H. 532. And it has been held that for the breach of an implied promise of an attorney to investigate the title to a freehold estate, the executor of the purchaser cannot sue without stating that the testator sustained some actual damage to his estate; 4 J. B. Moore 532. But the law on this point has been considerably modified by statute.

On the other hand, where the breach of the implied promise has occasioned damage to the *personal estate* of the deceased, though it has been said that an action in form *ex contractu* founded upon a *tort* whereby damage has been occasioned to the estate of the deceased, as debt against the sheriff for an escape, does not survive at common law; Neal v. Haygood, 1 Ga. 514 (though in this case the rule is altered in that state by statute), yet the better opinion is that, if the executor can show that damage has accrued to the *personal estate* of the deceased by the breach of an express or implied promise, he may well sustain an action at common law, to recover such damage, though the action is in some sort founded on a *tort;* Wms. Exec. 676; citing, *in extenso*, 2 Brod. & B. 102; 4 J. B. Moore 532. And see 3 Woodd. Lect. 78. So, by waiving the *tort* in a trespass, and going for the value of the property, the action of *assumpsit* lies as well for as against executors; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596.

A claim for money paid as usury survives against the estate of the person to whom it was paid; Roberts v. Burton's Estate, 27 Vt. 396; and so does an action against a justice of the peace on his official bond for neglect of duty; State v. Houston, 4 Blackf. (Ind.) 291. The liability of a deceased joint debtor survives; Megrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032; and the right of action of a joint payee; Semper v. Coates, 93 Minn. 76, 100 N. W. 662; and of the survivor of two joint parties to a contract; Northness v. Hillestad, 87 Minn. 304, 91 N. W. 1112.

In an action on a contract commenced against joint defendants, one of whom dies pending the suit, the rule varies. In some of the states the personal representatives of

the deceased defendant may be added as parties and the judgment taken against them jointly with the survivors; Smith v. Crutcher, 27 Miss. 455; Bennett v. Spillars, 9 Tex. 519; Ewell v. Tye, 76 S. W. 875, 25 Ky. L. Rep. 976; Strause v. Braunreuter, 14 Pa. Super. Ct. 125. In others the English rule obtains which requires judgment to be taken against the survivors only; and this is conceived to be the better rule, because the judgment against the original defendants is *de bonis propriis*, while that against the executors is *de bonis testatoris;* New Haven & N. Co. v. Hayden, 119 Mass. 361.

The death of one of several defendants works a severance and the plaintiff should either dismiss as to all except the administrator, or proceed against the living defendant only; Marcy v. Whallon, 115 Ill. App. 435.

Where action is pending against two partners, and the death of one is not suggested before judgment, the judgment is a lien on the partnership assets and binds the surviving partner personally; Sullivan v. Susong, 40 S. C. 154, 18 S. E. 268. On the death of a joint owner of a mortgage debt, it survives at law to the remaining owners who alone can sue for it; Cote v. Dequindre, Walk. Ch. (Mich.) 64; Martin v. McReynolds, 6 Mich. 70. This is under a statute whereby mortgages are excepted from the provision that grants to two or more persons are to be construed to create estates in common. In a comment upon an English case where the personal representative was held to be a necessary party, as he would in equity be entitled to the decedent's share of the debt when collected (1 Beav. 539), the Michigan court says: "The reason given for the decision is true in point of fact, but the consequence deduced from it does not follow."

In an action commenced against directors, where one dies after the suit commenced, his executor need not be joined; Githers v. Clark, 158 Pa. 616, 28 Atl. 232. On the death of a joint guarantor, the action cannot be revived against his representatives; American Copper Co. v. Lowther, 25 Misc. 441, 54 N. Y. Supp. 960, affirmed, and in a joint bond, if one obligor die, the debt survives, but the facts must be pleaded; Bentley v. Harmanson's Ex'rs, 1 Wash. (Va.) 273.

TORTS.—The ancient maxim which we are discussing applies more peculiarly to cases of *tort*. It was a principle of the common law that, if an injury was done either to the person or property of another for which *damages* only could be recovered in satisfaction,—where the declaration imputes a tort done either to the person or property of another, and the plea must be *not guilty*,—the action died with the person to whom or by whom the wrong was done. See Wms. Exec. 668; 3 Bla. Com. 302; 1 Saund. 216, 217, n. (1); Viner, Abr. *Executors* 123; Comyn, Dig. *Administrator*, B. 13.

But if the goods, etc., of the testator taken away continue in specie in the hands of the wrong-doer, it has long been decided that *replevin* and *detinue* will lie for the executor to recover back the specific goods, etc.; W. Jones 173, 174; 1 Saund. 217; Trigg v. Conway, 1 Hempst. 711, Fed. Cas. No. 14,173; Noland v. Leech, 10 Ark. 504; or, in case they are sold, an action for money had and received will lie for the executor to recover the value; 1 Saund. 217. And actions *ex delicto*, where one has obtained the property of another and converted it, survive to the representatives of the injured party, as replevin, trespass *de bonis asport.* But where the wrong-doer acquired no gain, though the other party has suffered loss, the death of either party destroys the right of action; Taylor v. Lowell, 3 Mass. 351, 3 Am. Dec. 141; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596; Mellen v. Baldwin, 4 Mass. 480; McEvers v. Pitkin, 1 Root (Conn.) 216.

Successive innovations upon this rule of the common law have been made by various statutes *with regard to actions which survive to* executors and administrators.

The stat. 4 Ed. III. c. 7, gave a remedy to executors for a *trespass* done to the personal estate of their testators, which was extended to executors of executors by the stat. 25 Ed. III. c. 5. But these statutes did not include wrongs done to the person or freehold of the testator or intestate; Wms. Exec. 670. By an equitable construction of these statutes, an executor or administrator shall now have the same actions for any injury done to the personal estate of the testator in his lifetime, *whereby it has become less beneficial* to the executor or administrator, as the deceased himself might have had, whatever the form of action may be; 1 Saund. 217; 1 Carr. & K. 271; W. Jones 173; 2 M. & S. 416; 5 Co. 27 *a;* Cro. Car. 297. These statutes are a recognized part of the common law in this country; Hegerich v. Keddie, 99 N. Y. 260, 1 N. E. 787, 52 Am. Rep. 25; they are followed by many state statutes and both these and the English statutes have been liberally construed in favor of survival in both countries; 7 East 134; Baker's Adm'r v. Crandall, 78 Mo. 584, 47 Am. Rep. 126; Ten Eyck v. Runk, 31 N. J. L. 428; Withee v. Brooks, 65 Me. 18; Aldrich v. Howard, 8 R. I. 125, 86 Am. Rep. 615; Fried v. R. Co., 25 How. Pr. (N. Y.) 287; Nettles' Ex'rs v. D'Oyley, 2 Brev. (S. C.) 27. And the laws of the different states, either by express enactment or by having adopted the English statutes, give a remedy to executors in cases of injuries done to the personal property of their testator in his lifetime. At common law an action of replevin was abated by the death of the defendant, but not by the death of the plaintiff; Potter v. Van Vranken, 36 N. Y. 619, 627; Mellen v. Bald-

win, 4 Mass. 480; 1 And. 241; and see Reist v. Heibrenner, 11 S. & R. (Pa.) 131; Keite v. Boyd, 16 *id.* 300; but the effect of the death of defendant is generally dependent upon the construction of state statutes under which, in most states, the action is saved, as in Kingsbury's Ex'rs v. Lane's Ex'rs, 21 Mo. 115; McCrory v. Hamilton, 39 Ill. App. 490; O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619. In Hambly v. Trott, Cowp. 37, Lord Mansfield held that in actions *ex delicto*, the liability for the tort died with the person, but that if thereby property was acquired, the personal representatives were liable, and this principle has been extensively applied in connection with the stat. 4 Edw. III. both in the enactment and construction of the state statutes. The cases are collected and classified in 53 Am. Rep. 525, note.

Trover for a conversion in the lifetime of the testator may be brought by his executor; Parrott's Adm'rs v. Dubignon, T. U. P. Charlt. (Ga.) 261; Eubanks v. Dobbs, 4 Ark. 173; Nations v. Hawkins' Adm'rs, 11 Ala. 859. But an executor cannot sue for expenses incurred by his testator in defending against a groundless suit; Deming v. Taylor, 1 Day (Conn.) 285; nor in *Alabama* (under the Act of 1826) for any injury done in the lifetime of deceased; Garey v. Edwards, 15 Ala. 109; nor in *Vermont* can he bring *trespass on the case*, except to recover damages for an injury to some specific property; Barrett's Adm'r v. Copeland, 20 Vt. 244. And he cannot bring *case* against a sheriff for a false return in testator's action; *ibid.* But he may have *case* against the sheriff for not keeping property attached, and delivering it to the officer holding the execution in his testator's suit; Barrett's Adm'r v. Copeland, 20 Vt. 244, n.; and case against the sheriff for the default of his deputy in not paying over to testator money collected in execution; Bellows v. Allen's Adm'r, 22 Vt. 108. An action in the nature of an action on the *case* for injuries resulting from breach of carrier's contract to transport a passenger safely, survives to the personal representative; Winnegar's Adm'r v. Ry. Co., 85 Ky. 547, 4 S. W. 237. An executor may revive an action against the sheriff for misfeasance of his deputy, but not an action against the deputy for his misfeasance; Valentine v. Norton, 30 Me. 194. So, where the action is merely penal, it does not survive; Estis' Ex'x v. Lenox, 1 N. C. 292; as to recover penalties for taking illegal fees by an officer from the intestate in his lifetime; Reed v. Cist, 7 S. & R. (Pa.) 183. But in such case the administrator may recover back the excess paid above the legal charge; *ibid.*

Under the common law an action to recover a penalty or forfeiture dies with the person; U. S. v. De Goer, 38 Fed. 80. The action will not abate upon death of the relator, if it is brought by the state upon an official bond; Davenport v. McKee, 98 N. C. 500, 4 S. E. 545.

The stat. 3 & 4 W. IV. c. 42, § 2, gave a remedy to executors, etc., for injuries done in the lifetime of the testator or intestate to his real property, which case was not embraced in the stat. Ed. III. This statute introduced a material alteration in the maxim *actio personalis moritur cum persona* as well in favor of executors and administrators of the party injured as against the personal representatives of the wrongdoer, but respects only injuries to personal and real property; Chit. Pl. Parties to Actions in form *ex delicto*. Similar statutory provisions have been made in most of the states. Thus, *trespass quare clausum fregit* survives; Dobbs v. Gullidge, 20 N. C. 197; McPherson v. Seguine, 14 N. C. 153; Kennerly v. Wilson, 1 Md. 102; Winters v. McGhee, 3 Sneed 128; Musick v. Ry. Co., 114 Mo. 309, 21 S. W. 491; Wilbur v. Gilmore, 21 Pick. (Mass.) 250; even if action was begun after the death of the injured party; Goodridge v. Rogers, 22 Pick. (Mass.) 495; Herbert v. Hendrickson, 38 N. J. L. 296; *proceedings to recover damages* for injuries to land by overflowing; Howcott's Ex'rs v. Warren, 29 N. C. 20; Upper Appomattox Co. v. Harding, 11 Gratt. (Va.) 1; *contra*, McLaughlin v. Dorsey, 1 Harr. & McH. (Md.) 224. *Ejectment* in the United States circuit court does not abate by death of plaintiff; Hatfield v. Bushnell, 22 Vt. 659, Fed. Cas. No. 6,211. In *Illinois* the statute law allows an action to executors only for an injury to the personalty, or personal wrongs, leaving injuries to realty as at common law; Reed v. R. Co., 18 Ill. 403.

Injuries to the person. In cases of injuries to the *person*, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action at *common law* can be supported either by or against the executors or other personal representatives; 3 Bla. Com. 302; 2 M. & S. 408; Mobile Life Ins. Co. v. Brame, 95 U. S. 756, 24 L. Ed. 580; Connecticut Mut. Life Ins. Co. v. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Winnegar's Adm'r v. R. Co., 85 Ky. 547, 4 S. W. 237; Roche v. Carroll, 6 D. C. 79; Thayer v. Dudley, 3 Mass. 296; and the action is not impliedly saved by a statute giving a right of action after death to the personal representatives; Martin's Adm'r v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. A case for the seduction of a man's daughter; Brawner v. Sterdevant, 9 Ga. 69; for libel; Walters v. Nettleton, 5 Cush. (Mass.) 544; for malicious prosecution; Nettleton v. Dinehart, 5 Cush. (Mass.) 543; are instances of the general rule stated. The death of one defendant, where partners are

sued for libel, does not abate the action, even aside from the statute; Brown v. Kellogg, 182 Mass. 297, 65 N. E. 378. But in one respect this rule has been materially modified in England by Lord Campbell's Act, and in this country by like acts in many states. These provide for the case where a wrongful act, neglect, or default has caused the death of the injured person, and the act is of such a nature that the injured person, had he lived, would have had an action against the wrong-doer. In such cases the wrong-doer is rendered liable, in general, not to the executors or administrators of the deceased, but to his near relations, husband, wife, parent or child. In the construction given to these acts, the courts have held that the measure of damages is in general the pecuniary value of the life of the person killed to the person bringing suit, and that vindictive or exemplary damages by reason of gross negligence on the part of the wrong-doer are not allowable; Sedg. Damages.

Most states have statutes founded on Lord Campbell's Act. In some states, by statute, an action may be brought against a city or town for damages to the person of deceased occasioned by an assault by another's dogs; Wilkins v. Wainwright, 173 Mass. 212, 53 N. E. 397; or by reason of a defect in a highway; Demond v. City of Boston, 7 Gray (Mass.) 544; Roberts v. City of Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572; but it is otherwise in South Carolina; All v. Barnwell County, 29 S. C. 161, 7 S. E. 58. In Ohio it is considered to be an action "for a nuisance" and abates at the death of the party injured; Village of Cardington v. Fredericks, 46 Ohio 442, 21 N. E. 766. But where the death, caused by a railway collision, was instantaneous, no action can be maintained under the statute of Massachusetts; for the statute supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right; Kearney v. R. Co., 9 Cush. (Mass.) 108. Where a person during his lifetime commenced an action for damages for injuries, and the action was pending at his death, an action to recover damages for his death by his representative was barred; but such representatives had the right to continue the action commenced by the decedent in his lifetime; Edwards v. Gimbel, 202 Pa. 30, 51 Atl. 357. But it has been held that an administrator cannot continue an action brought by the decedent in his lifetime, as the only action maintainable is by the administrator under the statute for the benefit of the heirs; Martin v. R. Co., 58 Kan. 475, 49 Pac. 605. But the accruing of the right of action does not depend upon intelligence, consciousness, or mental capacity of any kind on the part of the person injured; Hollenbeck v. R. Co., 9 Cush. (Mass.) 478. By the removal of a case to the Federal Court, the right to revive an action for personal injuries, upon the death of the plaintiff, is not lost; In re Connaway, 178 U. S. 421, 20 Sup. Ct. 951, 44 L. Ed. 1134; Baltimore & Ohio R. Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. Ed. 677.

In some of the states the statutes vest the right of action in the personal representatives, but the damages recovered accrue to the benefit of the widow and next of kin; City of Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Whiton v. R. Co., 21 Wis. 305; Needham v. R. Co., 38 Vt. 294. And, by act of May 30, 1908, provision is made for compensation to government employés for injuries, or, in case of death, to the widow and children; Comp. Laws (1911) 468.

Damages may be recovered by the parents in an action for death of minor child; Baltimore & O. R. Co. v. State, 24 Md. 271; Ihl v. R. Co., 47 N. Y. 317, 7 Am. Rep. 450; Ewen v. R. Co., 38 Wis. 613; Pennsylvania R. Co. v. Bantom, 54 Pa. 495; but there must have been a prospect of some pecuniary benefit had the child lived; 11 Q. B. D. 160; Rains v. R. Co., 71 Mo. 164, 36 Am. Rep. 459; 3 H. & N. 211. Where a father and daughter were injured by the same accident, and he died within an hour, held that the cause of action in him for his daughter's death did not survive to the mother, no action having been brought by him; King v. R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544.

Actions against the executors or administrators of the wrong-doer. The common-law principle was that if an injury was done either to the person or property of another, for which *damages* only could be recovered in satisfaction, the action died with the person by whom the wrong was committed; 1 Saund. 216 *a*, note (1); McLaughlin v. Dorsey, 1 H. & McH. (Md.) 224. And where the cause of action is founded upon any *malfeasance* or *misfeasance*, is a *tort*, or arises *ex delicto*, such as trespass for taking goods, etc., trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, and many other cases of the like kind, where the *declaration* imputes a tort done either to the person or the property of another, and the *plea* must be *not guilty*, the rule of the common law is *actio personalis moritur cum persona;* and if the person by whom the injury was committed die, no action of that kind can be brought against his executor or administrator. But now in England the stat. 3 & 4 W. IV. c. 42, § 2, authorizes an action of trespass, or trespass on the case, for an injury committed by deceased in respect to property *real* or *personal* of another. And similar provisions are in force in most of the states of this country. Thus, in *Alabama*, by statute, *trover* may be maintained against an executor for a conversion by his testator; Nations v. Hawkins' Adm'rs, 11 Ala. 859.

So in *New Jersey*, Terhune v. Bray's Ex'rs, 16 N. J. L. 54; *Georgia*, Woods v. Howell, 17 Ga. 495; and *North Carolina;* Weare v. Burge, 32 N. C. 169.

In *Virginia*, by statute, *detinue* already commenced against the wrongdoer survives against his executor, if the chattel actually came into the executor's possession; otherwise not; Allen's Ex'r v. Harlan's Adm'r, 6 Leigh (Va.) 42, 29 Am. Dec. 205; Catlett's Ex'r v. Russell, 6 Leigh (Va.) 344. So in *Kentucky*, Gentry's Adm'r v. McKehen, 5 Dana (Ky.) 34. *Replevin* in *Missouri* does not abate on the death of defendant; Kinsbury's Ex'rs v. Lane's Ex'r, 21 Mo. 115; nor does an action on a *replevin bond* in *Delaware*, Waples v. Adkins, 5 Harr. (Del.) 381. It has, indeed, been said that where the wrongdoer has secured no benefit to himself at the expense of the sufferer, the cause of action does not survive, but that where, by means of the offence, property is acquired which benefits the testator, then an action for the value of the property survives against the executor; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; Coburn v. Ansart, 3 Mass. 321; Troup v. Smith's Ex'r, 20 Johns. (N. Y.) 43; McEvers v. Pitkin, 1 Root (Conn.) 216; Cummins v. Cummins, 8 N. J. Eq. 173; Middleton's Ex'rs v. Robinson, 1 Bay (S. C.) 58, 1 Am. Dec. 596; and that where the wrongdoer has acquired gain by his wrong, the injured party may waive the *tort* and bring an action *ex contractu* against the representatives to recover compensation; Jones v. Hoar, 5 Pick. (Mass.) 285; Cummins v. Cummins, 8 N. J. Eq. 173.

But this rule, that the wrongdoer must have acquired a gain by his act in order that the cause of action may survive against his representatives, is not universal. Thus, though formerly in *New York* an action would not lie for a fraud of deceased which did not benefit the assets, yet it was otherwise for his fraudulent performance of a contract; Troup v. Smith's Ex'r, 20 Johns. (N. Y.) 43; and now the statute of that state gives an action against the executor for every injury done by the testator, whether by force or negligence, to the property of another; Elder v. Bogardus, Lalor's Supp. (N. Y.) 116; as for fraudulent representations by the deceased in the sale of land; Haight v. Hayt, 19 N. Y. 464; or wasting, destroying, taking, or carrying away personal property; Snider v. Croy, 2 Johns. (N. Y.) 227. Cases in which the survival of actions is fully considered are: Right of action against a sheriff does survive; Lynn's Adm'r v. Sisk, 9 B. Monr. 135; Paine v. Ulmer, 7 Mass. 317; Cravath v. Plympton, 13 Mass. 454 (but not one against a deputy sheriff; *id.*); one for a false return of execution; Jewett v. Weaver, 10 Mo. 234 (but not one against a constable for unnecessary assault in an arrest; Melvin v. Evans, 48 Mo. App. 421); case for injury to property; Jones v. Vanzandt, 4 McLean, 599, Fed. Cas. No. 7,503; trespass; Hamilton v. Jeffries, 15 Mo. 619; (both under statutes); suit against owner for criminal act of slave; Phillips v. Towler's Adm'rs, 23 Mo. 401; deceit in sale of chattels; 1 Car. L. Rev. 529; the remedy by petition for damages by overflowing lands; Raleigh & G. R. Co. v. Jones, 23 N. C. 24; against an attorney for neglect; Miller v. Wilson, 24 Pa. 114; 3 Stark. 154; 1 D. & R. 30; damages by reason of false representations as to value of land; Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357. Cases in which the right of action was held not to survive the death of the wrongdoer or defendant are: For torts unconnected with contract; Watson v. Loop, 12 Tex. 11; trespass; O'Conner v. Corbitt, 3 Cal. 370; actions for malicious prosecution; Conly v. Conly, 121 Mass. 550; whether brought in the lifetime of the wrongdoer or not; Jones v. Littlefield, 3 Yerg. (Tenn.) 133; McDermott v. Doyle, 17 Mo. 362; trespass for *mesne* profits; Harker v. Whitaker, 5 Watts (Pa.) 474; Means v. Presbyterian Church, 3 Pa. 93; Burgess v. Gates, 20 Vt. 326; In re Renwick's Estate, 2 Bradf. Sur. (N. Y.) 80; (but the representative may be sued on contract; *id.*); *contra*, Molton v. Munford's Adm'r, 10 N. C. 490; Burgess v. Gates, 20 Vt. 326 (by statute); case for false representation; Henshaw v. Miller, 17 How. (U. S.) 212, 15 L. Ed. 222. *Trespass for crim. con.*, where defendant dies pending the suit, does not survive against his personal representatives; Clarke v. McClelland, 9 Pa. 128. Where an action of trespass is brought by a widow for killing her husband, it abates with death of defendant; Weiss v. Hunsicker, 14 Pa. Co. Ct. 398.

Where the intestate had falsely pretended that he was divorced from his wife, whereby another was induced to marry him, the latter cannot maintain an action against his personal representatives; Grim v. Carr's Adm'rs, 31 Pa. 533. *Case* for nuisance does not lie against executors of a wrongdoer; Hawkins' Ex'rs v. Glass, 1 Bibb. (Ky.) 246; Knox v. Sterling, 73 Ill. 214; nor for fraud in the exchange of horses; Coker v. Crozier, 5 Ala. 369; nor, under the statute of *Virginia*, for fraudulently recommending a person as worthy of credit; Henshaw v. Miller, 17 How. (U. S.) 212, 15 L. Ed. 222; nor for negligence of a constable, whereby he failed to make the money on an execution; Logan v. Barclay, 3 Ala. 361; nor for misfeasance of constable; Gent v. Gray, 29 Me. 462; nor against the personal representatives of a sheriff for an escape, or for taking insufficient bail bond; Cunningham v. Jaques, 19 N. J. L. 42; nor against the administrators of the marshal for a false return of execution, or imperfect and insufficient entries thereon; U. S. v. Daniel, 6 How. (U. S.) 11, 12 L. Ed. 323; nor does *debt* for an escape survive against the sheriff's executors; Martin v.

Bradley, 1 Caines (N. Y.) 124; *aliter* in *Georgia*, by statute; Neal v. Haygood, 1 Ga. 514. An action against the sheriff to recover penalties for his failure to return process does not survive against his executors; Mason v. Ballew, 35 N. C. 483; nor does an action lie against the representatives of a deceased postmaster for money feloniously taken out of letters by his clerk; Franklin v. Low, 1 Johns. (N. Y.) 396. See ABATEMENT.

ACTIO IN PERSONAM (Lat. an action against the person).

A personal action.

This is the term in use in the civil law to denote the actions which in the common law are called personal. In modern usage it is applied in English and American law to those suits in admiralty which are directed against the person of the defendant, as distinguished from those *in rem* which are directed against the specific thing from which (or rather the proceeds of the sale of which) the complainant expects and claims a right to derive satisfaction for the injury done to him; 2 Pars. Mar. Law. 663.

ACTIO PIGNERATITIA. An action for a thing pledged after payment of the debt. Hunter, Rom. L. 448.

ACTIO PRÆSCRIPTIS VERBIS. A form of action which derived its force from continued usage or the *responsa prudentium*, and was founded on the unwritten law. 1 Spence, Eq. Jur. 212.

The distinction between this action and an *actio in factum* is said to be, that the latter was founded not on usage or the unwritten law, but by analogy to or on the equity of some subsisting law; 1 Spence, Eq. Jur. 212.

ACTIO REALIS (Lat.). A real action. The proper term in the civil law was *Rei Vindicatio;* Inst. 4. 6. 3.

ACTIO REDHIBITORIA. An action to compel a vendor to take back the thing sold and return the price paid. See REDHIBITORY ACTIONS.

ACTIO IN REM. An action against the thing. See ACTIO IN PERSONAM; ACTIO.

ACTIO RESCISSORIA. An action for rescinding a title acquired by prescription in a case where the party bringing the action was entitled to exemption from the operation of the prescription.

ACTIO PRO SOCIO. An action by which either partner could compel his co-partners to perform the partnership contract. Story, Partn., Bennett ed. § 352; Pothier, Contr. de Société, n. 34.

ACTIO EX STIPULATU. An action brought to enforce a stipulation.

ACTIO STRICTI JURIS (Lat. an action of strict right). An action in which the judge followed the formula that was sent to him closely, administered such relief only as that warranted, and admitted such claims as were distinctly set forth by the pleadings of the parties. 1 Spence, Eq. Jur. 218.

ACTIO DE TIGNO JUNCTO. An action by the owner of material built by another into his building. If so used in good faith double their value could be recovered; if in bad faith, the owner could recover suitable damage for the wrong, and recover the property when the building came down. So. African Leg. Dict.

ACTIO UTILIS. An action for the benefit of those who had the beneficial use of property, but not the legal title; an equitable action. 1 Spence, Eq. Jur. 214.

It was subsequently extended to include many other instances where a party was equitably entitled to relief, although he did not come within the strict letter of the law and the formulæ appropriate thereto.

ACTIO VENDITI. Where a person selling seeks to secure the performance of a special obligation found in a contract of sale or to compel the buyer to pay the price through an action. Hunter, Roman Law 332.

ACTIO VULGARIS. A legal action; a common action. Sometimes used for *actio directa*. 1 Mackeldey, Civ. L. 189.

ACTION (Lat. *agere*, to do). A doing of something; something done.

The formal demand of one's right from another person, made and insisted on in a court of justice. In a quite common sense, action includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

In the Institutes of Justinian an action is defined as *jus persequendi in judicio quod sibi debetur* (the right of pursuing in a judicial tribunal what is due one's self); Inst. 4. 6. In the Digest, however, where the signification of the word is expressly treated of, it is said, *Actio generaliter sumitur; vel pro ipso jure quod quis habet persequendi in judicio quod suum est sibive debetur; vel pro hac ipsa persecutione seu juris exercitio* (Action in general is taken either as that right which each one has of pursuing in a judicial tribunal his own or what is due him; or as the pursuit itself or exercise of the right); Dig. 50. 16. 16. Action was also said *continere formam agendi* (to include the form of proceeding); Dig. 1. 2. 10.

This definition of action has been adopted by Taylor (Civ. Law, p. 50). These forms were prescribed by the prætors originally, and were to be very strictly followed. The actions to which they applied were said to be *stricti juris*, and the slightest variation from the form prescribed was fatal. They were first reduced to a system by Appius Claudius, and were surreptitiously published by his clerk, Cneius Flavius. The publication was so pleasing to the people that Flavius was made a tribune of the people, a senator, and a curule edile (a somewhat more magnificent return than is apt to await the labors of the editor of a modern book of forms); Dig. 1. 2. 5.

These forms were very minute, and included the form for pronouncing the decision. See ACTIO.

In modern law the signification of the right of pursuing, etc., has been generally dropped, though it is recognized by Bracton, 98 *b;* Coke, 2d Inst. 40; 3 Bla. Com. 116; while the two latter senses of the exercise of the right and the means or method of its exercise are still found.

The vital idea of an action is a proceeding on the part of one person as actor against another, for the infringement of some right of the first, before a

court of justice, in the manner prescribed by the court or the law.

Subordinate to this is now connected in a quite common use, the idea of the answer of the defendant or person proceeded against; the adducing evidence by each party to sustain his position; the adjudication of the court upon the right of the plaintiff; and the means taken to enforce the right or recompense the wrong done, in case the right is established and shown to have been injuriously affected.

Actions are to be distinguished from those proceedings, such as writ of error, *scire facias*, mandamus, and the like, where, under the form of proceedings, the court, and not the plaintiff, appears to be the actor; Com. v. Commissioners of Lancaster County, 6 Binn. (Pa.) 9. And the term is not regularly applied, it would seem, to proceedings in a court of equity; Allen v. Partlow, 3 S. C. 417; Ulshafer v. Stewart, 71 Pa. 170.

In the Civil Law.

Civil Actions.—Those personal actions which are instituted to compel payments or do some other thing purely civil. Pothier, *Introd. Gen. aux Coutumes* 110.

Criminal Actions.—Those personal actions in which the plaintiff asks reparation for the commission of some tort or injury which he or those who belong to him have sustained.

Mixed Actions are those which partake of the nature of both real and personal actions; as, actions of partition, actions to recover property and damages. Just. Inst. 4, 6, 18–20; Domat, *Supp. des Lois Civiles* liv. 4, tit. 1, n. 4.

Mixed Personal Actions are those which partake of both a civil and a criminal character.

Personal Actions are those in which one person (*actor*) sues another as defendant (*reus*) in respect of some obligation which he is under to the actor, either *ex contractu* or *ex delicto*, to perform some act or make some compensation.

Real Actions.—Those by which a person seeks to recover his property which is in the possession of another.

In the Common Law.

The action properly is said to terminate at judgment; Co. Litt. 289 *a*; Rolle, Abr. 291; 3 Bla. Com. 116.

Civil Actions.—Those actions which have for their object the recovery of private or civil rights, or of compensation for their infraction.

Criminal Actions.—Those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of a crime. See 1 Chitty, Crim. Law.

Local Actions.—Those civil actions which can be brought only in the county or other territorial jurisdiction in which the cause of action arose. See LOCAL ACTION.

Mixed Actions.—Those which partake of the nature of both real and personal actions.

Personal Actions.—Those civil actions which are brought for the recovery of personal property, for the enforcement of some contract, or to recover damages for the commission of an injury to the person or property. See PERSONAL ACTION.

Real Actions.—Those brought for the specific recovery of lands, tenements, or hereditaments. Steph. Pl. 3. See REAL ACTION.

Transitory Actions.—Those civil actions the cause of which might well have arisen in one place or county as well as another. See TRANSITORY ACTION.

ACTION OF BOOK DEBT. A form of action in Connecticut and Vermont for the recovery of claims, such as are usually evidenced by a book account. Bradley v. Goodyear, 1 Day (Conn.) 105; Smith v. Gilbert, 4 Day (Conn.) 105; Newton v. Higgins, 2 Vt. 366.

ACTION ON THE CASE. This was a remedy given by the common law, but it appears to have existed only in a limited form and to a certain extent until the statute of Westminster 2d. In its most comprehensive signification it includes *assumpsit* as well as an action in form *ex delicto;* at present when it is mentioned it is usually understood to mean an action in form *ex delicto.*

It is founded on the common law or upon acts of Parliament, and lies generally to recover damages for torts not committed with force, actual or implied; or having been occasioned by force where the matter affected was not tangible, or the injury was not immediate but consequential; or where the interest in the property was only in reversion, in all of which cases trespass is not sustainable; 1 Chit. Pl. 132. See CASE; ASSUMPSIT.

ACTION REDHIBITORY. See REDHIBITORY ACTION.

ACTION RESCISSORY. See RESCISSORY ACTIONS.

ACTIONABLE. For which an action will lie. 3 Bla. Com. 23.

ACTIONARY. A commercial term used in Europe to denote a proprietor of shares or *actions* in a joint stock company.

ACTIONES NOMINATÆ (Lat. named actions).

In English Law. Those writs for which there were precedents in the English Chancery prior to the statute 13 Edw. I. (Westm. 2d) c. 34.

Prior to this statute, the clerks would issue no writs except in such actions. Steph. Pl. 8; Barnet v. Ihrie, 17 S. & R. (Pa.) 195. See CASE; ACTION.

ACTIONS (Fr.). Shares of corporate stock.

ACTIONS ORDINARY. In Scotch Law. All actions which are not rescissory. Ersk. Inst. 4, 1, 18.

ACTIVE TRUST. See TRUST.

ACTON BURNELL. An ancient English statute, so called because enacted by a par-

liament held at the village of Acton Burnell. 11 Edw. I.

It is otherwise known as *statutum mercatorum* or *de mercatoribus*, the statute of the merchants. It was a statute for the collection of debts, the earliest of its class, being enacted in 1283.

A further statute for the same object, and known as De Mercatoribus, was enacted 13 Edw. I. (c. 3.). See STATUTE MERCHANT.

ACTOR (Lat. *agere*). **In Civil Law.** A patron, pleader, or advocate. Du Cange; Cowell; Spelman.

Actor ecclesiæ.—An advocate for a church; one who protects the temporal interests of a church. *Actor villæ* was the steward or head-bailiff of a town or village. Cowell.

One who takes care of his lord's lands. Du Cange.

A guardian or tutor. One who transacts the business of his lord or principal; nearly synonymous with agent, which comes from the same word.

The word has a variety of closely-related meanings, very nearly corresponding with manager. Thus, *actor dominæ*, manager of his master's farm; *actor ecclesiæ*, manager of church property; *actores provinciarum*, tax-gatherers, treasurers, and managers of the public debt.

A plaintiff; contrasted with *reus*, the defendant. A proctor in civil courts or causes. *Actores regis*, those who claimed money of the king. Du Cange, *Actor;* Spelman, Gloss.; Cowell.

ACTRIX (Lat.). A female plaintiff. Calvinus, Lex.

ACTS OF COURT. Legal memoranda made in the admiralty courts in England, in the nature of pleas.

For example, the English court of admiralty disregards all tenders except those formally made by acts of court; Abbott, Shipp. 403; Dunlop, Adm. Pr. 104, 105; 4 C. Rob. Adm. 103; 1 Hagg. Adm. 157.

ACTS OF SEDERUNT. In Scotch Law. Ordinances for regulating the forms of proceeding, before the court of session, in the administration of justice, made by the judges, who have the power by virtue of a Scotch Act of Parliament passed in 1540. Erskine, Pract. book 1, tit. 1, § 14.

ACTUAL. Real, in opposition to constructive or speculative, something "existing in act;" State v. Wells, 31 Conn. 213; real as opposed to nominal; Astor v. Merritt, 111 U. S. 202, 4 Sup. Ct. 413, 28 L. Ed. 401. Wearing apparel "in actual use" is not confined to what is worn at the time or what has been worn, but includes what is set apart to be used as a part of one's wardrobe; *id.*, where the phrase is carefully examined and defined.

It is used as a legal term in contradistinction to virtual or constructive as of possession or occupation; Cleveland v. Crawford, 7 Hun (N. Y.) 616; or an actual settler, which implies actual residence; McIntyre v. Sherwood, 82 Cal. 139, 22 Pac. 937. An actual seizure means nothing more than seizure, since there was no fiction of constructive seizure before the act; L. R. 6 Exch. 203.

Actually is opposed to seemingly, pretendedly, or feignedly, as *actually engaged in farming* means really, truly, in fact; In re Strawbridge & Mays, 39 Ala. 367.

ACTUAL CASH VALUE. The term means the sum of money the insured goods would have brought for cash, at the market price, at the time when, and place where, they were destroyed by fire. Mack v. Ins. Co., 4 Fed. 59. See INSURANCE.

ACTUAL COST. The true and real price paid for goods upon a genuine *bona fide* purchase. Alfonso v. U. S., 2 Sto. 421, Fed. Cas. No. 188. Money actually paid out. Lexington & W. R. Co. v. R. Co., 9 Gray (Mass.) 226. It is said not to include interest on capital during construction; [1906] A. C. 368; nor "wasted expenditure" such as that on a condemned culvert, under a government contract; 20 S. C. 133, 416 (South African). Under a contract to supply electric light to a municipality, for which it was to pay such sum as would yield a return of 10 per cent. on the "actual cost of generating the light," it was held that this did not include interest on capital, but did include depreciation of plant and rents, taxes and insurance; [1908] A. C. 241.

ACTUAL DAMAGES. The damages awarded for a loss or injury actually sustained; in contradistinction from damages implied by law, and from those awarded by way of punishment. See DAMAGES.

ACTUAL DELIVERY. It is held commonly to apply to the ceding of the corporal possession by the seller, and the actual apprehension of corporal possession by the buyer, or by some person authorized by him to receive the goods as his representative for the purpose of custody or disposal, but not for mere conveyance. Bolin v. Huffnagle, 1 Rawle (Pa.) 19. See DELIVERY.

ACTUARIUS (Lat.). One who drew the acts or statutes.

One who wrote in brief the public acts.

An officer who had charge of the public baths; an officer who received the money for the soldiers, and distributed it among them; a notary.

An *actor*, which see. Du Cange.

ACTUARY. The manager of a joint stock company, particularly an insurance company.

An officer of a mercantile or insurance company skilled in financial calculations, especially respecting such subjects as the expectancy of the duration of life.

A clerk, in some corporations vested with various powers.

In Ecclesiastical Law. A clerk who registers the acts and constitutions of the convocation.

ACTUM (Lat. *agere*). A deed; something done.

Datum relates to the time of the delivery of the instrument; *actum*, the time of making it; *factum*, the thing made. *Gestum*, denotes a thing done without writing; *actum*, a thing done in writing. See Du Cange; ACTUS.

ACTUS (Lat. *agere*, to do; *actus*, done).

In Civil Law. A thing done. See ACTUM. A servitude which carried the right of driving animals and vehicles across the lands of another.

It included also the *iter*, or right of passing across on foot or on horseback.

In English Law. An act of parliament. 8 Coke 40.

A foot and horse way. Co. Litt. 56 *a*.

AD (Lat.). At; by; for; near; on account of; to; until; upon; with relation to or concerning.

AD ABUNDANTIOREM CAUTELAM (Lat.). For greater caution.

AD ALIUD EXAMEN (Lat.). To another tribunal. Calvinus, Lex.

AD ASSISAM CAPIENDAM. To take an assize. Bract. 110 *b*.

AD AUDIENDAM CONSIDERATIONEM CURIÆ. To hear the judgment of the court. Bract. 383 *b*.

AD AUDIENDUM ET DETERMINANDUM. To hear and determine. 4 Bla. Com. 278.

AD BARRAM EVOCATUS. Called to the bar. 1 Ld. Raym. 59.

AD CAMPI PARTEM. For a share of the land. Fleta, II, c. 36, § 4.

AD CAPIENDAS ASSISAS. To try writs of assize. 3 Bla. Com. 352.

AD COLLIGENDUM. For collecting; as an administrator or trustee *ad colligendum*. 2 Kent 414.

AD COMMUNE NOCUMENTUM. To the common nuisance. Broom & H. Com. 196.

AD COMMUNEM LEGEM. At common law. 2 Eden 39.

AD COMPARENDUM. To appear. Cro. Jac. 67.

AD CULPAM. Until misbehavior.

AD CURIAM. At court. 1 Salk. 195; 1 Ld. Raym. 638.

AD CUSTAGIA. At the costs. Toullier; Cowell; Whishaw.

AD CUSTUM. At the cost. 1 Sharsw. Bla. Com. 314.

AD DAMNUM (Lat.). To the damage. The technical name of that part of the declaration or statement of claim which contains a statement of the amount of the plaintiff's injury. The plaintiff cannot recover greater damages than he has laid in the *ad damnum;* 2 Greenl. Ev. § 260. The amount claimed may be amended by the court on motion. In Bierce v. Waterhouse, 219 U. S. 320, 31 Sup. Ct. 241, 55 L. Ed. 237, it was held that in replevin, the *ad damnum* could be increased to conform to the proofs without discharging the sureties.

AD DIEM. At the day. *Ad alium diem.* At another day. Y. B. 7 Hen. VI, 13. *Ad certum diem.* At a certain day. 2 Str. 747.

AD EVERSIONEM JURIS NOSTRI. To the overthrow of our right. 2 Kent 91.

AD EXCAMBIUM (Lat.). For exchange; for compensation. Bracton, fol. 12 *b*, 37 *b*.

AD EXHÆREDATIONEM. To the disherison, or disinheriting.

The writ of waste calls upon the tenant to appear and show cause why he hath committed waste and destruction in the place named, *ad exhæredationem*, etc.; 3 Bla. Com. 228; Fitzherbert, Nat. Brev. 55.

AD FACIENDUM. To do. Co. Litt. 204 *a*.

AD FACTUM PRÆSTANDUM. **In Scotch Law.** The name given to a class of obligations of great strictness.

A debtor *ad fac. præs.* is denied the benefit of the act of grace, the privilege of sanctuary, and the *cessio bonorum;* Erskine, Inst. lib. 3, tit. 3, § 62; Kames, Eq. 216.

AD FIDEM. In allegiance. 2 Kent 56. Subjects born in allegiance are said to be born *ad fidem.*

AD FILUM AQUÆ. To the thread of the stream; to the middle of the stream. Knight v. Wilder, 2 Cush. (Mass.) 207, 48 Am. Dec. 660; Child v. Starr, 4 Hill (N. Y.) 369; Claremont v. Carlton, 2 N. H. 369, 9 Am. Dec. 88; 2 Washb. R. P. 632; 3 Kent 428.

A former meaning seems to have been, to a stream of water. Cowell; Blount. *Ad medium filum aquæ* would be etymologically more exact; 2 Eden, Inj. 260; and is often used; but the common use of *ad filum aquæ* is undoubtedly to the thread of the stream; Thomas v. Hatch, 3 Sumn. 170, Fed. Cas. No. 13,899; Cates' Ex'rs v. Wadlington, 1 McCord (S. C.) 580, 10 Am. Dec. 699; 3 Kent 431; Starr v. Child, 20 Wend. (N. Y.) 149; Ingraham v. Wilkinson, 4 Pick. (Mass.) 272, 16 Am. Dec. 342; State v. Canterbury, 28 N. H. 195.

AD FILUM VIÆ (Lat.). To the middle of the way. Parker v. Inhabitants of Framingham, 8 Metc. (Mass.) 260.

AD FIRMAM. To farm.

Derived from an old Saxon word denoting rent, according to Blackstone, occurring in the phrase, *dedi concessi et ad firmam tradidi* (I have given, granted, and to farm let): 2 Bla. Com. 317. *Ad firmam noctis* was a fine or penalty equal in amount to the estimated cost of entertaining the king for one night. Cowell. *Ad feodi firmam*, to fee farm. Spelman, Gloss.; Cowell.

AD FUNDANDAM JURISDICTIONEM. To make the basis of jurisdiction. [1905] 2 K. B. 555.

AD GAOLAS DELIBERANDAS. To deliver the gaols. Bract. 109 *b*.

AD HOC. As to this.

AD IDEM. To the same point.

AD INQUIRENDUM (Lat. for inquiry). A judicial writ, commanding inquiry to be made of anything relating to a cause depending in court.

AD INSTANTIAM. At the instance. 2 Mod. 43.

AD INTERIM (Lat.). In the meantime.

An officer is sometimes appointed *ad interim*, when the principal officer is absent, or for some cause incapable of acting for the time. See ACTING.

AD JURA REGIS (Lat.). To the rights of the king. An old English writ to enforce a presentation by the king to a living against one who sought to eject the clerk presented.

AD LARGUM. At large: as, title at large; assize at large. See Dane, Abr. c. 144, art. 16, § 7.

AD LIBITUM. At pleasure. 3 Bla. Com. 292.

AD LITEM (Lat. *lites*). For the suit.

Every court has the power to appoint a guardian *ad litem;* 2 Kent 229; 2 Bla. Com. 427.

AD LUCRANDUM VEL PERDENDUM. For gain or loss.

AD MAJOREM CAUTELAM (Lat.). For greater caution.

AD MEDIUM FILUM AQUÆ. See AD FILUM AQUÆ.

AD NOCUMENTUM (Lat.). To the hurt or injury.

In an assize of nuisance, it must be alleged by the plaintiff that a particular thing has been done, *ad nocumentum liberi tenementi sui* (to the injury of his freehold); 3 Bla. Com. 221.

AD OMISSA VEL MALE APPRETIATA. With relation to omissions or wrong interpretations. 3 Ersk. Inst. 9, § 36.

AD OPUS. To the work. See 21 Harv. L. Rev. 264, citing 2 Poll. & Maitl. 232 *et seq.;* USE.

AD OSTIUM ECCLESIÆ (Lat.). At the church-door.

One of the five species of dower formerly recognized at the common law. 1 Washb. R. P. 149; 2 Bla. Com. 132. It was in common use in the time of Glanville. Glanv. lib. 6, c. 1; 4 Kent 36. See DOWER.

AD PIOS USUS. To religious purposes.

AD PROSEQUENDAM. To prosecute. 11 Mod. 362.

AD PUNCTUM TEMPORIS. At the point of time. Sto. Bailm. § 263.

AD QUÆRIMONIAM. On complaint of.

AD QUEM (Lat.). To which.

The correlative term to *a quo*, used in the computation of time, definition of a risk, etc., denoting the end of the period or journey.

The *terminus a quo* is the point of beginning or departure; the *terminus ad quem*, the end of the period or point of arrival.

AD QUOD DAMNUM (Lat.). What injury.

A writ issuing out of and returnable into chancery, directed to the sheriff, commanding him to inquire by a jury what damage it will be to the king, or any other, to grant a liberty, fair, market, highway, or the like.

The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked; Whishaw, Fitzherbert, Nat. Brev. 221; Termes de la Ley.

AD RATIONEM PONERE. To cite a person to appear.

AD RECTUM (L. Lat.). To right. To do right. To meet an accusation. To answer the demands of the law. *Habeant eos ad rectum.* They shall render themselves to answer the law, or to make satisfaction. Bract. fol. 124 *b*.

AD RESPONDENDUM. To make answer. Fleta, lib. II, c. 65. It is used in certain writs to bring a person before the court in order to make answer, as in *habeas corpus ad respondendum* or *capias ad respondendum*.

AD SATISFACIENDUM. To satisfy. It is used in the writ *capias ad satisfaciendum* and is an order to the sheriff to take the person of the defendant to satisfy the claims of the plaintiff.

AD SECTAM. At the suit of.

It is commonly abbreviated. It is used where it is desirable to put the name of the defendant first, as in some cases where the defendant is filing his papers; thus, Roe *ads.* Doe, where Doe is plaintiff and Roe defendant. It is found in the indexes to cases decided in some of our older American books of reports, but has become pretty much disused.

AD TERMINUM QUI PRÆTERIT. A writ of entry which formerly lay for the lessor or his heirs when a lease had been made of lands and tenements for a term of life or years, and, after the term had expired, the lands were withheld from the lessor by the tenant or other person possessing the same. Fitzherb. Nat. Brev. 201.

AD TUNC ET IBIDEM. The technical name of that part of an indictment containing the statement of the subject-matter "then and there being found." Bacon, Abr. *Indictment*, G. 4; 1 No. C. 93.

In an indictment, the allegation of time and place must be repeated in the averment of every distinct material fact; but after the day, year, and place have once been stated with certainty, it is afterwards, in subsequent allegations, sufficient to refer to them by the words *et ad tunc et ibidem*, and the effect of these words is equivalent to an actual rep-

etition of the time and place. The *ad tunc et ibidem* must be added to every material fact in an indictment; Saund. 95. Thus, an indictment which alleged that J. S. at a certain time and place made an assault upon J. N., *et eum cum gladio felonice percussit*, was held bad, because it was not said, *ad tunc et ibidem percussit;* Dy. 68, 69. And where, in an indictment for murder, it was stated that J. S. at a certain time and place, having a sword in his right hand, *percussit* J. N., without saying *ad tunc et ibidem percussit*, it was held insufficient; for the time and place laid related to the having the sword, and consequently it was not said when or where the stroke was given; Cro. Eliz. 738; 2 Hale, Pl. Cr. 178. And where the indictment charged that A. B. at N., in the county aforesaid, made an assault upon C. D. of F. in the county aforesaid, and him *ad tunc et ibidem quodam gladio percussit*, this indictment was held to be bad, because two places being named before, if it referred to both, it was impossible; if only to one, it must be to the last, and then it was insensible; 2 Hale, Pl. Cr. § 180.

AD ULTIMAM VIM TERMINORUM. To the most extended import of the term. 2 Eden 39.

AD VALOREM (Lat.). According to the valuation.

Duties may be specific or *ad valorem*. *Ad valorem* duties are always estimated at a certain per cent. on the valuation of the property; 3 U. S. Stat. L. 732; Bailey v. Fuqua, 24 Miss. 501.

AD VITAM AUT CULPAM. For life or until misbehavior.

Words descriptive of a tenure of office "for life or good behavior," equivalent to *quamdiu bene se gesserit.*

ADD. To unite; attach; annex; join. Board of Com'rs of Hancock County v. State, 119 Ind. 473, 22 N. E. 10.

ADDICERE (Lat.). **In Civil Law.** To condemn. Calvinus, Lex.

Addictio denotes a transfer of the goods of a deceased debtor to one who assumes his liabilities; Calvinus, Lex. Also used of an assignment of the person of the debtor to the successful party in a suit.

ADDITION (Lat. *additio*, an adding to). Whatever is added to a man's name by way of title or description, as additions of mystery, place, or degree. Cowell; Termes de la Ley; 10 Wentw. Pl. 371; Salk. 5; 2 Ld. Raym. 988; 1 Wils. 244.

Additions of estate are esquire, gentleman, and the like.

These titles can be claimed by none, and may be assumed by any one. In Nash v. Battersby (2 Ld. Raym. 986; 6 Mod. 80), the plaintiff declared with the addition of gentleman. The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurrer, and it was held ill; for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

Additions of mystery are such as scrivener, painter, printer, manufacturer, etc.

Additions of place are descriptions by the place of residence, as A. B. of Philadelphia, and the like. See Bacon, Abr. *Addition;* Doctr. Plac. 71; 2 Viner, Abr. 77; 1 Lilly, Reg. 39; Com. v. Lewis, 1 Metc. (Mass.) 151.

The statute of additions extends only to the party indicted. An indictment, therefore, need not describe, by any addition, the person upon whom the offence therein set forth is alleged to have been committed; 2 Leach, Cr. Cas. (4th ed.) 861; Com. v. Varney, 10 Cush. (Mass.) 402. And if an addition is stated, it need not be proved; 2 Leach, Cr. Cas. (4th ed.) 547; 2 Carr. & P. 230. But where a defendant was indicted for marrying E. C., "widow," his first wife being alive, it was held that the addition was material; 1 Mood. Cr. Cas. 303; 4 C. & P. 579. At common law there was no need of addition in any case; 2 Ld. Raym. 988; it was required only by stat. 1 Hen. V. c. 5, in cases where process of outlawry lies. In all other cases it is only a description of the person, and common reputation is sufficient; 2 Ld. Raym. 849. No addition is necessary in a *Homine Replegiando;* 2 Ld. Raym. 987; Salk. 5; 1 Wils. 244, 245; 6 Co. 67. See WOMAN.

Addition in the law of mechanics' liens. An addition erected to a former building to constitute a building within the meaning of the mechanics' lien law must be a lateral addition. It must occupy ground without the limits of the building to which it constitutes an addition; so that the lien shall be upon the building formed by the addition, and not the land upon which it stands. An alteration in a former building by adding to its height, or its depth, or to the extent of its interior accommodations, is an alteration merely, and not an addition; Updike v. Skillman, 27 N. J. L. 132. See LIEN; ACCESSION.

In addition to means not exclusive of, but by way of increase or accession to. In re Daggett's Estate, 9 N. Y. Supp. 652.

In French Law. A supplementary process to obtain additional information; Guyot, *Répert.*

ADDITIONAL. This term embraces the idea of joining or uniting one thing to another, so as thereby to form *one aggregate.* We add by bringing things together; State v. Hull, 53 Miss. 626, 645.

ADDITIONAL BURDEN. See EMINENT DOMAIN.

ADDITIONALES. Additional terms or propositions to be added to a former agreement.

ADDLED PARLIAMENT. The parliament which met in 1614 was so called. It sat for but two months and none of its bills received the royal assent. Taylor, Jurispr. 359.

ADDRESS. That part of a bill in equity which contains the appropriate description of the court where the plaintiff seeks his remedy. Cooper, Eq. Plead. 8; Story, Eq. Plead. § 26; Van Heyth. Eq. Draft. 2.

In Legislation. A formal request addressed to the executive by one or both branches

of the legislative body, requesting him to perform some act.

It is provided as a means for the removal of judges who are deemed unworthy longer to occupy their situations, although the causes of removal are not such as would warrant an impeachment. It is not provided for in the Constitution of the United States; and even in those states where the right exists it is exercised but seldom, and generally with great unwillingness.

ADDRESS TO THE CROWN. When the royal speech has been read in Parliament, an address in answer thereto is moved in both houses. Two members are selected in each house by the administration for moving and seconding the address. Since the commencement of the session 1890–1891, it has been a single resolution expressing their thanks to the sovereign for his gracious speech.

ADELANTADO. In Spanish Law. The military and political governor of a frontier province. This office has long since been abolished.

ADEMPTION (Lat. *ademptio*, a taking away). The extinction or withholding of a legacy in consequence of some act of the testator which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke.

It is a distinction between the revocation of a will and the ademption of a legacy that the former cannot be done wholly or partly by words, but parol evidence is admissible to establish the latter; 2 Tayl. Ev. § 1146; and it may also be rebutted by parol; *id.* § 1227.

The question of ademption of a *general legacy* depends entirely upon the intention of the testator, as inferred from his acts under the rules established in law; Cowles v. Cowles, 56 Conn. 240, 13 Atl. 414; Richards v. Humphreys, 15 Pick. (Mass.) 133. Where the relations of the parties are such that the legacy is, in law, considered as a portion, an advancement during the life of the testator will be presumed an ademption, at least, to the extent of the amount advanced; 5 M. & C. 29; 3 Hare 509; Roberts v. Weatherford, 10 Ala. 72; Moore v. Hilton, 12 Leigh (Va.) 1; Hansbrough's Ex'rs v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659; Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; and see 3 C. & F. 154; 18 Ves. 151, but this presumption may be rebutted; Jones v. Mason, 5 Rand. (Va.) 577, 16 Am. Dec. 761; and to raise the presumption, the donor must put himself *in loco parentis;* 2 Bro. C. C. 499. There is no ademption where the advancement and portion are not *ejusdem generis;* 1 Bro. C. C. 555; or where the advancement is contingent and the portion certain; 2 Atk. 493; 3 M. & C. 374; or where the advancement is expressed to be in *lieu* of, or *compensation* for, an interest; 1 Ves. Jr. 257; or where the bequest is of uncertain amount; 15 Ves. 513; 4 Bro. C. C. 494; but see 2 H. L. Cas. 131; or where the legacy is absolute and the advancement for life merely; 2 Ves. 38; 7 Ves. 516; or where the devise is of real estate; 3 Y. & C. 397; but in the Virginia case above cited the doctrine was held to apply as well to devises of realty as to bequests of personalty; Hansbrough's Ex'rs v. Hooe, 12 Leigh (Va.) 316, 37 Am. Dec. 659. See Marshall v. Rench, 3 Del. Ch. 239, where Bates, C., treats this subject in an able opinion.

It was treated as a settled rule in 5 Ves. 79, and in 1 Cox 187, that a residuary bequest to wife or children is never adeemed by an advancement, not being the gift of a portion; but in some cases there has been a tendency to qualify this doctrine, as also that of requiring the advancement and the legacy to be *ejusdem generis*, as above stated, and as bearing upon one or both of these points these cases should be consulted; 10 Ves. 1; 15 *id.* 507; 2 Bro. C. C. 394; Carmichael v. Lathrop, 108 Mich. 473, 66 N. W. 350, 32 L. R. A. 232; and see 10 Harv. L. Rev. 52. The doctrine will not be applied to a gift of residue to an adopted child and a stranger jointly; [1906] 2 Ch. 230; L. R. 7 Ch. App. 670. See note on these cases in 20 Harv. L. Rev. 72.

Where deposits are made in a bank by a father for the use of his daughter and in her name and the passbook is delivered to her, it will not work an ademption of a pecuniary legacy, although deposits are made partly after the execution of the will; In re Crawford, 113 N. Y. 560, 21 N. E. 692, 5 L. R. A. 71.

But where the testator was not a parent of the legatee, nor standing *in loco parentis*, the legacy is not to be held a portion, but a bounty, and the rule as to ademption does not apply; 2 Hare 424; 2 Story, Eq. Jur. § 1117; Wms. Exrs. 1338; except where there is a bequest for a particular purpose and money is advanced by the testator for the same purpose; 2 Bro. C. C. 166; 1 Ball & B. 303; see 6 Sim. 528; 3 M. & C. 359; 2 P. Wms. 140; 1 Pars. Eq. Cas. 139; Richards v. Humphreys, 15 Pick. (Mass.) 133; a legacy of a sum of money to be received in lieu of an interest in a homestead is satisfied by money amounting to the legacy during testator's lifetime; Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733.

The ademption of a *specific* legacy is effected by the extinction of the thing or fund, as it is generally stated, without regard to the testator's intention; 3 Bro. C. C. 432; 2 Cox, Ch. 182; Blackstone v. Blackstone, 3 Watts (Pa.) 338, 27 Am. Dec. 359; and see White v. Winchester, 6 Pick. (Mass.) 48; Richards v. Humphreys, 15 Pick. (Mass.) 133; Stout v. Hart, 7 N. J. L. 414; Bell's Estate, 8 Pa. Co. Ct. 454; but not where the extinction of the specific thing is by act of law and a new thing takes its place; Ambl. 59; 9 Hare 666; Cas. *temp.* Talbot 226; Walton v. Walton,

7 Johns. Ch. 258, 11 Am. Dec. 456; but see 4 C. P. D. 336; Kay & J. 341; [1906] 2 Ch. 480; and note thereon in 20 Harv. L. Rev. 239. The last cited case is rather a departure from the rule of the cases cited *supra* as to extinction of the legacy by act of law which does not rest on intention, but see Mahoney v. Holt, 19 R. I. 660, 36 Atl. 1, where the supposed intention of the testator was held to require the substitution of a money equivalent for certain stock bequeathed. Where a breach of trust has been committed or any trick or device practised with a view to defeat the specific legacy; 8 Sim. 171; or where the fund remains the same in substance, with some unimportant alterations; 1 Cox, Ch. 427; 3 Bro. C. C. 416; 3 M. & K. 296; Havens v. Havens, 1 Sandf. Ch. (N. Y.) 334; Ford v. Ford, 23 N. H. 212; as a lease of ground rent for 99 years after a devise of it; Eberhardt v. Perolin, 49 N. J. Eq. 570, 25 Atl. 511; or where the testator lends the fund on condition of its being replaced; 2 Bro. C. C. 113. A devise of a leasehold estate is adeemed if the lease expire and is renewed; 1 Bro. C. C. 261; 2 Ves. 418; 16 Ves. 197; 2 Atk. 593; or where it is assigned upon other trusts; 22 Beav. 223; but a bequest of an interest in profits of a firm is not lost by the expiration and renewal of the partnership agreement; Amb. 260. A specific legacy is not adeemed by a pledge of the subject; 3 Bro. C. C. 108; 3 Myl. & K. 358; but the legatee is entitled to have it redeemed; *id.* A specific legacy of a debt due testator from a third party is adeemed by its payment; 2 P. Wms. 328; 3 Bro. C. C. 431; 2 *id.* 108; 2 Cox C. C. 180; Ludlam's Estate, 1 Pars. Eq. (Pa.) 116; or partially to the extent of part payment; Gardner v. Printup, 2 Barb. (N. Y.) 83; but not by substitution of a new security or a change in its form; Ford v. Ford, 23 N. H. 212; New Hampshire Bank v. Willard, 10 N. H. 210; Dunham v. Dey, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282. But courts have been astute to construe a legacy to be demonstrative, if possible, to avoid an ademption; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456. See *infra*, subhead *Demonstrative Legacies.*

But when a mortgage specifically bequeathed was foreclosed and a new bond and mortgage taken from the purchaser, and a memorandum was found after testator's death in his handwriting to the effect that it was but a renewal of the old bond and that it was his intention that it should pass to the legatee, there was held an ademption; Beck v. McGillis, 9 Barb. (N. Y.) 35. In this case the hardship and defeat of intention was admitted, but it was considered that the rule could not be relaxed that if the subject of a specific legacy did not exist at the death of the testator it was adeemed and nothing else could be substituted.

A legacy of stock is adeemed by its sale though testator purchased back an equal amount of similar but not identical securities; 1 Myl. & K. 12.

The removal of goods from a place named in the legacy will work an ademption; 1 Bro. C. C. 129, n.; 3 Madd. 276; 21 Beav. 548; *contra*, 27 Beav. 138; and it makes no difference if the removal was because a lease had expired; 6 Sim. 19. Ademption is not worked by a mere temporary or accidental removal; 4 Bro. C. C. 537; or for repairs; 2 De G. & Sm. 425; or "for a necessary purpose," or on account of fire; 1 Ves. 271.

In the case of *demonstrative* legacies, to be paid out of a particular fund pointed out, there is no ademption, and if the fund does not exist, they are payable from the general assets; Armstrong's Appeal, 63 Pa. 312; Giddings v. Seward, 16 N. Y. 365; 4 Hare, 276; 1 P. Wms. 777; Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, 11 Am. Dec. 456; T. Raym. 335; 2 Bro. C. C. 114; Kenaday v. Sinnott, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; Ives v. Canby, 48 Fed. 718; Gelbach v. Shively, 67 Md. 498, 10 Atl. 247. The statement that the testator's intention has no bearing on the question of the ademption of specific legacies, made in 2 Cox 180, has been so frequently repeated as to be commonly accepted as a rule of decision; but, as remarked by Chancellor Kent in Walton v. Walton, 7 Johns. Ch. (N. Y.) 258, these words are to be taken with considerable qualification. It is certainly true that when it is necessary to label the legacy as general or specific, which is necessarily done in the case of *demonstrative* legacies, the question of intention is material and in 2 Ves. Jr. 639, Lord Loughborough makes the matter of intention the criterion, and there are few cases in which it is not discussed. In Kenaday v. Sinnott, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339, it was said that "the ademption of a specific legacy is effected by the extinction of the thing or fund bequeathed, and the intention that the legacy should fail is presumed"; but there a legacy to the wife of deposits in a bank "amounting to $10,000 more or less" was held not adeemed by purchasing bonds after the will was made, reducing the amount in bank, and the wife was awarded the amount of the legacy, which was held to be demonstrative upon the "manifest general intention of the testator" as shown by the whole will.

The courts lean against holding that there is an ademption unless the intention is clearly shown, and, to avoid it, favor the construction of a legacy as demonstrative rather than specific; Norris v. Thomson's Ex'rs, 16 N. J. Eq. 218; Cogdell's Ex'rs v. Cogdell's Heirs, 3 Desaus. (S. C.) 373; In re Foote, 22 Pick. (Mass.) 302; Bradford v. Haynes, 20 Me. 105; Boardman v. Boardman, 4 Allen (Mass.) 179; 8 Ves. 413; Appeal of Balliet, 14 Pa. 461. See 11 Am. Dec. 470, note.

Republication of a will may prevent the effect of what would otherwise work an ademption: 1 Rop. Leg. 351.

A specific legacy which has been adeemed will not be revived by a republication of the will after the ademption; Trustees of Unitarian Society in Harvard v. Tufts, 151 Mass. 76, 23 N. E. 1006, 7 L. R. A. 390. See LEGACY; ADVANCEMENT; GIFT; 37 Am. Dec. 667, note.

ADEQUATE CAUSE. Sufficient cause for a particular purpose. Pennsylvania & N. Y. Canal & R. Co. v. Mason, 109 Pa. 296, 58 Am. Rep. 722. Such a cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Boyett v. State, 2 Tex. App. 100. It is to be determined by the particular circumstances of each particular case; Williams v. State, 7 *id.* 396.

ADEU. Without day, as when a matter is finally dismissed by the court. *Alez adeu*, go without day. Y. B. 5 Edw. II. 173.

ADHERING (Lat. *adhærere*, to cling to). Cleaving to, or joining; as, adhering to the enemies of the United States.

The constitution of the United States, art. 3, s. 3, defines treason against the United States to consist only in levying war against them, or in *adhering* to their enemies, giving them aid and comfort.

A citizen's cruising in an enemy's ships with a design to capture or destroy American ships, would be an adhering to the enemies of the United States; 4 State Trials 328; Salk. 634; 2 Gilbert, Ev. Lofft ed. 798.

ADHESION. The entrance of another state into an existing treaty with respect only to a part of the principles laid down or the stipulations agreed to. Opp. Int. L. § 533.

Though, properly speaking, by adhesion the third state becomes a party only to such parts as are specifically agreed to, and by accession it accepts and is bound by the whole treaty, the distinction between the two terms is not always observed, as appears even in the Hague "Convention with Respect to the Laws and Customs of War on Land" 1899, which in art. iv authorizes non-signatory powers "to adhere" and provides how they shall make known their "adhesion"; while, as is remarked by the writer above cited, "accession" is meant. See ACCESSION.

ADIT. In mining law, an entrance or approach. A horizontal excavation used as an entrance to a mine, or a vent by which ores and water are carried away.

An excavation "in and along a lode," which in statutes of Colorado and other mining states is made the equivalent of a discovery shaft. Snyder, Mines 1296, App. B. I. § 6; Gray v. Truby, 6 Col. 278; Electro-Magnetic M. & D. Co. v. Van Auken, 9 Col. 204, 11 Pac. 80.

ADITUS (Lat.). An approach; a way; a public way. Co. Litt. 56 *a*.

ADJACENT. Next to, or near, neighboring. 29 Alb. L. J. 24.

Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining; 1 Cooke 128; Municipality No. 2, For Opening Roffignac St., 7 La. Ann. 76; Continental Imp. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167.

Land is adjacent to the line of a railroad, where by reason of its proximity thereto it is directly and materially benefitted by the construction thereof; U. S. v. Chaplin, 31 Fed. 890. Where a statute authorized the taking of material for building a railroad from public lands "adjacent" to the line thereof, what is adjacent land must depend on the circumstances of the particular case; where the adjacent ends and the non-adjacent begins may be difficult to determine. It is a word of flexible meaning, depending upon context and subject matter. U. S. v. R. Co., 31 Fed. 886.

ADJECTIVE LAW. Rules of procedure or administration as distinguished from rules of substantive law. See Holland, Jurispr. 76.

See SUBSTANTIVE LAW.

ADJOINING. The word in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent. In re Ward, 52 N. Y. 397; Miller v. Mann, 55 Vt. 479; Akers v. Canal Co., 43 N. J. L. 110. It is held that a yard may be separated by a street and yet adjoin; Com. v. Curley, 101 Mass. 25. Towns touching at corners adjoin; Holmes v. Carley, 31 N. Y. 289. The words "along" and "adjoining" are used as synonymous terms and as used in a statute imply contiguity, contact; Walton v. Ry. Co., 67 Mo. 58.

ADJOINING LANDOWNERS. See EMINENT DOMAIN; LATERAL SUPPORT; FENCE; WINDOW.

ADJOURN. To put off; to dismiss till an appointed day, or without any such appointment. But it has also acquired the meaning of suspending business for a time—deferring, delaying. Probably, as to a sale or judicial proceeding, it would include the fixing of another day; La Farge v. Van Wagenen, 14 How. Pr. (N. Y.) 54. See ADJOURNMENT.

ADJOURNED TERM. A continuation of a previous or regular term. Harris v. Gest, 4 Ohio St. 473; Van Dyke v. State, 22 Ala. 57.

ADJOURNMENT. The dismissal by some court, legislative assembly, or properly authorized officer, of the business before them, either finally (which, as popularly used, is called an adjournment *sine die*, without day), or to meet again at another time appointed (which is called a temporary adjournment).

The constitution of the United States, art. 1, s. 5, 4, directs that "neither house, during the session of congress, shall, without the

consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting."

An adjournment of an annual town meeting to another place or a later hour of the same day was held valid, but with hesitation as involving possible hardship; and the power should not be exercised except in extreme necessity; People v. Martin, 5 N. Y. 22.

In Civil Law. A calling into court; a summoning at an appointed time. Du Cange.

ADJOURNMENT DAY. In English Practice. A day appointed by the judges at the regular sittings for the trial of causes at *nisi prius*.

ADJOURNMENT DAY IN ERROR. In English Practice. A day appointed some days before the end of the term at which matters left undone on the affirmance day are finished. 2 Tidd, Pract. 1224.

ADJOURNMENT IN EYRE. The appointment of a day when the justices in eyre mean to sit again. 1 Bla. Com. 186.

ADJUDGE. To decide or determine. It is sometimes used with "considered, ordered, determined, decreed as one of the operative words of a final judgment," but is also applicable to interlocutory orders. It is synonymous with "decided," "determined," etc., "and may be used by a judge trying a case, without a jury with reference to his findings of fact, but they would not be a judgment"; Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. "Convicted and adjudged" not to be lawfully entitled to remain in the United States, under the Chinese Exclusion Act, means "found, decided by the Commissioner, representing, not the administration of criminal law, but the political department of the government;" U. S. v. Hing Quong Chow, 53 Fed. 233.

Adjudged does not mean the same as *deemed*, nor is one disqualified as a witness who "shall, upon conviction, be adjudged guilty of perjury" merely by verdict of guilty or until sentence; Blaufus v. People, 69 N. Y. 107, 25 Am. Rep. 148. It was said by Gibson, C. J., that the word "can be predicated only of an act of the court"; Searight v. Com., 13 S. & R. (Pa.) 301.

ADJUDICATAIRE. In Canadian Law. A purchaser at a sheriff's sale. See 1 Low. Can. 241; 10 *id.* 325.

ADJUDICATION. A judgment; giving or pronouncing judgment in a case. Determination in the exercise of judicial power. Street v. Benner, 20 Fla. 700; Joseph C. Irwin & Co. v. U. S., 23 Ct. Cl. 149.

In Scotch Law. A process for transferring the estate of a debtor to his creditor. Erskine, Inst. lib. 2, tit. 12, §§ 39–55.

ADJUNCTION (Lat. *adjungere*, to join to). **In Civil Law.** The attachment or union permanently of a thing belonging to one person to that belonging to another. This union may be caused by *inclusion*, as if one man's diamond be set in another's ring; by *soldering*, as if one's guard be soldered on another's sword; by *sewing*, as by employing the silk of one to make the coat of another; by *construction*, as by building on another's land; by *writing*, as when one writes on another's parchment; or by *painting*, as when one paints a picture on another's canvas.

In these cases, as a general rule, the accessory follows the principal; hence those things which are attached to the things of another become the property of the latter. The only exception which the civilians made was in the case of a picture, which, although an accession, drew to itself the canvas, on account of the importance which was attached to it; Inst. 2. 1. 34; Dig. 41. 1. 9. 2. The common law implicitly adopts the civil law doctrines. See 2 Bla. Com. 404. See ACCESSION.

ADJUNCTS. Additional judges sometimes appointed in the Court of Delegates, *q. v.* See Shelford, Lun. 310; 1 Hagg. Eccl. Rep. 384; 2 *id.* 84; 3 *id.* 471.

ADJUST. To put in order; to determine an amount due. See State v. Staub, 61 Conn. 553, 23 Atl. 924; State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774. Accounts are adjusted when they are settled and a balance struck; Townes v. Birchett, 12 Leigh (Va.) 173, 201. It is sometimes used in the sense of pay; see Lynch v. Nugent, 80 Ia. 422, 46 N. W. 61.

ADJUSTMENT. The determining of the amount of a loss. 2 Phillips, Ins. §§ 1814, 1815. To settle or bring to a satisfactory state so that parties are all agreed. Mayor of New York v. Ins. Co., 39 N. Y. 45, 100 Am. Dec. 400.

There is no specific form essentially requisite to an adjustment. To render it binding, it must be intended, and understood by the parties to a policy, to be absolute and final. It may be made by indorsement on the policy, or by payment of the loss, or the acceptance of an abandonment; 4 Burr. 1966; 1 Campb. 134, 274; Barlow v. Ins. Co., 4 Metc. (Mass.) 270; Reynolds v. Ins. Co., 22 Pick. (Mass.) 191, 33 Am. Dec. 727. It must be made with full knowledge of all the facts material to the right of the insured to recover, and the adjustment can be impeached only for fraud or mistake of such material fact; Remington v. Ins. Co., 14 R. I. 247. If there is fraud by either party to an adjustment, it does not bind the other; Faugier v. Hallett, 2 Johns. Cas. (N. Y.) 233; 3 Campb. 319. If one party is led into a material mistake of fact by fault of the other, the adjustment will not bind him; 2 East 469; Elting v. Scott, 2 Johns. (N. Y.) 157; Faugier v. Hallett, 2 Johns. Cas. (N. Y.) 233.

It is a sufficient adjustment if the party employed by an insurance company goes upon the premises, makes calculations, and

states the loss; Fame Ins. Co. v. Norris, 18 Ill. App. 570.

See INSURABLE INTEREST; ABANDONMENT; INSURANCE; POLICY.

ADMEASUREMENT OF DOWER. A remedy which lay for the heir on reaching his majority, to rectify an assignment of dower made during his minority, by which the doweress had received more than she was legally entitled to. 2 Bla. Com. 136; Gilbert, Uses 379.

The remedy is still subsisting, though of rare occurrence. See 1 Washb. R. P. 225, 226; Jones v. Brewer, 1 Pick. (Mass.) 314; McCormick v. Taylor, 2 Ind. 336.

In some of the states, the special proceeding which is given by statute to enable the widow to compel an assignment of dower, is termed an admeasurement of dower.

ADMEASUREMENT OF PASTURE. A remedy which lay in certain cases for surcharge of common of pasture. It lay where a common of pasture appurtenant or in gross was certain as to number; or where one had common appendant or appurtenant, the quantity of which had never been ascertained. The sheriff proceeded, with the assistance of a jury of twelve men, to admeasure and apportion the common as well of those who had surcharged as those who had not, and, *when the writ was fully executed*, returned it to the superior court. Termes de la Ley.

The remedy is now abolished in England; 3 Sharsw. Bla. Com. 239, *n.*; and in the United States; 3 Kent 419.

In English Law. Aid; support. Stat. 1 Edw. IV. c. 1.

In Civil Law. Imperfect proof. Merlin, *Répert.*

ADMINICULAR. Auxiliary and subordinate to. The Marianna Flora, 3 Mas. 116, 121, Fed. Cas. No. 9,080. *Adminicular evidence*, as used in ecclesiastical law, is evidence to explain and complete other evidence. 2 Lee, Eccl. 595. See 1 Gr. Ev. Sec. 606.

ADMINISTER. To give, to direct or cause to be taken. Gilchrist v. Comfort, 34 N. Y. 239; Brinson v. State, 89 Ala. 105, 8 South. 527.

ADMINISTERING POISON. An offence of an aggravated character, punishable under the various statutes defining the offence.

The stat. 9 G. IV. c. 31, s. 11, enacts "that if any person unlawfully and maliciously shall *administer*, or attempt to administer, to any person, or shall cause to be taken by any person, any poison or other destructive thing," etc., every such offender, etc. In a case under this statute, it was decided that, to constitute the act of administering the poison, it was not absolutely necessary that there should have been a delivery to the party poisoned, but that if she took it from a place where it had been put for her by the defendant, and any part of it went into her stomach, it was an administering; 4 Carr. & P. 369; 1 Mood. Cr. Cas. 114; Brown v. State, 88 Ga. 257, 14 S. E. 573; Bell v. Com., 88 Va. 365, 13 S. E. 742; Blackburn v. State, 23 Ohio St. 146; La Beau v. People, 34 N. Y. 223.

The statute 7 Will. IV. & 1 Vict. c. 85 enacts that "Whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing," shall be guilty of felony. Upon an indictment under this section, it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute; 1 Dears. & B. 127, 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended, but it must also appear that the drug administered was either a "poison" or a "noxious thing."

See ACCESSORY; ABORTION.

ADMINISTRATION (Lat. *administrare*, to assist in).

Of Estates. See EXECUTORS AND ADMINISTRATORS.

Of Government. The management of the executive department of the government.

Those charged with the management of the executive department of the government.

ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

See ORDINARY.

ADMINISTRATRIX. A woman to whom letters of administration have been granted and who administers the estate.

When an administratrix marries, that fact does not prevent her from suing as such; Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; nor does the marriage of a *feme sole* annul her appointment; Hamilton v. Levy, 41 S. C. 374, 19 S. E. 610.

ADMIRAL (Fr. *amiral*). A high officer or magistrate that hath the government of the king's navy, and the hearing of all causes belonging to the sea. Cowell. See ADMIRALTY.

By statute of July 25, 1866, the active lists of line-officers of the navy of the United States were divided into ten grades, of which the highest is that of admiral, and the next that of vice-admiral. By statute of Jan. 24, 1873, these grades ceased to exist when the offices became vacant, and the highest rank is rear-admiral.

ADMIRALTY. A court which has a very extensive jurisdiction of maritime causes, civil and criminal.

On the revival of commerce after the fall of the Western empire, and the conquest and settlement by the barbarians, it became necessary that some tribunal should be established that might hear and decide causes that arose out of maritime commerce. The rude courts established by the conquerors had properly jurisdiction of controversies that arose on land, and of matters pertaining to land, that being at the time the only property that was considered of value. To supply this want, which was felt by merchants, and not by the government or the people at large, on the coast of Italy and the northern shores of the Mediterranean, a court of consuls was established in each of the principal maritime cities. Contemporaneously with the establishment of these courts grew up the customs of the sea, partly borrowed, perhaps, from the Roman law, a copy of which had at that time been discovered at Amalfi, but more out of the usage of trade and the practice of the sea. These were collected from time to time, embodied in the form of a code, and published under the name of the *Consolato del Mare*. See that sub-

title under CODE. The first collection of these customs is said to be as early as the eleventh century; but the earliest authentic evidence we have of their existence is their publication, in 1266, by Alphonso X., King of Castile; 1 Pardessus, *Lois Maritimes*, 201. See 3 Kent 16.

On Christmas of each year, the principal merchants made choice of judges for the ensuing year, and at the same time of judges of appeal, and their courts had jurisdiction of all causes that arose out of the custom of the sea, that is, of all maritime causes whatever. Their judgments were carried into execution, under proper officers, on all movable property, ships as well as other goods, but an execution from these courts did not run against land; *Ordonnance de Valentia*, 1283, c. 1, §§ 22, 23.

When this species of property came to be of sufficient importance, and especially when trade on the sea became gainful and the merchants began to grow rich, their jurisdiction in most maritime states was transferred to a court of admiralty; and this is the origin of admiralty jurisdiction. The admiral was originally more a military than a civil officer, for nations were then more warlike than commercial; *Ordonnance de Louis XIV.*, liv. 1; 2 Brown, Civ. & Adm. Law, c. 1. The court had jurisdiction of all national affairs transacted at sea, and particularly of prize; and to this was added jurisdiction of all controversies of a private character that grew out of maritime employment and commerce; and this, as nations grew more commercial, became in the end its most important jurisdiction.

The admiralty is, therefore, properly the successor of the consular courts, which were emphatically the courts of merchants and sea-going persons. The most trustworthy account of the jurisdiction thus transferred is given in the *Ordonnance de Louis XIV.*, published in 1681. This was compiled under the inspiration of his great minister Colbert, by the most learned men of that age, from information drawn from every part of Europe, and was universally received at the time as an authoritative exposition of the common maritime law; Valin, Preface to his Commentaries; 3 Kent 16. They have been recognized as authority in maritime causes by the courts of this country, both federal and state; The Seneca, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; Morgan v. Ins. Co., 4 Dall. (U. S.) 455, 1 L. Ed. 907, where Tilghman, C. J., referred to them "not as containing any authority in themselves but as evidence of the general marine law." The changes made in the *Code de Commerce* and in the other maritime codes of Europe are unimportant and inconsiderable. This ordinance describes the jurisdiction of the admiralty courts as embracing all maritime contracts and torts arising from the building, equipment, and repairing of vessels, their manning and victualling, the government of their crews and their employment, whether by charter-party or bill of lading, and from bottomry and insurance. This was the general jurisdiction of the admiralty; it took all the consular jurisdiction which was strictly of a maritime nature and related to the building and employment of vessels at sea. See CODE.

In English Law. The court of the admiral.

This court was erected by Edward III. At least so it is affirmed by Blackstone, 3 Com. 69; but Judge Story cited Selden as having collected much evidence to carry back the origin of the jurisdiction more than two centuries before that, to the time of Henry I.; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; and Coke, the bitterest enemy of the Admiralty, refers to the jurisdiction as "so ancient that its commencement cannot be known"; 12 Rep. 80. The question, however, is merely academic, except as the jurisdiction of the Continental Courts at the period of its origin may aid in determining the extent and limitations of the early English Court. Authorities are collected in 66 L. R. A. 193, note, to show that Blackstone was mistaken.

It is said in Halsbury's Laws of England, § 86, that prior to the Judicature Act of 1873 the seal of the Judicial Committee of the Privy Council, affixed to orders in Admiralty appeals, bears upon its face the words *"Ab Edgare vindico,* thus picturesquely suggesting a very ancient origin of jurisdiction," but whether its origin was in Saxon times or those of Henry I., the jurisdiction of this court in the reign of Edw. III. was undisputed. It was held by the Lord High Admiral, and was called the High Court of Admiralty, or before his deputy, the Judge of the Admiralty, by which latter officer it has for a time been exclusively held. It sat as two courts, with separate commissions, known as the Instance Court and the Prize Court, the former of which was commonly intended by the term *admiralty.* At its origin the jurisdiction of this court was very extensive, embracing all maritime matters. By the statutes 13 Rich. II. c. 5, and 15 Rich. II. c. 3, especially as explained by the common law courts, its jurisdiction was much restricted; and this restriction was further provided for by the statute of 2 Hen. IV. c. 11, prescribing penalties for wrongfully suing in admiralty. A violent and long-continued contest between the admiralty and common law courts resulted in the establishment of the restriction which continued without interruption, except that abortive efforts were made to compromise the differences between the two jurisdictions, in 1575 and 1632, until the statutes 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 99, and 24 & 25 Vict. c. 10, materially enlarged its powers. See 2 Pars. Mar. Law 479; 1 Kent Lect. XVII; Smith, Adm. 1; De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; Ramsey v. Allegre, 12 Wheat. (U. S.) 611, 6 L. Ed. 746; Bains v. The James, 1 Baldw. 544, Fed. Cas. No. 756; Davies 93. This court was abolished by the Judicature Act of 1873, and its functions transferred to the High Court of Justice (Probate, Divorce, and Admiralty Division), with appeal to the Court of Appeal and thence to the House of Lords; Halsbury, Laws of Eng. § 93. As to the effect of the early English restriction statutes, see Judge Story's opinion in De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776, and also the L. R. A. note cited *supra,* which contains a review of English and American Admiralty jurisdiction.

For a historical review of the English Admiralty jurisdiction and how it was administered from time to time and the legislation on the subject, see the introduction to Williams & Bruce, Adm. Jur. & Prac. 3d Ed.

The *civil* jurisdiction of the court extends to *torts* committed on the high seas, including personal batteries and false representations; 4 C. Rob. Adm. 73; collision of ships; Abbott, Shipp. 230; [1893] A. C. 468; Lush. 539; restitution of possession from a claimant withholding unlawfully; 2 B. & C. 244; 1 Hagg. 81, 240, 342; 2 Dods. Adm. 38; 3 C. Rob. Adm. 93, 133, 213; 4 *id.* 275, 287; 5 *id.* 155; to dispossess masters; 4 C. Rob. 287; but not when title is to be decided as between conflicting claims or ownership, in which case the jurisdiction is in the Common Law Courts; 2 Dods. 289; cases of piratical and illegal taking at sea and *contracts* of a maritime nature, including suits between part owners; 1 Hagg. 306; 3 *id.* 299; 1 Ld. Raym. 223; 2 *id.* 1235; 2 B. & C. 248; for mariners' and officers' wages; 2 Ventr. 181; 3 Mod. 379; 1 Ld. Raym. 632; 2 *id.* 1206; 2 Str. 858, 937; 1 *id.* 707; Swab. 86; 2 Dods. 11; master's disbursements for which there is a lien; [1904] P. 422; seaman's suit for wrongful dismissal; L. R. 1 A. & E. 384; pilotage; [1898] P. 36; 2 Hagg. Adm. 326; Abbott. Shipp. 198, 200; towage; 3 W. Rob. 138; 5 P. D. 227; bottomry and respondentia bonds; 6 Jur. 241; 3 Hagg. Adm. 66; 3 Term 267; 2 Ld. Raym. 982; Rep. *temp.*

Holt, 48; 3 Ch. Rob. 240; 3 Moo. P. C. C. 1; [1899] P. 295; and by statute to questions of title arising in a bottomry suit; Halsb. L. Eng. Sec. 101; and salvage claims; 2 Hagg. Adm. 3; 3 C. Rob. Adm. 355; 1 W. Rob. Adm. 18; [1901] P. 304; *id.* 243; [1898] P. 179; *id.* 206; life salvage, if there is some property saved; 8 P. D. 115; damage to cargo; Lush. 458; Br. & L. 102; necessaries; [1895] P. 95; 13 P. D. 82. It has no jurisdiction over an action *in personam* against a pilot for damages arising from a collision between ships on the high seas, due to his negligence; [1892] 1 Q. B. 273.

Formerly the remedy *in rem* could not be enforced beyond the property proceeded against, but when owners appeared in such an action it was said by Sir F. Jeune, that the judgment can be enforced to the full amount although exceeding the value of the property; [1892] P. 304; [1899] P. 285; but see extended comment on these cases in Wms. & Br. Adm. Pr. Introd. 19, where it is pointed out that the point did not arise for decision.

In Gager v. The A. D. Patchin, 1 Am. L. J. (N. S.) 529, Fed. Cas. No. 5,170, Conkling, D. J., said: "But by a long series of American decisions terminating with that in New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465, the principle is now firmly established that the jurisdiction of the American courts of Admiralty does not depend on the decisions of the English Common Law Courts, relative to the jurisdiction of the high court of admiralty of England, but that all contracts in their nature strictly maritime are cognizable in the Admiralty." It was a suit *in rem* for salvage and as there was a special agreement, it was objected that it was a mere case of contract and not within the admiralty jurisdiction, but the decision was otherwise and was affirmed; The A. D. Patchin, 1 Blatchf. 414, Fed. Cas. No. 87.

It was therefore not practicable to rest the American jurisdiction upon the English system and ignore those decisions. The struggle in our courts was not so much between the two contentions which had distracted the English courts, as whether the narrow jurisdiction finally imposed upon the admiralty in England was that which our Constitution contemplated. While some of our judges contended for this view, the weight of authority was finally given to the more logical conclusion that the Admiralty and Maritime jurisdiction which was by the Constitution included within the judicial power of the United States was not limited by the Admiralty jurisdiction of England but is to be determined by the general maritime law.

The *criminal* jurisdiction of the court was transferred to the Central Criminal Court by the 4 & 5 Will. IV. c. 36. It extended to all crimes and offences committed on the high seas, or within the ebb and flow of the tide, and not within the body of a county. A conviction for manslaughter committed on a German vessel, by reason of negligent collision with an English vessel, within two and a half miles of the English coast, whereby a passenger on the English vessel was lost, is not within the jurisdiction of the English criminal courts; 46 L. J. M. C. 17.

The first step in the process in a plenary action may be the arrest of the person of the defendant, or of the ship, vessel, or furniture; in which cases the defendant must find bail or *fidejussors* in the nature of bail, and the owner must give bonds or stipulations equal to the value of the vessel and her immediate earnings; or the first step may be a monition to the defendant. In 1840, the form of proceeding in this court was very considerably changed. The advocates, surrogates, and proctors of the Court of Arches were admitted to practice there; the proceedings generally were assimilated to those of the common-law courts, particularly in respect of the power to take *vivâ voce* evidence in open court; power to compel the attendance of witnesses and the production of papers; to ordering issues to be tried in any of the courts of Nisi Prius, and allowing bills of exception on the trial of such issues, and the grant of power to admiralty to direct a new trial of such issues; to make rules of court, and to commit for contempt. The judge may have the assistance of a jury, and in suits for collision he usually decides upon his own view of the facts and law, after having been assisted by, and hearing the opinion of, two or more Trinity Brethren.

A court of admiralty exists in Ireland; but the Scotch court was abolished by 1 Will. IV. c. 69. See ELDER BRETHREN.

In American Law. A tribunal exercising jurisdiction over all maritime contracts, torts, injuries, or offences. 2 Pars. Mar. Law 508.

After a somewhat protracted contest the jurisdiction of admiralty was extended beyond that of the English admiralty court and has been said to be coequal with that of the English court as defined by the statutes of Rich. II., under the construction given to them by the contemporaneous or immediately subsequent courts of admiralty; 2 Pars. Mar. Law 508; Bened. Admir. §§ 7, 8. There is early English authority, mainly collected by Judge Story in his famous opinion in De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776, that the common law courts were wrong when, in their controversy with the admiralty court, they contended for the original narrow limit of the jurisdiction. It would seem, however, to be the more accurate view that the cases which settled the American jurisdiction established it not so much upon the basis of any construction of the English restraining statutes as upon the theory that they were not to be recognized as having force in this country, either in Colonial times or after the Revolution. In Waring v. Clarke, 5 How. (U. S.) 441, 12 L. Ed. 226, it was held that "the statutes of Richard II. were never in force in any of the colonies, except as they were adopted by the legislatures of some of them." And in a judgment much referred to and commended in subsequent cases, Judge Winchester, characterized by Judge Peters as "a distinguished ornament" of his

profession, in Stevens v. The Sandwich, 1 Pet. Adm. 233 n, was of opinion that "the statutes 11 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country." So Judge Wilson in Kynock v. The Propeller S. C. Ives, Newb. 205, Fed. Cas. No. 7,958, said: "The district courts of the United States, sitting as courts of admiralty, are not embarrassed by the restraining statutes of Richard II. and Henry IV., but exercise as large jurisdiction and are governed by the same principles of maritime law as are recognized by the courts of admiralty in the maritime nations of continental Europe."

It came to be generally conceded that at the time of the Revolution the English admiralty jurisdiction was emasculated by the construction put upon the restrictive statutes by the common law courts, but it must likewise be admitted that the decisions of those courts were the paramount law of England. It was therefore not practicable to rest the American jurisdiction upon the English system and ignore those decisions. The struggle in our courts was not so much between the two contentions which had distracted the English courts, as whether the narrow jurisdiction finally imposed upon the admiralty court in England was that which our constitution contemplated. While some of our judges contended for this view, the weight of authority was finally given to the more logical conclusion that the admiralty and maritime jurisdiction which was by the constitution included within the judicial power of the United States was not limited by the admiralty jurisdiction of England, but is to be determined by the recognized principles of the maritime law which were invoked by Mr. Justice Washington in Davis v. Brig Seneca, 3 Wall. Jr. 395, Fed. Cas. No. 12,670, as having "been respected by maritime courts of all nations and adopted by most, if not by all of them on the continent of Europe."

Finally, in a note to The Huntress, 2 Ware (Dav. 93) 102, Fed. Cas. No. 6,914, which is considered an authoritative discussion of the American admiralty jurisdiction, attention is directed to "contemporaneous declarations of every branch of the government, and the quiet assent of the people to an unbroken and unvarying practice of more than half a century, all concurring in one point, that the admiralty and maritime jurisdiction, under the constitution, is of larger extent than that of the English court of admiralty, and all repudiating the assumption that we are to look to the laws of England for the definition of these terms in the constitution." See De Lovio v. Boit, 2 Gall. 398, Fed. Cas. No. 3,776; The Huntress, 2 Ware (Dav. 93) 102, Fed. Cas. No. 6,914; Peele v. Ins. Co., 3 Mas. 28, Fed. Cas. No. 10,905; Read v. Hull of a New Brig, 1 Sto. 244, Fed. Cas. No. 11,609; Hale v. Ins. Co., 2 Sto. 176, Fed. Cas. No. 5,916; Ramsey v. Allegre, 12 Wheat. (U. S.) 611, 6 L. Ed. 746; U. S. v. The Sally, 2 Cr. (U. S.) 406, 2 L. Ed. 320; U. S. v. The Betsey, 4 Cr. (U. S.) 444, 2 L. Ed. 673; U. S. v. La Vengeance, 3 Dall. (U. S.) 297, 1 L. Ed. 610; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; Bogart v. The John Jay, 17 How. (U. S.) 399, 15 L. Ed. 95; Minturn v. Maynard, 17 How. (U. S.) 477, 15 L. Ed. 235; Ward v. Peck, 18 How. (U. S.) 267, 15 L. Ed. 383; Thomas v. Osborn, 19 How. (U. S.) 22, 15 L. Ed. 534; Schuchardt v. Babbage, 19 How. (U. S.) 239, 15 L. Ed. 625; Jackson v. The Magnolia, 20 How. (U. S.) 296, 15 L. Ed. 909; Taylor v. Carryl, 20 How. 583, 15 L. Ed. 1028.

The court of original admiralty jurisdiction in the United States is the United States District Court. From this court causes could formerly be removed, in certain cases, to the Circuit and ultimately to the Supreme Court.

So much of the foregoing as relates to appeals from Circuit and District Courts of the United States to the Supreme Court was changed by chap. 517, 1 Sup. Rev. Stats., so that appeals may be taken direct from those courts to the Supreme Court from the final sentences and decrees in prize causes; in other admiralty cases appeals will now lie from the District Court to the Circuit Court of Appeals, the decision of the latter court being final. In certain cases, however, the decisions of the Circuit Courts of Appeals may be reviewed by the Supreme Court, for which see UNITED STATES COURTS.

It extends to the navigable rivers of the United States, whether tidal or not, the lakes, and the waters connecting them; The Propeller Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. Ed. 1058; The Moses Taylor, 4 Wall. (U. S.) 411, 18 L. Ed. 397; The Eagle, 8 Wall. (U. S.) 15, 19 L. Ed. 365; The Belfast, 7 Wall. (U. S.) 624, 19 L. Ed. 266; Garcia y Leon v. Galceran, 11 Wall. (U. S.) 185, 20 L. Ed. 74; American Steamboat Co. v. Chace, 16 Wall. (U. S.) 522, 21 L. Ed. 369; Assante v. Bridge Co., 40 Fed. 765; to rivers which either alone or with others are highways for commerce with other states or foreign countries; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; U. S. v. Ferry Co., 21 Fed. 332; to a stream tributary to the lakes, but lying entirely within one state; The General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307; to a ferry boat plying between opposite sides of the Mississippi River; The Gate City, 5 Biss. 200, Fed. Cas. No. 5,267; to a steam ferryboat to carry railway cars across the Mississippi; The St. Louis, 48 Fed. 312; to the Illinois and Lake Michigan Canal; The Oler, 2 Hughes 12, Fed. Cas. No. 10,485; Ex parte Boyer, 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056; to the Welland Canal; The Avon, 1 Brown, Adm. 170, Fed. Cas. No. 680; Scott v. The Young America, Newb. 101, Fed. Cas. No. 12,549; to the Erie Canal; The E. M. McChesney, 8 Ben. 150, Fed. Cas. No. 4,463; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; to the Detroit River, out of the jurisdiction of any particular state and within the territorial limits of Canada; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. But it does not extend to a creek which, though accessible from the sea, has no public wharf or terminus for travel; Manigault v. S. M. Ward & Co., 123 Fed. 707; nor to a river which is not of itself a highway for interstate or foreign commerce; The Montello, 11 Wall. 411, 20 L. Ed. 191. For specific enumeration of certain navigable waters see notes, 48 L. Ed. 74; 22 *id.* 391, and 42 L. R. A. 305. The Judiciary Act of 1789 (R. S. § 563), while conferring admiralty jurisdiction upon the Federal courts, saves to suitors their common-law remedy, which has always existed for damages for collision at sea; Schoonmaker v. Gilmore, 102 U. S. 118, 26 L. Ed. 95; where a vessel is outside of the territorial limitation of the civil process of a court, jurisdiction by stipulation or consent of the master cannot be obtained for the purpose of a libel *in rem;* The Hungaria, 41 Fed. 109.

Admiralty has jurisdiction of a libel by mariners for wages against a vessel plying on navigable waters, even though lying en-

tirely within one state; The Sarah Jane, 2 Am. L. Rev. 455, Fed. Cas. No. 12,349; but see The Scotia, 3 Am. L. Rev. 610, Fed. Cas. No. 12,513, where the then cases on admiralty jurisdiction by reason of locality are fully treated. Also for services as engineer on a tug-boat; The W. F. Brown, 46 Fed. 290.

Its *civil* jurisdiction extends to cases of salvage; Mason v. The Blaireau, 2 Cr. (U. S.) 240, 2 L. Ed. 266; American Ins. Co. v. Canter, 1 Pet. (U. S.) 511, 7 L. Ed. 242; U. S. v. Coombs, 12 Pet. (U. S.) 72, 9 L. Ed. 1004; The Louisa Jane, 2 Low. 302, Fed. Cas. No. 8,532; The Roanoke, 50 Fed. 574; McMullin v. Blackburn, 59 Fed. 177; De Leon v. Leitch, 65 Fed. 1002; bonds of bottomry, respondentia, or hypothecation of ship and cargo; The Ann C. Pratt, 1 Curt. C. C. 340, Fed. Cas. No. 409; The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; The Aurora, 1 Wheat. (U. S.) 96, 4 L. Ed. 45; Blaine v. The Charles Carter, 4 Cr. (U. S.) 328, 2 L. Ed. 636; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1036; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267; seamen's wages; The Sarah Jane, 1 Low. 203, Fed. Cas. No. 12,349; 2 Pars. Mar. Law 509; The Karoo, 49 Fed. 651; Sheppard v. Taylor, 5 Pet. (U. S.) 675, 8 L. Ed. 269; The Thomas Jefferson, 10 Wheat. (U. S.) 428, 6 L. Ed. 358; seizures under the laws of impost, navigation, or trade; 1 U. S. Stat. at Large, 76; The Lewellen, 4 Biss. 156, Fed. Cas. No. 8,307; U. S. v. The Queen, 11 Blatchf. 416, Fed. Cas. No. 16,108; Two Hundred and Fifty Barrels of Molasses v. U. S., Chase, Dec. 503, Fed. Cas. No. 14,293; The North Cape, 6 Biss. 505, Fed. Cas. No. 10,316; cases of prize or ransom; Glass v. The Sloop Betsey, 3 Dall. (Pa.) 6, 1 L. Ed. 485; charter-parties; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Certain Logs of Mahogany, 2 Sumn. 589, Fed. Cas. No. 2,559; Arthur v. The Cassius, 2 Sto. 81, Fed. Cas. No. 564; Drinkwater v. The Spartan, 1 Ware 149, Fed. Cas. No. 4,085; contracts of affreightment between different states or foreign ports; The Maggie Hammond, 9 Wall. (U. S.) 449, 19 L. Ed. 772; The Queen of the Pacific, 61 Fed. 213; Church v. Shelton, 2 Curt. C. C. 271, Fed. Cas. No. 2,714; Oakes v. Richardson, 2 Low. 173, Fed. Cas. No. 10,390; The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657; The Rebecca, 1 Ware 188, Tex. Cas. No. 11,619; The Phebe, 1 Ware 263, Fed. Cas. No. 11,064; The Paragon, 1 Ware 322, Fed. Cas. No. 10,708; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; and upon a canal-boat without powers of propulsion, upon an artificial canal; The E. M. McChesney, 21 Int. Rev. Rec. 221, Fed. Cas. No. 4,463; but not to coal barges, not licensed or enrolled; Wood v. Two Barges, 46 Fed. 204; for injury to vessel in passing through a drawbridge over a navigable river; Assante v. Charleston Bridge Co., 40 Fed. 765; Hill v. Board of Chosen Freeholders of Essex County, 45 Fed. 260; but not against schooner for damages done to drawbridge; The John C. Sweeney, 55 Fed. 540; but see also, *contra*, Greenwood v. Town of Westport, 60 Fed. 560; contracts for conveyance of passengers; The New World v. King, 16 How. (U. S.) 469, 14 L. Ed. 1019; The Pacific, 1 Blatchf. 569, Fed. Cas. No. 10,643; The Zenobia, 1 Abbott, Adm. 48, Fed. Cas. No. 18,208; Walsh v. Wright, 1 Newb. 494, Fed. Cas. No. 17,115; The Hammonia, 10 Ben. 512, Fed. Cas. No. 6,006; and suits for loss of their baggage; Walsh v. Wright, Newb. 494, Fed. Cas. No. 17,115; The Priscilla, 106 Fed. 739; contracts with material-men; The General Smith, 4 Wheat. (U. S.) 438, 4 L. Ed. 609; The Onore, 6 Ben. 564, Fed. Cas. No. 10,538; see People's Ferry Co. v. Beers, 20 How. (U. S.) 393, 15 L. Ed. 961; 21 Bost. Law Rep. 601; jettisons, maritime contributions, and averages; Dike v. The St. Joseph, 6 McLean 573, Fed. Cas. No. 3,908; Cutler v. Rae, 7 How. (U. S.) 729, 12 L. Ed. 890; Dupont de Nemours v. Vance, 19 How. (U. S.) 162, 15 L. Ed. 584; 21 Bost. Law Rep. 87, 96; pilotage; The Anne, 1 Mas. 508, Fed. Cas. No. 412; Hobart v. Drogan, 10 Pet. (U. S.) 108, 9 L. Ed. 363; Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (U. S.) 299, 13 L. Ed. 996; see Wave v. Hyer, 2 Paine, C. C. 131, Fed. Cas. No. 17,300; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 207, 6 L. Ed. 23; Ex parte McNiel, 13 Wall. (U. S.) 236, 20 L. Ed. 624; The America, 1 Low. 177, Fed. Cas. No. 289; The California, 1 Sawy. 463, Fed. Cas. No. 2,312; Low v. Com'rs of Pilotage, R. M. Charlt. (Ga.) 302, 314; Smith v. Swift, 8 Metc. (Mass.) 332; 4 Bost. Law Rep. 20; contracts for wharfage; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373; The Kate Tremaine, 5 Ben. 60, Fed. Cas. No. 7,622; Banta v. McNeil, 5 Ben. 74, Fed. Cas. No. 966; The J. H. Starin, 15 Blatchf. 473, Fed. Cas. No. 7,320; Upper Steamboat Co. v. Blake, 2 D. C. App. 51; to injuries to a vessel by reason of a defective dock; Ball v. Trenholm, 45 Fed. 588; but not to injuries to wharves; The Ottawa, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; contracts for towage; The W. J. Walsh, 5 Ben. 72, Fed. Cas. No. 17,922; surveys of ship and cargo; Story, Const. § 1665; The Tilton, 5 Mas. 465, Fed. Cas. No. 14,054; Janney v. Ins. Co., 10 Wheat. (U. S.) 411, 6 L. Ed. 354; but see 2 Pars. Mar. Law 511, n.; and generally to all assaults and batteries, damages, and trespasses, occurring on the high seas; 2 Pars. Mar. Law; see Thomas v. Lane, 2 Sumn. 1, Fed. Cas. No. 13,902; The Sea Gull, Chase, Dec. 145, Fed. Cas. No. 145; Chase, Dec. 150, Fed. Cas. No. 6,477; The Normannia, 62 Fed. 469; Jervey v. The Carolina, 66 Fed. 1013; but not where the injury was received on land though the wrongful action was done on ship; The Mary Garrett, 63 Fed. 1009; Price v. The Belle of the Coast, 66 Fed. 62; The Haxby, 95 Fed. 170; or where the origin

of the wrong is on the water but the substance or consummation of the injury on land; The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125; Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274; Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; Cleveland T. & V. R. Co. v. Steamship Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215; The Troy, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. Ed. 512; and see The Blackheath, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236; for injury to seamen in consequence of negligence of master or owner; The A. Heaton, 43 Fed. 592; Grimsley v. Hankins, 46 Fed. 400; contract for supplies to a vessel; The Electron, 48 Fed. 689; The Ella, 48 Fed. 569; but see The H. E. Willard, 53 Fed. 599; Diefenthal v. Hamburg-Amerikanische Packetfahrt Actien-Gesellschaft, 46 Fed. 397; and to enforce a lien for repairs on a canal boat in a dry dock; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73; but not for supplies to a pile-driver; Pile Driver E. O. A., 69 Fed. 1005; for labor and material in completing and equipping a new vessel after she has been launched and named; The Manhattan, 46 Fed. 797; but not to contracts to procure insurance; Marquardt v. French, 53 Fed. 603; for insurance premium; The Daisy Day, 40 Fed. 603; nor to reform a policy of marine insurance; Williams v. Ins. Co., 56 Fed. 159. It also includes actions for damages for death caused by collision on navigable waters; The City of Norwalk, 55 Fed. 98; and for injury to a seaman from the explosion of a steamtug boiler due to negligence; Grimsley v. Hankins, 46 Fed. 400; or to a laborer, working in the hold of a vessel, from a piece of timber sent without warning down a chute by a person working on a pier; Hermann v. Mill Co., 69 Fed. 646. It extends to a bath-house built on boats but designed for transportation; The Public Bath No. 13, 61 Fed. 692.

With respect to the cases in which the cause of action arises partly on shipboard and partly on land, the admiralty jurisdiction of the United States is much more liberal than that of England, and the different classes of cases are enumerated in the opinion of Thomas, D. J., in The Strabo, 90 Fed. 110, where he lays down what seem to be the settled principles as to the jurisdiction with respect to maritime torts.

(1) Where the cause arises on the ship and is communicated to the property on land, as fire; The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125; Ex parte Phenix Ins. Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274; when missives are sent from the ship and take effect elsewhere; U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932; The Epsilon, 6 Ben. 378, Fed. Cas. No. 4,506; where some part of the ship comes in contact with the land to the injury of persons or property; Johnson v. Elevator Co., 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447; The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; and herein where the vessel does damage to wharves; The C. Accame, 20 Fed. 642; Homer Ramsdell T. Co. v. Compagnie Generale Transatlantique, 63 Fed. 845; also where material discharged from a ship comes in contact with persons on land; The Mary Garrett, 63 Fed. 1009; see also Price v. The Belle of the Coast, 66 Fed. 62. In all cases under this class there is no jurisdiction, the injured person or thing being on the land when the negligent act operates upon him or it.

(2) Cases where the primal cause arises on land and is injuriously communicated to the ship, as structures wrongfully maintained and interrupting navigation; Atlee v. Packet Co., 21 Wall. (U. S.) 389, 22 L. Ed. 619; The Maud Webster, 8 Ben. 547, Fed. Cas. No. 9,302; Greenwood v. Town of Westport, 60 Fed. 560; Oregon City Transp. Co. v. Bridge Co., 53 Fed. 549; City of Boston v. Crowley, 38 Fed. 202, 204; The Arkansas, 17 Fed. 383; where material discharged from the land into the ship does injury to persons on the ship; Hermann v. Mill Co., 69 Fed. 646. In this class admiralty has jurisdiction. The case of The H. S. Pickands, 42 Fed. 239, was said to be different from those last mentioned, the injury to the libellant being caused by the falling of a ladder against the side of the ship, and there was held to be no jurisdiction since the negligence was an act done on the wharf; but in The Strabo, 98 Fed. 998, 39 C. C. A. 375, a fall from a ladder was caused by its being negligently left fastened from the rail of the vessel so that libellant was thrown to the wharf and injured, and there was jurisdiction. The ultimate authority to which all cases referred was that of The Plymouth, 3 Wall. (U. S.) 20, 18 L. Ed. 125, cited *supra*. In The Mary Stewart, 10 Fed. 137, it was said that there must be two ingredients, the wrong on the water and the damage resulting, both of which must concur to constitute a maritime cause. This was criticized in City of Milwaukee v. The Curtis, 37 Fed. 705, where it was said that "it suffices if the damage, the substantial cause of action arising out of the wrong, is complete upon navigable waters." So in Hermann v. Mill Co., 69 Fed. 646, cited *supra*, it was thought that the language in The Mary Stewart, 10 Fed. 137, was too broad. It is said that the proper solution of the question of jurisdiction "is to ascertain the place of the consummation and substance of the injury."

There is no jurisdiction in Admiralty to administer relief as courts of equity, and an executory contract for the purchase of a vessel could not be enforced; Kynoch v. The S. C. Ives, Newb. 205, Fed. Cas. No. 7,958.

The jurisdiction may be invoked by one of two vessels, both held in fault for collision, to enforce contribution against the other.

Erie R. Co. v. Transp. Co., 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450.

The jurisdiction extends to all maritime torts, *q. v.*, and as to maritime contracts, see that title.

Its *criminal* jurisdiction extends to all crimes and offences committed on the high seas or beyond the jurisdiction of any country. The criminal jurisdiction of the United States courts is extended to the Great Lakes by 26 St. L. 424. The open waters of the Great Lakes are high seas within the meaning of R. S. § 5346; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. See JURISDICTION.

A civil suit is commenced by filing a libel, upon which a warrant for arrest of the person, or attachment of his property if he cannot be found, even though in the hands of third persons, or a simple monition to appear, may issue; or, in suits *in rem*, a warrant for the arrest of the thing in question; or two or more of these separate processes may be combined. Thereupon bail or stipulations are taken if the party offer them.

In most cases of magnitude, oral evidence is not taken; but it may be taken, and it is the general custom to hear it in cases where smaller amounts are involved. The decrees are made by the court without the intervention of a jury.

A suit *in rem* and a suit *in personam* may be brought concurrently in the same court, when arising on the same cause of action; The Normandie, 40 Fed. 590; The Baracoa, 44 Fed. 102.

In criminal cases the proceedings are similar to those at common law.

See UNITED STATES COURTS; BOTTOMRY; SALVAGE; COLLISION; COURT OF LORD HIGH ADMIRAL; COURTS OF ENGLAND; ELDER BRETHREN; ABANDONMENT; MARITIME CAUSE.

ADMIRALTY, FIRST LORD OF THE. At the head of the British Navy are five Lords Commissioners. The First Lord is a member of the Cabinet, the others are called Sea Lords.

ADMISSIBLE. Pertinent and proper to be considered in reaching a decision. Used with reference to the issues to be decided in any judicial proceeding.

ADMISSION (Lat. *ad*, to, *mittere*, to send). The act by which attorneys and counsellors become recognized as officers of the court and are allowed to practise. The qualifications required vary widely in the different states. See ATTORNEY.

ADMISSIONS. Confessions or voluntary acknowledgments made by a party of the existence of certain facts.

As distinguished from confessions, the term is applied to civil transactions and to matters of fact in criminal cases where there is no criminal intent.

As distinguished from consent, an admission may be said to be evidence furnished by the party's own act of his consent at a previous period.

Direct, called also *express*, admissions are those which are made in direct terms.

Implied admissions are those which result from some act or failure to act of the party.

Incidental admissions are those made in some other connection, or involved in the admission of some other fact.

As to the *parties* by whom admissions must have been made to be considered as evidence:—

They may be made by a party to the record, or by one identified in interest with him; 9 B. & C. 535; Morris' Lessee v. Vanderen, 1 Dall. (U. S.) 65, 1 L. Ed. 38. Not, however, where the party of record is merely a nominal party and has no active interest in the suit; 1 Campb. 392; 3 B. & C. 421; Appleton v. Boyd, 7 Mass. 131; Head v. Shaver, 9 Ala. 791; Frear v. Evertson, 20 Johns. (N. Y.) 142; Owings v. Low, 5 Gill & J. (Md.) 134; nor by one of several devisees on a contest of a will for incapacity and undue influence; O'Connor v. Madison, 98 Mich. 183, 57 N. W. 105.

They may be made by one of several having a joint interest, so as to be binding upon all; 8 B. & C. 36; Hunt v. Bridgham, 2 Pick. (Mass.) 581, 13 Am. Dec. 458; Beitz v. Fuller, 1 McCord (S. C.) 541, 10 Am. Dec. 693; Patterson v. Choate, 7 Wend. (N. Y.) 441; Bound v. Lathrop, 4 Conn. 336, 10 Am. Dec. 147; Getchell v. Heald, 7 Greenl. (Me.) 26; Owings v. Low, 5 Gill & J. (Md.) 144; Van Reimsdyk v. Kane, 1 Gall. 635; Fed. Cas. No. 16,872. Mere community of interest, however, as in case of coexecutors; 1 Greenl. Ev. § 176; Hammon v. Huntley, 4 Cow. (N. Y.) 493; James v. Hackley, 16 Johns. (N. Y.) 277; trustees; 3 Esp. 101; co-tenants; Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; Smith v. Vincent, 15 Conn. 1, 38 Am. Dec. 59; is not sufficient. Admissions of one of several defendants against his interests will be receivable in evidence against him only; Kiser v. Dannenberg, 88 Ga. 541, 15 S. E. 17.

The interest in all cases must have subsisted at the time of making the admissions; 2 Stark. 41; Plant v. McEwen, 4 Conn. 544; Packer's Lessee v. Gonsalus, 1 S. & R. (Pa.) 526. Admissions made by one subsequently appointed administratrix are not admissible against her when suing as such nor against her successor in office; Gooding v. Ins. Co., 46 Ill. App. 307; More v. Finch, 65 Hun 404, 20 N. Y. Supp. 164. An admission of debt by an executor does not bind the estate; Orr's Appeal, 7 W. N. C. (Pa.) 126.

They may be made by any person interested in the subject-matter of the suit, though the suit be prosecuted in the name of another person as a cestui que trust; 1 Wils. 257; 1 Bingh. 45; but see 3 N. & P.

598; 6 M. & G. 261; or by an indemnifying creditor in an action against the sheriff; 7 C. & P. 629.

They may be made by a third person, a stranger to the suit, where the issue is substantially upon the rights of such a person at a particular time; 1 Greenl. Ev. § 181; or one who has been expressly referred to for information; 3 C. & P. 532; or where there is a privity as between ancestor and heir; 5 B. & Ad. 223; assignor and assignee; Inhabitants of West Cambridge v. Inhabitants of Lexington, 2 Pick. (Mass.) 536; Little v. Libby, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; Gibblehouse v. Strong, 3 Rawle (Pa.) 437; Snelgrove v. Martin, 2 McCord (S. C.) 241; Smith v. Martin, 17 Conn. 399; intestate and administrator; 1 Taunt. 141; grantor and grantee of land; Jackson v. Bard, 4 Johns. (N. Y.) 230, 4 Am. Dec. 267; Norton v. Pettibone, 7 Conn. 319, 18 Am. Dec. 116; Weidman v. Kohr, 4 S. & R. (Pa.) 174; and others. Letters written by a third person at defendant's request about the matter in controversy, are admissible; Holley v. Knapp, 45 Ill. App. 372. Statements by a third person used by a party are evidence against him as admissions in a subsequent controversy; 4 Best & S. 641.

They may be made by an agent, so as to bind the principal; Steph. Ev. 17; declarations of an architect to the contractor in directing operations are admissible against the owner in an action for price of work and material; Wright v. Reusens, 133 N. Y. 298, 31 N. E. 215; so far only, however, as the agent has authority; Western Union Telegraph Co. v. Way, 83 Ala. 542, 4 South. 844; Barry v. Insurance Co., 62 Mich. 424, 29 N. W. 31; Ruggles v. Insurance Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; and not, it would seem, in regard to past transactions; 11 Q. B. 46; Haven v. Brown, 7 Greenl. (Me.) 421, 22 Am. Dec. 208; Thallhimer v. Brinckerhoff, 4 Wend. (N. Y.) 394, 21 Am. Dec. 155; City Bank of Baltimore v. Bateman, 7 Harr. & J. (Md.) 104; Parker v. Green, 8 Metc. (Mass.) 142. Declarations of an agent not in the course of the business of the agency, will not prove agency or ratification; Ransom v. Duckett, 48 Ill. App. 659. One cannot prove agency by the declarations of an alleged agent only; Sier v. Bache, 7 Misc. 165, 27 N. Y. Supp. 255; nor will acts and conduct of an alleged agent not acquiesced in by the principal, establish agency; Martin v. Suber, 39 S. C. 525, 18 S. E. 125.

The admissions of the wife bind the husband so far only as she has authority in the matter; 1 Carr. & P. 621; and so the formal admissions of an attorney bind his client; 7 C. & P. 6; but not a necessarily fatal admission unintentionally made; Nesbitt v. Turner, 155 Pa. 429, 26 Atl. 750; nor when not within the scope of his authority; Lewis v. Duane, 69 Hun 28, 23 N. Y. Supp. 433; and see 2 C. & K. 216; 3 C. B. 608. Declarations of a husband in the absence of his wife are not admissible to affect the title of his wife to personal property; Leedom v. Leedom, 160 Pa. 273, 28 Atl. 1024; nor will his admissions affect the wife's separate estate; Clapp v. Engledow, 82 Tex. 290, 18 S. W. 146. See EVIDENCE.

Implied admissions may result from assumed character; 1 B. & Ald. 677; from conduct; 6 C. & P. 241; Tilgham v. Fisher, 9 Watts (Pa.) 441; from acquiescence, which is positive in its nature; Carter v. Bennett, 4 Fla. 340; from possession of documents in some cases; 5 C. & P. 75; 25 State Tr. 120.

The omission to answer a letter is not evidence of the truth of statements made in the letter; see 16 Cyc. 960.

In civil matters, constraint will not avoid admissions, if imposition or fraud were not made use of.

Admissions of one in possession of lands, made to others than the owner, are to be considered in determining whether his possession is adverse to the owner; Lochausen v. Laughter, 4 Tex. Civ. App. 291, 23 S. W. 513.

Judicial admissions; 2 Campb. 341; Boyden v. Moore, 5 Mass. 365; Jones v. Hoar, 5 Pick. (Mass.) 285; those which have been acted on by others; Commercial Bank v. King, 3 Rob. (La.) 243; Kinney v. Farnsworth, 17 Conn. 355; 13 Jur. 253; and those contained in deeds as between parties and privies; Crane v. Morris, 6 Pet. (U. S.) 611, 8 L. Ed. 514; are conclusive evidence against the party making them.

Declarations and admissions are admissible to prove partnership, if made by alleged partners; Schulberg v. Gutterman, 8 Misc. 502, 28 N. Y. Supp. 763; admission of one that he is in partnership with another, is not binding on the latter; Bank of Osceola v. Outhwaite, 50 Mo. App. 124.

It frequently occurs in practice, that, in order to save expenses as to mere formal proofs, the attorneys on each side consent to admit, reciprocally, certain facts in the cause without requiring proof of them. These are usually reduced to writing. Such admissions are in general conclusive; 1 Gr. Ev. § 186, 205; Holley v. Young, 68 Me. 215, 28 Am. Rep. 40; Woodcock v. City of Calais, 68 Me. 244; Marsh v. Mitchell, 26 N. J. Eq. 497; Perry v. Mfg. Co., 40 Conn. 313; 1 Camp. 139; 1 M. & W. 507; and may be used in evidence on a new trial; State v. Bryan, 3 Gill (Md.) 389; Merchants' Bank v. Bank, 3 Gill (Md.) 96, 43 Am. Dec. 300; Farmers' Bank v. Sprigg, 11 Md. 389; Elwood v. Lannon's Lessee, 27 Md. 209; 5 C. & P. 386; but may be withdrawn if improvidently made, but only in a clear case of mistake; 1 Gr. Ev. § 206; Marsh v. Mitchell, 26 N. J. Eq. 501; and on timely notice; Hargroves v. Redd, 43 Ga. 150; 5 C. & P. 386; and upon leave granted in the exercise of a sound

discretion; Perry v. Mfg. Co., 40 Conn. 313; 7 *id.* 6; but not after the position of the parties has been changed, as by the death of a party or witness; Wilson v. Bank, 55 Ga. 98.

Admissions against interest in a bill in equity cannot be used as such in another case; Gresl. Eq. Ev. 323; Wigm. Evid. § 1065.

As to admissions during negotiations for a compromise, see COMPROMISE.

In Pleading. The acknowledgment or recognition by one party of the truth of some matter alleged by the opposite party.

IN EQUITY.

Partial admissions are those which are delivered in terms of uncertainty, mixed up with explanatory or qualifying circumstances.

Plenary admissions are those which admit the truth of the matter without qualification, whether it be asserted as from information and belief or as from actual knowledge.

AT LAW.

In all pleadings in confession and avoidance, admission of the truth of the opposite party's pleading is made. Express admissions may be made of matters of fact only.

The usual mode of making an express admission in pleading is, after saying that the plaintiff ought not to have or maintain his action, etc., to proceed thus, "Because he says that, although it be true that," etc., repeating such of the allegations of the adverse party as are meant to be admitted; Lawes, Civ. Pl. 143, 144. See 1 Chitty, Pl. 600; Archb. Civ. Pl. 215.

Pleadings which have been withdrawn from a court of law may be offered in evidence subject to explanation, to prove admissions of the pleader: Soaps v. Eichberg, 42 Ill. App. 375; but admissions contained in an original answer are not conclusive, where an amended answer has been filed excluding such matter; Baxter v. R. Co. (Tex.) 22 S. W. 1002. The plea of the general issue admits the corporate existence of the plaintiff corporation; Bailey v. Bank, 127 Ill. 332, 19 N. E. 695. In many states, in a suit against a firm or corporation, the partnership or corporate existence is taken as admitted unless denied by affidavit filed with the plea. Where complainant sets a plea down for argument, he admits its truth, but denies its sufficiency; Burrell v. Hackley, 35 Fed. 833. Allegations of the complaint not denied by the answer are to be taken as true; Robertson v. Perkins, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686. Where two defences are set up, a denial in one is qualified by an admission in the other; Northern Pac. R. Co. v. Paine, 119 U. S. 564, 7 Sup. Ct. 323, 30 L. Ed. 513.

See CONFESSION and AVOIDANCE.

ADMITTANCE. The act of giving possession of a copyhold estate. It is of three kinds: namely, upon a voluntary grant by the lord, upon a surrender by the former tenant, and upon descent. 2 Bla. Com. 366. See COPYHOLD.

ADMITTENDO CLERICO. An old English writ issuing to the bishop to establish the right of the Crown to make a presentation to a benefice.

ADMITTENDO IN SOCIUM. A writ associating certain persons to justices of assize. Cowell.

ADMONITIO TRINA. The three fold warning given to a prisoner who stood mute, before he was subjected to *peine forte et dure* (*q. v.*).

ADMONITION. A reprimand from a judge to a person accused, on being discharged, warning him of the consequences of his conduct, and intimating to him that, should he be guilty of the same fault for which he has been admonished, he will be punished with greater severity. Merlin, *Répert.* The admonition was authorized as a species of punishment for slight misdemeanors.

ADNEPOS. The son of a great-great-grandson. Calvinus, Lex.

ADNEPTIS. The daughter of a great-great-granddaughter. Calvinus, Lex.

ADNOTATIO (Lat. *notare*). A subscription or signing.

In the civil law, casual homicide was excused by the indulgence of the emperor, signed with his own sign-manual, called *adnotatio;* Code, 9. 16. 5; 4 Bla. Com. 187. See RESCRIPT.

ADOLESCENCE. That age which follows puberty and precedes the age of majority. It commences for males at fourteen, and for females at twelve years completed, and continues until twenty-one years complete. Wharton.

ADOPTION. The act by which a person takes the child of another into his family, and treats him as his own.

A juridical act creating between two persons certain relations, purely civil, of paternity and filiation. 6 Demolombe, § 1.

Adoption was practised in the remotest antiquity. Cicero asks, *"Quod est jus adoptionis? nempe ut is adoptet, qui neque procreare jam liberos possit, et cum potuerit, sit expertus."* At Athens, he who had adopted a son was not at liberty to marry without the permission of the magistrates. Gaius, Ulpian, and the Institutes of Justinian only treat of adoption as an act creating the paternal power. Originally, the object of adoption was to introduce a person into the family and to acquire the paternal power over him. The adopted took the name of the adopter, and only preserved his own adjectively, as *Scipio Æmilianus; Cæsar Octavianus,* etc. According to Cicero, adoptions produced the right of succeeding to the name, the property, and the lares: *"hereditates nominis, pecuniæ, sacrorum secutæ sunt;" Pro Dom.* § 13.

The first mode of adoption was in the form of a law passed by the *comitia curiata.* Afterwards, it was effected by the *mancipatio, alienatio per æs et libram,* and the *in jure cessio;* by means of the first the paternal authority of the father was dissolved, and by the second the adoption was completed. The *mancipatio* was a solemn sale made to the *emptor* in presence of five Roman citizens (who represented the five classes of the Roman people), and

a *libripens*, or scalesman, to weigh the piece of copper which represented the price. By this sale the person sold became subject to the *mancipium* of the purchaser, who then emancipated him; whereupon he fell again under the paternal power; and in order to exhaust it entirely it was necessary to repeat the *mancipatio* three times: *si pater filium ter venumdabit, filius a patre liber esto.* After the paternal power was thus dissolved, the party who desired to adopt the son instituted a fictitious suit against the purchaser who held him *in mancipium*, alleging that the person belonged to him or was subject to his paternal power; the defendant not denying the fact, the prætor rendered a decree accordingly, which constituted the *cessio in jure*, and completed the adoption. *Adoptantur autem, cum a parente in cujus potestate sunt, tertia mancipatione in jure ceduntur, atque ab eo, qui adoptat, apud eum apud quem legis actio est, vindicantur;* Gell. 5. 19.

Towards the end of the Republic another mode of adoption had been introduced by custom. This was by a declaration made by a testator, in his will, that he considered the person whom he wished to adopt as his son: In this manner Julius Cæsar adopted Octavius.

It is said that the adoption of which we have been speaking was limited to persons *alieni juris*. But there was another species of adoption, called adrogation, which applied exclusively to persons who were *sui juris*. By the adrogation a *pater-familias*, with all who were subject to his *patria potestas*, as well as his whole estate, entered into another family, and became subject to the paternal authority of the chief of that family. *Quæ species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an velit eum quem adopturus sit justum sibi filium esse; et is, qui adoptatur rogatur an id fieri patiatur; et populus rogatur an id fieri jubeat;* Gaius, 1. 99. The formulæ of these interrogations are in Aul. Gell. (see Hunter, Rom. Law 205): *"Velitis, jubeatis, Quirites, uti L. Valerius L. Titio tam jure legeque filius sibi siet, quam si ex eo patre matreque familias ejus natus esset, utique ei vitæ necisque in eo potestas siet uti pariendo filio est; hoc ita ut dixi vos, Quirites, rogo."* This public and solemn form of adoption remained unchanged, with regard to adrogation, until the time of Justinian: up to that period it could only take place *populi auctoritate*. According to the Institutes, 1. 11. 1, adrogation took place by virtue of a rescript of the emperor,—*principali rescripto*, which only issued *causa cognita;* and the ordinary adoption took place in pursuance of the authorization of the magistrate,—*imperio magistratus*. The effect of the adoption was also modified in such a manner, that if a son was adopted by a stranger, *extranea persona*, he preserved all the family rights resulting from his birth, and at the same time acquired all the family rights produced by the adoption.

There is no law of adoption in Scotland; Bell's Dict.; nor in England. In the latter country any renunciation by parents of their legal rights and liabilities is a mere empty form; [1901] 2 K. B. 385; 3 M. & G. 547.

In the United States, adoption exists only by statute; In re Thorne, 155 N. Y. 140, 49 N. E. 661; Ballard v. Ward, 89 Pa. 358. One of the first states to introduce it was Massachusetts in 1851; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. Its object is to change the succession of property and to create relations of paternity and affiliation not before existing; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500. In Louisiana it was abolished by the Code of 1808, art. 35, p. 50. See Vidal v. Commagére, 13 La. Ann. 517, but the right has since been restored; Civ. Code 1870, Art. 214. In Clarkson v. Hatton, 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635, it was said to exist in every state. In many of the continental states of Europe it is still permitted under various restrictions.

Adoption is never sustained by mere presumption; Sackman v. Campbell, 10 Wash. 533, 39 Pac. 145; In re Romero, 75 Cal. 379, 17 Pac. 434; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641; even though the child had been taken from an asylum at the age of seven, given the name of the people with whom he lived and treated by them as a son until majority; In re Huyck, 49 Misc. 391, 99 N. Y. Supp. 502; and where the method of adoption is provided by statute, it can be done in no other way; Taylor v. Deseve, 81 Tex. 246, 16 S. W. 1008; Foley v. Foley, 61 Ill. App. 577. There must be a substantial compliance with all statutory requirements; Smith v. Allen, 161 N. Y. 478, 55 N. E. 1056; Bresser v. Saarman, 112 Ia. 720, 84 N. W. 920.

A husband and wife may adopt a child jointly; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806 (but not if the husband be insane; Watts v. Dull, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141); or an unmarried person of suitable age; Krug v. Davis, 87 Ind. 590. The mere fact that one is in the senile age of life will not render him incompetent to adopt one in the prime and vigor of life; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518. It is held that a non-resident may not adopt a child; Knight v. Gallaway, 42 Wash. 413, 85 Pac. 21. An adult may be an adopted child; Sheffield v. Franklin, 151 Ala. 492, 44 South. 373, 12 L. R. A. (N. S.) 884, 125 Am. St. Rep. 37, 15 Ann. Cas. 90; In re Moran's Estate, 151 Mo. 555, 52 S. W. 377; Succession of Caldwell, 114 La. 195, 38 South. 140, 108 Am. St. Rep. 341; Markover v. Krauss, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518; but see *contra;* Petition of Moore, 14 R. I. 38; Williams v. Knight, 18 R. I. 333, 27 Atl. 210. Where the word "child" was used, the statute was held not to include an adult.

Usually the consent of the natural parents is required; Hopkins v. Antrobus, 120 Ia. 21, 94 N. W. 251; In re Estate of McCormick, 108 Wis. 234, 84 N. W. 148, 81 Am. St. Rep. 890; Succession of Vollmer, 40 La. Ann. 593, 4 South. 254; Luppie v. Winans, 37 N. J. Eq. 245; In re Bastin, 10 Pa. Super. Ct. 570; and in some states the consent of the child, when he is above a certain age; In re Johnson, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

If the child be a foundling, the parents have no authority over it and the situation is as if the parents were dead; Succession of Dupre, 116 La. 1090, 41 South. 324. A charitable society which maintains and cares

for a child may consent to its adoption; Booth v. Van Allen, 7 Phila. (Pa.) 401; and a probate court may appoint a guardian *ad litem* with power to give or withhold consent to adoption, where the parents are unknown and there is no guardian; In re Edds, 137 Mass. 346. To constitute abandonment there must be some act on the part of the parent evincing a settled purpose to forego all parental duties; Winans v. Luppie, 47 N. J. Eq. 302, 20 Atl. 969.

If the court be satisfied that the proceedings are for his benefit, the consent of a minor will be presumed; Morrison v. Sessions' Estate, 70 Mich. 297, 38 N. W. 249, 14 Am. St. Rep. 500.

The surrender of the child by its parents constitutes a valuable consideration for a promise of adoption; Healy v. Simpson, 113 Mo. 340, 20 S. W. 881; Godine v. Kidd, 64 Hun 585, 19 N. Y. Supp. 335; Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480.

Where there is a contract for adoption and a sufficient consideration therefor on the part of the child, such contract will be enforced; McElvain v. McElvain, 171 Mo. 244, 71 S. W. 142; 8 Hawaii 40.

When an infant child has been released to another, such release is not revocable without sufficient legal reasons; Janes v. Cleghorn, 54 Ga. 10; and unless proceedings to revoke are made promptly, it will be fatal to their maintenance; Brown v. Brown, 101 Ind. 340.

The right of inheritance. In the District of Columbia the right of inheritance is not included in the rights acquired by adoption; Moore v. Hoffman, Fed. Cas. No. 9,764 *a*; In New York it is; Theobald v. Smith, 103 App. Div. 200, 92 N. Y. Supp. 1019. In Ohio an adopted child inherits from the adopting parent but not through him; Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; in Illinois such child can take by descent only from the person adopting him and not from lineal or collateral kindred of the adopting parent; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Keegan v. Geraghty, 101 Ill. 26; and see Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, 4 Ann. Cas. 879. In Pennsylvania an adopted child can not take under a devise to "children" as it is not a child by nature; Schafer v. Eneu, 54 Pa. 304. He is held not to be within a conveyance to "bodily heirs"; Balch v. Johnson, 106 Tenn. 249, 61 S. W. 289; nor is he a lineal descendant; Com. v. Ferguson, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240; or lineal issue; Kerr v. Goldsborough, 150 Fed. 289, 80 C. C. A. 177. The word "child" in a statute relating to adoption has a broader signification than "issue"; Virgin v. Marwick, 97 Me. 578, 55 Atl. 520; and the adopted child has the same right of inheritance as a natural child; *id.* In Massachusetts an adopted child was held to be entitled to take from the deceased son of one of the adopting parents; Stearns v. Allen, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441.

The right of inheritance from adoption arises by operation of law from the acts of the parties in compliance with the statute and not from contract; Jordan v. Abney, 97 Tex. 296, 78 S. W. 486.

As an adopted child is not a lineal descendant, a legacy to him will not be exempted from payment of the collateral inheritance tax; Com. v. Ferguson, 137 Pa. 595, 20 Atl. 870, 10 L. R. A. 240; otherwise in New York by statute; In re Butler, 58 Hun 400, 12 N. Y. Supp. 201; but see In re Bird's Estate, 11 N. Y. Supp. 895, where payment of such a tax was required, in the case of a legacy to the child of an adopted child.

The adoptive parent may disinherit the child; Logan v. Lennix, 40 Tex. Civ. App. 62, 88 S. W. 364; and he has the same unlimited power of disposition of his property that a natural father has; Burnes v. Burnes, 132 Fed. 485.

Adopting parents inherit from the child in preference to the natural parents; Swick v. Coleman, 218 Ill. 33, 75 N. E. 807; Paul v. Davis, 100 Ind. 422; see Hyatt v. Pugsley, 33 Barb. (N. Y.) 373; Estate of Foley, 1 W. N. C. (Pa.) 301; but this rule is not always followed. In many cases the estate of the deceased child goes to his relatives by blood; Upson v. Noble, 35 Ohio St. 655; Com. v. Powel, 16 W. N. C. (Pa.) 297; Hole v. Robbins, 53 Wis. 514, 10 N. W. 617; Hill v. Nye, 17 Hun (N. Y.) 457. In Pennsylvania, although the act does in express words confer the right of inheritance upon the child from the adopting parent, the latter cannot inherit from the adopted child, because "the act does not so declare"; Com. v. Powel, 16 W. N. C. (Pa.) 297.

A child adopted in one state, where both it and its adopted parent are domiciled, can inherit land in another state having substantially similar adoption laws and permitting adopted children to inherit; Finley v. Brown, 122 Tenn. 316, 123 S. W. 359, 25 L. R. A. (N. S.) 1285; see cases in 65 L. R. A. 186, note; *contra*, Brown v. Finley, 157 Ala. 424, 47 South. 577, 21 L. R. A. (N. S.) 679, 131 Am. St. Rep. 68, 16 Ann. Cas. 778.

To "enact" implies the creating anew of a law which did not exist before; but "adopt," no doubt, implies the making that their own which was created by another, as the adoption of our statute laws of Great Britain, as they stood, by the Colonial Government; Williams v. Bank, 7 Wend. (N. Y.) 539.

The word "adoption" in a state constitution providing for a continuance in office of judges in office at the adoption of the constitution means when it is fully consummated and complete—not inchoate and imperfect; People v. Norton, 59 Barb. (N. Y.) 169.

"The primary and natural signification of the word adoption.....includes both take effect and in force"; People v. Norton, 59 Barb. (N. Y.) 169.

ADPROMISSOR (Lat. *promittere*). One who binds himself for another; a surety; a peculiar species of *fidejussor*. Calvinus, Lex.

The term is used in the same sense in the Scotch law. The cautionary engagement was undertaken by a separate act: hence, one entering into it was called *adpromissor* (promisor in addition to). Erskine, Inst. 3. 3. 1.

ADROGATION. One of two procedures for adoption under the Roman Law, i. e. by bill (*rogatio*) passed by the *comitia curiata*, with the formal consent of the intended father and son. 1 Roby, Rom. Priv. Law 60. See ADOPTION.

ADS. See AD SECTAM.

ADSCRIPTI (Lat. *scribere*). Joined to by writing; ascribed; set apart; assigned to; annexed to.

ADSCRIPTI GLEBÆ. Slaves who served the master of the soil; who were annexed to the land, and passed with it when it was conveyed. Calvinus, Lex.

These *servi adscripti* (or *adscriptitii*) *glebæ* held the same position as the *villeins regardant* of the Normans; 2 Bla. Com. 93. See 1 Poll. & Mait. 372.

ADSCRIPTICII (Lat.). A species of serfs or slaves. See 1 Poll. & Mait. 372.

Those persons who were enrolled and liable to be drafted as legionary soldiers. Calvinus, Lex.

ADSESSORES (Lat. *sedere*). Side judges. Those who were joined to the regular magistrates as assistants or advisers; those who were appointed to supply the place of the regular magistrates in certain cases. Calvinus, Lex. See ASSESSORS.

ADSTIPULATOR. In Civil Law. One who supplied the place of a procurator at a time when the law refused to allow stipulations to be made by procuration. Sand. Inst. 354.

ADULT. In Civil Law. A male infant who has attained the age of fourteen; a female infant who has attained the age of twelve. Domat. *Liv. Prel.* tit. 2, § 2, n. 8.

In Common Law. One of the full age of twenty-one. Swanst. Ch. 553; George v. State, 11 Tex. App. 95.

ADULTER (Lat.). One who corrupts; one who corrupts another man's wife.

Adulter solidorum. A corrupter of metals; a counterfeiter. Calvinus, Lex.

ADULTERA (Lat.). A woman who commits adultery. Calvinus, Lex.

ADULTERATION. The act of corrupting or debasing; the act of mixing something impure or spurious with something pure or genuine, or an inferior article with a superior one of the same kind. See 16 M. & W. 644; State v. Norton, 24 N. C. 40.

See FOOD AND DRUG LAWS.

ADULTERATOR (Lat.). A corrupter; a counterfeiter.

Adulterator monetæ. A forger. Du Cange.

ADULTERINE. The issue of adulterous intercourse.

Those are not deemed adulterine who are begotten of a woman openly married through ignorance of a former wife being alive.

Adulterine children are regarded more unfavorably than the illegitimate offspring of single persons. The Roman law refused the title of natural children, and the canon law discouraged their admission to orders.

ADULTERINE GUILDS. Companies of traders acting as corporations, without charters, and paying a fine annually for the privilege of exercising their usurped privileges. Smith, Wealth of Nat. book 1, c. 10; Wharton, Dict.

ADULTERIUM. A fine imposed for the commission of adultery. Barrington, Stat. 62, n.

ADULTERY. The voluntary sexual intercourse of a married person with a person other than the offender's husband or wife. Bishop, Mar. & D. § 415; Moore v. Com., 6 Metc. (Mass.) 243, 39 Am. Dec. 724; State v. Hutchinson, 36 Me. 261; Cook v. State, 11 Ga. 56, 56 Am. Dec. 410; Hull v. Hull, 2 Strobh. Eq. (S. C.) 174.

Unlawful voluntary sexual intercourse between two persons, one of whom at least is married, is the essence of the crime in all cases. In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication; Respublica v. Roberts, 1 Yeates (Pa.) 6; *id.;* 2 Dall. (Pa.) 124, 1 L. Ed. 316; State v. Parham, 50 N. C. 416; Smitherman v. State, 27 Ala. 23; State v. Thurstin, 35 Me. 205, 58 Am. Dec. 695; Com. v. Cregor, 7 Gratt. (Va.) 591; Com. v. Lafferty, 6 Gratt. (Va.) 673; Banks v. State, 96 Ala. 78, 11 South. 404; Hunter v. U. S., 1 Pinney (Wis.) 91, 39 Am. Dec. 277. In Massachusetts, however, and some of the other states, by statute, if the woman be married, though the man be unmarried, he is guilty of adultery; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284, and note; Com. v. Elwell, 2 Metc. 190, 39 Am. Dec. 398 (where the man was ignorant that the woman was married); State v. Pearce, 2 Blackf. (Ind.) 318; Wasden v. State, 18 Ga. 264; State v. Wallace, 9 N. H. 515; and see State v. Lash, 16 N. J. L. 380, 32 Am. Dec. 397; Mosser v. Mosser, 29 Ala. 313. In Connecticut and some other states, it seems that to constitute the offence of adultery it is necessary that the *woman* should be married; that if the man only is married, it is not the crime of adultery at common law or

under the statute, so that an indictment for adultery could be sustained against either party; though within the meaning of the law respecting divorces it is adultery in the man. Cohabitation with a man after marriage is not adultery, unless the woman knows of such marriage; Banks v. State, 96 Ala. 78, 11 South. 404; Vaughan v. State, 83 Ala. 55, 3 South. 530; it is not necessary to prove emission on prosecution for adultery; Com. v. Hussey, 157 Mass. 415, 32 N. E. 362.

A charge of open and notorious adultery is not sustained by proof of occasional illicit intercourse; Wright v. State, 5 Blackf. (Ind.) 358, 35 Am. Dec. 126, and note; State v. Crowner, 56 Mo. 147; Brevaldo v. State, 21 Fla. 789; Searls v. People, 13 Ill. 597; nor by merely living together as man and wife without any circumstances to cause scandal or suspicion; People v. Salmon, 148 Cal. 303, 83 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268; Schoudel v. State, 57 N. J. L. 209, 30 Atl. 598. While ordinarily marriage may be proved by admission or matrimonial cohabitation there is some conflict as to whether the fact of marriage can be proved by admission of a party so as to render him guilty of a crime, as of adultery. In many courts such evidence is held insufficient; People v. Humphrey, 7 Johns. (N. Y.) 314; State v. Roswell, 6 Conn. 446; State v. Medbury, 8 R. I. 543; People v. Isham, 109 Mich. 72, 67 N. W. 819; State v. Armstrong, 4 Minn. 335 (Gil. 251); but the weight of authority is against that rule; Cameron v. State, 14 Ala. 546, 48 Am. Dec. 111, and note; State v. Libby, 44 Me. 469, 69 Am. Dec. 115; Com. v. Holt, 121 Mass. 61; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Murphy v. State, 50 Ga. 150; State v. Sanders, 30 Ia. 582.

It was not, by itself, indictable at common law; 4 Bla. Com. 65; Whart. Cr. Law 1717; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Com. v. Isaacs, 5 Rand. (Va.) 634; but was left to the ecclesiastical courts for punishment. In the United States it is usually punishable by fine and imprisonment under various statutes.

Parties to the crime may be jointly indicted; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398; or one may be convicted and punished before or without the conviction of the other; 2 Whart. Cr. L. § 1730; "but when one has been previously tried and acquitted, or when both are tried together and the verdict is for one, the other cannot be found guilty;" State v. Mainor, 28 N. C. 340; State v. Parham, 50 N. C. 416; *contra;* State v. Caldwell, 8 Baxt. (Tenn.) 576; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207; Solomon v. State, 39 Tex. Cr. R. 140, 45 S. W. 706; and see 12 Harv. L. R. 282. The adultery of the wife will not avoid a previous voluntary settlement; Lister v. Lister, 35 N. J. Eq. 49; but if, in contemplation of future adultery, she induce a gift of property, it is revocable; 2 De G. F. & J. 481; Evans v. Evans, 118 Ga. 890, 45 S. E. 612, 98 Am. St. Rep. 180. The equitable jurisdiction is founded on fraud in concealing a material fact which, by reason of the relation, there was a duty to disclose; 17 Harv. L. Rev. 202. Where the petitioner in divorce was only able to prove acts of familiarity, suggestive of adultery, before the date of the petition, he was permitted to prove actual adultery after that date as showing what inferences should be drawn from the prior conduct; [1900] P. 63.

As to civil remedies, see CRIM. CON.

ADVANCE. To supply beforehand; to furnish something before an equivalent is received; to loan. Rogers v. Bank, 108 N. C. 574, 13 S. E. 245.

ADVANCEMENT. A gift by anticipation from a parent to a child of the whole or a part of what it is supposed such child will inherit on the death of the parent. Hengst's Estate, 6 Watts (Pa.) 87; Sampson v. Sampson, 4 S. & R. (Pa.) 333; Osgood v. Breed's Heirs, 17 Mass. 358; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Parish v. Rhodes, Wright (Ohio) 339; Darnes' Ex'r v. Lloyd, 82 Va. 859, 5 S. E. 87, 3 Am. St. Rep. 123. The doctrine applies only to intestate estates, and proceeds upon the presumption, in the absence of a will, that the gift is in anticipation of the parent's death, and that he intended equality; but a subsequent disposal by will rebuts the presumption; Marshall v. Rench, 3 Del. Ch. 239, per Bates, Ch.

But an advancement, properly so called, though a thing known under certain ancient customs in England, is now a creature of statute, and, by the statute, is confined to intestate estates, and never applied to lands devised; Marshall v. Rench, 3 Del. Ch. 239, 253, where the opinion states fully the English statutes and policy.

An advancement can only be made by a parent to a child; Callender v. McCreary, 4 How. (Miss.) 356; Shiver v. Brock, 55 N. C. 137; Bisph. Eq. 84; or in some states, by statute, to a grandchild; 4 Kent 419; Dickinson v. Lee, 4 Watts (Pa.) 82, 28 Am. Dec. 684; 4 Ves. 437. It must be *ejusdem generis;* 3 Yo. & Coll. 397; as is the rule with respect to ademption, *q. v.*

It is held that a gift to a husband by wife's father is considered an advancement to the wife; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; and that it is a question of fact, where decedent in his lifetime made a conveyance to his daughter-in-law; Palmer v. Culbertson, 65 Hun 625, 20 N. Y. Supp. 391.

The intention of the parent is to decide whether a gift is intended as an advancement; Lawson's Appeal, 23 Pa. 85; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; McPaw v. Blewit, 2 McCord Ch. (S.

C.) 103. See Weatherhead v. Field, 26 Vt. 665.

A mere gift is presumptively an advancement, but the contrary intention may be shown; Brown v. Burke, 22 Ga. 574; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; Lawrence v. Mitchell, 48 N. C. 190; Hatch v. Straight, 3 Conn. 31, 8 Am. Dec. 152; Scott v. Scott, 1 Mass. 527; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; Culp v. Wilson, 133 Ind. 294, 32 N. E. 928. The maintenance and education of a child, or the gift of money without a view to a portion or settlement in life, is not deemed an advancement; Ison v. Ison, 5 Rich. Eq. (S. C.) 15; Sherwood v. Smith, 23 Conn. 516. If security is taken for repayment, it is a debt and not an advancement; High's Appeal, 21 Pa. 283; West v. Bolton, 23 Ga. 531; Barton v. Rice, 22 Pick. (Mass.) 508; and see Procter v. Newhall, 17 Mass. 93; Osgood v. Breed's Heirs, 17 Mass. 359; Stewart v. State, 2 Harr. & G. (Md.) 114. Payment of a son's debts will be considered an advancement; Steele v. Frierson, 85 Tenn. 430, 3 S. W. 649; or the payment by the father as surety of the notes of his son who had no estate; Reynolds' Adm'r v. Reynolds, 92 Ky. 556, 18 S. W. 517.

No particular formality is requisite to indicate an advancement; 1 Madd. Ch. Pr. 507; 4 Kent 418; Brown v. Brown, 16 Vt. 197; unless prescribed by statute; 4 Kent 418; Hartwell v. Rice, 1 Gray (Mass.) 587; Mowry v. Smith, 5 R. I. 255; Sayles v. Baker, 5 R. I. 457.

Where a father divides his property equally between two sons, conveying to one his share, it is considered an advancement where no deed is delivered to the other; O'Connell v. O'Connell, 73 Ia. 733, 36 N. W. 764.

The effect of an advancement is to reduce the distributive share of the child by the amount so received, estimating its value at the time of receipt; Oyster v. Oyster, 1 S. & R. (Pa.) 422; Nelson v. Wyan, 21 Mo. 347; Burton v. Dickinson, 3 Yerg. (Tenn.) 112; Warfield v. Warfield, 5 Harr. & J. (Md.) 459; Beckwith v. Butler, 1 Wash. (Va.) 224; Hall v. Davis, 3 Pick. (Mass.) 450; in some states the child has his option to retain the advancement and abandon his distributive share; Clark v. Fox, 9 Dana (Ky.) 193; Taylor v. Reese, 4 Ala. 121; to abandon his advancement and receive his equal share of the estate; Knight v. Oliver, 12 Gratt. (Va.) 33; Andrews v. Hall, 15 Ala. 85; Phillips v. McLaughlin, 26 Miss. 592; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726; but this privilege exists only in case of intestacy; Newman v. Wilbourne, 1 Hill, Ch. (S. C.) 10; Sturdevant v. Goodrich, 3 Yerg. (Tenn.) 95; Howland v. Heckscher, 3 Sandf. Ch. (N. Y.) 520; Hawley v. James, 5 Paige, Ch. (N. Y.) 450; Ves. Ch. 323. See ADEMPTION; GIFT.

It is not chargeable with interest; Miller's Appeal, 31 Pa. 337; until the settlement of the estate.

ADVANCES. Payments made to the owner of goods by a factor or agent, who has or is to have possession of the goods for the purpose of selling them.

An agent is entitled to reimburse himself from the proceeds of the goods, and has a lien on them for the amount paid; Liverm. Ag. 38; Merchants' National Bank v. Pope, 19 Or. 35, 26 Pac. 622; and an action over for the balance, against his principal, if the sales are insufficient to cover the advances; Parker v. Brancker, 22 Pick. (Mass.) 40; Marfield v. Goodhue, 3 N. Y. 62; Frothingham v. Everton, 12 N. H. 239; Harrison, Frazier & Co. v. Mora, 150 Pa. 481, 24 Atl. 705; Eichel v. Sawyer, 44 Fed. 845; but he must first exhaust the property in his hands; Balderston v. Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772. Where to save himself from loss the factor buys the goods himself, the consignor may elect whether he will ratify the sale or demand the value of the goods; Sims v. Miller, 37 S. C. 402, 16 S. E. 155, 34 Am. St. Rep. 762.

See AGENT; FACTOR.

In the case of a contract for the manufacture and sale of merchandize, a stipulation to advance money on account means to supply beforehand, to loan before the work is done or the goods made; Powder Co. v. Burkhardt, 97 U. S. 110, 24 L. Ed. 973.

It also refers to a case where money is paid before, or in advance of, the proper time of payment; it may characterize a loan or a gift, or money advanced to be repaid conditionally; Vail v. Vail, 10 Barb. (N. Y.) 73.

Though in its strict legal sense the word does not mean gifts or advancements, but rather a sort of loan, in its ordinary and usual sense it includes both loans and gifts—rather the former than the latter; Prouty v. Swift, 51 N. Y. 597; Nolan's Ex'rs v. Bolton, 25 Ga. 352.

As to mortgages to secure future advancements, see MORTGAGE.

ADVANTAGE. Preference or priority. United States v. Preston, 4 Wash. 446, Fed. Cas. No. 16,087.

ADVENA (Lat. *venire*). **In Roman Law.** One of foreign birth, who has left his own country and settled elsewhere, and who has not acquired citizenship in his new locality; often called *albanus*. Du Cange.

ADVENT. The period commencing on Sunday falling on St. Andrew's day (30th of November), or the nearest Sunday to it, and continuing till Christmas. Blount.

It took its name from the fact that it immediately preceded the day set apart to commemorate the birth or coming (advent) of Christ. Cowel; Termes de la Ley.

Formerly, during this period, "all contentions at law were omitted." But, by statute 13 Edw. I. (Westm. 2) c. 48, certain actions were allowed.

ADVENTITIOUS (Lat. *adventitius*). That which comes incidentally, or out of the regular course.

ADVENTITIUS (Lat.). Foreign; coming from an unusual source.

Adventitia bona are goods which fall to a man otherwise than by inheritance.

Adventitia dos is a dowry or portion given by some friend other than the parent.

ADVENTURE. Sending goods abroad under charge of a supercargo or other agent, which are to be disposed of to the best advantage for the benefit of the owners.

The goods themselves so sent.

It is used synonymously with "perils"; it is often used by writers to describe the enterprise or voyage as a "marine adventure" insured against; Moores v. Louisville Underwriters, 14 Fed. 233. See INSURANCE; BILL OF ADVENTURE.

ADVENTURER. One who undertakes uncertain or hazardous actions or enterprises. It is also used to denote one who seeks to advance his own interests by unscrupulous designs on the credulity of others. It has been held that to impute that a person is an adventurer is a libel; 18 L. J. C. P. 241.

ADVERSE CLAIM. See ADVERSE POSSESSION.

ADVERSE ENJOYMENT. The possession or exercise of an easement or privilege under a claim of right against the owner of the land out of which the easement is derived. 2 Washb. R. P. 42.

Such an enjoyment, if open, 4 M. & W. 500; 4 Ad. & E. 369, and continued uninterruptedly; Powell v. Bagg, 8 Gray (Mass.) 441, 69 Am. Dec. 262; Colvin v. Burnet, 17 Wend. (N. Y.) 564; Pierre v. Fernald, 26 Me. 440, 46 Am. Dec. 573; Bullen v. Runnels, 2 N. H. 255, 9 Am. Dec. 55; Watt v. Trapp, 2 Rich. (S. C.) 136; 11 Ad. & E. 788; Grace Methodist Episcopal Church v. Dobbins, 153 Pa. 294, 25 Atl. 1120, 34 Am. St. Rep. 706, for the term of twenty years, raises a conclusive presumption of a grant, provided that there was, during the time, some one in existence, in possession and occupation, who was not under disability to resist the use; 2 Washb. R. P. 48. See PRESUMPTION; EASEMENT; ADVERSE POSSESSION.

ADVERSE POSSESSION. The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor. 3 East 394; Wallace v. Duffield, 2 S. & R. (Pa.) 527, 7 Am. Dec. 660; French v. Pearce, 8 Conn. 440, 21 Am. Dec. 680; Robinson v. Douglass, 2 Aik. (Vt.) 364; Smith v. Burtis, 9 Johns. (N. Y.) 174; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Bowles v. Sharp, 4 Bibb (Ky.) 550. See 15 L. R. A. (N. S.) 1178, note.

A prescriptive title rests upon a different principle from that of a title arising under the statute of limitations. Prescription operates as evidence of a grant and confers a positive title; Cruise, Dig. tit. 31, ch. 1, § 4. The statute of limitations operates not so much to confer positive title on the occupant, as to bar the remedy. Hence it is said to be properly called a negative prescription; *id.* It applies only when there has been a disseisin or some actionable invasion of the real owner's possession; Clawson v. Primrose, 4 Del. Ch. 670 *n.*

When such possession has been actual, Mather v. Ministers of Trinity Church, 3 S. & R. (Pa.) 517, 8 Am. Dec. 663, and has been adverse for twenty years, the law raises the presumption of a grant; Angell, Wat. Cour. 85. But this presumption arises only when the use or occupation would otherwise have been unlawful; Tinkham v. Arnold, 3 Greenl. (Me.) 120; Jackson v. Richards, 6 Cow. (N. Y.) 617; Jackson v. Vermilyea, *id.* 677; Hall v. Powel, 4 S. & R. (Pa.) 456, 8 Am. Dec. 722.

The statute of limitations is the source of title by adverse possession; Armijo v. Armijo, 4 N. M. (Gild.) 57, 13 Pac. 92. It is held to be not grounded upon the presumption of a grant; but is the fiat of the legislature cutting off the right to maintain suit; Louisville & N. R. Co. v. Smith, 125 Ky. 336, 101 S. W. 317, 31 Ky. L. Rep. 1, 128 Am. St. Rep. 254; and is for the interest of the stability of titles; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 54 L. R. A. 526, 87 Am. St. Rep. 766. It protects the disseisor in his possession not out of regard to the merits of his title, but because the real owner has acquiesced in his possession; Foulke v. Bond, 41 N. J. L. 527. It must be complied with in every substantial particular; Brokel v. McKechnie, 69 Tex. 33, 6 S. W. 623.

A mere possession, without color or claim of an adverse title, will not enable one in an action of right to avail himself of the statute of limitations; Clagett v. Conlee, 16 Ia. 487; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Stevens v. Brooks, 24 Wis. 329; Harvey v. Tyler, 2 Wall. (U. S.) 328, 17 L. Ed. 871. The terms "color of title" and "claim of title" are not synonymous; Herbert v. Hanrick, 16 Ala. 581. To constitute the former there must be a paper title, but the latter may rest wholly in parol; Hamilton v. Wright, 30 Ia. 480. The claim of right may be made inferentially by unequivocal acts of ownership; Barnes v. Light, 116 N. Y. 34, 22 N. E. 441; Wilbur v. R. Co., 116 Ia. 65, 89 N. W. 101; as by the occupation and use of land by a railroad for a right of way; Illinois Cent. R. Co. v. Houghton, 126 Ill. 235, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581; or by visible, hostile, exclusive, and continuous appropriation of the land;

Cox v. Hotel Co. (Tex.) 47 S. W. 808. It need not be a valid claim, so long as it is made and relied on by the person in possession; Jackson v. Ellis, 13 Johns. (N. Y.) 118; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Grant v. Fowler, 39 N. H. 101; Cornelius v. Giberson, 25 N. J. L. 1; Montgomery County v. Severson, 64 Ia. 326, 17 N. W. 197, 20 N. W. 458; Virginia Midland R. Co. v. Barbour, 97 Va. 118, 33 S. E. 554; Dothard v. Denson, 72 Ala. 541; and where all the other elements of an adverse possession have concurrently and persistently existed for the statutory time, color of title has been usually held not essential; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Dibble v. Land Co., 163 U. S. 63, 16 Sup. Ct. 939, 41 L. Ed. 72; and see the cases collected on this point, 15 L. R. A. (N. S.) 1178, *n.*

The intention must be manifest; Lewis v. Railroad Co., 162 N. Y. 202, 56 N. E. 540; Haney v. Breeden, 100 Va. 781, 42 S. E. 916; Marcy v. Marcy, 6 Metc. (Mass.) 360. It guides the entry and fixes its character; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178, citing Ewing v. Burnet, 11 Pet. (U. S.) 51, 9 L. Ed. 624. Possession taken under claim of title shows such intention; Probst v. Trustees, 129 U. S. 182, 9 Sup. Ct. 263, 32 L. Ed. 642. But if by mistake one oversteps his bounds and encroaches upon his neighbor's lands, not knowing the location of the true line and intending to claim no more than he really is entitled to possess, his possession is not adverse, and will not give him title no matter how long he actually holds it; Shirey v. Whitlow, 80 Ark. 444, 97 S. W. 444; Gordon v. Booker, 97 Cal. 586, 32 Pac. 593; Mills v. Penny, 74 Ia. 172, 37 N. W. 135, 7 Am. St. Rep. 474; Silver Creek Cement Corp. v. Cement Co., 138 Ind. 297, 35 N. E. 125, 37 N. C. 721; Preble v. Railroad Co., 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366; Kirkman v. Brown, 93 Tenn. 476, 27 S. W. 709. In such a case the intent to claim title exists only upon the condition that his belief as to his boundary is true. The intention is not absolute, but provisional, and the possession is not adverse; Preble v. Railroad Co., 85 Me. 260, 27 Atl. 149, 21 L. R. A. 829, 35 Am. St. Rep. 366. When a boundary line between adjoining landowners is perpetually in dispute, and neither has actual occupation to any definite line, there is no adverse possession beyond the true line; Liddle v. Blake, 131 Ia. 165, 105 N. W. 649; nor will the encroachment of one in the erection of his building on neighboring property through mistake constitute such a possession as will ripen into title by the lapse of time; Davis v. Owen, 107 Va. 283, 58 S. E. 581, 13 L. R. A. (N. S.) 728, nor where a deed, by mistake, covered land not intended to be conveyed; Garst v. Brutsche, 129 Ia. 501, 105 N. W. 452.

Where one enters into possession of real property by permission of the owner, without any tenancy whatever being created, except at sufferance, possession being given as a mere matter of favor, he can never acquire title by adverse possession, no matter how long continued against the true owner thereof, unless there is a clear, positive, unequivocal disclaimer and disavowal of the owner's title and an assertion by the occupant of a title in hostility thereto, notice thereof being brought home to the landowner. See McCutchen v. McCutchen, 77 S. C. 129, 57 S. E. 678, 12 L. R. A. (N. S.) 1140, and cases cited.

The adverse possession must be "actual, continued, visible, notorious, distinct, and hostile;" Boaz v. Heister, 6 S. & R. (Pa.) 21; Evans v. Templeton, 69 Tex. 375, 6 S. W. 843, 5 Am. St. Rep. 71; Haffindorfer v. Gault, 84 Ky. 124; Paldi v. Paldi, 95 Mich. 410, 54 N. W. 903; Chastang v. Chastang, 141 Ala. 451, 37 South. 799, 109 Am. St. Rep. 45; Foulke v. Bond, 41 N. J. L. 527; Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178. It is founded in trespass and disseisin, an ouster and continued exclusion of the true owner for the period prescribed by the statute; Olewine v. Messmore, 128 Pa. 470, 18 Atl. 495; Ward v. Cochran, 150 U. S. 597, 14 Sup. Ct. 230, 37 L. Ed. 1195. Nepean v. Doe, 2 Sm. Lead. Cas. 597; 16 Harv. L. Rev. 224. Even the sole possession by one tenant in common is not presumed adverse to a cotenant; the ordinary presumption is that such possession is held in the right of both tenants; Farmers' & Merchants' Nat. Bank v. Wallace, 45 Ohio St. 152, 12 N. E. 439; mere occupation and appropriation of rents; Todd v. Todd, 117 Ill. 92, 7 N. E. 583; Blackaby v. Blackaby, 185 Ill. 94, 56 N. E. 1053; or acquiescing in an adverse claim of a sub-tenant; Lee v. Livingston, 143 Mich. 203, 106 N. W. 713; will not affect the rights of the cotenants; and see Velott v. Lewis, 102 Pa. 326. There must be an actual ouster; Morris v. Davis, 75 Ga. 169; or exclusive possession after demand; or express notice of adverse possession; or acts of exclusive ownership of an unequivocal character; Rodney v. McLaughlin, 97 Mo. 426, 9 S. W. 726; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Breden v. McLaurin, 98 N. C. 307, 4 S. E. 136; Killmer v. Wuchner, 74 Ia. 359, 37 N. W. 778. The receipt of the entire profits, the exclusive possession for twenty-one years, and a claim of right for that time, will constitute an ouster; Abrams v. Rhoner, 44 Hun (N. Y.) 507; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682; or where a co-tenant asserts possession under a deed purporting to convey the whole title, he will be deemed to have ousted his co-tenant; Wright v. Kleyla, 104 Ind. 223, 4 N. E. 16; or where he devises by will read in the presence of his cotenant; Miller v. Miller, 60 Pa. 16, 100 Am. Dec. 538. The registration of a deed pur-

porting to vest title to the entire tract in the grantee is notice to the co-tenant of an adverse holding; McCann v. Welch, 106 Wis. 142, 81 N. W. 996. One claiming by adverse possession cannot avail himself of the previous possession of another person with whose title he is in no way connected; Stout v. Taul, 71 Tex. 438, 9 S. W. 329; Heflin v. Burns, 70 Tex. 347, 8 S. W. 48; Witt v. Ry. Co., 38 Minn. 122, 35 N. W. 862. If the combined periods of adverse possession of two successive holders equal twenty years, the true owner will be deprived of his title; but there must be a privity of estate such as a devise or conveyance; Sawyer v. Kendall, 10 Cush. (Mass.) 241; Frost v. Courtis, 172 Mass. 401, 52 N. E. 515. Where privity is required, a defective deed or even a mere oral transfer is sufficient; Weber v. Anderson, 73 Ill. 439; and see 13 Harv. L. Rev. 52. There can be no adverse possession against a state; Hurst v. Dulany, 84 Va. 701, 5 S. E. 802; but a state may acquire a title by adverse possession; Attorney General v. Ellis, 198 Mass. 91, 84 N. E. 430, 15 L. R. A. (N. S.) 1120; Eldridge v. City of Binghamton, 120 N. Y. 309, 24 N. E. 462; Birdsall v. Cary, 66 How. Pr. (N. Y.) 358; but see Whatley v. Patten, 10 Tex. Civ. App. 77, 31 S. W. 60. No length of adverse possession by user on the side of a highway by an abutting owner gives title to him; Parsons v. Village of Rye, 140 N. Y. Supp. 961.

When both parties claim under the same title; as, if a man seised of certain land in fee have issue two sons, and die seised, and one of the sons enter by abatement into the land, the statute of limitations will not operate against the other son; Co. Litt. s. 396.

There can be no adverse possession between husband and wife while the marital relation continues to exist; Bell v. Bell, 37 Ala. 536, 79 Am. Dec. 73; Veal v. Robinson, 70 Ga. 809; Hendricks v. Rasson, 53 Mich. 575, 19 N. W. 192.

As against the purchaser at an execution sale subject to dower, the possession of the widow is not adverse; Robinson v. Allison, 124 Ala. 325, 27 South. 461; see 14 Harv. L. Rev. 157.

When the possession of the one party is consistent with the title of the other; as, where the rents of a trust estate were received by a *cestui que trust* for more than twenty years without any interference of the trustee, it was held not to be adverse to the title of the trustee; 8 East 248. See Poston v. Balch, 69 Mo. 117. When trust property is taken possession of by a trustee, it is the possession of the *cestui que trust* and cannot be adverse until the trust is disavowed, to the knowledge of the *cestui que trust;* Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334, 1 L. R. A. 327, 9 Am. St. Rep. 523.

When the occupier has acknowledged the claimant's title; as, if a lease be granted for a term, and, after paying the rent for the land during such term, the tenant hold for twenty years without paying rent, his possession will not be adverse. See 1 B. & P. 542; 8 B. & C. 717.

The possession of the tenant becomes adverse where, to the knowledge of the landlord, the tenant disclaims the tenancy, and sets up a title adverse to the landlord; Willison v. Watkins, 3 Pet. (U. S.) 43, 7 L. Ed. 596, where it was held that the rule that a tenant cannot dispute his landlord's title during the existence of his lease would not defeat the right of tenant to acquire title by adverse possession, after a repudiation of the tenancy brought home to the landlord. If a tenant disclaims the tenure, and claims in his own right, of which the landlord has notice, the tenancy is terminated and the tenant becomes a trespasser, though the period of the lease has not expired; Walden v. Bodley, 14 Pet. (U. S.) 156, 10 L. Ed. 398; Fusselman v. Worthington, 14 Ill. 145; and the statute of limitations begins to run from the time of the tenant's disclaimer and the landlord's knowledge of it; Tillotson v. Doe, 5 Ala. 407, 39 Am. Dec. 330; Duke v. Harper, 6 Yerg. (Tenn.) 280, 27 Am. Dec. 462; Farrow's Heirs v. Edmundson, 4 B. Monr. (Ky.) 606, 41 Am. Dec. 250; and if continued will ripen into title; Sherman v. Transp. Co., 31 Vt. 162. There must be a disclaimer by the tenant and hostile possession to the landlord's knowledge, or such open and notorious possession as to raise a presumption of notice; Dothard v. Denson, 72 Ala. 541. See generally Townsend v. Boyd, 217 Pa. 386, 66 Atl. 1099, 12 L. R. A. (N. S.) 1149. And see Jasperson v. Scharnikow, 150 Fed. 571, 80 C. C. A. 373, 15 L. R. A. (N. S.) 1178. See LANDLORD AND TENANT; COLOR OF TITLE.

The title by adverse possession for such a period as is required by statute to bar an action, is a fee-simple title, and is as effective as any otherwise acquired; Cox v. Cox, 17 Wash. L. Rep. 53; Northern Pac. R. Co. v. Hasse, 197 U. S. 9, 25 Sup. Ct. 305, 49 L. Ed. 642.

When there has been a severance of the title to the surface and that to the minerals beneath it, adverse possession of the surface will not affect the title to the minerals; Moreland v. Frick Coke Co., 170 Pa. 33, 32 Atl. 634; Lulay v. Barnes, 172 Pa. 331, 34 Atl. 52.

It is not material that a break in the continuity of possession has been due to outside causes; Holliday v. Cromwell, 37 Tex. 437; but in such a case it was held that the running of the statute was suspended; Western v. Flanagan, 120 Mo. 61, 25 S. W. 531.

ADVERTISEMENT. Information or knowledge communicated to individuals or the public in a manner designed to attract general attention.

A notice published in handbills, placards, a newspaper, etc.; cited in Darst v. Doom, 38 Ill. App. 397.

The law in many instances requires parties to advertise in order to give notice of acts which are to be done; in these cases, the advertisement is in general equivalent to notice. But there are cases in which such notice is not sufficient, unless brought home to the actual knowledge of the party. Thus, notice of the dissolution of partnership by advertisement in a newspaper printed in the place where the business is carried on, although it is of itself notice to all persons who have had no previous dealings with the firm, yet is not notice to those who have had such previous dealings; it must be shown that persons of the latter class have received actual notice; Watkinson v. Bank, 4 Whart. (Pa.) 484, 34 Am. Dec. 521. See Vernon v. Manhattan Co., 17 Wend. (N. Y.) 526; *id.*, 22 Wend. (N. Y.) 183; Lind. Part. *222; Mauldin v. Bank, 2 Ala. 502; Hutchins v. Bank, 8 Humphr. (Tenn.) 418; 3 Bingh. 2. It has been held that the printed conditions of a line of public coaches are sufficiently made known to passengers by being posted up at the place where they book their names; Whitesell v. Crane, 8 W. & S. (Pa.) 373; 3 Esp. 271. An advertisement by a railroad corporation in a newspaper in the English language of a limitation of its liability for baggage is not notice to a passenger who does not understand English; Camden & A. R. Co. v. Baldauf, 16 Pa. 68, 55 Am. Dec. 481.

An ordinary advertising sheet is not a newspaper for the purpose of advertisement as required by law, and when notice is required to be published in two newspapers, English papers are presumed to be intended; Tyler v. Bowen, 1 Pittsb. (Pa.) 225; the posting up of a page of a newspaper, containing a large number of separate advertisements, will not be considered a handbill; Clark v. Chambers, 1 Pittsb. (Pa.) 224.

When an advertisement contains the terms of sale, or description of the property to be sold, it will bind the seller.

Advertisements published *bona fide* for the apprehension of a person suspected of crime, or for the prevention of fraud, are privileged; Heard, Lib. & Sland. § 131.

A sign-board, at a person's place of business, giving notice of lottery-tickets being for sale there, is an "advertisement"; Com. v. Hooper, 5 Pick. (Mass.) 42.

See NOTICE; FLAG.

ADVICE. Information given by letter by one merchant or banker to another in regard to some business transaction which concerns him. Chit. Bills 185.

ADVISARI (Lat.). To advise; to consider; to be advised; to consult. See CURIA ADVISARI VULT.

ADVISE. To give advice; to counsel. Long v. State, 23 Neb. 33, 36 N. W. 310. It is different in meaning from instruct; People v. Horn, 70 Cal. 17, 11 Pac. 470; or persuade; Wilson v. State, 38 Ala. 411.

ADVISEDLY. With deliberation; intentionally. 15 Moore P. C. 147.

ADVISEMENT. Consideration; deliberation; consultation. "Upon deliberate advisement, we are of opinion," etc. In re Hohorst, 150 U. S. 662, 14 Sup. Ct. 221, 37 L. Ed. 1211.

ADVISORY. Suggestive, but not conclusive.

ADVISORY OPINION. See OPINION OF JUDGES.

ADVOCATE. An assistant; adviser; a pleader of causes.

Derived from *advocare*, to summon to one's assistance; *advocatus* originally signified an assistant or helper of any kind, even an accomplice in the commission of a crime; Cicero, *Pro Cœcina*, c. 8; Livy, lib. ii. 55; iii. 47; Tertullian, *De Idolatr.* cap. xxiii.; Petron. *Satyric.* cap. xv. Secondarily, it was applied to one called in to assist a party in the conduct of a suit; Inst. 1, 11, D, 50, 13. *de extr. cogn.* Hence, a pleader, which is its present signification.

In Scotch and Ecclesiastical Law. An officer of the court, learned in the law, who is engaged by a suitor to maintain or defend his cause. Advocates, like counsellors, have the exclusive privilege of addressing the court either orally or in written pleadings; and, in general, in regard to duties, liabilities, and privileges, the same rules apply *mutatis mutandis* to advocates as to counsellors. See COUNSELLOR.

In the English ecclesiastical and admiralty courts, advocates had the exclusive right of acting as counsel. They were incorporated (8 Geo. III.) under the title of "The College of Doctors of Law Exercent in the Ecclesiastical and Admiralty Courts." In 1857, on the creation of the new court of probate and matrimonial causes, this college was empowered to surrender its charter and sell its real estate.

In Scotland all barristers are called advocates.

Lord Advocate.—An officer in Scotland appointed by the crown, during pleasure, to take care of the king's interest before the courts of session, justiciary, and exchequer. All actions that concern the king's interest, civil or criminal, must be carried on with concourse of the lord advocate. He also discharges the duties of public prosecutor, either in person or by one of his four deputies, who are called *advocates-depute*. Indictments for crimes must be in his name as accuser. He supervises the proceedings in important criminal cases, and has the right to appear in all such cases. He is, in fact, secretary of state for Scotland, and his principal duties are connected directly with the administration of the government.

Inferior courts have a *procurator fiscal*, who supplies before them the place of the

lord advocate in criminal cases. See 2 Bankt. Inst. 492.

College or Faculty of Advocates.—A corporate body in Scotland, consisting of the members of the bar in Edinburgh. A large portion of its members are not active practitioners, however; 2 Bankt. Inst. 486.

Queen's Advocate.—A member of the College of Advocates, appointed by letters patent to advise the crown on questions of civil, canon, and ecclesiastical law. He takes precedence next after the solicitor general.

Church or Ecclesiastical Advocates.—Pleaders appointed by the church to maintain its rights.

In Ecclesiastical Law. A patron of a living; one who has the advowson, *advocatio.* Tech. Dict.; Ayliffe, Par. 53; Dane, Abr. c. 81, § 20; Erskine, Inst. 79, 9.

Those persons whom we now call patrons of churches, and who reserved to themselves and their heirs a license to present on any avoidance. The term originally belonged to the founders of churches and convents and their heirs, who were bound to protect their churches as well as to nominate or present to them. But when the patrons grew negligent of their duty or were not of ability or interest in the courts of justice, then the religious began to retain law *advocates*, to solicit and prosecute their causes. Spelm.; Jacob, Law Dict.

A person admitted by the Archbishop of Canterbury to practise in the court of arches in the same manner as barristers in the common law courts. Rap. & Law. Law Dict.

ADVOCATI (Lat.). **In Roman Law.** Patrons; pleaders; speakers.

Originally the management of suits at law was undertaken by the *patronus* for his *cliens* as a matter of duty arising out of their reciprocal relation. Afterwards it became a profession, and the relation, though a peculiarly confidential one while it lasted, was but temporary, ending with the suit. The profession was governed by very stringent rules: a limited number only were enrolled and allowed to practise in the higher courts—one hundred and fifty before the *præfectus prætorio;* Dig. 8, 11; Code 2, 7; fifty before the *præf. aug.* and *dux Ægypticus* at Alexandria; Dig. 8, 13; etc., etc. The enrolled advocates were called *advocati ordinarii.* Those not enrolled were called *adv. supernumerarii* or *extraordinarii,* and were allowed to practise in the inferior courts; Dig. 8, 13. From their ranks vacancies in the list of *ordinarii* were filled; *Ibid.* The *ordinarii* were either *fiscales,* who were appointed by the crown for the management of suits in which the imperial treasury was concerned, and who received a salary from the state; or *privati* whose business was confined to private causes. The *advocati ordinarii* were bound to lend their aid to every one applying to them, unless a just ground existed for a refusal; and they could be compelled to undertake the cause of a needy party; l. 7, c. 2, 6. The *supernumerarii* were not thus obliged, but, having once undertaken a cause, were bound to prosecute or defend it with diligence and fidelity.

The client must be defended against every person, even the emperor, though the *advocati fiscales* could not undertake a cause against the *fiscus* without a special permission; ll. 1 et 2, C. 2, 9; unless such cause was their own, or that of their parents, children, or ward; l. 10, pr. C. 11, D. 3, 1.

An advocate must have been at least seventeen years of age; l. 1, § 3, D. 3, 1; he must not be blind or deaf; l. 1, §§ 3 et 5, D. 3, 1; he must be of good repute, not convicted of an infamous act; l. 1, § 8, D. 3, 1; he could not be advocate and judge in the same cause; l. 6, pr. C. 2, 6; he could not even be a judge in a suit in which he had been engaged as advocate; l. 17, D. 2, 1; l. 14, C. 1, 51; nor after being appointed judge could he practise as advocate even in another court; l. 14, pr. C. 1, 51; nor could he be a witness in the cause in which he was acting as advocate; l. ult. D. 22, 5; 22 Glück, Pand. p. 161, *et seq.*

He was bound to bestow the utmost care and attention upon the cause, *nihil studii reliquentes quod sibi possibile est;* l. 14, § 1, C. 3, 1. He was liable to his client for damages caused in any way by his fault; 5 Glück, Pand. 110. If he had signed the *concepit,* he was responsible that it contained no matter punishable or improper; Boehmer, Cons. et Decis. t. ii. p. 1, resp. cviii. no. 5. He must clearly and correctly explain the law to his clients, and honestly warn them against transgression or neglect thereof. He must frankly inform them of the lawfulness or unlawfulness of their cause of action, and must be especially careful not to undertake a cause clearly unjust, or to let himself be used as an instrument of chicanery, malice, or other unlawful action; l. 6, §§ 3, 4, C. 2, 6; l. 13, § 9; l. 14, § 1, C. 3, 1. In pleading, he must abstain from invectives against the judge, the opposite party or his advocate; l. 6, § 1, C. 2, 6. Should it become necessary or advantageous to mention unpleasant truths, this must be done with the utmost forbearance, and in the most moderate language; 5 Glück, Pand. 111. Conscientious honesty forbade his betraying secrets confided to him by his client or making any improper use of them; he should observe inviolable secrecy in respect to them; *ibid.;* he could not, therefore, be compelled to testify in regard to such secrets; l. ult. D. 22, 5.

If he violated the above duties, he was liable, in addition to compensation for the damage thereby caused, to fine, or imprisonment, or suspension, or entire removal from practice, or to still severer punishment, particularly where he had been guilty of a *prævaricatio,* or betrayal of his trust for the benefit of the opposite party; 5 Glück, Pand. 111.

Compensation.—By the *lex Cincia,* A. U. C. 549, advocates were prohibited from receiving any reward for their services. In course of time this became obsolete. Claudius allowed it, and fixed ten thousand sesterces as the maximum fee. Trajan prohibited this fee, called *honorarium,* from being paid before the termination of the action. This, too, was disregarded, and prepayment had become lawful in the time of Justinian; 5 Glück, Pand. 117. The fee was regulated by law, unless the advocate had made a special agreement with his client, when the agreement fixed the amount. But a *pactum de quota litis, i. e.,* an agreement to pay a contingent fee, was prohibited, under penalty of the advocate's forfeiting his privilege of practising; l. 5, C. 2, 6. A *palmarium,* or conditional fee in addition to the lawful charge and depending upon his gaining the cause, was also prohibited; 5 Glück, Pand. 120 *et seq.* But an agreement to pay a *palmarium* might be enforced when it was not entered into till after the conclusion of the suit; l. 1, § 12, D. 50, 13. The compensation of the advocate might also be in the way of an annual salary; 5 Glück, Pand. 122.

Remedy.—The advocate had the right to retain papers and instruments of his client until payment of his fee; l. 26, Dig. 3, 2. Should this fail, he could apply for redress to the court where the cause was tried by petition, a formal action being unnecessary; 5 Glück, Pand. 122.

Anciently, any one who lent his aid to a friend, and who was supposed to be able in any way to influence a judge, was called *advocatus.*

Causidicus denoted a speaker, or pleader merely; *advocatus* resembled more nearly a counsellor; or, still more exactly, causidicus might be rendered *barrister,* and advocatus *attorney,* or *solicitor,*

though the duties of an *advocatus* were much more extended than those of a modern attorney; Du Cange; Calvinus, Lex.

A witness.

ADVOCATI ECCLESIÆ. Advocates of the church.

These were of two sorts: those retained as pleaders to argue the cases of the church and attend to its law-matters; and advocates, or patrons of the advowson. Cowell; Spelman, Gloss.

ADVOCATI FISCI. In Civil Law. Those chosen by the emperor to argue his cause whenever a question arose affecting his revenues. 3 Bla. Com. 27.

ADVOCATIA. In Civil Law. The functions, duty, or privilege of an advocate. Du Cange, *Advocatia.*

ADVOCATUS. A pleader; a narrator. Bracton, 412 *a*, 372 *b*.

ADVOWSON. A right of presentation to a church or benefice.

He who possesses this right is called the patron or advocate. When there is no patron, or he neglects to exercise his right within six months, it is called a *lapse*, and a title is given to the ordinary to collate to a church: when a presentation is made by one who has no right, it is called a *usurpation*.

Advowsons are of different kinds; as *advowson appendant*, when it depends upon a manor, etc.; *advowson in gross*, when it belongs to a person and not to a manor; *advowson presentative*, where the patron presents to the bishop; *advowson donative*, where the king or patron puts the clerk into possession without presentation; *advowson collative*, where the bishop himself is a patron; *advowson of the moiety of the church*, where there are two several patrons and two incumbents in the same church; *a moiety of advowson*, where two must join the presentation of one incumbent; *advowson of religious houses*, that which is vested in the person who founded such a house. 2 Bla. Com. 21; Mirehouse, *Advowsons;* Comyns, Dig. *Advowson, Quare Impedit;* Bacon, Abr. *Simony;* Burns, Eccl. Law. See 2 Poll. & Maitl. 135.

An advowson in modern times and in ordinary language has, no doubt, been used to mean the perpetual right of presentation to a church or ecclesiastical benefice. An advowson in the limited sense of the word may be separated from the manor to which it is attached and perpetual right of presentation to a church may be severed from the lordship of the manor. Where an almshouse has been established by a lord of the manor, which afterwards became vested in the Crown by attainder, the charity also vested in the Crown by attainder and the right of nominating a master was analogous to an advowson separable from the manor and capable of being passed by grant from the Crown subsequent to the attainder; 22 L. J. Ch. 846.

ADVOWTRY, ADVOUTRY. The crime committed by a woman who, having committed adultery, continued to live with the adulterer. Cowell.

ÆDES. In Civil Law. A dwelling; a house; a temple. In the country everything upon the surface of the soil passed under the term *ædes*. Du Cange.

ÆDILE. In Roman Law. An officer who attended to the repairs of the temples and other public buildings; the repairs and cleanliness of the streets; the care of the weights and measures; the providing for funerals and games; and to regulating the prices of provisions. Ainsworth, Lex.; Smith, Lex.; Du Cange.

ÆDILITIUM EDICTUM. In Roman Law. That provision by which the buyer of a diseased or imperfect slave, horse, or other animal was relieved at the expense of the vendor who had sold him as sound knowing him to be imperfect. Calvinus, Lex.

AEL (Norman). A grandfather. Spelled also *aieul, ayle.* Kelham.

ÆQUITAS. In Roman Law. Referring to the use of this term, Prof. Gray says (Nature and Sources of the Law 290): "Austin and Maine take *æquitas* as having an analogous meaning to equity; they apply the term to those rules which the prætors introduced through the Edict in modification of the *jus civile*, but it seems to be an error to suppose that *æquitas* had this sense in the Roman Law." He quotes Prof. Clark (Jurisprudence 367) as doubting "whether *æquitas* is ever clearly used by the Roman jurists to indicate simply a *department* of Law" and expresses the opinion that an examination of the authorities more than justifies his doubt. *Æquitas* is opposed to *strictum jus* and varies in meaning between reasonable modification of the letter and substantial justice. It is to be taken as a frame of mind in dealing with legal questions and not as a source of law.

See ÆQUUM ET BONUM.

ÆQUUM ET BONUM. "The Roman conception involved in '*æquum et bonum*' or '*æquitas*' is identical with what we mean by 'reasonable' or nearly so. On the whole, the natural justice or 'reason of the thing' which the common law recognizes and applies does not appear to differ from the 'law of nature' which the Romans identified with *jus gentium*, and the medieval doctors of the civil and common law boldly adopted as being divine law revealed through man's natural reason." Sir F. Pollock, Expans. of C. L. 111, citing [1902] 2 Ch. 661, where *jus naturale* and *æquum et bonum* were taken to have the same meaning.

AËRIAL NAVIGATION. See AVIATION.

ÆS ALIENUM. In Civil Law. A debt.

Literally translated, the money of another; the civil law considering borrowed money as the prop-

erty of another, as distinguished from *æs suum*, one's own.

ÆSNECIUS. See ANECIUS.

ÆSTIMATIO CAPITIS (Lat. the value of a head). The price to be paid for taking the life of a human being.

King Athelstan declared, in an assembly held at Exeter, that mulcts were to be paid *per æstimationem capitis*. For a king's head (or life), 30,000 thuringæ; for an archbishop's or prince's, 15,000; for a priest's or thane's, 2,000; Leg. Hen. 1.

ÆTAS INFANTILI PROXIMA (Lat.). The age next to infancy. Often written *ætas infantiæ proxima*. This lasted until the age of twelve years; 4 Bla. Com. 22. See AGE.

ÆTAS PUBERTATI PROXIMA (Lat.). The age next to puberty. This lasted until the age of fourteen, in which there might or might not be criminal responsibility according to natural capacity or incapacity. Under twelve, an offender could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. 4 Bla. Com. ch. ii. See AGE.

AFFAIR (Fr.). A law suit.

AFFECT. To lay hold of, to act upon, impress or influence. It is often used in the sense of acting injuriously upon persons and things. Ryan v. Carter, 93 U. S. 84, 23 L. Ed. 807; Baird v. Hospital Ass'n, 116 Mo. 419, 22 S. W. 726.

AFFECTION. The making over, pawning, or mortgaging a thing to assure the payment of a sum of money, or the discharge of some other duty or service. Crabb, Techn. Dict.

As to affection as a consideration, see CONSIDERATION.

AFFECTUS (Lat.). Movement of the mind; disposition; intention. See CHALLENGE.

AFFEER. To fix in amount; to liquidate; to settle.

To affeer an amercement. To establish the amount which one amerced in a court-leet should pay. See AMERCEMENT.

To affeer an account. To confirm it on oath in the exchequer. Cowell; Blount.

AFFEERORS. Those appointed by a court-leet to mulct those punishable, not by a fixed fine, but by an arbitrary sum called amercement, *q. v.*; 4 Bla. Com. 379.

AFFIANCE. To assure by pledge. A plighting of troth between man and woman. Littleton, § 39.

An agreement by which a man and woman promise each other that they will marry together. Pothier, *Traité du Mar.* n. 24. Co. Litt. 34 *a*. See Dig. 23, 1. 1; Code, 5. 1. 4.

AFFIANT. A deponent; one who makes an affidavit.

AFFIDARE (Lat. *ad fidem dare*). To pledge one's faith or do fealty by making oath. Cowell.

Used of the mutual relation arising between landlord and tenant; 1 Washb. R. P. 19; 1 Bla. Com. 367; Termes de la Ley, *Fealty*. Affidavit is of kindred meaning.

AFFIDATUS. One who is not a vassal, but who for the sake of protection has connected himself with one more powerful. Spelman, Gloss.; Jacob, L. Dict.

AFFIDAVIT. A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation. Quoted and approved in Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326.

It differs from a deposition in this, that in the latter the opposite party has an opportunity to cross-examine the witness, whereas an affidavit is always taken *ex parte;* Gresley, Eq. Ev. 413; Stimpson v. Brooks, 3 Blatch. 456, Fed. Cas. No. 13,454.

An affidavit includes the oath, and may show what facts the affiant swore to, and thus be available as an oath, although unavailable as an affidavit; Burns v. Doyle, 28 Wis. 460.

By general practice, affidavits are allowable to present evidence upon the hearing of a motion, although the motion may involve the very merits of the action; but they are not allowable to present evidence on the trial of an issue raised by the pleadings. Here the witnesses must be produced before the adverse party. They are generally required on all motions to open defaults or to grant delay in the proceedings and in other applications by the parties addressed to the favor of the court.

Formal parts.—An affidavit must intelligibly refer to the cause in which it is made. The strict rule of the common law is that it must contain the exact title of the cause. This, however, is not absolutely essential; Harris v. Lester, 80 Ill. 307. If not entitled in the cause it cannot be considered in opposition to a motion for preliminary injunction; Goldstein v. Whelan, 62 Fed. 124.

The place where the affidavit is taken must be stated, to show that it was taken within the officer's jurisdiction; 1 Barb. Ch. Pr. 601; if the officer in signing the jurat fails to add the name of the county for which he is appointed, if it already appears in the caption, it will not be defective; Smith v. Runnells, 94 Mich. 617, 54 N. W. 375. The deponent must sign the affidavit at the end; Hathaway v. Scott, 11 Paige Ch. (N. Y.) 173. The jurat must be signed by the officer with the addition of his official title. In the case of some officers the statutes conferring authority to take affidavits require also his seal to be affixed.

In the absence of a rule of court or statute requiring it, if affiant's name appears in an affidavit as the person who took the oath, the subscription to it by affiant is not necessary; Norton v. Hauge, 47 Minn. 405, 50

N. W. 368; Shelton v. Berry, 19 Tex. 154, 70 Am. Dec. 326, or if his name is omitted in the body of the verification but it is properly signed, it is sufficient; Cunningham v. Doyle, 5 Misc. Rep. 219, 25 N. Y. Supp. 476. If the notary fails to attach his seal to an affidavit of an assignee in insolvency, it is not void; Clement v. Bullens, 159 Mass. 193, 34 N. E. 173; if he omits to add his name in the jurat in an affidavit for a writ of certiorari, the court may permit it to be done *nunc pro tunc;* State v. Cordes, 87 Wis. 373, 58 N. W. 771; if he omits to add his title it is not invalid; Jackman v. Gloucester, 143 Mass. 380, 9 N. E. 740.

In an affidavit which is to be the basis of judicial action the nature and quality and perhaps the source of information must be set forth, so that the court may be able to ascertain whether the party is right in entertaining the belief to which he deposes; Whitlock v. Roth, 10 Barb. (N. Y.) 78.

A "denial upon information and belief, without stating the sources of information and belief, can have no weight as against the appellant's positive affidavit as to what is still due him"; Harris v. Taylor, 35 App. Div. 462, 54 N. Y. Supp. 864. So-called evidence on information and belief "ought not to be looked at at all, not only unless the court can ascertain the sources of the information and belief, but also unless the deponent's statements are corroborated by someone who speaks from his own knowledge"; [1900] 2 Ch. 753. Such an affidavit should show that the persons from whom the information is obtained are absent or that their deposition cannot be obtained; Steuben County Bank v. Alberger, 78 N. Y. 252.

In general, an affidavit must describe the deponent sufficiently to show that he is entitled to offer it; for example, that he is a party, or agent or attorney of a party, to the proceeding; Ex parte Bank of Monroe, 7 Hill (N. Y.) 177, 42 Am. Dec. 61; Cunningham v. Goelet, 4 Denio (N. Y.) 71; Ex parte Shumway, *id.* 258, and this matter must be stated, not by way of recital or as mere description, but as an allegation in the affidavit; Staples v. Fairchild, 3 N. Y. 41; Payne v. Young, 8 N. Y. 158.

See JURAT.

AFFIDAVIT OF DEFENCE. A sworn statement made in proper form that the defendant has a good ground of defence to the action upon the merits.

The statements required in such an affidavit vary considerably in the different states where they are required. In some, it must state a ground of defence; McCarney v. McCamp, 1 Ashm. (Pa.) 4; in others, a simple statement of belief that a defence exists is sufficient. Called also an affidavit of merits, as in Massachusetts. See as to its salutary effect, Lord v. Bank, 20 Pa. 387, 59 Am. Dec. 728; Taggart v. Fox, 1 Grant (Pa.) 190.

It must be made by the defendant, or some person in his behalf who possesses a knowledge of the facts; McCarney v. McCamp, 1 Ashm. (Pa.) 4. In a suit against a corporation an affidavit of defence made by a mere stockholder should set out some reason why it is not made by an officer or director; Erie Boot & Shoe Co. v. Eichenlaub, 127 Pa. 164, 17 Atl. 889.

The effect of a failure to make such affidavit is, in a case requiring one, to default the defendant; Slocum v. Slocum, 8 Watts (Pa.) 367. It was first established in Philadelphia by agreement of members of the bar; Vanatta v. Anderson, 3 Binn. (Pa.) 417; and afterwards by act of assembly. A law permitting judgment in default of such an affidavit is constitutional; Lawrance v. Borm, 86 Pa. 225.

It is no part of the pleadings; it is merely to prevent a summary judgment; the case may be put at issue on other grounds than those stated therein; Muir v. Ins. Co., 203 Pa. 338, 53 Atl. 158.

AFFIDAVIT TO HOLD TO BAIL. An affidavit which is required in many cases before a person can be arrested.

Such an affidavit must contain a statement, clearly and certainly expressed, by some one acquainted with the fact, of an indebtedness from the defendant to the plaintiff, and must show a distinct cause of action; 1 Chit. Pl. 165. See BAIL.

AFFILARE. To put on record; to file. 8 Coke 319; 2 M. & S. 202.

AFFILIATION. The act of imputing or determining the paternity of a child.

A species of adoption which exists by custom in some parts of France. The person affiliated succeeded equally with other heirs to the property acquired by the deceased to whom he had been affiliated, but not to that which he inherited.

In Ecclesiastical Law. A condition which prevented the superior from removing the person affiliated to another convent. Guyot, *Répert.*

AFFINES. In Civil Law. Connections by marriage, whether of the persons or their relatives. Calvinus, Lex.

From this word we have affinity, denoting relationship by marriage; 1 Bla. Com. 434.

The singular, *affinis,* is used in a variety of related significations—a boundary; Du Cange; a partaker or sharer, *affinis culpæ* (an aider or one who has knowledge of a crime); Calvinus, Lex.

AFFINITAS. In Civil Law. Affinity.

AFFINITAS AFFINITATIS. That connection between parties arising from marriage which is neither consanguinity nor affinity.

This term signifies the connection between the kinsmen of the two persons married, as, for example, the husband's brother and the wife's sister; Erskine, Inst. 1. 6. 8.

AFFINITY. The connection existing, in consequence of marriage, between each of the married persons and the kindred of the

other. Solinger v. Earle, 45 N. Y. Super. Ct. 84.

It is distinguished from consanguinity, which denotes relationship by blood. Affinity is the tie which exists between one of the spouses with the kindred of the other: thus, the relations of my wife, her brothers, her sisters, her uncles, are allied to me by affinity, and my brothers, sisters, etc., are allied in the same way to my wife. But my brother and the sister of my wife are not allied by the ties of affinity.

A person cannot, by legal succession, receive an inheritance from a relation by affinity; neither does it extend to the nearest relations of husband and wife, so as to create a mutual relation between them. The degrees of affinity are computed in the same way as those of consanguinity. See 1 Bla. Com. 435; Pothier, Traité du Mar. pt. 3, c. 3, art. 2; Inst. 1, 10, 6; Dig. 38, 10, 4, 3; 1 Phill. Eccl. 210; Poydras v. Livingston, 5 Mart. O. S. (La.) 296.

AFFIRM (Lat. *affirmare*, to make firm; to establish).

To ratify or confirm a former law or judgment. Cowell.

Especially used of confirmations of the judgments of an inferior by an appellate tribunal.

To ratify or confirm a voidable act of the party.

To make a solemn religious asseveration in the nature of an oath. See AFFIRMATION.

AFFIRMANCE. The confirmation of a voidable act by the party acting, who is to be bound thereby.

The term is in accuracy to be distinguished from *ratification*, which is a recognition of the validity or binding force as against the party ratifying, of some act performed by another person; and from *confirmation*, which would seem to apply more properly to cases where a doubtful authority has been exercised by another in behalf of the person ratifying; but these distinctions are not generally observed with much care; 1 Pars. Contr. 243.

Express affirmance takes place where the party declares his determination of fulfilling the contract; Martin v. Byrom, Dudl. (Ga.) 203.

A mere acknowledgment that the debt existed, or that the contract was made, is not an affirmance; Robbins v. Eaton, 10 N. H. 561; 2 Esp. 628; Chambers v. Wherry, 1 Bail. (S. C.) 28; Benham v. Bishop, 9 Conn. 330, 23 Am. Dec. 358; Alexander v. Hutcheson, 9 N. C. 535; Ford v. Phillips, 1 Pick. (Mass.) 203; Martin v. Byrom, Dudl. (Ga.) 203; it must be a direct and express confirmation, and substantially (though it need not be in form) a promise to pay the debt or fulfill the contract; Goodsell v. Myers, 3 Wend. (N. Y.) 479; Rogers v. Hurd, 4 Day (Conn.) 57, 4 Am. Dec. 182; Wilcox v. Roath, 12 Conn. 550; Hale v. Gerrish, 8 N. H. 374; Bigelow v. Grannis, 2 Hill (N. Y.) 120; Millard v. Hewlett, 19 Wend. (N. Y.) 301.

Implied affirmance arises from the acts of the party without any express declaration; Boston Bank v. Chamberlin, 15 Mass. 220. See Aldrich v. Grimes, 10 N. H. 194; Curtin v. Patton, 11 S. & R. (Pa.) 305; 1 Bla. Com. 466, n. 10. See CONFIRMATION; RATIFICATION.

The confirmation by an appellate court of the judgment of a lower court.

AFFIRMANCE-DAY-GENERAL. In the English Court of Exchequer, is a day appointed by the judges of the common pleas and barons of the exchequer, to be held a few days after the beginning of every term for the general affirmance or reversal of judgments. 2 Tidd, Pract. 1091.

AFFIRMANT. One who makes affirmation instead of making oath that the evidence which he is about to give shall be the truth, as if he had been sworn.

He is liable to all the pains and penalty of perjury, if he shall be guilty of willfully and maliciously violating his affirmation. See PERJURY.

AFFIRMATION. A solemn religious asseveration in the nature of an oath. 1 Greenl. Ev. § 371.

Quakers, as a class, and other persons who have conscientious scruples against taking an oath, are allowed to make affirmation in any mode which they may declare to be binding upon their consciences, in confirmation of the truth of testimony which they are about to give; 1 Atk. 21, 46; Cowp. 340, 389; 1 Leach Cr. Cas. 64; 1 Ry. & M. 77; Vail v. Nickerson, 6 Mass. 262; Com. v. Buzzell, 16 Pick. (Mass.) 153; Buller, N. P. 292; 1 Greenl. Ev. § 371. See oaths and affirmations in Great Britain and Ireland, etc., reviewed in 25 Law J. 169; OATH.

AFFIRMATIVE. That which establishes; that which asserts a thing to be true.

It is a general rule of evidence that the affirmative of the issue must be proved; Buller, N. P. 298; Peake, Ev. 2. But when the law requires a person to do an act, and the neglect of it will render him guilty and punishable, the negative must be proved, because every man is presumed to do his duty, and in that case they who affirm he did not must prove it; 1 Rolle 83; 3 Bos. & P. 307. See BURDEN OF PROOF.

AFFIRMATIVE PREGNANT. An affirmative allegation implying some negative in favor of the adverse party.

For example, if to an action of assumpsit, which is barred by the statute of limitations in *six* years, the defendant pleads that he did not undertake, etc., within *ten* years, a replication that he did undertake, etc., within ten years would be an affirmative pregnant; since it would impliedly admit that the defendant had not promised within six years. Such a plea should be demurred to; Gould, Pl. c. 6, §§ 29, 37; Steph. Pl. 381; Bacon, Abr. *Pleas* (n. 6).

AFFIX. To attach or annex. See FIXTURES.

AFFORCE THE ASSIZE. To compel unanimity among the jurors who disagree.

It was done either by confining them without meat and drink, or, more anciently, by adding other jurors to the panel, to a limited extent, securing the concurrence of twelve in a verdict. See Bracton, 185 *b*, 292 *a*; Fleta, book 4, c. 9, § 2.

The practice is now discontinued.

AFFORESTATION. The turning of a part of a country into forest or woodland or subjecting it to forest law. *q. v.*

AFFRANCHISE. To make free.

AFFRAY. The fighting of two or more persons in a public place to the terror of the people.

Mere words cannot amount to an affray. Any person is justified in using force to part the combatants; 1 Cr. M. & R. 757.

It differs from a riot in not being premeditated; for if any persons meet together upon any lawful or innocent occasion, and happen on a sudden to engage in fighting, they are not guilty of a riot, but an affray only; and in that case none are guilty except those actually engaged in it; 4 Bla. Com. 146; 1 Russell, Cr. 271; 2 Bish. Cr. L. 1150.

Fighting in a private place is only an assault; 1 C. M. & R. 757; 1 Cox, Cr. Cas. 177; it must be in a public place; Gamble v. State, 113 Ga. 701, 39 S. E. 301; and the indictment need not describe it; State v. Baker, 83 N. C. 649; State v. Heflin, 8 Humph. (Tenn.) 84; State v. Sumner, 5 Strobh. (S. C.) 53; and that fact must be avowed; State v. Woody, 47 N. C. 335. But it will be an affray if commenced in a private place and continued in a public one or if the disturbance is so continuous as not to be distinguishable; State v. Billings, 72 Mo. 662; or if continued in public after pursuit; Wilson v. State, 3 Heisk. (Tenn.) 278.

Going about armed with unusual or deadly weapons is an affray, though there is no actual violence or fighting; Hawk. P. C. b. 1, c. 28, § 1; State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416; and the statute of Northampton, 2 Edw. III. c. 3, 4 Bla. Com. 149, forbidding it was declaratory of the common law; State v. Huntly, 25 N. C. 418, 40 Am. Dec. 416. For constituting this offense a gun is an unusual weapon; *id.* See RIOT.

The fighting of two persons in the presence of seven others was held an affray, the presence of the seven constituting the place a public one; State v. Fritz, 133 N. C. 725, 45 S. E. 957.

AFFRECTAMENTUM. Affreightment.

The word *fret* means tons, according to Cowell. *Affreightamentum* was sometimes used. Du Cange.

AFFREIGHTMENT. The contract by which a vessel, or the use of it, is let out to hire. See FREIGHT; GENERAL SHIP.

AFORESAID. Before mentioned; already spoken of or described.

Whenever in any instrument a person has once been described, all subsequent references therein may be made by giving his name merely and adding the term "aforesaid" for the purpose of identification. The same rule holds good also as to the mention of places or specific things described, and generally as to any description once given which it is desirable to refer to. So also as to a place in an indictment; 1 Gabbett, Cr. Law 212; 5 Term 616. See IDENTITY.

AFORETHOUGHT. Premeditated; prepense.

The length of time during which the accused has entertained the thought of committing the offence is not very material, provided he has in fact entertained such thought; he is thereby rendered criminal in a greater degree than if he had committed the offence without premeditation. See MALICE AFORETHOUGHT; PREMEDITATION; 2 Chit. Cr. Law, 785; 4 Bla. Com. 199; Fost. Cr. Cas. 132, 291; Respublica v. Mulatto Bob, 4 Dall. (Pa.) 146, 1 L. Ed. 776; Edwards v. State, 25 Ark. 446; U. S. v. Cornell, 2 Mas. 91, Fed. Cas. No. 14,868.

AFTER. Behind, following, subsequent to an event or date.

There is no invariable sense, however, to be attached to the word, but like "from," "succeeding," "subsequent," and similar words, where it is not expressly declared to be exclusive or inclusive, it is susceptible of different significations and is used in different senses, as will in the particular case effectuate the intention of the parties. Its true meaning must be collected from its context and the subject-matter; Sands v. Lyon, 18 Conn. 27.

AFTER ACQUIRED PROPERTY. See FUTURE ACQUIRED.

AFTER BORN CHILD. See EN VENTRE SA MERE; POSTHUMOUS CHILD.

AFTERMATH. The second crop of grass.

A right to have the last crop of grass or pasturage. 1 Chit. Prac. 181.

AFTERNOON. The word has two senses. It may mean the whole time from noon to midnight, or it may mean the earlier part of that time, as distinguished from the evening; 2 El. & Bl. 447, where an act forbidding innkeepers to have their houses open on Sunday during the usual hours of afternoon Divine Service was taken in the latter sense. See DAY; TIME.

AGAINST. Adverse or in opposition to. The meaning of the word varies according to the context; State v. Prather, 54 Ind. 63.

To marry "against one's consent" means without the consent; 2 Sim. & Stu. 179; 2 Vern. 572.

A verdict in disobedience of the instructions of the court upon a point of law is a verdict "against the law"; Declez v. Save, 71 Cal. 552, 12 Pac. 722; Bunten v. Ins. Co., 4 Bosw. (N. Y.) 254.

A statute providing that in an action by an administrator "neither party shall be allowed to testify against the other," or as to transactions with the deceased, does not preclude either party from being called to testify *for* the other; Dudley v. Steele, 71 Ala. 423.

AGAINST THE FORM OF THE STATUTE. Technical words which must be used

in framing an indictment for a breach of the statute prohibiting the act complained of. The Latin phrase is *contra formam statuti, q. v.*

AGAINST THE PEACE. See PEACE.

AGAINST THE WILL. Technical words which must be used in framing an indictment for robbery from the person. 1 Chit. Cr. Law 244.

In the statute of 13 Edw. I. (Westm. 2d) c. 34, the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will.* Per *Tindal*, C. J., and *Parke*, B., in the addenda to 1 Den. Cr. Cas. 1. And in England this statute definition was adopted by all the judges; Bell, Cr. Cas. 63, 71.

AGARD. Award. Burrill, Dict.

AGE. The length of time a person has lived. Full age or majority is the age at which the law allows persons to do acts or discharge functions which for want of years they were prohibited from doing or undertaking before.

As to the age of consent in prosecution for rape, see RAPE, as to the age of responsibility see INFANT, and see also PARENT AND CHILD.

In the United States, at twenty-five, a man may be elected a representative in congress; at thirty, a senator; and at thirty-five, he may be chosen president. He is liable to serve in the militia from eighteen to forty-five inclusive, unless exempted for some particular reason. In England no one can be chosen member of parliament till he has attained twenty-one years; nor be ordained a priest under the age of twenty-four; nor made a bishop till he has completed his thirtieth year. The age of serving in the militia is from sixteen to forty-five years. The law, according to Blackstone, recognizes no minority in the heir to the throne. See 1 Bla. Com. 224, note, and 2 *id.* 208, note, where this appears to result from the charter under which the king's oldest son becomes Duke of Cornwall by inheritance.

In French Law. A person must have attained the age of forty to be a member of the legislative body; twenty-five, to be a judge of a tribunal *de première instance;* twenty-seven, to be its president, or to be judge or clerk of a *cour royale;* thirty, to be its president or *procureur-general;* twenty-five, to be a justice of the peace; thirty, to be judge of a tribunal of commerce, and thirty-five, to be its president; twenty-five, to be a notary public; twenty-one, to be a testamentary witness; thirty, to be a juror. At sixteen, a minor may devise one-half of his property as if he were a major. A male cannot contract marriage till after the eighteenth year, nor a female before full fifteen years. At twenty-one, both males and females are capable to perform all the acts of civil life; Touillier, *Droit Civ.* liv. 1, Intr. n. 188.

In Roman Law. Infancy (*infantia*) extended to the age of seven; the period of childhood (*pueritia*) which extended from seven to fourteen, was divided into two periods; the first, extending from seven to ten and a half, was called the period nearest childhood (*ætas infantiæ proxima*); the other, from ten and a half to fourteen, the period nearest puberty (*ætas pubertati proxima*); puberty (*pubertas*) extended from fourteen to eighteen; full puberty extended from eighteen to twenty-five; at twenty-five, the person was *major.* See Taylor, Civ. Law 254; *Leçon El. du Droit Civ.* 22.

A witness may prove his own age; Cheever v. Congdon, 34 Mich. 296; State v. McClain, 49 Kan. 730, 31 Pac. 790; Morrel v. Morgan, 65 Cal. 575, 4 Pac. 580; State v. Best, 108 N. C. 747, 12 S. E. 907; Hill v. Eldridge, 126 Mass. 234; without giving his sources of information except on cross-examination; Central R. R. v. Coggin, 73 Ga. 689; even if the parent from whom it is admitted that the knowledge was derived is present; Loose v. State, 120 Wis. 115, 97 N. W. 526; or is living in the county where suit is brought; Pearce v. Kyzer, 84 Tenn. (16 Lea) 521, 57 Am. Rep. 240; but when the statement was made to a teacher for entry on school registry, that record is not admissible; Simpson v. State, 46 Tex. Cr. R. 551, 81 S. W. 320. The date of one's birth may be proved by himself or members of his family; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; Chicago & A. R. Co. v. Lewandowski, 190 Ill. 301, 60 N. E. 497; but not when the knowledge is acquired from another person, the witness being an orphan; People v. Colbath, 141 Mich. 189, 104 N. W. 633. One's own statement of his age has been said to be the best evidence; Morrison v. Emsley, 53 Mich. 564, 19 N. W. 187.

In a trial for rape of a female under sixteen years, her testimony as to her age was held competent; Com. v. Phillips, 162 Mass. 504, 39 N. E. 109; but a conviction for seduction under the age of eighteen could not be maintained when the oral evidence of the girl was contradicted by the church record of her birth on which she had stated her evidence was based; State v. Cougot, 121 Mo. 458, 26 S. W. 566.

A statement in a will that testator's daughter was born on a certain day is admissible; 3 Yo. & Coll. Ex. 82; and in 2 R. & Myl. 169, a person's age was proved by the declarations of a deceased relative.

The federal census returns have been held admissible on the question of age; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874; *contra*, Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201; see Wigm. Ev. 1671; and the testimony of an enumerator after refreshing his memory by examination of

his book and then stating particulars from recollection has been admitted; Battles v. Tallman, 96 Ala. 403, 11 South. 247; but a school census is inadmissible to prove age for any other than school purposes; Edwards v. Logan, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257.

There is no presumption of law that at any age a woman is past the age of child bearing, but courts have recognized a presumption of fact as to a married woman of 49¾ years who had never borne a child; L. R. 14 Eq. 245; widow of 55¾; L. R. 11 Eq. 408; a spinster of 53; 35 L. J. Ch. 303; and the presumption was refused in the case of a woman of 54½, married three years, who had never had a child; 9 Ch. D. 388. But in List v. Rodney, 83 Pa. 483, it was held that (quoting 2 Bla. Com. 125) "a possibility of issue is always supposed to exist in law . . . even though the donees be each of them one hundred years old," and that the law would not consider the physical impossibility of a woman's bearing children after she was seventy-five years old.

AGE-PRAYER. A statement made in a real action to which an infant is a party, of the fact of infancy and a request that the proceedings may be stayed until the infant becomes of age.

It is now abolished; stat. 11 Geo. IV.; 1 Will. IV. c. 37, § 10; 1 Lilly, Reg. 54; 3 Bla. Com. 300.

AGENCY. See PRINCIPAL AND AGENT.

AGENS (Lat. *agere*, to do; to conduct). A conductor or manager of affairs.

It is distinguished from *factor*, a workman.

A plaintiff. Fleta, lib. 4, c. 15, § 8.

AGENT. See PRINCIPAL AND AGENT.

AGENT AND PATIENT. A phrase indicating the state of a person who is required to do a thing, and is at the same time the person to whom it is done; as, when a man is indebted to another, and he appoints him his executor, the latter is required to pay the debt in his capacity of executor, and entitled to receive it in his own right; he is then *agent and patient*. Termes de la Ley.

AGER (Lat.). **In Civil Law.** A field; land generally.

A portion of land enclosed by definite boundaries.

Used like the word *acre* in the old English law, denoting a measure of undetermined and variable value. Spelman, Gloss.; Du Cange; 3 Kent 441.

AGGRAVATION. That which increases the enormity of a crime or the injury of a wrong.

One of the rules respecting variances is, that cumulative allegations, or such as merely *operate in aggravation*, are immaterial, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. This rule runs through the whole criminal law: that it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified; 2 Campb. 583; 4 B. & C. 329; Com. v. Livermore, 4 Gray (Mass.) 18; 1 Bish. Cr. L. 600. Thus, on an indictment for murder the prisoner may be convicted of manslaughter, for the averment of malice aforethought is merely matter of aggravation; Co. Litt. 282 *a*.

The introduction of matter into the declaration which tends to increase the amount of damages, but does not affect the right of action itself. Steph. Pl. 257; Gould, Pl. 42; 12 Mod. 597.

An example of this is found in the case where a plaintiff declares in trespass for entering his house, and breaking his close, and tossing his goods about; the entry of the house is the principal ground and foundation of the action, and the rest is only stated by way of aggravation; 3 Wils. 294; Hathaway v. Rice, 19 Vt. 107; and this matter need not be proved by the plaintiff or answered by the defendant.

See ALIA ENORMIA.

AGGREGATE. Consisting of particular persons or items, formed into one body. A combined whole.

See CORPORATION.

AGGREGATIO MENTIUM (Lat.). A meeting of minds. See AGREEMENT.

AGGRIEVED. Having a grievance, or suffered loss or injury.

The "parties aggrieved" are those against whom an appealable order or judgment has been entered; Ely v. Frisbie, 17 Cal. 260. One cannot be said to be aggrieved unless error has been committed against him; Kinealy v. Macklin, 67 Mo. 95; Wiggin v. Swett, 6 Metc. (Mass.) 197, 39 Am. Dec. 716; Swackhamer v. Kline's Adm'r, 25 N. J. Eq. 503; 4 Q. B. Div. 90.

AGIO. An Italian word for accommodation. A term used in commercial transactions to denote the difference of price between the value of bank-notes or other nominal money and the coin of the country.

AGISTMENT. The taking of another person's cattle into one's own ground to be fed, for a consideration to be paid by the owner. Williams v. Miller, 68 Cal. 290, 9 Pac. 166.

Tithe of Agistment was a small tithe paid to the rector or vicar on cattle or other produce of grass lands. It was paid by the occupier of the land and not by the person who put in his cattle to graze. Rawle, Exmoor 31.

In Canon Law. A composition or mean rate at which some right or due might be reckoned.

AGISTOR. An officer who had the charge of cattle pastured for a certain stipulated sum in the king's forest and who collected the money paid for them. One who takes in horses or other animals to pasture at certain

rates. Story, Bailm. § 443; Skinner v. Caughey, 64 Minn. 375, 67 N. W. 203.

He is not, like an innkeeper, bound to take all horses offered to him, nor is he liable for any injury done to such animals in his care, unless he has been guilty of negligence, or from his ignorance, negligence may be inferred; Holt 547. See Schroeder v. Faires, 49 Mo. App. 470; Brush v. Land Co., 2 Tex. Civ. App. 188, 21 S. W. 389.

In the absence of an express contract as to the degree of care to be taken, he is bound to provide reasonable feed and use ordinary care to protect cattle; Calland v. Nichols, 30 Neb. 532, 46 N. W. 631.

Where a number of animals are taken to pasture for an agreed compensation, one of them cannot be taken away without payment for all; Yearsley v. Gray, 140 Pa. 238, 21 Atl. 517; Kroll v. Ernst, 34 Neb. 482, 51 N. W. 1032. The lien of an agistor is prior to the claim of an assignee of overdue notes secured by mortgage on the horses; Blain v. Manning, 36 Ill. App. 214. That he has no lien, see Prof. J. B. Ames in 3 Sel. Essays in Anglo-Amer. Leg. Hist. 290, citing 5 M. & W. 342, which followed Cro. Car. 271.

See BAILMENT; ANIMAL; LIEN.

AGNATES. In Scotch Law. Relations on the father's side. See AGNATI.

AGNATI. In Civil Law. All individuals subject for the time being to the same *patria potestas*, or who would be so subject were the common ancestor alive. Brothers and sisters, with their uncles, aunts, nephews, nieces, and other collaterals (not having been received by adoption or marriage into another family), if related through males, were agnates. The civil issue of the state was the Agnatic Family. Cognates were all persons who could trace their blood to a single ancestor or ancestress, and agnates were those cognates who traced their connection exclusively through males. Maine, Anc. Law.

"The agnates were that assemblage of persons who would have been under the patriarchal authority of some common ancestor if he had lived long enough to exercise it." Maine, Early Hist. of Inst. 106. A son emancipated by his father lost all rights of agnation.

They were called *agnati—adgnati*, from the words *ad eum nati*. Ulpianus says: "*Adgnati autem sunt cognati virilis sexus ab eodem orti: nam post suos et consanguineos statim mihi proximus est consanguinei mei filius, et ego ei; patris quoque frater qui patruus appellatur; deincepsque ceteri, si qui sunt, hinc orti in infinitum;*" Dig. 38, 16. *De suis*, 2, § 1. Thus, although, the grandfather and father being dead, the children become *sui juris*, and the males become the founders of new families, still they all continue to be agnates; and the *agnatio* spreads and is perpetuated not only in the direct but also in the collateral line. Marriage, adoption, and adrogation also create the relationship of the *agnatio*. In the Sentences of Paulus, the order of inheritance is stated as follows: *Intestatorum hereditas, lege Duodecim Tabularum primum suis heredibus, deinde adgnatis et aliquando quoque gentibus deferebatur.* See COGNATI.

AGNATIO. In Civil Law. The relationship of *Agnati*.

AGNOMEN. A name or title which a *man* gets by some action or peculiarity; the last of the four names sometimes given a Roman. Thus, Scipio *Africanus*, from his African victories. Ainsworth, Lex.; Calvinus, Lex. See NOMEN.

AGNOSTIC. See OATH.

AGRARIAN LAWS. In Roman Law. Those laws by which the commonwealth disposed of its public land, or regulated the possession thereof by individuals were termed Agrarian Laws.

The greater part of the public lands acquired by conquest were laid open to the possession of any citizen, but the state reserved the title and the right to resume possession. The object of many of the agrarian laws was to limit the area of public land of which any one person might take possession. The law of Cassius, B. C. 486, is the most noted of these laws.

It was long assumed that these laws were framed to reach private property as well as to restrict possession of the public domain, and hence the term agrarian is, in legal and political literature, to a great degree fixed with the meaning of a confiscatory law, intended to reduce large estates and increase the number of landholders. Harrington, in his "Oceana," and the philosophers of the French Revolution, have advocated agrarian laws in this sense. The researches of Heyne, Op. 4, 351; Niebuhr, Hist. vol. ii. trans.; and Savigny, Das Recht des Besitzes, have redeemed the Roman word from the burden of this meaning.

AGREAMENTUM. Agreement.

Spelman says that it is equivalent in meaning to *aggregatio mentium*, though not derived therefrom.

AGREE. To concur with or assent. Thornton v. Kelly, 11 R. I. 498; to promise or engage; Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; to contract; McKisick v. McKisick, 6 Meigs (Tenn.) 427. To say that a jury agrees upon a verdict is equivalent to *find;* Benedict v. State, 14 Wis. 423.

It sometimes means a grant or covenant, as when a grantor agrees that no building shall be erected on an adjoining lot; Hogan v. Barry, 143 Mass. 538, 10 N. E. 253.

AGRÉÉ (Fr.). A person authorized to represent a litigant before the Tribunals of Commerce in France. If such person be a lawyer, he is called an *avocat-agréé*. Coxe, Manual of French Law.

AGREED STATEMENT OF FACTS. See CASE STATED.

AGREEMENT. A coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. Comyn, Dig. *Agreement*, A 1; Plowd. 5 *a*, 6 *a*.

Aggregatio mentium.—When two or more minds are united in a thing done or to be done.

It ought to be so certain and complete that either party may have an action on it, and there must be a *quid pro quo;* Dane, Abr. c. 11.

The consent of two or more persons concurring, the one in parting with, the other in receiving, some property, right, or benefit; Bacon, Abr. An act in the law whereby two or more persons declare their assent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. Poll. Contr. 3, adopted in [1887] 36 Ch. D. 698. It must be concerned with duties or rights which can be dealt with in a court of justice; Poll. Contr. 3.

"The expression by two or more persons of a common intention to affect the legal relations of those persons." Anson, Contr. 3.

An agreement "consists of two persons being of the same mind, intention, or meaning concerning the matter agreed upon." Leake, Contr. 12.

"Agreement" is seldom applied to specialties; *"contract"* is generally confined to simple contracts; *"promise"* refers to the engagement of a party without reference to the reasons or considerations for it, or the duties of other parties; Pars. Contr. 6.

An agreement ceases to be such by being put in writing under seal, but not when put in writing for a memorandum; Dane, Abr. c. 11.

It is a wider term than "contract;" Anson, Contr. 4; an agreement might not be a contract, because not fulfilling some requirement of the law of the place in which it is made.

The meaning of the contracting parties is their agreement; Whitney v. Wyman, 101 U. S. 396, 25 L. Ed. 1050.

An agreement of sale may imply not merely an obligation to sell, but an obligation on the part of the other party to purchase, while an agreement to sell is simply an obligation on the part of the vendor or promisor to complete his promise of sale; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853.

In its correct sense, as used in the statute of frauds, it signifies a mutual contract upon a consideration, between two or more parties; 5 East 10; although frequently used in a loose, incorrect, sense as synonymous with promise or undertaking; *id.;* but, in its popular signification it means no more than concord, the union of two or more minds, concurrence of views and intention. Everything done or omitted by the compact of two or more minds is universally and familiarly called an agreement. Whether a consideration exists is a distinct idea which does not enter into the popular notion. In most instances any consideration except the voluntary impluse of minds cannot be ascribed to the numberless agreements that are made daily; Marcy v. Marcy, 9 Allen (Mass.) 11; Sage v. Wilcox, 6 Conn. 85. Taken alone, it is sufficiently comprehensive to embrace all forms of stipulations, written or verbal; Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. 783, 38 L. Ed. 669.

The writing or instrument which is evidence of an agreement.

The agreement may be valid, and yet the written evidence thereof insufficient; as, if a promissory note be given for twenty dollars, the amount of a previous debt, where the note may generally be neglected and the debt collected by means of other evidence; or, again, if a note good in form be given for an illegal consideration, in which case the instrument is good and the agreement void.

See ACCORD AND SATISFACTION; ACCEPTANCE; CONSIDERATION; CONTRACT; NOVATION; PERFORMANCE; RESCISSION; INTERPRETATION.

The parties must agree or assent. There must be a definite offer by one party accepted by the other; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 500; Emerson v. Graff, 29 Pa. 358. There must be a communication of assent by the party accepting; a mere mental assent to the terms in his own mind is not enough; L. R. 2 App. Ca. 691. See Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869. But the assent need not be formally made; it can be inferred from the party's acts; L. R. 6 Q. B. 607; L. R. 10 C. P. 307; Smith v. Ingram, 90 Ala. 529, 8 South. 144. They must assent to the same thing in the same sense; Eliason v. Henshaw, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; Greene v. Bateman, 2 Woodb. & M. 359, Fed. Cas. No. 5,762; 9 M. & W. 535; L. R. 6 Q. B. 597; New York Life Ins. Co. v. Levy's Adm'r, 122 Ky. 457, 92 S. W. 325, 5 L. R. A. (N. S.) 739. The assent must be mutual and obligatory; there must be a request on one side, and an assent on the other; 5 Bingh. N. C. 75; Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193. Where there is a misunderstanding as to the date of performance there is no contract, for want of mutual assent; Pittsburg & S. Coal Co. v. Slack & Co., 42 La. Ann. 107, 7 South. 230; or where there is a misunderstanding as to the manner of payment; Robinson & Farrell v. Estes, 53 Mo. App. 582. The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provision, and it must not qualify them by any new matter; 1 Pars. Contr. 400; and even a slight qualification destroys the assent; 5 M. & W. 535; Hornbeck's Ex'r v. American Bible Society, 2 Sandf. Ch. (N. Y.) 133. The question of assent when gathered from conversations is for the jury; Thruston v. Thornton, 1 Cush. (Mass.) 89; De Ridder v. McKnight, 13 Johns. (N. Y.) 294.

A sufficient consideration for the agreement must exist; 2 Bla. Com. 444; 2 Q. B. 851; 5 Ad. & E. 548; as against third parties this consideration must be good or valuable; 10 B. & C. 606; as between the parties it may be equitable only; 1 Pars. Contr. 431.

But it need not be adequate, if only it have some real value; 2 Sch. & L. 395, n. *a;* 11 Ad. & E. 983; Hubbard v. Coolidge, 1 Metc. (Mass.) 84; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181, refraining from use of tobacco and liquor for a period is sufficient consideration for a promise to pay the party a sum of money; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.

If the consideration be illegal in whole or in part, the agreement will be void; Donallen v. Lennox, 6 Dana (Ky.) 91; Town of Hinesburgh v. Sumner, 9 Vt. 23, 31 Am. Dec. 599; Filson's Trustees v. Himes, 5 Pa. 452, 47 Am. Dec. 422; Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Ashbrook v. Dale, 27 Mo. App. 649; Smith v. Steely, 80 Ia. 738, 45 N. W. 912. A contract to regulate the price of commodities at a certain specified amount is a contract in restraint of trade, without consideration and cannot be enforced; 63 Law T. 455; Vulcan Powder Co. v. Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242; so also if the consideration be impossible; 5 Viner, Abr. 110, *Condition;* Co. Litt. 206 *a;* Shepp. Touchst. 164; L. R. 5 C. P. 588; 2 Lev. 161. See CONSIDERATION.

The agreement may be to do anything which is lawful, as to sell or buy real estate or personal property. But the evidence of the sale of real property must generally be by deed, sealed; and in many cases agreements in regard to personal property must be in writing. See STATUTE OF FRAUDS.

The construction to be given to agreements is to be favorable to upholding them, and according to the intention of the parties at the time of making it, as nearly as the meaning of the words used and the rules of law will permit; 2 Kent 555; 1 H. Bla. 569, 614; 30 Eng. L. & E. 479; Potter v. Ins. Co., 5 Hill (N. Y.) 147; Ricker v. Fairbanks, 40 Me. 43; 10 A. & E. 326; Thrall v. Newell, 19 Vt. 202, 47 Am. Dec. 682. This intent cannot prevail against the plain meaning of words; 5 M. & W. 535. Neither will it be allowed to contravene established rules of law.

And that the agreement may be supported, it will be construed so as to operate in a way somewhat different from that intended, if this will prevent the agreement from failing altogether; Brewer v. Hardy, 22 Pick. (Mass.) 376, 33 Am. Dec. 747; Rogers v. Fire Co., 9 Wend. (N. Y.) 611; Bryan v. Bradley, 16 Conn. 474.

Agreements are construed most strongly against the party proposing (*i. e., contra proferentem*); 6 M. & W. 662; 2 Pars. Contr. 20; 3 B. & S. 929; Deblois v. Earle, 7 R. I. 26. See CONTRACTS.

The effect of an agreement is to bind the parties to the performance of what they have thereby undertaken. In case of failure, the common law provides a remedy by damages, and equity will in some cases compel a specific performance.

The obligation may be avoided or destroyed by *performance* (*q. v.*), which must be by him who was bound to do it; and whatsoever is necessary to be done for the full discharge of this duty, although only incidental to it, must be done by him; 11 Q. B. 368; 4 B. & S. 556; Fauble v. Davis, 48 Ia. 462; Jennings v. Lyons, 39 Wis. 553, 20 Am. Rep. 57; by *tender* of exact performance according to the terms of the contract, which is sufficient when the other party refuses to accept performance under the contract; 6 M. & G. 610; Benj. Sales 563; Ans. Contr. 274; an agreement to pay a sum of money upon receipt of certain funds is not broken on refusal to pay on receipt of part of the funds; Fox v. Walker, 62 N. H. 419; by *acts of the party* to be benefited, which prevent the performance, or where some act is to be done by one party before the act of the other, the second party is excused from performance, if the first fails; 15 M. & W. 109; 8 Q. B. 358; 6 B. & C. 325; 10 East 359; by *rescission* (*q. v.*), which may be made by the party to be benefited, without any provision therefor in the agreement, and the mere acquiescence of the other party will be evidence of sufficient mutuality to satisfy the general rule that rescission must be mutual; Hill v. Green, 4 Pick. (Mass.) 114; Quincy v. Tilton, 5 Greenl. (Me.) 277; 1 W. & S. 442; rescission, before breach, must be by agreement; Leake, Contr. 787; 2 H. & N. 79; 6 Exch. 39; by *acts of law*, as confusion, merger; Baxter v. Downer, 29 Vt. 412; *death*, as when a master who has bound himself to teach an apprentice dies; *inability* to perform a personal service, such as singing at a concert; L. R. 6 Exch. 269; or *extinction* of the subject-matter of the agreement. See also ASSENT; CONTRACT; DISCHARGE OF CONTRACTS; PARTIES; PAYMENT; RESCISSION.

AGREEMENT FOR INSURANCE. An agreement often made in short terms preliminary to the filling out and delivery of a policy with specific stipulations.

Such an agreement, specifying the rate of premium, the subject, and risk, and amount to be insured, in general terms, and being assented to by the parties, is binding; Tyler v. Insurance Co., 4 Rob. (N. Y.) 151; Oliver v. Insurance Co., 2 Curt. 277, Fed. Cas. No. 10,498; Trustees of First Baptist Church v. Insurance Co., 19 N. Y. 305. It is usually in writing, but may be by parol or by parol acceptance of a written proposal; Union Mut. Ins. Co. v. Insurance Co., 2 Curt. 524, Fed. Cas. No. 14,372; Commercial Mut. Marine Ins. Co. v. Insurance Co., 19 How. (U. S.) 318, 15 L. Ed. 636; Mobile Marine Dock & Mutual Ins. Co. v. McMillan, 31 Ala. 711; Ellis v. Insurance Co., 50 N. Y. 402, 10 Am. Rep. 495; Ela v. French, 11 N. H. 356. It must be in such form or expression that the parties, subject, and risk can be thereby distinctly known, either by being specified or by references so that it can be definitely reduced to writing; Trustees of First Baptist Church v. Insurance Co., 19 N. Y. 305.

Such an agreement must have an express or implied reference to some form of policy. The ordinary form of the underwriters in like cases is implied, where no other is specified or implied; Eureka Ins. Co. v. Robinson, 56 Pa. 256, 94 Am. Dec. 65; 2 C. & P.

91; 3 B. & Ad. 906; Hubbard v. Insurance Co., 33 Ia. 325, 11 Am. Rep. 125; Barre v. Insurance Co., 76 Ia. 609, 41 N. W. 373; Oliver v. Insurance Co., 2 Curt. 277, Fed. Cas. No. 10,498.

Where the agreement is by a communication between parties at a distance, an offer by either will be binding upon both on a despatch by the other of his acceptance within a reasonable or the prescribed time, and prior to the offer having been countermanded; 1 Phil. Ins. §§ 17, 21; Myers v. Insurance Co., 27 Pa. 268, 67 Am. Dec. 462.

It is a common practice to "bind" insurance against fire for a short period by mere oral communication.

See POLICY; INSURANCE.

AGRICULTURAL HOLDING. Land cultivated for profit in some way. Within the meaning of the English Agricultural Holdings act of 1883, the term will not include natural grass lands. Such lands are pastoral holdings. 32 S. J. 630.

AGRICULTURAL PRODUCT. That which is the direct result of husbandry and the cultivation of the soil. The product in its natural unmanufactured condition; Getty v. Milling Co., 40 Kan. 281, 19 Pac. 617. It has been held not to include beef cattle; Davis & Co. v. City of Macon, 64 Ga. 128, 37 Am. Rep. 60.

AGRICULTURAL SOCIETY. One for the promotion of agricultural interests, such as the improvement of land, breeds of cattle, etc. Downing v. State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614, 12 L. R. A. 664. It is held a private corporation; Selinas v. State Agricultural Society, 60 Vt. 249, 15 Atl. 117, 6 Am. St. Rep. 114; Ismon v. Loder, 135 Mich. 345, 97 N. W. 769; Brown v. Agricultural Society, 47 Me. 275, 74 Am. Dec. 484; Lane v. Agricultural Society, 62 Minn. 175, 64 N. W. 382, 29 L. R. A. 708; but where its organization and the powers of its board of directors are provided for by statute, and it is not a society for pecuniary benefit, it is a public corporation; Hern v. State Agricultural Soc., 91 Ia. 97, 58 N. W. 1092.

As to their liability for negligence, see DANGEROUS PREMISES.

AGRICULTURE. The cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practised by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. The science that treats of the cultivation of the soil. Stand. Dict. The term refers to the field or farm, with all its wants, appointments and products, as distinguished from horticulture, which refers to the garden, with its less important though varied products; Dillard v. Webb, 55 Ala. 468.

A person is actually engaged in agriculture when he derives the support of himself and family in whole or in part from the cultivation of land; it must be something more than a garden, though it may be less than a field, and the uniting of any other business with this is not inconsistent with the pursuit of agriculture; Springer v. Lewis, 22 Pa. 193. See Bachelder v. Bickford, 62 Me. 526; Simons v. Lovell, 7 Heisk. (Tenn.) 515.

Within the meaning of an exemption law, one who cultivates a one acre lot and is also a butcher and day laborer is not engaged in agriculture.

AID AND ABET. See AIDING AND ABETTING.

AID AND COMFORT. Help; support; assistance; counsel; encouragement.

The constitution of the United States, art. 3, s. 3, declares that adhering to the enemies of the United States, giving them aid and comfort, shall be treason. These words, as they are to be understood in the constitution, have not received a full judicial construction; but see Young v. U. S., 97 U. S. 39, 24 L. Ed. 992, as to their meaning in the Act of Congress, March 12, 1863. See also Lamar v. Browne, 92 U. S. 187, 23 L. Ed. 650; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; Hanauer v. Doane, 12 Wall. (U. S.) 347, 20 L. Ed. 439; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; Witkowski v. U. S., 7 Ct. of Cl. 398; Bond v. U. S., 2 Ct. of Cl. 533. They import help, support, assistance, countenance, encouragement. The voluntary execution of an official bond of a commissioned officer of the Confederacy from motives of personal friendship, is giving aid and comfort; U. S. v. Padelford, 9 Wall. (U. S.) 539, 19 L. Ed. 788; as is the giving of mechanical skill to build boats for the Confederacy; Gearing v. U. S., 3 Ct. of Cl. 172. The word *aid*, which occurs in the stat. Westm. I. c. 14, is explained by Lord Coke (2 Inst. 182) as comprehending all persons counselling, abetting, plotting, assenting, consenting, and encouraging to do the act (and he adds, what is not applicable to the crime of treason), who are not present when the act is done. See also 1 Burn, Just. 5, 6; 4 Bla. Com. 37, 38.

To constitute aid and comfort it is not essential that the effort to aid should be successful and actually render assistance; U. S. v. Greathouse, 4 Sawy. 472, Fed. Cas. No. 15,254.

AID BONDS. See BONDS.

AID OF THE KING. A city or borough that holds a fee farm of the king, if anything be demanded against them which belongs thereto, may pray in aid of the king. In these cases the proceedings are stopped until the king's counsel is heard to say what they think fit for avoiding the king's prejudice; and this aid shall not in any case be granted after issue; because the king ought not to rely on the defence made by another. Termes de la Ley.

AID PRAYER. A petition to the court calling in help from another person who has an interest in the matter in dispute. For example, a tenant for life, by the curtesy, or for years, being impleaded, may pray aid of him in reversion; that is, desire the court that he may be called by writ, to allege what he thinks proper for the maintenance of the right of the person calling him, and of his own. Fitzh. Nat. Brev. 50.

AIDER BY VERDICT. The presumption which arises after verdict, whether in a civil or criminal case, that those facts, without proof of which the verdict could not have been found, were proved, though they are not distinctly alleged in the record; provided it contains terms sufficiently general to comprehend them in reasonable intendment.

The rule is that where a matter is so essentially necessary to be proved that, had it not been in evidence, the jury could not have given such a verdict as that recorded, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by the verdict; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial; 1 Maule & S. 234; 1 Saund. (6th Ed.) 227, 228; 1 Den. Cr. Cas. 356; 2 M. & G. 405; 13 M. & W. 377; 6 C. B. 136; Worster v. Proprietors of Canal Bridge, 16 Pick. (Mass.) 541; Wilson v. Coffin, 2 Cush. (Mass.) 316; Bartlett v. Crozier, 17 Johns. (N. Y.) 439, 458, 8 Am. Dec. 428; Kain v. R. Co., 29 Mo. App. 53; Bronnenburg v. Rinker, 2 Ind. App. 391, 28 N. E. 568.

AIDING AND ABETTING. The offence committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator thereof. 4 Bla. Com. 34; Russ. & R. 363, 421; State v. Hildreth, 31 N. C. 440, 51 Am. Dec. 369; U. S. v. Libby, 1 Woodb. & M. 221, Fed. Cas. No. 15,597; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; McCarty v. State, 26 Misc. 299. They are principals in the crime; U. S. v. Boyd, 45 Fed. 851; Engeman v. State, 54 N. J. L. 247, 23 Atl. 676. A common purpose to subserve the joint interests of the principal offender and his aider and abettor by misapplication of the funds of a bank is not necessary to create the offence of aiding and abetting a bank officer in misapplying its funds in violation of U. S. Rev. Stat. § 5209. It is immaterial whom they may have intended to benefit, if there existed the intent to defraud specified in the act; Coffin v. U. S., 162 U. S. 664, 16 Sup. Ct. 943, 40 L. Ed. 1109.

A principal in the second degree is one who is present aiding and abetting the fact to be done. 1 Hale, Pl. Cr. 615; 1 Bish. Cr. L. 648 (4). See State v. M'Gregor, 41 N. H. 407; Hill v. State, 28 Ga. 604; Doan v. State, 26 Ind. 496; State v. Squaires, 2 Nev. 226; State v. Fley, 2 Brev. (S. C.) 338, 4 Am. Dec. 583. Actual presence is not necessary: it is sufficient to be so situated as to come readily to the assistance of his fellows; Green v. State, 13 Mo. 382.

One cannot be convicted as aider and abettor unless the principal is jointly indicted with him, or if indicted alone, the indictment should give the name and description of the principal; Mulligan v. Com., 84 Ky. 229, 1 S. W. 417, and the one charged as an abettor may be convicted as principal; Benge v. Com., 92 Ky. 1, 17 S. W. 146, and the abettor may be convicted of murder in the second degree, though the principal has been acquitted; State v. Whitt, 113 N. C. 716, 18 S. E. 715; State v. Bogue, 52 Kan. 79, 34 Pac. 10.

The aider and abettor in a misdemeanor is chargeable as principal; Com. v. Ahearn, 160 Mass. 300, 35 N. E. 853; U. S. v. Sykes, 58 Fed. 1000.

To aid or abet a breach of an injunction decree is contempt of court; [1897] 1 Ch. 545. See ACCESSORY; PRINCIPAL; ABETTOR.

AIDS. **In English Law.** A species of tax payable by the tenant of lands to his superior lord on the happening of certain events.

They were originally mere benevolences granted to the lord in certain times of danger and distress, but soon came to be claimed as a right. They were originally given in three cases only, and were of uncertain amount. For a period they were demanded in additional cases; but this abuse was corrected by Magna Carta (of John) and the stat. 25 Edw. I. *(confirmatio cartarum)*, and they were made payable only,—to ransom the lord's person, when taken prisoner; to make the lord's eldest son a knight; to marry the lord's eldest daughter, by giving her a suitable portion. The first of these remained uncertain; the other two were fixed by act of parliament (25 Edw. III. c. 11) at twenty shillings each, being the supposed twentieth part of a knight's fee; 2 Bla. Com. 64. They were abolished by the 12 Car. II. c. 24; 2 Bla. Com. 77, n. See 1 Poll. § Maitl. 330.

AIEL (spelled also *Ayel*, *Aile*, and *Ayle*). A writ which lieth where the grandfather was seized in his demesne as of fee of any lands or tenements in fee simple the day that he died, and a stranger abateth or entereth the same day and dispossesseth the heir. Fitzh. Nat. Brev. 222; Termes de la Ley; 3 Bla. Com. 186; 2 Poll. & Maitl. 57. See ABATEMENT.

AIELESSE (Norman). A grandmother. Kelham.

AILE. A corruption of the French word *aieul*, grandfather. see AIEL.

AIR. No property can be had in the air; it belongs equally to all men, being indispensable to their existence. But this must be understood with this qualification, that no man has a right to use the air over another man's land in such a manner as to be injurious to him. To poison or materially to change the air, to the annoyance of the public, is a nuisance; Cro. Car. 510; 1 Burr. 333; see NUISANCE.

That abutting landowners have rights of light and air over a public highway is held in many cases; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; Story v. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Adams v. R. R. Co., 39

Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Barnett v. Johnson, 15 N. J. Eq. 481; Field v. Barling, 149 Ill. 556, 37 N. E. 850, 24 L. R. A. 406, 41 Am. St. Rep. 311. This right is said in Barnett v. Johnson, 15 N. J. Eq. 481, to be founded in such an urgent necessity that all laws and legal proceedings take it for granted; a right so strong that it protects itself, so urgent that upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions. This case, it has been said, anticipated the principle upon which compensation was at last secured in the elevated railroad cases in New York; 1 Lewis, Em. Dom. 183; Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, where it is said: "It is manifest that easements of light and air cannot be made dependent upon easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets" depends upon the cases of Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, and Lahr v. R. Co., 104 N. Y. 268, 10 N. E. 528.

In the Story Case, the extent of the abutting owner's right was defined to be not only access to the lot, but light and air from the street. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner;" and "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed, and which is made servient for that purpose." It is said that in that case a distinction was clearly made between the rights of abutting owners in the surface of the street and their rights in the space above the street; Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872, where it was held that the owner was protected against impairment of his easements of light and air by the substitution by a railway company of an elevated structure in lieu of its surface or partly depressed roadbed which occupied the street at the time of his purchase.

The erection over a street of an elevated viaduct, intended for general public travel, and not devoted to the exclusive use of a private transportation company, is a legitimate street improvement equivalent to a change of grade; and as in the case of a change of grade, an owner of land abutting on the street is not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it; Selden v. City of Jacksonville, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278; Willis v. Winona City, 59 Minn. 27, 60 N. W. 814, 26 L. R. A. 142; Colclough v. City of Milwaukee, 92 Wis. 182, 65 N. W. 1039; Walish v. City of Milwaukee, 95 Wis. 16, 69 N. W. 818; Home Building & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895, 27 L. R. A. 551; Meyer v. Richmond, 172 U. S. 82, 19 Sup. Ct. 106, 43 L. Ed. 374; Willets Mfg. Co. v. Board of Chosen Freeholders of Mercer County, 62 N. J. L. 95, 40 Atl. 782; Brand v. Multnomah County, 38 Or. 79, 60 Pac. 390, 62 Pac. 209, 50 L. R. A. 389, 84 Am. St. Rep. 772; Mead v. Portland, 45 Or. 1, 76 Pac. 347, affirmed in 200 U. S. 148, 26 Sup. Ct. 171, 50 L. Ed. 413; Sears v. Crocker, 184 Mass. 588, 69 N. E. 327, 100 Am. St. Rep. 577.

In some jurisdictions it is also held that recovery cannot be had by an abutting owner because of the interference with the light, air or prospect of his property through an elevation of railroad tracks, in the absence of any taking of his land or destruction of his easements, under a statute requiring compensation to be made for all damage caused by the taking of land, by the change or discontinuance of a private way, or by the taking of an easement; McKeon v. R. Co., 199 Mass. 292, 85 N. E. 475, 20 L. R. A. (N. S.) 1061; Egerer v. R. Co., 49 Hun 605, 2 N. Y. Supp. 69; and to the same effect, Austin v. R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; Pennsylvania R. Co. v. Lippincott, 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; Jones v. R. Co., 151 Pa. 30, 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. Rep. 722. In Selden v. City of Jacksonville, 28 Fla. 558, 10 South. 457, 14 L. R. A. 370, 29 Am. St. Rep. 278, cited and approved in Sauer v. City of New York, 206 U. S. 544, 27 Sup. Ct. 686, 51 L. Ed. 1176, it is said that there are, incident to property abutting on a street certain property rights which the public generally do not possess, viz.: the right of ingress and egress to and from the lot by the way of the street, and of light and air. These incidental rights are, under a constitutional prohibition simply against the "taking" or "appropriation" of private property, subordinate to the right of the state to alter a grade or otherwise improve a street. The original and all subsequent purchasers of abutting lots take with the implied understanding that the public shall have the right to improve or alter the street so far as may be necessary for its use as a street, and that they can sustain no claim for damages resulting to their lots or property from the improvement or destruction of such incidental rights as a mere consequence of the lawful use or improvement of the street as a highway.

One may erect a high fence shutting off light and air from his neighbor; Saddler v. Alexander (Ky.) 56 S. W. 518; Giller v. West, 162 Ind. 17, 69 N. E. 548; Metz v. Tierney, 13 N. M. 363, 83 Pac. 788; Metzger v. Hochrein, 107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; even though his motive is to annoy; Metzger v. Hochrein.

107 Wis. 267, 83 N. W. 308, 50 L. R. A. 305, 81 Am. St. Rep. 841; Bordeaux v. Greene, 22 Mont. 254, 56 Pac. 218, 74 Am. St. Rep. 600.

See EASEMENT; EMINENT DOMAIN; ANCIENT LIGHTS.

AIR SHIP. See AVIATION.

AISIAMENTUM (spelled also *Esamentum, Aismentum*). An easement. Spelman Gloss.

AJUAR. **In Spanish Law.** The jewels and furniture which a wife brings in marriage.

AJUTAGE (spelled also *Adjutage*). A conical tube used in drawing water through an aperture, by the use of which the quantity of water drawn is much increased.

When a privilege to draw water from a canal, through the forebay or tunnel, by means of an aperture, has been granted, it is not lawful to add an *ajutage*, unless such was the intention of the parties; Schuylkill Nav. Co. v. Moore, 2 Whart. (Pa.) 477.

ALABAMA. One of the United States of America, being the ninth admitted into the Union. It was formerly a part of Georgia, but in 1798 the territory now included in the states of Alabama and Mississippi was organized as a territory called Mississippi, which was cut off from the Gulf coast by Florida, then Spanish territory, extending to the French possessions in Louisiana. During the war of 1812, part of Florida lying between the Perdido and Pearl rivers was occupied by United States troops and afterwards annexed to Mississippi territory, forming part of the present state of Alabama, which was occupied principally by Creek Indians. The country becoming rapidly settled by the whites, the western portion was admitted into the Union as the state of Mississippi, and, by act of Congress of March 3, 1817, the eastern portion was organized as the territory of Alabama; 3 U. S. Stat. L. 371.

An act of Congress was passed March 2, 1819, authorizing the inhabitants of the territory of Alabama to form for themselves a constitution and state government. In pursuance of that act, the constitution of the state of Alabama was adopted by a convention which met at Huntsville, July 5, and adjourned August 2, 1819. *Amendment prohibiting sale and manufacture of intoxicating liquors, adopted 1909.*

ALASKA. Territory acquired by the United States under treaty with Russia dated March 30, ratified May 28, 1867. 15 Stat. L. 539. By this treaty the inhabitants of the territory were admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. The status of Alaska as an incorporated territory was contemplated by its provisions and has been since so declared by the courts; Rassmussen v. U. S., 197 U. S. 516, 25 Sup. Ct. 514, 49 L. Ed. 862.

The general laws of the state of Oregon were declared to be the laws of the territory, so far as applicable and not in conflict with the laws of the United States. By act of May 7, 1906, a delegate to congress was provided. By an order, May 11, 1891, under the Act of March 3, 1891, Alaska was assigned to the ninth judicial circuit. See TERRITORY.

ALBA FIRMA. White rents; rents reserved payable in silver, or white money.

They were so called to distinguish them from *reditus nigri*, which were rents reserved payable in work, grain, and the like. Coke, 2d Inst. 19.

ALBINATUS JUS. The *droit d'aubaine* in France whereby the king at the death of an alien was entitled to all his property, unless he had a peculiar exemption. Repealed in 1791.

ALCALDE. A judicial officer in Spain, and in those countries which have received the body of their laws from those of Spain. His powers and duties are similar to those of a justice of the peace.

ALDERMAN. Equivalent to senator or senior. Cowell.

In English Law. An associate to the chief civil magistrate of a corporate town or city.

The word was formerly of very extended signification. Spelman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office. Spelman, Gloss.

Aldermannus civitatus burgi seu castellæ (alderman of a city, borough, or castle). 1 Bla. Com. 475, n.

Aldermannus comitatus (alderman of the county), who is thought by Spelman to have held an intermediate place between an earl and a sheriff; by others, held the same as the earl. 1 Bla. Com. 116.

Aldermannus hundredi seu wapentachii (alderman of a hundred or wapentake). Spelman.

Aldermannus regis (alderman of the king) was so called, either because he was appointed by the king, or because he gave the judgment of the king in the premises allotted to him.

Aldermannus totius Angliæ (alderman of all England). An officer of high rank whose duties cannot be precisely determined. See Spelman, Gloss.

The aldermen of the city of London were probably originally the chiefs of guilds. See 1 Spence, Eq. Jur. 54, 56. For an account of the selection and installation of aldermen of the guild merchant of a borough, see 1 Poll. & Maitl. 648.

In American Cities. The aldermen are generally a municipal legislative body; though in many cities they hold separate courts, and have magisterial powers to a considerable extent.

Consult 1 Sharsw. Bla. Com. 116; Reeve, Hist. Eng. Law; Spence, Eq. Jur.

ALE-CONNER (also called *ale-taster*). An officer appointed by the court-leet, sworn to look to the assize and goodness of ale and beer within the precincts of the leet. Kitchin, Courts 46; Whishaw.

An officer appointed in every court-leet, and sworn to look to the assize of bread, ale, or beer within the precincts of that lordship. Cowell.

This officer is still continued in name,

though the duties are changed or given up; 1 Crabb, Real Prop. 501.

ALE SILVER. A duty anciently paid to the Lord Mayor of London by the sellers of ale.

ALEATOR (Lat. *alea*, dice.) A diceplayer; a gambler.

"The more skilful a player he is, the wickeder he is." Calvinus, Lex.

ALEATORY CONTRACT. In Civil Law. A mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to some of them, depend on an uncertain event. La. Civ. Code, art. 2982. See Moore v. Johnston, 8 La. Ann. 488; May, Ins. § 5.

The term includes contracts, such as insurance, annuities, and the like. See GAMING; MARGIN; OPTION.

An aleatory sale is one the completion of which depends on the happening of an uncertain event.

ALER SANS JOUR (Fr. *aller sans jour*, to go without day). A phrase formerly used to indicate the final dismissal of a case from court. The defendant was then at liberty to go, without any day appointed for his subsequent appearance; Kitchin, Courts 146; Termes de la Ley.

ALFET. The vessel in which hot water was put, for the purpose of dipping a criminal's arm in it up to the elbow in the ordeal by water. Cowell. See ORDEAL.

ALIA (Lat.). Other things.

ALIA ENORMIA (Lat. other wrongs). A general allegation, at the end of a declaration, of wrongful acts committed by the defendant to the damage of the plaintiff. In form it is, "and other wrongs then and there did against the peace," etc. Under this allegation, damages and matters which naturally arise from the act complained of may be given in evidence; 2 Greenl. Ev. § 678; including battery of servants, etc., in a declaration for breaking into and entering a house; 2 Term 166; Shafer v. Smith, 7 Harr. & J. (Md.) 68; and all matters in general which go in aggravation of damages merely, but would not of themselves be ground for an action; Bull. N. P. 89; Heminway v. Saxton, 3 Mass. 222; Dimmett v. Eskridge, 6 Munf. (Va.) 308.

But matters in aggravation may be stated specially; Moore v. Fenwick, Gilm. (Va.) 227; and matters which of themselves would constitute a ground of action must be so stated; 1 Chit. Pl. 348; Loker v. Damon, 17 Pick. (Mass.) 284. See AGGRAVATION.

ALIAS (Lat. *alius*, another). At another time; otherwise.

The term is sometimes used to indicate an assumed name. See ALIAS DICTUS.

An *alias* writ is a writ issued where one of the same kind has been issued *before* in the same cause. See Roberts v. Church, 17 Conn. 145.

The second writ runs, in such case, "we command you as we have *before* commanded you" (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs.

No waiver can make an *alias* attachment writ good and it is unauthorized; Dennison v. Blumenthal, 37 Ill. App. 385; an *alias* execution should not issue on return of the original which had been delivered long prior thereto, except it be shown that it had been delivered to an officer during its life, and had not been satisfied; People v. Brayton, 37 Ill. App. 319.

ALIAS DICTUS (Lat. otherwise called). A description of the defendant by adding to his real name that by which he is known in some writing on which he is to be charged, or by which he is known. Reid v. Lord, 4 Johns. (N. Y.) 118; Meredith v. Hinsdale, 2 Caines (N. Y.) 362; Petrie v. Woodworth, 3 Caines (N. Y.) 219. From long usage the word *alias* alone is now considered sufficient; Kennedy v. People, 39 N. Y. 245. See NAME.

ALIBI (Lat. elsewhere). Presence in another place than that described.

When a person, charged with a crime, proves *(se eadem die fuisse alibi)* that he was, at the time alleged, in a different place from that in which it was committed, he is said to prove an *alibi*, the effect of which is to lay a foundation for the necessary inference that he could not have committed it. See Bracton 140.

This proof is usually made out by the testimony of witnesses, but it is presumed it might be made out by writings; as if the party could prove by a record, properly authenticated, that on the day or at the time in question he was in another place.

It has been said that this defence must be subjected to a most rigid scrutiny, and that it must be established by a preponderance of proof; Com. v. Webster, 5 Cush. (Mass.) 324, 52 Am. Dec. 711; Washington Ben. Soc. v. Bacher, 20 Pa. 429; Creed v. People, 81 Ill. 565; State v. Reed, 62 Ia. 40, 17 N. W. 150. See remarks of Shaw, C. J., in Webster's Case, and 2 Alison's Cr. L. of Scotl. 624; Bish. Crim. L. 1061. In many states the defence is established if the evidence raises in the minds of the jury a reasonable doubt as to the guilt of the defendant; State v. Howell, 100 Mo. 628, 14 S. W. 4; Adams v. State, 28 Fla. 511, 10 South. 106; Pate v. State, 94 Ala. 14, 10 South. 665; People v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588; Howard v. State, 50 Ind. 190; People v. Pearsall, 50 Mich. 233, 15 N. W. 98; and if the testimony tends to prove an *alibi*, failure to instruct thereon is error; Fletcher v. State, 85 Ga. 666, 11 S. E. 872. An instruction that an *alibi* need not be established beyond a reasonable doubt, but it should be to the satisfaction of the jury, is correct; Peo-

ple v. Stone, 117 N. Y. 480, 23 N. E. 13; Caldwell v. State, 28 Tex. App. 566, 14 S. W. 122; Garrity v. People, 107 Ill. 162; State v. Jennings, 81 Mo. 185, 51 Am. Rep. 236; Ware v. State, 67 Ga. 349. It is peculiarly liable to be supported by perjury and false testimony of all sorts. There must be satisfactory proof that the prisoner could not have been at the place where the crime was committed, but the proof need not be higher than is required as to other facts; Johnson v. State, 59 Ga. 142. See State v. Northrup, 48 Ia. 583, 30 Am. Rep. 408; People v. Gam, 69 Cal. 552, 11 Pac. 183.

ALIEN (Lat. *alienus*, belonging to another; foreign). A foreigner; one of foreign birth.

In England, one born out of the allegiance of the king.

In the United States one born out of the jurisdiction of the United States and who has not been naturalized under their constitution and laws. 2 Kent 50.

The alien minor child of a naturalized citizen who has never dwelt in the United States is not invested with citizenship by the provision of § 2172, U. S. R. S. 1901, p. 1334, that minor children of naturalized citizens shall if dwelling in the U. S. be considered citizens thereof; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428.

Citizens of Porto Rico are not aliens; Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317.

As to right to sue, see ABATEMENT.

An American woman who marries a foreigner takes her husband's nationality, but not if she continues to reside in the United States; Wallenburg v. R. Co., 159 Fed. 217. If she resides abroad at the termination of the marriage relation, she may resume her citizenship by registering as an American citizen with a consul of the United States or by returning to the United States; Act of March 2, 1907.

A treaty with Japan securing to her subjects full liberty to enter, travel or reside in any part of the United States will not include such persons as are likely to become a public charge, or those forbidden to enter by the immigrant acts; The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; nor will any treaty give to a British subject any different measure of justice from our own; Barrington v. Missouri, 205 U. S. 487, 27 Sup. Ct. 582, 51 L. Ed. 890.

An alien cannot in general acquire title to real estate by descent, or by other mere operation of law; 7 Co. 25 *a*; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Hunt v. Warnicke's Heirs, Hard. (Ky.) 61; Geofroy v. Riggs, 133 U. S. 265, 10 Sup. Ct. 295, 33 L. Ed. 642; and if he purchase land, he may be divested of the fee, upon an inquest of office found; but until this is done he may sell, convey, or devise the lands and pass a good title to the same; Orr v. Hodgson, 4 Wheat. (U. S.) 453, 4 L. Ed. 613; Fox v. Southack, 12 Mass. 143; Mooers v. White, 6 Johns. Ch. (N. Y.) 365; Montgomery v. Dorion, 7 N. H. 475; 1 Washb. R. P. 49; Oregon Mtg. Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841. The state alone can question his right to hold land; Belden v. Wilkinson, 33 Misc. 659, 68 N. Y. Supp. 205; Madden v. State, 68 Kan. 658, 75 Pac. 1023. The disabilities of aliens in respect to holding lands are removed by statute in many of the states of the United States and by United States treaties; Bahuaud v. Bize, 105 Fed. 485, and cases cited. The California Act of May 19, 1913, permits that aliens not eligible to citizenship may hold land to the extent provided by any existing treaty between the United States and such aliens' nation (and also may hold land for agricultural purposes for a term of not over three years).

Provisions in regard to the transfer, devise or inheritance of property by aliens are fitting subjects of regulation under the treaty-making power of the United States, and a treaty will control or suspend the statutes of the individual states whenever it differs from them and, for that reason, if the subject of a foreign government is disqualified, under the laws of a state, from taking, holding or transferring real property, such disqualification will be removed if a treaty between the United States and such foreign government confers the right to take, hold, or transfer real property; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. So by virtue of treaties existing between the United States and France and Bavaria, citizens of the latter countries are exempt from the payment of a state tax imposed on foreign heirs and legatees; Succession of Dufour, 10 La. Ann. 391; Succession of Crusius, 19 *id.* 369; and by the "most favored nation" clause of the treaty with Italy, a subject of that country is likewise exempt from the same tax; Succession of Rixner, 48 La. Ann. 552, 19 South. 597, 32 L. R. A. 177.

The right of a state, in the absence of a treaty, to declare an alien capable of inheritance or taking property and holding the same within its borders, is not precluded by the constitution of the United States; Art. I, § 10, declaring that no state shall enter into any treaty, alliance or confederation; Blythe v. Hinckley, 180 U. S. 333, 21 Sup. Ct. 390, 45 L. Ed. 557.

An alien woman acquires citizenship by her marriage to an American, though she be an immigrant about to be deported; Hopkins v. Fachant, 130 Fed. 839, 65 C. C. A. 1.

After the termination of the marital relation, a woman who has acquired citizenship by marriage may retain it by continu-

ing in the United States. She may renounce it before a court having jurisdiction to naturalize aliens. If she reside abroad she may retain her citizenship by registering with a United States consul within the year; Act of March 2, '07.

The right to exclude or to expel aliens in war or in peace is an inherent and inalienable right of every independent nation; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; so in England; [1891] A. C. 272. Congress may exclude aliens altogether and prescribe the conditions upon which they may come to this country; U. S. v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543; and may have its policy in that respect enforced exclusively through executive officers without judicial intervention; The Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Nishimura Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Fok Ying Yo v. U. S., 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

What classes are excluded: Alien anarchists; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; all idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is satisfactorily shown that such person does not belong to one of the foregoing excluded classes or to the class of contract laborers; 26 Stat. L. 1084, U. S. Comp. Stat. 1901, p. 1294; Kaoru Yamataya v. Fisher, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; alien women for the purpose of prostitution or for any other immoral purpose are excluded; U. S. v. Bitty, 208 U. S. 393, 28 Sup. 396, 52 L. Ed. 543; and their importation is a crime against the United States; Act Feb. 20, 1907, 34 Stat. L. 898.

As to the exclusion of Chinese and Japanese, see those titles.

As to the nature of an alien's relation to the government, see ALLEGIANCE.

It is unlawful for any alien person or corporation to acquire, hold or own real estate or any interest therein in any of the territories of the United States, or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts, except where the right to hold and dispose of lands in the United States is secured by existing treaties with such foreign countries. Corporations of which more than twenty per cent. of the stock is held by aliens come within the same category; 24 U. S. Stat. L. 476; 1 R. S. Suppl. p. 556.

Foreign governments and their representatives may own real estate for legations or residences in the District of Columbia; 1 R. S. Suppl. 582.

An alien has a right to acquire personal estate, make and enforce contracts in relation to the same; he is protected from injuries and wrongs to his person and property; he may sue and be sued; 7 Co. 17; Dyer 2 *b*; Judd v. Lawrence, 1 Cush. (Mass.) 531; Slatter v. Carroll, 2 Sandf. Ch. (N. Y.) 582; Taylor v. Carpenter, 2 Woodb. & M. 1, Fed. Cas. No. 13,785; De Laveaga v. Williams, 5 Sawy. 573, Fed. Cas. No. 3,759; Airhart v. Massieu, 98 U. S. 491, 25 L. Ed. 213; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; McNair v. Toler, 21 Minn. 175; Crashley v. Pub. Co., 179 N. Y. 27, 71 N. E. 258, 1 Ann. Cas. 196. A state may debar an alien from holding stock in its corporations or admit him to that privilege on such terms as it may prescribe; State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138.

He may be an executor or administrator unless prohibited by statute; Cutler v. Howard, 9 Wis. 309; 1 Schouler's Ex'rs, 270, 537; Carthey v. Webb, 6 N. C. 268.

Discrimination in favor of local creditors is not unconstitutional where the effect of judgment in favor of an alien creditor would be to remove a fund to a foreign country there to be administered in favor of foreign creditors; The Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 28 Sup. Ct. 337, 52 L. Ed. 625. See 21 H. L. R. 537.

In England no alien can own a British ship or any share of one. He has no legal remedy in respect of an act of state. He will not be heard in an English court of law to complain of the acts of the English government. He has the protection of the laws of England against all private persons who do him an injury, but between him and the servants of the Crown, the laws are silent; 18 L. Q. Rev. 47.

See Pollock, Torts, as to what extent a resident alien is or ought to be protected against acts of state; See GOVERNMENTAL ACTS.

An alien may hold lands in Mexico, as a native, except that if within twenty leagues of the Northern frontier, he must have the consent of the government and if within five leagues of the coast, the consent of Congress; Taylor, Mex. Code, 1902, 313. The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of the immigration act of March 3, 1903, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien; Taylor v. U. S., 207 U. S. 120, 28 Sup. Ct. 53, 52 L. Ed. 130.

An alien, even after being naturalized, is ineligible to the office of president of the

United States, and in some states, as in New York, to that of governor; he cannot be a member of Congress till the expiration of seven years after his naturalization. An alien can exercise no political rights whatever; he cannot, therefore, vote at any political election, fill any office, or serve as a juror. See Bryce, Am. Com.; Collins v. Evans, 6 Johns. (N. Y.) 333. The disabilities of aliens may be removed and they may become citizens, under the provisions of the acts of Congress.

As to the case of alien enemies, see that title. As to contracts for alien labor, see LABOR.

As to their right to bring actions for death by wrongful act, see DEATH. See CHINESE; DEPORTATION; IMMIGRATION; JAPANESE; CITIZEN; NATURALIZATION; TREATY; EXPATRIATION; PARTIES.

ALIEN ENEMY. One who owes allegiance to the adverse belligerent. 1 Kent 73.

He who owes a temporary but not a permanent allegiance is an alien enemy in respect to acts done during such temporary allegiance only; and when his allegiance terminates, his hostile character terminates also; 1 B. & P. 163.

Alien enemies are said to have no rights, no privileges, unless by the king's special favor, during time of war; 1 Bla. Com. 372; Bynkershoek 195; 8 Term 166. But the tendency of modern law is to give them protection for person and property until ordered out of the country. If resident within the country, they may sue and be sued; 2 Kent 63; Clarke v. Morey, 10 Johns. (N. Y.) 69; Russel v. Skipwith, 6 Binn. (Pa.) 241; Zacharie v. Godfrey, 50 Ill. 186, 99 Am. Dec. 506; they may be sued as nonresident defendants; McVeigh v. U. S., 11 Wall. (U. S.) 259, 20 L. Ed. 80; Dorsey v. Kyle, 30 Md. 512, 96 Am. Dec. 617; and may be served by publication, even though they had no actual notice, being within the hostile lines; Dorsey v. Thompson, 37 Md. 25. Partnership with a foreigner is dissolved by the same event that makes him an alien enemy; Hanger v. Abbott, 6 Wall. (U. S.) 532, 18 L. Ed. 939. See WAR.

ALIEN AND SEDITION LAWS. See SEDITION.

ALIENAGE. The condition or state of an alien.

ALIENATE. To convey; to transfer. Co. Litt. 118 *b*. *Alien* is very commonly used in the same sense; 1 Washb. R. P. 53.

ALIENATION. The transfer of the property and possession of lands, tenements, or other things, from one person to another. Termes de la Ley.

It is particularly applied to absolute conveyances of real property; Conover v. Ins. Co., 1 N. Y. 290, 294. See CONVEYANCE; DEED.

By matter of record may be: Private acts of the legislature; grants, patents of lands, fines, common recovery. See CONVEYANCE; DEED; GRANT; FINE; COMMON RECOVERY; DEVISE; WILL.

In Medical Jurisprudence. A generic term denoting the different kinds of aberration of the human understanding. 1 Beck, Med. Jur. 535. See INSANITY.

ALIENATION OF AFFECTIONS. The rank and condition of the defendant cannot be considered in assessing damages, though his occupation and perhaps his social position may be shown; Bailey v. Bailey, 94 Ia. 598, 63 N. W. 341; and evidence of the condition of defendant as to means is not admissible. Such evidence must be confined to general reputation and not extended to particulars; Kniffen v. McConnell, 30 N. Y. 285; Chellis v. Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784; 2 Fost. & F. 160. In other cases it is said that "evidence of the defendant's property was admissible to show the extent of the injury"; Lawrence v. Cooke, 56 Me. 187, 96 Am. Dec. 443; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442; Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444.

See ENTICE.

ALIENATION OFFICE. An office in England to which all writs of covenants and entries were carried for the recovery of fines levied thereon.

ALIENEE. One to whom an alienation is made.

ALIENI GENERIS (Lat.). Of another kind.

ALIENI JURIS (Lat.). Subject to the authority of another. An infant who is under the authority of his father, or guardian, and a wife under the power of her husband, are said to be *alieni juris*. See SUI JURIS.

ALIENIGENA (Lat.). One of foreign birth; an alien. 7 Coke 31.

ALIENOR. He who makes a grant or alienation.

ALIGNMENT. The act of laying out or adjusting a line. The state of being so laid out or adjusted. The ground plan of a railway or other road or work as distinguished from its profile or gradients. Village of Chester v. Leonard, 68 Conn. 495, 37 Atl. 397.

ALIMENT. In Scotch Law. To support; to provide with necessaries. Paterson, Comp. §§ 845, 850.

Maintenance; support; an allowance from the husband's estate for the support of the wife. Paterson, Comp. § 893.

In Civil Law. Food and other things necessary to the support of life; money allowed for the purpose of procuring these. Dig. 50. 16. 43.

In Common Law. To supply with necessaries. Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194.

ALIMENTA (Lat. *alere*, to support). Things necessary to sustain life.

Under the term are included food, clothing, and a house; water also, it is said, in those regions where water is sold; Calvinus, Lex.; Dig. 50. 16. 43.

ALIMONY. The allowance which a husband by order of court pays to his wife, living separate from him, for her maintenance. 2 Bish. Marr. & D. 351; Chase v. Chase, 55 Me. 21; Odom v. Odom, 36 Ga. 286.

It is also commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce. Burrows v. Purple, 107 Mass. 432; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652; Hedrick v. Hedrick, 28 Ind. 291.

Alimony pendente lite is that ordered during the pendency of a suit in divorce.

Permanent alimony is that ordered for the use of the wife after the termination of the suit for divorce during their joint lives.

To entitle a wife to permanent alimony, the following conditions must be complied with:

First, a legal and valid marriage must be proved; 1 Rob. Eccl. 484; Purcell v. Purcell, 4 Hen. & M. (Va.) 507; McGee v. McGee, 10 Ga. 477; 5 Sess. Cas. N. S. Sc. 1288; Bowman v. Bowman, 24 Ill. App. 165. It will not be allowed where the marriage is denied; Hite v. Hite, 124 Cal. 389, 57 Pac. 227, 45 L. R. A. 793, 71 Am. St. Rep. 82; McKenna v. McKenna, 70 Ill. App. 340; Vreeland v. Vreeland, 18 N. J. Eq. 43; Collins v. Collins, 71 N. Y. 269; but see Schonwald v. Schonwald, 62 N. C. 219. But it has been held that where there had been a marriage which was void because the woman had another husband, alimony would be allowed; Cray v. Cray, 32 N. J. Eq. 25. So where there had been marriage ceremony, but its legality was questioned; Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255. In Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460, it was held that where the marriage is denied, the court will pass upon the question for the purpose of an application for alimony, and grant it if there is a fair presumption of marriage.

Second, by the common law the relation of husband and wife must continue to subsist; for which reason no alimony could be awarded upon a divorce *a vinculo matrimonii*, or a sentence of nullity; 1 Lee, Eccl. 621; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Davol v. Davol, 13 Mass. 264; Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Holmes v. Holmes, 4 Barb. (N. Y.) 295; Crane v. Meginnis, 1 Gill & J. (Md.) 463, 19 Am. Dec. 237; Richardson v. Wilson, 8 Yerg. (Tenn.) 67. This rule, however, has been very generally changed by statute in this country; 2 Bish. M. & D. § 376.

Third, the wife must be separated from the bed and board of her husband (or by divorce *a vinculo matrimonii*) by judicial decree; voluntary separation, for whatever cause, is insufficient. And, as a general rule, the alimony must be awarded by the same decree which grants the separation, or at least in the same suit, it not being generally competent to maintain a subsequent and independent suit for that purpose; Lawson v. Shotwell, 27 Miss. 630; Bankston v. Bankston, *id.* 692; Lyon v. Lyon, 21 Conn. 185; Fischli v. Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Richardson v. Wilson, 8 Yerg. (Tenn.) 67. The right to alimony need not be determined in the suit for divorce, if such right is reserved in the judgment; Galusha v. Galusha, 138 N. Y. 272, 33 N. E. 1062.

Fourth, the wife must not be the guilty party; Palmer v. Palmer, 1 Paige, Ch. (N. Y.) 276; Dailey v. Dailey, Wright (Ohio) 514; Pence v. Pence, 6 B. Monr. (Ky.) 496; Lovett v. Lovett, 11 Ala. 763; Sheafe v. Sheafe, 24 N. H. 564; Hickling v. Hickling, 40 Ill. App. 73; Spaulding v. Spaulding, 133 Ind. 122, 32 N. E. 224, 36 Am. St. Rep. 534; but in some states there are statutes in terms which permit the court, in its discretion, to decree alimony to the guilty wife; 2 Bish. M. & D. 378; [1892] Prob. Div. 1; and continued adultery of wife after divorce, is no ground for vacating a previous order allowing her permanent alimony; Cole v. Cole, 35 Ill. App. 544; Brooks v. Brooks, 18 W. N. C. (Pa.) 115.

It is said to be usual in a divorce decree in England to add the words *dum sola et casta* (while she remains unmarried and chaste), "no doubt for the reason that it would seem a parody of justice to suggest that a woman should lose her allowance if she marries again, but should not lose it if she lives with a man as his mistress. When indeed the reputation of the wife is spotless, these words may be omitted." [1898] P. 138.

It may be that a divorce is refused and yet alimony allowed to the wife, but not if the husband is willing to be reconciled on proper terms and has not abandoned her; Latham v. Latham, 30 Gratt. (Va.) 307.

In California, a divorce having been decreed against a non-resident, an order for alimony and for custody of children was vacated on appeal; 30 Am. Law Rev. 604, with elaborate discussion and criticism of this ruling. A decree for it cannot be made against a defendant who is not served with process for appearance, does not appear, or has no property within control of the court; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641. Whether it can be had after a final decree in the divorce case which is silent as to it, except through amendment of decree, *quære; id.*

Where a judgment for alimony is rendered in a court of one state, its enforcement in

another, according to the laws of the latter, is not a deprivation of property without due process of law; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810.

Alimony *pendente lite* is granted much more freely than permanent alimony, it being very much a matter of course to allow the former, unless the wife has sufficient separate property, upon the institution of a suit; 1 Hagg. Eccl. 773; 1 Curt. Eccl. 444; Logan v. Logan, 2 B. Monr. (Ky.) 142; Collins v. Collins, 2 Paige Ch. (N. Y.) 9; Rose v. Rose, 11 Paige Ch. (N. Y.) 166; Harding v. Harding, 40 Ill. App. 202; either for the purpose of obtaining a separation from bed and board; Smith v. Smith, 1 Edw. Ch. (N. Y.) 255; a divorce *a vinculo matrimonii;* Ryan v. Ryan, 9 Mo. 539; Jones v. Jones, 18 Me. 308, 36 Am. Dec. 723; Hewitt v. Hewitt, 1 Bland Ch. (Md.) 101; or a sentence of nullity, and whether the wife is plaintiff or defendant. The reason is that it is improper for the parties to live in matrimonial cohabitation during the pendency of such a suit, whatever may be its final result. She need only show probable ground for divorce to entitle her to alimony; Wooley v. Wooley, 24 Ill. App. 431. Upon the same principle, the husband who has all the money, while the wife has none, is bound to furnish her, whether plaintiff or defendant, with the means to defray her expenses in the suit; Jones v. Jones, 2 Barb. Ch. (N. Y.) 146; Story v. Story, Walk. Ch. (Mich.) 421; Daiger v. Daiger, 2 Md. Ch. Dec. 335; Tayman v. Tayman, 2 Md. Ch. Dec. 393. See Taylor v. Taylor, 46 N. C. 528. This alimony ceases as soon as the fault of the wife is finally determined; Dawson v. Dawson, 37 Mo. App. 207.

It has been held that a court of chancery has jurisdiction to grant alimony to a wife when the conduct of the husband renders it unsafe for her to live with him or he turns her out of doors; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; but there is a conflict of decisions as to whether, without a statute, an independent suit for alimony can be sustained; see 12 Am. Dec. 257, note, where the cases supporting both views are collected. Is not a matter of independent claim or right, but is incidental to a suit for divorce or other relief between husband and wife; Lynde v. Lynde, 54 N. J. Eq. 473, 35 Atl. 641.

Alimony is not a sum of money nor a specific proportion of the husband's estate given absolutely to the wife, but it is a continuous allotment of sums payable at regular intervals, for her support from year to year; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485; Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Clark v. Clark, 6 W. & S. (Pa.) 85; Miller v. Miller, 75 N. C. 70; Phelan v. Phelan, 12 Fla. 449; Crain v. Cavana, 62 Barb. (N. Y.) 109; but in some states statutory allowances of a gross sum have been given to the wife under the name of alimony; see Parsons v. Parsons, 9 N. H. 309, 32 Am. Dec. 362; Lyon v. Lyon, 21 Conn. 185; Herron v. Herron, 47 Ohio St. 544, 25 N. E. 420, 9 L. R. A. 667, 21 Am. St. Rep. 854; Burrows v. Purple, 107 Mass. 428; McClung v. McClung, 40 Mich. 493; Ross v. Ross, 78 Ill. 402; Williams v. Williams, 36 Wis. 362; Miller v. Clark, 23 Ind. 370; Blankenship v. Blankenship, 19 Kan. 159; Ex parte Spencer, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266. This would be enforced by the courts; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820, citing to the same effect Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417; followed in Whitney v. Warehouse Co., 183 Fed. 678, 106 C. C. A. 28; if in gross it should not ordinarily exceed one-half the husband's estate; McCartin v. McCartin, 37 Mo. App. 471. It must secure to her as wife a maintenance separate from her husband; an absolute title in specific property, or a sale of a part of the husband's estate for her use, cannot be decreed or confirmed to her as alimony; 3 Hagg. Eccl. 322; Maguire v. Maguire, 7 Dana (Ky.) 181; Wallingsford v. Wallingsford, 6 Harr. & J. (Md.) 485; Purcell v. Purcell, 4 Hen. & M. (Va.) 507; Rogers v. Vines, 28 N. C. 293. Nor is alimony regarded, in any general sense, as the separate property of the wife. Hence she can neither alienate nor charge it; Romaine v. Chauncey, 60 Hun 477, 15 N. Y. Supp. 198; if she suffers it to remain in arrear for more than one year, it has been held that she cannot generally recover such arrears; 3 Hagg. Eccl. 322; if she saves anything from her annual allowance, upon her death it will go to her husband; Clark v. Clark, 6 W. & S. (Pa.) 85; Sterling v. Sterling, 12 Ga. 201; if there are any arrears at the time of her death, they cannot be recovered by her executors; 8 Sim. 321; 8 Term 545; Clark v. Clark, 6 W. & S. (Pa.) 85; as the husband is only bound to support his wife during his own life, her right to alimony ceases with his death; Smith v. Smith, 1 Root (Conn.) 349; Sloan v. Cox, 4 Hayw. (Tenn.) 75; Jamison v. Jamison, 4 Md. Ch. Dec. 289; Wilson v. Hinman, 182 N. Y. 408, 75 N. E. 236, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820; Wagoner v. Wagoner, 132 Mich. 343, 93 N. W. 889; Lockwood v. Krum, 34 Ohio St. 1; Whitney v. Elevator & Warehouse Co., 183 Fed. 678, 106 C. C. A. 28; Martin v. Martin, 33 W. Va. 695, 11 S. E. 12; Storey v. Storey, 23 Ill. App. 558; Stahl v. Stahl, 114 Ill. 375, 2 N. E. 160; Casteel v. Casteel, 38 Ark. 477; and see Miller v. Miller, 64 Me. 484; In re Lawton, 12 R. I. 210; and it ceases upon reconciliation and cohabitation. The cases upon the effect of the husband's death upon a decree for alimony involve the question whether alimony is to be considered merely as support to which the wife is entitled by virtue of the marital relation, or as her interest in the joint prop-

erty. They are collected in a note in 2 L. R. A. (N. S.) 232, where it is said that they cannot be satisfactorily harmonized on either theory.

Its amount is liable at any time to be increased or diminished at the discretion of the court; 8 Sim. 315; Clark v. Clark, 6 W. & S. (Pa.) 85; and the court may insert a provision in the decree allowing any interested party thereafter to apply, on account of changed conditions, for a modification of the amount allowed; Stahl v. Stahl, 59 Hun 621, 12 N. Y. Supp. 854. If, however, the right is not reserved in the decree or given by statute, the amount cannot subsequently be varied in the case of absolute divorce; Howell v. Howell, 104 Cal. 45, 37 Pac. 770, 43 Am. St. Rep. 70; Walker v. Walker, 155 N. Y. 77, 49 N. E. 663; otherwise under a decree for separation; Taylor v. Taylor, 93 N. C. 418, 53 Am. Rep. 460. And where a statute authorizes the amount decreed for alimony to be changed, it cannot operate retrospectively, as thereby it would deprive the person of property without due process of law; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600.

Equity has power to modify provisions as to alimony and to retain jurisdiction over such decrees. Where an agreement between the parties provides for something more than alimony (as where it binds the husband to pay the wife a certain sum until her death, irrespective of whether she survives him or not, and transfers certain property to her absolutely and to trustees to pay her an allowance during her life and such agreement is embodied in the divorce decree), equity should not afterwards destroy the agreement although the wife marries again; but three judges dissented on the ground that the insertion of such an agreement in the decree was improper and that the decree should be set aside, the wife retaining her rights at law for the breach of the agreement; Emerson v. Emerson, 120 Md. 584, 87 Atl. 1033.

The preceding observations respecting the nature and incidents of alimony should be received with some caution in this country, where the subject is so largely regulated by statute; Burr v. Burr, 10 Paige, Ch. (N. Y.) 20; *id.*, 7 Hill (N. Y.) 207. It is said that alimony cannot be regarded as a debt owing from a husband to wife; Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; but that it is rather to be considered as a penalty imposed for the failure to perform a duty; Wetmore v. Markoe, 196 U. S. 74, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544. Nor is it a debt within the meaning of the constitutional inhibition against imprisonment for debt; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625. And a discharge in bankruptcy does not bar the collection of arrears of alimony and the allowance for the support of minor children; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084; Wetmore v. Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann. Cas. 265; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; and see Beach v. Beach, 29 Hun (N. Y.) 181; *contra*, Arrington v. Arrington, 131 N. C. 143, 42 S. E. 554, 92 Am. St. Rep. 769.

The amount to be awarded depends upon a great variety of considerations and is governed by no fixed rules; Ricketts v. Ricketts, 4 Gill (Md.) 105; Burr v. Burr, 7 Hill (N. Y.) 207; Richmond v. Richmond, 2 N. J. Eq. 90; McGee v. McGee, 10 Ga. 477; Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 28 Ky. L. Rep. 1355, 4 L. R. A. (N. S.) 909. The ability of the husband, however, is a circumstance of more importance than the necessity of the wife, especially as regards permanent alimony; and in estimating his ability his entire income will be taken into consideration, whether it is derived from his property or his personal exertions; 3 Curt. Eccl. 3, 41; McCrocklin v. McCrocklin, 2 B. Monr. (Ky.) 370; Bursler v. Bursler, 5 Pick. (Mass.) 427; Battey v. Battey, 1 R. I. 212; Small v. Small, 28 Neb. 843, 45 N. W. 248; McGrady v. McGrady, 48 Mo. App. 668.

Future expectations may be taken into consideration; Cralle v. Cralle, 84 Va. 198, 6 S. E. 12; Horning v. Horning, 107 Mich. 587, 65 N. W. 555; Muir v. Muir, 133 Ky. 125, 92 S. W. 314, 4 L. R. A. (N. S.) 909 and note. But if the wife has separate property; 2 Phill. 40; or derives income from her personal exertions, this will also be taken into account. If she has sufficient means to support herself in the rank of life in which she moved, she is entitled to no alimony; Stevens v. Stevens, 49 Mich. 504, 13 N. W. 835; Miller v. Miller, 75 N. C. 70; 2 Hagg. Consis. 203. The method of computation is, to add the wife's annual income to her husband's; consider what, under all the circumstances, should be allowed her out of the aggregate; then from the sum so determined deduct her separate income, and the remainder will be the annual allowance to be made her. There are various other circumstances, however, beside the husband's ability, to be taken into consideration: as, whether the bulk of the property came from the wife, or belonged originally to the husband; Fishli v. Fishli, 2 Litt. (Ky.) 337; Robbins v. Robbins, 101 Ill. 416; or was accumulated by the joint exertions of both, subsequent to the marriage; Lovett v. Lovett, 11 Ala. 763; Jeans v. Jeans, 2 Harr. (Del.) 142; whether there are children to be supported and educated, and upon whom their support and education devolves; Amos v. Amos, 4 N. J. Eq. 171; Fishli v. Fishli, 2 Litt. (Ky.) 337; McGee v. McGee, 10 Ga. 477; Emerson v. Emerson, 68

Hun (N. Y.) 37, 22 N. Y. Supp. 684; Parkhurst v. Race, 100 Ill. 570; Call v. Call, 65 Me. 407; Halleman v. Halleman, 65 Ga. 476; the nature and extent of the husband's *delictum;* 3 Hagg. Eccl. 657; Turrel v. Turrel, 2 Johns. Ch. (N. Y.) 391; Williams v. Williams, 4 Dec. Eq. (S. C.) 183; Sheafe v. Sheafe, 24 N. H. 564; the demeanor and conduct of the wife towards the husband who desires cohabitation; Burr v. Burr, 7 Hill (N. Y.) 207; Dejarnet v. Dejarnet, 5 Dana (Ky.) 499; Stewartson v. Stewartson, 15 Ill. 145; Jones v. Jones, 95 Ala. 443, 11 South. 11, 18 L. R. A. 95; the condition in life, place of residence, health, and employment of the husband, as demanding a larger or smaller sum for his own support; 1 Hagg. Eccl. 526, 532; the condition in life, circumstances, health, place of residence, and consequent necessary expenditures of the wife; Bursler v. Bursler, 5 Pick. (Mass.) 427; Ricketts v. Ricketts, 4 Gill (Md.) 105; Lovett v. Lovett, 11 Ala. 763; the age of the parties; Miller v. Miller, 6 Johns. Ch. (N. Y.) 91; Ricketts v. Ricketts, 4 Gill (Md.) 105; Schlosser v. Schlosser, 29 Ind. 488; the ability of the husband to work; Canine v. Canine, 16 S. W. 367, 13 Ky. L. Rep. 124; Snedager v. Kincaid, 60 S. W. 522, 22 Ky. L. Rep. 1347; Furth v. Furth (N. J.) 39 Atl. 128; and whatever other circumstances may address themselves to a sound judicial discretion.

So far as any general rule can be deduced from the decisions and practice of the courts, the proportion of the joint income to be awarded for permanent alimony is said to range from one-half, where the property came from the wife (2 Phill. 235), to one-third, which is the usual amount; 29 L. J. Mat. Cas. 150; Ricketts v. Ricketts, 4 Gill (Md.) 105; Forrest v. Forrest, 8 Bosw. (N. Y.) 640; Musselman v. Musselman, 44 Ind. 106; Turner v. Turner, 44 Ala. 437; or even less; Draper v. Draper, 68 Ill. 17; Garner v. Garner, 38 Ind. 139. In case of alimony *pendente lite*, it is not usual to allow more than about one-fifth, after deducting the wife's separate income; 2 Bish. Mar. Div. & Sep. § 945; and generally a less proportion will be allowed out of a large estate than a small one; for, though no such rule exists in respect to permanent alimony, there may be good reasons for giving less where the question is on alimony during the suit; when the wife should live in seclusion, and needs only a comfortable subsistence; 2 Phill. Eccl. 40. See Llamosas v. Llamosas, 4 Thomp. & C. (N. Y.) 574; Briggs v. Briggs, 36 Ia. 383; Harrell v. Harrell, 39 Ind. 185; Williams v. Williams, 29 Wis. 517.

Courts will take judicial notice that it is not infrequent in divorce proceedings for parties to agree on details of alimony; Whitney v. Warehouse Co., 183 Fed. 678, 106 C. C. A. 28.

An action upon a decree for alimony may be maintained in a court of another state where the amount is fixed and presently due and enforceable, but not when payable in future instalments; Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249, where the cases are critically reviewed; Page v. Page, 189 Mass. 85, 75 N. E. 92, 4 Ann. Cas. 296; *contra*, where there is power to change the decree for payments; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 19 L. R. A. (N. S.) 245, 129 Am. St. Rep. 477. Generally speaking, when a decree is rendered for alimony payable in instalments, the right to such instalments becomes absolute and vested upon becoming due and is protected by the full faith and credit clause of the United States constitution, provided, that no modification of the decree has been made prior to the maturity of the instalments. This general rule does not obtain where, by the law of the state in which such judgment is rendered, the right to such future alimony is discretionary with the court which made the decree, to such an extent that no absolute or vested right attaches to receive the instalments ordered to be paid; even although no application to annul or modify the decree in respect to alimony had been made prior to the instalments becoming due; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

Though an action on a decree for alimony rendered in one state may be maintained in another state if the amount payable is fixed and presently due, yet a decree for alimony becoming due in the future and payable in instalments is not a final decree enforceable in another state, within the full faith and credit clause, until the court which rendered it fixes the specific amount due; Hunt v. Monroe, 32 Utah, 428, 91 Pac. 269, 11 L. R. A. (N. S.) 249; Israel v. Israel, 148 Fed. 576, 79 C. C. A. 32, 9 L. R. A. (N. S.) 1168, 8 Ann. Cas. 697.

Although judgments are, by statute, liens on the defendant's real estate, a decree for alimony payable by instalments does not create a lien unless the record affirmatively shows that the court so intended; Scott v. Scott, 80 Kan. 489, 103 Pac. 1005, 25 L. R. A. (N. S.) 132, 133 Am. St. Rep. 217, 18 Ann. Cas. 564, and note. It is held that a decree for alimony in gross operates as a lien on the husband's lands; Holmes v. Holmes, 29 N. J. Eq. 9; Coffman v. Finney, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794; so of a monthly allowance; Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; but it is held that in the absence of a statute there is no lien; Kerr v. Kerr, 216 Pa. 641, 66 Atl. 107, 9 Ann. Cas. 89; Swansen v. Swansen, 12 Neb. 210, 10 N. W. 713; Kurtz v. Kurtz, 38 Ark. 119; In re Lawton, 12 R. I. 210; Campbell v. Trosper, 108 Ky. 602, 57 S. W. 245. A New York decree di-

recting the husband to mortgage his New Jersey lands to secure alimony will not be enforced in New Jersey; Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528.

Alimony, suit money and counsel fees cannot be allowed to the husband; State v. Templeton, 18 N. D. 525, 123 N. W. 283, 25 L. R. A. (N. S.) 234; Hoagland v. Hoagland, 19 Utah 103, 57 Pac. 20. Some allowance was made in Casey v. Casey, 116 Ia. 655, 88 N. W. 937, and 5 Quebec Pr. Rep. 137, under peculiar circumstances.

For an outside agreement for support of wife, not made part of a decree, see Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084.

See notes in 34 L. R. A. 110, and 25 L. R. A. (N. S.) 234.

ALIO INTUITU. Under a different aspect; with respect to another case or condition. 6 M. & S. 231. See DIVERSO INTUITU.

ALITER (Lat.). Otherwise; as otherwise held or decided.

ALIUNDE (Lat.). From another place. Evidence *aliunde* (*i. e.* from without the will) may be received to explain an ambiguity in a will. 1 Greenl. Ev. § 291. The word is also used in the same sense with respect to the admission of evidence to modify or explain other documents, generally treated as conclusive.

ALL. Completely, wholly, the whole amount, quantity or number.

It is frequently used in the sense of "each" or "every one of;" Sherburne v. Sischo, 143 Mass. 442, 9 N. E. 797; Towle v. Delano, 144 Mass. 100, 10 N. E. 769; 54 L. J. Q. B. 539; and is a general rather than a universal term, to be understood in one sense or the other according to the demands of sound reason; Kieffer v. Ehler, 18 Pa. 391; 9 Ves. Jr. 137. As to its use in a will, see DEVISE.

ALL AND SINGULAR. All without exception.

ALL FAULTS. A term in common use in the trade. A sale of goods with "all faults," in the absence of fraud on the part of the vendor, covers all such faults and defects as are not inconsistent with the identity of the goods as the goods described; Whitney v. Boardman, 118 Mass. 242; 5 B. & Ald. 240.

ALL FOURS. A metaphorical expression, signifying that a case agrees in all its circumstances with another.

ALLEGATA. A word which the emperors formerly signed at the bottom of their rescripts and constitutions; under other instruments they usually wrote *signata* or *testata*. Encyc. Lond.

ALLEGATA ET PROBATA (Lat. things alleged and proved). The allegations made by a party to a suit, and the proof adduced in their support.

It is a general rule of evidence that the *allegata* and *probata* must correspond; that is, the proof must at least be sufficiently extensive to cover all the allegations of the party which are material; 1 Greenl. Ev. § 51; The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12,342; White v. Noland, 3 Mart. N. S. (La.) 636; Boone v. Chiles, 10 Pet. (U. S.) 177, 9 L. Ed. 388.

ALLEGATION. The assertion, declaration, or statement of a party of what he can prove.

In Ecclesiastical Law. The statement of the facts intended to be relied on in support of a contested suit.

It is applied either to the libel, or to the answer of the respondent setting forth new facts, the latter being, however, generally called the *defensive allegation*. See 1 Browne, Civ. Law, 472, 473, n.

ALLEGATION OF FACULTIES. A statement made by the wife of the property of her husband, for the purpose of obtaining alimony. Lovett v. Lovett, 11 Ala. 763; Wright v. Wright, 3 Tex. 168.

To such an allegation the husband makes answer, upon which the amount of alimony is determined; 2 Lee, Eccl. 593; 3 Phill. Eccl. 387; or she may produce other proof, if necessary in consequence of his failure to make a full and complete disclosure; 2 Hagg. Cons. 199; 2 Bish. M. & Div. § 1082.

ALLEGIANCE. The tie which binds the citizen to the government, in return for the protection which the government affords him. The duty which the subject owes to the sovereign, correlative with the protection received.

It is a comparatively modern corruption of ligeance (*ligeantia*), which is derived from liege (*ligius*), meaning absolute or unqualified. It signified originally liege fealty, i. e. absolute and unqualified fealty. 18 L. Q. Rev. 47.

Acquired allegiance is that binding a citizen who was born an alien, but has been naturalized.

Local or *actual allegiance* is that which is due from an alien while resident in a country in return for the protection afforded by the government. From this are excepted foreign sovereigns and their representatives, naval and armed forces when permitted to remain in or pass through the country or its waters.

Natural allegiance is that which results from the birth of a person within the territory and under the obedience of the government. 2 Kent 42.

Allegiance may be an absolute and permanent obligation, or it may be a qualified and temporary one; the citizen or subject owes the former to his government or sovereign, until by some act he distinctly renounces it, whilst the alien domiciled in the country

owes a temporary and local allegiance continuing during such residence; Carlisle v. U. S., 16 Wall. (U. S.) 154, 21 L. Ed. 426.

At common law, in England and America, natural allegiance could not be renounced except by permission of the government to which it was due; 1 Bla. Com. 370, 371; 1 East, Pl. Cr. 81; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617; Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. Ed. 666; but see 8 Op. Att.-Gen. U. S. 139; 9 *id.* 356. Held to be the law of Great Britain in 1868; Cockb. Nationality. After many negotiations between the two countries, the rule has been changed in the United States by act of July 27, 1868, and in England by act of May 14, 1870. Whether natural allegiance revives upon the return of the citizen to the country of his allegiance is an open question; Whart. Confl. L. § 6. See Cockb. Nationality; Webster, Citizenship; Webster, Naturalization; 2 Whart. Int. L. Dig. ch. vii.; Whart. Confl. L.; Lawrence's Wheat. Int. L. App. It is said to be due to the king in his political, not his personal, capacity; L. R. 17 Q. B. D. 54, quoted in U. S. v. Wong Kim Ark, 169 U. S. 663, 18 Sup. Ct. 456, 42 L. Ed. 890; and so in this country "it is a political obligation" depending not on ownership of land, but on the enjoyment of the protection of government; Wallace v. Harmstad, 44 Pa. 492; and it "binds the citizen to the observance of all laws" of his own sovereign; Adams v. People, 1 N. Y. 173. See ALIEN; NATURALIZATION; EXPATRIATION.

ALLEGING DIMINUTION. See DIMINUTION OF THE RECORD.

ALLEVIARE. To levy or pay an accustomed fine. Cowell.

ALLEY. See STREET.

ALLIANCE. The union or connection of two persons or families by marriage; affinity.

In International Law. A contract, treaty, or league between two or more sovereigns or states, made for purposes of aggression or defence.

Defensive alliances are those in which a nation agrees to defend her ally in case the latter is attacked.

Offensive alliances are those in which nations unite for the purpose of making an attack, or jointly waging the war against another nation.

The term is also used in a wider sense, embracing unions for objects of common interest to the contracting parties, as the "Holy Alliance" entered into in 1815 by Prussia, Austria and Russia for the purpose of counteracting the revolutionary movement in the interest of political liberalism.

ALLISION. Running one vessel against another.

To be distinguished from collision, which denotes the running of two vessels against each other.

The distinction is not very carefully observed, but collision is used to denote cases strictly of allision.

ALLOCATIO NE FACIENDA. In English Law. A writ directed to the lord treasurer and barons of the exchequer, commanding that an allowance be made to an accountant for such moneys as he has lawfully expended in his office.

ALLOCATION. An allowance upon an account in the English Exchequer. Cowell. Placing or adding to a thing. Encyc. Lond.

ALLOCATO COMITATU. A new writ of exigent, allowed before any other county court, issued on the former not being fully served or complied with. Fitz. Exigent 14.

ALLOCATUR (Lat., it is allowed).

A Latin word formerly used to denote that a writ or order was allowed. See State v. Vanderveer, 7 N. J. L. 38.

A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account. Lee, Dict.; Archb. Pr. 129.

Where an appeal can be taken only by permission of the court, it is said to be by special allocatur.

ALLOCATUR EXIGENT. A writ of exigent which issued in a process of outlawry, upon the sheriff's making return to the original exigent that there were not five county courts held between the *teste* of the original writ and the return day. 1 Tidd, Pr. 128.

ALLOCUTION. The formal address of the judge to the prisoner, asking him if he has anything to say why sentence should not be pronounced against him.

In case of conviction of an offence not capital the omission is not fatal and the judgment will not be reversed therefor; State v. Ball, 27 Mo. 324.

In England it was held error, "for it is a necessary question, because he may have a pardon to plead, or may move in arrest of judgment," and for that reason the attainder was reversed; 3 Salk. 358; 2 *id.* 630. But in this country it is not material "whether a pardon was produced before or after judgment, as no attainder or other such consequences result from a capital conviction here, which a pardon may not remove"; State v. Ball, 27 Mo. 324. Form of entry was: "And thereupon it is forthwith demanded of the said J. S., if he hath or knoweth anything to say why the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless as he had before said. Whereupon," etc. Arch. Cr. Pl. & Pr. (23d ed.) 226.

ALLODIAL. Held in *alodum.* See ALOD, where the more recent understanding of the meaning and the accepted spelling of these words are found.

ALLONGE (Fr.). A piece of paper annexed to a bill of exchange or promissory note, on which to write endorsements for which there is no room on the instrument itself. Pardessus, n. 343; Story, Prom. Notes, §§ 121, 151; Tied. on Com. Paper 264. See INDORSEMENT.

ALLOTMENT. A share or portion; that which is allotted.

The division or distribution of land.

Allotment System. A system in England of assigning small portions of land, from the eighth of an acre to four or five acres, to be cultivated by day-laborers after their ordinary day's work. Brande.

Allotment Certificate. A document issued to an applicant for shares in a company or public loan announcing the number of shares allotted or assigned and the amounts and due dates of the calls or different payments to be made on the same. Where a letter withdrawing an application for shares was received after the shares had been allotted, but before the notice of allotment was mailed, the applicant was held entitled to have his name removed from the register of shareholders and to have the deposit returned; 81 L. T. R. 512. See SHAREHOLDER.

To constitute a public allotment of shares there must be an issue to persons other than those taking shares in payment of wares or for work done, or as a qualification for a seat on the board; 19 T. L. R. 614.

An allotment of shares is an appropriation by the directors of a company of shares to a particular person, but it does not necessarily create the status of membership; 80 L. T. 347.

ALLOTMENT NOTE. "A writing by a seaman, whereby he makes an assignment of part of his wages in favor of his wife, father or mother, grandfather or grandmother, brother or sister. Every allotment note must be in a form sanctioned by the Board of Trade. The allottee, that is the person in whose favor it is made, may recover the amount before justices of the peace." Moz. & Wh.

ALLOW. To sanction, either directly or indirectly; as opposed to merely suffering a thing to be done. [1894] 2 Q. B. 412. A claim is said to be *allowed* by a court.

To permit; Kearns v. Kearns, 107 Pa. 575; Doty v. Lawson, 14 Fed. 892; 3 H. & C. 75; to yield; Doty v. Lawson, 14 Fed. 892; to suffer, to tolerate; Gregory v. U. S., 17 Blatchf. 325, Fed. Cas. No. 5,803; to fix; Hinds v. Marmolejo, 60 Cal. 229; to substitute by way of compensation something for another; Glenn v. Glenn, 41 Ala. 571. I allow to give is equivalent to I intend to give; Harmon v. James, 7 Ind. 263; Hunter v. Stembridge, 12 Ga. 192; it is used as a synonym of intent by unlearned persons in wills; *id.*; it is also used as an equivalent of I will; Ramsey v. Hanlon, 33 Fed. 425. In the National Banking Act, providing that interest may be taken at a rate "allowed by the laws of the state or territory," it means fixed; Hinds v. Marmolejo, 60 Cal. 229.

ALLOWANCE. A definite sum or quantity set apart or granted. The share or portion given to a married woman, child, trustee, etc. Smith v. Smith, 45 Ala. 264. It is said to include what is awarded to a trustee for expenses, etc., in addition to his legal fees; Downing v. Marshall, 37 N. Y. 380; or a perquisite to an officer in addition to his salary, as for room, fire or light; 14 Q. B. D. 735; 23 *id.* 66, 531. The term is ordinarily only another name for a gift or gratuity to a child or other dependent; Taylor v. Staples, 8 R. I. 170, 5 Am. Rep. 556.

The term is not properly used to express contractual relation or regular compensation, but applies rather to the case of voluntary action in favor of dependents, servants or the poor; Mangam v. City of Brooklyn, 98 N. Y. 585, 50 Am. Rep. 705, where the meaning of the word is discussed critically and at length. It has been used in a judge's certificate as the equivalent of settlement; Atchison, T. & S. F. R. Co. v. Cone, 37 Kan. 567, 15 Pac. 499; or to express the approval of the court; Gildart's Heirs v. Starke, 1 How. (Miss.) 450.

ALLUVIO MARIS (Lat.). Soil formed by the washing-up of earth from the sea. Schultes, Aq. Rights 138.

ALLUVION. That increase of the earth on a bank of a river, or on the shore of the sea, by the force of the water, as by a current or by waves, or from its recession in a navigable lake, which is so gradual that no one can judge how much is added at each moment of time. Inst. l. 2, t. 1, § 20; 3 B. & C. 91; Ang. Watercourses 53; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 551; Lovingston v. St. Clair County, 64 Ill. 58, 16 Am. Rep. 516; Gould, Waters § 155.

Conversely, where land is submerged by the gradual advance of the sea, the sovereign acquires the title to the part thereby covered and it ceases to belong to the former owner; Wilson v. Shiveley, 11 Or. 217, 4 Pac. 324; 5 Mees & W. 327, 4 C. P. D. 438; Trustees, etc., of Town of East Hampton v. Kirk, 84 N. Y. 218, 38 Am. Rep. 505.

The proprietor of the bank increased by alluvion is entitled to the addition, this being regarded as the equivalent for the loss he may sustain from the encroachment of the waters upon his land; Chapman v. Hoskins, 2 Md. Ch. Dec. 485; Ingraham v. Wilkinson, 4 Pick. (Mass.) 273, 16 Am. Dec. 342; Murry v. Sermon, 8 N. C. 56; Lamb v. Ricketts, 11 Ohio, 311; Municipality No. 2 v. Cotton Press, 18 La. 122, 36 Am. Dec. 624; Handly v. Anthony, 5 Wheat. (U. S.) 380, 5 L. Ed.

113; Gerrish v. Clough, 48 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; Lovingston v. County of St. Clair, 64 Ill. 56, 16 Am. Rep. 516; Niehaus v. Shepherd, 26 Ohio St. 40; Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270; Kraut v. Crawford, 18 Ia. 549, 87 Am. Dec. 414; Jefferis v. Land Co., 134 U. S. 178, 10 Sup. Ct. 518, 33 L. Ed. 872; Freeland v. R. R. Co., 197 Pa. 529, 47 Atl. 745, 58 L. R. A. 206, 80 Am. St. Rep. 850; Rutz v. Seeger, 35 Fed. 188; Goodsell v. Lawson, 42 Md. 348. The increase is to be divided among riparian proprietors by the following rule: measure the whole extent of their ancient line on the river, and ascertain how many feet each proprietor owned on this line; divide the newly-formed river-line into equal parts, and appropriate to each proprietor as many of these parts as he owned feet on the old line, and then draw lines from the points at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed shore. In applying this rule, allowance must be made for projections and indentations in the old line; Inhabitants of Deerfield v. Pling Arms, 17 Pick. (Mass.) 41, 28 Am. Dec. 276; Emerson v. Taylor, 9 Greenl. (Me.) 44, 23 Am. Dec. 531; Batchelder v. Keniston, 51 N. H. 496, 12 Am. Rep. 143; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; see Clark v. Campau, 19 Mich. 325; Johnston v. Jones, 1 Black. (U. S.) 209, 17 L. Ed. 117; Kehr v. Snyder, 114 Ill. 313, 2 N. E. 68, 55 Am. Rep. 866. Where the increase is instantaneous, it belongs to the sovereign, upon the ground that it was a part of the bed of the river of which he was proprietor; Hagen v. Campbell, 8 Port. (Ala.) 9, 33 Am. Dec. 267; 2 Bla. Com. 269; the character of *alluvion* depends upon the addition being imperceptible; 3 B. & C. 91; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59; Municipality No. 2 v. Cotton Press, 18 La. 122, 36 Am. Dec. 624.

Sea-weed thrown upon a beach, as partaking of the nature of alluvion, belongs to the owner of the beach; Phillips v. Rhodes, 7 Metc. (Mass.) 322; Emans v. Turnbull, 2 Johns. (N. Y.) 322, 3 Am. Dec. 427; 3 B. & Ad. 967; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46; Clement v. Burns, 43 N. H. 609; Trustees of East Hampton v. Kirk, 68 N. Y. 459; *id.*, 84 N. Y. 215, 38 Am. Rep. 505. But sea-weed below low-water mark on the bed of a navigable river belongs to the public; Chapman v. Kimball, 9 Conn. 38, 21 Am. Dec. 707; Mather v. Chapman, 40 Conn. 382, 16 Am. Rep. 46; Nudd v. Hobbs, 17 N. H. 527; Peck v. Lockwood, 5 Day (Conn.) 22.

The doctrine as to alluvion is equally applicable to tide-waters, non-tidal rivers and lakes; Gould, Waters § 155; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59; Lovingston v. County, 64 Ill. 56, 16 Am. Rep. 516; Benson v. Morrow, 61 Mo. 345; Ridgway v. Ludlow, 58 Ind. 248; 4 C. P. D. 438; 7 H. & N. 151.

Alluvion differs from avulsion in this, that the latter is sudden and perceptible; County of St. Clair v. Lovingston, 23 Wall. (U. S.) 46, 23 L. Ed. 59. See AVULSION. And see 2 Ld. Raym. 737; Cooper, Inst. l. 2, t. 1; Ang. Waterc. § 53; Phill. Int. Law 255; Ang. Tide Waters 249; Inst. 2. 1. 20; Dig. 41. 1. 7; *id.* 39. 2. 9; *id.* 6. 1. 23; *id.* 41. 1. 5. For an interesting English case involving the *jus alluvion*, see address of M. Crackanthorpe before Am. Bar Assn. Report 1896. See ACCRETION; RIPARIAN PROPRIETORS.

ALLY. A nation which has entered into an alliance with another nation. 1 Kent 69.

A citizen or subject of one of two or more allied nations. 4 C. Rob. Adm. 251; 6 *id.* 205; Miller v. The Resolution, 2 Dall. (U. S.) 15, 1 L. Ed. 263; Dane, Abr. Index.

ALMANAC. A book or table containing a calendar of days, weeks, and months, to which various statistics are often added, such as the times of the rising and setting of the sun and moon, etc. Whewell.

The court will take judicial notice of an almanac; 3 Bla. Com. 333; State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; Reed v. Wilson, 41 N. J. L. 29; People v. Chee Kee, 61 Cal. 404.

ALMARIA. The archives, or, as they are sometimes styled, muniments of a church or library.

ALMOIN. Alms. See FRANKALMOIN.

ALMONER. One charged with the distribution of alms. The office was first instituted in religious houses and although formerly one of importance is now in England almost a sinecure. See LORD HIGH ALMONER.

ALMS. Any species of relief bestowed upon the poor.

That which is given by public authority for the relief of the poor. Shelf. Mortm. 802, note (X); Hayw. Elect. 263; 1 Dougl. El. Cas. 370; 2 *id.* 107. As to its meaning historically, see 1 Poll. & Maitl. 219.

ALMS FEE. Peter's pence, which see.

ALMSHOUSE. A house for the publicly supported paupers of a city or county. People v. City of New York, 36 Hun (N. Y.) 311. In England an almshouse is not synonymous with a workhouse or poorhouse, being supported by private endowment.

ALNAGER (spelled also *Ulnager*). A public sworn officer of the king, who, by himself or his deputy, looks to the assize of woollen cloth made throughout the land, and to the putting on the seals for that purpose ordained. Statute 17 Ric. II. c. 2; Cowell; Blount; Termes de la Ley.

ALOD, ALODIUM. It is a term used in opposition to *feodum* or *fief*, which means property, the use of which was bestowed up-

on another by the proprietor, on condition that the grantee should perform certain services for the grantor, and upon the failure of which the property should revert to the original possessor. See 1 Poll. & Maitl. 45.

A kind of tenure in England, not infrequently mentioned in Domesday Book. It is a French term and, in Continental law, is opposed to *feudum*. But no such opposition can be traced in the English common law after the Conquest. All ownership of land in England resolved itself into *tenure*, derived from a royal grant in consideration of *service*. There was no independent property in English feudal law like the *dominium* of Roman law, or like the *alleu* of Southern France. Vinogradoff, Engl. Soc. in Eleventh Cent. 236. Maitland (Domesday Book and Beyond 154) takes the same view: "Such sparse evidence as we can obtain from Normandy strengthens our belief that the wide, the almost insuperable gulf that modern theorists have found or set between 'alodial ownership' and 'feudal tenure' was not perceptible in the 11th Century."

These writers express the result of modern research on *alod* in early English institutions. But a different meaning has been given it from Coke down to recent times and, in that sense, has become fixed, as a mode of expression, in our law. This will appear from the following (from the last edition of this work):

An estate held by absolute ownership, without recognizing any superior to whom any duty is due on account thereof. 1 Washb. R. P. (5th ed.) *16.

In the United States the title to land is essentially allodial, and every tenant in fee-simple has an absolute and unqualified dominion over it; yet in technical language his estate is said to be in fee, a word which implies a feudal relation, although such a relation has ceased to exist in any form, while in several of the states the lands have been declared to be allodial; Wallace v. Harmstad, 44 Pa. 492; Matthews v. Ward, 10 Gill & J. (Md.) 443; but see Com. v. Alger, 7 Cush. (Mass.) 92; 2 Sharsw. Bla. Com. 77, n.; 1 Washb. R. P. (5th ed.) *41, *42; Sharsw. Lect. on Feudal Law (1870). In some states, the statutes have declared lands to be allodial. See also Barker v. Dayton, 28 Wis. 367.

In England there is no allodial tenure, for all land is held mediately or immediately of the king; but the words *tenancy in fee-simple* are there properly used to express the most absolute dominion which a man can have over his property; 3 Kent Com. *487; Cruise, Prelim. Dis. c. 1, § 13; 2 Bla. Com. 105.

ALODIAN. Sometimes used for alodial, but not well authorized. Cowell.

ALODIARII. Those who own alodial lands. Those who have as large an estate as a subject can have. Co. Litt.; Bac. Abr. *Tenure* A. But see ALOD.

ALONE. Apart from others; singly; sole. Salem Capital Flour Mills Co. v. Water-Ditch & Canal Co., 33 Fed. 154.

ALONG. By, on, up to or over, according to the subject-matter and context. Church v. Meeker, 34 Conn. 425; Walton v. R. Co., 67 Mo. 58; 1 B. & Adol. 448; Benton v. Horsley, 71 Ga. 619; Stevens v. R. Co., 34 N. J. L. 532, 3 Am. Rep. 269; *id.*, 21 N. J. Eq. 259; but not necessarily touching at all points; Com. v. Franklin, 133 Mass. 569.

ALSO. The word imports no more than "item" and may mean the same as "moreover"; but not the same as "in like manner"; Evans v. Knorr, 4 Rawle (Pa.) 68. It may be (1) the beginning of an entirely different sentence, or (2) a copulative carrying on the sense of the immediately preceding words into those immediately succeeding. Stroud, Jud. Dict., citing 1 Jarm. 497 n.; 1 Salk. 239.

ALTA PRODITIO. High treason.

ALTA VIA. The highway.

ALTARAGE. Offerings made on the altar; all profits which accrue to the priest by means of the altar. Ayliffe, Par. 61.

ALTERATION. A change in the terms of a contract or other written instrument by a party entitled under it, without the consent of the other party, by which its meaning or language is changed.

The term is properly applied to the change in the language of instruments, and is not used of changes in the contract itself. And it is in strictness to be distinguished from the act of a stranger in changing the form or language of the instrument, which is called a *spoliation*. This latter distinction is not always observed in practice, however.

Also sometimes applied to a change made in a written instrument, by agreement of the parties; but this use of the word is rather colloquial than technical. Such an alteration becomes a new agreement, superseding the original one; Leake, Cont. 430.

An alteration avoids the instrument; 11 Coke 27; 5 C. B. 181; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Wright v. Wright, 7 N. J. L. 175, 11 Am. Dec. 546; Wegner v. State, 28 Tex. App. 419, 13 S. W. 608; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469; but not, it seems, if the alteration be not material; Bowers v. Jewell, 2 N. H. 543; Nichols v. Johnson, 10 Conn. 192; Smith v. Crooker, 5 Mass. 540; Langdon v. Paul, 20 Vt. 217; Huntington v. Finch, 3 Ohio St. 445; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Oliver v. Hawley, 5 Neb. 439; Morrill v. Otis, 12 N. H. 466; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Harper v. Reaves, 132 Ala. 625, 32 South. 721 (a deed); Warder, Bushnell & Glessner Co. v. Stewart, 2 Marv. (Del.) 275, 36 Atl. 88; Crowe v. Beem, 36 Ind. App. 207, 75 N. E. 302. The insertion of such words as the law supplies is said to be not material; Granite Ry. Co. v.

Bacon, 15 Pick. (Mass.) 239; Thornton v. Appleton, 29 Me. 298. As to whether tearing and putting on a seal is material, see Powers v. Ware, 2 Pick. (Mass.) 451; Truett v. Wainwright, 4 Gilm. (Ill.) 411; 11 M. & W. 778. The question of materiality is one of law for the court; Martendale v. Follet, 1 N. H. 95; Brackett Ex'r v. Mountfort, 11 Me. 115; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; Hill v. Calvin, 4 How. (Miss.) 231; Pritchard v. Smith, 77 Ga. 463; and depends upon the facts of each case; L. R. 1 Ex. D. 176. The principle seems to be that a party "is discharged from his liability, if the altered instrument, supposed to be genuine, would operate differently to the original instrument, whether it be or be not to his prejudice;" Anson, Contr. (2d Am. Ed.) *327; 5 E. & B. 89. For instances, see Schwarz v. Oppold, 74 N. Y. 307; Leonard v. Phillips, 39 Mich. 182, 33 Am. Rep. 370; Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722; Robinson v. State, 66 Ind. 331; Moore v. Hutchinson, 69 Mo. 429; Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608; Warder v. Willyard, 46 Minn. 531, 49 N. W. 300, 24 Am. St. Rep. 250. Alteration of a deed will not defeat a vested estate or interest acquired under the deed; 11 M. & W. 800; 2 H. Bla. 259; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Barrett v. Thorndike, 1 Greenl. (Me.) 73; Withers v. Atkinson, 1 Watts (Pa.) 236; Smith v. McGowan, 3 Barb. (N. Y.) 404; see Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165; but as to an action upon covenants, has the same effect as alteration of an unsealed writing; 11 M. & W. 800; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299. As to filling blanks, see BLANK.

The same rule as to alterations applies to negotiable promissory notes as to other instruments; Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754. The unauthorized insertion of "or bearer" in a note, if made innocently, will not make the note void; Croswell v. Labree, 81 Me. 44, 16 Atl. 331, 10 Am. St. Rep. 238; but the insertion of "or order" will avoid; Taylor v. Moore (Tex.) 20 S. W. 53.

Where the alteration of a promissory note, though made by the holder, is prompted by honest motives, the instrument retains its legal validity and a bill in equity will lie to recover thereon; Wallace v. Tice, 32 Or. 283, 51 Pac. 733; the fraudulent detaching a stub containing conditions favorable to maker, from a note, avoids the note; Stephens v. Davis, 85 Tenn. 271, 2 S. W. 382.

A spoliation by a third party without the knowledge or consent of a party to the instrument will not avoid an instrument even if material, if the original words can be restored with certainty; 1 Greenl. Ev. § 566; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; but the material alteration of an instrument by a stranger, *while it is in the custody of the promisee*, avoids his rights under it; 11 Coke 27 *b*; L. R. 10 Ex. 330; because one who "has the custody of an instrument made for his benefit, is bound to preserve it in its original state;" 13 M. & W. 352; 3 E. & B. 687; Leake, Cont. 425; but see Clapp v. Shephard, 23 Pick. (Mass.) 231.

When a note was given by a corporation payable to its manager's wife for his salary, an alteration making it payable to the manager himself is material; Sneed v. Milling Co., 73 Fed. 925, 20 C. C. A. 230.

Where there has been manifestly an alteration of a parol instrument, the party claiming under it is bound to explain the alteration; Wilde v. Armsby, 6 Cush. (Mass.) 314; Simpson v. Stackhouse, 9 Pa. 186, 49 Am. Dec. 554; Hills v. Barnes, 11 N. H. 395; McMicken v. Beauchamp, 2 La. 290; Warren v. Layton, 3 Har. (Del.) 404; Commercial & R. Bank of Vicksburg v. Lum, 7 How. (Miss.) 414; Tillou v. Ins. Co., 7 Barb. (N. Y.) 564; 6 C. & P. 273. As to the rule in case of deeds, see Co. Litt. 225 *b*; 1 Kebl. 22; 5 Eng. L. & Eq. 349; Den v. Farlee, 21 N. J. L. 280.

Under the common law erasures and alterations of written instruments were presumed to have been made at the time of, or anterior to, their execution, the law presuming the honesty of purpose and action until the contrary is shown; Paramore v. Lindsey, 63 Mo. 66; Gooch v. Bryant, 13 Me. 386; Herrick v. Malin, 22 Wend. (N. Y.) 388; North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258.

See INTERLINEATION; SPOLIATION.

ALTERNAT. A usage among diplomatists by which the rank and places of different powers, who have the same right and pretensions to procedence, are changed from time to time, either in a certain regular order, or one determined by lot. In drawing up treaties and conventions, for example, it is the usage of certain powers to alternate, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. Wheat. Int. Law § 157.

ALTERNATIVE. Allowing a choice between two or more things or acts to be done.

In contracts, a party has often the choice which of several things to perform. A writ is in the alternative which commands the defendant to do the thing required, or show the reason wherefore he has not done it; Finch 257; 3 Bla. Com. 273. Under the common-law practice, the first *mandamus* is an alternative writ; 3 Bla. Com. 111; but in modern practice this writ is often dispensed with and its place is taken by a rule to show cause. See MANDAMUS.

ALTIUS NON TOLLENDI. In Civil Law. A serviture by which the owner of a house is restrained from building beyond a certain height.

ALTIUS TOLLENDI. In Civil Law. A servitude which consists in the right, to him who is entitled to it, to build his house as high as he may think proper. In general, every one enjoys this privilege, unless he is restrained by some contrary title.

ALTO ET BASSO. High and low.

This phrase is applied to an agreement made between two contending parties to submit all matters in dispute, alto et basso to arbitration. Cowell.

ALTUM MERE. The high sea.

ALUMNUS. A foster-child.

Also a graduate from a school, college, or other institution of learning.

ALVEUS (Lat.). The bed or channel through which the stream flows when it runs within its ordinary channel. Calvinus, Lex. *Alveus derelictus*, a deserted channel. 1 Mackeldey, Civ. Law 280.

AMALGAMATION. Union of different races, or diverse elements, societies, or corporations, so as to form a homogeneous whole or new body; interfusion; intermarriage; consolidation; coalescence; as the amalgamation of stock. Stand. Dict.

In England it is used in the case of the merger of two incorporated companies.

The word has no definite meaning; it involves the blending of two concerns into one; [1904] 2 Ch. 268.

See MERGER; SHAREHOLDER.

AMALPHITAN TABLE. A code of sea laws compiled for the free and trading republic of Amalphi toward the end of the eleventh century. 3 Kent 9.

It consists of the laws on maritime subjects which were or had been in force in countries bordering on the Mediterranean; and, on account of its collecting them into one regular system, it was for a long time received as authority in those countries. 1 Azuni, Mar. Law 376. It became a part of the law of the sea; The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822. See CODE.

AMBACTUS (Lat. *ambire*, to go about). A servant sent about; one whose services his master hired out. Spelman, Gloss.

AMBASSADOR IN INTERNATIONAL LAW. Ambassadors formed the first class of the public ministers (q. v.) who were sent abroad by sovereign states with authority to represent their government and to transact business with the government to which they were sent.

A distinction was formerly made between Ambassadors *Extraordinary*, who were sent to conduct special business or to remain for an indeterminate period, and Ambassadors *Ordinary*, who were sent on permanent missions; but this distinction is no longer observed.

Ambassadors are regarded as the personal representatives of the head of the state which sends them, and in consequence they are entitled to special honors, and have special privileges, chiefly that of negotiating personally with the head of the state, though this privilege is of little value at the present day, owing to the general adoption of constitutional forms of government. Only Empires, Kingdoms, Grand Duchies, and great Republics are entitled to send and receive Ambassadors. Until recently the United States was represented by Ministers Plenipotentiary, never having sent persons of the rank of Ambassador in the diplomatic sense. On March 3, 1893, a law was passed authorizing the President to designate as Ambassadors the representatives of the United States to such countries as he might be advised were so represented or about to be represented in the United States. In consequence of this law the United States is now represented by Ambassadors in Great Britain, Germany, Austria-Hungary, France, Italy, Mexico, Brazil, Russia, Japan, Turkey, and Spain.

Before an Ambassador is sent to a foreign country, it is the custom to inquire if the designated person will be a *persona grata* to the government of that country. No reasons need be given by the foreign government for refusing to receive a given individual. After an appointment the Ambassador is provided with a *letter of credence* (q. v.) which identifies him at the foreign court.

The duties of an Ambassador are varied; he is the mouthpiece of communications from his state to the foreign country; he must keep his government informed upon all questions of interest to it; he must see to the protection of citizens of his country resident in the foreign state; and he may negotiate treaties when his government specially empowers him to do so by giving him a document called *Full Powers* (q. v.).

The person of an Ambassador is inviolable. He is exempt from both the criminal and civil jurisdiction of the country to which he is sent. As early as 1708 an act was passed by the British Parliament confirming the immunity of Ambassadors from arrest and imposing heavy penalties upon any persons who should serve a writ or process upon them. They can not be arrested for debt, nor for violation of the law, except in cases where it may be necessary to prevent them from committing acts of violence. If, however, they should be so regardless of their duty and of the object of their immunity as to injure or openly attack the laws of the foreign government, their functions may be suspended by a refusal to treat with them, or application can be made to their own sovereign for their recall, or they may be dismissed or required to depart within a reasonable time.

By what is called the *fiction of ex-territoriality*, the exemption of an ambassador from the jurisdiction of the country in which he resides has been extended to his house and his suite. His house cannot be entered by officers of police, nor can his servants be arrested by the ordinary writ or process. In

consequence, the Ambassador's house has sometimes been used as an asylum (q. v.) for criminals. Much diplomatic controversy has taken place upon this point, and at present asylum is not given, except occasionally, in times of revolution, to political refugees.

An ambassador's children born abroad retain the citizenship of their father; Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; Moore, IV, §§ 623–695.

AMBIDEXTER (Lat.). Skilful with both hands.

Applied anciently to an attorney who took pay from both sides, and subsequently to a juror guilty of the same offence; Cowell.

AMBIGUITY. Duplicity, indistinctness or uncertainty of meaning of an expression used in a written instrument.

The word "uncertainty" in a suit refers to the uncertainty defined in pleading and does not include ambiguity; Kraner v. Halsey, 82 Cal. 209, 22 Pac. 1137.

Latent is that which arises from some collateral circumstance or extrinsic matter in cases where the instrument itself is sufficiently certain and intelligible. Inhabitants of Jay v. Inhabitants of East Livermore, 56 Me. 107; Tilton v. Bible Society, 60 N. H. 377, 49 Am. Rep. 321; Simpson v. Dix, 131 Mass. 179; Clark v. Woodruff, 83 N. Y. 518.

Patent is that which appears on the face of the instrument; that which occurs when the expression of an instrument is so defective that a court which is obliged to place a construction upon it, cannot, placing itself in the situation of the parties, ascertain therefrom the parties' intention. Williams v. Hichborn, 4 Mass. 205; U. S. v. Cantril, 4 Cra. (U. S.) 167, 2 L. Ed. 584; 1 Greenl. Ev. § 292; Ans. Contr. 248; Peisch v. Dickson, 1 Mas. 9, Fed. Cas. No. 10,911; Chambers v. Ringstaff, 69 Ala. 140; Palmer v. Albee, 50 Ia. 429; Nashville Life Ins. Co. v. Mathews, 8 Lea (Tenn.) 499.

The term does not include mere *inaccuracy*, or such uncertainty as arises from the use of peculiar words, or of common words in a peculiar sense; Wigr. Wills 174; 3 Sim. 24; 3 M. & G. 452; Brown v. Brown, 8 Metc. (Mass.) 576; Farmers' & Mechanics' Bank v. Day, 13 Vt. 36; see Fish v. Hubbard's Admr's, 21 Wend. (N. Y.) 651; 8 Bing. 244; and intends such expressions as would be found of uncertain meaning by persons of competent skill and information; 1 Greenl. Ev. § 298.

Latent ambiguities are subjects for the consideration of a jury, and may be explained by parol evidence; 1 Greenl. Ev. § 301; and see Wigr. Wills 48; 5 Ad. & E. 302; 3 B. & Ad. 728; Brown v. Brown, 8 Metc. (Mass.) 576; Astor v. Ins. Co., 7 Cow. (N. Y.) 202; Peisch v. Dickson, 1 Mas. 9, Fed. Cas. No. 10,911. *Patent* ambiguity cannot be explained by parol evidence, and renders the instrument as far as it extends inoperative; Williams v. Hichborn, 4 Mass. 205; New Jersey v. Wilson, 7 Cra. (U. S.) 167, 3 L. Ed. 303; Jarm. Wills (6th Am. Ed.) *400. See Neal v. Reams, 88 Ga. 298, 14 S. E. 617; Whaley v. Neill, 44 Mo. App. 320; Horner v. Stillwell, 35 N. J. L. 307; Hollen v. Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Pickering v. Pickering, 50 N. H. 349; Hyatt v. Pugsley, 23 Barb. (N. Y.) 285; Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159; Marshall v. Gridley, 46 Ill. 247.

See LATENT AMBIGUITY; PATENT AMBIGUITY.

AMBIT. A boundary line. Ellicott v. Pearl, 10 Pet. (U. S.) 412, 442, 9 L. Ed. 475.

AMBITUS (Lat.). A space beside a building two and a half feet in width, and of the same length as the building; a space two and a half feet in width between two adjacent buildings; the circuit, or distance around. Cicero; Calvinus, Lex.

AMBULANCE. A vehicle for the conveyance of the sick or wounded. In time of war they are considered neutral and must be respected by the belligerents. Oppenheim, Int. L. 126.

AMBULATORY (Lat. *ambulare*, to walk about). Movable; changeable; that which is not fixed.

Ambulatoria voluntas (a changeable will) denotes the power which a testator possesses of altering his will during his lifetime.

AMBUSH. The act of attacking an enemy unexpectedly from a concealed station; a concealed station, where troops or enemies lie in wait to attack by surprise; an ambuscade; troops posted in a concealed place, for attacking by surprise. To lie in wait, to surprise, to place in ambush.

AMELIORATIONS. Betterments. 6 Low. Can. 294; 9 *id.* 503.

AMENABLE. Responsible; subject to answer in a court of justice; liable to punishment.

AMENDE HONORABLE. A penalty imposed upon a person by way of disgrace or infamy, as a punishment for any offence, or for the purpose of making reparation for any injury done to another, as the walking into church in a white sheet, with a rope about the neck and a torch in the hand, and begging the pardon of God, or the king, or any private individual, for some delinquency.

In French Law. A punishment somewhat similar to this, which bore the same name, was common in France; it was abolished by the law of the 25th of September, 1791; Merlin, *Répert.* In 1826 it was re-introduced in cases of sacrilege and was finally abolished in 1830.

For the form of a sentence of Amende Honorable, see D'Aguesseau, Œuvres, 43e *Plaidoyer*, tom. 4, p. 246.

In modern usage, an apology.

AMENDMENT. **In Legislation.** An alteration or change of something proposed in a bill or established as law.

Thus the senate of the United States may amend money-bills passed by the house of representatives, but cannot originate such bills. The constitution of the United States contains a provision for its amendment; U. S. Const. art. 5.

In Practice. The correction, by allowance of the court, of an error committed in the progress of a cause.

Amendments, at common law, independently of any statutory provision on the subject, are in all cases in the discretion of the court, for the furtherance of justice. Under statutes in modern practice, they are very liberally allowed in all formal and most substantial matters, either without costs to the party amending, or upon such terms as the court think proper to order. See JEOFAILLE.

An amendment, where there is something to amend by, may be made in a criminal as in a civil case; 12 Ad. & E. 217; Com. v. Parker, 2 Pick. (Mass.) 550. But an indictment, which is a finding upon the oaths of the grand jury, can only be amended with their consent before they are discharged; 2 Hawk. Pl. Cr. c. 25, §§ 97, 98; Com. v. Child, 13 Pick. (Mass.) 200; State v. McCarthy, 17 R. I. 370, 22 Atl. 282; but see Miller v. State, 68 Miss. 221, 8 South. 273. In many states there are statutory provisions relative to the amendment of indictments; State v. Curtis, 44 La. Ann. 320, 10 South. 784. A bill of exceptions when signed and filed becomes a part of the record and may be amended like any other record; Martin v. R. Co., 53 Ark. 250, 13 S. W. 765; Lefferts v. State, 49 N. J. Law 26, 6 Atl. 521; Pollard v. Rutter, 35 Ill. App. 370; Burdoin v. Town of Trenton, 116 Mo. 358, 22 S. W. 728.

An information may be amended after demurrer; 4 Term 457; 4 Burr. 2568. At common law a mistake in an information may be amended at any time; State v. White, 64 Vt. 372, 24 Atl. 250.

Where a verdict is supported by evidence, a pleading will be considered as amended; Haley v. Kilpatrick, 104 Fed. 647, 44 C. C. A. 102.

Where, in the course of a trial, it appears that the pleadings should be amended, the usual practice is to move that "the declaration (or other pleading) be amended to conform to the facts." Ordinarily no further action is required.

An amended pleading speaks as of the time of the original; Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519, 19 C. C. A. 551.

It is not permitted by amendment to make an entirely new case; In re Sims, 9 Fed. 440.

AMENDS. A satisfaction given by a wrong-doer to the party injured, for a wrong committed. 1 Lilly, Reg. 81.

By statute 24 Geo. II, c. 44, in England, and by similar statutes in some of the United States, justices of the peace, upon being notified of an intended suit against them, may tender amends for the wrong alleged as done by them in their official character, and, if found sufficient, the tender bars the action; Lake v. Shaw, 5 S. & R. (Pa.) 517.

AMERCEMENT. A pecuniary penalty imposed upon an offender by a judicial tribunal.

The judgment of the court is, that the party be at the mercy of the court (*sit in misericordia*), upon which the *affeerors*—or, in the superior courts, the coroner—liquidate the penalty. As distinguished from a fine, at the old law an *amercement* was for a lesser offence, might be imposed by a court not of record, and was for an uncertain amount until it had been affeered. Either party to a suit who failed was to be amerced *pro clamore falso* (for his false claim); but these amercements have been long since disused; 4 Bla. Com. 379; Bacon, Abr. *Fines* and *Amercements*.

The officers of the court, and any person who committed a contempt of court, was also liable to be amerced.

Formerly, if the sheriff failed in obeying the writs, rules, or orders of the court, he might be amerced; but this practice has been generally superseded by attachment. In some of the United States, however, the sheriff may, by statutory provision, be amerced for making a return contrary to the provision of the statute; Coxe 136, 169; Stephens v. Clark, 8 N. J. L. 270; Wright v. Green, 11 N. J. L. 334; President, etc., of Paterson Bank v. Hamilton, 13 N. J. L. 159; Le Roy v. Blauvelt, 13 N. J. L. 341; Dawson v. Holcomb, 1 Ohio, 275, 13 Am. Dec 618; McLin v. Hardie, 25 N. C. 407; Cam. & N. 477; or if he fails to make a return within the proper time; Sharp v. Ross, 7 Ohio Cir. Ct. 55.

AMERCEMENT ROYAL. In Great Britain a penalty imposed on an officer for a misdemeanor in his office.

AMERICAN. Pertaining to the western hemisphere or in a more restricted sense to the United States. See Beardsley v. Selectmen of Bridgeport, 53 Conn. 493, 3 Atl. 557, 55 Am. Rep. 152.

AMEUBLISSEMENT. A species of agreement which by a fiction gives to immovable goods the quality of movable. Merl. Rép.; 1 Low. Can. 25, 58.

AMI (Fr.). A friend. See PROCHEIN AMY.

AMICABLE ACTION. An action entered by agreement of parties.

This practice prevails in Pennsylvania. When entered, such action is considered as if it had been adversely commenced and the defendant had been regularly summoned.

It presupposes that there is a real dispute between the parties, an actual controversy and adverse interests. The parties, to save needless expense and trouble, agree to conduct the suit in an amicable manner; Lord v. Veazie, 8 How. (U. S.) 255, 12 L. Ed.

1067; Adams v. R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 275; Ex parte Steele, 162 Fed. 694. It differs entirely from a "Moot" Case (*q. v.*).

An agreement between a county and a proposed buyer of its bonds to prosecute a made-up case to settle the question of the validity of the bonds, prior to issue, at the expense of the county, is void; Van Horn v. Kittitas County, 112 Fed. 1.

See CASE STATED.

AMICUS CURIÆ (Lat. a friend of the court). **In Practice.** A friend of the court.

One who, for the assistance of the court, gives information of some matter of law in regard to which the court is doubtful or mistaken; such as a case not reported or which the judge has not seen or does not, at the moment, recollect; 2 Co. Inst. 178; 2 Viner, Abr. 475.

This custom cannot be traced to its origin, but is immemorial in the English law. It is recognized in the Year Books, and it was enacted in 4 Hen. IV. (1403) that any stranger as "*amicus curiæ*" might move the court, etc. Under the Roman system the *Judex*, "especially if there was but one, called some lawyer to assist him with their counsel" "*sibi advocavit ut in consilio adessent;*" Cic. Quint. 2 Gell. xiv. 2; Suet. Lib. 33. There was in that day also the "*amicus consiliari,*" who was ready to make suggestions to the advocate, and this "*amicus*" was called a "*ministrator;*" Cic. de Orat. II. 75. This custom became incorporated in the English system, and it was recognized throughout the earlier as well as the later periods of the common law. At first suggestions could come only from the barristers or counsellors, although by the statute of Hen. IV. a "bystander" had the privilege. The custom included *instructing, warning, informing,* and *moving* the court. The information so communicated may extend to any matter of which the court takes judicial cognizance; 8 Coke 15.

It is not the function of *amicus curiæ* to take upon himself the management of a cause; Taft v. Transp. Co., 56 N. H. 416; In re Pina's Estate, 112 Cal. 14, 44 Pac. 332; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; or to proceed by error or appeal; Martin v. Tapley, 119 Mass. 116; or demurrer; Ex parte Henderson, 84 Ala. 36, 4 South. 284; or for a rehearing; People v. Loan Ass'n, 127 Cal. 400, 58 Pac. 822, 59 Pac. 692.

Any one as *amicus curiæ* may make application to the court in favor of an infant, though he be no relation; 1 Ves. Sen. 313; and see Williams v. Blunt, 2 Mass. 215; In re Green's Estate, 3 Brewst. (Pa.) 427; In re Guernsey's Estate, 21 Ill. 443. Any attorney as *amicus curiæ* may move the dismissal of a fictitious suit; Haley v. Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; Birmingham Loan & Auction Co. v. Bank, 100 Ala. 249, 13 South. 945, 46 Am. St. Rep. 45; Judson v. Jockey Club, 14 Misc. Rep. 562, 36 N. Y. Supp. 128; In re Guernsey's Estate, 21 Ill. 443; or one in which there is no jurisdiction; Williams v. Blunt, 2 Mass. 215; In re Columbia Real Estate Co., 101 Fed. 965; Jones v. City of Jefferson, 66 Tex. 576, 1 S. W. 903; 2 Show. 596; or move to quash a vicious indictment, for in case of trial and verdict, judgment must be arrested; Comberb. 13; or suggest an error which would prevent judgment when the absence of the party prevented a motion in arrest; 2 Show. 297. He may be allowed a reasonable compensation to be taxed by the court; In re St. Louis Institute of Christian Science, 27 Mo. App. 633.

The intervention may be by affidavit; Ex parte Guernsey's Estate, 21 Ill. 443; motion; Haley v. Bank, 21 Nev. 127, 26 Pac. 64, 12 L. R. A. 815; or oral statement; Olsen v. Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446; or it may be requested by the court; Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558.

The term is sometimes applied to counsel heard in a cause because interested in a similar one; Ex parte Yeager, 11 Grat. (Va.) 656; State v. Rost, 49 La. Ann. 1451, 22 South. 421; and occasionably to strangers suggesting the correction of errors in the proceedings; Year Books 4 Hen. VI. 16; 11 Mod. 137; U. S. v. Gale, 109 U. S. 68, 3 Sup. Ct. 1, 27 L. Ed. 857.

Leave to file briefs as *amicus curiæ* will be denied when it does not appear that the applicant is interested in any other case that will be affected by the decision and the parties are represented by competent counsel, whose consent has not been secured; Northern Securities Co. v. U. S., 191 U. S. 555, 24 Sup. Ct. 119, 48 L. Ed. 299; where many cases are cited in the argument.

The Attorney General of the United States has appeared in the Supreme Court in The Income Tax Cases, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; The Corporation Tax Cases, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; The Safety Appliance Case, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and the Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. In cases where the United States is not a party, but is substantially interested, it is the practice to ask leave to intervene, or to be heard as *amicus curiæ*, or he is heard by leave of court.

In the Reading Receivership (U. S. C. C. E. D. of Pa., 1893, Dallas, C. J.) certain Union employees petitioned the Court for an order restraining the receivers from discharging the petitioners unless they would dissolve their connections with their Union. The Attorney General, Mr. Olney, sent the Court an argument on behalf of the petitioners. The Court said at bar that, if counsel for the petitioners saw proper to offer it as part of their argument, it would be received. Opposing counsel did not object to it if so offered.

Where the question of the constitutionality of the Employers' Liability Act of 1906 was involved the court permitted an Assistant Attorney General to intervene and to be

heard, though considering that such a practice in a litigation strictly *inter partes* with which the United States had no concern, ought not to be encouraged, in the absence of any statute or law authorizing or directing the Attorney General to support by argument in the courts generally the legislation of Congress where the United States is not a party nor its interests involved in any tangible way; Brooks v. Southern Pac. Co., 148 Fed. 986.

In Mason v. Ry., 197 Mass. 349, 83 N. E. 876, 16 L. R. A. (N. S.) 276, 125 Am. St. Rep. 371, 14 Ann. Cas. 574, on motion of a member of the bar suggesting that the action be dismissed as being virtually brought against the King of England, accompanied by an affidavit establishing that fact, it was held that the action could not be maintained. There was no appearance for defendant.

AMITA (Lat.). An aunt on the father's side.

Amita magna. A great-aunt on the father's side.

Amita major. A great-great-aunt on the father's side.

Amita maxima. A great-great-great-aunt, or a great-great-grandfather's sister. Calvinus, Lex.

AMITINUS. The child of a brother or sister; a cousin; one who has the same grandfather, but different father and mother. Calvinus, Lex.

AMITTERE CURIAM (Lat. to lose court). To be excluded from the right to attend court. Stat. Westm. 2, c. 44.

AMITTERE LIBERAM LEGEM. To lose the privilege of giving evidence under oath in any court; to become infamous, and incapable of giving evidence. Glanville 2.

If either party in a wager of battle cried "craven" he was condemned *amittere liberam legem;* 3 Bla. Com. 340.

AMNESTY. An act of oblivion of past offences, granted by the government to those who have been guilty of any neglect or crime, usually upon condition that they return to their duty within a certain period.

Express amnesty is one granted in direct terms.

Implied amnesty is one which results when a treaty of peace is made between contending parties. Vattel, 1, 4, c. 2, § 20.

Amnesty and pardon are very different. The former is an act of the sovereign power, the object of which is to efface and to cause to be forgotten a crime or misdemeanor; the latter is an act of the same authority, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed; U. S. v. Wilson, 7 Pet. (U. S.) 160, 8 L. Ed. 640. Amnesty is the abolition and forgetfulness of the offence; pardon is forgiveness. A pardon is given to one who is certainly guilty, or has been convicted; amnesty, to those who may have been so; State v. Blalock, 61 N. C. 242.

Their *effects* are also different. That of pardon is the remission of the whole or a part of the punishment awarded by the law,—the conviction remaining unaffected when only a partial pardon is granted; an amnesty, on the contrary, has the effect of destroying the criminal act, so that it is as if it had not been committed, as far as the public interests are concerned.

Their *application* also differs. Pardon is always given to individuals, and properly only after judgment or conviction; amnesty may be granted either before judgment or afterwards, and it is in general given to whole classes of criminals, or supposed criminals, for the purpose of restoring tranquility in the state. But sometimes amnesties are limited, and certain classes are excluded from their operation.

The term *amnesty* belongs to international law, and is applied to rebellions which, by their magnitude, are brought within the rules of international law, but has no technical meaning in the common law, but is a synonym of *oblivion,* which, in the English law, is the synonym of *pardon;* Knote v. U. S., 10 Ct. Cl. 397.

The distinction here taken between pardon and amnesty was formerly drawn rather in a philosophical than legal sense, and it doubtless has its origin in the civil law. It is, however, not recognized in American law, and it is thus referred to: "Some distinction has been made, or attempted to be made, between pardon and amnesty. * * * This distinction is not, however, recognized in our law. The constitution does not use the word 'amnesty'; and, except that the term is generally employed where pardon is extended to whole classes or communities instead of individuals, the distinction between them is one rather of philological interest than of legal importance." Knote v. U. S., 95 U. S. 149, 24 L. Ed. 442. Amnesty, therefore, may be rather characterized as a general pardon granted to a class of persons by law or proclamation. The act in such case is as properly a pardon as if simply granted to an individual. Indeed, it seems to be generally conceded in the United States that the word "pardon" includes the word "amnesty"; Davies v. McKeeby, 5 Nev. 369, 373.

As to the amnesty proclamation of 29th May, 1865, see Hamilton's Case, 7 Ct. Cl. 444.

The general amnesty granted by President Johnson on Dec. 25, 1868, did not entitle one receiving its benefits to the proceeds of his property previously condemned and sold under the act of 17th July, 1862, the proceeds having been paid into the treasury; Knote v. U. S., 95 U. S. 149, 24 L. Ed. 442. As to amnesty in cases arising out of the War of Secession, see Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; Armstrong v. U. S., 13 Wall. (U. S.) 154, 20 L. Ed. 614; Carlisle v. U. S., 16 Wall. (U. S.) 147, 21 L. Ed. 426; Witkowski's Case, 7 Ct. Cl. 398; Haym's Case, 7 Ct. Cl. 443; Waring's Case, 7 Ct. Cl. 501; Meldrim's Case, 7 Ct. Cl. 595; Scott's Case, 8 Ct. Cl. 457.

As to the power of the president to grant a general amnesty, and whether there is any legislative power to grant pardon and amnesty, see EXECUTIVE POWER; PARDON; CONSTITUTION OF THE UNITED STATES; 34 L. R. A. 251, note.

AMONG. Mingled with or in the same group or class.

As used in the commercial clause of the federal constitution C. J. Marshall defines

it as "intermingled with"; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 194, 6 L. Ed. 23; and it is sometimes held to be equivalent to between; Hick's Estate, 134 Pa. 507, 19 Atl. 705; Records v. Fields, 155 Mo. 314, 55 S. W. 1021; Senger v. Senger's Ex'r, 81 Va. 687.

AMORTISE. To alien lands in mortmain.

AMORTISSEMENT (Fr.). The redemption of a debt by a sinking fund.

AMORTIZATION. An alienation of lands or tenements in mortmain.

It is used colloquially in reference to paying off a mortgage or other debt by installments, or by a sinking fund.

AMOTION (Lat. *amovere*, to remove; to take away).

An unlawful taking of personal chattels out of the possession of the owner, or of one who has a special authority in them.

A turning out of the proprietor of an estate in realty before the termination of his estate. 3 Bla. Com. 198. See OUSTER.

In Corporations. A removal of an official agent of a corporation from the station assigned to him, before the expiration of the term for which he was appointed. 8 Term 356; 1 East 562; Fuller v. Trustees, 6 Conn. 532; Dill. Mun. Corp. (4th ed.) § 238.

The term is distinguished from *disfranchisement*, which deprives a *member* of a public corporation of all rights as a corporator; while amotion applies only to officers; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; White v. Brownell, 4 Abb. Pr. N. S. (N. Y.) 162, 192. In Bagg's Case, recognized as a leading one, the distinction between amotion and disfranchisement was not quite clearly noted; 11 Co. 93; and see the observations upon it in Wilcock, Mun. Corp. 270. See 24 Cent. L. J. 99, as to the difference between amotion and disfranchisement.

Expulsion is the usual phrase in reference to loss of membership of private corporations. The term seems in strictness not to apply properly to cases where officers are appointed merely during the will of the corporation, and are superseded by the choice of a successor, but, as commonly used, includes such cases.

See DISFRANCHISEMENT; EXPULSION; ASSOCIATION.

The right of amotion of an officer *for just cause* is a common-law incident of all corporations; 1 Burr. 517; 2 Kent 297; 1 Dill. Mun. Corp. (4th ed.) § 251; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; State v. Judges, 35 La. Ann. 1075; and the power is inherent; Fawcett v. Charles, 13 Wend. (N. Y.) 473; Evans v. Philadelphia Club, 50 Pa. 107, 127; T. Raym. 435; Burr's Ex'r v. McDonald, 3 Gratt. (Va.) 215 (and see 2 Ld. Raym. 1564, where the contrary was asserted, though it may be considered settled as above stated); and in case of mere ministerial officers appointed *durante bene placito*, at the mere pleasure of those appointing him, without notice; Primm v. City of Carondelet, 23 Mo. 22; see 1 Ventr. 77; 2 Show. 70; 11 Mod. 403; Field v. Field, 9 Wend. (N. Y.) 394; O'Dowd v. City of Boston, 149 Mass. 443, 21 N. E. 949. Power to remove is necessarily incidental to the power of appointment and the trustees may remove without assigning any specific cause whenever it is in their judgment in the interest of the corporation; People v. Higgins, 15 Ill. 110. Notice and an opportunity to be heard are requisite where the appointment is *during good behavior*, or the removal is for a specified cause; Field v. Com., 32 Pa. 478; Page v. Hardin, 8 B. Monr. (Ky.) 648; City of Hoboken v. Gear, 27 N. J. L. 265; City of Madison v. Korbly, 32 Ind. 74; Stadler v. City of Detroit, 13 Mich. 346; 10 H. L. Cas. 404.

Before amotion the officer is entitled to notice of hearing, an accusation to be answered, reasonable time for answer, representation by counsel and an adjudication after hearing; Murdock v. Trustees, 12 Pick. (Mass.) 244. Mere acts, which are a cause for amotion, do not create a vacancy till the amotion takes place; State v. Trustees, 5 Ind. 77; Murdock v. Trustees, 12 Pick. (Mass.) 244.

Directors themselves have no implied power to remove one of their own number from office even for cause; nor to exclude him from taking part in their proceedings; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357. In the absence of a statute authorizing amotion by the directors of one of their number, the power can only be exercised by the stockholders; Scott v. Detroit Young Men's Society's Lessee, 1 Dougl. (Mich.) 149; Fuller v. Trustees, 6 Conn. 532; and see Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; State v. Trustees, 5 Ind. 77.

The causes for amotion are said by Lord Mansfield (1 Burr. 538) to be:—"*first*, such as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise (but indictment and conviction must precede amotion for such causes, except where he has left the country before conviction; 1 B. & Ad. 936); *second*, such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his office; *third*, such as are offences not only against the duty of his office, but also matter indictable at common law." See Com. v. Society, 2 Binn. (Pa.) 448, 4 Am. Dec. 453; Evans v. Philadelphia Club, 50 Pa. 107; 11 Mod. 379.

Sufficient grounds of removal: *Poverty* and inability to pay taxes; 3 Salk. 229; *total desertion of duty;* Bull. N. P. 206; 1 Burr. 541; as to *neglect* of duty, see 1 B. & Ad. 936; 4 Burr. 2004; 2 Stra. 819; 1 Vent. 146; *habitual drunkenness;* 3 Salk. 231; 3 Bulst. 190; *official misconduct* in

the office; 4 Burr. 1999; habitual but not mere casual non-attendance; Murdock v. Trustees, 12 Pick. (Mass.) 244; Fuller v. Trustees, 6 Conn. 532.

Insufficient grounds of removal: *Bankruptcy;* 2 Burr. 723; Atlas Nat. Bank v. Gardner, 8 Biss. 537, Fed. Cas. No. 635; *casual intoxication;* 3 Salk. 231; 1 Rolle 409; *old age;* 2 Rolle 11; *threats, insulting language,* or *libel upon the mayor or officers;* 11 Coke 93; 1 C. & P. 257; 10 Ad. & E. 374.

The K. B. in England will see that a right of amotion of an officer is lawfully exercised; but it will not control the discretion of the corporation, if so exercised; L. R. 5 H. L. 636.

AMOUNT IN CONTROVERSY. See JURISDICTION.

AMOUNT COVERED. The amount that is insured, and for which underwriters are liable for loss under a policy of insurance.

It is limited by that specified in the policy to be insured, and this limit may be applied to an identical subject only, as a ship, a building, or a life; or to successive subjects, as successive cargoes on the same ship, or successive parcels of goods transmitted on a certain canal or railroad during a specified period; and it may also be limited by the terms of the contract to a certain proportion, as a quarter, half, etc., of the value of the subject or interest on which the insurance is made; Jackson v. Ins. Co., 16 B. Monr. (Ky.) 242; Estabrook v. Smith, 6 Gray (Mass.) 574, 66 Am. Dec. 443; Louisiana Mut. Ins. Co. v. Ins. Co., 13 La. Ann. 246; Cushman v. Ins. Co., 34 Me. 487; 39 Eng. L. & Eq. 228.

AMOUNT OF LOSS. The diminution, destruction, or defeat of the value of, or of the charge upon, the insured subject to the assured, by the direct consequence of the operation of the risk insured against, according to its value in the policy, or in contribution for loss, so far as its value is covered by the insurance. 2 Phill. Ins. c. xv., xvi., xvii.; Forbes v. Ins. Co., 1 Gray, (Mass.) 371; Crombie v. Portsmouth Ins. Co., 26 N. H. 389; Flanagan v. Ins. Co., 25 N. J. L. 506; Cincinnati v. Duffield, 6 Ohio St. 200, 67 Am. Dec. 339; Eddy St. Foundry v. Ins. Co., 5 R. I. 426; Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217; 7 Ell. & B. 172. See Loss.

AMOVEAS MANUS (Lat. that you remove your hands). After office found, the king was entitled to the things forfeited, either lands or personal property; the remedy for a person aggrieved was by "petition," or "*monstrans de droit*," or "*traverses*," to establish his superior right. Thereupon a writ issued, *quod manus domini regis amoveantur;* 3 Bla. Com. 260.

AMPARO (Span.). A document protecting the claimant of land till properly authorized papers can be issued. Trimble v. Smithers' Adm'r, 1 Tex. 790.

AMPLIATION. In Civil Law. A deferring of judgment until the cause is further examined.

In this case, the judges pronounced the word *amplius,* or by writing the letters N. L. for *non liquet* (*q. v.*), signifying that the cause was not clear. It is very similar to the common-law practice of entering *cur. adv. vult* in similar cases.

In French Law. A duplicate of an acquittance or other instrument.

A notary's copy of acts passed before him, delivered to the parties.

AMUSEMENT. Pastime; diversion; enjoyment. See ENTERTAINMENT; PLACE OF AMUSEMENT; THEATRE.

AMY (Fr.). Friend. See PROCHEIN AMY; NEXT FRIEND.

AN, JOUR ET WASTE. Year, day and waste. See that title.

ANALOGY. The similitude of relations which exist between things compared. See Smith v. State, 63 Ala. 58.

Analogy has been declared to be an argument or guide in forming legal judgments, and is very commonly a ground of such judgments; 3 Bingh. 265; 4 Burr. 1962, 2022, 2068; 6 Ves. 675; 3 Swanst. 561; 3 P. Will. 391; 3 Bro. C. C. 639, n.

ANALYTICAL JURISPRUDENCE. A theory and system of jurisprudence wrought out neither by inquiring for ethical principles or the dictates of the sentiments of justice nor by the rules which may be actually in force, but by analyzing, classifying and comparing various legal conceptions.

See JURISPRUDENCE.

ANARCHY. The absence of all political government; by extension, Confusion in government.

The absence of government; a state of society where there is no law or supreme power. Spies v. People, 122 Ill. 253, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

A social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty. Cent. Dict.

Taken in its proper sense, the word has nothing to do with disorder or crime, but in the Act of Congress of March 3, 1903, the word "anarchists" is used synonymously with "persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law or the assassination of public officials," and this would seem to be the popular sense attaching to the word. In the address of U. M. Rose, President of the American Bar Association in

1902, *criminal* anarchy is defined as the doctrine that organized government should be overthrown by force and violence, or by assassination of the executive head or of any of the executive officials of the government, by any unlawful means. 15 Rep. Am. Bar Assn. 210.

In U. S. v. Williams, 194 U. S. 294, 24 Sup. Ct. 719, 48 L. Ed. 979, it was held that even though an alien anarchist only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating a universal strike and discoursing upon "the legal murder of 1887" (Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320) there was a justifiable inference that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end. And further, that even if "anarchists" should be interpreted to mean political philosophers innocent of evil intent, yet the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to the population and their exclusion infringes none of the constitutional guaranties respecting freedom of speech, etc. See ALIEN.

ANATHEMA. A punishment by which a person is separated from the body of the church, and forbidden all intercourse with the faithful.

It differs from excommunication, which simply forbids the person excommunicated from going into the church and taking the communion with the faithful.

ANATOCISM. In Civil Law. Taking interest on interest; receiving compound interest.

ANCESTOR. One who has preceded another in a direct line of descent; an ascendant.

A former possessor; the person last seised. Termes de la Ley; 2 Bla. Com. 201.

In the common law, the word is understood as well of the immediate parents as of those that are higher; as may appear by the statute 25 Edw. III., *De natis ultra mare,* and by the statute 6 Ric. II. c. 6, and by many others. But the civilians' relations in the ascending line, up to the great-grandfather's *parents,* and those above them, they term *majores,* which common lawyers aptly expound *antecessors* or ancestors, for in the descendants of like degree they are called *posteriores;* Cary, Litt. 45. The term *ancestor* is applied to natural persons. The words predecessors and successors are used in respect to the persons composing a body corporate. See 2 Bla. Com. 209; Bacon, Abr.; Ayliffe, Pand. 58.

It designates the ascendants of one in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters; Valentine v. Wetherill, 31 Barb. (N. Y.) 659.

ANCESTRAL. What relates to or has been done by one's ancestors; as homage ancestral (see HOMAGE) and the like.

That which belonged to one's ancestors.

Ancestral estates are such as come to the possessor by descent. 3 Washb. R. P. (5th Ed.) 411, 412.

ANCESTRAL ACTIONS. See ABATEMENT.

ANCHOR. A measure containing ten gallons.

The instrument used by which a vessel or other body is held. See The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; Walsh v. Dock Co., 77 N. Y. 448; Reid v. Ins. Co., 19 Hun (N. Y.) 284.

An *Anchor Watch* is one kept by a reduced number of men on a vessel in port or at anchor; The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; it may consist of one man on deck; The Rival, 1 Sprague 128, Fed. Cas. No. 11,867.

ANCHORAGE. A toll paid for every anchor cast from a ship in a port.

Such a toll is said to be incident to almost every port; 1 W. Bla. 413; 4 Term 260; and is sometimes payable though no anchor is cast; 2 Chit. Com. Law 16.

ANCIENT DEEDS. See ANCIENT WRITINGS.

ANCIENT DEMESNE. Manors which in the time of William the Conqueror were in the hands of the crown and are so recorded in the Domesday Book. Fitzh. Nat. Brev. 14, 56.

Tenure in *ancient desmesne* may be pleaded in abatement to an action of ejectment; 2 Burr. 1046.

Tenants of this class had many privileges; 2 Bla. Com. 99.

ANCIENT DOCUMENTS. See ANCIENT WRITINGS.

ANCIENT HOUSE. One which has stood long enough to acquire an easement of support. 3 Kent 437; 2 Washb. R. P. (5th ed.) *74, *76. See EASEMENT; LATERAL SUPPORT.

ANCIENT LIGHTS. Windows or openings which have remained in the same place and condition twenty years or more. Wright v. Freeman, 5 Harr. & J. (Md.) 477; Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46; Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57.

In England, a right to unobstructed light and air through such openings is secured by mere user for that length of time under the same title.

Until the last forty years there was no right of action merely because there was less light than formerly, but only where material inconvenience was caused in ordinary occupations; 1 Dick. 163; 2 C. & P. 465; 5 *id.* 438. This rule was followed in L. R. 4 Eq. 421; [1897] 2 Ch. 214; Ir. Rep. 11 Eq. 541. It is held that one is entitled to as much light as his building may ordinarily require for habitation or business; [1900] 2 K. B. 722. In L. R. [1904] A. C. 179, it is said: "To constitute actionable deprivation

of light, it is not enough that there be less light than before; there must be a substantial deprivation of light,—enough to render occupation uncomfortable according to ordinary notions of mankind." This has been said to be the leading case; 23 L. Q. R. 254. In [1902] 1 K. B. 15, the plaintiffs had an easement of light and needed an extraordinary amount in their business; a newly erected building cut off a substantial amount of it, but enough was left for all ordinary purposes of habitation or business; it was held they were entitled to relief. This case was approved; L. R. 6 Ch. 809; and disapproved; L. R. 4 Eq. 21; 28 L. T. 186. In [1907] A. C. 1, there had been a large obstruction of light by the erection of the defendant's house, and a large interference with the cheerfulness of a room in the plaintiff's house, so that the character of such room had been altered, and it had lost one of its chief advantages, causing a substantial depreciation in the rental value. It was held that an actionable nuisance had been committed. It is said the decision of the House of Lords in [1904] A. C. 179, has left the obstruction of ancient lights still, as it always has been, a question of nuisance or no nuisance, but has readjusted the law in respect to the test of nuisance, and that the test now is, not how much light has been taken, and whether that is enough materially to lessen the enjoyment and use of the house which the owner previously had, but how much light is left, and whether that is enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind; 74 L. J. Ch. 621; [1905] 2 Ch. 210.

In the United States, such right is not acquired without an express grant, in most of the states; 2 Washb. R. P. (5th ed.) 62, 63; 3 Kent 446, n. See Cherry v. Stein, 11 Md. 1; Hulley v. Safe Deposit Co., 5 Del. Ch. 578; Parker v. Foote, 19 Wend. (N. Y.) 309; Ward v. Neal, 37 Ala. 501; Pierre v. Fernald, 26 Me. 436, 46 Am. Dec. 573; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; and cases under Air. This same doctrine has been upheld in Illinois and Louisiana; Gerber v. Grabel, 16 Ill. 217; Taylor v. Boulware, 35 La. Ann. 469. It is said not to be suited to the conditions of a growing country and that it never became part of our common law; Myers v. Gemmel, 10 Barb. (N. Y.) 537. Other courts decline to adopt the English doctrine; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80; Randall v. Sanderson, 111 Mass. 119; Hoy v. Sterrett, 2 Watts (Pa.) 327, 27 Am. Dec. 313; Doyle v. Lord, 64 N. Y. 439, 21 Am. Rep. 629; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; Ingraham v. Hutchinson, 2 Conn. 597; Gerber v. Grabel, 16 Ill. 217; and even where it is accepted, its application should be limited to cases where the easement is strictly necessary to the beneficial user of the property granted; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; 15 Harv. L. Rev. 305.

One who claims that the land adjoining his shall remain unimproved should show an express grant or covenant; Morrison v. Marquardt, 24 Ia. 35, 92 Am. Dec. 444. There can be no such easement by implication over adjoining unimproved land of the grantor; *id.*; Stein v. Hauck, 56 Ind. 68, 26 Am. Rep. 10; Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Rennyson's Appeal, 94 Pa. 147, 39 Am. Rep. 777; Wilmurt v. McGrane, 16 App. Div. 412, 45 N. Y. Supp. 32. But it has been held that a grantee of land has an easement of light by implied grant over the adjoining unimproved land of his grantor; Sutphen v. Therkelson, 38 N. J. Eq. 318; Knoxville Water Co. v. Knoxville, 200 U. S. 25, 26 Sup. Ct. 224, 50 L. Ed. 353; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300. In 15 L. Q. R. 317, it is said that American courts, in declining to follow the English doctrine, have assumed that it was unknown prior to Independence. It was so said by Bronson, J., in Parker v. Foote, 19 Wend. (N. Y.) 309. But this is said to be incorrect. There is a dictum of Wray, C. J., in Mosely v. Bland (1611), cited in 9 Rep. 58 *b.*, and a reference to it as an established doctrine in 1443 Y. B., 32 Hen. VI, f. 15, and in 4 Del. Ch. 643, it was held that the doctrine was part of the common law of England and of the colonies at the time of American Independence, and as such continued to be the law of Delaware under the constitution adopted in 1776. See Air.

As between landlord and tenant it is held that a lease of a tenement carries with it an implied grant of the right to light and air from the adjoining land of the landlord where the situation and habitual use of the demised tenement are such that the right is essential to its beneficial enjoyment; Darnell v. Show-Case Co., 129 Ga. 62, 58 S. E. 631, 13 L. R. A. (N. S.) 333, 121 Am. St. Rep. 206; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; Case v. Minot, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536 (where the tenant of an upper floor was held entitled to light and air from a well); Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629; Hazlett v. Powell, 30 Pa. 293; *contra*, Keating v. Springer, 146 Ill. 484, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; Myers v. Gemmel, 10 Barb. (N. Y.) 537.

As to the right of an abutting owner to light and air over the highway, see Air.

ANCIENT READINGS. Essays on the early English statutes. Co. Litt. 280.

ANCIENT RECORDS. See Ancient Writings.

ANCIENT RENT. The rent reserved at

the time the lease was made, if the building was not then under lease. 2 Vern. 542.

ANCIENT WRITINGS. Deeds, wills, and other writings, more than thirty years old.

They may, in general, be read in evidence without any other proof of their execution than that they have been in the possession of those claiming rights under them; 1 Greenl. Ev. § 141; 12 M. & W. 205; 8 Q. B. 158; 7 Beav. 93; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Lessee of Clarke v. Courtney, 5 Pet. (U. S.) 319, 8 L. Ed. 140; Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266; Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; Middleton v. Mass, 2 Nott. & McC. (S. C.) 55; Duncan v. Beard, *id.* 400; Tolman v. Emerson, 4 Pick. (Mass.) 160; Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631; Dodge v. Briggs, 27 Fed. 170; O'Donnell v. Johns & Co., 76 Tex. 362, 13 S. W. 376; Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655; McClaskey v. Barr, 47 Fed. 154; King v. Sears, 91 Ga. 577, 18 S. E. 830; Whitman v. Heneberry, 73 Ill. 109. As to the admission of duplicate copies, see National Commercial Bank v. Gray, 71 Hun 295, 24 N. Y. Supp. 997. See DECLARATION; EVIDENCE.

The rule is broad enough to admit ancient deeds purporting to have been signed by an agent without production of the power of attorney; Wilson v. Snow, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. ——.

Spanish documents produced to and inspected by the court, coming from official custody and bearing on their face every evidence of age and authenticity, and otherwise entitled to admissibility as ancient documents, will not be excluded because subjected to various changes of possession during the transition of the government of Florida from Spain to the United States and during the Civil War, it not appearing that they were ever out of the custody of a proper custodian, that the originals were lost, or that there had been any fraudulent substitution; McGuire v. Blount, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. Ed. 125.

Ancient documents are not admissible in evidence as "public documents" where they were not intended to be so, but to serve temporary purposes only. Also where the records were made by a deceased official, there being nothing to show that they were made contemporaneously with the doing of something which it was the duty of the deceased official to record. In this case it was attempted to prove that certain land, within legal memory, had been covered by the sea. A survey made in 1616 by the Lord Warden of the Cinque Ports and an estimate by the King's engineer for the reparation of certain castles were rejected for the above reasons; [1905] 2 Ch. 538.

Where an instrument itself would be admissible without proof of execution, being over thirty years old, and its absence is satisfactorily accounted for, held that evidence of its contents was likewise admissible without proof of execution; Walker v. Peterson (Tex.) 33 S. W. 269, Dec. 18, 1895.

A deed signed by the grantor by his mark and not witnessed or acknowledged, and therefore insufficient on its face, is inadmissible as an ancient deed without proof of execution; O'Neal v. Railroad Co., 140 Ala. 378, 37 South. 275, 1 Ann. Cas. 319. As a general rule in the case of ancient writings, proof of execution is not necessary; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; Whitman v. Heneberry, 73 Ill. 109; such documents when admitted are to be construed as duly executed; Brown v. Wood, 6 Rich. Eq. (S. C.) 155; and the genuineness must be established; McCleskey's Adm'rs v. Leadbetter, 1 Ga. 551; mere antiquity is not enough if the paper appears defective upon its face; Reaume v. Chambers, 22 Mo. 36; Williams v. Bass, 22 Vt. 352; mere production is not sufficient; Fogal v. Pirro, 23 N. Y. Super. Ct. 100; when no consideration is expressed and the words "this indenture" are omitted, it is insufficient; Gitting's Lessee v. Hall, 1 Har. & J. (Md.) 14, 2 Am. Dec. 502. Deeds were admitted, though defective in form and execution, in Hoge v. Hubb, 94 Mo. 489, 7 S. W. 443; Hill v. Lord, 48 Me. 83; White v. Hutchings, 40 Ala. 253, 88 Am. Dec. 766.

ANCIENTS. Gentlemen in the Inns of Courts who are of a certain standing.

In the Middle Temple, all who have passed their readings are termed ancients. In Gray's Inn, the ancients are the oldest barristers; besides which, the society consists of benchers, barristers, and students; in the Inns of Chancery, it consists of ancients and students or clerks.

The *Council of Ancients* was the upper Chamber of the French legislature under the constitution of 1795, consisting of 250, each required to be at least forty years old.

ANCIENTY. Eldership; seniority. Used in the statute of Ireland, 14 Hen. VIII; Cowel.

ANCILLARY (Lat. *ancilla*, a handmaid). Auxiliary, subordinate.

As it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause, when once brought there, receives its final determination; 3 Bla. Com. 98.

Used of deeds, and also of an administration of an estate taken out in the place where assets are situated, which is subordinate to the principal administration, which is that of the domicil; 1 Story, Eq. Jur. 13th ed. § 533. See ADMINISTRATION. And in the same way in the case of receiverships. See RECEIVER.

ANCIPITIS USUS (Lat.). Of use for various purposes.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from its immediate destination; 1 Kent 140.

AND. A conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first.

It is said to be equivalent to "as well as"; Porter v. Moores, 4 Heisk. (Tenn.) 16.

It is sometimes construed as meaning "or," and has been so treated in the construction of statutes; Bay State Iron Co. v. Goodall, 39 N. H. 223, 75 Am. Dec. 219; U. S. v. Fisk, 3 Wall. (U. S.) 445, 18 L. Ed. 243; 1 U. C. Q. B. 357, deeds; Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; resolutions of a corporate board of directors; Brown v. Furniture Co., 58 Fed. 286, 7 C. C. A. 225, 22 L. R. A. 817 (per Taft, C. J.); and wills; Sayward v. Sayward, 7 Greenl. (Me.) 210, 22 Am. Dec. 191; 1 Ves. 217; 7 *id.* 453; 4 Bligh U. R. 321; Jackson v. Blanshan, 6 Johns. (N. Y.) 54, 5 Am. Dec. 188 (per Kent, C. J.); Janney v. Sprigg, 7 Gill (Md.) 197, 48 Am. Dec. 557, where the cases are reviewed, as also in a note thereto in 48 Am. Dec. 565.

That the power to change the words is not arbitrary, but only to effectuate the intention, see Armstrong v. Moran, 1 Bradf. Surr. (N. Y.) 314.

The character & has been recognized as "sanctioned by age and good use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, and with such frequency that it may be said to be a part of our language"; Brown v. State, 16 Tex. App. 245. So the abbreviation &c. is said to have "been naturalized in English for ages," and was constantly used by Lord Coke without a suggestion from any quarter that it is not English; Berry v. Osborn, 28 N. H. 279.

See OR.

ANDROLEPSY. The taking by one nation of the citizens or subjects of another in order to compel the latter to do justice to the former. Wolffius, § 1164; Molloy, *de Jure Mar.* 26.

ANECIUS (Lat. Spelled also *æsnecius, enitius, ænæas, eneyus* Fr. *aisne*). The eldest-born; the first-born; senior, as contrasted with the *puis-ne* (younger); Burrill, Law Dict. 99; Spelman, Gloss. *Æsnecia.*

ANGARIA. In Roman and Feudal Law. A service exacted by the government for public purposes; in particular, the right of a public officer to require the service of vehicles or ships; personal service exacted from a villein by his lord. Dig. 50, 4, 18, § 29; Spelman, Gloss.

ANGARY, RIGHT OF. In International Law. Formerly the right (*jus angariæ*) claimed by a belligerent to seize merchant vessels in the harbors of the belligerent and to compel them, on payment of freight, to transport troops and supplies to a designated port. It was frequently exercised by Louis XIV. of France, but as a result of specific treaties entered into by states not to exercise the right, it has now come to be abandoned. 2 Opp. 446.

At the present day, the right of a belligerent to appropriate, either for use, or for destruction in case of necessity, neutral property temporarily located in his own territory or in that of the other belligerent. The property may be of any description whatever, provided the appropriation of it be for military or naval purposes.

Requisition of neutral property is justified by military necessity, and accordingly the right of angary is a belligerent right, although the claim of the neutral owner to indemnity properly comes under the law of neutrality (*q. v.*).

An indirect recognition, *a fortiori*, of the duty of the belligerent to pay indemnity may be found in Arts. 52–53 of IV Hague Conf. 1907, which requires the payment of such indemnity when private *enemy* property is requisitioned. Art. 19 of V Hague Conf. 1907, provides that railway material coming from the territory of neutral powers shall not be requisitioned, except in case of absolute necessity, and neutral powers may, under similar necessity, retain railway material coming from the territory of the belligerent, due compensation being made by both sides.

ANGEL. An ancient English coin, of the value of ten shillings sterling. Jacobs, Law Dict.; Cunningham.

ANGILD (Sax.). The bare, single valuation or estimation of a man or thing, according to the legal estimates.

When a crime was committed, before the Conquest, the angild was the money compensation that the person who had been wronged was entitled to receive. Maitl. Domesday Book & Beyond 274.

The terms *twigild, trigild,* denote twice, thrice, etc. *angild. Leges Inæ,* c. 20; Cowell.

ANHLOTE (Sax.). A single tribute or tax. Cunningham. The sense is, that every one should pay, according to the custom of the country, his respective part and share. Spelman, Gloss.

ANIENS. Void; of no force. Fitzherbert, Nat. Brev. 214.

ANIENT (Fr. *anèantir*). Abrogated, or made null. Littleton, § 741.

ANIMAL. Any animate being which is not human, endowed with the power of voluntary motion.

Domitæ are those which have been tamed by man; domestic.

Ferœ naturæ are those which still retain their wild nature.

A man may have an absolute property in animals of a domestic nature; 2 Mod. 319; 2 Bla. Com. 390; but not so in animals *ferœ naturæ*, which belong to him only while in his possession; Wallis v. Mease, 3 Binn. (Pa.) 546; Pierson v. Post, 3 Caines (N. Y.) 175, 2 Am. Dec. 264; Gillet v. Mason, 7 Johns. (N. Y.) 16; State v. Murphy, 8 Blackf. (Ind.)

498; 2 B. & C. 934. Yet animals which are sometimes *feræ naturæ* may be tamed so as to become subjects of property; as an otter; State v. House, 65 N. C. 315, 6 Am. Rep. 744; pigeons which return to their house; 2 Den. Cr. Cas. 362; 4 C. & P. 131; Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; or pheasants hatched under a hen; 1 Fost. & F. 350. And the flesh of animals *feræ naturæ* may be the subject of larceny; 3 Cox, Cr. Cas. 572; 1 Den. Cr. Cas. 501; 2 C. & K. 981; State v. House, 65 N. C. 315, 6 Am. Rep. 744.

Animals *feræ naturæ* were considered by the Roman law as belonging in common to all the citizens of the state; Geer v. Connecticut, 161 U. S. 319, 16 Sup. Ct. 600, 40 L. Ed. 793; and by the common law the property in game was based on common ownership and subject to governmental authority; 2 Bla. Com. 14. One may have the privilege of hunting wild animals to the exclusion of other persons; 7 Co. 18 *a;* but only by grant of the king or of his officers or by prescription; *id.* (the case of the swans). In the United States the ownership of such animals is vested in the state, not as proprietor, but in its sovereign capacity, as representing the people and for their benefit; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463. It alone has power to control the killing and ownership of wild game; Geer v. Connecticut, 161 U. S. 532, 16 Sup. Ct. 600, 40 L. Ed. 793. Animals wild by nature are subjects of ownership while living only when on the land of the person claiming them; Cal. Civ. Code § 656. Under this provision it was held that one has a right in wild game birds within his game preserves, which entitles him to protect them against trespassers; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 66. Deer, when reclaimed and enclosed, are property, Dietrich v. Fargo, 194 N. Y. 359, 87 N. E. 518, 22 L. R. A. (N. S.) 696.

Bees are *feræ naturæ;* Goff v. Kilts, 15 Wend. (N. Y.) 550; but when hived or reclaimed one may have a qualified property in them; Goff v. Kilts, 15 Wend. (N. Y.) 550; Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; because they "have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it down is in the owner of the soil, and therefore such property as the bees are susceptible of is in him also"; Cooley on Torts 435; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463. The mere finder of them on the land of another acquires no title to the tree or the bees; State v. Repp, 104 Ia. 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463; Gillet v. Mason, 7 Johns. (N. Y.) 16; Merrils v. Goodwin, 1 Root (Conn.) 209. In a suit against the owner of bees for injuries caused by them to horses, it was held that however it might have been anciently, in modern days the bee has become almost as completely domesticated as the ox or the cow; Earl v. Van Alstine, 8 Barb. (N. Y.) 630.

But the ancient rule that animals *feræ naturæ* can only be the subject of property while in actual possession, and that loss of possession without intention to return on the part of the animal carries with it the loss of property by the owner; Mullett v. Bradley, 24 Misc. Rep. (N. Y.) 695, 53 N. Y. Supp. 781; seems inconsistent with the related law governing the responsibility of owners for injuries done by such animals; 12 Harv. L. Rev. 346; as where a bear slipped his collar and in his escape to the woods injured a man, the owner was held liable; Vredenburg v. Behan, 33 La. Ann. 627; but where a sea lion escaped from the possession of its owner and was abandoned by him and recaptured a year afterwards seventy miles from the place of its escape, the owner was held to have lost his property, expressly on the ground of loss of possession; Mullett v. Bradley, 24 Misc. 695, 53 N. Y. Supp. 781; 12 Harv. L. Rev. 346. In Manning v. Mitcherson, 69 Ga. 447, 47 Am. Rep. 764, it was said that to hold that wild animals of a menagerie, should they escape from their owner's immediate possession, would belong to the first person who should subject them to his dominion, would be an injustice.

The common law recognized a property in dogs; State v. Sumner, 2 Ind. 377; Chapman v. Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Uhlein v. Comack, 109 Mass. 273; and in the United States it is generally recognized by the law; Fisher v. Badger, 95 Mo. App. 289, 69 S. W. 26; Harrington v. Hall, 6 Pennewill (Del.) 72, 63 Atl. 875; Jones v. R. Co., 75 Miss. 970, 23 South. 358; Reed v. Goldneck, 112 Mo. App. 310, 86 S. W. 1104. Such property, however, is held to be of a peculiar character; Chunot v. Larson, 43 Wis. 536, 28 Am. Rep. 567; and of a qualified nature; Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175; City of Hagerstown v. Witmer, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649. The owner may recover for its wrongful injury; Louisville & N. R. Co. v. Fitzpatrick, 129 Ala. 322, 29 South. 859, 87 Am. St. Rep. 64; Chapman v. Decrow, 93 Me. 378, 45 Atl. 295, 74 Am. St. Rep. 357; Moore v. Electric Co., 136 N. C. 554, 48 S. E. 822, 67 L. R. A. 470; or its conversion; Graham v. Smith, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323; or unlawful killing; Wheatley v. Harris, 4 Sneed (Tenn.) 468, 70 Am. Dec. 258; Smith v. Ry. Co., 79 Minn. 254, 82 N. W. 577; State v. Coleman, 29 Utah, 417, 82 Pac. 465; Harrington v. Hall, 6 Pennewill (Del.) 72, 63 Atl. 875. At common law it was not larceny to steal a dog; 4 Bla. Com. 235; Mullaly v. People, 86 N. Y. 365;

State v. Jenkins, 78 N. C. 481; Jenkins v. Ballantyne, 8 Utah, 245, 30 Pac. 760, 16 L. R. A. 689 (see note in 15 Am. Rep. 356); because larceny was a crime punishable by death, and it was thought not fit that a man should die for a dog; Brainard v. Knapp, 9 Misc. 207, 29 N. Y. Supp. 678; but by statute in many of the states it is now made larceny; Com. v. Depuy, 148 Pa. 201, 23 Atl. 896; Patton v. State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732; Johnson v. McConnell, 80 Cal. 545, 22 Pac. 219; Harrington v. Miles, 11 Kan. 481, 15 Am. Rep. 355; City of Carthage v. Rhodes, 101 Mo. 175, 14 S. W. 181, 9 L. R. A. 352; State v. Mease, 69 Mo. App. 581; Harris v. Eaton, 20 R. I. 84, 37 Atl. 308. There is a conflict of opinion as to whether statutes against taking goods or other property shall be construed to include dogs. In subjecting them to taxation they are thereby made the subject of larceny under the generic term personal property or chattel; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; and see Hurley v. State, 30 Tex. App. 335, 17 S. W. 455, 28 Am. St. Rep. 916; Mullaly v. People, 86 N. Y. 365; but by other courts it is held that taxes are not imposed on the theory that they are property, but as police regulations; State v. Doe, 79 Ind. 9, 41 Am. Rep. 599; State v. Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

A statute requiring dogs to be put on the assessment rolls, and limiting any recovery by the owner to the value fixed by himself for the purpose of taxation, is constitutional; Sentell v. Railroad Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. In this case the animal was a valuable Newfoundland bitch kept by the owner for breeding purposes and was killed by an electric car. The court held that the statute put a premium upon valuable dogs by giving them a recognized position and permitting the owner to put his own valuation upon them.

They are embraced in the term "all brute creatures"; State v. Giles, 125 Ind. 124, 25 N. E. 159; or "animals"; Warner v. Perry, 14 Hun (N. Y.) 337; State v. Coleman, 29 Utah, 417, 82 Pac. 465; or "domestic animal"; Shaw v. Craft, 37 Fed. 317 (*contra*, State v. Harriman, 75 Me. 562, 46 Am. Rep. 423); and have been held to be included in the term "chattel"; Com. v. Hazelwood, 84 Ky. 681, 2 S. W. 489; see 40 L. R. A. 503 n.; not within the term "other beasts"; U. S. v. Gideon, 1 Minn. 292 (Gil. 226).

They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals (see State v. Harriman, 75 Me. 562), but rather in the category of cats, monkeys, parrots, singing birds, etc., kept for pleasure. They are peculiar in that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. They stand between animals *ferœ naturæ*, in which, until killed, there is no property, and domestic animals, in which the right of property is complete; Sentell v. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169.

A dog cannot lawfully be killed merely for trespassing; Marshall v. Blackshire, 44 Ia. 475; Brent v. Kimball, 60 Ill. 211, 14 Am. Rep. 35; Dinwiddie v. State, 103 Ind. 101, 2 N. E. 290; Bowers v. Horen, 93 Mich. 420, 53 N. W. 535, 17 L. R. A. 773, 32 Am. St. Rep. 513; Fenton v. Bisel, 80 Mo. App. 135; but killing a trespassing dog is justifiable if it be necessary to protect one's property; King v. Kline, 6 Pa. 318; Fisher v. Badger, 95 Mo. App. 289, 69 S. W. 26; and where dogs congregated on one's premises at night and by their noise interfered with the rest of a family, shooting among them was justified, as a reasonable and necessary means to protect the family from a nuisance; Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249, 30 Am. St. Rep. 426.

The owner of any animal, tame or wild, is liable for the exercise of such dangerous tendencies as generally belong to its nature, but not of any not in accordance with its nature, unless the owner or keeper knew, or ought to have known, of the existence of such dangerous tendency; Whart. Negl. § 923. To recover for damages inflicted by a ferocious dog, it is not necessary actually to prove that it has bitten a person before; L. R. 2 C. P. 1; Linnehan v. Sampson, 126 Mass. 511, 30 Am. Rep. 692; Rider v. White, 65 N. Y. 54, 22 Am. Rep. 600; Rowe v. Ehrmanntraut, 92 Minn. 17, 99 N. W. 211; Barclay v. Hartman, 2 Marv. (Del.) 351, 43 Atl. 174; McConnell v. Lloyd, 9 Pa. Super. Ct. 25.

The owner of a mischievous animal, known to him to be so, is responsible, when he permits him to go at large, for the damage he may do; Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487; Lyons v. Merrick, 105 Mass. 71; Partlow v. Haggarty, 35 Ind. 178; Kightlinger v. Egan, 75 Ill. 141; Meibus v. Dodge, 38 Wis. 300, 20 Am. Rep. 6; Snyder v. Patterson, 161 Pa. 98, 28 Atl. 1006; Shaw v. Craft, 37 Fed. 317; Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281; Burleigh & Jackson v. Hines, 124 Ia. 199, 99 N. W. 723; he is liable, though not negligent, in the matter of his escape from a close; Hammond v. Melton, 42 Ill. App. 186; Vredenburg v. Behan, 33 La. Ann. 627; Manger v. Shipman, 30 Neb. 352, 46 N. W. 527; 19 Ont. Rep. 39. In Muller v. McKesson, 73 N. Y. 195, 29 Am. Rep. 123, it is said that though it may be, in a certain sense, that the action for injury by vicious animals is based upon negligence, such negligence consists not in the manner of keeping the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious and the owner knows it. The negligence consists in keeping such an animal. See Speckmann v. Kreig, 79 Mo. App. 376. This rule is old: "If an ox gore a man or woman, that they die; then the ox shall

be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit. But if the ox were wont to push with his horn in time past, and it hath been testified to his owner, and he hath not kept him in, but that he hath killed a man or a woman; the ox shall be stoned, and his owner also shall be put to death." Exodus xxi, 28, 29.

One knowingly harboring a vicious and dangerous dog is liable for damages sustained by others from its bite; McGurn v. Grubnau, 37 Pa. Super. Ct. 454, 459. In [1908] 2 K. B. Div. 352, Channel, J., said that keeping a dog known to be savage stands on the same footing as keeping a wild beast. It is enough if he occasionally attacks human beings without provocation; Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066; the owner must have had actual knowledge; Muller v. Shufeldt, 114 N. Y. Supp. 1012; Alexander v. Crosby, 143 Ia. 50, 119 N. W. 717; but constructive knowledge has been held sufficient; Merritt v. Matchett, 135 Mo. App. 176, 115 S. W. 1066; the mere fact of the attack does not raise a presumption that the dog was vicious, but it can be established by proof that on previous occasions it had attacked people without provocation; *id.*; and one who has long harbored a vicious dog is presumed to know its propensities; *id.* Running out and barking at horses and persons passing is not, as a matter of law, evidence of viciousness; Muller v. Shufeldt, 114 N. Y. Supp. 1012. Where one kept dogs of the same family and appearance, a person bitten by one of them is not required to prove which one, nor to prove that previous attacks on others were made by the same dog; McGurn v. Grubnau, 37 Super. Ct. Pa. 454, 459.

On the other hand it has been held that when wild animals are kept for a purpose recognized as not censurable, all that can be demanded of their keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him; Cooley, Torts (3d ed.) 707, n.; 11 L. R. A. (N. S.) 748, n. One who knowingly, voluntarily and unnecessarily places himself within reach of a ferocious animal which is chained up cannot recover for injuries received; Ervin v. Woodruff, 119 App. Div. 603, 103 N. Y. Supp. 1051; Molloy v. Starin, 113 App. Div. 852, 99 N. Y. Supp. 603. An injunction will lie against keeping a vicious dog without appropriate restraint; it is a nuisance; Rider v. Clarkson, 77 N. J. Eq. 469, 78 Atl. 676, 140 Am. St. Rep. 614.

Any person may justify the killing of ferocious animals; Leonard v. Wilkins, 9 Johns. (N. Y.) 233; Putnam v. Payne, 13 Johns. (N. Y.) 312; Nehr v. State, 35 Neb. 638, 53 N. W. 589, 17 L. R. A. 771.

Running at large is defined as strolling about without restraint or confinement. Morgan v. People, 103 Ill. App. 257.

An animal untethered and unattended in the street in front of its owner's premises was held to be running at large; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554; or trespassing upon the premises of another and not under the immediate control of the owner; Gilbert v. Stephens, 6 Okl. 673, 55 Pac. 1070; but a domestic animal which has escaped from its inclosure without the fault of the owner; Briscoe v. Alfrey, 61 Ark. 196, 32 S. W. 505, 30 L. R. A. 607, 54 Am. St. Rep. 203; Myers v. Lape, 101 Ill. App. 182; and to recover which such owner is making reasonable efforts, is not running at large; Myers v. Lape, 101 Ill. App. 182.

It is unlawful to kill a dog because he is in the street outside of a poultry yard, inclosed by an impassable fence, though the dog had harassed the poultry before, or because of his predatory habits; State v. Smith, 156 N. C. 628, 72 S. E. 321, 36 L. R. A. (N. S.) 910.

It is the duty of the owner of domestic animals to keep them upon his own premises; Klenberg v. Russell, 125 Ind. 531, 25 N. E. 596; Robinson v. R. Co., 79 Mich. 323, 44 N. W. 779, 19 Am. St. Rep. 174. It is the nature of cattle and other animals to stray and to do damage, and the owner is bound to keep them from straying at his peril; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131. The common law doctrine is that the owner of cattle must fence them in; Taber v. Cruthers, 59 Hun 619, 13 N. Y. Supp. 446; Bulpit v. Matthews, 145 Ill. 345, 34 N. E. 525, 22 L. R. A. 55. He is not compelled to fence the cattle of others out. Owing to change of circumstances, due in part to the settlement of a new country, in many states a different rule prevails. The owner of land must fence out the cattle of others. He need not fence in his own. He takes the risk of loss of or injury to them from their running at large and wandering into danger; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131; Sprague v. R. Co., 6 Dak. 86, 50 N. W. 617; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; Kerwhaker v. R. Co., 3 Ohio St. 179, 62 Am. Dec. 246; Muir v. Thixton, 119 Ky. 753, 78 S. W. 466. To leave uncultivated lands uninclosed is an implied license to cattle to graze on them; Kerwhaker v. R. Co., 3 Ohio St. 179, 62 Am. Dec. 246; Seeley v. Peters, 5 Gilman (Ill.) 142; Comerford v. Dupuy, 17 Cal. 308; Chase v. Chase, 15 Nev. 259; Delaney v. Errickson, 10 Neb. 492, 6 N. W. 600, 35 Am. Rep. 487; Burgwyn v. Whitfield, 81 N. C. 261; Moore v. White, 45 Mo. 206; Little Rock & F. S. Ry. Co. v. Finley, 37 Ark. 562; Lee County v. Yarbrough, 85 Ala. 590, 5 South. 341; Frazier v. Nortinus, 34 Ia. 82; Faut v. Lyman, 9 Mont. 61, 22 Pac. 120; Meyers v. Menter, 63 Neb. 427, 88 N. W. 662. The keeping of live stock is usually under police regulation; Reser v. Umatilla County, 48 Or. 326, 86 Pac. 595, 120 Am. St. Rep. 815; and in many states stat-

utes forbidding animals to run at large, or restricting them or limiting such rights, are in force. By statute in Illinois the common law liability is now restored; Fredrick v. White, 73 Ill. 590; as it is in Pennsylvania; Barber v. Mensch, 157 Pa. 390, 27 Atl. 708. A statute in Idaho prohibits sheep from grazing on the public domain within two miles of a dwelling house. This was held not an unreasonable discrimination against the sheep industry, but rather as a matter of protection to the owners of other grazing cattle, as cattle will not graze and will not thrive upon lands where sheep are grazed to any extent; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; and the act was held to be a valid exercise of the police power; Sifers v. Johnson, 7 Ida. 798, 65 Pac. 709, 54 L. R. A. 785, 97 Am. St. Rep. 271; Sweet v. Ballentyne, 8 Ida. 431, 69 Pac. 995. See FENCE.

In the western states cattle are required to be branded. Such marks and brands are evidence of ownership and are a matter of statutory regulation, and the court will take judicial notice that in some states cattle run at large in great stretches of country with no other means of determining their separate ownership than by the marks and brands upon them; New Mexico v. R. Co., 203 U. S. 51, 27 Sup. Ct. 1, 51 L. Ed. 78.

As to the right to impound estrays, see ESTRAY; POUND.

Acts of congress have established a bureau of animal industry, and the Secretary of Agriculture is authorized to use such means as he may deem necessary for the prevention of the spread of pleuro-pneumonia and other diseases of animals. Carriers are forbidden to receive for transportation any live stock affected by any contagious or infectious disease. A state statute for the protection of domestic animals from contagious diseases is not a regulation of commerce between the states simply because it may incidentally or indirectly affect such commerce; Missouri, K. & T. Ry. v. Haber, 169 U. S. 627, 18 Sup. Ct. 488, 42 L. Ed. 878, citing Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; New York, N. H. & H. R. R. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; and where a statute provides a right of action for injuries arising from disease communicated to domestic cattle by cattle of a particular kind brought into a state, it does not conflict with any regulation established under the authority of congress to prevent the spread of contagious or infectious diseases from one state to another; Missouri, K. & T. Ry. v. Haber, 169 U. S. 627, 18 Sup. Ct. 488, 42 L. Ed. 878. See COMMERCE; INSPECTION LAWS; COMMON CARRIERS.

See AGISTOR; ACCESSION; CRUELTY.

Animals of a base nature are those animals which, though they may be reclaimed, are not such that at common law a larceny may be committed of them, by reason of the baseness of their nature.

Some animals which are now usually tamed come within this class, as dogs and cats; and others which, though wild by nature and often reclaimed by art and industry, clearly fall within the same rule, as bears, foxes, apes, monkeys, ferrets, and the like; Coke, 3d Inst. 109; 1 Hale, Pl. Cr. 511, 512; 1 Hawk. Pl. Cr. 33, § 36; 4 Bla. Com. 236; 2 East, Pl. Cr. 614. See 1 Wms. Saund. 84, note 2.

ANIMAL INDUSTRY, BUREAU OF. See HEALTH.

ANIMO (Lat.). With intention. See ANIMUS, used with various other words.

ANIMUS (Lat., mind). The intention with which an act is done. See INTENT.

ANIMUS CANCELLANDI. An intention to destroy or cancel. See CANCELLATION.

ANIMUS CAPIENDI. The intention to take. 4 C. Rob. Adm. 126, 155.

ANIMUS FURANDI. The intention to steal.

In order to constitute larceny, the thief must take the property *animo furandi;* but this is expressed in the definition of larceny by the word felonious; Coke, 3d Inst. 107; Hale, Pl. Cr. 503; 4 Bla. Com. 229. See 2 Russell, Crimes 96; Rapalje, Larceny, § 18. When the taking of property is lawful, although it may afterwards be converted *animo furandi* to the taker's use, it is not larceny; Bacon, Abr. *Felony*, C; People v. Anderson, 14 Johns. (N. Y.) 294, 7 Am. Dec. 462; Ry. & M. 160, 137; State v. Shermer, 55 Mo. 83; [1895] 2 Ir. 709. See LARCENY; MENS REA; MOTIVE; INTENT.

ANIMUS LUCRANDI. The intention to gain or profit. 3 Kent 357.

ANIMUS MANENDI. The intention of remaining.

To acquire a domicil, the party must have his abode in one place, with the intention of remaining there; for without such intention no new domicil can be gained, and the old will not be lost. See DOMICIL.

ANIMUS MORANDI. The intention to remain or delay.

ANIMUS RECIPIENDI. The intention of receiving.

ANIMUS REPUBLICANDI. The intention of republishing (as a will).

ANIMUS RESTITUENDI. An intention of restoring. Fleta, lib. 3, c. 2, § 3.

ANIMUS REVERTENDI. The intention of returning.

A man retains his domicil if he leaves it *animo revertendi;* In re Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; 4 Bla. Com. 225; 2 Russ. Cr. 23; Poph. 42, 52; 4 Coke 40. See DOMICIL.

ANIMUS REVOCANDI. An intention to revoke. 1 Powell, Dev. 595.

ANIMUS TESTANDI. An intention to make a testament or will.

This is required to make a valid will; for, whatever form may have been adopted, if there was no *animus testandi,* there can be no will. An idiot, for example, can make no will, because he can have no intention; Beach, Wills 77.

ANNALES. A title given to the Year Books. Burrill, Law Dict. Young cattle; yearlings. Cowell.

ANNALS. Masses said in the Romish church for the space of a year or for any other time, either for the soul of a person deceased, or for the benefit of a person living, or for both. Aylif. Parerg.

ANNATES. First-fruits paid out of spiritual benefices to the pope, being the value of one year's profit. Cowell.

ANNEXATION. The union of one thing to another.

It conveys the idea, properly, of fastening a smaller thing to a larger; an incident to a principal. It has been applied to denote the union of Texas to the United States.

Actual annexation includes every movement by which a chattel can be joined or united to the freehold. Mere juxtaposition, or the laying on of an object, however heavy, does not amount to annexation; Merritt v. Judd, 14 Cal. 64.

Constructive annexation is the union of such things as have been holden parcel of the realty, but which are not actually annexed, fixed, or fastened to the freehold. Sheppard, Touchst. 469; Amos & F. Fixt. 3d ed. See FIXTURES.

ANNI NUBILES (Lat. marriageable years). The age at which a girl becomes by law fit for marriage; the age of twelve.

ANNICULUS (Lat.). A child of a year old. Calvinus, Lex.

ANNO DOMINI (Lat. in the year of our Lord; abbreviated A. D.). The computation of time from the birth of Christ.

In a complaint, the year of the alleged offence may be stated by "A. D.," followed by words expressing the year; Com. v. Clark, 4 Cush. (Mass.) 596. But an indictment or complaint which states the year of the commission of the offence in figures only, without prefixing the letters "A. D.," is insufficient; Com. v. McLoon, 5 Gray (Mass.) 91, 66 Am. Dec. 354. The letters "A. D.," followed by figures expressing the year, have been held sufficient; State v. Hodgeden, 3 Vt. 481; State v. Seamons, 1 G. Greene (Ia.) 418; State v. Reed, 35 Me. 489, 58 Am. Dec. 727; 1 Bennett & H. Lead. Cr. Cas. 512; but the phrase, or its equivalents, may be dispensed with; 12 Q. B. 834; Engleman v. State, 2 Ind. 91, 52 Am. Dec. 494; State v. Munch, 22 Minn. 67; but see Whitesides v. People, Breese (Ill.) 21. See Whart. Prec. 4th ed. (2) n. g.; YEAR OF OUR LORD; INDICTION.

ANNONA. Barley; corn; grain; a yearly contribution of food, of various kinds, for support.

Annona porcum, acorns; *annona frumentum hordeo admixtum,* corn and barley mixed; *annona panis,* bread without reference to the amount. Du Cange; Spelman, Gloss.; Cowell.

The term is used in the old English law, and also in the civil law quite generally, to denote anything contributed by one person towards the support of another; as, *si quis mancipio annonam dederit* (if any shall have given food to a slave); Du Cange.

ANNONÆ CIVILES. Yearly rents issuing out of certain lands and payable to monasteries.

ANNOTATION. In Civil Law. The answers of the prince to questions put to him by private persons respecting some doubtful point of law. See RESCRIPT.

Summoning an absentee; Dig. 1. 5.

The designation of a place of deportation. Dig. 32. 1. 3.

ANNOYANCE. Discomfort; vexation. It is held to mean something less than nuisance. 25 S. J. 30. See NUISANCE.

ANNUAL ASSAY. An annual trial of the gold and silver coins of the United States, to ascertain whether the standard fineness and weight of the coinage is maintained.

At every delivery of coins made by the coiner to a superintendent, it is made the duty of the superintendent, in the presence of the assayer, to take indiscriminately a certain number of pieces of each variety for the annual trial of coins, the number for gold coins being not less than one piece for each one thousand pieces, or any fractional part of one thousand pieces delivered; and for silver coins, one piece for each two thousand pieces, or any fractional part of two thousand pieces delivered. The pieces so taken shall be carefully sealed up in an envelope, properly labelled, stating the date of the delivery, the number and denominations of the pieces enclosed, and the amount of the delivery from which they were taken. These sealed parcels containing the reserved pieces shall be deposited in a pyx, designated for the purpose at each mint, which shall be under the joint care of the superintendent and assayer, and be so secured that neither can have access to its contents without the presence of the other, and the reserved pieces in their envelopes from the coinage of each mint shall be transmitted quarterly to the mint at Philadelphia. A record shall also be kept of the number and denomination of the pieces so delivered, a copy of which shall be transmitted quarterly to the director of the mint; Sect. 40, Act of Feb. 12, 1873; U. S. R. S. § 3539.

To secure a due conformity in the gold and silver coins to their respective standards and weights, it is provided by law that an annual trial shall be made of the pieces reserved for this purpose at the mint and its branches, before the judge of the district court of the United States for the eastern district of Pennsylvania, the comptroller of the currency, the assayer of the assay office at New York, and such other persons as the president shall from time to time designate for that purpose, who shall meet as assay commissioners, on the second Wednesday in February annually, at the mint in Philadelphia, to examine and test, in the presence of the director of the mint, the fineness and weight of the coins reserved by the several mints for this purpose, and may continue their meetings by adjournment, if necessary; and if a majority of the commissioners shall fail to attend at any time appointed for their meeting, then the director of the mint shall call a meeting of the commissioners at such other time as he may deem convenient, and if it shall appear that these pieces do not differ from the standard fineness and weight by a greater quantity than is allowed by law, the trial shall be considered and reported as satisfactory; but if any greater deviation from the legal standard or weight shall appear, this fact shall be certified to the president

of the United States, and if, on a view of the circumstances of the case, he shall so decide, the officer or officers implicated in the error shall be thenceforward disqualified from holding their respective offices; § 48, Act of Feb. 12, 1873 (U. S. R. S. § 3547); *id.* §§ 49, 50 (R. S. §§ 3548, 3549). As to the standard weight and fineness of the gold and silver coins of the United States, see sections of the last-cited act. The limit of allowance for wastage is fixed; § 43, Act of Feb. 12, 1873; R. S. § 3542.

For the purpose of securing a due conformity in the weight of the coins of the United States, the brass troy pound weight procured by the minister of the United States (Mr. Gallatin) at London, in the year 1827, for the use of the mint, and now in the custody of the director thereof, shall be the standard troy pound of the mint, of the United States, conformably to which the coinage thereof shall be regulated; and it is made the duty of the director of the mint to procure and safely keep a series of standard weights corresponding to the aforesaid troy pound, and the weights ordinarily employed in the transactions of the mint shall be regulated according to such standards at least once in every year under his inspection, and their accuracy tested annually in the presence of the assay commissioners on the day of the annual assay; Act of Feb. 12, 1873; R. S. § 3543.

In England, the accuracy of the coinage is reviewed once in about every four years; no specific period being fixed by law. It is an ancient custom or ceremony, and is called the *Trial of the Pyx;* which name it takes from the pyx or chest in which the specimen-coins are deposited. These specimen-pieces are taken to be a fair representation of the whole money coined within a certain period. It having been notified to the government that a trial of the pyx is called for, the lord chancellor issues his warrant to summon a jury of goldsmiths who, on the appointed day, proceed to the Exchange Office, Whitehall, and there, in the presence of several privy councillors and the officers of the mint, receive the charge of the lord chancellor as to their important functions, who requests them to deliver to him a verdict of their finding. The jury proceed to Goldsmiths' Hall, London, where assaying apparatus and all other necessary appliances are provided, and, the sealed packages of the specimen-coins being delivered to them by the officers of the mint, they are tried by weight, and then a certain number are taken from the whole and melted into a bar, from which the assay trials are made, and a verdict is rendered according to the results which have been ascertained; Encyc. Brit. titles Coinage, Mint, Money, Numismatics.

ANNUAL INCOME. The annual receipts from property. See INCOME; TAX.

ANNUAL RENT. In Scotch Law. Interest.

To avoid the law against taking interest, a yearly rent was purchased; hence the term came to signify interest; Bell, Dict.; Paterson, Comp. §§ 19, 265.

ANNUALLY. Yearly; returning every year.

As applied to interest it is not an undertaking to pay interest at the end of one year only, but to pay interest at the end of each and every year during a period of time, either fixed or contingent; Sparhawk v. Wills, 6 Gray (Mass.) 164.

ANNUITY (Lat. *annuus*, yearly). A yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor. Co. Litt. 144 *b;* 2 Bla. Com. 40; Lumley, Ann. 1; Mayor, etc., of City of New Orleans v. Duplessis, 5 Mart. O. S. (La.) 312; Dav. Ir. 14; Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 216.

An annuity is different from a rent-charge, with which it is sometimes confounded,—the annuity being chargeable on the person merely, and so far personalty; while a rent-charge is something reserved out of realty, or fixed as a burden upon the estate in land; 2 Bla. Com. 40; Rolle, Abr. 226; Horton v. Cook, 10 Watts (Pa.) 127, 36 Am. Dec. 151. An annuity in fee is said to be a personal fee; for, though transmissible, as is real estate of inheritance; Ambl. Ch. 782; Challis, R. P. 46; liable to forfeiture as a hereditament; 7 Coke, 34 *a;* and not constituting assets in the hands of an executor, it lacks some other characteristics of realty. The husband is not entitled to curtesy, nor the wife to dower, in an annuity; Co. Litt. 32 *a.* It cannot be conveyed by way of use; 2 Wils. 224; is not within the statute of frauds, and may be bequeathed and assigned as personal estate; 2 Ves. Sen. 70; 4 B. & Ald. 59; Roscoe, Real Act. 68, 35; 3 Kent 460.

To enforce the payment of an annuity, an action of annuity lay at common law, but when brought for arrears must be before the annuity determines; Co. Litt. 285. In case of the insolvency or bankruptcy of the debtor, the capital of the constituted annuity becomes exigible; La. Civ. Code, art. 2769; stat. 6 Geo. IV. c. 16, §§ 54, 108; 5 Ves. 708; 4 *id.* 763; 1 Belt, Supp. Ves. 308, 431.

Land charged with an annuity, having descended to heirs at law of which the annuitant is one, is relieved of the annuity only *pro tanto;* but *quære* if the annuitant had acquired the same right by purchase; Addams v. Heffernan, 9 Watts (Pa.) 529.

See CHARGE; LIFE TABLES.

ANNUL. To abrogate, nullify, or abolish; to make void.

It is not a technical word and there is nothing which prevents the idea from being expressed in equivalent words; Woodson v. Skinner, 22 Mo. 24.

ANNULUS ET BACULUS (Lat. ring and staff). The investiture of a bishop was *per annulum et baculum* by the prince's delivering to the prelate a ring and pastoral staff, or crozier. 1 Sharsw. Bla. Com. 378.

ANNUM, DIEM ET VASTUM. See YEAR, DAY AND WASTE.

ANNUS LUCTUS (Lat.). The year of mourning. Code, 5. 9. 2.

It was a rule among the Romans, and also the Danes and Saxons, that the widows should not marry *infra annum luctus* (within the year of mourning); 1 Bla. Com. 457.

In the Transvaal a widower may not remarry within three months and a widow within 300 days, unless by dispensation. In the Orange River Colony the period for a widow is 280 days.

ANNUS UTILIS. A year made up of available or serviceable days. Brissonius; Calvinus, Lex. In prescription, the period of incapacity of a minor, etc., was not counted; it was no part of the *anni utiles*.

ANNUUS REDITUS. A yearly rent; annuity. 2 Sharsw. Bla. Com. 41; Reg. Orig. 158 *b*.

ANONYMOUS. Without name.

Books published without the name of the author are said to be anonymous. Cases in the reports of which the names of the parties are not given are said to be anonymous.

An anonymous society in the Mexican code is one which has no firm name and is designated by the particular designation of the object of the undertaking. The shareholders are liable for debts only to the extent of their shares.

ANSWER. A defence in writing, made by a defendant to the charges contained in a bill or information filed by the plaintiff against him in a court of equity.

In case relief is sought by the bill, the answer contains both the defendant's defence to the case made by the bill, and the examination of the defendant, on oath, as to the facts charged in the bill, of which discovery is sought; Gresley, Eq. Ev. 19; Jeremy's Mitf. Eq. Pl. 15, 16. These parts were kept distinct from each other in the civil law; their union, in chancery, has caused much confusion, in equity pleading; Langd. Eq. Pl. 41; Story, Eq. Pl. § 850; Dan. Ch. Pl. & Pr. *711.

As to the *form* of the answer, it usually contains, in the following order: *the title*, specifying which of the defendants it is the answer of, and the names of the plaintiffs in the cause in which it is filed as answer; 8 Ves. 79; 11 *id.* 62; 1 Russ. 441; see McLure v. Colclough, 17 Ala. 89; *a reservation* to the defendant of all the advantages which might be taken by exception to the bill, which is mainly effectual in regard to other suits; Beames, Eq. Pl. 46; Surget v. Byers, 1 Hempst. 715, Fed. Cas. No. 13,629; O'Niell v. Cole, 4 Md. 107; *the substance* of the answer, according to the defendant's knowledge, remembrance, information, and belief, in which the matter of the bill, with the interrogatories founded thereon, are answered, one after the other, together with such additional matter as the defendant thinks necessary to bring forward in his defence, either for the purpose of qualifying or adding to the case made by the bill, or to state a new case on his own behalf; *a general traverse* or denial of all unlawful combinations charged in the bill, and of all other matters therein contained not expressly answered.

The answer must be upon oath of the defendant, or, if of a corporation, under its seal; Langd. Eq. Pl. § 78; Bisp. Eq. 9; Royston v. Royston, 21 Ga. 161; Lahens v. Fielden, 1 Barb. (N. Y.) 22; see Maryland & N. Y. Coal & Iron Co. v. Wingert, 8 Gill (Md.) 170; 1 Dan. Ch. Pl. & Pr. *734; Van Valtenburg v. Alberry, 10 Ia. 264; unless the plaintiff waives an oath; Story, Eq. Pl. § 824; Bingham v. Yeomans, 10 Cush. (Mass.) 58; Chace v. Holmes, 2 Gray (Mass.) 431; Clements v. Moore, 6 Wall. (U. S.) 299, 18 L. Ed. 786; Brown v. Bulkley, 14 N. J. Eq. 306; Wallwork v. Derby, 40 Ill. 527; in which case it must generally be signed by the defendant; 6 Ves. 171, 285; Cooper, Eq. Pl. 326; Van Valtenburg v. Alberry, 10 Ia. 264; and must be signed by counsel; Story, Eq. Pl. § 876; unless taken by commissioners; Davis v. Davidson, 4 McL. 136, Fed. Cas. No. 3,631; 1 Dan. Ch. Pl. & Pr. *732. It is held that a corporation cannot be compelled to answer under oath; Colgate v. Compagnie Française du Telegraphe De Paris à N. Y., 23 Fed. 82; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164. Where the bill waives an answer under oath, the waiver is ineffectual unless accepted; Heath v. Ry. Co., Fed. Cas. No. 6,306; and if the defendant, notwithstanding the waiver, answers under oath, the answer has the same effect as if there had been no waiver; Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Woodruff v. R. Co., 30 Fed. 91; but it is held that even if its answer when sworn to is evidence under the equity rule, it cannot prove an affirmative defence; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164 (C. C. A. 6 Circ.).

Where bill waives answer under oath, the bill ceases to be a bill of discovery, and the defendant need not answer interrogatories therein; McFarland v. Bank, 132 Fed. 399. An averment that "defendant has no knowledge or belief" as to defendant's corporate capacity is sufficient to put plaintiff on proof thereof; W. L. Wells Co. v. Mfg. Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003.

As to substance, the answer must be full and perfect to all the material allegations of the bill, confessing and avoiding, denying or traversing, all the material parts; Comyns. Dig. *Chauncery*, K, 2; Mayer v. Galluchat, 6 Rich. Eq. (S. C.) 1; Beall v. Blake, 10 Ga. 449; Shotwell's Adm'r v. Struble, 21 N. J. Eq. 31; 24 Beav. 421; not literally merely, but answering the substance of the charge; Mitf. Eq. Pl. 309; Grady v. Robinson, 28 Ala. 289; Pitts v. Hooper, 16 Ga. 442; Smith v. Loomis, 5 N. J. Eq. 60; and see Hogencamp v. Ackerman, 10 N. J. Eq. 267; must be responsive; Howell v. Robb, 7 N. J. Eq. 17; Chambers v. Warren, 13 Ill. 318; Mann v. Betterly, 21 Vt. 326; and must state facts, and not arguments, directly and without evasion; Story, Eq. Pl. § 852; Spivey v. Frazee, 7 Ind. 661; Gates v. Adams, 24 Vt. 70; Thompson v. Mills, 39 N. C. 390; Gamble & Johnston v. Johnson, 9 Mo. 605; without scandal; Langdon v. Pickering, 19 Me. 214; Burr v. Burton, 18 Ark. 215; or impertinence; Langdon v. Goddard,

3 Sto. 13, Fed. Cas. No. 8,061; 6 Beav. 558; Gier v. Gregg, 4 McL. 202, Fed. Cas. No. 5,406; Conwell v. Claypool, 8 Blackf. (Ind.) 124. See 10 Sim. 345; 17 Eng. L. & Eq. 509; Saltmarsh v. Bower & Co., 22 Ala. 221; McIntyre v. Trustees of Union College, 6 Paige (N. Y.) 239; U. S. v. McLaughlin, 24 Fed. 823; Crammer v. Water Co., 39 N. J. Eq. 76; 6 Ves. 456.

Under the modern English practice the form of the answer has been much simplified; 15 & 16 Vict. c. 86, § 17. Under the General Orders of 1852 a form was adopted, though scarcely necessary in view of the absence of all technicality; 2 Dan. Ch. Pr. 724; 3 *id.* 2139. In the United States generally the answer has been simplified, but the variations from the old practice consist mainly in dividing the answer into numbered paragraphs, adjusting its general form to the bill as now drawn (see BILL), and in omitting the clause reserving exceptions (though in practice this is very frequently retained), and the clause denying combination, retaining merely, to form an issue on them, a general traverse of all allegations not expressly answered.

A material allegation in a bill, which is neither expressly admitted or denied, is deemed to be controverted; Glos v. Randolph, 133 Ill. 197, 24 N. E. 426; Yates v. Thompson, 44 Ill. App. 145.

Insufficiency of answer is a ground for exception when some material allegation, charge, or interrogatory is unanswered or not fully answered; West v. Williams, 1 Md. Ch. Dec. 358; Hardeman v. Harris, 7 How. (U. S.) 726, 12 L. Ed. 889; Lea v. Vanbibber, 6 Humphr. (Tenn.) 18. See Lanum v. Steel, 10 Humphr. (Tenn.) 280; McCormick v. Chamberlin, 11 Paige (N. Y.) 543; American Loan & Trust Co. v. R. Co., 40 Fed. 384; 1 Dan. Ch. Pl. & Pr. 760; Blaisdell v. Stevens, 16 Vt. 179.

Where the defendant in equity suffers a default he does not admit facts not alleged in the bill nor conclusions of the pleader from the facts stated; Cramer v. Bode, 24 Ill. App. 219.

An answer may, in some cases, be amended; 2 Bro. C. C. 143; 2 Ves. 85; to correct a mistake of fact; Ambl. 292; 1 P. Wms. 297; but not of law; Ambl. 65; nor any mistake in a material matter except upon evidence of surprise; Howe v. Russell, 36 Me. 124; Smith v. Babcock, 3 Sumn. 583, Fed. Cas. No. 13,008; 1 Bro. C. C. 319; and not, it seems, to the injury of others; Story, Eq. Pl. § 904; Bell's Adm'r v. Hall, 5 N. J. Eq. 49. The court may permit an answer to be amended even after the announcement of the decision of the cause; Arnett v. Welch's Ex'rs, 46 N. J. Eq. 543, 20 Atl. 48. A supplemental answer may be filed to introduce new matter; Suydam v. Truesdale, 6 McL. 459, Fed. Cas. No. 13,656; U. S. v. Morris, 7 Mackey (D. C.) 8; or correct mistakes; 2 Coll. 133; Graham v. Tankersley, 15 Ala. 634; Carey v. Ector, 7 Ga. 99; Coquillard v. Suydam, 8 Blackf. (Ind.) 24; which is considered as forming a part of the original answer. See DISCOVERY; Mitf. Eq. Pl. 244, 254.

The effect of an answer must be overcome by two witnesses or by one witness and corroborating evidence; but the answer of a corporation is not entitled to the same probative force as that of an individual; Langd. Eq. Pl. § 87, citing Union Bank v. Geary, 5 Pet. (U. S.) 111, 8 L. Ed. 60; and the rule does not apply where there is a mere denial made for want of knowledge; Blair v. Silver Peak Mines, 93 Fed. 332.

For an historical account, see 2 Brown, Civ. Law 371, n.; Barton, Suit in Eq.; Langdell's Summary of Equity 41.

By the Equity Rules of the Supreme Court of the United States, in effect February 1, 1913 (198 Fed. xix; 226 U. S. appendix) every defence to a bill in point of law, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or by answer. Defences formerly presentable by plea in bar or abatement shall be made in the answer. It shall in short and simple terms set out the defence to each claim in the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless defendant is without knowledge, in which case he shall so state, such statement operating as a denial. It may state as many defences in the alternative, regardless of consistency, as the defendant deems essential. Counter-claims arising out of the transaction must be stated. Any set-off or counter-claim, which might be the subject of any independent equity suit, may be set up without cross-bill.

In Practice. The declaration of a fact by a witness after a question has been put, asking for it.

ANTAPOCHA (Lat.). An instrument by which the debtor acknowledges the debt due the creditor, and binds himself. A copy of the *apocha* signed by the debtor and delivered to the creditor. Calvinus, Lex.

ANTE JURAMENTUM (Lat.; called also *Juramentum Calumniæ*). The oath formerly required of the parties previous to a suit, —of the plaintiff that he would prosecute, and of the defendant that he was innocent. Jacobs, Dict.; Whishaw.

ANTE LITEM MOTAM. Before suit brought.

ANTE-NUPTIAL. Before marriage; before marriage, with a view to entering into marriage. See CONTEMPLATION OF MARRIAGE.

ANTE-NUPTIAL CONTRACT. A contract made before marriage.

The term is most generally applied to a

contract entered into between a man and woman in contemplation of their future marriage, and in that case it is called a marriage contract.

A wife may waive all right to any portion of the estate of her husband by an ante-nuptial contract, and this is binding on her unless fraud, advantage or collusion can be shown; Edwards v. Martin, 39 Ill. App. 145. An ante-nuptial agreement that the wife shall claim no right of dower does not deprive her of her distributive share in the husband's personal property; Pitkin v. Peet, 87 Ia. 268, 54 N. W. 215. A contract by which each agreed to make no claim to the property of the one dying first is void so far as dower is concerned, as it makes no provision in lieu thereof; Brandon v. Dawson, 51 Mo. App. 237.

Conveyances made by one of two persons about to be married, usually called marriage settlements.

They are usually made in contemplation of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other persons; as their children. They may be of either personal or real estate. Such settlements vest the property in trustees upon specified terms, usually, for the benefit of the husband and wife during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children.

Ante-nuptial agreements of this kind will be enforced in equity by a specific performance of them, provided they are fair and valid and the intention of the parties is consistent with the principles and policy of law; Barnett v. Goings, 8 Blackf. (Ind.) 284, 44 Am. Dec. 766; Eaton v. Tillinghast, 4 R. I. 276; Whichcote v. Lyle's Ex'rs, 28 Pa. 73; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709; Neves v. Scott, 9 How. (U. S.) 196, 13 L. Ed. 102. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid both against creditors and purchasers; Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506.

A conveyance by the husband or wife prior to marriage, which, if permitted, would deprive the other of his or her marital rights in the property conveyed.

In Chandler v. Hollingsworth, 3 Del. Ch. 99, considering equitable relief against ante-nuptial agreements, Bates, Ch., held that the husband will be protected against a voluntary conveyance or settlement, by his intended wife, of all her estate, to the exclusion of the husband, made pending an engagement of marriage, without his knowledge, even in the absence of express misrepresentation or deceit, and whether the husband knew of the existence of the property or not; and that the wife's dower will be protected against the voluntary conveyance of the husband, under like circumstances. A settlement after marriage conveying property in execution of an oral ante-nuptial agreement is void as against creditors; 2 De G. & J. 76. But they have been allowed; Hussey v. Castle, 41 Cal. 239; Brown v. Lunt, 37 Me. 423. By an oral ante-nuptial agreement a husband agreed to convey to trustees, when it should come into possession, a reversion belonging to his wife to be held on certain trusts, which under voluntary settlements would not be valid as against creditors. In a post-nuptial writing the husband covenanted to perform the oral agreement. He afterwards became bankrupt. It was held that, the one agreement being oral and the other gratuitous, the trustee in bankruptcy would not be ordered to perform; [1901] 2 Ch. 145. It has been held that marriage is sufficient part performance to make the contract binding; Nowack v. Berger, 133 Mo. 24, 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; Chandler v. Hollingsworth, 3 Del. Ch. 99.

See MARRIAGE SETTLEMENT.

ANTEDATE. To put a date to an instrument of a time before the time it was written.

ANTENATI (Lat. born before). Those born in a country before a change in its political condition such as to affect their allegiance.

The term is ordinarily applied by American writers to denote those born in this country prior to the Declaration of Independence. It is distinguished from *postnati*, those born after the event.

As to the rights of British *antenati* in the United States, see Apthorp v. Backus, Kirby (Conn.) 413, 1 Am. Dec. 26; Miller v. English, 6 N. J. Eq. 305; Adams v. Ryerson, 6 N. J. Eq. 337; Kilham v. Ward, 2 Mass. 236, 244; Jackson v. Wright, 4 Johns. (N. Y.) 75; Hunter v. Fairfax's Devisee, 1 Munf. (Va.) 218; Com. v. Bristow, 6 Call (Va.) 60; Jackson's Lessee v. Burns, 3 Binn. (Pa.) 75; Dawson v. Godfrey, 4 Cra. (U. S.) 321, 2 L. Ed. 634; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617. As to the use of the term in England, see 7 Coke 1, 27; 2 B. & C. 779; 5 *id.* 771; 1 Wood. Lect. 382; POSTNATI.

ANTHROPOMETRY. A word given by a French savant, Alphonse Bertillon, to a system of identification depending on the unchanging character of certain measurements of parts of the human frame. It was largely adopted after its introduction in France in 1883, but fell into disfavor as being costly and as liable to error. It has given place to the "finger print" system devised by Francis Galton, which was adopted in Bengal by the Indian government in 1897 and in England three years later. Encycl. Br. *Anthropometry.* This method is in use also in Ger-

many and Italy; in other countries both systems are used; 4 Towns. Cr. Law 301.

See report of United States Commissioner of Education, 1895–6, vol. 2, c. 28, where the Bertillon system is fully described and statutes of Massachusetts, New York Pennsylvania, etc., are collected. See also Wigmore, Jud. Proof 79.

The Bertillon system was based upon: (1) The almost absolute immutability of the human frame after the twentieth year of age; the growth thereafter, being only of the thigh bone, is so little that it is easy to make allowance for it. (2) The diversity of dimension of the human skeleton of different subjects is so great that it is difficult, if not impossible, to find two individuals whose bony structure is even sufficiently alike to make confusion between them possible. (3) The facility and comparative precision with which certain dimensions of the skeleton may be measured in the living subject by calipers of simple construction. The measurements which, as the result of minute criticism, have been preferred, are as follows: (1) Height (man standing); (2) reach (finger tip to finger tip); (3) trunk (man sitting); (4) length; (5) width; (6) length of right ear; (7) width of right ear; (8) length of left foot; (9) length of left middle finger; (10) length of left little finger; (11) length of left forearm.

See ROGUES' GALLERY.

ANTI-MANIFESTO. The declaration of the reasons which one of the belligerents publishes, to show that the war as to him is defensive. Wolffius § 1187.

ANTI-TRUST ACTS. Federal and state statutes to protect trade and commerce from unlawful restraints and monopolies. See U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; RESTRAINT OF TRADE.

ANTICHRESIS. In Civil Law. An agreement by which the debtor gives to the creditor the income from the property which he has pledged, in lieu of the interest on his debt. Guyot, *Répert.*; Story Bailm. § 344.

It is analogous to the Welsh mortgage of the common law. In the French law, if the income was more than the interest, the debtor was entitled to demand an account of the income, and might claim any excess; La. Civ. Code, 2085. See Dig. 20. 1. 11; *id.* 13. 7. 1; Code, 8. 28. 1; Livingston's Ex'x v. Story, 11 Pet. (U. S.) 351, 9 L. Ed. 746; 1 Kent 137; Calderwood v. Calderwood, 23 La. Ann. 658.

ANTICIPATION (Lat. *ante*, before, *capere*, to take). The act of doing or taking a thing before its proper time.

In deeds of trust there is frequently a provision that the income of the estate shall be paid by the trustee as it shall accrue, and not by way of anticipation. A payment made contrary to such provision would not be considered as a discharge of the trustee; Bisp. Eq. 104.

As to the use of the term in patent law, see PATENT.

ANTICIPATORY BREACH OF CONTRACT. See BREACH.

ANTINOMIA. In Roman Law. A real or apparent contradiction or inconsistency in the laws. Merlin, *Répert.*

It is sometimes used as an English word, and spelled Antinomy.

ANTIQUA CUSTUMA (L. Lat. ancient custom). The duty due upon wool, woolfells, and leather under the statute 3 Edw. I.

The distinction between *antiqua* and *nova custuma* arose upon the imposition of an increased duty upon the same articles, in the twenty-second year of his reign; Bacon, Abr. *Smuggling*, C. 1.

ANTIQUA STATUTA. Also called *Vetera Statuta*. English statutes from the time of Richard First to Edward Third. Reeves, Hist. Eng. Law 227. See NOVA STATUTA.

ANTIQUARE. In Roman Law. To resolve a former law or practice; to reject or vote against a new law; to prefer the old law. Those who voted against a proposed law wrote on their ballots the letter "A," the initial of *antiquo*, I am for the old law; Calvin; Black, Dict.

ANTIQUITIES. The act of June 8, 1906, provides for the punishment of any person who shall injure or destroy, etc., any historic or prehistoric ruin, or object of antiquity, on any government lands. See LANDMARKS.

ANTITHETARIUS. In Old English Law. A man who endeavors to discharge himself of the crime of which he is accused, by retorting the charge on the accuser. He differs from an approver in this, that the latter does not charge the accuser, but others; Jacobs, Law Dict.

ANY. Some; one out of many; an indefinite number.

It is synonymous with "either;" State v. Antonio, 3 Brev. (S. C.) 562, 3 Wheel. Crim. Law Cas. 508; and is given the full force of "every" or "all"; Logan v. Small, 43 Mo. 254; 4 Q. B. D. 409; McMurray v. Brown, 91 U. S. 265, 23 L. Ed. 321; L. R. 5 H. L. 134; but its generality may be restricted by the context; 6 Q. B. D. 607.

ANY TERM OF YEARS. In Massachusetts, this term, in the statutes relating to additional punishment, means not less than two years. Ex parte Seymour, 14 Pick. (Mass.) 40; Ex parte Dick, *id.* 86; Ex parte White, *id.* 90; Ex parte Stevens, *id.* 94.

APANAGE. In French Law. A portion set apart for the use and support of the younger ones, upon condition, however, that it should revert, upon failure of male issue, to his original donor and his heirs. Spelman, Gloss.

APARTMENT. A part of a house occupied by a person, while the rest is occupied by another or others. 7 M. & G. 95; 6 Mod. 214; Woodf. L. & T. (1st Am. ed.) 660. "Apartments is a proper description of the premises so occupied;" 7 M. & G. 95.

The occupier of part of a house, where the

landlord resides on the premises and retains the key of the outer door, is held a mere lodger, and is not a person occupying "as owner or tenant;" 7 M. & G. 85.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other, the several apartments shall be rated as distinct mansion houses; but if the owner live therein, all the untenanted apartments shall be considered as parts of his house; 6 Mod. 214.

A flat or flat house is a building consisting of more than one story in which there are one or more suites of rooms on each floor equipped for private house-keeping purposes. An apartment house is either a building otherwise termed a flat or it is a building divided into separate suites of rooms intended for residence, but commonly without facilities for cooking; Lignot v. Jaekle, 72 N. J. Eq. 233, 65 Atl. 221.

By the lease of apartments in a building, in a town, for the purpose of trade, the lessee takes only such interests in the subjacent lands as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire, this interest ceases; McMillan v. Solomon, 42 Ala. 356, 94 Am. Dec. 654. See Cunningham v. Entrekin, 34 W. N. C. (Pa.) 353.

In an indictment for "entering a *room* or *apartment*, with the intention to commit larceny," it is right to charge the ownership of the room to be his who rented it from one who had the general supervision and control of the whole house, and occupied the same as a lodger; People v. St. Clair, 38 Cal. 137.

See FLAT.

APERTA BREVIA. Open, unsealed writs. Rap. & Lawr. Law Dict.

APEX JURIS (Lat. the summit of the law). A term used to indicate a rule of law of extreme refinement. A term used to denote a stricter application of the rules of law than is indicated by the phrase *summum jus*. Dennis v. Ludlow, 2 Caines (N. Y.) 117; Ex parte Foster, 2 Sto. 143, Fed. Cas. No. 4,960; Hinsdale v. Miles, 5 Conn. 334; 1 Burr. 341; 14 East 522. See Co. Litt. 3046; Wing. Max. 19; MAXIMS, *apices juris, etc.*

APHASIA. Loss of the power of using words properly, of comprehending them when spoken or written or of remembering the nature and uses of familiar objects. *Sensory aphasia* or *apraxia* is an inability to recognize the use or import of objects or the meaning of words, and includes *word blindness* and *word deafness*, visual and auditory asphasia. *Motor asphasia* is a loss of memory of the efforts necessary to pronounce words, and often includes *agraphia*, or the inability to write words of the desired meaning.

APICES LITIGANDI. Extremely fine points or subtleties of litigation nearly equivalent to the modern phrase "sharp practice." Rap. & Lawr. Law Dict., citing 3 Burr. 1243.

APOCA (Lat.). A writing acknowledging payments; acquittance.

It differs from acceptilation in this, that acceptilation imports a complete discharge of the former obligation whether payment be made or not; *apoca* discharge only upon payment being made. Calvinus, Lex.

APOCRISARIUS (Lat.). **In Civil Law.** A messenger; an ambassador.

Applied to legatees or messengers, as they carried the messages (*ἀπόκρισεις*) of their principals. They performed several duties distinct in character, but generally pertaining to ecclesiastical affairs.

A messenger sent to transact ecclesiastical business and report to his superior; an officer who had charge of the treasury of a monastic edifice; an officer who took charge of opening and closing the doors. Du Cange; Spelman, Gloss.; Calvinus, Lex.

Apocrisarius Cancellarius. An officer who took charge of the royal seal and signed royal despatches.

Called, also, *secretarius, consiliarius* (from his giving advice); *referendarius; a consiliis* (from his acting as counsellor); *a responsis*, or *responsalis*.

APOGRAPHIA. **In Civil Law.** An examination and enumeration of things possessed; an inventory. Calvinus, Lex.

APOPLEXY. **In Medical Jurisprudence.** The group of symptoms arising from rupture of a minute artery and consequent hemorrhage into the substance of the brain or from the lodgment of a minute clot in one of the cerebral arteries.

The symptoms consist usually of sudden loss of consciousness, muscular relaxation, lividity of the face and slow stertorous respiration, lasting from a few hours to several days. Death frequently ensues. If consciousness returns, there is found paralysis of some of the voluntary muscles, very frequently of the muscles of the face, arm, and leg upon one side, giving the symptom of hemiplegia. There is usually more or less mental impairment.

The mental impairment presents no uniform characters, but varies indefinitely, in extent and severity, from a little failure of memory, to an entire abolition of all the intellectual faculties. The power of speech is usually more or less affected; it may be a slight difficulty of utterance, or an inability to remember certain words or parts of words, or an entire loss of the power of articulation. This feature may arise from two different causes—either from a loss of the power of language, or a loss of power in the muscles of the larynx. This fact must be borne in mind by the medical jurist, and there can be little difficulty in distinguishing between them. In the latter, the patient is as capable as ever of reading, writing, or understanding spoken language. In the former, he is unable to communicate his thoughts by writing, because they are disconnected from their articulate signs. He recognizes their meaning when he sees them, but cannot recall them by any effort of the

perceptive powers. This affection of the faculty of language is manifested in various ways. One person loses all recollection of the names of persons and things, while other parts of speech are still at command. Another forgets everything but substantives, and only those which express some mental quality or abstract idea. Another loses the memory of all words but yes or no. In these cases the patient is able to repeat the words on hearing them pronounced, but, after a second or third repetition, loses them altogether.

See APHASIA.

Wills and contracts are not unfrequently made in that equivocal condition of mind which sometimes follows an attack of apoplexy or paralysis; and their validity is contested on the score of mental incompetency. In cases of this kind there are, generally, two questions at issue, viz., the absolute amount of mental impairment, and the degree of foreign influence exerted upon the party. They cannot be considered independently of each other. Neither of them alone might be sufficient to invalidate an act, while together, even in a much smaller degree, they would have this effect.

In testing the mental capacity of paralytics, reference should be had to the nature of the act in question. The question is not, had the testator sufficient capacity to make *a* will? but, had he sufficient capacity to make *the* will in dispute? A capacity which might be quite adequate to a distribution of a little personal property among a few near relatives would be just as clearly inadequate to the disposition of a large estate among a host of relatives and friends possessing very unequal claims upon the testator's bounty. Here, as in other mental conditions, all that is required is mind sufficient for the purpose, neither more nor less. See DEMENTIA; DELIRIUM; IMBECILITY; MANIA. In order to arrive at correct conclusions on this point, we must be careful, among other things, not to confound the power to appreciate the terms of a proposition with the power to discern its relations and consequences.

In testing the mental capacity of one who has lost the power of speech, it is always difficult, and often impossible, to arrive at correct results. If the person is able and willing to communicate his thoughts in writing, his mental capacity may be clearly revealed. If not disposed to write, he may communicate by constructing words and sentences by the help of a dictionary or block letters. Failing in this, the only other intellectual manifestation possible is the expression of assent or dissent by signs to propositions made by others. Any of these means of communication, other than that of writing, must leave us much in the dark respecting the amount of intellect possessed by the party. If the act in question is complicated in its relations, if it is unreasonable in its dispositions, if it bears the slightest trace of foreign influence, it cannot but be regarded with suspicion. If the party has only the power of assenting or dissenting, it must always be impossible to decide whether this does not refer to the terms rather than the merits of the proposition; and, therefore, an act which bears no other evidence than this of the will of the person certainly ought not to be established. Besides, it must be considered that a will drawn up in this manner is, actually, not the will of the testator, since every disposition has originated in the minds of others; Ray, Med. Jur. 363. The phenomena and legal consequences of paralytic affections are extensively discussed in Clark v. Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; 1 Hagg. Eccl. 502, 577; 2 *id.* 84; 1 Curt. Eccl. 782; Parish Will Case, 4 vols. N. Y. 1858. And see DEATH; INSANITY.

APOSTASY. A total renunciation of Christianity by embracing either a false religion or having no religion at all. 4 Bla. Com. 43. See BLASPHEMY; CHRISTIANITY.

APOSTLES. Brief letters of dismissal granted to a party who takes an appeal from the decision of an English court of admiralty, stating the case, and declaring that the record will be transmitted. 2 Brown, Civ. and Adm. Law 438; Dig. 49. 6. It is used in Adm. Rule 6, of the 2d Circ. 90 Fed. lxix.

This term was used in the civil law. It is derived from *apostolos*, a Greek word, which signifies *one sent*, because the judge from whose sentence an appeal was made, sent to the superior judge these letters of dismission, or apostles; Merlin, *Répert.* mot *Apôtres;* 1 Pars. Marit. Law 745.

APOSTOLI. In Civil Law. Certificates of the inferior judge from whom a cause is removed, directed to the superior. Dig. 49. 6. See APOSTLES.

Those sent as messengers. Spelman, Gloss.

APOTHECARY. "Any person who keeps a shop or building where medicines are compounded or prepared according to prescriptions of physicians, or where medicines are sold, shall be regarded as an apothecary." 14 Stat. L. 119, § 23.

In England and Ireland an apothecary is a member of an inferior branch of the medical profession and is licensed by the Apothecaries Company to practice medicine as well as to sell drugs.

See DRUGGIST.

APPARATOR (Lat.). A furnisher; a provider.

The sheriff of Bucks had formerly a considerable allowance as *apparator comitatus* (apparator for the county); Cowell.

APPARENT. That which appears; that which is manifest; what is proved. It is required that all things upon which a court must pass should be made to appear, if matter in pais, under oath; if matter of record, by the record. It is a rule that those things which do not appear are to be considered as not existing: *de non apparentibus et non existentibus eadem est ratio;* Broom,

Max. 20. What does not appear does not exist: *quod non apparet, non est;* La Frombois v. Jackson, 8 Cow. (N. Y.) 600, 18 Am. Dec. 463; 1 Term 404; 12 M. & W. 316.

In case of homicide when the term "apparent danger" is used it means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury as would make the killing apparently necessary for self-preservation; Evans v. State, 44 Miss. 762.

APPARITOR. An officer or messenger employed to serve the process of the spiritual courts in England and summon offenders. Cowell.

APPARURA. In Old English Law. Furniture or implements.

Carucariæ apparura, plough-tackle. Cowell; Jacob, Dict.

APPEAL. In Criminal Practice. A formal accusation made by one private person against another of having committed some heinous crime. 4 Bla. Com. 312.

Anciently, appeals lay for treason as well as felonies; but appeals for treason were abolished by statutes 5 Edw. III. c. 9, 25 Edw. III. c. 24, and 1 Hen. IV. c. 14, and for all other crimes by the statute 59 Geo. III. c. 46.

An appeal lay for the heir male for the death of his ancestors; for the widow while unmarried for the death of her husband; and by the party injured, for certain crimes, as robbery, rape, mayhem, etc.; Co. Litt. 287 *b;* 2 Bish Cr. Law 1001, note, par. 4.

It might be brought at any time within a year and a day, even though an indictment had been found. If the appellee was found innocent, the appellor was liable to imprisonment for a year, a fine, and damages to the appellee.

The appellee might claim *wager of battel.* This claim was last made in the year 1818 in England; 1 B. & Ald. 405. And see 2 W. Bla. 713; 5 Burr. 2643, 2793; 4 Sharsw. Bla. Com. 312–318, and notes.

In the 12th and 13th centuries and for some time thereafter, the Crown relied as much upon the Appeal of the private accuser as upon the presentment of a jury. The indictment came to take its place and at the end of the 13th century the action of trespass was an efficient substitute for the appeal, and it gradually decayed as a mode of criminal prosecution. It lived long in the law because it came to be forgotten. Appeals of treason brought in Parliament were abolished in 1400. Other appeals were gradually abolished. It was considered that certain appeals alleging felony were good in Coke's day; Co. Litt. 127; 2 Hawk. P. C. 157. The appeal of murder had the longest history and was only abolished by 59 Geo. III. c. 46. 2 Holdsw. Hist. E. L. 155.

In Legislation. The act by which a member of a legislative body who questions the correctness of a decision of the presiding officer, procures a vote of the body upon the decision. In the House of Representatives of the United States the question on an appeal is put to the House in this form: "Shall the decision of the chair stand as the judgment of the House?" Rob. R. of O. 14, 66.

If the appeal relates to an alleged breach of decorum, or transgression of the rules of order, the question is taken without debate. If it relates to the admissibility or relevancy of a proposition, debate is permitted, except when a motion for the previous question is pending.

As to Appeal, in practice, as one of the methods of appellate jurisdiction, see APPEAL AND ERROR.

APPEAL AND ERROR. The methods of exercising appellate jurisdiction for "the review by a superior court of the final judgment, order, or decree of some inferior court." Ex parte Batesville & Brinkley R. Co., 39 Ark. 82.

"The most usual modes of exercising appellate jurisdiction * * * are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin, and removes a cause, entirely subjecting the facts as well as the law to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter in suits at common law tried by a jury." Sto. Const. § 1762; Behn v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857; U. S. v. Goodwin, 7 Cra. (U. S.) 108, 3 L. Ed. 284.

The appellate jurisdiction "is exercised by revising the action of the inferior court, and remanding the cause for the rendition and execution of the proper judgment"; Dodds v. Duncan, 12 Lea (Tenn.) 731, 734. It "implies a resort from an inferior tribunal of justice, to a superior, for the purpose of revising the judgments" of the former; Smith v. Carr, Hard. (Ky.) 305; and it was said in Marbury v. Madison, that its essential criterion is "that it revises and corrects the proceedings in a cause already instituted, and does not create that cause"; 1 Cra. (U. S.) 137, 175, 2 L. Ed. 60. Auditor of State v. R. Co., 6 Kan. 500, 505, 7 Am. Rep. 575; Sto. Const. Sec. 1761; Tierney v. Dodge, 9 Minn. 166 (Gil. 153).

The methods of obtaining a review are different in law and equity. In the latter the legal process by which it is obtained is termed an *appeal*, which is the removal of a cause from a court of inferior to one of superior jurisdiction, for the purpose of obtaining a review and retrial; Wiscart v. Dauchy, 3 Dall. (U. S.) 321, 1 L. Ed. 619; U. S. v. Good-

win, 7 Cra. (U. S.) 110, 3 L. Ed. 284; Boone v. Chiles, 10 Pet. (U. S.) 205, 9 L. Ed. 388; Wetherbee v. Johnson, 14 Mass. 414; King v. Sloan, 1 S. & R. (Pa.) 78. When taken in open court it does not need the formalities of ancient law to indicate that it is taken against all adverse interests; Taylor v. Leesnitzer, 220 U. S. 93, 31 Sup. Ct. 371, 55 L. Ed. 382.

An appeal generally supersedes the judgment of the inferior court so far that no action can be taken upon it until after the final decision of the cause; Archer v. Hart, 5 Fla. 234; Danforth, Davis & Co. v. Carter, 4 Ia. 230; Waterman v. Raymond, 5 Wis. 185; Frederick v. Bank, 106 Ill. 147; Lamphear v. Lamprey, 4 Mass. 107; Walker v. Spencer, 86 N. Y. 162. A decree is final for the purposes of an appeal when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce what has been determined; St. Louis, I. M. & S. R. R. Co. v. Southern Co., 108 U. S. 24, 2 Sup. Ct. 6, 27 L. Ed. 638; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; Grant v. Ins. Co., 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237. Before an appeal can be prosecuted by one of several defendants, the case should be determined as to all; Meagher v. Mfg. Co., 145 U. S. 611, 12 Sup. Ct. 876, 36 L. Ed. 834. In equity cases all parties against whom a joint decree is rendered must join in an appeal, if any be taken; and when only one takes an appeal, and there is nothing in the record to show that the others were applied to and refused to appeal, and no order is entered by court, on notice, granting him a separate appeal, his appeal cannot be sustained; Beardsley v. R. Co., 158 U. S. 123, 15 Sup. Ct. 786, 39 L. Ed. 919.

A writ of error is the means of bringing under review by an appellate court, for revision and correction, the judgment in an action at law of an inferior court of record, when the proceedings are according to the course of the common law. See WRIT OF ERROR. In cases in which the proceedings are summary or different from the course of the common law they are reviewed by *Certiorari*. See that title. And in England the judgments of inferior courts not of record were brought up for review by writ of false judgment. See FALSE JUDGMENT. 4 Archb. Pr. 4, quoted in Ex parte Henderson, 6 Fla. 279.

A writ of error is considered, generally, as a new action; Gregg v. Bethea, 6 Porter (Ala.) 9. It does not vacate the judgment of the court below; that continues in force until reversed; Railway Co. v. Twombly, 100 U. S. 81, 25 L. Ed. 550. If such writ can ever be issued *nunc pro tunc* after the lapse of time allowed by law for bringing suits in error, the default must be attributable solely to official delinquency; Knight & Knight v. Towles, 32 Fla. 473, 14 South. 91.

If the common law is adopted in a state, the writ of error is introduced as part of that system; Moore v. Harris, 1 Tex. 36; but it is said that it is not a new action, but a continuation of the same one transferred to the appellate court for review; Corbett v. Territory, 1 Wash. T. 434; the allowance of such a writ is a matter of judicial determination on consideration of the sufficiency of the grounds for it stated in the petition and assignment of errors; Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; an appeal is a matter of right; Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621; Simpson v. Bank, 129 Fed. 257, 63 C. C. A. 371; where it was said, in reference to the rule requiring filing of an assignment of error, "no court or judge has any jurisdiction or power to condition allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors, which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively"; and it was held that, notwithstanding the rule, the assignment of errors need not be filed before an allowance of appeal.

Where one court administers law and equity, an appeal and writ of error are sometimes taken in a case, because of doubt whether it is strictly legal or equitable. An appeal and writ of error to review the same adjudications is not only proper, but commendable, where there is just reason to doubt which is the proper proceeding to give jurisdiction to the appellate court and that one will be dismissed which is ineffective, and the case will be reviewed according to the rules of the method applicable to it; Lockman v. Lang, 132 Fed. 1, 65 C. C. A. 621; but some courts hold that the two remedies cannot be pursued simultaneously, but that an appeal must be dismissed before a writ of error is taken; State v. Thompson, 30 Mo. App. 503.

While the word *appeal* has a strict technical definition, it is frequently used as embracing all kinds of proceedings for the review of causes; City of Rockford v. Compton, 115 Ill. App. 406; but in states adhering to common law forms an appeal will not lie from a judgment at law; Files v. Brown, 124 Fed. 133, 59 C. C. A. 403; Roberts v. Ry. Co., 138 Fed. 711, 71 C. C. A. 127; Trabue v. Williams, 46 Fla. 228, 35 South. 872; Ewings v. Hoffine, 67 Neb. 26, 93 N. W. 186; and in jurisdictions where the same courts administer both law and equity appeals and proceedings for review for errors of law are frequently governed by like rules; Traders' Ins. Co. v. Carpenter, 85 Ind. 350. A writ of error is the proper method of reviewing a judgment of the supreme court of a territory in an action at law tried without a jury; National Live Stock Bank of Chicago v.

Bank, 203 U. S. 296, 27 Sup. Ct. 79, 51 L. Ed. 192.

Where a common law form of reviewing statutory proceedings does not exist or is not resorted to, the conditions and form of appeal depend entirely upon statute and cannot be changed or aided by judicial action; People's Ice Co. v. The Excelsior, 43 Mich. 336, 5 N. W. 398. An appeal is a continuation of a suit, whereas a writ of error is considered a new action; Macklin v. Allenberg, 100 Mo. 337, 13 S. W. 350; the right of appeal in civil actions being unknown to the common law and of statutory origin, it is necessary that the requirements of the statute be strictly complied with to confer jurisdiction on the appellate courts; Arkansas & O. R. Co. v. Powell, 104 Mo. App. 362, 80 S. W. 336.

A writ of error is a writ of right which is grantable *ex debito justitiæ;* Skipwith v. Hill, 2 Mass. 35. The right to an appeal or writ of error cannot be refused, however indifferent or baseless the demand on the merits may be; People v. Knickerbocker, 114 Ill. 539, 2 N. E. 507, 55 Am. Rep. 879; State v. Judge of Superior District Court, 28 La. Ann. 547; McCreary v. Rogers, 35 Ark. 298; Ridgely v. Bennett, 13 Lea (Tenn.) 206. It is the constitutional right of every citizen to have his case reviewed in one form or another by a court of error; 1 Bland. 5; but in another state it is said not to be a constitutional right but subject to legislative control; Messenger v. Teagan, 106 Mich. 654, 64 N. W. 499. A suit at law can be reviewed only on writ of error; Behn, M. & Co. v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857; and an equity cause cannot be reviewed on writ of error; Files v. Brown, 124 Fed. 133, 59 C. C. A. 403; Nelson v. Lowndes County, 93 Fed. 538, 35 C. C. A. 419; Grooms v. Wood, 43 Fla. 50, 29 South. 445; Ex parte Sanford, 5 Ala. 562; Delaplaine v. City of Madison, 7 Wis. 407; Evans v. Hamlin, 164 Mass. 239, 41 N. E. 267; Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95. But see *contra,* Woodard v. Glos, 113 Ill. App. 353; but the error of a chancellor in refusing to grant an appeal on dismissal of injunction bill should be corrected by writ of error; Boyd v. Knox (Tenn.) 53 S. W. 972. A writ of error will not lie in a divorce case, an appeal is the only remedy; Miller v. Miller, 3 Binn. (Pa.) 30; Parmenter v. Parmenter, 3 Head (Tenn.) 225. But this does not apply to a decree for alimony, which is subject to revision by writ of error; McBee v. McBee, 1 Heisk. (Tenn.) 558; an appeal and not a writ of error is the proper proceeding to review probate orders; Horner v. Goe, 54 Ill. 285; Peckham v. Hoag, 92 Mich. 423, 52 N. W. 734; Shay v. Henk, 49 Pa. 79; but a writ of error lies to revise probate proceedings which are strictly according to the course of the common law; Fitzgerald v. Com., 5 Allen (Mass.) 509; or a proceeding for the probate of a will in which the parties have a right to a jury trial; Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; or where a case had been appealed from the probate court to a law court and the decree affirmed; Brunson v. Burnett, 1 Chand. (Wis.) 9. A writ of error will lie in cases where an appeal is not allowed; Ex parte Thistleton, 52 Cal. 220; Haines v. People, 97 Ill. 161; or if the aggrieved party cannot avail himself of an appeal; Valier v. Hart, 11 Mass. 300.

In an appellate court it is the general rule that findings of fact in the trial court are conclusive; E. Bement & Son v. Harrow Co., 186 U. S. 70, 22 Sup. Ct. 747, 46 L. Ed. 1058; American Bridge Co. v. R. Co., 135 Fed. 323, 68 C. C. A. 131; Smith v. City of Buffalo, 159 N. Y. 427, 54 N. E. 62; Fitchburg R. Co. v. Freeman, 12 Gray (Mass.) 401, 74 Am. Dec. 600; Hoffman v. Silverthorn, 137 Mich. 60, 100 N. W. 183; Jersey City v. Tallman, 60 N. J. L. 239, 37 Atl. 1026; Appeal of Melony, 78 Conn. 334, 62 Atl. 151; and when the case is tried by the court, without a jury, the findings of the trial judge are as conclusive as the verdict of a jury; York v. Washburn, 129 Fed. 564, 64 C. C. A. 132; Bell v. Wood, 87 Ky. 56, 7 S. W. 550; Rademacher v. Greenwood, 114 Ill. App. 542; Rauen v. Ins. Co., 129 Ia. 725, 106 N. W. 198; but when the appellate court is convinced that the premise upon which the lower court acted is without any support in the evidence, and that its finding is clearly erroneous, it may be disregarded; Darlington v. Turner, 202 U. S. 195, 26 Sup. Ct. 630, 50 L. Ed. 992; U. S. v. Puleston, 106 Fed. 294, 45 C. C. A. 297; Petition of Barr, 188 Pa. 122, 41 Atl. 303; Brown v. Brown, 174 Mass. 197, 54 N. E. 532, 75 Am. St. Rep. 292; Menz v. Beebe, 102 Wis. 342, 77 N. W. 913, 78 N. W. 601.

Cross appeals in equity must be prosecuted like other appeals; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Where defendant appeals from part of the decree, which is affirmed, and the plaintiff thereafter appeals from the other part of the decree, a motion to dismiss will be denied; State v. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975.

A federal appellate court in reversing a judgment for the plaintiff cannot direct a judgment for defendant, notwithstanding a verdict for the plaintiff, since under the VIIth Amendment of the Constitution the only course is to order a new trial, and this is true notwithstanding the state statute and practice authorizes such action; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. ——; Pederson v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. ——; but this amendment is not applicable to the state courts; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. ——; and the reversal of a cause upon the facts and rendition of final judgment by the appellate court is generally held not to be an infringement of the

right of trial by jury secured by the state constitutions; Borg v. R. Co., 162 Ill. 348, 44 N. E. 722; Gunn v. R. Co., 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362; *id.*, 27 R. I. 432, 63 Atl. 239, 2 L. R. A. (N. S.) 883; nor is the constitutional guaranty infringed by a statute authorizing the appellate court to make findings of facts "which shall be final and conclusive as to all matters of fact in controversy in such cause"; Larkins v. R. Ass'n, 221 Ill. 428, 77 N. E. 678; nor does it imply that a verdict on an issue of fact is beyond the controlling power of the trial or appellate court, to be exercised to prevent injustice; Chitty v. Ry. Co., 148 Mo. 64, 49 S. W. 868; nor does a statute authorizing the appellate court to reverse for excessive damages; Smith v. Pub. Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819; nor an act authorizing such court to affirm, reverse, amend or modify a judgment without returning the record to the court below; or to order a verdict and judgment to be set aside and a new trial had; Nugent v. Traction Co., 183 Pa. 142, 38 Atl. 587; where the damages are excessive the appellate court may require the plaintiff to remit the excess as a condition of affirmance without depriving either party of his right to trial by jury; Burdict v. Ry. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; Texas & N. O. R. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064; but where the jury finds the charge of negligence not sustained by the facts, the court cannot disturb the verdict, though it be of a different opinion; Gibson v. City of Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, 45 Am. St. Rep. 853.

Harmless error is no cause for reversal; Townsend v. Bell, 167 N. Y. 462, 60 N. E. 757; Springer v. Lipsis, 209 Ill. 264, 70 N. E. 641; O'Donnell v. Ins. Co., 73 Mich. 1, 41 N. W. 95; nor intermediate error where the ultimate judgment is right; Orr v. Leathers, 27 Ind. App. 572, 61 N. E. 941; Inhabitants of Winslow v. Troy, 97 Me. 130, 53 Atl. 1008; nor, when the losing party is not entitled to recover in any event, can he be heard to complain of error at the trial; Wood v. Wyeth, 106 App. Div. 21, 94 N. Y. Supp. 360; nor where, if the error did not prejudice the party against whom it was committed; Armour & Co. v. Russell, 144 Fed. 614, 75 C. C. A. 416, 6 L. R. A. (N. S.) 602; Strever v. Ry. Co., 106 Ia. 137, 76 N. W. 513.

Judgments will be reversed where the court below erred in failing to sustain a demurrer to one of several paragraphs of the declaration or complaint, and it cannot be determined on which paragraph or count the verdict was based; Gendron v. St. Pierre, 72 N. H. 400, 56 Atl. 915; Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306; or where evidence was improperly admitted, prejudice being presumed; National Biscuit Co. v. Nolan, 138 Fed. 6, 70 C. C. A. 436; Inhabitants of Wayland v. Inhabitants of Ware, 109 Mass. 248; or on the exclusion of evidence, the same presumption applying; Westall v. Osborne, 115 Fed. 282, 53 C. C. A. 74; Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12; so also an erroneous instruction on a material point (unless it clearly appears to have been harmless); Podhaisky v. City of Cedar Rapids, 106 Ia. 543, 76 N. W. 847; Ward v. Ward, 47 W. Va. 766, 35 S. E. 873; Neal v. Brandon, 70 Ark. 79, 66 S. W. 200.

A party cannot complain of error in his own favor; Copeland v. Dairy Co., 189 Mass. 342, 75 N. E. 704; Drown v. Hamilton, 68 N. H. 23, 44 Atl. 79; Fredrick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53; Lowenthal v. Lowenthal, 157 N. Y. 236, 51 N. E. 995. Questions not presented by the record cannot be considered on appeal; Inhabitants of New Marlborough v. Brewer, 170 Mass. 162, 48 N. E. 1089; Huff v. Cole's Estate, 127 Mich. 351, 86 N. W. 835; Lewis v. Lewis, 66 N. J. L. 251, 49 Atl. 453; Morgan v. Olvey, 50 Ind. 396; otherwise, sometimes, in criminal cases; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

When a cause comes before the court on a second appeal all matters passed on in the former decision are *res judicata;* Chapman v. Ry. Co., 146 Mo. 481, 48 S. W. 646; a rehearing will be denied; Pretzfelder v. Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; the law as determined in the former decision whether right or wrong binds the court on a subsequent appeal; Hopkins v. Grocery Co., 105 Ky. 357, 49 S. W. 18; Mead v. Tzschuck, 57 Neb. 615, 78 N. W. 262. See LAW OF THE CASE.

Where the supreme court affirms the decree in all respects but one, on subsequent appeal only this one particular point can be reviewed; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440. Ordinarily when the court is equally divided on appeal, the decree of the lower court is affirmed. But see 39 Nova Scotia 1, where the appeal was allowed.

It is a general rule of the law that all the judgments, decrees, or orders, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified, or annulled by that court; Bronson v. Schulten, 104 U. S. 415, 26 L. Ed. 797.

The Supreme Court disapproves the practice in an appellate court of reserving a judgment on one of a number of assigned errors without passing on the others, as likely to involve duplicate appeals; Bierce v. Waterhouse, 219 U. S. 320, 21 Sup. Ct. 241, 55 L. Ed. 237.

As to the practice when the appellant is deprived of his bill of exceptions by the death of the judge, etc., see NEW TRIAL.

See BILL OF EXCEPTIONS; JURISDICTION; WRIT OF ERROR; UNITED STATES COURTS.

In the United States Supreme Court a defendant in error or appellee may file a confession of error, and thereupon the judgment will be reversed and the cause remanded, with proper directions.

APPEARANCE. A coming into court as party to a suit, whether as plaintiff or defendant.

The former proceeding by which a defendant submits himself to the jurisdiction of the court. Tr. & H. Prac. 226, 271.

Appearance anciently meant an actual coming into court, either in person or by attorney. It is so used both in the civil and the common law. It is indicated by the word "comes," "and the said C. D. *comes* and *defends*," and, in modern practice, is accomplished by the entry of the name of the attorney of the party in the proper place on the record, or by filing bail where that is required. It was a formal matter, but necessary to give the court jurisdiction over the person of the defendant.

A time is generally fixed within which the defendant must enter his appearance; formerly in England and elsewhere, the *quarto die post (q. v.)*. If the defendant failed to appear within this period, the remedy in ancient practice was by distress infinite when the injuries were committed without force, and by capias or attachment when the injuries were committed against the peace, that is, were technical trespasses. But, until appearance, the courts could go no further than apply this process to secure appearance. See PROCESS.

In modern practice, a failure to appear generally entitles the plaintiff to judgment against the defendant by default, if, of course, the court has jurisdiction of the cause.

It may be of the following kinds:—

Compulsory.—That which takes place in consequence of the service of process.

Conditional.—One which is coupled with conditions as to its becoming general.

De bene esse.—One which is to remain an appearance, except in a certain event. See DE BENE ESSE.

General.—A simple and absolute submission to the jurisdiction of the court. See *infra.*

Gratis.—One made before the party has been legally notified to appear.

Optional.—One made where the party is not under any obligation to appear, but does so to save his rights. It occurs in chancery practice, especially in England.

Special.—That which is made for certain purposes only, and does not extend to all the purposes of the suit; as to contest the jurisdiction, or the sufficiency of the service. See *infra.*

Subsequent.—An appearance by the defendant after one has already been entered for him by the plaintiff. See Dan. Ch. Pr.

Voluntary.—That which is made in answer to a subpœna or summons, without process; 1 Barb. Ch. Pr. 77.

How to be made.—On the part of the plaintiff no formality is required. On the part of the defendant it may be effected by making certain formal entries in the proper office of the court, expressing his appearance; Zion Church v. Church, 5 W. & S. (Pa.) 215; Easton v. Altum, 1 Scam. (Ill.) 250; Griffin v. Samuel, 6 Mo. 50; Bennett v. Stickney, 17 Vt. 531; Rose v. Ford, 2 Ark. 26, Scott v. Hull, 14 Ind. 136; or in case of arrest, is effected by giving bail; or by putting in an answer; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94; Hayes v. Shattuck, 21 Cal. 51; President, etc., of Insurance Co. of North America v. Swineford, 28 Wis. 257; or a demurrer; State v. People, 6 Pet. (U. S.) 323, 8 L. Ed. 414; Kegg v. Welden, 10 Ind. 550; or notice to the other side; Livingston v. Gibbons, 4 Johns. Ch. (N. Y.) 94; or motion for continuance; Shaffer v. Trimble, 2 Greene (Ia.) 464; or taking an appeal; Weaver v. Stone, 2 Grant (Pa.) 422; appearance and offer to file answer; Tennison v. Tennison, 49 Mo. 110; or motion to have an interlocutory order set aside; Tallman v. McCarty, 11 Wis. 401.

A general appearance waives all question as to the service of process and is equivalent to a personal service; Platt v. Manning, 34 Fed. 817; Continental Casualty Co. v. Spradlin, 170 Fed. 322, 95 C. C. A. 112; Moulton v. Baer, 78 Ga. 215, 2 S. E. 471; Birmingham Flooring Mills v. Wilder, 85 Ala. 593, 5 South. 307; but it does not cure want of jurisdiction of subject matter; Wheelock v. Lee, 74 N. Y. 495; St. Louis & S. F. R. Co. v. Loughmiller, 193 Fed. 689; a general appearance in a federal court waives the defence that the defendant was not served in the district of which he was an inhabitant; Foote v. Ben. Ass'n, 39 Fed. 23; Betzoldt v. Ins. Co., 47 Fed. 705. A general appearance may be amended so as to make it special; Hohorst v. Packet Co., 38 Fed. 273.

It is not a general appearance where the question of jurisdiction of the person is raised by motion to quash for want of jurisdiction; McGillin v. Claflin, 52 Fed. 657; or petition to quash the writ; Turner v. Larkin, 12 Pa. Sup. Ct. 284. In general, however, when that objection is raised, the appearances should be specially restricted; Nicholes v. People, 165 Ill. 502, 46 N. E. 237; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; if by motion or otherwise he seeks to bring into action the powers of the court, he will be deemed to have appeared generally; Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237. If a special appearance is entered to contest jurisdiction, it becomes general if a defense is made to the merits; Sanderson v. Bishop, 171 Fed. 769.

A special appearance to raise the question of judicial action does not amount to a general appearance; Commercial Mut. Accident Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. A special appearance entered to contest the jurisdiction will not operate to waive objection to illegal or insufficient service; Lathrop-Shea & Henwood Co. v. Const. Co., 150 Fed. 666 (citing many Supreme Court cases where such appearance is recognized); Remington v. Ry. Co., 198 U. S. 95, 25 Sup. Ct. 577, 49 L. Ed. 959; Powers v. Ry. Co., 169 U. S. 92, 18 Sup. Ct. 264, 42

L. Ed. 673; Courtney v. Pradt, 196 U. S. 89, 25 Sup. Ct. 208, 49 L. Ed. 398; and the effect of such appearance is not enlarged by discussion of the merits in connection with the plea; Citizens' Savings & Trust Co. v. R. Co., 205 U. S. 46, 27 Sup. Ct. 425, 51 L. Ed. 703; nor by the removal of the cause; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; even if the petition for removal does not specify or restrict the purpose of the appearance and is not accompanied by a plea in abatement; National Accident Society v. Spiro, 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435. Filing a petition to remove is not a general appearance; Spreen v. Delsignore, 94 Fed. 71.

Where defendant files a formal appearance and simultaneously an exception to the jurisdiction, the two papers should be considered together and cannot be regarded as consent to the jurisdiction where consent is necessary; Wood v. Lumber Co., 226 U. S. 384, 33 Sup. Ct. 125, 57 L. Ed. ——.

It does not amount to a general appearance that a defendant not served is examined as a witness; Nixon v. Downey, 42 Ia. 78; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801; or is present when depositions are taken; Bentz v. Eubanks, 32 Kan. 321, 4 Pac. 269; Anderson v. Anderson, 55 Mo. App. 268; Scott v. Hull, 14 Ind. 136; or in the court room during the trial; Tiffany v. Gilbert, 4 Barb. (N. Y.) 320; Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237; Crary v. Barber, 1 Colo. 172.

Actual or formal appearance is now unnecessary; Gardiner v. McDowell's Adm'r, Wright (Ohio) 762; Byrne v. Jeffries, 38 Miss. 533; and a formal entry of one is unknown in Louisiana; Stoker v. Leavenworth, 7 La. 390. It need not be by any formal act or words in court; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; Salina Nat. Bank v. Prescott, 60 Kan. 490, 57 Pac. 121; Rhoades v. Delaney, 50 Ind. 468. It is generally done by entry of the attorney's name on the docket opposite the party's name; Romaine v. Ins. Co., 28 Fed. 625 (where the practice is examined at large); Scott v. Israel, 2 Binn. (Pa.) 145 (where the entry of the attorney's name on the docket opposite the names of two defendants, is good as to both, though one was not served); or the initials merely; Kennedy v. Fairman, 2 N. C. 405; or by endorsement on the declaration; Byrne, Vance & Co. v. Jeffries, 38 Miss. 533; or on the writ waiving service; Harrison v. Morton, 87 Md. 671, 40 Atl. 897; or any action in court in the case except to object to the jurisdiction; Audretsch v. Hurst, 126 Mich. 301, 85 N. W. 746; Warren v. Cook, 116 Ill. 199, 5 N. E. 538; Tippack v. Briant, 63 Mo. 580; People v. Cowan, 146 N. Y. 348, 41 N. E. 26, and see a variety of cases collected in 3 Cyc. 504, n. 28.

By whom to be made.—In civil cases it may in general be made either by the party or his attorney; and in those cases where it is said that the party must appear in person, it is sufficient if it is so entered on the record; although, in fact, the appearance is by attorney; Mockey v. Grey, 2 Johns. (N. Y.) 192; Arnold v. Sandford, 14 Johns. (N. Y.) 417. The unauthorized appearance of an attorney will not give the court jurisdiction; Great West Min. Co. v. Min. Co., 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; McNamara v. Carr, 84 Me. 299, 24 Atl. 856.

An appearance by attorney is, in strictness, improper where a party wishes to plead to the jurisdiction of the court, because the appointment of an attorney of the court admits its jurisdiction; 1 Chit. Pl. 398; 2 Wms. Saund. 209 *b;* and is insufficient in those cases where the party has not sufficient capacity to appoint an attorney. Thus *an idiot* can appear only in person, and as a plaintiff he may sue in person or by his next friend.

An infant cannot appoint an attorney; he must, therefore, appear by guardian or *prochein ami.*

A lunatic, if of full age, may appear by attorney; if under age, by guardian only. 2 Wms. Saund. 335; *id.* 232 (*a*), n. (4); but if so insane as to be incapable of knowing his mental state he cannot authorize appearance by an attorney; Chase v. Chase, 163 Ind. 178, 71 N. E. 485. Process should be served on defendant and the appearance for him should be entered by the guardian or committee; Stoner v. Riggs, 128 Mich. 129, 87 N. W. 109; Rutherford's Lessee v. Folger, 20 N. J. L. 115.

A married woman, when sued without her husband, should defend in person; 1 Wms. Saund. 209 *b.* When sued jointly with him under a statute providing for such suit on their joint contract and that she may defend separately or jointly, an appearance by counsel employed by her husband to defend does not bind her; Taylor v. Welslager, 90 Md. 414, 45 Atl. 478.

The effect of an appearance by the defendant is, that both parties are considered to be in court.

In criminal cases the personal appearance of the accused in court is often necessary. See 2 Burr. 931; *id.* 1786; 1 W. Bla. 198. The verdict of the jury must, in all cases of treason and felony, be delivered in open court, in the presence of the defendant. In cases of misdemeanor, the presence of the defendant during the trial is not essential; Bacon, Abr. *Verdict,* B; Arch. Cr. Pl. (14th ed.) 149.

No motion for a new trial is allowed unless the defendant, or, if more than one, the defendants, who have been convicted, are present in court when the motion is made; 3 M. & S. 10, note; 17 Q. B. 503; 2 Den. Cr. Cas. 372, note. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine

only; 2 Den. Cr. Cas. 459; or where the defendant is in custody on criminal process; 4 B. & C. 329. On a charge of felony, a party suing out a writ of error must appear in person to assign errors; and it is said that if the party is in custody in the prison of the county or city in which the trial has taken place, he must be brought up by *habeas corpus*, for the purpose of this formality, which writ must be moved for on affidavit. This course was followed in 2 Den. Cr. Cas. 287; 17 Q. B. 317; 8 E. & B. 54; 1 D. & B. 375.

Where a defendant is not liable to personal punishment, but to a fine, sentence may be pronounced against him in his absence; 1 Chit. Cr. L. 695; 2 Burr. 931; 3 *id.* 1780.

APPELLANT. He who makes an appeal from one court to another.

APPELLATE JURISDICTION. The jurisdiction which a superior court has to rehear causes which have been tried in inferior courts. See APPEAL AND ERROR.

APPELLATIO. In Civil Law. An appeal.

APPELLEE. In Practice. The party in a cause against whom an appeal has been taken.

APPELLOR. A criminal who accuses his accomplices; one who challenges a jury.

APPENDAGE. Something added as an accessory to or the subordinate part of another thing. State Treasurer v. R. Co., 28 N. J. L. 26; School Dist. No. 29, Bourbon County v. Perkins, 21 Kans. 536, 30 Am. Rep. 447.

APPENDANT. Annexed or belonging to something superior; an incorporeal inheritance belonging to another inheritance. Cowell; Termes de la Ley.

Appendant in deeds includes nothing which is substantial corporeal property, capable of passing by feoffment and livery of seisin. Co. Litt. 121; 4 Coke 86; 3 B. & C. 150; 6 Bingh. 150. A matter *appendant* must arise by prescription; while a matter appurtenant may be created at any time; 2 Viner, Abr. 594; 3 Kent 404.

APPENDITIA (Lat. *appendere*, to hang to or on). The appendages or pertinances of an estate; the appurtenances to a dwelling, etc.; thus, *pent-houses* are the *appenditid domus*.

APPERTAINING. Connected with in use or occupancy. Miller v. Mann, 55 Vt. 475, 479. It does not necessarily import contiguity, as does "adjoining," and is therefore not synonymous with it; *id.*

Peculiar to. Herndon v. Moore, 18 S. C. 339, where business "appertaining to minors" is defined as meaning peculiar to minors.

APPLICATION. The act of making a request for something. It need not be in writing; State v. Stiles, 12 N. J. L. 296.

A written request to have a certain quantity of land at or near a certain specified place, under a statute for location of public land of the state. Duncan's Lessee v. Curry, 3 Binn. (Pa.) 14; Biddle's Lessee v. Dougal, 5 Binn. (Pa.) 142.

A petition. Scott v. Strobach, 49 Ala. 477, 489.

The use or disposition made of a thing.

In Insurance. The preliminary statement made by a party applying for an insurance on life, or against fire. It usually consists of written answers to interrogatories proposed by the company applied to, respecting the proposed subject. It corresponds to the "representations" preliminary to maritime insurance. It is usually referred to expressly in the policy as being the basis or a part of the contract, and this reference creates in effect a warranty of the truth of the statements. In an action on a policy, the application and policy must be construed as one instrument; Studwell v. Association, 19 N. Y. Supp. 709. If the policy does not make the answers a part of the contract, this will have only the effect of representation; May, Ins. § 159; Columbia Ins. Co. v. Cooper, 50 Pa. 331. To constitute a warranty it must be made a part of the policy; Goddard v. Insurance Co., 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1. A mere reference in the policy to the application does not make its answers warranties; it is a question of intention; Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; Sheldon & Co. v. Insurance Co., 22 Conn. 235, 58 Am. Dec. 420; Commonwealth's Ins. Co. v. Monninger, 18 Ind. 352; the courts tend to consider the answers representations, rather than warranties, except in a clear case; Campbell v. Insurance Co., 98 Mass. 381; Miller v. Insurance Co., 31 Ia. 216, 7 Am. Rep. 122; Wilson v. Insurance Co., 4 R. I. 141. An oral misrepresentation of a material fact will defeat a policy on life or against fire, no less than in maritime insurance, on the ground of fraud; 1 Phill. Ins. § 650. Misrepresentation as to one of several buildings all being in one policy cannot defeat a recovery on another; Rogers v. Insurance Co., 121 Ind. 570, 23 N. E. 498. See REPRESENTATION; MISREPRESENTATION; INSURANCE.

Of Purchase-Money. The disposition made of the funds received by a trustee on a sale of real estate held under the trust.

Where there is a general power to sell for the payment of debts, or debts and legacies, the purchaser need not look to the application of the purchase-money; Bruch v. Lantz, 2 Rawle (Pa.) 392, 21 Am. Dec. 458; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; 1 Beas. 69; Hauser v. Shore, 40 N. C. 357; Gardner v. Gardner, 3 Mas. 178, Fed. Cas. No. 5,227; or so as to legacies where there is a trust for reinvestment; Wormley v. Wormley, 8 Wheat. (U. S.) 421, 5 L. Ed. 651; Grosvenor & Co. v. Austin's Adm'rs, 6 Ohio 114, 25 Am. Dec. 743; where the trust is to pay specified debts, the purchaser must see to the application of the purchase-money; Gardner v. Gardner, 3 Mas. 178, Fed. Cas. No. 5,227;

Cadbury v. Duval, 10 Pa. 267; 1 Pars. Eq. 57; Duffy v. Calvert, 6 Gill (Md.) 487. See note to Elliot v. Merryman, 1 Lead. Cas. Eq. 74; Perry, Trusts; Adams, Eq. *155. The doctrine is abolished in England by 23 & 24 Vict. c. 145, § 29, and is of little importance in the United States; Bisp. Eq. 278.

Of Payments. See APPROPRIATION.

APPOINT. To designate, ordain, prescribe, nominate; People v. Fitzsimmons, 68 N. Y. 519.

APPOINTEE. A person who is appointed or selected for a particular purpose; as, the appointee under a power is the person who is to receive the benefit of the power.

APPOINTMENT. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

The making out a commission is conclusive evidence of an appointment to an office for holding which a commission is required; Marbury v. Madison, 1 Cr. (U. S.) 137, 2 L. Ed. 60; U. S. v. Bradley, 10 Pet. (U. S.) 343, 9 L. Ed. 448. For a discussion of constitutional and statutory limitations of executive and legislative functions in respect to appointments to office, see 30 Amer. & Eng. Corp. Cas. 321, note.

The governor cannot make a valid appointment to an office which at the time is rightfully held by an incumbent whose term has not expired; State v. Peelle, 124 Ind. 515, 24 N. E. 440, 8 L. R. A. 228.

As distinguished from an election, it seems that an appointment is generally made by one person, or a limited number acting with delegated powers, while an election is made by all of a class.

The word is sometimes used in a sense quite akin to this, and apparently derived from it as denoting the right or privilege conferred by an appointment: thus, the act of authorizing a man to print the laws of the United States by authority, and the right thereby conferred, are considered such an appointment, but the right is not an office; Com. v. Binns, 17 S. & R. (Pa.) 219, 233. And see Com. v. Sutherland, 3 S. & R. (Pa.) 157; Cooper, Justin. 599, 604.

In Chancery Practice. The exercise of a right to designate the person or persons who are to take the use of real estate. 2 Washb. R. P. 302.

By whom to be made.—It must be made by the person authorized; 2 Bouv. Inst. § 1922; who may be any person competent to dispose of an estate of his own in the same manner; 4 Kent 324; including a married woman; 1 Sugd. Pow. 182; 3 C. B. 578; 5 *id.* 741; Ladd v. Ladd, 8 How. (U. S.) 27, 12 L. Ed. 967; even though her husband be the appointee; Rush v. Lewis, 21 Pa. 72; or an infant, if the power be simply collateral; 2 Washb. R. P. (5th ed.) *317. Where two or more are named as donees, all must in general join; Franklin v. Osgood, 14 Johns. (N. Y.) 553; but where given to several who act in a trust capacity, as a class, it may be by the survivors; Peter v. Beverly, 10 Pet. (U. S.) 564, 9 L. Ed. 522; Tainter v. Clark, 13 Metc. (Mass.) 220. When such a right is devolved upon two executors and two others are named as successors in case of their death, no others can execute the trust so long as any one of the four is living and has not declined the trust, and an administrator c. t. a. will be liable to suit by the succeeding trustee for trust property with which he intermeddles; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

How to be made.—A very precise compliance with the directions of the donor is necessary; 1 P. Will. 740; 6 Mann. & G. 386; Ladd v. Ladd, 8 How. (U. S.) 30, 12 L. Ed. 967; having regard to the intention, especially in substantial matters; Tudor, Lead. Cas. 306; 3 Ves. Ch. 421. It may be a partial execution of the power only, and yet be valid; 4 Cruise, Dig. 205; or, if excessive, may be good to the extent of the power; 2 Ves. Sen. 640; 3 Dru. & W. 339. It must come within the spirit of the power; thus, if the appointment is to be *to* and *amongst* several, a fair allotment must be made to each; 4 Ves. Ch. 771; 2 Vern. Ch. 513; otherwise, where it is to be made to such as the donee may select; 5 Ves. Ch. 857.

The effect of an appointment is to vest the estate in the appointee, as if conveyed by the original donor; 2 Washb. R. P. (5th ed.) *320; 2 Crabb. R. P. 726, 741; 2 Sugd. Pow. 22; Jackson v. Veeder, 11 Johns. (N. Y.) 169. Thus where the appointment, after an estate for life, is to a lineal descendant of the testator, but who is a collateral relation of the party exercising the power, the gift is not subject to a collateral inheritance tax; Com. v. Williams' Ex'rs, 13 Pa. 29.

See ILLUSORY APPOINTMENT; POWER. Consult 2 Washb. R. P. (5th ed.) *298, 337; Tudor, Lead. Cas.; Chance, Pow.; 4 Greenl. Cruise, Dig.

APPOINTOR. One authorized by the *donor*, under the statute of uses, to execute a power. 2 Bouv. Inst. n. 1923.

APPORTIONMENT. The division or distribution of a subject-matter in proportionate parts. Co. Litt. 147; 1 Swanst. 37, n.; 1 Story, Eq. Jur. (13th ed.) § 475 *a*.

Of Contracts. The allowance, in case of the partial performance of a contract, of a proportionate part of what the party would have received as a recompense for the entire performance of the contract. See generally Ans. Contr. 291.

Where the contract is to do an entire thing for a certain specified compensation, there can be no apportionment; 9 B. & C. 92; Quigley v. De Haas, 82 Pa. 267; Cox v. R. Co., 44 Cal. 18; Coburn v. Hartford, 38 Conn. 290; Barker v. Reagan, 4 Heisk. (Tenn.) 590; 1 Washb. R. P. 133, 549, 555; 2 *id.* 302; but see *contra*, Hollis v. Chapman, 36 Tex. 1. A contract for the sale of goods is entire; 9 B. & C. 386; Shinn v. Bodine, 60 Pa. 182,

100 Am. Dec. 560; but where there has been a part delivery of the goods, the buyer is liable on a *quantum valebant* if he retain the part delivered. 9 B. & C. 386; 10 *id.* 441; Bowker v. Hoyt, 18 Pick. (Mass.) 555 (but *contra* in New York and Ohio; Champlin v. Rowley, 13 Wend. (N. Y.) 258; Witherow v. Witherow, 16 Ohio, 238); though he may return the part delivered and escape liabilities. A contract consisting of several distinct items, and founded on a consideration apportioned to each item, is several; Lucesco Oil Co. v. Brewer, 66 Pa. 351. The question of entirety is one of intention, to be gathered from the contract. 2 Pars. Contr. (8th ed.) *517. Where no compensation is fixed, the contract is usually apportionable; 3 B. & Ad. 404; Cutter v. Powell, 2 Sm. Lead. Cas. 22, note (*q. v.* on this whole subject).

Of Annuities. Annuities, at common law, are not apportionable; Wiggin v. Swett, 6 Metc. (Mass.) 194, 39 Am. Dec. 716; 2 P. W. 501; so that if the annuitant died before the day of payment, his representative is entitled to no proportionate share of the annuity for the time which has elapsed since last payment; 16 Q. B. 357; 12 Ves. 484; Heizer v. Heizer, 71 Ind. 526, 36 Am. Rep. 202; Nading v. Elliott, 137 Ind. 261, 36 N. E. 695; 5 U. C. C. P. 364; Mower v. Sanford, 76 Conn. 504, 57 Atl. 119, 63 L. R. A. 625, 100 Am. St. Rep. 1008; Henry v. Henderson, 81 Miss. 743, 33 South. 960, 63 L. R. A. 616; Irving v. Rankine, 13 Hun (N. Y.) 147; Stewart v. Swaim, 13 Phila. (Pa.) 185; but by statute 11 Geo. II. it was enacted that annuities, rents, dividends, etc., and all other payments of every description made payable at fixed periods, should be apportioned; 2 P. Wms. 501; Gheen v. Osborn, 17 S. & R. (Pa.) 173; 3 Kent 471. This has been adopted by statute or decision in many of the states. Equity introduced some exceptions to the general rule that annuities are not apportionable, as in the case of those created for maintenance of infants and married women living apart from their husbands; Fisher v. Fisher, 5 Clark (Pa.) 178; Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379; Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580; Chase v. Darby, 110 Mich. 314, 68 N. W. 159, 64 Am. St. Rep. 347; 2 P. Wms. 501; the reason being that by reason of legal disabilities the annuitants might be unable to get credit for necessaries; Tracy v. Strong, 2 Conn. 659; and the exception has been extended to eleemosynary establishments; 16 Beav. 385. Another exception is of an annuity accepted in lieu of dower; Gheen v. Osborn, 17 S. & R. (Pa.) 171; In re Lackawanna Iron & Coal Co., 37 N. J. Eq. 26; but not when payable at the termination of the yearly periods commencing with the death of testator; Mower v. Sanford, 76 Conn. 504, 57 Atl. 119, 63 L. R. A. 625, 100 Am. St. Rep. 1008. See 63 L. R. A. 616, note.

Of Wages. Wages are not apportionable where the hiring takes place for a definite period; 5 B. & P. 651; 11 Q. B. 755; Olmstead v. Beale, 19 Pick. (Mass.) 528; Hansell v. Erickson, 28 Ill. 257; Miller v. Goddard, 34 Me. 102, 56 Am. Dec. 638; Sickels v. Pattison, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; Hawkins v. Gilbert, 19 Ala. 54; *contra*, Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713.

Of Incumbrances. The ascertainment of the amounts which each of several parties interested in an estate shall pay towards the removal or in support of the burden of an incumbrance.

As between a tenant for life and the remainderman, the tenant's share is limited to keeping down the interest; but not beyond the amount of rent accruing; Doane's Ex'r v. Doane, 46 Vt. 485; 31 E. L. & E. 345; if the principal is paid, the tenant for life must pay a gross sum equivalent to the amount of all the interest he would pay, making a proper estimate of his chances of life; 1 Washb. R. P. (5th ed.) *96; 1 Story, Eq. Jur. (13th ed.) § 487. See Jones v. Sherrard, 22 N. C. 179; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Houghton v. Hapgood, 13 Pick. (Mass.) 158.

Of Rent. The allotment of their shares in a rent to each of several parties owning it.

The determination of the amount of rent to be paid when the tenancy is terminated at some period other than one of the regular intervals for the payment of rent.

An apportionment of rent follows upon every transfer of a part of the reversion; Montague v. Gay, 17 Mass. 439; Nellis v. Lathrop, 22 Wend. (N. Y.) 121, 34 Am. Dec. 285; Reed v. Ward, 22 Pa. 144; see Blair v. Claxton, 18 N. Y. 529; or where there are several assignees, as in case of a descent to several heirs; Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. (N. Y.) 456; 10 Coke 128; Comyn, Land. & Ten. 422; where a levy for debt is made on a part of the reversion, or it is set off to a widow for dower; 1 Rolle, Abr. 237; but whoever owns at the time the rent falls due is entitled to the whole; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Burden of Thayer, 3 Metc. (Mass.) 76, 37 Am. Dec. 117. See Williams, Ex. (7th Am. ed.) *730. If a tenancy at will is terminated between two rent days by a conveyance of the premises from the landlord to a third person, the tenant is not liable and the rent cannot be apportioned; Emmes v. Feeley, 132 Mass. 346.

Rent is not, at common law, apportionable as to time; Smith, Land. & T. 134; 3 Kent 470; Menough's Appeal, 5 W. & S. (Pa.) 432; Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Stilwell v. Doughty, 3 Bradf. Surr. (N. Y.) 359. It is apportionable by statute 11 Geo. II. c. 19, § 15; and similar statutes have been adopted in this country to some extent; 2 Washb. R. P. (5th ed.)

*289; Perry v. Aldrich, 13 N. H. 343, 38 Am. Dec. 493; Codman v. Jenkins, 14 Mass. 94; 1 Hill, Abr. c. 16, § 50. In the absence of express statute or agreement, it is not; Dexter v. Phillips, 121 Mass. 178, 23 Am. Rep. 261. See LANDLORD AND TENANT. As to apportionment of dividends on stock as between life tenant and remainderman, see DIVIDEND.

Of Representatives. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state; Art. 14, § 2, U. S. Const.; Story, Const. 1963.

The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every 30,000; but each state shall have at least one representative; U. S. Const. Art. 1, § 2.

The Revised Statutes of the United States provide that from and after March 3, 1893, the house of representatives shall be composed of 356 members, and provide the number to which each state is entitled. Upon the admission of a new state, the representatives to be assigned to it are in addition to the above 356.

The first house of representatives consisted of 65 members, or one for every 30,000 of the representative population. By the census of 1790, it consisted of 106 representatives, or one for every 33,000; by the census of 1800, 142 representatives, or one for every 33,000; by the census of 1810, 183 representatives, or one for every 35,000; by the census of 1820, 213 representatives, one for every 40,000; by the census of 1830, 242 representatives, or one for every 47,700; by the census of 1840, 223 representatives, or one for every 70,680; by the census of 1850, and under the act of May 23, 1850, the number of representatives was increased to 233, or one for every 93,423 of the representative population.

Under the census of 1860, the ratio was ascertained to be for 124,183, upon the basis of 233 members; but by the act of 4th March, 1862, the number of representatives was increased to 241. This, by the act of 1872, Feb. 2, Rev. Stat. U. S. 1878, §§ 20, 21, was increased to 292 members, and by act of 1891, Feb. 7, the number was increased to 356. By act of Jan. 16, 1901, the number was increased to 386; and by Act of August 8, 1911, to 433.

See REPRESENTATIVE.

APPOSAL OF SHERIFFS. The charging them with money received upon account of the Exchequer. 22 & 23 Car. II.; Cowell.

APPOSER. An officer of the Exchequer, whose duty it was to examine the sheriffs in regard to their accounts handed in to the exchequer. He was also called the foreign apposer. The office is now abolished.

APPOSTILLE. In French Law. An addition, or annotation, made in the margin of a writing. Merlin, *Répert.*

APPRAISE. To value property at what it is worth. In a statute directing certain officers to "appraise all taxable property *at its full and true value in money*," the words italicized are superfluous and add no meaning which the statute would not have had without them; Cocheco Mfg. Co. v. Strafford, 51 N. H. 455, 482.

APPRAISEMENT. A just valuation of property.

Appraisements are required to be made of the property of decedents, of insolvents, and others; an inventory (*q. v.*) of the goods ought to be made, and a just valuation put upon them.

APPRAISER. A person appointed by competent authority to value goods or real estate. An importer is entitled to have a merchant appraiser who is familiar with the character and value of the goods in question, and in a suit brought to recover an excess of duties he may raise the question of want of qualification of the appraiser; Oelbermann v. Merritt, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164. As to Board of General Appraisers, see CUSTOMS DUTIES. As early as Edw. I. the judges were ordered to make provision for appraisers.

APPRECIATE. To estimate justly. The ability of a testator to *appreciate* his relation to those who had a claim upon his bounty is said to be an element of testamentary capacity; Brace v. Black, 125 Ill. 33, 17 N. E. 66.

APPREHEND. To understand, conceive, believe. Golden v. State, 25 Ga. 527, 531.

APPREHENSION. The capture or arrest of a person on a criminal charge.

The word strictly construed means the seizing or taking hold of a man and detaining him with a view to his ultimate surrender. It may be used when he is already in custody; L. R. 9 Q. B. D. 701, 705.

The term apprehension is more often applied to criminal cases, and arrest to civil cases; as, one having authority may *arrest* on *civil* process, and *apprehend* on a *criminal* warrant. See ARREST.

APPRENTICE. A person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship. 1

Bla. Com. 426; 2 Kent 211; Altemus v. Ely, 3 Rawle (Pa.) 307.

Formerly the name of *apprentice en la ley* was given indiscriminately to all students of law. In the reign of Edward IV. they were sometimes called *apprenticii ad barras*. And in some of the ancient law-writers the terms apprentice and barrister are synonymous; Co. 2d Inst. 214; Eunomus, Dial. 2, § 53, p. 155; 21 L. Q. R. 353. See BARRISTER.

APPRENTICESHIP. A contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business.

The term during which an apprentice is to serve. Pardessus, *Droit Comm.* n. 34.

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation; [1891] 1 Q. B. 75.

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit; 5 M. & S. 257; 5 D. & R. 339. But this contract, both in England and in the United States, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian (the father, if both parents be alive, being the proper party to such consent; Com. v. Crommie, 8 W. & S. [Pa.] 339), or by the parent and guardian for him, with his consent, such consent to be made a part of the contract; 2 Kent 261; Matter of M'Dowle, 8 Johns. (N. Y.) 328; Whitmore v. Whitcomb, 43 Me. 458; Balch v. State, 12 N. H. 437; Pierce v. Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333; Harney v. Owen, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; or, if the infant be a pauper, by the proper authorities without his consent; Com. v. Jones, 3 S. & R. (Pa.) 158; Vinalhaven v. Ames, 32 Me. 299; Baker v. Winfrey, 15 B. Monr. (Ky.) 499; Glidden v. Town of Unity, 30 N. H. 104; Brewer v. Harris, 5 Gratt. (Va.) 285. The contract need not specify the particular trade to be taught, but is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice; Fowler v. Hollenbeck, 9 Barb. (N. Y.) 309; People v. Pillow, 1 Sandf. (N. Y.) 672. Where the apprentice is bound to accept employment only from the master, but there is no covenant by the latter to provide employment, and the contract may be terminated only by him, it is invalid as being unreasonable and not for the benefit of the infant; 45 Ch. Div. 430. In a common indenture of apprenticeship the father is bound for the performance of the covenants by the son; 3 B. & Ald. 59. But to an action of covenant against the father for the desertion of the son, it is a sufficient answer that the master has abandoned the trade which the son was apprenticed to learn, or that he has driven the son away by cruel treatment; 4 Eng. L. & Eq. 412; Coffin v. Bassett, 2 Pick. (Mass.) 357.

This contract must generally be entered into by indenture or deed; 4 M. & S. 383; Com. v. Wilbank, 10 S. & R. (Pa.) 416; Squire v. Whipple, 1 Vt. 69; and is to continue, if the apprentice be a male, only during minority, and if a female, only until she arrives at the age of eighteen; 2 Kent 264; 5 Term 715. An apprenticeship other than one entered into by indenture in conformity with the statute is not binding; Lally v. Cantwell, 40 Mo. App. 44. The English statute law has been generally adopted in the United States, with some variations; 2 Kent 264.

An infant's deed of apprenticeship under the English Employers and Workmen Act of 1875, will not bind him unless reasonable and for his benefit; but this does not mean as to all its terms, since provision for suspension of wages during a lockout, due solely to the master, is bad; [1893] 1 Q. B. 310; but one confined to stoppage by reason of accident beyond control of master is good; [1899] 2 Q. B. 1.

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master; Barger v. Caldwell, 2 Dana (Ky.) 131; Clancy v. Overman, 18 N. C. 402. He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfil all the covenants he has entered into by the indenture. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law; 4 Clark & F. 234; Hall v. Gardner, 1 Mass. 172; but may correct him with moderation for negligence and misbehavior; Com. v. Baird, 1 Ashm. (Pa.) 267; 4 Keb. 661, pl. 50; People v. Sniffen, 1 Wheel. Cr. Cas. (N. Y.) 502. He cannot dismiss his apprentice except by consent of all the parties to the indenture; Graham v. Graham, 1 S. & R. (Pa.) 330; Nickerson v. Easton, 12 Pick. (Mass.) 110; 2 Burr. 766, 801; or with the sanction of some competent tribunal; Powers v. Ware, 2 Pick. (Mass.) 451; Warner v. Smith, 8 Conn. 14; Carmand v. Wall, 1 Bail. (S. C.) 209; even though the apprentice should steal his master's property, or by reason of incurable illness become incapable of service, the

covenants of the master and apprentice being independent; Powers v. Ware, 2 Pick. (Mass.) 451; 2 Dowl. & R. 465; 1 B. & C. 460; 5 Q. B. 447. If the apprentice proves to be an habitual thief, he may be properly dismissed; [1891] 1 Q. B. 431. The master cannot remove the apprentice out of the state under the laws of which he was apprenticed, unless such removal is provided for in the contract or may be implied from its nature; and if he do so remove him, the contract ceases to be obligatory; Com. v. Edwards, 6 Binn. (Pa.) 202; Com. v. Deacon, 6 S. & R. (Pa.) 526; Coffin v. Bassett, 2 Pick. (Mass.) 357; Vickere v. Pierce, 12 Me. 315; Walters v. Morrow, 1 Houst. (Del.) 527. An infant apprentice is not capable in law of consenting to his own discharge; 3 B. & C. 484; nor can the justices order money to be returned on the discharge of an apprentice; Stra. 69; *contra*, Salk. 67, 68, 490; 11 Mod. 110; 12 *id.* 498, 553. After the apprenticeship is at an end, the master cannot retain the apprentice on the ground that he has not fulfilled his contract, unless specially authorized by statute.

An apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavor to learn his trade or business, and perform all the covenants in his indenture not contrary to law. He must not leave his master's service during the terms of his apprenticeship; James v. Le Roy, 6 Johns. (N. Y.) 274; Coffin v. Bassett, 2 Pick. (Mass.) 357. The apprentice is entitled to payment for extraordinary services when promised by the master; Ex parte Steiner, 1 Penn. L. Jour. Rep. 368; see Bailey v. King, 1 Whart. (Pa.) 113, 29 Am. Dec. 42; and even when no express promise has been made, under peculiar circumstances; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 270, 2 L. Ed. 266; 3 C. Rob. Adm. 237; but see Bailey v. King, 1 Whart. (Pa.) 113, 29 Am. Dec. 42. Upon the death of the master, the apprenticeship, being a personal relation, is dissolved; Strange 284; Eastman v. Chapman, 1 Day (Conn.) 30.

To be binding on the apprentice, the contract must be made as prescribed by statute; Harper v. Gilbert, 5 Cush. (Mass.) 417; but if not so made, it can only be avoided by the apprentice himself; Fowler v. Hollenbeck, 9 Barb. (N. Y.) 309; In re McDowle, 8 Johns. (N. Y.) 328; Austin v. McCluney, 5 Strobh. (S. C.) 104; and if the apprentice do elect to avoid it, he will not be allowed to recover wages for his services, the relation being sufficient to rebut any promise to pay which might otherwise be implied; Maltby v. Harwood, 12 Barb. (N. Y.) 473; Williams v. Finch, 2 *id.* 208; but see Himes v. Howes, 13 Metc. (Mass.) 80. The master will be bound by his covenants, though additional to those required by statute; Davis v. Bratton, 10 Humphr. (Tenn.) 179.

Where an apprentice is employed by a third person without the knowledge or consent of the master, the master is entitled to his earnings, whether the person who employed him did or did not know that he was an apprentice; James v. Le Roy, 6 Johns. (N. Y.) 274; Bowes v. Tibbets, 7 Greenl. (Me.) 457; but in an action for harboring or enticing away an apprentice, a knowledge of the apprenticeship by the defendant is a prerequisite to recovery; Ferguson v. Tucker, 2 Harr. & G. (Md.) 182; Stuart v. Simpson, 1 Wend. (N. Y.) 376; McKay v. Bryson, 27 N. C. 216. A master is not entitled to the extraordinary earnings which do not interfere with his services; an apprentice is therefore entitled to salvage, in opposition to his master's claim; Mason v. The Blaireau, 2 Cra. (U. S.) 270, 2 L. Ed. 266.

The master has a right of action against any one injuring his apprentice causing a loss of his service; Ames v. Ry. Co., 117 Mass. 541, 19 Am. Rep. 426; 11 Ad. & El. 301.

Apprenticeship is a relation which cannot be assigned at common law; Com. v. Barker, 5 Binn. (Pa.) 423; Dougl. 70; Tucker v. Magee, 18 Ala. 99; 1 Ld. Raym. 683; though, if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship; Dougl. 70; Town of Guilderland v. Town of Knox, 5 Cow. (N. Y.) 363; Shoppard's Adm'r v. Kelly, 2 Bail. (S. C.) 93. But in some states the assignment of indentures of apprenticeship is authorized by statute; Com. v. Vanlear, 1 S. & R. (Pa.) 249; Com. v. Jones, 3 S. & R. (Pa.) 161; Phelps v. Culver, 6 Vt. 430. See, generally, 2 Kent 261; Bacon, Abr. *Master and Servant;* 1 Saund. 313. The law of France is very similar to our own; Pardessus, *Droit Comm.* nn. 518, 522.

See BINDING OUT.

APPROACH, RIGHT OF. **In International Law.** The right to draw near to a vessel in order to ascertain the nationality of its flag. In The Marianna Flora, 11 Wheat. (U. S.) 43, 44, 6 L. Ed. 405, it was held that the right of approach in time of peace was indispensable for the exercise by public vessels of their authority to arrest pirates and other offenders. Kent understood it to be equivalent to the right of visit (*q. v.*). 1 Kent 153. At present the right of approach has no existence apart from the right of visit. See VISIT; SEARCH.

APPROBATE AND REPROBATE. **In Scotch Law.** To approve and reject. To attempt to take advantage of one part of a deed and to reject the rest.

The doctrine of *approbate and reprobate* is the English doctrine of election. A party cannot both *approbate and reprobate* the

same deed; 4 Wils. & S. Hou. L. 460; 1 Ross, Lead. Cas. 617; Pat. Comp. 710; 1 Bell, Comm. 146.

APPROPRIATION. The perpetual annexation of an ecclesiastical benefice which is the general property of the church, to the use of some spiritual corporation, either sole or aggregate. See IMPROPRIATION.

It corresponds with impropriation, which is setting apart a benefice to the use of a lay corporation. The name came from the custom of monks in England to retain the churches in their gift and all the profits of them *in proprio usu* to their own immediate benefit. 1 Burns, Eccl. Law 71.

To effect a good appropriation, the king's license and the bishop's consent must first be obtained. When the corporation having the benefice is dissolved, the parsonage becomes disappropriate at common law; Co. Litt. 46; 1 Bla. Com. 385; 1 Hagg. Eccl. 162. There have been no appropriations since the dissolution of monasteries. For the form of an appropriation, see Jacob, Introd. 411.

APPROPRIATION OF PAYMENTS. The application of a payment made to a creditor by his debtor, to one or more of several debts.

The debtor has the first right of appropriation; 2 B. & C. 72. No precise declaration is required of him, his *intention* (Terhune v. Colton, 12 N. J. Eq. 233; *id.* 312), when made known, being sufficient; Bayley v. Wynkoop, 5 Gilman (Ill.) 449; Randall v. Parramore, 1 Fla. 409; 7 Beav. 10; King v. Andrews, 30 Ind. 429; Jones v. Williams, 39 Wis. 300; Hansen v. Rounsavell, 74 Ill. 238; Levystein v. Whitman, 59 Ala. 345; Adams Exp. Co. v. Black, 62 Ind. 128; Bean v. Brown, 54 N. H. 395. Still, such facts must be proved as will lead a jury to infer that the debtor did purpose the specific appropriation claimed; 4 Ad. & E. 840; Selfridge v. Bank, 8 W. & S. (Pa.) 320; Pindall's Ex'r v. Bank, 10 Leigh (Va.) 481; Rackley v. Pearce, 1 Ga. 241; Hall v. Marston, 17 Mass. 575; Runyon v. Latham, 27 N. C. 551; Miller v. Trevilian, 2 Rob. (Va.) 2, 27; Boutell v. Mason, 12 Vt. 608; Franklin Bank v. Cooper, 36 Me. 222; Bosley v. Porter, 4 J. J. Marsh. (Ky.) 621; Mitchell v. Dall, 4 Gill & J. (Md.) 361. An entry made by the debtor in his own book at the time of payment is an appropriation, if made known to the creditor; but otherwise, if not made known to him. The same rule applies to a creditor's entry communicated to his debtor; 2 B. & C. 65; Van Rensselaer's Ex'rs v. Roberts, 5 Denio (N. Y.) 470; Seymour v. Marvin, 11 Barb. (N. Y.) 80. The appropriation must be made by the debtor at or before the time of payment; suit fixes the appropriation; Haynes v. Waite, 14 Cal. 446; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427. The intention to appropriate may be referred to the jury on the facts of the transaction; West Branch Bank v. Moorehead, 5 W. & S. (Pa.) 542.

The creditor may apply the payment, as a general rule, if the debtor does not; Jones v. U. S., 7 How. 681, 12 L. Ed. 870; President, etc., of Washington Bank v. Prescott, 20 Pick. (Mass.) 339; Watt v. Hoch, 25 Pa. 411; Forretier v. Guerrineau's Creditors, 1 McCord (N. C.) 308; Blinn v. Chester, 5 Day (Conn.) 166; Brady's Adm'r v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Arnold v. Johnson, 1 Scam. (Ill.) 196; Whitaker v. Groover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300; Bell v. Radcliff, 32 Ark. 645; Burbank v. McCluer, 54 N. H. 345; Frazer v. Miller, 7 Wash. 521, 35 Pac. 427; Farren v. McDonnell, 74 Hun 176, 26 N. Y. Supp. 619; Northern Nat. Bank v. Lewis, 78 Wis. 475, 47 N. W. 834; Green v. Ford, 79 Ga. 130, 3 S. E. 624. In the absence of directions, the creditor may apply credits to the least secure items of his claim; Hildreth v. Davis, 6 Kulp (Pa.) 336. But there are some restrictions upon this right. The debtor must have known and waived his right to appropriate. Hence an agent cannot always apply his principal's payment. He cannot, on receipt of money due his principal, apply the funds to debts due himself as agent, selecting those barred by the statute of limitations; 1 Mann. & G. 54; Colby v. Cressy, 5 N. H. 237. A prior *legal* debt the creditor must prefer to a posterior equitable debt. Where only one of several debts is valid, all the payments must be applied to this, irrespective of its order in the account; Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187. Whether, if the equitable be prior, it must first be paid, see Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; 1 C. & M. 33.

If the creditor is also *trustee* for another creditor of his own debtor, he must apply the unappropriated funds *pro rata* to his own claims and those of his *cestui que trust;* Scott v. Ray, 18 Pick. (Mass.) 361. But if the debtor, besides the debts in his own right, owe also debts as executor or administrator, the unappropriated funds should first be applied to his personal debt, and not to his debts as executor; Fowke v. Bowie, 4 Harr. & J. (Md.) 566; Sawyer v. Toppan, 14 N. H. 352; 2 Dowl. Parl. Cas. 477. A creditor cannot apply unappropriated funds to such of his claims as are *illegal* and not recoverable at law; 3 B. & C. 165; 4 M. & G. 860; 4 Dowl. & R. 783; 2 Deac. & C. 534; Rohan v. Hanson, 11 Cush. (Mass.) 44; Caldwell v. Wentworth, 14 N. H. 431. But in the case of some debts illegal by statute—namely, those contracted by sales of spirituous liquors—an appropriation to them has been adjudged good; 2 Ad. & E. 41; Treadwell v. Moore, 34 Me. 112. And the debtor may always elect to have his payment applied to an illegal debt.

If some of the debts are barred by the

statute of limitations the creditor cannot first apply the unappropriated funds to them, and thus revive them; 2 Cr. M. & R. 723; 2 C. B. 476; Washington v. State, 13 Ark. 754; Pond v. Williams, 1 Gray (Mass.) 630. Still, a debtor may waive the bar of the statute, just as he may apply his funds to an illegal debt; and the creditor may insist, in the silence of the debtor, unless other facts controvert it, that the money was paid on the barred debts; 5 M. & W. 300; Livermore v. Rand, 26 N. H. 85; Watt v. Hoch, 25 Pa. 411. See Beck v. Haas, 31 Mo. App. 180. Proof of such intent on the debtor's part may be deduced from a mutual adjustment of accounts before the money is sent, or from his paying interest on the barred debt. But, in general, the creditor cannot insist that a part-payment revives the rest of the debt. He can only retain such partial payment as has been made; Pond v. Williams, 1 Gray (Mass.) 630. It has been held that the creditor may first apply a general payment to discharging any one of several accounts all barred, and by so doing he will revive the balance of that particular account, but he is not allowed to distribute the funds upon all the barred notes, so as to revive all; Ayer v. Hawkins, 19 Vt. 26.

Wherever the payment is not *voluntary*, the creditor has not the option in appropriation, but he must apply the funds received ratably to all the notes or accounts. This is the rule wherever proceeds are obtained by judicial proceedings. So, in cases of assignment by an insolvent debtor, the share received by a creditor, a party to the assignment, must be applied *pro rata* to all his claims, and not to such debts only as are not otherwise secured; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; 1 M. & G. 54; Stamps v. Brown, Walk. (Miss.) 526; Merrimack County Bank v. Brown, 12 N. H. 320; Bank of Portland v. Brown, 22 Me. 295; Cowperthwaite v. Sheffield, 1 Sandf. (N. Y.) 416.

A creditor having several demands may apply the payments to a debt not secured by sureties, where other rules do not prohibit it; Upham v. Lefavour, 11 Metc. (Mass.) 185. Where appropriations are made by a receipt, *prima facie* the creditor has made them, because the language of the receipt is his; U. S. v. Bradbury, Dav. Dist. Ct. 146, Fed. Cas. No. 14,635.

It is sufficiently evident from the foregoing rules that the principle of the civil law which required the creditor to act for his debtor's interest in appropriation more than for his own, is not a part of the common law; Logan v. Mason, 6 W. & S. (Pa.) 9. The nearest approach to the civil-law rule is the doctrine that when the right of appropriation falls to the creditor he must make such an application as his debtor could not *reasonably* have objected to; Bancroft v. Dumas, 21 Vt. 456; Parchman v. McKinney, 12 Smedes & M. (Miss.) 631. See IMPUTATION OF PAYMENTS.

The law will apply part-payments in accordance with the justice and equity of the case; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; Harker v. Conrad, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691; Field v. Holland, 6 Cra. (U. S.) 28, 3 L. Ed. 136; Sheehy v. Mandeville, 6 Cra. (U. S.) 253, 264, 3 L. Ed. 215; U. S. v. Wardwell, 5 Mas. 82, Fed. Cas. No. 16,640; Campbell v. Vedder, 1 Abb. App. Dec. (N. Y.) 295; Pickering v. Day, 2 Del. Ch. 333; Leef v. Goodwin, Taney 460, Fed. Cas. No. 8,207.

Unappropriated funds are always applied to a *debt due* at the time of payment, rather than to one not then due; 2 Esp. 666; Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Harrison & Robinson v. Johnston, 27 Ala. 445; Seymour v. Sexton, 10 Watts (Pa.) 255; Stone v. Talbot, 4 Wisc. 442; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474. But an express agreement with the debtor will make good an appropriation to debts not due; Shaw v. Pratt, 22 Pick. (Mass.) 305. The creditor should refuse a payment on an account not yet due, if he be unwilling to receive it; but if he do receive it he must apply it as the debtor directs; Wetherell v. Joy, 40 Me. 325; Levystein & Simon v. Whitman, 59 Ala. 345. A payment is applied to a *certain* rather than to a *contingent* debt, and, therefore, to a debt on which the payer is bound directly, rather than to one which binds him collaterally; President, etc., of Bank of Portland v. Brown, 22 Me. 295. And where the amount paid is precisely equal to one of several debts, a jury is authorized to infer its intended application to that debt; Seymour & Bouck v. Van Slyck, 8 Wend. (N. Y.) 403; Moody v. U. S., 1 Woodb. & M. 150, Fed. Cas. No. 1,636. Where one holds two notes, one of which is secured, and he receives further security with express agreement that he may apply proceeds thereof to either note, he may make such application to the unsecured note notwithstanding the objection of second mortgagee; Case v. Fant, 53 Fed. 41, 3 C. C. A. 418. Where a creditor is secured by both chattel and real estate mortgages, he may apply proceeds of sale of chattels first to the chattel mortgage and then to payment of debts otherwise secured; Schloss v. Solomon, 97 Mich. 526, 56 N. W. 753.

The law, as a general rule, will apply a payment in the way most beneficial to the *debtor* at the time of payment; Neal v. Allison, 50 Miss. 175; Moore v. Kiff, 78 Pa. 96. This rule seems to be similar to the civil-law doctrine. Thus, *e. g.*, courts will apply money to a mortgage debt rather than to a simple contract debt; see 12 Mod. 559; Dorsey v. Gassaway, 2 Harr. & J. (Md.) 402, 3

Am. Dec. 557; Bussey v. Gant's Adm'r, 10 Humphr. (Tenn.) 238; Robinson v. Doolittle, 12 Vt. 246; Pattison v. Hull, 9 Cow. (N. Y.) 747, 765; McTavish v. Carroll, 1 Md. Ch. Dec. 160; Hamer v. Kirkwood, 25 Miss. 95. In the absence of specific appropriation, the law will apply payments to unsecured indebtedness in preference to the secured; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746. Yet, on the other hand, in the pursuit of equity, courts will sometimes assist the *creditor*. Hence, of two sets of debts, courts allow the creditor to apply unappropriated funds to the debts least strongly secured; Planters' Bank v. Stockman, 1 Freem. Ch. (Miss.) 502; Baine v. Williams, 10 Smedes & M. (Miss.) 113; Stamford Bank v. Benedict, 15 Conn. 438; Ramsour v. Thomas, 32 N. C. 165; Jones v. Kilgore, 2 Rich. Eq. (S. C.) 63; Emery v. Tichout, 13 Vt. 15; Field v. Holland, 6 Cr. (U. S.) 8, 3 L. Ed. 136; Smith v. Loyd, 11 Leigh (Va.) 512, 37 Am. Dec. 621; Byer v. Fowler, 14 Ark. 86; Hargroves v. Cooke, 15 Ga. 321; Pattison v. Hull, 9 Cow. (N. Y.) 747, 765; The D. B. Steelman, 48 Fed. 580.

Interest. Payments made on account are first to be applied to the interest which has accrued thereon. And if the payment exceed the amount of interest, the residue goes to extinguish the principal; Peebles v. Gee, 12 N. C. 341; Jencks v. Alexander, 11 Paige, Ch. (N. Y.) 619; Bond v. Jones, 8 Smedes & M. (Miss.) 368; Hearn v. Cutberth, 10 Tex. 216; Righter v. Stall, 3 Sandf. Ch. (N. Y.) 608; Miami Exporting Co. v. Bank, 5 Ohio 260; Hart v. Dorman, 2 Fla. 445, 50 Am. Dec. 285; Spires v. Hamot, 8 W. & S. (Pa.) 17; Mills v. Saunders, 4 Neb. 190; Jacobs v. Ballenger, 130 Ind. 231, 29 N. E. 782, 15 L. R. A. 169. Funds must be applied by the creditor to a judgment bearing interest, and not to an unliquidated account; Scott v. Fisher, 4 T. B. Monr. (Ky.) 389; nor to usurious interest; Duncan v. Helm, 22 La. Ann. 418; Bank of Cadiz v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364.

Priority. When no other rules of appropriation intervene, the law applies part-payments to debts in the order of time, discharging the oldest first; Whetmore v. Murdock, 3 Woodb. & M. 390, Fed. Cas. No. 17,510; Huger's Ex'rs v. Bocquet, 1 Bay (S. C.) 497; Thurlow v. Gilmore, 40 Me. 378; Dows v. Morewood, 10 Barb. (N. Y.) 183; Allstan's Adm'r v. Contee's Ex'r, 4 Harr. & J. (Md.) 351; Ross's Ex'r v. McLauchlan's Adm'r, 7 Gratt. (Va.) 86; Shedd v. Wilson, 27 Vt. 478; Berghaus v. Alter, 9 Watts (Pa.) 386; Harrison v. Johnston, 27 Ala. 445; Town of St. Albans v. Failey, 46 Vt. 448; Allen v. Brown, 39 Ia. 330; Worthley v. Emerson, 116 Mass. 374; The Barges 2 and 4, 58 Fed. 425. Where the payment is upon an account, the law will apply it to the oldest items; The Tom Lysle, 48 Fed. 690. So strong is this priority rule that it has been said that equity will apply payments to the earliest items, even where the creditor has security for these items and none for later ones; Truscott v. King, 6 N. Y. 147. But this is opposed to the prevailing rule.

Sureties. The general rule is that neither debtor nor creditor can so apply a payment as to affect the liabilities of sureties, without their consent; Merrimack County Bank v. Brown, 12 N. H. 320; Myers v. U. S., 1 McLean 493, Fed. Cas. No. 9,996; Brander v. Phillips, 16 Pet. (U. S.) 121, 10 L. Ed. 909; Postmaster General v. Norvell, Gilp. 106, Fed. Cas. No. 11,310. Where a principal makes general payments, the law presumes them, *prima facie*, to be made upon debts guaranteed by a surety, rather than upon others; though circumstances and intent will control this rule of surety, as they do other rules of appropriation; 1 C. & P. 600; 8 Ad. & E. 855; 10 J. B. Moore 362; Mitchell v. Dall, 4 Gill & J. (Md.) 361; Donally v. Wilson, 5 Leigh (Va.) 329.

Continuous accounts. In these, payments are applied to the earliest items of account, unless a different intent can be inferred; 4 B. & Ad. 766; 4 Q. B. 792; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720, 6 L. Ed. 199; Gass v. Stinson, 3 Sumn. 98, Fed. Cas. No. 5,262; Miller v. Miller, 23 Me. 24, 39 Am. Dec. 597; Morgan v. Tarbell, 28 Vt. 498; Dulles v. De Forest, 19 Conn. 191; Harrison v. Johnston, 27 Ala. 445; Horne v. Bank, 32 Ga. 1; Shuford v. Chinski (Tex.) 26 S. W. 141; Winnebago Paper Mills v. Travis, 56 Minn. 480, 58 N. W. 36. Where one is indebted on two different accounts and money is paid without directions, the creditor may apply it to the later account; Henry Bill Pub. Co. v. Utley, 155 Mass. 366, 29 N. E. 635; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; or he may apply half the amount paid on each of two debts, where neither is barred by the statute of limitations; Beck v. Haas, 111 Mo. 264, 20 S. W. 19, 33 Am. St. Rep. 516.

Partners. Where a creditor of the old firm continues his account with the new firm, payments by the latter will be applied to the old debt, *prima facie*, the preceding rule of continuous accounts guiding the appropriations. As above, however, a different intent, clearly proved, will prevail; 5 B. & Ad. 925; 2 B. & Ald. 39; Logan v. Mason, 6 W. & S. (Pa.) 9. When a creditor of the firm is also the creditor of one partner, a payment by the latter of partnership funds must be applied to the partnership debts. Yet circumstances may allow a different application; 1 Mood. & M. 40; Fairchild v. Holly, 10 Conn. 175; McKee v. Stroup, 1 Rice (S. C.) 291; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Codman v. Armstrong, 28 Me. 91; Johnson v.

Boone's Adm'r, 2 Harr. (Del.) 172. See Tootle v. Jenkins, 82 Tex. 29, 17 S. W. 519. And so, unappropriated payments made by a party indebted severally and also jointly with another to the same creditor, for items of book-charges, are to be applied upon the several debts; Livermore v. Claridge, 33 Me. 428.

The rules of appropriation, it has now been seen, apply equally well whether the debts are of the same or of different orders, and though some are specialties while others are simple contracts; Town of Alexandria v. Patten, 4 Cra. (U. S.) 317, 2 L. Ed. 633; Bennett v. Woolfolk, 15 Ga. 221; Pennypacker v. Umberger, 22 Pa. 492; Hamilton v. Benbury, 3 N. C. 385.

As to the *time* during which the application must be made in order to be valid, there is much discrepancy among the authorities, but perhaps a correct rule is that any time will be good as between debtor and creditor, but a *reasonable* time only when third parties are affected; 6 Taunt. 597; Combs v. Little, 4 N. J. Eq. 314, 40 Am. Dec. 207; Starrett v. Barber, 20 Me. 457; Heilbron v. Bissell, Bail. Eq. (S. C.) 430; Reynolds v. McFarlane, 1 Overt. (Tenn.) 488; Moss v. Adams, 39 N. C. 42; Robinson v. Doolittle, 12 Vt. 249; Fairchild v. Holly, 10 Conn. 184.

When once made, the appropriation cannot be changed but by consent; and rendering an account, or bringing suit and declaring in a particular way, is evidence of an appropriation; Hill v. Southerland's Ex'rs, 1 Wash. (Va.) 128; Hopkins v. Conrad, 2 Rawle (Pa.) 316; Bank of North America v. Meredith, 2 Wash. C. C. 47, Fed. Cas. No. 893; Jackson v. Bailey, 12 Ill. 159; Codman v. Armstrong, 28 Me. 91; Pearce v. Walker, 103 Ala. 250, 15 South. 568. If the debtor receives without objection an account rendered, he cannot afterward question the imputation; Flower v. O'Bannon, 43 La. Ann. 1042, 10 South. 376; Sawyer v. Harrison, 43 Minn. 298, 45 N. W. 434.

Of Government. No money can be drawn from the treasury of the United States but in consequence of appropriations made by law; Const. art. 1, s. 9. Under this clause it is necessary for congress to appropriate money for the support of the federal government; this is done annually by acts of appropriation, some of which are for the general purposes of government, and others special and private in their nature. These general appropriation bills, as they are commonly termed, extend to the 30th of June in the following year, and usually originate in the house of representatives, being prepared by the committee of ways and means; but they are distinct from the bills for raising revenue, which the constitution declares shall originate in the house of representatives. A rule of the house gives appropriation bills precedence over all other business, and requires them to be first discussed in committee of the whole. Where money once appropriated remains unexpended for more than two years after the expiration of the fiscal year in which the act shall have been passed, such appropriations are deemed to have ceased, and the moneys so unexpended are immediately thereafter carried to the "surplus fund," and it is not lawful thereafter to pay them out for any purpose without further and specific appropriations by law. Certain appropriations, however, are excepted from the operation of this law, viz.: moneys appropriated for payment of the interest on the funded debt, or the payment of interest and reimbursement according to contract of any loan or loans made on account of the United States; as likewise moneys appropriated for a purpose in respect to which a longer duration is specially assigned by law. No expenditure is allowed in any department in any year in excess of the appropriation for that year; R. S. §§ 3660–3692, 7 O. A. G. 1.

The term "appropriation" was also used in 13 Stat. at L. 381, to include all taking and use of property by the army and navy in the course of the war not authorized by contract with the government; Filor v. U. S., 9 Wall. (U. S.) 45, 19 L. Ed. 549; U. S. v. Russell, 13 Wall. (U. S.) 623, 20 L. Ed. 474; Waters v. U. S., 4 Ct. Cl. 389.

It is also used in reference to taking property under eminent domain (*q. v.*) and particularly to taking water in connection with irrigation (*q. v.*).

APPROVE. To increase the profits upon a thing.

Used of common or waste lands which were enclosed and devoted to husbandry; 3 Kent 406; Old Nat. Brev. 79.

While confessing crime one's self, to accuse another of the same crime.

It is so called because the accuser must prove what he asserts; Staundf. Pl. Cr. 142; Crompton, Jus. Peace 250.

To vouch. To appropriate. To improve. Kelham.

To commend; be satisfied with.

APPROVED ENDORSED NOTES. Notes endorsed by another person than the maker, for additional security, the endorser being satisfactory to the payee.

Public sales are sometimes made on approved endorsed notes. The meaning of the term is that the purchaser shall give his promissory note for the amount of his purchases, endorsed by another, which, if approved of by the seller, shall be received in payment. If the party approve of the notes, he consents to ratify the sale; Mills v. Hunt, 20 Wend. (N. Y.) 431.

APPROVER. One confessing himself guilty of felony, and accusing others of the same crime to save himself. Crompton, Inst. 250; Co. 3d Inst. 129; Myers v. People, 26 Ill. 173; Gray v. People, 26 *id.* 344; 1 Cowper 331. See ANTITHETARIUS.

Such an one was obliged to maintain the truth of his charge, by the old law; Cowell. If he failed

to convict those he accused he was at once hung. Lea, Force & Superstition 243. It is said that they usually failed. 1 Pike, Hist. of Cr. 286. The approvement must have taken place before plea pleaded; 4 Bla. Com. 330.

Certain men sent into the several counties to increase the farms (rents) of hundreds and *wapentakes*, which formerly were let at a certain value to the sheriffs. Cowell.

Sheriffs are called the king's approvers. Termes de la Ley.

Approvers in the Marches were those who had license to sell and purchase beasts there.

APPURTENANCES. Things belonging to another thing as principal, and which pass as incident to the principal thing. Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Blaine's Lessee v. Chambers, 1 S. & R. (Pa.) 169; Cro. Jac. 121, 526; 1 P. Wms. 603; 2 Coke 32; Co. Litt. 5 *b*, 56 *a*, *b*; 2 Saund. 401, n. 2; 1 B. & P. 371; Grubb v. Grubb, 74 Pa. 25. See 13 Am. Dec. 657, note.

The word has a technical signification, and, when strictly considered, is employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. When thus used, to constitute an appurtenance there must exist a propriety of relation between the principal or dominant subject and the accessory or adjunct, which is to be ascertained by considering whether they so agree in nature or quality as to be capable of union without incongruity; Riddle v. Littlefield, 53 N. H. 508, 16 Am. Rep. 388; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473.

Thus, if a house and land be conveyed, everything passes which is necessary to the full enjoyment thereof and which is in use as incident or appurtenant thereto; U. S. v. Appleton, 1 Sumn. 492, Fed. Cas. No. 14,463. Under this term are included the curtilage; 2 Bla. Com. 17; a right of way; 4 Ad. & E. 749; water-courses and secondary easements, under some circumstances; Angell, Wat. C. (7th ed.) § 153 *a*; a turbary; 3 Salk. 40; and generally, anything necessary to the enjoyment of a thing; 4 Kent 468, n.; Simmons v. Cloonan, 81 N. Y. 557; but it is the general rule that land cannot pass as appurtenant to land; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Helme v. Guy, 6 N. C. 341; Woodhull v. Rosenthal, 61 N. Y. 390; but it may pass, in order to give effect to the intent of a will; Otis v. Smith, 9 Pick. (Mass.) 293; and in Pennsylvania where first purchasers of 5000 acres from William Penn, the Proprietary, obtained city lots as an incident to their purchase, it was held that the lots passed as appurtenant to a grant of 5000 acres; Hill's Lessee v. West, 4 Yeates (Pa.) 142; also flats pass as appurtenant to the fast land on a river front; Risdon v. City of Philadelphia, 18 W. N. C. (Pa.) 73; and the land covered by the water used for water power will pass as appurtenant to a saw-mill; Grubb v. Grubb, 74 Pa. 25. See also Scheetz v. Fitzwater, 5 Pa. 126; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724.

The mere use of the term "appurtenances," without more, will not pass a right of way established over one portion of land merely for convenience of the owner, it not being a way of necessity; Parsons v. Johnson, 68 N. Y. 62, 23 Am. Rep. 149.

An elevator is not a common appurtenance to the railroads of the several companies having the stock of the elevator company; a certificate of stock in an independent corporation cannot be an appurtenance to a railroad; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473, where, under a mortgage made by a railroad company, the term "appurtenances" was held to mean only such property as is indispensable to the use and enjoyment of the franchises of the company.

If a house is blown down, a new one erected there shall have the old appurtenances; 4 Coke 86. The word appurtenances in a deed will not usually pass any corporeal real property, but only incorporeal easements, or rights and privileges; Co. Litt. 121; 8 B. & C. 150; 2 Washb. R. P. 317, 327; 3 *id.* 418. See APPENDANT.

Appurtenances of a ship include whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to her owner. Ballast was held no appurtenance; 1 Leon. 46. Boats and cable are such; Briggs v. Strange, 17 Mass. 405; also, a rudder and cordage; 5 B. & Ald. 942; 1 Dods. Adm. 278; fishing-stores; 1 Hagg. Adm. 109; chronometers; 6 Jur. 910; see Richardson v. Clark, 15 Me. 421. For a full discussion, see 1 Pars. Marit. Law 71. See In re Bailey, 2 Sawy. 201, Fed. Cas. No. 728.

APPURTENANT. Belonging to; pertaining to.

The thing appurtenant must be of an inferior nature to the thing to which it is appurtenant; 2 Bla. Com. 19; U. S. v. Harris, 1 Sumn. 21, Fed. Cas. No. 15,315; Williams v. Baker, 41 Md. 523. A right of common may be appurtenant, as when it is annexed to lands in other lordships, or is of beasts not generally commonable; 2 Bla. Com. 33. Such can be claimed only by immemorial usage and prescription. See APPURTENANCES.

APUD ACTA (Lat.). Among the recorded acts. This was one of the verbal appeals (so called by the French commentators), and was obtained by simply saying, *appello*.

AQUA (Lat.). Water. It is a rule that water belongs to the land which it covers when it is stationary. *Aqua cedit solo* (water follows the soil); 2 Bla. Com. 18. But the owner of running water cannot obstruct the flow to the injury of an inheritance below him. *Aqua currit et currere debet* (water runs, and ought to run); 3 Kent 439;

Kauffman v. Griesemer, 26 Pa. 413, 67 Am. Dec. 437; 2 Washb. R. P. 340. See RIPARIAN PROPRIETORS.

AQUÆ DUCTUS. In Civil Law. A servitude which consists in the right to carry water by means of conduits over or through the estate of another. Dig. 8. 3. 1; Inst. 2. 3; Lalaure, *Des Serv.* c. 5, p. 23.

AQUÆ HAUSTUS. In Civil Law. A servitude which consists in the right to draw water from the fountain, pool, or spring of another. Inst. 2. 3. 2; Dig. 8. 3. 1. 1.

AQUÆ IMMITTENDÆ. In Civil Law. A servitude which frequently occurs among neighbors.

It was the right which the owner of a house, built in such a manner as to be surrounded with other buildings, so that it has no outlet for its waters, had to cast water out of his windows on his neighbor's roof, court, or soil. Lalaure, *Des Serv.* 23. It is recognized in the common law as an easement of drip; Wadsworth v. Hydraulic Ass'n, 15 Barb. (N. Y.) 95; Gale & Whatley, Easements. See EASEMENTS; DRIP.

AQUAGIUM (Lat.). A water-course. Cowell. Canals or ditches through marshes. Spelman. A signal placed in the *aquagium* to indicate the height of water therein. Spelman.

AQUATIC RIGHTS. Rights which individuals have in water.

ARALIA. Land fit for the plough. Denoting the character of land, rather than its condition. Spelman. Kindred in meaning *arare*, to plough; *arator*, a ploughman; *aratrum terræ*, as much land as could be cultivated by a single *arator; araturia*, land fit for cultivation.

ARBITER. A person bound to decide according to the rules of law and equity, as distinguished from an arbitrator, who may proceed wholly at his own discretion, so that it be according to the judgment of a sound man. Cowell.

This distinction between arbiters and arbitrators is not observed in modern law. Russell, Arbitrator 112. See ARBITRATOR.

One appointed by the Roman prætor to decide by the equity of the case, as distinguished from the *judex*, who followed the law. Calvinus, Lex.

One chosen by the parties to decide the dispute; an arbitrator. Bell, Dict.

ARBITRAGE. Transactions of bankers and mercantile houses by which stocks or bills are bought in one market and sold in another for the sake of the profit arising from a difference in price in the two markets.

ARBITRAMENT AND AWARD. A plea to an action brought for the same cause which had been submitted to arbitration and on which an award had been made. Watson, Arb. 256.

ARBITRARY PUNISHMENT. That punishment which is left to the decision of the judge, in distinction from those defined by statute. See DISCRETION.

ARBITRATION AND AWARD. Arbitration is the investigation and determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties, and called arbitrators, or referees.

1. CHARACTER OF THE PROCEEDING. Arbitration is the hearing and determination of a cause between the parties in controversy by a tribunal selected by them. Duren v. Getchell, 55 Me. 241. At common law it is entirely voluntary, and depends upon the agreement of the parties, to waive the right of trial in court by a jury.

"An arbitration is a domestic tribunal created by the will and consent of the parties litigant, and resorted to to avoid expense, delay and ill feeling consequent upon litigating in courts of justice." Reily v. Russell, 34 Mo. 524.

"Arbitration is where the parties injuring and injured submit all matters in dispute concerning any personal chattels or personal wrong to the judgment of two or more arbitrators, who are to decide the controversy; and if they do not agree it is usual to add that another person be called in as umpire (*imperator* or *impar*) to whose sole judgment it is then referred; or frequently there is only one arbitrator originally appointed. The decision in any of these cases is called an award, and thereby the question is as fully determined and the right transferred or settled as it could have been by the agreement of the parties or a judgment of a court of justice." 3 Bla. Com. 16, adopted in Fargo v. Reighard, 13 Ind. App. 39, 39 N. E. 888, 41 N. E. 74; Germania Fire Ins. Co. of City of New York v. Warner, 13 Ind. App. 466, 41 N. E. 969.

"Arbitration is a substitution by consent of the parties of another tribunal for those provided by the ordinary processes of law; but that such a substitution should be established, the consent of the parties thereto should be proved in the usual way." Boyden v. Lamb, 152 Mass. 416, 25 N. E. 609.

"An arbitration at common law was but a judicial investigation out of court," and as such it required notice of hearing and examination of the witnesses under oath, unless expressly waived. People v. Board of Sup'rs, 15 N. Y. Supp. 748.

"Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. When the submission is

made a rule of court, the arbitrators are not officers of the court, but are the appointees of the parties, as in cases where there is no rule of court." In re Curtis-Castle Arbitration, 64 Conn. 501, 30 Atl. 769, 42 Am. St. Rep. 200.

To constitute an arbitration, the matter submitted must be one in dispute between the parties and not some matter which it is expected may arise between them or a matter of accounting or appraisal. Toledo S. S. Co. v. Zenith Transp. Co., 184 Fed. 391, 106 C. C. A. 501.

Compulsory arbitration is when the consent of one of the parties is enforced by statutory provisions. Wood v. City of Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

Voluntary arbitration is by mutual and free consent of the parties. It usually takes place in pursuance of an agreement (commonly in writing) between the parties, termed a submission; the person to whom the reference is made is an arbitrator; and the determination of the arbitrators is called an award; Garr v. Gomez, 9 Wend. (N. Y.) 649; but a parol submission is good at common law; Cady v. Walker, 62 Mich. 157, 28 N. W. 805, 4 Am. St. Rep. 834.

A submission to arbitration made pending an action thereon, operates as a discontinuance of the suit; Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406; and it is a bar to any future action thereon; Baltes v. Machine Works, 129 Ind. 185, 28 N. E. 319. If the submission is not made under an order of court, the award cannot be made a judgment of the court unless it be by consent; Long v. Fitzgerald, 97 N. C. 39, 1 S. E. 844.

At common law it was either *in pais*,—that is, by simple agreement of the parties,—or by the intervention of a court of law or equity. The latter was called arbitration by rule of court; 3 Bla. Com. 16.

Besides arbitration at common law, there exists arbitration, in England as well as the United States, under various statutes.

Most of them are founded on the 9 & 10 Will. III. c. 15, and 3 & 4 Will. IV. ch. 42, § 49, by which it is allowed to refer a matter in dispute, not then in court, to arbitrators, and agree that the submission be made a rule of court. This agreement, being proved on the oath of one of the witnesses thereto, is enforced as if it had been made at first under a rule of court; 3 Bla. Com. 18; Kyd, Aw. 22. Some of the state statutes, however, provide for compulsory arbitration.

This is somewhat similar to the arbitrations of the Romans. There the prætor selected, from a list of citizens made for the purpose, one or more persons, who were authorized to decide all suits submitted to them, and which had been brought before him. The authority which the prætor gave them conferred on them a public character, and their judgments were without appeal. Toullier, *Droit Civ. Fr.* liv. 3, t. 3, c. 4, n. 820.

Although at common law arbitrators were unofficial persons selected by the parties, it is in the power of a state legislature to provide for statutory arbitrators to be selected from a class learned in the law, and that, in their proceedings, they shall be governed by certain rules and regulations. Such a commission is not an arbitrary one to which litigants are forced to submit their differences, but can only act by the express consent of the parties, which gives validity and vitality to the statute, and a judgment entered thereon is like other consent judgments; Henderson v. Beaton, 52 Tex. 29.

It is a general rule that in an arbitration as to matters of "public concern" a majority is sufficient to make an award; this rule was laid down by Eyre, C. J., in 1 Bos. & Pul. 229, and applied in Omaha Water Co. v. Omaha, 162 Fed. 225, 89 C. C. A. 205, 15 Ann. Cas. 498, where the appraisal of a water works, preparatory to their being taken over by a city, was held to be a matter of "public concern," and the decision of a majority binding; in Colombia v. Cauca Co., 190 U. S. 524, 23 Sup. Ct. 704, 47 L. Ed. 1159, where there had been an arbitration between the Republic of Colombia and a railroad company, and after the three arbitrators had heard and discussed the case, the Colombia representative withdrew, and there not being time under the treaty for proceedings to supply his place, the remaining arbitrators signed the award and it was held binding, among other reasons, because it was of "public concern"; in People v. Nichols, 52 N. Y. 478, 11 Am. Rep. 734, where an appropriation having been made (of $20,000, or so much thereof as might be necessary) for the purchase of relics of George Washington to be paid only on a certificate of genuineness and value of three named persons, it was held that a matter between a state and an individual is a matter of "public concern" and that a certificate signed by two was *sufficient*, the third having refused to sign. The rule was also applied in Morgan v. Ins. Ass'n, 52 App. Div. 61, 64 N. Y. Supp. 873.

2. Submission. The *submission* is an agreement, parol (oral or written) or sealed, by which parties agree to submit their differences to the decision of a referee or arbitrators. It is sometimes termed a reference; Kyd, Arb. 11; 3 M. & W. 816; McManus v. McCulloch, 6 Watts (Pa.) 357; Stewart v. Cass, 16 Vt. 663, 42 Am. Dec. 534; Howard v. Sexton, 4 N. Y. 157.

It is the authority given by the parties to the arbitrators, empowering them to inquire into and determine the matters in dispute.

It may be *in pais*, or by rule of court, or under the various statutes; Williams v. Wood, 12 N. C. 82.

It may be oral, but this is inconvenient, because open to disputes; by written agreement not under seal (in some states the submission must be in writing; De Armas v.

City of New Orleans, 5 La. 133; Smith v. Pollock, 2 Cal. 92); by indenture, with mutual covenants to abide by the decision of the arbitrator; by deed-poll, or by bond, each party executing an obligation to the other conditioned to be void respectively upon the performance of the award; Caldw. Arb. 16; McManus v. McCulloch, 6 Watts (Pa.) 357. A parol submission followed by a valid award, though not in writing, may be binding and conclusive upon the parties, if the arbitrators act fairly, but before a party is so bound, the agreement to arbitrate must be duly established; Childs v. State, 97 Ala. 52, 12 South. 441.

An offer to arbitrate not accepted by the other party cannot affect his right to sue; Funsten v. Commission Co., 67 Mo. App. 559; where a submission was provided for in a lease, and by failure of the parties to agree upon arbitrators, nothing had been done and suit was brought, the action could be defeated by an offer at the trial to proceed with the arbitration; Van Beuren v. Wotherspoon, 12 App. Div. 421, 42 N. Y. Supp. 404. A statutory provision for arbitration has been held not to be exclusive of the common-law right to arbitrate; Burkland v. Johnson, 50 Neb. 858, 70 N. W. 388. See also, as to the effect of statutory provisions upon common-law arbitration, New York Lumber & Wood Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4; Ehrman v. Stanfield, 80 Ala. 118.

When to be made. A submission may be made at any time of causes not in court, and at common law, where a cause was depending, submission might be made by rule of court before the trial, or by order of *nisi prius* after it had commenced, which was afterwards made a rule of court; 2 B. & Ald. 395; Craig v. Craig, 9 N. J. L. 198.

Who may make. Any one capable of making a disposition of his property or release of his right, or capable of suing or being sued, or of making a valid and binding contract with regard to the subject, may, in general, be a party to a reference or arbitration; but one under civil or natural incapacity cannot be bound by his submission; 2 P. Wms. 45; Furbish v. Hall, 8 Greenl. (Me.) 315; Eastman v. Burleigh, 2 N. H. 484; Schoff v. Bloomfield, 8 Vt. 472; Inhabitants of Buckland v. Inhabitants, 16 Mass. 396; Inhabitants of Griswold v. North-Stonington, 5 Conn. 367; Brady v. Brooklyn, 1 Barb. (N. Y.) 584; Street v. St. Clair, 6 Munf. (Va.) 458; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83, 12 L. Ed. 60; Lathers v. Fish, 4 Lans. (N. Y.) 213. Every one is so far, and only so far, bound by the award as he would be by an agreement of the same kind made directly by him. For example, the submission of a minor is not void, but voidable; Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496, where on motion for rehearing (after holding it void; *id.*, 134 N. C. 486, 46 S. E. 988) the court said that there was a conflict of authority, in which they were "inclined to concur with those courts and the text-writers who maintain the proposition that such contracts are voidable only" and that there is no reason to take it out of the general rule as to contracts of infants. See INFANT.

In general, in cases of incapacity of the real owner of property, as well as in many cases of agency, the person who has the legal control of the property may make submission, including a *husband* for his wife; 5 Ves. 846 (before the Married Women's Acts); a *parent* or *guardian* for an infant; Weston v. Stuart, 11 Me. 326; Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622; Weed v. Ellis, 3 Caines (N. Y.) 253 (but not a *guardian ad litem*; Hannum's Heirs v. Wallace, 9 Humphr. (Tenn.) 129); a *trustee* for his *cestui que trust*; 3 Esp. 101; an *attorney* for his client; 1 Ld. Raym. 246; Scarborough v. Reynolds, 12 Ala. 252; Wilson v. Young, 9 Pa. 101; Diedrick v. Richley, 2 Hill (N. Y.) 271; Talbot v. McGee, 4 T. B. Monr. (Ky.) 375; Holker v. Parker, 7 Cra. (U. S.) 436, 3 L. Ed. 396 (but see 6 Weekl. Rep. 10); an *agent* duly authorized for his principal; 8 B. & C. 16; Schoff v. Bloomfield, 8 Vt. 472; Inhabitants of Boston v. Brazer, 11 Mass. 449; Furber v. Chamberlain, 29 N. H. 405; Wood v. R. Co., 8 N. Y. 160; an *executor* or *administrator* at his own peril, but not thereby necessarily admitting assets; Wheatley v. Martin's Adm'r, 6 Leigh (Va.) 62; Lea v. Colston, 5 T. B. Monr. (Ky.) 240; Ireland v. Smith, 1 Barb. (N. Y.) 419; McKeen v. Oliphant, 18 N. J. L. 442; *assignees* under bankruptcy and insolvency laws, under the statutory restrictions, stat. 6 Geo. IV. c. 16, and state statutes; the right being limited in all cases to that which the person acting can control and legally dispose of; Baker v. Lovett, 6 Mass. 78, 4 Am. Dec. 88; Britton v. Williams's Devisees, 6 Munf. (Va.) 453; Milner v. Turner's Heirs, 4 T. B. Monr. (Ky.) 240; Fort v. Battle, 13 Smedes & M. (Miss.) 133; but not including a *partner*, for a partnership; 1 Cr. M. & R. 681; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. Ed. 121; Buchanan v. Curry, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; Pillsbury v. Cammett, 2 N. H. 284; Armstrong v. Robinson, 5 Gill & J. (Md.) 412; Taylor v. Coryell, 12 S. & R. (Pa.) 243; Lind. Partn. 129, 272; 3 Kent 49; the *administratrix* of a public contractor may join in a submission to arbitration of a controversy arising out of the contract; Bailey v. District of Columbia, 9 App. (D. C.) 360.

What may be included in a submission. Generally, any matter which the parties might adjust by agreement, or which may be the subject of an action or suit at law, except perhaps actions (*qui tam*) on penal statutes by common informers; for crimes cannot be made the subject of adjustment and composition by arbitration, this being

against the most obvious policy of the law; McMullen v. Mayo, 8 Smedes & M. (Miss.) 298; Akely v. Akely, 16 Vt. 450; Caton v. MacTavish, 10 Gill & J. (Md.) 192; Ligon v. Ford, 5 Munf. (Va.) 10; Partridge v. Hood, 120 Mass. 403, 21 Am. Rep. 524; Stanwood v. Mitchell, 59 Me. 121; Davenport v. Fulkerson, 70 Mo. 417; including a debt certain on a specialty, any question of law, the construction of a will or other instrument, any personal injury on which a suit will lie for damages, although it may be also indictable; 9 Ves. 367; Smith v. Thorndike, 8 Greenl. (Me.) 119; Walker v. Sanborn, 8 Greenl. (Me.) 288; Jones v. Mill Corp., 6 Pick. (Mass.) 148. All controversies of a civil nature, including disputes concerning real estate, may be the subject of a submission for arbitration; Finley v. Funk, 35 Kan. 668, 12 Pac. 15; "and in all cases of injury, either to the person or property, where damages would be recoverable by action, the arrangement of the matter may be left to arbitration;" Miller v. Brumbaugh, 7 Kan. 343, 349.

An agreement to refer future disputes will not be enforced by a decree of specific performance, nor will an action lie for refusing to appoint an arbitrator in accordance with such an agreement; 2 B. & P. 135; Tobey v. County of Bristol, 3 Sto. 800, Fed. Cas. No. 14,065; Leonard v. House, 15 Ga. 473. It is considered against public policy to exclude from the tribunals of the state disputes the nature of which cannot be foreseen; 4 Bro. C. C. 312, 315. See Lauman v. Young, 31 Pa. 306.

An agreement to arbitrate any dispute which may arise is ineffectual, under the settled rules of law, to oust the jurisdiction of the courts or debar either party from resorting thereto; The Excelsior, 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Mentz v. Ins. Co., 79 Pa. 478, 21 Am. Rep. 80; Supreme Council of Order of Chosen Friends v. Forsinger, 125 Ind. 52, 25 N. E. 129, 9 L. R. A. 501, 21 Am. St. Rep. 196; Randel v. Canal Co., 1 Harr. (Del.) 233; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116, 44 N. W. 1055; Hager v. Shuck, 120 Ky. 574, 87 S. W. 300, 27 Ky. L. Rep. 957; 5 H. L. Cas. 811; 8 Term 139; Straits of Dover S. S. Co. v. Munson, 100 Fed. 1005, 41 C. C. A. 156, affirming *id.*, 99 Fed. 787, where it is said that "such agreements ever since Lord Coke's time, and even before, have been held to be no defense to an action in the courts." Such an agreement does not oust the courts of jurisdiction, and if such is its intent, it is invalid; White v. R. Co., 135 Mass. 216; Chamberlain v. R. Co., 54 Conn. 472, 9 Atl. 244; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; Hurst v. Litchfield, 39 N. Y. 377. Agreements to submit questions of fact to arbitration have been sustained; 5 H. L. Cas. 811; President, etc., Delaware & Hudson Canal Co. v. Coal Co., 50 N. Y. 250, where it was held that the general rule stated should be applied to contracts only when coming strictly within the letter and spirit of decisions already made, and that it is contrary to the spirit of later times and not to be extended. Where, however, the agreement covers a case of mixed law and fact and its effect is to oust the jurisdiction of a court, it falls within the general rule and is void; Ison v. Wright, 55 S. W. 202, 21 Ky. L. Rep. 1368; Vass v. Wales, 129 Mass. 38; 1 Exch. Div. 257. A provision in articles of an association, that any dispute between it and any member should be decided by arbitration in lieu of legal proceedings, was held not to oust the primary jurisdiction of the courts; McMahon v. Ben. Ass'n, 17 Phila. (Pa.) 216; nor did a provision providing for submission of disputes, not to a particular person or tribunal, but to one or more persons to be mutually chosen; Home Fire Ins. Co. of Omaha v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521.

Revocation. The general principle with respect to voluntary arbitrations is that a submission is subject to revocation by either party; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116, 44 N. W. 1055; People v. Nash, 13 Civ. Pro. (N. Y.) 301; before the making and publication of the award; Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532; Oregon & W. M. Sav. Bank v. Mtg. Co., 35 Fed. 22; Williams v. Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954; Mead's Adm'x v. Owen, 83 Vt. 132, 74 Atl. 1058; Memphis Trust Co. v. Iron Works, 166 Fed. 398, 93 C. C. A. 162; Boston & L. R. Co. v. R. Corp., 139 Mass. 463, 31 N. E. 751; Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932; Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449; but not under a clause in a lease; Atterbury v. Trustees, 66 Misc. 273, 123 N. Y. Supp. 25; nor (under a statute) after final submission to the arbitrators; *id.*; People v. Nash, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747; Thomas W. Finucane Co. v. Board of Education, 190 N. Y. 76, 82 N. E. 737; but the "final submission" is held to be when the allegations and proofs of both parties are closed and the matter finally submitted to the arbitrators for their decision; In re Gitt, 140 App. Div. 382, 125 N. Y. Supp. 369; Atterbury v. Trustees of Columbia College, 66 Misc. 273, 123 N. Y. Supp. 25.

Revocation of a submission may take place at any time previous to the award, though it be expressed in the agreement to be irrevocable. See *infra*. The remedy of the injured party is by an action for breach of the agreement; Morse, Arb. & Aw. 230; 4 B. & C. 103; Rowley v. Young, 3 Day (Conn.) 118; Oregon & W. Mortg. Sav. Bank v. Mortgage Co., 35 Fed. 22.

A submission under rule of court or a statutory submission in a pending suit is

generally irrevocable, both in England and the United States; 5 Burr. 497; Haskell v. Whitney, 12 Mass. 47; Inhabitants of Cumberland v. North Yarmouth, 4 Greenl. (Me.) 459; Hunt v. Wilson, 6 N. H. 36; Bloomer v. Sherman, 5 Paige (N. Y.) 575; Tyson v. Robinson, 25 N. C. 333; Carey v. County Com'rs, 19 Ohio, 245; Poppers v. Knight, 69 Ill. App. 578; Zehner v. Nav. Co., 187 Pa. 487, 41 Atl. 464, 67 Am. St. Rep. 586; without leave of the court. But "the mere fact that the controversies agreed to be submitted were the subject of a pending action would not make it a submission by rule of court"; Minneapolis & St. L. R. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.

There are cases, apparently only in Pennsylvania, which hold that where the submission assumes the form of a contract, upon a sufficient consideration, it becomes irrevocable; McCune v. Lytle, 197 Pa. 404, 412, 47 Atl. 190, where Brown, J., says of this statement, "So well is it settled * * * that reference is hardly necessary to the * * * authorities," and then quotes from several cases, all of that state.

A right of revocation must be exercised before the publication of the award; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; and before the party seeking to revoke has notice that the award is made; Coon v. Allen, 156 Mass. 113, 30 N. E. 83; but where the submission provides for a written award, it may be revoked after the arbitrators have communicated to strangers their views, but before they have signed an award; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; but not after the award is made and published; Levy v. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

A submission is revocable even if it provides that it shall be irrevocable; 8 Coke, 81 *b*, where the reason is given that "a man cannot by his act make such authority, power or warrant not countermandable, which is by the law and of its own nature countermandable"; 5 B. & Ald. 507; People v. Nash, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747; Power v. Power, 7 Watts (Pa.) 205; Sartwell v. Sowles, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943; Tobey v. Bristol County, 3 Sto. 800, Fed. Cas. No. 14,065; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114.

The formality of the revocation must follow and conform to that of the submission, so a submission under seal can only be revoked by writing under seal; Horne v. Welsh, 35 Pa. Super. Ct. 569; Mullins v. Arnold, 4 Sneed (Tenn.) 262; Van Antwerp v. Stewart, 8 Johns. (N. Y.) 125; Jacoby v. Johnston, 1 Hun (N. Y.) 242; Wallis v. Carpenter, 13 Allen (Mass.) 19; McFarlane v. Cushman, 21 Wis. 401; Brown v. Leavitt, 26 Me. 251; one in writing only by writing; New York Lumber & Wood-Working Co. v. Schneider, 1 N. Y. Supp. 441 (so, by statute, of any revocation); Shisler v. Keavy, 75 Pa. 79; Keyes v. Fulton, 42 Vt. 159; Mand v. Patterson, 19 Ind. App. 619, 49 N. E. 974; so if it be oral it may be in like manner revoked; Sutton v. Tyrrell, 10 Vt. 91; Dexter v. Young, 40 N. H. 130.

The question whether a revocation was made before the award is for the jury; Hunt's Lessee v. Guilford, 4 Ohio 310. The institution of a suit by one party, before award, generally revokes by implication the submission; State v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237; Commercial Union Assurance Co. of London v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Peters' Adm'r v. Craig, 6 Dana (Ky.) 307; Kimball v. Gilman, 60 N. H. 54; Paulsen v. Manske, 126 Ill. 72, 18 N. E. 275, 9 Am. St. Rep. 532.

A submission is, however, not revoked by the commencement of an action unless the suit covers the whole subject matter submitted, and until a complaint is filed by a party to the submission the adverse party has no legal notice of the cause of action, and the arbitrators may proceed with the arbitration and render an award though a summons has been issued; Williams v. Mfg. Co., 153 N. C. 7, 68 S. E. 902, 31 L. R. A. (N. S.) 679, 138 Am. St. Rep. 637, 21 Ann. Cas. 954.

Though counsel may submit his client's cause to arbitration, the latter may revoke it before action upon it; Coleman v. Grubb, 23 Pa. 393.

As to arbitration as a condition precedent, see 11 Harv. L. Rev. 234.

A submission at common law is generally revoked by the death of either party (unless it be stipulated otherwise), or of the arbitrator, or his refusal to act; 2 B. & Ald. 394; Dexter v. Young, 40 N. H. 130; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; but see Bacon v. Crandon, 15 Pick. (Mass.) 79; Freeborn v. Denman, 8 N. J. L. 116; Price's Adm'r v. Tyson's Adm'rs, 2 Gill & J. (Md.) 479; Leonard v. House, 15 Ga. 473; by the death of the umpire, or the setting aside of the award by a decree of a court; Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696; so also by *marriage* of a *feme sole*, and the husband and wife may then be sued on her arbitration bond; 5 East 266. It is not revoked by the bankruptcy of the party or by the death of the arbitrator after publication of the award; 4 B. & Ald. 250; Cartledge v. Cutliff, 21 Ga. 1. A submission in a pending action at law falls where the award fails for misconduct of the arbitrators; Rand v. Peel, 74 Miss. 305, 21 South. 10.

Where the submission makes no provision for filling a vacancy, if one occurs by the death of an arbitrator or refusal to act, it is a revocation; Wolf v. Augustine, 181 Pa. 576, 37 Atl. 574.

A revocation may be good at law but bad in equity, and revocation of a submission

which has been made a rule of court is a contempt; 1 Jac. & W. 485.

Effect of. A submission of a case in court works a discontinuance and a waiver of defects in the process; Camp v. Root, 18 Johns. (N. Y.) 22; Bigelow v. Goss, 5 Wis. 421; Crooker v. Buck, 41 Me. 355; and the bail or sureties on a replevin bond are discharged; Hill v. Hunnewell, 1 Pick. (Mass.) 192; Cunningham v. Howell, 23 N. C. 9; 2 B. & Ad. 774. But see 6 Taunt. 379; 10 Bingh. 118. But this rule has been modified in England by stat. 17 & 18 Vict. c. 125, § 11; 8 Exch. 327.

The submission which defines and limits, as well as confers and imposes, the duty of the arbitrator must be followed by him in his conduct and award; but a fair and liberal construction is allowed in its interpretation; 1 Wms. Saund. 65; Hume v. Hume, 3 Pa. 144; Cheshire Bank v. Robinson, 2 N. H. 126; Karthaus v. Ferrer, 1 Pet. (U. S.) 222, 7 L. Ed. 121. If general, it submits both law and fact; Indiana Cent. R. Co. v. Bradley, 7 Ind. 49; if limited, the arbitrator cannot exceed his authority; Barrows v. Copen, 11 Cush. (Mass.) 37.

The statutes of many of the states of the United States provide for submissions by the parties before a justice of the peace, in which case the award will be enforced as if it had been made under rule of court; and statutes also regulate submissions made under rule of court.

3. The Arbitrators. A private extraordinary judge chosen by the parties who have a matter in dispute, invested with power to decide the same. Adopted from Bouv. L. Dict. in Gordon v. U. S., 7 Wall. 188, 194, 19 L. Ed. 35; also in Miller v. Canal Co., 53 Barb. (N. Y.) 590, 595, with this additional sentence from the same work: "Arbitrators are so called because they have generally an arbitrary power, there being, in common, no appeal from their sentences, which are called awards."

A private extraordinary judge, to whose decision matters in controversy are referred by consent of the parties.

"Referee" is of frequent modern use as a synonym of "arbitrator," but it is in its origin of broader significance and it is less accurate than arbitrator.

An arbitrator at common law "is to be considered as a judge or tribunal of the parties' own choosing, and his decision or judgment cannot be set aside unless for partiality or corruption, which will not be presumed on slight grounds, but must be clearly shown;" McManus v. McCulloch, 6 Watts (Pa.) 357.

Arbitrators are judges chosen by the parties to decide matters submitted to them, finally and without appeal; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96; Miller v. Canal Co., 53 Barb. (N. Y.) 590; and they must be taken as they are with their weaknesses and frailties, and their action if honest and fair, is binding; Silver v. Lumber Co., 40 Fed. 192; but the power to appoint them is not judicial, but executive; Kean v. Ridgway, 16 S. & R. (Pa.) 65.

They are sometimes considered as the substitutes and sometimes as the judges of the parties; they can do what the parties can and more than the courts, and their power is revocable as a power of attorney; Dixon v. Morehead, Add. (Pa.) 216.

Arbitrators have the powers of a court and jury; Kennedy v. Luhman, 13 Montg. Co. L. Rep. (Pa.) 131. They are judges, not agents of the parties appointing them; 1 Ves. 226; 9 Ves. 69; and their duties are more judicial than fiduciary; Collins v. Oliver, 4 Humph. (Tenn.) 439; quasi-judicial officers; Hoosac Tunnel, Dock & Elevator Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323; *per contra*, it is said that they are the agents of both parties and their acts are to be considered as the acts of the parties themselves; Hays v. Hays, 23 Wend. (N. Y.) 363; Strong v. Strong, 9 Cush. (Mass.) 560.

An arbitrator must be a disinterested person to whom a matter in dispute is submitted for decision; Garr v. Gomez, 9 Wend. (N. Y.) 649; Miller v. Canal Co., 53 Barb. (N. Y.) 590; State v. Appleby, 25 S. C. 100, 104; Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389. "In order to clothe a person with the authority of an arbitrator, the parties must mutually agree to be bound by the decision of the person chosen to determine the matter in controversy;" Gordon v. U. S., 7 Wall. 188, 194, 19 L. Ed. 35. Like jurors impannelled for the trial of a cause, arbitrators are invested *pro hac vice* with judicial functions, the rightful discharge of which calls for and presupposes the most absolute impartiality;" Strong v. Strong, 9 Cush. (Mass.) 560; Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304; where an appraiser under an insurance policy was not disinterested, and that fact was concealed, a suit was held maintainable to set aside the appraisement; Bradshaw v. Ins. Co., 137 N. Y. 137, 32 N. E. 1055, where it was held unnecessary to decide whether it was an arbitration.

Appointment and Qualifications. Usually a single arbitrator is agreed upon, or the parties each appoint one, with a stipulation that, if they do not agree, another person, called an umpire, named, or to be selected by the arbitrators, shall be called in, to whom the matter is to be referred; Cald. Arb. ch. IV; Smith v. Morse, 9 Wall. (U. S.) 76, 19 L. Ed. 597.

In general, any objection to the appointment of an arbitrator; Estice v. Cockerell, 26 Miss. 127; Indiana Ins. Co. v. Brehm, 88 Ind. 578; Robb v. Brachman, 38 Ohio St. 423; or umpire will be waived by attending before him; 9 Ad. & E. 679; Anderson v.

Burchett & Farley, 48 Kan. 153, 29 Pac. 315; and an objection should be made at the trial; Cones v. Vanosdol, 4 Ind. 248; Madison Ins. Co. v. Griffin, 3 Ind. 277; Graham v. Graham, 9 Pa. 254, 49 Am. Dec. 557; Christman v. Moran, 9 Pa. 487; one who goes to trial before a referee without requiring an oath waives the oath; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Maynard v. Frederick, 7 Cush. (Mass.) 247. It is said that any person may be chosen as an arbitrator; Morse, Arb. & Aw. 99; and it is no objection that one has been formerly counsel for the party in whose favor he found, that fact not being known to the other party; Goodrich v. Hulbert, 123 Mass. 190, 25 Am. Rep. 60; or that one had been intimate with the party and had heard his version of the dispute before; Morville v. Tract Soc., 123 Mass. 129; an employé of one party; Howard v. R. Co., 24 Fla. 560, 5 South. 356; a stockholder of a corporation party; Williams v. Ry. Co., 112 Mo. 463, 20 S. W. 631, 34 Am. St. Rep. 403; Inhabitants of Leominster v. R. Co., 7 Allen (Mass.) 38; a woman, married or single; Evans v. Ives, 15 Phila. (Pa.) 635; or a judge, if named by the parties; Hopkins v. Sodouskie, 1 Bibb (Ky.) 148; Galloway's Heirs v. Webb, Hard. (Ky.) 318 (but not under the civil law; Dom. Civ. L. sec. 1113); or one who has acted as an arbitrator before in the same capacity; Stemmer v. Ins. Co., 33 Ore. 55, 49 Pac. 588, 53 Pac. 498; Van Winkle v. Ins. Co., 55 W. Va. 286, 47 S. E. 82. The relation of landlord and tenant subsisting between an arbitrator and one of the parties does not disqualify him; Fisher v. Towner, 14 Conn. 26; nor does the fact that the referee and the attorney for one of the parties had an office together and were in daily and friendly intercourse; Perry v. Moore, 2 E. D. Smith (N. Y.) 32.

Whether natural or legal disabilities are a disqualification appears not to be authoritatively settled. It is said that they do not so operate; Viner, Abr. *Arbitrement* (A. 2); Russ. Arb. & Aw. (9th Ed.) 92 (citing only Viner); Morse, Arb. & Aw. 99 (citing only Russell); *contra*, Com. Dig. *Arbitrament* (C), who says that persons of nonsane memory, lunatics, infants, persons not *sui juris* as a villein, persons dead in law, as a monk, one attainted of treason or felony, cannot be arbitrators (citing no case but only West, Symb. 163 *b*.). There appears to be no decided case on the subject and no definite or modern authority to indicate that a person who is not *sui juris* for any other purpose would be qualified to act in this capacity. The rule of the civil law seems to be definite to the effect that all persons may be arbitrators except such as are under some incapacity or infirmity which renders them unfit for that function; Dom. Civ. L. sec. 1112. The only case cited to support the right of parties to appoint any one without qualification is simply a decision that it is immaterial whether the arbitrator be a professional man or not; 8 Dowl. 879.

There are certain facts which, as in the case of judges or jurors, will render a person incapable of being an arbitrator, if they are unknown to the party objecting, as, for example, interest in the subject matter; Connor v. Simpson, 4 Sadler (Pa.) 105, 7 Atl. 161; Pearson v. Barringer, 109 N. C. 398, 13 S. E. 942; Strong v. Strong, 12 Cush. (Mass.) 135 (where the question of the arbitrator's impartiality was submitted to the jury in an action on a bond to abide the award); kinship to either party; Brown v. Leavitt, 26 Me. 251 (but not equal relationship to both parties; McGregor v. Sprott, 59 Hun, 617, 13 N. Y. 191); a transfer to an arbitrator's son pending arbitration; Spearman v. Wilson, 44 Ga. 473; free judgment of the case; Beattie v. Hilliard, 55 N. H. 428 (but not an opinion expressed five years before; Brush v. Fisher, 70 Mich. 469, 38 N. W. 446, 14 Am. St. Rep. 510); previous conviction of perjury; Colles, P. C. 257; strong bias and prejudice; Bash v. Christian, 77 Ind. 290.

Proceedings. Arbitrators should give notice of the time and place of hearing to the parties interested; Lutz v. Linthicum, 8 Pet. (U. S.) 165, 178, 8 L. Ed. 904; Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; Bushey v. Culler, 26 Md. 534; Crowell v. Davis, 12 Metc. (Mass.) 293; Vessel Owners' Towing Co. v. Taylor, 126 Ill. 250, 18 N. E. 663; Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108; an award made without such notice of the hearing is a nullity; Peters v. Newkirk, 6 Cow. (N. Y.) 103; it is not binding on the party having no notice; Cobb v. Wood, 32 Me. 455; McKinney v. Page, 32 Me. 513; Dormoy v. Knower, 55 Ia. 722, 8 N. W. 670; but where the submission is by written agreement a surety in the agreement need not be notified of the hearing; Farmer v. Stewart, 2 N. H. 97; and where the respective attorneys of the parties were arbitrators and notice was unnecessary; Hill v. Hill, 11 Smedes & M. (Miss.) 616; and where notice was given and the party sought to set aside the award on the ground that he was unavoidably prevented from attending by the obstruction of roads caused by high water, it was not error to refuse the motion; Shroyer v. Barkley, 24 Mo. 346. Where one party had ineffectually attempted to revoke his submission and refused to attend, the arbitrator may proceed *ex parte*, without giving him notice; 1 Jac. & W. 485, 492; and the refusal of a party to attend or concern himself with the matter is a waiver of notice; Vincent v. Ins. Co., 120 Ia. 272, 94 N. W. 458. In England the practice seems to be that the arbitrators are not required to give notice, but that the party obtaining an appointment of the time for hearing should serve it on the solicitors of the other party;

Russ. Arb. & Aw. 132; Morse Arb. & Aw. 117; and in one case Lord Hardwicke held that no notice from the arbitrators was required; 3 P. Wms. 529. The power of the arbitrators is not determined by their neglect to attend at the time designated and they may appoint another session within any reasonable time; Harrington v. Rich, 6 Vt. 666.

They should all conduct the investigation together, and should sign the award in each other's presence; Smith v. Smith, 28 Ill. 56; Thompson v. Mitchell, 35 Me. 281; Hills v. Ins. Co., 129 Mass. 345; but a majority is held sufficient; Parker v. Ins. Co., 3 R. I. 192; Robinson v. Bickley, 30 Pa. 384; Hoffman v. Hoffman, 26 N. J. L. 175; Kile v. Chapin, 9 Ind. 150; Henderson v. Buckley, 14 B. Monr. (Ky.) 292; Cartledge v. Cutliff, 21 Ga. 1; Doherty v. Doherty, 148 Mass. 367, 19 N. E. 352. An award by two of three arbitrators is binding; Doyle v. Patterson, 84 Va. 800, 6 S. E. 138; Hewitt v. Craig, 86 Ky. 23, 5 S. W. 280; *contra*, Kent v. French, 76 Ia. 187, 40 N. W. 713. See *supra* as to matters of "public concern."

In investigating matters in dispute, they are allowed the greatest latitude; 1 B. & P. 91; Langley v. Hickman, 1 Sandf. (N. Y.) 681; Hollingsworth v. Leiper, 1 Dall. (U. S.) 161, 1 L. Ed. 82; Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148; Mulder v. Cravat, 2 Bay (S. C.) 370; Askew v. Kennedy, 1 Bail (S. C.) 46. But see Fennimore v. Childs, 6 N. J. L. 386; McAlister v. McAlister, 1 Wash. (Va.) 193; Fowler v. Thayer, 4 Cush. (Mass.) 111; Forbes v. Frary, 2 Johns. Cas. (N. Y.) 224; Latimer v. Ridge, 1 Binn. (Pa.) 458. They are judges both of law and of fact, and are not bound by the rules of practice adopted by the courts; 1 Ves. Ch. 369; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96; Skeels v. Chickering, 7 Metc. (Mass.) 316; Ward v. Bank, 7 Metc. (Mass.) 486; Kendall v. Power Co., 36 Me. 19; Long v. Rhodes, 36 Me. 108; Ebert v. Ebert, 5 Md. 353; In re Riddle's Estate, 19 Pa. 431; Sargeant v. Butts, 21 Vt. 99; White v. White, 21 Vt. 250; Bennett v. Bennett, 25 Conn. 66; Smith v. Douglass, 16 Ill. 34; Ross v. Watt, 16 Ill. 99; Lunsford v. Smith, 12 Gratt. (Va.) 554; Indiana Cent. Ry. Co. v. Bradley, 7 Ind. 49; Hotaling v. Cronise, 2 Cal. 64; Tyson v. Wells, *id.* 122; Sessions v. Bacon, 23 Miss. 272; Price v. Brown, 98 N. Y. 388; King v. Mfg. Co., 79 N. C. 360; Adams' Adm'r v. Ringo, 79 Ky. 211. Thus, the witnesses were not sworn in Bergh v. Pfeiffer, Lalor's Supp. (N. Y.) 110; Woodrow v. O'Conner, 28 Vt. 776. They may decide *ex æquo et bono*, and need not follow the law; the award will be set aside only when it appears that they meant to be governed by the law but have mistaken it; 2 C. B. 705; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; Pringle v. McClenachan, 1 Dall. (U. S.) 486, 1 L. Ed. 235; Jones v. Corp., 6 Pick. (Mass.) 148; White v. White, 21 Vt. 250; Greenough v. Rolfe, 4 N. H. 357; but if they decide a matter honestly and fairly according to their judgment, the award will not be set aside because they decide the facts erroneously, or were mistaken in the law they applied to them, or decide on an erroneous theory; Goddard v. King, 40 Minn. 164, 41 N. W. 659; Hall v. Ins. Co., 57 Conn. 105, 17 Atl. 356; Baltimore & O. R. Co. v. Canton Co., 70 Md. 405, 17 Atl. 394; Thornton v. McCormick, 75 Ia. 285, 39 N. W. 502; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96.

Under submissions *in pais*, the attendance of witnesses and the production of papers was entirely voluntary at common law; 2 Sim. & S. 418; 2 C. & P. 550. It was otherwise when made under a rule of court.

Duties and powers of. Arbitrators cannot delegate their authority; Cro. Eliz. 726; 6 C. B. 258; Sutton v. Horn, 7 S. & R. (Pa.) 228; Kingston v. Kincaid, 1 Wash. C. C. 448, Fed. Cas. No. 7,821; Shipman v. Fletcher, 82 Va. 601; Hicks v. McDonnell, 99 Mass. 459. The power ceases with the publication of the award; Newman v. Labeaume, 9 Mo. 30; and death after publication and before delivery does not vitiate it; Cartledge v. Cutliff, 21 Ga. 1. They cannot be compelled to make an award; in which respect the common law differs from the Roman; Story, Eq. Jur. § 1457; or to disclose the grounds of their judgment; 3 Atk. 644; Ebert v. Ebert, 5 Md. 353; State v. Peticrew's Ex'r, 19 Mo. 373.

An arbitrator may retain the award till paid for his services, but cannot maintain assumpsit in England without an express promise; 2 M. & G. 847, 870; 3 Q. B. 466, 928. But see 1 Gow. 7; 1 B. & P. 93. In the United States he may; Hinman v. Hapgood, 1 Den. (N. Y.) 188, 43 Am. Dec. 663; Goodall v. Cooley, 29 N. H. 48.

A submission to arbitration by one of several parties without the consent of the others, whether by rule of court or otherwise, is void; Gregory v. Trust Co., 36 Fed. 408.

4. The Umpire. Sometimes a submission provides for the appointment of one arbitrator by each party with authority, if they disagree, to call in a third person, usually designated as the *umpire*. This term "denotes one who is to decide the controversy in case the others cannot agree;" Keans v. Rankin, 2 Bibb (Ky.) 88. The jurisdiction of the umpire and arbitrators cannot be concurrent; Morse, Arb. & Aw. 241; if the arbitrators make an award, it is binding; if not, the award of the umpire is binding; T. Jones 167. If the umpire sign the award of the arbitrators, it is still their award, and *vice versa;* Rigden v. Martin, 6 Harr. & J. (Md.) 403. He determines the issue submitted to the arbitrators on which they have failed to agree, which is his sole award; and neither of the original arbitrators is required to

join in the award; Haven v. Winnisimmet Co., 11 Allen (Mass.) 384, 87 Am. Dec. 723; Ingraham v. Whitmore, 75 Ill. 30. Sometimes the third person called in so to decide is called a "special arbitrator." The distinction is that, when the special or third arbitrator is called in, the authority to make an award is vested in the three jointly, and even if an award by two is good, it must be the result of deliberations, but when, upon a disagreement between arbitrators, an umpire is called in, the powers of the former are *functus officio*, and the latter has exclusive authority to make a decision; Day v. Hammond, 57 N. Y. 479, 15 Am. Rep. 522, quoting Lyon v. Blossom, 4 Duer (N. Y.) 318; Chandos v. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Hartford Fire Ins. Co. v. Mercantile Co., 56 Fed. 378, 5 C. C. A. 524.

The power to appoint an umpire "must be given in express words" and is not to be implied even from "power given to two arbitrators in the event of their disagreement to select a third person," as in such case the latter "is a joint arbitrator and not an umpire"; Gaffy v. Bridge Co., 42 Conn. 143, quoting Lyon v. Blossom, 4 Duer. (N. Y.) 328.

A third or special arbitrator must be appointed before the hearing unless the appointment of one is waived either expressly or tacitly by appearance of the parties before the two; Badders v. Davis, 88 Ala. 367, 6 South. 834; Phipps v. Tompkins, 50 Ga. 641; 14 U. C. Q. B. 495; but an umpire may be appointed either before; Peck v. Wakely, 2 McCord (S. C.) 279; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 405; Rigden v. Martin, 6 Harr. & J. (Md.) 403; or after a disagreement between the arbitrators; Rogers v. Corrothers, 26 W. Va. 238; Chandos v. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; unless otherwise provided by statute; In re Grening, 74 Hun 62, 26 N. Y. S. 117.

Arbitrators may appoint an umpire after their term of service has expired, if the time is not gone within which the umpire was to make his award; McKinstry v. Solomons, 2 Johns. (N. Y.) 57. Subsequent dissent of the parties, without just cause, will have no effect upon the appointment; but they should have notice; Crowell v. Davis, 12 Metc. (Mass.) 293. If an umpire refuses to act, another may be appointed *toties quoties;* 11 East 367. If the arbitrators and umpire act together and make a joint award, it will be good; Rison v. Berry, 4 Rand. (Va.) 275; Bulstr. 184.

Under an agreement to arbitrate, the subsequent proceeding of one arbitrator and the umpire to make an award without the presence of the other arbitrator is unauthorized and illegal; Cravens v. Estes, 144 Ky. 511, 139 S. W. 761; and so is the choice of an umpire by lot, and the award will be set aside; 9 B. & C. 624; 9 Ad. & El. 699.

The umpire is called into the arbitration to act only after a disagreement between the arbitrators, and his opinion and judgment must control the award; Mullins v. Arnold, 4 Sneed (Tenn.) 262; but he cannot, in the absence of one of the parties and one of the arbitrators, act on information from the other party and arbitrator; Cravens v. Estes, 144 Ky. 511, 139 S. W. 761.

Where the agreement permits a majority decision, the withdrawal of one arbitrator and his refusal to act, after one party has attempted to withdraw, will not affect an award made the same day by the other arbitrators; Atterbury v. Trustees of Columbia College, 66 Misc. Rep. 273, 123 N. Y. S. 25.

At common law all the arbitrators must agree unless the submission provides to the contrary; Washburn v. White, 197 Mass. 540, 84 N. E. 106; Tennessee Lumber Mfg. Co. v. Clark Bros. Co., 182 Fed. 618, 105 C. C. A. 156; even where by statute or under a contract a majority may make a report, all the proceedings must be participated in by all the members; Heritage v. State, 43 Ind. App. 595, 88 N. E. 114; but where the agreement provided for an award by two of three, the fact that one refused to sign the award, or to participate in a further ascertainment of damages which the settlement required, did not invalidate a subsequent proceeding for ascertaining damages; Toledo S. S. Co. v. Transp. Co., 184 Fed. 391, 106 C. C. A. 501. And where the contract provided that one arbitrator should be selected by each party and they two have power to select a third, it was held that by clear implication two were authorized to make a binding and final award; Clark Bros. Co. v. Mfg. Co., 176 Fed. 929; but this case was reversed in Tennessee Lumber Mfg. Co. v. Clark Bros. Co., 182 Fed. 618, 105 C. C. A. 156, where the distinction is well put between cases where the power given to two to appoint a third is conditioned upon their disagreement or no; in the former case, the third is an umpire, and a majority award would be valid, but in the latter case, "the three constituted the board, * * * (and) their award, to be valid, must be unanimous;" and to the same effect is Weaver v. Powel, 148 Pa. 372, 23 Atl. 1070. Both courts cite Hobson v. McArthur, 16 Pet. (U. S.) 182, 10 L. Ed. 930, where the agreement was that "if the two could not agree on the value of the land or any part thereof, they should choose a third person, who should agree on the value of the land," and it was held "a more reasonable construction to consider the third man in the character of an umpire, to decide between the two that should disagree," and the award of two was held good. This case is contrary to the apparently well settled rule that, when there is an umpire, he alone decides and the arbitrators do not participate. But there are

other cases "on all fours" with that in Hobson v. McArthur, 16 Pet. (U. S.) 182, 10 L. Ed. 930, as Quay v. Westcott, 60 Pa. 163. See *supra*.

5. THE AWARD. The *award* is the judgment or decision of arbitrators or referees on a matter submitted to them. It is also the writing containing such judgment. Cowell; *Termes de la Ley;* Jenk. 137; Watson, Arb. 174; Russell, Arb. 234.

The word is derived from the Latin, *awarda, awardum,* Old French, *agarda* from *à garder,* to keep, preserve, to be guarded, or kept: so called because it is imposed on the parties to be observed or kept by them. Spelman, Gloss.

Requisites of. To be conclusive, the award should be consonant with and follow the submission, and affect only the parties to the submission; otherwise, it is an assumption of power, and not binding; Lutw. 530 (Onyons v. Cheese); 24 E. L. & Eq. 346; 8 Beav. 361; Martin v. Williams, 13 Johns. (N. Y.) 268; Howard v. Edgell, 17 Vt. 9; Barrows v. Capen, 11 Cush. (Mass.) 37; McNear v. Bailey, 18 Me. 251; Gates v. Treat, 25 Conn. 71; Fountain v. Harrington, 3 Harr. (Del.) 22; State v. Stewart, 12 Gill & J. (Md.) 456; Jessee v. Cater, 25 Ala. 351; Thornton v. Carson, 7 Cra. (U. S.) 599, 3 L. Ed. 451. See Humphreys v. Gardner, 11 Johns. (N. Y.) 61; Scott v. Barnes, 7 Pa. 134; Leslie v. Leslie, 50 N. J. Eq. 103, 24 Atl. 319; Buntain v. Curtis, 27 Ill. 374. Where it exceeds the terms of the submission, it is not void, where the judge on confirmation excludes as much as is incompetent; McCall v. McCall, 36 S. C. 80, 15 S. E. 348; but it is so where damages are allowed in a lump sum, in which are included matters not submitted to them; Dodds v. Hakes, 114 N. Y. 260, 21 N. E. 398.

It must be final and certain; Morse, Arb. 383; 5 Ad. & E. 147; Barnet v. Gilson, 3 S. & R. (Pa.) 340; Nichols v. Ins. Co., 22 Wend. (N. Y.) 125; Whitcomb v. Preston, 13 Vt. 53; Hanson v. Webber, 40 Me. 194; Hazen v. Addis, 14 N. J. L. 333; Carter v. Calvert, 4 Md. Ch. Dec. 199; Bannister v. Read, 1 Gilm. (Ill.) 92; Thomas v. Molier, 3 Ohio 266; Parker v. Eggleston, 5 Blackf. (Ind.) 128; Montifiori v. Engels, 3 Cal. 431; Lee v. Onstott, 1 Ark. 206; Ingraham v. Whitmore, 75 Ill. 24; Rhodes v. Hardy, 53 Miss. 587; Peck v. Wakely, 2 McCord (S. C.) 279; Lyle v. Rodgers, 5 Wheat. (U. S.) 394, 5 L. Ed. 117; Perkins v. Giles, 50 N. Y. 228; Carson v. Carter, 64 N. C. 332; Parker v. Parker, 103 Mass. 167; Burns v. Hendrix, 54 Ala. 78; and see Patterson v. Leavitt, 4 Conn. 50, 10 Am. Dec. 98; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Towne v. Jaquith, 6 Mass. 46, 4 Am. Dec. 84; conclusively adjudicating *all* the matters submitted; Calvert v. Carter, 6 Md. 135; Cox v. Gent, 1 McMull. (S. C.) 302; Pierson v. Norman, 2 Cal. 599; De Groot v. U. S., 5 Wall. (U. S.) 419, 18 L. Ed. 700; Frison v. De Peiffer, 83 Me. 71, 21 Atl. 746; and stating the decision in such language as to leave no doubt of the arbitrator's intention, or the nature and extent of the duties imposed by it on the parties; Pierson v. Norman, 2 Cal. 599, and cases above. An award reserving the determination of future disputes; Calvert v. Carter, 6 Md. 135; an award directing a bond without naming a penalty; 5 Co. 77; Rolle, Abr. *Arbitration* 2, 4; an award that one shall give security for the performance of some act or payment of money, without specifying the kind of security, is invalid; Viner, Abr. *Arbit.* 2, 12; Bacon, Abr. *Arbit.* E. 11, and cases above. So is one that finds that a party is entitled to receive his final payment and fails to ascertain the amount; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319.

It must be possible to be performed, and must not direct anything to be done which is contrary to law; 2 B. & Ald. 528; Yeamans v. Yeamans, 99 Mass. 585. It will be void if it direct a party to pay a sum of money at a day past, or direct him to commit a trespass, felony, or an act which would subject him to an action; 1 M. & W. 572; or if it be of things nugatory and offering no advantage to either of the parties; 6 J. B. Moore 713.

It must be without palpable or apparent mistake; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; 3 B. & P. 371; Pringle v. McClenachan, 1 Dall. (U. S.) 487, 1 L. Ed. 235; Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131. For if the arbitrator acknowledges that he made a mistake, or if an error (in computation, for instance) is apparent on the face of the award, it will not be good; Taylor v. Sayre, 24 N. J. L. 647; Goodell v. Raymond, 27 Vt. 241; Roloson v. Carson, 8 Md. 208; Goodrich v. City of Marysville, 5 Cal. 430; Spoor v. Tyzzer, 115 Mass. 40; Eisenmeyer v. Sauter, 77 Ill. 515; American Screw Co. v. Sheldon, 12 R. I. 324; for, although an arbitrator may decide contrary to law, yet if the award attempts to follow the law, but fails to do so from the mistake of the arbitrator, it will be void; Kendrick v. Tarbell, 26 Vt. 416; Ennos v. Pratt, *id.* 630; Burchell v. Marsh, 17 How. (U. S.) 344, 15 L. Ed. 96.

A parol award is sufficient notwithstanding the submission is in writing, if the submission does not in terms require an award in writing; Marsh v. Packer, 20 Vt. 198; an award determined by lot is vitiated thereby; Luther v. Medbury, 18 R. I. 141, 26 Atl. 37, 49 Am. St. Rep. 753; and where the umpire was chosen by lot a rule to set it aside was made absolute; 9 B. & Cr. 624; 9 Ad. & El. 699.

An award may be in part good and in part void, in which case it will be enforced so far as valid, if the good part is separable from

the bad; 10 Mod. 204; Cro. Jac. 664; Martin v. Williams, 13 Johns. (N. Y.) 264; Orcutt v. Butler, 42 Me. 83; Barrows v. Capen, 11 Cush. (Mass.) 37; Richards v. Brockenbrough's Adm'r, 1 Rand. (Va.) 449; Taylor v. Nicolson, 1 Hen. & M. (Va.) 67; Brown v. Warnock, 5 Dana (Ky.) 492; Dalrymple v. Whitingham, 26 Vt. 345; Cones v. Vanosdol, 4 Ind. 248; Cromwell v. Owings, 6 Harr. & J. (Md.) 10; Lyle v. Rodgers, 5 Wheat. (U. S.) 394, 5 L. Ed. 117.

As to *form*, the award should, in general, follow the terms of the submission, which frequently provides the time and manner of making and publishing the award. It may be by parol (oral or written), or by deed; 3 Bulstr. 311; Marsh v. Packer, 20 Vt. 198. It should be signed by *all* the arbitrators in the presence of each other; Leavitt v. Inv. Co., 54 Fed. 439, 4 C. C. A. 425; Kent. v. French, 76 Ia. 187, 40 N. W. 713. See Godfrey v. Knodle, 44 Ill. App. 638; Barr v. Chandler, 47 N. J. Eq. 532, 20 Atl. 733; *contra*, Doyle v. Patterson, 84 Va. 800, 6 S. E. 138; Hewitt v. Craig, 86 Ky. 23, 5 S. W. 280. Where the submission requires the concurrence of the three arbitrators, recovery cannot be had where but two sign, though the third says it is right, but refuses to sign; Weaver v. Powel, 148 Pa. 372, 23 Atl. 1070. See ARBITRATOR.

An award will be sustained by a liberal construction, *ut res magis valeat quam pereat;* Dolph v. Clemens, 4 Wis. 181; Roloson v. Carson, 8 Md. 208; Allen v. Hiller, 8 Ind. 310; Haywood v. Harmon, 17 Ill. 477; Bemus v. Clark, 29 Pa. 251; Reed Aw. 170.

Effect of. An award is a final and conclusive judgment between the parties on all the matters referred by the submission; Reizenstein v. Hahn, 107 N. C. 156, 12 S. E. 43; Leonard v. Reservoir Co., 113 Mass. 235; Spencer v. Curtis, 57 Ind. 221; Ford v. Burleigh, 60 N. H. 278; Evars v. Kamphaus, 59 Pa. 379. It transfers property as much as the verdict of a jury, and will prevent the operation of the statute of limitations; 3 Bla. Com. 16; Hunt's Lessee v. Guilford, 4 Ohio 310; Jackson v. Gager, 5 Cow. (N. Y.) 383; Davis v. Havard, 15 S. & R. (Pa.) 166, 16 Am. Dec. 537. See Gray v. Reed, 65 Vt. 178, 26 Atl. 526. A parol award following a parol submission will have the same effect as an agreement of the same form directly between the parties; Houghton v. Houghton, 37 Me. 72; Wells v. Lain, 15 Wend. (N. Y.) 99; Goodell v. Raymond, 27 Vt. 241; Smith v. Douglass, 16 Ill. 34; Smith v. Stewart, 5 Ind. 220; Martin v. Chapman, 1 Ala. 278; 2 Coxe 369; Davy v. Faw, 7 Cra. (U. S.) 171, 3 L. Ed. 305.

The right of real property cannot thus pass by mere award; but no doubt an arbitrator may award a conveyance or release of land and require deeds, and it will be a breach of agreement and arbitration bond to refuse compliance; and a court of equity will sometimes enforce this specifically; 8 East 15; Jones v. Mill Corp., 6 Pick. (Mass.) 148; Calhoun's Lessee v. Dunning, 4 Dall. (Pa.) 120, 1 L. Ed. 767; Akely v. Akely, 16 Vt. 450; Smith v. Bullock, *id.* 592; Sellick v. Addams, 15 Johns (N. Y.) 197; Gratz v. Gratz, 4 Rawle (Pa.) 411, 430; Shelton v. Alcox, 11 Conn. 240; McNear v. Bailey, 18 Me. 251; Jesse v. Cater, 28 Ala. 475; Murray v. Blackledge, 71 N. C. 492; Girdler v. Carter, 47 N. H. 305. Where there is a controversy as to the claims embraced within a mortgage, and the award merely fixes the amount due, it does not vest the legal title to the mortgaged property in the mortgagor; Collier v. White, 97 Ala. 615, 12 South. 385.

Arbitrament and award may be regularly pleaded at common law or equity to an action concerning the same subject-matter, and will bar the action; Brazill v. Isham, 12 N. Y. 9; Crooker v. Buck, 41 Me. 355. To an action on the award at common law, in general, nothing can be pleaded *dehors* the award; not even fraud; Owen v. Boerum, 23 Barb. (N. Y.) 187; Shepherd v. Briggs, 28 Vt. 81; Woodrow v. O'Conner, *id.* 776; *contra*, Strong v. Strong, 9 Cush. (Mass.) 560. Where an action has been referred under rule of court and the reference fails, the action proceeds.

Enforcement of. An award may be enforced by an action at law, which is the only remedy for disobedience when the submission is not made a rule of court, and no statute provides a special mode of enforcement; 5 B. & Ald. 507; 4 B. & C. 103; 3 C. B. 745. Assumpsit lies when the submission is not under seal; Piersons v. Hobbes, 33 N. H. 27; and *debt* on an award of money and on an arbitration bond; Nolte v. Lowe, 18 Ill. 437; *covenant* where the submission is by deed for breach of any part of the award, and *case* for the non-performance of the duty awarded. *Equity* will enforce specific performance when all remedy fails at common law; Com. Dig. *Chancery*, 2 K; Story, Eq. Jur. § 1458; 2 Hare 198; Bouck v. Wilber, 4 Johns. Ch. (N. Y.) 405; Ballance v. Underhill, 3 Scam. (Ill.) 453; 3 P. Wms. 137. But see 1 T. & R. 187; 5 Ves. 846. An award must be sued upon only because the arbitrator is not vested with power to enforce his decrees by execution, which is the end of the law; Collins v. Oliver, 4 Humph. (Tenn.) 439.

An award under a rule of court may be enforced by the court issuing execution upon it as if it were a verdict of a jury, or by attachment for contempt; 7 East 607. By the various state statutes regulating arbitrations, awards, where submission is made before a magistrate, may be enforced and judgment rendered thereon.

Amendment and setting aside. A court has no power to alter or amend an award; Jackson v. Todd, 25 N. J. L. 130; Jarvis v.

Water Co., 5 Cal. 179; Brazill v. Isham, 12 N. Y. 9; Crooker v. Buck, 41 Me. 355; Smith v. Kron, 109 N. C. 103, 13 S. E. 839; but may recommit to the referee in some cases; Swift v. Faris, 11 Tex. 18; 18 Can. S. C. R. 338. The court has no general supervisory power over an award and, if arbitrators keep within their jurisdiction, it will not be set aside for error of judgment either of law or facts, but it may for palpable error of fact or miscalculation of figures or of law when it appears on its face; Fudickar v. Ins. Co., 62 N. Y. 392.

"An arbitration partakes of judicial proceedings," and the award is regarded with great respect by the courts as the decision of persons chosen by the parties to settle their differences; but it can hardly be considered of equal dignity with the judgment of a court, which speaks by force and power of the law; while an award speaks by consent and contract of the parties; Shively v. Knoblock, 8 Ind. App. 433, 35 N. E. 1028. A court will not revise an award for mere errors of judgment; Offut v. Proctor, 4 Bibb (Ky.) 252; Vaughn v. Graham, 11 Mo. 576; Chesley v. Chesley, 10 N. H. 327; and misconduct or misbehavior of arbitrators in a statutory arbitration must be to do an intentional wrong; Smith v. Cutler, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580; Vaughn v. Graham, 11 Mo. 576.

It is not essential to an arbitration that it should adjust all matters in controversy; an award determining a single one of several may be conclusive so far; Pearce v. McIntyre, 29 Mo. 423.

An award will not be disturbed except for very cogent reasons. It will be set aside for *misconduct*, corruption, or irregularity of the arbitrator, which has or may have injured one of the parties; 5 B. & Ad. 488; Jenkins v. Liston, 13 Gratt. (Va.) 535; Payne v. Metz, 14 Tex. 56; Walls v. Wilson, 28 Pa. 514; Cutting v. Carter, 29 Vt. 72; it will not be set aside because one of the arbitrators was a relative; McGregor v. Sprott, 59 Hun 617, 13 N. Y. Supp. 191; so where one, after publishing his award, admits that it had been improperly obtained from him; [1891] 1 Ch. 558; it will be set aside for *error* in fact, or in attempting to follow the law, apparent on the face of the award; see *supra;* ARBITRATOR; for *uncertainty* or inconsistency; for an *exceeding* of his authority by the arbitrator; Shearer v. Handy, 22 Pick. (Mass.) 417; Stewart v. Ahrenfeldt, 4 Denio (N. Y.) 191; where it is made solely at the direction of one of the parties and not upon the arbitrator's own judgment; Hartford Fire Ins. Co. v. Mercantile Co., 44 Fed. 151, 11 L. R. A. 623; when it is *not final* and conclusive, without reserve; when it is a *nullity;* when a party or witness has *been at fault*, or has made a mistake; or when the arbitrator acknowledges that he has made a mistake or error in his decision.

Where arbitrators have once made an award they are *functus officio* and cannot afterwards make a second award, though the first was void because of defects; Flannery v. Sahagian, 134 N. Y. 85, 31 N. E. 319; Herbst v. Hagenaers, 137 N. Y. 290, 33 N. E. 315.

Equity has jurisdiction to set aside an award, on any of the enumerated grounds, when the submission cannot be made a rule of a common-law court. As to the circumstances under which awards may be examined in equity, see 1 Raithby's Vernon 158, note (1), where many English cases are collected.

In general, in awards under statutory provisions, as well as in those under rules of court, questions of law may be reserved for the opinion of the court, and facts and evidence reported for their opinion and decision.

ARBITRIUM (Lat.). Decision; award; judgment.

For some cases the law does not prescribe an exact rule, but leaves them to the judgment of sound men; or in the language of Grotius, *lex non exacte definit, sed arbitrio boni viri permittit;* 1 Bla. Com. 61. The decision of an arbiter is *arbitrium*, as the etymology indicates; and the word denotes, in the passage cited, the decision of a man of good judgment who is not controlled by technical rules of law, but is at liberty to adapt the general principles of justice to the peculiar circumstances of the case.

ARBOR (Lat.). A tree; a plant; something larger than an herb; a general term including vines, osiers, and even reeds. The mast of a ship. Brissonius. Timber. Ainsworth; Calvinus, Lex.

Arbor civilis. A genealogical tree. Coke, Inst.

A common form of showing genealogies is by means of a tree representing the different *branches* of the family. Many of the terms in the law of descent are figurative, and derived hence. Such a tree is called, also, *arbor consanguinitatis.*

ARCARIUS (Lat. *arca*). A treasurer; one who keeps the public money. Spelman, Gloss.

ARCHAIONOMIA. The name of a collection of Saxon laws published during the reign of Queen Elizabeth, in the Saxon language, with a Latin version by Lambard. Dr. Wilkins enlarged this collection in his work entitled Leges Anglo-Saxonicæ, containing all the Saxon laws extant, together with those ascribed to Edward the Confessor, in Latin; those of William the Conqueror, in Norman and Latin, and of Henry I., Stephen, and Henry II., in Latin.

ARCHBISHOP. The chief of the clergy of a whole province.

He has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause. The archbishop has also his own diocese, in which he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal authority; 1 Bla. Com. 380; 1 Ld. Raym. 541. In England he is addressed as *Most Reverend.*

ARCHDEACON. A ministerial officer subordinate to the bishop.

In the primitive church, the archdeacons were employed by the bishop in the more servile duties of collecting and distributing alms and offerings. Afterwards they became, in effect, "eyes to the overseers of the Church;" Cowell.

His jurisdiction is ecclesiastical, and immediately subordinate to that of the bishop throughout the whole or a part of the diocese. He is a ministerial officer; 1 Bla. Com. 383. He is addressed as *Venerable.*

ARCHDEACON'S COURT. The lowest court of ecclesiastical jurisdiction in England. Originally the archdeacon held a court as deputy of the bishop. Early in the 12th century the archdeacons possessed themselves of a customary jurisdiction. An appeal lay to the Consistory Court. Rept. Eccl. Com. (1883) 25.

ARCHES COURT. See COURT OF ARCHES.

ARCHIVES. The Rolls; any place where ancient records, charters, and evidences are kept. In libraries, the private depositary. Cowell; Spelman, Gloss.

The records need not be ancient to constitute the place of keeping them the Archives.

ARCHIVIST. One to whose care the archives have been confided.

ARCTA ET SALVA CUSTODIA (Lat.). In safe and close custody or keeping.

When a defendant is arrested on a *capias ad satisfaciendum (ca. sa.),* he is to be kept *in arcta et salva custodia;* 3 Bla. Com. 415.

AREA. An enclosed yard or opening in a house; an open place adjoining to a house. 1 Chit. Pr. 176.

ARENTARE (Lat.). To rent; to let out at a certain rent. Cowell.

Arentatio. A renting.

ARGENTARII (Lat. *argentum*). Moneylenders.

Called, also, *nummularii* (from *nummus,* coin) *mensarii* (lenders by the month). They were so called whether living in Rome or in the country towns, and had their shops or tables in the forum. *Argentarius* is the singular. *Argentarium* denotes the instrument of the loan, approaching in sense to our *note* or *bond.*

Argentarius miles was the porter who carried the money from the lower to the upper treasury to be tested. Spelman, Gloss.

ARGENTUM ALBUM (Lat.). Unstamped silver; bullion. Spelman, Gloss.; Cowell.

ARGENTUM DEI (Lat.). God's money; God's penny; money given as earnest in making a bargain. Cowell.

ARGUMENT. An effort to establish belief by a course of reasoning.

See 33 Amer. L. Rev. 476; State v. Burns, 119 Iowa, 663, 94 N. W. 239; Hopkins v. Hopkins, 132 N. C. 25, 43 S. E. 506.

ARGUMENTATIVE. By way of reasoning.

A plea must be (among other things) direct and positive, and not argumentative; 3 Bla. Com. 308; Steph. Pl. Andrew's ed. § 201.

ARGUMENTUM AB INCONVENIENTI. An argument arising from the inconvenience which the opposite construction of the law would create.

It is to have effect only in a case where the law is doubtful: where the law is certain, such an argument is of no force. Bacon, Abr. *Baron and feme H.*

ARIBANNUM. A fine for not setting out to join the army in obedience to the summons of the king.

ARIMANNI (Lat.). The possessors of lands holden or derived from their lords. Clients joined to some lord for protection. By some, said to be soldiers holding lands from a lord; but the term is also applied to women and slaves. Spelman, Gloss.

ARISE. To come into existence or action. A case arising in the land or naval forces is a case proceeding, issuing or springing from acts, in violation of the laws and regulations, committed while in the forces or service. In re Bogart, 2 Sawy. 396, Fed. Cas. No. 1,596.

ARISTOCRACY. A government in which a class of men rules supreme.

Aristotle classified governments according to the person or persons in whom the supreme power is vested: in monarchies or kingdoms, in which one rules supreme; in aristocracies, in which a class of men rules supreme; and in democracies, in which the people at large, the multitude, rule. The term aristocracy is derived from the Greek word ἄριστος, which, although finally treated as the superlative of ἀγαθός, good, originally meant the strongest, the most powerful; and in the compound term aristocracy it meant those who wielded the greatest power and had the greatest influence,—the privileged ones. The aristocracies in ancient Greece were, in many cases, governments arrogated by violence. If the number of ruling aristocrats was very small, the government was called an oligarchy. Aristotle says that in democracies the "demagogues lead the people to place themselves above the laws, and divide the people, by constantly speaking against the rich; and in oligarchies the rulers always speak in the interest of the rich. At present," he says, "the rulers, in some oligarchies, take an oath, 'And I will be hostile to the people, and advise, as much as is in my power, what may be injurious to them.'" (Politics, v. ch. 9.) There are circumstances which may make an aristocracy unavoidable; but it has always this inherent deficiency, that the body of aristocrats, being set apart from the people indeed, yet not sufficiently so, as the monarch is (who, besides, being but one, must needs rely on the classes beneath him), shows itself severe and harsh so soon as the people become a substantial portion of the community. The struggle between the aristocratic and the democratic element is a prominent feature of the middle ages; and at a later period it is equally remarkable that the crown, in almost every country of the European continent, waged war, generally with the assistance of the commonalty, with the privileged class, or aristocracy. The real aristocracy is that type of government which has nearly entirely vanished from our cis-Caucasian race; although the aristocratic element is found, like the democratic element, in various degrees, in most of the existing governments. The term aristocracy is at present frequently used for the body of privileged persons in the government of any institution,—for instance, in the church. In the first French Revolution, Aristocrat came to mean any person not belonging to the levellers, and whom the latter desired to pull down. The modern French communists use the slang term Aristo for aristocrat. The most complete and consistently developed aristocracy in history was the

Republic of Venice,—a government considered by many early publicists as a model: it illustrated, however, in an eminent degree, the fear and consequent severity inherent in aristocracies. See GOVERNMENT; ABSOLUTISM; MONARCHY.

ARISTO-DEMOCRACY. A form of government where the power is divided between the more powerful men of the nation and the people.

ARIZONA. One of the states of the American Union.

This region was first visited by the Spanish in 1526, and was afterwards explored under the direction of the viceroy of Mexico in 1540; nothing was done, however, towards settling the country until the year 1580, when a military post was established by the Spanish on the site of the present city of Tucson. Under the untiring efforts of the Jesuits, an unbroken line of settlements sprung up from Tucson to the Sonora line, the northern boundary of Mexico, a distance of about one hundred miles; but owing to the frequent attacks of the Indians, and the Mexican revolution of 1821, these settlements were abandoned. The first United States settlers were persons on their way to California in 1849. The United States acquired, by the treaty of Guadalupe Hidalgo, Feb. 2, 1848, a large extent of country from Mexico, including California and the adjacent territories, and by the Gadsden purchase, Dec. 30, 1853, another large tract south of the former. Until 1863, the territory of New Mexico included Arizona and also about 12,225 acres, which were detached and included in Nevada. Arizona was organized as a separate territory by the act of congress of Feb. 24, 1863, U. S. Stat. at Large, 664. By this act, the territory embraced "all that part of the territory of New Mexico situated west of a line running due south, from the point where the southwest corner of the territory of Colorado joins the northern boundary of the territory of New Mexico, to the southern boundary of the territory of New Mexico." The frame of government was substantially the same as that of New Mexico, and the laws of New Mexico were substantially extended to Arizona.

The Enabling Act for its admission to the Union was passed by Congress June 20, 1910. On August 21, 1911, the joint resolution of Congress for its admission was passed, to take effect upon Proclamation by the President that certain conditions had been complied with. The Proclamation was made February 14, 1912. Arizona became a state and adopted the constitution proposed for it by the constitutional convention held in the fall of 1910. The constitution was amended in 1912 by providing for the recall of public officers and granting to each municipal corporation within the state the right to engage in industrial pursuits, and providing for woman suffrage.

ARKANSAS. One of the United States of America; being the twelfth admitted to the Union.

It was formed of a part of the Louisiana Territory, purchased of France by the United States, by treaty of April 30, 1803, and from that time until 1812 it formed part of the Louisiana Territory; from 1812 to 1819 it was part of the Missouri Territory. By act of congress of March 2, 1819, a separate territorial government was established for Arkansas; 3 Stat. L. 493. It was admitted to the Union by act of congress of June, 1836, and the first constitution of the state was adopted on the 30th January, 1836. Section 16, article 5, amended February 10, 1913, which provides for a sixty day session of Legislature; section 1, article 5, amended, providing for the initiative and referendum, February 19, 1909.

ARLES. Earnest.

Used in Yorkshire in the phrase *Arles-penny*. Cowell. In Scotland it has the same signification. Bell, Dict. See EARNEST.

ARM OF THE SEA. A portion of the sea projecting inland, in which the tide ebbs and flows.

It includes bays, roads, creeks, coves, ports, and rivers where the water flows and reflows. An arm of the sea is considered as extending as far into the interior of a country as the water of fresh rivers is propelled backward by the tide; Ang. Tide Wat. (2d ed.) 73; Peyroux v. Howard, 7 Pet. (U. S.) 324, 8 L. Ed. 700; 2 Dougl. 441; 6 Cl. & F. 628; Tinicum Fishing Co. v. Cart, 61 Pa. 21, 100 Am. Dec. 597; Olc. Adm. 18. Arms of the sea, so closely embraced by land that a man standing on one shore can reasonably discern with the naked eye objects and what is done on the opposite shore, are within county limits; Bish. Cr. L. § 146; 2 East, P. C. 805; Russ. & R. 243. Lord Coke said (Owen 122) that the admiral has no jurisdiction when a man may see from one side to another. This was followed by Cockburn, C. J., in L. R. 2 Ex. 164, 168. See CREEK; NAVIGABLE WATERS; RIVER; SEA; FAUCES TERRÆ; TERRITORIAL WATERS; ADMIRALTY.

ARMED. Furnished with weapons of offence or defence; furnished with the means of security or protection. Webster's Dict.

The fact that there was on board a vessel but one musket, a few ounces of powder, and a few balls, would not make her an armed vessel; Murray v. The Charming Betsy, 2 Cra. (U. S.) 121, 2 L. Ed. 208.

ARMED NEUTRALITY. An attitude of neutrality between belligerents which the neutral state is prepared to maintain by armed force if necessary.

ARMED PEACE. A situation in which two or more nations, while actually at peace with each other, are armed for possible or probable hostilities.

ARMIGER (Lat.). An armor-bearer; an esquire. A title of dignity belonging to gentlemen authorized to bear arms. Kennett, Paroch. Antiq.; Cowell.

In its earlier meaning, a servant who carried the arms of a knight. Spelman, Gloss.

A tenant by scutage; a servant or valet; applied, also to the higher servants in convents. Spelman, Gloss; Wishaw.

ARMISTICE. An agreement between belligerent forces for a temporary cessation of hostilities. The condition of war between the parties continues in all other respects and produces its usual legal effects.

An armistice differs from a mere "suspension of arms" (*q. v.*) in that the latter is concluded for very brief periods and for local military purposes only, whereas an armistice not only covers a longer period, but is agreed upon for political purposes. It is said to be *general* if it relates to the whole area of the war, and *partial* if it relates to only a portion of that area. Partial armistices are sometimes called truces (*q. v.*) but

there is no hard and fast distinction between armistices and truces. Arts. 36–41 of IV Hague Conf. 1907 lay down certain international rules on the subject of armistices, their duration, their general or local character, the necessary notification, and the consequences of a violation of the armistice. As these rules do not cover the whole field, they need to be supplemented by customary law. 2 Opp. 290–299.

ARMS. Anything that a man wears for his defence, or takes in his hands, or uses in his anger, to cast at or strike at another. Co. Litt. 161 *b*, 162 *a*; Cromp. Just. P. 65; Cunning, Dict.

The constitution of the United States, Amend. art. 2, declares that, "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." This is said to be not a right granted by the constitution, and not dependent upon that instrument for its existence. The amendment means no more than that this right shall not be infringed by congress; it restricts the powers of the national government, leaving all matters of police regulations, for the protection of the people, to the states; U. S. v. Cruikshank, 92 U. S. 553, 23 L. Ed. 588.

An act forbidding the carrying of pistols, dirks, etc., is not repugnant to this article; the "arms" referred to are the arms of a soldier, etc.; English v. State, 35 Tex. 473, 14 Am. Rep. 374. A statute prohibiting the wearing of concealed deadly weapons is constitutional; Wright v. Com., 77 Pa. 470; Andrews v. State, 3 Heisk. (Tenn.) 165, 8 Am. Rep. 8; Hill v. State, 53 Ga. 472; Fife v. State, 31 Ark. 455, 25 Am. Rep. 556; Walls v. State, 7 Blackf. (Ind.) 572; Owen v. State, 31 Ala. 387; *contra*, Bliss v. Com., 2 Litt. (Ky.) 90, 13 Am. Dec. 251. See Story, Const. 5th ed. § 1895; Rawle, Const. 125.

A provision in a state bill of rights that "the people have a right to bear arms for their defense and security" is a limitation on legislative power to enact laws prohibiting the bearing of arms in the militia, or any other military organization provided for by law, but it is not a limitation on legislative power to prohibit and punish the promiscuous carrying of arms or other deadly weapons; City of Salina v. Blaksley, 72 Kan. 230, 83 Pac. 619, 3 L. R. A. (N. S.) 168, 115 Am. St. Rep. 196. This right is not violated by a statute prohibiting unauthorized bodies of men to associate together as a military organization, or to drill and parade with arms in cities and towns; Com. v. Murphy, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.

One who carries a pistol concealed in a satchel supported and carried by a strap over his shoulder, is guilty of carrying a concealed weapon about his person, although the satchel is locked and the key is in his pocket; Warren v. State, 94 Ala. 79, 10 South. 838; Boles v. State, 86 Ga. 255, 12 S. E. 361. The fact that one carries a concealed weapon for the purpose of selling it does not excuse his act; State v. Dixon, 114 N. C. 850, 19 S. E. 364; nor does the fact that he has repaired it and is returning it in his pocket; Strahan v. State, 68 Miss. 347, 8 South. 844; *contra*, State v. Roberts, 39 Mo. App. 47. The carrying of a pistol in the pocket for target practice does not constitute the offence of carrying a concealed weapon; State v. Murray, 39 Mo. App. 127. See DANGEROUS WEAPON; WEAPON.

Signs of arms, or drawings, painted on shields, banners, and the like. Heraldic bearings.

The arms of the United States are described in the resolution of congress of June 20, 1782.

ARMY. A large force of armed men designed and organized for military service on land.

The term "army" or "armies" has never been used by congress to include the navy or marines; In re Bailey, 2 Sawy. 205, Fed. Cas. No. 728.

See ARTICLES OF WAR; MILITARY LAW; MARTIAL LAW; COURTS-MARTIAL; RANK; REGULATIONS.

ARPENNUS. A measure of land of uncertain amount. It was called arpent also. Spelman, Gloss.; Cowell.

In French Law. A measure of different amount in each of the sixty-four provinces. Guyot, Répert. *Arpenteur.*

The measure was adopted in Louisiana; Strother v. Lucas, 6 Pet. (U. S.) 763, 8 L. Ed. 573.

ARPENT. A quantity of land containing a French acre. 4 Hall, L. J. 518.

ARPENTATOR. A measurer or surveyor of land.

ARRA. See ARRHÆ.

ARRAIGN. To call a prisoner to the bar of the court to answer the matter charged in the indictment. 2 Hale, Pl. Cr. 216. To set in order. An assize may be arraigned. Littleton, § 242; 3 Mod. 273; *Termes de la Ley*; Cowell.

ARRAIGNMENT. Calling the defendant to the bar of the court, to answer the accusation contained in the indictment.

The *first* step in the proceeding consists in calling the defendant to the bar by his name, and commanding him to hold up his hand.

This is done for the purpose of completely identifying the prisoner as the person named in the indictment. The holding up his hand is not, however, indispensable; for if the prisoner should refuse to do so, he may be identified by any admission that he is the person intended; 1 W. Bla. 33. See Archb. Cr. Pl. 123.

The *second* step is the reading the indictment to the accused person.

This is done to enable him fully to understand the charge to be produced against him. The mode in which it is read is, after saying, "A B, hold up your hand," to proceed, "you stand indicted by the name of A B, late of, etc., for that you, on, etc.," and then go through the whole of the indictment.

The *third* step is to ask the prisoner, "How say you (A B), are you guilty, or not guilty?"

Upon this, if the prisoner confesses the charge, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, the confession is recorded, and nothing further is done till judgment. If, on the contrary, he answers, "Not guilty," that plea is entered for him, and the clerk or attorney-general replies that he is guilty; when an issue is formed; Com. v. Battis, 1 Mass. 95; see 4 Bla. Com. c. xxv. The holding up of the hand is no longer obligatory in England, though still maintained in some of the United States with the qualification that if the defendant refuses to hold up his hand, but confesses that he is the person named, it is enough; Whart. Cr. Pl. & Pr. (9th ed.) § 699. In cases where arraignment of the defendant is required, a failure to arraign is fatal; Graeter v. State, 54 Ind. 159; Grigg v. People, 31 Mich. 471; Anderson v. State, 3 Pinn. (Wis.) 367; Smith v. State, 1 Tex. App. 408; People v. Gaines, 52 Cal. 480. See, *contra*, State v. Cassady, 12 Kan. 550. In cases of a mistrial (Hayes v. State, 58 Ga. 35), or removal to another court (Davis v. State, 39 Md. 355), there need not be a fresh arraignment.

If the defendant, when called upon, makes no answer, and it is a matter of doubt whether or not he is mute of malice, the court may direct a jury to be forthwith impanelled and sworn, to try whether the prisoner is mute of malice or *ex visitatione Dei;* and such jury may consist of any twelve men who may happen to be present. If a person is found to be mute *ex visitatione Dei,* the court in its discretion will use such means as may be sufficient to enable the defendant to understand the charge and make his answer; and if this is found impracticable, a plea of not guilty will be entered, and the trial proceed. But if the jury return a verdict that he is mute fraudulently and willfully, the court will pass sentence as upon a conviction; Ellenwood v. Com., 10 Metc. (Mass.) 222; Archb. Cr. Pl. 129; 3 C. & K. 121; Rosc. Cr. Ev. (8th ed.) 199. See the case of a deaf person who could not be induced to plead; 1 Leach, Cr. Cas. 451; of a person deaf and dumb; *id.* 102; Com. v. Hill, 14 Mass. 207; 7 C. & P. 503; 6 Cox, Cr. Cas. 386; 3 C. & K. 328; State v. Draper, 1 Houst. Del. Cr. Cas. 291. See DEAF AND DUMB; GUILTY; GOD AND MY COUNTRY; MUTE; PEINE FORTE ET DURE.

ARRAMEUR. An ancient officer of a port, whose business was to load and unload vessels.

There were formerly, in several ports of Guyenne, certain officers, called *arrameurs,* or stowers, who were master-carpenters and were paid by the merchants, who loaded the ship. Their business was to dispose properly, and stow closely, all goods in casks, bales, boxes, bundles, or otherwise; to balance both sides, to fill up the vacant spaces, and arrange everything to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers, but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also *sacquiers,* who were very ancient officers, as may be seen in the Theodosian code, *Unica de Scaccariis Portus Romæ,* lib. 14. Their business was to load and unload vessels loaded with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandise otherwise; Laws of Oleron, in 1 Pet. Adm. App. xxv. See STEVEDORE.

ARRANGEMENT. The natural meaning of the word is "setting in order." 1 El. & Bl. 540.

ARRANGEMENT, DEED OF. A term used in England to express an assignment for the benefit of creditors.

ARRAS. **In Spanish Law.** The donation which the husband makes to his wife, by reason or on account of marriage, and in consideration of the *dote,* or portion, which he receives from her. Aso & Man. Inst. b. 1, t. 7, c. 3.

The property contributed by the husband *ad sustinenda onera matrimonii* (for bearing the expenses).

The husband is under no obligation to give arras; but it is a donation purely voluntary. He is not permitted to give in *arras* more than a tenth of his property. The *arras* is the exclusive property of the wife, subject to the husband's usufruct during his life; Burge, Confl. Laws 417.

ARRAY. The whole body of jurors summoned to attend a court, as they are *arrayed* or arranged on the panel. See CHALLENGES; Dane, Abr. Index; 1 Chit. Cr. Law 536; Comyns, Dig. *Challenge,* B.

ARRAYER. An English military officer in the early part of the fifteenth century. His duties were similar to those of the modern Lord Lieutenant of a county.

ARREARAGES. Arrears.

ARREARS. The remainder of an account or sum of money in the hands of an accountant. Any money due and unpaid at a given time. Cowell; Spelman, Gloss.

"In arrear" means overdue and unpaid. Hollingsworth v. Willis, 64 Miss. 157, 8 South. 170.

ARREST. To deprive a person of his liberty by legal authority.

The taking, seizing or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest. U. S. v. Benner, Bald. 234, 239, Fed. Cas. No. 14,568.

"A restraint of the person, a restriction of the right of locomotion which cannot be implied in the mere notification, or summons on petition, or any other service of such process, by which no bail is required nor restraint of personal liberty." Hart v. Flynn's Ex'r, 8 Dana (Ky.) 190. "An arrest is an imprisonment." Blight v. Meeker, 7 N. J. L. 97. The term implies restraint of liberty by an officer of the law, but touching the person is not necessary unless required to acquire control of the person of the one arrested. State v. Buxton, 102 N. C. 129, 8 S. E. 774; McAleer v. Good, 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782; Butler v. Washburn, 25 N. H. 251; Bissell v. Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; 5 U. C. Q. B. 341; Strout v. Gooch, 8 Me. 126; 4 C. B. N. S. 180, 205, where the subject is examined by Willes, J., who expressly dissents from Sir James

Mansfield in 2 B. & P. N. R. 211, the authority usually relied upon *contra*. What is actually required is more tersely expressed in Lawson v. Buzines, 3 Harr. (Del.) 416, when he says that the officer "must make him his prisoner in an unequivocal form."

As ordinarily used, the terms arrest and attachment coincide in meaning to some extent; though in strictness, as a distinction, an arrest may be said to be the act resulting from the service of an attachment. And in the more extended sense which is sometimes given to attachment, including the act of taking, it would seem to differ from arrest in that it is more peculiarly applicable to a taking of property, while *arrest* is more commonly used in speaking of persons.

The terms are, however, often interchanged when speaking of the taking a man by virtue of legal authority. Arrest is also applied in some instances to a seizure and detention of personal chattels, especially of ships and vessels; but this use of the term is not common in modern law.

In Civil Practice. The apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action. Gentry v. Griffith, 27 Tex. 462.

One of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment. La. Civ. Code art. 211.

Acts which amount to a taking into custody are necessary to constitute an arrest; but there need be no actual force or manual touching the body: it is enough if the party be within the power of the officer and submit to the arrest; Cas. *temp.* Hardw. 301; 5 B. & P. 211; Huntington v. Blaisdell, 2 N. H. 318; Hart v. Flynn's Ex'r, 8 Dana (Ky.) 190; Strout v. Gooch, 8 Me. 127; Bissel v. Gold, 1 Wend. (N. Y.) 215, 19 Am. Dec. 480; Field v. Ireland, 21 Ala. 240; Courtoy v. Dozier, 20 Ga. 369; Cooper v. Adams, 2 Blackf. (Ind.) 294; but mere words without submission are not sufficient; 2 Hale, Pl. Cr. 129; Jones v. Jones, 35 N. C. 448; State v. Buxton, 102 N. C. 129, 8 S. E. 774.

Whom to be made by. It must be made by an officer having proper authority. This is, in the United States, the sheriff, or one of his deputies, general or special, or by a mere assistant of the officer, if he be so near as to be considered as acting, though he do not actually make the arrest; Cowp. 65.

The process of the United States courts is executed by a marshal. As to the power of the sergeant-at-arms of a legislative body to arrest for contempt or other cause, see 1 Kent 236. An order of the United States House of Representatives declaring a witness before one of its committees in contempt for not answering certain questions, and ordering his arrest and imprisonment is void and affords no defence to the sergeant-at-arms in an action for false imprisonment against him; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377, where there is a full review of the cases.

Who is liable to. All persons found within the jurisdiction are liable to arrest, excepting certain specified classes, including *ambassadors* and their servants; 1 B. & C. 554; 3 D. & R. 25, 833; Holbrook, Nelson & Co. v. Henderson, 4 Sandf. (N. Y.) 619; *attorneys at law; barristers* attending court or on circuit; 1 H. Bla. 636; see Elam v. Lewis, 19 Ga. 608; 8 Sim. 377; 16 Ves. 412; Secor v. Bell, 18 Johns. (N. Y.) 52; *bail* attending court as such; 1 H. Bla. 636; 1 Maule & S. 638; *bankrupts* until the time for surrender is passed, and under some other circumstances; 8 Term 475, 534; In re Kimball, 2 Ben. 38, Fed. Cas. No. 7,767; *bishops* (but not in U. S.); *consuls-general;* 9 East 447; though doubtful, and the privilege does not extend to consuls; 1 Taunt. 106; 3 Maule & S. 284; McKay v. Garcia, 6 Ben. 556, Fed. Cas. No. 8,844; *clergymen* in England while performing divine service; Bacon. Abr. *Trespass;* 24 & 25 Vict. c. 100 (which extended the provisions of 9 Geo. IV. c. 31, § 23, so as to include ministers not of the Established Church); *electors* attending a public election; Swift v. Chamberlain, 3 Conn. 537; *executors* sued on the testator's liability; *heirs* sued as such; *hundredors* sued as such; *insolvent debtors* lawfully discharged; 3 Maule & S. 595; and see 4 Taunt. 631; Duncan v. Klinefelter, 5 Watts (Pa.) 141, 30 Am. Dec. 295; Wilmarth v. Burt, 7 Metc. (Mass.) 257; not when sued on subsequent liabilities or promises, 6 Taunt. 563; see Glazier v. Stafford, 4 Harr. (Del.) 240; *Irish peers;* stat. 39 & 40 Geo. III. c. 67, § 4; *judges* on process from their own court; Tracy v. Whipple, 8 Johns. (N. Y.) 381; Gratz v. Wilson, 6 N. J. L. 419; *marshal* of the King's Bench; *members* of congress and state legislatures while attending the respective assemblies to which they belong; U. S. v. Cooper, 4 Dall. (Pa.) 341, Fed. Cas. No. 14,861, 1 L. Ed. 859; King v. Coit, 4 Day (Conn.) 133; Gibbes v. Mitchell, 2 Bay (S. C.) 406; McPherson v. Nesmith, 3 Gratt. (Va.) 237; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; Hoppin v. Jenckes, 8 R. I. 453, 5 Am. Rep. 597 (but the exemption does not apply while a member of Congress is in his state on private business with leave of absence; Worth v. Norton, 56 S. C. 56, 33 S. E. 792, 45 L. R. A. 563, 76 Am. St. Rep. 524; nor does it give a privilege from service of summons in a civil action; Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632; Gentry v. Griffith, 27 Tex. 461); *militiamen* while engaged in the performance of military duty; *officers* of the army and militia, to some extent; 4 Taunt. 557; but see 8 Term 105; Morgan v. Eckart, 1 Dall. (U. S.) 295, 1 L. Ed. 144; White v. Lowther, 3 Ga. 397; Ex parte McRoberts, 16 Ia. 600; People v. Campbell, 40 N. Y. 133; *parties* to a suit attending court; 11 East 439; Coxe 142; Richards v. Goodson, 2 Va. Cas. 381; Hurst's Case, 4 Dall. (U. S.) 387, 1 L. Ed. 878; Ex parte McNeil, 6 Mass. 245; *id.*, 264; Wilson

v. Nettleton, 12 Ill. 61; Sadler v. Ray, 5 Rich. (S. C.) 523; including a court of insolvency; 2 Marsh. 57; 6 Taunt. 336; 1 V. & B. 316; Wood v. Neale, 5 Gray (Mass.) 538; or a reference; Vincent v. Watson, 1 Rich. (S. C.) 194; the *former president* of a foreign republic while residing in one of the U. S.; Hatch v. Baez, 7 Hun (N. Y.) 596; but a party arrested on a criminal charge, and discharged on bail, may be arrested on civil process before he leaves the court room; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470; *soldiers;* White v. Lowther, 3 Ga. 397; *sovereigns*, including, undoubtedly, governors of the states; *the Warden of the Fleet; witnesses* attending a judicial tribunal; 3 B. & Ald. 252; Bowes v. Tuckerman, 7 Johns. (N. Y.) 538; In re Dickenson, 3 Harr. (Del.) 517; by legal compulsion; Ex parte McNeil, 6 Mass. 264; U. S. v. Edme, 9 S. & R. (Pa.) 147; Page v. Randall, 6 Cal. 32; Sanford v. Chase, 3 Cow. (N. Y.) 381; *women;* O'Boyle v. Brown, Wright (Ohio) 465; Wheeler v. Hartwell, 17 N. Y. Super. Ct. 664; but see Eypert v. Bolenius, 2 Abb. N. C. 193; Blight v. Meeker, 7 N. J. L. 97; and perhaps other classes, under local statutes; *married women*, on suits arising from contracts; 1 Term 486; 6 *id.* 451; 7 Taunt. 55; but the privilege may be forfeited by her conduct; 1 B. & P. 8; 5 *id.* 380; and the grounds of these early decisions are necessarily affected by the modern statutes permitting married women to contract and sue and be sued as if *sole*, but although the Pennsylvania act of 1887 in section 2 authorizes her so to be sued on her contract and for all torts, it has been held that a married woman is notwithstanding that section privileged from arrest under a *capias;* Lorenz v. Betz, 2 W. N. C. (Pa.) 274. Reference must be had in many of the above cases to statutes for modifications of the privilege. In all cases where the privilege attaches in consideration of an attendance at a specified place in a certain character, it includes the stay and a reasonable time for going and returning; 2 W. Bla. 1113; Smythe v. Banks, 4 Dall. (Pa.) 329, 1 L. Ed. 854; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; Crocker v. Duncan, 6 Blackf. (Ind.) 278; In re Dickenson, 3 Harr. (Del.) 517; but not including delays in the way; 3 B. & Ald. 252; Smythe v. Banks, 4 Dall. (Pa.) 329, 1 L. Ed. 854; or deviations; Chaffee v. Jones, 19 Pick. (Mass.) 260. A person brought from one state into another under federal process in an extradition proceeding, and discharged therefrom, cannot be arrested under civil process until he has reasonable time to return to the state from which he came; In re Baruch, 41 Fed. 472.

Where and when it may be made. An arrest may be made in any place, except in the actual or constructive presence of a court, where the defendant is necessarily in attendance on business, the privilege extending to going thereto and returning; 3 Bla. Com. 289; but this privilege does not avail one brought into court on criminal process and discharged on bail; Moore v. Green, 73 N. C. 394, 21 Am. Rep. 470. An officer may not break open an outer door to arrest one whose domicile is there; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Gordon v. Clifford, 28 N. H. 402; *aliter*, under statute; Hawkins v. Com., 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147; Phillips v. Ronald, 3 Bush (Ky.) 244, 96 Am. Dec. 216; but he may break inner doors to find the defendant when the outer door is open; Williams v. Spencer, 5 Johns. (N. Y.) 352; 8 Taunt. 250; Cowp. 1; and this includes the door of the room of a lodger; *id.*; but not the inner door of the house of a stranger upon suspicion that the defendant is there; 6 Taunt. 246. He may break the outer door of the house of defendant, who has escaped after arrest and taken refuge there; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564. It could not be made on Sunday or any public holiday; Stat. 29 Car. II. c. 7; *contra* (under a statute), King v. Strain, 6 Blackf. (Ind.) 447.

An officer with a proper writ may stop a train to arrest the railroad engineer running it; 20 Ohio L. J. 464; St. Johnsbury & L. C. R. Co. v. Hunt, 60 Vt. 588, 15 Atl. 186, 1 L. R. A. 189, 6 Am. Rep. 138.

Discharge from arrest on mesne process may be obtained by giving sufficient bail, which the officer is bound to take; 3 Maule & S. 283; 6 Term 355; 15 East 320; but when the arrest is on final process, giving bail does not authorize a discharge.

If the defendant otherwise withdraw himself from arrest, or if the officer discharge him, without authority, it is an *escape;* and the sheriff is liable to the plaintiff. See ESCAPE. If the party is withdrawn forcibly from the custody of the officer by third persons, it is a *rescue.* See RESCUE.

Extended facilities are offered to poor debtors to obtain a discharge under the statutes of most if not all of the states of the United States. In consequence, except in cases of apprehended fraud, as in the concealment of property or an intention to abscond, arrests are infrequently made. See, as to excepted cases, Armstrong v. Ayres, 19 Conn. 540; Bramhall v. Seavey, 28 Me. 45.

Generally. An unauthorized arrest, as under process materially irregular or informal; Russell v. Hubbard, 6 Barb. (N. Y.) 654; Welch v. Scott, 27 N. C. 72; Somervell v. Hunt, 3 H. & McH. (Md.) 113; Tackett v. State, 3 Yerg. (Tenn.) 392, 24 Am. Dec. 582; Lough v. Millard, 2 R. I. 436; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; or process issuing from a court which has no general jurisdiction of the subject-matter; 10 Co. 68; 10 B. & C. 28; Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Tracy v. Williams, 4 Conn. 107, 10 Am. Dec. 102; Flack v. Ankeny, Breese (Ill.) 187; Duckworth v. Johnston,

7 Ala. 581; Camp v. Moseley, 2 Fla. 171; State v. McDonald, 14 N. C. 471; Rodman v. Harcourt, 4 B. Monr. (Ky.) 230; State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; Brady v. Davis, 9 Ga. 73; Gurney v. Tufts, 37 Me. 130, 58 Am. Dec. 777; Ex parte Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; Greene v. Briggs, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; is void; but if the failure of jurisdiction be as to person, place, or process, it must appear on the warrant, to have this effect; Bull. N. P. 83; Savacool v. Boughton, 5 Wend. (N. Y.) 175, 21 Am. Dec. 181; Churchill v. Churchill, 12 Vt. 661; Barnes v. Barber, 1 Gilman (Ill.) 401; Miller v. Grice, 1 Rich. (S. C.) 147; Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Tuell v. Wrink, 6 Blackf. (Ind.) 249; State v. Tuell, *id.* 344; Wells v. Jackson, 3 Munf. (Va.) 458; Halsted v. Brice, 13 Mo. 171; Conner v. Com., 3 Binn. (Pa.) 38; Donahoe v. Shed, 8 Metc. (Mass.) 326; Humes v. Taber, 1 R. I. 464; 3 Burr. 1766; 1 W. Bla. 555. The arrest of the wrong person; 2 Scott N. S. 86; 1 M. & G. 775; Melvin v. Fisher, 8 N. H. 406; Scott v. Ely, 4 Wend. (N. Y.) 555; Gurnsey v. Lovell, 9 *id.* 319; renders the officer liable for a trespass to the party arrested. See 1 Bennett & H. Lead. Crim. Cas. 180–184.

In Criminal Cases. The apprehending or detaining of the person in order to be forthcoming to answer an alleged or suspected crime. Quoted and adopted, as is also the distinction which follows, in County of Montgomery v. Robinson, 85 Ill. 174; Hogan v. Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812.

The word *arrest* is said to be more properly used in civil cases, and *apprehension* in criminal. Thus, a man is arrested under a *capias ad respondendum*, and apprehended under a warrant charging him with larceny.

Who may make. The person to whom the warrant is addressed is the proper person in case a warrant has been issued, whether he be described by name; Salk. 176; Frost v. Thomas, 24 Wend. (N. Y.) 418; State v. Kirby, 24 N. C. 201; or by his office; 1 B. & C. 288; Russell v. Hubbard, 6 Barb. (N. Y.) 654. But, if the authority of the warrant is insufficient, he may be liable as a trespasser. See *supra*. A known officer need not show a warrant in making an arrest, but a special officer must if demanded; State v. Dula, 100 N. C. 423, 6 S. E. 89.

Any peace officer, as a justice of the peace; 1 Hale, Pl. Cr. 86; sheriff; 1 Saund. 77; 1 Taunt. 46; coroner; 4 Bla. Com. 292; constable; 32 Eng. L. & Eq. 783; Danovan v. Jones, 36 N. H. 246; or watchman; 3 Taunt. 14; 3 Campb. 420; may without a warrant arrest any person committing a felony in his presence; Wakely v. Hart, 6 Binn. (Pa.) 318; 3 Hawkins, Pl. Cr. 164; Shanley v. Wells, 71 Ill. 78; State v. Underwood, 75 Mo. 231; Boyd v. State, 17 Ga. 194; or committing a breach of the peace, during its continuance or immediately afterwards; 1 C. & P. 40; Taylor v. Strong, 3 Wend. (N. Y.) 384; Knot v. Gay, 1 Root (Conn.) 66; City Council v. Payne, 2 Nott. & M'C. (S. C.) 475; U. S. v. Hart, Pet. C. C. 390, Fed. Cas. No. 15,316; or if he is sufficiently near to hear what is said and the sound of the blows, although he cannot see for the darkness; State v. McAfee, 107 N. C. 812, 12 S. E. 435, 10 L. R. A. 607; Johnson v. State, 30 Ga. 430; White v. Kent, 11 Ohio St. 550; Brooks v. Com., 61 Pa. 352, 100 Am. Dec. 645; or even to prevent the commission; and such officer may arrest any one whom he reasonably suspects of having committed a felony, whether a felony has actually been committed or not; 3 Campb. 420; Rohan v. Sawin, 5 Cush. (Mass.) 281; Eanes v. State, 6 Humphr. (Tenn.) 53, 44 Am. Dec. 289; Wakely v. Hart, 6 Binn. (Pa.) 316; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; whether acting on his own knowledge or facts communicated by others; 6 B. & C. 635; but not unless the offence amount to a felony; 5 Exch. 378; Rohan v. Sawin, 5 Cush. (Mass.) 281; Com. v. Carey, 12 *id.* 246; Com. v. McLaughlin, 12 *id.* 615. See Russ. & R. 329; Wright v. Com., 85 Ky. 123, 2 S. W. 904. But a constable cannot arrest for an ordinary misdemeanor without a warrant, unless present at the time of the offence; Winn v. Hobson, 54 N. Y. Super. Ct. 330; North v. People, 139 Ill. 81, 28 N. E. 966; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677, 12 L. R. A. 379; State v. Davidson, 44 Mo. App. 513.

A police constable may arrest for a breach of the peace committed in his sight; 4 H. & N. 265. If upon probable suspicion or a reasonable charge made by a third person, he believes that a felony (but not a misdemeanor; 5 Exch. 378) has been committed he may arrest the person whom he believes to have committed the felony; 3 H. & N. 417. To do this he may break open doors. Blackstone (4 Com. 492) says he may kill the felon if necessary.

Mere impudence or abusive language to an officer does not justify arrest without a warrant; Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579, 7 L. R. A. 507, 18 Am. St. Rep. 473; Jenkins v. State, 3 Ga. App. 146, 59 S. E. 435; or threats of injury to another officer; Giroux v. State, 40 Tex. 98; otherwise if there is interference with the performance of his duty; Montgomery v. Sutton, 67 Ia. 497, 25 N. W. 748; Myers v. Dunn, 126 Ky. 548, 104 S. W. 352, 13 L. R. A. (N. S.) 881, and note; or if the language amounts to a breach of the peace on a public street; State v. Appleton, 70 Kan. 217, 78 Pac. 445; Davis v. Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am.

Rep. 828. Threats alone, unaccompanied by any effort or apparent intention to execute them, do not constitute the offence of resisting an officer in the execution of lawful process; Statham v. State, 41 Ga. 507; nor do mere derogatory remarks addressed by a bystander to a policeman; City of Chicago v. Brod, 141 Ill. App. 500; nor is it resistance to step in front of a policeman making an arrest, demand his number and remonstrate with him for ill treating the prisoner; Com. v. Sheriff, 3 Brewst. (Pa.) 343. A mere statement by one about to be arrested that he will die first is not within a statute making it a crime to oppose arrest; State v. Scott, 123 La. 1085, 49 South. 715, 24 L. R. A. (N. S.) 199, 17 Ann. Cas. 400.

An officer may arrest without warrant for the violation of a municipal ordinance committed in his presence; Village of Oran v. Bles, 52 Mo. App. 509; but in such case the offender must have a speedy trial or hearing; State v. Freeman, 86 N. C. 683; Judson v. Reardon, 16 Minn. 431 (Gil. 387); and the right exists whether such arrest is authorized by ordinance or not; Scircle v. Neeves, 47 Ind. 289; or if the charter confers on the officer the powers of a constable; State v. Castieny, 34 Minn. 1, 24 N. W. 458; and a municipal ordinance authorizing such arrests is valid; White v. Kent, 11 Ohio St. 550; as is also a charter or general statute; Mayo v. Wilson, 1 N. H. 53; Burroughs v. Eastman, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. Rep. 419; Jones v. Root, 6 Gray (Mass.) 435; but such arrest is not authorized if the offense is not committed in the presence of the officer; Pesterfield v. Vickers, 3 Coldw. (Tenn.) 205; State v. Belk, 76 N. C. 10, where it was also said that the right to arrest in such cases does not necessarily exist. But an ordinance authorizing arrest at the will of the officer without providing an opportunity for trial or preliminary examination is void and will not protect the officer even if acting in good faith; State v. Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.

As to the power to make arrest without a warrant, see Porter v. State, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730 and note.

A private person who is present when a felony is committed; 1 Mood. 93; Holley v. Mix, 3 Wend. (N. Y.) 353, 20 Am. Dec. 702; Long v. State, 12 Ga. 293; or during the commission of a breach of the peace; 10 C. & F. 28; In re Powers, 25 Vt. 261; or sees another in the act of carrying away property he has stolen; Hershey v. O'Neill, 36 Fed. 168; may and should arrest the felon, and may upon reasonable suspicion that the person arrested is the felon, if a felony has been committed; 1 Price, Exch. 525; United States v. Boyd, 45 Fed. 851; but in defence to an action he must allege and prove the offence to have been committed; 6 C. & P. 684, 723; Holley v. Mix, 3 Wend. (N. Y.) 353; Rohan v. Sawin, 5 Cush. (Mass.) 281; and also that he had reasonable grounds for suspecting the person arrested; 3 Campb. 35; 2 Q. B. 169; Hall v. Suydam, 6 Barb. (N. Y.) 84; Winebiddle v. Porterfield, 9 Pa. 137; Wasson v. Canfield, 6 Blackf. (Ind.) 406; Hall v. Hawkins, 5 Humphr. (Tenn.) 357; Wills v. Noyes, 12 Pick. (Mass.) 324; Wilmarth v. Mountford, 4 Wash. C. C. 82, Fed. Cas. No. 17,774. If a felony has been committed and there is reasonable cause to believe that A. committed it, a private person is justified in arresting A., though it turns out that B. was guilty; 8 C. & P. 522. See Russel v. Shuster, 8 W. & S. (Pa.) 308; 2 C. & P. 361, 565; 1 Benn. & H. L. Cas. 143; a private person may arrest if there be a breach of the peace, or if he has reasonable ground to believe that a breach of the peace that has been committed will be renewed; 10 Cl. & F. 28.

As to arrest to prevent the commission of crimes, see 2 B. & P. 260; 9 C. P. 262.

Where a private party attempts to make an arrest for riot on the order of a justice after offenders have dispersed, he becomes a trespasser and may be resisted; State v. Campbell, 107 N. C. 948, 12 S. E. 441. Any person may arrest an affrayer and detain him till his passion has cooled and then deliver him to an officer; 1 Cr. M. & R. 762; but not after the affray has ceased; 2 Q. B. 375.

A private detective, in pursuit of a fugitive from justice in another state, cannot arrest without a warrant by merely procuring a policeman to make the arrest; Harris v. R. Co., 35 Fed. 116; nor can such detective forcibly detain the defendant to await a legal order of arrest; Harland v. Howard, 57 Hun 113, 587, 10 N. Y. Supp. 449. As to arrest by hue and cry, see Hue and Cry. As to arrest by military officers, see Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581.

Who liable to. Any person is liable to arrest for crime, except ambassadors and their servants; Cooke v. Gibbs, 3 Mass. 197; Scott v. Curtis, 27 Vt. 762; U. S. v. Kirby, 7 Wall. (U. S.) 483, 19 L. Ed. 278.

It has been held that no legal arrest of a voter can be made on election day for cause relating to his suffrage; U. S. v. Small, 38 Fed. 103.

When and where it may be made. An arrest may be made at night as well as by day; and, for treason, felony, breach of the peace, or generally for an indictable offence, on Sunday as well as on other days; 16 M. & W. 172; Pearce v. Atwood, 13 Mass. 347; Wright v. Keith, 24 Me. 158. And the officer may break open doors even of the criminal's own house; Barnard v. Bartlett, 10 Cush. (Mass.) 501, 57 Am. Dec. 123; Hawkins v. Com., 14 B. Monr. (Ky.) 395, 61 Am. Dec. 147 (even to arrest a person therein, not the owner; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510); although he must first demand admission and be refused after

giving notice of his business; Russ. Cr. 840; McLennon v. Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353; State v. Shaw, 1 Root (Conn.) 134; as may a private person in fresh pursuit, under circumstances which authorize him to make an arrest; 4 Bla. Com. 293.

It must be made within the jurisdiction of the court under whose authority the officer acts; People v. McLeod, 1 Hill (N. Y.) 377, 37 Am. Dec. 328; Church v. Hubbart, 2 Cra. (U. S.) 187, 2 L. Ed. 249; Bromley v. Hutchins, 8 Vt. 194, 30 Am. Dec. 465; Lawson v. Buzines, 3 Harr. (Del.) 416; and jurisdiction for this purpose can be extended to foreign countries only by virtue of treaties or express laws of those countries; 1 Bish. Cr. Law § 598; Wheat. Int. Law (3d Eng. ed.) § 113; Com. v. Deacon, 10 S. & R. (Pa.) 125; Ex parte Holmes, 12 Vt. 631; In re Sheazle, 1 W. & M. 66, Fed. Cas. No. 12,734; In re Metzger, 1 Barb. (N. Y.) 248. And see, as between the states of the United States, Jones v. Van Zandt, 5 How. (U. S.) 215, 12 L. Ed. 122; Com. v. Tracy, 5 Metc. (Mass.) 536; State v. Howell, R. M. Charlt. (Ga.) 120; State v. Allen, 2 Humphr. (Tenn.) 258; as to arrest in a different county; Sturm v. Potter, 41 Ind. 181.

Manner of making. An officer authorized to make an arrest, whether by warrant or from the circumstances, may use necessary force; 2 Bish. Cr. Law 37; Findlay v. Pruitt, 9 Port. (Ala.) 195; State v. Mahon, 3 Harr. (Del.) 568; Wright v. Keith, 24 Me. 158; Henry v. Lowell, 16 Barb. (N. Y.) 268; State v. Stalcup, 24 N. C. 52; 4 B. & C. 596; Skidmore v. State, 43 Tex. 93 (but he may not strike except in self-defence); he may kill the felon if he cannot otherwise be taken; 1 Russ. Cr. 665–7 (7th Eng. ed.) 813; 1 Bish. N. Cr. L. § 647; Starr v. U. S., 153 U. S. 614, 14 Sup. Ct. 919, 38 L. Ed. 844; North Carolina v. Gosnell, 74 Fed. 734; U. S. v. Jailer, 2 Abb. (U. S.) 265, Fed. Cas. No. 15,463; State v. Anderson, 1 Hill (S. C.) 327; State v. Rhodes, Houst. Cr. Cas. (Del.) 476; Cousins v. State, 50 Ala. 117, 20 Am. Rep. 290 (but not "in any case where, with diligence and caution, the prisoner could be otherwise held"; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 628; State v. Coleman, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381; nor if the original difficulty is caused by the officer; Johnson v. State, 58 Ark. 57, 23 S. W. 7); and so may a private person in making an arrest which he is *enjoined* to make; 4 Bla. Com. 293; and if the officer or a private person is killed, in such case it is murder. In making an arrest for misdemeanor, an officer can kill or inflict bodily harm upon the person only when he is placed in like danger; Dilger v. Com., 88 Ky. 550, 11 S. W. 651, 11 Ky. Law Rep. 67; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68.

When an offender is not resisting but fleeing, an officer in making an arrest for a misdemeanor has no right to kill or shoot, although he may do so in case of felony; Head v. Martin, 85 Ky. 480, 3 S. W. 622. He cannot kill a fleeing misdemeanant to prevent escape; Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854, 15 L. R. A. 558, 29 Am. St. Rep. 68; Brown v. Weaver, 76 Miss. 7, 23 South. 388, 42 L. R. A. 423, 71 Am. St. Rep. 512 (where the sheriff's official bondsmen were held liable for the shooting by his deputy); *contra*, 1 Bish. Cr. Proc. § 161, which is criticised by the Arkansas court (which in its turn is reviewed in a later edition of the same work) and also by the Mississippi court. See also 12 Harv. L. Rev. 211, which approves the cases cited *supra* and strongly criticises Mr. Bishop. If the officer kill his prisoner in such case he is guilty of manslaughter; Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626. If a person kill an officer in resisting an illegal arrest, without warrant, it is reduced from murder, which it would have been if the officer had a right to arrest, to manslaughter, or it may be no offence, if the person arrested had the right to use such force as was necessary in resisting; John Bad Elk v. U. S., 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874; Jenkins v. State, 3 Ga. App. 146, 59 S. E. 435. For unnecessarily rough treatment in making an arrest an officer has been held liable in exemplary damages; McConathy v. Deck, 34 Colo. 461, 83 Pac. 135, 4 L. R. A. (N. S.) 358, 7 Ann. Cas. 896.

Reading a warrant and directing defendant to appear, is not an arrest; Baldwin v. Murphy, 82 Ill. 485; but see Shannon v. Jones, 76 Tex. 141, 13 S. W. 477. Arresting the body and exhibiting the process is enough; McNeice v. Weed, 50 Vt. 728.

See JUSTIFIABLE HOMICIDE; HOMICIDE; REWARD; full notes in 19 Am. Dec. 485; 61 *id.* 151.

ARREST OF JUDGMENT. The act of a court by which the judges refuse to give judgment for the plaintiff, because upon the face of the record it appears that the plaintiff is not entitled to it.

A motion for arrest of judgment must be grounded on some objection arising on the face of the record itself; State v. Casey, 44 La. Ann. 969, 11 South. 583; McGill v. Rothgeb, 45 Ill. App. 511; and no defect in the evidence or irregularity at the trial can be urged in this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which is not aided by the verdict, is a ground for arresting the judgment. In criminal cases, an arrest of judgment is founded on exceptions to the indictment. In civil cases whatever is alleged in arrest of judgment must be such

matter as would on demurrer have been sufficient to overturn the action or plea. In the applicability of the rule there is no difference between civil and criminal cases; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570. Although the defendant himself omits to make any motion in arrest of judgment, the court, if, on a review of the case, it is satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment; 1 East 146. Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment; 18 Q. B. 761; Dearsl. 3. See also 8 Ad. & E. 496; 1 Russ. & R. 429; Com. v. Marshall, 11 Pick. (Mass.) 350, 22 Am. Dec. 377; Com. v. Pattee, 12 Cush. (Mass.) 501. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a new indictment; Comyns. Dig. *Indictment*, N.; 1 Bish. Cr. Law 998.

Where a judgment rendered has been reversed, and a new trial granted, which is had upon the same indictment in the same court, a motion in arrest of judgment on the ground of a former acquittal of a higher offence charged in the indictment, is good where such facts appear in the record; Golding v. State, 31 Fla. 262, 12 South. 525.

ARRESTANDIS BONIS NE DISSIPENTUR. A writ for him whose cattle or goods, being taken during a controversy, are likely to be wasted and consumed.

ARRESTEE. In Scotch Law. He in whose hands a debt, or property in his possession, has been arrested by a regular arrestment.

If, in contempt of the arrestment, he make payment of the sum or deliver the goods arrested to the common debtor, he is not only liable criminally for breach of the arrestment, but he must pay the debt again to the arrester; Erskine, Inst. 3. 6. 6.

ARRESTER. In Scotch Law. One who sues out and obtains an arrestment of his debtor's goods or movable obligations. Erskine, Inst. 3. 6. 1.

ARRESTMENT. In Scotch Law. Securing a criminal's person till trial, or that of a debtor till he give security *judicio sisti*. The order of a judge, by which he who is debtor in a movable obligation to the arrester's debtor is prohibited to make payment or delivery till the debt due to the arrester be paid or secured. Erskine, Inst. 3. 6. 1; 1. 2. 12.

This word is used interchangeably with attachment in the act for the protection of seaman's wages; U. S. R. S. § 4536; which it is said must be liberally construed; Wilder v. Navigation Co., 211 U. S. 239, 29 Sup. Ct. 58, 53 L. Ed. 164, 15 Ann. Cas. 127. The court, after quoting the above definition, held that, though not literally so, the prohibition against "attachment or arrestment" must apply to execution after judgment as well as attachment before it.

ARRÊT (Fr.). A judgment, sentence, or decree of a court of competent jurisdiction.

The term is derived from the French law, and is used in Canada and Louisiana.

Saisie arrêt is an attachment of property in the hands of a third person. La. Code Pr. art. 209; 2 Low. C. 77; 5 *id.* 198, 218.

ARRETTED (*arrectatus*, i. e. *ad rectum vocatus*).

Convened before a judge and charged with a crime.

Ad rectum malefactorem is, according to Bracton, to have a malefactor forthcoming to be put on his trial.

Imputed or laid to one's charge; as, no folly may be *arretted* to any one under age. Bracton, l. 3, tr. 2, c. 10; Cunningham, Dict.

ARRHÆ. Money or other valuable things given by the buyer to the seller, for the purpose of evidencing the contract; earnest.

There are two kinds of arrhæ: one kind given when a contract has only been proposed; the other when a sale has actually taken place. Those which are given when a bargain has been merely proposed, before it has been concluded, form the matter of the contract, by which he who gives the arrhæ consents and agrees to lose them, and to transfer the title to them in the opposite party, in case he should refuse to complete the proposed bargain; and the receiver of arrhæ is obliged on his part to return double the amount to the giver of them in case he should fail to complete his part of the contract; Pothier, *Contr. de Vente*, n. 498. After the contract of sale has been completed, the purchaser usually gives arrhæ as evidence that the contract has been perfected. Arrhæ are therefore defined *quod ante pretium datur, et fidem fecit contractus, facti totiusque pecuniæ solvendæ. Id.* n. 506; Cod. 4. 45. 2. 3 Sand. Just. xxiii. See EARNEST.

Arrhæ sponsalitiæ were the earnest or present given by one betrothed to the other at the betrothal.

ARRIER BAN. A second summons to join the lord, addressed to those who had neglected the first. A summons of the inferiors or vassals of the lord. Spelman, Gloss.

ARRIERE FIEF (Fr.). An inferior fee granted out of a superior.

ARRIVE. To come to a particular place; to reach a particular or certain place. See cases in Leake, Contr., and in Abb. Dict.; Thompson v. U. S., 1 Brock. 411, Fed. Cas. No. 13,985; Meigs v. Ins. Co., 2 Cush. (Mass.) 439; 8 B. & C. 119; U. S. v. Open Boat, 5 Mas. 132, Fed. Cas. No. 15,967; Harrison v. Vose, 9 How. (U. S.) 372, 13 L. Ed. 179.

ARROGATION. The adoption of a person *sui juris*. 1 Brown, Civ. Law 119; Dig. 1. 7. 5; Inst. 1. 11. 3.

ARSER IN LE MAIN (Fr. Burning in the hand). The punishment inflicted on those who received the benefit of clergy. *Termes de la Ley*.

ARSON (Lat. *ardere*, to burn). The malicious burning of the house of another. Co. 3d Inst. 66; Bish. Cr. L. § 415; 4 Bla. Com.

220; Curran's Case, 7 Gratt. (Va.) 619; Ritchey v. State, 7 Blackf. (Ind.) 168; Mary v. State, 24 Ark. 44, 81 Am. Dec. 60; 1 Leach, Cr. Cas. 218; People v. Fisher, 51 Cal. 319; Young v. Com., 12 Bush (Ky.) 243; but it is not arson to demolish the house first and then burn the material; Mulligan v. State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435.

In some states by statute there are degrees of arson. The house, or some part of it, however small, must be consumed by fire; 9 C. & P. 45; Com. v. Van Schaack, 16 Mass. 105; State v. Mitchell, 27 N. C. 350. Where the house is simply scorched or smoked and the fire is not communicated to the building; Woolsey v. State, 30 Tex. App. 346, 17 S. W. 546; or where parts of a house already detached are burned; Mulligan v. State, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. Rep. 435; it is not arson; nor where a house was blown up by dynamite and splinters were torn from the roof and fired by the explosion; Landers v. State, 39 Tex. Cr. R. 671, 47 S. W. 1008; 12 Harv. L. Rev. 433. The question of burning is one of fact for the jury; 1 Mood. Cr. Cas. 398; Com. v. Betton, 5 Cush. (Mass.) 427.

It must be *another's* house; 1 Bish. Cr. Law § 389; but *aliter* under the N. H. statute; State v. Hurd, 51 N. H. 176; but if a man set fire to his own house with a view to burn his neighbor's, and does so, it is, at least, a great misdemeanor; 1 Hale, Pl. Cr. 568; W. Jones 351; Bloss v. Tobey, 2 Pick. (Mass.) 325; Erskine v. Com., 8 Gratt. (Va.) 624. See People v. Henderson, 1 Park. Cr. Cas. (N. Y.) 560; People v. Van Blarcum, 2 Johns. (N. Y.) 105; Ritchey v. State, 7 Blackf. (Ind.) 168; and under statutes in some states a tenant who sets fire to a house occupied by himself is guilty of the crime; State v. Moore, 61 Mo. 276; People v. Simpson, 50 Cal. 304. If one sets fire to a schoolhouse with the intention of burning an adjoining dwelling, which actually happens, he is guilty of arson; Combs v. Com., 93 Ky. 313, 20 S. W. 221.

The *house* of another must be burned, to constitute arson at common law; but the term "house" comprehends not only the very mansion-house, but all out-houses which are parcel thereof, though not contiguous to it, nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, mill-house, and the like, being within the curtilage, or same common fence, as the mansion itself; 4 C. & P. 245; State v. McGowan, 20 Conn. 245, 52 Am. Dec. 336; People v. Butler, 16 Johns. (N. Y.) 203; State v. Sandy, 25 N. C. 570; Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565; Stevens v. Com., 4 Leigh (Va.) 683; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; State v. Roper, 88 N. C. 656; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87; Ratekin v. State, 26 Ohio St. 420. And it has also been said that the burning of a barn, though no part of the mansion, if it has corn or hay in it, is felony at common law; 1 Hale, P. C. 567; 4 C. & P. 245; Sampson v. Com., 5 W. & S. (Pa.) 385; *contra*, Creed v. People, 81 Ill. 565. In Massachusetts, the statute refers to the dwelling-house strictly; Com. v. Barney, 10 Cush. (Mass.) 478. Where a prisoner set fire to his cell, in order to effect an escape, held, not arson; People v. Cotteral, 18 Johns. (N. Y.) 115; but see 1 Whart. Cr. L. (9th ed.) § 829; Luke v. State, 49 Ala. 30, 20 Am. Rep. 269; Willis v. State, 32 Tex. Cr. R. 534, 25 S. W. 123. The burning must have been both malicious and wilful; 1 Bishop, Cr. L. § 259; Maxwell v. State, 68 Miss. 339, 8 South. 546. And generally, if the act is proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary is proved; 1 Russ. & R. Cr. Cas. 26. On a charge of arson for setting fire to a mill, an intent to injure or defraud the mill-owners will be conclusively inferred from the wilful act of firing; 2 B. & C. 264. But this doctrine can only arise where the act is wilful, and therefore, if the fire appears to be the result of accident, the party who is the cause of it will not be liable; Jenkins v. State, 53 Ga. 33, 31 Am. Rep. 255; McDonald v. People, 47 Ill. 533.

In some states by statute a wife may be guilty of arson by burning a husband's property; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322.

It is a felony at common law, and originally punishable with death; Co. 3d Inst. 66; 2 East Pl. Cr. 1015; Sampson v. Com., 5 W. & S. (Pa.) 385; State v. Seaborn, 15 N. C. 305; but this is otherwise by statute; State v. Bosse, 8 Rich. (S. C.) 276; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; U. S. v. White, 5 Cra. C. C. 73, Fed. Cas. No. 16,676. If homicide result, the act is murder; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; 1 Bish. Cr. Law 361.

It is not an indictable offence at common law to burn one's own house to defraud insurers; 1 Whart. Cr. L. (9th ed.) § 843; otherwise in most states by statute; State v. Hurd, 51 N. H. 176; Shepherd v. People, 19 N. Y. 537; People v. Schwartz, 32 Cal. 160. See CRIMES.

ARSURA. The trial of money by heating it after it was coined. Now obsolete.

ART. **In Patent Law.** A principle put in practice and applied to some art, machine, manufacture, or composition of matter. Earle v. Sawyer, 4 Mas. 1, Fed. Cas. No. 4,247. See COPYRIGHT; PATENT.

Under the tariff laws an artist's copies of antique masterpieces are works of art of as high a grade as those executed by the same hand from original models of modern sculptors; Tutton v. Viti, 108 U. S. 312, 2 Sup. Ct. 687, 27 L. Ed. 737.

The word statuary as used in the import

laws includes professional productions of statuary or of a sculptor only; U. S. R. S. 478. This definition is held to embrace such works of art as are the result of the artist's own creation or are copies of them made under his supervision, as distinguished from the productions of the manufacturer or mechanic.

For most practical purposes works of art may be divided into four classes: 1. The fine arts properly so called, intended solely for ornamental purposes and including paintings in oil and water, upon canvas, plaster or other material, and original statuary of marble, bronze, or stone. 2. Minor objects of art intended also for ornamental purposes, such as statuettes, vases, drawings, etchings and articles which pass under the general name of bric-a-brac, and are susceptible of an indefinite number of reproductions from the original. 3. Objects of art which serve primarily an ornamental, and incidentally a useful purpose, such as painted or stained glass windows, tapestry, paper hangings, etc. 4. Objects primarily designed for a useful purpose, but made ornamental to gratify the taste, such as ornamented clocks, the higher grade of carpets, curtains, gas fixtures and household and table furniture; U. S. v. Perry, 146 U. S. 74, 13 Sup. Ct. 26, 36 L. Ed. 890. No special favor is extended by congress to any of these classes except the first, which is alone recognized as belonging to the domain of high art; *id.*, where stained glass windows were held not to be exempt from duty as paintings imported for the use of a religious society and not intended for sale.

Under the tariff act of 1897, plaster casts of clay models, though gilded and painted and produced in unlimited quantities, are "casts of sculpture" and entitled to free entry when specially imported in good faith for the use and by the order of any society established solely for religious, philosophical, scientific, educational or literary purposes; Benziger v. U. S., 192 U. S. 38, 24 Sup. Ct. 189, 48 L. Ed. 331.

ARTICLED CLERK. A person bound by indenture to a solicitor that he may acquire a knowledge pertaining to that business.

ARTICLES (Lat. *articulus*, a joint). Divisions of a written or printed document or agreement.

A specification of distinct matters agreed upon or established by authority or requiring judicial action.

The fundamental idea of an article is that of an object comprising some integral part of a complex whole. See Worcester, Dict. The term may be applied, for example, to a single complete question in a series of interrogatories; the statement of the undertakings and liabilities of the various parties to an agreement in any given event, where several contingencies are provided for in the same agreement; a statement of a variety of powers secured to a branch of government by a constitution; a statement of particular regulations in reference to one general subject of legislation in a system of laws; and in many other instances resembling these in principle. It is also used in the plural of the subject made up of these separate and related articles as articles of agreement, articles of war, the different divisions generally having, however, some relation to each other, though not necessarily a dependence upon each other.

In Chancery Practice. A formal written statement of objections to the credibility of witnesses in a cause in chancery, filed by a party to the proceedings after the depositions have been taken and published.

The object of articles is to enable the party filing them to introduce evidence to discredit the witnesses to whom the objections apply, where it is too late to do so in any other manner; 1 Dan. Ch. Pr. (6th Am. ed.) *957; and to apprize the party whose witnesses are objected to of the nature of the objections, that he may be prepared to meet them; 1 Dan. Ch. Pr. (6th Am. ed.) *958.

Upon filing the articles, a special order is obtained to take evidence; 2 Dick. Ch. 532; which is sparingly granted; 1 Beam. Ord. 187.

The interrogatories must be so shaped as not to call for evidence which applies directly to facts in issue; Wood v. Mann, 2 Sumn. 316, Fed. Cas. No. 17,953; Gass v. Stinson, 2 Sumn. 605, Fed. Cas. No. 5,261; Troup v. Sherwood, 3 Johns. Ch. (N. Y.) 558; 10 Ves. Ch. 49. The objections can be taken only to the credit and not to the competency of the witnesses; 3 Atk. 643; Troup v. Sherwood, 3 Johns. Ch. (N. Y.) 558; and the court are to hear all the evidence read and judge of its value; 2 Ves. Ch. 219. See, generally, 10 Ves. Ch. 49; 2 Ves. & B. 267; 1 Sim. & S. 467.

In Ecclesiastical Law. A complaint in the form of a libel exhibited to an ecclesiastical court.

ARTICLES OF AGREEMENT. A written memorandum of the terms of an agreement.

They may relate either to real or personal estate, or both, and if in proper form will create an equitable estate or trust such that a specific performance may be had in equity.

The instrument should contain a clear and explicit statement of the *names of the parties*, with their additions for purposes of distinction, as well as a designation as parties of the first, second, etc., part; *the subject-matter* of the contract, including the time, place, and more important details of the manner of performance; *the promises* to be performed by each party; *the date*, which should be truly stated. It should be signed by the parties or their agents. When signed by an agent, the proper form is, A B, by his agent [or attorney in fact], C D.

ARTICLES OF ASSOCIATION, OR OF INCORPORATION. The certificate filed in conformity with a general law, by persons who desire to become a corporation, setting forth the rules and conditions upon which the association or corporation is founded. Cent. Dict.

ARTICLES OF CONFEDERATION. The title of the compact which was made by the thirteen original states of the United States of America. Story, Const. 215, 223.

The full title was "Articles of Confederation and perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." It was adopted and went into force on the first day of March, 1781, and remained as the supreme law until the first Wednesday of March, 1789; Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

The accompanying analysis of this important instrument is from Judge Story's Commentaries on the Constitution of the United States.

The style of the confederacy was, by the first article, declared to be, "The United States of America." The second article declared that each state retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right which was not by this confederation *expressly* delegated to the United States, in congress assembled. The third article declared that the states severally entered into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever. The fourth article declared that the free inhabitants of each of the states (vagabonds and fugitives from justice excepted) should be entitled to all the privileges of free citizens in the several states; that the people of each state should have free ingress and regress to and from any other state, and should enjoy all the privileges of trade and commerce, subject to the same duties and restrictions as the inhabitants; that fugitives from justice should, upon the demand of the executive of the state from which they fled, be delivered up; and that full faith and credit should be given, in each of the states, to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

Having thus provided for the security and intercourse of the states, the next article (5th) provided for the organization of a general congress, declaring that delegates should be chosen in such manner as the legislature of each state should direct; to meet in congress on the first Monday in every year, with a power, reserved to each state, to recall any or all of the delegates, and to send others in their stead. No state was to be represented in congress by less than two nor more than seven members. No delegate was eligible for more than three in any term of six years; and no delegate was capable of holding office of emolument under the United States. Each state was to maintain its own delegates, and, in determining questions in congress, was to have one vote. Freedom of speech and debate in congress was not to be impeached or questioned in any other place; and the members were to be protected from arrest and imprisonment during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

By subsequent articles, congress was invested with the sole and exclusive right and power of determining on peace and war, unless in case of an invasion of a state by enemies, or an imminent danger of an invasion by Indians; of sending and receiving ambassadors; entering into treaties and alliances, under certain limitations as to treaties of commerce; of establishing rules for deciding all cases of capture on land and water, and for the division and appropriation of prizes taken by the land or naval forces, in the service of the United States; of granting letters of marque and reprisal in times of peace; of appointing courts for the trial of piracies and felonies committed on the high seas; and of establishing courts for receiving and finally determining appeals in all cases of captures.

Congress was also invested with power to decide in the last resort, on appeal, all disputes and differences between two or more states concerning boundary, jurisdiction, or any other cause whatsoever; and the mode of exercising that authority was specially prescribed. And all controversies concerning the private right of soil, claimed under different grants of two or more states before the settlement of their jurisdiction, were to be finally determined in the same manner, upon the petition of either of the grantees. But no state was to be deprived of territory for the benefit of the United States.

Congress was also invested with the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or that of the United States; of fixing the standard of weights and measures throughout the United States; of regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits should not be infringed or violated; of establishing and regulating post-offices from one state to another, and exacting postage to defray the expenses; of appointing all officers of the land forces in the service of the United States, except regimental officers; of appointing all officers of the naval forces, and commissioning all officers whatsoever in the service of the United States; and of making rules for the government and regulation of the land and naval forces, and directing their operations.

Congress was also invested with authority to appoint a committee of the states to sit in the recess of congress, and to consist of one delegate from each state, and other committees and civil officers, to manage the general affairs under their direction; to appoint one of their number to preside, but no person was to serve in the office of president more than one year in the term of three years; to ascertain the necessary sums for the public service, and to appropriate the same for defraying the public expenses; to borrow money and emit bills on credit of the United States; to build and equip a navy; to agree upon the number of land forces, and make requisitions upon each state for its quota, in proportion to the number of white inhabitants in such state. The legislatures of each state were to appoint the regimental officers, raise the men, and clothe, arm, and equip them at the expense of the United States.

Congress was also invested with power to adjourn for any time not exceeding six months, and to any place within the United States; and provision was made for the publication of its journal, and for entering the yeas and nays thereon when desired by any delegate.

Such were the powers confided in congress. But even these were greatly restricted in their exercise; for it was expressly provided that congress should never engage in a war; nor grant letters of marque or reprisal in time of peace; nor enter into any treaties or alliances; nor coin money or regulate the value thereof; nor ascertain the sums or expenses necessary for the defence and welfare of the United States; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war to be built, or purchased, or the number of land or sea forces to be raised; nor appoint a commander-in-chief of the army or navy; unless nine states should assent to the same. And no question on any other point, except for adjourning from day to day, was to be determined, except by vote of the majority of the states.

The committee of the states, or any nine of them, were authorized in the recess of congress to exercise such powers as congress, with the assent of nine states, should think it expedient to vest them with, except powers for the exercise of which, by the

articles of confederation, the assent of nine states was required, which could not be thus delegated.

It was further provided that all bills of credit, moneys borrowed, and debts contracted by or under the authority of congress before the confederation, should be a charge against the United States; that when land forces were raised by any state for the common defence, all officers of or under the rank of colonel should be appointed by the legislature of the state, or in such manner as the state should direct; and all vacancies should be filled up in the same manner; that all charges of war, and all other expenses for the common defence or general welfare, should be defrayed out of a common treasury, which should be supplied by the several states, in proportion to the value of the land within each state granted or surveyed, and the buildings and improvements thereon, to be estimated according to the mode prescribed by congress; and the taxes for that proportion were to be laid and levied by the legislatures of the states within the time agreed upon by congress.

Certain prohibitions were laid upon the exercise of powers by the respective states. No state, without the consent of the United States, could send an embassy to, or receive an embassy from, or enter into any treaty with any king, prince, or state; nor could any person holding any office under the United States, or any of them, accept any present, emolument, office, or title from any foreign king, prince, or state; nor could congress itself grant any title of nobility. No two states could enter into any treaty, confederation, or alliance with each other, without the consent of congress. No state could lay any imposts or duties which might interfere with any proposed treaties. No vessels of war were to be kept up by any state in time of peace, except deemed necessary by congress for its defence or trade; nor any body of forces, except as should be deemed requisite by congress to garrison its forts and necessary for its defence. But every state was required always to keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and to be provided with suitable field-pieces, and tents, and arms, and ammunition, and camp equipage. No state could engage in war without the consent of congress, unless actually invaded by enemies or in danger of invasion by the Indians. Nor could any state grant commissions to any ships of war, nor letters of marque and reprisal except after a declaration of war by congress, unless such state were infested by pirates, and then subject to the determination of congress. No state could prevent the removal of any property imported into any state to any other state, of which the owner was an inhabitant. And no imposition, duties, or restriction could be laid by any state on the property of the United States or of either of them.

There was also provision made for the admission of Canada into the Union, and of other colonies, with the assent of nine states. And it was finally declared that every state should abide by the determinations of congress on all questions submitted to it by the confederation; that the articles should be inviolably observed by every state; that the union should be perpetual; and that no alterations should be made in any of the articles, unless agreed to by congress and confirmed by the legislatures of every state.

ARTICLES OF IMPEACHMENT. Accusations in writing which form the basis of a trial by impeachment.

They are called by Blackstone a kind of bills of indictment, and perform the same office which an indictment does in a common criminal case. They do not usually pursue the strict form and accuracy of an indictment, but are sometimes quite general in the form of the allegations. Woodd. Lect. 605; Sto. Const. 5th ed. § 807; Com. Dig. *Parliament*, L. 21; Foster, Cr. L. 389. They should, however, contain so much certainty as to enable a party to put himself on the proper defence, and in case of an acquittal to avail himself of it as a bar to another impeachment. Additional articles may perhaps be exhibited at any stage of the proceedings; Rawle, Const. 216.

The answer to articles of impeachment need not observe great strictness of form; and it may contain arguments as well as facts. It is usual to give a full and particular answer to each article of the accusation; Story, Const. 5th ed. § 810; Jeff. Man. § 53. See IMPEACHMENT.

ARTICLES OF PARTNERSHIP. A written agreement by which the parties enter into a partnership upon the conditions therein mentioned.

These are to be distinguished from agreements to enter into a partnership at a future time. By articles of partnership a partnership is actually established; while an agreement for a partnership is merely a contract, which may be taken advantage of in a manner similar to other contracts. Where an agreement to enter into a partnership is broken, an action lies *at law* to recover damages; and *equity*, in some cases, to prevent frauds or manifestly mischievous consequences, will enforce specific performance; Story, Partn. § 109; 3 Atk. 383; 1 Swanst. 513, n.; Lindl. Partn. *475; 17 Beav. 294; but not when the partnership may be immediately dissolved; 9 Ves. Ch. 360. Specific performance was decreed in Whitworth v. Harris, 40 Miss. 483; Birchett v. Bolling, 5 Munf. (Va.) 442; and refused in Wadsworth v. Manning, 4 Md. 60. See 8 Beav. 129; 30 *id.* 376.

The instrument should contain *the names* of the contracting parties severally set out; the *agreement* that the parties do by the instrument enter into a partnership, expressed in such terms as to distinguish it from a covenant to enter into partnership at a subsequent time; the *date*, and necessary *stipulations*, some of the more common of which follow.

The *commencement* of the partnership should be expressly provided for. The date of the articles is the time, when no other time is fixed by them; 5 B. & C. 108; Lindl. Part. (2d Am. Ed.) *201, *412; Ingraham v. Foster, 31 Ala. 123; Beaman v. Whitney, 20 Me. 413; Everit v. Watts, 10 Paige (N. Y.) 82; if not dated, parol evidence is admissible to show that they were not intended to take effect at the time of their execution; 17 C. B. 625.

The *duration* of the partnership should be stated. It may be for life, for a limited period of time, or for a limited number of adventures. When a term is fixed, it endures until that period has elapsed; when no term or limitation is fixed, the partnership may be dissolved at the will of either partner; 17 Ves. 298; Carlton v. Cummins, 51 Ind. 478; McElvey v. Lewis, 76 N. Y. 373; Lindl. Partn. *121, *413; see Williams v. Ins. Co., 150 Pa. 20, 24 Atl. 346. Dissolution follows immediately and inevitably on the death of a partner; Hoard v. Clum, 31 Minn. 186, 17 N. W. 275; but provision may be made for the succession of the executors or administrators or a child or children of a deceased partner to his place and rights; Burwell v. Cawood, 2 How. (U. S.) 560, 11 L. Ed. 378; Powell v. Hopson, 13 La. Ann. 626; 9 Ves. Ch. 500. Where a provision is made for a succession by appointment, and the partner

dies without appointing, his executors or administrators may continue the partnership or not, at their option; 1 McClel. & Y. 579; Coll. Ch. 157. A continuance of the partnership beyond the period fixed for its termination will, in the absence of circumstances showing intent, be implied to be upon the basis of the old articles; U. S. Bank v. Binney, 5 Mas. 176, 185, Fed. Cas. No. 16,791; 15 Ves. Ch. 218; 1 Moll. Ch. 466; but it will be considered as at will, and not as renewed for a further definite period; 17 Ves. 307.

Persons dealing with a partnership are not bound by any stipulation as to its dissolution or continuance, unless they have actual notice before making contracts with the firm; St. Louis Electric Lamp Co. v. Marshall, 78 Ga. 168, 1 S. E. 430; Central Nat. Bank v. Frye, 148 Mass. 498, 20 N. E. 325.

The *nature* of the business and the *place* of carrying it on should be very carefully and exactly specified. Courts of equity will grant an injunction when one or more of the partners attempt, against the wishes of one or more of them, to extend such business beyond the provision contained in the articles; Story, Partn. § 193; Abbot v. Johnson, 32 N. H. 9; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573.

The *name* of the firm should be expressed. The members of the partnership are required to use the name thus agreed upon, and a departure from it will make them individually liable to third persons or to their partners, in particular cases; Lindl. Partn. *413; 2 Jac. & W. 266; 9 Ad. & E. 314; Story, Partn. §§ 102, 136, 142, 202; Crawford v. Collins, 45 Barb. (N. Y.) 269.

The *management* of the business, or of some particular branch of it, is frequently intrusted by stipulation to one partner, and such partner will be protected in his rights by equity; Story, Partn. §§ 172, 182, 193, 202; and see La. Civ. Code art. 2838; Pothier, *Société*, n. 71; Dig. 14, 1, 1, 13; Pothier, Pand. 14, 1, 4; or it may be to a majority of the partners, and should be where they are numerous. See PARTNERS.

The *manner* of furnishing capital and stock should be provided for. When a partner is required to furnish his proportion of the stock at stated periods, or pay by instalments, he will, where there are no stipulations to the contrary, be considered a debtor to the firm; Story, Partn. § 203; 1 Swanst. 89. As to the fulfillment of some conditions precedent by a partner, such as the payment of so much capital, etc., see Lindl. Partn. *416; 1 Wms. Saund. 320 *a*. Sometimes a provision is inserted that real estate and fixtures belonging to the firm shall be considered, as between the partners, not as partnership but as several property; 1 App. Cas. 181; Rushing v. People, 42 Ark. 390; Stumph v. Bauer, 76 Ind. 157; Clements v. Jessup, 36 N. J. Eq. 569. In cases of bankruptcy, this property will be treated as the separate property of the partners; Collyer, Partn. §§ 905, 909; 5 Ves. 189; 3 Madd. 63.

The *apportionment* of profits and losses should be provided for. The law distributes these equally, in the absence of controlling circumstances, without regard to the capital furnished by each; Story, Partn. 24; 3 Kent 28; Gould v. Gould, 6 Wend. (N. Y.) 263. But see 7 Bligh 432; 5 Wils. & S. 16; 20 Beav. 98; Hyatt v. Robinson, 15 Ohio, 399.

Very frequently the articles provide for the division of profits and determine the proportion in which each partner takes his share. There is nothing to prevent their making any bargain on this subject that they see fit to make; Pars. Partn. § 172.

Periodical accounts of the property of the partnership may be stipulated for. These, when settled, are at least *primâ facie* evidence of the facts they contain; 7 Sim. 239. It is proper to stipulate that an account settled shall be conclusive; Lindl. Partn. *420.

The *expulsion* of a partner for gross misconduct, bankruptcy, or other specified causes may be provided for; and the provision will govern, when the case occurs. See 10 Hare 493; L. R. 9 Ex. 190; Pars. Partn. 169, n; Patterson v. Silliman, 28 Pa. 304.

A *settlement* of the affairs of the partnership should always be provided for. It is generally accomplished in one of the three following ways: *first*, by turning all the assets into cash, and, after paying all the liabilities of the partnership, dividing such money in proportion to the several interests of the parties; or, *second*, by providing that one or more of the partners shall be entitled to purchase the shares of the others at a valuation; 20 Beav. 442; or, *third*, that all the property of the partnership shall be appraised, and that after paying the partnership debts it shall be divided in the proper proportions. The first of these modes is adopted by courts of equity in the absence of express stipulations; Lindl. Partn. 2d Am. ed. (Ewell) *429; Story, Partn. § 207; 8 Sim. 529; but see 6 Madd. 146; 3 Hare 581. Where partnership accounts have been fully settled, an express promise by one to pay the balance due to another is not necessary; Sears v. Starbird, 78 Cal. 225, 20 Pac. 547.

Submission of disputes to arbitration is provided for frequently, but such a clause is nugatory, as no action will lie for a breach; Story, Partn. § 215; and (except in England, under Com. L. Proc. Act, 1854) it is no defence to an action relative to the matter to be referred; Pars. Partn. 170; see Lindl. Partn. 2d Am. ed. (Ewell) *451. Where the settlement of partnership accounts is made by arbitrators without fraud, it will not be disturbed; Abell's Adm'r v. Phillips (Ky.) 13 S. W. 109.

The articles should be executed by the

parties, but need not be under seal. See PARTIES; PARTNERS; PARTNERSHIP.

ARTICLES OF THE PEACE. A complaint made before a court of competent jurisdiction by one who has just cause to fear that an injury to his person or property is about to be committed or caused by the party complained of, alleging the causes of his belief, and asking the protection of the court.

The object of articles is to compel the party complained of to find sureties of the peace. This will be granted when the articles are on oath; 12 Mod. 243; 12 Ad. & E. 599; unless the articles on their face are false; 2 Burr. 806; 3 *id.* 1922; or are offered under suspicious circumstances; 2 Str. 835; 1 W. Bla. 233. Their truth cannot be controverted by affidavit or otherwise; but exception may be taken to their sufficiency, or affidavits for reduction of the amount of bail tendered; 2 Str. 1202; 13 East 171. See GOOD BEHAVIOR; PEACE.

ARTICLES OF SEPARATION. See SEPARATION.

ARTICLES OF WAR. The code of laws established for the government of the army.

The term is used in this sense both in England and the United States. The term also includes the code established for the government of the navy. See R. S. U. S. § 1342, as to the army, and § 1624, as to the navy.

The constitution, art. 1, § 8, provides that Congress shall have power "to make rules for the government and regulation of the land and naval forces."

See MILITARY LAW; MARTIAL LAW; COURTS-MARTIAL; REGULATIONS OF THE ARMY; RANK.

ARTICULI CLERI. These articles (Edw. II.) were an attempt to delimit accurately the spheres of the lay and ecclesiastical jurisdictions, and were the basis of all subsequent legislation upon this subject during the mediæval period. 2 Holdsw. Hist. E. L. 253. See CIRCUMSPECTE AGATIS.

ARTIFICER. One who buys goods in order to reduce them by his own art, or industry, into other forms, and then to sell them. Lansdale v. Brashear, 3 T. B. Mon. (Ky.) 335.

The term applies to those who are actually and personally engaged or employed to do mechanical work or the like, and not to those taking contracts for labor to be done by others; 7 El. & Bl. 135.

ARTIFICIAL. Having its existence in the given manner by virtue of or in consideration only of the law.

Artificial person. A subject of duties and rights which is represented by one or more natural persons (generally, not necessarily, by more than one) but does not coincide with them. It has a continuous legal existence not necessarily depending on any natural life; this legal continuity answers to some real continuity of public functions or of special purpose recognized as having public utility or of some lawful common interest of the natural persons concerned. Pollock, First Book of Jurispr. 112. See CORPORATION.

A body, company, or corporation considered in law as an individual. Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

AS (Lat.). A pound.

It was composed of twelve ounces. The parts were reckoned (as may be seen in the law, *Servum de hæredibus*, Inst. lib. xiii. *Pandect*) as follows: *uncia*, 1 ounce; *sextans*, 2 ounces; *triens*, 3 ounces; *quadrans*, 4 ounces; *quincunx*, 5 ounces; *semis*, 6 ounces; *septunx*, 7 ounces; *bes*, 8 ounces; *dodrans*, 9 ounces; *dextans*, 10 ounces; *deunx*, 11 ounces.

The whole of a thing; *solidum quid.*

Thus, *as* signified the whole of an inheritance: so that an heir *ex asse* was an heir of the whole inheritance. An heir *ex triente, ex semisse, ex besse, ex deunce*, was an heir of *one-third, one-half, two-thirds*, or *eleven-twelfths*.

ASCENDANTS. Those from whom a person is descended, or from whom he derives his birth, however remote they may be. See CONSANGUINITY.

Every one has two ascendants at the first degree, his father and mother; four at the second degree, his paternal grandfather and grandmother, and his maternal grandfather and grandmother; eight at the third. Thus, in going up we ascend by various lines, which fork at every generation. By this progress sixteen ascendants are found at the fourth degree; thirty-two, at the fifth, sixty-four, at the sixth; one hundred and twenty-eighth, at the seventh, and so on. By this progressive increase, a person has at the twenty-fifth generation thirty-three million five hundred and fifty-four thousand four hundred and thirty-two ascendants. But, as many of the ascendants of a person have descended from the same ancestor the lines which were forked reunite to the first common ancestor, from whom the other descends; and this multiplication, thus frequently interrupted by the common ancestors, may be reduced to a less number.

ASCERTAIN. To make certain by examination; to find out. The word *ascertained* is held to have two meanings: (1) known; (2) made certain. L. R. 2 P. & D. 365.

ASCRIPTICIUS. One enrolled; foreigners who have been enrolled. Among the Romans, ascripticii were foreigners who had been naturalized, and who had in general the same rights as natives. Nov. 22, c. 17; Cod. 11, 47.

A man bound to the soil but not a slave. 2 Holdsw. Hist. E. L. 217. See ADSCRIPTICII.

ASEXUALIZATION. See VASECTOMY.

ASIDE. On one side; apart. *To set aside.* To annul; to make void. State v. Primm, 61 Mo. 171.

ASPHYXIA. In Medical Jurisprudence. Suspended animation and death produced by non-conversion of the venous blood of the lungs into arterial.

This term applies to the situation of persons who have been asphyxiated by submersion or drowning;

by breathing mephitic gas; by suspension or strangulation. In a legal point of view, it is always proper to ascertain whether the person who has thus been deprived of his senses is the victim of another, whether the injury has been caused by accident, or whether it is the act of the sufferer himself. See 1 Hamilton, Leg. Med. 113, 120; 1 Wh. & St. Med. Jur. 534; DEATH.

ASPORTATION (Lat. *asportatio*). The act of carrying a thing away; the removing a thing from one place to another.

The carrying away of a chattel which one is accused of stealing. See LARCENY.

ASSART, ESSART. A piece of forest land converted into arable land by grubbing up the trees and brushwood. New Dict.

ASSART RENTS. Rents paid to the Crown for assarted lands. New Dict.

ASSASSINATION. Murder committed for hire, without provocation or cause of resentment given to the murderer by the person upon whom the crime is committed. Erskine, Inst. b. 4, t. 4, n. 45.

A murder committed treacherously, with advantage of time, place, or other circumstances.

ASSAULT. An unlawful offer or attempt with force or violence to do a corporeal hurt to another.

Force unlawfully directed or applied to the person of another under such circumstances as to cause a well-founded apprehension of immediate peril. Bish. Cr. Law 548.

Aggravated assault is one committed with the intention of committing some additional crime. *Simple assault* is one committed with no intention to do any other injury.

Assault is generally coupled with battery, and for the excellent practical reason that they generally go together; but the result is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery; 1 Hawk. Pl. Cr. c. 62, § 1.

Where a person is only *assaulted*, still the form of the declaration is the same as where there has been a *battery*, "that the defendant assaulted, and beat, bruised, and wounded the plaintiff;" 1 Saund. 6th ed. 14 *a*. The word "ill-treated" is frequently inserted: and if the assaulting and ill-treating are justified in the plea, although the beating, bruising, and wounding are not, yet it is held that the plea amounts to a justification of the battery; 7 Taunt. 589; 1 J. B. Moore 420. So where the plaintiff declared, in trespass, for assaulting him, seizing and laying hold of him, and imprisoning him, and the defendant pleaded a justification under a writ of capias, it was held, that the plea admitted a battery; 3 M. & W. 28. But where in trespass for assaulting the plaintiff, and throwing water upon him, and also wetting and damaging his clothes, the defendant pleaded a justification as to assaulting the plaintiff and wetting and damaging his clothes, it was held, that, though the declaration alleged a battery, yet the matter justified by the plea did not amount to a battery; 3 Ad. & E. 602.

Any act causing a well-founded apprehension of immediate peril from a force already partially or fully put in motion is an assault; 4 C. & P. 349; 9 *id.* 483, 626; Com. v. White, 110 Mass. 407; State v. Davis, 23 N. C. 125, 35 Am. Dec. 735; State v. Crow, 23 N. C. 375; Com. v. Eyre, 1 S. & R. (Pa.) 347; State v. Sims, 3 Strobh. (S. C.) 137; State v. Blackwell, 9 Ala. 79; United States v. Hand, 2 Wash. C. C. 435, Fed. Cas. No. 15,297; unless justifiable. But if justifiable, then it is not necessarily either a battery or an assault. Whether the act, therefore, in any particular case is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was justifiable cause. If, therefore, the evidence fails to show the act to have been unjustifiable, or leaves that question in doubt, the criminal act is not proved; Com. v. McKie, 1 Gray (Mass.) 63, 64, 61 Am. Dec. 410. Any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an assault; Flournoy v. State, 25 Tex. App. 244, 7 S. W. 865; Lane v. State, 85 Ala. 11, 4 South. 730; 13 C. B. 860; People v. Lilley, 43 Mich. 527, 5 N. W. 982; but an approach with gesticulations and menaces was held not an assault; Berkeley v. Com., 88 Va. 1017, 14 S. E. 916; words are not legal provocation to justify an assault and battery; State v. Workman, 39 S. C. 151, 17 S. E. 694; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853. It is an assault where one strikes at another with a stick without hitting him; 1 Hawk. Pl. Cr. 110. Shooting into a crowd is an assault upon each member of the crowd; Scott v. State, 49 Ark. 156, 4 S. W. 750; an officer is guilty of an assault in shooting at a fleeing prisoner, who had been arrested for misdemeanor, whether he intended to hit the prisoner or not; State v. Sigman, 106 N. C. 728, 11 S. E. 520.

Generally speaking "consent to an assault is no justification," and "an injury, even in sport, would be an assault if it went beyond what was admissible in sports of the sort, and was intentional"; McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168, quoting Cooley, Torts 163; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853, and note; Poll. Torts 157; Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008, 30 Am. St. Rep. 413. But there are exceptions, as where the essence of the offense is its being against the consent, as in rape (*q. v.*). And consent to vaccination may be implied from conduct so that no assault is committed; O'Brien v. S. S. Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329.

It is not an assault for a beadle to turn out of church a man who is disturbing the service, if without unnecessary violence; [1893] 1 Q. B. 142; or for the master of a house to expel one who comes into his house and disturbs the peace of the family; 3 C. & K. 25.

If a teacher take indecent liberties with a female scholar, without her consent, though she does not resist, it is an assault; 6 Cox, Cr. Cas. 64; 9 C. & P. 722; Ridout v. State,

6 Tex. App. 249. So, if a medical practitioner unnecessarily strips a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault, if he assisted to take off her clothes; 1 Moody 19; 1 Lew. 11. Where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her professionally, she making no resistance solely from the belief that such was the case, it was held that he was properly convicted of an assault; 1 Den. Cr. Cas. 580; 4 Cox, Cr. Cas. 220; Templ. & M. 218. But an attempt to commit the misdemeanor of having carnal knowledge of a girl between ten and twelve years old, is not an assault, by reason of the consent of the girl; 8 C. & P. 574, 589; 7 Cox, Cr. Cas. 145. And see 1 Den. Cr. Cas. 377; 2 C. & K. 957; 3 Cox, Cr. Cas. 266. But it has been held that one may be convicted of an assault upon the person of a girl under ten years of age with intent to commit a rape, whether she consented or resisted; People v. Gordon, 70 Cal. 467, 11 Pac. 762. One is not guilty of an assault if he takes hold of a woman's hand and puts his arm around her shoulder, unless he does so without her consent or with an intent to injure her; Crawford v. State, 21 Tex. App. 454, 1 S. W. 446. One is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance, eats it and is injured; Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; but see 2 C. & K. 912; 1 Cox, Cr. Cas. 281; People v. Quin, 50 Barb. (N. Y.) 128. An unlawful imprisonment is also an assault; 1 Hawk. Pl. Cr. c. 62, § 1. A negligent attack may be an assault; Whart. Cr. L. § 603. See Steph. Dig. Cr. L. § 243.

A teacher has a right to punish a pupil for misbehavior; but this punishment must be reasonable and proportioned to the gravity of the pupil's misconduct; and must be inflicted in the honest performance of the teacher's duty, not with the mere intent of gratifying his ill-will or malice. If it is unreasonable and excessive, is inflicted with an improper weapon, or is disproportioned to the offence for which it is inflicted, it is an assault; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State v. Stafford, 113 N. C. 635, 18 S. E. 256; Spear v. State (Tex.) 25 S. W. 125. The punishment must be for some specific offence which the pupil has committed, and which he knows he is punished for; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128. If a person over the age of 21 voluntarily attends school, he thereby waives any privilege which his age confers, and may be punished for misbehavior as any other pupils; State v. Mizner, 45 Ia. 248, 24 Am. Rep. 769. A teacher has no right, however, to punish a child for neglecting or refusing to study certain branches from which the parents of the child have requested that it might be excused, or which they have forbidden it to pursue, if those facts are known to the teacher. The proper remedy in such a case is to exclude the pupil from the school; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128; Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471.

The teacher has in his favor the presumption that he has only done his duty, in addition to the general presumption of innocence; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; State v. Mizner, 50 Ia. 145, 32 Am. Rep. 128; and in determining the reasonableness of the punishment, the judgment of the teacher as to what was required by the situation should have weight; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645. When a proper instrument has been used, the character of the chastisement, as regards its cruelty or excess, must be determined by considering the nature of the offence for which it was inflicted, the age, physical and mental condition, as well as the personal attributes of the pupil, and the deportment of the teacher; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Dowlen v. State, 14 Tex. App. 61; and since the legitimate object of chastisement is to inflict punishment by the pain which it causes, as well as the degradation it implies, it does not follow that chastisement was cruel or excessive because pain was caused or abrasions of the skin resulted from the use of a switch by the teacher; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645.

A teacher will be liable for prosecution, if he inflict such punishment as produces or threatens lasting mischief, or if he inflict punishment, not in the honest performance of duty, but under the pretext of duty to gratify malice; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; State v. Long, 117 N. C. 791, 23 S. E. 431. But a charge to the jury that "malice means bad temper, high temper, quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant," is erroneous; for malice may exist without temper, and may not exist although the act be done while under the influence of temper, bad, high or quick. General malice, or malice against all mankind, "is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." Particular malice is "ill-will, grudge, a desire to be revenged on a particular person." This distinction should be explained to the jury, and the term "malice" should be accurately defined; State v. Long, 117 N. C. 791, 23 S. E. 431. See BATTERY; MENTAL SUFFERING; CORRECTION; SCHOOL; WHIPPING.

ASSAY. See ANNUAL ASSAY.

ASSAY OFFICE. An establishment, or department, in which the manipulations attending the assay of bullion and coins are conducted.

Assay offices are from time to time established by law at various points throughout the country, usually in connection with the branch mints, though the main assay office is in New York. R. S. § 3553 provides that the business of the assay office at New York shall be in all respects similar to that of the mints, except that bars only, and not coin, shall be manufactured therein; and no metals shall be purchased for minor coinage. All bullion intended by the depositor to be converted into coins of the United States, and silver bullion purchased for coinage, when assayed, parted, and refined, and its net value certified, shall be transferred to the mint at Philadelphia, under such directions as shall be made by the Secretary of the Treasury, at the expense of the contingent fund of the mint, and shall be there coined, and the proceeds returned to the assay office.

Sec. 3558 provides that the business of the mint at Denver, while conducted as an assay office, that of the assay office at Boise City, and that of any other assay offices hereafter established, shall be confined to the receipt of gold and silver bullion, for melting and assaying, to be returned to depositors of the same, in bars, with the weight and fineness stamped thereon.

The assay office is also subject to the laws and regulations applied to the mint; R. S. § 3562.

ASSECURATION. In European Law. Assurance; insurance of a vessel, freight, or cargo. Opposition to the decree of Grenoble. Ferrière.

ASSECURATOR. An insurer.

ASSEMBLY. The meeting of a number of persons in the same place. An assembly of persons would seem to mean three or more. 40 S. J. 481.

Political assemblies are those required by the constitution and laws: for example, the general assembly, which includes the senate and house of representatives. The meeting of the electors of the president and vice-president of the United States may also be called an assembly.

Popular assemblies are those where the people meet to deliberate upon their rights; these are guaranteed by the constitution. U. S. Const. Amend. art. 1.

Unlawful assembly is the meeting of three or more persons to do an unlawful act, although they may not carry their purpose into execution. Cl. Cr. Law. 341.

It differs from a riot or rout, because in each of the latter cases there is some act done besides the simple meeting. See State v. Stalcup, 23 N. C. 30, 35 Am. Dec. 732; 9 C. & P. 91, 431; 1 Bish. Cr. L. § 535; 3 id. § 1256; MEETING.

ASSENT. Approval of something done. An undertaking to do something in compliance with a request.

In strictness, *assent* is to be distinguished from *consent*, which denotes a willingness that something about to be done, be done; *acceptance*, compliance with, or receipt of, something offered; *ratification*, rendering valid something done without authority; and *approval*, an expression of satisfaction with some act done for the benefit of another beside the party approving. But in practice the term is often used in the sense of acceptance and approval. Thus, an offer is said to be assented to, although properly an offer and acceptance complete an agreement. It is apprehended that this confusion has arisen from the fact that a request, assent, and concurrence of the party requesting complete a contract as fully as an offer and acceptance. Thus, it is said there must be a request on one side, and assent on the other, in every contract; 5 Bingh. N. C. 75; and this assent becomes a promise enforceable by the party requesting, when he has done anything to entitle him to the right. Assent thus becomes in reality (so far as it is *assent* merely, and not *acceptance*) an offer made in response to a request. Assent and approval, as applied to acts of parliament and of congress, have become confounded from the fact that the bills of parliament were originally requests from parliament to the king. See 1 Bla. Com. 183.

Express assent is that which is openly declared. *Implied assent* is that which is presumed by law.

Unless express dissent is shown, acceptance of what it is for a person's benefit to take, is presumed, as in the case of a conveyance of land; 3 B. & Ald. 31; Harrison v. Trustees, 12 Mass. 461; Pearse v. Owens, 3 N. C. 234; Treadwell v. Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225; Jackson v. Bodle, 20 Johns. (N. Y.) 184; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82; the assent (or acceptance) of the grantee to the delivery of a deed by a person other than the grantor, vests the title in him from the time of the delivery by the grantor to that third person; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; Hulick v. Scoril, 4 Gilm. (Ill.) 176; Buffum v. Green, 5 N. H. 71, 20 Am. Dec. 562; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; Jackson v. Bodle, 20 Johns. (N. Y.) 187; Wesson v. Stephens, 37 N. C. 557; 5 B. & C. 671; a devise which draws after it no charge or risk of loss, is presumed to have been accepted by the devisee; Brown v. Wood, 17 Mass. 73; Hannah v. Swarner, 8 Watts (Pa.) 9, 34 Am. Dec. 442.

Assent must be to the same thing done or offered in the same sense; Matlock v. Thompson, 18 Ala. 605; Keller v. Ybarru, 3 Cal. 147; Eliason v. Henshaw, 4 Wheat. (U. S.) 225, 4 L. Ed. 556; 5 M. & W. 575; it must comprehend the whole of the proposition, must be exactly equal to its extent and provisions, and must not qualify them by any new matter; 5 M. & W. 535; Slaymaker v. Irwin, 4 Whart. (Pa.) 369; Vassar v. Camp, 11 N. Y. 441.

In general, when an assignment is made to one for the benefit of creditors, the assent of the assignee will be presumed; Skipwith's

Ex'r v. Cunningham, 8 Leigh (Va.) 272, 281, 31 Am. Dec. 642. But see Crosby v. Hillyer, 24 Wend. (N. Y.) 280; Welch v. Sackett, 12 Wis. 243. See ACCEPTANCE; ACCORD; AGREEMENT; CONTRACT.

ASSERT. To state as true; declare; maintain. To assert against another has probably a *prima facie* meaning of a contradiction of him, but the context or circumstances may show that it connotes a criminatory charge; 7 L. J. Ex. 268.

ASSERTORY OATH. See OATH.

ASSESS. To rate or fix the proportion which every person has to pay of any particular tax. To tax. To adjust the shares of a contribution by several towards a common beneficial object according to the benefit received. To fix the value of; to fix the amount of.

As used in a covenant to pay rates, etc., "assessed" means "reckoned on the value." 66 L. J. Ch. 353; [1897] 1 Ch. 633.

ASSESSMENT. Determining the value of a person's property or occupation for the purpose of levying a tax.

Determining the share of a tax to be paid by each individual.

Laying a tax.

Adjusting the shares of a contribution by several towards a common beneficial object according to the benefit received.

An assessment is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. It does not of itself lay the charge upon either person or property, but is a step preliminary thereto, and which is essential to the apportionment; Evansville & I. R. Co. v. Hays, 118 Ind. 214, 20 N. E. 736. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them; City of Chicago v. Fishburn, 189 Ill. 367, 59 N. E. 791; Pomeroy Coal Co. v. Emlen, 44 Kan. 123, 24 Pac. 340; State v. R. Co., 54 S. C. 564, 32 S. E. 691. To assess a tax is to determine what a taxpayer shall contribute to the public; and to levy a tax is to make a record of this determination and to extend the same against his property; Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069.

A local assessment can only be levied upon land. It cannot, as a tax can, be made a personal liability of the taxpayer. A tax is levied over a whole state, or a political subdivision. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other existence than to be the thing on which the levy is made. A tax is a continuing burden; a local assessment is exceptional both as to time and locality; it is brought into being to accomplish a particular purpose. A tax is levied, collected, and administered by a public agency; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule. It is unlike a tax in that the proceeds must be expended in an improvement from which a benefit, clearly exceptive and plainly perceived, must enure to the property upon which it is imposed; Town of Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451 (a leading case).

Though local assessments are laid under the taxing power, and are, in a certain sense, taxes, yet they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed; Mayor, etc., of Birmingham v. Klein, 89 Ala. 461, 7 South. 386, 8 L. R. A. 369; Holley v. County of Orange, 106 Cal. 420, 39 Pac. 790; Nichols v. City of Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; City Council of Augusta v. Murphey, 79 Ga. 101, 3 S. E. 326; Dempster v. Chicago, 175 Ill. 278, 51 N. E. 710; Board of Com'rs of Monroe County v. Harrell, 147 Ind. 500, 46 N. E. 124; Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722; Jones v. City of Boston, 104 Mass. 461; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; Mann v. Jersey City, 24 N. J. L. 662; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330; Raymond v. City of Cleveland, 42 Ohio St. 522; Beaumont v. Wilkes-Barre City, 142 Pa. 198, 21 Atl. 888; Heller v. City of Milwaukee, 96 Wis. 134, 70 N. W. 1111; as where a mining lease required a lessee to pay taxes, duties and imposts on coal mined, the mining improvements, and the surface and coal land itself, it was held not to require him to pay municipal assessments for paving a street or constructing a sewer; Pettibone v. Smith, 150 Pa. 118, 24 Atl. 693, 17 L. R. A. 423; and a devise requiring the life tenant to pay all necessary taxes on the property was held not to include assessments for sewers and curbing; Chambers v. Chambers, 20 R. I. 370, 39 Atl. 243; Chamberlin v. Gleason, 163 N. Y. 214, 57 N. E. 487. But "taxes" was held to include a sewer assessment in an agreement to convey a good title to land free from all mortgage encumbrances, taxes and mechanic's liens; Williams v. Monk, 179 Mass. 22, 60 N. E. 394.

The power to make special assessments for public improvements is within the taxing power of the state; People v. Mayor, etc., of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266, note; People v. Pitt, 169 N. Y. 521, 62 N. E. 662, 58 L. R. A. 372. The authority may be exercised directly, or it may be left to local boards or bodies; In re Piper, 32 Cal. 530; Kelly

v. Chadwick, 104 La. 719, 29 South. 295; People v. Buffalo, 147 N. Y. 675, 42 N. E. 344 (where assessors and not common council were authorized to fix the district of assessment for river dredging); but in the latter case the determination will be by a body possessing, for the purpose, legislative power, and whose action must be as conclusive as if taken by the legislature itself; Cooley, Taxation [3d ed.] 1207), where it is said the two methods of apportionment between which a choice is usually made are: 1. An assessment made by assessors or commissioners, appointed for the purpose under legislative authority, who are to view the estates and levy the expense in proportion to the benefits which, in their opinion, the estates respectively will receive from the work proposed. 2. An assessment by some definite standard fixed upon by the legislature itself, which is applied to estates by a measurement of length, quantity, or value.

An assessment will be upheld wherever it is not obvious from the nature and location of the property involved, the district prescribed, the condition and character of the improvement, or the cost and relative value of the property to the assessment, that the method adopted has resulted in imposing a burden in substantial excess of the benefits, or disproportionate, within the district, as between owners; King v. Portland, 184 U. S. 69, 22 Sup. Ct. 290, 46 L. Ed. 431, affirming *id.*, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; Weber v. Reinhard, 73 Pa. 373, 13 Am. Rep. 747; Jones v. City of Boston, 104 Mass. 461; Ahern v. Board of Improvement Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Simpson v. Kansas City, 46 Kan. 438, 26 Pac. 721; City of Chicago v. Baer, 41 Ill. 306; State v. Fuller, 34 N. J. L. 227.

A principle of assessment is void if it is not based upon benefits to the property assessed, and the assessment limited to the benefits; Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Lee v. Ruggles, 62 Ill. 427; In re Application for Drainage of Lands between Lower Chatham and Little Falls, 35 N. J. L. 497; In re City of New York, 3 Wend. (N. Y.) 452; Gilmore v. Hentig, 33 Kan. 174, 5 Pac. 781; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; Allegheny City v. R. Co., 138 Pa. 375, 21 Atl. 763; Hutcheson v. Storrie, 92 Tex. 688, 51 S. W. 848, 45 L. R. A. 289, 71 Am. St. Rep. 884; Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484; Cowley v. City of Spokane, 99 Fed. 840. That the cost of a local improvement may be assessed without regard to benefit is held in some jurisdictions; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Weeks v. City of Milwaukee, 10 Wis. 242, where the power to impose such burdens is placed upon a constitutional recognition of the power to make assessments as distinguished from taxation. It was held in In re Kingman, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417, that assessments for public improvement need not be in proportion to the benefits. In Iowa all local assessments are based on the simple ground that the object is public, and that the system of taxing abutting lots secures such a just distribution of burdens as to be within the rule requiring uniformity of taxation; Morrison v. Hershire, 32 Ia. 271.

Front Foot Rule. The apportionment of the entire cost of a pavement upon abutting lots according to frontage, without any preliminary hearing as to benefits, may be authorized by the legislature, and this will not constitute a taking without due process of law; French v. Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879. This case and the other cases reported in the same volume all involved the constitutionality of acts creating special taxing districts and providing for assessing the costs of local improvements upon abutting property, in proportion to their frontage. The opinions were delivered in all of them by Mr. Justice Shiras; Harlan, White and McKenna, JJ., dissenting.

In Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, an assessment of certain real estate in New Orleans for draining swamps was resisted in the state courts, and the case came into the Supreme Court of the United States on the ground that the proceeding deprived the owner of his property without due process of law. The origin and history of this provision of the constitution as found in Magna Carta and in the 5th and the 14th amendments were considered; the cases of Murray v. Imp. Co., 18 How. 272, 15 L. Ed. 372, and McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335, were approved; and it was held that "neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the federal constitution." And to the same effect, French v. Pav. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879, where the question involved was the constitutionality of the apportionment of the cost of a street pavement upon the lots of abutters.

There is a wide difference between a tax or assessment prescribed by a legislative body, and one imposed by a municipal corporation. And the difference is still wider between an act making the assessment, and the action of mere functionaries acting under municipal ordinances; Parsons v. District of Columbia, 170 U. S. 52, 18 Sup. Ct.

521, 42 L. Ed. 943, where the legislation in question was that of Congress, and was considered in the light of the conclusion that the United States possesses complete jurisdiction both of a political and municipal character. There a comprehensive system regulating the supply of water and the erection and maintenance of reservoirs and water mains was established, and of it every property owner of the District of Columbia was presumed to have notice. Accordingly, it was held that, when Congress enacted that thereafter assessments for laying water mains be levied on a front foot basis against all abutting lots, such act must be deemed conclusive alike of the question of the necessity of the work and of its benefits to abutting property, and that a property owner could not be heard to complain that he was not notified of the creation of such a system, or consulted as to the probable cost thereof.

The question of special benefit and the property to which it extends is a question of fact, and when the legislature determines it in a case within its general power, its decision is final; Spencer v. Merchant, 100 N. Y. 585, 3 N. E. 682. The courts cannot review its discretion. Where a tax or assessment is imposed by a direct exercise of the legislative power, calling for no inquiry into the weight of evidence, nor for anything in the nature of judicial examination, no notice to the owner is required; Hagar v. Dist. No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. But where an assessment is imposed upon property according to its value to be ascertained by assessors upon evidence, such officers act judicially; Williams v. Weaver, 100 U. S. 547, 25 L. Ed. 708; and notice and opportunity to be heard are necessary; *id.*

Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, was not intended, it is said, to overrule Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270, or Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943, both of these cases being cited in the opinion in the former case, and declared not to be inconsistent with the conclusion there reached. Special facts showing an abuse or disregard of the law, resulting in an actual deprivation of property, may be ground for applying to a court of equity; and this was thought by a majority of the Supreme Court to have been the case in Norwood v. Baker, supra, per Shiras, J., in Wight v. Davidson, 181 U. S. 371, 385, 21 Sup. Ct. 616, 45 L. Ed. 900.

The legislative authority in respect to assessment districts is sometimes exercised by making several districts for a single work, as in case of street improvements, a statute may make each street or part of a street a taxing district; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738. Where unconnected sections of a street were opened, such sections were held separate streets, and the cost of each chargeable on the property benefited; In re Opening One Hundred and Sixty-Seventh St., 68 Hun 158, 22 N. Y. Supp. 604; Bacon v. City of Savannah, 86 Ga. 301, 12 S. E. 580. Where a street is of different widths, it may be divided into as many sections as there are different widths, and the property on each section be assessed for the cost thereof; Findlay v. Frey, 51 Ohio St. 390, 38 N. E. 114. The improvement of several streets may be treated as one work for the purposes of a special assessment and the whole work apportioned by uniform rule throughout one district; Parker v. Challiss, 9 Kan. 155; Arnold v. Cambridge, 106 Mass. 352; Litchfield v. Vernon, 41 N. Y. 123. The legislature may create a city boundary, or designate any other boundary, for a local taxing district, without reference to existing civil or political districts; and a city, as such a district, may tax property within its limits which it would not be able to tax for municipal purposes only; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493; or it may create tax districts for road purposes without regard to the boundaries of counties, townships, or municipalities; Board of Com'rs of Monroe County v. Harrell, 147 Ind. 500, 46 N. E. 124; Street Lighting Dist. No. 1 v. Drummond, 63 N. J. L. 493, 43 Atl. 1061; for the construction and maintenance of a bridge across a river, several towns may be created a bridge and highway district; State v. Williams, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465. See Cooley, Taxation (3d ed.) 238. Taxing districts may be as numerous as the purposes for which the taxes are levied; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

Of Damages. Fixing the amount of damages to which the prevailing party in a suit is entitled.

It may be done by the court through its proper officer, the clerk or prothonotary, where the assessment is a mere matter of calculation, but must be by a jury in other cases. See DAMAGES; MEASURE OF DAMAGES.

In Insurance. An apportionment made in general average upon the various articles and interests at risk, according to their value at the time and place of being in safety, for contribution for damages and sacrifices purposely made, and expenses incurred for escape from impending common peril. 2 Phill. Ins. c. xv.

It is also made upon premium notes given by the members of mutual fire insurance companies, constituting their capital, and being a substitute for the investment of the paid up stock of a stock company; the liability to such assessments being regulated by the charter and the by-laws; May, Ins. § 549; Herkimer County Mut. Ins. Co. v. Full-

er, 14 Barb. (N. Y.) 374; New England Mut. Fire Ins. Co. v. Belknap, 9 Cush. (Mass.) 140; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Susquehanna Mut. Fire Ins. Co. v. Leavy, 136 Pa. 499, 20 Atl. 502, 505. A member of a mutual insurance company, who has paid something on a premium note, can be assessed for further losses to the face of the note only; Davis v. Parcher & Stewart Co., 82 Wis. 488, 52 N. W. 771. The right to assess is strictly construed, the notes being merely conditional promises to pay; Tesson v. Ins. Co., 40 Mo. 39, 93 Am. Dec. 293; American Ins. Co. v. Schmidt, 19 Ia. 502; Devendorf v. Beardsley, 23 Barb. (N. Y.) 656; May, Ins. § 557. As to assessments on corporate stock, see STOCK.

ASSESSMENT DISTRICTS. See ASSESSMENT.

ASSESSORS. In Civil and Scotch Law. Persons skilled in law, selected to advise the judges of the inferior courts. Bell, Dict.; Dig. 1. 22; Cod. 1. 51.

As to admiralty practice, see NAUTICAL ASSESSORS.

ASSETS. All the stock in trade, cash, and all available property belonging to a merchant or company.

The property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or other trustee is, as such, required to discharge.

Assets enter mains. Assets in hand. Such property as at once comes to the executor or other trustee, for the purpose of satisfying claims against him as such. *Termes de la Ley.*

Equitable assets. Such as can be reached only by the aid of a court of equity, and which are to be divided, *pari passu*, among all the creditors; 2 Fonblanque 401; Willis, Trust. 118.

Legal assets. Such as constitute the fund for the payment of debts according to their legal priority.

Assets per descent. That portion of the ancestor's estate which descends to the heir, and which is sufficient to charge him, as far as it goes, with the specialty debts of his ancestors; 2 Williams, Ex. (7th Am. ed.) *1553.

Personal assets. Goods and personal chattels to which the executor or administrator is entitled.

Real assets. Such as descend to the heir, as an estate in fee-simple.

In the United States, generally, by statute, all the property of a decedent, real and personal, is liable for his debts, and is to be applied as follows, when no statute prescribes a different order of application, exhausting all the assets of each class before proceeding to the next; *first*, the personal estate not specifically bequeathed; *second*, real estate devised or ordered to be sold for the payment of debts; *third*, real estate descended but not charged with debts; *fourth*, real estate devised, charged generally with the payment of debts; *fifth*, general pecuniary legacies *pro rata; sixth*, real estate devised, not charged with debts; 4 Kent 421; 2 Wh. & T. Lead. Cas. 72.

With regard to the distinction between realty and personalty in this respect, growing crops go to the administrator; Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; Kain v. Fisher, 6 N. Y. 597; Cheney v. Roodhouse, 135 Ill. 257, 25 N. E. 1019; he is entitled to a crop of cotton, the cultivation of which was practically completed at intestate's death, although it was harvested and sold by the heirs; Marx v. Nelms, 95 Ala. 304, 10 South. 551. See Wright v. Watson, 96 Ala. 536, 11 South. 634; so do nurseries, though not trees in general; Chapman v. City of Lowell, 4 Cush. (Mass.) 380; as do bricks in a kiln; Taunton Copper Co. v. Ins. Co., 22 Pick. (Mass.) 110; so do chattels real, as interests for years and mortgages; and hence the administrator must bring the action if the mortgagor die before foreclosing; Lewis' Heirs v. Ringo, 3 A. K. Marsh. (Ky.) 249; so does rent, provided the intestate dies before it is due; oil produced after testator's death and accruing as royalty, being the consideration for the lease, is not of the corpus but a part of the income of the estate; In re Woodburn's Estate, 138 Pa. 606, 21 Atl. 16, 21 Am. St. Rep. 932. Fixtures go to the heir; 2 Smith, Lead. Cas. 99; Jackson v. Twentyman, 2 Pet. (U. S.) 137, 7 L. Ed. 374; Swift v. Thompson, 9 Conn. 67, 21 Am. Dec. 718. In copyrights and patents the administrator has right enough to get them extended and beyond the customary time; Wilson v. Rousseau, 4 How. (U. S.) 646, 11 L. Ed. 1141. Where land is sold in partition, and one dies before the proceeds are distributed, his share passes as personalty to his administrator; State v. Harper, 54 Mo. App. 286. Land which an executor is directed to sell is personalty; 6 Ves. 520; 8 Ves. 547; Thomman's Estate, 161 Pa. 444, 29 Atl. 84; but a naked discretionary power of sale will not work a conversion until it is exercised; Sheridan v. Sheridan, 136 Pa. 14, 19 Atl. 1068; Darlington v. Darlington, 160 Pa. 65, 28 Atl. 503; In re Pyott's Estate, 160 Pa. 441, 28 Atl. 915, 921. Where the right of eminent domain has been exercised it converts the land into personalty in Pennsylvania; Hough's Estate, 3 D. R. Pa. 187; but not in New Jersey; Wetherill v. Hough, 52 N. J. Eq. 683, 29 Atl. 592. The wife's paraphernalia cannot be taken from her, in England, for the benefit of the children and heirs, but may be for creditors. In the United States, generally, the wearing apparel of widows and minors is retained by them, and

is not assets. So among things reserved is the widow's quarantine, *i. e.* forty days of food and clothing; Griswold v. Chandler, 5 N. H. 495; Washburn v. Hale, 10 Pick. (Mass.) 430.

A claim against the United States is not a local asset in the District of Columbia; King v. U. S., 27 Ct. Cl. 529. See Woerner, Am. L. of Admn.

See MARSHALLING OF ASSETS.

ASSEVERATION. The proof which a man gives of the truth of what he says, by appealing to his conscience as a witness.

It differs from an oath in this, that by the latter he appeals to God as a witness of the truth of what he says, and invokes him, as the avenger of falsehood and perfidy, to punish him if he speak not the truth. See AFFIRMATION; OATH.

ASSIGN. To make or set over to another. 2 Bla. Com. 326; Watkinson v. Inglesby, 5 Johns. (N. Y.) 391.

To appoint; to select; to allot. 3 Bla. Com. 58.

To set forth; to point out; as, to assign errors. Fitzherbert, Nat. Brev. 19.

ASSIGNATION. In French Law, a writ of summons.

ASSIGNEE. One to whom an assignment has been made.

Assignee in fact is one to whom an assignment has been made in fact by the party having the right.

Assignee in law is one in whom the law vests the right: as, an executor or administrator. See ASSIGNMENT.

ASSIGNMENT (Law Lat. *assignatio*, from *assigno*,—*ad* and *signum*,—to mark for; to appoint to one; to appropriate to).

A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.

A transfer by writing, as distinguished from one by delivery.

The transfer of the interest one has in *lands* and *tenements*, and more particularly applied to the unexpired residue of a term or estate for life or years; Cruise, Dig. tit. xxxii. (Deed) c. vii, § 15; 1 Steph. Com. 507. The deed by which the transfer is made is also called an assignment; Comyns, Dig.; Bacon, Abr.; La. Civ. Code, art. 2612; Angell, Assign.; 1 Am. Lead. Cas. 78, 85; 4 Cruise, Dig. 160.

What may be assigned. Every demand connected with a right of property, real or personal, is assignable. Every estate and interest in lands and tenements may be assigned, as also every present and certain estate or interest in incorporeal hereditaments, even though the interest be future, including *a term of years* to commence at a subsequent period; for the interest is vested *in præsenti*, though only to take effect *in futuro*; Co. Litt. 46 *b*; *rent* to grow due (but not that in arrear, Demarest v. Willard, 8 Cow. [N. Y.] 206); *a right of entry* where the breach of the condition *ipso facto* terminates the estate; Gwynn v. Jones' Lessee, 2 G. & J. (Md.) 173; Ensign v. Kellogg, 4 Pick. (Mass.) 1; *a right to betterments;* Lombard v. Ruggles, 9 Greenl. (Me.) 62; the *right to cut trees*, which have been sold on the grantor's land; Olmstead v. Niles, 7 N. H. 522; Pease v. Gibson, 6 Greenl. (Me.) 81; Emerson v. Fisk, 6 Greenl. (Me.) 200, 19 Am. Dec. 206; Kent v. Kent, 18 Pick. (Mass.) 569; McCoy v. Herbert, 9 Leigh (Va.) 548, 33 Am. Dec. 256; 11 Ad. & E. 34; a cause of action for cutting timber on another's land; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830; *a right in lands* which may be perfected by *occupation;* Smith v. Rankin, 4 Yerg. (Tenn.) 1, 26 Am. Dec. 213; Cook v. Shute, Cooke (Tenn.) 67. But no right of entry or re-entry can be assigned; Eskridge v. McClure, 2 Yerg. (Tenn.) 84; Littleton § 347; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Gwyn v. Wellborn, 18 N. C. 319; nor *a naked power;* though it is otherwise where it is coupled with an interest; 2 Mod. 317.

To make an assignment valid at law, the subject of it must have an existence, actual or potential, at the time of the assignment; Needles v. Needles, 7 Ohio St. 432, 70 Am. Dec. 85; 15 Mees. & W. 110; Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646. But courts of equity will support an assignment not only of interests in action and contingency, but of things which have no present, actual, or potential existence, but rest in mere possibility only; 2 Story, Eq. Jur. (13th ed.) §§ 1040 *b*, 1055; Fearne, Cont. Rem. 527; Smedes v. Bank, 20 Johns. (N. Y.) 380; as an heir's possibility of inheritance; Fitzgerald v. Vestal, 4 Sneed (Tenn.) 258; see 1 Ch. Rep. 29; Bacon v. Bonham, 33 N. J. Eq. 614; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96; Mandeville v. Welch, 5 Wheat. 283, 5 L. Ed. 87. "An assignment cannot at law pass future property, but it may be made effectual against future property on the ground that a court of equity will in a suitable case enforce it as a contract." 36 Ch. D. 348, 351. "It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode * * * is absolutely immaterial provided the intention of the parties is clear;" 13 A. C. 523.

The assignment of personal property is chiefly interesting in regard to choses in action and as to its effect in cases of insolvency and bankruptcy.

A chose in action cannot be transferred at common law; 10 Co. 48; Litt. 266 *a*; Thallhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; 1 Cra. (U. S.) 367; Pillsbury v. Mitchell, 5 Wis. 17; Chapman v. Holmes' Ex'rs, 10 N. J. L.

20. But the assignee may sue in the assignor's name, and the assignment will be considered valid in equity. See *infra.*

In equity, as well as at law, some choses in action are not assignable on the ground that they are against public policy, as *an officer's pay,* or commission; 2 Anstr. 533; 1 Ball & B. Ch. 387; 1 Swanst. 74; Schwenk v. Wyckoff, 46 N. J. Eq. 560, 20 Atl. 259, 9 L. R. A. 221, 19 Am. St. Rep. 438; or *the salary of a judge;* Morrison v. Deaderick, 10 Humphr. (Tenn.) 342; 5 Moore, P. C. C. 219; *contra,* State v. Hastings, 15 Wis. 78; or of unearned pay of public officers generally; Bliss v. Lawrence, 58 N. Y. 442, 17 Am. Rep. 273; Bowery Nat. Bank of New York v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; Inhabitants of Wayne Township v. Cahill, 49 N. J. L. 144, 6 Atl. 621; Schloss v. Hewlett, 81 Ala. 266, 1 South. 263 (but see *contra,* Johnson v. Pace, 78 Ill. 143; Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; Brackett v. Blake, 7 Metc. [Mass.] 335, 41 Am. Dec. 442; and also August v. Crane, 28 Misc. Rep. 549, 59 N. Y. Supp. 583; and Ciples v. Blair, Rice Eq. [S. C.] 60, where costs and fees were distinguished from salary and held assignable); or *claims for fishing* or other bounties from the government; or *rights of action for fraud* or tort as a right of action for *assault;* or in *trover;* Gardner v. Adams, 12 Wend. (N. Y.) 297 (*aliter* of a right of action in *replevin;* Foy v. R. Co., 24 Barb. [N. Y.] 382); or *of the sale of fish not yet caught;* Low v. Pew, 108 Mass. 350, 11 Am. Rep. 357; *assignment by a prosecuting attorney;* Holt v. Thurman, 111 Ky. 84, 63 S. W. 280, 98 Am. St. Rep. 399; or *by a sheriff to secure a promissory note;* Bowery Nat. Bank v. Wilson, 122 N. Y. 478, 25 N. E. 855, 9 L. R. A. 706, 19 Am. St. Rep. 507; *a cause of action for deceit is assignable;* Dean v. Chandler, 44 Mo. App. 338; and it seems that all rights of action which *would survive* to the personal representatives, may be assigned; Butler v. R. Co., 22 Barb. (N. Y.) 110; Patten v. Wilson, 34 Pa. 299; Jordan v. Gillen, 44 N. H. 424; Walton v. Rafel, 7 Misc. 663, 28 N. Y. Supp. 10; so of a right of action against a common carrier for not delivering goods; Jordan v. Gillen, 44 N. H. 424; or for injury to goods; Norfolk & W. R. Co. v. Read, 87 Va. 185, 12 S. E. 395. It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement, but under engagements subsequently to be made, are not assignable; Herbert v. Bronson, 125 Mass. 475; Bell v. Mulholland, 90 Mo. App. 612; Lehigh Valley R. Co. v. Woodring, 116 Pa. 513, 9 Atl. 58. If there is an existing employment under which it may reasonably be expected that the wages will be earned, then the possibility is coupled with an interest and the wages may be assigned; Rodijkeit v. Andrews, 74 Ohio St. 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564, 6 Ann. Cas. 761; Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; Edwards v. Peterson, 80 Me. 367, 14 Atl. 936, 6 Am. St. Rep. 207; Metcalf v. Kincaid, 87 Ia. 443, 54 N. W. 867, 43 Am. St. Rep. 391; Peterson v. Ball, 121 Ia. 544, 97 N. W. 79; Bell v. Mulholland, 90 Mo. App. 612; Kane v. Clough, 36 Mich. 436, 24 Am. Rep. 599; Manly v. Bitzer, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; Schilling v. Mullen, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; Augur v. Packing Co., 39 Conn. 536; Garland v. Harrington, 51 N. H. 409; Mulhall v. Quinn, 1 Gray (Mass.) 105, 61 Am. Dec. 414; and this is true though the employment is for no definite period and may be terminated at any time by either party; Thayer v. Kelley, 28 Vt. 19, 65 Am. Dec. 220. The distinction between the two classes of cases is well illustrated where a workman assigned all the wages he would earn in a year from his then employer, and having left that employment for two months and afterwards returned to it, the wages of the second employment did not pass, being considered as a mere possibility; O'Keefe v. Allen, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884. It has been suggested that to prevent the assignment of future earnings is in accordance with public policy; Woodring v. R. Co., 2 Pa. Co. Ct. 465; but while that is approved, it is suggested that such a policy must be a matter of legislative intervention; 14 Harv. L. Rev. 379. The assignment by a master in chancery of his unearned fees is void; Shannon v. Bruner, 36 Fed. 147; as is the assignment by an executor of his fees before they are ascertained and fixed; In re Worthington, 141 N. Y. 9, 35 N. E. 929, 23 L. R. A. 97. A cause of action for *malicious prosecution* is not assignable even after verdict; Lawrence v. Martin, 22 Cal. 174; Butler v. R. Co., 22 Barb. (N. Y.) 110; North v. Turner, 9 S. & R. (Pa.) 244; 6 Madd. 59; 2 M. & K. 592; nor is a right to recover damages for false imprisonment; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512; nor any *rights pendente lite.* Nor can *personal trusts* be assigned; Arkansas Valley Smelting Co. v. Min. Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; as the *right of a master* in his apprentice; Graham v. Kinder, 11 B. Monr. (Ky.) 60; Davis v. Coburn, 8 Mass. 299; or *the duties of a testamentary guardian;* Balch v. Smith, 12 N. H. 437; nor a *contract* for the performance of *personal services;* Halbert v. Deering, 4 Litt. (Ky.) 9; or one involving a relation of personal confidence; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; or one which couples the delegation of a duty with the transfer of a right. This was substantially the ground of the case of Boston

Ice Co. v. Potter, in 123 Mass. 28, 25 Am. Rep. 9, where a contract to supply merchandize was held not assignable since "a man has the right to determine with whom he shall contract," which case has been much discussed, and its name coupled with the doctrine declared by it; see 7 Columbia L. Rev. 32; 20 Harv. L. Rev. 424. In England courts have gone farther, holding that a contract was not assignable when the result would be to impose on one party a greater liability than he intended to assume; [1901] 2 K. B. 811, where a contract to supply a small company was held not assignable to a powerful company with larger capital which would require much larger supplies, the court expressly declining to "accept the contention that only those contracts in which personal confidence or ability is involved cannot be assigned." An invention may be transferred by parol; Jones v. Reynolds, 120 N. Y. 213, 24 N. E. 279; every patent or interest therein is assignable; R. S. U. S. § 4898; an assignment of a contingent remainder for a valuable consideration, while void in law, is enforceable in equity; Watson v. Smith, 110 N. C. 6, 14 S. E. 640, 28 Am. St. Rep. 665. An assignment of the proceeds of sale of merchandize to be delivered in the future, where no contract exists requiring such delivery by the assignor, is not valid, even though notice of it was accepted by the assignee, and the amount actually due was not secured from garnishment by a creditor of the assignor; O'Niel v. Kerr Co., 124 Wis. 234, 102 N. W. 573, 70 L. R. A. 338. But a valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be in writing nor accompanied by any transfer of the contract itself; Lanigan's Adm'r v. Currier Co., 50 N. J. Eq. 201, 24 Atl. 505.

In the assignment of a chose in action it is essential that it be delivered; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529; Hodenpuhl v. Hines, 160 Pa. 466, 28 Atl. 825; a partial assignment of choses in action is good in equity, although the legal title remains in the assignor; Texas Western Ry. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; the assignment of a fractional part of a claim is good, where the party who is to pay does not object; Kingsbury v. Burrill, 151 Mass. 199, 24 N. E. 36.

It is "a rule of general jurisprudence that if a person enters into a contract, and, without notice of any assignment, fulfills it to the person with whom he made the contract, he is discharged from his obligation;" L. R. 5 C. P. 594, per Willes, J.

Whether a prior assignment of a chose in action will be protected when no notice of it is given to the subsequent assignee or to the trustee or debtor, is a question somewhat complicated by the adherence of the English courts to a doctrine known as the rule of Dearle v. Hall, 3 Russ. 1, adopted also in Loveridge v. Cooper, *id.* 30. This rule is that an assignment of an equitable interest, or of a chose in action, without notice to the person having legal dominion of the subject matter, will be postponed to one made subsequently, of which notice is given. In applying this rule the English courts have held that inquiry by the later assignee is immaterial; 3 Cl. & Fin. 456; and that it is also immaterial that there was no trustee or person having dominion of the fund to whom the first assignee could give notice; [1904] 2 Ch. 385 (where it was said that "Dearle v. Hall is indisputable law, although many judges have said that they will not extend it"); that knowledge of the first assignment accidentally acquired by the trustee would protect it where there had been no formal notice; L. R. 3 Ch. App. 488; and that, in case of inquiry by the subsequent assignee, the trustee is not bound to answer; [1891] 3 Ch. 82; that notice to one of several trustees was sufficient, he not being the assignor; 4 De G., F. & J. 147; but knowledge of the assignor, being one of the trustees, did not avail in default of notice to the other two; 4 Drew. 635; [1901] 1 Ch. 365, where Cozens-Hardy, J., said: "I do not profess to be able to discover any definite principle upon which the rule in Dearle v. Hall is founded. Nevertheless it must now be recognized as a positive rule, though it is not one to be extended." This rule was recognized as law in [1893] A. C. 369, but it was critically examined and discussed by both L. Ch. Herschell and Lord Macnaghten and it is manifest that nothing short of the rigor of the English observance of the doctrine of *stare decisis* has maintained its authority.

The rule of the English courts was applied to an assignment of an interest in an English trust, made by one domiciled in New York; [1905] 2 Ch. 117, where the court admitted the validity of the assignment under the *lex loci contractus*, but considered that the law of the court administering a trust fund should settle the order of payment as between claimants.

The English rule requiring notice to the holder of the legal title or trustee of an assignment of the equitable interest or chose in action, has been followed in Judson v. Corcoran, 17 How. (U. S.) 614, 15 L. Ed. 231; Methven v. Power Co., 66 Fed. 113, 13 C. C. A. 362; Spain v. Hamilton's Adm'r, 1 Wall. (U. S.) 604, 17 L. Ed. 619; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578; Vanbuskirk v. Ins. Co., 14 Conn. 141, 36 Am. Dec. 473; Phillips' Estate, 205 Pa. 515, 55 Atl. 213, 66 L. R. A. 760, 97 Am. St. Rep. 746; Murdoch v. Finney, 21 Mo. 138 (and see Thomas v. Liebke, 13 Mo. App. 389); Merchants' and Mechanics' Bank of Chicago v. Hewitt, 3 Ia. 93, 66 Am. Dec. 49; Graham Paper Co. v. Pembroke, 124 Cal. 120,

56 Pac. 627, 44 L. R. A. 634, 71 Am. St. Rep. 26; Meier v. Hess, 23 Or. 602, 32 Pac. 755. In other cases the assignment is held to be effectual without notice even against a subsequent assignment of which notice was given; Putnam v. Story, 132 Mass. 205; Goodding v. Riley, 50 N. H. 408; Garland v. Harrington, 51 N. H. 409; Fortunato v. Patten, 147 N. Y. 277, 41 N. E. 572; Central Trust Co. of New York v. Imp. Co., 169 N. Y. 314, 62 N. E. 387. The cases are collected in 1 Perry Trusts, § 438, note. In Clodfelter v. Cox, 1 Sneed (Tenn.) 339, 60 Am. Dec. 157, it is said that there is an irreconcilable conflict in the American cases, and though the weight of authority seems to be against the English rule, the latter is considered more reasonable and safe and therefore followed. In a note to 14 Conn. 141, the view of the Tennessee court in that case as to the weight of authority is questioned and it is suggested as more correct to say that "by the preponderance of authority," an assignee of a chose in action without notice is protected against creditors of the assignor but not as against a subsequent assignee for value and in good faith, and this is said to be the English rule properly stated; 36 Am. Dec. 476 note.

The assignment of bills of exchange and promissory notes by general or special endorsement constitutes an exception to the law of transfer of choses in action. When negotiable (*i. e.*, made payable to order), they are transferable by the statute of 3 & 4 Anne; they may then be transferred by endorsement; the holder can sue in his own name, and the equitable defences which might have existed between the promisor and the original promisee are cut out; Bump v. Van Orsdale, 11 Barb. (N. Y.) 637, 639; Andrews v. Carr, 26 Miss. 577; Neyfong v. Wells, Hard. (Ky.) 562; where a payee endorses a note to third party adding a guaranty of payment, the contract and guaranty are assignable; Harbord v. Cooper, 43 Minn. 466, 45 N. W. 860. The assignee of a bill of lading has only such rights as the consignee would have had; Haas v. R. Co., 81 Ga. 792, 7 S. E. 629.

An assignee stands in the place of his assignor and takes simply his assignor's rights; Taliaferro v. Bank, 71 Md. 200, 17 Atl. 1036.

The most extensive class of assignments are the general assignments in trust made by insolvent and other debtors for the payment of their debts. These are usually regulated by state statutes.

The right of an insolvent debtor to make an assignment for the benefit of his creditors exists at common law, and when good in the state where executed is good in every state; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617. Where the assignment is valid under the laws of one state it will pass a debt to the assignor due under contract made there with a citizen of another state, though the assignment is void in such other state; O'Neill v. Nagle, 19 Abb. N. C. (N. Y.) 399.

Voluntary or common law assignments of property in other states will be respected except so far as they come into conflict with the rights of local creditors or with the laws or public policy of the state in which the assignment is sought to be enforced; Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247. With respect to statutory assignments, the prevailing doctrine is that a conveyance under a state insolvent law operates only upon property within that state and that with respect to property in other states it is given only such effect as the law of such other state would permit; and that in general it must give way to the claims of creditors pursuing their remedies there. It passes no title to real estate in another state. Nor as to personal property will the title acquired by it prevail against the garnishment of a debt due by the resident of another state or the seizure of tangible property therein under the laws of the state where the property is; Barth v. Backus, 140 N. Y. 240, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Catlin v. Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. Rep. 338; Security Trust Co. v. Dodd, 173 U. S. 624, 19 Sup. Ct. 545, 43 L. Ed. 845; King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. Ed. 211.

A debtor making an assignment for creditors may legally choose his own trustee, and the title passes out of him to them; Nichols v. McEwen, 21 Barb. (N. Y.) 65; Wilt v. Franklin, 1 Binn. (Pa.) 514, 2 Am. Dec. 474; Hannah v. Carrington, 18 Ark. 85; Hempstead v. Johnston, 18 Ark. 123, 65 Am. Dec. 458; Vansands v. Miller, 24 Conn. 180. The assent of creditors will ordinarily be presumed; Ashley's Adm'r v. Robinson, 29 Ala. 112, 65 Am. Dec. 387; Eager v. Com., 4 Mass. 183; Sebor v. Armstrong, 4 Mass. 206; De Forest v. Bacon, 2 Conn. 633; North v. Turner, 9 S. & R. (Pa.) 244; Copeland v. Wild, 8 Greenl. (Me.) 411.

In some states the statutes provide that the assignment shall be for the benefit of all creditors equally, in others preferences are legal. Independently of bankrupt and insolvent laws, or laws forbidding preferences, priorities and preferences in favor of particular creditors are allowed. Such preference is not considered inequitable, nor is a stipulation that the creditors taking under it shall release the debtor from all further claims; Sebor v. Armstrong, 4 Mass. 206; Doe v. Scribner, 41 Me. 277; Nutter v. Harris, 9 Ind. 88; Pearpoint v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10,877; Cameron v. Montgomery, 13 S. & R. (Pa.) 132; Frazier v. Fredericks, 24 N. J. L. 162; Billings v. Billings, 2 Cal. 107, 56 Am. Dec. 319; Cooper v. McClun, 16 Ill. 435; Miller v. Conklin, 17 Ga.

430, 63 Am. Dec. 248; U. S. v. Lenox, 2 Paine, 180, Fed. Cas. No. 15,592; Murray v. Riggs, 15 Johns. (N. Y.) 571; Union Bank of Maryland v. Kerr, 7 Md. 88; American Exchange Bank v. Inloes, *id.* 381; Hatton's Adm'rs v. Jordan, 29 Ala. 266; Haven v. Richardson, 5 N. H. 113; Brooks v. Marbury, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; Savings Bank of New Haven v. Bates, 8 Conn. 505; Hicks v. Harris, 26 Miss. 423; Bellamy v. Sheriff, 6 Fla. 62; Nightingale v. Harris, 6 R. I. 328; Lake Shore Banking Co. v. Fuller, 110 Pa. 156, 1 Atl. 731; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992; Van Wyck v. Read, 43 Fed. 716. See PREFERENCES.

How made. It used to be held that the instrument of assignment must be of as high a character and nature as the instrument transferred; but now a parol (usually written) assignment may transfer a deed, if the deed be at the same time delivered; Cannaday v. Shepard, 55 N. C. 224; Jones v. Witter, 13 Mass. 304; Porter v. Bullard, 26 Me. 448; Jackson v. Housel, 17 Johns. (N. Y.) 284; Prescott v. Hull, *id.* 292; Morange v. Edwards, 1 E. D. Smith (N. Y.) 414; Onion v. Paul, 1 Harr. & J. (Md.) 114; Lessee of Bentley's Heirs v. Deforest, 2 Ohio 221; Durst v. Swift, 11 Tex. 273; 5 Ad. & E. 107; 1 Madd. Ch. 53. When the transfer of personal chattels is made by an instrument as formal as that required in the assignment of an interest in lands, it is commonly called a *bill of sale* (which see). See as to the distinction, Blank v. German, 5 W. & S. (Pa.) 36. In most cases, however, personal chattels are transferred by mere note or memorandum, or, as in the case of negotiable paper, by mere endorsement; Ball v. Larkin, 3 E. D. Smith (N. Y.) 555; Ryan v. Maddux, 6 Cal. 247; Field v. Weir, 28 Miss. 56; Worthington v. Curd, 15 Ark. 491. "To constitute an assignment of a chose in action, in equity, no particular form is necessary;" Spain v. Hamilton's Adm'r, 1 Wall. (U. S.) 604, 624, 17 L. Ed. 619. Any binding appropriation of money or property to a particular use is a transfer of ownership; Watson v. Bagaley, 12 Pa. 167, 51 Am. Dec. 595; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Clark v. Iron Co., 81 Fed. 310, 26 C. C. A. 423. An assignment of a chose in action by parol as security is valid; Union Trust Co. v. Bulkeley, 150 Fed. 510, 80 C. C. A. 328, and so of book accounts to be thereafter earned by the assignor; L. R. 13 App. Cas. 523.

In France an assignment of a debt must be in writing; the registration duty must be paid thereon and formal notice in writing must be served after registration by an officer of the court, called a "*huissier.*" Notice can be replaced by the debtor's formal acknowledgment in a notarial French deed. This passes a legal title to the debt; [1900] 1 Ch. 602.

The *proper technical* and *operative* words in assignment are "assign, transfer, and set over;" but "give, grant, bargain, and sell," or any other words which show the intent of the parties to make a complete transfer, will work an assignment; 13 Sim. 469; 31 Beav. 351; Kimball v. Donald, 20 Mo. 577, 64 Am. Dec. 209.

No consideration is necessary to support the assignment of a term; 1 Mod. 263; McClenahan v. Gwynn, 3 Munf. (Va.) 556. Now, by the statute of frauds, all assignments of chattels *real* must be made by deed or note in writing, signed by the assigning party or his agent thereunto lawfully authorized by writing; 1 B. & P. 270. If a tenant assigns the whole or a part of an estate for a part of the term, it is a sub-lease, and not an assignment; Patten v. Deshon, 1 Gray (Mass.) 325; Astor v. Miller, 2 Paige, Ch. (N. Y.) 68; Buckingham v. Granville Alexandria Soc., 2 Ohio 369; 1 Washb. R. P. *327.

Effect of. During the continuance of the assignment, the assignee is liable on all covenants running with the land, but may rid himself of such continuing liability by transfer to a mere beggar; 5 Coke 16; Ans. Contr. 232; 1 B. & P. 21; 1 Sch. & L. 310; 1 Ball & B. 238; Dougl. 56, 183; (but a conveyance to an irresponsible person to avoid paying a ground-rent accruing on the land conveyed was held not to release the original covenantor; American Academy of Music v. Smith, 54 Pa. 130). By the assignment of a right, all its accessories pass with it: for example, the collateral security, or a lien on property, which the assignor of a bond had, will pass with it when assigned; Potts v. Water Power Co., 9 N. J. Eq. 592; Waller v. Tate, 4 B. Monr. (Ky.) 529; Pattison v. Hull, 9 Cow. (N. Y.) 747; Eskridge v. McClure, 2 Yerg. (Tenn.) 84; Boardman v. Hayne, 29 Ia. 339; Willis v. Twambly, 13 Mass. 204; Craig v. Parkis, 40 N. Y. 181, 100 Am. Dec. 469; Coffing v. Taylor, 16 Ill. 457. So, also, what belongs to the thing by the right of accession is assigned with it; Hodges v. Harris, 6 Pick. (Mass.) 360; Horn v. Thompson, 31 N. H. 562.

An assignee for the benefit of creditors takes the property assigned subject to all existing valid liens and equities against the assignor; Helm v. Gilroy, 20 Or. 517, 26 Pac. 851.

The assignee of a chose in action in a court of law must bring the action in the name of the assignor; and everything which might have been shown in defence against the assignor may be used against the assignee; 18 Eng. L. & Eq. 82; Pollard v. Ins. Co., 42 Me. 221; Guerry v. Perryman, 6 Ga. 119; Commercial Bank of Rochester v. Colt, 15 Barb. (N. Y.) 506; Sanborn v. Little, 3 N.

H. 539; Norton v. Rose, 2 Wash. (Va.) 233; Pitts v. Holmes, 10 Cush. (Mass.) 92; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Lyon v. Summers, 7 Conn. 399; Welch v. Mandeville, 1 Wheat. (U. S.) 236, 4 L. Ed. 79; In re Brown's Estate, 2 Pa. 463; Hamilton v. Greenwood, 1 Bay (S. C.) 173, 1 Am. Dec. 607; Matheson v. Crain, 1 McCord (S. C.) 219; U. S. v. Sturges, 1 Paine, 525, Fed. Cas. No. 16,414; Patterson v. Atherton, 3 McLean, 147, Fed. Cas. No. 10,822; Robinson v. Marshall, 11 Md. 251; 1 Bisph. Eq. 226; but in many states the assignee of a chose in action may sue in his own name; Smith v. Ry. Co., 23 Wis. 267; Hooker v. Bank, 30 N. Y. 83, 86 Am. Dec. 351; Long v. Heinrich, 46 Mo. 603; it is no objection to suit by an assignee of an account in his name that no consideration for the assignment is shown; Young v. Hudson, 99 Mo. 102, 12 S. W. 632; and where a party assigns her interest in a suit for negligence to her attorneys by way of security, there is no reason why suit should be carried on in her name; Rajnowski v. R. Co., 78 Mich. 681, 44 N. W. 335. In equity the assignee may sue in his own name, but he can only go into equity when his remedy at law fails; 1 Yo. & C. 481; Bigelow v. Willson, 1 Pick. (Mass.) 485; Moseley v. Boush, 4 Rand. (Va.) 392; Haskell v. Hilton, 30 Me. 419; Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441; Spring v. Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614. Such an assignment is considered as a declaration of trust; Morrison v. Deaderick, 10 Humphr. (Tenn.) 342; 3 P. Will. 199; Welch v. Mandeville, 1 Wheat. (U. S.) 235, 4 L. Ed. 79; but all the equitable defences exist; Rousset v. Ins. Co., 1 Binn. (Pa.) 429; Spring v. Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614. It has been held that the assignee of a chose in action does not take it subject to equities of third persons of which he had no notice; Himrod v. Bolton, 44 Ill. App. 516.

A valid assignment of a policy of insurance in the broadest legal sense, by consent of the underwriters, by statute, or otherwise, vests in the assignee all the rights of the assignor, legal and equitable, including that of action; but the instrument, not being negotiable in its character, is assignable only in equity, and not even so, if it has, as it sometimes has, a condition to the contrary; Field v. Ins. Co., 3 Md. 244; New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742; Kingsley v. Ins. Co., 8 Cush. (Mass.) 393; Grosvenor v. Ins. Co., 17 N. Y. 391; Simonton v. McLane's Adm'r, 25 Ala. 353; Folsom v. Ins. Co., 30 N. H. 231; Rison v. Wilkerson, 3 Sneed (Tenn.) 565; Pollard v. Ins. Co., 42 Me. 221; Birdsey v. Ins. Co., 26 Conn. 165; State Mut. Fire Ins. Co. v. Roberts, 31 Pa. 438; 18 Eng. L. & Eq. 427; Hall v. Ins. Co., 93 Mich. 184, 53 N. W. 727, 18 L. R. A. 135, 32 Am. St. Rep. 497. Where the policy does not provide that an assignment without the consent of the company renders it void, a parol assignment is valid; O'Brien v. Ins. Co., 57 Hun 589, 11 N. Y. Supp. 125. Upon transfer of a policy, in case of loss, the assignee may in some states sue in his own name; Southern Fertilizer Co. v. Reams, 105 N. C. 283, 11 S. E. 467, but this is usually when there is a statutory provision; and if there be none, suit must be in the name of the assignor; 3 Kent 261; Rousset v. Ins. Co., 1 Binn. (Pa.) 429. In marine policies, custom seems to have established a rule different from that of the common law, and to have made policies transferable with the subject matter of insurance; May, Ins. § 377.

Assignments are peculiarly the objects of equity jurisdiction; 9 B. & C. 300; Marbury v. Brooks, 7 Wheat. (U. S.) 556, 5 L. Ed. 522; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 529; Phillips v. Prevost, *id.* 205; Howell v. Baker, *id.* 119; Hays v. Ward, *id.* 129, 8 Am. Dec. 554; and *bona fide* assignments will in most cases be upheld in equity courts; Davenport v. Woodbridge, 8 Greenl. (Me.) 17; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; Kellogg v. Krauser, 14 S. & R. (Pa.) 137, 16 Am. Dec. 480; Sheftall's Adm'rs v. Clay's Adm'rs, T. U. P. Charlt. (Ga.) 230; Anderson v. Van Alen, 12 Johns. (N. Y.) 343; but champerty and maintenance, and the purchase of lawsuits, are inquired into and restrained in equity as in law, and fraud will defeat an assignment. By some of the state statutes regulating assignments, the assignee may bring an action in his own name in a court of law, but the equities in defence are not excluded. See Johns v. Johns, 6 Ohio 271; Sirlott v. Tandy, 3 Dana (Ky.) 142; Harper v. Butler, 2 Pet. (U. S.) 239, 7 L. Ed. 410; Defrance v. Davis, Walk. (Miss.) 69.

All assignments and transfers of any claim upon the United States, or of any part or share thereof, or interests therein, whatever may be the consideration therefor, are null and void, unless made after the allowance of such claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof; § 3477 R. S. See 24 Am. L. Rev. 442. But this does not apply to the passing of such claims to heirs, devisees, or assignees in bankruptcy; Erwin v. U. S., 97 U. S. 392, 24 L. Ed. 1065.

Notice is not necessary as against the creditor or his assignee in bankruptcy, but the claims of competing assignees or encumbrancers rank as between themselves according to the dates at which they have respectively given notice to the debtor; Pollock, Contr. 232, citing 3 Cl. & F. 456. This applies to rights created by trust; *id.* 233.

In this country it has also been held that notice of the assignment of a chose in action is effective without notice or acceptance by the debtor; Quigley v. Welter, 95 Minn. 383, 104 N. W. 236; Kingman v. Perkins,

105 Mass. 111; Columbia Finance & Trust Co. v. Bank, 116 Ky. 364, 76 S. W. 156; Young v. Upson, 115 Fed. 192; Tingle v. Fisher, 20 W. Va. 497.

The only purpose or necessity of notice is for the protection of the assignee against subsequent assignees or creditors or payments made by the debtor in ignorance of the assignment; Succession of Patrick, Mann. Unrep. Cas. (La.) 72; Chemical Co. v. McNair, 139 N. C. 326, 51 S. E. 949.

A party to an executory contract cannot assign it to a third party; but it is held in Taylor v. Palmer, 31 Cal. 240, that a public building contract is distinguished from a private building contract on the theory that the public generally were invited to bid for and take public contracts regardless of the professions, trades, or occupations; and that, aside from the discretion vested in the board of supervisors to reject all bids when they deemed it for the public good, or the bid of any party who had proved delinquent in a previous contract, there was no restriction upon the capacity of the contractor. Ernst v. Kunkle, 5 Ohio St. 520; City of St. Louis v. Clemens, 42 Mo. 69; Anderson v. De Uriosto, 96 Cal. 404, 31 Pac. 266. But in the construction of a complex plant, owners having no knowledge themselves as to how such a plant should be constructed, have a right to select the party with whom they would deal, and when the selection is made and the contract executed, there could be no substitution of contractors without the assent of the owners; and such a contract is not assignable by the contractor; Arkansas Valley Smelting Co. v. Min. Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; Putnam v. Ins. Co., 123 Mass. 328, 25 Am. Rep. 93; Swarts v. Lighting Co., 26 R. I. 388, 59 Atl. 77; Campbell v. County Com'rs, 64 Kan. 376, 67 Pac. 866; Edison v. Babka, 111 Mich. 235, 69 N. W. 499; Winchester v. Pyrites Co., 67 Fed. 45, 14 C. C. A. 300; Worden v. R. Co., 82 Ia. 735, 48 N. W. 71; Johnson v. Vickers, 139 Wis. 145, 120 N. W. 837, 131 Am. St. Rep. 1046.

See FUTURE ACQUIRED PROPERTY; INSOLVENCY; EQUITABLE ASSIGNMENT; CHOSE IN ACTION.

ASSIGNMENT OF DOWER. The act by which the share of a widow in her deceased husband's real estate is ascertained and set apart to her.

The assignment may be made *in pais* by the heir or his guardian, or the devisee or other persons seized of the lands subject to dower; Pierce v. Williams, 3 N. J. Law, 709; Meserve v. Meserve, 19 N. H. 240; Blood v. Blood, 23 Pick. (Mass.) 80; Shattuck v. Gragg, *id.* 88; McRae v. Pegues, 4 Ala. 160; Baker v. Baker, 4 Greenl. (Me.) 67; Boyers v. Newbanks, 2 Ind. 388; Tudor, Lead. Cas. 51; or it may be made after a course of judicial proceedings, where a voluntary assignment is refused. In this case the assignment will be made by the sheriff, who will set off her share by metes and bounds; 2 Bla. Com. 136; 1 Washb. R. P. 229. The assignment should be made within forty days after the death of the husband, during which time the widow may remain in the mansion-house. See Pharis v. Leachman, 20 Ala. 662; Chaplin v. Simmons' Heirs, 7 T. B. Monr. (Ky.) 337; Stedman v. Fortune, 5 Conn. 462; 1 Washb. R. P. 222, n. 227; QUARANTINE. The share of the widow is usually one-third of all the real estate of which the husband has been seized during coverture; and no writing or livery is necessary in a valid assignment, the dowress being *in*, according to the view of the law, of the seisin of her husband.

The assignment of dower in a house may be of so many rooms, instead of a third part of the house; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325. The remedy of the widow, when the heir refuses to assign dower, is by a writ of dower *unde nihil habet;* 4 Kent 63. A conveyance by a widow of her right of dower before it has been allotted does not vest the legal title in the grantee, and she is a necessary party to enforce the allotment; Parton v. Allison, 111 N. C. 429, 16 S. E. 416; see *id.*, 109 N. C. 674, 14 S. E. 107. If the guardian of a minor heir assign more than he ought, the heir on coming of age may have the writ of admeasurement of dower; McCormick v. Taylor, 2 Ind. 336; Jones v. Brewer, 1 Pick. (Mass.) 314; Co. Litt. 34, 35; Fitzh. Nat. Br. 148; Stat. Westm. 2 (13 Edw. I.) c. 7; 1 Washb. R. P. 222; 1 Kent 63, 69.

ASSIGNMENT OF ERRORS. The statement of the case of the plaintiff in error, on a writ of error, setting forth the errors complained of.

It corresponds with the declaration in an ordinary action; 2 Tidd, Pr. 1168; 3 Steph. Com. (11th ed.) 623. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendant may plead to them; Newnan v. Pryor, 18 Ala. 186; Reynolds v. Reynolds, 15 Conn. 83; Adams v. Munson, 3 How. (Miss.) 77.

It is an essential part of the pleadings and as such should be so complete in itself as to show the basis of the judgment or decree of the appellate court, since after the cause is disposed of and the record remitted to the court below, the precipe, assignment of errors and pleas thereto are all that usually remain of record; In re Cessna's Estate, 192 Pa. 14, 43 Atl. 376.

The ruling of a trial court must be specified in the assignment, in order to question it on appeal; Line v. State, 131 Ind. 468, 30 N. E. 703; as where no errors are assigned in the record, no question is presented for the appellate court for review; Wilcox v. Moore, 44 Ill. App. 293; Fullerton's Estate,

146 Pa. 61, 23 Atl. 321; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 Pac. 21; Hawkins v. McDougal, 126 Ind. 544, 25 N. E. 708. Errors not assigned will not usually be considered by an appellate court. But the United States Circuit Court of Appeals will notice plain error though not assigned; City of Memphis v. R. Co., 183 Fed. 529, 106 C. C. A. 75. Alleged errors of law will not be considered unless contained in the assignment of errors, where on the whole the facts justify the judgment; Behn, M. & Co. v. Campbell, 205 U. S. 403, 27 Sup. Ct. 502, 51 L. Ed. 857.

The term is commonly used in connection with appeals in cases in equity. Under the federal appellate practice, it is necessary to file an assignment of error with the petition for an appeal.

ASSIGNOR. One who makes an assignment; one who transfers property to another. See ASSIGNMENT.

ASSIGNS. Assignees; those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, "heirs, administrators and assigns." Grant v. Carpenter, 8 R. I. 36.

ASSISA (Lat. *assidere*). Originally an assembly or court; then the enactments of such a court. 1 Holdsw. H. E. L. 116.

A kind of jury or inquest. For the difference between *assisa* and *jurata*, see JURATA.

A writ; as, an assize of *novel disseisin*, assize of common pasture.

An ordinance; as, *assisa panis*. Littleton § 234; 3 Sharsw. Bla. Com. 402.

A fixed specific time, sum, or quantity. A tribute; tax fixed by law; a fine. Spelman, Gloss.

Assisa armorum. A statute defining the arms which all freemen must carry.

Assisa cadere. To be nonsuited. Cowell; 3 Bla. Com. 402.

Assisa continuanda. A writ for the continuation of the assize to allow the production of papers. Reg. Orig. 217.

Assisa de foresta. Assize of the forest.

Assisa mortis d'ancestoris. Assize of *mort d'ancestre.*

Assisa panis et cerevisiæ. Assize of bread and ale; a statute (1266) regulating the weight and measure of these articles. Abolished in London in 1815 and in the rest of England in 1836.

Assisa proroganda. A writ to stay proceedings where one of the parties is engaged in a suit of the king. Reg. Orig. 208.

Assisa ultimæ præsentationis. Assize of *darrein presentment*, which see.

Assisa venalium. Statutes regulating the sale of certain articles. Spelman, Gloss.

Assisa cadit (or *vertitur*) *in juratam.* Where a matter is so doubtful that it must necessarily be tried before a jury. Jacob L. Dict.

ASSISORS. In Scotch Law. Jurors.

ASSISTANCE, WRIT OF. See WRIT OF ASSISTANCE.

ASSITHMENT. A wergild or compensation by a pecuniary mulct. Blount.

ASSIZE, ASSIZA (Lat. *assidere*, to sit by or near, through the Fr. *assisa*, a session). A writ directed to the sheriff for the recovery of immovable property, corporeal or incorporeal. Littleton § 234.

The action or proceedings in court based upon such a writ. Magna Carta c. 12; Stat. 13 Edw. I. (Westm. 2) c. 25; 3 Bla. Com. 57, 252; Sellon, Pract. Introd. xii.

Such actions were to be tried by special courts, of which the judicial officers were justices of assize. See COURTS OF ASSIZE AND NISI PRIUS. This form of remedy is said to have been introduced by the parliament of Northampton (or Nottingham) A. D. 1176, for the purpose of trying titles to land in a more certain and expeditious manner before commissioners appointed by the crown than before the suitors in the county court of the king's justiciars in the Aula Regis. The action is properly a mixed action, whereby the plaintiff recovers his land and damages for the injury sustained by the disseisin. The value of the action as a means for the recovery of land led to its general adoption for that purpose, those who had suffered injury not really amounting to a disseisin alleging a disseisin to entitle themselves to the remedy. The scope of the remedy was also extended so as to allow the recovery of incorporeal hereditaments, as franchises, estovers, etc. It gave place to the action of ejectment, and is now abolished, having been previously almost, if not quite, entirely disused. Stat. 3 & 4 Will. IV. c. 27, § 36. Stearns, Real Act. 187.

A jury summoned by virtue of a writ of assize.

Such juries were said to be either *magna* (grand), consisting of sixteen members and serving to determine the right of property, or *parva* (petit), consisting of twelve and serving to determine the right to possession. Mirror of Just. lib. 2.

This sense is said by Littleton and Blackstone to be the original meaning of the word; Littleton § 234; 3 Bla. Com. 185. Coke explains it as denoting originally a *session* of justices; and this explanation is sanctioned by the etymology of the word. Co. Litt. 153 b. It seems, however, to have been early used in all the senses here given. The recognitors of assize (the jurors) had the power of deciding, upon their own knowledge, without the examination of witnesses, where the issue was joined on the very point of the assize; but collateral matters were tried either by a jury or by the recognitors acting as a jury, in which latter case it was said to be turned into a jury *(assisa vertitur in juratam)*. Booth, Real Act. 213; Stearns, Real Act. 187; 3 Bla. Com. 402. The term is no longer used in England to denote a jury.

The assizes are: The Grand Assize which provides a machinery for trying disputed claims to property; and possessory assizes for trying disputed claims to seisin or possession. 1 Holdsw. Hist. E. L. 149. See GRAND ASSIZE.

The verdict or judgment of the jurors or recognitors of assize; 3 Bla. Com. 57, 59.

A court composed of an assembly of knights and other substantial men, with the baron or justice, in a certain place, at an appointed time. Grand Coutum, c. 24. See COURT OF ASSIZE.

An ordinance or statute. Littleton § 234; Reg. Orig. 239. Anything reduced to a certainty in respect to number, quantity, quality, weight, measure, etc. 2 Bla. Com. 42; Cowell; Spelman, Gloss. *Assisa.*

As to this use of the term, see PROVISIONS.

See the title immediately following.

In Scotch Law. The jury, consisting of fifteen men, in criminal cases tried in the court of justiciary. Paterson, Comp.

ASSIZE OF CLARENDON. A set of instructions (1166) to the itinerant justices and sheriffs with reference to their duties and jurisdiction. 1 Holdsw. Hist. E. L. 21.

ASSIZE OF DARREIN PRESENTMENT. A writ of assize which formerly lay when a man or his ancestors under whom he claimed presented a clerk to a benefice, who was instituted, and afterwards upon the next avoidance, a stranger presented a clerk and thereby disturbed the real patron. 3 Sharsw. Bla. Com. 245; Stat. 13 Edw. I. (Westm. 2) c. 5. It has given way to the remedy by *quare impedit.*

ASSIZE OF FRESH FORCE. A writ of assize which lay where the disseisin had been committed within forty days. Fitzh. N. B. 7.

W. C. Bolland in Year Books of Edward II, Vol. VII, p. xxxvi (Selden Society), after referring to "a cryptic remark of Glanvill," and saying that "the history of this writ cannot be written yet," concludes that where the inhabitant of a town that has the franchise of having actions touching its own citizens heard and determined within the town is disseised of a tenement, then if he take action to recover it within a certain time of such disseisin (variously stated to be forty days or forty weeks) he must take that action by means of an assize of fresh force, otherwise he can avail himself only of a writ of right.

ASSIZE, GRAND. See GRAND ASSIZE.

ASSIZE OF MORTDANCESTOR. A writ of assize which lay to recover possession of lands against an abator or his alienee. It lay where the ancestor from whom the claimant derived title died seised. Cowell; 3 Bla. Com. 185.

ASSIZE OF NORTHHAMPTON. A re-enactment and enlargement (1176) of the Assize of Clarendon. 1 Holdsw. Hist. E. L. 21.

ASSIZE OF NOVEL DISSEISIN. A writ of assize which lay where the claimant had been lately disseised. The action must have been brought subsequently to the next preceding session of the eyre or circuit of justices, which took place once in seven years; Co. Litt. 153.

The assizes of darrein presentment, mort d'ancestre, novel disseisin, and *utrum* were possessory. They were tried before a jury. Abolished in 1834. 1 Holdsw. Hist. E. L. 151. The forms are given in *id.* 423.

ASSIZE OF NUISANCE. A writ of assize which lay where a nuisance had been committed to the complainant's freehold.

The complainant alleged some particular fact done which worked an injury to his freehold (*ad nocumentum liberi tenementi sui*), and, if successful, recovered judgment for the abatement of the nuisance and also for damages; Fitzh. N. B. 183; 3 Bla. Com. 221; 9 Co. 55; Tr. & Ha. Pr. 1776.

ASSIZE OF UTRUM. A writ of assize which lay for a parson to recover lands which his predecessor had improperly allowed the church to be deprived of. 3 Bla. Com. 257.

An assize for the trial of the question of whether land is a lay fee, or held in frankalmoigne. 1 Holdsw. Hist. E. L. 21.

ASSIZES. Sessions of the justices or commissioners of assize.

These assizes are held twice in each year in each of the various shires of England, with some exceptions, by virtue of several commissions, for the trial of matters of fact in issue in both civil and criminal cases. They still retain the ancient name in popular language, though the commission of assize is no longer issued. 3 Steph. Com. (11th ed.) 373. See ASSIZE; NISI PRIUS; COMMISSION OF ASSIZE; COURTS OF ASSIZE AND NISI PRIUS.

ASSIZES DE JERUSALEM. A code of feudal law prepared at a general assembly of lords after the conquest of Jerusalem, A. D. 1099.

It was compiled principally from the laws and customs of France. It was reduced to form by Jean d'Iblin, *Comte de Japhe et Ascalon*, about the year 1290. 1 Fournel, *Hist. des Av.* 49; 2 Dupin, *Prof. des Av.* 674; Steph. Pl. Andr. ed. App. xi.

ASSOCIATE. A partner in interest.

An officer in each of the superior courts of common law in England whose duty it was to keep the records of his court, to attend its *nisi prius* sittings, and to enter the verdict, make up the *postea*, and deliver the record to the party entitled thereto. Abbott, Law Dict.

A person associated with the judges and clerk of assize in commission of general jail delivery. Mozley & W. Dict.

The term is frequently used of the judges of appellate courts, other than the presiding judge or chief justice.

ASSOCIATED PRESS. An association to buy, gather and accumulate information and news; to vend, supply, distribute and publish the same

It is an association affected with a public interest, and must submit to control by the public for the common good. It must sell

its news without discrimination to all newspaper publishers who desire to purchase the same; Inter-Ocean Pub. Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184, and a by-law forbidding the furnishing news to or receiving news from an antagonistic person or corporation is void as creating a monopoly; *id.*

ASSOCIATION. The act of a number of persons in uniting together for some purpose. The persons so joining.

An organized union of persons for a common purpose; a body of persons acting together for the promotion of some object of mutual interest or advantage. Cent. Dict.

Any combination of persons whether the same be known by a distinctive name or not. Stroud, Jud. Dict.

An unincorporated company is fundamentally a large partnership, from which it differs mainly in the following particulars: That it is not bound by the acts of the individual partners, but only by those of its managers; that shares in it are transferable; and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members; Dicey, Parties 149.

In the United States this term is used to signify a body of persons united without a charter but upon the methods and forms used by incorporated bodies for the prosecution of some enterprise. Abbott, L. Dict.

Apart from a statute, no action lies by or against an unincorporated association as such; Karges Furniture Co. v. Woodworkers Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Dicey, Parties 148; especially when it is not organized to carry on some business; St. Paul Typothetæ v. Bookbinders' Union, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695; Cleland v. Anderson, 66 Neb. 252, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136. Actions must be brought in the names of all the members. The inconvenience of this doctrine has led to much legislation. Some statutes provide for suits against associations (or partnerships) in the associate names, service of process on officers or other associates, and judgments binding the associate property, but only those members individually who have been personally served; see 20 Harv. L. Rev. 58. Judgments may bind individually even those members not personally served; Patch Mfg. Co. v. Capeless, 79 Vt. 1, 63 Atl. 938. Such association may sue and be sued by its name; Whitney v. Backus, 149 Pa. 29, 24 Atl. 51; Davison v. Holden, 55 Conn. 103, 10 Atl. 515, 3 Am. St. Rep. 40. In New York actions may be brought against such association of seven or more persons in the name of the president or treasurer; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496. One or more members may sue for the benefit of all, where the members are so numerous that it is impracticable to bring them all in; Liggett v. Ladd, 17 Or. 89, 21 Pac. 133. In England it has been held that an association of employés might be sued in its name, upon the ground that such associations are expressly recognized by parliament, and such right arises by necessary implication from the legislative recognition, and the right to own property; [1901] A. C. 426. See 20 Harv. L. Rev. 58; Dicey, Parties.

See PARTNERSHIP; PARTIES; JOINT STOCK COMPANIES; BUILDING ASSOCIATIONS; BENEFICIAL ASSOCIATIONS; CHARITABLE USES; EXPULSION.

In English Law. A writ directing certain persons (usually the clerk and his subordinate officers) to associate themselves with the justices and sergeants for the purpose of taking the assizes. 3 Bla. Com. 59.

ASSOIL (spelled also *assoile, absoile, assoilyie*). To set free; to deliver from excommunication. Stat. 1 Hen. IV. c. 7; Cowell. See ABSOIL.

ASSUME. To take to or upon one's self. See Cincinnati, S. & C. R. Co. v. Ry. Co., 44 Ohio St. 314, 7 N. E. 139.

ASSUMPSIT (Lat. *assumpsit*, he has undertaken). **In Contracts.** An undertaking, either express or implied, to perform a parol agreement. 1 Lilly, Reg. 132.

Express assumpsit is an undertaking made orally, by writing not under seal, or by matter of record, to perform an act or to pay a sum of money to another.

Implied assumpsit is an undertaking presumed in law to have been made by a party, from his conduct, although he has not made any express promise.

The law presumes such an undertaking to have been made, on the ground that everybody is supposed to have undertaken to do what is, in point of law, just and right; 2 Burr. 1008; 8 C. B. 545; Leake, Contr. 75; Huffman v. Wyrick, 5 Ind. App. 183, 31 N. E. 823. Such an undertaking is never implied where the party has made an express promise; 2 Term 100; Kimball v. Tucker, 10 Mass. 192; nor ordinarily against the express declaration of the party to be charged, Jewett v. Inhabitants of Somerset, 1 Greenl. (Me.) 125; Wheelock v. Freeman, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; nor will it be implied unless there be a request or assent by the defendant shown; Webb v. Cole, 20 N. H. 490; though such request or assent may be inferred from the nature of the transaction; 1 Dowl. & L. 984; Hawley v. Sage, 15 Conn. 52; Hall v. R. Co., 28 Vt. 401; Treasurer of City of Camden v. Mulford, 26 N. J. Law 49; or from the silent acquiescence of the defendant; Doty v. Wilson, 14 Johns. (N. Y.) 378; Bradley v. Richardson, 2 Blatchf. 343, Fed. Cas. No. 1,786; or even contrary to fact on the ground of legal obligation; 1 H. Bla. 90; Inhabitants of Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203;

Inhabitants of Alna v. Plummer, 4 Greenl. (Me.) 258; Van Valkinburgh v. Watson, 13 Johns. (N. Y.) 480, 7 Am. Dec. 395; no promise to pay is implied from a mere use of personal property with the permission of the owner; Davis v. Breon, 1 Ariz. 240, 25 Pac. 537.

In Practice. A form of action which lies for the recovery of damages for the non-performance of a parol or simple contract. 7 Term 351; Ballard v. Walker, 3 Johns. Cas. (N. Y.) 60.

It differs from *debt*, since the amount claimed need not be liquidated (see DEBT), and from *covenant*, since it does not require a contract under seal to support it. See COVENANT. See 4 Coke 91; 4 Burr. 1008; Carter v. Carter, 14 Pick. (Mass.) 428; Newell v. Hill, 2 Metc. (Mass.) 181. Assumpsit is one of the class of actions called actions upon the case, and in the older books is called action upon the case upon assumpsit. Comyns, Dig.

It was a new variety of action on the case, framed, as it seems, as often on the writ of deceit as on that of trespass. Failure to perform one's agreements did not create a *debt*, but it was found to be a wrong in the nature of *deceit* for which there must be a remedy in damages. The first recorded case was Y. B. 2 Hen. IV, 3 pl. 9. It was only in 1596 (4 Co. Rep. 91 *a*) that it was conclusively decided that *assumpsit* was admissible at the plaintiff's choice where *debt* would also lie; and it was still later before it was admitted that the substantial cause of action was the contract; Poll. Contr. 148. See Prof. James Barr Ames in 2 Harv. L. Rev. 1, 53 (3 Sel. Essays, Anglo-Amer. L. H. 259); Holmes, Com. L. 284; 3 Holdsw. Hist. E. L. 329.

Special assumpsit is an action of assumpsit brought upon an express contract or promise.

General assumpsit is an action of assumpsit brought upon the promise or contract implied by law in certain cases. See 2 Sm. Lead. Cas. 14; Tr. & Ha. Pr. 1490.

The action should be brought by the party from whom the consideration moved; 3 B. & P. 149, n; 4 B. & C. 664; Cabot v. Haskins, 3 Pick. (Mass.) 83, 92; or by the person for whose benefit it was paid; Hinkley v. Fowler, 15 Me. 285; against the party who made the undertaking. It lies for a corporation; 1 Campb. 466; and against it; Bank of United States v. Dandridge, 12 Wheat. (U. S.) 68, 6 L. Ed. 552; City of San Antonio v. Lewis, 9 Tex. 69; Waring v. Catawba Co., 2 Bay (S. C.) 109; Overseers of Poor of North Whitehall Tp. v. Overseers of Poor of South Whitehall Tp., 3 S. & R. (Pa.) 117; but not in England formerly (because a corporation could not contract except under its seal), unless by express authority of some legislative act, or in actions on negotiable paper; 1 Chit. Pl. *119; 4 Bingh. 77; but now corporations are liable in many cases on contracts not under seal, and generally upon executed contracts, up to the extent of the benefit received; 6 A. & E. 846; L. R. 10 C. P. 409; Brice, Ultra Vires (3d ed.) 693.

Assumpsit will lie at the suit of a third party on a contract made in his favor; Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855; Kountz v. Holthouse, 85 Pa. 235 (but see Ramsdale v. Horton, 3 Pa. 330); Lawrence v. Fox, 20 N. Y. 268 (but see Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195); Snell v. Ives, 85 Ill. 279; Bassett v. Hughes, 43 Wis. 319. Contra, Warren v. Batchelder, 15 N. H. 129. See discussion in 15 Am. L. Rev. 231, and 4 N. J. L. J. 197.

A promise or undertaking on the part of the defendant, either expressly made by him or implied by the law from his actions, constitutes the gist of the action. A sufficient consideration for the promise must be averred and shown; 21 Am. Jur. 258, 283; though it may be implied by the law; Jackson v. Teele, 7 Johns. (N. Y.) 29; Jerome v. Whitney, *id.* 321; Parish v. Stone, 14 Pick. (Mass.) 210, 25 Am. Dec. 378; as in case of negotiable promissory notes and bills, where a consideration is presumed to exist till its absence is shown; Middlebury v. Case, 6 Vt. 165.

The action lies for—

Money had and received to the plaintiff's use, including all cases where one has money, or that which the parties have agreed to treat as money; Willie v. Green, 2 N. H. 333; Clark v. Pinney, 6 Cow. (N. Y.) 297; Marshall v. McPherson, 8 Gill & J. (Md.) 333; Barfield v. McCombs, 89 Ga. 799, 15 S. E. 666; Colt v. Clapp, 127 Mass. 476; Harper v. Claxton, 62 Ala. 46; McFadden v. Wilson, 96 Ind. 253; in his hands which in equity and good conscience he is bound to pay over, including bank-notes; 13 East 20, 130; Mason v. Waite, 17 Mass. 560; Ainslie v. Wilson, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; Hill's Adm'r v. Kennedy, 32 Ala. 523; promissory notes; Tebbetts v. Haskins, 16 Me. 285; Tuttle v. Mayo, 7 Johns. (N. Y.) 132; Edgerton v. Brackett, 11 N. H. 218; Indianapolis Ins. Co. v. Brown, 6 Blackf. (Ind.) 378; notes payable in specific articles; Crandal v. Bradley, 7 Wend. (N. Y.) 311; and some kinds of evidences of debt; 3 Campb. 199; Gilchrist v. Cunningham, 8 Wend. (N. Y.) 641; Mason v. Waite, 17 Mass. 560; but not goods, except under special agreement; Morrison v. Berkey, 7 S. & R. (Pa.) 246; 3 B. & P. 559; 1 Y. & J. 380; whether delivered to the defendant for a particular purpose to which he refuses to apply it; 3 Price 68; Wales v. Wetmore, 3 Day (Conn.) 252; McNeilly v. Richardson, 4 Cow. (N. Y.) 607; Eastman v. Hodges, 1 D. Chip. (Vt.) 101; Gutherie v. Hyatt, 1 Harr. (Del.) 446; see 2 Bingh. 7; Hall v. Marston, 17 Mass. 575; or obtained by him through fraud; 1 Salk. 28; Bliss v. Thompson, 4 Mass. 488; Lyon v. Annable, 4 Conn. 350; Phelps v. Conant, 30 Vt. 277; Reynolds v. Rochester, 4 Ind. 43; or by tortious seizure and conversion of the plaintiff's property; Bigelow v. Jones, 10 Pick. (Mass.) 161; and see Cowp. 414; 1

Campb. 285; or by duress, imposition, or undue advantage or other involuntary and wrongful payment; 6 Q. B. 276; Richardson v. Duncan, 3 N. H. 508; Wheaton v. Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; Chase v. Dwinal, 7 Greenl. (Me.) 135, 20 Am. Dec. 352; Perry v. Inhabitants of Dover, 12 Pick. (Mass.) 206; Central Bank v. Dressing Co., 26 Barb. (N. Y.) 23; Reynolds v. Rochester, 4 Ind. 43; Sheldon v. South School Dist., 24 Conn. 88; Elliott v. Swartwout, 10 Pet. (U. S.) 137, 9 L. Ed. 373; Sartwell v. Horton, 28 Vt. 370; or for a security which turns out to be a forgery, under some circumstances; 3 B. & C. 428; Terry v. Bissell, 26 Conn. 23; Rick v. Kelly, 30 Pa. 527; Ellis v. Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610; or paid under a mistake of fact; 9 Bingh. 647; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Dickens v. Jones, 6 Yerg. (Tenn.) 483, 27 Am. Dec. 488; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Tyler v. Smith, 18 B. Monr. (Ky.) 793; or upon a consideration which has failed; 3 B. & P. 181; President, etc., of Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111; Reynolds v. Harris, 9 Cal. 338; Keene v. Thompson, 4 Gill & J. (Md.) 463; Lyon v. Annable, 4 Conn. 350; Pennington v. Clifton, 10 Ind. 172; Burch v. Smith, 15 Tex. 224, 65 Am. Dec. 154; see Kitty v. Com., 18 B. Monr. (Ky.) 523; or under an agreement which has been rescinded without partial performance; 2 C. & P. 514; Holbrook v. Holbrook, 30 Vt. 432; M. E. Church v. Wood, 5 Ohio, 286; Dearborn v. Dearborn, 15 Mass. 319; Gillet v. Maynard, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329; Dickson v. Cunningham, Mart. & Y. (Tenn.) 203; Wharton v. O'Hara, 2 N. & McC. (S. C.) 65; Randlet v. Herren, 20 N. H. 102; or on common counts for breach of warranty upon the ground that the money was paid without consideration; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; or the owner of stolen money may recover the amount against one with whom it was deposited by the thief, who, after notice, pays it to a third person; Hindmarch v. Hoffman, 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842; interest paid by mistake on a judgment which did not bear interest is recoverable back; McMurtry v. R. Co., 84 Ky. 462, 1 S. W. 815; or where a factor disobeys instructions and sells grain, deposits made by principal may be recovered; Larminie v. Carley, 114 Ill. 196, 29 N. E. 382; or to recover purchase money under void contract for sale of lands; Gwin v. Smur, 49 Mo. App. 361; or to recover money advanced as prepayment of services to be rendered under contract, where contract is not performed; Trope v. Ass'n, 58 Hun 611, 12 N. Y. Supp. 519; or where one receives money for a specific purpose, but to which he does not apply it, keeping it for himself; Barrow v. Barrow, 55 Hun 505, 8 N. Y. Supp. 783.

Money paid for the use of another, including negotiable securities; Merchants' Bank v. Cook, 4 Pick. (Mass.) 414; Pearson v. Parker, 3 N. H. 366; Mason v. Franklin, 3 Johns. (N. Y.) 206; Craig v. Craig, 5 Rawle (Pa.) 91; Lapham v. Barnes, 2 Vt. 213; McLellan v. Crofton, 6 Greenl. (Me.) 331; where the plaintiff can show a previous request; Webb v. Cole, 20 N. H. 490; or subsequent assent; Packard v. Lienow, 12 Mass. 11; Tuttle v. Armstead, 53 Conn. 175, 22 Atl. 677; Wolff v. Matthews, 39 Mo. App. 376; or that he paid it for a reasonable cause, and not officiously; 3 M. & W. 607; Skillin v. Merrill, 16 Mass. 40; Ebel v. Chandler, 93 Cal. 372, 28 Pac. 934; Lovejoy v. Chandler, 93 Cal. 376, 28 Pac. 935; Graham v. Dunigan, 2 Bosw. (N. Y.) 516; 14 Q. B. D. 811; L. R. 3 C. P. 38; Keener Quasi Cont. 388; but a mere voluntary payment of another's debt will not make the person paying his creditor; Vanderheyden v. Mallory, 1 N. Y. 472; Turner v. Egerton, 1 Gill & J. (Md.) 433, 19 Am. Dec. 235; Mayor, etc., of Baltimore v. Hughes' Adm'r, 1 Gill & J. (Md.) 497, 19 Am. Dec. 243; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 603; Calhoun v. Cozens, 3 Ala. 500; Webb v. Cole, 20 N. H. 490.

Money lent, including negotiable securities of such a character as to be essentially money; 11 Jur. 157, 289; Payson v. Whitcomb, 15 Pick. (Mass.) 212; Crandal v. Bradley, 7 Wend. (N. Y.) 311; Penn v. Flack, 3 Gill & J. (Md.) 369; Edgerton v. Brackett, 11 N. H. 218; Fairbanks v. Stanley, 18 Me. 296; Peniston v. Wall's Adm'x, 3 J. J. Marsh. (Ky.) 37; Hart v. Connor, 21 Ga. 384; actually loaned by the plaintiff to the defendant himself; 1 Dane, Abr. 196.

Money found to be due upon an account stated, called an *insimul computassent*, for the balance so found to be due, without regard to the nature of the evidences of the original debt; 3 B. & C. 196; Danforth v. Turnpike Road, 12 Johns. (N. Y.) 227; Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; Fitch v. Leitch, 11 Leigh (Va.) 471; Burnham v. Spooner, 10 N. H. 532; Richey v. Hathaway, 149 Pa. 207, 24 Atl. 191.

Goods sold and delivered either in accordance with a previous request; 9 Conn. 379; Lyles v. Lyles' Ex'rs, 6 Harr. & J. (Md.) 273; Rogers v. Verona, 1 Bosw. (N. Y.) 417; Keyser v. Dist. No. 8, 35 N. H. 477; Abbott v. Coburn, 28 Vt. 666, 67 Am. Dec. 735; Philadelphia Co. v. Park Bros. & Co., 138 Pa. 346, 22 Atl. 86; or where the defendant receives and uses them; Jenkins v. Richardson, 6 J. J. Marsh. (Ky.) 441, 22 Am. Dec. 82; Kupfer v. Inhabitants of South Parish in Augusta, 12 Mass. 185; Emerson v. McNamara, 41 Me. 565; although tortiously; Hill v. Davis, 3 N. H. 384; Floyd v. Wiley, 1 Mo. 430; Floyde v. Wiley, *id.* 643. See Jones v. Hoar, 5 Pick. (Mass.) 285; TROVER.

Work performed; James v. Bixby, 11 Mass. 37; McDaniel v. Parks, 19 Ark. 671; James

v. Buzzard, 1 Hempst. 240, Fed. Cas. No. 7,206a; Trammell v. Lee County, 94 Ala. 194, 10 South. 213; Blakeslee v. Holt, 42 Conn. 226; Whelan v. Clock Co., 97 N. Y. 293; and materials furnished; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; with the knowledge of the defendant; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28, 11 Am. Dec. 237; Hort v. Norton, 1 McCord (S. C.) 22; McDaniel v. Parks, 19 Ark. 671; so that he derives benefit therefrom; Lowe v. Sinklear, 27 Mo. 308; Felton v. Simpson, 33 N. C. 84; whether there be an express contract or not. Also, where there is an express promise to pay for extra work, although the contract requires that the estimate should be in writing; Hughes v. Torgerson, 96 Ala. 348, 11 South. 209, 16 L. R. A. 600, 38 Am. St. Rep. 105. As to whether anything can be recovered where the contract is to work a specified time and the labor is performed during a portion of that time only, see Provost v. Harwood, 29 Vt. 219; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Allen v. Curles, 6 Ohio St. 505; Hughes v. Cannon, 1 Sneed (Tenn.) 622; Wolfe v. Howes, 24 Barb. (N. Y.) 174; Downey v. Burke, 23 Mo. 228. Services performed by relatives for one in his lifetime, but in the absence of an express or implied contract for payment, cannot be recovered for after his death; Patterson v. Collar, 31 Ill. App. 340. One may recover for work and material on an implied assumpsit although the work is destroyed before its completion; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654.

Use and occupation of the plaintiff's premises under a parol contract express or implied; Logan v. Lewis, 7 J. J. Marsh. (Ky.) 6; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Eppes' Ex'rs v. Cole, 4 Hen. & M. (Va.) 161, 4 Am. Dec. 512; Brewer v. Craig, 18 N. J. L. 214; Lloyd v. Hough, 1 How. (U. S.) 153, 11 L. Ed. 83; Phelps v. Conant, 30 Vt. 277; Crommelin v. Thiess, 31 Ala. 412, 70 Am. Dec. 499; Howe v. Russell, 41 Me. 446; Sampson v. Shaeffer, 3 Cal. 196; Theological Institute of Connecticut v. Barbour, 4 Gray (Mass.) 329; but not if it be tortious; Ryan v. Marsh's Adm'r, 2 N. & McC. (S. C.) 156; Henwood v. Cheeseman, 3 S. & R. (Pa.) 500; De Young v. Buchanan, 10 Gill & J. (Md.) 149, 32 Am. Dec. 156; Wiggin v. Wiggin, 6 N. H. 298; Strong v. Garfield, 10 Vt. 502; or where defendant enters under a contract for a deed; Smith v. Stewart, 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; Vandenheuvel v. Storrs, 3 Conn. 203; Jones v. Tipton, 2 Dana (Ky.) 295. The relation of landlord and tenant must exist expressly or impliedly; Chambers v. Ross, 25 N. J. L. 293; Newby v. Vestal, 6 Ind. 412; Williams v. Hollis, 19 Ga. 313.

And in many other cases, as for a breach of promise of marriage; Conn v. Wilson, 2 Overt. (Tenn.) 233, 5 Am. Dec. 663; to recover the purchase-money for land sold; Velie v. Myers, 14 Johns. (N. Y.) 162; Shephard v. Little, *id.* 210; Wood v. Gee, 3 McCord (S. C.) 421; and, specially, upon wagers; 2 Chit. Pl. 114; feigned issues; 2 Chit. Pl. 116; upon foreign judgments; 3 Term 493; Oysted v. Shed, 8 Mass. 273; Hubbell v. Coudrey, 5 Johns. (N. Y.) 132; but not on a judgment obtained in a sister state; Garland v. Tucker, 1 Bibb (Ky.) 361; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Boston India Rubber Factory v. Holt, 14 Vt. 92; money due under an award; Kingsley v. Bill, 9 Mass. 198; where the defendant has obtained possession of the plaintiff's property by a tort for which trespass or case would lie; Bigelow v. Jones, 10 Pick. (Mass.) 161; Budd v. Hiler, 27 N. J. L. 43; Hutton v. Wetherald, 5 Harr. (Del.) 38; Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468; or, having rightful possession, has tortiously sold the property; Foster v. Mfg. Co., 12 Pick. (Mass.) 452; Gilmore v. Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; Pritchard v. Ford, 1 J. J. Marsh. (Ky.) 543; Willet v. Willet, 3 Watts (Pa.) 277; Sanders v. Hamilton, 3 Dana (Ky.) 552; Chauncy v. Yeaton, 1 N. H. 151; King v. McDaniel, 4 Call (Va.) 451; Stockett v. Watkins' Adm'rs, 2 Gill & J. (Md.) 326, 20 Am. Dec. 438; or converted it to his own use; 3 M. & S. 191; Miller v. Miller, 7 Pick. (Mass.) 133, 19 Am. Dec. 264; Pike v. Bright, 29 Ala. 332; Emerson v. McNamara, 41 Me. 565; Janes v. Buzzard, 1 Hempst. 240, Fed. Cas. No. 7,206a; Alsbrock v. Hathaway, 3 Sneed (Tenn.) 454; Goodenow v. Snyder, 3 G. Greene (Ia.) 599; or, at the suit of an attaching creditor, where a sheriff pays money to subsequent lienor by order of court, which order is subsequently reversed; Haebler v. Myers, 132 N. Y. 363, 30 N. E. 963, 15 L. R. A. 588, 28 Am. St. Rep. 589; or where one purchases a bond relying on the seller's recommendation that it is good, when in fact it is worthless; Ripley v. Case, 86 Mich. 261, 49 N. W. 46.

The action may be brought for a sum specified in the promise of the defendant, or for the definite amount of money ascertained by computation to be due, or for as much as the services, etc., were worth (called a *quantum meruit*), or for the value of the goods, etc. (called a *quantum valebant*). The value of services performed under a contract void by the statute of frauds is recoverable on *quantum meruit;* Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Wonsettler v. Lee, 40 Kan. 367, 19 Pac. 862; a city is liable for water supplied after termination of the contract; Wilson v. City of Charlotte, 110 N. C. 449, 14 S. E. 961; one hired to do work, but who is wrongfully stopped, may recover on *quantum meruit* what the labor is worth, regardless of its value to the other party; Mooney v. Iron Co., 82 Mich. 263, 46 N. W. 376.

The *form* of the action, whether general

or special, depends upon the nature of the undertaking of the parties, whether it be express or implied, and upon other circumstances. In many cases where there has been an express agreement between the parties, the plaintiff may neglect the special contract and sue in general assumpsit. He may do this: *first*, where the contract is executed; 5 B. & C. 628; Robertson v. Lynch, 18 Johns. (N. Y.) 451; Baker v. Corey, 19 Pick. (Mass.) 496; Perkins v. Hart, 11 Wheat. (U. S.) 237, 6 L. Ed. 463; Cochran v. Tatum, 3 T. B. Monr. (Ky.) 405; Coursey v. Covington, 5 Harr. & J. (Md.) 45; Wood v. Gee, 3 McCord (S. C.) 421; Hancock v. Ross, 18 Ga. 364; and is for the payment of money; Brooks v. Scott's Ex'r, 2 Munf. (Va.) 344; Cochran v. Tatum, 1 J. J. Marsh. (Ky.) 394; Cochran v. Tatum, 3 T. B. Monr. (Ky.) 405; Morse v. Potter, 4 Gray (Mass.) 292; though if a time be fixed for its payment, not until the expiration of that time; 1 Stark. 229; *second*, where the contract, though only partially executed, has been abandoned by mutual consent; 7 Term 181; Mead v. Degloyer, 16 Wend. (N. Y.) 632; Tebbetts v. Haskins, 16 Me. 283; Adams v. Pugh, 7 Cal. 150; or extinguished and rescinded by some act of the defendant; Hoagland v. Moore, 2 Blackf. (Ind.) 167; Jenkins v. Thompson, 20 N. H. 457; *third*, where that which the plaintiff has done has been performed under a special agreement, but not in the time or manner agreed, but yet has been beneficial to the defendant and has been accepted and enjoyed by him; 1 Bingh. 34; Taft v. Inhabitants of Montague, 14 Mass. 282, 7 Am. Dec. 215; Watchman v. Crook, 5 Gill & J. (Md.) 240; McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470; Epperly v. Bailey, 3 Ind. 72; Allen v. McKibbin, 5 Mich. 449; Cole v. Clarke, 3 Wis. 323; see 2 Sm. Lead. Cas. 14; Miller v. Phillips, 31 Pa. 218.

A surety who has paid money for his principal may recover upon the common counts, though he holds a special agreement of indemnity from the principal; Gibbs v. Bryant, 1 Pick. (Mass.) 118. But in general, except as herein stated, if there be a special agreement, special assumpsit must be brought thereon; Sherman v. R. Co., 22 Barb. (N. Y.) 239; Maynard v. Tidball, 2 Wis. 34.

The declaration should state the contract in terms, in case of a special assumpsit; but, in general, assumpsit contains only a general recital of consideration, promise, and breach. Several of the common counts are frequently used to describe the same cause of action. Damages should be laid in a sufficient amount to cover the amount of the claim; see 2 Const. S. C. 339; Beverley v. Holmes, 4 Munf. (Va.) 95; Benden v. Manning, 2 N. H. 289; Bailey v. Freeman, 4 Johns. (N. Y.) 280; Hendrick v. Seely, 6 Conn. 176; People's Bank v. Adams, 43 Vt. 195; Davisson v. Ford, 23 W. Va. 617.

Non assumpsit is the usual plea, under which the defendant may give in evidence most matters of defence; Com. Dig. *Pleader* (2 G, 1). Under that plea it may be shown that no such promise as alleged was made or is implied, or that the promise if made was void; but defences which from their nature admit a promise and set up a subsequent performance or avoidance as, e. g. payment, set off, statute of limitations, should be pleaded specially, in the absence of a statutory definition of the effect of the general plea, which exists in many states. Where there are several defendants, they cannot plead the general issue severally; Meagher v. Bachelder, 6 Mass. 444; nor the same plea in bar severally; Ward v. Johnson, 13 Mass. 152. The plea of not guilty is defective, but is cured by verdict; King v. McDaniel, 4 Call (Va.) 451.

See, generally, Bacon, Abr.; Comyns, Dig., *Action upon the case upon assumpsit;* Dane, Abr.; Viner, Abr.; 1 Chit. Pl.; Lawes, Assump.; 1 Greenl. Ev.; Lawson, Encyc. of Pl. & Pr.; 1 Sm. Lead. Cas. 282, note to Lampleigh v. Braithwaite; Select Essays in Anglo-American Leg. Hist. vol. 3; COVENANT; DEBT; JUDGMENT.

ASSUMPTION OF RISK. See NEGLIGENCE; MASTER AND SERVANT; EMPLOYERS' LIABILITY.

ASSURANCE. Any instrument which confirms the title to an estate. Legal evidence of the transfer of property. 2 Bla. Com. 294; [1896] 1 Ch. 468.

The term *assurances* includes, in an enlarged sense, all instruments which dispose of property, whether they be the grants of private persons, or not; such are fines and recoveries, and private acts of the legislature. Eunom. Dial. 2, s. 5.

In Commercial Law. Insurance.

ASSURED. A person who has been insured by some insurance company or underwriter, against the losses or perils mentioned in the policy of insurance.

The party whom the underwriters agree to indemnify in case of loss. 1 Phill. Ins. § 2. He is sometimes designated in maritime insurance by description, and not by name, as in a policy "for whom it may concern;" Haynes v. Rowe, 40 Me. 181; Cobb v. Ins. Co., 6 Gray (Mass.) 192; Myers v. Ins. Co., 27 Pa. 268, 67 Am. Dec. 462; Blanchard v. Ins. Co., 33 N. H. 9; Augusta Ins. & Banking Co. of Georgia v. Abbott, 12 Md. 348. See INSURANCE.

ASSURER. An insurer; an underwriter.

ASTRARIUS HÆRES (from *astre*, the hearth of a chimney). Where the ancestor by conveyance hath set his heir apparent and his family in a house in his lifetime. Cunningham, L. Dict.

ASTRIHILTET. In Saxon Law. A penalty for a wrong done by one in the king's

peace. The offender was required to replace the damage twofold. Spelman, Gloss.

ASYLUM. A refuge; a place of retreat and security. An establishment for the detention and cure of persons suffering from mental disease—and also a place for the reception and bringing up of desolate orphans. That some of its inmates are to be orphans will not impart to the institution generally the character of an orphan asylum; [1899] A. C. 107. It is not an educational institution; State v. Bacon, 6 Neb. 286.

In International Law. 1. A place of refuge for fugitive offenders. Every sovereign state has the right to offer an asylum to fugitives from other countries, but there is no corresponding right on the part of the alien to claim asylum. In recent years this right of asylum has been voluntarily limited by most states by treaties providing for the extradition (*q. v.*) of fugitive criminals.

Owing to the privilege of ex-territoriality (*q. v.*) possessed by ambassadors, their residences were in former times frequently made an asylum for fugitive criminals. Although claimed by, and often conceded to, ambassadors, this right of asylum was not definitely recognized, and Grotius, in 1625, does not admit it as part of the law of nations (II, c. 18, § 8). In 1726, when the Spanish Government arrested the Duke of Ripperda, who had taken refuge in the residence of the British Embassy, the British Government complained of the act as a violation of international law (Causes Célèbres, I, 178). Within the past century the right of asylum has been rarely exercised, except in Central and South American countries and in the Orient, where it has been frequently granted to political refugees. Even in those countries the United States has discouraged its ministers from granting asylum, though it has not absolutely prohibited it.

The qualified privilege of ex-territoriality possessed by public vessels of a state in foreign waters has led them at times to exercise the right of asylum, but international comity requires that this privilege be not abused, and it can, in no case, be exercised by merchant vessels. II, Moore, §§ 291–307.

2. In time of war, a place of refuge in neutral territory for belligerent war-ships. See NEUTRALITY.

AT. Expresses position attained by motion to, and hence contact, contiguity or coincidence, actual or approximate, in space or time. Being less restricted as to relative position than other prepositions, it may in different constructions assume their office, and so become equivalent according to the context to in, on, near, by, about, under, over, through, from, to, toward, etc. Cent. Dict.

AT LARGE. Open to discussion or controversy; not precluded.

A congressman at large is one who is elected by electors of an entire state.

See POUND; RUNNING AT LARGE; ANIMAL.

AT LAW. According to the course of the common law. In the law.

ATAMITA. In Civil Law. A great-great-great-grandfather's sister.

ATAVUNCULUS. In Civil Law. A great-great-great-grandfather's brother.

ATAVUS. In Civil Law. The male ascendant in the fifth degree.

ATHA. In Saxon Law. (Spelled also *Atta, Athe, Atte.*) An oath. Cowell; Spelman, Gloss.

Athes, or *Athaa*, a power or privilege of exacting and administering an oath in certain cases. Cowell; Blount.

ATHEIST. One who denies or does not believe in the existence of a God.

Such persons are, at common law, incapable of giving testimony under oath, and are therefore, incompetent witnesses; but the disability is now largely removed. See WITNESS.

ATILIUM. Tackle; the rigging of a ship; plough-tackle. Spelman, Gloss.

ATMATERTERA (Lat.). **In Civil Law.** A great-great-great-grandmother's sister.

ATTACHÉ. One attached to an embassy or a legation at a foreign court.

ATTACHMENT. Taking into the custody of the law the person or property of one already before the court, or of one whom it is sought to bring before it.

A writ for the accomplishment of this purpose. This is the more common sense of the word.

It is in its nature, but not strictly, a proceeding *in rem;* since that only is a proceeding *in rem* in which the process is to be served on the thing itself, and the mere possession of the thing, by the service of process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever; Drake, Att. § 4 *a;* Megee v. Beirne, 39 Pa. 50; Bray v. McClury, 55 Mo. 128.

Of Persons. A writ issued by a court of record, commanding the sheriff to bring before it a person who has been guilty of contempt of court, either in neglect or abuse of its process or of subordinate powers; 3 Bla. Com. 280; 4 *id.* 283; or disregard of its authority in refusing to do what is enjoined; 1 Term 266; or by openly insulting the court; 4 Bla. Com. 283; 3 *id.* 17. It is to some extent in the nature of a criminal process; Stra. 441. See State v. McDermott, 10 N. J. L. 63; Bacon v. Wilber, 1 Cow. (N. Y.) 121, n.; 1 Term 266.

See ARREST.

Of Property. A writ issued at the institution or during the progress of an action, com-

manding the sheriff or other proper officer to attach the property, rights, credits, or effects of the defendant to satisfy the demands of the plaintiff.

It is a process which secures jurisdiction of the defendant, not by personal service, but by the seizure of his property. It may be either a foreign attachment, which is founded upon the absence or nonresidence of the defendant, or a domestic attachment, which, under various state statutes, is provided for, either as the beginning, or in the course of a suit. The proceedings in both classes of cases are usually, in substance, the same.

The origin of the law of attachment, as administered in the United States, is found in one of the customs of London, "which is agreed by all authorities to have a very ancient existence." Drake, Att. § 1. With other customs of London, it has, from time to time, been confirmed by Royal Charter and Acts of Parliament, and is declared "never to become obsolete by non-user or abuser"; *id.* The authority cited notes the curious fact respecting the customs of London that they were certified and recorded by word of mouth, and that the mayor and aldermen should declare whether the things under dispute were a custom or not, and that having been once recorded, they were afterwards to be judicially noticed. Locke, in his treatise on Attachment, according to the custom of London, attributes its origin to the Roman Law, quoting from Wilson's Adams, Rom. Antiq. 194, in support of his theory and passage, which is reproduced in a note to the section of Drake cited. In that and the subsequent sections will be found what is known of the remedy thus derived, which, as is there suggested, was found peculiarly adapted to our circumstances in the United States growing out of the division of the country into states, each sovereign, the unrestrained opportunity of transit from one to another and the expansion of credit and abolition of imprisonment for debt. All of these causes contributed to the adoption of a system of remedies for acting directly upon the property of debtors. The proceeding appears to be devoid of almost every feature of a common law proceeding, there being no service of process on the defendant, the seizure of his property *in limine*, and not under execution, and the appropriation of debts due to the defendant for the payment of his own debt, as well as the provision for the protection of the defendant by pledges to refund the amount so collected, if, within a specified time, there be an appearance and the debt be disproved; *id.* § 4. See CUSTOMS OF LONDON.

The original design of this writ was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge; 3 Bla. Com. 280.

By an extension of this principle, in the New England states, property attached remains in the custody of the law after an appearance, until final judgment in the suit. See Bond v. Ward, 7 Mass. 127, 5 Am. Dec. 28.

In some states attachments are distinguished as foreign and domestic,—the former issued against a non-resident of the state, the latter against a resident. Where this distinction is preserved, the foreign attachment enures solely to the benefit of the party suing it out; while the avails of the domestic attachment may be shared by other creditors, who come into court and present their claims for that purpose.

It is a distinct characteristic of the whole system of remedy by attachment, that it is—except in some states where it is authorized in chancery—a special remedy at *law*, belonging exclusively to a court of law, and to be resorted to and pursued in conformity with the terms of the law conferring it; and where from any cause the remedy by attachment is not full and complete, a court of equity has no power to pass any order to aid or perfect it; Drake, Att. § 4.

In the New England states the attachment of the defendant's property, rights, and credits is an incident of the summons in all actions *ex contractu*. This is called Trustee Process, *q. v.* Elsewhere throughout the country the writ issues only upon cause shown by affidavit. And in most of the states its issue must be preceded by the execution by or on behalf of the plaintiff of a cautionary bond to pay the defendant all damage he may sustain by reason of the attachment. The grounds upon which the writ may be obtained vary in the different states. Wherever an affidavit is required as the basis of the attachment, it must verify the plaintiff's cause of action, and also the existence of some one or more of the grounds of attachment prescribed by the local statute as authorizing the issue of the writ.

Among the grounds upon which attachments are usually permitted by statute, the most frequent and universal is non-residence in the state, which is the primary basis for the issue of a foreign attachment; with respect to this ground, however, a man may have two residences in different states; Barron v. Burke, 82 Ill. App. 116; Rosenzweig v. Wood, 30 Misc. 297, 63 N. Y. Supp. 447. Then again, in most jurisdictions, attachments may be levied against the property of absconding debtors, either actual; Stewart v. Lyman, 62 App. Div. 182, 70 N. Y. Supp. 936; or intentional; Stock v. Reynolds, 121 Mich. 356, 80 N. W. 289; Stouffer v. Niple, 40 Md. 477; and this intention must be shown; Hanson v. Tompkins, 2 Wash. 508, 27 Pac. 73; one has been held to be an absconding debtor who conceals himself; Stafford v. Mills, 57 N. J. L. 574, 32 Atl. 7; or absents himself so as to prevent the service of ordinary process upon him; Ellington v. Moore, 17 Mo. 424.

Other grounds upon which attachment is permitted in some states are: The fraudulent incurring of a debt under contract; Merchants' Bank of Cleveland v. Ins. & Trust Co., 12 Ohio Dec. (Rep.) 738; fraudulently removing or disposing of property; Bullene v. Smith, 73 Mo. 151; Howard v. Caperon, 3 Willson, Civ. Cas. Ct. App. § 313; or transferring it; Culbertson v. Cabeen, 29 Tex. 247; though in the ordinary course of business; Farris v. Gross, 75 Ark. 391, 87 S. W. 633, 5 Ann. Cas. 616; but the removal must be fraudulent; Dunn v. Claunch, 13 Okl. 577, 76 Pac. 143; and it must be actually, not constructively, fraudulent; Wadsworth v. Laurie, 164 Ill. 42, 45 N. E. 435; the death of a non-resident debtor owning property in the state; Bacchus v. Peters, 85 Tenn. 678, 4 S. W. 833; failing to pay on delivery the price or value of goods delivered where there was a contract so to pay; Harlow v. Sass, 38 Mo. 34; Miller v. Godfrey, 1 Colo. App. 177, 27 Pac. 1016; the fact that a demand is not otherwise secured, or that security given has become worthless; Williams v. Hahn, 113 Cal. 475, 45 Pac. 815 (but not if the security was originally worthless; Barbieri v. Ramelli, 84 Cal. 154, 23 Pac. 1086); the failure to pay for labor performed when it should have been paid at the time; De Lappe v. Sullivan, 7 Colo. 182, 2 Pac. 926.

The remedy by attachment is allowed in general only to a *creditor*. In some states, under special statutory provisions, damages arising *ex delicto* may be sued for by attachment; but the almost universal rule is otherwise. The claim of an attaching creditor, however, need not be so certain as to fall within the technical definition of a debt, or as to be susceptible of liquidation without the intervention of a jury. It is sufficient if the demand arise on contract, and that the contract furnish a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it; Van Winkle v. Ketcham, 3 Cai. (N. Y.) 323; Fisher v. Consequa, 2 Wash. C. C. 382, Fed. Cas. No. 4,816; Wilson v. Wilson, 8 Gill (Md.) 192, 50 Am. Dec. 685; Weaver v. Puryear, 11 Ala. 941; Jones v. Buzzard, 2 Ark. 415; Templin v. Krahn, 3 Ind. 374; Roelofson v. Hatch, 3 Mich. 277.

Some of the causes of action in tort upon which, in the absence of a statute, attachments have not been permitted are: Trover; Hynson v. Taylor, 3 Ark. 552; breach of promise of marriage; Phillips 527; a steamboat collision; Griswold v. Sharpe, 2 Cal. 17; trespass; Ferris v. Ferris, 25 Vt. 100; assault and battery; Thompson v. Carper, 11 Humph. (Tenn.) 542; Minga v. Zollicoffer, 23 N. C. 278; loss of profits resulting from the failure of the defendant to dispose properly of a return cargo; Warwick v. Chase, 23 Md. 154; malicious prosecution; Tarbell v. Bradley, 27 Vt. 535; Stanly v. Ogden, 2 Root (Conn.) 259; damage for loss of property by a common carrier declared on in tort; Piscataqua Bank v. Turnley, 1 Miles (Pa.) 312; money embezzled and lost in gambling; Babcock v. Briggs, 52 Cal. 502; misbehavior in office, where there was no bond and the action is in tort; Dunlop v. Keith, 1 Leigh (Va.) 430, 19 Am. Dec. 755; expense and loss of time caused by a wound inflicted by defendant; Prewitt v. Carmichael, 2 La. Ann. 943; breaking open a letter entrusted to the care of defendant; Raver v. Webster, 3 Ia. 502, 66 Am. Dec. 96; slander; Sargeant v. Helmbold, Harper (S. C.) 219; Baune v. Thomassin, 6 Mart. N. S. (La.) 563; destruction by fire of plaintiff's property caused by the negligence of the defendant; Handy v. Brong, 4 Neb. 60. If the plaintiff alleged a cause of action on a contract and it appears from the pleadings or the evidence not to be such, it should be dismissed; Elliott v. Jackson, 3 Wis. 649.

In some states an attachment may, under peculiar circumstances, issue upon a debt not yet due and payable; but in such cases the debt must possess an actual character to become due *in futuro*, and not be merely possible and dependent on a contingency, which may never happen; Smead v. Chrisfield, 1 Handy (Ohio) 442. An attachment can be sued out in equity against an absconding debtor by the accommodation maker of a negotiable note not yet due; Altmeyer v. Caulfield, 37 W. Va. 847, 17 S. E. 409.

Corporations, like natural persons, may be proceeded against by attachment; Libbey v. Hodgdon, 9 N. H. 394; Bushel v. Ins. Co., 15 S. & R. (Pa.) 173; Bank of United States v. Bank, 1 Rob. (Va.) 573; Wilson v. Danforth, 47 Ga. 676; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Planters' & Merchants' Bank of Mobile v. Andrews, 8 Porter (Ala.) 404; Mineral Point R. Co. v. Keep, 22 Ill. 9, 74 Am. Dec. 124. It will lie against a corporation for the conversion of its own stock; Condouris v. Cigarette Co., 3 Misc. 66, 22 N. Y. Supp. 695.

Representative persons, such as heirs, executors, administrators, trustees, and others, claiming merely by right of representation, are not liable to be proceeded against, as such, by attachment; Jackson v. Walsworth, 1 Johns. Cas. (N. Y.) 372; Peacock v. Wildes, 8 N. J. Law 179; McCoombe v. Dunch, 2 Dall. (U. S.) 73, 1 L. Ed. 294; Taliaferro v. Lane, 23 Ala. 369; Patterson v. McLaughlin, 1 Cra. 352, Fed. Cas. No. 10,828; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Smith v. Riley, 32 Ga. 356; Levy v. Succession of Lehman, 38 La. Ann. 9; Bryant v. Fussel, 11 R. I. 286.

Goods in the hands of a common carrier are not exempt from attachment, and, when it is pending, the carrier is not justified in giving them up to the consignor, as the right of the officer to hold them is to be determined by the court out of which the attachment issued; Stiles v. Davis, 1 Black (U. S.) 101, 17

L. Ed. 33; but goods in transit to another state cannot be attached, whether without the state, when the seizure was made (the carriers being within the jurisdiction); Bates v. R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369; Western R. R. v. Thornton, 60 Ga. 300; Sutherland v. Bank, 78 Ky. 250; Stevenot v. R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600; or still within the state, and not moved from the starting point, but loaded for movement; Baldwin v. R. Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. Rep. 370. Obedience to attachment process does not deprive the carrier of his right to his charges for services to the shipper, and he may retain possession of the goods until the charges are paid; Rucker v. Donovan, 13 Kan. 251, 19 Am. Rep. 84; Wolfe v. Crawford, 54 Miss. 514.

It is a question whether the personal baggage of a traveller can be reached or affected by attachment; Western R. R. v. Thornton, 60 Ga. 300.

Property in the hands of officers of court cannot be attached, as receivers; Martin v. Davis, 21 Ia. 537; Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. Ed. 322; Columbian Book Co. v. De Golyer, 115 Mass. 69; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Field v. Jones, 11 Ga. 413; Nelson v. Conner, 6 Rob. (La.) 339; Langdon v. Lockett, 6 Ala. 727, 41 Am. Dec. 78; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Gouverneur v. Warner, 2 Sandf. (N. Y.) 624; Yuba County v. Adams, 7 Cal. 35; Bentley v. Shrieve, 4 Md. Ch. 412; Robinson v. R. Co., 66 Pa. 160; an assignee in bankruptcy; In re Cunningham, 19 N. B. R. 276, Fed. Cas. No. 3478; or a sheriff; Bradley v. Kesee, 5 Cold. (Tenn.) 223, 94 Am. Dec. 246.

The levy of an attachment does not change the estate of the defendant in the property attached; Bigelow v. Willson, 1 Pick. (Mass.) 485; Starr v. Moore, 3 McLean 354, Fed. Cas. No. 13,315; Perkins' Heirs v. Norvell, 6 Humphr. (Tenn.) 151; Snell v. Allen, 1 Swan. (Tenn.) 208; Oldham v. Scrivener, 3 B. Monr. (Ky.) 579; Sammis v. Sly, 54 Ohio St. 511, 44 N. E. 508, 56 Am. St. Rep. 731. Nor does the attaching plaintiff acquire any property thereby; Bigelow v. Willson, 1 Pick. (Mass.) 485; Crocker v. Radcliffe, 3 Brev. (S. C.) 23; Willing v. Bleeker, 2 S. & R. (Pa.) 221; Owings v. Norwood's Lessee, 2 Harr. & J. (Md.) 96; Goddard v. Perkins, 9 N. H. 488. Nor can he acquire through his attachment any higher or better rights to the property attached than the defendant had when the attachment was levied, unless he can show some fraud or collusion by which his rights are impaired; Crocker v. Pierce, 31 Me. 177; Kentucky Refining Co. v. Bank, 89 S. W. 492, 28 Ky. Law Rep. 486.

The levy of an attachment constitutes a lien on the property or credits attached; Goore v. McDaniel, 1 McCord (S. C.) 480; Peck v. Webber, 7 How. (Miss.) 658; Van Loan v. Kline, 10 Johns. (N. Y.) 129; Davenport v. Lacon, 17 Conn. 278; Erskine v. Staley, 12 Leigh (Va.) 406; Moore v. Holt, 10 Gratt. (Va.) 284; Grigg v. Banks, 59 Ala. 311; Hervey v. Champion, 11 Humphr. (Tenn.) 569; Ziegenhager v. Doe, 1 Ind. 296; People v. Cameron, 2 Gilman (Ill.) 468; President, etc., of Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601; Kittredge v. Warren, 14 N. H. 509; Vreeland v. Bruen, 21 N. J. L. 214; Downer v. Brackett, 21 Vt. 599, Fed. Cas. No. 4,043; In re Rowell, 21 Vt. 620, Fed. Cas. No. 12,095; Ingraham v. Phillips, 1 Day (Conn.) 117; Lackey v. Seibert, 23 Mo. 85; Hannahs v. Felt, 15 Ia. 141; Emery v. Yunt, 7 Colo. 107, 1 Pac. 686; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Davis Mill Co. v. Bangs, 6 Kan. App. 38, 49 Pac. 628; Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. (N. S.) 1073; Perry v. Griefen, 99 Me. 420, 59 Atl. 601. But, as the whole office of an attachment is to seize and hold property until it can be subjected to execution, this lien is of no value unless the plaintiff obtain judgment against the defendant and proceed to subject the property to execution.

Where two or more separate attachments are levied simultaneously on the same property, they will be entitled each to an aliquot part of the proceeds of the property; Durant v. Johnson, 19 Pick. (Mass.) 544; Campbell v. Ruger, 1 Cow. (N. Y.) 215; Nutter v. Connet, 3 B. Monr. (Ky.) 201; True v. Emery, 67 Me. 28; Wilson v. Blake, 53 Vt. 305; Thurston v. Huntington, 17 N. H. 438; see Love v. Harper, 4 Humphr. (Tenn.) 113; Yelverton v. Burton, 26 Pa. 351. Where several attachments are levied successively on the same property, they have priority in the order in which they are sued out; Lutter & Voss v. Grosse, 82 S. W. 278, 26 Ky. L. Rep. 585; and a junior attaching creditor may impeach a senior attachment, or judgment thereon, for fraud; Pike v. Pike, 24 N. H. 384; Walker v. Roberts, 4 Rich. (S. C.) 561; McCluny v. Jackson, 6 Gratt. (Va.) 96; Smith v. Gettinger, 3 Ga. 140; Reed v. Ennis, 4 Abb. Pr. (N. Y.) 393; Hale v. Chandler, 3 Mich. 531; but not on account of irregularities; Kincaid v. Neall, 3 McCord (S. C.) 201; Camberford v. Hall, 3 McCord (S. C.) 345; Walker v. Roberts, 4 Rich. (S. C.) 561; In re Griswold, 13 Barb. (N. Y.) 412.

By the levy of an attachment upon personalty, the officer acquires a special property therein, which continues so long as he remains liable therefor, either to have it forthcoming to satisfy the plaintiff's demand, or to return it to the owner upon the attachment being dissolved, but no longer; Barker v. Miller, 6 Johns. (N. Y.) 195; Gates v. Gates, 15 Mass. 310; Poole v. Symonds, 1 N. H. 289, 8 Am. Dec. 71; Nichols v. Valentine, 36 Me. 322; Braley v. French, 28 Vt. 546; Foulks v. Pegg, 6 Nev. 136; Stiles v.

Davis, 1 Black (U. S.) 101, 17 L. Ed. 33; Holt v. Burbank, 47 N. H. 164; Wentworth v. Sawyer, 76 Me. 434; Rochester Lumber Co. v. Locke, 72 N. H. 22, 54 Atl. 705. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass, and replevin; Ludden v. Leavitt, 9 Mass. 104, 6 Am. Dec. 45; Lathrop v. Blake, 23 N. H. 46; Walker v. Foxcroft, 2 Greenl. (Me.) 270; 3 Foster 46; Carroll v. Frank, 28 Mo. App. 69; Whitney v. Ladd, 10 Vt. 165.

As it would often subject an officer to great inconvenience to keep attached property in his possession, he is allowed in the New England states and New York to deliver it over, during the pendency of the suit, to some responsible person, who will give an accountable receipt for it, and who is usually styled a receipter or bailee, and whose possession is regarded as that of the officer, and, therefore, as not discharging the lien of the attachment. This practice is not authorized by statute, but has been so long in vogue in the states where it prevails as to have become a part of their systems; Drake, Att. § 344.

In many states provisions exist, authorizing the defendant to retain possession of the attached property by executing a bond with sureties for the delivery thereof, either to satisfy the execution which the plaintiff may obtain in the cause, or when and where the court may direct. This bond, like the bailment of attached property, does not discharge the lien of the attachment; Gray v. Perkins, 12 Smedes & M. (Miss.) 622; Rives v. Wilborne, 6 Ala. 45; Evans v. King, 7 Mo. 411; People v. Cameron, 2 Gilman (Ill.) 468; Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470; Boyd v. Buckingham, 10 Humphr. (Tenn.) 434. Property thus bonded cannot be seized under another attachment, or under a junior execution; Rives v. Wilborne, 6 Ala. 45; Kane v. Pilcher, 7 B. Monr. (Ky.) 651; Gordon v. Johnston, 4 La. 304.

Provisions also exist in many states for the dissolution of an attachment by the defendant's giving bond and security for the payment of such judgment as the plaintiff may recover. This is, in effect, merely Special Bail. From the time it is given, the cause ceases to be one of attachment, and proceeds as if it had been instituted by summons; Harper v. Bell, 2 Bibb (Ky.) 221; People v. Cameron, 2 Gilman (Ill.) 468; Fife v. Clarke, 3 McCord (S. C.) 347; Reynolds v. Jordan, 19 Ga. 436; Drake, Att. § 312.

One holding property by virtue of a forthcoming bond may sue for its destruction; Louisville & N. R. Co. v. Brinkerhoff, 119 Ala. 606, 24 South. 892. The execution of the bond does not discharge the attachment or levy, but the property is still in contemplation of law in the possession of the court; Hobson & Co. v. Hall, 10 Ky. L. Rep. 635.

An attachment is dissolved by a final judgment for the defendant; Suydam v. Huggeford, 23 Pick. (Mass.) 465; Johnson v. Edson, 2 Aik. (Vt.) 299; Brown v. Harris, 2 G. Greene (Ia.) 505, 52 Am. Dec. 535; it may be dissolved, on motion, on account of defects in the plaintiff's proceedings, apparent on their face; but not for defects which are not so apparent; Baldwin v. Conger, 9 Smedes & M. (Miss.) 516. Every such motion must precede a plea to the merits; Garmon v. Barringer, 19 N. C. 502; Young v. Gray, Harp. (S. C.) 38; Stoney v. McNeill, Harp. (S. C.) 156; Watson v. McAllister, 7 Mart. O. S. (La.) 368; Symons v. Northern, 49 N. C. 241; Drakford v. Turk, 75 Ala. 339; Memphis, C. & L. R. Co. v. Wilcox, 48 Pa. 161. The death of the defendant *pendente lite* is held in some states to dissolve the attachment; Sweringen v. Eberius' Adm'r, 7 Mo. 421, 38 Am. Dec. 463; Vaughn v. Sturtevant, 7 R. I. 372; Phillips v. Ash's Heirs and Adm'rs, 63 Ala. 414 (but not after judgment; Fitch v. Ross, 4 S. & R. [Pa.] 557). And so the civil death of a corporation; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; Paschall v. Whitsett, 11 Ala. 472. Not so, however, the bankruptcy of the defendant; Downer v. Brackett, 21 Vt. 599, Fed. Cas. No. 4,043; President, etc., of Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601; Kittredge v. Warren, 14 N. H. 509; Davenport v. Tilton, 10 Metc. (Mass.) 320; Vreeland v. Bruen, 21 N. J. L. 214; Wells v. Brander, 10 Smedes & M. (Miss.) 348; Hill v. Harding, 93 Ill. 77.

In those states where under a summons property may be attached if the plaintiff so directs, the defendant has no means of defeating the attachment except by defeating the action; but in some states, where an attachment does not issue except upon stated grounds, provision is made for the defendant's contesting the validity of the alleged grounds; while in other states it is held that he may do so, as a matter of right, without statutory authority; Morgan v. Avery, 7 Barb. (N. Y.) 656; Campbell v. Morris, 3 Harr. & McH. (Md.) 535; Havis v. Trapp, 2 Nott & McC. (S. C.) 130; Harris v. Taylor, 3 Sneed (Tenn.) 536, 67 Am. Dec. 576; Voorhees v. Hoagland, 6 Blackf. (Ind.) 232.

As to the attachment of property or indebtedness held by or owing from a third person, see GARNISHMENT.

ATTACHMENT OF THE FOREST. See COURT OF ATTACHMENT.

ATTACHMENT OF PRIVILEGE. A process by which a man, by virtue of his privilege, calls another to litigate in that court to which he himself belongs, and who has the privilege to answer there.

A writ issued to apprehend a person in a privileged place. *Termes de la Ley.*

ATTAINDER. That extinction of civil rights and capacities which takes place

whenever a person who has committed treason or felony receives sentence of death for his crime. 1 Steph. Com. 408; 1 Bish. Cr. L. § 641.

Attainder by confession is either by pleading guilty at the bar before the judges, and not putting one's self on one's trial by a jury, or before the coroner in sanctuary, when, in ancient times, the offender was obliged to abjure the realm.

Attainder by verdict is when the prisoner at the bar pleads not guilty to the indictment, and is pronounced guilty by the verdict of the jury.

Attainder by process or *outlawry* is when the party flies, and is subsequently outlawed. Coke, Litt. 391.

The effect of attainder upon a felon is, in general terms, that all his estate, real and personal, is forfeited; that his blood is corrupted, so that nothing passes by inheritance to, from, or through him; 1 Wms. Saund. 361, n.; 6 Coke 63 *a*, 68 *b*; 2 Rob. Eccl. 547; 22 Eng. L. & Eq. 598; that he cannot sue in a court of justice; Co. Litt. 130 *a*. See 1 Bish. Cr. Law, § 641.

In England, by statute 33 & 34 Vict. c. 23, attainder upon conviction, with consequent corruption of blood, forfeiture, or escheat, is abolished.

In the United States, the doctrine of attainder is now scarcely known, although during and shortly after the Revolution acts of attainder were passed by several of the states. The passage of such bills is expressly forbidden by the constitution.

Under the Confiscation Act of July 17, 1862, which imposed the penalty of confiscation of property as a punishment for treason and rebellion, all that could be sold was a right to the property seized, terminating with the life of the person for whose offence it was seized; Bigelow v. Forrest, 9 Wall. (U. S.) 339, 19 L. Ed. 696.

ATTAINT. Attainted, stained, or blackened.

A writ which lies to inquire whether a jury of twelve men gave a false verdict. Bracton, l. 4, tr. 1, c. 134; Fleta, l. 5, c. 22, § 8.

Formerly the jury were rather witnesses than judges; a false verdict would be perjury. The aggrieved party procured a writ of attaint. The case was tried before 24 jurors, usually knights. The penalty on conviction was one year's imprisonment, forfeiture of goods, etc. Its origin is uncertain; it appears on the record of the King's Court in 1202. It was limited to the possessory assizes (see ASSIZE OF NOVEL DISSEISIN), but by 1360 it had been extended to all classes of cases. It came to be the rule that the attaint jury must have before it the evidence on which the first jury founded its verdict, but the first jury could produce new evidence. Before 1565 it was seldom in use; it was abolished in 1825. 1 Holdsw. Hist. E. L. 161.

ATTEMPT. An endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. Com. v. McDonald, 5 Cush. (Mass.) 367; Griffin v. State, 26 Ga. 493.

An intent to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bish. Cr. Law § 728; Johnson v. State, 14 Ga. 55; State v. Marshall, 14 Ala. 411; People v. Lawton, 56 Barb. (N. Y.) 126; Cunningham v. State, 49 Miss. 685.

"An attempt, in general, is an overt act done in pursuance of an intent to do a specific thing, tending to the end, but falling short of complete accomplishment of it."

"In law, the definition must have this further qualification, that the overt act must be sufficiently proximate to the intended crime to form one of the natural series of acts which the intent requires for its full execution." Mitchell, J., in Com. v. Eagan, 190 Pa. 10, 21, 42 Atl. 374, 377.

To constitute an attempt, there must be an intent to commit some act which would be indictable, if done, either from its own character of that of its natural and probable consequences; State v. Jefferson, 3 Harr. (Del.) 571; Moore v. State, 18 Ala. 532; People v. Shaw, 1 Park. Cr. Cas. (N. Y.) 327; Davidson v. State, 9 Humphr. (Tenn.) 455; 9 C. & P. 518; 1 Crawf. & D. 156, 186; 1 Bish. Cr. Law § 731; an act apparently adapted to produce the result intended; Whart. Cr. L. § 182; State v. Clarissa, 11 Ala. 57; Com. v. Manley, 12 Pick. (Mass.) 173; Dunbar v. Harrison, 18 Ohio St. 32; State v. Rawles, 65 N. C. 334; Kunkle v. State, 32 Ind. 220; U. S. v. Morrow, 4 Wash. C. C. 733, Fed. Cas. No. 15,819; Rasnick v. Com., 2 Va. Cas. 356; 6 C. & P. 403; 1 Leach 19 (though some cases require a complete adaptation; 1 Bish. Cr. L. 749); an act immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution; 1 F. & F. 511; including solicitations of another; 2 East 5; People v. Bush, 4 Hill (N. Y.) 133; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; Com. v. Harrington, 3 Pick. (Mass.) 26; U. S. v. Worrall, 2 Dall. (U. S.) 384, 1 L. Ed. 426; but mere solicitation, not directed to the procurement of some specific crime, is not an attempt; Whart. Cr. L. 179; see SOLICITATION; and the crime intended must be at least a misdemeanor; 1 C. & M. 661, n.; Respublica v. Roberts, 1 Dall. (U. S.) 39, 1 L. Ed. 27. An abandoned attempt, there being no outside cause prompting the abandonment, is not indictable; Whart. Cr. L. § 137.

It has been held that an attempt to commit a crime, which could not, under the circumstances, be consummated, is not a criminal attempt; Dears. & B. C. C. 197; 9 Cox C. C. 497; People v. Moran, 123 N. Y. 254, 25 N. E. 412, 10 L. R. A. 109, 20 Am. St. Rep. 732; *contra*, 38 W. R. 95 (where in a remark which seems both *obiter* and casual,

the Court of Cr. Cas. Res. disapproves the earlier English cases); Com. v. McDonald, 5 Cush. (Mass.) 365; People v. Jones, 46 Mich. 441, 9 N. W. 486; State v. Wilson, 30 Conn. 500; Rogers v. Com., 5 S. & R. (Pa.) 463; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22. These are commonly known as the "pickpocket cases," but the doctrine that one may be guilty of an attempt to commit a crime, when it was for some reason unknown to the perpetrator, impossible, has been applied in cases of other crimes, as homicide; People v. Lee Kong, 95 Cal. 666, 30 Pac. 800, 17 L. R. A. 626, 29 Am. St. Rep. 165; bribery; Ex parte Bozeman, 42 Kan. 451, 22 Pac. 628; State v. Mitchell, 170 Mo. 633, 71 S. W. 175, 94 Am. St. Rep. 763; obtaining by false pretense; 11 Cox C. C. 570; extortion; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; burglary, where there was no property on the premises which could be stolen; State v. Beal, 37 Ohio St. 108, 41 Am. Rep. 490; abortion, where the woman was not pregnant; 2 Cox C. C. 41; but not where the woman was not quick with child when that was required to constitute the offence of procuring an abortion; State v. Cooper, 22 N. J. L. 52, 51 Am. Dec. 248; or where the charge was of an attempt to commit rape where the circumstances were such that if the object had been obtained it would not have been rape; State v. Brooks, 76 N. C. 1; People v. Quin, 50 Barb. (N. Y.) 128; *contra*, 24 Q. B. D. 357; Com. v. Shaw, 134 Mass. 221; Rhodes v. State, 1 Coldw. (Tenn.) 351. The cases on this subject are collected in an article on "Criminal Attempts" by J. H. Beale, Jr., in 16 Harv. L. Rev. 491. See, also, 9 L. R. A. (N. S.) 263, note. The offense may exist though the act may be impossible of accomplishment by the methods employed; Com. v. Kennedy, 170 Mass. 18, 48 N. E. 770.

Mere preparations, though made with criminal intent, do not constitute an attempt; [1903] T. S. 868 (So. Afr.).

An indictment has been upheld upon a criminal intent coupled with an act (procuring dies for counterfeiting) which fell short of an attempt under their statute; 33 E. L. & E. 533. See 1 Bish. Cr. L. § 724.

An attempt to commit a crime was not in itself a crime, in the early common law, but it is now generally made such by statute; and in some cases attempts are specially provided against with reference to particular crimes, as arson. See 4 L. R. A. (N. S.) 417, note, where cases under some state statutes are found. See RAPE; SUICIDE.

ATTENDANT. One who owes a duty or service to another, or in some sort depends upon him. Termes de la Ley.

ATTENDANT TERMS. Long leases or mortgages so arranged as to protect the title of the owner.

To raise a portion for younger children, it was quite common to make a mortgage to trustees. The powers of these trustees were generally to take possession of the estate, or to sell a part of the term if the portions were not duly paid. If the deed did not become *ipso facto* void upon payment of the portion, a release was necessary from the trustees to discharge the mortgage. If this was not given, the term became an outstanding satisfied term. The purchaser from the heir then procured an assignment of the term to trustees for his benefit, which then became a satisfied term to attend the inheritance, or an attendant term. These terms were held attendant by the courts, without any assignment, and operated to defeat intermediate alienations to some extent. There were other ways of creating outstanding terms besides the method by mortgage; but the effect and general operation of all these were essentially the same. By reason of the want of notice, by means of registration, of the making of charges, mortgages, and conveyances of lands, this mode of protecting an innocent purchaser by means of an outstanding term to attend the inheritance came to be very general prior to the 8 & 9 Vict. c. 112, which abolished all such terms as soon as satisfied. 1 Washb. R. P. 311; 4 Kent. 86.

ATTENTAT. Any thing whatsoever wrongfully innovated or attempted in the suit by the judge *a quo*, pending an appeal. Used in the civil and canon law; 1 Add. Eccl. 22, note; Ayliffe, Parerg. 100.

ATTENTION. Consideration; notice. The phrase "your bill shall have attention" was held to be ambiguous and not to amount to an acceptance of the bill; 2 B. & Ald. 113.

ATTERMINARE. To put off to a succeeding term; to prolong the time of payment of a debt. Stat. Westm. 2, c. 4; Cowell; Blount.

ATTERMINING. The granting a time or term for the payment of a debt.

ATTERMOIEMENT. In Canon Law. A making terms; a composition, as with creditors. 7 Low. C. 272, 306.

ATTESTATION. The act of witnessing an instrument in writing, at the request of the party making the same, and subscribing it as a witness. 3 P. Wms. 254; Shanks v. Christopher, 3 A. K. Marsh. (Ky.) 146; Hall v. Hall, 17 Pick. (Mass.) 373.

Deeds, at common law, do not require attestation; 2 Bla. Com. 307; 3 Dane, Abr. 354; Thacher v. Phinney, 7 Allen (Mass.) 149; and there are several states where at common law it was not necessary; Ingram v. Hall, 2 N. C. 205; Dole v. Thurlow, 12 Metc. (Mass.) 157. In many of the states there are statutory requirements on the subject, and where such exist they must be strictly complied with. It is generally safe to have two witnesses, one of whom may be and usually is the officer taking the acknowledgment. See Coit v. Starkweather, 8 Conn. 289, 20 Am. Dec. 110; Stone v. Ashley, 13 N. H. 38; Shults v. Moore, 1 McLean 520, Fed. Cas. No. 12,824; Ross v. Worthington, 11 Minn. 443 (Gil. 323), 88 Am. Dec. 95; 2 Greenl. Ev. § 275, n.; 4 Kent 457. The requisites are not the same in all cases as against the grantor and as against purchasers. See French v. French, 3 N. H. 234.

The attesting witness need not see the grantor write his name: if he sign in the

presence of the grantor, and at his request, it is sufficient; Jar. Wills 87–91; 2 B. & P. 217.

Wills must usually be attested by *competent* or *credible* witnesses; 2 Greenl. Ev. § 691; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; 1 Burr. 414; who must subscribe their names attesting in the presence of the testator; Edelen v. Hardey's Lessee, 7 Harr. & J. (Md.) 61, 16 Am. Dec. 292; Neil v. Neil, 1 Leigh (Va.) 6; 1 Maule & S. 294; 2 Curt. Eccl. 320; 3 *id.* 118; 2 Greenl. Ev. § 678; Snider v. Burks, 84 Ala. 53, 4 South. 225; Mays v. Mays, 114 Mo. 536, 21 S. W. 921. And see Nickerson v. Buck, 12 Cush. (Mass.) 342; 1 Ves. Ch. 11; 2 Washb. R. P. 682; but he need not sign in their presence; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Simmons v. Leonard, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. Rep. 875. The term "presence" in a statute requiring the subscription of witnesses to a will to be made in the presence of the testator, means "conscious presence;" Tucker v. Sandidge, 85 Va. 546, 8 S. E. 650.

In some states three witnesses are required to wills devising lands; in the majority of states only two. In Pennsylvania no *attesting* witnesses are required except in wills making gifts to charity, where two credible witnesses, not interested in the charity, are required.

A person may attest a will by making his mark, although the person who writes his name fails to sign his own name as a witness to the mark; Davis v. Semmes, 51 Ark. 48, 9 S. W. 434. Persons signing as witnesses must do so after the testator has signed the will; Brooks v. Woodson, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160. If a will is signed by only two witnesses where three are required as to realty, it is inoperative as to the realty but valid as to the personalty; Hays v. Ernest, 32 Fla. 18, 13 South. 451.

ATTESTATION CLAUSE. That clause wherein the witnesses certify that the instrument has been executed before them, and the manner of the execution of the same.

The usual attestation clause to a will is in the following formula, to-wit: "Signed, sealed, published, and declared by the above-named A B, as and for his last will and testament, in the presence of us, who have hereunto subscribed our names as the witnesses thereto, in the presence of the said testator and of each other." That of deeds is generally in these words: "Sealed and delivered in the presence of us."

ATTESTING WITNESS. One who, upon being required by the parties to an instrument, signs his name to it to prove it, and for the purpose of identification. 3 Campb. 232; Jenkins v. Dawes, 115 Mass. 599.

ATTESTOR. One who attests or vouches for.

ATTILE. The rigging or furniture of a ship. Jacob, L. Dict.

ATTORN. To turn over; to transfer to another money or goods; to assign to some particular use or service. Kennet, Paroch. Antiq. 283.

Used of the part taken by the tenant in a transfer of lands; 2 Bla. Com. 288; Littleton § 551. Now used of assent to such a transfer; 1 Washb. R. P. 28. The lord could not alien his land without the consent of the tenant, nor could the tenant assign without the consent of his lord; 2 Bla. Com. 27; 1 Spence, Eq. Jur. 137; 1 Washb. R. P. 28, n. Attornment is abolished by various statutes; 1 Washb. R. P. 336; Wms. R. P. 288, 366.

Attornment is the acknowledgment by a tenant of a new landlord on the alienation of the land and an agreement to become the tenant of the purchaser; Lindley v. Dakin, 13 Ind. 388.

The attornment of a tenant to a stranger without consent of the landlord is void; Terry v. Terry, 66 S. W. 1024, 23 Ky. L. Rep. 2242; Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Perkins v. Potts, 53 Neb. 444, 73 N. W. 936.

The doctrine of attornment grew out of the peculiar relations existing between the landlord and his tenant under the feudal law, and the reasons for the rule never had any existence in this country, and is inconsistent with our laws, customs and institutions. Beyond its application to estop a tenant from denying the title of his landlord, it can serve but little, if any, useful purpose; Perrin v. Lepper, 34 Mich. 292.

Recognition by the tenant of the assignee of the landlord and payment of rent to him are a sufficient attornment; Bradley & Co. v. Coal Co., 99 Ill. App. 427; Cummings v. Smith, 114 Ill. App. 35; and so is taking a lease from the landlord's grantee, good from the beginning of accumulations of rent in arrear; Pelton v. Place, 71 Vt. 430, 46 Atl. 63.

A conveyance of the leased land passes to the purchaser the right to collect the rent, and the tenant cannot prevent it by refusing to attorn to him; Edwards v. Clark, 83 Mich. 246, 47 N. W. 112, 10 L. R. A. 659; nor can the tenant dispute his landlord's title and attorn to another while in possession under the lease, and if he desires, after his term expires, to contest his landlord's title, he must first surrender the possession to him; McDowell v. Sutlive, 78 Ga. 142, 2 S. E. 937; Grizzard v. Roberts, 110 Ga. 41, 35 S. E. 291; Stover v. Davis, 57 W. Va. 196, 49 S. E. 1023.

Attornment is not necessary to entitle an assignee of the landlord to demand payment of the rent and to dispossess the tenant; Wetterer v. Soubirous, 22 Misc. 739, 49 N. Y. Supp. 1043; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794. Where there is a statute authorizing summary proceedings by the assignee, etc., of the landlord, the latter cannot maintain them after a conveyance of the demised premises; Boyd v. Sametz, 17 Misc. 728, 40 N. Y. Supp. 1070; but such proceed-

ings may be instituted against the tenant of his grantor by the grantee of the landlord; Doner v. Ingram, 119 Mo. App. 156, 95 S. W. 983; Small v. Clark, 97 Me. 304, 54 Atl. 758; or by an assignee of the lease; Drew v. Mosbarger, 104 Ill. App. 635. It has been held that the action in such cases could not be brought by the purchaser in his own name, but in the name of the vendor for his use; Cooper v. Gambill, 146 Ala. 184, 40 South. 827; and also that a tenant may resist a warrant for forcible detainer brought by one under whom he did not enter; Gray v. Gray, 3 Litt. (Ky.) 468.

To transfer services or homage.

Used of a lord's transferring the homage and service of his tenant to a new lord. Bract. 81, 82; 1 Sullivan, Lect. 227.

ATTORNATO FACIENDO VEL RECIPIENDO. A writ to command a sheriff or steward of a county court or hundred court to receive and admit an attorney to appear for the person that owes suit of court. Fitz. N. B. 349.

ATTORNEY. One put in the place, turn, or stead of another, to manage his affairs; one who manages the affairs of another by direction of his principal. Spelman, Gloss.; *Termes de la Ley.*

One who acts for another by virtue of an appointment by the latter. Attorneys are of various kinds.

Attorney in fact. A person to whom the authority of another, who is called the constituent, is by him lawfully delegated.

This term is employed to designate persons who act under a special agency, or a special letter of attorney, so that they are appointed *in factum*, for the deed, or special act to be performed; but in a more extended sense it includes all other agents employed in any business, or to do any act or acts *in pais* for another. Bacon, Abr. *Attorney;* Story, Ag. § 25.

All persons who are capable of acting for themselves, and even those who are disqualified from acting in their own capacity, if they have sufficient understanding, as infants of a proper age, and femes coverts, may act as attorneys of others; Co. Litt. 52 *a*; 1 Esp. 142; 2 *id.* 511.

Attorney-at-law. An officer in a court of justice who is employed by a party in a cause to manage the same for him.

Appearance by an attorney, on behalf of his client, has been allowed in England from the time of the earliest records of the courts of that country. They are mentioned in Glanville, Bracton, Fleta, and Britton; and a case turning upon the party's right to appear by attorney is reported; Y. B. 17 Edw. III. p. 8, case 23. In France such appearances were first allowed by letters patent of Philip le Bel. A. D. 1290; 1 Fournel, *Hist. des. avocats,* 42, 92; 2 Loizel. *Coutumes* 14. It results from the nature of their functions, and of their duties, as well to the court as to the client, that no one can, even by consent, be the attorney of both the litigating parties in the same controversy; Farr. 47. The name of attorney has commonly been applied in this country to those who practise in courts of common law; solicitors, in courts of equity; and proctors, in courts of admiralty.

The two branches of the legal profession were distinguished by Lord Brougham in The Serjeant's Case in 1839: "If you appear by attorney, he represents you, but where you have the assistance of an advocate you are present. . . . . Appearance by an attorney is one thing, but admitting advocates to plead the cause of another is a totally different proceeding." The case is reported in Manning's *Serviens ad Legem.*

As a general rule the eligibility of persons to hold the office of attorney-at-law is settled by local legislation or by rule of court.

The admission of attorneys to practise and their powers, duties and privileges are proper subjects of legislative control to the same extent and subject to the same limitations, as in the case of any other profession or business; Cook v. De La Guerra, 24 Cal. 241; In re Cooper, 22 N. Y. 67. In Robinson's Case, 131 Mass. 376, 41 Am. Rep. 239, this was recognized where a woman applied for admission and was rejected because the statute had not so provided, and it was said that the duty of the courts is limited to declaring the law as it is; and whether any change would be expedient is a legislative question. In In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187, a statute provided that persons possessing certain qualifications should be admitted to the practise of the law. One of these was that such applicant should file with the clerk of the court a certificate of good moral character signed by two attorneys of the court. Protests against the admission of three applicants were filed on the ground that they were not of good moral character, and it was held that when a statute has prescribed the qualifications for admission, and an applicant is shown to possess these qualifications, the courts must admit him. It was urged that this statute impaired the inherent right of the court to control its officers, but the court, quoting from a dissenting opinion in an Illinois case *infra*, said that if this is one of the inherent powers of a court, it is just as inherent in one court as another, and so it might come about that the judges of the supreme court and each of the judges of the superior courts might require widely different qualifications.

The Illinois case is directly opposed to this, and holds that the function of determining whether an applicant is sufficiently acquainted with the law pertains to the courts themselves. An act providing that persons having certificates of graduation from law schools of a certain specified standard should be admitted to practise law was held to be an unconstitutional encroachment upon the judicial branch of the government; In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; and to the same effect, In re Branch, 70 N. J. L. 537, 57 Atl. 431; In re Mosness, 39 Wis. 509, 20 Am. Rep. 55, where a stat-

ute was held invalid which authorized the admission of a non-resident. See 13 Harv. L. Rev. 233, where it is said, "The legislature certainly has no positive power to compel the courts to admit persons to practice before them," although admitting a limited control to prevent the admission of unsuitable persons. And a Pennsylvania case commenting on an act providing that the court shall admit attorneys in specified cases says, "We are clearly of the opinion that the Act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government;" Petition of Splane, 123 Pa. 527, 16 Atl. 481.

It has been held that, excepting where permitted by special statute, women cannot act as attorneys-at-law in the various states; In re Bradwell, 55 Ill. 535; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; and the supreme court of the United States will not issue a mandamus to compel a state court to admit a woman to practise law before such court, upon the ground that she has been denied a privilege or immunity belonging to her as a citizen of the United States, in contravention of the constitution; In re Lockwood, 154 U. S. 116, 14 Sup. Ct. 1082, 38 L. Ed. 929; the right to practise law in a state court not being such privilege or immunity; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; but the general trend of authority now is that women may be admitted to practise as attorneys; In re Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701; Ricker's Petition, 66 N. H. 207, 29 Atl. 559, 24 L. R. A. 740; Richardson's Case, 3 D. R. (Pa.) 299. Any woman of good standing at the bar of the supreme court of any state or territory or of the District of Columbia for three years, and of good moral character, may become a member of the bar of the supreme court of the U. S.; Act Feb. 15, 1879. In North Carolina, unnaturalized foreigners cannot be licensed as attorneys; Ex parte Thompson, 10 N. C. 355; Weeks, Att. at Law, 79, note.

The business of attorneys is to carry on the practical and formal parts of the suit; 1 Kent 307. See, as to their powers, 2 Supp. to Ves. Jr. 241, 254; 3 Chit. Bla. Com. 23, 338; Bacon, Abr. *Attorney*; Lynch v. Com., 16 S. & R. (Pa.) 368, 16 Am. Dec. 582; Huston v. Mitchell, 14 S. & R. (Pa.) 307, 16 Am. Dec. 506; Holker v. Parker, 7 Cra. (U. S.) 452, 3 L. Ed. 396.

The presumption is that an attorney has authority to appear; if the person he appears for does not disclaim his authority, he is bound; Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A. (N. S.) 244; International Harvester Co. of America v. Champlin, 155 App. Div. 847, 140 N. Y. Supp. 842.

The authority of an attorney commences with his retainer; Stone v. Bank, 174 U. S. 413, 19 Sup. Ct. 747, 43 L. Ed. 1028; while acting generally for a client he cannot accept service without authority; Reed v. Reed, 19 S. C. 548. After he has been retained in a case, he has certain implied powers therein; Stone v. Bank, 174 U. S. 413, 19 Sup. Ct. 747, 43 L. Ed. 1028. In suits actually pending, he may agree that one suit shall abide the event of another suit; Ohlquest v. Farwell, 71 Ia. 231, 32 N. W. 277; Gilmore v. Ins. Co., 67 Cal. 366, 7 Pac. 781. He may discontinue an action; Barrett v. R. Co., 45 N. Y. 628; Simpson v. Brown, 1 Wash. Terr. 248. In Rhutasel v. Rule, 97 Ia. 20, 65 N. W. 1013, it was held that the authority to dismiss must be specially conferred; *contra*, Bacon v. Mitchell, 14 N. D. 454, 106 N. W. 129, 4 L. R. A. (N. S.) 244. He may, where a pending case has been referred to arbitrators, agree to the submission of all matters in controversy, including those not embraced in the case; Bingham's Trustees v. Guthrie, 19 Pa. 418.

In general, the agreement of an attorney-at-law, within the scope of his employment, binds his client; 1 Salk. 86; as, to amend the record; Johnson v. Chaffant, 1 Binn. (Pa.) 75; to refer a cause; Holker v. Parker, 7 Cra. (U. S.) 436, 3 L. Ed. 396; 3 Taunt. 486; not to sue out a writ of error; 1 H. Bla. 21, 23; 2 Saund. 71 *a*, *b*; 1 Term 388; to strike off a *non pros.*; Reinholdt v. Alberti, 1 Binn. (Pa.) 469; to waive a judgment by default; 1 Archb. Pr. 26; or waive a jury trial; Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399. But the act must be within the scope of his authority. He cannot, for example, without special authority, purchase lands for the client at sheriff's sale; Pearson v. Morrison, 2 S. & R. (Pa.) 21; Beardsley v. Root, 11 Johns. (N. Y.) 464, 6 Am. Dec. 386; or extend the time for payment of money to release a judgment in ejectment, entered by consent; Beatty v. Hamilton, 127 Pa. 71, 17 Atl. 755; or compromise a claim; Brockley v. Brockley, 122 Pa. 1, 15 Atl. 646; Willard v. Gas-Fixture Co., 47 Mo. App. 1; U. S. v. Beebe, 180 U. S. 343, 21 Sup. Ct. 371, 45 L. Ed. 563; *contra*, Beliveau v. Mfg. Co., 68 N. H. 225, 40 Atl. 734, 44 L. R. A. 167, 73 Am. St. Rep. 577; or satisfy a judgment for less than is due; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734.

In the absence of fraud, the client is concluded by the acts, and even by the omissions, of his attorney; Rogers v. Greenwood, 14 Minn. 333 (Gil. 256); Sampson v. Ohleyer, 22 Cal. 200; Weeks, Att. at Law 375.

The mistake or unskillfulness of the attorney is not enough to authorize an injunction to restrain the enforcement of a judgment; Donovan v. Miller, 12 Idaho 600, 88 Pac. 82, 9 L. R. A. (N. S.) 524, 10 Ann. Cas. 444; Hambrick v. Crawford, 55 Ga. 335; Lowe v. Hamilton, 132 Ind. 406, 31 N. E. 1117; Payton v. McQuown, 97 Ky. 757, 31 S. W. 874, 53 Am. St. Rep. 437, and 31 L. R. A. 33, where the cases are collected in a note. Nor is the mistake of counsel upon a point of

law ground for a new trial; Patterson v. Matthews, 3 Bibb (Ky.) 80. Relief, however, has been granted on this ground, notably in Sharp v. New York, 31 Barb. (N. Y.) 578, which with an early case in Tennessee is criticized as deciding "with a spirit of humanity but with little regard for the settled principles of law"; Black, Judg. sec. 375.

In general, he has all the powers exercised by the usages of the court in which the suit is pending; Weeks, Att. at Law 374.

The principal duties of an attorney are —to be true to the court and to his client; to manage the business of his client with care, skill, and integrity; 4 Burr. 2061; 1 B. & Ald. 202; 2 Wils. 325; 1 Bingh. 347; Mech. Ag. 824; to keep his client informed as to the state of his business; to keep his secrets confided to him as such. And he is privileged from disclosing such secrets when called as a witness; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Sibley v. Waffle, 16 N. Y. 180; Martin v. Anderson, 21 Ga. 301; 40 E. L. & Eq. 353; Sargent v. Inhabitants of Hampden, 38 Me. 581. See CLIENT; CONFIDENTIAL COMMUNICATIONS. His first duty is the administration of justice, and his duty to his client is subordinate to that; In re Thomas, 36 Fed. 242. If an attorney while employed by one side secretly seeks employment on the other side, promising to give information acquired during such employment, he will be disbarred; U. S. v. Costen, 38 Fed. 24; but an attorney who learns from his client, in a professional consultation, or in any other manner, that the latter intends to commit a crime, it seems is bound by a higher duty to society and to the party to be affected to disclose it; State v. Barrows, 52 Conn. 323.

In estimating the value of services rendered by an attorney it is proper to take into account the time necessarily employed in and the success of the litigation; Berry v. Davis, 34 Ia. 594; the amount of values involved; Smith v. R. Co., 60 Ia. 515, 15 N. W. 303; and recovered; Parsons v. Hawley, 92 Ia. 175, 60 N. W. 520; the ability, learning and experience of the attorney and his standing in the profession; Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023; the character of the claim and the amount of the services to be rendered; Morehouse v. R. Co., 185 N. Y. 520, 78 N. E. 179, 7 Ann. Cas. 377.

An attorney's contract with his client for a fifty per cent. contingent fee is not necessarily unenforceable on the ground of being unconscionable; In re Fitzsimons, 174 N. Y. 15, 66 N. E. 554, but see to the contrary, 48 Ohio L. Bul. 238, discussing Hermon v. R. Co., 121 Fed. 184; Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170. These cases were not decided on the ground of champerty, but of taking improper advantage of the fiduciary relation. Fifty per cent. of the claim was held not to be extortionate in a difficult and complicated case, where the attorney exercised no influence in adjusting the amount, but it was voluntarily offered, and where he had paid out of it large amounts to other counsel; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64.

Where an attorney had agreed to prosecute an action for a contingent fee of one-half the amount recovered, it was held that the client could maintain an action against the attorney for the whole amount so recovered less the costs paid by the attorney; Ackert v. Barker, 131 Mass. 436. See CHAMPERTY.

A contract for a contingent fee does not deprive the client of the right to substitute another attorney; Johnson v. Ravitch, 113 App. Div. 810, 99 N. Y. Supp. 1059.

Any agreement conditioned on obtaining a divorce or intended or calculated to facilitate its obtainment is void; Barngrover v. Pettigrew, 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206, where the contract was to procure evidence to obtain a divorce. The parties to the divorce suit compromised and settled their differences and the attorney sued to recover on the contract. It was held that he could not recover on a *quantum meruit* because the services rendered were in themselves illegal.

A provision of a trust mortgage deed that in case of its sale an attorney's fee of five per cent. should be paid out of the proceeds was held void as against public policy though the fee was reasonable; Turner v. Boger, 126 N. C. 300, 35 S. E. 592, 49 L. R. A. 590.

A contract between a wife and her solicitor providing that for his services in procuring an allowance of alimony and enforcing its payment he shall receive a share of the alimony recovered is void, not only because the claim for alimony is incapable of assignment, but also because the contract is against public policy; Lynde v. Lynde, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. Rep. 692. Here the Court of Chancery took jurisdiction over the solicitor as an officer of the court, in order to require him to do justice to his client.

Any contract whereby a client is prevented from settling or discontinuing a suit is void, as such an agreement would encourage litigation; Kansas City Elevated R. Co. v. Service, 74 Kan. 316, 94 Pac. 262, 14 L. R. A. (N. S.) 1105; Huber v. Johnson, 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; Boardman v. Thompson, 25 Ia. 487; Weller v. R. Co., 68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; Davis v. Chase, 159 Ind. 242, 64 N. E. 88, 853, 95 Am. St. Rep. 294; North Chicago St. R. Co. v. Ackley, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; Davis v. Webber, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; In re Snyder, 190 N. Y. 66, 82 N. E. 742, 14 L. R. A. (N. S.) 1101, 123 Am. St. Rep. 533, 13 Ann. Cas. 441; Davy v. Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694.

But courts have an inherent power to pro-

tect attorneys against settlements consummated with the express purpose of depriving them of their compensation; Potter v. Min. Co., 19 Utah 421, 57 Pac. 270; Jones v. Morgan, 39 Ga. 310, 99 Am. Dec. 458; Jackson v. Stearns, 48 Or. 25, 84 Pac. 798, 5 L. R. A. (N. S.) 390. The attorney may proceed in the original suit in the name of his client notwithstanding the settlement; Randall v. Van Wagenen, 115 N. Y. 527, 22 N. E. 361, 12 Am. St. Rep. 828. But this rule applies only when the attorney has acquired a lien; Weicher v. Cargill, 86 Minn. 271, 90 N. W. 402; and it is said that there are serious practical difficulties in the way of such a procedure when the action is to recover unliquidated damages. The power to arrest or rescind the effect of a settlement is cautiously exercised in respect to suits for debts actually owing; and the power would be more cautiously applied to actions for torts, where it would be impracticable for the court, upon the opposing representations of the parties and without hearing the proof, to ascertain whether there was a just cause of action or whether there was ground to distrust the justice of the settlement. The whole case would have to be tried before the court could pronounce that the suit was properly instituted, and that it afforded prima facie ground for the award of costs; Boogren v. R. Co., 97 Minn. 51, 106 N. W. 104, 3 L. R. A. (N. S.) 379, 114 Am. St. Rep. 691, where the court adopting the language of Betts, J., in Peterson v. Watson, 1 Blatchf. & H. 487, Fed. Cas. No. 11,037, concludes: "That manifestly could never be done without serious inconvenience and expense; and the better practical rule will doubtless be to leave the proctor to look to the responsibility of his client alone. Ordinarily he will take the precaution to secure himself against the mischances of suits of this character; and if he does not, no urgent equity is thereby created for an extraordinary interference on his behalf by the court." This practice may occasionally work a hardship to the attorneys, but it is nevertheless a salutary rule.

As to the right of the attorney to recover under statutes giving him a lien, where his client has settled without his knowledge, see LIEN.

For a violation of his duties an action will, in general, lie; Cavillaud v. Yale, 3 Cal. 108, 58 Am. Dec. 388; 2 Greenl. Ev. §§ 145, 146; and in some cases he may be punished by attachment. Official misconduct may be inquired into in a summary manner, and the name of the offender stricken from the roll; Rice v. Com., 18 B. Monr. (Ky.) 472; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. Ed. 646; 17 Am. Dec. 194 note. See Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; DISBAR.

It is held that to solicit causes of action tends to promote litigation and to degrade the profession and that a contract so obtained is invalid; Ingersoll v. Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282, 119 Am. St. Rep. 1003, 10 Ann. Cas. 829, where the plaintiffs, a firm of attorneys, solicited a large number of claims for personal injuries and brought suit thereon. The defendants compromised with the claimants without the consent of the attorneys, and the latter sued the defendants for the fees promised by the claimants.

An attorney who enters into a barratrous contract to bring suits cannot recover upon an implied contract for services rendered in a suit brought pursuant to such contract, though the services are not, in themselves and apart from the barratrous contract, improper or illegal; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779. A contract whereby an attorney agrees to pay for business brought to him is void; Alpers v. Hunt, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17; but this decision was under a statute providing for the disbarment of attorneys who lent their names to be used in legal proceedings by persons who were not attorneys. That case was followed in Langdon v. Conlin, 67 Neb. 243, 93 N. W. 389, 60 L. R. A. 429, 108 Am. St. Rep. 643, 2 Ann. Cas. 834, where the facts were similar and the statute declared the rights and duties of attorneys. That such contracts are void as against public policy and good morals is held in Lyon v. Hussey, 82 Hun 15, 31 N. Y. Supp. 281; Burt v. Place, 6 Cow. (N. Y.) 431, where a statute prohibits the promise of a valuable consideration to any person as an inducement to placing a claim in the hands of an attorney. An attorney was held to be prohibited from paying or agreeing to pay a layman for inducing a client to place his claim in the attorney's hands; In re Clark, 184 N. Y. 222, 77 N. E. 1, affirming 108 App. Div. 150, 95 N. Y. Supp. 388. But see to the contrary; Vocke v. Peters, 58 Ill. App. 338, where an agreement by attorneys to pay a commission for all business brought to them was held not contrary to public policy; and to the same effect, Dunne v. Herrick, 37 Ill. App. 180, where an attorney's clerk solicited business for him and a contract between attorney and client to pay the attorney one-half the amount recovered in a suit for personal injuries was held valid and binding on the client.

The execution and delivery by an attorney at law of a power of attorney to sign his name to any and all letters of collection and other business of the corporation as long as the attorney in fact should remain in the employ of the corporation, is unprofessional conduct requiring discipline; In re Rothschild, 140 App. Div. 583, 125 N. Y. Supp. 629, where, as the offence had never been passed upon by the court, the attorney was suspend-

ed from practice for one year with leave to apply for reinstatement on satisfactory proof of his conduct meanwhile.

An attorney is not an insurer of the result in a case in which he is employed, and only ordinary care and diligence can be required of him; Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, 16 Am. St. Rep. 585. The authority of an attorney is revoked by the death of the client, and he cannot proceed further in the cause without a new retainer from the proper representative; Prior v. Kiso, 96 Mo. 303, 9 S. W. 898; Moyle v. Landers, 78 Cal. 99, 20 Pac. 241, 12 Am. St. Rep. 22.

An attorney is entitled to two kinds of liens for his fees, one upon the papers of his client in his possession, called a retaining lien, and the other upon a judgment or fund recovered, called a charging lien; Goodrich v. McDonald, 112 N. Y. 157, 19 N. E. 649; Sanders v. Seelye, 128 Ill. 631, 21 N. E. 601; Strohecker v. Irvine, 76 Ga. 639, 2 Am. St. Rep. 62. See Blackburn v. Clarke, 85 Tenn. 506, 3 S. W. 505; Taylor Iron & Steel Co. v. Higgins, 66 Hun 626, 20 N. Y. Supp. 746.

"A corporation cannot practice law, directly or indirectly;" In re Co-operative Law Co., 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879.

In all United States courts parties may plead and manage their cases personally or by counsel as the rules of such courts provide. R. S. § 747.

See Lien; Champerty; Retainer; Ethics, Legal; Barrister; Disbar; Solicitor; Advocati.

ATTORNEY'S CERTIFICATE. A certificate of the commissioners of stamps that the attorney therein named has paid the annual duty. This must be renewed yearly; and the penalty for practising without such certificate is fifty pounds; Stat. 37 Geo. III. c. 90, §§ 26, 28, 30. See also 7 & 8 Vict. c. 73, §§ 21–26; 16 & 17 Vict. c. 63.

ATTORNEY-GENERAL. A great officer, under the king, created by letters patent, whose office is to exhibit informations and prosecute for the crown in matters criminal; to file bills in the exchequer in any matter concerning the king's revenue. Others may bring bills against the king's attorney; 3 Bla. Com. 27; *Termes de la Ley*. He is usually addressed as "Mr. Attorney."

In each state there is an attorney-general, or similar officer, who appears for the state or people, as in England the attorney-general appears for the crown.

"The office is a public trust, which involves the exercise of an almost boundless discretion by an officer who ought to stand as impartial as a judge." Com. v. Burrell, 7 Pa. 39, per Gibson, C. J.

ATTORNEY-GENERAL OF THE UNITED STATES. An officer appointed by the president. His duties are to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and give his advice upon questions of law when required by the president, or when requested by the heads of any of the departments, touching matters that concern their departments; Act of 24th Sept. 1789. He is a member of the cabinet and under the act of congress of Jan. 19, 1886, U. S. Rev. Stat. 1 Supp. 487, is the fourth in succession, after the vice-president, to the office of president in case of a vacancy. See Department of Justice; Cabinet.

ATTORNEY, LETTER OF. See Power of Attorney.

ATTORNEY, WARRANT OF. See Warrant of Attorney.

ATTORNMENT. See Attorn.

AU BESOIN. (Fr. in case of need. "*Au besoin chez Messieurs —— à ——.*" "In case of need, apply to Messrs. —— at ——").

A phrase used in the direction of a bill of exchange, pointing out the person to whom application may be made for payment in case of failure or refusal of the drawee to pay; Story, Bills § 65.

AUBAINE. See Droit d'Aubaine.

AUCTION. A public sale of property to the highest bidder. See 19 Cent. L. J. 247; Bateman, Auct.

The manner of conducting an auction is immaterial, whether it be by public outcry or by any other manner. The essential part is the selection of a purchaser from a number of bidders. In a case where a woman continued silent during the whole time of the sale, but when any one bid she gave him a glass of brandy, and, when the sale broke up, the person who received the last glass of brandy was taken into a private room and he was declared to be the purchaser, this was adjudged to be an auction; 1 Dowl. Bailm. 115.

Auctions are generally conducted by persons licensed for that purpose. A bidder may be employed by the owner, if it be done *bonâ fide* and to prevent a sacrifice of the property under a given price; National Fire Ins. Co. v. Loomis, 11 Paige Ch. (N. Y.) 431; Veazie v. Williams, 3 Sto. 622, Fed. Cas. No. 16,907; The Raleigh, 37 Fed. 125. It has been held that the owner should give fair notice of this so that no one should be misled or deceived; Miller v. Baynard, 2 Houst. (Del.) 559, 83 Am. Dec. 168; but where bidding is fictitious, and by combination with the owner to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale; Poll. Contr. 539; Veazie v. Williams, 8 How. (U. S.) 134, 12 L. Ed. 1018; *id.*, 3 Sto. 611, Fed. Cas. No. 16,907; Webster v. French, 11 Ill. 254; Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564; Phippen v. Stickney, 3 Metc. (Mass.) 384; Switzer v. Skiles, 3 Gilm. (Ill.) 529, 44 Am. Dec. 723. But see 2 Kent 539, where this subject is considered. And see 6 J. B. Moore 316; 15 M. & W. 367; Baham v. Bach, 13 La.

287, 33 Am. Dec. 561; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; McDowell v. Simms, 41 N. C. 278; Tomlinson v. Savage, *id.*, 430; Pennock's Appeal, 14 Pa. 446, 53 Am. Dec. 561. Unfair conduct on the part of the purchaser will avoid the sale; 6 J. B. Moore 216; 3 B. & B. 116; Veazie v. Williams, 3 Sto. 623, Fed. Cas. No. 16,907; Wooton v. Hinkle, 20 Mo. 290; Smith v. Greenlee, 13 N. C. 126, 18 Am. Dec. 564. Where a buyer addressed the company assembled at an auction and persuaded them that they ought not to bid against him, the purchase by such buyer was held void; 3 B. & B. 116.

Where a sale is "without reserve" neither the vendor nor any one on his behalf can bid, and the property must go to the highest bidder; see Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195. An auctioneer who offers his property for sale without reserve pledges himself that the sale shall be without reserve, or contracts that the property shall go to the highest *bona fide* bidder, and in case the owner overbid, the highest *bona fide* bidder may sue the auctioneer as upon a contract; 1 El. & El. 309; such a case is not affected by the Statute of Frauds, § 17, which relates only to direct sales; *id.* This rule was approved in [1899] 2 Ch. 73; and see [1904] 41 Sc. L. Rep. 688.

In the United States the influence of the leading English case (1 El. & El. 309) is less plainly shown and the rule is even less clearly defined; Tillman v. Dunman, 114 Ga. 406, 40 S. E. 244, 57 L. R. A. 787, 88 Am. St. Rep. 28.

In New York it is said there is no case in that state which is directly in point upon the proposition that as a matter of law, where an auctioneer advertises a sale at public auction, and in response to this invitation bidders attend, an implied contract arises between them that the property will be knocked down to the highest bidder; Taylor v. Harnett, 26 Misc. 362, 55 N. Y. Supp. 988. In this case the auctioneer refused to accept the highest bid because of its inadequacy; to the same effect, Newman v. Vonderheide, 9 Ohio Dec. Reprint 164; but see Hartwell v. Gurney, 16 R. I. 78, 13 Atl. 113, where it is said *obiter* that the stricter rule seems to be the just and honest one and ought to prevail, for an offer to sell at auction is an offer to sell to the highest bidder, and every bid is an inchoate acceptance entitling the bidder to the property offered, if it turns out to be the highest and there is no retraction on either side before the hammer falls. But it has been held that an announcement that a certain property will be sold to the highest bidder is a mere declaration of an intent to hold an auction; Anderson v. R. Co., 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N. S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

A bid may be retracted by the bidder or the property withdrawn before acceptance has been signified; 3 Term 148; 4 Bingh. 653; 6 Hare 443; Benj. Sales § 270; [1904] 41 Sc. L. Rep. 688. The making the bid is the offer and it is accepted and made a binding unilateral contract by the fall of the hammer; 13 Harv. L. Rev. 58, citing 3 Term 148; 6 B. & S. 720; Blossom v. R. Co., 3 Wall. (U. S.) 196, 18 L. Ed. 43; Coker v. Dawkins, 20 Fla. 141.

Sales at auction are within the Statute of Frauds; 2 B. & C. 945; 7 East 558; O'Donnell v. Leeman, 43 Me. 158, 69 Am. Dec. 54; People v. White, 6 Cal. 75; Talman v. Franklin, 3 Duer (N. Y.) 395.

In Louisiana a bid made at an auction sale, although formally accepted, is not a complete sale, but only a promise of sale, which gives a right of action for breach or a claim for specific performance; Collins v. Desmaret, 45 La. Ann. 108, 12 South. 121. In California and Dakota the codes provide that if the auctioneer, having authority to do so, announces that the sale will be without reserve, the highest *bona fide* bidder has an absolute right to the completion of the sale to him, and that bids by the seller or any agent for him are void. But they also enact that the bidder may withdraw at any time before the hammer falls. Cal. Civ. Code § 1796; Dak. Civ. Code § 1026. Elsewhere, it is complete, at common law. See Bateman, Auctions 180. Error in description of real estate sold will avoid the sale if it be material; 4 Bingh. N. C. 463; 8 C. & P. 469; 1 Y. & C. 658; but an immaterial variation merely gives a case for deduction from the amount of purchase-money; 2 Kent 437; Judson v. Wass, 11 Johns. (N. Y.) 525, 6 Am. Dec. 392; State v. Gaillard, 2 Bay (S. C.) 11, 1 Am. Dec. 628; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436.

See BY-BIDDING.

AUCTIONARIUS (Lat.). A seller; a regrator; a retailer; one who bought and sold; an auctioneer, in the modern sense. Spelman, Gloss. One who buys poor, old, worn-out things to sell again at a greater price. Du Cange.

AUCTIONEER. A person authorized by law to sell the goods of others at public sale; one who conducts a public sale or auction; Com. v. Harnden, 19 Pick. (Mass.) 482. He is the agent of the seller; Ans. Contr. 346; 3 Term 148; Boinest v. Leignez, 2 Rich. (S. C.) 464; and of the buyer, for some purposes at least; 4 Ad. & E. 792; 3 Ves. & B. 57; McComb v. Wright, 4 Johns. Ch. (N. Y.) 659; Trustees of First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28; Cleaves v. Foss, 4 Greenl. (Me.) 1; Inhabitants of Alna v. Plummer, *id.* 258; Brent v. Green, 6 Leigh (Va.) 16; 2 Kent 539; Walker v. Herring, 21 Gratt. (Va.) 678, 8 Am. Rep. 616; Harvey v. Stevens, 43 Vt. 653;

White v. Watkins, 23 Mo. 423; [1902] 2 Ch. 266; up to the moment of sale he is agent for the vendor exclusively; it is only when the bidder becomes the purchaser that the agency for the buyer begins; Benj. Sales § 270. He is the agent of both parties at a public sale within the Statute of Frauds; 7 East 558; Pugh v. Chesseldine, 11 Ohio 109, 37 Am. Dec. 414; Harvey v. Stevens, 43 Vt. 655; Benj. Sales § 268. And see 16 Harv. L. Rev. 220, where it is remarked that the case where an agent acts for both parties at a sale is in itself anomalous; but not if he sells goods at a private sale; 1 H. & C. 484. The memorandum must be made at the time of the sale; Horton v. McCarty, 53 Me. 394; Smith v. Arnold, 5 Mas. 414, Fed. Cas. No. 13,004. An auctioneer employed to sell goods in his possession ordinarily has authority to receive payment for them, but if he acts as a mere crier or broker for a principal who retains possession, he would not have such authority; Benj. Sales § 741. He has a special property in the goods, and may bring an action for the price; 7 Taunt. 237; Beller v. Block, 19 Ark. 566; Hulse v. Young, 16 Johns. (N. Y.) 1; see 5 M. & W. 645; 5 B. & Ad. 568; and has a lien upon them for the charges of the sale, his commission, and the auction-duty; Harlow v. Sparr, 15 Mo. 184; 2 Kent 536.

Where auctioneers were employed to sell goods upon the terms that they were to be paid a lump sum by way of commission and were further to be paid all expenses, they were not entitled to charge the owner with the gross amounts of printing and advertising bills (where they had received discounts from printers and proprietors, in the honest belief that they were entitled to have such discounts allowed them); L. R. [1905] 1 K. B. 1.

He must obtain the best price he fairly can, and is responsible for damages arising from a failure to pursue the regular course of business, or from a want of skill; 3 B. & Ald. 616; and where he sells goods as the property of one not the owner, is liable for their value to the real owner; 7 Taunt. 237; Hoffman v. Carow, 20 Wend. (N. Y.) 21; Allen v. Brown, 5 Mo. 323; and if he sells goods with notice that they were obtained by fraud of another, he is liable to the real owner; Morrow Shoe Mfg. Co. v. Shoe Co., 57 Fed. 685, 6 C. C. A. 508, 24 L. R. A. 417. See Hutchinson v. Gordon, 2 Harr. (Del.) 179. For false representation or breach of contract, the vendee of land sold at auction has a right of action against the vendor as well as the auctioneer to recover a deposit paid at the time of sale; Mahon v. Liscomb, 19 N. Y. Supp. 224. See AGENT; AUCTION; BIDDER.

AUCTOR. In Roman Law. An auctioneer. In auction sales, a spear was fixed upright in the forum, beside which the seller took his stand; hence goods thus sold were said to be sold *sub hasta* (under the spear). The catalogue of goods was on tablets called *auctionariæ*.

AUDIENCE. A hearing.

It is usual for the executive of a country to whom a minister has been sent, to give such minister an audience. And after a minister has been recalled, an *audience of leave* usually takes place.

As to the right of audience in court, see BARRISTER; DISBAR.

AUDIENCE COURT. See COURT OF AUDIENCE.

AUDITA QUERELA (Lat.). A form of action which lies for a defendant to recall or prevent an execution, on account of some matter occurring after judgment amounting to a discharge, and which could not have been, and cannot be, taken advantage of otherwise. Thatcher v. Gammon, 12 Mass. 268. If in a justice's suit the defendant is out of the state at the time of the service of the writ and remains away until after the return day and has no notice of suit, judgment by default may be set aside by *audita querela;* Sawyer v. Cross, 65 Vt. 158, 26 Atl. 528; but not unless the action was on its face appealable; Sawyer v. Cross, 66 Vt. 616, 30 Atl. 5.

It is a regular suit in which the parties appear and plead; Brooks v. Hunt, 17 Johns. (N. Y.) 484; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329; Clark v. Hydraulic Co., 12 Vt. 435; Melton v. Howard, 7 How. (Miss.) 103; Avery v. U. S., 12 Wall. (U. S.) 305, 20 L. Ed. 405; and in which damages may be recovered if execution was issued improperly; Brooke, Abr. *Damages* 38; but the writ must be allowed in open court, and is not of itself a *supersedeas;* Emery v. Patton, 9 Phila. (Pa.) 125.

It is a remedial process, equitable in its nature, based upon facts, and not upon the erroneous judgments or acts of the court; 2 Wms. Saund. 148, n.; Lovejoy v. Webber, 10 Mass. 103; Brackett v. Winslow, 17 Mass. 159; Little v. Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698; Porter v. Vaughn, 24 Vt. 211.

It lies where an execution against A has been taken out on a judgment acknowledged by B. without authority, in A's name; Fitzh. N. B. 233; and see Cro. Eliz. 233; and generally for any matters which work a discharge occurring after judgment entered; Cro. Car. 443; Pettit v. Seaman, 2 Root (Conn.) 178; Com. v. Whitney, 10 Pick. (Mass.) 439; see 5 Co. 86 *b*; and for matters occurring before judgment which the defendant could not plead through want of notice or through collusion or fraud of the plaintiff; Johnson v. Harvey, 4 Mass. 485; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Wardell v. Eden, 2 Johns. Cas. 258; Williams v. Butcher, 1 W. N. C. (Pa.) 304.

It may be brought after the day on which judgment might have been entered, al-

though it has not been; 1 Rolle, Abr. 306, 431, pl. 10; 1 Mod. 111; either before or after execution has issued; Lothrop v. Bennet, Kirb. (Conn.) 187.

It does not lie for matter which might have been, or which may be, taken advantage of by a writ of error; Sutton v. Tyrrell, 10 Vt. 87; in answer to a *scire facias* of the plaintiff; 1 Salk. 264; nor where there is or has been a remedy by plea or otherwise; T. Raym. 89; Thatcher v. Gammon, 12 Mass. 270; Barrett v. Vaughan, 6 Vt. 243; Avery v. U. S., 12 Wall. (U. S.) 305, 20 L. Ed. 405; nor where there has been an agreement to accept a smaller sum in payment of a larger debt, while any part of the agreement continues executory; Keen v. Vaughan's Ex'x, 48 Pa. 477; nor to show that a confessed judgment was to be collateral security only; Emery v. Patton, 9 Phila. (Pa.) 125; nor where a judgment is erroneous in part without a tender of the legal part of the judgment; Rickard v. Fisk, 66 Vt. 675, 30 Atl. 93; nor against the commonwealth; Com. v. Berger, 8 Phila. (Pa.) 237.

In modern practice it is usual to grant the same relief upon motion which might be obtained by *audita querela;* Baker v. Judges, 4 Johns. (N. Y.) 191; Witherow v. Keller, 11 S. & R. (Pa.) 274; and in some of the states the remedy by motion has entirely superseded the ancient remedy; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Longworth v. Screven, 2 Hill (S. C.) 298, 27 Am. Dec. 381; Marsh v. Haywood, 6 Humphr. (Tenn.) 210; Dunlap v. Clements, 18 Ala. 778; Chambers v. Neal, 13 B. Monr. (Ky.) 256; while in others *audita querela* is of frequent use as a remedy recognized by statute; Sawyer v. Cross, 66 Vt. 616, 30 Atl. 5; Rickard v. Fisk, 66 Vt. 675, 30 Atl. 93; Stone v. Chamberlain, 7 Gray (Mass.) 206; Foss v. Witham, 9 Allen (Mass.) 572.

"*Audita querela* was given quite recently, that is to say in the tenth year of the reign, in Parliament, . . . and it was never given before." Y. B. 18 Edw. III, Rolls Series, p. 308. See Jac. L. Dict.; Fitzh. N. B. 102; Register of Writs, vol. 1, pp. 149, 150 (for the writ itself).

AUDITOR. An officer of the government, whose duty it is to examine the accounts of officers who have received and disbursed public moneys by lawful authority.

"The name *auditor* seems to have been originally applied to one whose duties were judicial rather than fiscal." McIlwain, High Court of Parl. 251.

An officer of the court, assigned to state the items of an account between the parties in a suit where accounts are in question, and exhibit the balance. Whitwell v. Willard, 1 Metc. (Mass.) 218.

They may be appointed by courts either of law or equity. They are appointed at common law in actions of account; Bacon, Abr. *Accompt*, F; and in many of the states in other actions, under statute regulations; Pierce v. Thompson, 6 Pick. (Mass.) 193; Bartlett v. Trefethen, 14 N. H. 427; Campbell v. Crout, 3 R. I. 60. An order of reference is proper where an accounting is necessary and the questions of law involved have been disposed of; Brown v. Finch, 63 Hun 633, 18 N. Y. Supp. 551. Where a trial has been commenced before a jury and the defendant consents to an accounting and the discharge of the jury, he cannot afterwards object to the order of reference because it requires the auditor to pass on disputed questions of law and fact; Garrity v. Hamburger Co. (Ill.) 28 N. E. 743.

Appearing before an auditor and examining witnesses without objection constitutes a waiver of the auditor's taking an oath before entering on his duties; Pardridge v. Ryan, 134 Ill. 247, 25 N. E. 627; Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Kelsey v. Darrow, 22 Hun (N. Y.) 125.

They have authority to hear testimony; Shearman v. Akins, 4 Pick. (Mass.) 283; Leach v. Shepard, 5 Vt. 363; Townshend v. Duncan, 2 Bland, Ch. (Md.) 45; Callender v. Colegrove, 17 Conn. 1; Paine v. Ins. Co., 69 Me. 568; in their discretion; Smith v. Smith, 27 N. H. 244; in some states, to examine witnesses under oath; Palmer v. Palmer, 38 N. H. 418; Dorsey v. Hammond, 1 Bland, Ch. (Md.) 463; to examine books; Lazarus v. Ins. Co., 19 Pick. (Mass.) 81; Callender v. Colegrove, 17 Conn. 1; and other vouchers of accounts; Barnard v. Stevens, 11 Metc. (Mass.) 297.

The auditor's report must state a special account; Finney's Adm'r v. Harbeson, 4 Yeates (Pa.) 514; Thomas v. Alsop, 2 Root (Conn.) 12; Tutton v. Addams, 45 Pa. 67; Hill v. Hogaboom, 13 Vt. 141; Bartlett v. Trefethen, 14 N. H. 427; giving items allowed and disallowed; Macks v. Brush, 5 Vt. 70; Whitehead v. Perie, 15 Tex. 7; but it is sufficient if it refer to the account; Demund v. Gowen, 5 N. J. L. 687; but see Herrick v. Belknap's Estate, 27 Vt. 673; and are to report exceptions to their decision of questions taken before them to the court; Thompson v. Arms, 5 Vt. 546; Crousillat v. McCall, 5 Binn. (Pa.) 433; and exceptions must be taken before them; Chappedelaine v. Dechenaux, 4 Cra. (U. S.) 308, 2 L. Ed. 629; Thompson v. Arms, 5 Vt. 546; Davis' Heirs v. Foley, Walk. (Miss.) 43; Whitehead v. Perie, 15 Tex. 7; Benoit v. Brill, 24 Miss. 83; Anderson v. Usher, 59 Ga. 567; unless apparent on the face of the report; Himely v. Rose, 5 Cra. (U. S.) 313, 3 L. Ed. 111. See Mengas' Appeal, 19 Pa. 221.

In some jurisdictions, the report of auditors is final as to facts; Parker v. Avery, Kirb. (Conn.) 353; Wood v. Barney, 2 Vt. 369; Davis' Heirs v. Foley, Walk. (Miss.) 43; In re Ludlam's Estate, 13 Pa. 188; Bradford v. Wright, 5 R. I. 338; Whitehead v

Perle, 15 Tex. 7; Closson v. Means, 40 Me. 337; unless impeached for fraud, misconduct, or very evident error; Appeal of Stehman, 5 Pa. 413; Appeal of Speakman, 71 Pa. 25; Closson v. Means, 40 Me. 337; but subject to any examination of the principles of law in which they proceeded; Spencer v. Usher, 2 Day (Conn.) 116. In others it is held *prima facie* correct; Lyman v. Warren, 12 Mass. 412; Washington County Mutual Ins. Co. v. Dawes, 6 Gray (Mass.) 376; Tourne v. Riviere, 1 La. Ann. 380; Bartlett v. Trefethen, 14 N. H. 427; Mathes v. Bennett, 21 N. H. 188; and evidence may be introduced to show its incorrectness; Tourne v. Riviere, 1 La. Ann. 380; Benoit v. Brill, 24 Miss. 83; see Appeal of Thompson, 103 Pa. 603; Colgrove v. Rockwell, 24 Conn. 584; and in others it is held to be of no effect till sanctioned by the court; Dorsey v. Hammond, 1 Bland, Ch. (Md.) 463; Lee v. Abrams, 12 Ill. 111.

When the auditor's report is set aside in whole or in part, it may be referred back; Moore's Ex'r v. Beauchamp, 4 B. Monr. (Ky.) 71; Shearman v. Akins, 4 Pick. (Mass.) 283; Leach v. Shepard, 5 Vt. 363; Mason v. Potter, 26 Vt. 722; Bolware v. Bolware, 1 Litt. (Ky.) 124; Lee v. Abrams, 12 Ill. 111; Hoyt v. French, 24 N. H. 198; Turner v. Haughton, 71 N. C. 370; Mast v. Lockwood, 59 Wis. 48, 17 N. W. 543; Gardiner v. Schwab, 34 Hun (N. Y.) 582; or may be rectified by the court; Swisher v. Fitch, 1 Smedes & M. (Miss.) 543; Dorr v. Hammond, 7 Colo. 79, 1 Pac. 693; or accepted if the party in favor of whom the wrong decision was made remits the item.

Where the report is referred back to the auditor, the whole case is reopened, and all parties are bound to take notice; In re Thomas' Estate, 76 Pa. 30; see Mason v. Potter, 26 Vt. 722; O'Neill v. Capelle, 62 Mo. 202.

Where two or more are appointed, all must act; Crone v. Daniels, 20 Conn. 331; unless the parties consent that a part act for all; Booth v. Tousey, 1 Tyl. (Vt.) 407.

An accountant appointed for the purpose of verifying and stating the true financial condition of a corporation, firm or individual. Lindley, L. J., in [1895] 2 Ch. 673, defining his duties to be in substance: To ascertain and state the true financial condition of the company and his duty is confined to that. He must take reasonable care to ascertain that the books show the company's true financial position. But he does not guarantee that the books do correctly show the true position of the company's affairs; or that his balance sheet is accurate according to the books. He must use reasonable care and skill, under the circumstances, before he believes that what he certifies is true; where suspicion is aroused more care is necessary.

AUDITORS OF THE IMPREST. Officers in the exchequer who formerly had the charge of auditing the great accounts of the king's customs, naval and military expenses, etc., but who are now superseded by the commissioners for auditing the public accounts. Jacob.

AUGMENTATION. The increase arising to the crown's revenues from the suppression of monasteries and religious houses and the appropriation of their lands and revenues.

A court of augmentations erected by Henry VIII., which was invested with the power of determining suits and controversies relating to monasteries and abbey lands.

The court was dissolved in the reign of Mary, but the office of augmentations remained long after; Cowell.

A share of the great tithes temporarily granted to the vicars by the appropriators, and made perpetual by statute 29 Car. II. c. 8.

The word is used in a similar sense in the Canadian law.

See COURT OF AUGMENTATION.

AULA. This was employed in mediæval England along with *curia*, and meant an enclosure or hall; it was used of the meetings of the lord's men held there exactly in the same way that the word *court* was used. McIlwain, High Court of Parl. 30. See COURT; CURIA; CURIA REGIS.

AULA REGIA. (Called frequently *Aula Regis*). The King's hall or palace. See CURIA REGIS.

AULIC COUNCIL. Pertaining to a royal court. In the old German empire, the Aulic Council was the personal council of the emperor, and one of the two supreme courts of the empire which decided without appeal. It was instituted about 1502, and organized under a definite constitution in 1559, modified in 1654. It finally consisted of a president, a vice-president, and eighteen councillors, six of whom were Protestants; the unanimous vote of the latter could not be set aside by the others. The Aulic Council ceased to exist on the extinction of the German Empire in 1806. The title is now given to the Council of State of the Emperor of Austria. Cent. Dict.

AUNCEL WEIGHT. An ancient manner of weighing by means of a beam held in the hand. *Termes de la Ley;* Cowell.

AUNT. The sister of one's father or mother: she is a relation in the third degree. See 2 Comyn, Dig. 474; Dane, Abr. c. 126, a. 3, § 4.

AUSTRALIAN BALLOT. See ELECTION.

AUSTRIA-HUNGARY. An empire in the southern central portion of Europe.

Since 1867 it has consisted of Austria and Hungary united under one hereditary sovereign, a common army and navy and diplomacy controlled by the Delegations, a body of 120 members, one-half representing the legislature of Austria and one-half that of Hungary, the upper house of each country returning 20 and the lower house 40 delegates. Ordinarily the delegates sit and vote in two chambers, their jurisdiction being limited to foreign affairs, common finances, and war. The legislature of Aus-

tria consists of the Provincial Diets representing the provinces and the Reichsrath, which consists of an upper house composed of princes of the imperial family, nobles, ecclesiastics, and 120 life members nominated by the Emperor; also a lower house of 353 members, elected. There is a ministry of nine members.

The legislature of Hungary is conjointly in the King and the Diet or Reichstag. This consists of an upper house or house of magnates, including hereditary peers, ecclesiastics and fifty life peers appointed by the Crown and other special representatives, and the lower house elected by the people to the number of 453. There is a ministry of nine, including a president. The supreme court of Austria sits at Vienna, that of Hungary at Buda-Pesth. An administrative court, a high court of justice, and a court of *cassation* also sit at Vienna. There are courts of second instance in the larger cities and circuit courts at most of the principal towns throughout the Empire.

AUTER. Another. See AUTRE.

AUTER ACTION PENDANT (L. Fr. another action pending). A plea that another action is already pending. It may be made either at law or in equity; Story, Eq. Pl. § 736. The second suit must be for the same cause; 2 Dick. 611; Russell v. Alvarez, 5 Cal. 48; Hixon v. Schooley, 26 N. J. L. 461; Clark v. Tuggle, 18 Ga. 604; Ballou v. Ballou, 26 Vt. 673; Merritt v. Richey, 100 Ind. 416; but a writ of error may abate a suit on the judgment; Jenkins v. Pepoon, 2 Johns. Cas. (N. Y.) 312; and if in equity, for the same purpose; 2 M. & C. Ch. 602; see Hart v. Granger, 1 Conn. 154; and in the same right; Story, Eq. Pl. § 739. The criterion by which to decide whether two suits are for the same cause of action is, whether the evidence, properly admissible in the one, will support the other; Steam Packet Co. v. Bradley, 5 Cr. C. C. 393, Fed. Cas. No. 13,333. See Watson v. Jones, 13 Wall. (U. S.) 679, 20 L. Ed. 666.

The suits must be such that the same judgment may be rendered in both; Buffum v. Tilton, 17 Pick. (Mass.) 510. They must be between the same parties; Hall v. Holcombe, 26 Ala. 720; Adams v. Gardiner, 13 B. Monr. (Ky.) 197; Langham v. Thomason, 5 Tex. 127; in person or interest; Bennett v. Chase, 21 N. H. 570; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; Anderson v. Barry, 2 J. J. Marsh. (Ky.) 281. The parties need not be precisely the same; Rowley v. Williams, 5 Wis. 151.

A suit for labor is not abated by a subsequent proceeding *in rem* to enforce a lien; Delahay v. Clement, 3 Scam. (Ill.) 201. A suit in trespass is temporarily barred by a previous proceeding *in rem* to enforce a forfeiture under laws of United States; Gelston v. Hoyt, 3 Wheat. (U. S.) 314, 4 L. Ed. 381.

The prior action must have been in a domestic court; 4 Ves. Ch. 357; Bowne v. Joy, 9 Johns. (N. Y.) 221; Lyman v. Brown, 2 Curt. C. C. 559, Fed. Cas. No. 8,627; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Drake v. Brander, 8 Tex. 351; U. S. v. Cruikshank, 92 U. S. 548, 23 L. Ed. 588; Allen v. Watt, 69 Ill. 655; Yelverton v. Conant, 18 N. H. 123; see Newell v. Newton, 10 Pick. (Mass.) 470; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Salmon v. Wootton, 9 Dana (Ky.) 422; Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109; but a foreign attachment against the same subject-matter may be shown; Embree v. Hanna, 5 Johns. (N. Y.) 101; see Winthrop v. Carlton, 8 Mass. 456; Morton v. Webb, 7 Vt. 124; Sargent v. Granite Co., 3 Misc. 325, 23 N. Y. Supp. 886; Harvey v. R. Co., 59 Minn. 405, 52 N. W. 905, 17 L. R. A. 84; but it will not avail where there was no appearance in the attachment suit or no personal service on the party attached; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; and of the same character; 22 Eng. L. & Eq. 62; Story, Eq. Pl. 736; thus a suit at law is no bar to one in equity; Peak v. Bull & Co., 8 B. Monr. (Ky.) 428; Bolton v. Landers, 27 Cal. 104; nor is the pendency of a bill in equity a bar to an action at law; Mattel v. Conant, 156 Mass. 418, 31 N. E. 487; Blanchard v. Stone, 16 Vt. 234; unless there be concurrent jurisdiction; 22 Law Rep. 74; but the plaintiff may elect, and equity will enjoin him from proceeding at law if he elect to proceed in equity; 2 Dan. Ch. Pr. § 4; Bisp. Eq. § 363; but he will not be required to elect in such case, unless the suit at law is for the same cause, and the remedy at law is co-extensive, and equally beneficial with the remedy in equity. A suit in the circuit court having jurisdiction will abate a suit in the state court, if in the same state; Walsh v. Durkin, 12 Johns. (N. Y.) 99; Smith v. Ins. Co., 22 N. H. 21; and so will a suit in a state court abate one in a United States circuit court; Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243; but not unless jurisdiction is shown; White v. Whitman, 1 Curt. C. C. 494, Fed. Cas. No. 17,561; Ex parte Balch, 3 McLean, 221, Fed. Cas. No. 790; Wadleigh v. Veazie, 3 Sumn. 165, Fed. Cas. No. 17,031; and not unless the suit is pending for the same cause, and between the same parties, in the same state in which the circuit court is sitting; Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Brooks v. Mills County, 4 Dill. 524, Fed. Cas. No. 1,955.

The pendency of another suit for the same equitable relief, in another court of co-ordinate jurisdiction, is a bar to a motion for an injunction; Cleveland, P. & A. R. Co. v. City of Erie, 27 Pa. 380; and may be pleaded in abatement of an action at law for the same cause; Pittsburg & C. R. Co. v. R. Co., 76 Pa. 481.

In general, the plea must be in abatement; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; Carr v. Casey, 20 Ill. 637; Rowley v. Williams, 5 Wis. 151; Ex parte Balch, 3 McLean, 221, Fed. Cas. No. 790; Danforth v. R. Co., 93 Ala. 614, 11 South. 60; Central R. & Banking Co. v. Coleman, 88 Ga. 294, 14 S. E. 382; Mattel v. Conant, 156 Mass. 418, 31 N. E.

487; Rogers v. Hoskins, 15 Ga. 276; but in a penal action at the suit of a common informer, the priority of a former suit for the same penalty in the name of a third person may be pleaded in bar, because the party who first sued is entitled to the penalty; Anderson v. Barry, 2 J. J. Marsh. (Ky.) 281.

It must be pleaded in abatement of the subsequent action in order of time; Renner v. Marshall, 1 Wheat. (U. S.) 215, 4 L. Ed. 74; Carr v. Casey, 20 Ill. 637; Rowley v. Williams, 5 Wis. 151; Greenwood v. Rector, 1 Hempst. 708, Fed. Cas. No. 5,792; Hailman v. Buckmaster, 3 Gilm. (Ill.) 498; Buffum v. Tilton, 17 Pick. (Mass.) 510; Nicholl v. Mason, 21 Wend. (N. Y.) 339.

It must show an action pending or judgment obtained at the time of the plea; Hixon v. Schooley, 26 N. J. L. 461; Hope v. Alley, 11 Tex. 259; but it is sufficient to show it pending when the second suit was commenced; Parker v. Colcord, 2 N. H. 36; Toland v. Tichenor, 3 Rawle (Pa.) 320; the court first acquiring concurrent jurisdiction retains it to the exclusion of the other; Griffin v. Birkhead, 84 Va. 612, 5 S. E. 685; when both suits are commenced at the same time, the pendency of each may be pleaded in abatement of the other, and both be defeated; Davis v. Dunklee, 9 N. H. 545; Beach v. Norton, 8 Conn. 71; Harris v. Linnard, 9 N. J. L. 58; Morton v. Webb, 7 Vt. 124; Middlebrook v. Travis, 68 Hun 155, 22 N. Y. Supp. 672; and the plaintiff cannot avoid such a plea by discontinuing the first action subsequently to the plea; 2 Ld. Raym. 1014; Com. v. Churchill, 5 Mass. 174; Frogg's Ex'rs v. Long's Adm'r, 3 Dana (Ky.) 157, 28 Am. Dec. 69; *contra*, Marston v. Lawrance, 1 Johns. Cas. (N. Y.) 397; Ballou v. Ballou, 26 Vt. 673; Rogers v. Hoskins, 15 Ga. 270; Rush v. Frost, 49 Ia. 183; Findlay v. Keim, 62 Pa. 112; Warder v. Henry, 117 Mo. 530, 23 S. W. 776. And a prior suit discontinued before plea pleaded in the subsequent one will not abate such suit; Adams v. Gardiner, 13 B. Monr. (Ky.) 197; Dean v. Massey, 7 Ala. 601; Nichols v. Bank, 45 Minn. 102, 47 N. W. 462; nor will it if a nonsuit is entered *nunc pro tunc*, to make it of a date before the commencement of the second action; Wilson v. Pearson, 102 N. C. 290, 9 S. E. 707. It may be pleaded in abatement of the action in the inferior court, and must aver appearance, or at least service of process; 1 Vern. 318. Suing out a writ is said to be sufficient at common law; Bentley v. Joslin, 1 Hempst. 218, Fed. Cas. No. 18,232. See LIS PENDENS.

It must be shown that the court entertaining the first suit has jurisdiction; Rood v. Eslava, 17 Ala. 430; White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561. It is a sufficient defence that the plaintiff has pleaded the identical claim on which the action was brought as a set-off in a pending suit by the defendant; Pennsylvania R. Co. v. Davenport, 154 Pa. 111, 25 Atl. 890.

It must be proved by the defendant by record evidence; Fowler v. Byrd, Hempst. 213, Fed. Cas. No. 4,999 *a*; Com. v. Churchill, 5 Mass. 174; Riddle v. Potter, 1 Cra. C. C. 288, Fed. Cas. No. 11,811. It is said that if the first suit be so defective that no recovery can be had, it will not abate the second; Rogers v. Hoskins, 15 Ga. 270; Langham v. Thomason, 5 Tex. 127; Quinebaug Bank v. Tarbox, 20 Conn. 510; Downer v. Garland, 21 Vt. 362; Cornelius v. Vanarsdallen's Adm'r, 3 Pa. 434.

A prior indictment pending does not abate a second for the same offence; Dutton v. State, 5 Ind. 533; Com. v. Drew, 3 Cush. (Mass.) 279; Com. v. Dunham, Thach. Cr. Cas. (Mass.) 513.

When a defendant is arrested pending a former suit or action in which he was held to bail, he will not, in general, be held to bail if the second suit be for the same cause of action; Clark v. Weldo, 4 Yeates (Pa.) 206; under special circumstances, in the discretion of the court, a second arrest will be allowed; Peck v. Hozier, 14 Johns. (N. Y.) 347. Pendency of one attachment will abate a second in the same county; James v. Dowell, 7 Smedes & M. (Miss.) 333.

See, generally, Gould, Stephen, and Chitty on Pleading; Story, Mitford, and Beames on Equity Pleading; Bacon, Abr. *Abatement, Bail in Civil Cases.*

AUTER DROIT. In right of another.

AUTER VIE. See ESTATE PUR AUTRE VIE.

AUTHENTIC ACT. In Civil Law. An act which has been executed before a notary or other public officer authorized to execute such functions, or which is testified by a public seal, or has been rendered public by the authority of a competent magistrate, or which is certified as being a copy of a public register. Nov. 73, c. 2; Cod. 752, 6. 4. 21; Dig. 22. 4.

An act which has been executed before a notary public or other officer authorized to execute such functions, in presence of two witnesses, free, male, and aged at least fourteen years; or of three witnesses, if the party be blind. La. Civ. Code, art. 2231. If the party does not know how to sign, the notary must cause him to affix his mark to the instrument. La. Civ. Code, art. 2231. The authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns, unless it be declared and proved to be a forgery. *Id.* art. 2233. See Merlin, *Répert.*

AUTHENTICATION. A proper or legal attestation.

Acts done with a view of causing an instrument to be known and identified.

Under the constitution of the U. S., congress has power to provide a method of au-

thenticating copies of the records of a state with a view to their production as evidence in other states. See FOREIGN JUDGMENT; FULL FAITH AND CREDIT; RECORDS.

AUTHENTICS. A collection of the Novels of Justinian, made by an unknown person.

They are *entire,* and are distinguished by their name from the epitome made by Julian. See 1 Mackeldey, Civ. Law § 72.

A collection of extracts made from the Novels by a lawyer named Irnier, and which he inserted in the code at the places to which they refer. These extracts have the reputation of not being correct. Merlin, *Répert. Authentique.*

AUTHOR (Lat. *auctor,* from *augere,* to increase, to produce).

One who produces, by his own intellectual labor applied to the materials of his composition, an arrangement or compilation new in itself. Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640.

When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author; 7 C. B. N. S. 268; but he is not an author who merely suggests the subject, and has no share in the design or execution of the work; 17 C. B. 432; Drone, Copyright 236. The reporter of a speech verbatim is the author of the report; [1900] A. C. 539. The adopter of a foreign drama, who introduces into his version material alterations, is an author of a dramatic piece; 74 C. T. 77; within the Fine Arts Copyright Act, the operator who takes (or superintends the taking of) the negative is the author of a photograph and not the actual proprietor of the business; 52 L. J. Q. B. 750.

See COPYRIGHT.

AUTHORITIES. Enactments and opinions relied upon as establishing or declaring the rule of law which is to be applied in any case.

The opinion of a court, or of counsel, or of a text-writer upon any question, is usually fortified by a citation of authorities. In respect to their general relative weight, authorities are entitled to precedence in the order in which they are here treated.

The authority of the constitution and of the statutes and municipal ordinances are paramount; and if there is any conflict among these, the constitution controls, and courts declare a statute or ordinance which conflicts with the former to be so far forth of no authority. See CONSTITUTIONAL LAW.

The decisions of courts of justice upon similar cases are the authorities to which most frequent resort is to be had; and although in theory these are subordinate to the first class, in practice they do continually explain, enlarge, or limit the provisions of enactments, and thus in effect largely modify them. The word *authorities* is frequently used in a restricted sense to designate citations of this class. See 23 A. & E. Encyc. of Law 19; Chamberlain, *Stare Decisis.* See PRECEDENTS.

As to American decisions as authorities in English courts, see PRECEDENTS.

The opinions of legal writers. Of the vast number of treatises and commentaries which we have, comparatively few are esteemed as authorities. A very large number are in reality but little more than digests of the adjudged cases arranged in treatise form, and find their chief utility as manuals of reference. Hence it has been remarked that when we find an opinion in a text-writer upon any particular point, we must consider it not merely as the opinion of the author, but as the supposed result of the authorities to which he refers; and if on examination of those authorities they are found not to establish it, his opinion is disregarded; 3 B. & P. 301. Where, however, the writer declares his own opinion as founded upon principle, the learning and ability of the writer, together with the extent to which the reasons he assigns commend themselves to the reader, determine the weight of his opinion. A distinction has been made between writers who have and who have not held judicial station; Ram, Judgments 93. But this, though it may be borne in mind in estimating the learning and ability of an author, is not a just test of his authority. See 3 Term 64, 241. Early text-books have a footing of their own and are considered authorities. Pollock, First Book 236. "In England and America, not only is there no line between the careers of judges and advocates, but there is no line between the judges and advocates and the jurists. Indeed, a large proportion of those text-writers who could be properly cited as authority have either filled high judicial positions, or have been actively engaged in some branch of practice. Omitting the names of living writers, we have, in England, Bracton, Littleton, Coke, Hale, Doderidge, Gilbert, Foster, Blackstone, Fearne, Hargrave, Butler, Preston, Wigram, Abbott, Sugden, Stephen, Byles, Williams, Blackburn, Benjamin; and in the United States, Kent, Story, Redfield, Washburn, Rawle [Covenants for Title]." John C. Gray (Nature and Sources of Law 255). Foster's Crown Law (1762) is said to be the latest book to which authority in the exact sense can be ascribed. Pollock, First Book of Jurispr. 246. Five books are said to stand out pre-eminently in the history of English law—Glanvil, Bracton, Littleton, Coke and Blackstone. 2 Holdsw. Hist. E. L. 484.

"It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in court—I mean, of course, text-books by living authors—and some judges have gone so far as to say that they shall not be quoted." Kekewich, J., in [1887] L. R. 37 C. D. 54.

In complicated questions of real estate law,

in the absence of cases, weight is given to text-books of recognized authority; 18 C. B. N. S. 90, 107 (Erle, C. J.); and to the settled practice of conveyancers; 2 Brod. & Bing. 473, 600, per Eldon, L. C., in the House of Lords; Turn. & R. 81, 87, when the same judge puts his decision on that ground, saying, that "after the abuse which I have heard at the bar of the House of Lords and elsewhere upon that subject, I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice." The practice of conveyancers was considered by Jessel, M. C., worthy of consideration though not decisive; 16 Ch. D. 211, 223.

As to the value and effect of the opinions of the Attorney-Generals of the United States, see In re District Attorney of United States, 2 Cadwalader's Cases 138, Fed. Cas. No. 3,924, 7 Am. L. Reg. (N. S.) 801, per Cadwalader, J. Devens, Atty.-Gen., in 16 Op. 522, referred to this opinion as being that of a subordinate judge, and therefore less weighty than those of the Attorney-Generals. See EXECUTIVE POWER.

The opinions of writers on moral science, and the codes and laws of ancient and foreign nations, are resorted to in the absence of more immediate authority, by way of ascertaining those principles which have commended themselves to legislators and philosophers in all ages. See CODE. Lord Coke's saying that common opinion is good authority in law, Co. Litt. 186 *a*, is not understood as referring to a mere speculative opinion in the community as to what the law upon a particular subject is; but to an opinion which has been frequently acted upon, and for a great length of time, by those whose duty it is to administer the law, and upon which course of action important individual rights have been acquired or depend; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 577, 49 Am. Dec. 189.

As to the mode of citing authorities, see CITATION OF AUTHORITIES.

See JUDGE-MADE LAW; LAW.

AUTHORITY. The lawful delegation of power by one person to another.

Authority coupled with an interest is an authority given to an agent for a valuable consideration, or which forms part of a security.

Express authority is that given explicitly, either in writing or verbally.

General authority is that which authorizes the agent to do everything connected with a particular business. Story, Ag. § 17.

It empowers him to bind his principal by all acts within the scope of his employment; and it cannot be limited by any private direction not known to the party dealing with him. Paley, Ag. 199.

Limited authority is that where the agent is bound by precise instructions.

Special authority is that which is confined to an individual transaction. Story, Ag. § 19; 15 East 400, 408; Andrews v. Kneeland, 6 Cow. (N. Y.) 354.

Such an authority does not bind the employer, unless it is strictly pursued; for it is the business of the party dealing with the agent to examine his authority; and therefore, if there be any qualification or express restriction annexed to it, it must be observed; otherwise, the principal is discharged; Paley, Ag. 202.

Naked authority is that where the principal delegates the power to the agent wholly for the benefit of the former.

A naked authority may be revoked; an authority coupled with an interest is irrevocable.

Unlimited authority is that where the agent is left to pursue his own discretion.

See PRINCIPAL AND AGENT.

AUTOCRACY. A government where the power of the monarch is unlimited by law.

AUTOMATIC COUPLER. See SAFETY APPLIANCE ACT.

AUTOMOBILES. A vehicle for the carriage of passengers or freight, propelled by its own motor. It has been held to be a carriage, not a machine; Baker v. Fall River, 187 Mass. 53, 72 N. E. 336; but by the same court in a later case it was held that a statute enacted more than one hundred years ago providing that cities or towns should pay for the repairs of highways so as to make them reasonably safe for travellers with carriages could not be construed reasonably to include a heavy modern automobile; Doherty v. Inhabitants of Ager, 197 Mass. 241, 83 N. E. 677, 14 L. R. A. (N. S.) 816, 125 Am. St. Rep. 355.

The legislature may, under the police power, regulate the driving of automobiles and motor cycles and provide for a registration fee, which is a license fee, not a tax; Com. v. Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; see Com. v. Densmore, 29 Pa. Co. Ct. R. 217. A city may, under a charter conferring the power to regulate the use of its highways, enact an ordinance requiring the registering and numbering of automobiles or other motor vehicles and exacting a fee from the owner to pay for the license tag to be furnished by the city; People v. Schneider, 139 Mich. 673, 103 N. W. 172, 69 L. R. A. 345, 5 Ann. Cas. 790. It may regulate the speed of automobiles and require the use of reasonable safety appliances; City of Chicago v. Banker, 112 Ill. App. 94. It may prescribe different rates of speed in different parts of the city, according to the width of the streets, their use, and the density of population; Chittenden v. Columbus, 26 Ohio C. C. 531. An ordinance limiting speed within certain limits is not invalid because another ordinance permits street cars to run at a greater rate of speed; *id.* A provision in the charter of a city which empowered it to regulate the use of the streets and the speed of vehicles, and to license and regulate certain occupations, was held not to confer power

to enact an ordinance requiring one who uses an automobile for his private business and pleasure only to submit to an examination and to be licensed; City of Chicago v. Banker, 112 Ill. App. 94; the ordinance was further held to impose a burden upon one class of citizens not imposed upon others.

There may be a recovery for common law negligence in operating an automobile, although the use of such vehicles has become a matter of statutory regulation; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487. The law does not denounce motor carriages as such on the public ways. So long as they are constructed and propelled in a manner consistent with the proper use of the highways and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travellers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402; Indiana Springs Co. v. Brown, 165 Ind. 465, 74 N. E. 615, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656. There is nothing dangerous in their use when carefully managed. Their guidance, speed and noise are all subject to quick and easy regulation, and under the control of a competent and considerate manager it is as harmless on the road as other vehicles in common use; McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087. It is the manner of driving the vehicle, and that alone, which threatens the safety of the public. The ability to stop quickly, its quick response to guidance, its uncontrolled sphere of action, would seem to make the automobile one of the least dangerous of conveyances; Yale L. J. Dec. 1905. Because they are likely to frighten horses is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention; and in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even accidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road. It is improper to say that the driver of a horse has rights in the road superior to the driver of the automobile; Hannigan v. Wright, 5 Pennewill (Del.) 537, 63 Atl. 234; Wright v. Crane, 142 Mich. 508, 106 N. W. 71; and each is equally restricted in the exercise of his rights by the corresponding rights of the other; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Holland v. Bartch, 120 Ind. 46, 22 N. E. 83, 16 Am. St. Rep. 307. Each is required to use ordinary care, in order to avoid receiving injury as well as inflicting injury upon the other, and in this the degree of care required is to be estimated by the exigencies of the particular situation.

No operator of an automobile is exempt from liability for a collision in a public street by merely showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by the law. He is bound to anticipate that he may meet persons at any point in a public street; Buscher v. Transp. Co., 106 App. Div. 493, 94 N. Y. Supp. 798; and he must keep a proper lookout for them; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972; and keep his machine under such control as will enable him to avoid a collision with another person also using care and caution; Gregory v. Slaughter, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228, 124 Am. St. Rep. 402; if necessary he must run slowly, and even stop; Thies v. Thomas, 77 N. Y. Supp. 276. No blowing of a horn or whistle, nor the ringing of a bell or gong, without an attempt to lessen the speed, is sufficient, if the circumstances demand that the speed should be lessened, or the machine be stopped, and such a course is practicable. The true test is that he should use all the care which a careful driver would have exercised under the same circumstances; Thies v. Thomas, 77 N. Y. Supp. 276. He has been held to the same degree of care as a motorman of an electric car; McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972. A pedestrian crossing a street is not bound to "stop, look and listen" for automobiles; Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487. That a statute limiting speed on the highways applies only to horseless vehicles does not render it void as an unjust discrimination; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487.

The U. S. R. S. prohibiting passenger steamers from carrying as freight certain articles, including petroleum products or other like explosive fluids, except under certain conditions, were amended by the act of Feb. 20, 1901, which provides that "nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: provided however that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and the same be not relighted until after said vehicle shall have left the same." Under this act it was held that gasolene contained in the tank of an automobile being transported on a steam vessel was carried as freight within the meaning of the statute, that an automobile in which the motive power was generated by passing an electric spark through a compressed mixture of gasolene and air in the cylinder, causing

intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run in and off the boat by its own power, was a violation of the statute; The Texas, 134 Fed. 909. In 1905, Congress amended the existing law by enacting that "nothing in the foregoing or following sections of this act shall prohibit the transportation by steam vessels of gasolene or any of the products of petroleum when carried by motor vehicles (commonly known as automobiles) using the same as a source of motive power: provided however, that all fire, if any, in such vehicles or automobiles be extinguished immediately after entering said vessels and the same be not relighted until immediately before said vehicle shall leave the vessel; provided further, that any owner, master, agent or other person having charge of passenger steam vessels shall have the right to refuse to transport automobile vehicles, the tanks of which contain gasolene, naptha or other dangerous burning fluids"; 33 Stat. L. 720.

An absent owner of an automobile is not liable for the negligence of the chauffeur committed at a time when he was not engaged in the owner's business; Clark v. Buckmobile Co., 107 App. Div. 120, 94 N. Y. Supp. 771; Reynolds v. Buck, 127 Ia. 601, 103 N. W. 946; even though, as in the latter case, the automobile was decorated for the purpose of advertising the owner's business.

A statute providing that one operating a motor vehicle who has caused an accident to his knowledge and leaves the place without stopping or leaving his name is guilty of a felony, was held to be a simple police regulation. The driver who discloses his identity is not furnishing evidence of guilt, but rather of innocence; Ex parte Kneedler, 243 Mo. 632, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923.

See Huddy, Automobiles.

AUTONOMY (Greek, *αὐτονομία*). The state of independence.

The autonomos was he who lived according to his own laws,—who was free. The term was chiefly used of communities or states, and meant those which were independent of others. It was introduced into the English language by the divines of the seventeenth century, when it and its translation —self-government—were chiefly used in a theological sense. Gradually its translation received a political meaning, in which it is now employed almost exclusively. Of late the word autonomy has been revived in diplomatic language in Europe, meaning independence, the negation of a state of political influence from without or foreign powers. See Lieber, Civ. Lib.

AUTOPSY. See Dead Body.

AUTRE VIE (Fr.). The life of another. See Estate pur Autre Vie.

AUTREFOIS ACQUIT (Fr. formerly acquitted). A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and acquitted of the same offence.

The constitution of the United States, Amend. art. 5, provides that no person shall be subject for the same offence to be put twice in jeopardy of life or limb. This is simply a re-enactment of the common-law. The same provision is to be found in the constitution of almost all if not of every state, and if not in the constitution the same principles are probably declared by legislative act; so that they must be regarded as fundamental doctrines in every state; 2 Kent 12. See U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; Com. v. Bowden, 9 Mass. 494; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; State v. Hall, 9 N. J. L. 256. See, however, Com. v. Cook, 6 S. & R. (Pa.) 577, 9 Am. Dec. 465; State v. Garrigues, 2 N. C. 241; Whart. Crim. Pl. § 490. This plea is founded upon the maxim, *nemo debet bis vexari pro eadem causa;* Broom, Leg. Max. 265.

The court, however, must have been competent, having jurisdiction and the proceedings regular; McNeil v. State, 29 Tex. App. 48, 14 S. W. 393; Blyew v. Com., 91 Ky. 200, 15 S. W. 356; but see Powell v. State, 89 Ala. 172, 8 South. 109.

To be a bar, the acquittal must have been after a trial; Marston v. Jenness, 11 N. H. 156; State v. Odell, 4 Blackf. (Ind.) 156; State v. Tindal, 5 Harr. (Del.) 488; Hassell v. Nutt, 14 Tex. 260; and by verdict of a jury on a valid indictment; 4 Bla. Com. 335; People v. Barrett, 1 Johns. (N. Y.) 66; Heikes v. Com., 26 Pa. 513; State v. Wilson, 39 Mo. App. 187. In Pennsylvania and some other states, the discharge of a jury, even in a capital case, before verdict, except in case of absolute necessity, will support the plea; Com. v. Clue, 3 Rawle (Pa.) 498; State v. McGimsey, 80 N. C. 377, 30 Am. Rep. 90; but the prisoner's consent to the discharge of a previous jury is a sufficient answer; Peiffer v. Com., 15 Pa. 468, 53 Am. Dec. 605. In the United States courts and in some states, the separation of the jury when it takes place in the exercise of a sound discretion is no bar to a second trial; Whart. Cr. Pl. § 499; Clark, Cr. Law 373; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; as where the jury is discharged because of the sickness of a juror; People v. Ross, 85 Cal. 383, 24 Pac. 789; State v. Hazledahl, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150; see Stocks v. State, 91 Ga. 831, 18 S. E. 847; or because they failed to agree; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; State v. Whitson, 111 N. C. 695, 16 S. E. 332.

There must be an acquittal of the offence charged in law and in fact; Com. v. Myers, 1 Va. Cas. 188; Wortham v. Com., 5 Rand. (Va.) 669; Com. v. Goddard, 13 Mass. 457; McCreary v. Com., 29 Pa. 323; People v. March, 6 Cal. 543; Winn v. State, 82 Wis. 571, 52 N. W. 775; the plea will be bad if

the offences charged in the two indictments be perfectly distinct in point of law, however clearly they may be connected in fact; Burton v. U. S., 202 U. S. 345, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362, citing Com. v. Roby, 12 Pick. (Mass.) 502; but an acquittal is conclusive; Slaughter v. State, 6 Humphr. (Tenn.) 410; Com. v. Cummings, 3 Cush. (Mass.) 212, 50 Am. Dec. 732; State v. Brown, 16 Conn. 54; State v. Jones, 7 Ga. 422; State v. Johnson, 8 Blackf. (Ind.) 533; State v. Wright, 3 Brev. (S. C.) 421; State v. Spear, 6 Mo. 644; Dillard's Adm'r v. Moore, 7 Ark. 169; State v. De Hart, 7 N. J. L. 172; State v. Anderson, 3 Smedes & M. (Miss.) 751; State v. Burris, 3 Tex. 118; Lawyer v. Smith, 1 Denio (N. Y.) 207. If a *nolle prosequi* is entered without the prisoner's consent after issue is joined and the jury sworn, it is a bar to a subsequent indictment for the same offence; Franklin v. State, 85 Ga. 570, 11 S. E. 876; but the jeopardy does not begin until the jury is sworn, prior to that a *nol. pros.* may be entered without prejudice; State v. Paterno, 43 L. Ann. 514, 9 South. 442; a *nol. pros.* of two of three indictments is no bar to a prosecution under the third; O'Brien v. State, 91 Ala. 25, 8 South. 560. In Missouri the conviction of murder in the second degree, under an indictment for murder in the first degree, constitutes no bar to trial and conviction for murder in the first degree, upon a new trial, when the first verdict has been set aside; State v. Anderson, 89 Mo. 312, 1 S. W. 135.

Proceedings by state tribunals are no bar to court-martial instituted by the military authorities of the United States; 3 Opin. Atty.-Genl. 750; Stiener's Case, 6 *id.* 413; but a judgment of conviction by a military court, established by law in an insurgent state, is a bar to a subsequent prosecution by a state court for the same offence; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118. See COURTS-MARTIAL.

The plea must set out the former record, and show the identity of the offence and of the person by proper averments; Hawk. Pl. Cr. b. 2, c. 36; Atkins v. State, 16 Ark. 568; Wilson v. State, 24 Conn. 57.

The true test of whether a plea of *autrefois acquit* or *autrefois convict* is a sufficient bar in any particular case is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first; 1 Bish. Cr. L. 1012; 3 B. & C. 502; Com. v. Roby, 12 Pick. (Mass.) 504; State v. Williams, 45 La. Ann. 936, 12 South. 932. Thus, if a prisoner indicted for burglariously breaking and entering a house and stealing therein certain goods of A is acquitted, he cannot plead this acquittal in bar of a subsequent indictment for burglariously breaking and entering the same house and stealing other goods of B; 2 Leach 718, 719; Alexander v. State, 21 Tex. App. 406, 17 S. W. 139, 57 Am. Rep. 617.

The plea of *autrefois acquit* involves questions of mixed law and fact, and is properly referred to the jury when not demurrable on its face; State v. Williams, 45 La. Ann. 936, 12 South. 932.

The plea in the celebrated case of Regina v. Bird, 5 Cox Cr. Cas. 12, Templ. & M. 438, 2 Den. Cr. Cas. 224, is of peculiar value as a precedent.

See JEOPARDY.

AUTREFOIS ATTAINT (Fr. formerly attainted). A plea that the defendant has been attainted for one felony, and cannot, therefore, be criminally prosecuted for another; 4 Bla. Com. 336; 12 Mod. 109; R. & R. 268. This is not a good plea in bar in the United States, nor in England in modern law; 1 Bish. Cr. L. § 692; Singleton v. State, 71 Miss. 782, 16 South. 295, 42 Am. St. Rep. 488; Gaines v. State (Tex.) 53 S. W. 623; *contra*, Ex parte Myers, 44 Mo. 279; State v. Jolly, 96 Mo. 435, 9 S. W. 897. See State v. McCarty, 1 Bay (S. C.) 334.

AUTREFOIS CONVICT (Fr. formerly convicted). A plea made by a defendant indicted for a crime or misdemeanor, that he has formerly been tried and convicted of the same.

This plea is substantially the same in form as the plea of *autrefois acquit*, and is grounded on the same principle, viz.: that no man's life or liberty shall be twice put in jeopardy for the same offence; Whart. Cr. Pl. § 435; 1 Bish. Cr. Law § 651; State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; U. S. v. Keen, 1 McLean 429, Fed. Cas. No. 15,510; State v. Nelson, 7 Ala. 610; State v. Chaffin, 2 Swan (Tenn.) 493; State v. Parish, 43 Wis. 395.

A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to another indictment for the same offence; Cooley's Const. Lim. 326; Territory v. Dorman, 1 Ariz. 56, 25 Pac. 516; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; State v. Rhodes, 112 N. C. 857, 17 S. E. 164; otherwise, if the reversal were not for insufficiency in the indictment nor for error at the trial, but for matter subsequent, and *dehors* both the conviction and the judgment; Hartung v. People, 26 N. Y. 167. A prior conviction before a justice of the peace, and a performance of the sentence, constitute a bar to an indictment for the same offence, although the complaint on which the justice proceeded was so defective that his judgment might have been reversed for error; Com. v. Loud, 3 Metc. (Mass.) 328, 37 Am. Dec. 139. Where a person has been convicted for failing to support his wife and being disorderly, it is no bar to a second prosecution on a similar charge, where at the

time of the second offence he was not in prison on account of his first sentence; People v. Hodgson, 126 N. Y. 647, 27 N. E. 378. Where one has been convicted of an assault but discharged without sentence on giving security for good behavior, he cannot afterwards be convicted on an indictment for the same assault; 24 Q. B. Div. 423. See AUTREFOIS ACQUIT.

AUXILIUM (Lat.). An aid; services paid by the tenant to his lord. *Auxilium ad filium militem faciendum, vel ad filiam maritandam.* (An aid for making the lord's son a knight, or for marrying his daughter.) Fitzh. Nat. Brev. 62.

AUXILIUM CURIÆ. An order of the court summoning one party, at the suit and request of another, to appear and warrant something. Kenn. Par. Ant. 477.

AUXILIUM REGIS. A subsidy paid to the king. Spelman.

AUXILIUM VICE COMITI. An ancient duty paid to sheriffs. Cowell.

AVAILABLE. Capable of being used; valid or advantageous.

Available means. That numerous class of securities which are known in the mercantile world as representatives of value easily converted into money, but not money. Brigham v. Tillinghast, 13 N. Y. 218.

AVAILS. Profits or proceeds, as the avails of a sale at auction. Webst. Dict.

With reference to wills it applies to the proceeds of an estate after the debts have been paid; McNaughton v. McNaughton, 34 N. Y. 201; Allen v. De Witt, 3 *id.* 276.

AVAL. In Canadian Law. A contract of suretyship or guarantee on a promissory note. 1 Low. C. 221; 9 *id.* 360.

In French Law. The guaranty of a bill of exchange; so called because usually placed at the foot or bottom (*aval*) of the bill. Sto. Bills §§ 394, 454. See 11 Harv. L. Rev. 55; INDORSEMENT.

AVARIA, AVARIE. Average; the loss and damage suffered in the course of a navigation. Pothier, *Marit. Louage* 105.

AVENAGE. A certain quantity of oats paid by a tenant to his landlord as a rent or in lieu of other duties. Jacob, L. Dict.

AVENTURE. A mischance causing the death of a man, as by drowning, or being killed suddenly without felony. Co. Litt. 391; Whishaw.

AVER. To assert. See AVERMENT.

To make or prove true; to verify.

The defendant will offer to *aver.* Cowell; Co. Litt. 362 *b.*

Cattle of any kind. Cowell, *Averia;* Kelham.

Aver et tenir. To have and to hold.

Aver corn. A rent reserved to religious houses, to be paid in corn. Corn drawn by the tenant's cattle. Cowell.

Aver-land. Land ploughed by the tenant for the proper use of the lord of the soil. Blount.

Aver-penny. Money paid to the king's averages to be free therefrom. *Termes de la Ley.*

Aver-silver. A rent formerly so called. Cowell.

AVERA. A day's work of a ploughman, formerly valued at eight pence. Jacob, L. Dict.

AVERAGE. In insurance law this is general, particular, or petty.

GENERAL AVERAGE (also called gross) consists of expense purposely incurred, sacrifice made, or damage sustained, for the common safety of the vessel, freight and cargo, or two of them, at risk, and is to be contributed for by the several interests in the proportion of their respective values exposed to the common danger, and ultimately surviving, including the amount of expense, sacrifice, or damage so incurred in the contributory value; 2 Phill. Ins. § 1269; and see *Code de Com.* tit. xi.; Aluzet, *Trait. des Av.* cxx.; Sturgess v. Cary, 2 Curt. C. C. 59, Fed. Cas. No. 13,572; Greely v. Ins. Co., 9 Cush. (Mass.) 415; McLoon's Adm'r v. Cummings, 73 Pa. 98; Star of Hope v. Annan, 9 Wall. (U. S.) 203, 19 L. Ed. 638; Bailey, Gen. Av.; 2 Pars. Mar. Law, ch. xi.; Stevens, Av.; Benecke, Av.; Pothier, Av.; *Lex Rhodia,* Dig. 14. 2. 1.

General average is a comparatively modern expression. The early writers expressed the same idea by the words "averidge," or "contribution," which with them were synonymous terms; 21 L. Quart. Rev. 155. In the common memorandum which was added to marine policies about 1749, the words, *general* and *average,* occur for the first time; *id.;* Loundes, Mar. Ins. 206 (2d ed. 1885). By this time the word *average* had acquired the dual meaning still attaching to it: a particular, partial loss, and a contribution to the general loss; it was necessary to insert the words "unless general" in order to prevent the operation of the exception being extended to losses of the latter class. Lord Mansfield held that the word "unless" meant the same as "except"; 3 Burr. 1550. Lord Esher, M. R., said the true construction of the words "free from average unless general" was free from partial loss unless it be a general average loss; 22 Q. B. D. 580. The result of these decisions is that, while the assurer is to be excused from paying a loss of the nature of particular average, his pre-existing obligation to contribute to general average, though acknowledged, is left untouched; 21 L. Q. R. 155.

General average is recoverable for loss by jettison; 19 C. B. N. S. 563; for ship's stores used to fire the donkey-engine which worked the pumps; 7 L. R. Ex. 39; 2 Q. B. D. 91, 295; and for damage to a cargo caused by pouring on water to extinguish a fire; 8 Q. B. D. 653; The Roanoke, 46 Fed. 297; *id.,* 53 Fed. 270; *id.,* 59 Fed. 161, 8 C. C. A. 67.

Prior to the Harter Act, a common carrier

by sea could not, by any agreement in the bill of lading, exempt himself from responding to the owner of cargo for damages arising from the negligence of the master or crew of the vessel; Liverpool & Great Western Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. That act absolved the shipowner from responsibility for the negligence of the master and crew under certain circumstances. By its first and second sections shipowners are prohibited from inserting in their bills of lading agreements limiting their liability in certain respects. It was held under this act that if a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, the shipowner, who has exercised due diligence to make his vessel seaworthy, properly manned, equipped and supplied, under its provisions has no right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight, and cargo; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130. This case was distinguished in a later case where it was held that a general average agreement inserted in bills of lading providing that if the owner of a ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, the cargo shall contribute in general average with the shipowner even if the loss resulted from negligence in the management of the ship, is valid under the Harter Act, and entitles the shipowner to collect a general average contribution from the cargo owners in respect to sacrifices made and extraordinary expenses incurred by him for the common benefit and safety of ship, cargo, and freight subsequent to a negligent stranding; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. That in view of the provisions of section 3 of the act and of the general average clause the cargo owners have a right to contribution from the shipowner for sacrifices made subsequent to negligent stranding in order to save the joint interests from common peril is held; The Roanoke, 46 Fed. 297; *id.*, 59 Fed. 161; The Rapid Transit, 52 Fed. 320; The Santa Ana, 154 Fed. 800, 84 C. C. A. 312. There is a similar statute in England; 45 L. J. Q. B. 646; 8 Q. B. D. 653; [1908] 1 K. B. 51, affirmed [1908] App. Cas. 431.

Where a vessel was chartered to proceed to a foreign port and there take on a cargo, freight to be paid on the completion of the voyage home, and on the voyage out in ballast the vessel was grounded and a general average sacrifice made, it was held that, upon the subsequent completion of the voyage and the payment of the freight, such freight was liable to contribute to the general average sacrifice; [1901] 2 K. B. 861; and see 1 M. & S. 318; The Mary, 1 Sprague 17, Fed. Cas. No. 9,188; 15 Harv. L. Rev. 488.

If the peril is caused by a concealed defect in the shipment equally unknown to the shipper and shipowner, the shipper is entitled to the benefit of contribution; The Wm. J. Quillan, 180 Fed. 681, 103 C. C. A. 647.

The law of the destination, where ship and cargo separate, determines the right of general average; Monsen v. Amsinck, 166 Fed. 817.

Insurance is not a part of the owner's interest in a ship, and in case of general average, for the purpose of increasing the fund to be distributed, the insurance received by him should not be added to the value of what was saved; The Rapid Transit, 52 Fed. 320; The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153.

Average particular (also called partial loss) is a loss on the ship, cargo, or freight, to be borne by the owner of the subject on which it happens, and is so called in distinction from general average; and, if not total, it is also called a partial loss; 2 Phill. Ins. c. xvi.; Stevens, pt. 1, c. 2; Arnould, Mar. Ins. 953; *Code de Com.* l. 2, t. 11, a. 403; Pothier, Ass. 115; Benecke & S. Av., Phill. ed. 341.

It is insured against in marine policies in the usual forms on ship, cargo, or freight, when the action of peril is extraordinary, and the damage is not mere wear or tear; and, on the ship, covers loss by sails split or blown away, masts sprung, cables parted, spars carried away, planks started, change of shape by strain, loss of boat, breaking of sheathing or upper works or timbers, damage by lightning or fire, by collision or stranding, or in defence against pirates or enemies, or by hostile or piratical plunder; 2 Phill. Ins. c. xvi.; Orrok v. Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Sewall v. Ins. Co., 11 Pick. (Mass.) 90; 7 C. & P. 597; 3 *id.* 323; Sage v. Ins. Co., 1 Conn. 239; Waller v. Ins. Co., 9 Mart. O. S. (La.) 276; Fisk v. Ins. Co., 18 La. 77; Perry v. Ins. Co., 5 Ohio 306; Webb v. Ins. Co., 6 Ohio 456; Hallet v. Jenks, 3 Cra. (U. S.) 218, 2 L. Ed. 414; Byrnes v. Ins. Co., 1 Cow. (N. Y.) 265; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431; Dunham v. Ins. Co., 11 Johns. (N. Y.) 315, 6 Am. Dec. 374.

Particular average on freight may be by loss of the ship, or the cargo, so that full freight cannot be earned; but not if the goods, though damaged, could have been carried on to the port of destination; Coolidge v. Ins. Co., 15 Mass. 341; McGau v. Ins. Co., 23 Pick. (Mass.) 405; Bork v. Norton, 2 McLean, 423, Fed. Cas. No. 1,659; Jordan v. Ins. Co., 1 Sto. 342, Fed. Cas. No. 7,524; Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 410; Saltus v. Ins. Co., 12 Johns. (N. Y.) 107, 7 Am. Dec. 290.

Particular average on goods is usually ad-

justed at the port of delivery on the basis of the value at which they are insured, viz.: the value at the place of shipment, unless it is otherwise stipulated in the policy; 2 Burr. 1167; 2 East 58; 12 *id.* 639; 3 B. & P. 308; Rankin v. Ins. Co., 1 Hall (N. Y.) 682; Newlin v. Ins. Co., 20 Pa. 312; 36 E. L. & Eq. 198; 3 Taunt. 162. See SALVAGE; LOSS.

A particular average on profits is, by the English custom, adjusted upon the basis of the profits which would have been realized at the port of destination. In the United States the adjustment is usually at the same rate as on the goods the profits on which are the subject of the insurance; 2 Pars. Ins. 399; Fosdick v. Ins. Co., 3 Day (Conn.) 108; Alsop v. Ins. Co., 1 Sumn. 451, Fed. Cas. No. 262; Evans v. Ins. Co., 6 R. I. 47.

PETTY AVERAGE consists of small charges which were formerly assessed upon the cargo, viz.; pilotage, towage, light-money, beaconage, anchorage, bridge-toll, quarantine, pier-money. Le Guidon, c. 5, a. 13; Weyt, de A. 3, 4; Weskett, art. Petty Av.; 2 Phill. Ins. § 1269, n. 1; 2 Arnould, Mar. Ins. 927.

The doctrine of general average which has obtained in maritime insurance is not applicable to fire insurance; May, Ins. § 421 *a*.

AVERIA (Lat.). Cattle; working cattle. *Averia carucæ* (draft-cattle) are exempt from distress; 3 Bla. Com. 9; 4 Term 566.

AVERIIS CAPTIS IN WITHERNAM. A writ which lies in favor of a man whose cattle have been unlawfully taken by another, and driven out of the country where they were taken, so that they cannot be replevied.

It issues against the wrong-doer to take his cattle for the plaintiff's use. *Reg. Brev.* 82.

AVERIUM (Lat.). Goods; property. A beast of burden. Spelman, Gloss.

AVERMENT. A positive statement of facts, as opposed to an argumentative or inferential one. Bacon, Abr. *Pleas*, B.

Averments were formerly said to be general and particular; but only particular averments are found in modern pleading. 1 Chit. Pl. 277.

Particular averments are the assertions of particular facts.

There must be an averment of every substantive material fact on which the party relies, so that it may be replied to by the opposite party.

Negative averments are those in which a negative is used.

Generally, under the rules of pleading, the party asserting the affirmative must prove it; but an averment of illegitimacy, 2 Selwyn, Nisi P. 709, or criminal neglect of duty, must be proven; U. S. v. Hayward, 2 Gall. 498, Fed. Cas. No. 15,336; Hartwell v. Root, 19 Johns. (N. Y.) 345, 10 Am. Dec. 232; Com. v. Stow, 1 Mass. 54; 10 East 211; 3 Campb. 10; 3 B. & P. 302; 1 Greenl. Ev. § 80.

Immaterial and *impertinent averments* (which are synonymous, 5 D. & R. 209) are those which need not be made, and, if made, need not be proved. The allegation of deceit in the seller of goods in an action on the warranty is such an averment; 2 East 446; Panton v. Holland, 17 Johns. (N. Y.) 92, 8 Am. Dec. 369.

Unnecessary averments are statements of matters which need not be alleged, but which, if alleged, must be proved. Carth. 200.

General averments are almost always of the same form. The most common form of making particular averments is in express and direct words, for example: And the party *avers*, or *in fact saith*, or *although*, or *because*, or *with this that*, or *being*, etc. But they need not be in these words; for any words which necessarily imply the matter intended to be averred are sufficient.

AVERRARE. To carry goods in a wagon or upon loaded horses; a duty required of some customary tenants. Jacob L. Dict.

AVERSIO (Lat.). An averting; a turning away. A sale in gross or in bulk.

Letting a house altogether, instead of in chambers. 4 Kent 517.

Aversio periculi. A turning away of peril. Used of a contract of insurance. 3 Kent 263.

AVET. In Scotch Law. To abet or assist. Tomlin, Dict.

AVIATICUS (Lat.). In Civil Law. A grandson.

AVIATION. The air space above the high seas and unoccupied territory is admittedly free to all nations and persons. It is with the air space above territorial lands and waters that conflicting views of the rights of nations are concerned. According to Hazeltine (Law of the Air), there are the freedom-of-the-air theories, which comprise absolute and partial freedom either by lateral zone divisions or limited exercise of rights; and the sovereignty-of-the-air theories which may also be classified into absolute sovereignty and limited sovereignty groups. The zone and limited sovereignty theories are usually based on analogy to the three mile limit of sovereignty over the high seas. This analogy is obviously unsound both on account of the unsafe condition of states if alien and hostile air-craft were permitted to sail over them above a prescribed height, and the difficulty of calculating the exact or even approximate height of air-craft. The absolute sovereignty theory is probably better justified on reason and practicality. Rights of aliens to unhindered passage and rules for alighting could be settled by international agreement. See 4 Am. J. Int. L. 95; 45 L. J. 402; 126 L. T. 168. It is said to be clear that the territorial jurisdiction of a state must extend to the atmosphere above its soil if the state is to be able to protect itself from airships which would otherwise have it in their power to violate the laws of the state, or to inflict injury upon the citizens of the state in case of accident to the airship. On the other hand, it is reasonable that a state should allow the innocent passage of foreign air-

ships through its territorial atmosphere, subject to the domestic regulations imposed upon the aërial traffic of its own citizens. In this respect the territorial atmosphere of a state may be considered as governed by the same rules as the territorial waters of the state. Hershey 232.

With regard to the rights of a landowner in the air space above his land, there are also divergent views of absolute and limited rights. The Roman Law regarded the air as *res publica*, free to all persons. The French Code, on the other hand, defines land as including everything above and below the surface. The German Imperial Code adopts this same theory but limits the landowner's right to exclude persons from using the air space, to his actual interest in such exclusion. The Swiss Code is similar.

At common law the old maxim of *cujus est solum, ejus est usque ad cœlum* has led to much confusion. In its origin it had reference to the right of the owner to have the air space above his land remain in its natural state and to have excluded therefrom anything which would detract from his enjoyment of the land. 4 Am. J. Int. L. 95; 71 Cent. L. J. 1; 46 Can. L. J. 480. The flying of fowls, the passage of smoke and of wireless messages over another's land have never suggested such a conflict with the maxim as would amount to a trespass. Even navigation by balloons and aëroplanes for a century or more has been tacitly permitted. See 4 Camp. 219; 3 Bengal L. R. 43. But such passage in every instance must not by its frequency amount to a nuisance. The degree of peril and inconvenience to the landowner defines his legal rights; 14 Law Notes 69; 16 Case and Comment 216.

Under the commerce clause in the United States constitution it would seem that Congress has power to regulate aërial navigation; in the absence of such regulation, the individual states may legislate for their own exclusive territorial air space.

As to the liability of aviators for accidents it has been held that they are liable for all damage both direct and consequential; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; Conney v. Ass'n, 76 N. H. 60, 79 Atl. 517. This result is based on the view that all aërovehicles are dangerous devices and as such are operated at the aviator's peril. It is conceivable however that as aërial science develops, so that the present dangers and uncertainties are obviated, the stricter rule of liability will give way to one holding the aviator liable only for negligence. It has been urged that the more liberal rule would aid materially in the development of aërial science.

The intentional or negligent dropping and throwing articles overboard, which fall on private property and cause damage, is generally subjected to heavy liability. There is no inherent right to alight on private property without the consent of the owner, though an exception might possibly be allowed where an act of God or inevitable accident is the cause.

Every aëronaut shall be responsible for all damages suffered in this state by any person from injuries caused by any voyage in an airship directed by such aëronaut; and if he be the agent or employee of another in making such a voyage, his principal or employer shall be liable for such damage. Conn. Public Acts of 1911, p. 1351.

A Massachusetts act of May 7, 1913, regulates the use of air-craft; makes provision for the license of aviators after examination and registration; prescribes rules of the air for meeting and overtaking corresponding with the marine practice. Air machines are forbidden to fly over municipalities, except at prescribed altitudes, or to fly over crowds of people. Aviators are held liable for injuries resulting from flying unless they can demonstrate that they had taken every reasonable precaution to prevent injury. Dropping missles without special permission is forbidden, and also landing on public property without permission.

See generally Lycklama, Air Sovereignty; Hazeltine, Law of the Air; Davids, Law of Motor Vehicles, chap. 19.

The "Sovereignty of the Air" is treated by Blewett Lee, in Report of Tennessee Bar Ass'n (1913). He cites: Weili, The Air-Ship in Local Law, etc. (Zurich, 1908); Revue Juridicque Internat. de la Locomotion Aerienne, Vol. II.; Catellani, Il Diritto Aereo; Proceedings in Inter-Nat. Fair Association (1912, Paris Conference).

AVOCAT. In French Law. A barrister or advocate.

AVOIDANCE. A making void, useless, or empty.

In Ecclesiastical Law. It exists when a benefice becomes vacant for want of an incumbent.

In Pleading. Repelling or excluding the conclusions or implications arising from the admission of the truth of the allegations of the opposite party. See CONFESSION AND AVOIDANCE.

AVOIRDUPOIS (Fr.). The name of a system of weight.

This kind of weight is so named in distinction from the Troy weight. One pound avoirdupois contains seven thousand grains Troy; that is, fourteen ounces, eleven pennyweights, and sixteen grains Troy; a pound avoirdupois contains sixteen ounces; and an ounce sixteen drachms. Thirty-two cubic feet of pure spring-water, at the temperature of fifty-six degrees of Fahrenheit's thermometer, make a ton of two thousand pounds avoirdupois, or two thousand two hundred and forty pounds net weight. Dane, Abr. c. 211, art. 12, § 6. The avoirdupois ounce is less than the Troy ounce in the proportion of 72 to 79; though the pound is greater. Encyc. Amer. *Avoirdupois*. For the derivation of this phrase, see Barrington, Stat. 206. See the Report of Secretary of State of the United States to the

Senate, February 22, 1821, pp. 44, 72, 76, 79, 81, 87, for a learned exposition of the whole subject. See WEIGHT.

AVOUCHER. See VOUCHER.

AVOUÉ. **In French and Canadian Law.** A solicitor or attorney.

AVOW. To acknowledge the commission of an act and claim that it was done with right. 3 Bla. Com. 150.

To make an avowry. For example, when replevin is brought for a thing distrained, and the party taking claims that he had a right to make the distress, he is said to avow. See Fleta, l. 1, c. 4; Cunningham, Dict.; AVOWRY; JUSTIFICATION.

AVOWANT. One who makes an avowry.

AVOWEE. An advocate of a church benefice.

AVOWRY. The answer of defendant in an action of replevin brought to recover property taken in distress, in which he acknowledges the taking, and, setting forth the cause thereof, claims a right in himself or his wife to do so. Lawes, Pl. 35.

A justification is made where the defendant shows that the plaintiff had no property by showing either that it was the defendant's or some third person's, or where he shows that he took it by a right which was sufficient at the time of taking though not subsisting at the time of answer. The avowry admits the property to have been the plaintiff's, and shows a right which had then accrued, and still subsists, to make such caption. See 2 W. Jones 25.

An avowry is sometimes said to be in the nature of an action or of a declaration, so that privity of estate is necessary; Co. Litt. 320 *a;* Blaine's Lessee v. Chambers, 1 S. & R. (Pa.) 170. There is no general issue upon an avowry; and it cannot be traversed cumulatively; Hamilton v. Elliott, 5 S. & R. (Pa.) 377. Alienation cannot be replied to it without notice; for the tenure is deemed to exist for the purposes of an avowry till notice be given of the alienation; Hamm. Part. 131.

The object of an avowry is to secure the return of the property, that it may remain as a pledge; see 2 W. Jones 25; and to this extent it makes the defendant a plaintiff. It may be made for rents, services, tolls; State v. Patrick, 14 N. C. 478; for cattle taken, damage feasant, and for heriots, and for such rights wherever they exist. See Gilbert, Distr. 176 *et seq.;* 1 Chit. Pl. 436; Comyns, Dig. *Pleader*, 3 K.

AVOWTERER. **In English Law.** An adulterer with whom a married woman continues in adultery. *Termes de la Ley.*

AVOWTRY. **In English Law.** The crime of adultery.

AVULSION. The removal of a considerable quantity of soil from the land of one man and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water. 2 Washb. R. P. 452.

In such case the property belongs to the first owner; Bract. 221; Hargr. Tract. *de Jure Mar.;* Schultes, Aq. Rights 115; Bouvier v. Stricklett, 40 Neb. 792, 59 N. W. 550. Avulsion by the Missouri river, the middle of whose channel forms the boundary line between the states of Missouri and Nebraska, works no change in such boundary, but leaves it in the centre line of the old channel; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372; Nebraska v. Iowa, 143 U. S. 361, 12 Sup. Ct. 396, 36 L. Ed. 186.

See ACCRETION; ALLUVION; RIPARIAN PROPRIETORS; RELICTION.

AVUNCULUS. **In Civil Law.** A mother's brother. 2 Bla. Com. 230.

AWARD. The decision of arbitrators or referees of a case submitted for arbitration under agreement of the parties or rule of court. See ARBITRATION AND AWARD.

AWAY-GOING CROP. A crop sown before the expiration of a tenancy, which cannot ripen until after its expiration, to which, however, the tenant is entitled. Broom, Max. 306. See EMBLEMENTS.

AWN-HINDE. See THIRD-NIGHT-AWN-HINDE.

AYANT CAUSE. This term, which is used in Louisiana, signifies one to whom a right has been assigned, either by will, gift, sale, exchange, or the like; an assignee. An *ayant cause* differs from an heir who acquires the right by inheritance. 8 Toullier, n. 245.

AYUNTAMIENTO. **In Spanish Law.** A congress of persons; the municipal council of a city or town. 1 White, Rec. 416; 12 Pet. (U. S.) 442, notes.

B

B. The second letter of the alphabet.

It is used to denote the second page of a folio, and also as an abbreviation. See A.

BABY ACT. A term of reproach originally applied to the disability of infancy when pleaded by an adult in bar of recovery upon a contract made while he was under age, but extends to any plea of the statute of limitations. Anderson's Dict. L.

BACHELERIA. The commonalty as distinguished from the baronage. Cunningham, L. Dict.

BACHELOR. In modern use, one who has taken the first degree (baccalaureate) in the liberal arts and sciences, or in law, medicine, or divinity, in a college or university.

A man who has never been married.

An inferior kind of knight.

BACK-BOND. A bond of indemnification given to a surety.

In Scotch Law. A declaration of trust; a defeasance; a bond given by one who is apparently absolute owner, so as to reduce his right to that of a trustee or holder of a bond and disposition in security. Paterson, Comp.

BACK CARRY. In forest law, the crime of having, on the back, game unlawfully killed.

BACK-WATER. That water in a stream which, in consequence of some obstruction below, is detained or checked in its course, or re-flows.

The term is usually employed to designate the water which is turned *back*, by a dam erected in the stream below, upon the wheel of a mill above, so as to retard its revolution.

Every riparian proprietor is entitled to the benefit of the water in its natural state. Another such proprietor has no right to alter the level of the water, either where it *enters* or where it *leaves* his property. If he claims either to throw the water back above, or to diminish the quantity which is to descend below, he must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or an uninterrupted enjoyment for twenty years. If he cannot maintain his claim in either of these ways, he is liable for damages in favor of the injured party, or to an injunction to restrain his unlawful use of the water; 1 B. & Ad. 258, 874; 9 Coke 59; Brown v. Mfg. Co., 5 Gray (Mass.) 460; Mertz v. Dorney, 25 Pa. 519; Butz v. Ihrie, 1 Rawle (Pa.) 218; Sherwood v. Burr, 4 Day (Conn.) 244, 4 Am. Dec. 211; Noyes v. Stillman, 24 Conn. 15; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Watson v. Bartlett, 62 N. H. 447; Hill v. Ward, 2 Gilm. (Ill.) 285; Bowman v. City of New Orleans, 27 La. Ann. 501; McDonald v. Bacon, 3 Scam. (Ill.) 432; Johns v. Stevens, 3 Vt. 308; Tyler v. Wilkinson, 4 Mas. 400, Fed. Cas. No. 14,312; Lincoln v. Chadbourne, 56 Me. 197; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433. But he must show some actual, appreciable damage; Garrett v. McKie, 1 Rich. (S. C.) 444, 44 Am. Dec. 263; Chalk v. McAlily, 11 Rich. (S. C.) 153; *contra*, Hendrick v. Cook, 4 Ga. 241; Graver v. Sholl, 42 Pa. 67.

A riparian owner who obstructs a stream, impeding the usual flow of water or that caused by ordinary freshets and causing land to be overflowed, becomes liable; Bierer v. Hurst, 155 Pa. 523, 26 Atl. 742. Where a railroad company maintains a dam which causes water to overflow adjacent land, it is liable, although the dam was originally constructed by the county under authority of the legislature; Payne v. R. Co., 112 Mo. 6, 20 S. W. 322, 17 L. R. A. 628. At common law a railroad company must construct and maintain its road across a watercourse so as not to injure adjacent lands; Ohio & M. Ry. Co. v. Thillman, 43 Ill. App. 78; Fick v. R. Co., 157 Pa. 622, 27 Atl. 783.

An action to recover damages for flowing land is local, and must, therefore, be brought in the county where the land lies; Worster v. Winnipiseogee Lake Co., 25 N. H. 525; Watts' Adm'rs v. Kinney, 23 Wend. (N. Y.) 484; 2 East 497.

In Massachusetts and other states, acts have been passed giving to the owners of mills the right to flow the adjoining lands, if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process prescribed, which process is substituted for all other judicial remedies; Leland v. Woodbury, 4 Cush. (Mass.) 245; Nutting v. Page, 4 Gray (Mass.) 581; Waddy v. Johnson, 27 N. C. 333; Knox v. Chaloner, 42 Me. 150; Pratt v. Brown, 3 Wis. 603; Anderson v. R. Co., 86 Ky. 44, 5 S. W. 49, 9 Am. St. Rep. 263. These statutes, however, confer no authority to flow back upon existing mills; Baird v. Wells, 22 Pick. (Mass.) 312. See DAMAGES; INUNDATION; WATERCOURSE.

BACKADATION. A consideration given to keep back the delivery of stock when the price is lower for time than for ready money. Whart. Dict.; Lewis, Stocks. Sometimes called *Backwardation*.

BACKBERENDE (Sax.). Bearing upon the back or about the person.

Applied to a thief taken with the stolen property in his immediate possession, Bracton, l. 3, tr. 2, c. 32. Used with *handhabend*, having in the hand.

BACKING. Indorsement. Indorsement by a magistrate.

Backing a warrant becomes necessary when it is desired to serve it in a county other than that in which it was first issued. In such a case the indorsement of a magistrate of the new county authorizes its service there as fully as if first issued in that county. The custom prevails in England, Scotland, and some of the United States. See 2 N. Y. R. S. 590.

BACKSIDE. A yard at the back part of or behind a house, and belonging thereto.

The term was formerly much used both in conveyances and in pleading, but is now of infrequent occurrence except in conveyances which repeat an ancient description. Chitty, Pr. 177.

BACKWARDATION. See BACKADATION.

BAD. Vicious, evil, wanting in good qualities; the reverse of good. See Riddell v. Thayer, 127 Mass. 487; Tobias v. Harland, 4 Wend. (N. Y.) 537.

BADGE. A mark or sign worn by some persons, or placed upon certain things, for the purpose of designation.

Some public officers, as watchmen, policemen, and the like are required to wear badges that they may be readily known. It is used figuratively when we say that retention of possession of personal property by the seller is a badge of fraud.

Under its police power a legislature may forbid persons who are not members of societies from wearing the badge of such societies; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; Com. v. Martin, 35 Pa. Super. Ct. 241; *contra*, State v. Holland, 37 Mont. 393, 96 Pac. 719. One who wears a badge of a society without being a member holds himself out to the public and to actual members as guilty of a false personation. It is a deceit and a false pretense, and its object could be nothing else than deception, which it is in itself, with possibly ulterior motives; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; an association may obtain injunctive relief against the use by another association of its emblems; Benevolent & Protective Order of Elks v. Improved & Protective Order of Elks of the World, 60 Misc. 223, 111 N. Y. Supp. 1067, affirmed *id.*, 133 App. Div. 918, 118 N. Y. Supp. 1094.

BADGE OF FRAUD. A term used in the law of conveyances made to hinder and defraud creditors. It is defined as a fact tending to throw suspicion upon a transaction, and calling for an explanation. Bump, Fr. Conv. 31.

When such a fact appears, its effect is to require more persuasive proof of the payment of the consideration and the good faith of the parties than would ordinarily be required; Terrell v. Green, 11 Ala. 207. It is not fraud of itself, but evidence to establish a fraudulent intent; Wilson v. Lott, 5 Fla. 305; Pilling v. Otis, 13 Wis. 495.

The following have been held to be badges of fraud: *Indebtedness* on the part of the grantor; Callan v. Statham, 23 How. (U. S.) 477, 16 L. Ed. 532; Jackson v. Mather, 7 Cow. (N. Y.) 301; Cox v. Fraley, 26 Ark. 20; the *expectation* of a suit; Glenn v. Glenn, 17 Ia. 498; Hughes v. Roper, 42 Tex. 116; Schaferman v. O'Brien, 28 Md. 565, 92 Am. Dec. 708; Redfield & Rice Mfg. Co. v. Dysart, 62 Pa. 62; Godfrey v. Germain, 24 Wis. 410; *false recitals* in the deed; McKinster v. Babcock, 26 N. Y. 378; *inadequacy* of consideration; Monell v. Scherrick, 54 Ill. 269; Burke v. Murphy, 27 Miss. 167; Bray v. Hussey, 24 Ind. 228; Jaeger v. Kelley, 52 N. Y. 274; Gibson v. Hill, 23 Tex. 77; Craver v. Miller, 65 Pa. 456; Wheeler v. Kirtland, 23 N. J. Eq. 14; Kempner v. Churchill, 8 Wall. (U. S.) 362, 19 L. Ed. 461; *false statement* of the *consideration;* McKinster v. Babcock, 26 N. Y. 378; Peebles v. Horton, 64 N. C. 374; Enders v. Swayne, 8 Dana (Ky.) 103; *secrecy;* Barrow v. Bailey, 5 Fla. 9; Warner v. Norton, 20 How. (U. S.) 448, 15 L. Ed. 950; *concealment* of the deed, not recording it and leaving it in the hands of the grantor; Sands v. Hildreth, 14 Johns. (N. Y.) 493; Coates v. Gerlach, 44 Pa. 43; Beecher v. Clark, 12 Blatchf. 256, 10 N. B. R. 385, Fed. Cas. No. 1,223; Hildeburn v. Brown, 17 B. Monr. (Ky.) 779; *failure to record* a mortgage by agreement; Hutchinson v. Bank, 133 Ind. 271, 30 N. E. 952, 36 Am. St. Rep. 537; Day v. Goodbar, 69 Miss. 687, 12 South. 30; a *secret trust* between the grantor and grantee; 3 Co. 80; McCulloch v. Hutchinson, 7 Watts (Pa.) 434, 32 Am. Dec. 776; *retention of possession* of land by the grantor; Jackson v. Mather, 7 Cow. (N. Y.) 301; King v. Moon, 42 Mo. 551; Hartshorn v. Eames, 31 Me. 93; Lukins v. Aird, 6 Wall. (U. S.) 78, 18 L. Ed. 750; Purkitt v. Polack, 17 Cal. 327; Johnson v. Lovelace, 51 Ga. 18; mere delay to record a deed executed for a good consideration by an insolvent to his son, where there is no evidence that the son knew of the insolvency, is not a badge of fraud; Second Nat. Bank of Beloit v. Merrill, 81 Wis. 142, 50 N. W. 503, 29 Am. St. Rep. 870; but *in general* anything in the transaction out of the usual course of such transactions is held to be such; Danjean v. Blacketer, 13 La. Ann. 595; Bump, Fr. Conv. 50.

BADGER. (From the French *bagage*, a bundle, and thence is derived *bagagier*, a carrier of goods). One who buys corn and victuals in one place and carries them to another to sell and make a profit by them. A badger was exempted from the punishment of an engrosser by the statute 5 & 6 Ed. VI. c. 14. Jacob.

BAG. An uncertain quantity of goods and merchandise, from three to four hundred. Jacob.

BAGAVEL. The citizens of Exeter had granted to them by charter from Edward I.

the collection of a certain tribute or toll upon all manner of wares brought to that city to be sold, toward the paving of the streets, repairing of the walls, and maintenance of the city, which was commonly called bagavel, bethugavel and chippinggavel. Antiq. of Exeter.

BAGGAGE. Such articles of apparel, ornament, etc., as are in daily use by travellers, for convenience, comfort, or recreation. "It includes whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or ultimate purpose of the journey;" per Cockburn, C. J., in L. R. 6 Q. B. 612; only such articles of necessity or convenience as are generally carried by passengers for their personal use; Glovinsky v. Steamship Co., 6 Misc. 388, 26 N. Y. Supp. 751.

It is said that the decisions and text-books give us but one definite limitation to the term "baggage," and that is that it must be something for the personal use of the traveller; 12 Harv. L. Rev. 119; but that which one traveller would consider indispensable would be deemed superfluous by another; 19 C. B. N. S. 321; so that his station in life must be taken into consideration; Coward v. R. Co., 16 Lea (Tenn.) 225, 57 Am. Rep. 227; New York, C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531. What may be necessary for a voyage on land is unfit for a voyage at sea; and the length of the journey must be considered in determining the quantity of baggage necessary for it; 12 Harv. L. Rev. 119, and cases cited. The traveller is entitled to have carried with him whatever is essential to the ultimate purpose of his journey; Hannibal & St. J. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423; unless his requirements are unreasonable; Oakes v. R. Co., 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Merrill v. Grinnell, 30 N. Y. 594. It has been held that a bicycle is not baggage under a statute allowing 100 pounds of "ordinary baggage"; State v. R. Co., 71 Mo. App. 385; but in several states they are expressly declared baggage and in New York they must be carried free of charge if the owner travels on the same train.

In [1899] 1 Q. B. 243, it is said there are certain requirements which articles must meet in order that they may be regarded as "personal luggage": 1. They must be for the personal use of the passenger. 2. They must be for use in connection with the journey, i. e., something habitually taken by a person when travelling for his own use, not merely during the actual journey, but for use during the time he may be away from home. It was further considered that the word *luggage* involves the idea of a package, and that the law does not recognize as baggage the things contained, as distinct from the receptacle which contains them, and does not cast any duty on the carrier to receive personal baggage until it had been placed in a position of reasonable security for handling.

This term has been held to include jewelry carried as baggage, which formed a part of female attire, the plaintiff being on a journey with his family; 4 Bingh. 218; McGill v. Rowand, 3 Pa. 451, 45 Am. Dec. 654. A watch, carried in one's trunk, is proper baggage; Jones v. Voorhees, 10 Ohio 145; Walsh v. Wright, 1 Newb. 494, Fed. Cas. No. 17,115; but see Bomar v. Maxwell, 9 Humphr. (Tenn.) 621, 51 Am. Dec. 682; the surgical instruments of an army surgeon; Hannibal & St. J. R. Co. v. Swift, 12 Wall. (U. S.) 262, 20 L. Ed. 423; valuable laces carried by a foreign woman of rank, for which the jury found in $10,000 damages; New York, C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; one revolver, but not two; Chicago, R. I. & P. R. Co. v. Collins, 56 Ill. 212; an opera glass; Toledo, W. & W. R. Co. v. Hammond, 33 Ind. 379, 5 Am. Rep. 221; bedding of a poor man moving with his family; Ouimit v. Henshaw, 35 Vt. 604, 84 Am. Dec. 646; Glovinsky v. Steamship Co., 4 Misc. 266, 24 N. Y. Supp. 136; such articles as are ordinarily carried by travellers in valises; Hampton v. Car Co., 42 Mo. App. 134; books for reading or amusement; Doyle v. Kiser, 6 Ind. 242; a harness maker's tools, valued at $10; a rifle; Davis v. R. Co., 10 How. Pr. (N. Y.) 330; Porter v. Hildebrand, 14 Pa. 129; a rifle, revolver, two gold chains, two gold rings and a silver pencil case; 32 U. C. Q. B. 66; a carpet; Minter v. R. R., 41 Mo. 503, 97 Am. Dec. 288; an illustrated catalogue, the individual property of a travelling salesman, prepared by himself at his own expense, necessary for use in his business; Staub v. Kendrick, 121 Ind. 226, 23 N. E. 79, 6 L. R. A. 619.

The following have been held not to be baggage: Jewelry bought for presents; Nevins v. Steamboat Co., 4 Bosw. (N. Y.) 225; Metz v. R. Co., 85 Cal. 329, 24 Pac. 610, 9 L. R. A. 431, 20 Am. St. Rep. 228; a stock of jewelry carried by a salesman to be sold (checked, without saying anything as to its contents, and there being nothing to indicate its contents, and railroad company's agent having checked it without inquiries); Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. 711, 37 L. Ed. 587; a feather-bed not intended for use on the journey; Connolly v. Warren, 106 Mass. 146, 8 Am. Rep. 300; a lawyer's papers and bank notes to be used by him in conducting a case; 19 C. B. N. S. 321; trunks containing stage properties, costumes, paraphernalia, and advertising matters of a theatrical company, unless accepted as baggage, but the carrier, though without fault, is liable for the destruction of the trunks where its agent checked them as baggage with full knowledge that they contained,

besides personal apparel, stage costumes and properties; Oakes v. R. Co., 20 Or. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126. Samples of merchandise are not baggage; 13 C. B. N. S. 818; Stimson v. R. Co., 98 Mass. 83, 93 Am. Dec. 140; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Talcott v. R. Co., 66 Hun 456, 21 N. Y. Supp. 318; Alling v. R. Co., 126 Mass. 121, 30 Am. Rep. 667; Pennsylvania Co. v. Miller, 35 Ohio St. 541, 35 Am. Rep. 620; Southern Kansas R. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; nor a trunk deposited with the carrier without being accompanied by the passenger; Wright v. Caldwell, 3 Mich. 51; nor money even to a reasonable amount; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; Davis v. R. Co., 22 Ill. 278, 74 Am. Dec. 151; intended for trade, business or investment, or for transportation and not intended for the passenger while travelling; Pfister v. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Bomar v. Maxwell, 9 Humphr. (Tenn.) 621, 51 Am. Dec. 682; *contra*, Dunlap v. Steamboat Co., 98 Mass. 371; Merrill v. Grinnell, 30 N. Y. 594.

If a carrier knows that merchandise is included among baggage, and does not object, he is liable to the same extent as for other goods taken in the due course of his business; Butler v. R. Co., 3 E. D. Smith (N. Y.) 571; 8 Exch. 30; but he must have actual knowledge; L. R. 6 Q. B. 612; Michigan Cent. R. Co. v. Carrow, 73 Ill. 348, 24 Am. Rep. 248; Mississippi Cent. R. Co. v. Kennedy, 41 Miss. 671; Stoneman v. R. Co., 52 N. Y. 429; Ft. Worth & R. G. R. Co. v. Millinery Co. (Tex.) 29 S. W. 196. Where trunks containing merchandise were checked as baggage by a salesman (whose intention was to follow them to the same place) and through the negligence of the carrier were burnt soon after they had reached their destination, the carrier was held liable; McKibbin v. R. Co., 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489, 117 Am. St. Rep. 689; so where a carrier accepted as baggage trunks of samples belonging to the employer of the passenger, the owner was entitled to recover for their loss; Talcott v. R. Co., 159 N. Y. 461, 54 N. E. 1; but see 5 Q. B. D. 241; [1895] 2 Q. B. D. 387.

The general rule seems to be that where a railroad company has given an agent authority to receive and check baggage, he must be deemed to have authority to determine what class of articles come within the description of baggage, and when he accepts as baggage what is not strictly so, with knowledge or means of knowledge of its character, the company is held responsible for his acceptance of it; St. Louis S. W. R. Co. v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212; Waldron v. R. Co., 1 Dak. 357, 46 N. W. 456; Chicago, R. I. & P. R. Co. v. Conklin, 32 Kan. 55, 3 Pac. 762; Bergstrom v. R. Co., 134 Ia. 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Ann. Cas. 239; Sherlock v. R. Co., 85 Mo. App. 49; Trimble v. R. Co., 162 N. Y. 84, 56 N. E. 532, 48 L. R. A. 115; but see Blumantle v. R. Co., 127 Mass. 322, 34 Am. Rep. 376; and see Bergstrom v. R. Co., 134 Ia. 223, 111 N. W. 818, 10 L. R. A. (N. S.) 1119, 13 Ann. Cas. 239; Common Carriers.

A railroad's liability for baggage is not affected by the fact that the passenger did not travel on the same train; Larned v. R. Co., 81 N. J. L. 571, 79 Atl. 289. In the supreme court of Michigan it was held that one who purchases a ticket for the sole purpose of checking his baggage upon it, and with the intention of travelling to his destination in his private conveyance, can hold the carrier liable only as a gratuitous bailee, if it be stolen without negligence on the carrier's part; 55 L. R. A. 650, where in a note the cases are considered and the conclusion is reached that the Michigan case is in conflict with the current of opinion and should not be accepted as a precedent, and that the purchase of a ticket is a contract which gives the passenger two distinct rights, one to be carried as a passenger, and the other to have his baggage transported; and that having paid for two privileges, there is no reason why he should be compelled to avail himself of both, unless the carrier's burden in respect of one of them is increased by his failure to exercise the other; and see Warner v. R. Co., 22 Ia. 166, 92 Am. Dec. 389, where it is held that, whether on the same, the preceding, or the next train, if the baggage is sent pursuant to an agreement, and as part of the consideration for the fare paid by the passenger, the same rules apply as to care.

Where a passenger bought a through ticket and checked his baggage to go by a certain route, and the first carrier by mistake delivered the baggage to another carrier, which lost it, the second carrier was held to have assumed the responsibility of a common carrier, as it should have known by the checks that the baggage was to be carried by another route; Fairfax v. R. Co., 73 N. Y. 167, 29 Am. Rep. 119.

Where a passenger in second-class car delivered a dog to the baggage-master and declined to pay for carrying it, and at the plaintiff's destination, the baggage-master refused to deliver the dog, without the payment of money, and it was carried past the destination and lost, by the negligence of the baggage-master, held, that plaintiff could recover because of his ignorance of a rule as to a payment for conveying his dog on the train; Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 10 South. 282, 14 L. R. A. 515, 33 Am. St. Rep. 119.

The carrier may establish reasonable regulations as to baggage and is not liable if they are violated; Gleason v. Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

Limitations upon the liability of carriers

are taken most strongly against them; Louisville, N. A. & C. R. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. Rep. 206. A stipulation exempting the carrier from liability for "any loss or damage" to baggage was held not to extend to loss arising from negligence; Saunders v. R. Co., 128 Fed. 15; and one limiting liability to $100; Prentice v. Decker, 49 Barb. (N. Y.) 21; and one exempting the company from liability for its servants' negligence would not cover a loss arising from the company's negligence; Weinberg v. S. S. Co., 8 N. Y. Supp. 195; but a provision inserted in a steamship ticket limiting the liability of a carrier for loss of baggage to a certain amount, unless the true value is declared and excess paid for at regular freight rates, will operate to relieve the carrier from liability for such loss, even when due to his own negligence; Tewes v. S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909.

Limitations as to the value of baggage are said not to apply to hand baggage carried by a passenger on a car; 15 Yale L. J. 428. A provision in a ticket, limiting liability for loss of baggage to $100, where goods of the value of $300 were stolen from the baggage while in company's possession, held not to relate to loss or damage from any particular cause, but to the amount of loss only, and if the jury found negligence on the part of the railroad company, the carrier would be liable for the full amount lost; Louisville, N. A. & C. Ry. Co. v. Nicholai, 4 Ind. App. 119, 30 N. E. 424, 51 Am. St. Rep. 206. Baggage carried by a woman, not a pauper, coming from Germany to the U. S., consisting of clothing for herself and her two children, together with some bed feathers and covering of the value of $285, is reasonable in quantity and value, and therefore a provision in the transportation ticket, limiting the carrier's liability for loss of baggage to $50, is invalid, and will not defeat a recovery for loss of such baggage; Glovinsky v. Steamship Co., 4 Misc. 266, 24 N. Y. Supp. 136.

A baggage check merely indicating designation of baggage beyond terminus of issuing carrier's route does not prove a contract to carry to such destination; Marmonstein v. R. Co., 13 Misc. 32, 34 N. Y. Supp. 97. The issuance of a baggage check by a carrier to a passenger is not a contract by the carrier to deliver the baggage at such a point, but simply a means of identification of the baggage at the end of the route; Hyman v. R. Co., 66 Hun 202, 21 N. Y. Supp. 119.

Unless negligence is shown, a steamship company is not liable for baggage stolen from a passenger's stateroom; The Humboldt, 97 Fed. 656; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; American S. S. Co. v. Bryan, 83 Pa. 446. The contrary rule in New York is based on the idea that a passenger steamboat is subject to the liability of an inn-keeper; Adams v. Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616.

It was formerly held that carriers were not liable as such for baggage unless a distinct price be paid for its carriage; 1 Salk. 2821; and see 3 H. & C. 135; but the rule is now otherwise; L. R. 6 Q. B. 612; Powell v. Myers, 26 Wend. (N. Y.) 591; Parmelee v. McNulty, 19 Ill. 556; McGregor & Co. v. Kilgore, 6 Ohio 358, 27 Am. Dec. 260; Dill v. R. Co., 7 Rich. 158, 62 Am. Dec. 407; Bomar v. Maxwell, 9 Humph. (Tenn.) 621, 51 Am. Dec. 682; they may limit their common-law liability by express contract, and by reasonable regulations made known to the public, but they cannot relieve themselves from liability from loss occasioned by negligence; Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455; Cole v. Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Mobile & O. R. Co. v. Hopkins, 41 Ala. 488, 94 Am. Dec. 607. See L. R. 10 Q. B. 437. The carrier may make reasonable regulations for the checking, custody, and carriage of baggage; Najac v. R. Co., 7 Allen (Mass.) 329, 83 Am. Dec. 686. It is liable as a carrier until the passenger has had a reasonable time to remove his baggage after its arrival; Burgevin v. R. Co., 69 Hun 479, 23 N. Y. Supp. 415.

The carrier is not liable for loss of baggage occasioned by "act of God" (Johnstown flood) and not by his own negligence; Long v. R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732.

As to what may be carried as baggage in a sleeping car, see note 9 L. R. A. (N. S.) 407.

As to an innkeeper's liability for baggage of a guest, see INNKEEPER.

BAIL (Fr. *bailler*, to deliver). One who becomes surety for the appearance of the defendant in court.

To deliver the defendant to persons who, in the manner prescribed by law, become security for his appearance in court.

The word is used both as a substantive and a verb, though more frequently as a substantive, and in civil cases, at least, in the first sense given above. In its more ancient signification, the word includes the delivery of property, real or personal, by one person to another. Bail in actions was first introduced in favor of defendants, to mitigate the hardships imposed upon them while in the custody of the sheriff under arrest, the security thus offered standing to the sheriff in the place of the body of the defendant. Taking bail was made compulsory upon the sheriffs by the statute 23 Hen. VI. c. 9, and the privilege of the defendant was rendered more valuable and secure by successive statutes, until by statute 12 Geo. I. c. 29, made perpetual by 21 Geo. II. c. 3, and 19 Geo. III. c. 70, it was provided that arrests should not be made unless the plaintiff make *affidavit* as to the amount due, and this amount be endorsed on the writ; and for this sum and no more the sheriff might require bail.

In the King's Bench, bail above and below were both exacted as a condition of releasing the defend-

ant from the *custody* in which he was held from the time of his arrest till his final discharge in the suit. In the Common Bench, however, the origin of bail above seems to have been different, as the *capias* on which bail might be demanded was of effect only to bring the defendant to court, and after appearance he was theoretically in *attendance*, but not in *custody*. The failure to file such bail as the emergency requires, although no arrest may have been made, is, in general, equivalent to a default.

In some states the defendant when arrested gives bail by bond to the sheriff, conditioned to appear and answer to the plaintiff and abide the judgment and not to avoid, which thus answers the purpose of bail above and below; Hale v. Russ, 1 Greenl. (Me.) 336; Hamilton v. Dunklee, 1 N. H. 172; Pierce v. Read, 2 N. H. 360; Champion v. Noyes, 2 Mass. 484; Broaders v. Welsh, 2 N. & McC. (S. C.) 569; Harwood v. Robertson, 2 Hill (S. C.) 336; West v. Ratledge, 15 N. C. 40; Liceth v. Cobb, 18 Ga. 314. In criminal law the term is used frequently in the second sense given, and bail is allowed except in cases where the defendant is charged with the commission of the more heinous crimes.

Bail above. Sureties who bind themselves either to satisfy the plaintiff his debt and costs, or to surrender the defendant into custody, provided judgment be against him in the action and he fail to do so; Sellon, Pr. 137.

Bail to the action. Bail above.

Bail below, or *bail to the sheriff.* Sureties who bind themselves to the sheriff to secure the defendant's appearance, or his putting in bail to the action on the return-day of the writ. It may be demanded by the sheriff whenever he has arrested a defendant on a bailable process, as a prerequisite to releasing the defendant.

Civil bail. That taken in civil actions.

Common bail. Fictitious sureties formally entered in the proper office of the court.

It is a kind of bail above, similar in form to special bail, but having fictitious persons, John Doe and Richard Roe, as sureties. Filing common bail is tantamount to entering an appearance. 3 Bla. Com. c. xix. See BILL OF MIDDLESEX.

Special bail. Responsible sureties who undertake as bail above.

Requisites of. A person to become bail must, in England, be a freeholder or housekeeper; 2 Chitt. Bail 96; 5 Taunt. 174; Lofft 148; must be *subject to process* of the court, and not privileged from arrest either temporarily or permanently; 1 D. & R. 127; Coster v. Watson, 15 Johns. (N. Y.) 535; Brown v. Lord, Kirb. (Conn.) 209; must be *competent* to enter into a *contract;* must be *able to pay* the amount for which he becomes responsible, but the property may be real or personal if held in his own right; 2 Chit. Bail 97; 11 Price 158; and liable to ordinary legal process; 4 Burr. 2526.

Persons not excepted to as appearance bail cannot be objected to as bail above; Dunlops v. Laporte, 1 Hen. & M. (Va.) 22; and bail, if of sufficient ability, should not be refused on account of the personal character or opinions of the party proposed; 4 Q. B. 468; 1 B. & H. Lead. Cr. Cas. 236.

When it may be given or required. In civil actions the defendant may give bail in all cases where he has been arrested; Richards v. Porter, 7 Johns. (N. Y.) 137; and bail below, even, may be demanded in some cases where no arrest is made; Coward v. Bohun, 1 Harr. & J. (Md.) 538; Mickle v. Baker, 2 McCord (S. C.) 250; but where a statute forbids the taking of bail, an order of court authorizing it will not entitle a party thereto or make it valid; Swanson v. Matson, 31 Ill. App. 594.

Bail above is required under some restrictions in many of the states in all actions for considerable amounts; Cheshire v. Edson, 2 McCord (S. C.) 385; either *common;* Bernbridge v. Turner, 2 Yeates (Pa.) 429; Anonymous, 20 N. J. L. 494; Morrison v. Silverburgh, 13 Ill. 551; which may be filed by the plaintiff, and judgment taken by default against the defendant if he neglects to file proper bail, after a certain period; Lane v. Cook, 8 Johns. (N. Y.) 359; Corse v. Colfax, 2 N. J. L. 684; or *special*, which is to be filed of course in some species of action and may be demanded in others; Peareson v. Picket, 1 McCord (S. C.) 472; Whiting v. Putnam, 17 Mass. 176; Purcell v. Hartness, 1 Wend. (N. Y.) 303; Douglass v. Wight, 2 Brev. (S. C.) 218; but in many cases only upon special cause shown; Coxe 277; Brookfield v. Jones, 8 N. J. L. 311; Clason v. Gould, 2 Caines (N. Y.) 47; Jack v. Shoemaker, 3 Binn. (Pa.) 283; Hatcher v. Lewis, 4 Rand. (Va.) 152.

The existence of a debt and the amount due; Nevins v. Merrie, 2 Whart. (Pa.) 499; Lewis v. Brackenridge, 1 Blackf. (Ind.) 112; Jennings v. Sledge, 3 Ga. 128; in an action for debt, and, in some forms of action, other circumstances, must be shown by affidavit to prevent a discharge on common bail; Brooks v. McLellan, 1 Barb. (N. Y.) 247; Lewis v. Brackenridge, 1 Blackf. 112; Hockspringer v. Ballenburg, 16 Ohio 304; Mustin v. Mustin, 13 Ga. 357. It is a general rule that a defendant who has been once held to bail in a civil case cannot be held a second time for the same cause of action; Tidd, Pr. 184; Clark v. Weldo, 4 Yeates (Pa.) 206; President, etc., of Bank of South Carolina v. Green, 2 Rich. (S. C.) 336; but this rule does not apply where the second holding is in another state; Peck v. Hozier, 14 Johns. (N. Y.) 346; Hubbard v. Wentworth, 3 N. H. 43; Parasset v. Gautier, 2 Dall. (U. S.) 330, 1 L. Ed. 402; Man v. Lowden, 4 McCord (S. C.) 485. And see also James v. Allen, 1 Dall. (U. S.) 188, 1 L. Ed. 93; Read v. Chapman, 1 Pet. C. C. 404, Fed. Cas. No. 11,605; Woodbridge v. Wright, 3 Conn. 523; as to the effect of a discharge in insolvency.

In criminal cases the defendant may in general claim to be set at liberty upon giving bail, except when charged with the commission of a capital offence; 4 Bla. Com. 297; Ex parte Alexander, 59 Mo. 599, 21 Am. Rep. 393; State v. Arthur, 1 McMull. (S. C.) 456; State v. Holmes, 3 Strobh. (S. C.) 272;

Ex parte Richardson, 96 Ala. 110, 11 South. 316; Ready v. Com., 9 Dana (Ky.) 38; Ex parte White, 9 Ark. 222. One charged with murder should not be discharged on habeas corpus, unless the evidence before the committing magistrate was so insufficient that a verdict thereon requiring capital punishment would be set aside; In re Troia, 64 Cal. 152, 28 Pac. 231; Ex parte King, 86 Ala. 620, 5 South. 863; Ex parte Hamilton, 65 Miss. 147, 3 South. 241; and even in capital offences a defendant may be bailed in the discretion of the court, in the absence of constitutional or statutory provisions to the contrary; Archer's Case, 6 Gratt. (Va.) 705; Com. v. Semmes, 11 Leigh (Va.) 665; State v. Summons, 19 Ohio 139; People v. Van Horne, 8 Barb. (N. Y.) 158; Ex parte Croom, 19 Ala. 561; People v. Smith, 1 Cal. 9; Ex parte Wray, 30 Miss. 673; Com. v. Phillips, 16 Mass. 423; Ullery v. Com., 8 B. Monr. (Ky.) 3. Except under extraordinary circumstances, one convicted of felony will not be admitted to bail pending an appeal; Ex parte Smith, 89 Cal. 79, 26 Pac. 638; People v. Folmsbee, 60 Barb. (N. Y.) 480; Ex parte Ezell, 40 Tex. 451, 19 Am. Rep. 32; Corbett v. State, 24 Ga. 391. Where one is indicted for a capital offence, the burden rests on him to show that the proof of his guilt is not evident, on an application for bail; Ex parte Jones, 31 Tex. Cr. R. 422, 20 S. W. 983.

For any crime or offence against the United States, not punishable by death, any judge of the United States, or commissioner of a district court to take bail, or any chancellor, judge of the supreme or superior court, or first judge of any court of common pleas, or mayor of any city of any state, or any justice of the peace or magistrate of any state, where the offender may be found, may take bail; Act Sept. 24, 1789, § 33, Mar. 2, 1793, § 4; and, after commitment by a justice of the supreme or judge of district court of the United States, any judge of the supreme or superior court of any state (there being no judge of the United States in the district to take such bail) may admit the person to bail if he offer it.

When the punishment by the laws of the United States is death, bail can be taken only by the supreme or district court.

As to the principle on which bail is granted or refused in cases of capital offences in the King's Bench, see 1 E. & B. 1, 8; Dearsl. Cr. Cas. 51, 60.

The proceedings attendant on giving bail are substantially the same in England and the United States. An application is made to the proper officer; Gilliam v. Allen, 4 Rand. (Va.) 498, and the bond or the names of the bail proposed filed in the proper office, and notice is given to the opposite party, who must except within a limited time, or the bail justify and are approved. If exception is taken, notice is given, a hearing takes place, the bail must *justify*, and will then be approved unless the other party oppose successfully; in which case other bail must be added or substituted. A formal application is, in many cases, dispensed with, but a notification is given at the time of filing to the opposite party, and, unless exceptions are made and notice given within a limited time, the bail justify and are approved. If the sum in which the defendant is held is too large, he may apply for mitigation of bail.

The bail are said to enter into a recognizance when the obligation is one of record, which it is when government or the defendant is the obligee; when the sheriff is the obligee, it is called a bail bond. See BAIL BOND; RECOGNIZANCE.

Unless authorized by statute, it is illegal for an officer or magistrate to receive money in lieu of bail for the appearance of a person accused of a crime; Reinhard v. City, 49 Ohio St. 257, 31 N. E. 35.

Mitigation of excessive bail may be obtained by simple application to the court; Bunting v. Brown, 13 Johns. (N. Y.) 425; Keppele v. Zantzinger, 3 Yeates (Pa.) 83; and in other modes; Jones v. Kelly, 17 Mass. 116; Evans v. Foster, 1 N. H. 374. Exacting excessive bail is against the constitution of the United States, and was a misdemeanor at common law; U. S. Const. Amend. art. 8; Alexander v. Winn, 1 Brev. (S. C.) 14; U. S. v. Lawrence, 4 Cra. C. C. 518, Fed. Cas. No. 15,577.

The liability of bail is limited by the bond; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. Ed. 145; Fetterman v. Hopkins, 5 Watts (Pa.) 539; by the *ac etiam;* Mumford v. Stocker, 1 Cow. (N. Y.) 601; by the amount for which judgment is rendered; Longstreet v. Lafitte, 2 Speers (S. C.) 664; and special circumstances in some cases; Morton v. Bryce, 1 N. & McC. (S. C.) 64; Murden v. Perman, 1 McCord (S. C.) 128; Kinsler v. Kyzer, 4 McCord (S. C.) 315. See BAIL BOND; RECOGNIZANCE.

The powers of the bail over the defendant are very extensive. As they are supposed to have the custody of the defendant, they may, when armed with the bail piece, arrest him, though out of the jurisdiction of the court where they became bail, and in a different state; Parker v. Bidwell, 3 Conn. 84; Ruggles v. Corey, *id.* 421; Com. v. Brickett, 8 Pick. (Mass.) 138; Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; State v. Lingerfelt, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 605; may take him while attending court as a suitor, or at any time, even on Sunday; Broome v. Hurst, 4 Yeates (Pa.) 123; Read v. Case, 4 Conn. 170, 10 Am. Dec. 110; may break open a door if necessary; Nicolls v. Ingersoll, 7 Johns. (N. Y.) 145; Read v. Case, 4 Conn. 166, 10 Am. Dec. 110; may command the assistance of the sheriff and his officers; Com. v. Brickett, 8 Pick. (Mass.) 138; and may depute their power to others; State v. Ma-

hon, 3 Harr. (Del.) 568. He has been looked upon as the principal's gaoler, and the principal, when bailed, has been deemed as truly imprisoned as if he were still confined; 11 Harv. L. Rev. 541. "The bail have their principal on a string and may pull the string whenever they please and render him in their discharge;" 6 Mod. 231. Where the defendant has been surrendered by his sureties pending an appeal, a reasonable time and opportunity should be given him to get another bond; In re Bauer, 112 Mo. 231, 20 S. W. 488.

To refuse or delay to bail any person is an offence against the liberty of the subject, both at common law and by statute, but does not entitle the person refused to an action unless malice be shown; 4 Q. B. 468; 13 *id.* 240; Evans v. Foster, 1 N. H. 374.

In extradition cases bail is held not to be a question of practice; it is dependent on statute; although the United States statute in respect to procedure in extradition does not forbid bail in such cases, that is not enough, as the authority must be expressed; and as there is no provision for bail in the act, bail cannot be allowed; In re Carrier, 57 Fed. 578. In In re Wright, 123 Fed. 463, bail was denied in an extradition case for want of power. On appeal in Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, it was said: "We are unwilling to hold that the circuit court possesses no power in respect of admitting to bail other than as specifically vested by statute, or that while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief." In [1898] 2 Q. B. 615, it was held that the King's Bench had at common law jurisdiction to admit to bail.

In Canadian Law. A lease. See Merlin, Répert. *Bail.*

Bail emphyteotique. A lease for years, with a right to prolong indefinitely; 5 Low. C. 381. It is equivalent to an alienation; 6 Low. C. 58.

BAIL BOND. A specialty by which the defendant and other persons become bound to the sheriff in a penal sum proportioned to the damages claimed in the action, and which is conditioned for the due appearance of such defendant to answer to the legal process therein described, and by which the sheriff has been commanded to arrest him.

The defendant usually binds himself as principal with two sureties; but sometimes the bail alone bind themselves as principals, and sometimes also one surety is accepted by the sheriff. The bail bond may be said to stand in the place of the defendant so far as the sheriff is concerned, and, if properly taken, furnishes the sheriff a complete answer to the requirement of the writ, directing him to take and produce the body of the defendant. A bail bond is given to the sheriff, and can be taken only where he has custody of the defendant on process other than final, and is thus distinguished from recognizance, which see.

The sheriff can take the bond only when he has custody of the defendant's body on process other than final.

When a bail bond, with sufficient securities and properly prepared, is tendered to the sheriff, he must take it and discharge the defendant; Stat. 23 Hen. VI. c. 10, § 5.

The *requisites* of a bail bond are that it should be under seal; 1 Term 418; Walker v. Lewis, 3 N. C. 16; Peyton v. Moseley, 3 T. B. Monr. (Ky.) 80; Payne v. Britton's Ex'r., 6 Rand. (Va.) 101; should be to the sheriff by the name of the office; 1 Term 422; Loker v. Antonio, 4 McCord (S. C.) 175; Handley's Adm'r v. Ewings, 4 Bibb (Ky.) 505; Conant v. Sheldon, 4 Gray (Mass.) 300; conditioned in such manner that performance is possible; 3 Campb. 181; Fanshor v. Stout, 4 N. J. L. 319; for a proper amount; Oxley v. Turner, 2 Va. Cas. 334; Ellis v. Robinson, 3 N. J. L. 707; for the defendant's appearance at the place and day named in the writ; 1 Term 418; Holmes v. Chadbourne, 4 Greenl. (Me.) 10; Robeson v. Thompson, 9 N. J. L. 97; Carter v. Cockrill, 2 Munf. (Va.) 448; Blanding v. Rogers, 2 Brev. (S. C.) 394, 4 Am. Dec. 595; see BAIL; and should describe the action in which the defendant is arrested with sufficient accuracy to distinguish it; Ralston v. Love, Hard. (Ky.) 501; Colburn v. Downes, 10 Mass. 20; Kelly v. Com., 9 Watts (Pa.) 43; but need not disclose the nature of the suit; 6 Term 702. A bail bond which fails to specify the charge which the principal is to answer is void and the defect cannot be remedied by testimony; People v. Gillman, 58 Hun 368, 12 N. Y. Supp. 40. The sureties must be two or more in number to relieve the sheriff; 2 Bingh. 227; Long v. Billings, 9 Mass. 482; Seymour v. Curtiss, 1 Wend. (N. Y.) 108; and he may insist upon three, or even more, subject to statutory provisions on the subject; 5 M. & S. 223; but the bond will be binding if only one be taken; Glezen v. Rood, 2 Metc. (Mass.) 490; Caines v. Hunt, 8 Johns. (N. Y.) 358; Johnson's Assignee v. Williams, 2 Over. (Tenn.) 178; Lane v. Smith, 2 Pick. (Mass.) 284.

Putting in bail to the action; 5 Burr. 2683; and waiver of his right to such bail by the plaintiff; Phillips v. Oliver, 5 S. & R. (Pa.) 419; Flack v. Eager, 4 Johns. (N. Y.) 185; Culpeper Agricultural & Mfg. Soc. v. Digges, 6 Rand. (Va.) 165, 18 Am. Dec. 708; Hubbard v. Shaler, 2 Day (Conn.) 199; or a surrender of the person of the defendant, constitute a performance or excuse from the performance of the condition of the bond; 1 B. & P. 326; Stockton v. Throgmorton, 1 Baldw. 148, Fed. Cas. No. 13,463; Strang v. Barber, 1 Johns. Cas. (N. Y.) 329; Ellis v. Hay, *id.* 334; McClurg v. Bowers, 9 S. & R. (Pa.) 24; Coolidge v. Cary, 14 Mass. 115; Moyers v. Center, 2 Strobh. (S. C.) 439; Thorn v. Delany, 6 Ark. 219; see State v. Lingerfelt, 109 N. C. 775,

14 S. E. 75, 14 L. R. A. 605; as do many other matters which may be classed as changes in the circumstances of the defendant abating the suit; Treasurers of State v. Moore's Ex'rs, 1 N. & McC. (S. C.) 215; Champion v. Noyes, 2 Mass. 485; including a discharge in insolvency; Saunders v. Bobo, 2 Bail. (S. C.) 492; Kane v. Ingraham, 2 Johns. Cas. (N. Y.) 403; Champion v. Noyes, 2 Mass. 481; Sergeant v. Stryker, 16 N. J. L. 466, 32 Am. Dec. 404; Richmond v. De Young, 3 Gill & J. (Md.) 64; matters arising from the negligence of the plaintiff; 2 B. & P. 558; or from irregularities in proceeding against the defendant; 3 Bla. Com. 292; Boggs v. Chichester, 13 N. J. L. 209; Waples v. Derrickson, 1 Harr. (Del.) 134. Where the recognizance is for the appearance of a prisoner, and he does appear and pleads guilty, it cannot be forfeited for failure to appear subsequently to answer the sentence; State v. Cobb, 44 Mo. App. 375.

In those states in which the bail bond is conditioned to abide the judgment of the court as well as to appear, some of the acts above mentioned will not constitute performance. See RECOGNIZANCE. The plaintiff may demand from the sheriff an assignment of the bail bond, and may sue on it for his own benefit; Stat. 4 Anne, c. 16, § 20; Roop v. Meek, 6 S. & R. (Pa.) 545; Higgins v. Glass, 47 N. C. 353; unless he has waived his right so to do; Huguet v. Hallet, 1 Caines (N. Y.) 55; or has had all the advantages he would have gained by entry of special bail; Priestman v. Keyser, 4 Binn. (Pa.) 344; Union Bank of New York v. Kraft, 2 S. & R. (Pa.) 284.

The remedy is by *scire facias* in some states; Pierce v. Read, 2 N. H. 359; Hunter v. Hill, 3 N. C. 223; Harvey v. Goodman, 9 Yerg. (Tenn.) 273; Usher v. Frink, 2 Brev. (S. C.) 84; Belknap v. Davis, 21 Vt. 409; Waughhop v. State, 6 Tex. 337. The United States is not restricted to the remedies provided by the laws of a state in enforcing a forfeited bond taken in a criminal case, but may proceed according to the common law; U. S. v. Insley, 54 Fed. 221, 4 C. C. A. 296. See JUSTIFICATION.

BAIL COURT. A court auxiliary to the court of King's Bench at Westminster, wherein points connected more particularly with pleading and practice were argued and determined. Wharton, Law Dict. 2d Lond. ed. It has been abolished.

BAIL DOCK. Formerly at the Old Bailey, in London, a small room taken from one of the corners of the court, and left open at the top, in which certain malefactors were placed during trial. Cent. Dict.

BAIL PIECE. A certificate given by a judge or the clerk of a court, or other person authorized to keep the record, in which it is certified that the bail became bail for the defendant in a certain sum and in a particular case. It was the practice, formerly, to write these certificates upon small pieces of parchment, in the following form:—

In the court of ————, of the Term of ————, in the year of our Lord ——,

City and County of ————, ss.

Theunis Thew is delivered to bail, upon the taking of his body, to Jacobus Vanzant, of the city of ——, merchant, and to John Doe, of the same city, yeoman.

SMITH, JR. *Attor'y for Deft.* } At the suit of PHILIP CARSWELL.

Taken and acknowledged the — day of —, A. D. ——, before me. D. H.

See 3 Bla. Com. App.; 1 Sellon, Pr. 139.

BAILABLE ACTION. An action in which the defendant is entitled to be discharged from arrest only upon giving bond to answer.

BAILABLE PROCESS. Process under which the sheriff is directed to arrest the defendant and is required by law to discharge him upon his tendering suitable bail as security for his appearance. A *capias ad respondendum* is bailable; not so a *capias ad satisfaciendum.*

BAILEE. One to whom goods are bailed; the party to whom personal property is delivered under a contract of bailment.

His duties are to act in good faith, and perform his undertaking, in respect to the property intrusted to him, with the diligence and care required by the nature of his engagement.

When the bailee alone receives benefit from the bailment, as where he borrows goods or chattels for use, he is bound to exercise extraordinary care and diligence in preserving them from loss or injury; Bennett v. O'Brien, 37 Ill. 250; Ross v. Clark, 27 Mo. 549; but he is not an insurer; 9 C. & P. 383.

When the bailment is mutually beneficial, as where chattels are hired or pledged to secure a debt, the bailee is bound to exercise ordinary care in preserving the property; Petty v. Overall, 42 Ala. 145, 94 Am. Dec. 634; Dearbourn v. Bank, 58 Me. 275; Erie Bank v. Smith, 3 Brewst. (Pa.) 9; St. Losky v. Davidson, 6 Cal. 643.

When the bailee receives no benefit from the bailment, as where he accepts chattels or money to keep without recompense, or undertakes gratuitously the performance of some commission in regard to them, he is answerable only for the use of the ordinary care which he bestows upon his own property of a similar nature; Edw. Bailm. § 43. It has been held that such a bailee would be liable only for gross neglect or fraud; McKay v. Hamblin, 40 Miss. 472; Gulledge v. Howard, 23 Ark. 61; Edson v. Weston, 7 Cow. (N. Y.) 278; Burk v. Dempster, 34 Neb. 426, 51 N. W. 976; Hibernia Bldg. Ass'n

v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828. The case must have relation to the nature of the property bailed; Jenkins v. Motlow, 1 Sneed (Tenn.) 248, 60 Am. Dec. 154.

These differing degrees of negligence have been doubted. See BAILMENT.

The bailee is bound to redeliver or return the property, according to the nature of his engagement, as soon as the purpose for which it was bailed shall have been accomplished. Nothing will excuse the bailee from delivery to his bailor, except by showing that the property was taken from him by law, or by one having a paramount title, or that the bailor's title had terminated; Bliven v. R. Co., 36 N. Y. 403; Burton v. Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Bliven v. R. Co., 35 Barb. (N. Y.) 191.

He cannot dispute his bailor's title; Edw. Bailm. § 73; Dougherty v. Chapman, 29 Mo. App. 233; nor can he convey title as against the bailor, although the purchaser believes him to be the true owner; Hendricks v. Evans, 46 Mo. App. 313.

The bailee has a special property in the goods or chattels intrusted to him, sufficient to enable him to defend them by suit against all persons but the rightful owner. The depositary and mandatary acting gratuitously, and the finder of lost property, have this right; Edw. Bailm. § 245; Garlick v. James, 12 Johns. (N. Y.) 147, 7 Am. Dec. 294.

A bailee with a mere naked authority, having a right to remuneration for his trouble, but coupled with no other interest, may support trespass for any injury amounting to a trespass done while he was in the actual possession of the thing; Edw. Bailm. 37; Faulkner v. Brown, 13 Wend. (N. Y.) 63; Moran v. Packet Co., 35 Me. 55. A bailee may recover in trover for goods wrongfully converted by a third person; McGraw v. Patterson, 47 Ill. App. 87.

A bailee for work, labor, and services, such as a mechanic or artisan who receives chattels or materials to be repaired or manufactured, has a lien upon the property for his services; 2 Pars. Contr. 145, 146; 3 *id.* 270–273; Wheeler v. McFarland, 10 Wend. (N. Y.) 318. Other bailees, innkeepers, common carriers, and warehousemen, also, have a lien for their charges.

The responsibilities of a bailee cannot be thrust upon one without his knowledge and against his consent; they must be voluntarily assumed by him or his agents; First Nat. Bank of Lyons v. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Story, Bailm. 60. A constructive acceptance is sufficient; Rodgers v. Stophel, 32 Pa. 111, 12 Am. Dec. 775; as where one comes into possession by mistake; 1 Str. 505; Morris v. R. Co., 1 Daly (N. Y.) 202; or fortuitously; Preston v. Neale, 12 Gray (Mass.) 222, citing Story, Bailm. § 44 *a*; or where it is a custom of trade; Westcott v. Thompson, 18 N. Y. 363. Where property is consigned to a person as bailee, with specific directions as to its disposal, he may refuse to accept; Kansas Elevator Co. v. Harris, 6 Kan. App. 89, 49 Pac. 674; since a person has the same right to decline becoming a bailee as he has to decline becoming a purchaser; King v. Richards, 6 Whart. (Pa.) 418, 37 Am. Dec. 420; but innkeepers, common carriers, wharfingers or warehousemen, as persons exercising a public employment, are not within this rule. See those titles.

See also Schouler, Bailm.; Coggs v. Bernard, Sm. Lead. Cas.; BAILMENT.

BAILIE. In Scotch Law. An officer appointed to give infeftment.

In certain cases it is the duty of the sheriff, as king's bailie, to act: generally, any one may be made bailie, by filling in his name in the precept of sasine.

A magistrate possessing a limited criminal and civil jurisdiction. Bell, Dict.

BAILIFF. A person to whom some authority, care, guardianship, or jurisdiction is delivered, committed, or intrusted. Spelman, Gloss.

A sheriff's officer or deputy. 1 Bla. Com. 344.

A court attendant, sometimes called a tipstaff.

A magistrate, who formerly administered justice in the parliaments or courts of France, answering to the English sheriffs as mentioned by Bracton.

There are still bailiffs of particular towns in England; as, the bailiff of Dover Castle, etc.; otherwise, bailiffs are now only officers or stewards, etc.; as, *bailiffs of liberties*, appointed by every lord within his liberty, to serve writs, etc.; *bailiffs errant or itinerant*, appointed to go about the country for the same purpose; *sheriff's bailiffs*, sheriff's officers to execute writs; these are also called *bound bailiffs*, because they are usually bound in a bond to the sheriff for the due execution of their office; *bailiffs of court-baron*, to summon the court, etc.; *bailiffs of husbandry*, appointed by private persons to collect their rents and manage their estates; *water bailiffs*, officers in port towns for searching ships, gathering tolls, etc. Bacon, Abr.

A person acting in a ministerial capacity who has by delivery the custody and administration of lands or goods for the benefit of the owner or bailor, and is liable to render an account thereof. Co. Litt. 271; Story, Eq. Jur. § 446; Barnum v. Landon, 25 Conn. 149.

The word is derived from the old French *bailler*, to deliver, and originally implied the delivery of real estate, as of land, woods, a house, a part of the fish in a pond; Ow. 20; 2 Leon. 194; 37 Edw. III. c. 7; 10 Hen. VII. c. 30; but was afterwards extended to goods and chattels. Every bailiff is a receiver, but every receiver is not a bailiff. Hence it is a good plea that the defendant never was receiver, but was bailiff. 18 Edw. III. 16. See Cro. Eliz. 82, 83; Fitzh. N. B. 134 F; 8 Coke 48 *a*, *b*.

From a bailiff are required administration, care, management, skill. He is entitled to allowance for the expense of administration, and for all things done in his office according to his own judgment without the special direction of his principal, and also for casu-

al things done in the common course of business; Co. Litt. 89 *a*; Com. Dig. E, 12; Brooke, Abr. *Acc.* 18; but not for things foreign to his office; Brooke, Abr. *Acc.* 26, 88; Plowd. 282 *b*, 14; Com. Dig. *Acc.* E, 13; Co. Litt. 172. Whereas a mere receiver, or a receiver who is not also a bailiff, is not entitled to allowance for any expenses; 1 Rolle, Abr. 119; Com. Dig. E, 13; James v. Browne, 1 Dall. (U. S.) 340, 1 L. Ed. 165.

A bailiff may appear and plead for his principal in an assize; "and his plea commences" thus: "J. S., bailiff of T. N., comes," etc., not "T. N., by his bailiff J. S., comes," etc. Co. 2d Inst. 415; Keilw. 117 *b*. As to what matters he may plead, see Co. 2d Inst. 414.

BAILIWICK. The jurisdiction of a sheriff or bailiff. 1 Bla. Com. 344.

A liberty or exclusive jurisdiction which was exempted from the sheriff of the county, and over which the lord appointed a bailiff, with such powers within his precinct as the under-sheriff exercised under the sheriff of the county. Whishaw, Lex.

BAILLEW DE FONDS. In Canadian Law. The unpaid vendor of real estate.

His claim is subordinate to that of a subsequent hypothecary creditor claiming under a conveyance of prior registration; 1 Low. C. 1, 6; but is preferred to that of the physician for services during the last illness; 9 Low. C. 497.

BAILLI. In Old French Law. One to whom judicial authority was assigned or delivered by a superior. Black, L. Dict.

BAILMENT. A delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished. Prof. Joel Parker, MS. Lect. Harvard Law School, 1851.

The right to hold may terminate, and a duty of restoration may arise, before the accomplishment of the purpose; but that does not necessarily enter into the definition, because such duty of restoration was not the original purpose of the delivery, but arises upon a subsequent contingency. The party delivering the thing is called the bailor; the party receiving it, the bailee.

Various attempts have been made to give a precise definition of this term, upon some of which there have been elaborate criticisms, see Story, Bailm. 4th ed. § 2, n. 1, exemplifying the maxim, *Omnis definitio in lege periculosa est;* but the one above given is concise, and sufficient for a general definition.

Some other definitions are here given as illustrating the elements considered necessary to a bailment by the different authors cited.

A delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story, Bailm. § 2. See Merlin, *Répert. Bail.*

A delivery of goods in trust upon a contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee. 2 Bla. Com. 451. See *id.* 395.

A delivery of goods in trust upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee as soon as the purposes of the bailment shall be answered. 2 Kent 559.

A delivery of goods on a condition, express or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they are bailed shall be answered. Jones, Bailm. 1.

A delivery of goods in trust on a contract, either expressed or implied, that the trust shall be duly executed, and the goods redelivered as soon as the time or use for which they were bailed shall have elapsed or be performed. Jones, Bailm. 117.

According to Story, the contract does not necessarily imply an undertaking to redeliver the goods; and the first definition of Jones here given would seem to allow of a similar conclusion. On the other hand, Blackstone, although his definition does not include the return, speaks of it in all his examples of bailments as a duty of the bailee; and Kent says that the application of the term to cases in which no return or delivery or redelivery to the owner or his agent is contemplated, is extending the definition of the term beyond its ordinary acceptation in the English law. A consignment to a factor would be a bailment for sale, according to Story; while according to Kent it would not be included under the term bailment.

Sir William Jones has divided bailments into five sorts, namely: *depositum*, or deposit; *mandatum*, or commission without recompense; *commodatum*, or loan for use without pay; *pignus*, or pawn; *locatum*, or hiring, which is always with reward. This last is subdivided into *locatio rei*, or hiring, by which the hirer gains a temporary use of the thing; *locatio operis faciendi*, when something is to be done to the thing delivered; *locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another. Jones, Bailm. 36. See these several titles.

A better general division, however, for practical purposes, is into three kinds. *First*, those bailments which are for the benefit of the bailor, or of some person whom he represents. *Second*, those for the benefit of the bailee, or some person represented by him. *Third*, those which are for the benefit of both parties.

A radical distinction between a bailment and a chattel mortgage is that, by a mortgage, the title is transferred to the mortgagee, subject to be revested by performance of the condition, but, in case of a bailment, the bailor retains the title and parts with the possession for a special purpose; Walker v. Staples, 5 Allen (Mass.) 34. See MORTGAGE.

A hiring of property for a specific term is a bailment, though the hirer has an option to purchase before the expiration of the term; Hunt v. Wyman, 100 Mass. 198; Collins v. R. Co., 171 Pa. 243, 33 Atl. 331; Bailey v. Colby, 34 N. H. 29, 66 Am. Dec. 752. A telegraph company receiving a message is said to be a bailee for hire and not a common carrier; Western Union Telegraph Co. v. Fontaine, 58 Ga. 433; and to be governed by the law applicable to that class of bailments called *locatio operis faciendi;* Pinckney v. Telegraph Co., 19 S. C. 71, 45 Am. Rep. 765. See TELEGRAPH.

An agreement by which A is to let B have a horse, in consideration that B will let A have another horse, creates an exchange, not a bailment; King v. Fuller, 3 Cai. (N. Y.) 152; and where a jeweler's sweepings were delivered under an option to return either the product or its equivalent in value, the transaction was held to be either an exchange or a sale; Austin v. Seligman, 21 Blatchf. 506, 18 Fed. 519.

Where animals are delivered to be taken care of for a certain time, and at the expiration of that time the same number of animals is to be returned, and any increase is to be enjoyed by both parties, there is a bailment, not a partnership; Robinson v. Haas, 40 Cal. 474; so one who hired a boat, paying its running expenses out of the earnings and dividing what was left with the owner, was held a bailee, prior to paying the expenses and striking a balance; Ward v. Thompson, Fed. Cas. No. 17,162.

A contract for hiring teams and carriages for a certain time at a certain price, which, by its terms, is one of bailment, is not converted into one of service, so as to render the owner liable for the acts of the hirer, because the contract provides for the rates to be charged upon sub-letting the property and limits the territory in which it can be used and the kind of work that can be done, and because the owner employs an agent to supervise this branch of his business, to secure men to undertake the work and to make contracts with them; McColligan v. R. Co., 214 Pa. 229, 63 Atl. 792, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739, distinguishing L. R. 7 C. P. 272; L. R. 23 Q. B. D. 281; [1902] 2 K. B. 38.

When the identical article is to be returned in the same or in some altered form, the contract is one of bailment and the title to the property is not changed; but when there is no obligation to return the specific article and the receiver is at liberty to return another thing of equal value, then the transaction is a sale; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. This distinction or test of a bailment is recognized in Laflin & R. Powder Co. v. Burkhardt, 97 U. S. 116, 24 L. Ed. 973; Walker v. Butterick, 105 Mass. 237; Middleton v. Stone, 111 Pa. 589, 4 Atl. 523.

There are three degrees of care and diligence required of the bailee, and three degrees of the negligence for which he is responsible, according to the purpose and object of the bailment, as shown in those three classes; and the class serves to designate the degree of care, and of the negligence for which he is responsible. Thus, in the first class the bailee is required to exercise only slight care, and is responsible, of course, only for gross neglect. In the second he is required to exercise great care, and is responsible even for slight neglect. In the third he is required to exercise ordinary care, and is responsible for ordinary neglect. See BAILEE.

It has been held in some cases that there are, properly speaking, no degrees of negligence (though the above distinctions have been generally maintained in the cases; Edw. Bailm. § 61); 11 M. & W. 113; The New World v. King, 16 How. (U. S.) 474, 14 L. Ed. 1019; Perkins v. R. Co., 24 N. Y. 207, 82 Am. Dec. 281; L. R. 1 C. P. 612.

When a person receives the goods of another to keep without recompense, and he acts in good faith, keeping them as his own, he is not answerable for their loss or injury. As he derives no benefit from the bailment, he is responsible only for bad faith or gross negligence; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59; 2 Ad. & E. 256; Griffith v. Zipperwick, 28 Ohio St. 388; Laforge v. Morgan, 11 Mart. (O. S.) La. 462; Knowles v. R. Co., 38 Me. 55, 61 Am. Dec. 234; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No. 14,130; 2 C. B. 877; Burk v. Dempster, 34 Neb. 426, 51 N. W. 976; Kincheloe v. Priest, 89 Mo. 240, 1 S. W. 235, 58 Am. Rep. 117. But this obligation may be enlarged or decreased by a special acceptance; 2 Kent 565; Story, Bailm. § 33; 2 Ld. Raym. 910; Ames v. Belden, 17 Barb. (N. Y.) 515; and a spontaneous offer on the part of the bailee increases the amount of care required of him; 2 Kent 565. Knowledge by the bailee of the character of the goods; Jones, Bailm. 38; and by the bailor of the manner in which the bailee will keep them; Knowles v. R. Co., 38 Me. 55, 61 Am. Dec. 234; are important circumstances.

A bank (national or otherwise) accustomed to keep securities, whether authorized to do so by its charter or not, is liable for their loss by gross carelessness; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; Turner v. Bank, 26 Ia. 562; Chattahoochee Nat. Bank v. Schley, 58 Ga. 369; Gray v. Merriam, 148 Ill. 179, 35 N. E. 810, 32 L. R. A. 769, 39 Am. St. Rep. 172; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162, 34 L. Ed. 788; see First Nat. Bank v. Bank, 60 N. Y. 278, 19 Am. Rep. 181; *contra*, Whitney v. Bank, 50 Vt. 389, 28 Am. Rep. 503. A national bank has power to receive such deposits; National Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750.

So when a person receives an article and undertakes gratuitously some commission in respect to it, as to carry it from one place to another, he is only liable for its injury or loss through his gross negligence. It is enough if he keep or carry it as he does his own property; 6 C. Rob. Adm. 141; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No. 14,130; and cases above. A treasurer of an association who receives no compensation is only liable for gross negligence in paying out funds, as he is a gratuitous bailee; Hibernia

Building Ass'n v. McGrath, 154 Pa. 296, 26 Atl. 377, 35 Am. St. Rep. 828. See MANDATE.

As to the amount of skill such bailee must possess and exercise, see 2 Kent 509; Story, Bailm. § 174; Fellowes v. Gordon, 8 B. Monr. (Ky.) 415; Beardslee v. Richardson, 11 Wend. (N. Y.) 25, 25 Am. Dec. 596; Ferguson v. Porter, 3 Fla. 27; 11 M. & W. 113; and more skill may be required in cases of voluntary offers or special undertakings; 2 Kent 573.

The borrower, on the other hand, who receives the entire benefit of the bailment, must use extraordinary diligence in taking care of the thing borrowed, and is responsible for even the slightest neglect; Niblett v. White's Heirs, 7 La. 253; Moore v. Westervelt, 27 N. Y. 234; 2 Ld. Raym. 909; Ross v. Clark, 27 Mo. 549; Green v. Hollingsworth, 5 Dana (Ky.) 173, 30 Am. Dec. 680. See Hagebush v. Ragland, 78 Ill. 40.

He must apply it only to the very purpose for which it was borrowed; 2 Ld. Raym. 915; Story, Bailm. § 232; cannot permit any other person to use it; 1 Mod. 210; Wilcox v. Hogan, 5 Ind. 546; Sarjeant v. Blunt, 16 Johns. (N. Y.) 76; cannot keep it beyond the time limited; Wheelock v. Wheelwright, 5 Mass. 104; and cannot keep it as a pledge for demands otherwise arising against the bailor; 2 Kent 574. See 9 C. & P. 383; Chamberlin v. Cobb, 32 Ia. 161.

A borrower cannot recover for injuries caused by a defect in the thing borrowed, where such defect is hidden and the bailor had no knowledge of it; [1899] 1 Q. B. D. 145. In a bailment for hire it is said to be the duty of the bailor to use due care to find hidden defects; 6 Q. B. Div. 685. The obligation of the lender goes no further than to make known to the borrower a defect in the subject matter of the bailment should he know of the existence of such defect; he is not liable for an injury caused by a defect, even if he might have known of it; 6 H. & N. 329; 8 El. & Bl. 1035; Gagnon v. Dana, 69 N. H. 264, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. Rep. 170; but if he knows of a defect and by gross negligence omits to inform the borrower of it, an action may be maintained; 68 L. J. Q. B. N. S. 147.

When the property has been lost or destroyed without fault on his part, he is not responsible to the owner; Clark v. U. S., 95 U. S. 539, 24 L. Ed. 518; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 653, 22 Sup. Ct. 240, 46 L. Ed. 366; but when he contracts either expressly or by fair implication to return the thing even though it has been lost or destroyed without negligence on the bailee's part, such contract must be enforced according to its terms; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 654, 22 Sup. Ct. 240, 46 L. Ed. 366.

In the third class of bailments under the division here adopted, the benefits derived from the contract are reciprocal: it is advantageous to both parties. In the case of a pledge given on a loan of money or to secure the payment of a debt, the one party gains a credit and the other security by the contract. And in a bailment for hire, one party acquires the use of the thing bailed and the other the price paid therefor: the advantage is mutual. So in a bailment for labor and services, as when one person delivers materials to another to be manufactured, the bailee is paid for his services and the owner receives back his property enhanced in value by the process of manufacture. In these and like cases the parties stand upon an equal footing: there is a perfect mutuality between them. And therefore the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of the property bailed; Knapp v. Curtis, 9 Wend. (N. Y.) 60; 5 Bingh. 217; Bakwell v. Talbot, 4 Dana (Ky.) 217; Fulton v. Alexander, 21 Tex. 148; Mayor and Council of Columbus v. Howard, 6 Ga. 213; Brown v. Waterman, 10 Cush. (Mass.) 117. A bailee for hire is supposed to take such care of property as a reasonably prudent man would of his own; Cloyd v. Steiger, 139 Ill. 41, 28 N. E. 987.

The common law does not recognize the rule of the civil law that the bailor for hire is bound to keep the thing in repair, and in the absence of provision the question as to which party is bound to repair depends largely on custom and usage; Central Trust Co. of New York v. Ry. Co., 50 Fed. 857.

The depositary or mandatary has a right to the possession as against everybody but the true owner; Story, Bailm. § 93; Pitt v. Albritton, 34 N. C. 74; 4 E. L. & Eq. 438; see McMahon v. Sloan, 12 Pa. 229, 51 Am. Dec. 601; but is excused if he delivers it to the person who gave it to him, supposing him the true owner; Nelson v. Iverson, 17 Ala. 216; and may maintain an action against a wrong-doer; 1 B. & Ald. 59; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114.

It is contended by Story that a mere depository has no special property in the deposit, but a custody only; Story, Bailm. §§ 93, 133, citing Norton v. People, 8 Cow. (N. Y.) 137; Com. v. Morse, 14 Mass. 217; and that there is a clear distinction between the custody of a thing and the property, whether general or special, in a thing; 1 Term 658. If a depository has a special property in the deposit, it must be equally true that every other bailee has, and indeed that every person who lawfully has the custody of a thing, with the assent of the owner, has a special property in it. Under such circumstances, the distinction between a special property and a mere custody would seem to be almost, if not entirely, evanescent; Story, Bailm. § 93 a, citing the leading case of Hartop v. Hoare, 3 Atk. 44, where certain jewels en-

closed in a sealed paper and sealed bag had been placed by the owner with a jeweller for safe custody, and the latter afterwards broke the seals and pledged the jewels to Hoare for an advance of money. The owner brought suit against the pledgee and the court held, first, that the delivery to the jeweller was a mere naked bailment for the use of the bailor, and the jeweller was a mere depository, having no general or special property in the jewels, and no right to dispose of them; secondly, that as the pledge by the jeweller was wrongful, the refusal by the defendant to deliver the jewels to the owner was a tortious conversion. In a criticism on this view, it has been said that that case does not constitute a sufficient authority for denying the bailee's right to a special property in the bailment; that although the jeweller came into possession of the jewels by right originally, yet when he broke the seals and took them out of the bag, he was possessor *mala fide;* and that from this it might be inferred that the principle was admitted that, as respects third persons, a depository *has* a special property, as otherwise there is no pertinency in resting the want of it on the circumstances of his breaking the seals and taking the jewels out of the envelopes, and thereby divesting himself of the special property he originally had, and in fact ceasing to be a bailee; 16 Am. Jur. 280. Sir William Jones says: "The general bailee has unquestionably a limited property in the goods entrusted to his care;" Jones, Bailm. 80; and Lord Coke says: "Bailment maketh a privity. If one has goods as bailee where he hath only a possession, and no property, yet he shall have an action for them;" 2 Bulst. 306. If his possession be violated he may maintain trespass or trover; Waterman v. Robinson, 5 Mass. 303, where it was held that he had no special property by which he could maintain replevin.

A bailee of an officer in cases of an attachment of property has a sufficient property to maintain an action against a stranger for any dispossession or injury to the goods attached; Odiorne v. Colley, 2 N. H. 70, 9 Am. Dec. 39; Bender v. Manning, 2 N. H. 289.

A borrower has no property in the thing borrowed, but may protect his possession by an action against the wrong-doer; 2 Bingh. 173; Hurd v. West, 7 Cow. (N. Y.) 752. As to the property in case of a pledge, see PLEDGE.

In bailments for storage the bailee acquires a right to defend the property as against third parties and strangers, and is answerable for loss or injury occasioned through his failure to exercise ordinary care. See WAREHOUSEMAN; TROVER.

As to the lien of warehousemen and wharfingers for their charges on the goods stored with them, see LIEN.

The hire of things for use transfers a special property in them for the use agreed upon. The price paid is the consideration for the use: so that the hirer becomes the temporary proprietor of the things bailed, and has the right to detain them from the general owner for the term or use stipulated for. It is a contract of letting for hire, analogous to a lease of real estate for a given term. Edw. Bailm. § 325. See HIRE.

In a general sense, the hire of labor and services is the essence of every species of bailment in which a compensation is to be paid for care and attention or labor bestowed upon the things bailed. The contracts of warehousemen, carriers, forwarding and commission merchants, factors, and other agents who receive goods to deliver, carry, keep, forward, or sell, are all of this nature, and involve a hiring of services. In a more limited sense, a bailment for labor and services is a contract by which materials are delivered to an artisan, mechanic, or manufacturer to be made into some new form. The title to the property remains in the party delivering the goods, and the workman acquires a lien upon them for services bestowed upon the property. Cloth delivered to a tailor to be made up into a garment, a gem or plate delivered to a jeweller to be set or engraved, a watch to be repaired, may be taken as illustrations of the contract. The owner, who does not part with his title, may come and take his property after the work has been done; but the workman has his lien upon it for his reasonable compensation.

Where property is temporarily in charge of an incidental bailee such as a shopkeeper, restaurant keeper, barber, bathhouse proprietor, or the like, as an incident to his general business, the liability of the bailee does not differ in any respect from that of other bailees for hire; Tombler v. Koelling, 60 Ark. 62, 28 S. W. 795, 27 L. R. A. 502, 46 Am. St. Rep. 146; Dilberto v. Harris, 95 Ga. 571, 23 S. E. 112; Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114; Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519; Buttman v. Dennett, 9 Misc. 462, 30 N. Y. Supp. 247; Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786; Goff v. Wanamaker, 25 W. N. C. (Pa.) 358; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89; but see Powers v. O'Neill, 89 Hun 129, 34 N. Y. Supp. 1007; and contributory negligence on the part of the bailor in such cases may relieve the bailee from liability; Powers v. O'Neill, 89 Hun 129, 34 N. Y. Supp. 1007. An innkeeper who conducts a public bath house as an incident to his business is not liable to a guest as an innkeeper, but as a bailee for hire; Walpert v. Bohan, 126 Ga. 532, 55 S. E. 181, 6 L. R. A. (N. S.) 828, 115 Am. St. Rep. 114, 8 Ann. Cas. 89; Minor v. Staples, 71 Me. 316, 36 Am. Rep. 318. It is said that

the implied contract on the part of a shopkeeper (the consideration for which is the chance of profit) that, if customers come to the store, no harm that can reasonably be averted shall overtake them, must be held to extend to the safety of such property as the customers necessarily or habitually carry with them; Woodruff v. Painter, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786; and that the proprietor should provide a safe place for the keeping of such property when the customer while trying on apparel must necessarily lay aside his own; Bunnell v. Stern, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519; but see Wamser v. Browning, King & Co., 187 N. Y. 87, 79 N. E. 861, 10 L. R. A. (N. S.) 314, where the customer knowing the clerks to be busy, proceeded to wait on himself, knowing there was no one but himself to watch the garments he laid aside.

When the business of the bailee implies skill, a want of such skill as is customary in his calling will render him liable as for gross negligence; Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Stanton v. Bell, 9 N. C. 145, 11 Am. Dec. 744; even though the bailment is for the sole benefit of the bailor and the bailee receives no compensation; Conner v. Winton, 8 Ind. 315, 65 Am. Dec. 761.

As to the duties and liabilities of common carriers and innkeepers, see those titles. As to warehouse receipts, see that title. See DEPOSIT; MANDATE; HIRE; AGISTOR; SALE; ROLLING STOCK; LIEN.

BAILOR. He who bails a thing to another.

The bailor must act with good faith towards the bailee; Story, Bailm. § 74; permit him to enjoy the thing bailed according to contract; and in some bailments, as hiring, warrant the title and possession of the thing hired, and, probably, keep it in suitable order and repair for the purpose of the bailment; Story, Bailm. § 388.

BAIRN'S PART. See LEGITIM.

BAITING. To bait is to attack with violence; to provoke and harass. 2 A. & E. Encyc. 63; L. R. 9 Q. B. 380.

BALÆNA. A large fish, called by Blackstone a whale. Of this the king had the head and the queen the tail as a perquisite whenever one was taken on the coast of England. Prynne, Ann. Reg. 127; 1 Bla. Com. 221.

BALANCE. The amount which remains due by one of two persons, who have been dealing together, to the other, after the settlement of their accounts.

In the case of mutual debts, the balance only can be recovered by the assignee of an insolvent or the executor of a deceased person. But this mutuality must have existed at the time of the assignment by the insolvent, or at the death of the testator.

It is often used in the sense of residue or remainder; Lopez v. Lopez, 23 S. C. 269; Skinner v. Lamb, 25 N. C. 155.

The term *general balance* is sometimes used to signify the difference which is due to a party claiming a lien on goods in his hands for work or labor done, or money expended in relation to those and other goods of the debtor; 3 B. & P. 485; 3 Esp. 268; McWilliams v. Allan, 45 Mo. 573.

The phrase "net balance" as applied to the proceeds of the sale of stock means in commercial usage the balance of the proceeds after deducting the expenses incident to the sale; Evans v. Waln, 71 Pa. 74.

BALANCE OF POWER. In International Law. A distribution and an opposition of forces, forming one system, so that no state shall be in a position, either alone or united with others, to impose its will on any other state or interfere with its independence. Ortolan.

BALANCE SHEET. A statement made by merchants and others to show the true state of a particular business. A balance sheet should exhibit all the balances of debits and credits, also the value of merchandise, and the result of the whole.

BALDIO. In Spanish Law. Vacant land having no particular owner, and usually abandoned to the public for the purposes of pasture.

BALE. A quantity or pack of goods or merchandise, wrapped or packed in cloth and tightly corded. Wharton.

A bale of cotton means a bale compressed so as to occupy less space than if in a bag; 2 Car. & P. 525.

BALIUS. In Civil Law. A teacher; one who has the care of youth; a tutor; a guardian. Du Cange, *Bajultis*; Spelman, Gloss.

BALIVA (spelled also *Balliva*). Equivalent to *Balivatus*. *Balivia*, a bailiwick; the jurisdiction of a sheriff; the whole district within which the trust of the sheriff was to be executed. Cowell. Occurring in the return of the sheriff, *non est inventus in balliva mea* (he has not been found in my bailiwick); afterwards abbreviated to the simple *non est inventus*; 3 Bla. Com. 283.

BALLAST. That which is used for trimming a ship to bring it down to a draft of water proper and safe for sailing. Great Western Ins. Co. v. Thwing, 13 Wall. (U. S.) 674, 20 L. Ed. 607.

BALLASTAGE. A toll paid for the privilege of taking up ballast from the bottom of the port. This arises from the property in the soil; 2 Chitty, Comm. Law 16.

BALLIUM. A fortress or bulwark; also bail. Cunningham.

BALLIVO AMOVENDO (L. Lat. for removing a bailiff). A writ to remove a bailiff out of his office.

BALLOT. Originally a ball used in voting; hence, a piece of paper, or other thing used for the same purpose; whole amount of votes cast.

The act of voting by balls or tickets. Webster.

A ballot or ticket is a single piece of paper containing the names of the candidates and the offices for which they are running. People v. Holden, 28 Cal. 136. See ELECTION.

BAN. In Old English and Civil Law. A proclamation; a public notice; the announcement of an intended marriage. Cowell. An excommunication; a curse, publicly pronounced. A proclamation of silence made by a crier in court before the meeting of champions in combat. Cowell. A statute, edict, or command; a fine, or penalty.

An open field; the outskirts of a village; a territory endowed with certain privileges.

A summons; as *arriere ban*. Spelman, Gloss.

In French Law. The right of announcing the time of moving, reaping, and gathering the vintage, exercised by certain seignorial lords. Guyot, *Rép. Univ.*

BANALITY. In Canadian Law. The right by virtue of which a lord subjects his vassals to grind at his mill, bake at his oven, etc. Used also of the region within which this right applied. Guyot, *Rép. Univ.* It prevents the erection of a mill within the seignorial limits; 1 Low. C. 31; whether steam or water; 3 Low. C. 1.

BANC (Fr. bench). The seat of judgment; as, *banc le roy*, the king's bench; *banc le common pleas*, the bench of common pleas.

The meeting of all the judges, or such as may form a quorum, as distinguished from sittings at *Nisi Prius*: as, "the court sit in *banc*." Cowell.

BANCI NARRATORES. Advocates; countors; serjeants. Applied to advocates in the common pleas courts. 1 Bla. Com. 24.

BANCUS (Lat.). A bench; the seat or bench of justice; a stall or table on which goods are exposed for sale. Often used for the court itself.

A full bench, when all the judges are present. Cowell; Spelman, Gloss.

The English court of common pleas was formerly called *Bancus*. Viner, Abr. *Courts* (M). See BENCH; COMMON BENCH.

BANCUS REGINÆ (Lat.). The Queen's Bench.

BANCUS REGIS (Lat.). The King's Bench; the supreme tribunal of the king after parliament. 3 Bla. Com. 41.

In banco regis, in or before the court of king's bench.

The king has several times sat in his own person on the bench in this court, and all the proceedings are said to be *coram rege ipso* (before the king himself). But James I. was not allowed to deliver an opinion although sitting *in banco regis*. Viner, Abr. *Courts* (H L); 3 Bla. Com. 41; Co. Litt. 71 C.

BANDIT. A man outlawed; one under ban.

BANE. A malefactor. Bracton, l. 1, t. 8, c. 1.

BANISHMENT. A punishment inflicted upon criminals, by compelling them to quit a city, place, or country for a specified period of time, or for life. See Cooper v. Telfair, 4 Dall. (U. S.) 14, 1 L. Ed. 721. It is synonymous with exilement and imports a compulsory loss of one's country. 3 P. Wms. 38.

BANK (Anglicized form of *bancus*, a bench). The bench of justice.

Sittings in bank (or *banc*). An official meeting of four of the judges of a common-law court. Wharton, Lex.

Used of a court sitting for the determination of law points, as distinguished from *nisi prius* sittings to determine facts. 3 Bla. Com. 28, n.

Bank le Roy. The king's bench. Finch, 198.

The bank of the sea is the utmost border of dry land. Callis, Sewers 73.

In Commercial Law. A place for the deposit of money; Oulton v. Institution, 17 Wall. (U. S.) 118, 21 L. Ed. 618. See Curtis v. Leavitt, 15 N. Y. 166; Pratt v. Short, 79 N. Y. 440, 35 Am. Rep. 531; People v. R. Co., 12 Mich. 389, 86 Am. Dec. 64.

The business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. Mercantile Bank v. New York, 121 U. S. 138, 156, 7 Sup. Ct. 826, 30 L. Ed. 895.

Banks are said to be of three kinds, viz.; of *deposit*, of *discount*, and of *circulation*, they generally exercise all these functions; Oulton v. Sav. Soc., 17 Wall. (U. S.) 118, 21 L. Ed. 618.

It was the custom of the early money-changers to transact their business in public places, at the doors of churches, at markets, and, among the Jews, in the temple (Mark xi. 15). They used tables or benches for their convenience in counting and assorting their coins. The table so used was called *banche*, and the traders themselves, bankers or benchers. In times still more ancient, their benches was called *cambii*, and they themselves were called *cambiators*. Du Cange, *Cambii*.

The issue of paper in the similitude of bank notes and intended to circulate is an

act of banking; People v. R. Co., 12 Mich. 389, 86 Am. Dec. 64; so is keeping an office to discount notes; People v. Bartow, 6 Cow. (N. Y.) 290; but not if the party only lends his own money; People v. Brewster, 4 Wend. (N. Y.) 498; nor is merely receiving money on deposit; State v. Ins. Co., 14 Ohio 6; *contra*, Com. v. Sponsler, 16 Co. Ct. (Pa.) 116.

A corporation loaning its own money on mortgages is not a banking corporation; Oregon & W. Trust Inv. Co. v. Rathburn, 5 Sawy. 32, Fed. Cas. No. 10,555; nor a firm which does not lend money (except on landed security), discount paper or buy or sell drafts; Scott v. Burnham, 56 Ill. App. 30. An unincorporated bank owned by a private individual is not a legal entity, though it is conducted by a so-called president and cashier; Longfellow v. Barnard, 59 Neb. 455, 81 N. W. 307; to the same effect, In re Purl's Estate, 147 Mo. App. 105, 125 S. W. 849.

See NATIONAL BANKS; BANK NOTE; DISCOUNT; GUARANTEE FUND; CHECK; CASHIER; DIRECTOR; DEPOSIT; OFFICER; SAVINGS BANK.

BANK ACCOUNT. A fund which merchants, traders, and others have deposited into the common cash of some bank, to be drawn out by checks from time to time as the owner or depositor may require.

BANK CHARGES. This term in an action on a bill of exchange is equivalent to expenses of noting and may be especially endorsed as a liquidated demand; [1893] 1 Q. B. 318.

BANK CREDIT. A credit with a bank by which, on proper security given to the bank, a person receives liberty to draw to a certain extent agreed upon. In Scotland also called a cash account. Such credits were long a distinctive feature of Scotch banking. Cent. Dict.

BANK NOTE. A promissory note, payable on demand to the bearer, made and issued by a person or persons acting as bankers and authorized by law to issue such notes. The definition is confined to notes issued by incorporated banks in 2 Dan. Neg. Inst. § 1664. See 2 Pars. Bills & N. 88. Bank bills and bank notes are equivalent terms, even in criminal cases; Eastman v. Com., 4 Gray (Mass.) 416. The power thus to issue is not inherent or essential in banking business, and is not necessarily implied from the conference of a general power to do banking business. It must be distinctly, and in terms conferred in the incorporating act, or it will not be enjoyed. Morse, Banking, c. viii.; 11 Op. Att.-Gen. 334.

The notes of national banks have supplanted those of state banks at the present time.

For many purposes they are not looked upon as common promissory notes, and as mere evidences of debt. In the ordinary transactions of business they are recognized by general consent as cash. The business of issuing them being regulated by law, a certain credit attaches to them, that renders them a convenient substitute for money; Smith v. Strong, 2 Hill (N. Y.) 241. They may be reissued after payment; Chalm. Bills of Exch. 267.

The practice is, therefore, to use them as money; and they are a good tender, unless objected to; Snow v. Perry, 9 Pick. (Mass.) 542; Jefferson County Bank v. Chapman, 19 Johns. (N. Y.) 322; Felter v. Weybright, 8 Ohio 169; Hoyt v. Byrnes, 11 Me. 475; Ball v. Stanley, 5 Yerg. (Tenn.) 199, 26 Am. Dec. 263; Seawell v. Henry, 6 Ala. 226; 5 Dowl. & R. 289. They pass under the word "money" in a will, and, generally speaking, they are treated as cash; Mechanics' & Farmers' Bank v. Smith, 19 Johns. (N. Y.) 115; but see Armsworth v. Scotten, 29 Ind. 495, as to their receipt by a sheriff in payment of an execution. When payment is made in bank notes, they are treated as cash and receipts are given as for cash; Morris v. Edwards, 1 Ohio 189; Edwards v. Morris, 1 Ohio 524; Morrill v. Brown, 15 Pick. (Mass.) 177; Bradley v. Hunt, 5 G. & J. (Md.) 54, 23 Am. Dec. 597; Governor v. Carter, 10 N. C. 328, 14 Am. Dec. 588; Scott v. Com., 5 J. J. Marsh. (Ky.) 643; 1 Sch. & L. 318, 319; Tancil v. Seaton, 28 Gratt. (Va.) 605, 26 Am. Rep. 380; 1 Burr. 452. It has been held that the payment of a debt in bank notes discharges the debt; Bayard v. Shunk, 1 W. & S. (Pa.) 92, 37 Am. Dec. 441; Pearson v. Gayle, 11 Ala. 280; 2 Dan. Neg. Inst. § 1676; Edmunds v. Digges, 1 Gratt. (Va.) 359, 42 Am. Dec. 561; but not when the payer knew the bank was insolvent. The weight of authority is against the doctrine of the extinguishment of a debt by the delivery of bank notes which are not paid, when duly presented, in reasonable time. But it is undoubtedly the duty of the person receiving them to present them for payment as soon as possible; Gilman v. Peck, 11 Vt. 516, 34 Am. Dec. 702; Fogg v. Sawyer, 9 N. H. 365; President, etc., of Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; Young v. Adams, 6 Mass. 182; Houghton v. Adams, 18 Barb. (N. Y.) 545; Westfall, Stewart & Co. v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509; Frontier Bank v. Morse, 22 Me. 88, 38 Am. Dec. 284; Townsends v. Bank, 7 Wis. 185; 6 B. & C. 373.

Bank notes are governed by the rules applicable to other negotiable paper. They are assignable by delivery; Rep. *t.* Hard. 53; President, etc., of Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 236, 41 Am. Dec. 549. The holder of a note is entitled to payment, and cannot be affected by the fraud of a former holder, unless he is proved privy to the fraud; 1 Burr. 452; Sylvester v. Girard, 4 Rawle (Pa.) 185; Worcester County Bank v. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; 2 Dan. Neg. Instr. § 1680; Olm-

stead v. Bank, 32 Conn. 278, 85 Am. Dec. 260. The *bona fide* holder who has received them for value is protected in their possession even against a real owner from whom they have been stolen. Payment in forged bank notes is a nullity; Pindall's Ex'rs v. Bank, 7 Leigh (Va.) 617; Hargrave v. Dusenberry, 9 N. C. 326; Ramsdale v. Horton, 3 Pa. 330; Eagle Bank of New Haven v. Smith, 5 Conn. 71, 13 Am. Dec. 37; but the taker of such must give prompt notice that they are counterfeit, and offer to return them; Simms v. Clark, 11 Ill. 137. But where the bank itself receives notes purporting to be its own, and they are forged, it is otherwise; President, etc., of Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334. See 6 B. & C. 373. If a note be cut in two for transmission by mail, and one half be lost, the *bona fide* holder of the other half can recover the whole amount of the note; Hinsdale v. Bank, 6 Wend. (N. Y.) 378; Bank of Virginia v. Ward, 6 Munf. (Va.) 166; Farmers' Bank of Virginia v. Reynolds, 4 Rand. (Va.) 186; Dan. Neg. Inst. § 1696.

At common law, as choses in action, bank notes could not be taken in execution; 9 Cro. Eliz. 746. The statute laws of the several states, or custom, have modified the common law in this respect, and in many of them they can be taken on execution; Spencer v. Blaisdell, 4 N. H. 198, 17 Am. Dec. 412; Morrill v. Brown, 15 Pick. (Mass.) 173; Lovejoy v. Lee, 35 Vt. 430.

BANK STOCK. The capital of a bank. In England the sum is applied chiefly to the stock of the Bank of England.

BANKABLE. Bank notes, checks, and other securities for money received as cash by banks in the place where the word is used.

In the United States, the notes issued by the national banks have taken the place of those formerly issued by banks incorporated under state laws. The circulation of these notes being secured by United States bonds deposited with the treasurer of the United States, they are received as bankable money without regard to the locality of the bank issuing them. See U. S. Rev. Stat. § 5133; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482.

BANKER'S NOTE. A promissory note given by a private banker or banking institution, not incorporate, but resembling a bank note in all other respects. 6 Mod. 29; 3 Chit. Comm. Law 590.

BANKRUPT. Originally and strictly, a trader who secretes himself or does certain other acts tending to defraud his creditors. 2 Bla. Com. 471.

A broken-up or ruined trader. Everett v. Stone, 3 St. 453, Fed. Cas. No. 4,577.

By modern usage, an insolvent person.

A person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy.

The word is from the Italian *banca rota*, the custom being in the middle ages to break the benches or counters of merchants who failed to pay their debts. Voltaire, Dict. Phil. *voc. sig.* Banqueroute; Saint Bennet Dict. Faillete.

In the English law there were two characteristics which distinguished bankrupts from insolvents: the former must have been a *trader* and the object of the proceedings *against*, not *by*, him. Originally the bankrupt was considered a criminal; 2 Bla. Com. 471; and the proceedings were only against fraudulent traders; but this distinction has been abolished by the later English bankruptcy acts, although in some respects traders and non-traders continued to be put on a different footing; Mozl. & W. Law Dict. As used in American law, the distinction between a bankrupt and an insolvent is not generally regarded. Act of Congress of March 2, 1867, and Act of June 22, 1874 (both now repealed). On the continent of Europe the distinction between bankrupt and insolvent still exists; Holtz. Encyc. *voc. sig.* Bankerott. Under the constitution of the United States the Federal government has power to pass a uniform bankrupt law. The meaning of bankrupt as used in the constitution was not the technical early English one, but was commensurate with insolvent; Kunzler v. Kohaus, 5 Hill (N. Y.) 317. In the first bankrupt law of Apr. 4, 1800, repealed Dec. 19, 1803, the word bankrupt was used in the old English sense. The distinction, however, became less observed; Marshall, C. J., in Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; 2 Kent 390; and was finally abandoned and broken down by the act of Aug. 19, 1841, which was a union of both species of laws, including "all persons whatsoever." The constitutionality of the voluntary part of the act was much contested, but was fully sustained; Kunzler v. Kohaus, 5 Hill (N. Y.) 317; McCormick v. Pickering, 4 N. Y. 283. (For the reasons assigned *contra*, see Sackett v. Andross, 5 Hill [N. Y.] 327.)

The only substantial difference between a strictly bankrupt law and an insolvent law lies in the circumstance that the former affords relief upon the application of the creditor, and the latter upon the application of the debtor. In the general character of the remedy there is no difference, however much the modes by which the remedy may be administered may vary. But even in the respect named there is no difference in this instance. The act of congress (1867) was both a bankrupt act and an insolvent act by definition, for it afforded relief upon the application of either the debtor or the creditor, under the heads of voluntary and involuntary bankruptcy; Martin v. Berry, 37 Cal. 222.

A state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting

with such law; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; Odgen v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606.

A state bankrupt law so far as it attempts to discharge the contract is unconstitutional; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed. 224; whether passed before or after the debt was created; McMillan v. McNeill, 4 Wheat. (U. S.) 209, 4 L. Ed. 552; or where the suit was in a state of which both parties were citizens, and in which they resided until suit, and where the contract was made; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed. 224; but a bankrupt or insolvent law of a state which discharges the person of the debtor and his further acquisitions of property is valid, though a discharge under it cannot be pleaded in bar of an action by a citizen of another state in the courts of the United States or of any other state; Odgen v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606. Every state law is a bankrupt law in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors; and it is especially such if it causes the debtor to be discharged from his contracts, so far as it can do so; Nelson v. Carland, 1 How. (U. S.) 265, and note, 11 L. Ed. 126. When the United States statute is also an insolvent law acting upon the same persons and cases as the state insolvent law, the latter is suspended when the United States statute goes into operation; Nelson v. Carland, 1 How. (U. S.) 265, 11 L. Ed. 126; Ex parte Eames, 2 Sto. 326, Fed. Cas. No. 4,237, but the state law may be still in force as to a class of insolvents not included in the Federal act; Herron Co. v. Superior Court, 136 Cal. 279, 68 Pac. 814, 89 Am. St. Rep. 124. If the state court has acquired jurisdiction under a state statute, and is actually settling the debts and distributing the assets of the insolvent before or at the date at which the Federal law takes effect, it may proceed to a final conclusion of the case; Judd v. Ives, 4 Metc. (Mass.) 401; Martin v. Berry, 37 Cal. 208. A voluntary assignment made by the debtor within four months of being adjudged a bankrupt is void although it was made in conformity to the laws of his state; In re Gutwillig, 90 Fed. 475. See INSOLVENCY.

BANKRUPT LAWS.

Bankruptcy laws, as now understood, were not known to the common law. Certain acts in England, beginning with the statute 34 & 35 Henry VIII. c. 4, were first mainly directed against the criminal frauds of traders. The bankrupt was treated as a criminal offender; and, formerly, the not duly surrendering his property under a commission of bankruptcy, when summoned, was a capital felony. The bankrupt laws are now, and have for some time past been, regarded as a connected system of civil legislation, having the double object of enforcing a complete discovery and equitable distribution of the property of an insolvent trader, and of conferring on the trader the reciprocal advantage of security of person and a discharge from all claims of his creditors.

By the Act 6 Geo. IV. c. 16, the former statutes were consolidated and many important alterations introduced. All business under the earlier statutes was entrusted to commissioners appointed by the Lord Chancellor for each case. A subsequent statute, 1 & 2 Will. IV. c. 56, changed the mode of proceeding by constituting a Court of Bankruptcy, and removing the jurisdiction of bankrupt cases in the first instance from the Court of Chancery to that of Bankruptcy, reserving only an appeal from that court to the lord chancellor as to matters of law and equity and questions of evidence; and other important alterations were introduced. This was followed by the 5 & 6 Will. IV. c. 29. In 1869, bankruptcies in the counties were transferred to the county courts and in London to the London Court of Bankruptcy. Its jurisdiction was transferred in 1883 to the King's Bench Division of the High Court of Justice. The bankrupt laws were codified in 1883 and in 1890.

Bankrupt laws were passed in the United States in 1800, 1841, and 1867, but they were repealed after a brief existence.

The act of 1867 was repealed by act of June 7, 1878 (taking effect September 1, 1878) but not to affect pending cases.

A bankruptcy act was passed July 1, 1898. It extends not only to corporations ordinarily speaking, but to limited or other partnership associations whose capital alone is responsible for the debts of the association.

The act is not unconstitutional, though it provides that others than traders may be adjudged bankrupts on voluntary petition, though it allows the exemptions of the local laws, and though it provides that the discharge of the debtor under proceedings at his domicil shall be valid throughout the United States; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113.

A person shall be deemed insolvent within the act "whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Wage-earner shall include any person who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.

The courts of bankruptcy are the district courts of the United States and of the territories, the supreme court of the District of Columbia, and the United States courts of the Indian Territory and of Alaska. They are invested with such jurisdiction in law and at equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms; to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicil for the preceding six months, or the greater portion thereof, within their respective territorial jurisdictions, or who do not have

their principal place of business, reside, or have their domicil within the United States, but have property within the jurisdiction of the court or have been adjudged bankrupts by competent courts of jurisdiction without the United States, and have property within their jurisdictions.

Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground. See PREFERENCE.

A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months. Such time shall not expire until four months after (1) the date of the recording of the transfer, when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors, or for the purpose of giving a preference as in the act provided, or a general assignment for the benefit of his creditors, if by law such recording is required or permitted; (2) or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property, unless the petitioning creditor have received actual notice of such transfer or assignment.

It would be a defence to prove that the party was not insolvent as defined in the act at the time the petition was filed against him, and upon such proof the proceedings shall be dismissed. The burden of proof is on the alleged bankrupt. He must appear in court with books and accounts, and submit to an examination in respect to his insolvency.

The petitioner in involuntary proceedings is required to give bond with two good and sufficient sureties who shall reside in the jurisdiction to be approved by the court, in such sums as the court shall direct, conditioned on the payment of damages and costs in case the petition is dismissed. If the petition is dismissed the respondent is allowed all costs, counsel fees, expenses, and damages, to be fixed by the court and covered by the bond.

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a *voluntary* bankrupt."

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts." Mining corporations were added by the act of Feb. 5, 1903.

A partnership during its continuance or after its dissolution and before its final settlement may be adjudged a bankrupt. The court which has jurisdiction of one of the partners may have jurisdiction of all the partnership assets, but separate accounts of the partnership and individual property should be kept and expenses divided between them as the court shall determine. The net proceeds of partnership property goes to partnership debts, and those of the individual estates to individual debts. Any surplus in either case to the other class of debts. Proof of claims of partnership debts may be allowed against individual estates and *vice versa*, and the court may marshal the assets of both estates so as to prevent preferences and secure an equitable distribution.

If one or more but not all of the partners are adjudged bankrupt the partnership property shall not be administered in bankruptcy unless by consent of the partners not adjudged bankrupts. The latter shall settle the partnership business as expeditiously as possible and account for the interest of the bankrupt partners. Any exemptions in force when the petition was filed in the state where the bankrupt had his domicil for six months or the greater portion thereof immediately preceding the filing of the petition are preserved.

Provision is made for a composition with creditors, but not until the bankrupt has been examined in open court or at a meeting of creditors and has filed his schedule of assets and list of creditors. If the application therefor has been accepted in writing by a majority in number and amount of proved creditors, and the consideration thereof and money to pay all prior debts and costs have been deposited subject to the order of the court, it may be presented to the court, which, after notice and a hearing, may confirm it.

A discharge may be applied for, but not until one month after, and within the ensuing twelve months from the adjudication of bankruptcy (with a further extension, by order of court for cause, of six months). No discharge shall be granted if the bankrupt has committed an offence punishable by im-

prisonment under the act; or, with fraudulent intent to conceal his condition, etc., has destroyed, concealed, or failed to keep proper books of account.

A discharge releases all debts *except* taxes due the United States or the state, county, district, or municipality in which the bankrupt resides; judgments on claims for fraud or for obtaining property by false pretences and wilful injuries to the person or property of another; and debts not scheduled (unless the creditor was unknown to the bankrupt or the creditor had knowledge of the proceedings); or created by fraud, embezzlement, etc., as an officer or trustee; does not release a judgment obtained by a husband against the bankrupt for criminal conversation with his wife; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; nor a contract made by a divorced bankrupt by which he agreed to pay his wife a sum annually for her support and that of their child; Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084. A discharge in bankruptcy will be withheld if the bankrupt is shown to have obtained property on credit upon false representations in writing, and any creditors may avail themselves of this right; In re Harr, 143 Fed. 421.

The right to a trial by jury is given in respect of the fact of insolvency and of the commission of an act of bankruptcy, upon the application of the alleged bankrupt. The right is absolute and cannot be withheld at the court's discretion; Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

The district court now has jurisdiction of all matters and proceedings in bankruptcy, Jud. Code, § 24, including controversies between the trustee and any adverse claimant of his property. Suits by the trustee must be brought in the court where the bankrupt might have brought them, unless by consent of the proposed defendant.

The circuit court of appeals (Judicial Code, § 130) has appellate and supervisory jurisdiction which is to be exercised in the manner provided in the bankruptcy act. By § 25, appeals may be taken to the circuit court of appeals: 1. From a judgment adjudging or refusing to adjudge the defendant a bankrupt; 2. From a judgment granting or denying a discharge; 3. From a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal must be taken within ten days and may be heard by the appellate court in term time or in vacation.

The supreme court has appellate jurisdiction of controversies in bankruptcy from which it has appellate jurisdiction in other cases; and it exercises a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

An appeal may be taken to the supreme court from the final decision of the circuit court of appeals allowing or rejecting a claim, under such rules as may be prescribed by the supreme court in the following cases: 1. Where the amount in controversy exceeds $2,000 and the question involved is one which might have been taken on appeal or writ of error from the highest court of the state to the supreme court; 2. Where some justice of the supreme court shall certify that in his opinion the determination of the question involved is essential to the uniform construction of the bankruptcy laws.

Controversies may be certified to the supreme court from other United States courts and the supreme court may exercise jurisdiction thereof, and may issue writs of certiorari pursuant to the laws now in force.

In the computation of time the first day is excluded and the last included.

The act provides for the appointment for two years of a reasonable number of referees, to whom all matters may be referred. Referees in bankruptcy exercise much of the judicial authority of the court; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

The creditors appoint one or three trustees at their first meeting, failing which, the court shall do so.

A trustee holds the bankrupt's property subject to all the equities against it; Security Warehousing Co. v. Hand, 206 U. S. 423, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; he gets no better title than the bankrupt had; Hewit v. Mach. Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. Section 70 gives the trustee title to all property which, prior to the bankruptcy, could have been transferred or levied upon or sold under judicial proceedings against the bankrupt. The filing of a petition places all the bankrupt property in the custody of the court; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; but it has no jurisdiction against persons to whom the bankrupt made a sale or conveyance before the proceedings in bankruptcy, where it appears that the vendee acted in good faith; Wall v. Cox, 181 U. S. 244, 21 Sup. Ct. 642, 45 L. Ed. 845; but where the bankrupt made a general assignment for the benefit of creditors, and the assignee sold the property after a petition in bankruptcy was filed, it was held that the purchaser had no title superior to that of the trustee, although he bought the property in good faith; Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. A contingent remainder does not pass in bankruptcy; In re Hoadley, 101 Fed. 233. A bankrupt trustee takes only the surrender value of the insurance policies on the bankrupt's life, or if the company has loaned on it, only the excess of surrender value. The bankrupt is entitled to the policy by paying for it the cash surrender value or the excess over loans made on it at the date of filing the petition; and if the policy ma-

tures before the adjudication he or his legal representative is entitled to the proceeds of the policy over and above such amount; and this even though the bankrupt committed suicide prior to adjudication; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. —; Andrews v. Partridge, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. —.

The first meeting of creditors shall be held not less than ten nor more than thirty days after the adjudication. Subsequent meetings may be held when all creditors whose claims are allowed sign a written consent thereto. The court shall call a meeting whenever one-fourth of those who have proved their claims apply in writing. A final meeting shall be held when the estate is ready to be closed.

Adjudication in bankruptcy terminates the relation of landlord and tenant, and a claim for rent accruing after such adjudication will not be allowed, though the tenant executed promissory notes therefor; In re Hays, Foster & Ward Co., 117 Fed. 879. A sworn proof of claim against a bankrupt is *prima facie* evidence of its allegations; Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584; and a creditor who knowingly received a preference and gave it up only when compelled by the trustee cannot thereafter prove his claim; In re Owings, 109 Fed. 623. An attorney is not entitled to a preferential claim out of the estate for professional services in preparing a general assignment for the bankrupt within the four months' period; Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; nor for services in resisting an adjudication in voluntary bankruptcy; *id.;* but he may prove as an unsecured claim his services in the preparation of a deed of trust; *id.* Three or more creditors whose provable claims aggregate, above any securities, $500, or if all the creditors are less than twelve in number, then one whose claim exceeds such amount may petition in involuntary bankruptcy.

BANKRUPTCY. The state or condition of a bankrupt. See INSOLVENCY.

BANLEUCA. A certain space surrounding towns or cities, distinguished by peculiar privileges. Spelman, Gloss. It is the same as the French *banlieue.*

BANLIEU. In Canadian Law. See BANLEUCA.

BANNER. A small flag bearing a device or symbol and intended to be carried or waved. L. R. 2 P. C. 387. A canvas, particolored or bearing party words and stretched across a street is a banner; 4 O'M. & H. 179.

BANNERET. A degree of honor next after a baron's, when conferred by the king; otherwise, it ranks after a baronet. 1 Bla. Com. 403.

BANNITUS. One outlawed or banished. Calvinus, Lex.

BANNS OF MATRIMONY. Public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract, to the end that persons objecting to the same may have an opportunity to declare such objections before the marriage is solemnized. Cowell; 1 Bla. Com. 439; Pothier, *Du Mariage* p. 2, c. 2.

BANNUM. A ban.

BAR. To Actions. A perpetual destruction of the action of the plaintiff.

It is the *exceptio peremptoria* of the ancient authors. Co. Litt. 303 *b;* Steph. Pl. App. xxviii. It is always a perpetual destruction of the *particular action* to which it is a *bar, Doctrina Plac.* xxiii. § 1, p. 129; and it is set up only by a plea to the action, or in chief. But it does not always operate as a permanent obstacle to the plaintiff's right of action. He may have good cause for an action, though not for the action which he has brought; so that, although that particular action, or any one like it in nature and based on the same allegations, is forever barred by a well-pleaded bar, and a decision thereon in the defendant's favor, yet where the plaintiff's difficulty really is that he has misconceived his action, and advantage thereof be taken under the general issue (which is in bar), he may still bring his proper action for the same cause; Gould, Pl. c. v. § 137; 6 Coke 7, 8. Nor is final judgment on a demurrer, in such a case, a bar to the proper action, subsequently brought; Gould, Pl. c. ix. § 46. And where a plaintiff in one action fails on demurrer, from the omission of an essential allegation in his declaration, which allegation is supplied in the second suit, the judgment in the first is no bar to the second; for the merits shown in the second declaration were not decided in the first; Gould, Pl. c. ix. § 45; c. v. § 158.

Another instance of what is called a temporary bar is a plea (by executor, etc.) of *plene administravit,* which is a bar until it appears that more goods have come into his hands, and then it ceases to be a bar to that suit, if true before its final determination, or to a new suit of the same nature: *Doctrina Plac.* c. xxiii. § 1, p. 130; 4 East 508.

Where a person is bound in any action, real or personal, by judgment on demurrer, confession, or verdict, he is barred, that is, debarred, as to that or any other action of the like nature or degree, from the same thing forever. But the *effect* of such a bar is different in personal and real actions.

In personal actions, as in debt or account, trover, replevin, and for torts generally (and *all* personal actions), a recovery by the plaintiff is a perpetual bar to another action for the same matter. He has had one recovery; *Doctr. Plac.* c. lxviii. § 1, p. 412. So where a defendant has judgment against the plaintiff, it is a perpetual bar to another action of *like nature* for the same cause (*like nature* being here used to save the cases of misconceived action or an omitted averment, where, as above stated, the bar is *not* perpetual). And inasmuch as, in personal actions, all are of the *same degree,* a plaintiff against whom judgment has passed cannot, for the subject thereof, have an action of a *higher nature;* therefore he gener-

ally has in such actions no remedy (no manner of avoiding the bar of such a judgment) except by taking the proper steps to *reverse* the very judgment itself (by writ of error, or by appeal, as the case may be), and thus taking away the bar by taking away the judgment; 6 Coke 7, 8. (For occasional exceptions to this rule, see authorities above cited.)

In real actions, if the plaintiff be barred as above by judgment on a verdict, demurrer, confession, etc., he may still have an action of a higher nature, and try the same right again; Lawes, Plead. 39; Stearns, Real Act. See, generally, Bacon, Abr. *Abatement*, n.; *Plea in bar;* 3 East 346.

A particular part of the court-room.

As thus applied, and secondarily in various ways, it takes its name from the actual bar, or enclosing rail, which originally divided the bench from the rest of the court-room, as well as from that bar, or rail, which then divided, and now usually divides, the space including the bench and the place which lawyers occupy in attending on and conducting trials, from the body of the court-room.

Those who are authorized to appear before the court and conduct the trial of causes.

Those who, as advocates or counsellors, appeared as *speakers* in court, were said to be "called to the bar," that is, called to appear in presence of the court, as *barristers*, or persons who stay or attend at the bar of court. Richardson, Dict. *Barrister*. By a natural transition, a secondary use of the word was applied to *the persons* who were so called, and the advocates were, as a class, called "the bar." And in this country, since attorneys, as well as counsellors, appear in court to conduct causes, the members of the legal profession, generally, are called the bar, and in this sense are employed the terms "members of the bar" and "admission to the bar."

The court, in its strictest sense, sitting in *full term*.

Thus, a civil case of great consequence was not left to be tried at *nisi prius*, but was tried at the "bar of the court itself," at Westminster; 3 Bla. Com. 352. So a criminal trial for a capital offence was had "at bar," 4 *id.* 351; it is still used in a criminal trial before three judges in the King's Bench Division. It is also used in this sense, with a shade of difference (as not distinguishing *nisi prius* from full term, but as applied to *any* term of the court), when a person indicted for crime is called "the prisoner at the bar," or is said to stand at the bar to plead to the indictment. See Merlin, *Répert. Barreau;* 1 Dupin, *Prof. d'Av.* 451.

An obstacle or opposition. Thus, relationship within the prohibited degrees, or the fact that a person is already married, is a *bar* to marriage.

BAR ASSOCIATIONS. Associations of members of the bar have been organized in most of the states. The first of them was in Mississippi in 1825, but it is not known to have had a continued existence. One was formed in Boston for the state of Massachusetts in 1849, but it does not appear to have had any real life. An association of Grafton and Coös counties in New Hampshire had an existence before 1800, and probably a more or less continuous life since then, having finally merged into a state association. A state association was formed in Iowa in 1875, and existed for not more than five years. All printed reports relating to these associations are in the collection of the Harvard Law School. Similar associations exist in many of the counties in various states, especially in Pennsylvania, where they are chiefly Library Associations. The oldest association of the kind, certainly the oldest that has had a continuous life, is the Law Association of Philadelphia, organized in 1802. The American Bar Association was organized at Saratoga, in August, 1878, and has held annual meetings ever since. The National Bar Association, based upon representation from state and local associations, was organized in May, 1888, and held its last meeting in December, 1891.

BAR FEE. A fee taken by the sheriff, time out of mind, for every prisoner who is acquitted. Bacon, Abr. *Extortion*. Abolished by stats. 14 Geo. III. c. 26; 55 Geo. III. c. 50; 8 & 9 Vict. c. 114.

BAR ROOM. See SALOON.

BARBER. Barbers were incorporated with the surgeons of London, but not to practice surgery, except the drawing of teeth; 32 Hen. VIII. c. 42.

The business of a barber involves the public health and interest to such an extent that the requirement of a license is a valid exercise of legislative power; State v. Zeno, 79 Minn. 80, 81 N. W. 748, 48 L. R. A. 88, 79 Am. St. Rep. 422. Within the meaning of a civil rights act a barber shop is not a place of public accommodation; Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67.

Shaving on Sunday is not a work of necessity, charity or mercy; 4 Cl. & F. 234. A barber's work is a worldly labor in the course of the ordinary calling; State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555. In Com. v. Waldman, 140 Pa. 89, 21 Atl. 248, 11 L. R. A. 563, the court refused to say as a matter of law that the keeping open his place of business on Sunday by a barber was a matter of necessity. Shaving an aged or infirm person in his own home on Sunday is not, as a matter of law, a work of necessity; Stone v. Graves, 145 Mass. 353, 13 N. E. 906. A statute declaring that keeping open a barber shop is not deemed a work of necessity or charity does not exceed constitutional bounds, though as to other kinds of labor, that question is left to be determined as one of fact; State v. Petit, 74 Minn. 376, 77 N. W. 225; affirmed in Petit v. Minnesota, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716.

Where a state constitution forbids the passage of special or local laws for the punishment of crimes, a law making it a misdemeanor for a barber to work on Sunday after 12 noon was held unconstitutional; Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; and see Eden v. People, 161 Ill.

296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; State v. Granneman, 132 Mo. 326, 33 S. W. 784; Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L. R. A. (N. S.) 646; so where a law prohibited barbers from opening their bath rooms on Sunday, but did not prohibit other persons from doing so; Ragio v. State, 86 Tenn. 272, 6 S. W. 401; but see *contra*, State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707, the latter case by a divided court, three of seven judges dissenting on the ground that the act (making it a misdemeanor for a barber to work on Sunday, except in the cities of New York and Saratoga Springs, and there only until one o'clock) was vicious class legislation; and that the result necessarily leads to the conclusion that the legislature, by permitting barber shops to remain open for a portion of Sunday in two cities necessarily proceeded upon the theory that the business is a work of necessity. Where a general law prohibits all labor on Sunday, an act prohibiting barbers from working on that day is not class legislation; Breyer v. State, 102 Tenn. 103, 50 S. W. 769.

BARE. Naked; absence of a covering; unaccompanied. A bare trustee is one whose trust is to convey, and the time has arrived for a conveyance by him; or a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his *cestuis que trust*, be compellable in equity to convey the estate to them or by their direction. 1 Ch. Div. 281.

BAREBONES PARLIAMENT. A parliament summoned by Cromwell in 1653.

BARGAIN. It signifies a contract or agreement between two parties, the one to sell goods or lands, and the other to buy them. Hunt v. Adams, 5 Mass. 358, 4 Am. Dec. 68.

BARGAIN AND SALE. A contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell land to another person, called the bargainee, whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. 2 Washb. R. P. 128; Bisp. Eq. 419.

Upon principles of equity, any agreement, supported by a valuable consideration, to the effect that an estate or interest in land should be conveyed, as it might be specially enforced in the court of chancery, was held to entitle the purchaser to the use or beneficial ownership according to the terms and intent of the agreement, without any legal conveyance; and accordingly the vendor was held to be or stand seised to the use of the purchaser. Such transaction, as creating a use executed by the statute, became technically known as a *bargain and sale*. As a bargain and sale thus would have been effectual to convey a legal estate under the statute by mere force of the agreement without any writing or formality, it was thought expedient to add some formal conditions to the operation of the statute upon it; and it was enacted by a statute of the same session of parliament, 27 Hen. VIII. c. 16, to the effect that no estate of *freehold* shall pass by reason only of a bargain and sale, unless made by *writing indented, sealed*, and *enrolled* in manner and place therein provided. This statute applied only to estates of freehold, and a use for a term of years might still be created within the statute of uses by mere bargain and sale without deed or enrolment. Leake, Land Laws 108.

This is a very common form of conveyance in the United States. In consequence of the consideration paid, and the bargain made by the vendor, of which the conveyance was evidence, a use was raised at once in the bargainee. To this use the statute of uses transferred and annexed the seisin, whereby a complete estate became vested in the bargainee; 2 Washb. R. P. 128.

All things, for the most part, that may be granted by any deed may be granted by bargain and sale, and an estate may be created in fee, for life, or for years; 2 Coke 54; Dy. 309.

There must have been a valuable consideration; Springs v. Hanks, 27 N. C. 30; Wood v. Beach, 7 Vt. 522; Hanrick v. Thompson, 9 Ala. 410; Cheney's Lessee v. Watkins, 1 Harr. & J. (Md.) 527, 2 Am. Dec. 530; Okison v. Patterson, 1 W. & S. (Pa.) 395; Jackson v. Sebring, 16 Johns. (N. Y.) 515, 8 Am. Dec. 357; Cro. Car. 529; Tiedem. R. P. § 776; but its adequacy is immaterial; thus a rent of one peppercorn was held sufficient; 2 Mod. 249; see Leake, Land Laws 109; the consideration need not be expressed; Jackson v. Fish, 10 Johns. (N. Y.) 456. See Washb. R. P.; Hayes v. Kershow, 1 Sandf. Ch. (N. Y.) 259; Jackson v. Leek, 19 Wend. (N. Y.) 339; Wood v. Beach, 7 Vt. 522; Eckman v. Eckman, 68 Pa. 460; Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Perry v. Price, 1 Mo. 553; Jackson v. Dillon's Lessee, 2 Over. (Tenn.) 261.

The proper and technical words to denote a bargain and sale are *bargain and sell;* Mitch. R. P. 425; but any other words that are sufficient to raise a use upon a valuable consideration are sufficient; 2 Wood, Conv. 15; as, for example, *make over and grant;* Jackson v. Alexander, 3 Johns. (N. Y.) 484, 3 Am. Dec. 517; *release and assign;* Lynch v. Livingston, 8 Barb. (N. Y.) 463. See 2 Washb. R. P. 620; Shepp. Touchst. 222.

An estate *in futuro* may be conveyed by deed of bargain and sale; Rogers v. Eagle Fire Co., 9 Wend. (N. Y.) 611; 4 H. & N. 277; Drown v. Smith, 52 Me. 141; Trafton

v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Fisher v. Strickler, 10 Pa. 348, 51 Am. Dec. 488; Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333; *contra*, Sowle v. Sowle, 10 Pick. (Mass.) 376; Marden v. Chase, 32 Me. 329; 2 Washb. R. P. *417; but not at common law; note to Doe v. Tranmar, 2 Sm. Lead. Cas. 473, where the cases are discussed.

Consult Gilbert on Uses, Sugden's edition; Tiedem. R. P.

BARGAINEE. The grantee of an estate in a deed of bargain and sale. The person to whom property is tendered in a bargain.

BARGAINOR. The person who makes a bargain; he who is to deliver the property and receive the consideration.

BARGE. Lighters or a flat bottom boat for loading or unloading ships; or a boat used for pleasure. See The Mamie, 5 Fed. 813.

BARMOTE. See BERGMOTH.

BARO. A man, whether slave or free.

Si quis homicidium perpetraverit in barone libro seu servo, if any one shall have perpetrated a murder upon any man, slave or free. A freeman or freedman; a strong man; a hired soldier; a vassal; a feudal client.

Those who held of the king immediately were called barons of the king.

A man of dignity and rank; a knight.

A magnate in the church.

A judge in the exchequer (*baro scaccarii*).

The first-born child.

A husband.

The word is said by Spelman to have been used more frequently in its latter sense; Spelman, Gloss.

It is quite easy to trace the history of *baro*, from meaning simply man, to its various derived significations. Denoting a man, one who possessed the manly qualities of courage and strength would be desirable as a soldier, or might misuse them as a robber. One who possessed them in an eminent degree would be *the* man; and hence *baro*, in its sense of a title of dignity or honor, particularly applicable in a warlike age to the best soldier. See, generally, Bacon, Abr.; Comyns, Dig.; Spelman, Gloss. *Baro*.

BARON. A general title of nobility. 1 Bla. Com. 398; a particular title of nobility, next to that of viscount. The lowest title in Great Britain. Originally barons comprehended all the nobility, being the feudatories of provinces. At present barons may be by *prescription*, because they and their ancestors have immemorially sat in the House of Lords; by *patent;* or by *tenure*, holding the title as annexed to land.

A judge of the exchequer. 1 Bla. Com. 44.

A husband. See BARON ET FEME.

A freeman.

It has essentially the same meanings as *Baro*, which see.

BARON ET FEME. Man and woman; husband and wife.

It is doubtful if the words had originally in this phrase more meaning than man and woman. The vulgar use of *man* and *woman* for husband and wife suggests the change of meaning which might naturally occur from man and woman to husband and wife. Spelman, Gloss.; 1 Bla. Com. 442.

BARONAGE. A term used to designate the entire nobility of England of all ranks.

BARONES SCACCARII. See BARONS OF THE EXCHEQUER.

BARONET. A British title of hereditary rank next below that of a baron; it is the only title of hereditary knighthood. It is given by patent, not by investiture. The order was founded in 1611. They rank above all knights except those of the Garter. The order of Baronets of Ireland was founded in 1619 with the same privileges. The order of Baronets of Scotland was founded in 1625; after the Union (1707) they became Baronets of the United Kingdom. None have been created since. The usual abbreviation after the name is Bart. Cent. Dict.

BARONS OF THE CINQUE PORTS. See CINQUE PORTS.

BARONS OF THE EXCHEQUER. The judges of the exchequer. See EXCHEQUER.

BARONY. The dignity of a baron; a species of tenure; the territory or lands held by a baron. Spelman, Gloss. It is possible that this tenure was distinct from that of knight service. 2 Holdsw. Hist. Eng. L. 159.

In Scotland a large freehold estate even though the proprietor is not a baron.

BARRATOR. One who commits barratry.

BARRATRY (Fr. *barat, barraterie*, robbery, deceit, fraud). Sometimes written Barretry. The offence of frequently exciting and stirring up quarrels and suits, either at law or otherwise. 4 Bla. Com. 134; Co. Litt. 368. See 1 Cowp. 154, by Lord Mansfield.

An indictment for this offence must charge the offender with being a common barrator; 1 Sid. 282; Train & H. Prec. 55; and the proof must show at least three instances of offending; Com. v. McCulloch, 15 Mass. 227; State v. Simpson, 1 Bail. (S. C.) 379; Com. v. Mohn, 52 Pa. 243, 91 Am. Dec. 153; Lucas v. Pico, 55 Cal. 126; Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

An attorney is not liable to indictment for maintaining another in a groundless action; State v. Simpson, 1 Bail. (S. C.) 379. See 2 Bish. Cr. Law § 63; 2 *id.* § 57; Lambert v. People, 9 Cow. (N. Y.) 587; Com. v. McCulloch, 15 Mass. 229; State v. Simpson, 1 Bail. (S. C.) 379; 2 Saund. 308 and note.

The purchase of a single claim, with the intention of suing upon it, does not amount to barratry; to constitute the offence there must be a practice of fomenting suits; Chase's Bla. Com. 905, n. 7; Voorhees v. Dorr, 51 Barb. (N. Y.) 580.

In Maritime Law and Insurance. An unlawful or fraudulent act, or very gross and culpable negligence, of the master or mariners of a vessel in violation of their duty as such, and directly prejudicial to the owner, and without his consent; Roccus, h. t.; Abbott, Ship. 167, n.; 2 Ld. Raym. 349; Kendrick v. Delafield, 2 Caines (N. Y.) 67; Suckley v. Delafield, *id.* 222; McIntire v. Bowne, 1 Johns. (N. Y.) 229; Grim v. Ins. Co., 13 *id.* 451; Brown v. U. S., 8 Cra. (U. S.) 139, 3 L. Ed. 504; Greene v. Ins. Co., 9 Allen (Mass.) 217; Brown v. Ins. Co., 5 Day (Conn.) 1, 5 Am. Dec. 123; Hughes v. Ins. Co., 3 Wheat. (U. S.) 163, 4 L. Ed. 357; Crousillat v. Ball, 4 Dall. (Pa.) 294, 1 L. Ed. 840, 2 Am. Dec. 375; 5 B. & Ald. 597; Lawton v. Ins. Co., 2 Cush. (Mass.) 511; Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 230, 7 L. Ed. 659. It is said that the term implies an intentional injury; it does not embrace cases of negligence; Atkinson v. Ins. Co., 4 Daly (N. Y.) 1. A part owner of a ship who is its master may be guilty of barratry towards his coowners; Hutchins v. Ford, 82 Me. 363, 19 Atl. 832; Voisin v. Ins. Co., 62 Hun 4, 16 N. Y. Supp. 410. It extends, in addition to grosser cases of barratry, to the following:—sailing out of a port without paying port dues, whereby the cargo is forfeited; 6 Term 379; disregarding an embargo; 1 Term 127; or a blockade; 6 Taunt. 375; and when a master was directed to make purchases, and went into an enemy's settlement to trade (though it could be done there to better advantage), whereby the ship was seized, it was held barratry; L. R. 1 Q. B. 162; even though he thought thereby to benefit the owner. When a master is entitled to use his discretion, his conduct will not constitute barratry, unless he goes against his better judgment; 1 Stark. 240. See L. R. 3 C. P. 476. The grossest barratries, as piratically or feloniously seizing or running away with the vessel or cargo, or voluntarily delivering the vessel into the hands of pirates, or mutiny, are capital offences by the laws of the United States; Act of Congress, April 30, 1790, 1; Story's Laws U. S. 84. Barratry is one of the risks usually insured against in marine insurance; 3 Kent, Lacy's ed. 305, n. 50. See INSURABLE INTEREST.

BARREL. A measure of capacity, equal to thirty-six gallons.

BARREN MONEY. A debt which bears no interest.

BARRENNESS. The incapacity to produce a child.

This, when arising from impotence which existed at the time the relation was entered into, is a cause for dissolving a marriage; 1 Foderé, Méd. Leg. § 254; where a woman, by an operation, had been rendered incapable of bearing children, known to the husband before marrying, it was not ground of divorce; Jorden v. Jorden, 93 Ill. App. 633.

BARRISTER. In English Law. A counsellor admitted to plead at the bar. It did not become a usual name until the 16th century. As a popular name it meant an utter barrister; 21 L. Q. R. 253.

Inner barrister. A serjeant or king's counsel who pleads within the bar.

Outer or *Utter barrister.* One who pleads without the bar. Because they sat "uttermost on the forms of the benchers which they call the bar." 29 L. Q. R. 25. They are distinguished from benchers, or those who have been readers, and are allowed to plead within the bar, as are the king's counsel. See UTTER BARRISTER.

Vacation barrister. A counsellor newly called to the bar, who is to attend for several long vacations the exercises of the house.

In the old books, barristers are called *apprentices, apprentitii ad legem,* or *ad barras* (from which the term barrister was derived), being looked upon as learners, and not qualified until they obtain the degree of serjeant. Edmund Plowden, the author of the Commentaries, a volume of reports in the reigns of Edward VI., Mary, Philip and Mary, and Elizabeth, describes himself as an apprentice of the common law. See generally, Weeks on Attys. § 29.

Barristers are now either "utter barristers," now more frequently called "junior barristers," or king's counsel. The former is a person who was formerly a student at an Inn of Court and who has been "called to the bar" by the benchers of his Inn and at his Inn. A recent writer insists that the judges, by statute, alone have the right to call to the bar, i. e. alone can give the "right of audience"; the judges have constituted the benchers of the Inns of Court their deputies for that purpose; W. C. Bolland, 24 L. Q. R. 397; 23 *id.* 438. The Inns of Court only call to the bar of their societies and not to the bar itself; 29 L. Q. R. 23. See DISBAR.

A king's counsel is a barrister whom the judges have "called within the bar" at the Royal Courts of Justice; Odger, C. L. 1425.

See INNS OF COURT; SERJEANTS-AT-LAW.

Barristers have an exclusive right of audience as advocates in the House of Lords, Privy Council, Supreme Court of Judicature, Central Criminal Court and Assizes; also in Courts of County and Borough Quarter Sessions whenever a sufficient number regularly attend the court. They have no exclusive right in County Courts, Sheriffs' Courts, Coroners' Courts, Ecclesiastical Courts and Courts of Petty Sessions; Odger C. L. 1427. They are obliged to accept any brief (accompanied by a suitable fee) except under special circumstances.

BARTER. A contract by which parties exchange goods for goods.

It differs from a sale in that a barter is always of goods for goods; a sale is of goods for money, or for money and goods. In a sale there is a fixed price; in a barter there is not. See Benj. Sales 1; Speigle v. Meredith, 4 Biss. 120, Fed. Cas. No. 13,227; Com. v. Davis, 12 Bush (Ky.) 241; Cooper v. State, 37 Ark. 418.

There must be delivery of goods to complete the contract.

If an insurance be made upon returns from a country where trade is carried on by barter, the valuation of the goods in return shall be made on the cost of those given in barter, adding all charges; Weskett, Ins. 42. See 3 B. & Ald. 616; 3 Campb. 351; Cowp. 118; 1 Dougl. 24, n.; 4 B. & P. 151; Troplong, *De l'Echange*.

BARTON. In Old English Law. The demesne land of a manor; a farm distinct from the mansion.

Sometimes it is used for the manor house itself; and in some places for out houses and fold yards. In the statute 2 & 3 Edw. 6, c. 12, Barton lands and demesne lands are used as synonymous. Cowell.

BAS CHEVALIERS. Knights by tenure of a base military fee, as distinguished from bannerets, who were the chief or superior knights. Kennett, Paroch. Ant.; Blount.

BASE BALL. It is a game of skill within the criminal offense of betting on such a game; Mace v. State, 58 Ark. 79, 22 S. W. 1108. Prohibition of base ball playing on Sunday does not violate the right of conscience in matters of religion secured to the individual by the Ohio Bill of Rights; State v. Powell, 58 Ohio St. 324, 50 N. E. 900, 41 L. R. A. 854; nor does imposing a larger penalty on persons who play base ball on Sunday in violation of a statute than upon those who are engaged in hunting, fishing, rioting or quarrelling, and in acts of common labor, violate the constitutional right of citizens to equal privileges and immunities; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

Under a contract of hiring for a definite time, which is silent as to the degree of skill to be possessed, the ordinary skill, knowledge and efficiency of base ball players is all that is required; Baltimore Baseball Club & Exhibition Co. v. Pickett, 78 Md. 375, 28 Atl. 279, 22 L. R. A. 690, 44 Am. St. Rep. 304.

See Specific Performance of Negative Covenants; Injunction.

BASE COIN. Debased coin. Cohens v. Virginia, 6 Wheat. (U. S.) 333, 5 L. Ed. 257.

BASE COURT. An inferior court, that is, not of record, as the court baron. Cunningham.

BASE FEE. A fee which has a qualification annexed to it, and which must be determined whenever the annexed qualification requires.

A grant to A and his heirs, tenants of Dale, continues *only* while they are such tenants; 2 Bla. Com. 109. See Wiggins Ferry Co. v. R. Co., 94 Ill. 93.

The proprietor of such a fee has all the rights of the owner of a fee-simple until his estate is determined. Plowd. 557; 1 Washb. R. P. 62; 1 Prest. Est. 431; Co. Litt. 1 *b*.

BASE SERVICES. Such services as were unworthy to be performed by the nobler men, and were performed by the peasants and those of servile rank. 2 Bla. Com. 62; 1 Washb. R. P. 25.

BASEMENT. A floor partly beneath the surface of the ground but distinguished from a cellar by being well lighted and fitted for living purposes. In England the ground floor of a city house.

BASILICA. An abridgment of the Corpus Juris Civilis of Justinian, translated into Greek and first published in the ninth century.

The emperor Basilius, finding the Corpus Juris Civilis of Justinian too long and obscure, resolved to abridge it, and under his auspices the work was commenced A. D. 867, and proceeded to the fortieth book, which at his death remained unfinished. His son and successor, Leo Philosophus, continued the work, and published it, in sixty books, about the year 880. Constantine Porphyro-genitus, younger brother of Leo, revised the work, rearranged it, and republished it, A. D. 947. From that time the laws of Justinian ceased to have any force in the eastern empire, and the Basilica were the foundation of the law observed there till Constantine XIII., the last of the Greek emperors, under whom, in 1453, Constantinople was taken by Mahomet the Turk, who put an end to the empire and its laws. Histoire de la Jurisprudence; Etienne, Intr. à l'Etude du Droit Romain, § 53. The Basilica were translated into Latin by J. Cujas (Cujacius), Professor of Law in the University of Bourges, and published at Lyons, 22d of January, 1566, in one folio volume.

BASOCHE (Fr.). An association of the "Clercs du Parlement" of Paris, supposed to have been instituted in 1302. It judged all civil and criminal matters that arose among the clerks and all actions brought against them. Hist. for Ready Reference.

BASSA TENURA. See Base Fee.

BASTARD (*bas* or *bast*, abject, low, base, *aerd*, nature).

One born of an illicit connection, and before the lawful marriage of its parents.

One begotten and born out of lawful wedlock. 2 Kent 208.

One born of an illicit union. La. Civ. Code, arts. 29, 199.

The second definition, which is substantially the same as Blackstone's, is open to the objection that it does not include with sufficient certainty those cases where children are born during wedlock but are not the children of the mother's husband.

The term is said to include those born of parties under disability to contract marriage, as slaves. Timmins v. Lacy, 30 Tex. 115.

A child is a bastard if born before the marriage of his parents, but he is not a bastard if born after marriage, although begotten before; 1 Bla. Com. 455, 456; 8 East 210; State v. Herman, 35 N. C. 502. By the civil law and by the statute law of many of the states, a subsequent marriage of the parents legitimates children born prior thereto. The rule prevails substantially in Arkansas, Alabama, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, Ohio, Pennsylvania, Texas, Vermont,

and Virginia, with somewhat varying provisions in the different states; 2 Kent 210; but under the common law this is not so; Brock v. State, 85 Ind. 397; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321. See HEIR.

A child is a bastard if born during coverture under such circumstances as to make it impossible that the husband of his mother can be his father; Nich. Adult. Bast. 249; Hall v. Com., Hard. (Ky.) 479; Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. Ed. 553; 2 M. & K. 349; State v. Britt, 78 N. C. 439; Herring v. Goodson, 43 Miss. 392; Bussom v. Forsyth, 32 N. J. Eq. 277; Kleinert v. Ehlers, 38 Pa. 439; Caujolle v. Ferrié, 23 N. Y. 90; but in England the presumption of legitimacy holds if the husband had any opportunity of sexual access during the natural period of gestation, and the question for the jury is not—was the husband the father, but could he have been; 1 Broom & H. Com. 562; and such is the rule in the United States; Van Aernam v. Van Aernam, 1 Barb. Ch. (N. Y.) 375; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; Watts v. Owen, 62 Wis. 512, 22 N. W. 720; Chase's Bla. Com. 172, n. 13. If there were opportunities for intercourse, evidence is generally not allowed to establish illegitimacy; 2 Gr. Ev. §§ 150, 151 and n.; Inhabitants of Abington v. Inhabitants of Duxbury, 105 Mass. 287. See 9 Beav. 552; 1 Whart. Ev. § 608; 2 *id.* 1298; 1 Bish. Mar. & Div. §§ 1170, 1179. It is, however, held that a strong moral impossibility, or such improbability as to be beyond a reasonable doubt is sufficient; Stegall v. Stegall, 2 Brock. 256, Fed. Cas. No. 13,351; Cross v. Cross, 3 Paige Ch. (N. Y.) 139, 23 Am. Dec. 778; Wright v. Hicks, 15 Ga. 160, 60 Am. Dec. 687; State v. Herman, 35 N. C. 502. The presumption of legitimacy of a child born in wedlock is so strong that it cannot be overcome by proof of the adultery of the wife while cohabiting with her husband, much less by the mere admission of the adulterer; Grant v. Mitchell, 83 Me. 23, 21 Atl. 178; [1903] P. 141; 1 Moo. & Rob. 269, where Alderson, B., said: "The law will not under such circumstances, allow a balance of evidence, as to who is most likely to have been the father."

As to who may be admitted to prove non-access, see 3 E. L. & Eq. 100; Bowles v. Bingham, 2 Munf. (Va.) 442, 5 Am. Dec. 497; People v. Overseers of Poor, 15 Barb. (N. Y.) 286; Parker v. Way, 15 N. H. 45; Dennison v. Page, 29 Pa. 420, 72 Am. Dec. 644; 1 Bla. Com. 458; Gardner Peerage Case, Le Marchant's report; 5 C. & F. 163; Dejol v. Johnson, 12 La. Ann. 853. Neither husband nor wife are competent for this purpose; Mink v. State, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386; Tioga County v. South Creep Tp., 75 Pa. 436; Corson v. Corson, 44 N. H. 587; 1 Q. B. 444; 5 Ad. & E. 180; but see State v. McDowell, 101 N. C. 734, 7 S. E. 785, and see ACCESS.

The child may be exhibited to the jury to show resemblance to the putative father; Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600; Finnegan v. Dugan, 14 Allen (Mass.) 197; Warlick v. White, 76 N. C. 175; 15 Yale L. J. 96; *contra*, Clark v. Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221. See 14 Harv. L. Rev. 545.

A child is a bastard if born beyond a competent time after the coverture has determined; Co. Litt. 123 *b*; Hargrave & B. note; 2 Kent 210. See GESTATION.

The principal right which a bastard child has is that of maintenance from his parents; 1 Bla. Com. 458; La. Civ. Code § 254; (though not from his father at common law; Schoul. Dom. Rel. *384); which may be secured by the public officers who would be charged with the support of the child, by a peculiar process, or in some cases by the mother; 2 Kent 215. A bastard has no inheritable blood at common law; but he may take by devise if described by the name he has gained by reputation; 1 Ves. & B. 423; Stover v. Boswell's Heir, 3 Dana (Ky.) 233; Cooley v. Dewey, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; Barwick v. Miller, 4 Des. Eq. (S. C.) 434. In many of the states, by statute, bastards can inherit from and transmit to their mothers real and personal estate under some modifications; 2 Kent 213; Schoul. Dom. Rel. *381; Pettus v. Dawson, 82 Tex. 18, 17 S. W. 714; see Stoltz v. Doering, 112 Ill. 234; Cox v. Rash, 82 Ind. 519; and in Utah it can inherit from its father; Cope v. Cope, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832. Whether a person claiming an inheritance in real estate is the lawful child of the last owner is to be determined by the *lex rei sitæ*; Ross v. Ross, 129 Mass. 243, 37 Am. Rep. 321.

Nearly all of the states have statutory provisions relative to bastardy proceedings and as to the liability of the father criminally as well as to the care of the child.

In bastardy proceedings, evidence of improper relations of the prosecutrix with other men than the defendant, but not during the period of gestation, is incompetent; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155.

Bastardy complaints are civil actions; 85 Me. 285; they abate on the death of the respondent before trial and during the pendency of the proceedings; McKenzie v. Lombard, 85 Me. 224, 27 Atl. 110. See HEIR.

BASTARD EIGNÉ. Bastard elder.

By the old English law, when a man had a bastard son, and he afterwards married the mother, and by her had a legitimate son, the first was called a bastard eigné, or, as it is now spelled, aîné, and the second son was called puisné, or since born, or sometimes he was called mulier puisné. 2 Bla. Com. 248.

BASTARDA. A female bastard. Calvinus, Lex.

BASTARDY. The offence of begetting a bastard child. The condition of a bastard.

BASTARDY PROCESS. The statutory mode of proceeding against the putative father of a bastard to secure a proper maintenance for the bastard.

BASTON. In Old English Law. A staff or club.

In some old English statutes the servants or officers of the wardens of the fleet are so called, because they attended the king's courts with a red staff. See JUSTICES OF TRAIL BASTON.

BATTEL. See WAGER OF BATTEL.

BATTERY. Any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent. 2 Bish. Cr. L. § 71; Clark, Cr. L. 199; Long v. Rogers, 17 Ala. 540; Pike v. Hanson, 9 N. H. 491.

An unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him; Kirland v. State, 43 Ind. 153, 13 Am. Rep. 386. The slightest touching of another in anger is a battery; Goodrum v. State, 60 Ga. 511.

It must be either wilfully committed, or proceed from want of due care; Stra. 596; Plowd. 19; Bullock v. Babcock, 3 Wend. (N. Y.) 391. Hence an injury, be it ever so small, done to the person of another in an angry, spiteful, rude, or insolent manner; Com. v. Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347; as by spitting in his face; 6 Mod. 172; or on his body; 1 Swint. 597; or any way touching him in anger; 1 Russell, Cr. 751; Johnson v. State, 17 Tex. 515; or throwing water on him; 3 N. & P. 564; or violently jostling him; see 4 H. & N. 481; or where one riding a bicycle recklessly runs against a person standing with his back partially towards him, when by the exercise of slight care it could be avoided; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76; is a battery in the eye of the law; 1 Hawk. Pl. Cr. 263. And anything attached to the person partakes of its inviolability: if, therefore, A strikes a cane in the hands of B, it is a battery; Respublica v. De Longchamps, 1 Dall. (U. S.) 114, 1 L. Ed. 59; State v. Davis, 1 Hill (S. C.) 46; Rich v. Hogeboom, 4 Denio (N. Y.) 453; United States v. Ortega, 4 Wash. C. C. 534, Fed. Cas. No. 15,971. Whether striking a horse is striking the driver, see Kirland v. State, 43 Ind. 146, 13 Am. Rep. 386.

A battery may be justified on various accounts.

As a salutary mode of correction. A parent may correct his child (though if done to excess, it is battery); Com. v. Coffey, 121 Mass. 66; Neal v. State, 54 Ga. 281; Smith v. Slocum, 62 Ill. 354; a guardian his ward; Stanfield v. State, 43 Tex. 167; a master his apprentice; 24 Edw. IV.; Com. v. Randall, 4 Gray (Mass.) 36; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; a teacher his scholar, within reason; State v. Mizner, 45 Ia. 248, 24 Am. Rep. 769; State v. Alford, 68 N. C. 322; Starr v. Liftchild, 40 Barb. (N. Y.) 541; Marlsbary v. State, 10 Ind. App. 21, 37 N. E. 558; and a superior officer, one under his command; Keilw. 136; Buller, N. P. 19; Bee, Adm. 161; Flemming v. Ball, 1 Bay (S. C.) 3; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365. And see Cowp. 173; Hannen v. Edes, 15 Mass. 347; 3 C. & K. 142; but a master, ordinarily, not his servant; Com. v. Baird, 1 Ashm. (Pa.) 267; Davis v. State, 6 Tex. App. 133; and the mate of a steamboat has no legal right to enforce his orders by beating one of the crew; The General Rucker, 35 Fed. 152. See ASSAULT; BEAT; CORRECTION. Doubtless these cases, or some of them, would hardly now be followed.

As a means of preserving the peace, in the exercise of an office, under process of court, and in aid of an authority at law. See ARREST.

As a necessary means of defence of the person against the plaintiff's assaults in the following instances: in defence of himself, his wife, 3 Salk. 46, his child, and his servant, Ow. 150 (but see 1 Salk. 407); but he is not justified in using force against a man to prevent his wife leaving him at the persuasion of such other; State v. Weathers, 98 N. C. 685, 4 S. E. 512. So, likewise, a person may defend any member of his family against an assault as he could himself, the wife may justify a battery in defending her husband, the child its parent, and the servant his master; 3 Salk. 46; Com. v. Malone, 114 Mass. 295; Smith v. Slocum, 62 Ill. 354; Patten v. People, 18 Mich. 314, 100 Am. Dec. 173; State v. Greer, 22 W. Va. 800; Staten v. State, 30 Miss. 619; Webb, Poll. Torts, 255. In these situations, the party need not wait until a blow has been given; for then he might come too late, and be disabled from warding off a second stroke or from protecting the person assailed. Care, however, must be taken that the battery do not exceed the bounds of necessary defence and protection; for it is only permitted as a means to avert an impending evil which might otherwise overwhelm the party and not as a punishment or retaliation for the injurious attempt; Stra. 593; 1 Const. S. C. 34; Watrous v. Steel, 4 Vt. 629, 24 Am. Dec. 628; Shain v. Markham, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; Poll. Torts 255. The degree of force necessary to repel an assault will naturally depend upon, and be proportioned to, the violence of the assailant; but with this limitation any degree is justifiable; 1 Ld. Raym. 177; Young v. State, 11 Humphr. (Tenn.) 200; Shorter v. People, 2 N. Y. 193, 51 Am. Dec. 286; Stewart v. State, 1 Ohio St. 66; Holmes v. State, 23 Ala. 17; Carroll v. State, 23 Ala. 28, 58 Am. Dec. 282; Rapp v. Com., 14 B. Monr. (Ky.) 614; Campbell v. People, 16 Ill. 17, 61 Am. Dec. 49; Monroe v. State, 5 Ga. 85.

Evidence justifying an assault and battery is not admissible under a general denial; Hathaway v. Hatchard, 160 Mass. 296, 35 N. E. 857.

A battery may likewise be justified in the necessary defence of one's property; State v. Miller, 12 Vt. 437; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143. If the plaintiff is in the act of entering peaceably upon the defendant's land, or, having entered, is discovered, not committing violence, a request to depart is necessary in the first instance; 2 Salk. 641; Abt v. Burgheim, 80 Ill. 92; see Low v. Elwell, 121 Mass. 309, 23 Am. Rep. 272; Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116; and if the plaintiff refuses, the defendant may then, and not till then, gently lay hands upon the plaintiff to remove him from the close, and for this purpose may use, if necessary, any degree of force short of striking the plaintiff, as by thrusting him off; Skinn. 28. See Everton v. Esgate, 24 Neb. 235, 38 N. W. 794. If the plaintiff resists, the defendant may oppose force to force; Com. v. Clark, 2 Metc. (Mass.) 23; 1 C. & P. 6. But if the plaintiff is in the act of forcibly entering upon the land, or, having entered, is discovered subverting the soil, cutting down a tree, or the like, 2 Salk. 641, a previous request is unnecessary, and the defendant may immediately lay hands upon the plaintiff; 8 Term 78. A man may justify a battery in defence of his *personal* property without a previous request, if another forcibly attempt to take away such property; 2 Salk. 641. One from whom property has been wrongfully taken may regain the momentarily interrupted possession by the use of reasonable force, especially after demanding possession; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591.

BATTONIER. In French and Canadian law, a member of the bar selected as the head of the bar.

BATTURE (Fr. shoals, shallows). An elevation of the bed of a river *under* the surface of the water; but it is sometimes used to signify the same elevation when it has risen *above* the surface. Morgan v. Livingston, 6 Mart. (O. S.) 19, 216. See Municipality No. 2 v. Orleans Cotton Press, 18 La. 123, 36 Am. Dec. 624; Hollingsworth v. Chaffe, 33 La. Ann. 551.

The term battures is applied principally to certain portions of the bed of the river Mississippi, which are left dry when the water is low, and are covered again, either in whole or in part, by the annual swells.

If it rises high, to be susceptible of ownership it does not pass in a grant of the adjacent land; Producers' Oil Co. v. Hanszen, 132 La. 691, 61 South. 754.

BAWDY-HOUSE. A house of ill-fame, kept for the resort and unlawful commerce of lewd people of both sexes. State v. Evans, 27 N. C. 603. See HOUSE OF ILL FAME.

BAY. An enclosure, or other contrivance, to keep in the water for the supply of a mill, so that the water may be able to drive the wheels of such mill. Stat. 27 Eliz. c. 19. (This is generally called a forebay.)

A bending or curving of the shore of the sea or of a lake, so as to form a more or less inclosed body of water. State v. Town of Gilmanton, 14 N. H. 477.

BAY WINDOW. A window projecting from the wall of a building so as to form a recess or bay within and, properly speaking, rising from the ground or basement, with straight sides only; but the term is also ordinarily applied to such projecting windows with curved sides, properly called bow windows, and also to projecting windows supported from the building, above the ground, properly called oriel windows.

The footways of streets being under municipal control, the authorities may determine the extent to which the sidewalks may be obstructed by such projections beyond the building line; their erection will not be enjoined by a court of equity if it appear that they will cause no appreciable injury, either by the finding of the master to that effect; Livingston v. Wolf, 136 Pa. 519, 20 Atl. 551, 20 Am. St. Rep. 936; or from the affidavits submitted on an application by the attorney-general to prevent the erection as a public nuisance; Gray v. Baynard, 5 Del. Ch. 499. Equity will not interfere in such cases at suit of a private person; Blanchard v. Reyburn, 1 W. N. C. (Pa.) 529; but will at suit of the attorney-general to prevent the erection of bay windows extending over the street; Commonwealth v. Harris, 10 W. N. C. (Pa.) 10; Com. v. Reimer, 39 Leg. Int. (Pa.) 108; and a second story bay window is a nuisance and will be restrained; Appeal of Reimer, 100 Pa. 182, 45 Am. Rep. 373.

BAYOU. A stream which is the outlet of a swamp near the sea. Applied to the creeks in the lowlands lying on the Gulf of Mexico.

BEACH. See FORESHORE; SEA-SHORE.

BEACONAGE. Money paid for the maintenance of a beacon. Comyns, Dig. *Navigation* (H).

BEADLE (Sax. *Beodan*, to bid). A church servant chosen by the vestry, whose business it is to attend the vestry, to give notice of its meetings, to execute its orders, to attend upon inquests, and to assist the constables. See BEDEL.

BEARER. One who bears or carries a thing.

If a bill or note be made payable to bearer, it will pass by delivery only, without indorsement; and whoever fairly acquires a right to it may maintain an action against the drawer or acceptor.

It has been decided that the bearer of a bank note, payable to bearer, is not an assignee of a chose in action within the eleventh section of the judiciary act of 1789, c. 20, limiting the jurisdiction of the circuit court; Wood v. Dummer, 3 Mas. 308, Fed. Cas. No. 17,944.

BEARERS. Such as bear down or oppress others; maintainers.

BEARING DATE. Words frequently used in pleading and conveyancing to introduce the date which has been put upon an instrument.

When in a declaration the plaintiff alleges that the defendant *made* his promissory note on such a day, he will not be considered as having alleged that it *bore date* on that day, so as to cause a variance between the declaration and the note produced bearing a different date; 2 Greenl. Ev. § 160; 2 Dowl. & L. 759.

BEAST. Any four-footed animal which may be used for labor, food, or sport; as opposed to man; any irrational animal. Webst. A cow is a beast; Taylor v. State, 6 Humph. (Tenn.) 285; and so is a horse; Winfrey v. Zimmerman, 8 Bush (Ky.) 587; and a hog; State v. Enslow, 10 Ia. 115; but a dog was held not to be; U. S. v. Gideon, 1 Minn. 292 (Gil. 226); but see Morewood v. Wakefield, 133 Mass. 241.

BEASTS OF THE CHASE. Properly, the buck, doe, fox, martin, and roe, but in a common and legal sense extending likewise to all the beasts of the forest, which beside the others are reckoned to be the hind, hare, bear, and wolf, and, in a word, all wild beasts of venery or hunting. Co. Litt. 233; 2 Bla. Com. 39. See ANIMAL.

BEASTS OF THE FOREST. See BEASTS OF THE CHASE.

BEASTS OF THE WARREN. Hares, coneys, and roes. Co. Litt. 233; 2 Bla. Com. 39.

BEAT or BEATING. To strike or hit repeatedly, as with blows.

To beat, in a legal sense, is not merely to whip, wound, or hurt, but includes any unlawful imposition of the hand or arm. The slightest touching of another in anger is a battery. Goodrum v. State, 60 Ga. 511.

The beating of a horse by a man refers to the infliction of blows; Com. v. McClellan, 101 Mass. 35. See BATTERY.

BEATING OF THE BOUNDS. An ancient custom in England by which, once a year, the minister, etc., of a parish walked about its boundaries to preserve a recollection of them. Cent. Dict. (Perambulation).

BEAUPLEADER (L. Fr. fair pleading). A writ of prohibition directed to the sheriff or another, directing him not to take a fine for beaupleader.

There was anciently a fine imposed called a fine for beaupleader, which is explained by Coke to have been originally imposed for bad pleading Coke, 2d Inst. 123. It was set at the will of the judge of the court, and reduced to certainty by consent, and annually paid. Com. Dig. *Prerogative* (D, 52). The statute of Marlebridge (52 Hen. III.) c. 11, enacts, that neither in the circuit of justices, nor in counties, hundreds, or courts-baron, any fines shall be taken for *fair pleading;* namely, for not pleading fairly or aptly to the purpose. Upon this statute this writ was ordained, directed to the sheriff, bailiff, or him who shall demand the fine; and it is a prohibition or command not to do it; New Nat. Brev. 596; Fitzh. N. B. 270 *a;* Hall, Hist. Comm. Law, c. 7. Mr. Reeve explains it as a fine paid for the privilege of a fair hearing; 2 Reeve, Eng. Law 70. This latter view would perhaps derive some confirmation from the connection in point of time of this statute with Magna Carta, and the resemblance which the custom bore to the other customs against which the clause in the charter of *nulli vendemus, etc.,* was directed. See Com. Dig. *Prerogative* (D, 51, 52); Cowell; Co. 2d Inst. 122; Crabb, Eng. Law 150.

BED. The channel of a stream; the part between the banks worn by the regular flow of the water. See Howard v. Ingersoll, 13 How. (U. S.) 426, 14 L. Ed. 189.

The phrase divorce from *bed* and *board,* contains a legal use of the word synonymous with its popular use.

BED-ALE or BID-ALE. A friendly assignation for neighbors to meet and drink at the house of newly married persons or other poor people and then for the guests to contribute to the housekeepers. Cowell.

BEDEHOUSE. A hospital or almshouse for bedesmen or poor people who prayed for their founders and benefactors; from the Saxon *biddan,* to pray. Cunningham.

BEDEL. In English Law. A crier or messenger of court, who summons men to appear and answer therein. Cowell. An inferior officer in a parish or liberty, or in an institution, such as the Blue Coat School in London.

A subordinate officer of a university who walked with a mace before one of the officers on ceremonial occasions and performed other minor duties ordinarily.

A herald to make public proclamations. Cent. Dict.

The more usual spelling is BEADLE, *q. v.*

BEDELARY. The jurisdiction of a *bedel,* as a bailiwick is the jurisdiction of a bailiff. Co. Litt. 234 *b;* Cowell.

BEDEREPE. A service which certain tenants were anciently bound to perform, as to reap their landlord's corn at harvest. Said by Whishaw to be still in existence in some parts of England. Blount; Cowell.

BEDEWERI. Those which we now call *banditti;* profligate and excommunicated persons. Cunningham.

BEEF. This word is used frequently to mean an animal of the cow species and not beef prepared for market. A beef or one beef is an expression frequently used to designate an animal fit for use as beef, instead

of designating it as a steer, a heifer, an ox, or a cow. Davis v. State, 40 Tex. 135.

BEER. A malt liquor of the lighter sort and differs from ordinary beer or ales, not so much in its ingredients as in its processes of fermentation.

BEES are animals *ferœ naturœ* while unreclaimed; Wallis v. Mease, 3 Binn. (Pa.) 546; Cock v. Weatherby, 5 Smedes & M. (Miss.) 333. See Inst. 2. 1. 14; Dig. 41. 1. 5. 2; Gillet v. Mason, 7 Johns. (N. Y.) 16; 2 Bla. Com. 392. If while so unreclaimed they take up their abode in a tree, they belong to the owner of the soil, but not so if reclaimed and they can be identified; Goff v. Kilts, 15 Wend. (N. Y.) 550. See Ferguson v. Miller, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; Idol v. Jones, 13 N. C. 162. See ANIMAL.

BEGGAR. One who obtains his livelihood by asking alms. The laws of several of the states punish begging as an offence. See TRAMP; VAGRANT.

BEGIN. To originate. To come into existence. As to the right to begin at a trial, see OPENING AND CLOSING.

BEGOTTEN. "To be begotten" means the same as "begotten," embracing all those whom the parent shall have begotten during his life, *quos procreaverit.* 1 Maule & S. 135; Wager v. Wager, 1 S. & R. (Pa.) 377.

BEGUN. In a statute providing that nothing contained in it should affect prosecutions "begun" under any existing act, the word "begun" means both those which have already been begun and those which may hereafter be begun. Lang v. U. S., 133 Fed. 201, 66 C. C. A. 255.

BEHALF. Benefit, support, defence, or advantage.

BEHAVIOR. Manner of having, holding, or keeping one's self; carriage of one's self, with respect to propriety, morals, and the requirements of law. Surety to be of good behavior is a larger requirement than surety to keep the peace; Dalton, c. 122; 4 Burns, Just. 355. See GOOD BEHAVIOR.

BEHETRIA. **In Spanish Law.** Lands situated in districts and manors in which the inhabitants had the right to select their own lords.

BEHOOF (Sax.). Use; service; profit; advantage. It occurs in conveyances.

BELIEF. Conviction of the mind, arising not from actual perception or knowledge, but by way of inference, or from evidence received or information derived from others. See DECEIT.

Belief may evidently be stronger or weaker according to the weight of evidence adduced in favor of the proposition to which belief is granted or refused; Thompson v. White, 4 S. & R. (Pa.) 137; 1 Greenl. Ev. §§ 7–13. See 1 Stark. Ev. 41; 2 Powell, Mortg. 555; 1 Ves. Ch. 95; 12 *id.* 80; Dy. 53; 2 W. Bla. 881; Carmalt v. Post, 8 Watts (Pa.) 406; Bennifield v. Hypres, 38 Ind. 504; Hatch v. Carpenter, 9 Gray (Mass.) 274; Humphreys v. McCall, 9 Cal. 62, 70 Am. Dec. 621; Ventress v. Smith, 10 Pet. (U. S.) 171, 9 L. Ed. 382.

BELLIGERENCY. **In International Law.** The status of *de facto* statehood attributed to a body of insurgents, by which their hostilities are legalized. Before they can be recognized as belligerents they must have some sort of political organization and be carrying on what in international law is regarded as legal war. There must be an armed struggle between two political bodies, each of which exercises *de facto* authority over persons within a determined territory, and commands an army which is prepared to observe the ordinary laws of war. It is not enough that the insurgents have an army; they must have an organized civil authority directing the army.

The exact point at which revolt or insurrection becomes belligerency is often extremely difficult to determine; and belligerents are not usually recognized by nations unless they have some strong reason or necessity for doing so, either because the territory where the belligerency is supposed to exist is contiguous to their own, or because the conflict is in some way affecting their commerce or the rights of their citizens. Thus in 1875 President Grant refused to recognize the Cubans as belligerents, although they had been maintaining hostilities for eight years, because they had no real and palpable political organization manifest to the world, and because, being possessed of no seaport, their contest was solely on land and without the slightest effect upon commerce; Moore, Int. Law Dig. I, 196. One of the most serious results of recognizing belligerency is that it frees the parent country from all responsibility for what takes place within the insurgent lines; Dana's Wheaton, note 15, page 35.

When revolutionists have no organized political government and it becomes necessary to recognize them in some way, a status of insurgency (*q. v.*) is sometimes recognized. In this way the parent state avoids the necessity of treating the insurgents as pirates and third Powers obtain certain of the rights of neutrals. In 1895 President Cleveland recognized a status of insurgency in Cuba and enjoined the observance of the Neutrality Laws. Moore I, 242. See Hall, 6th ed. 31–42; Hershey 118–123.

BELLIGERENT. **In International Law.** As adj. and noun. Engaged in lawful war; a state so engaged. In plural. A body of insurgents who by reason of their temporary organized government are regarded as conducting lawful hostilities. Also, militia,

corps of volunteers, and others, who although not part of the regular army of the state, are regarded as lawful combatants provided they observe the laws of war; 4 H. C. 1907, arts. 1, 2. See WAR; BELLIGERENCY.

BELONG. To appertain to; to be the property of. Property "belonging" to a person has two general meanings: (1) ownership; (2) the absolute right of user. A road may be said with perfect propriety to belong to a man who has the right to use it as of right although the soil does not belong to him; 31 L. J. Ex. 227. See FIXTURES.

It may also signify a legal residence. As, the town to which a slave belongs is that alone in which he has a legal settlement; Columbia v. Williams, 3 Conn. 467.

BELOW. Inferior; preliminary. The court below is the court from which a cause has been removed. See BAIL.

BENCH. A tribunal for the administration of justice.

The judges taken collectively, as distinguished from counsellors and advocates, who are called the bar.

The term, indicating originally the seat of the judges, came to denote the body of judges taken collectively, and also the tribunal itself. The *jus banci*, says Spelman, properly belongs to the king's judges, who administer justice in the last resort. The judges of the inferior courts, as of the barons, are deemed to judge *plano pede*, and are such as are called in the civil law *pedanei judices*, or by the Greeks *χαμαιδικασταί*, that is *humi judicantes*. The Greeks called the seats of their higher judges *βήματα*, and of their inferior judges *βάθρα*. The Romans used the word *sellæ* and *tribunalia* to designate the seats of their higher judges, and *subsellia* to designate those of the lower. See Spelman, Gloss. *Bancus;* 1 Reeve, Eng. Law 40, 4th ed.

"The court of common pleas in England was formerly called *Bancus*, the Bench, as distinguished from *Bancus Regis*, the King's Bench. It was also called *Communis Bancus*, the Common Bench; and this title is still retained by the reporters of the decisions in the court of Common Pleas. Mention is made in the Magna Charta *'de justiciariis nostris de Banco,'* which all men know to be the justices of the court of Common Pleas, commonly called the Common Bench, or the Bench." Viner, Abr. *Courts* (n. 2).

BENCH WARRANT. An order issued by or from a bench, for the attachment or arrest of a person. It may issue either in case of a contempt, or where an indictment has been found.

BENCHERS. Seniors in the Inns of Court, intrusted with their government.

They have the absolute and irresponsible power of punishing a barrister of their Inn guilty of misconduct, by either admonishing or rebuking him, by prohibiting him from dining in the hall, or even by expelling him from the bar, called disbarring. They may also refuse admission to a student, or reject his call to the bar. Wharton, Lex. But see BARRISTER, as to the sole right of the judges to admit to the bar and to debar.

See INNS OF COURT; COUNCIL OF THE BAR.

BENEFICE. An ecclesiastical preferment. In its more extended sense, it includes any such preferment; in a more limited sense, it applies to rectories and vicarages only. See BENEFICIUM; SIMONY.

BENEFICE DE DISCUSSION. See BENEFIT OF DISCUSSION.

BENEFICIAL ASSOCIATIONS. Voluntary associations for mutual assistance in time of need and sickness, and for the care of families of deceased members. Niblack, Ben. Soc. and Accid. Ins. These associations form in substance a very effective system of co-operative life insurance. The payment to the beneficiary is not a gift, but a right arising from the contract of membership, and when the conditions of membership have been fulfilled may be enforced at law; *id.* ch. xxvi. The suspension of a subordinate lodge will not defeat a recovery unless legally done; Young v. Grand Lodge of Sons of Progress, 173 Pa. 302, 33 Atl. 1038.

In a suit for sick benefits the constitution and by-laws of the society constitute the contract between the parties, and the mode which they provide to ascertain the right to benefits must be pursued in order to recover; Delaware Lodge No. 1, I. O. O. F., v. Allmon, 1 Pennewill (Del.) 160, 39 Atl. 1098. When after a certificate had been issued under the law as it then stood payable at death to a creditor (named), a subsequent law prohibiting payment to other than relatives or dependents of the insured could have no retroactive effect nor compel him to designate a new beneficiary; Emmons v. Supreme Conclave, I. O. H., 6 Pennewill (Del.) 115, 63 Atl. 871; Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263; Sargent v. Knights of Honor, 158 Mass. 557, 33 N. E. 650; Mulderick v. Grand Lodge of A. O. U. W., 155 Pa. 505, 26 Atl. 663; Wist v. Grand Lodge A. O. U. W., 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Hadley v. Queen City Camp No. 27, W. O. W., 1 Tenn. Ch. App. 413; Roberts v. Cohen, 60 App. Div. 259, 70 N. Y. Supp. 57. The beneficiary has not a vested right and a change could have been made by the member but the legislation was intended to be prospective and could not *proprio vigore* disturb existing relations; Hadley v. Queen City Camp No. 27, W. O. W., 1 Tenn. Ch. App. 413.

Where a statute authorizes a beneficial association to issue certificates for the benefit of certain enumerated relatives or dependents, and a person outside the specified classes is named in the certificate, that fact will not avoid the right in the fund of the beneficiaries designated by law; Royal League v. Shields, 251 Ill. 250, 96 N. E. 45, 36 L. R. A. (N. S.) 208. A servant is not a dependent; Grand Lodge A. O. U. W. of New Jersey v. Gandy, 63 N. J. Eq. 692, 53 Atl. 142; a mother, under certain facts, has been held not to be; Elsey v. Odd Fellows Mut.

Relief Ass'n, 142 Mass. 224, 7 N. E. 844; or a brother; Supreme Council American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; an adopted child may or may not be a dependent, and the dependency will not rest upon whether there has been a legal adoption; Murphy v. Nowak, 223 Ill. 301, 79 N. E. 112, 7 L. R. A. (N. S.) 393. A person who assisted a deceased member and took care of him in his last illness was held not to be a dependent; Groth v. Central Verein der Gegenseitigen Unterstuetzungs Gesellschaft Germania, 95 Wis. 140, 70 N. W. 80; a creditor is not; Skillings v. Benefit Ass'n, 146 Mass. 217, 15 N. E. 566; nor an illegitimate child, even though the father had been boarding with the mother and paying therefor; Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N. E. 674, 54 L. R. A. 814, 86 Am. St. Rep. 460; Supreme Tent of Knights of Maccabees of the World v. McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382; James v. Supreme Council of Royal Arcanum, 130 Fed. 1014. Dependency for favor or affection or companionship is held to be excluded; Alexander v. Parker, 144 Ill. 366, 33 N. E. 183, 19 L. R. A. 187, where an affianced wife was held not to be a dependent; *contra*, McCarthy v. Supreme Lodge, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637.

It is held in some courts that a woman is a dependent who in good faith lives with a member in the belief that she is his wife, although there is no legal marriage; Supreme Lodge, A. O. U. W., v. Hutchinson, 6 Ind. App. 399, 33 N. E. 816; Supreme Tent of Knights of Maccabees of the World v. McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. Rep. 382; *contra*, Severa v. Beranak, 138 Wis. 144, 119 N. W. 814. Where the association has charter power to pay sums to the family and heirs of deceased members, a contract to pay to his legal representatives was construed to mean his heirs; Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939.

A failure to apportion the proceeds of a benefit certificate between the beneficiaries entitles one to the entire sum upon the other proving ineligible; Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213.

For most purposes mutual benefit associations are insurance companies and certificates issued by them are policies of life insurance. There are, however, some essential differences, one of which is the power on the part of the assured in mutual benefit associations to change the beneficiary; Holland v. Taylor, 111 Ind. 121, 12 N. E. 116. In a policy of life insurance, the beneficiary has a vested right. In a benevolent society the beneficiary has no vested right in the certificate before the death of the member; Masonic Benevolent Ass'n v. Bunch, 109 Mo. 560, 19 S. W. 25. The certificates of such associations are said to partake of the nature of testamentary dispositions of property; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420. They may be disposed of by will unless the rules of the society prohibit it; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; Catholic Ben. Ass'n v. Priest, 46 Mich. 429, 9 N. W. 481; High Court Catholic Order of Foresters v. Malloy, 169 Ill. 58, 48 N. E. 392. The member may change the beneficiary without the latter's consent; Masonic Ben. Ass'n v. Bunch, 109 Mo. 560, 19 S. W. 25; he may change as to a portion of the insurance; Woodruff v. Tilman, 112 Mich. 188, 70 N. W. 420; *contra*, McClure v. Johnson, 56 Ia. 620, 10 N. W. 217.

If the by-laws point out the mode in which the beneficiary may be changed, another beneficiary can be substituted only in the manner provided, and an attempt of the member to dispose of the fund by will is held ineffectual; Stewart v. Trustees of College, 2 Den. (N. Y.) 409 (where the objection was raised by the society); Holland v. Taylor, 111 Ind. 121, 12 N. E. 116; Stephenson v. Stephenson, 64 Ia. 534, 21 N. W. 19; McCarthy v. New England Order of Protection, 153 Mass. 314, 26 N. E. 866, 11 L. R. A. 144, 25 Am. St. Rep. 637; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506. Opposing this rule, it is held that such a provision was for the benefit of the association which might waive it or insist upon it, and if waived by the association, the member might change his beneficiary by will; Splawn v. Chew, 60 Tex. 532; Kepler v. Supreme Lodge, 45 Hun (N. Y.) 274.

Where no method of changing the beneficiary is provided, a letter mailed to the company directing the payment to a new beneficiary completes the change; Hirschl v. Clark, 81 Ia. 200, 47 N. W. 78, 9 L. R. A. 841; Fink v. Mutual Aid Society, 57 App. Div. 507, 68 N. Y. Supp. 80.

Such association has power to amend its by-laws so as to increase the assessments on its members, where the existing rate has proved inadequate, under charter authority to provide for the payment of a certain death benefit to be secured by assessment; Reynolds v. Supreme Council of Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; Gaut v. Life Ass'n, 121 Fed. 403; Miller v. National Council of Knights & Ladies of Security, 69 Kan. 234, 76 Pac. 830; *contra*, unless there was an express agreement that a member should be bound by future by-laws, varying or modifying his contract; Covenant Mut. Life Ass'n of Illinois v. Kentner, 188 Ill. 431, 58 N. E. 966; Pearson v. Indemnity Co., 114 Mo. App. 283, 83 S. W. 588; Wright v. Knights of Maccabees of the World, 48 Misc. 558, 95 N. Y. Supp. 996 (though the proposed increase was necessary to keep the association solvent). A member cannot be assessed for losses that occurred prior to his mem-

bership unless he had so agreed; Clark v. Traveling Men's Ass'n (Ia.) 135 N. W. 1114, 42 L. R. A. (N. S.) 631; or for the creation of an emergency fund; *id.*

If at the time one becomes a member of a beneficial order, its constitution and by-laws expressly reserve the right to make amendments thereto, he is bound by a subsequent amendment injuriously affecting him; Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193. Such an amendment must be reasonable; Knights Templars' & Masons' Life Indemnity Co. v. Jarman, 104 Fed. 638, 44 C. C. A. 93; Modern Woodmen of America v. Wieland, 109 Ill. App. 340; Smith v. Supreme Lodge, 83 Mo. App. 512; O'Neill v. Supreme Council, 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422. The power to make it, not being a power to destroy the contract rights of the members; Parish v. Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; but where it makes so radical a change as to amount to a repudiation of a contract it will be void; Beach v. Supreme Tent, 177 N. Y. 100, 69 N. E. 281. The voluntary acceptance of by laws providing for the imposition of coercive fines does not make such fines legal and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746.

A discussion of the effect of an erroneous description of the beneficiary in a certificate by Cyrus J. Wood, 57 Cent. L. J. 383, reaches the conclusion that the courts are inclined to take into consideration the benevolent character and purpose of these societies and, in order to effectuate this purpose, liberally construe by-laws and statutes, giving a broad interpretation to such terms as relatives, families and dependents, so that one wrongfully described as a relative may obtain the benefit on proving dependency, and if the beneficiary cannot be brought within the prescribed limits, those who are within the rules may receive the benefit as against both the insured and the society since a misdescription seems to be ignored and the rights of all concerned are decided according to the benevolent purpose of the society with regard to the real relation of the appointed beneficiary to the deceased. See 17 Harv. L. Rev. 211.

See In re Harton's Estate, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; RAILROAD RELIEF FUNDS.

See ASSOCIATION; FAMILY.

BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.

A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate. If A makes a contract with B to pay C a sum of money, C has the beneficial interest in the contract.

BENEFICIAL POWER. It is used in New York and has for its object the donee of the power, and is to be executed solely for his benefit, in contradistinction to *trust powers*, which have for their object persons other than the donee and are to be executed solely for their benefit. Jennings v. Conboy, 73 N. Y. 234.

BENEFICIAL SOCIETIES. See BENEFICIAL ASSOCIATIONS.

BENEFICIARY. A term suggested by Judge Story as a substitute for *cestui que trust*, and adopted to some extent. 1 Story, Eq. Jur. § 321.

The person named in a policy of insurance to whom the insurance is payable upon the happening of the event insured against.

The beneficiary of a contract is not a *cestui que trust;* 12 Harv. L. Rev. 564.

BENEFICIO PRIMO (more fully *beneficio primo ecclesiastico habendo*). A writ directed from the king to the chancellor, commanding him to bestow the benefice which shall first fall in the King's gift, above or under a certain value, upon a particular and certain person. *Reg. Orig.* 307.

BENEFICIUM (Lat.). A portion of land or other immovable thing granted by a lord to his followers for their stipend or maintenance.

It originally meant a "benefaction" from the king, usually to a noble. The analogous English institution was the laen or loan; Maitl. Domesd. Book & Beyond 301.

In the early feudal times, grants were made to continue only during the pleasure of the grantor, which were called *munera;* but soon afterwards these grants were made for life, and then they assumed the name of *beneficia.* Dalrymple, Feud. Pr. 199. Pomponius Laetus, as cited by Hotoman, *De Feudis,* c. 2, says, "That it was an ancient custom, revived by the Emperor Constantine, to give lands and villas to those generals, prefects, and tribunes who had grown old in enlarging the empire, to supply their necessities as long as they lived, which they called *parochial* parishes, etc. But between *(feuda)* fiefs or feuds and *(parochias)* parishes there was this difference, that the latter were given to old men, veterans, etc., who, as they deserved well of the republic, were sustained the rest of their life *(publico beneficio)* by the public benefaction; or, if any war afterwards arose, they were called out not so much as soldiers as leaders *(magistri militum).* Feuds *(feuda),* on the other hand, were usually given to robust young men who could sustain the labors of war. In later times, the word *parochia* was appropriated exclusively to ecclesiastical persons, while the word *beneficium (militare)* continued to be used in reference to military fiefs or fees.

A general term applied to ecclesiastical livings. 4 Bla. Com. 107. See BENEFICE.

In Civil Law. Any favor or privilege.

BENEFICIUM CLERICALE. Benefit of clergy, which see.

BENEFICIUM COMPETENTIÆ. In Scotch Law. The privilege of retaining a competence belonging to the obligor in a gratuitous obligation. Such a claim consti-

tutes a good defence in part to an action on the bond. Paterson, Comp.

In Civil Law. The right which an insolvent debtor had, among the Romans, on making cession of his property for the benefit of his creditors, to retain what was required for him to live honestly according to his condition. 7 Toullier, n. 258.

A defendant's privilege of being condemned only in an amount which he could pay without being reduced to a state of destitution. Sand. Justinian iv. vi. 37.

BENEFICIUM DIVISIONIS. See BENEFIT OF DIVISION.

BENEFICIUM INVENTARII. See BENEFIT OF INVENTORY.

BENEFICIUM ORDINIS. In Scotch and Civil Law. The privilege of the surety allowing him to require that the creditor shall take complete legal proceedings against the debtor to exhaust him before he calls upon the surety. 1 Bell, Com. 347.

BENEFIT. Profit, fruit, or advantage.

The acceptance of the benefits of a contract estops a party from denying its validity; City of St. Louis v. Davidson, 102 Mo. 149, 14 S. W. 825, 22 Am. St. Rep. 764; Spencer v. Jennings, 139 Pa. 198, 21 Atl. 73; Wood v. Bullard, 151 Mass. 324, 25 N. E. 67, 7 L. R. A. 304; Palmerton v. Hoop, 131 Ind. 23, 30 N. E. 874; Gladstone Exch. Bank v. Keating, 94 Mich. 429, 53 N. W. 1110; St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627.

BENEFIT ASSOCIATION. See BENEFICIAL ASSOCIATIONS.

BENEFIT OF CESSION. In Civil Law. The release of a debtor from future imprisonment for his debts, to which he is entitled upon the surrender of his property for the benefit of his creditors. Pothier, *Procéd. Civ.* part 5, c. 2, § 1.

This was something like a discharge under the insolvent laws, which releases the person of the debtor, but not goods he acquires afterwards. See BANKRUPT; CESSIO BONORUM; INSOLVENT.

BENEFIT OF CLERGY. Originally it meant that an ordained clerk charged with felony could be tried only in the Ecclesiastical Court. But, before the end of Henry III.'s reign, the king's court, though it delivered him to the Ecclesiastical Court for trial, took a preliminary inquest as to his guilt or innocence. The latter court tried him by compurgation. It could sentence him to degradation, imprisonment or whipping. Benefit of clergy did not apply to treason, breach of forest laws, trespasses or misdemeanors. In time it changed and became a complicated series of rules exempting certain persons from punishment for certain criminal offences. It was extended to secular clerks, then to all who could read. In 1705 this requirement was abolished. Till 1692 a woman commoner could not claim it. By act in 1487, all persons except those in orders were, if convicted of a clergyable felony, branded and disabled from claiming the privilege a second time. A peer, even if he could not read, had the privilege (1547). By act in 1717, persons (not peers or clerks in orders) were if convicted of clergyable larcenies transported for 7 years. Gradually the number of non-clergyable offences was increased and new offences, when created, were made non-clergyable. It was abolished in England in 1827. 1 Holdsw. H. E. L. 381.

Kelyng reports, "At the Lent Assizes for Winchester (13 Car. II.) the clerk appointed by the bishop to give clergy to the prisoners, being to give it to an old thief, I directed him to deal clearly with me, and not to say *legit* in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked on the book at all: and yet the bishop's clerk, upon the demand of *'legit?* or *non legit?'* answered *'legit.'* And thereupon I told him I doubted he was mistaken, and had the question again put to him; whereupon he answered again, something angrily, *'legit.'* Then I bid the clerk of assizes not to record it, and I told the parson that he was not the judge whether the culprit could read or no, but a ministerial officer to make a true report to the court; and so I caused the prisoner to be brought near, and delivered him the book, when he confessed that he could not read. Whereupon I told the parson that he had unpreached more that day than he could preach up again in many days, and I fined him five marks." An instance of humanity is mentioned by Donne, of a culprit convicted of a non-clergyable offence prompting a convict for a clergyable one in reading his *neck-verse.* In the very curious collection of *prolegomena* to Coryat's Crudities are commendatory lines by Inigo Jones. The famous architect wrote,

"Whoever on *this* book with scorn would look,
May he at sessions crave, and want *his* book."

When one who could read had the privilege, it was enough to read a line in a book, and the same verse of Psalms li. 1, was said to be used with each prisoner, called the "neck-verse."

See 1 Soc. Engl. 297; 1 P. & M. 429; 1 Stephen H. C. L. 464.

The benefit of clergy seems never to have been extended to breach of forest laws, trespass or high treason, nor misdemeanors inferior to felony. In time it became a complicated series of rules exempting certain persons from punishment for certain criminal offences. It has been usually acknowledged as belonging to the common law of most of the United States; 1 Bish. Cr. L. 938. See 1 Chit. Cr. L. 667; 4 Bla. Com. ch. 28; 1 Bish. Cr. Law § 936.

By act of congress of April 30, 1790, R. S. § 5329, the benefit of clergy shall not be used or allowed upon conviction of any crime for which the punishment is death. Repealed by act of March 4, 1909; apparently the doctrine thus becomes obsolete.

See BURNING IN THE HAND.

BENEFIT OF DISCUSSION. The right which a surety has to cause the property of the principal debtor to be applied in satisfaction of the obligation in the first instance. La. Civ. Code, art. 3014. See BENEFICE DE DISCUSSION.

BENEFIT OF DIVISION. In Civil Law. The right of one of several joint sureties, when sued alone, to have the whole obligation apportioned amongst the solvent sureties, so that he need pay but his share. La. Civ. Code, arts. 3014-3020.

BENEFIT OF INVENTORY. In Civil Law. The privilege which the heir obtains of being liable for the charges and debts of the succession, only to the value of the effects of the succession, by causing an inventory of these effects within the time and manner prescribed by law. La. Civ. Code, art. 1025; Pothier, *des Success.* c. 3, s. 3, a. 2. See Spence, Eq. Jurisd. 585. See also Paterson, Comp. as to the Scotch law.

BENERETH. A service which the tenant rendered to his lord with his plow and cart. Cowell.

BENEVOLENCE. A voluntary gratuity given by the subjects to the king. Cowell.

Benevolences were first granted to Edward IV.; but under subsequent monarchs they became anything but voluntary gifts, and by the Petition of Rights (3 Car. I.) no benevolence shall be extorted without the consent of parliament. The illegal claim and collection of these benevolences was one of the prominently alleged causes of the rebellion of 1640. 1 Bla. Com. 140; 4 *id.* 436.

The love of humanity; the desire to promote its prosperity or happiness. When used in a bequest with charity, it is synonymous. Saltonstall v. Sanders, 11 Allen (Mass.) 446. See CHARITABLE USES.

BENEVOLENTIA REGIS HABENDA. The form in ancient fines and submissions to purchase the king's pardon and favor in order to be restored to place, title or estate. Paroch. Antiq. 172.

BENHURST. In Berkshire, a remedy for the inhabitants thereof to levy money recovered against them on the statute of hue and cry. 39 Eliz. c. 25.

BEQUEATH. To give personal property by will to another. Lasher v. Lasher, 13 Barb. (N. Y.) 106. The word may be construed *devise*, so as to pass real estate; Wigram, Wills 11; or *devise and* bequeath; Laing v. Barbour, 119 Mass. 525; Dow v. Dow, 36 Me. 216; Lasher v. Lasher, 13 Barb. (N. Y.) 109. See LEGACY.

BEQUEST. A gift by will of personal property. See LEGACY.

BERTILLON SYSTEM. See ANTHROPOMETRY.

BESAILE, BESAYLE. The great-grandfather, *proavus*. 1 Bla. Com. 186.

BESIDES. In addition to; moreover. In provisions in a will for children "besides" an eldest son, no children take unless there be a son; 4 Dr. & War. 235.

BESOT. To stupefy, to make dull or senseless, to make to dote; and "to dote" is to be delirious, sill or insane. Gates v. Meredith, 7 Ind. 441.

BEST. Of the highest quality. Of the greatest usefulness for the purpose intended. Where one covenants to use his best endeavors, there is no breach if he is prevented by causes wholly beyond his control and without any default on his part; 7 H. & N. 92. A contract to erect a building of the best lumber means the best lumber of which buildings are ordinarily constructed at that place; McIntire v. Barnes, 4 Col. 285.

BEST EVIDENCE. The best evidence of which the nature of the case admits, not the highest or strongest evidence which the nature of the thing to be proved admits of: *e. g.* a copy of a deed is not the best evidence: the deed itself is better. 1 Greenl. Ev., Lewis's ed. § 82; State v. McDonald, 65 Me. 467; Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275; Whitehead v. School Dist., 145 Pa. 418, 22 Atl. 991; 15 Q. B. 782.

The rule requiring the best evidence to be produced is to be understood of the best *legal* evidence; Gray v. Pentland, 2 S. & R. (Pa.) 34; 3 Bla. Com. 368, n. 10, by Christian. It is relaxed in some cases, as where the words or the act of the opposite party avow the fact to be proved. A tavern-keeper's sign avows his occupation; taking of tithes avows the clerical character; Cummim v. Smith, 2 S. & R. (Pa.) 440; 1 Saund. Pl. 49.

Letterpress copies of letters are the best secondary evidence of their contents; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403. Where a note and the deed of trust given to secure it differ in describing the payee of the note, the note will prevail as evidence over the deed of trust; Magee v. Burch, 108 Mo. 336, 18 S. W. 1078.

Prof. Thayer (Evid. 484) treats the subject and expresses the opinion that this phraseology tends to confusion; though admitting that in the earlier days it may have been useful and may become so again as the discretion of the courts is enlarged. He prefers "primary" and "secondary." *Id.* 505.

BESTIALITY. A sexual connection between a human being and a brute of the opposite sex. Buggery seems to include both sodomy and bestiality; Ausman v. Veal, 10 Ind. 356, 71 Am. Dec. 331. See SODOMY.

BETROTHMENT, BETROTHAL. A contract between a man and a woman by which they agree that at a future time they will marry together.

The contract must be mutual; the promise of the one must be the consideration for the promise of the other. It must be obligatory on both parties at the same instant, so that each may have an action upon it, or it will bind neither; 1 Freem. 95; 3 Kebl. 148; Co. Litt. 79 *a*, *b*.

The parties must be able to contract. If either be married at the time of betrothment, the contract is void; but the married party cannot take advantage of his own wrong, and set up a marriage or previous engagement as an answer to the action for the breach of the contract, because this disability proceeds from the defendant's own act; 1 Ld. Raym. 387; 3 Inst. 89; 1 Sid. 112; 1 Bla. Com. 432.

The performance of this contract, or the completion of the marriage, must be accomplished within a reasonable time. Either party may, therefore, call upon the other to fulfil the engagement, and, in case of refusal or neglect to do so within a reasonable time after request made, may treat the betrothment as at an end, and bring action for the breach of the contract; 2 C. & P. 631. For a breach of the betrothment without a just cause, an action on the case may be maintained for the recovery of damages. It may be maintained by either party; 1 Salk. 24.

In Anglo-Saxon times the betrothal was between the bridegroom and the woman's father or other protector; 2 Poll. & Maitl. H. E. L. 365.

In Germany and Holland a party could be compelled to complete his contract. See PROMISE OF MARRIAGE. As to the Roman Law, see Bryce, Studies in History.

BETTER EQUITY. The right which, in a court of equity, a second incumbrancer has who has taken securities against subsequent dealings to his prejudice, which a prior incumbrancer neglected to take although he had an opportunity. 1 Chanc. Prec. 470, n.; Oliver v. Oliver, 4 Rawle (Pa.) 144, 26 Am. Dec. 123.

BETTERMENTS. Improvements made to an estate. It signifies such improvements as render it better than mere repairs. Maddocks v. Jellison, 11 Me. 482; Davis' Lessee v. Powell, 13 Ohio, 308; M'Kinly v. Holliday, 10 Yerg. (Tenn.) 477; Thompson v. Gilman, 17 Vt. 109. The term is also applied to denote the additional value which an estate acquires in consequence of some public improvement, as laying out or widening a street, etc.

The measure of the value of betterments is not their actual cost, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner or could not profitably be used by him; Carolina Cent. R. Co. v. McCaskill, 98 N. C. 526, 4 S. E. 468.

BETTING. The act of making a wager; a species of gambling.

A bet or wager is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which those agreeing take part, shall become the property of one or some of them, on the happening in the future of an event at the present uncertain; Harris v. White, 81 N. Y. 539. See GAMING.

BETWEEN. In the intermediate space of, without regard to distance; from one to another; belonging to two as a mutual relation.

The words "between A. & B." in a deed excludes the termini mentioned therein; Revere v. Leonard, 1 Mass. 93, but see Morris & E. R. Co. v. R. Co., 31 N. J. L. 212. Between two places is held to exclude both; 8 C. & P. 612.

"Between" when properly predicable of time is intermediate. "Between two days" was held exclusive of both; Bunce v. Reed, 16 Barb. (N. Y.) 352. See Robinson v. Foster, 12 Ia. 186. A testamentary gift to two or more between or amongst them creates a tenancy in common; 2 Mer. 70. It is often synonymous with among; Myres v. Myres, 23 How. Pr. (N. Y.) 415. When *between* and *among* follow the verb *divide*, the general signification is very similar and in popular use they are synonymous; Senger v. Senger's Ex'r, 81 Va. 698.

BEYOND SEAS. Out of the kingdom of England; out of the state; out of the United States. "Beyond seas" means, generally, without the jurisdiction of the state or government in which the question arises; 32 E. L. & Eq. 84; Forbes' Adm'r v. Foot's Adm'r, 2 McCord (S. C.) 331, 13 Am. Dec. 732; Galusha v. Cobleigh, 13 N. H. 79; Hatch v. Spofford, 24 Conn. 432.

It means "out of the United States;" Thurston v. Fisher, 9 S. & R. (Pa.) 288; Earle v. McDowell, 12 N. C. 16; Davie v. Briggs, 97 U. S. 638, 24 L. Ed. 1086; Keeton's Heirs v. Keeton's Adm'r, 20 Mo. 530; Darling v. Meachum, 2 G. Greene (Ia.) 602. Other cases hold that it means out of the state; Byrne v. Crowninshield, 1 Pick. (Mass.) 263; Pancoast's Lessee v. Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520; Forbes' Adm'r v. Foote's Adm'r, 2 McCord (S. C.) 331, 13 Am. Dec. 732; Mansell's Adm'r v. Israel, 3 Bibb (Ky.) 510; Houston v. Moore, 3 Wheat. (U. S.) 433, 4 L. Ed. 428; Galusha v. Cobleigh, 13 N. H. 86; Stephenson v. Doe, 8 Blackf. (Ind.) 515, 46 Am. Dec. 489; Richardson's Adm'rs v. Richardson's Adm'rs, 6 Ohio, 126, 25 Am. Dec. 745; Thomason v. Odum, 23 Ala. 486; Wakefield v. Smart, 8 Ark. 489. See also Sleght v. Kane, 1 Johns. Cas. (N. Y.) 76; and to this effect is the very uniform current of authorities.

In the various statutes of limitation the term "out of the state" is now generally used. And the United States courts adopt and follow the decisions of the respective states upon the interpretation of their respective laws; Shelby v. Guy, 11 Wheat. (U. S.) 361, 6 L. Ed. 495. What constitutes absence out of the state within the

meaning of the statute is wholly undeterminable by any rule to be drawn from the decisions. It seems to be agreed that temporary absence is not enough; but what is a temporary absence is by no means agreed; Ang. Lim. § 200, n. Any place in Ireland was held to be "beyond the sea," under 21 Jac. I. c. 16; Show. 91; but this is changed by stat. 3 & 4 William IV. c. 27, which enacted that no part of the United Kingdom of Great Britain and Ireland, nor of the Channel Islands, should be deemed to be beyond seas within the meaning of the acts of limitation.

BIAS. A particular influential power which sways the judgment; the inclination or propensity of the mind towards a particular object; adopted in Willis v. State, 12 Ga. 449.

Justice requires that the judge should have no bias for or against any individual, and that his mind should be perfectly free to act as the law requires.

There is, however, one kind of bias which the courts suffer to influence them in their judgments: it is a bias favorable to a class of cases, or persons, as distinguished from an individual case or person. A few examples will explain this. A bias is felt on account of convenience; 1 Ves. Sen. 13; 3 Atk. 524. It is also felt in favor of the heir at law, as when there is an heir on one side and a mere volunteer on the other; 1 W. Bla. 256; 1 Ball & B. 309; 1 Wils. 310. On the other hand, the court leans against double portions for children; 13 Price 599; against double provisions, and double satisfactions; 3 Atk. 421; and against forfeitures; 3 Term 172.

BIBLE. See SCHOOLS; FAMILY BIBLE.

BICAMERAL SYSTEM. A term applied by Jeremy Bentham to the division of a legislative body into two chambers, as in the United States government.

BICYCLE. A two-wheeled vehicle propelled by the rider.

To ride a bicycle in the ordinary manner on a public highway for convenience, pleasure, or business is lawful. A person driving a horse thereon has no rights superior to a person riding a bicycle; Thompson v. Dodge, 58 Minn. 555, 60 N. W. 545, 28 L. R. A. 608, 49 Am. St. Rep. 503.

It has been held that an ordinance which attempts to forbid bicyclists to use that part of the street which is devoted to the use of vehicles is void as against common right; Swift v. City of Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 772; City of Emporia v. Wagoner, 6 Kan. App. 659, 49 Pac. 701; but see Twilley v. Perkins, 77 Md. 252, 26 Atl. 286, 19 L. R. A. 632, 39 Am. St. Rep. 408.

Their proper place is the roadway rather than the sidewalk; State v. Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394; and statutes and ordinances in some states declare their use upon sidewalks unlawful; Com. v. Forrest, 170 Pa. 40, 32 Atl. 652, 29 L. R. A. 365; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221, 10 Am. St. Rep. 76. It has been held that, even in the absence of an ordinance prohibiting it, one riding a bicycle upon a sidewalk takes the risk of any injury he may thereby cause to pedestrians; Fielder v. Tipton, 149 Ala. 608, 42 South. 985, 8 L. R. A. (N. S.) 1268, 123 Am. St. Rep. 69, 13 Ann. Cas. 1012; and that permission under municipal ordinance is not justification for violating a statute prohibiting riding a bicycle on a sidewalk; Millett v. City of Princeton, 167 Ind. 582, 79 N. E. 909, 10 L. R. A. (N. S.) 785. A municipal corporation, however, is not liable for injury to a person struck by a bicycle ridden by another on a sidewalk because of failure to enact or enforce an ordinance prohibiting the riding of bicycles on sidewalks; Jones v. City of Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294. Where a rider was injured by a defective sidewalk, it was held that the use of a bicycle thereon was not unlawful and that he could recover; Lee v. City of Port Huron, 128 Mich. 533, 87 N. W. 637, 55 L. R. A. 308.

Bicycles may be left standing in the street while the owner is calling at a residence or place of business, as any other vehicle may; Lacey v. Winn, 3 D. R. (Pa.) 811; Lacy v. Winn, 4 *id.* 409. Whether a bicyclist who leaves his wheel standing against the curbstone in front of a horse and wagon is negligent in failing to ascertain whether the horse was unattended and unfastened is a question of fact for the jury; Wagner v. Milk Co., 21 Misc. 62, 46 N. Y. Supp. 939.

An innkeeper is liable for damages where a bicycle belonging to a guest is stolen from the yard of the inn; 28 Ir. L. T. & S. J. 297. A municipality has power to require bicyclists to carry lights when using the streets after dark; City of Des Moines v. Keller, 116 Ia. 648, 88 N. W. 827, 57 L. R. A. 243, 93 Am. St. Rep. 268. A person who rides a bicycle without a light or signal of warning in a public thoroughfare at a time when objects can be discerned readily at a distance of but a few feet is, as a matter of law, guilty of negligence; Cook v. Fogarty, 103 Ia. 500, 72 N. W. 677, 39 L. R. A. 488.

Where a statute declares that bicycles are entitled to the same rights and subject to the same restrictions as are prescribed in the case of persons using carriages, the rider of a bicycle must turn out for a heavy vehicle; Taylor v. Traction Co., 184 Pa. 465, 40 Atl. 159, 47 L. R. A. 289, following the rule of the road established in earlier decisions; Beach v. Parmeter, 23 Pa. 196; Grier v. Sampson, 27 Pa. 183; but see *contra*,

Foote v. Produce Co., 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764, 78 Am. St. Rep. 806.

A bicyclist has a right to insist that the highway shall be maintained in a reasonably safe condition of repair; if not so maintained the corporation is answerable for injury to him or his vehicle; Geiger v. Turnpike Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458. Though, on an ordinary country road, he is exposed to greater danger than a person in a vehicle drawn by horses, the commissioners of highways are not bound to any higher obligation to him, but only to maintain such road in reasonably safe condition; Sutphen v. Town of North Hempstead, 80 Hun 409, 30 N. Y. Supp. 128; Fox v. Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234, 1 Ann. Cas. 548.

Bicycles are carriages under the tariff act; Adams, Tariff 99; so for the purpose of collecting tolls; Geiger v. Turnpike Road, 167 Pa. 582, 31 Atl. 918, 28 L. R. A. 458; and under an act forbidding furiously driving a carriage; L. R. 4 Q. B. Div. 228; and an act requiring carriages to turn to the right; State v. Collins, 16 R. I. 371, 17 Atl. 131, 3 L. R. A. 394. But in Glouchester & Salem Turnpike Co. v. Leppe, 62 N. J. L. 92, 40 Atl. 681, 41 L. R. A. 457, they were held not liable to tolls as "carriages of burthen or pleasure." They were held not to be within an act of 1786, requiring highways to be kept reasonably safe for carriages; Richardson v. Danvers, 176 Mass. 413, 57 N. E. 688, 50 L. R. A. 127, 79 Am. St. Rep. 320; to the same effect under an early act in Fox v. Clarke, 25 R. I. 515, 57 Atl. 305, 65 L. R. A. 234, 1 Ann. Cas. 548.

As to bicycles as baggage, see BAGGAGE.

BID. An offer to pay a specified price for an article about to be sold at auction.

An offer to perform a contract for work and labor or supplying materials at a specified price.

BIDDER. One who offers to pay a specified price for an article offered for sale at a public auction. Webster v. French, 11 Ill. 254; one who offers to enter into a contract for work and labor, or supplying materials at a specified price.

The bidder at an auction has a right to withdraw his bid expressly at any time before it is accepted, which acceptance is generally manifested by the fall of the hammer; Benj. Sales 50, 73; 3 Term 148; Doolin v. Ward, 6 Johns. (N. Y.) 194; Bab. Auct. 30, 42; Blossom v. R. Co., 3 Wall. (U. S.) 196, 18 L. Ed. 43; Coker v. Dawkins, 20 Fla. 153; Nebraska Loan & Trust Co. v. Hamer, 40 Neb. 293, 58 N. W. 695; or the bid may be withdrawn by implication, as by an adjournment of the sale before the article under the hammer is knocked down; Faunce v. Sedgwick, 8 Pa. 408.

The bidder is required to act in good faith, and any combination between him and others, to prevent a fair competition, would avoid the sale made to himself; 3 B. & B. 116; Martin v. Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Veazie v. Williams, 8 How. (U. S.) 134, 12 L. Ed. 1018. But there is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, fixing a certain price which they are willing to give, and appointing one of their number to be the bidder; Smull v. Jones, 6 W. & S. (Pa.) 122; National Fire Ins. Co. v. Loomis, 11 Paige Ch. (N. Y.) 431; Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. Ed. 787; Veazie v. Williams, 3 Sto. 623, Fed. Cas. No. 16,907. See AUCTION; AUCTIONEER.

The writ of mandamus will not lie to compel city authorities to award a contract to the lowest bidder, where, in the exercise of their discretion, they have decided that the faithful performance of the contract requires judgment and skill which he does not possess, notwithstanding his ability to furnish good security; Com. v. Mitchell, 82 Pa. 343.

BIENNIALLY. In a statute this term signifies not duration of time, but a period for the happening of an event; People v. Tremain, 9 Hun (N. Y.) 573. In most of the states legislative sessions occur biennially; that is, once in two years.

BIENS (Fr. goods). Property of every description, except estates of freehold and inheritance. Sugd. Vend. 495; Co. Litt. 119 *b*; Dane, Abr.

In the French law, this term includes all kinds of property, real and personal. Biens are divided into *biens meubles*, movable property; and *biens immeubles*, immovable property. The distinction between movable and immovable property is recognized by them, and gives rise, in the civil as well as in the common law, to many important distinctions as to rights and remedies. Story, Confl. Laws, § 13, note 1.

Tous les biens means in French law "all the property, and must therefore be accepted as including both real and personal estate"; Lindsay v. Wilson, 103 Md. 252, 63 Atl. 566, 2 L. R. A. (N. S.) 408.

In Eddy v. Davis, 35 Vt. 247, it was held that *biens*, goods, includes both animate and inanimate movable property, citing Co. Litt. 118 *b*, to the effect that "*biens*, *bona*," are words which include all chattels, as well real as personal, and adding: "In this sense the word *goods* is used in the ancient and well known form of the solemnization of matrimony contained in the Book of Common Prayer: * * * 'With all my worldly *goods* I thee endow.'"

In *biens*, real estate is included "in the sense of the civilians and continental jurists"; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Sto. Confl. L. §§ 13, 146.

BIGAMUS. In Civil Law. One who had been twice married, whether both wives were

alive at the same time or not. One who had married a widow.

Used in ecclesiastical matters as a reason for denying benefit of the clergy. *Termes de la Ley.*

BIGAMY. The state of a man who has two wives, or of a woman who has two husbands, living at the same time.

When the man has more than two wives, or the woman more than two husbands, living at the same time, then the party is said to have committed polygamy; but the name of bigamy is more frequently given to this offence in legal proceedings. 1 Russell, Cr. 137.

According to the canonists, bigamy is threefold, viz.: *(vera, interpretativa et similitudinaria)* real, interpretative, and similitudinary. The first consisted in marrying two wives successively (virgins they may be), or in once marrying a widow; the second consisted, not in a repeated marriage, but in marrying e. g. *meretricem vel ab alio corruptam,* a harlot; the third arose from two marriages, indeed, but the one metaphorical or spiritual, the other carnal. This last was confined to persons initiated in sacred orders, or under the vow of continence. Deferriere's Tract. Juris Canon. tit. xxi. See also Bacon, Abr. *Marriage.*

In England this crime was punishable by the stat. 24 & 25 Vict. c. 100, § 57, which made the offence felony; but it exempted from punishment the party whose husband or wife should continue to remain absent for seven years before the second marriage without being heard from, and persons who had been legally divorced. The statutory provisions in the United States against bigamy or polygamy are in general similar to, and copied from, the statute of 1 Jac. I. c. 11, which was supplied by the act of 24 & 25 Vict. c. 100, excepting as to the punishment. The several exceptions to this statute are also nearly the same in the American statutes; but the punishment of the offence is different in many of the states; 2 Kent 69.

Bigamy and polygamy are crimes by the laws of all civilized and Christian countries, and the First Amendment to the constitution declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was never intended to be a protection against legislation for the punishment of such crimes; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. It is no defence that polygamy is a religious belief; U. S. v. Reynolds, 1 Utah 226; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244.

The act of March 22, 1882, creates a new and distinct offence from bigamy or polygamy, one which is declared to be a misdemeanor (there having been and being no such declaration as to bigamy and polygamy), and the punishment is much less than for bigamy and polygamy. It is the offence of cohabiting with more than one woman; Snow v. U. S., 118 U. S. 346, 6 Sup. Ct. 1059, 30 L. Ed. 207.

It is no defence that the accused believed his former marriage was annulled, when the statute merely defines the offence as marrying again where a former spouse is living; State v. Zichfeld, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep. 800.

If a woman, who has a husband living, marries another person, she is punishable, though her husband has voluntarily withdrawn from her and remained absent and unheard of for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead; Com. v. Mash, 7 Metc. (Mass.) 472. See a discussion of this case by Mr. Bishop, in which he dissents from its ruling, in 4 So. L. J. (N. S.) 153; Clark, Cr. L. 311. Also, 12 Am. L. Rev. 471. The same rule applies also to the marriage of the husband, where he believes the wife to be dead; Dotson v. State, 62 Ala. 141, 34 Am. Rep. 2; Davis v. Com., 13 Bush (Ky.) 318. The same rule now obtains in England, after some conflict of opinion; 14 Cox C. C. 45; but *quære,* if her belief were founded on positive evidence; Steph. Dig. Cr. Law, art. 34, n. 9. On the trial of a woman for bigamy whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage she knew that he was alive, but that she had the means of acquiring knowledge of that fact had she chosen to make use of them. It was held that upon this finding the conviction could not be supported; 1 Dearsl. & B. Cr. Cas. 98. If a man is prosecuted for bigamy, his first wife cannot be called to prove her marriage with the defendant; T. Raym. 1; Williams v. State, 44 Ala. 24; 15 Low. Can. J. 21; nor it seems even to prove that the first marriage was invalid; 4 Up. Can. Q. B. 588; but see as to this last point, 2 Whart. Cr. L. § 1709.

In a prosecution for bigamy it devolves on the state to prove a valid first marriage and that the lawful spouse of the defendant was living at the time of the second marriage; Sokel v. People, 212 Ill. 238, 72 N. E. 382; State v. Kniffen, 44 Wash. 485, 87 Pac. 837, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113; McCombs v. State, 50 Tex. Cr. R. 490, 99 S. W. 1017, 9 L. R. A. (N. S.) 1036, 123 Am. St. Rep. 855, 14 Ann. Cas. 72. Belief of the death of the former wife is no defence to a prosecution for bigamy; Cornett v. Com., 134 Ky. 613, 121 S. W. 424, 21 Ann. Cas. 399. The first marriage may be proved by the admissions of the prisoner; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481. When the first marriage is proved to the satisfaction of the court, the second husband is admissible as a witness for or against the defendant; Whart. Cr. Ev. § 397; State v. Johnson, 12 Minn. 476 (Gil. 378), 93 Am. Dec. 241; 4 Up. Can. (Q. B.) 588; Miles v. U. S., 103 U. S. 304, 26 L. Ed. 481.

A conviction for bigamy has been supported although the person who solemnized the marriage had not the required authority;

Carmichael v. State, 12 Ohio St. 553, but see Bates v. State, 29 Ohio Cir. Ct. Rep. 189; 20 Harv. L. Rev. 576. Admissions of a prior marriage in a foreign country are sufficient without proof of cohabitation or other corroborating circumstances to establish the marriage; State v. Wylde, 110 N. C. 500, 15 S. E. 5.

Where the first marriage was made abroad, it must be shown to have been valid where made; People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49. When the celebration of the marriage is once shown, every fact necessary to its validity will be presumed until the contrary is shown; People v. Calder, 30 Mich. 85, Fleming v. People, 27 N. Y. 329; Com. v. Kenney, 120 Mass. 387, where the marriage was performed in a foreign country; but see Weinberg v. State, 25 Wis. 370.

Reputation and cohabitation are not sufficient to establish the fact of the first marriage; Gahagan v. People, 1 Park Cr. Cas. (N. Y.) 378. If the second marriage be in a foreign state, it is not bigamy; People v. Mosher, 2 Park. Cr. Cas. (N. Y.) 195; except by statute; 36 E. L. & Eq. 614. Where the first marriage was not performed according to the statute and there is no evidence of subsequent cohabitation of the parties the second marriage is not bigamy; People v. McQuaid, 85 Mich. 123, 48 N. W. 161.

See MARRIAGE.

BILAN. A book in which bankers, merchants, and traders write a statement of all they owe and all that is due to them. A balance sheet. The term is used in Louisiana, and is derived from the French.

BILATERAL CONTRACT. A contract in which both the contracting parties are bound to fulfill obligations reciprocally towards each other. *Leç. Elém.* § 781. See CONTRACT; UNILATERAL CONTRACT; ACCEPTANCE.

BILGED. The state of a ship in which water is freely admitted through holes and breaches made in the planks of the bottom, occasioned by injuries, whether the ship's timbers are broken or not. Peele v. Ins. Co., 3 Mas. 39, Fed. Cas. No. 10,905.

BILINE. Collateral.

BILINGUIS. Using two languages.

A term formerly applied to juries half of one nation and half of another. Plowd. 2.

BILL (Lat. *billa*). A complaint in writing addressed to the chancellor, or judges of a court exercising chancery jurisdiction.

Its office in a chancery suit is the same as a declaration in an action at law, a libel in a court of admiralty, or an allegation in the spiritual courts.

A bill formerly consisted of nine parts, which contained *the address*, to the chancellor, court, or judge acting as such; *the names* of the plaintiffs and their descriptions, but the statement of the parties in this part of the bill merely is not sufficient; 2 Ves. & B. 327; *the statement* of the plaintiff's case, called *the stating part*, which should contain a distinct though general statement of every material fact to which the plaintiff means to offer evidence; 1 Brown, Ch. 94; 3 P. Wms. 276; 2 Atk. 96; 1 Vern. 483; 11 Ves. Ch. 240; 2 Hare 264; James v. McKernon, 6 Johns. (N. Y.) 565; Nesmith v. Calvert, 1 Woodb. & M. 34, Fed. Cas. No. 10,123; Story, Eq. Pl. § 265 *a*; *a general charge* of confederacy; *the allegations* of the defendant's pretences, and charges in evidence of them; *the clause* of jurisdiction and an averment that the acts complained of are contrary to equity; *a prayer* that the defendant may *answer* the interrogatories, usually called the interrogating part; *the prayer for relief; the prayer for process;* 2 Madd. 166; Wright v. Wright, 8 N. J. Eq. 143; 1 Mitf. Eq. Pl. 41.

In England and in most, if not all, of the states, including those having a separate court of chancery, the formal style of the old English bill has fallen entirely into disuse. The form used and generally provided for by rule of court, is a concise and consecutive statement of the plaintiff's case in numbered paragraphs, stripped of technical phrases and verbiage, concluding with prayers, consecutively numbered, for answer, for account, if incidental or appropriate to the relief sought, for the special relief sought, as payment of sums found due, specific performance, etc., for injunction, if required, for other relief, and for process.

By Equity Rule 25 of the United States Supreme Court, in effect February 1, 1913 (33 Sup. Ct. xxv), a bill must contain the names, citizenship and residence of the parties (with their disabilities, if any); a short and plain statement of the grounds of jurisdiction; a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence; reasons for the omission of any proper parties, if any be omitted; and a prayer for any special relief pending the suit or on final hearing, which may be stated in alternative forms.

The bill must be signed by counsel; Davis v. Davis, 19 N. J. Eq. 180; 1 Dan. Ch. Pr. *312. It need not ordinarily be sworn to; but if special relief pending suit be asked, it must be verified by plaintiff, or some one having knowledge of the facts. Equity Rule 25 of S. C. of U. S. So, it is said, where some preliminary relief is required or in bills praying for the production of documents, incident to relief at law, or for relief in equity on a lost instrument; 1 Dan. Ch. Pr. *393, and cases cited in notes; so, bills to perpetuate testimony must have an affidavit of the circumstances under which the testimony is likely to be lost; *id.* *394, n. 3; and bills of interpleader must have an affidavit

of no collusion; *id.* *394, n. 4. A bill filed by a corporation need not be under seal; Georges Creek Coal & Iron Co. v. Detmold, 1 Md. Ch. Dec. 371; City of Moundsville v. R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161; so also of a bill brought by a municipal corporation; City of Moundsville v. R. Co., 37 W. Va. 92, 16 S. E. 514, 20 L. R. A. 161.

A bill filed by a woman need not show whether she is married or single; Paige v. Broadfoot, 100 Ala. 610, 13 South. 426.

A bill in the United States district court must, in the prayer for a subpœna, contain the names of the defendants; otherwise it may be dismissed by the court of its own motion; City of Carlsbad v. Tibbetts, 51 Fed. 852. It is a fatal defect; Goebel v. Supply Co., 55 Fed. 825. But the new equity rules omit that provision.

"A bill is not to be construed strictly as an indictment would have been 100 years ago, but is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. The demurrer is to be read with the same liberality." Swift & Co. v. U. S., 196 U. S. 395, 25 Sup. Ct. 279, 49 L. Ed. 518, per Holmes, J.

Bills are said to be original, not original, or in the nature of original bills.

Original bills are those which do, and which do not, pray for relief. Story, Eq. Pl. § 17.

Those which pray for relief are either *bills* praying the decree or order touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the plaintiff's right, which is the most common kind of bill; Mitf. Eq. Pl. 34; 1 Dan. Ch. Pr. 305.

Those which do not pray for relief are either to perpetuate testimony; to examine witnesses *de bene esse;* or for discovery.

Bills not original are either supplemental; of *revivor;* or of *revivor and supplement.*

Also a *cross bill;* a *bill of review;* a *bill to impeach* a decree; *to suspend* the operation, or *avoid the decree* for subsequent matter; *to carry a decree* into effect; *or partaking* of the qualities of some one or all of them. See Mitf. Eq. Pl. 35; Story, Eq. Pl. § 18. Van Heythuysen (Equity Draftsman 444) designates these as bills in the nature of original bills, and adds to them: A *bill in the nature of a bill of revivor,* to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill; and a *bill in the nature of a supplement bill* to obtain the benefit of a suit either after abatement in other cases which do not admit of a continuance of the original bill, or after the suit is become defective, without abatement in cases which do not admit of a supplemental bill to supply that defect.

For an account of these bills, consult the various titles.

As a Contract. An obligation; a deed, whereby the obligor acknowledges himself to owe the obligee a certain sum of money or some other thing, in which, besides the names of the parties, are to be considered the sum or thing due, the time, place, and manner of payment or delivery thereof. It may be indented or poll, and with or without a penalty. West, Symb. § 100.

This signification came to include all contracts evidenced by writing, whether specialties or parol, but is no longer in use except in phrases, such as bill payable, bill of lading.

In Legislation. A special act passed by a legislature in the exercise of a quasi judicial power. Thus, bills of attainder, bills of pains and penalties, are spoken of. See ACT; BILL OF ATTAINDER; BILL OF PAINS AND PENALTIES.

The draft of a law submitted to the consideration of a legislative body for its adoption. Southwark Bank v. Com., 26 Pa. 450. By the constitution of the United States, all bills for raising revenue must originate in the house of representatives; but the senate may propose or concur with amendments as on other bills. See MONEY BILLS.

As to money bills in Parliament, see PARLIAMENTARY ACT.

Every bill, before it becomes a law, must be approved by the president of the United States, or within ten days returned, with his objections, to the house in which it originated. Two-thirds of each house may then enact it into a law. Similar provisions are copied in the constitutions of most of the states; U. S. Const. art. 1, § 7.

In Mercantile Law. The creditor's written statement of his claim, specifying the items.

It differs from an account stated in this, that a bill is the creditor's statement; an account stated is a statement which has been assented to by both parties. See ACCOUNT STATED.

In England it has been held that a bill thus rendered is conclusive against the party making it out against an increase of charge on any of the items contained in it; and strong evidence as to items; 1 B. & P. 49. But in New York it has been held that merely presenting a bill, no payment or agreement as to the amount being shown, does not conclude the party from suing for a larger sum; Williams v. Glenny, 16 N. Y. 389.

BILL FOR A NEW TRIAL. One filed in a court of equity praying for an injunction after a judgment at law when there is any fact which renders it against conscience to execute such judgment, and of which the injured party could not avail himself in a court of law, or, if he could, was prevented by fraud or accident, unmixed with any fault or negligence of himself or his agents. Mitford, Eq. Pl. 131; 2 Story Eq. Pl. § 887.

Bills of this description are not now generally countenanced; Woodworth v. Van Buskerk, 1 Johns. Ch. (N. Y.) 432; Floyd v. Jayne, 6 Johns. Ch. (N. Y.) 479.

BILL FOR FORECLOSURE. One which is filed by a mortgagee against the mortgagor, for the purpose of having the property sold, thereby to obtain the sum secured on the premises, with interest and costs. 1 Madd. Ch. Pr. 528. See FORECLOSURE.

BILL IMPEACHING A DECREE FOR FRAUD. This must be an original bill, which may be filed without leave of court; 1 Sch. & L. 355; 1 Ves. Ch. 120; 3 Bro. C. C. 74. It must state the decree, the proceedings which led to it, and the ground on which it is impeached; Story, Eq. Pl. § 428.

The effect of the bill, if the prayer be granted, is to restore the parties to their former situation, whatever their rights. See Story, Eq. Pl. § 426; Mitf. Eq. Pl. 84.

BILL IN AID OF EXECUTION. A bill which assumes as its basis the principle of a decree and seeks merely to carry it into effect. Story, Eq. Pl. § 249. For instance, where all the facts do not distinctly appear on the record; 1 Ph. 181; or where, since the decree, the rights of the parties have become embarrassed by subsequent events, and a new decree is necessary; Adams, Eq. 415.

BILL IN NATURE OF A BILL OF REVIEW. One which is brought by a person not bound by a decree, praying that the same may be examined and reversed; as where a decree is made against a person who has no interest at all in the matter in dispute, or had not an interest sufficient to render the decree against him binding upon some person claiming after him.

Relief may be obtained against error in the decree by a bill in the nature of a bill of review. This bill in its frame resembles a bill of review except that, instead of praying that the former decree may be reviewed and reversed, it prays that the cause may be heard with respect to the new matter made the subject of the supplemental bill, at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill may require; 1 Harrison, Ch. Pr. 145.

BILL IN NATURE OF A BILL OF REVIVOR. One which is filed when the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery. In the case of a devise of real estate, the suit is not permitted to be continued by bill of revivor; 1 Chanc. Cas. 123, 174; 3 Chanc. Rep. 39; Mosel. 44.

In such cases, an original bill, upon which the title may be litigated, must be filed, and this bill will have so far the effect of a bill of revivor that if the title of the representative by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by bill of revivor; 1 Vern. 427; 2 *id.* 548, 672; 2 Brown, P. C. 529; 1 Eq. Cas. Abr. 83; Mitf. Eq. Pl. 71.

BILL IN NATURE OF A SUPPLEMENTAL BILL. One which is filed when the interest of the plaintiff or defendant, suing or defending, wholly determines, and the same property becomes vested in another person not claiming under him. Hinde, Ch. Pr. 71.

The principal difference between this and a supplemental bill seems to be that a supplemental bill is applicable to such cases only where the same parties or the same interests remain before the court; whereas an original bill in the nature of a supplemental bill is properly applicable where new parties, with new interests arising from events occurring since the institution of the suit, are brought before the court; Cooper, Eq. Pl. 75; Story, Eq. Pl. § 345. For the exact distinction between a bill of review and a supplemental bill in the nature of a bill of review, see 2 Phill. Ch. 705; 1 Macn. & G. 397.

BILL OBLIGATORY. A bond absolute for the payment of money. It is called also a single bill, and differs from a promissory note only in having a seal; Farmers' & Mechanics' Bank v. Greiner, 2 S. & R. (Pa.) 115. See Read, Pl. 236; West, Symb.

BILL OF ADVENTURE. A writing signed by a merchant, ship-owner, or master to testify that goods shipped on board a certain vessel are at the venture of another person, he himself being answerable only for the produce.

BILL OF CERTIORARI. In Equity Practice. One praying for a writ of certiorari to remove a cause from an inferior court of equity. Cooper, Eq. 44. Such a bill must state the proceedings in the inferior court, and the incompetency of such court by suggestion of the reason why justice is not likely to be done—as distances of witnesses, lack of jurisdiction etc.,—and must pray a writ of certiorari to remove the record to the superior court. Harrison, Ch. Pr. 49; Story, Eq. Pl. § 298.

Where an equitable right is sued for in an inferior court of equity, and by means of its limited jurisdiction the defendant cannot have complete justice, the defendant may file a bill in chancery, praying a special writ, called a bill of certiorari, to remove the cause into the Court of Chancery; Mitf. & Tyler, Eq. Pl. 148.

BILL OF CONFORMITY. In Equity Practice. One filed by an executor or administrator, who finds the affairs of the deceased so much involved that he cannot safely administer the estate except under the direction of a court of chancery. This bill is filed against the creditors, generally, for the purpose of having all their claims adjusted, and procuring a final decree settling the order of payment of the assets. 1 Story, Eq. Jur. 440.

BILL OF COSTS. A statement of the items which form the total amount of the costs of a suit or action. It must be taxed by the proper officer of the court, and is demandable as a matter of right before the

payment of the costs. See COSTS; TAXING COSTS.

BILL OF CREDIT. Paper issued by the authority of a state on the faith of the state, and designed to circulate as money. Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709.

Promissory notes or bills issued by a state government, exclusively, on the credit of the state, and intended to circulate through the community for its ordinary purposes as money, redeemable at a future day, and for the payment of which the faith of the state is pledged. 4 Kent 408.

The constitution of the United States provides that no state shall emit bills of credit, or make anything but gold and silver coin a legal tender in payment of debts. U. S. Const. art. 1, § 10. This prohibition, it seems, does not apply to bills issued by a bank owned by the state but having a specific capital set apart; Cooley, Const. Lim. 84; State v. Billis, 2 McCord (S. C.) 12; McFarland v. Bank, 4 Ark. 44, 37 Am. Dec. 761; Briscoe v. Bank, 11 Pet. (U. S.) 257, 7 L. Ed. 709; Darrington v. Bank, 13 How. (U. S.) 12, 14 L. Ed. 30; but see Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903; Linn v. Bank, 1 Scam. (Ill.) 87, 25 Am. Dec. 71; nor does it apply to notes issued by corporations or individuals which are not made legal tender; 4 Kent 408; nor to coupons on state bonds, receivable for taxes and negotiable, but not intended to circulate as money; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. But it does apply to a state warrant containing a direct promise to pay the bearer the amount stated on its face, and which is intended to circulate as money; Bragg v. Tuffts, 49 Ark. 554, 6 S. W. 158.

In Mercantile Law. A letter sent by an agent or other person to a merchant, desiring him to give credit to the bearer for goods or money. Comyns, Dig. *Merchant*, F, 3; 3 Burr. 1667; Pagaud v. State, 5 Smedes & M. (Miss.) 491; McFarland v. Bank, 4 Ark. 44; State v. Calvin, R. M. Charlt. (Ga.) 151.

BILL OF DEBT. An ancient term including promissory notes and bonds for the payment of money. Comyns, Dig. *Merchant*, F, 2.

BILL OF DISCOVERY. In Equity Practice. One which prays for the discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings, or other things in his custody or power. Hinde, Ch. Pr. 20; Blake, Chanc. Pract. 37.

It does not seek relief in consequence of the discovery (and this constitutes its characteristic feature), though it may ask for a stay of proceedings till discovery is made; 2 Story, Eq. Jur. § 1483; Bisph. Eq. § 557; and such relief as does not require a hearing before the court may be part, it is said, of the prayer; Eden, Inj. 78; 19 Ves. Ch. 376; 4 Madd. 247; 5 *id.* 218; 1 Sch. & L. 316; 1 Sim. & S. 83.

It is commonly used in aid of the jurisdiction of a court of law, to enable the party who prosecutes or defends a suit at law to obtain a discovery of the facts which are material to such prosecution or defence; Hare, Discov. 119; Marsh v. Davison, 9 Paige, Ch. (N. Y.) 580; Lane v. Stebbins, 9 Paige, Ch. (N. Y.) 622; 2 Dan. Ch. Pr. 1556; Langd. Eq. Pl. § 167. A defendant in equity may obtain the same relief by a cross bill; Langd. Eq. Pl. § 128.

The plaintiff must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, as of deeds he claims under, and not to pry into that of the defendant; 2 Ves. Ch. 445. See Mitf. Eq. Pl. 52; 1 Madd. Ch. Pr. 196; Hare; Wigram, Disc. It will not lie to compel a judgment debtor to disclose assets on which execution may be levied; Cargill v. Kountze, 86 Tex. 386, 22 S. W. 1015, 25 S. W. 13, 24 L. R. A. 183, 40 Am. St. Rep. 853.

There has been much controversy as to whether the defendant is entitled to discovery to aid him in preparing his answer; Langd. Eq. Pl. § 129.

The bill must show a present and vested title and interest in the plaintiff, and what that title and interest are; Pease v. Pease, 8 Metc. (Mass.) 395; 1 Vern. 105; Story, Eq. Jur. § 1490; Baxter v. Farmer, 42 N. C. 239; with reasonable certainty; 3 Ves. 343; must state a case which will constitute a just ground for a suit or a defence at law; McIntyre v. Mancius, 3 Johns. Ch. (N. Y.) 47; 1 Bro. C. C. 96; must describe the deeds and acts with reasonable certainty; 3 Ves. Ch. 343; Horton v. Moseley, 17 Ala. 794; must state that a suit is brought, or about to be, and the nature thereof must be given with reasonable certainty; 5 Madd. 18; must show that the defendant has some interest; 1 Ves. & B. 550; Wakeman v. Bailey, 3 Barb. Ch. (N. Y.) 484; and, where the right arises from privity of estate, what that privity is; Mitf. Eq. Pl.; it must show that the matter is material, and how; Many v. Iron Co., 9 Paige Ch. (N. Y.) 188; Marsh v. Davison, 9 Paige Ch. (N. Y.) 580; Lane v. Stebbins, 9 Paige Ch. (N. Y.) 622; Stacy v. Pearson, 3 Rich. Eq. (S. C.) 148; and must set forth the particulars of the discovery sought; Laight v. Morgan, 2 Caines Cas. (N. Y.) 344; 1 Y. & J. 577. Adverse examination before trial of a defendant will not be permitted for the purpose of discovering a cause of action; Britton v. MacDonald, 3 Misc. 514, 23 N. Y. Supp. 350.

A bill for discovery but waiving answer under oath is not demurrable for want of an affidavit and cannot be treated as a bill for discovery; Harrington v. Harrington, 15 R. I. 341, 5 Atl. 502; if the oath has been waived, the defendant is not excused from answering, but he loses the benefit of his own declarations, while his admissions are evidence against him; Uhlmann v. Brewing Co., 41 Fed. 369.

It will not lie in aid of a criminal prosecution, a mandamus, or suit for a penalty; 2 Ves. Ch. 398; Colton v. Ross, 2 Paige Ch. (N. Y.) 399, 22 Am. Dec. 648; Story, Eq. Jur. § 1494; 1 Pom. Eq. Jur. § 197.

BILL OF EXCEPTIONS. A written statement of objections to the decision of a court upon a point of law, made by a party to the cause, and properly certified by the judge or court who made the decision.

The object of a bill of exceptions is to put the decision objected to upon record for the information of the court having cognizance of the cause in error. They were authorized by statute Westm. 2d (13 Edw. I.), c. 31, the principles of which have been adopted in all the states, though the statute has been held to be superseded in some, by their own statutes. It provides for compelling the judges to sign such bills, and for securing the insertion of the exceptions upon the record. They may be brought by either plaintiff or defendant. Abolished in England by the Judicature Act, 1873.

"The statute gives a bill of exceptions only in a trial according to the course of the common law; and there is no other means of putting evidence on a record;" Union Canal Co. v. Keiser, 19 Pa. 137, per Gibson, J.

In what cases. In the trial of civil causes, wherever the court, in making a decision, is supposed by the counsel against whom the decision is made to have mistaken the law, such counsel may tender exceptions to the ruling, and require the judge to authenticate the bill; 3 Bla. Com. 372; Sowerwein v. Jones, 7 Gill & J. (Md.) 335; Ray v. Lipscomb, 48 N. C. 185; including the receiving improper, and the rejecting proper, evidence; Samuel v. Withers, 9 Mo. 166; Com. v. Bosworth, 6 Gray (Mass.) 479; King v. Gray, 17 Tex. 62; and a failure to call the attention of the jury to material matter of evidence, after request; Ex parte Baily, 2 Cow. (N. Y.) 479; and including a refusal to charge the jury in a case proper for a charge; Fletcher v. Howard, 2 Aik. (Vt.) 115, 16 Am. Dec. 686; Emerson v. Hogg, 2 Blatchf. 1, Fed. Cas. No. 4,440; Com. v. Packard, 5 Gray (Mass.) 101; but not including a failure to charge the jury on points of law when not requested; Texas & P. R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239, 38 L. Ed. 78; Law v. Merrills, 6 Wend. (N. Y.) 274; Brigham v. Wentworth, 11 Cush. (Mass.) 123; Rogers v. R. Co., 38 Me. 227; and including a refusal to order a special verdict in some cases; Syme v. Butler, 1 Call (Va.) 105. It can be taken to the action or want of proper action of the trial court, upon any proceeding in the progress of the trial from the commencement of the same to its conclusion and when properly presented can be considered by the court on writ of error; Wilson v. United States, 149 U. S. 67, 13 Sup. Ct. 765, 37 L. Ed. 650.

An exception cannot be taken to the decision of the court upon matters resting in its discretion; Cummings v. Fullam, 13 Vt. 459; Law v. Merrills, 6 Wend. (N. Y.) 277; Deloach v. Walker, 7 How. (Miss.) 164; Mosseaux v. Brigham, 19 Vt. 457; nor upon any theory announced by the court, unless such be expressed in particular language; Bogk v. Gassert, 149 U. S. 17, 13 Sup. Ct. 738, 37 L. Ed. 631; nor for the refusal of a non-suit; Ballentine v. White, 77 Pa. 20; nor where the record shows a fatal error, as want of jurisdiction; Fields v. Maloney, 78 Mo. 172; nor, generally, in cases where there is a right of appeal; Wheelock v. Moulton, 13 Vt. 430; though the practice in some states is otherwise.

In *criminal* cases, at common law, judges are not required to authenticate exceptions; 1 Chitty, C. L. 622; People v. Holbrook, 13 Johns. (N. Y.) 90; Wynhamer v. People, 20 Barb. (N. Y.) 567; Case v. Com., 1 Va. Cas. 264; Middleton v. Com., 2 Watts (Pa.) 285; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; but statutory provisions have been made in several states authorizing the taking of exceptions in criminal cases; Com. v. Jones, 1 Leigh (Va.) 598; Wynhamer v. People, 20 Barb. (N. Y.) 567; Osburn v. State, 7 Ohio, 214, pt. 1; Donnelly v. State, 26 N. J. L. 463; Shannon v. People, 5 Mich. 36; Fife v. Com., 29 Pa. 429.

When to be taken. The bill must be tendered at the time the decision is made; Midberry v. Collins, 9 Johns. (N. Y.) 345; State v. Lord, 5 N. H. 336; Coburn v. Murray, 2 Greenl. (Me.) 336; Bratton v. Mitchell, 5 Watts (Pa.) 69; Hawkins' Heirs v. Lowry, 6 J. J. Marsh. (Ky.) 247; Agnew v. Campbell's Adm'rs, 17 N. J. L. 291; Lenox v. Pike, 2 Ark. 14; Bompart v. Boyer, 8 Mo. 234; Randolph v. Alsey, 8 Mo. 656; Croft v. Ferrell, 21 Ala. 351; Patterson v. Phillips, 1 How. (Miss.) 572; McKell v. Wright, 4 Ia. 504; Houston v. Jones, 4 Tex. 170; and it must, in general, be taken before the jury have delivered their verdict; Morris v. Buckley, 8 S. & R. (Pa.) 211; Lanuse v. Barker, 10 Johns. (N. Y.) 312; Kilgore v. Bonic, 9 Mo. 291; Fugate v. Muir, 9 Mo. 355; Jones v. Van Patten, 3 Ind. 107; Armstrong v. Mock, 17 Ill. 166; Martin v. State, 25 Tex. App. 557, 8 S. W. 682; State v. Brown, 100 N. C. 519, 6 S. E. 568.

In the circuit court of appeals no exceptions to rulings at a trial will be considered, unless taken at the trial, embodied in a bill of exceptions, presented to the judge at the same term or at a time allowed by rule of court made at the term, or by a standing rule of court, or by consent of the parties, and except under extraordinary circumstances must be allowed and filed with the clerk during the same term; New York & N. E. R. Co. v. Hyde, 56 Fed. 188, 5 C. C. A. 461. See Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726.

In practice, however, the point is merely noted at the time, and the bill is afterwards settled; Bull. N. P. 315; Stewart v. Hunt-

ingdon Bank, 11 S. & R. (Pa.) 270, 14 Am. Dec. 628; State v. Lord, 5 N. H. 336; Shipherd v. White, 3 Cow. (N. Y.) 32; Ferrell v. Alder, 2 Swan (Tenn.) 77; but in general before the close of the term of court; Staggs v. State, 3 Humphr. (Tenn.) 372; Pomeroy v. Selmes, 8 Mo. 727; Sheppard v. Wilson, 6 How. (U. S.) 260, 12 L. Ed. 430; and then must appear on its face to have been signed at the trial; Walton v. U. S., 9 Wheat. (U. S.) 651, 6 L. Ed. 182; Law v. Merrills, 6 Wend. (N. Y.) 268; Byrd v. Tucker, 3 Ark. 451. A bill may be sealed by the judge after the record has been removed, and even after the expiration of his term; Bennett v. Davis, Morris (Ia.) 364. See Whitcomb v. Williams, 4 Pick. (Mass.) 228; Consaul v. Lidell, 7 Mo. 250. If presented to and signed by a judge after the close of term, and the record does not show any order or consent so to do, the supreme court will affirm the judgment; U. S. v. Jones, 149 U. S. 262, 13 Sup. Ct. 840, 37 L. Ed. 726.

Formal proceedings. The bill must be signed by the judge or a majority of the judges who tried the cause; Law v. Jackson, 8 Cow. (N. Y.) 746; Gordon v. Brownes' Ex'r, 3 Hen. & M. (Va.) 219; Kennedy v. Trustees of Covington, 4 J. J. Marsh. (Ky.) 543; Darling v. Gill, Wright (Ohio) 73; Small v. Haskins, 29 Vt. 187; Cameron v. Ward, 22 Ga. 168; upon notice of time and place when and where it is to be done; Bull. N. P. 316; Law v. Jackson, 8 Cow. (N. Y.) 746; Harris v. State, 2 Ga. 211; Smith v. Burn, *id.* 262.

Allowing and signing a bill of exceptions is a judicial act, which can only be done by the judge who sat at the trial, or by the presiding judge if more than one sat; consent of counsel will not give validity; Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163. If the proper judge die before signing it, the court will grant a new trial; *id.*, citing 16 C. B. 29; 3 *id.* 796; State v. Weiskittle, 61 Md. 51. It was held in Penn. Mut. Life Ins. Co. v. Ashe, 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491, that if a circuit judge dies, pending a motion for a new trial, and there is no record from which his successor could fairly pass upon the motion and sign a bill of exceptions, his only authority under the statute is to grant a new trial. In case a judge resigns, his successor has jurisdiction, in his discretion, to sign a bill of exceptions; McIntyre v. Modern Woodmen of America, 200 Fed. 1.

Where the bill is presented for signature within the prescribed time, one will not be prejudiced by the refusal or neglect of the judge to sign it within the prescribed time; Hawes v. Pulver, 129 Ill. 123, 21 N. E. 777; Wright v. Judge of Superior Court, 41 Mich. 726, 49 N. W. 925. The bill need not be sealed; U. S. R. S. § 953; but must be signed by the judge, and the initials "A. B." are not the signature of the judge and do not constitute a sufficient authentication; Origet v. U. S., 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743; Malony v. Adsit, 175 U. S. 287, 20 Sup. Ct. 115, 44 L. Ed. 163.

Facts not appearing on the bill are not presumed; Beavers v. Smith, 11 Ala. 29; Cravins v. Gant, 4 T. B. Monr. (Ky.) 126; Courtney v. Com., 5 Rand. (Va.) 666; Snowden v. Warder, 3 Rawle (Pa.) 101; Berry v. Hale, 1 How. (Miss.) 315; Pons v. Hart, 5 Fla. 457; Dunlop v. Munroe, 7 Cra. (U. S.) 270, 3 L. Ed. 329.

Effect of. The bill when sealed is conclusive evidence as to the facts therein stated as between the parties; 3 Burr. 1765; Bingham v. Cabbot, 3 Dall. (U. S.) 38, 1 L. Ed. 491; Law v. Merrills, 6 Wend. (N. Y.) 276; in the suit to which it relates, but no further; Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83; see Baylor v. Smithers, 1 T. B. Monr. (Ky.) 6; and all objections not appearing by the bill are excluded; 8 East 280; Baring v. Shippen, 2 Binn. (Pa.) 168; Allen v. Smith, 12 N. J. L. 160; Com. v. Stephens, 14 Pick. (Mass.) 370; Dean v. Gridley, 10 Wend. (N. Y.) 254; Newsum v. Newsum, 1 Leigh (Va.) 86, 19 Am. Dec. 739; Picket v. Allen, 10 Conn. 146; Drexel v. Man, 6 W. & S. (Pa.) 343; Bone v. McGinley, 7 How. (Miss.) 671; Brown v. Brown, 7 Mo. 288; Stimpson v. R. Co., 3 How. (U. S.) 553, 11 L. Ed. 722; Lewis v. Lewis, 75 Ia. 669, 37 N. W. 166. But see Murdock v. Herndon's Ex'rs, 4 Hen. & M. (Va.) 200. In the absence of a bill of exceptions pointing out the alleged errors the appellate court will not review the instructions unless fundamentally erroneous; Howard v. State, 25 Tex. App. 602, 8 S. W. 806. An exception to conclusions of law admits the findings of fact; Neisler v. Harris, 115 Ind. 560, 18 N. E. 39.

It draws in question only the points to which the exception is taken; Van Gordon v. Jackson, 5 Johns. (N. Y.) 467; Coxe v. Field, 13 N. J. L. 216; Watson v. Watson, 10 Conn. 75; Picket v. Allen, *id.* 146; and an exception to an instruction will not be considered when the bill of exceptions does not show what the evidence tended to prove; Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644. It does not of itself operate as a stay of proceedings; Seymour v. Slocum, 18 Wend. (N. Y.) 509; Holcombe v. Roberts, 19 Ga. 588. The practice of making the entire charge to the jury a part of the bill of exceptions is strongly disapproved; Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

A stipulation, if it can be understood, may answer in place of a bill of exceptions; Houlehan v. Rassler, 73 Wis. 557, 41 N. W. 720.

If the judge's rulings and the grounds of objection thereto appear of record, the right of the party excepting is fully preserved without the retention of a bill; State v. Judge Twenty-Third District Court, 40 La. Ann. 809, 5 South. 467. If the judge has

certified and filed the record containing the evidence, exceptions, and charge, he is not compelled to sign a second or separate bill for the party excepting; Com. v. Arnold, 161 Pa. 320, 29 Atl. 270. Where the error is apparent upon the record it need not be presented by a bill of particulars; Moline Plow Co. v. Webb, 141 U. S. 616, 12 Sup. Ct. 100, 35 L. Ed. 879.

They have been abolished in English practice. A curious case in McDonald v. Faulkner, 2 Ark. 472, shows what is probably the only instance of the kind,—a bill of exceptions certified by bystanders. The verdict and judgment was entered for the plaintiff September 10, 1893; September 12 the defendant moved for a new trial, and on the 16th the motion was overruled and the defendant accepted and obtained leave to prepare a bill of exceptions. Under date of the 21st, the record states: "The defendant filed his bill of exceptions, whereupon the plaintiff filed his bill of exceptions certified by the bystanders." To the latter the judge appended a statement that he declined signing it, "not that it does not contain the facts of the case, but because it purports to be an exception to the opinion of the court in signing a bill of exceptions taken to a former decision of the court in signing a bill of exceptions in the progress of the cause." Thereupon the plaintiff's bill of exceptions was signed and certified to be true by five bystanders. The judgment was reversed and a new trial ordered, but no mention is made of plaintiff's bill of exceptions on petition for rehearing. In an opinion denying it, the judge refers to the "plaintiff's bill of exceptions taken and signed by bystanders on the 25th of September," and holds him estopped by the statements in it from denying the accuracy of defendant's bill of exceptions.

BILL OF EXCHANGE.

A written order from one person to another, directing the person to whom it is addressed to pay to a third person a certain sum of money therein named. Byles, Bills 1.

By the Negotiable Instrument Act, a bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it requiring the addressee to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. It may be either an inland bill or a foreign bill, and may be drawn in sets. The act defines a check as a bill of exchange drawn on a bank and payable on demand. See NEGOTIABLE INSTRUMENTS, for the states, etc., in which it has been enacted.

A bill of exchange may be negotiable or non-negotiable. If negotiable, it may be transferred either before or after acceptance.

The person making the bill, called the drawer, is said to draw upon the person to whom it is directed, and undertakes impliedly to pay the amount with certain costs if he refuse to comply with the command. The drawee is not liable on the bill till after acceptance, and then becomes liable as principal to the extent of the terms of the acceptance; while the drawer becomes liable to the payee and indorsees conditionally upon the failure of the acceptor to pay. The liabilities between indorsers and indorsees are subject to the same rules as those of indorsers and indorsees on promissory notes. Regularly, the drawee is the person to become acceptor; but other parties may accept, under special circumstances.

A *foreign* bill of exchange is one of which the drawer and drawee are residents of countries foreign to each other. In this respect the states of the United States are held foreign as to each other; Phœnix Bank v. Hussey, 12 Pick. (Mass.) 483; Wells v. Whitehead, 15 Wend. (N. Y.) 527; Hopkins v. Clay, 3 A. K. Marsh. (Ky.) 488; Bank of Cape Fear v. Stinemetz, 1 Hill (S. C.) 44; Brown v. Ferguson, 4 Leigh (Va.) 37, 24 Am. Dec. 707; Green v. Jackson, 15 Me. 136; Donegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Todd v. Neal's Adm'r, 49 Ala. 266; Rice v. Hagan, 8 Dana (Ky.) 133; Carter v. Burley, 9 N. H. 558; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Knickerbocker Life Ins. Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866; Ticonic Bank v. Stackpole, 41 Me. 302; 1 Dan. Neg. Inst. § 9. But see *contra*, Miller v. Hackley, 5 Johns. (N. Y.) 384, 4 Am. Dec. 372, and see Grimshaw v. Bender, 6 Mass. 162.

An *inland* bill is one of which the drawer and drawee are residents of the same state or country; Ragsdale v. Franklin, 25 Miss. 143. As to whether a bill is considered as foreign or inland when made partly in one place and partly in another, see 5 Taunt. 529; 8 *id.* 679; 1 Maule & S. 87. Defined by statute 19 & 20 Vict. c. 97, § 7.

The distinction between inland and foreign bills becomes important with reference to the question whether protest and notice are to be given in case of non-acceptance. See 3 Kent 95; PROTEST.

The *parties* to a bill of exchange are the drawer, the drawee, the acceptor, and the payee. Other persons connected with a bill in case of a transfer as parties to the transfer are the indorser, indorsee, and holder. See those titles. It sometimes happens that one or more of the apparent parties to a bill are fictitious persons. The rights of a *bonâ fide* holder are not thereby prejudiced where the payee and indorser are fictitious; 2 H. Bla. 78; 1 Campb. 130; Blodgett v. Jackson, 40 N. H. 26; Benj. Chal. Dig. § 85; or even where the drawer and payee are both fictitious; 10 B. & C. 468; and all the various parties need not be different persons; Wildes v. Savage, 1 Sto. 22, Fed. Cas. No. 17,653. The qualifications of parties who are to be made liable by the making or transfer of bills are the same as in case of other contracts. See PARTIES; FICTITIOUS PAYEE.

The bill must be *written*; 1 Pardessus, 344; 2 Stra. 955. See Goldman v. Blum, 58 Tex. 636.

It should be properly *dated*, both as to place and time of making; Beawes, *Lex Merc.* pl. 3; 2 Pardessus, n. 333; 1 B. & C. 398. But it is not essential to the validity of a bill; 1 Dan. Neg. Inst. § 82; Drake v. Rogers, 32 Me. 524; Coon v. Swan, 30 Vt. 11. If not dated, it will be considered as dated at the time it was made; Seldonridge v. Connable, 32 Ind. 375; Cowing v. Altman, 71 N. Y. 441, 27 Am. Rep. 70; First Nat.

Bank of St. Charles v. Hunt, 25 Mo. App. 174. Bills are sometimes ante or post-dated for convenience; Union Bethel African M. E. Church v. Sheriff, 33 La. Ann. 1461; Frazier v. Printing & Bookbinding Co., 24 Hun (N. Y.) 281.

The *superscription* of the sum for which the bill is payable will aid an omission in the bill, but is not indispensable; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; 10 Q. B. Div. 30.

The *time* of payment should be expressed; but if no time is mentioned it is considered as payable on demand; 2 B. & C. 157; Porter v. Porter, 51 Me. 376; First Nat. Bank of St. Charles v. Hunt, 25 Mo. App. 174; Converse v. Johnson, 146 Mass. 22, 14 N. E. 925; Hall v. Toby, 110 Pa. 318, 1 Atl. 369; Roswell Mfg. Co. v. Hudson, Watson & Co., 72 Ga. 25; L. R. 3 Q. B. 573. In Massachusetts it must be payable at a definite time or at such a time as can be made definite upon election of the holder; Stults v. Silva, 119 Mass. 137; Mahoney v. Fitzpatrick, 133 Mass. 151, 43 Am. Rep. 502.

The *place* of payment may be prescribed by the drawer; 8 C. B. 433; or by the acceptor on his acceptance; 3 Jur. 34; Green v. Goings, 7 Barb. (N. Y.) 652; but is not as a general practice, in which last case the bill is considered as payable and to be presented at the usual place of business of the drawee, King v. Holmes, 11 Pa. 456, at his residence, where it was made, or to him personally anywhere; 10 B. & C. 4; M. & M. 381; 4 C. & P. 35; Scott v. Perlee, 39 Ohio St. 67, 48 Am. Rep. 421.

Such an *order* or request to pay must be made as demands a right, and not asks a favor; M. & M. 171; and it must be absolute, and not contingent; 2 B. & Ald. 417; Woolley v. Sergeant, 8 N. J. L. 262, 14 Am. Dec. 419; Smurr v. Forman, 1 Ohio, 272; Van Vacter v. Flack, 1 Smedes & M. (Miss.) 393, 40 Am. Dec. 100; Henry v. Hazen, 5 Ark. 401; Kinney v. Lee, 10 Tex. 155. Mere civility in the terms does not alter the legal effect of the instrument.

The word *pay* is not necessary; *deliver* is equally operative; 8 Mod. 364; as well as other words; 9 C. B. 570; but they must be words requiring *payment;* 10 Ad. & E. 98; *"Il vous plaira de payer"* is, in France, the proper language of a bill; Pailliet, Man. 841.

Each of the duplicate or triplicate (as the case may be) bills of a set of foreign exchange contains a provision that the particular bill is to be paid only if the others remain at the time unpaid; see 2 Pardessus, n. 342; and all the parts of the set constitute but one bill; Ingraham v. Gibbs, 2 Dall. (U. S.) 134, 1 L. Ed. 320.

A bill should *designate the payee*; 26 E. L. & Eq. 404; Lyon v. Marshall, 11 Barb. (N. Y.) 241; Moody v. Threlkeld, 13 Ga. 55; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 154; Adams v. King, 16 Ill. 169, 61 Am. Dec. 64; and see Wheeler v. Webster, 1 E. D. Smith (N. Y.) 1; Moore v. Anderson, 8 Ind. 18; but when no payee is designated, the holder by indorsement may fill the blank with his own name; 2 Maule & S. 90; and if payable to the bearer it is sufficient; 3 Burr. 1526.

To make it negotiable, it must be payable to the order of the payee or to the bearer, or must contain other equivalent and operative words of transfer; 9 B. & C. 409; Gerard v. La Coste, 1 Dall. (U. S.) 194, 1 L. Ed. 96; Downing v. Backenstoes, 3 Caines (N. Y.) 137; Fernon v. Farmer's Adm'r, 1 Harr. (Del.) 32; Hackney v. Jones, 3 Humphr. (Tenn.) 612; Reed v. Murphy, 1 Ga. 236; Smurr v. Forman, 1 Ohio, 272; Raymond v. Middleton, 29 Pa. 530; otherwise in some states of the United States by statute, and in Scotland; Maxwell v. Goodrum, 10 B. Monr. (Ky.) 286. But in England and the United States negotiability is not essential to the validity of a bill; 3 Kent 78; Big. Bills & N. 12; 6 Term 123; President, etc., of Goshen & Minisink Turnpike Road v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273; Duncan v. Sav. Inst., 10 Gill & J. (Md.) 299; Coursin v. Ledlie's Adm'rs, 31 Pa. 506; Michigan Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. Ed. 763; though it is otherwise in France; Code de Comm. art. 110, 188; 2 Pardessus, n. 339. The fact that the bill provides that it shall bear interest from date in case of failure to pay at maturity, will not affect its negotiability as the rule that it must be for a sum certain applies to the principal and not interest; Christian County Bank v. Goode, 44 Mo. App. 129; nor a provision that a higher rate of interest shall be paid after default; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; nor will its negotiability be affected by a stipulation in it to pay a reasonable attorney's fee; Bank of Commerce of Owensboro v. Fuqua, 11 Mont. 285, 28 Pac. 291, 14 L. R. A. 588, 28 Am. St. Rep. 461; Wolff v. Dorsey, 38 Ill. App. 305; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37; Benn v. Kutzschan, 24 Or. 28, 32 Pac. 763; *contra*, Clark v. Barnes, 58 Mo. App. 667; First Nat. Bank of Decorah v. Laughlin, 4 N. D. 391, 61 N. W. 473; Woods v. North, 84 Pa. 407, 24 Am. Rep. 201.

The *sum* for which the bill is drawn should be written in full in the body of the instrument, as the words in the body govern in case of doubt; 5 Bingh. N. C. 425; Mears v. Graham, 8 Blackf. (Ind.) 144; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; the marginal figures are not a part of the contract, but a mere memorandum; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; Com. v. Bank, 98 Mass. 12, 93 Am. Dec. 126.

The amount must be fixed and certain, and not contingent; 2 Salk. 375; Philadelphia Bank v. Newkirk, 2 Miles (Pa.) 442; Story v. Lamb, 52 Mich. 525, 18 N. W. 248. It must be payable in money, and not in mer-

chandise; Jerome v. Whitney, 7 Johns. (N. Y.) 321; Thomas v. Roosa, *id.* 461; Peay v. Pickett, 1 N. & Mc. (S. C.) 254; Gwinn v. Roberts, 3 Ark. 72; Strader v. Batchelor, 8 B. Monr. (Ky.) 168; Hosstatter v. Wilson, 36 Barb. (N. Y.) 307; and is not negotiable if payable in bank bills or in *currency* or other substitutes for legal money of similar denominations; Hasbrook v. Palmer, 2 McLean, 10, Fed. Cas. No. 6,188; Collins v. Lincoln, 11 Vt. 268; Kirkpatrick v. McCullough, 3 Humphr. (Tenn.) 171, 39 Am. Dec. 158; Hawkins v. Watkins, 5 Ark. 481; McCormick v. Trotter, 10 S. & R. (Pa.) 94; Irvine v. Lowry, 14 Pet. (U. S.) 293, 10 L. Ed. 462; Bank of Mobile v. Brown, 42 Ala. 108; held otherwise in Swetland v. Creigh, 15 Ohio, 118; Besancon v. Shirley, 9 Smedes & M. (Miss.) 457; Cockrill v. Kirkpatrick, 9 Mo. 697; Wilburn v. Greer, 6 Ark. 255; Ogden v. Slade, 1 Tex. 13; Fleming v. Nall, *id.* 246; Chevallier v. Buford, *id.* 503; Lacy v. Holbrook, 4 Ala. 88; Carter v. Penn, *id.* 140; Bull v. Bank, 123 U. S. 112, 8 Sup. Ct. 62, 31 L. Ed. 97; Laird v. State, 61 Md. 309.

It is not necessary, however, that the money should be current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever; Black v. Ward, 27 Mich. 193, 15 Am. Rep. 162; Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546; King v. Hamilton, 12 Fed. 478; 1 Dan. Neg. Inst. § 58. But it is necessary that the instrument should express the specific denomination of money when payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherwise it is not negotiable; 1 Dan. Neg. Inst. § 58. As to bills payable in Confederate money, see Thorington v. Smith, 8 Wall. (U. S.) 12, 19 L. Ed. 361; The Confederate Note Case, 19 Wall. (U. S.) 548, 22 L. Ed. 196; Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275; and that title.

"*Value received*" is often inserted, but is not of any use in a negotiable bill; Hubble v. Fogartie, 3 Rich. (S. C.) 413, 45 Am. Dec. 775; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; Lines v. Smith, 4 Fla. 47; Coursin v. Ledlie's Adm'rs, 31 Pa. 506; 3 M. & S. 351.

A *direction* to place to the account of some one, drawer, drawee, or third person, is often added, but is unnecessary; Comyns, Dig. *Merchant*, F, 5; 1 B. & C. 398.

As per advice, inserted in a bill, deprives the drawee of authority to pay the bill until advised; Chitty, Bills 162.

It should be *subscribed* by the drawer, though it is sufficient if his name appear in the body of the instrument; 2 Ld. Raym. 1376; Claussen v. La Franz, 1 Ia. 231; May v. Miller, 27 Ala. 515; and should be *addressed* to the drawee by the Christian name and surname, or by the full style of the firm; 2 Pardessus, n. 335; Beawes, *Lex Merc.* pl. 3; Chitty, Bills 186.

Provision may be made by the drawer, and inserted as a part of the bill, for applying to another person, for a return without protest, or for limiting the damages for re-exchange, expense, etc., in case of the failure or refusal of the drawee to accept or to pay; Chitty, Bills 188.

A *bona fide* holder of a bill negotiated before maturity merely as a security for an antecedent debt is not affected, without notice, by equities or defences between the original parties; Brooklyn City & N. R. Co. v. Bank, 102 U. S. 14, 26 L. Ed. 61.

A certificate, made and payable in a state out of a particular fund, and purporting to be the obligation of a municipal corporation, is not governed by the law merchant, and is open in the hands of subsequent holders to the same defences as existed against the original payee; Indiana v. Glover, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243.

See INDORSEMENT; INDORSER; INDORSEE; ACCEPTANCE; PROTEST; DAMAGES; PROMISSORY NOTE; NEGOTIABLE INSTRUMENT; FOREIGN BILL OF EXCHANGE.

BILL OF GROSS ADVENTURE. In French Maritime Law. Any written instrument which contains a contract of bottomry, respondentia, or any other kind of maritime loan. There is no corresponding English term. Hall, Marit. Loans 182. See BOTTOMRY; RESPONDENTIA.

BILL OF HEALTH. A certificate, properly authenticated, that a certain ship or vessel therein named comes from a place where no contagious distempers prevail, and that none of the crew at the time of her departure were infected with any such distemper.

It is generally found on board ships coming from the Levant, or from the coasts of Barbary where the plague prevails; 1 Marsh. Ins. 408; and is necessary whenever a ship sails from a suspected port, or where it is required at the port of destination; Holt 167; 1 Bell, Comm. 5th ed. 553.

BILL OF INDICTMENT. A written accusation of one or more persons of a crime or misdemeanor, lawfully presented to a grand jury. If twelve or more members of the jury are satisfied that the accused ought to be tried, the return is made, A true bill; but when no sufficient ground is shown for putting the accused on trial, a return is made, Not a true bill, or, Not found; formerly, *Ignoramus*, and this phrase is still sometimes used. See INDICTMENT; TRUE BILL.

BILL OF INFORMATION. One which is instituted by the attorney-general or other proper officer in behalf of the state or of those whose rights are the objects of its care and protection. It is usually termed simply an information, or information in equity.

If the suit immediately concerns the right

of the state, the information is generally exhibited without a relator. If it does not immediately concern those rights, it is conducted at the instance and under the immediate direction of some person whose name is inserted in the information and is termed the relator. In case a relator is concerned, the officers of the state are not further concerned than as they are instructed and advised by those whose rights the state is called upon to protect and establish. In such case the attorney-general simply determines *in limine* whether the suit is one proper to be instituted in his name, and the subsequent proceedings are usually conducted by the solicitor of the relator at the cost of the latter. See Harrison, Ch. Pr. 151; Mitf. Eq. Pl. (by Tyler) 196; INFORMATION.

BILL OF INTERPLEADER. One in which the person exhibiting it claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. Cooper, Eq. Plead. 43; Mitf. Eq. Pl. 32; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Adams v. Dixon, 19 Ga. 513, 65 Am. Dec. 608.

An interpleader is a proceeding in equity for the relief of a party against whom there are, at law, separate and conflicting claims, whether in suit or not, for the same debt, duty, or thing, and where a recovery by one of the claimants will not, at law, protect the party against a recovery for the same debt or duty by the other claimant. It is out of this latter circumstance that the equity to relief arises; *per* Bates, Ch., Hastings v. Cropper, 3 Del. Ch. 165; Badeau v. Rogers, 2 Paige, Ch. (N. Y.) 209; and where the facts present a proper case for an interpleader, equity will not entertain a bill simply to restrain one of the parties claiming the fund in controversy from prosecuting his claims until the other party has failed to establish his claim; Hastings v. Cropper, 3 Del. Ch. 165; but leave will be granted to amend by making it a bill of interpleader by adding proper parties, bringing the fund into court, and filing the affidavit denying collusion; *id.*

A bill exhibited by a third person, who, not knowing to whom he ought of right to render a debt or duty or pay his rent, fears he may be hurt by some of the claimants, and therefore prays that they may interplead, so that the court may judge to whom the thing belongs, and he be thereby safe on the payment; Pract. Reg. 78; Bedell v. Hoffman, 2 Paige Ch. (N. Y.) 199; City Bank v. Bangs, *id.* 570; Cameron v. The Marcellus, 48 N. C. 83; Hall v. Craig, 125 Ind. 523, 25 N. E. 538; Glaser v. Priest, 29 Mo. App. 1.

A bill of the former character may, in general, be brought by one who has in his possession property to which two or more lay claim; Strange v. Bell, 11 Ga. 103; Consociated Presbyterian Soc. of Green's Farm v. Staples, 23 Conn. 544; Herndon v. Higgs, 15 Ark. 389; Freeland v. Wilson, 18 Mo. 380; Heusner v. Ins. Co., 47 Mo. App. 336.

Such a bill must contain the plaintiff's statement of his rights, negativing any interest in the thing in controversy; 3 Story, Eq. Jur. § 821; but showing a clear title to maintain the bill; 3 Madd. 277; and also the claims of the opposing parties; Mohawk & H. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 384; 7 Hare 57; Robards v. Clayton, 49 Mo. App. 608; that the adverse title of the claimants is derived from a common source is sufficient; Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; must have annexed to it the affidavit of the plaintiff that there is no collusion between him and either of the parties; Farley v. Blood, 30 N. H. 354; must contain an offer to bring money into court if any is due, the bill being demurrable, if there is failure, unless it is offered or else actually produced; Mitf. Eq. Pl. 49; Barton, Suit in Eq. 47, n. 1; must show that there are persons in being capable of interpleading and setting up opposing claims; 18 Ves. Ch. 377; it is also demurrable if upon its face it shows that one of the defendants has no claim to the debt due from the complainant; Pusey & Jones Co. v. Miller, 61 Fed. 401.

These proceedings should not be brought except when there is no other way for one to protect himself, and in order to maintain the action, it is necessary to show that the plaintiff has not acted in a partisan manner as between the claimants; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21.

It should pray that the defendants set forth their several titles, and interplead, settle, and adjust their demands between themselves. It also generally prays an injunction to restrain the proceedings of the claimants, or either of them, at law; and in this case the bill should offer to bring the money into court; and the court will not, in general, act upon this part of the prayer unless the money be actually brought into court; Mohawk & H. R. Co. v. Clute, 4 Paige, Ch. (N. Y.) 384; Richards v. Salter, 6 Johns. Ch. (N. Y.) 445.

In the absence of statutes, such a bill does not ordinarily lie, except where there is privity of some sort between all the parties, and where the claim by all is of the same nature and character; 3 Beav. 579; Story, Eq. Jur. § 807; Lincoln v. R. Co., 24 Vt. 639; White Water Valley Canal Co. v. Comegys, 2 Ind. 469. The granting of an order of interpleader is within the judicial discretion; Taylor v. Satterthwaite, 2 Misc. 441, 22 N. Y. Supp. 187.

The decree for interpleader may be obtained after a hearing in the usual manner; 4 Bro. Ch. 297; City Bank v. Bangs, 2 Paige, Ch. (N. Y.) 570; or without a hearing, if the

defendants do not deny the statements of the bill; 16 Ves. Ch. 203; Story, Eq. Pl. § 297 *a*.

A bill in the nature of a bill of interpleader will lie in many cases by a party in interest to ascertain and establish his own rights, where there are other conflicting rights between third persons; Story, Eq. Pl. § 297 *b*; Bedell v. Hoffman, 2 Paige, Ch. (N. Y.) 199; Cameron v. The Marcellus, 48 N. C. 83.

In a bill of interpleader the complainant being indifferent between the parties, the duty of his solicitor is ended as such, when the bill is filed, and he has no interest in the decree except that the bill shall be adjudged to be properly filed. The solicitor may then appear for one of the parties, but only by leave of the court, which will be granted only upon consideration of the special circumstances of the facts of the case and the conclusion that the case is a proper one for granting the leave; Morrow v. Robinson, 4 Del. Ch. 534, note; Webster v. McDaniel, 2 *id.* 297; and see Houghton v. Kendall, 7 Allen (Mass.) 72. See INTERPLEADER.

A bill of interpleader is said in 22 Harv. L. R. 294, to lie on behalf of one who is in the position of an innocent stakeholder who is ready to do his duty, in order to free him from subjection to two suits and the possibility of a double liability. The requisites of the suit are, roughly speaking, ten in number: 1. The adverse claims must be mutually exclusive; National Ins. Co. v. Pingrey, 141 Mass. 411, 6 N. E. 93; Bassett v. Leslie, 123 N. Y. 396, 25 N. E. 386. It would be manifestly unjust to make the claimants fight each other when the validity of one claim is not dependent upon the invalidity of the other; there can then be no dispute between the claimants. For this reason, if one of the claimants gets a verdict or judgment the bill no longer lies; see Maxwell v. Leichtman, 72 N. J. Eq. 780, 65 Atl. 1007. 2. The complainant must be willing to bring into court or surrender all that is claimed by either defendant; M. & H. R. Co. v. Clute, 4 Paige (N. Y.) 384. If he has a counterclaim against either claimant he cannot have it determined in such a proceeding. 3. The position of the stakeholder must be such a precarious one that he really needs the aid of equity to prevent injustice. Thus, one who is in possession of land claiming no title need only move out. So also the bill does not lie if all the claims would be settled in one suit at law; Fitts v. Shaw, 22 R. I. 17, 46 Atl. 42; or if one of the claims is clearly invalid; M. & H. R. Co. v. Clute, *supra;* or both are illegal; Applegarth v. Colley, 2 Dowl. N. S. 223. 4. There must be no collusion between the complainant and either claimant; Murietta v. So. Amer. Co., 62 L. J. Q. B. N. S. 396. The bill lies to help only a disinterested stakeholder. 5. The stakeholder must not have been placed in his precarious position through his own fault; Horner v. Willcocks, 1 Ir. Jur. O. S. 136; and he must not be guilty of laches in pursuing his remedy. 6. If equity is unable to enjoin the prosecution of one of the claims at law, it can give no relief. Thus a state court declined to entertain a bill because it could not enjoin a federal court from enforcing its judgment; Smith v. Reed, 74 N. J. Eq. 776, 70 Atl. 961. These six requisites are based on sound principles of justice. The following, although supported by authority, are extremely technical and will be found upon examination to have a doubtful equitable basis. 7. It is often required that all the claims be derived from a common source; First Nat. Bank v. Bininger, 26 N. J. Eq. 345. This is a survival of the narrow view of interpleader held by the common law. The requisite of privity is foreign to the purpose of the bill; for the position of a stakeholder is equally precarious irrespective of the sources from which the defendants derive their claims. The refusal to allow an interpleader therefore seems unsound; see Crane v. McDonald, 118 N. Y. 648, 23 N. E. 991; 17 Harv. L. Rev. 489. 8. It is sometimes required that the stakeholder have no claim or interest in the stake; see 4 Pomeroy, Eq. Jurisp. § 1325; Maclennan, Interpleader 64. If the amount of the stakeholder's charge is disputed, the bill will not lie; Lawson v. Warehouse Co., 70 Hun 281, 24 N. Y. Supp. 281; but it is otherwise if the claim is available against, and admitted by, both defendants; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592. The result should be the same where the lien is available against only one of the defendants, if he does not dispute it. Hence this requirement is really covered by the second class above. 9. The stakeholder must have incurred no collateral or independent liability to either claimant; Bartlett v. His Imperial Majesty, 23 Fed. 257; Crawshay v. Thornton, 2 My. & C. 1; *contra*, Attenborough v. London, etc., Co., 3 C. P. D. 450 (statutory); since, it is argued, one of the claimants may be subjected to two suits to enforce his rights. On the contrary (and this seems to be the better and more modern view) the bill will settle once and for all the ownership of the *res;* and it may settle the whole controversy; see In re Mersey Docks, [1890] 1 Q. B. 546. The fact of the collateral liability is immaterial and relief should therefore be granted. 10. Lastly, it is insisted that the same thing, debt, or duty, must be claimed by all the defendants; Slaney v. Sidney, 14 M. & W. 800. See 4 Pomeroy, Eq. Jurisp. § 1323. This however seems unnecessarily refined in its technicality. So long as the claims are mutually exclusive, and the stakeholder is willing to bring into court the full amount claimed by either, it would seem that he should be entitled to maintain his bill. And in a few cases it has so been held; Thomson v. Ebbets, Hopk. Ch. (N. Y.) 272.

In Hayward & Clark v. McDonald, 192 Fed. 890, 113 C. C. A. 368, it was said that the true limits of equity jurisdiction in bills of interpleader is not precisely settled; but that a strict bill is one in which the complainant claims no relief against either defendant. There are, however, innumerable cases of bills in the nature of bills of interpleader in which the complainant may be entitled to relief by such bill; among these is a case where the complainant has property in which others have conflicting claims, but in which the complainant may have equitable rights himself, citing Van Winkle v. Owen, 54 N. J. Eq. 253, 34 Atl. 400; Stephenson & Coon v. Burdett, 56 W. Va. 109, 48 S. E. 846, 10 L. R. A. (N. S.) 748; Groves v. Sentell, 153 U. S. 465, 14 Sup. Ct. 898, 38 L. Ed. 785.

BILL OF LADING. The written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight.

A written acknowledgment of the receipt of certain goods and an agreement for a consideration to transport and to deliver the same at a specified place to a person therein named or his order. See Porter, Bills of Lading. See also The Delaware, 14 Wall. (U. S.) 596, 20 L. Ed. 779.

It is at once a receipt and a contract; St. Louis, I. M. & S. R. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Schouler, Pers. Prop. 408; but it has been said that rather than to consider it as a mere receipt, it seems better to regard it as analogous to a negotiable instrument; 19 Harv. L. Rev. 391. A bill of lading ordinarily represents title to the goods covered by it; Peters v. Elliott, 78 Ill. 321; and this is said to be the prevalent American view; 12 Harv. L. Rev. 436.

A memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order on board of his ship or vessel, therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the dangers of the sea excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same; 1 Term 745; Abb. Sh. 216; Code de Comm. art. 281.

A similar acknowledgment made by a carrier by land.

A through bill of lading is one where a railroad contracts to transport over its own line for a certain distance carloads of merchandise or stock, there to deliver the same to its connecting lines to be transported to the place of destination at a fixed rate per car-load for the whole distance; Gulf, C. & S. F. R. Co. v. Vaughn, 4 Willson, Ct. App. Tex. § 182, 16 S. W. 775.

It should contain the name of the shipper or consignor; the name of the consignee; the names of the vessel and her master; the places of shipment and destination; the price of the freight, and, in the margin, the marks and numbers of the things shipped. Jacobsen, Sea Laws.

The general rule that contracts are governed as to nature, validity, and interpretation by the *lex loci contractus*, unless it clearly appears that the parties had some other law in view, is applicable to a bill of lading; Brockway v. Exp. Co., 171 Mass. 158, 50 N. E. 626; Frasier v. R., 73 S. C. 140, 52 S. E. 964; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 42 L. R. A. 210, 66 Am. St. Rep. 253; Herf & Frerichs Chemical Co. v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346; but where one provides for the delivery of goods in a state it has been held to be a contract of that state although made in another state; Pennsylvania Co. v. Yoder, 25 Ohio Cir. Ct. 32; C., C., C. & St. L. Ry. Co. v. Simon, 15 *id.* 123. Any reasonable doubt as to the construction of the printed portion should be resolved against the carrier; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245.

Writing is unnecessary and an oral contract satisfactorily proved, if there is no fraud or imposition, is equally obligatory; Missouri K. & T. Ry. Co. v. Patrick, 144 Fed. 632, 75 C. C. A. 434. A promise to carry on the faith of which the shipper buys goods is a contract of carriage; Bigelow v. Ry. Co., 104 Wis. 109, 80 N. W. 95; Meloche v. Ry. Co., 116 Mich. 69, 74 N. W. 301; and so is the receipt of goods and undertaking to deliver; Indiana, I. & I. R. Co. v. Mfg. Co., 118 Ill. App. 652; but a mere promise to ship is not sufficient; Southern Ry. Co. v. Wilcox, 99 Va. 394, 39 S. E. 144. It was held in effect that the legal liability of a common carrier is part of the contract as if written in it; Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148; and so is the obligation to ship within a reasonable time; Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586, 28 N. E. 208.

Ordinarily parol evidence is not admissible in the absence of fraud or mistake to vary a bill of lading; Inman & Co. v. R. Co., 159 Fed. 960; De Sola v. Pomares, 119 Fed. 373; Tallassee Falls Mfg. Co. v. R. R., 117 Ala. 520, 23 South. 139, 67 Am. St. Rep. 179; Chouteaux v. Leech & Co., 18 Pa. 224, 57 Am. Dec. 602; Keller v. R. Co., 10 Pa. Super. Ct. 240; Gibbons v. Robinson, 63 Mich. 146, 29 N. W. 533; but it has been held competent to contradict a statement that the goods were received in apparent good order; Foley v. R. Co., 96 N. Y. Supp. 182; and, of course, in case of error or fraud; Sonia Cotton-Oil Co. v. The Red River, 106 La. 42, 30 South. 303, 87 Am. St. Rep. 293; and it is said to make a *prima facie* case only and to be open to explanation; Planters' Fertilizer Mfg. Co. v. Elder, 101 Fed. 1001, 42 C. C. A. 130; or to

correct an omission or ambiguity; Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 South. 988; either as to the route; Louisville & N. R. Co. v. Duncan, 137 Ala. 446, 34 South. 988; or the time of arrival; Sloop v. R. Co., 117 Mo. App. 204, 84 S. W. 111.

Where the conditions are on the face and in the body of the bill of lading, and the consignor receives it and ships the goods without complaint, he is presumed to have assented to these conditions, and they become, if not inimical to law, a valid contract. The shipper's signature is not essential; Inman & Co. v. R. Co., 159 Fed. 960; Smith v. Express Co., 108 Mich. 572, 66 N. W. 479; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Com. v. R. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

An exception in a bill of lading, limits the liability, not the duty; hence it is the duty of the owner by himself and his servants to do all he can to avoid the excepted perils; Bowen, L. J., in [1891] 1 Q. B. 619 (C. A.).

An exception of losses caused by (*inter alia*) "pirates, robbers, or thieves of whatever kind, whether on board or not, by land or sea," did not apply to thefts committed by persons in the service of the ship; [1891] 1 Q. B. 619 (C. A.).

Exceptions in a bill of lading are to be construed most strongly against the shipowner. As between the shipowner and the shipper, the bill of lading only can be considered as the contract; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

Under the Harter Act (*q. v.*) there is provided in section 2 a prohibition of the insertion "in any bill of lading or shipping document" of any covenant or agreement relieving the owner from the exercise of due diligence in equipping, etc., vessels. The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. Under this act a stipulation limiting the liability of a vessel owner to $100 was held invalid, not only under the Harter Act but under the decisions upon the subject generally; Calderon v. S. S. Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033. As to the construction of the Harter Act generally, see SHIP.

Though it is not necessary that the shipper should sign the bill of lading, yet if its terms restrict the carrier's common-law liability, his assent thereto must be shown. This assent need not be express, it is sufficiently indicated by an acceptance of the bill of lading containing the restrictions; Port. B. of L. 157; Lawrence v. R. Co., 36 Conn. 63; Wertheimer v. R. Co., 1 Fed. 232; McMillan v. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Boorman v. Exp. Co., 21 Wis. 152; Robinson v. Transp. Co., 45 Ia. 476. Where the bill contains a limitation of the carrier's common law liability and is accepted by the shipper, there is a limitation of the liability which binds all the parties, although the shipper could not read, and did not know of the limitation in the bill; Jones v. R. Co., 89 Ala. 376, 8 South. 61; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Nines v. R. Co., 107 Mo. 475, 18 S. W. 26; Dimmitt v. R. Co., 103 Mo. 433, 15 S. W. 761. See Louisville & N. R. Co. v. Meyer, 78 Ala. 597.

A bill of lading is usually made in three or more original parts, one of which is sent to the consignee with the goods, one or more others are sent to him by different conveyances, one is retained by the merchant or shipper, and one should be retained by the master. Abbott, Shipp. 217; 2 Dan. Neg. Inst. § 1735. Where one is marked "original" and the other "duplicate," the latter is in effect an original; Missouri Pac. R. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

It is regarded as so much merchandise of the kind covered by it; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892. It is not negotiable, but rather a symbol or representative of the goods themselves; *id;* Raleigh & Gaston R. Co. v. Lowe, 101 Ga. 320, 28 S. E. 867; Brown v. Babcock, 3 Mass. 29; Stollenwerck v. Thacher, 115 Mass. 224. At common law it is *quasi* negotiable; 1 T. R. 63; Lickbarrow v. Mason, 1 Sm. L. C. 1148; National Bank of Bristol v. R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; and in many of the states is made so by statute. A statute making bills of lading negotiable by endorsement does not impart to them all the characteristics of bills and notes; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892. The mere sending of a bill of lading without endorsement or actual delivery of the goods to the consignee does not, of itself, pass title; Delta Bag Co. v. Kearns, 112 Ill. App. 269; it is *prima facie* evidence, but not conclusive; Harrison v. Hixson, 4 Blackf. (Ind.) 226; but delivery *without* endorsement as security for advances, or for a valuable consideration, transfers title; Lewis v. Bank, 166 Ill. 311, 46 N. E. 743; Jeffersonville R. Co. v. Irvin, 46 Ind. 180; American Zinc Lead & Smelting Co. v. Lead Works, 102 Mo. App. 158, 76 S. W. 668; National Newark Banking Co. v. R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A. 595, 103 Am. St. Rep. 825; Neill v. Produce Co., 41 W. Va. 37, 23 S. E. 702. There may also be constructive delivery; White Live Stock Commission Co. v. R. Co., 87 Mo. App. 330; Storey v. Hershey, 19 Pa. Super. Ct. 485; or by way of estoppel against the carrier and also against the shipper and endorser; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607.

It is also assignable by endorsement, whereby the assignee becomes entitled to the goods subject to the shipper's right of stoppage in transitu, in some cases, and to various

liens; Port. B. of L. 438; Pollard v. Reardon, 65 Fed. 848, 13 C. C. A. 171. See LIENS; STOPPAGE IN TRANSITU.

By endorsement to a vendee, the vendor transfers the possession to him; People v. Midkiff, 71 Ill. App. 141; and the property; Law v. Hatcher, 4 Blackf. (Ind.) 364. As against the carrier, when the bill of lading is attached to sight drafts, the transferee is entitled to receive the goods; Walters v. R. Co., 66 Fed. 862, 14 C. C. A. 267; or to sue for wrongful delivery; Tishomingo Sav. Inst. v. Johnson (Ala.) 40 South. 503; to the pledgor without surrender of the bills; Chesapeake S. S. Co. v. Bank, 102 Md. 589, 63 Atl. 113; even when the bill of lading did not contain the words "or order"; Chicago & S. R. Co. v. Bank, 26 Ind. App. 600, 59 N. E. 43. One in possession under a bill of lading can sue for conversion against one with no better title; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137. Placing a car on a side track and notifying the transferee is a sufficient delivery; Anchor Mill Co. v. Ry. Co., 102 Ia. 262, 71 N. W. 255. The assignee of a bill of lading as collateral security for drafts upon the consignee is in a general sense the absolute owner of the goods; 2 Term 63; at least to the extent and until payment of the drafts; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214; Willman Mercantile Co. v. Fussy, 15 Mont. 514, 39 Pac. 738, 48 Am. St. Rep. 698; Missouri Pac. R. Co. v. Law, 57 Neb. 560, 78 N. W. 291; and the consignee takes the goods subject to the rights of the holder of the bill of lading and cannot set off the price against a debt due from the consignor; Emery v. Bank, 25 Ohio St. 360, 18 Am. Rep. 299. But in Mason v. Cotton Co., 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, 128 Am. St. Rep. 635, it was held that the right of such assignee does not extend so far as to make him liable for a breach of warranty by the consignor in the sale of the property, and the case in Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, which was *contra* (and which the Supreme Court of Alabama followed in Haas v. Bank, 144 Ala. 562, 39 South. 129, 1 L. R. A. [N. S.] 242, 113 Am. St. Rep. 61, and the Supreme Court of Tennessee refused to follow in Leonhardt & Co. v. Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. [N. S.] 887, 119 Am. St. Rep. 994), was expressly overruled after having been subjected to much criticism. See the above cited cases, the opinions in which and the annotations collect the cases.

But the assignee obtains by such assignment only the title of his assignor, and the negotiability is mostly the quality of transferability by endorsement and delivery which enables the rightful assignee to sue in his own name; Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892; Stollenwerck v. Thacher, 115 Mass. 224; Dickson v. Elevator Co., 44 Mo. App. 498. It is only negotiable so far that the owner may transfer it by endorsement or assignment so as to vest the legal title in the assignee; Douglas v. Bank, 86 Ky. 176, 5 S. W. 420, 9 Am. St. Rep. 276.

Delivery of a bill of lading is delivery of the property; Forbes v. R. Co., 133 Mass. 154; but the transfer from one who wrongfully attains it, having no title to the property shipped, passes no title as against the true owner; Merchants' Nat. Bank v. Bales, 148 Ala. 279, 41 South. 516; and the transfer by endorsement of a bill of lading, drawn to the shipper's order, vests the title to the goods in the transferee, as purchaser or pledgee, as the case may be; Scheuermann v. Fruit Co., 123 La. 55, 48 South. 647.

It is considered to partake of the character of a written contract, and also of that of a receipt; St. Louis, I. M. & S. Ry. Co. v. Knight, 122 U. S. 79, 7 Sup. Ct. 1132, 30 L. Ed. 1077; Schoul. Pers. Prop. 408; The Missouri v. Webb, 9 Mo. 193; Mears v. R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192; Chicago & N. W. Ry. Co. v. Simon, 160 Ill. 648, 43 N. E. 596. In so far as it admits the character, quality, or condition of the goods at the time they were received by the carrier, it is a mere receipt, and the carrier may explain or contradict it by parol; Missouri Pac. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Fasy v. Nav. Co., 77 App. Div. 469, 79 N. Y. Supp. 1103, affirmed without opinion Fasy v. Nav. Co., 177 N. Y. 591, 70 N. E. 1098; Baltimore & O. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; but as respects the agreement to carry and deliver, it is a contract, and must be construed according to its terms; Ellis v. Willard, 9 N. Y. 529; White v. Van Kirk, 25 Barb. (N. Y.) 16; 1 Abb. Adm. 209, 397; Louisville & N. R. Co. v. Fulgham, 91 Ala. 555, 8 South. 803; Snow v. R. Co., 109 Ind. 422, 9 N. E. 702; Portland Flouring Mills Co. v. Ins. Co., 130 Fed. 860, 65 C. C. A. 344, affirming British & Foreign Marine Ins. Co. v. Mills Co., 124 Fed. 855. And see Rhodes v. Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859.

One who receives it without objection is presumed to have assented to its terms; Cox v. R. Co., 170 Mass. 129, 49 N. E. 97; mere ignorance from failure to read or ascertain them is not sufficient in the absence of fraud or concealment; Schaller v. Ry. Co., 97 Wis. 31, 71 N. W. 1042. Reasonable doubt as to the construction of its printed terms is resolved against the carrier; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245, affirming Doyle v. R. Co., 126 Fed. 841. Where a bill of lading is given, and accepted without objection, it is the real contract by which the mutual obligations of the parties is to be governed and not any prior agreement; The Caledonia, 43 Fed. 681.

Stipulations stamped on it before delivery

are part of the contract; The Henry B. Hyde, 82 Fed. 681. And one in a bill of lading that all claims for damages must be presented within 30 days from its date is reasonable; The Queen of the Pacific, 180 U. S. 49, 21 Sup. Ct. 278, 45 L. Ed. 419; as is also an exemption of loss by fire though the regular freight rates were charged; Arthur v. R. Co., 204 U. S. 506, 27 Sup. Ct. 338, 51 L. Ed. 590. In an action against a carrier for damages to property transported the shipper cannot set up a special contract and recover on an implied one, nor can he rely on a parol agreement and recover on proof of a written contract; Evansville & T. H. R. Co. v. McKinney, 34 Ind. App. 402, 73 N. E. 148.

A clean bill of lading is one which contains nothing in the margin qualifying the words in the bill of lading itself; 61 Law T. 330. Under a "clean" bill of lading in the usual form (viz., one having no stipulation that the goods shipped are to be carried on deck), there is a contract implied that the goods shall be carried under the deck; and parol evidence to the contrary will not be received; Creery v. Holly, 14 Wend. (N. Y.) 26; Sayward v. Stevens, 3 Gray (Mass.) 97; The Governor Carey, 2 Hask. 487, Fed. Cas. No. 5,645a; but evidence of a well-known and long-established usage is admissible, and will justify the carriage of goods on deck, though, under a general rule, the party relying on a local custom must prove it by clear and conclusive evidence; The Paragon, 1 Ware 322, Fed. Cas. No. 10,708.

See Carriers; Freight; Shipping; Harter Act.

It was decided in England that the master of a ship who signed a bill of lading for goods which had never been received was not to be regarded as the agent of the owner so as to make the latter responsible; 10 C. B. 665. This decision was immediately followed by an act of Parliament, which makes clear the right of a holder for valuable consideration of such a bill of lading as against the master or other person signing the bill, unless the holder of the bill had notice that the goods had not been taken on board; 18 & 19 Vict. The statute makes the bill conclusive against the person who signed the document; 18 Q. B. D. 147. As far as the shipowner or other principal of the agent issuing the document is concerned, the law of the first decision has been constantly followed in England; [1902] A. C. 117; Scotland; 25 Sc. L. Rep. 112; and Canada; 5 Duval 179. In the United States the question has given rise to great difference of opinion. Most of the cases relate to bills of lading issued by station agents of railroads. The English rule has been followed in Missouri P. R. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; Friedlander v. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Clark v. S. S. Co., 148 Fed. 243; The Isola Di Procida, 124 Fed. 942; The Asphodel, 53 Fed. 835; Martin v. Ry. Co., 55 Ark. 510, 19 S. W. 314; National Bank of Commerce v. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566; Hazard v. R. Co., 67 Miss. 32, 7 South. 280; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Williams v. R. Co., 93 N. C. 42, 53 Am. Rep. 450; Anderson v. Mills Co., 37 Or. 483, 60 Pac. 839, 50 L. R. A. 235, 82 Am. St. Rep. 771; Roy & Roy v. R. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Ann. Cas. 728. Other cases hold that as against a *bona fide* purchaser the principal is estopped; Jasper Trust Co. v. R. Co., 99 Ala. 416, 14 South. 546, 42 Am. St. Rep. 75; Relyea v. Mill Co., 42 Conn. 579; Wichita Sav. Bank v. R. Co., 20 Kan. 519; Sioux City & Pac. R. Co. v. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488; Armour v. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Brooke v. R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Watson v. R. Co., 9 Heisk. (Tenn.) 255. In countries where the civil law prevails, the carrier would generally be held liable; 25 Sc. L. Rep. 112; French Commercial Code, art. 283; and the same is copied in Belgium, Holland, Italy, Spain, Mexico and many Central and South American countries; 34 Reichsgericht 79.

As against the consignee, the bill of lading is not conclusive as to the quantity of goods received, though of great weight; the ship may show that she delivered all the cargo she received; James v. Oil Co., 191 Fed. 827, 112 C. C. A. 341.

There are statutes in many states making it a criminal offence for any agent of a carrier to issue documents of title when the goods have not been received. Such provision is in the Uniform act. An act to make uniform the law of bills of lading has been passed in Illinois, Iowa, Massachusetts, Maryland, New York, Ohio, Pennsylvania, Connecticut, New Jersey, Louisiana and Alaska.

Its chief provisions make bills of lading non-negotiable or straight bills, and negotiable or order bills. Negotiable bills must not be issued in sets. Duplicate as well as non-negotiable bills must be so marked. The insertion of the name of the person to be notified does not affect the negotiability of the bill. Upon receipt of the bill, if consignor makes no objection, he and those after him are bound by its terms. Negotiable bills must be cancelled when goods are delivered, and if not the carrier is liable to a *bona fide* purchaser of the bill without notice of the delivery. Such bills must be so marked when a part is delivered. Any alteration of a bill without consent is void and the bill is enforceable according to its original tenor. In the cases of lost or destroyed bills the court may order delivery upon sufficient proof and the giving of a bond. The carrier has reasonable time to ascertain the validity of

claims, but an adverse title is no defence to the consignee of a non-negotiable bill or to the holder of a negotiable bill unless enforced by legal process. The issuance of a bill, where no goods have been received by an agent whose actual or apparent authority includes the issuing of bills of lading, makes the carrier liable to one who has given value in good faith relying upon the description therein of the goods. The carrier may, by inserting the words "shipper's load and count" or such like words, indicate that the goods were loaded by the shipper and the description made by him; and if such is the case the carrier shall not be liable for damages caused by improper loading, non-receipt or mis-description of the goods. If goods are under negotiable bills then one cannot attach or levy; the remedies are to reach the bills. The carrier has a lien for his charges, but this must be stated on the bill. Negotiation may be by delivery or endorsement and the rights of the holder are substantially the same as the holder of a negotiable note or bill of exchange. The endorser is not a guarantor but is held to give the usual warranties. One who holds a bill as security, and, receiving payment of the debt, transfers the bill, shall not be deemed a guarantor. The manner in which the bill is drawn may indicate the rights of the buyer and seller. If the seller sends a bill with a sight draft attached, the buyer is bound to honor the draft in order to secure any rights under the bill, but if the buyer transfers it to a *bona fide* holder in due course, the latter is protected. Negotiation defeats the vendor's lien in the case of an order bill. Issuing a bill, where goods have not been received, is a criminal offence. It is likewise a criminal offence for a person to ship goods to which he has no title or upon which there exists any lien, and where one takes an order bill which he negotiates with intent to deceive. Inducing a carrier to issue bill, when the person knows the carrier has not received the goods, is criminal. Any person who with intent to defraud issues or aids in issuing a non-negotiable bill, without the words "not negotiable" placed plainly upon the face, shall be guilty of a crime. England has a similar act.

BILL OF MIDDLESEX. A fiction by which the King's Bench acquired jurisdiction in ordinary civil suits. The court could proceed by bill against certain officials of the court, or against any persons accused of contempts, deceits or trespasses. But this process did not apply in actions of debt, detinue, account or covenant. A method was found in the fact or fiction of the custody of the marshal. It was held that a mere record on the rolls of the court that the defendant had given bail would be sufficient evidence of actual custody. To get this evidence on record a bill of Middlesex was filed stating that the defendant was guilty of trespass *vi et armis*—an offence falling properly within the jurisdiction of the court. The plaintiff gave pledges for the prosecution which, even in Coke's day, were John Doe and Richard Roe. The sheriff of Middlesex was then directed to produce the defendant to answer the plaintiff of a plea of trespass. If the sheriff made return to the bill of "*non est inventus*," a writ of *latitat* was issued to the sheriff of an adjoining county. This recited the bill of Middlesex and the proceedings thereon and stated that the defendant "*latitat et discurrit*" in the county and directed the sheriff to catch him. If the defendant did not live in Middlesex, the *latitat* was the first step taken. If the defendant appeared, the court obtained jurisdiction; if not, the plaintiff could enter an appearance for him and give as sureties John Doe and Richard Roe. This was called "common bail." In certain cases substantial bail was required; this was called "special bail."

The above process did not set forth the true cause of action. That was added by the so-called "*ac etiam*" clause stating the true cause of action. The supposed trespass gave jurisdiction; the real cause of action in the "*ac etiam*" clause authorized the arrest in default of "special bail." These fictions were abolished by 2 Will. IV. c. 39. See 1 Holdsw. Hist. E. L. 87. The "*nec non*" clause was used as a like fiction to give jurisdiction in certain cases to the Common Pleas.

BILL OF MORTALITY. A written statement or account of the number of deaths which have occurred in a certain district within a given time.

See VITAL STATISTICS.

BILL OF PAINS AND PENALTIES. A special act of the legislature which inflicts a punishment less than death upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. 2 Woodd. Lect. 625. It differs from a bill of attainder in this, that the punishment inflicted by the latter is death. The clause in the constitution prohibiting bills of attainder includes bills of pains and penalties; Story, Const. § 1338; Hare, Am. Const. L. 549; Cummings v. Missouri, 4 Wall. (U. S.) 323, 18 L. Ed. 356; Ex parte Law, 35 Ga. 285, 300, Fed. Cas. No. 8,126. See Fletcher v. Peck, 6 Cra. (U. S.) 138, 3 L. Ed. 162.

BILL OF PARCELS. An account containing in detail the names of the items which compose a parcel or package of goods. It is usually transmitted with the goods to the purchaser, in order that if any mistake has been made it may be corrected.

BILL OF PARTICULARS. A detailed informal statement of a plaintiff's cause of action, or of the defendant's set-off. It is an

account of the items of the claim, and shows the manner in which they arose.

The plaintiff is required, sometimes under statutory provisions, which vary widely in the different states, to file a bill of particulars, either in connection with his declaration; Com. v. Giles, 1 Gray (Mass.) 466; Moore v. Mauro, 4 Rand. (Va.) 488; Landon v. Sage, 11 Conn. 302; Soria v. Bank, 3 How. (Miss.) 46; Cregier v. Smyth, 1 Speers (S. C.) 298; or subsequently to it, upon request of the other party; Davis v. Hunt, 2 Bail. (S. C.) 416; Brown v. Calvert, 4 Dana (Ky.) 219; Watkins v. Brown, 5 Ark. 197; McCreary v. Hood, 5 Blackf. (Ind.) 316; Williams v. Sinclair, 3 McLean 289, Fed. Cas. No. 17,737; Dennison v. Smith, 1 Cal. 437; upon an order of the court, in some cases; Constable v. Hardenbergh, 76 Hun 434, 27 N. Y. Supp. 1022; in others, without such order.

He need not give particulars of matters which he does not seek to recover; 4 Exch. 486; nor of payments admitted; Williams v. Shaw, 4 Abb. Pr. (N. Y.) 209. See 6 Dowl. & L. 656.

The plaintiff is concluded by the bill when filed; Hall v. Sewell, 9 Gill (Md.) 146; and where he gives notice at the trial that he intends to rely only upon the count for an account stated, the notice operates as an amendment of the pleadings and an abandonment of the bill of particulars; Waidner v. Pauly, 141 Ill. 442, 30 N. E. 1025.

The defendant, in giving notice or pleading set-off, must give a bill of particulars; failing to do which, he will be precluded from giving any evidence in support of it at the trial; Starkweather v. Kittle, 17 Wend. (N. Y.) 20; Harding v. Griffin, 7 Blackf. (Ind.) 462; Rice's Ex'r v. Annatt's Adm'r, 8 Gratt. (Va.) 557.

The court may order the defendant to file a bill of particulars where he alleges matter by way of counterclaim; Peabody v. Cortada, 64 Hun 632, 18 N. Y. Supp. 622; where the defence is payment it will not be required; Moody v. Belden, 60 Hun 582, 15 N. Y. Supp. 119.

The bill must be as full and specific as the nature of the case admits in respect to all matters as to which the adverse party ought to have information; 16 M. & W. 773; but need not be as special as a count on a special contract. The object is to prevent surprise; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. (U. S.) 541, 9 L. Ed. 222; Smith v. Hicks, 5 Wend. (N. Y.) 51; Watkins v. Brown, 5 Ark. 197. If the bill is not sufficiently explicit, application should be made to the court for a more specific one, as the objection cannot be made on the trial; Buckeye Tp. v. Clark, 90 Mich. 432, 51 N. W. 528; Minneapolis Envelope Co. v. Vanstrom, 51 Minn. 512, 53 N. W. 768.

It is not error to refuse to strike out part of a bill of particulars; Lewis v. Godman, 129 Ind. 359, 27 N. E. 563.

According to ancient practice, a defect in a pleading in a divorce suit may in some states, and in England, be cured by filing a bill of particulars; but this will not supply the want of a more definite allegation; 12 P. D. 19; Realf v. Realf, 77 Pa. 31; Harrington v. Harrington, 107 Mass. 329; Sanders v. Sanders, 25 Vt. 713. This is not proper under the Code system, however; and has been abandoned in the Code states, except New York; Freeman v. Freeman, 39 Minn. 370, 40 N. W. 167. See Mitchell v. Mitchell, 61 N. Y. 398; Carpenter v. Carpenter, 17 N. Y. Supp. 195.

BILL OF PEACE. In Equity Practice. One which is filed when a person has a right which may be controverted by various persons, at different times, and by different actions. It is necessary to allege that the complainant is in possession or that both parties are out of possession; Boston & M. Consol. Copper & S. Mining Co. v. Ore Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626.

In such a case, the court will prevent a multiplicity of suits by directing an issue to determine the right and ultimately grant an injunction; 1 Madd. Ch. Pr. 166; 2 Story, Eq. Jur. § 852; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; The Thomas Gibbons, 8 Cra. (U. S.) 426, 3 L. Ed. 610; L. R. 2 Ch. 8; Bisph. Eq. 415. Such a bill cannot usually be maintained until the right of the complainant has been established at law; Bisph. Eq. § 417; and it must be filed on behalf of all who are interested in establishing the right; *id.*

Another species of bill of peace may be brought when the plaintiff, after repeated and satisfactory trials, has established his right at law, and is still in danger of new attempts to controvert it. In order to quiet the possession of the plaintiff, and to suppress future litigation, equity will grant a perpetual injunction; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Alexander v. Pendleton, 8 Cra. (U. S.) 462, 3 L. Ed. 624; Mitf. Eq. 143; Primm v. Raboteau, 56 Mo. 407; Douglass v. McCoy, 5 Ohio 522. A bill will lie to enjoin a defendant from interfering with plaintiff's tenants; Polk v. Rose, 25 Md. 153, 89 Am. Dec. 773. A bill to quiet title can be filed only by a party in possession, against a defendant who has been ineffectually seeking to establish a legal title by repeated actions of ejectment; and as a prerequisite to such bill it is necessary that the plaintiff's title should have been established by at least one successful trial at law; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. See BILL QUIA TIMET; BILL TO QUIET POSSESSION.

A community of interest in the law and fact involved is enough on which to found a bill of peace; Crawford v. R. Co., 83 Miss.

708, 36 South. 82, 102 Am. St. Rep. 476; *contra* Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813.

For violation of a city ordinance requiring street railroads under penalty, to furnish sufficient cars to prevent overcrowding, etc., the appellant had begun in the justice's court sixty suits against one appellee, and a hundred against the other, and was threatening more. The two appellees, for themselves and others similarly situated, filed a bill of peace to have the suits enjoined on the ground that the ordinance was unconstitutional. It was held a bill of peace would not lie; Chicago v. Ry. Co., 222 Ill. 560, 78 N. E. 890.

BILL OF PRIVILEGE. In English Law. The form of proceeding against an attorney of the court, who is not liable to arrest. Brooke, Abr. *Bille;* 12 Mod. 163.

It is considered a privilege for the benefit of clients; 4 Burr. 2113; Dougl. 381; and is said to be confined to such as practise; 2 Maule & S. 605. But see 1 Bos. & P. 4; 2 Lutw. 1667. See 3 Sharsw. Bla. Com. 289.

BILL OF PROOF. The claim made by a third person to the subject-matter in dispute between the parties to a suit in the court of the mayor of London. 2 Chitty, Pr. 492; 1 Marsh. 233.

BILL OF REVIEW. One which is brought to have a decree of the court reviewed, altered, or reversed.

It is only brought after enrollment; 1 Ch. Cas. 54; 3 P. Will. 371; Simpson v. Downs, 5 Rich. Eq. (S. C.) 421; 1 Story, Eq. Pl. § 403; and is thus distinguished from a bill in the nature of a bill in review, or a supplemental bill in the nature of a bill in review; Dexter v. Arnold, 5 Mas. 303, Fed. Cas. No. 3856; Greenwich Bank v. Loomis, 2 Sandf. Ch. (N. Y.) 70; Gilbert, For. Rom. c. 10, p. 182.

It must be brought either for error in point of law; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; Cooper, Eq. Pl. 89; or for some new matter of fact, relevant to the case, discovered since publication passed in the cause, and which could not, with reasonable diligence, have been discovered before; Irwin v. Meyrose, 7 Fed. 533; Putnam v. Day, 22 Wall. (U. S.) 60, 22 L. Ed. 764; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Wiser v. Blachly, 2 Johns. Ch. (N. Y.) 488; see U. S. v. Samperyac, 1 Hempt. 118, Fed. Cas. No. 16,216 *a;* Stevens v. Dewey, 27 Vt. 638; Foy v. Foy, 25 Miss. 207; Cocke v. Copenhaver, 126 Fed. 145, 61 C. C. A. 211; Hill v. Phelps, 101 Fed. 650, 41 C. C. A. 569; or to correct an error apparent on the face of a decree in the original suit; Osborne v. Land & Town Co., 178 U. S. 22, 20 Sup. Ct. 860, 44 L. Ed. 961; where there are no disputed questions of fact; Smyth v. Fitzsimmons, 97 Ala. 451, 12 South. 48.

If based on newly discovered evidence it requires leave of court; Buckingham v. Corning, 29 N. J. Eq. 238; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; Reynolds v. R. Co., 42 Fla. 387, 28 South. 861; Florida Cent. & P. R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283; the evidence must be new or else such as the party could not by diligence have known, and failure to produce it sooner must be explained; it must be controlling, not cumulative; Acord v. Corporation, 156 Fed. 989; Kern v. Wyatt & Co., 89 Va. 885, 17 S. E. 549. Granting it is discretionary with the court, and is subject to review; Reynolds v. R. Co., 42 Fla. 387, 28 South. 861; Florida Cent. & P. R. Co. v. Reynolds, 183 U. S. 471, 22 Sup. Ct. 176, 46 L. Ed. 283; it will be refused for laches; Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509; or if granting it would work hardship to innocent parties; Acord v. Corporation, 156 Fed. 989; Ricker v. Powell, 100 U. S. 104, 25 L. Ed. 527; if it is based upon fraud it is a matter of right; Cox v. Bank (Tenn.) 63 S. W. 237; so if filed for error of law appearing on the face of the record; Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; Denson v. Denson, 33 Miss. 560; a bill may join both error in law and newly discovered evidence; Acord v. Corporation, 156 Fed. 989. It is held that if for error of law, it must be filed within the time of appeal; Jorgenson v. Young, 136 Fed. 378, 69 C. C. A. 222; Taylor v. Easton, 180 Fed. 363, 103 C. C. A. 509; and for newly discovered evidence, within a reasonable time; Camp Mfg. Co. v. Parker, 121 Fed. 195; within two months after decree was held in time; Bruschke v. Verein, 145 Ill. 433, 34 N. E. 417. The practice is to petition for leave if leave be necessary; Massie v. Graham, Fed. Cas. No. 9,263. Granting leave does not prejudge the case at final hearing; Hopkins v. Hebard, 194 Fed. 301, 114 C. C. A. 261.

A rehearing upon the ground that the court had overlooked a controlling fact (not brought to its attention by counsel) was refused in Moneyweight Scale Co. v. Scale Co., 199 Fed. 905, 118 C. C. A. 235.

Application after judgment in the appellate court must be made in that court; Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047; Camp Mfg. Co. v. Parker, 121 Fed. 195; Keith v. Alger, 124 Fed. 32, 59 C. C. A. 552.

Where one proceeds to a decree after discovering facts on which a new claim is founded, he cannot afterwards file a supplemental bill in the nature of a bill of review on such new facts; Hood v. Green, 42 Ill. App. 664.

BILL OF REVIVOR. One which is brought to continue a suit which has abated before its final consummation, as, for example, by death, or marriage of a female plaintiff. It is not the commencement of a new suit, but a continuation of the old one; Clarke v. Mathewson, 12 Pet. (U. S.) 164, 9 L. Ed. 1041.

Under the new Supreme Court equity rule 35 (33 Sup. Ct. xxviii) it is not necessary to set forth any of the statements in the original suit unless the special circumstances of the case may require it.

It must be brought by the proper representatives of the person deceased, with reference to the property which is the subject-matter; 4 Sim. 318; Douglass v. Sherman, 2 Paige, Ch. (N. Y.) 358; Story, Eq. Pl. § 354.

BILL OF REVIVOR AND SUPPLEMENT. One which is a compound of a supplemental bill and bill of revivor, and not only continues the suit, which has abated by the death of the plaintiff, or the like, but supplies any defects in the original bill arising from subsequent events, so as to entitle the party to relief on the whole merits of his case. Westcott v. Cady, 5 Johns. Ch. (N. Y.) 334, 9 Am. Dec. 306; Mitf. Eq. Pl. 32, 74; 13 Ves. 161; Eastman v. Batchelder, 36 N. H. 141, 72 Am. Dec. 295; Pendleton v. Fay, 3 Paige, Ch. (N. Y.) 204.

BILL OF RIGHTS. A formal and public declaration of popular rights and liberties.

The document pre-eminently known by that name was the English statute, 1 W. and M., Sess. 2, c. 2 (1689).

What was known as the Declaration of Right was delivered to the Prince and Princess of Orange (afterwards William III. and Mary) by the English lords and commons, and in December, 1689 (at the second session of the Convention Parliament, which had reassembled October 25, 1689), it was, with some amendments, few but important, enacted into a statute known as the Bill of Rights. The Declaration was presented to the new monarchs as embodying the conditions of their election, and only after their acceptance of its terms was proclamation of their accession made, on February 13, 1689; 2 Gneist, Hist. Eng. Const. 316, note.

The Bill of Rights contained 13 clauses or guaranties, suggested by the illegal and arbitrary acts previously committed by the Crown. These were a declaration of the *illegality* of (1) the pretended power of the suspension of laws or their execution, by regal authority, without consent of Parliament; (2) the recent assumption and exercise of the same power; (3) the commission for erecting the late Court of Commissioners for ecclesiastical causes and other similar commissions and courts; (4) levying money for the use of the Crown by pretense of prerogative without grant of Parliament; (6) raising or keeping a standing army in time of peace, without consent of Parliament. There were also *declarations* in favor of (5) the right of petition; (7) the right of Protestants to bear arms; (8) free elections of members of Parliament; (9) freedom of speech and debates in Parliament, which should not be questioned elsewhere; (10) that excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; (11) the due impanelling and return of jurors, and that those in treason trials should be freeholders; (12) that grants and promises of fines and forfeitures before conviction are illegal and void; (13) that Parliament ought to be held frequently.

The absence of what was popularly known as a Bill of Rights in the Federal Constitution, as originally adopted, was the cause of some opposition to the work of the Convention which framed it, and an effort was made to secure its insertion by Congress. This failed and it was believed by Madison, and those who joined him in opposing the movement to amend, that its success would, by creating confusion as to what instrument was to be ratified, have endangered the final adoption of the Constitution. 2 Curtis, Hist. Const. U. S. 498.

Subsequently and very soon after the original instrument went into effect the first ten amendments, adopted together, embodied, as limitations upon the powers of the Federal government, substantially all the guaranties, considered applicable to our conditions, of the English Bill of Rights. Since all of those provisions are also embodied in most, if not all, of the American Constitutions, their assertion of fundamental, political and personal liberty are referred to collectively as a "bill of rights." Indeed some of the State Constitutions preserve the name as well as the substance.

The text of the English Bill of Rights will be found in 2 Hist. for Ready Ref. 937.

See CONSTITUTION OF THE UNITED STATES.

BILL OF SALE. A writing evidencing the transfer of personal property from one person to another. Putnam v. McDonald, 72 Vt. 4, 5, 47 Atl. 159.

It is in frequent use in the transfer of personal property, especially that of which immediate possession is not or cannot be given.

In England a bill of sale of a ship at sea or out of the country is called a *grand bill of sale;* but no distinction is recognized in this country between grand and ordinary bills of sale; Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253. The effect of a bill of sale is to transfer the property in the thing sold.

By the maritime law, the transfer of a ship must generally be evidenced by a bill of sale; Weston v. Penniman, 1 Mas. 306, Fed. Cas. No. 17,455; and by act of congress, every sale or transfer of a registered ship to a citizen of the United States must be accompanied by a bill of sale, setting forth, at length, the certificate of registry; R. S. U. S. § 4170. Where the bill is insufficient under the statute, the executor of the seller can be compelled to reform it; Sprague v. Thurber, 17 R. I. 454, 22 Atl. 1057. And this bill of sale is not valid except between the parties or those having actual notice, unless recorded; R. S. § 4192. A contract to sell, accompanied by delivery of possession, is, however, sufficient; Taggard v. Loring,

16 Mass. 336, 8 Am. Dec. 140; Bixby v. Ins. Co., 8 Pick. (Mass.) 86; Wendover v. Hogeboom, 7 Johns. (N. Y.) 308.

See SALE.

BILL OF SIGHT. A written description of goods, supposed to be inaccurate, but made as nearly exact as possible, furnished by an importer or his agent to the proper officer of the customs, to procure a landing and inspection of the goods. It was allowed by an English statute where the merchant is ignorant of the real quantity and quality of goods consigned to him, so as to be unable to make a proper entry of them.

BILL OF SUFFERANCE. A license granted to a merchant, permitting him to trade from one English port to another without paying customs.

BILL PAYABLE. A bill of exchange accepted, or a promissory note made, by a merchant, whereby he has engaged to pay money. It is so called as being payable by him. An account is usually kept of such bills in a book with that title, and also in the ledger. See Parsons, Notes and Bills.

BILL PENAL. A written obligation by which a debtor acknowledges himself indebted in a certain sum, and binds himself for the payment thereof, in a larger sum.

Bonds with conditions have superseded such bills in modern practice; Steph. Pl. 265, n. They are sometimes called bills obligatory, and are properly so called; but every bill obligatory is not a bill penal; Comyns, Dig. *Obligations*, D.; Cro. Car. 515. See 2 Ventr. 106, 198.

BILL QUIA TIMET. A bill to guard against possible future injuries and to conserve present rights from possible destruction or serious impairment. The limits of the application of the remedy are not clearly defined, but it rests on the principle of relieving the party and his title from some claim or liability which may, if enforced, entail serious loss. Such a bill may be filed when a person is entitled to property of a personal nature after another's death, and has reason to apprehend it may be destroyed by the present possessor; or when he is apprehensive of being subjected to a future inconvenience, probable, or even possible, to happen or be occasioned by the neglect, inadvertence, or culpability of another; or when he seeks to be relieved against an invalid title, claim, or incumbrance which has been created by the act of another. See 3 Daniell, Ch. Pr. 1961, n. Another illustration of the application of the remedy is in case of a counterbond; although the surety is not troubled for the money, after it becomes payable, a decree for its payment may be had against the principal, or when a trustee has incurred liability as the holder of shares for another under a covenant of indemnity, against liability; L. R. 7 Ch. 395.

Upon a proper case being made out, the court will, in one case, secure the property for the use of the party (which is the object of the bill), by compelling the person in possession of it to give a proper security against any subsequent disposition or wilful destruction; and, in the other case, they will quiet the party's apprehension of future inconvenience, by removing the causes which may lead to it; 1 Madd. Ch. Pr. 218; 2 Story, Eq. Jur. §§ 825, 851. See BILL TO QUIET POSSESSION AND TITLE; BILL OF PEACE.

BILL RECEIVABLE. A promissory note, bill of exchange, or other written instrument for the payment of money at a future day, which a merchant holds. So called because the amounts for which they are given are receivable by the merchant. They are entered in a book so called, and are charged to an account in the ledger under the same title, to which account the cash, when received, is credited. See Pars. N. & B.

BILL, SINGLE. A written unconditional promise by one or more persons to pay to another person or other persons therein named a sum of money at a time therein specified. It is usually under seal, and may then be called a bill obligatory; Farmers' & Mechanics' Bank v. Greiner, 2 S. & R. (Pa.) 115. It has no condition attached, and is not given in a penal sum; Comyns, Dig. *Obligation*, C. See Jarvis v. McMain, 10 N. C. 10; Fields v. Mallett, 10 N. C. 465.

BILL, SUPPLEMENTAL. See SUPPLEMENTAL BILL.

BILL TO CARRY A DECREE INTO EXECUTION. One which is filed when, from the neglect of parties or some other cause, it may become impossible to carry a decree into execution without the further decree of the court. Hinde, Ch. Pr. 68; Story, Eq. Pl. § 429.

BILL TO MARSHAL ASSETS. See ASSETS.

BILL TO MARSHAL SECURITIES. See MARSHALLING SECURITIES.

BILL TO PERPETUATE TESTIMONY. One which is brought to secure the testimony of witnesses with reference to some matter which is not in litigation, but is liable to become so.

It differs from a bill to take testimony *de bene esse* (*q. v.*) inasmuch as the latter is sustainable only when there is a suit already pending.

A bill to perpetuate testimony "lies when the party is in actual, undisturbed possession; or where lands are devised by will from the heir at law; or when no action has been brought, but the party intends to commence a suit." Hickman v. Hickman, 1 Del. Ch. 133. It proceeds on the ground that, the party not being in a situation to bring his title to a trial, his evidence may be lost,

through lapse of time, a risk affecting all evidence, irrespective of the condition of a witness; Hall v. Stout, 4 Del. Ch. 269.

It must show the subject-matter touching which the plaintiff is desirous of giving evidence; Rep. *temp.* Finch 391; 4 Madd. 8; that the plaintiff has a positive interest in the subject-matter which may be endangered if the testimony in support of it be lost, as a mere expectancy, however strong, is not sufficient; Mitf. Eq. Pl. 51; May v. Armstrong, 3 J. J. Marsh. (Ky.) 260, 20 Am. Dec. 137. That the defendant has, or pretends to have, or that he claims, an interest to contest the title of the plaintiff in the subject-matter of the proposed testimony; Cooper, Pl. 56; Story, Eq. Pl. § 302; and some ground of necessity for perpetuating the evidence; Story, Eq. Pl. § 303; Mitf. Eq. Pl. 52, 148, n.

The bill should describe the right in which it is brought with reasonable certainty, so as to point the proper interrogations on both sides to the true merits of the controversy; 1 Vern. 312; Cooper, Eq. Pl. 56; and should pray leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated; Mitf. Eq. Pl. 52. The bill is filed and service made in the usual way; Green v. Compagnia Generale Italiana Di Navigation, 82 Fed. 490.

A bill is demurrable if it contains a prayer for relief; Hickman v. Hickman, 1 Del. Ch. 133; 2 Ves. 497.

It must appear that the relief is absolutely necessary to prevent a failure of justice; Crawford v. McAdams, 63 N. C. 67; if no reason exists for bringing the action in aid of which such a bill is filed, the bill will be dismissed; In re Ketchum, 60 How. Pr. (N. Y.) 154. Where a party sought to perpetuate testimony of his legitimacy, the bill was dismissed because the legitimacy act gave him a remedy; [1903] 2 Ch. 378. So as to a threatened slander suit where the answer released all claims against the plaintiff for slander; Hanford v. Ewen, 79 Ill. App. 327. The testimony of an injured man not expected to live may be taken for the benefit of his family; Ohio Copper Min. Co. v. Hutchings, 172 Fed. 201, 96 C. C. A. 653 (under a Utah statute).

Where one is threatened by patent suits which are not brought, he may file a bill under R. S. § 866, to perpetuate testimony that the patent is invalid; Westinghouse Mach. Co. v. Battery Co., 170 Fed. 430, 95 C. C. A. 600, 25 L. R. A. (N. S.) 673, with note; and it is held that he need not show that it is necessary to take the depositions to prevent a failure of justice; *id.*

BILL TO QUIET POSSESSION AND TITLE. Also called a bill to remove a cloud in title, and though sometimes classed with bills *quia timet* or for the cancellation of void instruments, they may be resorted to in other cases when the complainant's title is clear and there is a cloud to be removed; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; Town of Corinth v. Locke, 62 Vt. 411, 20 Atl. 809; Alsop v. Eckles, 81 Ill. 424; the latter may be said to exist whenever in ejectment by the holder of the adverse title any evidence would be required to defeat a recovery; Sloan v. Sloan, 25 Fla. 53, 5 South. 603.

Whenever an instrument exists which may be vexatiously or injuriously used against a party, after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately protect his right by any proceedings at law, equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require; Martin v. Graves, 5 Allen (Mass.) 602; Dull's Appeal, 113 Pa. 510, 6 Atl. 540; 2 Story, Eq. § 694.

Equity will entertain a bill to adjust the claims or to settle the priorities of conflicting claimants, where there is thereby created a cloud over the title, which would prevent the sale of the land at a fair market price; Bisph. Eq. 236; to restrain the collection of an illegal tax; *ibid.;* to set aside deeds, etc., which may operate as a cloud upon the legal title of the owner; whether they be void or voidable, and whether the character of the instrument appears on its face or not; Kerr v. Freeman, 33 Miss. 292; Peirsoll v. Elliott, 6 Pet. (U. S.) 95, 8 L. Ed. 332; but it has been held that equity will not interfere to remove an alleged cloud upon title to land, if the instrument or proceeding constituting such alleged cloud is absolutely void upon its face, so that no extrinsic evidence is necessary to show its invalidity; nor if the instrument or proceeding is not thus void on its face, but the party claiming, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity; Rich v. Braxton, 158 U. S. 375, 15 Sup. Ct. 1006, 39 L. Ed. 1022.

In a suit brought in the district court of the United States, to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, an order may be made upon a defendant not residing in the district or found therein, and not appearing *gratis*, to appear and answer, plead or demur by a certain day; 18 Stat. L. 472, c. 137, Sec. 8; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 178; but such suit will affect only the property concerned; *id.* See BILL OF PEACE; BILL QUIA TIMET.

BILL TO SUSPEND A DECREE. One brought to avoid or suspend a decree under

special circumstances. See 1 Ch. Cas. 3, 61; 2 *id.* 8; Mitf. Eq. Pl. 85, 86.

BILL TO TAKE TESTIMONY DE BENE ESSE. One which is brought to take the testimony of witnesses to a fact material to the prosecution of a suit at law which is actually commenced, where there is good cause to fear that the testimony may otherwise be lost before the time of trial; Hall v. Stout, 4 Del. Ch. 269, where the distinction between this bill and one to perpetuate testimony is clearly stated. The right to a bill to take testimony *de bene esse* depends on the condition of the witness, while the other depends on the situation of the party with respect to his power to bring his rights to immediate investigation; *id.* See 1 S. & S. 83; 2 Story, Eq. Jur. § 1813, n.; 13 Ves. 56.

It lies, in general, where witnesses are aged or infirm; Cooper, Eq. Pl. 57; Ambl. 65; 13 Ves. Ch. 56, 261; propose to leave the country; 2 Dick. 454; Story, Eq. Pl. § 308; or there is but a single witness to a fact; 1 P. Wms. 97; 2 Dick. 648.

The one at whose instance the deposition is taken has no control over it, and if he directs the commissioner to withhold it because he is surprised by the testimony, the court will order its return; First Nat. Bank of Grand Haven v. Forest, 44 Fed. 246.

BILLA CASSETUR (Lat. that the bill be quashed or made void). A plea in abatement concluded, when the pleadings were in Latin, *quod billa cassetur* (that the bill be quashed). 3 Bla. Com. 303.

BILLA EXCAMBII. A bill of exchange.

BILLA EXONERATIONIS. A bill of lading.

BILLA VERA (Lat.). A true bill. The form of words indorsed on a bill of indictment, when proceedings were conducted in Latin, to indicate the opinion of the grand jury that the person therein accused ought to be tried. See TRUE BILL.

BILLET DE CHANGE. A contract to furnish a bill of exchange. A contract to pay the value of a bill of exchange already furnished. Guyot, *Répert. Univ.*

Where a person intends to furnish a bill of exchange *(lettre de change)*, and is not quite prepared to do so, he gives a *billet de change*, which is a contract to furnish a *lettre de change* at a future time. Guyot, *Répert. Univ.*; Story, Bills § 2.

BINDER. Used to designate a temporary insurance against fire. In effect, an agreement to insure, but taking effect immediately. It is usually unwritten. See AGREEMENT FOR INSURANCE.

BINDING OUT. A term applied to the contract of apprenticeship, which see.

The contract must be by deed, to which the infant, as well as the parent or guardian, must be a party, or the infant will not be bound; 3 B. & Ald. 584; In re McDowle, 8 Johns. (N. Y.) 328; Stringfield v. Heiskell, 2 Yerg. (Tenn.) 546; Pierce v. Massenburg, 4 Leigh (Va.) 493, 26 Am. Dec. 333; Trimble v. State, 4 Blackf. (Ind.) 437; Balch v. Smith, 12 N. H. 438.

BINDING OVER. The act by which a magistrate or court hold to bail a party accused of a crime or misdemeanor.

The binding over may be to appear at a court having jurisdiction of the offence charged, to answer, or to be of good behavior, or to keep the peace.

BIPARTITE. Of two parts. This term is used in conveyancing; as, this indenture bipartite, between A, of the one part, and B, of the other part.

BIRRETUM, BIRRETUS. A cap or coif used formerly in England by judges and sergeants at law. Spelman, Gloss.

BIRTH. The act of being wholly brought into the world.

The conditions of live birth are not satisfied when a part only of the body is born. The whole body must be brought into the world and detached from that of the mother, and after this event the child must be alive; 5 C. & P. 329; 7 *id.* 814. The circulating system must also be changed, and the child must have an independent circulation; 5 C. & P. 539; 9 *id.* 154; Tayl. Med. Jur. 591.

But it is not necessary that there should have been a separation of the umbilical cord. That may still connect the child with its mother, and yet the killing of it will constitute murder; 7 C. & P. 814. See 1 Beck, Med. Jur. 478; 1 Chit. Med. Jur. 438; GESTATION; LIFE; VITAL STATISTICS.

BISAILE. See BESAILE.

BISHOP. In England, an ecclesiastical officer, who is the chief of the clergy of his diocese, and is the next in rank to an archbishop. A bishop is a corporation sole; 1 Bla. Com. 469. In the United States it is the title of a high ecclesiastical officer of the Roman Catholic, Episcopal and Methodist Episcopal and some other churches. In the first two he is the head of a diocese. He is addressed in the Church of England and the Protestant Episcopal Church as Right Reverend.

In England the two archbishops and twenty-four bishops are entitled to sit in the House of Lords, and are known as spiritual peers. When there is a vacancy, the senior existing bishop is entitled to fill it and not the successor of the one who died. The bishop's powers are threefold: 1. *Potestas ordinis*, under which he confers orders, confirms, consecrates churches, etc.; 2. *Potestas jurisdictionis*, which he exercises as ecclesiastical judge of the diocese; 3. *Administratio familiaris*, by which he governs the revenue; 1 Bla. Com. 377, 155. As to his appointment, see CONGÉ D'ÉLIRE; CHURCH OF ENGLAND.

In the Roman Church he is the governing authority in his diocese and is said to be "the supreme pastor, the supreme teacher, the supreme governor." It is his duty, under the laws and discipline of his church, to administer the regulations provided by its laws, and to construe and interpret such regulations. The court will not review the judgments or acts of a religious organization with reference to its internal affairs for the purpose of ascertaining their regularity or accordance with the discipline and usage of such organization; Pounder v. Ashe, 44 Neb. 673, 63 N. W. 48; Bonacum v. Harrington, 65 Neb. 831, 91 N. W. 886. See RELIGIOUS SOCIETY.

BISHOP'S COURT. In English Law. An ecclesiastical court held in the cathedral of each diocese, the judge of which is the bishop's chancellor.

BISHOPRIC. In Ecclesiastical Law. The extent of country over which a bishop has jurisdiction; a see; a diocese.

BISSEXTILE. The day which is added every fourth year to the month of February, in order to make the year agree with the course of the sun.

By statute 21 Hen. III., the 28th and 29th of February count together as one day. This statute is in force in some of the United States. Porter v. Holloway, 43 Ind. 35; Harker v. Addis, 4 Pa. 515.

A writ in 1256 to the justices of the bench, relating to the manner in which Leap Year should be counted, had the force of a statute. Holdsw. Hist. E. L. 174.

It is called *bissextile,* because in the Roman calendar it was fixed on the *sixth* day before the calends of March (which answers to the twenty-fourth day of February), and this day was counted *twice;* the first was called *bissextus prior,* and the other *bissextus posterior;* but the latter was properly called bissextile or intercalary day. See CALENDAR.

BITCH. A female dog, wolf or fox. See 1 C. & K. 459. An approbious name for a woman. State v. Harwell, 129 N. C. 550, 40 S. E. 48. Although it has been held that when applied to a woman, it does not, in its common acceptation, import whoredom in any of its forms, and therefore is not slanderous; Schurick v. Kollman, 50 Ind. 336.

BLACK ACRE. A term used by the old writers to distinguish one parcel of land from another, to avoid ambiguity, as well as the inconvenience of a fuller description. "White acre" is also so used. A and B are used in the same way to distinguish persons.

BLACK ACT. In English Law. The act of parliament, 9 Geo. II. c. 22. This act was passed for the punishment of certain marauders who committed great outrages disguised and with faces blackened. It was repealed by 7 & 8 Geo. IV. c. 11. See 4 Sharsw. Bla. Com. 245. It is held not to be a part of the common law in Georgia; State v. Campbell, T. U. P. Charlt. (Ga.) 167.

BLACK BOOK OF THE ADMIRALTY. An ancient book compiled in the reign of Edward III. It has always been deemed of the highest authority in matters concerning the admiralty. It contains the laws of Oleron, at large; a view of the crimes and offences cognizable in the admiralty; ordinances and commentaries on matters of prize and maritime torts, injuries, and contracts; De Lovio v. Boit, 2 Gall. 404, Fed. Cas. No. 3,776. It is said by Selden to be not more ancient than the reign of Henry VI. Selden, *de Laud. Leg. Ang.* c. 32. By other writers it is said to have been composed earlier. It was republished (1871) by the British government, with an introduction by Sir Travers Twiss.

BLACK BOOK OF THE EXCHEQUER. The name of a book kept in the English exchequer, containing a collection of treaties, conventions, charters, etc.

BLACK CAP. A portion of the full dress of a judge. It is not known when the custom of putting on the black cap when passing sentence of death was introduced into England. Townsend, Man. of Dates.

BLACK MAIL. Rents reserved, payable in work, grain, and the like.

Such rents were called black mail *(reditus nigri)* in distinction from white rents *(blanche firmes),* which were rents paid in silver.

A yearly payment made for security and protection to those bands of marauders who infested the borders of England and Scotland about the middle of the sixteenth century and laid the inhabitants under contribution. Hume, Hist. Eng. vol. i. 473; vol. ii. App. No. 8; Cowell.

In common parlance, the term is equivalent to, and synonymous with, extortion—the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose the weaknesses, the follies, or the crimes of the victim. Edsall v. Brooks, 17 Abb. Pr. (N. Y.) 226.

Threats by defendant to accuse another of a crime, with intent, himself, to commit the crime of extortion, accompanied by success in obtaining money from that other.

That such other person was endeavoring to induce defendant to receive money, for the purpose of accusing him of extortion, and so could not have been moved by fear, will not prevent his conviction for an attempt at extortion; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; under an act declaring it a crime to threaten a person with a criminal prosecution for the purpose of extorting money, it is immaterial that the person making the

threats believed that the person threatened had committed the crime; People v. Eichler, 75 Hun 26, 26 N. Y. Supp. 998; where threats of prosecution for perjury were made maliciously and with intent to compel the one threatened to do an act against his will, the offence is complete; and it is immaterial whether the one threatened was guilty of perjury; People v. Whittemore, 102 Mich. 519, 61 N. W. 13. In a prosecution under an act providing for the punishment of one who, for the purposes of extortion, sends a letter expressing or implying, or adapted to imply, any threat, and the letter threatens to make a charge against the person to whom it is sent, the truth or falsity of the charge is immaterial; People v. Choynski, 95 Cal. 640, 30 Pac. 791; an act making it an offence to accuse one of crime "with intent to extort money," etc., does not cover the case of an owner who demands compensation for property criminally destroyed, and accompanies his demand with a threat to accuse the defendant of the crime, and, where he is indicted for extortion, it is error to charge that it is immaterial whether the accusation made by him was true or false; Mann v. State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656. A charge of soliciting sexual intercourse with the wife of another is a charge of immoral conduct, which, if true, would tend to disgrace one and subject him to the contempt of society, and threatening to make such charge is black mail; Motsinger v. State, 123 Ind. 498, 24 N. E. 342.

On a trial for maliciously threatening to accuse another of burning a building with intent to extort money, evidence of the truth of the charge is inadmissible on the question of malice or of intent, or to impeach the prosecuting witness; Com. v. Buckley, 148 Mass. 27, 18 N. E. 577, 1 L. R. A. 624.

BLACK RENTS. Rents reserved in work, grain, or baser money than silver. Whishaw.

BLACK ROD, GENTLEMAN USHER OF THE. A chief officer of the king, deriving his name from his Black Rod of Office, on the top of which reposes a golden lion. During the session of Parliament he attends on the peers, summons the Commons to the House of Lords, and to his custody all peers impeached for any crime or contempt are first committed. Black Book 255; Wharton. His deputy is the Yeoman Usher. Similar officers are found in the Dominion of Canada and other colonies. Cent. Dict.

BLACKLEG. A professed gambler, a person who makes a business of betting—not necessarily dishonest, though disreputable: 3 H. & N. 376; 31 L. T. O. S. 217, per Pollock, C. B. In the same case Watson, B., thought the word had no precise signification; but Martin and Bramwell, BB., thought it imputed the indictable offence of cheating at cards.

BLACKLISTING. A list of names of persons kept for the purpose of prohibiting or recommending against dealings with them.

The publication of such a list is libellous *per se* unless justified or privileged; Hartnett v. Plumbers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194; Nettles v. Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658; Western Union Telegraph Co. v. Pritchett, 108 Ga. 411, 34 S. E. 216. To blacklist has been held not to impute the commission of a crime or other conduct exposing one to public hatred, punishment, disgrace or derision; Wabash R. Co. v. Young, 162 Ind. 103, 69 N. E. 1003, 4 L. R. A. (N. S.) 1091. False statements manifestly hurtful to a man in his credit or business and intended to be so are not privileged; Weston v. Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; nor are communications sent to the members of an organization for the purpose of coercing the payment of the claims of the persons publishing such communication; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115. See COMMERCIAL AGENCY; LIBEL.

A more general understanding of the term is that it has reference to the practice of one employer presenting to another the names of employés for the purpose of furnishing information concerning their standing as employés; State v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550.

In the report of the Anthracite Coal Strike Commission, May, 1903, it is described as a combination among employers not to employ workmen discharged by any of the members of the coal combination, and in this sense it is recognized by the legislative enactments in many of the states which prohibit employers from blacklisting an employé with the intent of preventing his employment by others. But many of these acts also contain a provision that they shall not be construed as preventing an employer from furnishing a truthful statement of the cause of discharge. Such an act is held not to be in violation of the 14th amendment and not to be class legislation; State v. Justus, 85 Minn. 279, 88 N. W. 759, 56 L. R. A. 757, 89 Am. St. Rep. 550; Joyce v. R. Co., 100 Minn. 225, 110 N. W. 975, 8 L. R. A. (N. S.) 756.

In the absence of malice, it is not libelous to circulate a blacklist of workmen among officials whose duty it is to employ them; Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794; and a record may be kept of the reasons for the discharge of a railway servant and communicated to persons interested; Hebner v. R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387. Such a communication, when the employé was discharged for gross neglect of duty, was held privileged; [1891] 2 Q. B. 189; but blacklisting was held libelous in Hartnett v. Plumb-

ers' Supply Ass'n, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194.

An agreement among several railroad companies not to employ a person discharged for a good cause by any of them is not legally injurious, unless the statements are false and the person has sought and been refused employment elsewhere; Hundley v. R. Co., 105 Ky. 162, 48 S. W. 429, 63 L. R. A. 289, 88 Am. St. Rep. 298; nor is an agreement among employers not to employ those who leave without cause and refuse to conform to certain rules an unlawful combination or conspiracy; Willis v. Mfg. Co., 120 Ga. 597, 48 S. E. 177, 1 Ann. Cas. 472. It has been said that an agreement of employers not to employ a particular person, in order more effectively to compete with employés, is not distinguishable from an agreement of laborers not to work for a particular person; 17 Harv. L. R. 139; but see Mattison v. R. Co., 3 Oh. S. C. & C. P. 526, where such a combination of employers was declared illegal.

Striking employés, whose names were in a blacklist sent to other employers in the same city, may not unite in an action. If a right exists, it is in favor of each one separately; Worthington v. Waring, 157 Mass. 421, 32 N. E. 744, 20 L. R. A. 342, 34 Am. St. Rep. 294.

An injunction will not be granted to restrain a company from placing employés' names on a blacklist, or from maintaining such a list and permitting other employers to inspect it; Boyer v. Tel. Co., 124 Fed. 246; but see Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193, where the publication of posters, circulars, etc., by employés for the purpose of carrying out a conspiracy to boycott was restrained by injunction.

A blacklisting statute requiring a corporation to give to its employés service letters stating the true reason for their discharge does not deprive it of the equal protection of the laws under the 14th amendment; St. Louis Southwestern R. Co. v. Hixon (Tex.) 126 S. W. 338.

See BOYCOTT; COMBINATION; CONSPIRACY; INJUNCTION; LIBEL; LABOR UNION.

BLADA. Growing crops of grain. Spelman, Gloss. Any annual crop. Cowell. Used of crops, either growing or gathered. Reg. Orig. 94 *b*; Coke, 2d Inst. 81.

BLANC SEIGN. It is a paper signed at the bottom by him who intends to bind himself, give acquittance, or compromise at the discretion of the person whom he entrusts with such *blanc seign*, giving him power to fill it with what he may think proper, according to agreement. This power is personal and dies with the attorney. Musson v. Blank, U. S., 6 Mart. O. S. (La.) 718.

BLANCH HOLDING. In Scotch Law. A tenure by which land is held.

The duty is generally a trifling one, as a peppercorn. It may happen, however, that the duty is of greater value; and then the distinction received in practice is founded on the nature of the duty. Stair. Inst. sec. iii. lib. 3, § 33. See Paterson, Comp. 15; 2 Bla. Com. 42.

BLANCHE FIRME. A rent reserved, payable in silver.

BLANK. A space left in a writing, to be filled up with one or more words to complete the sense.

When a blank is left in a written agreement which need not have been reduced to writing, and would have been equally binding whether written or unwritten, it is presumed, in an action for the non-performance of the contract, parol evidence might be admitted to explain the blank. And where a written instrument which was made professedly to record a fact is produced as evidence of that fact which it purports to record, and a blank appears in a material part, the omission may be supplied by other proof; Wood v. Beach, 7 Vt. 522. Hence a blank left in an award for a name was allowed to be supplied by parol proof; Lynn v. Risberg, 2 Dall. (U. S.) 180, 1 L. Ed. 339. But where a creditor signs a deed of composition, leaving the amount of his debt in blank, he binds himself to all existing debts; 1 B. & Ald.

It is said that a blank may be filled by consent of the parties and the instrument remain valid; Cro. Eliz. 626; 11 M. & W. 468; Smith v. Crooker, 5 Mass. 538; Woodworth v. Bank, 19 Johns. (N. Y.) 396, 10 Am. Dec. 239; Cribben v. Deal, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; though not, it is said, where the blank is in a part material to the operation of the instrument as an instrument of the character which it purports to be; 6 M. & W. 200; McKee v. Hicks, 13 N. C. 379; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; Boyd v. Boyd, 2 N. & McC. (S. C.) 125; Byers v. McClanahan, 6 Gill & J. (Md.) 250; at least, without a new execution; 2 Pars. Cont. 8th ed. *724. But see Wiley v. Moor, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; Commercial Bank of Buffalo v. Kortright, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; Bank of Commonwealth v. Curry, 2 Dana (Ky.) 142; Duncan v. Hodges, 4 McCord (S. C.) 239, 17 Am. Dec. 734; 4 Bingh. 123. If a blank is left in a policy of insurance for the name of the place of destination of a ship, it will avoid the policy; Park. Ins. 22; Wesk. Ins. 42. See cases in note to 10 Am. Rep. 268.

A power of attorney to convey land is inoperative until the name of the attorney is inserted by some one having authority from the principal; U. S. v. Mfg. Co., 198 Fed. 881. As to filling in blanks after execution, see Lewis's Gr. Evid. § 568.

Leaving blanks in a note and chattel mortgage as to the amount, and the delivery of the instruments in that condition, create an agency in the receiver to fill them in the manner contemplated by the maker; Mackey v. Basil, 50 Mo. App. 190. As between the parties to a deed it is not void because it did not contain the grantee's name when acknowledged, if it was afterwards written in by the grantor; Vought's Ex'rs v. Vought, 50 N. J. Eq. 177, 27 Atl. 489.

Where the amount is left blank in the body of a note, its insertion in figures in the margin does not complete it; Hollen v. Davis, 59 Ia. 444, 13 N. W. 413, 44 Am. Rep. 688; Norwich Bank v. Hyde, 13 Conn. 279; *contra*, Witty v. Ins. Co., 123 Ind. 411, 24 N. E. 141, 8 L. R. A. 365, 18 Am. St. Rep. 327; nor if words as well as figures are in the margin; Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879, note, 7 Ann. Cas. 802. So where the name of the payee is left blank, although a *bona fide* holder may insert his own name; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 156; it must be done before suit; Thompson v. Rathbun, 18 Or. 202, 22 Pac. 837; Greenhow v. Boyle, 7 Blackf. (Ind.) 56; Seay v. Bank, 3 Sneed (Tenn.) 558, 67 Am. Dec. 579.

A transfer of shares by deed executed in blank as to the name of the purchaser or the number of the shares, is void in England, though sanctioned by the usage of the stock exchange; 4 D. & J. 559; 2 H. & C. 175. But the rule is otherwise in Kortright v. Bank, 20 Wend. (N. Y.) 91; German Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. 67; (but see Denny v. Lyon, 38 Pa. 98, 80 Am. Dec. 463); Day v. Holmes, 103 Mass. 306; Bridgeport Bank v. R. Co., 30 Conn. 274. See the subject discussed in Lewis, Stocks 50. As to blanks in notes, see Knoxville Nat. Bank v. Clark, 51 Ia. 264, 1 N. W. 491, 33 Am. Rep. 130.

See ALTERATION.

BLANK BAR. See COMMON BAR.

BLANK INDORSEMENT. An indorsement which does not mention the name of the person in whose favor it is made.

Such an indorsement is generally effected by writing the indorser's name merely on the back of the bill; Chit. Bills 170. A note so indorsed is transferable by delivery merely, so long as the indorsement continues blank; and its negotiability cannot be restricted by subsequent special indorsements; 1 Esp. 180; Peake 225; Mitchell v. Fuller, 15 Pa. 268, 53 Am. Dec. 594. See 3 Campb. 339; INDORSEMENT.

BLANKET POLICY. A policy which contemplates that the risk is shifting, fluctuating, or varying, and is applied to a class of property, rather than to any particular thing. 1 Wood, Ins. § 40. See Home Ins. Co. v. Warehouse Co., 93 U. S. 541, 23 L. Ed. 868.

BLASPHEMY. To attribute to God that which is contrary to his nature, and does not belong to him, and to deny what does. A false reflection uttered with a malicious design of reviling God. Emlyn's Pref. to vol. 8, St. Tr.; Com. v. Kneeland, 20 Pick. (Mass.) 244.

An impious or profane speaking of God or of sacred things; reproachful, contemptuous, or irreverent words uttered impiously against God or religion. Blasphemy cognizable by common law is defined by Blackstone to be "denying the being or providence of God, contumelious reproaches of our Saviour Christ, profane scoffing at the Holy Scripture, or exposing it to contempt or ridicule;" by Kent as "maliciously reviling God or religion."

In general blasphemy may be described as consisting in speaking evil of the Deity with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God calculated and designed to impair and destroy the reverence, respect, and confidence due to him as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as "calumny" usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence for God by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such; Com. v. Kneeland, 20 Pick. (Mass.) 211, 212, per Shaw, C. J.

If a man, not for the sake of argument, makes a scurrilous attack on doctrines which the majority of persons hold to be true, in a public place where passersby may be offended and young people may come, he becomes liable for a blasphemous libel; see 72 J. P. 188.

The offense of publishing a blasphemous libel, and the crime of blasphemy, are in many respects technically distinct, and may be differently charged; yet the same act may, and often does, constitute both. The latter consists in blaspheming the name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world; and this may be done by language orally uttered. But it is not the less blasphemy if the same thing be done by language written, printed, and published; although when done in this form it also constitutes the offence of libel; Com. v. Kneeland, 20 Pick. (Mass.) 213, per Shaw, C. J.; Heard, Lib. & Sl. § 336.

In most of the United States, statutes have been enacted against this offence; but these statutes are not understood in all cases to have abrogated the common law; the rule being that where the statute does not vary the class and character of an offence, but only authorizes a particular mode of proceeding and of punishment, the sanction is cumulative and the common law is not taken away. And it has been decided that neither these statutes nor the common-law doctrine is repugnant to the constitutions of those states in which the question has arisen; Heard, Lib.

& Sl. § 343; Com. v. Kneeland, 20 Pick. (Mass.) 206; Updegraph v. Com., 11 S. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Andrew v. New York Bible & Common Prayer Book Society, 4 Sandf. (N. Y.) 156; State v. Chandler, 2 Harr. (Del.) 553; Vidal v. Girard, 2 How. (U. S.) 127, 11 L. Ed. 205.

In England, to speak, write and publish any profane words vilifying or ridiculing God, Jesus Christ or the Holy Ghost, the Old or New Testament, or Christianity in general, with intent to shock and insult believers or to pervert or mislead the ignorant or unwary, is a misdemeanor. The intent is an essential element. Odgers, C. L. 206. See [1908] 72 J. P. 188.

In France, before the 25th of September, 1791, it was a blasphemy, also, to speak against the Holy Virgin and the saints, to deny the faith, to speak with impiety of holy things, and to swear by things sacred; Merlin, *Répert.* The law was repealed on that date.

The Civil Law forbade blasphemy; such, for example, as to swear by the hair of the head of God; and it punished its violation with death. *Si enim contra homines factæ blasphemiæ impunitæ non relinquuntur, multo magis qui ipsum Deum blasphemant digni sunt supplicia sustinere.* (For if slander against men is not left unpunished, much more do those deserve punishment who blaspheme God.) No. 77. 1. § 1.

In Spain it is blasphemy not only to speak against God and his government, but to utter injuries against the Virgin Mary and the saints. *Senen Vilanova y Manes, Materia Criminal, forènse,* Observ. 11, cap. 3, n. 1. See CHRISTIANITY.

BLASTING. A mode of rending rock and other solid substances by means of explosives.

Blasting rock in the city of New York is necessary and therefore legal; Gourdier v. Cormack, 2 E. D. Sm. (N. Y.) 254; Wiener v. Hammell, 14 N. Y. Supp. 365. It is a useful and often a necessary means for the improvement of land, and where it does not amount to a nuisance, the person is answerable only if negligent; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936. Absolute liability is imposed on the keeper of dangerous explosives only when by reason of the location and surrounding circumstances the magazine is a nuisance; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654. Many cases hold that injuries to a house caused by pulsations of the earth, vibrations of the air, and jarring the house will not render the one blasting liable therefor; Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692; Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649; Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149; Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 South. 627, 12 L. R. A. (N. S.) 389; in the absence of negligence on his part; *id.; contra,* Fitz Simons & Connell Co. v. Braun, 199 Ill. 390, 65 N. E. 249, 59 L. R. A. 421; City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221; Longtin v. Persell, 30 Mont. 306, 76 Pac. 699, 65 L. R. A. 655, 104 Am. St. Rep. 723, 2 Ann. Cas. 198; but it has been held in other cases to be a nuisance where it causes loud noises and renders adjoining property untenantable; Gossett v. R. Co., 115 Tenn. 376, 89 S. W. 737, 1 L. R. A. (N. S.) 97, 112 Am. St. Rep. 846; that the continuance of the concussions amount to a private nuisance; Morgan v. Bowes, 17 N. Y. Supp. 22; and that injury to buildings caused by blasting renders the user of the explosives liable in damages, whether he was or was not negligent; Farnandis v. R. Co., 41 Wash. 486, 84 Pac. 18, 5 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556. One engaged in blasting was held liable for a fire communicated by the explosion of blasts; City of Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; and for the splitting of the underlying strata of rock; Gourdier v. Cormack, 2 E. D. Sm. (N. Y.) 200. That one attempting to use dynamite in blasting cannot foresee the consequences of his act does not relieve him from liability for an injury to the occupant of a neighboring property, in a populous neighborhood; Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545.

For injuries to land caused by débris cast thereon by blasts in an adjoining quarry, trespass is the proper remedy; Scott v. Bay, 3 Md. 431; right to blast for the purpose of making excavations on one's own land is subject to the limitation that the soil, stones, etc., must not be cast upon neighboring land; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 (a leading case). An injunction will be granted; Sayen v. Johnson, 4 Pa. Co. Ct. 360; Wilsey v. Callanan, 21 N. Y. Supp. 165; though negligence is not proved; Central Iron & Coal Co. v. Vanderheuk, 147 Ala. 546, 41 South. 145, 61 L. R. A. (N. S.) 570, 119 Am. St. Rep. 102, 11 Ann. Cas. 346; and notwithstanding the work was authorized by a city ordinance; Rogers v. Hanfield, 14 Daly (N. Y.) 339. So an injunction was granted to prevent the violent disturbance of a house, where the effect ultimately would be to shake it down; Hill v. Schneider, 13 App. Div. 299, 43 N. Y. Supp. 1; but it is held that blasting at night in a mine cannot be restrained by the owner of the surface, merely because the blasting disturbs sleep; Marvin v. Mining Co., 55 N. Y. 538, 14 Am. Rep. 322.

One who blasts on his own land is liable where death results, irrespective of negligence; Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. St. Rep. 274; though the blast is fired for a lawful purpose and by one skilled at the work; People's Gas Co. v. Tyner, 131 Ind. 277, 31

N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433. It is negligence not to cover the blast, where the work is done on land adjacent to a public road; Beauchamp v. Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30. Where a city ordinance requires the blast to be covered and the orifice to be protected by planks and timber, a failure to comply with it is a sufficient neglect of duty to justify a finding of negligence; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Devlin v. Gallagher, 6 Daly (N. Y.) 494. If it is not practicable to cover the blast, it is incumbent on the person doing the work to see that there is notice of danger; Herrington v. Village of Lansingburgh, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; see City of Logansport v. Dick, 70 Ind. 65, 36 Am. Rep. 166. On the ground that the work is intrinsically dangerous, a city is held liable for damage caused by blasting in a street done by a contractor in constructing a sewer; City of Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17; City of Logansport v. Dick, 70 Ind. 78, 36 Am. Rep. 166; but see Pack v. City of New York, 8 N. Y. 222; Kelly v. City of New York, 11 N. Y. 432; Simon v. Henry, 62 N. J. L. 486, 41 Atl. 692. The negligence of a contractor in blasting in a street to make trenches for a water company, was held to be chargeable to the company; Ware v. St. Paul Water Co., 2 Abb. U. S. 261, Fed. Cas. No. 17,172.

BLIND. The condition of one who is deprived of the faculty of seeing.

Persons who are blind may enter into contracts and make wills like others; Carth. 53; Barnes, 19; Boyd v. Cook, 3 Leigh (Va.) 32. When an attesting witness becomes blind, his handwriting may be proved as if he were dead; 1 Starkie, Ev. 341. But before proving his handwriting the witness must be produced, if within the jurisdiction of the court; 1 Ld. Raym. 734; 1 Mood. & R. 258.

It is not negligence for a blind man to travel along a highway; Sleeper v. Town of Sandown, 52 N. H. 244.

BLOCKADE. In International Law. The actual investment of a port or place by a hostile force fully competent, under ordinary circumstances, to cut off all communication therewith, so arranged or disposed as to be able to apply its force to every point of practicable access or approach to the port or place so invested.

Nature and character. Blockades may be either military or commercial, or may partake of the nature of both. As military blockades they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of the enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist. As commercial blockades, they may consist of operations against an enemy's trade or revenue, either localized at a single important seaport, or as a more comprehensive strategic operation, by which the entire sea frontier of an enemy is placed under blockade. A blockade, being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute a blockade as an exercise of those rights.

The justification of blockade lies in the international recognition of the necessity which the belligerent is under of imposing that restriction upon neutral commerce for the successful prosecution of hostilities.

It is not settled whether the mouth of an international river can be blockaded in case one or more of the upper riparian states remain neutral. But if a river constitutes the boundary line between a belligerent and a neutral, it may not be blockaded so as to prevent access to the neutral side of the river. The Peterhoff, 5 Wall. (U. S.) 49, 18 L. Ed. 564. In case of civil war, a government may blockade certain of its own ports, as was done by the United States during the American Civil War and by France during the Franco-Prussian War.

Effectiveness. In international jurisprudence it is a well-settled principle that the blockading force must be present and of sufficient force to be effective, and a mere notification of one belligerent that the port of the other is blockaded, sometimes termed a paper blockade, is not sufficient to establish a legal blockade. A blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of inland ports, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter; The Circassian, 2 Wall. (U. S.) 135, 17 L. Ed. 796. In 1856 the Declaration of Paris prescribed that blockades to be obligatory must be effective, that is to say, maintained by a sufficient force really to prevent access of the enemy's ships and other vessels. The United States, although not a party to this declaration, has upheld the same doctrine since 1781, when, by ordinance of Congress, it was declared that there should be a number of vessels stationed near enough to the port to make the entry apparently dangerous; Journals of Congress, vol. vii. p. 186. By the convention of the Baltic Powers in 1780, and again in 1801, the same doctrine was promulgated; and in 1871, by treaty between Italy and the United States, a clearer and more satisfactory definition of an effective blockade was agreed upon, as follows: "It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of neutrals, and

so stationed as to create an evident danger on their part to attempt it."

The French doctrine of an effective blockade is that access must be barred by a line of ships forming a chain around the blockaded port, while the United States, Great Britain and Japan hold that it is sufficient to have men-of-war cruising in the vicinity of the port, provided the disposition of the cruisers constitutes an actual danger to a vessel seeking to run the blockade. A blockade does not cease to be effective because the blockading force is temporarily withdrawn owing to stress of weather. 1 C. Rob. 86, 154. If a single modern cruiser, blockading a port, renders it in fact dangerous for other craft to enter the port, the blockade is practically effective; the Olinde Rodrigues, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065.

Neutrals. To involve a neutral in the consequences of violating the blockade, it is indispensable that he should have due notice of it. This information may be communicated to him in two ways: either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact; Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459; 6 C. Rob. Adm. 367; 2 *id.* 110, 128; 1 Act. Prize Cas. 61. Formal notice is not required; any authentic information is sufficient; 1 C. Rob. Adm. 334; 5 *id.* 77, 286; Edw. Adm. 203; 3 Phill. Int. Law 397; The Revere, 24 Bost. L. Rep. 276, Fed. Cas. No. 11,716; Hall, Int. L. 648; it is a settled rule that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it begins; 2 Black 630.

Breach. A violation may be either by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. Also placing himself so near a blockaded port as to be in a condition to slip in without observation, is a violation of the blockade, and raises the presumption of a criminal intent; 6 C. Rob. Adm. 30, 101, 182; Radcliff v. Ins. Co., 7 Johns. (N. Y.) 47; 1 Edw. Adm. 202; Fitzsimmons v. Ins. Co., 4 Cra. (U. S.) 185, 2 L. Ed. 591; The Josephine, 3 Wall. (U. S.) 83, 18 L. Ed. 65. The sailing for a blockaded port, knowing it to be blockaded, is held by the English prize courts to be such an act as may charge the party with a breach of the blockade; British instructions to their fleet in the West India station, Jan. 5, 1804; and the same doctrine is recognized in the United States; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; The Nereide, 9 Cra. (U. S.) 440, 3 L. Ed. 769; 1 Kent *150; The Bermuda, 3 Wall. (U. S.) 514, 18 L. Ed. 200; 3 Phill. Int. Law, 397; Hall, Int. L. 662; The Revere, 24 Bost. L. Rep. 276, Fed. Cas. No. 11,716. See Fitzsimmons v. Ins. Co., 4 Cra. (U. S.) 185, 2 L. Ed. 591; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143; Vos v. Ins. Co., 2 Johns. Cas. (N. Y.) 180; *id.*, 469; 10 Moore, P. C. 58; The Adula, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505.

But in the case of long voyages, sailing for a blockaded port, contingently, might be permitted, if inquiry were afterwards made at convenient ports; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143; Sperry v. Delaware Ins. Co., 2 Wash. C. C. 243, Fed. Cas. No. 13,236; but the ordinance of 1781 authorized the condemnation of vessels "destined" to any blockaded port, without any qualification based upon proximity or notice. A neutral vessel in distress may enter a blockaded port; The Diana, 7 Wall. (U. S.) 354, 19 L. Ed. 165.

Penalty. When the ship has contracted guilt by a breach of the blockade she may be taken at any time before the end of her voyage; but the penalty travels no further than the end of her return voyage; 2 C. Rob. Adm. 128; 3 *id.* 147; The Wren, 6 Wall. (U. S.) 582, 18 L. Ed. 876. When taken, the ship is confiscated; and the cargo is always, *prima facie*, implicated in the guilt of the owner or master of the ship; and the burden of rebutting the presumption that the vessel was going in for the benefit of the cargo, and with the direction of the owners rests with them; 1 C. Rob. Adm. 67, 130; 3 *id.* 173; 4 *id.* 93; 1 Edw. Adm. 39. The Declaration of London (*q. v.*) Arts. 1–21, apart from re-stating existing practice, lays down the following rules upon controverted points: The question whether a blockade is effective is a question of fact, that is, each case must be decided upon its own merits; a "declaration" of the blockade must be made by the blockading government or by the naval authorities acting in its name. This declaration must be followed by a "notification," first, to the neutral powers themselves, and, secondly, to the local authorities, who must, in turn, notify the foreign consular officers at the place. The liability of a neutral vessel is dependent upon the knowledge of the blockade, and this knowledge is presumed if the vessel left port subsequently to the notification of the blockade to the neutral power. Neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships maintaining the blockade, nor, if they have broken blockade "outwards," are they liable to capture after pursuit has been abandoned by the blocking force. This overrules the British and American doctrine stated above.

BLOOD. Relationship; stock; family. 1 Roper, Leg. 103; 1 Belt, Suppl. Ves. 365. Kindred. Bacon, Max. Reg. 18.

Brothers and sisters are said to be of the whole blood if they have the same father and mother, and of the half-blood if they have only one parent in common. Baker v. Chalfant, 5 Whart. (Pa.) 477. See Oglesby Coal Co. v. Pasco, 79 Ill. 166; 15 Ves. 107.

BLOOD FEUD. Avenging the slaughter of kin on the person who slaughtered him,

or on his belongings. Whether the Teutonic or the Anglo-Saxon law had a legal right of blood feud has been disputed, but in Alfred's day it was unlawful to begin a feud until an attempt had been made to exact the price of the life *(wer-gild)*.

BLOOD STAINS. See STAINS, BLOOD.

BLOODHOUND. Evidence from the tracking of a prisoner by bloodhounds is not permissible until it is shown that they were reliable and accurate; State v. Adams, 85 Kan. 435, 116 Pac. 608, 35 L. R. A. (N. S.) 870; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. Rep. 479, 11 Ann. Cas. 1181; other cases express in various ways the foundation that must be laid; Richardson v. State, 145 Ala. 46, 41 South. 82, 8 Ann. Cas. 108; Parker v. State, 46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893; in Brott v. State, 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789, such evidence is held dangerous and incompetent.

Such dogs are remarkable for their sense of smell and ability to follow a scent or track a human being; to permit evidence that a hound has tracked an alleged criminal, it must be shown that it had been trained in that work; Pedigo v. Com., 103 Ky. 41, 44 S. W. 143, 42 L. R. A. 432, 82 Am. St. Rep. 566.

BLOODWIT. An amercement for bloodshed. Cowell. The privilege of taking such amercements. Skene.

A privilege or exemption from paying a fine or amercement assessed for bloodshed. Cowell; *Termes de la Ley*.

BLUE LAWS. A name often applied to severe laws for the regulation of religious and personal conduct in the colonies of Connecticut and New Haven; hence any rigid Sunday laws or religious regulations. The best account of the Blue Laws is by Trumbull, "The True Blue Laws of Connecticut and New Haven, and the False Blue Laws invented by the Rev. Sam'l Peters, etc." The latter reference is to a collection without credit. See also Hinman; Schmucker, Blue Laws; Barker, Hist. & Antiq. of New Haven; Peters, Hist. Conn.; Fiske, Beginnings of New England 238.

BLUE SKY LAW. A popular name for acts providing for the regulation and supervision of investment companies, for the protection of the community from investing in fraudulent companies. The first of these acts was passed in Kansas (1911). Some twenty states have passed them. Such act was held valid in a lower court in Kansas, and invalid in Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173 (Michigan act).

BOARD OF HEALTH. See HEALTH; DELEGATION.

BOARD OF SPECIAL INQUIRY. An instrument of executive power, not a court, made up of the immigrant officials in the service, subordinates of the commissioner of immigration, whose duties are declared to be administrative. Its decisions are not binding upon the Secretary of Commerce. The act of congress making them final means final where they are most likely to be questioned, in the courts; Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029.

BOARD OF SUPERVISORS. A county board of representatives of towns or townships, under a system existing in some states, having charge of the fiscal affairs of the county.

This system originated in the state of New York, and has been adopted in Michigan, Illinois, Wisconsin, and Iowa. The board, when convened, forms a deliberative body, usually acting under parliamentary rules. It performs the same duties and exercises like authority as the COUNTY COMMISSIONERS or BOARD OF CIVIL AUTHORITY in other states. See, generally, Haines's Township Laws of Mich., and Haines's Town Laws of Ill. & Wis.

BOARD OF TRADE. See CHAMBER OF COMMERCE; GRAIN.

BOARDER. One who makes a special contract with another person for food with or without lodging. Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 424; Pollock v. Landis, 36 Ia. 651. To be distinguished from a guest of an innkeeper; Story, Bailm. § 477; McDaniels v. Robinson, 26 Vt. 343, 62 Am. Dec. 574; Chamberlain v. Masterson, 26 Ala. 371; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417. See Edwards, Bailments § 456.

In a boarding-house, the guest is under an express contract, at a certain rate, for a certain time; but in an inn there is usually no express engagement; the guest, being on his way, is entertained from day to day according to his business, upon an implied contract; Willard v. Reinhardt, 2 E. D. Smith (N. Y.) 148; Stewart v. McCready, 24 How. Pr. (N. Y.) 62; Cady v. McDowell, 1 Lans. (N. Y.) 484.

There is a duty on the part of a boarding house keeper to take reasonable care for the safety of property brought by a guest into his house, and evidence of refusal to furnish a key of the bed room and also for a chest of drawers therein was sufficient to go to the jury as a breach of that duty; [1905] 2 K. B. 805, in the English Court of Appeal, where the prior cases are examined and criticized, and Danzy v. Richardson, 3 E. & B. 144, is approved, Holder v. Soulley, 8 C. B. N. S. 254, not followed, and Calye's Case, 8 Co. 32 *a*, explained. See note in 31 Mag. L. Rev. 226; BAILMENT; INNKEEPER.

BOAT. A boat does not pass by the sale of a ship and appurtenances; Molloy, b. 2, c. 1, § 8; Beawes, *Lex. Merc.* 56; Starr v. Goodwin, 2 Root (Conn.) 71; Park. Ins. 8th ed. 126. But see Briggs v. Strange, 17 Mass. 405; 2 Marsh. 727. Insurance on a ship covers her boats; 1 Mann. & R. 392; 1 Pars. Marit. Law 72, n.

BOC (Sax.). A writing; a book. Used of the *land-bocs*, or evidences of title among the Saxons, corresponding to modern deeds. These *bocs* were destroyed by William the Conqueror. 1 Spence, Eq. Jur. 22; 1 Washb. R. P. *17, 21. See 1 Poll. & Maitl. 472, 571; 2 *id.* 12, 86.

BOC HORDE. A place where books, evidences, or writings are kept. Cowell. These were generally in monasteries. 1 Spence, Eq. Jur. 22.

BOC LAND. Alodial lands held by written evidence of title.

Such lands might be granted upon such terms as the owner should see fit, by greater or less estate, to take effect presently, or at a future time, or on the happening of any event. In this respect they differed essentially from feuds. 1 Washb. 5th ed. R. P. *17; 4 Kent 441. But see ALOD.

BODY. A person. Used of a natural body, or of an artificial one created by law, as a corporation.

A collection of laws; that is, the embodiment of the laws in one connected statement or collection, called a body of laws.

In practice when the sheriff returns *cepi corpus* to a capias, the plaintiff may obtain a rule, before special bail has been entered, to bring in the body; and this must be done either by committing the defendant or entering special bail. See DEAD BODY.

BODY CORPORATE. A corporation. This is an early and undoubtedly correct term to apply to a corporation. Co. Litt. 250 *a*; Ayliffe, Par. 196; Ang. Corp. § 6.

BODY POLITIC. See CORPORATION.

BONA (Lat. *bonus*). Goods; personal property; chattels, real or personal; real property.

Bona et catalla (goods and chattels) includes all kinds of property which a man may possess. In the Roman law it signified every kind of property, real, personal, and mixed; but chiefly it was applied to *real estate*, chattels being distinguished by the words *effects*, *movables*, etc. *Bona* were, however, divided into *bona mobilia* and *bona immobilia*. It is taken in the civil law in nearly the sense of *biens* in the French law. See NULLA BONA.

BONA CONFISCATA. Goods confiscated or forfeited to the imperial *fisc* or treasury. 1 Bla. Com. 299.

BONA FIDE HOLDER FOR VALUE. The Negotiable Instruments Act provides, § 52: A holder in due course is a holder who has taken the instrument under the following conditions: 1. That it is complete and regular upon its face; 2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

If he has had notice of any infirmity in the instrument or defect in the title of the person he took it from before he had paid the full amount agreed to be paid, he is a holder in due course only to the amount theretofore paid by him. The title of a person who negotiates an instrument is defective when he obtained it, or any signature to it, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. To constitute notice of an infirmity, etc., the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable; but a holder who derives his title through a holder in due course and is not himself party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course; but this does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. See NEGOTIABLE INSTRUMENTS for the States, etc., in which it is enacted.

BONA FIDE PURCHASER FOR VALUE. See PURCHASER FOR VALUE WITHOUT NOTICE.

BONA FIDES. Good faith, honesty, as distinguished from *mala fides* (bad faith).

Bona fide. In good faith.

BONA FORISFACTA. Forfeited goods. 1 Bla. Com. 299.

BONA GESTURA. Good behavior.

BONA GRATIA. Voluntarily; by mutual consent. Used of a divorce obtained by the agreement of both parties.

BONA MOBILIA. In Civil Law. Movables. Those things which move themselves or can be transported from one place to another; which are not intended to make a permanent part of a farm, heritage, or building.

BONA NOTABILIA. Chattels or goods of sufficient value to be accounted for.

Where a decedent leaves goods of sufficient amount *(bona notabilia)* in different dioceses, administration is granted by the metropolitan, to prevent the confusion arising from the appointment of many different administrators; 2 Bla. Com. 509; Rolle, Abr. 908; Williams, Ex. 7th ed. The value

necessary to constitute property *bona notabilia* has varied at different periods, but was finally established at £5, in 1603.

BONA PERITURA. Perishable goods. An executor, administrator, or trustee is bound to use due diligence in disposing of perishable goods, such as fattened cattle, grain, fruit, or any other article which may be worse for keeping; Bacon, Abr. *Executors;* 5 Co. 9; Cro. Eliz. 518; McCall v. Peachy's Adm'r, 3 Munf. (Va.) 288; 1 Beatt. Ch. 5, 14. A carrier is in general not liable for injuries to perishable goods occurring without his negligence; 7 L. R. Ch. 573; 1 C. P. D. 423. He may discriminate in favor of such goods, if pressed by a rush of business; Great Western Ry. Co. v. Burns, 60 Ill. 284; Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Peet v. R. Co., 20 Wis. 594, 91 Am. Dec. 446. See PERISHABLE GOODS.

BONA VACANTIA. Goods to which no one claims a property, as shipwrecks, treasure-trove, etc.; vacant goods.

Bona vacantia belonged, under the common law, to the finder, except in certain instances, when they were the property of the king. 1 Sharsw. Bla. Com. 298, n.

BONA WAVIATA. Goods thrown away by a thief in his fright for fear of being apprehended. By common law such goods belonged to the crown. 1 Bla. Com. 296.

BOND. An obligation in writing and under seal. Taylor v. Glaser, 2 S. & R. (Pa.) 502; Pinkard v. Ingersol, 11 Ala. 19; Cantey v. Duren, Harp. (S. C.) 434; Deming v. Bullitt, 1 Blackf. (Ind.) 241; Denton v. Adams, 6 Vt. 40; Harman v. Harman, 1 Baldw. 129, Fed. Cas. No. 6,071; Biery v. Steckel, 194 Pa. 445, 45 Atl. 376.

It may be single—*simplex obligatio*—as where the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day named, or it may be *conditional* (which is the kind more generally used), that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force, as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money, borrowed of the obligee, with interest, which principal sum is usually one-half of the *penal* sum specified in the bond.

There must be proper parties; and no person can take the benefit of a bond except the parties named therein; Fuller v. Fullerton, 14 Barb. (N. Y.) 59; except, perhaps, in some cases of bonds given for the performance of their duties by certain classes of public officers; Fellows v. Gilman, 4 Wend. (N. Y.) 414; Ing v. State, 8 Md. 287; Roll v. Raguet, 4 Ohio 418, 22 Am. Dec. 759; Baker v. Bartol, 7 Cal. 551; Hartz v. Com., 1 Grant, Cas. (Pa.) 359; State v. Druly, 3 Ind. 431. A man cannot be bound to himself even in connection with others; Smith v. Lusher, 5 Cow. (N. Y.) 688. See McDowell v. Butler, 56 N. C. 311. But if a bond is given by the treasurer of a corporation to the directors as a class, of which he is one, it is not for that reason invalid; Durburow v. Niehoff, 37 Ill. App. 403. If the bond run to several persons jointly, all must join in suit for a breach, though it be conditioned for the performance of different things for the benefit of each; Pearce v. Hitchcock, 2 N. Y. 388.

The instrument must be in writing and sealed; Harman v. Harman, 1 Baldw. 129, Fed. Cas. No. 6,071; Denton & Smith v. Adams, 6 Vt. 40; but a sealing sufficient where the bond is made is held sufficient though it might be an insufficient sealing if it had been made where it is sued on; Meredith v. Hinsdale, 2 Caines (N. Y.) 362. The signature and seal may be in any part of the instrument; Reed v. Drake, 7 Wend. (N. Y.) 345. See McLeod v. State, 69 Miss. 221, 13 South. 268. An instrument not under seal is not a bond and will not satisfy a statute requiring an appeal bond; Corbin v. Laswell, 48 Mo. App. 626; although in the body thereof it is recited that the parties thereto have set their hands and seals; Williams v. State, 25 Fla. 734, 6 South. 831, 6 L. R. A. 821.

It must be delivered by the party whose bond it is to the other; Carey v. Dennis, 13 Md. 1; Chase v. Breed, 5 Gray (Mass.) 440; Towns v. Kellett, 11 Ga. 286; Harris v. Regester, 70 Md. 109, 16 Atl. 386. But the delivery and acceptance may be by attorney; Madison & I. Plank-Road Co. v. Stevens, 10 Ind. 1. The date is not considered of the substance of a deed; and therefore a bond which either has no date or an impossible one is still good, provided the real day of its being dated or given, that is, delivered, can be proved; 2 Bla. Com. 304; Com. Dig. *Fait*, B, 3; Ross v. Overton, 3 Call (Va.) 309, 2 Am. Dec. 552. There is a presumption that a deed was executed on the day of its date; Steph. Dig. Ev. Art. 87; Costigan v. Gould, 5 Denio (N. Y.) 290.

The condition is a vital part of a conditional bond, and generally limits and determines the amount to be paid in case of a breach; Strang v. Holmes, 7 Cow. (N. Y.) 224; but interest and costs may be added; Van Wyck v. Montrose, 12 Johns. (N. Y.) 350; Campbell v. Pope, 1 Hempst. 271, Fed. Cas. No. 2,365a. The recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach. So far as interest is payable by the terms of the contract, and until default made, it is limited by the penalty; but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation; Brainard v. Jones, 18 N. Y. 35.

See Philadelphia & R. R. Co. v. Knight, 124 Pa. 58, 16 Atl. 492. The omission from a statutory bond of a clause which does not affect the rights of the parties, and imposes no harder terms upon the obligors, does not invalidate it; Power v. Graydon, 53 Pa. 198.

Where a bond is for the performance of an illegal contract the parties are not bound thereon; State v. Pollard, 89 Ala. 179, 7 South. 765.

On the *forfeiture* of the bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interfered, and would not permit a man to take more than in conscience he ought, viz.: his principal, interest, and expenses in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due with interest and costs, even though the bond were forfeited and a suit commenced thereon, should be a full satisfaction and discharge; 2 Bla. Com. 340.

All of the obligors in a joint bond are presumed to be principals, except such as have opposite their names the word "security;" Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751, 1 S. E. 193; or unless it is otherwise expressed.

If in a bond the obligor *binds himself*, without adding his *heirs, executors, and administrators*, the executors and administrators are bound, but not the heir; Sheppard, Touchst. 369; for the law will not imply the obligation upon the heir; Co. Litt. 209 *a*.

If a bond lie *dormant* for twenty years, it cannot afterwards be recovered; for the law raises a presumption of its having been paid, and the defendant may plead *solvit ad diem* to an action upon it; 1 Burr. 434; 4 *id.* 1963. And in some cases, under particular circumstances, even a less time may create a presumption; 1 Term 271; Cowp. 109. The presumption of payment after twenty years is in the nature of a statute of limitations. It is available as a bar to an action to recover on the instrument, but not where the party asks affirmative relief based upon the fact of payment; Lawrence v. Ball, 14 N. Y. 477.

Where a company bought in its own debentures and then reissued them, held that the new holder could not claim *pari passu* with the other holders; [1904] 2 Ch. 474; so where debentures were used as collateral and the loan was paid and a second loan made; [1907] 2 Ch. 540; [1906] 2 Ch. 216; [1905] 2 Ch. 587, A. C. But where receivers used the corporate funds to buy in its mortgage funds, it was held that if reissued, they could share in the mortgage security; In re Fifty-Four First Mortgage Bonds, 15 S. C. 304, Simpson, C. J., dissenting upon the ground that they had been extinguished. In Pruyne v. Mfg. Co., 92 Hun 214, 36 N. Y. Supp. 361, there seems to have been an agreement that there was no merger. Corporation mortgages usually provide that all bonds shall share equally in the mortgage security, no matter when issued, so that the English cases are not in point.

Forthcoming Bond. A bond conditioned that a certain article shall be forthcoming at a certain time or when called for.

General Mortgage Bond. A bond secured upon an entire corporate property, parts of which are subject to one or more prior mortgages.

Heritable Bond. In Scotch Law, a bond for a sum of money to which is joined a conveyance of land or of heritage, to be held by the creditor in security of the debt.

Income Bonds. Bonds of a corporation the interest of which is payable only when earned and after payment of interest upon prior mortgages.

Lloyd's Bond. A bond issued for work done or goods delivered and bearing interest. This was a device of an English barrister named Lloyd, by which railway and other companies did, in fact, increase their indebtedness without technically violating their charter provisions prohibiting the increase of debt.

Municipal Bond, *q. v.*

Railroad Aid Bonds are issued by municipal corporations to aid in the construction of railways. The power to subscribe to the stock of railways, and to issue bonds in pursuance thereof, does not belong to towns, cities, or counties, without special authority of the legislature, and the power of the latter to confer such authority, where the state constitution is silent, has been a much-contested question. The weight of the very numerous decisions is in favor of the power. In several of the states the constitutions prohibit or restrict the right of municipal corporations to invest in the stock of railroads or similar corporations; Citizens' Savings & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Pitzman v. Village of Freeburg, 92 Ill. 111; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39; Ogden v. Daviess County, 102 U. S. 634, 26 L. Ed. 263; Harshman v. County Court, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; Knox County v. Bank, 147 U. S. 91, 13 Sup. Ct. 267, 37 L. Ed. 93; Barnum v. Okolona, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; McKittrick v. Ry. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518; Rogers v. Keokuk, 154 U. S. 546, 14 Sup. Ct. 1162, 18 L. Ed. 74; Ætna Life Ins. Co. v. Pleasant Tp., 62 Fed. 718,

10 C. C. A. 611; Denison v. City of Columbus, 62 Fed. 775; Atlantic Trust Co. v. Town of Darlington, 63 Fed. 76; Dill. Mun. Corp. § 508.

The recital in bonds issued by a municipal corporation in payment of a subscription to railroad stock, that they were issued "in pursuance of an act of the legislature . . . and ordinances of the city council . . . passed in pursuance thereof," does not put a *bona fide* purchaser for value upon inquiry as to the terms of the ordinances under which the bonds were issued, nor does it put him on inquiry whether a proper petition of two-thirds of the residents had been presented to the common council before it subscribed for the stock; Evansville v. Dennett, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; and recitals in county bonds, that they are issued in pursuance of an order of the court, etc., as a subscription to the capital stock, estop the county issuing them as against an innocent purchaser from showing that the bonds are void because in fact issued as a donation to the railroad company, whereas the statute only authorized a subscription to its stock; Ashman v. Pulaski County, 73 Fed. 927, 20 C. C. A. 232; where a county, under authority from the state, issued its bonds in payment of a subscription to stock in a railway company, made upon a condition which was never complied with, and which was subsequently waived by the county, and received and held the certificates and paid interest on its bonds and refunded them under legislative authority, the bonds originally issued were held valid in the hands of a *bona fide* holder for value before maturity; Graves v. Saline County, 161 U. S. 359, 16 Sup. Ct. 526, 40 L. Ed. 732; where there is a total want of power to subscribe for such stock and to issue bonds in payment, a municipality cannot estop itself by admissions or by issuing securities in negotiable form, nor even by receiving and enjoying the proceeds of such bonds; *id.*

STRAW BOND. A bond upon which is used either the name of fictitious persons or those unable to pay the sum guaranteed; generally applied to insufficient bail bonds, improperly taken, and designated by the term "straw bail."

As to the overissue of bonds, see OVERISSUE.

BONDAGE. A term which has not obtained a juridical use distinct from the vernacular, in which it is either taken as a synonym with *slavery*, or as applicable to any kind of personal servitude which is involuntary in its continuation.

The propriety of making it a distinct juridical term depends upon the sense given to the word *slavery*. If *slave* be understood to mean, exclusively, a natural person who, in law, is known as an object in respect to which legal persons may have rights of possession or property, as in respect to domestic animals and inanimate things, it is evident that any one who is regarded as a legal person, capable of rights and obligations in other relations, while bound by law to render service to another, is not a slave in the same sense of the word. Such a one stands in a legal relation, being under an obligation correlative to the right of the person who is by law entitled to his service, and, though not an object of property, nor possessed or owned as a chattel or thing, he is a person bound to the other, and may be called a *bondman*, in distinction from a *slave* as above understood. A greater or less number of rights may be attributed to persons bound to render service. Bondage may subsist under many forms. Where the rights attributed are such as can be exhibited in very limited spheres of action only, or are very imperfectly protected, it may be difficult to see wherein the condition, though nominally that of a legal person, differs from chattel slavery. Still, the two conditions have been plainly distinguishable under many legal systems, and even as existing at the same time under one source of law. The Hebrews may have held persons of other nations as slaves of that chattel condition which anciently was recognized by the laws of all Asiatic and European nations; but they held persons of their own nation in bondage only as legal persons capable of rights, while under an obligation to serve. Cobb's Hist. Sketch, ch. 1. When the serfdom of feudal times was first established, the two conditions were coexistent in every part of Europe (*ibid.* ch. 7), though afterwards the bondage of serfdom was for a long period the only form known there until the revival of chattel slavery, by the introduction of negro slaves into European commerce, in the sixteenth century. Every villein under the English law was clearly a legal person capable of some legal rights, whatever might be the nature of his services. Co. Litt. 123 *b*; Coke, 2d Inst. 4, 45. But at the first recognition of negro slavery in the jurisprudence of England and her colonies, the slave was clearly a natural person, known to the law as an object of possession or property for others, having no legal personality, who therefore, in many legal respects, resembled a thing or chattel. It is true that the moral responsibility of the slave and the duty of others to treat him as an accountable human being and not as a domestic animal were always more or less clearly recognized in the criminal jurisprudence. There has always been in his condition a mingling of the qualities of person and of thing, which has led to many legal contradictions. But while no rights or obligations, in relations between him and other natural persons such as might be judicially enforced by or against him, were attributed to him, there was a propriety in distinguishing the condition as *chattel slavery*, even though the term itself implies that there is an essential distinction between such a person and natural things, of which it seems absurd to say that they are either free or not free. The phrases *instar rerum, tanquam bona*, are aptly used by older writers. The bondage of the villein could not be thus characterized; and there is no historical connection between the principles which determined the existence of the one and those which sanctioned the other. The law of English villenage furnished no rules applicable to negro slavery in America. Com. v. Turner, 5 Rand. (Va.) 680, 683; Fable v. Brown, 2 Hill, Ch. (S. C.) 390; Neal v. Farmer, 9 Ga. 561; 1 Hurd, Law of Freedom and Bondage, cc. 4, 5. Slavery in the colonies was entirely distinct from the condition of those white persons who were held to service for years, which was involuntary in its continuance, though founded in most instances on contract. These persons had legal rights, not only in respect to the community at large, but also in respect to the person to whom they owed service.

In the American slaveholding states before the Civil War, the moral personality of those held in the customary slavery was recognized by jurisprudence and statute to an extent which makes it difficult to say whether, there, slaves were by law regarded as things and not legal persons (though subject to the laws which regulate the title and transfer of property), or whether they were still things and property in the same sense and degree in which

they were so formerly. Compare laws and authorities in Cobb's Law of Negro Slavery, ch. iv., v.

The Emancipation Proclamation (January 1, 1863), and the amendments to the constitution of the United States, have rendered the views entertained on the subject purely speculative, as slavery has ceased to exist.

The Emancipation Proclamation was issued by President Lincoln as commander-in-chief of the army and navy of the United States during the existence of armed rebellion, and by its terms purported to be nothing more than "a fit and necessary war measure for suppressing said rebellion." By virtue of this power, it was therein ordered and declared that all persons held as slaves within certain designated states, and parts of states, were and henceforward should be free, and that the executive government of the United States, including the military and naval authorities thereof, should recognize and maintain the freedom of said persons. The proclamation was not meant to apply to those states or parts of states not in rebellion.

The constitutionality of this measure has been a subject of some doubt, the prevailing opinion being that it could be supported as a war measure alone, and apply where the slaveholding territory was actually subdued by the military power of the United States; Slaughter-House Cases, 16 Wall. (U. S.) 68, 21 L. Ed. 394; In South Carolina, it has been held that slavery was not abolished by the Emancipation Proclamation, and the same view was sustained in Texas; Pickett v. Wilkins, 13 Rich. Eq. (S. C.) 366; Hall v. Keese, 31 Tex. 504. In Louisiana, Posey v. Driggs, 20 La. Ann. 199, and Alabama, Morgan v. Nelson, 43 Ala. 592, the opposite view is held. But see McElvain v. Mudd, 44 Ala. 70, 4 Am. Rep. 106. In Mississippi the question of the time when slavery was abolished is left open; Herrod v. Davis, 43 Miss. 102.

The 13th Amendment to the constitution, proclaimed Dec. 18, 1865, was the definite settlement of the question of slavery in the United States. It declares, "1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. 2. Congress shall have power to enforce this article by appropriate legislation." See SLAVE; MANUMISSION.

BONDED WAREHOUSE. A warehouse for the storage of goods, wares and merchandise, deposited pursuant to law, held under bond for the payment of duties or revenue taxes.

Under the act authorizing persons to keep a warehouse for the storage of dutiable goods, it was held that no person has any right to do so unless appointed by the Secretary of the Treasury, and such appointment can be revoked at pleasure; Corkle v. Maxwell, Fed. Cas. No. 3,231. Goods in a bonded warehouse under the revenue laws, are in possession of the sovereign and no lien can be obtained thereon by a creditor; In re Johnston, Fed. Cas. No. 7,424. The statutes regulating bonded warehouses, usually provide that goods deposited therein may be withdrawn for consumption within one year of the date of original importation, on payment of duties and charges; Allen v. Jones, 24 Fed. 13. The Tariff Act of 1909 makes the period of withdrawal three years; sec. 20. The goods cannot be transferred from the original packages for safety or preservation while in the warehouse, unless entered for exportation and legally removed from the warehouse into the possession of the importer; W. H. Thomas & Son Co. v. Barnett, 144 Fed. 338, 75 C. C. A. 300. The expense of storage of imported merchandise pending inspection and analysis under the Pure Food Law should be borne by the government and not by the importer; U. S. v. Acker, Merrall & Condit, 133 Fed. 842. The Tariff Act of 1913 re-enacts the former law, with an amendment permitting the manufacture of cigars in a bonded warehouse. Ore and metal smelting and refining works may be designated as bonded warehouses.

BONIS NON AMOVENDIS. A writ addressed to the sheriff, when a writ of error has been brought, commanding that the person against whom judgment has been obtained be not suffered to remove his goods till the error be tried and determined. Reg. Orig. 131.

BONITARIAN OWNERSHIP. DOMINIUM BONITARIUM. The term *in bonis habere* was used to express an ownership which was practically absolute, because it was protected by the authority of the prætor in cases where, wishing to give all the advantages of ownership, he was prevented by the civil law from giving the legal (Quiritarian) *dominium*.

BONO ET MALO. A special writ of jail delivery, which formerly issued of course for each particular prisoner. 4 Bla. Com. 270.

BONUS. A premium paid to a grantor or vendor.

A sum exacted by the state from a corporation as a consideration for granting a charter; in such case it is clearly distinguished from a tax; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; Com. v. Transp. Co., 107 Pa. 112.

A consideration given for what is received. Extraordinary profit accruing in the operation of a stock company or private corporation. 10 Ves. Ch. 185; 7 Sim. 634; 2 Spence, Eq. Jur. 569.

An additional premium paid for the use of money beyond the legal interest. Mechanics' & Working Men's Mut. Sav. Bank & Bldg. Ass'n of New Haven v. Wilcox, 24 Conn. 147. It it not a gift or gratuity, but is paid for some services or consideration and is in addition to what would ordinarily be given; Kenicott v. Wayne County, 16 Wall. (U. S.) 452, 21 L. Ed. 319.

In its original sense of *good* the word was formerly much used. Thus, a jury was to be composed of twelve good men *(boni homines)*; 3 Bla. Com. 349; *bonus judex* (a good judge). Co. Litt. 246.

BOOK. A general name given to every literary composition which is printed, but appropriately to a printed composition bound in a volume. See COPYRIGHT.

A manuscript may, under some circumstances, be regarded as a "book;" In re Beecher's Estate, 17 Pa. C. C. R. 161; 8 L. J. Ch. 105.

BOOK-LAND. **In English Law.** Land, also called charter-land, which was held by deed under certain rents and fee services, and differed in nothing from free socage land. 2 Bla. Com. 90. See 2 Spelman, English Works 233, tit. *Of Ancient Deeds and Charters;* BOC-LAND.

Land held by book, by a royal and ecclesiastical *privilegium.* Maitland, Domesday and Beyond 257. The church introduced the custom of conveying land by written documents. The "boc" or written charter was ecclesiastical in its origin. It was used by the king, the church or very great men. The practice never became common. 2 Holdsw. Hist. E. L. 14, 60.

BOOK OF ACCOUNT. See ORIGINAL ENTRY, BOOKS OF.

BOOK OF ACTS. The records of a surrogate's court.

BOOK OF ADJOURNAL. **In Scotch Law.** The records of the court of justiciary.

BOOK OF RATES. An account or enumeration of the duties or tariffs authorized by parliament. 1 Bla. Com. 316.

BOOK OF RESPONSES. **In Scotch Law.** An account which the director of the Chancery keeps particularly to note a seizure when he gives an order to the sheriff in that part to give it to an heir whose service has been returned to him. Wharton, Lex.

BOOKS OF ORIGINAL ENTRIES. See ORIGINAL ENTRY, BOOKS OF.

BOOKS OF SCIENCE. Scientific books, even of received authority, are not admissible in evidence before a jury; 5 C. & P. 73; Com. v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401; Harris v. R. Co., 3 Bosw. (N. Y.) 18; 2 Carl. 617; 1 Greenl. Ev. § 440, *a;* except to contradict an expert who bases his opinion upon them; City of Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 678; standard medical works with explanation of technicalities are admissible; Carter v. State, 2 Ind. 617; Stoudenmeir v. Williamson, 29 Ala. 558. Counsel may read such books to the jury in their argument; State v. Hoyt, 46 Conn. 330 (two judges dissenting); *contra,* Com. v. Wilson, 1 Gray (Mass.) 337; Ordway v. Haynes, 50 N. H. 159; People v. Anderson, 44 Cal. 65; Gale v. Rector, 5 Ill. App. 481. In Wade v. De Witt, 20 Tex. 398 and Luning v. State, 1 Chand. (Wis.) 178, it was held that the admission of such evidence was in the discretion of the court. See 26 Am. Law Rev. 390; Wade v. De Witt, 20 Tex. 398; Washburn v. Cuddihy, 8 Gray (Mass.) 430; Gallagher v. Ry. Co., 67 Cal. 13, 6 Pac. 869, 51 Am. Rep. 680, n.

The law of foreign countries may be proved by printed books of statutes, reports, and text writers, as well as by the sworn testimony of experts; so held, in a learned opinion by Lowell, J., in the U. S. C. C. The Pawashick, 2 Low. 142, Fed. Cas. No. 10,851. See Farmers' Loan & Trust Co. v. Telegraph Co., 44 Hun (N. Y.) 400; Bollinger v. Gallagher, 163 Pa. 245, 29 Atl. 751, 43 Am. St. Rep. 791; *contra,* but without authority, Dickerson v. Matheson, 50 Fed. 73. A scientific witness may testify to the written foreign law, with or without the text of the law before him; 11 Cl. & F. 85, 114; 8 Q. B. 208. It has been said that foreign law must always be proved by an expert; 1 Greenl. Ev. 486, 488; but see Westl. Pr. Int. Law (3d ed.) § 356; but the court may in its discretion require the printed book of law to be produced in order to corroborate the witness; Pierce v. Indseth, 106 U. S. 546, 1 Sup. Ct. 418, 27 L. Ed. 254.

See FOREIGN LAW; EXPERTS.

BOOKS, PRODUCTION OF. See PRODUCTION OF BOOKS AND DOCUMENTS.

BOOM. An enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber. 10 Am. & Eng. Corp. Cas. 399. See LOGS.

BOOM COMPANY. A company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, and rafting logs. 10 Am. & Eng. Corp. Cas. 399; A. & E. Encyc.

BOON-DAYS. Certain days in the year on which copyhold tenants were bound to perform certain services for the lord. Called, also, due-days. Whishaw.

BOOTY. The capture of personal property by a public enemy on land, in contradistinction to prize, which is a capture of such property by such an enemy on the sea.

After booty has been in complete possession of the enemy for twenty-four hours, it becomes absolutely his, without any right of postliminy in favor of the original owner, particularly when it has passed *bona fide* into the hands of a neutral; 1 Kent 110. The right to booty belongs to the sovereign; but sometimes the right of the sovereign, or of the public, is transferred to the soldiers, to encourage them; Pothier, *Droit de Propriété,* p. 1, c. 2, a. 1, § 2; 2 Burl. Nat. & Pol. Law, pt. 4, c. 7, n. 12.

BORDAGE. A species of base tenure by which *bordlands* were held. The tenants were called *bordarii.* These bordarii would seem to have been those tenants of a less servile condition, who had a cottage and land assigned to them on condition of supplying their lord with poultry, eggs, and such small matters for his table. Whishaw; Cowell.

BORDEREAU. In French law, a detailed statement of account; a summary of an instrument.

BORDLANDS. The demesnes which the lords keep in their hands for the maintenance of their board or table. Cowell.

BORDLODE. The rent or quantity of food which the *bordarii* paid for their lands. Cowell.

BORG (Sax.). Suretyship.

Borgbriche (violation of a pledge or suretyship) was a fine imposed on the *borg* for property stolen within its limits.

A tithing in which each one became a surety for the others for their good behavior. Spelman, Gloss.; Cowell; 1 Bla. Com. 115.

BORN. It is now settled according to the dictates of common sense and humanity, that a child *en ventre sa mère* for all purposes for his own benefit, is considered as absolutely born; Swift v. Duffield, 5 S. & R. (Pa.) 40.

If an infant is born dead or at such an early stage of pregnancy as to be unable to live, it is to be considered as never born; Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35.

See BIRTH; EN VENTRE SA MÈRE.

BOROUGH. A town; a town of note or importance. Cowell. An ancient town. Littleton § 164. A town which sends burgesses to parliament, whether corporate or not. 1 Bla. Com. 115; Whishaw.

A corporate town that is not a city. 1 M. & G. 1; Cowell. In its more modern English acceptation, it denotes a town or city organized for purposes of government. 3 Steph. Com. (11th ed.) 33. See TOWN.

It is impossible to reconcile the meanings of this word given by the various authors cited, except upon the supposition of a change of requirements necessary to constitute a borough at different periods. The only essential circumstance which underlies all the meanings given would seem to be that of a number of citizens bound together for purposes of joint action, varying in the different boroughs, but being either for representation or for municipal government.

Many causes, in no two cases quite alike, went to make up the peculiar community which the 13th Century recognized as a borough. The borough community, though a different variety, is not a different genus from that of the other communities with which England of the early Middle Ages was peopled; 2 Holdsw. Hist. E. L. 257. See BURH; Brit. Borough Charters 1042-1216, by Bolland; Batteson, Borough Customs.

In American Law. In Pennsylvania, the term denotes a political division, organized for municipal purposes; and the same is true of Connecticut and New Jersey. Sav. Bor. L. 4; Southport v. Ogden, 23 Conn. 128; see also Brown v. State, 18 Ohio St. 496; 1 Dill. Mun. Corp. § 41, n.

In Scotch Law. A corporation erected by charter from the crown. Bell, Dict.

BOROUGH COURTS. **In English Law.** Courts of limited jurisdiction held in particular districts by prescription, charter, or act of parliament, for the prosecution of petty suits. 19 Geo. III. c. 70; 3 Will. IV. c. 74; 3 Bla. Com. 80. See COURTS OF ENGLAND.

BOROUGH ENGLISH. A custom prevalent in some parts of England, by which the youngest son inherits the estate in preference to his older brothers. 1 Bla. Com. 75.

The custom is said by Blackstone to have been derived from the Saxons, and to have been so called in distinction from the Norman rule of descent; 2 Bla. Com. 83. A reason for the custom is found in the fact that the elder children were usually provided for during the life of the parent as they grew up, and removed, while the younger son usually remained. See, also, Bacon, Abr.; Comyns, Dig. *Borough English; Termes de la Ley;* Cowell. The custom applies to socage lands; 2 Bla. Com. 83. See BURGAGE.

BORROW. The word is often used in the sense of returning the thing borrowed in specie, as to borrow a book, or any other thing to be returned again. But it is evident where money is borrowed the identical money loaned is not to be returned, because if this is so, the borrower would derive no benefit from the loan. In a broad sense it means a contract for the use of money. State v. School Dist. No. 24, 13 Neb. 88, 12 N. W. 812; Kent v. Min. Co., 78 N. Y. 177.

BORROWER. He to whom a thing is lent at his request.

In general he has the right to use the thing borrowed, himself, during the time and for the purpose intended between the parties. He is bound to take extraordinary care of the thing borrowed; to use it according to the intention of the lender; to restore it in proper condition at the proper time; Story, Bailm. § 268; Edw. Bailm. 135; 2 Kent 446. See BAILMENT.

BOSCAGE. That food which wood and trees yield to cattle.

To be quit of boscage is to be discharged of paying any duty of wind-fall wood in forest; Whishaw; Manwood, For. Laws.

BOSCUS. Wood growing; wood; both high wood or trees, and underwood or coppice. The high wood is properly called *saltus*. Spelman, Gloss.; Co. Litt. 5 *a*.

BOTE, BOT. A recompense or compensation. The common word *to boot* comes from this word. Cowell. The term is applied as well to making repairs in houses, bridges, etc., as to making a recompense for slaying a man or stealing property. *House bote*, materials which may be taken to repair a house; *hedge bote*, to repair hedges; *brig bote*, to repair bridges; *man bote*, compensation to be paid by a murderer. It was this system of bot and wer, resting upon blood-feud and upon outlawry, which was the ground work of the Anglo-Saxon criminal law; 2 Holdsw. Hist. E. L. 36.

Bote is known to the English law also under the name of Estover; 1 Washb. R. P. *99; 2 Bla. Com. 35. The tenant for life was entitled to take reasonable "botes" and "estovers," without committing waste. 3 Holdsw. Hist. E. L. 105.

BOTTOMRY. A contract in the nature of a mortgage, by which the owner of a ship, or the master, as his agent, borrows money for the use of the ship, and for a specified

voyage, or for a definite period, pledges the ship (or the keel or *bottom* of the ship, *pars pro toto*) as a security for its repayment, with maritime or extraordinary interest on account of the marine risks to be borne by the lender; it being stipulated that if the ship be lost in the course of the specified voyage, or during the limited time by any of the perils enumerated in the contract, the lender shall also lose his money. 2 Hagg. Adm. 48; 2 Sumn. 157. See Davies & Co. v. Soelberg, 24 Wash. 308, 64 Pac. 540.

Bottomry differs materially from an ordinary loan. Upon a simple loan the money is wholly at the risk of the borrower, and must be repaid at all events. But in bottomry, the money, to the extent of the enumerated perils, is at the risk of the lender during the voyage on which it is loaned, or for the period specified. Upon an ordinary loan only the usual legal rate of interest can be reserved; but upon *bottomry* and *respondentia* loans any rate of interest, not grossly extortionate, which may be agreed upon, may be legally contracted for.

When the loan is not made upon the ship, but on the goods laden on board and which are to be sold or exchanged in the course of the voyage, the borrower's personal *responsibility* is deemed the principal security for the performance of the contract, which is therefore called respondentia, which see. And in a loan upon respondentia the lender must be paid his principal and interest though the ship perish, provided the goods are saved. In most other respects the contracts of *bottomry* and of *respondentia* stand substantially upon the same footing. See further, 10 Jur. 845; 4 Thornt. 285, 512; 2 W. Rob. Adm. 83-85; Thompson v. Perkins, 3 Mas. 225, Fed. Cas. No. 13,972.

Bottomry bonds may be given by a master appointed by the charterers of the ship, by masters necessarily substituted or appointed abroad, or by the mate who has become master, as *hæres necessarius*, on the death of the appointed master. 1 Dod. 278; 3 Hagg. Adm. 18; The Fortitude, 3 Sumn. 246, Fed. Cas. No. 4,953. But while in a port in which the owners, or one of them, or a recognized agent of the owners, reside, the master, as such, has no authority to make contracts affecting the ship, and a bottomry bond executed under such circumstances is void; Lavinia v. Barclay, 1 Wash. C. C. 49, Fed. Cas. No. 8,125; 22 Eng. L. & Eq. 623. Unless, it has been held in an English case, he has no means of communicating with the owners; 1 Dod. 273. See 7 Moore's P. C. C. 398. The master has authority to hypothecate the vessel only in a foreign port; but in the jurisprudence of the United States all maritime ports, other than those of the state where the vessel belongs, are foreign to the vessel; Burke v. Rich, 1 Cliff. 308, Fed. Cas. No. 2,161; The William & Emmeline, 1 Blatch. & H. 66, Fed. Cas. No. 17,687; The Hilarity, 1 Blatch. & H. 90, Fed. Cas. No. 6,480.

The owner of the vessel may borrow upon bottomry in the vessel's home port, and whether she is in port or at sea; and it is not necessary to the validity of a bond made by the owner that the money borrowed should be advanced for the necessities of the vessel or her voyage; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057; The Mary, 1 Paine, 671, Fed. Cas. No. 9,187; 2 Dods. Ad. R. 461. But it may well be doubted, whether when money is thus borrowed by the owner for purposes other than necessities or uses of the ship, and a bottomry bond in the usual form is given, a court of admiralty has jurisdiction to enforce the lien; Bee 348. As a contract made and to be performed on land, and having no necessary connection with the business of navigation, it is probable that it would not now be deemed a maritime contract, but would take effect and be enforced as a common-law mortgage. See Hurry v. John & Alice, 1 Wash. C. C. 293, Fed. Cas. No. 6,923; Shrewsbury v. Two Friends, Bee, 433, Fed. Cas. No. 12,819; 1 Swab. 269. But see The Mary, 1 Paine 671, Fed. Cas. No. 9,187; Rucher v. Conyngham, 2 Pet. Adm. 295, Fed. Cas. No. 12,106.

If the bond be executed by the master of the vessel, it will be upheld and enforced only upon proof that there was a necessity for the loan, and also for pledging the credit of the ship; as the authority of the master to borrow money on the credit of the vessel rests upon the necessity of the case, and only exists under such circumstances of necessity as would induce a prudent owner to hypothecate his ship to raise money for her use; 3 Hagg. Adm. 66, 74; The Fortitude, 3 Sumn. 228, Fed. Cas. No. 4,953; The Aurora, 1 Wheat. (U. S.) 96, 4 L. Ed. 45; The Mary, 1 Paine, 671, Fed. Cas. No. 9,187; Tunno v. The Mary, Bee, 120, Fed. Cas. No. 14,237. His authority is not confined, however, to such repairs and supplies as are absolutely and indispensably necessary, but includes also all such as are reasonably fit and proper for the ship and the voyage; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; The Emily Souder, 17 Wall. (U. S.) 666, 21 L. Ed. 683.

If the master could have obtained the necessary supplies or funds on the personal credit of himself or of his owner, and this fact was known to the lender, the bond will be held invalid; The Fortitude, 3 Sumn. 257, Fed. Cas. No. 4,953. And if the master borrows on bottomry without apparent necessity, or when the owner is known to be accessible enough to be consulted upon the emergency, the bond is void, and the lender can look only to the personal responsibility of the master; 3 W. Rob. Adm. 243, 265. For the fact that the advances were necessary, and were made on the security of the vessel, is not, in any instance, to be presumed; Walden v. Chamberlain, 3 Wash. C. C. 290, Fed. Cas. No. 17,055. And moneys advanced to the master without inquiry as to the necessity of the advance, or seeing to the proper application, have been disallowed; 33 Eng. L. & Eq. 602. It may be given after the advances have been made, in pursuance of a prior agreement; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1,036. If given for a larger sum than the actual advances,

in fraud of the owners or underwriters, it vitiates the bond and avoids the bottomry lien even for the sum actually advanced; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267; The Ann C. Pratt, 1 Curt. C. C. 341, Fed. Cas. No. 409.

The contract of bottomry is usually in form a bond (termed a bottomry bond) conditioned for the repayment of the money lent, with the interest agreed upon, if the ship safely accomplishes the specified voyage or completes in safety the period limited by the contract; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057. See The Lykus, 36 Fed. 919. Sometimes it is in that of a bill of sale, and sometimes in a different shape; but it should always specify the principal lent and the rate of maritime interest agreed upon; the names of the lender and borrower; the names of the vessel and of her master; the subject on which the loan is effected, whether of the ship alone, or of the ship and freight; whether the loan is for an entire or specific voyage or for a limited period, and for what voyage or for what space of time; the risks the lender is contented to bear; and the period of repayment. Where the master of a ship in a foreign port gives a draft on the owners for money advanced for wages and supplies, it was held to be an abbreviated form of bottomry; Hanschell v. Swan, 23 Misc. 304, 51 N. Y. Supp. 42. It is negotiable; 5 C. Rob. Adm. 102. Where the bond covers "the vessel, her tackle, apparel, furniture, and freight as per charter-party," demurrage previously earned is not freight; Brett v. Van Praag, 157 Mass. 132, 31 N. E. 761. It cannot be given in connection with personal security by the owner of the vessel to pay the debt regardless of the return of the vessel to port; Theo. H. Davies & Co. v. Soelberg, 24 Wash. 308, 64 Pac. 540.

In case a highly extortionate or wholly unjustifiable rate of interest be stipulated for in a bottomry bond, courts of admiralty will enforce the bond for only the amount fairly due, and will not allow the lender to recover an unconscionable rate of interest. But in mitigating an exorbitant rate of interest they will proceed with great caution. For the course pursued where the amount of interest was accidentally omitted, see 1 Swab. 240. Fraud will induce a court of equity to set aside a bottomry bond, in England; 8 Sim. 358; 3 M. & C. 451, 453, n.

Where the express contract of bottomry is void for fraud, no recovery can be had, on the ground of an implied contract and lien of advances actually made; The Ann C. Pratt, 1 Curt. C. C. 340, Fed. Cas. No. 409; Carrington v. The Ann C. Pratt, 18 How. (U. S.) 63, 15 L. Ed. 267. But a bottomry bond may be good in part and bad in part; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654; Furniss v. The Magoun, Olc. 55, Fed. Cas. No. 5,163. And it has been held in England that fraud of the owner or mortgagor of a vessel, which might render the voyage illegal, does not invalidate a bottomry bond to a *bona fide* lender; L. R. 1 Adm. & Ec. 13.

Not only the ship, her tackle, apparel, and furniture (and the freight, if specifically pledged), are liable for the debt in case the voyage or period is completed in safety, but the borrower is also, in that event, personally responsible. See 2 Bla. Com. 457; Brett v. Van Praag, 157 Mass. 132, 31 N. E. 761. It binds not only the ship but her entire earnings, as against prior bottomries, mortgages and other loans to the owner or master; The Anastasia, Fed. Cas. No. 347. But only, it would seem, in cases in which such responsibility has been especially made a condition of the bond; Kelly v. Cushing, 48 Barb. (N. Y.) 269.

The borrower on bottomry is affected by the doctrines of seaworthiness and deviation; 3 Kent 360; and if, before or after the risk on the bottomry bond has commenced, the voyage or adventure is voluntarily broken up by the borrower, in any manner whatsoever, whether by a voluntary abandonment of the voyage or adventure, or by a deviation or otherwise, the maritime risks terminate, and the bond becomes presently payable; The Draco, 2 Sumn. 157, Fed. Cas. No. 4,057; 3 Kent 360. But maritime interest is not recoverable if the risk has not commenced.

But in England and America the established doctrine is that the owners are not personally liable, except to the extent of the fund pledged which has come into their hands; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 554, 8 L. Ed. 1036; 1 Hagg. Adm. 1, 13. If the ship or cargo be lost, not by the enumerated perils of the sea, but by the fraud or fault of the borrower or master, the hypothecation bond is forfeited and must be paid.

The risks assumed by the lender are usually such as are enumerated in the ordinary policies of marine insurance. If the ship be wholly lost in consequence of these risks, the lender, as before stated, loses his money; but the doctrine of constructive total loss does not apply to bottomry contracts; 1 Maule & S. 30; Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274. See 13 C. B. 442.

It is usual in bottomry bonds to provide that, in case of damage to the ship (not amounting to a total loss) by any of the enumerated perils, the lender shall bear his proportion of the loss, viz.: an amount which will bear the same proportion to the whole damage that the amount lent bears to the whole value of the vessel prior to the damage. Unless the bond contains an express stipulation to that effect, the lender is not entitled to take possession of the ship pledged, even when the debt becomes due; but he may enforce payment of the debt by a proceeding *in rem*, in the admiralty, against the ship; under which she may be

arrested, and, in pursuance of a decree of the court, ultimately sold for the payment of the amount due. And this is the ordinary and appropriate remedy of the lender upon bottomry; though he has also, as a general rule, his remedy by action of covenant or debt at common law upon the bond; Tyl. Mar. Loans 782. It was held in Mississippi that state legislatures have no authority to create maritime liens, or confer jurisdiction on state courts to enforce such liens by proceedings *in rem*. Such jurisdiction is exclusively in the courts of admiralty of the United States; Murphey v. Trade Co., 49 Ala. 436; The Belfast, 7 Wall. (U. S.) 624, 19 L. Ed. 266.

In entering a decree in admiralty upon a bottomry bond, the true rule is to consider the sum lent and the maritime interest as the principal, and to allow *common interest* on that sum from the time such principal became due; The Packet, 3 Mas. 255, Fed. Cas. No. 10,654. Where money is necessarily taken up on bottomry to defray the expenses of repairing a partial loss, against which the vessel is insured, the underwriter (although he has nothing to do with bottomry bond) is liable to pay his share of the extra expense of obtaining the money, in that mode, for the payment of such expenses; Braalie v. Insurance Co., 12 Pet. (U. S.) 378, 9 L. Ed. 1123.

The lien or privilege of a bottomry bond holder, like all other maritime liens, has, ordinarily, preference of all prior and subsequent common-law and statutory liens, and binds all prior interests centering in the ship; Blaine v. The Charles Carter, 4 Cra. (U. S.) 328, 2 L. Ed. 636. It holds good (if reasonable diligence be exercised in enforcing it) as against subsequent purchasers and common-law incumbrancers; but the lien of a bottomry bond is not indelible, and, like other admiralty liens, may be lost by unreasonable delay in asserting it, if the rights of purchasers or incumbrancers have intervened; The St. Jago De Cuba, 9 Wheat. (U. S.) 409, 6 L. Ed. 122; 2 W. & M. 48; 1 Swab. 269; 1 Cliff. 308; 5 Rob. Adm. 94. The lien extends to the fund recoverable for the ship's tortious destruction; Miller v. O'Brien, 59 Fed. 621. The rules under which courts of admiralty marshal assets claimed to be applicable to the payment of bottomry and other maritime liens and of common-law and statutory liens, will be more properly and fully considered in the article Maritime Liens, which see. But it is proper here to state that, as between the holders of two bottomry bonds upon the same vessel in respect to different voyages, the later one, as a general rule, is entitled to priority of payment out of the proceeds of the vessel; 1 Dod. 201; Furniss v. The Magoun, Olc. 55, Fed. Cas. No. 5,163.

Seamen have a lien, prior to that of the holder of the bottomry bond, for their wages for the voyage upon which the bottomry is founded, or any subsequent voyage; but the owners are also personally liable for such wages, and if the bottomry-bond holder is compelled to discharge the seamen's lien, he has a resulting right to compensation over against the owners, and has been held to have a lien upon the proceeds of the ship for his reimbursement; The Virgin v. Vyfhius, 8 Pet. (U. S.) 538, 8 L. Ed. 1036; 1 Hagg. Adm. 62. And see 1 Swab. 261; 1 Dod. 40; Blaine v. The Charles Carter, 4 Cra. (U. S.) 328, 2 L. Ed. 636.

Under the laws of the United States, bottomry bonds are only *quasi* negotiable, and except in cases subject to the principle of equitable estoppel, the indorsee takes only the payee's right; The Serapis, 37 Fed. 436.

The act of congress of July 29, 1850, declaring bills of sale, mortgages, hypothecations, and conveyances of vessels invalid against persons other than the grantor or mortgagor, his heirs and devisees, not having actual notice thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled, expressly provided that the lien by bottomry on any vessel, created during her voyage by a loan of money or materials necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority or be in any way affected by the provisions of that act.

Contracts of bottomry and respondentia are so different in different countries that when disputes arise they are to be decided by the words used in the contract rather than by principles of general commercial law; O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469.

Where a bottomry bond of an English vessel was executed in New Orleans and the charter provided she should be governed by American law, the liability was according to law of United States; The Wyandotte, 136 Fed. 470; affirmed in The Wyandotte, 145 Fed. 321, 75 C. C. A. 117.

BOUGHT NOTE. A written memorandum of a sale, delivered, by the broker who effects the sale, to the vendee. Story, Ag. § 28; 11 Ad. & E. 589; 8 M. & W. 834.

Bought and sold notes are made out usually at the same time, the former being delivered to the vendee, the latter to the vendor. When the broker has not exceeded his authority, both parties are bound thereby; 1 C. & P. 388; 5 B. & C. 436; 1 Bell, Com. (4th ed.) 347, 477. Where the same broker acts for both parties, the notes must correspond; 5 B. & C. 436; 17 Q. B. 103; Suydam v. Clark, 2 Sandf. (N. Y.) 133. The broker, as to this part of the transaction, is agent for both parties; 2 H. & N. 210; Coddington v. Goddard, 16 Gray (Mass.) 442. Whether a memorandum in the broker's books will cure a disagreement, see 17 Q. B. 115; 1 H. & N. 484; but it is said to be the better opinion that the signed entry in the

broker's book constitutes the real contract between the parties; 1 C. P. D. 777; 9 M. & W. 802; but it may be shown that the entry was in excess of the broker's authority; 4 L. R. Ir. 94; that the bought and sold notes do not constitute the contract, see 17 Q. B. 115. Where there is a variance between the bought and sold notes, and no entry of the transaction, there is no contract; 17 Q. B. 115. A bought note will take the case out of the Statute of Frauds, if there is no variance; 16 C. B. N. S. 11. See a full discussion in Benj. Sales § 276; Tiedman, Sales § 79.

BOUND BAILIFF. A sheriff's officer, who serves writs and makes arrests. He is so called because bound to the sheriff for the due execution of his office. 1 Bla. Com. 345.

BOUNDARY. Any separation, natural or artificial, which marks the confines or line of two contiguous estates. 3 Toullier, n. 171.

The term is applied to include the objects placed or existing at the angles of the bounding lines, as well as those which extend along the lines of separation.

A *natural* boundary is a natural object remaining where it was placed by nature.

A river or stream is a natural boundary, and the centre line of the stream is the line; Jackson v. Louw, 12 Johns. (N. Y.) 252; People v. Seymour, 6 Cow. (N. Y.) 579; Haye's Ex'r v. Bowman, 1 Rand. (Va.) 417; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Dunlap v. Stetson, 4 Mas. 349, Fed. Cas. No. 4,164; State v. Town of Gilmanton, 9 N. H. 461; 1 Tayl. 136; Morgan v. Reading, 3 Smedes & M. (Miss.) 366; Browne v. Kennedy, 5 Harr. & J. (Md.) 195, 9 Am. Dec. 503; Hammond v. Ridgely's Lessee, 5 Harr. & J. (Md.) 245, 9 Am. Dec. 522; MacDonald v. Morrill, 154 Mass. 270, 28 N. E. 259. Where a natural pond is the boundary, the line is the natural shore; but where an artificial pond, the thread of the stream; Waterman v. Johnson, 13 Pick. (Mass.) 261; State v. Town of Gilmanton, 9 N. H. 461; Mansur v. Blake, 62 Me. 38; Kirkpatrick v. Ice Co., 45 Mo. App. 335; Gouverneur v. Ice Co., 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669; Noyes v. Collins, 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609, 54 Am. St. Rep. 571; where a meandered lake, the middle thereof; Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; where the seashore, the line is at low water mark; Doane v. Willcutt, 5 Gray (Mass.) 335, 66 Am. Dec. 369; U. S. v. Pacheco, 2 Wall. (U. S.) 587, 17 L. Ed. 865; Oakes v. De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628. So where one of the great lakes is the boundary; Sloan v. Biemiller, 34 Ohio St. 492; or a navigable lake; see Village of Wayzata v. Ry. Co., 50 Minn. 438, 52 N. W. 913. A grant of land bounded by navigable tide-water, carries no title to land below high water mark; De Lancey v. Piepgras, 63 Hun 169, 17 N. Y. Supp. 681.

Where land is bounded by the sea, and the latter suddenly recedes, leaving considerable space uncovered, this new land, under the royal prerogative, becomes the property of the king. But if the dereliction be gradual, and by imperceptible degrees, then the land gained belongs to the adjacent owner, for *de minimis non curat lex;* 3 Barn. & C. 91, and cases cited. Similarly, where a stream forming the boundary between two owners *gradually* changes its course, it continues to mark the line; but if the change be sudden and immediate, the boundary remains in the old channel; 2 Bla. Com. 262; Collins v. State, 3 Tex. App. 323, 30 Am. Rep. 142; Niehaus v. Shepherd, 26 Ohio St. 40; Holbrook v. Moore, 4 Neb. 437; Missouri v. Kentucky, 11 Wall. (U. S.) 395, 20 L. Ed. 116.

An *artificial* boundary is one erected by man.

The ownership, in case of such boundaries, must, of course, turn mainly upon circumstances peculiar to each case; 5 Taunt. 20; 8 B. & C. 259; generally extending to the centre; Child v. Starr, 4 Hill (N. Y.) 369; Warner v. Southworth, 6 Conn. 471. A tree standing directly on the line is the joint property of both proprietors; Griffin v. Bixby, 12 N. H. 454, 37 Am. Dec. 225; otherwise, where it only stands so near that the roots penetrate; 1 M. & M. 112; 2 Rolle 141. Land bounded on a highway extends to the centre-line, though a private street; Newhall v. Ireson, 8 Cush. (Mass.) 595, 54 Am. Dec. 790; Paul v. Carver, 26 Pa. 223, 67 Am. Dec. 413; Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705; Schneider v. Jacob, 86 Ky. 101, 5 S. W. 350; Halloway v. Southmayd, 64 Hun 632, 18 N. Y. Supp. 707; unless the description excludes the highway; Jackson v. Hathaway, 15 Johns. (N. Y.) 454, 8 Am. Dec. 263; Town of Chatham v. Brainerd, 11 Conn. 60; Codman v. Evans, 1 Allen (Mass.) 443; 3 Washb. R. P. *635.

Boundaries are frequently denoted by monuments fixed at the angles. In such case the connecting lines are always presumed to be straight, unless described to be otherwise; Allen v. Kingsbury, 16 Pick. (Mass.) 235; Baker v. Talbott, 6 T. B. Monr. (Ky.) 179; Burrows v. Vandevier, 3 Ohio, 382; Nelson v. Hall, 1 McLean 519, Fed. Cas. No. 10,107; 2 Washb. R. P. *632. A practical surveyor may testify whether, in his opinion, certain marks on trees, piles of stones, or other marks on the ground were intended as monuments of boundaries; Northumberland Coal Co. v. Clement, 10 W. N. C. (Pa.) 321.

The following is the order of importance in boundaries: *first*, the highest regard is had to natural boundaries; Redmond v Stepp, 100 N. C. 212, 6 S. E. 727; Walrod v. Flanigan, 75 Ia. 365, 39 N. W. 645; Morse

v. Rollins, 121 Pa. 537, 15 Atl. 645; Hughes v. Cawthorn, 35 Fed. 248; Wood v. Ramsey, 71 Md. 9, 17 Atl. 563; McAninch v. Freeman, 69 Tex. 445, 4 S. W. 369; *second*, to lines actually run and corners marked at the time of the grant; *third*, if the lines and courses of an adjoining tract are called for, the lines will be extended, if they are sufficiently established, and no other departure from the deed is required, preference being given to marked lines; *fourth*, to courses and distances; Yanish v. Tarbox, 49 Minn. 268, 51 N. W. 1051.

Courses and distances give way to monuments, but they must be of a permanent character, and the place where they are at the time of the conveyance must be satisfactorily located; Brown v. Morrill, 91 Mich. 29, 51 N. W. 700; Whitehead v. Ragan, 106 Mo. 231, 17 S. W. 307. But this is a mere rule of construction; Green v. Horn, 207 N. Y. 489, 101 N. E. 430. When a description in a deed by metes and bounds conflicts with a description by reference to plats, the former governs; Waldin v. Smith, 76 Ia. 652, 39 N. W. 82.

Parol evidence is often admissible to identify and ascertain the locality of monuments called for by a description; Waterman v. Johnson, 13 Pick. (Mass.) 267; Frost v. Spaulding, 19 Pick. (Mass.) 445, 31 Am. Dec. 150; and where the description is ambiguous, the practical construction given by the parties may be shown; Choate v. Burnham, 7 Pick. (Mass.) 274. Common reputation may be admitted to identify monuments, especially if of a public or quasi-public nature; Griffin v. Graham, 8 N. C. 116, 9 Am. Dec. 619; Harmer v. Morris, 1 McLean, 45, Fed. Cas. No. 6,076; Nelson v. Hall, 1 McLean, 518, Fed. Cas. No. 10,107; Whitney v. Smith, 10 N. H. 43; Cravenson v. Meriwither, 2 A. K. Marsh. (Ky.) 158; Beaty v. Hudson, 9 Dana (Ky.) 322; Smith v. Shackleford, 9 Dana (Ky.) 465; Boardman v. Reed, 6 Pet. (U. S.) 341, 8 L. Ed. 415; Harriman v. Brown, 8 Leigh (Va.) 697; McCoy's Lessee v. Galloway, 3 Ohio, 282, 17 Am. Dec. 591. On a conflict of boundaries between deeds from the same person, the one that was first executed controls; Flynn v. Sparks, 11 S. W. 206, 10 Ky. L. Rep. 960. Where there are two conflicting monuments, and one corresponds with the courses and distances, that one should be taken and the other rejected as surplusage; Zeibold v. Foster, 118 Mo. 349, 24 S. W. 155.

The determination of the boundaries of the states is placed by the constitution in the supreme court of the United States; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233; *id.*, 4 How. (U. S.) 591, 11 L. Ed. 1116; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67. This position was taken by that court against the opinion of Chief Justice Taney, who held that a controversy between states, or between individuals, in relation to the boundaries of a state, falls within the province of the court where the suit is brought to try a right of property in the soil, or any other right which is properly the subject of *judicial* cognizance and decision; but not a contest for rights of sovereignty and jurisdiction between states over any particular territory. This he held to be a *political* question; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 752, 9 L. Ed. 1233. All the cases of boundary disputes between states which arose prior to the constitution and were tried under the articles of confederation, by courts specially constituted by Congress, are collected in 131 U. S. App. II.

Long acquiescence in the assertion of a particular boundary between states and the exercise of sovereignty within it, should be accepted as conclusive; Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 571, 50 L. Ed. 934.

See LINE.

As to state boundaries, when they are rivers, see AVULSION; RIVER.

BOUNDING OR ABUTTING. See ABUT.

BOUNTY. An additional benefit conferred upon, or a compensation paid to, a class of persons.

It differs from a reward, which is usually applied to a sum paid for the performance of some specific act to some person or persons. It may or may not be part of a contract. Thus, the bounty offered a soldier would seem to be part of the consideration for his services. The bounty paid to fishermen is not a consideration for any contract, however. See Fowler v. Danvers, 8 Allen (Mass.) 80; Eichelberger v. Sifford, 27 Md. 320; Abbe v. Allen, 39 How. Pr. (N. Y.) 481.

A premium offered or given to induce men to enlist into the public service. Abbe v. Allen, 39 How. Pr. (N. Y.) 481.

BOURSE. An exchange. Bourses owe their origin to the Jews. The word originated at Bruges, where merchants gathered at the house of Van der Bruse; or the word is from the three purses (bourses) carved on the gable of the house where the meetings were held. Stock Exchange by Van Antwerp.

BOUWERYE. A farm.

BOUWMASTER. A farmer.

BOVATA TERRÆ. As much land as one ox can cultivate. Said by some to be thirteen, by others eighteen, acres in extent. Skene; Spelman, Gloss.; Co. Litt. 5 *a*.

Bovate is used in expressing a quantity of land and meaning one-eighth of a carucate, *i. e.* the amount of land which can be ploughed by one ox; generally about fifteen acres. 2 Holdsw. Hist. E. L. 57. See CARUCATE. Both terms seem to be French, and not part of the official Latin. Maitl. Domesday and Beyond 395.

BOYCOTT. An organized effort to exclude a person from business relations with

others by persuasion, intimidation and other acts which tend to violence, and thereby to coerce him, through fear of resulting injury, to submit to dictation in the management of his affairs. Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193, citing State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23.

In State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23, it was held that to threaten or intimidate a person to compel him against his will to do or abstain from doing any act which he has a legal right to do, is an unlawful conspiracy. See also 15 Q. B. D. 476; 23 *id.* 598; [1892] A. C. 25; [1893] 1 Q. B. 715; Toledo Ry. Co. v. Penn. Co., 54 Fed. 730, 19 L. R. A. 387; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Crump's Case, 84 Va. 940, 6 S. E. 620, 10 Am. St. Rep. 895; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99. The word itself is held in Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193, to be a threat. Intimidation and coercion are its essential elements; Gray v. Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172.

On the other hand it is held that a boycott is not unlawful, unless attended by some act in itself illegal; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Longshore Printing & Pub. Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640; that an act lawful in itself is not converted by a bad motive into an unlawful or tortious act; Allen v. Flood, [1898] A. C. 1.

A product may be the subject of a boycott; Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; and combinations for this purpose both on the part of dealers to compel one in the same business to join their association and of labor unions to force an employer to submit to their terms are usually in the United States held illegal; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275, where it was held "a man's business is his property, and to put one in actual fear of its loss or of injury to his business is often no less potent in coercing than fear of violence to his person," citing Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330.

In Allen v. Flood, [1898] A. C. 1, it is said that workmen have an equal right of property in their labor, to dispose of it as they please, limited only by the equal right of the employer to do the same; that as each workman and all of them had a right to refuse to work if his demands were not acceded to, it could be in no sense coercion to put the employer to an election; and because the incidents of the situation made it to his interests to accede to the demand made so that (unless he was willing to assume the resulting loss) he had no real option in the matter, his yielding was no proof of intimidation. It was further said: "In every such case the controlling inquiry is one of means, and these can never be unlawful, if what was in fact done marks an exercise of a right, or a declaration of a purpose to do that which is not of itself unlawful."

In Quinn v. Leathem, [1901] A. C. 495, Allen v. Flood is distinguished, and it is held that a conspiracy to injure, if there be damage, gives rise to civil liability; that an oppressive combination differs widely from an invasion of civil rights by a single person; that if wrongful interference with a man's liberty of action is intended to injure, and in fact damages a third person, such third person has a remedy by an action; and that annoyance and coercion by many may be actionable, where like conduct on the part of one person would not be so. This case approves Temperton v. Russel, [1893] 1 Q. B. 715. In Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, a combination to boycott a manufactured product was held to fall within the class of restraints of trade prohibited by the federal anti-trust act.

In Gompers v. Stove & Range Co., 221 U. S. 437, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, it is said: "Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant by a combination of persons not immediately connected with him in business may be restrained. Others hold that the secondary boycott can be enjoined where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him, by threats that unless they do, they themselves will be boycotted. Others hold that no boycott can be enjoined, unless there are acts of physical violence, or intimidation caused by threats of physical violence."

The publication of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount

to a violation of the injunction; Reynolds v. Davis, 198 Mass. 300, 84 N. E. 457, 17 L. R. A. (N. S.) 162; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Brown v. Pharmacy Co., 115 Ga. 452, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 126; Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; Thomas v. R. Co., 62 Fed. 803; Continental Ins. Co. v. Board, 67 Fed. 310; Beck v. Protective Union, 118 Mich. 527, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Barr v. Trades Council, 53 N. J. Eq. 102, 30 Atl. 881. See, also, Ludwig v. West Tel. Co., 216 U. S. 156, 30 Sup. Ct. 280, 54 L. Ed. 423; Bitterman v. R. Co., 207 U. S. 206, 28 Sup. Ct. 91, 52 L. Ed. 171; Scully v. Bird, 209 U. S. 489, 28 Sup. Ct. 597, 52 L. Ed. 899. (These cases are cited in the opinion. Gompers v. Stove & Range Co., 221 U. S. 438, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874.)

One who is under no contract relation to another may without question withdraw from business relations with that other. This includes the right to cease to deal not only with the individual who may be pursuing a course deemed by him detrimental, but with all who, by their patronage, aid in the maintenance of the objectionable policies; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165, where it was held that if the workmen violated no right of the company by refusing to work for it, they violated none by refusing to work for contractors who used material bought of it. To the same effect, [1892] A. C. 25; National Protective Ass'n of Steam Fitters & Helpers v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Clemmitt v. Watson, 14 Ind. App. 38, 42 N. E. 367; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; Macauley v. Tierney, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; Payne v. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373; Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882; State v. Van Pelt, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495; Lindsay & Co. v. Federation of Labor, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722; [1898] A. C. 128.

On the other hand, it is held that it is unlawful, in an effort to compel A to yield a legitimate benefit to B, for B to demand that C withdraw his patronage from A under penalty of losing B's services or patronage to which he has no contract right; Thomas v. Ry. Co., 62 Fed. 803; *id.*, 4 Inters. Com. Rep. 788; Hopkins v. Stave Co., 83 Fed. 912, 28 C. C. A. 99, 49 U. S. App. 709; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; Beck v. Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Lucke v. Clothing Cutters & Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; [1901] A. C. 495.

The term seems to have been derived from an incident that occurred in Ireland. Captain Boycott, an Englishman, who was agent of Lord Earne and a farmer of Lough Mask, served notices upon the lord's tenants, and they in turn, with the surrounding population, resolved to have nothing to do with him, and, as far as they could prevent it, not to allow any one else to have. His life appeared to be in danger, and he had to claim police protection. His servants fled from him, and the awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him, and no one would supply him with food. He and his wife were compelled to work in their own fields with the shadows of armed constabulary ever at their heels; Justin MacCarthy's "England under Gladstone." See State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; 18 L. R. Ir. 430.

Combinations, in the nature of boycotts, which have been held to be unlawful conspiracies are: To compel a member of a labor union to pay a fine assessed against him for working in a mill with steam machinery by preventing his obtaining employment; 5 Cox, C. C. 162; to obstruct an employer in the conduct of his business; People v. Petheram, 64 Mich. 252, 31 N. W. 188; 10 Cox, C. C. 592; to coerce an employer to conduct his business with reference to apprentices and delinquent members according to the demand of the union, by injuring his business through notices to customers and material men that dealings with him would be followed by similar measures against them; Moores & Co. v. Bricklayers' Union, 23 Wkly. L. B. (Ohio) 48; to prevent the employment of a granite cutter declared by a labor union to be a "scab"; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; to compel an employer to discharge non-union men; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; People v. Wilzig, 4 N. Y. Crim. Rep. 403; People v. Kostka, *id.* 429; People v. Smith, 5 N. Y. Crim. Rep. 509; to induce employés to leave their employment and prevent others from entering it; Walker v. Cronin, 107 Mass. 555; to induce workmen to quit in a body to enforce the demands of a labor union; Old Dominion S. S. Co. v. McKenna, 30 Fed. 48; to parade in front of a factory with banners to induce workmen to keep away; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689. Con-

binations to prevent the sale of a manufactured product except upon conditions with which the manufacturer does not wish to comply; Purington v. Hinchliff, 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N. S.) 824, 109 Am. St. Rep. 322; or to force a business man to conform his prices to those of an association of others in the same business; Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203; or to join are association of other men in the same business; Boutwell v. Marr, 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608; or to unionize his place of business; Purvis v. United Brotherhood of Carpenters & Joiners, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; are illegal means of enforcing a boycott; and so it is held are any combinations to secure action which essentially obstructs the free flow of commerce between the states or restricts, in that regard, the liberty of a trader to engage in business; Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; an agreement by shipowners, in order to secure a carrying trade exclusively for themselves, that agents of members should be prohibited upon pain of dismissal from acting in the interests of competing shipowners; [1892] A. C. 25; a combination of retailers binding the members to refuse to purchase of wholesalers who should sell to non-members of the combination; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; an agreement of contractors to withdraw their patronage from wholesalers selling to a contractor who has conceded to the demands of his employés for an eight hour day; Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; a threat by a railroad company to discharge any employé who should deal with the plaintiff; Payne v. R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; a threat by an employer that he would discharge any laborer who rented plaintiff's house; Heywood v. Tillson, 75 Me. 225, 46 Am. Rep. 373.

To gather around a place of business and follow employés to and from work, and to collect about their boarding-places with threats, intimidation, and ridicule; Murdock v. Walker, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; Barnes & Co. v. Typographical Union, 232 Ill. 424, 83 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Ann. Cas. 54; or to congregate around the entrance to a place of business for the purpose of preventing the public from entering; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759, 53 Atl. 230; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; such besetting of works is called *picketing (q. v.)*.

Boycotts may be restrained by injunction; Friedman v. Israel, 26 Fed. 803; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193; a violation of which is punishable as a contempt; U. S. v. Debs, 64 Fed. 724; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; when they are found to be unlawful conspiracies; Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Barr v. Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; and the fact that they are such will not prevent such remedy where they threaten irreparable injury to persons or property; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514. That the ultimate purpose of the combination is to secure benefits to its members rather than to inflict damage on a boycotted business is held to be no justification; Erdman v. Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783. The court cannot look beyond the immediate injury to the remote result; Purvis v. United Brotherhood, 214 Pa. 348, 63 Atl. 585, 12 L. R. A. (N. S.) 642, 112 Am. St. Rep. 757, 6 Ann. Cas. 275. In their efforts to better their condition they may inflict more or less damage upon others. But these results should be incidental damage and inconvenience consequent on the operation of general rules, lawful in themselves, rather than those which follow a specific intent and immediate purpose of injury to others in order that good may ultimately come to themselves. The doctrine that the end justifies the means has no place in a condition of society where law prevails; Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 30, where it was said that the right to be free from molestation must be considered as well as that of bettering a class condition, per O. W. Holmes, Jr., C. J.

On the other hand, where the publication of a libelous circular for the purpose of creating a boycott was sought to be enjoined, it was held that the court cannot, by injunction interfere with the constitutional right freely to speak or write; Marx v. Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; and for the same offense, an injunction was refused on the ground that the plaintiffs had no property right in the trade of any particular person. In several states there are statutes on the subject, some of them merely declaratory of the common law, and others, more drastic, which extend the doctrine to new acts and circumstances.

See, generally, Moses, Strikes; Stimson's Handbook of Labor Law in the U. S.;

COMBINATION; LABOR UNION; BLACKLISTING; CONSPIRACY; MALICE; MOTIVE; RESTRAINT OF TRADE; STRIKE.

BOZERO. **In Spanish Law.** An advocate; one who pleads the causes of others, either suing or defending. *Las Partidas*, part. 3, tit. v. l. 1–6.

Called also *abogado*. Amongst other classes of persons excluded from this office are minors under seventeen, the deaf, the dumb, friars, women, and infamous persons. White, New Rec. 274.

BRANCH. A portion of the descendants of a person, who trace their descent to some common ancestor, who is himself a descendant of such person.

The whole of a genealogy is often called the *genealogical tree;* and sometimes it is made to take the form of a tree, which is in the first place divided into as many branches as there are children, afterwards into as many branches as there are grandchildren, then great-grandchildren, etc. If, for example, it be desired to form the genealogical tree of Peter's family, Peter will be made the trunk of the tree; if he has had two children, John and James, their names will be written on the first two branches, which will themselves shoot out into as many smaller branches as John and James have children; from these others proceed, till the whole family is represented on the tree. Thus the origin, the application, and the use of the word branch in genealogy will be at once perceived.

BRANDING. An ancient mode of punishment by inflicting a mark on an offender with a hot iron. It is generally disused in civil law, but is a recognized punishment for some military offences.

It is also used with reference to the marking of cattle for the purpose of identification. See ANIMAL.

BRANKS. An instrument of punishment formerly made use of in some parts of England for the correction of scolds, which it was said to do so effectually and so very safely that it was looked upon by Dr. Plotts, in his History of Staffordshire, p. 389, "as much to be preferred to the ducking-stool, which not only endangers the health of the party, but also gives the tongue liberty 'twixt every dip, to neither of which is this liable; it brings such a bridle for the tongue as not only quite deprives them of speech, but brings shame for the transgression and humiliation thereupon before it is taken off."

BRASS KNUCKLES. A weapon worn on the hand for the purposes of offence or defence, so made that in hitting with the fist considerable damage is inflicted.

It is called "brass knuckles" because it was originally made of brass. The term is now used as the name of the weapon without reference to the metal of which it is made; Patterson v. State, 3 Lea (Tenn.) 575.

BREACH. **In Contracts.** The violation of an obligation, engagement, or duty.

A *continuing* breach is one where the condition of things constituting a breach continues during a period of time, or where the acts constituting a breach are repeated at brief intervals; F. Moore 242; Holt 178; 2 Ld. Raym. 1125.

The right to rescind a contract for nonperformance is a remedy as old as the law of contract itself. When the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side and on the other are dependent, and performance by the one party cannot be enforced by the other without performance or a tender of performance on his own part; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. In that case plaintiff agreed to ship 5,000 tons of rails at the rate of about 1,000 tons a month beginning in February, and the whole contract to be shipped before the first of August of the same year. Only 400 tons were shipped in February and 885 in March, and it was held that the failure to fulfill the contract in respect to these first two installments justified the rescission of the whole contract, provided that the defendants distinctly and seasonably asserted their right to rescind; and the fact that the defendants had accepted the shipment of 400 tons in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. An English case in 1859 allowed rescission on the ground of insufficient delivery of the first installment of an iron contract; 5 H. & N. 19. Where on a year's contract for furnishing coke, payment to be made on the twentieth of each month for the deliveries of the preceding month, it was held that there might be a breach of the contract on the twenty-third of the month, if the sum were still unpaid; Hull Coal & Coke Co. v. Coal & Coke Co., 113 Fed. 256, 51 C. C. A. 213. The supreme court of Michigan has decided, in a contract to deliver wood in installments, that a refusal to pay for the third installment was not such a breach as to excuse the defendant from making further deliveries, on the ground that the defendant's refusal to pay did not evince an intention no longer to be bound by the contract; West v. Bechtel, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. This case is distinguished from Norrington v. Wright, *supra*, in that the latter was a breach for non-delivery and the Michigan case was a breach for non-payment.

In Iowa it was held that a failure to pay for a shipment of coal within thirty days, as agreed in a contract for the shipment of a certain amount in quantities as ordered, does not go to the whole consideration of the contract, and does not therefore give the right to rescind; Osgood v. Bauder, 75 Ia. 550, 39 N. W. 887, 1 L. R. A. 655; *contra*, Ross-Meehan Foundry Co. v. Wheel Co., 113 Tenn. 370, 83 S. W. 167, 68 L. R. A. 829, 3 Ann. Cas. 898; and in New Jersey a failure to deliver the first installment of goods on a contract for delivery in installments does

not justify a rescission by the buyer; Gerli v. Silk Mfg. Co., 57 N. J. L. 432, 31 Atl. 401, 30 L. R. A. 61, 51 Am. St. Rep. 611. Acts indicating an intention to abandon a contract justify the aggrieved party in rescinding, but mere breach in performance, without repudiation, cannot warrant rescission; 9 C. P. 208; [1900] 2 Ch. 298. Where one party to a contract is guilty of a breach, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform. Such an abandonment is not technically a rescission of the contract, but merely an acceptance of the situation which the wrongdoing of the other party has brought about; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; Pierce v. R. Co., 173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591; Roehm v. Horst, 178 U. S. 14, 20 Sup. Ct. 780, 44 L. Ed. 953. It has been held that when a contract is repudiated by one party, and the other party has not elected to treat such a repudiation as a breach, the latter is not excused from continuing to perform on his part; Smith v. Banking Co., 113 Ga. 975, 39 S. E. 410.

Where the agreement is mutual and dependent, and one party fails to perform his part, the other party may treat it as rescinded; South Texas Telephone Co. v. Huntington (Tex.) 121 S. W. 242; and he is not bound to tender performance; Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126. The abandonment of a ship is a renunciation of the contract of affreightment; The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, four judges dissenting. Where one party to a contract refuses, by anticipation, to perform the contract, the other party may consider it a breach and sue immediately; Hochster v. De la Tour, 2 El. & Bl. 678. In Frost v. Knight, 7 Ex. 111, defendant had promised to marry plaintiff as soon as his father should die. While his father was yet alive, he absolutely refused to marry plaintiff; it was held that an action would lie during the father's lifetime. In 17 Q. B. 127, it was held that upon the defendant railroad company giving notice to plaintiff that it would not receive any more of its chairs, it might sue for the breach without tendering the goods. In 16 Q. B. Div. 467, it was held that where one party by anticipation refuses to perform the contract, it entitled the other party, if he pleased, to agree to the contract being put an end to. In Dingley v. Oler, 117 U. S. 502, 6 Sup. Ct. 850, 29 L. Ed. 984, the court considered the cases, but declined to decide whether or not the rule should be maintained as applicable to the class of cases to which the one then before it belonged; and said it has been called in England a "novel doctrine" and has never been applied in that court.

The cases of Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 87, 8 C. C. A. 14, and Edward Hines Lumber Co. v. Alley, 73 Fed. 603, 19 C. C. A. 599, followed Hochster v. De la Tour. In Horst v. Roehm, 84 Fed. 569, Dallas, J., was of opinion that the question was an open one, so far as the supreme court was concerned, and followed the ruling of Judge Lowell in Dingley v. Oler, 11 Fed. 372, supported by the two federal cases last above mentioned. He considered that Judge Lowell had answered the argument of the court in Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; and concurred with him in thinking that the cases which follow the English rule are "founded in good sense, and rest on strong grounds of convenience however difficult it may be to reconcile them with the strictest logic."

Wallace, C. J., in Marks v. Van Eeghen, 85 Fed. 853, 30 C. C. A. 208, considered that Dingley v. Oler, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984, was a *dictum*, and that there was an overwhelming preponderance of adjudication in favor of the doctrine of Hochster v. De la Tour. He cited also Nichols v. Steel Co., 137 N. Y. 471, 33 N. E. 561; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332; Davis v. School-Furniture Co., 41 W. Va. 717, 24 S. E. 630.

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406, the court reviewing the English and American cases, held that, upon such breach, the other party may consider himself absolved from any future performance, and either sue immediately, or wait till the time when the act was to be done, still holding the contract as prospectively binding for the exercise of his option.

In The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406, Holmes, J., said: "A repudiation of a contract, amounting to a breach, warrants the other party in going no further in performance on his side. Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406."

The rule adopted in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, 4 Ann. Cas. 406, was applied in John A. Roebling's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; *id.*, 12 N. Y. St. Rep. 292; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; McCormick v. Basal, 46 Ia. 235; Davis v. Furniture Co., 41 W. Va. 717, 24 S. E. 630; Remy v. Olds, 88 Cal. 537, 26 Pac. 355; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275.

The renunciation must be unequivocal and absolute; and must be acted upon by the other parties and must terminate the entire contract; [1900] 2 Ch. 298; John A. Roebling's Sons' Co. v. Fence Co., 130 Ill. 660, 22 N. E. 518. It does not operate as a rescission of the contract, because one party alone cannot rescind; but the other party may adopt such renunciation with the effect that the

contract is at an end, except for the purpose of bringing an action for the damages consequent upon the renunciation; [1910] 2 Ch. 248. The rule in Hochster v. De la Tour was disapproved in Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384, and Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760, on elaborate consideration. The rejection of the rule in the former case was based upon its inapplicability to commercial paper, but in Roehm v. Horst, 178 U. S. 17, 20 Sup. Ct. 780, 44 L. Ed. 953, it was pointed out that in that case the consideration had passed, there were no mutual obligations, and that such case did not fall within the reason of the rule, citing Nichols v. Steel Co., 137 N. Y. 487, 33 N. E. 561.

See Wald's Anson, Contracts (Williston's ed.) 355.

Where a trust company agrees to make a loan upon a building to be built and later repudiates the agreement, a right of action arises at once and the prospective borrower need not wait until the building is completed; Holt v. Ins. Co., 74 N. J. L. 795, 67 Atl. 118, 11 L. R. A. (N. S.) 100, 12 Ann. Cas. 1105. In New York it is held that an action will not lie at once where the maker of a draft declares he will not pay it on maturity; Benecke v. Haebler, 38 App. Div. 344, 58 N. Y. Supp. 16; and so where an insurance company decides to limit the amount payable on existing policies; Langan v. Supreme Council, 174 N. Y. 266, 66 N. E. 932; Porter v. Supreme Council, 183 Mass. 326, 67 N. E. 238; *contra*, O'Neill v. Supreme Council, 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422.

In a contract for the purchase of a horse in return for personal services for a specified period, where the buyer refuses to work, the seller may retake the horse; Cleary v. Morson, 94 Miss. 278, 48 South. 817; where one cancels an order for clothing before it is manufactured, the seller cannot complete the manufacture and sue for the full contract; he is bound to reduce his damages as far as possible; Woolf v. Hamburger, 129 App. Div. 883, 114 N. Y. Supp. 186.

Though a party has waived a breach for which he could have declared a forfeiture, he may still counterclaim damages for such breach; Clark v. West, 193 N. Y. 349, 86 N. E. 1; neither payments on account, nor permitting the contractor to complete the work after the specified time, is a waiver of such damages; Reading Hardware Co. v. City of New York, 129 App. Div. 292, 113 N. Y. Supp. 331; nor taking possession of a building before completion; Mikolajewski v. Pugell, 62 Misc. 449, 114 N. Y. Supp. 1084. But where the defendant has himself repudiated the contract after the delivery of one installment he is barred from setting up the defectiveness of such installment subsequently discovered; 21 T. L. R. 413. Where government officials test and accept a defective dock in ignorance of such defects which if known would have led to a refusal to accept, the government is not precluded from refusing it on subsequent discovery; U. S. v. Walsh, 115 Fed. 697, 52 C. C. A. 419.

An anticipatory breach will operate as a present breach only if accepted and acted upon by the other party, who may disregard it and await the appointed day. If not accepted by the other party, the renunciation may be withdrawn before performance is due, but if not withdrawn it is evidence of a continued intention to that effect. It operates as a continued waiver of all conditions precedent to the liability for performance; Leake, Contract 639.

As to one endeavoring to persuade a third party to break his contract, see INJUNCTION.

In Pleading. That part of the declaration in which the violation of the defendant's contract is stated.

It is usual in assumpsit to introduce the statement of the particular breach, with the allegation that the defendant, contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff, neglected and refused to perform, or performed, the particular act, contrary to the previous stipulation.

In debt, the breach or cause of action complained of must proceed only for the nonpayment of money previously alleged to be payable; and such breach is very similar whether the action be in debt on simple contract, specialty, record, or statute, and is usually of the following form: "Yet the said defendant, although often requested so to do, hath not as yet paid the said sum of ——— dollars, above demanded, nor any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused so to do, to the damage of the said plaintiff ——— dollars, and therefore he brings suit," etc.

The breach must obviously be governed by the nature of the stipulation; it ought to be assigned in the words of the contract, either negatively or affirmatively, or in words which are coextensive with its import and effect; Comyns, Dig. *Pleader*, C, 45; 2 Wms. Saund. 181 *b*, *c*; Fletcher v. Peck, 6 Cra. (U. S.) 127, 3 L. Ed. 162. And see Hughes v. Smith, 5 Johns. (N. Y.) 168; Bender v. Fromberger, 4 Dall. (U. S.) 436, 1 L. Ed. 898; Craghill v. Page, 2 Hen. & M. (Va.) 446; Steph. Pl. (And. ed.) 115.

When the contract is in the disjunctive, as on a promise to deliver a horse by a particular day, or to pay a sum of money, the breach ought to be assigned that the defendant did not do the one act nor the other; 1 Sid. 440; Hardr. 320; Comyns, Dig. *Pleader*, C.

BREACH OF CLOSE. Every unwarrantable entry upon the soil of another is a breach of his close; 3 Bla. Com. 209.

BREACH OF COVENANT. A violation of, or a failure to perform the conditions of, a bond or covenant. The remedy is in some cases by a writ of covenant; in others, by an action of debt; 3 Bla. Com. 156.

BREACH OF THE PEACE. A violation of public order; the offence of disturbing the public peace. One guilty of this offence may be held to bail for his good behavior. An act of public indecorum is also a breach of the peace. The remedy for this offence is by indictment.

Persons who go out on a "strike" and then linger about the place of their former employment, hooting at others taking their places, may be bound over to keep the peace; Com. v. Silvers, 11 Pa. Co. C. R. 481. One may disturb the peace while on his own premises by the use of violent language to a person lawfully there; State v. Brumley, 53 Mo. App. 126.

BREACH OF PRISON. An unlawful escape out of prison. This is of itself a misdemeanor; 1 Russell, Cr. 378; 4 Bla. Com. 129; 2 Hawk. Pl. Cr. c. 18, s. 1; State v. Leach, 7 Conn. 452, 18 Am. Dec. 113. The remedy for this offence is by indictment. See ESCAPE.

BREACH OF PROMISE OF MARRIAGE. See PROMISE OF MARRIAGE.

BREACH OF TRUST. The wilful misappropriation, by a trustee, of a thing which had been lawfully delivered to him in confidence.

The distinction between larceny and a breach of trust is to be found chiefly in the terms or way in which the thing was taken originally into the party's possession; and the rule seems to be, that whenever the article is obtained upon a fair contract not for a mere temporary purpose, or by one who is in the employment of the deliverer, then the subsequent misappropriation is to be considered as an act of breach of trust. This rule is, however, subject to many nice distinctions. Lewer v. Com., 5 S. & R. (Pa.) 93, 97. It has been adjudged that when the owner of goods parts with the *possession* for a particular purpose, and the person who receives them avowedly for that purpose has at the time a fraudulent intention to make use of the possession as a means of converting the goods to his own use, and does so convert them, it is larceny; but if the owner part with the *property*, although fraudulent means have been used to obtain it, the act of conversion is not larceny; Alison, Princ. c. 12, p. 354.

In the Year Book 21 Hen. VII. 14, the distinction is thus stated:—"*Pigot.* If I deliver a jewel or money to my servant to keep, and he flees or goes from me with the jewel, is it felony? *Cutler* said, Yes: for so long as he is with me or in my house, that which I have delivered to him is adjudged to be in my possession; as my butler, who has my plate in keeping, if he flees with it, it is felony. Same law, if he who keeps my horse goes away with him. The reason is, they are always in my possession. But if I deliver a horse to my servant to ride to market or the fair, and he flee with him, it is no felony; for he comes lawfully to the possession of the horse by delivery. And so it is if I give him a jewel to carry to London, or to pay one, or to buy a thing, and he flee with it, it is not felony; for it is out of my possession, and he comes lawfully to it. *Pigot.* It can well be; for the master in these cases has an action against him, viz.: Detinue, or Account." See this point fully discussed in Stanford, Pl. Cr. lib. 1. See also Year B. Edw. IV. fol. 9; 32 Hen. III. 7; 21 Hen. VII. 15. See BREAKING BULK.

BREAKING. Parting or dividing by force and violence a solid substance, or piercing, penetrating, or bursting through the same.

In cases of burglary and housebreaking, the removal of any part of the house, or of the fastenings provided to secure it, with violence and a felonious intent.

The breaking is actual, as in the above case; or constructive, as when the burglar or housebreaker gains an entry by fraud, conspiracy or threat; Whart. Cr. L. 759; 1 Hale, Pl. Cr. 553; State v. Wiseman, 68 N. C. 207; Johnston v. Com., 85 Pa. 54, 27 Am. Rep. 622; Com. v. Lowrey, 158 Mass. 18, 32 N. E. 940; lifting a latch in order to enter a building is a breaking; State v. O'Brien, 81 Ia. 93, 46 N. W. 861. In England it has been decided that if the sash of a window be partly open, but not sufficiently so to admit a person, the raising of it so as to admit a person is not a breaking of the house; 1 Mood. 178; followed in Com. v. Strupney, 105 Mass. 588, 7 Am. Rep. 556. See People v. Dupree, 98 Mich. 26, 56 N. W. 1046. No reasons are assigned. It is difficult to conceive, if this case be law, what further opening will amount to a breaking. But see 1 Moody 327, 377; 1 B. & H. Lead. Cr. Cas. 524. See BURGLARY.

It was doubted, under the ancient common law, whether the breaking out of a dwelling-house in the night-time was a breaking sufficient to constitute burglary. Sir M. Hale thinks that this was not burglary, because *fregit et exivit, non fregit et intravit;* 1 Hale, Pl. Cr. 554; Rolland v. Com., 82 Pa. 324, 22 Am. Rep. 758; see Brown v. State, 55 Ala. 123, 28 Am. Rep. 693. It may, perhaps, be thought that a breaking out is not so alarming as a breaking in, and, indeed, may be a relief to the minds of the inmates; they may exclaim, as Cicero did of Catiline, *Magno me metu liberabis, dummodo inter me atque te murus intersit.* But this breaking was made burglary by the statute 12 Anne, c. 1, § 7 (1713). The getting the head out through a skylight has been held to be a sufficient breaking out of a house to complete the crime of burglary; 1 Jebb 99. The statute of 12 Anne is too recent to be binding as a part of the common law in all of the United States; 2 Bish. Crim. L. § 99; 1 B. & H. Lead. Cr. Cas. 540.

BREAKING BULK. The doctrine of breaking bulk proceeds upon the ground of a determination of the privity of the bailment by the wrongful act of the bailee. Thus, where a carrier had agreed to carry certain bales of goods, which were delivered to him, to Southampton, but carried them to another place, broke open the bales, and took the goods contained in them feloniously and converted them to his own use, the majority of the judges held that if the party had sold the entire bales it would not have been felony; "but as he broke them, and took what was in them, he did it without warrant," and so was guilty of felony; Y. B. 13 Edw. IV. fol. 9. If a miller steals part of the meal, "although the corn was delivered to him to grind, nevertheless if he steal

it it is felony, being taken from the rest;" 1 Rolle, Abr. 73, pl. 16; Com. v. James, 1 Pick. (Mass.) 375. This construction involves the absurd consequence of its being felony to steal *part* of a package, but a breach of trust to steal the whole.

In an early case in Massachusetts, it was decided that if a wagon-load of goods, consisting of several packages, is delivered to a common carrier to be transported in a body to a certain place, and he, with a felonious intent, separates one entire package, whether before or after the delivery of the other packages, this is a sufficient breaking of bulk to constitute larceny, without any breaking of the package so separated; Com. v. Brown, 4 Mass. 580. But this decision is in direct conflict with the English cases. Thus, where the master and owner of a ship steals a package out of several packages delivered him to carry, without removing anything from the particular package; 1 Russ. & R. 92; or where a letter-carrier is intrusted with two directed envelopes, each containing a 5*l.* note, and delivers the envelopes, having previously taken out the two notes; 1 Den. Cr. Cas. 215; or where a drover separates one sheep from a flock intrusted to him to drive a certain distance; 1 Jebb. 51; this is not a breaking of bulk sufficient to terminate the bailment and to constitute larceny; 2 Bish. Cr. L. 860, 868. The Larceny Act of 1861 has met the difficulty of deciding this class of cases in England, by providing that a bailee of any chattel, money, or valuable security, who fraudulently takes the same, although not breaking bulk, shall be guilty of larceny.

BREAKING DOORS. Forcibly removing the fastenings of a house so that a person may enter. See ARREST.

BREATH. **In Medical Jurisprudence.** The air expelled from the chest at each expiration.

Breathing, though a usual sign of life, is not conclusive that a child was *wholly* born alive; as breathing may take place before the whole delivery of the mother is complete; 5 C. & P. 329. See BIRTH; LIFE; INFANTICIDE.

BREHON LAW. The ancient system of Irish law; so named from the judges, called Brehons, or Breitheamhuin. Its existence has been traced from the earliest period of Irish history down to the time of the Anglo-Norman invasion. It is still a subject of antiquarian research. An outline of the system will be found in Knight's English Cyclopædia, and also in the Penny Cyclopædia. See Encyc. Brit.

BRETHREN. It is used in the sense of brother.

It may be legitimately used in addressing mixed numbers, although such use is unusual; it may include a daughter; Terry v. Brunson, 1 Rich. Eq. (S. C.) 78. It is so used in the Protestant Episcopal Prayer Book.

BRETHREN OF TRINITY HOUSE. See ELDER BRETHREN.

BRETTS AND SCOTTS, LAWS OF THE. A code or system of laws in use among the Celtic tribes of Scotland down to the beginning of the fourteenth century, and then abolished by Edward I. A fragment only is now extant. See Acts of Parl. of Scotland, vol. 1, pp. 299–301, Edin. 1844. It is interesting, like the Brehon laws of Ireland, in a historical point of view.

BREVE (Lat. *breve*, *brevis*, short). A writ. An original writ. Any writ or precept issuing from the king or his courts.

It is the Latin term which in law is translated by "writ." In the Roman law these *brevia* were in the form of letters; and this form was also given to the early English *brevia*, and is retained to some degree in the modern writs. Spelman, Gloss. The name *breve* was given because they stated briefly the matter in question *(rem quæ est breviter narrat)*. It was said to be "shaped in conformity to a rule of law" *(formatum ad similitudinem regulæ juris)*; because it was requisite that it should state facts against the respondent bringing him within the operation of some rule of law. The whole passage from Bracton is as follows: *"Breve quidem, cum sit formatum ad similitudinem regulæ juris quia breviter et paucis verbis intentionem proferentes exponit, et explanat sicut regula juris rem quæ est breviter narrat. Non tamen ita breve esse debet, quin rationem et vim intentionis contineat."* Bracton 413 *b*, § 2. It is spelled *briefe* by Brooke. Each writ soon came to be distinguished by some important word or phrase contained in the brief statement, or from the general subject-matter; and this name was in turn transferred to the form of action, in the prosecution of which the writ (or *breve*) was procured. Stephen, Pl. 9. See WRIT. It is used perhaps more frequently in the plural *(brevia)* than in the singular, especially in speaking of the different classes of writs.

BREVE INNOMINATUM. A writ containing a general statement only of the cause of action.

BREVE NOMINATUM. A writ containing a statement of the circumstances of the action.

BREVE ORIGINALE. An original writ.

BREVE DE RECTO. A writ of right. The writ of right patent is of the highest nature of any in the law. Cowell; Fitzherb. Nat. Brev.

BREVE TESTATUM. A written memorandum introduced to perpetuate the tenor of the conveyance and investiture of lands. 2 Bla. Com. 307.

It was prepared after the transaction, and depended for its validity upon the testimony of witnesses, as it was not sealed. Spelman, Gloss.

In Scotch Law. A similar memorandum made out at the time of the transfer, attested by the *pares curiæ* and by the seal of the superior. Bell, Dict.

BREVET. **In French Law.** A warrant

granted by government to authorize an individual to do something for his own benefit.

Brevet d'invention. A patent.

In American Law. A commission conferring on a military officer a degree of rank specified in the commission, without, however, conveying a right to receive corresponding pay. See U. S. v. Hunt, 14 Wall. (U. S.) 552, 20 L. Ed. 739.

BREVIA (Lat.). Writs. The plural of *breve*, which see.

BREVIA ANTICIPANTIA (Lat.). Writs of prevention. See QUIA TIMET.

BREVIA DE CURSU (Lat.). Writs of course. See BREVIA FORMATA.

BREVIA FORMATA (Lat.). Certain writs of approved and established form which were granted of course in actions to which they were applicable, and which could not be changed but by consent of the great council of the realm. Bracton 413 *b*.

All original writs, without which an action could not anciently be commenced, issued from the chancery. Many of these were of ancient and established form, and could not be altered; others admitted of variation by the clerks according to the circumstances of the case. In obtaining a writ, a præcipe was issued by the party demandant, directed to the proper officer in chancery, stating the substance of his claim. If a writ already in existence and enrolled upon the Register was found exactly adapted to the case, it issued as of course *(de cursu)*, being copied out by the junior clerks, called *cursitors*. If none was found, a new writ was prepared by the chancellor and subjected to the decision of the grand council, their assent being presumed in some cases if no objection was made. In 1250 it was provided that no new writs should issue except by direct command of the king or the council. The clerks, however, it is supposed, still exercised the liberty of adapting the old forms to cases new only in the *instance*, the council, and its successor (in this respect, at least), parliament, possessing the power to make writs new in principle. The strictness with which the common-law courts, to which the writs were returnable, adhered to the ancient form, gave occasion for the passage of the Stat. Westm. 2, c. 24, providing for the formation of new writs. Those writs which were contained in the Register are generally considered as pre-eminently *brevia formata*.

BREVIA JUDICIALIA (Lat.). Judicial writs. Subsidiary writs issued from the court during the progress of an action, or in execution of the judgment.

They were said to vary according to the variety of the pleadings and responses of the parties to the action; Bract. 413 *b*; Fleta, lib. 2, c. 13, § 3; Co. Litt. 54 *b*, 73 *b*. The various forms, however, became long since fixed beyond the power of the courts to alter them; Barnet v. Ihrie, 1 Rawle (Pa.) 52. Some of these judicial writs, especially that of *capias*, by a fiction of the issue of an original writ, came to supersede original writs entirely, or nearly so. See ORIGINAL WRIT.

BREVIA MAGISTRALIA. Writs framed by the masters in chancery. They were subject to variation according to the diversity of cases and complaints. Bracton, 413 *b*; Fleta, lib. 2, c. 13, § 4.

BREVIA TESTATA. See BREVE TESTATUM.

BREVIARIUM ALARICIANUM. A compilation made by order of Alaric II. and published for the use of his Roman subjects in the year 506. It contained large excerpts from the Theodosian Codex, a few from the Gregorianus and Hermogenianus, some post-Theodosian constitutions, some of the *Sententiæ* of Paulus, one little scrap of Papinian and an abridged version of the Institutes of Gaius. Maitland, 1 Sel. Essays in Anglo-Amer. L. H. 15 (14 L. Q. R. 13). It is also known as *Lex Romana Visigothorum*. It became the principal, if not the only, representative of Roman law among the Franks. *id.*

BREVIATE. An abstract or epitome of a writing. Holthouse. The name is usually applied to the famous brief of Mr. Murray (afterwards Lord Mansfield) for the complainant in the case of Penn v. Lord Baltimore, 1 Ves. 444. A copy of the original printed folio is in the Pennsylvania Historical Society and it is reprinted in the Pennsylvania Archives, making volume 16 of the Third Series.

BREVIBUS ET ROTULIS LIBERANDIS. A writ or mandate directed to a sheriff, commanding him to deliver to his successor the county and the appurtenances, with all the briefs, rolls, remembrances, and other things belonging to his office.

BRIBE. The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission; or of some illegal emolument, as a consideration for preferring one person to another, in the performance of a legal act.

BRIBERY. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity. Co. 3d Inst. 149; 1 Hawk. Pl. Cr. c. 67, s. 2; 4 Bla. Com. 139; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Dishon v. Smith, 10 Ia. 212.

The term bribery now extends further, and includes the offence of giving a bribe to many other classes of officers; it applies both to the actor and receiver, and extends to voters, cabinet ministers, legislators, sheriffs, and other classes; 2 Whart. Cr. L. § 1858. The offence of the giver and the receiver of the bribe has the same name. For the sake of distinction, that of the former—viz.: the briber—might be properly denominated active bribery; while that of the latter—viz.: the person bribed—might be called passive bribery.

Bribery consists in offering a present or receiving one; extortion is demanding a fee or present by color of office; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

Bribery at elections for members of parliament has always been a crime at common law, and punishable by indictment or information. It still remains so in England, not-

withstanding the stat. 24 Geo. II. c. 14; 3 Burr. 1340, 1589. So is payment or promise of payment for votes at an election of an assistant overseer of a parish; 16 Cox, C. C. 737. To constitute the offence, it is not necessary that the person bribed should in fact vote as solicited to do; 3 Burr. 1236; or even that he should have a right to vote at all; both are entirely immaterial; 3 Burr. 1590; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; or that he acted without jurisdiction; People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243.

Bribery of a voter consists in the offering of a reward or consideration for his vote or his failure to vote; Nichols v. Mudgett, 32 Vt. 546; State v. Jackson, 73 Me. 91, 40 Am. Rep. 342; Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; 15 Q. B. 870.

An attempt to bribe, though unsuccessful, has been held criminal; U. S. v. Worrall, 2 Dall. (Pa.) 384, Fed. Cas. No. 16,766, 1 L. Ed. 426; 4 Burr. 2500; Co. 3d Inst. 147; State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Com. v. Chapman, 1 Va. Cas. 138. In Illinois a proposal by an officer to receive a bribe, though not bribery, was held to be an indictable misdemeanor at common law; 21 Am. L. Reg. 617 (with note by Judge Redfield); s. c. Walsh v. People, 65 Ill. 58, 16 Am. Rep. 569; but it has been held that upon such a proposal by an officer, one offering him a bribe was not punishable; O'Brien v. State, 6 Tex. App. 665. Keeping open house for the entertainment of the members of the legislature is not bribery; Randall v. News Ass'n, 97 Mich. 136, 56 N. W. 361.

On the trial of an officer for bribery for taking unlawful fees, a corrupt intent must be proved; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

A writing containing a statement that a person has been bribed to testify as a witness imputes to such person the crime of perjury and is libelous; Atlanta News Publishing Co. v. Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. (N. S.) 1139; Hillhouse v. Dunning, 6 Conn. 391.

See LOBBYIST; CORRUPT PRACTICES.

BRIBOUR. One who pilfers other men's goods; a thief. See 28 Edw. II. c. 1.

BRIDGE. A structure erected over a river, creek, stream, ditch, ravine, or other place to facilitate the passage thereof; including by the term both arches and abutments; Board of Chosen Freeholders of Sussex County v. Strader, 18 N. J. L. 108, 35 Am. Dec. 530; Bardwell v. Town of Jamaica, 15 Vt. 438; Daniels v. Intendent & Wardens of Athens, 55 Ga. 609; and approaches of the length of 180 feet on either side of it; 71 L. T. 430; and the roadway over it; 57 L. J. Q. B. 280. The embankment contiguous to a bridge is a part of it; Morgan County v. Glass, 139 Ga. 415, 77 S. E. 583. A railway viaduct, designed only for the passage of engines and cars, is not a "bridge," within the statutory meaning of that word; Bridge Proprietors v. Land & Improvement Co., 1 Wall. (U. S.) 116, 17 L. Ed. 571. See Lake v. R. Co., 7 Nev. 294; Whitall v. Board of Chosen Freeholders of Gloucester County, 40 N. J. L. 305.

A bridge may be a street; 26 L. J. Q. B. 11. It is a public highway; Murphy v. Village of Ft. Edward, 79 Misc. 296, 140 N. Y. Supp. 885.

Bridges are either public or private. Public bridges are such as form a part of the highway, common, according to their character as foot, horse, or carriage bridges, to the public generally, with or without toll; 2 East 342; though their use may be limited to particular occasions, as to seasons of flood or frost; 2 Maule & S. 262; 4 Campb. 189. They are established either by legislative authority or by dedication.

By legislative authority. By the Great Charter (9 Hen. III. c. 15), in England, no town or freeman can be compelled to make new bridges where never any were before, but by act of parliament. Under such act, they may be erected and maintained by corporations chartered for the purpose, or by counties, or in whatever other mode may be prescribed; Woolrych, Ways 196. In this country it is the practice to charter companies for the same purpose, with the right to take tolls for their reimbursement; Williams v. Turnpike Corporation, 4 Pick. (Mass.) 341; or to erect bridges at the state's expense; or by general statutes to impose the duty of erection and maintenance upon towns, counties, or districts; Com. v. Com'rs of Monroe County, 2 W. & S. (Pa.) 495; Sampson v. Goochland Justices, 5 Gratt. (Va.) 241; Town of Granby v. Thurston, 23 Conn. 416; Nelson County Court v. Washington County Court, 14 B. Monr. (Ky.) 92; Lobdell v. Inhabitants of New Bedford, 1 Mass. 153; Hill v. Board of Sup'rs of Livingston County, 12 N. Y. 52; State v. Town of Campton, 2 N. H. 513; Town of Waterville v. Kennebec County Com'rs, 59 Me. 80. In re Saw-Mill Run Bridge, 85 Pa. 163; State v. Titus, 47 N. J. L. 89. For their erection the state may take private property, upon making compensation, as in case of other highways; Ang. Highw. § 81; the rule of damages for land so taken being not its mere value for agricultural purposes, but its value for a bridge site, minus the benefits derived to the owner from the erection; Young v. Harrison, 17 Ga. 30. The right to erect a bridge upon the land of another may also be acquired by mere parol license, which, when acted upon, becomes irrevocable; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Hall v. Boyd, 14 Ga. 1. But see Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505. The franchise of a toll bridge or ferry may be taken, like other property, for a free bridge; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Central Bridge Corporation v.

Lowell, 4 Gray (Mass.) 474; State v. Canterbury, 28 N. H. 195; and, when vested in a town or other public corporation, may be so taken without compensation; Town of East Hartford v. Bridge Co., 10 How. (U. S.) 511, 13 L. Ed. 518.

A new bridge may be erected, under legislative authority, so near an older bridge or ferry as to impair or destroy its value, without compensation, unless the older franchise be protected by the terms of its grant; Proprietors of Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; *id.*, 7 Pick. (Mass.) 344; Thompson v. R. Co., 3 Sandf. Ch. (N. Y.) 625; Piatt v. Bridge Co., 8 Bush (Ky.) 31; Parrot v. Lawrence, 2 Dill. 332, Fed. Cas. No. 10,772; 21 Can. S. C. R. 456; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; but, unless authorized by statute, a new bridge so erected is unlawful, and may be enjoined as a nuisance; 3 Bla. Com. 218; 2 Cr. M. & R. 432; Norris v. Farmers' & Teamsters' Co., 6 Cal. 590, 65 Am. Dec. 535; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 621, 9 L. Ed. 773. And if the older franchise, vested in an individual or private corporation, be protected, or be exclusive within given limits, by the terms of its grant, the erection of a new bridge or ferry, even under legislative authority, is unconstitutional, as an act impairing the obligations of contract; Proprietors of Piscataqua Bridge v. New Hampshire Bridge, 7 N. H. 35; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 40, 42 Am. Dec. 716; Mayor, etc., of City of Columbus v. Rodgers, 10 Ala. 37. See 21 Can. S. C. R. 456. The entire expense of a bridge erected within a particular district may be assessed upon the inhabitants; Shaw v. Dennis, 5 Gilman (Ill.) 405; Town of Granby v. Thurston, 23 Conn. 416. The absolute control of navigable streams in the United States is vested in congress; Miller, Const. 457; but in the absence of legislation by congress a state has the right to erect a bridge over a navigable river within its own limits; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; Com. v. Breed, 4 Pick. (Mass.) 460; Works v. R. Co., 5 McLean 425, Fed. Cas. No. 18,046; Dugan v. Bridge Co., 27 Pa. 303, 67 Am. Dec. 464; People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; and so may a county; In re Waverly Borough's Bridge, 12 Pa. Co. Ct. 669; although in exercising this right, care must be taken to interrupt navigation as little as possible; State v. Inhabitants of Freeport, 43 Me. 198; Renwick v. Morris, 3 Hill (N. Y.) 621; Terre-Haute Drawbridge Co. v. Halliday, 4 Ind. 36; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Columbus Ins. Co. v. Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Columbus Ins. Co. v. Curtenius, 6 McLean 209, Fed. Cas. No. 3,045.

The erection of a bridge entirely within a state across a navigable river running partly within and partly without the state is not a matter so directly connected with interstate commerce as to be under the exclusive control of congress, and in the absence of congressional action the state has authority to regulate the same; Rhea v. R. Co., 50 Fed. 16.

A state has no power to fix tolls on a bridge connecting it with another state, thereby regulating charges on interstate commerce without the consent of congress or the concurrence of such other state. The chief justice and three associate justices concurred on the ground that concurrent acts of the state incorporating the bridge company and authorizing it to fix tolls constituted a contract between the corporation and both states which could not be altered by one state without the consent of the other; Covington & Cincinnati Bridge Co. v. Com., 154 U. S. 204, 224, 14 Sup. Ct. 1087, 38 L. Ed. 962. The power of erecting a bridge, and taking tolls thereon, over a navigable river forming the boundary between two states, can only be conferred by the concurrent legislation of both; President, etc., for Erecting a Bridge near Trenton v. Bridge Co., 13 N. J. Eq. 46; Dover v. Portsmouth Bridge, 17 N. H. 200.

A bridge is no less a means of commercial intercourse than a navigable stream, and the state power may properly determine whether the interruption to commerce occasioned by the bridge be not more than compensated by the facilities which it affords. And if the bridge be authorized in good faith by a state, the federal courts are not bound to enjoin it. However, congress, since its power to regulate commerce is supreme, may interpose whenever it may see fit, by general or special laws, and may prevent the building of a bridge, or cause the removal of one already erected; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; The Passaic Bridges, 3 Wall. (U. S.) 782, 16 L. Ed. 799; Silliman v. Bridge Co., 4 Blatchf. 74, Fed. Cas. No. 12,851; Id., 4 Blatchf. 395, Fed. Cas. No. 12,852; The Clinton Bridge, 10 Wall. (U. S.) 454, 19 L. Ed. 969; or it may authorize the erection of a bridge over a navigable river, although it may partially obstruct the free navigation; People v. Kelly, 76 N. Y. 475. So railroads, having become the principal instruments of commerce, are as much under the control of congress as navigable streams, and a railroad bridge might be authorized by congress; In re Clinton Bridge, 1 Woolw. 150, Fed. Cas. No. 2,900; which has power directly or through a corporation created for the purpose to construct bridges over navigable waters between states, for the purpose of interstate commerce by land; Luxton v. Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; or it may grant such rights to an existing corporation; Haeussler v. City of St. Louis, 205

Mo. 656, 103 S. W. 1034; the bridge across East River between New York and Brooklyn is authorized by acts of New York and of congress and cannot be declared to be a public nuisance, even though it may injuriously affect the business of a warehouseman on the banks of the river above the bridge; Miller v. New York, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971. See also on the subject at large Miller, Const. U. S. Lect. ix. For any unecessary interruption the proprietors of the bridge will be liable in damages to the persons specially injured thereby, or to have the bridge abated as a nuisance, by injunction, though not by indictment; such bridge, although authorized by state laws, being in contravention of rights secured by acts of congress regulating commerce; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; 1 W. & M. 401; Works v. Junction Railroad, 5 McLean 425, Fed. Cas. No. 18,046; Columbus Ins. Co. v. Bridge Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Jolly v. Drawbridge Co., 6 McLean 237, Fed. Cas. No. 7,441.

Dedication. The dedication of bridges depends upon the same principles as the dedication of highways, except that their acceptance will not be presumed from mere use, until they are proved to be of public utility; 5 Burr. 2594; State v. Town of Campton, 2 N. H. 513; Williams v. Cummington, 18 Pick. (Mass.) 312; 3 M. & S. 526. See Town of Dayton v. Town of Rutland, 84 Ill. 279, 25 Am. Rep. 457; State v. Bridge Co., 22 Kan. 438; HIGHWAYS.

Repairs to. At common law, all public bridges are *primâ facie* to be repaired by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges; 13 East 95; Bacon, Abr. *Bridges*, p. 533; 5 Burr. 2594. In this country, the common law not prevailing, the duty of repair is imposed by statute, generally, upon towns or counties; State v. Town of Franklin, 9 Conn. 32; State v. Campton, 2 N. H. 513; Hill v. Livingston County, 12 N. Y. 52; House v. Board of Com'rs, 60 Ind. 580, 28 Am. Rep. 657; Township of Newlin v. Davis, 77 Pa. 317; Hedges v. Madison County, 1 Gilman (Ill.) 567; Bardwell v. Town of Jamaica, 15 Vt. 438; Saunders v. Hathaway, 25 N. C. 402; Waterville v. Kennebec County, 59 Me. 80; McCalla v. Multnomah County, 3 Or. 424; Agawam v. Hampden, 130 Mass. 528; or chartered cities; Shartle v. Minneapolis, 17 Minn. 308 (Gil. 284); Holmes v. Hamburg, 47 Ia. 348; except that bridges owned by corporations or individuals are reparable by their proprietors; Williams v. Bridge & Turnpike Corp., 4 Pick. (Mass.) 341; Ward v. Turnpike Co., 20 N. J. L. 323; Townsend v. Turnpike Road, 6 Johns. (N. Y.) 90; Beecher v. Ferry Co., 24 Conn. 491; and that where the necessity for a bridge is created by the act of an individual or corporation in cutting a canal, ditch, or railway through a highway, it is the duty of the author of such necessity to make and repair the bridge; Perley v. Chandler, 6 Mass. 458, 4 Am. Dec. 159; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Nobles v. Langly, 66 N. C. 287; Pennsylvania R. Co. v. Borough of Irwin, 85 Pa. 336; Roberts v. Ry. Co., 35 Wis. 679. Where a bridge is rebuilt at county expense, but over which it has no control or care and on which it expends no money thereafter, it does not become liable to maintain or repair it; Delta Lumber Co. v. Board of Auditors of Wayne County, 71 Mich. 572, 40 N. W. 1. The parties chargeable must constantly keep the bridge in such repair as will make it safe and convenient for the service for which it is required; Hawk. Pl. Cr. c. 77, s. 1; Frankfort Bridge Co. v. Williams, 9 Dana (Ky.) 403, 35 Am. Dec. 151; Holley v. Turnpike Co., 1 Aik. (Vt.) 74; People v. Turnpike Road, 23 Wend. (N. Y.) 254. See Town of Grayville v. Whitaker, 85 Ill. 439; Holmes v. City of Hamburg, 47 Ia. 348; Rapho Tp. v. Moore, 68 Pa. 408, 8 Am. Rep. 202; Hicks v. Chaffee, 13 Hun (N. Y.) 293; Abbot v. Wolcott, 38 Vt. 666.

Remedies for failure to repair. If the parties chargeable with the duty of repairing neglect so to do, they are liable to indictment; Hawk. Pl. Cr. c. 77, s. 1; People v. Dutchess County, 1 Hill (N. Y.) 50; State v. Canterbury, 28 N. H. 195; Com. v. Newburyport Bridge, 9 Pick. (Mass.) 142; State v. King, 25 N. C. 411. It has also been held that they may be compelled by mandamus to repair; Brander v. Chesterfield Justices, 5 Call (Va.) 548, 2 Am. Dec. 606; Dinwiddie Justices v. Chesterfield Justices, 5 Call (Va.) 556; People v. Dutchess County, 1 Hill (N. Y.) 50; Nelson County Court v. Washington County Court, 14 B. Monr. (Ky.) 92; State v. Freeholders of Essex, 23 N. J. L. 214. But see 12 A. & E. 427; 3 Campb. 222; State v. Cloud County Com'rs, 39 Kan. 700, 18 Pac. 952. If a corporation be charged with the duty by charter, they may be proceeded against by *quo warranto* for the forfeiture of their franchise; People v. R. Co., 23 Wend. (N. Y.) 254; or by action on the case for damages in favor of any person specially injured by reason of their neglect; Sherwood v. Weston, 18 Conn. 32; Townsend v. Turnpike Road, 6 Johns. (N. Y.) 90; Richardson v. Turnpike Co., 6 Vt. 496; Randall v. Turnpike, 6 N. H. 147, 25 Am. Dec. 453; Williams v. Turnpike, 4 Pick. (Mass.) 341; Board of Com'rs of Sullivan County v. Sisson, 2 Ind. App. 311, 28 N. E. 374. And a similar action is given by statute, in many states, against public bodies chargeable with repair; Whipple v. Walpole, 10 N. H. 130; Board of Com'rs of Allen County v. Creviston, 133 Ind. 39, 32 N. E. 735. A city is liable to an action for damages caused by a failure to maintain a bridge as required by law; City of Boston

v. Crowley, 38 Fed. 202. In Georgia counties are not liable for injuries from defects in free bridges or ferries; Arline v. Laurens County, 77 Ga. 249, 2 S. E. 833.

Tolls. The law of travel upon bridges is the same as upon highways, except when burdened by tolls. The payment of tolls can be lawfully enforced only at the gate or toll-house; State v. Dearborn, 15 Me. 402. Where by the charter of a bridge company, certain persons are exempted from payment, such exemption is to be liberally construed; Cayuga Bridge Co. v. Stout, 7 Cow. (N. Y.) 33; Salmon v. Mallett, 6 N. C. 372; South Carolina R. Co. v. Jones, 4 Rich. Eq. (S. C.) 459.

Bridges, when owned by individuals, are real estate; In re Meason's Estate, 4 Watts (Pa.) 341; Arnold v. Ruggles, 1 R. I. 165, Hudson River Bridge Co. v. Patterson, 74 N. Y. 365; and also when owned by the public; yet the freehold of the soil is in its original owner; Co. 2d Inst. 705. The materials of which they are formed belong to the parties who furnished them, subject to the public right of passage; and when the bridge is taken down or abandoned become the property of those who furnished them; 6 East 154; President, etc., of Turnpike Road Co. v. Com'rs of Franklin County, 6 S. & R. (Pa.) 229.

A *private* bridge is one erected for the use of one or more private persons. Such a bridge will not be considered a public bridge although it may be occasionally used by the public; 12 East 203; Thompson v. R. Co., 3 Sandf. Ch. (N. Y.) 625; 1 Rolle, Abr. 368, *Bridges*, pl. 2; 2 Inst. 701; 1 Salk. 359. The builder of a private bridge over a private way is not indictable for neglect to repair, though it be generally used by the public. See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; *id.*, 11 Pet. (U. S.) 539, 9 L. Ed. 773; People v. Cooper, 6 Hill (N. Y.) 516.

As to bridges over navigable waters, see that title.

See COMMERCE; FERRY.

BRIEF (Lat. *brevis*, L. Fr. *briefe*, short).

In Ecclesiastical Law. A papal rescript sealed with wax. See BULL.

In Practice. A writ. It is found in this sense in the ancient law authors.

An abridged statement of the party's case.

A *trial* brief properly and thoroughly prepared should contain a *statement* of the *names of the parties*, and of their residence and occupation, the character in which they sue and are sued, and wherefore they prosecute or resist the action; an abridgment of all the pleadings; a chronological and methodical *statement* of the *facts*, in plain language; a *summary* of the *points* or *questions* in issue, and of the proof which is to support such issues, mentioning specially the names of the witnesses by which the facts are to be proved, or, if there be written evidence, an abstract of such evidence; the *personal character* of the witnesses, whether the moral character is good or bad, whether they are naturally timid or over-zealous, whether firm or wavering; of the *evidence* of the *opposite party*, if known, and such facts as are adapted to oppose, confute, or repel it.

This statement should be perspicuous and concise. The object of a brief is to inform the person who tries the case of the facts important for him to know, to present his case properly where it has been prepared by another person—as is the general practice in England, and to some extent in this country—or as an aid to the memory of the person trying a case when he has prepared it himself.

A brief on *error or appeal* is a legal argument upon the questions which the record brings before the appellate court. These are written or printed and vary somewhat according to the purposes they are to subserve.

The rules of most of the appellate courts require the filing of printed briefs for the use of the court and opposing counsel at a time designated for each side before hearing. In the rules of the supreme court and circuit court of appeals of the United States the brief is required to contain a concise statement of the case, a specification of errors relied on, including the substance of evidence, the admission or rejection of which is to be reviewed, or any extract from a charge excepted to, and a brief of argument exhibiting clearly the points of law or fact to be discussed, with proper reference to the record or the authorities relied upon. When a statute is cited, so much as is relied on should be printed at length. Such a brief will generally be sufficient to answer the requirements of any of the courts in the several states whose rules require printed briefs.

See Briefmaking by Lyle (Cooley's ed.).

BRIEF OF TITLE. An abridged and orderly statement of all matters affecting the title to a certain portion of real estate.

It should give the effective parts of all patents, deeds, indentures, agreements, records, and papers relating to such estate, with sufficient fulness to disclose their full effect, and should mention incumbrances existing whether acquired by deed or use. All the documents of title should be arranged in chronological order, noticing particularly in regard to deeds, the date, names of parties, consideration, description of the property, and covenants. See 1 Chit. Pr. 304, 463; 14 Am. L. Reg. N. S. 529. See ABSTRACT OF TITLE.

BRIGBOTE (Sax.). A contribution to repair a bridge. See BOTE.

BRINGING MONEY INTO COURT. The act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty, or of an interpleader. See PAYMENT INTO COURT.

BROCAGE. The wages or commissions of a broker. His occupation is also sometimes called brocage.

BROCARIUS, BROCATOR. A broker; a middle-man between buyer and seller; the

agent of both transacting parties. Used in the old Scotch and English law. Bell, Dict.; Cowell.

BROKERAGE. The trade or occupation of a broker; the commissions paid to a broker for his services.

BROKERS. Those who are engaged for others in the negotiation of contracts relative to property, with the custody of which they have no concern. Paley, Agency 13. See Com. Dig. *Merchant*, C.

A broker is, for some purposes, treated as the agent of both parties; but, in the first place, he is deemed the agent only of the person by whom he is originally employed, and does not become the agent of the other until the bargain or contract has been definitely settled, as to the terms, between the principals, when he becomes the agent of both parties for the purpose of executing the bought and sold notes; Evans v. Waln, 71 Pa. 69; 5 B. & Ald. 333; Hinckley v. Arey, 27 Me. 362; Woods v. Rocchi, 32 La. Ann. 210.

A commission merchant differs from a broker in that he may buy and sell in his own name without disclosing his principal, while the broker can only buy or sell in the name of his principal. A commission merchant has a lien upon the goods for his charges, advances, and commissions, while the broker has no control of the property and is only responsible for bad faith; Edwards v. Hoeffinghoff, 38 Fed. 635.

One who negotiates a sale of another's property without having either actual or constructive possession of it is a broker as distinguished from a factor; J. M. Robinson, Norton & Co. v. Cotton Factory, 124 Ky. 435, 99 S. W. 305, 102 S. W. 869, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

The authority of a broker to bind his principal may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled as to be a constituent part of the law merchant; Benj. Sales § 273.

Bill and Note Brokers negotiate the purchase and sale of bills of exchange and promissory notes.

They are paid a commission by the seller of the securities; and it is not their custom to disclose the names of their principals. There is an implied warranty that what they sell is what they represent it to be; and should a bill or note sold by them turn out to be a forgery, they are held to be responsible; but it would appear that by showing a payment over to their principals, or other special circumstances attending the transaction proving that it would be inequitable to hold them responsible, they will be discharged; Edw. Fact. & Bro. § 10; Aldrich v. Butts, 5 R. I. 218; *contra*, Baxter v. Duren, 29 Me. 434, 50 Am. Dec. 602; Morrison v. Currie, 4 Duer (N. Y.) 79.

Exchange Brokers negotiate bills of exchange drawn on foreign countries, or on other places in this country.

It is sometimes part of the business of exchange brokers to buy and sell uncurrent bank notes and gold and silver coins, as well as drafts and checks drawn or payable in other cities; although, as they do this at their own risk and for their own profit, it is difficult to see the reason for calling them brokers. The term is often thus erroneously applied to all persons doing a money business.

Insurance Brokers procure insurance, and negotiate between insurers and insured.

Merchandise Brokers negotiate the sale of merchandise without having possession or control of it, as factors have.

Pawnbrokers lend money in small sums, on the security of personal property, generally at usurious rates of interest. They are licensed by the authorities, and excepted from the operation of the usury laws.

Real Estate Brokers. Those who negotiate the sale or purchase of real property. In addition to the above duty they sometimes procure loans on mortgage security, collect rents, and attend to the leasing of houses and lands.

Ship Brokers negotiate the purchase and sale of ships, and the business of freighting vessels. Like other brokers, they receive a commission from the seller only.

Stock Brokers. Those employed to buy and sell stocks and bonds of incorporated companies, and government bonds.

In the larger cities, the stock brokers are associated together under the name of the *Board of Brokers*. This Board is an association admission to membership in which is guarded with jealous care. Membership is forfeited for default in carrying out contracts, and rules are prescribed for the conduct of the business, which are enforced on all members. The purchases and sales are made at sessions of the Board, and are all officially recorded and published by the association. Stock brokers charge commission to both the buyers and sellers of stocks.

See COMMISSIONS; MARGIN; STOCK EXCHANGE; PLEDGE; BOUGHT NOTE; PRINCIPAL AND AGENT; REAL ESTATE BROKER.

See Story, Ag. § 28; Malynes, *Lex Merc.* 143; Liverm. Ag.; Whart. Ag.; Benj. Sales; Lewis, Stock Exchange; Biddle, Stock Brokers; Mechem, Ag.; Gross; Walker, Real Est.

BROTHEL. A bawdy-house; a common habitation of prostitutes.

Such places have always been deemed common nuisances in the United States, and the keepers of them may be fined and imprisoned. Till the time of Henry VIII. they were licensed in England, but that prince suppressed them. See Coke, 2d Inst. 205; BAWDY-HOUSE. For the history of these places, see Merlin, *Rép. Mot Bordel;* Parent Duchatellet, *De la Prostitution dans la Ville de Paris; Histoire de la Législation sur les Femmes publiques*, etc., par Sabatier.

BROTHER. He who is born from the same father and mother with another, or from one of them only.

Brothers are of the whole blood when they are born of the same father and mother, and of the half-blood when they are the issue of one of them only. In the civil law, when they are the children of the same father and mother, they are called

brothers germain; when they descend from the same father but not the same mother, they are *consanguine brothers;* when they are the issue of the same mother, but not the same father, they are *uterine brothers.* A *half-brother* is one who is born of the same father or mother, but not of both; one born of the same parents before they were married, a *left-sided brother;* and a bastard born of the same father or mother is called a *natural brother.* See BLOOD; HALF-BLOOD; LINE; Merlin, *Répert. Frère; Dict. de Jurisp. Frère;* Code 2. 28. 27; Nov. 84, præf.; Dane, Abr. Index; 44 U. C. Q. B. 536; Gardner v. Collins, 3 Mas. 398, Fed. Cas. No. 5,223; *id.,* 2 Pet. (U. S.) 58, 7 L. Ed. 347; Wheeler v. Clutterbrick, 52 N. Y. 67.

To obtain a conviction of the crime of incest, under a statute forbidding the marriage of brother and sister, it is not necessary to show legitimacy of birth; State v. Schaunhurst, 34 Ia. 547.

BROTHERHOOD AND GUESTLING, COURT OF. The Brotherhood was a conference of seven towns (*i. e.,* the Cinque Ports and two other ancient towns) as to the provision of the necessary ships and as to arranging for the herring sale at Yarmouth, and for other such purposes. The Guestling was rather a wider meeting, at which not merely the Brotherhood, but deputies from other associated towns were present for the discussion of subjects of common interest to all.

BROTHER-IN-LAW. The brother of a wife, or the husband of a sister.

There is no *relationship,* in the former case, between the husband and the brother-in-law, nor in the latter, between the brother and the husband of the sister: there is only *affinity* between them. See Vaugh. 302, 329.

BRUISE. In Medical Jurisprudence. An injury done with violence to the person, without breaking the skin: it is nearly synonymous with *contusion* (*q. v.*). 1 Ch. Pr. 38. See 4 C. & P. 381, 487, 558.

BUBBLE ACT. The name given to the statute 6 Geo. I. c. 18 (1719), intended "for restraining several extravagant and unwarrantable practices therein mentioned." See 2 P. Wms. 219.

BUCKET SHOP. An establishment nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets or wagers, usually for small amounts, on the rise and fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in. State v. McGinnis, 138 N. C. 724, 51 S. E. 50, adopting definition of Cent. Dict.; Gatewood v. North Carolina, 203 U. S. 531, 27 Sup. Ct. 167, 51 L. Ed. 305. Ostensible brokerage offices in which transactions in stocks and commodities are closed by the payment of gains or losses, as determined by price quotations. No property is bought or sold. Report to Gov. Hughes of N. Y., 1909. See GAMBLING.

BUGGERY. See SODOMY.

BUILDING. An edifice, erected by art, and fixed upon or over the soil, composed of brick, marble, wood, or other proper substance, connected together, and designed for use in the position in which it is so fixed. Every building is an accessory to the soil, and is therefore real estate; it belongs to the owner of the soil; Cruise, Dig. tit. 1, s. 46; but a building placed on another's land by his permission is the personal estate of the builder; 2 Bla. Com. 17.

BUILDING ASSOCIATIONS. Co-operative associations, usually incorporated, established for the purpose of accumulating and loaning money to their members upon real estate security. It is usual for the members to make monthly payments upon each share of stock, and for those who borrow money from the association to make such payments in addition to interest on the sum borrowed. When the stock, by successive payments and the accumulation of interest, has reached par, the mortgages given by borrowing members are cancelled, and the non-borrowing members receive in cash the par of their stock. See Endlich, Build. Assoc.; Wrigl. Build. Assoc. The general design of such an association is the accumulation from fixed periodical contributions of its shareholders and from the profits derived from the investment of the same, of a fund to be applied from time to time in accommodating such shareholders with loans, to enable them to acquire and improve real estate by building thereon; the conditions of the loan being such that the liability incurred therefor may be gradually extinguished by the borrower's periodical contributions upon his stock, so that when the latter shall be fully paid up the amount paid shall be sufficient to cancel the indebtedness; State v. Loan Ass'n, 45 Minn. 154, 47 N. W. 540, 10 L. R. A. 752. It differs from an ordinary corporation among other ways in the fact that in an ordinary business corporation stock is subscribed and either paid for at the time, or if partly paid for it becomes the property of the subscriber subject to future calls, while in a building association the stock subscriber is not the out and out owner of the stock from the beginning. He pays thereon a monthly payment, and, when these monthly payments, with his increment of gains accrued, equal the par value of the share of stock he is entitled to receive that amount. If, in the meantime, he has borrowed on his stock, it by pledge or operation of the loan remains the property or quasi property of the corporation, and the loan is returned by the payment of interest and stock dues, penalties, etc., the repayment of the loan culminating at the same time the stock itself matures, at which time, in theory, the corporation, or a given series or issue of its stock, is liquidated—the non-borrowing stockholders have their stock redeemed and the borrowers have

their loans cancelled; Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93, 4 L. R. A. (N. S.) 439, 112 Am. St. Rep. 480.

That it has power to borrow money to pay its stockholders when their stock reaches its par value is held in North Hudson Mut. Bldg. & Loan Ass'n v. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; that such power is implied when no statute denies it is held in Bohn v. Bldg. & Loan Ass'n, 135 Ia. 140, 112 N. W. 199, 124 Am. St. Rep. 263; Marion Trust Co. v. Inv. Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257. Other cases hold that a loan for the purpose of paying withdrawing members is *ultra vires* and void in the absence of an express borrowing power in the association; 22 Ch. D. 61; Standard Savings & Loan Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393.

It has no power to transfer to another association the contract of a borrowing stockholder; Thomp. Bldg. & Loan Ass'n (2d ed.) 286; Barton v. Loan & Bldg. Ass'n, 114 Ind. 226, 16 N. E. 486, 5 Am. St. Rep. 608; Lovelace v. Pratt, 163 Mo. 70, 63 S. W. 383. That it has such power in the absence of statutory prohibitions, is held in Bowlby v. Kline, 28 Ind. App. 659, 63 N. E. 723; Quein v. Smith, 108 Pa. 325.

In case of an advance by one loan association to take up a loan in another upon stock which has partly matured, the net amount of the loan is the sum still due, and not the face value of the loan, although the latter amount is charged on the books of the association and a credit as of an advance payment thereon given for the withdrawal value of the stock in the other association; Butson v. Sav. & Trust Co., 129 Ia. 370, 105 N. W. 645, 4 L. R. A. (N. S.) 98, 113 Am. St. Rep. 463.

One loaning money to a building association to satisfy the claims of withdrawing members, taking an assignment of mortgages of borrowing members as security, cannot hold the mortgages against the claims of a receiver of the association, since he is charged with knowledge of the want of power of the association to make the assignment; Standard Savings & Loan Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393. A statute authorizing such associations to retire stock out of a portion of its current receipts, was held not to confer any power to give its notes to retiring stockholders; Appeal of Powell, 93 Mo. App. 296. Such an association may stipulate in a contract of loan for the payment of a monthly premium limited to a certain number of payments; Burkheimer v. Bldg. & Loan Ass'n, 59 W. Va. 209, 53 S. E. 372, 4 L. R. A. (N. S.) 1047.

When its articles have been amended to conform to a statute providing for lower rates of interest, the association may not deny its benefits to members who have borrowed before the act was passed on the ground that the provisions of the amended articles do not refer to pre-existing contracts; St. John v. Bldg. & Loan Ass'n, 136 Ia. 448, 113 N. W. 863, 15 L. R. A. (N. S.) 503.

An absolute promise to mature its shares in a specified time is not changed to a conditional one dependent upon the success of the enterprise, by the shareholder's agreement, as expressed in the certificate of stock, to pay a specified monthly installment on each share until it matures or is withdrawn, and the provision of the by-laws accepted by him, that such installments shall be paid until each share is fully paid; Eastern Building & Loan Ass'n v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735, following Vought v. Building & Loan Ass'n, 172 N. Y. 508, 65 N. E. 496, 92 Am. St. Rep. 761, and affirming Williamson v. Building & Loan Ass'n, 62 S. C. 390, 38 S. E. 616, 1008.

The ground that such a promise on the part of the association was *ultra vires* was held not available where the shareholder had fully performed his part of the contract; Assets Realization Co. v. Heiden, 215 Ill. 9, 74 N. E. 56; Eastern Building & Loan Ass'n v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. Ed. 735; Floyd-Jones v. Anderson, 30 Mont. 351, 76 Pac. 751; Leahy v. Building & Loan Ass'n, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945; Hammerquist v. Savings & Loan Co., 15 S. D. 70, 87 N. W. 524.

But it has been held, where authority to issue stock having a fixed period of maturity was not expressly given by statute or by the articles or by-laws of the association, the ground of *ultra vires* may be set up by the association; O'Malley v. Building, Loan & Savings Ass'n, 92 Hun 572, 36 N. Y. Supp. 1016; McKean v. Building & Loan Ass'n, 10 Pa. Dist. R. 197; and to the same effect, King v. Building, Loan & Inv. Union, 170 Ill. 135, 48 N. E. 677; Schell v. Loan & Inv. Ass'n, 150 Mo. 103, 51 S. W. 406.

A stockholder who actively or passively concurs in the management of the affairs of a building association must bear his share of the losses during his membership resulting from such management; Browne v. Sanders, 20 D. C. 455.

In considering the question of usury in a loan from a building association, payments made by the borrower as dues are not to be considered as interest, as such payments are made in order to acquire an interest in the property of the association and not for the use of money; Tilley v. Building & Loan Ass'n, 52 Fed. 618; a premium bid for a loan cannot be allowed as a cloak for usury; International Building & Loan Ass'n v. Biering, 86 Tex. 476, 25 S. W. 622, 26 S. W. 39.

Fines imposed for default in payment of dues and interest cannot be collected by fore-

closure of a mortgage given to secure payment of an amount borrowed, unless it has been agreed that this may be done; Bowen v. Building & Loan Ass'n, 51 N. J. Eq. 272, 28 Atl. 67.

BUILDING CONTRACT. A contract to erect a building subject to the acceptance or rejection of the architect and in strict accordance with the plans, does not make the architect's acceptance conclusive (there being no clause to that effect); Mercantile Trust Co. v. Hensey, 205 U. S. 298, 27 Sup. Ct. 535, 51 L. Ed. 811, 10 Ann. Cas. 572.

BUILDING PERMIT. A city, when authorized by its charter to control the construction and repair of all houses, may require a permit from it as a prerequisite to the erection of a building; Fellows v. City of Charleston, 62 W. Va. 665, 59 S. E. 623, 13 L. R. A. (N. S.) 737, 125 Am. St. Rep. 990, 13 Ann. Cas. 1185; Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266. But it cannot require buildings to conform in size, appearance, etc., to other buildings in the same neighborhood; Bostock v. Sams, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394.

BUILDING RESTRICTION. When one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement which will be enforced in equity against the grantee of one of the other lots, although there is no direct contractual relation between the two. Through the common character of the deeds, the grantees are given an interest in a contractual stipulation which is used for their common benefit; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171, where the erection of a garage was held to be within a restriction forbidding the erection on the property of any building for shops or any other business objectionable to the neighborhood for dwelling houses. The maintenance of a hospital was enjoined where a covenant provided that the premises should not be leased for any noisome, obnoxious or offensive trade or business; 58 L. J. Ch. N. S. 83; 48 *id.* 339. An undertaker's establishment where bodies were received, kept and embalmed, funeral services and autopsies were held, and bodies dissected, was enjoined where the restriction provided that no trade or business offensive to the neighborhood should be carried on; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182. The location of a coal yard which received and broke up coal and separated it from the dust was enjoined under such a restrictive covenant; Barron v. Richard, 3 Edw. Ch. (N. Y.) 96; as was the location of a large school for boys; 68 L. J. Ch. 8.

But such a covenant is held not, as a matter of law, to be violated by the erection of a three-story building with stores on the first floor and flats or apartments above; Hurley v. Brown, 44 App. Div. 480, 60 N. Y. Supp. 846; or by one for the sale of groceries and provisions; Tobey v. Moore, 130 Mass. 448; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171. Generally, such restrictions will be construed in favor of the free use of property; James v. Irvine, 141 Mich. 376, 104 N. W. 631.

That a house shall be set back a certain distance and shall correspond with the grantor's adjoining house is the benefit of the land, and not a personal covenant: its life is limited to the life of the first house erected on the granted premises; Welch v. Austin, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189.

See EASEMENT; MUNICIPAL CORPORATION; POLICE POWER.

The state may limit the height of buildings to be erected in cities; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048. It may permit them to be higher in the sections where there is a demand for office space than in the residential portions, though the streets in the former may be narrower than in the latter; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523. It may restrict the height of buildings adjacent to a certain square in a city, compensation being given to persons injured in their property rights; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, affirmed in Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559, where the statute was held not to be in conflict with the federal constitution.

A city may forbid the erection of any frame structure within the "fire limits"; O'Bryan v. Apartment Co., 128 Ky. 282, 108 S. W. 257, 15 L. R. A. (N. S.) 419; may require the removal of a wooden building within such limits; Davison v. City of Walla Walla, 52 Wash. 453, 100 Pac. 981, 21 L. R. A. (N. S.) 454, 132 Am. St. Rep. 983; may require buildings used for certain purposes to be equipped with fire escapes; Arnold v. Starch Co., 194 N. Y. 42, 86 N. E. 815, 21 L. R. A. (N. S.) 178; may refuse its consent to the repair of a wooden building within the fire limits which has been damaged by fire; Brady v. Ins. Co., 11 Mich. 425. The owner thereof in such case, it is said, must first be given opportunity to remove the building; Village of Louisville v. Webster, 108 Ill. 418.

It may destroy a building infected with smallpox, as a nuisance; Sings v. City of Joliet, 237 Ill. 300, 86 N. E. 663, 22 L. R. A.

(N. S.) 1128, 127 Am. St. Rep. 323. It may prevent the moving of a wooden building into the city limits from a point outside; Red Lake Falls Milling Co. v. City of Thief River Falls, 109 Minn. 52, 122 N. W. 872, 24 L. R. A. (N. S.) 456, 18 Ann. Cas. 182; Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 368.

BULK. Merchandise which is neither counted, weighed, nor measured.

A sale by bulk is a sale of a quantity of goods such as they are, without measuring, counting, or weighing. La. Civ. Code, art. 3522, n. 6.

As to contracts forbidding "sales in bulk" of a tradesman's entire stock, see SALES.

BULL (Lat. *bulla*, a stud or boss). A letter from the pope of Rome, written on parchment, to which is attached a metal seal impressed with the images of Saint Peter and Saint Paul, on either side of a cross. On the other side of the seal is the name of the pope, with the year of his pontificate. See SEAL; BULLÆ.

There are three kinds of apostolical rescripts—the *brief*, the *signature*, and the *bull;* which last is most commonly used in legal matters. Bulls may be compared to the edicts and letters-patents of secular princes: when the bull grants a favor, the seal is attached by means of silken strings; and when to direct execution to be performed, with flax cords. Bulls are written in Latin, in a round and Gothic hand. Ayliffe, Par. 132; Ayliffe, Pand. 21; Merlin, *Répert.*

BULLÆ. Metal seals used, chiefly in the southern countries of Europe, in place of wax, which would be affected by heat; also used in other parts of Europe and even in England. Usually of lead, but sometimes of gold. Encycl. Br.

BULLETIN. An official account of public transactions in matters of importance. In France, it is the registry of the laws.

BULLION. The term bullion is commonly applied to uncoined gold and silver, in the mass or lump.

BULLION FUND. A deposit of public money at the mint and its branches. The object of this fund is to enable the mint to make returns of coins to private depositors of bullion without waiting until such bullion is actually coined. If the bullion fund is sufficiently large, depositors are paid as soon as their bullion is melted and assayed and the value ascertained. It thus enables the mint to have a stock of coin on hand to pay depositors in advance. Such bullion becomes the property of the government, and, being subsequently coined, is available as a means of prompt payment to other depositors; Act of June 22, 1874, Rev. Stat. U. S. § 3545.

BUNDLE. To sleep on the same bed without undressing; applied to the custom of a man and woman, especially lovers, thus sleeping. A. & E. Ency. See Seagar v. Sligerland, 2 Cai. (N. Y.) 219; Hollis v. Wells, 3 Clark (Pa.) 169.

BUOY. A piece of wood, or an empty barrel, or other thing, moored at a particular place and floating on the water, to show the place where it is shallow, to mark the channel, or to indicate the danger there is to navigation.

The act of congress approved the 28th September, 1850, enacts that all buoys shall be so colored and lettered that in passing up the coast or up a harbor, red buoys with even numbers shall be on the right, black buoys with uneven numbers on the left and with red and black stripes on either hand. In channels with alternate black and white stripes.

BURDEN OF PROOF. The duty of proving the facts in dispute on an issue raised between the parties in a cause. See People v. McCann, 16 N. Y. 66, 69 Am. Dec. 642; Ex parte Walls, 64 Ind. 461; Wilder v. Cowles, 100 Mass. 487.

Burden of proof is to be distinguished from *prima facie* evidence or a *prima facie* case. Generally, when the latter is shown, the duty imposed upon the party having the burden will be satisfied; but it is not necessarily so; Delano v. Bartlett, 6 Cush. (Mass.) 364; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Swallow v. State, 22 Ala. 20; Doty v. State, 7 Blackf. (Ind.) 427; Com. v. McKie, 1 Gray (Mass.) 61, 61 Am. Dec. 410.

The burden of proof lies upon him who substantially asserts the affirmative of the issue; 1 Greenl. Ev. § 74; 3 M. & W. 510; but where the plaintiff grounds his case on negative allegations, he has the burden; 1 C. & P. 220; 5 B. & C. 758; 1 Greenl. Ev. § 81; Daugherty v. Deardorf, 107 Ind. 527, 8 N. E. 296. As a general rule the burden of proof is upon the plaintiff to establish the facts alleged as the cause of action; Read v. Buffum, 79 Cal. 77, 21 Pac. 555, 12 Am. St. Rep. 131; Stoddard v. Rowe, 74 Ia. 670, 39 N. W. 84; Woolsey v. Jones, 84 Ala. 88, 4 South. 190; Brimberry v. R. Co., 78 Ga. 641, 3 S. E. 274; but in certain forms of action the burden may by the pleadings be shifted to the defendant.

In criminal cases, on the twofold ground that a prosecutor must prove every fact necessary to substantiate his charge against a prisoner, and that the law will presume innocence in the absence of convincing evidence to the contrary, the burden of proof, unless shifted by legislative interference, will fall on the prosecuting party, though in order to convict he must necessarily have recourse to negative evidence; 1 Tayl. Ev. 8th ed. §§ 113, 371; U. S. v. Gooding, 12 Wheat. (U. S.) 460, 6 L. Ed. 693. The burden of proof is throughout on the government, to make out the whole case; and when a *prima facie* case is established, the burden of proof is not thereby shifted upon the defendant, and he is not bound to restore himself to that presumption of innocence in which he was at the commencement of the trial; State v. Middleham, 62 Ia. 150, 17 N. W. 446; Wharton v. State, 73 Ala. 366; People v. Fairchild, 48 Mich. 31, 11 N. W.

773. As to the burden of proof where the defence of insanity is set up, see INSANITY.

BUREAU (Fr.). A place where business is transacted.

In the classification of the ministerial officers of government, and the distribution of duties among them, a bureau is understood to be a division of one of the great departments of which the secretaries or chief officers constitute the cabinet.

BURGAGE. A species of tenure, described by old law-writers as but tenure in socage, where the king or other person was lord of an *ancient borough*, in which the tenements were held by a rent certain.

Such boroughs had, and still have, certain peculiar customs connected with the tenure, which distinguished it from the ordinary socage tenure. These customs are known by the name of Borough-English; and they alter the law in respect of descent, as well as of dower, and the power of devising. By it the youngest son inherits the lands of which his father died seised. A widow, in some boroughs, has dower in respect to all the tenements which were her husband's; in others, she has a moiety of her husband's lands so long as she remains unmarried; and with respect to devises, in some places, such lands only can be devised as were acquired by purchase; in others, estates can only be devised for life; 2 Bla. Com. 82; Glanv. b. 7, c. 3; Litt. § 162; Cro. Car. 411; 1 P. Wms. 63; Fitzh. N. B. 150; Cro. Eliz. 415.

The tenure at a money rent would become the typical tenure of a burgage tenement; Maitl. Domesday & Beyond 198.

BURGATOR. One who breaks into houses or enclosed places, as distinguished from one who committed robbery in the open country. Spelman, Gloss. *Burglaria.*

BURGESS. A magistrate of a borough. Blount. An officer who discharges the same duties for a borough that a mayor does for a city. The word is used in this sense in Pennsylvania.

An inhabitant of a town; a freeman; one legally admitted as a member of a corporation. Spelman, Gloss. A qualified voter. 3 Steph. Com. 192. A representative in parliament of a town or borough. 1 Bla. Com. 174.

BURGESS ROLL. A list of those entitled to new rights under the act of 5 & 6 Will. IV. c. 74; 3 Steph. Com. 34, 38.

BURGHMOTE. In Saxon Law. A court of justice held twice a year, or oftener, in a *burg*. All the thanes and free owners above the rank of ceorls were bound to attend without summons. The bishop or lord held the court. Spence, Eq. Jur.

BURGLAR. One who commits burglary. He that by night breaketh and entereth into the dwelling-house of another. Wilmot, Burgl. 3.

BURGLARIOUSLY. A technical word which must be introduced into an indictment for burglary at common law. The essential words are "feloniously and burglariously broke and entered the dwelling-house in the night-time"; Whart. Cr. Pl. § 265. No other word at common law will answer the purpose, nor will any circumlocution be sufficient; 4 Co. 39; 5 *id.* 121; Cro. Eliz. 920; Bacon, Abr. *Indictment* (G, C); State v. McClung, 35 W. Va. 280, 13 S. E. 654. But there is this distinction: when a statute punishes an offence by its legal designation without enumerating the acts which constitute it, then it is necessary to use the terms which technically charge the offence named at common law. But this is not necessary when the statute describes the whole offence, and the indictment charges the crime in the words of the statute. Thus, an indictment which charges the statute crime of burglary is sufficient, without averring that the crime was committed "burglariously;" Tully v. Com., 4 Metc. (Mass.) 357. See Portwood v. State, 29 Tex. 47, 94 Am. Dec. 258; People v. Bosworth, 64 Hun 72, 19 N. Y. Supp. 114.

BURGLARY. The breaking and entering the house of another in the night-time, with intent to commit a felony therein, whether the felony be actually committed or not. Co. 3d Inst. 63; 1 Hale, Pl. Cr. 549; 1 Hawk. Pl. Cr. c. 38, s. 1; 4 Bla. Com. 224; 2 Russ. Cr. 2; State v. Wilson, 1 N. J. L. 441, 1 Am. Dec. 216; Com. v. Newell, 7 Mass. 247; 1 Whart Cr. L. (9th ed.) § 758; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477.

In what place a burglary can be committed. It must, in general, be committed in a mansion-house, actually occupied as a dwelling; but if it be left by the owner *animo revertendi*, though no person resides in it in his absence, it is still his mansion; Fost. 77; Com. v. Brown, 3 Rawle (Pa.) 207; Com. v. Barney, 10 Cush. (Mass.) 478. See DWELLING-HOUSE. But burglary may be committed in a church, at common law. And under the statutes of some of the states, it has been held that it could be committed in a store over which were rooms in which the owner lived; Quinn v. People, 71 N. Y. 561, 27 Am. Rep. 87. A shoeshop in a room connected with the dwelling is a part of it; People v. Dupree, 98 Mich. 26, 56 N. W. 1046; a wheat house; Bass v. State, 1 Lea (Tenn.) 444; a railroad depot; State v. Bishop, 51 Vt. 287, 31 Am. Rep. 690; a stable; Orrell v. People, 94 Ill. 456, 34 Am. Rep. 241; but not a mill-house, seventy-five yards from the owner's dwelling, and not shown to be appurtenant; 3 Cox 581; Co. 3d Inst. 64. It must be the dwelling-house of another person; 2 Bish. Cr. Law § 90; 2 East, Pl. Cr. 502. A store-house in which a clerk sleeps to protect the property is a dwelling; State v. Pressley, 90 N. C. 730; U. S. v. Johnson, 2 Cra. C. C. 21, Fed. Cas. No. 15,485.

At what time it must be committed. The

offence must be committed in the night; for in the daytime there can be no burglary; 4 Bla. Com. 224; 1 C. & K. 77; Lewis v. State, 16 Conn. 32; State v. Bancroft, 10 N. H. 105. For this purpose it is deemed night when by the light of the sun a person cannot clearly discern the face or countenance of another; 1 Hale, Pl. Cr. 550; Co. 3d Inst. 62; 1 C. & P. 297; 7 Dane, Abr. 134. This rule, it is evident, does not apply to moonlight; 4 Bla. Com. 224; 2 Russ. Cr. 32; State v. Bancroft, 10 N. H. 105; Thomas v. State, 5 How (Miss.) 20; State v. McKnight, 111 N. C. 690, 16 S. E. 319. The breaking and entering need not be done the same night; 1 R. & R. 417; but it is necessary that the breaking and entering should be in the night-time; for if the breaking be in daylight and the entry in the night, or *vice versa*, it is said, it will not be burglary; 1 Hale, Pl. Cr. 551; 2 Russ. Cr. 32. But *quære*, Wilmot, Burgl. 9. See Com., Dig. *Justices*, P, 2; 2 Chit. Cr. Law 1092. In some states by statute the breaking and entering in the daytime with intent to commit a misdemeanor or felony is burglary; State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Hutchinson, 111 Mo. 257, 20 S. W. 34.

The means used. There must be both a *breaking* and an *entry* or an *exit*. An *actual breaking* takes place when the burglar breaks or removes any part of the house, or the fastenings provided for it, with violence; 1 Bish. Cr. Law 91. Breaking a window, taking a pane of glass out, by breaking or bending the nails or other fastenings; 1 C. & P. 300; 9 *id.* 44; 1 R. & R. 341, 499; Walker v. State, 52 Ala. 376; cutting and tearing down a netting of twine nailed over an open window; Com. v. Stephenson, 8 Pick. (Mass.) 354; Sims v. State, 136 Ind. 358, 36 N. E. 278; raising a latch, where the door is not otherwise fastened; 8 C. & P. 747; Coxe 439; Curtis v. Hubbard, 1 Hill (N. Y.) 336; State v. Newbegin, 25 Me. 500; Bass v. State, 1 Lea (Tenn.) 444; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; State v. O'Brien, 81 Ia. 93, 46 N. W. 861; picking open a lock with a false key; putting back the lock of a door, or the fastening of a window, with an instrument; lowering a window fastened only by a wedge or weight; 1 R. & R. 355, 451; State v. Moore, 117 Mo. 395, 22 S. W. 1086; Walker v. State, 52 Ala. 376; or opening a door when not locked or bolted; Grimes v. State, 77 Ga. 762, 4 Am. St. Rep. 112; *contra*, Williams v. State (Tex.) 13 S. W. 609; State v. Reid, 20 Ia. 413; Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376; People v. Nolan, 22 Mich. 229; Carter v. State, 68 Ala. 96; Lyons v. People, 68 Ill. 271; turning the key when the door is locked in the inside, or unloosing any other fastening which the owner has provided; lifting a trap-door; 1 Mood. 377; but see 4 C. & P. 231; are several instances of actual breaking. But removing a loose plank in a partition wall was held not a breaking; Com. v. Trimmer, 1 Mass. 476. According to the Scotch law, entering a house by means of the true key, while in the door, or when it had been stolen, is a breaking; Alison, Pr. 284. See 1 Swint. Just. 433.

Constructive breakings occur when the burglar gains an entry by fraud; 1 Cr. & D. 202; Ducher v. State, 18 Ohio, 308; State v. Henry, 31 N. C. 463; Rolland v. Commonwealth, 82 Pa. 306; by conspiracy or threats; 1 Russ. Cr. Graves ed. 792; 2 *id.* 2; State v. Rowe, 98 N. C. 629, 4 S. E. 506; by bribing a servant; by knocking at the door, and, when opened, rushing in; by gaining admittance on pretense of wishing to speak to some one within; by gaining admittance by threats; Odgers, Com. L. 383. When one of three breaks and enters, another watches at the door, and a third stands farther off to give notice if help comes, it is burglary in all; 1 Hale, Pl. Cr. 555.

Where one is let into a store in the night-time on pretence of making a purchase and while in he unbolts a door and admits his accomplice, who secretes himself on the inside and afterwards steals, both may be convicted of breaking and entering; Com. v. Lourey, 158 Mass. 18, 32 N. E. 940. Where a window is slightly raised in the daytime so as to prevent the bolt from being effectual, it would not prevent the subsequent breaking and entering in the night-time through the window from being burglary; People v. Dupree, 98 Mich. 26, 56 N. W. 1046. The breaking of an inner door of the house will be sufficient to constitute a burglary; 1 Hale, Pl. Cr. 553; 8 C. & P. 747; People v. Fralick, Lalor's Sup. (N. Y.) 63; 2 Bish. Cr. Law § 97; or the opening of an inner closed door; 2 East, P. C. 48; and it is not necessary that such breaking be accompanied with an intention to commit a felony in the very room entered; Hartmann v. Com., 5 Pa. 66. Entry through an open door in the night-time with intent to steal is not burglary; Costello v. State (Tex.) 21 S. W. 360.

Any, the least *entry*, with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a felony, will be sufficient to constitute the offence; Co. 3d Inst. 64; 4 Bla. Com. 227; Bacon, Abr. *Burglary* (B); Com. Dig. *Justices*, P, 4; Allen v. State, 40 Ala. 334, 91 Am. Dec. 477; Franco v. State, 42 Tex. 276; Com. v. Glover, 111 Mass. 395; Harris v. People, 44 Mich. 305, 6 N. W. 677. Where a person enters a chimney of a storehouse intending to go down such into the store to steal, he is guilty of burglary; Olds v. State, 97 Ala. 81, 12 South. 409. But the introduction of an instrument, in the act of breaking the house, will not be sufficient entry unless it be in-

troduced for the purpose of committing a felony; 1 Leach 406; 1 Mood. 183. The whole physical frame need not pass within; 2 Bish. Cr. Law § 92; 1 Gabb. Cr. Law 176.

There was, at common law, doubt whether breaking out of a dwelling-house would constitute burglary; 4 Bla. Com. 227; 1 B. & H. Lead. Cr. Cas. 540; but it was declared to be so by stat. 12 Anne, c. 7, § 3, and 7 & 8 Geo. IV. c. 29, § 11. The better opinion seems to be that it was not so at common law; Rolland v. Com., 82 Pa. 324, 22 Am. Rep. 758; Whart. Cr. L. 9th ed. § 771; *contra*, State v. Ward, 43 Conn. 489, 21 Am. Rep. 665. As to what acts constitute a breaking out, see 1 Jebb 99; 8 C. & P. 747; 1 Russ. Cr. (Graves ed.) 792; 1 B. & H. Lead. Cr. Cas. 540.

The intention. The intent of the breaking and entry must be felonious; if a felony, however, be committed, the act will be *prima facie* evidence of an intent to commit it; 1 Gabb. Cr. Law 192. See Alexander v. State, 31 Tex. Cr. R. 359, 20 S. W. 756; State v. Scripture, 42 N. H. 485; People v. Young, 65 Cal. 225, 3 Pac. 813. See State v. Colter, 6 R. I. 195; Com. v. Tuck, 20 Pick. (Mass.) 356; Lowder v. State, 63 Ala. 143, 35 Am. Rep. 9. If the breaking and entry be with an intention to commit a trespass, or a mere misdemeanor, and nothing further is done, the offence will not be burglary; Com. v. Newell, 7 Mass. 245; State v. Cooper, 16 Vt. 551; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; 1 Hale, Pl. Cr. 560.

See HAMOSOCNE; BREAKING; CREPUSCULUM.

It need not appear that the ulterior felony was actually committed. And if a tramp enters for shelter and is tempted to steal, it is not burglary; Odgers, Com. L. 384.

BURGOMASTER. In Germany, this is the title of an officer who performs the duties of a mayor.

BURH. For a long time after the Germanic invasion of England, it meant a fastness. The hill-top that has been fortified is a burh. Very often it has given its name to a neighboring village; it is the future *borough*. The entrenchment around a great man's house was a burh. Early in the 10th century a burh came to have many men in it and usually a moot was held there—a burh-gemot. See Maitland, Domesday and Beyond, 183.

BURIAL. The act of interring the dead. No burial is lawful unless made in conformity with the local regulations; and when a dead body has been found, it cannot be lawfully buried until the coroner has holden an inquest over it. In England it is the practice for coroners to issue warrants to bury, after a view. See DEAD BODY; CEMETERY.

BURLAW COURTS. In Scotch Law. Assemblages of neighbors to elect burlaw men, or those who were to act as rustic judges in determining disputes in their neighborhood. Skene; Bell, Dict.

BURNING. See ACCIDENT; FIRE.

BURNING IN THE HAND. When a layman was admitted to benefit of the clergy he was burned in the hand, "in the brawn of the left thumb," in order that he might not claim the benefit twice. This practice was finally abolished by stat. 19 Geo. III. c. 74; though before that time the burning was often done with a cold iron; 12 Mod. 448; 4 Bla. Com. 267. See BENEFIT OF CLERGY.

BURYING-GROUND. A place appropriated for depositing the dead; a cemetery. In Massachusetts, burying-grounds cannot be appropriated to roads without the consent of the owners. Mass. Gen. Stat. 244. So in Pennsylvania by acts passed in 1849 and 1861. See CEMETERY.

BUSHEL. The Winchester bushel, established by the 13 Will. III. c. 5 (1701) was made the standard of grain. A cylindrical vessel, eighteen and a half inches in diameter, and eight inches deep inside, contains a bushel; the capacity is 2145.42 cubic inches. The bushel established by the 5 & 6 Geo. IV. c. 74, is to contain 2218.192 cubic inches. This measure has been adopted in many of the United States. In other states the capacity varies.

See the subject discussed in report of the Secretary of State of the United States to the Senate, Feb. 22, 1821.

BUSINESS. That which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment. It embraces everything about which a person can be employed; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, yet a series of such acts would be so considered. Lemons v. State, 50 Ala. 130; People v. Com'rs of Taxes of City of New York, 23 N. Y. 244.

It is a word of large and indefinite import; the legislature could not well have used a larger word. Jessel, M. R., in 15 Ch. D. 258. See PLACE OF BUSINESS; DOMICIL.

BUSINESS HOURS. The time of the day during which business is transacted. In respect to the time of presentment and demand of bills and notes, business hours generally range through the whole day down to the hours of rest in the evening, except when the paper is payable at a bank or by a banker; Cayuga County Bank v. Hunt, 2 Hill (N. Y.) 635. See Flint v. Rogers, 15 Me.

67; Lunt v. Adams, 17 *id.* 230; Byles, Bills 283.

The term "usual business hours" does not mean the time an employer may require his employé's services, but those of the community generally; Derosia v. R. Co., 18 Minn. 154 (Gil. 119).

See TIME.

BUTLERAGE. A certain portion of every cask of wine imported by an alien, which the king's butler was allowed to take.

Called also prisage; 2 Bulstr. 254. Anciently, it might be taken also of wine imported by a subject. 1 Bla. Com. 315; *Termes de la Ley;* Cowell.

BUTT. A measure of capacity, equal to one hundred and eight gallons; also denotes a measure of land. Jac. Dict.; Cowell. See MEASURE.

BUTTALS. The bounding lines of land at the end; abuttals, which see.

BUTTS. The ends or short pieces of arable lands left in ploughing. Cowell.

BUTTS AND BOUND. The lines bounding an estate. The angles or points where these lines change their direction. Cowell; Spelman, Gloss. See ABUTTALS.

BUYING TITLES. The purchase of the rights of a desseisee to lands of which a third person has the possession.

When a deed is made by one who, though having a legal right to land, is at the time of the conveyance disseised, the sale is void as a general rule of the common law: the law will not permit any person to buy a quarrel, or, as it is commonly termed, a pretended title. Such a conveyance is an offence at common law and by a statute of 32 Hen. VIII. c. 9. This rule has been generally adopted in the United States, and is affirmed by statute in some states; 3 Washb. R. P. *596. In the following states the act is unlawful, and the parties are subject to various penalties in the different states: in *Connecticut*, Hinman v. Hinman, 4 Conn. 575; *Georgia*, Helms v. May, 29 Ga. 124; *Indiana*, Webb v. Thompson, 23 Ind. 432; Galbreath v. Doe, 8 Blackf. (Ind.) 366; *Kentucky*, Wash v. McBrayer, 1 Dana (Ky.) 566; Williams v. Rogers, *id.* 374; see Young v. Kimberland, 2 Litt. (Ky.) 225; Aldridge v. Kincaid, *id.* 393; Ewing's Heirs v. Savary, 4 Bibb (Ky.) 424; *Massachusetts*, Brinley v. Whiting, 5 Pick. (Mass.) 356; Wade v. Lindsey, 6 Metc. (Mass.) 407; *Mississippi*, Bush v. Cooper, 26 Miss. 599, 59 Am. Dec. 270; *New Hampshire*, Dame v. Wingate, 12 N. H. 291; *New York*, Thurman v. Cameron, 24 Wend. (N. Y.) 87; *North Carolina*, Den v. Shearer, 5 N. C. 114; Hoyle v. Logan, 15 N. C. 495; *Ohio*, Walker, Am. Law 297, 351; *Vermont*, Selleck v. Starr, 6 Vt. 198; see White v. Fuller, 38 Vt. 204; Park v. Pratt, *id.* 553.

By the transaction, the grantor does not lose his estate; Brinley v. Whiting, 5 Pick. (Mass.) 348; Sohier v. Coffin, 101 Mass. 179.

In *Illinois*, Fetrow v. Merriwether, 53 Ill. 279; *Missouri*, Rev. Stat. 119; *Pennsylvania*, Cresson v. Miller, 2 Watts (Pa.) 272; *Ohio*, Hall's Lessee v. Ashby, 9 Ohio 96, 34 Am. Dec. 424; *Wisconsin*, Stewart v. McSweeney, 14 Wis. 471; *South Carolina*, Poyas v. Wilkins, 12 Rich. (S. C.) 420; *Maine*, Rev. Stat. c. 73, § 1; *Michigan*, Crane v. Reeder, 21 Mich. 82, 4 Am. Rep. 430; such sales are valid. See CHAMPERTY.

BY. Near, beside, passing in presence, and it also may be used as exclusive. Rankin v. Woodworth, 3 P. & W. (Pa.) 48.

When used descriptively in a grant it does not mean in immediate contact with, but near to the object to which it relates. It is a relative term, meaning, when used in land patents, very unequal and different distances; Wilson v. Inloes, 6 Gill (Md.) 121.

BY-BIDDING. Bidding with the connivance or at the request of the vendor of goods by auction, without an intent to purchase, for the purpose of obtaining a higher price than would otherwise be obtained.

By-bidders are also called *puffers*, which see. It has been said that the practice is probably allowable if it be done fairly, with an intention only to prevent a sale at an unduly low price; Latham's Ex'rs v. Morrow, 6 B. Monr. (Ky.) 630; Veazie v. Williams, 3 Sto. 622, Fed. Cas. No. 16,907; 15 M. & W. 371; Steele v. Ellmaker, 11 S. & R. (Pa.) 86. A bidder is required to act in good faith and any combination to prevent a fair competition would avoid the sale; 3 B. & B. 116; Martin v. Ranlett, 5 Rich. (S. C.) 541, 57 Am. Dec. 770; Barnes v. Nays, 88 Ga. 696, 16 S. E. 67; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Veazie v. Williams, 8 How. (U. S.) 153, 12 L. Ed. 1018. See BID; AUCTION.

Lord Mansfield held that the employment of a single puffer was a fraud; Cowp. 395; this rule was afterwards relaxed, in equity only, so as to allow a single bidder; 12 Ves. 477. The rule was stated in L. R. 1 Ch. 10, to be, that a single puffer will vitiate a sale in law, but may be allowed in equity; though either at law or in equity, such bidding is permissible upon notice at the sale. By 30 and 31 Vict. c. 48, the rule in equity was declared to be the same as at law. See L. R. 9 Eq. 60. Lord Mansfield's opinion was followed in Appeal of Pennock, 14 Pa. 446, 53 Am. Dec. 561, per Gibson, C. J., overruling Steele v. Ellmaker, 11 S. & R. (Pa.) 86; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Baham v. Bach, 13 La. 287, 33 Am. Dec. 561. In New Jersey it seems that if there is a *bona fide* bid next before that of the buyer, the bidding of puffers will not avoid the sale (so held also in Veazie v. Williams, 3 Story 611, Fed. Cas. No. 16,907); but it is

intimated that it would be a better rule to forbid puffing; National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 159. Kent favors Lord Mansfield's rule; 2 Kent *540. The employment of a puffer to enhance the price of property sold is a fraud; Fisher v. Hersey, 17 Hun (N. Y.) 373. So held in Caldwell v. U. S. 8 How. (U. S.) 378, 12 L. Ed. 1115. Exceptions to the rule may occur when it does not appear that the buyer paid more than the value of the property or than he had determined to bid; Tomlinson v. Savage, 41 N. C. 430. A purchaser thus misled must restore the property as soon as he discovers the fraud; Backenstoss v. Stahler's Adm'rs, 33 Pa. 251, 75 Am. Dec. 592; Veazie v. Williams, 3 Story 611, 631, Fed. Cas. No. 16,907. In Phippen v. Stickney, 3 Metc. (Mass.) 384, the validity of the sale is held to depend upon the *animus* with which the puffing is carried on. Where a sale is advertised to be "without reserve" or "positive," the secret employment of by-bidders renders the sale voidable by the buyer; Curtis v. Aspinwall, 114 Mass. 187, 19 Am. Rep. 332.

BY BILL. Actions commenced by *capias* instead of by original writ were said to be *by bill*. 3 Bla. Com. 285, 286. See Harkness v. Harkness, 5 Hill (N. Y.) 213.

The usual course of commencing an action in the King's Bench was by a bill of Middlesex. In an action commenced *by bill* it is not necessary to notice the form or nature of the action; 1 Chit. Pl. 283.

BY ESTIMATION. A term used in conveyances. In sales of land it not unfrequently occurs that the property is said to contain a certain number of acres *by estimation*, or so many acres, *more or less*. When these expressions are used, if the land fall short by a small quantity, the purchaser will receive no relief. In one case of this kind, the land fell short two-fifths, and the purchaser received no relief; Ketchum v. Stout, 20 Ohio 453; Stull v. Hurtt, 9 Gill (Md.) 446; Jollife v. Hite, 1 Call (Va.) 301, 1 Am. Dec. 519; Stebbins v. Eddy, 4 Mas. 419, Fed. Cas. No. 13,342; Jones's Devisees v. Carter, 4 H. & M. (Va.) 184; Boar v. M'Cormick, 1 S. & R. (Pa.) 166; Mann v. Pearson, 2 Johns. (N. Y.) 37; Howe v. Bass, 2 Mass. 382, 3 Am. Dec. 59; Snow v. Chapman, 1 Root (Conn.) 528. The meaning of these words has never been precisely ascertained by judicial decision. See Sugden, Vend. 231, where the author applies the rule to contracts *in fieri*. But this distinction was not accepted in Noble v. Googins, 99 Mass. 234.

See More or Less; Subdivision.

BY-LAW MEN. In an ancient deed, certain parties are described as "yeomen and *by-law men* for this present year in Easinguold." 6 Q. B. 60.

They appear to have been men appointed for some purpose of limited authority by the other inhabitants, as the name would suggest, under by-laws of the corporation appointing.

BY-LAWS. Rules and ordinances made by a corporation for its own government. See Drake v. R. Co., 7 Barb. (N. Y.) 539. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and among themselves; Flint v. Pierce, 99 Mass. 70, 96 Am. Dec. 691. A by-law was originally a *town* law, from "by" the Scandinavian word for town. So the Anglo-Saxon *bylage*, a private law. Thomp. Corp. § 938. As to the analogy between by-law and ordinance, see 34 Am. Dec. 627, n.; Dillon, Munc. Corp. § 307. The power to make by-laws is usually conferred by express terms of the charter creating the corporation. When not expressly granted, it is given by implication, and it is incident to the very existence of a corporation; Brice, *Ultra Vires* (3d Ed.) 6; Moraw. Priv. Corp. 491. When there is an express grant, limited to certain cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication; 2 P. Wms. 207; Ang. Corp. 177. The power of making by-laws, if the charter is silent, resides in the members of the corporation; Union Bank of Maryland v. Ridgely, 1 Harr. & G. (Md.) 324; 4 Burr. 2515; 6 Bro. P. C. 519; Morton Gravel Road Co. v. Wysong, 51 Ind. 4; People v. Throop, 12 Wend. (N. Y.) 183; State v. Ferguson, 33 N. H. 424; and the power to repeal them also exists; Bank of Holly Springs v. Pinson, 58 Miss. 4215, 38 Am. Rep. 330; 7 Dowl. & R. 267; Smith v. Nelson, 18 Vt. 511.

By-laws, when contrary to the Constitution or laws of the state or the U. S. are void whether the charter authorizes the making of such by-law or not; because no legislature can grant power larger than that which it possesses; Coates v. City of New York, 7 Cow. (N. Y.) 585; Stuyvesant v. City of New York, *id.* 604; First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Jay Bridge Corporation v. Woodman, 31 Me. 573; In re Butcher's Beneficial Ass'n, 35 Pa. 151; People v. Fire Department, 31 Mich. 458; State v. Curtis, 9 Nev. 325; 1 Q. B. D. 12. They must not be inconsistent with the charter; Green's Brice, *Ultra Vires*, 15.

By-laws must be reasonable; Cartan v. Benevolent Society, 3 Daly (N. Y.) 20; Com. v. Gill, 3 Whart. (Pa.) 228; State v. Merchants' Exchange, 2 Mo. App. 96; and not retrospective; People v. Crockett, 9 Cal. 112; People v. Fire Department, 31 Mich. 458; they bind the members; Cummings v. Webster, 43 Me. 192; Weatherly v. Medical & Surgical Society, 76 Ala. 567; Kent v. Mining Co., 78 N. Y. 179; Harrington v. Benevolent Ass'n, 70 Ga. 341; Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 691; who are presumed to have notice of them; Cummings

v. Webster, 43 Me. 192; Village of Buffalo v. Webster, 10 Wend. (N. Y.) 100; Clark v. Life Ass'n, 14 App. D. C. 154, 43 L. R. A. 390; Purdy v. Life Ass'n, 101 Mo. App. 91, 74 S. W. 486; but a by-law void as against strangers or non-assenting members, may be good as a contract against assenting members; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Cooper v. Frederick, 9 Ala. 738; Davis v. Proprietors of Meeting-House, 8 Metc. (Mass.) 321. See State v. Overton, 24 N. J. L. 440, 61 Am. Dec. 671. It has been held that third parties dealing with corporations are not bound to take notice of by-laws; Fay v. Noble, 12 Cush. (Mass.) 1; Wild v. Bank, 3 Mas. 505, Fed. Cas. No. 17,646; see Samuel v. Holladay, Woolw. 400, Fed. Cas. No. 12,288, where a distinction was raised between by-laws made by the corporation and those made by the directors, so far as relates to notice to third parties; but, *contra*, Adriance v. Roome, 52 Barb. (N. Y.) 399.

See Williston, 3 Sel. Essays on Anglo-Amer. Leg. Hist. 213.

But it is said that where third persons who deal with a corporation know its course of business and follow a prescribed regulation, it will be presumed that they dealt with reference thereto; Thomp. Corp. Sec. 492. A court will not take judicial notice of the by-laws of a corporation; Haven v. Asylum for Insane, 13 N. H. 532, 38 Am. Dec. 512. Unless required by statute it is not necessary that the by-laws of a private corporation should be in writing; Knights and Ladies of America v. Weber, 101 Ill. App. 488.

A by-law may be created and made binding upon the members by custom; Stafford v. Banking Co., 16 Ohio Cir. Ct. 50.

A by-law which is acquiesced in for eleven years must be presumed to be regularly adopted; Marsh v. Mathias, 19 Utah, 350, 56 Pac. 1074; and by-laws adopted by stockholders but not by an expressed vote of the directors will be considered as adopted by the directors, their conduct indicating that they regarded them as the by-laws of the corporation; Graebner v. Post, 119 Wis. 392, 96 N. W. 783, 100 Am. St. Rep. 890.

In England the term *by-law* includes any order, rule or regulation made by any local authority or statutory corporation subordinate to Parliament; 1 Odgers, C. L. 91.

Under some circumstances an action may be brought upon by-laws against members; Thomp. Corp. § 949.

BY THE BYE. Without process. A declaration is said to be filed by the bye when it is filed against a party already in the custody of the court under process in another suit. This might have been done, formerly, where the party was under arrest and technically in the custody of the court; and even giving common bail was a sufficient custody in the King's Bench; 1 Sellon, Pr. 228; 1 Tidd. Pr. 419. It is no longer allowed; Archbold, New Pr. 293.

C

C. The third letter of the alphabet. It was used among the Romans to denote condemnation, being the initial letter of *condemno*. See A.

In Rhode Island as late as 1785 it was branded on the forehead as part of the punishment for counterfeiting; Anderson, Dict. Law.

C. A. V. See CURIA ADVISARI VULT.

C. C. An abbreviation of *cepi corpus*, I have taken his body.

C. C.; B. B. I have taken his body; bail bond entered. See CAPIAS AD RESPONDENDUM.

C. C. & C. I have taken his body and he is held.

C. F. & I. Letters used in British contracts for *cost, freight and insurance*, indicating that the price fixed covers not only cost but freight and insurance to be paid by the seller; Benj. Sales, § 887; L. R. 8 Ex. 179. The invoice gives the buyer credit for the freight he will have to pay on delivery of the goods; L. R. 5 H. L. 395, 406. A contract for a shipment of iron to a port C. F. & I. does not of itself import a delivery at that port; 7 H. & N. 574.

C. O. D. Collect on delivery. Where goods shipped are thus marked, the carrier in addition to his ordinary liabilities, and responsibilities is to collect the amount specified by the consignor, and for failure to return to him, either the price or the goods, he has a right of action on the contract against the carrier. See United States Exp. Co. v. Keefer, 59 Ind. 264; State v. Intoxicating Liquors, 73 Me. 278; American Merchants' Union Exp. Co. v. Schier, 55 Ill. 140; Collender v. Dinsmore, 55 N. Y. 206, 14 Am. Rep. 224.

These initials have acquired a fixed and determinate meaning, which courts and juries may recognize from their general information; State v. Intoxicating Liquors, 73 Me. 278.

The weight of authority is said by Williston (Sales § 279) to support the view that possession only is to be retained by the seller until the price is paid, and that property passes immediately on delivery to the car-

rier, which view he prefers, citing U. S. v. Exp. Co., 119 Fed. 240; Pilgreen v. State, 71 Ala. 368; City of Carthage v. Munsell, 203 Ill. 474, 67 N. E. 831; State v. Intoxicating Liquors, 98 Me. 464, 57 Atl. 798; Higgins v. Murray, 73 N. Y. 252; Coleman v. Lytle, 49 Tex. Civ. App. 44, 107 S. W. 562. That property does not pass, see The Robert W. Parsons, 191 U. S. 41, 24 Sup. Ct. 8, 48 L. Ed. 43; State v. Exp. Co., 118 Ia. 447, 92 N. W. 66; State v. Wingfield, 115 Mo. 428, 22 S. W. 363, 37 Am. St. Rep. 406; State v. O'Neil, 58 Vt. 140, 2 Atl. 586, 56 Am. Rep. 557. To the same effect E. M. Brash Cigar Co. v. Wilson, 32 Okl. 153, 121 Pac. 223; Guarantee Title & Trust Co. v. Bank, 185 Fed. 373; 107 C. C. A. 429. See also Harlan, J., dissenting, in O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 393, 36 L. Ed. 450. See cases collected in 4 Col. L. Rev. 541, by Prof. Gregory.

See SALES; DELIVERY.

CA. SA. An abbreviation of *capias ad satisfaciendum, q. v.*

CABALLERIA. In Spanish Law. A quantity of land, varying in extent in different provinces. In those parts of the United States which formerly belonged to Spain, it is a lot of one hundred feet front, two hundred feet depth, and equivalent to five peonias. 2 White, New Recop. 49; 12 Pet. (U. S.) 444, n.; Escriche, Dicc. Raz.

CABINET. Certain officers who, taken collectively, form a council or advisory board; as the cabinet of the president of the United States, which is composed of the secretary of state, the secretary of the treasury, the secretary of the interior, the secretary of war, the secretary of the navy, the secretary of agriculture, the attorney-general, the postmaster-general, the secretary of commerce and the secretary of labor. See DEPARTMENTS.

"The president—not the cabinet—is responsible for all the measures of the administration, and whatever is done by one of the heads of department is considered as done by the president, through the proper executive agent;" 1 Cooley's Bla. Com. 232. The cabinet, as such, has no legal existence. In passing the act (1913) creating the department of labor, a provision that the incumbent should "be a member of the cabinet" was stricken out.

In case of the removal, death, resignation or inability of both the president and vice-president of the United States, then the members of the cabinet shall act as president until such disability is removed or a president elected, in the following order: the secretary of state, secretary of the treasury, secretary of war, attorney-general, postmaster-general, secretary of the navy, and secretary of the interior; 24 Stat. L. p. 1. No provision is made for the succession of the remaining (and more recently created) secretaries.

These officers are the heads of their respective departments; and by the constitution (art. 2, sec. 2) the president may require the opinion in writing of these officers upon any subject relating to the duties of their respective departments. These officers respectively have, under different acts of congress, the power of appointing many inferior officers charged with duties relating to their departments. See Const. art. 2, sec. 2.

The cabinet meets frequently at the executive mansion, by direction of the president. No record of its doings is kept; and it has, as a body, no legal authority. Its action is advisory merely; and the president and heads of departments in the execution of their official duties may disregard the advice of the cabinet and take the responsibility of independent action.

See Lerned, The President's Cabinet.

In Great Britain, the members of the Ministry are the heads of various executive departments of the government. The Prime Minister and his associates, having been selected from the party in power in the House of Commons, may be said to be in control of the House. If they lose their majority in the House, they resign office in a body and a new Ministry is then chosen from the new party in power.

The head of the Cabinet and of the Ministry is the Prime Minister, who is selected by the Crown. He chooses his colleagues, but his choice really extends rather to the division of offices and to the choice of ministers; he is in effect limited to the prominent parliamentary leaders of his own party. He almost invariably holds the office of First Lord of the Treasury, unless he is a Peer, and then that office is held by the government leader of the House of Commons. His resignation dissolves the Cabinet. Other members of the Cabinet are: Lord Chancellor; the Chancellor of the Exchequer; the five Secretaries of State; the First Lord of the Admiralty; the Lord President of the Council; the Lord Privy Seal; the Attorney General; the Presidents of the Board of Trade, the Local Government Board and the Board of Education (of late years); the Chief Secretary for Ireland (except when the Lord Lieutenant is a member); the Secretary for Scotland; and the Chancellor of the Duchy of Lancaster (usually). The President of the Board of Agriculture, and the Postmaster General are often members; the First Commissioner of Works and the Lord Chancellor of Ireland (occasionally). The tendency now is said to be towards including the head of any considerable branch of the administration. Lowell, Gov. of Engl.

The king, under the British constitution, is irresponsible; or, as the phrase is, the king can do no wrong. (See that title.) The

real responsibility of government in that country, therefore, rests with his ministers, some of whom constitute the cabinet. The king may dismiss his ministers if they do not possess his confidence; but they are seldom dismissed by the king. They ordinarily resign when they cannot command a majority in favor of their measures in the house of commons.

CABOTAGE. A nautical term from the Spanish, denoting strictly navigation from cape to cape along the coast without going out into the open sea. In International Law, cabotage is identified with *coasting-trade* so that it means navigating and trading along the coast between the ports thereof. In construing this term in commercial treaties and International Law no consideration need be given to the fact that municipal laws sometimes attach a meaning absolutely different from that it has or can have in International Law.

It is the universally recognized law of nations that every littoral state can exclude foreign merchantmen from the cabotage within the maritime belt, just as it can exclude foreigners from the fisheries therein.

In commercial treaties the meaning of cabotage has been stretched so as to exclude "sea-trade between any two ports of the same country, whether on the same coast or different coasts (cabotage petit or grand cabotage), provided always that the different coasts are all of them the coasts of the same country as a political and geographical unit." Thus Russia excludes foreigners from trade between Russian ports and Vladivostok. The United States makes a further extension of the word so as to exclude trade between ports of the United States proper and ports in the Philippines, Porto Rico and the Hawaiian Islands.

CACICAZGOS. **In Spanish Law.** Lands held in entail by the caciques in Indian villages in Spanish America.

CADASTRE. The official statement of the quantity and value of real property in any district, made for the purpose of justly apportioning the taxes payable on such property. 12 Pet. (U. S.) 428, n.; 3 Am. St. Pap. 679.

CADERE (Lat.). To fall; to fail; to end; to terminate.

The word was generally used to denote the termination or failure of a writ, action, complaint, or attempt: as, *cadit actio* (the action fails), *cadit assisa* (the assise abates), *cadere causa* or *a causa* (to lose a cause). Abate will translate *cadere* as often as any other word, the general signification being, as stated, to fail or cease. *Cadere ab actione* (literally, to fall from an action), to fail in an action; *cadere in partem*, to become subject to a division.

To become; to be changed to; *cadit assisa in juratam* (the assize has become a jury). Calvinus, Lex.

CADET. A younger brother. One trained for the army or navy.

CADI. A Turkish civil magistrate.

CADUCA (Lat. *cadere*, to fall). **In Civil Law.** An inheritance; an escheat; every thing which falls to the legal heir by descent.

Bona caduca are said to be those to which no heir succeeds, equivalent to escheats. Du Cange.

Glans caduca, "the acorn which has fallen to the ground," is used in a famous judgment of Kekewich, J., in [1902] 1 Ch. 847, where a fund in court belonging to an Austrian intestate, who was a bastard, was held not to go to the Austrian government by the law of Austria, but to the British crown by the law of England.

CADUCARY. Relating to or of the nature of escheat, forfeiture or confiscation. 2 Bla. Com. 245.

CÆSARIAN OPERATION. A surgical operation whereby the fœtus, which can neither make its way into the world by the ordinary and natural passage, nor be extracted by the attempts of art, whether the mother and fœtus be yet alive, or whether either of them be dead, is by a cautious and well-timed operation taken from the mother with a view to save the lives of both, or either of them.

If this operation be performed after the mother's death, the husband cannot be tenant by the curtesy; since his right begins from the birth of the issue, and is consummated by the death of the wife; but if mother and child are saved, then the husband would be entitled after her death. Wharton.

CÆTERIS PARIBUS (Lat.). Other things being equal.

CÆTERORUM. See ADMINISTRATION.

CALEFAGIUM. A right to take fuel yearly. Blount.

CALENDAR. An almanac.

Julius Cæsar ordained that the Roman year should consist of three hundred and sixty-five days, except every fourth year, which should contain three hundred and sixty-six—the additional day to be reckoned by counting the 24th day of February (which was the 6th of the calends of March) twice. See BISSEXTILE. This period of time exceeds the solar year by eleven minutes or thereabouts, which amounts to the error of a day in about one hundred and thirty-one years. In 1582 the error amounted to eleven days or more, which was corrected by Pope Gregory. Out of this correction grew the distinction between Old and New Style. The Gregorian or New Style was introduced into England in 1752, the 2d day of September (O. S.) of that year being reckoned as the 14th day of September (N. S.).

A list of causes pending in a court; as court calendar.

In Criminal Law. A list of prisoners, containing their names, the time when they were committed and by whom, and the cause of their commitments.

CALENDS. See IDES.

CALIFORNIA. The eighteenth state admitted to the Union.

In 1534 a Portuguese navigator in the Spanish service discovered the Gulf of California and penetrated into the mainland, but no settlement was made until about a century afterwards, when the Franciscan Fathers planted a mission on the site of San Diego; other settlements soon followed, and

in a short time the country was entirely under the control of the priests, who accumulated great wealth. The Spanish power in the territory now constituting California was overthrown by the Mexican revolution in 1822, and the secular government by the priests was abolished. By the treaty of Guadalupe Hidalgo, May 30, 1848, terminating the war between the United States and Mexico, the latter country ceded to the United States for $15,000,000 a large tract of land including the present states of California, Nevada, and Utah, and part of Colorado and Wyoming, and of the present territories of Arizona and New Mexico, and the whole tract was called the territory of New Mexico.

The commanding officer of the U. S. forces exercised the duties of civil governor at first, but June 3, 1849, Brigadier-General Riley, then in command, issued a proclamation for holding an election August 1, 1849, for delegates to a general convention to frame a state constitution.

The convention met at Monterey, Sept. 1, 1849; adopted a constitution on October 10, 1849, which was ratified by a vote of the people, November 13, 1849. At the same time an election was held for governor and other state officers, and two members of congress.

The first legislature met at San Jose, December 15, 1849. General Riley, on December 20, 1849, resigned the administration of civil affairs to the newly elected officers under the constitution, and shortly thereafter two United States senators were elected.

In March, 1850, the senators and representatives submitted to congress the constitution, with a memorial asking the admission of the state into the American Union.

On September 9, 1850, congress passed an act admitting the state into the Union on an equal footing with the original states, and allowing her two representatives in congress until an apportionment according to an actual enumeration of the inhabitants of the United States. The third section of the act provides for the admission, upon the express condition that the people of the state, through their legislation or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall not pass any law or do any act whereby the title of the United States to any right to dispose of the same shall be impaired or questioned; and that they shall never lay any tax or assessment of any description whatsoever upon the public domain of the United States, and that in no case shall non-resident proprietors who are citizens of the United States be taxed higher than residents; and that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of the state as to the citizens of the United States, and without any tax, impost, or duty therefor.

Congress passed an act, March 3, 1851, to ascertain and settle the private land claims in the state of California. By this act a board of commissioners was created, before whom every person claiming lands in California, by virtue of any right or title derived from the Spanish or Mexican governments, was required to present his claim, together with such documentary evidence and testimony of witnesses as he relied upon. From the decision of this board an appeal might be taken to the district court of the United States for the district in which the land was situated. Both the board and the court, on passing on the validity of any claim, were required to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim was derived, the principles of equity, and the decisions of the supreme court of the United States.

A large part of the best agricultural lands of the state was claimed under Spanish and Mexican grants. The evidence in support of these grants was in many instances meagre and unsatisfactory, and the amount of litigation arising therefrom was enormous and has not yet wholly ceased. The board of commissioners, having completed its work, went out of existence.

By an act passed September 28, 1850, congress declared all laws of the United States, not locally inapplicable, in force within the State.

The constitution adopted in 1849 was amended November 4, 1856, and September 3, 1862, and on January 1, 1880, was superseded by the present constitution, which had been framed by a convention March 3, 1879, and adopted by popular vote May 7, 1879. It was further amended in 1898, 1902 and 1906. Section 1, article IV amended in 1911 by providing for initiative, referendum and recall; section 1, article II, amended by giving right of equal suffrage to women in 1912.

CALL. An agreement to sell. Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853.

It is within the War Revenue Act of June 13, 1898, requiring a revenue stamp on all sales or agreements to sell or memoranda of sale or deliveries or transfers of stock; *id.*

CALL DAY. There are four call days at the Inns of Court in London: In January, May, June and November.

CALLING THE PLAINTIFF. A formal method of causing a nonsuit to be entered.

When a plaintiff perceives that he has not given evidence to maintain his issue, and intends to become nonsuited, he withdraws himself; whereupon the crier is ordered to call the plaintiff, and on his failure to appear he becomes nonsuited. The phrase "let the plaintiff be called," which occurs in some of the earlier state reports, is to be explained by reference to this practice. See 3 Bla. Com. 376; 2 C. & P. 403; Porter v. Perkins, 5 Mass. 236, 4 Am. Dec. 52; Trask v. Duval, 4 Wash. C. C. 97, Fed. Cas. No. 14,143; NON DICIT.

CALLING TO THE BAR. Conferring the degree or dignity of barrister upon a member of the inns of court. Holthouse, Dict.

"Calls to the bench and bar are to be made by the most ancient, being a reader, who is present at supper on call night." 1 Black Books of Lincoln's Inn. 339. But see BARRISTER as to admission to the bar.

CALUMNIÆ JUSJURANDUM (Lat.). The oath against calumny.

Both parties at the beginning of a suit, in certain cases, were obliged to take an oath that the suit was commenced in good faith and in a firm belief that they had a good cause. Bell, Dict. It was a fore-oath—before suit brought. The object was to prevent vexatious and unnecessary suits. It was especially used in divorce cases, though of little practical utility; Bish. Marr. & Div. § 353; 2 Bish. Marr. Div. & Sep. § 264. A somewhat similar provision is to be found in the requirement made in some states that the defendant shall file an affidavit of merits.

CALUMNIATORS. In Civil Law. Persons who accuse others, whom they know to be innocent, of having committed crimes.

CALVO DOCTRINE. The doctrine stated by the Argentine jurist, Carlos Calvo, that a government is not bound to indemnify aliens for losses or injuries sustained by them in consequence of domestic disturbances or civil war, where the state is not at fault, and that therefore foreign states are not justified in intervening, by force or otherwise, to secure the settlement of claims of their citizens on account of such losses or injuries. Such intervention, Calvo says, is not

in accordance with the practice of European States towards one-another, and is contrary to the principle of state sovereignty. 3 Calvo §§ 1280, 1297. The Calvo Doctrine is to be distinguished from the Drago Doctrine (*q. v.*).

See 18 Green Bag 377.

CAMBIALE JUS. The law of exchange.

CAMBIATORS. See BANK.

CAMBIO. Exchange.

CAMBIPARTIA. Champerty.

CAMBIPARTICEPS. A champertor.

CAMBIST. A person skilled in exchange; one who deals or trades in promissory notes or bills of exchange; a broker.

CAMBIUM. Change, exchange. Applied in the civil law to exchange of lands, as well as of money or debts. Du Cange.

Cambium reale or *manuale* was the term generally used to denote the technical common-law exchange of lands; *cambium locale, mercantile, or trajectitium,* was used to designate the modern mercantile contract of exchange, whereby a man agrees, in consideration of a sum of money paid him in one place, to pay a like sum in another place. Pothier, *de Change,* n. 12; Story, Bills § 2.

CAMERA. See IN CAMERA.

CAMERA REGIS. In old English law a chamber of the king; a place of peculiar privileges especially in a commercial point of view. The city of London was so called. Year Book, p. 7, Hen. VI. 27; Burrill, Law Dic.

CAMERA SCACCARII. The Exchequer Chamber. Spelman, Gloss.

CAMERA STELLATA. The Star Chamber.

CAMERARIUS. A chamberlain; a keeper of the public money; a treasurer. Spelman, Gloss. *Cambellarius;* 1 Perr. & D. 243.

CAMPARTUM. A part or portion of a larger field or ground, which would otherwise be in gross or in common. See CHAMPERTY.

CAMPERTUM. A cornfield; a field of grain. Cowell; Whishaw.

CAMPUM PARTERE. To divide the land. See CHAMPERTY.

CAMPUS (Lat. a field). In old European law an assembly of the people so called from being held in the open air, in some plain capable of containing a large number of persons. 1 Robertson's Charles V. App. n. 38.

In feudal or old English law a field or plain. Burrill, Law Dict.

CANADA. The name given to a confederation of all the British possessions in North America except Newfoundland.

The first explorations of this country, of which any authentic information exists, were by Jacques Cartier, between the years 1534 and 1554, thus giving to France the first claim upon its territory. Great activity was shown during these and the succeeding years on the part of Great Britain and France to acquire territorial jurisdiction on the newly discovered continent, and the division lines between their acquisitions were not very clearly marked. Those of France included Florida in the south and the lands watered by the St. Lawrence in the north, and to it all the name of "New France" was given. In 1603 an expedition for trading purposes was fitted out under the command of Samuel Champlain, whose explorations up the river St. Lawrence and its tributary, the Richelieu River, brought him to the lake which still bears his name.

The viceroyalty of New France was conferred in 1612 upon the Prince de Condé, who made a formal assignment of it in 1619 to Admiral Montmorency, who personally visited the country.

In 1628, under the rule of Cardinal Richelieu in France, the colony was ceded to "La Compagnie de Cents Associés" (The Company of the One Hundred Associates), a trading company, but armed, like the Hudson Bay Company in later years, with full power for the administration of justice in the primitive forms practicable in new countries and with mixed populations.

This company had an unsuccessful career financially, and upon its disorganization, in 1663, Louis XIV. resumed territorial jurisdiction over the colony, and in April of that year published an edict establishing a "Sovereign Council" for the government of Canada, and this council was specially instructed to prepare laws and ordinances for the administration of justice, framed as much as possible upon those then in force in France under the provisions of the "Custom of Paris."

For more than one hundred years all the legal business of the province was determined by this council—in fact, until the conquest by the English in 1759. By the terms of the capitulation, it was stipulated and conceded that the ancient laws of land tenure should continue to subsist, but it was understood that the English criminal and commercial law should be introduced and adopted.

Under this stipulation the law of France, as it existed in 1759, was recognized as the civil law of Canada, and has always since formed the basis of that law—modified, of course, after the subsequent establishment of a representative government in the colony, by the statutory provisions of the colonial parliaments. This result was applicable, however, only to that section of the country which subsequently was called Lower Canada, now the province of Quebec. The portion of the colony since known as the province of Upper Canada (now the province of Ontario) was then unsettled, and being subsequently colonized from Great Britain and her other dependencies, the whole body of law, civil as well as criminal, was based upon that in force in England.

Under the provisions of a statute passed by the imperial parliament of Great Britain in 1774, called "The Quebec Act," a legislative council of twenty-three members was established for the province, with power to enact laws. In 1791, Pitt introduced the bill into the English House of Commons which gave a constitution to Canada and divided it into the two provinces of Upper and Lower Canada. Since then (with the short interregnum from 1837 to 1841), regular parliaments have been held, at which the jurisprudence of the country and the establishment of its courts have been determined by formal acts.

In 1867, the confederation of the different North American dependencies of Great Britain, under the name of the "Dominion of Canada," was consummated by an act of the imperial parliament, at the instance and request of the different provinces, including Upper and Lower Canada (under the names of Ontario and Quebec), New Brunswick, and Nova Scotia, to which have since been added Prince Edward Island, Manitoba, and British Columbia (all the provinces except Newfoundland). The act under which this confederation was established—called The British North American Act (in effect July 1, 1868)—contains the provisions of a written constitution, under which the executive government and authority is declared to be vested in the sover-

eign of Great Britain, whose powers are deputed to a governor-general, nominated by the imperial government, but whose salary is paid by the Dominion. The form of government is modelled after that of Great Britain. The governor-general acts under the guidance of a council, nominally selected by himself, but which must be able to command the support of a majority in that branch of parliament which represents the suffrages of the electors.

THE JUDICIAL POWER.—There is a supreme court with ultimate jurisdiction in matters affecting the Dominion and as a final court of appeal from the provincial courts. It consists of a chief justice and five puisne judges, and holds three sessions a year at Ottawa. The exchequer court can hold sessions at any town, and is a colonial court of admiralty and exercises admiralty jurisdiction throughout Canada and the waters thereof. Certain local judges of admiralty are created with limited jurisdiction, the appeal from whose decisions lies to the Court of Exchequer, or it may lie direct to the Supreme Court of Canada under certain conditions.

CANAL. An artificial cut or trench in the earth, for conducting and confining water to be used for transportation. See Bishop v. Seeley, 18 Conn. 394.

Public canals originate under statutes and charters enacted to authorize their construction and to protect and regulate their use. They are in this country constructed and managed either by the state itself or by companies incorporated for the purpose. These commissioners and companies are armed with authority to appropriate private property for the construction of their canals, in exercising which they are bound to a strict compliance with the statutes by which it is conferred. Where private property is thus taken, it must be paid for in gold and silver; State v. Beackmo, 8 Blackf. (Ind.) 246. Such payment need not precede or be cotemporaneous with the taking; Rogers v. Bradshaw, 20 Johns. (N. Y.) 735; Hankins v. Lawrence, 8 Blackf. (Ind.) 266; though, if postponed, the proprietor of the land taken is entitled to interest; People v. Canal Com'rs, 5 Denio (N. Y.) 401; Harness v. Canal Co., 1 Md. Ch. Dec. 248. A city through which a canal passes cannot construct levees along its banks and recover the cost thereof from the canal company; City of New Orleans v. Canal & Nav. Co., 42 La. Ann. 6, 7 South. 63.

After the appropriation of land for a canal, duly made under statute authority, though the title remains in the original owner until he is paid therefor, he cannot sustain an action against the party taking the same for any injury thereto; Turrell v. Norman, 19 Barb. (N. Y.) 263; Ligat v. Com., 19 Pa. 456. But if there be a deviation from the statute authority, the statute is no protection against suits by persons injured by such deviation; Lynch v. Stone, 4 Denio (N. Y.) 356; Farnum v. Canal Corp., 1 Sumn. 46, Fed. Cas. No. 4,675; 2 Dow. 519. Though a special remedy for damages be given by a statute authorizing the construction of a canal, the party injured thereby is not barred of his common-law action; Denslow v. New Haven & N. Co., 16 Conn. 98. But see, to the contrary, Stevens v. Canal, 12 Mass. 466; Town of Lebanon v. Olcott, 1 N. H. 339. The legislature has the exclusive power to determine when land may be taken for a canal or other public use, and the courts cannot review its determination in that respect; Harris v. Thompson, 9 Barb. (N. Y.) 350; Hankins v. Lawrence, 8 Blackf. (Ind.) 266.

In navigating canals, it is the duty of the canal-boats to exercise due care in avoiding collisions, and in affording each other mutual accommodation; and for any injury resulting from the neglect of such care the proprietors of the boats are liable in damages; 1 Sher. & Redf. Neg. 404; Rathbun v. Payne, 19 Wend. (N. Y.) 399; Sheerer v. Kissinger, 1 Pa. 44. The proprietors of the canal will be liable for any injury to canal-boats occasioned by a neglect on their part to keep the canal in proper repair and free from obstructions; Riddle v. Proprietors, 7 Mass. 169, 5 Am. Dec. 35; James River & Kanawha Co. v. Early, 13 Gratt. (Va.) 541; Muir v. Canal Co., 8 Dana (Ky.) 161; Moore v. Canal, 7 Ind. 462; Griffith v. Follett, 20 Barb. (N. Y.) 620; 11 A. & E. 223. Where a state exercises control over a canal, it is liable for injuries caused by an officer's negligence in failing to repair bridges over it; Woodman v. People, 127 N. Y. 397, 28 N. E. 20.

In regard to the right of the proprietors of canals to tolls, the rule is that they are only entitled to take them as authorized by statute, and that any ambiguity in the terms of the statute must operate in favor of the public; 2 B. & Ad. 792; Perrine v. Canal Co., 9 How. (U. S.) 172, 13 L. Ed. 92; Myers v. Foster, 6 Cow. (N. Y.) 567; Delaware & H. Canal Co. v. Coal Co., 21 Pa. 131. A statutory authority to charge tolls upon boats, etc., used for transportation along it gives no authority to charge tolls on tugs while towing vessels through the canal or on the return trip; Sturgeon Bay Harbor Co. v. Leatham, 164 Ill. 239, 45 N. E. 422.

A canal constructed and maintained at private expense is like a private highway over which the public is permitted to travel, but in which it obtains no vested right; Potter v. Ry. Co., 95 Mich. 389, 54 N. W. 956.

An easement in the waters of state canals cannot be acquired by prescription; Burbank v. Fay, 65 N. Y. 57.

CANAL ZONE. See PANAMA CANAL.

CANCELLARIA. Chancery; the court of chancery. *Curia cancellaria* is also used in the same sense. See 4 Bla. Com. 46; Cowell.

CANCELLARIUS (Lat.). A chancellor.

In ancient law, a janitor or one who stood at the door of the court and was accustomed to carry out the commands of the judges; afterwards a secretary; a scribe; a notary. Du Cange.

In early English law, the keeper of the king's seal.

The office of chancellor is of Roman origin. He appears at first to have been a chief scribe or secretary, but was afterwards invested with judicial power, and had superintendence over the other officers of the empire. From the Romans the title and office passed to the church; and therefore every bishop of the Catholic church has, to this day, his chancellor, the principal judge of his consistory. In ecclesiastical matters it was the duty of the *cancellarius* to take charge of all matters relating to the books of the church,—acting as librarian; to correct the laws, comparing the various readings, and also to take charge of the seal of the church, affixing it when necessary in the business of the church.

When the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor, with different jurisdictions and dignities, according to their different constitutions. In all he seems to have had a supervision of all charters, letters, and such other public instruments of the crown as were authenticated in the most solemn manner; and when seals came into use, he had the custody of the public seal.

According to Du Cange it was under the reign of the Merovingian kings in France that the *cancellarii* first obtained the dignity corresponding with that of the English chancellor, and became keepers of the king's seal.

In this latter sense only of keeper of the seal, the word chancellor, derived hence, seems to have been used in the English law; 3 Bla. Com. 46.

The origin of the word has been much disputed; but it seems probable that the meaning assigned by Du Cange is correct, who says that the *cancellarii* were originally the keepers of the gate of the king's tribunal, and who carried out the commands of the judges. Under the civil law their duties were varied, and gave rise to a great variety of names, as *notarius, a notis, abactis, secretarius, a secretis, a cancellis, a responsis, a libellis,* generally derived from their duties as keepers and correctors of the statutes and decisions of the tribunals.

The transition from keeper of the seal of the church to keeper of the king's seal would be natural and easy in an age when the clergy were the only persons of education sufficient to read the documents to which the seal was to be appended. And this latter sense is the one which has remained and been perpetuated in the English word Chancellor. See Du Cange; Spelman, Gloss.; Spence, Eq. Jur. 78; 3 Bla. Com. 46.

It was an evolution which passed through several stages, the first of which had its origin in the period when the king was actually as well as theoretically the fountain of justice and equity. At first he personally heard their complaints and administered justice to his subjects.

It was, however, after the growth of the population had increased the applications to the king for the redress of grievances to such an extent as to require him to seek assistance, that the officer afterwards called chancellor appeared. He was then a scribe to whom were referred the complaints made, and it was his duty to determine if they should be entertained and the form of writ adapted to the case. Thus what was afterwards the primary duty of the chancellor was devolved upon this officer, called the *referendarius,* and known by this title, according to Selden, during the reign of Ethelbert and subsequent kings to Edred. To separate and protect them from the suitors this officer and his assistants sat by a lattice, the laths of which were called *cancelli,* and to this commentators ascribe the origin of the word *cancellarius,* which was used in the reign of the Confessor and is not clearly traced to an earlier date. At that time little more appears than that he was an officer who issued writs, but during Anglo-Saxon times he seems to have been little more, and the charter of Westminster shows his precedence at that time to have been after two archbishops, nine bishops, and seven abbots, though now the lord chancellor is second only after the royal family. True, it is said by Ingulphus that Edward the Elder appointed Torquatel his chancellor, so that whatever business of the king, spiritual or temporal, required a decision, should be decided by his advice and decree, and, being so decided, the decree should be held irrevocable; Spence, Eq. Jur. 78, n. Nevertheless there does not seem to have been at that period a conception of the office as one maintained for the exercise of judicial functions. According to Pollock and Maitland, "even in Edward I.'s reign it is not in our view a court of justice; it does not hear and determine causes. It was a great secretarial bureau, a home office, a foreign office, and a ministry of justice;" 1 Hist. Eng. Law 172.

The chancellor's jurisdiction was an off-shoot from that of the king's council. It does not appear that he had any individual judicial functions otherwise than as one of the council; he certainly acquired power to sit alone, or had it confirmed, in 1349, but this did not forthwith exclude the older practice. Pollock, Expans. of C. L. 68.

But whatever the origin of the title, it is not difficult to apprehend the development of the janitor or keeper of the gate, acting as intermediary between the suitor and the king or judge, into the officer whose judgment was relied on in dealing with the petition, and how the original scribe or *referendarius,* exercising at first clerical functions, but selected for them because it required legal learning to discharge them, gradually developed into the chancellor of modern conception, holding the seal and representing the conscience of the king. The fact that it is an evolution is clear, however obscure and difficult to trace are some of its successive stages.

Lord Ellesmere, who is practically the first chancellor whose decrees have come down to us, was the most conspicuous representative of the period of the Tudors and the first Stuarts. He did much towards settling the practice and procedure of the court. He successfully fought the great fight with Coke over the supremacy of the chancellor's writ of injunction, and during the period from Ellesmere to the Restoration the real foundation was laid of an equitable system modifying ancient common law principles and practices which no longer agreed with current views of justice; 15 Harv. L. Rev. 110. Instances of specific relief, under what became in after times the great heads of equity, may nevertheless be found at a surprisingly early day. The editor of the Selden Society's volume of Select Cases in Chancery gives the following list of the earliest cases: Accident, after 1398; account, 1385; cancellation and delivery of instruments, 1337; charities, after 1393; discovery, 1415-17; dower, 1393; duress, 1337; fraud, 1386; injunctions, 1396-1403; mistake, 1417-24; mortgage, 1456; partition, 1423-43; perpetuation of testimony, 1486-1500; rescission of contract, 1396-1403; specific performance, after 1398; trusts, after 1393; waste, 1461-67; wills, after 1393.

In his efforts to establish some sort of fixed practice, Lord Ellesmere frequently referred to precedents, but numerous instances of his vicarious charity reveal the latitude of his discretion. In the Earl of Oxford's Case, 2 W. & T. 644, he expressly claimed the power to legislate on individual rights.

The Restoration, or rather the chancellorship of Lord Nottingham, marks an epoch in the history of equity, of which he has been justly called the "father." The interference of the chancellors had been instrumental in bringing about, through legislation and otherwise, a steady improvement in common law practice and procedure, and the necessity for further intervention, except where there was an avowed divergence between the two systems, had become rare. Then the abolition of the incidents of feudal tenure by the Restoration Parliament introduced a system of real property which continued almost to the reign of Victoria. Controversies arising out of these new methods of conveyancing and settlement naturally found their way into chancery, where alone trusts and equities of redemption were recognized and contracts specifically enforced; and the contemporaneous abolition of the Court of Wards

ultimately turned the guardianship of the estates of infants into chancery. Moreover, the searching investigations which had been made during the Commonwealth exercised a powerful influence in the direction of reform in procedure. All these influences combined to form a new era in equity. Prior to the Restoration, it could be said with entire accuracy that the "grand reason for the interference of a court of equity is the imperfection of the legal remedy in consequence of the universality of legislative provisions." But during the period from Nottingham to Eldon the chancellor was chiefly occupied with the adjudication and administration of proprietary rights. At the close of Lord Eldon's service, equity was no longer a system corrective of the common law; its principles were no less universal than those of the common law. It could be described only as that part of remedial justice which was administered in chancery; its work was administrative and protective, as contrasted with the remedial and retributive justice of the common law. See 15 Harv. L. Rev. 109.

See 4 Co. Inst. 78; Dugdale Orig. Jur. fol. 34; and generally Selden, Discourses; Inderwick, King's Peace; 3 Steph. Com. 346; 1 Poll. & Maitl. 172; 1 Stubbs, Const. Hist. 381; Campbell, Lives of the Lord Chancellors, vol. 1; Holdsw. Hist. E. L.; Pollock, Expans. of C. L. See CHANCELLOR; EQUITY.

CANCELLATION. The act of crossing out a writing. The manual operation of tearing or destroying a written instrument; 1 Eq. Cas. Abr. 409.

The statute of frauds provides that the revocation of a will by cancellation must be by the "testator himself, or in his presence and by his direction and consent." This provision is in force in many of the states; 1 Jarm. Wills (3d Am. ed.) *113 n. In order that a revocation may be effected, it must be proved to have been done according to the statute; Delafield v. Parish, 25 N. Y. 79; Heise v. Heise, 31 Pa. 246; Spoonemore v. Cables, 66 Mo. 579; Barker v. Bell, 46 Ala. 216; declarations of a testator are not sufficient; Lewis v. Lewis, 2 W. & S. (Pa.) 455; Wittman v. Goodhand, 26 Md. 95; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390.

Cancelling a will, *animo revocandi*, is a revocation; and the destruction or obliteration need not be complete; 3 B. & Ald. 489; Avery v. Pixley, 4 Mass. 462; Card v. Grinman, 5 Conn. 168; Burns v. Burns, 4 S. & R. (Pa.) 567. It must be done *animo revocandi*; Schoul. Wills 384; Wolf v. Bollinger, 62 Ill. 368; Dickey v. Malechi, 6 Mo. 177, 34 Am. Dec. 130; and evidence is admissible to show with what intention the act was done; Jackson v. Holloway, 7 Johns. (N. Y.) 394; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Botsford v. Morehouse, 4 Conn. 550; Corliss v. Corliss, 8 Vt. 373; Tomson v. Ward, 1 N. H. 9; Burns v. Burns, 4 S. & R. (Pa.) 297; Bates v. Holman, 3 Hen. & M. (Va.) 502; Carroll's Lessee v. Llewellin, 1 Harr. & McH. (Md.) 162; 4 Kent 531; Collagan v. Burns, 57 Me. 449; Harring v. Allen, 25 Mich. 505; Durant v. Ashmore, 2 Rich. (S. C.) 184; Patterson v. Hickey, 32 Ga. 156. Accidental cancellation is not a revocation; Smock v. Smock, 11 N. J. Eq. 156. Where the first few lines of a will were cut off, the remainder, which was complete, was admitted to probate; L. R. 2 P. & D. 206. Partial cancellation, with proof of an *animus revocandi*, will revoke a will; Bohanon v. Walcot, 1 How. (Miss.) 336, 29 Am. Dec. 631; and when more than one-third of the items were cancelled, leaving the remainder unintelligible and repugnant, the will was held to be revoked; Dammann v. Dammann (Md.) 28 Atl. 408. Where the testator wrote on his will "This will is invalid," held a revocation; Witter v. Mott, 2 Conn. 67.

Cancellation by an insane man will not revoke a valid will; In re Forman's Will, 54 Barb. (N. Y.) 274; Ford v. Ford, 7 Humphr. (Tenn.) 92. See Laughton v. Atkins, 1 Pick. (Mass.) 535; Farr v. O'Neall, 1 Rich. (S. C.) 80.

In Louisiana it requires a written instrument executed with formalities to revoke a will, hence placing it among waste paper and refusal to receive it after attention was called to it, and an unsuccessful attempt to make a new will, were held to be no cancellation; Succession of Hill, 47 La. Ann. 329, 16 South. 819.

There may be a partial obliteration, which works a revocation *pro tanto*; Clark v. Smith, 34 Barb. (N. Y.) 140; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32; Wolf v. Bollinger, 62 Ill. 368; Giffin v. Brooks, 48 Ohio St. 211, 31 N. E. 743; and a careful interlineation is not a cancellation; Dixon's Appeal, 55 Pa. 424. A cancellation by pencil is enough; 2 D. & B. 311; 6 Hare 39; L. R. 2 P. & D. 256; Estate of Tomlinson, 133 Pa. 245, 19 Atl. 482, 19 Am. St. Rep. 637. Where a will is found among a testator's papers, torn, there is a presumption of revocation; Beaumont v. Keim, 50 Mo. 28; In re Johnson's Will, 40 Conn. 587; Idley v. Bowen, 11 Wend. (N. Y.) 227. Where after a person's death a will is found in an unsealed envelope which had been in his possession up to the time of his death and with lines drawn through his signature, the presumption is that he himself drew the lines for the purpose of revoking the will; In re Philp, 64 Hun, 635, 19 N. Y. Supp. 13.

Perpendicular marks across a will are not "handwriting;" In re Hopkins, 172 N. Y. 360, 65 N. E. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746.

Mere cancellation of a deed does not divest the grantee's title; Devlin, Deeds 300, 305; Holbrook v. Tirrell, 9 Pick. (Mass.) 108; Fawcetts v. Kimmey, 33 Ala. 264; Botsford v. Morehouse, 4 Conn. 550; National Union Bld'g Ass'n v. Brewer, 41 Ill. App. 223; even though done before recording; Hall v. McDuff, 24 Me. 312; but it might practically have that effect between the parties by estoppel; Sawyer v. Peters, 50 N. H. 143; or by reason of the destruction of the only evidence of the transaction; Blaney v. Hanks, 14 Ia. 400; Parker v. Kane, 4 Wis. 12, 65 Am. Dec. 283.

On a bill in equity for the re-execution of lost securities, which were held by a decedent in his lifetime and after his death were not found among his papers, a party alleging their destruction or cancellation by the decedent is bound to prove the fact to the satisfaction of the court. The absence of the papers raises no presumption of such destruction or cancellation; nor is mere proof of an intention to destroy or cancel, or of the declaration of such intention, alone sufficient; Gilpin v. Chandler, 2 Del. Ch. 219.

In the case of an insurance policy after death, the remedy of the company for fraud, etc., is at law by way of a defence to a suit on the policy; a bill in equity will not lie for revocation in the absence of special facts; Riggs v. Ins. Co., 129 Fed. 207, 63 C. C. A. 365.

See DEED; INSURANCE; WILL; LOST INSTRUMENT; REVOCATION.

CANDIDATE (Lat. *candidatus*, from *candidus*, white. Said to be from the custom of Roman candidates to clothe themselves in a white tunic).

One who offers himself, or is offered by others, for an office.

One who seeks office is a candidate; it is not necessary that he should have been nominated for it. Leonard v. Com., 112 Pa. 624, 4 Atl. 220.

CANON. In Ecclesiastical Law. A prebendary, or member of a chapter. All members of chapters except deans are now entitled *canons*, in England. 2 Steph. Com. 11th ed. 687, n.; 1 Bla. Com. 382.

CANON LAW. A body of ecclesiastical law, which originated in the church of Rome, relating to matters of which that church has or claims jurisdiction.

A canon is a rule of doctrine or of discipline, and is the term generally applied to designate the ordinances of councils and decrees of popes. The position which the canon law obtains beyond the papal dominions depends on the extent to which it is sanctioned or permitted by the government of each country; and hence the system of canon law as it is administered in different countries varies somewhat.

In the wording of a canon it is not enough to admonish or to express disapprobation; its wording must be explicitly permissive or prohibitory, backed by the provision, expressed or admittedly understood, that its infringement will be visited with punishment. Cent. Dict.

Though this system of law is of primary importance in Roman Catholic countries alone, it still maintains great influence and transmits many of its peculiar regulations down through the jurisprudence of Protestant countries which were formerly Roman Catholic. Thus, the canon law has been a distinct branch of the profession in the ecclesiastical courts of England for several centuries; but the recent modifications of the jurisdiction of those courts have done much to reduce its independent importance.

The *Corpus Juris Canonici* is drawn from various sources—the opinions of the ancient fathers of the church, the decrees of councils, and the decretal epistles and bulls of the holy see, together with the maxims of the civil law and the teachings of the Scriptures. These sources were first drawn upon for a regular ecclesiastical system about the time of Pope Alexander III. (1139), when one Gratian, an Italian monk, animated by the discovery of Justinian's Pandects, collected the ecclesiastical constitutions also into some method in three books, which he entitled *Concordia Discordantium Canonum*. These are generally known as *Decretum Gratiani*. They were never promulgated as a code, like the preceding.

The subsequent papal decrees to the time of the pontificate of Gregory IX. were collected in much the same method, under the auspices of that pope, about the year 1234, in five books, entitled *Decretalia Gregorii Noni*. A sixth book was added by Boniface VIII., about the year 1298, which is called *Sextus Decretalium*, or *Liber Sextus*. The Clementine Constitution, or decrees of Clement V., were in like manner authenticated in 1313 by his successor, John XXII., who also published twenty constitutions of his own, called the *extravagantes Joannis*, so called because they were in addition to, or beyond the boundary of, the former collections, as the additions to the civil law were called Novels. To these have since been added some decrees of later popes, down to the time of Sixtus IV., in five books, called *Extravagantes communes*. And all these together—Gratian's Decrees, Gregory's Decretals, the Sixth Decretals, the Clementine Constitutions, and the Extravagants of John and his successors—form the *Corpus Juris Canonici*, or body of the Roman canon law; 1 Bla. Com. 82; *Encyclopédie, Droit Canonique, Droit Public Ecclésiastique;* Dict. de Jur. *Droit Canonique;* Erskine, Inst. b. 1, t. 1, s. 10.

This body of canon law was the *jus commune* of the church in England. The English provincial constitutions merely formed a supplement to it and were valid only as interpreting or enforcing the papal decrees; 1 Holdsw. H. E. L. 355. It forms no part of the law of England, unless it has been brought into use and acted on there; 11 Q. B. 649.

See generally Encycl. Br., *sub voce*, Canon Law; Maitland, Canon Law; Jenks' Teutonic Law; 1 Sel. Essays on Anglo-Amer. Leg. Hist. 46.

See, in general, Ayliffe, Par. Jur. Can. Ang.; Shelford, Marr. & D. 19; Preface to Burn, Eccl. Law, Tyrwhitt ed. 22; Hale, Civ. L. 26; Bell's Case of a Putative Marriage, 203; *Dict. du Droit Canonique;* Stair, Inst. b. 1, t. 1, 7; 1 Poll. & Maitl. 90; 2 Sel. Essays on Anglo-Amer. Leg. Hist. 258. See EXTRAVAGANTES.

CANONRY. An ecclesiastical benefice attaching to the office of canon. Holthouse, Dict.

CANT. A method of dividing property held in common by two or more persons peculiar to the civil law, and may be avoided by the consent of all of those who are interested, in the same manner that any other contract or agreement may be avoided. Hayes v. Cuny, 9 Mart. O. S. (La.) 89. See LICITACION.

CANTERBURY, ARCHBISHOP OF. The primate of all England; the chief ecclesiastical dignitary in the church. His customary privilege is to crown the kings and queens of England. By 25 Hen. VIII. c. 21, he had the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God where the pope used formerly to grant them, which is the foundation of his granting special licenses to marry at any place or time, etc. Wharton. See CHURCH OF ENGLAND.

CANTRED. A hundred, a district containing a hundred villages. Used in Wales

in the same sense as hundred in England. Cowell; *Termes de la Ley.*

CANVASS. The act of examining the returns of votes for a public officer. This duty is usually intrusted to certain officers of a state, district, or county, who constitute a board of canvassers. The determination of the board of canvassers of the persons elected to an office is *prima facie* evidence only of their election. A party may go behind the canvass to the ballots, to show the number of votes cast for him. The duties of the canvassers are wholly ministerial; People v. Ferguson, 8 Cow. (N. Y.) 102; People v. Vail, 20 Wend. (N. Y.) 14; People v. Van Cleve, 1 Mich. 362, 53 Am. Dec. 69; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769. A canvassing board has no power to go behind the returns and inquire into the legality of the votes; McQuade v. Furgason, 91 Mich. 438, 51 N. W. 1073; State v. Van Camp, 36 Neb. 9, 91, 54 N. W. 113. In making a recount they have no authority to throw out the vote of a precinct or ward on the ground of fraud, as their power is merely ministerial; May v. Board of Canvassers, 94 Mich. 505, 54 N. W. 377. See In re Woods, 5 Misc. 575, 26 N. Y. Supp. 169; ELECTION.

CANVASSING BOARD. See CANVASS.

CAPACITY. Ability, power, qualification, or competency of persons, natural or artificial, for the performance of civil acts depending on their state or condition as defined or fixed by law; as, the capacity to devise, to bequeath, to convey lands; or to take and hold lands; to make a contract, and the like. 2 Com. Dig. 294.

CAPAX DOLI (Lat. capable of committing crime). The condition of one who has sufficient mind and understanding to be made responsible for his actions. See DISCRETION.

CAPE. A judicial writ, now abolished, touching a plea of lands and tenements. The writs which bear this name are of two kinds—namely, *cape magnum*, or grand cape, and *cape parvum*, or petit cape. The *cape magnum* was the writ for possession where the tenant failed to appear. The petit cape is so called not so much on account of the smallness of the writ as of the latter; it was the shorter writ issued when the plaintiff prevailed after the tenant had appeared. Fleta, l. 6, c. 55, § 40. For the difference between the form and the use of these writs, see 2 Wms. Saund. 45 *c*, *d*; Fleta, l. 6, c. 55, § 40.

CAPERS. Vessels of war owned by private persons, and different from ordinary privateers only in size, being smaller. Beawes, *Lex Merc.* 230.

CAPIAS (Lat. that you take). A writ directing the sheriff to take the person of the defendant into custody.

It is a judicial writ, and issued originally only to enforce compliance with the summons of an original writ or with some judgment or decree of the court. It was originally issuable as a part of the original process in a suit only in case of injuries committed by force or with fraud, but was much extended by statutes. See ARREST; BAIL. Being the first word of distinctive significance in the writ, when writs were framed in Latin, it came to denote the whole class of writs by which a defendant's person was to be arrested. It was issuable either by the court of Common Pleas or King's Bench, and bore the seal of the court.

See Spence, Eq. Jur.; BAIL; BREVE; ARREST; and the titles here following.

CAPIAS AD AUDIENDUM JUDICIUM. A writ issued, in a case of misdemeanor, after the defendant has appeared and is found guilty, to bring him to judgment if he is not present when called. 4 Bla. Com. 368.

CAPIAS AD COMPUTANDUM. A writ which issued in the action of account rendered upon the judgment *quod computet*, when the defendant refused to appear in his proper person before the auditors and enter into his account.

According to the ancient practice, the defendant might, after arrest upon this process, be delivered on mainprize, or, in default of finding mainpernors, was committed to the Fleet prison, where the auditors attended upon him to hear and receive his account. The writ is now disused.

Consult Thesaurus Brevium 38; Coke, Entries 46, 47; Rastell, Entries 14 b. 15.

CAPIAS PRO FINE. A writ which issued against a defendant who had been fined and did not discharge the fine according to the judgment.

The object of the writ was to arrest a defendant against whom a plaintiff had obtained judgment, and detain him until he paid to the king the fine for the public misdemeanor, coupled with the remedy for the private injury sustained, in all cases of forcible torts; 11 Coke 43; 5 Mod. 285; falsehood in denying one's own deed; Co. Litt. 131; 8 Coke 60; unjustly claiming property in replevin, or contempt by disobeying the command of the king's writ, or the express prohibition of any statute; 8 Coke 60. It is now abolished; 3 Bla. Com. 398.

CAPIAS AD RESPONDENDUM. A writ commanding the officer to whom it is directed "to take the body of the defendant and keep the same to answer the plaintiff," etc.

This is the writ of capias which is generally intended by the use of the word capias, and was formerly a writ of great importance. For some account of its use and value, see ARREST; BAIL.

According to the course of the practice at common law, the writ bears teste, in the name of the chief justice, or presiding judge of the court, on some day in term-time, when the judge is supposed to be present, not being Sunday, and is made returnable on a regular return day.

If the writ has been served and the defendant does not give bail, but remains in custody, it is returned C. C. (*cepi corpus*); if he have given bail, it is returned C. C. B. B. (*cepi corpus*, bail bond); if the defendant's appearance have been accepted, the return is, "C. C., and defendant's appearance accepted." See 1 Archb. Pr. 67.

CAPIAS AD SATISFACIENDUM. A writ directed to the sheriff or coroner, commanding him to take the person therein named and him safely keep so that he may have his body in court on the return day of the writ, to satisfy (*ad satisfaciendum*) the party who has recovered judgment against him.

It is a writ of execution issued after judgment, and might have been issued against a plaintiff against whom judgment was obtained for costs, as well as against the defendant in a personal action. As a rule at common law it lay in all cases where a *capias ad respondendum* lay as a part of the mesne process. Some classes of persons were, however, exempt from arrest on mesne process who were liable to it on final. It was a very common form of execution, until within a few years, in many of the states; but its efficiency has been destroyed by statutes facilitating the discharge of the debtor, in some states, and by statutes prohibiting its issue, in others, except in specified cases. See ARREST; PRIVILEGE. It is commonly known by the abbreviation *ca. sa.*

It is tested on a general teste day, and returnable on a general return day.

It is executed by arresting the defendant and keeping him in custody. He cannot be discharged upon bail or by consent of the sheriff. See ESCAPE. And payment to the sheriff is held in England not to be sufficient to authorize a discharge. He might be discharged by showing irregularities in the writ; 3 D. P. C. 291; 4 *id.* 6.

The return made by the officer is either C. C. & C. (*cepi corpus et committitur*), or N. E. I. (*non est inventus*). The effect of execution by a ca. sa. is to prevent suing out any other process against the lands or goods of the person arrested, at common law; but this is modified by statutes in the modern law. See EXECUTION.

CAPIAS UTLAGATUM. A writ directing the arrest of an outlaw.

If *general*, it directs the sheriff to arrest the outlaw and bring him before the court on a general return day.

If *special*, it directs the sheriff, in addition, to take possession of the goods and chattels of the outlaw, summoning a jury to determine their value.

It was a part of the process subsequent to the capias, and was issued to compel an appearance where the defendant had absconded and a capias could not be served upon him. The outlawry was readily reversed upon any plausible pretext, upon appearance of a party in person or by attorney, as the object of the writ was then satisfied. The writ issued after an outlawry in a criminal as well as in a civil case. See 3 Bla. Com. 284; 4 *id.* 320.

CAPIAS IN WITHERNAM. A writ directing the sheriff to take other goods of a distrainor equal in value to a distress which he has formerly taken and still withholds from the owner beyond the reach of process.

When chattels taken by distress were decided to have been wrongfully taken and were by the distrainor *eloigned*, that is, carried out of the county or concealed, the sheriff made such a return. Thereupon this writ issued, thus putting distress against distress.

Goods taken *in withernam* are irrepleviable till the original distress be forthcoming; 3 Bla. Com. 148.

CAPIATUR PRO FINE. See CAPIAS PRO FINE.

CAPITA (Lat.). Heads, and figuratively entire bodies, whether of persons or animals. Spelman.

An expression of frequent occurrence in laws regulating the distribution of the estates of persons dying intestate. When all the persons entitled to shares in the distribution are of the same degree of kindred to the deceased person (*e. g.* when all are grandchildren), and claim directly from him in their own right, and not through an intermediate relation, they take *per capita*, that is, equal shares, or share and share alike. But when they are of different degrees of kindred (*e. g.* some the children, others the grandchildren or the great-grandchildren of the deceased), those more remote take *per stirpem* or *per stirpes*, that is, they take respectively the shares their parents (or other relation standing in the same degree with them of the surviving kindred entitled, who are in the nearest degree of kindred to the intestate) would have taken had they respectively survived the intestate. Reeve, Descent, Introd. xxvii.; also, 1 Roper, Leg. 126, 130. See PER CAPITA; PER STIRPES; STIRPES.

CAPITAL. The sum of money which a merchant, banker, or trader adventures in any undertaking, or which he contributes to the common stock of a partnership, and also the fund of a trading company. McCulloch.

Capital signifies the actual estate, whether in money or property, owned by an individual or corporation; People v. Com'rs of Taxes, 23 N. Y. 192; it is the fund upon which it transacts its business, which would be liable to its creditors, and in case of insolvency pass to a receiver; International Life Assur. Soc. of London v. Com'rs of Taxes, 28 Barb. (N. Y.) 318; it does not include money borrowed temporarily; Bailey v. Clark, 21 Wall. (U. S.) 284, 22 L. Ed. 651 See, also, Mechanics' & Farmers' Bank v. Townsend, 5 Blatchf. 315, Fed. Cas. No. 9,381; People v. Sup'rs, 18 Wend. (N. Y.) 605.

Profits of a corporation are not appropriated to its capital because it has incurred a debt nearly equal to such profits in permanent improvements; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801. See DIVIDENDS; INCOME; MONEYED CAPITAL.

As to what is moneyed capital in a federal act respecting state taxation of national bank stock, see Mercantile Bank v. New York, 121 U. S. 157, 7 Sup. Ct. 826, 30 L. Ed. 895; First Nat. Bank v. Chapman, 173 U. S. 214, 19 Sup. Ct. 407, 43 L. Ed. 669.

CAPITAL CRIME. One for which the punishment of death is inflicted.

CAPITAL PORTMEN. See IPSWICH, DOMESDAY OF.

CAPITAL PUNISHMENT. The punishment of death.

The subject of capital punishment has occupied the attention of enlightened men for a long time, particularly since the middle of the last century; and none deserves to be more carefully investigated. The right of punishing its members by society is admitted; but how far this right extends, by the laws of nature or of God, has been much disputed by theoretical writers, although it cannot be denied

that most nations, ancient and modern, have deemed capital punishment to be within the scope of the legitimate powers of government. Beccaria contends with zeal that the punishment of death ought not to be inflicted in time of peace, nor at other times, except in cases where the laws can be maintained in no other way. Beccaria, chap. 28.

The ancient method of administering the law was by retribution or the vindication of the law upon the offender, and in England, as late as Geo. III., there were about two hundred offences punishable by death, among which were cutting down a tree, robbing a rabbit warren, harboring an offender against the revenue acts, stealing in a dwelling-house to the amount of forty shillings, or in a shop goods to the amount of five shillings, counterfeiting the stamps that were used for the sale of perfumery, etc. Owing to the efforts of Sir Samuel Romilly, and later of Sir James Mackintosh, the old criminal code was succeeded by more humane legislation, and since the statute of 1861 there are but four crimes now punishable in England by death, high treason, murder, piracy with violence, and setting fire to the king's ships, dockyards, arsenals or stores. See, also, 2 Poll. & Maitl. 450; CRIMES; EXECUTION. It was abolished in Italy in 1890, and has recently been restored in France. It has been abolished in some states. It is usually by hanging; some states have adopted electrocution; and two states permit a choice between hanging and shooting.

See ELECTROCUTION.

CAPITAL STOCK. The sum, divided into shares, which is raised by mutual subscription of the members of a corporation. It is said to be the sum upon which calls may be made upon the stockholders, and dividends are to be paid; Barry v. Exchange Co., 1 Sandf. Ch. (N. Y.) 280; State v. Fire Ass'n, 23 N. J. L. 195; Ang. & A. Corp. §§ 151, 556; Union Bank of Tennessee v. State, 9 Yerg. (Tenn.) 490; State Bank of Wisconsin v. City of Milwaukee, 18 Wis. 281. The term is used to indicate the amount of capital which the charter provides for, and not the value of the property of the corporation; State v. Fire Ass'n, 23 N. J. L. 195; or the original amount upon which a corporation commences; State Bank v. City Council, 3 Rich. (S. C.) 346. See St. Louis, I. M. & S. Ry. Co. v. Loftin, 30 Ark. 693 (*contra*, under an Illinois revenue statute; Pacific Hotel Co. v. Lieb, 83 Ill. 602); the entire sum agreed to be contributed to the enterprise, whether paid in or not; Reid v. Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

It has been held to mean the amount paid in, not the amount subscribed; City of Philadelphia v. Ry. Co., 52 Pa. 177; Mayeski v. His Creditors, 40 La. Ann. 98, 4 South. 9; *contra*, Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; nor that named in the articles of association; Pratt v. Munson, 17 Hun (N. Y.) 475. See 1 Thomp. Corp. § 1060; STOCK.

CAPITALIS JUSTICIARIUS. See JUSTICIAR.

CAPITANEUS. He who held his land or title directly from the king himself.

A commander or ruler over others, either in civil, military, or ecclesiastical matters.

A naval commander. This latter use began A. D. 1264. Spelman, Gloss. *Capitaneus, Admiralius.*

CAPITATION (Lat. *caput*, head). A poll-tax. An imposition yearly laid upon each person.

The constitution of the United States provides that "no capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration, thereinbefore directed to be taken." Art. 1, s. 9, n. 4. See Hylton v. U. S., 3 Dall. (U. S.) 171, 1 L. Ed. 556; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98.

CAPITE. See IN CAPITE.

CAPITULA. Collections of laws and ordinances drawn up under heads or divisions. Spelman, Gloss.

The term is used in the civil and old English law, and applies to the ecclesiastical law also, meaning chapters or assemblies of ecclesiastical persons. Du Cange.

The *Royal and Imperial Capitula* were the edicts of the Frankish Kings and Emperors. They are distinguishable from the *leges* and probably had a less permanent effect. They might, by general consent, become a part of the *leges—legibus addita.*

CAPITULA CORONÆ. Specific and minute schedules, or *capitula itineris.*

CAPITULA ITINERIS. Schedules of inquiry delivered to the justices in eyre before setting out on their circuits, and which were intended to embrace all possible crimes.

CAPITULA DE JUDÆIS. A register of mortgages made to the Jews. 2 Bla. Com. 343; Crabb, Eng. Law 130.

CAPITULARY. In French Law. A collection of laws and ordinances orderly arranged by divisions.

The term is especially applied to the collections of laws made and published by the early French emperors. The execution of these capitularies was intrusted to the bishops, courts, and *missi regis;* and many copies were made. The best edition of the Capitularies is said to be that of Baluze, 1677; Co. Litt. 191 *a*, Butler's note 77.

In Ecclesiastical Law. A collection of laws and ordinances orderly arranged by divisions. A book containing the beginning and end of each Gospel which is to be read every day in saying mass. Du Cange.

CAPITULATION. The treaty which determines the conditions under which a fortified place or army in the field is abandoned to the commanding officer of the opposing army.

On surrender by capitulation, all the property of the inhabitants protected by the articles is considered by the law of nations as neutral, and not subject to capture on the high seas by the belligerent or its ally; Miller v. The Resolution, 2 Dall. (U. S.) 8, 1 L. Ed. 263.

Capitulations. The name used for treaty engagements between the Turkish government and the principal states of Europe by which subjects of the latter, residents in the territory of the former, were exempt from the laws of the places where they dwelt. 1 Kinglake, Invasion of Crimea 116.

In Civil Law. An agreement by which the prince and the people, or those who have

the right of the people, regulate the manner in which the government is to be administered. Wolffius, § 989.

CAPITULUM (Lat.). A leading division of a book or writing; a chapter; a section. Tert. Adv. Jud. 9, 19. Abbreviated, Cap.

CAPTAIN (Lat. *capitaneus;* from *caput,* head). The commander of a company of soldiers.

The term is also used of officers in the municipal police in a somewhat similar sense: as, captain of police, captain of the watch.

The master or commander of a merchant-vessel, or a vessel of war.

A subordinate officer having charge of a certain part of a vessel of war.

In the United States, the commander of a merchant-vessel is, in statutes and legal proceedings and language, more generally termed *master,* which title see. In foreign laws and languages he is frequently styled *patron.*

The rank of captain in the United States navy is next above that of commander; and captains are generally appointed from this rank in the order of seniority. The president has the appointing power, subject to the approval and consent of the senate.

CAPTATION. In French Law. The act of one who succeeds in controlling the will of another, so as to become master of it. It is generally taken in a bad sense.

It was formerly applied to the first stage of the hypnotic or mesmeric trance.

Captation takes place by those demonstrations of attachment and friendship, by those assiduous attentions, by those services and officious little presents, which are usual among friends, and by all those means which ordinarily render us agreeable to others. When these attentions are unattended by deceit or fraud, they are perfectly fair, and the captation is lawful; but if, under the mask of friendship, fraud is the object, and means are used to deceive the person with whom you are connected, then the captation is fraudulent, and the acts procured by the captator are void.

CAPTION (Lat. *capere,* to take). A taking, or seizing; an arrest. The word is no longer used in this sense.

The heading of a legal instrument, in which is shown when, where, and by what authority it was taken, found, or executed.

In the English practice, when an inferior court, in obedience to the writ of certiorari, returned an indictment into the king's bench, it was annexed to the caption, then called a schedule, and the caption concluded with stating that "it is presented in manner and form as appears in a certain indictment thereto annexed," and the caption and indictment were returned on separate parchments. 1 Wms. Saund. 309, n. 2.

In some of the states, every indictment has a caption attached to it, and returned by the grand jury as part of their presentment in each particular case; and in this respect a caption differs essentially from that of other tribunals, where the separate indictments are returned without any caption, and the caption is added by the clerk of the court, as a general caption embracing all the indictments found at the term; Com. v. Stone, 3 Gray (Mass.) 454; Com. v. Edwards, 4 Gray (Mass.) 5; Com. v. Gee, 6 Cush. (Mass.) 174.

In Criminal Practice. The object of the caption is to give a formal statement of the proceedings, describe the court before which the indictment is found, and the time when and place where it was found; Hall, Int. L. 413; Com. v. Stone, 3 Gray (Mass.) 454; and the jurors by whom it was found; Whart. Cr. Pl. § 91. Thus particulars must be set forth with reasonable certainty; U. S. v. Prentice, 6 McLean, 66, Fed. Cas. No. 16,083; State v. Conley, 39 Me. 78; Reeves v. State, 20 Ala. 33. It must show that the *venire facias* was returned and from whence the jury came; Whart. Cr. Pl. § 91. The caption may be amended in the court in which the indictment was found; U. S. v. Prentice, 6 McLean 66, Fed. Cas. No. 16,083; Com. v. Hines, 101 Mass. 33; Brown v. Com., 78 Pa. 122; even in the supreme court; State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483; State v. Williams, 2 McCord (S. C.) 301. It is no part of the indictment; Com. v. Stone, 3 Gray (Mass.) 454; State v. Wentworth, 37 N. H. 196; People v. Bennett, 37 N. Y. 117, 93 Am. Dec. 551; Noles v. State, 24 Ala. 672.

A clerical error in naming the district court of Alaska in the caption of an indictment as "the District Court of the United States," etc., does not vitiate such indictment; Jackson v. U. S., 102 Fed. 473, 42 C. C. A. 452.

In Depositions. The caption should state the title of the cause, the names of the parties, and at whose instance the depositions are taken; Knight v. Nichols, 34 Me. 208. See Waskern v. Diamond, 1 Hemp. 701, Fed. Cas. No. 17,248; Weeks, Depositions.

For some decisions as to the forms and requisites of captions, see State v. Sutton, 5 N. C. 281; State v. Creight, 1 Brev. (S. C.) 169, 2 Am. Dec. 656; Mitchell v. State, 8 Yerg. (Tenn.) 514; State v. Brickell, 8 N. C. 354; Kirk v. State, 6 Mo. 469; Duncan v. People, 1 Scam. (Ill.) 456; Beauchamp v. State, 6 Blackf. (Ind.) 299; Thomas v. State, 5 How. (Miss.) 20.

CAPTIVE. A prisoner of war. Such a person does not by his capture lose his civil rights.

CAPTOR. In International Law. A belligerent who has taken property from an enemy or from an offending belligerent. The term also designates a belligerent who has captured the person of an enemy.

Formerly, goods taken in war were adjudged to belong to the captor; they are now considered to vest primarily in the state or sovereign, and belong to the individual captors only to the extent that the municipal laws provide. Captors are responsible to the owners of the property for all losses and damages, when the capture is tortious and without reasonable cause in the exercise of belligerent rights. But if the capture is originally justifiable, the captors will not be responsible, unless by subsequent misconduct they become trespassers *ab initio;* 1 C. Rob. Adm. 93, 96. See The Flying Fish, 2 Gall. 374, Fed. Cas. No. 4,892; The Anne Green, 1 Gall. 274, Fed. Cas. No. 414; Hart v. The

Littlejohn, 1 Pet. Adm. 116, Fed. Cas. No. 6,153; The London Packet, 1 Mas. 14, Fed. Cas. No. 8,474.

CAPTURE. In International Law. The taking of property by one belligerent from another or from an offending neutral.

Private property of the enemy is not subject to capture on land, but the contrary rule holds at sea. When private enemy vessels are seized at sea, title does not immediately vest in the captor, but the vessel must be brought before a prize court and legally condemned. When public enemy vessels are seized, title vests immediately in the captor state. Capture is deemed lawful when made in accordance with the laws of war.

Private neutral property is subject to capture by a belligerent for the carriage of contraband (*q. v.*), breach of blockade (*q. v.*) and unneutral service (*q. v.*) The Declaration of Paris (*q. v.*) laid down the rule that enemy goods, except contraband of war, should not be subject to capture under a neutral flag, nor neutral goods under an enemy flag.

It has been a subject of controversy whether captured neutral vessels may be destroyed by a belligerent under exceptional circumstances. British practice held that neutral prizes should be abandoned if they could not be brought into court. Russia followed the opposite rule in the war with Japan in 1905. The Declaration of London (*q. v.*) compromised the question and allows destruction of a neutral vessel when it is liable to condemnation upon the facts of the case and when the release of the vessel would involve danger to the safety of the war-ship and the success of the operations in which she is engaged at the time. II Opp. 546–558. See NEUTRALITY.

CAPUT (Lat. head).

In Civil Law. Status; a person's civil condition.

According to the Roman law, three elements concurred to form the *status* or *caput* of the citizen, namely, liberty, *libertas*, citizenship, *civitas*, and family, *familia*.

Libertas est naturalis facultas ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur. This definition of liberty has been translated by Dr. Cooper, and all the other English translators of the Institutes, as follows: "Freedom, from which we are denominated free, is the natural power of acting as we please, unless prevented by force or by the law." This, although it may be a literal, is certainly not a correct, translation of the text. It is absurd to say that liberty consists in the power of acting as we think proper, so far as not restrained by force; for it is evident that even the slave can do what he chooses, except so far as his volition is controlled by the power exercised over him by his master. The true meaning of the text is: "Liberty (from which we are called free) is the power which we derive from nature of acting as we please, except so far as restrained by physical and moral impossibilities." It is obvious that a person is perfectly free though he cannot reach the moon nor stem the current of the Mississippi; and it is equally clear that true freedom is not impaired by the rule of law not to appropriate the property of another to ourselves, or the precept of morality to behave with decency and decorum.

Civitas—the city—reminds us of the celebrated expression, "*civis sum Romanus*," which struck awe and terror into the most barbarous nations. The citizen alone enjoyed the *jus Quiritium*, which extended to the family ties, to property, to inheritance, to wills, to alienations, and to engagements generally. In striking contrast with the *civis* stood the *peregrinus hostis, barbarus*. *Familia*—the family—conveyed very different ideas in the early period of Roman jurisprudence from what it does in modern times. Besides the singular organization of the Roman family, explained under the head of pater familias, the members of the family were bound together by religious rites and sacrifices,—*sacra familiæ*.

The loss of one of these elements produced a change of the *status*, or civil condition; this change might be threefold; the loss of liberty carried with it that of citizenship and family, and was called the *maxima capitis deminutio;* the loss of citizenship did not destroy liberty, but deprived the party of his family, and was denominated *media capitis deminutio;* when there was a change of condition by adoption or abrogation, both liberty and citizenship were preserved, and this produced the *minima capitis deminutio*. But the loss or change of the *status*, whether the great, the less, or the least, was followed by serious consequences: all obligations merely civil were extinguished; those purely natural continued to exist. Gaius says, *Eas obligationes quæ naturalem præstationem habere intelliguntur, palam est capitis deminutione non perire, quia civilis ratio naturalia jura corrumpere non potest*. Usufruct was extinguished by the diminution of the head: *amittitur usufructus capitis deminutione*. D. 3. 6. § 28. It also annulled the testament: "*Testamenta jure facta infirmantur, cum is qui fecerit testamentum capite deminutus sit.*" Gaius, 2, § 143.

At Common Law. A head.

Caput comitatis (the head of the county). The sheriff; the king. Spelman, Gloss.

A person; a life. The upper part of a town. Cowell. A castle. Spelman, Gloss.

Caput anni. The beginning of the year. Cowell.

CAPUT LUPINUM (Lat.). Having a wolf's head.

Outlaws were anciently said to have *caput lupinum*, and might be killed by any one who met them, if attempting to escape; 4 Bla. Com. 320. In the reign of Edward III. this power was restricted to the sheriff when armed with lawful process; and this power, even, disappeared, and the process of outlawry was resorted to merely as a means of compelling an appearance; Co. Litt. 128 *b;* 4 Bla. Com. 284; 1 Reeve's Hist. Eng. Law 471. See OUTLAWRY.

CAPUTAGIUM. Head-money; the payment of head-money. Spelman, Gloss.; Cowell.

CAR TRUST ASSOCIATION. See ROLLING STOCK.

CAR TRUST SECURITIES. A name used commercially to indicate a class of investment securities based upon the conditional sale or hire of railroad cars or locomotives to railroad companies with a reservation of title or lien in the vendor or bailor until the property is paid for. See ROLLING STOCK.

CARAT. The weight of four grains, used by jewellers in weighing precious stones. Webster.

CARCAN. In French Law. An instrument of punishment, somewhat resembling a pillory. It sometimes signifies the punishment itself. Biret, Vocab.

CARDINAL. The title given to one of the highest dignitaries of the church of Rome.

Cardinals are next to the pope in dignity: he is elected by them and out of their body. There are cardinal bishops, cardinal priests, and cardinal deacons. See Fleury, *Hist. Ecclés.* liv. xxxv. n. 17, li. n. 19; Thomassin, part. ii. liv. i. c. 53, part iv. liv. i. cc. 79, 80; Loiseau, *Traité des Ordres*, c. 3, n. 31; André *Droit Canon.*

CARDS. Small rectangular pasteboards, on which are figures of various colors, used for playing certain games. The playing of cards for amusement is not forbidden; nor is gaming for money, at common law; Bish. Stat. Cr. § 504.

One who obtains from another a sum of money by a fraudulent use of cards is guilty of larceny; State v. Donaldson, 35 Utah 96, 99 Pac. 447, 20 L. R. A. (N. S.) 1164, 136 Am. St. Rep. 1041.

Cards are a gambling device; State v. Herryford, 19 Mo. 377; State v. Lewis, 12 Wis. 434.

CARE. Charge or oversight; implying responsibility for safety and prosperity. Webst. Dict.

It is used with reference to the degree of care required of bailees and carriers. For the utmost care, see Baltimore & O. R. Co. v. Worthington, 21 Md. 275, 83 Am. Dec. 578; Brand v. R. Co., 8 Barb. (N. Y.) 368; extraordinary care, Toledo, W. & W. Ry. Co. v. Baddeley, 54 Ill. 19, 5 Am. Rep. 71; great care, Brand v. R. Co., 8 Barb. (N. Y.) 368; especial care, Chicago & N. W. Ry. Co. v. Clark, 2 Ill. App. 116; proper and reasonable care, Neal v. Gillett, 23 Conn. 443; South & N. A. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578; due care, Heathcock v. Pennington, 33 N. C. 640; Butterfield v. R. Co., 10 Allen (Mass.) 532, 87 Am. Dec. 678; ordinary care, State v. Railroad, 52 N. H. 528; Ernst v. R. Co., 35 N. Y. 9, 90 Am. Dec. 761; Smith v. R. Co., 10 R. I. 22; slight care, Johnson v. R. Co., 20 N. Y. 65, 75 Am. Dec. 375. See NEGLIGENCE.

CARETA (spelled, also, *Carreta* and *Carecta*). A cart; a cart-load.

In Magna Charta (9 Hen. III. c. 21) it is ordained that no sheriff shall take horses or carts *(careta)* without paying the ancient livery therefor.

CARGO. The entire load of a ship or other vessel. Abbott, Shipp.; Phile v. The Anna, 1 Dall. (U. S.) 197, 1 L. Ed. 98; Merlin, *Répert.;* Allegre's Adm'rs v. Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424. See Benj. Sales §§ 589, 590.

This term is usually applied to *goods* only, and does not include human beings; 1 Phill. Ins. 135; 4 Pick. 429. But in a more extensive and less technical sense it includes persons: thus, we say, A cargo of emigrants. See 7 M. & G. 729, 744; Davison v. Von Lingen, 113 U. S. 49, 5 Sup. Ct. 346, 28 L. Ed. 885.

CARLISLE TABLES. Life and annuity tables compiled at Carlisle, England, about 1870. Used by actuaries and others. See LIFE TABLES.

CARMACK ACT. An act of Congress, June 29, 1906, amending the Hepburn Act. It supersedes all state regulations; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323.

CARNAL KNOWLEDGE. Sexual connection. Com. v. Squires, 97 Mass. 59; Noble v. State, 22 Ohio St. 541. The term is generally, if not exclusively, applied to the act of a male.

In the statutes relating to abuse or carnal knowledge of a female child of tender age, the word abuse includes the words carnally know, and the latter term also includes the former, as there could be no carnal knowledge of such a child by a man capable of committing rape, without injury; Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754.

CARNALLY KNEW. A technical phrase usual in an indictment to charge the defendant with the crime of rape.

These words were considered essential; Com. Dig. *Indictment;* 1 Ch. Cr. L. 243; 1 Hale, P. C. 632; but Chitty afterwards says that it does not seem so clear; 3 Ch. Cr. L. 812; and the settled opinion seems to be that the words "carnally knew" are included in the term "rapuit" and are therefore unnecessary; 2 Hawk. P. C. c. 25, § 56; 2 Stark. Cr. Pl. 431, n. (*e*); but it is safer not to omit them; *id.;* 1 Ch. Cr. L. 243; 1 East, P. C. 448. These authorities would apply in states in which the offence is described simply as the crime of rape, but in those states where the crime is designated by the words "did ravish and carnally know" it would on general principles of criminal pleading be safer to use the words of the statute. The use of the words "carnally knew" will not supply the omission of the word "ravished"; 1 Hale, P. C. 628, 632; 3 Russell, Cr. (6th ed.) 230. See Noble v. State, 22 Ohio St. 545; Dawkins v. State, 58 Ala. 378, 29 Am. Rep. 754.

CARRIAGE. See VEHICLE; AUTOMOBILE.

CARRIER. One who undertakes to transport goods from one place to another. 2 Pars. Contr. (8th ed.) *163.

They are either *common* or *private.* Private carriers incur the responsibility of the exercise of ordinary diligence only, like other bailees for hire; Story, Bailm. § 495; Satterlee v. Groat, 1 Wend. (N. Y.) 272; ——— v. Jackson, 2 N. C. 14; Robertson & Co. v. Kennedy, 2 Dana (Ky.) 430, 26 Am. Dec. 466; 2 C. B. 877. Special carriers of goods are not insurers and are only liable for injuries caused by negligence; Allis v. Voigt, 90 Mich. 125, 51 N. W. 190. A carrier's liability attaches the moment goods are delivered to him; Gregory v. Ry. Co., 46 Mo. App. 574;

Railway Co. v. Neel, 56 Ark. 279, 19 S. W. 963.

See COMMON CARRIERS.

CARRYING AWAY. Such a removal or taking into possession of personal property as is required in order to constitute the crime of larceny.

The words "did take and carry away" are a translation of the words *cepit et asportavit*, which were used in indictments when legal processes and records were in the Latin language. But no single word in our language expresses the meaning of *asportavit*. Hence the word "away," or some other word, must be subjoined to the word "carry," to modify its general signification and give it a special and distinctive meaning. Com. v. Adams, 7 Gray (Mass.) 45.

Any removal, however right, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient; 2 Bish. Cr. Law § 699; 1 Dearsl. 421; State v. Wilson, 1 N. J. L. 439, 1 Am. Dec. 216. Thus, to snatch a diamond from a lady's ear, which is instantly dropped among the curls of her heir; 1 Leach 320; to remove sheets from a bed and carry them into an adjoining room; 1 Leach 222, n.; to take plate from a trunk, and lay it on the floor with intent to carry it away; *id;* to remove a package from one part of a wagon to another, with a view to steal it; 1 Leach 236; have respectively been holden to be felonies. But nothing less than such a severance will be sufficient; 2 East, Pl. Cr. 556; 1 Ry. & M. 14; 4 Bla. Com. 231; 2 Russ. Cr. 96; Clarke, Cr. L. 242, 260.

CARRYING CONCEALED WEAPONS. See ARMS.

CARS. See RAILROAD; INTERSTATE COMMERCE COMMISSION; ROLLING STOCK.

CART. A carriage for luggage or burden, with two wheels, as distinguished from a wagon, which has four wheels. Worcester, Dict.; Brande. The vehicle in which criminals are taken to execution. Johnson.

The term has been held to include four-wheeled vehicles, to carry out the intent of a statute; Favers v. Glass, 22 Ala. 621, 58 Am. Dec. 272.

CART BOTE. An allowance to the tenant of wood sufficient for carts and other instruments of husbandry. 2 Bla. Com. 35. See BOTE.

CARTA. A charter, which title see. Any written instrument.

In Spanish Law. A letter; a deed; a power of attorney. *Las Partidas*, pt. 3, t. 18, l. 30.

CARTA DE FORESTA. See CHARTA DE FORESTA.

CARTA MERCATORIA. A grant (1303) to certain foreign merchants, in return for custom duties, of freedom to deal wholesale in all cities and towns of England, power to export their merchandise, and liberty to dwell where they pleased, together with other rights pertaining to speedy justice; 1 Holdsw. Hist. E. L. 311.

CARTE BLANCHE. The signature of one or more individuals on a white paper, with a sufficient space left above it to write a note or other writing.

In the course of business, it not unfrequently occurs that, for the sake of convenience, signatures in blank are given with authority to fill them up. These are binding upon the parties. But the blank must be filled up by the very person authorized; Musson v. Bank, 6 Mart. O. S. (La.) 707. See Chit. Bills 70; Frazer v. D'Invilliers, 2 Pa. 200, 44 Am. Dec. 190. BLANK.

CARTEL. Agreements between belligerents authorizing certain non-hostile intercourse between one another which would otherwise be prevented by the state of war; for example, agreements for the exchange of prisoners, for intercommunication by post, telegraph, telephone, railway. II Op. 282.

Cartel ship. A ship commissioned in time of war to exchange prisoners, or to carry any proposals between hostile powers; she must carry no cargo, ammunition, or implements of war, except a single gun for signals. The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations; 4 C. Rob. Adm. 357. See Merlin, *Répert.;* Dane, Abr. c. 40, a. 6, § 7; 1 Kent 68; 3 Phill. Int. Law 161; Crawford v. Penn, 1 Pet. C. C. 106, Fed. Cas. No. 3,372; 3 C. Rob. Adm. 141; 6 *id.* 336; 1 Dods. Adm. 60.

A written challenge to a duel.

CARTMEN. Persons who carry goods and merchandise in carts, either for great or short distances, for hire.

Cartmen who undertake to carry goods for hire as a common employment are common carriers; 3 C. & K. 61; Edw. Bailm. 500; Story, Bailm. § 496. And see Allen v. Sewall, 2 Wend. (N. Y.) 327; Cohen v. Hume, 1 McCord (S. C.) 444; Smyrl v. Niolon, 2 Bail. (S. C.) 421, 23 Am. Dec. 146; Spencer v. Daggett, 2 Vt. 92; Williams v. Branson, 5 N. C. 417, 4 Am. Dec. 562; Bac. Abr. *Carriers*, A.

CARTULARIES. Ancient English records containing documents and legal proceedings —the muniments of title of the great landowners, and other miscellaneous documents. 2 Holdsw. Hist. E. L. 273. See 1 Poll. & Maitl. p. xxii.

CARUCA. A plow. A four-wheeled carriage. A team for a plow, of four oxen abreast. See CARUCATA.

CARUCAGE. A taxation of land by the *caruca*. The act of plowing.

The *caruca* was as much land as a man could cultivate in a year and a day with a single plow *(caruca)*. *Carucage, carugage,* or *caruage* was the tribuate paid for each *caruca* by the *carucarius,* or tenant. Spelman, Gloss.; Cowell.

CARUCATA, CARUCATE. A certain quantity of land used as the basis for taxation. A cartload. As much land as may be tilled by a single plow in a year and a day. Skene, *de verb. sig.* A plow land of one hundred acres. Ken. Gloss. The quantity varies in different counties from sixty to one hundred and twenty acres. Whart. See Littleton, Ten. cclxii.

It may include houses, meadow, woods, etc. It is said by Littleton to be the same as *soca,* but has a much more extended signification. Spelman, Gloss.; Blount; Cowell.

Carucate was a primitive measure of land in England. *Caruca* was a plow team. *Carucate* was based upon the amount of land eight oxen could cultivate in a year. As a fiscal unit it was equivalent to a hide of 120 acres. An eighth was a bovate. 2 Holdsw. Hist. E. L. 56; Maitl. Domesday Book and Beyond 395. See 1 L. J. R. 96.

CASE. A question contested before a court of justice. An action or suit at law or in equity. Martin v. Hunter, 1 Wheat. (U. S.) 352, 4 L. Ed. 97.

A case arising under a treaty, within U. S. Const. art. 3, § 2, is a suit in which the validity or construction of a treaty of the United States is drawn in question; 2 Sto. Const. § 1647; and under the judiciary act of 1789, § 25, the United States supreme court exercises an appellate jurisdiction in such cases decided by a state court only when the decision of the latter is against the title, right, privilege, or exemption set up or claimed by the party seeking to have the decision reviewed; Martin v. Hunter, 1 Wheat. (U. S.) 356, 4 L. Ed. 97. The decision of the state court against the claimant must be upon the construction of the treaty; if it rests upon other grounds it is not a case arising under a treaty, and the supreme court is without any jurisdiction; Gill v. Oliver, 11 How. (U. S.) 529, 13 L. Ed. 799; Williams v. Oliver, 12 How. (U. S.) 111, 13 L. Ed. 915.

In Practice. A form of action which lies to recover damages for injuries for which the more ancient forms of action will not lie. Steph. Pl., And. ed. § 52.

Case, or, more fully, action upon the case, or trespass on the case, includes in its widest sense *assumpsit* and *trover,* and distinguishes a class of actions in which the writ is framed according to the special circumstances of the case, from the ancient actions, the writs in which, called *brevia formata,* are collected in the *Registrum Brevium.*

By the common law, and by the statute Westm. 2d, 13 Edw. I. c. 24, if any cause of action arose for which no remedy had been provided, a new writ was to be formed, analogous to those already in existence which were adapted to similar causes of action. The writ of trespass was the original writ most commonly resorted to as a precedent; and in process of time the term trespass seems to have been so extended as to include every species of wrong causing an injury, whether it was *malfeasance, misfeasance,* or *nonfeasance,* apparently for the purpose of enabling an action on the case to be brought in the king's bench. It thus includes actions on the case for breach of a parol undertaking, now called assumpsit (see ASSUMPSIT), and actions based upon a finding and subsequent unlawful conversion of property, now called trover (see TROVER), as well as many other actions upon the case which seem to have been derived from other originals than the writ of trespass, as nuisance, deceit, etc.

And, as the action had thus lost the peculiar character of a technical trespass, the name was to a great extent dropped, and actions of this character came to be known as actions on the case.

As used at the present day, *case* is distinguished from *assumpsit* and *covenant,* in that it is not founded upon any contract, express or implied; from *trover,* which lies only for unlawful conversion; from *detinue* and *replevin,* in that it lies only to recover damages; and from *trespass,* in that it lies for injuries committed without force, or for forcible injuries which damage the plaintiff consequentially only, and in other respects. See 3 Reeves, Eng. Law 84; 1 Spence, Eq. Jur. 237; 1 Chit. Pl. 123; 3 Bla. Com. 41; Poll. Tort 645; 5 Term 648.

A similar division existed in the civil law, in which upon nominate contracts an action distinguished by the name of the contract was given. Upon innominate contracts, however, an action *præscriptis verbis* (which lay where the obligation was one already recognized as existing at law, but to which no name had been given), or *in factum* (which was founded on the equity of the particular case), might be brought.

The action lies for:

Torts not committed with force, actual or implied; Metcalf v. Alley, 24 N. C. 38; Law v. Law, 2 Gratt. (Va.) 366; Griffin v. Farwell, 20 Vt. 151; as, for malicious prosecution; Muse v. Vidal, 6 Munf. (Va.) 27; Shaver v. White, 6 Munf. (Va.) 113, 8 Am. Dec. 730; Warfield v. Walter, 11 Gill & J. (Md.) 80; Hays v. Younglove, 7 B. Monr. (Ky.) 545; Seay v. Greenwood, 21 Ala. 491; Lally v. Cantwell, 30 Mo. App. 524; Swift v. Chamberlain, 3 Conn. 537; 5 M. & W. 270; see MALICIOUS PROSECUTION; fraud in contracts of sale; Hughes v. Robertson, 1 T. B. Monr. (Ky.) 215, 15 Am. Dec. 104; Ward v. Wiman, 17 Wend. (N. Y.) 193; Casco Mfg. Co. v. Dixon, 3 Cush. (Mass.) 407; Mowry v. Schroder, 4 Strobh. (S. C.) 69; Johnson v. McDaniel, 15 Ark. 109; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; conspiracy to defame; Wildee v. McKee, 111 Pa. 335, 2 Atl. 108, 56 Am. Rep. 271.

Torts committed forcibly where the matter affected was *not tangible;* Wetmore v. Robinson, 2 Conn. 529; Wilson v. Wilson, 2 Vt. 68; as for obstructing a private way; Lambert v. Hoke, 14 Johns. (N. Y.) 383; Wright v. Freeman, 5 Harr. & J. (Md.) 467; Cushing v. Adams, 18 Pick. (Mass.) 110; Osborne v. Butcher, 26 N. J. L. 308; disturbing the plaintiff in the use of a pew; 1 Chit. Pl. 43; injury to a franchise.

Torts committed forcibly when the injury is consequential merely, and not immediate; Cotteral v. Cummins, 6 S. & R. (Pa.) 348; Knott v. Digges, 6 Harr. & J. (Md.) 230;

4 D. & B. 146; Hamilton v. Water Power Co., 81 Mich. 21, 45 N. W. 648; as, special damage from a public nuisance; Martin v. Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 56; Garrett v. McKie, 1 Rich. (S. C.) 444, 44 Am. Dec. 263; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; Beardsley v. Swan, 4 McLean, 333, Fed. Cas. No. 1,187; Plumer v. Alexander, 12 Pa. 81; Scott v. Bay, 3 Md. 431; acts done on the defendant's land which by immediate consequence injure the plaintiff; Shrieve v. Stokes, 8 B. Monr. (Ky.) 453, 48 Am. Dec. 401; Woodward v. Aborn, 35 Me. 271, 58 Am. Dec. 699; Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474; Nelson v. Godfrey, 12 Ill. 20; Whitney v. Bartholomew, 21 Conn. 213. See Pruitt v. Ellington, 59 Ala. 454; Fleming v. Lockwood, 36 Mont. 384, 92 Pac. 962, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263.

Injuries to the relative rights; Vanhorn v. Freeman, 6 N. J. L. 322; Haney v. Townsend, 1 McCord (S. C.) 207; Ream v. Rank, 3 S. & R. (Pa.) 215; McGowen v. Chapen, 6 N. C. 61; Durden v. Barnett, 7 Ala. 169; Hopson v. Boyd, 6 B. Monr. (Ky.) 296; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Wilbur v. Brown, 3 Den. (N. Y.) 361; enticing away servants and children; 4 Litt. 25; Legaux v. Feasor, 1 Yeates (Pa.) 586; Thacker Coal Co. v. Burke, 59 W. Va. 253, 53 S. E. 161, 5 L. R. A. (N. S.) 1091, 8 Ann. Cas. 885; seduction of a daughter or servant; Clough v. Tenney, 5 Greenl. (Me.) 446; or wife; Matheis v. Mazet, 164 Pa. 580, 30 Atl. 434. Also for criminal conversation with spouse, by husband; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442; Browning v. Jones, 52 Ill. App. 597; Dalton v. Dregge, 99 Mich. 250, 58 N. W. 57; but not by wife against another woman; Kroessin v. Keller, 60 Minn. 372, 62 N. W. 438, 27 L. R. A. 685, 51 Am. St. Rep. 533; for alienation of affection of spouse, by husband; French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Fratini v. Caslani, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843; or the wife; Railsback v. Railsback, 12 Ind. App. 659, 40 N. E. 276, 1119; Young v. Young, 8 Wash. 81, 35 Pac. 592; Price v. Price, 91 Ia. 693, 60 N. W. 202, 29 L. R. A. 150, 51 Am. St. Rep. 360; Rice v. Rice, 104 Mich. 371, 62 N. W. 833. See HUSBAND; WIFE.

Injuries which result from *negligence;* Carey v. R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Cook v. Transp. Co., 1 Den. (N. Y.) 91; Ellis v. R. Co., 24 N. C. 138; Clifford v. Richardson, 18 Vt. 620; McCready v. R. Co., 2 Strobh. (S. C.) 356; Freer v. Cameron, 4 Rich. (S. C.) 228, 55 Am. Dec. 663; Ferrier v. Wood, 9 Ark. 85; Thomasson v. Agnew, 24 Miss. 93; Lord v. Ocean Bank, 20 Pa. 387, 59 Am. Dec. 728; Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219, 56 Am. Dec. 563; Conger v. R. Co., 15 Ill. 366; Kerwhaker v. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; though the direct result of actual force; 4 B. & C. 223; Blin v. Campbell, 14 Johns. (N. Y.) 432; Dalton v. Favour, 3 N. H. 465; Cole v. Fisher, 11 Mass. 137; Maull v. Wilson, 2 Harr. (Del.) 443; Baldridge v. Allen, 24 N. C. 206; Claflin v. Wilcox, 18 Vt. 605; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Brennan v. Carpenter, 1 R. I. 474.

Wrongful acts done under a legal process regularly issuing from a court of competent jurisdiction; Watson v. Watson, 9 Conn. 141, 23 Am. Dec. 324; Hayden v. Shed, 11 Mass. 500; Plummer v. Dennett, 6 Greenl. (Me.) 421, 20 Am. Dec. 316; Lovier v. Gilpin, 6 Dana (Ky.) 321; Turner v. Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329; Riley v. Johnston, 13 Ga. 260; Robinson v. Kellum, 6 Cal. 399; Joseph v. Henderson, 95 Ala. 213, 10 South. 843.

Wrongful acts committed by the defendant's servant without his order, but for which he is responsible; Powell v. Deveney, 3 Cush. (Mass.) 300, 50 Am. Dec. 738; Broughton v. Whallon, 8 Wend. (N. Y.) 474; Mayor, etc., of City of Memphis v. Lasser, 9 Humphr. (Tenn.) 757; Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219, 56 Am. Dec. 563; Samyn v. McClosky, 2 Ohio St. 536; Illinois Cent. R. Co. v. Reedy, 17 Ill. 580.

The infringement of rights given by statute; Sharp v. Curtiss, 15 Conn. 526; Riddle v. Proprietors of Locks and Canals, 7 Mass. 169, 5 Am. Dec. 35; Savings Inst. v. Makin, 23 Me. 371; Hunt v. Town of Pownal, 9 Vt. 411; Hull v. Richmond, 2 Woodb. & M. 337, Fed. Cas. No. 6,861.

Injuries committed to property of which the plaintiff has the *reversion* only; Ashley v. Ashley, 4 Gray (Mass.) 197; Noyes v. Stillman, 24 Conn. 15; Hall v. Snowhill, 14 N. J. L. 8; Campbell v. Arnold, 1 Johns. (N. Y.) 511; Hilliard v. Dortch, 10 N. C. 246; Williams v. Lanier, 44 N. C. 30; McGowen v. Chapen, 6 N. C. 61; Elliot v. Smith, 2 N. H. 430; Ives v. Cress, 5 Pa. 118, 47 Am. Dec. 401; Short v. Piper, 4 Harr. (Del.) 181; Kidder v. Jennison, 21 Vt. 108; Beavers v. Trimmer, 25 N. J. L. 97; Tinsman v. R. Co., 25 N. J. L. 255, 64 Am. Dec. 415; Files v. Magoon, 41 Me. 104; as where property is in the hands of a bailee for hire; 3 East 593; Hilliard v. Dortch, 10 N. C. 246; Hawkins v. Phythian, 8 B. Monr. (Ky.) 515; also where grantor destroys an unrecorded deed placed in his hands for safekeeping by the grantee; Edwards v. Dickinson, 102 N. C. 519, 9 S. E. 456.

As to the effect of intention, as distinguishing case from trespass, see Bell v. Lakin, 1 McMull. (S. C.) 364; Schuer v. Veeder, 7 Blackf. (Ind.) 342; Vandenburgh v. Truax, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; Schuneman v. Palmer, 4 Barb. (N. Y.) 225; Kelly

v. Lett, 35 N. C. 50; Moore v. Appleton, 26 Ala. 633. In some states the distinction is expressly abolished by statute; Welch v. Whittemore, 25 Me. 86; Hines v. Kinnison, 8 Blackf. (Ind.) 119; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; Schultz v. Frank, 1 Wis. 352.

The declaration must not state the injury to have been committed *vi et armis;* Gates v. Miles, 3 Conn. 64 [yet after verdict the words *vi et armis* (with force and arms) may be rejected as surplusage; White v. Marshall, Harp. (S. C.) 122]; and should not conclude *contra pacem;* Com. Dig. *Action on the Case* (C, 3).

Damages not resulting necessarily from the acts complained of must be specially stated; Rowand v. Bellinger, 3 Strobh. (S. C.) 373; Swan v. Tappan, 5 Cush. (Mass.) 104; Morris v. McCamey, 9 Ga. 160; Hall v. Kitson, 4 Chandl. (Wis.) 20. Evidence which shows the injury to be trespass will not support case; Dillingham v. Snow, 5 Mass. 560; Burdick v. Worrall, 4 Barb. (N. Y.) 596; Scott v. Bay, 3 Md. 431.

The plea of not guilty raises the general issue; Henion v. Morton, 2 Ashm. (Pa.) 150. Under this plea almost any matter may be given in evidence, except the statute of limitations; the rule is modified in actions for slander and a few other instances; 1 Wms. Saund. 130.

The judgment is that the plaintiff recover a sum of money ascertained by a jury for his damages sustained by the commission of the grievances complained of in the declaration; Cox v. Skeen, 24 N. C. 221, 38 Am. Dec. 691; Burdick v. Glasko, 18 Conn. 494; with costs. See Act. & Def. ch. xxxiv., as to cases in which this action will lie.

"*Case or controversy,*" as used in the judiciary act, imply the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication; Muskrat v. U. S., 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246.

Cases, in the title of an old law book, may mean moot cases or questions put by the author for the consideration of the reader; *e. g.,* Stillingfleet's "Ecclesiastical Cases . . . Stated and Resolved," 1698–1704.

CASE CERTIFIED. Where there is a difference of opinion between the judges of the circuit court, they may certify the question to the supreme court of the United States, but it must be a distinct point or proposition of law so clearly stated that it can be answered without regard to the other issues of law or fact in the case; Fire Ins. Ass'n v. Wickham, 128 U. S. 426, 9 Sup. Ct. 113, 32 L. Ed. 503; U. S. v. Perrin, 131 U. S. 55, 9 Sup. Ct. 681, 38 L. Ed. 88; U. S. v. Reilly, 131 U. S. 58, 9 Sup. Ct. 664, 33 L. Ed. 75. It must not involve the whole case and must be a question of law only; Fire Ins. Ass'n v. Wickham, 128 U. S. 426, 9 Sup. Ct. 113, 32 L. Ed. 503; nor can a case be certified in advance of a regular trial; U. S. v. Perrin, 131 U. S. 55, 9 Sup. Ct. 681, 38 L. Ed. 88.

CASE LAW. The body of law created by judicial decisions, as distinguished from law derived from statutory and other sources. See PRECEDENTS; STARE DECISIS.

CASE MADE. A statement of facts in relation to a disputed point of law, agreed to by both parties and submitted to the court *without a preceding action.* This is only found in the Code states. See De Armond v. Whitaker, 99 Ala. 252, 13 South. 613; Farthing v. Carrington, 116 N. C. 315, 22 S. E. 9; Bradford v. Buchanan, 39 S. C. 237, 17 S. E. 501.

CASE STATED. A statement of all the facts of a case, with the names of the witnesses, and a detail of the documents which are to support them. A brief.

An agreement in writing, between a plaintiff and defendant, that the facts in dispute between them are as therein agreed upon and set forth. Diehl v. Ihrie, 3 Whart. (Pa.) 143.

Some process of this kind exists, it is presumed, in all the states, for the purpose of enabling parties who agree upon the facts to dispense with a formal trial to ascertain what is already known, and secure a decision upon the law involved merely. These agreements are called also agreed cases cases agreed on, agreed statements, etc. In chancery, also, when a question of mere law comes up, it is referred to the king's bench, or common pleas, upon a case stated for the purpose; 3 Sharsw. Bla. Com. 453, n.; 6 Term 313.

A case stated usually embodies a written statement of the facts in the case consented to by both parties as correct, and submitted to the court by their agreement, that a decision may be rendered upon the court's conclusions of law on the facts stated, without a trial by jury.

The facts being thus ascertained, it is left for the court to decide for which party is the law. As no writ of error lies on a judgment rendered on a case stated; Dane, Abr. c. 137, art. 4, § 7; it is usual in the agreement to insert a clause that the case stated shall be considered in the nature of special verdict. In that case, a writ of error lies on the judgment which may be rendered upon it. But a writ of error will also lie on a judgment on a case stated, when the parties have agreed to it; Fuller v. Trevoir, 8 S. & R. (Pa.) 529; and it is usual to include such a provision.

There must be a pending action, in which the case is stated; Smith v. Eline, 4 D. R. (Pa.) 490; it must state all the facts; and cannot refer to outside documents; Hemphill v. Yerkes, 132 Pa. 545, 19 Atl. 342, 19 Am. St. Rep. 607; the court must decide on the case stated, not on the report of a master subsequently appointed; Frailey v. Legion of Honor, 132 Pa. 578, 20 Atl. 684; and cannot

go outside of the case stated in deciding it; Northampton Co. v. Ry. Co., 148 Pa. 282, 23 Atl. 895; Mutchler v. City of Easton, 148 Pa. 441, 23 Atl. 1109; Com. v. Howard, 149 Pa. 302, 24 Atl. 308; if no right of appeal is reserved, the decision of the court is final; Com. v. Callahan, 153 Pa. 625, 25 Atl. 1000.

Where a controversy is submitted to a court upon a case stated, but which fails to recite that it is submitted for its opinion on the law and judgment, the court is without jurisdiction to render judgment; Tyson v. Bank, 77 Md. 412, 26 Atl. 520, 23 L. R. A. 161. Where an agreed statement was made by the parties under a mistake of facts, it was a proper subject of amendment; Levy v. Sheehan, 3 Wash. St. 420, 28 Pac. 748.

CASE SYSTEM. A method of teaching or studying the science of the law by a study of the cases historically, or by the inductive method. It was introduced in the Law School of Harvard University in 1869–70 by Christopher C. Langdell, Dane Professor of Law. It is usually based upon printed collections of selected cases arranged chronologically under appropriate titles. The system is not necessarily based upon the exclusive use of cases, but the cases are made the basis of instruction. Text-books may be used for the purpose of reference and collateral reading, and are so used by many teachers under this system. It has been very generally adopted in law schools.

The reasons for the adoption of this system of instruction are given in a paper read before the Section of Legal Education of the American Bar Association in 1894 by Professor W. A. Keener, formerly of the Law School of Harvard University.

"1. That law, like other applied sciences, should be studied in its application, if one is to acquire a working knowledge thereof. 2. That this is entirely feasible for the reason that while the adjudged cases are numerous the principles controlling them are comparatively few. 3. That it is by the study of cases that one is to acquire the power of legal reasoning, discrimination and judgment, qualities indispensable to the practising lawyer. 4. That the study of cases best develops the power to analyze and to state clearly and concisely a complicated state of facts, a power which, in no small degree, distinguished the good from the poor and indifferent lawyer. 5. That the system, because of the study of fundamental principles, avoids the danger of producing a mere case lawyer, while it furnishes, because the principles are studied in their application to facts, an effectual preventive of any tendency to mere academic learning. 6. That the student, by the study of cases, not only follows the law in its growth and development, but thereby acquires the habit of legal thought, which can be acquired only by the study of cases, and which must be acquired by him either as a student, or after he has become a practitioner, if he is to attain any success as a lawyer. 7. That it is the best adapted to exciting and holding the interest of the student, and is, therefore, best adapted to making a lasting impression upon his mind. 8. That it is a method distinctly productive of individuality in teaching and of a scientific spirit of investigation, independence, and self-reliance on the part of the student." Reprinted in 28 Am. L. Rev. 709.

See also 24 *id.* 211; 27 *id.* 801; 12 Harv. L. Rev. 203, 418; 9 *id.* 169; 14 *id.* 258; 27 Am. L. Reg. 416; Report of Amer. Bar Assoc. 1895, 1896.

CASH. That which circulates as money, including bank bills, but not mere bills receivable. The provision of the limited partnership acts requiring "actual cash payment" by the special partner is not complied with by the delivery to the firm of promissory notes, which are received and treated as cash; Pierce v. Bryant, 5 Allen (Mass.) 91; nor of credits, Van Ingen v. Whitman, 62 N. Y. 513; nor of post-dated checks, Durant v. Abendroth, 69 N. Y. 148, 25 Am. Rep. 158; though regular checks of third parties, conceded to represent cash, have been allowed; Hogg v. Orgill, 34 Pa. 344.

Cash price is the price of articles paid for in cash at the time of purchase, in distinction from the barter and credit prices. A sale for cash is a sale for money in hand; Steward v. Scudder, 24 N. J. L. 101.

CASH-BOOK. A book in which a merchant enters an account of all the cash he receives or pays. An entry of the same thing ought to be made, under the proper dates, in the journal. The object of the cash-book is to afford a constant facility to ascertain the true state of a man's cash. Pardessus, n. 87.

CASH REGISTER. In a prosecution for selling liquor on certain days, cash register records were held inadmissible to sustain the testimony of a party to the transaction that liquor had not been sold; Cullinan v. Moncrief, 90 App. Div. 538, 85 N. Y. Supp. 745. They are not books of account, but memoranda made by a party in his own interest. See note in 13 Yale L. J. 397.

CASHIER. An officer of a moneyed institution, or of a private person or firm, who is entitled by his office to take care of the cash or money of such institution, person, or firm.

The cashier of a bank is usually intrusted with all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly, or through subordinate officers, all moneys and notes of the bank; delivers up all discounted notes and

other securities; signs drafts on corresponding banks, and, with the president, the notes payable on demand issued by the bank; and, as an executive officer of the bank, transacts much of its general business. He is the chief executive officer of the bank; Morse, Bank. § 152; Minor v. Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47; Bissell v. Bank, 69 Pa. 415. He is the custodian of its money, securities, books, and valuable papers; Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240. He may borrow money for the use of the bank and pledge notes owned by it as security for the loan; Citizens' Bank v. Bank, 126 Ky. 169, 103 S. W. 249, 11 L. R. A. (N. S.) 598, 128 Am. St. Rep. 282. He may certify checks; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. He will bind the bank by his contract to pay commissions for the disposal of its land through a broker, but which, through a mistake in identity, the bank does not own; Arnold v. Bank, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

He need not be a stockholder; indeed, some bank charters prohibit him from owning stock in the bank. He usually gives security for the faithful discharge of his trusts. It is his duty to make reports to the proper state officer (in banks incorporated under the national bank act to the comptroller of the currency; U. S. R. S. § 5210) of the condition of the bank, as provided by law.

In general, the bank is bound by the acts of the cashier within the scope of his authority, express or implied; Minor v. Bank, 1 Pet. (U. S.) 46, 70, 7 L. Ed. 47; Fleckner v. Bank, 8 Wheat. (U. S.) 361, 5 L. Ed. 631; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; Wild v. Bank, 3 Mas. 505, Fed. Cas. No. 17,646; Matthews v. Nat. Bank, 1 Holmes 396, Fed. Cas. No. 9,286; Pendleton v. Bank, 1 T. B. Monr. (Ky.) 179; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. It is bound by his act in drawing checks in its name, though with the intent to apply the proceeds to his own use; Phillips v. Bank, 67 Hun (N. Y.) 378, 22 N. Y. Supp. 254; Lowndes v. Bank, 82 Conn. 8, 72 Atl. 150, 22 L. R. A. (N. S.) 408. He may endorse to himself and sue on a note payable to the bank; Young v. Hudson, 99 Mo. 102, 12 S. W. 632. But the bank is not bound by a declaration of the cashier not within the scope of his authority; as if, when a note is about to be discounted by the bank, he tells a person that he will incur no responsibility by becoming an indorser on such note; Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51, 8 L. Ed. 316; see West St. Louis Sav. Bank v. Bank, 95 U. S. 557, 24 L. Ed. 490; President, etc., of Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111; State Bank at Elizabeth v. Chetwood, 8 N. J. L. 1; Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. (Pa.) 240. He has no authority to accept certificates of the capital stock of an insurance company in payment of a debt due the bank; Bank of Commerce v. Hart, 37 Neb. 197, 55 N. W. 631, 20 L. R. A. 780, 40 Am. St. Rep. 479. He may not accept a new note, so as to discharge a surety on the first note; Gray v. Bank, 81 Md. 631, 32 Atl. 518. He may not give away, surrender, or release the bank's securities; 1 Dan. Neg. Inst. § 395; Morse, Banks & Bankg. § 169.

Where a cashier does acts on behalf of a bank which are not against public policy or criminal, when once executed in whole or part, they are binding on the bank, as it cannot enjoy the benefits and escape the liabilities; Owens v. Stapp, 32 Ill. App. 653; a cashier of a bank has authority to have the paper of the bank rediscounted, in the usual course of business; Davenport v. Stone, 104 Mich. 521, 62 N. W. 722, 53 Am. St. Rep. 467. Merely by virtue of his office, he has no implied power to receive money for interest in advance on a note owned by the bank, and to agree to extend the time of payment, thus discharging an indorser from liability; Bank of Ravenswood v. Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305, 6 Ann. Cas. 48; Vanderford v. Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (a case under the negotiable instrument law). When the cashier of a bank instituted an action in the name of the bank commenced by capias issued on his affidavit, alleging his connection with the bank, it will be presumed that he has authority to do so; Wachmuth v. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278. A banking corporation, whose charter does not otherwise provide, may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing in the records of the proceedings of the directors, and where the cashier has so acted for a series of years without objection, the bank is estopped to deny his authority; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49.

The mere notification by the cashier to his individual creditor that he has placed the amount of the debt to the latter's credit on the books of the bank, followed by the honoring of his check for a portion of the amount, does not charge the bank with responsibility for the credit; Langlois v. Gragnon, 123 La. 453, 49 South. 18, 22 L. R. A. (N. S.) 414.

He has no authority to bind the bank by a pledge of its credit to secure a discount of his own notes for the benefit of a corporation in which he was a stockholder; State Nat. Bank v. Bank, 66 Fed. 691, 14 C. C. A. 61; nor has he authority to sell property belonging to the bank; Greenawalt v. Wil-

son, 52 Kan. 109, 34 Pac. 403; nor has he power to bind the bank to pay the draft of a third person on one of its customers, to be drawn at a future day, when it expects to have a deposit from him sufficient to cover it; Flannagan v. Bank, 56 Fed. 959, 23 L. R. A. 836; nor to assign collaterals belonging to himself, which were given to secure a loan to another person for the cashier's benefit; Merchants' Nat. Bank v. Demere, 92 Ga. 735, 19 S. E. 38.

The power of a bank cashier to transfer notes and securities held by the bank can be questioned only by the bank or its representative; Haugan v. Sunwall, 60 Minn. 367, 62 N. W. 398.

See NATIONAL BANK; DIRECTORS; AGENT.

In Military Law. To deprive a military officer of his office. See Art. of War, art. 14.

CASSARE. To quash; to render void; to break. Du Cange.

CASSATION. **In French Law.** A decision emanating from the sovereign authority, by which a decree or judgment in the court of last resort is set aside or annulled. See COUR DE CASSATION.

CASSETUR BREVE (Lat. that the writ be quashed). A judgment sometimes entered against a plaintiff at his request when, in consequence of allegations of the defendant, he can no longer prosecute his suit with effect.

The effect of such entry is to stop proceedings, and exonerate the plaintiff from liability for future costs, leaving him free to sue out new process; 3 Bla. Com. 303. See Gould, Pl. c. 5, § 139; 5 Term 634.

CAST. A term used in connection with the imposition upon a party litigant of costs in the suit: A is cast for the costs of the case.

CASTELLORUM OPERATIO. **In Old English Law.** Service or labor done by inferior tenants for the building and upholding of castles and public places of defence.

Towards this some gave their personal service, and others, a contribution of money or goods. This was one branch of the *trinoda necessitas;* 1 Bla. Com. 263; from which no lands could be exempted under the Saxons; though immunity was sometimes allowed after the conquest; Kennett, Paroch. Ant. 114; Cowell.

CASTIGATORY. An engine used to punish women who have been convicted of being common scolds. It is sometimes called the trebucket, tumbrel, ducking-stool, or cucking-stool. This barbarous punishment has perhaps never been inflicted in the United States; James v. Com., 12 S. & R. (Pa.) 225.

CASTING-VOTE. The privilege which the presiding officer possesses of deciding a question where the body is equally divided. It sometimes signifies the single vote of a person who never votes except in the case of a tie; sometimes the double vote of a person who first votes with the rest, and then upon a tie creates a majority by giving a second vote; Christian's note to 1 Bla. Com. 18. The vice-president of the United States, as president of the senate, has the casting-vote when that body is equally divided, but cannot vote at any other time; Const. I. 3. This is a provision frequently made, though in some cases the presiding officer, after giving his vote with the other members, is allowed to decide the question in case of a tie; People v. Church, 48 Barb. (N. Y.) 603.

A casting vote neither exists in corporations or elsewhere, unless it is expressly given by statute or charter, or, what is equivalent, exists by immemorial usage; and in such cases it cannot be created by a by-law; 6 T. R. 732; see 2 B. & Ad. 704.

See MEETING.

CASTRATION. The act of gelding. When this act is maliciously performed upon a man, it is a mayhem, and punishable as such, although the sufferer consented to it; 2 Bish. Cr. Law §§ 1001, 1008. By the ancient law of England the crime was punished by retaliation, *membrum pro membro;* Co. 3d Inst. 118. It is punished in the United States, generally, by fine and imprisonment. The civil law punished it with death; Dig. 74. 8. 4. 2. For the French law, vide Code Pénal art. 316. The consequences of castration, when complete, are impotence and sterility; 1 Beck, Med. Jur. 72.

Voluntary castration after marriage is no ground of divorce; Berger v. Berger, 23 Pa. Co. Ct. R. 232.

CASU CONSIMILI. See CONSIMILI CASU.

CASU PROVISO (Lat. in the case provided for). A writ of entry framed under the provisions of the statute of Gloucester (6 Edw. I.) c. 7, which lay for the benefit of the reversioner when a tenant in dower aliened in fee or for life.

It seems to have received this name to distinguish it from a similar writ framed under the provisions of the statute Westm. 2d (13 Edw. I.) c. 24, where a tenant by curtesy had alienated as above, and which was known emphatically as the writ *in consimili casu.*

The writ is now practically obsolete. Fitzh. Nat. Brev. 205; Dane, Abr. Index.

CASUAL EJECTOR. The person supposed to perform the fictitious ouster of the tenant of the demandant in an action of ejectment. See EJECTMENT.

CASUALTY. Inevitable accident. Unforeseen circumstances not to be guarded against by human agency, and in which man takes no part. Story, Bailm. § 240; 1 Pars. Contr. 543; 2 Whart. Negl. 8th ed. *159, 160. See 17 C. B. N. S. 51; Waldeck v. Ins. Co. 56 Wis. 98, 14 N. W. 1.

CASUALTY INSURANCE. See INSURANCE.

CASUS FŒDERIS (Lat.). **In International Law.** A case within the stipulations of a treaty of alliance.

The question whether, in case of a treaty of alliance, a nation is bound to assist its ally in war against a third nation, is determined in a great measure by the justice or injustice of the war. If manifestly unjust on the part of the ally, it cannot be considered as *casus fœderis*. Grotius, b. 2, c. 25; Vattel, b. 2, c. 12, § 168.

See 1 Kent 49.

In Commercial Law. The case or event contemplated by the parties to a contract, or stipulated for by it, or coming within its terms. Black, Law Dict.

CASUS FORTUITUS (Lat.). An inevitable accident. A loss happening in spite of all human effort and sagacity. 3 Kent 217, 300; Whart. Negl. §§ 113, 553.

It includes such perils of the sea as strokes of lightning, etc. A loss happening through the agency of rats was held an unforeseen, but not an inevitable, accident. Bullard v. Ins. Co., 1 Curt. C. C. 148, Fed. Cas. No. 2,122. The happening of a *casus fortuitus* excuses shipowners from liability for goods conveyed; 3 Kent 216; L. R. 1 C. P. D. 143.

CASUS MAJOR (Lat.). An unusual accident. Story, Bailm. § 240.

CASUS OMISSUS (Lat.). A case which is not provided for. When such cases arise in statutes which are intended to provide for all cases of a given character which may arise, the common law governs; 5 Co. 38; 11 East 1; Cresoe v. Laidley, 2 Binn. (Pa.) 279; 2 Sharsw. Bla. Com. 260; Broom, Max. 46. A *casus omissus* may occur in a contract as well as in a statute; 2 Bla. Com. 260.

CAT. A whip sometimes used for whipping criminals. It consists of nine lashes tied to a handle, and is frequently called cat-o-nine-tails. It is used where the whipping-post is retained as a mode of punishment and was formerly resorted to in the navy.

CATALLA OTIOSA (Lat.). Dead goods, and animals other than beasts of the plow, *averia carucæ*, and sheep. 3 Bla. Com. 9; Bract. 217 *b*.

CATALLUM. A chattel.

The word is used more frequently in the plural, *catalla*, but has then the same signification, denoting all goods, movable or immovable, except such as are in the nature of fees and freeholds. Cowell; Du Cange.

CATANEUS. A tenant *in capite*. A tenant holding immediately of the crown. Spelman, Gloss.

CATCHING BARGAIN. An agreement made with an heir expectant for the purchase of his expectancy at an inadequate price.

In such cases the heir is, in general, entitled to relief in equity, and may have the contract rescinded upon terms of redemption; 1 Vern. 167, 320, n.; 2 Cox 80; 2 Ch. Cas. 136; 1 P. Wms. 312; 1 Cro. Car. 7; 2 Atk. 133; 2 Swanst. 147; L. R. 8 Ch. Ap. 484; L. R. 10 Eq. 641. It has been said that all persons dealing for a reversionary interest are subject to this rule; but it may be doubted whether the course of decisions authorizes so extensive a conclusion, and whether, in order to constitute a title to relief, the reversioner must not combine the character of heir; 2 Swanst. 148, n. See 1 Ch. Pr. 112, 113, n., 458, 826, 838, 839. A mere hard bargain is not sufficient ground for relief.

The English law on this subject was altered by stat. 31 and 32 Vic. c. 4. Before that act slight inadequacy of consideration was sufficient to set the contract aside; under the act only positive unfairness was relieved against; Bisph. Eq. § 221. Under the Moneylenders' Act, 1900, the courts have power to re-open catching bargains where the interest is excessive and the transaction is unconscionable, and where the interest is excessive and the transaction is such that a court of equity would give relief; [1906] A. C. 469; [1903] 1 K. B. 705; [1906] 1 K. B. 79, where 75 per cent. was held reasonable under the circumstances. This act does not include pawnbrokers, registered building or loan societies, banking or insurance companies, etc. Money lenders are subjected to having their contracts judicially varied in the interest of borrowers, but the rights of *bona fide* assignees or holders for value without notice may not be affected. Money lenders are obliged to register. Bellot, Bargains with Money-Lenders. See Chesterfield v. Janssen, 1 Lead. Cas. in Eq. 773, and notes. The contract may be for a loan, sale, annuity, or mortgage; 16 Ves. 512; L. R. 10 Ch. Ap. 389; 26 Beav. 644; Butler v. Duncan, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711.

CATCHPOLE. A name formerly given to a sheriff's deputy, or to a constable, or other officer whose duty it is to arrest persons. He was a sort of sergeant. The word is not now in use as an official designation; Minshew.

CATER COUSIN. A very distant relation. Bla. Law Tracts 6.

CATHEDRAL. A tract set apart for the service of the church.

After the establishment of Christianity, the emperors and other great men gave large tracts of land whereon the first places of public worship were erected,—which were called *cathedræ*, cathedrals, *sees*, or seats, from the clergy's residence thereon. And when churches were afterwards built in the country, and the clergy were sent out from the cathedrals to officiate therein, the cathedral or head seat remained to the bishop, with some of the chief of the clergy as his assistants.

CATHOLIC EMANCIPATION ACT. The act 10 Geo. IV. c. 7. This act relieves from disabilities and restores all civil rights to Roman Catholics, except that of holding ecclesiastical offices and certain high state of-

fices. The previous legislation which by gradual stages led up to the final removal of these disabilities is to be found in the acts of 18 Geo. III. c. 60; 31 Geo. III. c. 32; and 43 Geo. III. c. 7. 2 Steph. Com. 721.

CATTLE. A collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine. Web. Dict.; Decatur Bank v. Bank, 21 Wall. (U. S.) 299, 22 L. Ed. 560.

A railroad engineer cannot take chances of an animal's getting off the track, where he has an opportunity of avoiding all possibility of an injury; Elmsley v. R. Co. (Miss.) 10 South. 41. It is immaterial whether the stock was legally at large or not, where the road is not fenced; Terre Haute & I. R. Co. v. Schaefer, 5 Ind. App. 86, 31 N. E. 557; but where not legally at large and the company is under no legal obligation to fence its road, it will only be responsible for gross, wanton, or wilful negligence in causing injury to stock; Windsor v. R. Co., 45 Mo. App. 123. See Ohio & M. Ry. Co. v. Gross, 41 Ill. App. 561. The law does not presume negligence from the mere fact that stock was killed or injured by a railroad company; Eddy v. Lafayette, 49 Fed. 798, 1 C. C. A. 432; See ANIMALS; RUNNING AT LARGE.

CATTLE GATE. A customary proportionate right of pasture enjoyed in common with others. The right is measured not by the number of cattle to be pastured, but by reference to the rights of others and the whole amount of pasture. 34 E. L. & Eq. 511; 1 Term 137.

CATTLE GUARDS. See FENCE.

CAUCUS. See ELECTION.

CAUSA (Lat.). A cause; a reason.

A condition; a consideration. Used of contracts, and found in this sense in the Scotch law also. Bell, Dict.

It cannot be considered that *consideration* was borrowed from equity as a modification of the Roman "causa." Prof. J. B. Ames in 3 Sel. Essays in Anglo-Amer. Leg. Hist. 279. Practically it covers somewhat wider ground than the modern "Consideration Executed," but it has no generic notion corresponding to it, at least none coextensive with the notion of contract; Poll. Contr. 74.

A suit; an action pending. Used in this sense in the old English law.

Property. Used thus in the civil law in the sense of *res* (a thing). *Non porcellum, non agnellum nec alia causa* (not a hog, not a lamb, nor other thing). Du Cange.

By reason of.

Causa proxima. The immediate cause.

Causa remota. A cause operating indirectly by the intervention of other causes.

Causa causans. The inducing or immediate cause.

In its general sense, *causa* denotes anything operating to produce an effect. Thus, it is said, *causa causantis causa est causati* (the cause of the thing causing is the cause of the thing caused). Marble v. City of Worcester, 4 Gray (Mass.) 398; 4 Campb. 284. In law, however, only the direct cause is considered. See 9 Co. 50; 12 Mod. 639; CAUSA PROXIMA NON REMOTA SPECTATUR; CONTRACTS.

CAUSA JACTITATIONIS MARITAGII (Lat.). A form of action which anciently lay against a party who boasted or gave out that he or she was married to the plaintiff, whereby a common reputation of their marriage might ensue. 3 Bla. Com. 93. See JACTITATION OF MARRIAGE.

CAUSA MATRIMONII PRÆLOCUTI (Lat.). A writ lying where a woman has given lands to a man in fee-simple with the intention that he shall marry her, and he refuses so to do within a reasonable time, upon suitable request. Cowell. Now obsolete. 3 Bla. Com. 183, n.

CAUSA MORTIS DONATIO. See DONATIO MORTIS CAUSA.

CAUSA PROXIMA NON REMOTA SPECTATUR (Lat.). The direct and not the remote cause is considered.

In many cases important questions arise as to which, in the chain of acts tending to the production of a given state of things, is to be considered the responsible cause. It is not merely distance of place or of causation that renders a cause remote. The cause nearest in the order of causation, without any efficient concurring cause to produce the result, may be considered the direct cause. In the course of decisions of cases in which it is necessary to determine which of several causes is so far responsible for the happening of the act or injury complained of, what is known as the doctrine of proximate cause is constantly resorted to in order to ascertain whether the act, omission, or negligence of the person whom it is sought to hold liable was in law and in fact responsible for the result which is the foundation of the action.

The rule was formulated by Bacon, and his comment on it is often cited: "It were infinite for the law to judge the cause of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause; and judgeth of acts by that, without looking to any further degree;" Max. Reg. 1. Its subsequent development has resulted rather in its application to new conditions than in deviation from the principle as originally stated. Proximate cause, it may be generally stated, is such adequate and efficient cause as, in the natural order of events, and under the particular circumstances surrounding the case, would necessarily produce the event; and this having been discovered, is to be deemed the true cause, unless some new cause not incidental to, but independent of, the first, shall be found to intervene between it and the first. Sh. & Redf. Neg. § 10; Marble v. City of

Worcester, 4 Gray (Mass.) 412; Story, J., in Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371; Alexander v. Town of New Castle, 115 Ind. 51, 17 N. E. 200; State v. R. R., 52 N. H. 528; Webb's Poll. Torts 29. It is a cause which in natural sequence, undisturbed by any independent cause, produces the result complained of; Behling v. Pipe Lines, 160 Pa. 359, 28 Atl. 777, 40 Am. St. Rep. 724; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Putnam v. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; and the result must be the natural and probable consequence such as ought to have been foreseen as likely to flow from the act complained of; Ewing v. R. Co., 147 Pa. 44, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709; McDonald v. Snelling, 14 Allen (Mass.) 290, 92 Am. Dec. 768; Pilmer v. Traction Co., 14 Ida. 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; Kreigh v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684.

Two elements go to make up proximate cause: 1. The act must be the efficient cause of the injury; 2. The result must be one which might reasonably have been anticipated when the negligent act was committed; Goodlander Mill Co. v. Oil Co., 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; Cole v. Sav. & Loan Soc., 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; Kreigh v. Church, 152 Fed. 120; 81 C. C. A. 338, 11 L. R. A. (N. S.) 684; Teis v. Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893; Hoag v. R. Co., 85 Pa. 293, 27 Am. Rep. 653; Hartman v. Clarke, 104 App. Div. 62, 93 N. Y. Supp. 314; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204.

From a legal point of view it is said to be of two kinds: 1. As in insurance cases; 2. Responsibility for a wrongful act, whether in tort or contract; 15 Harv. L. Rev. 566, where it is said: "The fundamental difference between these classes is that in the former investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the latter the object is to connect the circumstances which are the subject of the action with a responsible human will." *id.;* see Gilson v. Canal Co., 36 Am. St. Rep. 807, note.

Where a train was forty-five minutes late when a gust of wind threw it from the track and injured a passenger, it was held that though the train would have escaped the gust of wind had it been on time, yet the accident was neither the natural nor probable consequence of the delay; McClary v. R. Co., 3 Neb. 44, 19 Am. Rep. 631. When a horse hitched to a defective hitching-post was frightened by the running away of another horse, and broke the post and ran over a person in the street, the latter could not recover against the owner of the post for the defect in the post as the cause of the injury; City of Rockford v. Tripp, 83 Ill. 247, 25 Am. Rep. 381. Negligently setting fire to grass on the property of another may be found to be the proximate cause of the death of one burned whilst attempting to extinguish it; Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N. E. 362, 15 L. R. A. (N. S.) 819, 11 Ann. Cas. 368. Exposure to cold was held the proximate cause of injury to the health of one who, although ill at the time, would not have suffered seriously but for such exposure; Louisville & N. R. Co. v. Daugherty, 108 S. W. 336, 32 Ky. L. Rep. 1392, 15 L. R. A. (N. S.) 740. The escape of oil from a tank near a river bank was held the proximate cause of injury caused by the oil to boats lower down; Brennan Construction Co. v. Cumberland, 29 App. D. C. 554, 15 L. R. A. (N. S.) 535, 10 Ann. Cas. 865. Where a railroad company obstructed a railroad crossing and delayed a physician, held that his patient had a right of action against it if she suffered by the delay; Terry v. R. Co. (Miss.) 60 South. 729. Permitting a road to remain out of repair so that fire apparatus is hindered in responding to an alarm is not the proximate cause of the destruction of the property by fire; Hazel v. Owensboro, 99 S. W. 315, 30 Ky. L. Rep. 627, 9 L. R. A. (N. S.) 235.

The question of proximate cause is said to be determined, not by the existence or non-existence of intervening events, but by their character and the natural connection between the original act or omission and the injurious consequences. When the intervening cause is set in operation by the original negligence, such negligence is still the proximate cause; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204. If the party guilty of the first act of negligence might have anticipated the intervening cause, the connection is not broken; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204; Missouri Pac. R. Co. v. Columbia, 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; Smith v. Tel. Co., 113 Mo. App. 429, 87 S. W. 71; Citizens Telephone Co. of Texas v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879. Any number of causes and effects may intervene, and if they are such as might with reasonable diligence have been foreseen, the last result is to be considered as the proximate result. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence, and except for which the final injurious consequence could not have happened, then such injurious consequence must be deemed too remote; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362; Kreigh

v. Westinghouse, Church, Kerr & Co., 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684. Gas was negligently permitted to remain in a mine. A workman was overcome by the gas, and, in removing him to the surface, his leg was broken in the elevator. The gas-filled mine was not the proximate cause of the broken leg; Teis v. Smuggler Min. Co., 158 Fed. 260, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893.

The cases in which the original wrongdoer is still liable, though independent acts of other persons may have intervened, are classified generally by Prescott F. Hall in 15 Harv. L. Rev. 541, as:

1. Acts directly malicious; Laidlaw v. Sage, 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216 (where an explosion was held the proximate cause, though the person injured by it was forced by another into the position of danger). Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610; Isham v. Dow's Estate, 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. One who violates a duty owed to others or commits a tortious or wrongfully negligent act is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act; Smethurst v. Barton Square Church, 148 Mass. 261, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550 (snow from a roof fell on a horse causing it to start and thereby injure a passer-by).

2. Acts such as wilful misrepresentation and false warranties: Of this class of cases is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455 (where a druggist carelessly labelled a deadly poison as a harmless medicine); where a druggist labelled extract of belladonna as extract of dandelion; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; where naphtha was sold for oil; Wellington v. Oil Co., 104 Mass. 64; or poisonous food; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; or a proprietary medicine containing ingredients harmful to one using it according to its directions; Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; or a beverage represented to be harmless, but containing bits of broken glass; Watson v. Brewing Co., 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157; or where a manufacturer sold a defective article knowing it to be defective, though there was no privity of contract between the person injured and the manufacturer; Schubert v. Clark Co., 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; Woodward v. Miller, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188; Holmvik v. Self-feeder Co., 98 Minn. 424, 108 N. W. 810.

3. Acts conclusively presumed to be malicious, such as violations of statutes. Where liability for personal injury is imposed by statute on counties, etc., or persons for defective highways, bridges, etc., the innocent intervening act of a third person will not discharge the first wrong-doer from his responsibility; Hayes v. Hyde Park, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249.

Generally it is held that a company maintaining overhead wires is liable for injuries resulting from their fall notwithstanding an intervening act of a third person who attempts to remove them. This is usually on the ground that the company should have foreseen that some person would interfere with such wires; Citizens' Telephone Co. of Texas v. Thomas, 45 Tex. Civ. App. 20, 99 S. W. 879; Neal v. R. Co., 3 Pennewill (Del.) 467, 53 Atl. 338; Smith v. Telephone Co., 113 Mo. App. 429, 87 S. W. 71; Dannenhower v. Telegraph Co., 218 Pa. 216, 67 Atl. 207; Kansas City v. Gilbert, 65 Kan. 469, 70 Pac. 350; but where a wire fell to the ground and was knocked by a policeman with his club towards the sidewalk, the intervening act of the policeman was held the proximate cause of injury to one who caught the wire; Seith v. Electric Co., 241 Ill. 252, 89 N. E. 425, 24 L. R. A. (N. S.) 978, 132 Am. St. Rep. 204. And the negligence of a telephone company in maintaining a pole in a dangerous position until it fell across a highway was held not the proximate cause of an accident, when it was set back in the hole by passers-by and insecurely propped, afterwards falling and killing the daughter of the plaintiff; Harton v. Telephone Co., 146 N. C. 429, 59 S. E. 1022, 14 L. R. A. (N. S.) 956, 14 Ann. Cas. 390.

Where a manufacturer undertook to supply a boiler which would stand a working pressure of one hundred pounds and at a less pressure the boiler exploded in consequence of the defective construction of a hinge, thereby injuring the buyer's employees, and rendering such buyer liable in damages to them, it was held that though the buyer might have discovered the defect by inspection, yet he was entitled to recover from the manufacturer, as, even if his conduct be called want of ordinary care, it was induced by the warranty or representations of the manufacturer; Boston Woven Hose & Rubber Co. v. Kendall, 178 Mass. 232, 59 S. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478. In [1895] 1 Q. B. 857, and [1895] 2 Q. B. 650, it is intimated that the injured workman could have recovered against the manufacturer in the first place. In the Massachusetts case it is said that there are difficulties in holding one liable in damages when the tort of another has intervened between his act and the consequences complained of, but that in some cases there may be a recovery, citing Nashua Iron & Steel Co. v. R. Co., 62 N. H. 159.

The manufacturer or vendor of a tool machine or appliance which is not in its nature intrinsically dangerous is not ordinarily liable for defects therein to one not in privity with him; Heizer v. Mfg. Co., 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; Heindirk v. Elevator Co., 122 Ky. 675, 92 S. W. 608, 5 L. R. A. (N. S.) 1103; but a well recognized exception to this rule is where the thing is eminently dangerous to human life; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; as where circulars sent out by a bottler of aërated water indicated his knowledge that the bottles were liable to explode, and the evidence tended to show that the tests applied by him to the bottles sent out were not adequate to justify the conclusion that they would not burst under customary usage, with the knowledge of which defendants might reasonably be chargeable; Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894.

A contractor, after the completion and delivery of possession of a building and its acceptance by the owner, is not liable to a stranger to the contract for injuries resulting from defects in the construction of the building; Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220, where the court said, quoting from Whart. Neg. 439, "There must be causal connection between the negligence and the hurt, and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency; Miner v. McNamara, 81 Conn. 690, 72 Atl. 138, 21 L. R. A. (N. S.) 477; Fitzmaurice v. Fabian, 147 Pa. 199, 23 Atl. 444; Fowles v. Briggs, 116 Mich. 425, 74 N. W. 1046, 40 L. R. A. 528, 72 Am. St. Rep. 537, where a shipper of lumber negligently loaded was held not liable for injury to a brakeman, after it had become the duty of the railroad company to provide for the inspection of the car.

The manufacturer and seller of a side saddle to a husband was held to be under no duty to the wife, for whose use he knows it to have been purchased, for its defective construction; Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567, 66 L. R. A. 924. The leading case is Winterbottom v. Wright, 10 M. & W. 109, where the defendant had contracted with the postmaster-general to provide a mail coach and keep it in repair. He was held not liable to an employee of one who contracted with the postmaster-general to provide horses and coachmen for the purpose of carrying the mail.

Where the defendant sold gunpowder to a child, and the parents took charge of it and let the child have some, the sale was held too remote as a cause of injury to the child by an explosion; Carter v. Towne, 103 Mass. 507; on the other hand an injury from a railway accident, having been the direct cause of a diseased condition which resulted in paralysis, was held to be the proximate cause of the latter; Bishop v. R. Co., 48 Minn. 26, 50 N. W. 927; but where by reason of injury in a collision a passenger became disordered in mind and body and eight months after committed suicide, in a suit for damages against the railroad company it was held that his own act was the proximate cause of his death; Scheffer v. R. Co., 105 U. S. 249, 26 L. Ed. 1070. A woman's illness, caused by fright from shooting a dog in her presence, is not a result reasonably to be anticipated; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654.

If two causes operate at the same time to produce a result which might be produced by either, they are concurrent causes, and in such case each is a proximate cause, but if the two are successive and unrelated in their operation, one of them must be proximate and the other remote; Herr v. City of Lebanon, 149 Pa. 222, 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603. When there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished; Howard Fire Ins. Co. v. Transp. Co., 12 Wall. (U. S.) 194, 20 L. Ed. 378 (a marine insurance case). See the reporter's note of Mr. J. C. Carter's argument for appellant. As an illustration of concurrent causes, where lumber was negligently piled, and remained a long time in that condition, and was caused to fall by the negligence of a stranger, the negligence in piling concurring with the negligence of the stranger, was the direct and proximate cause; Pastene v. Adams, 49 Cal. 87.

The question as to what is the proximate cause of an injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine in view of the accompanying circumstances, all of which must be submitted to the jury, who must determine whether the original cause is by continuous operation linked to each successive fact; Lehigh Valley R. Co. v. McKeen, 90 Pa. 122, 35 Am. Rep. 644; Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; a finding that the burning of the plaintiff's mill and lumber was the unavoidable consequence of the burning of the defendant's elevator, is in effect a finding that there was no intervening and independent cause between the negligent conduct of defendant and injury to plaintiff; *id.* The doctrine under consideration finds its most frequent application in *fire and marine insurance;* L. R. 4 Q. B. 414; L. R. 4 C. P. 206; L. R. 5 Ex. 204; Nelson v.

Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 770; Paine v. Smith, 2 Duer (N. Y.) 301; Mathews v. Ins. Co., 11 N. Y. 9; Montgomery v. Ins. Co., 16 B. Monr. (Ky.) 427; Western Ins. Co. v. Cropper, 32 Pa. 351, 75 Am. Dec. 561; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 14 L. Ed. 452; in cases of *tort founded on negligence;* 5 C. & P. 190; L. R. 4 C. P. 279; L. R. 8 Q. B. 274; 3 M. & R. 105; Cuff v. R. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664; Metallic Compression Casting Co. v. R. Co., 109 Mass. 277, 12 Am. Rep. 689; in *measure of damages* and in *highway cases;* 15 Harv. L. Rev. 541, which see for a thorough review of the history of this doctrine; Webb's Poll. Torts 29, 566; Howe, Civ. L. 201.

See NEGLIGENCE.

CAUSA REI (Lat.). **In Civil Law.** Things accessory or appurtenant. All those things which a man would have had if the thing had not been withheld. Du Cange; 1 Mackeldey, Civ. Law 55.

CAUSARE (Lat. to cause). To be engaged in a suit; to litigate; to conduct a cause. Used in the old English and in the civil law.

CAUSATION. See CAUSA PROXIMA.

CAUSATOR (Lat.). A litigant; one who takes the part of the plaintiff or defendant in a suit.

CAUSE (Lat. *causa*). **In Civil Law.** The consideration or motive for making a contract. Dig. 2. 14. 7; Toullier, liv. 3, tit. 3, c. 2, § 4; 1 Abb. 28.

In Pleading. Reason; motive.

In a replication *de injuria,* for example, the plaintiff alleges that the defendant of his own wrong and *without the cause* by him, etc., where the word *cause* comprehends all the facts alleged as an excuse or reason for doing the act. 8 Co. 67; 11 East 451; 1 Chit. Pl. 585.

In Practice. A suit or action. Any question, civil or criminal, contested before a court of justice. Wood, Civ. Law 301. It was held to relate to civil actions only, and not to embrace *quo warranto;* 5 E. & B. 1. See Logan v. Small, 43 Mo. 254; 3 Q. B. 901.

CAUSE OF ACTION. In Practice. Matter for which an action may be brought.

A cause of action is said to accrue to any person when that person first comes to a right to bring an action. There is, however, an obvious distinction between a cause of action and a right, though a cause of action generally confers a right. Thus, statutes of limitation do not affect the cause of action, but take away the right. A cause of action implies that there is some person in existence who can bring suit and also a person who can lawfully be sued; Douglas v. Beasley, 40 Ala. 148; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588. See Parish v. Ward, 28 Barb. (N. Y.) 330; 4 Bing. 704; Graham v. Scripture, 26 How. Pr. (N. Y.) 501.

When a wrong has been committed, or a breach of duty has occurred, the cause of action has accrued, although the claimant may be ignorant of it; 3 B. & Ald. 288, 626; 5 B. & C. 259; 4 C. & P. 127. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property or persons concerned to bring an action; 5 B. & C. 360; 8 D. & R. 346; 4 Bingh. 686.

"A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong. It is essential to the existence of such facts that there should be a right to be violated and a violation thereof. Since those two elements constitute a cause of action, and to satisfy the statute [Code pleading statute as to joinder of action] they must arise out of one or more circumstances called a transaction, the latter is to be viewed as something distinct from the cause of action itself, else the latter could not arise out of the former." Emerson v. Nash, 124 Wis. 369, 102 N. W. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944.

Every judicial action has in it certain necessary elements—a primary right belonging to the plaintiff and a corresponding primary right devolving upon the defendant; the wrong done by the defendant, which consists of a breach of such primary right and duty; a remedial right in plaintiff and a remedial duty upon the defendant, and, finally, the remedy or relief itself. Of these the primary right and duty and the delict or wrong constitute the cause of action; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1. Stated in brief, a cause of action may be said to consist of a right belonging to the plaintiff and some wrongful act or omission done by defendant by which that right has been violated. Pom. Rem. § 453.

It comprises every fact necessary to the right to the relief prayed for; McAndrews v. R. Co., 162 Fed. 856, 89 C. C. A. 546. In United States v. Land Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476, it was said by Holmes, J.: "The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time; he cannot even split up his claim (1 Salk. 11; Trask v. R. Co., 2 Allen (Mass.) 331; Freem. Judge [4th Ed.] § 238, 241) and, a *fortiori,* he cannot divide the grounds of recovery;" and this language is quoted in Northern Pac. R. Co. v. Slaght, 205 U. S. 132, 27 Sup. Ct. 446, 51 L. Ed. 742.

Where a party brings an action for a part only of the entire indivisible demand and recovers judgment, he cannot subsequently sue for another part of the same demand; Baird v. U. S., 96 U. S. 432, 24 L. Ed. 703.

This rule applies to the foreclosure of a mortgage on several tracts of land; if the mortgagee forecloses as to a portion of the land, he waives his lien as to the rest; Mascarel v. Raffour, 51 Cal. 242. So of a

vendor having a lien for the purchase money on lands; if he enforces the lien as to a portion of the land, he may not bring a second suit; Day v. Preskett, 40 Ala. 624. And it was held in Codwise v. Taylor, 4 Sneed (Tenn.) 346, that if he proceeded to enforce his lien for a portion of the money which is due, he exhausts his remedy as to the rest of the land for that portion of the debt afterwards maturing.

But a defendant may not split his counterclaim, using part of it as a *defense* and then sue on the *other part*; Palm's Adm'rs v. Howard, 102 S. W. 267, 31 Ky. Law Rep. 316; *id.*; 102 S. W. 1199, 31 Ky. Law Rep. 814. A suit on a bond and a suit on its coupons are on different causes of action; Presidio County v. Bond & Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402. The words "arising out of the same cause of action" in United States admiralty rule 53 are used in a more general sense as meaning the same transaction, dispute or subject matter; United Transp. & Lighterage Co. v. Transp. Line, 185 Fed. 388, 107 C. C. A. 442, following Vianello v. The Credit Lyonnais, 15 Fed. 637.

CAUSIDICUS. A speaker or pleader. See ADVOCATE.

CAUTIO, CAUTION. In Civil Law. Security given for the performance of any thing. A bond whereby the debtor acknowledges the receipt of money and promises to pay it at a future day.

In French Law. The person entering into an obligation as a surety.

In Scotch Law. A pledge, bond, or other security for the performance of an obligation, or completion of the satisfaction to be obtained by a judicial process. Bell, Dict.

CAUTIO FIDEJUSSORIA. Security by means of bonds or pledges entered into by third parties. Du Cange.

CAUTIO PIGNORATITIA. A pledge by a deposit of goods.

CAUTIO PRO EXPENSIS. Security for costs or expenses.

This term is used among the civilians, Nov. 112, c. 2, and generally on the continent of Europe. In nearly all the countries of Europe, a foreign plaintiff, whether resident or not, is required to give caution *pro expensis:* that is, security for costs. In some countries this rule is modified, and, when such plaintiff has real estate or a commercial or manufacturing establishment within the state, he is not required to give such caution. Fœlix, *Droit Intern. Privé*, n. 106.

CAUTIO USUFRUCTUARIA. Security, which tenants for life give, to preserve the property rented free from waste and injury. Ersk. Inst. 2. 9. 59.

CAUTION JURATORY. Security given by oath. That which a suspender swears is the best he can afford in order to obtain a suspension. Ersk. Pr. 4. 3. 6.

CAUTIONARY BOND. See BOND.

CAUTIONARY JUDGMENT. Where an action in tort was pending and the plaintiff feared the defendant would dispose of his real property before judgment, a cautionary judgment was entered with a lien on the property; Seisner v. Blake, 13 Pa. Co. Ct. R. 333; so in an action on a note against a religious association, where it was alleged that the defendant was endeavoring to sell its real estate before judgment on the note; Witmer & Dundore v. Port Treverton Church, 17 Pa. Co. Ct. R. 38.

CAUTIONER. A surety; a bondsman. One who binds himself in a bond with the principal for greater security. He is still a cautioner whether the bond be to pay a debt or whether he undertake to produce the person of the party for whom he is bound. Bell, Dict.

CAVEAT (Lat. let him beware). A notice not to do an act, given to some officer, ministerial or judicial, by a party having an interest in the matter.

It is a formal caution or warning not to do the act mentioned, and is addressed frequently to prevent the admission of wills to probate, the granting letters of administration, etc. See Wms. Ex. 581.

1 Burn, Eccl. Law 19, 263; Nelson, Abr.; Dane, Abr.; Ayliffe, *Parerg.;* 3 Bla. Com. 246; 2 Chit. Pr. 502, note *b*; 3 Redf. Wills 119; 4 Brew. Pr. 3974; Poph. 133; 1 Sid. 371; In re Road, 8 N. J. L. 139. See WILL.

Filing a caveat to the probate of a will does not of itself constitute a "contest" of a will; In re McCahan's Estate, 221 Pa. 188, 70 Atl. 711.

In Patent Law. A legal notice to the patent office that the caveator claims to be the inventor of a particular device, in order to prevent the issue of a patent on it to any other person without notice to the caveator. It gives no advantage to the caveator over any rival claimant, but only secures to him an opportunity to establish his priority of invention.

It is filed in the patent office under statutory regulations; U. S. R. S. § 4902. The principal object of filing it is to obtain for an inventor time to perfect his invention without the risk of having a patent granted to another person for the same thing. The practice was abolished by act of June 10, 1910.

It is also used to prevent the issue of land patents; Harper v. Baugh, 9 Gratt. (Va.) 508; and where surveys are returned to the land office, and marked "in dispute," this entry has the effect of a *caveat* against their acceptance; Hughes v. Stevens, 43 Pa. 197.

CAVEAT EMPTOR (Lat. let the purchaser take care). In every sale of real property, a purchaser's right to relief at law or in equity on account of defects or incumbrances in or upon the property sold depends solely upon the covenants for title which he has received; 2 Sugd. Vend. 425; Co. Litt. 384 *a*,

Butl. note; 3 Swanst. 651; Hodges v. Saunders, 17 Pick. (Mass.) 475; Redwine v. Brown, 10 Ga. 311; Dorsey v. Jackman, 1 S. & R. (Pa.) 52, 7 Am. Dec. 611; unless there be fraud on the part of the vendor; 3 B. & P. 162; Abbott v. Allen, 2 Johns. Ch. (N. Y.) 519, 7 Am. Dec. 554; Miles v. Williamson, 24 Pa. 142; Etheridge v. Vernoy, 70 N. C. 713; Tuck v. Downing, 76 Ill. 71; Beale v. Seiveley, 8 Leigh (Va.) 658; Sutton v. Sutton, 7 Gratt. (Va.) 238, 56 Am. Dec. 109; Butler v. Miller, 15 B. Monr. (Ky.) 627; Allen v. Hopson, Freem. Ch. (Miss.) 276; Nance v. Elliott, 38 N. C. 408; Maney v. Porter, 3 Humphr. (Tenn.) 347; Brandt v. Foster, 5 Ia. 293; Rice v. Burnet, 39 Tex. 177; and consult Rawle, Cov. for Title, 5th ed. § 319. This doctrine applies to a sale made under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sales; Norton v. Loan & Trust Co., 35 Neb. 466, 53 N. W. 481, 18 L. R. A. 88, 37 Am. St. Rep. 441.

In sales of personal property substantially the same rule applies, and is thus stated in Story, Sales, 3d ed. § 348: The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale; Benj. Sales, § 611; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Gaylord Mfg. Co. v. Allen, 53 N. Y. 515; Porter v. Bright, 82 Pa. 441; Mixer v. Coburn, 11 Metc. (Mass.) 559, 45 Am. Dec. 230; Dean v. Morey, 33 Ia. 120; Roseman v. Canovan, 43 Cal. 110; Armstrong v. Bufford, 51 Ala. 410; Biggs & Co. v. Perkins, 75 N. C. 397. It is the settled doctrine of English and American law that the purchaser is required to notice such qualities of the goods purchased as are reasonably supposed to be within the reach of his observation and judgment. Under the civil law there was on a sale for a fair price an implied warranty of title and that the goods sold were sound, but under the common law there is a clear distinction between the responsibility of the seller as to title and as to quality; the former he warranted, the latter, if the purchaser had opportunity to examine, he did not; 2 Kent 478; Pothier, *Cont. de Vente*, No. 184; See MISREPRESENTATION; CONCEALMENT; SALES; WARRANTY.

This doctrine does not apply in an action for damages for inducing one by false representations to take an assignment of a lease executed by one who had no title to the land; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750. It was applied where the buyer of cows was a competent judge and had ample time, before buying, for inspection; Dorsey v. Watkins, 151 Fed. 340.

Consult Rawle, Covenants for Title; Benjamin, Sales; Story, Sales; 2 Kent 478; Leake, Cont. 198; 1 Story, Equity; Sugden, Vendors & P.

CAVEATOR. One who files a caveat.

CAYAGIUM. A toll or duty paid the king for landing goods at some quay or wharf. The barons of the Cinque Ports were free from this duty. Cowell.

CEAPGILD. Payment of an animal. An ancient species of forfeiture. Cowell.

CEDE. To assign; to transfer. Applied to the act by which one state or nation transfers territory to another.

CEDENT. An assignor. The assignor of a chose in action. Kames, Eq. 43.

CEDULA. In Spanish Law. A written obligation, under private signature, by which a party acknowledges himself indebted to another in a certain sum, which he promises to pay on demand or on some fixed day.

In order to obtain judgment on such an instrument, it is necessary that the party executing it should acknowledge it in open court, or that it be proved by two witnesses who saw its execution.

The citation affixed to the door of an absconding offender, requiring him to appear before the tribunal where the accusation is pending.

CELEBRATION OF MARRIAGE. The solemn act by which a man and woman take each other for husband and wife, conformably to the rules prescribed by law.

CELIBACY. The state or condition of life of a person not married.

CEMETERY. A place set apart for the burial of the dead. Cemeteries are regulated in England and many of the United States by statute.

After ground has once been devoted to this object it can be applied to secular purposes only with the sanction of the legislature; L. R. 4 Q. B. 407; Sohier v. Church, 109 Mass. 1.

An abandoned cemetery, from which all the bodies had not been removed, cannot be sold; Ritter v. Couch (W. Va.) 76 S. E. 428, 42 L. R. A. (N. S.) 1216. A cemetery association holds the fee of lands purchased for the purposes of the association. The persons to whom lots are conveyed for burial purposes take only an easement—the right to use their lots for such purposes; Buffalo City Cemetery v. Buffalo, 46 N. Y. 503; People v. Trustees of St. Patrick's Cathedral, 21 Hun (N. Y.) 184; Washb. Easem. 604; Sohier v. Church, 109 Mass. 21; Price v. Church, 4 Ohio 515; it resembles the grant of a pew in a church; Jones v. Towne, 58 N. H. 462, 42 Am. Rep. 602; Sohier v. Church, 109 Mass. 1. It is a mere (exclusive) usufructuary right, subject to the conditions of the charter and by-laws of the cemetery company; Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S. E. 769. It is in the nature of an easement; *id.*; so is the right to burial in a particular burial vault; 22 Beav.

596; capable of being created by deed only; 8 B. & C. 288; but it can be created by prescription; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96. It has been held to be a license; Buffalo City Cemetery v. Buffalo, 46 N. Y. 503; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481. A statute directing a removal of bodies, without providing compensation to the lot owners, is constitutional; Went v. Church of Williamsburgh, 80 Hun 266, 30 N. Y. Supp. 157. In the absence of a deed, or certificate equivalent thereto, they are mere licensees; 8 B. & C. 288. Non-residence does not divest an heir at law of an easement in a burial lot while the gravestones of his parents remain; Hook v. Joyce, 94 Ky. 450, 22 S. W. 651, 21 L. R. A. 96.

Their rights cease when the cemetery is vacated, as such, by authority of law; Partridge v. Church, 39 Md. 631; Craig v. Church, 88 Pa. 42, 32 Am. Rep. 417; and the owner of a lot in which no interments have been made, loses all use of it by the passage of a law making interments therein unlawful; Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377. An act declaring it unlawful to open a public street through a cemetery does not prevent one who has laid out a cemetery from dedicating a strip along the edge of it which he still owns for a public alley, it not abridging the rights of parties to whom lots had been sold; Du Bois Cemetery Co. v. Griffin, 165 Pa. 81, 30 Atl. 840.

A cemetery association has the right to limit all interments to the family of the lot owner and their relatives; Farelly v. Cemetery Ass'n, 44 La. Ann. 28, 10 South. 386.

The property of cemetery associations is usually exempt from taxation; Woodlawn Cemetery v. Inhabitants of Everett, 118 Mass. 354; People v. Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; People v. Pratt, 129 N. Y. 68, 29 N. E. 7; and this exemption has been held to include immunity from claims for municipal improvements; Olive Cemetery Co. v. City of Philadelphia, 37 Leg. Int. (Pa.) 264. See 1 Washb. R. P. 9; Washb. Easem. 515; Cooley, Tax. 203; but it is held that it would not be relieved from paying an assessment for street improvements; Lima v. Cemetery Ass'n, 42 Ohio St. 128, 51 Am. Rep. 809; Alexander v. City Council, 5 Gill (Md.) 396, 46 Am. Dec. 630; Boston Seamen's Friend Society v. Boston, 116 Mass. 181, 17 Am. Rep. 153; President, etc., of City of Paterson v. Society, 24 N. J. L. 385; People v. Cemetery Co., 86 Ill. 336, 29 Am. Rep. 32; Sheehan v. Hospital, 50 Mo. 155, 11 Am. Rep. 412.

A lot owner may maintain an action of trespass against one who wrongfully trespasses upon it; Smith v. Thompson, 55 Md. 5, 39 Am. Rep. 409; Gowen v. Bessey, 94 Me. 114, 46 Atl. 792; it has been held that he may even sue the owner of the fee for such wrongful act; Hoff v. Olson, 101 Wis. 1181, 76 N. W. 1121, 70 Am. St. Rep. 903; Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26. He may enjoin the cemetery association from preventing a member of his family from being buried in the family lot; Wright v. Cemetery Corp., 112 Ga. 884, 38 S. E. 94, 52 L. R. A. 521; or from removing the ashes of the dead; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521; or may obtain an order to compel the association to keep the grounds in good order and maintain the whole as a cemetery; Clark v. Cemetery Co., 69 N. J. Eq. 636, 61 Atl. 261.

An injunction may issue against the lot owner and the cemetery association to prevent the burial of a dog; Hertle v. Riddell, 127 Ky. 623, 106 S. W. 282, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364.

A purchaser of a lot must look to the charter and by-laws of the corporation, they being part of his contract of purchase. When the by-laws provide that "this cemetery is set apart for the burial of the white race," a negro may not be buried therein; Hertle v. Riddell, 127 Ky. 623, 106 S. W. 282, 15 L. R. A. (N. S.) 796, 128 Am. St. Rep. 364; People v. Cemetery Co., 258 Ill. 36, 101 N. E. 219. One who purchased a lot in a distinctively Roman Catholic cemetery takes it with the tacit understanding that he will not be allowed to use it for the burial of one not a member of that church; People v. Trustees of St. Patrick's Cathedral, 21 Hun (N. Y.) 184; Dwenger v. Geary, 113 Ind. 106, 14 N. E. 903. But, where a lot was sold to a colored man for burial purposes, the corporation was not allowed afterwards to change its by-laws so as to exclude him and his family from the right of burial therein; Mt. Moriah Cemetery Ass'n v. Com., 81 Pa. 235, 22 Am. Rep. 743.

Where a testator devised to trustees a lot of ground for burial of the dead of his family, without any fund for its care, and the lot fell into disuse, the Orphans' Court may decree its sale and apply the proceeds in part to buying a lot in another cemetery, removing the dead, marking the graves or caring for the lot in the future and may divide the remainder among the heirs of the testator, but with no part for an elaborate monument to the testator; Young's Estate, 224 Pa. 570, 73 Atl. 941. The residue is distributable as real estate; Young's Estate, 20 Pa. D. R. 686.

See DEAD BODY; CHARITABLE USES (as to a legacy to keep a lot in order).

CENEGILD. **In Saxon Law.** A pecuniary mulct or fine paid to the relations of a murdered person by the murderer or his relations. Spelman, Gloss.

CENNINGA. A notice given by a buyer to a seller that the things which had been sold were claimed by another, in order that he

might appear and justify the sale. Blount; Whishaw.

The exact significance of this term is somewhat doubtful. It probably denoted notice, as defined above. The finder of stray cattle was not always entitled to it; for Spelman says, "As to strange (or stray) cattle, no one shall have them but with the consent of the hundred of tithingmen; unless he have one of these, we cannot allow him any *cenninga* (I think notice)." Spelman, Gloss.

CENS. **In Canadian Law.** An annual payment or due reserved to a seigneur or lord, and imposed merely in recognition of his superiority. Guyot, Inst. c. 9.

The land or estate so held is called a *censive;* the tenant is a *censitarie.* It was originally a tribute of considerable amount, but became reduced in time to a nominal sum. It is distinct from the rentes. The *cens* varies in amount and in mode of payment. Payment is usually in kind, but may be in silver; 2 Low. C. 40.

CENSARIA. A farm, or house and land, let at a standing rent. Cowell.

CENSO. **In Spanish and Mexican Law.** An annuity; a ground rent. The right which a person acquires to receive a certain annual pension, in consideration of the delivery to another of a determined sum of money or of an immovable thing. Civil Code Mex. art. 3206; Black, Dict.; Trevino v. Fernandez, 13 Tex. 655.

CENSO RESERVATIO. **In Spanish and Mexican Law.** The right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. Trevino v. Fernandez, 13 Tex. 655.

CENSUS. An official reckoning or enumeration of the inhabitants and wealth of a country.

The census of the United States is taken every tenth year, in accordance with the constitution; and many of the states have made provisions for a similar decennial reckoning at intervening periods.

The act of July 2, 1909, provides for the 13th and subsequent censuses. The period of three years beginning July 1st next preceding the census, is designated as the decennial census period and the reports must be completed and published within that period.

Certified copies of census returns are admissible in evidence upon the question of the age of a citizen deceased since the return was made; Priddy v. Boice, 201 Mo. 309, 99 S. W. 1055, 9 L. R. A. (N. S.) 718, 119 Am. St. Rep. 762, 9 Ann. Cas. 874; but the record does not import absolute verity; Western Cherokee Indians v. U. S., 27 Ct. Cl. 1.

The courts take judicial notice of the results of a census; State v. Braskamp, 87 Ia. 588, 54 N. W. 532; People v. Williams, 64 Cal. 87, 27 Pac. 939; Guldin v. Schuylkill County, 149 Pa. 210, 24 Atl. 171; Hawkins v. Thomas, 3 Ind. App. 399, 29 N. E. 157; State v. County Court, 128 Mo. 427, 30 S. W. 103; *contra,* People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836.

CENSUS REGALIS. The royal property (or revenue).

CENT (Lat. *centum,* one hundred). A coin of the United States, weighing forty-eight grains, and composed of ninety-five per centum of copper and of tin and zinc in such proportions as shall be determined by the Director of the Mint. Act of Feb. 12, 1873, s. 13. See Rev. Stat. section 3515.

Previous to the act of congress just cited, the cent was composed wholly of copper. By the act of April 2, 1792, Stat. at Large, vol. 1, p. 248, the weight of the cent was fixed at eleven pennyweights, or 264 grains; the half cent in proportion. Afterwards, namely, on the 14th of January, 1793, it was reduced to 208 grains; the half-cent in proportion. 1 U. S. Stat. at Large, 299. In 1796 (Jan. 26), by the proclamation of President Washington, who was empowered by law to do so, act of March 3, 1795, sect. 8, 1 U. S. Stat. at Large, 440, the cent was reduced in weight to 168 grains; the half-cent in proportion. It remained at this weight until the passage of the act of Feb. 21, 1857, which provided for a weight of seventy-eight grains and an alloy of eighty-eight per centum of copper and twelve of nickel. The same act directs that the coinage of half-cents should cease. By the coinage act of Feb. 12, 1873, the weight and alloy were fixed as above stated. The first issue of cents from the national mint was in 1793, and has been continued every year since, except 1815. But in 1791 and 1792 some experimental pieces were struck, among which was the so-called Washington cent of those years.

CENTENA. See HUNDRED.

CENTESIMA (Lat. *centum*). **In Roman Law.** The hundredth part.

Usuriæ centesimæ. Twelve *per cent. per annum;* that is, a hundredth part of the principal was due each month,—the month being the unit of time for which the Romans reckoned interest. 2 Bla. Com. 462, n.

CENTRAL CRIMINAL COURT. A court in England (erected in 1834) which is the court of assize and of quarter sessions for the city of London and its liberties and the court of assize for the counties of London and Middlesex, and parts of Essex, Kent and Surrey. It has jurisdiction over all offences committed on the high seas or within the jurisdiction of the admiralty and offences committed outside its jurisdiction, sent to it by the King's Bench Division under a writ of certiorari. It consists of the lord chancellor, the judges of the High Court, the lord mayor, the aldermen, recorder, and common serjeant of the city of London, and two commissioners.

Twelve sessions at least are held every year, at the Old Bailey. The important cases are heard in a session of the court presided over by two of the judges of the High Court. The less important cases are tried by either the recorder or common serjeant. Odger, C. L. 986.

CENTUMVIRI (Lat. one hundred men). The name of a body of Roman judges.

Their exact number was one hundred and five, there being selected three from each of the thirty-five tribes comprising all the citizens of Rome. They constituted, for ordinary purposes, four tribunals; but some cases (called *centumvirales causæ*) required the judgment of all the judges. 3 Bla. Com. 515.

CENTURY. One hundred. One hundred years.

The Romans were divided into *centuries*, as the English were formerly divided into hundreds.

CEORL. A tenant at will of free condition, who held land of the thane on condition of paying rent or services.

A freeman of inferior rank occupied in husbandry. Spelman, Gloss.

Those who tilled the outlands paid rent; those who occupied or tilled the inlands, or demesne, rendered services. Under the Norman rule, this term, as did others which denoted workmen, especially those which applied to the conquered race, became a term of reproach, as is indicated by the popular signification of churl. Cowell; Spelman, Gloss. See 1 Poll. & Maitl. 8; 2 *id.* 458.

CEPI (Lat.). I have taken. It was of frequent use in the returns of sheriffs when they were made in Latin; as, for example, *cepi corpus et* B. B. (I have taken the body and discharged him on bail bond); *cepi corpus et est in custodia* (I have taken the body and it is in custody); *cepi corpus et est languidus* (I have taken the body and he is sick).

CEPIT (Lat. *capere*, to take; *cepit*, he took or has taken). A form of replevin which is brought for carrying away goods merely. Wells, Repl. § 53; Cummings v. Vorce, 3 Hill (N. Y.) 282. *Non detinet* is not the proper answer to such a charge; Davis v. Calvert, 17 Ark. 85. And see Ford v. Ford, 3 Wis. 399. Success upon a *non cepit* does not entitle the defendant to a return of the property; Douglass v. Garrett, 5 Wis. 85. A plea of *non cepit* is not inconsistent with a plea showing property in a third person; Smith v. Morgan, 8 Gill (Md.) 133.

A technical word necessary in an indictment for larceny. The charge must be that the defendant *took* the thing stolen with a felonious design. Bacon, Abr. *Indictment*, G., 1.

CEPIT ET ABDUXIT (Lat.). He took and led away. Applicable in a declaration in trespass or indictment for larceny where the defendant has taken away a living chattel.

CEPIT ET ASPORTAVIT (Lat.). He took and carried away. Applicable in a declaration in trespass or an indictment for larceny where the defendant has carried away goods without right. 4 Bla. Com. 231. See CARRYING AWAY; LARCENY.

CEPIT IN ALIO LOCO (Lat. he took in another place). A plea in replevin, by which the defendant alleges that he took the thing replevied in another place than that mentioned in the declaration; 1 Chit. Pl. 490; 2 *id.* 558; Rast. Entr. 554, 555; Morris, Repl. 141; Wells, Repl. § 707. It is the usual plea where the defendant intends to avow or justify the taking to entitle himself to a return.

CERT MONEY. The head-money given by the tenants of several manors yearly to the lords, for the purpose of keeping up certain inferior courts. Called in the ancient records *certum letæ* (leet money). Cowell.

CERTAINTY. In Contracts. Distinctness and accuracy of statement.

A thing is certain when its essence, quality, and quantity are described, distinctly set forth, etc. Dig. 12, 1. 6. It is uncertain when the description is not that of an individual object, but designates only the kind. La. Civ. Code, art. 3522, no. 8; 5 Co. 121.

If a contract be so vague in its terms that its meaning cannot be certainly collected, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty; 5 B. & C. 583; or parol evidence cannot supply the defect, then neither at law nor in equity can effect be given to it; 1 R. & M. 116. If it is impossible to ascertain any definite meaning, such agreement is necessarily void; [1892] Q. B. 478. As to uncertainty of contract see Davie v. Min. Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Van Schaick v. Van Buren, 70 Hun 575, 24 N. Y. Supp. 306.

It is a maxim of law that that is certain which may be made certain: *id certum est quod certum reddi potest;* Co. Litt. 43. For example, when a man sells the oil he has in his store at so much a gallon, although there is uncertainty as to the quantity of oil, yet, inasmuch as it can be ascertained, the maxim applies, and the sale is good. See, generally, Story, Eq. § 240; Mitf. Eq. Pl., Jeremy ed. 41.

In Pleading. Such clearness and distinctness of statement of the facts which constitute the cause of action or ground of defence that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give the judgment. 2 B. & P. 267; Co. Litt. 303; Com. Dig. *Pleader.* See Giroux Amalgamator Co. v. White, 21 Or. 435, 28 Pac. 390.

Certainty to a common intent is attained by a form of statement in which words are used in their ordinary meaning, though by argument or inference they may be made to bear a different one. See 2 H. Bla. 530; Andr. Steph. Pl. 384.

Certainty to a certain intent in general is attained when the meaning of the statute may be understood upon a fair and reasonable construction without recurrence to possible facts which do not appear; 1 Wms. Saund. 49; Spencer v. Southwick, 9 Johns. (N. Y.) 317; Fuller v. Hampton, 5 Conn. 423.

Certainty to a certain intent in particular is attained by that technical accuracy of statement which precludes all argument, inference, and presumption against the party pleading. When this certainty is required, the party must not only state the facts of his case in the most precise way, but add to them such as show that they are not to be

controverted, and, as it were, anticipate the case of his adversary; Lawes, Pl. 54.

The last description of certainty is required in estoppels; Co. Litt. 303; 2 H. Bla. 530; Dougl. 159; and in pleas which are not favored in law, as alien enemy; 8 Term 167; Russel v. Skipwith, 6 Binn (Pa.) 247. See Clarke v. Morey, 10 Johns. (N. Y.) 70. With respect to an indictment, it is laid down that "an indictment ought to be certain to every intent, and without any intendment to the contrary;" Cro. Eliz. 490; and the charge contained in it must be sufficiently explicit to support itself; for no latitude of intention can be allowed to include anything more than is expressed; 2 Burr. 1127; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819; State v. Stiles, 40 Ia. 148; State v. Philbrick, 31 Me. 401; Com. v. Terry, 114 Mass. 263; State v. Fancher, 71 Mo. 460; State v. Messenger, 58 N. H. 348.

These definitions, which have been adopted from Coke, have been subjected to severe criticism, but are of some utility in drawing attention to the different degrees of exactness and fulness of statement required in different instances. Less certainty is required where the law presumes that the knowledge of the facts is peculiarly in the opposite party; 8 East 85; 13 *id.* 112; 3 Maule & S. 14; People v. Dunlap, 13 Johns. (N. Y.) 437.

Less certainty than would otherwise be requisite is demanded in some cases, to avoid prolixity of statement; 2 Wms. Saund. 117, n. 1. See, generally, 1 Chit. Pl.

CERTIFICANDO DE RECOGNITIONE STAPULÆ. In English Law. A writ commanding the mayor of the staple to certify to the lord chancellor a statute staple taken before him where the party himself detains it, and refuses to bring in the same. There is a like writ to certify a statute merchant and in divers other cases. Reg. Orig. 148; Black, Dict.

CERTIFICATE. A writing made in any court, and properly authenticated, to give notice to another court of anything done therein.

A writing by which testimony is given that a fact has or has not taken place.

Certificates are either *required by law*, as an insolvent's certificate of discharge, an alien's certificate of naturalization, which are evidence of the facts therein mentioned; or *voluntary*, which are given of the mere motion of the party giving them, and are in no case evidence. Com. Dig. *Chancery* (T. 5); 1 Greenl. Ev. § 498; 2 Willes 549.

There were anciently various modes of trial commenced by a certificate of various parties, which took the place of a writ in a common-law action. See Com. Dig. *Certificate.*

By statute, the certificates of various officers may be made evidence, in which case the effect cannot be extended by including facts other than those authorized; 1 Maule & S. 599; U. S. v. Buford, 3 Pet. (U. S.) 12, 29, 7 L. Ed. 585; Arnold v. Tourtellot, 13 Pick. (Mass.) 172; Stewart v. Allison, 6 S. & R. (Pa.) 324, 9 Am. Dec. 433; Governor v. Bell, 7 N. C. 331; Exchange & Banking Co. of New Orleans v. Boyce, 3 Rob. (La.) 307. An officer who has made a defective certificate of a married woman's acknowledgment cannot correct the defect after the expiration of his term; Griffith v. Ventress, 91 Ala. 366, 8 South. 312, 11 L. R. A. 193, 24 Am. St. Rep. 918; nor can he contradict his own certificate by testifying to fraud and coercion on the part of the husband toward the wife; Hockman v. McClanahan, 87 Va. 33, 12 S. E. 230. A certificate of acknowledgment is a judicial act, and in the absence of fraud conclusive of material facts stated in it; Cover v. Manaway, 115 Pa. 338, 8 Atl. 393, 2 Am. St. Rep. 552; Citizen's Saving & Loan Ass'n v. Heiser, 150 Pa. 514, 24 Atl. 733; but only of facts required by statute to be included in it, and therefore not that the wife of the grantor was of full age; Williams v. Baker, 71 Pa. 476. See RETURN; NOTARY; ACKNOWLEDGMENT; STOCK.

CERTIFICATE OF ASSIZE. A writ granted for the re-examination or retrial of a matter passed by assize before justices. Fitzh. Nat. Brev. 181. It is now entirely obsolete. 3 Bla. Com. 389. Consult, also, Comyns, Dig. *Assize* (B, 27, 28).

CERTIFICATE OF COSTS. See JUDGE'S CERTIFICATE.

CERTIFICATE OF DEPOSIT. A written statement from a bank that the party named therein has deposited the amount of money specified in the certificate and that the same is held subject to his order in accordance with the terms thereof.

When payable at a future date, with interest till due, for the use of a person named or to his order, upon return of the certificate, it is a negotiable promissory note; Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97; In re Baldwin's Estate, 170 N. Y. 160, 63 N. E. 62, 58 L. R. A. 124; Poorman v. Mills, 35 Cal. 118, 95 Am. Dec. 90; Lynch v. Goldsmith, 64 Ga. 42; Beardsley v. Webber, 104 Mich. 88, 62 N. W. 173; Bank of Saginaw v. Title & Trust Co., 105 Fed. 491; Forrest v. Trust Co., 174 Fed. 345. This has been substantially followed in all the states except Pennsylvania, where it has always been held otherwise, if the certificate contains no express promise to pay; Patterson v. Poindexter, 6 W. & S. (Pa.) 227, 40 Am. Dec. 554; and this was recognized to be the law in Pennsylvania as late as 1909; Forrest v. Trust Co., 174 Fed. 345, where the court followed the rule of Miller v. Austen, 13 How. (U. S.) 218, 14 L. Ed. 119; and expressed the opinion that such certificates

were negotiable under the Negotiable Instruments Act enacted in Pennsylvania, as well as under the general commercial law.

CERTIFICATE OF REGISTRY. A certificate that a ship has been registered as the law requires. 3 Kent 149. Under the United States statutes, "every alteration in the property of a ship must be indorsed on the certificate of registry, and must itself be registered." Unless this is done, the ship or vessel loses its national privileges as an American vessel; 1 Pars. Sh. & Adm. 50. The English statutes make such a transfer void. Stat. 3 & 4 Will. IV, c. 54; 17 & 18 Vict. c. 104; Abb. Sh. (13th ed.) 925.

The registry is not a document required by the law of nations as expressive of a ship's national character; 4 Taunt. 367; and is at most only *prima facie* evidence of ownership; U. S. v. Brune, 2 Wall. Jr. 264, Fed. Cas. No. 14,677; Newb. Adm. 176, 312; Lincoln v. Wright, 23 Pa. 76, 62 Am. Dec. 316; Brooks v. Minturn, 1 Cal. 481; 33 E. L. & Eq. 204. The registry acts are to be considered as forms of local or municipal institution for purposes of public policy; 3 Kent 149.

CERTIFIED CHECK. A check which has been recognized by the proper officer as a valid appropriation of the amount of money therein specified to the person therein named, and which bears upon itself the evidence of such recognition. See CHECK.

CERTIFIED PUBLIC ACCOUNTANT. A term applied to trained accountants who examine the books of accounts of corporations and others and report upon them. See AUDITOR.

CERTIORARI. A writ issued by a superior to an inferior court of record, or other tribunal or officer, exercising a judicial function, requiring the certification and return to the former of some proceeding then pending, or the record and proceedings in some cause already terminated, in cases where the procedure is not according to the course of the common law.

The extensive use of this writ and the lack of precise judicial definition of the public bodies and proceedings to which it is applicable lend interest to the early common law definitions, which are of value since the use of the writ is still usually regulated by common law principles and precedents.

The most frequently quoted common law definitions are those of Fitzherbert and Bacon, by the first of which the writ lies in the case of records of the courts, the treasury, sheriffs, coroners, commissioners, escheators; F. N. B. 554 A. He includes among forms given one to the mayor and sheriff of London in case of indictment and attachment and one to the mayor and sheriffs of York in assize of fresh force sued out before them without writ; *id.* 554 E, 557 L. Bacon uses only the general terms, "judges or officers of inferior courts"; Bac. Abr. 162; but in an enumeration of instances entitled "to what court it lies" he puts an "inquisition taken by a sheriff . . . and the verdict and judgment thereon," which were quashed on the ground that, no notice appearing, the record did not show jurisdiction, and on objection that the writ did not, he was answered that "there can be no doubt of that if it is not prohibited by the act of Parliament"; *id.* 168, citing 4 Burr. 2244. It was said that "the substance of this (Bacon's) definition has never been departed from, except where the statute has broadened the scope of the writ"; In re Dance, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768. The English Court of Appeal says that "certiorari is a writ in aid of justice, and is the apt means of preventing the infliction or continuance of wrong from any assumption or excess of jurisdiction"; 2 L. R. (K. B.) 313; it is matter of discretion, not of right; *id.*

Blackstone refers only to it as a means of removing criminal causes from an inferior court to the King's Bench, as the supreme court of criminal jurisdiction; 4 Bla. Com. 265; or cases of Peers to the House of Lords; *id.* 321; or after summary order in a lower court which might be quashed or confirmed; *id.* 272. It might be granted at the instance of either prosecution or defendant, in the former case as matter of right, in the latter as matter of discretion; *id.* 321.

The function of the writ is to secure the correction of errors of a judicial nature in the proceedings of inferior courts or in the decisions of special tribunals, commissioners, magistrates and officers exercising judicial powers affecting the property or rights of a citizen, who act in a summary way, and not according to the course of the common law, and it also applies in many cases to the proceedings of municipal corporations. It has also been allowed when the power is ministerial but necessarily connected with judicial action; People v. Hill, 65 Barb. (N. Y.) 170; In re Nichols, 6 Abb. N. C. (N. Y.) 474. The writ is issued in two classes of cases: (1) Where the inferior court has exceeded its jurisdiction; (2) where it has proceeded illegally and there is no appeal or writ of error; White v. Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60, quoting Hyslop v. Finch, 99 Ill. 171.

"Official acts, executive, legislative, administrative or ministerial in their nature or character, were never subject to review by *certiorari*. The writ could be issued only for the purpose of reviewing some judicial act;" People v. Brady, 166 N. Y. 44, 47, 59 N. E. 701; St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. —. In some states the writ has been abolished by statute so far as the common law name is concerned, but the remedy is preserved under the new statutory name of "writ of review"; but this term and the old one mean precisely the same remedy, except so far as it may be modified by statute; People v. County Judge, 40 Cal. 479; Sutherlin v. Roberts, 4 Or. 388; Southwestern Telegraph & Telephone Co. v. Robinson, 48 Fed. 771, 1 C. C. A. 91. So where, by statute, appellate proceedings are to be taken by appeal in all cases theretofore covered by error, appeal or certiorari, but the right of review is not changed in extent, it was held that the appeal was in effect a common law *certiorari*, and the right to issue a *certiorari* remained the same as before; Rand v. King, 134 Pa. 641, 19 Atl. 806; so an appeal in a habeas corpus case is equivalent to a certiorari and brings up only the record; Com. v. Superintendent of Philadelphia County Prison, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939.

The writ lies in most of the states to remove from the lower courts proceedings which are created and regulated by statute merely, for the purpose of revision; Com. v. West Boston Bridge, 13 Pick. (Mass.) 195; Bath Bridge & Turnpike Co. v. Magoun, 8 Greenl. (Me.) 293; Bob v. State, 2 Yerg. (Tenn.) 173; Williamson v. Carnan, 1 G. & J. (Md.) 196; Adams v. Newfane, 8 Vt. 271; People v. Lawrence, 54 Barb. (N. Y.) 589; John v. State, 1 Ala. 95; People v. Supervisors, 8 Cal. 58; In re Robinson's Estate, 6 Mich. 137; Board of Com'rs of Hillsboro v.

Smith, 110 N. C. 417, 14 S. E. 972; Miller v. Trustees, 88 Ill. 27; and to complete the proceedings when the lower court refuses to do so, upon erroneous grounds; Anonymous, 2 N. C. 302; Auditor v. Woodruff, 2 Ark. 73, 33 Am. Dec. 368; and to correct errors in law; McAllilley v. Horton, 75 Ala. 491; Rawson v. McElvaine, 49 Mich. 194, 13 N. W. 513; Lapan v. Cumberland County Com'rs, 65 Me. 160; Conover v. Davis, 48 N. J. L. 112, 2 Atl. 667. In England; 13 E. L. & Eq. 129; 9 L. R. Q. B. 350; and in some states; State v. Stone, 3 H. & McH. (Md.) 115; State v. Hunt, 1 N. J. L. 287; People v. Vermilyea, 7 Cow. (N. Y.) 141; Com. v. McGinnis, 2 Whart. (Pa.) 117; State v. Washington, 6 N. C. 100; John v. State, 1 Ala. 95; Kenney v. State, 5 R. I. 385; the writ may also be issued to remove criminal causes to a superior court; Har. Certiorari 8. But see Winn v. State, 10 Ohio 345. It also lies where a probate court proceeds without jurisdiction in admitting a claim against an estate; Durham v. Field, 30 Ill. App. 121; or where the court has jurisdiction but makes an order exceeding its power; State v. County Court, 45 Mo. App. 387. It is also given by statute to review the acts and powers of official boards and officers; Haven v. County Com'rs, 155 Mass. 467, 29 N. E. 1083; State v. City of Ashland, 71 Wis. 502, 37 N. W. 809.

The writ has been used to review the proceedings of courts-martial; Rathbun v. Sawyer, 15 Wend. (N. Y.) 451; of canal appraisers charged with acting without notice; Fonda v. Canal Appraisers, 1 Wend. (N. Y.) 288; of commissioners of appeal in cases of taxation; State v. Falkinburge, 15 N. J. L. 320; of commissioners of highways; Lawton v. Com'rs of Highways, 2 Cal. (N. Y.) 179; or where a void order was made by them; Fitch v. Com'rs of Highways, 22 Wend. (N. Y.) 132; a municipal assessment for a local improvement departing essentially from the statutory method; People v. Rochester, 21 Barb. (N. Y.) 656; common council of a city in laying out a new street; State v. City of Fond du Lac, 42 Wis. 287. It has also been issued upon the refusal to grant a writ of habeas corpus on the ground of want of jurisdiction; People v. Mayer, 16 Barb. (N. Y.) 362; and upon the discharge of a complaint under the act abolishing imprisonment for debt on the ground of want of proof; Learned v. Duval, 3 Johns. Cas. (N. Y.) 141. It may issue at the suit of a taxpayer and voter to test the legality of an act uniting highway districts by the trustees of the township; Dunham v. Fox, 100 Ia. 131, 69 N. W. 436.

The supreme court may issue writs of certiorari in all proper cases, and will do so when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in furtherance of justice. In re Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782.

To warrant a *certiorari* the act must be plainly judicial and not executive or legislative; People v. N. Y., 2 Hill (N. Y.) 14; accordingly it was refused in case of a corporate resolution appropriating land for a public square; *id;* and of an order of a board of health adjudging a question of nuisance; 15 Wend. 255; 21 Barb. 656.

It is used also as an auxiliary process to obtain a full return to other process, as when, for example, the record of an inferior court is brought before a superior court by appeal, writ of error, or other lawful mode, and there is a manifest defect or suggestion of diminution, to obtain a perfect transcript and all papers; Stewart v. Ingle, 9 Wheat. (U. S.) 526, 6 L. Ed. 151; Colden v. Knickerbacker, 2 Cow. (N. Y.) 38; Stewart v. Court of County Com'rs, 82 Ala. 209, 2 South. 270; Smick v. Opdycke, 12 N. J. L. 85; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; State v. Reid, 18 N. C. 382, 28 Am. Dec. 572; Thatcher v. Miller, 11 Mass. 414; Scott v. Hall, 2 Munf. (Va.) 229; Franklin Academy v. Hall, 16 B. Monr. (Ky.) 472; Carter v. Douglass, 2 Ala. 499; Clements v. Hahn, 1 Col. 490. It does not issue as a matter of right on mere suggestion of defects in the record, but the application must be supported by proof; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329.

The office of the writs of certiorari and mandamus is often much the same. It is the practice of the U. S. supreme court, upon a suggestion of any defect in the transcript of the record sent up to that court upon a writ of error, to allow a special certiorari, requiring the court below to certify more fully; Fowler v. Lindsey, 3 Dall. (U. S.) 411, 1 L. Ed. 658; Barton v. Petit, 7 Cra. (U. S.) 288, 3 L. Ed. 347; Stimpson v. R. Co., 3 How. (U. S.) 553, 11 L. Ed. 722; U. S. v. Adams, 9 Wall. (U. S.) 661, 19 L. Ed. 808. Relief may also be had in the U. S. Circuit Court of Appeals on allegation of diminution in the record sent up from the circuit court, as provided by rule 18; Blanks v. Klein, 49 Fed. 1, 1 C. C. A. 254. The same result might also be effected by a writ of mandamus. The two remedies are, when addressed to an inferior court of record, from a superior court, requiring the return of a record, much the same. But where diminution of the record is suggested in the inferior court, and the purpose is to obtain a more perfect *record,* and not merely a more perfect *copy* or *transcript,* it is believed that the writ of mandamus is the appropriate remedy.

In many of the states, the writ produces the same result in proceedings given by statute, such as the proceedings for obtaining damages under the mill acts, highway acts, pauper laws, etc., as the writ of error does when the proceedings are according to the course of the common law. Where the lower court is to be required to proceed in a cause, a writ of procedendo or mandamus is the proper remedy.

The writ is generally said to issue only after final judgment of the inferior court or tribunal whose proceedings are to be reviewed; Patterson v. United States, 2 Wheat. (U. S.) 221, 4 L. Ed. 224; People v. Railroad Com'rs, 160 N. Y. 202, 54 N. E. 697; Lynde v. Noble, 20 Johns. (N. Y.) 80,

Wallace v. Jameson, 179 Pa. 91, 36 Atl. 145; Case of Road from Bough Street, 2 S. & R. 419; Vaughn v. Marshall, 1 Houst. (Del.) 348; Stewart v. State, 98 Ga. 202, 25 S. E. 424; Meads v. Copper Mines, 125 Mich. 456, 84 N. W. 615; People v. Lindsay, 1 Idaho, 401; State v. Valliant, 123 Mo. 524, 27 S. W. 379, 28 S. W. 586; State v. Gill, 137 Mo. 627, 39 S. W. 81; Glennon v. Burton, 144 Ill. 551, 33 N. E. 23; Gauld v. Board of Sup'rs, 122 Cal. 18, 54 Pac. 272; Culver v. Travis, 108 Mich. 640, 66 N. W. 575; where the reason for the rule is thus stated: "The writ of certiorari is a writ of review. Its office is to bring up for review *final* determinations and adjudications of inferior tribunals, boards or officers exercising judicial functions, where there is no appeal, nor any plain, speedy and adequate remedy. The writ is necessarily founded on a final determination. Were the rule otherwise a writ might issue at any step in the proceedings of the inferior tribunal, although such tribunal might, were the point presented, decide that it had no jurisdiction in the matter submitted to it. This would be the exercise of original jurisdiction by the court issuing the writ and not a review of the determination of the inferior tribunal. The matter complained of would be, not that the tribunal had exceeded, but that it was about to exceed, its jurisdiction." As the writ relates back to the first day of the term, it will not issue to review a case not pending at that time; Womer v. R. Co., 37 W. Va. 287, 16 S. E. 488.

The English rule is different in civil cases, and the writ is usually issued before the final determination; 7 D. & R. 769; 13 L. J. Q. B. 149; 8 Ont. L. J. 277; 2 Ont. L. J. N. S. 277; 3 U. C. Q. B. O. S. 149. In one state at least it is held that the writ may issue, in the case of municipal corporations, before final decision; State v. City Council of Camden, 47 N. J. L. 64, 54 Am. Rep. 117.

Under the act of March 2, 1833, providing for the removal by *certiorari* of suits in state courts against revenue officers, the writ from the United States circuit court to a state court will stay all proceedings; State v. Circuit Judge, 33 Wis. 127. And under the removal act of 1875, if the state court decides to retain jurisdiction in a removable case, a *certiorari* may be resorted to to obtain a transfer of the record; U. S. R. S. 1 Supp. 84.

It does not lie to enable the superior court to revise a decision upon matters of fact; People v. Board of Fire Com'rs, 100 N. Y. 82, 2 N. E. 613; Appeal of Yeager, 34 Pa. 176; Beach v. Mullin, 34 N. J. L. 343; Farmington River Water Power Co. v. County Com'rs, 112 Mass. 206; Lapan v. Cumberland County Com'rs, 65 Me. 160; Low v. R. Co., 18 Ill. 324; Frederick v. Clark, 5 Wis. 191; Central Pac. R. Co. v. Placer County, 46 Cal. 667; Farmers' & Merchants' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312; North & South St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478; Herbert v. Curtis, 55 N. J. L. 87, 25 Atl. 386; State v. Whitford, 54 Wis. 150, 11 N. W. 424; Shearous v. Morgan, 111 Ga. 858, 36 S. E. 927; State v. Judge, 41 La. Ann. 179, 6 South. 18; nor matters resting in the discretion of the judge of the inferior court; Inhabitants of New Marlborough v. County Com'rs, 9 Metc. (Mass.) 423; Roston v. Morris, 25 N. J. L. 173; Brown v. Board of Sup'rs, 124 Cal. 274, 57 Pac. 82; State v. Judge, 43 La. Ann. 825, 9 South. 639; People v. Board of Fire Com'rs, 82 N. Y. 358; Hall v. Oyster, 168 Pa. 399, 31 Atl. 1007; Sunberg v. District Court of Linn County, 61 Ia. 597, 16 N. W. 724; Huffaker v. Boring, 8 Ala. 87; Matter of Saline County Subscription, 45 Mo. 52, 100 Am. Dec. 337; 3 El. & Bl. 529; 8 Ont. 651, 12 Can. Sup. Ct. 111; 29 Nova Scotia 521; unless by special statute; Starr v. Trustees of Village of Rochester, 6 Wend. (N. Y.) 564; In re Hayward, 10 Pick. (Mass.) 358; Independence v. Pompton, 9 N. J. L. 209; or where palpable injustice has been done; Duggen v. McGruder, Walk. (Miss.) 112, 12 Am. Dec. 527; Fonda v. Canal Appraisers, 1 Wend. (N. Y.) 288; Com. v. Coombs, 2 Mass. 489; State v. Smith, 101 Mo. 174, 14 S. W. 108; Bostick v. Palmer, 79 Ga. 680, 4 S. E. 319; Lapan v. County Com'rs, 65 Me. 160; Ex parte Schmidt, 24 S. C. 363.

It does not lie where the errors are formal merely, and not substantial; 8 Ad. & E. 413; Patrick v. McKernon, 5 How. (Miss.) 578; Furbush v. Cunningham, 56 Me. 184; Hermann v. Butler, 59 Ill. 225; nor where substantial justice has been done though the proceedings were informal; Criswell v. Richter, 13 Tex. 18; Knapp v. Heller, 32 Wis. 467; City of Charlestown v. Middlesex County Com'rs, 109 Mass. 270; Hyslop v. Finch, 99 Ill. 171; State v. Kemen, 61 Wis. 494, 21 N. W. 530; nor where the proceedings are not void on their face and show no arbitrary action on the part of the trial judge; Williams v. District Court, 45 La. Ann. 1295, 14 South. 57.

Under the statute authorizing all writs not specifically provided for the federal courts have power to issue writs of certiorari in proper cases; American Construction Co. v. R. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589.

Certiorari will not lie as a substitute for an appeal from an interlocutory order of a superior court; Guilford County v. Georgia Co., 109 N. C. 310, 13 S. E. 861; nor to review an appealable order; In re McConnell, 74 Cal. 217, 15 Atl. 746. The evidence cannot be reviewed upon certiorari; Com. v.

Gillespie, 146 Pa. 546, 23 Atl. 393; nor rulings on the admission of evidence; Lord v. Wirt, 96 Mich. 415, 56 N. W. 7.

The court may deal only with questions of law and cannot say what the court should have done if the facts had been different; Beach v. Mullin, 34 N. J. L. 343; Inhabitants of Plymouth v. Plymouth County Com'rs, 16 Gray (Mass.) 341; nor can it determine questions of fact depending on evidence arising outside of the record; Hayford v. City of Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A. (N. S.) 940; nor are such facts to be considered in determining the propriety of the writ; U. S. Standard Voting Machine Co. v. Hobson, 132 Ia. 38, 109 N. W. 458, 7 L. R. A. (N. S.) 512, 119 Am. St. Rep. 539, 10 Ann. Cas. 972. The evidence forms no part of the record, and in the absence of anything in the record to establish the contrary, it will be presumed that the evidence was sufficient to sustain the finding; De Rochebrune v. Southeimer, 12 Minn. 78 (Gil. 42); People v. Dawell, 25 Mich. 251, 12 Am. Rep. 260; whatever the evidence tended to show is treated as proved; *id.*

Certiorari may issue in criminal cases in aid of *habeas corpus* to review proceedings before a commissioner on commitments; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151 (but not to review his decision on the facts; In re Stupp, 12 Blatchf. 501, Fed. Cas. No. 13,563); or to the circuit court to ascertain from its proceedings whether that court has exceeded its authority; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872 (citing the prior cases); Ex parte Virginia, 100 U. S. 343; 25 L. Ed. 676; State v. Johnson, 103 Wis. 625, 79 N. W. 1081, 51 L. R. A. 33.

A court of exclusively appellate jurisdiction cannot issue a certiorari to pass over an intermediate appellate court; Carr v. Tweedy, Hempst. 287, Fed. Cas. No. 2,440a. The common law writ does not lie with respect to proceedings subsequent to appeal or writ of error; U. S. v. Young, 94 U. S. 258, 24 L. Ed. 153.

It is granted or refused in the discretion of the superior court; Lees v. Childs, 17 Mass. 352; Huse v. Grimes, 2 N. H. 210; People v. McCarthy, 102 N. Y. 642, 8 N. E. 85; State v. Blauvett, 34 N. J. L. 261; Freeman v. Oldham's Lessee, 4 T. B. Monr. (Ky.) 420; Flourney v. Payne, 28 Ark. 87; West River Bridge Co. v. Dix, 16 Vt. 446; Livingston v. Livingston, 24 Ga. 379; L. R. 5 Q. B. 466; Welch v. County Court, 29 W. Va. 63, 1 S. E. 337; Ex parte Hitz, 111 U. S. 766, 4 Sup. Ct. 698, 28 L. Ed. 592; Board of Supervisors v. Magoon, 109 Ill. 142; and the application must disclose a proper case upon its face; 8 Ad. & E. 43; Lees v. Childs, 17 Mass. 351; Cullen v. Lowery, 2 Harr. (Del.) 459; Willis v. Dun, Wright (Ohio) 130; Hartsfield v. Jones, 49 N. C. 309; Redmond v. Anderson, 18 Ark. 449; Russell v. Pickering, 17 Ill. 31; Mays v. Lewis, 4 Tex. 1; McMurray v. Milan, 2 Swan (Tenn.) 176.

As stated *supra*, the doctrine that *certiorari* will not lie where there is an appeal is characterized as "the rule" to that effect. That this is too broad a generalization will readily appear from an examination of the numerous cases, which are collected in a very full note on "Exceptions to the Rule" in 50 L. R. A. 787. The note is appended to two cases in the same court, each decided by a divided court, which will illustrate the difficulty of the question. In one it was stated as the general rule that *certiorari* will not lie to correct mere errors of a tribunal having jurisdiction, in the rightful exercise of that jurisdiction, where there is an appeal by means of which those errors may be corrected; State v. Shelton, 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798. In the other case it was said that that statement of the law was too broad, and that, to bar the writ, the remedy by appeal must be adequate to meet the necessities of the case and must be equally beneficial, speedy and sufficient; State v. Guinotte, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787. It is doubtful if a general rule can be formulated to apply to all cases, and, with reference to any given state of the facts, the authorities must be critically examined. It may however be said that it should not issue where there is another adequate remedy; People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522; In re Randall, 11 Allen (Mass.) 472; State v. Probate Court, 72 Minn. 434, 75 N. W. 700; Oyster v. Bank, 107 Ia. 39, 77 N. W. 523; Ex parte Howard-Harrison Iron Co., 130 Ala. 185, 30 South. 400; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589; Watson v. City of Plainfield, 60 N. J. L. 260, 37 Atl. 615; Kern's Adm'r v. Foster, 16 Ohio, 274; 9 Ad. & El. 540; 33 N. Brunsw. 80; 20 Nova Scotia 283; 17 Quebec Super. Ct. 383. And though as stated by Bacon (*supra*) it may issue out of chancery, it cannot be used for the review of decrees in equity alleged to be void for want of power; In re Tampa Suburban R. Co., 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589; In re Haney, 14 Wis. 417; Gilliland v. Sellers' Adm'rs, 2 Ohio St. 223; "nor can *certiorari* be made to operate as an injunction, and restrain a tribunal from acting beyond its jurisdiction, however well grounded may be the apprehension in that respect;" Glennon v. Burton, 144 Ill. 551, 33 N. E. 23.

The common law remedy has been successfully invoked where statutes provided that the decision of the inferior tribunal should be final and conclusive, upon the theory that it is an inherent part of the judicial power of the superior court and cannot be taken away without express negative words; Murfree v. Leeper, 1 Overt (Tenn.); Ritter v. Kunkle, 39 N. J. L. 259; and even where the statute

directed that no *certiorari* should issue to remove proceedings had in pursuance of it, the writ may be used to ascertain whether the proceedings have been invoked in pretence of the statutory authority and are therefore not in pursuance, but in derogation, of it; Ackerman v. Taylor, 8 N. J. L. 305; *id.*, 9 N. J. L. 65. Possibly the New York Court of Appeals may have come near to the formulation of a general rule in saying that a common law *certiorari* can only be availed of to review when there is no other adequate remedy; in other cases it will be confined to its original and appropriate office, to enable a court of review to determine whether the inferior tribunal proceeded within its jurisdiction; People v. Betts, 55 N. Y. 600, which is cited in Harris v. Barber, 129 U. S. 371, 9 Sup. Ct. 314, 32 L. Ed. 697, and the language of which is quoted in People v. Feitner, 51 App. Div. 196, 64 N. Y. Supp. 675. The last case was a *certiorari* to the secretary of state for granting a charter for a name claimed to be already in use. The court quashed the writ, saying that the existing company had a remedy in equity, but if the charter had been refused there might be no other remedy.

The judgment is either that the proceedings below be quashed or that they be affirmed; Har. Certiorari 38, 49; Marshall v. Hill, 8 Yerg. (Tenn.) 102; Kincaid v. Smith, *id.* 218; Com. v. Turnpike Corporation, 5 Mass. 423; Hall v. State, 12 G. & J. (Md.) 329; Weigand v. Malatesta, 6 Coldw. (Tenn.) 362; see McAllilley v. Horton, 75 Ala. 491; Hamilton v. Harwood, 113 Ill. 154; Taylor v. Gay, 20 Ga. 77; Bandlow v. Thieme, 53 Wis. 57, 9 N. W. 920; either wholly or in part; Com. v. Turnpike Corp. 5 Mass. 420; Nichol v. Patterson, 4 Ohio 200; Bronson v. Mann, 13 Johns. (N. Y.) 461. See, also, Beck v. Knabb, 1 Overt. (Tenn.) 58; Henry v. Heritage, 3 N. C. 38. The costs are discretionary with the court; Myers v. Town of Pownal, 16 Vt. 426; Chance v. Haley, 6 Ind. 367; but at common law neither party recovers costs; Low v. Rogers, 8 Johns. (N. Y.) 321; Com. v. Ellis, 11 Mass. 465; State v. Leavitt, 3 N. H. 44; Nichol v. Patterson, 4 Ohio 200; and the matter is regulated by statute in some states; Atkinson v. Crossland, 4 Watts (Pa.) 451; Hinchman v. Cook, 20 N. J. L. 271. See MANDAMUS; PROCEDENDO. Consult 4 Bla. Com. 262, 265.

By the act of congress of March 3, 1891, establishing circuit courts of appeal, § 6, it is provided that in any case in which the decision of that court is final a certiorari may issue from the supreme court to bring up the record to that court for "its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." 1 U. S. Comp. Stat. 550. At the first term of the supreme court after the passage of this act, upon an application for a *certiorari*, it was said that "it is evident that it is solely questions of gravity and importance" that should be certified up to the supreme court either by the action of the circuit courts of appeals or by requirement of the supreme court upon *certiorari;* In re Lau Ow Bew, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868, where although it was said the jurisdiction should be exercised sparingly and with great caution, the writ was issued to determine the effect of the Chinese exclusion acts. The rule thus early laid down was reiterated in several subsequent cases illustrating what the court considered cases of sufficient "gravity and importance."

"While the power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only where the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of the nation in its internal or external relations demands such exercise." Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095.

It was held that a case which could otherwise be finally determined by that court may, under the statute, be removed from the circuit court of appeals on *certiorari* at any time during its pendency there; but where there is merely private interest involved it will not be done where there has been no final judgment; *id.*, citing to this express point Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. 281, 36 L. Ed. 1002, which is sometimes incorrectly referred to as holding that the Supreme Court has no power to remove by *certiorari* before final judgment. While the supreme court may require a case to be certified up at any stage, particularly when the question of jurisdiction is involved, it should not be done to review an interlocutory decree "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486. The writ may issue after the mandate has gone down from the circuit court of appeals; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. It may issue to an inferior state court when the highest state court has refused jurisdiction; Western Union Telegraph Co. v. Hughes, 203 U. S. 505, 27 Sup. Ct. 162, 51 L. Ed. 294.

The decisions upon applications for this writ indicate the construction which it has placed upon the phrase used by it in the first case, "questions of gravity and importance." These words are evidently applied only to

cases of public and not private interest and importance. For example, the writ was issued to settle the construction of a treaty and immigration laws; The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; to review a case of habeas corpus finally determined by the circuit court of appeals; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; to settle questions of jurisdiction of the bankruptcy court; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413; to secure a uniform construction of the bankruptcy act; Holden v. Stratton, 191 U. S. 115, 24 Sup. Ct. 45, 48 L. Ed. 116; or of a tariff act; The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937; to determine whether a judge who made an order was disqualified to sit in the circuit court of appeals on the review of it; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; to prevent conflict of decision between federal and state courts within the same territorial jurisdiction; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; to avoid a possible question of jurisdiction upon a writ of error; Montana Min. Co. v. Min. Co., 204 U. S. 204, 27 Sup. Ct. 254, 51 L. Ed. 444; and when there have been conflicting decisions of different circuit courts of appeals; Expanded Metal Co. v. Bradford, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034.

On the other hand the writ has been refused where the court of appeals has reversed proceedings putting a railroad company in the hands of a receiver; American Const. Co. v. Ry. Co., 148 U. S. 372, 13 Sup. Ct. 158, 37 L. Ed. 486; where questions of the state law of *res judicata* and of master and servant were considered not of sufficient "gravity and general importance"; In re Woods, 143 U. S. 202, 12 Sup. Ct. 417, 36 L. Ed. 125; in a case of where the circuit court of appeals was found to have no jurisdiction, and had rendered no decision except to certify that question; Good Shot v. U. S., 179 U. S. 87, 21 Sup. Ct. 33, 45 L. Ed. 101; or where the issue is a mere technicality and the essential rights of the parties are not involved; Smith v. Vulcan Iron Works, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810.

While under section 6 of the Circuit Court of Appeals Act *certiorari* can only be issued when a writ of error cannot lie, it will not be issued merely because the writ of error will not lie, but only where the case is one of gravity, or where there is conflict between decisions of state and federal courts or between federal courts of different circuits, or something affecting the relations of this nation with foreign nations or of general interest to the public; Fields v. U. S., 205 U. S. 292, 27 Sup. Ct. 543, 51 L. Ed. 807.

A certiorari may be allowed when a case has been improperly brought up on a writ of error and the record filed in the latter may be treated as a proper return; Security Trust Co. v. Dent, 187 U. S. 237, 23 Sup. Ct. 61, 47 L. Ed. 158. When a case is removed to it under the act of 1891, the entire record is before the supreme court, which has power to decide the case; Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 30 Sup. Ct. 505, 54 L. Ed. 757.

See UNITED STATES COURTS; BILL OF CERTIORARI.

CERTIORARI FACIAS. Cause to be certified. The command of a writ of certiorari.

CERVISARII (*cervisia*, ale). Among the Saxons, tenants who were bound to supply drink for their lord's table. Cowell.

CERVISIA. Ale. *Cervisarius.* An ale-brewer; an ale-house keeper. Cowell.

CESIONARIO. In Spanish Law. An assignee. White, New Recop. 304.

CESSAVIT PER BIENNIUM (Lat. he has ceased for two years). An obsolete writ, which could formerly have been sued out when the defendant had for two years *ceased* or neglected to perform such service or to pay such rent as he was bound to do by his tenure, and had not upon his lands sufficient goods or chattels to be distrained. Fitzh. N. B. 208. It also lay where a religious house held lands on condition of performing certain spiritual services which it failed to do. 3 Bla. Com. 232.

CESSET EXECUTIO (Lat. let execution stay). The formal order for a stay of execution, when proceedings in court were conducted in Latin. See EXECUTION.

CESSET PROCESSUS (Lat. let process stay). The formal order for a stay of process or proceedings, when the proceedings in court were conducted in Latin. See 2 Dougl. 627; 11 Mod. 231.

CESSIO BONORUM (Lat. a transfer of property). In Civil Law. An assignment of his property by a debtor for the benefit of his creditors.

Such an assignment discharged the debtor to the extent of the property ceded only, but exempted him from imprisonment. Dig. 2. 4. 25; 48. 19. 1; Nov. 4. 3. See La. Civ. Code 2166; Golis v. His Creditors, 2 Mart. N. S. (La.) 108; Richards v. His Creditors, 5 Mart. N. S. (La.) 299; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; 1 Kent 422.

CESSION (Lat. *cessio*, a transfer). In Civil Law. An assignment. The act by which a party transfers property to another. See CESSIO BONORUM.

In Ecclesiastical Law. A surrender. When an ecclesiastic is created bishop, or when a parson takes another benefice, without dis-

pensation, the first benefice becomes void by a legal cession or surrender. Cowell.

In Government Law. The transfer of land by one government to another.

France ceded Louisiana to the United States, by the treaty of Paris, of April 30, 1803; Spain made a cession of East and West Florida, by the treaty of Feb. 22, 1819. Cessions have been severally made to the general government of a part of their territory by New York, Virginia, Massachusetts, Connecticut, South Carolina, North Carolina, and Georgia. See Gordon, Dig. art. 2236–2250.

It is the usage of civilized nations, when territory is ceded, to stipulate for the property rights of its inhabitants; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215.

In case of a cession to the United States, the laws of the ceded country inconsistent with the constitution and laws of the United States, so far as applicable, would cease to be of obligatory force; but otherwise the municipal laws of the foreign country continue; Municipality of Ponce v. Church, 210 U. S. 310, 28 Sup. Ct. 737, 52 L. Ed. 1068.

Annexation is an act of state, and any obligation assumed under a treaty to that effect, either to the ceding sovereign or to individuals, is not one which municipal courts are authorized to enforce; [1899] A. C. 572.

CESTUI QUE TRUST. He for whose benefit another person is seised of lands or tenements or is possessed of personal property.

He who has a right to a beneficial interest in and out of an estate the legal title to which is vested in another. 2 Wash. R. P. *163.

He may be said to be the equitable owner; Will. R. P. 188; 1 Spence, Eq. Jur. 497; Inhabitants of Orleans v. Inhabitants of Chatham, 2 Pick. (Mass.) 29; is entitled, therefore, to the rents and profits; may transfer his interest, subject to the provisions of the instrument creating the trust; 1 Spence, Eq. Jur. 507; 2 Washb. R. P. 195; and may ordinarily mortgage his interest; Perrine v. Newell, 49 N. J. Eq. 57, 23 Atl. 492; may defend his title in the name of his trustee; 1 Cruise, Dig. tit. 12, c. 4, § 4; but has no legal title to the estate, as he is merely a tenant at will if he occupies the estate; 2 Ves. Sen. Ch. 472; 16 C. B. 652; 1 Washb. R. P. 88; and may be removed from possession in an action of ejectment by his own trustee; Lew. Trust. 8th ed. *677; Hill, Trust. 274; Mordecai v. Parker, 14 N. C. 425; Russell v. Lewis, 2 Pick. (Mass.) 508; he cannot sue for damages to trust lands unless the trustee refuses to protect the rights of the beneficiary; Lindheim v. R. Co., 68 Hun 122, 22 N. Y. Supp. 685. Where the trustee neglects to defend the legal title to trust property, the beneficiary may sue to remove a cloud on the title; President, etc., of Bowdoin College v. Merritt, 54 Fed. 55. See TRUST; BENEFICIARY; SPENDTHRIFT TRUST.

CESTUI QUE USE. He for whose benefit land is held by another person.

He who has a right to take the profits of lands of which another has the legal title and possession, together with the duty of defending the same and to direct the making estates thereof; Tudor, Lead. Cas. 252; 2 Bla. Com. 330. See 2 Washb. R. P. 95; USE.

CESTUI QUE VIE. He whose life is the measure of the duration of an estate. 1 Washb. R. P. 88.

CHAFEWAX. An officer in chancery who fits the wax for sealing to the writs, commissions, and other instruments there made to be issued out. He is probably so called because he warms (*chaufe*) the wax.

CHAFFERS. Anciently signified wares and merchandise; hence the word *chaffering*, which is yet used for buying and selling, or beating down the price of an article. The word is used in stat. 3 Edw. III. c. 4.

CHALDRON. A measure of capacity, equal to fifty-eight and two-thirds cubic feet, nearly. Cowell.

CHALLENGE. A request by one person to another to fight a duel. No particular form of words is necessary to constitute a challenge, and it may be oral or written; State v. Perkins, 6 Blackf. (Ind.) 20; Ivey v. State, 12 Ala. 276; State v. Strickland, 2 Nott & McC. (S. C.) 181; Com. v. Pope, 3 Dana (Ky.) 418. Sending a challenge is a high offence at common law, and indictable as tending to a breach of the peace; Hawk. Pl. Cr. b. 1, c. 3, § 3; Com. v. Tibbs, 1 Dana (Ky.) 524; State v. Gibbons, 4 N. J. L. 40; State v. Dupont, 2 McCord (S. C.) 334; State v. Taylor, 1 Const. (S. C.) 107; State v. Farrier, 8 N. C. 487; State v. Perkins, 6 Blackf. (Ind.) 20; Com. v. Lambert, 9 Leigh (Va.) 603. He who carries a challenge is also punishable by indictment; Clark, Cr. L. 340; U. S. v. Shackelford, 3 Cra. C. C. 178, Fed. Cas. No. 16,260. In most of the states, this barbarous practice is punishable by special laws. 2 Bish. Cr. Law, § 312. And in a large number of them by their constitutions the giving, accepting, or knowingly carrying a challenge, deprives the party of the right to hold any office of honor or profit in the commonwealth.

In most of the civilized nations, challenging another to fight is a crime, as calculated to destroy the public peace; and those who partake in the offence are generally liable to punishment. In Spain, it is punished by loss of offices, rents, and honors received from the king, and the delinquent is incapable to hold them in future; Aso & M. Inst. b. 2, t.

19, c. 2, § 6. See, generally, Joy, Chall.; 1 Russ. Cr. 275; 2 Bish. Cr. Law, chap. xv.; Com. v. Hart, 6 J. J. Marsh. (Ky.) 120; State v. Taylor, 1 Const. (S. C.) 107; In re Leigh, 1 Munf. (Va.) 468.

In Practice. An exception to the jurors who have been arrayed to pass upon a cause on its trial. See 2 Poll. & Maitl. 619, 646.

An exception to those who have been returned as jurors. Co. Litt. 155 *b*.

The most satisfactory derivation of the word is that adopted by Webster and Crabb, from *call*, challenge implying a calling off. The word is also used to denote exceptions taken to a judge's capacity on account of interest; Bank of North America v. Fitzsimons, 2 Binn. (Pa.) 454; Pearce v. Affleck, 4 *id.* 349; and to the sheriff for favor as well as affinity; Co. Litt. 158 *a*; Munshower v. Patton, 10 S. & R. (Pa.) 336, 13 Am. Dec. 678. The right is not allowed to enable the prisoner to select such jurors as he may wish, but to select just and impartial ones; State v. Jones, 97 N. C. 469, 1 S. E. 680.

Challenges are of the following classes:—

To the array. Those which apply to all the jurors as arrayed or set in order by the officer upon the panel. Such a challenge is, in general, founded upon some error or manifest partiality committed in obtaining the panel, and which, from its nature, applies to all the jurors so obtained. These are not allowed in the United States generally; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134; Thomas v. State, 5 How. (Miss.) 20; the same end being attained by a motion addressed to the court, but are in some states; Bowman v. State, 41 Tex. 417; Boles v. State, 24 Miss. 445; Quinebaug Bank v. Tarbox, 20 Conn. 510; Peck v. Freeholders of Essex County, 21 N. J. L. 656; Pringle v. Huse, 1 Cow. (N. Y.) 432; Cowgill v. Woodeu, 2 Blackf. (Ind.) 332; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. The challenge must be based upon objection to all the jurors composing the panel; Clears v. Stanley, 34 Ill. App. 338. Mere irregularity in drawing a jury is not sufficient cause to sustain a challenge to the array; Nealon v. People, 39 Ill. App. 481; nor is the fact that a challenge to the array has been sustained for bias and prejudice of the officer summoning them and few of the same jurors are on the second venire; People v. Vincent, 95 Cal. 425, 30 Pac. 581; nor is the fact that one of the men named on the special venire is dead and another removed from the county; State v. Whitt, 113 N. C. 716, 18 S. E. 715; Smith v. Smith, 52 N. J. L. 207, 19 Atl. 255. It was a good ground of challenge to the array that no persons of African descent were selected as jurors but all such were excluded because of their race and color, on affidavit of the prisoner to that effect, no evidence having been adduced *pro* or *con;* Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

For cause. Those for which some reason is assigned.

These may be of various kinds, unlimited in number, may be to the array or to the poll, and depend for their allowance upon the existence and character of the reason assigned.

To the favor. Those challenges to the poll for cause which are founded upon reasonable grounds to suspect that the juror will act under some undue influence or prejudice, though the cause be not so evident as to authorize a principal challenge; Co. Litt. 147 *a*, 157 *a;* Bacon, Abr. *Juries*, E, 5; Shoeffler v. State, 3 Wis. 823. Such challenges are at common law decided by triors, and not by the court. See Triors; Cancemi v. People, 16 N. Y. 501; Mann v. Glover, 14 N. J. L. 195. But see Milan v. State, 24 Ark. 346; Costigan v. Cuyler, 21 N. Y. 134; Weston v. People, 6 Hun (N. Y.) 140.

Peremptory. Those made without assigning any reason, and which the court must allow. The number of these in trials for felonies was, at common law, thirty-five; 4 Bla. Com. 354; but, by statute, has been reduced to twenty in most states, and is allowed in criminal cases only when the offence is capital; Thorn. Juries 119; U. S. v. Cottingham, 2 Blatchf. 470, Fed. Cas. No. 14,872; Hayden v. Com., 10 B. Monr. (Ky.) 125; Fouts v. State, 8 Ohio St. 98; see Schumaker v. State, 5 Wis. 324; State v. Cadwell, 46 N. C. 289; Todd v. State, 85 Ala. 339, 5 South. 278. The prosecuting officer may exercise his right of peremptory challenge of a juror at any time previous to the acceptance of the jury by the defendant; State v. Haines, 36 S. C. 504, 15 S. E. 555; in civil cases the right is not allowed at all; 9 Exch. 472; 2 F. & F. 137; U. S. v. Cottingham, 2 Blatchf. 470, Fed. Cas. No. 14,872; or, if allowed, only to a very limited extent; How v. Canal Co., 5 Harr. (Del.) 245; Cleveland, P. & A. R. Co. v. Stanley, 7 Ohio St. 155; Waterford & W. Turnpike v. People, 9 Barb. (N. Y.) 161; Quinebaug Bank v. Tarbox, 20 Conn. 510; Wyatt v. Noble, 8 Blackf. (Ind.) 507; Lewis v. Detrich, 3 Ia. 216. Unless given by statute no right exists; Brown v. R. Co., 86 Ala. 206, 5 South. 195. The rule that a juror shall be accepted or challenged and sworn as soon as his examination is completed is not objectionable as embarrassing the exercise of the right of peremptory challenge; St. Clair v. U. S., 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936. In the federal courts in trials for treason or capital cases, the accused has twenty and the United States five peremptory challenges; U. S. R. S. § 819. The act granting peremptory challenges to the government in criminal cases has not taken away the right to conditional or qualified challenges when permitted in a state, or where it has been adopted by a federal court as a rule or by special order. The exercise of the right is under the supervision of the court, which should not permit it to be used unreasonably or so as to prejudice the defendant. It is not an unreasonable exercise

of the privilege where, notwithstanding its exercise, neither the government nor the defendant had exhausted all their peremptory challenges; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972.

The allowance of peremptory challenges in excess of the statutory provision is not ground for reversal, where no prejudice to the opposite party appears; Stevens v. R. Co., 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. The number of peremptory challenges allowed varies much in the different states. See 12 A. & E. Encyc. 346, 347, n. 3, for state statutes on the subject.

To the poll. Those made separately to each juror to whom they apply. Distinguished from those to the array.

Principal. Those made for a cause which when substantiated is of itself sufficient evidence of bias in favor of or against the party challenging. Co. Litt. 156 *b*. See 3 Bla. Com. 363; 4 *id.* 353. They may be either to the array or to the poll; Co. Litt. 156 *a*, *b*.

The importance of the distinction between principal challenges and those to the favor is found in the case of challenges to the array or of challenges to the poll for favor or partiality. All other challenges to the poll must, it seems, be principal. The distinctions between the various classes of challenges are of little value in modern practice, as the court generally determine the qualifications of a juror upon suggestion of the cause for challenge, and examination of the juror upon oath when necessary. See TRIORS.

The *causes* for challenge are said to be either *propter honoris respectum* (from regard to rank), which do not exist in the United States; *propter defectum* (on account of some defect), from personal objections, as alienage, infancy, lack of statutory requirements; *propter affectum* (on account of partiality), from some bias or partiality either actually shown to exist or presumed from circumstances; *propter delictum* (on account of crime), including cases of legal incompetency on the ground of infamy; Co. Litt. 155 *b et seq.*

These causes include, amongst others, *alienage;* Hollingsworth v. Duane, Wall. C. C. 147, Fed. Cas. No. 6,618; but see Queen v. Hepburn, 2 Cra. 3, Fed. Cas. No. 11,503; *incapacity* resulting from age, lack of statutory qualifications; Montague v. Com., 10 Gratt. (Va.) 767; see State v. Garig, 43 La. Ann. 365; *partiality* arising from near relationship; March v. R. Co., 19 N. H. 372; Balsbaugh v. Frazer, 19 Pa. 95; Jaques v. Com., 10 Gratt. (Va.) 690; State v. Perry, 44 N. C. 330; Hardy v. Sprowle, 32 Me. 310; Quinebaug Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272; Paddock v. Wells, 2 Barb. Ch. (N. Y.) 331; Trullinger v. Webb, 3 Ind. 198; Moody v. Griffin, 65 Ga. 304; see State v. Walton, 74 Mo. 270; Wirlbach's Ex'r v. Bank, 97 Pa. 543, 39 Am. Rep. 821; an *interest* in the result of the trial; Fleming v. State, 11 Ind. 234; Page v. R. Co., 21 N. H. 438; Peck v. Freeholders, 21 N. J. L. 656; Houston & T. C. Ry. Co. v. Terrell, 69 Tex. 650, 7 S. W. 670; but it should be a direct pecuniary interest; Phillips v. State, 29 Ga. 105; *conscientious scruples* as to finding a verdict of conviction in a capital case; U. S. v. Wilson, 1 Baldw. 78, Fed. Cas. No. 16,730; White v. State, 16 Tex. 206; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; People v. Tanner, 2 Cal. 257; Williams v. State, 3 Ga. 453; Lewis v. State, 9 Smedes & M. (Miss.) 115; Martin v. State, 16 Ohio 364; People v. Majors, 65 Cal. 148, 3 Pac. 597, 52 Am. Rep. 295; Kennedy v. State, 19 Tex. App. 618; see Gates v. People, 14 Ill. 433; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *membership* of societies, under some circumstances; 13 Q. B. 815; People v. Reyes, 5 Cal. 347; Com. v. Livermore, 4 Gray (Mass.) 18; *citizenship* in a municipality interested in the case; Cramer v. Burlington, 42 Ia. 315; Fulweiler v. St. Louis, 61 Mo. 479; Gibson v. Wyandotte, 20 Kan. 156; Goshen v. England, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; but see Kendall v. Albia, 73 Ia. 241, 34 N. W. 833; acting as an employé of one of the parties; Louisville R. Co. v. Mask, 64 Miss. 738, 2 South. 360; Gunter v. Mfg. Co., 18 S. C. 263, 44 Am. Rep. 573; Central R. Co. v. Mitchell, 63 Ga. 173; *bias* indicated by *declarations* of wishes or opinions as to the result of the trial; State v. Spencer, 21 N. J. L. 196; Busick v. State, 19 Ohio 198; Blake v. Millspaugh, 1 Johns. (N. Y.) 316; Davis v. Walker, 60 Ill. 452; Winnesheik Ins. Co. v. Schueller, *id.* 465; O'Mara v. Com., 75 Pa. 424; Scranton v. Stewart, 52 Ind. 68; or *opinions* formed or expressed as to the guilt or innocence of one accused of crime; Meyer v. State, 19 Ark. 156; Marsh v. State, 30 Miss. 627; Sutton v. Albatross, 2 Wall. Jr. 333, Fed. Cas. No. 13,645; Moses v. State, 10 Humphr. (Tenn.) 456; Neely v. People, 13 Ill. 685; Trimble v. State, 2 G. Greene (Ia.) 404; Busick v. State, 19 Ohio 198; Monroe v. State, 5 Ga. 85; see State v. Fox, 25 N. J. L. 566; Baker v. State, 15 Ga. 498; Rice v. State, 7 Ind. 332; Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316; People v. McCauley, 1 Cal. 379; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Smith v. Com., 7 Gratt. (Va.) 593; Baldwin v. State, 12 Mo. 223; State v. Potter, 18 Conn. 166; but if opinion is based on newspaper report or rumor, and the juror says he can give an impartial decision on the evidence, he is competent; People v. Cochran, 61 Cal. 548; Walker v. State, 102 Ind. 502, 1 N. E. 856; Thayer v. Min. Co., 105 Ill. 547; State v. Dugay, 35 La. Ann. 327; State v. Green, 95 N. C. 611; Ulrich v. People, 39 Mich. 245; Weston v. Com., 111 Pa. 251, 2 Atl. 191. A juror may be asked whether his "political affiliations or party predilections tend to bias his judgment either for or against the defendant"; Connors v. U. S., 158 U. S. 408, 15 Sup. Ct. 951, 39 L. Ed. 1033.

Who may challenge. Both parties, in civil

as well as in criminal cases, may challenge, for cause; and equal privileges are generally allowed both parties in respect to peremptory challenges; but see Tharp v. Feltz's Adm'r, 6 B. Monr. (Ky.) 15; Shoeffler v. State, 3 Wis. 823; Pfomer v. People, 4 Park. Cr. Cas. (N. Y.) 586; and after a juror has been challenged by one party and found indifferent, he may yet be challenged by the other; Williams v. State, 32 Miss. 389, 66 Am. Dec. 615. A juror has no right to challenge himself, and though a good cause of challenge subsists, yet, if neither party will take advantage of it, the court cannot reject him; Denn v. Pissant, 1 N. J. L. 220; but see Gilliam v. Brown, 43 Miss. 641.

The time to make a challenge is between the appearance and swearing of the jurors; Thompson v. Com., 8 Gratt. (Va.) 637; State v. Patrick, 48 N. C. 443; Lewis v. Detrich, 3 Ia. 216; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Williams v. State, 3 Ga. 453; State v. Bunger, 14 La. Ann. 461; State v. Anderson, 4 Nev. 265; Woodward v. Dean, 113 Mass. 297; but see Haynes v. Crutchfield, 7 Ala. 189; U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; Burns v. State, 80 Ga. 544, 7 S. E. 88; Thorp v. Deming, 78 Mich. 124, 43 N. W. 1097; the fact that a panel has been passed by a party as satisfactory will not prevent him from challenging one of the jurors so passed at any time before he is sworn; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; Daniels v. State, 88 Ala. 220, 7 South. 337. See Mayers v. Smith, 121 Ill. 442, 13 N. E. 216; Boteler v. Roy, 40 Mo. App. 234. A challenge for cause should be made before the juror is sworn; People v. Duncan, 8 Cal. App. 186, 96 Pac. 414; but the court may permit it before the jury is completed; People v. Schmitz, 7 Cal. App. 330, 94 Pac. 407, 419, 15 L. R. A. (N. S.) 717; so also peremptory challenges may be made before the juror is sworn; State v. Deliso, 75 N. J. L. 808, 69 Atl. 218.

It is a general rule at common law that no challenge can be made till the appearance of a full jury; 4 B. & Ald. 476; Taylor v. R. Co., 45 Cal. 323; on which account a party who wishes to challenge the array may pray a *tales* to complete the number, and then make his objection. Challenges to the array, where allowed, must precede those to the poll; and the right to the former is waived by making the latter; Co. Litt. 158 *a;* Bacon, Abr. *Juries*, E, 11; People v. Roberts, 6 Cal. 214; Weeping Water Electric Light Co. v. Haldeman, 35 Neb. 139, 52 N. W. 892; but see Clinton v. Englebrecht, 13 Wall. (U. S.) 434, 20 L. Ed. 659. In cases where peremptory challenges are allowed, a juror unsuccessfully challenged for cause may subsequently be challenged peremptorily; 4 Bla. Com. 356; 6 Term 531; 4 B. & Ald. 476. See Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Manner of making. Challenges to the array must be made in writing; People v. Doe, 1 Mich. 451; Suttle v. Batie, 1 Ia. 141; but challenges to the poll are made orally and generally by the attorney's or party's saying, "Challenge," or "I challenge," or "We challenge;" 1 Chit. Cr. Law 533–541; 4 Hargr. St. Tr. 740; Trials per Pais 172; Cro. Car. 105. See State v. Knight, 43 Me. 11; Zimmerly v. Road Com'rs, 25 Pa. 134; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758.

The guaranty in the constitution of a trial by jury does not prevent legislation as to the manner of selecting jurors or allowing peremptory challenges to the state; State v. Ward, 61 Vt. 153, 17 Atl. 483. See JURY, *sub-tit. Qualifications.*

CHAMBER. A room in a house. There may be an estate of freehold in a chamber as distinct and separate from the ownership of the rest of the house; 1 Term 701; Co. Litt. 48 *b;* Loring v. Bacon, 4 Mass. 576; Proprietors of South Congregational Meeting-house v. City of Lowell, 1 Metc. (Mass.) 538; Cheeseborough v. Green, 10 Conn. 318, 26 Am. Dec. 396; and ejectment will lie for a deprivation of possession; 1 Term 701; Otis v. Smith, 9 Pick. (Mass.) 293; though the owner thereof does not thereby acquire any interest in the land; Stockwell v. Hunter, 11 Metc. (Mass.) 448, 45 Am. Dec. 220. See Brooke, Abr. *Demand* 20; Aldrich v. Parsons, 6 N. H. 555; Wusthoff v. Dracourt, 3 Watts (Pa.) 243; 3 Leon. 210.

Consult Washburn; Preston, Real Property.

CHAMBER OF ACCOUNTS. In French Law. A sovereign court, of great antiquity, in France which took cognizance of and registered the accounts of the king's revenue: nearly the same as the English court of exchequer. Encyc. Brit.

CHAMBER OF COMMERCE. A society of the principal merchants and traders of a city, who meet to promote the general trade and commerce of the place. Some of these are incorporated, as in Philadelphia. Similar societies exist in all the large commercial cities, and are known by various names, as, Board of Trade, etc.

CHAMBERS. The private room of the judge. Any hearing before a judge which does not take place during a term of court or while the judge is sitting in court, or an order issued under such circumstances, is said to be *in chambers.* The act may be an official one, and the hearing may be in the court-room; but if the court is not in session, it is still said to be done *in chambers.* See IN CAMERA; OPEN COURT.

CHAMPART. In French Law. The grant of a piece of land by the owner to another, on condition that the latter would deliver to

him a portion of the crops. 18 Toullier, n. 182.

CHAMPERTOR. One who makes pleas or suits, or causes them to be moved, either directly or indirectly, and sues them at his proper costs, upon condition of having a part of the gain. Stat. 33 Edw. I. stat. 2.

One who is guilty of champerty.

CHAMPERTY (Lat. *campum partire*, to divide the land). A bargain with a plaintiff or defendant in a suit, for a portion of the land or other matter sued for, in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense. See 19 Alb. L. J. 468; Nickels v. Kane's Adm'r, 82 Va. 309; 7 Bing. 369.

Champerty differs from maintenance chiefly in this, that in champerty the compensation to be given for the service rendered is a part of the matter in suit, or some profit growing out of it; 4 Bla. Com., Chase's ed. 905, n. 8; Wheeler v. Pounds, 24 Ala. 472; Lathrop v. Bank, 9 Metc. (Mass.) 489; Barnes v. Strong, 54 N. C. 100; Arden v. Patterson, 5 Johns. Ch. (N. Y.) 44; Meeks v. Dewberry, 57 Ga. 263; Hayney v. Coyne, 10 Heisk. (Tenn.) 339; Coleman v. Billings, 89 Ill. 183; while in simple maintenance the question of compensation does not enter into the account; 2 Bish. Cr. Law § 131; Quigley v. Thompson, 53 Ind. 317.

The offence was indictable at common law; 4 Bla. Com. 135; Thurston v. Percival, 1 Pick. (Mass.) 415; Brown v. Beauchamp, 5 T. B. Monr. (Ky.) 413, 17 Am. Dec. 81; Douglas v. Wood's Lessee, 1 Swan. (Tenn.) 393; 8 M. & W. 691; see L. R. 8 Q. B. 112; 2 App. Cas. 186; 4 L. R. Ir. 43; Key v. Vattier, 1 Ohio 132; Wright v. Meek, 3 G. Greene (Ia.) 472; Newkirk v. Cone, 18 Ill. 449; Danforth v. Streeter, 28 Vt. 490; McMullen v. Guest, 6 Tex. 275; and is in some of the states by statute; Low v. Hutchinson, 37 Me. 196; Sedgwick v. Stanton, 14 N. Y. 289; Thompson v. Reynolds, 73 Ill. 11; Davis v. Sharron, 15 B. Monr. (Ky.) 64; Stoddard v. Mix, 14 Conn. 12; Richardson v. Rowland, 40 Conn. 565; Bentinck v. Franklin, 38 Tex. 458; Duke v. Harper, 2 Mo. App. 1. Champerty avoids contracts into which it enters; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586. A common instance of champerty, as defined and understood at common law, is where an attorney agrees with a client to collect by suit at his own expense a particular claim or claims in general, receiving a certain proportion of the money collected; Dumas v. Smith, 17 Ala. 305; Key v. Vattier, 1 Ohio 132; 4 Dowl. 304; or a percentage thereon; Lathrop v. Bank, 9 Metc. (Mass.) 489; 2 Bish. Cr. Law § 132; Kelly v. Kelly, 86 Wis. 170; 56 N. W. 637; and see Ogden v. Des Arts, 4 Duer (N. Y.) 275; Major's Ex'r v. Gibson, 1 Pat. & H. (Va.) 48; Newkirk v. Cone, 18 Ill. 449; Davis v. Sharron, 15 B. Monr. (Ky.) 64; Poe v. Davis, 29 Ala. 676; Evans v. Bell, 6 Dana (Ky.) 479; Lytle v. State, 17 Ark. 608; Backus v. Byron, 4 Mich. 535; Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586; Fetrow v. Merriwether, 53 Ill. 275; Harmon v. Brewster, 7 Bush (Ky.) 355.

The tendency of modern decisions is, while departing from the unnecessary severity of the old law, at the same time to preserve the principle which defeats the mischief to which the old law was directed. It has been the disposition of courts to look not so much to technical distinctions, and by treating statutes on the subject as declaratory of the common law, to deal with the subject with more flexibility, keeping in view the real object of the policy to restrain what was defined by Knight Bruce, L. J., to be "the traffic of merchandizing in quarrels, of huckstering in litigious discord;" 1 D. M. & G. 680, 686. In this spirit, the common-law rule relative to champerty and maintenance is no longer recognized in many states; Nickels v. Kane's Adm'r, 82 Va. 309; Brown v. Begne, 21 Or. 260, 28 Pac. 11, 14 L. R. A. 745, 28 Am. St. Rep. 752; Byrne v. R. Co., 55 Fed. 44; but in New York by statute it is unlawful for an attorney to give or promise a consideration for placing in his hands a claim for injuries against a railroad company; Code C. P. 678; Oishei v. Lazzarone, 61 Hun 623, 15 N. Y. Supp. 933. Where an attorney agrees to prosecute an action for damages and advance all costs because of the poverty of the plaintiff, taking a contingent fee of a portion of the amount recovered, it is not void for champerty; Dunne v. Herrick, 37 Ill. App. 180; nor is a contract to pay for services of an attorney contingent entirely upon success; Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444; Mumma's Appeal, 127 Pa. 474, 18 Atl. 6; Omaha & R. V. R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Lewis v. Brown, 36 W. Va. 1, 14 S. E. 444 (and see Elliott v. Rubel, 132 Ill. 9, 23 N. E. 400); Fowler v. Callan, 102 N. Y. 395, 7 N. E. 169; Winslow v. R. Co., 71 Ia. 197, 32 N. W. 330; Belding v. Smythe, 138 Mass. 530; Phelps v. Park Com'rs, 119 Ill. 626, 10 N. E. 230; Aultman v. Waddle, 40 Kan. 195, 19 Pac. 730; Stevens v. Sheriff, 76 Kan. 124, 90 Pac. 799, 11 L. R. A. (N. S.) 1153; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; if unconscionable, it will not be upheld; Muller v. Kelly, 125 Fed. 212, 60 C. C. A. 170. A committee of the Pennsylvania Bar Association (1908, 1909) and one of the New York State Bar Association (1909) have reported strongly against contingent fees. The purchase by attorneys of rights of action, for the purpose of bringing suit thereon, is commonly prohibited in law, on grounds of public policy; Chase's Bla. Com. 905, n. 8; and an agreement that the client shall receive a certain amount out of the sum recovered, and that all above that shall belong to the attorney, is champertous; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Silverman v. R. Co., 141 Fed. 382; but such an agreement for collection without suit is not champertous; Burnham v. Heselton, 84 Me. 578, 24 Atl. 955.

A contract by an attorney to pay witness

fees out of a contingent fee to be allowed him for successful services in a suit is champertous; Barngrover v. Pettigrew, 128 Ia. 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206, and so is a contract stipulating that the client shall not compromise or settle his claim without the consent of the attorney; Davy v. Ins. Co., 78 Ohio St. 256, 85 N. E. 504, 17 L. R. A. (N. S.) 443, 125 Am. St. Rep. 694. Some cases have held that an attorney is under absolute disability to purchase from his client the subject of his retainer; 12 Ir. Eq. 1; West v. Raymond, 21 Ind. 305; such purchases have been held in other cases to be presumptively void; Stubinger v. Frey, 116 Ga. 396, 42 S. E. 713; Roby v. Colehour, 135 Ill. 300, 25 N. E. 777; or to be voidable at the option of the client; Lane v. Black, 21 W. Va. 617; they will be closely scrutinized by the court; Mitchell v. Colby, 95 Ia. 202, 63 N. W. 769; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865; but they will not be set aside if they were "open, honest and in every way fair to the client"; Vanasse v. Reid, 111 Wis. 303, 87 N. W. 192. Many cases have refused to hold the attorney to be under an absolute disability in this respect; Handlin v. Davis, 81 Ky. 34; Cox v. Delmas, 99 Cal. 104, 33 Pac. 836; Klein v. Borchert, 89 Minn. 377, 95 N. W. 215. The attorney, to sustain such a purchase, must establish the utmost good faith and fairness and adequacy of consideration and that he gave full information and disinterested advice to the client; Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101; Dunn v. Record, 63 Me. 17; Day v. Wright, 233 Ill. 218, 84 N. E. 226; he must prove *uberrima fides;* Young v. Murphy, 120 Wis. 49, 97 N. W. 496; this rule has been applied to purchases made after the relation has terminated; 33 Beav. 133; Barrett v. Ball, 101 Mo. App. 288, 73 S. W. 865.

A contract by one not acting as attorney, for a specific consideration, to defeat the probate of a will, is void as a species of champerty or maintenance; Cochran v. Zachery, 137 Ia. 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307, 15 Ann. Cas. 297; but an agreement by one having a claim against a decedent's estate to do everything proper and legitimate to aid the heirs in recovering the estate in consideration that they would pay his claim is not void as champerty or maintenance; Smith v. Hartsell, 150 N. C. 71, 63 S. E. 172, 22 L. R. A. (N. S.) 203.

In England contingent fees to solicitors are void by a statute of 1870. They are unknown in the case of barristers.

In England, in New York, and probably most of the states, the purchase of land, pending a suit concerning it, is champerty; and if made with knowledge of the suit and not pursuant to a previous agreement, it is void; 4 Kent 449; Bowling's Heirs v. Roark (Ky.) 24 S. W. 4; Sneed v. Hope (Ky.) 30 S. W. 20; Snyder v. Church, 70 Hun 428, 24 N. Y. Supp. 337; this doctrine, established by the English statutes, Westm. 1, c. 25, Westm. 2, c. 49, and 28 Edw. I. c. 11, became part of the common law, and either as such or by statutory adoption became engrafted upon the law of almost all the states. The principle extends to the purchase of any cause of action, as a patent which has been infringed; Keiper v. Miller, 68 Fed. 627; unpaid promissory notes; Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315, 48 Am. St. Rep. 811. In Pennsylvania a person may convey an interest in lands held adversely to him; Murray's Estate, 13 Pa. Co. Ct. 70.

See BUYING TITLES.

The champerty of the plaintiff is no defence in the action concerning which the contract was made. A railroad company sued for an overcharge cannot defend by showing that the plaintiff made a champertous contract with his attorney to induce the company to accept the overcharge and then sue for the penalty; Railway Co. v. Smith, 60 Ark. 221, 29 S. W. 752; nor is such defence good in actions for personal injuries; Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; nor can a purchaser of a disputed title defend against a prior unrecorded deed to plaintiff's attorney for one-half of the land, on the ground that the latter was given under a champertous contract; Chamberlain v. Grimes, 42 Neb. 701, 60 N. W. 948; and generally the objection that a contract is champertous cannot be set up by a stranger to it or in defence of a suit brought under it; Ashurst v. Peck, 101 Ala. 499, 14 South. 541; Pennsylvania Co. v. Lombardo, 49 Ohio St. 1, 29 N. E. 573, 14 L. R. A. 785; Gilkeson Sloss Commission Co. v. Bond, 44 La. Ann. 841, 11 South. 220; Euneau v. Rieger, 105 Mo. 659, 16 S. W. 854.

An attorney suing as "administrator" to recover for a death by wrongful act may be guilty of a champertous agreement with the beneficiaries, which may be pleaded as a defence to the suit under a statute investing the courts with equity powers for the purpose of discovering and preventing the offence; Byrne v. R. Co., 55 Fed. 44. For an analysis of the cases, see Wald's Poll. Cont. 293.

As to agreements between attorney and client regarding fees in divorce cases, see DIVORCE; ATTORNEY; ETHICS, LEGAL.

As to conditional fees in Roman Law, see ADVOCATI.

CHAMPION. He who fights for another, or who takes his place in a quarrel. One who fights his own battles. Bracton, l. 4, t. 2, c. 12.

CHANCE. See ACCIDENT.

CHANCE-MEDLEY. A sudden affray. This word is sometimes applied to any kind of homicide by misadventure, but in strictness it is applicable to such killing only as

happens in defending one's self. 4 Bla. Com. 184.

CHANCELLOR. An officer appointed to preside over a court of chancery, invested with various powers in the several states.

There is a chancellor for the state in Delaware, and also, with vice-chancellors, in New Jersey, and in Alabama, Mississippi, and Tennessee there are district chancellors elected by the people. Under the federal system and in the other states the powers and jurisdiction of courts of equity are administered by the same judges who hold the common-law courts.

The title is also used in some of the dioceses of the Protestant Episcopal Church in the United States to designate a member of the legal profession who gives advice and counsel to the bishop and other ecclesiastical authorities.

In Scotland, this title is given to the foreman of the jury. Bisph. Eq. 7.

An officer bearing this title is to be found in some countries of Europe, and is generally invested with extensive political authority. It was finally abolished in France in 1848. The title and office of chancellor came to us from England.

See 1 Spence, Eq. Jur.; 4 Viner, Abr. 374; Woodd. Lect. 95.

For the history of the office, see CANCELLARIUS.

In England the title is borne by several functionaries, thus:

Lord High Chancellor of Great Britain. This has been the title of his office since the Union with Scotland (in effect May 1, 1707). He is appointed by the Crown, by the delivery to him of the Great Seal of the United Kingdom, and verbally addressing him by the title. It is usual to appoint the person recommended by the Prime Minister, from such members of the bar as hold or have held the office of Attorney or Solicitor General. There is no qualification for the office, except that none but a Protestant can be appointed. 7 Halsb. Laws of Eng. 56. He holds office during pleasure, and as a member of the Cabinet and under the usage accepts or retires from office with the political party to which he belongs. He is expressly excepted from the term of office during good behavior provided for the judges in the Judicature Acts. He is a member of the Privy Council, probably by prescription; also prolocutor or speaker of the House of Lords by prescription. He is not necessarily a peer, and if not, he cannot address the House of Lords. He is custodian of the Great Seal, except when it is entrusted to a Lord Keeper, or is in commission. He is head of the judicial administration of England and is responsible for the appointment of judges of the High Court, except the Chief Justice, who is appointed by the Prime Minister. He appoints County Court judges (except where the whole of the County Court district lies within the Duchy of Lancaster). He advises the Crown as to nominating Justices of the Peace. He is President of the High Court of Justice, and of the Chancery Division of the High Court and an *ex officio* member of the Court of Appeals, and presiding officer thereof.

Lord Chancellors Since 1660.

1660	Lord Clarendon.
1667	Lord Keeper (Sir Orlando Bridgman).
1672	Lord Shaftesbury.
1673	Lord Nottingham.
1682	Lord Keeper Guilford.
1685	Lord Keeper Guilford.
1685	Lord Jeffreys.
1687	Lord Commissioner Meynard and others.
1690	Lord Commissioner Trevor and others.
1693	Lord Somers (John Somers).
1700	Lord Keeper Wright (Nathan Wright).
1702	Lord Keeper Wright.
1705	Lord Cowper (Earl Cowper).
1710	Lord Harcourt.
1714	Lord Harcourt.
1714	Lord Cowper.
1718	Lord Macclesfield (Thomas Parker).
1725	Lord King (Peter King).
1727	Lord King.
1733	Lord Talbot (Charles Talbot).
1737	Lord Hardwicke (Philip Yorke).
1757	Lord Keeper Henley (Robert Henley).
1760	Lord Northington.
1766	Lord Camden (Charles Pratt).
1770	Charles Yorke.
1771	Lord Apsley, Earl Bathurst (Henry Bathurst).
1778	Lord Thurlow (Edward Thurlow).
1783	Lord Thurlow.
1793	Lord Loughborough (Alexander Wedderburn).
1801	Lord Eldon (John Scott).
1806	Lord Erskine (Thomas Erskine).
1807	Lord Eldon.
1820	Lord Eldon.
1827	Lord Lyndhurst (John Singleton Copley).
1830	Lord Brougham (Henry Brougham).
1834	Lord Lyndhurst.
1836	Lord Cottenham (Charles Christopher Pepys).
1837	Lord Cottenham.
1841	Lord Lyndhurst.
1846	Lord Cottenham.
1850	Lord Truro (Thomas Wilde).
1852	Lord St. Leonards (Edward Burtenshaw Sugden).
1852	Lord Cranworth (Robert Monsey Rolfe).
1858	Lord Chelmsford (Frederick Thesiger).
1859	Lord Campbell (John Campbell).
1861	Lord Westbury (Richard Bethell).
1865	Lord Cranworth.
1866	Lord Chelmsford.
1868	Lord Cairns (Hugh McCalmont Cairns).
1868	Lord Hatherly (Wm. Page-Wood).
1872	Lord Selborne (Roundell Palmer).
1874	Lord Cairns.
1880	Lord Selborne.
1885	Lord Halsbury (Hardinge Stanley Giffard).
1886	Lord Herschell (Farrer Herschell).
1886	Lord Halsbury.
1892	Lord Herschell.
1895	Lord Halsbury.
1905	Lord Loreburn (Robert Threshie Reid).
1912	Lord Haldane (Richard Burdon Haldane).

There is a Lord Chancellor of Ireland, but none in Scotland since the Union.

The Chancellor of the Duchy of Lancaster, who presides over the court of the duchy, to judge and determine controversies relating to lands holden of the king in right of the Duchy of Lancaster.

The Chancellor of the Exchequer is an officer who formerly sat in the court of ex-

chequer, and, with the rest of the court, ordered things for the king's benefit. Cowell. This part of his functions is now practically obsolete; the chancellor of the exchequer is now known as the minister of state who has control over the national revenue and expenditure. 2 Steph. Com. 467.

The Chancellor of a Diocese is the officer appointed to assist a bishop in matters of law, and to hold his consistory courts for him. 1 Bla. Com. 382; 2 Steph. Com., 11th ed. 684.

The Chancellor of a University, who is the principal officer of the university. His office is for the most part honorary.

CHANCELLORS' COURTS IN THE TWO UNIVERSITIES. Courts of local jurisdiction, resembling borough courts, in and for the two Universities of Oxford and Cambridge in England. 3 Bla. Com. 83. These are courts subsisting under ancient charters granted to these universities and confirmed by act of parliament. If the defendant be a member of the University of Oxford resident within its limits, the suit must be in this court, although the plaintiff is not connected with the university or resident there, and although the cause of action did not arise within its limits; Odgers, C. L. 1030, citing 16 Q. B. D. 761. The rule at Cambridge is the same, except that the privilege cannot be claimed if any person not a member of the university be a party. The University of Oxford claims a similar privilege in criminal matters when any member of the university, resident within its limits, is defendant or prosecutor; Odgers, C. L. 1030; 4 Inst. 227; Rep. *t.* Hardw. 341; 2 Wils. 406; 12 East 12; 13 *id.* 635; 15 *id.* 634; 10 Q. B. 292. This privilege of exclusive jurisdiction was granted in order that the students might not be distracted from their studies and other scholastic duties by legal process from distant courts.

The most ancient charter containing this grant to the University of Oxford was 28 Hen. III. A. D. 1244, and the privileges thereby granted were confirmed and enlarged by every succeeding prince down to Hen. VIII., in the 14th year of whose reign the largest and most extensive charter of all was granted, and this last-mentioned charter is the one now governing the privileges of that university. A charter somewhat similar to that of Oxford was granted to Cambridge in the third year of Elizabeth. And subsequently was passed the statute of 13 Eliz. c. 29, whereby the legislature recognized and confirmed all the charters of the two universities, and those of the 14 Henry VIII. and 3 Eliz. by name (13 Eliz. c. 29); 16 Q. B. D. 761 (Oxford), 12 East 12 (Cambridge), which act established the privileges of these universities without any doubt or opposition.

It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants, and when an action in the High Court is brought against such member the university enters a *claim of conusance*, that is, claims the cognizance of the matter, whereupon the action is withdrawn from the High Court and transferred to the University Court; 16 Q. B. D. 761.

Procedure in these courts was usually regulated according to the laws of the civilians, subject to specific rules made by the vice-chancellor, with the approval of three of his Majesty's judges. See (as to Oxford) 25 & 26 Vict. c 26, § 12. Under the charter of Henry VIII. the chancellor and vice-chancellor and the deputy of such vice-chancellor are justices of the peace for the counties of Oxford and Berks, which jurisdiction was confirmed in them by 49 & 50 Vict. c. 31; 3 Steph. Com. 325.

The judge of the chancellor's court at Oxford was a vice-chancellor, with a deputy or assessor. An appeal lay from his sentence to delegates appointed by the congregation, thence to delegates appointed by the house of convocation, and thence, in case of any disagreement only, to judges delegates appointed by the crown under the great seal in chancery; 3 Steph. Com., 11th ed. 325.

CHANCER. To adjust according to principles of equity, as would be done by a court of chancery. Cent. Dict.

The practice indicated by the word arose in parts of New England at a time when the courts had no equity jurisdiction, and were sometimes compelled to act upon equitable principles; as by restraining the enforcement of the penalty of a bond beyond what was equitable.

In Inhabitants of Machiasport v. Small, 77 Me. 109, and Lewiston v. Gagne, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432, bonds were "chancered" after judgment had been entered for the penalty. The court will "chancer" a bond upon a writ of scire facias; Colt v. Eaton, 1 Root (Conn.) 524; a court of bankruptcy may "chancer" a bond given for the release of a bankrupt; In re Appel, 163 Fed. 1002, 90 C. C. A. 172, 20 L. R. A. (N. S.) 76 (C. C. A., 1st Cir.). Under a statute, the penalty of a recognizance to prosecute a writ of error was "chancered" after execution had been returned satisfied; James v. Smith, 1 Tyler (Vt.) 128. See Vt. Stat. 1894, §§ 2035–2038. In the absence of a statute "chancering" was refused in Philbrick v. Buxton, 40 N. H. 384.

The practice of "chancering" is a very old one. A forfeiture could be "chancered" under a law of 1699; Phœnix Mut. Life Ins. Co. v. Clark, 59 N. H. 561. Adjudged cases in 1630–1692 may be found in the Records of the Court of Assistants of Massachusetts Bay Colony. The early laws of Massachusetts provided for "chancering" the forfeiture of any penal bond; Acts of 1692, 1693, 1697, 1698, 1699; and bonds and mort-

gages were frequently "chancered" by special act; 10 Acts and Resolves of Massachusetts Bay, 403, 676; 11 *id.* 585; 13 *id.* 244; 16 *id.* 95. In Rhode Island an act of 1746 provided for "chancerizing" the forfeiture "where any penalty is forfeited, or conditional estate recovered, or equity of redemption sued for, whether judgment is confessed or otherwise obtained."

Chancer is defined in the New Dictionary as to "tax" (an account or bill of costs) but there seems to be no authority for this.

CHANCERY. See COURT OF CHANCERY.

CHANNEL. The bed in which the main stream of a river flows, and not the deep water of the stream, as followed in navigation. Dunlieth & Dubuque Bridge Co. v. Dubuque County, 55 Ia. 558, 8 N. W. 443. The main channel is that bed of the river over which the principal volume of water flows. St. Louis & St. P. Packet Co. v. Bridge Co., 31 Fed. 757.

By act of congress of Sept. 19, 1890, U. S. R. S. 1 Supp. 800, any alteration or modification of the channel of any navigable water of the United States, by any construction, excavation, or filling, or in any other manner without the approval of the secretary of war, is prohibited. For the construction of this act, see U. S. v. Burns, 54 Fed. 351.

CHANTRY. A church or chapel endowed with lands for the maintenance of priests to say mass daily for the souls of the donors. *Termes de la Ley;* Cowell.

CHAPELRY. The precinct of a chapel; the same thing for a chapel that a parish is for a church. *Termes de la Ley;* Cowell.

CHAPELS. Places of worship. They may be either *private* chapels, such as are built and maintained by a private person for his own use and at his own expense, or *free* chapels, so called from their freedom or exemption from all ordinary jurisdiction, or chapels *of ease,* which are built by the mother-church for the ease and convenience of its parishioners, and remain under its jurisdiction and control.

CHAPTER. **In Ecclesiastical Law.** A congregation of clergymen.

Such an assembly is termed *capitulum,* which signifies a little head; it being a kind of head, not only to govern the diocese in the vacation of the bishopric, but also for other purposes. Coke, Litt. 103.

CHARACTER. The possession by a person of certain qualities of mind or morals, distinguishing him from others.

In Evidence. The opinion generally entertained of a person derived from the common report of the people who are acquainted with him; his reputation. Kimmel v. Kimmel, 3 S. & R. (Pa.) 336, 8 Am. Dec. 655; Boynton v. Kellogg, 3 Mass. 192, 3 Am. Dec. 122; 3 Esp. 236; Tayl. Ev. 328, 329.

A clear distinction exists between the strict meaning of the words character and reputation. Character is defined to be the assemblage of qualities which distinguish one person from another, while reputation is the opinion of character generally entertained; Worcester, Dict. This distinction, however, is not regarded either in the statutes or in the decisions of the courts; thus, a libel is said to be an injury to character; the character of a witness for veracity is said to be impeached; evidence is offered of a prisoner's good character; Abbott, Law Dict. See Leverich v. Frank, 6 Or. 213; Powers v. Leach, 26 Vt. 278. The word character is therefore used in the law rather to express what is properly signified by reputation.

The moral character and conduct of a person in society may be used in proof before a jury in three classes of cases; *first,* to afford a presumption that a particular person has not been guilty of a criminal act; *second,* to affect the damages in particular cases, where their amount depends on the reputation and conduct of any individual; and, *third,* to impeach or confirm the veracity of a witness.

Where the guilt of an accused person is doubtful, and the character of the supposed agent is involved in the question, a presumption of innocence arises from his former conduct in society, as evidenced by his general reputation; since it is not probable that a person of known probity and humanity would commit a dishonest or outrageous act in the particular instance. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things and beyond common experience—it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind—that evidence of reputation and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. People v. Ryder, 151 Mich. 187, 114 N. W. 1021. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, evidence of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime, like murder, to prove a high character, and by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. Lewis v. State, 93 Miss. 697, 47 South. 467. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and

counteract it. But it is not competent for the prosecution to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character; Per Shaw, C. J., Com. v. Webster, 5 Cush. (Mass.) 325, 52 Am. Dec. 711. See 1 Campb. 460; 2 St. Tr. 1038; State v. Wells, 1 N. J. L. 424, 1 Am. Dec. 211; Nash v. Gilkeson, 5 S. & R. (Pa.) 352; Gregory v. Thomas, 2 Bibb (Ky.) 286, 5 Am. Dec. 608; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Humphrey v. Humphrey, 7 Conn. 116; Fowler v. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; Jeffries v. Harris, 10 N. C. 105; Felsenthal v. State, 30 Tex. App. 675, 18 S. W. 644; State v. Ellwood, 17 R. I. 763, 24 Atl. 782; Carter v. State, 36 Neb. 481, 54 N. W. 853; Smothers v. City of Jackson, 92 Miss. 327, 45 South. 982.

Where, in a criminal trial, no evidence has been offered, there is a presumption of good character, as to which the jury should, on his request, be instructed; it is error for the court to comment unfavorably upon the character of the accused; Mullen v. U. S., 106 Fed. 895, 46 C. C. A. 22; and a prosecuting officer may not appeal to the jury to assume that his character was bad, because he had produced no evidence to the contrary; Lowdon v. U. S., 149 Fed. 673, 79 C. C. A. 361; Gater v. State, 141 Ala. 10, 37 South. 692; McQuiggan v. Ladd, 79 Vt. 90, 64 Atl. 503, 14 L. R. A. (N. S.) 689; People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745.

In a trial for rape there is no presumption, in the absence of proof to the contrary, that the defendant was of good character. Addison v. People, 193 Ill. 405, 62 N. E. 235.

On the trial of an indictment for homicide, evidence offered generally to prove that the deceased was well known, and understood to be a quarrelsome, riotous, and savage man, is inadmissible; 1 Whart. Cr. L. § 641; see Perry v. State, 94 Ala. 25, 10 South. 650; Com. v. Straesser, 153 Pa. 451, 26 Atl. 17; but for the purpose of showing that the homicide was justifiable on the ground of self-defence, proof of the character of the deceased may be admitted, if it is also shown that the prisoner was influenced by his knowledge thereof in committing the deed; Marts v. State, 26 Ohio St. 162; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; but in a civil action for damages for homicide which defendant alleges was committed in self-defence evidence of good character was held not admissible; Morgan v. Barnhill, 118 Fed. 24, 55 C. C. A. 1. The general reputation of the deceased as a violent and dangerous person is presumptive proof of knowledge of decedent's character; Trabune v. Com. (Ky.) 17 S. W. 186. Unless the character of the deceased is attacked, it is clearly not admissible for the prosecution to prove its peaceableness; Davis v. People, 114 Ill. 86, 29 N. E. 192. Good character will not avail one if the crime has been proven beyond a reasonable doubt; People v. Sweeney, 133 N. Y. 609, 30 N. E. 1005; Hathcock v. State, 88 Ga. 91, 13 S. E. 959; Kistler v. State, 54 Ind. 400; People v. Jassino, 100 Mich. 536, 59 N. W. 230; *contra*, Com. v. Cate, 220 Pa. 138, 69 Atl. 322, 123 Am. St. Rep. 683. It is erroneous to instruct a jury that evidence of good character can only be considered when the question of guilt or innocence is in doubt; Rowe v. U. S., 97 Fed. 779, 38 C. C. A. 496; State v. Dickerson, 77 Ohio St. 34, 82 N. E. 969, 122 Am. St. Rep. 479, 11 Ann. Cas. 1181. In a criminal case the defendant has the right to prove his reputation for honesty and truth; Browder v. State, 30 Tex. App. 614, 18 S. W. 197; though he be indicted for murder by poisoning, he can show his reputation for peace and quietude; Hall v. State, 132 Ind. 317, 31 N. E. 536.

In a prosecution for theft, the accused may prove his reputation for honesty and integrity, but not particular acts; Leonard v. State, 53 Tex. Cr. R. 187, 109 S. W. 149; nor special traits or particular instances not bearing on the peculiar nature of the crime charged; Arnold v. State, 131 Ga. 494, 62 S. E. 806. Proof of previous occupations and of family history is inadmissible; State v. Clem, 49 Wash. 273, 94 Pac. 1079. It is competent for a witness to testify that he has never heard the reputation of the defendant questioned; State v. McClellan, 79 Kan. 11, 98 Pac. 209, 17 Ann. Cas. 106; Foerster v. U. S., 116 Fed. 860, 54 C. C. A. 210, but proof that he has never before been arrested or accused of crime is incompetent; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584.

It is proper to cross-examine a witness who has testified to the defendant's reputation for peace and quiet, as to how many men she had heard he had shot; People v. Laudiero, 192 N. Y. 304, 85 N. E. 132.

In an action by a locomotive engineer for injury resulting from a collision, evidence that he frequently had slept at his post, and run by stations where he should have stopped, was properly excluded; Missouri, K. & T. R. Co. v. Johnson, 92 Tex. 380, 48 S. W. 568.

In some instances, evidence in disparagement of character is admissible, not in order to prove or disprove the commission of a particular fact, but with a view to damages. In actions for criminal conversation with the plaintiff's wife, evidence may be given of the wife's general bad reputation for want of chastity, and even of particular acts of adultery committed by her previous to her intercourse with the defendant; Whart. Ev. 51; Bull. N. P. 27, 296; 12 Mod. 232;

3 Esp. 236; and a wife who has confessed her adultery cannot prove previous good conduct; State v. Foster, 136 Ia. 527, 114 N. W. 36. See Ligon v. Ford, 5 Munf. (Va.) 10. As to the statutory use of the word "character," see Carpenter v. People, 8 Barb. (N. Y.) 603; People v. Kenyon, 5 Park. Cr. C. (N. Y.) 254; Andre v. State, 5 Ia. 389, 68 Am. Dec. 708; Boak v. State, 5 Ia. 430; State v. Prizer, 49 Ia. 531, 31 Am. Rep. 155.

In actions for slander or libel, the law is well settled that evidence of the previous general character of the plaintiff, before and at the time of the publication of the slander or libel, is admissible, under the general issue, in mitigation of damages. The ground of admitting such evidence is that a person of disparaged fame is not entitled to the same measure of damages as one whose character is unblemished. And the reasons which authorize the admission of this species of evidence under the general issue alike exist, and require its admission, where a justification has been pleaded but the defendant has failed in sustaining it; Stone v. Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; where the decisions are collected and reviewed; Hamer v. McFarlin, 4 Denio (N. Y.) 509; Bowen v. Hall, 20 Vt. 232; Steinman v. McWilliams, 6 Pa. 170; Eifert v. Sawyer, 2 Nott & McC. (S. C.) 511, 10 Am. Dec. 633. When evidence is admitted touching the general reputation of a person, it is manifest that it is to be confined to matters in reference to the nature of the charge against him; Douglass v. Tousey, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616. See People v. Cowgill, 93 Cal. 596, 29 Pac. 228.

In an action for damages for assault and battery it is error to admit evidence of defendant's good character; Pokriefka v. Mackurat, 91 Mich. 399, 51 N. W. 1059; Sturgeon v. Sturgeon, 4 Ind. App. 232, 30 N. E. 805.

The party against whom a witness is called may disprove the facts stated by him, or may examine other witnesses as to his general character; but they will not be allowed to speak of particular facts or parts of his conduct; Bull. N. P. 296; State v. Rose, 47 Minn. 47, 49 N. W. 404. For example, evidence of the general character of a prosecutrix for a rape may be given, as that she was a street-walker; but evidence of specific acts of criminality cannot be admitted; 3 C. & P. 589. And see Cadwell v. State, 17 Conn. 467; Low v. Mitchell, 18 Me. 372; Commonwealth v. Murphy, 14 Mass. 387; 5 Cox, Cr. Cas. 146. The regular mode is to inquire whether the witness under examination has the means of knowing the former witness's general character, and whether, from such knowledge, he would believe him on his oath; 4 St. Tr. 693; 4 Esp. 102; Knode v. Williamson, 17 Wall. (U. S.) 586, 21 L. Ed. 670. In answer to such evidence against character, the other party may cross-examine the witness as to his means of knowledge and the grounds of his opinion, or he may attack such witness's general character, and by fresh evidence support the character of his own; 2 Stark. 151, 241; Stark. Ev. pt. 4, 1753 to 1758; 1 Phill. Ev. 229. A party cannot give evidence to confirm the good character of a witness, unless his general character has been impugned by his antagonist; Braddee v. Brownfield, 9 Watts (Pa.) 124; State v. Cooper, 71 Mo. 436; Fitzgerald v. Goff, 99 Ind. 28; Turner v. Commonwealth, 86 Pa. 74, 27 Am. Rep. 683; Atwood v. Dearborn, 1 Allen (Mass.) 483, 79 Am. Dec. 755.

See note in 14 L. R. A. (N. S.) 689.

CHARGE. A duty or obligation imposed upon some person. A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies.

To impose such an obligation; to create such a claim.

To accuse.

The distinctive significance of the term rests in the idea of obligation directly bearing upon the individual thing or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. Thus, charging an estate with the payment of a debt is appropriating a definite portion to the particulor purpose; charging a person with the commission of a crime is pointing out the individual who is bound to answer for the wrong committed; charging a jury is stating the precise principles of law applicable to the case immediately in question. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed, or the act fixing such responsibility.

In Contracts. An obligation, binding upon him who enters into it, which may be removed or taken away by a discharge. *Termes de la Ley.*

An undertaking to keep the custody of another person's goods.

An obligation entered into by the owner of an estate, which binds the estate for its performance. Comyns, Dig. *Rent*, c. 6; 2 Ball & B. 223.

In Devises. A duty imposed upon a devisee, either personally, or with respect to the estate devised. It may be the payment of a legacy or sum of money or an annuity, the care and maintenance of a relative or other person, the discharge of an existing lien upon land devised or the payment of debts, or, in short, the performance of any duty or obligation which may be lawfully imposed as a condition of the enjoyment of the bounty of a testator. A charge is not an interest in, but a lien upon, lands; Potter v. Gardner, 12 Wheat. (U. S.) 498, 6 L. Ed. 706; Thayer v. Finnegan, 134 Mass. 62, 45 Am. Rep. 285; Appeal of Walter, 95 Pa. 305; 1 Ves. & B. 260; it will not be divested by a sheriff's sale; Rohn v. Odenwelder, 162 Pa. 346, 29 Atl. 899.

Where a charge is personal, and there are no words of limitation, the devisee will generally take the fee of the estate devised; 4 Kent 540; 2 Bla. Com. 108; Jackson v. Mer-

rill, 6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Wait v. Belding, 24 Pick. (Mass.) 139; but he will take only a life estate if it be upon the estate generally; 14 Mees. & W. 698; Gardner v. Gardner, 3 Mas. 209, Fed. Cas. No. 5,227; Wright v. Denn, 10 Wheat. (U. S.) 231, 6 L. Ed. 303; Jackson v. Martin, 18 Johns. (N. Y.) 35; McLellan v. Turner, 15 Me. 436; Lithgow v. Kavenagh, 9 Mass. 161; Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200; unless the charge be greater than a life estate will satisfy; 6 Co. 16; 4 Term 93; Olmsted v. Harvey, 1 Barb. (N. Y.) 102; Wait v. Belding, 24 Pick. (Mass.) 138; 1 Washb. R. P. 59. See 9 L. R. A. 584, n., LEGACY.

In Equity Pleading. An allegation in the bill of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. Story, Eq. Pl. § 31.

It is frequently omitted, and this the more properly, as all matters material to the plaintiff's case should be fully stated in the stating part of the bill; Cooper, Eq. Pl. 11; 1 Dan. Ch. Pr. 372, 1883, n.; 11 Ves. Ch. 574. See 2 Hare, Ch. 264.

In Practice. The instructions given by the court to the grand jury or inquest of the county, at the commencement of their session, in regard to their duty.

The exposition by the court to a petit jury of those principles of the law which the latter are to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the legal rights of the parties to the suit.

It formerly preceded the addresses of counsel to the jury; Thayer, Evid.; and that is still the practice in the federal district court in Maryland. It usually includes a summing up of the facts.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligations to obey; Com. v. Porter, 10 Metc. (Mass.) 285-287; Pierce v. State, 13 N. H. 536; Townsend v. State, 2 Blackf. (Ind.) 162; Davenport v. Com., 1 Leigh (Va.) 588; Montee v. Com., 3 J. J. Marsh. (Ky.) 150; 21 How. St. Tr. 1039; Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787. See 5 South. L. Rev. 352; 1 Crim. L. Mag. 51; 3 *id.* 484. This is the rule in the federal courts; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; Alabama; Pierson v. State, 12 Ala. 153; Arkansas; Pleasant v. State, 13 Ark. 360; Sweeney v. State, 35 Ark. 585; California; People v. Anderson, 44 Cal. 65; Kentucky; Com. v. Van Tuyl, 1 Metc. 1, 71 Am. Dec. 455; Maine; State v. Wright, 53 Me. 336; Massachusetts; Com. v. Porter, 10 Metc. 286; Com. v. Anthes, 5 Gray 185; Michigan; People v. Mortimer, 48 Mich. 37, 11 N. W. 776; Mississippi; Bangs v. State, 61 Miss. 363; Missouri; Hardy v. State, 7 Mo. 607; Nebraska; Parrish v. State, 14 Neb. 60, 15 N. W. 357; New Hampshire; Pierce v. State, 13 N. H. 536; New York; People v. Bennett, 49 N. Y. 141; North Carolina; State v. Peace, 46 N. C. 251; Ohio; Adams v. State, 29 Ohio St. 412; Pennsylvania; Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89; South Carolina; State v. Drawdy, 14 Rich. 87; Texas; Pharr v. State, 7 Tex. App. 472. By statute, in some states, the jury are constituted judges of the law as well as of the facts in criminal cases,—an arrangement which assimilates the duties of a judge to those of the moderator of a town-meeting or of the preceptor of a class of law-students, besides subjecting successive criminals to a code of laws varying as widely as the impulses of successive juries can differ. It is so in Georgia; Oneil v. State, 48 Ga. 66; Illinois; Board of Super's of Clay County v. Plant, 42 Ill. 331; Indiana; Anderson v. State, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Louisiana; State v. Ford, 37 La. Ann. 444; Maryland; Forwood v. State, 49 Md. 531; Tennessee; Nelson v. State, 2 Swan 237; and Vermont; State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90. Even in these states, however, the courts have tried to escape from this doctrine, and have of late years practically nullified it in many instances. See Habersham v. State, 56 Ga. 61; Bell v. State, 57 Md. 108; Mullinix v. People, 76 Ill. 211; State v. Ford, 37 La. Ann. 449; State v. Hopkins, 56 Vt. 263. The charge frequently and usually includes a *summing up* of the evidence, given to show the application of the principles involved; and in English practice the term *summing up* is used instead of charge. Though this is customary in many courts, the judge is not bound to sum up the facts; Thomps. Charging Juries § 79; State v. Morris, 10 N. C. 390. But if he do sum up he must present all the material facts; Parker v. Donaldson, 6 W. & S. (Pa.) 132; Merchants' Bank of Macon v. Bank, 1 Ga. 428, 44 Am. Dec. 665. This is the practice in the courts of the United States; United States Exp. Co. v. Kountze Bros., 8 Wall. 342, 19 L. Ed. 457.

It should be a clear and explicit statement of the law applicable to the condition of the facts; Finch's Ex'rs v. Elliot, 11 N. C. 61; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Williams v. Cheesebrough, 4 Conn. 356; Van Hoesen v. Van Alstyne, 3 Wend. (N. Y.) 75; Com. v. White, 10 Metc. (Mass.) 14; Com. v. Porter, 10 Metc. (Mass.) 263; Coleman v. Roberts, 1 Mo. 97; Jenness v. Parker, 24 Me. 289; Lett v. Horner, 5 Blackf. (Ind.) 296; Whiteford v. Burckmyer & Adams, 1 Gill (Md.) 127, 39 Am. Dec. 640; People v. Murray, 72 Mich. 10, 40 N. W. 29. The defendant in a criminal case is entitled to a full statement of the law from the court; Bird v. U. S., 180 U. S. 356, 21 Sup. Ct. 403, 45 L. Ed. 570. The charge should add such comments on the evidence as are necessary to explain its application; Ware v. Ware, 8 Greenl. (Me.) 42; Kinloch v. Palmer, 1 Mill, Const. (S. C.) 216; Nieman v. Ward, 1 W. & S. (Pa.) 68; Wyley v. Stanford, 22 Ga. 385 (though in some states the court is prohibited by law from charging as to matters of fact, "but may state the testimony and the law;" *e. g.*, California, Tennessee, South Carolina, Georgia, Massachusetts, etc.); and may include an opinion on the weight of evidence; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; 2 M. & G. 721; Cook v. Brown, 34 N. H. 460; Swift v. Stevens, 8 Conn. 431; Dunlap v. Patterson, 5 Cow. (N. Y.) 243; Hinson v. King, 50 N. C. 393; though the rule is otherwise in some states; Frame v. Badger, 79 Ill. 441; Wannack v. Mayor, etc., of City of Macon, 53 Ga. 162; Jenkins v. Tobin, 31 Ark. 307; Barnett v. State, 83 Ala. 40, 3 South. 612; State v. Huffman, 16 Or. 15, 16 Pac. 640; People v. Gastro, 75 Mich. 127, 42 N. W. 937; but should not undertake to decide the facts; Fightmaster v.

Beasly, 7 J. J. Marsh. (Ky.) 410; Sullivan v. Enders, 3 Dana (Ky.) 66; Beekman v. Bemus, 7 Cow. (N. Y.) 29; Planters' Bank of Prince George's County v. Bank, 10 Gill & J. (Md.) 346; State v. Lynott, 5 R. I. 295; unless in the entire absence of opposing proof; Chase v. Breed, 5 Gray (Mass.) 440; Nichols v. Goldsmith, 7 Wend. (N. Y.) 160; Rippey v. Friede, 26 Mo. 523; Jones' Ex'rs v. Mengel, 1 Pa. 68. A United States court may express an opinion upon the facts; Lovejoy v. U. S., 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; Sorenson v. R. Co., 36 Fed. 166. In federal courts the trial judge may express his opinion on the facts, while leaving them to the jury; this power is not controlled by state statutes forbidding judges to express any opinion on the facts; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257. It is improper to instruct which of two conflicting theories of the evidence the jury shall accept; Mitchell v. State, 94 Ala. 68, 10 South. 331. The presiding judge may express to the jury his opinion as to the weight of evidence. He is under no obligation to recapitulate all the items of the evidence, nor even all bearing on a single question; Allis v. U. S., 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

Failure to give instructions not asked for is not error; Winn v. State, 82 Wis. 571, 52 N. W. 775; People v. Ahern, 93 Cal. 518, 29 Pac. 49; Mead v. State, 53 N. J. L. 601, 23 Atl. 264; Small v. Williams, 87 Ga. 681, 13 S. E. 589. A request to charge is properly refused though embodying correct principles, where there is no evidence to support it; Bostic v. State, 94 Ala. 45, 10 South. 602; Com. v. Cosseboom, 155 Mass. 298, 29 N. E. 463; Page v. Alexander, 84 Me. 84, 24 Atl. 584; Frost v. Lumber Co., 3 Wash. 241, 28 Pac. 354, 915; Everitt v. Walker, 109 N. C. 132, 13 S. E. 860; Guernsey v. Greenwood, 88 Ga. 446, 14 S. E. 709; Floyd v. Efron, 66 Tex. 221, 18 S. W. 497; Kitchen v. McCloskey, 150 Pa. 376, 24 Atl. 688, 30 Am. St. Rep. 811; New York & C. Mining Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031; City of Rock Island v. Cuinely, 126 Ill. 408, 18 N. E. 753; Spoonemore v. State, 25 Tex. App. 358, 8 S. W. 280. A request to charge may be disregarded when the court has already fully instructed the jury on the point. The court should refuse to charge upon a purely hypothetical statement of facts calculated to mislead the jury; White v. Van Horn, 159 U. S. 3, 15 Sup. Ct. 1027, 40 L. Ed. 55. A judge is not bound to charge a jury in the exact words proposed to him by counsel, and there is no error if he instructs the jury correctly and substantially covers the relevant rules of law suggested; Cunningham v. Springer, 204 U. S. 647, 27 Sup. Ct. 301, 51 L. Ed. 662, 9 Ann. Cas. 897.

Erroneous instructions in matters of law which might have influenced the jury in forming a verdict are a cause for a new trial; Lane v. Crombie, 12 Pick. (Mass.) 177; West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737; Doe v. Paine, 11 N. C. 64, 15 Am. Dec. 507; even though on hypothetical questions; Etting v. Bank, 11 Wheat. (U. S.) 59, 6 L. Ed. 419; Yarborough v. Tate, 14 Tex. 483; People v. Roberts, 6 Cal. 214; on which no opinion can be required to be given; Jordan v. James, 5 Ohio, 88; Mitchell v. Mitchell, 11 Gill & J. (Md.) 388; Pollard v. Teel, 25 N. C. 470; Smith v. Sasser, 50 N. C. 388; Dunlap v. Robinson, 28 Ala. 100; Whitaker v. Pullen, 3 Humphr. (Tenn.) 466; Nicholas v. State, 6 Mo. 6; Whitney v. Goin, 20 N. H. 354; Hammat v. Russ, 16 Me. 171; Miller v. Gorman, 5 Blackf. (Ind.) 112; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Hicks' Adm'x v. Bailey, 16 Tex. 229; Raver v. Webster, 3 Ia. 509, 66 Am. Dec. 96; McDougald v. Bellamy, 18 Ga. 411; but the rule does not apply where the instructions could not prejudice the cause; Johnson v. Blackman, 11 Conn. 342; U. S. v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; Rhett v. Poe, 2 How. (U. S.) 457, 11 L. Ed. 338. See Miller v. State, 3 Wyo. 657, 29 Pac. 136. Any decision or declaration by the court upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled, is considered within the scope and meaning of the term "instructions;" Hilliard, New Trials 255.

Where on a trial for murder defendant's counsel asks the court to give its charge in writing, and after complying it gives orally other and additional charges, it is cause for new trial; Willis v. State, 89 Ga. 188, 15 S. E. 32.

When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

"But no charge delivered by a trial court is to be judged by the same standards as a statement of law carefully elaborated and deliberately pronounced by a court of appeals, sitting *in banc*. It serves a very different office. It is to call the attention of twelve men unfamiliar with legal distinctions to whatever is necessary and proper to guide them to a right decision in a particular case, and to nothing more. To make almost any rule of law intelligible to the ordinary juror, it must be expressed in a few words. Qualifications and exceptions which the case does not call for are worse than useless, and those which are requisite it may be better to supply later, by a separate statement. A charge must be taken as a whole in determining its natural effect." Per

Baldwin, J., in Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70.

See Thompson, Charging Juries.

CHARGEABLE. This word in its ordinary acceptation, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject, or liable to be charged, or proper to be charged, or legally liable to be charged. Walbridge v. Walbridge, 46 Vt. 625.

CHARGÉ D'AFFAIRES. CHARGÉ DES AFFAIRES. In International Law. The title of a diplomatic representative or minister of an inferior grade, to whose care are confided the affairs of his nation. The term is usually applied to a secretary of legation or other person in charge of an embassy or legation during a vacancy in the office or temporary absence of the ambassador or minister.

He has not the title of minister, and is generally introduced and admitted through a verbal presentation of the minister at his departure, or through letters of credence addressed to the minister of state of the court to which he is sent. He has the essential rights of a minister; 1 Kent 39, n.; Du Pont v. Pichon, 4 Dall. (U. S.) 321, 1 L. Ed. 851. The term *chargé des affaires* is sometimes restricted to a chargé d'affaires *ad interim*, who is not accredited from one Foreign Office to another, but who is merely in temporary charge of the affairs of the mission.

CHARGES. The expenses which have been incurred in relation either to a transaction or to a suit. Thus, the *charges* incurred for his benefit must be paid by a hirer; the defendant must pay the *charges* of a suit. In relation to actions, the term includes something more than the costs, technically so called.

CHARITABLE USES, CHARITIES. Gifts to general public uses, which may extend to the rich as well as the poor. Camden, Ld. Ch. in Ambl. 651; adopted by Kent, Ch., Coggeshall v. Pelton, 7 Johns. Ch. (N. Y.) 294, 11 Am. Dec. 471; Lyndhurst, Ld. Ch., in 1 Ph. Ch. 191; and U. S. Supreme Court in Perin v. Carey, 24 How. (U. S.) 506, 16 L. Ed. 701; Bisp. Eq. § 124; Franklin v. Armfield, 2 Sneed (Tenn.) 305.

Gifts to such purposes as are enumerated in the act 43 Eliz. c. 4, or which, by analogy, are deemed within its spirit or intendment. Boyle, Char. 17.

Such a gift was defined by Mr. Binney to be "whatever is given for the love of God or for the love of your neighbor, in the catholic and universal sense—given from these motives, and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish." Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205; approved in Price v. Maxwell, 28 Pa. 35, and Ould v. Hospital, 95 U. S. 311, 24 L. Ed. 450.

Lord MacNaghten said in [1891] A. C. 531: Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads.

They had their origin under the Christian dispensation, and were regulated by the Justinian Code. Code Just. i. 3, *De Episc. et Cler.;* Domat, b. 2, t. 2, § 6, 1, b. 4, t. 2, § 6, 2; 1 Eq. Cas. Abr. 96; Mr. Binney's argument on the Girard will, p. 40; Chastel on the Charity of the Primitive Churches, b. 1, c. 2, b. 2, c. 10; *Codex, donationem piarum, passim.* Under that system, donations for pious uses which had not a regular and determined destination were liable to be adjudged invalid, until the edicts of Valentinian III. and Marcian declared that legacies in favor of the poor should be maintained even if legatees were not designated. Justinian completed the work by sweeping all such general gifts into the coffers of the church, to be administered by the bishops. The doctrine of pious uses seems to have passed directly from the civil law into the law of England; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 100, 139, 7 L. Ed. 617; Howe, Studies in the Civil Law 68. It would seem that, by the English rule before the statute, general and indefinite trusts for charity, especially if no trustees were provided, were invalid. If sustainable, it was under the king's prerogative, exercising in that respect a power analogous to that of the ordinary in the disposition of *bona vacantia* prior to the Statute of Distributions; F. Moore 882, 890; Duke, Char. Uses 72, 362; 1 Vern. 224, note; 1 Eq. Cas. Abr. 96, pl. 3; 1 Ves. Sen. 225; Hob. 136; Chittenden v. Chittenden, 1 Am. L. Reg. 545. The main purpose of the stat. 43 Eliz. c. 4 was to define the uses which were charitable, as contradistinguished from those which, after the Reformation in England, were deemed superstitious, and to secure their application; Shelf. Mortm. 89, 103. The objects enumerated in the statute were, "Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repairs of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans, relief, stock or maintenance for houses of correction; marriage of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

Subsequently it appears that this statute, as a mode of proceeding, fell into disuse, although under its influence and by its mere operation many charities were upheld which would otherwise have been void; Shelf. Mortm. 378, 379, and notes; Gallego's Ex'rs v. Attorney General 3 Leigh (Va.) 470, 24 Am. Dec. 650; Nelson, *Lex Test.* 137; Boyle, Char. 18 *et seq.;* 1 Burn, Eccl. Law, 317 *a.* Under this statute, courts of chancery are empowered to appoint commissioners to superintend the application and enforcement of charities; and if, from any cause, the charity cannot be applied precisely as the testator has declared, such courts exercise the power in some cases of appropriating it, according to the principles indicated in the devise, as near as they can to the purpose expressed. And this is called an application *cy pres;* 3 Washb. R. P. 514. See Cy Pres.

There is no need of any particular persons or objects being specified; the generality and indefiniteness of the object constituting the charitable character of the donation; Boyle, Char. 23. A charitable use, when neither law nor public policy forbids,

may be applied to almost anything that tends to promote the well-doing and well-being of man; Perry, Trusts, § 687.

They embrace gifts to the poor of every class, including poor relations, where the intention is manifest; Soohan v. City of Philadelphia, 33 Pa. 9; Franklin v. Armfield, 2 Sneed (Tenn.) 305; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229; Chapin v. School District No. 2, 35 N. H. 445; 7 Ch. D. 714; for the poor of a county, "who by timely assistance may be kept from being carried to the poor house;" State v. Griffith, 2 Del. Ch. 392; Griffith v. State, *id.* 421; for the poor, though the distribution of the fund is private and to private persons; Bullard v. Chandler, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104; for every description of college and school; Stevens v. Shippen, 28 N. J. Eq. 487; City of Cincinnati v. McMicken, 6 Ohio C. C. 188; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Bedford v. Bedford's Adm'r, 99 Ky. 273, 35 S. W. 926; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226 (that the state provides free education for children will not render a private bequest for the same purpose void; Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917); to all institutions for the advancement of the Christian religion; Alexander v. Slavens, 7 B. Monr. (Ky.) 351; Gibson v. Armstrong, 7 B. Monr. (Ky.) 481; White v. Attorney General, 39 N. C. 19, 44 Am. Dec. 92; Appeal of Domestic & Foreign Missionary Society, 30 Pa. 425; to all churches; Inhabitants of Princeton v. Adams, 10 Cush. (Mass.) 129; In Case of St. Mary's Church, 7 S. & R. (Pa.) 559; Johnson v. Mayne, 4 Ia. 180; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; foreign missions; Kinney v. Kinney's Ex'r, 86 Ky. 610, 6 S. W. 593; for the education of two young men for all coming time for the Christian ministry; Field v. Seminary, 41 Fed. 371; the advancement of Christianity among the infidels; 1 Ves. Jr. 243; the benefit of ministers of the gospel; Trustees of Cory Universalist Society at Sparta v. Beatty, 28 N. J. Eq. 570; for distributing Bibles and religious tracts; Winslow v. Cummings, 3 Cush. (Mass.) 358; Pickering v. Shotwell, 10 Pa. 23; chapels, hospitals and orphan asylums; Soohan v. City of Philadelphia, 33 Pa. 9; Fink v. Fink's Ex'r, 12 La. Ann. 301; Attorney General v. Society, 8 Rich. Eq. (S. C.) 190; Second Religious Society of Boxford v. Harriman, 125 Mass. 321; even when discrimination is made in favor of members of one religious denomination; Burd Orphan Asylum v. School District, 90 Pa. 21; Trustees v. Gutherie, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321; dispensaries; Beekman v. People, 27 Barb. (N. Y.) 260; public libraries; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420; and the like; Shotwell v. Mott, 2 Sandf. Ch. (N. Y.) 46; Jackson v. Phillips, 14 Allen (Mass.) 539; 2 Sim. & S. 594; 7 H. L. Cas. 124; friendly societies; 32 Ch. D. 158; the Salvation Army; 34 Ch. D. 528; educational trusts; [1895] 1 Ch. 367; a volunteer corps; [1894] 3 Ch. 265; for the furtherance of the principles of food reform as advocated by certain named vegetarian societies; [1898] 1 Ir. R. 431; 21 T. L. R. 295; any religious society; [1893] 2 Ch. 41 (but not a Dominican convent, for the promotion of private prayer by its own members; *id.* 51); a society for the prevention of cruelty to animals; Minns v. Billings, 183 Mass. 126, 66 N. E. 593, 5 L. R. A. (N. S.) 686, 97 Am. St. Rep. 420 (but not for the maintenance of animals; so also 35 C. C. R. 545); 41 Ch. D. 552; [1895] 2 Ch. 501; a drinking fountain for horses; In re Estate of Graves, 242 Ill. 23, 89 N. E. 672, 24 L. R. A. (N. S.) 283, 134 Am. St. Rep. 302, 17 Ann. Cas. 137; to repair a sea dyke; 38 Ch. D. 507; to provide a scholarship; [1895] 1 Ch. 480; to repair a churchyard; 33 Ch. D. 187; to form a fund for pensioning old and worn-out clerks of a certain firm; 48 W. R. 300; to recompense such persons as shall annually ring a peal of bells in a designated parish to commemorate the restoration of the monarchy to England; [1906] 2 Ch. 184; to establish a cemetery; Hunt v. Tolles, 75 Vt. 48, 52 Atl. 1042; or maintain one; Rollins v. Merrill, 70 N. H. 436, 48 Atl. 1088 (*contra*, In re Corle, 61 N. J. Eq. 409, 48 Atl. 1027); (but not to repair a tomb; L. R. 4 Eq. 521; Kelly v. Nichols, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; nor to erect a monument to a parent; 35 C. C. R. 505; nor to keep a testator's clock in repair; Kelly v. Nichols, 17 R. I. 306, 21 Atl. 906; nor for the purpose of cleaning a painting every four years; 70 L. J. Ch. 42; nor to encourage sport; [1895] 2 Ch. 649; nor a bequest to general public purposes; Cresson's Appeal, 30 Pa. 437; as supplying water or light to towns, building roads and bridges, keeping them in repair, etc.; Town of Hamden v. Rice, 24 Conn. 350;) and to the advancement of religion and other charitable purposes general in their character; Derby v. Derby, 4 R. I. 414; Fink v. Fink's Ex'r, 12 La. Ann. 301; Hullman v. Honcomp, 5 Ohio St. 237; Brendle v. German Reformed Congregation, 33 Pa. 415; Bethlehem Borough v. Fire Co., 81 Pa. 445; Lewis' Estate, 152 Pa. 477, 25 Atl. 878; Sweeney v. Sampson, 5 Ind. 465; L. R. 10 Eq. 246; L. R. 1 Eq. 585; L. R. 4 Ch. App. 309; L. R. 20 Eq. 483; Holmes v. Coates, 159 Mass. 226, 34 N. E. 190; Hadden v. Dandy, 51 N. J. Eq. 154, 26 Atl. 464, 32 L. R. A. 625; [1893] 2 Ch. 41; Union Pac. R. Co. v. Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581; Tudor, Char. Tr.; or a devise may be made to a municipal

corporation for charitable uses; Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205; Barkley v. Donnelly, 112 Mo. 561, 19 S. W. 305; Skinner v. Harrison Tp., 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137; and a city may refuse to accept such a bequest; Dailey v. City of New Haven, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69.

In determining whether or not a gift is charitable, courts will consider the nature of the gift, rather than the motives of the donor; In re Smith's Estate, 181 Pa. 109, 37 Atl. 114.

When a testator creates a trust which is invalid because it is one which the law will not permit to be carried out, the trust fails; Fairchild v. Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; Jackson v. Phillips, 14 Allen (Mass.) 539; Campbell's Heirs v. McArthur, 4 N. C. 557; State v. Griffith, 2 Del. Ch. 392; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558; De Camp v. Dobbins, 31 N. J. Eq. 671.

A bequest for a religious purpose is *prima facie* a bequest for a charitable purpose; [1893] 2 Ch. 41. In England bequests for masses for the repose of the testator's soul are void as being for superstitious uses; 2 Drew. 417; 2 Myl. & K. 684. In the United States they have been held good charitable trusts; Petition of Schouler, 134 Mass. 426; Appeal of Seibert, 18 W. N. C. (Pa.) 276; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241. In New York, though they were held charitable, they were held void for want of a specific legatee; Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; Gilman v. McArdle, 99 N. Y. 451, 2 N. E. 464. In Alabama the gift was held not charitable; Festorazzi v. Church, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48; so in California; In re Lennon's Estate, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024. Such a bequest was upheld, not as a charity, but as an expenditure directed by the testator for services rendered to him; Moran v. Moran, 104 Ia. 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443. It is upheld, not as a charitable, but as a religious use; Appeal of Rhymer's, 93 Pa. 142, 39 Am. Rep. 736. Money given by his followers to the founder of a church constitutes a trust fund; Holmes v. Dowie, 148 Fed. 634. If given "for poor souls," it is a public charity, not being restricted to designated persons; Ackerman v. Fichter (Ind.) 101 N. E. 493.

In Ireland gifts for masses are generally held good charitable bequests; Ir. R. 2 Eq. 321. They were held not to be bequests for any purpose merely charitable, within the exception of a statute imposing a legacy duty; 11 Ir. R. 10 C. L. 104; 21 L. R. Ir. 480. Such a bequest was held not to be an attempt to create a perpetuity; 21 L. R. Ir. 138; but that it is such was held in 25 L. R. Ir. 388; [1896] 1 Ir. 418; and that the gift was void for the want of a definite *cestui que trust* was held in Ir. R. 11 Eq. 433.

A charitable devise may become void for uncertainty as to the beneficiary; Society of the Most Precious Blood v. Moll, 51 Minn. 277, 53 N. W. 648; Brennan v. Winkler, 37 S. C. 457, 16 S. E. 190; Yingling v. Miller, 77 Md. 104, 26 Atl. 491; Johnson v. Johnson, 92 Tenn. 559, 23 S. W. 114, 22 L. R. A. 179, 36 Am. St. Rep. 104; Simmons v. Burrell, 8 Misc. 388, 28 N. Y. Supp. 625. The decision that the appropriation for the World's Columbian Exposition was a charitable use; U. S. v. Exposition, 56 Fed. 630; was reversed by the circuit court of appeals, which held that, being made for the benefit of a local corporation, it did not constitute a charitable trust, although aiding a great public enterprise; World's Columbian Exposition v. U. S., 56 Fed. 654, 6 C. C. A. 58.

When the purposes of a charity may be best sustained by alienating the specific property bequeathed and investing the proceeds in a different manner, a court of equity has jurisdiction to direct such sale and investment, taking care that no deviation of the gift be permitted; City of Newark v. Stockton, 44 N. J. Eq. 179, 14 Atl. 630; Peter v. Carter, 70 Md. 139, 16 Atl. 450.

Charities in England were formerly interpreted, sustained, controlled, and applied by the court of chancery, in virtue of its general jurisdiction in equity, aided by the stat. 43 Eliz. c. 4 and the prerogative of the crown; the latter being exercised by the lord chancellor, as the delegate of the sovereign acting as *parens patriæ;* Spence, Eq. Jur. 439, 441; Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99. The subject has since been regulated by various statutes; the Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, amended by various subsequent acts down to 1894; Tud. Char. Tr. part iii.; 3d ed. By the Toleration Act, 1 Wm. & M. c. 18, charitable trusts for promoting the religious opinions of Protestant Dissenters have been held valid; 2 Ves. Sen. 273. Roman Catholics share in their benefits; 2 & 3 Will. IV. c. 115; and Jews, by 9 & 10 Vict. c. 59, § 2.

The weight of judicial authority in England was in favor of the doctrine which, as will be seen, prevails in this country, that equity exercised an inherent jurisdiction over charitable uses independently of the statute of Elizabeth; that the statute did not create, but was in aid of, the jurisdiction. In support of this conclusion are found such judges as Ld. Ch. Northington, in 1 Eden 10; Amb. 351; Sir Jos. Jekyll, in 2 P. Wms. 119; Ld. Ch. Redesdale, in 1 Bligh 347; Ld. Ch. Hardwicke, in 2 Ves. Sr. 327; Ld. Keeper Finch, in 2 Lev. 167; Ld. Ch. Sugden, in 1 Dr. & W. 258; Ld. Ch. Somers, in 2 Vern. 342; Ld. Ch. Eldon, in 1 Bligh 358, and 7 Ves. 36; Wilmot, C. J., in Wilmot's Notes 24; Ld. Ch. Lyndhurst, in Bligh 335; and Sir John Leach, in 1 Myl. & K. 376.

The stat. 43 Eliz. c. 4 has not been re-enacted or strictly followed in the United States. In some states it has been adopted by usage; but, with several striking exceptions, the decisions of the English Chancery upon trusts for charity have furnished the rule of adjudication in our courts, without particular reference to the fact that the most remarkable of them were only sustainable under the peculiar construction given to certain phrases in the statute; Boyle, Char. 18. The opinion prevailed extensively in this country that the validity of charitable endowments and the jurisdiction of courts of equity in such cases depended upon that statute. In the case of the Baptist Association v. Hart, 4 Wheat. (U. S.) 1, 4 L. Ed. 499, the court adopted that view and accepted the conclusion that there was at common law no jurisdiction of charitable uses exercised in chancery, although in afterwards reviewing that decision an effort was made to distinguish the case by the two features that such cases are not recognized by the law of Virginia, where it arose, and that it was a donation to trustees incapable of taking, with beneficiaries uncertain and indefinite; Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205. These views were assailed in 1833 by Baldwin, J. (Magill v. Brown, Bright. 346, Fed. Cas. No. 8,952), in 1835 in Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154, and in 1844 by Mr. Binney in the Girard will case in Vidal v. Girard, 2 How. (U. S.) 128, 11 L. Ed. 205. In that case there was furnished a memorandum of fifty cases extracted from the then recently published chancery calendars, in which the jurisdiction had been exercised prior to the stat. of 43 Eliz. (2 How. [U. S.] 155, note); and although the accuracy of this list was challenged by Mr. Webster in argument; (*id.* 179 note), the court, per Story, J., accepted it to "establish, in the most satisfactory and conclusive manner," the conclusion stated. Baldwin, J., also enumerated forty-six cases of the enforcement of such trusts independently of the statute; Magill v. Brown, Bright. 346, Fed. Cas. No. 8,952. The doctrine was fully adopted by the United States supreme court in the Girard will case, and has been since adhered to; Ould v. Hospital, 95 U. S. 304, 24 L. Ed. 450. It is now conceded as settled that courts of equity have an inherent and original jurisdiction over charities, independent of the statute; Perry, Trusts § 694; Tappan v. Deblois, 45 Me. 122; Chambers v. St. Louis, 29 Mo. 543; Paschal v. Acklin, 27 Tex. 173; State v. Griffith, 2 Del. Ch. 392; Griffith v. State, *id.* 421, 463; Kronshage v. Varrell, 120 Wis. 161, 97 N. W. 928.

In Virginia and New York, that statute, with all its consequences, seems to have been repudiated; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450, 24 Am. Dec. 650; Cottman v. Grace, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145. So in North Carolina, Connecticut, Maryland, and the District of Columbia; McAuley v. Wilson, 16 N. C. 276, 18 Am. Dec. 587; Griffin v. Graham, 8 N. C. 96, 9 Am. Dec. 619; Bridges v. Pleasants, 39 N. C. 26, 44 Am. Dec. 94; Greene v. Dennis, 6 Conn. 293, 16 Am. Dec. 58; White v. Fisk, 22 Conn. 31; Dashiell v. Attorney General, 5 Harr. & J. (Md.) 392, 9 Am. Dec. 572; *id.*, 6 Harr. & J. (Md.) 1; Wilderman v. Baltimore, 8 Md. 551; Halsey v. Church, 75 Md. 275, 23 Atl. 781; Ould v. Hospital, 95 U. S. 304, 24 L. Ed. 450. In Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Rhode Island, Vermont, and perhaps some other states, the English rule is acted on; McCord v. Ochiltree, 8 Blackf. (Ind.) 15; Baptist Church v. Church, 18 B. Monr. (Ky.) 635; Beall v. Fox, 4 Ga. 404; Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Derby v. Derby, 4 R. I. 414; Fink v. Fink's Ex'r, 12 La. Ann. 301; Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127, 11 L. Ed. 205; Perin v. Carey, 24 How. (U. S.) 465, 16 L. Ed. 701; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454. See Gilman v. Hamilton, 16 Ill. 225; Dickson v. Montgomery, 1 Swan (Tenn.) 348. While not in force as a statute in Pennsylvania, it is embodied as to its principles in the common law of that state; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Dulles's Estate, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177. Connecticut has a substitute statute for that of 43 Eliz., passed in 1684, which is more strict than the English law in that it requires certainty in the person to be benefited or at least a certain and definite class of persons, with an ascertained mode of selecting them; Adge v. Smith, 44 Conn. 60, 26 Am. Rep. 424.

It is said that charitable uses are favorites with courts of equity; the construction of all instruments, when they are concerned, is liberal in their behalf; Ould v. Hospital, 95 U. S. 313, 24 L. Ed. 450; and even the rule against perpetuities is relaxed for their benefit; *id.;* [1891] 3 Ch. 252; Woodruff v. Marsh, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; Bisph. Eq. § 133; Perin v. Carey, 24 How. (U. S.) 495, 16 L. Ed. 701; Brown v. Baptist Society, 9 R. I. 177; *contra*, Bascom v. Albertson, 34 N. Y. 584. See also Gray, Perp. § 589. But if a gift to charity is made to depend on a condition precedent, the event must occur within the rule against perpetuities; [1894] 3 Ch. 265; except where the event is the divesting of another charity; [1891] 3 Ch. 252.

An immediate gift to charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any assignable limit of time, or may never take effect at all, except on the

occurrence of events in their essence contingent and uncertain; while on the other hand, a gift in trust for charity which is conditional upon a future and uncertain event is subject to the same rules as any other estate depending on its coming into existence upon a condition precedent; 74 L. J. Ch. 354; [1905] 1 Ch. 669, 92 L. T. 715.

A gift may be made to a charity not *in esse* at the time; *id.;* Perry, Trusts § 736; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. See Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. 238; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279. And a gift for specific charitable purposes will not fail for want of trustees; Sears v. Chapman, 158 Mass. 400, 33 N. E. 604, 35 Am. St. Rep. 502; Municipality of Ponce v. Roman Catholic Apostolic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068. See Dammert v. Osborn, 140 N. Y. 30, 35 N. E. 407.

Generally, the rules against accumulations do not apply; Perry, Trusts § 738; Odell v. Odell, 10 Allen (Mass.) 1; City of Philadelphia v. Girard's Heirs, 45 Pa. 9, 84 Am. Dec. 470; as accumulations for charity, for a longer period than is allowed by the rule against perpetuities will be upheld; Brigham v. Hospital, 126 Fed. 796; St. Paul's Church v. Attorney General, 164 Mass. 188, 41 N. E. 231. A bequest of money to be accumulated until the fund, with any additions from other sources, should suffice to pay the state debt, was held void as exceeding the limitation of the rule against remoteness and accumulations; Russell v. Trust Co., 171 Fed. 161.

Where there is no trustee appointed or none capable of acting, the trust will be sustained, and a trustee appointed; 3 Hare 191; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99, 7 L. Ed. 617. In New York a certain designated beneficiary was essential to the creation of a valid trust and the *cy pres* doctrine formerly was not accepted; see Power v. Cassidy, 79 N. Y. 602, 35 Am. Rep. 550, said to reach the limit of uncertainty in that state, and In re O'Hara's Will, 95 N. Y. 418, 47 Am. Rep. 53, and Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420, commenting on that case and reasserting the general rule in New York as stated; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487; a bequest in which the beneficiary is not designated and the selection thereof is delegated to trustees with complete discretionary power was held invalid, and the uncertainty as to beneficiaries could not be cured by anything done by the trustees to execute it; *id.*

But by New York Laws of 1893, c. 701, it is provided that if in an instrument creating a gift, grant, devise, or bequest there is a trustee named to execute the same, the legal title to the property shall vest in such trustee, and if no trustee be named, the title shall vest in the supreme court; Bowman v. Domestic & Foreign Missionary Society, 182 N. Y. 498, 75 N. E. 535; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568. The effect of this act is to restore the ancient doctrine of charitable uses and trusts as a part of the laws of New York; *id.;* to confer all power over charitable trusts and trustees on the supreme court and to require the attorney general to represent the beneficiaries in cases within the statute as was the practice in England; Rothschild v. Goldenberg, 58 App. Div. 499, 69 N. Y. Supp. 523.

A testamentary gift for a charity to an unincorporated association afterwards incorporated is sometimes sustained; as when the devise does not vest until after the incorporation; Plymouth Soc. of Milford v. Hepburn, 57 Hun 161, 10 N. Y. Supp. 817; but otherwise the incapacity to take cannot be cured by subsequent incorporation or amendment; Lougheed v. Dykeman's Baptist Church and Soc., 129 N. Y. 211, 29 N. E. 249, 14 L. R. A. 410 and note. A devise to a charity, however, is held valid where future incorporation is provided for or contemplated; *id.;* Field v. Theological Seminary, 41 Fed. 371; Trustees of Storrs Agricultural School v. Whitney, 54 Conn. 342, 8 Atl. 141; Miller v. Chittenden, 4 Ia. 252; Swasey v. Bible Soc., 57 Me. 523; Burrill v. Boardman, 43 N. Y. 254, 3 Am. Rep. 694; Kinnaird v. Miller's Ex'r, 25 Gratt. (Va.) 107. Under the civil law, a similar rule seems to have prevailed, and gifts for pious uses might be made to a legal entity to be established by the state after the testator's death; Mackeldy, Civ. Law § 157; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 100, 7 L. Ed. 617; Milne's Heirs v. Milne's Ex'rs, 17 La. 46; Howe, Studies in the Civil Law 68.

A legacy to a corporation for general corporate purposes is in some cases held to create a trust; De Camp v. Dobbins, 29 N. J. Eq. 36; 1 Dr. & War. 258; President, etc., of Harvard College v. Society, 3 Gray (Mass.) 280; in others not a trust but a gift with conditions annexed as to its expenditure; Woman's Foreign Missionary Society of Methodist Episcopal Church v. Mitchell, 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711; In re Griffin's Will, 167 N. Y. 71, 60 N. E. 284; Bird v. Merklee, 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423.

A gift to a perpetual institution not charitable is not necessarily bad. The gift is good if it is not subject to any trust that will prevent the existing members of the association from dealing with it as they please, or if it can be construed as a gift to or for the benefit of the individual members of the association. If the gift is one which by the terms of it, or which by reason of the constitution of the association in whose favor it is made, tends to a perpetuity, the gift is bad; 70 L. J. Ch. 631; [1901] 2 Ch. 110.

A gift to a society the object of which was

the employment of its funds for mutual benevolences among its members and their families was held not a charitable use under the common law of Pennsylvania or the statute of Elizabeth; Babb v. Reed, 5 Rawle (Pa.) 151, 28 Am. Dec. 650; Swift's Ex'rs v. Society, 73 Pa. 362.

In England a devise or bequest for benevolent purposes is held to be too indefinite and therefore void; 3 Mer. 17; 9 Ves. 399; but though wider than charity in legal signification; Norris v. Thomson's Ex'rs, 19 N. J. Eq. 307; its meaning may be narrowed by the context; De Camp v. Dobbins, 31 N. J. Eq. 695. Any act of kindness, forethought, good will, or friendship may properly be described as benevolent; Suter v. Hilliard, 132 Mass. 413, 42 Am. Rep. 444; and it has been held that whatever may be the meaning of the word when used alone in a bequest in connection with charity, it is synonymous with it; Saltonstall v. Sanders, 11 Allen (Mass.) 446. A fund for providing oysters for benchers at one of the Inns of Court, however benevolent, would hardly be called charitable; [1891] A. C. 580. A gift to an archbishop of property to be used as he "may judge most conducive to the good of religion in this diocese," is not a gift for "religious purposes" and is invalid; 106 L. T. 394 (P. C.). A bequest to executors to distribute the property among benevolent objects is not too indefinite to be permitted to stand; Dulles's Estate, 218 Pa. 162, 67 Atl. 49, 12 L. R. A. (N. S.) 1177.

Legacies to pious or charitable uses are not, by the law of England, entitled to a preference in distribution; although such was the doctrine of the civil law. Nor are they in the United States, except by special statutes.

In jurisdictions which have adopted the statute of uses, or which accept the doctrine of original jurisdiction in equity, trusts otherwise valid, especially when in aid of religious, educational, or charitable objects, are not void because of lack of corporate capacity in the beneficiary; Appeal of Evangelical Ass'n, 35 Pa. 316; Conklin v. Davis, 63 Conn. 377, 28 Atl. 537; Tappan v. Deblois, 45 Me. 122; Lewis v. Curnutt, 130 Ia. 423, 106 N. W. 914; Burbank v. Whitney, 24 Pick. (Mass.) 146, 35 Am. Dec. 312; Parker v. Cowell, 16 N. H. 149; Mason's Ex'rs v. M. E. Church, 27 N. J. Eq. 47.

In Evangelical Ass'n's Appeal, supra, it was held that a bequest to an unincorporated religious society, not upon any defined charity, or for any specified charitable use, was valid; in such case it is necessary only to name the legatee; such a society can take without any direction that the legacy (or gift) should be expended for charity purposes; its own character determines the character of the gift. Strong, J. (a great authority on this law), in delivering the opinion of the court, cited 3 Russ. 142, where it was held that in a bequest to a purely charitable corporation the court will decree payment without requiring that a scheme be settled for its distribution; also, 1 Sim. & Stu. 43, where a legacy to an unincorporated charitable institution, to become part of its general funds, was upheld. See also Burr's Ex'rs v. Smith, 7 Vt. 241, 29 Am. Dec. 154. He also cited with disapproval the statement to the contrary in 1 Jarm. Wills 193. The case also held that it makes no difference that the members of such society are largely non-residents.

A devise for the benefit of an unincorporated association of individuals unnamed, which may increase and add to its number, or lose by death or withdrawal, and the membership of which is not known, and is indeterminate, is held void for uncertainty; Miller v. Ahrens, 150 Fed. 644. In jurisdictions in which the statute of Elizabeth is not a part of the existing laws, only incorporated bodies can take charitable bequests; Mount v. Tuttle, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428; Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813 (where the opinion was also by Strong, J., then a member of that court); Fifield v. Van Wyck, 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745; Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. 590.

Where the association is not charitable, the gift is void within the doctrine of Morice v. Bishop of Durham, 9 Ves. 399: "There can be no trust over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership, not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the owner But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree a performance." This doctrine was applied where the gift was for the use and benefit of a convent, not charitable but religious; 11 L. R. Ir. 236; to an individual with the condition that he spend his time in retirement and constant devotion; L. R. 12 Eq. 574.

Where a statute declares void a gift by will to a charity if made within less than 30 days of the death, a gift to a trust company to take effect if a legacy to charities should be void under the act, was held void because it was clearly made to carry out the bequest to the charities designated in the will; In re Stirk's Estate, 232 Pa. 98, 81 Atl. 187.

See, generally, 3 Washburn, Real Prop. 687, 690; Boyle, Char.; Duke, Char. Uses; 2 Kent 361; 4 *id.* 616; 2 Ves. Ch. 52, 272; 6 *id.* 404; 7 *id.* 86; Ambl. 715; 2 Atk. 88;

Barr v. Weld, 24 Pa. 84; Mayor, etc., of Philadelphia v. Elliott, 3 Rawle (Pa.) 170; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644; Gass & Bonta v. Wilhite, 2 Dana (Ky.) 170, 26 Am. Dec. 446; McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516; Kniskern v. Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439; Yates v. Yates, 9 Barb. (N. Y.) 324; Voorhees v. Church, 17 Barb. (N. Y.) 104; Brett, Lead. Cas. Mod. Eq.; Trustees of McIntire Poor School v. Canal & Mfg. Co., 9 Ohio 203, 34 Am. Dec. 436; Hullman v. Honcomp, 5 Ohio St. 237; Town of Hamden v. Rice, 24 Conn. 350; Cincinnati v. White, 6 Pet. (U. S.) 435, 8 L. Ed. 452; Pawlet v. Clark, 9 Cra. (U. S.) 331, 3 L. Ed. 735; Dwight's argument, Rose will case; Dwight's Charity Cases; a full article on Jurisdiction of the Court of Chancery to Enforce Charitable Uses, 1 Am. L. Reg. (N. S.) 129, 321, 385; Dashiell v. Attorney-General, 5 Harr. & J. (Md.) 392, 9 Am. Dec. 577. See 31 Am. L. Reg. 123, 235, and 5 Harv. L. Rev. 389, for discussion of the Tilden will case, cited *supra;* 15 *id.* 509; and also Potter will case, Houston v. Townsend, 1 Del. Ch. 421, 12 Am. Dec. 109, in which the arguments are very fully reported and the authorities collected on both sides of the questions involved in this title.

Usually a charitable corporation is not liable in damages for personal injuries resulting from the torts of its officers and agents; Abston v. Academy, 118 Tenn. 24, 102 S. W. 351, 11 L. R. A. (N. S.) 1179; Fire Ins. Patrol v. Boyd, 120 Pa. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. Rep. 745; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; Farrigan v. Pevear, 193 Mass. 147, 78 N. E. 855, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; Leavell v. Asylum, 122 Ky. 213, 91 S. W. 671, 4 L. R. A. (N. S.) 269, 12 Ann. Cas. 827; Thornton v. Franklin Square House, 200 Mass. 465, 86 N. E. 909, 22 L. R. A. (N. S.) 486. But a public charitable reformatory is held liable to one whom it imprisons against her consent and without lawful authority; Gallon v. House of Good Shepherd, 158 Mich. 361, 122 N. W. 631, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387; a hospital is not exempt from liability for negligent injury to an employee merely because it was founded by property given for charitable purposes; Hewett v. Hospital, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. So a hospital which is an adjunct to a medical school and conducted for profit is liable for negligent injury to an employee; University of Louisville v. Hammock, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N. S.) 784, 128 Am. St. Rep. 355; as is one maintained by a railroad company for its employees to which they are obliged to contribute; Phillips v. R. Co., 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; and a religious corporation is liable to one injured in repairing its property, through the negligence of its servants in furnishing unsafe scaffolding; Bruce v. Central M. E. Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150. Its property cannot be sold under execution on a judgment rendered for the nonfeasance, misfeasance or malfeasance of its agents or trustees; Fordyce v. Ass'n, 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485.

A religious or charitable corporation is not exempt from liability for negligent injury to one coming upon its premises to perform service for it; Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889; Kellogg v. Church Charity Foundation, 203 N. Y. 191, 96 N. E. 406, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913A, 883; Mulchey v. Religious Society, 125 Mass. 487; Hewett v. Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496; Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; but such corporation is not liable for the negligent injury to a beneficiary by one of its servants; Gable v. Sisters of St. Frances, 227 Pa. 254, 75 Atl. 1087, 136 Am. St. Rep. 879; Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103; McDonald v. Massachusetts General Hospital, 120 Mass. 432, 21 Am. Rep. 529; Cunningham v. Sheltering Arms, 135 App. Div. 178, 119 N. Y. Supp. 1033; Powers v. Hospital, 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372; though the beneficiary be a patient in a hospital paying for the treatment received; nor will an inmate of a reform school be permitted to recover from the institution; Corbett v. Industrial School, 177 N. Y. 16, 68 N. E. 997; nor is such corporation liable where an inmate who partly pays for his care by work is killed in the course of it while directed by a competent servant; Cunningham v. Sheltering Arms, 61 Misc. 501, 115 N. Y. Supp. 576.

See FOREIGN CHARITIES; CY PRES; PERPETUITIES.

CHARTA. A charter or deed in writing. Any signal or token by which an estate was held.

CHARTA CHYROGRAPHATA. An indenture. The two parts were written on the same sheet, and the word chyrograph written between them in such a manner as to divide the word in the separation of the two parts of the indenture.

CHARTA COMMUNIS. An indenture.

CHARTA PARTITA. A charter-party.

CHARTA DE UNA PARTE. A deed poll. A deed of one part.

Formerly this phrase was used to distin-

guish a *deed poll*—which is an agreement made by one party only; that is, only one of the parties does any act which is binding upon him—from a deed *inter partes*. Co. Litt. 229. See DEED POLL.

CHARTA DE FORESTA (written *Carta de Foresta*). A collection of the laws of the forest, made in the reign of Hen. III.

The *charta de foresta* was called the Great Charter of the woodland population, nobles, barons, freemen, and slaves, loyally granted by Henry III. early in his reign (A. D. 1217). Inderwick, King's Peace 159; Stubb's Charters 347. There is a difference of opinion as to the *original* charter of the forest similar to that which exists respecting the true and original Magna Carta (*q. v.*), and for the same reason, viz., that both required repeated confirmation by the kings, despite their supposed inviolability. This justifies the remark of recent historians as to the great charter that "this theoretical sanctity and this practical insecurity are shared with 'the Great Charter of Liberties' by the Charter of the Forest which was issued in 1217." 1 Poll. & Maitl. 158. It is asserted with great positiveness by Inderwick that no forest charter was ever granted by King John, but that Henry III. issued the charter of 1217 (which he puts in the third year of the reign, which, however, only commenced Oct. 28, 1216), in pursuance of the promises of his father; and Lord Coke, referring to it as a charter on which the lives and liberties of the woodland population depended, says that it was confirmed at least thirty times between the death of John and that of Henry V.; 4 Co. Inst. 303.

Webster, under the title Magna Charta, says that the name is applied to the charter granted in the 9th Hen. III. and confirmed by Edw. I. Prof. Maitland, in speaking of Magna Carta, refers to "the sister-charter which defined the forest law" as one of the four documents which, at the death of Henry III., comprised the written law of England. 1 Soc. England 410. Edward I. in 1297 confirmed "the charter made by the common consent of all the realm in the time of Henry III. to be kept in every point without breach." Inderwick, King's Peace 160; Stubb's Charters 486. The Century Dictionary refers to this latter charter of Edw. I. as *the* Charter of the Forest; but it was, as already shown, only a confirmation of it, and a comparison of the authorities leaves little if any doubt that the date was as above stated and the history as here given. Its provisions may be found in Stubb's Charters and they are summarized by Inderwick, in his recent work above cited. See FOREST LAWS.

CHARTEL. A challenge to single combat. Used at the period when trial by single combat existed. Cowell.

CHARTER. A grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. 1 Story, Const. § 161; 1 Bla. Com. 108.

A charter differs from a constitution in this, that the former is granted by the sovereign, while the latter is established by the people themselves: both are the fundamental law of the land.

A deed. The written evidence of things done between man and man. Cowell. Any conveyance of lands. Any sealed instrument. Spelman. See Co. Litt. 6; 1 Co. 1; F. Moore 687.

An act of a legislature creating a corporation.

The charter of a corporation consists of its articles of incorporation taken in connection with the law under which it was organized; Chicago Open Board of Trade v. Bldg. Co., 136 Ill. App. 606.

The name is ordinarily applied to government grants of powers or privileges of a permanent or continuous nature, such as incorporation, territorial dominion or jurisdiction. Between private persons it is also loosely applied to deeds and instruments under seal for the conveyance of lands. Cent. Dict.

It is to be strictly construed; Rockland Water Co. v. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388; Oregon R. & Nav. Co. v. Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; East Line & R. R. Ry. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834. The reservation by the legislature of power to repeal a charter cannot give authority to take away or destroy property lawfully acquired or created under the charter; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684. A charter may be taken under the power of eminent domain; Appeal of Philadelphia & Gray's Ferry Pass. R. Co., 102 Pa. 123. See FORFEITURE.

As to the power of the state to alter, amend or repeal a charter, see IMPAIRING OBLIGATIONS OF A CONTRACT.

The early history of the genesis of the corporation, particularly of municipal corporations, is elaborated in a paper by A. M. Eaton in Am. Bar. Ass'n Rep. (1902) 292, 322, in which it is said: "The facts of history now known, and many of which were unknown to Coke, show that charters were granted by lords of manors, lay and spiritual, as well as by kings holding manors as of their own demesne and not acting in the exercise of any royal prerogative, to towns and boroughs confirming the continued enjoyment of 'liberties' in the future as they had already been long enjoyed in the past. Sometimes additional new 'liberties' were added, and afterwards similar brand-new charters were granted, relating only to future enjoyment of such 'liberties' similar to those already long enjoyed by the old towns and boroughs. In return for these grants the townspeople agreed at first, each one severally, to render his feudal dues (or rent in place thereof); then a group of the principal townsmen or burghers became responsible for the whole sum, and finally the town itself became thus liable for the fee-ferm rent. There was no intention on either part to form a corporation, indeed neither knew what a corporation was; for the name did not exist, but the thing itself was being gradually evolved."

BLANK CHARTER. A document given to the agents of the crown in the reign of Richard II., with power to fill up as they pleased.

CHARTER OF PARDON. In English Law. An instrument under the great seal by which a pardon is granted to a man for a felony or other offence. Black, L. Dict.

See FRANCHISE.

CHARTER-LAND. In English Law. Land formerly held by deed under certain rents and free services. It differed in nothing from free socage land; and it was also called bookland. 2 Bla. Com. 90.

CHARTER-PARTY. A contract of afreightment, by which the owner of a ship or other vessel lets the whole or a part of her to a merchant or other person for the conveyance of goods, on a particular voyage, in consideration of the payment of freight.

The term is derived from the fact that the contract which bears this name was formerly written on a card *(charta-partita)*, and afterwards the card was cut into two parts from top to bottom and one part was delivered to each of the parties, which was produced when required, and by this means counterfeits were prevented. Abb. Ship. 175; Pothier, *Traité de Charte-partie*, gives this explanation taken from Boerius: "It was formerly usual in England and Aquitaine to reduce contracts into writing on a chart, divided afterwards into two parts from top to bottom, of which each of the contracting parties took one, which they placed together and compared when they had occasion to know the terms of their contract."

It is in writing not generally under seal, in modern usage; 1 Pars. Adm. & Sh. 270; In re Cloherty, 2 Wash. 145, 27 Pac. 1064; Brown v. Ralston, 4 Rand. (Va.) 504; but may be by parol; Ben. Adm. 287; Taggard v. Loring, 16 Mass. 336, 8 Am. Dec. 140; Muggridge v. Eveleth, 9 Metc. (Mass.) 233; The Phebe, Ware 263, Fed. Cas. No. 11,064; The Tribune, 3 Sumn. 144, Fed. Cas. No. 14,171. It should contain, *first*, the name and tonnage of the vessel; see Johnson v. Miln, 14 Wend. (N. Y.) 195; Ashburner v. Balchen, 7 N. Y. 262; *second*, the name of the captain; 2 B. & Ald. 421; *third*, the names of the vessel-owner and the freighter; *fourth*, the place and time agreed upon for the loading and discharge; *fifth*, the price of the freight; Kleine v. Catara, 2 Gall. 61, Fed. Cas. No. 7,869; *sixth*, the demurrage or indemnity in case of delay; 9 C. & P. 709; Clendaniel v. Tuckerman, 17 Barb. (N. Y.) 184; Lacombe v. Waln, 4 Binn. (Pa.) 299; Brown v. Ralston, 9 Leigh (Va.) 532; Towle v. Kettell, 5 Cush. (Mass.) 18; *seventh*, such other conditions as the parties may agree upon; 13 East 343; Bee 124. The owner who signs a charter-party impliedly warrants that the vessel is commanded by competent officers; Tebo v. Jordan, 67 Hun 392, 22 N. Y. Supp. 156. One of the conditions implied in a charter-party is that the vessel will commence the voyage with reasonable diligence; waiting four months violates the contract; Olsen v. Hunter-Benn & Co., 54 Fed. 530.

It may either provide that the charterer hires the whole capacity and burden of the vessel,—in which case it is in its nature a contract whereby the owner agrees to carry a cargo which the charterer agrees to provide,—or it may provide for an entire surrender of the vessel to the charterer, who then hires her as one hires a house, and takes possession in such a manner as to have the rights and incur the liabilities which grow out of possession. See 8 Ad. & E. 835; Palmer v. Gracie, 4 Wash. C. C. 110, Fed. Cas. No. 10,692; Hooe v. Groverman, 1 Cra. (U. S.) 214, 2 L. Ed. 86; Lyman v. Redman, 23 Me. 289; Clarkson v. Edes, 4 Cow. (N. Y.) 470; The Volunteer, 1 Sumn. 551, Fed. Cas. No. 16,991; Ruggles v. Bucknor, 1 Paine 358, Fed. Cas. No. 12,115. If the object sought can be conveniently accomplished without a transfer of the vessel, the courts will not be inclined to consider the contract as a demise of the vessel; U. S. v. Cassedy, 2 Sumn. 583, Fed. Cas. No. 14,745; Sweatt v. R. Co., 3 Cliff. 339, Fed. Cas. No. 13,684; Hooe v. Groverman, 1 Cra. (U. S.) 214, 2 L. Ed. 86; Reed v. U. S., 11 Wall. (U. S.) 591, 20 L. Ed. 220; Work v. Leathers, 97 U. S. 379, 24 L. Ed. 1012.

When a ship is chartered, this instrument serves to authenticate many of the facts on which the proof of her neutrality must rest, and should therefore be always found on board chartered ships; 1 Marsh. Ins. 407.

Unqualified charter-parties are to be construed liberally as mercantile contracts, and one who has thereby charged himself with an obligation must make it good unless prevented by the act of God, the law, or the other party; The B. F. Bruce, 50 Fed. 118. A charter-party controls a bill of lading in case of conflict between them; Ardan S. S. Co. v. Theband, 35 Fed. 620. In construing a charter-party, matter expunged from a printed form may be considered in determining the intention of the parties; One Thousand Bags of Sugar v. Harrison, 53 Fed. 828, 4 C. C. A. 34. See INTERPRETATION. Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause excepting liability for results caused by restraints of successor; The Progreso, 50 Fed. 835, 2 C. C. A. 45.

CHARTERED ACCOUNTANT. See AUDITOR.

CHARTIS REDDENDIS (Lat. for returning charters). A writ which lay against one who had charters of feoffment intrusted to his keeping, which he refused to deliver. Reg. Orig. 159. It is now obsolete.

CHASE. The liberty or franchise of hunting, oneself, and keeping protected against all other persons, beasts of the chase within a specified district, without regard to the ownership of the land. 2 Bla. Com. 414.

The district within which such privilege is to be exercised.

A chase is a franchise granted to a subject, and hence is not subject to the *forest* laws; 2 Bla. Com. 38. It differs from a park, because it may be another's ground, and is not enclosed. It is said by some to be smaller than a forest and larger than a park. *Termes de la Ley*. But this seems to be a customary incident, and not an essential quality.

The act of acquiring possession of animals *ferœ naturæ* by force, cunning, or address.

The hunter acquires a right to such animals by occupancy, and they become his property; 4 Toullier, n. 7. No man has a right to enter on the lands of another for the purpose of hunting, without his consent; 14 East 249; Pothier, *Propriété*, pt. 1, c. 2, a. 2.

CHASTE. In the seduction statutes it means actual virtue in conduct and principle. One who falls from virtue and afterwards reforms is chaste within the meaning of the statutes; Wood v. State, 48 Ga. 288, 15 Am. Rep. 664; Andre v. State, 5 Ia. 389, 68 Am. Dec. 708; Carpenter v. People, 8 Barb. (N. Y.) 603; Boyce v. People, 55 N. Y. 644; Wilson v. State, 73 Ala. 527.

CHASTITY. That virtue which prevents the unlawful commerce of the sexes.

A woman may defend her chastity by killing her assailant. See SELF-DEFENCE.

Sending a letter to a married woman soliciting her to commit adultery is an indictable offence; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105. See Shannon v. Com., 14 Pa. 226. In England, and perhaps elsewhere, the mere solicitation of chastity is not indictable; 2 Chit. Pr. 478. Words charging a woman with a violation of chastity are actionable in themselves, because they charge her with a crime punishable by law, and of a character to degrade and disgrace her, and exclude her from society; Frisbie v. Fowler, 2 Conn. 707; Brown v. Nickerson, 5 Gray (Mass.) 2; Heard, Lib. & Sl. § 36; Brooker v. Coffin, 5 Johns. (N. Y.) 190, 4 Am. Dec. 337; Gosling v. Morgan, 32 Pa. 275; but not so in the District of Columbia; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308. See LIBEL; PROMISE OF MARRIAGE.

CHATTEL (Norm. Fr. *goods*, of any kind). Every species of property, movable or immovable, which is less than a freehold.

In the *Grand Coutumier* of Normandy it is described as a mere movable, but is set in opposition to a fief or *feud;* so that not only goods, but whatever was not a *feud* or fee, were accounted chattels; and it is in this latter sense that our law adopts it. 2 Bla. Com. 385.

Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land. And the duration of the lease is immaterial, whether it be for one or a thousand years, provided there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description; and so in fact will be found to be any other interest in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is, therefore, something less than a freehold. A lease giving the exclusive privilege for a term of years of boring and digging for oil and other minerals is also a chattel; Brown v. Beecher, 120 Pa. 590, 15 Atl. 608.

Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another; 2 Kent 340; Co. Litt. 48 *a*; 4 Co. 6; In re Gay, 5 Mass. 419; Brewster v. Hill, 1 N. H. 350.

Chattels, whether real or personal, are treated as personal property in every respect, and, in case of the death of the owner, usually belong to the executor or administrator, and not to the heir at law. There are some chattels, however, which, as Chancellor Kent observes, though they be movable, yet are necessarily attached to the freehold: contributing to its value and enjoyment, they go along with it in the same path of descent or alienation. This is the case with deeds, and other papers which constitute the muniments of title to the inheritance; the shelves and family pictures in a house; and the posts and rails of an enclosure. It is also understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond go with the inheritance, as heirlooms to the heir at law. But fixtures, or such things of a personal nature as are attached to the realty, whether for a temporary purpose or otherwise, become chattels, or not, according to circumstances; Mitch. R. P. 21. See FIXTURES; 2 Kent 342; Co. Litt. 20 *a*, 118; 12 Price 163; 11 Co. 50 *b*; Bacon, Abr. *Baron*, etc. C, 2; Dane, Abr. Index; Com. Dig. *Biens*, A.

CHATTEL INTEREST. An interest in corporeal hereditaments less than a freehold. 2 Kent 342.

There may be a chattel interest in real property, as in case of a lease; Stearns, Real Act. 115. A term for years, no matter of how long duration, is but a chattel interest, unless declared otherwise by statute. The subject is treated in 1 Washburn, R. P. 310.

CHATTEL MORTGAGE. A transfer of personal property as security for a debt or obligation in such form that upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee. Thomas, Mort. 427.

An absolute pledge, to become an absolute interest if not redeemed at a fixed time. Cortelyou v. Lansing, 2 Caines, Cas. (N. Y.) 200, per Kent, Ch.

Strictly speaking, a conditional sale of a chattel as security for the payment of a debt or the performance of some other obligation. Jones, Chat. Mort. § 1. The condition is that the sale shall be void upon the performance of the condition named. If the condition be not performed, the chattel is irredeemable at law; but it may be otherwise in equity or by statute; *id.* The title is fully vested in the mortgagee and can be defeated only by

the due performance of the condition; upon a breach, the mortgagee may take possession and treat the chattel as his own; *id.;* Porter v. Parmly, 34 N. Y. Sup. Ct. 398. See Flanders v. Thomas, 12 Wis. 413.

At common law a chattel mortgage may be made without writing; it is valid as between the parties; Bank of Rochester v. Jones, 4 N. Y. 497, 55 Am. Dec. 290. A verbal chattel mortgage is valid between the parties; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542; Stearns v. Gafford, 56 Ala. 544; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; Bates v. Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234; Carroll Exch. Bank v. Bank, 50 Mo. App. 92; and as to third parties with notice; Sparks v. Wilson, 22 Neb. 112, 34 N. W. 111; *contra,* Lazarus v. Bank, 72 Tex. 359, 10 S. W. 252; Knox v. Wilson, 77 Ala. 309; and even as against third parties if accompanied by possession in the mortgagee; Bardwell v. Roberts, 66 Barb. (N. Y.) 433; but delivery is not essential in all cases to the validity of a chattel mortgage; Morrow v. Turney's Adm'r, 35 Ala. 131; but see Bardwell v. Roberts, 66 Barb. (N. Y.) 433. It differs from a *pledge* in that in case of a mortgage the title is vested in the mortgagee, subject to defeasance upon the performance of the condition; while in the case of a pledge, the title remains in the pledgor, and the pledgee holds the possession for the purposes of the bailment; White v. Cole, 24 Wend. (N. Y.) 116; Conner v. Carpenter, 28 Vt. 237; Day v. Swift, 48 Me. 368; Heyland v. Badger, 35 Cal. 404; Badlam v. Tucker, 1 Pick. (Mass.) 389, 11 Am. Dec. 202; Sims v. Canfield, 2 Ala. 555. By a mortgage the title is transferred; by a pledge, the possession; Jones, Mort. § 4.

Upon default, in cases of pledge, the pledgor may recover the chattel upon tendering the amount of the debt secured; but in case of a mortgage, upon default the chattel, at law, belongs to the mortgagee; Porter v. Parmly, 43 How. Pr. (N. Y.) 445. In equity he may be held liable to an account; Stoddard v. Denison, 38 *id.* 296. Apart from statutes, no special form is required for the creation of a chattel mortgage. A bill of sale absolute in form, with a separate agreement of defeasance, constitute together a mortgage, as between the parties; Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489, 93 Am. Dec. 113; Davis v. Hubbard, 38 Ala. 185; Polhemus v. Trainer, 30 Cal. 685; Soell v. Hadden, 85 Tex. 182, 19 S. W. 1087; State v. Bell, 2 Mo. App. 102; or a note with an endorsement on the back that at any time the maker agreed to make a chattel mortgage; Riddle v. Norris, 46 Mo. App. 512. And in equity, the defeasance may be subsequently executed; Locke's Ex'r v. Palmer, 26 Ala. 312. A parol defeasance is not good in law; Harper v. Ross, 10 Allen (Mass.) 332; Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767; Montany v. Rock, 10 Mo. 506; *contra,* Fuller v. Parrish, 3 Mich. 211; but it is in equity; Coe v. Cassidy, 72 N. Y. 133; Laeber v. Langhor, 45 Md. 477; Stokes v. Hollis, 43 Ga. 262; National Ins. Co. v. Webster, 83 Ill. 470; Bartel v. Lope, 6 Or. 321; Hurford v. Harned, 6 Or. 363; even as to third parties with notice; Omaha Book Co. v. Sutherland, 10 Neb. 334, 6 N. W. 367. See Conway v. Iron Co., 33 Neb. 454, 50 N. W. 326. The question whether a bill of sale was intended as a chattel mortgage is for the jury; King v. Greaves, 51 Mo. App. 534.

In a *conditional sale,* the purchaser has merely a right to purchase, and no debt or obligation exists on the part of the vendor; this distinguishes such a sale from a mortgage; Weathersly v. Weathersly, 40 Miss. 462, 90 Am. Dec. 344; Gomez v. Kamping, 4 Daly (N. Y.) 77.

Where there is an absolute sale and a simultaneous agreement of resale, the tendency is to consider the transaction a mortgage; Barnes v. Holcomb, 12 Sm. & M. (Miss.) 306; Fowler v. Stoneum, 11 Tex. 478, 62 Am. Dec. 490; Folsom v. Fowler, 15 Ark. 280; but not when the intention of the parties is clearly otherwise; Forkner v. Stuart, 6 Gratt. (Va.) 197; Bracken v. Chaffin, 5 Humph. (Tenn.) 575.

It is not necessary that a written chattel mortgage should be under seal; Gerrey v. White, 47 Me. 504; Sherman v. Fitch, 98 Mass. 59; Ping. Chat. Mort. 45; Gibson v. Warden, 14 Wall. (U. S.) 244, 20 L. Ed. 797; Sweetzer v. Mead, 5 Mich. 107.

A chattel mortgage of a crop must designate the land; W. L. Hurley & Sons v. Ray, 160 N. C. 376, 76 S. E. 234.

At *common law* a mortgage can be given only of chattels actually in existence, and belonging to the mortgagor actually or potentially; Pierce v. Emery, 32 N. H. 484; Roy v. Goings, 6 Ill. App. 162; Looker v. Peckwell, 38 N. J. L. 253; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; Cook v. Corthell, 11 R. I. 482, 23 Am. Rep. 518; Bouton v. Haggart, 6 Dak. 32, 50 N. W. 197; and even though the mortgagor may afterwards acquire title, the mortgage is bad against subsequent purchasers and creditors; but it is otherwise between the parties; Ludwig v. Kipp, 20 Hun (N. Y.) 265; claims for money not yet earned may be the subject of a chattel mortgage; Sandwich Mfg. Co. v. Robinson, 83 Ia. 567, 49 N. W. 1031, 14 L. R. A. 126, and an elaborate note thereto.

In *equity* the rule is different; the mortgage, though not good as a conveyance, is valid as an executory agreement; the mortgagor is considered as a trustee for the mortgagee; Williams v. Briggs, 11 R. I. 476, 23 Am. Rep. 518; 10 H. L. Cas. 191; Mitchell v. Winslow, 2 Sto. 630, Fed. Cas. No. 9,673; Beall v. White, 94 U. S. 382, 24 L. Ed. 173; Schuelenburg & Boeckler v. Martin, 2

Fed. 747; Ellett v. Butt, 1 Woods, 214, Fed. Cas. No. 4,384; Perry v. White, 111 N. C. 197, 16 S. E. 172. But see Moody v. Wright, 13 Metc. (Mass.) 17, 46 Am. Dec. 706; Hunter v. Bosworth, 43 Wis. 583. Under this principle all sorts of future interests in chattels may be mortgaged; Jones, Chat. Mort. § 174.

The crops of specified land or the future young of animals could at one time be sold or mortgaged on the ground that seller had potential possession and passed legal title; Hob. 132, but the English Sale of Goods Act, § 5, provides that where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell goods. No exception is made in favor of property which at common law was the subject of potential possession. This seems to change the rule in England. The mere agreement to mortgage personalty subsequently to be acquired gave the mortgagee a lien upon the property; 10 H. L. Cas. 191; [1903] 2 K. B. 367. It is essential that the mortgagee shall have actually advanced his money; 13 App. Cas. 523.

Mortgages of future acquired chattels where the mortgagor is in possession are held invalid against an attachment or levy by creditors; American Surety Co. v. Mfg. Co., 100 Fed. 40; Tatman v. Humphrey, 184 Mass. 361, 68 N. E. 844, 63 L. R. A. 738, 100 Am. St. Rep. 562; Francisco v. Ryan, 54 Ohio St. 307, 43 N. E. 1045, 56 Am. St. Rep. 711; Girard Trust Co. v. Mellor, 156 Pa. 579, 27 Atl. 662; *contra*, Riddle v. Dow, 98 Ia. 7, 66 N. W. 1066, 32 L. R. A. 811; Cunningham v. Woolen Mills, 69 N. J. Eq. 710, 61 Atl. 372. The general rule is that a chattel mortgagee has title, and so a mortgage on animals covers the increase, though not mentioned in the mortgage on the property, *partus sequitur ventrem;* Northwestern Nat. Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307; but in those states where such a mortgage gives only a lien, then it is limited to the property actually described; Demers v. Graham, 36 Mont. 402, 93 Pac. 268, 14 L. R. A. (N. S.) 431, 122 Am. St. Rep. 384, 13 Ann. Cas. 97; *contra*, First Nat. Bank v. Investment Co., 86 Tex. 636, 26 S. W. 488. See 19 Harv. L. Rev. 557, by Samuel Williston.

A chattel mortgage on growing crops, given as security for a note and for future advances and merchandise sold, is valid; Souza v. Lucas (Cal.) 100 Pac. 115.

The registration statutes simply provide a substitute for change of possession. Between the parties, a change of possession is unnecessary; if there is a change of possession, registration is not required; Morrow v. Reed, 30 Wis. 81; Janvrin v. Fogg, 49 N. H. 340; Fordice v. Gibson, 129 Ind. 7, 28 N. E. 303. At common law an unrecorded chattel mortgage is *prima facie* fraudulent and void as to creditors, where there is no change of possession, but such presumption may be rebutted; Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367; Frankhouser v. Worrall, 51 Kan. 404, 32 Pac. 1097; See Frost v. Mott, 34 N. Y. 253; Kleine v. Katzenberger, 20 Ohio St. 110, 5 Am. Rep. 630.

Possession by the mortgagee cures defects in the form of the mortgage, or its execution; Springer v. Lipsis, 209 Ill. 261, 70 N. E. 641; Farmers' & Merchants' Bank v. Orme, 5 Ariz. 304, 52 Pac. 473; so of defects in acknowledgment when possession is taken before a third party's lien attaches; Garner v. Wright, 52 Ark. 385, 12 S. W. 785, 6 L. R. A. 715; and so as to the affidavit accompanying the mortgage; Chicago Title & Trust Co. v. O'Marr, 18 Mont. 568, 46 Pac. 809, 47 Pac. 4; and as to any insufficiency in the description of the chattels; Frost v. Bank, 68 Wis. 234, 32 N. W. 110; Kelley v. Andrews, 102 Ia. 119, 71 N. W. 251. But if the mortgage is not recorded and is thereby invalid, it is not validated by the mortgagee's possession as to the mortgagor's creditors whose debts were created or whose rights attached after execution and before possession taken; In re Bothe, 173 Fed. 597, 97 C. C. A. 547; Stephens v. Perrine, 143 N. Y. 476, 39 N. E. 11. Where the mortgagee takes contemporaneous possession and retains it, recording is not essential; Fordice v. Gibson, 129 Ind. 7, 28 N. E. 303; Brockway v. Abbott, 37 Wash. 263, 79 Pac. 924; and, though not recorded, a chattel mortgage is good against all the world if, after condition broken, the mortgagee takes possession; Garrison v. Carpet Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. Rep. 799.

A mortgage not filed under the statute is good against a subsequent bill of sale made by the mortgagor after the mortgagee was in possession; Smith v. Connor (Tex.) 46 S. W. 267. So of a subsequent chattel mortgage made by the mortgagor; National Bank of Metropolis v. Sprague, 21 N. J. Eq. 530; and an attachment subsequently levied against the mortgagor; Baldwin v. Flash, 59 Miss. 61; Isenberg v. Fansler, 36 Kan. 402, 13 Pac. 573.

The English Bill of Sales Acts only required written chattel mortgages to be recorded, but they need not be written. The mortgage statutes on recording are collected in Jones, Chattel Mortgages, § 190 et seq. Some make the mortgagor's place of residence the place of record; others the place where the property is situated at the time; others require them to be refiled every year, and so on. In general, innocent third parties will prevail over the holder of a chattel mortgage or conditional bill of sale, unless the instrument has been recorded or the goods have been delivered; Funk v. Paul, 64 Wis. 35, 24 N. W. 419, 54 Am. Rep. 576. As a general rule, where a judgment is not

a lien upon personal property, a mortgage recorded after judgment, but before execution, has priority; Jones, Chatt. Mortg. § 245d. It is held that where a mortgage is not recorded nor possession taken by the mortgagee, it is good as against general, but not judgment, creditors; Stephens v. Meriden Britannia Co., 160 N. Y. 180, 54 N. E. 781, 73 Am. St. Rep. 678. A mortgagee who has not taken possession or recorded his mortgage immediately cannot protect himself against the mortgagor's creditors; Roe v. Meding, 53 N. J. Eq. 350, 30 Atl. 587, 33 Atl. 394.

An unrecorded chattel mortgage is valid against a general assignment by the mortgagor for his creditors; Jones, Chatt. Mortg. § 244; but is invalid as to a receiver of the mortgagor because he represents creditors; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163; Fidelity Trust Co. v. Clay Co., 70 N. J. Eq. 550, 67 Atl. 1078 (there being creditors whose debts are a lien upon the chattels); *contra;* Berline Machine Works v. Trust Co., 60 Minn. 161, 61 N. W. 1131; Ryder v. Ryder, 19 R. I. 188, 32 Atl. 919.

Where statutes provide that a mortgage of chattels shall be void unless the mortgage is filed or there shall be an actual and continued change of possession, it is essential that such provisions be strictly complied with; Buckstaff Bros. Mfg. Co. v. Snyder, 54 Neb. 538, 74 N. W. 863; McTaggart v. Rose, 14 Ind. 230. See Mower v. McCarthy, 79 Vt. 142, 64 Atl. 578, 7 L. R. A. (N. S.) 418, 118 Am. St. Rep. 942.

The removal of the mortgaged chattels from the county where the mortgage on them was recorded does not require it to be recorded in the new place; Jones, Chatt. Mortg. § 260; National Bank of Commerce v. Jones, 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 311, 11 Ann. Cas. 1041.

Statutes regulating chattel mortgages exist in all of the states except Louisiana.

Under the old Bankrupt Act it was held that a bankrupt assignee took only the debtor's title to goods in the case of an unrecorded mortgage; Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816; and so in England; 12 M. & W. 855. The rule was generally otherwise in insolvency; Jones, Chatt. Mortg. § 242. The present Bankrupt Act (§ 67 a) provides that liens which are invalid against creditors shall be invalid against the trustee. See Knapp v. Trust Co., 216 U. S. 545, 30 Sup. Ct. 412, 54 L. Ed. 610. It leaves open to the individual states to allow the acquisition of a lien by the mortgagee by taking possession at any time before actual bankruptcy, and it is immaterial that possession is taken with the mortgagor's consent; Humphrey v. Tatman, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

A chattel mortgage void by a state statute as to creditors of the mortgagor, for want of change of possession, is invalid as to his trustees in bankruptcy.

A chattel mortgage with power of sale and a deed of trust are practically one and the same instrument, as understood in the District of Columbia; Hunt v. Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381.

No mortgage of a *vessel* is valid against third parties without notice, unless recorded in the office of the collector of customs of the port where the vessel is enrolled; Rev. Stat. § 4192, etc. As between parties and those who have notice, registration is not required; Moore v. Simonds, 100 U. S. 145, 25 L. Ed. 590; Best v. Staple, 61 N. Y. 71; The John T. Moore, 3 Wood 61, Fed. Cas. No. 7,430. As to Extraterritoriality of Chattel Mortgages, see CONFLICT OF LAWS.

See MORTGAGE.

CHAUD-MEDLEY (Fr. *chaud*, hot). The killing of a person in the heat of an affray.

It is distinguished by Blackstone from chance-medley, an accidental homicide. 4 Bla. Com. 184. The distinction is said to be, however, of no great importance. 1 Russ. Cr. 660. Chance-medley is said to be the killing in self-defence, such as happens on a sudden rencounter, as distinguished from an accidental homicide. *Id.*

CHEAT. "Deceitful practices in defrauding or *endeavoring* to defraud another of his known right, by some *wilful device*, contrary to the plain rules of common honesty." Hawk. Pl. Cr. b. 2, c. 23, § 1.

The fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony) which affects or may affect the public.

In order to constitute a cheat or indictable fraud, there must be a prejudice received; and such injury must affect the public welfare, or have a tendency so to do; 2 East, Pl. Cr. 817; 1 Deacon, Cr. Law 225.

It seems to be a fair result of the cases, that a cheat, in order to be indictable at common law, must have been public in its nature, by being calculated to defraud numbers, or to deceive or injure the public in general, or by affecting the public trade or revenue, the public health, or being in fraud of public justice, etc. And the other cases to be found in the books, of cheats apparently private which have been yet held to be indictable at common law, will, upon examination, appear to involve considerations of a public nature also, or else to be founded in conspiracy or forgery. Thus, it is not indictable for a man to obtain goods by false verbal representations of his credit in society, and of his ability to pay for them; Com. v. Warren, 6 Mass. 72; or to violate his contract, however fraudulently it be broken; Com. v. Hearsey, 1 Mass. 137; or fraudulently to deliver a less quantity of amber than was contracted for and represented; 2 Burr. 1125; 1 W. Bla. 273; or to receive good barley to grind, and to return instead a musty mixture of barley and oat-

meal; 4 Maule & S. 214. See 2 East, Pl. Cr. 816; People v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. Dec. 256; Com. v. Morse, 2 Mass. 138; Cross v. Peters, 1 Greenl. (Me.) 387, 10 Am. Dec. 78; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Republica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31; 1 B. & H. L. Cr. Cas. 1. Refusing to return a promissory note obtained for the purpose of examination is merely a private fraud; People v. Miller, 14 Johns. (N. Y.) 371.

To cheat a man of his money or goods, by using false weights or false measures, has been indictable at common law from time immemorial; 3 Greenl. Ev. § 86; Com. v. Warren, 6 Mass. 72. See Republica v. Powell, 1 Dall. (Pa.) 47, 1 L. Ed. 31. In addition to this, the statute 33 Hen. VIII. 1, which has been adopted and considered as a part of the common law in some of the United States, and the provisions of which have been either recognized as common law or expressly enacted in nearly all of them, was directed, as appears from its title and preamble, against such persons as received money or goods by means of counterfeit letters or privy tokens in other men's names; Com. v. Warren, 6 Mass. 72; People v. Johnson, 12 Johns. (N. Y.) 292; 3 Greenl. Ev. § 86; 2 Bish. Cr. L. 145. A "privy token," within the meaning of this statute, was held to denote some real visible mark or thing, as a key, a ring, etc., and not a mere affirmation or promise. And though writings, generally speaking, may be considered as tokens, yet to be within this statute they must be such as were made in the names of third persons, whereby some additional credit and confidence might be gained to the party using them; 2 East, Pl. Cr. 826, 827.

The word "cheat" is not actionable, unless spoken of the plaintiff in relation to his profession or business; Odiorne v. Bacon, 6 Cush. (Mass.) 185; 2 Chit. Rep. 657; Rush v. Cavenaugh, 2 Pa. 187; 20 Up. Can. Q. B. 382; Ostrom v. Calkins, 5 Wend. (N. Y.) 263; Stevenson v. Hayden, 2 Mass. 406; Lucas v. Flinn, 35 Ia. 9. See DECEIT; FRAUD; FALSE PRETENSES; TOKEN; ILLITERATE.

CHECK. A written order or request, addressed to a bank or persons carrying on the business of banking, by a party having money in their hands, desiring them to pay, on presentment, to a person therein named or bearer, or to such person or order, a named sum of money. 2 Dan. Neg. Inst. 528; Blair v. Wilson, 28 Gratt. (Va.) 170; Deener v. Brown, 1 MacArth. (D. C.) 350; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985. See Chapman v. White, 6 N. Y. 412, 57 Am. Dec. 464.

A check is a bill of exchange drawn on a bank, payable on demand. Neg. Instr. Act § 185.

The chief differences between checks and bills of exchange are: *First*, a check is not due until presented, and, consequently, it can be negotiated any time before presentment, and yet not subject the holder to any equities existing between the previous parties; Cruger v. Armstrong, 3 Johns. Cas. (N. Y.) 5, 9, 2 Am. Dec. 126; 9 B. & C. 388; Chit. Bills (8th ed.) 546. *Secondly*, the drawer of a check is not discharged for want of immediate presentment with due diligence; while the drawer of a bill of exchange is. The drawer of a check is only discharged by such neglect when he sustains actual damage by it, and then only *pro tanto;* Murray v. Judah, 6 Cow. (N. Y.) 484; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 306; Little v. Bank, 2 Hill (N. Y.) 425. See Case v. Morris, 31 Pa. 100. *Thirdly*, the death of the drawer of a check rescinds the authority of the banker to pay it; while the death of the drawer of a bill of exchange does not alter the relations of the parties; 3 M. & G. 571-573. *Fourthly*, checks, unlike bills of exchange, are always payable without grace; Woodruff v. Bank, 25 Wend. (N. Y.) 673; Merchants' Bank of New York v. Woodruff, 6 Hill (N. Y.) 174. See a discussion of this subject, 4 Kent (Lacey's ed.) note on p. 571 of the index, commenting upon opinion of Cowen, J., in Harker v. Anderson, 21 Wend. (N. Y.) 372.

Checks are in use only between banks and bankers and their customers, and are designed to facilitate banking operations. It is of their very essence to be payable on demand, because the contract between the banker and customer is that the money is payable on demand; Harker v. Anderson, 21 Wend. (N. Y.) 372; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 647, 19 L. Ed. 1008; Wood River Bank v. Bank, 36 Neb. 744, 55 N. W. 239.

As between the holder of a check and the indorser it is required that due diligence be used in presenting them; Lewis, Hubbard & Co. v. Supply Co., 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 132; Start v. Tupper, 81 Vt. 19, 69 Atl. 151, 15 L. R. A. (N. S.) 213, 130 Am. St. Rep. 1015; and it should be protested in order to fix the liability of indorsers; 3 Kent (Lacey's ed.) 88; but it is not necessary to use diligence in presenting an ordinary check, in order to charge the drawer, unless he has received damage by the delay; Buckner v. Finley, 2 Pet. (U. S.) 586, 7 L. Ed. 528; Little v. Bank, 2 Hill (N. Y.) 425; Daniels v. Kyle, 1 Ga. 304; 2 M. & R. 401; Syracuse, B. & N. Y. R. Co. v. Collins, 57 N. Y. 641; Purcell v. Allemong, 22 Gratt. (Va.) 743; Taylor v. Sip, 30 N. J. L. 284; Stewart v. Smith, 17 Ohio St. 82; Morrison v. McCartney, 30 Mo. 183; Cork v. Bacon, 45 Wis. 192, 30 Am. Rep. 712; Montelius v. Charles, 76 Ill. 303. If not presented for payment within a reasonable time after issue, the drawer will be discharged from liability thereon to the extent of the loss caused by the delay; Neg. Instr. Act § 186. Where one deposits a check in his bank and it is collected and credited, it is equivalent to payment to him in the ordinary course as though presented to another bank and paid over the counter; American Nat. Bank of Nashville, Tenn., v. Miller, 229 U. S. 517, 33 Sup. Ct. 883, 57 L. Ed. ——.

In common with other kinds of negotiable paper, they must contain an order to pay money, and words of negotiability. This enables a *bona fide* holder for value to col-

lect the money without regard to the previous history of the paper; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Coddington v. Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec. 342; Bank of Mobile v. Brown, 42 Ala. 108.

They must be properly signed by the person or firm keeping the account at the banker's, as it is part of the implied contract of the banker that only checks so signed shall be paid. The words "Agt. Glass Buildings" added to the signature of a check used for paying an individual debt of the agent, are enough to put the person receiving it on inquiry as to his authority to use the fund for such purpose; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, and note reviewing cases.

Post-dated checks are payable on the day of their date, although negotiated beforehand. See Taylor v. Sip, 30 N. J. L. 284; Mohawk Bank v. Broderick, 10 Wend. (N. Y.) 304; In re Brown, 2 Sto. 502, Fed. Cas. No. 1,985. Where all the parties to a check reside in the same place, the holder has until the day following its date or receipt by him in which to present it.

A check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check; Neg. Instr. Act § 189; Doherty v. Watson, 29 W. N. C. (Pa.) 32.

Certified Checks. Checks are not to be accepted, but presented at once for payment. There is a practice, however, of marking checks "good," by the banker, which fixes his responsibility to pay that particular check when presented, and amounts, in fact, to an acceptance; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 648, 19 L. Ed. 1008. Such a marking is called certifying; and checks so marked are called certified checks. See Meads v. Bank, 25 N. Y. 143, 82 Am. Dec. 331; Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751. The bank thereby becomes the principal debtor; First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350, 11 Am. Rep. 708; Merchants' Nat. Bank v. Bank, 10 Wall. (U. S.) 648, 19 L. Ed. 1008; Morse, Banks & Banking 414; to the holder, not the drawer; Girard Bank v. Bank, 39 Pa. 92, 80 Am. Dec. 507; Metropolitan Nat. Bank of Chicago v. Jones, 137 Ill. 634, 27 N. E. 533, 12 L. R. A. 492, 31 Am. St. Rep. 403; Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 229; and the statute of limitation does not run until demand made; Girard Bank v. Bank, 39 Pa. 92, 80 Am. Dec. 507; and the certifying after delivery at payee's instance takes the amount thereof out of the hands of the maker, and any loss by the insolvency of the bank falls on the payee; Continental Nat. Bank of Chicago v. Cornhouser & Co., 37 Ill. App. 475; Minot v. Russ, 156 Mass. 458, 31 N. E. 489, 16 L. R. A. 510, 32 Am. St. Rep. 472; where the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereon; Neg. Instr. Act § 188; but where certified to at maker's request he is not discharged from liability; Born v. Bank, 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312; Bickford v. Bank, 42 Ill. 238, 89 Am. Dec. 436; Mutual Nat. Bank v. Rotgé, 28 La. Ann. 933, 26 Am. Rep. 126; Randolph Nat. Bank v. Hornblower, 160 Mass. 401, 35 N. E. 850.

The bank cannot refuse to pay because notified not to pay by the drawer; Freund v. Bank, 12 Hun (N. Y.) 537; even where it had been stolen and the holder acquired it three years after certification; *id.;* nor generally can it set up that the check was forged, or that the drawer has no funds; Espy v. Bank, 18 Wall. (U. S.) 621, 21 L. Ed. 947. In New York, it is held that certifying a check warrants only the signature, and not the terms of the check; Security Bank of New York v. Bank, 67 N. Y. 458, 23 Am. Rep. 129. See First Nat. Bank of Chicago v. Bank, 40 Ill. App. 640; *contra,* Louisiana Nat. Bank v. Bank, 28 La. Ann. 189, 26 Am. Rep. 92. The certification is in effect merely an acceptance, and creates no trust in favor of the holder of the check, and gives no lien on any particular portion of the assets of the bank; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407. It has, however, been held that a certified check operates as an assignment of the funds to meet it, and makes the bank liable to the holder; Blake v. Savings Bank Co., 79 Ohio 189, 87 N. E. 73, 20 L. R. A. (N. S.) 290, 128 Am. St. Rep. 684, 16 Ann. Cas. 210. See *supra.*

Certification is equivalent to an acceptance; Neg. Instr. Act § 187.

A statement by a bank officer that the drawer's check was "good," or "all right," will not constitute an acceptance of the check; Espy v. Bank, 18 Wall. (U. S.) 604, 21 L. Ed. 947; but a parol acceptance has been held sufficient; Pope v. Bank, 59 Barb. (N. Y.) 226. A bank is not bound to accept by telegram the checks or drafts of its depositors, although it be in possession of funds to pay; First Nat. Bank of Atchison v. Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281. One relying on a telegram as an acceptance should see to it that the language used will, at least fairly, mean that; Myers v. Bank, 27 Ill. App. 254. See Bank of Springfield v. Bank, 30 Mo. App. 271, holding that a parol statement by a bank that a check is good is not equivalent to a certification; nor does it release the holder from the duty of proper diligence in presentment for payment. It binds the bank to nothing more than that the statement was true at the time when it was made. But where the inquiry was, "Will you pay

J. T.'s check on you for $22,000? Answer," and the answer was, "J. T. is good. Send on your paper," it was held an acceptance; North Atchison Bank v. Garretson, 51 Fed. 168, 2 C. C. A. 145. And, generally, where the party inquiring takes the check in reliance upon such statement and for a valuable consideration, the bank will be liable; Leach v. Hill, 106 Ia. 171, 76 N. W. 667; Farmers' & Merchants' Bank v. Dunbier, 32 Neb. 487, 49 N. W. 376; Henrietta Nat. Bank v. Bank, 80 Tex. 648, 16 S. W. 321, 26 Am. St. Rep. 773.

A bank receiving a check for collection is negligent in sending it to the drawee bank, although it is the only bank in the place; Winchester Mill Co. v. Bank, 120 Tenn. 225, 111 S. W. 248, 18 L. R. A. (N. S.) 441; Minneapolis S. & D. Co. v. Bank, 76 Minn. 136, 78 N. W. 980, 44 L. R. A. 504, 77 Am. St. Rep. 609; Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95; American Exchange Nat. Bank v. Bank, 71 Mo. App. 451; Wagner v. Crook, 167 Pa. 259, 31 Atl. 576, 46 Am. St. Rep. 672. But that such negligence on the part of the forwarding bank will not make it liable where there are no funds to the credit of the drawer, or where the drawee bank is insolvent, is held in some cases; Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687, 89 N. W. 570, 95 Am. St. Rep. 449; First Nat. Bank v. Bank, 12 Tex. Civ. App. 318, 34 S. W. 458. In Farmer's Bank & Trust Co. v. Newland, 97 Ky. 465, 31 S. W. 38, it was said that when a customer deposits checks with a bank, for collection at a distant point, he must know the bank cannot send one of its agents to make the collection. He is presumed to know the method employed by banks in making such collections. He has made the bank his agent for that purpose, and he does it with the implied understanding that the bank will follow the customary method. And where it was shown to be a universal custom to send checks directly to the drawee bank for collection, the custom was held to amount to a good presentment for payment; Kershaw v. Ladd, 34 Or. 375, 56 Pac. 402, 44 L. R. A. 236; Wilson v. Bank, 187 Ill. 222, 58 N. E. 250, 52 L. R. A. 632. But such a custom was held unreasonable and bad; Farley Nat. Bank v. Pollock & Bernheimer, 145 Ala. 321, 39 South. 612, 2 L. R. A. (N. S.) 194, 117 Am. St. Rep. 44, 8 Ann. Cas. 370.

The rule is well settled that a drawee accepts or pays at his peril a forged bill in the hands of a holder in due course; 3 Burr. 1354; for the reason that as between two persons of equal equities, one of whom must suffer, the one having legal title should prevail; 4 H. L. R. 229; 16 *id.* 514; *contra*, First Nat. Bank of Lisbon v. Bank, 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588.

A bank which receives for deposit a check on which the payee's indorsement has been forged, and collects its amount and pays it over to the depositor, is liable to the payee; Farmer v. Bank, 100 Tenn. 187, 47 S. W. 234; Buckley v. Bank, 35 N. J. L. 400, 10 Am. Rep. 249.

An unrestricted indorsement of a draft is a representation that the signature of the drawer is genuine, upon which the drawee may rely, so that in case it proves to be a forgery he may recover back the money paid upon the draft to the indorser; Ford & Co. v. Bank, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744.

The depositor owes a duty to the bank to use due diligence in examining the returned pass books and vouchers. If he or his clerk intrusted with the examination uses such diligence, whether it results in the discovery of the forgery or not, the depositor can recover from the bank the sums paid out; Frank v. Bank, 84 N. Y. 213, 38 Am. Rep. 501. If, however, the examining clerk is the forger and conceals the result of the examination from the depositor, the bank will not be liable; First Nat. Bank of Birmingham v. Allen, 100 Ala. 476, 14 South. 335, 27 L. R. A. 426, 46 Am. St. Rep. 80; Leather Mfrs. Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Dana v. Bank, 132 Mass. 156; Myers v. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672. When the depositor has knowledge that his forged check has been paid by the bank, he must promptly give notice to the bank in order to hold it liable for the loss; McNeely Co. v. Bank, 221 Pa. 588, 70 Atl. 588, 20 L. R. A. (N. S.) 79; Myers v. Bank, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; Critten v. Bank, 171 N. Y. 228, 63 N. E. 969, 57 L. R. A. 529; U. S. v. Bank, 45 Fed. 163. But the depositor's delay is not a defence unless the bank shows some injury caused thereby; Murphy v. Bank, 191 Mass. 159, 77 N. E. 693, 114 Am. St. Rep. 595; Janin v. Bank, 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 Am. St. Rep. 82; Third Nat. Bank of City of New York v. Bank, 76 Hun 475, 27 N. Y. Supp. 1070; *contra*, McNeely Co. v. Bank, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79.

To entitle one who, by mistake, has paid out money on a forged endorsement of a check or other commercial paper, to recover back the same, notice must, within a reasonable time after discovery, be given to the party receiving such payment; National Exchange Bank v. U. S., 151 Fed. 402, 80 C. C. A. 632; 3 Kent 85, Holmes' note; but this does not apply to the payment to a bank of a pension check by the sub-treasury upon a forged endorsement; U. S. v. Bank, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184.

Crossed Checks. The practice of crossing checks originated at the clearing house, the clerks of the different bankers who did busi-

ness there having been accustomed to write across the checks the names of their employers, so as to enable the clearing house clerks to make up their accounts. It afterwards became a common practice to cross checks which were not intended to go through the clearing house, with the name of a banker or with "& Co.," and a custom or usage grew up in regard to this also; 7 Exch. 389, which held the practice of crossing checks to be a safeguard to the owner and not to restrict their negotiability.

A check is said to be specially crossed when the name of a bank or banking firm is written across the face of the check (it is then payable only to the bank indicated), and it is said to be generally crossed when the words "and company" or any abbreviation thereof, usually "& Co.," between two parallel transverse lines are written across the check (it must then be paid only to some bank). Another form of the general crossing is recognized by the later English statutes which consists merely of two parallel transverse lines across the face of the checks without any words; Farmers' Bank v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

Crossed checks in England are now governed by the Bill of Exchange Act of 1882, providing that where a banker in good faith and without negligence receives payment from a customer of a crossed check, and the customer has no title, or a defective title thereto, the banker shall not incur any liability to the true owner of the check by reason only of having received such payment; [1903] A. C. 240, affirming [1902] 1 K. B. 242; [1904] 2 K. B. 465.

The effect of crossing a check with the name of a banker means a direction to the drawee, by the owner, to pay it only through the banker; disregard of this direction would be evidence of negligence if payment were made to one who was not the lawful owner; 7 Exch. 389. By 19 & 20 Vict. c. 25, this custom was made statutory; 1 Q. B. Div. 31.

In the United States the system of "crossed checks," strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the Clearing House.

Where a check was stamped at the time it was drawn with the words "payable through (a named bank) at current rate," it was held a material part of the direction, and the drawee bank was not required to pay the check when not presented through the bank thus named; Farmers' Bank v. Johnson, King & Co., 134 Ga. 486, 68 S. E. 85, 30 L. R. A. (N. S.) 697, 137 Am. St. Rep. 242.

There is a practice of writing across checks "memorandum," or "mem." They are given thus, not as an ordinary check, but as a memorandum of indebtedness; and between the original parties this seems to be their only effect. In the hands of a third party, for value, they have, however, all the force of checks without such word of restriction; Franklin Bank v. Freeman, 16 Pick. (Mass.) 535; Dykers v. Bank, 11 Paige (N. Y.) 612; Story, Pr. Notes § 499. See INDORSEMENT.

Giving a check is not payment unless the check is paid; Cromwell v. Lovett, 1 Hall (N. Y.) 64; Franklin v. Vanderpool, 1 Hall (N. Y.) 88; L. R. 10 Ex. 153; Small v. Mining Co., 99 Mass. 277; Sweet v. Titus, 4 Hun (N. Y.) 639; Heartt v. Rhodes, 66 Ill. 351; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116. But a tender was held good when made by a check contained in a letter, requesting a receipt in return, which the plaintiff sent back, demanding a larger sum, without objecting to the nature of the tender; and receiving a check marked "good" is payment; 2 Dan. Neg. Inst. 559. See PAYMENT.

CHECK BOOK. A book containing blanks for checks.

These books are so arranged as to leave a margin, called by merchants a *stump*, or *stubb*, when the check is filled out and torn off. Upon these stumps a memorandum is made of the date of the check, the payee, and the amount; and this memorandum, in connection with the evidence of the party under oath, is evidence of the facts there recorded.

CHECK ROOM. The owner of property lost while in a railroad check room can recover without proof of negligence on the part of the railroad company; Terry v. Ry., 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295.

CHECQUE. See CHECK.

CHEMICAL ANALYSIS. The court takes judicial notice that to analyze a beverage requires not only learning and skill in chemistry, but instruments and appliances not in common use; State v. Powell, 141 N. C. 780, 53 S. E. 515, 6 L. R. A. (N. S.) 477.

CHEMIN (Fr.). The road wherein every man goes; the king's highway. Called in law Latin *via regia*. *Termes de la Ley;* Cowell; Spelman, Gloss.

CHEMIST. See APOTHECARY; DRUGGIST.

CHEROKEE NATION. One of the Civilized Indian tribes. See INDIAN; INDIAN TRIBE.

CHEVAGE. A sum of money paid by villeins to their lords in acknowledgment of their villenage.

It was paid to the lord in token of his being chief or head. It was exacted for permission to marry, and also permission to remain without the dominion of the lord. When paid to the king, it was called subjection. *Termes de la Ley;* Co. Litt. 140 *a;* Spelman, Gloss.

CHEVANTIA. A loan, or advance of money on credit.

CHEVISANCE (Fr. agreement). A bargain or contract. An unlawful bargain or contract.

CHICKASAW NATION. One of the Civilized Indian tribes. See INDIAN; INDIAN TRIBE.

CHIEF. One who is put above the rest. Principal. The best of a number of things.

Declaration in chief is a declaration for the principal cause of action. 1 Tidd, Pr. 419.

Examination in chief is the first examination of a witness by the party who produces him. 1 Greenl. Ev. § 445.

Tenant in chief was one who held directly of the king. 1 Washb. R. P. *19.

CHIEF BARON. The title of the chief justice of the English court of exchequer. 3 Bla. Com. 44.

CHIEF JUDGE. In some states the presiding judge is thus styled, as in the New York Court of Appeals and the Maryland Court of Appeals. The term is also used in 1 Tyler (Vt.) with "assistant" judge for the *puisne*.

CHIEF JUSTICE. The presiding or principal judge of a court.

CHIEF JUSTICIAR. See JUSTICIAR.

CHIEF LORD. The immediate lord of the fee. Burton, R. P. 317.

CHIEF PLEDGE. The borsholder, or chief of the borough. Spelman, Gloss.

CHILD. The son or daughter, in relation to the father or mother.

Illegitimate children are bastards. *Legitimate children* are those born in lawful wedlock. *Natural children* are illegitimate children. *Posthumous children* are those born after the death of the father.

Children born in lawful wedlock, or within a competent time afterwards, are presumed to be the issue of the father, and follow his condition; but this presumption may be repelled by the proof of such facts tending to establish non-intercourse as may satisfy a jury to the contrary; Field, Inf. 40; 3 C. & P. 215, 427; 13 Ves. Ch. 58; Cross v. Cross, 3 Paige, Ch. (N. Y.) 139, 23 Am. Dec. 778; Com. v. Shepherd, 6 Binn. (Pa.) 286, 6 Am. Dec. 449; Barden v. Barden, 14 N. C. 548. See Blackburn v. Crawford, 3 Wall. (U. S.) 175, 18 L. Ed. 186. See ACCESS. Those born out of lawful wedlock follow the condition of the mother.

The term *children* does not, ordinarily and properly speaking, comprehend grandchildren, or issue generally; yet sometimes that meaning is given to it in cases of necessity; 6 Co. 16; 14 Ves. 576; Adams v. Law, 17 How. (U. S.) 417, 15 L. Ed. 149; McGuire v. Westmoreland, 36 Ala. 594; Thomson v. Ludington, 104 Mass. 193. And it has been held to signify the same as issue, in cases where the testator, by using the terms children and issue indiscriminately, showed his intention to use the former term in the sense of issue, so as to entitle grandchildren, etc., to take under it; 1 Ves. Sen. Ch. 196; Mowatt v. Carow, 7 Paige, Ch. (N. Y.) 328, 32 Am. Dec. 641; Ruff v. Rutherford, 1 Bail. Eq. (S. C.) 7; Dickinson v. Lee, 4 Watts (Pa.) 82, 28 Am. Dec. 684; 3 Greenl. Cruise, Dig. 213. See Walker v. Williamson, 25 Ga. 549; Appeal of Castner, 88 Pa. 478.

It is a rule of decision in England that the word "children" means legitimate children; 7 Ves. 458; 31 Ch. D. 542; L. R. 7 H. L. 568; and such is the general rule in this country; Gardner v. Heyer, 2 Paige (N. Y.) 11; Heater v. Van Auken, 14 N. J. Eq. 159; Thompson v. McDonald, 22 N. C. 463; Gates v. Seibert, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; In re Scholl's Will, 100 Wis. 650, 76 N. W. 616; Bealafeld v. Slaughenhaupt, 213 Pa. 565, 62 Atl. 1113; although illegitimate children may be considered as included by express designation or necessary implication; Stewart v. Stewart, 31 N. J. Eq. 398; Collins v. Hoxie, 9 Paige (N. Y.) 81; Bennett v. Toler, 15 Grat. (Va.) 588, 78 Am. Dec. 638; Morton's Estate v. Morton, 62 Neb. 420, 87 N. W. 182; and when the term is used in a will, there must be evidence to be collected from the will itself, or extrinsically, to show affirmatively that the testator intended that his illegitimate children should take, or they will not be included; 1 V. & B. 422; 4 Kent 346, 414, 419; 6 H. L. 265; Palmer v. Horn, 84 N. Y. 516. See BASTARD.

The question whether the term "child" can include "twins" is said not to have been raised in any English case, in 70 Alb. L. J. 2, where an interesting foreign case is noted, but no decision is stated. No American case on the point has been found.

Posthumous children inherit, in all cases, in like manner as if they had been born in the lifetime of the intestate and had survived him; 2 Greenl. Cruise, Dig. 135; 4 Kent 412. See 2 Washb. R. P. 439, 699.

In Pennsylvania; act of 1836, p. 250; and in some other states; Rhode Island, Rev. Stat. tit. xxiv. c. 154, § 10; Bancroft v. Ives, 3 Gray (Mass.) 367; the will of their fathers or mothers in which no provision is made for them is revoked, as far as regards them, by operation of law; Coates v. Hughes, 3 Binn. (Pa.) 498; Barnes v. Barker, 5 Wash. 390, 31 Pac. 976. In Iowa a will is revoked by the birth of a child after its execution; Ware v. Wisner, 50 Fed. 310. See, as to the law of Virginia on this subject, Armistead v. Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501.

An elaborate statute known as the Children's Act, 1908, was passed December 21, 1908, in England to consolidate and amend the law on that subject. It consists of 134 sections covering the divisions of infant life

protection, prevention of cruelty to children, juvenile smoking, reformatory and industrial schools, juvenile offenders and miscellaneous and general provisions; L. R. 46 Stat. 453.

See AGE; IN VENTRE SA MERE. As to their competency as witnesses, see WITNESS. And see PARENT AND CHILD.

The courts construe these laws liberally as within the police powers of a state and they are generally upheld, the rule having been laid down that the courts will not interfere with the legislative action in regard to such regulations; In re Weber, 149 Cal. 392, 86 Pac. 809. Statutes have been held constitutional forbidding the employment of children under twelve years of age in factories; Starnes v. Mfg. Co., 147 N. C. 556, 61 S. E. 525, 17 L. R. A. (N. S.) 602, 15 Ann. Cas. 470; of children under fourteen years of age in factories; In re Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; Bryant v. Hardware Co., 76 N. J. L. 45, 69 Atl. 23; City of New York v. Chelsa Jute Mills, 43 Misc. 266, 88 N. Y. Supp. 1085; under sixteen years of age in factories; People v. Taylor, 124 App. Div. 434, 108 N. Y. Supp. 796; or in coal mines; Collett v. Scott, 30 Pa. Super. Ct. 430; or the employment of minors under sixteen years of age over ten hours a day or over six days a week; State v. Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A. (N. S.) 1121; or girls under fourteen years of age as dancers or in theaters; People v. Ewer, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788. Other cases in which statutes limit the hours which women and children may be employed are Stehle v. Mach. Co., 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122; Com. v. Mfg. Co., 120 Mass. 383; and see generally as to the constitutionality of such laws; 65 L. R. A. 33, note, and 12 L. R. A. (N. S.) 1130, note.

The question has been much discussed whether one employing a child under the statutory age may set up contributory negligence or assumption of risk to defeat liability for personal injury. In New York, reversing the lower court, it was held error to exclude testimony on the question of contributory negligence, and to hold as a matter of law that the question could not be considered; Lee v. Mfg. Co., 115 App. Div. 589, 101 N. Y. Supp. 78. It is held that contributory negligence could not be set up; American Car & Foundry Co. v. Armentraut, 214 Ill. 509, 73 N. E. 766; Lenahan v. Min. Co., 218 Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; Nairn v. Biscuit Co., 120 Mo. App. 144, 96 S. W. 679. In other cases, it is held that contributory negligence is a question for the jury, with due consideration of the tender age of the child; Queen v. Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; Morris v. Stanfield, 81 Ill. App. 264; Sterling v. Carbide Co., 142 Mich. 284, 105 N. W. 755. In Marino v. Lehmaier, 173 N. Y. 530, 66 N. E. 572, 61 L. R. A. 811, it was held that a child of a forbidden age was not, as a matter of law, chargeable with contributory negligence or with assumption of risk. In that case it was also decided that the fact that a penalty was prescribed by the act did not prevent the injured child from having an action for damages. The defense of contributory negligence was also allowed in the case of a child employed in violation of the statute where he was shown to be familiar with the construction of the machine by which he was injured; Borck v. Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254; and in another case it was held error not to have withdrawn the case from the jury, although the plaintiff was employed in violation of the statute; Beghold v. Auto Body Co., 149 Mich. 14, 112 N. W. 691, 14 L. R. A. (N. S.) 609.

In North Carolina, before the enactment of the statute, it was held that in an action by a child of nine years for injury the evidence as to the youth, inexperience and ignorance of the child, the failure of the company to instruct him was properly left to the jury on the question of the negligence of the company and the contributory negligence of the infant employé; Fitzgerald v. Furniture Co., 131 N. C. 637, 42 S. E. 946, where the legislation on the subject up to that time is summarized. After the passage of a state statute on the subject the employment of the child in violation of the statute was held to be evidence of negligence to be submitted to the jury, as also the question of contributory negligence; Rolin v. Tobacco Co., 141 N. C. 300, 53 S. E. 891, 7 L. R. A. (N. S.) 335, 8 Ann. Cas. 638.

The violation of a statute forbidding the employment of children under a certain age, or at certain specified work, or specifying conditions to be complied with, is negligence *per se*, in an action by the child for injury; American Car & Foundry Co. v. Armentraut, 214 Ill. 509; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Brower v. Locke, 31 Ind. App. 353, 67 N. E. 1015; Queen v. Iron Co., 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935; Cooke v. Mfg. Co., 33 Hun (N. Y.) 351; Woolf v. Nauman Co., 128 Ia. 261, 103 N. W. 785; Sterling v. Carbide Co., 142 Mich. 284, 105 N. W. 755.

But in Perry v. Tozer, 90 Minn. 431, 97 N. W. 137, 101 Am. St. Rep. 416, it was held that while employment in violation of the statute was *prima facie* evidence of negligence, it might be rebutted by proof of due care or of contributory negligence, the violation of a statute merely shifting the burden of proof. In Breckenridge v. Reagan, 22 Ohio C. C. 71, the employment in violation of a statute was held "some evidence" of negligence.

CHILDWIT (Sax.). A power to take a fine from a bondwoman gotten with child without the lord's consent.

By custom in Essex county, England, every reputed father of a bastard child was obliged to pay a small fine to the lord. This custom is known as childwit. Cowell.

CHILTERN HUNDREDS. The offices of steward or bailiff of His Majesty's three Chiltern Hundreds of Stoke, Desborough, and Bonenham; or the steward of the Manor of Northsted. These offices have sometimes been refused, but they are ordinarily given to any member of the House of Commons who applies for them as a means of ceasing to be a member of the House, an office which cannot be resigned; but which becomes vacant upon the acceptance of any other office by a member. The office is retained until the appointment is revoked to make way for the appointment of another holder. The practice began about 1750. The offices of steward of the Manor of East Hendred and Hempholme were last used for this purpose in 1840 and 1865 respectively. Chiltern Hundreds is an appointment under the hand and seal of the Chancellor of the Exchequer. In 1861, and since, the words "reposing especial trust and confidence," etc., were omitted. May, Parl. Pr. 642.

CHIMIN. See CHEMIN.

CHIMINAGE. A toll for passing on a way through a forest; called in the civil law *pedagium.* Cowell. See Co. Litt. 56 *a;* Spelman, Gloss.; *Termes de la Ley;* Baldwin's Ed. of Britton, 63.

CHIMINUS. The way by which the king and all his subjects and all under his protection have a right to pass, though the property of the soil of each side where the way lieth may belong to a private man. Cowell.

CHIMNEY MONEY. See HEARTH MONEY; FUMAGE.

CHINA. By Act of June 30, 1906, a "United States Court for China" is created to which is given the jurisdiction formerly exercised by consuls and ministers, except as mentioned in the title CONSULAR COURTS. It is held by one judge appointed by the President, with the consent of the Senate (salary $8000, term of office ten years). It sits at Shanghai, and, at stated periods, at Canton, Tientsin and Hankan. An appeal to it lies from all consular courts of China (and of Korea so long as the right of extraterritoriality shall obtain in favor of the United States). It has supervisory control over consuls and vice-consuls in respect of the estates of decedents in China.

Its procedure is in accordance, so far as practicable, with that prescribed by the Revised Statutes for consular courts in China, but it may modify and supplement such rules. Its jurisdiction is exercised in accordance with treaties and law of the United States, and where these are deficient or unsuitable, then in accordance with the common law and the law established by United States courts.

An appeal lies to the Circuit Court of Appeals of the Ninth Circuit and appeals and writs of error may be taken thence to the Supreme Court in the same class of cases as those in which they are permitted in cases coming to the former court from the District Court.

See CHINESE.

CHINESE. Stringent laws for the entire exclusion of Chinese from the United States have been passed in the Pacific states, many of which have been decided to be unconstitutional; as is an ordinance that every male person imprisoned in the county jail should have his hair cut short; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546. A statute forbidding the employment of Chinamen on public works, etc., is void, as contravening the Burlingame treaty and the 14th amendment; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; In re Tiburcio Parrott, 1 Fed. 481. So is an act forbidding Chinamen to fish for the purpose of sale; In re Ah Chong, 2 Fed. 733. But a state law forbidding the exhumation of dead bodies and their removal, without a permit, is not invalid when applied to the removal of bodies of Chinamen who have been buried in California; it is a merely sanitary regulation; In re Wong Yung Quy, 2 Fed. 624.

The convention between the United States and China of 1894 provided that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens; 28 Stat. L. 1211.

Teachers, officials, students, etc., have the privilege of coming to and residing in the United States on presentation of a certificate from their government, or the government where they last resided viséd by the diplomatic or consular representative of the United States in the country or port whence they departed. Upon application for admission this certificate is *prima facie* evidence of the facts set forth therein. One cannot be deported unless there is evidence to overcome the legal effect of the certificate; Liu Hop Fong v. U. S., 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

The regulations of the treasury department of Dec. 8, 1900, governing the privilege of transit by Chinese laborers across the territory of the United States which require that evidence be produced which shall satisfy the collector of customs that a *bona fide* transit only was intended were authorized by the provision of the treaty with China of

March 17, 1894 (28 Stat. L. 1211) that Chinese laborers shall continue to enjoy such privilege of transit, subject to such regulations by the government of the United States as may be necessary to prevent abuse of the privilege; Fok Yung Yo v. U. S., 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108.

Chinese persons born out of the United States, remaining subjects of China, are entitled to the protection of and owe allegiance to the United States so long as they are permitted by the United States to reside here, and are subject to the jurisdiction thereof in the same sense as all other aliens residing in the United States; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Lau Ou Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

The failure of a Chinese laborer to register, as required by act of Congress, May 5, 1892, is held not to be excused by the fact that after the commencement of the time allowed for registration, but before its expiration, he was convicted and imprisoned for crime; U. S. v. Ah Poing, 69 Fed. 972.

Act of Nov. 3, 1893 (exclusion act), applies to Chinese persons who, having left the country before its passage, afterwards sought to return; Lew Jim v. U. S., 66 Fed. 953, 14 C. C. A. 281. A Chinaman, who during half his time is engaged in cutting and sewing garments for sale by a firm of which he is a member, is not a merchant within the exclusion act; Lai Moy v. U. S., 66 Fed. 955, 14 C. C. A. 283.

The Chinese exclusion acts cannot control the meaning or impair the effect of the constitutional amendment but must be construed and executed in subordination to its provisions; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; and the right of the United States as exercised by and under these acts, to exclude or expel from the country persons of the Chinese race, born in China and continuing to be subjects thereof, though having acquired a commercial domicil in the United States, has been upheld, for reasons applicable to all aliens alike, and inapplicable to citizens of whatever race or color; Chae Chan Ping v. U. S., 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140. A Chinaman, within the United States who resists deportation on the ground that he is an American born citizen may not be deported until the right to do so has been ascertained; Moy Suey v. U. S., 147 Fed. 697, 78 C. C. A. 85. It was considered that the case was radically different from that of a Chinese citizen who left the United States and was excluded on his return, in which case it was held that the decision of the immigration officers was final unless reversed by the Secretary of Commerce and Labor, and was not reviewable by the federal courts; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

The constitutionality of the power of the Secretary, in cases where the alienage is admitted, is settled; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; and also that one who claims citizenship cannot resort to the courts before prosecuting an appeal to the Secretary; U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917; as a citizen could not be excluded from the country except as a punishment for crime; In re Sing Tuck, 126 Fed. 386; Lee Sing Far v. U. S., 94 Fed. 834, 35 C. C. A. 327; it may reasonably be contended that the determination of this constitutional right is a judicial and not an executive function, and therefore it is a question whether the decision of an executive official upon it is due process of law; Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721.

By section 3 of the Geary Act the burden of proving affirmatively his right to remain in the country rests upon a Chinaman who has been arrested for being here illegally and the act raising this presumption of guilt is valid; U. S. v. Chun Hoy, 111 Fed. 899, 50 C. C. A. 57; the presumption, it is said, should be viewed under the rule of evidence as to facts peculiarly within the knowledge of the accused; 11 Y. L. J. 262; and its harshness arose mainly from the penalty imposed by section 4; In re Sing Lee, 54 Fed. 334; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, which section was held unconstitutional; U. S. v. Wong Dep Ken, 57 Fed. 206.

See CHINA.

CHIPPINGAVEL. A toll for buying and selling. A tax imposed on goods brought for sale. Whishaw; Blount.

CHIRGEMOTE (spelled, also, *Chirchgemote, Circgemote, Kirkmote;* Sax. *circgemote*, from *circ, ciric*, or *cyric*, a church, and *gemot*, a meeting or assembly).

In Saxon Law. An ecclesiastical court or assembly (*forum ecclesiasticum*); a synod; a meeting in a church or vestry. Blount; Spelm. Gloss.; Hen. I. cc. 4, 8; Co. 4th Inst. 321; Cunningh. Law Dict.

CHIROGRAPH (Lat. *chirographa*). A deed or public instrument in writing.

Chirographs were anciently attested by the subscription and crosses of witnesses. Afterwards, to

prevent frauds and concealments, deeds of mutual covenant were made in a *script* and *rescript*, or in a part and counter-part; and in the middle, between the two copies, they drew the capital letters of the alphabet, and then tallied, or cut asunder in an indented manner, the sheet or skin of parchment, one of which parts being delivered to each of the parties were proved authentic by matching with and answering to one another. Deeds thus made were denominated *syngrapha* by the canonists, because that word, instead of the letters of the alphabet or the word *chirographum*, was used. 2 Bla. Com. 296. This method of preventing counterfeiting, or of detecting counterfeits, is now used, by having some ornament or some word engraved or printed at one end of certificates of stocks, checks, and a variety of other instruments, which are bound up in a book, and, after they are executed, are cut asunder through such ornament or word. See SYNGRAPH; INDENT.

The last part of a fine of land.

It is called, more commonly, the foot of the fine. It is an instrument of writing, beginning with these words: "This is the final agreement," etc. It concludes the whole matter, reciting the parties, day, year, and place, and before whom the fine was acknowledged and levied. Cruise, Dig. t. 35, c. 2, s. 52.

In Civil and Canon Law. An instrument written out and subscribed by the hands of the king or prince. An instrument written out by the parties and signed by them.

The Normans, destroying these *chirographa*, called the instruments substituted in their place *charta* (charters), and declared that these *charta* should be verified by the seal of the signer with the attestation of three or four witnesses. Du Cange; Cowell.

CHIVALRY, COURT OF. See COURT OF CHIVALRY.

CHIVALRY, TENURE BY. Tenure by knight-service. Co. Litt.

CHOCTAW NATION. See INDIAN TRIBE.

CHOPS. The mouth of a harbor. Stats. of Mass. 1882, p. 1288.

CHOSE (Fr. *thing*). Personal property.

Choses in possession. Personal things of which one has possession.

Choses in action. See that title.

CHOSE IN ACTION. A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with contract, but which cannot be enforced without action. Comyns, Dig. *Biens.*

It is difficult to find out the exact meaning of the expression; the meaning attributed to it has been explained from time to time; 30 Ch. D. 282, 276, 277; 11 App. Cas. 439, where Lord Blackburn said that the phrase has been used "accurately or inaccurately, as including all personal chattels that are not in possession." It now includes all personal chattels which are not in possession; 11 App. Cas. 440. It includes an annuity; 3 Mer. 86, unless charged on land; 14 Sim. 76; consols; 1 Ves. Jun. 198; shares; 11 A. & E. 205; a ticket in a Derby sweepstakes; 8 Q. B. 134; all debts and all claims for damages for breach of contract; Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. Ed. 736; open accounts or unliquidated accounts; Sere v. Pitot, 6 Cra. (U. S.) 332, 3 L. Ed. 240; Wilkinson v. Wilkinson, 2 Curt. 582, Fed. Cas. No. 17,677; contracts for the delivery of chattels or money; Bushnell v. Kennedy, 9 Wall. (U. S.) 387, 19 L. Ed. 736; certificates of deposit; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; a check on a bank; L. R. 6 Eq. 198; a personal right not reduced into possession but recoverable by a suit at law; 2 Kent 351; a mere right of action as to a chattel, not in actual possession; Yerby v. Lynch, 3 Gratt. (Va.) 494.

It is one of the qualities of a chose in action that at common law it is not assignable; 10 Co. 47; Gardner v. Adams, 12 Wend. (N. Y.) 297; 1 Cra. (U. S.) 367. In Bracton's day it went to the heir, and he, not the executor, sued for the debts due to a dead man. This naturally led to difficulties, and the courts gradually yielded to the pressure of necessity and without a statute, so momentous a change was made as that, early in the time of Edward I., the chancery had framed and the king's court had upheld writs of debt for and against executors; 2 Poll. & Maitl. 344. It was Coke's idea that the origin of the rule against assignment of choses in action was the "wisdom and policy of the founders of our law," in discouraging maintenance and litigation, but Pollock thinks that there is no doubt that it was the logical consequence of the primitive view of a contract as creating a strictly personal obligation between creditor and debtor. See Wald, Poll. Torts 207, and note G. in App. supporting this view. In equity, from an early period, the courts have viewed the assignment of a chose in action for a valuable consideration as a contract by the assignor to permit the assignee to use his name for the purpose of recovery, and, consequently, enforce its specific performance, unless contrary to public policy; 1 P. Wms. Ch. 381; Hoppiss v. Eskridge, 37 N. C. 54; Dobyns v. McGovern, 15 Mo. 662. And now, at common law, the assignee is entitled to sue and recover in the name of the assignor, and the debtor will not be allowed, by way of defence to such suit, to avail himself of any payment to or release from the assignor, if made or obtained after notice of the assignment; 4 Term 340; Bartlett v. Pearson, 29 Me. 9; Webb v. Steele, 13 N. H. 230; Pitts v. Holmes, 10 Cush. (Mass.) 93; Blin v. Pierce, 20 Vt. 25; Caldwell v. Meshew, 44 Ark. 564. If, after notice of the assignment, the debtor expressly promise the assignee to pay him the debt, the assignee will then be entitled to sue in his own name; Crocker v. Whitney, 10 Mass. 316; Tiernan v. Jackson, 5 Pet. (U. S.) 597, 8 L. Ed. 234; Clarke v. Thompson, 2 R. I. 146; Barger v. Collins, 7 Harr. & J. (Md.) 213; Ford v. Adams, 2 Barb. (N. Y.) 349; Geer v. Archer, 2 Barb. (N. Y.) 420; Thompson v. Emery, 27 N. H. 269; but without

such express promise the assignee, except under peculiar circumstances, must proceed, even in equity in the name of the assignor; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Carter v. Ins. Co., 1 Johns. Ch. (N. Y.) 463; Adair v. Winchester, 7 Gill & J. (Md.) 114; Lenox v. Roberts, 2 Wheat. (U. S.) 373, 4 L. Ed. 264; or by agreement he can sue in his own name and pay over the proceeds of the sale to the assignor, in which case he becomes a trustee; Dean v. Chandler, 44 Mo. App. 338.

The English Judicature Act of 1873 provides to a certain extent for assignments of choses in action; but not every equitable assignment is within the statute [1902] 2 K. B. 196. A partial assignment of choses in action is good in equity, although the legal title remains with the assignor; Texas W. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98.

But courts of equity will not, any more than courts of law, give effect to such assignments when they contravene any rule of law or of public policy. Thus, they will not give effect to the assignment of the half pay or full pay of an officer in the army; 1 Ball & B. 389; or of a right of entry or action for land held adversely; Hoppiss v. Eskridge, 37 N. C. 54; or of a part of a right in controversy, in consideration of money or services to enforce it; Wilhite v. Roberts, 4 Dana (Ky.) 173. Neither do the courts, either of law or of equity, give effect to the assignment of mere personal actions which die with the person; Jabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Oliver v. Walsh, 6 Cal. 456; Smith v. Sherman, 4 Cush. (Mass.) 408. A cause of action for deceit is assignable; Dean v. Chandler, 44 Mo. App. 338; but not for slander; Miller v. Newell, 20 S. C. 123, 47 Am. Rep. 833. But a claim of damages to property, though arising *ex delicto*, which on the death of the party would survive to his executors or administrators as assets, may be assigned; Bisp. Eq. 166; McKee v. Judd, 12 N. Y. 622, 64 Am. Dec. 515; Webber v. Quaw, 46 Wis. 118, 49 N. W. 830. The transfer of a bill of lading will pass the claim for the conversion of the goods represented by it; Dickson v. Elevator Co., 44 Mo. App. 498; Haas v. R. Co., 81 Ga. 792, 7 S. E. 629. See Smith v. Thompson, 94 Mich. 381, 54 N. W. 168. The right of vendor to bring a second suit in trespass to try title is assignable and passes to the vendee; Williams v. Bennett, 1 Tex. Civ. App. 498, 20 S. W. 856.

The assignee of a chose in action, unless it be a negotiable promissory note or bill of exchange, without notice, in general takes it subject to all the equities which subsist against the assignor; 1 P. Wms. 496; 4 Price 161; Brashear v. West, 7 Pet. (U. S.) 608, 8 L. Ed. 801; Cornish v. Bryan, 10 N. J. Eq. 146; Bishop v. Holcomb, 10 Conn. 444; Bush v. Lathrop, 22 N. Y. 535; Martin v. Richardson, 68 N. C. 255; Boardman v. Hayne, 29 Ia. 339; Lane v. Smith, 103 Pa. 415; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; Kleeman v. Frisbie, 63 Ill. 482. But it is not subject to the equities of third persons of which he had no notice; Himrod v. Bolton, 44 Ill. App. 516. And a payment made by the debtor, even after the assignment of the debt, if before notice thereof, will be effectual; Woodbridge v. Perkins, 3 Day (Conn.) 364; Bishop v. Holcomb, 10 Conn. 444; U. S. v. Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; Warren v. Copelin, 4 Metc. (Mass.) 594.

In Pennsylvania by statute a bond is assignable and suit can be brought on it by the assignee if there are two witnesses to the assignment and in Delaware under a similar statute but one witness is now required.

To constitute an assignment, no writing or particular form of words is necessary, if the consideration be proved and the meaning of the parties apparent; Dunn v. Snell, 15 Mass. 485; Dawson v. Coles, 16 Johns. (N. Y.) 51; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Shannon v. Mayor, etc., of City of Hoboken, 37 N. J. Eq. 123; Garnsey v. Gardner, 49 Me. 167; Patten v. Wilson, 34 Pa. 299; 13 Sim. Ch. 469; and therefore the mere delivery of the written evidence of debt; Cannaday v. Shepard, 55 N. C. 224; Boeka v. Nuella, 28 Mo. 180; Jones v. Witter, 13 Mass. 304; Titcomb v. Thomas, 5 Greenl. (Me.) 282; Prescott v. Hull, 17 Johns. (N. Y.) 284; the delivery being essential to the assignment; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529; Shannon v. Mayor, etc., of City of Hoboken, 37 N. J. Eq. 123; Noyes v. Brown, 33 Vt. 431; or the giving of a power of attorney to collect a debt, may operate as an equitable transfer thereof, if such be the intention of the parties; 7 Ves. Ch. 28; Bergen v. Bennett, 1 Caines Cas. (N. Y.) 18, 2 Am. Dec. 281; People v. Tioga Common Pleas, 19 Wend. (N. Y.) 73. See ASSIGNMENT.

Bills of exchange and promissory notes, in exception to the general rule, are by the law merchant transferable, and the legal as well as equitable right passes to the transferee. See BILL OF EXCHANGE; NEGOTIABLE INSTRUMENTS. In some states, by statutory provisions, bonds, mortgages, and other documents may be assigned, and the assignee receives the whole title, both legal and equitable; 2 Bouvier, Inst. 192. In New York, the code enables an assignee to maintain an action in his own name in those cases in which the right was assignable in law or in equity before the code was adopted; Purple v. R. Co., 4 Duer (N. Y.) 74.

A distinction must be made between the security or the evidence of the debt, and the thing due. A deed, a bill of exchange or a promissory note may be in the possession of the owner, but the money or damages

due on them are no less choses in action. This distinction is to be kept in view. The chose in action is the money, damages or thing owing. The bond or note is but the evidence of it. There can in the nature of things be no present possession of a thing which lies merely in action; 1 Bouv. Inst. p. 191; First Nat. Bank v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898.

In the absence of fraudulent transfer or such other fraud as would positively impede an action at law and proceeding in garnishment, equity will not subject the choses in action of the debtor to the payment of his debts; Hall v. Imp. Co., 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363.

See ASSIGNMENT; SITUS; GIFT; 20 L. J. R. 113.

CHOSEN FREEHOLDERS. See BOARD OF FREEHOLDERS.

CHRISTIAN. One who believes in or assents to the truth of the doctrines of Christianity, as taught by Jesus Christ in the New Testament. It does not include Mohammedans, Jews, Pagans, or infidels; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

CHRISTIAN NAME. The baptismal name as distinct from the surname. A Christian name may consist of a single letter. Wharton. See NAME.

CHRISTIAN SCIENCE. In Pennsylvania a charter was refused to an organization of Christian Scientists on the ground that to recognize their doctrines was against the public policy of the state; In re First Church of Christ, Scientist, 205 Pa. 543, 55 Atl. 536, 63 L. R. A. 411, 97 Am. St. Rep. 753; but in Illinois they have been incorporated; People v. Gordon, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165.

The consent of a patient to be treated by a Christian Scientist healer will preclude holding him liable in damages for failure to effect a cure, although that method of treatment is illegal by state law; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. In Maine, a Christian Scientist was held entitled to recover for his services. The defense set up that it was delusion and charlatanry being considered immaterial, as defendant had chosen the treatment and promised to pay for it; Wheeler v. Sawyer (Me.) 15 Atl. 67.

While the practice of Christian Science is not a practice of medicine as usually and generally understood, yet being a treatment for mental and bodily ailments, such practice is a violation of the state laws for the protection of the public health; State v. Buswell, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68; *contra*, State v. Mylod, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428. It has been held that to give treatments for a fee is practicing medicine; State v. Marble, 72 Ohio St. 21, 73 N. E. 1063, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898, where an act regulating such practice is considered a valid exercise of the police power and not void as discriminating against Christian Science in not making special provision for those who wish to practice it.

Under a municipal ordinance imposing a penalty on physicians for not reporting contagious diseases, the evidence must show that a Christian Scientist who attended the person knew that he was afflicted with such disease; Kansas City v. Baird, 92 Mo. App. 204.

A belief in Christian Science, ascribing to it certain miraculous powers of curing disease, is not sufficient evidence of insane delusions to avoid a will; In re Brush, 35 Misc. 689, 72 N. Y. Supp. 421.

A conviction of a father for wilfully omitting, without lawful excuse, to furnish medical attendance for his minor son, was upheld; Owens v. State, 6 Okl. Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218.

See an article in 10 Va. L. Reg. 285.

CHRISTIANITY. The religion established by Jesus Christ.

Christianity has been judicially declared to be a part of the common law of Pennsylvania; Updegraph v. Com., 11 S. & R. (Pa.) 394; Guardians of the Poor v. Greene, 5 Binn. (Pa.) 555; (cited in U. S. v. Laws, 163 U. S. 263, 16 Sup. Ct. 998, 41 L. Ed. 151); see Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558; of New York, People v. Ruggles, 8 Johns. 291, 5 Am. Dec. 335; of Connecticut, 2 Swift, System 321; of Delaware, State v. Chandler, 2 Harr. 553; of Massachusetts, 7 Dane, Abr. c. 219, a. 2, 19. See Com. v. Kneeland, 20 Pick. (Mass.) 206. To write or speak contemptuously and maliciously against it is an indictable offence; Odg. Lib. & Sl. 450; Cooper, Libel 59, 114. See 5 Jur. 529; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Com. v. Kneeland, 20 Pick. (Mass.) 206. "This is a religious people, not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men." U. S. v. Laws, 163 U. S. 263, 16 Sup. Ct. 998, 41 L. Ed. 151.

Archbishop Whately, in his preface to the Elements of Rhetoric, says, "It has been declared, by the highest legal authorities, that 'Christianity is part of the law of the land,' and, consequently, any one who impugns it is liable to prosecution. What is the precise meaning of the above legal maxim I do not profess to determine, having never met with any one who could explain it to me; but evidently the mere circumstance that we have religion by law established does not of itself imply the illegality of arguing against that religion." It seems difficult, says an accomplished writer (Townsend, St. Tr. vol. ii. p. 389), to render more intelligible a maxim which has perplexed so learned a critic. Christianity was pronounced to be part of the common law, in contradistinction to the ecclesiastical law, for the purpose of proving that the temporal courts, as

well as the courts spiritual, had jurisdiction over offences against it. Blasphemies against God and religion are properly cognizable by the law of the land, as they disturb the foundations on which the peace and good order of society rest, root up the principle of positive laws and penal restraints, and remove the chief sanction for truth, without which no question of property could be decided and no criminal brought to justice. Christianity is part of the common law, as its root and branch, its majesty and pillar—as much a component part of that law as the government and maintenance of social order. The inference of the learned archbishop seems scarcely accurate, that all who impugn this part of the law must be prosecuted. It does not follow, because Christianity is part of the law of England, that every one who impugns it is liable to prosecution. The manner of and motives for the assault are the true tests and criteria. Scoffing, flippant, railing comments, not serious arguments, are considered offences at common law, and justly punished, because they shock the pious no less than deprave the ignorant and young. The meaning of Chief Justice Hale cannot be expressed more plainly than in his own words. An information was exhibited against one Taylor, for uttering blasphemous expressions too horrible to repeat. Hale, C. J., observed that "such kind of wicked, blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. For, to say religion is a cheat, is to subvert all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and to *reproach* the Christian religion is to speak in subversion of the law." Ventr. 293. To remove all possibility of further doubt, the English commissioners on criminal law, in their sixth report, p. 83 (1841), have thus clearly explained their sense of the celebrated passage: "The meaning of the expression used by Lord Hale, that 'Christianity was parcel of the laws of England,' though often cited in subsequent cases, has, we think, been much misunderstood. It appears to us that the expression can only mean either that, as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law, or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense, Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatever sense the expression is to be understood, it does not appear to us to supply any reason in favor of the rule that arguments may not be used against it; for it is not criminal to speak or write either against the common law of England, generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws." If blasphemy mean a railing accusation, then it is, and ought to be, forbidden; Heard, Lib. & Sl. § 338. See Vidal v. Girard, 2 How. (U. S.) 127, 197, 11 L. Ed. 205; Updegraph v. Com., 11 S. & R. (Pa.) 394; People v. Ruggles, 8 Johns. (N. Y.) 290, 5 Am. Dec. 335; Shover v. State, 10 Ark. 259; State v. Chandler, 2 Harr. (Del.) 553, 569; 21 Am. L. Reg. 201, 333, 537. See Cooley, Const. Lim.

Christianity is a part of the common law; the existence of God has always been assumed in English Law. See J. B. Thayer, Leg. Essays 325.

CHURCH. A society of persons who profess the Christian religion. Den v. Bolton, 12 N. J. L. 206, 214; Stebbins v. Jennings, 10 Pick. (Mass.) 193; German Reformed Church v. Com., 3 Pa. 282; St. Johns Church v. Hanns, 31 Pa. 9.

The place where such persons regularly assemble for worship. Blair v. Odin, 3 Tex. 288.

The term church includes the chancel, aisles, and body of the church. Hamm. N. P. 204; Blair v. Odin, 3 Tex. 288. By the English law, the terms church or chapel, and church-yard, are expressly recognized as in themselves correct and technical descriptions of the building and place, even in criminal proceedings; 3 B. & C. 25; 1 Salk. 256; 11 Co. 25 *b*; 2 Esp. 5, 28.

Burglary may be committed in a church, at common law; 3 Cox, Cr. Cas. 581.

The church of England is not a corporation aggregate; but the church in any particular place is so considered, for the purposes at least of receiving a gift of lands; Town of Pawlet v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Lockwood v. Weed, 2 Conn. 287; Stone v. Griffin, 3 Vt. 400; Wilson v. Presbyterian Church, 2 Rich. Eq. (S. C.) 192. See Rice v. Osgood, 9 Mass. 44; Sawyer v. Baldwin, 11 Pick. (Mass.) 495; Proprietors of Town of Shapleigh v. Pilsbury, 1 Greenl. (Me.) 288; Blair v. Odin, 3 Tex. 288; African Methodist Bethel Church v. Carmack, 2 Md. Ch. Dec. 143.

As to the right of succession to glebe lands, see Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Town of Pawlett v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Mason v. Muncaster, 9 Wheat. (U. S.) 468, 6 L. Ed. 131; or other church property, see Wheaton v. Gates, 18 N. Y. 395. As to the power of a church to make by-laws, etc., under local statutes, see Com. v. Cain, 5 S. & R. (Pa.) 510; German Reformed Church v. Com., 3 Pa. 282; Vestry of St. Luke's Church v. Mathews, 4 Des. (S. C.) 578, 6 Am. Dec. 619; Perrin v. Granger, 30 Vt. 595; Farnsworth v. Storrs, 5 Cush. (Mass.) 412. Acquiescence in and use of a constitution for over 50 years makes it valid and binding on the society; Schlichter v. Keiter, 156 Pa. 119, 27 Atl. 45, 22 L. R. A. 161; Bear v. Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

See RELIGIOUS SOCIETY.

A municipal corporation may stipulate, under its charter authority to contract for a water supply, that churches be furnished with water free of charge; Independent School Dist. of Le Mars v. Water & Light Co., 131 Ia. 14, 107 N. W. 944, 10 L. R. A. (N. S.) 859. In a statute limiting the height of buildings the exception of churches does not deprive owners of private property of the equal protection of the laws; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048.

CHURCH OF ENGLAND. The act of 26 Henry VIII. recognized the king as being the only supreme head on earth of the Church of England, having the power to

correct all errors, heresies, abuses, offences, contempts and enormities.

In 1531, Henry was acknowledged by Convocation as "Protector and Supreme Head of the English Church and Clergy," "so far as the law of Christ allowed."

The Church of England is governed internally by means of its Convocation of bishops and clergy; there is one for each province, Canterbury and York. Each consists of two houses; the upper, composed of archbishops and bishops; the lower, composed of deans of every cathedral, the archdeacons with proctors elected from every chapter and two or more elected by the clergy of the diocese of the province of Canterbury, and by every archdeacon in the province of York.

The name Convocation is specifically given to the assembly of the spirituality of the realm of England. It is summoned by the metropolitan archbishops of Canterbury and of York, respectively, within their ecclesiastical provinces, pursuant to a royal writ, whenever the Parliament of the realm is summoned, and is continued or discharged, as the case may be, whenever the Parliament is prorogued or dissolved.

The present constitution of the Convocation of the Prelates and Clergy of the province of Canterbury was recognized as early as 1283 as its normal constitution, and in extorting recognition from the crown, which the clergy accomplished by refusing to attend unless summoned in lawful manner *(debito modo)* through their metropolitan, the clergy of the province of Canterbury taught the laity the possibility of maintaining the freedom of the nation against the encroachments of the royal power.

The form of the royal writ, which it is customary to issue in the present day to the metropolitan of each province, is identical in its purport with the writ issued by the crown in 1283 to the metropolitan of the province of Canterbury. The existing constitution of the Convocation of the province of Canterbury—and the same is true of the province of York—in respect of its comprising representatives of the chapters and of the beneficed clergy, in addition to the bishops and other dignitaries of the church, would thus appear to be of even more ancient date than the existing constitution of the Parliament of the realm.

It was decreed during the time of Henry VI. that the prelates and other clergy, with their servants and attendants, when called to the Convocation pursuant to the king's writ, should enjoy the same liberties and defence as when summoned to the king's Parliament.

In 1717, in pursuance of a royal writ, Convocation was prorogued and no license from the crown was granted to Convocation to proceed to business until 1861.

In 1872 Convocation was empowered by the crown to frame resolutions on the subject of public worship, which resolutions were afterwards incorporated in the Act of Uniformity Amendment Act.

To Convocation in later years has been added the House of Laymen, for both provinces, which, to a certain extent, secured the co-operation of the lay element. It is elected for every new Parliament, by Diocesan Conferences, who are in turn elected by the laity. In 1896, joint sessions of both Convocations, in conjunction with the Houses of Laymen, for consultative purposes, were held. This body is now termed the Representative Church Council and has adopted a constitution; all formal business is however, transacted in the separate Convocations.

The crown has the right to nominate to vacant sees. In cases of sees of old foundation, this is done by means of a congé d'élire; in that of all others, by letters patent. The usual selection of bishops is in the hands of the Prime Minister, but it is usual now to select those approved by public opinion.

Bishops hold their temporalities as barons, and are spiritual members of Parliament. Only twenty-six have the right to seats in the House of Lords, of which five, the two archbishops and the bishops of London, Durham and Winchester, always sit, the others taking their seats in order of seniority of confirmation. See Encycl. Brit.

The Judicial Committee of the Privy Council is the highest court of appeal in ecclesiastical cases.

The *Church of Ireland* was by the Act of Union, 1800, united with the Church of England. By the disestablishment act of 1869, this union was severed, and on January 1, 1871, the Church of Ireland became independent. The supreme governing board of the Church of Ireland is the church Synod, which meets annually. There are also twenty-three dioceses and Synods which are constituted by similar elective bodies called diocesan councils. The bishop of the diocese is chosen by the clerical and lay members of the diocesan Synod. The Primate is chosen by the House of Bishops from among their own number.

CHURCH RATE. A tribute by which the expenses of the church are to be defrayed. They are to be laid by the parishioners, in England, and may be recovered before two justices, or in the ecclesiastical court. Wharton, Dict.

CHURCH-WARDEN. An officer whose duty it is to take care of or guard the church.

They are taken to be a kind of corporation in favor of the church for some purposes: they may have, in that name, property in goods and chattels, and bring actions for them for the use and benefit of the church, but may not waste the church property, and are liable to be called to account; 3 Steph. Com. 90; 1 Bla. Com. 394; Cowell.

These officers are created in some ecclesiastical corporations by the charter, and their rights and duties are definitely explained. In England, it is said, their principal duties are to take care of the church or building, the utensils and furniture, the church-yard, certain matters of good order concerning the church and church-yard, the endowments of the church; Bacon, Abr. By the common law, the capacity of church-wardens to hold property for the church is limited to personal property; Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650.

CHURL. See CEORL.

CIGARETTES. See COMMERCE.

CINQUE PORTS. The five ports of England which lie towards France.

These ports, on account of their importance as defences to the kingdom, early had certain privileges granted them, and in recompense were bound to furnish a certain number of ships and men to serve on the king's summons once in each year. "The service that the barons of the Cinque Ports acknowledge to owe; upon the king's summons, if it shall happen, to attend with their ships fifteen days at their own cost and charges, and so long as the king pleases, at his own charge;" Cowell, *Quinque Portus*. The Cinque Ports, under the ordinance of Henry III. in 1229, were Hastings, Dover Sandwich, Hythe and Romney, to which were added Winchelsea and Rye; 1 Social England 412. The two latter are sometimes reckoned ports of Sandwich; and the other of the Cinque Ports have ports appended to them in like manner. The Cinque Ports had a Lord Warden, who had a peculiar jurisdiction, sending out writs in his own name. This office is still maintained.

The first admiralty jurisdiction in somewhat modern form appears to have been committed to the Lord Warden and Bailiffs of the Cinque Ports. The constitution of these ports into a confederacy for the supply and maintenance of the navy was due to Edward the Confessor. Edward I. confirmed their charter. The last charter was in 1668. Their courts had civil, criminal, equity, and admiralty jurisdiction and were not subject to the courts at Westminster. See the charters in Jeakes' Charters of the Cinque Ports. See Inderwick's King's Peace; Les Cinque Ports, by Benoist-Lucy; COURT OF THE CINQUE PORTS.

The representatives in parliament and the inhabitants of the Cinque Ports were termed barons; Brande; Cowell; *Termes de la Ley*. And see Round, Feudal England 563.

CIPHER. See TELEGRAPH.

CIRCUIT. A division of the country in England appointed for a particular judge to visit for the trial of causes. See 3 Bla. Com. 58.

Courts are held in each of these circuits, at stated periods, by judges assigned for that purpose; 3 Steph. Com. 321. The United States is divided into nine circuits; 1 Kent 301.

The term is often applied, perhaps, to the periodical journeys of the judges through their various circuits. The judges, or, in England, commissioners of assize *nisi prius*, are said *to make their circuit;* 3 Bla. Com. 57. The custom is of ancient origin. In A. D. 1170, justices in *eyre* were appointed, with delegated powers from the *Curia Regis*, being held members of that court, and directed to make the circuit of the kingdom once in seven years. See Inderwick's King's Peace 60.

Under COURTS OF ASSIZE AND NISI PRIUS will be found a list of English circuits.

CIRCUIT COURTS. Courts whose jurisdiction extends over several counties or districts, and of which terms are held in the various counties or districts to which their jurisdiction extends.

The term was applied distinctively to a class of the federal courts of the United States, of which terms are held in two or more places successively in the various circuits into which the whole country is divided for this purpose. The name was changed to district court by the Judiciary Act of March 3, 1911, in effect January 1, 1912. See UNITED STATES COURTS. In some states it applies to courts of general jurisdiction of which terms are held in the various counties or districts of the state. Such courts sit in some instances as courts of nisi prius, in others, either at nisi prius or in banc. They may have an equity as well as a common-law jurisdiction, and may be both civil and criminal courts. The systems of the various states are widely different in these respects; and reference must be had to the articles on the different states for an explanation of the system adopted in each. The term is unknown in the classification of English courts, and conveys a different idea in the various states in which it is adopted as the designation of a court or class of courts, although the constitution of such courts, in many instances, is quite analogous to that of the English courts of assize and nisi prius.

CIRCUIT COURT OF APPEALS. See UNITED STATES COURTS.

CIRCUIT JUSTICE. A justice of the Supreme Court of the United States allotted to any circuit. Act of March 3, 1911.

CIRCUITY OF ACTION. Indirectly obtaining, by means of a subsequent action, a result which may be reached in an action already pending.

This is particularly obnoxious to the law, as tending to multiply suits; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412.

CIRCUMSPECTE AGATIS. A royal writ (1285) dealing with lay and ecclesiastical jurisdiction which perhaps technically acquired the force of a statute. Its authenticity was doubtful. 2 Holdsw. Hist. E. L. 246. See ARTICULI CLERI.

CIRCUMSTANCES. The particulars which accompany an act. The surroundings at the commission of an act.

The facts proved are either possible or impossible, ordinary and probable or extraordinary and improbable, recent or ancient; they may have happened near us, or afar off; they are public or private, permanent or transitory, clear and simple or complicated; they are always accompanied by circumstances which more or less influence the mind in forming a judgment. And in some instances these circumstances assume the character of irresistible evidence: where, for example, a woman was found dead in a room, with every mark of having met with a violent death, the presence of another person at the scene of action was made manifest by the bloody mark of a *left* hand visible on her *left* arm; 14 How. St. Tr. 1324; Greenl. Ev. 13 *a*. These points ought to be carefully examined, in order to form a correct opinion. The first question ought to be, is the fact possible? If so, are there any circumstances which render it impossible? If the facts are impossible, the witness ought not to be credited. If, for example, a man should swear that he saw the deceased shoot himself with his own pistol, and, upon an examination of the ball which killed him, it should be found too large to enter into the pistol, the witness ought not to be credited;

1 Stark. Ev. 505; or if one should swear that another had been guilty of an impossible crime.

CIRCUMSTANTIAL EVIDENCE. See EVIDENCE.

CIRCUMSTANTIBUS. See TALES.

CITACION. In Spanish Law. The order of a legal tribunal directing an individual against whom a suit has been instituted to appear and defend it within a given time. It is synonymous with the term *emplazamiento* in the old Spanish law, and the *in jus vocatio* of the Roman law.

CITATIO AD REASSUMENDAM CAUSAM. In Civil Law. The name of a citation, which issued when a party died pending a suit, against the heir of the defendant, or, when the plaintiff died, for the heir of the plaintiff. Our bill of revivor is probably borrowed from this proceeding.

CITATION. A writ issued out of a court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not. Proctor, Pract.

The act by which a person is so summoned or cited.

In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely: the insertion of the name of the judge, of the promovert, of the impugnant, of the cause of suit, of the place, and of the time of appearance; to which may be added the affixing the seal of the court, and the name of the register or his deputy. 1 Brown, Civ. Law 453, 454; Ayliffe, Parerg. xliii. 175; Hall, Adm. Pr. 5; Merlin, *Rép.*

The process issued in courts of probate and admiralty courts. It is usually the original process in any proceeding where used, and is in that respect analogous to the writ of capias or summons at law, and the subpœna in chancery.

CITATION OF AUTHORITIES. The production of or reference to the text of acts of legislatures, treatises, or cases of similar nature decided by the courts, in order to support propositions advanced.

As the knowledge of the law is to a great degree a knowledge of precedents, it follows that there must be necessarily a frequent reference to these preceding decisions to obtain support for propositions advanced as being statements of what the law is. Constant reference to the law as it is enacted is, of course, necessary. References to the works of legal writers are also desirable for elucidation and explanation of doubtful points of law.

The civilians on the continent of Europe, in referring to the Institutes, Code, and Pandects or Digest, usually give the number, not of the book, but of the law, and the first word of the title to which it belongs; and, as there are more than a thousand of these, it is no easy task for one not thoroughly acquainted with those collections to find the place to which reference is made. The American writers generally follow the natural mode of reference, by putting down the name of the collection, and then the number of the book, title, law, and section. For example, Inst. 4. 15. 2. signifies Institutes, book 4, title 15, and section 2; Dig. 41. 9. 1. 3. means Digest, book 41, title 9, law 1, section 3; Dig. *pro dote*, or *ff pro dote*, signifies section 3, law 1, of the book and title of the Digest or Pandects entitled *pro dote*. It is proper to remark that Dig. and *ff* are equivalent: the former signifies Digest, and the latter—which is a careless mode of writing the Greek letter π, the first letter of the word πανδέκται—signifies Pandects; and the Digest and Pandects are different names for one and the same thing. The Code is cited in the same way. The Novels are cited by their number, with that of the chapter and paragraph: for example, Nov. 185. 2. 4. for *Novella Justiniani* 185, *capite* 2, *paragrapho* 4. Novels are also quoted by the collation, the title, chapter, and paragraph, as follows: *In Authentico, Collatione* 1, *titulo* 1, *cap.* 281. The Authentics are quoted by their first words, after which is set down the title of the Code under which they are placed: for example, *Authentica, cum testator. Codice ad legem fascidiam.* See Mackeldey, Civ. Law § 65; Domat, Civ. Law, Cush. ed. Appendix; DECRETALES GREGORII NONI.

Statutes of the states are here cited by giving the number of the volume (where there are more volumes than one), the name of the state (using the common geographical abbreviation), the designation of the code, and the page where the statute or provision in consideration is found: thus, 1 N. Y. Rev. Stat. 4th ed. 63. To this it is desirable to add, when regard for space allows, the chapter and section of the statute referred to.

United States statutes, and statutes of the states not included in the codified collection of the state, are cited as statutes of the year in which they were enacted, or by the proper section of the Revised Statutes.

English statutes are referred to by indicating the year of the reign in which they were enacted, the chapter and section: thus, 17 & 18 Vict. c. 96, § 2, or the date or year of the act. Recent English authors are coming to give the date or the year in the text and perhaps the regnal year in a foot note.

Text-books are referred to by giving the number of the volume (if more than one), and the name of the author, with an abbreviation of the title of the work sufficiently extended to distinguish it from other works by the same author, and to indicate the class of subjects of which it treats: thus, 2 Story, Const.

Where an edition is referred to which has been prepared by other persons than the authors, or where an edition subsequent to the first is referred to, this fact is sometimes indicated, and the page, section, or paragraph of the edition cited is given: thus, Angell & A. Corp., Lothrop ed. 96; Smith, Lead. Cas., 5th Hare & W. ed. 173. The various editions of Blackstone's Commentaries, however, have the editor's name preceding the title of the book: thus Sharswood, Bla. Com.; Coleridge, Bla. Com.; wherever the reference is to a note by the editor cited; otherwise the reference is merely to Blackstone.

The earlier *reports* of the Federal courts of the United States, and of the English, Irish, and Scotch courts, are cited by the names of the reporters: thus, 3 Cra. 96; 5 East 241. In a few instances,

common usage has given a distinctive name to a series; and wherever this is the case such name has been adopted; as, Term; C. B.; Exch.

The reports of the state courts are cited by the name of the state, wherever a series of such reports has been recognized as existing: thus, 5 Ill. 63; 21 Pa. 96; and the same rule applies to citations of the reports of provincial courts: thus, 6 Low. C. 167. The later volumes of reports of the supreme court of the United States are cited by their serial number: thus, 161 U. S.

Otherwise, the reporter's name is used; thus, 5 Rawle 23, or an abbreviation of it; as 11 Pick. 23. This rule extends also to the provincial reports; and the principle is applied to the decisions of Scotch and Irish cases, except in later cases, when the official method is adopted.

Where the same reporter reports decisions in courts both of law and equity, an additional abbreviation, usually to equity reports and sometimes to law reports, indicates which series is meant: thus, 3 Ired. Eq. 87; 14 N. J. L. 42.

As to the usual mode of citing English, Scotch and Irish Reports, see Tables etc. of All Reports of Cases etc. by the Council of Law Reporting (1895); REPORTS.

For a list of abbreviations as used in this book, and as commonly used in legal books, see ABBREVIATIONS.

CITE. To summon; to command the presence of a person; to notify a person of legal proceedings against him and require his appearance thereto. See CITATION.

CITIZEN. **In English Law.** An inhabitant of a city. 1 Rolle, Abr. 138; 18 L. Q. Rev. 49. The representative of a city, in parliament. 1 Bla. Com. 174.

At common law a natural-born subject included every child born in England of alien parents except the child of an ambassador or diplomatic agent or of an alien enemy in hostile occupation of the place where the child was born; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. It made no difference whether the parents were permanently or only temporarily residing in England; Cockb. Nat. 7.

In Roman Law. Under Roman law there were four methods of acquiring citizenship: 1. Every man was a citizen whose father was such before him. 2. A slave when he became a free man followed the condition of his former master. 3. Certain privileged classes by statutes could by their own acts become citizens, as by service for three years in the Roman armies, or the erection of a house in Rome worth at least 100,000 sesterces, or building a ship and for six years carrying corn to Rome. 4. By legislation such aliens as were thought fit were received into citizenship. This would now be termed naturalization.

Citizenship might be lost by reduction into slavery, capture in war, banishment and voluntary expatriation.

The net result of citizenship was that by it alone one became entitled to the protection of the laws—the *jus civile*. It was exclusive and personal, not territorial. For a discussion of the subject, see 17 L. Q. Rev. 270.

See JUS CIVITATIS.

The term *citizen* was used in Rome to indicate the possession of private civil rights, including those accruing under the Roman family and inheritance law and the Roman contract and property law. All other subjects were peregrines. But in the beginning of the 3d century the distinction was abolished and all subjects were citizens; 1 Sel. Essays in Anglo-Amer. L. H. 578.

By the Roman law the citizenship of the child followed that of the parent. The Code Napoléon changed the law of France, which until then (1807) had followed the feudal rule that citizenship was determined by birth, to the rule of the descent of blood, the *jus sanguinis* of the civil law. It has been contended that this is the true principle of international law; Vattel, b. 1, c. 19, § 212; Bar, Int. L. § 31; dissenting opinion in U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. But the last case settled the law of the United States that mere birth within the country confers citizenship, following the rule of the English common law and denying the existence of a settled and definite rule of international law inconsistent therewith.

In American Law. One who, under the constitution and laws of the United States, has a right to vote for representatives in congress, and other public officers, and who is qualified to fill offices in the gift of the people.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside; 14th Amendment, U. S. Const.

One of the sovereign people. A constituent member of the sovereignty, synonymous with the people. Scott v. Sandford, 19 How. (U. S.) 404, 15 L. Ed. 691.

A member of the civil state entitled to all its privileges. Cooley, Const. Lim. 77. See U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; Web. Cit. 48.

The provisions of the U. S. R. S. in relation to citizens are as follows:

Sec. 1992. All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Sec. 1994. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

The term *natural-born citizen* used in the federal constitution is not therein defined.

Its meaning must be gathered from the common law; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Citizens are either native-born or naturalized. Native citizens may fill any office; naturalized citizens may be elected or appointed to any office under the constitution of the United States, except the offices of president and vice-president.

The right of citizenship never descends in the legal sense, either by the common law, or under the common naturalization acts. It is incident to birth in the country, or it is given personally by statute; Pamphlet by Mr. Binney on the Alienigenæ of the United States (1853), partly published in 2 Am. L. Reg. 193 (1854). See *sub-tit.* In Roman Law, *supra.*

Generally it is presumed, at least until the contrary is shown, that every person is a citizen of the country in which he resides; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. Ed. 387; Molyneaux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662; State v. Haynes, 54 Ia. 109, 6 N. W. 156; Moore v. Wilson's Adm'rs, 10 Yerg. (Tenn.) 406; Quinby v. Duncan, 4 Harr. (Del.) 383. Where it is shown that a person was once a citizen of a foreign country even though residing in another, the presumption is, until the contrary appears, that he still remains such; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628; Ehrlich v. Weber, 114 Tenn. 711, 88 S. W. 188; Bode v. Trimmer, 82 Cal. 513, 23 Pac. 187; Charles Green's Son v. Salas, 31 Fed. 106. Evidence of foreign birth overcomes the presumption of citizenship raised by residence and raises the presumption of citizenship of the country of birth; State v. Jackson, 79 Vt. 504, 65 Atl. 657, 8 L. R. A. (N. S.) 1245.

The first clause of section 1 of the 14th Amendment of the United States Constitution for the first time recognizes and defines citizenship of the United States and makes those who are entitled to it citizens of the state in which they reside. This amendment changed the origin and character of American citizenship, or at least removed all doubt. Instead of a man's being a citizen of one of the states, he was now made a citizen of any state in which he might choose to reside because he was antecedently a citizen of the United States. Blaine, Twenty Years of Congress, vol. 2, p. 189. There is therefore a twofold citizenship under our system—federal citizenship and state citizenship; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. One may be a citizen of the United States without being a citizen of a state, and an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen thereof, but it is only necessary that he should be born or naturalized in the United States to make him a citizen of the Union; Slaughter-House Cases, 16 Wall. (U. S.) 36, 73, 21 L. Ed. 394; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

The object of the amendment in respect to citizenship was to preserve equality of rights and prevent discrimination between citizens, but not radically to change the whole theory of state and federal governments and the relation of both to the people or to each other; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869. It declares that persons may be citizens of the United States without regard to their citizenship of a particular state and makes "*all persons* born within the United States and subject to its jurisdiction citizens of the United States." This language is intended to except children of "ministers, consuls, and citizens or subjects of foreign states born within the United States." In order to make a citizen of the United States also a citizen of a state, he must reside within it. This distinction becomes important in connection with the question, hereafter noted, as to what are the privileges and immunities guaranteed by the amendment; Slaughter-House Cases, 16 Wall. (U. S.) 36, 72, 21 L. Ed. 394.

The object of the clause is to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290. It applies, so far as state citizenship is concerned, only to citizens removing from one state to another; In re Hobbs, 1 Woods, 542, Fed. Cas. No. 6,550; Live Stock Dealers' & Butchers' Ass'n v. Slaughter-House Co., 1 Abb. U. S. 397, Fed. Cas. No. 8,408. The constitution had already provided in art. IV, § 2, that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." As to the scope and meaning of these words, see PRIVILEGES AND IMMUNITIES.

The 14th Amendment was not intended to impose any new restrictions upon citizenship or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form and enabling and extending in effect. Its main purpose was to establish the citizenship of free negroes and to put it beyond doubt that all blacks as well as whites born or naturalized within the jurisdiction of the United States are citizens thereof; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; In re Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; Benny v. O'Brien, 58 N. J. L. 36,

32 Atl. 696; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

The Civil Rights Act of 1866 used language very similar to that of the 14th Amendment, and Harlan, J., in a dissenting opinion quoted from the veto message of President Johnson his interpretation of its meaning: It "comprehends the Chinese of the Pacific states, Indians subject to taxation, the people called gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes, and persons of African blood. Every individual of those races born in the United States is made a citizen thereof;" Elk v. Wilkins, 112 U. S. 94, 114, 5 Sup. Ct. 41, 28 L. Ed. 643; see also In re Gee Hop, 71 Fed. 274.

"No white person born within the limits of the United States and subject to their jurisdiction, or born without those limits and subsequently naturalized under their laws, owes his status of citizenship to the recent amendments to the federal constitution;" Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

The amendment does not give to congress power to protect by legislation the rights of state and national citizenship; Smoot v. Ry. Co., 13 Fed. 337; but it distinguishes between the two; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131. A person may be a citizen of the United States without being a citizen of any state; Slaughter-House Cases, 16 Wall. (U. S.) 74, 21 L. Ed. 394; U. S. v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; Cully v. R. Co., 1 Hughes, 536, Fed. Cas. No. 3,466. The term *citizen* is analogous to *subject* at common law; U. S. v. Rhodes, 1 Abb. U. S. 39, Fed. Cas. No. 16,151; Sampson v. Burgwin, 20 N. C. 21; McKay v. Campbell, 2 Sawy. 129, Fed. Cas. No. 8,840. The amendment does not confer citizenship on persons of foreign birth; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136. Neither Chinese nor Japanese can become citizens; In re Ah Yup, 5 Sawy. 155, Fed. Cas. No. 104; In re Look Tin Sing, 21 Fed. 905; In re Saito, 62 Fed. 126; In re Gee Hop, 71 Fed. 274; State v. Ah Chew, 16 Nev. 51, 40 Am. Rep. 488; unless born in this country of resident parents not engaged in the diplomatic service; In re Look Tin Sing, 10 Sawy. 353, 21 Fed. 905; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890.

Indians are not citizens; McKay v. Campbell, 2 Sawy. 129, Fed. Cas. No. 8,840; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643; but an Indian if taxed, after tribal relations are dissolved, is a citizen; U. S. v. Elm, 23 Int. Rev. Rec. 419, Fed. Cas. No. 15,048; and the child of a member of one of the Indian tribes within the United States is not a citizen, though born in the United States; McKay v. Campbell, 2 Sawy. 118, Fed. Cas. No. 8,840; and although the parents have given up their tribal relations they cannot become citizens until they are first naturalized; Elk v. Wilkins, 112 U. S. 94, 103, 5 Sup. Ct. 41, 28 L. Ed. 643.

Free persons of color, born in the United States, were always entitled to be regarded as citizens; U. S. v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151; but see Dred Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691. Negroes born within the United States are citizens; U. S. v. Canter, 2 Bond 389, Fed. Cas. No. 14,719; In re Turner, Chase's Dec. 157, Fed. Cas. No. 14,247 (but not before the 14th Amendment; Dred Scott v. Sandford, 9 How. (U. S.) 393, 15 L. Ed. 691; Marshall v. Donovan, 10 Bush (Ky.) 681); but not an escaped slave residing in Canada or his children; People v. Board, 26 Mich. 51, 12 Am. Rep. 297.

A woman is a citizen; Bradwell v. Illinois, 16 Wall. (U. S.) 130, 21 L. Ed. 442; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; but the amendment does not confer upon her the right to vote; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Cruikshank, 1 Woods, 308, Fed. Cas. No. 14,897; U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459; Spencer v. Board, 1 McArthur (D. C.) 169, 29 Am. Rep. 582; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; or to practice law; Bradwell v. Illinois, *supra*.

Children born in a foreign country of American parents, who, though residing there, still claim citizenship, are citizens of the United States; Ware v. Wisner, 50 Fed. 310; so if the father only is a citizen; R. S. § 1993. The children of ambassadors and ministers at foreign courts, however, are citizens; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 155, 7 L. Ed. 617. A person born in this country of alien parents who were domiciled, but not naturalized here, is a citizen; Benny v. O'Brien, 58 N. J. L. 36, 32 Atl. 696; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. The child of American parents born in a foreign country, on board an American ship of which his father was captain is a citizen of the United States; U. S. v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231. All children born out of the United States, who are citizens thereof and who continue to reside out of the United States, shall, in order to receive the protection of the government, be required, upon reaching the age of eighteen, to record at an American consulate their intention to become residents and remain citizens of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining their majority; Act March 2, 1907. It is said that formerly a man might from the circumstances of his birth be a subject of two states at once. A child of French parents born in England owed allegiance to the King

of England. If he went to France he carried with him that allegiance. It was the distinction between the *jus soli* and the *jus sanguinis*. But by the act of 1870 the reception of a British subject into the allegiance of a foreign state extinguishes his British nationality *ipso jure;* no alien naturalized in England is to be deemed a British subject while in the country of his original allegiance so long as by the law of that country he remains a subject of it, and a man who is a British subject by the *jus soli* and a foreigner by the *jus sanguinis* may make his election between these two conditions; 18 L. Q. Rev. 47.

The act of March 2, 1907, provides that any American woman who marries a foreigner shall take the nationality of her husband. At his death, she may resume her American citizenship if abroad, by registering as an American citizen within one year with a consul of the United States or by returning to reside in the United States, or, if then residing in the United States, by continuing to reside there.

Any alien woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after his death, if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad, she may retain her citizenship by registering as such before a United States consul within one year.

In Comitis v. Parkerson, 56 Fed. 556, it is said: "Four attorney-generals of the United States have given opinions as to the effect of a female citizen marrying an alien husband. Two have held that she became an alien; two that she remained a citizen." That case held that she did not become an alien merely by her marriage, for both husband and wife intended to reside in this country.

A French woman, who has become naturalized under the statute by a marriage with an American citizen, will again become an alien, by a second marriage to a French citizen residing in this country; Pequignot v. Detroit, 16 Fed. 211. The common law did not recognize marriage as affecting in any way the nationality of the parties. An alien woman who married a British subject remained an alien, and a woman who was a British subject could not put off her allegiance by becoming the wife of an alien. This is changed by the naturalization act of 1870; 18 L. Q. R. 49.

The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to this country which do not attach to the father; and when children of American fathers are born without the jurisdiction of the United States the country within whose jurisdiction they are born may claim them as citizens; U. S. v. Wong Kim Ark, 169 U. S. 649, 691, 18 Sup. Ct. 456, 42 L. Ed. 890. Such children are said to be born to a double character; the citizenship of the father is that of the child, so far as the laws of the country of which the father is a citizen are concerned, and within the jurisdiction of that country, but the child may owe another fealty besides that which attaches to the father. Opinions of the Executive Departments on Naturalization, Expatriation, and Allegiance (1873) 17, 18; U. S. For. Rel. 1873–74, 1191, 1192. The conclusions in the opinion above cited by Attorney-General Hoar were quoted and adopted by Secretary Bayard in 1886, when a son born of American parents in France made an application for a passport; U. S. For. Rel. 1886, 303.

It is said that the children of our citizens born abroad, and the children of foreigners born in the United States, have the right, on arriving at full age, to elect one allegiance and repudiate the other; Whart. Confl. L. §§ 10, 12. The objection has been taken that as our law provides no right of election by or for a child, as do the continental codes, the resulting dual citizenship is contrary to the theory of citizenship. But the difficulty is said to be rather apparent than real. When a child is born in America of Chinese parents, China claims him by the *jus sanguinis;* America by the *jus soli*. It is not a question whether he is an American or a Chinaman. He is both. The municipal laws being thus in conflict, his citizenship at any time will depend upon whether he is subject to the jurisdiction of the one or of the other country. The duality of citizenship is a fact, only in a third country. In China he is a Chinaman; in America, an American; 12 Harv. L. Rev. 55. See DOMICIL; RESIDENCE; NATURALIZATION; ALIEN.

Where a foreigner takes the oath declaring his intention of becoming a citizen of the United States, his minor sons thereby acquire an inchoate status as citizens, and if they attain majority before their father completes his naturalization, they are capable of becoming citizens by other means than the direct application provided for by the naturalization laws; Boyd v. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103; where a resident alien woman marries a naturalized citizen, under R. S. § 2172, her children residing with her are citizens; U. S. v. Kellar, 11 Biss. 314, 13 Fed. 82; Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; For. Rel. 1900, 527.

Nationality is not inherited through women and an illegitimate child, born abroad of an American woman, is not a citizen of the United States; 3 Moore, Dig. Int. L. 285; but when the reputed father of an illegitimate child marries the mother and was afterwards naturalized, the child was a citizen of the United States; Dale v. Irwin, 78 Ill. 170. The fact that an unnaturalized person of foreign birth is enabled by a state statute

to vote and hold office does not make him a citizen; Lanz v. Randall, 4 Dill. 425, Fed. Cas. No. 8,080.

The *age* of the person does not affect his citizenship, though it may his political rights; 1 Abb. L. Dict. 224; nor the *sex; id.;* Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; the right to vote and the right to hold office are not necessary constituents of citizenship; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; Van Valkenburg v. Brown, 43 Cal. 43, 13 Am. Rep. 136.

All natives are not citizens of the United States: the descendants of the aborigines are not entitled to the rights of citizens; see *supra;* also Elk v. Wilkins, 112 U. S. 103, 5 Sup. Ct. 41, 28 L. Ed. 643. Anterior to the adoption of the constitution of the United States, each state had the right to make citizens of such persons as it pleased.

A citizen of the United States residing in any of the states is a citizen of that state; Gassies v. Ballon, 6 Pet. (U. S.) 761, 8 L. Ed. 573; Catlett v. Ins. Co., Paine 594, Fed. Cas. No. 2,517; Health v. Austin, 12 Blatch. 320, Fed. Cas. No. 6,305; Prentiss v. Barton, 1 Brock. 391, Fed. Cas. No. 11,384; Rogers v. Rogers, 1 Paige Ch. (N. Y.) 183; Smith v. Moody, 26 Ind. 299.

A person may be a citizen for commercial purposes and not for political purposes; Field v. Adreon, 7 Md. 209.

Among the rights which belong to the citizen derived from the constitution and laws of the United States are the right to vote at a federal election; In re Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; the right to remain on a homestead entry for the purpose of perfecting the title; U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; the right to protection while in custody on a charge of crime of the officers of the United States; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; the right to furnish information to the authorities of violations of the laws of the United States; In re Quarles, 158 U. S. 532, 15 Sup. Ct. 959, 39 L. Ed. 1080; Motes v. U. S., 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150; the right to contract outside the state for insurance on his property; Allgeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. But the constitution of the United States does not secure to any the right to work at a given occupation or a particular calling free from injury, oppression or interference by individual citizens; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65.

All persons who deserted the naval or military service of the United States, and did not return thereto within sixty days after the issuance of the proclamation of the president, dated March 11, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, and to be incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizenship thereof; R. S. § 1996.

As to citizenship as acquired by naturalization, see ALLEGIANCE; NATURALIZATION; ALIEN.

Citizenship, not residence, confers the right to sue in the federal courts; Haskell v. Bailey, 63 Fed. 873, 11 C. C. A. 476. See Reno. Non-Residents, c. vii. Corporations are citizens of the state by which they are created, irrespective of the citizenship of their members; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; National S. S. Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552. If two corporations created by different states, are consolidated each still retains its own citizenship for purposes of suit; Nashua & L. R. Corp. v. R. Co., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668. See Reno. Non-Residents, § 104. See MERGER.

There is an indisputable legal presumption that a state corporation, when sued or suing in a circuit court of the United States, is composed of citizens of the state which created it; and this presumption accompanies it when it does business in another state, and it may sue or be sued in the federal courts in such other state as a citizen of the state of its original creation; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802; Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964.

A corporation is not a "citizen" within the meaning of the first clause of section 1 of the 14th Amendment; Insurance Co. v. New Orleans, 1 Woods 85, Fed. Cas. No. 7,052; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; but it is a person (*q. v.*). In many cases a corporation is treated as a citizen for purposes of jurisdiction; U. S. v. Transp. Co., 164 U. S. 686, 17 Sup. Ct. 206, 41 L. Ed. 599. In order to accomplish this result a curious legal fiction was created which is discussed *infra.*

It may now be considered as fairly well settled that except as to the 14th Amendment as stated *supra,* corporations are recognized as citizens by all departments of the federal government. This was done by the Supreme Court in construing an act for payment of "claims for property of citizens of the United States" taken or destroyed by Indians. It was held that the word "citizen" included corporations; U. S. v. Transp.

Co., 164 U. S. 686, 17 Sup. Ct. 206, 41 L. Ed. 599. The word has also been frequently used by Congress to include corporations; *id.*, where an instance is referred to in R. S. § 2319; the right to purchase mineral deposits in public lands is given to "citizens of the United States and those who have declared their intention to become such," and section 2321 in prescribing how citizenship shall be established, makes specific provision for the evidence required "in the case of a corporation organized under the laws of the United States or of any state or territory thereof." Again corporations are expressly recognized as citizens by the executive branch of the government in various treaties with Great Britain, Venezuela, Peru and Mexico, all referred to in the case last cited, 164 U. S. at page 689, 17 Sup. Ct. 206, 41 L. Ed. 599.

The doctrine that a corporation is a "citizen" was not accepted in the first instance, but it was treated as an association of individuals whose citizenship should control the question of federal jurisdiction; Bank of U. S. v. Deveaux, 5 Cra. (U. S.) 61, 3 L. Ed. 38, where Marshall, C. J., delivered the opinion. But this doctrine was speedily questioned and the Chief Justice regretted the decision and expressed his conviction that it was unsound in principle; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 555, 11 L. Ed. 353. The case however was followed; Breithaupt v. Bank, 1 Pet. (U. S.) 238, 7 L. Ed. 127; and not until after his death departed from. It was then first held that, "when a corporation exercises its powers in the state which chartered it, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction." Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 559, 11 L. Ed. 353. In that case the doctrine was decisively sustained that "a corporation created by and doing business in a particular state is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars, it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it and where its business is done, for all the purposes of suing and being sued."

A few years after, Daniels, J., in a dissenting opinion insisted that a corporation could be in no sense a citizen, and Catron, J., in one of the majority opinions in the same case, considered that the jurisdiction in cases of corporations depended upon the citizenship of the managing officers; Rundle v. Canal Co., 14 How. 101, 14 L. Ed. 335.

Very soon after this, against strong dissent, the doctrine of the conclusive presumption from the habitat of a corporation as to the residence or citizenship of those who used its name and exercised its faculties. was pronounced; Marshall v. R. Co., 16 How. 314, 14 L. Ed. 953. This presumption was reaffirmed and both parties held estopped with respect to it; Covington Drawbridge Co. v. Shepherd, 20 How. 227, 15 L. Ed. 896; and the presumption was held to be a "legal" one, which no averment or evidence might rebut; Ohio & M. R. Co. v. Wheeler, 1 Black 286, 17 L. Ed. 130; and in Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207, the court, by Strong, J., said, "A corporation itself can be a citizen of no state in the sense in which the word 'citizen' is used in the constitution of the United States," and then reiterates the doctrine of conclusive presumption as settled law. Thus the theory on which corporations were finally recognized as citizens was based upon what Baldwin, C. J., properly characterized as a legal fiction; 41 Am. L. Rev. 38. This fiction, as he says, was given definite, and as it was supposed final, shape by Taney, C. J., in Ohio & M. R. Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130, where not only was the doctrine of conclusive presumption sustained, but it was also said that "in such a suit it can make no difference whether plaintiffs sue in their own proper names or by the corporate name and style by which they are described."

The difficulties arising from the extension of corporate operations to different states necessarily caused some modification of the doctrine, and when the courts were asked to extend it so that a corporation of one state (conclusively presumed to be composed of citizens of that state) was authorized by the law of another state to do business therein, that it should be deemed to be composed of citizens of the second state with the same jurisdictional results, they said, "We are unwilling to sanction such an extension of the doctrine, which, as heretofore established, went to the very verge of judicial power," and having stated the doctrine as beginning with an assumption of fact that state corporations were composed of citizens of the state creating them and then the change of the presumption to one of law, said, "There we are content to leave it;" St. Louis & S. F. Ry. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Finally when a case arose in which the suit was brought against a corporation by a stockholder asserting the control of the corporation by antagonistic interests, it was held that there might be proof that the stockholder was not a citizen of the state which created the corporation, and that he had a constitutional right to bring his suit in the federal court. The court said: "It is one thing to give to a corporation a status, and another thing to take from a citizen the right given

him by the constitution." Accordingly, it was considered that the presumption of citizenship of stockholders must give way to the actual fact proved that the complainant was a citizen of a different state, and that thereupon the jurisdiction attached. After quoting the phrase above cited from 161 U. S. 545, that the doctrine as then settled "went to the very verge of judicial power," it was added: "Against the further step urged by appellees we encounter the Constitution of the United States." Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606. Thus in this case the court, as is said by Baldwin, C. J., in the article above cited, "marked the limits of the verge, but in such a way as practically to overrule many of their earlier decisions." The precise question decided in the last case had undoubtedly been determined differently long before, where citizens of Louisiana sued a Mississippi Bank and a plea to the jurisdiction, that two other citizens of Louisiana were among the shareholders, was sustained; Commercial & R. Bank v. Slocomb, 14 Pet. (U. S.) 60, 10 L. Ed. 354; the changed result is attributed, by Baldwin, C. J., to the fact, not that the written law had changed, but that "a new generation of judges gave it a new interpretation and twisted a new theory into an old shape," and the ease with which this was done he considers as striking evidence both of the strength of a written constitution and the futility of a written fiction.

CITY. In England. An incorporated town or borough which is or has been the see of a bishop. Co. Litt. 108; 1 Bla. Com. 114; Cowell. There is said, however, to be no necessary connection between a city and a see. Oxford Dict., citing Freeman.

A large town incorporated with certain privileges. The inhabitants of a city. The citizens. Worcester, Dict.

Although the first definition here given is sanctioned by such high authority, it is questionable if it is essential to its character as a city, even in England, that it has been at any time a see; and it certainly retains its character of a city after it has lost its ecclesiastical character; 1 Steph. Com. 115; 1 Bla. Com. 114; and in the United States it is clearly unnecessary that it should ever have possessed this character. Originally, this word did not signify a town, but a portion of mankind who lived under the same government—what the Romans called *civitas*, and the Greeks πόλις; whence the word *politeia—civitas seu reipublicæ status et administratio.* Toullier, *Dr. Civ.* Fr. l. 1, t. 1, n. 202; Henrion de Pansey, *Pouvoir Municipal*, pp. 36, 37.

By cities in the Middle Ages in Germany was meant fortified places in the enjoyment of market-jurisdiction. The German as well as the French cities are a creation of the Middle Ages; there was an organic connection with the Roman town-system. Schröder, Lehrbuch des Deutchen Rechtsgeschichte 588.

CIVIL. In contradistinction to *barbarous* or *savage*, indicates a state of society reduced to order and regular government: thus, we speak of civil life, civil society, civil government, and civil liberty. In contradistinction to *criminal*, to indicate the private rights and remedies of men, as members of the community, in contrast to those which are public and relate to the government: thus, we speak of civil process and criminal process, civil jurisdiction and criminal jurisdiction.

It is also used in contradistinction to *military* or *ecclesiastical*, to *natural* or *foreign*; thus, we speak of a civil station, as opposed to a military or an ecclesiastical station; a civil death, as opposed to a natural death; a civil war, as opposed to a foreign war; Story, Const. § 789; 1 Bla. Com. 6, 125, 251; Montesquieu, Sp. of Laws, b. 1, c. 3; Rutherforth, Inst. b. 2, c. 2; *id.* c. 3; *id.* c. 8, p. 359; Heineccius, Elem. Jurisp. Nat. b. 2, ch. 6.

CIVIL ACTION. In the Civil Law.—A personal action which is instituted to compel payment, or the doing some other thing which is purely civil. Pothier, Introd. *Gen. aux Cont.* 110.

At Common Law.—An action which has for its object the recovery of private or civil rights or compensation for their infraction. See Action.

CIVIL COMMOTION. An insurrection of the people for general purposes, though it may not amount to rebellion where there is an usurped power. 2 Marsh. 793.

In the printed proposals which are considered as making a part of the contract of insurance against fire, it is declared that the insurance company will not make good any loss happening by any civil commotion.

CIVIL CONTEMPT. See Contempt.

CIVIL DAMAGE ACTS. Acts passed in many of the United States which provide an action for damages against a vender of intoxicating liquors, on behalf of the wife or family of a person who has sustained injuries by reason of his intoxication. Dice v. Sherberneau, 152 Mich. 601, 116 N. W. 416, 16 L. R. A. (N. S.) 765; Bistline v. Ney Bros., 134 Ia. 172, 111 N. W. 422, 13 L. R. A. (N. S.) 1158, 13 Ann. Cas. 196.

Such an act, even if it allows an action against the owner of the property where the liquor was sold, without evidence that he authorized the sale, is constitutional; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323. See, also, Bedore v. Newton, 54 N. H. 117; Moran v. Goodwin, 130 Mass. 158, 39 Am. Rep. 443; Wightman v. Devere, 33 Wis. 570; Stanton v. Simpson, 48 Vt. 628. Where the owner of a building had no knowledge as to how his premises were used, he is nevertheless liable where his agent rents it for the sale of intoxicating liquors; Hall v. Germain, 131 N. Y. 536, 30 N. E. 591. See Keedy v. Howe, 72 Ill. 133. The act in New York creates a new right of action, viz., for injury to the "means of support;"

it is not necessary that the injury should be one remediable at common law; Volans v. Owen, 74 N. Y. 526, 30 Am. Rep. 337. Injury to means of support is not necessarily deprivation of the bare necessities of life, but any substantial subtraction from the maintenance suitable to the man's business and condition of life; Herring v. Ervin, 48 Ill. App. 369. The Indiana act is constitutional, even though the liquor-seller was licensed; Horning v. Wendell, 57 Ind. 171. So in Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801. If the death of the husband can be traced to an intervening cause, the liquor-seller is not liable; Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446; Collier v. Early, 54 Ind. 559. Intoxication must be shown to have been the proximate cause of the injury; Beem v. Chestnut, 120 Ind. 390, 22 N. E. 303. Damages for injuries resulting in death cannot be recovered; Kirchner v. Myers, 35 Ohio St. 85, 35 Am. Rep. 598, 601; *contra*, Roose v. Perkins, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409; Hayes v. Phelan, 4 Hun (N. Y.) 733; Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386; Flynn v. Fogarty, 106 Ill. 263; Bedore v. Newton, 54 N. H. 117; Rafferty v. Buckman, 46 Ia. 195; but see Jackson v. Brookins, 5 Hun (N. Y.) 530; Davies v. McKnight, 146 Pa. 610, 23 Atl. 320. In some states exemplary damages can be recovered; Weitz v. Ewen, 50 Ia. 34; Gilmore v. Mathews, 67 Me. 517; Bean v. Green, 33 Ohio St. 444; *contra*, Ward v. Thompson, 48 Ia. 588. The fact that the wife had bought liquor from the defendant under compulsion, or in order to keep her husband at home, does not defeat her right; *id.*

CIVIL DEATH. That change of state of a person which is considered in the law as equivalent to death. See DEATH.

CIVIL LAW. This term is generally used to designate the Roman jurisprudence, *jus civile Romanorum.*

In its most extensive sense, the term Roman Law comprises all those legal rules and principles which were in force among the Romans, without reference to the time when they were adopted. But in a more restricted sense we understand by it the law compiled under the auspices of the Emperor Justinian, and which are still in force in many of the states of modern Europe, and to which all refer as authority or written reason.

The ancient *leges curiatæ* are said to have been collected in the time of Tarquin, the last of the kings, by a *pontifex maximus* of the name of *Sextus* or *Publius Papinius.* This collection is known under the title of *Jus Civile Papinianum;* its existing fragments are few, and those of an apocryphal character. Mackeldey § 21.

After a fierce and uninterrupted struggle between the patricians and plebeians, the latter extorted from the former the celebrated law of the *Twelve Tables,* in the year 300 of Rome. This law, framed by the decemvirs and adopted in the *comitia centuriata,* acquired great authority, and constituted the foundation of all the public and private laws of the Romans, subsequently, until the time of Justinian. It is called *Lex Decemviralis.* From this period the sources of the *jus scriptum* consisted in the *leges,* the *plebiscita,* the *senatus consulta,* and the constitutions of the emperors, *constitutiones principium;* and the *jus non scriptum* was found partly in the *mores majorum,* the *consuetudo,* and the *res judicata,* or *auctoritas rerum perpetua similiter judicatorum.* The edicts of the magistrates, or *jus honorarium,* also formed a part of the unwritten law; but by far the most prolific source of the *jus non scriptum* consisted in the opinions and writings of the lawyers—*responsa prudentium.*

The few fragments of the twelve tables that have come down to us are stamped with the harsh features of their aristocratic origin. But the *jus honorarium* established by the prætors and other magistrates, as well as that part of the customary law which was built up by the opinions and writings of the *prudentes,* are founded essentially on principles of natural justice.

Many collections of the imperial constitutions had been made before the advent of Justinian to the throne. He was the first after Theodosius who ordered a new compilation to be made. For this purpose he appointed a committee of ten lawyers, with very extensive powers; at their head was the *ex-quæstor sacri palatii,* Johannes, and among them the afterwards well-known Tribonian. His instructions were to select, in the most laconic form, all that was still of value in the existing collections, as well as in the later constitutions; to omit all obsolete matter; to introduce such alterations as were required by the times; and to divide the whole into appropriate titles. Within fourteen months the committee had finished their labors. Justinian confirmed this new code, which consisted of twelve books, by a special ordinance, and prohibited the use of the older collections of rescripts and edicts. This code of Justinian, which is now called *Codex vetus,* has been entirely lost.

After the completion of this code, Justinian, in 530, ordered Tribonian, who was now invested with the dignity of *quæstor sacri palatii,* and sixteen other jurists, to select all the most valuable passages from the writings of the old jurists which were regarded as authoritative, and to arrange them, according to their subjects, under suitable heads. These commissioners also enjoyed very extensive powers; they had the privilege, at their discretion, to abbreviate, to add, and to make such other alterations as they might consider adapted to the times; and they were especially ordered to remove all the contradictions of the old jurists, to avoid all repetitions, and to omit all that had become entirely obsolete. The natural consequence of this was, that the extracts did not always truly represent the originals, but were often interpolated and amended in conformity with the existing law. Alterations, modifications, and additions of this kind are now usually called *emblemata Triboniani.* This great work is called the Pandects, or Digest, and was completed by the commissioners in three years. Within that short space of time, they had extracted from the writings of no less than thirty-nine jurists all that they considered valuable for the purpose of this compilation. It was divided into fifty books, and was entitled *Digesta sive Pandectæ juris enucleati ex omni vetere jure collecti.* The Pandects were published on the 16th of December, 533, but they did not go into operation until the 30th of that month. In confirming the Pandects, Justinian prohibited further reference to the old jurists; and, in order to prevent legal science from becoming again so diffuse, indefinite, and uncertain as it had previously been, he forbade the writing of commentaries upon the new compilation, and permitted only the making of literal translations into Greek.

In preparing the Pandects, the compilers met very frequently with controversies in the writings of the jurists. Such questions, to the number of thirty-four, had been already determined by Justinian before the commencement of the collection of the Pandects, and before its completion the decisions of this kind were increased to fifty, and were known as the fifty decisions of Justinian. These decisions were at first collected separately, and afterward embodied in the new code.

For the purpose of facilitating the study of the law, Justinian ordered Tribonian, with the assistance of Theophilus and Dorotheus, to prepare a brief system of law under the title of Institutes,

which should contain the elements of legal science. This work was founded on, and to a great extent copied from, the commentaries of Gaius, which, after having been lost for many centuries, were discovered by the great historian Niebuhr, in 1816, in a palimpsest, or re-written manuscript, of some of the homilies of St. Jerome, in the Chapter Library of Verona. What had become obsolete in the commentaries was omitted in the Institutes, and references were made to the new constitutions of Justinian so far as they had been issued at the time. Justinian published his Institutes on the 21st November, 533, and they obtained the force of law at the same time with the Pandects, December 30, 533. Theophilus, one of the editors, delivered lectures on the Institutes in the Greek language, and from these lectures originated the valuable commentaries known under the Latin title, *Theophili Antecessoris Paraphrasis Græca Institutionum Cæsarearum.* The Institutes consist of four books, each of which contains several titles.

After the publication of the Pandects and the Institutes, Justinian ordered a revision of the Code, which had been promulgated in the year 529. This became necessary on account of the great number of new constitutions which he had issued, and of the fifty decisions not included in the Old Code, and by which the law had been altered, amended, or modified. He therefore directed Tribonian, with the assistance of Dorotheus, Menna, Constantinus, and Johannes, to revise the Old Code and to incorporate the new constitutions into it. This revision was completed in the same year; and the new edition of the Code, *Codex repetitæ prælectionis,* was confirmed on the 16th November, 534, and the Old Code abolished. The Code contains twelve books subdivided into appropriate titles.

During the interval between the publication of the *Codex repetitæ prælectionis,* in 535, to the end of his reign, in 565, Justinian issued, at different times, a great number of new constitutions, by which the law on many subjects was entirely changed. The greater part of these constitutions were written in Greek, in obscure and pompous language, and published under the name of *Novellæ Constitutiones,* which are known to us as the Novels of Justinian. Soon after his death, a collection of one hundred and sixty-eight Novels was made, one hundred and fifty-four of which had been issued by Justinian, and the others by his successors.

Justinian's collections were, in ancient times, always copied separately, and afterwards they were printed in the same way. When taken together, they were indeed called, at an early period, the *Corpus Juris Civilis;* but this was not introduced as the regular title comprehending the whole body; each volume had its own title until Dionysius Gothofredus gave this general title in the second edition of his glossed *Corpus Juris Civilis,* in 1604. Since that time this title has been used in all the editions of Justinian's collections.

It is generally believed that the laws of Justinian were entirely lost and forgotten in the Western Empire from the middle of the eighth century until the alleged discovery of a copy of the Pandects at the storming and pillage of Amalfi, in 1135. This is one of those popular errors which had been handed down from generation to generation without question or inquiry, but which has now been completely exploded by the learned discussion, supported by conclusive evidence, of Savigny, in his History of the Roman Law during the Middle Ages. Indeed, several years before the sack of Amalfi the celebrated Irnerius delivered lectures on the Pandects in the University of Bologna. The pretended discovery of a copy of the Digest at Amalfi, and its being given by Lothaire II. to his allies the Pisans as a reward for their services, is an absurd fable. No doubt, during the five or six centuries when the human intellect was in a complete state of torpor, the study of the Roman Law, like that of every other branch of knowledge, was neglected; but on the first dawn of the revival of learning the science of Roman jurisprudence was one of the first to attract the attention of mankind; and it was taught with such brilliant success as to immortalize the name of Irnerius, its great professor.

Even at the present time the Roman Law, as a complete system, exercises dominion in every state in Europe except England (though not all of Continental law comes from it. Poll. & Maitl. xxxvi). The countrymen of Lycurgus and Solon are governed by it, and in the vast empire of Russia it furnishes the rule of civil conduct. In America, it is the foundation of the law of Louisiana, Canada, Mexico, and all the republics of South America. As to its influence on the common law of England there is great diversity of opinion. The subject is too large to be considered here. It has recently been treated in detail by Holdsworth (Hist. of Engl. Law).

See CODE; DIGESTS; INSTITUTES; NOVELS; BASILICA.

CIVIL LIST. An annual sum granted by the English parliament at the commencement of each reign, for the expenses of the royal household and establishment as distinguished from the general exigencies of the state. It is the provision for the crown made out of the taxes in lieu of its proper patrimony and in consideration of the assignment of that patrimony to the public use. Wharton, Dict.

CIVIL OBLIGATION. One which binds in law, and which may be enforced in a court of justice. Pothier, Obl. 173, 191.

CIVIL OFFICER. Any officer of the United States who holds his appointment under the national government, whether his duties are executive or judicial, in the highest or the lowest departments of the government, with the exception of officers of the army and navy. Rawle, Const. 213; 1 Story, Const. § 790.

The term occurs in the constitution of the United States, art. 2, sec. 4, which provides that the president, vice-president, and *civil officers* of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. It has been decided that a senator of the United States is not a civil officer within the meaning of this clause of the constitution. Senate Journals, 10th January, 1799; 4 Tucker, Bla. Com. App. 57, 58; Rawle, Const. 213; Sergeant, Const. Law 376; Story, Const. § 791.

CIVIL REMEDY. The remedy which the party injured by the commission of a tortious act has by action against the party committing it, as distinguished from the proceeding by indictment, by which the wrongdoer is made to expiate the injury done to society.

In cases of treason, felony, and some other of the graver offences, this private remedy is suspended, on grounds of public policy, until after the prosecution of the wrongdoer for the public wrong; 4 Bla. Com. 363; 12 East 409; Bell's Adm'r v. Troy, 35 Ala. 184. The law is otherwise in *Massachusetts,* except, perhaps, in case of felonies punishable with death; Boardman v. Gore, 15 Mass. 333; *North Carolina,* Smith v. Weaver, 1 N. C. 141; *Ohio,* Story v. Hammond, 4 Ohio 377; *South Carolina,* Robinson v. Culp, 3 Brev. 302; *Mississippi,* Newell v. Cowan, 30 Miss. 492; *Tennessee,* Ballew v. Alexander, 6 Humph. 433; *Maine,* Belknap v. Milliken, 23 Me. 381; and *Virginia.* At common law, in cases of homicide the civil remedy is

merged in the public punishment; 1 Chit. Pr. 10. See INJURIES; MERGER; Bish. Cr. L. § 267.

CIVIL RIGHTS. A term applied to certain rights secured to citizens of the United States by the 13th and 14th Amendments to the constitution, and by various acts of congress made in pursuance thereof.

The act of April 9, 1866 ("ordinarily called the 'Civil Rights Bill';" Bradley, J., in U. S. v. Stanley, 109 U. S. 3, 16, 3 Sup. Ct. 18, 27 L. Ed. 835), provided that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of the United States; that such citizens of every race and color shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, etc., and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and be subject to like punishment, etc., and none other. This act was said by Swayne, J., to be not a penal statute but a remedial one to be construed liberally; U. S. v. Rhodes, 1 Abb. U. S. 28, Fed. Cas. No. 16,151.

This legislation was substantially replaced by the 14th Amendment which was broader in its scope, manifestly intended to vindicate those rights against individual aggression; Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692. This amendment was finally promulgated as adopted in July, 1868 (see FOURTEENTH AMENDMENT) and thereafter Congress enacted several laws intended to enforce its provisions. The first was the act of May 31, 1870, known as the Enforcement Act (supplemented by an amending act of February 28, 1871). The purpose was to protect negro voters by requiring in sections 1 and 2 that all citizens should be accorded equal facilities without distinction of race or color; in sections 3, 4 and 5 for the punishment through federal courts of persons who violated the act; and in section 6 for punishment in like manner of conspiracies to defeat the elective franchise. There was also provided an elaborate scheme of supervision of all elections, which included members of Congress, through the federal courts, which became R. S. §§ 2011, 2012, 2016, 2017, 2021, 2022, 5515 and 5522. The power of Congress to impose this system of supervision was upheld in Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; and sections 3 and 4 of the Enforcement Act were held unconstitutional; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; while section 6 was, in effect, held unenforceable, as not providing for the punishment of any act punishable under the constitution and laws of the United States; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

The next act in the series was that of April 20, 1871, known as the "Ku Klux Act." It was an effort to create both civil and criminal liability for the action of individuals against individuals; and also gave authority to the President to employ the army and navy in cases of domestic disturbance within a state and to suspend the writ of habeas corpus, and disqualified for jury service all persons involved. It also contained a remarkable section (6) making any person liable who could, by reasonable diligence, have prevented any other person from depriving individuals of the equal protection of the laws, and failed to do so. This act was practically rendered ineffective by the construction given by the Supreme Court to the power of Congress to enforce the 14th Amendment by legislation. Cases in which various provisions of it were held to be unenforceable in the cases in which it was resorted to are: U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; Carter v. Greenhow, 114 U. S. 317, 5 Sup. Ct. 928, 962, 29 L. Ed. 202; Bowman v. Ry. Co., 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766; Holt v. Mfg. Co., 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374; Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909.

The last act of the series was that of March 1, 1875, which was pre-eminently known as the "Civil Rights Act" and consisted of five sections. Section 1 provided that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations, etc., of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to all citizens of whatever race or color, regardless of any previous condition of servitude. Section 2 provided for the punishment of any person who should violate the foregoing section, both criminally and by a suit for a penalty. Section 3 gave jurisdiction to the federal courts exclusively of all offenses against the act, and of suits for a penalty. Section 4 provided that no person should be excluded from service as grand or petit juror in any court of the United States or any state, on account of race, color or previous condition of servitude. Section 5 gave to the Supreme Court a right of review of all cases arising under the act.

Section 4 was declared constitutional in Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676. Sections 1 and 2 were held unconstitutional and void in the Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, as not being authorized by either the 13th or 14th Amendments. And having been so declared unconstitutional, they were not separable as to their operation in such places as are under the exclusive jurisdiction of the national government and the statute was therefore unconstitutional in its entirety; Butts v. Merchants & Miners Transp. Co.,

230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422; The Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550.

The 13th Amendment denounces a status or condition irrespective of the manner or authority by which it is created. The prohibitions of the 14th and 15th Amendments are largely upon the acts of the states; but the 13th Amendment names no party or authority, but simply forbids slavery and involuntary servitude and grants to Congress power to enforce this prohibition by appropriate legislation; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. Such legislation may be primary and direct in its character; *id.*

In the Civil Rights Cases the court held that although the constitution and statutes of a state may not be repugnant to the 13th Amendment, Congress, by legislation of a direct and primary character, may, in order to enforce the amendment, reach and punish individuals whose acts are in hostility to rights and privileges derived from and secured by or dependent upon that amendment; Clyatt v. U. S., 197 U. S. 207, 25 Sup. Ct. 429, 49 L. Ed. 726. The power, duty and responsibility to enforce the rights of citizens under any of the constitutional amendments rests with the state and not with the United States government; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567. But in Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65, the 13th Amendment was held not to empower Congress to protect against individual interference (where a conspiracy was alleged to exclude negroes from making contracts to labor).

Prohibiting intermarriage between white persons and negroes is not interference with civil rights; State v. Gibson, 36 Ind. 389, 10 Am. Rep. 42; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; nor requiring separate schools; State v. McCann, 21 Ohio St. 210; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; nor requiring separate accommodations on railroad trains within the state; Louisville, N. O. & T. Ry. Co. v. State, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599; *id.*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; nor is the refusal of an innkeeper or keeper of a place of public amusement or proprietor of a public conveyance to accept certain classes of patrons such an interference with the civil rights of such excluded persons as to call for their constitutional protection; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Miller v. Texas, 153 U. S. 537, 14 Sup. Ct. 874, 38 L. Ed. 812; nor are civil rights denied to a negro because the grand jury which indicted him for murder was purposely composed of white men; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Smith v. Mississippi, 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082. But see Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417, where such discrimination on account of race was held a denial of rights under the 14th Amendment, the objection having been taken in the state court by motion to quash the indictment.

Congressional inaction is equivalent to a declaration that a carrier may by its regulations separate white and negro interstate passengers; Chiles v. Ry. Co., 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, 20 Ann. Cas. 980.

Within the meaning of Civil Rights Acts, federal or state, a barber shop is not a place of public accommodation; Faulkner v. Solazzi, 79 Conn. 541, 65 Atl. 947, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67; nor a bootblack stand; Burks v. Bosso, 180 N. Y. 341, 73 N. E. 58, 105 Am. St. Rep. 762; nor a drug store containing a soda fountain; Cecil v. Green, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566; nor a saloon; Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002; Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31, changed by statute Gen. St. Minn. 1913, § 6082; nor a billiard room; Com. v. Sylvester, 13 Allen (Mass.) 247; but a barber shop cannot discriminate against a negro; Messenger v. State, 25 Neb. 674, 41 N. W. 638. A skating rink has been held a place of amusement within such a state law; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; otherwise as to one carried on by the owner of the building without state or municipal license; Bowlin v. Lyon, 67 Ia. 536, 25 N. W. 766, 56 Am. Rep. 355. A race meeting is not; Grannan v. Racing Ass'n, 153 N. Y. 449, 47 N. E. 896; but a bowling alley is; Johnson v. Pop Corn Co., 24 Ohio Cir. Ct. R. 135.

The Civil Rights Act is in derogation of the common law and must be strictly construed; Grace v. Moseley, 112 Ill. App. 100; and the provision that any "person" who violates its provisions shall be amenable thereto is not restricted to natural persons, but includes corporations; Johnson v. Pop Corn Co., 24 Ohio Cir. Ct. 135.

A person operating a place of public resort, who claims the right to exclude persons indicated by conduct, dress, or demeanor to be members of a disreputable class, is liable for a mistake made in the exercise of that right; Davis v. Power Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

U. S. R. S. § 641, U. S. Comp. Stat. 1901, pp. 520, 521, authorizes the removal of a criminal prosecution from a state to a federal court, wherever the accused is denied or cannot enforce in the state courts any right secured to him by any law providing for equal civil rights of citizens of the United States or of all persons within the jurisdiction. But the denial in summoning or impaneling jurors of any equal civil right secured by the federal constitution or laws does not, unless authorized by the state con-

stitution or laws as interpreted by its highest courts, give a right to such removal; Kentucky v. Powers, 201 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692, where there was a deliberate exclusion of Republicans from a jury selected to try the accused for the murder of a Democrat. In that case it was held that, while the decisions of the United States Supreme Court construing this section had reference to discrimination against negroes because of their race, the decisions were not intended to confine the operation of that section or of the 14th Amendment to negroes alone, but the rules announced apply equally where discrimination exists as to the white race; *id.*

Section 641, U. S. R. S., was repealed by section 297 of the Judicial Code of March 3, 1911, and is re-enacted in the same words (except the substitution of district court for circuit court) in section 31 of that code.

See EQUAL PROTECTION OF THE LAW; PRIVILEGES AND IMMUNITIES; FOURTEENTH AMENDMENT; DUE PROCESS OF LAW; REMOVAL OF CAUSES.

CIVIL SERVICE. The Civil Service Act of Congress, Jan. 16, 1883, does not delegate legislative power to the President and Civil Service Commissioners; Butler v. White, 83 Fed. 578. Under it neither the Civil Service Commission nor the President, nor both combined, can make any regulations having the effect of law; nor will courts of equity enforce them. The President can enforce such regulations by the exercise of the power of removal, and if he does not do so, courts of equity will not interfere; Flemming v. Stahl, 83 Fed. 940; nor will it enjoin the removal of government officers; White v. Berry, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; Morgan v. Nunn, 84 Fed. 551; Jaedicke v. U. S., 85 Fed. 373, 29 C. C. A. 199; though it may be unjustly or improperly made; nor decide the right of a party to remain in office; Marshall v. Board of Managers, 201 Ill. 9, 66 N. E. 314. The power of removal is incident to the power of appointment; Flemming v. Stahl, 83 Fed. 940. A provision in a civil service law for the removal of one who is a veteran volunteer fireman only after a hearing, which is not required in the case of one not a veteran, does not contravene the 14th Amendment; People v. Folks, 89 App. Div. 171, 85 N. Y. Supp. 1100. See OFFICER.

CIVILIAN. A doctor, professor, or student of the civil law.

CIVILITER. Civilly: opposed to *criminaliter*, or criminally.

When a person does an unlawful act injurious to another, whether with or without an intention to commit a tort, he is responsible *civiliter*. In order to make him liable *criminaliter*, he must have *intended* to do the wrong; for it is a maxim, *actus non facit reum nisi mens sit rea*. 2 East 104.

CIVILITER MORTUUS. Civilly dead. In a state of civil death.

In New York one sentenced to life imprisonment in the state prison is *civiliter mortuus;* Troup v. Wood, 4 Johns. Ch. (N. Y.) 228; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118.

CIVITAS. A term in the Anglo-Saxon land books, commonly applied to Worcester, Canterbury and other such places, which are both bishop's sees and the head places of large districts. Maitland, Domesday and Beyond 183. See 17 L. Q. R. 274. It was applied by the Romans to the independent tribes or states of Gaul, and then to the chief towns of those tribes. Oxford Dict. *s. v. City.*

See CITY.

CLAIM. A challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant. Plowd. 359. See Cummings v. Lynn, 1 Dall. (U. S.) 444, 1 L. Ed. 215; Willing v. Peters, 12 S. & R. (Pa.) 177.

In a popular sense, claim is a right to claim; a just title to something in the possession or at the disposal of another. Steele v. State, 159 Ala. 9, 48 South. 673.

The owner of property proceeded against in admiralty by a suit *in rem* must present a *claim* to such property, verified by oath or affirmation, stating that the claimant by whom or on whose behalf the claim is made, and no other person, is the true and *bona fide* owner thereof, as a necessary preliminary to his making defence; 2 Conkl. Adm. 201-210.

A demand entered of record of a mechanic or material man for work done or material furnished in the erection of a building, in Pennsylvania and some other states.

The assertion of a liability to the party making it to do some service or pay a sum of money. See Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060.

The possession of a settler upon the wild lands of the government of the United States; the lands which such a settler holds possession of. The land must be so marked out as to distinguish it from adjacent lands; Sargeant v. Kellogg, 5 Gilman (Ill.) 273. Such claims are considered as personalty in the administration of decedents' estates; Stewart v. Chadwick, 8 Ia. 463; are proper subjects of sale and transfer; Hill v. Smith, Morris (Ia.) 70; Freeman v. Holliday, Morris (Ia.) 80; Wilson v. Webster, Morris (Ia.) 312, 41 Am. Dec. 230; Stewart v. Chadwick, 8 Ia. 463; Turney v. Saunders, 4 Scam. (Ill.) 531; the possessor being required to deduce a regular title from the first occupant to maintain ejectment; Turney v. Saunders, 4 Scam. (Ill.) 531; and a sale furnishing sufficient consideration for a promissory note; Freeman v. Holliday, Morris (Ia.) 80; Starr v. Wilson, Morris (Ia.) 438; Pierson v. David, 1 Ia. 23. An express promise to pay for improvements made by "claimants" is good, and the proper amount to be paid may be determined by the jury; Johnson v. Moulton, 1 Scam. (Ill.) 532.

CLAIM OF CONUSANCE. An intervention by a third person demanding jurisdiction of a cause which the plaintiff has commenced out of the claimant's court. Now obsolete. 3 Bla. Com. 298. See COGNIZANCE.

CLAIM PROPERTY BOND. A bond filed by a defendant in cases of replevin and of execution. Upon filing such bond in replevin the defendant is entitled to a return of the goods by the sheriff. Its use is said to have been long sanctioned by usage in Pennsylvania; Snyder v. Frankenfield, 4 Pa. Dist. R. 767. It has taken the place in replevin of the writ *de proprietate probanda;* Weaver v. Lawrence, 1 Dall. (U. S.) 156, 1 L. Ed. 79. Upon giving such bond defendant's title to the goods becomes indefeasible and the plaintiff can only look to the security for the damages which he may recover; 1 Dall. U. S. (4th Ed. by Brightly) 156, 157, note.

In the case of an execution, if a third party files such bond, the sheriff may at his peril withdraw his levy.

CLAIMANT. In Admiralty Practice. A person authorized and admitted to defend a libel brought *in rem* against property; thus, Thirty Hogsheads of Sugar, Bentzon, Claimant v. Boyle, 9 Cra. (U. S.) 191, 3 L. Ed. 701.

CLAMOR (Lat.). A suit or demand; a complaint. Du Cange; Spelman, Gloss.

In Civil Law. A claimant. A debt; any thing claimed from another. A proclamation; an accusation. Du Cange.

CLARENDON, ASSIZE OF. A statute (1166) the principal feature of which was an improvement of judicial procedure in the case of criminals. It was a part of the same scheme of reform as the Constitution of Clarendon. See James C. Carter, The Law, etc., 65.

CLARENDON, CONSTITUTIONS OF. Certain statutes made in the reign of Henry II. at a parliament held at Clarendon (A. D. 1164) by which the king checked the power of the pope and his clergy and greatly narrowed the exemption they claimed from secular jurisdiction.

Previous to this time, there had been an entire separation between the clergy and laity, as members of the same commonwealth. The clergy, having emancipated themselves from the laws as administered by the courts of law, had assumed powers and exemptions quite inconsistent with the good government of the country.

This state of things led to the enactment referred to. By this enactment all controversies arising out of ecclesiastical matters were required to be determined in the civil courts, and all appeals in spiritual causes were to be carried from the bishops to the primate, and from him to the king, but no further without the king's consent. The archbishops and bishops were to be regarded as barons of the realm, possessing the privileges and subject to the burdens belonging to that rank, and bound to attend the king in his councils. The revenues of vacant sees were to belong to the king, and goods forfeited to him by law were no longer to be protected in churches or church-yards. Nor were the clergy to pretend to the right of enforcing the payment of debts in cases where they had been accustomed to do so, but should leave all lawsuits to the determination of the civil courts. The rigid enforcement of these statutes by the king was unhappily stopped, for a season, by the fatal event of his disputes with Archbishop Becket. Fitz Stephen 27; 2 Lingard 59; 1 Hume 382; Wilkins 321; 4 Bla. Com. 422; 1 Poll. & M. 430-440, 461; 2 *id.* 196.

CLASS. A number of persons or things ranked together for some common purpose or as possessing some attribute in common.

The term is used of legatees; Swinton v. Legare, 2 McCord Eq. (S. C.) 440; of obligees in a bond; Justices of Cumberland v. Armstrong, 14 N. C. 284; and of other collections of persons; White v. Delavan, 17 Wend. (N. Y.) 52; Ellis v. Kimball, 16 Pick. (Mass.) 132; Wheeler v. Philadelphia, 77 Pa. 338; 1 Ld. Raym. 708.

CLASSIFICATION IN STATUTES. As to what is proper classification of the subjects of statutes, see EQUAL PROTECTION OF THE LAW; POLICE POWERS.

CLAUSE. A part of a treaty; of a legislative act; of a deed; of a will, or other written instrument. A part of a sentence.

CLAUSULA DEROGATIVA. A clause in a will which provides that no will subsequently made is to be valid. The latter would still be valid, but there would be ground for suspecting undue influence. Grotius.

CLAUSUM. In Old English Law. Close. Closed.

A writ was either *clausum* (close) or *apertum* (open). Grants were said to be by *literæ patentæ* (open grant) or *literæ clausæ* (close grant); 2 Bla. Com. 346.

A close. An enclosure.

Occurring in the phrase *quare clausum fregit* (Rucker v. McNeely, 4 Blackf. [Ind.] 181), it denotes in this sense only realty in which the plaintiff has some exclusive interest, whether for a limited or unlimited time or for special or for general purposes; 1 Chit. Pl. 174; Austin v. Sawyer, 9 Cow. (N. Y.) 39; 6 East 606.

CLAUSUM FREGIT. See QUARE CLAUSUM FREGIT; TRESPASS.

CLEAN HANDS. It is said that a party seeking the aid of a court of equity must come into court with clean hands. It refers only to wrongful conduct in the particular acts or transactions which raise the equity he seeks to enforce; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; West v. Washburn, 153 App. Div. 460, 138 N. Y. Supp. 230.

CLEAR. Free from indistinctness or uncertainty; easily understood; perspicuous, plain; free from impediment, embarrassment or accusation. Webster.

For a clear deed, see Rohr v. Kindt, 3 W. & S. (Pa.) 563, 39 Am. Dec. 53; clear title; Roberts v. Bassett, 105 Mass. 409; clear of expense; 2 Ves. & B. 341; clear of assessments; Peart v. Phipps, 4 Yeates (Pa.) 386; clear days; 14 M. & W. 120; 3 B. & Ald. 581.

CLEARANCE. A certificate given by the collector of a port, in which it is stated that

the master or commander (naming him) of a ship or vessel named and described, bound for a port named (and having on board goods described, in case the master requires the particulars of his cargo to be stated in such clearance), has entered and cleared his ship or vessel according to law.

This certificate, or clearance, evidences the right of the vessel to depart on her voyage; and clearance has therefore been properly defined as *a permission to sail*. The same term is also used to signify the act of clearing. Worcester, Dict.

By U. S. R. S. § 4197, the master of any vessel bound to a foreign port shall deliver to the collector of the district from which he sails a sworn manifest of his cargo and its value. To sail without a clearance is punishable by a fine of $500.

By R. S. § 4200, before a clearance can be granted to any foreign-bound vessel the owners, shippers or consignors of the cargo shall deliver to the collector sworn manifests of their parts of the cargo, specify the kind of goods shipped and their value, and the master of the vessel and the owners, etc., of the cargo shall subscribe an oath as to the foreign place in which such cargo is intended truly to be landed.

The collector of the port cannot refuse clearance because a ship contains contraband; Northern Pac. R. Co. v. Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. Ed. 269.

According to Boulay-Paty, *Dr. Com.* t. 2, p. 19, the clearance is imperatively demanded for the safety of the vessel; for if a vessel should be found without it at sea it may be legally taken and brought into some court for adjudication on a charge of piracy. See SHIP'S PAPERS.

CLEARANCE CARD. A letter given to an employé by a railroad company, at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. Such a card is in no sense a letter of recommendation and in many cases might be of a form and character which the holder would hesitate and decline to present to any person to whom he was making application for employment; Cleveland, C., C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 62 L. R. A. 922, 66 Am. St. Rep. 296; with a full note on the question of the duty of employers to give recommendations to employés either discharged or voluntarily quitting. See BLACKLIST.

CLEARING-HOUSE. An office where bankers settle daily with each other the balance of their accounts.

The origin of the system is said to have been in Edinburgh; at least the bankers of that city so claim; but the earliest record of one (and that is not clear as to date) is that of London, founded in 1775, or possibly earlier. It was started in the ale-house of those times, the general resort of proprietors of new enterprises. The system, however, increased in usefulness so much as to require rooms, which were procured in Lombard Street, and a system was rapidly developed of exchanging checks and other securities to reduce the amount of actual money required for settlements. In this country such associations were established in New York in 1853, Boston in 1856, Philadelphia, Baltimore, and Cleveland in 1858, Worcester in 1861, Chicago in 1865, and since that date the system has extended to most of the cities in which there are several banks. They also exist in the continental countries of Europe. Most of these associations are unincorporated, but in Minnesota there is an act (March 4, 1893) for their incorporation. The Clearing-House Association of New York consists of all the incorporated banks—private bankers not being admitted, as in London. Two clerks from each bank attend at the clearing-house every morning, where one takes a position inside of a counter at a desk bearing the number of his bank, the other standing outside the counter and holding in his hand parcels containing the checks on each of the other banks received the previous day. At the sound of a bell, the outside men begin to move, and at each desk they deposit the proper parcel, with an account of its contents—until, having walked around, they find themselves at their own desk again. At the end of this process the representative of each bank has handed to the representatives of every other bank the demands against them, and received from each of the other banks their demands on his bank. A comparison of the amounts tells him at once whether he is to pay into or receive from the clearing-house a balance in money. Balances are settled daily. In London the practice of presenting checks at the clearing-house has been held a good presentment to the banker at law. It is not usual to examine the checks until they are taken to the bank, and if any are then found not good they are returned to the bank which presented them, which settles for such returned checks. In this country when a check is returned not good through the clearing-house, it is usually again presented at the bank.

To accomplish this purpose of settling daily balances was the original and still is the principal object of a clearing-house, whatever differences of method or detail may be found in different cities. The mode of proceeding in Philadelphia is described in Crane v. Clearing-House, 32 W. N. C. (Pa.) 358, and Philler v. Yardley, 62 Fed. 645, 10 C. C. A. 562, 25 L. R. A. 824; and that of London in 5 Mann. & G. 348, 6 Scott, N. R. 1, 12 L. J. C. P. 113.

The original purpose of a clearing-house—the exchange of paper payable by the several banks and the settlement of the daily balances between them—has undergone a gradual but very extensive expansion. In the larger cities they have become to some extent financial regulators and the medium through which in times of financial disturbance there is attained concerted action by the banks of a city. In the panic of 1893, the New York clearing-house issued "clearing-house certificates" representing the deposit of securities; these could be used by the banks to settle clearing-house balances.

Such certificates are held valid, and suit may be brought by the clearing-house committee upon notes included in the collateral deposited by a bank for the purpose of taking out certificates; Philler v. Woodfall, 32 W. N. C. (Pa.) 183; Philler v. Field, 29 W. N. C. (Pa.) 139; Philler v. Esler, 29 W. N. C. (Pa.) 258. A clearing-house due bill is an ordinary due bill from a bank "to Banks," and usually stipulates that it is good when both signed and countersigned by duly authorized officers, and to be payable only

through the clearing-house on the day after its issue. During the financial difficulties above referred to such due bills were used by the banks in payment of checks whenever practicable, being as available as cash for deposit in another bank of the same city. They are held not to be certificates of deposit but negotiable, and requiring indemnity to recover the amount due on them if lost or stolen; Dutton v. Bank, 16 Phila. (Pa.) 94.

A clearing-house association is properly sued in the names of the committee who have the entire control of its securities and business funds; Yardley v. Philler, 58 Fed. 746.

The tendency of the decisions upon the rights and liabilities of clearing-houses is to treat them with respect to the customs of the banks as merely instruments of making the exchanges, and not as liable to individual depositors or holders of paper for funds which have passed through the clearing-house in the process of exchange between banks. They are not responsible for anything except the proper distribution of money paid to settle balances, their purpose being to provide a convenient place where checks may be presented and balances adjusted; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303. When a bank suspended after the morning exchanges but before the payment of the general balance due from it, which was made good by the other banks and applied by the clearing-house to the indebtedness of the suspended bank, it was held that the clearing-house was not liable to the holder of a draft on one of the other banks deposited in the suspended bank, because the draft was never in the hands of the clearing-house for collection, nor did its manager hold the proceeds thereof with knowledge of the plaintiff's rights or of the existence of the draft until demand was made upon it; Crane v. Clearing-House, 32 W. N. C. (Pa.) 358.

The rules of a clearing-house have the binding effect of law as between the banks; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303; Overman v. Bank, 31 N. J. L. 563; Blaffer v. Bank, 35 La. Ann. 251; but do not affect the relations between the payee of a check presented through the clearing-house for payment, and the bank on which the check is drawn; People v. Bank, 77 Hun 159, 28 N. Y. Supp. 407.

The course of business of a clearing-house is based upon the idea that the members are principals (and trusted by each other as such), and not agents of parties not members, and this renders possible the volume of business transacted; Overman v. Bank, 31 N. J. L. 563.

With respect to the effect of presentment at the clearing-house or failure to demand payment there, it has been held that presentation to the banker's clerk at the clearing-house was a presentation at the place of payment designated in a bill of exchange; 2 Campb. 596; that the failure to present a check at the clearing-house in violation of an imperative custom to do so does not discharge the drawer of the check as between the bankers and their customer; 1 Nev. & M. 541; and such failure to present is not material if presented in the ordinary way, even if the check was to have been paid if presented at the clearing-house, the latter being merely a substitute for ordinary presentation, authorized by custom but not required except as a substitute for the regular mode if that is omitted; Kleekamp v. Meyer, 5 Mo. App. 444. Sending notes to a bank through the clearing-house is but leaving them there for payment during banking hours and not a demand at the bank for immediate payment; National Exchange Bank v. Bank, 132 Mass. 147.

The right of return of paper found not good secured by the rules of the clearing-house is a special provision in compensation for payment without inspection, with an opportunity for future inspection and recall of the payment. When the opportunity is had and not availed of, the general principles of law intervene to regulate the rights and liabilities of the paying bank; National Bank of North America of Boston v. Bangs, 106 Mass. 441, 8 Am. Rep. 349. The return of such paper after its receipt through the clearing-house is not prevented by its having been marked cancelled by mistake; 1 Campb. 426; 5 Mann. & G. 348; nor by putting it on a file and entering it in the journal; German Nat. Bank v. Bank, 118 Pa. 294, 12 Atl. 303; nor by failure to return by the time fixed by rule whether caused by mistake of fact; Manufacturers' Nat. Bank v. Thompson, 129 Mass. 438, 37 Am. Rep. 376; Merchants' Nat. Bank v. Bank, 101 Mass. 281, 100 Am. Dec. 120; or not; Boylston Nat. Bank v. Richardson, 101 Mass. 287; nor in such case if the bank had through mistake given credit to the depositor; Merchants' Nat. Bank v. Bank, 139 Mass. 513, 2 N. E. 89; but a rule of the Chicago clearing-house limiting the time of return was held to constitute a binding contract, and the right to recover back a payment made by mistake and discovered within fifteen minutes was denied and the Massachusetts rule criticised; Preston v. Bank, 23 Fed. 179.

When there is no rule and no uniform custom, payment at the clearing-house is provisional, to become complete when payment is made in the ordinary course of business, and if not so made to be treated as payment under a mistake of fact, and with the same rights of reclamation as if made without a clearing-house; National Exchange Bank v. Bank, 132 Mass. 147. The rules may be waived; Stuyvesant Bank v. Banking Ass'n, 7 Lans. (N. Y.) 197.

A bank not a member, in sending checks through the clearing-house, is bound by its action under its rules in returning payment made by mistake; *id.;* but a bank not a member is not bound by the clearing-house rules as to the time of returning checks not good, in case of a check sent by it through a bank which was a member; such a case is governed by the ordinary principles applicable to it and not by the clearing-house rules; Overman v. Bank, 31 N. J. L. 563.

When the drawee bank received a forged check through the clearing-house as genuine and failed to return it or to discover the forgery for several days, the bank which took the check and sent it to the clearing-house could not be held liable for negligence in receiving it from a stranger and sending it through the clearing-house without notice; Commercial & Farmers' Nat. Bank of Baltimore v. Bank, 30 Md. 11, 96 Am. Dec. 554.

In London there is also a railway clearing-house.

See National City Bank v. Bank, 101 N. Y. 595, 5 N. E. 463; 25 L. R. A. 824, note.

See INSOLVENT.

CLEMENTINES. The collection of decretals or constitutions of Pope Clement V., which was published, by order of John XXII., his successor, in 1317.

The death of Clement V., in 1314, prevented him from publishing this collection, which is properly a compilation as well of the epistles and constitutions of this pope as of the decrees of the council of Vienna, over which he presided. The Clementines are divided into five books, in which the matter is distributed nearly upon the same plan as the decretals of Gregory IX. See Dupin, *Bibliothèque.*

CLERGY. The name applicable to ecclesiastical ministers as a class.

Clergymen were exempted by the emperor Constantine from all civil burdens. Baronius, *ad ann.* 319, § 30. Lord Coke says, 2 Inst. 3, ecclesiastical persons have more and greater liberties than other of the king's subjects, wherein to set down all would take up a whole volume of itself. In the United States the clergy is not established by law.

CLERGY, BENEFIT OF. See BENEFIT OF CLERGY.

CLERGYABLE. Allowing of, or entitled to, the benefit of clergy (*privilegium clericale*). Used of persons or crimes. 4 Bla. Com. 371. See BENEFIT OF CLERGY.

CLERICAL ERROR. An error made by a clerk in transcribing or otherwise. This is always readily corrected by the court. An error, for example, in the teste of a *fi. fa.;* Baker v. Smith, 4 Yeates (Pa.) 185; Berthon v. Keeley, *id.* 205; or in the teste and return of a *vend. exp.;* or in a certificate of a notary; Schwarz v. Baird, 100 Ala. 154, 13 South. 947; or where an action is begun by one plaintiff and is afterwards amended by adding additional parties, the entering of judgment in favor of "the plaintiff" instead of "the plaintiffs" is a clerical error and amendable on appeal; Shoemaker v. Knorr, 1 Dall. (U. S.) 197, 1 L. Ed. 97; or in writing Dowell for McDowell; Peddle v. Hollinshead, 9 S. & R. (Pa.) 284. See 8 Co. 162 *a;* Citizens' Bank v. Farwell, 56 Fed. 570, 6 C. C. A. 24; Storke v. Storke, 99 Cal. 621, 34 Pac. 339. An error is amendable where there is something to amend by, and this even in a criminal case; Benner v. Frey, 1 Binn. (Pa.) 367; 12 Ad. & E. 217; for the party ought not to be harmed by the omission of the clerk; Jack v. Eales, 3 Binn. (Pa.) 102; even of his signature, if he affixes the seal; McCormick v. Meason, 1 S. & R. (Pa.) 97. Where a clerical error has crept into a decree, the court will rectify it, though the decree has been passed and entered; Hovey v. McDonald, 109 U. S. 157, 3 Sup. Ct. 136, 27 L. Ed. 888; but not after the term without notice, especially where the condition of the parties has changed; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745.

CLERICI DE CURSU. See CURSITOR.

CLERICUS (Lat.). **In Civil Law.** Any one who has taken orders in church, of whatever rank; monks. A general term including bishops, subdeacons, readers, and cantors. Du Cange. Used, also, of those who were given up to the pursuit of letters, and who were learned therein. Also of the amanuenses of the judges or courts of the king. Du Cange.

In English Law. A secular priest, in opposition to a regular one. Kennett, Paroch. Ant. 171. A clergyman or priest; one in orders. *Nullus clericus nisi causidicus* (no clerk but what is a pleader). 1 Bla. Com. 17. A freeman, generally. One who was charged with various duties in the king's household. Du Cange.

CLERICUS MERCATI HOSPITII REGIS. The clerk of the market at the king's gate. An honorable office pertinent to the ancient custom of holding markets in the suburbs of the king's court. In early times he witnessed the parties' verbal contracts. At a later date he adjudicated in its prices of commodities; he inquired as to all weights and measures; he measured land; and had the power to send bakers and others to the pillory. Inderwick, The King's Peace.

CLERK. In Commercial Law. A person in the employ of a merchant, who attends only to a part of his business, while the merchant himself superintends the whole. He differs from a factor in this, that the latter wholly supplies the place of his principal in respect to the property consigned to him. Pardessus, *Droit Comm.* n. 38; 1 Chit. Pr. 80.

In Ecclesiastical Law. Any individual who is attached to the ecclesiastical state and has submitted to the tonsure. One who has been ordained. 1 Bla. Com. 388. A clergyman. 4 Bla. Com. 367.

In Offices. A person employed in an office,

public or private, for keeping records or accounts.

His business is to write or register, in proper form, the transactions of the tribunal or body to which he belongs. Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined chiefly to superintending the markets. This is a common use of the word at the present day, and is also a very ancient signification, being derived, probably, from the office of the *clericus*, who attended, amongst other duties, to the provisioning the king's household. See Du Cange.

A person serving a practising solicitor under binding articles in England, for the purpose of being admitted to practice as a solicitor. See CLERKSHIP.

In New England, used to designate a corporation official who performs some of the duties of a secretary.

CLERK OF THE CROWN. An officer whose duty it is to issue writs for election for members of Parliament, upon the warrant of the Lord Chancellor and to deliver to the House of Commons the list of members returned (elected); to certify the election of Scotch and Irish peers; and to perform duties formerly performed by the Clerk of the Hanaper. He is Permanent Secretary of the Lord Chancellor's Office, House of Lords.

CLERK OF THE PEACE. An officer of Courts of Quarter Sessions in England.

CLERK OF THE TABLE. An official of the British House of Commons who advises the speaker on all questions of order.

CLERKSHIP. The period which must be spent by a law-student in the office of a practising attorney before admission to the bar. 1 Tidd, Pr. 61. Under the present rules he must serve as a clerk to a practising solicitor under binding articles for from three to five years; Odgers, C. L. 1431. For the earlier history of clerkships at law, see Report of Amer. Bar Assoc., 1911 (Section of Leg. Educ.).

CLIENT. In Practice. One who employs and retains an attorney or counsellor to manage or defend a suit or action to which he is a party, or to advise him about some legal matters. See ATTORNEY-AT-LAW.

CLOGGING THE EQUITY OF REDEMPTION. See EQUITY OF REDEMPTION.

CLOSE. An interest in the soil. Doctor & Stud. 30; 6 East 154; 1 Burr. 133; or in trees or growing crops. Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215; Stewart v. Doughty, 9 Johns. (N. Y.) 113.

In every case where one man has a right to exclude another from his land, the law encircles it, if not already inclosed, with an imaginary fence, and entitles him to a compensation in damages for the injury he sustains by the act of another passing through his boundary—denominating the injurious act a breach of the inclosure; Hamm. N. P. 151; Doctor & Stud. dial. 1, c. 8, p. 30; Worrall v. Rhoads, 2 Whart. (Pa.) 430, 30 Am. Dec. 274.

In considering the cases in which trespass might be supported for an injury to land (for breaking the close) it is laid down that the term *close*, being technical, signifies the *interest* in the soil, and not merely an inclosure in the common acceptance of that term. It lies, however temporary the tenant's interest, and though it be merely in the profits of the soil as *vesturæ terræ* or *herbagii pasturæ;* Co. Litt. 4 *b;* 5 East 480; 6 *id.* 606; 5 T. R. 535; *prima tonsura;* 7 East 200; chase for warren, etc.; 2 Salk. 637; if it be in exclusion of others; 2 Bla. Rep. 1150; 8 M. & S. 499. So it lies by one having a right to take off grass; 6 East 602; or after a tenancy expires, a right to emblements; Stewart v. Doughty, 9 Johns. (N. Y.) 108; or by one having the right to cut timber trees; Clap v. Draper, 4 Mass. 266, 3 Am. Dec. 215.

Ejectment will not lie for a close; 11 Co. 55; Cro. Eliz. 235; Ad. Ej. 24. See CLAUSUM.

CLOSE COPIES. Copies which might be written with any number of words on a sheet. Office copies were to contain only a prescribed number of words on each sheet.

CLOSE HAULED. The arrangement of a vessel's sails when she endeavors to make progress in the nearest direction possible towards that point of the compass from which the wind blows. 6 El. & Bl. 771; Black, L. Dict.

CLOSE ROLLS. Rolls containing the record of the close writs *(literæ clausæ)* and grants of the king, kept with the public records. 2 Bla. Com. 346. See LETTERS CLOSE; ROLLS.

CLOSE SEASON. A time of the year when the taking of game is prohibited by statute. See FENCE MONTH.

CLOSE WRITS. Writs directed to the sheriff instead of to the lord. 3 Reeve, Hist. Eng. Law 45. Writs containing grants from the crown to particular persons and for particular purposes, which, not being intended for public inspection, are closed up and sealed on the outside, instead of being open and having the seal appended by a strip of parchment. 2 Bla. Com. 346; Sewall, Sher. 372.

CLOSED COURT. A term sometimes used to designate the Common Pleas Court of England when only serjeants could argue cases, which practice persisted until 1833.

CLOSING A CONTRACT. An expression used in New York to indicate the settlement or carrying out of a contract.

CLOTURE (Fr.). The procedure in deliberative assemblies whereby debate is closed. Introduced in the English parliament in the session of 1882. Wharton. It is generally

effected by moving the previous question. See Roberts, Rules of Order §§ 20, 58 *a*. This motion is not recognized in the senate of the United States.

CLOUD ON TITLE. See BILL TO QUIET POSSESSION AND TITLE.

CLUB. An incorporated or unincorporated association of persons for purposes of a social, literary, or political nature or the like. The latter is not a partnership; 2 M. & W. 172; 87 L. T. 571. No member becomes liable as such to pay to the society or any one else any money except the amount required by the rules; *id.;* [1903] A. C. 139.

The by-laws of a club constitute a contract between the members and the club. A member's resignation, to be effectual, must comply with the by-laws; Boston Club v. Potter, 212 Mass. 23, 98 N. E. 614, Ann. Cas. 1913C, 397.

A club organized for various sports voted, by a majority, to abolish pigeon shooting; held, that it was within its power; [1906] 1 Ch. 480.

See RESIGNATION; AMOTION; LIQUOR LAWS.

CO-ADMINISTRATOR. One who is administrator with one or more others. See ADMINISTRATOR.

CO-ASSIGNEE. One who is assignee with one or more others. See ASSIGNMENT.

CO-EXECUTOR. One who is executor with one or more others. See EXECUTOR.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See DIVORCE.

COADJUTOR. The assistant of a bishop. An assistant.

COADUNATIO. A conspiracy. 9 Coke 56.

COAL NOTE. A species of promissory note authorized by 3 Geo. II. c. 26, §§ 7, 8, which, having these words expressed therein, namely, "value received in coals," is to be protected and noted as an inland bill of exchange.

COAST. The margin of a country bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough for supporting life, and are uninhabited, though resorted to for shooting birds, form a part of the coast.

COCKET. A seal appertaining to the king's custom-house. Reg. Orig. 192. A scroll or parchment sealed and delivered by the officers of the custom-house to merchants as an evidence that their wares are customed. Cowell; Spelman, Gloss. See 7 Low. C. 116. The entry office in the custom-house itself. A kind of bread said by Cowell to be hard-baked; sea-biscuit; a measure. See WASTEL.

CODE (Lat. *Codex*, the stock or stem of a tree—originally the board covered with wax, on which the ancients originally wrote). A body of law established by the legislative authority of the state, and designed to regulate completely, so far as a statute may, the subject to which it relates.

From the rude beginning, expressed in the derivation of the word, there developed the somewhat diversified signification which it has acquired in jurisprudence. It has been used to describe a collection of pre-existing laws arranged and classified into a logical system, or one intended to be such, without the interpolation of new matter, and also a declaration of the law composed partly of such materials as might be at hand from all sources,—statutes, adjudications, customs,—supplemented by such amendments, alterations, and additions as seemed to the lawgivers to be required to constitute a complete system and adapt it to the purpose of its adoption, or promulgation.

This mixed character, it may probably be asserted with confidence, is essential to the existence of a code as the term is now understood, and has entered more or less into the composition of every body of laws known as such in history.

The idea of a code involves that of the exercise of the legislative power in its promulgation; but the name has been loosely applied also to private compilations of statutes.

The subject of codes and the kindred topics of legal reform have received great attention from the jurists and statesmen of the present century. Probably no subject in the domain of law has been the occasion of more extended and earnest discussion than the relative merits of the Code system as it is understood by jurists, and that which is considered and treated on both sides of the controversy as its antithesis, a body of law partly written and partly unwritten, finding its beginnings in customs gradually ripening into customary law; seeking later expression in statutes and passing through a period of judicial interpretation and modification by being fitted, as it were, into successive cases, with sufficiently varying facts to produce that flexibility which is needed for final crystallization into a body of rules and principles sufficiently well settled as to have attained the dignity of a well ordered system. Of the one the Roman Law is the illustration unrivalled in history, as is the English Common Law of the other. While, however, these do represent two distinct and well defined systems of the development of law, the thoughtful and impartial reader of what is written by the ardent advocates of each, assuming as many of them do that the adoption of the one is the exclusion of the other, may find himself inclining to the conclusion that in dealing with this as with most juridical questions, an entirely one-sided view will leave much to be desired. It may be permissible to question whether these two systems are essentially distinct and antagonistic types, or different methods employ-

ed in and essential to the evolution of municipal law as a whole, and of the science of jurisprudence in its widest sense. It is true that there are recorded in history proposals to form a code of laws *de novo* having relation only to the future and disregarding the past, but this has been properly regarded as the visionary dream of the enthusiast rather than the matured conclusion of a judicious lawgiver. It is hardly to be questioned that no code has ever taken its place as an instrument of legal administration into which there did not enter as a substantial constituent a body of existing common law, and that every body of unwritten law on a given subject is tending towards ultimately finding its expression in what is tantamount to a code, whether called by that name or not. Indeed, if dry technicalities of definition be avoided, it is hardly an exaggeration to say that there are single decisions of English or American judges, such, for example, as Coggs v. Bernard, which may not be inaptly termed a code or codification of the law on the subject to which they relate, and which come to be recognized as such with authority which could hardly be increased by legislative affirmation. The difficulty of making a hard and fast line between the two systems is quite well shown by all the attempts to define precisely the word code. A judicious writer, after a review of the historical codes, concludes that substantially they are of three kinds; and his classification is not only satisfactory in itself but admirably illustrates what has been said.

"First.—The classification of statutes of force systematically arranged, according to subject-matter, without amendment, alteration, or interpolation of new law, the only change being in the correction of errors of expression, repetitions, superfluities, and contradictions, compressed into as small a space as possible, which, when done, will leave the laws in letter and in spirit just as they *were.*

"Second.—The same as the first in form, but going further and making such amendments as are deemed necessary to harmonize and perfect the existing system.

"Third.—To take a yet greater latitude, and, without changing the existing *system* of laws, to add new laws, and to repeal old laws, both in harmony with it, so that the code will meet *present* exigencies, and so far as possible provide for the future; and this is *real* codification." To these statements the writer adds a fourth, "wholly impracticable and even visionary," which is "to disregard at will *existing* laws, and make a system substantially *new,*" such as the author deems best and wisest. Paper of Judge Clark, Rep't Ga. St. Bar Ass'n, 1890.

There is unquestionably a strong tendency towards codification in a general sense, which manifests itself in the tendency to general revisions of federal and state statutes, the adoption of codes of procedure by name in several of them, and in fact though not in name in many others, the codes of India, and not the least in the growing interest in an active discussion of the subject. If this interest leads to action wisely tempered with a due regard for the proper functions of written and unwritten law, and freedom from extreme views and the effort to accomplish the impossible task of reducing all law to the unyielding forms of statutory enactment, it will undoubtedly be fruitful of good results.

When it is considered how rapidly statutes accumulate as time passes, it is obvious that great convenience will be found in having the statute law in a systematic body, arranged according to subject-matter, instead of leaving it unorganized, scattered through the volumes in which it was from year to year promulgated. Revision to this extent is very frequent, and is what is usually accomplished in the Revised Statutes of many states which are inartificially termed codes. Of this general character were the Revised Statutes of the United States; *infra.* When the transposition of the statutes from a chronological to a scientific order is undertaken, more radical changes immediately propose themselves. These are of two classes: *first,* amendments for the purpose of harmonizing the inconsistencies which such an arrangement brings to notice, and supplying defects; *second,* the introduction into the system of all other rules which are recognized as the unwritten or common law of the state. The object of the latter class of changes is to embody in one systematic enactment all that is thenceforth to be regarded as the law of the land. It is this attempt which is usually intended by the distinctive term codification.

The first two of the questions thus indicated may be deemed as settled, by general concurrence, in favor of the expediency of such changes; and the process of the collection of the statute law in one general code, or in a number of partial codes or systematic statutes, accompanied by the amendments which such a revision invites, is a process which for some years has been renovating the laws of England and the United States. Although at the same time something has been done, especially in this country, towards embodying in these statutes principles which before rested in the common or report law, yet the feasibility of doing this completely, or even to any great extent, must be deemed an open question. It has been discussed with great ability by Bentham, Savigny, Thibaut, and others. It is undeniable that, however successfully a code might be supposed to embody all existing and declared law, so as to supersede previous sources, it cannot be expected to provide prospectively for all the innumerable cases which the diversity of affairs rapidly engenders, and there must soon come a time when it must be studied in the light of numerous explanatory decisions.

Real codification involves the most intimate and exhaustive knowledge not only of the statute law to be included, but also of the judicial interpretation and construction of it, and from the moment of the adoption of a code it begins to be the subject of a new series of decisions which are required to interpret, modify, and explain it and adapt it to modern conditions and the facts of cases of new impression, as is and always has been the case with respect to the adaptation of the ancient rules of the common law to modern conditions. In doing this the necessity for and opportunity of judicial legislation are infinite, and with the multiplicity of courts and jurisdictions the difficulties of preserving a system founded on reason are far greater than they were even a very few years ago. And this consideration is strongly urged in favor of the code system. On the other hand, that the law of master and servant, which was founded on such relations as the coachman and the blacksmith's striker, should have been applied with so little friction to the railroad and the factory, is hardly less wonderful than the development of the common carrier of the post road and van to the telephone company, and these rapid transformations may serve as the basis of an argument that no civil code can be framed with sufficient wisdom to provide for the constantly changing conditions of life and business.

In addition to the considerations herein mentioned as bearing upon the subject, Lord Chief Justice Russell, in his address before the American Bar Association (Report 1896), in disapproving of the proposal to codify international law, mentions and illustrates a very fundamental objection to the codification of branches of the law not yet definitely reduced to fixed rules. His observations approach very nearly the suggestion of a striking and effective limitation of the extent to which codification should go beyond the scientific revision of statute law, and in the direction of including law settled by decision and not by statute. Some branches of the law are admirably adapted to complete codification, some others are not yet, and others again by their nature never can or will be.

Judge Redfield points out clearly the well known objections to codification: "This is one of the great excellencies of the unwritten law above a written code. The general principles of the former are allowed to embrace new cases as they arise, without regard to the enumerations already made under it; while the latter having been reduced to formal definitions, necessarily excludes all cases not anticipated at the time these definitions were made." 12 Amer. L. Reg. N. S. 185. On the other hand it is said that the opposition thereto of many English

lawyers "is supported, if not justified, by the fear that the courts would put a narrow construction on the articles of a Code." 14 L. Q. R. 9.

"However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their growth fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is." O. W. Holmes, The Common Law, 27.

See 2 Sel. Essays in Anglo-Amer. Leg. Hist., by Charles M. Hepburn, on the Historical Development of Code Pleading (1897).

The discussions on this subject have called attention to a subject formerly little considered, but which is of fundamental importance to the successful preparation of a code—the matter of statutory expression. There is no species of composition which demands more care and precision than that of drafting a statute. The writer needs not only to make his language intelligible, he must make it incapable of misconstruction. When it has passed to a law, it is no longer his intent that is to be considered, but the intent of the words which he has used; and that intent is to be ascertained under the strong pressure of an attempt of the advocate to win whatever possible construction may be most favorable to his cause. The true safeguard is found not in the old method of accumulating synonyms and by an enumeration of particulars, but rather—as is shown by those American codes of which the Revised Statutes of New York and the revision of Massachusetts are admirable specimens—by concise but complete statement of the full principle in the fewest possible words, and the elimination of description and paraphrase by the separate statement of necessary definitions. One of the rules to which the New York revisers generally adhered, and which they found of very great importance, was to confine each section to a single proposition. In this way the intricacy and obscurity of the old statutes were largely avoided. The reader who wishes to pursue this interesting subject will find much that is admirable in Coode's treatise on Legislative Expression (Lond. 1845) (reprinted in Brightly's Purdon's Digest, Penna.). The larger work of Gael (Legal Composition, Lond. 1840) is more especially adapted to the wants of the English profession.

Great Britain. There has not been in England any general codification in the modern sense.

There were some early English so-called codes which were of the former character. The first code in England appears to have been about the year 600 by Athelbert, king of the Kentings. His laws have come down to us only in a copy made after the Norman Conquest. They consist of ninety brief sentences. In the end of the 7th century the west Saxons had written laws,—the laws of Ine. The next legislator is Alfred the Great, about two centuries later. Later came the code of Cnute. 1 Social England 165.

These are merely of historical interest. But in recent years there has been in England as elsewhere an interest in the subject of the arrangement, classification, and simplification of the law which found expression not only in words but in legislative action. The necessity for some reform, and the conditions which have forced the subject upon the attention of the English Bar and Parliament, are well expressed by Mr. Crackanthorpe in his address before the Amer. Bar Assoc. (1896):

"We have in our libraries a number of monographs, dealing with the subheads of Law in the most minute detail—books on Torts and Contracts, on Settlements and Wills, on Purchases and Sales, on Specific Performance, on Negotiable Instruments, and so forth. We have also many valuable compendia, or institutional treatises, dealing with the Law as a whole. Each and all of these, however, bear witness to the disjointed character of our Jurisprudence. The numerous monographs overlap and jostle each other, like so many rudderless boats tossing at random on the surface of a wind-swept lake, while the institutional treatises, in their endeavor to be exhaustive, fail in point of logical arrangement, just as a vessel overladen with a mixed cargo fails to get it properly stowed away in the hold. Some day, perhaps, we shall produce a Corpus Juris which will reduce our legal wilderness to order, and, by grubbing up the decayed trees, enable us to discern the living forest. We have already digested with success portions of our civil law, notably that relating to bills of exchange and a part of that relating to partnership and trusts. These experiments are likely to be renewed from time to time, and I doubt not that ultimately we shall have a civil code as complete as that which has just been promulgated in Germany. At present we have not even a criminal code such as you have in the State of New York and as is to be found in most continental countries, all that has been done in that direction being to pass five consolidating statutes dealing with larceny and a few other common offences."

In addition to those mentioned the partial codes thus far adopted in England include the Bills of Sale Act, the Employers' Liability Act, and others, and the India code is the result of a very successful effort to codify specific titles of the common law, and it is now constantly referred to in common-law jurisdictions as the best considered expression of the rules of the common law on subjects covered by it at the time of its adoption. In addition to the partial or special English codes referred to, the course which the discussion upon codification has taken in that country has led to the systematic collection and revision of statutes upon particular subjects. Under the direction of Lord Cairns, the statutes of England from 1 Henry III. have been systematically revised by a committee, and published as the "Revised Statutes."

In other British dependencies there have been movements in the direction of codification more pronounced in some instances than those in England. In Hong Kong and at the Straits Settlements codes of civil procedure were adopted on the lines of the New York code, which was also utilized in the Indian code.

The English Judicature Acts of 1873 and 1875 accomplished many of the reforms in the line of simplification. Its chief merit was the fusion of law and equity.

United States. In this country the subject has received no less attention and has presented obstacles of less magnitude. Codes and revisions have been enacted as follows:

The Revision of Federal Statutes in 1873, which went into effect June 22, 1874, was by act of congress declared to constitute the law of the land; the pre-existing laws were thereby repealed, and ceased to be of

effect. By subsequent acts of congress, certain errors in this revision were corrected. A new edition of the Revision of 1873 was authorized by acts of March 2, 1877, and March 9, 1878; this is not a new enactment, but merely a new publication; it contains a copy of the Revision of 1873, with certain specific alterations and amendments made by subsequent enactments of the 43d and 44th congresses, incorporated according to the judgment and discretion of the editor, under the authority of the acts providing for his appointment. These alterations, or amendments, were merely indicated by italics and brackets. The act of March 9, 1878, provides that the edition of 1878 shall be legal evidence of the laws therein contained in all the courts of the United States, and of the several states and territories, "but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress since the first day of December, 1873."

The supplement of 1881 is official to a limited extent. The provisions in regard to it are as follows: "The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by congress: *Provided*, that nothing herein contained shall be construed to change or alter any existing law;" 21 Stat. L. 388. See Wright v. U. S., 15 Ct. Cl. 80, where the subject is explained by Richardson, J., one of the compilers. Volume I, Supplement to the Revised Statutes, contains all the permanent general laws enacted from the passage of the Revised Statutes in 1874, to and including the fifty-first congress, which expired in 1891, and supersedes Vol. I., prepared under resolution of June 7, 1880. The publication is *prima facie* evidence of the laws therein contained in all of the courts of the United States. Vol. II. of the Supplement contains the general laws of the fifty-second and subsequent congresses.

The laws of the United States relating to the judiciary were enacted into the Judicial Code, March 3, 1911, and went into effect January 1, 1912; those relating to crimes were enacted into the Criminal Code, March 4, 1909, and went into effect January 1, 1910.

Colonial Codes. Of these there were several adopted in the colonies prior to the Revolution.

In 1665 a code prepared by Lord Chancellor Clarendon, called the "Duke's Laws," was promulgated and went into operation at Long Island and West Chester, New York. Afterwards its provisions slowly made their way in New York and the other provinces.

It was an attempt to state the law relating to the rights of persons and property, and of procedure both civil and criminal.

The Massachusetts colony, in March, 1634, appointed a committee to revise the law. Other committees were appointed in 1635 and 1637. Maryland adopted a code in 1639. In Massachusetts in 1641, a code of laws was adopted which was called "The Liberties of the Massachusetts Colony in New England." Connecticut adopted a code in 1650, chiefly copied from the Massachusetts code. Virginia appears to have adopted a body of laws in 1611, and in 1656 their laws were reduced into one volume.

State Codes. New York is the pioneer in the work of codification. In that state the first act relating to procedure after the organization of state government was passed March 16, 1778. Various other acts were passed between 1801 and 1813. In 1813 there was a general revision of the law, and the subject of practice of the law. In 1828 the revisers collected into one act the various provisions relating to practice in all the courts which was made a part of the Revised Statutes. It is said that this part of the Revised Statutes constituted the first code of civil procedure in New York. It embraced nearly all the practice in all the courts and has been the basis of subsequent code revision. In 1848 the "Code of Procedure" was adopted. David Dudley Field, the eminent writer on this subject, had begun his work on law reform in 1839. In 1848 a commission of which he was chairman produced the "Code of Procedure," containing 391 sections, which was adopted in that year. This code was largely amended in 1849, and has received frequent amendments at various times since that year.

The laws of Pennsylvania were extensively revised in 1833–1836, upon the Report of Commissioners appointed by the legislature, William Rawle, Joel Jones and Thomas I. Wharton.

Codification has proceeded in many states, especially in procedure. The list of states cannot be given here.

The enactment of uniform laws on special branches of the law, in many states and in England, is a movement towards codification upon proper lines. The act on Negotiable Instruments has been passed in nearly all the states; the Warehouse Receipt Act, the Sales Act, Bills of Lading Act and the Stock Transfer Act have been passed in many states.

In Louisiana, the civil law prevails and there are complete codes framed thereunder. One feature of the Louisiana code should be carefully noted. Art. 21 declares that "in all civil matters where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where

positive law is silent." This code was adopted in 1824 and took effect in 1825, the revision of 1870 being the same code, with the slavery provisions omitted, and with such amendments as had previously been made. It is said that the power above quoted has never been exercised except to furnish a remedy or mode of procedure.

FOREIGN COUNTRIES. On the continent of Europe the systems of law are generally founded upon the civil law, and each country has its own code, which is usually an adaptation in whole or in part of Roman Law. These codes are different in character, falling within sometimes one and sometimes another of the classes above enumerated, as they were intended to be scientific collections and classifications of existing law or to exclude new legislation.

The modern codes of Europe were preceded by periods of codification, such as that which Maine designates the "era of codes," in which, throughout the world, so far as the sphere of Roman and Hellenic influence extended, there appeared codes of the class of which The Twelve Tables is the conspicuous example; Maine, Anc. L. 2, 13; and the many codes of the Middle Ages based upon Roman law modified by local customs. There were also a great number of codes of maritime law, which in its nature was, and still is, well adapted to this exact form of expression, many of which are collected in the Black Book of the Admiralty, which has been said to contain all maritime codes known at the time. Below are briefly referred to the best known codes, ancient and modern.

AMALPHITAN TABLE. Amalphi, on the Adriatic Sea, is said to have had a Maritime Court in the 10th century presided over by the consuls of the sea. A manuscript containing the ordinances of the Maritime Court of Amalphi was discovered in the Imperial Library at Vienna in 1843. And has been called by that name. Its date is the 11th century. Printed in Black Book of the Admiralty, Vol. IV. See The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822.

AUSTRIAN. *The Civil Code* was promulgated July 7, 1810. The first part of it was published and submitted to the Universities and the courts of justice, and some parts having been found wholly unsuited to the purpose, were by his successor abrogated. It is founded in a great degree upon the Prussian. *The Penal Code* (1852) is said to adopt to some extent the characteristics of the French Penal Code.

The civil code originated in an ordinance issued by Maria Theresa in 1753, the avowed objects being to provide for uniformity of the law in the provinces and digest the existing law. The result was unsatisfactory and another commission authorized Counsellor Harten to construct a code, of which the conditions prescribed are quite worthy of repetition. They were: 1. To abstain from doctrinal development. 2. To have in view contestations of the most frequent occurrence. 3. To be clear in expression. 4. To be governed by natural equity rather than the principles of the Roman Law. 5. To simplify the laws and to refrain from too much subtlety in details.

BURGUNDIAN. The *Lex Romana Burgundionum* seems to be the law-book that Gundobad promised to his Roman subjects. He died in 516. They were East Germans scattered among the Roman provincials. Rules in it were taken from the three Roman *codices*, from the current abridgments of imperial constitutions and from the works of Gaius and Paulus. Little that is good has been said of it. Maitland, in 1 Sel. Essays in Anglo-Amer. Leg. Hist. 14.

CONSOLATO DEL MARE. A code of maritime law of high antiquity and great celebrity.

A collection of the customs of the sea observed in the Consular Court of Barcelona. It received many additions and acquired the name of the "Consulate" early in the 15th century. The Book of the Consulate was printed at Barcelona in the Catalan tongue in 1494 and was drawn up by the notary of the Consular Court for the use of the Consuls of the sea at Barcelona. It dates back to the 14th century. T. C. Mears in Roscoe, Adm. Jur. (3d ed.); Sir Travers Twiss, in 2 Black Book of Adm. Lord Mansfield quotes from it as containing a valuable body of maritime law; 2 Burr. 889. Lord Stowell refers to it in 1 C. Rob. 43, and 1 Dods. 116. The edition of Pardessus, in his *Collection de Lois Maritimes* (vol. 2), is deemed the best. There is also a French translation by Boucher, Paris, 1808. See also, Reddie, Hist. of Mar. Com. 171; Marvin's Leg. Bibl.; J. Duer, Ins.; 7 N. A. Rev. 330.

CHINA. Ta Ching Lu Li (literally, Statute Laws and Usages of the Great Ching Dynasty), generally known as the Penal Code. Compiled in 1647. A remarkable collection of imperial proclamations, philosophical dissertations, positive laws and procedure both civil and penal from remotest times. There is an English translation by G. T. Staunton, 1810, London.

EGYPT. Code of International Tribunals of "Mixed Courts." See MIXED TRIBUNALS. These are codes of substantive law and procedure in civil and criminal matters closely following the Code Napoléon. See "The Law Affecting Foreigners in Egypt" by J. H. Scott, 1907, London; Hertslet, Commercial Treaties, vol. XIV, p. 303.

FRENCH CODES. The chief French codes of the present day are five in number, sometimes known as *Les Cinq Codes*. They were in great part the work of Napoleon, and the first in order bears his name. They are all frequently printed in one duodecimo volume. These codes do not embody the whole French law, but minor codes and a number of scattered statutes must also be resorted to upon special subjects.

Code Civil, or *Code Napoléon*, is composed of thirty-six laws, the first of which was passed in 1803 and the last in 1804, which united them all in one body, under the name of *Code Civil des Français*.

The first steps towards its preparation were taken in 1793, but it was not prepared till some years subsequently, and was finally thoroughly discussed in

all its details by the Court of Cassation, of which Napoleon was president and in the discussions of which he took an active part throughout. In 1807 a new edition was promulgated, the title *Code Napoléon* being substituted. In the third edition (1816) the old title was restored; but in 1852 (the Second Empire) it was again displaced by that of Napoleon and after the Republic came in, in 1870, it again became the Code Civil.

Under Napoleon's reign it became the law of Holland, of the Confederation of the Rhine, Westphalia, Bavaria, Italy, Naples, Spain, etc. It has undergone great amendment by laws enacted since it was established. It is divided into three books. Book 1, Of Persons and the enjoyment and privation of civil rights. Book 2, Property and its different modifications. Book 3, Different ways of acquiring property. Prefixed to it is a preliminary title, Of the Publication, Effects, and Application of Laws in General.

One of the most perspicuous and able commentators on this code is Toullier, frequently cited in this work.

There is an English translation by Cachard and a later one by Wright.

Writing from the standpoint of a common-law lawyer, James C. Carter (the Law, etc., 303) refers to the Code Napoléon, so far as establishing a system of law certain, easy to be learned and easy to be administered, as a failure, citing Amos, An English Code, as holding the same view. For a history of it, see 40 Amer. L. Rev. 833, by U. M. Rose; 49 Amer. L. Reg. (o. s.) 127, by W. W. Smithers.

Code de Procédure Civil. That part of the code which regulates civil proceedings.

It is divided into two parts. Part First consists of five books: the first of which treats of justices of the peace; the second, of inferior tribunals; the third, of royal (or appellate) courts; the fourth, of extraordinary means of proceeding; the fifth, of the execution of judgments. Part Second is divided into three books, treating of various matters and proceedings special in their nature.

Code de Commerce. The code for the regulation of commerce.

This code was enacted in 1807. Book 1 is entitled, Of Commerce in General. Book 2, Maritime Commerce. The whole law of this subject is not embodied in this book. Book 3, Failures and Bankruptcy. This book was very largely amended by the law of 28th May, 1838. Book 4, Of Commercial Jurisdiction,—the organization, jurisdiction and proceedings of commercial tribunals. This code is, in one sense, a supplement to the *Code Napoléon*, applying the principle of the latter to the various subjects of commercial law. Sundry laws amending it have been enacted since 1807. Pardessus is one of the most able of its expositors. See Goirand, Code of Commerce.

Code d'Instruction Criminelle. The code regulating procedure in criminal cases, taking that phrase in a broad sense.

Book 1 treats of the police; Book 2, of the administration of criminal justice. It was enacted in 1808 to take effect with the Penal Code in 1811.

Code Pénal. The penal or criminal code.

Enacted in 1810. Book 1 treats of penalties in criminal and correctional cases, and their effects; Book 2, of crimes and misdemeanors, and their punishment; Book 3, offences against the police regulations, and their punishment. Important amendments of this code have been made by subsequent legislation.

Code Militaire. The military code, substantive and procedural, for the army. Promulgated in 1857.

There is also a *Code Forestier;* and the name code has been inaptly given to some private compilations on other subjects.

Gentoo Code. A translation of the laws of the Hindus made during the administration of Warren Hastings as Governor-General of India, and prior to the translation of the Institutes of Manu.

The formulation of Hindu law in those institutes *(q. v. supra)* had the same effect in India as had always resulted from the written expression of the law. There was gradually formed a new body of law consisting of decisions and opinions of learned men upon the construction of written law closely resembling the body of law which was engrafted upon the Institutes of Justinian. The translation of those laws in the Gentoo code was followed by a further digest under the authority of the English government, so that a very complete body of Hindu law grew up, which discloses a system of procedure resembling in a marked degree that of the present day, comprising,—a complaint, a summons or citation, an appearance, a hearing of both parties, the presence of attorneys, and a law of evidence and method of examining witnesses.

There seems also to have been in India in very early times a system of natural arbitration by neighbors, probably the earliest effort at an administration of justice and resembling the ancient county court of the Saxons. See Manu, *infra.*

German Code. In the current which swept over Europe during the sixteenth century, substituting, as Professor Sohm phrases it, "the revived spirit of antiquity for mediæval conceptions and ideas," Germany participated in the changes which took place in all departments of science. Then the Roman law was "received" in that country, and from that time it has been a controlling factor in the jurisprudence of the countries which form the German Empire. In certain territorial limits over which the Prussian Landrecht (see Prussian Code) held sway "the formal validity of the *Corpus Juris Civilis* has been expressly set aside," but even there "the force of Roman principles of law has nevertheless remained substantially unimpaired within large departments of German jurisprudence." Particularly is the science of the Roman private law imbedded in the German jurisprudence, and indeed the existence of law as a science in Germany dates from the introduction of the Roman law. There were no preconceived ideas with which to conflict, and it was accepted by a national intellect unprejudiced by any preconceived ideas. See Prussian Code, *infra.*

The completion of twenty-five years of the life of the Empire has been made the occasion of the construction and promulgation of a new German code which has been in the course of preparation for several years. It is an example for the most part of antecedent laws, though of an arrangement novel in various respects. The civil code, having passed the Reichstag and received the approval of the emperor, was duly promulgated August 19, 1896, to go into effect January 1, 1900, at the same time with other special codes, including those of Civil Procedure (1877), Insolvency, Assignments, Arbitrations, and the like. See Guide to Law of Germany, published by the Library of Congress (1912).

There is an English translation of "The

Civil Code of the German Empire" by Walter Loewy, published by a joint Committee of Pennsylvania Bar Association and University of Pennsylvania, 1909.

F. W. Maitland said of the Civil Code: "Never yet, I think, has so much first-rate brain power been put into any actual legislation;" 3 Collected Papers 474.

GREGORIAN. An unofficial compilation of the rescripts of the Roman emperors. It is said to have been made in the Orient perhaps about A. D. 295. Maitland in 14 L. Q. R. 15. It is not now extant.

The Theodosian Code, which was promulgated nearly a century afterwards, was a continuation of this and of the collection of Hermogenes. The chief interest of all these collections is in their relation to their great successor the Justinian Code.

GUIDON DE LA MER. A collection of sea laws drawn up towards the close of the 16th century, probably at the instance of the merchants of Rouen.

HAMMURABI, CODE OF. A collection of decisions in the civil courts and adapted to general use in Babylonia, about 2250 B. C. It was discovered in the Acropolis of Susa. A translation by C. H. W. Jones was published in 1903.

HANSE TOWNS, LAWS OF THE. A code of maritime law established by the Hanseatic towns. See HANSEATIC LEAGUE.

It was first published in German, at Lubec, in 1597. In an assembly of deputies from the several towns, held at Lubec, May 23, 1614, it was revised and enlarged. The text, with a Latin translation, was published with a commentary by Kuricke; and a French translation has been given by Cleirac in *Us et Coutumes de la Mer*. An English version may be found in 1 Peters, Adm. xciii, and in 30 Fed. Cas. 1197.

HENRI (French). The best-known of several collections of ordinances made during the sixteenth, seventeenth, and eighteenth centuries, the number of which in part both formed the necessity and furnished the material for the *Code Napoléon*.

HENRI (Haytien). A very judicious adaptation from the *Code Napoléon* for the Haytiens. It was promulgated in 1812 by Christophe (Henri I.).

HERMOGENIAN. An unofficial compilation made in the fourth century, supplementary to the code of Gregorius. It is not now extant. It is said to have been made in the Orient, perhaps between A. D. 314 and 324, but these dates are uncertain. Maitland in 14 L. Q. R. 15.

JAPAN. In 1880 a Penal Code and a Code of Penal Procedure were adopted, in 1890 a Commercial Code (revised in 1899), and in 1893 a Civil Code, became effective. There is an English translation of the Civil Code by L. H. Loenholm, Tokio, 1906, 3d ed., and another with annotations by J. E. de Becker, London, 1910. There is an English translation of the Commercial Code by Yang Yin Hang published in 1911 by the University of Pennsylvania. The principles are derived from German and French sources, with the former predominating in the Commercial, and the latter in the Civil, Code.

JUSTINIAN CODE. A collection of imperial ordinances compiled by order of the emperor Justinian.

All the judicial wisdom of the Roman civilization which is of importance to the American lawyer is embodied in the compilations to which Justinian gave his name, and from which that name has received its lustre. Of these, first in contemporary importance, if not first in magnitude and present interest, was the Code. In the first year of his reign he commanded Tribonian, a statesman of his court, to revise the imperial ordinances. The first result, now known as the *Codex Vetus*, is not extant. It was superseded a few years after its promulgation by a new and more complete edition. Although it is this alone which is now known as the Code of Justinian, yet the Pandects and the Institutes which followed it are a part of the same system, declared by the same authority; and the three together form one codification of the law of the Empire. The first of these works occupied Tribonian and nine associates fourteen months. It is comprised in twelve divisions or books, and embodies all that was deemed worthy of preservation of the imperial statutes from the time of Hadrian down. The Institutes is an elementary treatise prepared by Tribonian and two associates upon the basis of a similar work by Gaius, a lawyer of the second century.

The Pandects, which were made public about a month after the Institutes, were an abridgment of the treatises and the commentaries of the lawyers. They were presented in fifty books. Tribonian and the sixteen associates who aided him in this part of his labors accomplished this abridgment in three years. It has been thought to bear obvious marks of the haste with which it was compiled; but it is the chief embodiment of the Roman law, though not the most convenient resort for the modern student of that law.

Tribonian found the law, which for fourteen centuries had been accumulating, comprised in two thousand books, or—stated according to the Roman method of computation—in three million sentences. It is probable that this matter, if printed in law volumes such as are now used, would fill from three to five hundred volumes. The comparison, to be more exact, should take into account treatises and digests, which would add to the bulk of the collection more than to the substance of the material. The commissioners were instructed to extract a series of plain and concise laws, in which there should be no two laws contradictory or alike. In revising the imperial ordinances, they were empowered to amend in substance as well as in form.

The codification being completed, the emperor decreed that no resort should be had to the earlier writings, nor any comparison be made with them. Commentators were forbidden to disfigure the new with explanations, and lawyers were forbidden to cite the old. The imperial authority was sufficient to sink into oblivion nearly all the previously existing sources of law; but the new statutes which the emperor himself found it necessary to establish, in order to explain, complete, and amend the law, rapidly accumulated throughout his long reign. These are known as the "Novels." The Code, the Institutes, the Pandects, and the Novels, with some subsequent additions, constitute the *Corpus Juris Civilis*. See CIVIL LAW.

Among English translations of the Institutes are that by Cooper (Phila. 1812; N. Y. 1841)—which is regarded as a very good one—and that by Sandars (Lond. 1853), which contains the original text also, and copious references to the Digests and Code. Among the modern French commentators are Ortolan and Pasquiere.

LIVINGSTON'S CODE. Edward Livingston, one of the commissioners who prepared the Louisiana Code, prepared and presented to

congress a draft of a penal code for the United States; which, though it was never adopted, is not unfrequently referred to in the books as stating principles of criminal law.

MARINE ORDINANCES OF LOUIS XIV. See ORDONNANCE DE LA MARINE, *infra*.

MANU, INSTITUTES OF. A code of Hindu law, of great antiquity, which still forms the basis of Hindu jurisprudence (Elphinstone's Hist. of India, p. 83), and is said also to be the basis of the laws of the Burmese and of the Laos. Buckle, Hist. of Civilization, vol. 1, p. 54, note, 70. "It undoubtedly enshrines many genuine observances of the Hindu race, but the opinion of the best contemporary orientalists is that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, *ought* to be the law." Maine, Anc. Law 16.

This code contains simple rules for regulating the trial of ordinary actions; the number and competency of witnesses and sufficiency of evidence; methods of procedure in court and the judgment and its enforcement. There is no indication of such an office as the attorney, as the judge is required to examine witnesses and parties; there is also a summary of the customary law.

The institutes of Manu are, in point of the relative progress of Hindu jurisprudence, a recent production; Maine, Anc. Law 17; though ascribed to the ninth century B. C. A translation will be found in the third volume of Sir William Jones's Works. See, also, Gentoo Code, *supra;* HINDU LAW.

MOSAIC CODE. The code proclaimed by Moses for the government of the Jews, B. C. 1491.

One of the peculiar characteristics of this code is the fact that, whilst all that has ever been successfully attempted in other cases has been to change details without reversing or ignoring the general principles which form the basis of the previous law, that which was chiefly done here was the assertion of great and fundamental principles in part contrary and in part perhaps entirely new to the customs and usages of the people. These principles have given the Mosaic Code vast influence in the subsequent legislation of other nations than the Hebrews. The topics on which it is most frequently referred to as an authority in our law are those of marriage and divorce, and questions of affinity and of the punishment of murder and seduction.

ORDONNANCE DE LA MARINE. A code of maritime law promulgated by Louis XIV.

It was promulgated in 1681, and with great completeness embodied all existing rules of maritime law, including insurance. Kent pronounces it a monument of the wisdom of the reign of Louis "far more durable and more glorious than all the military trophies won by the valor of his armies." Its compilers are unknown. An English translation is found in 2 Peter's Adm. Dec., appendix; also in 30 Fed. Cas. 1203. The ordinance has been at once illustrated and eclipsed by Valin's commentaries upon it.

OLERON, LAWS OR ROLLS OF. The chief code of maritime law of the Middle Ages, which takes its name from the island of Oleron.

Both the French and the English claim the honor of having originated this code,—the former attributing its compilation to the command of Queen Eleanor, Duchess of Guienne, near which province the island of Oleron lies; the latter ascribing its promulgation to her son, Richard I. An English writer considers that the greater part of it is probably of older date, and was merely confirmed by Richard; 1 Soc. Eng. 313. He, without doubt, caused it to be improved, if he did not originate it, and he introduced it into England. He did at Chinon, in 1190, issue ordinances for the government of the navy which have been fairly described as the basis of our modern articles of war, and what they did for the navy, the code of Oleron, to which they were allied, did for the merchant service. After much learned discussion all are agreed now that the home of these judgments was Southern France; Studer, Oak Book of Southampton, Vol. II. Twiss considers that they were judgments of the Mayor's Court of Oleron. Other writers hold the view that they were a compilation of customs. Some additions were made to this Code by King John. It was promulgated anew in the reign of Henry III., and again confirmed in the reign of Edward III., at which time they had acquired the status of laws. There is a translation in 1 Pet. Adm. Dec. The text will be found in the Black Book of the Admiralty. The French version, with Cleirac's commentary, is contained in *Us et Coutumes de la Mer*. Studer's work, *supra*, discusses the subject at length, giving the various extant MSS. together with a critical translation of the text with variorum notes. The subjects upon which it is now valuable are much the same as those of the *Consolato del Mare*.

OSTROGOTHIC. The code promulgated by Theodoric, king of the Ostrogoths, at Rome, A. D. 500. It was founded on the Roman law.

PRUSSIAN CODE. *Allgemeines Landrecht.* The former code of 1751 was not successful, and the Grand Chancellor de Cocceji was charged by Frederick II. with the duty of codifying the law of Prussia; he died in 1735, and afterwards the work was arrested by the seven years' war, but was resumed in 1780, under Frederic II., and a project was prepared by Dr. Carmer and Dr. Volmar, which was submitted to the *savans* of Europe and to the royal courts. After long and thorough discussion, the present code was finally promulgated and put in force June 1, 1794, by Frederick William, and then for the first time all Europe was united under one system of law. It is known also as the Code Frederic. See German code, *supra*.

RHODIAN LAWS. A maritime code adopted by the people of Rhodes, and in force among the nations upon the Mediterranean nine or ten centuries before Christ. There is reason to suppose that the collection under this title in Vinnius is spurious, and, if so, the code is not extant. See Marsh. on Ins. b. 1, c. 4, p. 15.

SPAIN. This country, even more than France, has developed the Roman Law to its modern state in which it now divides the world with the English Common Law. The earliest codification, *Fuero Juzgo* or *Forum Judicum*, known to us as the *Visigothic Code*, appeared about 650 and embraced the Visigothic traditions that were first reduced to writing by Euric, in the latter half of the fifth century, the original of which is lost, and also much of the *Breviarium Alarici-anum*, composed largely of the Justinian and Theodosian Codes and promulgated early in the sixth century by Alaric II. The Com-

parative Law Bureau of the American Bar Association in 1910 published a translation by S. P. Scott who says in the preface that it is "the most remarkable monument of legislation which ever emanated from a semi-barbarian people and the only essential memorial of greatness or erudition bequeathed by the Goths to posterity."

Fuero Real or *Fuero de las Leyes*, a collection of laws and usages of the Castilian monarchy as well as Roman doctrines was promulgated by Alfonso X, the Wise, in 1255, and is considered an important monument of Spanish jurisprudence. It is in course of translation by S. P. Scott for the Comparative Law Bureau.

Las Siete Partidas (The Seven Parts) was also the product of Alfonso X, having been begun in 1256 and published in 1263, as *Libro de las Leyes*. The final popular title was not officially given to it until 1347, by Alfonso XI. Embracing the laws and customs contained in former codes, this was also a work of wisdom and philosophy and the most complete treatise of jurisprudence that had been published up to that time. It is still the authority of last resort wherever Spanish law once dominated. A translation has been made by S. P. Scott for the Comparative Law Bureau and is about to be published.

In 1507, under Phillip II, *La Nueva Recopilacion* was sanctioned and *La Novisima Recopilacion* was decreed in force on July 15, 1805, and while collections of laws, they were clearly utilitarian measures to create order in a vast mass of systemless legislation conflicting with the older but controlling codes.

The modern *Civil Code* had its origin in the Constitutional Cortes of Cadiz which in 1810, by special commission, undertook to codify the most important branches of the law; after many idle intervals it was completed and promulgated in Spain July 24, 1889. By decree of July 31, 1889, it was extended to Cuba, Porto Rico and the Philippine Islands. It has been translated by the War Department of the United States and also by Clifford S. Walton in his work "Civil Law in Spain and Spanish America," 1900. In its conciseness, scientific classification and underlying doctrines it shows the influence of the Romans, the Visigoths and the Moors.

Other modern codes and the years of their adoption are as follows: Civil Procedure, 1881; Criminal Code, 1870; Criminal Procedure, 1882; Commercial Code, 1885, and Military Code, 1890.

SPANISH AMERICA. While all these countries rest their jurisprudence on *Las Siete Partidas;* see LAS PARTIDAS; each one has its Civil and Commercial Codes; the countries, codes and dates of adoption are as follows: *Argentine Republic*, Commercial Code, 1890; Civil Code, effective 1871 (there is an English translation by Frank L. Joannini, published by the Comparative Law Bureau of the American Bar Association, 1914); *Bolivia*, Commercial Code, 1891; *Brazil*, Commercial Code 1850, Civil Code 1891; *Colombia*, Civil Code effective 1893, Commercial Code 1886–87; *Chili*, Civil Code 1857, Commercial Code 1865; *Costa Rica*, Commercial Code 1853, Civil Code effective 1888; *Ecuador*, Civil Code 1887, Commercial Code, 1878; *Guatemala*, Civil Code 1877, Commercial Code 1877; *Honduras*, Civil Code, effective 1899; *Mexico*, Civil Code 1884, Commercial Code 1889; *Peru*, Civil Code, effective 1852 (English translation by Frank L. Joannini, published by the Comparative Law Bureau of the American Bar Association, 1914); *Salvador*, Civil Code 1880, Commercial Code 1880, effective 1882; *Uruguay*, Civil Code 1895; *Venezuela*, Civil Code, effective 1896.

SWITZERLAND. On January 1, 1912, a Civil Code became effective and is the latest and most scientific work of its kind. It was drawn by Dr. Eugene Huber and was promulgated officially in French, German and Italian. An English translation by Robert P. Shick and Charles Wetherill is published by the Comparative Law Bureau of the American Bar Association (1914).

THEODOSIAN. A code compiled by a commission of eight under the direction of Theodosius the Younger.

It comprises the edicts and rescripts of sixteen emperors, embracing a period of one hundred and twenty-six years. It was promulgated in the Eastern Empire in 438, and quickly adopted, also, in the Western Empire. The great modern expounder of this code is Gothofredus (Godefroi). The results of modern researches regarding this code are well stated in the Foreign Quar. Rev. vol. 9, 374.

TRANI, ORDINANCES AND CUSTOMS OF THE SEA OF. Published in 1063, and said to be the most ancient body of maritime laws in existence. Its 32 articles consist of a series of decisions made by the maritime consuls of the guild of navigators at Trani, a city on the Adriatic Sea, in the 11th century. Printed in Black Book of the Admiralty, Vol. IV. "It was no 'code' in our modern sense of that term. It was only a more or less methodic collection of modern statutes." Maitland, 1 Sel. Essays in Anglo-Amer. Leg. Hist. 12 (14 L. Q. R. 16).

TWELVE TABLES. Laws of ancient Rome.

They arose out of the discontent of the plebs; after a long struggle decemoirs were appointed to draft a body of general laws (B. C. 449-451). Their draft was enacted into a statute. It was neither a code, nor, in the main, new law, but rather a concise and precise statement of the most important among the ancient customs of the people. It was the germ of the Roman law, and as late as Cicero boys learned it by heart. See Bryce, Rome & England (1 Sel. Essays in Anglo-Amer. Leg. Hist. 338). See fragment of the law of the Twelve Tables, in Cooper's Justinian 656; Gibbon's Rome c. 44; Maine, Anc. Law 2.

VISIGOTHIC. *Lex Romana Visigothorum.* See *supra*, sub-title SPAIN.

WISBY, LAWS OF. A concise but comprehensive code of maritime law, established by the "merchants and masters of the magnificent city of Wisby."

The port of Wisby, now in ruins, was situated on the northwestern coast of Gottland, on the Baltic sea. It was the capital of the island, and the seat of an extensive commerce, of which the chief relic and the most significant record is this code. It is a mooted point whether this code was derived from the laws of Oleron, or that from this; but the similarity of the two leaves no doubt that one was the offspring of the other. It was of great authority in the northern parts of Europe. *"Lex Rhodia navalis,"* says Grotius, *"pro jure gentium in illo mare Mediterraneo vigebat; sicut apud Gallium leges Oleronis, et apud omnes transrhenanos leges Wisbuenses." De Jure B.* lib. 2, c. 3. It is still referred to on subjects of maritime law. An English translation will be found in 1 Pet. Adm. Dec.; also in the Black Book of the Admiralty and 30 Fed. Cas. 1189.

The main additions to the above title, referring to recent codes or publication of new editions of the older codes, have been prepared for this work by William W. Smithers, of the Philadelphia Bar, Secretary of the Comparative Law Bureau of the American Bar Association (organized August 28, 1907), of which Simeon E. Baldwin, Founder of the American Bar Association, was also a Founder and has been the Director. The work of the Bureau has been of great public value and promises even greater results.

Publishers announce the publication of "The Commercial Laws of the World" in thirty-five volumes.

In a learned address before the American Bar Association (Annual Report, 1886), upon "Codification, the Natural Result of the Evolution of the Law," Mr. Semmes, one of the most earnest advocates of the merits of the civil law and the code system, sketches the history of the codes of Europe and the relation of the civil to the common law and in conclusion says:

"The history of codification teaches that the task of preparing a code of laws is difficult, that its proper execution is a work of years, to be entrusted, not to a deciduous committee of fugitive legislators, but to a permanent commission of the most enlightened and cultivated jurists, whose project, prior to adoption, should be subjected to rigid and universal criticism."

CODEX (Lat.). A volume or roll. The code of Justinian. See CODE.

CODICIL. Some addition to, or qualification of, a last will and testament.

This term is derived from the Latin *codicillus,* which is a diminutive of *codex,* and in strictness imports a little code or writing,—a little will. In the Roman Civil Law, codicil was defined as an act which contains dispositions of property in prospect of death, without the institution of an heir or executor. Domat, Civil Law, p. ii. b. iv. tit. i. s. 1; Just. *De Codic.* art. i. s. 2. So, also, the early English writers upon wills define a codicil in much the same way. "A codicil is a just sentence of our will touching that which any would have done after their death, without the appointing of an executor." Swinb. Wills, pt. i. s. 5, pl. 2. But the present definition of the term is that first given. 1 Wills, Exrs. 8; Swinb. Wills, pt. i. s. v. pl. 5.

Under the Roman Civil Law, and also by the early English law, as well as the canon law, all of which very nearly coincided in regard to this subject, it was considered that no one could make a valid will or testament unless he did name an executor, as that was of the essence of the act. This was attended with great formality and solemnity, in the presence of seven Roman citizens as witnesses, *omni exceptione majores.* Hence a codicil is there termed an unofficious, or unsolemn, testament. Swinb. Wills, pt. i. s. v. pl. 4; Godolph, pt. i. c. 1, s. 2; *id.* pt. i. c. 6, s. 2; Plowd. 185; where it is said by the judges, that "without an executor a will is null and void," which has not been regarded as law, in England, for the last two hundred years, probably.

The office of a codicil under the civil law seems to have been to enable the party to dispose of his property, in the near prospect of death, without the requisite formalities of executing a will (or testament, as it was then called). Codicils were strictly confined to the disposition of property; whereas a testament had reference to the institution of an heir or executor, and contained trusts and confidences to be carried into effect after the decease of the testator. Domat, b. iv. tit. i.

In the Roman Law there were two kinds of codicils: the one, where no testament existed, and which was designed to supply its place as to the disposition of property, and which more nearly resembled our *donatio causa mortis* than anything else now in use; the other, where a testament did exist, had relation to the testament, and formed a part of it and was to be construed in connection with it. Domat, p. ii. b. iv. tit. i. s. i. art. v. It is in this last sense that the term is now universally used in the English law, and in the American states where the common law prevails.

Codicils owe their origin to the following circumstance. Lucius Lentulus, dying in Africa, left codicils, confirmed by anticipation in a will of former date, and in those codicils requested the Emperor Augustus, by way of *fidei commissum,* or trust, to do something therein expressed. The emperor carried this will into effect, and the daughter of Lentulus paid legacies which she would not otherwise have been legally bound to pay. Other persons made similar *fidei commissa,* and then the emperor, by the advice of learned men whom he consulted, sanctioned the making of codicils, and thus they became clothed with legal authority. Inst. 2. 25; Bowy. Com. 155.

All codicils are part of the will, and are to be so construed; 17 Sim. 108; 16 Beav. 510, 2 Ves. Sen. Ch. 242; 4 Y. & C. Ch. 160; Wilkes v. Harper, 3 Sandf. Ch. (N. Y.) 11; 4 Kent 531. See Gelbke v. Gelbke, 88 Ala. 427, 6 South. 834; Burhans v. Haswell, 43 Barb. (N. Y.) 424; and executed with the same formalities; Schoul. Wills 359; 4 Kent 531; Tilden v. Tilden, 13 Gray (Mass.) 103.

A codicil properly executed to pass real and personal estate, and in conformity with the statute of frauds, and upon the same piece of paper with the will, operates as a republication of the will, so as to have it speak from that date; Coale v. Smith, 4 Pa. 376; Armstrong v. Armstrong, 14 B. Monr. (Ky.) 333; Brimmer v. Sohier, 1 Cush. (Mass.) 118; 3 M. & C. 359. So also it has been held that it is not requisite that the codicil should be on the same piece of paper in order that it should operate as a republication of the will; Kip v. Van Cortland, 7 Hill (N. Y.) 346; Den v. Snowhill, 23 N. J. L. 447; 1 Ves. Sen. 442; Harvy v. Chouteau, 14 Mo. 587, 55 Am. Dec. 120; but where it is on the same piece of paper, not signed, only the will proper which was signed should be admitted to probate; Smith's

Estate, 9 Pa. Co. Ct. R. 333; but see Brown's Ex'r v. Tilden, 5 Har. & J. (Md.) 371.

A codicil duly executed, and attached or referring to a paper defectively executed as a will, has the effect to give operation to the whole, as one instrument; Schoul. Wills 448; Beall v. Cunningham, 3 B. Monr. (Ky.) 390, 39 Am. Dec. 469; Haven v. Foster, 14 Pick. (Mass.) 543; 16 Ves. Ch. 167; 1 Ad. & E. 423; Matter of Hardenburg's Will, 85 Hun 580, 33 N. Y. Supp. 150. See numerous cases cited in 7 Ves. Ch. (Sumner ed.) 98; 1 Cr. & M. 42.

There may be numerous codicils to the same will. In such cases, the later ones operate to revive and republish the earlier ones; 3 Bingh. 614; 12 J. B. Moore 2. See Johns Hopkins University v. Pinckney, 55 Md. 365.

In order to set up an informally executed paper by means of one subsequently executed in due form, referring to such informal paper, the reference must be such as clearly to identify the paper; Tonnele v. Hall, 4 N. Y. 140.

A codicil which depends on the will for interpretation or execution falls, if the will be revoked; 1 Tucker 436; Jouse v. Forman, 5 Bush (Ky.) 337.

It is not competent to provide by will for the disposition of property to such persons as shall be named in a subsequent codicil, not executed according to the prescribed formalities in regard to wills; since all papers of that character, in whatever form, if intended to operate only in the disposition of one's property after death, are of a testamentary character, and must be so treated; 2 Ves. Ch. 204; 2 M. & K. 765.

So much of the will as is inconsistent with the codicil is revoked; Bosley v. Wyatt, 14 How. (U. S.) 390, 14 L. Ed. 468.

A codicil whose only provision is the appointment of an executor who had died, cannot be admitted to probate apart from the will; Pepper's Estate, 148 Pa. 5, 23 Atl. 1039. A testator executed a codicil which was described as "a codicil to my will executed some years ago," and after his death the will could not be found, but probate of the codicil was granted; [1892] Prob. 254. See WILLS.

COEMPTIO. In Civil Law. The ceremony of celebrating marriage by solemnities. The parties met and gave each other a small sum of money. They then questioned each other in turn. The man asked the woman if she wished to be his *mater-familias*. She replied that she so wished. The woman then asked the man if he wished to be her *pater-familias*. He replied that he so wished. They then joined hands; and these were called nuptials by *coemptio*. Boethius, *Coemptio;* Calvinus, Lex.; Taylor, Law Gloss.

COERCION. Constraint; compulsion; force.

Direct or positive coercion takes place when a man is by physical force compelled to do an act contrary to his will: for example, when a man falls into the hands of the enemies of his country, and they compel him, by a just fear of death, to fight against it. See Grossmeyer v. U. S., 4 Ct. Cls. (U. S.) 1; Miller v. U. S., 4 Ct. Cls. (U. S.) 288; Padelford v. U. S., 4 Ct. Cls. (U. S.) 317.

Implied coercion exists where a person is legally under subjection to another, and is induced, in consequence of such subjection, to do an act contrary to his will.

As will is necessary to the commission of a crime or the making of a contract, a person actually coerced into either has no will on the subject, and is not responsible; 1 East, Pl. Cr. 225; 5 Q. B. 279; Griffith v. Sitgreaves, 90 Pa. 161. The command of a superior to an inferior; United States v. Jones, 3 Wash. C. C. 209, 220, Fed. Cas. No. 15,494; Com. v. Blodgett, 12 Metc. (Mass.) 56; Harmony v. Mitchell, 1 Blatchf. 549, Fed. Cas. No. 6,082; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; of a parent to a child; Broom, Max. 11; of a master to his servant, or a principal to his agent; Hays v. State, 13 Mo. 246; Com. v. Drew, 3 Cush. (Mass.) 279; Kliffield v. State, 4 How. (Miss.) 304; State v. Bugbee, 22 Vt. 32; do not amount to coercion.

As to persons acting under the constraint of superior power, and, therefore, not criminally amenable, the principal case is that of married women, with respect to whom the law recognizes certain presumptions. Thus, if a wife commits a felony, other than treason or homicide, or, perhaps, highway robbery, in company with her husband, the law presumes that she acted under his coercion, and, consequently, without any guilty intent, unless the fact of non-coercion is distinctly proved; Clarke, Cr. L. 77. See Com. v. Eagan, 103 Mass. 71; State v. Williams, 65 N. C. 398. This presumption appears on some occasions to have been considered conclusive, and is still practically regarded in no very different light, especially when the crime is of a flagrant character; but the better opinion seems to be that in every case the presumption may now be rebutted by positive proof that the woman acted as a free agent; and in one case that was much discussed, the Irish judges appear to have considered that such positive proof was not required, but that the question was always one to be determined by the jury on the evidence submitted to them; Jebb 93; 1 Mood. 143. It seems that a married woman cannot be convicted under any circumstances as a receiver of stolen goods, when the property has been taken by her husband and given to her by him; 1 Dearsl. 184.

Husband and wife were jointly charged with felonious wounding with intent to disfigure and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not

personally inflict any violence on the prosecutor. On this finding, the wife was held entitled to an acquittal; 1 Dearsl. & B. 553.

Whether the doctrine of coercion extends to any misdemeanor may admit of some doubt; but the better opinion seems to be that, provided the misdemeanor is of a serious nature, as, for instance, the uttering of base coin, the wife will be protected in like manner as in cases of felony; although it has been distinctly held that the protection does not extend to assaults and batteries or the offence of keeping a brothel; Russ. Cr. 38; 2 Lew. 229; 8 C. & P. 19, 541; Com. v. Lewis, 1 Metc. (Mass.) 151; Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105. Indeed, it is probable that in all inferior misdemeanors this presumption, if admitted at all, would be held liable to be defeated by far less stringent evidence of the wife's active co-operation than would suffice in cases of felony; 8 C. & P. 541; 2 Mood. 53.

There is coercion only when the husband is present; it does not extend to treason, murder and grave felonies; 2 C. & K. 903; it extends to the lesser felonies and most misdemeanors, and even in these the circumstances may repel the presumption of coercion; 8 C. & P. 554. If it appear that she took the leading part, his presence will not protect her; 12 Cox 45. If she acted in his absence, no presumption of coercion arises; she is a principal; Russ & Ry. 270.

A wife is not chargeable with guilt until the presumption of coercion has been removed; State v. Harvey, 130 Ia. 394, 106 N. W. 938; there is a presumption of coercion if the husband was present, but it may be rebutted; Com. v. Adams, 186 Mass. 101, 71 N. E. 78; her conduct alone at the time may suffice to overcome a presumption; *id.* Where the wife of a convicted murderer at his instigation shot the revolver, the offence was committed in the husband's presence and there was nothing to rebut the presumption of coercion; State v. Miller, 162 Mo. 253, 62 S. W. 692, 85 Am. St. Rep. 498. If it appears that the wife was not urged by the husband, but was the inciter, she is liable; People v. Ryland, 2 N. Y. Cr. R. 441. In the case of a disorderly house, they are both equally guilty; State v. Jones, 53 W. Va. 613, 45 S. E. 916.

The marriage need not be strictly proved; reputation is sufficient proof of marriage; but mere cohabitation is not; Odgers, C. L. 1347.

See 1 B. & H. Lead. Cr. Cas. 76; DURESS.

CO-EXECUTOR. One who is a joint executor with one or more others. See EXECUTOR.

COGNATI, COGNATES. In Civil Law. All those persons who can trace their blood to a single ancestor or ancestress.

The term is not used in the civil law as it now prevails in France. In the common law it has no technical sense; but as a word of discourse in English it signifies, generally, allied by blood, related in origin, of the same family.

Originally, the maternal relationship had no influence in the formation of the Roman family, nor in the right of inheritance. But the edict of the prætor established what was called the Prætorian succession, or the *bonorum possessio*, in favor of cognates in certain cases. Dig. 38. 8. See PATERFAMILIAS; AGNATI.

COGNATION. In Civil Law. Signifies generally the kindred which exists between two persons who are united by ties of blood or family, or both.

Civil cognation is that which proceeds alone from the ties of families, as the kindred between the adopted father and the adopted child.

Mixed cognation is that which unites at the same time the ties of blood and family, as that which exists between brothers the issue of the same lawful marriage. Inst. 3. 6; Dig. 38. 10.

Natural cognation is that which is alone formed by ties of blood; such is the kindred of those who owe their origin to an illicit connection, either in relation to their ascendants or collaterals.

COGNISANCE. See COGNIZANCE.

COGNITIONIBUS ADMITTENDIS. A writ requiring a justice or other qualified person, who has taken a fine and neglects to certify it in the court of common pleas, to do so.

COGNIZANCE (Lat. *cognitio*, recognition, knowledge; spelled, also, *Conusance* and *Cognisance*). Acknowledgment; recognition; jurisdiction; judicial power; hearing a matter judicially. See 12 Ad. & El. 259.

Of Pleas. Jurisdiction of causes. A privilege granted by the king to a city or town to hold pleas within the same. *Termes de la Ley.* It is in frequent use among the older writers on English law in this latter sense, but is seldom used, if at all, in America, except in its more general meaning. The universities of Cambridge and Oxford possess this franchise; 11 East 543; 1 W. Bla. 454; 3 Bla. Com. 298.

Claim of Cognizance (or of Conusance). An intervention by a third person, demanding judicature in the cause against the plaintiff, who has chosen to commence his action out of claimant's court. 2 Wils. 409; 2 Bla. Com. 350, n.

It is a question of jurisdiction between the two courts; Fortesc. 157; 5 Viner, Abr. 588; and not between the plaintiff and defendant, as in the case of plea to the jurisdiction, and must be demanded by the party entitled to conusance, or his representative, and not by the defendant or his attorney; 1 Chit. Pl. 403.

There are three sorts of conusance. *Tenere placita*, which does not oust another court of its jurisdiction, but only creates a concurrent one. *Cognitio placitorum*, when

the plea is commenced in one court, of which conusance belongs to aother. A conusance of exclusive jurisdiction: as, that no other court shall hold plea, etc. Hardr. 509; Bac. Abr. *Courts*, D.

In Pleading. The answer of the defendant in an action of replevin who is not entitled to the distress or goods which are the subject of the action—acknowledging the taking, and justifying it as having been done by the command of one who is so entitled. Lawes, Pl. 35. An acknowledgment made by the deforciant, in levying a fine, that the lands in question are the right of the complainant. 2 Bla. Com. 350. See Inhabitants of Sturbridge v. Winslow, 21 Pick. (Mass.) 87; Noble v. Holmes, 5 Hill (N. Y.) 194.

COGNOMEN (Lat.). A family name.

The *prænomen* among the Romans distinguished the person, the *nomen* the gens, or all the kindred descended from a remote common stock through males, while the *cognomen* denoted the particular family. The *agnomen* was added on account of some particular event, as a further distinction. Thus, in the designation Publius Cornelius Scipio Africanus, Publius is the *prænomen*, Cornelius is the *nomen*, Scipio the *cognomen*, and Africanus the *agnomen*. Vicat. See Cas. *temp.* Hardw. 286; 6 Co. 65.

COGNOVIT ACTIONEM (Lat. he has confessed the cause of action. *Cognovit* alone is in common use with the same significance).

A written confession of a cause of action by a defendant, subscribed, but not sealed, and authorizing the plaintiff to sign judgment and issue execution, usually for a sum named.

COHABIT (Lat. *con* and *habere*). To live together in the same house, claiming to be married.

The word does not include in its signification, necessarily, occupying the same bed; 1 Hagg. Cons. 144; Dunn v. Dunn, 4 Paige, Ch. (N. Y.) 425; though the word is popularly, and sometimes in statutes, used in this latter sense; State v. Byron, 20 Mo. 210; Bish. Marr. & Div. § 506, n.; Jackson v. State, 116 Ind. 464, 19 N. E. 330; Pruner v. Com., 82 Va. 115; Com. v. Dill, 159 Mass. 61, 34 N. E. 84; Cannon v. U. S., 116 U. S. 55, 6 Sup. Ct. 278, 29 L. Ed. 561.

COHABITATION. It does not necessarily mean living together under the same roof; a man may be absent on business, or two married domestic servants may live with different employers, and yet be cohabiting in the broader sense; [1904] P. 389.

To live together in the same house.

Used without reference to the relation of the parties to each other as husband and wife, or otherwise. Used of sisters or other members of the same family, or of persons not members of the same family, occupying the same house; 2 Vern. 323; Bish. Marr. & Div. & Sep. 506, n. See In re Yardley's Estate, 75 Pa. 207; Sullivan v. State, 32 Ark. 127.

See LASCIVIOUS COHABITATION.

COIF. A head-dress.

In England there are certain serjeants at law who are called serjeants of the coif, from the white lawn coif they wear on their heads under their small black skull-cap of silk or velvet when they are admitted to that order. It was anciently worn as a distinguishing badge. When powdered wigs were introduced, a round patch of black silk edged with white was worn on the crown of the wig as a diminutive representation of the coif and cap. See Pulling, Order of the Coif.

COIN. A piece of metal stamped with certain marks and made current at a certain value. Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, or shells, which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process called coining. Wharton.

To fashion pieces of metal into a prescribed shape, weight, and fineness, and stamp them with prescribed devices, by authority of government, that they may circulate as money. Thayer v. Hedges, 22 Ind. 306; Griswold v. Hepburn, 2 Duvall (Ky.) 29.

Congress alone has the power to coin money; Const. U. S. Art. 1, § 7; but the states may pass laws to punish the circulation of false coin; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213.

So long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value; U. S. v. Lissner, 12 Fed. 840. See Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 16 Sup. Ct. 276, 40 L. Ed. 430.

COLD BLOOD. See COOL BLOOD.

COLIBERTUS. One who, holding in free socage, was obliged to do certain services for the lord. A middle class of tenants between servile and free, who held their freedom of tenure on condition of performing certain services. Said to be the same as the *conditionales*. Cowell.

COLLATERAL (Lat. *con*, with, *latus*, the side). That which is by the side, and not the direct line. That which is additional to or beyond a thing.

COLLATERAL ANCESTORS. Sometimes used to designate uncles and aunts and other collateral ancestors of the person spoken of, who are in fact not his ancestors. Banks v. Walker, 3 Barb. Ch. (N. Y.) 446.

COLLATERAL ASSURANCE. That which is made over and above the deed itself.

COLLATERAL CONSANGUINITY. That relationship which subsists between persons who have the same ancestors but not the same descendants,—who do not descend one from the other. 2 Bla. Com. 203.

The essential fact of consanguinity (common ancestral blood) is the same in lineal and collateral consanguinity; but the relationship is aside from the direct line. Thus, father, son, and grandson are lineally related; uncle and nephew, collaterally.

COLLATERAL ESTOPPEL. The collateral determination of a question by a court

having general jurisdiction of the subject. See Small v. Haskins, 26 Vt. 209.

COLLATERAL FACTS. Facts not directly connected with the issue or matter in dispute.

Such as are offered in evidence to establish the matters or facts in issue. Garwood v. Garwood, 29 Cal. 521; King v. Chase, 15 N. H. 16, 41 Am. Dec. 675. Facts offered in evidence at a trial to establish the issue, though not necessarily conclusive thereof. Freem. Judgm. § 258.

Such facts are inadmissible in evidence; but, as it is frequently difficult to ascertain *a priori* whether a particular fact offered in evidence will or will not clearly appear to be material in the progress of the cause, in such cases it is usual in practice for the court to give credit to the assertion of the counsel who tenders such evidence, that the facts will turn out to be material. But this is always within the sound discretion of the court. It is the duty of the counsel, however, to offer evidence, if possible, in such order that each part of it will appear to be pertinent and proper at the time it is offered; and it is expedient to do so, as this method tends to the success of a good cause.

When a witness is cross-examined as to collateral facts, the party cross-examining will be bound by the answer; and he cannot, in general, contradict him by another witness; Rosc. Cr. Ev. 139.

COLLATERAL INHERITANCE TAX. A tax levied upon the collateral devolution of property by will or under the intestate law. See TAX.

COLLATERAL ISSUE. An issue taken upon some matter aside from the general issue in the case.

Thus, for example, a plea by the criminal that he is not the person attainted when an interval exists between attainder and execution, a plea in abatement, and other such pleas, each raises a collateral issue. 4 Bla. Com. 338, 396.

COLLATERAL KINSMEN. Those who descend from one and the same common ancestor, but not from one another.

Thus brothers and sisters are collateral to each other; the uncle and the nephew are collateral kinsmen, and cousins are the same. All kinsmen are either *lineal* or *collateral*.

COLLATERAL LIMITATION. A limitation in the conveyance of an estate, giving an interest for a specified period, but making the right of enjoyment depend upon some *collateral* event; as an estate to A till B shall go to Rome. Park, Dow. 163; 4 Kent 128; 1 Washb. R. P. 215.

COLLATERAL SECURITY. A separate obligation attached to another contract to guaranty its performance. The transfer of property or of other contracts to insure the performance of a principal engagement. See Lochrane v. Solomon, 38 Ga. 292; Mervin v. Sherman, 9 Ia. 331.

The property or securities thus conveyed are also called collateral securities; 1 Pow. Mortg. 393; 2 *id.* 666, n. 871; 3 *id.* 944, 1001; Munn v. McDonald, 10 Watts (Pa.) 270. See PLEDGE; CHATTEL MORTGAGE.

COLLATERAL UNDERTAKING. A contract based upon a pre-existing debt, or other liability, and including a promise to pay, made by a third person, having immediate respect to and founded upon such debt or liability, without any new consideration moving to him. Elder v. Warfield, 7 Har. & J. (Md.) 391.

COLLATERAL WARRANTY. Warranty as to an estate made by one who was ancestor to the heir thereof, either actually or by implication of law, in respect to other property, but who could not have been so in respect to the estate in question.

Warranty made where the heir's title to the land neither was nor could have been derived from the warranting ancestor. *Termes de la Ley.*

Collateral warranty is spoken of as "a mode of common assurance." The statute of Gloucester being silent as to a collateral warranty, a warranty of a collateral ancestor, whose heir the issue in tail might be descending upon the latter, would bind him without assets by force of the common law. Therefore, by getting a collateral relation, whose heir the issue in tail was to be, to concur in the alienation and bind himself and his heirs to warranty, the statute *De Donis* was successfully evaded.

Thus, if a tenant in tail should discontinue the tail, have issue and die, and the uncle of the issue should release to the discontinuee and die without issue, this is a collateral warranty to the issue in tail. Littleton § 709. The tenant in tail having discontinued as to his issue before his birth, the heir in tail was driven to his action to regain possession upon the death of his ancestor tenant in tail; and in this action the collateral warranty came in as an estoppel. 2 Washb. R. P. 670.

The heir was barred from ever claiming the land, and, in case he had assets from the warranting ancestor, was obliged to give the warrantee other lands in case of an eviction. 4 Cruise, Dig. 436.

By the statute of Gloucester, 6 Edw. I. c. 3, tenant by the curtesy was restrained from making such warranty as should bind the heir. By a favorable construction of the statute *De Donis*, and by the statute 3 & 4 Will. IV. c. 74, tenants in tail were deprived of the power of making collateral warranty. By 11 Hen. VII. c. 20, warranty by a tenant in dower, with or without the assent of her subsequent husband, was prevented; and finally 4 & 5 Anne, c. 16, declares all warranties by a tenant for life void against the heir, unless such ancestor has an estate of inheritance in possession. See Co. Litt. 373, Butler's note [328]; Stearns, R. Act. 135, 372.

It is doubtful if the doctrine has ever prevailed to a great extent in the United States, and the statute of Anne has not been generally adopted in American statute law, although re-enacted in New York; 4 Kent *469; and in New Jersey; Den v. Crawford, 8 N. J. L. 106. It has been adopted and is in force in Rhode Island; Sisson v. Seabury, 1 Sumn. 235, Fed. Cas. No. 12,913; and in Delaware; Ford's Lessee v. Hays, 1 Harr. 50, 23 Am. Dec. 369. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended; Doe v. Moore, 1 Dana (Ky.) 59. In Pennsyl-

vania, the statute of Gloucester is in force, but the statute of Anne is not, and a collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted; Carson v. Cemetery Co., 104 Pa. 575. See 2 Bla. Com. 301; 2 Washb. R. P. 668. If the learning of collateral warranty has been called difficult, it is simply because the law of warranty came to be turned from the purpose of its introduction,—that of protection and defence,—and fashioned into a remedy to meet an entirely different purpose. Later, collateral warranty ceased to be used for the purpose of barring estates tail, and its use could never have been universal. Rawle, Cov. for Title, secs. 8, 9. See Litt. § 709; 12 Mod. 513; Year Book 12 Edw. IV. 19; Tudor, Lead. Cas. R. P. 695; Pig. Recov. 9.

COLLATERALES ET SOCII. The former title of masters in chancery.

COLLATIO BONORUM. A collation of goods.

COLLATION. In Civil Law. The supposed or real return to the mass of the succession which an heir makes of the property he received in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. See Succession of Thompson, 9 La. Ann. 96.

As the object of collation is to equalize the heirs, it follows that those things are excluded from collation which the heir acquired by an onerous title from the ancestor; that is, where he gave a valuable consideration for them. And, upon the same principle, if a co-heir claims no share of the estate, he is not bound to collate. *Qui non vult hereditatem non cogitur ad collationem.* It corresponds to the common law hotchpot; 2 Bla. Com. 517.

In Ecclesiastical Law. The act by which the bishop who has the bestowing of a benefice gives it to an incumbent.

Where the ordinary and patron were the same person, presentation and institution to a benefice became one and the same act; and this was called collation. Collation rendered the living full except as against the king; 1 Bla. Com. 391. An advowson under such circumstances is termed collative; 2 Bla. Com. 22.

In Practice. The comparison of a copy with its original, in order to ascertain its correctness and conformity. The report of the officer who made the comparison is also called a collation.

COLLECTOR. One appointed to receive taxes or other impositions: as, collector of taxes, collector of militia fines, etc. A person appointed by a private person to collect the credits due him.

COLLECTOR OF THE CUSTOMS. An officer of the United States, appointed for the term of four years. Rev. Stat. U. S. § 2613. His general duties are defined in § 2621.

COLLEGA. In Civil Law. One invested with joint authority. A colleague; an associate. Black, L. Dict.

COLLEGE. An organized collection or assemblage of persons. A civil corporation, society, or company, having, in general, some literary object.

The assemblage of the cardinals at Rome is called a college. The body of presidential electors is called the electoral college, although the whole body never come together.

A qualified person is *prima facie* entitled to register as a student in a university; Gleason v. University, 104 Minn. 359, 116 N. W. 650; but in Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, Marshall, C. J., said: "No individual youth has a vested interest in the institution which can be asserted in a court of justice." Refusal of an incorporated medical college to admit negro students does not deny them any constitutional privilege, for private institutions of learning, though incorporated, may select those whom they will receive, and may discriminate on account of sex, age, proficiency in learning or otherwise; Booker v. Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N. S.) 447.

Mandamus was held the proper remedy to remove a professor after the professorship had been abolished; People v. Medical College, 10 Abb. N. C. (N. Y.) 122; or to prevent an application on behalf of a colored boy to be admitted; State v. Maryland Institute, 87 Md. 643, 41 Atl. 126; or to compel the admission of a woman as a student in a law college; Foltz v. Hoge, 54 Cal. 28; or to compel the admission of a doctor to the College of Physicians; 4 Burr. 2186. But it will not lie, on the relation of a medical college, to compel the State Board of Medical Examiners to recognize it as a medical institution in good standing; State v. Coleman, 64 Ohio St. 377, 60 N. E. 568, 55 L. R. A. 105.

A college cannot dismiss a student without cause; Booker v. College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A. (N. S.) 447; mandamus to reinstate a student who has been expelled has generally been refused; Dunn's Case, 9 Pa. C. C. 417; a college may forbid its students to join a secret society, and a student who does so may be expelled; People v. College, 40 Ill. 186. Where a college degree was withheld from a student who had satisfactorily passed his examinations, mandamus was refused in State v. Medical College, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407; People v. School, 68 Hun 118, 22 N. Y. Supp. 663; *contra*, People v. Medical College, 60 Hun 107, 14 N. Y. Supp. 490, affirmed in 128 N. Y. 621, 28 N. E. 253, it appearing that the refusal was merely arbitrary; and so in State v. Medical College, 81 Neb. 533, 116 N. W.

294, 17 L. R. A. (N. S.) 930. The reason for granting the writ is usually a so-called contractual relation arising between college and student on matriculation; but such relation was denied in 31 Law Jour. 119, where an action for breach of contract was brought. The better view is said in England to be that the sole jurisdiction to settle such questions rests in the visitor to the college or university, and not in the courts; 33 L. J. Rep. (Ch.) 625. Mandamus will not lie to compel a college to issue a diploma; State v. Medical College, 128 Wis. 7, 106 N. W. 116, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 80 Ann. Cas. 407. A diploma is not necessary to granting of a degree, for a vote that a degree be conferred on a person invests him with such degree *ipso facto;* Wright v. Lanckton, 19 Pick. (Mass.) 288.

An instructor's relation with a school is ordinarily a purely contractual one; Butler v. Regents of University, 32 Wis. 124; Trustees of University v. Walden, 15 Ala. 655; Board of Regents v. Mudge, 21 Kan. 223.

In the absence of a statute providing the manner for the dissolution of a college corporation, it may dissolve itself by a voluntary surrender of its franchise; People v. College, 38 Cal. 166; and while a palpable misuse of the powers is ground for its dissolution; State v. College Co., 63 Ohio St. 341, 58 N. E. 799, 52 L. R. A. 365; a partial decay of one department, caused by students refusing to take that special course, would not be ground for forfeiture; State v. College, 32 Ohio St. 487. A statute providing that credit for certain purposes is not to be given to students who are minors attending a college, unless the assent of some officer of the college be obtained, is a proper exercise of legislative functions; Soper v. College, 1 Pick. (Mass.) 177, 11 Am. Dec. 159; Morse v. State, 6 Conn. 9; 18 Q. B. 647.

The board of regents of a state college cannot exact a fee of students to be used for maintenance of the Y. M. C. A. or Y. W. C. A.; Connell v. Gray, 33 Okl. 591, 127 Pac. 417, 42 L. R. A. (N. S.) 336.

Notwithstanding the agreement of a university to educate five boys without cost, to be appointed annually by the mayor of a city, in consideration of exemption from taxes, it may charge a free student a laboratory fee to cover material actually used and destroyed by him in the laboratory courses; City of New Orleans v. Board of Adm'rs, 123 La. 550, 49 South. 171.

In a suit for injuries suffered at a university foot ball game by the collapse of the seats, the game being under the auspices of a university athletic association, it was held that it was a branch of the university; George v. Athletic Ass'n, 107 Minn. 424, 120 N. W. 750.

One who conducts a business college in Philadelphia without the authority to confer degrees will be restrained from describing his school as a university; it appearing that by the use of the name "University of Philadelphia" persons intending to correspond with the "University of Pennsylvania" were misled, the latter institution was entitled to protection against the use of the word "university"; Com. v. Banks, 198 Pa. 397, 48 Atl. 277. A business college is not entitled to exemption from taxation as a general educational institution; Parsons Business College v. City of Kalamazoo, 166 Mich. 305, 131 N. W. 553, 33 L. R. A. (N. S.) 921.

See DEGREE.

COLLEGE FRATERNITIES. Individual members of a college fraternity may enjoin the unauthorized withdrawal of the charter of the chapter to which they belong; the membership would remain to them in spite of the withdrawal. The fact that a college has not the proper material for the maintenance of a Greek letter fraternity is no ground for the withdrawal of its fraternity charter by the head council, where there is no provision in the constitution or by-laws authorizing such withdrawal, except for a violation of the rules and usages of the fraternity. A disclosure by charter members of the constitution of a Greek letter fraternity and of certain secrets relative to an attempt by the grand council to withdraw a charter was not such a violation of the constitution and by-laws as would authorize the fraternity to forfeit their charter, where such violation was rendered necessary by the fraternity itself. Heaton v. Hull, 51 App. Div. 126, 64 N. Y. Supp. 279. See 42 Am. L. Rev. 170.

COLLEGIUM (Lat. *colligere*, to collect). **In Civil Law.** A society or assemblage of those of the same rank or honor. An army. A company, in popular phrase. The whole order of bishops. Du Cange.

Collegium illicitum. One which abused its right, or assembled for any other purpose than that expressed in its charter.

Collegium licitum. An assemblage or society of men united for some useful purpose or business, with power to act like a single individual.

All *collegia* were *illicita* which were not ordained by a decree of the senate or of the emperor; 2 Kent 269.

A corporation.

COLLIERY, COALERY. A coal mine, coal pit, or place where coals are dug, with the engines and machinery used in discharging the water and raising the coal. Webster.

Colliery is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined; Carey v. Bright, 58 Pa. 85.

COLLISION. The act of ships or vessels striking together, or of one vessel running against or foul of another.

It may happen *without fault*, no blame being imputable to those in charge of either vessel. In such case, in the English, American, and French courts, each party must bear his own loss; Pardessus, *Droit Comm.* p. 4, t. 2, c. 2, § 4; General Mutual Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452; 1 Pars. Sh. & Adm. 525.

A collision by *inevitable accident* is when a collision is caused exclusively by natural causes, without any fault on the part of the owners or those in charge; The Sea Gull, 23 Wall. (U. S.) 169, 23 L. Ed. 90; Killam v. Eri, 3 Cliff. 456, Fed. Cas. No. 7,765; Sampson v. U. S., 12 Ct. Cl. 480. It must appear that neither vessel was in fault; Sterling v. The Jennie Cushman, 3 Cliff. 636, Fed. Cas. No. 13,375. Where the captain and crew, except the second mate, were taken sick, and a collision occurred, through the absence of a lookout, it was held to be inevitable accident; The Southern Home, 8 Reporter 389, Fed. Cas. No. 13,187. See also The F. W. Gifford, 7 Biss. 249, Fed. Cas. No. 5,166.

It may happen by *mutual fault*, that is, by the misconduct, fault, or negligence of those in charge of both vessels; The C. R. Stone, 49 Fed. 475; The Brinton, 50 Fed. 581; The T. B. Van Houten, 50 Fed. 590; The Riversdale, 53 Fed. 286; The Allen Green, 60 Fed. 459, 9 C. C. A. 73. In such case, neither party has relief at common law; 3 Kent 231; 3 C. & P. 528; Barnes v. Cole, 21 Wend. (N. Y.) 188; Hartfield v. Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273; Brown v. Maxwell, 6 Hill (N. Y.) 592, 41 Am. Dec. 771; Parker v. Adams, 12 Metc. (Mass.) 415, 46 Am. Dec. 694 (though now otherwise in England by the Judicature Act 1873); but the maritime courts aggregate the damages to both vessels and their cargoes, and then divide the same equally between the two vessels; 3 Kent 232; The Teutonia, 23 Wall. (U. S.) 84, 23 L. Ed. 44; The Clara, 49 Fed. 765; The State of California, 49 Fed. 172, 1 C. C. A. 224; The Bolivia, 49 Fed. 169, 1 C. C. A. 221; Fristad v. The Premier, 51 Fed. 766; The Marion, 56 Fed. 271; The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095. See 1 Swab. 60. Where two tugs and two scows in tow by one of them are all in fault, each is liable for an equal share of the damages, even though more than one be owned by the same person; The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600. Where the collision is by intentional wrong of both parties, the libel will be dismissed; The R. L. Maybey, 4 Blatch. 88, Fed. Cas. No. 11,870.

It may happen by *inscrutable fault*, that is, by the fault of those in charge of one or both vessels and yet under such circumstances that it is impossible to determine who is in fault. In such case the American courts of admiralty and the European maritime courts formerly adopted the rule of an equal division of the aggregate damage; The Comet, 1 Abb. U. S. 451, Fed. Cas. No. 3,050; The Scioto, 2 Ware (Davels 365) 360, Fed. Cas. No. 12,508; Flanders, Mar. Law, 296. The English courts have refused a remedy in admiralty; 2 Hagg. Adm. 145; 6 Thornt. 240; and see The Kallisto, 2 Hugh. 128, Fed. Cas. No. 7,600; but it has now been decided by a vast preponderance of authority that there can be no recovery or partial recovery unless fault be affirmatively shown; The Jumna, 149 Fed. 173, 79 C. C. A. 119, following The Clara, 102 U. S. 200, 26 L. Ed. 145; The Sunnyside, 91 U. S. 208, 23 L. Ed. 302.

It may happen *by the fault* of those belonging to one of the colliding vessels, without any fault being imputable to the other vessel. In such case the owners of the vessel in fault must bear the damage which their own vessel has sustained, and are liable as well as their master to a claim for compensation from the owners of the other vessel for the damage done to her; 1 Swab. 23, 173, 200, 211; 3 W. Rob. 283; The Narragansett, 1 Blatchf. 211, Fed. Cas. No. 10,017; Vantine v. The Lake, 2 Wall. Jr. 52, Fed. Cas. No. 16,878; Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35; Williamson v. Barrett, 13 How. (U. S.) 101, 14 L. Ed. 68; although wilfully committed by the master; Ralston v. State Rights, Crabbe 22, Fed. Cas. No. 11,540; Dusar v. Murgatroyd, 1 Wash. C. C. 13, Fed. Cas. No. 4,199; Dias v. The Revenge, 1 Wash. C. C. 262, Fed. Cas. No. 3,877. But see 1 W. Rob. 399; 2 *id.* 502; Wright v. Wilcox, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507.

Where one vessel, clearly shown to be guilty of a fault adequate in itself to have caused a collision, seeks to impugn the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault, and this principle is peculiarly applicable to a vessel at anchor, complying with regulations concerning lights and receiving injuries, through the fault of a steamer in motion; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943. If a cargo be damaged by collision between two vessels, the owner may pursue both vessels or either, or the owners or both, or either; and in case he proceeds against one only, and both are held in fault, he may recover his entire damages of the one sued; In re Eastern Dredging Co., 182 Fed. 179; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993.

These four classes of cases are noted in 2 Dods. 85, by Lord Stowell.

Full compensation is, in general, to be made in such cases for the loss and damage which the prosecuting party has sustained by the fault of the party proceeded against:

2 W. Rob. 279; including all damages which are fairly attributable exclusively to the act of the original wrong-doer, or which may be said to be the direct consequence of his wrongful act; 3 W. Rob. 7, 282; 11 M. & W. 228; 1 Swab. 200; The Narragansett, 1 Blatchf. 211, Fed. Cas. No. 10,017; Vantine v. The Lake, 2 Wall. Jr. 52, Fed. Cas. No. 16,878; Smith v. Condry, 1 How. (U. S.) 28, 11 L. Ed. 35; The Catharine, 17 How. (U. S.) 170, 15 L. Ed. 233; The Anna W., 201 Fed. 58, 119 C. C. A. 396.

As to limited liability of owners, see SHIP.

For the prevention of collisions, certain rules have been adopted (see NAVIGATION RULES) which are binding upon vessels approaching each other from the time the necessity for precaution begins, and continue to be applicable, as the vessels advance, so long as the means and opportunity to avoid the danger remain; New York & L. U. S. Mail S. S. Co. v. Rumball, 21 How. 372, 16 L. Ed. 144. But, whatever may be the rules of navigation in force at the place of collision, it is apparent that they must sometimes yield to extraordinary circumstances, and cannot be regarded as binding in all cases. Thus, if a vessel necessarily goes so near a rock, or the land, that by following the ordinary rules she would inevitably go upon the rock, or get on shore or aground, no rule should prevail over the preservation of property and life; 1 W. Rob. 478, 485; 4 J. B. Moore 314; The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218; but obedience to the rules is not a fault, even if a different course would have prevented a collision, and the necessity must be clear and the emergency sudden and alarming before an act of disobedience can be excused; Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264, 37 L. Ed. 1218. No vessel should unnecessarily incur the probability of a collision by a pertinacious adherence to the rule of navigation; 1 W. Rob. 471, 478; Hawkins v. Steamboat Co., 2 Wend. (N. Y.) 452; and if it was clearly in the power of one of the vessels which came into collision to have avoided all danger by giving way, she will be held bound to do so, notwithstanding the rule of navigation; 6 Thornt. Adm. 600, 607; Lane v. The A. Denike, 3 Cliff. 117, Fed. Cas. No. 8,045.

All navigation rules pertinent to a given situation are to be construed together, and while each of two approaching vessels has the right to expect the other to navigate in accordance with the rules or a passing agreement, when it becomes evident that either is not doing so, it is the duty of the other to navigate accordingly and take such measures as may seem necessary to avoid a collision; U. S. v. Erie R. Co., 172 Fed. 50, 96 C. C. A. 538. But a vessel is not required to depart from the rule when she cannot do so without danger; Biggs v. Barry, 2 Curt. C. C. 363, Fed. Cas. No. 1,402; Crockett v. The Isaac Newton, 18 How. 581, 15 L. Ed. 492.

There must be a lookout properly *stationed and kept;* and under circumstances of special danger, two; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; and the absence of such a lookout is *prima facie* evidence of negligence; St. John v. Paine, 10 How. (U. S.) 557, 13 L. Ed. 537; Whitridge v. Dill, 23 How. (U. S.) 448, 16 L. Ed. 581; The Scioto, Daveis, 359, Fed. Cas. No. 12,508; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219; The Nellie Clark, 50 Fed. 585. The rule requiring a lookout admits of no exception on account of size in favor of any craft capable of committing injury; The Marion, 56 Fed. 271. The absence of a lookout is not material where the presence of one would not have availed to prevent a collision; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469. A sailing vessel is entitled to assume that a steam vessel approaching her is being navigated with a proper lookout; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219. By the International Code, rule 8, lights also must be kept; the rule was formerly otherwise in regard to vessels on the high seas; 2 W. Rob. 4; The Delaware v. The Osprey, 2 Wall. Jr. 268, Fed. Cas. No. 3,763. See NAVIGATION RULES; The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. Ed. 1058; Haney v. Packet Co., 23 How. (U. S.) 287, 16 L. Ed. 562; The Emily, 1 Blatchf. 236, Fed. Cas. No. 4,452; The Santa Claus, 1 Blatchf. 370, Fed. Cas. No. 12,326; Carsley v. White, 21 Pick. (Mass.) 254, 32 Am. Dec. 259; Simpson v. Hand, 6 Whart. (Pa.) 324, 36 Am. Dec. 231; The Havilah, 50 Fed. 331, 1 C. C. A. 519; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943. Stu. Adm. Low. C. 222, 242; 1 Thornt. Adm. 592; 6 *id.* 176; 7 *id.* 507; 2 W. Rob. 377; 3 *id.* 7, 49, 190; 1 Swab. 20, 233.

The injury to an insured vessel occasioned by a collision is a loss within the ordinary policy of insurance; 4 Ad. & E. 420; 6 N. & M. 713; Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452; Nelson v. Ins. Co., 8 Cush. (Mass.) 477, 54 Am. Dec. 776; but when the collision is occasioned by the fault of the insured vessel, or the fault of both vessels, the insurer is not ordinarily liable for the amount of the injury done to the other vessel which may be decreed against the vessel insured; 4 Ad. & E. 420; 7 E. & B. 172; 40 E. L. & Eq. 54; Mathews v. Ins. Co., 11 N. Y. 9; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 352, 14 L. Ed. 452, and cases cited; but some policies now provide that the insurer shall be liable for such a loss; 40 E. L. & Eq. 54; 7 E. & B. 172.

Damage caused to one vessel by striking

upon another vessel's anchor, is within a policy of marine insurance providing against collisions between vessels; [1901] 2 K. B. 792.

See Matsunami, Collisions between Warships and Merchant Vessels.

When the collision was without fault on either side, and occurred in a foreign country, where, in accordance with the local law, the damages were equally divided between the colliding vessels, the amount of the decree against the insured vessel for its share of the damages suffered by the other vessel was held recoverable under the ordinary policy; Peters v. Ins. Co., 14 Pet. (U. S.) 99, 10 L. Ed. 371.

The fact that the libellants in a collision case had received satisfaction from the insurers for the vessel destroyed, furnishes no ground of defence for the respondent; The Monticello v. Mollison, 17 How. (U. S.) 152, 15 L. Ed. 68.

Improper speed on the part of a steamer in a dark night, during thick weather, or in the crowded thoroughfares of commerce, will render such vessel liable for the damages occasioned by a collision; and it is no excuse for such dangerous speed that the steamer carries the mail and is under contract to convey it at a greater average speed than that complained of; 3 Hagg. Adm. 414; McCready v. Goldsmith, 18 How. (U. S.) 89, 15 L. Ed. 288; The New York v. Rea, 18 How. (U. S.) 223, 15 L. Ed. 359; Sampson v. United States, 12 Ct. Cls. (U. S.) 480; The Manistee, 7 Biss. 35, Fed. Cas. No. 9,028; The Majestic, 48 Fed. 730, 1 C. C. A. 78; Fabre v. Steamship Co., 53 Fed. 288, 3 C. C. A. 534; The Bolivia, 49 Fed. 169, 1 C. C. A. 221; The Laurence, 54 Fed. 542, 4 C. C. A. 501; The Fulda, 52 Fed. 400; The Trave, 55 Fed. 117; The Britannia, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687.

As between a steamer and a sailing vessel, the former must keep out of the way of the latter; The Java, 14 Blatch. 524, Fed. Cas. No. 7,233; The Free State, 91 U. S. 200, 23 L. Ed. 299; The Blue Jacket, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; The Havana, 54 Fed. 411; The Robert Holland, 59 Fed. 200; as between a vessel in motion and one at anchor, with proper lights, the former is ordinarily liable for a collision; The Lady Franklin, 2 Low. 220, Fed. Cas. No. 7,984; The J. W. Everman, 2 Hugh. 17, Fed. Cas. No. 7,591. Where a vessel is moored for the night according to custom along a well-known dock and not projecting beyond the wharf, if run into by a steamer in the fog, she is not at fault because she had no light set and sounded no gongs; The Express, 48 Fed. 323. A vessel at anchor in a fairway must take precautions commensurate with the danger she presents to shipping; The Europe, 175 Fed. 596.

A sailing vessel beating in the vicinity of a steam vessel is not obliged to run out her tack, provided her going about is not calculated to mislead or embarrass the steam vessel; The Coe F. Young, 49 Fed. 167, 1 C. C. A. 219.

An inexperienced oarsman is guilty of negligence in attempting to cross the path of a steamboat but a short distance in front of it; Sekerak v. Jutte, 153 Pa. 117, 25 Atl. 994. As to collisions due to the fault of a pilot, see PILOTAGE.

A cause of collision, or *collision and damage*, as it is technically called, is a suit *in rem* in the admiralty.

In the United States courts it is commenced by the filing of a libel and the arrest of the vessel to the mismanagement or fault of which the injury is imputed. In the English admiralty the suit is commenced by the arrest of the vessel and the filing of a petition. In England, the judge is usually assisted at the hearing of the cause by two of the Masters or Elder Brethren of Trinity House, or other experienced shipmasters, whose opinions upon all questions of professional skill involved in the issue are usually adopted by the court; 1 W. Rob. 471; 2 *id.* 225; 2 Chit. Genl. Pr. 514.

In the American courts of admiralty, the judge usually decides without the aid or advice of experienced shipmasters acting as assessors or advisers of the court; but the evidence of such shipmasters, *as experts*, is sometimes received in reference to questions of professional skill or nautical usage. Such evidence is not, however, admissible to establish a usage in direct violation of those general rules of navigation which have been sanctioned and established by repeated decisions; Wheeler v. The Eastern State, 2 Curt. C. C. 141, Fed. Cas. No. 17,494; The Clement, 2 Curt. C. C. 363, Fed. Cas. No. 2,879.

When a party sets up circumstances as the basis of exceptions to the general rules of navigation, he is held to strict proof; 1 W. Rob. 157, 182, 478; 6 Thornt. 607; 5 *id.* 170; 3 Hagg. Adm. 321; and courts of admiralty lean against such exceptions; 11 N. Y. Leg. Obs. 353. The admissions of a master of one of the colliding vessels subsequently to the collision are admissible in evidence; 5 E. L. & Eq. 556; and the masters and crew are admissible as witnesses; 2 Dods. 83; 2 Hagg. Adm. 145; 3 *id.* 321, 325; 1 Conkl. 384.

The general rules in regard to costs in collision cases, in the admiralty courts, are that if only one party is to blame, he pays the costs of both; if neither is to blame, and the party prosecuting had apparent cause for proceeding, each party pays his own costs, but in the absence of apparent or probable cause the libel will be dismissed with costs; if both parties are to blame, the costs of both are equally divided, or, more generally, each party is left to pay his own costs. But costs in admiralty are always in the discretion of the court, and will be given or withheld in particular cases without regard to these general rules, if the equity of the case requires a departure from them; 2 W. Rob. 213, 244; 5 Jur. 1067; 2 Conkl. 438.

"In case of collision on the high seas between ships of different nationalities, the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted, governs. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; In re State Steamship Co., 60 Fed. 1018. This rule is subject to two qualifications: (1) Persons in charge of either ship would not be open to blame for following sailing directions and rules of navigation prescribed by their own government; The Scotia, 14 Wall. [U. S.] 170, 20 L. Ed. 822. (2) If the maritime law, as administered by the nations to which the ships respectively belong, is the same in respect of a particular matter, it will, if duly proved, be followed in respect of such matter, though it differ from the maritime law as understood in the country of the litigation; The Scotland, 105 U. S. 24, 26 L. Ed. 1001." Moore's notes to Dicey, Conflict of Laws, 670. See Meili, Internat. Civil and Comm. L. 524.

See FOG; LIEN; NAVIGATION RULES.

COLLISTRIGIUM. The pillory.

COLLOCATION. In French Law. The act by which the creditors of an estate are arranged in the order in which they are to be paid according to law.

The order in which the creditors are placed is also called collocation. 2 Low. C. 9, 139.

COLLOQUIUM. A general averment in an action for slander connecting the whole publication with the previous statement. 1 Stark. Sl. 431; Heard, Lib. & Sl. 228; or stating that the whole publication applies to the plaintiff, and to the extrinsic matters alleged in his declaration. 1 Greenl. Ev. § 417.

An averment that the words were spoken "of or concerning" the plaintiff, where the words are actionable in themselves. 6 Term 162; Ellis v. Kimball, 16 Pick. (Mass.) 132; Cro. Jac. 674; or where the injurious meaning which the plaintiff assigns to the words results from some extrinsic matter, or of and concerning, or with reference to, such matter; Bloss v. Tobey, 2 Pick. (Mass.) 328; Carter v. Andrews, 16 Pick. (Mass.) 1; 11 M. & W. 287.

An averment that the words in question are spoken of or concerning some usage, report, or fact which gives to words otherwise indifferent the peculiar defamatory meaning assigned to them. Shaw, C. J., Carter v. Andrews, 16 Pick. (Mass.) 6.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the *inducement*. There must then be a *colloquium* averring that the slanderous words were spoken of or concerning this fact. Then the word "meaning," or *innuendo*, is used to connect the matters thus introduced by averments and *colloquia* with the particular words laid, showing their identity and drawing what is then the legal inference from the whole declaration, that such was, under the circumstances thus set out, the meaning of the words used. Per Shaw, C. J., Carter v. Andrews, 16 Pick. (Mass.) 6. By the Com. L. Proc. Act (1852) in England the colloquium has been rendered unnecessary. See INNUENDO; Odger, Lib. & Sl.

COLLUSION. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law.

Collusion and fraud of every kind vitiate all acts which are infected with them, and render them void. See 3 Hagg. Eccl. 130, 133; McKay v. Williams, 67 Mich. 547, 35 N. W. 159, 11 Am. St. Rep. 597; Winter v. Truax, 87 Mich. 324, 49 N. W. 604, 24 Am. St. Rep. 160; 2 Greenl. Ev. § 51; Bousquet, Dict. *Abordage.*

In Divorce Law. An agreement between a husband and wife that one of them will commit or appear to commit a breach of matrimonial duties in order that the other may obtain a remedy at law as for a real injury. 2 Wait, Act. & Def. 591; 2 Lev. & Tr. 302; L. R. 1 P. & M. 121. See Reed v. Reed, 86 Mich. 600, 49 N. W. 587; Belz v. Belz, 33 Ill. App. 105. Such an agreement is a fraud upon the court where the remedy is sought; Hopkins v. Hopkins, 39 Wis. 167; and will bar a divorce; L. R. 1 P. & M. 121; 2 Bish. Mar. Div. & Sep. 251.

"The authorities are uniform in holding that any contract between the parties, having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in the pending action for divorce to withdraw his or her opposition and to make no defense, is void as *contra bonos mores*, and any note given in consideration thereof is void." Adams v. Adams, 25 Minn. 72; Weeks v. Hill, 38 N. H. 199. This was quoted by Sulzberger, J., in Pietz v. Pietz, 20 Dist. R. (Pa.) 311. The fact that defendant voluntarily appears, without service, and makes no defense, is not of itself collusion, but the court will, in such case, narrowly examine the evidence; Lyon v. Lyon, 13 Dist. Rep. (Pa.) 623. A mere mutual desire to be divorced will not defeat the granting of the decree when there is no collusion between the parties for the purpose of making evidence; Taylor v. Taylor, 35 Pa. Co. Ct. 385. In Dunbar v. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, while the husband and wife were living apart, the husband told the wife that if she would not contest divorce proceedings he would make provision for her support. The court, in holding that a bond for such provision was not discharged in bankruptcy, said that it might be considered as in the nature of an ordinary alimony decree.

COLONIAL LAWS. The laws of a colony.

In the United States the term is used to designate the body of law in force in the colonies of America at the time of the com-

mencement of our independence, which was, in general, the common law of England, with such modifications as the colonial experience had introduced. The colonial law is thus a transition state through which our present law is derived from the English common law.

In England the term colonial law is used with reference to the present colonies of that realm. See COLONY.

COLONUS (Lat.). **In Civil Law.** A serf attached to the soil and whose descendants so continued. Whilst the *coloni* were not really *servi*, and in many respects were held to be *ingenui*, they were not permitted to remove from the place on which they were born into this status. They paid rent to the owner of the land and generally in kind. Those who were *coloni liberi* had well-ascertained rights of property as against the owner of the land, and were subject to few other obligations; while another class, called *censiti*, had no property, and what they might acquire was acquired for the master. Howe, Civ. L. (2d ed.) 152.

It is thought by Spence not improbable that many of the *ceorls* were descended from the *coloni* brought over by the Romans. The names of the *coloni* and their families were all recorded in the archives of the colony or district. Hence they were called *adscriptitii*. 1 Spence, Eq. Jur. 51.

COLONY. A union of citizens or subjects who have left their country to people another, and remain subject to the mother-country. U. S. v. The Nancy, 3 Wash. C. C. 287, Fed. Cas. No. 15,854.

A tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region. quoted by J. B. Thayer (Legal Essays 166) from Prof. Hart.

In conquered or ceded countries, their laws remain in force until changed, but where a colony is planted in an uninhabited country, the colonists carry with them all the English laws that are applicable to their condition; 1 Steph. Com. 62.

The country occupied by the colonists.

A colony differs from a possession or a dependency. See DEPENDENCY.

A province of Canada is not a British colony or dependency; [1911] 2 Ch. 58.

See Burge, Colonial Laws, by Renton & Phillimore.

COLOR. In Pleading. An apparent but legally insufficient ground of action admitted to subsist in the opposite party by the pleading of one of the parties to an action. 3 Bla. Com. 309; 4 B. & C. 547. To give color is to give the plaintiff credit for having an apparent or *prima facie* right of action, independent of the matter introduced to destroy it, in order to introduce new matter in avoidance of the declaration. It was necessary that all pleadings in confession and avoidance should give color. See 3 Bla. Com. 309, n.; 1 Chit. Pl. 531.

Express color is a feigned matter pleaded by the defendant, from which the plaintiff seems to have a good cause, whereas he has in truth only an appearance or color of cause. Bacon, Abr. *Trespass*, I, 4; 1 Chit. Pl. 530. It was not allowed in the plaintiff to traverse the colorable right thus given; and it thus became necessary to answer the plea on which the defendant intended to rely.

Implied color is that which arises from the nature of the defence; as where the defence consists of matter of law, the facts being admitted but their legal sufficiency denied by matters alleged in the plea. 1 Chit. Pl. 528; Steph. Pl. 206.

By giving color the defendant could remove the decision of the case from before a jury and introduce matter in a special plea, which would otherwise oblige him to plead the general issue; 3 Bla. Com. 309.

The colorable right must be plausible or afford a supposititious right such as might induce an unlearned person to imagine it sufficient, and yet it must be in legal strictness inadequate to defeat the defendant's title as shown in the plea; Comyns, Dig. *Pleading;* Keilw. 1036; 1 Chit. Pl. 531; 4 Dane, Abr. 552; Archb. Pl. 211.

COLOR OF OFFICE. A pretence of official right to do an act made by one who has no such right. 9 East 364. Such person must be at least a *de facto* officer; Burrall v. Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582.

An act wrongfully done by an officer, under the pretended authority of his office, and grounded upon corruption, to which the office is a mere shadow of color. Griffiths v. Hardenbergh, 41 N. Y. 464.

COLOR OF TITLE. In Ejectment. An apparent title to land founded upon a written instrument, such as a deed, levy of execution, decree of court, or the like. 3 Wait, Act. & Def. 17; Brooks v. Bruyn, 35 Ill. 394; Torrey v. Forbes, 94 Ala. 135, 10 South. 320. Color of title, for the purpose of adverse possession under the statute of limitations, is that which has the semblance or appearance of title, legal or equitable, but which, in fact, is no title; Sharp v. Furnace Co., 100 Va. 27, 40 S. E. 103; that which is a title in appearance, but not in reality; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95; Dickens v. Barnes, 79 N. C. 490; Cameron v. U. S., 148 U. S. 301, 13 Sup. Ct. 595, 37 L. Ed. 459; Lindt v. Uihlein, 116 Ia. 48, 89 N. W. 214; an apparent right; Newlin v. Rogers, 6 Kan. App. 910, 51 Pac. 315; a title *prima facie* good; Farley v. Smith, 39 Ala. 38; Converse v. R. Co., 195 Ill. 204, 62 N. E. 887.

A writing upon its face professing to pass title, but which does not do so, either from

a want of title in the person making it, or from the defective conveyance used; a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law; Williamson v. Tison, 99 Ga. 792, 26 S. E. 766; Head v. Phillips, 70 Ark. 432, 68 S. W. 878; Bloom v. Straus, 70 Ark. 483, 69 S. W. 549, 72 S. W. 563.

It has been held to be wholly immaterial how imperfect or defective the writing may be, considered as a deed; if it is in writing, and defines the extent of the claim, it is a sign, semblance or claim of title; Street v. Collier, 118 Ga. 470, 45 S. E. 294; Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. 527; that strictly speaking it cannot rest in parol, see Armijo v. Armijo, 4 N. M. (Gild.) 57, 13 Pac. 92.

A state grant of land, included in an older grant, is color of title; Weaver v. Love, 146 N. C. 414, 59 S. E. 1041; so of a writing signed by the heirs of an owner of lands allotting them to two of their number and relinquishing their own right thereto; Henry v. Brown, 143 Ala. 446, 39 South. 325; and a patent, whether good against the sovereign or void; Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633; and a record of proceedings in partition; Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811.

Color of title and claim of right are not synonymous terms; Herbert v. Hanrick, 16 Ala. 581. "Claim of title" does not necessarily include "color of title"; Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901. To constitute color of title, there must be a paper title; but claim of title may rest wholly in parol; Hamilton v. Wright, 30 Ia. 480. It has been held that, to give color of title, a conveyance must describe the property; Packard v. Moss, 68 Cal. 123, 8 Pac. 818; Wood v. Conrad, 2 S. D. 334, 50 N. W. 95; that it must designate a specified interest in the land; Etowah, etc., Mining Co. v. Parker, 73 Ga. 53; Wilson v. Johnson, 145 Ind. 40, 38 N. E. 38, 43 N. E. 930.

A tax deed, though void for failure to comply with the statutes, affords color of title; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; City of Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; Van Gunden v. Iron Co., 52 Fed. 838, 3 C. C. A. 294. To give color, the conveyance, etc., must be good in form, and profess to convey the title and be duly executed; La Frombois v. Jackson, 8 Cow. (N. Y.) 589, 18 Am. Dec. 463; Latta v. Clifford, 47 Fed. 614; Irey v. Markey, 132 Ind. 546, 32 N. E. 309; but a deed to a tenant in possession from one who has no title to the land is insufficient as a basis for adverse possession; McRoberts v. Bergman, 132 N. Y. 73, 30 N. E. 261. A conveyance void on its face is not sufficient; Moore v. Brown, 11 How. (U. S.) 424, 13 L. Ed. 751; Marsh v. Weir, 21 Tex. 97. An entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another; McCall v. Meely, 3 Watts (Pa.) 72. A quit-claim deed is sufficient color of title to support a plea of title by limitation; Parker v. Newberry, 83 Tex. 428, 18 S. W. 815. The deed, or color of title, under which a person takes possession of land, serves to define specifically the boundaries of his claims; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475. When a disseisor enters upon and cultivates part of a tract, he does not thereby hold possession of the whole tract constructively, unless this entry was by color of title by specific boundaries to the whole tract; color of title, is valuable only so far as it indicates the extent of the disseisor's claim; Ege v. Medlar, 82 Pa. 99. See Allen v. Mansfield, 108 Mo. 343, 18 S. W. 901; Sholl v. Coal Co., 139 Ill. 21, 28 N. E. 748. A person taking lands under a judicial sale, though void, has color of title; Irey v. Mater, 134 Ind. 238, 33 N. E. 1018; Mullan's Adm'r v. Carper, 37 W. Va. 215, 16 S. E. 527.

See 15 L. R. A. (N. S.) 1178, note; ADVERSE POSSESSION.

COLORADO. One of the United States of America, being the twenty-fifth state admitted into the Union.

The territory of which it is composed was ceded by the treaties with France in 1803, and Mexico in 1848. The enabling act was approved March 3, 1875, and the state was finally admitted August 1, 1876. The Constitution was adopted in Convention March 14, 1876, and ratified July 1, 1876. It was amended in 1902. See CALIFORNIA; LOUISIANA.

Jan. 22, 1913, article XXI added to the Constitution providing for recall from office of public officials, and section 1, article VI, amended by providing for the recall of decisions and section 6, article XX, amended by giving home rule to cities and towns.

COLORE OFFICII. By color of office.

COLORED PERSON. This term generally refers to one of the negro race.

There is no legal technical signification to this phrase which the courts are bound judicially to know; Pauska v. Daus, 31 Tex. 74. See NEGRO.

COLT. An animal of the horse species, whether male or female, not more than four years old. Russ. & R. 416.

COMBAT. The form of a forcible encounter between two or more persons or bodies of men; an engagement or battle. A duel.

COMBINATION. A union of men for the purpose of violating the law. See STRIKE; BOYCOTT; RESTRAINT OF TRADE; CONSPIRACY.

A union of different elements. A patent may be taken out for a new combination of existing machines; Moody v. Fiske, 2 Mas. 112, Fed. Cas. No. 9,745. See PATENTS.

COMBUSTIO DOMORUM. Arson. 4 Bla. Com. 272.

COMBUSTIO PECUNIÆ. Burning of money; the ancient method of testing mixed and corrupt money paid into the exchequer, by melting it down. Black, L. Dict.

COMES. In Pleading. A word used in a plea or answer which indicates the presence in court of the defendant.

In a plea, the defendant says, "And the said C D, by E F, his attorney, *comes*, and defends," etc. The word comes, *venit*, expresses the appearance of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as, in strictness, constituting a part of the plea; 1 Chit. Pl. 411; Steph. Pl. 432.

COMES (Lat. *comes*, a companion). An earl. A companion, attendant, or follower.

By Spelman the word is said to have been first used to denote the companions or attendants of the Roman proconsuls when they went to their provinces. It came to have a very extended application, denoting a title of honor generally, always preserving this generic signification of companion of, or attendant on, one of superior rank.

Among the Germans the comites accompanied the kings on their journeys made for the purpose of hearing complaints and giving decisions. They acted in the character of assistant judges. Tacitus *de Mor. Germ.* cap. 11, 12; 1 Spence, Eq. Jur. 66; Spelman, Gloss. Among the Anglo-Saxons, the *comites* were the great vassals of the king, who attended, as well as those of inferior degree, at the great councils or courts of their kings. The term included also the vassals of those chiefs, 1 Spence, Eq. Jur. 42. *Comitatus*, county, is derived from *comes*, the earl or earlderman to whom the government of the district was intrusted. This authority he usually exercised through the *vice-comes*, or *shire reeve* (whence our *sheriff*). The *comites* of Chester, Durham, and Lancaster maintained an almost royal state and authority; and these counties have obtained the title of palatine; 1 Bla. Com. 116; COUNTY PALATINE. The title of earl or comes has now become a mere shadow, as all the authority is exercised by the sheriff *(vice-comes)*; 1 Bla. Com. 398.

COMITAS (Lat.). Courtesy; comity. An indulgence or favor granted another nation, as a mere matter of indulgence, without any claim of right made.

COMITATUS (Lat. from *comes*). A county. A shire. The portion of the country under the government of a *comes* or count. 1 Bla. Com. 116.

An earldom. Earls and counts were originally the same as the *comitates*. 1 Ld. Raym. 13.

The county court, of great dignity among the Saxons. 1 Spence, Eq. Jur. 42, 66.

The retinue which accompanied a Roman proconsul to his province. Du Cange. A body of followers; a prince's retinue. Spelman, Gloss.

The *comitatus* was the personal following of professional warriors. Taylor, Jurispr. 216.

COMITES. Persons who are attached to a public minister. As to their privileges, see Respublica v. De Longchamps, 1 Dall. (Pa.) 117, 1 L. Ed. 59; U. S. v. Benner, Baldw. 240, Fed. Cas. No. 14,568; AMBASSADOR.

COMITIA (Lat.). The public assemblies of the Roman people at which all the most important business of the state was transacted, including in some cases even the trial of persons charged with the commission of crime. Anthon, Rom. Antiq. 51.

COMITIA CALATA. A session of the *comitia curiata* for the purpose of *adrogation*, the confirmation of wills, and the adoption by an heir of the sacred rites which followed the inheritance.

COMITIA CENTURIATA (called, also, *comitia majora*). An assemblage of the people voting by centuries. The people acting in this form elected their own officers, and exercised an extensive jurisdiction for the trial of crimes. Anthon, Rom. Antiq. 52.

COMITIA CURIATA. An assemblage of all adult male citizens. In these assemblies no one of the *plebs* could vote. They were held for the purpose of confirming matters acted on by the senate, for electing certain high officers, and for carrying out certain religious observances. A majority of the votes of the curiæ (see CURIA) determined the result after the roll of each curia had been determined by a majority of its members. Taylor, Jurispr. 56.

COMITIA TRIBUTA. Assemblies to create certain inferior magistrates, elect priests, make laws, and hold trials. Their power was increased very materially subsequently to their first creation, and the range of subjects acted on became much more extensive than at first. Anthon, Rom. Antiq. 62; 1 Kent 518.

COMITY. A term designating the practice by which one court follows the decision of another court on a like question, though not bound by the law of precedents to do so. The question most frequently arises among the federal courts of different circuits.

The importance of securing uniformity in the law as administered in the several circuits in patent cases is so great that a decision of a court of co-ordinate jurisdiction should be followed by this court in every case where the question as presented can fairly be regarded as doubtful; Gormley & Jeffery Fire Co. v. U. S. Agency, 177 Fed. 691, 101 C. C. A. 479; Pratt v. Wright, 65 Fed. 99; Enterprise Mfg. Co. v. Deisler, 46 Fed. 855.

A decision of the circuit court and the circuit court of appeals, derived from the official reports upon the point in issue (profits in a patent case) would be of controlling weight in another circuit court of appeals both on the ground of comity and also as adjudications entitled to the greatest respect; Taft, C. J., in National Folding-Box & Paper Co. v. Novelty Co., 95 Fed. 996.

A circuit court should, in the orderly administration of the law, follow the ruling of a circuit court of appeals in another circuit; Coxe, J., in Hale v. Hilliker, 109 Fed. 273; but the courts of one circuit are not controlled by the views of a patent taken by the courts of another circuit, nor absolved from an independent examination of the questions

involved; Archbald, J., in Cimiotti Unhairing Co. v. Fur Refining Co., 120 Fed. 672; the district court may decline to follow the weight of authority in the lower federal courts; McPherson, J., in U. S. v. Exp. Co., 119 Fed. 240.

The circuit court of appeals will follow the decision of another circuit court of appeals unless under especially exceptional circumstances; Pittsburgh Rys. Co. v. Sullivan, 166 Fed. 750, 92 C. C. A. 429; U. S. v. F. A. Marsily & Co., 165 Fed. 186, 91 C. C. A. 220; In re Baird, 154 Fed. 215; Gill v. Austin, 157 Fed. 234, 84 C. C. A. 677.

"Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. . . . Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so the judge is bound to determine them according to his own convictions. . . . It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law." Mast, Foos & Co. v. Mfg. Co., 177 U. S. 485, 488, 20 Sup. Ct. 708, 44 L. Ed. 856.

Where questions on an important patent had been decided in two circuits, the Supreme Court felt itself "bound to defer somewhat to this unanimity of opinion on the part of so many learned and distinguished judges"; Hobbs v. Beach, 180 U. S. 389, 21 Sup. Ct. 409, 45 L. Ed. 586.

In the seventh circuit decisions in patent cases in other circuits will not be followed, but each case will stand on its own merits; Welsbach Light Co. v. Gaslight Co., 100 Fed. 648.

There is no statute or common law rule by which one court is bound to abide by the decisions of another court of equal rank. It does so simply for what may be called comity among judges. There is no common law or statutory rule to oblige a court to bow to its own decisions; it does so on the ground of judicial comity; (1884) 9 P. D. 98, per Brett, M. R.

The doctrine has no application to foreign corporations. It "was not established for the purpose of giving to any state an unlimited power to dispose of the franchise of acting in a corporate capacity in other states. To obtain a charter for the purpose of evading the laws of a foreign state, under cover of the rule of comity, would be a fraud upon the state granting the charter; and to attempt to act under such charter in a foreign state would be a fraud upon the latter;" National Lead Co. v. Paint Store Co., 80 Mo. App. 247, 271.

It would seem that the use of the term "comity" in connection with cases where a court of one state under the rule of the conflict of laws adjudicates a case upon the law of another state is not correct. When a case involves a transaction in another jurisdiction and is properly decided upon the law of that other jurisdiction, under well settled rules of the conflict of laws, the law of that other jurisdiction is applied as a matter of right, and not upon the ground of comity.

Of this use of the term Mr. Dicey says: "The term 'comity,' as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor."

Cases such as the following may perhaps illustrate another class not included in either of the above classes: "A court of equity in one state may enjoin parties from proceeding in a court of law in another state; but on principles of courtesy, and perhaps of policy, this power should not be exercised where the court of law has a concurrent jurisdiction, which was first assumed and exercised over the subject matter, unless there should exist some peculiar equitable ground for so doing." Bank of Bellows Falls v. R. Co., 28 Vt. 470.

COMITY OF NATIONS. The most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and it is inadmissible when it is contrary to its known policy, or prejudicial to its interests. In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of the municipal law are ascertained and guided. Story, Confl. L. § 38.

COMMANDER-IN-CHIEF. The president is made commander-in-chief of the army and navy of the United States and of the militia when in actual service, by art. ii. § 2 of the constitution.

COMMANDITE. In French Law. A partnership in which some furnish money, and others furnish their skill and labor in place of capital. A special or limited partnership.

Those who embark capital in such a partnership are bound only to the extent of the capital so invested; Guyot, *Rép. Univ.*

The business being carried on in the name of

some of the partners only, it is said to be just that those who are unknown should lose only the capital which they have invested, from which alone they can receive an advantage. Under the name of limited partnerships, such arrangements are now allowed by many of the states; although no such partnerships are recognized at common law. Troubat, Lim. Partn. cc. 3, 4.

The term includes a partnership containing *dormant* rather than *special* partners. Story, Partn. § 109.

COMMENCEMENT OF A DECLARATION. That part of the declaration which follows the venue and precedes the circumstantial statement of the cause of action. It formerly contained a statement of the names of the parties, and the character in which they sue or are sued, if any other than their natural capacity; of the mode in which the defendant had been brought into court, and a brief statement of the form of action. In modern practice, however, in most cases, little else than the names and character of the parties is contained in the commencement.

COMMENDA. In French Law. The delivery of a benefice to one who cannot hold the legal title, to keep and manage it for a time limited and render an account of the proceeds. Guyot, *Rép. Univ.*

In Mercantile Law. An association in which the management of the property was intrusted to individuals. Troubat, Lim. Partn. c. 3, § 27.

COMMENDAM. In Ecclesiastical Law. The appointment of a suitable clerk to hold a void or vacant benefice or church living until a regular pastor be appointed. Hob. 144; Latch 236.

In Louisiana. A species of limited partnership.

It is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is funished, in his or their own name or firm, on condition of receiving a share in the profits in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished, and no more. A similar partnership exists in France. *Code de Comm.* 26, 33; Sirey, 12, pt. 2, p. 25. He who makes this contract is called, in respect to those to whom he makes the advance of capital, a partner *in commendam*. La. Civ. Code, art. 2811.

See also Mitchell, in 3 Sel. Essays, Anglo-Amer. L. H. 183.

COMMENDATORS. In Ecclesiastical Law. Secular persons upon whom ecclesiastical benefices are bestowed. So called because they are commended and intrusted to their oversight. They are merely trustees.

COMMENDATORY LETTERS. In Ecclesiastical Law. Such as are written by one bishop to another on behalf of any of the clergy or others of his diocese travelling thither, that they may be received among the faithful; or that the clerk may be promoted; or necessaries administered to others. Wharton.

COMMENDATUS. In Feudal Law. One who by voluntary homage puts himself under the protection of a superior lord. Cowell; Spelman, Gloss.

COMMERCE. The various agreements which have for their object facilitating the exchange of the products of the earth or the industry of man, with an intent to realize a profit. Pardessus, *Dr. Com.* n. 1. Any reciprocal agreements between two persons, by which one delivers to the other a thing, which the latter accepts, and for which he pays a consideration: if the consideration be money, it is called a sale; if any other thing than money, it is called exchange or barter. Domat, *Dr. Pub.* liv. 1, tit. 7, s. 1, n. 2.

"Commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several states, but not to that commerce 'completely internal, which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states.'" Harlan, J., in Adair v. U. S., 208 U. S. 161, 177, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764.

It has been frequently said by the Supreme Court that commerce includes intercourse, though usually the term is qualified as "commercial intercourse"; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; U. S. v. E. C. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; Welton v. Missouri, 91 U. S. 275, 280, 23 L. Ed. 347; Pensacola Telegraph Co. v. Western Telegraph Co., 96 U. S. 1, 9, 24 L. Ed. 708; Mobile County v. Kimball, 102 U. S. 691, 702, 26 L. Ed. 238 (where the phrase is "intercourse and traffic"); Addyston Pipe & Steel Co. v. U. S., 175 U. S. 211, 241, 20 Sup. Ct. 96, 44 L. Ed. 136; Lindsay & P. Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400; Interstate Commerce Commission v. Brimson, 154 U. S. 447, 470, 14 Sup. Ct. 1125, 38 L. Ed. 1047; Lottery Case, 188 U. S. 321, 346, 23 Sup. Ct. 321, 47 L. Ed. 492. The first expression of this was by Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; quoted by Fuller, C. J., in U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325; and characterized by White, J., as a "luminous definition" in Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, to the effect that commerce is something more than traffic; "it is intercourse; it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." This has been practically, if not literally, quoted in all the cases cited. There is nothing in the decisions to define or limit so broad a term as intercourse, except the word com-

mercial, usually attached to it. As it is hardly likely that the courts intended to say that commerce is intercourse in the sense in which it is defined "communication between persons or places"; Cent. Dict.; it is probable that the word was not intended to be used to express more than such intercourse as is connected with traffic and transportation with foreign countries or between the states.

"The word 'commerce' is undoubtedly, in its usual sense, a larger word than 'trade,' in its usual sense. Sometimes 'commerce' is used to embrace less than 'trade' and sometimes 'trade' is used to embrace as much as 'commerce.' They are . . . in this statute (Sherman Act) synonymous;" U. S. v. Patterson, 55 Fed. 605, 639.

"The term 'commerce' comprehends more than a mere exchange of goods; it embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land;" In re Second Employers' Liability Cases, 223 U. S. 1, 46, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; the "movement of persons as well as of property;" Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 43 L. R. A. (N. S.) 906.

"Transportation of passengers and freight from one state to another, or through more than one state to another, or through more than one state, whether by land or water, is commerce within the meaning of" the commerce clause, "and the words of the grant comprehend every species of commercial intercourse, and the power is complete in itself, and may be exercised to its utmost extent without limitations other than such as are prescribed in the Constitution;" Sweatt v. R. Co., 3 Cliff. (U. S.) 339, 350, Fed. Cas. No. 13,684.

It includes navigation and the control of all navigable waters of the United States; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 724, 18 L. Ed. 96; quoted in Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, as well as the improvement of harbors, bays and rivers; *id.*, quoting Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238.

Commerce is not a technical legal conception, but a practical one drawn from the course of business; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

"Nothing is more complex than commerce"; 6 Webster's Wks. 8.

Retail trade as well as wholesale is included in the idea of commerce; Guckenheimer v. Sellers, 81 Fed. 1000.

Commerce takes its character as interstate or foreign when it is actually shipped or started in the course of transportation to another state or to a foreign country; Railroad Commission of Louisiana v. Ry. Co., 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. —; Reid v. R. Co., 153 N. C. 490, 69 S. E. 618. It does not end on the arrival of the train at the terminal, but the breaking up of the train and removal of goods to other trains is part of it; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. —; it continues until the delivery to the consignee; Barrett v. New York, 183 Fed. 793; *id.*, 189 Fed. 268, where in two hearings it was held that an express company taking goods from a steamer or railroad and transporting them through the street of the city to the consignee is still engaged in interstate commerce. The transportation to be effective under the commerce clause takes effect at the time when it "commences its final movement for transportation" out of the state; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 Sup. Ct. 266, 47 L. Ed. 394; in both of which cases the property was to remain within the state of departure until it was convenient to transport it; but in Ogilvie v. Crawford County, 7 Fed. 745, where it was stored awaiting transportation it was protected from taxation; Ogilvie v. Crawford County, 7 Fed. 745; and to the same effect is Standard Oil Co. v. Bachelor, 89 Ind. 1.

The decisions in cases arising under the federal Employers' Liability Act involve interesting questions as to when a workman is engaged in interstate commerce, and the test is said to be—"is the work in question a part of the interstate commerce in which the carrier is engaged?" Pedersen v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. —, citing many cases. In that case it was held that one carrying materials (bolts or rivets) to be used in repairing an instrumentality of interstate commerce (a bridge) was engaged in such commerce, although injured by an intrastate train; so also was an engineer while taking his engine from the roundhouse to the track on which were cars to be hauled by him in interstate commerce; Johnson v. Southern P. Co., 196 U. S. 1, 21, 25 Sup. Ct. 158, 49 L. Ed. 363; Lamphere v. R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156. See EMPLOYERS' LIABILITY ACT.

Contracts generally seem not to be subject to the commerce clause. It is said by a text-writer on the subject that to bring them within its scope some other element must be involved such as "transportation of property or transmission of intelligence, as by telegraph"; Cooke, Com. Cl. § 6.

Insurance is not commerce; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357; Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Noble v. Mitchell, 164 U. S. 367, 17 Sup. Ct. 110, 41 L. Ed. 472; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; New York Life Ins. Co. v. Deer Lodge County, 231 U. S. —, 34 Sup. Ct. 167, 58 L. Ed. —, decided Dec. 15, 1913, but not yet officially reported; nor are contracts for per-

sonal services between persons in different states; Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186; Smith v. Jackson, 103 Tenn. 673, 54 S. W. 981, 47 L. R. A. 416; though Boothe v. King, 71 Ala. 499, seems *contra*.

Congress has power by the constitution to regulate commerce with foreign nations and among the several states, and with the Indian tribes; Const. U. S. Art. I, § 8; 1 Kent 431; Story, Const. § 1052.

The power conferred upon congress by the above clause is exclusive, so far as it relates to matters within its purview which are national in their character, and admit of a requisite uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

Such power is not restricted by state authority; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; but a state statute, which conflicts with the actual exercise of the powers of congress, must give way to the supremacy of the national authority; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508.

The power to regulate commerce with the Indian tribes which is included in the commerce clause may cover sales and transportation entirely within a state; U. S. v. Holliday, 3 Wall. (U. S.) 407, 18 L. Ed. 182 (which was outside of any reservation); or by an Indian to another; U. S. v. Shaw-Mux, 2 Sawy. 364, Fed. Cas. 16,268; but not a sale to an Indian who had acquired citizenship; In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848; and see Farrell v. U. S., 110 Fed. 942, 49 C. C. A. 183, which must be considered as overruled by the Supreme Court case. Under the protection of this clause a state tax on goods of a trader with the Indians was void; Foster v. Board of County Com'rs, 7 Minn. 140 (Gil. 84); but a contract between a state and Indians was not; In re Narragansett Indians, 20 R. I. 715, 40 Atl. 347.

The Constitutional Power of Regulation. The power of congress to regulate foreign commerce is complete in itself and no individual has a vested right to trade with foreign nations otherwise than subject to the power of congress to determine what and on what terms articles may be imported; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; while every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, so far as to compel it to respect the rules for such commerce lawfully established by congress; Northern Securities Co. v. U. S., 193 U. S. 350, 24 Sup. Ct. 436, 48 L. Ed. 679.

The right to carry on interstate commerce is not derived from the state but is a constitutional right of every citizen of the United States, and congress alone can limit the right of corporations to engage in it; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; Ludwig v. Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, where it was also held that a company doing interstate business does not require permission of the state to enter it.

The power of congress over interstate commerce includes not only imposing regulations but insuring their efficiency; Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

In the Second Employers' Liability Case, 223 U. S. 1, 46, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (opinion by Van Devanter, J.), the court enunciated six distinct propositions as having become "so firmly settled as no longer to be open to dispute," with respect to the construction and enforcement of the federal power to regulate interstate commerce and to enact such legislation as might be necessary for that purpose:

"1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on by water or by land.

"2. The phrase 'among the several states' marks the distinction, for the purpose of governmental regulation, between commerce which concerns two or more states and commerce which is confined to a single state and does not affect other states, the power to regulate the former being conferred upon congress and the regulation of the latter remaining with the states severally.

"3. 'To regulate,' in the sense intended, is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large.

"4. This power over commerce among the states, so conferred upon congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

"5. Among the instruments and agents to which the power extends are the railroads over which transportation from one state to another is conducted, the engines and cars by which such transportation is affected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employés.

"6. The duties of common carriers in respect of the safety of their employés, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce and therefore are within the range of this power."

In the Covington Bridge Case, Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, the Supreme Court cases with respect to the power of the states over commerce have been divided into three classes, which division is repeated in Southern R. Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257:

First, those in which the power of the state is exclusive. (Cases in which this power may be exercised by the states are enumerated *infra* under the subtitle "*When the State Power is Exclusive.*")

Second, those in which the states may act in the absence of legislation by congress. In the case cited, it is said that these cases embrace what may be termed "concurrent jurisdiction," but it does not appear that such jurisdiction ever exists, because the power of the states is terminated instantly by legislation of congress on the subject. (See *infra*, under subtitle "*State Action Valid in Case of Non-Action by Congress.*")

Third, cases in which the action of congress is exclusive and the states cannot act at all. (See *infra*, under subtitle "*When the Power of Congress is Exclusive.*")

Neither this, nor in fact any other, classification of cases is satisfactory, nor is there any one of them which has been uniformly adhered to by the Supreme Court.

It may probably be fairly stated as the result of the decisions on the commerce clause that while the states have exclusive jurisdiction of certain local matters, which are controlled by virtue of its reserved police power, and they have also exclusive control of intrastate commerce, the clause of the constitution under consideration gives to congress absolute control of interstate and foreign commerce, to become at its will exclusive of all other authority. Upon many subjects affecting this commerce, the states do legislate and their statutes are held valid, but this is solely because congress has not acted, and once it does so, the power of the state ends. State legislation is not forbidden in matters either local in their operation, or intended to be mere aids to commerce, for which special regulations can more effectually provide, such as harbors, pilotage, beacons, buoys, and other improvements of harbors, bays, and rivers within a state, if their free navigation be not thereby impaired; congress by its inaction in such matters virtually declares that till it deems best to act, they may be controlled by the states; County of Mobile v. Kimball, 102 U. S. 691, 26 L. Ed. 238, per Field, J. As to certain subjects the power of congress is exclusive, and the states cannot interfere in any case, and the line of distinction is plainly marked. The cases in which the state may act so long as congress does not, are those which relate to matters of local concern, and which do not require a general uniform regulation applying to the whole country; Rhea v. R. Co., 50 Fed. 16; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959. On the other hand, as to all matters affecting interstate commerce, directly or indirectly, national in character and requiring a uniform system or regulation throughout the country, the power of congress to regulate them is exclusive. This in brief seems to be the result of the decisions, which will be found cited in this title under the various subdivisions of the subject. The distinction between cases where the state may or may not act in case of non-action by congress, is well expressed in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, to this effect: The power to regulate it between the states is a unit, but the states may legislate with regard to it in view of local needs and circumstances where particular subjects within its operation do not require the application of a general or uniform system, but where the subject does require a uniform system, as between the states, the power is exclusively in congress and cannot be encroached upon by the states. In that very leading case it was held that the right of importation of intoxicating liquors from one state to another includes the right of sale in the original packages at the place where the importation terminates; so also; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150.

It is to be noted, however, in connection with this classification of the cases, that there are many instances in which congress does act upon that intrastate commerce which is primarily within the control of the states, particularly in the case of railroads. The operation of a purely intrastate train may be so bound up with the operation of interstate trains or instrumentalities of interstate commerce, that in substance their operation is one and the same thing, and necessarily the subject of one and the same source of regulation. Of such a character are, e. g. examination of eyesight of employés, character of switches, of rails, of interlocking devices, all of which, and the like, are so connected with the operation of the railroad as an entirety, that they constitute but a single subject of governmental regulation, which, as it cannot go to both state and general government, goes, of course, when it acts, to the latter; Wabash R. Co. v. U. S., 168 Fed. 1, 93 C. C. A. 393, where the Safety Appliance Act of March 2, 1903, is held constitutional and to apply to all carriers of interstate commerce, whether

the cars and trains are operated between points in the same state, are empty, or the traffic carried is wholly intrastate. The movement of a car on a private switch used for transporting cars in interstate commerce is within the operation of that act; Gray v. R. Co., 197 Fed. 874; and so also is one used between points in the same state by a carrier engaged in interstate commerce; U. S. v. Ry. Co., 164 Fed. 347.

The commercial clause includes authority to regulate navigation in aid of commerce and to make improvements in navigable waters, such as building a lighthouse in the bed of a stream or requiring navigators of a stream to follow a prescribed course, or directing the water of a navigable stream from one channel to another; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782. See also U. S. v. Duluth, 1 Dill. 469, Fed. Cas. No. 15,001.

Congress may construct or authorize the construction of railroads across the states and territories; California v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; and highways, including canals, and outside of state lines; Wilson v. Shaw, 204 U. S. 24, 27 Sup. Ct. 233, 51 L. Ed. 351, where the power of congress to construct the Panama Canal was affirmed.

The powers conferred upon congress to regulate commerce among the several states, are not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keep pace with the progress of the country, and adapt themselves to new developments of time and circumstances. Accordingly, the power of regulation is applied to much subject-matter unknown at the date of the adoption of the constitution. In addition to those things commonly understood to be included in the definitions of commerce, *supra*, it has been extended to sleeping and parlor cars; Allen v. Pullman Co., 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 134; refrigerator cars; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 20 Sup. Ct. 631, 44 L. Ed. 708; express companies; Osborne v. Florida, 164 U. S. 650, 17 Sup. Ct. 214, 41 L. Ed. 586; telegraph and telephone; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; Western Union Telegraph Co. v. Missouri, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; business correspondence schools; International Text Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; a herd of sheep driven from one state across another to a point in a third for shipment; Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; natural gas, after severance from the ground; Haskell v. Gas Co., 224 U. S. 217, 32 Sup. Ct. 442, 56 L. Ed. 738; State v. Gas & Mining Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; the transmission of lottery tickets between states; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. As to goods, intrastate carriage *in transitu* to another state, is interstate commerce; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; the ultimate destination prevails; Houston Direct Nav. Co. v. Ins. Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; if the shipment partially intrastate is *bona fide* it is not interstate, but otherwise if a mere subterfuge to benefit *pro tanto* by reduced state rates; Gulf, C. & S. F. Ry. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540.

Interstate commerce by sea is of a national character and within the exclusive power of congress; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; and so is transportation from a point in one state to or through another or other states, and it is commerce among the states even as to the part of the journey within the state; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. Where the railroad runs for a few miles out of a state and back the carriage is interstate commerce; Hanley v. Ry. Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333; so of a vessel between two ports of the same state passing more than a marine league from shore; Pacific Coast S. S. Co. v. R. Com'rs, 18 Fed. 10. Prior to the decision of the Supreme Court, the state courts were divided; Sternberger v. R. Co., 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105, agreeing with it, and State v. Telegraph Co., 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570, *contra*; it was, however, held that when a passenger (whose ultimate destination is to a place in another state) purchases a ticket to a point within the state and then another to his destination, his first purchase was intrastate commerce to which state rates apply; Kansas City S. R. Co. v. Brooks, 84 Ark. 233, 105 S. W. 93.

A grain elevator engaged in the business of storing grain in the course of interstate transportation is not engaged in interstate commerce; W. W. Cargill Co. v. Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619; People v. Miller, 84 App. Div. 174, 82 N. Y. Supp. 582, where Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247, and Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, were cited with the comment that in each of them the point was a minor one and did not receive full consideration, and upon that point they had been much criticized. So it was held that coal mined in one state and sent into another to await shipment to purchasers was not exempt from state taxation as subject-matter of interstate commerce; Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction, 75 N. J. L. 922, 68 Atl. 806, 15 L. R. A. (N. S.) 514.

The commodities clause of the Hepburn Act, *q. v.*, is a regulation of commerce with-

in the power of congress to enact, and its power to regulate interstate commerce does not require that the regulation should apply to all commodities alike, nor does an exception of one invalidate it; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

The Employers' Liability Act of June 11, 1906, providing that every common carrier engaged in trade and commerce in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of any of its employés which may result from the negligence of any of its officers, agents or employés was held to be a regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of congress to enact; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, four Justices dissenting. As to the case of the Second Employers' Liability Act of 1908, see *supra*.

Transportation in and out of the state is interstate commerce. A railroad entirely in a state, but a connecting link of interstate roads, is engaged in interstate commerce; Houston Direct Nav. Co. v. Ins. Co., 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; but an interstate shipment (in this case, of car load lots) on reaching the point designated in the original contract of transportation ceases to be an interstate shipment, and its further transportation to another point within the same state, on the order of the consignee, is controlled by the law of the state and not by the interstate commerce act; Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. Shipments of lumber on local bills of lading from one point in a state to another point in the same state destined from the beginning for export, are foreign and not intrastate commerce; De Bary & Co. v. Louisiana, 227 U. S. 108, 33 Sup. Ct. 239, 57 L. Ed. ——; following Southern Pac. Terminal Co. v. Commerce Commission, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 310; Railroad Commission of Ohio v. R. Co., 225 U. S. 101, 32 Sup. Ct. 653, 56 L. Ed. 1004; distinguishing Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540.

When the Power of Congress is Exclusive. The power of congress over interstate commerce "is necessarily exclusive whenever the subject-matter is national in its character and properly admits of only one uniform system," and in such cases non-action by congress is equivalent to a declaration that it shall be free and untrammelled; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 336, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Robbins v. Taxing Dist., 120 U. S. 489, 498, 7 Sup. Ct. 592, 30 L. Ed. 694; where it was said that if selling goods by sample needs regulation, it must obviously be based on a uniform system applicable to the whole country, and congress alone can do it; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Crandall v. Nevada, 6 Wall. (U. S.) 35, 18 L. Ed. 745, where it was held that the states have no right to tax interstate commerce although they may tax the instruments of such commerce in like manner as other property of the same description. Such a regulation, national in its nature, is the requirement of a bond of indemnity from passengers arriving from foreign ports; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; or the payment of a tax on each such passenger; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702 (but the requirement of a list of passengers, with ages, occupations, etc., is a police regulation within the power of the state; New York v. Miln, 11 Pet. [U. S.] 103, 9 L. Ed. 648); so also the transportation of persons or merchandise "is in its nature national, admitting of but one regulating power"; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Sloman v. Moebs Co., 139 Mich. 334, 102 N. W. 854; Richter v. Poppenhausen, 42 N. Y. 374; Greek-American Sponge Co. v. Drug Co., 124 Wis. 469, 102 N. W. 888, 109 Am. St. Rep. 961; though the delivery is made by an agent, residing in the state, of the non-resident seller; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; whether the sale is made directly to the customer or to a retailer; *id.*; imported goods in unbroken original packages are not subject to state taxation; In re Doane, 197 Ill. 376, 64 N. E. 377; State v. Board of Assessors, 46 La. Ann. 145, 15 South. 10, 49 Am. St. Rep. 318; but merchandise consigned by non-resident sellers to and stored by a warehouseman, awaiting future sale and delivery, is not protected from local assessment as interstate commerce; Merchants' Transfer Co. v. Board of Review, 128 Ia. 732, 105 N. W. 211, 2 L. R. A. (N. S.) 662, 5 Ann. Cas. 1016.

As to matters under the exclusive power of congress, national in their character and requiring general and not local rules of regulation, the fact that congress has not legislated does not make it lawful for the states to do so. Such inaction shows only that no restrictions are to be put upon commerce in that direction. The right to legislate is exclusively vested in congress; and when congress legislates on a subject within its exclusive power a state loses control of any right it may have had to apply the police power to it, even though the federal act is not to take effect until a future period, Northern Pac. Ry. Co. v. Washington, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237.

The course of decisions, mainly in the United States Supreme Court, covers a great variety of subjects with which the state

legislatures have attempted to deal in the enactment of statutes which have been held unconstitutional because they interfered with the exclusive power of congress conferred by the commerce clause of the constitution. Among the statutes which have thus fallen under the ban of the final authority on the subject is one imposing a burdensome condition upon a shipmaster as a prerequisite for landing his passengers, with the alternative of the payment of a small sum for each of them; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; one regulating the arrival of passengers from a foreign port and authorizing an executive officer to include passengers of certain classes at his discretion; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550; which the court considered as having been enacted mainly to exclude Chinese immigration, and to go far beyond the legitimate state action of excluding pauper or convict immigrants. See also In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102. But a statute is not invalid where the detention is for the purpose of disinfection by the order of a state board of health; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276. So statutes are unconstitutional which require the payment of a license tax by commercial travellers selling goods manufactured in other states, but not by those selling goods manufactured in the state itself; Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 391; McClellan v. Pettigrew, 44 La. Ann. 356, 10 South. 853; Overton v. City of Vicksburg, 70 Miss. 558, 13 South. 226; Hurford v. State, 91 Tenn. 669, 20 S. W. 201 (but not when the same tax is levied upon peddlers selling goods made in or out of the state; Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754; or which were part of the mass of property in the state; Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; and see Tiernan v. Rinker, 102 U. S. 123, 26 L. Ed. 103); so of an act requiring importers of foreign goods to take out a license in the exercise of a power of taxation; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; and a state law which requires a party to take out a license for carrying on interstate commerce; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; a city ordinance laying wharf fees upon vessels laden with products of other states, which are not exacted from vessels laden with products of the home state; Guy v. Baltimore, 100 U. S. 434, 25 L. Ed. 743; a state tonnage tax on foreign vessels; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; levied to defray quarantine expenses; Peete v. Morgan, 19 Wall. (U. S.) 581, 22 L. Ed. 201; otherwise of a tax for city purposes levied upon a vessel owned by a resident of the city which is not imposed for the privilege of trading; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. Ed. 412; The North Cape, 6 Biss. 505, Fed. Cas. No. 10,316; granting a telegraph company exclusive right to maintain telegraph lines in such state as contrary to the Act of July 24, 1866, which practically forbids the state to exclude from its borders a telegraph company building its lines in pursuance of this act of congress; Pensacola Telegraph Co. v. Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; an attempt to regulate transmission of telegraphic messages into other states and their delivery; Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; as telegraphic communications carried on between different states are interstate commerce; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; a statute providing for inspection of sea-going vessels arriving at a port and of damaged goods found thereon by a state officer, with a view to furnishing official evidence to the parties immediately concerned, and when goods are damaged to provide for their sale; Foster v. Master & Wardens of New Orleans, 94 U. S. 246, 24 L. Ed. 122; and one prohibiting the driving of cattle from another state into the state during certain months; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. Ed. 527; one regulating the rates on interstate traffic; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244.

A state law, requiring the master of every vessel in the foreign trade to pay a certain sum to a state officer for every passenger brought from a foreign country into the state, is void; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702. No state can grant an exclusive monopoly for the navigation of any portion of the waters within its limits upon which commerce is carried on under coasting licenses granted under the authority of congress; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; the rights here in controversy were the exclusive right to navigate the Hudson river with steam vessels. See also, on this point, Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; The Daniel Ball, 10 Wall. (U. S.) 557, 19 L. Ed. 999; Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636. But a state law granting to an individual an exclusive right to navigate the upper waters of a stream which is wholly within the limits of a state, separated from tide waters by falls impassable for purposes of navigation, and not forming a part of a continuous track of navigation between two or more states, or with a foreign country, is not invalid; Veazie v. Moor, 14 How. (U. S.)

568, 14 L. Ed. 545; and see McReynolds v. Smallhouse, 8 Bush (Ky.) 447. A statute forbidding common carriers to bring intoxicating liquors into the state without being furnished with a certificate that the consignee was authorized to sell intoxicating liquors in the county is invalid; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700. And so is an act taxing a corporation of another state, owning a railroad which is a link in an interstate line, for the privilege of keeping an office in the state; Norfolk & W. R. Co. v. Com., 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394. And a tax on persons and property received and landed within one state after being transported from another was held a tax upon interstate commerce and a regulation thereof upon a matter which is within the exclusive power of congress; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158.

When the State Power is Exclusive. The states may authorize the construction of highways, turnpikes, railways and canals between points in the same states and regulate the tolls thereof; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; the building of bridges over nonnavigable streams and regulate the navigation of the strictly internal waters of the state, such as do not by themselves, or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries; Veazie v. Moor, 11 How. (U. S.) 568, 14 L. Ed. 545; The Montello, 11 Wall. (U. S.) 411, 20 L. Ed. 191; *id.*, 20 Wall. (U. S.) 430, 22 L. Ed. 391; and this rule obtains even if goods or passengers, over such highways between points in the same state, may have an ultimate destination in other states, and, to a *slight* extent the state regulations may be said to interfere with interstate commerce; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244; the states may also exact a bonus or even a portion of the earnings of such corporation as a condition to the grant of its charter; Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. Ed. 897; Provident Inst. for Savings v. Massachusetts, 6 Wall. (U. S.) 611, 18 L. Ed. 907; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (U. S.) 632, 18 L. Ed. 904; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773. The power to enact police regulations relating exclusively to intrastate trade cannot be interfered with by congress; U. S. v. De Witt, 9 Wall. (U. S.) 41, 19 L. Ed. 593; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; State v. R. Co., 152 Wis. 341, 140 N. W. 70; U. S. v. Vassar, 5 Wall. (U. S.) 462, 470, 471, 18 L. Ed. 497. The remarks of Chase, C. J., in this case contain the substance of the whole doctrine: "Over this (the internal) commerce and trade, congress has no power of regulation or any direct control. This power belongs exclusively to the states. No interference by congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

Regulation of intrastate commerce belongs to the state subject to the condition that prescribed rates must not be so unreasonably low as to deprive the carrier of his property without due process of law; Smyth v. Ames, 169 U. S. 466, 526, 18 Sup. Ct. 418, 42 L. Ed. 819. See RATES.

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States; Allen v. Newberry, 21 How. (U. S.) 244, 16 L. Ed. 110. But later adjudications have ignored this distinction as applied to those waters; The Belfast, 7 Wall. (U. S.) 624, 641, 19 L. Ed. 266; The Lottawanna, 21 Wall. (U. S.) 558, 587, 22 L. Ed. 654; Lord v. Steamship Co., 102 U. S. 541, 26 L. Ed. 224.

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on; United States v. Steffens, 100 U. S. 82, 25 L. Ed. 550.

State statutes affecting interstate commerce have been sustained as follows: One directed against color blindness; Nashville, C. & St. L. R. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; requiring interstate locomotive engineers to obtain a license after a qualifying examination, and imposing a penalty for operating without such license; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; forbidding a contract limiting liability for injury; Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; Peirce v. Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state; Western Union Telegraph Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; forbidding the running of freight trains on Sunday; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; requiring railroad companies to fix their rates annually for the transportation of passengers and freight and to post a printed copy of such rates at all their stations; Chicago

& N. W. Ry. Co. v. Fuller, 17 Wall. (U. S.) 560, 21 L. Ed. 710; forbidding the consolidation of parallel or competing lines of railways; Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849; regulating the heating of passenger cars and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853; requiring track connections and facilities for the interchange of cars and traffic at railroad intersections; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. A statute regulating receipts for deposits of money is not a burden on, or regulation of, interstate commerce, simply because such receipts are likely to be transmitted to other states or foreign countries; Engel v. O'Malley, 219 U. S. 128, 31 Sup. Ct. 190, 55 L. Ed. 128. The Arkansas "Full Crew" act is not unconstitutional under the commerce clause, congress not having acted in regard thereto; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 31 Sup. Ct. 275, 55 L. Ed. 290.

The line of distinction between an interference with commerce and a mere police regulation is sometimes exceedingly dim and shadowy. Undoubtedly, congress may go beyond the general regulations of commerce which comprise its exclusive jurisdiction and descend to minute directions which will exclude the exercise of state power as to matters covered by them. It may establish police regulations, as well as the states, as to matters of which it is given control by the constitution, but generally the police power being better exercised by the local authorities, and the power to arrest collision residing in the national courts, the regulations of congress seldom exclude the establishment of others by the state covering many particulars; Cooley, Const. Lim. 731. See Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200.

It was said by Strong, J., in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 473, 24 L. Ed. 527, that "the police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution, it is the duty of the courts to guard vigilantly against any needless intrusion." This language was quoted with approval by Matthews, J., in Bowman v. R. Co., 125 U. S. 465, 492, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

The doing of interstate business by one engaged also in local commerce is not a bar to state regulation or taxation; Osborne v. State, 33 Fla. 162, 14 South. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99.

The commerce clause is not violated by a state statute prohibiting the manufacture and sale of adulterated goods; Crossman v. Lurman, 192 U. S. 189, 24 Sup. Ct. 234, 48 L. Ed. 401; nor by a state tax on cab service; New York v. Knight, 192 U. S. 21, 24 Sup. Ct. 202, 48 L. Ed. 325; nor by a tax on nonresident managers of meat packing houses, construed by the highest state court to apply only to selling to local customers from stock of original packages not as a mere incident of interstate commerce; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; nor a tax on foreign corporations engaged in carrying passengers or merchandise upon their gross receipts outside of the state; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164; Indiana v. Exp. Co., 7 Biss. 227, Fed. Cas. No. 7,021; nor by a shipment of buggies (by a foreign manufacturer) either complete or in packages of parts put together and peddled about the state by an agent who was held liable to an occupation tax; Saulsbury v. State, 43 Tex. Cr. R. 90, 63 S. W. 568, 96 Am. St. Rep. 837. A state may, in the absence of federal legislation on the subject, reasonably regulate the hours of labor of employés on interstate railroads; State v. R. Co., 36 Mont. 582, 93 Pac. 945, 15 L. R. A. (N. S.) 134, 13 Ann. Cas. 144. It may adopt regulations to prevent the spread of diseases among plants; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L. R. A. (N. S.) 138.

The constitutional provision does not apply to regulations as to life-preservers, boiler inspections, etc., on steamboats which confine their business to ports wholly within a state; The Thomas Swan, 6 Ben. 42, Fed. Cas. No. 13,931; nor to any commerce entirely within a state; The Daniel Ball v. U. S., 10 Wall. (U. S.) 557, 19 L. Ed. 999; Lehigh Val. R. Co. v. Pennsylvania, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; nor to a condition in a railroad charter granted by a state that the company shall pay a part of its earnings to the state, from time to time, as a bonus; Baltimore & O. R. Co. v. Maryland, 21 Wall. (U. S.) 456, 22 L. Ed. 678; nor to a state law prescribing regulations for warehouses, carrying on business within the state exclusively, notwithstanding they are used as instruments of interstate traffic; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; nor to a law of Virginia by which only such persons as are not citizens of that state are prohibited from planting oysters in a soil covered by her tide-waters. Subject to the paramount right of navigation, each state owns the beds of all tide-waters within its jurisdiction, and may appropriate them to be used by its own citizens; McCready v. Virginia, 94 U. S. 391, 24

L. Ed. 248. It does not forbid a state from enacting, as a police regulation, a law prohibiting the manufacture and sale of intoxicating liquors; Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; nor the sale of oleomargarine brought from another state; Com. v. Paul, 148 Pa. 559, 24 Atl. 78; Com. v. Schollenberger, 156 Pa. 201, 27 Atl. 30, 22 L. R. A. 155, 36 Am. St. Rep. 32; Com. v. Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; though in original packages; In re Scheitlin, 99 Fed. 272; or imposing a license tax upon travelling salesmen selling liquor in quantities of less than five gallons, the statute having been held by the highest court of the state to be a police regulation and not a taxing act; Delamater v. South Dakota, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724 (where it was said that such an act is within the purview of, and not in conflict with, the Wilson Act); or a state act prescribing maximum rates of transportation within the state; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; and see Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Cooley, Const. L. 75. Nor is a city ordinance, exacting a license fee, for the maintenance of its office in the city, from an express company doing business beyond the limits of a state, invalid; Osborne v. Mobile, 16 Wall. (U. S.) 479, 21 L. Ed. 470; nor a tax on telegraph poles erected within a city; St. Louis v. Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; Philadelphia v. Cable Co., 67 Hun 21, 21 N. Y. Supp. 556; nor a statute requiring locomotive engineers to be licensed after examination, it being a valid exercise of the police power; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; see Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; nor one forbidding dealing in futures on margins; State v. Beatty (Miss.) 60 South. 1016; nor prohibiting shipment or sale of unripe fruits; Sligh v. Kirkwood (Fla.) 61 South. 185; nor prescribing the effect of domestic indorsements on foreign bills of lading; Roland M. Baker Co. v. Brown, 214 Mass. 196, 100 N. E. 1025.

A city ordinance providing that only rock dressed within the state should be used in any city public works was held valid; Allen v. Labsap, 188 Mo. 692, 87 S. W. 926, 3 Ann. Cas. 306, considered as sound in 19 Harv. L. Rev. 70; and criticized in 61 Cent. L. J. 65. Railroad cars engaged in interstate commerce may be attached under an execution issued out of a state court; Davis v. Ry. Co., 217 U. S. 157, 30 Sup. Ct. 463, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907. In Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636, it was held that the right of the state to limit charges of a railroad company could not be granted away by giving to the company the right from time to time to fix and regulate their charges, and that a state was not foreclosed of its right to act upon the reasonableness of the charges and to regulate them for business within the state. A state statute requiring a carrier to settle within a specified time claims for loss or damages is not, in the absence of legislation by congress, an unwarrantable interference with interstate commerce, and is constitutional; Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411. See Morris v. Express Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983. And so is one providing that a railroad is liable for damages from fire; McCandless v. R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440. See FIRE. So also are municipal ordinances, in the exercise of police power, prohibiting the sale of a commodity, otherwise than in original packages, as intoxicating liquor; Duluth Brewing & Malting Co. v. Superior, 123 Fed. 353, 59 C. C. A. 481; or perishable market produce sold in railroad depots; State v. Davidson, 50 La. Ann. 1297, 24 South. 324, 69 Am. St. Rep. 478.

The principles regulating the police power of the states in its relation to the commerce clause are well defined in Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, where it was said in substance that the United States constitution gives no one a right to introduce into a state, against its will, live stock affected by a contagious disease. Congress not having assumed charge of the matter as involved in interstate commerce, a state may protect its people, but it must not go beyond the necessities of the case nor unreasonably burden the exercise of privileges secured by the constitution.

State Action Valid in Case of Non-Action by Congress. There is a class of cases in which the state may act so long as congress does not, as detailed in County of Mobile v. Kimball, *supra*. The question whether nonaction by congress "is conclusive of its intention that the subject shall be free from all positive regulation, or that, until it positively interferes, such commerce may be left to be freely dealt with by the respective states," is to be determined in each case as it arises; Bowman v. Ry. Co., 125 U. S. 465, 483, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

In this class of cases have been included: Laws for the regulation of pilots; Cooley v. Board of Wardens, etc., 12 How. (U. S.) 299, 13 L. Ed. 996; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805; In re McNiel, 13 Wall. (U. S.) 236, 20 L. Ed. 624; Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 234; quarantine and inspection laws and the policing of harbors; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 203, 6 L. Ed. 23; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed. 648; Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; the improvement of navigable channels; Mobile County v. Kimball,

102 U. S. 691, 26 L. Ed. 238; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; the regulation of wharfs, piers, and docks; Cannon v. New Orleans, 20 Wall. (U. S.) 577, 22 L. Ed. 417; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80, 24 L. Ed. 377; Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423, 25 L. Ed. 688; Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584; Ouachita & M. R. Packet Co. v. Aiken, 121 U. S. 444, 7 Sup. Ct. 907, 30 L. Ed. 976; the establishment of ferries; Conway v. Taylor's Ex'r, 1 Black (U. S.) 603, 17 L. Ed. 191; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 211, 14 Sup. Ct. 1087, 38 L. Ed. 962; Marshall v. Grimes, 41 Miss. 27; Chilvers v. People, 11 Mich. 43; and dams; Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Neaderhouser v. State, 28 Ind. 257; Woodman v. Mfg. Co., 1 Biss. 546, Fed. Cas. No. 17,978; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; acts giving a right of action against the owners of a vessel engaged in interstate traffic for the death of a passenger caused by the negligence of those in charge of the vessel; Sherlock v. Alling, 93 U. S. 99, 23 L. Ed. 819; forbidding the sale of plumage, skin or body of any non-game bird, whether captured or killed within or without the state; In re Schwartz, 119 La. 290, 44 South. 20, 121 Am. St. Rep. 516; acts for preventing the spread of disease among plants and trees whether grown or sold within or without the state and transported and sold for planting within the state; Ex parte Hawley, 22 S. D. 23, 115 N. W. 93, 15 L. R. A. (N. S.) 138.

The state may authorize the building of dams and bridges over navigable waters, notwithstanding the fact that they may, to some extent, interfere with the navigation of the stream; Willson v. Black-Bird Creek Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Cardwell v. Bridge Co., 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; Pound v. Turck, 95 U. S. 459, 24 L. Ed. 525. If the stream is one over which the regulation of congress extends, the question arises whether the bridge will interfere with navigation or not; it is not necessarily unlawful if properly built, and if the general traffic of the country will be benefited rather than injured by its construction. There are many cases in which a bridge may be vastly more important than the navigation of the stream which it crosses. It may be said that a state may authorize such constructions, provided they do not constitute a material obstruction to navigation; and each case depends upon its own particular facts. The decision of the state legislature is not conclusive; the final decision rests with the federal courts, who may cause the structure to be abated if it be found to obstruct unnecessarily the traffic on the stream; Cooley, Const. Lim. 738, 739, 740; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; see also Columbus Ins. Co. v. Bridge Ass'n, 6 McLean 70, Fed. Cas. No. 3,046; Columbus Ins. Co. v. Curtenius, 6 McLean 209, Fed. Cas. No. 3,045; Jolly v. Draw-Bridge Co., 6 McLean 237, Fed. Cas. No. 7,441; Board of Com'rs of St. Joseph County v. Pidge, 5 Ind. 13; Rhea v. R. Co., 50 Fed. 16; State v. Leighton, 83 Me. 419, 22 Atl. 380; Luxton v. Bridge Co., 153 U. S. 525, 14 Sup. Ct. 891, 38 L. Ed. 808; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. See BRIDGE. The state has also the power to regulate the speed and general conduct of vessels navigating its waters, provided such regulations do not conflict with regulations prescribed by congress for foreign commerce, or commerce among the states; Cooley, Const. Lim. 740; People v. Jenkins, 1 Hill (N. Y.) 469, 470.

Of this class of cases, it was said by Mr. Justice Curtis in Cooley v. Board of Wardens, 12 How. (U. S.) 299, 318, [13 L. Ed. 996]: "If it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the constitution (Federalist No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such power to congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." See, also, Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 193, 4 L. Ed. 529. But even in the matter of building a bridge, if congress chooses to act, its action necessarily supersedes the action of the state; Pennsylvania v. Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435. As a matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. See NAVIGABLE WATERS.

Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself. Brown, J., in Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962.

But wherever such laws, instead of being of local nature and only affecting interstate commerce incidentally, are national in their character, the non-action of congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the class wherein the jurisdiction of

congress is exclusive; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962, and *supra*.

This contingent right of action by the states may sometimes be exercised by the courts as well as by legislatures, as where there has been no action by congress or the interstate commerce commission, a state court may by mandamus compel a railroad company doing interstate business to afford equal switching service to its shippers notwithstanding the cars in regard to which the service is claimed would eventually be engaged in interstate commerce; Missouri Pac. Ry. Co. v. Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352.

The Wilson Act (see LIQUOR) provides that intoxicating liquors transported into any state or territory shall be subject to the laws thereof enacted under the police power "upon arrival in such state." In construing this act it has been held that the interstate commerce is not ended until the goods are moved from the station platform to the freight warehouse, if sent by express; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; State v. Intoxicating Liquors, 102 Me. 206, 66 Atl. 393, 11 L. R. A. (N. S.) 550; that they are not subject to seizure while in the hands of the express company; Adams Exp. Co. v. Iowa, 196 U. S. 147, 25 Sup. Ct. 185, 49 L. Ed. 424; that delivery to the consignee is necessary to constitute arrival in the state; Heymann v. Ry. Co., 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; and that this phrase means actual, not implied, delivery; U. S. v. Building Co., 206 U. S. 120, 27 Sup. Ct. 676, 51 L. Ed. 983; Adams Exp. Co. v. Kentucky, 206 U. S. 138, 27 Sup. Ct. 608, 51 L. Ed. 992; that an agreement of the local express agent to hold for a few days a C. O. D. shipment to suit the convenience of the consignee in paying did not affect the transaction as interstate commerce; American Exp. Co. v. Kentucky, 206 U. S. 139, 27 Sup. Ct. 609, 51 L. Ed. 993; State v. Intoxicating Liquors, 101 Me. 430, 64 Atl. 812. In State v. Holleyman, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366, 45 L. R. A. 567, before the United States Supreme Court decisions, it was held that liquor received in another state and taken to its destination in a buggy did not "arrive" until both buggy and liquor arrived with the purchaser at his home in the state. Cases which held otherwise, decided prior to the United States Supreme Court decisions and of course overruled by them, are In re Langford, 57 Fed. 570; Southern Exp. Co. v. State, 114 Ga. 226, 39 S. E. 899; State v. Intoxicating Liquors, 95 Me. 140, 49 Atl. 670; State v. Intoxicating Liquors, 96 Me. 415, 52 Atl. 911. An article in 22 Green Bag 10, on "Liquor in Interstate Relations" suggests that, to give effect to state laws, congress may either repeal all legislation recognizing liquors as the subject of interstate commerce, or explicitly recognize that, for the purpose of giving effect to state prohibitory legislation, they are not to be regarded as such.

State Action Held Invalid. Any "state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom does encroach upon the exclusive power of congress"; Rae v. Loan & Guaranty Co., 176 U. S. 126, 20 Sup. Ct. 341, 44 L. Ed. 398; Lindsay & P. Co. v. Mullen, 176 U. S. 147, 20 Sup. Ct. 325, 44 L. Ed. 400; quoting Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, where it was held that a long and short haul clause in a state statute was invalid as applied to interstate commerce. The following are invalid: A state statute requiring carriers by water to give all persons, without distinction of race or color, equal rights and privileges in all parts of the vessel, it being in effect a regulation of conduct through the entire voyage while assuming to regulate it while passing through the state; Hall v. De Cuir, 95 U. S. 485, 24 L. Ed. 547 (but not one which only applies to passengers carried within the state; Louisville R. Co. v. Mississippi, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784); or any penal statute which interferes with commerce; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; as an act requiring the license of a pedlar of tea, the growth of a foreign country. A statute is invalid which under pretense of protecting the public health imposes a direct burden on interstate commerce; Com. v. Moore, 214 Mass. 19, 100 N. E. 1071; and so is a statute, ostensibly a license tax, but in fact a regulation of commerce; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638 (where the provision that flour brought into a state and offered for sale should be reviewed and have the Virginia inspection mark on it, was held discriminating and unconstitutional, such inspection not being required for flour manufactured in the state); Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862 (where there was a license tax on the sale of western meat, accompanied by burdensome regulations not imposed on the sale of meat produced in the state); and a license tax on photographers, etc., does not affect the shipment from a corporation in another state of pictures and frames to be put together and delivered by its agent, who is free from license tax; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336.

A state statute penalizing shipments of liquor C. O. D. and making the place of delivery the place of sale is invalid; Adams Express Co. v. Kentucky, 206 U. S. 129, 27 Sup. Ct. 606, 51 L. Ed. 987. Liquor is a

recognized article of commerce and a state law denying the right to send it from one state to another is unconstitutional; Vance v. Vandercook Co., 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, followed in Adams Express Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; Louisville & N. R. Co. v. Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; in both which cases it is also held that transportation is not completed until delivery to the consignee, and under the Wilson Act (*q. v.*) it is not subject to regulation under state laws until such delivery. See *supra*.

A burden imposed upon interstate commerce cannot be sustained simply because the statute imposing it applies to the people of all the states, including the enacting one; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455, where a statute requiring inspection within twenty-four hours before slaughtering of all animals killed for food, was held unconstitutional.

While a state may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of the delivery of merchandise, any regulation which directly burdens interstate commerce is a regulation thereof and unconstitutional; McNeill v. R. Co., 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142, where the regulation was an order requiring a railroad company to deliver cars from another state to the consignee on a private siding beyond its own right of way; but where congress and the interstate commerce commission have not acted, the state may compel a railroad company to give equal switching facilities to all customers, even if affecting cars to be used in interstate commerce; Missouri Pac. R. Co. v. Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352.

Other cases of invalid state action were: Assessment by a state for taxation of property in original packages before incorporation into the mass of property; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; and taxation of tea imported from a foreign country, and stored in a government warehouse in the original unbroken package; Siegfried v. Raymond, 190 Ill. 424, 60 N. E. 868.

A state has no power to interfere with an interstate commerce train if thereby a direct burden is imposed upon interstate commerce, as by a police regulation requiring the stoppage of a train at certain stations; Mississippi R. Com. v. R. Co., 203 U. S. 335, 27 Sup. Ct. 90, 51 L. Ed. 209; Cleveland, C. C. & St. L. Ry. Co. v. Illinois, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868; or regulations of master and servant, applicable to those actually engaged in the operation of interstate commerce after congress had acted upon the subject; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 28 Sup. Ct. 121, 52 L. Ed. 230; Johnson v. Southern Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Schlemmer v. R. Co., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681.

The Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, have been reported since this title was prepared. It might be cited as an authority confirming almost every legal proposition above stated as established by the authorities, and the opinion of the court by Mr. Justice Hughes may be referred to as a thorough and exhaustive discussion of the whole subject of interstate commerce.

The special point decided arose out of the contention that, even admitting that the rates prescribed by the state were reasonable, as a regulation of intrastate commerce, as applied to cities on the state's boundary or to places within competitive districts crossed by the state line, nevertheless the rates disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden upon interstate commerce and creating discriminations as against localities in other states. In reply to this contention, it was held that the authority of the state to prescribe reasonable charges for intrastate transportation is statewide, unless limited by the exercise of the constitutional power of congress, which is not confined to a part of the state, but extends throughout its limits—to cities adjacent to its boundaries as well as to those in the interior; and a restriction of the authority of the state must be by virtue of the actual exercise of the federal control and not by reason of a dormant federal power that has not been exerted.

See INTERSTATE COMMERCE COMMISSION; CONSTITUTION OF UNITED STATES.

COMMERCE CLAUSE. See COMMERCE; ORIGINAL PACKAGE; CONSTITUTION OF THE UNITED STATES.

COMMERCE COURT. See UNITED STATES COURTS.

COMMERCE, DEPARTMENT OF. See DEPARTMENTS.

COMMERCIA BELLI. Agreements entered into by belligerents, either in time of peace to take effect in the event of war, or during the war itself, by which arrangement is made for non-hostile intercourse. They may take the form of armistices, truces, capitulations, cartels, passports, safe-conducts, safeguards. 1 Kent 159; 2 Opp. 274. See separate titles.

Contracts between citizens of one belligerent and those of another, or between citizens of one belligerent and the other belligerent. They may take the form of ransom bills (*q. v.*), bills of exchange drawn by prisoners of war, or receipts for requisitions. 1 Kent 104.

COMMERCIAL AGENCY. A person, firm, or corporation engaged in the business of

collecting information as to the financial standing, ability, and credit of persons engaged in business and reporting the same to subscribers or to customers applying and paying therefor. "They have become vast and extensive factors in modern commercial transactions for furnishing information to retail jobbers as well as to wholesale merchants. The courts are bound to know judicially that no vendor of goods at wholesale can be regarded as a prudent business man if he sells to a retail dealer, upon a credit, without first informing himself through these mediums of information of the financial standing of the customer, and the credit to which he is fairly entitled;" Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103. See also Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Holmes v. Harrington, 20 Mo. App. 661.

How far the agency may contract against its own negligence. An exception is made to some extent in favor of such agencies to the rule against stipulations by a person against liability for his own negligence. The agency usually contracts that their agents shall be considered as the agents of their patrons, and that they shall not be liable for the negligence of their agents. Where in an action upon such a contract the plaintiff contended that under it the agency was protected only against gross and not against ordinary negligence, it was held otherwise; Duncan v. Dun, 7 W. N. C. (Pa.) 246, Fed. Cas. No. 4,134.

Under a contract that the actual correctness of the information was in no manner guaranteed, the agency was not liable for loss occasioned to a subscriber by the wilful and fraudulent act of a sub-agent in furnishing false information; Dun v. Bank, 58 Fed. 174, 7 C. C. A. 152, 23 L. R. A. 687, reversing City Nat. Bank v. Dun, 51 Fed. 160. Where the inquiry was made concerning a grocer and the agency reported concerning the wrong person, who had the same name and was a grocer and saloon keeper, the plaintiff could not recover from the agency the value of goods sold on the strength of the report, the evidence being held to show that there was not such gross negligence as would render the agency liable; Xiques v. Bradstreet Co., 70 Hun 334, 24 N. Y. Supp. 48; but such a contract does not protect the agency from an error made in the publication of its books of reference giving the financial responsibility of merchants and others, and upon which a subscriber of the agency relied in selling goods and suffered a loss, and in such case it is unnecessary to thus establish the insolvency of the purchaser by suit before suing the agency; Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500, 7 L. R. A. 661, 19 Am. St. Rep. 681.

When reports are privileged and when libellous. Such an agency is a lawful business when lawfully conducted, but is not exempt from liability for false and defamatory publications when other citizens would not be exempt. Its communications to a person interested in the information are privileged even if false, if made in good faith and without malice, but if communicated to its subscribers generally they are not privileged; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; Kingsbury v. Bradstreet Co., 116 N. Y. 211, 22 N. E. 365; Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555; Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5, 9 L. R. A. 102, 21 Am. St. Rep. 516; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; State v. Lonsdale, 48 Wis. 348, 4 N. W. 390; Trussell v. Scarlett, 18 Fed. 214; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Erber v. R. G. Dun & Co., 4 McCrary 160, 12 Fed. 526; Johnson v. Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77. See also 3 Montreal, Q. B. 83; 18 Can. S. C. 222. The contract of the agency to furnish information to all its subscribers, including those who have no special interest in it, is no defence to an action for libel; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; nor was the fact that the information was given by printed signs of which each subscriber had the key; Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; the matter is privileged if communicated to the proper person by a clerk or agent as well as by the proprietor of the agency; King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Erber v. R. G. Dun & Co., 12 Fed. 526; (but see Beardsley v. Tappan, 5 Blatchf. 497, Fed. Cas. No. 1,189, and Tappan v. Beardsley, 10 Wall. 427, 19 L. Ed. 974, criticised in the two cases just cited;) or if specially reported upon proper occasion to subscribers having special interest in them, though not applied for by such subscribers; Locke v. Bradstreet Co., 22 Fed. 771; but if a subscriber apply for special information from the agency, a false denunciation of the person inquired about, coupled with the report, is actionable; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868. So also are statements at first privileged but repeated and persisted in when known to be false, or, if otherwise privileged, made maliciously; Erber v. R. G. Dun & Co., 12 Fed. 526; or if made recklessly and without due care and caution in making inquiry; Locke v. Bradstreet Co., 22 Fed. 771; Bradstreet Co. v. Gill, 72 Tex. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768; Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542.

The publication and circulation to subscribers in daily reports of the execution of a chattel mortgage was not libellous; Newbold v. J. M. Bradstreet & Son, 57 Md. 38, 40 Am. Rep. 426; *contra*, King v. Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; nor was that of a copy of a judgment, with

a note that the judgment was paid the same day; 8 Ir. Rep. 349; but in a similar case when the judgment was so paid, but it was not so stated, the publication was held libellous; 16 Ir. Rep. C. L. 298; and so also is a false publication of a trader that a judgment had been rendered; 22 Q. B. 134. And where the action was for publishing that a judgment had been rendered when only a verdict had been returned, it was held proper to ask a witness to the effect of such statement, whether if he had known the actual fact his conduct would have been the same; Hessel v. Bradstreet Co., 141 Pa. 501, 21 Atl. 659.

The burden of proof is upon the agency to show privilege *prima facie*, and after its character is established the burden is on the plaintiff to show malice; Erber v. R. G. Dun & Co., 12 Fed. 526; Ormsby v. Douglass, 37 N. Y. 477; and it is matter of law for the court to determine whether the matter published is libellous *per se;* Woodruff v. Bradstreet Co., 35 Hun (N. Y.) 16.

An action for libel may be brought by a person whose name is published in a book containing a list of delinquent debtors, distributed to subscribers, manifestly for coercing the payment of claims, who is denied credit because of such publication, or by one to whom a letter is sent in an envelope on which is printed the name of an association and a statement that it is an organization for the purpose of collecting bad debts; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123, 9 L. R. A. 86, 20 Am. St. Rep. 115.

A report of a mercantile agency, alleging that plaintiff had made a general assignment for the benefit of creditors, is not privileged, where it appears that plaintiff had assigned only to secure the endorsement of a note; Douglass v. Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; but if the mistake could not have been avoided by reasonable care, the report is privileged, but if it was the result of carelessness, the privilege is lost; *id.* Communications though made in good faith by a commercial agency to a subscriber containing defamatory statements of plaintiff's character, are not privileged; [1908] A. C. 390. A complaint that a mercantile agency report alleging that plaintiff's account with the bank was "not classed as an entirely desirable one," and averred to be false and malicious, was held good on demurrer; Mower-Hobart Co. v. R. G. Dun & Co., 131 Fed. 812.

Effect of fraudulent representations by vendee to agency upon vendor who relies upon them. An action for deceit will lie against persons or corporations making false representations of pecuniary responsibility to an agency in order to obtain credit and defraud those who may rely upon the reports; Carroll Exchange Bank v. Bank, 50 Mo. App. 94; Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822, reversing 57 App. Div. 450, 67 N. Y. Supp. 1017; Eaton, Cole & Burnham Co. v. Avery, 18 Hun (N. Y.) 44; in such action the statements falsely made to the agency are admissible, *if relied on* by the vendee; Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103; or if approved by him after being written out by the agency, but not if not known to the vendor until after the sale; Robinson v. Levi, 81 Ala. 134, 1 South. 554; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425. A contract for the sale of goods to the person making such representations, who proves to be insolvent at the time of making them and of the sale, may be rescinded and possession of the goods recovered; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Cook v. Harrington, 31 Mo. App. 199; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790; Lindauer v. Hay, 61 Ia. 667, 17 N. W. 98; Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959, 19 Am. St. Rep. 738; In re Epstein, 109 Fed. 874; it is enough if he had not reasonable grounds for believing them to be true; In re Roalswick, 110 Fed. 639; but where there were no representations other than those obtained by the agency from the seller, a fraudulent intent on the part of the vendee to use the agency as an instrument of fraud must be clearly shown; Victor v. Henlien, 33 Hun (N. Y.) 549; Dieckerhoff v. Brown (Md.) 2 Atl. 723; Macullar v. McKinley, 99 N. Y. 353, 2 N. E. 9. The vendor may show that he refused to make the sale until he received the report of the agency, and the agent may show his business methods; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790. The right to rescind the sale is not affected by a refusal of the vendee to give further statements of his condition, as the original one is presumed to continue if not recalled by the agency; Claflin v. Flack, 13 N. Y. Supp. 269; but if the vendee has made subsequent reports showing an impaired responsibility, the vendor must take all the reports into consideration, and not only on the original one; but the vendee is not required to make subsequent reports unless he actually becomes insolvent or knows that he will soon be; Cortland Mfg. Co. v. Platt, 83 Mich. 419, 47 N. W. 330; reports made six weeks before the sale may be relied on; 20 Mo. App. 173; but not those made from five to seven months before; Zucker v. Karpeles, 88 Mich. 413, 50 N. W. 373; Macullar v. McKinley, 99 N. Y. 353, 2 N. E. 9. A financial statement to a commercial agency is a continuing representation for a reasonable time that the facts therein stated are true; In re Kyte, 174 Fed. 867.

How affected by the statute of frauds. With respect to the liability of the agency for representations not made in writing when the liability was contested, on the ground that the contract was within the statute of

frauds, there is not a satisfactory result to be found in decisions; but it has been held that the action was upon the original contract with the customer, which was by no statute required to be written; U. C. 39 Q. B. 551; (reversed on other points and doubted on this; 1 Ont. App. 153;) and also that the action was sustainable on the original contract to furnish accurate statements, in response to inquiry respecting any persons; Sprague v. Dun, 12 Phila. (Pa.) 310.

No remedy in equity against publication. An injunction will not be granted to restrain the agency from the publication of matter injurious to the standing of the plaintiff, there being no jurisdiction in equity unless there is a breach of trust or contract involved; Raymond v. Russell, 143 Mass. 295, 9 N. E. 544, 58 Am. Rep. 137; Burwell v. Jackson, 9 N. Y. 544.

See LIBEL; PRIVILEGED COMMUNICATION.

COMMERCIAL COURT. A name commonly applied in English practice to the trial of commercial causes in London and Liverpool before judges of the High Court. It is said to be "a mere piece of convenience in the arrangement of business"; [1895] 2 Ch. 491.

COMMERCIAL LAW. A phrase employed to denote those branches of the law which relate to the rights of property and relations of persons engaged in commerce.

This term denotes more than the phrase "maritime law," which is sometimes used as synonymous, but which more strictly relates to shipping and its incidents.

As the subjects with which commercial law, even as administered in any one country, has to deal are dispersed throughout the globe, it results that commercial law is less local and more cosmopolitan in its character than any other great branch of municipal law; and the peculiar genius of the common law, in adapting recognized principles of right to new and ever-varying combinations of facts, has here found a field where its excellence has been most clearly shown. The various systems of commercial law have been well contrasted by Leone Levi in his collection entitled "Commercial Law, its Principles and Administration, or the Mercantile Law of Great Britain compared with the Codes and Laws of Commerce of all the Important Mercantile Countries of the Modern World, and with the Institutes of Justinian;" London, 1850-52; a work of great interest both as a contribution to the project of a mercantile code and as a manual of present use.

As to the rule in the federal courts, see Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Carpenter v. Ins. Co., 16 Pet. (U. S.) 511, 10 L Ed. 1044; Burgess v. Seligman, 107 U. S. 33, 2 Sup. Ct. 10, 27 L. Ed. 359, where Bradley, J., says, "Where the law has not been settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law." See UNITED STATES COURTS.

COMMERCIAL PAPER. Negotiable paper given in due course of business, whether the element of negotiability be given it by the law merchant or by statute. In re Sykes, 5 Biss. 113, Fed. Cas. No. 13,708. See NEGOTIABLE INSTRUMENTS.

COMMERCIAL TRAVELLER. A travelling salesman who simply exhibits samples of goods kept for sale by his principal, and takes orders from purchasers for such goods, which goods are afterwards to be delivered by the principal to the purchasers, and payment for the goods is to be made by the purchaser to the principal on such delivery. City of Kansas v. Collins, 34 Kan. 436, 8 Pac. 865; State v. Miller, 93 N. C. 511, 53 Am. Rep. 469. An order solicited by and given to such salesman does not constitute a sale, either absolute or conditional, of the goods ordered, but is a mere proposal, to be accepted or not, as the principal may see fit; McKindly v. Dunham, 55 Wis. 515, 13 N. W. 485, 42 Am. Rep. 740; Clark v. Smith, 88 Ill. 298.

An agent who sells by sample and on credit, and is not intrusted with the possession of the goods to be sold, has no implied authority to receive payment, and payment to him will not discharge the purchaser; Butler v. Dorman, 68 Mo. 302, 30 Am. Rep. 795; Law v. Stokes, 32 N. J. L. 250, 90 Am. Dec. 655; Seiple v. Irwin, 30 Pa. 513; Kornemann v. Monaghan, 24 Mich. 36.

Even if he has power to collect accounts, receiving checks payable to his principal, no authority to endorse such checks will be implied; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, 36 Am. St. Rep. 81; nor authority to bind his principals on a contract for advertising his business in a newspaper; Tarpey v. Bernheimer, 16 N. Y. Supp. 870.

It has been held that possession of the goods by a commercial traveller who sells them is evidence of authority to collect therefor; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89; John Hutchinson Mfg. Co. v. Henry, 44 Mo. App. 263; Cross v. Haskins, 13 Vt. 536.

Where a drummer sold his samples and converted the proceeds, it was held, in the absence of evidence of the custom or usage of the drummer's disposition of samples, that the principals were not bound by the sale; Kohn v. Washer, 64 Tex. 131, 53 Am. Rep. 745; but where such sale is ratified, the payment to the agent is ratified also; Bailey v. Pardridge, 134 Ill. 188, 27 N. E. 89.

The drummer may hire a carriage upon the credit of his principals if necessary; Bentley v. Doggett, 51 Wis. 224, 8 N. W. 155, 37 Am. Rep. 827; Huntley v. Mathias, 90 N. C. 101, 47 Am. Rep. 516, where the principals were held liable for the drummer's tort in overdriving a horse.

COMMISSARIA LEX. A principle of the Roman law relative to the forfeiture of contracts. It is not unusual to restrict a sale

upon credit, by a clause in the agreement that if the buyer should fail to make due payment the seller might rescind the sale. In the meantime, however, the property was the buyer's and at his risk. A debtor and his pledgee might also agree that if the debtor did not pay at the day fixed, the pledge should become the absolute property of the creditor. 2 Kent 583. This was abolished by a law of Constantine. Cod. 8. 35. 3.

COMMISSARY. An officer whose principal duties are to supply an army, or some portion thereof, with provisions.

The subsistence department of the army shall consist of one commissary-general of subsistence, with the rank of brigadier-general; two assistant commissaries-general of subsistence, with the rank of lieutenant-colonel of cavalry; eight commissaries of subsistence, with the rank of major of cavalry; and sixteen commissaries of subsistence, with the rank of captain of cavalry. U. S. Rev. Stat. § 1140. Their duties are defined in the following sections.

An official to whom the bishop of a diocese sometimes delegated jurisdiction in his Consistory Court over certain parts of the diocese. 1 Holdsw. Hist. L. 369.

COMMISSION (Lat. *commissio;* from *committere*, to intrust to).

An undertaking without reward to do something for another, with respect to a thing bailed. Rutherforth, Inst. 105.

A body of persons authorized to act in a certain matter. 5 B. & C. 850.

The act of perpetrating an offence.

An instrument issued by a court of justice, or other competent tribunal, to authorize a person to take depositions, or do any other act by authority of such court or tribunal, is called a commission.

Letters-patent granted by the government, under the public seal, to a person appointed to an office, giving him authority to perform the duties of his office. The commission is not the appointment, but only evidence of it, and, as soon as it is signed and sealed, vests the office in the appointee. Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; State v. Billy, 2 N. & McC. (S. C.) 357. See Talbot v. Simpson, 1 Pet. C. C. 194, Fed. Cas. No. 13,730; U. S. v. Vinton, 2 Sumn. 299, Fed. Cas. No. 16,624; Scofield v. Lounsbury, 8 Conn. 109. In this sense it is much used in Great Britain; the great seal is sometimes placed in commission by the crown in the hands of one or more persons; judges assigned to certain duties are appointed thereto by commission; the royal assent to bills in parliament is usually given by commissioners appointed for the purpose.

In Common Law. A sum allowed, usually a certain per cent. upon the value of the property involved, as compensation to a servant or agent for services performed. See COMMISSIONS.

COMMISSION GOVERNMENT. A method of municipal government in which the legislative power is in the hands of a few persons.

Constitutional provisions dividing government into legislative, executive and judicial departments are held to apply to state and not to local governments, and not to affect a law providing a commission plan of city government; State v. Ure, 91 Neb. 31, 135 N. W. 224. The legislature has the power to allow the electors of all cities in the same class to adopt or reject the commission plan of government; *id.;* such method is constitutional; State v. City of Mankato, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111.

An act authorizing certain cities to adopt this form of government only becomes effective in cities which may adopt it by vote, and does not violate state constitutions prohibiting special or local legislation in matters affecting the incorporation of cities, etc.; People v. Edmands, 252 Ill. 108, 96 N. E. 914.

An act authorizing the government of certain cities by commission at their option is not violative of the constitution as an unwarranted delegation of legislative power; State v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; Eckerson v. Des Moines, 137 Ia. 452, 115 N. W. 177; City of Jackson v. State (Miss.) 59 South. 873. To the same effect, Bryan v. Voss, 143 Ky. 422, 136 S. W. 884.

COMMISSION MERCHANT. As this term is used, it is synonymous with the legal term "factor," and means one who receives goods, chattels, or merchandise, for sale, exchange, or other disposition, and who is to receive a compensation for his services, to be paid by the owner or derived from the sale of the goods. Perkins v. State, 50 Ala. 154. See AGENCY; FACTORS.

COMMISSION OF ASSIZE. In English Practice. A commission which formerly issued from the king, appointing certain persons as commissioners or judges of assize to hold the assizes in association with discreet knights during those years in which the justices in eyre did not come.

Other commissions were added to this, which has finally fallen into complete disuse. See COURTS OF ASSIZE AND NISI PRIUS.

COMMISSION OF LUNACY. A writ issued out of chancery, or such court as may have jurisdiction of the case, directed to a proper officer, to inquire whether a person named therein is a lunatic or not. 1 Bouvier, Inst. n. 382.

COMMISSION OF REBELLION. In English Law. A writ formerly issued out of chancery to compel an attendance. It was abolished by the order of August 8, 1841.

COMMISSIONED OFFICER. A person in the United States military service of or above the rank of second lieutenant. Davis, Mil. L. 26.

COMMISSIONER. See COMMISSION.

COMMISSIONER OF PATENTS. The title given by law to the head of the patent office. Prior to 1836 the business of that office was under the immediate charge of a clerk in the state department, who was generally known as the superintendent of the patent office. He performed substantially the same duties which afterwards devolved upon the commissioner, except that he was not required to decide upon the patentability of any contrivance for which a patent was sought, inasmuch as the system of examinations had not then been introduced and the applicant was permitted to take out his patent at his own risk.

Under the existing acts he hears appeals from the examiners in chief, and an appeal lies from his decision in interference cases to the Court of Appeals. Act of Feb. 9, 1893. See PATENTS; PATENT OFFICE, EXAMINERS IN.

COMMISSIONER, UNITED STATES. An officer appointed by the United States District Court in each district, in place of Commissioners of the Circuit Court. The court may appoint such number and in such districts as it deems best. They hold for four years, subject to removal by the court. No person can be both a District Court clerk (or deputy) and commissioner without the approval of the Attorney-General. Act of May 28, 1896. A commissioner in proceedings under R. S. § 1014, does not hold a "court"; Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982; and he is in no constitutional sense a judge; Rice v. Ames, 180 U. S. 371, 378, 21 Sup. Ct. 406, 45 L. Ed. 577. He is a mere ministerial officer, who while acting as a committing magistrate in such proceedings exercises duties which are judicial in character; U. S. v. Jones, 134 U. S. 483, 10 Sup. Ct. 615, 33 L. Ed. 1007; U. S. v. Ewing, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388; but he cannot punish for contempt committed in his presence; Ex parte Perkins, 29 Fed. 900; In re Mason, 43 Fed. 510.

COMMISSIONER OF WOODS AND FORESTS. An officer created by act of parliament of 1817, to whom was transferred the jurisdiction of the chief justices of the forest. Inderwick, The King's Peace.

COMMISSIONERS OF BAIL. Officers appointed by some courts to take recognizances of bail in civil cases.

COMMISSIONERS OF DEEDS. Officers appointed by the governors of many of the states, resident in another state or territory, empowered to take acknowledgments, administer oaths, etc., to be used in the state from which they derive their appointment. They have, for the most part, all the powers of a notary public, except that of protesting negotiable paper. Rap. & Lawr. Law Dict.

COMMISSIONERS OF HIGHWAYS. Officers having certain powers and duties concerning the highway, within the limits of their jurisdiction. They are usually three in number. In some of the states they are county officers, and their jurisdiction is coextensive with the county. In others, as in New York, Michigan, Illinois, and Wisconsin, they are town or township officers. They have power to establish, alter, and vacate highways; and it is their duty to cause them to be kept in repair.

COMMISSIONERS OF SEWERS. A court of record of special jurisdiction in England.

It was a temporary tribunal, erected by virtue of a commission under the great seal, which formerly was granted *pro re natâ* at the pleasure of the crown, but afterwards at the discretion and nomination of the lord chancellor, lord treasurer, and chief justices, pursuant to the statute of sewers. 23 Hen. VIII. c. 5.

Its jurisdiction was to overlook the repairs of the banks and walls of the sea-coast and navigable rivers and the streams communicating therewith, and was confined to such county or particular district as the commission should expressly name. The commissioners might take order for the removal of any annoyances or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney Marsh, or otherwise, at their own discretion. They were also to assess and collect taxes for such repairs and for the expenses of the commission. They might proceed with the aid of a jury or upon their own view; 3 Bla. Com. 73; Crabb, Hist. E. L. 469.

COMMISSIONS. Compensation allowed to agents, factors, executors, trustees, receivers, and other persons who manage the affairs of others, in recompense for their services.

The *right* to such allowance may either be the subject of a special contract, may rest upon an implied contract to pay *quantum meruit*, or may depend upon statutory provisions; 7 C. & P. 584; 9 *id.* 559.

The right does not generally accrue till the completion of the services; 4 C. & P. 289; 7 Bingh. 99; Sibbald v. Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; and see 10 B. & C. 438; and does not then exist unless proper care, skill, and perfect fidelity have been employed; 3 Campb. 451; 9 Bingh. 287; Dodge v. Tileston, 12 Pick. (Mass.) 328; McDonald v. Maltz, 94 Mich. 172, 53 N. W. 1058, 34 Am. St. Rep. 331; Smith v. Tripis, 2 Tex. Civ. App. 267, 21 S. W. 722; and the services must not have been illegal nor against public policy; 3 B. & C. 639; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468.

Brokers. The broker is entitled to a fair and reasonable opportunity to perform his

obligations, subject to the right of the seller to sell independently, but, that having been granted to him, the right of the principal to terminate his authority is unrestricted, except only that he may not do it in bad faith, and as a mere device to escape commissions; Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Crowe v. Trickey, 204 U. S. 228, 27 Sup. Ct. 275, 51 L. Ed. 454 (where the death of the principal was held to terminate the broker's authority though he had found the purchaser, and the sale was afterwards completed by the administrator); Fulty v. Wimer, 34 Kan. 576, 9 Pac. 316; Wilson v. Sturgis, 71 Cal. 226, 16 Pac. 772; Ropes v. Rosenfeld's Sons, 145 Cal. 679, 79 Pac. 354; that the owner sold the property after the expiration of the contract period and that such sale was, to some extent, aided by the broker's efforts, does not give the broker a right to commissions; Donovan v. Weed, 182 N. Y. 43, 74 N. E. 563; Kelly v. Marshall, 172 Pa. 396, 33 Atl. 690.

Where the purchaser's refusal to complete the transaction is due to the fact that the seller's title is defective, the broker may nevertheless recover his commissions; Hammond v. Crawford, 66 Fed. 425, 14 C. C. A. 109; Phelps v. Prusch, 83 Cal. 626, 23 Pac. 1111; Davis v. Laurence, 52 Kan. 383, 34 Pac. 1051; Stange v. Gosse, 110 Mich. 153, 67 N. W. 1108; Yoder v. Randol, 16 Okl. 308, 83 Pac. 537, 3 L. R. A. (N. S.) 576; Gilder v. Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398; Parker v. Walker, 86 Tenn. 566, 8 S. W. 391; Birmingham Land & Loan Co. v. Thompson, 86 Ala. 146, 5 South. 473; so he may recover where he has found a purchaser ready and willing to complete the contract, though the sale fails because the vendor has been mistaken in the identity of the lands he offered for sale; Arnold v. Bank, 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

Financial inability of the purchaser to perform his contract to purchase real estate does not deprive the broker of his commissions; Moore v. Irwin, 89 Ark. 289, 116 S. W. 662, 20 L. R. A. (N. S.) 1168, 131 Am. St. Rep. 97; the broker's contract is to effect a bargain, and if he produces a responsible customer, ready to contract, his principal cannot defeat his right to commissions by capriciously refusing to make the contract. The proof of the responsibility of the intending purchaser is required, not because the broker contracts to guarantee responsibility, but to show that the failure to make the contract was not the fault of the broker; Alt v. Doscher, 186 N. Y. 566, 79 N. E. 1100; Leuschner v. Patrick (Tex.) 103 S. W. 664; Wray v. Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; Parker v. Estabrook, 68 N. H. 349, 44 Atl. 484; Stewart v. Fowler, 53 Kan. 537, 36 Pac. 1002; Jenkins v. Hollingsworth, 83 Ill. App. 139.

On the contrary, it is held in some cases that, to entitle a broker to his commissions, he must produce a party capable of becoming, and who ultimately becomes, the purchaser; that it is not sufficient that a contract of sale is executed between the parties and a portion of the price paid, where there is a forfeiture of the contract because of the financial inability of the purchaser; Riggs v. Turnbull, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783. Where a broker procures a purchaser of street railway bonds, who refuses to complete his contract because of their invalidity, he may not recover his commissions, if he knew such customer never intended to take and pay for them, but meant to negotiate their sale to other parties for a higher price; Berg v. R. Co. (Tex.) 49 S. W. 921.

Where he knows, or has reason to believe, that his purchaser is unable to complete his contract, the broker cannot recover commissions; Burnham v. Upton, 174 Mass. 408, 54 N. E. 873; Butler v. Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897; Boysen v. Frink, 80 Ark. 258, 96 S. W. 1056; Little v. Herzinger, 34 Utah, 337, 97 Pac. 639. Even though the broker did not have the exclusive agency, if he were in fact the procuring cause of the purchase, he is entitled to commissions, though a sale was made by the owner in ignorance of the broker's instrumentality in procuring the purchaser; Kiernan v. Bloom, 91 App. Div. 429, 86 N. Y. Supp. 899; Southwick v. Swavienski, 114 App. Div. 681, 99 N. Y. Supp. 1079; Craig v. Wead, 58 Neb. 782, 79 N. W. 718; Tyler v. Parr, 52 Mo. 249; Adams v. Decker, 34 Ill. App. 17; Graves v. Bains, 78 Tex. 92, 14 S. W. 256; but that under such circumstances no right to commissions is acquired is held in Quist v. Goodfellow, 99 Minn. 509, 110 N. W. 65, 8 L. R. A. (N. S.) 153, 9 Ann. Cas. 431; Anderson v. Smythe, 1 Colo. App. 253, 28 Pac. 478.

A broker is entitled to commission if up to a certain time he was the middleman, though the contract was afterwards completed without his instrumentality; 8 C. & P. 1; [1907] 2 Ir. R. K. B. 212.

The *amount* of such commissions is generally a percentage on the sums paid out or received. When there is a usage of trade at the particular place or in the particular business, the amount of commissions allowed to auctioneers, brokers, and factors is regulated by such usage, in the absence of special agreement; 10 B. & C. 438; Story, Ag. § 326; where there is no agreement and no custom, the jury may fix the commission on a *quantum meruit;* 9 C. & P. 620; Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488.

The amount which executors, etc., are to receive is frequently fixed by statute, subject to modification in special cases by the proper tribunal; Van Buren v. Ins. Co., 12 Barb. (N. Y.) 671. In the absence of statutory provision, commissions cannot be allowed to executors for services in partition-

ing real estate, and allotting and transferring the same; Bruce v. Lorillard, 62 Hun 416, 16 N. Y. Supp. 900. Where the executor has failed to keep accounts and to make investments according to the directions in the will, and by his negligence has involved the estate in litigation, he will not be allowed commissions; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271. The entire commissions are not properly exigible before the administration is terminated; Succession of Sparrow, 40 La. Ann. 484, 4 South. 513. An executor is not entitled to commissions on his own indebtedness to the estate; In re Hoffer's Estate, 156 Pa. 473, 27 Atl. 11. In England, no commissions are allowed to executors or trustees; 1 Vern. Ch. 316; 4 Ves. Ch. 72, n.; 9 Cl. & F. 111; even where he carries on the testator's business by his direction; 6 Beav. 371. See the cases in all the states in 2 Perry, Trusts § 918, note.

In case the factor guaranties the payment of the debt, he is entitled to a larger compensation (called a *del credere* commission) than is ordinarily given for the transaction of similar business where no such guaranty is made; Paley, Ag. 88.

See EXECUTORS AND ADMINISTRATORS; PRINCIPAL AND AGENT; REAL ESTATE BROKERS.

COMMISSIONS FOR REGULATION OF CORPORATIONS. See PUBLIC SERVICE CORPORATIONS.

COMMITMENT. The warrant or order by which a court or magistrate directs a ministerial officer to take a person to prison.

The act of sending a person to prison by means of such a warrant or order. Skinner v. White, 9 N. H. 204.

A commitment should be in writing under the hand and seal of the magistrate, and should show his authority and the time and place of making it; Lough v. Millard, 2 R. I. 436; Somervell v. Hunt, 3 Harr. & McH. (Md.) 113; State v. Caswell, T. U. P. Charlt. (Ga.) 280; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495. It must be made in the name of the United States or of the commonwealth or people, as required by the constitution of the United States or of the several states.

It should be directed to the keeper of the prison, and not generally to carry the party to prison; 2 Stra. 934; 1 Ld. Raym. 424. It should describe the prisoner by his name and surname, or the name he gives as his.

It ought to state that the party has been charged on oath; People v. Miller, 14 Johns. (N. Y.) 371; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; but see Com. v. Jackson, 2 Va. Cas. 504; State v. Killet, 2 Bail. (S. C.) 290; and should mention with convenient certainty the particular crime charged against the prisoner; In re Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; 11 St. Tr. 304, 318; Day v. Day, 4 Md. 262; Young v. Com., 1 Rob. (Va.) 744; Ex parte Rohe, 5 Ark. 104; In re Howard, 26 Vt. 205; but a defect in describing the offence is immaterial if it is sufficiently described in the order endorsed on the deposition; Ex parte Estrado, 88 Cal. 316, 26 Pac. 209. It should point out the place of imprisonment, and not merely direct that the party be taken to prison; 2 Stra. 934; 1 Ld. Raym. 424.

It may be for further examination, or final. If final, the command to the keeper of the prison should be to keep the prisoner "until he shall be discharged by due course of law," when the offence is not bailable; see Washburn v. Belknap, 3 Conn. 502; 29 E. L. & E. 134; when it is bailable, the gaoler should be directed to keep the prisoner in his "said custody for want of sureties, or until he shall be discharged by due course of law." When the commitment is not final, it is usual to commit the prisoner "for further hearing."

The word commit in a statute has a technical meaning, and a warrant which does not direct an officer to commit a party to prison but only to receive him into custody and safely keep him for further examination, is not a commitment; Gilbert v. U. S., 23 Ct. Cl. 218.

COMMITTEE. One or more members of a legislative body, to whom is specially referred some matter before that body, in order that they may examine into it and report to the body which delegated this authority to them.

The minority of a committee to which a corporate power has been delegated, cannot bind the majority, or do any valid act, in the absence of any special provision otherwise; Brown v. District of Columbia, 127 U. S. 579, 8 Sup. Ct. 1314, 32 L. Ed. 262.

A guardian appointed to take charge of the person or estate of one who has been found to be *non compos mentis*.

For committee of the person, the next of kin is usually selected; and, in case of the lunacy of a husband or wife, the one who is of sound mind is entitled, unless under very special circumstances, to be the committee of the other; Shelf. Lun. 137, 140. It is the duty of such a person to take care of the lunatic.

For committee of the estate, the heir at law is favored. Relations are preferred to strangers; but the latter may be appointed; Shelf. Lun. 144. It is the duty of such committee to administer the estate faithfully and to account for his administration. He cannot, in general, make contracts in relation to the estate of the lunatic, or bind it, without a special order of the court or authority that appointed him.

COMMITTING MAGISTRATE. See MAGISTRATE; JUSTICE OF THE PEACE.

COMMITTITUR PIECE. In English Law. An instrument in writing, on paper or parch-

ment, which charges a person already in prison, in execution at the suit of the person who arrested him.

COMMIXTION. **In Civil Law.** A term used to signify the act by which goods are mixed together.

The matters which are mixed are dry or liquid. In the commixtion of the former, the matter retains its substance and individuality; in the latter, the substance no longer remains distinct. The commixtion of liquid is called *confusion* (*q. v.*), and that of solids a mixture. *Lec. Elém. du Dr. Rom.* §§ 370, 371; Story, Bailm. § 40; 1 Bouvier, Inst. n. 506.

COMMODATE. **In Scotch Law.** A gratuitous loan for use. Erskine, Inst. b. 3, t. 1, § 20; 1 Bell, Com. 225. The implied contract of the borrower is to return the thing borrowed in the same condition as received.

Judge Story regrets that this term has not been adopted, as mandate has been from *mandatum*. Story, Bailm. § 221. Ayliffe, in his Pandects, has gone further and terms the bailor the *commodant*, and the bailee the *commodatory*, thus avoiding those circumlocutions which, in the common phraseology of our law, have become almost indispensable. Ayliffe, *Pand.* b. 4, t. 16, p. 517. Brown, in his Civil Law, vol. 1, 352, calls the property loaned "*commodated* property."

COMMODATO. **In Spanish Law.** A contract by which one person lends gratuitously to another some object not consumable, to be restored to him in kind at a given period.

COMMODATUM. A contract by which one of the parties binds himself to return to the other certain personal chattels which the latter delivers to him to be used by him without reward; loan for use. See BAILMENT.

COMMODITIES CLAUSE. The act of Congress, June 29, 1906, provides that it shall be unlawful for any railroad company to transport commodities (excepting timber and its manufactured products) manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary or intended for its use in its business; U. S. v. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458.

Stock ownership in a bona fide corporation, irrespective of the extent of such ownership, does not preclude the railroad company from transporting such commodities; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; unless it uses its power as a stockholder to obliterate all distinctions between the two corporations; U. S. v. R. Co., 220 U. S. 257, 31 Sup. Ct. 387, 55 L. Ed. 458.

See COMMERCE; COMMON CARRIERS; RAILROADS.

COMMODITY. Commodity is a broader term than merchandise, and may mean almost any description of article called movable or personal estate. Shuttleworth v. State, 35 Ala. 415; State v. Henke, 19 Mo. 225. Labor is not a commodity; Rohlf v. Kasemeier, 140 Ia. 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1285.

COMMODORE. A grade in the United States navy, superior to a captain. Omitted from the active list. Act of March 3, 1899.

COMMON. An incorporeal hereditament, which consists in a profit which one man has in connection with one or more others in the land of another. Trustees of Western University of Pennsylvania v. Robinson, 12 S. & R. (Pa.) 32; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 647, 25 Am. Dec. 582; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Leyman v. Abeel, 16 Johns. (N. Y.) 30; Thomas v. Inhabitants of Marshfield, 10 Pick. (Mass.) 364; 3 Kent 403.

Common of digging, or common in the soil, is the right to take for one's own use part of the soil or minerals in another's lands; the most usual subjects of the right are sand, gravel, stones and clay. It is of a very similar nature to common of estovers and of turbary. Elton, Com. 109; Black, L. Dict.

Common of estovers is the liberty of taking necessary wood, for the use of furniture of a house or farm, from another man's estate. This right is inseparably attached to the house or farm, and is not apportionable. If, therefore, a farm entitled to estovers be divided by the *act of the party* among several tenants, neither of them can take estovers, and the right is extinguished; 2 Bla. Com. 34; Plowd. 381; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582. It is to be distinguished from the right to estovers which a tenant for life has in the estate which he occupies. See ESTOVERS.

Common of pasture is the right of feeding one's beast on another's land. It is either appendant, appurtenant, because of vicinage, or in gross.

Common of piscary is the liberty of fishing in another man's water. 2 Bla. Com. 34. See FISHERY.

Common of shack. The right of persons occupying lands, lying together in the same common field, to turn out their cattle after harvest, or where lands were fallow, to feed promiscuously in that field; Steph. Com., 623; 1 B. & Ald. 710.

Common of turbary is the liberty of digging turf in another man's ground. Common of turbary can only be appendant or appurtenant to a house, not to lands, because turves are to be spent in the house; 4 Co. 37; 3 Atk. 189; Noy 145; 7 East 127.

The taking seaweed from a beach is a commonable right in Rhode Island; Knowles v. Nichols, 2 Curt. C. C. 571, Fed. Cas. No. 7,897; Kenyon v. Nichols, 1 R. I. 106; Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715; In Virginia there are statutory provisions concerning the use of all unappropriated

lands on the Chesapeake Bay, on the shore of the sea, or of any river or creek, and the bed of any river or creek in the eastern part of the commonwealth, ungranted and *used as common;* Va. Code, c. 62, § 1.

In most of the cities and towns in the United States, there are considerable tracts of land appropriated to public use. These commons were generally laid out with the cities or towns where they are found, either by the original proprietors or by the early inhabitants. See PARKS.

Where land thus appropriated has been accepted by the public, or where individuals have purchased lots adjoining land so appropriated, under the expectation excited by its proprietors that it should so remain, the proprietors cannot resume their exclusive ownership; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Emerson v. Wiley, 10 Pick. (Mass.) 310; Stiles v. Curtis, 4 Day (Conn.) 328; Proctor v. Ferebee, 36 N. C. 144, 36 Am. Dec. 34; Carr v. Wallace, 7 Watts (Pa.) 394. And see Mansfield v. Hawkes, 14 Mass. 440; Rogers v. Goodwin, 2 Mass. 475; White v. Smith, 37 Mich. 291; Emerson v. Thompson, 2 Pick. (Mass.) 475; Trustees of Western University v. Robinson, 12 S. & R. (Pa.) 32; State v. Trask, 6 Vt. 355, 27 Am. Dec. 554.

COMMON APPENDANT. Common of pasture appendant is a right annexed to the possession of land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. It can only be claimed by prescription: so that it cannot be pleaded by way of custom; 1 Rolle, Abr. 396; 6 Coke 59. It is regularly annexed to arable land only, and can only be claimed for such cattle as are necessary to tillage, as horses and oxen to plough the land, and cows and sheep to manure it; 2 Greenl. Cruise, Dig. 4, 5; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 647, 25 Am. Dec. 582. Common appendant may by usage be limited to any certain number of cattle; but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land to which it is appendant; Digb. R. P. 156; 2 M. & R. 205; 2 Dane, Abr. 611, § 12. It may be assigned; and by assigning the land to which it is appended, the right passes as a necessary incident to it. It may be apportioned by granting over a parcel of the land to another, either for the whole or a part of the owner's estate; 4 Co. 36; 8 *id.* 78. It may be extinguished by a release of it to the owner of the land, by a severance of the right of common, by unity of possession of the land, or by the owner of the land, to which the right of common is annexed, becoming the owner of any part of the land subject to the right; Bell v. R. Co., 25 Pa. 161, 64 Am. Dec. 687; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; Cro. Eliz. 592.

Common of estovers or of piscary, which may also be appendant, cannot be apportioned; 8 Co. 78. But see Hall v. Lawrence, 2 R. I. 218, 57 Am. Dec. 715.

COMMON APPURTENANT. Common appurtenant differs from common appendant in the following particulars, viz.: it may be claimed by grant or prescription, whereas common appendant can only arise from prescription; it does not arise from any connection of tenure, nor is it confined to arable land, but may be claimed as annexed to any kind of land; it may be not only for beasts usually commonable, such as horses, oxen, and sheep, but likewise for goats, swine, etc.; it may be severed from the land to which it is appurtenant, it may be commenced by grant; and an interrupted usage for twenty years is evidence of a grant. In most other respects commons appendant and appurtenant agree; 2 Greenl. Cruise, Dig. 5; 30 E. L. & Eq. 176; 15 East 108.

COMMON BECAUSE OF VICINAGE. The right which the inhabitants of two or more contiguous townships or vills have of intercommoning with each other. It ought to be claimed by prescription, and can only be used by cattle *levant* and *couchant* upon the lands to which the right is annexed; and cannot exist except between *adjoining* townships, where there is no intermediate land; Co. Litt. 122 *a*; 4 Co. 38 *a*; 7 *id.* 5; 10 Q. B. 581, 589, 604; Smith v. Floyd, 18 Barb. (N. Y.) 523.

COMMON IN GROSS. A right of common which must be claimed by deed or prescription. It is a personal and not a prædial right. It has no relation to land, but is annexed to a man's person, and may be for a certain or indefinite number of cattle. It cannot be aliened so as to give the entire right to several persons to be enjoyed by each in severalty. And where it comes to several persons by operation of law, as by descent, it is incapable of division among them, and must be enjoyed jointly. Common appurtenant for a limited number of cattle may be granted over, and by such grant becomes common in gross; Co. Litt. 122 *a*, 164 *a*; 5 Taunt. 244; Leyman v. Abeel, 16 Johns. (N. Y.) 30; 2 Bla. Com. 34.

See Viner, Abr. *Common;* Bacon, Abr. *Common;* Com. Dig. *Common;* 2 Bla. Com. 34; 2 Washb. R. P.; Williams, Rights of Common (1880); 3 Holdsw. Hist. E. L. 120.

COMMON APPEARANCE. Where the defendant in an action after due service of process on him has removed from the jurisdiction without having entered an appearance, or cannot be found, the plaintiff may file a common appearance and enter a rule on defendant to plead. This is by stat. 12 Geo. II., c. 29, and is the practice in Pennsylvania; 1 Troub. & Haly, Pr. 159; Bender v. Ryan, 9 W. N. C. (Pa.) 144; and in replevin under the act of 1901.

COMMON ASSURANCES. Deeds which make safe or assure to a man the title to his estate, whether they are deeds of conveyance or to charge or discharge.

COMMON BAIL. Fictitious sureties.

In the fictitious proceedings by which the King's Bench extended its jurisdiction of ordinary civil suits, if the defendant did not appear to the Bill of Middlesex or the Latitat, he was in contempt; this, too, was fictitious; the plaintiff was allowed to enter an appearance for the defendant, with John Doe and Richard Roe as sureties. This was "common bail." See BILL OF MIDDLESEX.

COMMON BAR. A plea to compel the plaintiff to assign the particular place where the trespass has been committed. Stepn. Pl., And. ed. 351. It is sometimes called a blank bar.

COMMON BARRATRY. See BARRATRY.

COMMON BENCH. The ancient name for the court of common pleas. See BENCH; BANCUS COMMUNIS.

COMMON CARRIERS. One whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him. Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Fish v. Chapman, 2 Ga. 353, 46 Am. Dec. 393; Schoul. Bailm. § 345; Naugatuck R. Co. v. Button Co., 24 Conn. 479.

The definition includes carriers by land and water. They are, on the one hand, stagecoach and omnibus proprietors, railroad and street railway companies; Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; truckmen, wagoners, and teamsters, carmen and porters; and express companies, whether such persons undertake to carry goods from one portion of the same town to another, or through the whole extent of the country, or even from one state or kingdom to another. And, on the other hand, this term includes the owners and masters of every kind of vessel or water-craft who set themselves before the public as the carriers of freight of any kind for all who choose to employ them, whether the extent of their navigation be from one continent to another or only in the coasting trade or in river or lake transportation, or whether employed in lading or unlading goods or in ferrying, with whatever mode of motive power they may adopt; Story, Bailm. § 494; 2 Kent 598, 599; Redf. Railw. § 124; 1 Salk. 249; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393; Knox v. Rives, 14 Ala. 261, 48 Am. Dec. 97; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed 788; Robertson v. Kennedy, 2 Dana (Ky.) 431, 26 Am. Dec. 466; Dibble v. Brown, 12 Ga. 217, 56 Am. Dec. 460. An oil pipe line company is a common carrier; Giffin v. Pipe Lines, 172 Pa. 580, 33 Atl. 578.

General truckman are common carriers; Jackson Architectural Iron Works v. Hurl but, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432. Telegraph or telephone companies formerly were held not to be common carriers; Tyler v. Telegraph Co., 60 Ill. 421, 14 Am. Rep. 38; Leonard v. Telegraph Co., 41 N. Y. 544, 1 Am. Rep. 446; Passmore v. Telegraph Co., 78 Pa. 238; Breese v. Telegraph Co., 45 Barb. (N. Y.) 274; Western Union Tel. Co. v. Fontaine, 58 Ga. 433; but were subject to the rules governing common carriers and others engaged in like public employment; Delaware & A. Telegraph & Telephone Co. v. Delaware, 50 Fed. 677, 2 C. C. A. 1; Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883.

The term "common carrier," as used in the Interstate Commerce Act and its amendments, includes express and sleeping car companies, telegraph, telephone and cable companies (both wire and wireless), and pipe lines. See TELEGRAPH COMPANIES; TELEPHONE COMPANIES.

The liability of the owner of a tug-boat to his tow is not that of a common carrier; Hays v. Millar, 77 Pa. 238, 18 Am. Rep. 445; Caton v. Rumney, 13 Wend. (N. Y.) 387; The New Philadelphia, 1 Black (U. S.) 62, 17 L. Ed. 84; White v. The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

And although the carrier receives the goods as a forwarder only, yet if his contract is to transport and to deliver them at a specified address, he is liable as a common carrier; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242.

Common carriers are responsible for all loss or damage during transportation, from whatever cause, except the act of God or the public enemy; 2 Ld. Raym. 909, 918; 1 Salk. 18 and cases cited; 25 E. L. & Eq. 595; 2 Kent 597, 598; Turney v. Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 515; Murphy v. Staton, 3 Munf. (Va.) 239; McArthur v. Sears, 21 Wend. (N. Y.) 190; McCall v. Brock, 5 Strob. (S. C.) 119; Faulkner v. Wright, Rice (S. C.) 108; New Brunswick Steamboat Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; Harris v. Rand, 4 N. H. 259, 17 Am. Dec. 421; Christenson v. Express Co., 15 Minn. 279 (Gil. 208), 2 Am. Rep. 122; South & N. A. R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749; Inman & Co. v. R. Co., 159 Fed. 960. The act of God is held to extend only to such inevitable accidents as occur without the intervention of man's agency; McArthur v. Sears, 21 Wend. (N. Y.) 190; which could not be avoided by the exercise of due skill and care; Hart v. Allen, 2 Watts (Pa.) 114; Memphis & C. R. Co. v. Reeves, 10 Wall. (U. S.) 176, 19 L. Ed. 909; but where freight cars are stopped by a flood and the contents stolen, the loss is not due to inevitable accident, act of God,

or insurrection; Lang v. R. Co., 154 Pa. 342. See Act of God.

The carrier is not responsible for losses occurring from natural causes, such as frost, fermentation, evaporation, or natural decay of perishable articles, or the natural and necessary wear in the course of transportation, or the shipper's carelessness, provided the carrier exercises all reasonable care to have the loss or deterioration as little as practicable; Bull. N. P. 69; 2 Kent 299; Story, Bailm. § 492 *a*; Warden v. Greer, 6 Watts (Pa.) 424; Redf. Railw. § 141; Jordan v. Exp. Co., 86 Me. 225, 29 Atl. 980; The Guiding Star, 53 Fed. 936; International & G. N. R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Goodman v. Nav. Co., 22 Or. 14, 28 Pac. 894. See Wabash St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407, 4 N. E. 641; Fox v. R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702. But a carrier which receives perishable goods for through transportation is bound to furnish cars adapted to preserve them during the journey, and cannot escape its duty by delegating to an independent contractor the task of furnishing and icing a refrigerator car; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58; damp weather and delays incident to railway traffic are no excuse for failure properly to ice cars; C. C. Taft Co. v. Exp. Co., 133 Ia. 522, 110 N. W. 897.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy when she begins her voyage, and his undertaking is not discharged because the want of fitness is the result of latent defects; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

Carriers, both by land and water, when they undertake the general business of carrying every kind of goods, are bound to carry for all who offer; and if they refuse, without just excuse, they are liable to an action; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Pomeroy v. Donaldson, 5 Mo. 36; Hale v. Navigation Co., 15 Conn. 539, 39 Am. Dec. 398; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Sewall v. Allen, 6 Wend. (N. Y.) 335; Citizens' Bank v. Steamboat Co., 2 Sto. 16, Fed. Cas. No. 2,730; L. R. 1 C. P. 423; Piedmont Mfg. Co. v. R. Co., 19 S. C. 353; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; 30 L. J. Q. B. 273.

A common carrier is bound to treat all shippers alike and may be compelled to do so by mandamus; Missouri Pac. R. Co. v. Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; State v. Ry. Co., 52 La. Ann. 1850, 28 South. 284; it cannot lawfully reject some goods and afterwards receive and transport others when at the time of refusal there is room for the rejected goods; Ocean S. S. Co. of Savannah v. Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A. (N. S.) 867, 127 Am. St. Rep. 265, 15 Ann. Cas. 1044. It must furnish cars when requested by a shipper, and if unable to do so must advise the shipper of that fact; Di Giorgio Importing & Steamship Co. v. R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108; but at common law there is no duty to furnish sufficient cars for transportation beyond its own line of road; Gulf, C. & S. F. R. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028. The Hepburn Act (June 29, 1906) made it the duty of interstate carriers to furnish cars; this invalidated all state laws on the same subject; Chicago, R. I. & P. R. Co. v. Elevator Co., 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, reversing Hardwick Farmers' Elevator Co. v. R. Co., 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; Yazoo & M. V. R. Co. v. Grocery Co., 227 U. S. 1, 33 Sup. Ct. 213, 55 L. Ed. ——. But the business of a common carrier may be restricted within such limits as he may deem expedient, if an individual, or which may be prescribed in its grant of powers, if a corporation, and he is not bound to accept goods out of the line of his usual business. But should the carrier accept goods not within the line of his business, he assumes the liability of a common carrier as to the specific goods accepted; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Hays v. Mouille, 14 Pa. 48; Bennett v. Dutton, 10 N. H. 481; Powell v. Mills, 30 Miss. 231, 64 Am. Dec. 158; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Sewall v. Allen, 6 Wend. (N. Y.) 335; Kimball v. R. Co., 26 Vt. 248, 62 Am. Dec. 567. The carrier may require freight to be paid in advance; but in an action for not carrying, it is only necessary to allege a readiness to pay freight; 8 M. & W. 372; Galena & C., U. R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; Knox v. Rives, 14 Ala. 249, 48 Am. Dec. 97. It is not required to prove or allege a tender, if the carrier refuse to accept the goods for transportation. The carrier is entitled to a lien upon the goods for freight; 2 Ld. Raym. 752; and for advances made to other carriers; White v. Vann, 6 Humphr. (Tenn.) 70, 44 Am. Dec. 294; Bissel v. Price, 16 Ill. 408; Palmer v. Lorillard, 16 Johns. (N. Y.) 356; Boggs v. Martin, 13 B. Monr. (Ky.) 243. The consignor is *prima facie* liable for freight; but the consignee may be liable when the consignor is his agent, or when the title is in him and he accepts the goods; 3 Bingh. 383; Merian v. Funck, 4 Den. (N. Y.) 110; New York & Harve Steam Nav. Co. v. Young, 3 E. D. Sm. (N. Y.) 187. A shipper must pay the combined rates over connecting railroads existing at the time of the shipment, and he cannot take advantage of a reduction, while the goods are in transit over the first road, if there are no joint through rates; Payne

v. Atchison, T. & S. F. R. Co., 12 Int. St. Com. Rep. 190.

Common carriers may qualify their common-law responsibility by special contract; 4 Coke 83; 1 Ventr. 238; Story, Bailm. § 549; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Michigan C. R. Co. v. Mfg. Co., 16 Wall. (U. S.) 318, 21 L. Ed. 297; Empire Transp. Co. v. Oil Co., 63 Pa. 14, 3 Am. Rep. 515; Indianapolis, D. & W. R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138. A carrier cannot exact as a condition precedent that a shipper must sign a contract in writing limiting the common law liability; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Missouri, K. & T. R. Co. of Texas v. Carter, 9 Tex. Civ. App. 677, 29 S. W. 565. A contract to qualify the common-law liability may be shown by proving a notice, brought home to and assented to by the owner of the goods or his authorized agent, wherein the carrier stipulates for a qualified liability; 8 M. & W. 243; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; Dorr v. Nav. Co., 11 N. Y. 491, 62 Am. Dec. 125; Laing v. Colder, 8 Pa. 479, 49 Am. Dec. 533; Swindler v. Hilliard, 2 Rich. (S. C.) 286, 45 Am. Dec. 732; Reno v. Hogan, 12 B. Monr. (Ky.) 63, 54 Am. Dec. 513; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Dec. 68; Barney v. Prentiss, 4 Har. & J. (Md.) 317, 7 Am. Dec. 670. A carrier may for a consideration limit its common law liability; Simmons Hardware Co. v. Ry. Co., 140 Mo. App. 130, 120 S. W. 663; a mere agreement to carry is not a sufficient consideration; Burgher v. R. Co., 139 Mo. App. 62, 120 S. W. 673; the limitation must be made by special contract; Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128; and no contract will be implied from any condition in a bill of lading unless clearly brought to the shipper's attention at the time of shipment; Baltimore & O. R. Co. v. Doyle, 142 Fed. 669, 74 C. C. A. 245. In the case of passage tickets for an ocean voyage a limitation with regard to baggage liability covers a loss occasioned by negligence although not expressly provided for; Tewes v. S. S. Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A. (N. S.) 199, 9 Ann. Cas. 909. A contract by a carrier limiting his liability for negligence is governed by the *lex loci contractus;* Fairchild v. R. Co., 148 Pa. 527, 24 Atl. 79.

But the carrier cannot contract against his own negligence or the negligence of his employés and agents; Muser v. Exp. Co., 1 Fed. 382; Welch v. R. Co., 41 Conn. 333; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627; Adams Exp. Co. v. Sharpless, 77 Pa. 516; Inman v. R. Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612; Liverpool & G. W. Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; L. R. 2 App. Cas. 792; South & N. A. R. Co. v. Henlein, 56 Ala. 368; Merchants' Despatch Transp. Co. v. Theilbar, 86 Ill. 71; Wright v. Gaff, 6 Ind. 416; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Hoadley v. Transp. Co., 115 Mass. 304, 15 Am. Rep. 106; Levering v. Ins. Co., 42 Mo. 88, 97 Am. Dec. 320. In the absence of legislation by congress a state may impose upon common carriers even in interstate business a liability for their negligence, a contract to the contrary notwithstanding; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268; usually a common carrier cannot limit its liability for loss due to its negligence; Central of Georgia R. Co. v. Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128; Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Russell v. R. Co., 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214; Baltimore & O. S. W. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560; Pittsburgh, C., C. & St. L. Ry. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; even though a reduced rate based on a limited valuation of the property has been approved by the state commission; Everett v. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; this rule does not apply outside of the performance of its duties as a common carrier; Santa Fé, P. & P. Ry. Co. v. Const. Co., 228 U. S. 177, 33 Sup. Ct. 474, 57 L. Ed. ——; where a gratuitous pass containing a condition absolving the company from negligence is issued by a carrier by sea, there can be no recovery for the carrier's negligence; [1900] P. D. 161. The reasons for the rule forbidding a contract against its own negligence fail as to persons riding on pass; Griswold v. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. 1069, 25 L. R. A. 491; Quimby v. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Kinney v. R. Co., 34 N. J. L. 513, 3 Am. Rep. 265; Wells v. R. Co., 24 N. Y. 181; Muldoon v. R. Co., 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901. The carrier is liable for injuries to the shipper's servants resulting from defects in a car furnished by it; Chicago, I. & L. R. Co. v. Pritchard, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857; and likewise if the defects injure the property received by it, although the car is in fact the property of another corporation; Ladd v. R. Co., 193 Mass. 359, 79 N. E. 742, 9 L. R. A. (N. S.) 874, 9 Ann. Cas. 988.

Railroad companies, steamboats, and all other carriers who allow express companies to carry parcels and packages on their cars, or boats, or other vehicles, are liable as common carriers to the owners of goods for all loss or damage which occurs, without re-

gard to the contract between them and such express carriers; New Jersey Steam Nav. Co. v. Bank, 6 How. (U. S.) 344, 12 L. Ed. 465; Farmers' & Mechanics' Bank v. Transp. Co., 23 Vt. 186, 56 Am. Rep. 68; American Exp. Co. v. Ogles, 36 Tex. Civ. App. 407, 81 S. W. 1023.

A carrier is not liable for the loss of a mail package through the negligence of its employé, being in that employment not a carrier, but a public agent of the United States; Bankers' Mutual Casualty Co. v. Ry. Co., 117 Fed. 434, 54 C. C. A. 608, 65 L. R. A. 397. But where the carrier transports cars of an express company under a special contract, a clause exempting the carrier from liability is valid; Baltimore & O. S. Ry. Co. v. Voigt, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560.

Railways, steamboats, packets, and other common carriers of passengers, although not liable for injuries to their passengers without their fault, are nevertheless responsible for the baggage of such passengers intrusted to their care as common carriers of goods; and such responsibility continues for a reasonable time after the goods have been placed in the warehouse or depot of the carrier, at the place of destination, for delivery to the passenger or his order; 2 B. & P. 416; Powell v. Myers, 26 Wend. (N. Y.) 591; Bennett v. Dutton, 10 N. H. 481; Dill v. R. Co., 7 Rich. (S. C.) 158, 62 Am. Dec. 407. See Galveston, H. & S. A. Ry. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

Where baggage was stored with a carrier as warehouseman after its arrival by railroad, the burden is on the owner to show negligence; Yazoo & M. V. R. Co. v. Hughes, 94 Miss. 242, 47 South. 662, 22 L. R. A. (N. S.) 975. If a carrier maintains a check room and limits its liability for articles checked, such limitation is good, but the carrier is liable as an insurer for the limited amount; Terry v. Southern Ry., 81 S. C. 279, 62 S. E. 249, 18 L. R. A. (N. S.) 295.

See BAGGAGE.

The responsibility of common carriers begins upon the delivery of the goods for immediate transportation. A delivery at the usual place of receiving freight, or to the employés of the company in the usual course of business, is sufficient; Merriam v. R. Co., 20 Conn. 354, 52 Am. Dec. 344; 2 M. & S. 172; Gregory v. Ry. Co., 46 Mo. App. 574; Railway Co. v. Neel, 56 Ark. 279, 19 S. W. 963; Rogers v. Wheeler, 52 N. Y. 262; Illinois Cent. R. Co. v. Smyser & Co., 38 Ill. 354, 87 Am. Dec. 301; but where carriers have a warehouse at which they receive goods for transportation, and goods are delivered there not to be forwarded until some event occur, the carriers are, in the meantime, only responsible as depositaries; Moses v. R. R., 24 N. H. 71, 55 Am. Dec. 222; and where goods are received as wharfingers, or warehousers, or forwarders, and not as carriers, liability will be incurred only for ordinary negligence; Platt v. Hibbard, 7 Cow. (N. Y.) 497. A carrier may make reasonable regulations governing the manner and place in which it will receive articles which it professes to carry, and these regulations may be changed on reasonable notice to the public; Robinson v. R. Co., 129 Fed. 753, 64 C. C. A. 281; proof of delivery of property to the carrier in sound condition and of its re-delivery at the end of the route in damaged condition is sufficient to sustain a recovery; Duncan v. R. Co., 17 N. D. 610, 118 N. W. 826, 19 L. R. A. (N. S.) 952. Where goods are injured because of insecure packing or boxing, the carrier is not liable; Goodman v. O. R. & N. Co., 22 Or. 14, 28 Pac. 894; but where it does not appear that they were received as in bad order, or that they were so in fact, the presumption is that they were in good order; Henry v. Banking Co., 89 Ga. 815, 15 S. E. 757. Where there was less than a carload of goods, and there was no agreement on the part of the carrier to transport them in a ventilated car, although it was requested by the carrier that they should be so shipped, it was held that the carrier was not liable for the loss of perishable goods; Davenport Co. v. R. Co., 173 Pa. 398, 34 Atl. 59.

The responsibility of the carrier terminates after the arrival of the goods at their destination and a reasonable time has elapsed for the owner to receive them in business hours. After that, the carrier may put them in a warehouse, and is only responsible for ordinary care; Thomas v. R. Corp., 10 Metc. (Mass.) 472, 43 Am. Dec. 444; Smith v. Railroad, 27 N. H. 86, 59 Am. Dec. 364; 2 M. & S. 172. Where goods are delivered to the consignee in violation of instructions not to deliver without a bill of lading, the company is liable to the shipper for loss thereby sustained; Foggan v. R. Co., 61 Hun 623, 16 N. Y. Supp. 25. The delivery of goods from a ship must be according to the custom of the port, and such delivery will discharge the carrier of his responsibility; Constable v. S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, 38 L. Ed. 903.

Notice to the consignee of the arrival of goods and a reasonable time to remove them are necessary to reduce the liability of the carrier to that of a warehouseman; Roythress v. R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427; and where goods are stolen after notice to the consignee, but before a reasonable time for removal has elapsed, the carrier is liable; Burr v. Express Co., 71 N. J. L. 263, 58 Atl. 609. The test of reasonable time for the removal of goods which changes a carrier to a warehouseman is whether the consignee exercised reasonable diligence to ascertain when the goods had arrived or would arrive, and to remove them after he had received, or, with reasonable care, would have received notice;

Lewis v. R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A. (N. S.) 938, 21 Ann. Cas. 527. Three and a half months was held more than reasonable time; Norfolk & W. R. Co. v. Mill. Co., 109 Va. 184, 63 S. E. 415; eighteen days after notice was mailed; Southern R. Co. v. Machine Co., 165 Ala. 436, 51 South. 779. Where baggage was left over night, the carrier's liability, if any, for its loss, was that of a warehouseman: Campbell v. R. Co., 78 Neb. 479, 111 N. W. 126. One and a half business days is sufficient to terminate the liability of the carrier as such; United Fruit Co. v. Transportation Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240, 10 Ann. Cas. 437; a carrier whose liability has become that of a warehouseman is liable as a bailee for hire unless it notifies the owner that it will no longer hold the property as warehouseman; Brunson & Boatwright v. R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A. (N. S.) 577.

On unconditional consignments the carrier must treat the consignee as the absolute owner until he receives notice to the contrary; Pratt v. Express Co., 13 Idaho, 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, 121 Am. St. Rep. 268; where the consignee takes the goods from the carrier's possession without its knowledge or consent, the carrier is not justified for its failure to comply with an order of the shipper diverting the consignment; Atchison, T. & S. F. R. Co. v. Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A. (N. S.) 1056; but there is no liability where the carrier permits inspection of the goods at the point of destination in consequence of which the consignor, who was also the consignee, was prevented from making a sale thereof; Dudley v. Ry. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A. (N. S.) 1135, 112 Am. St. Rep. 1027.

Where goods are so marked as to pass over successive lines of railways, or other transportation having no partnership connection in the business of carrying, the successive carriers are only liable for damage or loss occurring during the time the goods are in their possession for transportation; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. (U. S.) 129, 22 L. Ed. 827; Van Santvoord v. St. John, 6 Hill (N. Y.) 158; Hood v. R. Co., 22 Conn. 502; Nutting v. R. Co., 1 Gray (Mass.) 502; Dunbar v. Ry. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860; Church v. R. Co., 1 Okl. 44, 29 Pac. 530; Alabama G. S. R. Co. v. Mt. Vernon Co., 84 Ala. 175, 4 South. 356; Central R. Co. v. Hasselkus, 91 Ga. 384, 17 S. E. 838, 44 Am. St. Rep. 37; Erie R. Co. v. Wilcox, 84 Ill. 240, 25 Am. Rep. 451; Louisville & N. R. Co. v. Campbell, 7 Heisk. (Tenn.) 257; Beard v. R. Co., 79 Ia. 531, 44 N. W. 803; Kyle v. R. Co., 10 Rich. (S. C.) 382, 70 Am. Dec. 231. A carrier may stipulate that it shall be released from liability after goods have left its road; Texas & P. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; McCarn v. Ry. Co., 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; Coles v. R. Co., 41 Ill. App. 607; Gulf, C. & S. F. R. Co. v. Clarke, 5 Tex. Civ. App. 547, 24 S. W. 355. The English courts hold the first carrier, who accepts goods marked for a place beyond his route, responsible for the entire route, unless he stipulates expressly for the extent of his own route only; 8 M. & W. 421; 3 E. L. & Eq. 497; 18 *id.* 553, 557; 7 H. L. 194.

Where one of the carriers has contracted clearly and unequivocally to deliver goods at their destination, *i. e.*, to carry them over the whole route, his liability will continue until final delivery; Converse v. Transp. Co., 33 Conn. 178; Pennsylvania R. Co. v. Berry, 68 Pa. 272; Stewart v. R. Co., 3 Fed. 768; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693; Erie Ry. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451. See 9 L. R. A. 833, note; Newell v. Smith, 49 Vt. 255; Jennings v. R. Co., 127 N. Y. 438, 28 N. E. 394; but the carrier upon whose line the damage or loss has occurred will also be liable; Laughlin v. Ry. Co., 28 Wis. 209, 9 Am. Rep. 493; Brintnall v. R. Co., 32 Vt. 665. Where the connecting carrier refuses or unreasonably delays to accept goods, the original carrier while so holding them is a carrier, and the liability as such continues until they are warehoused; Bennitt v. Ry. Co., 46 Mo. App. 656.

A contract to transport goods from or to points not on the carrying line, and without the state by which it is incorporated, is held to be good; Perkins v. R. Co., 47 Me. 573, 74 Am. Dec. 507; Noyes v. R. Co., 27 Vt. 110; Weed v. R. Co., 19 Wend. (N. Y.) 534; Redf. Railw. Cases 110; Nashua Lock Co. v. R. Co., 48 N. H. 339, 2 Am. Rep. 242; *contra*, Naugatuck R. Co. v. Button Co., 24 Conn. 468.

At common law a carrier, unless there is a special contract is only bound to carry over its own line and deliver to a connecting carrier; Gulf, C. & S. F. Ry. Co. v. State, 56 Tex. Civ. App. 353, 120 S. W. 1028. If it accepts goods marked for a point beyond its own line, it is bound to carry and deliver them at that place; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 104; and when it has so contracted, all connecting lines are its agents, for whose default it is responsible; Schwartz v. R. Co., 155 Cal. 742, 103 Pac. 196; and if loss occurs through the negligence of the connecting carrier or while in its possession the original carrier is liable; Whitnack v. R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A. (N. S.) 1011, 130 Am. St. Rep. 692; St. Louis, I. M. & S. Ry. Co. v. Randle, 85 Ark. 127, 107 S. W. 669; the interchange of traffic between two connecting carriers is, in the absence of statutory pro-

vision, a matter of contract, and the courts have no power to compel such interchange of traffic; Central Stock Yards Co. v. R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213, affirmed in Central Stock Yards Co. v. R. Co., 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565; when goods arrive at the end of the original carrier's line, it is the duty of such carrier to deliver them to the succeeding carrier or notify it of their arrival; Texas & P. R. Co. v. Reiss, 183 U. S. 621, 22 Sup. Ct. 252, 46 L. Ed. 358; in the absence of such notice, the original carrier is not relieved of his liability as insurer; *id.* If the original carrier still continues to have control over the goods and has a choice as between connecting carriers, his liability is not terminated until actual delivery of the goods to one of the connecting carriers; Texas & P. R. Co. v. Callender, 183 U. S. 632, 22 Sup. Ct. 257, 46 L. Ed. 362. The original carrier's duty is not discharged by tendering the goods in an unfit condition whether such condition arises from an injury received in its possession or from some unusual cause; Buston v. R. Co., 116 Fed. 235, affirmed in 119 Fed. 808, 56 C. C. A. 320; the receipt of perishable goods involves the duty of the carrier to provide a refrigerator car and to ice it properly, not only on its own line, but on the connecting carrier's route; Pennsylvania R. Co. v. Produce Co., 111 Md. 356, 73 Atl. 571. If the connecting carrier negligently detains goods at the connecting point until they are overtaken by a flood, the original carrier is still liable for the loss; Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; a shipper may demand delivery of the goods at the connecting point of two routes by paying the charges of the first carrier; Wente v. R. Co., 79 Neb. 179, 115 N. W. 859, 15 L. R. A. (N. S.) 756.

The Carmack Amendment to the Interstate Commerce Act makes a carrier liable for loss beyond its own lines when goods are received for interstate transportation. It is a valid exercise of the commerce power; Atlantic Coast Line R. Co. v. Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7; but it was not decided there whether a carrier can be compelled to accept goods for transportation beyond its own lines.

The agents of railway and steamboat companies, will bind their principals to the full extent of the business intrusted to their control, whether they follow their instructions or not; Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468, 483, 14 L. Ed. 502. See Jennings v. R. Co., 127 N. Y. 438, 28 N. E. 394. Nor will it excuse the company because the servant or agent acted wilfully in disregard of his instructions; Weed v. R. Co., 5 Duer (N. Y.) 193; Redf. Railw. § 137, and cases cited in notes.

A common carrier has power to make reasonable regulations governing the manner and place in which it will receive goods for transportation and also may change such regulations upon reasonable notice to the public; Robinson v. R. Co., 129 Fed. 753, 64 C. C. A. 281; Platt v. Lecocq, 158 Fed. 723, 85 C. C. A. 621, 15 L. R. A. (N. S.) 558. It may require reasonable assurance of the character of the goods, and also provide for a reasonable inspection; Adams Express Co v. Com., 129 Ky. 420, 112 S. W. 577, 18 L. R. A. (N. S.) 1182.

A stipulation in a bill of lading limiting the time within which claims for damage may be presented is valid, provided the time fixed is reasonable; Nashville, C. & St. L. R. R. v. H. M. Long & Son, 163 Ala. 165, 50 South. 130; but a stipulation of ten days is not reasonable with regard to injuries to live-stock; Wabash R. Co. v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A. (N. S.) 104.

Transportation of animals is common carriage; Swiney v. Exp. Co., 144 Ia. 342, 115 N. W. 212; and the carrier is bound to care for and feed them in transit; Toledo, W. & W. R. Co. v. Hamilton, 76 Ill. 393; Peck v. R. Co., 138 Ia. 187, 115 N. W. 1113, 16 L. R. A. (N. S.) 883, 128 Am. St. Rep. 185. A common carrier is absolutely liable for the destruction by fire of animals while in its possession; Stiles, Gaddie & Stiles v. R. Co., 129 Ky. 175; a carrier of live stock is liable only for the negligence of its servants, but not as insurer; Cash v. Wabash R. Co., 81 Mo. App. 109; Rick v. Wells Fargo Co., 39 Utah, 130, 115 Pac. 991; he is not liable for loss due to the natural propensities and habits of the stock; Texas Cent. R. Co. v. Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; Summerlin v. Ry., 56 Fla. 687, 47 South. 557, 19 L. R. A. (N. S.) 191, 131 Am. St. Rep. 164; where trained bears while in transit injure a person, the carrier is not liable; Molloy v. Starin, 191 N. Y. 21, 83 N. E. 588, 16 L. R. A. (N. S.) 445, 14 Ann. Cas. 57. It is the duty of the carrier to provide a safe pen for unloading stock at a junction point; El Paso & N. E. R. Co. v. Lumbley, 56 Tex. Civ. App. 418, 120 S. W. 1050; and they must be kept in a reasonably safe condition; St. Louis & S. F. R. Co. v. Beets, 75 Kan. 295, 89 Pac. 683, 10 L. R. A. (N. S.) 571. If the carrier accept live stock for transportation, he is bound to exercise at least ordinary care; German v. R. Co., 38 Ia. 127; Gulf, C. & S. F. Ry. Co. v. Ellison, 70 Tex. 491, 7 S. W. 785; St. Louis, I. M. & S. Ry. Co. v. Jones (Tex.) 29 S. W. 695; Duvenick v. R. Co., 57 Mo. App. 550; Norfolk & W. R. Co. v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855; Schaeffer v. R. Co., 168 Pa. 209, 31 Atl. 1088, 47 Am. St. Rep. 884; Gulf, C. & S. F. Ry. Co. v. Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925; Crow v. R. Co., 57 Mo App. 135. The burden of proof is on the carrier to show that loss or injury to live-

stock resulted from an excepted cause, when shipped under special contract, containing exemptions from liability; Johnson v. R. Co., 69 Miss. 191, 11 South. 104, 30 Am. St. Rep. 534.

Under the act of congress of June 29, 1906, common carriers by land and water carrying live stock in interstate commerce are forbidden to confine them more than 28 consecutive hours "without unloading the same in a humane manner into properly equipped pens for rest, water and feeding, for a period of at least 5 consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight," except that sheep need not be unloaded in the night time, and it is provided that upon the written request of the owner, etc., of a particular shipment, separate from any bill of lading or other railroad form, the time of confinement may be extended to 36 hours.

Animals so unloaded shall be properly fed and watered either by the owner or custodian, or, in case of his default, by the carrier at the reasonable expense of the owner or custodian, for which the carrier shall have a lien upon the animals, but the owner or shipper shall have the right to furnish food if he so desires. Section 3 provides that where animals are carried in such way that they have proper food, water, space and opportunity to rest, they need not be unloaded.

A railroad company which delivers the cars to a connecting carrier within the 28 hours is relieved from responsibility; U. S. v. Southern Pac. Co., 157 Fed. 459; Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

That the company had made proper rules requiring employees to comply with the act is no defense; U. S. v. Atlantic Coast Line R. Co., 173 Fed. 764, 98 C. C. A. 110; nor is pressure of business; U. S. v. Union Pac. R. Co., 169 Fed. 65, 94 C. C. A. 433. It is no defense that the violation was by reason of the oversight of a train dispatcher, contrary to the rules and orders; Montana Cent. Ry. Co. v. U. S., 164 Fed. 400, 90 C. C. A. 388.

An accidental or unavoidable cause, as mentioned in the act, which cannot be anticipated or avoided, etc., is one which cannot be avoided by that degree of care which the law requires of every one under the circumstances of the particular case; Missouri, K. & T. R. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

Failure to provide unloading stations, congested traffic, conditions reasonably to be anticipated from past experience, and breakdowns resulting from negligent operation and omission to furnish properly equipped and inspected cars, etc., are not accidental or unavoidable causes which will relieve the carrier; U. S. v. R. Co., 166 Fed. 160. A company must know how long a connecting line has kept animals without food or water and must learn such fact at its peril; U. S. v. Stockyards Co., 181 Fed. 625. The question of compliance with the act of congress of the written request for the extension of the period of confinement is for the court; Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15, 101 C. C. A. 143.

The act is not criminal; it does not require proof of malevolent purpose, but only that animals were knowingly and intentionally confined beyond the prescribed period; U. S. v. Stockyards Co., 162 Fed. 556.

There is a separate offense as to each lot of cattle shipped simultaneously as soon as the prescribed time expires as to each lot, regardless of the number of shippers, trains or cars. The aggregate sum of the possible penalties is the amount in dispute for jurisdictional purposes; Baltimore & O. S. W. R. Co. v. U. S., 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. 384.

The carrier has an insurable interest in the goods, both in regard to fire and marine disasters, measured by the extent of his liability for loss or damage; Chase v. Ins. Co., 12 Barb. (N. Y.) 595.

The carrier is not bound, unless he so stipulate, to deliver goods by a particular time, or to do more than to deliver in a reasonable time under all the circumstances attending the transportation; 5 M. & G. 551; Broadwell v. Butler, 6 McLean 296, Fed. Cas. No. 1,910; Wibert v. R. Co., 12 N. Y. 245. See 15 W. R. 792; L. R. 9 C. P. 325; McLaren v. R. Co., 23 Wis. 138; Illinois Central R. Co. v. Waters, 41 Ill. 73; Dawson v. R. Co., 79 Mo. 296. The implied agreement of a common carrier is to deliver at the destination within a reasonable time; Chicago & Alton R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033; Missouri Pac. Ry. Co. v. Implement Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A. (N. S.) 1058, 117 Am. St. Rep. 468, 9 Ann. Cas. 790; interference by strikers excuses delay; Sterling v. R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655; but where the carrier's facilities were overtaxed by an unusual press of business, which it knew of at the time of the shipment, the consequent delay in delivery is not excused; Yazoo & M. V. R. Co. v. Blum Co., 88 Miss. 180, 40 South. 748, 10 L. R. A. (N. S.) 432; for failure to deliver promptly theatrical scenery and properties, the carrier is liable for the value of the ordinary earnings, less the expenses which the owner has saved by inability to exhibit; Weston v. R. Co., 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825. A carrier is liable for delay if it knows and does not disclose the probability of it; Thomas v. R. Co., 63 Fed. 200; at least as held by some courts, when the shipper does not know

the circumstances; Nelson v. R. Co., 28 Mont. 297, 72 Pac. 642. What is a reasonable time is to be decided by the jury; Nettles v. R. Co., 7 Rich. (S. C.) 190, 62 Am. Dec. 409; 32 L. J. Q. B. 292.

But if the carrier contract specially to deliver in a prescribed time, he must perform his contract, or suffer the damages sustained by his failure; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; 2 B. & P. 416; Knowles v. Dabney, 105 Mass. 437; Ball v. R. Co., 83 Mo. 574.

He is liable, upon general principles, where the goods are not delivered through his default, to the extent of their market value at the place of their destination; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. Dec. 54; Grieff v. Switzer, 11 La. Ann. 324; 2 B. & Ad. 932; Newell v. Smith, 49 Vt. 255; Rankin v. R. R., 55 Mo. 167. See, also, Gillingham v. Dempsey, 12 S. & R. (Pa.) 183; Ringgold v. Haven, 1 Cal. 108.

Receipt of goods and failure to deliver raises a presumption against the carrier; Everett v. R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985; but the carrier is not liable for failure to deliver a carload of fruit where municipal authorities forbid the delivery on account of quarantine; Alabama & V. R. Co. v. Tirelli, 93 Miss. 797, 48 South. 962, 21 L. R. A. (N. S.) 731, 136 Am. St. Rep. 559, 17 Ann. Cas. 879.

If the goods are only damaged, or not delivered in time, the owner is bound to receive them. He will be entitled to damages, but cannot repudiate the goods and recover from the carrier as for a total loss; Shaw v. R. Co., 5 Rich. (S. C.) 462, 57 Am. Dec. 768; Scovill v. Griffith, 12 N. Y. 509; Hackett v. R. R., 35 N. H. 390; Robertson v. Steamship Co., 60 N. Y. Super. Ct. 132; Chesapeake & O. R. Co. v. Saulsbury, 126 Ky. 179, 103 S. W. 254, 12 L. R. A. (N. S.) 431.

Where a carrier is actually deceived as to the contents of a package containing intoxicating liquors, which it transports into local option territory, it cannot be punished under a statute forbidding such transportation; Adams Exp. Co. v. Com., 129 Ky. 420, 112 S. W. 577, 18 L. R. A. (N. S.) 1182; and to protect itself, it may require reasonable assurance that the goods are not contraband, and provide for a reasonable inspection when practicable; *id.*

If a shipper is guilty of fraud in misrepresenting the nature or value of the article, he forfeits his right to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the article and the risk assumed, and has tended to lessen the vigilance of the carrier; Hart v. R. Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; in such case he cannot hold the carrier for more than the apparent value, or the value stated by him; *id.*; Georgia S. & F. Ry. Co. v. Johnson, King & Co., 121 Ga. 231, 48 S. E. 807; Graves v. R. Co., 137 Mass. 33, 50 Am. Rep. 282; Rowan v. Wells, Fargo & Co., 80 App. Div. 31, 80 N. Y. Supp. 226. This rule has been applied to one shipping a valuable horse as a horse of ordinary value at a rate applicable to the latter; Duntley v. R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A. 449, 49 Am. St. Rep. 610; one concealing valuable memorandum books in clothing shipped as "worn clothing;" Savannah, F. & W. Ry. Co. v. Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; one delivering a package of the value of $234,000, and representing its value as $1,000, paying for the latter valuation; U. S. Exp. Co. v. Koerner, 65 Minn. 540, 68 N. W. 181, 33 L. R. A. 600; to one shipping jewelry in a package as household goods; Charleston & S. Ry. Co. v. Moore, 80 Ga. 522, 5 S. E. 769. It has been held that in such case the carrier is relieved from all liability; Shackt v. R. Co., 911 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176; Southern Exp. Co. v. Wood, 98 Ga. 268, 25 S. E. 436. On the other hand, it has been held that, where fraud was practiced in order to get a lower rate, the carrier would not be bound by the rate given, but that in such case the carrier's liability was not lessened; Lucas v. Ry. Co., 112 Ia. 594, 84 N. W. 673; Rice v. R. Co., 3 Mo. App. 27. A mere failure of the shipper, unasked, to state the value, is not, as a matter of law, a fraud upon the carrier which defeats all right of recovery; New York, C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. Ed. 531; but other cases have imposed upon the shipper the duty of disclosing to the carrier that the article is valuable; White v. Cable Co., 25 App. D. C. 364; Gilman v. Telegraph Co., 48 Misc. 372, 95 N. Y. Supp. 564. Where the value, when not stated, was, by the company's regulation, placed at $50, this limit was enforced; Magnin v. Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608. See a full note in 23 L. R. A. (N. S.) 745. But in Pennsylvania contracts limiting liability for the full value are held void; Wright v. Exp. Co., 230 Pa. 635, 79 Atl. 760, where the value was greatly in excess of the $50 limit and the bill of lading was stamped "value asked and not given."

Where an express company fixes its charges in proportion to the value of the property shipped and the shipper has knowledge of same, in case of loss, the shipper is limited to the value stated, and this is not a violation of the act of June 29, 1906, which states that a carrier in an interstate shipment cannot limit his liability; Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314.

For the authorities in the civil law on the subject of common carriers, the reader is referred to Dig. 4. 9. 1 to 7; Pothier, *Pand.* lib. 4, t. 9; Domat, liv. 1, t. 16, ss. 1 and 2; Pardessus, art. 537 to 555; *Code Civil*, art.

1782, 1786, 1952; Moreau & Carlton, *Las Partidas*, c. 5, t. 8, l. 26; Erskine, Inst. b. 2, t. 1, § 28; 1 Bell, Comm. 465; Abbott, Shipp. part 3, c. 3, § 3, note (1); 1 Voet, *Ad Pand.* lib. 4, t. 9; Merlin, Rép. *Voiture, Voiturier;* Goirand, Code of Commerce (1880) 163.

See COMMON CARRIERS OF PASSENGERS; BAGGAGE; BAILMENTS; LIEN; EXPRESS COMPANIES; PASSENGER; TICKET; SLEEPING CAR; INTERSTATE COMMERCE COMMISSION.

COMMON CARRIERS OF PASSENGERS. Common carriers of passengers are such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing. Thomps. Carriers of Passengers 26, n. § 1; Vinton v. R. Co., 11 Allen (Mass.) 304, 87 Am. Dec. 714; Hollister v. Nowlen, 19 Wend. (N. Y.) 239, 32 Am. Dec. 455; Bennett v. Dutton, 10 N. H. 486; Galena & C. U. R. Co. v. Yarwood, 15 Ill. 472; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; 3 B. & B. 54.

A company owning parlor and sleeping cars, who enter into no contract of carriage with the passenger, but only give him superior accommodations, was formerly held not a common carrier; Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. Rep. 258; Duval v. Palace Car Co., 62 Fed. 265, 10 C. C. A. 331, 33 L. R. A. 715. See PARLOR CARS; SLEEPING CARS. A street railway company is a common carrier of passengers and liable as such on common-law principles; Spellman v. Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753. See STREET RAILWAYS.

Common carriers may excuse themselves when there is an unexpected press of travel and all their means are exhausted. But where it appears that there is usually a large crowd at a particular station for a particular train, it is evidence of negligence on the part of the carrier in failing to anticipate the large crowd and take precautions to protect intending passengers from injury therefrom; Kuhlen v. Ry. Co., 193 Mass. 341, 79 N. E. 815, 7 L. R. A. (N. S.) 729, 118 Am. St. Rep. 516. And see Bennett v. Dutton, 10 N. H. 486; and they may for good cause exclude a passenger: thus, they are not required to carry drunken and disorderly persons, or one affected with a contagious disease, or those who come on board to assault passengers, commit a crime, flee from justice, gamble, or interfere with the proper regulations of the carrier, and disturb the comfort of the passengers; Thurston v. R. Co., 4 Dill. 321, Fed. Cas. No. 14,019; Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. Ed. 447; O'Brien v. R. Co., 15 Gray (Mass.) 20, 77 Am. Dec. 347; Pittsburgh, C. & St. L. Ry. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Pittsburgh & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Railway Co. v. Valleley, 32 Ohio St. 345, 30 Am. Rep. 601; or one whose purpose is to injure the carrier's business; Jencks v. Coleman, 2 Sumn. 221, Fed. Cas. No. 7,258; Barney v. Martin, 11 Blatchf. 233, Fed. Cas. No. 1,030; but if a carrier receives a passenger, knowing that a good cause exists for his exclusion, he cannot afterwards eject him for such cause; Pearson v. Duane, 4 Wall. (U. S.) 605, 18 L. Ed. 447; Tarbell v. R. Co., 34 Cal. 616. Where one rightfully on a train as a passenger is put off, it is of itself a good cause of action against the company irrespective of any physical injury that may have resulted; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71. It is not liable for injuries resulting from one trying to steal a ride on a freight train; Planz v. R. Co., 157 Mass. 377; 32 N. E. 356, 17 L. R. A. 835.

Passenger-carriers are not held responsible as insurers of the safety of their passengers, as common carriers of goods are. But they are bound to the very highest degree of care and watchfulness in regard to all their appliances for the conduct of their business; so that, as far as human foresight can secure the safety of passengers, there is an unquestionable right to demand it of all who enter upon the business of passenger-carriers; Spellman v. Rapid Transit Co., 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753; Texas Central R. Co. v. Stuart, 1 Tex. Civ. App. 642, 20 S. W. 962; Chicago, P. & St. L. R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; L. R. 9 Q. B. 122; 2 Q. B. D. 377; White v. R. Co., 136 Mass. 321; Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Philadelphia & R. R. Co. v. Anderson, 94 Pa. 351, 39 Am. Rep. 787. They are liable only for injuries resulting from their negligence; [1901] A. C. 496; and such negligence must be the proximate cause of the injury; Bevard v. L. Traction Co., 74 Neb. 802, 105 N. W. 635, 3 L. R. A. (N. S.) 318. A carrier is not permitted to contract against liability for negligence, but a private carrier may, by special contract; Cleveland, C., C. & St. L. R. Co. v. Henry, 170 Ind. 94, 83 N. E. 710. Where a conductor negligently assists a passenger from the car to the station platform, the company is responsible for injuries resulting therefrom; Hanlon v. R. Co., 187 N. Y. 73, 79 N. E. 846, 10 L. R. A. (N. S.) 411, 116 Am. St. Rep. 591, 10 Ann. Cas. 366; and even carrying a passenger at reduced fare does not entitle the carrier to stipulate for an exemption from liability for negligence; Pittsburgh, C., C. & St. L. R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081.

A state may by statute limit the right of recovery for injuries to certain classes of persons; Martin v. R. Co., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184.

It is not responsible to persons board-

ing trains to assist passengers; Hill v. R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432; to purchase fruit from one not in the employ of the railroad company; Peterson v. R. Co., 143 N. C. 260, 55 S. E. 618, 8 L. R. A. (N. S.) 1240, 118 Am. St. Rep. 799; or to speak to a passenger thereon; Bullock v. R. Co. (Tex.) 55 S. W. 184; and it owes no duty to them.

Where an injury occurs on cars chartered by an association or individual, the carrier is liable to a passenger thereon as in other cases; Clerc v. R. & S. S. Co., 107 La. 370, 31 South. 886, 90 Am. St. Rep. 319; Estes v. R. Co., 110 Mo. App. 725, 85 S. W. 627; Collins v. R. Co., 15 Tex. Civ. App. 169, 39 S. W. 643; and so where such a passenger has been ejected from such a train; Kirkland v. R. Co., 79 S. C. 273, 60 S. E. 668, 128 Am. St. Rep. 848. Where a train is signalled at a section house, which is not a regular stopping-place, and a person boards it without any one's knowledge, and in doing so is injured, the carrier is not liable; Georgia Pac. R. Co. v. Robinson, 68 Miss. 643, 10 South. 60.

The passenger must be ready and willing to pay such fare as is required by the established regulations of the carriers in conformity with law. But an actual tender of fare or passage-money does not seem requisite in order to maintain an action for an absolute refusal to carry, and much less is it necessary in an action for any injury sustained; 6 C. B. 775; 2 Kent 598. The rule of law is the same in regard to paying fare in advance that it is as to freight, except that, the usage in the former case being to take pay in advance, a passenger is expected to have procured his ticket before he had taken passage.

It is the carrier's duty to maintain safe stations and approaches, whether on their own premises or on another's and maintained by them; Delaware, L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442; Tobin v. R. Co., 59 Me. 183, 8 Am. Rep. 415; or even where maintained by another; Cotant v. R. Co., 125 Ia. 46, 99 N. W. 115, 69 L. R. A. 982; Gulf, C. & S. F. R. Co. v. Glenk, 9 Tex. Civ. App. 599, 606, 30 S. W. 278; Schlessinger v. R. Co., 49 Misc. 504, 98 N. Y. Supp. 840; Beard v. R. Co., 48 Vt. 101; but in such case it is suggested that the liability is rather for not guarding the carrier's premises so that the defective approach would not be used; 20 Harv. L. Rev. 67. If there are two approaches and one is faulty, the carrier is liable to one using it; 19 C. B. N. S. 183. In making platforms safe the care required is not the highest degree of care, but ordinary care; Pittsburgh, C., C. & St. Louis R. Co. v. Harris, 38 Ind. App. 77, 77 N. E. 1051; Chicago & N. W. Ry. Co. v. Scates, 90 Ill. 586; but they have been held to all that human sagacity and foresight can do and liable for slightest negligence; Zimmer v. R. Co., 36 App. Div. 265, 55 N. Y. Supp. 308; Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Gratt. (Va.) 431, 26 Am. Rep. 384.

A carrier is liable for severe illness of a passenger caused by negligent failure to heat its cars properly; Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553.

It is the duty of a steamship company running a night boat to supply berths to unobjectionable passengers in the order of application; Patterson v. S. S. Co., 140 N. C. 412, 53 S. E. 224. And they must absolutely protect passengers against the misconduct of their own servants engaged in executing the contract; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Haver v. R. Co., 62 N. J. L. 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; but if an employé is free from liability for injury done a passenger, the carrier is also; New Orleans & N. E. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919. Where one enters a ticket-office to buy a ticket he is entitled to the protection of a passenger, although the agent refuse to sell him a ticket; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.

The degree of speed allowable upon a railway depends upon the condition of the road; 5 Q. B. 747.

Passenger-carriers are not responsible where the injury resulted directly from the negligence of the passenger; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; Pennsylvania R. Co. v. Aspell, 23 Pa. 147, 62 Am. Dec. 323; 3 B. & Ald. 304.

It is the duty of a street railway company to stop when a passenger is about to alight and not to start again until he has done so; Washington & G. R. Co. v. Harmon, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; but the act of alighting from a moving car is not negligence *per se*, regardless of attending circumstances; Duncan v. Ry. Co., 48 Mo. App. 659; McCaslin v. Ry. Co., 93 Mich. 553, 53 N. W. 724; Ober v. R. Co., 44 La. Ann. 1059, 11 South. 818, 32 Am. St. Rep. 366; Louisville, N. A. & C. R. Co. v. Johnson, 44 Ill. App. 56; but see Brown v. Barnes, 151 Pa. 562, 25 Atl. 144. A carrier is not liable, because it fails to stop a train for an intending passenger, for injury to his health, where he later procured a carriage to drive him across country on a stormy night to avoid delay in waiting for the next train; International & G. N. R. Co. v. Addison, 100 Tex. 241, 97 S. W. 1037, 8 L. R. A. (N. S.) 880.

Carriers of passengers are bound to carry for the whole route for which they stipulate, and according to their public advertisements and the general usage and custom of their business; Weed v. R. Co., 19 Wend. (N. Y.)

534; 8 E. L. & Eq. 362. The carrier's liability extends over the entire route for which he has contracted to carry, though the destination is reached over connecting lines; McElroy v. R. Co., 4 Cush. (Mass.) 400, 50 Am. Dec. 794; McLean v. Burbank, 11 Minn. 277 (Gil. 189); Candee v. R. Co., 21 Wis. 582, 94 Am. Dec. 566. But the carrier is also liable on whose line the loss or injury is suffered; Hood v. R. Co., 22 Conn. 502; Sprague v. Smith, 29 Vt. 421; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222.

Where a passenger holds a coupon ticket (not jointly issued) over connecting lines and is delayed by the negligence of a preceding carrier, a succeeding road is not bound to carry him on such ticket if it has expired; Brian v. R. Co., 40 Mont. 109, 105 Pac. 489, 20 Ann. Cas. 311; New York, L. E. & W. R. Co. v. Bennett, 50 Fed. 496, 1 C. C. A. 544; otherwise where it was a round trip ticket and the initial and last carrier were the same and the delay was by an intermediate carrier, the ticket being refused on the return by the last carrier; Stevens v. R. Co., 45 Tex. Civ. App. 196, 100 S. W. 807. Where the ticket is jointly issued, the passenger is entitled to complete his journey after the time has expired; Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787. If all the lines are operated by the company selling the ticket, and the passenger commences his journey within the period, he may complete it after the ticket, by its terms has expired; Brian v. R. Co., 40 Mont. 109, 105 Pac. 489, 20 Ann. Cas. 311.

Where a passenger is carried some distance beyond his destination, and ejected against his protest, being compelled to walk back to the station, the company is liable for breach of contract; Evansville & R. R. Co. v. Kyte, 6 Ind. App. 52, 32 N. E. 1134; and so where he was injured in walking back on a dark night; Kentucky & I. Bridge & R. R. Co. v. Buckler, 125 Ky. 24, 100 S. W. 328, 8 L. R. A. (N. S.) 555, 128 Am. St. Rep. 234.

Passenger-carriers may establish reasonable regulations in regard to the conduct of passengers, and discriminate between those who conform to their rules in regard to obtaining tickets, and those who do not, —requiring more fare of the latter; Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562; Hilliard v. Goold, 34 N. H. 230, 66 Am. Dec. 765; Stephen v. Smith, 29 Vt. 160; Com. v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; 29 E. L. & Eq. 143; Crocker v. R. Co., 24 Conn. 249; Lake Erie & W. R. Co. v. Mays, 4 Ind. App. 413, 30 N. E. 1106; but a passenger is not bound to comply with the rules of a company unless they are reasonable; Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352. Passengers may be required to go through in the same train or forfeit the remainder of their tickets; Cheney v. R. R. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190; Oil Creek & A. R. Ry. Co. v. Clark, 72 Pa. 231; State v. Overton, 24 N. J. L. 438, 61 Am. Dec. 671; Cleveland, C. & C. R. Co. v. Bartram, 11 Ohio St. 462; Gulf, C. & S. F. Ry. Co. v. Henry, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318. The words "good this trip only" upon a ticket will not limit the undertaking of the company to any particular day or any specific train,—they relate to a journey and not to a time; and the ticket is good if used at any time within six years from its date; Pier v. Finch, 24 Barb. (N. Y.) 514; Drew v. R. Co., 51 Cal. 425. See Lundy v. R. Co., 66 Cal. 191, 4 Pac. 1193, 56 Am. Rep. 100; Auerbach v. R. Co., 89 N. Y. 281, 42 Am. Rep. 290; Gulf, C. & S. F. Ry. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787; but a ticket "good for this day only," or for "only two days after date," is of no validity after that date though not used; Boston & L. R. Co. v. Proctor, 1 Allen (Mass.) 267, 79 Am. Dec. 729; Gale v. R. Co., 7 Hun (N. Y.) 670. Where a passenger buys a ticket which is silent as to stop-over privileges, he may rely on the statements of the ticket agent on that subject; New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71. In determining what is a reasonable regulation the convenience of both the public and the company must be considered; Faber v. Ry. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789, where the schedule was disarranged and no notice given that the car would not proceed to its destination. It was held that the passenger could not be required to transfer to a car ahead; Burrow v. Ry. & Light Co., 12 Va. L. Reg. 763; *contra*, 37 Can. Sup. Ct. 523; but where a transfer is compelled there is a remedy for failure to provide seats in the new car; Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697, 22 L. R. A. 259; see Camden & A. R. R. Co. v. Hoosey, 99 Pa. 492, 497, 44 Am. Rep. 120. An ordinance imposing a penalty for unnecessary changes is reasonable; City of New York v. Ry. Co., 43 Misc. 29, 86 N. Y. Supp. 673. It is the duty of the carrier to give information necessary for the journey; Dwinelle v. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; as of circumstances likely to cause delay; Hasseltine v. Railway, 75 S. C. 141, 55 S. E. 142, 6 L. R. A. (N. S.) 1009; and passengers have the right to rely on information given; Pennsylvania Co. v. Hoagland, 78 Ind. 203. The obligation is treated as an incident of the business; see 20 Harv. L. Rev. 232; but in England false information is dealt with as if deceit; 5 El. & Bl. 860.

Railway passengers, when required by the regulations of the company to surrender

their tickets in exchange for the conductor's checks, are liable to be expelled from the cars for a refusal to comply with such regulation, or to pay fare again; Northern R. Co. v. Page, 22 Barb. (N. Y.) 130; or for refusal to exhibit a ticket at the request of the conductor in compliance with the standing regulations of the company; Hibbard v. R. Co., 15 N. Y. 455. See TICKET.

Railway companies may exclude merchandise from their passenger trains. It is not the duty of a company to search every parcel carried by a passenger, and it is not guilty for the death of a fellow passenger resulting from an explosion of fire works carried by another; [1901] A. C. 396. The company is not bound to carry a passenger daily whose trunk or trunks contain merchandise, money, or other things known as "express matter"; 5 Am. Law Reg. 364.

COMMON CONDIDIT. See CONDIDIT, COMMON.

COMMON COUNCIL. See COUNCIL.

COMMON COUNTS. Certain general counts, not founded on any special contract, which are introduced in a declaration, for the purpose of preventing a defeat of a just right by an accidental variance in the evidence.

These are, in an action of assumpsit, counts founded on implied promises to pay money in consideration of a precedent debt, and have been variously classified. Those usually comprehended under the term are:—

1. *Indebitatus assumpsit*, which alleges a debt founded upon one of the several causes of action from which the law implies a promise to pay, and this is made the consideration for the promise to pay a sum of money equivalent to such indebtedness. This covers two distinct classes:—

a. Those termed money counts, because they related exclusively to money transactions as the basis of the debt alleged:

(1) Money paid for defendant's use.
(2) Money had and received by defendant for the plaintiff's use.
(3) Money lent and advanced to defendant.
(4) Interest.
(5) Account stated.

b. Any of the usual states of fact upon which the debt may be founded, the most common being:

(1) Use and occupation.
(2) Board and lodging.
(3) Goods sold and delivered.
(4) Goods bargained and sold.
(5) Work, labor, and services.
(6) Work, labor, and materials.

2. *Quantum meruit.*
3. *Quantum valebant.*

See ASSUMPSIT.

COMMON FINE. A small sum of money paid to the lords by the residents in certain leets. Fleta; Wharton.

COMMON FISHERY. A fishery to which all persons have a right. A common fishery is different from a *common of fishery*, which is the right to fish in another's pond, pool, or river. See FISHERY.

COMMON HIGHWAY. By this term is meant a road to be used by the community at large for any purpose of transit or traffic. Hammond, N. P. 239. See HIGHWAY.

COMMON INFORMER. One who, without being specially required by law or by virtue of his office, gives information of crimes, offences, or misdemeanors which have been committed, in order to prosecute the offender; a prosecutor.

COMMON INTENT. The natural sense given to words.

It is the rule that when words are used which will bear a natural sense and an artificial one, or one to be made out by argument and inference, the natural sense shall prevail. It is simply a rule of construction, and not of addition. Common intent cannot add to a sentence words which have been omitted; 2 H. Blackst. 530. In pleading, certainty is required; but certainty to a common intent is sufficient—that is, what upon a reasonable construction may be called certain, without recurring to *possible* facts; Co. Litt. 203 *a;* Dougl. 163. See CERTAINTY.

COMMON LAW. That system of law or form of the science of jurisprudence which has prevailed in England and in the United States of America, in contradistinction to other great systems, such as the Roman or civil law.

Those principles, usages, and rules of action applicable to the government and security of persons and of property, which do not rest for their authority upon any express and positive declaration of the will of the legislature. 1 Kent 492.

The body of rules and remedies administered by courts of law, technically so called, in contradistinction to those of equity and to the canon law.

The law of any country, to denote that which is common to the whole country, in contradistinction to laws and customs of local application.

The most prominent characteristic which marks this contrast, and perhaps the source of the distinction, lies in the fact that under the common law neither the stiff rule of a long antiquity, on the one hand, nor, on the other, the sudden changes of a present arbitrary power, are allowed ascendency, but, under the sanction of a constitutional government, each of these is set off against the other; so that the will of the people, as it is gathered both from long established custom and from the expression of the legislative power, gradually forms a system—just, because it is the deliberate will of a free people—stable, because it is the growth of centuries—progressive, because it is amenable to the constant revision of the people. A full idea of the genius of the common law cannot be gathered without a survey of the philosophy of English and American history. Some of the elements will, however, appear in considering the various narrower senses in which the phrase "common law" is used.

Perhaps the most important of these narrower senses is that which it has when used in contradistinction to statute law, to designate unwritten as distinguished from written law. It is that law which derives its force and authority from the universal consent and immemorial practice of the people. It has never received the sanction of the legislature by an express act, which is the criterion by which it is distinguished from the statute law.

When it is spoken of as the *lex non scripta*, it is meant that it is law not written by authority of law. The statutes are the expression of law in a written form, which form is essential to the statute. The decision of a court which establishes or declares a rule of law may be reduced to writing and published in the reports; but this report is not the law; it is but evidence of the law; it is but a written account of one application of a legal principle, which principle, in the theory of the common law, is still unwritten. However artificial this distinction may appear, it is nevertheless of the utmost importance, and bears continually the most wholesome results. It is only by the legislative power that law can be bound by phraseology and by forms of expression. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed, and the reported adjudications declaring such principles are but the instances in which they have been applied. The principles themselves are still unwritten, and ready, with all the adaptability of truth, to meet every new and unexpected case. Hence it is said that the rules of the common law are flexible; Bell v. State, 1 Swan (Tenn.) 42; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 587, 628, 632.

It naturally results from the inflexible form of the statute or written law, which has no self-contained power of adaptation to cases not foreseen by legislators, that every statute of importance becomes, in course of time, supplemented, explained, enlarged, or limited by a series of adjudications upon it, so that at last it may appear to be merely the foundation of a larger superstructure of unwritten law. It naturally follows, too, from the less definite and precise forms in which the doctrine of the unwritten law stands, and from the proper hesitation of courts to modify recognized doctrines in new exigencies, that the legislative power frequently intervenes to declare, to qualify, or to abrogate the doctrines of the common law. Thus, the written and the unwritten law, the statutes of the present and the traditions of the past, interlace and react upon each other. Historical evidence supports the view which these facts suggest, that many of the doctrines of the common law are but the common-law form of antique statutes, long since overgrown and imbedded in judicial decisions. While this process is doubtless continually going on in some degree, the contrary process is also continually going on; and to a very considerable extent, particularly in the United States, the doctrines of the common law are being reduced to the statutory form, with such modifications, of course, as the legislature will choose to make. This subject is more fully considered under the title Code, which see.

In a still narrower sense, the expression "common law" is used to distinguish the body of rules and of remedies administered by courts of law technically so called in contradistinction to those of equity administered by courts of chancery, and to the canon law, administered by the ecclesiastical courts.

In England the phrase is more commonly used at the present day in the second of the three senses above mentioned.

In this country the common law of England has been adopted as the basis of our jurisprudence in all the states except Louisiana. Many of the most valued principles of the common law have been embodied in the constitution of the United States and the constitutions of the several states; and in many of the states the common law and the statutes of England in force in the colony at the time of our independence are by the state constitution declared to be the law of the state until repealed. There is an express constitutional adoption of it in Delaware, New York, Michigan, Wisconsin, and West Virginia, and an implied adoption of it in the constitutions of Kentucky and West Virginia. It has been adopted by statute in Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Washington and Wyoming. It was extended to Alabama by the ordinance of 1787 and the recognition of the latter in the state constitution; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Barlow v. Lambert, 28 Ala. 707, 65 Am. Dec. 374. It is recognized by judicial decision without any statute in Iowa; State v. Twogood, 7 Ia. 252; Mississippi; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586. See 1 Bish. Crim. Law § 15, note 4, § 45, where the rules adopted by the several states in this respect are stated. Hence, where a question in the courts of one state turns upon the laws of a sister state, if no proof of such laws is offered, it is, in general, presumed that the common law as it existed at the time of the separation of this country from England prevails in such state; Abell v. Douglass, 4 Denio (N. Y.) 305; Schurman v. Marley, 29 Ind. 458; Kermot v. Ayer, 11 Mich. 181; Mohr v. Miesen, 47 Minn. 228, 49 N. W. 862; *contra*, in Pennsylvania, in cases where that state has changed from the common law; the presumption being that the law of the sister state has made the same change, if there is no proof to the contrary. The term common law as thus used may be deemed to include the doctrine of equity; Williams v. Williams, 8 N. Y. 535; but the term is also used in the amendments to the constitution of the United States (art. 7) in contradistinction to equity, in the provision that "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The "common law" here mentioned is the common law of England, and not of any particular state; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732. See Patterson v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Com. v. Leach, 1 Mass. 61; Coburn v. Harvey, 18 Wis. 147. The term is used in contradistinction to equity, admiralty, and maritime law; Parsons v. Bedford, 3 Pet. (U. S.) 446, 7 L. Ed. 732; Bains v. The Catherine, 1 Baldw. 554, Fed. Cas. No. 756.

The common law of England is not in all respects to be taken as that of the United States or of the several states: its general principles are adopted only so far as they are applicable to our situation, and the principles upon which courts discriminate between what is to be taken and what is to be left have been much the same whether the common law was adopted by constitu-

tion, statute, or decision. While no hard and fast rule can be laid down which will at once differentiate every case, a very discriminating effort was made by Chancellor Bates, in Clawson v. Primrose, 4 Del. Ch. 643, to formulate the result of the decisions and ascertain the criterion which they had in most instances applied to the subject. In this discussion, which was characterized by Professor Washburn as having great value, the conclusion reached is thus stated:

"It cannot be overlooked that, notwithstanding the broad language of the constitution ('the common law of England as well as so much of the statute law as has been heretofore adopted in practice, . . . such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights') there were many parts of the common law of England, as it stood prior to 1776, which never have in fact been regarded by our courts as in force in this country; yet it is to be observed that the courts have not herein acted arbitrarily in adopting some parts of the common law and rejecting other parts, according to their views of the policy of particular rules or doctrine. On the contrary, those parts of the common law of England which have not been here practically administered by the courts will be found on examination to reduce themselves to two classes, resting upon grounds which render them proper to be treated as *implied* exceptions to the constitutional provision in addition to the *expressed* exception of such parts of the common law as were repugnant to the rights and privileges contained in the constitution. One of these classes of exceptions may be briefly disposed of. It embraces those parts of the rules and practice of the common law which had become superseded by long settled usages of trade, or business, or habits of dealing among our people, such as could not be unsettled or disturbed without serious inconvenience or injury. In such cases, upon the necessary maxim that *communis error facit jus,* the courts accepted these departures as practical modifications of the common law. . . .

"The other class of rules which, though parts of the common law of England, have never been administered by the courts under the constitution of 1776, embraces those parts of the common law which in the terms usually employed were, at the period of our independence, inapplicable to the existing circumstances and institutions of our people.

"There is less difficulty in applying the limitation practically than in attempting to define it. I understand it as excluding those parts of the common law of England which were applicable to subjects connected with political institutions and usages peculiar to the mother country, and having no existence in the colonies, such for example as officers, dignities, advowsons, titles, etc.; also, as excluding some of the more artificial rules of the common law, springing out of the complicated system of police, revenue, and trade, among a great commercial people and not therefore applicable to the more simple transactions of the colonies or of the states in their early history; also it may be understood as excluding or modifying many rules of what is known as the common law of practice, and possibly of evidence, which the greater simplicity in our system for the administration of justice, would render unnecessary or inconvenient.

"But, on the other hand, our legislative and judicial history shows conclusively that what may be termed the common law of property was received as an entire system, subject to alterations by the legislature only. Rights of property and of person are fundamental rights necessary to be defined and protected in every civil society. The common law, as a system framed to this very end, could not be deemed inapplicable in the colonies for want of a subject matter, or as being needless or superfluous, or unacceptable, which is the true sense of the limitation in question. Certain it is, as a matter of history, that our ancestors did not so treat it."

Among the other cases in which the subject is treated are Van Ness v. Pacard, 2 Pet. (U. S.) 144, 7 L. Ed. 374; Town of Pawlet v. Clark, 9 Cra. (U. S.) 333, 3 L. Ed. 735; Lyle v. Richards, 9 S. & R. (Pa.) 330; Rensselaer Glass Factory v. Reid, 5 Cow. (N. Y.) 628; Doe v. Winn, 5 Pet. (U. S.) 241, 8 L. Ed. 108; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; U. S. v. Coolidge, 1 Wheat. (U. S.) 415, 4 L. Ed. 124; Robinson v. Campbell, 3 Wheat. (U. S.) 223, 4 L. Ed. 372; U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. Ed. 388; U. S. v. Worrall, 2 Dall. (U. S.) 384, 1 L. Ed. 426; Com. v. Leach, 1 Mass. 61; Boynton v. Rees, 9 Pick. (Mass.) 532; Winthrop v. Dockendorff, 3 Greenl. (Me.) 162; Colley v. Merrill, 6 Greenl. (Me.) 55; Sibley v. Williams, 3 Gill. & J. (Md.) 62; U. S. v. Coolidge, 1 Gall. (U. S.) 489, Fed. Cas. No. 14,857; State v. Danforth, 3 Conn. 114; Johnson v. Terry, 34 Conn. 260; Dawson v. Coffman, 28 Ind. 220; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629; Lansing v. Stone, 37 Barb. (N. Y.) 16; Barlow v. Lambert, 28 Ala. 704, 65 Am. Dec. 374. See Sampson's Discourse before the N. Y. Hist. Soc.

The adoption of the common law has been held to include the construction of common-law terms; Carpenter v. State, 4 How. (Miss.) 163, 34 Am. Dec. 116; Buckner v. Bank, 5 Ark. 536, 41 Am. Dec. 105; statutes; Com. v. Churchill, 2 Metc. (Mass.) 118; and constitutional provisions; McGinnis v. State, 9 Humph. (Tenn.) 43, 49 Am. Dec. 697; curtesy; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; dower; Davis v. O'Ferrall, 4 G. Greene (Ia.) 168; husband and wife; Van Maren v. Johnson, 15 Cal. 308; champerty; Key v. Vattier, 1 Ohio 132; real property, title, estate, and tenures; Hemingway v. Scales, 42 Miss. 1, 97 Am. Dec. 425, 2 Am. Rep. 586; Harkness v. Sears, 26 Ala. 493, 62 Am. Dec. 742; Powell v. Brandon, 24 Miss. 343; sureties; Vidal v. Girard, 2 How. (U. S.) 127, 11 L. Ed. 205; charitable uses; Burr v. Smith, 7 Vt. 241, 29 Am. Dec. 154; Williams v. Williams, 8 N. Y. 541; Witman v. Lex, 17 S. & R. (Pa.) 88, 17 Am. Dec. 644; decedent's estates; Cutting v. Cutting, 86 N. Y. 529; remedies and practice; Straffin's Adm'r v. Newell, T. U. P. Charlt. (Ga.) 172, 4 Am. Dec. 705; U. S. v. Wonson, 1 Gall. 20, Fed. Cas. No. 16,750; Hightower v. Fitzpatrick's Heirs, 42 Ala. 597; Grande v. Foy, 1 Hemp. 105, Fed. Cas. No. 5,682a; Fisher v. Cockerell, 5 Pet. (U. S.) 253, 8 L. Ed. 114; Wiley v. Ewing, 47 Ala. 424.

In actions in the federal courts in a territory, the common law is the rule of decision, in the absence of statutes or proof of laws or customs prevailing in the territory; Pyeatt v. Powell, 51 Fed. 551, 2 C. C. A. 367. The common-law rule of decision in a federal

court is that of the state in which it is sitting; Lorman v. Clarke, 2 McLean 568, Fed. Cas. No. 8,516.

Illustrations of what it has been held not to include are the rule respecting conveyance by parol; Lindsley's Lessee v. Coats, 1 Ohio 245; but see Lavelle v. Strobel, 89 Ill. 370; shifting inheritances; Drake v. Rogers, 13 Ohio St. 21; Cox v. Matthews, 17 Ind. 367; Bates v. Brown, 5 Wall. (U. S.) 710, 18 L. Ed. 535; mere possession of land as against miners; McClintock v. Bryden, 5 Cal. 100, 63 Am. Dec. 87; newspaper communications respecting a judge considered as a contempt in England; Stuart v. People, 3 Scam. (Ill.) 404; cutting timber; Dawson v. Coffman, 28 Ind. 220; easement by use in party-wall; Hieatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280; estates in joint tenancy; Sergeant v. Steinberger, 2 Ohio 305, 15 Am. Dec. 553; rule as to partial reversal of a judgment against an infant and another; Wilford v. Grant, Kirby (Conn.) 117; *cy prés* doctrine; Grimes' Ex'rs v. Harmon, 35 Ind. 198, 9 Am. Rep. 690; riparian rights to soil under water; Reno Smelting, Milling & Reduction Works v. Stevenson, 20 Nev. 269, 21 Pac. 317, 4 L. R. A. 60, 19 Am. St. Rep. 364; overruling Vansickle v. Haines, 7 Nev. 249; to running water; Martin v. Bigelow, 2 Aik. (Vt.) 187, 16 Am. Dec. 696; the definition of a navigable river; Fulmer v. Williams, 122 Pa. 191, 15 Atl. 726, 1 L. R. A. 603, 9 Am. St. Rep. 88; the law of waters as applied to large lakes, or to a river which is a national boundary; Champlain & St. L. R. Co. v. Valentine, 19 Barb. (N. Y.) 484.

In criminal law the common law is generally in force in the states to some extent, and while it is in some states held that no crime is punishable unless by statute, there are in many states general statutes resorting to the common law for all crimes not otherwise enumerated, and for criminal matters generally. When there is no statutory definition of a crime named, the common-law definition is generally resorted to; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; as also are its rules of evidence in criminal cases, and of practice as well as principle in the absence of statutes to the contrary; Hyde v. State, 16 Tex. 445, 67 Am. Dec. 630; and in Louisiana, although not recognized in civil matters, the common law in criminal cases is expressly adopted; State v. McCoy, 8 Rob. 545, 41 Am. Dec. 301. It has been held to prevail in the District of Columbia as to theft; State v. Cummings, 33 Conn. 260, 89 Am. Dec. 208; as to conspiracy in Maryland; State v. Buchanan, 5 Harr. & J. 358, 9 Am. Dec. 534; kidnapping in New Hampshire; State v. Rollins, 8 N. H. 550; homicide without intent to kill in Maine; State v. Smith, 32 Me. 369, 54 Am. Dec. 578; and in Tennessee; Jacob v. State, 3 Humph. 493; capacity to commit rape in New York; People v. Randolph, 2 Park. Cr. Rep. 174; but not in Ohio; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536.

There is no common law of the United States, as a distinct sovereignty; Swift v. R. Co., 64 Fed. 59; Gatton v. Ry. Co. (Ia.) 63 N. W. 589; Wheaton v. Peters, 8 Pet. (U. S.) 658, 8 L. Ed. 1055; People v. Folsom, 5 Cal. 374; Forepaugh v. R. Co., 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672; and therefore there are no common-law offences against the U. S.; U. S. v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; In re Greene, 52 Fed. 104; U. S. v. Lewis, 36 Fed. 449; U. S. v. Britton, 108 U. S. 199, 2 Sup. Ct. 525, 27 L. Ed. 703; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591. There is a rare and valuable pamphlet on this subject, by St. George Tucker Campbell, of the Philadelphia Bar, which contains a full discussion of this question. For earlier cases before the question was fully settled, see U. S. v. Worrall, 2 Dall. (U. S.) 384, Fed. Cas. No. 16,766; U. S. v. Coolidge, 1 Gall. 488, Fed. Cas. No. 14,857; *id.*, 1 Wheat. (U. S.) 415, 4 L. Ed. 124. But the common law is resorted to by federal courts for definition of common-law crimes not defined by statute; U. S. v. Armstrong, 2 Curt. C. C. 446, Fed. Cas. No. 14,467; U. S. v. Coppersmith, 4 Fed. 198. See COMMERCIAL LAW.

The admiralty law is distinct from the common law and the line of demarcation is to be sought in the English decisions before the Revolution and those of the state courts prior to the constitution. See La Amistad de Rues, 5 Wheat. (U. S.) 391, 5 L. Ed. 115; Bains v. The James and Catherine, Baldw. 558, Fed. Cas. No. 756; Sawyer v. Steamboat Co., 46 Me. 400, 74 Am. Dec. 463. And as to the adoption of the English ecclesiastical law, see Le Barron v. Le Barron, 35 Vt. 365; Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447; Perry v. Perry, 2 Paige Ch. (N. Y.) 501; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460. New York has adopted only so much of the common law as is applicable to the circumstances of the colonies and conformable to her institutions; Cutting v. Cutting, 86 N. Y. 522; Shayne v. Publishing Co., 168 N. Y. 70, 61 N. E. 115, 55 L. R. A. 777, 85 Am. St. Rep. 654. In adopting the common law in New York, principles inconsonant with the circumstances or repugnant to the spirit of American institutions were not adopted; Barnes v. Terminal Co., 193 N. Y. 378, 85 N. E. 1093, 127 Am. St. Rep. 962.

It does not become a part of the law of a state of its own vigor, but is adopted by constitutional provision, statute or decision; Western Union Tel. Co. v. Milling Co., 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815. As to Indiana, see Sopher v. State, 169 Ind. 177, 81 N. E. 913, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27.

"There is no body of federal common law separate and distinct from the common law

existing in the several states in the sense that there is a body of statute law enacted by congress separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of congress;" Western Union Tel. Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, following Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 308; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; New York C. R. Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 L. Ed. 627. There is an elaborate opinion in Murray v. Ry. Co., 62 Fed. 24, on this subject. See also 36 Amer. L. Rev. 498; 18 Harv. L. Rev. 134.

Sir F. Pollock expresses the opinion that there is a common law of the United States as distinguished from that of a state. 3 Encycl. of Laws of England 142.

In general, too, the statutes of England are not understood to be included, except so far as they have been recognized by colonial legislation, but the course pursued has been rather to re-enact such English statutes as were deemed applicable to our case. Those passed since the settlement of the particular colony are not in force, unless specially accepted by it, or expressly made to apply to it; if these were suitable to the condition of the colony they were usually accepted; Baker v. Mattocks, Quincy (Mass.) 72; Cathcart v. Robinson, 5 Pet. (U. S.) 280, 8 L. Ed. 120; Morris v. Vanderen, 1 Dall. (U. S.) 64, 1 L. Ed. 38.

There cannot be said to be a settled rule as to what date is to be fixed as determining what British statutes were received as part of the common law. Many states fix July 4, 1776. This is provided by constitution in Florida, Maryland and Rhode Island, and by statute in Kentucky; in other states 4th Jac. I. is the period named after which English statutes are not included, as Arkansas, Colorado, Illinois, Indiana, Missouri, Virginia, Wyoming (but the last four except stats. 43 Eliz. c. 6, § 2; 13 Eliz. c. 8 and 37 Hen. VIII. c. 9); McCool v. Smith, 1 Black (U. S.) 459, 17 L. Ed. 218; Scott v. Lunt, 7 Pet. (U. S.) 596, 8 L. Ed. 797; Baker's Adm'r v. Crandall, 78 Mo. 587, 47 Am. Rep. 126; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342. As to English statutes in force in Pennsylvania, see Report of the Judges in Roberts, Eng. Stat.; Boehm v. Engle, 1 Dall. (U. S.) 15, 1 L. Ed. 17; Biddle v. Shippen, 1 Dall. (U. S.) 19, 1 L. Ed. 19; Respublica v. Mesca, 1 Dall. (U. S.) 73, 1 L. Ed. 42; Shewel v. Fell, 3 Yeates (Pa.) 17; *id.*, 4 Yeates (Pa.) 47; Johnson v. Hessel, 134 Pa. 315, 19 Atl. 700. Generally, it may be stated that the statutes adopted prior to the Revolution, and held applicable under rules stated, are accepted as part of the common law; Hamilton v. Kneeland, 1 Nev. 40; Sackett v. Sackett, 8 Pick. (Mass.) 309; Coburn v. Harvey, 18 Wis. 148. But see Matthews v. Ansley, 31 Ala. 20; Bogardus v. Trinity Church, 4 Paige (N. Y.) 178; Crawford v. Chapman, 17 Ohio 452; In re Lamphere, 61 Mich. 105, 27 N. W. 882. Upon the subject of English statutes as part of the common law see an able note on the whole subject of this title in 22 L. R. A. 501. By reason of the modifications arising out of our different condition, and those established by American statutes and by the course of American adjudication, the common law of America differs widely in many details from the common law of England; but the fact that this difference has not been introduced by violent changes, but has grown up from the native vigor of the system, identifies the whole as one jurisprudence.

See works of Franklin, by Sparks, vol. 4, p. 271, as to the adoption of the common law in America; see also Cooley, Const. Lim. (2d ed.) 34, n. 35; Pierce v. Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; 2 Wait, Actions and Defences, 276; Reinsch, English Common Law in the Early American Colonies, 1 Sel. Essays in Anglo-Amer. L. H. 367; Sioussat, Extension of English Statutes to the Plantations, *id.* 416; Jenks, Teutonic Law, *id.* 49; Ed. Combinations 216; James C. Carter, The Law, etc.; O. W. Holmes, The Common Law; Gray, Sources of the Law; 23 Q. B. D. 611, where Bowen, L. J., speaks of it as "an arsenal of sound common sense."

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances; Munn v. Illinois, 94 U. S. 113, 134, 24 L. Ed. 77; quoted and approved, Second Employers' Liability Cases, 223 U. S. 1, 50, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

See LAW MERCHANT.

COMMON LAW MARRIAGE. See MARRIAGE.

COMMON LAW PROCEDURE ACTS. See PROCEDURE ACTS.

COMMON NUISANCE. One which affects the public in general, and not merely some particular person. 1 Hawkins, Pl. Cr. 197 See NUISANCE.

COMMON PLEAS. The name of a court having jurisdiction generally of civil actions.

Such pleas or actions are brought by private persons against private persons, or by the government, when the cause of action is of a civil nature. In England, whence we derived this phrase, common pleas are so called to distinguish them from *pleas of the crown.*

The Court of Common Pleas in England consisted of one chief and four puisne (associate) justices. It is thought by some to have been established by king John for the purpose of diminishing the power of the *aula regis,* but is referred by some writers to a much earlier period. 8 Co. 289; 1 Poll. & Maitl. 177; *Termes de la Ley;* 3 Bla. Comm. 39. It exercised an exclusive original jurisdiction in many classes of civil cases. See 3 Sharsw. Bla. Comm. 38, n. The right of practising in this court was for a long time confined to two classes of practitioners, limited in number; see SERJEANT; but is now thrown open to the bar generally. Its jurisdiction is merged in the High Court of Justice. See COURTS OF ENGLAND.

Courts of the same name exist in many states.

COMMON RECOVERY. A judgment recovered in a fictitious suit, brought against the tenant of the freehold, in consequence of a default made by the person who is last vouched to warranty in the suit, which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoverer.

A common recovery is a kind of conveyance, and is resorted to when the object is to create an absolute bar of estates tail, and of the remainders and reversions expectant on the determination of such estates. 2 Bla. Com. 357. Though it has been used in some of the states, this form of conveyance is nearly obsolete, easier and less expensive modes of making conveyances, which have the same effect, having been substituted; 2 Bouvier, Inst. nn. 2092, 2096; Frost v. Cloutman, 7 N. H. 9, 26 Am. Dec. 723; Lyle v. Richards, 9 S. & R. (Pa.) 322; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Sharp v. Thompson, 1 Whart. (Pa.) 151; Dow v. Warren, 6 Mass. 328.

COMMON SCHOOLS. Schools for general elementary instruction, free to all the public. 2 Kent 195. See SCHOOLS.

COMMON SCOLD. One who, by the practice of frequent scolding, disturbs the neighborhood. Bish. Crim. Law § 147.

The offence of being a common scold is cognizable at common law. It is a particular form of nuisance, and was punishable by the ducking-stool at common law, in place of which punishment fine and imprisonment are substituted in the United States; Whart. Cr. L. 1442; James v. Com., 12 S. & R. (Pa.) 220. See 1 Term 748; 6 Mod. 11; 4 Rog. 90; 1 Russ. Cr. 302; Roscoe, Cr. Ev., 8th ed. 824; Baker v. State, 53 N. J. L. 45, 20 Atl. 858.

COMMON SEAL. The seal of a corporation. See SEAL.

COMMON SERJEANT. A judicial officer of the corporation of the city of London. He attends the Lord Mayor and Court of Aldermen on court days and acts as one of the judges of the Central Criminal Court. Whart.

COMMON, TENANTS IN. See ESTATE IN COMMON.

COMMON TRAVERSE. See TRAVERSE.

COMMON VOUCHEE. In common recoveries, the person who is vouched to warranty. In this fictitious proceeding the crier of the court usually performs the office of a common vouchee. 2 Bla. Com. 358.

COMMONALTY. The common people of England, as distinguished from the king and nobles.

The body of a society or corporation, as distinguished from the officers. 1 Perr. & D. 243. Charters of incorporation of the various tradesmen's societies, etc., in England are usually granted to the master, wardens, and commonalty of such corporation.

COMMONER. One possessing a right of common.

COMMONS. Those subjects of the English nation who are not noblemen. They are represented in parliament by the house of commons.

COMMONWEALTH. A word which properly signifies the common weal or public policy; sometimes it is used to designate a republican form of government. But it was used in royal times in reference to England. 17 L. Q. R. 131.

The English nation during the time of Cromwell was called The Commonwealth. It is the legal title of the states of Massachusetts, Pennsylvania, Kentucky, and Virginia.

COMMORANT. One residing in a particular town, city, or district. Barnes 162.

COMMORIENTES. Those who perish at the same time in consequence of the same calamity. See SURVIVOR; DEATH.

COMMUNE CONCILIUM. The King's Council. See PRIVY COUNCIL.

COMMUNI DIVIDUNDO. In Civil Law. An action which lies for those who have property in common, to procure a division. It lies where parties hold land in common but not in partnership. Calvinus, Lex.

COMMUNINGS. In Scotch Law. The negotiations preliminary to a contract.

COMMUNIO BONORUM (Lat.). In Civil Law. A community of goods.

When a person has the management of common property, owned by himself and others, not as partners, he is bound to account for the profits, and is entitled to be reimbursed for the expenses which he has sustained by virtue of the quasi-contract which is created by his act, called *communio bonorum.* Vicat; 1 Bouvier, Inst. n. 907, note.

COMMUNITY (Lat. *communis,* common). In Civil Law. A corporation or body politic. Dig. 3. 4.

"We can find in our law books no such terms as *corporation, body corporate, body politic,* though we may read much of *convents, chapters* and *communities.* The larg-

est term in general use is *community, commonalty* or *commune*, in Latin, *communitas* or *communa*. It is a large, vague word. . . . But we dare not translate it by *corporation*, for if, on the one hand, it is describing cities and boroughs which already are, or at least are on their way to become, corporations, it will stand equally well for counties, hundreds and townships which in the end have failed to acquire a corporate character. . . ." 1 Poll. & Maitl. Hist. E. L. 494.

In French Law. A species of partnership which a man and woman contract when they are lawfully married to each other.

Conventional community is that which is formed by express agreement in the contract of marriage.

By this contract the legal community which would otherwise subsist may be modified as to the proportions which each shall take, and as to the things which shall compose it.

Legal community is that which takes place by virtue of the contract of marriage itself.

The French system of community property was known as the dotal system. The Spanish system was the Ganancial System, *q. v.* The conquest of Mexico by the Spaniards and their acquisition of the Florida territory resulted in the introduction on American soil of the Spanish system. Louisiana, originally a French colony, was afterwards ceded to Spain when the Spanish law was introduced. It again reverted to the French and from them was acquired by the United States. The Louisiana Code has, with slight modifications, adopted the dotal system of the *Code Napoléon* as regards the separate rights of husband and wife, but as to their common property it retained the essential features of the Spanish ganancial system. Texas and California have adopted the community system of Spain and Mexico or modified it by their constitutions. New Mexico appears to have followed the Spanish law of property rights of married persons in its entirety. The community system as adopted in older community states has been adopted by Nevada, Washington, and Idaho, with certain modifications. Hence it may be said that the American community system prevails at this day in Louisiana, Texas, California, Nevada, Arizona, Washington, Idaho, Montana, and New Mexico, and in Porto Rico, and is indebted to Spain for its origin. See Ballinger, Community Property, § 6; Chavez v. McKnight, 1 N. M. 147. It is said to be the only remains in those states (except Louisiana) of the civil law.

Property (in Washington Territory) acquired during marriage with community funds became an acquêt of the community and not the sole property of the one in whose name the property was bought, although by the law existing at the time the husband was given the management, control and power of sale of such property; this right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community. Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555.

The community embraces the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact; and of the estates which they may acquire during the marriage, either by donations made jointly to them, or through their outlay or industry as well as the fruits of the *bienos proprios* which each one brought to the matrimony, and of all that which this acquisition produced by whatever title acquired; Ballinger, Community Prop. § 5, or by purchase, or in any other similar way, even although the purchase be made in the name of one of the two, and not of both; because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase; Davidson v. Stuart, 10 La. 146; Brown v. Cobb, 10 La. 172; Clark v. Norwood, 12 La. Ann. 598. The debts contracted during the marriage enter into the community, and must be acquitted out of the common fund; but not the debts contracted before the marriage.

The husband has the right to manage and control the community property during its existence; Warburton v. White, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; Stockstill v. Bart, 47 Fed. 231; and hence he can alienate or encumber during coverture, even without the consent or joinder of the wife, any of the property belonging to the community; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Cook v. Vault Co., 104 Ky. 473, 47 S. W. 325; Moore v. Moore, 73 Tex. 383, 11 S. W. 396; Hearfield v. Bridges, 75 Fed. 47, 21 C. C. A. 212. He must act in good faith toward the wife, and if he disposes of property with intent to defraud her, his conveyance or disposal will be voidable on that ground, but a *bona fide* purchaser is protected; Lord v. Hough, 43 Cal. 581; Cotton v. Cotton, 34 La. Ann. 858; Hagerty v. Harwell, 16 Tex. 663. But in Washington the husband has no right to sell or encumber the property unless the wife joins with him; Kimble v. Kimble, 17 Wash. 75, 49 S. W. 216. In general a sale or conveyance of the property by the wife alone is absolutely void; Tryon v. Sutton, 13 Cal. 490; Humphries v. Sorenson, 33 Wash. 563, 74 Pac. 690.

The property is liable for the community debts; Succession of Kerley, 18 La. Ann. 583; Barnett v. O'Loughlin, 14 Wash. 259, 44 Pac. 267; and it is in general also liable for the husband's separate debts; Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Lee v. Henderson, 75 Tex. 190, 12 S. W. 981; Gund v. Parke, 15 Wash. 393, 46 Pac. 408; *contra* as to realty; Ross v. Howard, 31

Wash. 393, 72 Pac. 74. The husband usually sues alone in his own name; Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Jordan v. Moore, 65 Tex. 363; Crow v. Van Sickle, 6 Nev. 146; Ford v. Brooks, 35 La. Ann. 157. But in Washington, since the husband and wife have equal interests in the community, all actions must be brought by the husband and wife jointly; Parke v. City of Seattle, 8 Wash. 78, 35 Pac. 594.

The community is dissolved by the death of either spouse; Thompson v. Vance, 110 La. 26, 34 South. 112; by divorce; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; (*contra*, in Porto Rico, Garrozi v. Dastas, 204 U. S. 64, 27 Sup. Ct. 224, 51 L. Ed. 369); and by a judicial decree following a suit for separation of property; Succession of Bothick, 52 La. Ann. 1863, 28 South. 458. A culpable abandonment of one spouse by the other may entitle the party abandoned to the rights in the community that follow upon its dissolution; Cullers v. James, 66 Tex. 494, 1 S. W. 314; mere voluntary separation is not sufficient; Muse v. Yarborough, 11 La. 521; nor is insanity; Succession of Bothick, 52 La. Ann. 1863, 28 South. 458.

Either surviving spouse may sell his or her interest in the absence of fraud upon the rights of others; Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513; but the survivor cannot, except for the payment of community debts, alienate the interest of the heirs of the deceased spouse; Meyer v. Opperman, 76 Tex. 105, 13 S. W. 174; Biossat v. Sullivan, 21 La. Ann. 565. The general rule is that one half of the property vests in the surviving spouse and one half in the heirs of the deceased; Payne v. Payne, 18 Cal. 291; George v. Delaney, 111 La. 760, 35 South. 894; Chadwick v. Tatem, 9 Mont. 354, 23 Pac. 729; Wortman v. Vorhies, 14 Wash. 152, 44 Pac. 129.

The effects which compose the community of gains are divided into two equal portions between the heirs at the dissolution of the marriage; La. Civ. Code 2375. See Pothier, Contr.; Toullier. But the wife's interest in the community property is residuary and she is not the owner of any specific property before the debts are paid, whether to third persons or to the succession of her husband; Berthelot v. Fitch, 45 La. Ann. 389, 12 South. 625.

A right to recover damages for personal injuries, if acquired during marriage, is considered community property; Neale v. Ry. Co., 94 Cal. 425, 29 Pac. 954.

See ACQUÊTS.

COMMUTATION. The change of a punishment to which a person has been condemned into a less severe one. This can be granted only by the authority in which the pardoning power resides. See Ex parte Janes, 1 Nev. 321; In re Victor, 31 Ohio St. 206; Lee v. Murphy, 22 Gratt. (Va.) 789, 12 Am. Rep. 563.

See PRISONER.

COMMUTATIVE CONTRACT. In Civil Law. One in which each of the contracting parties gives and receives an equivalent.

The contract of sale is of this kind. The seller gives the thing sold, and receives the price, which is the equivalent. The buyer gives the price, and receives the thing sold, which is the equivalent. Such contracts are usually distributed into four classes, namely: *Do ut des* (I give that you may give); *Facio ut facias* (I do that you may do); *Facio ut des* (I do that you may give); *Do ut facias* (I give that you may do). Pothier, Obl. n. 13. See La. Civ. Code, art. 1761.

COMPACT. An agreement. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. Story, Const. b. 3, c. 3; Rutherf. Inst. b. 2, c. 6, § 1.

The parties may be nations, states, or individuals; but the constitution of the United States declares that "no state shall, without the consent of congress, enter into agreement or compact with another state, or with a foreign power." See Marlatt v. Silk, 11 Pet. (U. S.) 1, 9 L. Ed. 609; Poole v. Fleeger, 11 Pet. (U. S.) 185, 9 L. Ed. 680; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547.

COMPANIONS. In French Law. A general term, comprehending all persons who compose the crew of a ship or vessel. Pothier, Mar. Contr. n. 163.

COMPANY. An association of a number of individuals for the purpose of carrying on some legitimate business.

This term is not synonymous with partnership, though every such unincorporated company is a partnership. Usage has reserved the term to associations whose members are in greater number, their capital more considerable, and their enterprises greater, either on account of their risk or importance.

When these companies are authorized by the government, they are known by the name of corporations.

The proper signification of the word "company" when applied to a person engaged in trade, denotes those united for the same purpose or in a joint concern. It is commonly used in this sense or as indicating a partnership. Palmer v. Pinkham, 33 Me. 32.

Sometimes the word is used to represent those members of a partnership whose names do not appear in the name of the firm. See 12 Toullier 97.

COMPARATIVE JURISPRUDENCE. See JURISPRUDENCE.

COMPARATIVE NEGLIGENCE. That doctrine in the law of negligence by which the negligence of the parties is compared in the degree of "slight," "ordinary," and

"gross" negligence, and a recovery permitted notwithstanding the contributory negligence of the plaintiff, when the negligence of the plaintiff is slight and the negligence of the defendant gross, but refused when the plaintiff has been guilty of a want of ordinary care contributing to his injury; or when the negligence of the defendant is not gross, but only ordinary or slight when compared under the circumstances of the case with the contributory negligence of the plaintiff. Chicago, B. & Q. R. Co. v. R. Co., 103 Ill. 512; Calumet Iron & Steel Co. v. Martin, 115 Ill. 358, 3 N. E. 456; Rockford, R. I. & St. L. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308. This doctrine existed in the civil law, and in some instances in admiralty, but it did not exist in the states other than Illinois and Louisiana.

The doctrine of comparative negligence no longer obtains in Illinois; it must now be established in actions for personal injuries, or for death by wrongful act that the plaintiff, or the deceased, was exercising ordinary care; Imes v. R. Co., 105 Ill. App. 37; see Sluder v. Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 239. It has been revived in the Federal Employer's Liability Act of 1908.

COMPATIBILITY. Such harmony between the duties of two offices that they may be discharged by one person.

COMPENSACION. In Spanish Law. The extinction of a debt by another debt of equal dignity between persons who have mutual claims on each other.

COMPENSATIO CRIMINIS. The compensation or set-off of one crime against another: for example, in questions of divorce, where one party claims the divorce on the ground of adultery of his or her companion, the latter may show that the complainant has been guilty of the same offence, and, having himself violated the contract, cannot complain of its violation on the other side. This principle is incorporated in the codes of most civilized nations. See 1 Hagg. Cons. 144; 1 Hagg. Eccl. 714; Wood v. Wood, 2 Paige, Ch. (N. Y.) 108, 2 D. & B. 64; Bishop, Marr. & D. §§ 393, 394.

COMPENSATION. In Chancery Practice. Something to be done for or paid to a person of equal value with something of which he has been deprived by the acts or negligence of the party so doing or paying.

When a simple mistake, not a fraud, effects a contract, but does not change its essence, a court of equity will enforce it, upon making compensation for the error. "The principle upon which courts of equity act," says Lord Chancellor Eldon, "is by all the authorities brought to the true standard, that though the party had not a title at law, because he had not strictly complied with the terms so as to entitle him to an action (as to time, for instance), yet if the time, though introduced (as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other), is not of the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract upon this ground, that one party is ready to perform, and that the other may have a performance in substance if he will permit it;" 13 Ves. Ch. 287. See 10 *id.* 505; 13 *id.* 73, 81, 426; 6 *id.* 575; 1 Cox, Ch. 59.

In Civil Law. A reciprocal liberation between two persons who are both creditors and debtors of each other. *Est debiti et crediti inter se contributio.* Dig. 16. 2. 1.

It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea. See 2 Bouvier, Inst. n. 1407.

It may be *legal*, by *way of exception*, or by *reconvention;* Blanchard v. Cole, 8 La. 158; 8 Dig. 16. 2; Code, 4. 31; Inst. 4. 6. 30; Burge, Suret. b. 2, c. 6, p. 181.

It takes place by mere operation of law, and extinguishes reciprocally the two debts as soon as they exist simultaneously, to the amount of their respective sums. It takes place only between two debts having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable. It takes place whatever be the *cause* of the debts, except in case, *first*, of a demand of restitution of a thing of which the owner has been unjustly deprived; *second*, of a demand of restitution of a deposit and a loan for use; *third*, of a debt which has for its cause aliments declared not liable to seizure. La. Civ. Code 2203–2208. See Dorvin v. Wiltz, 11 La. Ann. 520; Stewart v. Harper, 16 La. Ann. 181.

As to taking property, see EMINENT DOMAIN.

In Criminal Law. Recrimination, which see.

COMPERTORIUM. In the Civil Law. A judicial inquest by delegates or commissioners to find out and relate the truth of a cause. Wharton.

COMPERUIT AD DIEM (Lat. he appeared at the day). A plea in bar to an action of debt on a bail bond. The usual replication of this plea is, *nul tiel record:* that there is not any such record of appearance of the said ——. For forms of this plea, see 5 Wentworth 470; Lilly, Entr. 114; 2 Chit. Pl. 527.

When the issue is joined on this plea, the trial is by the record. See 1 Taunt. 23; Tidd, Pr. 239. And see, generally, Comyns, Dig. *Pleader* (2 W. 31); 7 B. & C. 478.

COMPETENCY. The legal fitness or ability of a witness to be heard on the trial of a cause. That quality of written or other evidence which renders it proper to be given on the trial of a cause.

There is a difference between competency and credibility. A witness may be competent, and, on examination, his story may be so contradictory and improbable that he may not be believed; on the contrary, he may be incompetent, and yet be perfectly credible if he were examined.

The court are the sole judges of the competency of a witness, and may, for the purpose of deciding whether the witness is or is not competent, ascertain all the facts necessary to form a judgment; 1 Greenl. Ev. § 426.

Prima facie every person offered is a competent witness, and must be received, unless his incompetency appears; 9 State Tr. 652.

In French Law. The right in a court to exercise jurisdiction in a particular case: as, where the law gives jurisdiction to the court when a thousand francs shall be in dispute, the court is competent if the sum demanded is a thousand francs or upwards, although the plaintiff may ultimately recover less.

COMPETENT. Able, fit, qualified; authorized or capable to act. Abb. L. Dict.; as *competent court;* 1 C. P. D. 176; *competent evidence;* Chapman v. McAdams, 1 Lea (Tenn.) 504; *competent persons,* 5 Ad. & El. 75; *competent clerk,* Porter v. Duglass, 27 Miss. 393.

COMPETENT EVIDENCE. That evidence which the very nature of the thing to be proven requires, as the production of a writing where its contents are the subject of inquiry. Chapman v. McAdams, 1 Lea (Tenn.) 504; 1 Greenl. Ev. § 2. See EVIDENCE.

COMPETENT WITNESS. One who is legally qualified to be heard to testify in a cause. In many states a will must be attested, for the purpose of passing lands, by competent witnesses.

COMPILATION. A literary production composed of the works of others and arranged in a methodical manner.

A compilation requiring, in its execution, taste, learning, discrimination, and intellectual labor, is an object of copyright (*q. v.*); as, for example, Bacon's Abridgment. Curtis, Copyr. 186. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of an author; Story v. Holcombe, 4 McLean 314, Fed. Cas. No. 13,497.

COMPLAINANT. One who makes a complaint. A plaintiff in a suit in chancery is so called.

COMPLAINT. In Criminal Law. The allegation made to a proper officer that some person, whether known or unknown, has been guilty of a designated offence, with an offer to prove the fact, and a request that the offender may be punished. It is a technical term, descriptive of proceedings before a magistrate. Com. v. Davis, 11 Pick. (Mass.) 436.

To have a legal effect, the complaint must be supported by such evidence as shows that an offence has been committed and renders it certain or probable that it was committed by the person named or described in the complaint.

The fact that a complaint is drawn in flagrant disregard of the rules of pleading is not sufficient to support a demurrer thereto, if the allegations are susceptible of a construction that will support the action; U. S. Nat. Bank v. Bank, 18 N. Y. Supp. 758.

In Practice. The name given in New York and other states to the statement of the plaintiff's case which takes the place of the declaration in common-law pleading.

COMPOS MENTIS. See NON COMPOS MENTIS.

COMPOSITION. An agreement, made upon a sufficient consideration, between a debtor and creditor, by which the creditor accepts part of the debt due to him in satisfaction of the whole. See COMPOUNDING A FELONY.

A composition deed executed by a debtor and his creditors in due form, operates as a settlement of the original claims of such creditors and supersedes the cause of action thereon, the rights and remedies of the parties being determined thereafter by the new agreement; Brown v. Farnham, 48 Minn. 317, 51 N. W. 377. An oral agreement between several creditors and their debtor to compound and discharge their claims is valid; Halstead v. Ives, 73 Hun 56, 25 N. Y. Supp. 1058; Chemical Nat. Bank v. Kohner, 85 N. Y. 189. In an action upon a composition agreement, any creditor being a party thereto may bring a several action for damages for breach thereof; Brown v. Farnham, 55 Minn. 27, 56 N. W. 352.

COMPOSITION OF MATTER. A mixture or chemical combination of materials. The term is used in the act of congress, July 4, 1836, § 6, in describing the subjects of patents. It may include both the substance and the process, when the compound is new.

COMPOUND INTEREST. Interest upon interest; for example, when a sum of money due for interest is added to the principal, and then bears interest. This is not, in general, allowed. See INTEREST.

COMPOUNDER. In Louisiana. He who makes a composition.

An amicable compounder is one who has undertaken by the agreement of the parties to compound or settle differences between them. La. Code of Pract. art. 444.

COMPOUNDING A FELONY. The act of a party immediately aggrieved, who agrees with a thief or other felon that he will not

prosecute him, on condition that he return to him the goods stolen, or who takes a reward not to prosecute. See State v. Buckmaster, 2 Harr. (Del.) 532; Bothwell v. Brown, 51 Ill. 234; Chandler v. Johnson, 39 Ga. 85; Powell v. State, 51 Tex. Cr. R. 342, 101 S. W. 1006.

This is an offence punishable by fine and imprisonment, and at common law rendered the person committing it an accessory; Hawk. Pl. Cr. 125. And a conviction may be had though the person guilty of the original offence has not been tried; Watt v. State, 97 Ala. 72, 11 South. 901; or if no offence liable to a penalty has been committed by the person from whom the consideration is received; State v. Carver, 69 N. H. 216, 39 Atl. 973. A failure to prosecute for an assault with an intent to kill is not compounding a felony; Phillips v. Kelly, 29 Ala. 628. The accepting of a promissory note signed by a party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute the offence; Com. v. Pease, 16 Mass. 91; and the offence is committed although the consideration is for another than the one making the agreement; State v. Ruthven, 58 Ia. 121, 12 N. W. 235. The mere retaking by the owner of stolen goods is no offence, unless the offender is not to be prosecuted; Hale, Pl. Cr. 546; 1 Chit. Cr. Law 4; Clarke, Cr. L. 329; Bothwell v. Brown, 51 Ill. 234.

In an indictment for compounding a felony, it must be alleged that the felony was committed by the person with whom the corrupt agreement is made; State v. Hodge, 142 N. C. 665, 55 S. E. 626, 7 L. R. A. (N. S.) 709, 9 Ann. Cas. 563. The agreement not to prosecute being the gist of the offense, it must be clearly charged; Williams v. State, 51 Tex. Cr. 1, 100 S. W. 149. An information is insufficient if it fails to allege that the defendant intended to hinder the course of justice and allow the felon to escape unpunished; State v. Wilson, 80 Vt. 249, 67 Atl. 533. See note 20 L. R. A. (N. S.) 484.

The compounding of *misdemeanors*, as it is also a perversion or defeating of public justice, is in like manner an indictable offence at common law; Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; Pearce v. Wilson, 111 Pa. 14, 2 Atl. 99, 56 Am. Rep. 243; McMahon v. Smith, 47 Conn. 221, 36 Am. Rep. 67. But the law will permit a compromise of any offence, though made the subject of a criminal prosecution, for which the injured party might recover damages in an action.

There is said to be no reported case in England for compounding a misdemeanor, but that in grave cases (perjury or rioting) it would be held an offence; such agreements in lesser cases are often sanctioned by courts. and in cases when the injured party can both sue and prosecute (especially for an assault) compromises are not illegal and will be enforced; Odgers, C. L. 202, citing L. R. 10 Ch. 297. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; 6 Q. B. 308; Fay v. Oatley, 6 Wis. 42; Buck v. Bank, 27 Mich. 293, 15 Am. Rep. 189; Shaw v. Reed, 30 Me. 105; Jones v. Rice, 18 Pick. (Mass.) 440, 29 Am. Dec. 612; State v. Carver, 69 N. H. 216, 39 Atl. 973.

Compounding a felony is an indictable offence. No action can be supported on any contract of which such offence is the consideration in whole or in part; Com. v. Pease, 16 Mass. 91; Mattacks v. Owen, 5 Vt. 42; Plumer v. Smith, 5 N. H. 553, 22 Am. Dec. 478; People v. Buckland, 13 Wend. (N. Y.) 592; Sneed v. Com., 6 Dana (Ky.) 338; Levy v. Ross, T. U. P. Charlt. (Ga.) 292. A receipt in full of all demands given in consideration of stifling a criminal prosecution is void; Bailey v. Buck, 11 Vt. 252. A contract which is void as compounding a felony is incapable of ratification; Stanard v. Sampson, 23 Okl. 13, 99 Pac. 796; the law leaves the parties where it finds them; it will neither aid in enforcing the contract, nor permit a recovery of the consideration; Town of Cottonwood v. Austin, 158 Ala. 117, 48 South. 345; Jourdan v. Burstow, 76 N. J. Eq. 55, 74 Atl. 124, 139 Am. St. Rep. 741.

Proceedings on a judgment by confession will be enjoined where the consideration was stifling a prosecution for forgery; Given's Appeal, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795. An injunction will be granted against action on a note given in consideration of compounding a felony; Porter v. Jones, 6 Coldw. (Tenn.) 313; 13 Sim. 513; *contra*, Adams v. Barrett, 5 Ga. 404; Allison v. Hess, 28 Ia. 388; Williams v. Englebrecht, 37 Ohio St. 383; Rock v. Mathews, 35 W. Va. 537, 14 S. E. 137, 14 L. R. A. 508.

COMPRA Y VENTA (Span.). Buying and selling. The laws of contracts arising from purchase and sale are given very fully in *Las Partidas*, part 3, tit. xviii. ll. 56.

COMPRINT. The surreptitious printing of the copy of another to the intent to make a gain thereby. Strictly, it signifies to print together. There are several statutes in prevention of this act. Jacob; Cowell.

COMPRIVIGNI (Lat.). Step-brothers or step-sisters. Children who have one parent, and only one, in common. Calvinus, Lex.

COMPROMIS (French). An agreement of arbitration. 2 Amer. J. of Int. L. 898.

COMPROMISARIUS. In Civil Law. An arbitrator.

COMPROMISE. An agreement made between two or more parties as a settlement of matters in dispute.

Such settlements are sustained at law; Poll. Contr. 180; Durham v. Wadlington, 2 Strobh. Eq. (S. C.) 258; Van Dyke v. Davis, 2 Mich. 145; and are highly favored; Zane's

Devisees v. Zane, 6 Munf. (Va.) 406; Taylor v. Patrick, 1 Bibb (Ky.) 168; Truett v. Chaplin, 11 N. C. 178; Stoddard v. Mix, 14 Conn. 12; Barlow v. Ins. Co., 4 Metc. (Mass.) 270; Hart v. Gould, 62 Mich. 262, 28 N. W. 831. The amount in question must, it seems, be uncertain; 2 B. & Ad. 889. And see Muirhead v. Kirkpatrick, 21 Pa. 237; Livingston v. Dugan, 20 Mo. 102; Wilbur v. Crane, 13 Pick. (Mass.) 284; 3 M. & W. 648. The compromise of a doubtful or disputed claim is a sufficient consideration to uphold an *assumpsit;* Cox v. Stokes, 156 N. Y. 491, 51 N. E. 316. See Battle v. McArthur, 49 Fed. 715. The compromise of a doubtful claim made in good faith is a good consideration for a promise, though it afterwards appears that the claim was wholly groundless; L. R. 5 Q. B. 449; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. It is not necessary that the claim settled should be one that could be successfully maintained; Neibles v. Ry. Co., 37 Minn. 151, 33 N. W. 332. Nor is necessary that there should be any doubt about the claim; it is enough if the parties consider it doubtful; City Electric Ry. Co. v. Floyd County, 115 Ga. 655, 42 S. E. 45; Bement v. May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387; or if the parties thought at the time that there was a real question between them; Alexander v. Trust Co., 106 Md. 170, 66 Atl. 836. In Pitkin v. Noyes, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218, it was held that the claim must be one which was understood by both parties to be doubtful. It is said that the question is as to the belief, in good faith, of the claimant in the validity of his claim. There must be a colorable ground for the claim; Smith v. Boruff, 75 Ind. 412; an agreement not to contest a will is not enough, if the party had no right to make a contest; Bement v. May, 135 Ind. 664, 34 N. E. 327, 35 N. E. 387. "A claim is honest if the claimant does not know that his claim is unsubstantial, or if he does not know the facts which show that his claim is a bad one;" L. R. 32 Ch. Div. 266; Grandin v. Grandin, 49 N. J. L. 514, 9 Atl. 756, 60 Am. Rep. 642. But it has been held that one may buy his peace by compromising a claim which he knows is without right; Dailey v. King, 79 Mich. 568, 44 N. W. 959. But the compromise of an illegal claim will not sustain a promise; Read v. Hitchings, 71 Me. 590; so of a note given for a gambling debt; Tyson v. Woodruff, 108 Ga. 368, 33 S. E. 981; and a note given for liquor sold without a license; Melchoir v. McCarty, 31 Wis. 252, 11 Am. Rep. 605; where, however, the illegal contract has been fully performed, a compromise may be valid; Antoine v. Smith, 40 La. Ann. 560, 4 South. 321; and where the parties have disputed claims against each other and agree to settle them, it is binding although some or all of the claims were illegal; Wilder v. R. Co., 65 Vt. 43, 25 Atl. 896; after a claim is in suit, it is said to make no difference whether it could have been maintained or not; Clark v. Turnbull, 47 N. J. L. 265, 54 Am. Rep. 157. The subject is fully treated in Armijo v. Henry, 14 N. M. 181, 89 Pac. 305, 25 L. R. A. (N. S.) 275.

Where a debtor tenders part of a disputed claim to the creditor in full satisfaction, if the latter accepts the tender, he is bound by the terms thereof; Deutmann v. Kilpatrick, 46 Mo. App. 624. An offer of settlement by plaintiff, but not accepted by defendant, does not bind either party; Clark v. Pope, 29 Fla. 238, 10 South. 586. As to a compromise of a criminal charge, see COMPOUNDING A FELONY.

An offer to pay money by way of compromise is not evidence of debt, since, as was said by Lord Mansfield, "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether anything, or what, is due."

If the terms "buy their peace" are attended to, they will resolve all doubts on this head of evidence; Bull. N. P. 236; and the author adds an example: If A sue B for one hundred pounds, and B offer to pay him twenty pounds, it shall not be received in evidence, for this neither admits nor ascertains any debt, and is no more than saying he would give twenty pounds to get rid of the action. But if an account consist of ten articles, and B admits that a particular one is due, it is good evidence for so much.

In one of the oldest cases on the subject, Lord Kenyon declared at *nisi prius:* "Evidence of concessions made for the purpose of settling matters in dispute I shall never admit;" 3 Esp. 113; but evidence was admitted that after the action was brought the defendant called upon the plaintiff and said he was sorry that the thing had happened, and offered two hundred pounds in settlement, which was not accepted; 3 Stark. N. P. 128; and in other cases evidence of offers of compromise made, but not expressed to be without prejudice, were held to be admissible; 1 M. & W. 446; apparently in opposition to the rule laid down by Lord Mansfield and Lord Kenyon above referred to.

It may, however, be considered settled that letters or admissions containing the expression in substance that they are to be without prejudice will not be admitted in evidence; 4 C. & P. 462; L. R. 6 Ch. 827; 3 Sc. N. R. 741.

In the last case the rule is put definitely on the ground of public policy by Tindal, C. J., who said: "It is of great consequence that parties should be unfettered by correspondence entered into upon the express understanding that it is to be without prejudice," and he also declared "that where used in the letter containing the offer, the words 'without prejudice' must cover the whole correspondence." And this rule has been followed and it was held that not only the letter bearing the words "without prejudice," but also the answer thereto, which was not so guarded, was inadmissible in evidence; and to the same effect is L. R. 10 Ch. 264. It is the recognized rule in the United States that admissions made in treating for an adjustment cannot be given in evidence; Ferry v. Taylor, 33 Mo. 323; Durgin v. Somers, 117 Mass. 55; Molyneaux v. Collier, 13 Ga. 406; and in Canada; 3 Ont. 584; 11 *id.* 442. In Finn v. Tel. Co., 101 Me. 279, 64 Atl. 490, it was held that the admissibility of such evi-

dence depended upon the intention of the party seeking the compromise. If he intended it as an admission of liability, it was admissible; if he only intended it as a compromise settlement, it was not.

Verbal offers of compromise of a claim made by a defendant's solicitor are also protected and cannot be given in evidence against his client; 2 C. & K. 24; 6 C. P. 437.

An account rendered by the defendant to the plaintiff, showing a balance in the plaintiff's favor, accompanied by a letter proposing an arrangement and stating that the letter and account were without prejudice was held to be inadmissible as evidence; 6 C. P. 437. The principle of the exclusion of such admissions, whether verbal or documentary, therefore, seems to rest on the fact that there is some matter in controversy or some claim by one person against the other for the settlement or adjustment of which the communication is made, and that in furtherance of the maxim, *"Interest republicæ ut sit finis litium,"* it is for the public good that communications having that end in view should not be allowed to prejudice either party in the event of their proving abortive. It is not necessary that such communications should be expressly guarded if they manifestly appear to have been made by way of compromise; 2 C. & K. 24; such admissions or negotiations are inadmissible whether made "without prejudice" or not; Reynolds v. Manning, 15 Md. 510; Frick & Co. v. Wilson, 36 S. C. 65, 15 S. E. 331; Emery v. Real Estate Exch., 83 Ga. 321, 14 S. E. 556; Smith v. Satterlee, 130 N. Y. 677, 29 N. E. 225; 2 Whart. Ev. § 1090; but see Chaffe v. Mackenzie, 43 La. Ann. 1062, 10 South. 369; Hood v. Tyner, 3 Ind. App. 51, 28 N. E. 1033; Thom v. Hess, 51 Ill. App. 274. Where a letter opening negotiations for a compromise, but not stated to be without prejudice, was followed a day or two afterwards by another guarding against prejudice, it was held that the whole correspondence was thereby protected; 26 W. R. 109, and Gurney, B., refused to receive in evidence a letter written "without prejudice," even in favor of the party who had written it, saying, "If you write without prejudice so as not to bind yourself, you cannot use the letter against the other party;" 8 C. & P. 388.

And evidence of plaintiff that offers of compromise were made by him is inadmissible; York v. Conde, 66 Hun 316, 20 N. Y. Supp. 961. And negotiations between parties for the purpose of clearing title to land and compromising differences will not prejudice the rights of either party; Hand v. Swann, 1 Tex. Civ. App. 241, 21 S. W. 282.

Correspondence of this kind is not only inadmissible as evidence at the trial of the action, but it has also been held to be privileged from production for the purpose of discovery; 11 Beav. 111; 15 *id.* 321, 388.

Romilly, M. R., in the last of these cases, stated the rule very much in the same way as did Tindal, C. J., *supra;* he said: "Such communications made with a view of an amicable arrangement ought to be held very sacred, for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences."

When a correspondence for a settlement had commenced "without prejudice" but those words were afterwards dropped, it was immaterial; 6 Ont. 719.

The same principle is applied where the cause of action is other than a debt, as in a bastardy proceeding, where offers of compromise were held not admissible against the defendant as admissions of his guilt; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155; East Tennessee, V. & G. Ry. Co. v. Davis, 91 Ala. 615, 8 South. 349; Carey v. Carey, 108 N. C. 267, 12 S. E. 1038; nor does the payment of a certain sum on a claim for a much larger sum constitute a recognition of a legal liability to make further payments on such claim; Camp v. U. S., 113 U. S. 648, 5 Sup. Ct. 687, 28 L. Ed. 1081; but where offers of compromise are made to a third person, who has no authority to settle the claim, and there is no intimation that they were made "without prejudice" or in confidence, they are admissible in evidence; Moore v. Mfg. Co., 113 Mo. 98, 20 S. W. 975; a statement made by one of several defendants to his co-defendants, advocating the settlement of plaintiff's claims is not within the rule excluding offers made for the purpose of compromise, but is competent as an admission of liability; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; and evidence of the admission of an independent fact, although made during a negotiation tending towards a compromise, is admissible; Hess v. Van Auken, 11 Misc. 422, 32 N. Y. Supp. 126; Durgin v. Somers, 117 Mass. 55.

In a prosecution for rape, evidence that defendant had offered money to the foster father of prosecutrix to stop criminal proceedings was incompetent, Sanders v. State, 148 Ala. 603, 41 South. 466.

The extent of the protection which may be invoked by the use of the word "without prejudice" is limited to the purposes contemplated by the rule as stated and will not be extended to exclude evidence of communications, which from their character may prejudice the person to whom it is addressed if he should reject the offer; 62 L. J. Rep. Q. B. 511; nor a letter which is intended to be used by the party writing it; the words protect both parties from its use, but if the writer declare that he will use it, from that moment it loses its privileged character; 29 U. C. Q. B. 136. Such communications, when the negotiation is successful and a compromise is agreed to, are admissible both for the purpose of showing the terms of the compromise and enforcing it; 6 Ont. 719; and also in order to account for lapse of time; 15 Beav. 388; L. R. 23 Q. B. Div. 38. But whether verbal or written, such communications cannot be regarded for the purpose of determining the question of costs; 58 L. J. Rep. Q. B. 501. In this well considered case, the English court of appeal established the rule contrary to what had been in some previous cases thought proper. See 2 Dr. & Sm. 29; 1 Jur. N. S. 899.

As to a compromise on a mistaken interpretation of a will, see [1905] 1 Ch. 704.

See ACCORD AND SATISFACTION.

In Civil Law. An agreement between two or more persons, who, wishing to settle their disputes, refer the matter in controversy to arbitrators, who are so called because those who choose them give them full powers to arbitrate and decide what shall appear just and reasonable, to put an end to the differences of which they are made the judges. 1 Domat, *Lois, Civ.* liv. 1, t. 14.

COMPTE ARRÊTÉ (Fr.). An account stated in writing and acknowledged to be correct on its face by the party against whom it

is stated. Chevalier v. Hyams, 9 La. Ann. 485.

COMPTROLLER. An officer of a state, or of the United States, who has certain duties to perform in the regulation and management of the fiscal matters of the government under which he holds office.

In the treasury department of the United States there is an officer known as the comptroller of the treasury. R. S. § 268 *et seq.* He is charged with the duty of revising accounts, upon appeal from the settlements made by the auditors. Upon the request of a disbursing officer, or the head of a department, he is required to give his decision upon the validity of a payment to be made; to approve, disapprove, or modify all decisions made by the auditors making an original construction, or modifying an existing construction of statutes, and to certify his action to the auditor. The forms of keeping and rendering all public accounts (except those relating to the postal service), the recovery of debts certified by the auditors to be due to the United States, and the preservation, with their vouchers and certificates, of accounts finally adjusted, are under his direction.

COMPTROLLER OF THE CURRENCY. An officer of the United States Treasury Department. R. S. § 324 *et seq.* He has supervision over the creation of national banks and their operations, with a visitatorial power; he may appoint receivers for them if he deems them insolvent.

COMPULSION. Forcible inducement to the commission of an act.

Acts done under compulsion are not, in general, binding upon a party; but when a man is compelled by lawful authority to do that which he ought to do, that compulsion does not affect the validity of the act; as, for example, when a court of competent jurisdiction compels a party to execute a deed, under the pain of attachment for contempt, the grantor cannot object to it on the ground of compulsion. But if the court compelled a party to do an act forbidden by law, or had not jurisdiction over the parties or the subject-matter, the act done by such compulsion would be void. See COERCION; DURESS.

COMPULSORY NON-SUIT. See NON-SUIT.

COMPULSORY PILOTAGE. See PILOT.

COMPULSORY SCHOOL ATTENDANCE ACTS. Such acts are not unconstitutional as an invasion of the natural right of the parents to control their children; State v. Bailey, 157 Ind. 324, 61 N. E. 730, 59 L. R. A. 435; State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739. They do not include occasions of temporary absence; State v. Jackson, 71 N. H. 552, 53 Atl. 1021, 60 L. R. A. 739.

In Washington the act provides that any parent may be summoned before a superior judge to show cause why his child should not be kept in school, and for want of cause may be found guilty of a misdemeanor and fined. See State v. Macdonald, 25 Wash. 122, 64 Pac. 912.

COMPURGATOR. One of several neighbors of a person accused of a crime or charged as a defendant in a civil action, who appeared and swore that they believed him on his oath. 3 Bla. Com. 341.

Formerly, when a person was accused of a crime, or sued in some kinds of civil actions, he might purge himself upon oath of the accusation made against him, whenever the proof was not the most clear and positive; and if upon his oath he declared himself innocent, he was absolved.

This usage, so eminently calculated to encourage perjury by impunity, was soon found to be dangerous to the public safety. To remove this evil, the laws were changed, by requiring that the oath should be administered with the greatest solemnity; but the form was soon disregarded, for the mind became easily familiarized to those ceremonies which at first imposed on the imagination, and those who cared not to violate the truth did not hesitate to treat the form with contempt. In order to give a greater weight to the oath of the accused, the law was again altered so as to require that the accused should appear before the judge with a certain number of his neighbors, who were freeholders of the hundred, who should swear that they believed the accused had sworn truly. This new species of witnesses were called compurgators. If it was not his first offence or if his compurgators did not agree to make the oath, he was put to the ordeal *(q. v.)*. The origin of the system lies back in the history of the Teuton race. It is said still to survive in the practice of the criminal courts by which an accused person is allowed to call witnesses as to his character, as a defence, while the prosecution is not allowed to traverse their testimony. Inderwick, The King's Peace. See WAGER OF LAW.

The number of compurgators varied according to the nature of the charge and and other circumstances, and the rank of the party—formerly, from two to five; later the practice was twelve. See 2 Holdsw. Hist. E. L. See Du Cange, *Juramentum;* Spelman, Gloss. *Assarth; Termes de la Ley;* 3 Bla. Com. 341-343. The last reported case is 2 B. & C. 538; see 2 Poll. & Maitl. 600.

COMPUTUS (Lat. *computare*, to account). A writ to compel a guardian, bailiff, receiver, or accountant, to yield up his accounts. It is founded on the stat. Westm. 2, cap. 12; Reg. Orig. 135.

CONCEAL. To withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete physical objects from sight or observation. Gerry v. Dunham, 57 Me. 339.

CONCEALED WEAPONS. See DANGEROUS WEAPONS.

CONCEALERS. Such as find out concealed lands: that is, lands privily kept from the king by common persons having nothing to show for them. They are called "*a troublesome, disturbant sort of men; turbulent persons.*" Cowell.

CONCEALMENT. The improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The omission by an applicant for insurance preliminarily to state facts known to him, or which he is bound to know, material to the risk proposed to be insured against, or omission to state truly the facts expressly inquired about by the underwriters to whom

application for insurance is made, whether the same are or are not material to the risk.

Concealment, when fraudulent, avoids a contract, or renders the party using it liable for the damage arising in consequence thereof; Kidney v. Stoddard, 7 Metc. (Mass.) 252; Prentiss v. Russ, 16 Me. 30; Jackson v. Wilcox, 1 Scam. (Ill.) 344; 3 B. & C. 605; Daniels v. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192. But it must have been of such facts as the party is bound to communicate; Webb, Poll. Torts 368; 3 E. L. & Eq. 17; Otis v. Raymond, 3 Conn. 413; Van Arsdale & Co. v. Howard, 5 Ala. 596; Kintzing v. McElrath, 5 Pa. 467; Stevens v. Fuller, 8 N. H. 463; Hamrick v. Hogg, 12 N. C. 351; Fleming v. Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224; George v. Johnson, 6 Humphr. (Tenn.) 36, 44 Am. Dec. 288. A concealment of extrinsic facts is not, in general, fraudulent, although peculiarly within the knowledge of the party possessing them; Laidlaw v. Organ, 2 Wheat. (U. S.) 195, 4 L. Ed. 214; Blydenburgh v. Welsh, Baldw. 331, Fed. Cas. No. 1,583; Bench v. Sheldon, 14 Barb. (N. Y.) 72; Burnett v. Stanton, 2 Ala. 181. But see Frazer v. Gervais, Walk. (Miss.) 72; Baker v. Seahorn, 1 Swan (Tenn.) 54, 55 Am. Dec. 724; Hough v. Evans, 4 McCord (S. C.) 169. And the rule against the concealment of latent defects is stricter in the case of personal than of real property; Mason v. Crosby, 1 Woodb. & M. 342, Fed. Cas. No. 9,234; 3 Campb. 508; 3 Term 759.

A failure to state facts known to an insurer or his agent, or which he ought to know, or which lessen the risk, for that only is material which tends to increase the risk, in the absence of express stipulation, and where no inquiry is made, is no concealment; May, Ins. § 207; Lexington Fire, Life & Marine Ins. Co. v. Paver, 16 Ohio 334.

Where there is confidence reposed, concealment becomes more fraudulent; 9 B. & C. 577.

See, generally, 2 Kent 482; DECEIT; MISREPRESENTATION; REPRESENTATION.

CONCERT OF EUROPE. The union between the chief powers of Europe for purposes of concerted action in matters affecting their mutual interests. It is sometimes called the *Primacy of the Great Powers.* It has existed under various forms from the time of the Congress of Vienna, in 1815. The most important action of the *Concert of Europe* within recent years was that taken at Berlin in 1878, when the status of the European provinces of Turkey was determined, and again in 1885, when the general act of the Congo Conference laid down rules determining the status of the newly acquired colonies in Africa.

CONCESSI (Lat. I have granted). A term formerly used in deeds.

It is a word of general extent, and is said to amount to a grant, feoffment, lease, release, and the like; 2 Saund. 96; Co. Litt. 301; Dane, Abr. Index; Hemphill v. Eckfeldt, 5 Whart. (Pa.) 278.

It has been held in a feoffment or fine to imply no warranty; Co. Litt. 384; 4 Co. 80; Vaughan's Argument in Vaughan 126; Butler's note, Co. Litt. 384. But see 1 Freem. 339, 414.

CONCESSIMUS (Lat. we have granted). A term used in conveyances. It created a joint covenant on the part of the grantors. 5 Co. 16; Bacon, Abr. *Covenant.*

CONCESSION. A grant. The word is frequently used in this sense when applied to grants made by the French and Spanish governments in Louisiana.

CONCESSOR. A grantor.

CONCILIUM. A council.

In Roman Law. A meeting of a section of the people to consider and decide matters especially affecting itself. Launspach, State and Family in Early Rome 70.

CONCILIUM REGIS. See CURIA REGIS; PRIVY COUNCIL; COMMUNE CONCILIUM.

CONCLUSION. The close; the end.

In Pleading. IN DECLARATIONS. That part which follows the statement of the cause of action. In personal or mixed actions, where the object is to recover damages, the conclusion is, properly, *to the damage* of the plaintiff, etc. Com. Dig. *Pleader*, c. 84; 10 Co. 1156. And see 1 M. & S. 236; DAMAGES.

The form was anciently, in the King's Bench, "To the damage of the said A B, and thereupon he brings suit;" in the Exchequer, "To the damage," etc., "whereby he is the less able to satisfy our said lord the king the debts which he owes his said majesty at his exchequer, and therefore he brings his suit;" 1 Chit. Pl. 356. It is said to be mere matter of form, and not demurrable; Pierson v. Wallace, 7 Ark. 282.

IN PLEAS. The conclusion is either *to the country*—which must be the case when an issue is tendered, that is, whenever the plaintiff's material statements are contradicted—or by verification, which must be the case when new matter is introduced. See VERIFICATION. Every plea in bar, it is said, must have its proper conclusion. All the formal parts of pleadings have been much modified by statute in the various states and in England.

In Practice. Making the last argument or address to the court or jury. The party on whom the burden of proof rests, in general, has the conclusion. See OPENING AND CLOSING.

In Remedies. An estoppel; a bar; the act of a man by which he has confessed a matter or thing which he can no longer deny.

For example, the sheriff is concluded by his return to a writ; and, therefore, if upon a capias he return *cepi corpus*, he cannot afterwards show that he did not arrest the defendant, but is con-

cluded by his return. See Plowd. 276 *b*; 3 Thomas, Co. Litt. 600.

CONCLUSION TO THE COUNTRY. In Pleading. The tender of an issue for trial by a jury.

When an issue is tendered by the defendant, it is as follows: "And of this the said C D puts himself upon the country." When tendered by the plaintiff, the formula is, "And this the said A B prays may be inquired of by the country." It is held, however, that there is no material difference between these two modes of expression, and that if the one be substituted for the other the mistake is unimportant; 10 Mod. 166.

When there is an affirmative on one side and a negative on the other, or *vice versa*, the conclusion should be to the country; 2 Saund. 189; Gazley v. Price, 16 Johns. (N. Y.) 267. So it is though the affirmative and negative be not in express words, but only tantamount thereto; Co. Litt. 126 *a*; 1 Saund. 103; 1 Chit. Pl. 592; Com. Dig. *Pleader*, E, 32.

CONCLUSIVE EVIDENCE. That which cannot be controlled or contradicted by any other evidence.

Evidence which of itself, whether contradicted or uncontradicted, explained or unexplained, is sufficient to determine the matter at issue. 6 Lond. L. Mag. 373.

Evidence upon the production of which the judge is bound by law to regard some fact as proved, and to exclude evidence to disprove it. Steph. Dig. Ev.

CONCLUSIVE PRESUMPTION. A rule of law determining the quantity of evidence requisite for the support of a particular averment which is not permitted to be overcome by any proof that the fact is otherwise. 1 Greenl. Ev. § 15. Thus, for example, the possession of land under claim of title for a certain period of time raises a conclusive presumption of a grant. See PRESUMPTION.

In the civil law, such presumptions are said to be *juris et de jure*.

CONCORD. An agreement or supposed agreement between the parties in levying a fine of lands in which the deforciant (or he who keeps the other out of possession) acknowledges that the lands in question are the right of complainant; and from the admission of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied, the cognizee. 2 Bla. Com. 350; Cruise, Dig. tit. 35, c. 2, § 33; Com. Dig. *Fine* (E, 9).

CONCORDAT. A convention; a pact; an agreement. The term is generally confined to the agreements made between independent governments, and most usually applied to those between the pope and some prince.

In French Law. A composition. The French Concordat was repealed in 1906.

CONCUBEANT. Lying together. Wharton.

CONCUBINAGE. A species of marriage which took place among the ancients.

The act or practice of cohabiting, in sexual commerce, without the authority of law or a legal marriage. See 1 Brown, Civ. Law 80; Merlin, *Rép.*; Dig. 32. 49. 4; 7. 1. 1; Code, 5. 27. 12.

"Concubinage is the act upon the part of the woman of cohabiting with a man without ceremonial marriage, or consent and intent good at common law." U. S. v. Bitty, 155 Fed. 938. See a definition in State v. Baldwin, 214 Mo. 290, 113 S. W. 1123.

Living together and having sexual relations as husband and wife; State v. Tucker, 72 Kan. 481, 84 Pac. 126. The words *concubinage* and *prostitution* have no common law meaning, but in their popular sense cover all cases of lewd intercourse; People v. Cummons, 56 Mich. 544, 23 N. W. 215. See ABDUCTION; PROSTITUTION; PROCURATION.

CONCUBINATUS. A sort of unequal marriage which existed under Roman law between a man of superior rank and a woman of inferior rank. It did not raise the wife to the husband's level; the children were not legitimate, but they could require their father to support them, and, in Justinian's time, had a qualified right of intestate succession to him. They followed their mother's condition and could inherit from her. A man could not have more than one concubine at a time. It was abolished by the Emperor Leo the Philosopher in A. D. 887. Bryce, Studies in Hist., etc. See MARRIAGE.

CONCUBINE. A woman who cohabits with a man as his wife, without being married.

CONCUR. In Louisiana. To claim a part of the estate of an insolvent along with other claimants. Thompson v. Chauveau, 6 Mart. N. S. (La.) 460; as, "the wife concurs with her husband's creditors, and claims a privilege over them."

CONCURRENCE. In French Law. The equality of rights or privileges which several persons have over the same thing; as, for example, the right which two judgment-creditors, whose judgments were rendered at the same time, have to be paid out of the proceeds of real estate bound by them. *Dict. de Jur.*

CONCURRENT. Running together; having the same authority; thus, we say, a concurrent consideration occurs in the case of mutual promises; such and such courts have concurrent jurisdiction,—that is, each has the same jurisdiction.

Concurrent writs. Duplicate originals, or several writs running at the same time for the same purpose, for service on or arrest of a person, when it is not known where he is to be found; or for service on several persons, as when there are several defendants to an action. Mozley & W. Dict.

CONCURSUS. A proceeding in Louisiana similar to interpleader. See Louisiana Molasses Co. v. Le Sassier, 52 La. Ann. 2070, 28 South. 217.

CONCUSSION. **In Civil Law.** The unlawful forcing of another by threats of violence to give something of value. It differs from robbery in this, that in robbery the thing is taken by force, while in concussion it is obtained by threatened violence. Heineccius, Lec. El. § 1071.

CONDEMN. To sentence; to adjudge. 3 Bla. Com. 291.

To declare a vessel a prize. To declare a vessel unfit for service. 1 Kent 102; 5 Esp. 65.

CONDEMNATION. The sentence of a competent tribunal which declares a ship unfit for service. This sentence may be reexamined and litigated by the parties interested in disputing it; 5 Esp. 65; Abb. Sh. 15; 30 L. J. Ad. 145.

The judgment, sentence, or decree by which property seized and subject to forfeiture for an infraction of revenue, navigation, or other laws is condemned or forfeited to the government. See CAPTOR.

In International Law. The sentence or judgment of a court of competent jurisdiction that a ship or vessel taken as a prize on the high seas was liable to capture, and was properly and legally captured and held as prize.

Some of the grounds of capture and condemnation are: *violation of neutrality* in time of war; The Commercen, 2 Gall. 261, Fed. Cas. No. 3,055; *carrying contraband goods;* The Springbok, 5 Wall. (U. S.) 1, 18 L. Ed. 480; The Peterhoff, 5 Wall. (U. S.) 28, 18 L. Ed. 564; The Bermuda, 3 Wall. (U. S.) 514, 18 L. Ed. 200; *breach of blockade;* The Plymouth, 3 Wall. (U. S.) 28, 18 L. Ed. 125; The Louisiana, 3 Wall. (U. S.) 170, 18 L. Ed. 85; The Admiral, 3 Wall. (U. S.) 603, 18 L. Ed. 58.

By the general practice of the law of nations, a sentence of condemnation is at present generally deemed necessary in order to divest the title of a vessel taken as a prize. Until this has been done, the original owner may regain his property, although the ship may have been in possession of the enemy twenty-four hours, or carried *infra præsidia;* Hall, Int. L.; The Estrella, 4 Wheat. (U. S.) 298, 4 L. Ed. 574. A sentence of condemnation is generally binding everywhere; Gelston v. Hoyt, 3 Wheat. (U. S.) 246, 4 L. Ed. 381; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670. Title vests completely in the captors, and relates back to the time of capture; 2 Russ. & M. 35; 15 Ves. 139.

Confiscation (*q. v.*), in technical if not in general usage, is the act of the sovereign against a rebellious subject; condemnation as prize is the act of a belligerent against another belligerent. The former may be effected by such means as the sovereign through legal channels may please to adopt; the latter can be made only in accordance with principles recognized in the common jurisprudence of the world. Both are *in rem;* but confiscation recognizes the title of the original owner, while in prize the tenure of the property is qualified, provisional and destitute of absolute ownership; Winchester v. U. S., 14 Ct. Cls. 14.

The condemnation of prize property while lying in a neutral port or the port of an ally is valid; Jecker v. Montgomery, 13 How. (U. S.) 498, 14 L. Ed. 240; 4 C. Rob. 43.

By Art. 3 of the Convention Relative to the Establishment of an International Prize Court (*q. v.*) the judgments of national prize courts condemning neutral ships or cargoes, or enemy cargoes on board neutral ships, may be reviewed by the International Prize Court.

The word is in general use in connection with the taking of land under the right of eminent domain, *q. v.* The condemnation of lands is but a purchase of them *in invitum,* and the title acquired is but a quit claim; Lake Merced Water Co. v. Cowles, 31 Cal. 215.

In Civil Law. A sentence or judgment which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded.

The word is used in this sense by common-law lawyers also; though it is more usual to say conviction, both in civil and criminal cases; 3 Bla. Com. 291. It is a maxim that no man ought to be condemned unheard and without the opportunity of being heard.

CONDICTIO (Lat. from *condicere*).

In Civil Law. A summons.

A personal action. An action arising from an obligation to do or give some certain, precise, and defined thing. Inst. 3. 15. pr.

Condictio is a general name given to personal actions, or actions arising from obligations, and is distinguished from *vindicatio* (real action), an action to regain possession of a thing belonging to the *actor,* and from *actiones mixtæ* (mixed actions). *Condictio* is also distinguished from an action *ex stipulatu,* which is a personal action which lies where the thing to be done or given is uncertain in amount or identity. See Calvinus, Lex.; Halifax, Anal. 117.

CONDICTIO EX LEGE. An action arising where the law gave a remedy but provided no appropriate form of action. Calvinus, Lex.

CONDICTIO INDEBITATI. An action which lies to recover that which the plaintiff has paid to the defendant, by mistake, and which he was not bound to pay, either in fact or in law.

This action does not lie if the money was due *ex æquitate,* or by a natural obligation, or if he who made the payment knew that nothing was due; for *qui consulto dat quod non debetat præsumitur donare;* Bell, Dict.; Calvinus, Lex.; 1 Kames, Eq. 301.

CONDICTIO REI FURTIVÆ. An action against the thief or his heir to recover the thing stolen.

CONDICTIO SINE CAUSA. An action by which anything which has been parted with without consideration may be recovered. It also lay in case of failure of consideration, under certain circumstances. Calvinus, Lex.

CONDIDIT, COMMON. The name of a plea entered by a party to a libel in the Ecclesiastical Court. The administrators "formally propounded the will, in a plea known as *common condidit* from its merely pleading the deceased to have *made* the will, being of sound mind, etc., in set form—in common use . . . in this description of cases"; 3 Addams Eccl. 79 (2 Engl. Eccl. Repts., Phila. Reprint 438); also used in 1 Curteis Eccl. 707 (6 Engl. Eccl. Rep. 431).

CONDITION. In Civil Law. The situation of every person in some one of the different orders of persons which compose the general order of society and allot to each person therein a distinct, separate rank. Domat, tom. ii. l. 1, tit. 9, sec. i. art. viii.

A paction or agreement which regulates that which the contractors have a mind should be done if a case which they foresee should come to pass. Domat, tom. i. l. 1, tit. 1, sec. 4.

Casual conditions are such as depend upon accident, and are in no wise in the power of the person in whose favor the obligation is entered into.

Mixed conditions are such as depend upon the joint wills of the person in whose favor the obligation is contracted and of a third person: as "If you marry my cousin, I will give," etc. Pothier.

Potestative conditions are those which are in the power of the person in whose favor the obligation was contracted: as, If I contract to give my neighbor a sum of money in case he cuts down a tree.

Resolutory conditions are those which are added not to suspend the obligation till their accomplishment, but to make it cease when they are accomplished.

Suspensive obligations are those which suspend the obligation until the performance of the condition. They are casual, mixed, or potestative.

Domat says conditions are of three sorts. The *first* tend to accomplish the covenants to which they are annexed. The *second* dissolve covenants. The *third* neither accomplish nor avoid, but create some change. When a condition of the first sort comes to pass, the covenant is thereby made effectual. In case of conditions of the second sort, all things remain in the condition they were in by the covenant, and the effect of the *condition* is in suspense until the condition comes to pass and the covenant is void. Domat, lib. 1. tit. 1, § 4, art. 6. See Pothier, Obl. pt. i. c. 2, art. 1, § 1; pt. ii. c. 3, art. 2.

In Common Law. The status or relative situation of a person in the state arising from the regulations of society. Thus, a person under twenty-one is an infant, with certain privileges and disabilities. Every person is bound to know the condition of the person with whom he deals.

A qualification, restriction, or limitation modifying or destroying the original act with which it is connected.

A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation, or, in a case of a will, to suspend, revoke, or modify the devise or bequest.

A modus or quality annexed by him that hath an estate, or interest or right to the same, whereby an estate, etc., may either be defeated, enlarged, or created upon an uncertain event. Co. Litt. 201 *a*.

A qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do a particular act, an estate shall commence, be enlarged, or be defeated. Greenl. Cruise, Dig. tit. xiii. c. 1. § 1.

A future uncertain event on the happening or the non-happening of which the accomplishment, modification, or rescission of a testamentary disposition is made to depend.

A condition annexed to a bond is usually termed a defeasance, which see. A condition defeating a conveyance of land in a certain event is generally a mortgage. See MORTGAGE. Conditions annexed to the realty are to be distinguished from *limitations;* a stranger may take advantage of a *limitation,* but only the grantor or his heirs of a condition; Den v. R. Co., 26 N. J. L. 1; Vermont v. Society, 2 Paine 545, Fed. Cas. No. 16,920; a limitation always determines an estate without entry or claim, and so doth not a condition; Sheppard, Touchst. 121; 2 Bla. Com. 155; 4 Kent 122, 127; Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; Van Rensselaer v. Ball, 19 N. Y. 100; from *conditional limitations;* in case of a condition, the entire interest in the estate does not pass from the grantor, but a possibility of reverter remains to him and to his heirs and devisees; in case of a conditional limitation, the possibility of reverter is given over to a third person; Chal. R. P. 233; Proprietors of the Church in Brattle Square v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725; from *remainders;* a conditon operates to defeat an estate before its natural termination, a remainder takes effect on the completion of a preceding estate; Co. Litt. Butler's note 94; from *covenants;* a covenant may be said to be a contract, a condition, something affixed *nomine pœnæ* for the non-fulfilment of a contract; the question often depends upon the apparent intention of the parties, rather than upon fixed rules of construction; if the clause in question goes to the whole of the consideration, it is rather to be held a condition; 2 Parsons Contr. 31; Platt, Cov. 71; 10 East 295; see Woodruff v. Power Co., 10 N. J. Eq. 489; McCullough v. Cox, 6 Barb. (N. Y.) 386; Houston v. Spruance, 4 Harr. (Del.) 117; a covenant may be made by a grantee, a condition by the grantor only; 2 Co. 70; from *charges;* if a testator create a charge upon the devisee personally in respect of the estate devised, the devisee takes the estate on condition, but where a devise is made of an estate and also a bequest of so much to another person, payable "thereout"

or "therefrom" or "from the estate," it is rather to be held a charge; 4 Kent 604; Potter v. Gardner, 12 Wheat. (U. S.) 498, 6 L. Ed. 706; Taft v. Morse, 4 Metc. (Mass.) 523; Harvey v. Olmsted, 1 N. Y. 483; 14 M. & W. 698. Where a forfeiture is not distinctly expressed or implied, it is held a charge; Luckett v. White, 10 Gill & J. (Md.) 480; Pownal v. Taylor, 10 Leigh (Va.) 172, 34 Am. Dec. 725. See, also, Wilson v. Wilson, 38 Me. 1, 61 Am. Dec. 227; 1 Pow. Dev. 664; CHARGE; LEGACY.

Affirmative conditions are positive conditions.

Affirmative conditions implying a negative are spoken of by the older writers: but no such class is now recognized. Shep. Touchst. 117.

Collateral conditions are those which require the doing of a collateral act. Shep. Touchst. 117.

Compulsory conditions are such as expressly require a thing to be done.

Consistent conditions are those which agree with the other parts of the transaction.

Copulative conditions are those which are composed of distinct parts or separate conditions, all of which must be performed. They are generally conditions precedent, but may be subsequent. Pow. Dev. c. 15.

Covert conditions are implied conditions.

Conditions in deed are express conditions.

Disjunctive conditions are those which require the doing of one of several things. If a condition become impossible in the copulative, it may be taken in the disjunctive. Viner, Abr. *Condition* (S b) (Y b 2).

Express conditions are those which are created by express words. Co. Litt. 328.

Implied conditions are those which the law supposes the parties to have had in mind at the time the transaction was entered into, though no condition was expressed. Shep. Touchst. 117.

Impossible conditions are those which cannot be performed in the course of nature.

Inherent conditions are such as are annexed to the rent reserved out of the land whereof the estate is made. Shep. Touchst. 118.

Insensible conditions are repugnant conditions.

Conditions in law are implied conditions. The term is also used by the old writers without careful discrimination to denote limitations, and is little used by modern writers. Littleton § 380; 2 Bla. Com. 155.

Lawful conditions are those which the law allows to be made.

Positive conditions are those which require that the event contemplated should happen.

Possible conditions are those which may be performed.

Precedent conditions are those which are to be performed before the estate or the obligation commences, or the bequest takes effect. Powell, Dev. c. 15. A bond to convey land on the payment of the purchase-money furnishes a common example of a condition precedent. Stone v. Ellis, 9 Cush. (Mass.) 95. They are distinguished from conditions subsequent.

Repugnant conditions are those which are inconsistent with, and contrary to, the original act.

Restrictive conditions are such as contain a restraint: as, that a lessee shall not alien. Shep. Touchst. 118.

Single conditions are those which require the doing of a single thing only.

Subsequent conditions are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation.

A mortgage with a condition defeating the conveyance in a certain event is a common example of a condition subsequent. All conditions must be either precedent or subsequent. The character of a condition in this respect does not depend upon the precise form of words used; Creswell's Lessee v. Lawson, 7 Gill & J. (Md.) 227, 240; Vanhorne's Lessee v. Dorrance, 2 Dall. (Pa.) 317, Fed. Cas. No. 16,857, 1 L. Ed. 391; In re New York Cent. R. Co., 20 Barb. (N. Y.) 425; Brockenbrough v. Ward's Adm'r, 4 Rand. (Va.) 352; Sprigg's Heirs v. Albin's Heirs, 6 J. J. Marsh. (Ky.) 161; Barry v. Alsbury, Litt. Sel. Cas. (Ky.) 151; Shinn v. Roberts, 20 N. J. L. 435, 43 Am. Dec. 636; Yeatman v. Broadwell, 1 La. Ann. 424; Rogan v. Walker, 1 Wis. 527; nor upon the position of the words in the instrument; 1 Term 645; Cas. *temp.* Talb. 166; the question is whether the conditional event is to happen before or after the principal; Brockenbrough v. Ward's Adm'r, 4 Rand. (Va.) 352. The word "if" implies a condition precedent, however, unless controlled by other words; Crabb, R. P. § 2152.

Unlawful conditions are those which are forbidden by law.

They are those which *first,* require the performance of some act which is forbidden by law, or which is *malum in se;* or, *second,* require the omission of some act commanded by law; or, *third,* those which encourage such acts or omissions. 1 P. Wms. 189.

Void conditions are those which are of no validity or effect.

Creation of. Conditions must be made at the same time as the original conveyance or contract, but may be by a separate instrument, which is then considered as constituting one transaction with the original; Hamilton v. Elliott, 5 S. & R. (Pa.) 375; Cooper v. Whitney, 3 Hill (N. Y.) 95; Brown v. Dean, 3 Wend. (N. Y.) 208; Perkins' Lessee v. Dibble, 10 Ohio 433, 36 Am. Dec. 97; Bassett v. Bassett, 10 N. H. 64; Blaney v. Bearce, 2 Greenl. (Me.) 132; Watkins v. Gregory, 6 Blackf. (Ind.) 113. Conditions are sometimes annexed to and depending upon estates, and sometimes annexed to and depending upon recognizances, statutes, obligations, and other things, and are also sometimes contained in acts of parliament and records; Shep. Touchst. 117.

Unlawful conditions are void. Conditions in restraint of marriage *generally* are held void; Poll. Contr. 334; Williams v. Cowden, 13 Mo. 211, 53 Am. Dec. 143; see Com. v. Stauffer, 10 Pa. 350, 51 Am. Dec. 489; Denfield, Petitioner, 156 Mass. 265, 30 N. E. 1018; Knight v. Mahoney, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 573; Mann v. Jackson,

84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358; otherwise of conditions restraining from marriage to a particular person, or restraining a widow from a second marriage; 10 E. L. & Eq. 139; 2 Sim. 255; Fahs v. Fahs, 6 Watts (Pa.) 213. A condition in general restraint of alienation is void; Schermerhorn v. Negus, 1 Den. (N. Y.) 449; 6 East 173; Potter v. Couch, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; and see Blackstone Bank v. Davis, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; but a condition restraining alienation for a limited time may be good; Co. Litt. 223. An unreasonable condition is also void; In re Vandevort, 62 Hun 612, 17 N. Y. Supp. 316; as is a condition repugnant to the grant; Hardy v. Galloway, 111 N. C. 519, 15 S. E. 890, 32 Am. St. Rep. 828.

Where land is devised, there need be no limitation over to make the condition good; 1 Mod. 300; 1 Atk. 361. See Tilley v. King, 109 N. C. 461, 13 S. E. 936; but where the subject of the gift is personalty without a limitation over, the condition, if subsequent, is held to be *in terrorem* merely, and void; 1 Jarm. Wills 887; McIlvaine v. Gethen, 3 Whart. (Pa.) 575. See In re Vandevort, 62 Hun 612, 17 N. Y. Supp. 316. But if there be a limitation over, a non-compliance with the condition divests the bequest; 1 Eq. Cas. Abr. 112. A limitation over must be to persons who could not take advantage of a breach; Jackson v. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515; Wheeler v. Walker, 2 Conn. 196, 7 Am. Dec. 264. A gift of personalty may not be on condition subsequent at common law, except as here stated; 1 Rolle, Abr. 412. See Halbert v. Halbert, 21 Mo. 277.

Any words suitable to indicate the intention of the parties may be used in the creation of a condition; "On condition" is a common form of commencement.

Formerly, much importance was attached to the use of particular and formal words in the creation of a condition. Three phrases are given by the old writers by the use of which a condition was created without words giving a right of re-entry. These were *Sub conditione* (On condition), *Provisa ita quod* (Provided always), *Ita quod* (So that). Littleton 331; Shep. Touchst. 125.

Amongst the words used to create a condition where a clause of re-entry was added were, *Quod si contingat* (If it shall happen), *Pro* (For), *Si* (If), *Causa* (On account of); sometimes, and in case of the king's grants, but not of any other person, *ad faciendum* or *faciendo, ea intentione, ad effectum* or *ad propositum*. For avoiding a lease for years, such precise words of condition are not required; Co. Litt. 204 *b*. In a gift, it is said, may be present a modus, a condition and a consideration: the words of creation are *ut* for the modus, *si* for the condition, and *quid* for the consideration.

Technical words in a will will not create a condition where it is unreasonable to suppose that the testator intended to create a technical condition; Emery v. Judge of Probate, 7 N. H. 142. The words of condition need be in no particular place in the instrument; 1 Term 645; 6 *id.* 668.

Construction of. Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed; Crabb, R. P. § 2130; Mayor etc., of New York v. Stuyvesant, 17 N. Y. 34; Inhabitants of Hadley v. Mfg. Co., 4 Gray (Mass.) 140; Chapin v. School District, 35 N. H. 445; Wilson v. Galt, 18 Ill. 431; Perkins v. Fourniquet, 15 How. (U. S.) 323, 14 L. Ed. 435. The condition of an obligation is said to be the language of the obligee, and for that reason to be construed liberally in favor of the obligor; Co. Litt. 42 *a*, 183 *a*; Shep. Touchst. 375; Dy. 14 *b*, 17 *a*; Jackson v. Brownell, 1 Johns. (N. Y.) 267, 3 Am. Dec. 326. But wherever an obligation is imposed by a condition, the construction is to be favorable to the obligee; Catlin v. Fire Ins. Co., 1 Sumn. 440, Fed. Cas. No. 2,522. Conditions subsequent are not favored in law but are always strictly construed because they tend to destroy estates; Peden v. R. Co., 73 Ia. 328, 35 N. W. 424, 5 Am. St. Rep. 680; and where it is doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

Performance should be complete and effectual; 1 Rolle, Abr. 425. An inconsiderable casual failure to perform is not nonperformance; Mayor, etc., of New York v. Stuyvesant's Heirs, 17 N. Y. 34. Any one who has an interest in the estate may perform the condition; but a stranger gets no benefit from performing it; Frederick v. Gray, 10 S. & R. (Pa.) 186. Conditions precedent, if annexed to land, are to be strictly performed, even when affecting marriage. Conditions precedent can generally be exactly performed; and, at any rate, equity will not generally interfere to avoid the consequences of non-performance; 3 Ves. Ch. 89; 2 Brown, Ch. 431. But in cases of conditions subsequent, equity will interfere where there was even a partial performance, or where there is only a delay of performance; Crabb, R. P. § 2160; Leach v. Leach, 4 Ind. 628, 58 Am. Dec. 642; Luques v. Thompson, 26 Me. 525. This is the ground of equitable jurisdiction over mortgages.

Generally, where there is a gift over in case of non-performance, the parties will be held more strictly to a performance than where the estate or gift is to revert to the grantor or his heirs.

Where conditions are liberally construed, a strict performance is also required; and it may be said, in the same way, that a non-exact performance is allowed where there is a strict construction of the condition.

Generally, where no time of performance is limited, he who has the benefit of the contract may perform the condition when he pleases, at any time during his life;

Plowd. 16; Co. Litt. 208 *b;* and need not do it when requested; Co. Litt. 209 *a.* A condition precedent must be performed within a reasonable time, when no time is fixed for the performance thereof; Soderberg v. Crockett, 17 Nev. 409, 30 Pac. 826. But if a prompt performance be necessary to carry out the will of a testator, the beneficiary shall not have a lifetime in which to perform the condition; Hamilton v. Elliott, 5 S. & R. (Pa.) 384. In this case, no previous demand is necessary; Hamilton v. Elliott, 5 S. & R. (Pa.) 385; nor is it when the continuance of an estate depends upon an act to be done at a fixed time; Royal v. Aultman & Taylor Co., 116 Ind. 424, 19 N. E. 202, 2 L. R. A. 526. But even then a reasonable time is allowed; 1 Rolle, Abr. 449.

If the place be agreed upon, neither party alone can change it, but either may with consent of the other; 1 Rolle 444; Peck's Adm'r v. Hubbard, 11 Vt. 612; 3 Leon. 260. See CONTRACT; PERFORMANCE.

Non-performance of a condition which was possible at the time of its making, but which has since become impossible, is excused if the impossibility is caused by act of God; Poll. Contr. 387; Merrill v. Emery, 10 Pick. (Mass.) 507; or by act of law, if it was lawful at its creation; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287; Kelly v. Henderson, 1 Pa. 495; or by the act of the party; as, when the one imposing the obligation accepts another thing in satisfaction or renders the performance impossible by his own default; Bradstreet v. Clark, 21 Pick. (Mass.) 389; Vermont v. Society, 1 Paine 652, Fed. Cas. No. 16,919; U. S. v. De la Maza Arredondo, 6 Pet. 691, 8 L. Ed. 547; Frets v. Frets, 1 Cow. (N. Y.) 339. If performance of one part becomes impossible by act of God, the whole will, in general, be excused; 1 B. & P. 242; Cro. Eliz. 280; 5 Co. 21; 1 Ld. Raym. 279.

The effect of conditions may be to *suspend* the obligation; as, if I bind myself to convey an estate to you on condition that you first pay one thousand dollars, in which case no obligation exists until the condition is performed: or may be to *rescind* the obligation; as, if you agree to buy my house on condition that it is standing unimpaired on the tenth of May, or I convey to you my farm on condition that the conveyance shall be void if I pay you one thousand dollars, in such cases the obligation is rescinded by the non-performance of the condition: or it may *modify* the previous obligation; as if I bind myself to convey my farm to you on the payment of four thousand dollars if you pay in bank stock, or of five thousand if you pay in money: or, in case of gift or bequest, may qualify the gift or bequest as to amount or persons.

The effect of a condition precedent is, when performed, to vest an estate, give rise to an obligation, or enlarge an estate already vested; Ludlow v. R. Co., 12 Barb. (N. Y.) 440. Unless a condition precedent be performed, no estate will vest; and this even where the performance is prevented by the act of God or of the law; Co. Litt. 42; 2 Bla. Com. 157; 4 Kent 125; Mizell v. Burnett, 49 N. C. 249, 69 Am. Dec. 744; Tilley v. King, 109 N. C. 461, 13 S. E. 936. Not so if prevented by the party imposing it; Jones v. Walker, 13 B. Monr. (Ky.) 163, 56 Am. Dec. 557.

If a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute; 2 Bla. Com. 157; Taylor v. Sutton, 15 Ga. 103, 60 Am. Dec. 682. Where the condition upon which an estate is to be divested and go to a third party is founded on a contingency that can never happen, the grantee will take a fee simple; Munroe v. Hall, 97 N. C. 206, 1 S. E. 651.

In case of a condition broken, if the grantor is in possession, the estate revests at once; Lincoln & Kennebeck Bank v. Drummond, 5 Mass. 321; Hamilton v. Elliott, 5 S. & R. (Pa.) 375; Andrews v. Senter, 32 Me. 394; Thrall v. Spear, 63 Vt. 266, 22 Atl. 414; Higbee v. Rodeman, 129 Ind. 244, 28 N. E. 442; Alford v. Alford, 1 Tex. Civ. App. 245, 21 S. W. 283. But see Willard v. Henry, 2 N. H. 120. But if the grantor is out of possession, he must enter; Cross v. Carson, 8 Blackf. (Ind.) 138, 44 Am. Dec. 742; Phelps v. Chesson, 34 N. C. 194; Bowen v. Bowen, 18 Conn. 535; Sperry v. Sperry, 8 N. H. 477; Inhabitants of Bangor v. Warren, 34 Me. 324, 56 Am. Dec. 657; 8 Exch. 67; and is then in, as of his previous estate; Co. Litt. Butler's note, 94. Only the grantor, his heirs or devisees, can take advantage of the failure to perform a condition subsequent, contained in a deed; Boone v. Clark, 129 Ill. 466, 21 N. E. 850, 5 L. R. A. 276; Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514.

It is usually said in the older books that a condition is not assignable, and that no one but the grantor and his heirs can take advantage of a breach; Gilbert, Ten. 26. Statutory have equal rights in this respect with common-law heirs; Bowen v. Bowen, 18 Conn. 535; Marwick v. Andrews, 25 Me. 525; and in some of the states the common-law rule has been broken in upon, and the devisee may enter; McKissick v. Pickle, 16 Pa. 150; Hayden v. Stoughton, 5 Pick. (Mass.) 528; *contra*, Underhill v. Ry. Co., 20 Barb. (N. Y.) 455; while in others even an assignment of the grantor's interest is held valid, if made before breach; McKissick v. Pickle, 16 Pa. 140; and of a particular estate; Van Rensselaer v. Ball, 19 N. Y. 100. In *equity*, a condition with a limitation over to a third person will be regarded as a trust, and, though the legal rights of the grantor and his heirs may not be destroyed, equity will follow him and compel a performance of the trust; Co. Litt. 236 *a*;

Downer v. Downer, 9 Watts (Pa.) 60; Wheeler v. Walker, 2 Conn. 201, 7 Am. Dec. 264.

Consult Blackstone; Kent, Commentaries; Crabb; Washburn, Real Prop.; Leake, Pollock, Contracts. As to effect of conditions in deeds, see Conger v. Low, 124 Ind. 368, 24 N. E. 889, 9 L. R. A. 165.

CONDITIONAL FEE. A fee which, at the common law, was restrained to some particular heirs, exclusive of others.

It was called a conditional fee by reason of the condition, expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that, on failure of the heirs specified in the grant, the grant should be at an end and the land return to its ancient proprietor.

Such a gift, then, was held to be a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but, if he had, it should then remain to the donee. It was, therefore, called a fee simple, on condition that the donee had issue. As soon as the donee had issue born, his estate was supposed to become absolute, by the performance of the condition,—at least so far absolute as to enable him to charge or to alienate the land, or to forfeit it for treason. But on the passing of the statute of Westminster II., commonly called the statute *De Donis Conditionalibus*, the judges determined that the donee had no longer a conditional fee simple which became absolute and at his own disposal as soon as any issue was born; but they divided the estate into two parts, leaving the donee a new kind of particular estate, which they denominated a *fee tail;* and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue, which expectant estate was called a reversion. And hence it is said that tenant in fee tail is by virtue of the statute *De Donis*. 2 Bla. Com. 112.

A conditional fee may be granted by will as well as by deed; Corey v. Springer, 138 Ind. 506, 37 N. E. 322.

CONDITIONAL LIMITATION. A condition followed by a limitation over to a third person in case the condition be not fulfilled or there be a breach of it.

A condition determines an estate after breach upon entry or claim by the proper person: a limitation marks the period which determines an estate without any act on the part of him who has the next expectant interest. A conditional limitation is, therefore, of a mixed nature, partaking of that of a condition and a limitation. Proprietors of Church in Brattle Square v. Grant, 3 Gray (Mass.) 143, 63 Am. Dec. 725. The limitation over need not be to a stranger; 2 Bla. Com. 155; Fifty Associates v. Howland, 11 Metc. (Mass.) 102; Watk. Conv. 204.

See CONDITION; LIMITATION; 1 Washburn, Real Prop. 459; 4 Kent 122, 127; 1 Preston, Est. §§ 40, 41, 93.

CONDITIONAL SALE. See SALE; ROLLING STOCK.

CONDITIONAL STIPULATION. In Civil Law. A stipulation on condition. Inst. 3, 16, 4.

CONDITIONS OF SALE. The terms upon which the vendor of property by auction proposes to sell it.

The instrument containing these terms, when reduced to writing or printing.

It is always prudent and advisable that the conditions of sale should be printed and exposed in the auction-room: when so done, they are binding on both parties, and nothing that is *said* at the time of sale, to add to or vary such printed conditions, will be of any avail; 12 East 6; 6 Ves. Ch. 330; 15 *id.* 521; 1 Des. Ch. 573; Judson v. Wass, 11 Johns. (N. Y.) 525, 6 Am. Dec. 392. See forms of conditions of sale in Babington Auct. 233–243; Sugden, Vend. App. no. 4.

CONDONACION. In Spanish Law. The remission of a debt, either expressly or tacitly.

CONDONATION. The conditional forgiveness or remission, by a husband or wife, of a matrimonial offence which the other has committed.

"A blotting out of an imputed offence against the marital relation so as to restore the offending party to the same position he or she occupied before the offence was committed." 1 Sw. & Tr. 334. See, as to this definition, 2 Bish. Mar. & Div. § 35; Odom v. Odom, 36 Ga. 286; [1893] P. D. 313.

While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; Bish. Mar. & Div. § 354.

The doctrine of condonation is chiefly, though not exclusively, applicable to the offence of adultery. It may be either express, *i. e.* signified by words or writing, or implied from the conduct of the parties. The latter, however, is much the more common; and it is in regard to that that the chief legal difficulty has arisen. The only general rule is, that any cohabitation with the guilty party, after the commission of the offence, and with the knowledge or belief on the part of the injured party of its commission, will amount to conclusive evidence of condonation; but this presumption may be rebutted by evidence; 60 L. J. Prob. 73. The construction, however, is more strict when the wife than when the husband is the delinquent party; Bish. Mar. & Div. § 355; Miles v. Miles, 101 Ill. App. 406. A mere promise to condone is not in itself a condonation; 1 Sw. & Tr. 183; Quarles v. Quarles, 19 Ala. 363; but see, *contra*, Christianberry v. Christianberry, 3 Blackf. (Ind.) 202, 25 Am. Dec. 96, where there was only an unaccepted inducement held out to the wife to return. Knowledge of the offence is essential; Burns v. Burns, 60 Ind. 259; Turnbull v. Turnbull, 23 Ark. 615; Connelly v. Connelly, 98 Mo. App. 95, 71 S. W. 1111. A divorce will not be granted for adultery where the parties continue to live together after it was known; Land v. Martin, 46 La. Ann. 1246, 15 South. 657; Day v. Day, 71 Kan. 385, 80 Pac. 974, 6 Ann. Cas. 169; or there is sexual intercourse after knowledge of the adultery; Rogers v. Rogers, 67 N. J. Eq. 534, 58 Atl. 822; or sleeping together for a single night; Toulson v. Toulson, 93 Md. 754, 50 Atl. 401;

Todd v. Todd (N. J.) 37 Atl. 766 (the wife alleging that he had intercourse with her); *contra*, where for three or four nights they occupied the same bed, but there was no reconciliation and no sexual intercourse; Hann v. Hann, 58 N. J. Eq. 211, 42 Atl. 564; or where they continued to cohabit but a disease was communicated to the wife; Muir v. Muir, 92 S. W. 314, 28 Ky. L. Rep. 1355, 4 L. R. A. (N. S.) 909; or where the husband had a venereal disease which he told the wife was the result of an injury; Wilkins v. Wilkins (N. J.) 58 Atl. 821; or where the wife denied actual guilt, and the husband, after belief in her innocence was no longer possible, left her; Gosser v. Gosser, 183 Pa. 499, 38 Atl. 1014; or where the husband lied to the wife as to his offence, and she left him after she learned the truth; Merrill v. Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503.

Every implied condonation is upon the implied condition that the party forgiven will abstain from the commission of the like offence thereafter; and also treat the forgiving party, in all respects, with conjugal kindness. Such, at least, is the better opinion; though the latter branch of the proposition has given rise to much discussion. It is not necessary, therefore, that the subsequent injury be of the same kind, or proved with the same clearness, or sufficient of itself, when proved, to warrant a divorce or separation. Accordingly, it seems that a course of unkind and cruel treatment will revive condoned adultery, though the latter be a ground of divorce *a vinculo matrimonii*, while the former will, at most, only authorize a separation from bed and board; Johnson v. Johnson, 14 Wend. (N. Y.) 637; Warner v. Warner, 31 N. J. Eq. 225; Wagner v. Wagner, 6 Mo. App. 573; Atteberry v. Atteberry, 8 Or. 224. Acts of cruelty against a wife revive acts of cruelty which have been condoned; Straus v. Straus, 67 Hun 491, 22 N. Y. Supp. 567; Denison v. Denison, 4 Wash. 705, 30 Pac. 1100.

Condonation is not so strict a bar against the wife as the husband; Armstrong v. Armstrong, 32 Miss. 279; Phillips v. Phillips, 1 Ill. App. 245; 1 Hag. Ec. 773.

The presumption of condonation from cohabitation in cases of cruelty is not so strong as in cases of adultery; 2 Bish. Mar. & Div. § 50 *et seq.* A divorce on the ground of cruelty will not be granted where the parties lived together a long time after the alleged cruelty and before the action was brought, as the offence will be presumed to have been condoned; O'Connor v. O'Connor, 109 N. C. 139, 13 S. E. 887; Hitchins v. Hitchins, 140 Ill. 326, 29 N. E. 888; Nullmeyer v. Nullmeyer, 49 Ill. App. 573. But not in cases where it is overlooked for a time, but its continuance makes it intolerable; Owens v. Owens, 96 Va. 191, 31 S. E. 72; Gauntt v. Gauntt, 34 Pa. C. C. R. 100; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797.

Enduring cruelty for several years in the hope of better treatment will not prevent a reliance upon the original cruelty; Creyts v. Creyts, 133 Mich. 4, 94 N. W. 383; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; Twyman v. Twyman, 27 Mo. 383.

Where a husband's infidelity was condoned, a remedy because of such infidelity was revived by his subsequent cruelty to her; Moorhouse v. Moorhouse, 90 Ill. App. 401; Fisher v. Fisher, 93 Md. 298, 48 Atl. 833; or by subsequent adultery; 19 L. Q. R. 365; or by subsequent desertion; 29 *id.* 108.

Condonation of husband's cruelty is upon the explicit condition that he will thereafter treat her kindly. A breach of this condition revives the right of suit for the original misconduct; Smith v. Smith, 167 Mass. 87, 45 N. E. 52; and it is not necessary that the subsequent misconduct shall be sufficient to warrant divorce without regard to previous cruelty if there is such frequent unkindness as to warrant the belief that it will break out into acts of gross cruelty; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123.

If condonation was based upon conditions which the husband failed to perform, it was ineffective; Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682. It is always based upon the condition of proper conduct afterwards; a breach of a condition revives the original offence; Owens v. Owens, 96 Va. 191, 31 S. E. 72; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820, 125 Am. St. Rep. 654; [1905] P. 94.

There is no condonation in case of a continuing venereal disease; Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 5 L. R. A. (N. S.) 729, 13 Ann. Cas. 214.

CONDUCT MONEY. Money paid to a witness for his travelling expenses. Wharton.

CONDUCTIO (Lat.). A hiring; a bailment for hire.

It is the correlative of *locatio*, a letting for hire. *Conducti actio*, in the civil law, is an action which the hirer of a thing or his heir had against the latter or his heir to be allowed to use the thing hired. *Conducere*, to hire a thing. *Conductor*, a hirer, a carrier; one who undertakes to perform labor on another's property for a specified sum. *Conductus*, the thing hired. Calvinus, Lex.; Du Cange; 2 Kent 536. See BAILMENT.

CONE AND KEY. A woman at fourteen or fifteen years of age may take charge of her house and receive *cone* and *key* (that is, keep the accounts and keys). Cowell. Said by Lord Coke to be *cover* and *keye*, meaning that at that age a woman knew what in her house should be kept under lock and key. Co. 2d Inst. 203.

CONFECTIO (Lat. from *conficere*). The making and completion of a written instrument. 5 Co. 1.

CONFEDERACY. **In Criminal Law.** An agreement between two or more persons to do an unlawful act or an act which though not unlawful in itself, becomes so by the confederacy. The technical term usually employed to signify this offence is *conspiracy*. See State v. Crowley, 41 Wis. 284, 22 Am. Rep. 719; Watson v. Navigation Co., 52 How. Pr. (N. Y.) 353.

In Equity Pleading. An improper combination alleged to have been entered into between the defendants to a bill in equity.

A general charge of confederacy is made a part of a bill in chancery, and is the fourth part, in order, of the bill; but it has become merely formal, except in cases where the complainant intends to show that such a combination actually exists or existed, in which case a special charge of such confederacy must be made. Story, Eq. Pl. § 29; Mitf. Eq. Pl. 41.

In International Law. An agreement between two or more states or nations, by which they unite for their mutual protection and good. This term is applied to such an agreement made between two independent nations; but it is also used to signify the union of different states of the same nation: as, the confederacy of the states.

The original thirteen states, in 1781, adopted for their federal government the "Articles of confederation and perpetual union between the states." These were completed on the 15th of November, 1777, and, with the exception of Maryland, which afterwards also agreed to them, were adopted by the several states, which were thereby formed into a federal government, going into effect on the first day of March, 1781, 1 Story, Const. § 225, and so remained until the adoption of the present constitution, which acquired the force of the supreme law of the land on the first Wednesday of March, 1789. Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124. See ARTICLES OF CONFEDERATION.

CONFEDERATE BONDS. As the bonds of the Confederate States have been declared illegal by the Fourteenth Amendment, a contract entered into since the war for the sale and delivery of such bonds is void, and no action will lie for a breach of the contract; Branch v. Haas, 16 Fed. 53.

CONFEDERATE MONEY. Contracts made during the rebellion in Confederate money may be enforced in the United States courts, and parties compelled to pay in lawful money of the United States the actual value of the notes at the time and place of contract; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495; and when payment was accepted and receipted for by the creditor, it was held to be a valid payment; Glasgow v. Lipse, 117 U. S. 327, 6 Sup. Ct. 757, 29 L. Ed. 901. These notes were currency imposed upon the community by irresistible force, and it must be considered in the courts of law the same as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States; Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. Ed. 361; and a contract payable in such notes was not invalid; Hanauer v. Woodruff, 15 Wall. (U. S.) 448, 21 L. Ed. 224; Confederate Note Case, 19 Wall. (U. S.) 556, 22 L. Ed. 196; Stevens v. Griffith, 111 U. S. 50, 4 Sup. Ct. 283, 28 L. Ed. 348; Cook v. Lillo, 103 U. S. 792, 26 L. Ed. 460; Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275; Rives v. Duke, 105 U. S. 132, 26 L. Ed. 1031; but where a contract was entered into before the war, and the deferred payments came due and were discharged with depreciated currency, it was held, as against the non-ratification of the payment, to be void; Opie v. Castleman, 32 Fed. 511.

After one has accepted payment in Confederate money and acquiesces in the transaction for fifteen years, he is concluded by laches from disputing its validity; Washington v. Opie, 145 U. S. 214, 12 Sup. Ct. 822, 36 L. Ed. 680. Where payment was made in 1864 in such money, it was sufficient consideration though it afterwards became worthless; Dohoney v. Womack, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950. The act of a fiduciary in accepting Confederate money in payment of debts due the estate and investing the proceeds in bonds of the Confederate States issued for the avowed purpose of waging war against the United States is wholly illegal; Opie v. Castleman, 32 Fed. 511.

CONFEDERATE STATES OF AMERICA. The Confederate States were a *de facto* government in the sense that its citizens were bound to render the government obedience in civil matters, and did not become responsible, as wrong-doers, for such acts of obedience; Thorington v. Smith, 8 Wall. (U. S.) 9, 19 L. Ed. 361; but it was not strictly a *de facto* government; *ibid.*; see Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716. During the war the inhabitants of the Confederate States were treated as belligerents; Thorington v. Smith, 8 Wall. (U. S.) 10, 19 L. Ed. 361; U. S. v. Alexander, 2 Wall. (U. S.) 404, 17 L. Ed. 915. Land sold to the Confederate government, and captured by the Federal government, became the property of the United States; U. S. v. Huckabee, 16 Wall. (U. S.) 414, 21 L. Ed. 457.

The Confederate States was an illegal organization, within the provision of the constitution of the United States prohibiting any treaty, alliance, or confederation of one state with another; whatever efficacy, therefore, its enactments possessed in any state entering into that organization, must be attributed to the sanction given to them by that state; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716. The laws of the *several states* were valid except so far as they tended to impair the national authority or the rights of citizens under the constitution; *ibid.*

Unless suspended or superseded by the commanders of the United States forces

which occupied the insurrectionary states, the laws of those states, so far as they affected the inhabitants, remained in force during the war, and over them their tribunals continued to exercise their ordinary jurisdiction; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118.

"Beyond all doubt, the late rebellion against the government of the United States was a sectional civil war; and all persons interested in or affected by its operations are entitled to have their rights determined by the laws applicable to such a condition of affairs." Waite, C. J., in Young v. U. S., 97 U. S. 39, 24 L. Ed. 992.

Transactions between persons actually dwelling within the territory dominated by the government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority; that within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, etc., were, during the war, under the control of the local governments constituting the so-called Confederate States. What was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held invalid *merely* because those governments were organized in hostility to the Union. Judicial and legislative acts in the respective states should be respected by the courts if they were not hostile in their purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the federal constitution. Harlan, J., in Baldy v. Hunter, 171 U. S. 388, 18 Sup. Ct. 890, 43 L. Ed. 208.

"The government of the Confederate States, although in no sense a government *de jure*, and never recognized by the United States as in all respects a government *de facto*, yet was an organized and actual government, maintained by military power, throughout the limits of the states that adhered to it, except in those portions of them protected from its control by the presence of the armed forces of the United States; and the United States had conceded to that government some of the rights and obligations of a belligerent." Oakes v. U. S., 174 U. S. 794, 19 Sup. Ct. 864, 43 L. Ed. 1169.

See 2 So. L. Rev. 313; 3 *id.* 47; SECESSION.

CONFEDERATION. The name given to the form of government which the American colonies during the revolution devised for their mutual safety and government.

CONFEDERATION CLAUSE. See CONFEDERACY.

CONFÉRENCE. **In French Law.** A similarity between two laws or two systems of laws.

In International Law. Verbal explanations between the representatives of at least two nations, for the purpose of accelerating matters by avoiding the delays and difficulties of written communications.

A meeting of plenipotentiaries of different nations to adjust differences or formulate a plan of joint action; as, the conference at Berlin of representatives of the United States, Great Britain, and Germany respecting the affairs of Samoa, in 1889, the monetary conference at Brussels of representatives of the United States and several European powers in 1894, and the Hague Conferences of 1899 and 1907. See CONGRESS.

In Legislation. Mutual consultations by two committees appointed, one by each house of a legislature, in cases where the houses cannot agree in their action.

CONFESSION. **In Criminal Law.** The voluntary admission or declaration made by a person who has committed a crime or misdemeanor, to another, of the agency or participation which he had in the same. People v. Parton, 49 Cal. 632; State v. Novak, 109 Ia. 717, 79 N. W. 465.

Judicial confessions are those made before a magistrate or in court in the due course of legal proceedings.

Extra-judicial confessions are those made by the party elsewhere than before a magistrate or in open court.

Voluntary confessions are admissible in evidence; Rafe v. State, 20 Ga. 60; Hamilton v. State, 3 Ind. 552; Dick v. State, 30 Miss. 593; Craig v. State, 30 Tex. App. 619, 18 S. W. 297; McQueen v. State, 94 Ala. 50, 10 South. 433; State v. Coella, 3 Wash. 99, 28 Pac. 28; Wigginton v. Com., 92 Ky. 282, 17 S. W. 634; People v. Taylor, 93 Mich. 638, 53 N. W. 777; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Anderson v. State, 25 Neb. 555, 41 N. W. 357; State v. Demareste, 41 La. Ann. 617, 6 South. 136; Com. v. Culver, 126 Mass. 464; but a confession is not admissible in evidence where it is obtained by temporal inducement, by threats, promise or hope of favor held out to the party in respect of his escape from the charge against him, by a person in authority; 4 C. & P. 570; State v. York, 37 N. H. 175; Simon v. State, 5 Fla. 285; Smith v. State, 10 Ind. 106; Smith v. Com., 10 Gratt. (Va.) 734; Flagg v. People, 40 Mich. 706; Joe v. State, 38 Ala. 422; Earp v. State, 55 Ga. 136; Garrard v. State, 50 Miss. 147; Territory v. McClin, 1 Mont. 394; Beery v. U. S., 2 Col. 186; State v. Carr, 37 Vt. 191; Laros v. Com., 84 Pa. 200; see People v. Rogers, 18 N. Y. 9, 72 Am. Dec. 484; Com. v. Cuffee, 108 Mass. 285; State v. Day, 55 Vt. 510; State v. De Graff, 113 N. C. 688, 18 S. E. 507; or where there is reason to presume that such person appeared to the party to sanction such threat or in-

ducement; 5 C. & P. 539; 2 Crawf. & D. 347; State v. Roberts, 12 N. C. 259.

To make an admission or a declaration a confession, it must, in some way, have been an acknowledgment of guilt, and have been so intended, for it must have been voluntary; State v. Novak, 109 Ia. 717, 79 N. W. 465; People v. Parton, 49 Cal. 632. Voluntary does not in such cases mean spontaneous; Levison v. State, 54 Ala. 520; Roesel v. State, 62 N. J. L. 216, 41 Atl. 408. There are three kinds: (1) A confession in open court of the prisoner's guilt, which is conclusive and renders any proof unnecessary. (2) The next highest kind of confession is that made before a magistrate. (3) The lowest is that which is made to any other person, and requires to be sustained by proof of corroborating circumstances; Garrard v. State, 50 Miss. 147.

The distinction between a confession and a statement or declaration is recognized both by courts and text-writers. A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offense has been committed and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred; State v. Campbell, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; State v. Reinhart, 26 Or. 466, 38 Pac. 822; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193.

Where a defendant attended an inquest in obedience to a subpœna and testified under a threat of punishment for contempt if he refused, his testimony was held admissible, though he was not advised of his rights when it was given; it being shown that he was not under arrest or formally accused of crime; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. To the same effect, Taylor v. State, 37 Neb. 788, 56 N. W. 623; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; People v. Chapleau, 121 N. Y. 266, 24 N. E. 469; Wilson v. State, 110 Ala. 1, 20 South. 415, 55 Am. St. Rep. 17; State v. Coffee, 56 Conn. 399, 16 Atl. 151; People v. Hickman, 113 Cal. 80, 45 Pac. 175; People v. Parton, 49 Cal. 632. The inducement must be held out by a person in authority; Com. v. Tuckerman, 10 Gray (Mass.) 173; but see 4 C. & P. 570; otherwise the confession is admissible; 1 C. & P. 97, 129; State v. Gossett, 9 Rich. (S. C.) 428; Shifflet v. Com., 14 Gratt. (Va.) 652; Com. v. Sego, 125 Mass. 210; Cady v. State, 44 Miss. 332; Ulrich v. People, 39 Mich. 245; but see Spears v. State, 2 Ohio St. 583; or if the inducement be spiritual merely; 1 Mood. 197; Jebb, Ir. 15; Com. v. Drake, 15 Mass. 161; Fouts v. State, 8 Ohio St. 98; or an appeal to the party to speak the truth; L. R. 1 C. C. 362; Cady v. State, 44 Miss. 333; Huffman v. State, 130 Ala. 89, 30 South. 394; State v. General Armstrong, 167 Mo. 267, 66 S. W. 961; Com. v. Sego, 125 Mass. 210; even if the appeal comes from an officer of the law; 15 Ir. L. R. N. S. 60; Harding v. State, 54 Ind. 359; State v. McLaughlin, 44 Ia. 82; Davis v. State, 2 Tex. App. 588; Hornsby v. State, 94 Ala. 55, 10 South. 522; Com. v. Myers, 160 Mass. 530, 36 N. E. 481; but see 2 Crawf. & D. 152. Mere advice to confess and tell the truth does not exclude; State v. Hagan, 54 Mo. 192; Stafford v. State, 55 Ga. 592; but see State v. Carson, 36 S. C. 524, 15 S. E. 588; and the temporal inducement must have been held out by the person to whom the confession was made; 4 C. & P. 223; unless collusion be suspected; 4 C. & P. 550. The fact that defendant was intoxicated when he made his confession, though tending to affect its weight, is not ground for its exclusion; White v. State, 32 Tex. Cr. R. 625, 25 S. W. 784; State v. Hogan, 117 La. 863, 42 South. 352; Lester v. State, 32 Ark. 727; Eskridge v. State, 25 Ala. 30.

Confessions made by an accused in her sleep were held admissible; State v. Morgan, 35 W. Va. 266, 13 S. E. 385; *contra*, People v. Robinson, 19 Cal. 41.

Nervousness on the part of the accused will not render his statements inadmissible; State v. Jones, 47 La. Ann. 1524, 18 South. 515; or that he was greatly excited; People v. Cokahnour, 120 Cal. 253, 52 Pac. 505; Young v. State, 90 Md. 579, 45 Atl. 531; or that he had but recently recovered from delirium tremens; Com. v. Chance, 174 Mass. 245, 54 N. E. 551, 75 Am. St. Rep. 306.

A confession is admissible though elicited by questions put to a prisoner by a constable, magistrate, or other person; 5 C. & P. 312; Austin v. State, 14 Ark. 556; Com. v. Smith, 119 Mass. 305; Murphy v. People, 63 N. Y. 590; State v. Carlisle, 57 Mo. 102; State v. Ingram, 16 Kan. 14; McQueen v. State, 94 Ala. 50, 10 South. 433; Bell v. State, 31 Tex. Cr. R. 276, 20 S. W. 549; State v. McLaughlin, 44 Ia. 82; even though the question assumes the prisoner's guilt or the confession is obtained by trick or artifice; 1 Mood. 28; Sam v. State, 33 Miss. 347; State v. Fredericks, 85 Mo. 145; State v. Staley, 14 Minn. 105 (Gil. 75); Balbo v. People, 80 N. Y. 484; King v. State, 40 Ala. 314; and although it appears that the prisoner was not warned that what he said would be used against him; 8 Mod. 89; 9 C. & P. 124. Statements made to a trial judge freely and voluntarily are admissible in evidence; State v. Chambers, 45 La. Ann. 36, 11 South. 944.

Confession under oath is admissible when freely made; Com. v. Wesley, 166 Mass. 248, 44 N. E. 228; Shoeffler v. State, 3 Wis. 823; Com. v. Clark, 130 Pa. 641, 18 Atl. 988; State v. Legg, 59 W. Va. 315, 53 S. E. 545, 3 L. R. A. (N. S.) 1152; U. S. v. Brown, 40 Fed. 457; People v. McGloin, 91 N. Y. 241. That it was made under oath does not change it from a confession into a deposition; People v.

Owen, 154 Mich. 571, 118 N. W. 590, 21 L. R. A. (N. S.) 520.

The question of the admissibility of confessions at examinations under oath is almost wholly controlled by statute, the prisoner being permitted to become a witness for himself, and being entitled to be cautioned that his statements may be used against him. It is then simply a question whether the statutory requirements have been fulfilled. Where a statute contained no provision authorizing or permitting an oath in the preliminary examination, a confession under oath was held inadmissible; People v. Gibbons, 43 Cal. 557.

The spirit of the law is that one accused of crime shall not be required to be put under oath, and thus placed in the dilemma of either being required to testify against himself or being subject to the penalties of false swearing; Adams v. State, 129 Ga. 248, 58 S. E. 822, 17 L. R. A. (N. S.) 468, 12 Ann. Cas. 158, where the accused were summoned before a coroner's jury, and without being informed of their right not to testify, were sworn.

A statement, not compulsory, made by a party not at the time a prisoner under a criminal charge, is admissible in evidence against him, although it is made upon oath; 5 C. & P. 530; State v. Broughton, 29 N. C. 96, 45 Am. Dec. 507; State v. Vaigneur, 5 Rich. (S. C.) 391; Com. v. Reynolds, 122 Mass. 454; Alston v. State, 41 Tex. 39; Snyder v. State, 59 Ind. 105; *contra*, Josephine v. State, 39 Miss. 615; see 8 C. & P. 250; otherwise, if the answers are compulsory; 1 Den. Cr. Cas. 236; People v. McMahon, 15 N. Y. 384; Shoeffler v. State, 3 Wis. 823; People v. McMahon, 2 Park. Cr. Cas. (N. Y.) 663; U. S. v. Prescott, 2 Dill. 405, Fed. Cas. No. 16,085; People v. Soto, 49 Cal. 69.

A confession may be inferred from the conduct and demeanor of a prisoner when a statement is made in his presence affecting himself; 5 C. & P. 332; State v. Crowson, 98 N. C. 595, 4 S. E. 143; Slattery v. People, 76 Ill. 217; Murphy v. State, 36 Ohio St. 628; Broyles v. State, 47 Ind. 251; unless such statement is made in the deposition of a witness or examination of another prisoner before a magistrate; 1 Mood. 347; 6 C. & P. 164.

Where a confession has been obtained, or an inducement held out, under circumstances which would render a confession inadmissible, a confession subsequently made is not admissible, unless from the length of time intervening, from proper warning of the consequences, or from other circumstances, there is reason to presume that the hope or fear which influenced the first confession is dispelled; 1 Greenl. Ev. 221; 4 C. & P. 225; State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State v. Patrick, 48 N. C. 443; State v. Vaigneur, 5 Rich. (S. C.) 391; Van Buren v. State, 24 Miss. 512; Bubster v. State, 33 Neb. 663, 50 N. W. 953; State v. Drake, 113 N. C. 624, 18 S. E. 166; State v. Carr, 37 Vt. 191; Com. v. Sheets, 197 Pa. 69, 46 Atl. 753; People v. Castro, 125 Cal. 521, 58 Pac. 133; Smith v. State, 74 Ark. 397, 85 S. W. 1123; State v. Wood, 122 La. 1014, 48 South. 438, 20 L. R. A. (N. S.) 392; U. S. v. Charles, 2 Cra. C. C. 76, Fed. Cas. No. 14,786; and the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will be rejected; State v. Roberts, 12 N. C. 259; Peter v. State, 12 Smedes & M. (Miss.) 31; Com. v. Taylor, 5 Cush. (Mass.) 605; State v. Potter, 18 Conn. 166; Moore v. Com., 2 Leigh (Va.) 701; Bob v. State, 32 Ala. 560; Deathridge v. State, 1 Sneed (Tenn.) 75.

Under such circumstances, contemporaneous declarations of the party are receivable in evidence, or not, according to the attending circumstances; but any act of the party, though done in consequence of such confession, is admissible if it appears from a fact thereby discovered that so much of the confession as immediately relates to it is true; 1 Leach 263, 386; Russ & R. 151; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; Jordan v. State, 32 Miss. 382; State v. Motley, 7 Rich. (S. C.) 327.

A confession made before a magistrate is admissible; State v. Patterson, 68 N. C. 292; State v. Hand, 71 N. J. L. 137, 58 Atl. 641; though made before the evidence of the witnesses against the party was concluded; 4 C. & P. 567.

Parol evidence, precise and distinct, of a statement made by a prisoner before a magistrate during his examination, is admissible though such statement neither appears in the written examination nor is vouched for by the magistrate; State v. Bowe, 61 Me. 171; 7 C. & P. 188; but not if it is of a character which it was the duty of the magistrate to have noted; 1 Greenl. Ev. § 227, n. Parol evidence of a confession before a magistrate may be given where the written examination is inadmissible through informality; 4 C. & P. 550, n.; State v. Parish, 44 N. C. 239.

Accusatory statements made to a prisoner and not replied to by him are admissible; Simmons v. State (Ala.) 61 South. 466.

The whole of what the prisoner said must be taken together; 1 Greenl. Ev. 218; 2 C. & K. 221; Brown v. Com., 9 Leigh (Va.) 633, 33 Am. Dec. 263; Republica v. McCarty, 2 Dall. (Pa.) 86, 1 L. Ed. 300. Where a prisoner signs the confession which is written by another for him, he waives any objection to it as evidence; Com. v. Coy, 157 Mass. 200, 32 N. E. 4.

The prevailing rule is that confessions are *prima facie* voluntary; Egner v. State, 25

Ohio St. 464; Com. v. Culver, 126 Mass. 464; State v. Sanders, 84 N. C. 728; State v. Meyers, 99 Mo. 107, 12 S. W. 516; State v. Hottman, 196 Mo. 110, 94 S. W. 237; State v. Grover, 96 Me. 363, 52 Atl. 757; Thurman v. State, 169 Ind. 240, 82 N. E. 64; but it is sometimes held that confessions are *prima facie* involuntary and therefore inadmissible, and they can be rendered admissible only by showing that they are voluntary and not constrained; Amos v. State, 83 Ala. 1, 3 South. 749, 3 Am. St. Rep. 682; Jackson v. State, 83 Ala. 76, 3 South. 847; Corley v. State, 50 Ark. 305, 7 S. W. 255; but a confession is not rendered inadmissible by the fact that the party is in custody, provided it is not extorted by inducements or threats; Pierce v. U. S., 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; Nicholson v. State, 38 Md. 140; State v. Johnson, 30 La. Ann. 881; State v. Hernia, 68 N. J. L. 299, 53 Atl. 85; State v. Conly, 130 N. C. 683, 41 S. E. 534; Hintz v. State, 125 Wis. 405, 104 N. W. 110; Calloway v. State, 103 Ala. 27, 15 South. 821; State v. Armstrong, 203 Mo. 554, 102 S. W. 503.

The practice of eliciting confessions by a magistrate during the preliminary examination has been strongly condemned. Such a power, once admitted, is liable to unlimited abuse. It is a power not judicial, but essentially inquisitorial, and, on the whole, prejudicial to the administration of justice; Kelly v. State, 72 Ala. 244; Brown v. Walker, 161 U. S. 596, 16 Sup. Ct. 644, 40 L. Ed. 819.

In Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, it was said: To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he had seen him commit the offense; to make this statement to him under circumstances which call imperatively for an admission or a denial; and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought; and then to use the denial made by the person so situated as a confession because of the form in which the denial is made, is not only to compel the reply, but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

A confession by a prisoner who had been confined for several days in a sweat box is not admissible against him, though no threats nor coercion were used, nor any inducements held out to him; Ammons v. State, 80 Miss. 592, 32 South. 9, 18 L. R. A. (N. S.) 768, 92 Am. St. Rep. 607. Such sweat box procedure is unlawful; Flagg v. People, 40 Mich. 706.

Where the accused was taken to the office of the chief of police, and in the presence of several deputies, detectives and newspaper men, for an hour to an hour and a half, was closely questioned by those present until he was very much broken down, being very weak but "not quite collapsed," and in this condition he confessed, such confession was held involuntary and inadmissible; Gallaher v. State, 40 Tex. Cr. R. 296, 50 S. W. 388.

In 31 Ont. Rep. 14, it is said that as to statements made by persons accused, while in custody, in response to questions put by an officer in charge, the judges have regarded the matter from three points of view. First, there are those who consider the practice so reprehensible that any statement so obtained should not be given in evidence. Others, that while the practice of interrogation is undesirable and not to be encouraged, yet the answer so obtained could not be rejected as evidence. The third class held that such an investigation might be so conducted as to be useful and even desirable in the furtherance of justice.

That the confession was drawn out by the questions of a police officer will not render it inadmissible; Bram v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; Com. v. Storti, 177 Mass. 339, 58 N. E. 1021; Com. v. Williams, 171 Mass. 461, 50 N. E. 1035; State v. Phelps, 74 Mo. 128. In State v. Brinte, 4 Pennewill (Del.) 551, 58 Atl. 258, an objection was made that such a confession was involuntary under the 5th Amendment to the U. S. Constitution, but it was held that this applies to judicial examinations, not to extra-judicial confessions; so in (1893) 2 Q. B. 12.

The prisoner's confession, when the *corpus delicti* is not otherwise proved, is insufficient to warrant his conviction; State v. Guild, 10 N. J. L. 163, 185, 18 Am. Dec. 404; Keithler v. State, 10 Smedes & M. (Miss.) 229; Flower v. U. S., 116 Fed. 241, 53 L. Ed. 271; Bergen v. People, 17 Ill. 426, 65 Am. Dec. 672. See, *contra*, Russ. & R. 481, 509; 1 Leach 311; People v. Rulloff, 3 Park. Cr. Cas. (N. Y.) 401; Stephen v. State, 11 Ga. 225.

Whether a confession is voluntary is held to be primarily for the court to determine; State v. Hernia, 68 N. J. L. 299, 53 Atl. 85; State v. Burgwyn, 87 N. C. 572; Hunter v. State, 74 Miss. 515, 21 South. 305; Smith v. Com., 10 Gratt. (Va.) 734; Brown v. State, 124 Ala. 76, 27 South. 250; Murray v. State, 25 Fla. 528, 6 South. 498; State v. Gorham, 67 Vt. 365, 31 Atl. 845; State v. Sherman, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869; Com. v. Howe, 132 Mass. 250; State v. Stebbins, 188 Mo. 387, 87 S. W. 460; People v. White, 176 N. Y. 331, 68 N. E. 630; Com. v. Johnson, 217 Pa. 77, 66 Atl. 233; Hintz v. State, 125 Wis. 405, 104 N. W. 110; other cases hold that, on conflicting evidence, it is for the jury; Burdge v. State, 53 Ohio

St. 512, 42 N. E. 594; People v. Cassidy, 133 N. Y. 612, 30 N. E. 1003; Com. v. Sheu, 190 Pa. 23, 42 Atl. 377; Com. v. Burrough, 162 Mass. 513, 39 N. E. 184; People v. Robinson, 86 Mich. 415, 49 N. W. 260; State v. Stebbins, 188 Mo. 387, 87 S. W. 460; State v. Moore, 160 Mo. 443, 61 S. W. 199; Com. v. Epps, 193 Pa. 512, 44 Atl. 570; People v. Oliveria, 127 Cal. 377, 59 Pac. 772.

When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they shall reject the confession if, upon the whole evidence, they are satisfied it was not the voluntary act of the defendant; Wilson v. U. S., 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090, followed in Roesel v. State, 62 N. J. L. 216, 41 Atl. 408; Burdge v. State, 53 Ohio St. 512, 42 N. E. 594; Hardy v. U. S., 3 App. D. C. 35; Com. v. Preece, 140 Mass. 276, 5 N. E. 494.

Consult Greenleaf; Wigmore; Phillipps, Evidence; Wharton, Criminal Evidence; Roscoe, Crim. Ev.; Joy, Confessions; 1 Bennett & H. Lead. Cr. Cas. 112. See ADMISSIONS.

CONFESSION AND AVOIDANCE. The admission in a pleading of the truth of the facts as stated in the pleading to which it is an answer, and the allegation of new and related matter of fact which destroys the legal effect of the facts so admitted. The plea and any of the subsequent pleadings may be by way of confession and avoidance, or, which is the same thing, *in* confession and avoidance. Pleadings in confession and avoidance must give color. See COLOR; 1 East 212. They must admit the material facts of the opponent's pleading, either expressly in terms; Dy. 171 *b*; or in effect. They must conclude with a verification; 1 Saund. 103, n. For the form of statement, see Steph. Pl. 72, 79.

Pleas in confession and avoidance are either in justification and excuse, which go to show that the plaintiff never had any right of action, as, for example, son assault demesne, or in discharge, which go to show that his right has been released by some matter subsequent.

CONFESSOR. A priest of some Christian church who hears confessions of their sins by members of his church and undertakes to give them absolution of their sins. The common law does not recognize any such relation, at least so as to exempt or prevent the confessor from disclosing such communications as are made to him in this capacity, when he is called upon as a witness. See CONFIDENTIAL COMMUNICATIONS.

CONFIDENCE. This word is considered peculiarly appropriate to create a trust. It is, when applied to the subject of a trust, as nearly a synonym as the English language is capable of. Trust is a confidence which one man reposes in another, and confidence is a trust. Coates' Appeal, 2 Pa. 133.

CONFIDENTIAL COMMUNICATIONS. Those statements with regard to any transaction made by one person to another during the continuance of some relation between them which calls for or warrants such communications.

At law, certain classes of such communications are held not to be proper subjects of inquiry in courts of justice, and the persons receiving them are excluded from disclosing them when called upon as witnesses, upon grounds of public policy.

Secrets of state and communications between the government and its officers are usually privileged; Gray v. Pentland, 2 S. & R. (Pa.) 23; Thompson v. R. Co., 22 N. J. Eq. 111; 5 H. & N. 538; Totten v. U. S., 92 U. S. 107, 23 L. Ed. 605. So also the consultations of the judges, the testimony of arbitrators in certain cases, and the sources of information in criminal prosecutions; 1 Wharton, Ev. sec. 600; Welcome v. Batchelder, 23 Me. 85; 4 C. & P. 327; Woodbury v. Northy, 3 Greenl. (Me.) 85, 14 Am. Dec. 214; Worthington v. Scribner, 109 Mass. 487, 12 Am. Rep. 736; Stephen's Dig. Ev. art. 113.

Of this character are all communications made between husband and wife in all cases in which the interests of the other party are involved; Stein v. Bowman, 13 Pet. (U. S.) 223, 10 L. Ed. 129; Drew v. Tarbell, 117 Mass. 90; Castello v. Castello, 41 Ga. 613; Corse v. Patterson, 6 Har. & J. (Md.) 153; Warner v. Pub. Co., 132 N. Y. 181, 30 N. E. 393; French v. Wade, 35 Kan. 391, 11 Pac. 138; Higham v. Vanosdol, 101 Ind. 160. Nor does it make any difference which party is called upon as a witness; Ry. & M. 352; or when the relation commenced; 3 C. & P. 558; or whether it has terminated; Stein v. Bowman, 13 Pet. (U. S.) 209, 10 L. Ed. 129; Barnes v. Camack, 1 Barb. (N. Y.) 392; 1 C. & P. 364; Robb's Appeal, 98 Pa. 501; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213; Crose v. Rutledge, 81 Ill. 266; Lingo v. State, 29 Ga. 470. A third party who overheard such a conversation may testify as to it; Com. v. Griffin, 110 Mass. 181; Gannon v. People, 127 Ill. 518, 21 N. E. 525, 11 Am. St. Rep. 147. The wife may be examined as to a conversation with her husband in the presence of a third party; State v. Center, 35 Vt. 379; Lyon v. Prouty, 154 Mass. 488, 28 N. E. 908; Fay v. Guynon, 131 Mass. 31; Floyd v. Miller, 61 Ind. 224; Westerman v. Westerman, 25 Ohio St. 500; but not if the third person failed to hear or paid no attention to the conversation; Jacobs v. Hesler, 113 Mass. 160.

The confidential counsellor, solicitor, or attorney of any party cannot be compelled to disclose papers delivered or communications made to him, or letters written or entries

made by him, in that capacity; 4 B. & Ad. 876; Britton v. Lorenz, 45 N. Y. 57; Orton v. McCord, 33 Wis. 205; Johnson v. Sullivan, 23 Mo. 474; Chirac v. Reinicker, 11 Wheat. (U. S.) 295, 6 L. Ed. 474; Sweet v. Owens, 109 Mo. 1, 18 S. W. 928; Swaim v. Humphreys, 42 Ill. App. 370; Andrews v. Simms, 33 Ark. 771; Hollenback v. Todd, 119 Ill. 543, 8 N. E. 829; Higbee v. Dresser, 103 Mass. 523; Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12, 28 L. Ed. 158; Snow v. Gould, 74 Me. 540, 43 Am. Rep. 604; 9 Exch. 298; nor will he be permitted to make such communications against the will of his client; 4 Term 756, 759; 12 J. B. Moo. 520; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Anon., 8 Mass. 370; nor even if the communication is made in the presence of a third person; Blount v. Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554; nor will the client be compelled to disclose such communications; Bigler v. Reyher, 43 Ind. 112; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362; Hemenway v. Smith, 28 Vt. 701; not even when the client takes the witness stand on his own behalf; Bigler v. Reyher, 43 Ind. 112; Barker v. Kuhn, 38 Ia. 395; Duttenhofer v. State, 34 Ohio St. 91, 32 Am. Rep. 362; *contra*, Inhabitants of Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333.

The privilege extends to all matters made the subject of professional intercourse, without regard to the pendency of legal proceedings; 5 C. & P. 592; Miller v. Weeks, 22 Pa. 89; Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Sargent v. Inhabitants of Hampden, 38 Me. 581; Wetherbee v. Ezekiel, 25 Vt. 47; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Jones v. State, 65 Miss. 179, 3 South. 379; Young v. State, 65 Ga. 525; but see Hemenway v. Smith, 28 Vt. 701; Thompson v. Kilborne, 28 Vt. 750, 67 Am. Dec. 742; and to matters discovered by the counsellor, etc., in consequence of this relation; 5 Esp. 52.

Conversations between solicitor or counsel and a party, relating to the subject matter of a suit, are privileged; Montgomery v. Perkins, 94 Fed. 23; but evidence of a contract between an attorney and client for compensation, or the assignment of an interest in the judgment, is not privileged; Strickland v. Mills, 74 S. C. 16, 54 S. E. 220, 7 L. R. A. (N. S.) 426; and the attorney is released from his obligation of secrecy so far as is necessary to protect his interests; Keck v. Bode, 23 Oh. C. C. 413; Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550; Minard v. Stillman, 31 Or. 164, 49 Pac. 976, 65 Am. St. Rep. 815; Nave v. Baird, 12 Ind. 318; L. R. 35 Ch. Div. 722. An attorney will be compelled to disclose the name and residence of a person who retains him as counsel for an accused person, but he need not disclose, the interest of such person in the matter; U. S. v. Lee, 107 Fed. 702. A communication to a counselor in the course of his employment by persons other than his client is not privileged; General Electric Co. v. Jonathon Clark & Sons Co., 108 Fed. 170; likewise a letter written by an attorney to his client advising him of the terms of an injunction granted against him; Aaron v. U. S., 155 Fed. 833, 84 C. C. A. 67.

The doctrine of privileged communications does not apply to a solicitor of patents when he is not an attorney-at-law; Brungger v. Smith, 49 Fed. 124.

Communications between a party or his legal adviser and witnesses are privileged; L. R. 8 Eq. 522; 16 *id.* 112; but see In re Mellen, 18 N. Y. Supp. 515; so are communications between parties to a cause touching the preparation of evidence; Hare, Discov. 152; 43 L. J. C. P. 206; but see 6 B. & S. 888; 3 H. & N. 871. Communications between an attorney and client are not privileged where the latter disclaims the existence of such relations.

Interpreters; 4 Term 756; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; In re Mellen, 18 N. Y. Supp. 515; Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; Maas v. Bloch, 7 Ind. 202; Andrews v. Solomon, 1 Pet. C. C. 356, Fed. Cas. No. 378; and agents to collect evidence; 2 Beav. 173; 1 Phill. Ch. 471, 687; are considered as standing in the same relation as the attorney; so, also, is a barrister's clerk; 2 C. & P. 195; 5 *id.* 177; 5 M. & G. 271; Foster v. Hall, 12 Pick. (Mass.) 93, 22 Am. Dec. 400; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Sibley v. Waffle, 16 N. Y. 180; Landsberger v. Gorham, 5 Cal. 450; but not a student at law in an attorney's office; Barnes v. Harris, 7 Cush. (Mass.) 576, 54 Am. Dec. 734. *Contra*, Pritchard v. Henderson, 3 Pennewill (Del.) 128, 50 Atl. 217.

The cases in which communications to counsel have been held not to be privileged may be classed under the following heads: When the communication was made before the attorney was employed as such; 1 Ventr. 197; see Sargent v. Hampden, 38 Me. 581; Sharon v. Sharon, 79 Cal. 636, 22 Pac. 26, 131; Althouse v. Wells, 40 Hun (N. Y.) 336; Wilson v. Godlove, 34 Mo. 337; after the attorney's employment has ceased; 4 Term 431; Williams v. Benton, 12 La. Ann. 91; when the attorney was consulted because he was an attorney, yet was not acting as such; 4 Term 753; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Goltra v. Wolcott, 14 Ill. 89; Branden & Nethers v. Gowing, 7 Rich. (S. C.) 459; where his relation of attorney was the cause of his being present at the taking place of a fact, but there was nothing in the circumstances to make it amount to a communication; 2 Ves. Ch. 189; 2 Curt. Eccl. 866; Patten v. Moor, 29 N. H. 163; when the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential com-

munication; 7 East 357; Riggs v. Denniston, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; Lloyd v. Davis, 2 Ind. App. 170, 28 N. E. 232; when it was intended that the communications should be imparted by him to others; Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65; when the things disclosed had no reference to professional employment, though disclosed while the relation of attorney and client subsisted; Peake 77; when the attorney made himself a subscribing witness; 2 Curt. Eccl. 866; 3 Burr. 1687; when he is a party to the transaction; Dudley v. Beck, 3 Wis. 274; Story, Eq. Pl. § 601; when he was directed to plead the facts to which he is called to testify; Cormier v. Richard, 7 Mart. La. (N. S.) 179; where an attorney is employed only to draw up a deed and bill of sale to be executed by another to such person, he may testify as to what passed between them and himself; O'Neill v. Murry, 6 Dak. 107, 50 N. W. 619.

The attorney may be called upon to prove his client's handwriting; Brown v. Jewett, 120 Mass. 215; L. R. 8 Eq. 575; L. R. 5 Ch. Ap. 703; Glenn v. Liggett, 47 Fed. 472; to identify his client; 2 D. & R. 347; though not to disclose his client's address; L. R. 15 Eq. 257; unless the client be a ward of court; L. R. 8 Eq. 575; or a bankrupt; L. R. 5 Ch. 703. He may be required to testify as to whether he was retained by his client, and in what capacity; Whart. Ev. 589; Heaton v. Findlay, 12 Pa. 304; but see Chirac v. Reinicker, 11 Wheat. (U. S.) 280, 6 L. Ed. 474.

After testator's death on the question whether an instrument present for probate was his will, the attorney may testify as to directions given him in its preparation by testator; Doherty v. O'Callaghan, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258. He may testify as to what was said in their presence by a third person brought by his client; Tyler v. Hall, 106 Mo. 313, 17 S. W. 319, 27 Am. St. Rep. 337.

The rule of privilege does not extend to confessions made to *clergymen;* 1 Greenl. Ev. 247; 4 Term 753; 2 Skimm. 404; Com. v. Drake, 15 Mass. 161; 1 McNally 253; State v. Bostick, 4 Harr. (Del.) 563; 22 L. R. Ir. 158; see 33 Am. L. Rev. 544; though judges have been unwilling to enforce a disclosure; 3 C. & P. 519; 6 Cox, C. C. 219; and see Totten v. U. S., 92 U. S. 105, 23 L. Ed. 605; Sutton v. Johnson, 62 Ill. 209; Com. v. Call, 21 Pick. (Mass.) 515, 32 Am. Dec. 284; and the rule is otherwise by statute in some states; nor to *physicians;* 11 Hargr. St. Tr. 243; 20 How. St. Tr. 643; 1 C. & P. 97; L. R. 6 C. P. 252; Campau v. North, 39 Mich. 606, 33 Am. Rep. 433; L. R. 9 Ex. 398; but in some states this has been changed by statute; Whart. Ev. § 606; Masonic Mut. Ben. Ass'n v. Beck, 77 Ind. 203, 40 Am. Rep. 295; Connecticut Mut. Life Ins. Co. v. Trust Co., 112 U. S. 250, 5 Sup. Ct. 119, 28 L. Ed. 708; Corbett v. R. Co., 26 Mo. App. 621; Kansas City, Ft. S. & M. R. Co. v. Murray, 55 Kan. 336, 40 Pac. 646; In re Flint, 100 Cal. 391, 34 Pac. 863; Johnson v. Johnson, 14 Wend. (N. Y.) 637; and information acquired by the physicians of a railroad company in treating an injured person against her protest is privileged; Union Pac. R. Co. v. Thomas, 152 Fed. 365, 81 C. C. A. 491; but he may testify from knowledge and information acquired while not treating a patient professionally; Fisher v. Fisher, 129 N. Y. 654, 29 N. E. 951.

Privilege does not extend to *confidential friends;* 4 Term 758; Hoffman v. Smith, 1 Cai. (N. Y.) 157; Brayton v. Chase, 3 Wis. 456; Goltra v. Wolcott, 14 Ill. 89; L. R. 18 Eq. 649; *clerks;* 3 Campb. 337; 1 C. & P. 337; *bankers;* 2 C. & P. 325; a banker is not privileged to withhold the identity of a person depositing securities in his bank; Interstate Commerce Commission v. Harriman, 157 Fed. 432; *stewards;* 2 Atk. 524; 11 Price 455; nor *servants;* Isham v. State, 6 How. (Miss.) 35.

Where, at the trial, the privilege of a physician is waived, such waiver extends to subsequent trials; Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023, 6 L. R. A. (N. S.) 1082, 8 Ann. Cas. 653; McKinney v. R. Co., 104 N. Y. 352, 10 N. E. 544; Green v. Crapo, 181 Mass. 55, 62 N. E. 956; *contra,* Burgess v. Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359; Briesenmeister v. Supreme Lodge, 81 Mich. 525, 45 N. W. 977; Grattan v. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372 (referred to in brief of counsel, but not cited in the opinion of the court, in McKinney v. R. Co., 104 N. Y. 352, 10 N. E. 544); but a waiver by the plaintiff as to the testimony of his own physicians does not operate as a waiver of the testimony of a physician called by the defendant who had attended the plaintiff for the same injuries but at a different time; Metropolitan St. Ry. Co. v. Jacobi, 112 Fed. 924, 50 C. C. A. 619.

A trial judge may properly refuse to charge the jury that they might draw inferences from a party's refusal to waive the privilege with respect to his physician's testimony; Pennsylvania R. Co. v. Durkee, 147 Fed. 99, 78 C. C. A. 107, 8 Ann. Cas. 790; Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303; Wigm. Ev. § 2386; *contra,* Deutschmann v. R. Co., 87 App. Div. 503, 84 N. Y. Supp. 887.

See COMMERCIAL AGENCY; PRIVILEGED COMMUNICATIONS; LIBEL.

CONFIRMATIO (Lat. *confirmare*). The conveyance of an estate, or the communication of a right that one hath in or unto lands or tenements, to another that hath the possession thereof, or some other estate therein, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased or enlarged. Shep. Touchst. 311; 2 Bla. Com. 325.

Confirmatio crescens tends and serves to increase or enlarge a rightful estate, and so to pass an interest.

Confirmatio diminuens tends or serves to diminish and abridge the services whereby the tenant holds.

Confirmatio perficiens tends and serves to confirm and make good a wrongful and defeasible estate, by adding the right to the possession or defeasible seisin, or to make a conditional estate absolute, by discharging the condition.

CONFIRMATIO CHARTARUM (Lat. confirmation of the charters). A statute passed in the 25 Edw. I., whereby the Great Charter is declared to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral-churches and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that, by word or deed or counsel, act contrary thereto or in any degree infringe it. 1 Bla. Com. 128.

CONFIRMATIO PERFICIENS. A confirmation which makes valid a wrongful and defeasible title, or makes a conditional estate, absolute. Shep, Touchst. 311; Black.

CONFIRMATION. A contract by which that which was voidable is made firm and unavoidable.

A species of conveyance.

Where a party, acting for himself or by a previously authorized agent, has attempted to enter into a contract, but has done so in an informal or invalid manner, he confirms the act and thus renders it valid, in which case it will take effect as between the parties from the original making. See 2 Bouvier, Inst. nn. 2067–2069.

To make a valid confirmation, the party must be apprized of his rights; and where there has been a fraud in the transaction he must be aware of it and intend to confirm his contract. See 1 Ball & B. 353; 2 Sch. & L. 486; 12 Ves. Ch. 373; 1 *id.* 215; 1 Atk. 301.

A confirmation does not strengthen a void estate. For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law; Co. Litt. 295. The canon law agrees with this rule; and hence the maxim, *qui confirmat nihil dat.* Toullier, Dr. Civ. Fr. l. 3, t. 3, c. 6, n. 476. See Viner, Abr.; Comyns, Dig.; Ayliffe, Pand. *386; 1 Chit. Pr. 315; Blessing v. House's Lessee, 3 Gill & J. (Md.) 290; Love's Lessee v. Shields, 3 Yerg. (Tenn.) 405; 9 Co. 142 *a;* RATIFICATION.

CONFIRMEE. He to whom a confirmation is made.

CONFIRMOR. He who makes a confirmation to another.

CONFISCARE. To confiscate.

CONFISCATE. To appropriate to the use of the state.

Especially used of the goods and property of alien enemies found in a state in time of war. 1 Kent 52 *et seq. Bona confiscata* and *forisfacta* are said to be the same (1 Bla. Com. 299), and the result to the individual is the same whether the property be forfeited or confiscated; but, as distinguished, an individual forfeits, a state confiscates, goods or other property. Used also as an adjective—forfeited. 1 Bla. Com. 299.

In International Law. It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary; Hall, Int. L. 397; The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. Ed. 568. It has been frequently provided by treaty that foreign subjects should be permitted to remain and continue their business, notwithstanding a rupture between the governments, so long as they conducted themselves innocently; and when there was no such treaty, such a liberal permission has been announced in the very declaration of war. Vattel, l. 3, c. 4, § 63. Sir Michael Foster (Discourses on High Treason, pp. 185–6) mentions several instances of such declarations by the king of Great Britain; and he says that alien enemies were thereby enabled to acquire personal chattels and to maintain actions for the recovery of their personal rights in as full a manner as alien friends; 1 Kent 57.

In the United States, the broad principle has been laid down "that war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found. The mitigations of this rigid rule which the policy of modern times has introduced into practice will more or less affect the exercise of this right, but cannot impair the right itself;" Brown v. U. S., 8 Cra. (U. S.) 122, 3 L. Ed. 504. Commercial nations have always considerable property in the possession of their neighbors; and when war breaks out, the question what shall be done with enemies' property found in the country is one rather of policy than of law, and is properly addressed to the consideration of the legislature, and not to courts of law. The strict right of confiscation exists in congress; and without a legislative act authorizing the confiscation of enemies' property, it cannot be condemned; 8 Cra. (U. S.) 128, 3 L. Ed. 504.

Notwithstanding this positive statement of the law, private property of enemy subjects was not confiscated during the wars of the 19th century, and it may safely be said that an international custom prohibiting such confiscation has grown up having nearly the force of law. An exception is to be found in the right of a belligerent to seize and make use of such private property of enemy subjects as may be of use in the conduct of the war, upon payment of proper indemnity. On

the other hand, public property, such as provisions, ammunition, rolling stock of state railroads, realizable securities, funds, etc., of one belligerent in the territory of the other, is subject to seizure. See IV H. C. Art. 53.

The claim of a right to confiscate debts contracted by individuals in time of peace, and which remain due to subjects of the enemy in time of war, rests upon much the same principle as that concerning the enemy's tangible property found in the country at the commencement of the war. But it is the universal practice to forbear to seize and confiscate debts and credits. 1 Kent 64.

The right of confiscation exists as fully in case of a civil war as it does when the war is foreign, and rebels in arms against the lawful government, or persons inhabiting the territory exclusively within the control of the rebel belligerents, may be treated as public enemies. So may adherents, or aiders and abettors of such a belligerent, though not resident in such enemy's territory; Miller v. U. S., 11 Wall. (U. S.) 269, 20 L. Ed. 135. Proceedings under the Confiscation Act of July 17, 1862, were justified as an exercise of belligerent rights against a public enemy, but were not, in their nature, a punishment for treason. Therefore, confiscation being a proceeding distinct from, and independent of, the treasonable guilt of the owner of the property confiscated, pardon for treason will not restore rights to property previously condemned and sold in the exercise of belligerent rights as against a purchaser in good faith and for value; Semmes v. U. S., 91 U. S. 21, 23 L. Ed. 193.

A suit in confiscation is an action of entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent or against an offending neutral. Confiscation may be effected by such means, either summary or arbitrary, as the sovereign expressing his will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional and destitute of absolute ownership; The Peterhoff, Blatchf. Pr. Cas. 620, Fed. Cas. No. 11,025. To confiscate property seized upon land, resort must be had to the common-law side of the court; The Confiscation Cases, 20 Wall. (U. S.) 110, 22 L. Ed. 320; prize proceedings are always in admiralty; Winchester v. U. S., 14 Ct. Cls. 48.

See, generally, Chitty, Law of Nations, c. 3; Marten, Law of Nat. lib. 8, c. 3, s. 9; Burlamaqui, Pol. Law, part 4, c. 7; Vattel, liv. 3, c. 4, § 63; Twiss, Law of Nations; Wheaton; Hall, International Law.

CONFITENS REUS. An accused person who admits his guilt. Wharton.

CONFLICT OF LAWS. A contrariety or opposition in the laws of states or countries in cases where the rights of the parties, from their relations to each other or to the subject-matter in dispute, are liable to be affected by the laws of both jurisdictions.

As a term of art, it also includes the deciding which law is in such cases to have superiority. It also includes many cases where there is no opposition between two systems of law, but where the question is how much force may be allowed to a foreign law with reference to which an act has been done, either directly or by legal implication, in the absence of any domestic law exclusively applicable to the case.

As to the most suitable term to apply to this branch of the law, see PRIVATE INTERNATIONAL LAW.

Among the leading canons on the subject are these: the laws of every state affect and bind directly all property, real or personal, situated within its territory, all contracts made and acts done and all persons resident within its jurisdiction, and are supreme within its own limits by virtue of its sovereignty; Milne v. Moreton, 6 Binn. (Pa.) 361, 6 Am. Dec. 466; Green v. Van Buskirk, 7 Wall. (U. S.) 151, 19 L. Ed. 109; Minor v. Cardwell, 37 Mo. 354, 90 Am. Dec. 390; Cowp. 208; 4 T. R. 192. Ambassadors and other public ministers while in the state to which they are sent, and members of an army marching through or stationed in a friendly state, are not subject to this rule; Crawford v. Wilson, 4 Barb. (N. Y.) 522; U. S. v. Lafontaine, 4 Cra. C. C. 173, Fed. Cas. No. 15,550.

Possessing exclusive authority, with the above qualification, a state may regulate the manner and circumstances under which property, whether real or personal, in possession or in action, within it, shall be held, transmitted, or transferred, by sale, barter, or bequest, or recovered or enforced; the condition, capacity, and state of all persons within it; the validity of contracts and other acts done there; the resulting rights and duties growing out of these contracts and acts; and the remedies and modes of administering justice in all cases; Story, Confl. Laws § 18; Vattel, b. 2, c. 7, §§ 84, 85.

Whatever force and obligation the laws of one country have in another depends upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent; Huberus, lib. 1, t. 3, § 2.

The power of determining whether, or how far, or with what modification, or upon what conditions, the laws of one state or any rights dependent upon them shall be recognized in another, is a legislative one. The comity involved is a comity of the states, and

not of the courts, and the judiciary must be guided in deciding the question by the principle and policy adopted by the legislature; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Stack v. Cedar Co., 151 Mich. 21, 114 N. W. 876, 16 L. R. A. (N. S.) 616, 14 Ann. Cas. 112. The contract in the latter case was made in Michigan, in which state an Illinois corporation had been admitted to do business. An Illinois statute provided that no corporation should interpose the defense of usury in any action. It was contended that this disability imposed in the state creating the corporation followed it and attached to its charter in Michigan. But the court held that the restriction in Illinois would not follow it into Michigan so as to prevent it from taking advantage of the local statute against usury.

When a statute or the unwritten or common law of the country forbids the recognition of the foreign law, the latter is of no force whatever. When both are silent, then the question arises, which of the conflicting laws is to have effect. Each sovereignty must determine for itself whether it will enforce a foreign law; Finney v. Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486; Hunt v. Whewell, 122 Wis. 33, 99 N. W. 599; Fox v. Telegraph-Cable Co., 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490. It is a principle universally recognized that the revenue laws of one country have no force in another. The exemption laws and laws relating to married women, as well as the local statute of frauds, and statutes authorizing distress and sale for non-payment of rent, are not recognized in another jurisdiction under the principles of comity. Morgan v. Neville, 74 Pa. 52; Waldron v. Ritchings, 3 Daly (N. Y.) 288; Siegel v. Robinson, 56 Pa. 19, 93 Am. Dec. 775; Ross v. Wigg, 34 Hun (N. Y.) 192; Ludlow v. Van Rensselaer, 1 Johns. (N. Y.) 95.

The statutes of one state giving a right of action to enforce a penalty have no force in another; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Russell v. R. Co., 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747; Ferguson v. Sherman, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823.

So rights of action arising under foreign bankrupt, insolvent, or assignment laws are not recognized by a state when prejudicial to the interests of its own citizens; Warner v. Jaffray, 96 N. Y. 248, 48 Am. Rep. 616; In re Waite, 99 N. Y. 443, 2 N. E. 440; Barth v. Backus, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; Giman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. Ed. 432.

A remedy special to a particular foreign state is not, by any principle of comity enforceable elsewhere and must be applied within the jurisdiction of the domicile of the corporation; Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; Young v. Farwell, 139 Ill. 326, 28 N. E. 845; Tuttle v. Bank, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; National Bank of Auburn v. Dillingham, 147 N. Y. 603, 42 N. E. 338, 49 Am. St. Rep. 692; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

Generally, force and effect will be given by any state to foreign laws in cases where from the transactions of the parties they are applicable, unless they affect injuriously her own citizens, violate her express enactments, or are *contra bonos mores*.

The broad rule as to contracts is thus stated by Wharton (Confl. Laws § 401): "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of their performance, to the law of the place of their performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above, supplies the applicatory law." This rule is quoted by Hunt, J., in Scudder v. Bank, 91 U. S. 411, 23 L. Ed. 245. In a later part of his opinion, in the same case, he says: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought. A careful consideration of the decisions of this country and of England will sustain these positions;" cited in Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241, which is in turn cited in Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104, where, in a suit on a bond executed in New York to indemnify the plaintiff's intestate as surety in an appeal bond in a suit in Louisiana, the court defined the "*seat of the obligation*" and held the law applicable to be the *lex loci solutionis* which was the law of Louisiana; the *lex loci contractus* was said to be a confusing phrase, because it is in reality the law not of the place of execution but of the seat of the obligation, and that might be either the place of execution or the place of performance.

Mr. Wharton expressed the rule in the following terms, in the second edition (1881) of his Confl. Laws § 401: "A contract, so far as concerns its formal making, is to be determined by the place where it is solemnized, unless the *lex situs* of property disposed of otherwise requires; so far as concerns its interpretation, by the law of the place where its terms are settled, unless the parties had the usages of another place in view; so far as concerns the remedy, by the law of the

place of suit; and so far as concerns its performance, by the law of the place of performance."

The criterion by which to ascertain whether a particular inquiry relates to the substance of the contract or the remedy merely is said to be: *Suppose* the legislature of the *locus contractus* to enact the law of the forum, making it applicable to the existing contract. If the result is that the obligation of the contract is either increased or impaired thereby, then the point to which the law of the forum relates is part of the obligation or substance of the contract and is not merely a matter of remedy, and the *lex loci*, not the *lex fori*, should control. If, on the other hand, the result is that the obligation of the contract is not at all affected, being neither increased nor diminished, then the inquiry relates to a matter of remedy only, and the *lex fori* should govern. 16 Harv. L. Rev. 262.

A contract (to pay money) was made in Dakota by a married woman and was payable there. The Dakota law permitted her to contract and to sue, and be sued as though she were unmarried. She owned land in Missouri which the Dakota creditor sought to attach. By the law of Missouri (*lexi fori*) a married woman (for purposes of this case) was competent to be sued personally, but her property could not be attached. The question was whether the particular remedy of attachment related to the obligation of the contract (to be governed by Dakota law) or to the remedy merely, in which case the law of Missouri should control. By a divided court it was held that the Missouri law should control; Ruhe v. Buck, 124 Mo. 178, 27 S. W. 412, 25 L. R. A. 178, 46 Am. St. Rep. 439.

Where an action was brought in Massachusetts upon a contract made in New York to convey land situated in Massachusetts, it was held that the measure of damages for the breach of contract was part of the obligation of the contract to be determined by New York law, not a mere matter of remedy to be controlled by the *lex fori;* Atwood v. Walker, 179 Mass. 514, 61 N. E. 58.

Prof. Beale (23 Harv. L. Rev.) considers very fully the laws governing the validity of contracts and reaches substantially the following results (here summarized by permission):

Story states as a general principle that the law of the place of making governs, but there is an exception where the contract is to be elsewhere performed, and hence the law of the place of performance governs. The rule that the intention of the parties shall govern may be directly traced to the *dictum* of Lord Mansfield in Robinson v. Bland, 2 Burr. 1077, and was derived by him from the doctrines of the Civil Law. The rule that the law of the place of performance governs may be traced to the statement of Judge Story in his Conflict of Laws § 280, often repeated verbatim in the cases; and it was on his part a restatement of his opinion in Van Reimsdyk v. Kane, 1 Gall. 371, 375, Fed. Cas. No. 16,871. The present tendency greatly stimulated by the late English and federal cases, is toward the adoption of the law intended by the parties. Though the greater number of states still profess adherence to Judge Story's rule, it is being superseded by the other rule. In enumerating the states which accept one or the other of the principal rules, it must be pointed out that in several the question appears not to have arisen; in others, the decisions or dicta are not sufficiently clear to justify including the state in either list.

Cases adopting the law of the place of making: Wolf v. Burke, 18 Colo. 264, 32 Pac. 427, 19 L. R. A. 792; Garrigue v. Kellar, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324; New York Security & Trust Co. v. Davis, 96 Md. 81, 53 Atl. 669; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452; Gray v. Telegraph Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706; Galloway v. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

Cases adopting the law of the place of performance: Southern Exp. Co. v. Gibbs, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, 130 Am. St. Rep. 24; Midland Valley R. Co. v. Mfg. Co., 80 Ark. 399, 97 S. W. 679, 10 Ann. Cas. 372; Progresso S. S. Co. v. Ins. Co., 146 Cal. 279, 79 Pac. 967; Odom v. Security Co., 91 Ga. 505, 18 S. E. 131; Spinney v. Chapman, 121 Ia. 38, 95 N. W. 230, 100 Am. St. Rep. 305; Alexander v. Barker, 64 Kan. 396, 67 Pac. 829; Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Lynch v. Postlethwaite, 7 Mart. (O. S.) 69, 12 Am. Dec. 495; Stanton v. Harvey, 44 La. Ann. 511, 10 South. 778; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849; Arbuckle v. Reaume, 96 Mich. 243, 55 N. W. 808; Limerick Nat. Bank v. Howard, 71 N. H. 13, 51 Atl. 641, 93 Am. St. Rep. 489; Brownell v. Freese, 35 N. J. L. 285, 10 Am. Rep. 239; Montana Coal & Coke Co. v. Coal & Coke Co., 69 Ohio St. 351, 69 N. E. 613; Bennett v. Loan Ass'n, 177 Pa. 233, 35 Atl. 684, 34 L. R. A. 595, 55 Am. St. Rep. 723; First Nat. Bank v. Doeden, 21 S. D. 400, 113 N. W. 81.

Cases adopting the law intended by the parties: Beggs v. Bartels, 73 Conn. 132, 46 Atl. 874, 84 Am. St. Rep. 152; Burson v. Vogel, 29 App. D. C. 396; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253; Security Co. of Hartford, Connecticut v. Eyer, 36 Neb. 507, 54 N. W. 838, 38 Am. St. Rep. 735; Wilson v. Mill Co., 150 N. Y. 314, 44 N. E. 959, 55 Am. St. Rep. 680; Williams v. Mutual Reserve Fund Life Ass'n, 145 N. C. 128, 58 S. E. 802, 13 Ann. Cas. 51; U. S. Savings & Loan Co.

v. Shain, 8 N. D. 136, 77 N. W. 1006; Galletley v. Strickland, 74 S. C. 394, 54 S. E. 576; Metropolitan Life Ins. Co. v. Bradley, 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509; Union Central Life Ins. Co. v. Pollard, 94 Va. 146, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; Benjamin Bank v. Doherty, 42 Wash. 317, 84 Pac. 872, 4 L. R. A. (N. S.) 1191, 114 Am. St. Rep. 123; Brown v. Gates, 120 Wis. 349, 97 N. W. 221, 98 N. W. 205, 1 Ann. Cas. 85; and, in usury cases, also the federal courts and Alabama, Georgia, Kansas, Missouri, Mississippi, Ohio, and Tennessee.

THE FEDERAL CASES. *1.* Place of making governs; Fidelity Mut. Life Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; Robinson v. Brick Co., 127 Fed. 804, 62 C. C. A. 484; thus the place of making is adopted as opposed to the law of the domicil of the parties; Northwestern S. S. Co. v. Ins. Co., 161 Fed. 166; or to the place from which the offer is sent; Equitable Life Assur. Soc. of United States v. Trimble, 83 Fed. 85, 27 C. C. A. 404; or to the place where a document is signed, prior to its taking effect elsewhere as an obligation; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513.

2. In a small number of cases, it has been held that the law of the place of performance governs the validity of the contract; Smith v. Ins. Co., 5 Fed. 582; Pacific States Savings, Loan & Bldg. Co. v. Green, 123 Fed. 43, 59 C. C. A. 167; Berry v. Chase, 146 Fed. 625, 77 C. C. A. 161; but where there is more than one place of performance, it has been held that the parties *ex necessitate* must be referred to the law of the place of making; Morgan v. R. Co., 2 Woods 244, Fed. Cas. No. 9,804.

3. The place by the law of which the contract is valid: In usury cases it has often been held that, if the place of performance would hold an agreement void for usury, the law of the place of making may be resorted to for making the contract valid; Sturdivant v. Bank, 60 Fed. 730, 9 C. C. A. 256; Andruss v. Saving Ass'n, 94 Fed. 575, 36 C. C. A. 336; Dygert v. Trust Co., 94 Fed. 913, 37 C. C. A. 389.

4. Place intended by the parties: In some cases the court seeks to find the intention of the parties, and governs the contract by that; Wayman v. Southard, 10 Wheat. (U. S.) 1, 6 L. Ed. 253; Gibson v. Ins. Co., 77 Fed. 561. This is the rule most commonly laid down in the usury cases, where the parties are presumed to intend the law of the place of making or of the place of performance, according to which would make the contract valid; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Matthews v. Murchison, 17 Fed. 760; so in other than usury cases; Hubbard v. Bank, 72 Fed. 234, 18 C. C. A. 525; but where both laws would make the agreement usurious, the intention of the parties is allowed no weight, and the law of the place of making governs; Andrews v. Pond, 13 Pet. (U. S.) 65, 10 L. Ed. 61; Heath v. Griswold, 5 Fed. 573, 18 Blatch. 555. The law of the place of making is presumed, in some cases, to be that intended by the parties; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Mutual Life Ins. Co. v. Cohen, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181; The Majestic, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746; in a few other cases, the law of the place of performance is presumed to be that intended by the parties; Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Johnson v. Norton Co., 159 Fed. 361, 86 C. C. A. 361. When the parties expressly agree that the contract shall be subject to a certain law, it has been intimated, though never expressly decided by the Supreme Court, that the court will give effect to this intention; Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 24 Sup. Ct. 538, 48 L. Ed. 788; but no such stipulation will be given effect where it is regarded as against public policy; Lewisohn v. Steamship Co., 56 Fed. 602; Botany Worsted Mills v. Knott, 76 Fed. 582; or where the parties would thereby avoid the provisions of a statute of the place of making; Fowler v. Trust Co., 141 U. S. 384, 12 Sup. Ct. 1, 35 L. Ed. 786; Mutual Life Ins. Co. v. Hathaway, 106 Fed. 815, 45 C. C. A. 655; Albro v. Ins. Co., 119 Fed. 629; but a legislative enactment which declares a public policy and prohibits its violation has, to some extent, an extra-territorial effect; thus, a prohibition in a decree of divorce against the re-marriage of the guilty party during the lifetime of the other has, in general, no extra-territorial effect; Dimpfel v. Wilson, 107 Md. 329, 68 Atl. 561, 13 L. R. A. (N. S.) 1180, 15 Ann. Cas. 753; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189; Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408; yet where a statute forbids such remarriage within a specified time, and the persons go to another state for the express purpose of evading the law of their domicil, contract a marriage in such state, valid under its laws, and return to the state of their domicil, such marriage will there be held invalid as against public policy and good morals; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; and where the state statutes prohibit the guilty party in a divorce granted for adultery from marrying the co-respondent, during the lifetime of the innocent spouse, a marriage in another state, valid according to its laws, will not be recognized in the state declaring such a marriage to be against its public policy and good morals; Pennegar v. State, 87 Tenn. 244, 10 S. W. 305, 2 L. R. A. 703, 10 Am. St. Rep. 648; Stull's Estate, 183 Pa. 625, 39 Atl. 16, 39 L. R. A. 539, 63 Am. St. Rep. 776; so where a statute prohibited the marriage of negroes and white persons, such a marriage,

when made outside of the state and valid where performed, was held void in the state enacting it; Dupre v. Boulard's Ex'r, 10 La. Ann. 411; Kinney v. Com., 30 Gratt. (Va.) 858, 32 Am. Rep. 690; so where an English statute provided that a marriage with a deceased wife's sister should be invalid, a marriage made outside of England, and lawful where it was celebrated, was held void in England; 9 H. L. Cas. 193; so where there was statutory prohibition of the marriage of first cousins, such a marriage was held void where the parties contracted a valid marriage elsewhere and returned to the state prohibiting it; Johnson v. Johnson, 57 Wash. 89, 106 Pac. 500, 26 L. R. A. (N. S.) 179.

A like provision in the Civil Code of South Dakota was held not to warrant the annulment of a marriage contracted in California between first cousins who at the time of the marriage were citizens of California; Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586, Ann. Cas. 1912C, 621.

A statute declared that re-marriage by one of the parties to a divorce within a given time, either within or without the state, should be void; after a divorce within the state, one of the parties within the prohibited time went to a foreign country and there acquired a domicil and contracted a marriage valid by its laws; six years after she returned to the state, where she was divorced and married again. On a prosecution for bigamy, her foreign marriage was held valid; State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800, on the ground that her domicil was at the time in such foreign country.

Real Estate. In general, the mode of conveying, incumbering, transmitting, devising, and controlling real estate is governed by the law of the place of situation of the property; Bronson v. Lumber Co., 44 Minn. 348, 46 N. W. 570; Cochran v. Benton, 126 Ind. 58, 25 N. E. 870; U. S. v. Crosby, 7 Cr. (U. S.) 115, 3 L. Ed. 287; Oakey v. Bennett, 11 How. (U. S.) 33, 13 L. Ed. 593; Augusta Ins. & Banking Co. v. Morton, 3 La. Ann. 418; 14 Ves. 541; 4 T. R. 182; Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; Brine v. Ins. Co., 96 U. S. 627, 24 L. Ed. 858. See Lex Rei Sitæ.

Perhaps an exception may exist in the case of mortgages; Bank of England v. Tarleton, 23 Miss. 175; Dundas v. Bowler, 3 McLean 397, Fed. Cas. No. 4,141. But the point cannot be considered as settled; 1 Washb. R. P. 524; Story, Confl. Laws § 363; Westl. Priv. Int. Law 75. It is said by Wharton (Confl. Laws § 368) that the law governing the mortgage, as such, is the law of *situs* of the land which the mortgage covers; but the *debt* is governed by the law of the domicil of the party to whom it is due, no matter where the property be situated; see Townsend v. Riley, 46 N. H. 300; Oregon & W. Trust Inv. Co. v. Rathburn, 5 Sawy. 32, Fed. Cas. No. 10,555; Cope v. Wheeler, 41 N. Y. 313; Post v. Bank, 138 Ill. 559, 28 N. E. 978; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; and that when the money is invested on the land for which the mortgage is given, the *lex sitæ* prevails. For the purposes of taxation a *debt* has its *situs* at the domicil of the creditor; Hauenstein v. Lynham, 100 U. S. 490, 25 L. Ed. 628.

Personal Property. For the general rules as to the disposition of personal property, see Domicil. *Bills of exchange and promissory notes* are to be governed, as to validity and interpretation, by the law of the place of making, as are other contracts. The residence of the drawee of a bill of exchange, and the place of making a promissory note where no other place of payment is specified, is the *locus contractus;* 10 B. & C. 21; 4 C. & P. 35; Bissell v. Lewis, 4 Mich. 450; Davis v. Clemson, 6 McLean, 622, Fed. Cas. No. 3,630; Barney v. Newcomb, 9 Cush. (Mass.) 46; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Wilson v. Lazier, 11 Gratt. (Va.) 477; Lizardi v. Cohen, 3 Gill (Md.) 430; Fessenden v. Taft, 65 N. H. 39, 17 Atl. 713; Stevens v. Gregg, 89 Ky. 461, 12 S. W. 775; see Raymond v. Holmes, 11 Tex. 54; Frazier v. Warfield, 9 Smedes & M. (Miss.) 220, where the place of address is said to be the place of making. As between the drawee and drawer and other parties (but not as between an indorser and indorsee, Everett v. Vendyres, 19 N. Y. 436; but see Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205); each indorsement is considered a new contract; Young v. Harris, 14 B. Monr. (Ky.) 556, 61 Am. Dec. 170; Cook v. Litchfield, 5 Sandf. (N. Y.) 330; Cox v. Adams, 2 Ga. 158; Dundas v. Bowler, 3 McLean 397, Fed. Cas. No. 4,141. On a bill of exchange drawn in one state and payable in another, the time within which notice of protest must be mailed is determined by the law of the latter state; Brown v. Jones, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227. In case of commercial paper the notice required to bind drawer and indorser is determined by law of place of drawing and indorsing. See Lex Loci. A statute of limitations of a foreign state providing that an action on a note shall be brought within a certain time after the cause of action accrues bars the debt itself if not brought within the time limited, and may be pleaded in bar of an action brought on the note in another state; Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620. See MacNichol v. Spence, 83 Me. 87, 21 Atl. 748. Place of payment governs as to all matters connected with payment; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Tarbox v. Childs, 165 Mass. 408, 43 N. E. 124.

The better rule as to the rate of interest to be allowed on bills of exchange and promissory notes, where no place of payment is specified and no rate of interest mentioned,

seems to be the rate of the *lex loci;* 5 C. & F. 1, 12; Slacum v. Pomery, 6 Cra. (U. S.) 221, 3 L. Ed. 205; The Star, 3 Wheat. (U. S.) 101, 4 L. Ed. 338; James v. Allen, 1 Dall. (Pa.) 191, 1 L. Ed. 93; Hawley v. Sloo, 12 La. Ann. 815. And see Friend v. Wilkinson, 9 Gratt. (Va.) 31; Buck v. Little, 24 Miss. 463; Price v. Page & Bacon, 24 Mo. 65; 1 Pars. Contr. 238; Cope v. Alden, 53 Barb. (N. Y.) 350; Campbell v. Nichols, 33 N. J. L. 81; The Star, 3 Wheat. (U. S.) 101, 4 L. Ed. 338. The damages recoverable on a bill of exchange not paid are those of the place where the plaintiff is entitled to reimbursement. In the United States, these are generally fixed by statute; Hendricks v. Franklin, 4 Johns. (N. Y.) 119; Grimshaw v. Bender, 6 Mass. 157; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Grant v. Healey, 3 Sumn. 523, Fed. Cas. No. 5,696.

Where a place of payment is specified, the interest of that place must be allowed; French v. French, 126 Mass. 360; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Dickinson v. Edwards, 77 N. Y. 573, 33 Am. Rep. 671. See Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; except that when a contract is made in one state, to be performed in another, parties may contract for the legal rate of interest allowable in either state, provided such contract is entered into in good faith, and not merely to avoid the usury laws; Depau v. Humphreys, 8 Mart. N. S. (La.) 1; Townsend v. Riley, 46 N. H. 300; Miller v. Tiffany, 1 Wall. (U. S.) 310, 17 L. Ed. 540; Berrien v. Wright, 26 Barb. (N. Y.) 213; Kilgore v. Dempsey, 25 Ohio St. 413, 18 Am. Rep. 306; Arnold v. Potter, 22 Ia. 194; Brownell v. Freese, 35 N. J. L. 285, 10 Am. Rep. 239. See Odom v. Security Co., 91 Ga. 505, 18 S. E. 131; *contra,* Story, Confl. Laws § 298. A note made in one state and payable in another, is not subject to the usury laws of the latter state, if it is valid in that respect in the state where it was made; Matthews v. Paine, 47 Ark. 54, 14 S. W. 463; Brewster v. Lyndes, 2 Miles (Pa.) 185.

Chattel mortgages valid and duly registered under the laws of the state in which the property is situated at the time of the mortgage, will be held valid in another state to which the property is removed, although the regulations there are different; Bank of United States v. Lee, 13 Pet. (U. S.) 107, 10 L. Ed. 81; Feurt v. Rowell, 62 Mo. 524; Barker v. Stacy, 25 Miss. 471; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Martin v. Hill, 12 Barb. (N. Y.) 631; but see Handley v. Harris, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703, 30 Am. St. Rep. 322; Clough v. Kyne, 40 Ill. App. 234; Green v. Van Buskirk, 7 Wall. (U. S.) 140, 19 L. Ed. 109; and it will be enforced in the state to which the property has been removed, although it would have been invalid if made in that state; Smith v. Hutchings, 30 Mo. 383; but it is said by Wharton (Confl. Laws § 317), that the law in regard to chattel mortgages is governed by the *lex rei sitæ;* that a lien is extinguished when goods are taken from the place where the lien was created to a place where such a lien is not recognized; Whart. Confl. Laws § 318; McCabe v. Blymyre, 9 Phila. (Pa.) 615 (where a chattel mortgage made in Maryland was held invalid in Pennsylvania as against a *bona fide* purchaser without notice); and a Louisiana court refused to enforce a chattel mortgage made in another state, such mortgages being unknown in Louisiana; Delop v. Windsor & Randolph, 26 La. Ann. 185.

The law of the *situs* governs a mortgage of chattels in one state, executed in another; Rorer, Int. St. L. 96; Jones, Chat. Mortg. § 305; Clark v. Tarbell, 58 N. H. 88; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109; Denny v. Faulkner, 22 Kan. 89. See Ames Iron Works v. Warren, 76 Ind. 512, 40 Am. Rep. 258; Tyler v. Strang, 21 Barb. (N. Y.) 198; *contra,* Runyon v. Groshon, 12 N. J. Eq. 86; Blystone v. Burgett, 10 Ind. 28, 68 Am. Dec. 658. The same is true in the case of conditional sales; Langworthy v. Little, 12 Cush. (Mass.) 109; Hervey v. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Cleveland Machine Works v. Lang, 67 N. H. 348.

The *lex fori* determines the remedies on the mortgage; Ferguson v. Clifford, 37 N. H. 86; *contra,* Story, Confl. Laws § 402; Mumford v. Canty, 50 Ill. 370, 99 Am. Dec. 525 (where there appears to have been notice). See Wattson v. Campbell, 38 N. Y. 153, where a mortgage on a ship, made and shown to be invalid in Pennsylvania, was held invalid in New York; Beaumont v. Yeatman, 8 Humphr. (Tenn.) 542.

The registration of chattel mortgages and transfer of government and local stocks are frequently made subjects of positive law, which then suspends the law of the domicil.

Where the mortgagor of chattels removes with them to another state, the mortgagee, to preserve his rights, need not again record the mortgage in such other state; Keenan v. Stimson, 32 Minn. 377, 20 N. W. 364; Ferguson v. Clifford, 37 N. H. 87; Feurt v. Rowell, 62 Mo. 524; Parr v. Brady, 37 N. J. L. 201. But in Alabama it must be recorded to preserve its validity; Johnson v. Hughes, 89 Ala. 588, 8 South. 147.

As to whether such mortgages will be respected in preference to claims of citizens of the state into which the property is removed, it is held that they will; Jones v. Taylor, 30 Vt. 42, overruling Skiff v. Solace, 23 Vt. 279; Kanaga v. Taylor, 7 Ohio St. 134, 70 Am. Dec. 62; Martin v. Hill, 12 Barb. (N. Y.) 631; Beaumont v. Yeatman, 8 Humphr. (Tenn.) 542. A chattel mortgage

valid in the state where executed without change of possession protects the property mortgaged against an attachment in Vermont, though in the possession of the mortgagor; Taylor v. Boardman, 25 Vt. 581; Norris v. Sowles, 57 Vt. 360.

Questions of priority of liens and other claims are, in general, to be determined by the *lex rei sitæ* even in regard to personal property; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; Olivier v. Townes, 2 Mart. N. S. (La.) 93; In re Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; Hammond v. Stovall, 17 Ga. 491; Walker v. Roberts, 4 Rich. (S. C.) 561; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338. A chattel mortgage made in Canada, with possession delivered to the mortgagee, was held entitled to priority in Michigan, whither the property was taken without consent of the mortgagee, over a prior chattel mortgage in Michigan executed before the property was taken to Canada and recorded after its return; Vining v. Millar, 109 Mich. 205, 67 N. W. 126, 32 L. R. A. 442.

The existence of the lien will generally depend on the *lex loci;* Story, Confl. Laws §§ 322 *b*, 402; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104. See note on extra-territoriality of chattel mortgages, 17 L. R. A. 127.

Marriage comes under the general rule in regard to contracts, with some exceptions. See Lex Loci; 25 Amer. Law Rev. 82.

The scope of a marriage settlement made abroad is to be determined by the *lex loci contractus;* 1 Bro. P. C. 129; 2 M. & K. 513; where not repugnant to the *lex rei sitæ;* 31 E. L. & Eq. 443; De Pierres v. Thorn, 4 Bosw. (N. Y.) 266.

When the contract for marriage is to be executed elsewhere, the place of execution becomes the *locus contractus;* 23 E. L. & Eq. 288. On the continent of Europe, capacity is usually governed by nationality, though in administering the rule the courts favor their own citizens; in England it was governed by domicil, but now the courts have gone back to the decision in 3 P. D. 1, holding capacity is governed by law of place of ceremony; and in America by the *lex loci;* Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509. Hence it is quite unsafe for an American to marry a foreigner without a complete investigation of his capacity to marry according to his personal law. See an article by J. H. Beale, Jr., in 15 H. L. R. 382; Marriage.

Torts. In an action brought in one state for injuries done in another, the statutes and decisions of the courts of the latter state must fix the liability; Njus v. Ry. Co., 47 Minn. 92, 49 N. W. 527; Erickson v. S. S. Co., 96 Fed. 80; Burnett v. R. Co., 176 Pa. 45, 34 Atl. 972 (where a ticket was purchased at a point in New Jersey to a place in New York; the person was injured in Pennsylvania; the law of Pennsylvania was held to apply); Alexander v. Pennsylvania Co., 48 Ohio St. 623, 30 N. E. 69; Railway Co. v. Lewis, 89 Tenn. 235, 14 S. W. 603. See Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 193, 12 Sup. Ct. 806, 36 L. Ed. 672.

In a proceeding to limit liability for claims against a French vessel found to be in fault for a collision in a fog on the high seas, the law of France, which authorizes a recovery for loss of life against the vessel in fault, will be enforced by the courts of the United States, although the French courts, in applying the facts, found the international rule as to the speed of vessels in a fog might not have held such vessel to be at fault; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

Movables in general. An assignment of a movable which gives a good title according to the law of the country where it is situated is recognized as valid in England, whatever the domicil of the parties may be; [1892] 1 Ch. 238; so it lies with the law of the place where a written instrument is situated to determine whether it is negotiable or not; [1905] 1 K. B. 677. Where, by the law of the place where goods are shipped and where the ship is, a shipper is entitled to exercise a right of stoppage in transitu, and has exercised that right in a manner recognized as valid by such law, his title to the goods will be recognized; 1 East 515. The rights of the assignor and the assignee on an assignment, in one country, of a document of title to a debt or to an interest in personal property, are in general governed by the law of the country where the assignment takes place, although the debt may be due from persons living in, or the personal property may be situated in, a foreign country; [1898] A. C. 616. The validity of an assignment of documents, such as policies of insurance; 17 Q. B. D. 309; or negotiable instruments; [1904] 2 K. B. 870; is determined by the law of the place where the assignment is made; 15 App. Cas. 267.

Special Personal Relations. *Executors and administrators,* in the absence of a specific statute authorizing it, have no power to sue or be sued by virtue of a foreign appointment as such; Westl. Priv. Int. Law 279; Brookshire v. Dubose, 55 N. C. 276; Kirkpatrick v. Taylor, 10 Rich. (S. C.) 393; L. R. 5 Ch. App. 315; Swatzel v. Arnold, 1 Woolw. 383, Fed. Cas. No. 13,682; Clark v. Blackington, 110 Mass. 369; Parker's Appeal, 61 Pa. 478; Watson's Adm'r v. Pack's Adm'r, 3 W. Va. 154; Turner v. Linam, 55 Ga. 253; Morton v. Hatch, 54 Mo. 408; Bell's Adm'r v. Nichols, 38 Ala. 678; Gilman v. Gilman, 54 Me. 453; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; 3 Q. B. 498; 2 Ves. 35. Where a foreign executor has brought assets into a state, then as the title is in him he can sue as an individual, but not as executor; Talmage v. Chapel, 16 Mass. 71.

In the United States, however, payment to

such executor will be an equitable discharge, if the money has been distributed to those entitled; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 49, 11 Am. Dec. 389.

Ships and cargoes and the proceeds thereof, on the death of the owner, complete their voyages and return to the home port to be administered; Story, Confl. Laws § 520; Wells v. Miller, 45 Ill. 382; Orcutt v. Orms, 3 Paige Ch. (N. Y.) 459.

See EXECUTORS AND ADMINISTRATORS.

Guardians have no power over the property, whether real or personal, of their wards, by virtue of a foreign appointment; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 153; Kraft v. Wickey, 4 Gill & J. (Md.) 332, 23 Am. Dec. 569; 4 T. R. 185; they must have the sanction of the appropriate local tribunal; Curtis v. Smith, 6 Blatch. 537, Fed. Cas. No. 3,505; Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. Ed. 757; Woodworth v. Spring, 4 Allen (Mass.) 321; Whart. Confl. Laws § 260; L. R. 2 Eq. 74.

As to the power of a guardian over the domicil of his ward, see DOMICIL.

As to their extra-territorial powers, see RECEIVERS.

Sureties come under the general rules, and their contracts are governed by the *lex loci;* but in the case of a bond with sureties, given to the government by a navy agent for the faithful performance of his duties, the liability of the sureties is governed by the common law, as the accountability of the principal was at Washington, the seat of government; Cox v. U. S., 6 Pet. (U. S.) 172, 8 L. Ed. 359 (the case coming up from Louisiana). See Duncan v. U. S., 7 Pet. (U. S.) 435, 8 L. Ed. 739. See SURETYSHIP.

JUDGMENTS AND DECREES OF FOREIGN COURTS relating to immovable property within their jurisdiction are held binding everywhere. And the rule is the same with regard to movables actually within their jurisdiction; Noble v. Oil Co., 79 Pa. 354, 21 Am. Rep. 66; The Rio Grande, 23 Wall. (U. S.) 458, 23 L. Ed. 158; 2 C. & P. 155. See Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; L. R. 4 H. L. 414; Barrow v. West, 23 Pick. (Mass.) 270; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670. Thus *admiralty* proceedings *in rem* are held conclusive everywhere if the court had a rightful jurisdiction founded on actual possession of the subject-matter; Rose v. Himely, 4 Cra. (U. S.) 241, 2 L. Ed. 608; Hudson v. Guestier, 4 Cra. (U. S.) 293, 2 L. Ed. 625; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; The Mary, 9 Cra. (U. S.) 126, 3 L. Ed. 678; Grant v. M'Lachlin, 4 Johns. (N. Y.) 34; Bradstreet v. Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Magoun v. Ins. Co., 1 Sto. 157, Fed. Cas. No. 8,961; Gray v. Swan, 1 H. & J. (Md.) 142; Calhoun v. Ins. Co., 1 Binn. (Pa.) 299; Baxter v. Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; L. R. 5 Q. B. 599; Dunham v. Ins. Co., 1 Low. 253, Fed. Cas. No. 4,152; State v. R. Co., 10 Nev. 47.

But such decree may be avoided for matter apparently erroneous on the face of the record; 7 Term 523; or if there be an ambiguity as to grounds of condemnation; 7 Bingh. 495; 1 Greenl. Ev. § 541, n.; Andrews v. Herriot, 4 Cow. (N. Y.) 520, n. 3; 2 Kent 120.

Jurisdiction to garnish a debt not payable at a particular place cannot, according to some cases, be had without personal service on the creditor; see cases collected in Minor, Confl. of Laws § 125. These cases are overruled in Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144, which holds that service on the garnishee alone, obtained in the state of his domicil, gives jurisdiction. This decision was based on reasoning and dicta which would allow jurisdiction irrespective of domicil wherever such service is obtained, and this view had been previously adopted by a few cases cited in Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. See, *contra*, Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

Proceedings under the garnishee process are held proceedings *in rem;* and a decree may be pleaded in bar of an action against the trustee or garnishee; 1 Greenl. Ev. § 542; 4 Cow. (N. Y.) 520, n. But the court must have rightful jurisdiction over the *res* to make the judgment binding; and then it will be effectual only as to the *res*, unless the court had actual jurisdiction over the person also; McVicker v. Beedy, 31 Me. 314, 50 Am. Dec. 666; Mattingly's Heirs v. Corbit, 7 B. Monr. (Ky.) 376; State v. R. Co., 10 Nev. 47; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

ASSIGNMENTS AND TRANSFERS. Voluntary assignments of personal property, valid where made, will transfer property everywhere; Speed v. May, 17 Pa. 91, 55 Am. Dec. 540; Schroder v. Tompkins, 58 Fed. 672; Van Wyck v. Read, 43 Fed. 716; Richardson v. Leavitt, 1 La. Ann. 430, 45 Am. Dec. 90; Greene v. Mfg. Co., 52 Conn. 330; Train v. Kendall, 137 Mass. 366; not as against citizens of the state of the *situs* attaching prior to the assignees' obtaining possession; Ingraham v. Geyer, 13 Mass. 146, 7 Am. Dec. 132; King v. Johnson, 5 Har. (Del.) 31. Otherwise Wilson v. Carson, 12 Md. 54.

An involuntary assignment by operation of law as under bankrupt or insolvent laws will not avail as against attaching creditors in the place of situation of the property; Hoyt v. Thompson, 5 N. Y. 320; Frazier v. Fredericks, 24 N. J. L. 162; Blake v. Williams, 6 Pick. (Mass.) 286, 302, 17 Am. Dec. 372; McNeil v. Colquhoon, 3 N. C. 24; Robinson v. Crowder, 4 McCord (S. C.) 519, 17

Am. Dec. 762; Saunders v. Williams, 5 N. H. 213; Olivier v. Townes, 2 Mart. N. S. (La.) 93; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Harrison v. Sterry, 5 Cra. (U. S.) 289, 3 L. Ed. 104; Very v. McHenry, 29 Me. 208; Burk v. McClain, 1 Harr. & McH. (Md.) 236; Beer v. Hooper, 32 Miss. 246; Upton v. Hubbard, 28 Conn. 274, 73 Am. Dec. 670; Woodward v. Roane, 23 Ark. 526; Osborn v. Adams, 18 Pick. (Mass.) 247; Lichtenstein v. Gillett, 37 La. Ann. 522.

It may be a question whether the same rule would hold if the assignees had obtained possession; Cook v. Van Horn, 81 Wis. 291, 50 N. W. 893. An assignment by operation of law is good so as to vest property in the assignees by comity; 6 M. & S. 126; Holmes v. Remsen, 20 Johns. (N. Y.) 262, 11 Am. Dec. 269; Milne v. Moreton, 6 Binn. (Pa.) 363, 6 Am. Dec. 466; Goodwin v. Jones, 3 Mass. 517, 3 Am. Dec. 173.

In England it is settled that an assignment under the bankrupt law of a foreign country passes all the personal property of the bankrupt locally situate, and debts owing in England, and that an attachment of such property by an English creditor, after such bankruptcy, with or without notice to him, is invalid to overreach the assignment. See 25 Q. B. Div. 399.

Discharges by the *lex loci contractus* are valid everywhere; May v. Breed, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; Long v. Hammond, 40 Me. 204; Peck v. Hibbard, 26 Vt. 703, 62 Am. Dec. 605; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Mason v. Haile, 12 Wheat. (U. S.) 370, 6 L. Ed. 660; 5 East 124. This rule is restricted in the United States by the clause in the constitution forbidding the passage of any law impairing the obligation of contracts. Under this provision, it is held that a state insolvent or bankrupt law may not have any extra-territorial effect to discharge the debtor; Cook v. Moffat, 5 How. (U. S.) 307, 12 L. Ed. 159; Donnelly v. Corbett, 7 N. Y. 500; Story, Const. § 1115. See LEX FORI. It may, however, take away the remedy for non-performance of the contract in the *locus contractus*, on contracts made subsequently.

As to FOREIGN JUDGMENTS and FOREIGN LAWS, see those titles.

The important question of federal courts following state decisions, or not, is properly treated here. There is no common law of the United States in the sense of a national customary law distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. A determination in a given case, of what that law is, may be different in a federal court from one prevailing in a state court. This arises from the circumstance that the federal courts, where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment; Western Union Telegraph Co. v. Pub. Co., 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. The conclusion of a state court, as to the time when a cause of action accrues in case of fraud or concealment, based, not on a construction of a state statute, but on the view taken of the rule of the common law, is not binding on a federal court, when called on to construe the common law and to apply its principles to cases arising between citizens of different states; Murray v. R. Co., 62 Fed. 24.

U. S. R. S. § 721, provides that the laws of the several states shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply. Judge Story in Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865, says: "It will hardly be contended that decisions of courts constitute laws. They are at most only evidence of what the laws are, and are not themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, ill-founded or otherwise incorrect." All the decisions of the state courts are "highly persuasive" upon the United States courts, even on propositions of general law; this is because of the desire for harmony between the jurisdictions; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. Some of the questions on which the federal courts have refused to follow the state courts are as follows: A case concerning building and loan associations; Alexander v. Loan Ass'n, 110 Fed. 267; as to taking possession of chattels under a chattel mortgage; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; as to the liability of common carriers, in the absence of a statute; Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97; the law of fellow servant; Baltimore & O. R. Co. v. Baugh, 149 U. S. 372, 13 Sup. Ct. 914, 37 L. Ed. 772; the law as to the duties of the master to furnish safe appliances to the servant; Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; the law as to injuries at railroad crossings; Schofield v. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; and as to the validity of contracts exempting telegraph companies from liability for mistakes, etc., in the transmission of messages; Western Union Telegraph Co. v. Cook, 61 Fed. 624, 9 C. C. A. 680.

As to all matters governed by the law merchant, the federal courts are not bound by state decisions; Burgess v. Seligman,

107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. It is said that the same is true in the law of insurance; see Foster Fed. Pr. 557, 575, where the cases are collected.

Federal courts follow decisions of state courts: 1. Upon the construction of state constitutions and statutes; Walker v. State Harbor Com'rs, 17 Wall. 648, 21 L. Ed. 744; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449; its interpretation is accepted as the true interpretation, whatever may be the federal court's opinion of its soundness; Oates v. Bank, 100 U. S. 245, 25 L. Ed. 580. 2. Upon questions involving the title to land; Myrick v. Heard, 31 Fed. 241; Deguire v. Lead Co., 37 Fed. 663; Shields v. McAuley, 37 Fed. 302; Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630. 3. Upon the question whether a third person may sue on a contract made for his benefit; Bethlehem Iron Co. v. Hoadley, 152 Fed. 735; as to the effect upon contracts of a statute prohibiting labor on Sunday; Hill v. Hite, 79 Fed. 826; as to what constitutes a breach of a contract for service; Ely v. Revolving Door Co., 184 Fed. 459; as to the right of the lowest bidder to the award of a contract for a public improvement; U. S. Wood Preserving Co. v. Sundmaker, 186 Fed. 678, 110 C. C. A. 224; as to the payment of wages of employees; Crowther v. Ins. Trust & C. Co., 85 Fed. 41, 29 C. C. A. 1. 4. Upon the construction and effect of statutes in relation to marriage; Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826; and generally as to the capacity of married women to contract and their liability on their contracts; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843; and specifically her right, under married women's acts, to mortgage her separate property to secure her husband's debts; Mitchell v. Lippincott, 2 Woods 467, Fed. Cas. No. 9,665; the requisites of conveyances; Gillespie v. Coal, etc., Co., 163 Fed. 992, 91 C. C. A. 494; and acknowledgment; Berry v. Bank, 93 Fed. 44, 35 C. C. A. 185, by a married woman; the effect of conveyances to husband and wife; Meyers v. Reed, 17 Fed. 401; a wife's right to sue in her own name; and as to the running of the statute of limitations against her; Kibbe v. Ditto, 93 U. S. 674, 23 L. Ed. 1005; the common-law right of husband and wife respectively to the custody of a child; In re Barry, 42 Fed. 113, 136 U. S. 597, 34 L. Ed. 503, note. 5. Upon questions distinctive of a statute giving a right of action for a negligent homicide; Matz v. C. & A. R. R. Co., 85 Fed. 180; Spinello v. R. Co., 183 Fed. 762, 106 C. C. A. 189. 6. Upon the validity of a license ordinance adopted by a board of county supervisors; Flanigan v. Sierra County, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597; or ordinances respecting the traffic in intoxicating liquors; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620. 7. Upon general questions of local law in regard to the character and extent of the powers and liabilities of the political bodies or municipal corporations of a state; Johnson v. St. Louis, 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949. 8. Upon questions in relation to the state courts; Mohr v. Manierre, 101 U. S. 417, 25 L. Ed. 1052.

See 40 L. R. A. (N. S.) 380, with an exhaustive note.

The rules of evidence of the state are generally applied in the federal courts; Bucher v. R. Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795.

As to the situs of movable property for taxation, see TAXATION.

See UNITED STATES COURTS; HUSBAND AND WIFE; LEGITIMACY; DIVORCE; CONTRACTS; GUARDIAN AND WARD; ADOPTION; POWERS; USURY; TRUSTS; CORPORATIONS; CONSTITUTION OF UNITED STATES.

CONFORMITY STATUTE. A term used to designate section 721 of Revised Statutes of the U. S. which provides as to federal courts conforming to state practice.

CONFRONTATION. The act by which a witness is brought into the presence of the accused, so that the latter may object to him, if he can, and the former may know and identify the accused and maintain the truth in his presence. In criminal cases no man can be a witness unless confronted with the accused, except by consent.

CONFUSIO (Lat. *confundere*). **In Civil Law.** A pouring together of liquids; a melting of metals; a blending together of an inseparable compound.

It is distinguished from *commixtion* by the fact that in the latter case a separation may be made, while in a case of *confusio* there cannot be. 2 Bla. Com. 405.

CONFUSION OF DEBTS. The concurrence of two adverse rights to the same thing in one and the same person. Woods v. Ridley, 11 Humph. (Tenn.) 198.

CONFUSION OF GOODS. Such a mixture of the goods of two or more persons that they cannot be distinguished.

When this takes place by the mutual consent of the owners, they have an interest in the mixture in proportion to their respective shares; Silsbury v. McCoon, 6 Hill (N. Y.) 425, 41 Am. Dec. 753; but see Wells v. Batts, 112 N. C. 283, 17 S. E. 417, 34 Am. St. Rep. 506. Where it is caused by the wilful act of one party without the other's consent, the one causing the mixture must separate them at his own peril; Bisp. Eq. § 86; Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Bryant v. Ware, 30 Me. 295; Dunning v. Stearns, 9 Barb. (N. Y.) 630; 2 Kent 365; and must bear the whole loss; Brackenridge v. Holland, 2 Blackf. (Ind.) 377, 20 Am. Dec. 123; Huff v. Earl, 3 Ind. 306; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Willard v. Rice, 11 Metc. (Mass.)

493, 45 Am. Dec. 226; Hesseltine v. Stockwell, 30 Me. 237; unless he can identify his goods; Ayre v. Hixson, 53 Or. 19, 98 Pac. 518, 133 Am. St. Rep. 819; Levyeau v. Clements, 175 Mass. 376, 56 N. E. 735, 50 L. R. A. 397; otherwise, it is said, if the confusion is the result of negligence merely, or accident; Pratt v. Bryant, 20 Vt. 333; or of the wrongful act of a stranger; Bryant v. Ware, 30 Me. 295; if commingled by mistake or accident, or by consent of the parties, the owners will be treated as tenants in common; Ayre v. Hixson, 53 Or. 19, 98 Pac. 518, 133 Am. St. Rep. 819. The rule extends no further than necessity requires; 2 Campb. 575; Holbrook v. Hyde, 1 Vt. 286; Wood v. Fales, 24 Pa. 246, 64 Am. Dec. 655; Queen v. Wernwag, 97 N. C. 383, 2 S. E. 657; for if the goods can be distinguished, it will not justify one in taking another's goods upon the ground that they have been intermingled; Claflin v. Beaver, 55 Fed. 576.

Lord Eldon was of opinion that the wrongdoer should not lose his whole property in the mass; 15 Ves. 442; and with this view agrees a learned article in 6 Am. L. Rev. 455, understood (Williston, Sales, 179) to have been written by Mr. Justice O. W. Holmes, and containing a full discussion of the principles relating to grain in elevators.

Where a vessel was wrecked and the bales of cotton that were saved were indistinguishable as to ownership, it was held that the several owners of the cotton that was shipped had a proportional interest in what was saved, as by a kind of tenancy in common; L. R. 3 C. P. 427.

The fact that defendants in replevin to recover ore had wrongfully mixed plaintiff's ore with their ore of a lower grade did not preclude recovery of their ore, though some of the defendants' might have been taken with it; Blurton v. Hansen, 135 Mo. App. 548, 116 S. W. 474. Where a bank commingles its own collateral to secure its own debts with collaterals which it held to secure a note payable through the bank, owed to a depositor, in such a way that it was impossible to distinguish one set from the other, all the collaterals became the property of the depositor to secure the note; First Nat. Bank of Decatur v. Henry, 159 Ala. 367, 49 South. 97.

A writer in 14 Harv. L. Rev. 157, is of opinion that the better view is that where there has been no change of value and the mass is homogeneous each party is entitled to his proportionate share irrespective of brand; citing Hesseltine v. Stockwell, 30 Me. 237, 50 Am. Dec. 627; Claflin v. Jersey Works, 85 Ga. 27, 46, 11 S. E. 721.

As to grain in an elevator, the cases give effect to the intention of the parties (which undoubtedly exists) that the depositor shall retain title; Williston, Sales, § 154, citing Woodward v. Semans, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225; Moses v. Teetors, 64 Kan. 149, 67 Pac. 526, 57 L. R. A. 267; Ledyard v. Hibbard, 48 Mich. 421, 12 N. W. 637, 42 Am. Rep. 474; Millhiser Mfg. Co. v. Mills Co., 101 Va. 579, 44 S. E. 760; Rahilly v. Wilson, 3 Dill. 420, Fed. Cas. No. 11,532. The same writer says (section 154): "The warehouseman is thus a bailee to keep the grain, with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again, and with a continuous power of sale, substitution and resale. At any given moment, however, all the holders of receipts for the grain are tenants in common of the amount in store, the share of each being proportionate to the amount of his receipts as compared with the total number of receipts outstanding." It is the duty of the bailee to keep sufficient grain to meet all his outstanding receipts; Young v. Miles, 23 Wis. 643.

Where gas from plaintiff's well was wrongfully mixed with gas from defendant's 59 wells, plaintiff could recover $^1/_{60}$ of the proceeds from the sale of the product of all of the 60 wells; Great Southern Gas & Oil Co. v. Fuel Co., 155 Fed. 114, 83 C. C. A. 574.

The doctrine does not apply to cattle and horses or other like property that can be readily identified; McKnight v. U. S., 130 Fed. 659, 65 C. C. A. 37.

CONFUSION OF RIGHTS. A union of the qualities of debtor and creditor in the same person. The effect of such a union is, generally, to extinguish the debt; 1 Salk. 306; Cro. Car. 551; 1 Ld. Raym. 515. See 5 Term 381; Comyns, Dig. *Baron et Feme* (D).

CONGÉ. In French Law. A clearance. A species of passport or permission to navigate.

CONGÉ D'ACCORDER (Fr. leave to accord). A phrase used in the process of levying a fine. Upon the delivery of the original writ, one of the parties immediately asked for a *congé d'accorder*, or leave to agree with the plaintiff. *Termes de la Ley*; Cowell. See LICENTIA CONCORDANDI; 2 Bla. Com. 350.

CONGÉ D'ÉLIRE (Fr. leave to elect). The king's permission royal to a dean and chapter in time of vacation to choose a bishop, or to an abbey or priory of his own foundation to choose the abbot or prior.

Originally, the king had free appointment of all ecclesiastical dignities whensoever they chanced to be void. Afterwards he made the election over to others, under certain forms and conditions: as, that at every vacation they should ask of the king *congé délire;* Cowell; *Termes de la Ley;* 1 Bla. Com. 379, 382. The permission to elect is a mere form; the choice is practically made by the crown. A letter missive accompanies the authority to elect, designating the person to be chosen and if there is no election within twenty days there is a liability to a penalty.

CONGÉ D'EMPARLER (Fr. leave to imparl). The privilege of an imparlance (*licentia loquendi*). 3 Bla. Com. 299.

CONGEABLE (Fr. *congé*, permission, leave). Lawful, or lawfully done, or done with permission; as, entry congeable and the like. Littleton, § 279.

CONGREGATION. A society of a number of persons who compose an ecclesiastical body.

Certain bureaus at Rome, where ecclesiastical matters are attended to.

In the United States, the members of a particular church who meet in one place to worship. See Robertson v. Bullions, 9 Barb. (N. Y.) 64.

CONGRESS. An assembly of deputies convened from different governments to treat of peace or of other international affairs; as the Congress of Berlin to settle the terms of peace between Russia and Turkey in 1878, composed of representations of the great Powers of Europe.

In theory a congress may conclude a treaty, while a conference is for consultation, and its result, ordinarily a protocol, prepares the way for a treaty. See Cent. Dict.; Encyc. Dict. But this is not always true, as the Berlin conference of 1889 was composed of plenipotentiaries and its deliberations resulted in a treaty.

The legislative body of the United States, composed of the senate and house of representatives (*q. v.*). U. S. Const. art. 1, § 1.

Each house is the judge of the election and qualifications of its members. A majority of each house is a quorum; but a smaller number may adjourn from day to day, and compel the attendance of absent members. Each house may make rules, punish its members, and by a two-thirds vote expel a member. Each house must keep a journal and publish the same, excepting such parts as may, in their judgment, require secrecy, and record the yeas and nays at the desire of one-fifth of the members present. Art. 1, s. 5. A court is bound to assume that the journal speaks the truth and cannot receive oral testimony to impeach its correctness; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321.

The members of both houses are in all cases, except treason, felony, and breach of the peace, privileged from arrest while attending to and returning from the session of their respective houses; and no member can be questioned in any other place for any speech or debate in either house. U. S. Const. art. 1, s. 6.

Whether a senator of the United States has waived his privilege from arrest and whether such privilege is personal or given for the purpose of always securing the representation of his state in the senate are questions which can be raised by writ of error directly to the district court; Burton v. U. S., 196 U. S. 283, 25 Sup. Ct. 243, 49 L. Ed. 482.

Each house of congress has claimed and exercised the power to punish contempts and breaches of its privileges, on the ground that all public functionaries are essentially invested with the powers of self-preservation, and that whenever authorities are given, the means of carrying them into execution are given by necessary implication. Jefferson, Manual, § 3, art. *Privilege;* Duane's Case, Senate Proceedings, Gales and Seaton's Annals of Cong., 6th Congress, pp. 122, 134; Wolcott's Case, Journal Hou. Reps. 1st Sess. 35th Congress, pp. 371, 386, 535. Irwin's Case, 2d Sess. 43d Congress, Index. In Kilbourn's Case, 103 U. S. 168, 26 L. Ed. 377, it was held that although the house can punish its own members for disorderly conduct or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, when the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness,—there is not found in the constitution any general power vested in either house to punish for contempt. The order of the house ordering the imprisonment of a witness for refusing to answer certain questions put to him by the house, concerning the business of a real estate partnership of which he was a member, and to produce certain books in relation thereto, was held void and no defence on the part of the sergeant-at-arms in an action by the witness for false imprisonment. The members of the committee, who took no actual part in the imprisonment, were held not liable to such action. The cases in which the power had been exercised are numerous. This power, however, extends no further than imprisonment; and that will continue no further than the duration of the power that imprisons. The imprisonment will therefore terminate with the adjournment or dissolution of congress.

The rules of proceeding in each house are substantially the same: the house of representatives choose their own speaker; the vice-president of the United States is, *ex officio*, president of the senate. For rules of proceeding, see Hind's Precedents of the H. of R.

When a bill is engrossed, and has received the sanction of both houses, it is sent to the president for his approbation. If he approves of the bill, he signs it. If he does not, it is returned, with his objections, to the house in which it originated, and that house enters the objections at large on its journal and proceeds to reconsider it. If, after such reconsideration, two-thirds of the house agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes a law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are to be entered on the journal of each house respectively.

If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return; in which case it shall not be a law. See Kent, Lect. XI.

The right of the president to sign a bill after an adjournment of congress although within ten days of its passage, has been inferentially approved by the supreme court on four different occasions, in connection with the captured and abandoned property act, which was signed by the president on March 12, 1863, and after the adjournment of congress; Tobey v. Leonard, 2 Wall. (U. S.) 423, 17 L. Ed. 842; U. S. v. Anderson, 9 Wall. (U. S.) 56, 19 L. Ed. 615; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519. Upon this point the court of claims held that a bill signed by the president after the usual adjournment of congress for the winter holidays, but within ten days from the time when it was presented to him, was duly approved within the intent and meaning of the constitution; U. S. v. Alice Weil, 29 Ct. Cl. 523.

The house of representatives has the exclusive right of originating bills for raising revenue; and this is the only privilege that house enjoys in its legislative character which is not shared equally with the other; and even those bills are amendable by the senate in its discretion; Art. 1, s. 7.

One of the houses cannot adjourn, during the session of congress, for more than three days without the consent of the other; nor to any other place than that in which the two houses shall be sitting; Art. 1, s. 5.

All the legislative powers granted by the constitution of the United States or necessarily implied from those granted, are vested in the congress.

CONJECTIO CAUSÆ. In Civil Law. A statement of the case. A brief synopsis of the case given by the advocate to the judge in opening the trial. Calvinus, Lex.

CONJECTURE. A slight degree of credence, arising from evidence too weak or too remote to cause belief. 1 Mascardus, *De Prob.* quæst. 14, n. 14.

An idea or notion founded on a probability without any demonstration of its truth.

CONJOINTS. Persons married to each other. Story, Confl. Laws, § 71; Wolffius, *Droit de la Nat.* § 858.

CONJUGAL RIGHTS. See RESTITUTION OF CONJUGAL RIGHTS.

CONJUNCTIVE. Connecting in a manner denoting union.

There are many cases in law where the conjunctive *and* is used for the disjunctive *or*, and *vice versa*.

CONJUNCTIVE OBLIGATION. One in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects; and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. Civil Code, La. § 2063.

CONJURATION (Lat. a swearing together). A plot, bargain, or compact, made by a number of persons under oath, to do some public harm.

Personal conference with the devil or some evil spirit, to know any secret or effect any purpose. The laws against conjuration and witchcraft were repealed in 1736. Mozley & W. Law Dict.

CONNECTICUT. The name of one of the original states of the United States of America.

It was not until the year 1665 that the whole territory now known as the state of Connecticut was under one colonial government. The charter was granted by Charles II. in April, 1662. Previous to that time there had been two colonies, with separate governments.

As this charter to the colony of Connecticut embraced the colony of New Haven, the latter resisted it until about January, 1665, when the two colonies, by mutual agreement, became indissolubly united. In 1687, Sir Edmund Andros attempted to seize and take away the charter; but it was secreted and preserved in the famous Charter Oak at Hartford, and is now kept in the office of the secretary of state. 1 Hollister, Hist. Conn. 315. It remained in force, with a temporary suspension, as a fundamental law of the state, until the present constitution was adopted. Story, Const. 386; Comp. Stat. Conn. Rev. of 1875, iii. xlv.

The present constitution was adopted on the 15th of September, 1818. Seventeen amendments have been adopted, 1823-1875; also in 1901 and 1905.

CONNECTING LINES. See COMMON CARRIERS.

CONNIVANCE. An agreement or consent, indirectly given, that something unlawful shall be done by another.

Connivance differs from condonation, though the same legal consequences may attend it. Connivance necessarily involves criminality on the part of the individual who connives; condonation may take place without imputing the slightest blame to the party who forgives the injury. Connivance must be the act of the mind before the offence has been committed; condonation is the result of a determination to forgive an injury which was not known until after it was inflicted. 3 Hagg. Eccl. 350.

Connivance differs, also, from collusion: the former is generally collusion for a particular purpose, while the latter may exist without connivance. 3 Hagg. Eccl. 130.

The connivance of the husband to his wife's prostitution deprives him of the right of obtaining a divorce, or of recovering damages from the seducer; Geary, Mar. & Fam. R. 268; 4 Term 657. The husband may actively connive at the adultery; Myers v. Myers, 41 Barb. (N. Y.) 114; Hedden v. Hedden, 21 N. J. Eq. 61; or he may passively; 5 Eng. Ecc. 27; 3 Hagg. Eccl. 87. It may be satisfactorily proved by implication. See Shelf. Mar. & Div. 449; 2 Bish. Mar. & Div. § 6; 2 Hagg. Eccl. 278, 376; 3 *id.* 58, 82, 107, 119, 312; Pierce v. Pierce, 3 Pick. (Mass.) 299, 15 Am. Dec. 210; Seagar v. Sligerland, 2 Caines (N. Y.) 219; Masten v. Masten, 15 N. H. 161; Herrick v. Herrick, 31 Mich. 300; In re Childs, 109 Mass. 407; Cochran v. Cochran, 35 Ia. 477.

A husband who connives at or consents to adultery by his wife is deemed as consenting to it with others and cannot have a divorce for a subsequent act with a different person, though the act connived at was not committed; Hedden v. Hedden, 21 N. J. Eq. 61; nor can he where the wife was led into it by connivance of a detective employed by the husband, not for such purpose but to obtain evidence; Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 Atl. 687; L. R. 2 P. & D. 428. So also abandonment by the wife, knowing (as she said she did) that the husband would naturally seek other women, was held to be connivance; Richardson v. Richardson, 114 N. Y. Supp. 912. Where a husband wilfully abstains from any attempt to prevent misconduct which he must know is likely to occur, he is held to have connived at such misconduct; 33 L. J. Mat. Cas. 161.

CONNOISSEMENT. In French Law. An instrument, signed by the master of a ship or his agent, containing a description of the goods loaded on a ship, the persons who have sent them, the persons to whom they were sent, and the undertaking to transport them. A bill of lading. Guyot, *Répert. Univ.; Ord. de la Marine*, l. 3, t. 3, art. 1.

CONNUBIUM (Lat.). A lawful marriage. See MARRIAGE; CONCUBINATUS.

CONOCIMIENTO. In Spanish Law. A bill of lading. In the Mediterranean ports it is called *poliza de cargamiento*.

CONQUEST (Lat. *conquiro*, to seek for).

In Feudal Law. Purchase; any means of obtaining an estate out of the usual course of inheritance.

The estate itself so acquired.

According to Blackstone and Sir Henry Spelman, the word in its original meaning was entirely dissociated from any connection with the modern idea of military subjugation, but was used solely in the sense of purchase. It is difficult and quite profitless to attempt a decision of the question which has arisen, whether it was applied to William's acquisition of England in its original or its popular meaning. It must be allowed to offer a very reasonable explanation of the derivation of the modern signification of the word, that it was still used at that time to denote a technical *purchase*—the prevalent method of *purchase* then, and for quite a long period subsequently, being by driving off the occupant by superior strength. The operation of making a *conquest*, as illustrated by William the Conqueror, was no doubt often afterwards repeated by his followers on a smaller scale; and thus the modern signification became established. On the other hand, it would be much more difficult to derive a general signification of *purchase* from the limited modern one of military subjugation. But the whole matter must remain mainly conjectural; and it is undoubtedly going too far to say, with Burrill, that the meaning assigned by Blackstone is "demonstrated," or, with Wharton, that the same meaning is a "mere idle ingenuity." Fortunately, the question is not of the slightest importance in any respect.

See 17 L. Q. R. 392.

In International Law. The acquisition of the sovereignty of a country by force of arms, exercised by an independent power which reduces the vanquished to submission to its empire.

The intention of the conqueror to retain the conquered territory is generally manifested by formal proclamation of annexation, and when this is combined with a recognized ability to retain the conquered territory, the transfer of sovereignty is complete. A treaty of peace based upon the principle of *uti possidetis* (*q. v.*) is formal recognition of conquest.

The effects of conquest are to confer upon the conquering state the public property of the conquered state, and to invest the former with the rights and obligations of the latter; treaties entered into by the conquered state with other states remain binding upon the annexing state, and the debts of the extinct state must be taken over by it. Conquest likewise invests the conquering state with sovereignty over the subjects of the conquered state. Among subjects of the conquered state are to be included persons domiciled in the conquered territory who remain there after the annexation. The people of the conquered state change their allegiance but not their relations to one another. Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891.

After the transfer of political jurisdiction to the conqueror the municipal laws of the territory continue in force until abrogated by the new sovereign. American Ins. Co. v. Canter, 1 Pet. (U. S.) 511, 7 L. Ed. 242.

CONQUÊTS. In French Law. The name given to every acquisition which the husband and wife, jointly or severally, make during the conjugal community. Thus, whatever is acquired by the husband and wife, either by his or her industry or good fortune, enures to the extent of one half for the benefit of the other. Merlin, *Rép. Conquêt;* Merlin, *Quest., Conquêt.* In Louisiana, these gains are called *acquêts.* La. Civ. Code, art. 2369. The *conquêts* by a former marriage may not be settled on a second wife to prejudice the heirs; 2 Low. C. 175.

CONSANGUINEOUS FRATER. A brother who has the same father. 2 Bla. Com. 231.

CONSANGUINITY (Lat. *consanguis*, blood together).

The relation subsisting among all the different persons descending from the same stock or common ancestor. See Sweezey v. Willis, 1 Brad. Surr. R. (N. Y.) 495.

Having the blood of some common ancestor. Blodget v. Brinsmaid, 9 Vt. 30.

Collateral consanguinity is the relation subsisting among persons who descend from the same common ancestor, but not from each other. It is essential, to constitute this relation, that they spring from the same common root or stock, but in different branches.

Lineal consanguinity is that relation which exists among persons where one is descended from the other, as between the son and the father, or the grandfather, and so upward in a direct ascending line; and between the father and the son, or the grandson, and so downwards in a direct descending line.

In computing the degree of lineal consanguinity existing between two persons, every generation in the direct course of relationship between the two parties makes a degree; and the rule is the same by the canon, civil, and common law.

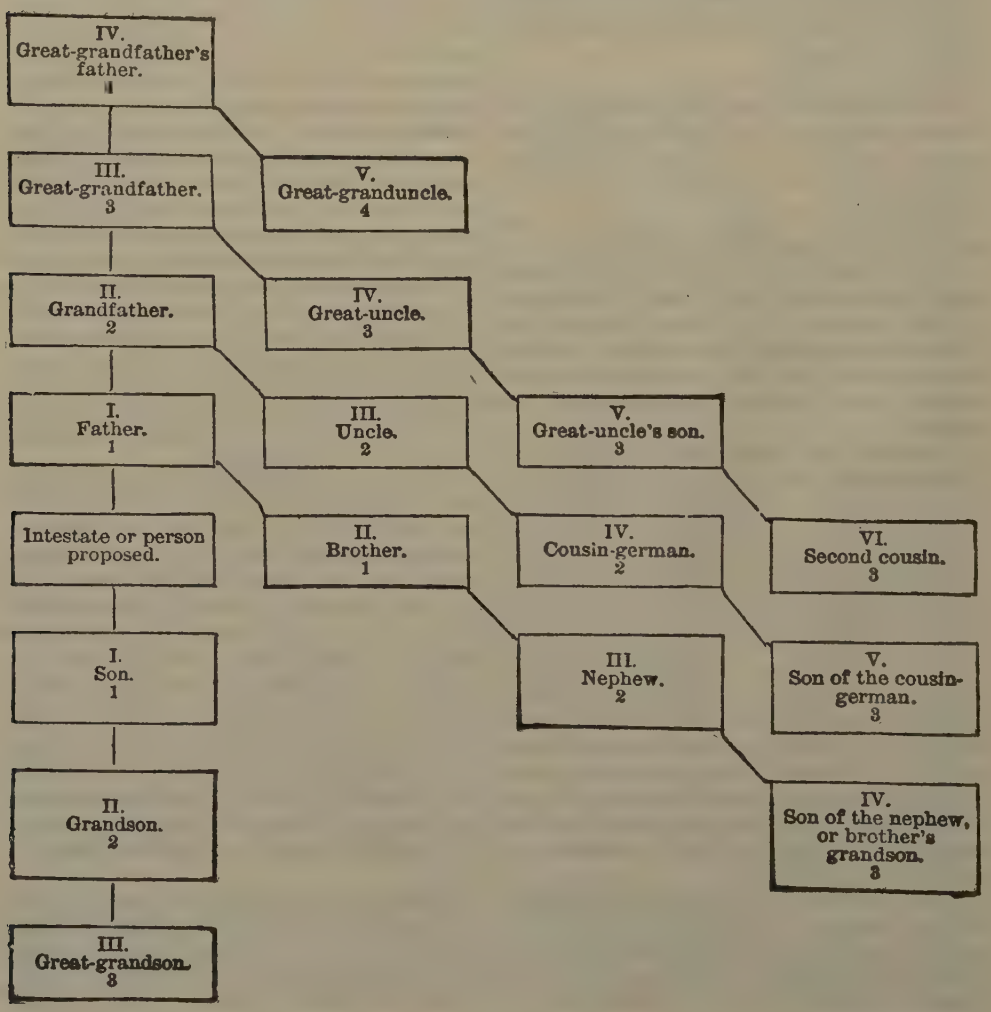
The mode of computing degrees of collateral consanguinity at the common and by the canon law is to discover the common ancestor, to begin with him to reckon downwards, and the degree the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them. For instance, two brothers are related to each other in the first degree, because from the father to each of them is one degree. An uncle and a nephew are related to each other in the second degree, because the nephew is two degrees distant from the common ancestor; and the rule of computation is extended to the remotest degrees of collateral relationship.

The method of computing by the civil law is to begin at either of the persons in question, and count up to the common ancestor, and then downwards to the other person, calling it a degree for each person, both as-

cending and descending, and the degrees they stand from each other is the degree in which they stand related. Thus, from a nephew to his father is one degree; to the grandfather, two degrees; and then to the uncle three; which points out the relationship.

The following table, in which the Roman numeral letters express the degrees by the civil law, and those in Arabic figures those by the common law, will fully illustrate the subject.

The mode of the civil law is preferable, for it points out the actual degree of kindred in all cases; by the mode adopted by the common law, different relations may stand in the same degree. The uncle and nephew stand related in the second degree by the common law, and so are two first cousins, or two sons of two brothers; but by the civil law the uncle and nephew are in the third degree, and the cousins are in the fourth. The mode of computation, however, is immaterial; for both will establish the same person to be the heir; 2 Bla. Com. 202.



CONSCRIPTION. A compulsory enrolment of men for military service; draft. The body of conscripts. Stand. Dict.

A military force was raised by conscription under the acts of July 17, 1862, March 3, 1863, and February 10, 1864. They provided for a national enrolment under the authority of the United States, for an apportionment of quotas among the states, and authorized the quotas to be obtained in the several districts into which the states were divided. Certain classes of persons were exempt, and drafted men were released upon furnishing acceptable substitutes or by the payment of a statutory sum of money. Davis, Mil. Law. 51.

CONSEIL D'ÉTAT. This is one of the oldest of French institutions, its origin dating back to 1302. Under a law of 1879 it was reorganized as follows: President, the keeper of the seals, who at the same time is invariably the Minister of Justice. There are thirty-two councillors (ordinary) and eighteen councillors (extraordinary) and

thirty assistant councillors. It decides upon state questions and measures proposed for legislation, submitted to it by the President of the Republic and by the members of the Cabinet. It advises in connection with bills submitted by Parliament for its consideration and bills prepared by the government, and proposed decrees. Matters relating to public administration come within the scope of its duties. Coxe, Manual of French Law.

CONSEILLE DE FAMILLE (Fr.). A family council, which see.

CONSENSUAL CONTRACT. In Civil Law. A contract completed by the consent of the parties merely, without any further act.

The contract of sale, among the civilians, is an example of a consensual contract, because the moment there is an agreement between the seller and the buyer as to the thing and the price, the vendor and the purchaser have reciprocal actions. On the contrary, on a loan, there is no action by the lender or borrower, although there may have been consent, until the thing is delivered or the money counted; Pothier, Obl. pt. 1, c. 1, s. 1, art. 2; 1 Bell, Comm. 435.

CONSENSUS AD IDEM. An agreement of parties to the same thing; a meeting of minds. See AGREEMENT.

CONSENT (Lat. *con*, with, together, *sentire*, to feel). A concurrence of wills.

Express consent is that directly given, either *viva voce* or in writing.

Implied consent is that manifested by signs, actions, or facts, or by inaction or silence, from which arises an inference that the consent has been given.

Consent supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Fonblanque, Eq. b. 1, c. 2, s. 1. Consent is implied in every agreement. See AGREEMENT; CONTRACT.

Where a power of sale requires that the sale should be with the consent of certain specified individuals, the fact of such consent having been given ought to be evinced in the manner pointed out by the creator of the power, or such power will not be considered as properly executed; 10 Ves. Ch. 308, 378. See as to consent in vesting or divesting legacies; 2 V. & B. 234; 3 Ves. Ch. 239; 12 *id.* 19; 3 Bro. C. C. 145; 1 Sim. & S. 172. As to implied consent arising from acts, see ESTOPPEL IN PAIS.

See Hakm Chand, Law of Consent.

In Criminal Law. No act shall be deemed a crime if done with the consent of the party injured, unless it be committed in public, and is likely to provoke a breach of the peace, or tends to the injury of a third party; provided no consent can be given which will deprive the consenter of any inalienable right; A. & E. Encyc; Desty, Cr. L. § 33. The one who gives consent must be capable of doing so; 1 Whar. Cr. L. § 146; Hadden v. People, 25 N. Y. 373. But by statutes in various states a female child under a certain specified age cannot consent to sexual intercourse. See RAPE.

CONSENT JUDGMENT. One entered by agreement of the parties.

Proceedings at the instance of one party to a cause are not taken by consent simply because the other party had notice and did not object; Jennings v. R. Co., 218 U. S. 255, 31 Sup. Ct. 1, 54 L. Ed. 1031.

CONSENT RULE. An entry of record by the defendant, confessing the lease, entry, and ouster by the plaintiff, in an action of ejectment. This was, until recently, used in England, and still is in those states in which ejectment is still retained as a means of acquiring possession of land.

The consent rule contains the following particulars, viz.: *first*, the person appearing consents to be made defendant instead of the casual ejector; *second*, he agrees to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; *third*, to receive a declaration in ejectment, and to plead not guilty; *fourth*, at the trial of the case, to confess lease, entry, and ouster, and to insist upon his title only; *fifth*, that if, at the trial, the party appearing shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able to prosecute his suit, such party shall pay to the plaintiff the cost of the *non pros.*, and suffer judgment to be entered against the casual ejector; *sixth*, that if a verdict shall be given for the defendant, or the plaintiff shall not prosecute his suit for any other cause than the non-confession of lease, entry, and ouster, the lessor of the plaintiff shall pay costs to the defendant; *seventh*, that, when the landlord appears alone, the plaintiff shall be at liberty to sign judgment immediately against the casual ejector, but that execution shall be stayed until the court shall further order; Ad. Eject. 233. See, also, Jackson v. Stiles, 2 Cow. (N. Y.) 442; Jackson v. Denniston, 4 Johns. (N. Y.) 311.

CONSENTIBLE LINES. See LINE.

CONSEQUENTIAL DAMAGES. Those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. See DAMAGES.

CONSERVATOR (Lat. *conservare*, to preserve). A preserver; one whose business it is to attend to the enforcement of certain statutes.

A delegated umpire or standing arbitrator, chosen to compose and adjust difficulties arising between two parties. Cowell.

A guardian. So used in Connecticut. Woodford v. Webster, 3 Day (Conn.) 472; Treat v. Peck, 5 Conn. 280; Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622.

See CONSERVATOR TRUCIA.

CONSERVATOR OF THE PEACE. He who hath an especial charge, by virtue of his office, to see that the king's peace be kept.

Before the reign of Edward III., who created justices of the peace, there were sundry persons interested to keep the peace, of whom there were two classes: one of which had the power annexed to the office which they hold; the other had it merely by itself, and were hence called wardens or conservators of the peace. Lambard, *Eirenarchia*, l. 1, c. 3. This latter sort are superseded by the modern justices of the peace; 1 Bla. Com. 349.

The king was the principal conservator of the peace within all his dominions. The lord chancellor or keeper, the lord treasurer, the lord high steward, the lord marshal and lord high constable, all the justices of the court of king's bench (by virtue of their offices), and the master of the rolls (by prescription) were general conservators of the peace throughout the whole kingdom, and might commit all breakers of it, or bind them in recognizances to keep it: the other judges were only so in their own courts. The coroner was also a conservator of the peace within his own county, as also the sheriff, and both of them might take recognizances or security for the peace. Constables, tythingmen, and justices of the peace were also conservators of the peace within their own jurisdiction; and might apprehend all breakers of the peace, and commit them until they found sureties for their keeping it. See Stephen, Hist. Cr. L. 110; Burns Justice; 19 State Tr. (Judgment of Lord Camden).

The judges and other similar officers of the various states, and also of the United States, are conservators of the public peace, being entitled "to hold to the security of the peace and during good behavior."

The Constitution of Delaware (1831) provides that: "The members of the senate and house of representatives, the chancellor, the judges, and the attorney-general shall, by virtue of their offices, be conservators of the peace throughout the state; and the treasurer, secretary, and prothonotaries, registers, recorders, sheriffs, and coroners, shall, by virtue of their offices, be conservators thereof within the counties respectively in which they reside."

CONSERVATOR TRUCIS (Lat.). An official appointed under an English act of 1414 passed to prevent breaches of truces made, or of safe conducts granted, by the king. 2 Holdsw. Hist. E. L. 392.

Such offences are declared to be treason, and such officers are appointed in every port, to hear and determine such cases, "according to the ancient maritime law then practised in the admiral's court as may arise upon the high seas, and with two associates to determine those arising upon land." 4 Bla. Com. 69.

CONSIDER, CONSIDERED. See CONSIDERATUM EST PER CURIAM.

CONSIDERATION. An act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other as an inducement to that other's act or promise. Poll. Contr. 91.

Blackstone defines it to be the reason which moves a contracting party to enter into a contract (2 Com. 443); Burgher v. R. Co., 139 Mo. App. 62, 120 S. W. 673; but this definition is manifestly defective because it is within the distinction taken by Patteson, J., who says: "It is not to be confounded with motive, which is not the same thing as consideration. The latter means something which is of value in the eye of the law, moving from the plaintiff, either of benefit to the plaintiff or of detriment to the defendant;" Langd. Sel. Cas. Contr. 168; s. c. 2 Q. B. 851. In distinguishing between consideration and motive a helpful criterion is to be found in the expression "nothing is consideration that is not regarded as such by both parties;" Philpot v. Gruninger, 14 Wall. (U. S.) 570, 577, 20 L. Ed. 743; Ellis v. Clark, 110 Mass. 389, 14 Am. Rep. 609; Sterne v. Bank, 79 Ind. 549, 551.

The price, motive, or matter of inducement to a contract,—whether it be the compensation which is paid, or the inconvenience which is suffered by the party from whom it proceeds. A compensation or equivalent. A cause or occasion meritorious, requiring mutual recompense in deed or in law. Viner, Abr. *Consideration* (A).

Consideration, in a contract, is the *quid pro quo* that the party to whom the promise is made does or agrees to do in exchange for the contract. Phœnix Mut. Life Ins. Co. v. Raddin, 120 U. S. 197, 7 Sup. Ct. 500, 30 L. Ed. 644. See also Pollock, Contracts (1902 Ed.).

It is also defined as "any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant." Tindal, C. J., in 3 Scott 250. According to Kent it must be given in *exchange, mutual,* an *inducement* to the contract, *lawful,* and of sufficient *value,* with respect to the assumption. 2 Com. 464.

"The name *consideration* appeared only about the 16th century, and we do not know by what steps it became a settled term of art." Pollock Contr. 170. That it was not borrowed from equity as a modification of the Roman Law *causa,* see CAUSA.

Concurrent considerations are those which arise at the same time or where the promises are simultaneous and reciprocal.

Continuing considerations are those which consist of acts which must necessarily continue over a considerable period of time.

Executed considerations are acts done or values given at the time of making the contract. Leake, Contr. 18, 612.

Executory considerations are promises to do or give something at a future day. *Ibid.*

Good considerations are those of blood, natural love or affection, and the like.

Motives of natural duty, generosity, and prudence come under this class; 2 Bla. Com. 297; Batty v. Carswell, 2 Johns. (N. Y.) 52; Ewing v. Ewing, 2 Leigh (Va.) 337; Carpenter v. Dodge, 20 Vt. 595; 1 C. & P. 401; Doran v. McConlogue, 150 Pa. 98, 24 Atl. 357; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170. The only purpose for which a *good* consideration may be effectual is to support a covenant to stand seized to uses, in favor of wife, child or blood relation. It is good

against a grantor when it has been executed; Chitty, Contr. 28; so of a gift; Candee v. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568; but may be void against creditors and subsequent bona fide purchasers for value; Stat. 27 Eliz. c. 4; 10 B. & C. 606; Patterson v. Mills, 69 Ia. 755, 28 N. W. 53; Shep. Touchst. 512; Leake Contr. 442.

The term is sometimes used in the sense of a consideration valid in point of law; and it then includes a valuable as well as a meritorious consideration; Hodgson v. Butts, 3 Cra. (U. S.) 140, 2 L. Ed. 391; Lang v. Johnson, 24 N. H. 302; 2 Madd. 430; 3 Co. 81; Ambl. 598. Generally, however, *good* is used in antithesis to *valuable*.

Illegal considerations are acts, which if done or promises which if enforced, would be prejudicial to the public interest. Harriman, Cont. 101.

Impossible considerations are those which cannot be performed.

Moral considerations are such as are based upon a moral duty.

Past consideration is an act done before the contract is made, and is ordinarily by itself no consideration for a promise; Anson, Contr. 82. Pollock considers that whether a past benefit is, in any case, a good consideration is a question not free from uncertainty. On principle it should not be. Possible exceptions might be services rendered on request, without definite promise of reward (see Hob. 105) and voluntarily doing something which one was legally bound to do. Also a promise to pay a debt barred by the statute of limitations; but he considers that none of these exceptions are logical. See Poll. Contr. 170.

Valuable considerations are either some benefit conferred upon the party by whom the promise is made, or upon a third party at his instance or request; or some detriment sustained, at the instance of the party promising, by the party in whose favor the promise is made. Doct. & Stud. 179; Townsley v. Sumrall, 2 Pet. (U. S.) 182, 7 L. Ed. 386; Violett v. Patton, 5 Cra. (U. S.) 142, 3 L. Ed. 61; Wright v. Wright, 1 Litt. (Ky.) 183; Powell v. Brown, 3 Johns. (N. Y.) 100; Brewster v. Silence, 8 N. Y. 207; Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Lemaster v. Burckhart, 2 Bibb (Ky.) 30; Wooldridge v. Cates, 2 J. J. Marsh. (Ky.) 222; Farmer v. Stewart, 2 N. H. 97; Shenk v. Mingle, 13 S. & R. (Pa.) 29; Tompkins v. Philips, 12 Ga. 52; Odineal v. Barry, 24 Miss. 9; Dunbar v. Bonesteel, 3 Scam. (Ill.) 33; Taylor v. Meek, 4 Blackf. (Ind.) 388; 3 C. B. 321; Hodge v. Powell, 96 N. C. 67, 2 S. E. 182, 60 Am. Rep. 401. The detriment to the promisee must be a detriment on entering into the contract and not from the breach of it; Ridgway v. Grace, 2 Misc. 293, 21 N. Y. Supp. 934.

"A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." L. R. 10 Ex. 162. See Train v. Gold, 5 Pick. (Mass.) 380.

A valuable consideration is usually in some way pecuniary, or convertible into money; and a very slight consideration, provided it be valuable and free from fraud, will support a contract; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; Phelps v. Stewart, 12 Vt. 259; Upson v. Raiford, 29 Ala. 188; Harlan v. Harlan, 20 Pa. 303; Sanborn v. French, 22 N. H. 246; 11 Ad. & E. 983; Mathews v. Meek, 23 Ohio St. 292. Valuable considerations are divided by the civilians into four classes, which are given, with literal translations: *Do ut des* (I give that you may give), *Facio ut facias* (I do that you may do), *Facio ut des* (I do that you may give), *Do ut facias* (I give that you may do).

Consideration has been treated as the very life and essence of a contract; and a parol contract or promise for which there was no consideration could not be enforced at law; Reading R. R. Co. v. Johnson, 7 W. & S. (Pa.) 317; Plowd. 308; Cumber v. Wane, 1 Smith, Lead. Cas. 606; Mosby v. Leeds, 3 Call (Va.) 439; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Brown v. Adams, 1 Stew. (Ala.) 51, 18 Am. Dec. 36; Thacher v. Dinsmore, 5 Mass. 301, 4 Am. Dec. 61; Burnet v. Bisco, 4 Johns. (N. Y.) 235; Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Dec. 388; Beverleys v. Holmes, 4 Munf. (Va.) 95; Westmoreland v. Walker, 25 Miss. 76; Chase v. Vaughan, 30 Me. 412; Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; McNutt v. Loney, 153 Pa. 281, 25 Atl. 1088; Bush v. Rawlins, 89 Ga. 117, 14 S. E. 886; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Brooke, Abr. *Action sur le Case*, 40; such a promise was often termed a *nudum pactum* (*ex nudo pacto non oritur actio*), or *nude pact*. This phrase was undoubtedly borrowed from the Roman law, but its use in English law had no relation whatever to its meaning in the Roman; nor is the word *pact* of the latter in any sense related to the common-law *contract*. The *nudum pactum*, as appears by the note cited *infra* from Pollock, had not anciently in England its modern signification of an agreement without consideration in the sense of the maxim quoted. In an elaborate note to Pollock, Contracts 673, the learned author calls attention to a difference between consideration in the English law and its nearest continental analogies, which difference, he says, has not always been realized. The actual history of the English doctrine is obscure. The most we can affirm is that the general idea was formed somewhere in the latter part of the fifteenth century. At the same time or a little later, *nudum pactum* lost its ancient meaning (viz.: an agreement not made by specialty so as to support an action of covenant or falling within one of certain classes so as to support an action of debt), and came to mean what it does now. The word consideration in the sense now before us came into use, at least as a settled term of art, still later. In the early writers, *consideration* always means the judgment of a court.

The early cases of actions of assumpsit show by negative evidence which is almost conclusive that in the first half of the 15th century, the doctrine of consideration was quite unformed, though the phrase *quid pro quo* is earlier. But in 1459 there was a case which showed that an action of debt would then lie on any consideration executed. In the Doctor and Student (A. D. 1530) we find substantially the modern doctrine. So far as the writer of that work knows, he finds the first full discussion of consideration by that name in Plowden's report of Sharington *v.* Strotton, Plowd. 298.

The question of consideration was of importance in the learning of Uses before the statute, and the reflection is obvious that both the general conception and the name of Consideration have had their origin in the court of chancery in the law of uses and have been thence imported into the law of contracts rather than developed by the common-law courts. On this hypothesis, a connection with the Roman *causa* may be suggested with some plausibility. But see CAUSA.

The same writer proceeds to say that in the process thus sketched out some steps are conjectural, and considers that the materials are not ripe for a positive conclusion and will not be until the unpublished records of mediæval English law shall be competently edited. See Holmes, Common Law 253, where a different theory of the origin of consideration is given as being a generalization from the technical requirements of the action of debt in its earlier form.

The theory on which the phrase *nudum pactum* was wrongly applied was that the maxim signified that a *gratuitous promise* to do or pay anything on the one side, without any compensation on the other, could only be enforced, in the Roman law, when made (or clothed) with proper words or formalities—*pactum verbis prescriptis vestitum;* Vinnius, *Com. de Inst.* lib. 3, *de verborum obligationibus,* tit. 16, p. 677; Cod. lib. 7, tit. 52. This solemnity it was argued had much the force of our seal, which imported consideration, as it was said, meaning that the formality implied *consideration* in its ordinary sense *i. e.*, deliberation, caution, and fulness of assent; Hare, Contr. 146; 3 Bingh. 111; 3 Burr. 1639; Wing v. Chase, 35 Me. 260; Augusta Bank v. Hamblet, 35 Me. 491; Erickson v. Brandt, 53 Minn. 10, 55 N. W. 62; but see Winter v. Goebner, 2 Colo. App. 259, 30 Pac. 51. There was, however, the distinction often lost sight of but which ought to be made that even on the theory that the vitality of a seal was solely as a token of the existence of a consideration, under the common law it was not the fact that the instrument was under seal which gave it vitality, but the consideration whose existence is implied therefrom, while, under the civil law, the subject of consideration bore no such relation to the contract as it does under the English law even accepting the theory of Stephen and other writers stated under title CONTRACT, *q. v.*, that the consideration is not an essential element of a contract,—necessary to its existence. Under the civil law it was of the essence of certain contracts that they should be gratuitous, and those based upon a consideration constituted only a single division called commutative contracts, which again was subdivided into the four classes represented by the formula quoted, *supra, do et des,* etc.

While, therefore, the Roman law doubtless exercised a large influence upon the English law of contracts, the subject of consideration particularly has been overlaid with erroneous theories, and the ascertainment of its true bearing long postponed, by the pursuit of false analogies, due probably to the early adoption of such phrases as the above and their incorporation into the common law, to express superficial impressions created by them rather than the meaning attributed to them by the Roman jurists.

These analogies have, however, been in recent years the subject of more careful investigation, and the study of the early English authorities and a greatly increased interest in, and knowledge of, the Roman law, have resulted in disturbing many of the theories of consideration in its true relation to the contract and the true meaning of the seal as making a contract actionable which would not be so if by parol.

The consideration is generally conclusively presumed from the nature of the contract, when sealed; Grubb v. Willis, 11 S. & R. (Pa.) 107; but in some of the states the want or failure of a consideration may be a good defence against an action on a sealed instrument or contract; Solomon v. Kimmel, 5 Binn. (Pa.) 232; Case v. Boughton, 11 Wend. (N. Y.) 106; Leonard v. Bates, 1 Blackf. (Ind.) 173; Coyle's Ex'x v. Fowler, 3 J. J. Marsh. (Ky.) 473; Peebles v. Stephens, 1 Bibb (Ky.) 500; Matlock v. Gibson, 8 Rich. (S. C.) 437.

While one cannot deny the existence of some consideration, so as to defeat a deed; McGee v. Allison, 94 Ia. 527, 63 N. W. 322; Weissenfels v. Cable, 208 Mo. 515, 106 S. W. 1028; it may be proved to have been greater or less or different in character, as property or services, instead of money, and the like; Jost v. Wolf, 130 Wis. 37, 110 N. W. 232; to the same effect; Jackson v. R. Co., 54 Mo. App. 636; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Martin v. White, 115 Ga. 866, 42 S. E. 279. The receipt for the consideration money is only *prima facie* evidence of its payment, which may be rebutted by parol testimony; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197; R.

A. Sherman's Sons Co. v. Mfg. Co., 82 Conn. 479, 74 Atl. 773. Parol evidence is admissible to prove a promise to pay a consideration in addition to that expressed in the deed; Allen v. Rees, 136 Ia. 423, 110 N. W. 583; 8 L. R. A. (N. S.) 1137; Henry v. Zurflieh, 203 Pa. 440, 53 Atl. 243; but if the consideration is contractual, such evidence is not admissible; Baum v. Lynn, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441.

See note in 25 L. R. A. (N. S.) 1194.

"The truth is that neither consideration or anything of the kind ever was necessary in the case of a deed and . . . a mere acknowledgment of consideration received, forming no part of a contract, is only evidence, and hence may be qualified or disputed altogether." Bigelow, Estoppel, 478.

Where a deed states a consideration grossly misrepresenting the value of the property for the purpose of cheating and defrauding another who relies on such representations, such statement of value may be made the basis of an action for fraud; Leonard v. Springer, 197 Ill. 532, 64 N. E. 299.

Negotiable instruments also, as bills of exchange and promissory notes, by statute 3 & 4 Anne (adopted as common law or by re-enactment in the United States), carry with them *prima facie* evidence of consideration; 4 Bla. Com. 445. See BILLS OF EXCHANGE; NEGOTIABLE INSTRUMENTS.

The consideration, if not expressed (when it is *prima facie* evidence of consideration), in all parol contracts (oral or written), must be proved; this may be done by evidence *aliunde;* Thompson v. Blanchard, 3 N. Y. 335; Tingley v. Cutler, 7 Conn. 291; Whitney v. Stearns, 16 Me. 394; Bean v. Burbank, 16 Me. 458, 33 Am. Dec. 681; Arms v. Ashley, 4 Pick. (Mass.) 71; Cummings v. Dennett, 26 Me. 397; Patchin v. Swift, 21 Vt. 292; Sloan v. Gibson, 4 Mo. 33.

Moral or equitable considerations are not sufficient to support an express or implied promise. They are only sufficient as between the parties in conveyances by deed, and in transfers, not by deed, accompanied by possession; Scott v. Carruth, 9 Yerg. (Tenn.) 418; 3 B. & P. 249. See 11 A. & E. 438; Mills v. Wyman, 3 Pick. (Mass.) 207. These purely moral obligations are left by the law to the conscience and good faith of the individual. Baron Parke says, "A mere moral consideration is *nothing;*" 9 M. & W. 501; Kennerly v. Martin, 8 Mo. 698. See In re James, 78 Hun 121, 28 N. Y. Supp. 992. It was at one time held in England that an express promise made in consequence of a previously existing moral obligation created a valid contract; per Mansfield, C. J., Cowp. 290; 5 Taunt. 36. This doctrine was at one time received in the United States, but appears now to be repudiated there; Poll. Contr. 168; except in Pennsylvania; Cornell v. Vanartsdalen, 4 Pa. 364; Hemphill v. McClimans, 24 Pa. 370. Where one is induced to become a surety for another's husband and the promise by the other party is void on account of coverture, a subsequent promise made after the disability was removed is void for lack of consideration; Hollaway's Assignee v. Rudy, 60 S. W. 650, 22 Ky. L. Rep. 1406, 53 L. R. A. 353.

It is often said that a moral obligation is sufficient consideration; but it is a rule, that such moral obligation must be one which has once been valuable and enforceable at law, but has ceased to be so by the operation of the statute of limitations, or by the intervention of bankruptcy for instance. The obligation, in such case, remains equally strong on the conscience of the debtor. The rule amounts only to a permission to waive certain positive rules of law as to *remedy;* Poll. Contr. 623; 2 Bla. Com. 445; Cowp. 290; 3 B. & P. 249, n.; 2 East 506; 2 Ex. 90; 8 Q. B. 487; Way v. Sperry, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; Turner v. Chrisman, 20 Ohio 332; Ehle v. Judson, 24 Wend. (N. Y.) 97; Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406; Paul v. Stackhouse, 38 Pa. 306; Smith v. Ware, 13 Johns. (N. Y.) 259; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Hawley v. Farrar, 1 Vt. 420; Biddle v. Moore, 3 Pa. 172; Willing v. Peters, 12 S. & R. (Pa.) 177; Levy v. Cadet, 17 S. & R. (Pa.) 126, 17 Am. Dec. 650; Viser v. Bertrand, 14 Ark. 267; Pritchard v. Howell, 1 Wis. 131, 60 Am. Dec. 363; Trumball v. Tilton, 21 N. H. 129; Ellicott v. Turner, 4 Md. 476. See Easley v. Gordon, 51 Mo. App. 637; In re James, 78 Hun 121, 28 N. Y. Supp. 992; Brooks v. Bank, 125 Pa. 394, 17 Atl. 418. But now, by statute, in England a promise to pay a debt barred by bankruptcy or one contracted during infancy is void; Leake, Contr. 318. If the *moral duty* were once a *legal* one which could have been made available in defence, it is equally within the rule; Nash v. Russell, 5 Barb. (N. Y.) 556; Watkins v. Halstead, 2 Sandf. (N. Y.) 311; Phelan v. Kelley, 25 Wend. (N. Y.) 389; Mardis v. Tyler, 10 B. Monr. (Ky.) 382; Womack v. Womack, 8 Tex. 397, 58 Am. Dec. 119. See as to moral obligation as a consideration, 32 Cent. L. J. 53.

An express promise to perform a previous legal obligation, without any new consideration, does not create a new obligation; 7 Dowl. 781; Reynolds v. Nugent, 25 Ind. 328; 15 C. B. 295; 16 Q. B. 689; Vanderbilt v. Schreyer, 91 N. Y. 401; Withers v. Ewing, 40 Ohio St. 400; Conover v. Stillwell, 34 N. J. L. 54; Cobb v. Cowdery, 40 Vt. 28, 94 Am. Dec. 370; Runnamaker v. Cordray, 54 Ill. 303; Warren v. Hodge, 121 Mass. 106. The promise of one party under an existing contract to perform his obligation is not a valid consideration for a new promise by the other party; Wescott v. Mitchell, 95 Me. 377, 50 Atl. 21; so where one party promises to do less than

he has already agreed to do and the other party promises to do more than he is obliged to do; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; and where the consideration of the new contract is services which one is legally bound to perform under a pre-existing contract; Alaska Packers' Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485; *contra*, where additional compensation is promised to induce another to complete his contract after abandonment on account of unforeseen and unanticipated difficulties; Linz v. Schuck, 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N. S.) 789, 124 Am. St. Rep. 481, 14 Ann. Cas. 495. Whether (a) the performance of an existing contractual obligation or (b) a new promise of such performance made to a new promisee is a good consideration for a new contract has been much discussed by legal writers. That neither is good is maintained by Anson and Williston; that both are good is the view of Ames (who even holds that a new promise of the same thing to the same promisee may be good) and Harriman; that (a) is not good, but (b) is, is the opinion of Langdell, Leake and Pollock and (for not quite the same reason) Beale. See 20 L. Q. R. 9. See Articles on consideration in 9 Harv. L. R. 233; 12 *id.* 517; 17 *id.* 71; 17 Yale L. Journal, 338; 17 L. Q. R. 415.

A valuable consideration alone is good as against subsequent purchasers and attaching creditors; and one which is rendered at the request, express or implied, of the promisor; Dy. 172, n.; 1 Rolle, Abr. 11, pl. 2, 3; 1 Ld. Raym. 312; 1 Wms. Saund. 264, n. (1); 6 Ad. & E. 718; 3 C. & P. 36; 6 Am. & W. 485; 3 Q. B. 234; Cro. Eliz. 442; Hort v. Norton, 1 McCord (S. C.) 22.

Among valuable considerations may be mentioned these:

In general, the waiver of any legal or equitable right at the request of another is sufficient consideration for a promise; Knapp v. Lee, 3 Pick. (Mass.) 452; Farmer v. Stewart, 2 N. H. 97; Nicholson v. May, 1 Wright (Ohio) 660; Smith v. Weed, 20 Wend. (N. Y.) 184, 32 Am. Dec. 525; Williams v. Alexander, 39 N. C. 207; 4 B. & C. 8; Union Bank v. Geary, 5 Pet. (U. S.) 114, 8 L. Ed. 60; 4 Ad. & E. 108; Heitsch v. Cole, 47 Minn. 320, 50 N. W. 235; Fraser v. Backus, 62 Mich. 540, 29 N. W. 92; Vogel v. Meyer, 23 Mo. App. 427.

Forbearance for a certain or reasonable time to institute a suit upon a valid or doubtful claim, but not upon one utterly unfounded. This is a benefit to one party, the promisor, and an injury to the other, the promisee; 1 Rolle, Abr. 24, pl. 33; Com. Dig. *Action on the Case upon Assumpsit* (B, 1); L. R. 7 Ex. 235; L. R. 10 Q. B. 92; L. R. 2 C. P. 196; Busby v. Conoway, 8 Md. 55, 63 Am. Dec. 688; King v. Upton, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; Elting v. Vanderlyn, 4 Johns. (N. Y.) 237; Jennison v. Stafford, 1 Cush. (Mass.) 168, 48 Am. Dec. 594; Giles v. Ackles, 9 Pa. 147, 49 Am. Dec. 551; McKinley v. Watkins, 13 Ill. 140; Gilman v. Kibler, 5 Humphr. (Tenn.) 19; Colgin v. Henley, 6 Leigh. (Va.) 85; 21 E. L. & Eq. 199; Mills' Heirs v. Lee, 6 T. B. Monr. (Ky.) 91, 17 Am. Dec. 118; Hargroves v. Cooke, 15 Ga. 321; Boyd v. Freize, 5 Gray (Mass.) 553; Tappan v. Campbell, 9 Yerg. (Tenn.) 436; Sage v. Wilcox, 6 Conn. 81; 1 Bulstr. 41; Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494; Downing v. Funk, 5 Rawle (Pa.) 69; Hakes v. Hotchkiss, 23 Vt. 235; Morgan v. Bank, 44 Ill. App. 582; 18 C. B. 273; Calkins v. Chandler, 36 Mich. 320, 24 Am. Rep. 593; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Edgerton v. Weaver, 105 Ill. 43; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39. "If an intending litigant *bona fide* forbears the right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value." Lord Bowen in 32 Ch. Div. 266, 291. An agreement to forbear suit, though for an indefinite period, is sufficient consideration; Traders' Nat. Bank of San Antonio v. Parker, 130 N. Y. 415, 29 N. E. 1094; Mathews v. Seaver, 34 Neb. 592, 52 N. W. 283; Lancaster v. Elliot, 42 Mo. App. 503.

An invalid or not enforceable agreement to forbear is not a good consideration; suit may be brought immediately after the promise is made. The forbearance must be an enforceable agreement for a reasonable time; Hardr. 5; 4 M. & W. 795; King v. Upton, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; Rix v. Adams, 9 Vt. 233, 31 Am. Dec. 619; L. R. 8 Eq. 36; Tucker v. Ronk, 43 Ia. 80; Prater v. Miller, 25 Ala. 320, 60 Am. Dec. 521; Kidder v. Blake, 45 N. H. 530; Mulholland v. Bartlett, 74 Ill. 58; Cline v. Templeton, 78 Ky. 550. But if a meritorious claim is made in good faith, a forbearance to prosecute it may be a good consideration for a promise, although on the facts or on the law the suit would have failed of success; L. R. 5 Q. B. 449; Rue v. Meirs, 43 N. J. Eq. 377, 12 Atl. 369; 25 L. T. R. 504; 32 Ch. Div. 269; Hewett v. Currier, 63 Wis. 387, 23 N. W. 884; Fish v. Thomas, 5 Gray (Mass.) 45, 66 Am. Dec. 348; 10 Harv. L. Rev. 113.

Forbearance to prosecute a claim honestly made but not legally valid is no consideration for a promise; Price v. Bank, 62 Kans. 743, 64 Pac. 639.

The prevention of litigation is a valid and sufficient consideration; for the law favors the settlement of disputes. Thus, a compromise or mutual submission of demands to arbitration is a highly favored consideration at law; Van Dyke v. Davis, 2 Mich. 145; Zane's Devisees v. Zane, 6 Munf. (Va.) 406; Taylor v. Patrick, 1 Bibb (Ky.) 168; Truett v. Chaplin, 11 N. C. 178; Stoddard v. Mix, 14 Conn. 12; Barlow v. Ins. Co., 4

Metc. (Mass.) 270; Burnham v. Dunn, 35 N. H. 556; Blake v. Peck, 11 Vt. 483; Field v. Weir, 28 Miss. 56; Mayo v. Gardner, 49 N. C. 359; Pounds v. Richards, 21 Ala. 424; Stoddart v. Mix, 14 Conn. 12; Banks v. Searles, 2 McMull. (S. C.) 356; Coleman v. Frum, 3 Scam. (Ill.) 378; Clarke v. McFarland's Ex'rs, 5 Dana (Ky.) 45; 21 E. L. & Eq. 199; 5 B. & Ald. 117; Battle v. McArthur, 49 Fed. 715; Robson v. Logging Co., 43 Fed. 364; White v. Hoyt, 73 N. Y. 514; Barnes v. Ryan, 66 Hun 170, 21 N. Y. Supp. 127; Swem v. Green, 9 Colo. 358, 12 Pac. 202; Moon v. Martin, 122 Ind. 211, 23 N. E. 668; 32 Ch. D. 266.

The giving up a suit instituted to try a question respecting which the law is doubtful, or is supposed by the parties to be doubtful, is a good consideration for a promise; Poll. Contr. 180; Leake, Contr. 626; L. R. 5 Q. B. 241; Hunter v. Lanius, 82 Tex. 677, 18 S. W. 201; Hamaker v. Eberley, 2 Binn. (Pa.) 509, 4 Am. Dec. 477; 2 C. B. 548; 4 East 455; Feeter v. Weber, 78 N. Y. 334; Parker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Livingston v. Smith, 5 Pet. (U. S.) 98, 8 L. Ed. 57; Easton v. Easton, 112 Mass. 438; Grandin v. Grandin, 49 N. J. Law, 508, 9 Atl. 756, 60 Am. Rep. 642; Feeter v. Weber, 78 N. Y. 334; Prout v. Fire Dist., 154 Mass. 453, 28 N. E. 679, and cases cited.

Incurring a legal liability to a third party is a valid consideration for a promise by the party at whose request the liability was incurred; L. R. 8 Eq. 134.

Refraining from the use of liquor and tobacco for a certain time at the request of another, is a sufficient consideration for a promise by the latter to pay a sum of money; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693.

The assignment of a debt or chose in action (unless void by reason of maintenance) with the consent of the debtor, is a good consideration for the debtor's promise to pay the assignee. It is merely a promise to pay a debt due, and the consideration is the discharge of the debtor's liability to the assignor; 4 B. & C. 525; 13 Q. B. 548; Whittle v. Skinner, 23 Vt. 532; Harrison v. Knight, 7 Tex. 47; Edson v. Fuller, 22 N. H. 185; 10 J. B. Moo. 34; 2 Bingh. 437; 1 Cr. M. & R. 430; Morse v. Bellows, 7 N. H. 549, 28 Am. Dec. 372. Work and service are perhaps the most common considerations.

In the case of deposit or mandate it was once held that there was no consideration; Yelv. 4, 128; Cro. Eliz. 883; the reverse is now usually maintained; 10 J. B. Moo. 192; 2 M. & W. 143; M'Cl. & Y. 205; Robinson v. Threadgill, 35 N. C. 39; Clark v. Gaylord, 24 Conn. 484; Coggs v. Bernard, 1 Sm. Lead. Cas. 354.

In these cases there does not appear to be any benefit arising from the bailment to the promisor. The definitions of mandate and deposit exclude this. Nor does any injury at the time accrue to the promisee; the bailment is for his benefit entirely.

Trust and confidence in another are said to be the considerations which support this contract. But we think parting with the possession of a thing may be considered an injury to the promisee, for which the prospect of return was the consideration held out by the promisor.

Mutual promises made at the same time are concurrent considerations, and will support each other if both be legal and binding; Cro. Eliz. 543; 6 B. & C. 255; 3 B. & Ad. 703; 3 E. L. & Eq. 420; Dorsey v. Packwood, 12 How. (U. S.) 126, 13 L. Ed. 921; Babcock v. Wilson, 17 Me. 372, 35 Am. Dec. 263; Forney v. Shipp, 49 N. C. 527; Nott v. Johnson, 7 Ohio St. 270; Cherry v. Smith, 3 Humphr. (Tenn.) 19, 39 Am. Dec. 150; Miller v. Drake, 1 Cai. (N. Y.) 45; Howe v. O'Mally, 5 N. C. 287, 3 Am. Dec. 693; McKinley v. Watkins, 13 Ill. 140; Byrd v. Fox, 8 Mo. 574; Flanders v. Wood, 83 Tex. 277, 18 S. W. 572; Earle v. Angell, 157 Mass. 294, 32 N. E. 164; Bracco v. Tighe, 75 Hun 140, 27 N. Y. Supp. 34. Yet the promise of an infant is a consideration for the promise of an adult. The infant may avoid his contract, but the adult cannot; Boyden v. Boyden, 9 Metc. (Mass.) 519; McGinn v. Shaeffer, 7 Watts (Pa.) 412; Hunt v. Peake, 5 Cow. (N. Y.) 475, 15 Am. Dec. 475; Pool v. Pratt, 1 D. Chipm. (Vt.) 252; Cannon v. Alsbury, 1 A. K. Marsh. (Ky.) 76, 10 Am. Dec. 709; Eubanks v. Peak, 2 Bail. (S. C.) 497; 3 Maule & S. 205. While a contract is executory, an agreement by one party to modify it is a consideration for a like agreement by the other; Dickson v. Owens, 134 Ill. App. 561; and a contract of employment is not lacking in mutuality because the party employed does not bind himself to continue in the employment for a definite period; Newhall v. Printing Co., 105 Minn. 44, 117 N. W. 228, 20 L. R. A. (N. S.) 899.

Marriage is a *valuable* consideration; Whelan v. Whelan, 3 Cow. (N. Y.) 537; Huston's Adm'r v. Cantril, 11 Leigh (Va.) 136; Magniac v. Thompson, 7 Pet. (U. S.) 348, 8 L. Ed. 709; Donallen v. Lennox, 6 Dana (Ky.) 89; 2 D. F. & J. 566; Edwards v. Martin, 39 Ill. App. 145; Prignon v. Doussat, 4 Wash. 199, 29 Pac. 1046, 31 Am. St. Rep. 914; Whitehill's Lessee v. Lousey, 2 Yeates (Pa.) 109; Nally v. Nally, 74 Ga. 669, 58 Am. Rep. 458. A promise by one to support another in consideration of the other party's release of the first party from his promise to marry her, is valid and enforceable; Henderson v. Spratlen, 44 Colo. 278, 98 Pac. 14, 19 L. R. A. (N. S.) 655.

Subscriptions to shares in a chartered company are said to rest upon sufficient consideration; for the company is obliged to give the subscriber his shares, and he must

pay for them; Pars. Contr. 377; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; New Bedford & B. Turnpike Corp. v. Adams, 8 Mass. 138, 5 Am. Dec. 81; Curry v. Rogers, 21 N. H. 247; Kennebec & P. R. Co. v. Jarvis, 34 Me. 360; Barnes v. Perine, 15 Barb. (N. Y.) 249; Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

On the subject of voluntary subscriptions for charitable purposes there is much confusion among the authorities; Ives v. Sterling, 6 Metc. (Mass.) 310. A promise of a subscription for the purchase of a church site, followed by the subsequent contract of the church for the land, is supported by a valid consideration; First Universalist Church v. Pungs, 126 Mich. 670, 86 N. W. 235. See SUBSCRIPTION.

Illegal considerations can be no foundation for a contract. Violations of morality, decency, and policy are in contravention of common law: as, contracts to commit, conceal, or compound a crime. So, a contract for *future* illicit intercourse, or in fraud of a third party, will not be enforced. *Ex turpi contractu non oritur actio.* But the act in question is not always a criterion; e. g. as to immoral considerations that which the law considers is whether the promise has a tendency to produce immoral results; hence while a promise of future illicit cohabitation is an illegal consideration; L. R. 16 Eq. 275; Boigneres v. Boulon, 54 Cal. 146; Baldy v. Stratton, 11 Pa. 316; Harriman, Cont. 114; but a promise founded upon past illicit cohabitation is not illegal; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; but simply voluntary and governed by the same rules as other past executed considerations; Poll. Cont. 262. The illegality created by statute exists when the statute either expressly prohibits a particular thing, or affixes a penalty which implies prohibition, or implies such prohibition from its object and nature; 10 Ad. & E. 815; Donallen v. Lennox, 6 Dana (Ky.) 91; Brown's Adm'rs v. Langford's Adm'rs, 3 Bibb (Ky.) 500; Town of Hinesburgh v. Sumner, 9 Vt. 23, 31 Am. Dec. 599; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468; Deering v. Chapman, 22 Me. 488, 39 Am. Dec. 592; Gamble v. Grimes, 2 Ind. 392; President, etc., of Springfield Bank v. Merrick, 14 Mass. 322; Sharp v. Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Aspinwall v. Meyer, 2 Sandf. (N. Y.) 186; Hale v. Henderson, 4 Humphr. (Tenn.) 199; Lewis v. Welch, 14 N. H. 294; Caldwell v. Wentworth, *id.* 435; Cornwell v. Holly, 5 Rich. (S. C.) 47; Solomons v. Jones, 3 Brev. (S. C.) 54, 5 Am. Dec. 538; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759. If any part of the consideration is void as against the law, it is void *in toto;* Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Allen v. Pearce, 84 Ga. 606, 10 S. E. 1015; see Wilcox v. Daniels, 15 R. I. 261, 3 Atl. 204; Buck v. Abbee, 26 Vt. 184, 62 Am. Dec. 564; Widoe v. Webb, 20 Ohio St. 431, 5 Am. Rep. 664; Hazelton v. Sheckels, 202 U. S. 71, 26 Sup. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; but *contra*, if the promise be divisible and apportionable to any part of the consideration, the promise so far as not attributable to the illegal consideration might be valid; Leake, Contr. 631; 2 M. & G. 167.

A contract founded upon an impossible consideration is void. *Lex neminem cogit ad vana aut impossibilia;* 5 Viner, Abr. 110, 111, *Condition* (C) *a*, (D) *a;* 1 Rolle, Abr. 419; Co. Litt. 206 *a;* 2 B. & C. 474; Leake, Contr. 719. But such impossibility must be a natural or physical impossibility; 7 Ad. & E. 798; Youqua v. Nixon, 1 Pet. C. C. 221, Fed. Cas. No. 18,189; 2 Moore & S. 89; 9 Bingh. 68; but it may be otherwise when the consideration is valid at the time the contract was formed, but afterwards became impossible; Leake, Contr. 719.

An executory consideration which has totally failed will not support a contract when the performance of the consideration forms a condition precedent to the performance of the promise; 2 C. B. 548; New York Life Ins. Co. v. Beebe, 7 N. Y. 369; Fowler v. Shearer, 7 Mass. 14; Woodward v. Cowing, 13 Mass. 216; Pettibone v. Roberts, 2 Root (Conn.) 258; Dean v. Mason, 4 Conn. 428, 10 Am. Dec. 162; Boyd v. Anderson, 1 Ov. (Tenn.) 438, 3 Am. Dec. 762; Treat v. Inhabitants of Orono, 26 Me. 217; Charlton v. Lay, 5 Humphr. (Tenn.) 496; Cabot v. Haskins, 3 Pick. (Mass.) 83; Jarvis v. Sutton, 3 Ind. 289. Sometimes when the consideration partially fails, the appropriate part of the agreement may be apportioned to what remains, if the contract is capable of being severed; 4 Ad. & E. 605; 8 M. & W. 870; Parish v. Stone, 14 Pick. (Mass.) 198, 25 Am. Dec. 378; Carleton v. Woods, 28 N. H. 290; Frazier v. Thompson, 2 W. & S. (Pa.) 235; L. R. 10 Q. B. 491; 1 Q. B. Div. 679; Wilson v. Hentges, 26 Minn. 288, 3 N. W. 338. See BREACH.

A past consideration will not generally be sufficient to support a contract. It is something done before the obligor makes his promise, and, therefore, cannot be a foundation for that promise, unless it has been executed at the request (express or implied) of the promisor. Such a request plainly implies a promise of fair and reasonable compensation; L. R. 8 Ch. 888; Carson v. Clark, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; Doty v. Wilson, 14 Johns. (N. Y.) 378; Gleason v. Dyke, 22 Pick. (Mass.) 393; Hayden v. Inhabitants of Madison, 7 Greenl. (Me.) 76; Abbot v. Third School Dist., 7 Greenl. (Me.) 118; Comstock v. Smith, 7 Johns. (N. Y.) 87; Bulkley v. Landon, 2 Conn. 404; 1 Sm. Lead. Cas. 144, note to Lampleigh v. Brathwait. But a pre-existing obligation will support a promise to perform

that obligation which the law, in the case of a debt, will imply; Harriman, Contr. 83; 5 M. & W. 541; but a past consideration which did not raise an obligation at the time it was furnished, will support no promise whatever; 3 Q. B. 234; Harriman, Contr. 83; where there has been a request for services, a subsequent promise to pay a definite sum for them is evidence of the actual value of the services; *id.* Where a creditor gives an extension of time for payment of a pre-existing debt and takes a mortgage as security he is a purchaser for value; O'Brien v. Fleckenstein, 180 N. Y. 350, 73 N. E. 30, 105 Am. St. Rep. 768; the promise to pay for another's past services to and support of defendant's mother during an illness is valid; Montgomery v. Downey, 116 Ia. 632, 88 N. W. 810; but an agreement to take up a past due note without additional consideration or a request or promise of forbearance against the maker is without consideration; J. H. Queal & Co. v. Peterson, 138 Ia. 514, 116 N. W. 593, 19 L. R. A. (N. S.) 842.

As to time, considerations may be of the past, present, or future. Those which are present or future will support a contract not void for other reasons; Story, Contr. 71. When the consideration is to do a thing hereafter, and the promise has been accepted, and a promise in return founded upon it, the latter promise rests upon sufficient foundation, and is obligatory; Stewart v. Redditt, 3 Md. 67; Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253; Andrews v. Pontue, 24 Wend. (N. Y.) 285; Gardner v. Webber, 17 Pick. (Mass.) 407.

The adequacy of the consideration is generally immaterial; L. R. 5 Q. B. 87; 8 A. & E. 745; L. R. 7 Ex. 235; 5 C. B. N. S. 265; 24 L. J. C. P. 271; 16 East 372; Hesser v. Steiner, 5 W. & S. (Pa.) 476; Downing v. Funk, 5 Rawle (Pa.) 69; excepting formerly in England before 31 & 32 Vict. c. 4, in the case of the sale of a reversionary interest or where the inadequacy of the consideration is so gross as of itself to prove fraud or imposition; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181. There is no case where mere inadequacy of price, independent of other circumstances has been held sufficient to set aside a contract between parties standing on equal ground and dealing with each other without imposition or oppression; Hind v. Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107; Williams v. Jensen, 75 Mo. 681; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Wells v. Tucker, 57 Vt. 227; Worth v. Case, 42 N. Y. 369. The adequacy of the consideration does not affect the contract; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; but the consideration must be real and not merely colorable; one cent has been held not to be a sufficient consideration for a promise to pay $700; Schnell v. Nell, 17 Ind. 29, 79 Am. Dec. 453; and $1 has been held insufficient to support a promise to pay $1000; Shepard v. Rhodes, 7 R. I. 470, 84 Am. Dec. 573; a dollar would be a sufficient consideration for any promise except one to pay a larger sum of money absolutely; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326. A fully executed contract will not be disturbed for want of consideration; Lamb's Estate v. Morrow, 140 Ia. 89, 117 N. W. 1118, 18 L. R. A. (N. S.) 226.

See note to Chesterfield v. Jannsen in 1 W. & T. Lead. Cas.; CONTRACT.

CONSIDERATUM EST PER CURIAM (Lat. it is considered by the court). A formula used in giving judgments.

A judgment is the decision or sentence of the law, given by a court of justice, as the result of proceedings instituted therein for the redress of an injury. The language of the judgment is not, therefore, that "it is decreed," or "resolved," by the court, but that "it is considered by the court," *considera-tum est per curiam*, that the plaintiff recover his debt, etc.

In the early writers, *considerare*, *consideratio* always means the judgment of a court. This usage was preserved down to our time in the judgment of the common-law courts in the form "It is considered," which, as Sir Frederick Pollock says, was for no obvious reason altered to "It is adjudged," in the Judicature Acts. Poll. Contr. 177. "Adjudged" was current with text-writers from the 16th century onward.

CONSIGN. To send goods to a factor or agent. See Gillespie v. Winberg, 4 Daly (N. Y.) 320.

In Civil Law. To deposit in the custody of a third person a thing belonging to the debtor, for the benefit of the creditor, under the authority of a court of justice. Pothier, Obl. pt. 3, c. 1, art. 8.

The term to consign, or consignation, is derived from the Latin *consignare*, which signifies to seal; for it was formerly the practice to seal up the money thus received in a bag or box. Aso & M. Inst. b. 2, t. 11, c. 1, § 5.

Generally, the consignation is made with a public officer: it is very similar to our practice of paying money into court. See Burge, Surety.

CONSIGNATIO. See CONSIGN.

CONSIGNEE. One to whom a consignment is made.

It is usual in bills of lading to state that the goods are to be delivered to the consignee or his assigns, he or they paying freight: in such case the consignee or his assigns, by accepting the goods, by implication become bound to pay the freight; Du Peirat v. Wolfe, 29 N. Y. 436; Dart v. Ensign, 47 N. Y. 619; 3 Bingh. 383.

CONSIGNMENT. The goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignees, who are in another. The goods sent by one person to another, to be sold or

disposed of by the latter for and on account of the former. The transmission of the goods.

CONSIGNOR. One who makes a consignment.

CONSILIARIUS (Lat. *consiliare*, to advise). In Civil Law. A counsellor, as distinguished from a pleader or advocate. An assistant judge. One who participates in the decisions. Du Cange.

CONSILIUM (called, also, *Dies Consilii*). A day appointed to hear the counsel of both parties. A case set down for argument.

It is commonly used for the day appointed for the argument of a demurrer, or errors assigned; 1 Tidd, Pr. 438; 2 *id.* 684, 1122; 1 Sell. Pr. 336; 1 Archb. Pr. 191, 246.

CONSIMILI CASU (Lat. in like case). A writ of entry, framed under the provisions of the statute Westminster 2d (13 Edw. I.), c. 24, which lay for the benefit of the reversioner, where a tenant by the curtesy alienated in fee or for life; 3 Bla. Com., 4th Dublin ed. 183 n.; Bac. Abr. Court of Chancery (A).

Many other new writs were framed under the provisions of this statute; but this particular writ was known emphatically by the title here defined. The writ is now practically obsolete. See 3 Bla. Com. 51; CASE; ASSUMPSIT.

CONSISTOR. A magistrate. Jacob L. D.

CONSISTORY. An assembly of cardinals convoked by the pope.

The consistory is either public or secret. It is *public* when the pope receives princes or gives audience to ambassadors; *secret* when he fills vacant sees, proceeds to the canonization of saints, or judges and settles certain contestations submitted to him.

A tribunal (*prætorium*).

CONSISTORY COURT. The courts of diocesan bishops held in their several cathedrals (before the bishop's chancellor, or commissary, who is the judge) for the trial of all ecclesiastical causes arising within their respective dioceses, and also for granting probates and administrations. Originally the "Chancellor" or "Official" of the bishop usually presided. In time he came to be a permanent judge, but the bishop could withdraw cases from his cognizance and hear them himself, or delegate jurisdiction over certain parts of the diocese to his "commissary"; 1 Holdsw. Hist. E. L. 369, citing L. R. 1902, 1 K. B. 816. A Consistory Court of London still exists. From the sentence of these courts an appeal lies to the Provincial Court of the archbishop of each province respectively. 2 Steph. Com. 230; 3 *id.* 430; 3 Bla. Com. 64; 1 Woodd. Lect. 145; Halifax, An. b. 3, c. 10, n. 12.

CONSOLATO DEL MARE. See CODE.

CONSOLIDATE. To unite into one distinct things or parts of a thing. In a general sense, to unite into one mass or body, as to consolidate the forces of an army or various funds. In parliamentary usage, to consolidate two bills is to unite them into one. In law, to consolidate benefices, actions, or corporations is to combine them into one. See Independent Dist. of Fairview v. Durland, 45 Ia. 56.

CONSOLIDATED FUND. In England. (Usually abbreviated to *Consols.*) A fund for the payment of the public debt.

Formerly, when a loan was made by government, a particular part of the revenue was appropriated for the payment of the interest and principal. This was called the fund; and every loan had its fund. In this manner the Aggregate fund originated in 1715; the South-Sea fund in 1717; the General fund in 1717; and the Sinking fund, into which the surplus of these flowed, which, although intended for the diminution of the debt, was applied to the necessities of the government. These four funds were consolidated into one in the year 1787; and this fund is the Consolidated fund.

It is wholly appropriated to the payment of certain specific charges and the interest on the sums originally lent the government by individuals, which yield an annual interest of three per cent. to the holders. The principal of the debt is to be returned only at the option of the government.

CONSOLIDATION. In Civil Law. The union of the usufruct with the estate out of which it issues, in the same person; which happens when the usufructuary acquires the estate, or *vice versa*. In either case the usufruct is extinct. Lec. Elm. Dr. Rom. 424.

CONSOLIDATION OF CORPORATIONS. See MERGER.

CONSOLIDATION RULE. An order of the court requiring the plaintiff to join in one suit several causes of action against the same defendant which may be so joined consistently with the rules of pleading, but upon which he has brought distinct suits. Brown v. Scott, 1 Dall. (Pa.) 147, 1 L. Ed. 74; Groff v. Musser, 3 S. & R. (Pa.) 264; 2 Archb. Pr. 180. The matter is regulated by statute in many of the states.

It may take place in two ways: first, by the usufructuary surrendering his right to the proprietor, which in the common law is called a surrender; secondly, by the release of the proprietor of his rights to the usufructuary, which in our law is called a release.

In Ecclesiastical Law. The union of two or more benefices in one. Cowell.

In Practice. The union of two or more actions in the same declaration.

An order of court, issued in some cases, restraining the plaintiff from proceeding to trial in more than one of several actions brought against different defendants but involving the same rights, and requiring the defendants also, in such actions, to abide the event of the suit which is tried. It is in reality in this latter case a mere stay of proceedings in all the cases but one.

It is often issued where separate suits are brought against several defendants founded upon a policy of insurance; 2 Marsh. Ins. 701; see Jackson v. Schauber, 4 Cow. (N. Y.) 78; Sherman v. McNitt, *id.* 85; or against several obligors in a bond; 3 Chit. Pr. 645;

3 C. & P. 58. See Scott v. Brown, 1 N. & McC. (S. C.) 417, note; Powell v. Gray, 1 Ala. 77; Dews v. Eastham, 5 Yerg. (Tenn.) 297; Sykes v. Ins. Co., 7 Mo. 477; Den v. Fen, 9 N. J. L. 335; Groff v. Musser, 3 S. & R. (Pa.) 262; Farmers' & Manufacturers' Bank v. Tracy, 19 Wend. (N. Y.) 23.

A court may consolidate actions for trial when they involve the same property and the same questions of law and fact and the parties are the same; Welch v. Lynch, 30 App. D. C. 122.

Where two actions arose upon the same transaction, one for trespass against defendant's property, another against his person, and might have been joined, the court ordered them tried at the same time; Holmes v. Sheridan, 1 Dill. 351, Fed. Cas. No. 6,644.

When two actions are consolidated, the original actions are discontinued and only the consolidated action remains; Hiscox v. New Yorker Staats Zeitung, 30 Abb. N. C. (N. Y.) 131; *id.*, 3 Misc. Rep. 110, 23 N. Y. Supp. 682.

The Federal courts are authorized to consolidate actions of a like nature, or relative to the same question, as they may deem reasonable; Rev. Stat. § 921.

CONSOLS. See CONSOLIDATED FUND.

CONSORTIUM (Lat. a union of lots or chances). A lawful marriage. Union of parties in an action.

The right of the husband and wife respectively to the conjugal fellowship, company, cooperation and aid of the other.

Company; companionship.

It occurs in this last sense in the phrase *per quod consortium amisit* (by which he has lost the companionship), used when the plaintiff declares for any bodily injury done to his wife by a third person; 3 Bla. Com. 140.

It is not property, but "a marital right growing out of the marriage relation"; Hodge v. Wetzler, 69 N. J. L. 490, 55 Atl. 49; but is treated as property in a broader sense in some cases; Jaynes v. Jaynes, 39 Hun (N. Y.) 40; Deitzman v. Mullin, 108 Ky. 610, 57 S. W. 247, 50 L. R. A. 808, 94 Am. St. Rep. 390; Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. "It usually includes the person's affection, society and aid," and, as to it, the husband and wife are equal; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553, where the term is discussed at length. See HUSBAND AND WIFE.

CONSPIRACY (Lat. *con*, together, *spiro*, to breathe). A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. Pettibone v. U. S., 148 U. S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346; People v. Mather, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122; State v. Burnham, 15 N. H. 396; State v. Buchanan, 5 H. & J. (Md.) 317, 9 Am. Dec. 534; Collins v. Com., 3 S. & R. (Pa.) 220; Stale v. Rowley, 12 Conn. 101; 11 Cl. & F. 155; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Breitenberger v. Schmidt, 38 Ill. App. 168.

Lord Denman defines conspiracy as a combination for accomplishing an unlawful end or a lawful end by unlawful means; 4 B. & Ad. 345.

Criminal Conspiracy. Conspiracies formed to commit crimes, or to do anything unlawful, were first treated as substantive offenses by the Star Chamber; 2 Steph. H. C. L. 227; before that, a conspiracy only extended to taking civil and criminal proceedings maliciously; 3 Holdsw. H. E. L. 313. In a prosecution for a conspiracy at common law it was neither necessary to aver nor to prove an overt act; Bannon v. U. S., 156 U. S. 468, 15 Sup. Ct. 467, 39 L. Ed. 494. So long as the design to do an unlawful act, or to do a lawful act by unlawful means, rests in intention only, it is not indictable; but when two or more agree to carry it into effect, the very plot is an act in itself and the act of each of the parties, promise against promise, act against act; L. R. 3 H. L. 317, approved in [1901] A. C. 529; [1905] 2 K. B. 746.

An indictment for a conspiracy to compass or promote a criminal or unlawful purpose must set forth that purpose, fully and clearly; and an indictment for a conspiracy to compass or promote a purpose not in itself criminal or unlawful, by the use of criminal or unlawful means, must set forth the means intended to be used; Com. v. Hunt, 4 Metc. (Mass.) 111, 38 Am. Dec. 346.

The participation in a common plan by two or more persons is not in itself a criminal conspiracy; in order to make it such, the motives of those who enter into the combination must be corrupt; People v. Flack, 125 N. Y. 324, 26 N. E. 267, 11 L. R. A. 807; Wood v. State, 47 N. J. L. 461, 1 Atl. 509; but if one member of the combination has no corrupt motive when entering into it, but afterward becomes aware of its illegality and remains a member, he is criminally liable; U. S. v. Mitchell, 1 Hughes 439, Fed. Cas. No. 15,790. So persons who agree in good faith to do an act innocent in itself do not become guilty of conspiracy if it is afterwards ascertained that the act is forbidden by statute; People v. Powell, 63 N. Y. 88.

In the definitions the terms criminal or unlawful are used, because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by numbers to do them is an unlawful conspiracy and punishable by indictment; Stale v. Rowley, 12 Conn. 101; State v. Burnham, 15 N. H. 396; People v. Richards, 1 Mich. 216, 51 Am. Dec. 75; 11

Q. B. 245; Twitchell v. Com., 9 Pa. 211; State v. Shooter, 8 Rich. (S. C.) 72.

Of this character was a conspiracy to cheat by false pretences without false tokens, when a cheat by false pretences only by a single person was not a punishable offence; 11 Q. B. 245. So a combination to destroy the reputation of an individual by verbal calumny of itself is not indictable; per Shaw, C. J., Com. v. Hunt, 4 Metc. (Mass.) 123, 38 Am. Dec. 346. So a conspiracy to induce and persuade a young woman, by false representations, to leave the protection of her parent's house, with a view to facilitate her prostitution; Mifflin v. Com., 5 W. & S. (Pa.) 461, 40 Am. Dec. 527; 2 Den. C. Cas. 79; and to procure an unmarried girl of seventeen to become a prostitute; 4 F. & F. 160; to procure a woman to be married by a mock ceremony, whereby she was seduced; State v. Savoye, 48 Ia. 562. And see Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Murphy, 6 Ala. 765, 41 Am. Dec. 79. So a conspiracy, by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; 1 Dearsl. 337. A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; 1 F. & F. 33.

The obtaining of goods on credit by an insolvent person without disclosing his insolvency, and without having any reasonable expectation of being able to pay for such goods in and by means of the fair and ordinary course of his business, is not of itself such an unlawful act as may be the subject of an action for conspiracy; though it would be otherwise, it seems, in the case of a purchase made without any expectation of payment. But the obtaining possession of goods under the pretence of paying cash for them on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use in fraud of the seller, is such a fraud or cheat as may be the subject of a charge of conspiracy; Com. v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596.

A combination to go to a theatre to hiss an actor; 2 Campb. 369; 6 Term 628; to indict for the purpose of extorting money; 4 B. & C. 329; to charge a person with being the father of a bastard child; 1 Salk. 174; to coerce journeymen to demand a higher rate of wages; 6 Term 619; People v. Fisher, 14 Wend. (N. Y.) 9, 28 Am. Dec. 501; to charge a person with poisoning another; F. Moore 816; to affect the price of public stocks by false rumors; 3 M. & S. 67; to prevent competition at an auction; 6 C. & P. 239; to cheat by a fraudulent prospectus of a projected company and by false accounts; 11 Cox, Cr. Ca. 414; by false accounts between partners; L. R. 1 C. C. 274; by a mock auction; 11 Cox, Cr. Ca. 404; have each been held indictable for conspiracy; as was an association of retail coaldealers in a city to fix prices and prevent a person not a member from obtaining coal from wholesalers; People v. Sheldon, 66 Hun 590, 21 N. Y. Supp. 859; *id.*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221, 36 Am. St. Rep. 690. So it is a crime for two or more persons to conspire to cheat and defraud another out of his property, but in such case the indictment must set forth the means proposed to be used to accomplish the purpose; U. S. v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588.

In order to render the offence complete, it is not necessary that any act should be done in pursuance of the unlawful agreement entered into between the parties, or that any one should have been defrauded or injured by it. The conspiracy is the gist of the crime; 9 Co. 55; 28 L. T. N. S. 75; Com. v. Judd, 2 Mass. 337, 3 Am. Dec. 54; Com. v. Tibbetts, 2 Mass. 538; Collins v. Com., 3 S. & R. (Pa.) 220; People v. Mather, 4 Wend. (N. Y.) 259, 21 Am. Dec. 122; State v. Norton, 23 N. J. L. 33; Steele v. Kinkle, 3 Ala. 360; State v. Buchanan, 5 Harr. & J. (Md.) 317, 9 Am. Dec. 534; State v. Brady, 107 N. C. 822, 12 S. E. 325; U. S. v. Lancaster, 44 Fed. 896, 10 L. R. A. 333. But see Torrey v. Field, 10 Vt. 353. Where persons enter on an unlawful purpose, with the intent to aid or encourage each other in carrying out their design, they are each criminally responsible for everything resulting from such purpose whether specifically contemplated or not; Turner v. State, 97 Ala. 57, 12 South. 54; Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077.

It is a crime for several persons, out of malice, to agree to induce many others not to enter into contracts with a certain person; see [1901] A. C. 531; or for strangers to a contract, and without just excuse, to combine in inducing a breach of it; [1905] A. C. 239; otherwise, in most cases, if they act merely out of self-interest; see 23 Q. B. D. 618. That may be unlawful if done by several, which is not if done by one; [1892] A. C. 45, per Lord Bramwell. One may be indicted alone for a conspiracy "with other persons to the jury unknown"; 94 L. T. 887.

A criminal conspiracy as boycotting, may arise out of acts which in themselves might be done by one person without preconcert with others. The parties must be numerous; they must be actuated by ill-will, and their conduct must be calculated to do harm to the person intended; 14 Cox 505.

Conspiracy may be proved by showing the declarations, acts and conduct of the conspirators; State v. Ryan, 47 Or. 338, 82 Pac. 703, 1 L. R. A. (N. S.) 862.

Where it is necessary that two persons concur in the commission of an act to make it a crime, as in case of bigamy, adultery or the like, the agreement is said to form part of the crime and not a conspiracy; Shannon

v. Com., 14 Pa. 226; Miles v. State, 58 Ala. 390; the combination, which is the essential of conspiracy, is not an aggravation of, but necessary to constitute, the offense, and probably such an agreement not coupled with an overt act would be a mere attempt; 2 Bish. Crim. L. (8th ed.) § 184, n. 4, cited in 20 Harv. L. Rev. 63, where the matter is illustrated by U. S. v. Guilford, 146 Fed. 298, where the indictment was for conspiracy to violate the Elkins act in giving and taking rebates and the fact was proved, there being three takers and two givers besides two other persons who were go-betweens or agents. It was held not a conspiracy, upon the principle stated.

Where three defendants were jointly arraigned on a charge of conspiracy, and one of them pleaded guilty and the other two were acquitted on pleas of not guilty, it was held that the judgment against the one who pleaded guilty must be vacated; [1902] 2 K. B. 339; this rule it has been said was "tacitly assumed by the early English decisions, and has been expressly recognized by the later ones." 1 Stra. 193; 5 B. & C. 538; 12 Q. B. D. 241; 16 Q. B. 832. The same rule is adopted in some states in certain cases in which the offense was necessarily a joint one committed by two persons; Turpin v. State, 4 Blackf. (Ind.) 72; State v. Mainor, 28 N. C. 340; State v. Rinehart, 106 N. C. 787, 11 S. E. 512; and repudiated in others; Alonzo v. State, 15 Tex. App. 378, 49 Am. Rep. 207; State v. Caldwell, 8 Baxt. (Tenn.) 576. It is argued in a note on the subject that the last two cases are more in accord with reason; as one defendant might be a party to a joint act without criminal intent, and in the first English case cited the plea of guilty outweighs the verdict, which means nothing more than not proven; 16 Harv. L. Rev. 142.

Civil Liability. It is an early saying in the law that a conspiracy of itself gives no cause of action. There must be some overt act by one of the parties to the injury of another, Bowen v. Matheson, 14 Allen (Mass.) 499 (though there is a *dictum, contra,* in Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141); Hutchins v. Hutchins, 7 Hill (N. Y.) 104; Bush v. Sprague, 51 Mich. 41, 16 N. W. 222; Hauser v. Tate, 85 N. C. 81, 39 Am. Rep. 689; 1 Ld. Raym. 374; and an act which is lawful when committed by one will not be rendered unlawful when two or more conspire to do it; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210, 6 L. R. A. 629, 15 Am. St. Rep. 230; Martens v. Reilly, 109 Wis. 464, 84 N. W. 840; De Wulf v. Dix, 110 Ia. 553, 81 N. W. 779; Adler v. Fenton, 24 How. (U. S.) 407, 16 L. Ed. 696; [1898] 1 Q. B. 181; but it is held otherwise in Cote v. Murphy, 159 Pa. 420, 28 Atl. 190, 23 L. R. A. 135, 39 Am. St. Rep. 686; and this is supported by a *dictum* in State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700.

Civil actions have been sustained for conspiracies to injure in person or reputation, as by maliciously prosecuting; Dreux v. Domec, 18 Cal. 83; or by making false charges; Irvine v. Elliott, 206 Pa. 152, 55 Atl. 859; or to injure one in property or business; Van Horn v. Van Horn, 52 N. J. L. 284, 20 Atl. 485, 10 L. R. A. 184; Garst v. Charles, 187 Mass. 144, 72 N. E. 839; Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739, 31 Am. Rep. 415; Casey v. Typographical Union No. 3, 45 Fed. 135, 12 L. R. A. 193; [1893] 1 Q. B. 715; Martell v. White, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; as by fraudulent use of legal proceedings; Verplanck v. Van Buren, 76 N. Y. 247.

An association of ship owners to secure a profitable and exclusive carrying trade, having agreed to limit the number of ships to be sent by members, and to allow a rebate on freights to all shippers who dealt only with members, is not an actionable conspiracy, as it was done with the lawful object of protecting and increasing trade and profit and no unlawful means had been used; [1892] A. C. 25, where the House of Lords affirmed the judgment in 23 Q. B. D. 598, where the C. A. affirmed the judgment of Lord Coleridge in 21 Q. B. D. 544.

Corporations as Conspirators. The law of conspiracy is applicable to corporations, and a combination of corporations for an unlawful purpose, either as an end or means, is a conspiracy in any case where a combination of natural persons would be such, and the converse of the proposition is equally true; Noyes, Intercorp. Rel. § 326. "We entertain," said the New York Court of Appeals, "no doubt that an action against a corporation may be maintained to cover damages caused by a conspiracy," and "it is well settled . . . that the malice and wicked intent needful to sustain such action, may be imputed to such corporations"; Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 670, 12 N. E. 826; Transportation Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 88 Am. St. Rep. 895. Both of these were civil actions against the Standard Oil Company, but apparently the same reason should apply in making a corporation liable for criminal conspiracy as well as civil, and such was the opinion of Judge Noyes as expressed in the section of his text book above cited. But this view was authoritatively declared when an indictment and conviction of the same company (its individual co-defendant being acquitted) were sustained on appeal. The court said: "Corporations can unquestionably commit and be guilty of a criminal conspiracy denounced by the statute, as it so expressly enacts, and they, therefore, must be counted," and further that "independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents who engage in the conspiracy must be held to be

parties to it"; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015. Where it is provided, as in the laws of several states, that corporations as well as individuals shall be subject to the provisions of anti-trust laws the construction given to these laws has been that they "did not contemplate the commission of an offense by an impalpable abstraction, which could neither think nor act; but it was intended to bind this corporate entity by the imputed actions of its human agencies"; National Lead Co. v. Paint Store Co., 80 Mo. App. 247; State v. Ins. Co., 152 Mo. 37, 52 S. W. 595, 45 L. R. A. 363.

Conspiracy under Federal Laws. Conspiracies to prevent witnesses from testifying, to impede the course of justice, to hinder citizens from voting, to prevent persons from holding office, to defraud the United States by obtaining approval of false claims, to levy war against the United States, to impede the enforcement of the laws, etc., etc., are made punishable by acts of congress; U. S. R. S. Index, *Conspiracy.*

In the absence of damage, the simple act of conspiracy does not furnish ground for a civil action; Robertson v. Parks, 76 Md. 118, 24 Atl. 411.

After a conspiracy has come to an end, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429.

In a prosecution under U. S. R. S. § 5480, as amended, for a conspiracy to defraud by means of the postoffice, three matters of fact must be charged in the indictment and established by the evidence: 1. That the persons charged devised a scheme to defraud; 2. that they intended to effect this scheme by opening or intending to open correspondence with some other person through the postoffice establishment or by inciting such other person to open communication with them; 3. and that in carrying out such scheme such person must have either deposited a letter or packet in the postoffice, or taken or received one therefrom; Stokes v. U. S., 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667.

Where parties are on trial for conspiracy to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if brought home to them, and so, too, are acts and declarations of persons not parties to the record if it appears that they were made in carrying the conspiracy into effect; Clune v. U. S., 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269.

Under R. S. § 5440, the conspiracy to commit a crime against the United States is itself the offence, without reference to whether the crime is consummated, or agreed upon by the conspirators in all its details; an indictment charging the accused with a conspiracy to commit the crime of subornation of perjury was held in this case to be sufficient although the precise persons to be suborned, and the time and place of such suborning were not particularized; Williamson v. U. S., 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278. A conspiracy under that statute does not necessarily involve a direct pecuniary loss, but may exist to impair, obstruct or defeat the lawful function of any department of the government; Haas v. Henkel, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112. The words "unlawfully did conspire to defraud the United States," followed by a statement of the nature and purpose of the conspiracy and the acts done to effect its object, is sufficient; Wright v. U. S., 108 Fed. 805, 48 C. C. A. 37, where the subject is very fully discussed. It is a conspiracy under that act to do an act which Congress has made a crime, if two or more conspire to do it, and Congress may make the punishment for conspiring greater than for committing the crime itself; U. S. v. Stevenson, 215 U. S. 200, 30 Sup. Ct. 37, 54 L. Ed. 157.

The crime is complete when the conspiracy is shown; it is not necessary to aver that it succeeded; U. S. v. Greene, 115 Fed. 343.

Upon a charge of conspiracy to defraud, a somewhat wide latitude is always allowed in the introduction of circumstantial evidence to prove the intent; U. S. v. Greene, 108 Fed. 816.

The jurisdiction is in the district in which the conspiracy was entered into, although the overt act carrying it out is within another jurisdiction; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90.

Where a conspiracy had been formed more than the period of the statute of limitations before the indictment and an overt act is committed within the statutory period, if the existence of the conspiracy as well as the overt act are proved, the prosecution may be sustained; Ware v. U. S., 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233, where the subject is thoroughly discussed and the cases collected by Sanborn, C. J., and in a note to the last citation.

A federal court has no jurisdiction, under the 13th Amendment, of a charge of conspiracy made and carried out in a state to prevent its citizens of African descent because of their color and race from making or carrying out contracts and agreements of labor; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65.

On a bill alleging a malicious conspiracy to interfere with carrying the mails and with interstate commerce, an injunction may be granted to restrain the ordering or causing a strike of the carrier's employés; Wabash R. Co. v. Hannahan, 121 Fed. 563. No civil action lies for conspiracy, unless there be an

overt act that results in damage to the plaintiff; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. —.

Some writers consider that there is in this country a tendency to extend the doctrine of criminal conspiracy and utilize it for the indictment of persons suspected of crime of which there is difficulty in obtaining sufficient proof. This tendency is the subject of extended discussion in an article on "The Judge-Made Law of Conspiracy," by F. P. Blair, in 37 Am. L. Rev. 33, in which the author contends that there has been a departure from the common law upon this subject. It contains a valuable enumeration and discussion of the early English cases on the subject of conspiracy.

As to conspiracies in connection with labor and labor unions, see BOYCOTT; LABOR UNION; STRIKE; COMBINATION; RESTRAINT OF TRADE.

CONSPIRATORS. Persons guilty of a conspiracy.

CONSTABLE. An officer whose duty it is to keep the peace in the district which is assigned to him. See SHERIFF.

The most satisfactory derivation of the term and history of the origin of this office is that which deduces it from the French *comestable* (Lat. *comes stabuli*), who was an officer second only to the king. He might take charge of the army, wherever it was, if the king were not present, and had the general control of everything relating to military matters, as the marching troops, their encampment, provisioning, etc. Guyot, *Rép. Univ.*

The same extensive duties pertained to the constable of Scotland. Bell, Dict.

The duties of this officer in England seem to have been first fully defined by the stat. Westm. (13 Edw. I.); and question has been frequently made whether the office existed in England before that time. 1 Bla. Com. 356. It seems, however, to be pretty certain that the office in England is of Norman origin, being introduced by William, and that subsequently the duties of the Saxon tithing-men, borsholders, etc., were added to its other functions. See Cowell; Wilc. Const.; 1 Bla. Com. 356; 1 Poll. & M. 542.

High constables were first ordained, according to Blackstone, by the statute of Westminster, though they were known as efficient public officers long before that time. 1 Sharsw. Bla. Com. 356. They were appointed for each franchise or hundred by the leet, or, in default of such appointment, by the justices at quarter-sessions. Their first duty is that of keeping the king's peace. In addition, they are to serve warrants, return lists of jurors, and perform various other services enumerated in Coke, 4th Inst. 267; 3 Steph. Com. 47.

The parish constables, under various names, were probably the successors of the old reeves in the townships. In each hundred, and in many franchises, there were also high constables, or similar officers with other names, who corresponded with the parish constables in the townships. They continued to be appointed till of late years, but their duties became almost nominal, and were abolished practically in 1869. Parish constables continued to be appointed till 1872. Up to 1829 they were the only body of men, except the watchmen in cities and boroughs, charged with the duty of apprehending criminals and preventing crime. 1 Steph. Cr. L.

In some cities and towns in the United States there are officers called high constables, who are the principal police officers in their jurisdiction.

Petty constables are inferior officers in every town or parish, subordinate to the high constable. They perform the duties of headborough, tithing-man, or borsholder, and, in addition, their more modern duties appertaining to the keeping the peace within their town, village, or tithing.

In the United States, generally, petty constables only are retained, their duties being generally the same as those of constables in England prior to the 5 & 6 Vict. c. 109, including a limited judicial power as conservators of the peace, a ministerial power for the service of writs, etc., and some other duties not strictly referable to either of these heads. Their immunities and indemnities are proportioned to their powers, and are quite extensive. See 1 Sharsw. Bla. Com. 356, n.; ARREST.

CONSTABLE OF A CASTLE. The warden or keeper of a castle; the castellain. Stat. Westm. 1, c. 7 (3 Edw. I.); Spelman, Gloss.

The constable of Dover Castle was also warden of the Cinque Ports. There was besides a constable of the Tower, as well as other constables of castles of less note. Cowell; Lambard, Const.

CONSTABLE OF ENGLAND. His office consisted in the care of the common peace of the realm in deeds of arms and matters of war. Lambard, Const. 4.

He was to regulate all matters of chivalry, tournaments and feats of arms which were performed on horseback. 3 Steph. Com. 47. He held the court of chivalry, besides sitting in the *curia regis*. 4 Bla. Com. 92.

The office is disused in England, except on coronation-days and other such occasions of state, and was last held by the Duke of Buckingham, under Henry VIII. The title is Lord High Constable of England. 3 Steph. Com. 47; 1 Bla. Com. 355; 2 Grose, Mil. Antiq. 216.

See COURT OF CHIVALRY; COURT OF EARL MARSHAL.

CONSTABLE OF SCOTLAND. An officer who was formerly entitled to command all the king's armies in the absence of the king, and to take cognizance of all crimes committed within four miles of the king's person or of parliament, the privy council, or any general convention of the estates of the kingdom. The office was hereditary in the family of Errol, and was abolished by the 20 Geo. III. c. 43. Bell, Dict.; Erskine, Inst. 1. 3. 37.

CONSTABLE OF THE EXCHEQUER. An officer spoken of in the 51 Hen. III. stat. 5, cited by Cowell.

CONSTABLEWICK. The territorial jurisdiction of a constable. 5 Nev. & M. 261.

CONSTABULARIUS (Lat.). An officer of horse; an officer having charge of foot or horse; a naval commander; an officer having charge of military affairs generally. Spelman, Gloss.

The titles were very numerous, all derived, however, from *comes-stabuli*, and the duties were quite similar in all the countries where the civil law prevailed. His powers were second only to those of the king in all matters relating to the armies of the kingdom.

In England his power was early diminished and restricted to those duties which related to the preservation of the king's peace. The office is now abolished in England, except as a matter of ceremony, and in France. Guyot, *Rép. Univ.;* Cowell.

CONSTAT (Lat. it appears). A certificate by an officer that certain matters therein stated appear of record. See Wilcox v. Ray, 2 N. C. 410.

An exemplification under the great seal of the enrolment of letters patent. Co. Litt. 225.

A certificate which the clerk of the pipe and auditors of the exchequer make at the request of any person who intends to plead or move in the court for the discharge of anything; and the effect of it is, the certifying what *constat* (appears) upon record touching the matter in question.

CONSTAT D'HUISSIER. In French Law. An affidavit made by a *huissier* setting forth the appearance, form, quality, color, etc., of any article upon which a suit depends. Arg. Fr. Merc. L. 554; Black, L. Dict.

CONSTATING INSTRUMENTS. The term is used to signify the documents or collection of documents which fix the constitution or charter of a corporation. Brice, *Ultra Vires* 34; Ackerman v. Halsey, 37 N. J. Eq. 363.

CONSTITUENT. He who gives authority to another to act for him. The constituent is bound by the acts of his attorney, and the attorney is responsible to his constituent.

CONSTITUERE. In Old English Law. To establish; to appoint; to ordain.

Used in letters of attorney, and translated by constitute. Applied generally, also, to denote appointment. Reg. Orig. 172; Du Cange.

CONSTITUTED AUTHORITIES. The officers properly appointed under the constitution for the government of the people. Those powers which the constitution of each people has established to govern them, to cause their rights to be respected, and to maintain those of each of its members.

They are called *constituted*, to distinguish them from the *constituting* authority which has created or organized them, or has delegated to an authority, which it has itself created, the right of establishing or regulating their movements.

CONSTITUTIO. In Civil Law. An establishment or settlement. Used of controversies settled by the parties without a trial. Calvinus, Lex.

A sum paid according to agreement. Du Cange.

An ordinance or decree having its force from the will of the emperor. Dig. 1. 4. 1, Cooper's notes.

In Old English Law. An ordinance or statute. A provision of a statute.

CONSTITUTION. The fundamental law of a state, directing the principles upon which the government is founded, and regulating the exercise of the sovereign powers, directing to what bodies or persons those powers shall be confided and the manner of their exercise.

An established form of government; a system of laws and customs.

Constitution, in the former law of the European continent, signified as much as decree,—a decree of importance, especially ecclesiastical decrees. The decrees of the Roman emperors referring to the *jus circa sacra*, contained in the code of Justinian, have been repeatedly collected and called the Constitutions. The famous bull *Unigenitus* was usually called in France the Constitution. Comprehensive laws or decrees have been called constitutions; thus the *Constitutio Criminalis Carolina*, which is the penal code decreed by Charles V. for Germany, the Constitutions of Clarendon (*q. v.*). In political law the word constitution came to be used more and more for the fundamentals of a government,—the laws and usages which give it its characteristic feature. We find, thus, former English writers speak of the constitution of the Turkish empire. These fundamental laws and customs appeared to our race especially important where they limited the power and action of the different branches of government; and it came thus to pass that by constitution was meant especially the fundamental law of a state in which the citizen enjoys a high degree of civil liberty; and, as it is equally necessary to guard against the power of the executive in monarchies, a period arrived—namely, the first half of the present century—when in Europe, and especially on the continent, the term constitutional government came to be used in contradistinction to absolutism. We now mean by the term constitution, in common parlance, the fundamental law of a free country, which characterizes the organism of the country and secures the rights of the citizen and determines his main duties as a freeman. Sometimes, indeed, the word constitution has been used in recent times for what otherwise is generally called an organic law. Napoleon I. styled himself Emperor of the French by the Grace of God and the Constitutions of the Empire.

Constitutions were generally divided into written and non-written constitutions, analogous to *leges scriptæ* and *non scriptæ*. These terms do not indicate the distinguishing principle; Lieber, therefore, divides political constitutions into accumulated or cumulative constitutions and enacted constitutions. The constitution of ancient Rome and that of England belong to the first class. The latter consists of the customs, statutes, common laws, and decisions of fundamental importance. The Reform act is considered by the English a portion of the constitution as much as the trial by jury or the representative system, which have never been enacted, but correspond to what Cicero calls *leges natæ*.

Constitutional law in England appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state; all rules which define the members of the sovereign power

and their relation to each other and the mode in which it, or the members thereof, exercise their authority, the order of succession to the throne, the prerogations of the chief magistrate and the form of the legislature and its mode of election, ministers with their responsibilities and sphere of action, the territory over which the sovereignty of the state extends, and who are to be deemed citizens and subjects. Dicey, Const. 22.

Our constitutions are enacted; that is to say, they were, on a certain day and by a certain authority, enacted as a fundamental law of the body politic. In many cases enacted constitutions cannot be dispensed with, and they have certain advantages which cumulative constitutions must forego; while the latter have some advantages which the former cannot obtain. It has been thought, in many periods, by modern nations, that enacted constitutions and statutory law alone are firm guarantees of rights and liberties. This error has been exposed in Lieber's Civil Liberty. Nor can enacted constitutions dispense with the "grown law" (*lex nata*). For the meaning of much that an enacted constitution establishes can only be found by the grown law on which it is founded, just as the British Bill of Rights (an enacted portion of the English constitution) rests on the common law.

Enacted constitutions may be either *octroyed*, that is, granted by the presumed full authority of the grantor, the monarch; or they may be enacted by a sovereign people prescribing high rules of action and fundamental laws for its political society, such as ours is; or they may rest on contracts between contracting parties,—for instance, between the people and a dynasty, or between several states. We cannot enter here into the interesting inquiry concerning the points on which all modern constitutions agree, and regarding which they differ,—one of the most instructive inquiries for the publicist and jurist. See Hallam's Constitutional History of England; Hare; Miller; Rawle; Story; Tucker; Watson; Willoughby; Stimson; Sutherland; Flanders; Guthrie; Foster; Boutwell; Tiedeman (the Unwritten Constitution); Taylor; Thayer, on the Constitution; Farrand, Records of the Federal Convention; Sheppard's Constitutional Text-Book; Elliot's Debates on the Constitution, etc.; Lieber's article (Constitution), in the Encyclopædia Americana; Cooley, Const. Lim.; Bryce, Am. Com.; Von Holst, Hist. U. S.

For the constitutions of the several states, including those in force and the previous ones, see Charters and Constitutions, published under authority of Congress in 1878.

Thorpe's American Charters, Constitutions, etc., gives the constitutions down to 1908 inclusive.

Constitution, Self-Executing Provisions. A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced, and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Cooley, Const. Lim. 99 [84], 4th ed. 101.

"The question in every case is whether the language of a constitutional provision is addressed to the courts or the legislature. . . . If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts." Willis v. Mabon, 48 Minn. 150, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626.

"But it must remain entirely clear that where a state constitution declares in clear language that the members of corporations shall be individually liable for their debts to a defined extent, it cannot be held that supplementary legislation is required to execute this provision, and hence that the legislature may leave it forever dormant and inoperative merely because the framers of the constitution did not go on and prescribe the remedy which should be pursued for enforcing it." Thomp. Corp. § 3004.

See Morley v. Thayer, 3 Fed. 739; Barnes v. Wheaton, 80 Hun 14, 29 N. Y. Supp. 830; May v. Black, 77 Wis. 104, 45 N. W. 949; Groves v. Slaughter, 15 Pet. (U. S.) 449, 10 L. Ed. 800; Pierce v. Com., 104 Pa. 150; Fredericks v. Canal Co., 148 Pa. 317, 23 Atl. 1067.

But it has been held that a constitutional provision that "dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by such stockholder, and such other means as shall be provided by law," is not self-executing and is inoperative until supplemented by statute; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

A provision of a state constitution imposing upon stockholders personal liability, to an additional amount equal to their stock, for "dues from corporations," is self-executing; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587.

CONSTITUTION OF THE UNITED STATES OF AMERICA. The supreme law of the United States.

It was framed by a convention of delegates from all of the original thirteen states (except Rhode Island), which assembled at Philadelphia on the 14th of May, 1787. On September 17, 1787, by the unanimous consent of the states present, a form of constitution was agreed upon, and on September 28th was submitted to the congress of the confederation, with recommendations as to the method of its adoption by the states. In accordance with these recommendations, it was transmitted by the congress to the several state legislatures, in order to be submitted to conventions of delegates chosen in each state by the people thereof. The several states accordingly called conventions, which ratified the constitution upon the following dates: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18,

1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

It was said by Mr. Gladstone, who may be considered an impartial critic, that "as the British constitution is the most subtle organism which has proceeded from progressive history, so the American constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Fisher, Evolution of the Constitution, 11. In connection with this comment of the great English statesman, it is interesting to quote from an address before the American Bar Association in 1912 by George Sutherland, Senator from Utah (Rep. p. 371), which probably expresses the view of a majority of the thoughtful lawyers and statesmen of all parties. Alluding to "a growing sentiment that the constitution has become obsolete and that its provisions stand in the way of reforms which are demanded by the people," he continues: "Many of us do not believe that the constitution has been outworn, or that it has become a dead wall in the path of progress, to be assaulted and overthrown before we can move on. Its principles are living forces, as vital now as when they were adopted. It is not and never has been a wall, but a wide, free flowing stream within whose ample banks every needed and wholesome reform may be launched and carried." And the address concludes: "To the thoughtful student of law and government the great principles of the constitution, as old as the struggle for human liberty, are as nearly eternal as anything in this mutable world can be. We do not outgrow them any more than we outgrow the Ten Commandments or the enduring morality of the Sermon on the Mount. . . . The constitution did not create the Union, but, by making it 'more perfect,' preserved it from destruction. If the present day teachers of vague and visionary reform would know the fate which will overtake the republic if the constitution, through the shattered faith of the people, shall lose its binding force, they have but to read the history of our country under the Articles of Confederation. If by some unhappy turn of fortune the constitution should be wrecked, those conditions will be repeated, but intensified in the proportion that our population has increased, our territory extended, and our problems have become more numerous and intricate. The forty-eight states into which our imperial domain has finally been rounded, filled with patriotic, intelligent, justice-loving people, after all constitute but the body of the Union. Its soul is the constitution."

Under the terms of the constitution (art. vii.), its ratification by nine states was sufficient to establish it between the states so ratifying it. Accordingly, when, on July 2, 1788, the ratification by the ninth state was read to congress, a committee was appointed to prepare an act for putting the constitution into effect; and on September 13, 1788—in accordance with the recommendations made by the convention in reporting the constitution—congress appointed days for choosing electors, etc., and resolved that the first Wednesday in March then next (March 4, 1789) should be the time, and the then seat of congress (New York) the place, for commencing government under the new constitution. Proceedings were had in accordance with these directions, and on March 4, 1789, congress met, but, owing to the want of a quorum, the house did not organize until April 1st, nor the senate until April 6th. Washington took the oath of office on April 30th. The constitution became the law of the land on March 4, 1789. Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

Its adoption abrogated the ordinance of 1787, except as continued in force by congress; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; Permoli v. Municipality No. 1 of New Orleans, 3 How. (U. S.) 589, 11 L. Ed. 739; Strader v. Graham, 10 How. (U. S.) 82, 13 L. Ed. 337; South Carolina v. Georgia, 93 U. S. 4, 23 L. Ed. 782; Wharton v. Wise, 153 U. S. 155, 14 Sup. Ct. 783, 38 L. Ed. 669. The constitution is to be construed with respect to the law existing at the time of its adoption and as securing to the individual citizen the rights inherited by him under English law, and not with reference to new guarantees; Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; it is to be interpreted according to common law rules; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99; Kepner v. U. S., 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; In re Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627. Under it are derived all powers exercised by the various departments of the federal government; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; and the courts were thereafter bound to take notice of it; Marbury v. Madison, 1 Cra. (U. S.) 178, 2 L. Ed. 60; and in construing it, they gave special weight to the contemporaneous construction of it, acquiesced in; Stuart v. Laird, 1 Cra. (U. S.) 299, 2 L. Ed. 115. The "United States of America" was thereby constituted a government with full

powers necessary for accomplishing the objects of its creation; Respublica v. Sweers, 1 Dall. (U. S.) 44, 1 L. Ed. 29; U. S. v. Maurice, 2 Brock. 109, Fed. Cas. No. 15,747; U. S. v. Bradley, 10 Pet. (U. S.) 363, 9 L. Ed. 448; U. S. v. Linn, 15 Pet. (U. S.) 290, 10 L. Ed. 742; U. S. v. Tingey, 5 Pet. (U. S.) 115, 8 L. Ed. 66. The government created was one of delegated powers only; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; Gilman v. Philadelphia, 3 Wall. (U. S.) 713, 18 L. Ed. 96; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; and though a government of limited powers, it possesses, to every extent, the sovereignty required for the exercise of those powers which do not require to be put in practice by legislative action, but may be exercised at once by virtue of the constitution through the executive departments; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The constitution creates a government for the United States of America, and not for countries outside of their limits, and it can, therefore, have no operation in another country; In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

The preamble of the constitution declares that the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, do ordain and establish this constitution for the United States of America.

The "people of the United States" who are declared to have ordained and established the constitution "were the people of the several states that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth (Declaration of Independence) and had by Articles of Confederation and Perpetual Union, in which they took the name of 'The United States of America,' entered into a firm league of friendship with each other for their common defence, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade or any pretense whatever" (Articles of Confederation, *q. v.*); Minor v. Happersett, 21 Wall. (U. S.) 162, 165, 22 L. Ed. 627.

The "perfect union" contemplated by the constitution was said by the Supreme Court to be "an indestructible union composed of indestructible states"; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227, where it was also said that the union is indissoluble by the act of any one or more of them; U. S. v. Cathcart, 1 Bond 556, Fed. Cas. No. 14,756. The ordinances of secession were declared to be absolute nullities; White v. Cannon, 6 Wall. (U. S.) 443, 18 L. Ed. 923; but the effort to separate from the Union will not destroy the identity of a state, or discharge it from its obligations under the constitution; Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071; nor does a condition of civil war take away from congress any of the powers necessary to the maintenance of the Union; Tyler v. Defrees, 11 Wall. (U. S.) 331, 20 L. Ed. 161. The federal and state governments are distinct and independent of each other, and while they exercise their powers within the same territorial limits, neither can intrude upon the sphere of the other, but in case of conflict between the authorities of the two governments, those of the federal government will control until the questions between them are determined by the federal tribunals; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; Tarble's Case, 13 Wall. (U. S.) 397, 20 L. Ed. 597.

In addition to the powers conferred upon the federal government, the power to provide for the common defence authorizes the condemnation by a state of land for the purpose of ceding it to the United States for forts and navy-yards; In re League Island, 1 Brewst. (Pa.) 524.

The first article is divided into ten sections. By the *first* the legislative power is vested in congress. The *second* regulates the formation of the house of representatives, and declares who shall be electors. The *third* provides for the organization of the senate, and bestows on it the power to try impeachments. The *fourth* directs the time of meeting of congress, and who may regulate the times, places, and manner of holding elections for senators and representatives. The *fifth* determines the power of the respective houses. The *sixth* provides for a compensation to members of congress, and for their safety from arrests, and disqualifies them from holding certain offices. The *seventh* directs the manner of passing bills. The *eighth* defines the powers vested in congress. The *ninth* contains the following provisions: 1st. That the migration or importation of certain classes of persons shall not be prohibited prior to the year 1808. 2d. That the writ of *habeas corpus* shall not be suspended, except in particular cases. 3d. That no bill of attainder or *ex post facto* law shall be passed. 4th. The manner of levying taxes. 5th. The manner of drawing money out of the treasury, 6th. That no title of nobility shall be granted. 7th. That no officer shall receive a present from a foreign government. The *tenth* forbids the respective states to exercise certain powers there enumerated.

Sec. 1. The power vested in congress under the constitution comprised all that por-

tion of governmental power and sovereignty which was, at the time of the adoption of the constitution, known and recognized as the "legislative power." As to what this includes and what it excludes, see LEGISLATIVE POWER.

Sec. 2. The right to vote for members of congress is derived from the constitution, and this is equally true even if the qualifications for electors of state officers have been adopted by the federal law as those to be required of electors for members of congress. Wiley v. Sinkler, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; and a denial to vote at an election of members of congress involves a federal question; Swafford v. Templeton, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005.

While congress has no power to establish qualifications for voters in state elections, it may impose a deprivation of citizenship as a penalty, and if the state constitution prescribes citizenship of the United States as one of the qualifications for voting, the voter, upon conviction, might thus be deprived of his right. Huber v. Reily, 53 Pa. 112.

The word "state," in this section, is used in the geographical or territorial sense. Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227.

The qualifications of members of congress being fixed by par. 4, the state cannot enlarge or vary them; Barney v. McCreery, 1 Cont. Elect. Cas. 167.

As to what are direct taxes within the meaning of the constitution, see TAXATION.

The requirement that congress shall apportion direct taxes according to population does not apply to the District of Columbia or the territories, and a direct tax may be imposed in the direct district in proportion to the census; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98.

Sec. 3. Under the 17th amendment, adopted in 1913, the method of choosing senators is changed from an election by the legislature to an election by the people of each state voting at large.

The senate is a permanent body. Cush. L. & Pr. of Legisl. Ass. 272. The seat of a senator is vacated by his addressing a resignation to the governor of the state without notice of its acceptance; 1 Cont. Elect. Cas. 869. A vacancy in the senate, which has occurred before a meeting of the Legislature which adjourns without filling the vacancy, cannot be filled by the governor; 1 Cont. Elect. Cas. 874; nor is it competent for the governor to make a recess appointment to fill a vacancy which shall happen but has not happened; 1 Cont. Elect. Cas. 871.

Where a state constitution directed the governor to call a special session of the legislature upon the happening of a vacancy in the senate, and he was required by the federal constitution to make a temporary appointment, he considered that the two were in conflict and he exercised his discretion to disregard the positive mandate of the state constitution and appoint a senator to fill the vacancy. Knox's Case, 29 Pa. Co. Ct. 471 (opinion of Governor (formerly Judge) Pennypacker).

In the trials of impeachment in which the Chief Justice presides, he is a member of the court with a right to vote. 1 Trial of Pres. Johnson 185; Utica Bank v. Wagar, 8 Cow. (N. Y.) 398; Rights of Lieutenant-Governor, 2 Wend. (N. Y.) 213.

Sec. 4. When the legislature has failed to "prescribe the times, places and manner" of holding an election under this section, the governor may issue a writ of election, allowing a reasonable time for notice. 1 Cont. Elect. Cas. 135. Congress may control the election of senators and representatives and change any existing state regulations; In re Siebold, 100 U. S. 371, 25 L. Ed. 717; In re Clarke, 100 U. S. 399, 25 L. Ed. 715; and it may pass such laws as are required to secure the free exercise of a right of suffrage and punish illegal interference with it; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; it may also punish violation of duty by election officers; U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; it may authorize the appointment of supervisors and deputy marshals; In re Siebold, 100 U. S. 371, 399, 25 L. Ed. 717; and generally may regulate the return and counting of the vote; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274.

Sec. 5. The returns from the state authorities are only *prima facie* evidence of election and are not conclusive upon either house of congress; Spaulding v. Mead, 1 Cont. Elect. Cas. 157; Reed v. Cosden, 1 Cont. Elect. Cas. 353; and a failure of the state executive to grant a certificate of election does not affect the right of one who is elected a member of congress; *id.* 95.

A majority of the house is a quorum and a majority of the quorum is sufficient to pass a bill; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321; and the house may determine any means, not in violation of the constitutional restraints or fundamental rights, for ascertaining the presence of a quorum, as by rule authorizing the counting of members who do not vote sufficient to make a quorum; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321.

Each of the two houses possesses an inherent power to punish for contempt; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; the power cannot be delegated, though a law providing for the indictment of a contumacious witness is valid; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154. The power to punish for contempt requires that the matter in question shall be strictly within the jurisdiction of the body; Kilbourne v. Thompson, 103 U. S. 168, 26 L. Ed. 377, which overrules Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242, on the point

that the warrant of the speaker for the commitment of the witness is not conclusive by way of justification to the serjeant-at-arms in an action for false imprisonment. The court relied upon some English cases as authorities; 4 Moore P. C. 63; 11 Moore P. C. 347; 4 Moore P. C. (N. S.) 203.

The power to expel a member has been held to cover an offence not punishable by statute but inconsistent with the duty of a member. Blount's Case, cited 1 Story, Const. § 838; Smith's Case, 1 Hall, L. J. 459.

The constitutional power granted to each house to keep a journal of its proceedings does not make it evidence that an enrolled bill has passed containing a section not appearing in the enrolled act filed in the state department; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294.

Sec. 6. The privilege from arrest extends to all indictable offences; 1 Story, Const. § 865; but it has been held that the privilege from arrest of a member of the legislature applies only to civil process and not to cases of crime or misdemeanor. Com. v. Keeper of Jail, 4 W. N. C. (Pa.) 540. The privilege extends to the service of civil process while in attendance on their public duties; Geyer v. Irwin, 4 Dall. (U. S.) 107, 1 L. Ed. 762; Nones v. Edsall, 1 Wallace, Jr. 191, Fed. Cas. 10,290; Respublica v. Duane, 4 Yeates (Pa.) 347; and the privilege extends to the period of going or returning as well as the time of attendance; Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; and it protects a member who loses his seat on a contest until his return home in the shortest reasonable time; Com. v. Crans, 2 Clark (Pa.) 450.

The acceptance of a federal office after election to congress operates as a forfeiture of the seat; 1 Cont. Elect. Cas. 122; and this includes a military commission in a volunteer regiment; 2 Cont. Elect. Cas. 92; Hammond v. Herrick, 1 Cont. Elect. Cas. 295; but one who continued to execute the duties of a federal office after election to congress but before taking his seat is not disqualified; Hammond v. Herrick, 1 Cont. Elect. Cas. 287, 314, 316.

Sec. 7. An act imposing taxes on the notes of a national bank is not a revenue bill within this section; Twin City Nat. Bank v. Nebeker, 167 U. S. 196, 17 Sup. Ct. 766, 42 L. Ed. 134.

A bill takes effect from the time of its approval, and the doctrine that there is no fraction of a day does not apply; In re Richardson, 2 Sto. 571, Fed. Cas. No. 11,777; People v. Clark, 1 Cal. 406; *contra*, In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407. As to the presentation of bills and their approval, see Executive Power.

Under the last paragraph of this section the senate has decided, July 7, 1856, that two-thirds of a quorum were sufficient to pass a bill over a veto.

A proposed amendment to the constitution need not be presented to the president for approval; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644; nor joint resolutions; 6 Opin. A. G. 680.

Sec. 8. This section enumerates the powers specifically granted to congress, and with respect to them it is held that where they are not exclusive, either expressly or by necessary imputation, the states may exercise them concurrently; Sturges v. Crowninshield, 4 Wheat. (U. S.) 193, 4 L. Ed. 529; Houston v. Moore, 5 Wheat. (U. S.) 49, 5 L. Ed. 19. The power of congress to lay taxes is limited, so that it may not reach the means and instrumentalities of the government of a state; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; or the salaries of state officers; Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; nor the revenues, or interest on bonds, of municipal corporations of the states; U. S. v. R. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; but it may lay a tax upon an inheritance or property by states or from municipalities; Snyder v. Bettman, 190 U. S. 249, 23 Sup. Ct. 803, 47 L. Ed. 1035.

The debts of the United States, of which congress is authorized to provide for the payment, include those of an equitable character which would not be recoverable in a court of law; as, for example, the payment of sugar bounties to producers who were prevented by the repeal of the act from obtaining them in due time; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215. The requirement that taxes shall be uniform throughout the United States is a geographical expression and means simply to operate generally throughout the country; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; High v. Coyne, 178 U. S. 111, 20 Sup. Ct. 747, 44 L. Ed. 997; but this does not include foreign territory acquired by conquest or treaty and not incorporated into the United States; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

As to the scope of the taxing power of congress in this section, see Taxation; Impost; Excise; as to the power to regulate commerce, see Commerce; Restraint of Trade; Interstate Commerce Commission; as to naturalization and bankruptcy, see those titles; as to coining money, see Coinage; as to counterfeiting, post-offices and post-roads, see Forgery; Post-Office; Postal Service; as to the power to promote science and useful arts, see Copyright; Patent; Trade-Mark; as to the power to establish inferior courts, see United States Courts; as to the power to define and punish piracy and felonies on the high seas, see Admiralty; Piracy; High Seas; as to the power to declare war and support armies and a navy

and to provide for the government regulation of military forces, see WAR; LETTER OF MARQUE AND REPRISAL; MILITARY LAW; COURT-MARTIAL; MILITIA; as to the power of legislation for the seat of government, see DISTRICT OF COLUMBIA; as to the line of distinction between the authority of the states over their internal affairs and that of congress in regulation of commerce, see POLICE POWER; HEALTH; QUARANTINE; INSPECTION; see also NAVIGABLE WATERS; BRIDGE; PILOT; HARBORS; FERRIES.

Sec. 9. The first paragraph of this section is no longer in force, being superseded by the 13th and 14th Amendments. While in force it was held to apply to the African race and the word "migration" related to free persons and "importation" to slaves; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383.

As to the prohibition of the suspension of the writ of habeas corpus, see that title; as to the three following paragraphs, see BILL OF ATTAINDER; EX POST FACTO; TAXATION. Under the last paragraph of this section it was determined that a United States marshal could not hold the office of commercial agent of France; 6 Opin. A. G. 409.

Sec. 10. The prohibition of the first paragraph of this section operated to make the Confederate government an illegal organization; Williams v. Bruffy, 96 U. S. 176, 24 L. Ed. 716; and during the time of the existence of the so-called Confederacy, the states composing it could not pass any law impairing the obligation of a contract; U. S. v. Kimbal, 13 Wall. (U. S.) 636, 20 L. Ed. 503; Ford v. Surget, 97 U. S. 594, 24 L. Ed. 1018.

The prohibitions against the states are absolute. They cannot, directly or indirectly, coin money; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; emit bills of credit; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903; which implies a pledge of the public faith and the issue of paper intended to circulate as money; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; pass a bill of attainder, which includes bills of pains and penalties; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. Ed. 356; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Drehman v. Stifle, 8 Wall. (U. S.) 595, 19 L. Ed. 508. As to the other prohibitions, see EX POST FACTO; IMPAIRING THE OBLIGATION OF CONTRACTS; NOBILITY. The prohibition against the entry by a state into an agreement or compact with another state or foreign power implies the broadest use of words and forbids any negotiations or intercourse between a state and a foreign nation; Bank of Augusta v. Earle, 14 Pet. (U. S.) 540, 10 L. Ed. 274. The states may, with the consent of congress, enter into a compact fixing their boundaries; Poole v. Fleeger, 11 Pet. (U. S.) 185, 9 L. Ed. 680; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67; and the consent of congress may be implied from its legislation and proceedings as well as by express action; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Virginia v. West Virginia, 11 Wall. (U. S.) 39, 20 L. Ed. 67; Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728, 37 L. Ed. 537.

There is nothing in the constitution of the United States prohibiting a state from changing the common law by permitting the recovery of damages for injury sustained for which at common law there could be no recovery; Ivey v. Telegraph Co., 165 Fed. 371.

The second article is divided into four sections. The *first* vests the executive power in the president of the United States, and (as amended) provides for his election and that of the vice-president. The *second* section confers various powers on the president. The *third* defines his duties. The *fourth* provides for the impeachment of the president, vice-president, and all civil officers of the United States.

This article deals with the executive power vested in the president, which comprehends by that term all the powers belonging to the executive department, and of governments, where the three-fold division of governmental powers is recognized. As to what is comprehended in this term, see EXECUTIVE POWER.

Sec. 1. The section under consideration provides in the first place for the election of the president by electors appointed in such manner as the state legislature may direct, and for this purpose their power is exclusive, and a law providing for their election by districts is valid; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869, affirming McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587. The jurisdiction of an indictment for illegal voting for electors, even where the sentence included punishment for illegal voting for a member of congress, is in the state courts; In re Green, 134 U. S. 377, 10 Sup. Ct. 586, 33 L. Ed. 951.

The third clause of this section, providing for the manner of ascertaining the result of the voting by the electors, and of choosing a president and vice-president in case of failure to elect, is of no further force having been supplied by the 12th Amendment.

The time of choosing electors has been fixed by congress as the Tuesday next after the first Monday in November; 1 U. S. R. S. § 131; and the time for electors to meet and vote in their respective states is the second Monday in January; Act Feb. 3, 1887, 1 Comp. St. 67, which invalidates a state law making provision for the meeting of electors, so far as the date is concerned, but not otherwise. The same act provides (sections 4–7) the method of ascertaining the result of the election by congress.

As to who are natural-born citizens and citizens of the United States with respect to

the qualifications of the president, see CITIZEN. As to the succession to the presidency in case of a vacancy in the office of both president and vice-president, see CABINET.

Sec. 2. Under the power vested in the president as commander-in-chief of the army and navy, he has authority without legislation to put in force all legitimate acts of belligerency, among which are included the power to remove an officer of the army if the case is not provided for by law; Keyes v. U. S., 109 U. S. 336, 3 Sup. Ct. 202, 27 L. Ed. 954; and to institute a blockade; U. S. v. The Tropic Wind, Fed. Cas. No. 16,541a; U. S. v. The F. W. Johnson, Fed. Cas. No. 15,179; to convene a general court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; levy contributions on the enemy; Cross v. Harrison, 16 How. (U. S.) 164, 190, 14 L. Ed. 889; Fleming v. Page, 9 How. (U. S.) 603, 13 L. Ed. 276; authorize the military or naval commanders of conquered territory to provide for civil and military government, and to impose duties on imports and tonnage for its support; Dooley v. U. S., 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; Cross v. Harrison, 16 How. (U. S.) 164, 14 L. Ed. 889; or courts for the administration of civil and criminal law in such territory may be established by the president, or a commanding officer therein; Mechanics' & Traders' Bank v. Bank, 22 Wall. (U. S.) 277, 22 L. Ed. 871; The Grapeshot, 9 Wall. (U. S.) 129, 19 L. Ed. 651; Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891. The president becomes commander-in-chief of the militia only when it is called into the service of the United States; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; but his authority as to when it is necessary so to call it is decisive; Martin v. Mott, 12 Wheat. (U. S.) 19, 6 L. Ed. 537; and it may be made a criminal offence by state statute for the militia to refuse to obey his call; Houston v. Moore, 5 Wheat. (U. S.) 1, 5 L. Ed. 19. The president may place the militia under command of officers of the United States army to whom he may delegate his powers; 2 Opin. A. G. 711; but he cannot delegate his judicial duty to review the findings of a court-martial; Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167.

The pardoning power conferred upon the president does not destroy the power of congress to pass an act of general amnesty; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819. Pardon includes amnesty, and there is no distinction between them under the constitution; Knote v. U. S., 95 U. S. 149, 24 L. Ed. 442; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519. A pardon is a private official act, and must be conveyed to and accepted by the criminal, and must be brought judicially to the attention of the court to be noticed; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; unless made by public proclamation, when it has the force of law; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812. A pardon may be granted before trial; 6 Opin. A. G. 20; or after the expiration of imprisonment when that is part of the sentence; Steller's Case, Fed. Cas. No. 13,380, 1 Phila. 302; 9 Opin. A. G. 478. He may remit penalties, forfeitures and fines; Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388; even after the death of the offender; Caldwell's Case, 11 Opin. A. G. 35; or fines imposed for contempt of court; In re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911.

As to the force and effect of pardons generally, see PARDON; AMNESTY. As to the treaty power, see TREATY.

Nomination and appointment to office are voluntary acts distinct from the issuing of the commission; Marbury v. Madison, 1 Cra. (U. S.) 137, 155, 2 L. Ed. 60; and the president may, after confirmation, withhold a commission, and until it has been delivered the appointment is not consummated; Case of Lieutenant Cox, 4 Opin. A. G. 218; but it was held in Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60, that formal delivery of a commission was not necessary to complete the appointment, which was done by affixing the seal to the commission; this having been done, the death of the president before the delivery will not affect its validity; U. S. v. Le Baron, 19 How. 73, 15 L. Ed. 525. See OFFICER; EXECUTIVE POWER; which latter title see also as to the power of the president to make recess appointments.

Inferior officers, such as are mentioned in the second paragraph of the section, include clerks of courts; In re Hennen, 13 Pet. (U. S.) 230, 10 L. Ed. 138; U. S. v. Avery, 1 Deady, 204, Fed. Cas. No. 14,481; extradition commissioners; Rice v. Ames, 180 U. S. 371, 21 Sup. Ct. 406, 45 L. Ed. 577; vice-consuls; U. S. v. Eaton, 169 U. S. 331, 18 Sup. Ct. 374, 42 L. Ed. 767; inspectors of immigration; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.

Sec. 3. The authority given to the president to communicate his views and recommendations to congress, and his power to adjourn them in case of disagreement between the two houses, does not seem to have been the occasion of any judicial or official construction. It is interesting to note that President Wilson has revived the earlier custom of communicating his views to both houses in person. The power to convene the two houses in extraordinary sessions has been frequently exercised, and there is not in the federal constitution, as there is in those of many states, any power given to the president to limit the subjects of consideration to that for which he calls the extraordinary sessions. As to the power to receive ambassadors and other public ministers, and the inferences which have been drawn from it,

and also the direction to take care that the laws be faithfully executed, see EXECUTIVE POWER.

It was determined in Blount's Case, p. 22, 102, that a member of either house of congress is not a civil officer subject to impeachment, nor is a territorial judge, his office being created by legislation only; 3 Opin. A. G. 409. As to the method of proceeding and impeachment, generally, see that title. The constitutional power of impeachment does not interfere with the president's power of removal for cause which he deems adequate; Shurtleff v. U. S., 189 U. S. 311, 23 Sup. Ct. 535, 47 L. Ed. 828. See EXECUTIVE POWER.

The third article contains three sections. The *first* vests the judicial power in sundry courts, provides for the tenure of office by the judges, and for their compensation. The *second* provides for the extent of the judicial power, vests in the supreme court original jurisdiction in certain cases, and directs the manner of trying crimes. The *third* defines treason, and vests in congress the power to declare its punishment.

Sec. 1. This article deals with the *judicial power*, as to which, generally, see that title. As to the power of the courts to declare an act of congress or of a state legislature unconstitutional, see CONSTITUTIONAL. The authority of the federal courts over state legislation is confined to cases in which it is repugnant to the federal constitution, and they have no power to declare it void under the state constitution; Jackson v. Lamphire, 3 Pet. (U. S.) 280, 7 L. Ed. 679.

The federal courts are not to be treated by the state courts as belonging to another sovereign; Com. v. R. Co., 58 Pa. 43.

It was established by an early case that the power of congress to create inferior tribunals is unlimited except by the sense of that body as to what is necessary and proper; Stuart v. Laird, 1 Cra. (U. S.) 299, 2 L. Ed. 115; and in the same case it was answered to an objection that the judges of the supreme court had no right to sit as circuit judges, that the practice and acquiescence in the custom "affords an irresistible answer and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature . . . too strong and obstinate to be shaken or controlled; . . . the question is at rest and ought not now to be disturbed."

It has also been determined in many cases that the territorial courts are not courts of the United States; Good v. Martin, 95 U. S. 90, 24 L. Ed. 341; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. As to the territorial courts, generally, see McAllister v. U. S., 141 U. S. 174, 11 Sup. Ct. 949, 35 L. Ed. 693.

The courts which congress is authorized by this section to establish do not include a court-martial, or a court for the administration of civil and criminal jurisdiction in conquered territory, which may be created by the president; *supra*. See COURT-MARTIAL.

The authority of congress to create new courts carries with it *ex necessitate* the power to define their jurisdiction; Sheldon v. Sill, 8 How. (U. S.) 449, 12 L. Ed. 1147.

The provision that the compensation of a judge shall not be diminished prevents a tax upon his salary; Com. v. Mann, 5 W. & S. (Pa.) 415.

Sec. 2. The constitutional jurisdiction of the federal courts cannot be affected by state legislation; Watson v. Tarpley, 18 How. (U. S.) 517, 15 L. Ed. 509; Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; as by attempting to regulate executions; Bank of U. S. v. Halstead, 10 Wheat. (U. S.) 51, 6 L. Ed. 264; or by the interference of state courts or officers with persons or property within the jurisdiction of the federal court; Beers v. Haughton, 9 Pet. (U. S.) 329, 9 L. Ed. 145; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; or by a limitation of remedies within the state; Suydam v. Broadnax, 14 Pet. (U. S.) 67, 10 L. Ed. 357; Lincoln County v. Luning, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. Ed. 766; or by removing a case from one state court to another; Hyde v. Stone, 20 How. (U. S.) 170, 15 L. Ed. 874. As to the attempts to limit to state courts the litigation by or against foreign corporations, see FOREIGN CORPORATION. The grant of judicial power includes both criminal and civil cases; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; but there is no common law jurisdiction in the federal courts in criminal cases; United States v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259; though their implied powers include all that is necessary to enforce their jurisdiction; United States v. Hudson, 7 Cra. (U. S.) 32, 3 L. Ed. 259.

Cases at law under this section include all those usually embraced under that term, including for example, proceedings for the condemnation of land under the power of eminent domain; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; and those in equity are those which are included within the English system of equity jurisprudence, and include all cases of which the English court of chancery would have jurisdiction; Boyle v. Zacharie, 6 Pet. (U. S.) 648, 8 L. Ed. 532; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; and the system of equity administered by the federal courts is determined by the practice in England, subject to changes by legislation or by rule of court; Boyle v. Zacharie, 6 Pet. (U. S.) 648, 8 L. Ed. 532; but it cannot be affected by state legislation; Dravo v. Fabel, 132 U. S. 487, 10 Sup. Ct. 170, 33 L. Ed. 421; Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113.

A case "arising" under the constitution, laws or treaties of the United States means

one which required for its decision a construction of either; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; or which involves a right created or protected by them; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; New Orleans v. De Armas, 9 Pet. (U. S.) 224, 9 L. Ed. 109. See as to this point, JURISDICTION; FEDERAL QUESTION; UNITED STATES COURTS. See those titles, generally, as to the subjects of the judicial power of the United States as enumerated in this section.

The clause relating to jury trials remains unaffected by the 6th Amendment; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; see JURY. As to the admiralty jurisdiction conferred by this section, see ADMIRALTY; MARITIME LAW; and other cognate titles.

The power of congress to designate the place of trial for offences not committed within any state includes the power to designate a place of trial for an offence previously committed; Cook v. U. S., 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906.

Sec. 3. As to *treason*, see that title. The provision as to proof applies to the trial and not the preliminary hearing; Charge to Grand Jury, Treason, 2 Wall. Jr. 134, Fed. Cas. No. 18,276; 1 Burr's Trial 196.

The prohibition contained in the last paragraph of this section was set up to defeat a forfeiture of real property employed in violation of the revenue laws, as making the act under which the remedy was applied in practical effect a bill of attainder within this provision, and it was said by Hall, J., that the clauses in this section "have respect to high crimes, and punishing them, restraining rigor and guarding against arbitrarily enacting guilt. The case before the court is a civil suit *in rem*, against the thing, to ratify the seizure of it, and the provision of the act of congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy, framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for congress in the exercise of its legislative power to determine." Accordingly, the objection was overruled, and the information sustained, and a decree of condemnation was made; U. S. v. Distillery, 2 Abb. U. S. 192, Fed. Cas. No. 14,965.

The fourth article is composed of four sections. The *first* provides that state records, etc., shall have full faith and credit in other states. The *second* secures to citizens of each state all privileges and immunities of citizens in the several states, and the delivery of fugitives from justice or from labor. The *third* provides for the admission of new states, and the government of the territories. The *fourth* guarantees to every state in the Union a republican form of government, and protection from invasion or domestic violence.

Sec. 1. As to the full faith and credit to be given in one state to the records and judicial proceedings of another under this section, see FOREIGN JUDGMENT.

Sec. 2. As to the privileges and immunities to which citizens of each state are entitled in other states, see PRIVILEGES AND IMMUNITIES. As to the delivery of fugitives from justice by one state to another, see FUGITIVE FROM JUSTICE, sub-tit. *Interstate Rendition.*

The third paragraph of this section relates mainly to slavery and is necessarily obsolete, but the expression "no person held to service or labor" includes apprentices; Boaler v. Cummines, 5 Clark (Pa.) 246; *id.*, Fed. Cas. No. 1,584.

Sec. 3. It was held in Luther v. Borden, 7 How. 1, 12 L. Ed. 581, that the power of recognizing state governments is vested in congress. The territories cannot without the consent of congress take legislative action for the formation of constitutions and state governments, but the people of a territory may meet in primary assemblies or conventions for the purpose of making application to congress for admission into the Union as a state; 2 Opin. A. G. 726. The admission of a new state gives it the same status as the other states; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; and its sovereignty and equality cannot be restrained by congressional action; Withers v. Buckley, 20 How. (U. S.) 84, 15 L. Ed. 816; and immediately upon its admission, the federal laws extend over and into it; Calkin v. Cocke, 14 How. (U. S.) 229, 14 L. Ed. 398.

The consent of the legislature to the division of a state requires that it be one representing and governing the whole state and not merely a part of it; 10 Opin. A. G. 426.

The power of congress over public lands is unlimited; U. S. v. Gratiot, 14 Pet. 526, 10 L. Ed. 573; and that power is not affected by the admission of a territory as a state; Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. See LANDS, PUBLIC.

Sec. 4. The guarantee of a republican form of government to every "state" means to its people and not to its government; Texas v. White, 7 Wall. (U. S.) 700, 19 L. Ed. 227. Where it was also held that this clause was sufficient authority for the reconstruction, after the Civil War, of the governments of the states included within the Confederacy.

No precise definition of what constitutes a republican government under this clause has been judicially declared; it does not involve the recognition of woman suffrage; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; nor is it violated by a pro-

vision for minority representation in a constitutional convention; Woods' Appeal, 75 Pa. 59; nor by an act of a state legislature giving the courts control over municipal boundaries; Forsyth v. Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095. The decision as to what is a republican government must necessarily remain absolutely with congress; Luther v. Borden, 7 How. (U. S.) 42, 12 L. Ed. 581; and the execution of this constitutional power belongs to the political department of the government and not the judicial; Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187. See REPUBLICAN FORM OF GOVERNMENT.

The authority to grant federal aid in the suppression of domestic violence may be exercised upon the call of the executive whenever the legislature cannot be convened; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

The *fifth article* merely provides for the method of amendment which is to be made on the proposal of two-thirds of both houses and becomes part of the constitution when ratified by the legislature of three-fourths of the states, or by conventions in three-fourths of the states, as may be provided by congress in the proposal. Congress may also by a vote of two-thirds of each house or on the application of the legislatures of two-thirds of the states call a convention for proposing amendments.

The limitations on the power of amendment were that, prior to 1808 the first and fourth clauses in the ninth section of the first article should not be affected. The clauses in question were those relating to the importation of slaves, and requiring capitation or other direct tax to be laid in proportion to the population.

It was also provided "that no state, without its consent, shall be deprived of its equal suffrage in the senate."

Proposed amendments to the constitution need not be approved by the president; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644.

The *sixth article* declares that the debts due under the Confederation shall be valid against the United States; that the constitution and treaties made under its powers shall be the supreme law of the land; that public officers shall be required by oath or affirmation to support the constitution of the United States; and that no religious test shall be required as a qualification for office.

The first clause has reference to a then condition and not to general powers of government; Dred Scott v. Sandford, 19 How. 393, 15 L. Ed. 691. The second clause is a very vital one, which has been and still is in the course of constant application to test the validity of legislation by the states and by congress. In either case if repugnant to the federal constitution, laws or treaties, it is void and the courts will so declare it; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; and in many other cases, which have declared federal or state laws unconstitutional, the principle has been declared. The obligations imposed by the federal constitution cannot be released or impaired by a state constitution; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. Ed. 401; or any constitution or law of a foreign state received into the Union; League v. De Young, 11 How. (U. S.) 185, 13 L. Ed. 657; Herman v. Phalen, 14 How. (U. S.) 79, 14 L. Ed. 334. As to the principles which will be applied in testing the constitutionality of statutes, see CONSTITUTIONAL. And as to the force of treaties after being duly executed and ratified, see TREATY. Under this provision of the constitution, the constitution, laws and treaties of the United States are made a part of the law of every state; Hauenstein v. Lynham, 100 U. S. 483, 25 L. Ed. 628.

The *seventh article* directs what shall be a sufficient ratification of this constitution by the states.

In pursuance of the fifth article of the constitution, articles in addition to, and amendments of, the constitution, were proposed by congress, and ratified by the legislatures of the several states. These additional articles are to the following import. The first ten were proposed at the first session of the first congress, in accordance with the recommendations of various states in ratifying the constitution, and were adopted in 1791. The dates of the adoption of the subsequent amendments are given below.

As to the combined effect of the first ten amendments, see *infra*.

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

Since this applies entirely to the federal government, there is no provision protecting the religious liberties of citizens of the states, and the claim that an ordinance of a state municipal corporation impairs it, raises no federal question; Permoli v. Municipality No. 1 of New Orleans, 3 How. (U. S.) 589, 11 L. Ed. 739; the term "religion" in this amendment refers exclusively to a person's views of his relations to his Creator, though often confused with some particular form of worship, from which it must be distinguished; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. The religious freedom secured is not available as a protection against legislation for the punishment of criminals, and their offences are not mitigated by the sanction of a re-

ligious sect; Church of Jesus Christ of L. D. S. v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; (the Mormon Church case); Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; or by territorial legislation; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637. This provision securing religious freedom is not violated by an appropriation of money by congress to a hospital as compensation for the treatment of poor patients; Bradfield v. Roberts, 175 U. S. 291, 20 Sup. Ct. 121, 44 L. Ed. 168.

The provision securing freedom of speech is not violated by legislation excluding alien anarchists from the country; or their deportation after entry in violation of law; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979.

The provision securing freedom of the press is not invaded by the exclusion of lottery literature from the mails; Ex parte Rapier, 143 U. S. 110, 12 Sup. Ct. 374, 36 L. Ed. 93; Horner v. U. S., 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126; and its transportation otherwise may be prohibited; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, disregarding a suggestion in In re Jackson, 96 U. S. 727, 24 L. Ed. 877.

The right of peaceable assemblage and of petition was not created, but simply recognized by the constitution and protected against federal interference; for its continued protection, the reliance must be had upon the states; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Second Amendment. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The right secured by this article is not created, but only secured against interference by congress; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; and it may be regulated by state statutes not conflicting with valid congressional action; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; Wright v. Com., 77 Pa. 470; Nunn v. State, 1 Ga. 243; Cockrum v. State, 24 Tex. 394; State v. Reid, 1 Ala. 612, 35 Am. Dec. 44; State v. Mitchell, 3 Blackf. (Ind.) 229; Bliss v. Com., 2 Litt. (Ky.) 90, 13 Am. Dec. 251.

Third Amendment. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

No legal question seems to have arisen under this article.

Fourth Amendment. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The guaranty of this article applies to letters and sealed packages in the mails as fully as to property retained in a man's home; In re Jackson, 96 U. S. 727, 24 L. Ed. 877. It is violated by an act requiring the defendant in revenue cases to produce his private books etc., in court, and providing that, on refusal, the case shall be taken as confessed against him; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; but not by an inquiry of a broker as to purchases or sales on behalf of any senator of corporate stock liable to be affected by the action of the senate; In re Chapman, 166 U. S. 661, 17 Sup. Ct. 677, 41 L. Ed. 1154; nor by compulsory production of documentary evidence under a statute which gives immunity from prosecution or forfeiture because of the testimony given; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860. Testimony procured in violation of this prohibition is not thereby rendered inadmissible; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

The provision as to warrants does not apply to any issued under a state process; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269; nor to an action by the federal government for a debt due to it without search warrant; Den v. Improv. Co., 18 How. (U. S.) 272, 15 L. Ed. 372.

Fifth Amendment. No persons shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This amendment operates solely on the federal government and not on the state; Barrington v. Missouri, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. Ed. 890; Hunter v. Pittsburgh, 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151. It is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for the removal of the person charged from the district where he is arrested; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882. The requirement in the amendment of presentment or indictment for the grand jury does not take upon itself the local law as to how the

grand jury shall be made up and raise the latter to a constitutional requirement; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

Whether a person on trial is compelled to be witness against himself contrary to the 5th Amendment because compelled to stand up and walk before the jury, or because the jury were stationed during a recess so as to observe his size and walk, was not decided, but it was held that it did not affect the jurisdiction of the trial court and render the judgment void; In re Moran, 203 U. S. 96, 27 Sup. Ct. 25, 51 L. Ed. 105.

As to the several guarantees contained in this article, see the separate titles and particularly FOURTEENTH AMENDMENT; DUE PROCESS OF LAW; EQUAL PROTECTION OF THE LAWS.

Sixth Amendment. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The purpose of this amendment was to provide for trial by jury in criminal cases in all the federal courts; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281; it applies to the territories; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; and after the admission of a state, it cannot provide for the trial of felonies committed before its admission otherwise than by a common law jury; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. The provision applies to all criminal cases, not felonies merely; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; but only such crimes as were previously tried by jury; U. S. v. Duane, Wall. Sr. 102, Fed. Cas. No. 14,997. It does not include an action for goods claimed to have been forfeited by an importer; U. S. v. Zucker, 161 U. S. 475, 16 Sup. Ct. 641, 40 L. Ed. 777; or petty criminal offences; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. The protection of this amendment extends to aliens within the country; Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

See JURY; VENUE; WITNESS.

Seventh Amendment. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

This article secures the right of trial by jury in civil cases. Suits at common law mean only those distinguished from admiralty and equity; Parsons v. Bedford, 3 Pet. (U. S.) 433, 7 L. Ed. 732; Shields v. Thomas, 18 How. (U. S.) 253, 15 L. Ed. 368; U. S. v. La Vengeance, 3 Dall. (U. S.) 297, 1 L. Ed. 610; but the right cannot be impaired by blending a claim at law with an equitable demand; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358. The right to a jury trial is secured in bankruptcy cases; In re Wood, 210 U. S. 246, 258, 28 Sup. Ct. 621, 52 L. Ed. 1046; and in proceedings for the condemnation of property seized as a prize; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882; The Sarah, 8 Wheat. (U. S.) 394, 5 L. Ed. 644; it does not apply to proceedings to disbar an attorney; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; nor to findings by the court of claims; McElrath v. U. S., 102 U. S. 426, 26 L. Ed. 189; or by a special tribunal for hearing claims against a municipality not strictly legal, but properly provided for by legislation; Guthrie Nat. Bank v. Guthrie, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796; nor to condemnations under the right of eminent domain; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. The common law which in this article is made the criterion of suits in which the right of trial by jury is secured is the common law of England; U. S. v. Wonson, 1 Gall. 5, Fed. Cas. No. 16,750. See JURY.

Eighth Amendment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

As to the prohibitions of this article, see BAIL; FINE; PUNISHMENT.

Ninth Amendment. The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

A distinction is taken between a case of express prohibition of state actions and one in which the power of the states is taken away by implication. In the former case the power of the state ceased upon the adoption of the constitution, in the latter it continues until congress acts upon the subject matter; Moore v. Houston, 3 S. & R. (Pa.) 169, 179, to which a writ of error to the United States Supreme Court was dismissed. So a grant to congress of power over a certain subject matter does not invest any particular court with jurisdiction over it until congress has enacted a law upon the subject; U. S. v. New Bedford Bridge, 1 Woodb. & M. 401, Fed. Cas. No. 15,867.

Tenth Amendment. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The federal government possesses only the delegated powers defined by the constitution and all others are reserved to the states; U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; from this results a different rule of interpretation of the federal constitution from those of the states; the former is strict, the latter liberal; Com. v. Hartman, 17 Pa. 118; Weister v. Hade, 52 Pa. 474. See INTERPRETATION.

All powers not conferred upon the federal government by the constitution are reserved to the states, and among the powers not surrendered by them are the police power (subject to the limitations imposed by the constitution); New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; Patterson v. Kentucky, 97 U. S. 501, 24 L. Ed. 1115; Prigg v. Com., 16 Pet. (U. S.) 539, 10 L. Ed. 1060; the right to control tide waters within the limits of the states; Weber v. Harbor Com'rs, 18 Wall. (U. S.) 57, 21 L. Ed. 798; Illinois Cent. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Pollard v. Hagan, 3 How. (U. S.) 212, 11 L. Ed. 565; the regulation of real property with respect to its acquisition, tenure and disposition; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; and the imposition of succession duties; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; and generally the power of taxation of subject matter within their jurisdiction; Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. Ed. 558; Providence Bank v. Billings, 4 Pet. (U. S.) 563, 7 L. Ed. 939.

The United States has no inherent powers of sovereignty and only those enumerated in the constitution of the United States; the manifest purpose of the 10th Amendment was to put beyond dispute the proposition that all powers not so granted were reserved to the people, and any further powers can only be attained by a new grant; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

The first ten amendments do not apply to the states; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213; Twitchell v. Pennsylvania, 7 Wall. (U. S.) 321, 19 L. Ed. 223; Spies v. Illinois, 123 U. S. 131, 8 Sup. Ct. 22, 31 L. Ed. 80; McElvaine v. Brush, 142 U. S. 155, 160, 12 Sup. Ct. 156, 35 L. Ed. 971; Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas. 689; the same was held as to the first eight amendments; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; and as to the 2d and 4th; Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812; and as to the 5th; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300; Fallbrook Irrig. District v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; and as to the 5th and 6th; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300; and as to the 8th Amendment; O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Pervear v. Mass., 5 Wall. (U. S.) 475, 18 L. Ed. 608. The provision of the 14th Amendment forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States does not operate to extend to the states the limitations on the powers of the federal government contained in the 10th Amendment; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; or those contained in the first eight; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; but the 7th applies in an appellate federal court to a case which was tried in a state court; Justices of Supreme Court v. U. S., 9 Wall. (U. S.) 274, 19 L. Ed. 658.

Eleventh Amendment. (1798). The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.

This amendment was a result of the decision in Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440. It has been the subject of much judicial construction and the cases upon the point as to what is a suit against a state are very numerous, the question being usually raised as to whether a suit against a state officer respecting property or official action is in fact a suit against a state.

Many suits against state officers have been held to be in effect against the state, but it is established, as a settled principle, that an attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the state in its sovereign capacity and is an illegal act, and the officer is stripped of his official character and is subjected as an individual for the consequences of it. The state has no power to impart to its officer immunity from responsibility to the supreme authority of the U. S.; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

As to what has been held to be a suit against a state within this amendment, see STATE; and also an interesting discussion of the history and scope of this amendment by W. L. Guthrie in 8 Colum. L. Rev. 183. In the South Carolina Distillery Cases, Murray v. Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742, and Murray v. South Carolina, 213 U. S. 174, 29 Sup. Ct. 465, 53 L. Ed. 752, the first being a *certiorari* to the circuit court of appeals, and the second being a writ of error to the supreme court of

the state, the former was reversed and the latter affirmed. It was held that a bill in equity to compel specific performance of a contract between an individual and the state cannot, against the objection of the state, be maintained in the federal courts; and that the consent of a state to be sued in its own courts by a creditor does not give that creditor a right to sue in a federal court. It was also held that although by engaging in business, a state may not avoid a pre-existing right of the federal government to tax that business, it does not thereby lose the exemption from suit under this amendment, which was also held to prevent a suit in the federal courts against state officers by vendors of supplies for business carried on by the courts.

Twelfth Amendment (1804). The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of death or other constitutional disability of the president.

The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole shall be necessary to a choice.

But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

This is a substitute for the third paragraph of section 1 of Article II of the constitution and provides for the method of the election of president and vice-president by the electors, or in default of an election by them.

Thirteenth Amendment (1865). Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

This amendment has been recognized by the Supreme Court as having been passed with special reference to the completion of the enfranchisement of the African race; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; but the word "servitude" which is included in it is of larger meaning than slavery, and by the use of it the amendment operates to prohibit any kind of slavery, including peonage and coolie labor; Butchers' Benevolent Ass'n v. Slaughter House Co., 16 Wall. (U. S.) 36, 21 L. Ed. 394; and every species of involuntary servitude; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; but imprisonment at hard labor, compulsory and unpaid, is in the strongest sense of the words within this exception; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. In a much later case than those which first defined the scope of this amendment, it is said: "The words 'involuntary servitude' have a 'larger meaning than slavery.' . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." Bailey v. Alabama, 219 U. S. 241, 31 Sup. Ct. 145, 55 L. Ed. 191.

Fourteenth Amendment (1868). All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of

persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to the male inhabitants of such state, being of twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

No person shall be a senator or representative in congress, or elector of president or vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This amendment has given rise to so much discussion by the courts that it requires fuller treatment than can be given here, and for this see the title, FOURTEENTH AMENDMENT, and the cross-references therein; POLICE POWER; EMINENT DOMAIN.

Fifteenth Amendment (1870). The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

The congress shall have power to enforce this article by appropriate legislation.

This amendment under the decisions is not to be extended beyond the precise meaning of the words employed. It does not operate to increase the right of suffrage in the states, except so far as that had been previously abridged by "race, color or previous condition of servitude," or had been confined to white persons; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. It does not confer the right of suffrage upon women; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627; nor upon Indians still under tribal relations and not naturalized; Elk v. Wilkins, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643. The amendment is not violated by the qualifications requiring a specific amount of literacy; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012.

Sixteenth Amendment (1913). Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

Seventeenth Amendment (1913). The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

The reader is referred to the notes to the United States Constitution in Vol. I of Ar demas Stewart's Edition of Purdon's Dig. (Pa. Stats.) which may be properly termed a treatise on the subject of great value.

CONSTITUTIONAL. That which is consonant and agrees with the constitution.

Laws made in violation of the constitution are null and void. It is well established that it is the function of the courts so to declare them in any case coming before the court, which involves the question of their constitutionality. See *infra*. "An unconstitutional law is not a law." Chicago, I. & L. Ry. Co. v. Hackett, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. —. The presumption is always in favor of the constitutionality of a law, and the party alleging the opposite must clearly establish it; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; Ex parte Davis, 21 Fed. 396; Ewing v. Hoblitzelle, 85 Mo. 64; Pleuler v. State, 11 Neb. 547, 10 N. W. 481; Com'rs of Leavenworth County v. Miller, 7 Kan. 479, 12 Am. Rep. 425; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437; In re League Island, 1 Brewst. (Pa.) 524; People v. Reardon, 184 N. Y. 431, 77 N. E. 970, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed.

415, 9 Ann. Cas. 736; where an act is capable of two interpretations, the court will adopt that which will sustain it rather than that which will render it void as unconstitutional; St. Louis Nat. Bank v. Papin, 4 Dill. 29, Fed. Cas. No. 12,239; the incompatibility of the statute with the constitution should be so clear as to leave little reason for doubt before it is pronounced to be invalid; Ex parte Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366.

An act may be declared partly valid and partly void as unconstitutional; Com. v. Kimball, 24 Pick. (Mass.) 361, 35 Am. Dec. 326; Berry v. R. Co., 41 Md. 446, 20 Am. Rep. 69; McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587; In re Sternbach, 45 Fed. 175; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; Unity v. Burrage, 103 U. S. 459, 26 L. Ed. 405; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; Gamble v. McCrady, 75 N. C. 509.

A part of a law may be unconstitutional, while there is no such objection to the remaining parts, and in this case all of the law stands, except that part which is unconstitutional; People v. Van De Carr, 178 N. Y. 425, 70 N. E. 965, 66 L. R. A. 189, 102 Am. St. Rep. 516; Cella Commission Co. v. Bohlinger, 147 Fed. 419, 78 C. C. A. 467, 8 L. R. A. (N. S.) 537; but the parts must be wholly independent of each other; Allen v. Louisiana, 103 U. S. 80, 26 L. Ed. 318; and capable of separation; Bank of Hamilton v. Dudley, 2 Pet. (U. S.) 492, 526, 7 L. Ed. 496; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; El Paso & N. E. R. Co. v. Gutierrez, 215 U. S. 87, 30 Sup. Ct. 21, 54 L. Ed. 106. The parts must be separable, so that each may be read by itself; Baldwin v. Franks, 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. Ed. 766; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550; but if the two provisions are so united that a presumption arises that the legislature would not have adopted the one without the other both will fail; Ex parte Frazer, 54 Cal. 94; Western Union Tel. Co. v. State, 62 Tex. 630; Slauson v. City of Racine, 13 Wis. 398; Connolly v. Sewer Pipe Co., 184 U. S. 540, 565, 22 Sup. Ct. 431, 46 L. Ed. 679; and it is a question for the court to determine whether it was the intent of congress to have the part which is constitutional stand by itself; Butts v. Transp. Co., 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. ——; or where the section which is unconstitutional is an inseparable part of several sections which form one system mutually dependent; Campau v. City of Detroit, 14 Mich. 276; or where all the provisions of the act are secondary to the unconstitutional provisions; Brooks v. Hydorn, 76 Mich. 273, 42 N. W. 1122; where a portion is unconstitutional, the statute must fall as a whole, unless the apparent legislative intent is that in such case the remaining portion shall stand alone; Grey v. City of Dover, 62 N. J. L. 40, 40 Atl. 640.

This power of the courts to declare a law unconstitutional can only exist where there is a written constitution. No such power is possessed by the English courts, and an act of parliament is absolutely conclusive and binds everybody when once its meaning is ascertained. But, where a written constitution exists, it is the expression of the will of the sovereign power, and no body which owes its existence to that constitution (as does the legislature) can violate this fundamental expression of the will of the people. It was originally doubted whether the courts possessed this power, even where a written constitution exists, but it is now established beyond doubt. The question may arise with regard to both state and United States laws considered with reference to the United States constitution, and with regard to state laws also as considered in reference to the state. No important question of law has ever been approached with more caution, examined and discussed with more deliberation and finally determined more conclusively, than that of the existence of this judicial power. It arose as early as 1792, on an act conferring powers upon the judges which were alleged to be not judicial, but a decision was avoided by repeal of the statute; see Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436; but the question arising in another case, the act was declared unconstitutional; see U. S. v. Ferreira, 13 How. (U. S.) 40, 52 note, 14 L. Ed. 42; the question was again raised in 1798 and not decided; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648; and later it was stated from the bench as the general sentiment of the bench and bar that the power existed; Com. v. Coxe, 4 Dall. (U. S.) 194, 1 L. Ed. 786. But in 1803 the question was directly raised in a famous case recently much discussed in legal periodical literature, and the power and duty of the court to declare an act unconstitutional were declared in an opinion by Marshall, C. J., in what Kent terms "an argument approaching to the precision and certainty of a mathematical demonstration;" 1 Kent 453; in that case the actual decision was against the jurisdiction, and therefore no law was declared unconstitutional, but the reasoning of the opinion is the basis of the rule afterwards applied and firmly settled; the question was next seriously raised and finally settled by the reasoning of Marshall, C. J., in Cohen v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; prior to this decision the question had been raised and decided in favor of the power of the courts in New Jersey; State v. Parkhurst, 9 N. J. L. 427, 440, 444; in Virginia, In re First Case of the Judges, 4 Call, 1, 135; Com. v. Cherry, 2 Va. Cas. 20;

Page v. Pendleton, Wythe, 211; in South Carolina, Bowman v. Middleton, 1 Bay 252; in North Carolina, Den v. Singleton, 1 N. C. 48; in Rhode Island, Pamph. J. B. Varnum, Providence, 1787; and it was raised in New York in a case argued by Hamilton; Hamilton's Works, vol. 5, 115; vol. 7, 197. See Dillon, Laws & Jur. of Eng. 203.

In Eakin v. Raub, 12 S. & R. (Pa.) 330, Gibson, C. J., in a dissenting opinion, was of opinion that the right of the judiciary to declare a legislative act unconstitutional does not exist, unless expressly stated; but that it is expressly given by the clause in the federal constitution which provides that the constitution shall be the supreme law of the land, etc. The same judge in Norris v. Clymer, 2 Pa. 281, said to counsel that he had changed his opinion for two reasons: —the late convention of Pennsylvania by their silence sanctioned the pretensions of the court to deal freely with the acts of the legislature; and he was satisfied from experience of the necessity of the case.

The power has been exercised by the supreme court of the United States in the following cases: Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436; U. S. v. Ferreira, 13 How. (U. S.) 40, 52, 14 L. Ed. 42; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; Gordon v. U. S., 2 Wall. (U. S.) 561, 17 L. Ed. 921; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Hepburn v. Griswold, 8 Wall. (U. S.) 603, 19 L. Ed. 513; U. S. v. Dewitt, 9 Wall. (U. S.) 41, 19 L. Ed. 593; Supreme Justices v. Murray, 9 Wall. (U. S.) 274, 19 L. Ed. 658; Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; U. S. v. R. Co., 17 Wall. (U. S.) 322, 21 L. Ed. 597; U. S. v. Reese, 92 U. S. 214, 23 L. Ed. 563; U. S. v. Fox, 95 U. S. 670, 24 L. Ed. 538; U. S. v. Steffens, 100 U. S. 82, 25 L. Ed. 550; Kilbourn v. Thompson, 103 U. S. 168, 26 L. Ed. 377; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764. And the power has been exercised by that court with respect to state or territorial statutes in cases running into the hundreds.

The discussion of the subject was recently revived by an article on the Income Tax Cases in 29 Am. L. Rev. 550, characterizing the exercise of the power in question as "without constitutional warrant" and "based only on the plausible sophistries of John Marshall, and another by the same writer on the case of Marbury v. Madison, characterizing the doctrine as an "unconstitutional usurpation of the lawmaking power by the federal courts;" 30 Am. L. Rev. 188. The first of these was followed by an article in the same periodical taking issue with it; *id.* 55; and one in 34 Am. L. Reg. & Rev. 796. In the last the subject is thoroughly reviewed from the earliest cases down to the Income Tax cases, and it contains much historical matter bearing upon the question not before collected. See also 7 Harv. L. Rev. 129; 19 Am. L. Rev. 177; Coxe on Judicial Power and Unconstitutional Legislation; an elaborate discussion of the subject by Jno. R. Wilson, Pres't, Rep. Ind. St. Bar Ass'n for 1899, p. 12.

In judging what a constitution means, it must be interpreted in the light and by the assistance of the common law; Durham v. State, 117 Ind. 477, 19 N. E. 327; Brewer, J., in South Carolina v. U. S., 199 U. S. 437, 449, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Matthews, J., in Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564, 31 L. Ed. 508; Gray, J., in U. S. v. Wong Kim Ark, 169 U. S. 649, 654, 18 Sup. Ct. 456, 42 L. Ed. 890; Bradley, J., in Moore v. U. S., 91 U. S. 270, 274, 23 L. Ed. 346.

Certain fundamental principles govern the courts in passing upon the validity of legislative acts under the constitution; among them are the following:

It is not usual as a *matter of practice* for courts to pass upon constitutional questions excepting before a full bench; Briscoe v. Bank, 8 Pet. (U. S.) 118, 8 L. Ed. 887.

It has been said that inferior courts will not pass upon these questions; Ortman v. Greenman, 4 Mich. 291; but see, *contra*, Cooley, Const. Lim. 198, n.; Mayberry v. Kelly, 1 Kan. 116. The contrary rule would seem now to be well settled.

Courts will not draw into consideration constitutional questions collaterally, or unless the consideration is necessary to the determination of the very point in controversy; Hoover v. Wood, 9 Ind. 287; Smith v. Speed, 50 Ala. 277; Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; Parker v. State, 5 Tex. App. 579; State v. Rich, 20 Mo. 393; Ireland v. Turnpike Co., 19 Ohio St. 373. If a statute is valid on its face, the court will not look into evidence *aliunde* to determine whether it violates the constitution; Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673; but where it is plainly invalid for other reasons, courts will not pass on its constitutionality; State v. Price, 8 Ohio Cir. Ct. R. 25, 4 O. C. D. 296; Smith v. Speed, 50 Ala. 276; Weimer v. Bunbury, 30 Mich. 201; White v. Scott, 4 Barb. (N. Y.) 56. The question whether a legislative act is constitutional never comes before a court for decision as an abstract question, but can only be considered when it arises in a suit *inter partes*. "The serious duty of condemning state legislation as constitutional and void cannot be thrown upon this court, except at the suit of parties directly and

certainly effected thereby"; Chadwick v. Kelly, 187 U. S. 540, 23 Sup. Ct. 175, 47 L. Ed. 293; Manley v. Park, 187 U. S. 547, 23 Sup. Ct. 208, 47 L. Ed. 296. As to the effect of a decision in such a case upon the act itself, see *infra*.

To justify a court in declaring an act unconstitutional, the case must be so clear that no reasonable doubt can be said to exist; Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248; Smithee v. Garth, 33 Ark. 17; Petition of Wellington, 16 Pick. (Mass.) 95, 26 Am. Dec. 631; New York & O. M. R. Co. v. Van Horn, 57 N. Y. 473; Kerrigan v. Force, 68 N. Y. 381; Gormley v. Taylor, 44 Ga. 76; State v. R. Co., 48 Mo. 468; see Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; Rich v. Flanders, 39 N. H. 304; Chicago, D. & V. R. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; and every intendment will be made in favor of the constitutionality of the law; People v. Rucker, 5 Colo. 455. "The principle is universal, that legislation, whether by congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear;" Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; and in Minsinger v. Rau, 236 Pa. 327, 84 Atl. 902, it was said that when an act has been the result of deliberate thought of a commission of prominent citizens, and has been passed upon by two legislatures before final approval by the governor, it will not be set aside as unconstitutional "unless the alleged breaches of the fundamental law are so glaring that there is no escape."

The courts cannot pronounce void an act within the general scope of legislative powers, merely because contrary to natural justice; Commissioners of Northumberland County v. Chapman, 2 Rawle (Pa.) 74; Weber v. Reinhard, 73 Pa. 370, 13 Am. Rep. 747; State v. Kruttschnitt, 4 Nev. 178; Hills v. Chicago, 60 Ill. 86; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Martin v. Dix, 52 Miss. 53, 24 Am. Rep. 661; Maxwell v. Board, 119 Ind. 20, 23, 19 N. E. 617, 21 N. E. 453; nor because it violates fundamental principles of republican government, unless these principles are protected by the constitution; License Tax Cases, 5 Wall. (U. S.) 469, 18 L. Ed. 497; Perry v. Keene, 56 N. H. 514; nor because it is supposed to conflict with the *spirit* of the constitution; People v. Fisher, 24 Wend. (N. Y.) 220; Walker v. City of Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Cooley, Const. Lim. (6th ed.) 204. Any legislative act which does not encroach upon the powers vested in the other departments of the government must be enforced by the courts; Chicago, D. & V. R. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Fletcher v. Peck, 6 Cra. (U. S.) 128, 3 L. Ed. 162. The courts of one state should not declare unconstitutional and void a statute of another state, whose courts had held it constitutional; American Print Works v. Lawrence, 23 N. J. L. 596, 57 Am. Dec. 420.

In the discussion of this subject expressions have been used from time to time by courts and legal authors which tend to leave in the mind of the reader an impression that legislative acts have been set aside upon some other or higher ground than that of unconstitutionality. These expressions will be found on examination either to consist of *dicta* not only entirely *obiter*, but usually not justified even as *dicta* by the facts of the cases in which they occur, or to be qualified by a context usually omitted in citing them. A few of them will suffice as examples. Judge Cooley, in the preface to the second edition of his very learned work on Constitutional Limitations, says: "There are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restraints which the people impose by their state constitutions." Again, in the work itself it is said that it is not necessary that the courts, before they can set aside a law as invalid must be able to find some *specific* inhibition which has been disregarded, or some *specific* command which has been disobeyed; Cooley, Const. Lim. 206. This language has been quoted and interpreted to sustain the idea sometimes hinted at rather than seriously and argumentatively advanced, that there is some vague sense of justice and right—some higher law, it might be termed—which may justify a court in holding that a legislative act is invalid, in the absence of an express or implied constitutional objection. And it has been considered that the same view is maintained by Judge Redfield in an article in 10 Am. L. Reg. N. S. 161. So in an early case it has been said that statutes against plain and obvious principles of common right and common reason are void; Ham v. McClaws, 1 Bay (S. C.) 98. So also Judge Story made some forcible observations respecting "fundamental maxims of free government," to disregard which no power "lurked under any general grant of legislative authority," Wilkinson v. Leland, 2 Pet. (U. S.) 627, 7 L. Ed. 542, 657, which have been referred to as supporting the view under consideration. Of the like character were the assertions of Hosmer, C. J., that he could not agree "with those judges who assert the omnipotence of the legislature in all cases when the constitution has not interposed an explicit restraint;" Inhabitants of Goshen v. Inhabitants of Stonington, 4 Conn. 209, 225, 10 Am. Dec. 121; and the language of a New York court which declared that the vested *rights* of the inhabitants of the city of New York in certain public property rested "not merely upon the constitution, but upon the great principles of eternal justice which lie at the foundation of all free government;" Benson v. City of New York, 10 Barb. (N. Y.)

223, 244. Commenting on these and similar statements, Mr. C. A. Kent, in an article in 11 Am. L. Reg. N. S. 734, says on this subject: "The judiciary of a state cannot declare a legislative act unconstitutional, unless it conflict, expressly or by implication, with some provision of the state or of the federal constitution." See City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93, note. A careful examination of these and other authorities relied upon for the purpose stated will make it apparent that there is no substantial basis for a doctrine which will permit a court to apply to a legislative act any test of validity other than that of its constitutionality. When there is doubt as to the construction of a law, courts may give to it one consonant with rather than opposed to principles of right and justice, and this was precisely the scope of the South Carolina case. In the New York case the great fundamental principles need not have been referred to by the court, for the reason that they were all protected by the constitution, and in the Connecticut case not only was no law held invalid, but the sole question decided was that an act declaring valid all marriages previously celebrated by a clergyman of any religious denomination according to its forms was constitutional. The note by Judge Redfield, referred to, is directed only to show that there are limitations to the legislative power, and that it does not embrace "judicial decrees or despotic orders or assessments such as a military conqueror might make," under the guise of taxation. But it will be found that the cases put by him, as well as those used by Judge Cooley, to illustrate the expression quoted from his work, and indeed all of those which have given rise to the theory under consideration, are provided for in the American constitutions either by express prohibitions and declarations of rights, or by the distribution of the powers of government and the right of the judicial branch to determine finally whether a given act is an exercise of *legislative power*. The whole subject is thoroughly discussed by Judge Cooley in his Constitutional Limitations, 6th ed., and upon full consideration of the authorities he concludes that a court cannot "declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution (p. 197); . . . that except when the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case" (p. 201), nor because of "apparent injustice or impolicy," or because "they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the constitution" (p. 202). See also Potter, Dwar. Stats. 62.

"There is no room in our constitutional theory for any transcendent right or instinct of nature, except as guaranteed by the constitution"; Henry v. Cherry & Webb, 30 R. I. 13, 31, 73 Atl. 97, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006; State v. McCrillis, 28 R. I. 165, 66 Atl. 301, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701; State v. Ins. Co., 73 Conn. 255, 47 Atl. 299, 57 L. R. A. 481, denying the existence of "the vague notion of a higher law." The courts are not guardians of the rights of the people except as those rights are secured by some constitutional provision; Cooley, Const. Lim. 201. And see a thorough discussion of the subject of "Implied Limitations upon the Exercise of the Legislative Power" by R. C. Dale, Am. Bar. Ass'n Rep. (1901) 294.

A court cannot interfere merely because it does not consider that the circumstances at the time justified the action of the legislature; there must be a clear unmistakable infringement of rights secured by the fundamental law; Otis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323, where an act forbidding sales of stock on margins was held not unconstitutional. By way of illustration, Holmes, J., said that no court would declare usury laws or Sunday laws unconstitutional, though every member of it believed such law to be unwise or useless; while on the other hand wagers may be declared illegal without a statute, or lotteries under one, though formerly thought pardonable.

In the consideration of these questions, the distinction between the federal and state constitutions must be borne in mind: "Congress can pass no laws but such as the constitution authorizes expressly or by clear implication; while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited." Cooley, Const. Lim. 210; see Weister v. Hade, 52 Pa. 477; Giozza v. Tiernan, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599. But it has been held that the decision of congress that certain claims upon the public treasury are founded upon moral and honorable obligations and upon principles of right and justice, and that public money be appropriated in payment of such claims is constitutional, and can rarely, if ever, be the subject of review by the judicial branch of the government; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

No one can attack as unconstitutional an independent provision of a law, who has no interest in and is not affected by such provision; State v. Becker, 3 S. D. 29, 51

N. W. 1018; Farneman v. Cemetery Ass'n, 135 Ind. 344, 35 N. E. 271; Burnside v. County Court, 86 Ky. 423, 6 S. W. 276; Jones v. Black, 48 Ala. 540; Moore v. City of New Orleans, 32 La. Ann. 726; People v. R. Co., 89 N. Y. 75.

The judiciary of the United States should not strike down a legislative enactment of a state, especially if it has direct connection with the social order, health and morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the national constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223.

An act adjudged to be unconstitutional is as if it had never been enacted; Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718; City of Detroit v. Martin, 34 Mich. 170, 22 Am. Rep. 512; Woolsey v. Dodge, 6 McLean, 142, Fed. Cas. No. 18,032; Clark v. Miller, 54 N. Y. 528; Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; though it was held in Com. v. McCombs, 56 Pa. 436, that an officer acting under an unconstitutional law was a *de facto* officer. An unconstitutional law must be deemed to have the force of law so far as to protect an officer acting under it, until it is declared void; Sessums v. Botts, 34 Tex. 335; but see Astrom v. Hammond, 3 McLean, 107, Fed. Cas. No. 596; Poindexter v. Greenhow, 114 U. S. 288, 5 Sup. Ct. 903, 962, 29 L. Ed. 185. If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is considered to have been in force during the whole period since its enactment; Pierce v. Pierce, 46 Ind. 86; but see Menges v. Dentler, 33 Pa. 495, 75 Am. Dec. 616; Geddes v. Brown, 5 Phila. (Pa.) 180; Gelpcke v. Dubuque, 9 Am. L. Rev. 402. An unconstitutional act can under no circumstances be validated by the legislature; State v. Whitesides, 30 S. C. 579, 9 S. E. 661, 3 L. R. A. 777.

See 11 Am. L. Reg. N. S. 730; 9 *id.* 585.

The power of the courts to declare legislative acts unconstitutional is the subject of an extended article by Wm. M. Meigs, in 40 Am. L. Rev. 641, which in a sense continues a previous article in 19 Am. L. Rev. 175. Mr. Meigs elaborates the argument on the subject, particularly with reference to the early decisions and the congressional debates on the repeal of the Judiciary Act, in 1802, of which he declares his ignorance at the time he wrote his first article. He cites five cases in which the right was exercised and two others in which it was approved prior to 1800, and gives an interesting history of the earlier development of the subject, which has been less discussed in connection with it.

In passing upon an act the court can only take the facts before it; in this way it may sometimes enforce laws which would be declared invalid if attacked in a different manner; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350.

As to the constitutionality of various classes of statutes, see the several titles of constitutional law, including: ARMS; BONDS; BRIDGES; CIVIL RIGHTS; COMMERCE; DUE PROCESS OF LAW; EMINENT DOMAIN; EX POST FACTO LAWS; EXECUTIVE POWER; EXTRADITION; FEDERAL QUESTION; FOREIGN JUDGMENTS; FULL FAITH AND CREDIT; HABEAS CORPUS; IMPAIRING OBLIGATION OF CONTRACTS; INTERSTATE COMMERCE; JUDICIAL POWER; JUDICIARY; LIQUOR LAWS; ORIGINAL PACKAGES; POLICE POWER; PRIVILEGES AND IMMUNITIES; RETROACTIVE LAWS; SPECIAL LEGISLATION; STATUTES; TAXATION; TITLE; UNITED STATES COURTS.

See Thorpe, Amer. Charters, Constitutions and Organic Laws, for the text of state constitutions.

CONSTITUTIONAL CONVENTION. A convention summoned by the legislature to draw up a new, or amend an old constitution. It is ancillary and subservient to the fundamental law, not hostile and paramount thereto. Jameson, Const. Conv. § 11. It is bound by the act creating it; Wood's Appeal, 75 Pa. 59. See Jameson, Const. Conv. §§ 376–418. The result of its labors, when adopted, must be submitted to a vote of the people, before it can become effective; Jameson, § 479 *et seq.* *Contra*, if the legislature does not so provide in the act calling the convention; State v. Neal, 42 Mo. 119; Sproule v. Fredericks, 69 Miss. 898, 11 South. 472; in such case it need not be submitted to vote; Sproule v. Fredericks, 69 Miss. 898, 11 South. 472.

For a complete list of Constitutional conventions held in the United States, to 1876, see Jameson, Const. Conv. Appendix B, and see the work generally for a full discussion of the interesting questions which have arisen respecting the powers and duties of such bodies. See STATE.

CONSTITUTIONS OF CLARENDON. See CLARENDON.

CONSTITUTIONS OF THE FOREST. See FOREST LAWS; CHARTA DE FORESTA.

CONSTITUTOR. **In Civil Law.** He who promised by a simple pact to pay the debt of another; and this is always a principal obligation. Inst. 4. 6. 9.

CONSTITUTUM (Lat.). An agreement to pay a subsisting debt which exists without any stipulation, whether of the promisor or another party. It differs from a stipulation in that it must be for an existing debt. Du Cange.

A day appointed for any purpose. A form of appeal. Calvinus, Lex.

CONSTRAINT. The word constraint is equivalent to the word restraint. Edmondson v. Harris, 2 Tenn. Ch. 433.

CONSTRUCTION (Lat. *construere*, to put together). **In Practice.** Determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement.

Drawing conclusions respecting subjects that lie beyond the direct expression of the term. Lieber, Leg. & Pol. Herm. 20.

Construction and interpretation are generally used by writers on legal subjects, and by the courts, as synonymous, sometimes one term being employed and sometimes the other. Lieber, in his Legal and Political Hermeneutics, distinguishes between the two, considering the province of interpretation as limited to the written text, while construction goes beyond, and includes cases where texts interpreted and to be construed are to be reconciled with rules of law or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument or determine its application to cases unprovided for; C. 1, § 8; c. 3, § 2; c. 4; c. 5. Dr. Wharton (2 Contracts, c. 19) adopts this view. Leake (Digest of Contracts 217) and Prof. James B. Thayer (Evidence 411) consider them as synonymous. Black (Interpretation of Laws 1) makes some distinction between the terms.

Legal rules of construction so called, suggest natural methods of finding and weighing evidence and ascertaining the fact of intention, but do not determine the weight which the evidence has in mind, and do not establish a conclusion at variance with that reached by a due consideration of all the competent proof; Edes v. Boardman, 58 N. H. 580, 592.

A *strict* construction is one which limits the application of the provisions of the instrument or agreement to cases clearly described by the words used. It is called, also, literal.

A *liberal* construction is one by which the letter is enlarged or restrained so as more effectually to accomplish the end in view. It is called, also, equitable.

The terms *strict* and *liberal* are applied mainly in the construction of statutes; and the question of strictness or liberality is considered always with reference to the statute itself, according to whether its application is confined to those cases clearly within the legitimate import of the words used, or is extended beyond though not in violation of *(ultra sed non contra)* the strict letter. In contracts, a strict construction as to one party would be liberal as to the other.

One leading principle of construction is to carry out the intention of the authors of or parties to the instrument or agreement, so far as it can be done without infringing upon any law of superior binding force.

The subject will be treated under INTERPRETATION.

CONSTRUCTIVE. That which amounts in the view of the law to an act, although the act itself is not necessarily really performed. For words under this head, such as constructive fraud, etc., see the various titles FRAUD; NOTICE; TRUST; etc.

CONSUETUDINARIUS (Lat.). **In Old English Law.** A ritual or book containing the rites and forms of divine offices or the customs of abbeys and monasteries.

A record of the *consuetudines* (customs). Blount; Whishaw.

CONSUETUDINARY LAW. Customary or traditional law.

CONSUETUDINES FEUDORUM (Lat. feudal customs). A compilation of the law of feuds or fiefs in Lombardy, made A. D. 1170.

It is called, also, the Book of Fiefs, and is of great and generally received authority. The compilation is said to have been ordered by Frederic Barbarossa, Erskine, Inst. 2. 3. 5, and to have been made by two Milanese lawyers, Spelman, Gloss., but this is uncertain. It is commonly annexed to the *Corpus Juris Civilis*, and is easily accessible. See 3 Kent, Comm., 10th ed. 665, n.; Spelman, Gloss.

CONSUETUDO (Lat.) A custom; an established usage or practice. Co. Litt. 58.

Tolls; duties; taxes. Co. Litt. 58 *b*.

This use of *consuetudo* is not correct: *custuma* is the proper word to denote duties, etc. 1 Shars. Bla. Com. 313, n. An action formerly lay for the recovery of customs due, which was commenced by a writ *de consuetudinibus et servitiis* (of customs and services). This is said by Blount to be "a writ of right close which lies against the tenant that deforceth the lord of the rent and services due him." Blount; Old Nat. Brev. 77; Fitzh. Nat. Brev. 151.

There were various customs: as, *consuetudo Anglicana* (custom of England), *consuetudo curiæ* (practice of a court), *consuetudo mercatorum* (custom of merchants). See CUSTOM; LEX; LEX ET CONSUETUDO REGNI NOSTRI; LEGES ET CONSUETUDINES REGNI.

CONSUL. A commercial agent appointed by a government to reside in a seaport or other town of a foreign country, and commissioned to watch over the commercial rights and privileges of the nation deputing him. The term includes consuls-general and vice-consuls. Rev. Stat. § 4130.

A *vice-consul* is one acting in the place of a consul.

Among the Romans, consuls were chief magistrates who were annually elected by the people, and were invested with powers and functions similar to those of kings. During the middle ages the term consul was sometimes applied to ordinary judges; and, in the Levant, maritime judges are yet called *consuls*. 1 Boulay Paty, Dr. Mar. tit. *Prél.* s. 2, p. 57. Officers with powers and duties corresponding to those of modern consuls were employed by the ancient Athenians, who had them stationed in commercial ports with which they traded. 3 St. John, Mann. and Cus. of Anc. Greece 283. They were appointed about the middle of the twelfth century by the maritime states of the Mediterranean; and their numbers have increased greatly with the extension of modern commerce.

As a general rule, consuls represent the subjects or citizens of their own nation not otherwise represented; Bee 209; The London Packet, 1 Mas. 14, Fed. Cas. No. 8,474; The Anne, 3 Wheat. (U. S.) 435, 4 L. Ed. 428; The Antelope, 10 Wheat. (U. S.) 66, 6 L. Ed. 268. Their duties and privileges are now generally limited, defined, and se-

cured by commercial treaties, or by the laws of the countries they represent. They are not strictly judicial officers; 3 Taunt. 102; and have no judicial powers except those which may be conferred by treaty and statutes. See The William Harris, Ware 367, Fed. Cas. No. 17,695; Dainese v. Hale, 91 U. S. 13, 23 L. Ed. 190.

American consuls are nominated by the president and confirmed by the senate. U. S. Const. art. 2, § 2. Upon the exercise of this power of appointment by the president, congress can place no limitation; Foote v. U. S., 23 Ct. Cls. 443.

The consular system was reorganized by Act of April 5, 1906. Seven classes of consuls-general were created with salaries running from $12,000 to $3,000; nine classes of consuls, with salaries running from $8,000 to $2,000. The offices of vice-consul-general, deputy-consul-general, vice-consul and deputy-consul were continued, and also consular agents. The office of commercial agent was abolished. No consul-general, consul, or consular agent, receiving a salary of $1,000 or over shall transact business as a merchant, manufacturer, broker, or other trader, or as a clerk for such, within the limits of his jurisdiction, nor practice as a lawyer.

They are required to perform many duties in relation to the commerce of the United States and towards masters of ships, mariners, and other citizens of the United States. Among these are the authority to receive protests or declarations which captains, masters, crews, passengers, merchants, and others make relating to American commerce; they are required to administer on the estates of American citizens dying within their consular jurisdiction and leaving no legal representatives, when the laws of the country permit it; see 2 Curt. Eccl. 241; to take charge of and secure the effects of stranded American vessels in the absence of the master, owner, or consignee; to settle disputes between masters of vessels and the mariners; to provide for destitute seamen within their consulate, and send them to the United States at the public expense. See R. S. § 1674 *et seq.* Also to hear complaints of ill-treatment of seamen; The Welhaven, 55 Fed. 80. The consuls are also authorized to make certificates of certain facts in certain cases, which receive faith and credit in the courts of the United States; Potter v. Ins. Co., 3 Sumn. 27, Fed. Cas. No. 11,335. But these consular certificates are not to be received in evidence, unless they are given in the performance of a consular function; Church v. Hubbart, 2 Cra. (U. S.) 187, 2 L. Ed. 249; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; U. S. v. Mitchell, 2 Wash. C. C. 478, Fed. Cas. No. 15,791; Foster v. Davis, 1 Litt. (Ky.) 71; nor are they evidence, between persons not parties or privies to the transaction, of any fact, unless, either expressly or impliedly, made so by statute; Levy v. Burley, 2 Sumn. 355, Fed. Cas. No. 8,300; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; Brown v. The Independence, 2 Crabbe 54, Fed. Cas. No. 2,014.

Their rights are to be protected agreeably to the laws of nations, and of the treaties made between the United States and the nation to which they are sent.

A consul is liable for negligence or omission to perform seasonably the duties imposed upon him, or for any malversation or abuse of power, to any injured person, for all damages occasioned thereby; and for all malversation and corrupt conduct in office a consul is liable to indictment.

Of foreign consuls. Before a consul can perform any duties in the United States, he must be recognized by the president of the United States, and have received his *exequatur*.

A consul is clothed only with authority for commercial purposes; he has a right to interpose claims for the restitution of property belonging to the citizens of the country he represents; The Adolph, 1 Curt. 87, Fed. Cas. No. 86; The London Packet, 1 Max. 14, Fed. Cas. No. 8,474; Gernon v. Cochran, Bee 209, Fed. Cas. No. 5,368; The Bello Corrunes, 6 Wheat. (U. S.) 152, 5 L. Ed. 229; but he is not to be considered as a minister or diplomatic agent, intrusted by virtue of his office to represent his country in negotiations with foreign states; The Anne, 3 Wheat. (U. S.) 435, 4 L. Ed. 428. They do not represent the country, but are subject to the laws of the country where they reside; U. S. v. Wong Kim Ark, 169 U. S. 678, 18 Sup. Ct. 456, 42 L. Ed. 890.

Consuls are generally invested with special privileges by local laws and usages, or by international compacts; but by the laws of nations they are not entitled to the peculiar immunities of ambassadors. In civil and criminal cases they are subject to the local laws, in the same manner with other foreign residents owing a temporary allegiance to the state; 1 Op. Atty. Gen. 45, 302; Com. v. Kosloff, 5 S. & R. (Pa.) 546; 3 M. & S. 284; U. S. v. Ravara, 2 Dall. (U. S.) 297, 1 L. Ed. 388; Hall, Int. L. 289; Wicquefort, *De l'Ambassadeur*, liv. 1, § 5; Bynkershoek, cap. 10; Marten, *Droit des Gens*, liv. 4, c. 3, § 148.

R. S. § 687, gives to the supreme court original but not exclusive jurisdiction of all suits in which a consul or vice-consul shall be a party. See Mannhardt v. Soderstrom, 1 Binn. (Pa.) 143; State v. De La Foret, 2 N. & M'C. (S. C.) 217; Hall v. Young, 3 Pick. (Mass.) 80, 15 Am. Dec. 180; Sartori v. Hamilton, 13 N. J. L. 107; Valarino v. Thompson, 7 N. Y. 576.

His functions may be suspended at any time by the government to which he is sent, and his *exequatur* revoked. In general, a consul is not liable personally on a contract

made in his official capacity on account of his government; Jones v. Le Tombe, 3 Dall. (U. S.) 384, 1 L. Ed. 647. A vice-consul of a foreign nation who possesses an unrevoked *exequatur* issued by the President of the United States, must still be recognized by the courts as the accredited representative of his country and entitled to all its privileges, although the government which sent him has been overthrown and a revolutionary government established in its place; U. S. v. Trumbull, 48 Fed. 94.

A consul-general is a *consul* within an act concerning acknowledgments of real estate instruments; Linton v. Ins. Co., 104 Fed. 584, 44 C. C. A. 54.

See CONSULAR COURTS.

CONSULAR COURTS. By Act of June 22, 1860, ministers and consuls are invested with judicial authority in China, Japan, Siam, Egypt and Madagascar, to try and to sentence "all citizens of the United States charged with offences against law committed in such countries" and to issue process in execution of the sentence, and with jurisdiction in civil cases "in matter of contract" embracing "all controversies between citizens of the United States, or others," as provided by treaties. This jurisdiction is exercised in conformity with the laws of the United States as to its citizens, and as to others to the extent that the treaties require. If such laws are not adapted to the object or are deficient in suitable remedies, "common law and equity and admiralty rules" are to be applied. If none of the above provide sufficient remedies, then the ministers shall, by decrees and regulations having the force of law, supply the deficiencies.

A consul alone may decide all cases when the fine does not exceed $500, or the imprisonment 90 days; but if the former exceeds $100 or the latter 60 days, an appeal on the law and facts lies to the minister.

If there be no minister in any such country, his duties devolve upon the Secretary of State.

The act is extended to Persia as to disputes between United States citizens; and by amendment (June 14, 1878) to Tripoli, Tunis, Morocco, Muscat and the Samoan Islands and to countries with which an applicable treaty shall be negotiated.

In China and Japan (Act of July 1, 1870), an appeal on the law and fact lies when the matter in dispute exceeds $500 and does not exceed $2,500, exclusive of costs; on final judgment exceeding $2,500, an appeal lies to the district court for the district of California; there is a like appeal by a person charged with crime.

By treaty between the United States and Japan, Nov. 22, 1894, it was provided that on July 17, 1899, consular jurisdiction in Japan should "absolutely and without notice cease and determine." 2 Moore, Int. Dig. 659.

By Act of March 23, 1874, the president may suspend the Act of June 22, 1860, as to the territory of the Sublime Porte and Egypt, or either of them, upon the organization of judicial tribunals by the Ottoman Government and accept such tribunals. See MIXED TRIBUNALS.

In China (Act of June 30, 1906), consular courts have the above jurisdiction in civil cases where the sum or value of the property does not exceed $500, and in criminal cases where the punishment cannot exceed $100 fine or 60 days imprisonment; all other jurisdiction is given by that act to the "United States Court for China." See CHINA. The vice-consul at Shanghai (Act of March 2, 1909) exercises such judicial functions in the place of the consul-general.

The judicial system of the United States in China was held to be constitutional in Forbes v. Scannell, 13 Cal. 242.

By Act of June 22, 1860, insurrection against any of the countries named, and murder, are punishable with death. Such cases, and also felonies, are tried before the minister.

In criminal cases of legal difficulty, or when the consul deems that severer punishments than those specified will be required, he shall summon not exceeding four citizens of the United States, and in capital cases not less than four, to sit with him in the trial. The consul may alone decide civil cases when the damages demanded do not exceed $500, but if he is of opinion that any such cases involve legal perplexities, or such damages exceed $500, he shall call in two or three citizens of the United States to sit with him. If all agree, the judgment is final. If any associate differs from the consul, either party may appeal to the minister, but if there be no appeal, the decision of the consul is final.

The constitutional guaranty of trial by jury and indictment by grand jury does not apply to consular courts in trying offenses committed in a foreign country. In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581. The jurisdiction of home courts over offenses on the high seas does not exclude the jurisdiction of a consular court if the offender is not taken to the United States; *id.*

CONSULAR OFFICER. See CONSUL.

CONSULTATION. The name of a writ whereby a cause, being formerly removed by prohibition out of an inferior court into some of the king's courts in Westminster, is returned thither again; for, if the judges of the superior court, comparing the proceedings with the suggestion of the party, find the suggestion false or not proved, and that, therefore, the cause was wrongfully called from the inferior court, then, upon consul-

tation and deliberation, they decree it to be returned, whereupon this writ issues. *Termes de la Ley;* 3 Bla. Com. 114.

In French Law. The opinion of counsel upon a point of law submitted to them.

CONSUMMATE. Complete; finished; entire.

A marriage is said to be consummate. A right of dower is *inchoate* when coverture and seisin concur, *consummate* upon the husband's death. 1 Washb. R. P. 250, 251. A tenancy by the curtesy is *initiate* upon the birth of issue, and consummate upon the death of the wife. 1 Washb. R. P. 140; Watson v. Watson, 13 Conn. 83; Witham v. Perkins, 2 Greenl. (Me.) 400; 2 Bla. Com. 128.

A contract is said to be consummated when everything to be done in relation to making it has been accomplished. It is frequently of great importance to know when a contract has been consummated, in order to ascertain the rights of the parties, particularly in the contract of sale. See DELIVERY, where the subject is more fully examined. It is also sometimes of consequence to ascertain where the consummation of the contract took place, in order to decide by what law it is to be governed. See CONFLICT OF LAWS; CONTRACT; LEX LOCI.

CONTAGIOUS DISEASES. Diseases which are capable of being transmitted by mediate or immediate contact.

Persons sick of such disorders may remain in their own houses; Boom v. City of Utica, 2 Barb. (N. Y.) 104; but are indictable for exposing themselves in a public place endangering the public. See 4 M. & S. 73, 272. Nuisances which produce such diseases may be abated; Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397. See People v. Townsend, 3 Hill (N. Y.) 479; Barclay v. Com., 25 Pa. 503, 64 Am. Dec. 715; Caldwell v. Bridal, 48 Ia. 15; and a right of action may also be had for injury done to health; Jarvis v. Ry. Co., 26 Mo. App. 253; Fow v. Roberts, 108 Pa. 489.

A landlord is liable in damages for renting a property knowing it to be contaminated with an infectious disease; Snyder v. Gorden, 12 N. Y. St. Rep. 556; under the police power, cities and towns may adopt ordinances for the preservation and promotion of the health of the inhabitants; Com. v. Cutter, 156 Mass. 52, 29 N. E. 1146; Com. v. Hubley, 172 Mass. 58, 51 N. E. 448, 42 L. R. A. 403, 70 Am. St. Rep. 242; Borden's Condensed Milk Co. v. Board of Health, 81 N. J. L. 218, 80 Atl. 30. It is not unconstitutional, as a deprivation of property without due process of law, to pass an ordinance directing a milk inspector to destroy all milk below a certain standard of purity without notice to the owner; Blazier v. Miller, 10 Hun (N. Y.) 435; nor is an act unconstitutional as denying equal protection of the laws which gives a state board of health authority to prevent the landing of passengers and goods from a ship to a locality infected by contagious disease; Compagnie Francaise de Navigation a Vapeur v. Board of Health, 186 U. S. 380, 22 Sup. Ct. 811, 46 L. Ed. 1209, affirming 51 La. Ann. 645, 25 South. 591, 56 L. R. A. 795, 72 Am. St. Rep. 458; vaccination laws making vaccination of children a condition of their attendance in public schools are not unconstitutional; Viemeister v. White, 88 App. Div. 44, 84 N. Y. Supp. 712, affirmed 179 N. Y. 235, 72 N. E. 97, 70 L. R. A. 796, 103 Am. St. Rep. 859, 1 Ann. Cas. 334.

A state law may also prohibit the transportation of cattle from another state, except under certain conditions requiring a certificate of health of such cattle, and it is not an interference with interstate commerce; Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108; St. Louis S. Ry. Co. v. Smith, 20 Tex. Civ. App. 451, 49 S. W. 627, affirmed Smith v. Ry. Co., 181 U. S. 248, 21 Sup. Ct. 603, 45 L. Ed. 847; and so with regard to sheep; State v. Rasmussen, 7 Idaho 1, 59 Pac. 933, 52 L. R. A. 78, 97 Am. St. Rep. 234, affirmed in Rasmussen v. Idaho, 181 U. S. 198, 21 Sup. Ct. 594, 45 L. Ed. 820. Sleeping car companies may exclude from their cars insane persons and persons afflicted with contagious or infectious diseases; Pullman Car Co. v. Krauss, 145 Ala. 395, 40 South. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218.

See HEALTH.

CONTANGO. A double bargain, consist- of a sale for cash of stock previously bought which the broker does not wish to carry, and a repurchase for the re-settlement two weeks ahead of the same stock at the same price as at the sale plus interest accrued up to the date of that settlement. The rate of interest is called a "contango" and contango days are the two days during the settlement when these arrangements are in effect.

CONTEK (L. Fr.). A contest, dispute, disturbance, opposition. Britt. c. 42.

CONTEMPLATION OF BANKRUPTCY. An intention or expectation of breaking up business or applying to be decreed a bankrupt. Atkinson v. Bank, Crabbe 529, Fed. Cas. No. 609; 5 B. & Ad. 289; 4 Bing. 20; McLean v. Bank, 3 McLean 587, Fed. Cas. No. 8,888.

Contemplation of a *state* of bankruptcy or a known insolvency and inability to carry on business, and a stoppage of business. Story, J., Hutchins v. Taylor, 5 Law Rep. 295, 299, Fed. Cas. No. 6,953. See Everett v. Stone, 3 Sto. 446, Fed. Cas. No. 4,577.

Something more is meant by the phrase than the expectation of insolvency; it includes the making provision against the results of it; Buckingham v. McLean, 13 How. (U. S.) 151, 14 L. Ed. 91; Heroy v. Kerr, 8 Bosw. (N. Y.) 194. See Rison v. Knapp, 1 Dill. 186, Fed. Cas. No. 11,861; Martin v. Toof, 1 Dill. 203, Fed. Cas. No. 9,167.

A conveyance or sale of property made in contemplation of bankruptcy is fraudulent and void; 2 Bla. Com. 285.

CONTEMPLATION OF INSOLVENCY. This term means something more than ex-

pectation of its occurrence; it must include provision against its results so far as the transferee is concerned, and that can only be where he is already a creditor and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent. Heroy v. Kerr, 21 How. Pr. Rep. (N. Y.) 409.

CONTEMPT. A wilful disregard or disobedience of a public authority.

By the constitution of the United States, each house of congress may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. The same provision is substantially contained in the constitutions of the several states.

The power to make rules carries that of enforcing them, and to attach persons who violate them and punish them for contempts; 1 Kent 236; State v. Matthews, 37 N. H. 450; 14 East 1. But see 4 Moore, P. C. 63; 11 *id.* 347. This power of punishing for contempts is confined to punishment during the session of the legislature, and cannot extend beyond it; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 230, 231, 5 L. Ed. 242; Rap. Contempt 2; and it seems this power cannot be exerted beyond imprisonment. It is often regulated by statute; U. S. R. S. §§ 101–103. The arrest of the offending party is made by the sergeant-at-arms, acting by virtue of the speaker's warrant, both in England and the United States; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; 10 Q. B. 359. The power of congress to punish for contempt must be found in some express grant in the constitution or be found necessary to carry into effect such powers as are there granted; Kilbourn v. Thompson, 103 U. S. 169, 26 L. Ed. 377; U. S. v. Lee, 106 U. S. 220, 1 Sup. Ct. 240, 27 L. Ed. 171. See CONGRESS.

Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings; 8 Co. 38 *b*; State v. Matthews, 37 N. H. 450; State v. Morrill, 16 Ark. 384; Ex parte Walker, 25 Ala. 81; Ex parte Adams, 25 Miss. 883, 59 Am. Dec. 234; Clark v. People, Breese (Ill.) 340, 12 Am. Dec. 178; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; Kregel v. Bartling, 23 Neb. 848, 37 N. W. 668; Matter of Moore, 63 N. C. 397; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; Ex parte Wright, 65 Ind. 508. See In re Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; Respublica v. Oswald, 1 Dall. (U. S.) 319, 1 L. Ed. 155; it is said that the legislature cannot restrict the power; Ex parte McCown, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603. A court may commit for a period reaching beyond the term at which the contempt is committed; Ex parte Maulsby, 13 Md. 642. The punishment should not be by piecemeal, but must be entire and final; O'Rourke v. Cleveland, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. St. Rep. 719.

Contempts of court are of two kinds: such as are committed in the presence of the court, and which interrupt its proceedings, which may be summarily punished by order of the presiding judge; and constructive contempts, arising from a refusal to comply with an order of court; Androscoggin & K. R. Co. v. R. Co., 49 Me. 392. In the court of chancery the failure or refusal to perform an order or decree is a contempt, and the enforcement of such orders and decrees is by attachment. For an exhaustive discussion of the practice in such cases, see note to State v. Livingston, 4 Del. Ch. 265.

A prosecution for contempt of court in order to compel obedience to an order made in a chancery proceeding is a civil action; Leopold v. People, 140 Ill. 552, 30 N. E. 348.

The punishment is summary and generally immediate in contempts committed *in facie curiæ*, and no process or evidence is necessary; In re Noonan, 47 Kan. 771, 28 Pac. 1104; 2 L. R. H. L. 361; Middlebrook v. State, 43 Conn. 257, 21 Am. Rep. 650; and a party in contempt cannot be heard except to purge himself; Gross v. Clark, 87 N. Y. 272.

In some states, as in Pennsylvania, the power to punish for contempts is restricted to offences committed by the officers of the court, or in its presence, or in disobedience of its mandates, orders, or rules; but no one is guilty of a contempt for any publication made or act done out of court which is not in violation of such lawful rules or orders or in disobedience of its process. By Act of Congress, March 2, 1831, the power in the federal courts to punish for contempt has been limited. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. The power of the circuit and district courts can only be exercised to ensure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253, where it was held a grand juror was not guilty of contempt for violating his oath to keep the counsel of the United States. See Oswald's Case, 4 Lloyd's Debates 141. If a newspaper article is *per se* libellous, making a direct charge against court or jury, or admitting of but one reasonable construction and requiring no innuendo to apply its meaning to the court, then the publisher cannot escape by denying under oath that he intended the plain meaning which the language used conveys; Allen

v. State, 131 Ind. 599, 30 N. E. 1093. The question of contempt depends upon the act and not the intention of the party; 22 W. R. 398; Wartman v. Wartman, Taney 362, Fed. Cas. No. 17,210; 3 Burr. 1329; 3 C. B. 745. A publication in a newspaper, read by the jurors and attendants of the court, which has a tendency to interfere with the unbiased administration of the laws in pending cases, may be a contempt; State v. Judge of Civil District Court, 45 La. Ann. 1250, 14 South. 310, 40 Am. St. Rep. 282.

The jurisdiction prescribed by congress for federal courts gives no power to punish a newspaper publisher for contempt for criticising the conduct and integrity of the court; Cuyler v. R. Co., 131 Fed. 95; ordinarily, however, newspapers can be so punished; where a statement of facts are published which tend to influence a jury in a pending trial and such facts could not have been shown in evidence, such publication is a contempt; Telegram Newspaper Co. v. Com., 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280; where a newspaper article tends to prejudice the fair trial of a person who has been accused but has not yet been committed, it is a contempt; 67 J. P. 421; even an unintentional mis-statement of the conclusion reached by the court is a contempt; In re Providence Journal Co., 28 R. I. 489, 68 Atl. 428, 17 L. R. A. (N. S.) 582, 125 Am. St. Rep. 755. Contempt is not the proper remedy against one who publishes a newspaper article reflecting on the conduct of a judge in the performance of his ministerial duties, the keeping of accounts, fees, etc.; Hamma v. People, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. (N. S.) 621, 15 Ann. Cas. 655. It is a contempt to publish any account, however meagre, and whether accurate or inaccurate, of proceedings heard *in camera;* [1894] 3 Ch. 193.

Criticism of the manner in which trials are conducted cannot be punished unless it refers to some particular case pending before the court; Ex parte Green, 46 Tex. Cr. App. 576, 81 S. W. 723, 66 L. R. A. 727, 108 Am. St. Rep. 1035.

There may be contempt of court by scandalizing the court itself; by abusing parties concerned in causes; by prejudicing mankind against persons before the cause is heard; 2 Atk. 471; but fair criticism on the proceedings of a court when the case is over, can seldom be contempt of court; [1889] A. C. 549. There is no sedition in just criticism on the administration of the law, but it must be without malignity and not attribute corrupt and malicious motives; 11 Cox 49.

A statement in a petition for re-hearing that the court's ruling is all wrong and written for political reasons is a contempt; In re Chartz, 29 Nev. 110, 85 Pac. 352, 5 L. R. A. (N. S.) 916, 124 Am. St. Rep. 915; but not to file a motion suggesting the disqualification of the judge on the ground that he is related to parties having an interest in the suit; Johnson v. State, 87 Ark. 45, 112 S. W. 143, 18 L. R. A. (N. S.) 619, 15 Ann. Cas. 531. For a case holding in contempt a trial judge who had grossly attacked in print an appellate court who had twice reversed his judgment in a trial for rape, see In re Fite, 11 Ga. App. 665, 76 S. E. 397.

A federal court may punish for contempt one who interferes with a receiver in bankruptcy appointed by it; In re Wilk, 155 Fed. 943; and contempts committed before its referee; United States v. Tom Wah, 160 Fed. 207; one accused of contempt is not entitled to a jury trial; In re Fellerman, 149 Fed. 244; O'Flynn v. State, 89 Miss. 850, 43 South. 82, 9 L. R. A. (N. S.) 1119, 119 Am. St. Rep. 727, 11 Ann. Cas. 530; a denial on oath of having committed a contempt raises an issue of fact for trial; Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124; either a municipal or business corporation may be fined for contempt where its officers and servants have violated an injunction; Marson v. City of Rochester, 112 App. Div. 51, 97 N. Y. Supp. 881; Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248. A defendant in a divorce proceeding who refused to pay alimony may be punished by having his answer stricken from the record; Bennett v. Bennett, 15 Okl. 286, 81 Pac. 632, 70 L. R. A. 864.

One cannot be guilty of contempt in refusing to obey an order which the court has no power to make; McHenry v. State, 91 Miss. 562, 44 South. 831, 16 L. R. A. (N. S.) 1062; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. A decree for the payment of money may be enforced by contempt proceedings; it is not imprisonment for debt; Jastram v. McAuslan, 29 R. I. 390, 71 Atl. 454, 17 Ann. Cas. 320. A decree that a trustee pay over a specified sum in trust funds is enforceable by execution but not by contempt; Mast v. Washtenaw Circuit Judge, 154 Mich. 485, 117 N. W. 1052. An unsuccessful attempt to induce a third person to influence a jury does not constitute a contempt; U. S. v. Carroll, 147 Fed. 947; an assault committed on an attorney in a case by persons interested in the party opposed to him is a contempt, although committed outside the court room; U. S. v. Barrett, 187 Fed. 378; and so where proceedings in a criminal case are ordered to be stayed, and a mob, with knowledge of such order, takes the prisoner from jail and hangs him; U. S. v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; *id.*, 214 U. S. 387, 29 Sup. Ct. 637, 53 L. Ed. 1041; a court may punish an attorney for contempt for wilfully absenting himself in a criminal case; In re Clark, 126 Mo. App. 391, 103 S.

W. 1105; In re McHugh, 152 Mich. 505, 116 N. W. 459; In re Clark, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389.

The power of inferior courts to punish for contempt is usually restricted to contempts committed in the presence of the court; 3 Steph. Com. 342, n. 9; L. R. 8 Q. B. 134. A justice of the peace cannot punish contempts, even committed before him, by summary proceedings; Albright v. Lapp, 26 Pa. 99, 67 Am. Dec. 402; nor a committing magistrate for refusal to obey a subpœna; Farnham v. Colman, 19 S. D. 342, 103 N. W. 161, 1 L. R. A. (N. S.) 1135, 117 Am. St. Rep. 944, 9 Ann. Cas. 314.

It is said that it belongs exclusively to the court offended to judge of contempts; State v. Matthews, 37 N. H. 450; State v. McKinnon, 8 Or. 487; In re Pryor, 18 Kan. 72, 26 Am. Rep. 752; In re Williamson, 26 Pa. 9, 67 Am. Dec. 374; State v. Anderson, 40 Ia. 207; and no other court or judge can or ought to undertake, in a collateral way, to question or review an adjudication of a contempt made by another competent jurisdiction; 14 East 1; Gist v. Bowman, 2 Bay (S. C.) 182; State v. Tipton, 1 Blackf. (Ind.) 166; State v. White, T. U. P. Charlt. (Ga.) 136; Cossart v. State, 14 Ark. 538; Bunch v. State, *id.* 544; Lockwood v. State, 1 Ind. 161; Yates v. People, 6 Johns. (N. Y.) 337; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; People v. Owens, 8 Utah 20, 28 Pac. 871; Seventy-Six Land & Water Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813. But it has been repeatedly held that a court of superior jurisdiction may review the decision of one of inferior jurisdiction on a matter of contempt; Com. v. Newton, 1 Grant, Cas. (Pa.) 453; Ex parte Rowe, 7 Cal. 181; Baltimore & O. R. Co. v. City of Wheeling, 13 Gratt. (Va.) 40; Patton v. Harris, 15 B. Mon. (Ky.) 607; though not on *habeas corpus;* Jordan v. State, 14 Tex. 436; see Ex parte Smith, 53 Cal. 204; Shattuck v. State, 51 Miss. 50, 24 Am. Rep. 624; see Tolman v. Jones, 114 Ill. 147, 28 N. E. 464. It should be by direct order of the court; Geisse v. Beall, 5 Wis. 227. A proceeding for contempt is regarded as a distinct and independent suit; 22 E. L. & Eq. 150; Ex parte Langdon, 25 Vt. 680; Lyon v. Lyon, 21 Conn. 185; and irregularities in the proceedings are immaterial where the result is a sufficient purging of the contempt and a consequent discharge of the rule; Martin v. Burgwyn, 88 Ga. 78, 13 S. E. 958.

Though the same act constitute both a contempt and a crime, the contempt may be tried and punished by the court; U. S. v. Debs, 64 Fed. 724; affirmed by the supreme court, which held that it was competent to invoke the jurisdiction of the courts to remove or restrain obstructions to interstate commerce or the mails, though the acts were criminal in themselves, an injunction having been served, the circuit court had authority to inquire whether its orders had been disobeyed, and finding that they had been, to enter the order of punishment, and its findings as to the act of disobedience are not open to review on *habeas corpus* in the supreme court or any other; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Proceedings for contempt are of two classes, criminal or punitive, and civil or remedial. The former vindicates the dignity of the courts, the latter protects, preserves, and enforces the rights of private parties and compels obedience to orders, judgments and decrees made to enforce such rights: Wasserman v. United States, 161 Fed. 722, 88 C. C. A. 582; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295; when contempt proceedings are brought to enforce a civil right, the constitutional provision that no person shall be compelled to be a witness against himself does not apply, since it is not a criminal proceeding; Patterson v. District Council, 31 Pa. Super. Ct. 112.

Every member of the public "is bound to observe the restrictions of an injunction, when known, to the extent that he must not aid and abet its violation by others," nor obstruct the administration of justice; the power of the court to proceed against one so offending is inherent and indisputable; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, citing [1897] L. R. 1 Ch. 545; In re Reese, 107 Fed. 942, 47 C. C. A. 87. There is an elementary distinction between disobedience of an injunction by parties and privies, and the conduct of others in contempt of the commands of the courts; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295. Actual notice will render one not a party guilty of contempt in violating an injunction; it is not necessary that he should have been served with a copy of the injunction decree or the writ; In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; Aldinger v. Pugh, 132 N. Y. 403, 30 N. E. 745. But publication in newspapers and the posting upon wagons of a teaming company of an injunction order forbidding interference with its teams, are not enough to charge with knowledge thereof one not a party to the proceedings who assists in a riot in which the teams are interfered with, such person denying knowledge and having a presumption of innocence in his favor; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295. But mere reading and giving to one not a party a copy of the decree constitutes sufficient notice as a basis for contempt proceedings; Fowler v. Beckman, 66 N. H. 424, 30 Atl. 1117.

Proceedings for contempt against one not a party to the cause, for disobedience of an injunction, are criminal in their nature, and the accused is entitled to the presumption of innocence; they are reviewable by writ of

error; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295, citing Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; In re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

A proceeding instituted by an aggrieved party to punish the other party for contempt for affirmatively violating an injunction in the same action in which the injunction was issued, and praying for damages and costs, is a civil proceeding in contempt of which the only punishment is by fine, measured by the pecuniary injury sustained. If the main suit is discontinued, the contempt proceedings fall with it, but in such case the court may institute proceedings to vindicate its authority; Gompers v. Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

For a contempt out of the view and hearing of the court, the offending party will be allowed to answer and offer evidence in defence of the charge; Hohenadel v. Steele, 237 Ill. 229, 86 N. E. 717. At common law the sworn answer of one charged with contempt was conclusive and discharged the contempt; Coleman v. State, 121 Tenn. 1, 113 S. W. 1045; Baird v. People, 134 Ill. App. 433.

Where a defendant violates an injunction pending an appeal, the appellate court is the proper tribunal to punish the contempt; Menuez v. Candy Co., 77 Ohio 386, 83 N. E. 82, 11 Ann. Cas. 1037; an order punishing contempt, made in the progress of a case not criminal, is interlocutory and can only be reviewed on appeal from final decree; Doyle v. Guarantee & Acc. Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; In re Christensen Engineering Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072.

See 20 Am. Law Reg. N. S. 81, where the subject is treated at length; Rapalje, Contempt; JUDGE.

As to proceedings to compel payment of alimony, see Staples v. Staples, 87 Wis. 592, 58 N. W. 1036, 24 L. R. A. 433.

CONTEMPTIBILITER (L. Lat. contemptuously). **In Old English Law.** Contempt, contempts. Fleta, lib. 2, c. 60, § 35.

CONTENEMENTUM. See WAINAGIUM; CONTENTMENT.

CONTENTIOUS JURISDICTION. In Ecclesiastical Law. That which exists in cases where there is an action or judicial process and matter in dispute is to be heard and determined between party and party. It is to be distinguished from *voluntary* jurisdiction, which exists in cases of taking probate of wills, granting letters of administration, and the like. 3 Bla. Com. 66.

CONTENTMENT (or, more properly, *contenement;* L. Lat. *contenementum*). A man's countenance or credit, which he has together with, and by reason of, his freehold; or that which is necessary for the support and maintenance of men, agreeably to their several qualities or states of life. Cowell; 4 Bla. Com. 379.

CONTENTS. The contents of a note are the sum it shows to be due; Sere v. Pitot, 6 Cra. (U. S.) 332, 3 L. Ed. 240; Corbin v. Black Hawk County, 105 U. S. 659, 26 L. Ed. 1136; of a chose in action are the rights created by it; *id.*

CONTENTS AND NOT-CONTENTS. The "contents" are those who, in the house of lords, express assent to a bill; the "not-" or "non-contents," dissent. May, P. L. c. 12, 357.

CONTENTS UNKNOWN. A phrase contained in a bill of lading, denoting that the goods are shipped in apparently good condition. Clark v. Barnwell, 12 How. (U. S.) 273, 13 L. Ed. 985.

CONTESTATIO LITIS. In Civil Law. The statement and answer of the plaintiff and defendant, thus bringing the case before the judge, conducted usually in the presence of witnesses. Calvinus, Lex.

This sense is retained in the canon law. 1 Kaufm. Mackeldey, C. L. 205. A cause is said to be *contestata* when the judge begins to hear the cause after an account of the claims, given not through pleadings, but by statement of the plaintiff and answer of the defendant. Calvinus, Lex.

In Old English Law. Coming to an issue; the issue so produced. Steph. Pl. App. n. 39; Crabb, Hist. 216.

CONTESTED ELECTION. This phrase has no technical or legally defined meaning. An election may be said to be contested whenever an objection is formally urged against it, which, if found to be true in fact, would invalidate it. This must be true both as to objection founded upon some constitutional provision, as well as upon any mere statutory enactment; Robertson v. State, 109 Ind. 116, 10 N. E. 582, 643.

CONTEXT. Those parts of a writing which precede and follow a phrase or passage in question; the connection.

It is a general principle of legal interpretation that a passage or phrase is not to be understood absolutely as if it stood by itself, but is to be read in the light of the context, *i. e.* in its connection with the general composition of the instrument. The rule is frequently stated to be that where there is any *obscurity* in a passage the context is to be considered; but the true rule is much broader. It is always proper to look at the context in the application of the most ambiguous expression. Thus, if on a sale of goods the vendor should give a written receipt acknowledging payment of the price, and containing, also, a promise *not* to deliver the goods, the word "not" would be rejected by the court, because it is repugnant to the context. It not unfrequently happens that two provisions of an instrument are conflicting: each is then the context of the other, and they are to be taken together and so understood as to harmonize with each other so far as may be, and to carry out the general intent of the instrument. In the context of a will, that which follows controls that which precedes; and the same rule has been asserted with reference to statutes. See CONSTRUCTION; INTERPRETATION; STATUTES.

CONTIGUOUS. In close proximity, in actual close contact. Arkell v. Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168; as, contiguous proprietors are those whose lands actually touch. Vicinal are not necessarily contiguous proprietors; Raxedale v. Seip, 32 La. Ann. 435.

In an ordinance relating to excavations and the preservation of *contiguous* structures, it contemplates nearness of a structure, but with intervening space; Baxter v. Realty Co., 128 App. Div. 79, 112 N. Y. Supp. 455.

CONTINGENCY. The quality of being contingent or casual; the possibility of coming to pass; an event which may occur. Webster.

It is a fortuitous event which comes without design, foresight, or expectation. People v. Village of Yonkers, 39 Barb. (N. Y.) 272.

CONTINGENCY WITH DOUBLE ASPECT. If there are remainders so limited that the second is a substitute for the first in case it should fail, and not in derogation of it, the remainder is said to be in a contingency with double aspect. Fearne, Rem. 373; 1 Steph. Com. 328.

CONTINGENT. When applied to a use, remainder, devise, bequest, or other legal right or interest, it means that no present interest exists, and that whether such interest or right ever will exist, depends upon a future uncertain event. The legal definition of the word concurs with its ordinary acceptation in showing that the term contingent implies a possibility; Jemison v. Blowers, 5 Barb. (N. Y.) 692.

CONTINGENT DAMAGES. Those given where the issues upon counts to which no demurrer has been filed are tried, before demurrer to one or more counts in the same declaration has been decided. 1 Stra. 431.

Inaccurately used to describe consequential damages, *q. v.*

CONTINGENT ESTATE. A contingent estate depends for its effect upon an event which may or may not happen: as, an estate limited to a person not *in esse*, or not yet born. Crabb, R. P. § 946.

CONTINGENT FEES. See CHAMPERTY.

CONTINGENT INTEREST IN PERSONAL PROPERTY. It may be defined as a future interest not transmissible to the representatives of the party entitled thereto, in case he dies before it vests in possession. Thus, if a testator leaves the income of a fund to his wife for life, and the capital of the fund to be distributed among such of his children as shall be living at her death, the interest of each child during the widow's lifetime is *contingent*, and in case of his death is not transmissible to his representatives. Moz. & W. Law Dict.

CONTINGENT LEGACY. A legacy made dependent upon some uncertain event. 1 Rop. Leg. 506. Beach, Wills 406.

A legacy which has not vested. Wms. Ex. 1229.

CONTINGENT REMAINDER. An estate in remainder which is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, by which no present or particular interest passes to the remainderman, so that the particular estate may chance to be determined and the remainder never take effect. 2 Bla. Com. 169.

A remainder limited so as to depend upon an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. Fearne, Cont. Rem. 3; 2 Washb. R. P. 224. See L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310; Maguire v. Moore, 108 Mo. 267, 18 S. W. 897; Peirce v. Hubbard, 152 Pa. 18, 25 Atl. 231; [1892] 1 Q. B. 184; REMAINDER; 30 Harv. L. Rev. 192; Dawson v. Lancaster, 28 Pa. Co. Ct. R. 657; Fisher v. Wagner, 109 Md. 243, 71 Atl. 999, 21 L. R. A. (N. S.) 121.

CONTINGENT USE. A use limited in a deed or conveyance of land which may or may not happen to vest, according to the contingency expressed in the limitation of such use.

Such a use as by possibility may happen in possession, reversion, or remainder. 1 Co. 121; Com. Dig. *Uses* (K, 6). A use limited to take effect upon the happening of some future contingent event; as, where lands are conveyed to the use of A and B after a marriage had between them. 2 Bla. Com. 334.

A contingent remainder limited by way of uses. Sugd. Uses 175. See 4 Kent 237.

CONTINUAL CLAIM. A formal claim made once a year to lands or tenements of which we cannot, without danger, attempt to take possession. It had the same effect as a legal entry, and thus saved the right of entry to the heir. Cowell; 2 Bla. Com. 316; 3 *id.* 175. This effect of a continual claim is abolished by stat. 3 & 4 Will. IV. c. 27, § 11. 1 Steph. Com. 509.

CONTINUANCE. The adjournment of a cause from one day to another of the same or a subsequent term.

The postponement of the trial of a cause.

In the ancient practice, continuances were entered upon the record, and a variety of forms adapted to the different stages of the suit were in use. See 1 Chit. Pl. 455; 3 Bla. Com. 316. The object of the continuance was to secure the further attendance of the defendant, who having once attended could not be required to attend again, unless a day was fixed. The entry of continuance became at the time mere matter of form, and is now discontinued in England and most of the states of the United States.

Before the declaration, continuance is by *dies datus prece partium;* after the declaration, and before issue joined, by *imparlance;* after issue joined, and before verdict, by *vice-comes non misit breve;* and after verdict or demurrer, by *curia advisare*

vult. 1 Chit. Pl. 455, 749; Bac. Abr. *Pleas* (P), *Trial* (H); Com. Dig. *Pleader* (V); Steph. Pl. 64. In its modern use the word has the second of the two meanings given above.

Among the causes for granting a continuance are *absence of a material witness;* Steinmetz v. Currie, 1 Dall. (U. S.) 270, 1 L. Ed. 132; Higginbotham v. Chamberlayne, 4 Munf. (Va.) 547; Eads v. State, 26 Tex. App. 69, 9 S. W. 68; Carter v. Wharton, 82 Va. 264; but he must have been subpœnaed; Bone v. Hillen, 1 Mill, Const. (S. C.) 198; Parker v. Leman, 10 Tex. 116; Wright v. State, 18 Ga. 383; in many states the opposite party may prevent it by admitting that certain facts would be proved by such witness; Smith v. Creason's Ex'rs, 5 Dana (Ky.) 298, 30 Am. Dec. 688; Willis v. People, 1 Scam. (Ill.) 399; Dominges v. State, 7 Smedes & M. (Miss.) 475, 45 Am. Dec. 315; Nave v. Horton, 9 Ind. 563; Keith v. Knoche, 43 Ill. App. 161; State v. Hatfield, 72 Mo. 518; and the party asking delay is usually required to make affidavit as to the facts on which he grounds his request; Rhea v. State, 10 Yerg. (Tenn.) 258; Vickers v. Hill, 1 Scam. (Ill.) 307; Phillips v. Reardon, 7 Ark. 256; People v. Baker, 1 Cal. 403; Smith v. Barker, 3 Day (Conn.) 280, Fed. Cas. No. 13,012; Ralston v. Lothain, 18 Ind. 303; and, in some states, as to what he expects to prove by the witness; Nash v. Upper Appomattox Co., 5 Gratt. (Va.) 332; Bailey v. Hardy, 12 Ill. 459; Sledman v. Hamilton, 4 McLean 538, Fed. Cas. No. 13,343; Merchant v. Bowyer, 3 Tex. Civ. App. 367, 22 S. W. 763; if the opposing counsel stipulates that the witness, if called, would so testify, a continuance is refused. In other states, an examination is made by the court; Harris v. Harris, 2 Leigh (Va.) 584; Irroy v. Nathan, 4 E. D. Sm. (N. Y.) 68; as to what diligence was used to procure his presence; St. Louis & K. C. R. Co. v. Olive, 40 Ill. App. 82; Weeks v. State, 31 Miss. 490; Fiott v. Com., 12 Gratt. (Va.) 564; and it is error to grant a continuance on oral statement of counsel; Whaley v. King, 92 Cal. 431, 28 Pac. 579; the court is not bound to grant it where it is altogether conjectural whether the witnesses are alive, and if so where they reside or if their evidence can be procured; Lowenstein v. Greve, 50 Minn. 383, 52 N. W. 964; or to examine a witness not summoned; Soper v. Manning, 158 Mass. 381, 33 N. E. 516; *inability to obtain the evidence* of a witness out of the state in season for trial, in some cases; U. S. v. Duane, 1 Wall. Sr. 5, Fed. Cas. No. 14,996; Marsh v. Hulbert, 4 McLean 364, Fed. Cas. No. 9,116; *filing amendments* to the pleadings which introduce new matter of substance; Tourtelot v. Tourtelot, 4 Mass. 506; Jones v. Talbot, 4 Mo. 279; Taylor v. Heffner, 4 Blackf. (Ind.) 387; *filing a bill of discovery* in chancery in some cases; Ridgely v. Campbell, 1 Har. & J. (Md.) 452; Hurst v. Hurst, 3 Dall. (Pa.) 512, Fed. Cas. No. 6,929, 1 L. Ed. 700; *detention of a party* in the public service; Republica v. Matlack, 2 Dall. (Pa.) 108, 1 L. Ed. 310; see Nones v. Edsall, 1 Wall. Jr. 189, Fed. Cas. No. 10,290; *illness of counsel,* sometimes; Shultz v. Moore, 1 McLean 334, Fed. Cas. No. 12,825; Rhode Island v. Massachusetts, 11 Pet. (U. S.) 226, 9 L. Ed. 697; State v. Adams, 5 Harring. (Del.) 107; Thompson v. Thornton, 41 Cal. 626; Brady v. Malone, 4 Ia. 146; Printup v. Mitchell, 19 Ga. 586; *or surprise* from unexpected testimony; Branch v. Du Bose, 55 Ga. 21; Childs v. State, 10 Tex. App. 183. But it is not sufficient where it is not shown that the client's case is prejudiced thereby; Board of Com'rs of Tipton County v. Brown, 4 Ind. App. 288, 30 N. E. 925.

The request must be made in due season; Woods v. Young, 4 Cra. (U. S.) 237, 2 L. Ed. 607; McCourry v. Doremus, 10 N. J. L. 245; Clinton v. Hopkins, 2 Root (Conn.) 25; Smith v. Holebrook, *id.* 45; Hanna v. McKenzie, 5 B. Monr. (Ky.) 314, 43 Am. Dec. 122. It is addressed to the discretion of the court; Fiott v. Com., 12 Gratt. (Va.) 564; Scogin v. Hudspeth, 3 Mo. 123; Farrand v. Bouchell, Harp. (S. C.) 85; Justrobe v. Price, Harp. (S. C.) 112; Sheppard v. Lark, 2 Bailey (S. C.) 576; Cornelius v. Boucher, Breese (Ill.) 32; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741; Smith v. Collins, 94 Ala. 394, 10 South. 334; Baumberger v. Arff, 96 Cal. 261, 31 Pac. 53; Wilkowski v. Halle, 37 Ga. 678, 95 Am. Dec. 374; Armour & Co. v. Kollmeyer, 161 Fed. 78, 88 C. C. A. 242; 16 L. R. A. (N. S.) 1110; without appeal; Hill v. Bishop, 2 Ala. 320; Babcock v. Scott, 1 How. (Miss.) 100; State v. Duncan, 28 N. C. 98; Magruder v. Snapp, 9 Ark. 108; Porter v. Lee, 16 Pa. 412; Simms v. Hundley, 6 How. (U. S.) 1, 12 L. Ed. 319; and is not reviewable on error; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962, 36 L. Ed. 741; Woods v. Young, 4 Cra. (U. S.) 237, 2 L. Ed. 607; Vanguilder v. Stull, 10 N. J. L. 235; but an improper and unjust abuse of such discretion may be remedied by superior courts, in various ways. See Vanblaricum v. Ward, 1 Blackf. (Ind.) 50; Fuller v. State, 1 Blackf. (Ind.) 64; Fox v. Govan, 4 Hen. & M. (Va.) 157; Reynard v. Brecknell, 4 Pick. (Mass.) 302; Sealy v. State, 1 Ga. 213, 44 Am. Dec. 641; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; Darne v. Broadwater, 9 Mo. 19; Hipp v. Bissell, 3 Tex. 18; Cole v. Choteau, 18 Ill. 439; People v. Vermilyea, 7 Cow. (N. Y.) 369; Davis & Rankin Bldg. & Mfg. Co. v. Butter & Cheese Co., 84 Wis. 262, 54 N. W. 506; Isaacs v. U. S., 159 U. S. 487, 16 Sup. Ct. 51, 40 L. Ed. 229; Valdes v. Central Altagracia, 225 U. S. 58, 32 Sup. Ct. 664, 56 L. Ed. 980.

CONTINUANDO (Lat. *continuare,* to continue). An averment that a trespass has been continued during a number of days. 3

Bla. Com. 212. It was allowed, to prevent a multiplicity of actions; 2 Rolle, Abr. 545; only where the injury was such as could, from its nature, be continued; 1 Wms. Saund. 24, n. 1.

The form is now disused, and the same end secured by alleging divers trespasses to have been committed between certain days. 1 Saund. 24, n. 1. See Gould, Pl. c. 3, § 86; Hamm. N. P. 90, 91; Bac. Abr. *Trespass*, I, 2, n. 2.

CONTINUING CONSIDERATION. See CONSIDERATION.

CONTINUING DAMAGES. See MEASURE OF DAMAGES.

CONTINUING OFFENCE. When an offence consumes a great length of time in its perpetration, the question often arises whether it is but a single offence or whether it can be split into a number of indictments. The test is that, if the transaction is set in motion by a single impulse and operated upon by a single unintermittent force, it forms a continuous act, and hence must be treated as one; Whart. Cr. Law (10th ed.) §§ 27, 931. Thus gas fraudulently drawn from a main pipe for a great space of time constitutes but one offence; L. R. 1 C. C. 172; articles removed at intervals a few minutes apart but by one impulse; 4 C. & P. 217, 386; or when a shaft of coal is opened and quarried, if there be but one tapping of the vein, though it continue several years; 2 C. & P. 765. Nuisances, though usually continuous offences, may be the object of successive prosecutions, if distinct impulses are given at intermittent times. The test is whether the individual acts are prohibited or the course of action which they constitute; Whart. Cr. Law § 27. Cohabitation with more than one woman for a period of time constitutes but one offence under the act of congress of March 22, 1882; In re Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658.

The offence of receiving a rebate under the Elkins act is the transaction that the given rebate consummates, and not the units of measurement of the physical thing transported; Standard Oil Co. of Indiana v. U. S., 164 Fed. 376, 90 C. C. A. 364; as to interstate merchandise, it is a single continuing offence, continuously committed in each district through which it is conducted; Armour Packing Co. v. U. S., 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681.

CONTINUOUS EASEMENTS. Easements of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a waterspout or a right of light or air. Washb. Easem. 21. See EASEMENTS.

CONTIONES. General meetings of the Roman people. Launspach, State and Family in Early Rome 69.

CONTRA (Lat.). Over; against; opposite. Against; otherwise decided. After stating a rule of law, if it be followed by *contra*, and the citation of other cases, it signifies that the latter hold a contrary view. It is equivalent to *aliter*. *Per contra*. In opposition.

CONTRA BONOS MORES. Against sound morals.

Contracts which are incentive to crime, or of which the consideration is an obligation or engagement improperly prejudicial to the feelings of a third party, offensive to decency or morality, or which has a tendency to mischievous or pernicious consequences, are void, as being *contra bonos mores;* 2 Wils. 447; Cowp. 729; 4 Campb. 152; 1 B. & Ald. 683; 16 East 150.

CONTRA FORMAM STATUTI (Lat. against the form of the statute). The formal manner of alleging that the offence described in an indictment is one forbidden by statute.

When one statute prohibits a thing and another gives the penalty, in an action for the penalty the declaration should conclude *contra formam statutorum;* Plowd. 206; 2 East 333. The same rule applies to informations and indictments; 2 Hale, Pl. Cr. 172. But where a statute refers to a former one, and adopts and continues the provisions of it, the declaration or indictment should conclude *contra formam statuti;* Hale, Pl. Cr. 172. Where a thing is prohibited by several statutes, if one only gives the action and the others are explanatory and restrictive, the conclusion should be *contra formam statuti;* 2 Saund. 377.

When the act prohibited was not an offence or ground of action at common law, it is necessary both in criminal and civil cases to conclude against the form of the statute or statutes; 1 Saund. 135 *c;* 1 Chit. Pl. 556; Com. v. Inhabitants of Stockbridge, 11 Mass. 280; Cross v. U. S., 1 Gall. 30, Fed. Cas. No. 3,434.

But if the act prohibited by the statute is an offence or ground of action at common law, the indictment or action may be in the common-law form, and the statute need not be noticed even though it prescribe a form of prosecution or of action,—the statute remedy being merely cumulative; Co. 2d Inst. 200; 2 Burr. 803; 3 *id.* 1418; 4 *id.* 2351; 2 Wils. 146; Com. v. Hoxey, 16 Mass. 385.

When a statute only inflicts a punishment on that which was an offence at common law, the punishment prescribed may be inflicted though the statute is not noticed in the indictment; Com. v. Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446.

If an indictment for an offence at common law only conclude "against the form of the statute in such case made and provided;" or "the form of the statute" generally, the conclusion will be rejected as surplusage, and the indictment maintained as at

common law; 1 Saund. 135 n. 3; Com. v. Hoxey, 16 Mass. 385; Com. v. Shattuck, 4 Cush. (Mass.) 143. But it will be otherwise if it conclude against the form of "the statute aforesaid," when a statute has been previously recited; 1 Chit. Cr. L. 289. See, further, Com. Dig. *Pleader* (C,) 76; 5 Viner, Abr. 552, 556; Cross v. U. S., 1 Gall. 26, Fed. Cas. No. 3,434; Sears v. U. S., 1 Gall. 257, Fed. Cas. No. 12,592; Scroter v. Harrington, 8 N. C. 192; Town of Barkhamsted v. Parsons, 3 Conn. 1; Com. v. Inhabitants of Stockbridge, 11 Mass. 280; Barter v. Martin, 5 Greenl. (Me.) 79.

CONTRA PACEM (Lat. against the peace). **In Pleading.** An allegation in an action of trespass or ejectment that the actions therein complained of were against the peace of the king. Such an allegation was formerly necessary, but has become a mere matter of form and not traversable. See 4 Term 503; 1 Chit. Pl. 163, 402; Arch. Civ. Pl. 155; TRESPASS.

CONTRABAND OF WAR. In International Law. Goods which neutrals may not carry in time of war to either of the belligerent nations without subjecting themselves to the loss of the goods, and formerly the owners, also, to the loss of the ship and other cargo, if intercepted. 1 Kent 138, 143. See Elrod v. Alexander, 4 Heisk. (Tenn.) 345. Food (8 Am. Lawy. 108).

Provisions may be contraband of war, and generally all articles calculated to be of direct use in aiding the belligerent powers to carry on the war; and if the use is doubtful, the mere fact of a hostile destination renders the goods contraband; 1 Kent 140; Hall, Int. L. 618.

The classification of goods made by English and American courts divides all merchandise into three classes: (1) Articles manufactured and primarily or ordinarily used for military purposes in time of war; (2) articles which may be and are used for war or peace according to circumstances; (3) articles exclusively used for peaceful purposes. Articles of the first class destined to a belligerent country are always contraband; articles of the second class are so only when actually destined to the military or naval use of the belligerent; articles of the third class are not contraband, though liable to seizure for violation of blockade or siege.

The Declaration of London (*q. v.*) introduces a new division of contraband. Certain specified articles, such as arms, ammunition, and other articles of direct use in military and naval operations, are arranged under the head of "Absolute Contraband" and are liable to capture if destined to territory belonging to, or occupied by, the enemy, or to the armed forces of the enemy. Other specified articles, such as foodstuffs, clothing, bullion, railroad material, fuel, etc., are classified under the name of "Conditional Contraband," and are liable to capture if destined for the use of the armed forces or of a government department of the enemy state. Certain other articles, such as cotton, wool, rubber, metallic ores, and industrial machinery, are expressly declared not to be contraband of war.

In the case of absolute contraband it is immaterial, according to the Declaration of London, whether the carriage of the goods is direct, or entails trans-shipment or a subsequent transport by land. This is but a restatement of the existing English and American rule. On the other hand, conditional contraband is not liable to capture under the above circumstances, so that the doctrine of "Continuous Voyage" does not apply in this case. By analogy with the right exercised by a belligerent of preventing contraband trade, a belligerent is allowed to prevent neutral ships from carrying dispatches or officers for the other belligerent. The Declaration of London lays down definite rules upon this subject under the title of "Unneutral service" (*q. v.*).

A belligerent may, by force, prevent a neutral ship from carrying dispatches or officers for the other belligerent, by analogy to the law of contraband. Probably a mere common carrier receiving persons in the service of a belligerent would not be subject to any penalty, therefore, if they took passage in the ordinary course of business; Hall Int. Law 673, approved in L. R. 1 K. B. (1908).

CONTRACAUSATOR. A criminal; one prosecuted for a crime. Wharton.

CONTRACT (Lat. *contractus*, from *con*, with, and *traho*, to draw. *Contractus ultro utroque obligatio est quam Græci* συνάλλαγμα *vocant.* Fr. *contrat*).

An agreement between two or more parties to do or not to do a particular thing. Taney, C. J., Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 572, 9 L. Ed. 773. An agreement in which a party undertakes to do or not to do a particular thing. Marshall, C. J., Sturges v. Crowninshield, 4 Wheat. (U. S.) 197, 4 L. Ed. 529. An agreement between two or more parties for the doing or not doing of some specified thing. 1 Pars. Com. 5.

It has been also defined as follows: A compact between two or more parties. Fletcher v. Peck, 6 Cra. (U. S.) 87, 136, 3 L. Ed. 162. An agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. Encyc. Amer.; Webster. A contract or agreement is where a promise is made on one side and assented to on the other; or where two or more persons enter into an engagement with each other by a promise on either side. 2 Steph. Com. 108, 109.

An agreement upon sufficient consideration to do or not to do a particular thing. 2 Bla. Com. 446; 2 Kent 449.

A covenant or agreement between two parties with a lawful consideration or cause. West, Symbol. lib. 1, § 10; Cowell; Blount.

A deliberate engagement between competent par-

ties upon a legal consideration to do or to abstain from doing some act. Story, Contr. § 1.

An agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other, to give some particular thing or to do or abstain from doing some particular act. Pothier, Conts. Pt. I, c. 1, § 1; 36 Ch. D. 695.

A mutual promise upon lawful consideration or cause which binds the parties to a performance. The writing which contains the agreement of parties with the terms and conditions, and which serves as a proof of the obligation. The last is a distinct signification. Pierson v. Townsend, 2 Hill (N. Y.) 551.

A voluntary and lawful agreement by competent parties, for a good consideration, to do or not to do a specified thing. Robinson v. Magee, 9 Cal. 83, 70 Am. Dec. 638.

An agreement enforceable at law, made between two or more persons, by which rights are acquired by one or both to acts or forbearances on the part of the other. Anson, Contr. 9.

A learned writer has said, in discussing the proper definition of contract, that "if we seek to build up a definition of the term 'contract' which shall include all things that have been called contracts and shall exclude all things that have been held not to be contracts, the task is evidently impossible. . . . Any definition of contract therefore must be either arbitrary or inexact." Harriman, Contr. 4.

The consideration is not properly included in the definition of contract, because it does not seem to be essential to a contract, although it may be necessary to its enforcement. See CONSIDERATION; 1 Pars. Contr. 7.

Mr. Stephen, whose definition of contract is given above, thus criticizes the definition of Blackstone, which has been adopted by Chancellor Kent and other high authorities. *First* that the word *agreement* itself requires definition as much as contract. *Second*, that the existence of a consideration, though essential to the validity of a parol contract, forms properly no part of the idea. *Third*, that the definition takes no sufficient notice of the mutuality which properly distinguishes a contract from a promise. 2 Steph. Com. 109.

The use of the word *agreement (aggregatio mentium)* seems to have the authority of the best writers in ancient and modern times (see above) as a part of the definition of contract. It is probably a translation of the civil-law *conventio (con* and *venio)*, a coming together, to which (being derived from *ad* and *grex*) it seems nearly equivalent. We do not think the objection that it is a synonym (or nearly so) a valid one. Some word of the kind is necessary as a basis of the definition. No two synonyms convey precisely the same idea. "Most of them have minute distinctions," says Reid. If two are entirely equivalent, it will soon be determined by accident which shall remain in use and which become obsolete. To one who has no knowledge of a language, it is impossible to define any abstract idea. But to one who understands a language, an abstraction is defined by a synonym properly qualified. By pointing out distinctions and the mutual relations between synonyms, the object of definition is answered. Hence we do not think Blackstone's definition open to the first objection.

As to the idea of consideration, Mr. Stephen seems correct and to have the authority of some of the first legal minds of modern times. Consideration, however, may be necessary to enforce a contract, though not essential to the idea. Even in that class of contracts (by specialty) in which no consideration is in fact required, one is said to be always presumed in law,—the form of the instrument being held to import a consideration. 2 Kent 450, n. But see CONSIDERATION, where the subject is more fully treated.

The third objection of Mr. Stephen to the definition of Blackstone does not seem one to which it is fairly open. There is an idea of mutuality in *con* and *traho*, to draw together, and it would seem that mutuality is implied in agreement as well. An *aggregatio mentium* seems impossible without mutuality. Blackstone in his analysis appears to have regarded agreement as implying mutuality; for he defines it (2 Bla. Com. 442) "a mutual bargain or convention." In the above definition, however, all ambiguity is avoided by the use of the words "between two or more parties" following agreement.

In its widest sense, "contract" includes records and specialties (but see *infra*); but this use as a general term for all sorts of obligations, though of too great authority to be now doubted, seems to be an undue extension of the proper meaning of the term, which is much more nearly equivalent to "agreement" which is never applied to specialties. Mutuality is of the very essence of both,—not only mutuality of assent, but of act. As expressed by Lord Coke, *Actus contra actum;* 2 Co. 15; 7 M. & G. 998, argument and note.

This is illustrated in contracts of sale, bailment, hire, as well as partnership and marriage; and no other engagements but those with this kind of mutuality would seem properly to come under the head of contracts. In a bond there is none of this mutuality,—no act to be done by the obligee to make the instrument binding. In a judgment there is no mutuality either of act or of assent. It is *judicium redditum in invitum.* It may properly be denied to be a contract, though Blackstone insists that one is implied. Per Mansfield, 3 Burr. 1545; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; per Story, J., Bullard v. Bell, 1 Mas. 288, Fed. Cas. No. 2,121. Chitty uses "obligation" as an alternative word of description when speaking of bonds and judgments. Chit. Con. 2, 4. An act of legislature may be a contract; so may a legislative grant with exemption from taxes; Matheny v. Golden, 5 Ohio St. 361. So a charter is a contract between a state and a corporation within the meaning of the constitution of the United States, art. 1, § 10, clause 1; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629. Contract is used in the United States constitution in its ordinary sense as signifying the agreement of two or more minds, from considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence; it does not extend to a judgment against a city for damages suffered from a mob (given by statute); Louisiana v. New Orleans, 109 U. S. 288, 3 Sup. Ct. 211, 27 L. Ed. 936.

At common law, contracts have been divided ordinarily into contracts of record, contracts by specialty, and simple or parol contracts. The latter may be either written (not sealed) or verbal; and they may also be express or implied. Implied contracts may be either implied in law or implied in fact. "The only difference between an express contract and one implied in fact is in the mode of substantiating it. An express agreement is proved by express words, written or spoken . . . ; an implied agreement is proved by circumstantial evidence showing that the parties intended to contract;" Leake, Contr. 11; 1 B. & Ad. 415; 1 Aust. Jur. 356, 377.

Accessory contracts are those made for assuring the performance of a prior contract, either by the same parties or by others, such as suretyship, mortgage, and pledges. Louisiana Code, art. 1764; Poth. Obl. pt. 1, c. 1, s. 1, art. 2, n. 14.

Bilateral contracts are those in which a promise is given in consideration of a promise. Parsons, Contr. 464.

Contracts of beneficence are those by which only one of the contracting parties is benefited: as, loans, deposit, and mandate. Louisiana Code, art. 1767.

Certain contracts are those in which the thing to be done is supposed to depend on the will of the party, or when, in the usual course of events, it must happen in the manner stipulated.

Commutative contracts are those in which what is done, given, or promised by one party is considered as an equivalent to or in consideration of what is done, given, or promised by the other. Louisiana Code, art. 1761.

Consensual contracts were contracts of agency, partnership, sale, and hiring in the Roman law, in which a contract arose from the mere consensus of the parties without other formalities. Maine, Anc. Law 243.

Entire contracts are those the consideration of which is entire on both sides.

Executed contracts are those in which nothing remains to be done by either party, and where the transaction has been completed, or was completed at the time the contract or agreement was made: as, where an article is sold and delivered and payment therefor is made on the spot.

Executory contracts are those in which some act remains to be done: as, when an agreement is made to build a house in six months; to do an act before some future day; to lend money upon a certain interest payable at a future time. Fletcher v. Peck, 6 Cra. (U. S.) 87, 136, 3 L. Ed. 162.

A contract *executed* (which differs in nothing from a grant) transfers a chose in possession; a contract *executory* transfers a chose in action. 2 Bla. Com. 443. As to the importance of grants considered as contracts, see IMPAIRING THE OBLIGATION OF CONTRACTS.

Express contracts are those in which the terms of the contract or agreement are openly and fully uttered and avowed at the time of making: as, to pay a stated price for certain specified goods; to deliver an ox, etc. 2 Bla. Com. 443.

Gratuitous contracts are those of which the object is the benefit of the person with whom it is made, without any profit or advantage received or promised as a consideration for it. It is not, however, the less gratuitous if it proceed either from gratitude for a benefit before received or from the hope of receiving one hereafter, although such benefit be of a pecuniary nature. Louisiana Code, art. 1766. Gratuitous promises are not binding at common law unless executed with certain formalities, viz., by execution under seal.

Illegal contracts are agreements to do acts prohibited by law, as to commit a crime; to injure another, as to publish a libel. H. & N. 73.

Hazardous contracts are those in which the performance of that which is one of its objects depends on an uncertain event. Louisiana Code, art. 1769.

Implied contracts may be either implied *in law* or *in fact*. A contract implied *in law* arises where some pecuniary inequality exists in one party relatively to the other which justice requires should be compensated, and upon which the law operates by creating a debt to the amount of the required compensation; Leake, Contr. 38. See 2 Burr. 1005; 11 L. J. C. P. 99; 8 C. B. 541. The case of the defendant obtaining the plaintiff's money or goods by fraud, or duress, shows an implied contract to pay the money or the value of the goods.

A contract implied in fact arises where there was not an express contract, but there is circumstantial evidence showing that the parties did intend to make a contract; for instance, if one orders goods of a tradesman or employs a man to work for him, without stipulating the price or wages, the law raises an implied contract (*in fact*) to pay the value of the goods or services. In the former class, the implied contract is a pure fiction, having no real existence; in the latter, it is inferred as an actual fact. See Leake, Contr. 12.

Independent contracts are those in which the mutual acts or promises have no relation to each other either as equivalents or as considerations. Louisiana Code, art. 1762.

Mixed contracts are those by which one of the parties confers a benefit on the other, receiving something of inferior value in return, such as a donation subject to a charge.

Contracts of mutual interest are such as are entered into for the reciprocal interest and utility of each of the parties: as sales, exchange, partnership, and the like.

Onerous contracts are those in which something is given or promised as a consideration for the engagement or gift, or some service, interest, or condition is imposed on what is given or promised, although unequal to it in value.

Oral contracts are simple contracts.

Principal contracts are those entered into by both parties on their own accounts, or in the several qualities or characters they assume.

Real contracts are those in which it is necessary that there should be something more than mere consent, such as a loan of money, deposit, or pledge, which, from their nature, require a delivery of the thing (*res*).

Reciprocal contracts are those by which the parties expressly enter into mutual engagements, such as sale, hire, and the like.

Contracts of record are those which are evidenced by matter of record, such as judgments, recognizances, and statutes staple.

These have been said to be the highest class of contracts. Statutes, merchant and staple, and other securities of the like nature, are confined to England. They are contracts entered into by the intervention of some public authority, and are witnessed by the highest kind of evidence, viz., matter of record; Poll. Contr. 141; 4 Bla. Com. 465.

Severable (or *separable*) *contracts* are those the considerations of which are by

their terms susceptible of apportionment or division on either side, so as to correspond to the several parts or portions of the consideration on the other side.

A contract to pay a person the worth of his services as long as he will do certain work, or so much per week as long as he shall work, or to give a certain price per bushel for every bushel of so much corn as corresponds to a sample, would be a severable contract. If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. So when the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire. But the mere fact of sale by weight or measure—*i. e.* so much per pound or bushel—does not make a contract severable.

Simple contracts are those not of specialty or record.

They are the lowest class of express contracts, and answer most nearly to our general definition of contract.

To constitute a sufficient parol agreement to be binding in law, there must be that reciprocal and mutual assent which is necessary to all contracts. They are by parol (which includes both oral and written). The only distinction between oral and written contracts is in their mode of proof. And it is inaccurate to distinguish *verbal* from *written;* for contracts are equally *verbal* whether the words are *written* or spoken,—the meaning of verbal being *—expressed in words.* See 3 Burr. 1670; 7 Term 350, note; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Cook v. Bradley, 7 Conn. 57, 18 Am. Dec. 79; Union Turnpike Co. v. Jenkins, 1 Caines (N. Y.) 385.

Specialties are those which are under seal; as, deeds and bonds.

Specialties are sometimes said to include also contracts of record; 1 Pars. Contr. 7; in which case there would be but two classes at common law, viz., specialties and simple contracts. The term specialty is always used substantively.

They are the second kind of express contracts under the ordinary common-law division. They are not merely written, but *signed, sealed,* and *delivered* by the party bound. The solemnities connected with these acts, and the formalities of witnessing, gave in early times an importance and character to this class of contracts which implied so much caution and deliberation (consideration) that it was unnecessary to prove the consideration even in a court of equity; Plowd. 305; 7 Term 477; 4 B. & Ad. 652; 3 Bingh. 111; 1 Fonb. Eq. 342, note. Though little of the real solemnity now remains, and a scroll is substituted in most of the states for the seal, the distinction with regard to specialties has still been preserved intact except when abolished by statute. In Ortman v. Dixon, 13 Cal. 33, it is said that the distinction is now unmeaning and not sustained by reason. See CONSIDERATION; SEAL.

When a contract by specialty is changed by a parol agreement, the whole contract becomes parol; Vicary v. Moore, 2 Watts (Pa.) 451, 27 Am. Dec. 323; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Delacroix v. Bulkley, 13 Wend. (N. Y.) 71.

Unilateral contracts are those in which the party to whom the engagement is made makes no express agreement on his part.

They are so called even in cases where the law attaches certain obligations to his acceptance. Louisiana Code, art. 1758. A loan for use and a loan of money are of this kind. Poth. Obl. pt. 1, c. 1, s. 1, art. 2.

Verbal contracts are simple contracts.

Written contracts are those evidenced by writing.

Pothier's treatise on Obligations, taken in connection with the Civil Code of Louisiana, gives an idea of the divisions of the civil law. Poth. Obl. pt. 1, c. 1, s. 1, art. 2, makes the five following classes: *reciprocal* and *unilateral; consensual* and *real; those of mutual interest, of beneficence* and *mixed; principal* and *accessory; those which* are subjected by the civil law to certain rules and forms, and *those which* are regulated by mere natural justice.

It is true that almost all the rights of personal property do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them; which is the method taken by the civil law; it has referred the greatest part of the duties and rights of which it treats to the head of obligations *ex contractu* or *quasi ex contractu.* Inst. 3. 14. 2; 2 Bla. Com. 443.

Quasi-contracts. The usual classification of contracts is objected to by Prof. Keener in his law of Quasi-Contracts. A true contract exists, he says, because the contracting party has *willed,* in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. His contract may be implied in fact, or express. Which of the two it is, is purely a question of the kind of evidence used to establish the contract. In either case the source of the obligation is the intention of the party. "Contract implied in law" is, however, a term used to cover a class of obligations, where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and, in many cases, in spite of his actual dissent. Such contracts, according to the work cited, may be termed quasi-contracts, and are not true contracts. They are founded generally:—

1. Upon a record.

2. Upon statutory, official, or customary duties.

3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another. The latter is the most important and most numerous class. See also Ans. Contr. 6th ed. 7; 2 Harv. L. Rev. 64; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936.

A claim for half-pilotage fees under a statute allowing such fees, where a pilot's services are offered and declined, is an instance of a quasi-contract of the second class; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805. See also Milford v. Com., 144 Mass. 64, 10 N. E. 516. Prof. Keener, in his work above cited, considers the duty of a carrier to receive and carry safely as being of a quasi-contractual nature. Among the third class are also cases of the liability of a husband to pay for necessaries furnished to his wife; of a father for those furnished to his child. Also cases of actions to recover money paid under a mistake; actions in assumpsit against a tort-feasor, where the tort is waived; actions to recover compensation for benefits received under a contract which the plaintiff cannot enforce because he has

failed to comply with the conditions thereof; actions for benefits conferred by the plaintiff under a contract which the defendant, by reason of the statute of frauds, illegality, impossibility, etc., is not bound to perform; actions for benefits conferred on the defendant at his request, but in the absence of a contract; actions for benefits intentionally conferred, but without the defendant's request; actions for money paid to the use of the defendant; and actions for money paid under compulsion of law and money paid to the defendant under duress, legal or equitable. These are the general classes given in Keener, Quasi-Contracts, to which reference is made, *passim*. The question to be determined is not the defendant's intention, but what in equity and good conscience the defendant ought to do. The action of *indebitatus assumpsit* was extended to most cases of quasi-contracts; Harriman, Contr. 24; 2 Harv. L. Rev. 63. The settled tendency of English and American law is toward a new classification of contracts and the treatment of implied contracts upon the lines here indicated. They are lines clearly defined in the Roman law as shown by Maine (Anc. Law, 3d. Am. ed. 332), who is extensively quoted by Keener. See CONTRACTUAL OBLIGATION; Woodward, Quasi-Contracts.

Negotiations preceding a contract. Where there is an agreement between parties to enter into a contract in the future, and any essential part of the contract is left open, the agreement does not constitute a contract in itself; Sibley v. Felton, 156 Mass. 273, 31 N. E. 10. Such is the case also if the agreement itself shows that it was not intended to bind the parties, but that a formal contract was to be executed; Eads v. City of Carondelet, 42 Mo. 113; 70 L. T. 781. But a mere reference to a contract to be drawn up in the future is not conclusive that the parties are not bound by their original agreement, though it tends to show that such is the case; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; L. R. 18 Eq. 180. The question is one of intention to be gathered from the original agreement, in view of all the circumstances; Sanders v. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757; Harriman, Contr. 52.

Where negotiations are made "subject to the preparation and approval" or "completion of a formal contract," they do not constitute a binding contract, whether the condition is expressed in the offer; [1895] 2 Ch. 1844; or in the acceptance; 7 Ch. D. 29; but "the mere reference to a future contract is not enough to negative the existence of a present one;" 8 Ch. D. 70. Where a baker sold, and a company bought a shop, and the contract seemed complete in two letters, but afterward the company wrote a third letter introducing a new and vital term, viz., a restriction upon the baker's trading in the district, it was held that the three letters read together negatived the idea that the two letters constituted the contract; 42 Ch. D. 616. Where the acceptance was "subject to the title being approved by our solicitor" it was held, that this meant no more than the liberty which every purchaser impliedly reserves to himself of breaking off the contract if the vendor breaks it, by not making a good title. The Court of Appeals construed these words as a condition, but Lord Cairns, L. C., pointed out that they would, if so construed, imply that the vendor was free, but the purchaser bound; 4 App. Cas. 311. In 3 App. Cases 1124, in the House of Lords, it was said, in holding that a correspondence between parties constituted a complete contract, "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, 'We will have this agreement put in due form by a solicitor.'" In the same case Lord Blackburn said that there must be a complete agreement, "if not there is no contract so long as the parties are only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not."

The tendency in recent authorities is said in Pollock, Contr. 47, to discourage all attempts to lay down any fixed rule as governing these cases. The question may be made clear by putting it this way, whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be proposed. "It is a settled law that a contract may be made by letter and that the mere reference in them to a future formal contract will not prevent their constituting a binding contract;" 8 Ch. D. 70. It is not binding if the terms are uncertain, *e. g.*, an agreement to sell an estate reserving "the necessary land for making a railroad"; [1875] 20 Eq. 492; to make such a contract in the future "as the parties may agree upon"; Shepard v. Carpenter, 54 Minn. 153, 55 N. W. 906; to give a lease in the

form usual in the city where the property is situate; Scholtz v. Ins. Co., 100 Fed. 573, 40 C. C. A. 556; otherwise of an agreement to execute a deed of separation containing the "usual covenants"; [1881] 18 Ch. Div. 670.

Where all the terms of a contract were agreed upon and it was dictated to a stenographer to be written out and signed by the parties, the contract was held to be complete, though it was not reduced to writing before breach; Hollerbach & May Contract Co. v. Wilkins, 130 Ky. 51, 112 S. W. 1126. Though the parties to a contract agreed to reduce it to writing, failure to do so does not invalidate it, but merely affects the mode of proof; Jenkins & Reynolds Co. v. Alpena Portland Cement Co., 147 Fed. 641, 77 C. C. A. 625.

Where a contract was reduced to writing and assented to by the parties, but not yet signed, it was held not binding; Fourchy v. Ellis, 140 Fed. 149.

Since the judicature acts in England, a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in precisely the same position as if the lease had been executed; 21 Ch. D. 9.

Qualities of contracts. Every agreement should be so complete as to give either party his action upon it; both parties must assent to all its terms; 3 Term 653; 1 B. & Ald. 681; McCulloch v. Ins. Co., 1 Pick. (Mass.) 278. To the rule that the contract must be obligatory on both parties, there are some exceptions: as the case of an infant, who may sue, though he cannot be sued, on his contract; Add. Contr. 380; Stra. 937. See other instances, 6 East 307; 3 Taunt. 169; 5 *id.* 788; 3 B. & C. 232. There must be a good and valid consideration (*q. v.*), which must be proved though the contract be in writing; 7 Term 350, note (*a*); 2 Bla. Com. 444; Fonb. Eq. 335, n. (*a*). There is an exception to this rule in the case of bills and notes, which are of themselves *prima facie* evidence of consideration. And in other contracts (written), when consideration is acknowledged, it is *prima facie* evidence thereof, but open to contradiction by parol testimony. There must be a thing to be done which is not forbidden by law, or one to be admitted which is not enjoined by law. Fraudulent, immoral, or forbidden contracts are void. A contract is also void if against public policy or the statutes, even though the statute be not prohibitory but merely affixes a penalty; Poll. Contr. 259 *et seq.*; Mitchell v. Smith, 4 Dall. (U. S.) 269, 1 L. Ed. 828; Mabin v. Coulon, 4 Dall. (U. S.) 298, 1 L. Ed. 841; Stanley v. Nelson, 28 Ala. 514; Siter v. Sheets, 7 Ind. 132; Solomon v. Dreschler, 4 Minn. 278 (Gil. 197); Coburn v. Odell, 30 N. H. 540; Bell v. Quin, 2 Sandf. (N. Y.) 146. But see Branch Bank at Montgomery v. Crocheron, 5 Ala. 250. As to contracts which cannot be enforced from non-compliance with the statute of frauds, see FRAUDS, STATUTE OF.

Suits by third parties. It was for a long time not fully settled whether a contract between A and B that one of them should do something for the benefit of C did or did not give C a right of action on the contract. See 1 B. & P. 98; 3 *id.* 149; but it is now distinctly established in England that C cannot sue; 1 B. & S. 393; Poll. Contr. 200; in America the authorities are conflicting.

On specialties most courts do not permit a suit in a third person's name, yet some do; Poll. Contr. 204, citing Millard v. Baldwin, 3 Gray (Mass.) 484. Professor Harriman (Contracts, ch. VII), after citing the authorities for the common-law rule that the one not a party to it can enforce a contract, enumerates and discusses the exceptions. The only exception recognized in Massachusetts (the right to recover money in the hands of the defendant which is of right the property of the plaintiff), is considered no real exception, as the liability is not contractual; the right of a son to sue on a promise made to a father is not now recognized in England or in Massachusetts as it formerly was, and it has no foundation in principle. The broad exception existing in most of the states permitting a person for whose benefit a promise is made to sue upon it, he considers not founded on any principle, but a clear case of judicial legislation which, like most arbitrary rules, has led to confusion. He reaches the conclusion that the right of a stranger to sue in certain cases is recognized in New York, Missouri, Indiana, Illinois, Nebraska, New Hampshire, Maine, and Rhode Island, and that in Massachusetts and Michigan, as in England, the common law prevails. In the federal courts he considers the rule not clearly settled, but that the general rules laid down by the supreme court coincide with the common-law rule.

In Hendrick v. Lindsay, 93 U. S. 143, 23 L. Ed. 855, the court (Davis, J.) said that "the right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." In Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75, it was held that while the common-law rule is that a stranger cannot sue upon it, "there are confessedly many exceptions to it." In Pennsylvania the general rule is recognized; but it is held that where money or property is placed by one in the possession of another, to be paid or delivered to a third person, the latter has a right of action, being regarded as a party to the consideration on which the undertaking rests; Adams v. Kuehn, 119 Pa. 76, 13 Atl. 184; so, also, Blymire v. Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458. And a promise to one to pay a debt due by him to another is valid; Hind v. Holdship, 2 Watts (Pa.) 104, 26 Am. Dec. 107. In some jurisdictions, even includ-

ing courts adhering to the general common-law rule, a third person has a right to enforce a trust created for his benefit by another person; Union P. R. Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Street v. McConnell, 16 Ill. 125; Bay v. Williams, 112 Ill. 91, 1 N. E. 340, 54 Am. Rep. 209; Chace v. Chapin, 130 Mass. 128; Pruitt v. Pruitt, 91 Ind. 595. But see Crandall v. Payne, 154 Ill. 627, 39 N. E. 601, where it was held that when a contract of sale of land from A to B recited that part of the purchase money was "going to C," the latter could not sue B.

See for a general discussion of the subject, Southern Express Co. v. R. Co., 29 Am. L. Reg. O. S. 596; 4 N. J. L. J. 197, 229; 8 Harv. L. Rev. 93; Harriman, Contr.

Construction and interpretation in reference to contracts. The intention of the parties is the pole-star of construction; but their intention must be found expressed in the contract and be consistent with rules of law. The court will not make a new contract for the parties, nor will words be forced from their real signification.

The subject matter of the contract and the situation of the parties are to be fully considered with regard to the sense in which language is used.

The legality of the contract is presumed and is favored by construction.

Words are to be taken, if possible, in their ordinary and common sense.

The whole contract is to be considered with relation to the meaning of any of its parts.

The contract will be supported rather than defeated: *ut res magis valeat quam pereat.*

All parts will be construed, if possible, so as to have effect.

Construction is generally against the grantor—*contra proferentem*—except in the case of the sovereign. This rule of construction is not of great importance, except in the analogous case of penal statutes; for the law favors and supposes innocence.

Construction is against claims or contracts which are in themselves against common right or common law.

Neither bad English nor bad Latin invalidates a contract ("which perhaps a classical critic may think no unnecessary caution"); 2 Bla. Com. 379; 6 Co. 59. See CONSTRUCTION; INTERPRETATION.

Parties. There is no contract unless the *parties* assent thereto; and where such assent is impossible from the want, immaturity, or incapacity of mind of one of the parties, there can be no perfect contract. See PARTIES.

Remedy. The foundation of the common law of contracts may be said to be the giving of damages for the breach of contracts. When the thing to be done is the payment of money, damages paid in money are entirely adequate. When, however, the contract is for anything else than the payment of money, the common law knows no other than a money remedy: it has no power to enforce a specific performance of the contract.

The injustice of measuring all rights and wrongs by a money standard, which as a remedy is often inadequate, led to the establishment of the equity power of decreeing specific performance when the remedy has failed at law. For example: contracts for the sale of real estate will be specifically enforced in equity; performance will be decreed, and conveyances compelled.

Where a contract is for the benefit of the contracting party, no action can be maintained by a third person who is a stranger to the contract and the consideration; Freeman v. R. Co., 173 Pa. 274, 33 Atl. 1034.

As to signing a contract without reading it, see SIGNATURE.

See ACCEPTANCE; AGREEMENT; BREACH; CONSIDERATION; CONTRACTUAL OBLIGATION; LETTER; NOVATION; OFFER; PAYMENT; PERFORMANCE; SATISFACTION; STATUS.

For the early history of parol contracts, see Ames, 3 Sel. Essays in Anglo-Amer. L. H. 304; Salmond, *id.* 321.

See IMPAIRING OBLIGATION OF A CONTRACT; THIRD PARTIES, CONTRACTS FOR.

In Roman and Mediæval Law. "Formal contracts *(legitimæ conventiones)* gave a right of action irrespective of their subject matter. In Justinian's time the only form of contract in use was the Stipulation or verbal contract by question and answer. Its origin is believed to have been religious, though the precise manner of its adoption remains uncertain. It appears as a formal contract capable of being applied to any kind of subject matter. Its application was in time extended by the following steps: 1. The question and answer were not required to be in Latin. 2. An exact verbal correspondence between them was not necessary. 3. An instrument in writing purporting to be the record of a Stipulation was treated as strong evidence of the Stipulation having taken place. Hence the mediæval development of operative writings.

"Informal agreements *(pacta)* did not give any right of action without the presence of something more than the mere fact of the agreement. This something was called *causa.* Practically the term covers a somewhat wider ground than our modern 'consideration executed'; but it has no general notion corresponding to it, at least none co-extensive with the notion of contract; it is simply the mark which distinguishes any particular class from the common herd of *pacta* and makes them actionable. Informal agreements not coming within any of the privileged classes were called *nuda pacta* and could not be sued on. The term *nudum pactum* is sometimes used however with a special and rather different meaning to express the rule that a contract without delivery will not pass property.

"The further application of this metaphor by speaking of the *causa* when it exists as the clothing or vesture of the agreement is without classical authority, but very common; it is adopted to the full extent by our early writers.

"The privileged informal contracts were the following: 1. *Real* contracts, where the *causa* consisted in the delivery of money or goods; namely, *mutui datio, commodatum, depositum, pignus,* corresponding to our bailments. This class was expanded within historical times to cover the so-called *innominate* contracts denoted by the formula *do ut des,* etc. 2. Consensual contracts, being contracts of constant occurrence in daily life in which no *causa*

was required beyond the nature of the contract itself. Four such contracts were recognized, the first three of them at all events, from the earliest times from which we knew anything, namely, Sale, Hire, Partnership, and Mandate *(Emptio Venditio, Locatio Conductio, Societas, Mandatum)*. To this class great additions were made in later times. Subsidiary contracts *(pacta adiecta)* entered into at the same time and in connection with contracts of an already enforceable class became likewise enforceable; and divers kinds of informal contracts were specially made actionable by the Edict and by imperial constitutions, the most material of these being the *constitutum* covering the English heads of *account stated* and *guaranty*. Justinian added the *pactum donationis*, it seems with a special view to gifts to pious uses. Even after all these extensions, however, matters stood thus: 'The Stipulation, as the only formal agreement existing in Justinian's time gave a right of action. Certain particular classes of agreements also gave a right of action even if informally made. All other informal agreements *(nuda pacta)* gave none. This last proposition, that *nuda pacta* gave no right of action, may be regarded as the most characteristic principle of the Roman law of Contract.' (Sav. Obl. 2, 231.) It is desirable to bear in mind that in Roman and also in early English law-text *nudum pactum* does not mean an agreement without consideration. Many *nuda pacta* according to the classical Roman law would be quite good in English law, as being made on sufficient consideration; while in many cases obligations recognized by Roman law as fully binding (e. g. from mandate or *negotiorum gestio*) would be unenforceable as being without consideration, in the common law.

". . . In Western Christendom the natural obligation admitted to arise from an informal agreement was gradually raised to full validity, and the difference between *pactum* and *legitima conventio* ceased to exist. The process however was not completed until English law had already struck out its own line.

"The identification of Stipulation with formal writing, complete on the Continent not later than the 9th Century, was adopted by our mediæval authors." Pollock, Contracts 743.

CONTRACT LABOR ACT. See LABOR.

CONTRACTION (Lat. *con*, together, *traho*, to draw). A form of a word abbreviated by the omission of one or more letters. This was formerly much practised, but in modern times has fallen into general disuse. Much information in regard to the rules for contraction is to be found in the Instructor Clericalis.

CONTRACTOR. One who enters into a contract. Generally used of those who undertake to do public work or the work for a company or corporation on a large scale, or to furnish goods to another at a fixed or ascertained price. 2 Pard. n. 300. See Sullivan v. Johns, 5 Whart. (Pa.) 366; Mason v. U. S., 14 Ct. Cl. 59; Neal v. U. S., *id.* 280; Merriam v. U. S., *id.* 289; Carr v. U. S., 13 Ct. Cl. 136; Denver Pacific Ry. Co. v. U. S., *id.* 392. As to liability of a party for the negligence of a contractor employed by him, see INDEPENDENT CONTRACTOR.

CONTRACTUAL. Of the nature of or pertaining to a contract, as, contractual liability or contractual obligation, which see. A term used by writers on the Roman law to designate the class of obligations described in the classification of the civilians as *ex contractu*, and recently much used in English and American law in connection with the more modern method of classifying contracts referred to in connection with Quasi-Contract. See CONTRACT.

CONTRACTUAL OBLIGATION. The obligation which arises from a contract or agreement.

In the *Roman law* the expression was a familiar one, and, taking the result of the discussions of the subject by writers on the civil law, and keeping in view both the etymology and the use of the word obligation, we may define it, as there used, to be a tie binding one to the performance of a duty arising from the agreement of parties.

The term is resorted to as a relief from what he considers the misuse of the word contract and the difficulty of defining it, by Prof. Harriman, who uses it in this sense: "Nevertheless in the case of many 'contracts,' using the word in its broadest sense, we find existing an obligation with certain definite characteristics which can easily be recognized. This obligation we shall venture to call contractual." He divides "the endless variety of obligations which the courts enforce" into irrecusable and recusable obligations. The former are those which are imposed upon the person without his consent and without regard to any act of his own; the latter are the result of a voluntary act on the part of the person on whom they are imposed. These terms are adopted by him from an article by Professor John H. Wigmore in 8 Harv. L. Rev. 200, and he again divides recusable obligations into definite and indefinite, meaning thereby to express whether the extent of the undertaking is determined by the act of the party upon whom the obligation rests or not; and to differentiate still further the precise character of definite recusable obligations, which he terms contractual obligations, Professor Harriman originates the terms unifactoral and bifactoral, as the obligation is created by the act of the party bound, or requires two acts, one by the party bound and the other by the party to be benefited. The term contractual was of constant use by writers on the civil law, and Maine, in his Early Law and Custom, refers to the German Salic Law as elaborately discussing contractual obligation. Professor Harriman's definition of this term is "that obligation which is imposed by the law in consequence of a voluntary act, and which is determined as to its nature and extent by that act." Harr. Cont. 27. The idea of contractual obligation he thinks was unknown to our Anglo-Saxon ancestors; *id.* 15. It is undoubtedly true, as Professor Harriman asserts, that the best considered theory of contract at the present time has been a slow and tedious development; but it is equally true that among the writers who have given most attention to the study of the historical development of the law there remain wide differences of opinion as to the time and manner of its development. It is likewise to be observed that the theories of Professor Harriman and those who have preceded him, in the views which he has so logically and comprehensively treated, do in fact include much that is familiar to the student of the Roman law, while there is exhibited a reluctance to give to that system due credit for the principles which were fully developed in it. In his preface the author here cited quotes with approval the remark of Sir F. Pollock, that English speaking lawyers "must seek a genuine philosophy of the common law, and not be put off with a surface dressing of Romanized generalities." It may be suggested that when, after centuries of an unscientific development of the English law of contract (due to causes which Professor Harriman well sketches in Part II. of his introduction), what seems to be not only a better, but the true theory has come to be recognized and developed; the coincidence of that theory with the root idea of the subject, as expressed in so scientific a system as the Roman law, should be acknowledged and utilized, rather than ignored, or characterized as "recasting

English ideas and institutions in a Roman mould." It may be safely asserted that neither contract nor contractual obligation is an English idea or institution, but an idea of human civilization. Maine says we have no society disclosed to us destitute of the conception; Anc. Law 303. It is equally creditable to us to have discovered and developed the correct idea of it after it has been overlaid with the misconceptions of the common law, as to its true nature, as it was to the Civilians to have formulated it correctly as part of their scientifically constructed system. That a concurrence is reached by these distinct processes is strong confirmation of the accuracy of the result. The reader is also referred to Keener, Quasi-Contracts; Holmes, Common Law; Sandars, Inst. of Justinian; Howe, Studies in the Civil Law, which contains a statement of the subject of obligations in the Roman law.

CONTRADICT. To prove a fact contrary to what has been asserted by a witness.

A party cannot *impeach* the character of his witness, but may contradict him as to any particular fact; 1 Greenl. Ev. § 443; 3 B. & C. 746; Lawrence v. Barker, 5 Wend. (N. Y.) 305; Stockton v. Demuth, 7 Watts (Pa.) 39, 32 Am. Dec. 735; Brown v. Bellows, 4 Pick. (Mass.) 179, 194; Dennett v. Dow, 17 Me. 19.

CONTRAESCRITURA. In Spanish Law. Counter-letter. An instrument, usually executed in secret, for the purpose of showing that an act of sale, or some other public instrument, has a different purpose from that imported on its face. Acts of this kind, though binding on the parties, have no effect as to third persons.

CONTRAFACTIO (Lat.). Counterfeiting: as, *contrafactio sigilli regis* (counterfeiting the king's seal). Cowell; Reg. Orig. 42. See COUNTERFEIT.

CONTRAROTULATOR (Fr. *contrerouleur*). A controller. One whose business it was to observe the money which the collectors had gathered for the use of the king or the people. Cowell.

CONTRAROTULATOR PIPÆ. An officer of the exchequer that writeth out summons twice every year to the sheriffs to levy the farms (rents) and debts of the pipe. Blount.

CONTRAVENTION. In French Law. An act which violates the law, a treaty, or an agreement which the party has made. That infraction of the law punished by a fine which does not exceed fifteen francs and by an imprisonment not exceeding three days.

CONTRE-MAITRE. In French Law. The second officer in command of a ship.

CONTRECTATIO. In Civil Law. The removal of a thing from its place amounting to a theft. The offence is purged by a restoration of the thing taken. Bowy. Com. 268.

CONTREFAÇON. In French Law. The offence of those who print or cause to be printed, without lawful authority, a book of which the author or his assigns have a copyright. Merlin, *Répert.*

CONTRIBUTION. Payment by one or more persons who are liable, in company with others, of a proportionate part of the whole liability or loss, to one or more of the parties so liable upon whom the whole loss has fallen or who has been compelled to discharge the whole liability; Dupuy v. Johnson, 1 Bibb (Ky.) 562; Lawrence v. Cornell, 4 Johns. Ch. (N. Y.) 545; Pars. Part. 198.

"The principle is that parties having a common interest in a subject-matter shall bear equally any burden affecting it. *Qui sentit commodum sentire debet et onus.* Equality is equity. One shall not bear a common burden in ease of the rest. Hence, if, (as often may be done), a lien, charge, or burden of any kind, affecting several, is enforced at law against one only, he should receive from the rest what he has paid or discharged on their behalf. This is the doctrine of equitable contribution, resting on as simple a principle of natural justice as can be put." Per Bates, Ch., in Eliason v. Eliason, 3 Del. Ch. 260; 3 Co. 11 *b;* 1 Cox, C. C. 318; 1 B. & P. 270; 1 Sto. Eq. 477; 1 Wh. & Tud. L. Cas. in Eq. 66. Though its most common application is to sureties and owners of several parcels of land subject to a lien, the application of the principle is said to be universal by Lord Redesdale in 3 Bligh 59; and it applies equally to dower as to other incumbrances; Eliason v. Eliason, 3 Del. Ch. 260; Bank of United States v. Delorac's Ex'rs, Wright (Ohio) 285.

A right to contribution exists in the case of debtors who owe a debt jointly which has been collected from one of them; Davis v. Burnett, 49 N. C. 71, 67 Am. Dec. 263; Haupt v. Mills, 4 Ga. 545; Mills v. Hyde, 19 Vt. 59, 46 Am. Dec. 177; Norton v. Coons, 3 Denio (N. Y.) 130; Fletcher v. Brown, 7 Humphr. (Tenn.) 385. See Russell v. Failor, 1 Ohio St. 327, 59 Am. Dec. 631. It also exists where land charged with a legacy, or the portion of a posthumous child, descends or is devised to several persons, when the share of each is held liable for a proportionate part; Armistead v. Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501; Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; Blaney v. Blaney, 1 Cush. (Mass.) 107; Taylor v. Taylor, 8 B. Monr. (Ky.) 419, 48 Am. Dec. 400. As to contribution under the maritime law, see GENERAL AVERAGE.

Originally this right was not enforced at law, but courts of common law in modern times have assumed a jurisdiction to compel contribution among sureties in the absence of any positive contract, on the ground of an implied assumpsit, and each of the sureties may be sued for his respective quota or proportion; Wh. & Tud. Lead. Cas. 66; Carroll v. Bowie, 7 Gill (Md.) 34; Ellicott v. Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Lindell v. Brant, 17 Mo. 150. The remedy in equity is, however, much more effective; Couch v. Terry's Adm'rs, 12 Ala. 225; Mo-

Kenna v. George, 2 Rich. Eq. (S. C.) 15; Bisp. Eq. § 329. For example, a surety who pays an entire debt can, in equity, compel the solvent sureties to contribute towards the payment of the entire debt; 1 Ch. Cas. 346; Finch 15, 203; while at law he can recover no more than an aliquot part of the whole, regard being had to the number of co-sureties; 2 B. & P. 268; 6 B. & C. 697; Powers v. Gowen, 32 Me. 381. See SUBROGATION. See, as to co-sureties, 1 Lead. Cas. Eq. 100.

There is no contribution, as a general rule, between joint tort-feasors; 8 T. R. 186; Nichols v. Nowling, 82 Ind. 488; Percy v. Clary, 32 Md. 245; Miller v. Fenton, 11 Paige (N. Y.) 18; Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663; but this rule does not apply when the person seeking redress did not in fact know that the act was unlawful, and is not chargeable with knowledge of that fact; 4 Bing. 72; Moore v. Appleton, 26 Ala. 633; Bailey v. Bussing, 28 Conn. 455; Armstrong County v. Clarion County, 66 Pa. 218, 5 Am. Rep. 368.

It is not the admiralty rule; Erie R. Co. v. Transp. Co., 204 U. S. 225, 27 Sup. Ct. 246, 51 L. Ed. 450.

The rule against contribution between wrongdoers is not universal. If the parties are not equally at fault, the principal delinquent may be responsible to the others for damages incurred by their joint offence. With respect to offences in which is involved any moral delinquency, all parties are equally guilty, and the courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum* and in no sense immoral, the court will inquire into their relative delinquency and administer justice between them; Lowell v. R. Co., 23 Pick. (Mass.) 32, 34 Am. Dec. 33, cited in Washington Gas Co. v. Dist. of Columbia, 161 U. S. 316, 327, 16 Sup. Ct. 564, 40 L. Ed. 712, where it is said that the cases are too numerous for citation; they are collected in Whart. Neg. 246; 2 Thomp. Neg. 789, 1061; 2 Dill. Mun. Corp. § 1035.

The rule stated also fails when the injury grows out of a duty resting primarily upon one of the parties, and but for his negligence there would have been no cause of action against the other. A servant is consequently liable to his master for the damages recovered against the latter in consequence of the negligence of the servant; Merryweather v. Nixan, 2 Sm. Lead. Cas. 483. Where a recovery is had against a municipal corporation for an injury resulting from an obstruction to the highway, or other nuisance, occasioned by the act or default of its servant, or even of a citizen, the municipality has a right of action against the wrongdoer for indemnity; Chicago v. Robbins, 2 Black (U. S.) 418, 17 L. Ed. 298.

In Civil Law. A partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property proportionably to the amount of their respective credits. *La. Code*, art. 2522, n. 10. It is a division *pro rata*. Merlin, *Répert.*

CONTRIBUTORY. A person liable to contribute to the assets of a company which is being wound up, as being a member or (in some cases) a past-member thereof. 3 Steph. Com. 24; Moz. & W. Law Dict.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONTROLLER. A comptroller, which see.

CONTROVER. One who invents false news. Co. 2d Inst. 227.

CONTROVERSY. A dispute arising between two or more persons.

In the federal jurisdiction clause relating to controversies "between two or more states," etc., it means those that are justiciable between the parties thereto. Louisiana v. Texas, 176 U. S. 1, 24, 20 Sup. Ct. 251, 44 L. Ed. 347.

It differs from case, which includes all suits, criminal as well as civil; whereas controversy is a civil and not a criminal proceeding; Chisholm v. Georgia, 2 Dall. (U. S.) 419, 431, 432, 1 L. Ed. 440; 1 Tuck. Bla. Com. App. 420, 421.

By the constitution of the United States, the judicial power extends to controversies to which the United States shall be a party. Art. III. sec. 2. The meaning to be attached to the word controversy in the constitution is that above given.

CONTUBERNIUM. In Civil Law. A marriage between two slaves; it was not a legal relation, and the children were not legitimate. Bryce, Studies in Hist. etc., Essay XVI.

CONTUMACE CAPIENDO. A writ provided by 53 Geo. III. c. 127, in place of the writ *de excommunicato capiendo* to enable Ecclesiastical Courts to enforce an appearance and punish for contempt. 1 Holdsw. Hist. Engl. Law App. XVIII. See EXCOMMUNICATION.

CONTUMACY (Lat. *contumacia*, disobedience). The refusal or neglect of a party accused to appear or answer to a charge preferred against him in a court of justice.

Actual contumacy is the refusal of a party actually before the court to obey some order of the court.

Presumed contumacy is the act of refusing or declining to appear upon being cited. 3 Curt. Ecc. 1.

One who has been convicted *in contumaciam* in a foreign country is to be regarded, not as convicted of, but only charged with, the offence; Ward, C. J., in Ex parte Fudera, 162 Fed. 591, adopting Moore, Extrad. art. 102.

CONTUMAX. One accused of a crime who refuses to appear and answer to the charge. An outlaw.

CONTUSION. In Medical Jurisprudence. An injury or lesion, arising from the shock

of a body with a large surface, which presents no loss of substance and no apparent wound. If the skin be divided, the injury takes the name of a contused wound. See 4 C. & P. 381, 558, 565; 6 *id.* 684; Thomas, Med. Dict. *sub v.*; 2 Beck, Med. Jur. 18, 23.

CONUSANCE, CLAIM OF. See COGNIZANCE.

CONUSANT. One who knows; as, if a party knowing of an agreement in which he has an interest makes no objection to it, he is said to be conusant. Co. Litt. 157.

CONUSOR. A cognizor.

CONVENE. **In Civil Law.** To bring an action.

CONVENTICLE. A private assembly of a few folks under pretence of exercise of religion. The name was first given to the meetings of Wickliffe, but afterwards applied to the meetings of the non-conformists. Cowell.

The meetings were made illegal by 16 Car. II. c. 4, and the term in its later signification came to denote an unlawful religious assembly.

CONVENTIO (Lat. a coming together). **In Canon Law.** The act of summoning or calling together the parties by summoning the defendant.

When the defendant was brought to answer, he was said to be convened,—which the canonists called *conventio*, because the plaintiff and defendant met to contest. Story, Eq. Pl. 402.

In Contracts. An agreement; a covenant. Cowell.

Often used in the maxim *conventio vincit legem* (the express agreement of the parties supersedes the law). Story, Ag. § 368. But this maxim does not apply, it is said, to prevent the application of the general rule of law. Broom, Max. 690. See MAXIMS.

CONVENTION. **In Civil Law.** A general term which comprehends all kinds of contracts, treaties, pacts, or agreements. The consent of two or more persons to form with each other an engagement, or to dissolve or change one which they had previously formed. Domat, l. 1, t. 1, s. 1; Dig. lib. 2, t. 14, l. 1; lib. 1, t. 1, l. 1, 4 and 5.

In Legislation. This term is applied to a meeting of the delegates elected by the people for other purposes than usual legislation. It is used to denote an assembly to make or amend the constitution of a state; also an assembly of the delegates of the people to nominate candidates to be supported at an election. As to the former use, see Jameson, Constit. Conv.; Cooley, Const. Lim.; CONSTITUTIONAL CONVENTION.

CONVENTION PARLIAMENTS. Parliaments which met in 1660 (and restored Charles II) and in 1688–9 (and brought William and Mary to the throne). So called because they were not summoned by the king's writ. The acts of the former were confirmed by the succeeding Parliament summoned in due form, but this was not deemed necessary as to those of the latter. Tasw.-Langmead, Engl. Const. Hist. 575.

CONVENTIONAL. Arising from, and dependent upon, the act of the parties, as distinguished from *legal*, which is something arising from act of law. 2 Bla. Com. 120.

CONVENTIONES LEGITIMÆ. See CONTRACT.

CONVENTUS (Lat. *convenire*). An assembly. *Conventus magnatum vel procerum.* An assemblage of the chief men or nobility; a name of the English parliament. 1 Bla. Com. 248.

In Civil Law. A contract made between two or more parties.

A multitude of men, of all classes, gathered together.

A standing in a place to attract a crowd.

A collection of the people by the magistrate to give judgment. Calvinus, Lex.

CONVENTUS JURIDICUS. A Roman provincial court for the determination of civil causes.

CONVERSANT. One who is in the habit of being in a particular place is said to be conversant there. Barnes 162.

Acquainted; familiar.

CONVERSION. **In Equity.** The exchange of property from real to personal or from personal to real, which takes place under some circumstances in the consideration of the law, such as, to give effect to directions in a will or settlement, or to stipulations in a contract, although no such change has actually taken place. 1 Bro. C. C. 497; 1 Lead. Cas. Eq. 619; *id.* 872; Lawrence v. Elliott, 3 Redf. (N. Y.) 235; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Maddock v. Astbury, 32 N. J. Eq. 181.

A *qualified* conversion is one directed for some particular purpose; Harker v. Reilly, 4 Del. Ch. 72. Where the purpose of conversion totally fails no conversion takes place, but the property remains in its original state, but where there is a partial failure of the purpose of conversion of land the surplus results to the heir; 1 Bro. C. C. 503; as money and not as land, and therefore if he be dead it will pass to his personal representatives even if the land were sold in his lifetime; 4 Madd. 492. The English authorities strongly favor the heir, and the authorities are collected by Bispham (Eq. pt. ii. ch. v.) and by Bates, Ch. (Harker v. Reilly, 4 Del. Ch. 72), who held that where there was a qualified conversion by will, if one of the legacies fail, whether it be void *ab origine* or lapse, that portion of the fund which fails of its object will result to the party who would have been entitled to the real estate unsold. Bispham considers the American authorities less favorable to the heir than the English, citing Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. Ed. 460, where it was held that if the intent of the testator appears to have been

to stamp upon the proceeds of the land described to be sold the character of personalty, to all intents and purposes the claim of the heir is defeated and the estate is considered personal (see also Morrow v. Brenizer, 2 Rawle [Pa.] 185). But in the Delaware case cited it was considered that the English doctrine of qualified conversion was fully sustained by the American cases at large as collected in the American note to Ackroyd v. Smithson, 1 Wh. & Tud. L. Cas. in Eq. 590; and the case cited by Bispham from 3 Wheat., as appears from the foregoing statement of it, does not conflict with the English doctrine, as it is expressly limited to cases in which the intention is clear that the heir shall not take.

Land is held to be converted into money, in equity, when the owner has contracted to sell; and if he die before making a conveyance, his executors will be entitled to the money, and not his heirs; 1 W. Bla. 129; Masterson v. Pullen, 62 Ala. 145.

When land is ordered by a will to be sold, it is regarded as converted into personalty; Hough's Estate, 3 D. R. (Pa.) 187; so of a direction to sell after 20 years; Handley v. Palmer, 103 Fed. 39, 43 C. C. A. 100; but a mere power of sale will not have that effect until it is exercised; Chew v. Nicklin, 45 Pa. 84. Lands taken under the right of eminent domain are converted.

Money may be held to be converted into land under various circumstances: as where, for example, a man dies before a conveyance is made to him of land which he has bought. 1 P. Wms. 176; Peter v. Beverly, 10 Pet. (U. S.) 563, 9 L. Ed. 522. See Giraud v. Giraud, 58 How. Pr. (N. Y.) 175; Orrick v. Boehm, 49 Md. 72.

Where land forming part of a decedent's estate is sold in foreclosure to pay off a debt, the sale converts the real estate into money. But the conversion is effectual only to the extent and for the purposes for which the sale was authorized, whether by will or by the order of the court. So far as these purposes do not extend, and in so far as any of them do not take effect, in fact or in law, the property retains its former character in respect of the rights of its owner and passes accordingly; 2 Woerner, Am. L. of Adm. § 481; Kitchens v. Jones, 87 Ark. 502, 113 S. W. 29, 19 L. R. A. (N. S.) 723, 128 Am. St. Rep. 36.

In case of foreclosure of a mortgage, as to whether the heir or personal representative takes the surplus depends upon whether the mortgagor died before or after the foreclosure; 2 Sim. St. 323; although in one case, where foreclosure was before mortgagor's death, still it was held that the surplus went to his heirs; 124 L. T. 503. A conditional direction to sell land can cause no equitable conversion until the condition is satisfied; L. R. 26 Ch. Div. 601.

When a binding option for the purchase of land is not exercised until after the death of the vendor, the conversion relates back as between the heir and the personal representative to the date of the contract by which the option was given; 14 Ves. 591; D'Arras v. Keyser, 26 Pa. 249; Newport Water-Works v. Sisson, 18 R. I. 411, 28 Atl. 336; *contra*, Smith v. Loewenstein, 50 Ohio 346, 34 N. E. 159.

Courts of equity have power to order the conversion of property held in a trust from real estate into personal estate, or *vice versa*, when such conversion is not in conflict with the will of the testator, expressly or by implication, and is for the interest of the *cestui que trust;* Ex parte Jordan, 4 Del. Ch. 615; Johnson v. Payne, 1 Hill (S. C.) 112. The English court of chancery largely exercised this jurisdiction; 2 Sto. Eq. Jur. § 1357; 6 Ves. Jr. 6; 6 Madd. 100.

At Law. An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Stickney v. Munroe, 44 Me. 197; Gilman v. Hill, 36 N. H. 311; Aschermann v. Brewing Co., 45 Wis. 262.

A constructive conversion takes place when a person does such acts in reference to the goods or personal chattels of another as amount, in view of the law, to appropriation of the property to himself.

A direct conversion takes place when a person actually appropriates the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroys it, or alters its nature.

Every such unauthorized taking of personal property; Pollock, Torts 435; Kennet v. Robinson, 2 J. J. Mar. (Ky.) 84; Hutchinson v. Bobo, 1 Bailey (S. C.) 546; Murray v. Burling, 10 Johns. (N. Y.) 172; Howitt v. Estelle, 92 Ill. 218; and all intermeddling with it beyond the extent of authority conferred, in case a limited authority over it has been given; Cummings v. Perham, 1 Metc. (Mass.) 555; Grant v. King, 14 Vt. 367; Seymour v. Ives, 46 Conn. 109; People v. Bank, 75 N. Y. 547; Liptrot v. Holmes, 1 Ga. 381; with intent so to apply or dispose of it as to alter its condition or interfere with the owner's dominion; Stevens v. Curtis, 18 Pick. (Mass.) 227; 8 M. & W. 540; constitutes a conversion, including a *taking* by those claiming without right to be assignees in bankruptcy; 3 Brod. & B. 2; *using* a thing without license of the owner; Holland v. Osgood, 8 Vt. 281; Silsbury v. McCoon, 6 Hill (N. Y.) 425, 41 Am. Dec. 753; Johnson v. Weedman, 4 Scam. (Ill.) 495; Scruggs v. Davis, 5 Sneed (Tenn.) 261; Johnson's Adm'rs v. The Arabia, 24 Mo. 86; or in excess of the license; Hart v. Skinner, 16 Vt. 138, 42 Am. Dec. 500; Wheelock v. Wheelwright, 5 Mass. 104; Disbrow v. Ten Broeck, 4 E. D. Sm. (N.

Y.) 397; Creach v. McRae, 50 N. C. 122; *misuse* or *detention* by a finder or other bailee; Wheelock v. Wheelwright, 5 Mass. 104; Marriam v. Yeager, 2 B. Monr. (Ky.) 339; Cargill v. Webb, 10 N. H. 199; Ripley v. Dolbier, 18 Me. 382; Spencer v. Pilcher, 8 Leigh (Va.) 565; Gentry v. Madden, 3 Ark. 127; Horsely v. Branch, 1 Humph. (Tenn.) 199; Disbrow v. Ten Broeck, 4 E. D. Sm. (N. Y.) 397; Fail v. McArthur, 31 Ala. 26; see Harvey v. Epes, 12 Gratt. (Va.) 153; *delivery* by a bailee in violation of orders; St. John v. O'Connel, 7 Port. (Ala.) 466; *non-delivery* by a wharfinger, carrier, or other bailee; Langford v. Cummings, 4 Ala. 46; Judah v. Kemp, 2 Johns. Cas. (N. Y.) 411; Ewart v. Kerr, Rice (S. C.) 204; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1, 28 Am. Dec. 268; *a wrongful sale* by a bailee, under some circumstances; 10 M. & W. 576; 11 *id.* 363; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Carraway v. Burbank, 12 N. C. 306; Howitt v. Estelle, 92 Ill. 218; Baylis v. Cronkite, 39 Mich. 413; a sale of stolen goods by an auctioneer, though made without notice of the lack of title; [1892] 1 Q. B. 495; where one, who has authority to sell, sells below the authorized price, it does not constitute conversion; Sarjeant v. Blunt, 16 Johns. (N. Y.) 74; *contra*, Chase v. Baskerville, 93 Minn. 402, 101 N. W. 950. It is not conversion to sell for credit, when authorized to sell only for cash; Loveless v. Fowler, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407; but exchanging the goods has been held a conversion; Ainsworth v. Partillo, 13 Ala. 460; *a failure to sell* when ordered; Barton v. White's Adm'r, 1 Harr. & J. (Md.) 579; Ainsworth v. Partillo, 13 Ala. 460; *improper* or *informal* seizure of goods by an officer; Sanborn v. Hamilton, 18 Vt. 590; Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Burk v. Baxter, 3 Mo. 207; Martin v. England, 5 Yerg. (Tenn.) 313; Burgin v. Burgin, 23 N. C. 453; Calkins v. Lockwood, 17 Conn. 154, 42 Am. Dec. 729; Fiedler v. Maxwell, 2 Blatchf. 552, Fed. Cas. No. 4,760; Ferguson v. Clifford, 37 N. H. 86; *informal sale* by such officer; Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; or *appropriation* to himself; Perkins v. Thompson, 3 N. H. 144; as against such officer in the last three cases; the *adulteration* of liquors as to the whole quantity affected; 3 A. & E. 306; Young v. Mason, 8 Pick. (Mass.) 551; an *excessive levy* on a defendant's goods, followed by a sale; 6 Q. B. 381; but *not including* a *mere trespass* with no further intent; 8 M. & W. 540; Stevens v. Curtis, 18 Pick. (Mass.) 227; nor an *accidental loss* by mere omission of a carrier; 2 Greenl. Ev. § 643; 5 Burr. 2825; Dwight v. Brewster, 1 Pick. (Mass.) 50, 11 Am. Dec. 133; Hawkins v. Hoffman, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; nor mere *nonfeasance;* 2 B. & P. 438; Cairnes v. Bleecker, 12 Johns. (N. Y.) 300. A manual taking is not necessary.

Trover will lie for the value of property illegally withheld under an unlawful claim for freight charges; Marsh v. R. Co., 9 Fed. 873; Richardson v. Rich, 104 Mass. 156, 6 Am. Rep. 210; Beasley v. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048; though the refusal to surrender was conditional, for the purpose of ascertaining whether the bill of lading or the waybill was the true statement of the sum due; Beasley v. R. Co., 27 App. D. C. 595, 6 L. R. A. (N. S.) 1048. It is not conversion for a common carrier, who has received property from one not rightfully entitled to its possession, to deliver it in accordance with the contract of carriage, unless the true owner intervenes before the goods are delivered and demands them; Shellnut v. R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A. (N. S.) 494; Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555; Burditt v. Hunt, 25 Me. 419, 43 Am. Dec. 289; *contra*, Southern Express Co. v. Palmer, 48 Ga. 85.

Where the carrier has been notified by the true owner while the goods are still in its possession, however, it is a conversion to deliver them according to the directions of the shipper; Atchison, T. & S. F. R. Co. v. Jordon, 67 Kan. 86, 72 Pac. 533; Charleston & W. C. R. Co. v. Pope, 122 Ga. 577, 50 S. E. 374.

The intention required is simply an intent to use or dispose of the goods, and the knowledge or ignorance of the defendant as to their ownership has no influence in deciding the question of conversion; Lee v. McKay, 25 N. C. 29; Thayer v. Wright, 4 Denio (N. Y.) 180; Thrall v. Lathrop, 30 Vt. 307, 73 Am. Dec. 306; Riley v. Water Power Co., 11 Cush. (Mass.) 11; Newkirk v. Dalton, 17 Ill. 413; Bartlett v. Hoyt, 33 N. H. 151.

A license may be presumed where the taking was under a necessity, in some cases; 6 Esp. 81; or, it is said, to do a work of charity; 2 Greenl. Ev. § 643; or a *kindness* to the owner; 4 Esp. 195; Sparks v. Purdy, 11 Mo. 219; Plumer v. Brown, 8 Metc. (Mass.) 578; without intent, in the last two cases, to injure or convert it; Plumer v. Brown, 8 Metc. (Mass.) 578. As to what constitutes a conversion as between joint owners, see Lowthorp v. Smith, 2 N. C. 255; White v. Osborn, 21 Wend. (N. Y.) 72; Campbell v. Campbell, 6 N. C. 65; Bradley v. Arnold, 16 Vt. 382; and as to a joint conversion by two or more, see White v. Demary, 2 N. H. 546; Forbes v. Marsh, 15 Conn. 384; Guerry v. Kerton, 2 Rich. (S. C.) 507; White v. Wall, 40 Me. 574. A tenant in common can maintain trover for the sale or attempted sale of the common chattel; Williams v. Chadbourne, 6 Cal. 559; Dyckman v. Valiente, 42 N. Y. 549; *contra*, Barton v. Burton, 27 Vt. 93; 9 Ex. 145; some cases hold that

nothing short of the destruction of the plaintiff's property is a conversion, because a sale passes only the vendor's title and the co-tenant continues a co-tenant with the purchaser; Big. Torts 204. It is held also that trover lies, between co-tenants, for a mere withholding of the chattel, or the misuse of it, or for a refusal to terminate the common interest; Agnew v. Johnson, 17 Pa. 373, 55 Am. Dec. 565; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54.

An original unlawful taking is in general conclusive evidence of a conversion; Davis v. Duncan, 1 McCord (S. C.) 213; Farrington v. Payne, 15 Johns. (N. Y.) 431; Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508; Garrard v. R. Co., 29 Pa. 154; Skinner v. Brigham, 126 Mass. 132; as is the existence of a state of things which constitutes an actual conversion; Everett v. Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; Combs v. Johnson, 12 N. J. L. 244; Newsum v. Newsum, 1 Leigh (Va.) 86, 19 Am. Dec. 739; Jewett v. Patridge, 12 Me. 243, 27 Am. Dec. 173; Himes v. McKinney, 3 Mo. 382; Grant v. King, 14 Vt. 367; without showing a demand and refusal; but where the original taking was lawful and the detention only is illegal, a demand and refusal to deliver must be shown; Witherspoon v. Blewett, 47 Miss. 570; 5 B. & C. 146; Kennet v. Robinson, 2 J. J. Marsh. (Ky.) 84; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Polk's Adm'r v. Allen, 19 Mo. 467; Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363; but this evidence is open to explanation and rebuttal; Cooley, Torts 532; 2 Wms. Saund. 47 *e;* 5 B. & Ald. 847; Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121; Jacoby v. Laussatt, 6 S. & R. (Pa.) 300; Lockwood v. Bull, 1 Cow. (N. Y.) 322, 13 Am. Dec. 539; Munger v. Hess, 28 Barb. (N. Y.) 75; Dietus v. Fuss, 8 Md. 148; even though absolute; 2 C. M. & R. 495. Demands and unlawful refusal constitute a conversion; Big. Torts 200; mere refusal is only evidence of conversion; *id.* 202.

There has been a conspicuous lack of harmony in the decisions as to whether a pledgee or purchaser from one guilty of conversion is himself guilty, before demand and refusal. In England the law is briefly summarized in 46 Solicitor's Journ. 24. In 11 Q. B. Div. 99, it is held that there is no conversion until detention after demand; so also Rawley v. Brown, 18 Hun (N. Y.) 456; but by the weight of American authority demand is not necessary; Riley v. Water Power Co., 11 Cush. (Mass.) 11, and see an article in 15 Am. L. Rev. 363.

The refusal, to constitute such evidence, must be unconditional, and not a reasonable excuse; 3 Ad. & E. 106; Robinson v. Burleigh, 5 N. H. 225; Wood v. Dudley, 8 Vt. 433; Thompson v. Rose, 16 Conn. 76, 41 Am. Dec. 121; Bowman v. Eaton, 24 Barb. (N. Y.) 528; or accompanied by a condition which the party has no right to impose; 6 Q. B. 443; Dowd v. Wadsworth, 13 N. C. 130, 18 Am. Dec. 567; if made by an agent, it must be within the scope of his authority, to bind the principal; 6 Jur. 507; Cass v. R. R. Co., 1 E. D. Sm. (N. Y.) 522; but is not evidence of conversion where accompanied by a condition which the party has a right to impose; 6 Q. B. 443; 5 B. & Ald. 247; Shotwell v. Few, 7 Johns. (N. Y.) 302; Dowd v. Wadsworth, 13 N. C. 130, 18 Am. Dec. 567; Watt v. Potter, 2 Mas. 77, Fed. Cas. No. 17,291. It may be made at any time prior to bringing suit; 2 Greenl. Ev. § 644; 11 M. & W. 366; Storm v. Livingston, 6 Johns. (N. Y.) 44; if before he has parted with his possession; Knapp v. Winchester, 11 Vt. 351. It may be inferred from non-compliance with a proper demand; 7 C. & P. 339; Judah v. Kemp, 2 Johns. Cas. (N. Y.) 411. The demand must be a proper one; White v. Demary, 2 N. H. 546; La Place v. Aupoix, 1 Johns. Cas. (N. Y.) 406; Spence v. Mitchell, 9 Ala. 744; made by the proper person; see 2 Brod. & B. 447; Watt v. Potter, 2 Mas. 77, Fed. Cas. No. 17,291; Carr v. Farley, 12 Me. 328; and upon the proper person or persons; 3 Q. B. 699; White v. Demary, 2 N. H. 546. The plaintiff must have at least the right to immediate possession; Hardy v. Munroe, 127 Mass. 64.

CONVEYANCE. The transfer of the title of land from one person or class of persons to another. Dickerman v. Abrahams, 21 Barb. (N. Y.) 551; Abendroth v. Town of Greenwich, 29 Conn. 356.

There is no magical meaning in this word; it denotes an instrument which carries from one person to another an interest in land; Cairns, L. C., in L. R. 10 Ch. App. 12.

The instrument for effecting such transfer. It includes leases; Jones v. Marks, 47 Cal. 242; and mortgages; Odd Fellows Savings Bank v. Banton, 46 Cal. 603.

When there is no express agreement to the contrary, the expense of the conveyance falls upon the purchaser; 2 Ves. 155, note; who must prepare and tender the conveyance. But see, *contra*, Fairfax v. Lewis, 2 Rand. (Va.) 20; Warvelle, Vend. 347. The expense of the execution of the conveyance is, on the contrary, usually borne by the vendor; Sugd. Vend. & P. 296; *contra*, Fairfax v. Lewis, 2 Rand. (Va.) 20; Cooper v. Brown, 2 McLean 495, Fed. Cas. No. 3,191. See Livermore v. Bagley, 3 Mass. 487; Dudley v. Sumner, 5 *id.* 472; Eunom. 2, § 12.

The forms of conveyance have varied widely from each other at different periods in the history of the law, and in the various states of the United States. The mode at present prevailing in this country is by bargain and sale.

A lease is a conveyance; Shimer v. Town of Phillipsburg, 58 N. J. L. 506, 33 Atl. 852; Sanford v. Johnson, 24 Minn. 172; Jones v.

Marks, 47 Cal. 242; Crouse v. Michell, 130 Mich. 347, 90 N. W. 32, 97 Am. St. Rep. 479; Koeber v. Somers, 108 Wis. 497, 84 N. W. 991, 52 L. R. A. 512; Milliken v. Faulk, 111 Ala. 658, 20 South. 594; *contra*, Stone v. Stone, 1 R. I. 425 (under a general recording statute; and is it where a married woman's act requires a husband to join in all conveyances?); Heal v. Oil Co., 150 Ind. 483, 50 N. E. 482; Perkins v. Morse, 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780; Sullivan v. Barry, 46 N. J. L. 1; nor within meaning of an act declaring that no covenants shall be implied in any conveyance of real estate; Tone v. Brace, 11 Paige Ch. (N. Y.) 566; Mayor, etc., of City of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538; Shaft v. Carey, 107 Wis. 273, 83 N. W. 288. Where a statute allowed appeals in cases involving conveyances of real estate, it was held that an order directing a lease to be executed was not within the statute; Tuohy's Estate, 23 Mont. 305, 58 Pac. 722.

CONVEYANCER. One who makes it his business to draw deeds of conveyance of lands for others and to investigate titles to real property. They frequently act as brokers for the sale of real estate and obtaining loans on mortgage, and transact a general real estate business.

CONVEYANCING. A term including both the science and art of transferring titles to real estate from one man to another.

It includes the examination of the title of the alienor, and also the preparation of the instruments of transfer. It is, in England and Scotland, and, to a less extent, in the United States, a highly artificial system of law, with a distinct class of practitioners. A profound and elaborate treatise on the English law of conveyancing is Mr. Preston's. Geldart and Thornton's works are also important; and an interesting and useful summary of the American law is given in Washburn on Real Property. See Clerke; Martindale; Morris; Yeakle, Conveyancing.

CONVEYANCING COUNSEL TO THE COURT OF CHANCERY. Certain counsel, not less than six in number, appointed by the Lord Chancellor, for the purpose of assisting the court of chancery, or any judge thereof, with their opinion in matters of title and conveyancing. Stat. 15 & 16 Vict. c. 80, §§ 40, 41.

CONVICIUM. In Civil Law. The name of a species of slander or injury uttered in public, and which charged some one with some act *contra bonos mores*. Vicat; Bac. Abr. *Slander*, 29.

CONVICT. One who has been condemned by a competent court. One who has been convicted of a crime or misdemeanor.

He differs from a slave, not being mere property without civil rights, but having all the rights of an ordinary citizen not taken from him by the law. While the law takes his liberty and imposes a duty of servitude and observance of discipline, it does not deny his right of personal security against unlawful invasion; Westbrook v. State, 133 Ga. 578, 66 S. E. 788, 26 L. R. A. (N. S.) 591, 18 Ann. Cas. 295. See PRISONER; PRISON LABOR.

To condemn. To find guilty of a crime or misdemeanor. 4 Bla. Com. 362.

CONVICT-MADE GOODS. See PRISON LABOR.

CONVICTED. Attaint. Thayer, Evidence.

CONVICTION (Lat. *convictio;* from *con*, with, *vincire*, to bind). In Practice. That legal proceeding of record which ascertains the guilt of the party and upon which the sentence or judgment is founded. Nason v. Staples, 48 Me. 123; Com. v. Lockwood, 109 Mass. 323, 12 Am. Rep. 699; Com. v. Gorham, 99 Mass. 420.

Finding a person guilty by verdict of a jury. 1 Bish. Cr. L. § 223; see 45 Alb. L. J. 1.

A record of the summary proceedings upon any penal statute before one or more justices of the peace or other persons duly authorized, in a case where the offender has been *convicted* and sentenced. Holthouse, Dict.

In its popular sense a verdict of guilty is said to be a conviction; Smith v. Com., 14 S. & R. (Pa.) 69. In its strict legal sense it means judgment on a plea or verdict of guilty; Com. v. McDermott, 224 Pa. 363, 73 Atl. 427, 24 L. R. A. (N. S.) 431.

The first of the definitions here given undoubtedly represents the accurate meaning of the term, and includes an ascertainment of the guilt of the party by an authorized magistrate in a summary way, or by confession of the party himself, as well as by verdict of a jury. The word is also used in each of the other senses given. It is said to be sometimes used to denote final judgment. Dwar. 2d ed. 683.

Summary conviction is one which takes place before an authorized magistrate without the intervention of a jury.

Conviction must precede judgment or sentence; In re McNeill, 1 Cai. (N. Y.) 72; State v. Cross, 34 Me. 594; see Faunce v. People, 51 Ill. 311; but it is not necessarily or always followed by it; 1 Den. C. C. 568; Ex parte Dick, 14 Pick (Mass.) 88; Kane v. People, 8 Wend. (N. Y.) 204; Smith v. Eames, 3 Scam. (Ill.) 76, 36 Am. Dec. 515. Generally, when several are charged in the same indictment, some may be convicted and the others acquitted; 2 Den. C. C. 86; State v. Allen, 11 N. C. 356; Bloomhuff v. State, 8 Blackf. (Ind.) 205; but not where a joint offence is charged; Stephens v. State, 14 Ohio, 386; State v. Mainor, 28 N. C. 340. A person cannot be convicted of part of an offence charged in an indictment, except by statute; Com. v. Newell, 7 Mass. 250; State v. Shoemaker, 7 Mo. 177; State v. Bridges, 5 N. C. 134; Cameron v. State, 13 Ark. 712. A conviction prevents a second prosecution for the same offence; Whart. Cr. Pl. § 456;

U. S. v. Keen, 1 McLean 429, Fed. Cas. No. 15,510; State v. Benham, 7 Conn. 414; Mount v. State, 14 Ohio 295, 45 Am. Dec. 542; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; Solliday v. Com., 28 Pa. 13. But the recovery in a civil suit, of a fine, part of a penalty under a statute, does not prevent the prosecution of the defendant for the purpose of enforcing the full penalty by imprisonment; In re Leszynsky, 16 Blatchf. 9, Fed. Cas. No. 8,279. A conviction of a less offence may be had where the indictment charges a greater offence, which necessarily includes the less; State v. Outerbridge, 82 N. C. 621; Green v. State, 8 Tex. App. 71; De Lacy v. State, 8 Baxt. (Tenn.) 401; State v. O'Kane, 23 Kan. 244; State v. Schele, 52 Ia. 608, 3 N. W. 632. As to the rule where the indictment under which the conviction is procured is defective and liable to be set aside, see 1 Bish. Cr. L. §§ 663, 664; 4 Co. 44 *a*.

At common law conviction of certain crimes when accompanied by judgment disqualifies the person convicted as a witness; Keithler v. State, 10 Smedes & M. (Miss.) 192. And see Utley v. Merrick, 11 Metc. (Mass.) 302. But where a statute making *defendants* witnesses is without exception, a conviction rendering such defendant infamous will not disqualify him; Delamater v. People, 5 Lans. (N. Y.) 332; Newman v. People, 63 Barb. (N. Y.) 630. See Com. v. Wright, 107 Mass. 403.

Summary convictions, being obtained by proceedings in derogation of the common law, must be obtained strictly in pursuance of the provisions of the statute; 1 Burr. 613; and the record must show fully that all proper steps have been taken; Welman v. Polhill, R. M. Charlt. (Ga.) 235; Singleton v. Com'rs of Tobacco Inspection, 2 Bay (S. C.) 105; Bigelow v. Stearns, 19 Johns. (N. Y.) 39, 41, 10 Am. Dec. 189; Chase v. Hathaway, 14 Mass. 224; Cumming's Case, 3 Greenl. (Me.) 51; Keeler v. Milledge, 24 N. J. L. 142; and especially that the court had jurisdiction; Brackett v. State, 2 Tyler (Vt.) 167; Powers v. People, 4 Johns. (N. Y.) 292; Mayor, etc., of City of Philadelphia v. Nell, 3 Yeates (Pa.) 475.

As to payment of costs upon conviction, see 1 Bish. Cr. Pr. § 1317, n.

CONVIVIUM. A tenure by which a tenant was bound to provide meat and drink for his lord at least once in the year. Cowell.

CONVOCATION (Lat. *con*, together, *voco*, to call). **In Ecclesiastical Law.** The general assembly of the clergy to consult upon ecclesiastical matters. See COURT OF CONVOCATION; CHURCH OF ENGLAND.

CONVOY. A naval force, under the command of an officer appointed by government, for the protection of merchant-ships and others, during the whole voyage, or such part of it as is known to require such protection. Marsh. Ins. b. 1, c. 9, s. 5; Park. Ins. 388.

Warranties are sometimes inserted in policies of insurance that the ship shall sail with convoy. To comply with this warranty, five things are essential: first, the ship must sail with the regular convoy appointed by the government; secondly, she must sail from the place of rendezvous appointed by the government; thirdly, the convoy must be for the voyage; fourthly, the ship insured must have sailing instructions; fifthly, she must depart and continue with the convoy till the end of the voyage, unless separated from it by necessity. Marsh. Ins. b. 1, c. 9, s. 5.

CO-OBLIGOR. One who is bound together with one or more others to fulfil an obligation. See PARTIES; JOINDER.

COOL BLOOD. Tranquillity, or calmness. The condition of one who has the calm and undisturbed use of his reason. In cases of homicide, it frequently becomes necessary to ascertain whether the act of the person killing was done in cool blood or not, in order to ascertain the degree of his guilt. Bacon, Abr. *Murder* (B); Kel. 56; Sid. 177; Lev. 180.

COOLING-TIME. Time for passion to subside and reason to interpose. Cooling-time destroys the effect of provocation, leaving homicide murder the same as if no provocation had been given; 1 Russ. Cr. 667; Whart. Hom. 448; McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196. See HOMICIDE; SELF-DEFENCE.

COPARCENARY, ESTATES IN. Estates of which two or more persons form one heir. 1 Washb. R. P. 414.

The title to such an estate is always by descent. The shares of the tenants need not be equal. The estate is rare in America, but sometimes exists; Manchester v. Doddridge, 3 Ind. 360; Purcell v. Wilson, 4 Gratt. (Va.) 16; Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251; Gilpin v. Hollingsworth, 3 Md. 190, 56 Am. Dec. 737. See Watk. Conv. 145.

COPARCENERS. Persons to whom an estate of inheritance descends jointly, and by whom it is held as an entire estate. 2 Bla. Com. 187.

In the old English and the American sense the term includes males as well as females, but in the modern English use is limited to females; 4 Kent 366. But the husband of a deceased coparcener, if entitled as tenant by the curtesy, holds as a coparcener with the surviving sisters of his wife, as does also the heir-at-law of his deceased wife upon his own death; Brown, Dict.

COPARTNER. One who is a partner with one or more other persons; a member of a partnership.

COPARTNERSHIP. A partnership.

COPARTNERY. **In Scotch Law.** The contract of copartnership. Bell, Dict.

COPE. A duty charged on lead from certain mines in England. Blount.

COPIA LIBELLI DELIBERANDA. A writ to enable a man accused to get a copy of the libel from the judge ecclesiastical. Cowell.

COPULATIVE TERM. One which is plac-

ed between two or more others to join them together.

COPY. A true transcript of an original writing.

Exemplifications are copies verified by the great seal or by the seal of a court. 1 Gilb. Ev. 19.

Examined copies are those which have been compared with the original or with an official record thereof.

Office copies are those made by officers intrusted with the originals and authorized for that purpose.

The papers need not be exchanged and read alternately; 2 Taunt. 470; 1 Stark. 183; 4 Campb. 372; 1 C. & P. 578. An examined copy of the books of an unincorporated bank is not evidence *per se;* Ridgway v. Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681; Vance v. Reardon, 2 N. & M'C. 299; 1 Greenl. Ev. § 508.

Copies cannot be given in evidence, unless proof is made that the original is lost or in the power of the opposite party, and, in the latter case, that notice has been given him to produce the original; 1 Greenl. Ev. § 508.

A translation of a book is not a copy; Stowe v. Thomas, 2 Wall. Jr. 547; 2 Am. L. Reg. 229, Fed. Cas. No. 13,514; a copy of a book means a transcript of the entire work; Rogers v. Jewett, 12 Mo. Law Rep. N. S. 339, Fed. Cas. No. 12,012.

As to copies mechanically made being originals, see International Harvester Co. of America v. Elfstrom, 101 Minn. 263, 112 N. W. 252, 12 L. R. A. (N. S.) 343, 118 Am. St. Rep. 626, 11 Ann. Cas. 107.

COPYHOLD. A tenure by copy of court-roll. Any species of holding by particular custom of the manor. The estate so held.

A copyhold estate was originally an estate at the will of the lord, agreeably to certain customs evidenced by entries on the roll of the courts baron. Co. Litt. 58 *a;* 2 Bla. Com. 95; 1 Poll. & M. 351, 357. It is a villenage tenure deprived of its servile incidents. The doctrine of copyhold is of no application in the United States. Wms. R. P. 257, 258, Rawle's note; 1 Washb. R. P. 26. See VILLEIN.

COPYHOLDER. A tenant by copyhold tenure (by copy of court-roll). 2 Bla. Com. 95.

COPYRIGHT. The exclusive privilege, secured according to certain legal forms, of printing, or otherwise multiplying, publishing, and vending copies of certain literary or artistic productions.

According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing, which may be multiplied by the arts of printing in any of its branches. Property in the other classes of intellectual objects is usually secured by letters-patent, and the interest is called a *patent-right.* But the distinction is arbitrary and conventional.

The foundation of all rights of this description is the natural dominion which every one has over his own ideas, the enjoyment of which, although they are embodied in visible forms or characters, he may, if he chooses, confine to himself or impart to others. But, as it would be impracticable in civil society to prevent others from copying such characters or forms without the intervention of positive law, and as such intervention is highly expedient, because it tends to the increase of human culture, knowledge, and convenience, it has been the practice of civilized nations in modern times to secure and regulate the otherwise insecure and imperfect right which, according to the principles of natural justice, belongs to the author of new ideas.

This has been done by securing an exclusive right of multiplying copies for a limited period, as far as the municipal law of the particular country extends. But, inasmuch as the original right, founded in the principles of natural justice, is of an imperfect character, and requires, in order to be valuable, the intervention of municipal law, the law of nations has not taken notice of it as it has of some other rights of property; and therefore all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle; because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement.

It was formerly doubtful in England whether copyright, as to books, existed at common law. The subject was much discussed in 4 H. L. c. 815. It is said that "the negative conclusion is now generally accepted by lawyers." Sir F. Pollock, First Book of Jurispr. 200. It was held that the common law copyright for protection exists in favor of works of literature, art or science to this limited extent only, that while they remain unpublished no person can copyright them; 10 Ir. Ch. Rep. 121, followed in [1908] 2 Ch. 441; and that the publisher of a copyrighted unpublished picture is liable for damages for infringement of the owner's common law right of property therein; [1908] 2 Ch. 441.

The following judgment states the law in the United States: "Statutory copyright is not to be confounded with the common law right. At common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author having complied with the statute and given up his common law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one." Caliga v. Newspaper Co., 215 U. S. 183, 30 Sup. Ct. 38, 54 L. Ed. 150. The Act March 4, 1909, expressly reserves the common law rights of an author of an unpublished work in law or in equity.

By art. 1, § 8, of the federal constitution, power was given to congress "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The following is a concise and substantial abstract of the Act of March 4, 1909, in effect July 1, 1909:

The exclusive rights secured under the act are to print, reprint, publish, copy and

vend the copyrighted work; to translate into other languages or make other versions, if a literary work; to dramatize it if non-dramatic; to convert it into a novel or other non-dramatic work, if a drama; to arrange or adapt it if it be a musical work; to complete it if it be a model or a design for a work of art; to deliver or authorize its delivery in public for profit if it be a lecture, etc.; to perform or represent it publicly if it be a drama, or if it be a dramatic work and not reproduced for sale, to vend any manuscript or record of it; to make any transcription or record of it which may be exhibited, etc.; to exhibit it, etc., in any manner whatsoever; if it be a musical composition, to perform it publicly for profit, and for the purpose of publishing and vending copies to make any arrangement or setting of it or of the melody of it in any system of notation or form of record from which it may be reproduced, provided that the act so far as it secures copyright controlling the parts of instruments serving to reproduce mechanically the musical work shall not include the works of a foreign author or composer unless the nation of such composer grants to citizens of the United States similar rights, and provided that whenever the owner of the musical copyright has used or permitted it, etc., to be used mechanically, any other person may make similar use of it upon the payment of a royalty of two cents on each part manufactured. The reproduction of a mechanical composition on coin-operating machines is not to be deemed a public performance for profit unless a fee is charged for admission to the place where it occurs.

Nothing in the act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication or use of his work without his consent, and to obtain damages therefor.

By section 4, copyright works include all the writings of an author; and by section 5 the subject-matter of copyright is in the following classes:

Books, including composite and cyclopedic works, directories, gazetteers, and other compilations; periodicals, including newspapers; lectures, sermons, addresses (prepared for oral delivery); dramatic or dramatico-musical compositions; musical compositions; maps; works of art; models or designs for works of art; reproductions of a work of art; drawings or plastic works of a scientific or technical character; photographs; prints and pictorial illustrations; but this classification shall not limit the subject-matter as defined in section 4, and error in classification shall not invalidate a copyright. By Act of Aug. 24, 1912, two classes were added: Motion-picture photo-plays and motion-pictures other than photo-plays.

Compilations, abridgments, dramatizations, translations, etc., of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright or works republished with new matter, are new works and are subjects of copyright.

No copyright shall subsist in the text of any work which is in the public domain, or in any work which was published in this country or a foreign country prior to the going into effect of the act and not already copyrighted in the United States, or in any publication of the United States government.

Alien authors or proprietors are within the act if domiciled within the United States at the time of the first publication, or if the nation of such alien has extended reciprocal rights to citizens of the United States.

A copyright is secured by publication with notice of copyright attached to each copy of the work.

Registration of a claim to a copyright is obtained by complying with the terms of the act, including the deposit of copies, and upon such compliance the register of copyrights shall issue the prescribed certificate.

Copyrights may be had on the works of an author, of which copies are not reproduced for sale, upon the deposit of one copy of such work, if it be a lecture, etc., or a dramatic or musical, etc., composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photo-play; of a photographic print if a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion-picture, if the work be a motion-picture other than a photo-play; or of a photograph or other identifying reproduction, if a work of art, plastic work or drawing.

After securing copyright by publication, with notice, two complete copies of the best edition of the work shall be promptly deposited in the copyright office at Washington.

There are provisions for the manufacture of books, etc., within the limits of the United States.

"Notice of copyright shall consist either of the word 'Copyright' or the abbreviation 'Copr.,' accompanied by the name of the copyright proprietor, and if the work be a printed, literary, musical or dramatic work, the year of the copyright," except that on maps, works of art, photographs, etc., it may consist of the letter "C" in a circle, with the initials, monogram or symbol of the proprietor, but on some accessible portions of such copies the name must appear. In a printed publication, the copyright notice must be on the title page or the page immediately following, or, if a periodical, upon the first page of text of each separate number, or under the title heading, or in a musical work either on the title page or the first page of music.

Copyright is for twenty-eight years from the date of first publication, whether the

copyrighted work bears the author's true name or is published anonymously or under an assumed name. If the work is posthumous, a periodical, an encyclopædia, or other composite work, or was copyrighted by a corporation (not being the author's assignee or licensee) or by an employer for whom a work was made for hire, there may be a renewal for twenty-eight years, if applied for within one year before expiration. In case of any other copyrighted work, the author, or if not living, his widow or children, or failing all such, his executors or next of kin, may renew for twenty-eight years, if application is made more than one year before expiration.

Jurisdiction of all suits is vested in the district court of the United States in the district in which the defendant or his agent is an inhabitant or in which he may be found.

Section 25 (Act of March 4, 1909, as amended by Act of Aug. 24, 1912) provides for injunctions in cases of infringement, and specifies the measure of damages in certain cases; also provides for the surrender and destruction of infringing copies, etc. Injunctions may be served on the parties anywhere in the United States, and shall be operative throughout the United States and enforceable by any other court or judge. Such proceedings may be reviewed as in any other cases. No criminal proceeding shall be maintained unless commenced within three years.

Assignments of copyright shall be recorded in the copyright office within three months after execution if within the United States or within six months after execution without the United States; but otherwise shall be void as against any mortgagee or subsequent purchaser for a valuable consideration without notice, whose assignment has been recorded. The assignee's name may be substituted in the statutory notice of copyright.

The fee for the registration of any work deposited under the act is one dollar, which includes the certificate of registration under seal, except in cases of photographs, for which the fee is fifty cents when a certificate is not demanded.

The date of publication is the earliest day when copies of the first authorized edition were placed on sale or publicly distributed. "Author" includes an employer in the case of works made for hire.

Oratorios, cantatas, etc., may be performed for charity by public schools, church choirs or vocal societies, when obtained from a public library, or from a public school, church choir or vocal society library, without constituting infringement.

The prohibition of the importation of piratical copies does not apply: To works in raised characters for the blind; to foreign newspapers or magazines, although containing copyright matter printed or reprinted by authority of the copyright proprietor, unless they contain also copyright matter printed or reprinted without such authorization; to an authorized edition of a book in a foreign language, of which only an English translation has been copyrighted here; to books published abroad, with the author's authority, when imported one copy at a time for individual use and not for sale (but excepting a foreign reprint of a book by an American author copyrighted here); or to books imported for the United States or for libraries, etc.; or when such book is part of a library bought *en bloc;* or when brought personally into the United States.

Cases in the former revision under former acts are retained as likely to be useful under the act of 1909.

What may be copyrighted. Private letters may be copyrighted by their author; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; and so may abstracts of title; Banker v. Caldwell, 3 Minn. 94 (Gil. 46).

The compilations of existing material selected from common sources arranged and combined in original and useful form are the subject of a copyright, whether it consists wholly of selected matter or partly of original composition; Drone, Copyr. 152. Thus: Dictionaries; 2 Sim. & Stu. 1; gazetteers; 5 Beav. 6; road and guide books; 1 Drew. 353; directories; L. R. 1 Eq. 697; calendars; 12 Ves. 270; catalogues; L. R. 18 Eq. 444; trade catalogues; Da Prato Statuary Co. v. Guiliani Statuary Co., 189 Fed. 90; mathematical tables; 1 Russ. & Myl. 73; a list of hounds; L. R. 9 Eq. 324; a collection of statistics; L. R. 3 Eq. 718.

An abridgment, one not a mere transcript of the part of an original, may be copyrighted; Gray v. Russell, 1 Story 11, Fed. Cas. No. 5,728; so may a digest; Drone, Copyr. 158. One who prepares reports of decided cases may obtain a valid copyright for the parts of which he is the author or compiler; Wheaton v. Peters, 8 Pet. (U. S.) 591, 8 L. Ed. 1055; Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8,394; Paige v. Banks, 13 Wall. (U. S.) 608, 20 L. Ed. 709; but the reporter is not entitled to a copyright in the opinion of the court, even though he took it down from the lips of the judge, nor in the head notes when prepared by the judge; Chase v. Sanborn, 6 U. S. Pat. Off. Gaz. 932, Fed. Cas. No. 2,628.

The collection and arrangement of advertisements in a trade directory are the subject of copyright, though each single advertisement is not; [1893] 1 Ch. 218. A compilation made from voluminous public documents may be copyrighted; Hanson v. Jaccard Jewelry Co., 32 Fed. 202. A compilation of prices and quotations on the stock exchange, printed on sheets and issued daily as a newspaper; Exchange Telegraph Co. v. Gregory & Co., 73 Law Times Rep. 120.

A photographer, who makes no charge for photographing an actress in her public character, has the right to secure a copyright for

his own exclusive benefit; Press Pub. Co. v. Falk, 59 Fed. 324; and where he produces by an arrangement of lights and shadows, an original effect representing his conception of her in a certain character, he is entitled to the protection of the copyright laws; Falk v. Donaldson, 57 Fed. 32. So of an artistic photograph of a woman and child; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349; Falk v. Brett Lithographing Co., 48 Fed. 678.

A "book" may be printed on one sheet; Clayton v. Stone, 2 Paine 383, Fed. Cas. No. 2,872; Drury v. Ewing, 1 Bond 540, Fed. Cas. No. 4,095. As a general rule a printed publication is a book within the copyright laws when its contents are complete in themselves, deal with a single subject, need no continuation, and have appreciable size; Smith v. Hitchcock, 226 U. S. 53, 33 Sup. Ct. 6, 57 L. Ed. 119.

A diagram with directions for cutting ladies' garments printed on a single sheet of paper is a "book"; Drury v. Ewing, 1 Bond 540, Fed. Cas. No. 4,095; a manufacturer of women's wearing apparel issued a book containing illustrations of the latest modes and information as to materials and prices; it was held a proper subject of copyright, though used for advertisements; National Cloak & Suit Co. v. Kaufman, 189 Fed. 215; and so is a cut in an illustrated newspaper; Harper v. Shoppell, 26 Fed. 519; information in a guide-book may be copyrighted; L. R. 1 Eq. 697.

A scene in a play representing a series of dramatic incidents, but with very little dialogue, may be copyrighted; Daly v. Webster, 56 Fed. 483, 4 C. C. A. 10; so of the introduction, chorus, and skeleton of a "topical song"; Henderson v. Tompkins, 60 Fed. 758,

A manufacturer of records for mechanically producing a musical composition may enjoin another from copying his records; Æolian Co. v. Music Roll Co., 196 Fed. 926.

When a new edition differs substantially from the former one, a new copyright may be acquired, provided the alteration shall materially affect the work; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728; Bonks v. McDivitt, 13 Blatchf. 163, Fed. Cas. No. 961. New editions of a copyright work are protected by the original copyright, but not new matter; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Farmer v. Lithographing Co., 1 Flipp. 228, Fed. Cas. No. 4,651.

What may not be copyrighted. No copyright can be obtained on racing tips published in a copyrighted newspaper; [1895] 2 Ch. 29; nor on a daily price current; Clayton v. Stone, 2 Paine 382, Fed. Cas. No. 2,872; nor on a blank; Baker v. Selden, 101 U. S. 99, 25 L. Ed. 841; nor cuts contained in a trade catalogue; J. L. Mott Iron Works v. Clow, 72 Fed. 168.

Where a judge of a supreme court of a state prepares the opinion of the court, the statement of the case, and the syllabus, and the reporter of the court takes out a copyright in his own name for the state, the copyright is invalid; Banks v. Manchester, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425. Where a reporter of decisions is employed on condition that his reports shall belong to the state, he is not entitled to a copyright; Little v. Gould, 2 Blatchf. 165, Fed. Cas. No. 8,394; Banks & Bros. v. Pub. Co., 27 Fed. 50.

Publications of an improper kind will not be protected by the courts; Martinetti v. Maguire, 1 Deady (U. S.) 223, Fed. Cas. No. 9,173.

An author cannot acquire any right to the protection of his literary products by using an assumed name or pseudonym. Without the protection of a copyright, his work is dedicated to a public when published; The "Mark Twain" Case, 14 Fed. 728.

The compilation of the statutes of a state may be so original as to entitle the author to a copyright, but he cannot obtain one for the laws alone, and the legislature of the state cannot confer any such exclusive privilege upon him; Davidson v. Wheelock, 27 Fed. 61. Such a compilation of statutes may be copyrighted as to the manner in which the work was done, but not as to the laws alone; *id.*

A stage dance illustrating the poetry of motion by a series of graceful movements, etc., is not a dramatic composition within the act; Fuller v. Bemis, 50 Fed. 926. The copyright of a book describing a new system of stenography does not protect the system apart from the language by which it is explained; Griggs v. Perrin, 49 Fed. 15.

An opinion is not the subject-matter of copyright; nor is a printed expression of it, unless it amount to a literary composition; [1895] 2 Ch. 29.

As to notice. In the notice of copyright of a photograph the abbreviation "'94," representing the year, is a substantial compliance with the act; Snow v. Mast, 65 Fed. 995. The following notice on a map: "Copyright entered according to Act of Congress, 1889, by T. C. Hefel, Civil Engineer," was held sufficient, since it differed from the prescribed formula only by including words which were surplusage; Hefel v. Land Co., 54 Fed. 179. The words "1889. Copyrighted by B. J. Falk, New York," were held sufficient; Falk v. Schumacher, 48 Fed. 222; Falk v. Seidenberg, 48 Fed. 224. The words "Copyrighted 1891. All rights reserved," were held not a sufficient notice of copyright; Osgood v. Instrument Co., 69 Fed. 291.

The initial of the Christian name is sufficient if the full surname be given; Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. Where the printed title was deposited by E. B. Meyers

& Chandler and the printed notice of the entry of the copyright showed that the copyright was entered by E. B. Meyers alone, it was held immaterial; Callaghan v. Myers, 128 U. S. 657, 9 Sup. Ct. 177, 32 L. Ed. 547.

A copyright may be taken in the name of a trustee for the benefit of some third party who is the author or proprietor; Hanson v. Jewelry Co., 32 Fed. 202; Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; *id.*, 56 Fed. 764.

One who does business under a fictitious partnership name may receive a copyright under that name; Scribner v. Henry G. Allen Co., 49 Fed. 854. An author of an article intended for a foreign encyclopædia obtained a copyright therefor under an agreement with the publisher. It was held that the agreement was a license only to use the article, and that the copyright was properly in the author's name; Black v. Henry G. Allen Co., 56 Fed. 764. An author of a painting, who, not being a subject of a foreign state with which the United States has copyright relations, is excluded from benefit of copyright, cannot convey such right to a person whose citizenship is within the statute; Bong v. Art Co., 214 U. S. 236, 29 Sup. Ct. 628, 53 L. Ed. 979, 16 Ann. Cas. 1126.

As to what will constitute a sufficient publication to deprive an author of his copyright: The public performance of a play is not such publication; Boucicault v. Wood, 2 Biss. 34, Fed. Cas. No. 1,693; Boucicault v. Hart, 13 Blatchf. 47, Fed. Cas. No. 1,692; the private circulation of even printed copies of a book is not; Bartlett v. Crittenden, 5 McLean 32, Fed. Cas. No. 1,076; Keene v. Wheatley & Clarke, 9 Am. L. Reg. 33, Fed. Cas. No. 7,644; 1 Macn. & G. 25; the deposit of a chart with the secretary of the navy with an express agreement that it was not to be published, is not; Blunt v. Patten, 2 Paine, 393, Fed. Cas. No. 1,579; see generally, Palmer v. De Witt, 47 N. Y. 532, 7 Am. Rep. 488. Publication of a manuscript constitutes a dedication to the public; Carte v. Duff, 25 Fed. 183; Tompkins v. Halleck, 133 Mass. 32, 43 Am. Rep. 480; the sale of a picture unconditionally carries with it the right of making copies of it and the publication thereof; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. A picture which is publicly exhibited without having inscribed upon some visible portion of it, or upon the substance on which it was mounted, the notice required by the statute, is published; Pierce & Bushnell Mfg. Co. v. Werckmeister, 72 Fed. 54, 18 C. C. A. 431. But entering an original painting with the copyright reserved at an exhibition of the Royal Academy whose by-laws prohibit copying, was held not such a publication; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

The remedy for an infringement of copyright is threefold. By an action of debt for certain penalties and forfeitures given by the statute. By an action on the case at common law for damages, founded on the legal right and the injury caused by the infringement. The action must be case, and not trespass; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640. By a bill in equity for an injunction to restrain the further infringement, as an incident to which an account of the profits made by the infringer may be ordered by the court; 2 Morg. Lit. 706; 6 Ves. 705; 8 *id.* 323; 9 *id.* 341; 1 Russ. & M. 73, 159; 1 Y. & C. 197; 2 Hare 560; though it cannot embrace penalties; Stevens v. Cady, 2 Curt. C. C. 200, Fed. Cas. No. 13,395; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640.

An injunction may go against an entire work or a part; 2 Russ. 393; Emerson v. Davies, 3 Sto. 768, Fed. Cas. No. 4,436; 2 Beav. 6; 2 Brown, Ch. 80; though the court will not interfere where the extracts are trifling; 2 Swanst. 428; 1 Russ. & M. 73; 2 *id.* 247.

The remedies of forfeiture and penalty and of injunction given to the owner of a copyrighted map under the former act in case of infringement are exclusive and preclude any resort to an action at law to recover damages sustained; Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. Ed. 1096.

An injunction to restrain the infringement of the rights of the owner of one directory by another will be limited to the extent to which the two books are identical; List Pub. Co. v. Keller, 30 Fed. 772.

Where the extracts of a copyrighted work are scattered through the defendant's book in such manner that the two cannot be distinguished and separated, the court may enjoin the defendant's book as a whole, but if the matters can be separated the injunction should extend only to the copyrighted matter; Farmer v. Elstner, 33 Fed. 494. Where the author's pirated paragraphs of a digest can be separated from paragraphs not subject to criticism, the injunction should be restricted to the infringing paragraphs, even though it might consume a decade to examine the paragraphs of the digest and compare them. This will not relieve the complainant from the burden of proving his case; West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441. Although the court is not convinced that a compilation which wrongfully appropriates extracts from the plaintiff's copyrighted work will injure its sale, yet an injunction in a proper case may be granted. Actual pecuniary damage is not the sole right to enjoining violation of copyright; Farmer v. Elstner, 33 Fed. 494.

The practice of one newspaper copying literary matter from another is no defence to an action for the infringement of a copyright; [1892] 3 Ch. 489, where the cases are collected.

There may be a piracy: 1st. By *reprinting* the whole or part of a book *verbatim*. The mere quantity of matter taken from a book is not of itself a test of piracy; 3 M. & C. 737; the court will look at the value or quality more than the quantity taken; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728. Extracts and quotations fairly made, and not furnishing a substitute for the book itself, or operating to the injury of the author, are allowable; 17 Ves. 422; 1 Campb. 94; Ambl. 694; 2 Swanst. 428; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; 2 Russ. 383; 2 Beav. 6; 11 Sim. 31. A "fair use" of a book, by way of quotation or otherwise, is allowable; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; L. R. 8 Ex. 1; L. R. 18 Eq. 444; L. R. 5 Ch. 251; it may be for purposes of criticism, but so as not to supersede the work itself; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; L. R. 8 Ex. 1; Harper v. Shoppell, 26 Fed. 519; or in a later work to the extent of fair quotation; 11 Sim. 31; Folsom v. Marsh, 2 Sto. 100, Fed. Cas. No. 4,901; in compiling a directory, but not so as to save the compiler all independent labor; List Pub. Co. v. Keller, 30 Fed. 772; L. R. 1 Eq. 697; 7 *id.* 34; *id.* 5 Ch. 279; a descriptive catalogue of fruit, etc.; L. R. 18 Eq. 444; a book on ethnology; L. R. 5 Ch. 251; a dictionary, provided the new book may fairly be considered a new work; 31 L. T. R. 16. See West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441, for a full discussion.

2d. By *imitating* or copying, with colorable alterations and disguises, assuming the appearance of a new work. Where the resemblance does not amount to identity of parallel passages, the criterion is whether there is such similitude and conformity between the two books that the person who wrote the one must have used the other as a model, and must have copied or imitated it; see 5 Ves. 24; 16 *id.* 269, 422; 2 Brown, Ch. 80; 2 Russ. 385; 2 S. & S. 6; 1 Campb. 94; Gray v. Russell, 1 Sto. 11, Fed. Cas. No. 5,728; Emerson v. Davies, 3 Sto. 768, Fed. Cas. No. 4,436; Webb v. Powers, 2 W. & M. 497, Fed. Cas. No. 17,323; Blunt v. Patten, 2 Paine 393, Fed. Cas. No. 1,579, which was the case of a chart. A fair and *bona fide* abridgment has in some cases been held to be no infringement of the copyright; 1 Morg. Lit. 319, 343; 2 Atk. 141; 1 Brown, Ch. 451; 5 Ves. 709; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; 1 Y. & C. 298; Story v. Holcombe, 4 McLean 306, Fed. Cas. No. 13,497; Folsom v. Marsh, 2 Sto. 105, Fed. Cas. No. 4,901; 2 Kent 382; see 3 Am. L. Reg. 129. But Drone, Copyright 440, maintains the contrary doctrine. A booklet entitled "Opera Stories," consisting of mere fragmentary statements of the story and characters of the operas, taken from descriptions other than librettos, is not an infringement of the copyrights on the librettos; Ricordi & Co. v. Mason, 201 Fed. 182.

"The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole or whether a material part is taken. In this view of the subject it is no defence of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is whether the substance of the work is taken without authority;" Drone, Copyr. 385.

An author may resort with full liberty to the common sources of information and make use of the common materials open to all, but his work must be the result of his own independent labor; Simms v. Stanton, 75 Fed. 6.

A subsequent compiler of a directory is only required to do for himself that which the first compiler has done. He may not use a previous compilation to save himself trouble, though he do so but to a very limited extent; but he may use the former work to verify the spelling of names or the correctness of the addresses; List Pub. Co. v. Keller, 30 Fed. 772.

The compiler of a digest may compare notes, abstracts, and paragraphs from opinions of the courts and from syllabi prepared by the courts, and may digest such opinions and syllabi from printed copies and published in a copyrighted system, but he may not copy the original work of the reporter, or use his work in any way in order to lighten his labors, though he may use it to verify his own accuracy, to detect errors, etc.; West Pub. Co. v. Pub. Co., 64 Fed. 360, 25 L. R. A. 441. The author of a law book may copy the citations of a prior author if he examines and verifies the cases cited and may use them in the same order and with additions and subtractions; White v. Bender, 185 Fed. 921. A copyrighted law book is not infringed by the collection by another author of the cases cited therein for use in another publication; Thompson Co. v. Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607.

The singing of a single verse and chorus of a copyrighted song without musical accompaniment, in imitation of the voice, postures and mannerisms of another, is not an infringement; Green v. Minzensheimer, 177 Fed. 286; but *contra*, where one sings an entire copyrighted song with musical accompaniment she is guilty of infringement, though she intends merely to mimic another; Green v. Minzensheimer, 177 Fed. 287.

Mere fragmentary scenes of various operas do not infringe the copyrighted librettos; Ricordi & Co. v. Mason, 201 Fed. 184.

Moving pictures depicting the story of an author's work are a dramatization of it and infringe the copyright; Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285.

A translation has been held not to be a violation of the copyright of the original; Stowe v. Thomas, 2 Wall. Jr. 547, Fed. Cas. No. 13,514. The correctness of this decision is questioned in Drone, Copyr. 455.

When the infringement of a copyright is established the question of intent is immaterial; Fishel v. Lueckel, 53 Fed. 499.

A copyrighted compilation, comprising lists of trotting and pacing horses with their speed, is infringed by one who uses the table to make up records of horses of 2.30 or better, notwithstanding the fact that the latter compilation might have been made by the defendant from other publications valuable to him; American Trotting Register Ass'n v. Gocher, 70 Fed. 237.

Damages. Where the infringing material is so intermingled with the rest of the contents as to be almost incapable of separation, the infringer is liable for the entire profit realized from the book; Callaghan v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; National Hat Pouncing Mach. Co. v. Hedden, 148 U. S. 488, 13 Sup. Ct. 680, 37 L. Ed. 529. Where the infringing publication uses only a part of the original matter and is issued in a cheaper form, the measure of damages is the profit realized by the infringer, and not what the copyright owner would have realized by a sale of an equal number of the original copyright work; Scribner v. Clark, 50 Fed. 473.

The owner of a copyright who wishes to sell the published work directly and only to individual subscribers, through canvassers employed by him, will be protected from interference by other dealers who have surreptitiously obtained copies without his consent and offered them for sale; Bill Pub. Co. v. Smythe, 27 Fed. 914. But it has been held that the owner of a copyright transferring the title of copyrighted books under an agreement restricting their use, cannot, under the copyright statutes, restrain sales of books in violation of the agreement; Harrison v. Maynard, Merrill & Co., 61 Fed. 689, 10 C. C. A. 17; the remedy is confined to the breach of the contract; *id.*

A notice on a copyright book that it must not be sold for less than a specified price does not reserve any right to the copyright owner, nor limit the absolute title acquired by purchaser; Bobbs-Merrill Co. v. Straus, 139 Fed. 155, affirmed in 147 Fed. 15, 77 C. C. A. 607, and 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086.

The words "Webster's Dictionary" are public property by reason of the expiration of the copyright in the dictionary; Merriam v. Clothing Co., 47 Fed. 411.

One who buys copies of a publication which violates copyright and sells them again is liable for the profit on his sales; Myers v. Callaghan, 24 Fed. 636.

Copyright is based on statute, while unfair competition, except as affected by legislative enactment in connection with patents, trade-marks, etc., is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade whether having words or letters in its composition and appearance or not; West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 100 C. C. A. 303.

The British copyright code went into effect July 1, 1912. Australia adopted a code in 1905 and Canada in 1911.

See LITERARY PROPERTY; Bowker, Copyright.

International Copyright. Under the reciprocity clause of the Act of March 4, 1909, the President made proclamations April 9, 1910, that the following countries were entitled to all the benefits of the acts, excepting those under section 1 (e): Austria, Belgium, Chile, Costa Rica, Cuba, Denmark, France, Germany, Great Britain and possessions, Italy, Mexico, Netherlands and possessions, Norway, Portugal, Spain and Switzerland. A like proclamation was made as to Luxemburg, June 29, 1910; as to Sweden, May 26, 1911; as to Tunis, October 4, 1912.

The benefits of the act as to section 1 (e) were extended by proclamation: to Germany, December 8, 1910; Belgium, June 14, 1911; Cuba, November 27, 1911; Luxemburg, June 14, 1911; and Norway, June 14, 1911.

A copyright convention with Hungary went into effect October 15, 1912.

The United States, as a party only to the Pan-American Union and not a member of the International Copyright Union under the Berne-Berlin Conventions, has not secured for its citizens general rights of copyright in other countries, without repetition of formalities, and such rights are secured only by reciprocity in the countries designated by presidential proclamation and according to the formalities of their domestic legislation. The International Copyright Union held a convention in Berlin, 1908, which replaced, in the relations between the contracting states, the Convention of Berne of 1886, with the additional act and the interpretative declaration of 1896. Fifteen signatory powers of the Union attended, including France, Germany and Great Britain; the United States was not a signatory power. Twenty non-Union powers also attended the Conference, including the United States whose delegate, Thorvald Solberg, while stating that it was not deemed possible by the Unit-

ed States to send a plenipotentiary delegate, also expressed the sympathy of the United States with the purposes of the Union. See Bowker, Copyright.

CORAAGIUM or CORAAGE. Measures of corn. An unusual and extraordinary tribute, arising only on special occasions. They are thus distinguished from services. Mentioned in connection with *hidage* and *carvage*. Cowell.

CORAM IPSO REGE (Lat.). Before the king himself. Proceedings in the court of king's bench are said to be *coram rege ipso*. 3 Bla. Com. 41.

CORAM NOBIS. A writ of error on a judgment in the king's bench is called a *coram nobis* (before us). 1 Archb. Pr. 234. See CORAM VOBIS.

CORAM NON JUDICE. Acts done by court which has no jurisdiction either over the person, the cause, or the process, are said to be *coram non judice*. Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200. Such acts have no validity. If an act is required to be done before a particular person, it would not be considered as done before him if he were asleep or *non compos mentis;* Wickes' Lessee v. Caulk, 5 Harr. & J. (Md.) 42; Griffith v. Frazier, 8 Cra. (U. S.) 9, 3 L. Ed. 471; Fisher v. Harnden, 1 Paine 55, Fed. Cas. No. 4,819; 1 Prest. Conv. 266.

CORAM PARIBUS. In the presence of the peers or freeholders. 2 Bla. Com. 307.

CORAM VOBIS. A writ of error directed to the same court which tried the cause, to correct an error in fact. Bridendolph v. Zellers' Ex'rs, 3 Md. 325; 3 Steph. Com. 642.

If a judgment in the King's Bench be erroneous in matter of fact only, and not in point of law, it may be reversed in the same court by writ of error *coram nobis* (before us), or *quæ coram nobis residant;* so called from its being founded on the record and process, which are stated in the writ to remain in the court of the king before the king himself. But if the error be in the *judgment* itself, and not in the process, a writ of error does not lie in the same court upon such judgment. 1 Rolle, Abr. 746. In the Common Pleas, the record and proceedings being stated to remain before the king's justices, the writ is called a writ of error *coram vobis* (before you) or *quæ coram vobis residant.* 3 Chit. Bla. Com. 406, n.

CORD. A measure of wood, containing 128 cubic feet. See Kennedy v. R. Co., 67 Barb. (N. Y.) 169.

CO-RESPONDENT. Any person called upon to answer a petition or other proceeding, but now chiefly applied to a person charged with adultery with the husband or wife, in a suit for divorce, and made jointly a respondent to the suit. See DIVORCE.

CORN. In its most comprehensive sense, this term signifies every sort of grain, as well as peas and beans; this is its meaning in the memorandum usually contained in policies of insurance. But it does not include rice; Park, Ins. 112; 1 Marsh. Ins. 223, n.; Wesk. Ins. 145. See Com. Dig. *Biens* (G, 1). In the United States it usually means maize, or Indian corn; Sullins v. State, 53 Ala. 474.

CORN-LAWS. Laws regulating the trade in bread-stuffs.

The object of corn laws is to secure a regular and steady supply of the great staples of food; and for this object the means adopted in different countries and at different times widely vary, sometimes involving restriction or prohibition upon the export, and sometimes, in order to stimulate production, offering a bounty upon the export. Of the former character was the famous system of corn laws of England, initiated in 1773 by Burke, and repealed in 1846 under Sir Robert Peel. See Cobden's Life.

CORN RENTS. Rents reserved in wheat or malt in certain university leases in England. Stat. 18 Eliz. c. 6; 2 Bla. Com. 322.

CORNAGE. A species of tenure in England, by which the tenant was bound to blow a horn for the sake of alarming the country on the approach of an enemy. Bac. Abr. *Tenure* (N.).

CORNET. A commissioned officer in a regiment of cavalry, abolished in England in 1871, and not existing in the United States army.

CORODY. An allowance of meat, drink, money, clothing, lodging, and such like necessaries for sustenance. 1 Bla. Com. 283; 1 Chit. Pr. 225. An allowance from an abbey or house of religion, to one of the king's servants who dwells therein, of meat and other sustenance. Fitzh. N. B. 230.

An assize lay for a corody; Cowell. Corodies are now obsolete; Co. 2d Inst. 630; 2 Bla. Com. 40.

CORONATION. It "is but a royal ornament and solemnization of the royal descent, but no part of the title." By the laws of England there can be no interregnum; 7 Co. Rep. 10 *b*.

CORONATION OATH. The oath administered to a sovereign in England before coronation. Whart. Law Dic. Its form was somewhat changed at the coronation of Edward VII.

CORONATOR (Lat.). A coroner. Spel.

CORONATORE EXONERANDO. A writ for the removal of a coroner, for a cause therein assigned.

CORONER. An officer whose principal duty it is to hold an inquisition, with the assistance of a jury, over the body of any person who may have come to a violent death, or who has died in prison.

It is his duty, in case of the death of the sheriff or his incapacity, or when a vacancy occurs in that office, to serve all the writs and processes which the sheriff is usually bound to serve; Gunby v. Welcher, 20 Ga. 336; Brown v. Barker, 10 Humph. (Tenn.)

346; Manning v. Keenan, 73 N. Y. 45; 1 Bla. Com. 349. See SHERIFF.

Coroners were county officers placed beside the sheriff to look after the administration of criminal justice and the revenue to the king resulting therefrom; Brunner, 2 Sel. Essays in Anglo-Amer. L. H. 31. See Gross, History of Coroners. It is supposed that the first institution of coroners dates from 1194. The office may have existed before then. 2 Holdsw. Hist. E. L. 45; Pollock, King's Peace, 2 Sel. Essays in Anglo-Amer. L. H. 410.

It was also the coroner's duty to inquire concerning shipwreck, and to find who had possession of the goods; concerning treasure-trove, who were the finders, and where the property was; 1 Bla. Com. 349. The stat. 4 Edw. I. ch. 2 (1276), entitled "*De Officio Coronatoris*," empowered the coroner to inquire who was slain and who were there, who and in what manner they were culpable of the act or force. Whoever was found culpable was turned over to the sheriff, and whoever was not culpable was attached until the coming of the justices. The Chief Justice of the King's Bench was the chief coroner of all England; though he did not perform the active duties of that office in any one county; 4 Co. 57 *b*; Bac. Abr. Coroner; 3 Com. Dig. 242; 5 *id.* 212.

Coroners were abolished in Massachusetts in 1877, and "men learned in the science of medicine" are appointed to make autopsies and in case of a violent death to report it to a justice of the district.

In England a coroner (one in every county and in certain boroughs) holds a court of record; his jury of inquest consists of not less than 12 nor more than 23 persons. Upon a verdict of the jury, the coroner can commit the accused for trial and he may be arraigned without any presentment by a grand jury. Odgers, C. L. 1031.

A coroner is a "judicial officer" within a bribery act; People v. Jackson, 191 N. Y. 293, 84 N. E. 65, 15 L. R. A. (N. S.) 1173, 14 Ann. Cas. 243.

It is proper for a coroner in most cases of homicide to cause an examination to be made by a physician, and in many cases it is his duty so to do; 4 C. & P. 571. See Jameson v. Board of Com'rs of Bartholomew County, 64 Ind. 524; Sanford v. Lee County, 49 Ia. 148; Cook v. Multnomah County, 8 Or. 170.

In Coroner's Duties, 20 D. R. (Pa.) 685, Sulzberger, P. J., instructed the coroner as to his duties in Pennsylvania, where the practice has been much modified, to the effect that the district attorney should always be present at the coroner's inquest and that he has power to cross-examine witnesses; also that if the district attorney is of opinion that there is no evidence to hold the person charged, he should be discharged, but not otherwise.

CORPORAL (Lat. *corpus*, body). Bodily; relating to the body: as, corporal punishment.

A non-commissioned officer of the lowest grade in an infantry, cavalry, or artillery company.

CORPORAL OATH. An oath which the party takes laying his hand on the gospels. Cowell. It is now held to mean solemn oath. Jackson v. State, 1 Ind. 184.

CORPORAL TOUCH. Actual, bodily contact with the hand.

It was once held that before a seller of personal property could be said to have stopped it *in transitu*, so as to regain the possession of it, it was necessary that it should come to his corporal touch; but the contrary is now settled. These words were used merely as a figurative expression. 3 Term 464; 5 East 184.

CORPORATION. A body, consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members.

"An artificial being created by law and composed of individuals who subsist as a body politic under a special denomination with the capacity of perpetual succession and of acting within the scope of its charter as a natural person." Fietsam v. Hay, 122 Ill. 293. By fiction it is partly a person and partly a citizen, yet it has not the inalienable rights of a natural person; Northern Securities Co. v. United States, 193 U. S. 200, 24 Sup. Ct. 436, 48 L. Ed. 679.

A corporation aggregate is a collection of individuals united in one body by such a grant of privileges as secures succession of members without changing the identity of the body and constitutes the members for the time being one artificial person or legal being capable of transacting the corporate business like a natural person. Bronson, J., People v. Assessors of Village of Watertown, 1 Hill (N. Y.) 620.

For a long time the prevailing theory on the Continent of Europe of the true nature of corporate bodies was that the personality of a corporation was a mere legal fiction, and its rights derived in every case from a special creation by the state. But of late years writers of considerable authority have taken the view that the legal existence or personality of a corporation, though limited in various ways, is quite as real as that of an individual; Pollock, First Book of Jurispr. 113, where various authorities are referred to, and the author expresses his belief that the latter view is sounder. The corporation in England was the joint result of certain groups in ecclesiastical life and certain other groups active in temporal affairs. For centuries the development of each was wholly independent of the other. The boroughs first began to secure from the king franchises to hold their own courts, to their own customs and freedom from toll. A borough had two organizations—gild and governmental. They were connected, but not identical. The franchises were in the form of a grant from the king and were made to the burgesses. No legal person was created, but the burgesses died and their privileges were continued to their successors. When individual inhabitants of the borough offended the king

by their acts, he took away the franchise of the borough as a punishment, which punishment fell on the community. Once in such a case the Londoners prayed that only the guilty might be punished; Riley, Chronicles 84. The king treated the burgesses as a group and the burgesses in respect to their property acted as a group.

The same idea developed in ecclesiastical life. For wholly different reasons, religious groups were formed. The basic doctrines of the Christian church require co-operation and also continuity of thought and effort. Monasteries, convents and chapters were the result. It became evident that this indefinite something produced by the association of several should be given a name and its status established. There was much blind groping after the nature of this indefinite something. For a time the idea naturally suggested by the analogy of the human body was applied to these groups. The chief officer, as the mayor or the bishop, was the head and the members were the arms, legs, etc. This was called the anthropomorphic theory and for a long time obscured the true corporate idea; 1 Poll. & Maitl. (2d ed.) 491, and citations of the year books there given; 19 Harv. L. Rev. 350.

Finally, however, the oneness of these groups was given a definite recognition, not as a real, but as an ideal or legal person. The conception of an ideal person having legal rights and duties was borrowed directly from the early English theory as to church ownership. In very early times, several centuries at least before the reign of Edward I., there were in England what were vaguely known as church lands. At first the land was given direct to God. Sometimes it was given to a particular saint, who was supposed to guard and protect it. Little by little, the saint and the buildings became merged in each other and the church itself was thought to be the property owner. The functions of ownership were necessarily performed by human beings—by the clergy—and the theory was naturally extended to cases where there was only one cleric. Thus was introduced the corporation sole, characterized as "that unhappy freak of English law"; 1 Poll. & Maitl. 488. In ecclesiastical affairs, the corporation aggregate was almost resolved into a mere collection of corporations sole; *id.* 507. See *infra.*

It was not until about the middle of the 15th century that it was settled as a matter of positive law that the corporation must be created by the sovereign power, which rule arose simply from considerations of political expediency. Recognizing that boroughs, organized communities and gilds might become dangerous, the king made them a source of revenue by selling the privilege to exist. In 1440 the first municipal charter was granted. The mayor, burgesses and their successors, mayors and burgesses of the town of Kingston-upon-Hull, were incorporated so as to form "one perpetual corporate commonalty." 19 Harv. L. Rev. 350.

"What we call a corporation was first called 'un corps' or a body, whence our 'body politic,' or 'body corporate'; or 'un gros' or something that had an existence in itself, apart from its constituents. Thus there was gradually evolved the idea of an abstract artificial individuality, composed of members for the time being, to be succeeded by others after them, but continuing after their death. This became the *persona ficta* of a later time." A. M. Eaton in 1902 Amer. Bar Assoc. Repts. 320. Referring to the earlier historical days, the same author says, (p. 322): "There was no intention on either part to form a corporation, indeed neither knew what a corporation was; for the name did not exist, but the thing itself was being gradually evolved."

For the history of corporations before 1800, see Williston, 2 Harv. L. Rev. 149 (3 Sel. Essays in Anglo-Amer. L. H. 195); Baldwin, History of Private Corp., 3 Sel. Essays in Anglo-Amer. L. H. 236.

For centuries the leading case on corporations in England was the case of Sutton's Hospital, 10 Co. 1 (1612), where the king, on the petition of Sutton, had granted a charter to a hospital. Sutton conveyed land to such corporation. Against the contention of the heir that there was no corporation and that the conveyance was void, it was held that both the incorporation and the deed were valid and that the incorporation of the persons might precede the foundation of the hospital; 21 Harv. L. Rev. 305.

It was considered at that time that corporations aggregate could not commit treason, nor be outlawed nor excommunicated, for they have no souls. Neither can they appear in person, but by attorney; they cannot do fealty, for an invisible body can neither be in person nor swear; 10 Coke 32 b. Blackstone said it can neither maintain nor be defendant to an action of battery or such like personal injuries, for a corporation can neither beat, nor be beaten, in its body politic; 1 Bla. Com. 476. It could not be executor or administrator or perform any personal duties, for it could not take an oath for the due execution of the office; *id.*

The fiction that a corporation can do nothing but by an attorney, that it was an artificial being, guarded by the body of associates forming it, led to the theory that its administrative officers could exercise only a delegated authority; 21 Harv. L. Rev. 535. It is said that under the pressure of modern analysis this fiction tends to yield to more rational ideas, and corporate action is perceived more truly as simple group action; *id.* A corporation represents the most advanced attainment of the group idea; 19 *id.* 350.

The first business corporate charter in the United States was in 1768: "The Philadelphia Contributionship for Insuring Houses from Loss by Fire."

Aggregate corporations are those which are composed of two or more members at the same time.

Civil corporations are those which are created to facilitate the transaction of business.

Ecclesiastical corporations are those which are created to secure the public worship of God.

Eleemosynary corporations are those which are created for the purposes of charities, such as schools, hospitals, and the like.

Lay corporations are those which exist for secular purposes.

Municipal corporations are those created for the purpose of administering some portion of the government in a political subdivision of the state, as a city, county, etc.

Private corporations are those which are created wholly or in part, for purposes of private emolument. Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668, 4 L. Ed. 629; Bank of United States v. Bank, 9 Wheat. (U. S.) 907, 6 L. Ed. 244.

Public corporations are those which are exclusively instruments of the public interest.

Corporations sole are those which by law consist of but one member at any one time, as a bishop in England. But see *infra;* also *supra.*

In the Dartmouth College Case, 4 Wheat. (U. S.) 666, 4 L. Ed. 629, Mr. Justice Story defined the various kinds of corporations as follows:

"An aggregate corporation at common law is a collection of individuals united into one collective body, under a special name, and possessing certain immunities, privileges, and capacities in its collective character, which do not belong to the natural

persons composing it. . . . A great variety of these corporations exist in every country governed by the common law; . . . some of these corporations are, from the particular purposes to which they are devoted, denominated *spiritual*, and some *lay*; and the latter are again divided into *civil* and *eleemosynary* corporations. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms and bounty of the founder. . . . In this class are ranked hospitals, and colleges, etc. Another division of corporations is into *public* and *private*. Public corporations are generally esteemed such as exist for public and political purposes only, such as towns, cities, etc. Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the Government, the corporation is private. . . . For instance, a bank created by the Government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government for general charity. But a bank, whose stock is owned by private persons, is a private corporation. . . . The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private. . . . This reasoning applies in its full force to eleemosynary corporations. . . . This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law."

Kent divides corporations into ecclesiastical and lay, and lay corporations into eleemosynary and civil; 2 Kent 274.

It has been held that a public corporation is one that cannot carry out the purposes of its organization without certain rights under its charter from the commonwealth, and that mere private corporations are those that need no franchise from the state to carry out such purposes; Allegheny Co. v. Diamond Market, 123 Pa. 164, 16 Atl. 619. But Judge Thompson doubts as to whether these divisions promote clear conceptions of the law; 1 Thomp. Corp. § 22; he considers that a more practical conception would divide them into three classes: public-municipal corporations, to promote the public interest; corporations technically private but of *quasi* public character, such as railroads etc.; and corporations strictly private; *id.* § 37.

The essence of a corporation consists "in a capacity (1) to have perpetual succession in a special and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; (3) to receive and enjoy in common grants of privileges and immunities; Thomas v. Dakin, 22 Wend. (N. Y.) 71.

By both the civil and the common law, the *sovereign* authority only can create a corporation,—a corporation by prescription, or so old that the license or charter which created it is lost, being presumed, from the long-continued exercise of corporate powers, to have been entitled to them by sovereign grant. In England, corporations are created by royal charter or parliamentary act; in the United States, by legislative act of any state, or of the congress of the United States,—congress having power to create a corporation, as, for instance, a national bank when such a body is an appropriate instrument for the exercise of its constitutional powers; McCulloch v. Maryland, 4 Wheat. (U. S.) 424, 4 L. Ed. 579. In many or most of the states general acts have been passed for the creation of certain classes of some corporations. And some state constitutions have taken from the legislature the power to create them by special act.

All corporations, of whatever kind, are moulded and controlled, both as to what they may do and the manner in which they may do it, by their charters or acts of incorporation, which to them are the laws of their being, which they can neither dispense with nor alter. Subject, however, to such limitations as these, or such as general statute or constitutional law, may impose, every corporation aggregate has, by virtue of incorporation and as incidental thereto, *first*, the power of perpetual succession, including the admission, and, except in the case of mere stock corporations, the removal for cause, of members; *second*, the power to sue and be sued, to grant and to receive grants, and to do all acts which it may do at all, in its corporate name; *third*, to purchase, receive, and to hold lands and other property, and to transmit them in succession; *fourth*, to have a common seal, and to break, alter, and renew it at pleasure; and, *fifth*, to make by-laws for its government, so that they be consistent with its charter and with law. It may, within the limits of its charter or act of incorporation express or implied, lawfully do all acts and enter into all contracts that a natural person may do or enter into, so that the same be appropriate as means to the end for which the corporation was created.

It is not obliged to use all its powers unless its charter especially so requires; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

A corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not

authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and ascertain if it has exceeded its powers; Wilson v. U. S., 221 U. S. 382, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912A, 558. A corporation of one state may be made a corporation of another state in regard to property and acts within its territorial jurisdiction; Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; Chicago & N. W. R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. Ed. 571; St. Louis R. Co. v. Vance, 96 U. S. 450, 24 L. Ed. 752; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. Ed. 780; Martin v. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Louisville, N. A. & C. R. Co. v. Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Mackay v. R. Co., 82 Com. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768; but the mere grant of privileges and powers to it as an existing corporation, without more, does not confer the power usually exercised over corporations by the state or by the legislature. The language used must imply creation or adoption; Pennsylvania R. Co. v. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Goodlett v. R. R., 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. Ed. 1230; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802. Where a corporation is incorporated simultaneously in several states, it exists in each state; Pinney v. Nelson, 183 U. S. 149, 22 Sup. Ct. 52, 46 L. Ed. 125. Where it is sued in one of such states it cannot escape the jurisdiction thereof and remove the cause to the federal court; Patch v. R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518, distinguishing Southern R. Co. v. Allison, 190 U. S. 326, 23 Sup. Ct. 713, 47 L. Ed. 1078. Where several corporations, each of a different state, are so consolidated by the co-operating legislation of those states as to assume a new corporate form and name, the consolidated corporation is, in each of those states, a corporation of such state; Patch v. R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. Ed. 204, 12 Ann. Cas. 518. See MERGER.

Where property is involved, a corporation is regarded as a person separate and distinct from its stockholders, or any or all of them; Home Fire Ins. Co. v. Barber, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, per Pound, Com'r. The entirely separate identity of the rights and remedies of a corporation itself and the individual shareholders is settled; Big Creek Gap Coal & Iron Co. v. Trust Co., 127 Fed. 626, 62 C. C. A. 351; Bronson v. R. Co., 2 Wall. (U. S.) 283, 17 L. Ed. 725; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Church v. R. Co., 78 Fed. 526; Forbes v. R. Co., Fed. Cas. No. 4,926.

But it is held that while a corporation is ordinarily considered a legal entity, yet it may, in the interest of justice, be considered as an association of persons; and where one corporation is organized and owned by the stockholders and officers of another, they may be treated as identical; U. S. v. Transit Co., 142 Fed. 247.

Its residence is fixed by artificial conditions, such as the location of its principal office, or (if a foreign corporation) the personal residence of its duly appointed attorney in fact on whom service is to be made in a state where it is registered as a foreign corporation; Lemon v. Glass Co., 199 Fed. 927.

A corporation having stockholders is *organized* when the first meeting has been called, the act of incorporation accepted, officers elected, and by-laws providing for future meetings adopted, within the meaning of a statute providing that incorporators and subscribers shall hold the franchise until the corporation is *organized;* Roosevelt v. Hamblin, 199 Mass. 127, 85 N. E. 98, 18 L. R. A. (N. S.) 748; or when the officers provided for in the law of its being have been appointed and taken upon themselves the burden of their offices; Com. v. Mann Co., 150 Pa. 64, 24 Atl. 601; Walton v. Oliver, 49 Kan. 107, 30 Pac. 172, 33 Am. St. Rep. 355. It has been held not to be organized where it had not recorded a certificate of complete organization; Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99; North Chicago Electric Ry. Co. v. Peuser, 190 Ill. 67, 60 N. E. 78; or filed its articles of incorporation; Capps v. Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; or its certificate that the requisite capital stock had been deposited; Gent v. Ins. Co., 107 Ill. 652.

In civil cases a corporation is liable for the malice of its officers and servants; [1900] 1 Q. B. 22; [1904] A. C. 423.

Ordinarily in England it cannot be prosecuted for a crime; but it may be for a misdemeanor, which is merely a civil wrong; (*e. g.*) for breaches of the Food and Drug Act; Odger, C. L. 1405. In the United States it may be indicted for crime, but not for every species; 5 Thomps. Cap. § 6418. It may be for a criminal libel; Brennan v. Tracy, 2 Mo. App. 540 (dictum); for keeping a disorderly house; State v. Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680; for obstructed public navigation by not constructing a draw bridge; Com. v. Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; for a public nuisance; State v. City of Portland, 74 Me. 268, 43 Am. Rep. 586; Delaware Division Canal Co. v. Com., 60 Pa. 367, 100 Am. Dec. 570; for failure to perform public duties (as of a municipality failing to keep highways in repair); State v. Town of Murfreesboro, 11 Humph. (Tenn.) 217; for usury; State v. Bank, 2 S. D. 538, 51 N. W. 337; for conspiracy to aid a lynching mob; Rogers v.

R. Co., 194 Fed. 65, 114 C. C. A. 85; and of course for offences under modern industrial statutes.

It is held that it can be indicted only when the legislation has so provided; State v. Hotel Co., 42 Ind. App. 282, 85 N. E. 724.

The definition at the beginning of this title of a corporation sole is the one usually given in the books. It is said, in England, to include the Crown, all bishops, rectors, vicars and the like; 3 Steph. Com. 15 ed. 2. So of the supervisor of a town; Jansen v. Ostrander, 1 Cow. (N. Y.) 670; the governor of a state; Governor v. Allen, 8 Humphr. (Tenn.) 176. It has been defined as a "term established by usage indicating a person some of whose rights and liabilities are permitted by law to pass to his successors in a particular office, rather than to his heirs, executors or administrators. Such a corporation was unknown in the civil law." 21 Harv. L. Rev. 306. But the conception has been disapproved by modern authors. Thus, Sir F. Pollock (note to Maine, Anc. Law 226) says: "Our English category of corporations sole is not only, as Maine calls it, a fiction, but modern, anomalous, and of no practical use. When a parson or other solely corporate office-holder dies, there is no one to act for the corporation until a successor is appointed, and when appointed, that successor can do nothing which he could not do without being called a corporation sole. . . . As for the King, or 'the Crown,' being a corporation sole, the language of our books appears to be nothing but a clumsy and, after all, ineffective device to avoid openly personifying the state. . . . The whole thing seems to have arisen from the technical difficulty of making grants to a parson and his successors after the practice of making them to God and the patron saint had been discontinued. . . . All this we may now think makes for historical curiosity rather than philosophical edification."

"A bishop is not a corporation sole"; per Strong, J., in Kain v. Gibboney, 101 U. S. 362, 25 L. Ed. 813, referring to a Roman Catholic bishop.

See Maitland, Corporation Sole (16 L. Q. R. 335); The Crown as a Corporation (17 *id.* 131). Judge Thompson has said (Corp. vol. 1, § 8) that the conception of a corporation sole is "passing out of American law."

See CHARTER; STOCK; STOCKHOLDER; DIRECTOR; MEETINGS; OFFICER; TRUST FUND THEORY; DISSOLUTION; MERGER; EMINENT DOMAIN; DE FACTO; ECCLESIASTICAL CORPORATIONS.

CORPORATOR. A member of a corporation.

The corporators are not the corporation, for either may sue the other; Culbertson v. Wabash Nav. Co., 4 McLean, 547, Fed. Cas. No. 3,464; Rogers v. Universalist Society, 19 Vt. 187; Peirce v. Partridge, 3 Metc. (Mass.) 44; Omaha Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917.

CORPOREAL HEREDITAMENTS. Substantial permanent objects which may be inherited. The term land will include all such. 2 Bla. Com. 17.

CORPOREAL PROPERTY. *In Civil Law.* That which consists of such subjects as are palpable.

In the common law, the term to signify the same thing is property in possession. It differs from incorporeal property, which consists of choses in action and easements, as a right of way, and the like.

CORPSE. The dead body of a human being. 1 Russ. & R. 366, n.; 2 Term 733; 1 Leach 497; Com. v. Loring, 8 Pick. (Mass.) 370; Dig. 47. 12. 3. 7; 11. 7. 38; Code, 3. 44. 1. Stealing a corpse is an indictable offence, but not larceny at common law; Co. 3d Inst. 203; 1 Russ. Cr. 629. See DEAD BODY.

CORPUS (Lat.). A body. The substance. Used of a human body, a corporation, a collection of laws, etc. The capital of a fund or estate as distinguished from the income.

CORPUS COMITATUS. The body of the county; the inhabitants or citizens of a whole county, as distinguished from a part of the county or a part of its citizens. U. S. v. Grush, 5 Mas. 290, Fed. Cas. No. 15,268.

CORPUS CUM CAUSA. See HABEAS CORPUS CUM CAUSA.

CORPUS DELICTI. The body of the offence; the essence of the crime.

It is a general rule not to convict unless the *corpus delicti* can be established, that is, until the fact that the crime has been actually perpetrated has been first proved. Hence, on a charge of homicide, the accused should not be convicted unless the death be first distinctly proved, either by direct evidence of the fact or by inspection of the body; Best, Pres. § 201; 1 Stark. Ev. 575. See 6 C. & P. 176; 2 Hale, P. C. 290; Whart. Cr. Ev. § 324. Instances have occurred of a person being convicted of having killed another, who, after the supposed criminal has been put to death for the supposed offence, has made his appearance alive. The wisdom of the rule is apparent; but it has been questioned whether, in extreme cases, it may not be competent to prove the basis of the *corpus delicti* by presumptive evidence; 3 Benth. Jud. Ev. 234; Wills, Cir. Ev. 105; Best, Pres. § 204; 3 Greenl. Ev. 30. In cases of felonious homicide, the *corpus delicti* consists of two fundamental and necessary facts: first, the death; and secondly, the existence of criminal agency as its cause; Pitts v. State, 43 Miss. 472. A like analysis would apply in the case of any other crime. When the body of a murdered man was mutilated and burned beyond recognition, testimony that a piece of charred cloth found

in the ashes with the body were like the trousers that a certain man wore, and that a slate pencil found there was identical with one he carried about him, was competent evidence to establish the identity of the body; State v. Martin, 47 S. C. 67, 25 S. E. 113.

The presumption arising from the possession of the fruits of crime recently after its commission, which in all cases is one of fact rather than of law, is occasionally so strong as to render unnecessary any direct proof of the *corpus delicti*. Thus, to borrow an illustration from Mr. Justice Maule, if a man were to go into the London docks quite sober, and shortly afterwards were to be found very drunk, staggering out of one of the cellars, in which above a million gallons of wine are stowed, "I think," says the learned judge, "that this would be reasonable evidence that the man had stolen some of the wine in the cellar, though no proof were given that any particular vat had been broached and that any wine had actually been missed." Dears. 284; 1 Tayl. Ev. § 122. In this case it was proved that a prisoner indicted for larceny was seen coming out of the lower room of a warehouse in the London docks, in the floor above which a large quantity of pepper was deposited, and where he had no business to be. He was stopped by a constable, who suspected him from the bulky state of his pockets, and said, "I think there is something wrong about you;" upon which the prisoner said, "I hope you will not be hard upon me;" and then threw a quantity of pepper out of his pocket on the ground. The witness stated that he could not say whether any pepper had been stolen, nor that any pepper had been missed; but that which was found upon the prisoner was of like description with the pepper in the warehouse. It was held by all the judges that the prisoner, upon these facts, was properly convicted of larceny.

The *corpus delicti* in *arson* consists in proof of the burning and of criminal agency in causing it; Spears v. State, 92 Miss. 613, 46 South. 166, 16 L. R. A. (N. S.) 285.

A confession alone ought not to be considered sufficient proof of the *corpus delicti;* Springfellow v. State, 26 Miss. 157, 59 Am. Dec. 247; People v. Hennessey, 15 Wend. (N. Y.) 147; Bines v. State, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33. It may be proved by circumstantial evidence; Dimmick v. U. S., 135 Fed. 257, 70 C. C. A. 141; State v. Gillis, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993.

CORPUS JURIS CANONICI (Lat. the body of the canon law). The name given to the collections of the decrees and canons of the Roman church. See CANON LAW.

CORPUS JURIS CIVILIS. The body of the civil law. The collection comprising the Institutes, the Pandects or Digest, the Code, and the Novels of Justinian. See those several titles, and also CIVIL LAW for fuller information. The name is said to have been first applied to this collection early in the seventeenth century. See BASILICA; CANON LAW.

CORRECTION. Chastisement, by one having authority, of a person who has committed some offence, for the purpose of bringing him into legal subjection.

It is chiefly exercised in a parental manner by parents, or those who are placed *in loco parentis*. A parent may therefore justify the correction of the child either corporally or by confinement; and a schoolmaster may justify similar correction; but the correction in both cases must be moderate and in a proper manner; Com. Dig. *Pleader*, (3 M.) 19; Hawk. c. 60, s. 23, c. 62, s. 2, c. 29, s. 5; Johnson v. State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; State v. Pendergrass, 19 N. C. 365, 31 Am. Dec. 416; Cook v. Neely, 143 Mo. App. 632, 128 S. W. 233. See ASSAULT; WHIPPING.

The master of an apprentice, for disobedience, may correct him moderately; 1 B. & C. 469; Cro. Car. 179; Mitchell v. Armitage, 10 Mart. O. S. (La.) 38; but he cannot delegate the authority to another. A master has no right to correct his servants who are not apprentices; Matthews v. Terry, 10 Conn. 455; 2 Greenl. Ev. § 97; see ASSAULT for cases of undue correction. A master may be found guilty of murder for whipping a servant so that he dies, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice; State v. Shaw, 64 S. C. 566, 43 S. E. 14, 60 L. R. A. 801, 92 Am. St. Rep. 817.

Soldiers were formerly liable to moderate correction from their superiors. For the sake of maintaining discipline in the navy, the captain of a vessel, belonging either to the United States or to private individuals, might formerly inflict moderate correction on a sailor for disobedience or disorderly conduct; Ab. Sh. 160; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365; Flemming v. Ball, 1 Bay (S. C.) 3; Aertsen v. Aurora, Bee 161, Fed. Cas. No. 95; Thorne v. White, 1 Pet. Adm. 168, Fed. Cas. No. 13,989; Moll. 209; Turner's Case, 1 Ware 83, Fed. Cas. No. 14,248. Such has been the general rule. But flogging and other degrading punishments are now forbidden in the army, navy, merchant service, and military prisons; R. S. §§ 1342, 1624, 4611, 1354.

The husband, by the old law, might give his wife moderate correction; 1 Hawk. P. C. 2. But in later times this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or a husband against his wife; 1 Bla. Com. 444; Stra. 478, 875, 1207; 2 Lev. 128. See MARRIED WOMEN.

Any excess of correction by the parent, master, officer, or captain rendered the par-

ty guilty of an assault and battery and liable to all its consequences; Com. v. Randall, 4 Gray (Mass.) 36. See ASSAULT. In some prisons, the keepers are permitted to correct the prisoners.

The King's Council, in the minority of Henry VI. authorized a subject to chastise the king "when he trespasseth or doth amys." 3 Holdsw. Hist. E. L. 356.

CORREGIDOR. In Spanish Law. A magistrate who took cognizance of various misdemeanors, and of civil matters. 2 White, New Rec. 53.

CORREI. In Civil Law. Two or more bound or secured by the same obligation.

Correi credendi. Creditors secured by the same obligation.

Correi debendi. Two or more persons bound as principal debtors to pay or perform. Ersk. Inst. 3. 3. 74; Calvinus, Lex.; Bell, Dict.

CORRUPT AND ILLEGAL PRACTICES. A British act of 1883 and supplements forbid certain acts in connection with Parliamentary elections, chiefly bribery, treating, undue influence and personation. Such acts are made criminal offences and may be ground for the loss of the seat if brought home to the candidate personally or through his agent. If by bribery, etc., it appears that the electorate did not really express its will, the election may be declared void. Certain practices are declared illegal, such as payment for the conveyance of electors to or from the polls, paying an elector for the use of his property, paying agents other than those specified in the act, and making a false statement as to the personal character or conduct of a candidate. In certain cases the penalty to the candidate may be disqualification forever from serving for the constituency in question, and, for seven years, from serving for any other constituency. 2 Steph. Com. (15th ed.) 463, 476.

This subject has more recently attracted much attention in the United States, and acts are being passed on the subject, but it cannot be said that the ground is fully covered. Among such acts are those requiring candidates to file, immediately after election, a statement of expenses incurred.

In some states, the state treasury assumes certain nomination expenses. See State Assumption of Expenses, 23 Yale L. Journ. 158, by Simeon E. Baldwin.

CORRUPTION. An act done with an intent to give some advantage inconsistent with official duty and the rights of others.

It includes bribery, but is more comprehensive; because an act may be corruptly done though the advantage to be derived from it be not offered by another. Merlin, *Rép.*

Something against law: as, a contract by which the borrower agreed to pay the lender usurious interest. It is said, in such case, that it was corruptly agreed, etc.

CORRUPTION OF BLOOD. The incapacity to inherit, or pass an inheritance, in consequence of an attainder to which the party has been subject. Abolished by stats. 3 & 4 Will. IV. c. 106, and 33 & 34 Vict. c. 23; 1 Steph. Com. 446.

When this consequence flows from an attainder, the party is stripped of all honors and dignities he possessed, and becomes ignoble.

The constitution of the United States, art. 3, s. 3, n. 2, declares that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted."

The act of Congress of July 17, 1862, for the seizure and condemnation of enemies' estates, with the resolution of the same date, does not conflict with this section, the forfeiture being only during the life of the offender; Bigelow v. Forrest, 9 Wall. (U. S.) 339, 19 L. Ed. 696; Miller v. U. S., 11 Wall. (U. S.) 268, 20 L. Ed. 135; Day v. Micou, 18 Wall. (U. S.) 156, 21 L. Ed. 860; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; Wallach v. Van Kiswick, 92 U. S. 202, 23 L. Ed. 473.

So far as it prevented descent being traced through a felon, the doctrine of corruption of blood was abolished in England in 1834; the whole law of escheat for felony, together with the king's year, day and waste, was abolished in 1870.

CORSE-PRESENT. In Old English Law. A gift of the second best beast belonging to a man at his death taken along with the corpse and presented to the priest. Stat. 21 Hen. VIII. cap. 6; Cowell; 2 Bla. Com. 425.

CORSNED. In Old English Law. A piece of barley bread, which, after the pronunciation of certain imprecations, a person accused of crime was compelled to swallow.

A piece of cheese or bread of about an ounce weight was consecrated with an exorcism desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty, but might turn to health and nourishment if he was innocent. Spelman, Gloss. 439. It was then given to the suspected person, who at the same time received the sacrament. If he swallowed it easily, he was esteemed innocent; if it choked him, he was esteemed guilty. See 4 Bla. Com. 345.

CORTES. The name of the legislative assemblies of Spain and Portugal.

CORVEE. In French Law. Gratuitous labor exacted from the villages or communities, especially for repairing roads, constructing bridges, fortifications, etc.

Corvée seigneuriale are *services* due the lord of the manor. Guyot, *Rép. Univ.*; 3 Low. C. 1.

COSBERING. In Feudal Law. A prerogative or seignorial right of a lord, as to lie and feast himself and his followers at his tenants' houses. Cowell.

COSENING. In Old English Law. An offence whereby anything is done deceitfully,

whether in or out of contracts, which cannot be fitly termed by any especial name. Called in the civil law *Stellionatus*. West. Symb. pt. 2, *Indictment*, § 68; Blount; 4 Bla. Com. 158.

COSINAGE (spelled, also, *Cousinage*, *Cosenage*). A writ to recover possession of an estate in lands when a stranger has entered and abated after the death of the grandfather's grandfather or of certain collateral relations. 3 Bla. Com. *186.

Relationship; affinity. Stat. 4 Hen. III. cap. 8; 3 Bla. Com. 186; Co. Litt. 160 *a*.

COST. The cost of an article purchased for exportation is the price paid, with all incidental charges paid at the place of exportation. Goodwin v. U. S., 2 Wash. C. C. 493, Fed. Cas. No. 5,554. Cost price is that actually paid for goods. Buck v. Burk, 18 N. Y. 337. See ACTUAL COST.

COST-BOOK. In English Law. A book in which a number of adventurers who have obtained permission to work a lode and have agreed to share the enterprise in certain proportions, enter the agreement and from time to time the receipts and expenditures of the mine, the names of the shareholders, their respective accounts with the mine, and transfers of shares. These associations are called "Cost-book mining companies," and are governed by the general law of partnership. Lindl. Partn. *147.

COSTS. The expenses incurred by the parties in the prosecution or defence of a suit.

They are distinguished from fees in being an allowance to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. Musser v. Good, 11 S. & R. (Pa.) 248.

No costs were recoverable by either plaintiff or defendant at common law. They were first given to plaintiff by the statute of Gloucester, 6 Edw. I. c. 1, which has been substantially adopted in all the United States.

The ultimate power to impose costs must be found in a statute. This may be granted by the legislature in general terms to the courts who may then establish a fee bill. This grant has been made by congress; Jordan v. Woollen Co., 3 Cliff. 239; Fed. Cas. No. 7,516. This was before the Revised Statutes but the fee bill of 1853 which was then under consideration by that court does not differ in any important respect from the appropriate sections of the Revised Statutes; Tesla Electric Co. v. Scott, 101 Fed. 524. The cases are collected in Kelly v. Ry. Co., 83 Fed. 183, and the various statutes are cited in Hathaway v. Roach, Fed. Cas. No. 6,213; Costs in Civil Cases, Fed. Cas. No. 18,284; The Baltimore, 8 Wall. (U. S.) 388, 19 L. Ed. 463.

Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly; 2 Stra. 1006, 1069; 3 Burr. 1287; Com. v. Tilghman, 4 S. & R. (Pa.) 129; Farry v. Thomson, 1 Rich. (S. C.) 4.

They do not extend to the government; and therefore when the United States, or one of the several states, is a party they neither pay nor receive costs, unless it be so expressly provided by statute; Irwin v. Commissioners of Northumberland County, 1 S. & R. (Pa.) 505; U. S. v. Barker, 2 Wheat. (U. S.) 395, 4 L. Ed. 271; U. S. v. Boyd, 5 How. (U. S.) 29, 12 L. Ed. 36; Collier v. Powell, 23 Ala. 579; State v. Kinne, 41 N. H. 238; State v. Harrington, 2 Tyler (Vt.) 44; and in actions of a public nature, conducted solely for the public benefit, costs are rarely given against public officers; Cassady v. Trustees of Schools, 94 Ill. 589; Clare County v. Auditor General, 41 Mich. 182, 1 N. W. 926; Avery v. Slack, 19 Wend. (N. Y.) 50. This exemption is founded on the sovereign character of the state, which is subject to no process; 3 Bla. Com. 400; McKeehan v. Com., 3 Pa. 153. But in Missouri v. Illinois, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. Ed. 1160, it was said: "So far as the dignity of the state is concerned, that is its own affair. The United States has not been above taking costs." U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112. Rule 24 of the Supreme Court of the United States provides that no costs shall be allowed to or against the United States in equity. The king neither receives nor pays costs; (1785) T. R. 86.

The right of the state to costs on conviction in criminal cases is generally declared by statute.

In many cases, the right to recover costs is made to depend, by statute, upon the amount of the verdict or judgment. Where there is such a provision, and the verdict is for less than the amount required by statute to entitle the party to costs, the right to costs, in general, will depend upon the mode in which the verdict has been reduced below the sum specified in the act. In such cases, the general rule is that if the amount be reduced by evidence of direct payment, the party shall lose his costs; but if by set-off or other collateral defence he will be entitled to recover them; 8 East 28, 347; 2 Price 19; 4 Bingh. 169; Cooper v. Coats, 1 Dall. (U. S.) 308, 1 L. Ed. 150; Bunner v. Neil, 1 Dall. (U. S.) 457, 1 L. Ed. 222; Stewart v. Mitchell's Adm'rs, 13 S. & R. (Pa.) 287.

When a case is dismissed for want of jurisdiction over the person, no costs are allowed to the defendant unless expressly given by statute. The difficulty in giving costs, in such case, is the want of power. If the case be not legally before the court, it has no more jurisdiction to award costs than it has to grant relief; Burnham v. Rangeley, 2 W. & M. 417, Fed. Cas. No. 2,177; Bank of Cumberland v. Willis, 3 Sumn. 473, Fed. Cas. No. 885; Clark v. Rockwell, 15 Mass. 221; Banks v. Fowler, 3 Litt. (Ky.) 332; Eames v. Carlisle, 3 N. H. 130; Paine v. Commissioners, Wright (Ohio) 417.

In equity, the giving of costs is entirely discretionary, as well with respect to the period at which the court decides upon them as with respect to the parties to whom they are given.

In the exercise of their discretion, courts of equity are generally governed by certain fixed principles which they have adopted on the subject of costs. It was the rule of the civil law that *victus victori in expensis condemnatus est;* and this is the general rule adopted in courts of equity as well as in courts of law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success to the party who prevails; 3 Dan. Ch. Pr. 1515.

In patent cases in equity costs will not be allowed a plaintiff where some of the claims are withdrawn at the argument and some adjudged invalid, though others are sustained; Thomson-Houston Electric Co. v. R. Co., 71 Fed. 886.

An executor or administrator suing at law or in equity in his representative capacity is not personally liable to the opposite party for costs in case he is unsuccessful, if the litigation were carried on in good faith for the benefit of the estate; Gratz v. Bayard, 11 S. & R. (Pa.) 47; Callender's Adm'r v. Ins. Co., 23 Pa. 471. But the rule is otherwise where vexatious litigation is caused by the executor or administrator, and where he has been guilty of fraud or misconduct in relation to the suit; 1 Wms. Exec. 451; Show v. Conway, 7 Pa. 136, 137.

Costs, when recovered, belong to the client; Celluloid Mfg. Co. v. Chandler, 27 Fed. 12.

In divorce, the wife's costs can be taxed *de die in diem;* Graves v. Cole, 19 Pa. 171, citing 2 Hagg. Cons. 204.

Ordinarily an appeal does not lie from a decree for costs only in a chancery suit; but there are exceptions to the rule, turning on the question of the discretionary power of the trial court respecting costs. A decree for such costs as are discretionary is not appealable, but one for costs not in the discretion of the court is appealable if the amount is sufficient to confer jurisdiction; Nutter v. Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. (N. S.) 1083, 6 Ann. Cas. 94.

See DOUBLE COSTS; TREBLE COSTS; SURETY COMPANY; ACTUAL.

COSTS OF THE DAY. Costs incurred in preparing for trial on a particular day. Ad. Eq. 343.

In English practice, costs are ordered to be paid by a plaintiff, who neglects to go to trial according to notice; Mozley & W. Law Dict.; Lush, Pr. 496.

COSTS DE INCREMENTO (increased costs, costs of increase). Costs adjudged by the court in addition to those assessed by the jury. Day v. Woodworth, 13 How. (U. S.) 372, 14 L. Ed. 181.

The cost of the suit, etc., recovered originally under the statute of Gloucester is said to be the origin of costs *de incremento;* Bull. N. P. 328 *a*. Where the statute requires costs to be doubled in case of an unsuccessful appeal, costs *de incremento* stand on the same footing as jury costs; 2 Stra. 1048; TAXED COSTS. Costs were enrolled in England in the time of Blackstone as *increase* of damages; 3 Bla. Com. 399.

COTERELLUS. A cottager.

Coterellus was distinguished from *cotarius* in this, that the *cotarius* held by socage tenure, but the *coterellus* held in mere villenage, and his person, issue, and goods were held at the will of the lord. Cowell.

COTLAND. Land held by a cottager, whether in socage or villenage. Cowell; Blount.

COTSETUS. A cottager or cottageholder who held by servile tenure and was bound to do the work of the lord. Cowell.

COTTAGE, COTTAGIUM. In Old English Law. A small house without any land belonging to it, whereof mention is made in stat. 4 Edw. I.

But, by stat. 31 Eliz. cap. 7, no man may build such cottage for habitation unless he lay unto it four acres of freehold land, except in market-towns, cities, or within a mile of the sea, or for the habitation of laborers in mines, shepherds, foresters, sailors, etc. Twenty years' possession of cottage gives good title as against the lord; Bull. N. P. 103 *a*, 104. By a grant of a cottage the curtilage will pass; 4 Vin. Abr. 582.

COTTIER TENANCY. A species of tenancy in Ireland, constituted by an agreement in writing, and subject to the following terms: That the tenement consist of a dwelling-house with not more than half an acre of land; at a rental not exceeding 5*l*. a year; the tenancy to be for not more than a month at a time; the landlord to keep the house in good repair. Landlord and Tenant Act (Ireland), 23 & 24 Vict. c. 154, s. 81.

COUCHANT. Lying down. Animals are said to have been *levant* and *couchant* when they have been upon another person's land, damage feasant, one night at least. 3 Bla. Com. 9.

COULISSE. The stock brokers' curb market in Paris.

COUNCIL (Lat. *concilium*, an assembly). The legislative body in the government of cities or boroughs. An advisory body selected to aid the executive. See Opinion of the Justices, 14 Mass. 470; Opinion of the Justices, 3 Pick. (Mass.) 517; In re Adams, 4 Pick. (Mass.) 25.

A governor's council is still retained in some of the states; 70 Me. 570. It is analogous in many respects to the privy council (*q. v.*), of the king of Great Britain and of the governors of the British colonies, though of a much more limited range of duties.

Common council is a term frequently applied to the more numerous branch of the legislative bodies in cities.

The British parliament is the common council of the whole realm.

COUNCIL OF THE BAR. A body composed of members of the English bar which governs the bar. It hears complaints against barristers and reports its findings with recommendations to the benchers of the Inn of Court of which the barrister is a member, who alone can act. Leaming, Phila. Lawy. in Lond. Courts 67.

COUNCIL OF LEGAL EDUCATION. See LEGAL EDUCATION.

COUNSEL. The counsellors who are associated in the management of a particular cause, or who act as legal advisers in reference to any matter requiring legal knowledge and judgment.

The term is used both as a singular and plural noun, to denote one or more. It is usual to say of one concerned in a case that he is "of counsel."

Originally there was no distinction between council and counsel; both were *consilium.* Ilbert, Legisl. Meth. 5.

Knowledge. A grand jury is sworn to keep secret "the commonwealth's *counsel,* their fellows', and their own."

COUNSELLOR AT LAW. An officer in the supreme court of the United States, and in some other courts, who is retained by a party in a cause to conduct the same on its trial on his behalf.

He differs from an attorney at law.

In the supreme court of the United States, the two degrees of attorney and counsel were at first kept separate, and no person was permitted to practise in both capacities, but the present practice is otherwise; Weeks, Att. 54. It is the duty of the counsel to draft or review and correct the special pleadings, to manage the cause on trial, and, during the whole course of the suit, to apply established principles of law to the exigencies of the case; 1 Kent 307. In England the term "counsel" is applied to a barrister.

Generally, in the courts of the various states the same person performs the duties of counsellor and attorney at law.

In giving their advice to their clients, counsel have duties to perform to their clients, to the public and to themselves. In such cases they have thrown upon them something which they owe to their administration of justice, as well as to the private interests of their employers. The interests propounded for them ought, in their own apprehension, to be just, or at least fairly disputable; and when such interests are propounded, they ought not to be pursued *per fas et nefas;* 1 Hagg. Adm. 222. An attorney and counsellor is not an officer of the United States, he is an officer of the court. His right to appear for suitors and to argue causes is not a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can be deprived only by the judgment of the court, for moral or professional delinquency; *Ex parte* Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366.

See ATTORNEY; PRIVILEGE; CONFIDENTIAL COMMUNICATIONS; DISBAR; BARRISTER.

COUNT (Fr. *comte;* from the Latin *comes*). An earl.

It gave way as a distinct title to the Saxon earl, but was retained in countess, viscount, and as the basis of county. *Termes de la ley;* 1 Bla. Com. 398. See COMES.

In Pleading. (Fr. *conte,* a narrative). The plaintiff's statement of his cause of action.

This word is in our old law-books used synonymously with declaration; but practice has introduced the following distinction. When the plaintiff's complaint embraces only a single cause of action, and he makes only one statement of it, that statement is called, indifferently, a declaration or count; though the former is the more usual term. But when the suit embraces two or more causes of action (each of which, of course, requires a different statement), or when the plaintiff makes two or more different statements of one and the same cause of action, each several statement is called a count, and all of them, collectively, constitute the declaration. In all cases, however, in which there are two or more counts, whether there is actually but one cause of action or several, each count purports, upon the face of it, to disclose a distinct right of action, unconnected with that stated in any of the other counts.

One object proposed in inserting two or more counts in one declaration when there is in fact but one cause of action, is, in some cases, to guard against the danger of an insufficient statement of the cause, where a doubt exists as to the legal sufficiency of one or another of two different modes of declaring; but the more usual end proposed in inserting more than one count in such case is to accommodate the statement to the cause, as far as may be, to the possible state of the proof to be exhibited on trial, or to guard, if possible, against the hazard of the proofs varying materially from the statement of the cause of action; so that, if one or more of several counts be not adapted to the evidence, some other of them may be so; Gould, Pl. c. 4, ss. 2, 3, 4; Steph. Pl. 266; *Doctrina Plac.* 178; 3 Com. Dig. 291; Dane, Abr. Index. In real actions, the declaration is usually called a count; Steph. Pl. 29. See COMMON COUNTS.

COUNT SUR CONCESSIT SOLVERE. A claim based upon a promise to pay. An ancient count in the mayor's court of London and now commonly used there. Under it the plaintiff can sue for any liquidated demand, but not for money due under a covenant. Particulars defining more precisely the nature of the claim must be delivered with the declaration. Odger, C. L. 1029.

COUNT AND COUNT-OUT. These words refer to the count of the house of commons by the speaker. Forty members, including the speaker, are required to constitute a quorum. Each day after parliament is opened, the speaker counts the house. If forty

members are not present he waits till four o'clock, and then counts the house again. If forty members are not then present, he at once adjourns it to the following meeting day. May, Parl. Prac. 219.

COUNTER (spelled, also, *Compter*). The name of two prisons formerly standing in London, but now demolished. They were the Poultry Counter and Wood Street Counter. Cowell; Whish. L. D.; Coke, 4th Inst. 248.

COUNTER AFFIDAVIT. An affidavit made in opposition to one already made. This is allowed in the preliminary examination of some cases.

COUNTER-BOND. A bond to indemnify. 2 Leon. 90.

COUNTER-CLAIM. A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending RECOUPMENT and SET-OFF, *q. v.*, though broader than either.

The New York code thus defines it:

The counter-claim must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action:—

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract existing at the commencement of the action. N. Y. Code, 1889, § 501. See National Fire Ins. Co. v. McKay, 21 N. Y. 191; Waddell v. Darling, 51 *id.* 327; Smith v. Hall, 67 *id.* 48; Elwell v. Skiddy, 77 *id.* 282; Ballou v. Ballou, 78 *id.* 325; Cook v. Jenkins, 79 *id.* 575; Coffin v. McLean, 80 *id.* 560; Ward v. Craig, 87 *id.* 550; Clapp v. Wright, 21 Hun (N. Y.) 240; Dietrich v. Koch, 35 Wis. 618; Devries v. Warren, 82 N. C. 356; Howe Mach. Co. v. Reber, 66 Ind. 498; Brady v. Brennan, 25 Minn. 210.

By such statutes when a counter-claim is established the defendant may recover in the same action the amount by which his claim exceeds that of the plaintiff. A question as to which the cases vary in result is the effect upon the jurisdiction when the counter-claim exceeds the limit of the court. Some courts hold that the jurisdiction is not ousted by reason of excess in the amount of the counter-claim; Howard Iron Works v. Elevating Co., 176 N. Y. 1, 68 N. E. 66; *aliter*, Haygood v. Boney, 43 S. C. 63, 20 S. E. 803; but it is said that the majority of the cases deny the right in such case to file the counter-claim; 17 Harv. L. Rev. 350 (citing Griswold v. Pieratt, 110 Cal. 259, 42 Pac. 820, and Almeida v. Sigerson, 20 Mo. 497), where that view is approved.

A counter-claim is a matter which is capable of use as the basis of a judgment against the plaintiff, and, of course, may be used as a set-off; Marconi Wireless Telegraph Co. of America v. Electric Signaling Co., 206 Fed. 295.

COUNTER-LETTER. An agreement to reconvey where property has been passed by absolute deed with the intention that it shall serve as security only. A defeasance by a separate instrument. Livingston v. Story, 11 Pet. (U. S.) 351, 9 L. Ed. 746.

COUNTER-SECURITY. Security given to one who has become security for another, the condition of which is, that if the one who first became surety shall be damnified, the one who gives the counter-security will indemnify him.

COUNTERFEIT. To make something false in the semblance of that which is true. It always implies a fraudulent intent. It refers usually to imitations of coin or paper money. See Vin. Abr. *Counterfeit;* State v. Calvin, R. M. Charlt. (Ga.) 151; Kirby v. State, 1 Ohio St. 185; FORGERY.

COUNTERMAND. A change or recalling of orders previously given.

Express countermand takes place when contrary orders are given and a revocation of the prior orders is made.

Implied countermand takes place when a new order is given which is inconsistent with the former order.

When a command or order has been given, and property delivered, by which a right vests in a third person, the party giving the order cannot countermand it. For example, if a debtor should deliver to A a sum of money to be paid to B, his creditor, B has a vested right in the money, and, unless he abandon that right and refuse to take the money, the debtor cannot recover it from A. 1 Rolle, Abr. 32, pl. 13; Yelv. 164; Styles 296. See 3 Co. 26 *b*; 2 Ventr. 298; 10 Mod. 432; Vin. Abr. *Countermand* (A, 1), *Bailment* (D); 9 East 49; Bac. Abr. *Bailment* (D); Com. Dig. *Attorney* (B, 9), (C, 8); Dane, Abr. *Countermand.*

COUNTERPART. Formerly, each party to an indenture executed a separate deed: that part which was executed by the grantor was called the original, and the rest the counterparts. It is now usual for all the parties to execute every part; and this makes them all originals. 2 Bla. Com. 296.

In granting lots subject to a ground-rent reserved to the grantor, both parties execute the deeds, of which there are two copies; although both are original, one of them is sometimes called the counterpart. See 12 Vin. Abr. 104; Dane, Abr. Index; 7 Com. Dig. 443; Merlin, *Rép. Double Ecrit.*

COUNTERPLEA. A plea to some matter incidental to the main object of the suit, and out of the direct line of pleadings. Steph. Pl., Andr. ed. 165; 2 Wms. Saund. 45 *h*. Thus, *counterplea of oyer* is the defendant's allegations why oyer of an instrument should

not be granted. *Counterplea to aid prayer* is the demandant's allegation why the vouchee of the tenant in a real action, or a stranger who asks to come in to defend his right, should not be admitted. *Counterplea of voucher* is the allegation of the vouchee in avoidance of the warranty after admission to plead. Counterpleas are of rare occurrence. *Termes de la Ley;* Com. Dig. *Voucher* (B, 1, 2); Dane, Abr.

COUNTEUR. In the time of Edward I, a pleader; also called a *Narrator*, and *Serjeant-Counteur.*

COUNTRY. A word often used in pleading and practice. Usually signifies a jury, or the inhabitants of a district from which a jury is to be summoned. 3 Bla. Com. 349; 4 *id.* 349; Steph. Pl. 73, 78, 230.

COUNTY. One of the civil divisions of a country for judicial and political purposes. 1 Bla. Com. 113. Etymologically, it denotes that portion of the country under the immediate government of a count. 1 Bla. Com. 116.

The states are generally divided into counties. Counties are, in many of the states, divided into townships or towns. In the New England states, however, towns are the basis of all civil divisions, and the counties are rather to be considered as aggregates of towns, so far as their origin is concerned. In Pennsylvania, the state was originally divided into three counties by William Penn. See Proud's Hist. Pa. 234; 2 *id.* 258.

In some states, a county is considered a corporation; Coles v. Madison County, Breese (Ill.) 154, 12 Am. Dec. 161; in others, it is held a quasi corporation; Inhabitants of County of Hampshire v. Franklin County, 16 Mass. 87; Emerson v. Washington County, 9 Greenl. (Me.) 88; Jackson v. Cory, 8 Johns. (N. Y.) 385; Boykin's Devisees v. Smith, 3 Munf. (Va.) 102. In regard to the division of counties, see Drake's Adm'r v. Vaughan, 6 J. J. Marsh. (Ky.) 147; State v. Jones, 9 N. J. L. 357, 17 Am. Dec. 483; Gary v. People, 9 Cow. (N. Y.) 640; Walsh v. Com., 89 Pa. 419, 33 Am. Rep. 771; Blount County v. Loudon County, 8 Baxt. (Tenn.) 74; Stuart v. Bair, *id.* 141; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Eagle v. Beard, 33 Ark. 497; Cocke v. Gooch, 5 Heisk. (Tenn.) 294. A county may be required by act of legislature to build a public work outside the county limits, where it is of special interest to the people of the county; Carter v. Bridge, 104 Mass. 236; Talbot County Com'rs v. County Com'rs, 50 Md. 245.

A state has a greater latitude of control over a county, than over a town or city, as the latter had a two-fold character—public, as an agency of the state, and private, as affecting matter of local concern; State v. Board of Com'rs, 170 Ind. 595, 85 N. E. 513.

The terms "county" and "people of the county" are, or may be, used interchangeably; St. Louis County Court v. Griswold, 58 Mo. 175.

In the English law, this word signifies the same as *shire*,—county being derived from the French, and *shire* from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided, for the better government thereof and the more easy administration of justice. There is no part of England that is not within some county; and the shirereeve (*sheriff*) was the governor of the province, under the *comes*, earl, or count.

COUNTY COMMISSIONERS. Certain officers generally intrusted with the superintendence of the collection of the county taxes and the disbursements made for the county. They are invested by the local laws with various powers. In some of the states they are called supervisors.

COUNTY CORPORATE. A city or town, with more or less territory annexed constituting a county by itself. 1 Bla. Com. 120. See State v. Finn, 4 Mo. App. 347. They differ in no material points from other counties.

COUNTY COURTS. A number of different local courts existed in England in early times, but their jurisdiction was gradually absorbed by the royal courts of justice to such an extent that in the 18th century practically all the judicial work of the country was done by the common law courts, the Lord Chancellor or the Master of the Rolls; 1 Holdsw. Hist. E. L. 418. See the various titles under COURT. In 1846 courts of limited jurisdiction were established for England and Wales. They were inferior courts of record. Various acts in reference to these courts were consolidated in an act passed in 1888 under which England and Wales were divided in 56 districts, in which, as a rule, a County Court is held by one of the 53 County Court judges once in every month, except September. The judges, who must be barristers of seven years standing, are appointed by the Lord Chancellor (except in the Duchy of Lancaster).

Jurisdiction depends mainly on the place where the defendant resides or the property in dispute is situated, and the nature and amount of the claim. Ordinarily, suit must be brought in the district where defendant resides or carries on business, but there are special exceptions.

The ordinary jurisdiction extends (if the amount in controversy does not exceed £100) to personal actions, ejectment, the trial of title to corporeal or incorporeal hereditaments. A County Court cannot, except by consent, try any action in which the title to any toll, fair, market or franchise (including patents) is in question, or for libel, slander, seduction or breach of promise of mar-

riage. It has all the powers in equity of the High Court of Justice (up to the jurisdictional amount of £500) in administration actions by creditors, legatees, devisees, heirs-at-law and next of kin, in actions for the executions of trusts, for the foreclosure of any charge or lien, for the specific performance, reforming or cancelling of agreements for the sale or lease of property, for dissolution or winding up partnerships.

In common law, but not in equity, the parties may agree that a particular court may try an action for a claim of any amount. In the large provincial towns it is a court of bankruptcy with all the powers therein of the High Court. Several of the County Courts have jurisdiction in admiralty. Numerous acts have extended their jurisdiction in special instances.

In American Law. Courts in many of the states of the United States and in Canada, of widely varying powers.

COUNTY PALATINE. An independent principality in England and Wales of the continental type in which the king's writ did not run. 1 Holdsw. Hist. E. L. 49. In feudal times political power was distributed among the larger landowners, who procured grants to themselves of the new processes and powers of the Curia Regis. Commissioners were sent out (1274) to enquire by what warrant different landowners were exercising their *jura regalia*. Many franchises were cancelled; the franchises of some remained. The Counties Palatine were Durham, Lancaster and Chester (by prescription). The palatine jurisdiction also existed in Wales and the Stannaries (see STANNARY COURTS) and in a lesser degree in the liberties of Ely, Pembroke (taken away by 27 Henry VIII. c. 26, § 17) and Hescham and the Universities of Oxford and Cambridge. *id.* The name was derived from *palatinus* used on the continent to imply something peculiarly royal. Lapsley, County Palatinate of Durham. Coke says the powers of those that had counties palatinate was Kinglike, for they might pardon treasons, murders, felonies and outlawries and make justices in Eyre, of assize, etc. All writs ran, and criminal process was made, in the name of the person having the County Palatine. 4 Inst. 205.

See COURTS OF THE COUNTIES PALATINE.

COUNTY SESSIONS. In England, the Court of General Quarter Sessions of the Peace held in every county once in every quarter of a year. Mozley & W. Law Dict.

COUPONS. Those parts of a commercial instrument which are to be *cut*, and which are evidence of something connected with the contract mentioned in the instrument. They are generally attached to bonds or certificates of loan, where the interest is payable at particular periods, and, when the interest is paid, they are cut off and delivered to the payor. In England, they are known as *warrants* or *dividend warrants*, and the securities to which they belong, debentures; 13 C. B. 372. In the United States they have been decided to be negotiable instruments, if payable to bearer or order, upon which suit may be brought though detached from the bond; Town of Cicero v. Clifford, 53 Ind. 191; Beaver County v. Armstrong, 44 Pa. 63; Haven v. Depot Co., 109 Mass. 88; Antoni v. Wright, 22 Gratt. (Va.) 833; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; Thompson v. Perrine, 106 U. S. 589, 1 Sup. Ct. 564, 27 L. Ed. 298; Jones, R. R. Sec. § 320; Myers v. R. Co., 43 Me. 232; Horne v. State, 82 N. C. 382; Walker v. State, 12 S. C. 200. Otherwise, in Clarke v. Janesville, 1 Biss. 105, Fed. Cas. No. 2,854, if the bond to which the coupons were attached was not negotiable; see Myers v. R. Co., 43 Me. 232; and otherwise if not payable to bearer or order; Evertson v. Bank, 66 N. Y. 14, 23 Am. Rep. 9; see Crosby v. R. Co., 26 Conn. 121. They are distinct instruments from the bonds, and can be added to the bond thereof to make up a jurisdictional amount; Edwards v. Bates County, 163 U. S. 269, 16 Sup. Ct. 967, 41 L. Ed. 155. Suits on a bond and on coupons cut therefrom are different causes of action; Presidio County, Tex., v. Bond & Stock Co., 212 U. S. 58, 29 Sup. Ct. 237, 53 L. Ed. 402.

In England the question has not been directly decided, but it has been held that they are not promissory notes, and therefore do not require a stamp; 13 C. B. 373. Dividend warrants of the Bank of England made payable to a particular person, but not containing words of transfer, were held not to be negotiable, notwithstanding they had been so by custom for sixty years; 9 Q. B. 396. A purchaser of overdue coupons takes only the title of his vendor; Arents v. Com., 18 Gratt. (Va.) 750; Gilbough v. R. Co., 1 Hughes 410, Fed. Cas. No. 5,419. Negotiable coupons were held entitled to days of grace; Evertson v. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Jones, R. R. Sec. § 326; *contra*, Arents v. Com., 18 Gratt. (Va.) 773; 2 Dan. Neg. Instr., 3d ed. § 1490 *a*.

Interest on coupons may be recovered in a suit on the coupons; Beaver County v. Armstrong, 44 Pa. 75; Hollingsworth v. Detroit, 3 McLean 472, Fed. Cas. No. 6,613; Genoa v. Woodruff, 92 U. S. 502, 23 L. Ed. 586; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; Ashuelot R. Co. v. Elliot, 57 N. H. 397; Burroughs v. Richmond County Com'rs, 65 N. C. 234; Connecticut Mut. Life Ins. Co. v. R. Co., 41 Barb. (N. Y.) 9. The *rate* of interest provided for in the bond continues on the coupon till it is merged in judgment; Cromwell v. Sac County, 96 U. S. 51, 24 L. Ed. 681; McLane v. Abrams, 2 Nev. 199; Marietta Iron Works v. Lottimer, 25 Ohio St. 621; *contra*, Brewster v. Wakefield, 22 How. (U. S.) 118, 16 L. Ed.

301; Com. of Virginia v. State, 32 Md. 501; Pearce v. Hennessy, 10 R. I. 223. See Jones, R. R. Sec. § 336. A suit on the coupon is not barred by the statute of limitations unless a suit on the bond would be barred; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. Ed. 809; otherwise, when the coupons have passed into the hands of the party who does not hold the bonds; Clark v. Iowa City, 20 Wall. (U. S.) 583, 22 L. Ed. 427. As to practice in actions on coupons, see Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. Ed. 725.

COUR DE CASSATION. In French Law. See COURTS OF FRANCE.

COURSE. The direction of a line with reference to a meridian.

Where there are no monuments, the land is usually described by courses and distances and those mentioned in the patent or deed will fix the boundaries. But when the lines are actually marked, they must be adhered to though they vary from the course mentioned in the deeds. See BOUNDARY.

COURSE OF BUSINESS. What is usually done in the management of trade or business. A statute exempting from distress property deposited with a tavern-keeper "in the usual course of business," only includes property deposited by a guest for safekeeping; Harris v. Boggs, 5 Blackf. (Ind.) 489. Carriages used for carrying the band and performers of a circus in a street parade, are not carriages "used solely for the conveyance of any goods or burdens in the course of trade;" L. R. 9 Exch. 25.

Men are presumed to act for their own interest, and to pursue the way usually adopted by men generally: hence it is presumed in law that men in their actions will pursue the usual course of trade.

COURSE OF THE VOYAGE. By this term is understood the regular and customary track, if such there be, which a ship takes in going from one port to another, and the shortest way. Marsh. Ins. 185; Phill. Ins. 981.

COURT (Fr. *cour*, Dutch, *koert*, a yard). A body in the government to which the administration of justice is delegated.

The presence of a sufficient number of the members of such a body regularly convened in an authorized place at an appointed time, engaged in the full and regular performance of its functions. Wightman v. Karsner, 20 Ala. 446; Brumley v. State, 20 Ark. 77.

The place where justice is judicially administered. Co. Litt. 58 *a*; 3 Bla. Com. 23, 25. See Hobart v. Hobart, 45 Ia. 501.

The judge or judges themselves, when duly convened. See JUDGE.

The term is used in all the above senses, though but infrequently in the third sense given. The application of the term—which orignally denoted the place of assembling—to denote the assemblage, strikingly resembles the similar application of the Laten term *curia* (if, indeed, it be not a mere translation), and is readily explained by the fact that the earlier courts were merely assemblages, in the court-yard of the baron or of the king himself, of those who were qualified and whose duty it was so to appear at stated times or upon summons. Traces of this usage and constitution of courts still remain in the courts baron, the various courts for the trial of impeachments in England and the United States, and in the control exercised by the parliament of England and the legislatures of the various states of the United States over the organization of courts of justice, as constituted in modern times. Indeed, the English parliament is still the *High Court of Parliament*, and in Massachusetts the united legislative bodies are entitled, as they (and the body to which they succeeded) have been from time immemorial, the *Genral Court*.

In England, however, and in those states of the United States which existed as colonies prior to the revolution, most of these judicial functions were early transferred to bodies of a compacter organization, whose sole function was the public administration of justice. The power of impeachment of various high officers, however, is still retained by the legislative bodies both in England and the United States, and is, perhaps, the only judicial function which has ever been exercised by the legislative bodies in the newer states of the United States. These more compact bodies are the *courts*, as the term is used in its modern acceptance.

The one common and essential feature in all courts is a judge or judges—so essential, indeed, that they are even called *the court*, as distinguished from the accessory and subordinate officers; Michigan Cent. R. Co. v. R. Co., 3 Ind. 239; McClure v. McClurg, 53 Mo. 173; see Gold v. R. Co., 19 Vt. 478. Courts of record are also provided with a recording officer, variously known as clerk, prothonotary, register, etc.: while in all courts there are counsellors, attorneys, or similar officers recognized as peculiarly suitable persons to represent the parties actually concerned in the causes, who are considered as officers of the court and assistants of the judges, together with a variety of ministerial officers, such as sheriffs, constables, bailiffs, tipstaves, criers, etc. For a consideration of the functions of the various members of a court, see the various appropriate titles, as JURY, SHERIFF, etc.

Courts are said to belong to one or more of the following classes, according to the nature and extent of their jurisdiction, their forms of proceeding, or the principles upon which they administer justice, viz.:

Admiralty. See ADMIRALTY.

Appellate, which take cognizance of causes removed from another court by appeal or writ of error. See APPEAL AND ERROR; BILL OF EXCEPTIONS; DIVISION OF OPINION.

Civil, which redress private wrongs. See JURISDICTION.

Criminal, which redress public wrongs, that is, crimes or misdemeanors.

Ecclesiastical. See ECCLESIASTICAL COURTS.

Of equity, which administer justice according to the principles of equity. See EQUITY; COURT OF EQUITY; COURT OF CHANCERY.

Of general jurisdiction, which have cognizance of and may determine causes various in their nature.

Inferior, which are subordinate to other courts. Nugent v. State, 18 Ala. 521. Also, those of a very limited jurisdiction.

Of law, which administer justice according to the principles of the common law.

Of limited or special jurisdiction, which can take cognizance of a few specified matters only.

Local, which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough, or, in England, of a barony.

Martial. See COURT-MARTIAL.

Not of record. See COURT OF RECORD.

Of original jurisdiction, which have jurisdiction of causes in the first instance. See JURISDICTION.

Of record. See COURT OF RECORD.

Superior. In England the High Court of justice is spoken of a superior court of record; in the United States the term superior courts has come to be applied to courts of intermediate jurisdiction between the inferior and supreme courts; also, those of controlling, as distinguished from those of subordinate, jurisdiction. As to superior and inferior courts, see 34 Amer. L. Rev. 71.

Supreme, which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, though not the court of final resort.

A court cannot pass upon the validity of its own organization; State v. Hall, 142 N. C. 710, 55 S. E. 806; but it would at least be a *de facto* court and its authority could not be attacked collaterally; In re Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264. See DE FACTO.

As to holding court with closed doors, see OPEN COURT.

See the various titles following.

Courts of the United States are treated under UNITED STATES COURTS; Courts of Great Britain, Ireland, Scotland, and France, under COURTS OF ENGLAND, IRELAND, SCOTLAND, AND FRANCE, respectively.

COURT OF ADMIRALTY. See ADMIRALTY; UNITED STATES COURTS.

COURT OF ANCIENT DEMESNE. A court of peculiar constitution, held by a bailiff appointed by the king, in which alone the tenants of the king's demesne could be impleaded. 2 Burr. 1046; 1 Spence, Eq. Jur. 100; 2 Bla. Com. 99; 1 Report Eng. Real Prop. Comm. 28; 1 Steph. Com. 224; 1 Poll. & Maitl. 367.

COURT OF APPEAL. In England, one of the two sections of the Supreme Court of Judicature. See COURTS OF ENGLAND.

COURT OF APPEALS. An appellate tribunal which, in Kentucky, Maryland, and New York, is the court of last resort. In New Jersey, it is known as the Court of Errors and Appeals; in Virginia and West Virginia, the Supreme Court of Appeals; in Connecticut, the Supreme Court of Errors; in Massachusetts and Maine, the Supreme Judicial Court; in the other states, and in the federal courts, the Supreme Court. In Texas there is a court of Civil Appeals, and in Illinois, Indiana, Missouri, Pennsylvania, and other states, and the United States, there are appellate courts inferior to the highest court of appeals.

COURT OF ARCHDEACON. The most inferior of the English ecclesiastical courts, from which an appeal lay to the Consistory Court. The archdeacon formerly held it as a deputy of the bishop. Later it had a customary jurisdiction, and the bishops adopted the plan of exercising their jurisdiction through officials; 1 Holdsw. Hist. E. L. 369.

COURT OF THE ARCHES. The usual name for the Court of the "Official Principal" of the Archbishop of Canterbury. It was a court of appeal from all the diocesan courts and also a court of first instance in all ecclesiastical causes.

The most ancient consistory court belonging to the archbishop of Canterbury for the trial of spiritual causes, the judge of which is called the *dean of the arches*, because he anciently held his court in the church of St. Mary *le Bow (Sancta Maria de arcubus*,—literally, "St. Mary *of the arches*"), so named from the style of its steeple which is raised upon pillars built *archwise*, like so many bent bowes. *Termes de la Ley.* It is now held, as are also the other spiritual courts, in the hall belonging to the College of Civilians, commonly called Doctor's Commons. It is still a part of the English system.

Its proper jurisdiction is only over the thirteen peculiar parishes of London, which were exempt from the jurisdiction of the bishop of London; but, the office of dean of the arches having been for a long time united with that of the archbishop's "Official Principal," the judge of the arches, in right of such added office, receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. 3 Bla. Com. 64; 3 Steph. Com. 306; Whart. Law Dict. *Arches Court.* Many suits are also brought before him as original judge, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction under a certain form of proceeding known in the common law as *letters of request.* 3 Steph. Com. 306; 2 Chitty, Gen. Pr. 496; 2 Add. Eccl. 406.

From the court of arches an appeal formerly lay to the pope, and afterwards, by statute 25 Hen. VIII. c. 19, to the king in chancery (*i. e.*, to the Court of Delegates, *q. v.*), as supreme head of the English church, but now, by 2 & 3 Will. IV. c. 92, and 3 & 4 Will. IV. c. 41, to the Judicial Committee of the Privy Council.

A suit is commenced in the ecclesiastical court by citing the defendant to appear, and exhibiting a libel containing the complaint against him, to which he answers. Proofs are then adduced, and the judge pronounces a decree upon hearing the arguments of advocates, which is then carried into effect.

The corresponding court of the archbishop of York was the Chancery Court.

The Public Worship Regulation Act (37 & 38 Vict.) provides for the appointment by the archbishops of Canterbury and York of a single judge to hold the position of the Official Principal of the Court of the Arches and the Chancery Court, and Master of the Faculties to the Archbishop of Canterbury. He must be either a barrister of 10 years standing or a judge of one of the superior courts.

COURT OF ASSISTANTS. A court in Massachusetts organized in 1630, consisting of the governor, deputy governor and assistants. It exercised the whole power both legislative and judicial of the colony and an extensive chancery jurisdiction as well; S. D. Wilson in 18 Am. L. Rev. 226.

COURTS OF ASSIZE AND NISI PRIUS. Courts composed of two or more commissioners, called judges of assize (or of assize and *nisi prius*), who are twice in every year sent by special commission on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall; there being, however, as to London and Middlesex, this exception, that, instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, at what are called the London and Westminster sittings.

These judges of assize came into use in the room of the ancient justices in eyre *(justiciarii in itinere)*, who were regularly established, if not first appointed, by the Parliament of Northampton, A. D. 1176 (the first of these of whom we have any record, were appointed in 1170), with a delegated power from the king's great court or *aula regis*, being looked upon as members thereof; though the present justices of assize and *nisi prius* are more immediately derived from the stat. Westm. 2, 13 Edw. I. c. 30, and consist principally of the judges of the superior courts of common law, being assigned by that statute out of the king's sworn justices, associating to themselves one or two discreet knights of each county. By stat. 27 Edw. I. c. 4 (explained by 12 Edw. II. c. 3), assizes and inquests are allowed to be taken before any one justice of the court in which the plea is brought, associating with him one knight or other approved man of the county: by stat. 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench (though the plea be not depending in his own court), or before the chief baron of the exchequer, if he be a man of the law, or, otherwise, before the justices of assize, so that one of such justices be a judge of the king's bench or common pleas, or the king's sergeant sworn; and, finally, by 2 & 3 Vict. c. 22, all justices of assize may, on their respective circuits, try causes pending in the court of exchequer, without issuing (as it had till then been considered necessary to do) a separate commission from the exchequer for that purpose. 3 Steph. Com. 352; 3 Bla. Com. 57, 58.

There are eight circuits (formerly seven), viz.: Northern, Northeastern, Midland, Southeastern, Oxford, Western, North Wales and Chester and South Wales. At least one judge of the High Court goes around each circuit three times a year—in the winter, summer and autumn. Two judges attend at the larger towns twice a year. At Liverpool, Manchester and Leeds four assizes are held in each year, two of them by two judges and two by one judge. The judges are under three commissions—oyer and terminer, gaol delivery and assize. The last empowers them *inter alia* to try civil actions; 2 Odger, Com. Law. 985.

Where courts of this kind exist in the United States, they are instituted by statutory provision. Dawson v. Ryan, 4 W. & S. (Pa.) 404. See OYER AND TERMINER; GAOL DELIVERY; COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; NISI PRIUS; COMMISSION OF THE PEACE.

COURT OF ATTACHMENTS. The lowest of the three courts held in the forests. It has fallen into total disuse. It was held before the verderers of the forest once in every forty days, to view the attachments by the foresters for offences against the vert and the venison. It had cognizance only of small trespasses. Larger ones were enrolled and heard by the Justices in Eyre; 1 Holdsw. Hist. E. L. 343. See COURTS OF THE FOREST; Rawle, Exmoor For. 51.

COURT OF AUDIENCE. The Archbishop of Canterbury possessed a jurisdiction concurrent with that of the Court of the Arches, which he exercised in the Court of Audience, later held by a judge. It does not appear to have been revived after the Restoration. 1 Holdsw. Hist. E. L. 371. The Archbishop of York held a like Court of Audience.

COURT OF AUGMENTATION. A court established by 27 Hen. VIII. c. 27, for managing the revenues and possessions of all monasteries whose income was under £200 a year (which by an act of parliament of the same session had been given to the king), and for determining suits relating thereto.

It was called "The Court of the Augmentations of the Revenues of the King's Crown" (from the *augmentation* of the revenues of the crown derived from the suppression of the monasteries), and was a court of record, with one great seal and one privy seal,—the officers being a chancellor, who had the great seal, a treasurer, a king's attorney and solicitor, ten auditors, seventeen receivers, with clerk, usher, etc.

All dissolved monasteries under the above value, with some exceptions, were in survey of the court, the chancellor of which was directed to make a yearly report of their revenues to the king. The court was dissolved in the reign of queen Mary, but the Office of Augmentation remained long after; and the records of the court are now at the Public Record Office. Cowell.

COURT OF BANKRUPTCY. A court of record, in England, with jurisdiction in bankruptcy, primary and appellate, which is declared a court of law and equity for that

purpose. The Bankrupt Law Consolidation Act, 1849.

By the judicature acts, 1873 and 1875 (*q. v.*) the court of bankruptcy was consolidated into the supreme court of judicature.

COURT BARON. A domestic court, incident to every manor, held by the steward within the manor, for redressing misdemeanors and nuisances therein, and for settling disputes among the tenants relating to property. It is not a court of record. 1 Poll. & Maitl. Hist. E. L. 580.

Coke (1st Inst. 58 *a*) speaks of the Court Baron as of two natures; the first, by the common law, called a court baron, a freeholders' court where they are the judges; the second, a customary court, in which the lord or his steward is the judge. Blackstone (3 Com. 33) says that, though in their nature distinct, they are frequently confounded together. Later writers doubt if there were two courts; 1 Poll. & Maitl. Hist. E. L. 580.

Their jurisdiction was practically abolished by the County Courts Act, 30 and 31 Vict. c. 142, s. 28; 3 Steph. Com. 279. In the state of New York such courts were held while the state was a province. See charters in Bolton's Hist. of New Chester. A deed of Wm. Penn to Letitia Penn for a manor in Pennsylvania granted the privilege of holding court baron; Myers, Immigration of Quakers 127. They existed in Maryland; Hall, The Lords Baltimore, etc. The court derived its name from the fact that it was the court of the baron or lord of the manor. 3 Bla. Com. 33, n.; see Fleta, lib. 2, c. 53; though it is explained by some as being the court of the freeholders, who were in some instances called barons. Co. Litt. 58 *a*.

The lord's steward usually presided. From the 13th century he was a lawyer. All kinds of personal actions (where the cause of action did not exceed 40 shillings in value) were tried there; contracts, trespass, libel, slander, assault, etc. Both the common law and chancery courts interfered to protect suitors if injustice were done. The jurisdiction of the customary court declined and all that it was used for was copyhold conveyancing business; 1 Poll. & Maitl. 578.

COURT OF CHANCERY, or CHANCERY. A court formerly existing in England and still existing in several of the United States, which possesses an extensive equity jurisdiction.

The name is said by some to be derived from that of the chief judge, who is called a chancellor; others derive both names directly from the *cancelli* (bars) which in this court anciently separated the press of people from the officers. See 3 Bla. Com. 46, n.; Story, Eq. Jur. 40; CANCELLARIUS.

In American Law. A court of general equity jurisdiction.

The terms equity and chancery, court of equity and court of chancery, are constantly used as synonymous in the United States. It is presumed that this custom arises from the circumstance that the equity jurisdiction which is exercised by the courts of the various states is assimilated to that possessed by the English courts of chancery. Indeed, in some of the states it is made identical therewith by statute, so far as conformable to our institutions.

Separate courts of chancery or equity exist in a few of the states; in others, the courts of law sit also as courts of equity; in others, equitable relief is administered under the forms of the common law; and in others, the distinction between law and equity has been formally abolished or never existed. The federal courts exercise an equity jurisdiction as understood in the English courts at the time of the Revolution; Miller Const. 318; independent of local state law; *id.*; Gordon v. Hobart, 2 Sumn. 401, Fed. Cas. No. 5,609; and the remedies are not according to state practice but as distinguished and defined in that country from which we derive our knowledge of those principles; Robinson v. Campbell, 3 Wheat. (U. S.) 212, 4 L. Ed. 372; whether the state courts in the district are courts of equity or not; Lorman v. Clarke, 2 McLean, 568, Fed. Cas. No. 8,516; Gaines v. Relf, 15 Pet. (U. S.) 9, 10 L. Ed. 642; Bennett v. Butterworth, 11 How. (U. S.) 669, 13 L. Ed. 859.

In English Law. Formerly the highest court of judicature next to parliament. Prior to the judicature acts it was the superior court of chancery, called distinctively "The High Court of Chancery," and consisted of six separate tribunals, viz.: the court of the lord high chancellor of Great Britain; the court of the master of the rolls, or keeper of the records in chancery; the court of appeal in chancery, the three separate courts of the vice-chancellors.

The jurisdiction of this court was fourfold.

The common-law or ordinary jurisdiction. By virtue of this the lord-chancellor was a privy councillor and prolocutor of the house of lords. The writs for a new parliament issued from this department. The Petty Bag Office was in this jurisdiction. It was a common-law court of record, in which pleas of *scire facias* to repeal letters-patent were exhibited, and many other matters were determined, and whence all original writs issued. See 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

The statutory jurisdiction included the power which the lord-chancellor exercised under the *habeas corpus* act, and by which he inquired into charitable uses, but did not include the equitable jurisdiction.

The specially delegated jurisdiction included the exclusive authority which the lord-chancellor and lords justices of appeal had over the persons and property of idiots and lunatics.

The equity or extraordinary jurisdiction was either *assistant* or *auxiliary* to the common law, including discovery for the promotion of substantial justice at the common law, preservation of testimony of persons not litigants relating to suits or questions at law, removal of improper impediments and prevention of unconscientious defences at common law, giving effect to and relieving

from the consequences of common-law judgments; *concurrent* with the common law, including the remedial correction of fraud, the prevention of fraud by injunction, accident, mistake, account, dower, interpleader, the delivery up of documents and specific chattels, the specific performance of agreements; or *exclusive*, relating to trusts, infancy, the equitable rights of wives, legal and equitable mortgages, the assignment of choses in action, partition, the appointment of receivers, charities, or public trusts. Whart. Law Dict.

By the Judicature Acts (1873 and 1875) this court was merged in the High Court of Justice. See COURTS OF ENGLAND.

The inferior courts of chancery are the courts of the Palatine Counties (Lancaster and Durham), the courts of the Two Universities, the lord-mayor's courts in the city of London, and the court of chancery in the Isle of Man. See 18 & 19 Vict. c. 48, and the titles of these various courts. See Story, Eq. Jur.; Dan. Ch. Pr.; Spence, Eq. Jur.; 1 Holdsw. Hist. E. L. 194; Spence, 2 Sel. Essays in Anglo-Amer. L. H. 219; COURTS OF EQUITY; EQUITY; CANCELLARIUS.

COURT OF THE CHIEF JUSTICE IN EYRE. The highest of the courts of the forest, held every three years, by the chief justice, to inquire of purprestures or encroachments, assarts, or cultivation of forest land, claims to franchises, parks, warrens, and vineyards in the forest, as well as claims of the hundred, claims to the goods of felons found in the forest, and any other civil questions that might arise within the forest limits. But it had no criminal jurisdiction, except of offences against the forest laws. In the exercise of this, he passed sentences upon offenders convicted by the verderers in Swanimote (see COURT OF SWANIMOTE) and performed all the duties of a justice in eyre (*q. v.*). It was called also the court of justice seat. Inderwick, King's Peace. See FOREST LAWS; COURTS OF THE FOREST. Since the Restoration the forest laws have fallen into disuse. The office was abolished in 1817.

COURT OF CHIVALRY. An ancient military court, possessing both civil and criminal jurisdiction touching matters of arms and deeds of war. It was held by the constable of England and after that office reverted to the crown in the time of Henry VIII., by the earl-marshal. Davis, Mil. Law 13. It had cognizance, by statute 13 Ric. II. c. 2, "of contracts and other matters touching deeds of arms and war, as well out of the realm as within it." This jurisdiction was of importance while the English kings held territories in France.

As a court of criminal jurisdiction, it had jurisdiction over "pleas of life and member arising in matters of arms and deeds of war, as well out of the realm as within it." It was *curia militaris*.

It was not a court of record and could neither fine nor imprison; 7 Mod. 137 (where it was held to have still survived with doubtful and trifling jurisdiction). It is said to have fallen entirely into disuse; 3 Bla. Com. 68. The last trial before a Court of Chivalry was that of Lord Audeley, in 1497, but the trial of the Earl of Warwick in 1499 took place before the Court of the Lord High Steward. Harcourt, The Steward and Trial of Peers.

COURTS CHRISTIAN. Ecclesiastical courts, which see.

COURTS OF THE CINQUE PORTS. Courts of limited local jurisdiction, formerly held before the mayor and jurats (aldermen) of the Cinque Ports. From the earliest times they had the right to hold pleas and the right to wreck, and were always exempt from the jurisdiction of the admiralty. A writ of error lay to the lord-warden in his Court of Shepway, and from this court to the King's Bench.

In 1856 when the general civil jurisdiction of the lord-warden was abolished, his admiralty jurisdiction was retained. An appeal lies to the lord-warden in admiralty causes from the County Courts within his jurisdiction. Their jurisdiction was not affected by the Judicature Act of 1873. The regular sitting place was in the aisle of St. James' Church, Dover, but the judge now often sits at the Royal Courts of Justice; See 1 Holdsw. Hist. E. L. 305; 3 Bla. Com. 79; 2 Steph. Com. 499. This jurisdiction is said to present the type and original of all the admiralty and maritime courts; 1 Holdsw. Hist. E. L. 305.

COURT OF CLAIMS. See UNITED STATES COURTS.

COURT OF THE CLERK OF THE MARKET. A tribunal incident to the market held in the suburbs of the king's court. The *clericus mercati hospitii regis* was the incumbent of an honorable office pertinent to the ancient custom of holding such markets. The clerk in early times witnessed verbal contracts; later he adjudicated on prices of corn, bread, and wine and other commodities as fixed by the justices of the peace; inquired as to the correctness of weights and measures in every city, town, or borough, subject to appeal to the lord high steward, who could fine him for extortion and send him to the tower for a third offence. The clerk also measured land in case of dispute, and he had power to send bakers, brewers, and others to the pillory for unlawful dealings. See Inderwick, King's Peace 104.

The jurisdiction over weights and measures formerly exercised was taken from him by stat. 5 & 6 Will. IV. c. 63; 9 M. & W. 747; 4 Steph. Com. 323.

COURT OF COMMERCE. See UNITED STATES COURTS.

COURT OF COMMISSIONERS OF SEWERS. See COMMISSIONERS OF SEWERS.

COURT OF COMMON PLEAS. In American Law. A court of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law.

Courts of this name exist in some of the states of the United States, and frequently have a criminal as well as civil jurisdiction. They are, in general, courts of record, being expressly made so by statute in Pennsylvania, April 14, 1834, § 18. In Pennsylvania they exercise an equity jurisdiction also, as well as that at common law. Courts of substantially similar powers to those indicated in the definition exist in all the states, under various names.

In English Law. Formerly one of the three superior courts of common law at Westminster.

This court, which is sometimes called, also, Bancus Communis, Bancus, and Common Bench, was a branch of the *curia regis*. At the end of John's reign there was a separation between the court which sat at a certain place to hear common pleas and the court which followed the king with jurisdiction both over common pleas and pleas of the crown. There were not as yet two distinct bodies of judges. There is a reported case in 1237 which shows that the distinction was well recognized. In 1272 there was a chief justice of the common pleas, and from that date it may be said that the separation was complete. The common pleas was inferior to the court which followed the king, since error lay from it to his court. Magna Carta provided that it should sit at some fixed place, which was usually Westminster. 1 Holdsw. Hist. E. L. 74.

The establishment of this court at Westminster, and the consequent construction of the *Inns of Court* and gathering together of the common-law lawyers, enabled the law itself to withstand the attacks of the canonists and civilians. It derived its name from the fact that the causes of *common people* were heard there. It had exclusive jurisdiction of real actions as long as those actions were in use, and had also an extensive and, for a long time, exclusive jurisdiction of all actions between subjects. This latter jurisdiction, however, was gradually encroached upon by the king's bench and exchequer, with which it afterwards had a concurrent jurisdiction in many matters. Formerly none but serjeants at law were admitted to practise before this court *in banc*. See SERJEANTS-AT-LAW. Its judges were always serjeants-at-law.

It consisted of a chief justice and four puisne or associate justices.

It had a civil, common-law jurisdiction, concurrent with the king's bench and exchequer, of personal actions and actions of ejectment, and a peculiar or exclusive jurisdiction of real actions, actions under the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, the registration of judgments, annuities, etc., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 Vict. c. 15; respecting fees for conveyances under 3 & 4 Will. IV. c. 74; the examination of married women concerning their conveyances; 11 & 12 Vict. c. 70; 17 & 18 Vict. c. 75; 19 & 20 Vict. c. 108, § 73; and of appeals from the revising barristers' court; 6 & 7 Vict. c. 18. Whart. Law Dict.

See BILL OF MIDDLESEX.

Appeals formerly lay from this court to the King's Bench; and by statutes 11 Geo. IV. and 1 Will. IV. c. 70, writs of error were afterwards taken to the King's Bench and Exchequer Chamber, from whose judgment an appeal lay to the House of Lords. 3 Bla. Com. 40.

Its jurisdiction has been transferred to the High Court of Justice. See COURTS OF ENGLAND.

COURTS OF CONSCIENCE. See COURTS OF REQUESTS.

COURT FOR CONSIDERATION OF CROWN CASES RESERVED. A court established by stat. 11 & 12 Vict. c. 78, composed of such of the judges of the superior courts of Westminster as were able to attend, for the consideration of questions of law reserved by any judge in a court of oyer and terminer, gaol delivery, or quarter sessions, before which a prisoner had been found guilty by verdict. 4 Steph. Com. 442. The trial judge was empowered to "state a case" for the opinion of that court. He could not be compelled to do so, and only a question of law could be raised. If the court considered that the point had been wrongly decided at the trial, the conviction would be quashed. Prior to this act a judge who had a doubt as to the correctness of his opinion in a criminal trial would sentence the prisoner, but would suspend punishment until he could consult his brother judges or serjeants. By Act of 1907, the Court of Criminal Appeal was created and the Court for Crown Cases Reserved was abolished.

COURT, CONSISTORY. See CONSISTORY COURT.

COURT OF CONVOCATION. A convocation or ecclesiastical synod, which is in the nature of an ecclesiastical parliament.

There is one for each province. They are composed respectively of the archbishop, all the bishops, deans, and archdeacons of their province, with one proctor, or representative, from each chapter, and, in the province of Canterbury, two proctors for the beneficed parochial clergy in each diocese, while in the province of York there are two proctors for each archdeaconry. In York the convocation consists of only one house; but in Canterbury there are two houses, of which the archbishop and bishops form the upper house, and the lower consists of the remaining members of the convocation. In this house a prolocutor, performing the duty of president, is elected. These assemblies meet at the time appointed in the queen's writ. The convocation has long been summoned *pro forma* only, but is still, in fact, summoned before the meeting of every new parliament, and adjourns immediately afterwards, without proceeding to the dispatch of any business.

The purpose of the convocation is stated to be the enactment of canon law, subject to the license and authority of the sovereign, and consulting on ecclesiastical matters.

In their judicial capacity, their jurisdiction extends to matters of heresy, schisms, and other mere spiritual or ecclesiastical causes,—an appeal lying from their judicial proceedings to the king in council, by stat. 2 & 3 Will. IV. c. 92.

But there is a question whether at any time Convocation ever acted as a court. There is some evidence to show that in the 14th and 15th centuries persons accused of heresy were brought before Convocation by the bishop, but the members did not vote on such trials, being probably rather in the nature of a body of assessors to the archbishop. Convocation exercises no jurisdiction at the present day; 1 Holdsw. Hist. E. L. 373.

Cowell; Bac. Abr. *Ecclesiastical Courts*, A, 1; 1 Bla. Com. 279; 2 Steph. Com. 525, 668; 2 Burn, Eccl. Law, 18.

COURT OF THE CORONER. A court the chief duty of which was to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end; 4 Steph. Com. 323; 4 Bla. Com. 274; now generally known as an inquest. See CORONER.

COURTS OF THE COUNTIES PALATINE. In the county palatine of Durham there was a Central Court of Pleas, a body of justices who sat by virtue of commissions of assize, oyer and terminer and gaol delivery. The judges were often the same persons as those who sat in the royal courts. The bishop's council was a court of appeal and had original jurisdiction. The bishop had his Chancery. In 1536 an act was passed by which the independent judicial system was made to depend directly upon the king.

In the county palatine of Lancaster, the courts were a Court of Common Pleas, justices of assize, gaol delivery, oyer and terminer and of the peace; a Chancery Court presided over by the Vice-Chancellor; and a Court of Duchy Chamber, presided over by the Chancellor of the duchy, which sat at Westminster and heard appeals from the Chancery Court. It has ceased to exist. The Chancellor of the Duchy is no longer a judicial officer. The Act of 1536 (*supra*) extended to Lancaster and also to Chester.

In the county palatine of Chester, a justice held a Court of Pleas for the Crown and Common Pleas. The Lord Chancellor or Lord Keeper, by act in 1536, could appoint justices of the peace and gaol delivery for Chester and Wales. The chamberlain of Chester, assisted by the vice-chamberlain, exercised the equitable and common-law jurisdiction of the Chancery and of a Court of Exchequer. The palatinate jurisdiction of Chester and Wales ended in 1830. Six counties in Wales were created in 1284 and organized on the English model; other counties in Wales were under the Lords Marchers.

For the existing courts, see COURTS OF ENGLAND; COUNTY PALATINE; 1 Holdsw. Hist. E. L. 47; 1 Steph. Hist. C. L. 138; Coke, 4 Inst. 239; 1 Harg. L. Tr. 378.

COURT OF DELEGATES. A court of appeal for all ecclesiastical cases and called the High Court of Delegates. 25 Henry VIII. c. 19; repealed, 1 & 2 Phil. & Mary, c. 8; revived, 1 Eliz. c. 1. The crown could issue a Commission of Review and rehear the cases. It was held by commissioners appointed under the Great Seal. It was therefore a shifting body, which could not establish general rules of procedure. It was usually composed of junior civilians. By 2 & 3 Will. IV. c. 92, its jurisdiction was transferred to the Privy Council. 1 Holdsw. Hist. E. L. 373.

COURT FOR DIVORCE AND MATRIMONIAL CAUSES. In English Law. A court which had the jurisdiction formerly exercised by the ecclesiastical courts in respect of divorces *a mensa et thoro*, suits of nullity of marriage, suits of jactitation of marriage, suits for restitution of conjugal rights, and all suits, causes, and matters matrimonial.

It consisted of the lord chancellor and the justices of the queen's bench, the common pleas, the exchequer, and the judge of the court of probate, who was entitled judge ordinary.

The judge ordinary exercised all the powers of the court, except petitions for dissolving or annulling marriages and applications for new trials of matters of fact, bills of exception, special verdict and special cases, for hearing which excepted cases he must be joined by two of the other judges. Provision was made for his absence by authorizing the lord chancellor to appoint one of certain judicial persons to act in such absence. Juries were summoned to try matters of fact, and such trials were conducted in the same manner as jury trials at common law. It is now merged in the High Court of Justice. See COURTS OF ENGLAND.

COURT OF THE DUCHY OF LANCASTER. A court of special jurisdiction, which has jurisdiction of all matters of equity relating to lands holden of the king in right of the duchy of Lancaster. See COURTS OF THE COUNTIES PALATINE.

COURT OF THE EARL MARSHAL. In the reign of William the Conqueror the marshal was next in rank to the constable, in command of the army. When the constable's office ceased, his duties devolved upon the earl marshal. The military Court of the Constable came to be known as the Marshal's Court, or, in its modern form, Court-Martial. Aside from its criminal jurisdiction, it had much to do with questions relating to fiefs and military tenures, though not to property rights involved therein. The earl marshal is now the head of the Heralds' College. Davis, Mil. Laws of U. S. 14. See Hale, Hist. C. L. 36; Grose, Mil. Antiq. See COURT OF CHIVALRY; COURTS-MARTIAL; CONSTABLE OF ENGLAND.

COURTS OF ENGLAND. The Judicature Acts (in force November 2, 1875) created the Supreme Court of Judicature. It con-

sists of the High Court of Justice and the Court of Appeal, both of which are superior courts of record. In itself it performs no judicial function.

To the High Court of Justice was transferred every jurisdiction formerly vested in the High Court of Chancery, the Queen's Bench, and the Common Pleas at Westminster, the Exchequer as a court of revenue as well as a common-law court, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, the Courts created by Commissioners of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissioners, and, by Act of 1883, the jurisdiction of the London Court of Bankruptcy.

To the Court of Appeal were transferred all jurisdiction and powers of the Court of Appeal in Chancery, the Court of Appeal in Chancery of the County Palatine of Lancaster, the Court of the Lord Warden of the Stannaries, the Court of Exchequer Chamber, the Judicial Committee of the Privy Council upon appeal from any judgment or order of the High Court of Admiralty, and many other minor appellate jurisdictions.

The High Court of Justice now consists of three divisions: The King's Bench Division, the Chancery Division, and the Probate, Divorce and Admiralty Division. By the original Judicature Act each of the superior courts of common law was made a separate division of the High Court of Justice, but by an Order in Council, December 16, 1880, the Common Pleas and Exchequer Divisions were merged in the King's Bench Division, and the offices of Lord Chief Justice of the Common Pleas Division and Lord Chief Baron of the Exchequer Division were abolished.

The courts of law give any relief which the Court of Chancery could formerly have given. Law and equity are now administered concurrently. See (1887) 12 App. Cas. 308.

The King's Bench Division. The Lord Chief Justice of England is the President, nominated by the Prime Minister; there are seventeen puisne judges appointed on the recommendation of the Lord Chancellor. They hear cases in London or at the assizes throughout England and Wales. At the commencement of each sitting, one judge is appointed to hear causes in London and one in Liverpool. They are assisted by nine Masters who have power to transact all interlocutory and much other business, by District Registrars in most of the large provincial towns and by Official Referees. It has the bankruptcy jurisdiction formerly vested in the London Court of Bankruptcy, exercised by one of the judges called the Judge in Bankruptcy.

The judges of this division frequently sit as a Divisional Court, consisting of two or more judges. Any number of such courts may sit at the same time. In civil matters its jurisdiction is almost entirely appellate. It deals with appeals from Revising Barristers, from County Courts in Bankruptcy, and from certain inferior courts; with special cases stated by the courts of petty sessions and quarter sessions in civil matters, and by the Railway Commissioners; appeals from the Mayor's Court, London, the Salford Hundred Court, the V. C. Court of Oxford, and in a few cases of appeals from a judge of the High Court in Chambers. On the crown side it deals with indictments and criminal informations, and in civil proceedings with *mandamus*, *habeas corpus*, *certiorari*, prohibitions, informations in the nature of *quo warranto*, attachments for contempt of court and petitions of right.

The Chancery Division consists of the Lord Chancellor, who is President, and six puisne judges; the latter are divided into three groups of two each. The work consists chiefly of equity business; it, however, administers law as well as equity, but it tries no cases with a jury. It deals with administering the estates of deceased persons, partnership, mortgages, charitable and private trusts, infants, and other heads of equitable jurisdiction.

The Probate, Divorce and Admiralty Division consist of the President and one puisne judge. Probate matters consist of the probate of wills, but their interpretations and the administrations of the estates are in the Chancery Division. In admiralty matters it hears appeals from the County Courts.

The Court of Appeal consists of the Master of the Rolls and five Lords Justices of Appeal, with the occasional assistance of the Lord Chancellor, any ex-Lord Chancellor, the Chief Justice of England and the President of the P., D. & A. Division. It sits in two divisions; the Master of the Rolls presides in the first and the senior Lord Justice in the second. It has the jurisdiction formerly exercised by the Lord Chancellor and by the Court of Appeal in Chancery, including bankruptcy, and by the Exchequer Chamber, and in admiralty and lunacy, etc.

The House of Lords is not a part of the Supreme Court of Judicature. When sitting as the supreme appellate court, it is usually composed of the Lord Chancellor, the ex-Lord Chancellor, if any, and the six Lords of Appeal in Ordinary; peers who have held high judicial office are entitled to sit. At least three judges are required to form a quorum. It may summon the judges to assist in their deliberations and give their opinion on any point of law. Lay peers have, strictly speaking, a right to vote, but, since 1883, have never exercised that right. It has no original jurisdiction in ordinary civil actions; an appeal lies to it against any judgment or order of the Court of Appeal.

Judicial Committee of the Privy Council, as created in 1833, is a court of final appeal

from the ecclesiastical courts, the courts of India, the colonies, the Channel Islands and the Isle of Man. It is held by the Lord Chancellor, the six Lords of appeal in Ordinary, if Privy Councillors, and such other members of the Privy Council as have held high judicial office in the United Kingdom or the colonies.

There are other courts with local or special jurisdiction which are superior courts of record but are not part of the Supreme Court of Judicature.

The Chancery Court of the County Palatine of Lancaster is held by the V. C. of the Duchy and County Palatine of Lancaster at Liverpool and Manchester. Within the county palatine it has the jurisdiction of the Chancery Division; it is essential that the parties to actions should be within the county palatine.

The Chancery Court of the County Palatine of Durham is held by the Chancellor of the County Palatine at Durham. Either the parties to a suit must reside in the county palatine or the property be situate there. Its jurisdiction is unlimited in amount and is similar to that of the Chancery Division.

The Court of Railway and Canal Commissioners is held by a judge of the High Court and two laymen appointed by the crown, on the nomination of the Board of Trade, one of whom must be an expert in railway matters. The judge alone decides points of law. It deals with transportation facilities, preferences, rates, etc. An appeal lies to the Court of Appeal.

The Inferior Courts of Record. The most important are the County Courts (see that title). There are nineteen borough courts, whose jurisdiction is generally limited to causes of action arising in the borough; in most of them the Recorder is the judge. The most prominent of them are: The Mayor's Court, London; the City of London Court; the Liverpool Court of Passage; the Salford Hundred Court; the Courts of Tolzey and Pie Poudre, Bristol. From the Court of Passage an appeal lies to the Court of Appeal; from the others to the King's Bench Division.

The University Courts are analogous to the borough courts, and claim exclusive jurisdiction over the members of the Universities. See CHANCELLORS' COURTS OF THE TWO UNIVERSITIES.

The Sheriff's Court is held by the undersheriff with a jury of twelve.

A Coroner's Court is held in every county, every county borough and in borough having a court of quarter sessions.

Inferior Courts Not of Record. The *Revising Barrister's Court* annually revises the lists of parliamentary voters, of burgesses and county electors. It is held by one barrister. An appeal lies, in certain cases, on a point of law, to the King's Bench Divisional Court, and from there, but only on special leave, to the Court of Appeal.

The Courts of Petty Sessions, which may be held by a single justice, have jurisdiction in disputes as to contracts between master and servant, or between members of friendly societies, affiliation orders and in certain matrimonial matters.

The ordinary *criminal courts* are: Courts of Petty Session; Courts of Quarter Session; the Assizes; the Central Criminal Court; the King's Bench Division; and the Court of Criminal Appeal. Courts of Borough Quarter Sessions are now held in 131 of the larger cities and towns, having the same jurisdiction as the Quarter Sessions in a county. The judge of each is called a Recorder (*q. v.*).

Peers charged with treason, felony, or misprision are tried either in the House of Lords or in the Court of the Lord High Steward.

Appeals in criminal cases from the Channel Islands, the Isle of Man, the Empire of India and the colonies are heard by the Judicial Committee of the Privy Council.

Courts of Petty Sessions are held by Justices of the Peace appointed by the crown on the recommendation of the Lord Lieutenant of the county. There is no limit to the number in any county. They are unpaid. They elect their own chairmen. They hold office for life, but may be removed by the Lord Chancellor for misconduct. They are appointed for a whole county, but ordinarily act in the sessional division in or near which they reside. Any two or more may in their own division form a Capital Court of Petty Session. An appeal lies to the Court of Quarter Session or the King's Bench Division, the latter only on a point of law.

Courts of Quarter Sessions are inferior Courts of Record. All the justices of the county are justices of this court for their county; two constitute a quorum. They try by jury prisoners committed for trial by the Courts of the Petty Sessions for the county. In boroughs there is a great variety of such courts under their various charters. The judge of a borough court is called a Recorder. Appeals from the Petty Sessions are heard without a jury; the cases are reheard. The King's Bench Division may review on *certiorari* any proceeding of a Court of Quarter Sessions.

The Assizes are held by the judges of the High Court at the capital of each county and other assize towns. There are eight circuits. See ASSIZE.

The Central Criminal Court was created in 1834. It is the Court of Assize and Quarter Session for the City of London and its Liberties, and the Court of Assize for the Counties of London and Middlesex and certain parts of Essex, Kent and Surrey. It sits at least twelve times a year. Its judges include the Lord Chancellor, the Judges of the High Court, the Lord Mayor, Aldermen, Recorder and Common Serjeant of the City of London, and two Commissioners.

The *King's Bench Division* is the successor of the Assize Court for the ancient county of

Middlesex, which could try on indictment any treason, felony, or misdemeanor committed therein, and it still has the same power, though rarely exercised. It can try any misdemeanor committed in any part of England, for which a criminal information has been filed by an officer of the crown, and any crimes committed out of England by public officials of colonies, or by officials of the crown in India. Any indictment from inferior courts may be removed by *certiorari* and tried there either "at bar" (by three judges), or at nisi prius (by one), before a jury of the county where the crime was committed. But this can be done only on the ground that an impartial trial could not be had in the court below, or that some difficult question of law is involved, or a special jury, or a view of certain premises, is necessary to a satisfactory trial. It has general superintendence over all inferior courts of criminal jurisdiction and can review any proceedings of a court of quarter sessions on summary jurisdiction or *certiorari*. Any court of summary jurisdiction may state a case setting forth the facts for the King's Bench Division and the latter may order justices of the petty sessions to state such a case. A court of quarter sessions may state a case for it on a point of law arising in some matter that has come before it on appeal from a court of petty sessions.

The Court of Criminal Appeal has jurisdiction over all criminal cases tried at Quarter Sessions, the Assizes, the Central Criminal Court, or in the King's Bench Division. It consists of the Lord Chief Justice of England and the other judges of the King's Bench Division. Not less than three judges must be present and the number must be uneven. An appeal lies to the House of Lords when the Attorney General has certified that a point of law of exceptional public importance is involved. A convicted prisoner has a right of appeal on any question of law or fact, or of mixed law and fact, if he can obtain leave of the Court of Criminal Appeal or a certificate from the judge who tried the case that it is a fit case for appeal. By leave of the Court of Criminal Appeal a prisoner can appeal against a sentence passed upon him, but in such case that the court may inflict a more serious sentence. It may quash a conviction and may enter a verdict of acquittal. In a proper case it will hear fresh evidence. It cannot grant a new trial.

The House of Lords may try any one impeached by the House of Commons for any high crime or misdemeanor; also temporal peers and peeresses accused of high treason, felony or misprision. At such trial it is presided over by a peer as Lord High Steward appointed by the crown, or in the absence of such appointment, by the Lord Chancellor. All the members of the House are entitled to be present and are equally judges of law and fact. The judges may be summoned to give their opinion on any question of law. The bishops may be present, but may not vote in capital cases. If the House of Lords is not sitting, the accused will be tried in the Court of the Lord High Steward. See that title.

The above is abridged from Odgers, Common Law. See also Halsbury's Laws of England, title *Courts*.

See COUNTY COURTS.

COURT OF EQUITY. A court which administers justice according to the principles of equity.

As to the constitution and jurisdiction of such courts, see COURT OF CHANCERY.

Such courts are not, strictly speaking, courts of record except when made so by statute; Yelv. 226; Evans v. Tatem, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717. Their decrees touch the person only; Post v. Neafie, 3 Cai. (N. Y.) 36; but are conclusive between the parties; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Van Riper v. Claxton, 9 N. J. Eq. 302; Hopkins v. Lee, 6 Wheat. (U. S.) 109, 5 L. Ed. 218. See Rice's Heirs v. Lowan, 2 Bibb (Ky.) 149. And as to the personalty, their decrees are equal to a judgment; 2 Madd. 355; 2 Salk. 507; 1 Vern. 214; Post v. Neafie, 3 Cai. (N. Y.) 35; and have preference according to priority; 3 P. Wms. 401, n.; Cas. *temp.* Talb. 217; 4 Bro. P. C. 287; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 638. See Chase, Bla. Com. 843, n. 3. They are admissible in evidence between the parties; Pleasants v. Clements, 2 Leigh (Va.) 474; Goddard v. Long, 5 Smedes & M. (Miss.) 783; Randall v. Parramore, 1 Fla. 409; Whitmore v. Johnson's Heirs, 10 Humphr. (Tenn.) 610; and see Landers v. Beauchamp, 8 B. Monr. (Ky.) 493; Wardlaw v. Hammond, 9 Rich. (S. C.) 454; when properly authenticated; Barbour v. Watts, 2 A. K. Marsh. (Ky.) 290; and come within the provisions of the constitution for authentication of judicial records of the various states for use as evidence in other states; Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3,328.

An action may be brought at law on a decree of a foreign court of chancery for an ascertained sum; 1 Campb. 253; Burnett v. Wylie, Hempst. 197, Fed. Cas. No. 2172a; but not for an unascertained sum; Post v. Neafie, 3 Cai. (N. Y.) 37, note; but *nil debet* or *nul tiel record* is not to be pleaded to such an action; Evans v. Tatem, 9 S. & R. (Pa.) 252, 11 Am. Dec. 717. See EQUITY; COURT OF CHANCERY.

COURT OF ERROR. An expression applied especially to the court of exchequer chamber and the house of lords, as taking cognizance of *error* brought. Moz. & W. Dict. 3 Steph. Com. 333. It is applied in some of the United States to the court of last resort in the state. See COURT OF APPEALS.

COURT OF EXCHEQUER. In English Law. A superior court of record, administering justice in questions of law and revenue.

It was the lowest in rank of the three superior common-law courts of record, and had jurisdiction originally only of cases of injury to the revenue by withholding or non-payment. The privilege of suing and being sued in this court in personal actions was extended to the king's accountants, and then, by a fiction that the plaintiff was a debtor of the king to all personal actions. See QUO MINUS, WRIT OF. It had formerly an equity jurisdiction, and the cases were heard before the Treasurer, the Chancellor of the Exchequer and the Barons. By statute in 1342 this jurisdiction was transferred to the court of chancery.

It consisted of one chief and four puisne judges or barons.

As a court of common law, it administered redress between subject and subject in all actions whatever, except real actions.

The appellate jurisdiction from this court was to the judges of the king's bench and common pleas sitting as the court of exchequer chamber, and from this latter court to the house of lords; 3 Steph. Com. 338; 3 Bla. Com. 44. Its jurisdiction has been transferred to the high court of justice. See COURTS OF ENGLAND.

COURT OF EXCHEQUER CHAMBER. In English Law. A court for the correction and prevention of errors of law in the three superior common-law courts of the kingdom.

A court of exchequer chamber was first erected by statute 31 Edw. III. c. 12, to determine causes upon writs of error from the common-law side of the exchequer court. It consisted of the chancellor, treasurer, and the "justices and other sage persons as to them seemeth." The judges were merely assistants. A second court of exchequer chamber was instituted by statute 27 Eliz. c. 8, consisting of the justices of the common pleas and the exchequer, or any six of them, which had jurisdiction in error of cases in the king's bench. In 1830 these courts were abolished and the court of exchequer chamber substituted in their place as an intermediate court of appeal between the three common-law courts and Parliament. It consisted of the judges of the two courts which had not rendered the judgment in the court below. It is now merged in the High Court of Justice. See COURTS OF ENGLAND.

There was an early practice, continuing as late as the 17th century, by which cases of difficulty in either of the three common-law courts might be adjourned to be argued before all the judges and the barons in the exchequer chamber; but the judgment was given in the court in which the proceedings had begun. 1 Holdsw. Hist. E. L. 109.

COURT OF FACULTIES. A tribunal of the archbishop in England.

It does not hold pleas in any suits, but creates rights to pews, monuments, and other mortuary matters. It has also various other powers under 25 Hen. VIII. c. 21, in granting licenses, faculties, dispensations, etc., of different descriptions; as, a license to marry, a faculty to erect an organ in a parish church, to level a churchyard, to remove bodies previously buried; and it may also grant dispensations to eat flesh on days prohibited, or to ordain a deacon under age, and the like. The archbishop's office in this tribunal is called *magister ad facultates;* Co. 4th Inst. 337; 2 Chit. Gen. Pr. 507.

It still exists as a registry for marriage licenses. It appoints notaries.

See COURT OF ARCHES.

COURT OF FIRST INSTANCE. See FIRST INSTANCE.

COURTS OF THE FOREST. Courts held for the enforcement of the forest laws. The lowest of these was the Woodmote, or Court of Attachments (*q. v.*). The next was the Swanimote (*q. v.*). The highest was the Court of the Chief Justice (*q. v.*). There was also a Survey of Dogs (see REGARD) held by the Regarders of the Forest every three years for the lawing of dogs. Inderwick, King's Peace. See FOREST LAWS.

COURTS OF FRANCE. Cour de Cassation (from *casser*, to reverse, because it only affirms or reverses) is the highest court in France (the Tribunal des Conflits possibly excepted). It is composed of forty-five Conseillers, with one Premier Président and three Présidents de Chambre. Attached to it are sixty lawyers who are both Avoués and Avocats.

There are twenty-seven Cours d'Appel, sitting in twenty-seven different cities and each having jurisdiction over several departments; also three hundred and fifty-nine district courts of first instance, two hundred and fourteen Tribunals of Commerce, and a large number of Justices of the Peace; also a certain number of Tradesmen's Courts, Conseils de Prud'hommes.

TRIBUNAL DES CONFLITS.—This is a jurisdictional court and nothing else. A dispute as to whether a given question shall be disposed of by a government department or by the law courts is decided by this court. The Minister of Justice is President of this court, *ex officio;* the eight other members are taken from the Conseil d'Etat and the Cour de Cassation.

COURTS OF THE FRANCHISES. Jurisdictions in the early Norman period which rested upon royal grants—often assumed. Edward I., in 1274, sent out commissioners to enquire by what warrant different landowners were exercising their *jura regalia.* Those showing continued possession since the beginning of Richard I. were allowed to stand—chiefly the less important franchises; the exceptions are the palatinate jurisdictions. See COURTS OF THE COUNTIES PALATINE. There were many varieties of lesser franchises, such as those conferred by the old Saxon terms, *sac* and *soc*, *infangtheft* and *outfangtheft*, view of frankpledge. Some of these franchises were recognized as existing by the County Courts Acts, 1846–1888. 1 Holdsw. Hist. E. L. 61.

COURT OF GENERAL QUARTER SESSIONS OF THE PEACE. **In American Law.** A court of criminal jurisdiction, so-called in many states.

In English Law. A court of criminal jurisdiction, in England, held in each county once in every quarter of a year, but in the county of Middlesex twice a month. 4 Steph. Com. 317. When held at other times than quarterly, the sessions are called "general sessions of the peace."

It is held before two or more justices of the peace, one of whom was a justice of the *quorum*.

Edward III. appointed justices of the peace for each county in England and enacted that they should meet at least four times a year, and the ordinary meetings of the county court appear soon to have merged in, or been extinguished by, these quarterly meetings of justices which are now known as Quarter Sessions of the Peace. 2 Odgers, C. L. 966. See COURTS OF ENGLAND.

COURT OF GREAT SESSIONS IN WALES. A court formerly held in Wales; abolished by 11 Geo. IV. and 1 Will. IV. c. 70, and the Welsh judicature incorporated with that of England. 3 Bla. Com. 77; 3 Steph. Com. 317, n.

COURT OF HIGH COMMISSION. An ecclesiastical court created under the Act of Supremacy, 1 Eliz. c. 1, § 8 (1559). Its duties were to enforce the Acts of Supremacy and Uniformity and to deal generally with ecclesiastical offences. It entertained all important causes of doctrine and ritual; also matters of immorality and misconduct of the clergy and laity and of recusancy and nonconformity. It had concurrent jurisdiction with the ordinary ecclesiastical court. It fell in 1640 and was not revived at the Restoration; 1 Holdsw. Hist. E. L. 375.

COURT-HOUSE. The building occupied for the purposes of a court of record. The term may be used of a place temporarily occupied for the sessions of a court, though not the regular court-house; as, a church used when the court-house was occupied by troops; Kane v. McCown, 55 Mo. 181; and see Hambright v. Brockman, 59 Mo. 52; and where the court-house was burned down, sales required by law to be at its door must be held at the ruins of the door; Waller v. Arnold, 71 Ill. 350.

COURT, HUNDRED. See HUNDRED COURT.

COURT OF HUSTINGS. The county court in the city of London.

It is held nominally before the lord mayor, recorder, and aldermen; but the recorder is practically the sole judge. It has an appellate jurisdiction of causes in the sheriff's court of London. A writ of error lies from the decisions of this court to certain commissioners (usually five of the judges of the superior courts of law), from whose judgment a writ of error lies to the house of lords. No merely personal actions can be brought in this court. See 3 Bla. Com. 80, n.; 3 Steph. Com. 293, n.; Madox, Hist. Exch. c. 20; Co. 2d Inst. 327. Since the abolition of all real and mixed actions except ejectment, the jurisdiction of this court has fallen into comparative desuetude. Pulling on Cust. Lond.

In American Law. A local court in some parts of Virginia. Smith v. Commonwealth, 6 Gratt. 696.

COURT FOR THE TRIAL OF IMPEACHMENTS. A tribunal for determining the guilt or innocence of any person impeached. In England, the House of Lords, and in this country, generally, the more select branch of the legislative assembly, constitutes a court for the trial of impeachments. A peer could always be impeached for any crime, and although Blackstone lays it down that a commoner cannot be impeached for a capital offence, but only for a high misdemeanor, the opinion seems to have prevailed that he could be impeached for high treason; 4 Bla. Com. 260; 4 Steph. Com. 299; May, Parl. Prac. c. 23.

The Commons might impeach any person before the House of Lords. The practice fell into abeyance between 1459 and 1621, and its place was taken by Acts of Attainder. There has been no instance of impeachment since 1805. 1 Holdsw. Hist. E. L. 190.

COURT FOR THE RELIEF OF INSOLVENT DEBTORS IN ENGLAND. A court in London only, which received the petitions of insolvent debtors and decided upon the question of granting a discharge.

It was held by the commissioners of bankruptcy; and its decisions, if in favor of a discharge, were not reversible by any other tribunal. See 3 Steph. Com. 426; 4 *id.* 287. Abolished by the Bankruptcy Act of 1861.

COURT OF INQUIRY. **In English Law.** A court sometimes appointed by the crown to ascertain the propriety of resorting to ulterior proceedings against a party charged before a court-martial. See 2 Steph. Com. 590; 1 Coler. Bla. Com. 418, n.; 2 Brod. & B. 130. Also a court for hearing the complaints of private soldiers. Moz. & W. Dict.; Simmons, Cts. Mart. § 341.

In American Law. A court constituted by authority of the articles of war, invested with the power to examine into the nature of any transaction, accusation, or imputation against any officer or soldier.

They are not strictly *courts*, having no power to try and determine guilt or innocence. They are rather *agencies* created by statute to investigate facts and report thereon. They cannot compel the attendance of witnesses nor require them to testify; Davis, Mil. Law 220. They may be convened by any

military commander who has power to convene a court-martial to try the charge which is to be inquired into. The President may convene a court of inquiry at any time; otherwise they can be convened only on the application of the officer or soldier whose conduct is in question. They are composed of from one to three commissioned officers, with a recorder. They give no opinions unless required to do so. 119th Art. of War. Their proceedings are admitted in evidence by a court-martial, in cases not capital nor extending to the dismissal of an officer, if the oral testimony cannot be obtained; 121st Art. of War.

A *naval* court of inquiry may be ordered by the President, Secretary of the Navy, or commander of a fleet or squadron, consisting of not more than three commissioned officers. They "have power to summon witnesses, etc., in the same manner as courts-martial, but they shall only state facts and not give their opinion unless expressly required so to do" in the convening order. The person under inquiry, or his attorney, have a right to cross-examine witnesses (R. S. § 1624). The Act of February 16, 1909, provides for subpœnas to witnesses. See COURTS-MARTIAL (naval).

COURTS OF IRELAND. The *Court of Appeal* consists of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the Lord Chief Baron of the Exchequer and two Lords Justices of Appeal.

The *High Court of Justice.* The Chancery Division consists of the Lord Chancellor, the Master of the Rolls, a Judge and a Land Judge. The King's Bench Division consists of the Lord Chief Justice, the Lord Chief Baron, and five judges, one of which is a probate judge and another a judge in admiralty and bankruptcy cases.

There are 33 County Court judges and chairmen of Quarter Sessions in the different counties.

COURT OF JUSTICE SEAT. See COURT OF THE CHIEF JUSTICE IN EYRE.

COURT OF JUSTICIARY. See COURTS OF SCOTLAND.

COURT OF KING'S BENCH. The supreme court of common law in the kingdom, now merged in the High Court of Justice. See COURTS OF ENGLAND.

It was one of the successors of the *curia regis* and received its name, it is said, because the king formerly sat in it in person, the style of the court being *coram rege ipso* (before the king himself). During the reign of a queen it was called the Queen's Bench, and during Cromwell's Protectorate it was called the Upper Bench. Its jurisdiction was originally confined to the correction of crimes and misdemeanors which amounted to a breach of the peace, including those trespasses which were committed with force *(vi et armis)*, and in the commission of which there was, therefore, a breach of the peace. By aid of a fiction of the law (see COURT OF THE STEWARD AND THE MARSHAL; BILL OF MIDDLESEX), the number of actions which might be alleged to be so committed was gradually increased, until the jurisdiction extended to all actions on the case, of debt upon statutes or where fraud was alleged, and, finally, included all personal actions whatever, and the action of ejectment. See ASSUMPSIT; ARREST; ATTACHMENT. It was from its constitution, ambulatory and liable to follow the king's person, all process in this court being returnable *"coram rege ubicunque tum fuerimus in Anglia"* (wherever in England we [the sovereign] shall then be). It was for centuries held at Westminster. As early as Henry IV.'s reign the king could not pronounce judgment.

It consisted of a lord chief justice and four puisne or associate justices, who were, by virtue of their office, conservators of the peace and supreme coroners of the land.

It had original criminal jurisdiction and transferred jurisdiction from inferior courts, by *Certiorari*, where a fair trial could not be had in the inferior court or some difficult question of law was likely to arise; also by writ of error and motion for a new trial. Its civil jurisdiction was original and in error. The former did not exist originally in ordinary civil suits between man and man, but was attained by a fiction that the defendant was in the custody of the marshal *(supra)*. The jurisdiction in error was by *audita querela*, motion for a new trial, and in respect of certain errors in the process of the court. Jurisdiction in error belonged almost exclusively to the King's Bench. It had superintendence over the proper observance of the law by officials and others by means of certain "prerogative writs": *Certiorari*, prohibition, *mandamus*, *quo warranto*, *habeas corpus*, *de homini replegiando*, mainprize, the writ *de odio et atia* (which last three were superseded by *habeas corpus*); 1 Holdsw. Hist. E. L. 78.

COURT LANDS. See DEMESNE.

COURT LEET. In English Law. A court of record for a particular hundred, lordship, or manor, holden therein before the steward of the leet, for the punishment of petty offences and the preservation of the peace. Kitchin, Courts Leet.

The Sheriff's Tourn *(q. v.)* was the Grand Court Leet for the county.

The privilege of holding them was a franchise subsisting in the lord of the manor by prescription or charter, and might be lost by disuse. The court leet had a limited criminal jurisdiction. For some offences of a lower order, punishment by fines, amercements, or other means might be inflicted. For the higher crimes, they either found indictments which were to be tried by the higher courts, or made presentment of the case to such higher tribunals. They also took *view of frank-pledge*. Among other duties for the keeping of the peace, the court assisted in the election of, or, in some cases, elected certain municipal officers in the borough to which the leet was appended. A court leet is still held in many manors and a few boroughs in England; Odgers, C. L. 965.

Powell, Courts Leet; 1 Reeve, Hist. Eng. Law; Inderwick, King's Peace 11; 1 Poll. & Maitl. 568; 4 Steph. Com. 306.

It was but a specially important moot of the *leta*, the fraction of the hundred or wap-

entake, alienated into private hands. Vinogradoff, Engl. Soc. in Eleventh Cent. 214.

COURT OF THE LORD HIGH ADMIRAL. In the earlier part of the 14th century, the Admiral possessed a disciplinary jurisdiction over his fleet. After 1340 it is reasonable to suppose that the Admiral could hold an independent court and administer justice in piracy and other maritime cases. In 1353 a case was had before the Admiral and the Council. Four years later there is the earliest distinct reference to a Court of Admiralty. There were at first several admirals and several courts. From the early 15th century there was one Lord High Admiral and one Court of Admiralty. 1 Holdsw. Hist. E. L. 313. The term *admiral* appears to have been first used in 1300. *id.*

COURT OF THE LORD HIGH STEWARD. If the House of Lords is not sitting, cases of impeachment and temporal peers and peeresses accused of high treason, felony or misprision are tried in the Court of the Lord High Steward. He is appointed for the occasion, and is usually the Lord Chancellor. All peers who have a right to sit and vote in Parliament must be summoned. They are the sole judges of fact, and the majority, which must consist of twelve at least, decides. The Lord High Steward has a vote, and is judge of all matters of law.

HOUSE OF LORDS; COURTS OF ENGLAND. Trials of peers before it began about 1500. See Harcourt, The Steward and Trial of Peers.

COURT OF THE LORD HIGH STEWARD OF THE UNIVERSITIES. In English Law. A court constituted for the trial of scholars or privileged persons connected with the university of Oxford or Cambridge who are indicted for treason, felony, or mayhem.

The court consists of the lord high steward, or his deputy nominated by the chancellor of the university and approved of by the lord high chancellor of England. The steward issues a precept to the sheriff, who returns a panel of eighteen freeholders, and another to the university beadle, who return a panel of eighteen matriculated laymen. From these panels a jury *de medietate* is selected, before whom the cause is tried. An indictment must first have been found by a grand jury, and cognizance claimed thereof at the first day. 3 Bla. Com. 83; 4 *id.* 277; 1 Steph. Com. 67; 3 *id.* 341; 4 *id.* 261. See CHANCELLORS' COURTS OF THE UNIVERSITIES.

COURT OF MAGISTRATES AND FREEHOLDERS. A court in South Carolina for the trial of slaves and free persons of color for criminal offences. Now abolished.

COURT OF THE MARSHALSEA. See COURT OF THE STEWARD AND THE MARSHAL.

COURT-MARTIAL. A military or naval tribunal, which has jurisdiction of offences against the laws of the service, military or naval, in which the offender is engaged.

Courts-martial have some of the functions of the Court of Chivalry, which title see. They exist and have their jurisdiction by virtue of the military law, the court being constituted and empowered to act in each instance by authority from a commanding officer. The general principles applicable to courts-martial in the army and navy are essentially the same. Courts-martial for the regulation of the militia are held in the various states under local statutes, which resemble in their main features those provided for in the army of the United States; and when in actual service the militia, like the regular troops, are subject to courts-martial, of which a majority of members must be militia officers (Act of May 27, 1908). Where all the members of a court-martial convened to try a volunteer officer are officers of the regular army, the court is illegal; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049 (considering at length the historical relations of volunteers to the regular army and approving Deming v. McClaughry, 113 Fed. 639, 51 C. C. A. 349).

ARMY COURTS-MARTIAL.—By Act of March 2, 1913, it is provided that after July 1, 1913, courts-martial shall be of three kinds: 1. *General Courts-Martial* (consisting of any number of officers from 5 to 13 inclusive) may try any person, subject to military offence, punishable by the Articles of War, and any other person who by statute or the law of war is subject to trial by military tribunal.

Special Courts-Martial (consisting of any number of officers from 3 to 5 inclusive) shall have power to try any person subject to military law, except an officer, for any crime or offence not capital, punishable by the Articles of War, but the President may make regulations excepting from their jurisdiction any class or classes of persons. They have power to adjudge punishment, not to exceed confinement at hard labor for 6 months or forfeiture of pay, or both, with reduction to the ranks of non-commissioned officers and reduction in classification of first-class privates.

Summary Courts-Martial (one officer) may try any soldier, except one having a certificate of eligibility to promotion, for any crime or offence not capital, punishable by the Articles of War. But non-commissioned officers shall not, if they object, be tried without the authority of officers competent to bring them to trial before a General Court-Martial. They may adjudge punishments not to exceed confinement at hard labor for 3 months or forfeiture of 3 months pay, or both, with reduction to the ranks as aforesaid; but when the Summary Court-Martial is also the commanding officer, confinement or forfeiture of pay for more than one month, must be approved by superior authority.

Art. 74 provides that officers who may appoint a court-martial shall be competent to appoint a judge-advocate for the same. He withdraws when the court sits in closed session. His advice must be given in open court. U. S. R. S. § 1342.

The jurisdiction of such courts is limited

to offences against the military law (which title see) committed by individuals in the service; Smith v. Shaw, 12 Johns. (N. Y.) 257; which latter term includes sutlers, retainers to the camp, and persons serving with the army in the field; 60th Art. of War; and persons employed in a *quasi*-military capacity with its troops in time of war and on its theatre; Davis, Mil. L. 478.

While a district is under martial law, by proclamation of the executive, as for rebellion, they may take jurisdiction of offences which are cognizable by the civil courts only in time of peace; 11 Op. Att.-Gen. 137. This rule is said by American writers to apply where the army passes into a district where there are no civil courts in existence; Benet, Mil. Law 15.

Military commissions organized during the Civil War, in a state not invaded and not engaged in rebellion, in which the federal courts were not obstructed in the exercise of their judicial functions, had no jurisdiction to convict, for a criminal offence, a citizen, who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service; and congress could not invest them with any such power; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281. Cases arising in the land and naval forces, or in the militia in time of war or public danger, are excepted from the right of trial by jury; *ibid.*

The court must appear from its record to have acted within its jurisdiction; Fox v. Wood, 1 Rawle (Pa.) 143; Brooks v. Adams, 11 Pick. (Mass.) 442; Mills v. Martin, 19 Johns. (N. Y.) 7; Mathews v. Bowman, 25 Me. 168; Ex parte Biggers, 1 McMull. (S. C.) 69; Mitchell v. Harmony, 13 How. (U. S.) 134, 14 L. Ed. 75. A court-martial unlawfully convened is not a *de facto* court; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049. A want of jurisdiction either of the person, Meade v. Deputy Marshall, 1 Brock. 324, Fed. Cas. No. 9,372, or of the offence, will render the members of the court and officers executing its sentence trespassers; Wise v. Withers, 3 Cra. (U. S.) 331, 2 L. Ed. 457. So, too, the members are liable to a civil action if they admit or reject evidence contrary to the rules of the common law; 2 Kent 10; V. Kennedy, Courts-Mart. 13; or award excessive or illegal punishment; V. Kennedy, Courts-Mart. 13. The President may return the proceedings with a recommendation that a more severe sentence be imposed; Swaim v. U. S., 165 U. S. 563, 17 Sup. Ct. 448, 41 L. Ed. 823.

The decision and sentence of a court-martial, having jurisdiction of the person accused and of the offence charged, and acting within the scope of its lawful powers, cannot be reviewed or set aside by writ of *habeas corpus;* Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. But by *habeas corpus*, the legality of the action of a court-martial—whether it was legally constituted and had jurisdiction—may be enquired into; In re Reed, 100 U. S. 23, 25 L. Ed. 538.

"Courts-martial are lawful tribunals, with authority to determine finally any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." Carter v. Roberts, 177 U. S. 496, 20 Sup. Ct. 713, 44 L. Ed. 861. Quoted with approval in Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236; Grafton v. U. S., 206 U. S. 333, 347, 27 Sup. Ct. 749, 51 L. Ed. 1084.

The presumptions in favor of official action preclude attack on the sentences of courts-martial, though they are courts of special or limited jurisdiction; In re Chapman, 166 U. S. 670, 17 Sup. Ct. 677, 41 L. Ed. 1154, disapproving Runkle v. U. S., 122 U. S. 543, 7 Sup. Ct. 1141, 30 L. Ed. 1167. They are entitled to the same finality as to the issue involved as the judgment of a civil court; Grafton v. U. S., 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084. Questions of procedure, the improper admission of evidence, and the like, are not grounds of collateral attack on the judgment of a court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823. Under Art. 62, general courts-martial may take cognizance of all crimes not capital committed by an officer or soldier in the territory within which he is serving; this is concurrent with civil courts; if the former first obtains jurisdiction, its judgment can be disregarded by the civil courts only for reasons affecting its jurisdiction; Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084.

If the offence is a crime against society, the punishment provided by law may be imposed and also a dishonorable discharge; In re Mason, 105 U. S. 696, 26 L. Ed. 1213.

Acquittal by a court-martial does not bar a prosecution by the civil authorities; In re Fair, 100 Fed. 149. Acquittal in a state court on a charge of murder does not bar a trial by court-martial for "conduct to the prejudice of good order and military discipline," though based on the same act; In re Stubbs, 133 Fed. 1012.

The President, by virtue of his office as Commander-in-Chief, may appoint a general court-martial; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

The presiding officer has no command over the other members; they are all on an equality; Dig. J. Adv. Gen. 609.

No officer shall, when it can be avoided, be tried by officers inferior to him in rank. 79th Art. Whether it "can be avoided" is for the decision of the convening officer; Swaim v.

U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

Consent does not give jurisdiction to a court of regular officers to try officers or soldiers of other forces; McClaughry v. Deming, 186 U. S. 49, 22 Sup. Ct. 786, 46 L. Ed. 1049.

Retired army officers are subject to trial by court-martial; Murphy v. U. S., 38 Ct. Cl. 511; Closson v. U. S., 7 App. D. C. 460; so is a minor who has enlisted without consent of his parents or guardians and has deserted; Solomon v. Davenport, 87 Fed. 318, 30 C. C. A. 664. When jurisdiction has attached, an enlisted man may be tried and sentenced after his enlistment has expired; Barrett v. Hopkins, 7 Fed. 312; and his sentence carried out; Coleman v. Tennessee, 97 U. S. 509, 24 L. Ed. 1118; so of an officer after he has ceased to be such; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236.

Courts-martial should in general follow the rules of evidence of the civil courts and especially of the United States criminal courts; Davis, Mil. L. 251; Town of Lebanon v. Heath, 47 N. H. 359; 2 Op. A.-G. 343. Perhaps more latitude is allowed; Davis, Mil. L. 251. In England (Act of 1881) the ordinary rules of evidence must be applied. The accused is not entitled to counsel but the privilege is usually granted; Davis, Mil. L. 38.

Where a prisoner on trial for a trivial offence is absent for a day, it does not vitiate the proceedings; Weirman v. U. S., 36 Ct. Cl. 236. Where the offence is one punishable by the civil authorities, a court-martial may inflict the same punishment and add a dishonorable discharge; Ex parte Mason, 105 U. S. 696, 26 L. Ed. 1213, cited in Carter v. McClaughry, 183 U. S. 382, 22 Sup. Ct. 181, 46 L. Ed. 236.

A death sentence requires the concurrence of two-thirds of the members; Art. 96.

Naval Courts-Martial.—*Summary courts-martial* (R. S. § 1624, Act of March 2, 1885) may be ordered upon petty officers and persons of inferior ratings, by the commander of any vessel, or by the commandant of any navy-yard, naval station or marine barracks, for the trial of offences which such officer may deem deserving of greater punishment than such officer is authorized to inflict, but not sufficient to require trial by general court-martial. They consist of 3 officers not below the rank of ensign, as members, and a recorder.

The punishments which they can inflict are specified in the act. No sentence shall be carried into execution until the proceedings have been approved by the convening officer and by the commander-in-chief, or, in his absence, by the senior officer present, and, if it involves loss of pay, until approved by the Secretary of the Navy. The convening officer may remit in part or altogether, but not commute, the sentence. Any punishment which a summary court-martial may inflict may also be inflicted by a general court-martial.

No officer shall be dismissed from the service except by order of the President or by sentence of a general court-martial, or, in time of peace, except in pursuance of a sentence of a general court-martial or in mitigation thereof.

A general court-martial shall consist of not more than 13 nor less than 5 commissioned officers, and as many officers, not exceeding 13, as can be convened without injury to the service (which is for the convening officer to decide); Bishop v. U. S., 197 U. S. 334, 25 Sup. Ct. 440, 49 L. Ed. 780; but in no case, where it can be avoided without injury to the service, shall more than one-half, exclusive of the President, be junior to the officer to be tried.

When proceedings have been commenced, they shall not be suspended or delayed on account of the absence of any of the members, provided five or more are assembled. But where a member is absent for legal cause, the witnesses examined during his absence must be recalled and their testimony read to him and acknowledged by them to be correct, and they must be subject to such further examination as he may require. Without compliance with this rule and an entry thereon on the record, such member shall not sit again in that case.

Two-thirds must concur in a death sentence. All other sentences may be determined by a majority.

A convening officer may order a court-martial to reconsider its proceedings and sentence before it has dissolved; In re Reed, 100 U. S. 13, 25 L. Ed. 538; where it has been adjourned by the Secretary of the Navy till further orders, he may reconvene it to reconsider the proceedings; Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601.

Where the sentence of an officer is dismissal from the navy (in time of peace) it is subject to the President's confirmation, disapproval or order. His action thereon is judicial; Bishop v. U. S., 197 U. S. 334, 25 Sup. Ct. 440, 49 L. Ed. 780.

Deck Courts (Act of February 16, 1909) are courts for the trial of enlisted men in the Navy and Marine Corps for minor offences formerly triable by summary court-martial and may be ordered by the commanding officer of a naval vessel, by the commandant of a navy-yard or station, by a commanding officer of marines or by a higher naval authority. They consist of one commissioned officer only, who shall hear and determine cases and impose punishment, but not discharge from the service or impose confinement or forfeiture of pay for longer than 20 days. The officer within whose command the court sits may "remit or mitigate, but not commute, any sentence; no sentence

shall be carried into effect until it shall have been so approved or mitigated, and such officer shall have power to remit any punishment." No person who objects thereto shall be tried before a deck court; in case of objection, trial shall be by summary, or by general, court-martial, as may be appropriate.

The Secretary of the Navy may set aside the proceedings or remit or mitigate the sentence imposed by any court-martial.

General courts-martial may be convened by the President, the Secretary of the Navy, by the commander-in-chief of a fleet, or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States.

The use of irons as a form of punishment in the Navy is abolished, except for the purpose of safe custody, or when part of a sentence as imposed by a general court-martial. Act of May 11, 1908.

A general court-martial or court of inquiry of the Navy may issue like process to witnesses which United States courts of criminal jurisdiction within the state, etc., where the court is ordered to sit, may lawfully issue. Any person duly subpœnaed as a witness, who wilfully neglects or refuses to appear or qualify or to testify or to produce documentary evidence, is guilty of a misdemeanor, excepting persons residing beyond the state, etc., where the court is held. No witness can be compelled to incriminate himself. Depositions may be taken in certain cases.

The sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present, and those of deck courts upon the approval of the convening authority or his successor in office. Act of February 16, 1909.

The ordinary rules of evidence are applied as far as justice requires and are to be departed from in cases of necessity created by the nature of the service, the constitution of the court, and its course of procedure. The accused is entitled to counsel, but he may only address the court by permission, and only in case a stenographer is employed.

No federal tribunal has jurisdiction over a naval court-martial nor can it interfere in the performance of its duties; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Swaim v. U. S., 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823.

Consult Benét; De Hart, and also Adye; Defalon; Hough; J. Kennedy; V. Kennedy; M'Arthur; Macnaghten; Macomb; Simmons; Tytler; Dudley; Davis, Courts-Martial; Brickhimer; Ives; Merrill; Winthrop, Mil. Law; Opinions J. Adv. Gen. *passim;* Regulations for the Govt. of the Navy (1909); COURT OF INQUIRY.

COURT OF NISI PRIUS. A court of original civil jurisdiction in the city and county of Philadelphia, held by one of the judges of the supreme court of the state. Abolished by the constitution of 1874. See NISI PRIUS; COURTS OF ASSIZE AND NISI PRIUS.

COURT OF THE OFFICIAL PRINCIPAL. See COURT OF THE ARCHES.

COURT OF ORDINARY. A court which has jurisdiction of the probate of wills and the regulation of the management of decedents' estates.

Such a court exists in Georgia (Code 1882, § 318), and formerly existed in New Jersey, South Carolina, and Texas, but has been replaced by other courts. See 2 Kent 409; ORDINARY.

COURT OF ORPHANS. The court of the lord mayor and aldermen of London, which had the care of those orphans whose parents died in London and were free of the city.

By the custom of London this court was entitled to the possession of the person, lands, and chattels of every infant whose parent was free of the city at the time of his death and who died in the city. The executor or administrator of such deceased parent was obliged to exhibit inventories of the estate of the deceased, and give security to the chamberlain for the orphan's part or share. It is now said to be fallen into disuse. 2 Steph. Com. 313; Pull. Cust. Lond. 196, *Orphans' Court.*

COURT OF OYER AND TERMINER. The name of courts of criminal jurisdiction in several of the states, as in Delaware and Pennsylvania. They were abolished in New York and New Jersey in 1895. In Pennsylvania they are held at the same time with the court of quarter sessions, as a general rule, and by the same judges. In Delaware they are specially called by a precept from the judges when there are capital felonies to be tried, and consist of the chief justice and three associate judges.

COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY. **In English Law.** Tribunals for the examination and trial of criminals.

They are held before commissioners selected by the High Court, among whom are usually two justices of that court.

Under the commission of *oyer and terminer* the justices try indictments previously found at the same assizes for treason, felony, or misdemeanors. Under the commission of *general gaol delivery* they may try and deliver every prisoner who is in gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted or for whatsoever crime committed. These commissioners are joined with those of *assize* and *nisi prius* and the commission *of the peace.* 3 Steph. Com. 352. See COURTS OF ASSIZE AND NISI PRIUS.

In American Law. Courts of criminal jurisdiction in some states. See COURT OF OYER AND TERMINER.

COURT OF THE PALACE. See COURT OF THE STEWARD AND THE MARSHAL.

COURT OF PASSAGE. A court, still existing, in Liverpool, having civil jurisdiction. It is an inferior court of record.

COURT OF PECULIARS. Ecclesiastical courts which grew up in England and gradually displaced the jurisdiction of the ordinary diocesan court. There are peculiars of various descriptions in most dioceses, and in some they are very numerous: Royal, archiepiscopal, episcopal, deaconal, subdeaconal, prebendal, rectorial and vicarial. Some of them were wholly exempt from episcopal, and even archiepiscopal control. There was an appeal formerly to the Pope; in later days to the High Court of Delegates. Most of them have been abolished by legislation. 1 Holdsworth, Hist. Engl. Law 352.

COURTS OF PETTY SESSIONS. See COURTS OF ENGLAND.

COURT OF PIE POWDER, PY-POWDER, PIPOWDER, PIE POUDRE, or PIED-POUDRE (Fr. *pied*, foot, and *poudre*, dust or *pied puldreaux* [old French] pedler). A court of special jurisdiction in every fair or market, said to have been so called because the several disputes which arose were adjudged with a dispatch that suited the convenience of transitory suitors,—the men with "dusty feet."

The word *pie powder*, spelled also *piedpoudre* and *pypowder*, has been considerd as signifying dusty feet, pointing to the general condition of the feet of the suitors therein; Cowell; Blount; or as indicating the rapidity with which justice is administered, as rapidly as dust can fall from the foot; Co. 4th Inst. 472; or pedler's feet, as being the court of such chapmen or petty traders as resorted to fairs. It was not confined to fairs or markets, but might exist, by custom, in cities, boroughs, or vills for the collection of debts and the like; Cro. Jac. 313; Cro. Car. 46; 2 Salk. 604. Coke calls them "Courts Pepoudrous." 4 Inst. 272. It was an important court in his time. It was held before the steward of him who was entitled to the tolls from the market.

In an enumeration of common-law institutions which he claims were derived from the Roman law, Mr. Semmes claims that these courts owe both their origin and their name to the Roman law, "as will be seen by referring to the code l. 3, tit. 3, *De Pedaneis Judicibus*." Address, Am. Bar. Assn. Rep. 1886, p. 197.

The *civil* jurisdiction extended to all matters of contract arising within the precinct of the fair or market during the continuance of the particular fair or market at which the court was held, the plaintiff being obliged to make oath as to the time and place. The cases were mostly trade disputes, and accordingly the decisions were law made by merchants, and a good deal of interest attached to them as decisions by juries of experts; 1 Social England 464. Disputes only could be determined which arose *in the fair* and *in fair time;* Inderwick, King's Peace 105.

The *criminal* jurisdiction embraced all offences committed at the particular fair or market at which the court was held. An appeal lay to the courts at Westminster. See Barrington, Stat. 337; 3 Bla. Com. 32; 3 Steph. Com. 317, n.; Skene, *de verb. sig. Pede pulverosus;* Bracton 334; 22 L. Q. R. 244; 1 Holdsw. Hist. E. L. 309.

The court of pie poudre is mentioned in Odgers, C. L. 1021, as being an inferior court not of record, now in existence.

COURT OF POLICIES OF INSURANCE. A court of special jurisdiction which took cognizance of cases involving claims made by those insured upon policies in the city of London.

It was organized by a commission issued yearly by the lord chancellor, by virtue of 43 Eliz. c. 12, and 13 & 14 Car. II. c. 23, to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common-law lawyers, and eight merchants, empowering any three of them (one being a civilian or barrister) to determine in a summary way all causes concerning policies in the city of London. The jurisdiction was confined to actions brought by assured persons upon policies of insurance on merchandise; and an appeal lay by way of a bill to the court of chancery. The court has been long disused, and was formally abolished by stat. 26 & 27 Vict. c. 125. 3 Bla. Com. 74; 3 Steph. Com. 317, n.; Crabb, Hist. Eng. Law 503.

COURT PREROGATIVE. See PREROGATIVE COURT.

COURT OF PROBATE. **In American Law.** A court which has jurisdiction of the probate of wills and the regulation of the management and settlement of decedents' estates, as well as a more or less extensive control of the estates of minors and other persons who are under the especial protection of the law. In some states, this court has also a limited jurisdiction in civil and criminal actions. For the states in which such courts exist, and the limits of their jurisdiction, see the articles on the various states.

In English Law. A court in England, established under the Probate Act of 1857, having exclusive jurisdiction of testamentary causes or proceedings relating to the validity of wills and the succession to the property of intestates. 2 Steph. Com. 192; 3 *id.* 346. This court is now merged in the High Court of Justice under the Judicature Act of 1873. See COURTS OF ENGLAND.

COURT OF PYPOWDER. See COURT OF PIE-POWDER.

COURT OF QUARTER SESSIONS. See COURTS OF ENGLAND.

COURT OF QUARTER SESSIONS OF THE PEACE. A court of criminal jurisdiction in the state of Pennsylvania. There is one such court in each county of the state.

Its sessions are, in general, held at the same time and by the same judges as the *court of oyer and terminer and general gaol delivery.*

COURT OF QUEEN'S BENCH. See COURT OF KING'S BENCH.

COURT OF RECORD. A judicial organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceeding according to the course of the common law. Ex parte Gladhill, 8 Metc. (Mass.) 171, per Shaw, C. J.

A court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. 3 Bla. Com. 24.

A court which has jurisdiction to fine and imprison, or one having jurisdiction of civil causes above forty shillings, and proceeding according to the course of the common law. Woodman v. Somerset County, 37 Me. 29,

All courts are either *of record* or *not of record.* The possession of the right to fine and imprison for contempt was formerly considered as furnishing decisive evidence that a court was a court of record; Co. Litt. 117 *b*, 260 *a*; 1 Salk. 144; 12 Mod. 388; 2 Wms. Saund. 101*a*; Viner, Abr. *Courts*; and it is said that the erection of a new tribunal with this power renders it by that very fact a court of record; 1 Salk. 200; 12 Mod. 388; 1 Woodd. Lect. 98; 3 Bla. Com. 24, 25; but every court of record does not possess this power; 1 Sid. 145; 3 Sharsw. Bla. Com. 25, n. The mere fact that a permanent record is kept does not, in modern law, stamp the character of the court; since many courts, as probate courts and others of limited or special jurisdiction, are obliged to keep records and yet are held to be courts not of record. See Smith v. Rice, 11 Mass. 510; Smith v. Morrison, 22 Pick. (Mass.) 430; Scott v. Rushman, 1 Cow. (N. Y.) 212; Thomas v. Robinson, 3 Wend. (N. Y.) 268; Snyder v. Wise, 10 Pa. 158; Silver Lake Bank v. Harding, 5 Ohio, 545; Bancroft v. Stanton, 7 Ala. 351; Ellis v. White, 25 Ala. 540. The definition first given above is taken from the opinion of Shaw, C. J., in Ex parte Gladhill, 8 Metc. (Mass.) 171, with an additional element not required in that case for purposes of distinction, and is believed to contain all the distinctive qualities which can be said to belong to all courts technically of record at modern law. To be a court of record, a court must have a clerk and a seal; Lewis Co. v. Adamski, 131 Wis. 311, 111 N. W. 495. As to what are courts of record and courts not of record in England, see 2 Odgers, C. L. 1021.

Courts may be at the same time of record for some purposes and not of record for others; Wheaton v. Fellows, 23 Wend. (N. Y.) 376; Lester v. Redmond, 6 Hill (N. Y.) 590; Ex parte Gladhill, 8 Metc. (Mass.) 168.

Courts of record have an inherent power, independently of statutes, to make rules for the transaction of business; but such rules must not contravene the law of the land; Fullerton v. Bank, 1 Pet. (U. S.) 604, 7 L. Ed. 280; Boas v. Nagle, 3 S. & R. (Pa.) 253; Snyder v. Bauchman, 8 S. & R. (Pa.) 336; Risher v. Thomas, 2 Mo. 98. They can be deprived of their jurisdiction by express terms of denial only; Kline v. Wood, 9 S. & R. (Pa.) 298; 2 Burr. 1042; 1 W. Bla. 285. Actions upon the judgments of such courts may, under the statutes of limitations of some of the states of the United States, be brought after the lapse of the period of limitation for actions on simple contracts; and this provision has given rise to several determinations of what are and what are not courts of record. See Smith v. Morrison, 22 Pick. (Mass.) 430; Mowry v. Cheesman, 6 Gray (Mass.) 515; Lester v. Redmond, 6 Hill (N. Y.) 590; Scott v. Rushman, 1 Cow. (N. Y.) 212; Ellis v. White, 25 Ala. 540; Woodman v. Somerset County, 37 Me. 29.

Under the naturalization act of the United States, "every court of record in a state having common-law jurisdiction and a seal and a clerk or prothonotary" has certain specified powers. As to what the requirements are to constitute a court of record under this act, see Carter v. Gregory, 8 Pick. (Mass.) 168; Wheaton v. Fellows, 23 Wend. (N. Y.) 375.

A writ of error lies to correct erroneous proceedings in a court of record; 3 Bla. Com. 407; Gay v. Richardson, 18 Pick. (Mass.) 417; but will not lie unless the court be one, technically, of record; Smith v. Rice, 11 Mass. 510. See WRIT OF ERROR.

COURT OF REFEREES. See REFEREES, COURT OF; LOCUS STANDI.

COURT OF REGARD. See REGARD.

COURT OF REQUESTS (called otherwise *court of conscience*). A court of equity for poor suitors, or for the king's servants privileged to sue there. The first record of a case is in 8 Henry VIII. Originally a standing committee of the Council, its members being the same as those of the Star Chamber. Later it became a separate court and its regular judges were styled Masters of Request. It was virtually abolished by Act of 1640; 1 Holdsw. H. E. L. 208. See 3 Steph. Com. 449; Bac. Abridg.; Select Cases in the Court of Requests (Selden Society, Publ. vol. 12).

In the 17th and 18th centuries Courts of Request were established in different parts of England for the collection of small debts; by 1800, fifty-four such courts had been created by fifty-four acts of Parliament.

COURT ROLLS. The rolls of a manor court. In the 13th century landowners were beginning to catalogue their possessions and enrol the proceedings of their courts. The court rolls show that there was a large body of law systematically and regularly administered in these local Courts; 2 Holdsw. Hist. E. L. 272. See COPYHOLD; ROLL.

COURTS OF SCOTLAND. The *Court of Session* consists of the Inner House, and the Outer House. The former has two divisions; the Lord President and three judges constitute the first division; the Lord Justice Clerk and three judges constitute the second division. In the Outer House are five permanent Lords Ordinary, attached equally to both divisions of the court.

Court of Justiciary is a court of general criminal and limited civil jurisdiction.

It consists of the Lord Justice General, the Lord Justice Clerk, and all the members of the court of session. The kingdom is divided into three circuits, in each of which two sessions, of not less than three days each, are to be held annually. A term may be held by any two of the justices, or by the Lord Justice General alone, or in Glasgow, by a simple justice; except in Edinburgh, where three justices constitute a quorum, and four generally sit in important cases.

Its criminal jurisdiction extends to all crimes committed in any part of the kingdom; and it has the power of reviewing the sentences of all inferior criminal courts, unless excluded by statute. Alison, Pr. 25.

Its civil jurisdiction on circuits is appellate and final in cases involving not more than twelve pounds sterling.

COURT OF SESSIONS. A court of criminal jurisdiction existing in some of the states.

COURT OF SHERIFF'S TOURN. See SHERIFF'S TOURN.

COURT OF STANNARIES. See STANNARY COURTS.

COURTS OF THE STAPLE. See STATUTE STAPLE.

COURT OF STAR CHAMBER. A court which was formerly held by members of the King's Council, together with two judges of the courts of common law.

The name *star chamber* is of uncertain origin. It has been thought to be from the Saxon *steoran*, to govern, alluding to the jurisdiction of the court over the crime of cosenage; and has been thought to have been given because the hall in which the court was held was full of windows, Lambard, Eiren. 148; or, according to Blackstone, because the contracts and obligations of the Jews (called *Starra*, which were enrolled in three places, one of which was the exchequer at Westminster) were originally kept there; 4 Bla. Com. 266, n. The room so used came to be appropriated to the Council. The derivation of Blackstone receives confirmation from the fact that this location (the exchequer) is assigned to the *star chamber* the first time it is mentioned. The word *star* acquired at some time the recognized signification of inventory or schedule. Stat. Acad. Cont. 32; 4 Sharsw. Bla. Com. 266, n; Coke (4 Inst. 66). Sir Thomas Smith (3 Comm. c. 4), and Camden (Britannia 130), derive the name from the fact that the roof of the room where the Council sat, was ornamented with stars. "Sterred Chambre" is first refered to in 1348; 1 Holdsw. Hist. E. L. 272.

In 1487 an act relating to the King's Council provided that the Chancellor and Treasurer of England, the Keeper of the Privy Seal, or two of them, a bishop and a temporal lord of the Council, the two chief justices, or two other justices in their absence, should have jurisdiction over certain "misdoers." According to Coke and Bacon this act merely confirmed the jurisdiction of the Council and vested it in a committee. This committee became an ordinary court towards the end of the 16th century, though closely connected with the Council. It was officially styled "The Lords of the Council sitting in the Star Chamber." The jurisdiction related to matters in some way concerning the state such as piracy, prize, salvage, disputes arising in the course of trade; punishing libels, conspiracy and false accusations, riots, fraud, forgery, and enforcing the laws against recreants. In private disputes, it was open to all. It protected the weak from the oppression of great offenders. If the poor were oppressed they sought relief in the Star Chamber. Palgrave (Council 104) says that it "became indispensable for the preservation of the rights and liberties of the people."

The court became unpopular and its proceedings in political cases became tyrannical before 1640. In that year it was abolished by Parliament, together with the Council of Wales, the Council of the North, the jurisdiction of the Star Chamber exercised by the Court of the Duchy of Lancaster, and the Court of Exchequer of the County Palatine of Chester. The act provided that neither the King nor his Privy Council have, or should have, jurisdiction by English bill, petition etc. over the lands and chattels of subjects, but that the same ought to be determined in the ordinary courts of justice and by the ordinary course of law. See GRAND REMONSTRANCE.

As the act referred only to English bills or petitions, it did not affect the appellate jurisdiction of the Council over places outside the English law. To this is largely due the present Judicial Committee of the Privy Council, which title see. See 1 Holdsw. Hist. E. L. 271; Encycl. Brit., art. *Star Chamber;* Palgrave, Council; Scofield; Hudson, Star Chamber; 12 Am. L. Rev. 21; COURTS OF ENGLAND; PRIVY COUNCIL.

COURT OF THE STEWARD AND THE MARSHAL. A court which had cognizance of cases which arose within the Verge *i. e.* within 12 miles of the place where the king was actually residing. Its judges had jurisdiction as deputies of the Lord Chief Justice; when he was present, their general authority ceased. When, in 28 Edw. I., the King's Bench was ordered to follow the king, their general jurisdiction practically ceased, though they sometimes tried cases in vacation under a special commission of oyer and terminer.

As judges of the Court of the Marshalsea, the Steward and the Marshal had jurisdiction in debt and covenant (if both parties were of the King's household), and in trespass *vi et armis* (if one was); and it was limited to the Verge (10 Co. Rep. 71). As it was obliged to follow the king it was an extremely inconvenient court to use.

It is probable that the fiction by which the King's Bench ultimately acquired concurrent jurisdiction with the Common Pleas

sprang from its early connection with this court.

Charles I. created a Court of the Palace to be held by the Steward and the Marshal, having jurisdiction over all personal actions arising within the Verge of Whitehall, but cases begun there, if of importance, were usually removed to the King's Bench or Common Pleas; 1 Holdsw. Hist. E. L. 80. The Palace Court was abolished by 12 & 13 Vict. c. 101. 3 Steph. Com. 317.

COURT OF SWANIMOTE or SWEINMOTE (spelled, also, *Swainmote, Swain-gemote;* Saxon, *swang,* an attendant, a freeholder, and *mote* or *gemote,* a meeting).

In English Law. One of the forest courts, now obsolete, held before the verderers, as judges, by the steward, thrice in every year, —the sweins or freeholders within the forest composing the jury.

This court had jurisdiction to inquire into grievances and oppressions committed by the officers of the forest, and also to receive and try presentments certified from the court of attachments, certifying the cause, in turn, under the seals of the jury, in case of conviction, to the court of justice seat for the rendition of judgment. Cowell; 3 Bla. Com. 71, 72; 3 Steph. Com. 317, n. See Inderwick, King's Peace 150; FOREST LAWS.

COURTS OF SURVEY. These are courts held in England and Wales under the Merchants' Shipping Act of 1894. The Wreck Commissioner is judge of every such court in the United Kingdom. There are a large number of associate judges in various circuits in England and Wales.

COURTS OF THE TWO UNIVERSITIES. **In English Law.** See CHANCELLOR'S COURTS OF THE TWO UNIVERSITIES.

COURTS OF THE UNITED STATES. See UNITED STATES COURTS.

COURT OF VICAR GENERAL. A court of the Archbishop of Canterbury, in which the bishops of the province are confirmed. 1 Holdsw. Hist. E. L. 372.

COURT OF WARDS AND LIVERIES. A court of record in England, which had the supervision and regulation of inquiries concerning the profits which arose to the crown from the fruits of tenure, and to grant to heirs the delivery of their lands from the possession of their guardians.

The Court of the King's Wards was instituted by stat. 32 Hen. VIII. c. 46, to take the place of the ancient *inquisitio post mortem,* and the jurisdiction of the restoration of lands to heirs on their becoming of age (livery) was added by statute 33 Hen. VIII. c. 22, when it became the Court of Wards and Liveries. It was abolished in 1660.

The jurisdiction extended to the superintendence of lunatics and idiots in the king's custody, granting licenses to the king's widows to marry, and imposing fines for marrying without license; 4 Reeve, Hist. E. L. 259; Crabb, Hist. E. L. 468; 1 Steph. Com. 183; 4 *id.* 40; 2 Bla. Com. 68; 3 *id.* 258.

COURTESY. See CURTESY.

COUSIN. The son or daughter of the brother or sister of one's father or mother.

The issue, respectively, of two brothers or two sisters, or of a brother and a sister.

Those who descend from the brother or sister of the father of the person spoken of are called paternal cousins; maternal cousins are those who are descended from the brothers or sisters of the mother. See 2 Brown, Ch. 125; 1 Sim. & S. 301; 9 Sim. 386, 457. The word is still applied in Devonshire to a nephew. 1 Ves. Jr. 73.

COUSINAGE. See COSINAGE.

COUTHUTLAUGH. He that willingly receives an outlaw and cherishes or conceals him. In ancient times he was subject to the same punishment as the outlaw. Blount.

COUTUM (Fr.). Custom; duty; toll. 1 Bla. Com. 314.

COUTUMIER (Fr.). See GRAND COUTUMIER.

COVENABLE (L. Fr.). Convenient; suitable. Anciently written *convenable.*

COVENANT (Lat. *convenire,* to come together; *conventio,* a coming together. It is equivalent to the *factum conventum* of the civil law).

In Contracts. An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or non-performance of certain acts, or that a given state of things does or shall, or does not or shall not, exist.

A contract under seal; a deed.

Affirmative covenants are those in which the covenantor declares that something has been already done, or shall be done in the future.

Affirmative covenants do not operate to deprive covenantees of rights enjoyed independently of the covenants; Dyer 19 *b*; 1 Leon. 251.

Covenants against incumbrances. See COVENANT AGAINST INCUMBRANCES.

Alternative covenants are disjunctive covenants.

Auxiliary covenants are those which do not relate directly to the principal matter of contract between the parties, but to something connected with it. Those the scope of whose operations is in *aid* or *support* of the principal covenant. If the principal covenant is void, the auxiliary is discharged; Anstr. 256; Prec. Chanc. 475.

Collateral covenants are those which are entered into in connection with the grant of something, but which do not relate immediately to the thing granted: as, to pay a sum of money in gross, that the lessor shall

distrain for rent on some other land than that which is demised, to build a house on the land of some third person, or the like. Platt, Cov. 69; Shepp. Touchst. 161; 4 Burr. 2439; 3 Term 393; 2 J. B. Moore 164; 5 B. & Ald. 7; 2 Wils. 27; 1 Ves. 56.

Concurrent covenants are those which are to be performed at the same time. When one party is ready and offers to perform his part, and the other refuses or neglects to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act; Platt, Cov. 71; 2 Selw. N. P. 443; Dougl. 698; 18 E. L. & Eq. 81; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; Denny v. Kile, 16 Mo. 450.

Declaratory covenants are those which serve to limit or direct uses. 1 Sid. 27; 1 Hob. 224.

Dependent covenants are those in which the obligation to perform one is made to depend upon the performance of the other. Covenants may be so connected that the right to insist upon the performance of one of them depends upon a prior performance on the part of the party seeking enforcement. Platt, Cov. 71; 2 Selw. N. P. 443; 1 C. B. N. S. 646; Northrup v. Northrup, 6 Cow. (N. Y.) 296; Cassell v. Cooke, 8 S. & R. (Pa.) 268, 11 Am. Dec. 610; Smith v. Lewis, 24 Conn. 624, 63 Am. Dec. 180; Low v. Marshall, 17 Me. 232; Humphries v. Goulding, 3 Ark. 581; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36; Bailey v. White, 3 Ala. 330. To ascertain whether covenants are dependent or not, the intention of the parties is to be sought for and regarded, rather than the order or time in which the acts are to be done, or the structure of the instrument, or the arrangement of the covenant; 1 Wms. Saund. 320, n.; 5 B. & P. 223; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; McCrelish v. Churchman, 4 Rawle (Pa.) 26; Grant v. Johnson, 5 N. Y. 247; Leveret v. Sherman, 1 Root (Conn.) 170; Brockenbrough v. Ward's Adm'r, 4 Rand. (Va.) 352. See note to Cutter v. Powell, 2 Smith Lead. Cas. 22.

Disjunctive covenants. Those which are for the performance of one or more of several things at the election of the covenantor or covenantee, as the case may be. Platt, Cov. 21; Harmony v. Bingham, 1 Duer (N. Y.) 209.

Executory covenants are those whose performance is to be future. Shepp. Touchst. 161.

Express covenants are those which are created by the express words of the parties to the deed declaratory of their intention; Platt, Cov. 25. The formal word covenant is not indispensably requisite for the creation of an express covenant; 5 Q. B. 683; 8 J. B. Moore 546; Marshall v. Craig, 1 Bibb (Ky.) 379, 4 Am. Dec. 647; Hallett v. Wylie, 3 Johns. (N. Y.) 44, 3 Am. Dec. 457; Mitchell v. Hazen, 4 Conn. 508, 10 Am. Dec. 169; Randel v. Canal, 1 Harr. (Del.) 233. The words "I oblige," "agree," 1 Ves. 516; "I bind myself," Hardr. 178; 3 Leon. 119; have been held to be words of covenant, as are the words of a bond; 1 Ch. Cas. 194. Any words showing the intent of the parties to do or not to do a certain thing, raise an express covenant; Lovering v. Lovering, 13 N. H. 513. But words importing merely an order or direction that other persons should pay a sum of money, are not a covenant; 6 J. B. Moore 202.

Covenants for further assurance. See COVENANT FOR FURTHER ASSURANCE.

Covenants for quiet enjoyment. See COVENANT FOR QUIET ENJOYMENT.

Covenants for title are those covenants in a deed conveying land which are inserted for the purpose of securing to the grantee and covenantee the benefit of the title which the grantor and covenantor professes to convey.

Those in common use in England are four in number—of *right to convey*, for *quiet enjoyment*, against *incumbrances*, and for *further assurance*—and are held to run with the land; the covenant for *seisin* has not been generally in use in modern conveyances in England; Rawle, Cov. § 24. In the United States there is, in addition, a covenant of *warranty*, which is more commonly used than any of the others. What are "often called 'full covenants' are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and, almost always, of warranty—this last often taking the place of the covenant for quiet enjoyment;" Rawle, Cov. § 27. The covenants of seisin, for right to convey, and against incumbrances, are generally held to be *in præsenti;* if broken at all, they are broken as soon as made; Rawle, Cov. 318; 4 Kent 471; Whitney v. Dinsmore, 6 Cush. (Mass.) 128; 3 Washb. R. P. 478; see Mitch. R. P. 448; Allen v. Little, 36 Me. 170; and the various titles below for a fuller statement of the law relative to the different covenants for title.

Implied covenants or *covenants in law* are those which arise by intendment and construction of law from the use of certain words having a known legal operation in the creation of an estate, so that after they have had their primary operation in the creation of the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created; 1 C. B. 429; Bacon, Abr. *Covenant*, B; Rawle, Cov. § 270, n. In Co. Litt. 139 *b*, it is said that "of covenants there be two kinds: a covenant personal and a covenant real; a covenant in deed and a covenant in law." In a conveyance of lands in fee, the

words "grant, bargain, and sell," imply certain covenants; see 4 Kent 473; and the word "give" implies a covenant of warranty during the life of the feoffor; Raymond v. Raymond, 10 Cush. (Mass.) 134; Frost v. Raymond, 2 Cai. (N. Y.) 193, 2 Am. Dec. 228; Crouch v. Fowle, 9 N. H. 222, 32 Am. Dec. 350; Young v. Hargrave's Adm'r, 7 Ohio 69, pt. 2; (but this covenant and that implied from the word "grant" are abolished in England by 8 & 9 Vict. c. 106, § 14); and in a lease the use of the words "grant and demise;" Co. Litt. 384; Barney v. Keith, 4 Wend. (N. Y.) 502; "grant;" Cro. Eliz. 214; 1 P. & D. 360; "demise;" 4 Co. 80; 10 Mod. 162; Crouch v. Fowle, 9 N. H. 222, 32 Am. Dec. 350; Vernam v. Smith, 15 N. Y. 327; "demisement;" 1 Show. 79; 1 Salk. 137; raise an implied covenant on the part of the lessor, as do "yielding and paying;" Boardman v. Harrington, 9 Vt. 151; on the part of the lessee. In regard to the covenants arising to each grantee by implication on sale of an estate with conditions, in parcels to several grantees, see Brouwer v. Jones, 23 Barb. (N. Y.) 153.

Covenants in deed. Express covenants.

Covenants in gross. Such as do not run with the land.

Covenants in law. Implied covenants.

Illegal covenants are those which are expressly or impliedly forbidden by law. Covenants are absolutely void when entered into in violation of the express provisions of statutes; Hall v. Mullin, 5 Har. & J. (Md.) 193; Seidenbender v. Charles' Adm'rs, 4 S. & R. (Pa.) 159, 8 Am. Dec. 682; Weaver v. Wallace, 9 N. J. L. 252; (see VOID); or if they are of an immoral nature; 1 B. & P. 340; Winebrinner v. Weisiger, 3 T. B. Monr. (Ky.) 35; against public policy; Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec. 232; Hodsdon v. Wilkins, 7 Greenl. (Me.) 113, 20 Am. Dec. 347; Gulick v. Ward, 10 N. J. L. 87, 18 Am. Dec. 389; Nichols v. Ruggles, 3 Day (Conn.) 145, 3 Am. Dec. 262; Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315, 40 Am. Dec. 519; Cowen v. Boyce, 5 How. (Miss.) 769; Scudder v. Andrews, 2 McLean, 464, Fed. Cas. No. 12,564; Toler v. Armstrong, 4 Wash. C. C. 297, Fed. Cas. No. 14,078; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468; in general restraint of trade; Ross v. Sadgheer, 21 Wend. (N. Y.) 166; Pierce v. Woodward, 6 Pick. (Mass.) 206; or fraudulent as between the parties; Duncan v. McCullough, 4 S. & R. (Pa.) 483; Banorgee v. Hovey, 5 Mass. 16, 4 Am. Dec. 17; or as to third persons; Bailey v. Lewis, 3 Day (Conn.) 450; Martin v. Mathiot, 14 S. & R. (Pa.) 214, 16 Am. Dec. 491; Case v. Gerrish, 15 Pick. (Mass.) 49.

Independent covenants are those the necessity of whose performance is determined entirely by the requirements of the covenant itself, without regard to other covenants between the parties relative to the same subject-matter or transactions or series of transactions.

Covenants are generally construed to be independent; Platt, Cov. 71; Barruso v. Madan, 2 Johns. (N. Y.) 145; Mill Dam Foundery v. Hovey, 21 Pick. (Mass.) 438; 3 Bingh. N. S. 355; unless the undertaking on one side is *in terms* a condition to the stipulation of the other, and then only consistently with the intention of the parties; 3 Maule & S. 308; or unless dependency results from the nature of the acts to be done, and the order in which they must necessarily precede and follow each other in the progress of performance; Willes 496; or unless the nonperformance on one side goes to the entire substance of the contract, and to the whole consideration; Grant v. Johnson, 5 N. Y. 247. If once independent, they remain so; Evans v. Harris, 19 Barb. (N. Y.) 416.

Inherent covenants are those which relate directly to the land itself, or matter granted. Shepp. Touchst. 161. Distinguished from collateral covenants.

If real, they run with the land; Platt, Cov. 66.

Intransitive covenants are those the duty of performing which is limited to the covenantee himself, and does not pass over to his representative.

Joint covenants are those by which several parties agree to do or perform a thing together, or in which several persons have a joint interest as covenantees. Cheesbrough v. Agate, 26 Barb. (N. Y.) 603; Calvert v. Bradley, 16 How. (U. S.) 580, 14 L. Ed. 1066; Capen v. Barrows, 1 Gray (Mass.) 376; Evans v. Sanders, 10 B. Monr. (Ky.) 291. They may be in the negative; Wing v. Chase, 35 Me. 260.

Negative covenants are those in which the party obliges himself *not* to do or perform some act. Courts are unwilling to construe a negative covenant a condition precedent, inasmuch as it cannot be said to be performed till a breach becomes impossible; 2 Wms. Saund. 156; 1 Mod. 64; 2 Kebl. 674.

Obligatory covenants are those which are binding on the party himself. 1 Sid. 27; 1 Kebl. 337. They are distinguished from declaratory covenants.

Personal Covenants. See PERSONAL COVENANT.

Principal covenants. Those which relate directly to the principal matter of the contract entered into between the parties. They are distinguished from auxiliary.

Real covenants. See REAL COVENANT.

Covenants of rights to convey. See COVENANT OF RIGHT TO CONVEY.

Covenants of seisin. See COVENANT OF SEISIN.

Covenants to stand seized, etc. See COVENANT TO STAND SEIZED TO USES.

Transitive covenants are those personal

covenants the duty of performing which passes over to the representatives of the covenantor.

Covenants of warranty. See COVENANT OF WARRANTY.

Covenants are subject to the same rules as other contracts in regard to the qualifications of *parties*, the *assent* required, and the nature of the *purpose* for which the contract is entered into. See PARTIES; CONTRACTS.

No peculiar words are needed to raise an express covenant; Midgett v. Brooks, 34 N. C. 145, 55 Am. Dec. 405; 5 Q. B. 683; 3 Ex. 237, per Parke, B.; and by statute in Alabama, Arkansas, Delaware, Illinois, Indiana, Mississippi, Missouri, Montana, Nevada, New Mexico, Pennsylvania, and Texas, the words *grant*, *bargain*, and *sell*, in conveyances in fee, unless specially restricted, amount to covenants that the grantor was seized in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment against his acts; 4 Kent 473; Gratz's Lessee v. Ewalt, 2 Binn. (Pa.) 95; Dickson v. Desire's Adm'r, 23 Mo. 151, 66 Am. Dec. 661; Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174; Griffin v. Reynolds, 17 Ala. 198; Prettyman v. Wilkey, 19 Ill. 235; Davis v. Tarwater, 15 Ark. 289; but do not imply any general warranty of title in Alabama, Arkansas, Pennsylvania, and North Carolina; 4 Kent 474; Winston v. Vaughan, 22 Ark. 72, 76 Am. Dec. 418; Ricketts v. Dickens, 5 N. C. 343, 4 Am. Dec. 555; Roebuck v. Duprey, 2 Ala. 535. In Iowa, by the statute of 1843, the same rule was authorized, and upon this it was held that all covenants were express; Brown v. Tomlinson, 2 G. Greene (Ia.) 525; but no such provisions are to be found in the revised code of 1884. In Ohio the statute of 1795 was almost exactly copied from the Pennsylvania statute, but was repealed in 1824 and reenacted in substance, and entirely repealed in 1831, and the latest Revised Statutes (1884), like those of Iowa, are silent on the subject. The Wisconsin statute, providing that no covenant shall be implied, makes an exception in the case of the short form of conveyance provided by statute, and declares that such a deed shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, etc.; Rev. Stat. 1878. In Tennessee there is no statutory provision as to implied covenants, but a statutory short form of conveyance was held to authorize the broadest construction of the granting words unless their effect was specially limited by the instrument itself; Daly v. Willis, 5 Lea (Tenn.) 100. In California and North and South Dakota the same rule substantially is prescribed by statute in the first-named state, the implied covenants do not run with the land; Lawrence v. Montgomery, 37 Cal. 183. In Georgia a covenant of general warranty is held to include covenants of a right to convey, quiet enjoyment, and freedom from incumbrances; Burk v. Burk, 64 Ga. 632. See generally on this subject, Rawle, Cov. § 286.

Describing lands in a deed as bounded on a street of a certain description raises a covenant that the street shall be of that description; Loring v. Otis, 7 Gray (Mass.) 563; and that the purchaser shall have the use thereof; Moale v. Mayor, etc., of Baltimore, 5 Md. 314, 61 Am. Dec. 276; Greenwood v. R. R., 23 N. H. 261; which binds subsequent purchasers from the grantor; Thomas v. Poole, 7 Gray (Mass.) 83.

In New York it is provided by statute that no covenants can be implied in any conveyance of real estate; 4 Kent 469; but this provision does not extend to leases for years; Tone v. Brace, 11 Paige (N. Y.) 566; Mack v. Patchin, 42 N. Y. 174, 1 Am. Rep. 506.

The New York statute has been enacted in Michigan, Minnesota, Oregon, Wisconsin, and Wyoming, and no covenants for title seem to be implied in states other than those above named. In some cases where the covenants relate to lands, the rights and liabilities of the covenantor, or covenantee, or both, pass to the assignee of the thing to which the covenant relates. In such cases the covenant is said to run with the land. If rights pass the *benefit* is said to run; if liabilities, the *burden*. Only real covenants run with the land, and these only when the covenant has entered into the consideration for which the land, or some interest therein to which the covenant is annexed, passed between the covenantor and the covenantee; 2 Sugd. Vend. 468, 484; 2 M. & K. 535; Morse v. Aldrich, 19 Pick. (Mass.) 449; Hurd v. Curtis, 19 Pick. (Mass.) 464; Van Rensselaer v. Bonesteel, 24 Barb. (N. Y.) 366; Lyon v. Parker, 45 Me. 474; see 1 Washb. R. P. 526; and they die with the estate to which they are annexed; Lewis v. Cook, 35 N. C. 193; but an estoppel to deny passage of title is said to be sufficient; Trull v. Eastman, 3 Metc. (Mass.) 124, 37 Am. Dec. 126; and the passage of mere possession, or defeasible estate without possession, enables the covenant to run; Dickson v. Desire's Adm'r, 23 Mo. 151, 66 Am. Dec. 661; Chambers' Adm'r v. Smith's Adm'r, 23 Mo. 174.

It is said by some authorities that the benefit of a covenant to do acts upon land of the covenantee, made with the "covenantee and his assigns," will run with the land though no estate passed between the covenantor and covenantee; Rawle, Cov. 335; Year B. 42 Edw. III. 13; Allen v. Culver, 3 Den. (N. Y.) 301; but the weight of authority is otherwise; 2 Sugd. Vend. 468; Platt, Cov. 461. Covenants concerning title generally run with the land; Carter v. Denman's Ex'rs, 23 N. J. L. 260; except those that are broken before the land passed; 4 Kent 473; Swasey v. Brooks, 30 Vt. 692. See COVENANT OF SEISIN, etc. "*Until breach*, covenants for title, without distinction between them, run with the land to heirs and

assigns. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and, perhaps, against incumbrances, are what are called covenants *in præsenti*,—if broken at all, their breach occurs at the moment of their creation. . . . These covenants, it is held, are then turned into a mere right of action, which is not assignable at law and can neither pass to an heir, a devisee, or a subsequent purchaser. A distinction is considered, by this class of cases, to exist, in this respect, between the covenants first named, and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character;" Rawle, Cov. §§ 204, 205. See also Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379.

Covenants in leases, by virtue of the statute 32 Hen. VIII. c. 34, which has been reenacted in most of the states, are assignable as respects assignees of the reversion and of the lease. The lessee continues liable on express covenants after an assignment by him, but not on implied ones; 4 Term 98; but he is liable to the assignee of the lessor on implied covenants, at common law; Platt, Cov. 532; 2 Sugd. Vend. 466; Burton, R. P. § 855. See 1 Washb. R. P. 526.

In case of the assignment of lands in parcels, the assignees may recover *pro rata*, and the original covenantee may recover according to his share of the original estate remaining; 2 Sugd. Vend. 508; Rawle, Cov. § 215; Allen v. Little, 36 Me. 170; McClure's Ex'rs v. Gamble, 27 Pa. 288; White v. Whitney, 3 Metc. (Mass.) 87; Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 407; Dougherty v. Duvall's Heirs, 9 B. Monr. (Ky.) 58. But covenants are not, in general, apportionable; McClure's Ex'rs v. Gamble, 27 Pa. 288.

See Spencer's case, 1 Sm. Lead. Cas. 206.

In Practice. A form of action which lies to recover damages for breach of a contract under seal. It is one of the *brevia formata* of the register, and is sometimes a concurrent remedy with *debt*, though never with *assumpsit*, and is the only proper remedy where the damages are unliquidated in nature and the contract is under seal; Fitzh. N. B. 340; Chit. Pl. 112, 113; 2 Steph. N. P. 1058. As to the early history of the action, see Salmond, 3 Sel. Essays, Anglo-Amer. L. H. 324.

The action lies, generally, where the covenantor does some act contrary to his agreement, or fails to do or perform that which he has undertaken; 4 Dane, Abr. 115; or does that which disables him from performance; Cro. Eliz. 449; 15 Q. B. 88; Heard v. Bowers, 23 Pick. (Mass.) 455.

To take advantage of an oral agreement modifying the original covenant in an essential point, the covenant must be abandoned and assumpsit brought; Lehigh Coal & Nav. Co. v. Harlan, 27 Pa. 429; Sherwin v. R. R. Co., 24 Vt. 347.

The venue is local when the action is founded on privity of estate; 1 Wms. Saund. 241 *b*, n.; and transitory when it is founded upon privity of contract. As between original parties to the covenant, the action is transitory; and, by 32 Hen. VIII. c. 34, an action of covenant by an assignee of the reversion against a lessor, or by a lessee against the assignee of the reversion, is also transitory; 1 Chit. Pl. 274.

The declaration must, at common law, aver a contract under seal; 2 Ld. Raym. 1536; and either make profert thereof or excuse the omission; 3 Term 151; at least of such part as is broken; Bender v. Fromberger, 4 Dall. (U. S.) 436, 1 L. Ed. 898; Killian v. Herndon, 4 Rich. (S. C.) 196; and a breach or breaches; Fortenbury v. Tunstall, 5 Ark. 263; Steele v. Curle, 4 Dana (Ky.) 381; which may be by negativing the words of the covenant in actions upon covenants of seisin and right to convey; Rawle, Cov. § 176; or according to the legal effect; but must set forth the incumbrance in case of a covenant against incumbrances; *id.* § 86; and must allege an eviction in case of warranty; *id.* § 155. The disturbance must be averred to have been under lawful title; *id.* No consideration need be averred or shown, as it is said to be implied from the seal; but performance of an act which constitutes a condition precedent to the defendant's covenant, if there be any such, must be averred; 2 Greenl. Ev. § 235; Nesbitt v. McGehee, 26 Ala. 748. The damages laid must be large enough to cover the real amount sought to be recovered; Clarke v. McAnulty, 3 S. & R. (Pa.) 364; Jordan v. Cooper, *id.* 567.

There is no plea of general issue in this action. Under *non est factum*, the defendant may show any facts contradicting the making of the deed; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Agent of State Prison v. Lathrop, 1 Mich. 438; as, personal incapacity; 2 Campb. 272; that the deed was fraudulent; Lofft 457; was not delivered; 4 Esp. 255; or was not executed by all the parties; 6 Maule & S. 341.

Non infregit conventionem and *nil debet* have both been held insufficient; Com. Dig. *Pleader*, 2 V, 4. As to the effect of covenant performed, see COVENANTS PERFORMED.

The judgment is that the plaintiff recover a named sum for the damages which he has sustained by reason of the breach or breaches of covenant, together with costs.

COVENANT TO CONVEY. A covenant by which the covenantor undertakes to convey to the covenantee the estate described in the covenant, under certain circumstances.

This form of conditional alienation of lands is in frequent use; Espy v. Anderson, 14 Pa. 308; Atkins v. Bahrett, 19 Barb. (N. Y.) 639; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92; Morgan v. Smith, 11 Ill. 194; Campbell v. Gittings, 19 Ohio, 347. Substantially the same effect is secured as by a conveyance

and a mortgage back for the purchase-money, with this important difference, however, that the title remains in the covenantor until he actually executes the conveyance.

The remedy for breach may be by action on the covenant; Haverstick v. Gas Co., 29 Pa. 254; but the better remedy is said to be in equity for specific performance; Poor Directors v. McFadden, 1 Grant Cas. (Pa.) 230.

It is satisfied only by a perfect conveyance of the kind bargained for; Atkins v. Bahrett, 19 Barb. (N. Y.) 639; otherwise where an imperfect conveyance has been accepted; Marshall v. Haney, 4 Md. 498, 59 Am. Dec. 92.

COVENANT FOR FURTHER ASSURANCE. One by which the covenantor undertakes, at the requirement of the covenantee, to do such reasonable acts in addition to those already performed as may be necessary for the completion of the transfer made, or intended to be made. It relates both to the title of the vendor and to the instrument of conveyance, and operates as well to secure the performance of all acts for supplying any defect in the former, as to remove all objections to the sufficiency and security of the latter. Platt Cov. 341.

The covenant is of frequent occurrence in English conveyances; but its use here seems to be limited to some of the middle states; 2 Washb. R. P. 648; Griffin v. Fairbrother, 10 Me. 91; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Raymond v. Raymond, 10 Cush. (Mass.) 134. It is usual in railroad and other corporation mortgages.

The covenantor, in execution of his covenant, is not required to do unnecessary acts; Yelv. 44; 9 Price 43. He must in equity grant a subsequently acquired title; 2 Ch. Cas. 212; 2 P. Wms. 630; must levy a fine; 16 Ves. 366; 4 Maule & S. 188; must remove a judgment or other incumbrance; 5 Taunt. 427; but a mortgagor with such covenant need not release his equity; 1 Ld. Raym. 36. It may be enforced by a bill in equity for specific performance, or an action at law to recover damages for the breach; 2 Co. 3 *a*; 6 Jenk. Cas. 24; Rawle, Cov. § 362; 2 Washb. R. P. 666.

COVENANT AGAINST INCUMBRANCES. One which has for its object security against those rights to, or interests in, the land granted which may subsist in third persons to the diminution of the value of the estate, though consistently with the passing of the fee by the deed of conveyance. See INCUMBRANCE.

The mere existence of an incumbrance constitutes a breach of this covenant; 2 Washb. R. P. 658; McLemore v. Mabson, 20 Ala. 137; without regard to the knowledge of the grantee; 2 Greenl. Ev. § 242; Butler v. Gale, 27 Vt. 739; Medler v. Hiatt, 8 Ind. 171.

Such covenants, being *in præsenti*, do not run with the land in Massachusetts and most of the other states; but the rule is otherwise, either by statute or decision in *Maine*, R. S. 1883, p. 697, tit. 9, § 18; *Colorado*, R. S. 1883, 172; *Georgia*, Code 1882, 672; *New York*, Hall v. Dean, 13 Johns. 105; Colby v. Osgood, 29 Barb. 339; *Ohio*, Foote v. Burnet, 10 Ohio, 327, 36 Am. Dec. 90; *Minnesota*, Kimball v. Bryant, 25 Minn. 496; *Missouri*, Magwire v. Riggin, 44 Mo. 512; Hall v. Scott Co., 7 Fed. 341, 2 McCrary 356; *Indiana*, Martin v. Baker, 5 Blackf. 232; *Wisconsin*, Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68 (reversing the rule adopted in Pillsbury v. Mitchell, 5 Wis. 17); *Iowa*, Knadler v. Sharp, 36 Ia. 232; *South Carolina*, Brisbane v. M'Crady's Ex'rs, 1 N. & McC. 104, 9 Am. Dec. 676; *Vermont*, Cole v. Kimball, 52 Vt. 639; and possibly in Michigan. See Rawle, Cov. § 212. If the covenant is so linked with another covenant as to have a prospective operation it runs with the land; *id.* This covenant is usually coupled with that of seisin in considering this question, but it was not treated as running with the land in this country so readily as the latter; Rawle, Cov. § 212.

Yet the incumbrance may be of such a character that its enforcement may constitute a breach of the covenant of warranty; as in case of a mortgage; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Sprague v. Baker, 17 Mass. 586; Tufts v. Adams, 8 Pick. (Mass.) 547.

The measure of damages is the amount of injury actually sustained; Delavergne v. Norris, 7 Johns. (N. Y.) 358, 5 Am. Dec. 281; Bean v. Mayo, 5 Greenl. (Me.) 94; Wyman v. Ballard, 12 Mass. 304; Batchelder v. Sturgis, 3 Cush. (Mass.) 201; Morrison v. Underwood, 20 N. H. 369; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320; Rawle, Cov. § 188.

The covenantee may extinguish the incumbrance and recover therefor, at his election, in the absence of agreement; Lawless v. Collier's Ex'rs, 19 Mo. 480; Willson v. Willson, 25 N. H. 229, 57 Am. Dec. 320. See COVENANT; REAL COVENANT.

COVENANT OF NON-CLAIM. A covenant sometimes employed, particularly in the New England States, and in deeds of extinguishment of ground rents in Pennsylvania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed. Rawle, Cov. § 22. It is substantially the same as the covenant of warranty, *q. v.*; *id.* § 231.

COVENANT NOT TO SUE. One entered into by a party who has a cause of action at the time of making it, by which he agrees not to sue the party liable to such action.

A *perpetual* covenant not to sue is one by which the covenantor agrees not to sue the covenantee at any time. Such a covenant operates as a release to the covenantee, and may be pleaded as such. Cro. Eliz. 623; Hastings v. Dickinson, 7 Mass. 153, 5 Am.

Dec. 34; Shed v. Pierce, 17 Mass. 623; Harvey v. Harvey, 3 Ind. 473; 34 L. J. Q. B. 25. And see Wolf v. Wyeth, 11 S. & R. (Pa.) 149.

A covenant of this kind with one of several, jointly and severally bound, will not protect the others so bound; 12 Mod. 551; Ward v. Johnson, 6 Munf. (Va.) 6, 8 Am. Dec. 729; Walker v. McCulloch, 4 Greenl. (Me.) 421; Mason v. Jouett's Adm'r, 2 Dana (Ky.) 107; Shed v. Pierce, 17 Mass. 623. It is equivalent to a release with a reserve of remedies, and hence is properly used in composition deeds in preference to a release, which discharges all sureties and co-debtors; 3 B. & C. 361.

A covenant by one of several partners not to sue cannot be set up as a release in an action by all; 3 P. & D. 149.

A *limited* covenant not to sue, by which the covenantor agrees not to sue for a limited time, does not operate a release; and a breach must be taken advantage of by action; Carth. 63; 1 Show. 46; 2 Salk. 573; 11 Q. B. 852; Howland v. Marvin, 5 Cal. 501. See Keep v. Kelly, 29 Ala. 322, as to requisite consideration. See Leake, Contr. 928.

COVENANT FOR QUIET ENJOYMENT. An assurance against the consequences of a defective title, and of any disturbances thereupon. Platt, Cov. 312; 11 East 641; Rawle, Cov. § 91. By it, when general in its terms, the covenantor stipulates at all events; 1 Mod. 101; to indemnify the covenantee against all acts committed by virtue of a paramount title; Platt, Cov. 313; 4 Co. 80 *b*; Cro. Car. 5; 3 Term 584; Howard v. Doolittle, 3 Duer (N. Y.) 464; Parker v. Dunn, 47 N. C. 203; Hagler v. Simpson, 44 N. C. 384; Carter v. Denman's Ex'rs, 23 N. J. L. 260; not including the acts of a mob; Surget v. Arighi, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46; Rantin v. Robertson, 2 Strobh. (S. C.) 367; nor a mere trespass by the lessor; Mayor, etc., of New York v. Mabie, 13 N. Y. 151, 64 Am. Dec. 538.

But this rule may be varied by the terms of the covenant; as where it is against acts of a particular person; Cro. Eliz. 212; 5 Maule & S. 374; or those "claiming or pretending to claim;" 10 Mod. 383; or molestation by any person. See Surget v. Arighi, 11 Smedes & M. (Miss.) 87, 49 Am. Dec. 46.

It has practically superseded the ancient doctrine of warranty as a guaranty of title, in English conveyances; 2 Washb. R. P. 661; but the latter is more common in conveyances in America; Rawle, Cov. § 91.

It occurs most frequently in leases; 1 Washb. R. P. 325; Rawle, Cov. § 91; and is usually the only covenant used in such cases; it is there held to be raised by the words grant, demise, lease, yielding and paying, give, etc.; 1 P. & D. 360; Crouch v. Fowle, 9 N. H. 222, 32 Am. Dec. 350; Vernam v. Smith, 15 N. Y. 327; 6 Bingh. 656; 4 Kent 474, n.; and exists impliedly in a parol lease; 20 E. L. & Eq. 374; Carter v. Denman's Ex'rs, 23 N. J. L. 260; see Blydenburgh v. Cotheal, 1 Duer (N. Y.) 176. It is usual in ground-rent deeds in Pennsylvania; Rawle, Cov. § 91.

COVENANT OF RIGHT TO CONVEY. An assurance by the covenantor that the grantor has sufficient capacity and title to convey the estate which he by his deed undertakes to convey.

In modern English conveyancing, this covenant has taken the place of the covenant of seisin; 2 Washb. R. P. 648. It is said to be the same as a covenant of seisin; Griffin v. Fairbrother, 10 Me. 91; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; but is not necessarily so, as it includes the capacity of the grantor; T. Jones 195; Cro. Jac. 358.

The breach takes place on execution of the deed, if at all; Freem. 41; Chapman v. Holmes' Ex'rs, 10 N. J. L. 20; and the covenantee need not wait for a disturbance to bring suit; 5 Taunt. 426; but a second recovery of damages cannot be had for the same breach; Platt, Cov. 310; 1 Maule & S. 365; 4 *id.* 53.

COVENANT OF SEISIN. An assurance to the grantee that the grantor has the very estate, both in quantity and quality, which he professes to convey. Platt, Cov. 306. It has given place in England to the covenant of right to convey, but is in use in several states; 2 Washb. R. P. 648.

In England; 1 Maule & S. 355; 4 *id.* 53; and in several states of the United States; *e. g.* Colorado, Georgia, New York, Ohio, Minnesota and other states (see Rawle, Cov. § 211); by decisions; Martin v. Baker, 5 Blackf. (Ind.) 232; Devore v. Sunderland, 17 Ohio 52, 49 Am. Dec. 442; Mecklem v. Blake, 22 Wis. 495, 99 Am. Dec. 68; Schofield v. Homestead Co., 32 Ia. 317, 7 Am. Rep. 197; Magurre v. Riggin, 44 Mo. 512; or by statute; 2 Washb. R. P. 650; this covenant runs with the land, and may be sued on for breach by an assignee; in other states it is held that a mere covenant of *lawful seisin* does not run with the land, but is broken, if at all, at the moment of executing the deed; Bearce v. Jackson, 4 Mass. 408; Prescott v. Trueman, 4 Mass. 627, 3 Am. Dec. 246; Raymond v. Raymond, 10 Cush. (Mass.) 134; Fowler v. Poling, 2 Barb. (N. Y.) 303; Cushman v. Blanchard, 2 Greenl. (Me.) 269, 11 Am. Dec. 76; Wilson v. Forbes, 13 N. C. 30; Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 396; Kencaid v. Brittain, 5 Sneed (Tenn.) 119; Bottorf v. Smith, 7 Ind. 673; Brady v. Spurck, 27 Ill. 482; Lawrence v. Montgomery, 37 Cal. 188; Pate v. Mitchell, 23 Ark. 590, 79 Am. Dec. 114. See COVENANT AGAINST INCUMBRANCES.

A covenant for *indefeasible seisin* is everywhere held to run with the land; Garfield v. Williams, 2 Vt. 328; Wilson v. Forbes, 13 N. C. 30; Bender v. Fromberger, 4 Dall. (Pa.)

439, 1 L. Ed. 898; Kincaid v. Brittain, 5 Sneed (Tenn.) 123; Abbott v. Allen, 14 Johns. (N. Y.) 248; Smith v. Strong, 14 Pick. (Mass.) 128; Collier v. Gamble, 10 Mo. 467; and to apply to all titles adverse to the grantor's; 2 Washb. R. P. 656.

A covenant of *seisin* or *lawful seisin*, in England and most of the states, is satisfied only by an indefeasible seisin; Rawle, Cov. § 41; 7 C. B. 310; Mills v. Catlin, 22 Vt. 106; Parker v. Brown, 15 N. H. 176; Lockwood v. Sturdevant, 6 Conn. 374; while in other states possession under a claim of right is sufficient; Catlin v. Hurlburt, 3 Vt. 403; Raymond v. Raymond, 10 Cush. (Mass.) 134; Bearce v. Jackson, 4 Mass. 408; Marston v. Hobbs, 2 Mass. 439, 3 Am. Dec. 61; Wilson v. Widenham, 51 Me. 567; Montgomery v. Reed, 69 Me. 510; Watts v. Parker, 27 Ill. 229; Scott v. Twiss, 4 Neb. 133; Vancourt v. Moore, 26 Mo. 92; Backus' Adm'rs v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Robinson v. Neil, 3 Ohio 525.

A covenant of seisin, of whatever form, is broken at the time of the execution of the deed if the grantor has no possession either by himself or another; and no rights can pass to the assignee of the grantee; Greenby v. Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; Garfield v. Williams, 2 Vt. 327; Mitchell v. Warner, 5 Conn. 497; Bartholomew v. Candee, 14 Pick. (Mass.) 170; Devore v. Sunderland, 17 Ohio 60, 49 Am. Dec. 442; Dickinson v. Hoomes's Adm'r, 8 Gratt. (Va.) 397; Pollard v. Dwight, 4 Cra. (U. S.) 430, 2 L. Ed. 666; Allen v. Little, 36 Me. 170; Abernathy v. Boazman, 24 Ala. 189, 60 Am. Dec. 459; 4 Kent 471. But it is said that this is only a technical breach, and that a cause of action for a substantial breach does not accrue, and the statute of limitations commence to run, till there has been some substantial injury; Forshay v. Shafer, 116 Ia. 302, 89 N. W. 1106; but other cases hold that the full consideration paid may be recovered immediately upon breach. The cases will be found in 8 Am. & Engl. Enc. Law 186.

The existence of an outstanding life-estate; Mills v. Catlin, 22 Vt. 106; a material deficiency in the amount of land; Pringle v. Witten's Ex'rs, 1 Bay (S. C.) 256, 1 Am. Dec. 612; see Phipps v. Tarpley, 24 Miss. 597; non-existence of the land described; Wheelock v. Thayer, 16 Pick. (Mass.) 68; the existence of fences or other fixtures on the premises belonging to other persons, who have a right to remove them; Mott v. Palmer, 1 N. Y. 564; West v. Stewart, 7 Pa. 122; Van Wagner v. Van Nostrand, 19 Ia. 427; or of a paramount right in another to divert a natural spring; Clark v. Conroe's Estate, 38 Vt. 471; or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed; Hall v. Gale, 20 Wis. 293; Traster v. Snelson's Adm'r, 29 Ind. 96; concurrent seisin of another as tenant in common; Wheeler v. Hatch, 12 Me. 389; Morrison v. McArthur, 43 Me. 567; adverse possession of a part by a stranger; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 376; a conveyance by one of two tenants in common of the entire estate (so far as his half is concerned); Downer's Adm'rs v. Smith, 38 Vt. 464; constitute a breach of this covenant. But the existence of such easements or incumbrances as do not affect the seisin of the purchaser does not constitute a breach of the covenant; Rawle, Cov. § 59. For instance, the existence of a highway over a part of the land; Jackson v. Hathaway, 15 Johns. (N. Y.) 449, 8 Am. Dec. 263; Lewis v. Jones, 1 Pa. 336, 44 Am. Dec. 138; Peck v. Smith, 1 Conn. 103, 6 Am. Dec. 216; Vaughn v. Stuyaker, 16 Ind. 340; or of a judgment, mortgage, or right of dower; Rawle, Cov. § 59; Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 430, 19 Am. Dec. 139; Tuite v. Miller, 10 Ohio 383; Sedgwick v. Hollenback, 7 Johns. (N. Y.) 380; (otherwise if the mortgagee has entered; Rawle, Cov. § 59); the removal of fixtures; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173. But see Whitney v. Dinsmore, 6 Cush. (Mass.) 124.

In the execution of a power, a covenant that the power is subsisting and not revoked is substituted; Platt, Cov. 309.

COVENANT TO STAND SEISED TO USES. A covenant by means of which under the statute of uses a conveyance of an estate may be effected. Burton, R. P. §§ 136, 145.

Such a covenant cannot furnish the ground for an action of covenant broken, and in this respect resembles the ancient real covenants.

The consideration for such a covenant must be relationship either by blood or marriage; 2 Washb. R. P. 129; See Corwin v. Corwin, 6 N. Y. 342, 57 Am. Dec. 453.

As a mode of conveyance it has fallen into disuse; though the doctrine is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance; 2 Washb. R. P. 155; 2 Sand. Uses 79, 83; Wallis v. Wallis, 4 Mass. 136, 3 Am. Dec. 210; Gale v. Coburn, 18 Pick. (Mass.) 397; Allen v. Sayward, 5 Greenl. (Me.) 232, 17 Am. Dec. 221; Jackson v. Staats, 11 Johns. (N. Y.) 351, 6 Am. Dec. 376; Cains' Lessee v. Jones, 5 Yerg. (Tenn.) 249.

COVENANT OF WARRANTY. An assurance by the grantor of an estate that the grantee shall enjoy the same without interruption by virtue of paramount title. Parker v. Dunn, 47 N. C. 203; Howard v. Doolittle, 3 Duer (N. Y.) 464; Rindskopf v. Trust Co., 58 Barb. (N. Y.) 36; Moore v. Lanham, 3 Hill (S. C.) 304.

It is not in use in English conveyances, but is in general use in the United States; 2 Washb. R. P. 659; and in several states

is the *only* covenant in general use; Rawle, Cov. § 21; Leary v. Durham, 4 Ga. 593; Dickinson v. Hoome's Adm'r, 8 Gratt. (Va.) 353; Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am. Dec. 36.

A special warranty is not a covenant against incumbrances; Washington City Sav. Bank v. Thornton, 83 Va. 157, 2 S. E. 193. See Bender v. Fromberger, 4 Dall. (Pa.) 436, 1 L. Ed. 898.

The form in common use is as follows: "And I the said [grantor], for myself, my heirs, executors, and administrators, do covenant with the said [grantee], his heirs and assigns, that I will, and my heirs, executors, and administrators shall, *warrant* and *defend* the same to the said [grantee], his heirs and assigns forever, against the lawful claims and demands of all persons [or, of all persons claiming by, through, or under me, but against none other]," [or other special covenant, as the case may be]. When *general*, it applies to lawful adverse claims of all persons whatever; when *special*, it applies only to certain persons or claims to which its operation is limited or restricted; 2 Washb. R. P. 665. See a form in Rawle, Cov. § 21, n.

This limitation may arise from the nature of the subject-matter of the grant; Tufts v. Adams, 8 Pick. (Mass.) 547; Wheelock v. Henshaw, 19 Pick. (Mass.) 341; Patterson's Lessee v. Pease, 5 Ohio 190.

Such covenants give the covenantee and grantee the benefit of subsequently acquired titles; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Brown v. McCormick, 6 Watts (Pa.) 60, 31 Am. Dec. 450; Terrett v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Wark v. Willard, 13 N. H. 389; Patterson's Lessee v. Pease, 5 Ohio 190; Somes v. Skinner, 3 Pick. (Mass.) 52; Lawry v. Williams, 13 Me. 281; to the extent of their terms; Blake v. Tucker, 12 Vt. 39; Trull v. Eastman, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; Jackson v. Hoffman, 9 Cow. (N. Y.) 271; Larrabee v. Larrabee, 34 Me. 483; but not if an interest actually passes at the time of making the conveyance upon which the covenant may operate; Lewis v. Baird, 3 McLean 56, Fed. Cas. No. 8,316; Blanchard v. Brooks, 12 Pick. (Mass.) 47; Wynn v. Harmon's Devisees, 5 Gratt. (Va.) 157; in case of terms for years, as well as conveyances of greater estates; Wms. R. P. 229; 4 Kent 261, n.; Cro. Car. 109; Barney v. Keith, 4 Wend. (N. Y.) 502; as against the grantor and those claiming under him; 2 Washb. R. P. 479; including purchasers for value; Bates v. Norcross, 14 Pick. (Mass.) 224; Kimball v. Blaisdell, 5 N. H. 533, 22 Am. Dec. 476; Allen v. Sayward, 5 Me. 231, 17 Am. Dec. 221; Jackson v. Murray, 12 Johns. (N. Y.) 201; Terrett v. Taylor, 9 Cra. (U. S.) 53, 3 L. Ed. 650; but see Jackson v. Bradford, 4 Wend. (N. Y.) 619. And this principle does not operate to prevent the grantee's action for breach of the covenant, if evicted by such title; Jarvis v. Aikens, 25 Vt. 635; Curtis v. Deering, 12 Me. 499. See Wheeler v. Wheeler, 33 Me. 347. A deed of land is not void as between the parties because of a want of consideration, and such want is no answer to an action upon a breach of covenant of warranty; Comstock v. Son, 154 Mass. 389.

In case of a *release* of right and title, covenants limited to those claiming under the grantor do not prevent the assertion by the grantor of a subsequently acquired title; Bell v. Twilight, 26 N. H. 401; Jackson v. Peek, 4 Wend. (N. Y.) 300; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369; Kinsman's Lessee v. Loomis, 11 Ohio 475; Ham v. Ham, 14 Me. 351; Cole v. Persons Unknown, 43 Me. 432; Gee v. Moore, 14 Cal. 472.

It is a real covenant, and runs with the estate in respect to which it is made, into the hands of whoever becomes the owner; 2 Washb. R. P. 659; Chal. R. P. 279; Laurence v. Senter, 4 Sneed (Tenn.) 52; Marbury v. Thornton, 82 Va. 702, 1 S. E. 909; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; against the covenantor and his personal representatives; McClures' Ex'rs v. Gamble, 27 Pa. 288; Carter v. Denman's Ex'rs, 23 N. J. L. 260; see Mygatt v. Coe, 142 N. Y. 78, 36 N. E. 870, 24 L. R. A. 850; to the extent of assets received, and cannot be severed therefrom; Lewis v. Cook, 35 N. C. 193.

The covenant of warranty and that of seisin or of right to convey are not equivalent covenants. Defect of title will sustain an action upon the latter, while disturbance of possession is requisite to recover upon the former; Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53. Grantors having made an express contract of warranty, cannot set up knowledge of vice in their title, to exonerate themselves from the obligation of their contract; New Orleans v. Gaines, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

The action for breach should be brought by the owner of the land and, as such, assignee of the covenant at the time it is broken; Bickford v. Page, 2 Mass. 455; Elder v. Elder, 10 Me. 81, 25 Am. Dec. 205; Thompson v. Sanders, 5 T. B. Monr. (Ky.) 357; Chase v. Weston, 12 N. H. 413; but may be by the original covenantee, if he has satisfied the owner; Withy v. Mumford, 5 Cow. (N. Y.) 137; Wheeler v. Sohier, 3 Cush. (Mass.) 222; Thompson v. Sanders, 5 T. B. Monr. (Ky.) 357; Booth v. Starr, 1 Conn. 244, 6 Am. Dec. 233; Markland v. Crump, 18 N. C. 94, 27 Am. Dec. 230; Redwine v. Brown, 10 Ga. 311; Smith v. Perry, 26 Vt. 279.

To constitute a breach there must be an eviction by paramount title; Rawle, Cov. § 131; Fowler v. Poling, 6 Barb. (N. Y.) 165; Evans v. Lewis, 5 Harr. (Del.) 162; Faries v. Smith's Adm'r, 11 Rich. (S. C.) 80; Norton

v. Jackson, 5 Cal. 262; Hannah v. Henderson, 4 Ind. 174; Picket's Adm'r v. Picket's Adm'r, 6 Ohio St. 525; Vancourt v. Moore, 26 Mo. 92; Moore v. Vail, 17 Ill. 185; Reed v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Higgins v. Johnson, 14 Ark. 309, 60 Am. Dec. 544; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479; McGregor v. Tabor (Tex.) 26 S. W. 443; Gleason v. Smith, 41 Vt. 296; which may be constructive; Curtis v. Deering, 12 Me. 499; Moore v. Vail, 17 Ill. 185; and it is sufficient if the tenant yields to the true owner, or if, the premises being vacant, such owner takes possession; St. John v. Palmer, 5 Hill. (N. Y.) 599; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Beebe v. Swartwout, 3 Gil. (Ill.) 162; Wilmington & R. R. Co. v. Robeson, 27 N. C. 393; Ogden v. Ball, 40 Minn. 94, 41 N. W. 453; Hodges v. Latham, 98 N. C. 239, 3 S. E. 495, 2 Am. St. Rep. 333; Succession of Cassidy, 40 La. Ann. 827, 5 South. 292; McGary v. Hastings, 39 Cal. 560, 2 Am. Rep. 456; Kellog v. Platt, 33 N. J. L. 328. But in such case the grantee must prove the existence and assertion of such paramount, outstanding, hostile title; Brown v. Corson, 16 Or. 388, 19 Pac. 66, 21 Pac. 47; Claycomb v. Munger, 51 Ill. 377; Crance v. Collenbaugh, 47 Ind. 256; Ryerson v. Chapman, 66 Me. 557; Merritt v. Morse, 108 Mass. 276; Smith v. Sprague, 40 Vt. 43; and assume the burden of proof with as much particularity as if suing in ejectment; Rawle, Cov. § 136; Thomas v. Stickle, 32 Ia. 76; Westrope v. Chambers' Estate, 51 Tex. 178; unless the adverse right has been established by a judgment or decree in a suit of which the covenantor had been properly notified; Rawle, Cov. § 136; in which case the judgment or decree will be conclusive evidence of the validity of the paramount title; *id.* See *id.* § 123 *et seq.*

Exercise of the right of eminent domain does not render the covenantor liable; Taylor v. Young, 71 Pa. 83; Kimball v. Semple, 25 Cal. 452; Raymond v. Raymond, 10 Cush. (Mass.) 134; Brown v. Jackson, 3 Wheat. (U. S.) 452, 4 L. Ed. 432.

When the covenantee is threatened with eviction, it is usual and proper for him to give notice to the covenantor to appear and defend the suit. If it appears on the record that the covenantor received the notice or if he defends the suit, recovery therein will be conclusive against him in an action by the covenantee; otherwise the question of notice will go to the jury on the facts. If no notice was given, the record of the adverse suit is not even *prima facie* evidence that the adverse title was paramount. Notice of the adverse suit is not indispensable to a recovery against the covenantor; Rawle, Cov. § 125.

COVENANTS PERFORMED. A plea to an action of covenant, in use in Pennsylvania, whereby the defendant, upon proper notice to the plaintiff, may give anything in evidence which he might have pleaded. Bender v. Fromberger, 4 Dall. (U. S.) 439, 1 L. Ed. 898; Neave v. Jenkins, 2 Yeates (Pa.) 107; Roth v. Miller, 15 S. & R. (Pa.) 105. And this evidence, it seems, may be given in the circuit court without notice, unless called for; Webster v. Warren, 2 Wash. C. C. 456, Fed. Cas. No. 17,339.

COVENANTEE. One in whose favor a covenant is made. Shepp. Touch. 150.

COVENANTOR. One who becomes bound to perform a covenant.

COVENTRY ACT. The common name for the statute 22 & 23 Car. II. c. 1,—it having been enacted in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament.

By this statute it is enacted that if any person shall, of malice aforethought, and by lying in wait, unlawfully cut or disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member, of any other person, with intent to maim or disfigure him, such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy. The act was repealed by 9 Geo. IV. c. 31.

COVERING DEED. A trust deed executed by a trading company to secure an issue of debentures.

Such deed usually contains a conveyance to the trustees of the holders of debentures or debenture stock with provisions authorizing the company to retain possession and carry on the business until forfeiture. Simonson, Debentures, 38. It corresponds to the general corporation mortgage to secure an issue of bonds, as used in this country. They did not formerly include a charge on personal chattels because of decisions that trust deeds containing charges on personalty must be framed and registered under the Bills of Sales acts; 34 Ch. Div. 43; but it having been held that a covering deed is not subject to the registration provisions; (1891) 1 Ch. (C. A.) 627; (1896) 2 Ch. 212; they now usually contain such a charge; Simonson, Debentures, 39. See DEBENTURE.

COVERT BARON. A wife. So called from being under the protection of her husband, baron, or lord. 1 Bla. Com. 442.

COVERTURE. The condition or state of a married woman.

During coverture the civil existence of the wife is, for many purposes, merged in that of her husband; 2 Steph. Com. 263. See ABATEMENT; PARTIES; MARRIED WOMEN.

COVIN. A secret contrivance between two or more persons to defraud and prejudice another in his rights. Co. Litt. 357 b; Comyns,

Dig. *Covin*, A; 1 Viner, Abr. 473; Mix v. Muzzy, 28 Conn. 186. See COLLUSION; DECEIT; FRAUD.

COW. In a penal statute which mentions both cows and heifers, it was held that by the term cow must be understood one that had had a calf. 2 East, Pl. Cr. 616; 1 Leach 105. See Taylor v. State, 6 Humph. (Tenn.) 285.

COWARDICE. Pusillanimity; fear; misbehavior through fear in relation to some duty to be performed before an enemy. O'Brien, Court M. 142.

By both the army and navy regulations of the United States this is an offence punishable in officers or privates with death, or such other punishment as may be inflicted by a court-martial; Rev. Stat. §§ 1342, 1624.

CRAFT. Art or skill; dexterity in particular manual employment, hence the occupation or employment itself; manual art; a trade. Webster.

This word is also now applied to all kinds of sailing vessels. Owners of the Wenonah v. Bragdon, 21 Gratt. (Va.) 693. See 23 L. J. Rep. 156; 3 El. & Bl. 888.

CRANAGE. A toll paid for drawing merchandise out of vessels to the wharf; so called because the instrument used for the purpose is called a crane. 8 Co. 46.

CRASTINUM, CRASTINO (Lat. to-morrow). On the day after. The return day of writs is made the second day of the term, the first day being some saint's day, which gives its name to the term. In the law Latin, *crastino* (the morning, the day after) would then denote the return day. 2 Reeve, Hist. Eng. Law 56. In the United States the return day is the first day of the term.

CRAVE. To ask; to demand.

The word is frequently used in pleading: as, to crave oyer of a bond on which the suit is brought; and in the settlement of accounts the accountant-general craves a credit or an allowance. 1 Chit. Pr. 520. See OYER.

CRAVEN. A word denoting defeat, and begging the mercy of the conqueror.

It was used (when used) by the vanquished party in trial by battle. Victory was obtained by the death of one of the combatants, or if either champion proved *recreant*,—that is, yielded, and pronounced the horrible word *"craven."* Such a person became infamous, and was thenceforth unfit to be believed on oath. 3 Bla. Com. 340. See WAGER OF BATTEL.

CRÉANCE. In French Law. A claim; a debt; also belief, credit, faith. 1 Bouvier, Inst. n. 1040.

CREANSOR. A creditor. Cowell.

CREATE. To create a charter is to make an entirely new one, and differs from renewing, extending, or continuing an old one. Moers v. City of Reading, 21 Pa. 188; People v. Marshall, 1 Gilm. (Ill.) 672; Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188. See McClellan v. McClellan, 65 Me. 500; Palmer v. Preston, 45 Vt. 154, 12 Am. Rep. 191.

CREDENTIALS. In International Law. The instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed. If the state or prince receive the minister, he can be received only in the quality attributed to him in his credentials. They are as it were his letter of attorney, his mandate patent, *mandatum manifestum*. Vattel, liv. 4, c. 6, § 76. See FULL POWERS; LETTER OF CREDENCE.

CREDIBILITY. Worthiness of belief. The credibility of witnesses is a question for the jury to determine, as their competency is for the court; Best, Ev. § 76; 1 Greenl. Ev. §§ 49, 425; Tayl. Ev. 1257. See IMPEACHMENT.

CREDIBLE WITNESS. One who, being competent to give evidence, is worthy of belief. Armory v. Fellowes, 5 Mass. 229; 2 Curt. Eccl. 336.

In deciding upon the credibility of a witness, it is always pertinent to consider whether he is capable of knowing thoroughly the thing about which he testifies; whether he was actually present at the transaction; whether he paid sufficient attention to qualify himself to be a reporter of it; and whether he honestly relates the affair fully as he knows it, without any purpose or desire to deceive, or to suppress or add to the truth.

In some of the states, wills must be attested by credible witnesses. In several of the states, *credible witness* is used, in certain connections, as synonymous with *competent witness*, and in Connecticut, in a statute providing for the certification of copies of records, it refers to a witness giving testimony under the sanction of the witness's oath; Dibble v. Morris, 26 Conn. 416; Hall v. Hall, 18 Ga. 40; Garland v. Crow's Ex'rs, 2 Bail. (S. C.) 24; Hawes v. Humphrey, 9 Pick. (Mass.) 350, 20 Am. Dec. 481; Sears v. Dillingham, 12 Mass. 358; Fuller v. Fuller, 83 Ky. 350; Lord v. Lord, 58 N. H. 8, 42 Am. Rep. 565; Jarm. Wills, 124.

See WITNESS.

CREDIT. The ability to borrow, on the opinion conceived by the lender that he will be repaid.

A debt due in consequence of a contract of hire or borrowing of money.

The time allowed by the creditor for the payment of goods sold by him to the debtor.

That which is due to a merchant, as distinguished from debit, that which is due by him.

That influence connected with certain social positions. 20 Toullier, n. 19.

In a statute making credits the subject of taxation, the term is held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services, due or to become due to the person liable to pay taxes thereon, when added together (estimating every such claim or demand at its true value in money) over and above the sum of all legal *bona fide* debts owing by such person; Payne v. Watterson, 37 Ohio St. 123.

See, generally, 5 Taunt. 338; Dry Dock Bank v. Trust Co., 3 N. Y. 344; Rindge v. Judson, 24 N. Y. 64, 71; People v. Loan Soc., 51 Cal. 243, 21 Am. Rep. 704.

As to the "full faith and credit" to be given in one state to the records, etc., of another state, see FOREIGN JUDGMENTS.

CREDIT, BILL OF. See BILL OF CREDIT.

CREDIT INSURANCE. See INSURANCE.

CREDITOR. He who has a right to require the fulfillment of an obligation or contract.

A person to whom any obligation is due. New Jersey Ins. Co. v. Meeker, 37 N. J. L. 300. See Pettibone v. Roberts, 2 Root (Conn.) 261.

Preferred creditors are those who, in consequence of some provision of law, are entitled to some special privilege in the order in which their claims are to be paid.

CREDITOR, JUDGMENT. One who has obtained a judgment against his debtor, under which he can enforce execution.

CREDITORS' BILL. A bill in equity, filed by one or more creditors, for the purpose of collecting their debts out of assets, or under circumstances as to which an execution at law would not be available.

It is a proceeding *in rem*, to make effective a judgment against the debtor's property which is concealed; Houghton & Co. v. Axelsson, 64 Kan. 274, 67 Pac. 825. Such bills are usually filed by and on behalf of the complainant and all other creditors who shall come in under the decree. They may be either against the debtor in his lifetime or for an account of the assets and a due settlement of the estate of a decedent.

They are divided by Bispham (Equity) into two classes, numbered in the order here stated. In bills of the second class, or those which in effect seek for the administration of a decedent's estate, the usual decree against the executor or administrator is *quod computet;* it directs the master to take the accounts between the deceased and all his creditors, and to cause the creditors, upon due public notice, to come before him to prove their debts, and to take an account of all the personal estate of the deceased in the hands of the executor or administrator, and the same to be applied in payment of the debts and other charges in a due course of administration; 1 Story, Eq. Jur. 546.

Generally speaking, this jurisdiction has been transferred to probate courts in most of the states, but in some states the original jurisdiction of equity over the administration of estates remains unabridged by the statutes and is concurrent with that of probate courts. See 3 Pom. Eq. Jur. § 1154.

Creditors' suits of the other class are brought while the debtor is living and for the collection of a debt against him. This jurisdiction had its origin in the inadequacy of common-law remedies by writs of execution. These writs at common law often did not extend to estates and interests which were equitable in their nature, and creditors' suits were therefore permitted to be brought where the relief at common law by execution was ineffectual, as for the discovery of assets, to reach equitable and other interests not subject to levy and sale at law, and to set aside fraudulent conveyances.

Statutes in England and America have extended the common-law remedies and provided adequate legal relief in many cases where formerly a resort to equity was necessary; Pom. Eq. Jur. § 1415.

The jurisdiction of chancery in suits brought by judgment creditors to enforce the collection of their judgments, after having exhausted their remedy at law, although it may have previously existed, is in some states expressly declared and defined by statutes.

Before a creditor can resort to the equitable estate of his debtor, he must first obtain judgment and seek to collect the debt by execution; exhausting his remedy at law; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; Newman v. Willetts, 52 Ill. 98; Lawson's Ex'r v. Grubbs's Adm'r, 44 Ga. 466; and it must appear that a judgment has been recovered, execution issued thereon and returned "*nulla bona;*" Preston v. Colby, 117 Ill. 477, 4 N. E. 375; Taylor v. Bowker, 111 U. S. 110, 4 Sup. Ct. 397, 28 L. Ed. 368; but this rule is said to be too general; 3 Pom. Eq. Jur. § 1415; it probably would not apply where the judgment was a lien; *id.;* Fleming v. Grafton, 54 Miss. 79; and in the federal court the objection that the claim has not been reduced to judgment can be raised only by defendant and may be waived; Pennsylvania Steel Co. v. Ry. Co., 157 Fed. 440. A judgment cannot be questioned upon a creditor's bill brought to secure its payment; Mattingly v. Nye, 8 Wall. (U. S.) 370, 19 L. Ed. 380.

In a few jurisdictions the equitable rule has been changed by statute, so that suits to set aside fraudulent conveyances may be maintained by simple contract creditors; Builders' & Painters' Supply Co. v. Bank, 123 Ala. 203, 26 South. 311; Riggin v. Hillard, 56 Ark. 476, 20 S. W. 402, 35 Am. St. Rep. 113; Huntington v. Jones, 72 Conn. 45, 43 Atl. 564; Phelps v. Smith, 116 Ind. 399, 17 N. E. 602, 19 N. E. 156; Balls v. Balls, 69 Md. 388, 16 Atl. 18; Sandford v. Wright, 164 Mass. 85, 41 N. E. 120; Dawson Bank v. Harris, 84 N. C. 206; Greene v. Starnes, 1 Heisk. (Tenn.) 582; Stovall v. Bank, 78 Va. 188; Frye v. Miley, 54 W. Va. 324, 46 S. E. 135. A judgment of a court of record is ordinarily sufficient; Chalmers v. Sheehy, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62; Schaible v. Ardner, 98 Mich. 70, 56 N. W.

1105; Thorp v. Leibrecht, 56 N. J. Eq. 499, 39 Atl. 361; but a judgment may be dispensed with when a creditor desires to reach assets of a deceased debtor; Mallow v. Walker, 115 Ia. 238, 88 N. W. 452, 91 Am. St. Rep. 158; or when a debtor has absconded and cannot be found within the state; First Nat. Bank of Riverside v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Quarl v. Abbett, 102 Ind. 234, 1 N. E. 476, 52 Am. Rep. 662; or where the debtor is insolvent and the claim is undisputed; Talley v. Curtain, 54 Fed. 43, 4 C. C. A. 177. An attachment which creates a lien upon real property may be the foundation of a creditor's bill to set aside a fraudulent conveyance; Chicago & A. Bridge Co. v. Packing Co., 46 Fed. 584; Evans v. Loughton, 69 Wis. 138, 33 N. W. 573. Where execution after judgment is necessary to form part of basis for a bill, it should be directed to and returned either from the county where the judgment was obtained or where the debtor resides; Nashville, C. & St. L. R. Co. v. Mattingly, 101 Ky. 219, 40 S. W. 673; Illinois Malleable Iron Co. v. Graham, 55 Ill. App. 266.

Creditors cannot attack the interest of third parties, alleged to have been obtained by fraud, until they have gained a standing in court by legal proceedings; Scott v. Chambers, 62 Mich. 532, 29 N. W. 94; Goode v. Garrity, 75 Ia. 713, 38 N. W. 150; Tift v. Collier, 78 Ga. 194, 2 S. E. 943; McMurtry v. Masonic Temple Co., 86 Ky. 206, 5 S. W. 570.

Judgments of the federal court cannot be made the basis of a creditor's bill in a state court; Winslow v. Leland, 128 Ill. 304, 21 N. E. 588; *contra*, First Nat. Bank of Chicago v. Sloman, 42 Neb. 350, 60 N. W. 589, 47 Am. St. Rep. 707; Chicago & A. Bridge Co. v. Fowler, 55 Kan. 17, 39 Pac. 727. The plaintiff in a creditor's bill is not concluded by sworn answer of defendant; Edwards v. Rodgers, 41 Ill. App. 405.

A creditor's bill is not maintainable against a debtor and his fraudulent grantee, after the return of an execution satisfied; Davis v. Walton, 80 Me. 461, 15 Atl. 48. A judgment creditor's bill may be framed for the double purpose of aiding an execution and to reach property not open to execution; Vanderpool v. Notley, 71 Mich. 431, 42 N. W. 680.

The debtor should be made a party; U. S. v. Howland, 4 Wheat. (U. S.) 108, 4 L. Ed. 526; the person who has possession of the property sought to be reached must be joined; Dobbins v. Coles, 59 N. J. Eq. 80, 45 Atl. 444; and in general all who have interests which will be affected by the decree in the property sought to be reached must be made parties; State v. Superior Court, 14 Wash. 686, 45 Pac. 670; Marshall's Ex'r v. Hall, 42 W. Va. 641, 26 S. E. 300. A single creditor may file a bill on his own behalf and he is entitled to retain the priority thereby gained over other creditors; Senter v. Williams, 61 Ark. 189, 32 S. W. 490, 54 Am. St. Rep. 200; Pullis v. Robison, 73 Mo. 201, 39 Am. Rep. 497; Clark v. Figgins, 31 W. Va. 157, 5 S. E. 643, 13 Am. St. Rep. 860 (*contra*, where other creditors intervene; Johnston v. Paper Co., 153 Pa. 189, 25 Atl. 560, 885); except in certain suits, where a trust or *quasi-trust* exists for all creditors; Fauch v. De Socarras, 56 N. J. Eq. 524, 39 Atl. 381; Coddington v. Bispham's Ex'rs, 36 N. J. Eq. 574; Baker v. Kinnaird, 94 Ky. 5, 21 S. W. 237; Day v. Washburn, 24 How. (U. S.) 355, 16 L. Ed. 712.

It is the filing of the bill and service of process after the return of execution which gives the plaintiff a specific lien; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580; Beith v. Porter, 119 Mich. 365, 78 N. W. 336, 75 Am. St. Rep. 402.

A court of equity has jurisdiction to sequestrate property in a creditor's suit, where the bill charges fraud as well as insolvency; Robinson v. Ins. Co., 162 Fed. 794. Intangible property can be reached by creditor's bill, such as patents and copyrights; Stephens v. Cady, 14 How. (U. S.) 528, 14 L. Ed. 528; Ager v. Murray, 105 U. S. 126, 26 L. Ed. 942; probably the majority rule is that, in the absence of statutory authorization, a creditor's bill cannot reach choses in action unless the case presents some independent ground of equity jurisdiction; Greene v. Keene, 14 R. I. 388, 51 Am. Rep. 400.

Alimony awarded to a wife cannot be applied by creditor's bill to the payment of a debt contracted before the decree of divorce; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544; a contingent interest, such as devise under a will, may be subjected to the payment of debts; Jacob v. Howard (Ky.) 22 S. W. 332; so of any equitable interest; Galveston, H. & S. A. R. R. Co. v. McDonald, 53 Tex. 510. Fraudulent transfers of personalty may be set aside, but the bill is seldom used for this purpose, the general practice being to levy on personal property and determine the ownership by action of replevin; O'Brien v. Stambach, 101 Ia. 40, 69 N. W. 1133, 63 Am. St. Rep. 368; Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; Highley v. Bank, 185 Ill. 565, 57 N. E. 436.

Motives of public policy prohibit a bill to reach the salary of a state official; Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379; or of an employé of a municipal corporation; Addyston Pipe Co. v. City of Chicago, 170 Ill. 580, 48 N. E. 967, 44 L. R. A. 405; Morgan v. Rust, 100 Ga. 346, 28 S. E. 419; but if the court can ascertain that no inconvenience can result to the public in a given case, the suit may be maintained; Berton v. Anderson, 56 Ark. 476, 20 S. W. 250; Knight v. Nash, 22 Minn. 452; Pendleton v. Perkins, 49 Mo. 565. There are various statutory exemp-

tions, such as homesteads; Jayne v. Hymer, 66 Neb. 785, 92 N. W. 1019; Hines v. Duncan, 79 Ala. 112, 58 Am. Rep. 580. Money *in custodia legis*, as in the hands of a clerk of court in his official capacity, cannot be made the subject of a creditor's bill; Anheuser-Busch Brewing Ass'n v. Hier, 52 Neb. 424, 72 N. W. 588; U. S. v. Eisenbeis, 88 Fed. 4. A creditor's bill will lie against municipal corporation, though the same be not subject to garnishment. See Addison Pipe & Steel Co. v. Chicago, 28 Chicago Leg. News 256.

State statutes authorizing suits in the nature of creditors' bills against corporations do not give the federal courts jurisdiction to entertain such suits when the creditor has not first exhausted his legal remedy, since the equity jurisdiction of those courts cannot be enlarged by a state statute; Morrow Shoe Mfg. Co. v. Shoe Co., 60 Fed. 341, 8 C. C. A. 652, 24 L. R. A. 417; nor will such a bill lie to obtain the seizure of the property of an insolvent corporation which has failed to collect stock subscriptions and executed an illegal trust deed, as these facts do not change the rule of those courts that simple contract creditors cannot obtain the aid of equity to effect the seizure of the debtor's property and its application to their claims; Hollins v. Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. But see Atlanta & F. R. Co. v. Ry. Co., 35 Cent. L. J. 207.

See Bisph. Eq. 525–528; Richmond v. Irons, 121 U. S. 44, 7 Sup. Ct. 788, 30 L. Ed. 864; 4 Harv. L. Rev. 99; 5 *id.* 101; Ad. Eq. 250.

CREEK. Such small inlets of the sea, whether within the precinct or extent of a port or without, as are narrow passages, and have shore on either side of them. Callis, Sew. 56; 5 Taunt. 705.

Such inlets that though possibly for their extent and situation they might be ports, yet are either members of or dependent upon other ports.

In England the name arose thus. The king could not conveniently have a customer and comptroller in every port or haven. But such custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that port where these custom-officers were placed. 1 Chit. Com. Law, 726; Hale, *de Portibus Maris*, pt. 2, c. 1, vol. 1, p. 46; Comyns, Dig. *Navigation* (C); Callis, Sew. 34.

A small stream, less than a river. Baker v. Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Schermerhorn v. R. Co., 38 N. Y. 103.

A creek passing through a deep level marsh and navigable by small craft, may, under legislative authority, be obstructed by a dam, or wholly filled up and converted into house-lots,—such obstructions not being in conflict with any act of congress regulating commerce; Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Rowe v. Bridge Corp., 21 Pick. (Mass.) 344; Charlestown v. County Com'rs, 3 Metc. (Mass.) 202; Glover v. Powell, 10 N. J. Eq. 211.

CREEK NATION. See INDIAN TRIBE.

CREMATION. The act or practice of reducing a corpse to ashes by means of fire. Act Pa. 1891, June 8; P. L. 212.

To burn a dead body instead of burying it is not a misdemeanor unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body it is a misdemeanor so to dispose of the body as to prevent the coroner from holding an inquest; L. R. 12 Q. B. D. 247. In L. R. 20 Ch. D. 659, it was doubted as to whether it is lawful to burn a body, but the question was not decided. See 43 Alb. L. J. 140. See DEAD BODY.

CREMENTUM COMITATUS. The increase of the county. The increase of the king's rents above the old vicontiel rents for which the sheriffs were to account. Wharton, Dict.

CREPUSCULUM. Daylight; twilight. The light which immediately precedes or follows the rising or setting of the sun. 4 Bla. Com. 224. Housebreaking during the period in which there is sunlight enough to discern a person's face (*crepusculum*) is not burglary; Co. 3d Inst. 63; 1 Russell, Cr. 820; 3 Greenl. Ev. § 75.

CRETIO. Time for deliberation allowed an heir (usually 100 days), to decide whether he would or would not take an inheritance. Calvinus, Lex.; Taylor, Gloss.

CREW. The word crew used in a statute in connection with *master*, includes officers as well as seamen. U. S. v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740; U. S. v. Winn, 1 Law Rep. 63, Fed. Cas. No. 16,739a. Sometimes also the master is included; Millaudon v. Martin, 6 Rob. (La.) 534; but a passenger would not be; U. S. v. Libby, 1 W. & M. 231, Fed. Cas. No. 15,597. See FULL CREW.

CRIER (Norman, to proclaim). An officer whose duty it is to make the various proclamations in court, under the direction of the judges. The office of crier in chancery is now abolished in England. Wharton.

CRIM. CON. An abbreviation for criminal conversation, of very frequent use, denoting adultery, unlawful sexual intercourse with a married woman. Bull. N. P. 27; Bacon, Abr. *Marriage* (E) 2; Nixon v. Brown, 4 Blackf. (Ind.) 157; 3 Bla. Com. 139.

The term is used to denote the act of adultery in a suit brought by the husband of the married woman with whom the act was committed, to recover damages of the adulterer. That the plaintiff connived at or assented to his wife's infidelity, or that he prostituted her for gain, is a complete answer to the action. But the fact that the wife's character for chastity was bad before the plaintiff married her, that he lived with her after he knew of the criminal intimacy with the defendant, that he had connived at her intimacy with

other men, or that the plaintiff had been false to his wife, only go in mitigation of damages; Sanborn v. Neilson, 4 N. H. 501; Sherwood v. Titman, 55 Pa. 77; as will the fact that the wife willingly consented or threw herself in the way of her paramour; Ferguson v. Smethers, 70 Ind. 520, 36 Am. Rep. 186.

The wife cannot maintain an action for criminal conversation with her husband; and for this, among other reasons, because her husband, who is *particeps criminis*, must be joined with her as plaintiff. But the husband may maintain the action after a divorce granted; 2 Bish. Marr. Div. & Sep. § 727; Ratcliff v. Wales, 1 Hill (N. Y.) 63. This action is rare in the United States, and has been abolished in England by 20 & 21 Vict. c. 85, § 59. The husband may, however, in suing for a divorce, claim damages from the adulterer; 3 Steph. Com. 437. The right to an action for damages is not barred by the fact that the act was done by violence, and that a criminal action will lie; Egbert v. Greenwalt, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260. See 15 Am. L. Reg. (N. S.) 451. That the defendant was ignorant that the woman was married is immaterial; Wales v. Miner, 89 Ind. 119; 4 C. & P. 499.

CRIME. An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bish. Cr. Law § 43. See People v. Supervisors of Ontario County, 4 Denio (N. Y.) 260; Rector v. State, 6 Ark. 187; Durr v. Howard, *id.* 461; Clark, Cr. Law 1. See INTENT; MENS REA.

The word crime generally denotes an offence of a deep and atrocious dye. When the act is of an inferior degree of guilt, it is called a misdemeanor; 4 Bla. Com. 4. Crime, however, is often used as comprehending *misdemeanor* and even as synonymous therewith, and also with *offence;* in short, as embracing every indictable offence; State v. Corporation of Savannah, T. U. P. Charlt. (Ga.) 235, 4 Am. Dec. 708; Van Meter v. People, 60 Ill. 168; In re Bergin, 31 Wis. 383; In re Clark, 9 Wend. (N. Y.) 212; Kentucky v. Dennison, 24 How. (U. S.) 102, 16 L. Ed. 717; In re Voorhees, 32 N. J. L. 144; People v. Board of Police Com'rs, 39 Hun (N. Y.) 510; People v. French, 102 N. Y. 583, 7 N. E. 913; but it is not synonymous with felony; County of Lehigh v. Schock, 113 Pa. 379, 7 Atl. 52.

Crimes are defined and punished by statutes and by the common law. Most common-law offences are as well known and as precisely ascertained as those which are defined by statutes: yet, from the difficulty of exactly defining and describing every act which ought to be punished, the vital and preserving principle has been adopted that all immoral acts which tend to the prejudice of the community are punishable criminally by courts of justice; 2 East 5, 21; State v. Doud, 7 Conn. 386; People v. Smith, 5 Cow. (N. Y.) 258; Com. v. Harrington, 3 Pick. (Mass.) 26.

As to "moral turpitude" as ground of deportation, see that title.

There are no common-law offences against the United States; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591; Pettibone v. U. S., 148 U. S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419. See COMMON LAW. There can be no constructive offences, and before a man can be punished, his case must be plainly and unmistakably within the statute; U. S. v. Lacher, 134 U. S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080; Todd v. U. S., 158 U. S. 282, 15 Sup. Ct. 889, 39 L. Ed. 982.

Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act; Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. Ed. 237.

A crime *malum in se* is an act which shocks the moral sense as being grossly immoral and injurious. With regard to some offences, such as murder, rape, arson, burglary, and larceny, there is but one sentiment in all civilized countries, which is that of unqualified condemnation. With regard to others, such as adultery, polygamy, and drunkenness, in some communities they are regarded as *mala in se;* while in others they are not even *mala prohibita.*

An offence is regarded as strictly a *malum prohibitum* only when, without the prohibition of a statute, the commission or omission of it would in a moral point of view be regarded as indifferent. The criminality of the act or omission consists not in the simple perpetration of the act, or the neglect to perform it, but in its being a violation of a positive law.

The nature of the offense and the amount of punishment prescribed, rather than its place in the statutes, determine whether it is to be placed among the serious or petty offenses, whether among crimes or misdemeanors; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. The purchase or receipt for sale of oleomargarine which has not been branded or stamped according to law was held a misdemeanor, not a crime; *id.*

A corrupt purpose, a wicked intent to do evil, is indispensable to conviction of a crime which is morally wrong. But no evil intent is essential to an offence which is a mere *malum prohibitum.* A simple purpose to do the act forbidden in violation of the statute is the only criminal intent requisite to a conviction of a statutory offense which is not *malum in se;* Armour Packing Co. v. U. S., 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400.

It may be by act of omission, *e. g.*, where a public officer, charged with the duty of rescuing bathers, neglects his duty and one is drowned.

The following is, perhaps, as complete a classification as the subject admits:

Offences against the sovereignty of the state. 1. Treason. 2. Misprision of treason.

Offences against the lives and persons of individuals. 1. Murder. 2. Manslaughter.

3. Attempts to murder or kill. 4. Mayhem. 5. Rape. 6. Robbery. 7. Kidnapping. 8. False imprisonment. 9. Abduction. 10. Assault and battery. 11. Abortion. 12. Cruelty to children.

Offences against public property. 1. Burning or destroying public property. 2. Injury to the same.

Offences against private property. 1. Arson. 2. Burglary. 3. Larceny. 4. Obtaining goods on false pretences. 5. Embezzlement. 6. Malicious mischief.

Offences against public justice. 1. Perjury. 2. Bribery. 3. Destroying public records. 4. Counterfeiting public seals. 5. Jailbreach. 6. Escape. 7. Resistance to officers. 8. Obstructing legal process. 9. Barratry. 10. Maintenance. 11. Champerty. 12. Contempt of court. 13. Oppression. 14. Extortion. 15. Suppression of evidence. 16. Compounding felony. 17. Misprision of felony.

Offences against the public peace. 1. Challenging or accepting a challenge to a duel. 2. Unlawful assembly. 3. Rout. 4. Riot. 5. Breach of the peace. 6. Libel.

Offences against chastity. 1. Sodomy. 2. Bestiality. 3. Adultery. 4. Incest. 5. Bigamy. 6. Seduction. 7. Fornication. 8. Lascivious carriage. 9. Keeping or frequenting house of ill-fame.

Offences against public policy. 1. False currency. 2. Lotteries. 3. Gambling. 4. Immoral shows. 5. Violations of the right of suffrage. 6. Destruction of game, fish, etc. 7. Nuisance.

Offences against the currency, and public and private securities. 1. Forgery. 2. Counterfeiting. 3. Passing counterfeit money.

Offences against religion, decency, and morality. 1. Blasphemy. 2. Profanity. 3. Sabbath-breaking. 4. Obscenity. 5. Cruelty to animals. 6. Drunkenness. 7. Promoting intemperance. See 2 Sharsw. Bla. Com. 42.

Offences against the public, individuals, or their property. 1. Conspiracy.

Under recent legislation certain new offences have been created, such as conspiracies in restraint of trade; infractions of rules affecting commerce and carriers and the like. These have been called commercial crimes; such, for instance, as infractions of the Sherman Anti-Trust Act.

As to state compensation to one unjustly accused of crime, see RESTITUTION.

See CONTINUING OFFENCE; LETTER; INTENT; PROSECUTOR; CRIMINAL LAW.

CRIME AGAINST NATURE. Sodomy or buggery. Ausman v. Veal, 10 Ind. 355, 71 Am. Dec. 331.

CRIMEN FALSI. In Civil Law. A fraudulent alteration, or forgery, to conceal or alter the truth, to the prejudice of another. This crime may be committed in three ways, namely: by forgery; by false declarations or false oath,—perjury; by acts, as by dealing with false weights and measures, by altering the current coin, by making false keys, and the like; see Dig. 48. 10. 22; 34. 8. 2; Code 9. 22; 2. 5. 9. 11. 16. 17. 23. 24; Merlin, *Répert.*; 1 Bro. Civ. Law 426; 1 Phill. Ev. 26; 2 Stark. Ev. 715.

At Common Law. Any crime which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. Johnston v. Riley, 13 Ga. 97; Webb v. State, 29 Ohio St. 351, 358; Harrison v. State, 55 Ala. 239; U. S. v. Block, 4 Sawy. 211, Fed. Cas. No. 14,609. See MAXIMS (*crimen falsi dicitur*, etc.).

The meaning of this term at common law is not well defined. It has been held to include forgery; 5 Mod. 74; perjury, subornation of perjury; Co. Litt. 6 *b*; Comyns, Dig. *Testmoigne* (A 5); suppression of testimony by bribery or conspiracy to procure the absence of a witness; Ry. & M. 434; conspiracy to accuse of crime; 2 Hale, Pl. Cr. 277; 2 Leach 496; 2 Dods. 191; barratry; 2 Salk. 690; the fraudulent making or alteration of a writing, to the prejudice of another man's right; or of a stamp, to the prejudice of the revenue; 4 Steph. Comm. (15th ed.) 119, citing 2 East P. C. Ch. xix, § 60. The effect of a conviction for a crime of this class is infamy, and incompetence to testify; Barbour v. Com., 80 Va. 288. Statutes sometimes provide what shall be such crimes.

CRIMEN LÆSÆ MAJESTATIS. See LÆSA MAJESTAS.

CRIMINA EXTRAORDINARIA. In South African Law. Certain crimes have been so called by Voet and the classification is sometimes broadly used. They include interfering with another's marital rights, seducing a girl, polluting streams, procuring abortion, blackmail and many others. The classification does not seem valuable. See 28 So. Afr. L. J. 490.

CRIMINAL CONVERSATION. See CRIM. CON.

CRIMINAL INFORMATION. A criminal suit brought, without interposition of a grand jury, by the proper officer of the king or state. Cole, Cr. Inf.; 4 Bla. Com. 398. See INFORMATION.

CRIMINAL INTENT. The intent to commit a crime; malice, as evidenced by a criminal act. Black, Dict.

CRIMINAL LAW. That branch of jurisprudence which treats of crimes and offences.

From the very nature of the social compact on which all municipal law is founded, and in consequence of which every man, when he enters into society, gives up part of his natural liberty, result those laws which, in certain cases, authorize the infliction of penalties the privation of liberty and even the destruction of life with a view to the future prevention of crime and to insuring the safety and well-being of the public. *Salus populi suprema lex.*

The extreme importance of a knowledge of the criminal law is evident. For a mistake in point of law, which every person of discretion not only may know but is bound and presumed to know, is in criminal cases no defence. *Ignorantia eorum quæ quis scire tenetur non excusat.* This law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it; per Tindal, C. J., in 10 Cl. & F. 210. See U. S. v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459; Hoover v. State, 59 Ala. 57; State v. Goodenow, 65 Me. 30; State v. Halsted, 39 N. J. L. 402. And this is true though the statute making an act illegal is of so recent promulgation as to make it impossible to know of its existence; Branch Bank at Mobile v. Murphy, 8 Ala. 119; Heard v. Heard, 8 Ga. 380; The Ann, 1 Gall. C. C. 62, Fed. Cas. No. 397. This doctrine has been carried so far as to include the case of a foreigner charged with a crime which was no offence in his own country; 7 C. & P. 456; Russ. & R. 4. See Sumner v. Beeler, 50 Ind. 341, 19 Am. Rep. 718. And, further, the criminal law, whether common or statute, is imperative with reference to the conduct of individuals; so that, if a statute forbids or commands a thing to be done, all acts or omissions contrary to the prohibition or command of the statute are offences at common law, and ordinarily indictable as such; Hawk. Pl. Cr. bk. 2, c. 25, § 4; 8 Q. B. 883. An offence which may be the subject of criminal procedure is an act committed or omitted in violation of a public *law* either forbidding or commanding it; U. S. v. Eaton, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591.

In seeking for the sources of our law upon this subject, when a statute punishes a crime by its legal designation, without enumerating the acts which constitute it, then it is necessary to resort to the common law for a definition of the crime with its distinctions and qualifications. So if an act is made criminal, but no mode of prosecution is directed or no punishment provided, the common law furnishes its aid, prescribing the mode of prosecution by indictment, and as a mode of punishment, fine, and imprisonment. This is generally designated the common law of England; but it might now be properly called the common law of this country. It was adopted by general consent when our ancestors first settled here. So far, therefore, as the rules and principles of the common law are applicable to the administration of criminal law and have not been altered and modified by legislative enactments or judicial decisions, they have the same force and effect as laws formally enacted; Tully v. Com., 4 Metc. (Mass.) 358; Com. v. Chapman, 13 Metc. (Mass.) 69. "The common law of crimes is at present that *jus vagum et incognitum* against which jurists and vindicators of freedom have strenuously protested. It is to be observed that the definitions of crimes, the nature of punishments, and the forms of criminal procedure originated, for the most part, in the principles of the most ancient common law, but that most of the unwritten rules touching crimes have been modified by statutes which assume the common-law terms and definitions as if their import were familiar to the community. The common law of crimes has, partly from humane and partly from corrupt motives, been pre-eminently the sport of judicial constructions. In theory, indeed, it was made for the state of things that prevailed in this island and the kind of people that inhabited it in the reign of Richard I.; in reality, it is the patchwork of every judge in every reign, from Cœur de Lion to Victoria." Ruins of Time Exemplified in Hale's Pleas of the Crown, by Amos, Pref. x.

Some of the leading principles of the English and American system of criminal law are—*First.* Every man is presumed to be innocent until the contrary is shown; and if there is any reasonable doubt of his guilt, he is entitled to the benefit of the doubt. See Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. *Second.* In general, no person can be brought to trial until a grand jury on examination of the charge has found reason to hold him for trial. Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. *Third.* The prisoner is entitled to trial by a jury of his peers, who are chosen from the body of the people with a view to impartiality, and whose decision on questions of fact is final. *Fourth.* The question of his guilt is to be determined without reference to his general character. By the systems of continental Europe, on the contrary, the tribunal not only examines the evidence relating to the offence, but looks at the probabilities arising from the prisoner's previous history and habits of life. *Fifth.* The prisoner cannot be required to criminate himself. (The general rule, however, now seems to be in jurisdictions where there is no statutory prohibition, that an accused person testifying in his own behalf may be cross-examined like any other witness; People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L. R. A. 669; People v. Howard, 73 Mich. 10, 40 N. W. 789; Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218; Keyes v. State, 122 Ind. 527, 23 N. E. 1097; State v. Pfefferle, 36 Kan. 90, 12 Pac. 406; State v. Huff, 11 Nev. 17; Chambers v. People, 105 Ill. 413. See for a full discussion of this question, Rice, Ev. § 223 and note; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.) *Sixth.* He cannot be twice put in jeopardy for the same offence. See Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; In re Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118. *Seventh.* He cannot be punished for an act which was

not an offence by the law existing at the time of its commission; nor can a severer punishment be inflicted than was declared by law at that time.

See CRIME; IGNORANCE; INTENT; JEOPARDY; INFAMOUS CRIME; INFAMY; PRISONER.

As to the identification of criminals, see ANTHROPOMETRY; ROGUE'S GALLERY.

As to circulating photographs of criminals, to assist in detecting crime, see PRIVILEGED COMMUNICATIONS.

CRIMINAL LAW CONSOLIDATION ACTS. Passed in England in 1861, for the consolidation of the criminal law of England and Ireland. 4 Steph. Com. 227. They are a codification of the modern criminal law of England. See Bruce's Archb. Pl. & Ev. in Cr. Ca. 1875.

CRIMINAL PROCEDURE. The method pointed out by law for the apprehension, trial, or prosecution, and fixing the punishment of those persons who have broken or violated, or are supposed to have broken or violated, the laws prescribed for the regulation of the conduct of the people of the community, and who have thereby laid themselves liable to fine or imprisonment, or both. A. & E. Encyc. Law. See PROCEDURE.

CRIMINAL PROCESS. Process which issues to compel a person to answer for a crime or misdemeanor. Ward v. Lewis, 1 Stew. (Ala.) 26.

CRIMINALITER. Criminally; on criminal process.

CRIMINATE. To exhibit evidence of the commission of a criminal offence.

It is a rule that a witness cannot be compelled to answer any question which has a tendency to expose him to a penalty, or to any kind of punishment, or to a criminal charge; 4 St. Tr. 6; 6 *id.* 649; 10 How. St. Tr. 1090; Johnson v. Goss, 2 Yerg. (Tenn.) 110; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; Bellinger v. People, 8 Wend. (N. Y.) 598; Parry v. Almond, 12 S. & R. (Pa.) 284; State v. Quarles, 13 Ark. 307. Such a statement cannot be used to show guilt and a confession must be free and voluntary; In re Emery, 107 Mass. 180, 9 Am. Rep. 22. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself; Spies v. People, 122 Ill. 235, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. See INCRIMINATION.

An accomplice admitted to give evidence against his associates in guilt is bound to make a full and fair confession of the whole truth respecting the subject-matter of the prosecution; Com. v. Knapp, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; 2 Stark. Ev. 12, note; but he is not bound to answer with respect to his share in other offences, in which he was not concerned with the prisoner; People v. Whipple, 9 Cow. (N. Y.) 721, note (a); 2 C. & P. 411.

CRIMINOLOGY. The science which treats of crimes and their prevention and punishment.

CRIMP. One who decoys and plunders sailors under cover of harboring them. Wharton.

CRITICISM. The art of judging skilfully of the merits or beauties, defects or faults, of a literary or scientific composition, or of a production of art. When the criticism is reduced to writing, the writing itself is called a criticism.

Liberty of criticism must be allowed, or there would be neither purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of literature and science. That publication, therefore, is not a libel which has for its object not to injure the reputation of an individual, but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste for literature, or to censure that which is hostile to morality; 1 Campb. 351. As every man who publishes a book commits himself to the judgment of the public, any one may comment on his performance; if he does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. The critic does a good service to the public who writes down any such vapid or useless publication as should never have appeared; and, although the author may suffer a loss from it, the law does not consider such loss an injury; because it is a loss which the party ought to sustain. It is the loss of fame and profit to which he was never entitled; 1 Campb. 358, n. See 1 Esp. 28; Stark. Lib. and Sl. 228; 4 Bingh. N. S. 92; 3 Scott 340; 1 Mood. & M. 74, 187; Cooke, Def. 52; 20 Q. B. D. 275. See LIBEL; SLANDER.

CROFT. A little close adjoining a dwelling-house, and enclosed for pasture and tillage or any particular use. Jacob, Law Dict. A small place fenced off in which to keep farm-cattle. Spelman, Gloss.

CROP. See EMBLEMENTS; GROWING CROPS; AWAY-GOING CROP.

CROPPER. One who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. Fry v. Jones, 2 Rawle (Pa.) 12; Harrison v. Ricks, 71 N. C. 7.

CROSS. A mark made by a person who is unable to write, instead of his name.

See MARK.

CROSS-ACTION. An action by a defendant in an action, against the plaintiff in the same action, upon the same contract, or for the same tort. Thus, if Peter bring an action of trespass against Paul, and Paul bring

another action of trespass against Peter, the subject of the dispute being an assault and battery, it is evident that Paul could not set off the assault committed upon him by Peter, in the action which Peter had brought against him; therefore a cross-action becomes necessary. 10 Ad. & E. 643.

CROSS-APPEAL. Where both parties to a judgment appeal therefrom, the appeal of each is called a cross-appeal as regards that of the other. 3 Steph. Com. 581.

CROSS-BILL. One which is brought by a defendant in a suit against a plaintiff in or against other defendants in the same suit, or against both, touching the matters in question in the original bill. Story, Eq. Pl. § 389; Mitf. Eq. Pl. 80. It is brought either to obtain a discovery of facts, in aid of the defence to the original bill, or to obtain full and complete relief as to the matters charged in the original bill; Ayers v. Carver, 17 How. (U. S.) 595, 15 L. Ed. 179.

It is considered as a defence to the original bill, and is treated as a dependency upon the original suit; 1 Eden, Inj. 190; 3 Atk. 312; 19 E. L. & Eq. 325; Cockrell v. Warner, 14 Ark. 346; McDougald v. Dougherty, 14 Ga. 674; Slason v. Wright, 14 Vt. 208; Nelson v. Dunn, 15 Ala. 501; Kidder v. Barr, 35 N. H. 251. It is usually brought either to obtain a necessary discovery, as, for example, where the plaintiff's answer under oath is desired; 3 Swanst. 474; 3 Y. & C. 594; 2 Cox, Ch. 109; or to obtain full relief for all parties, since the defendant in a bill could originally only pray for a dismissal from court, which would not prevent subsequent suits; 1 Ves. 284; 2 Sch. & L. 9, 144; Speer v. Whitfield, 10 N. J. Eq. 107; Jones v. Smith, 14 Ill. 229; Bullock v. Brown, 20 Ga. 472; or where the defendants have conflicting interests; Pattison v. Hull, 9 Cow. (N. Y.) 747; Armstrong v. Pratt, 2 Wis. 299; but may not introduce new parties; Shields v. Barrow, 17 How. (U. S.) 130, 15 L. Ed. 158; unless affirmative relief is demanded and justice so requires; Brooks v. Applegate, 37 W. Va. 376, 16 S. E. 585. New parties cannot be brought in by a cross-bill; if the defendant's interest requires their presence, he should object for non-joinder and compel plaintiff to amend; Patton v. Marshall, 173 Fed. 350, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127. It is also used for the same purpose as a plea *puis darrein continuance* at law; 2 Ball & B. 140; 2 Atk. 177, 553; Baker v. Whiting, 1 Sto. 218, Fed. Cas. No. 786.

It should state the original bill, and the proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of a cross-litigation, on the grounds on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill; Mitf. Eq. Pl. 81; and it should not introduce new and distinct matters; Gallatian v. Cunningham, 8 Cow. (N. Y.) 361.

It should be brought before publication; Sterry v. Arden, 1 Johns. Ch. (N. Y.) 62; Josey v. Rogers, 13 Ga. 478; and not after, —to avoid perjury; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250; Nelson 103.

In England it need not be brought before the same court; Mitf. Eq. Pl. 81. For the rule in the United States, see Carnochan v. Christie, 11 Wheat. (U. S.) 446, 6 L. Ed. 516; Story, Eq. Pl. § 401; Dan. Ch. Pl. & Pr. 1549.

The granting or refusing permission to file a cross-bill is largely in the discretion of the court; Huff v. Bidwell, 151 Fed. 563, 81 C. C. A. 43.

Under the Equity Rules of Supreme Court of United States (Feb. 1, 1913), matter proper for a cross-bill may be set up in the answer, with the same effect. Rule 30 (33 Sup. Ct. xxvi).

CROSS-COMPLAINT. This is allowed when a defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action. The only real difference between a complaint and a cross-complaint, is, that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and such demands affirmative relief upon the facts stated. The difference between a counter-claim and a cross-complaint is that in the former the defendant's cause of action is against the plaintiff; and the latter, against a co-defendant, or one not a party to the action; White v. Reagan, 32 Ark. 290.

CROSS-DEMAND. A demand is so called which is preferred by B, in opposition to one already preferred against him by A.

CROSS-ERRORS. Errors assigned by the respondent in a writ of error.

CROSS-EXAMINATION. The examination of a witness by the party opposed to the party who called him, and who examined, or was entitled to examine him in chief.

The purpose of the cross-examination is to test the truthfulness, intelligence, memory, bias or interest of the witness, and any question to that end within reason is usually allowed; Briggs v. People, 219 Ill. 330, 76 N. E. 499; Real v. People, 42 N. Y. 270; Wroe v. State, 20 Ohio St. 460.

In England and some of the states, when a competent witness is called and sworn, the other party is ordinarily entitled to cross-examine him as to matters not covered by the direct examination; 1 Esp. 357; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Varick v. Jackson, 2 Wend. (N. Y.) 166, 19 Am. Dec. 571; Fulton Bank v. Stafford, 2 Wend. (N. Y.) 483; Aiken v. Cato, 23 Ga. 154; Mask v. State, 32 Miss. 405; see 3 C. & P. 16; 2 M. & R. 273; Aiken v. Cato, 23

Ga. 154; but see Swift v. Ins. Co., 122 Mass. 578; but it is held in other states and in the federal courts that the cross-examination must be confined to facts connected with the direct examination; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; Philadelphia & Trenton R. Co. v. Stimpson, 14 Pet. (U. S.) 448, 10 L. Ed. 535; Ellmaker v. Buckley, 16 S. & R. (Pa.) 77; Floyd v. Bovard, 6 W. & S. (Pa.) 75; Donnelly v. State, 26 N. J. Law, 463; Landsberger v. Gorham, 5 Cal. 450; Cokely v. State, 4 Ia. 477; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904; Hansen v. Miller, 145 Ill. 538, 32 N. E. 548; In re Westerfield, 96 Cal. 113, 30 Pac. 1104; Winkler v. Roeder, 23 Neb. 706, 37 N. W. 607, 8 Am. St. Rep. 155; Fulton v. Bank, 92 Pa. 112; Monongahela Water Co. v. Stewartson, 96 Pa. 436. It may extend to every fact which is part of the plaintiff's case, but not to matter of defense; Smith v. Philadelphia Traction Co., 202 Pa. 54, 51 Atl. 345; New York Iron Mine v. Bank, 39 Mich. 644; affirmative defenses cannot be introduced on cross-examination; McCrea v. Parsons, 112 Fed. 917, 50 C. C. A. 612.

Inquiry may be made in regard to collateral facts in the discretion of the judge; 7 C. & P. 389; Lawrence v. Barker, 5 Wend. (N. Y.) 305; Huntsville Belt Line & Monte Sano Ry. Co. v. Corpening & Co., 97 Ala. 681, 12 South. 295; but not merely for the purpose of contradicting the witness by other evidence; 7 C. & P. 789; Com. v. Buzzell, 16 Pick. (Mass.) 157; Ware v. Ware, 8 Greenl. (Me.) 42. And see Howard v. Ins. Co., 4 Denio (N. Y.) 502; State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. (U. S.) 461, 10 L. Ed. 535. Considerable latitude should be allowed in cross-examining witnesses as to value, in order that the ground of their opinion may appear; Phillips v. Inhabitants of Marblehead, 148 Mass. 326, 19 N. E. 547.

A written paper identified by the witness as having been written by him may be introduced in the course of cross-examination as a part of the evidence of the party producing it, if necessary for the purposes of the cross-examination; 8 C. & P. 369. A witness may be asked whether he has not made previous statements contradictory to his present testimony; People v. Walker, 140 Cal. 153, 73 Pac. 831; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; but he must be given a chance to explain; Rice v. Rice, 43 App. Div. 458, 60 N. Y. Supp. 97. Where the statement about which he is asked is in writing, it is necessary that his attention be called to the writing and if he denies that he made such statement, the writing must be proved in the ordinary way; Gaffney v. People, 50 N. Y. 416. In Queen Caroline's Case, 2 B. & B. 286, it was held that on cross-examination counsel is not allowed to represent in the statement of a question the contents of a letter and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without first having shown the letter to the witness and asked whether he wrote such letter. This is commonly spoken of as the rule in the Queen's Case. It is severely and ably criticised in Wigmore, Evidence 1259–1263. In England it was unanimously condemned by the bar, and in 1854 a statute was passed which abolished it. In the United States it was adopted in People v. Lambert, 120 Cal. 170, 52 Pac. 307; Simmons v. State, 32 Fla. 387, 13 South. 896; Taylor v. State, 110 Ga. 150, 35 S. E. 161; Momence Stone Co. v. Groves, 197 Ill. 88, 64 N. E. 335; Glenn v. Gleason, 61 Ia. 28, 15 N. W. 659; Hendrickson v. Com. (Ky.) 64 S. W. 954; State v. Cain, 106 La. 708, 31 South. 300; O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740; Story v. State, 68 Miss. 609, 10 South. 47; State v. Matthews, 88 Mo. 121; Omaha Loan & Trust Co. v. Douglas County, 62 Neb. 1, 86 N. W. 936; Haines v. Ins. Co., 52 N. H. 467; Gaffney v. People, 50 N. Y. 423; State v. Steeves, 29 Or. 85, 43 Pac. 947; Kann v. Bennett, 223 Pa. 36, 72 Atl. 342; Chicago, M. & St. P. Ry. Co. v. Artery, 137 U. S. 520, 11 Sup. Ct. 129, 34 L. Ed. 747; Kalk v. Fielding, 50 Wis. 339, 7 N. W. 296; Mr. Wigmore thinks that its repudiation in England was not known at the time of its early adoption here.

A cross-examination as to matters not otherwise admissible in evidence entitles the party producing the witness to re-examine him as to those matters; 3 Ad. & E. 554; Stuart v. Baker, 17 Tex. 417. If the defendant be permitted on cross-examination to bring out new matter, constituting his own case, which he had not opened to the jury, to the injury of the plaintiff, it may be ground for reversal; Thomas & Sons v. Loose, Seaman & Co., 114 Pa. 35, 6 Atl. 326; Hughes v. Coal Co., 104 Pa. 207.

Leading questions may be put in cross-examination; 1 Stark. Ev. 96; Floyd v. Bovard, 6 W. & S. (Pa.) 75; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

The trial court has not such a discretion as to the scope of cross-examination of the defendant in a criminal cause as in the examination of other witnesses; People v. O'Brien, 96 Cal. 171, 31 Pac. 45. See State v. Wright, 40 La. Ann. 589, 4 South. 486.

A refusal to permit cross-examination as to relevant matters brought out in direct examination is usually ground for reversal; Prout v. Bernards Land & Sand Co., 77 N. J. L. 719, 73 Atl. 486, 25 L. R. A. (N. S.) 683, note; Eames v. Kaiser, 142 U. S. 488, 12 Sup. Ct. 302, 35 L. Ed. 1091; Graham v. Larimer, 83 Cal. 173, 23 Pac. 286. A full and fair cross-examination is a matter of right and a denial of it is error; after such has been allowed, further cross-examination becomes discretionary; Ressurrection Gold Min. Co. v. Fortune Min. Co., 129 Fed. 668, 64 C. C.

A. 180; City of Florence v. Calmet, 43 Colo. 510, 96 Pac. 183.

It is improper for a trial judge to cross-examine defendant's witnesses in such a manner as to impress the jury with the idea that he thinks the defendant guilty. If he participates in the cross-examination, he should do it in such a way as to indicate his entire impartiality; Adler v. U. S., 182 Fed. 464, 104 C. C. A. 608.

CROSS-REMAINDER. Where a particular estate is conveyed to several persons in common, or various parcels of the same land are conveyed to several persons in severalty, and upon the termination of the interest of either of them his share is to go in remainder to the rest, the remainders so limited over are said to be cross-remainders. In deeds, such remainders cannot arise without express limitation. In wills, they frequently arise by implication; 1 Prest. Est. 94; 2 Hilliard, R. P. 44; 4 Kent 201; Chal. R. P. 241.

CROSS-RULES. Rules entered where each of the opposite litigants obtained a rule *nisi*, as the plaintiff to increase the damages, and the defendant to enter a nonsuit. Wharton.

CROSSED-CHECK. See CHECK.

CROSSING. See GRADE CROSSING.

CROWN. **In England.** A word often used for the sovereign. As to the Crown as a corporation, see Maitland, 16 L. Q. R. 335, 17 *id.* 131.

See DEMISE OF THE CROWN.

CROWN CASES RESERVED. See COURT FOR CONSIDERATION OF CROWN CASES RESERVED.

CROWN DEBTS. Debts due to the crown, which are put, by various statutes, upon a different footing from those due to a subject.

CROWN LANDS. The demesne lands of the crown. 2 Steph. Com. 534.

CROWN LAW. **In England.** Criminal law, the crown being the prosecutor.

CROWN OFFICE. The criminal side of the court of king's bench. The king's attorney in this court is called master of the crown office. 4 Bla. Com. 308.

CROWN SIDE. The criminal side of the court of king's bench. Distinguished from the pleas side, which transacts the civil business. 4 Bla. Com. 265.

CROWN SOLICITOR. **In England.** The solicitor to the treasury.

CRUEL AND UNUSUAL PUNISHMENT. See PUNISHMENT.

CRUELTY. ***As between husband and wife.*** See LEGAL CRUELTY.

Cruelty towards weak and helpless persons takes place where a party bound to provide for and protect them either abuses them by whipping them unnecessarily, or by neglecting to provide for them those necessaries which their helpless condition requires. Exposing a person of tender years, under one's care, to the inclemency of the weather; 2 Campb. 650; keeping such a child, unable to provide for himself, without adequate food; 1 Leach 137; Russ. & R. 20; or an overseer neglecting to provide food and medical care to a pauper having urgent and immediate occasion for them; Russ. & R. 46; are examples of this species of cruelty.

In many of the principal cities, beginning with New York, in April, 1875, societies for the prevention of cruelty to children have been formed, authorized to prosecute persons who maltreat children, or force them to pursue improper and dangerous employments; N. Y. Act of April 21, 1875; Delafield on Children, 1876. Stat. 42 & 43 Vict. c. 34 regulates certain employments for children. By the act of Congress of February 13, 1885, the association for the prevention of cruelty to animals for the District of Columbia, was authorized to extend its operation, under the name of the Washington Humane Society, to the protection of children as well as animals from cruelty and abuse, and the agents of the society have power to prefer complaints for the violation of any law relating to or affecting the protection of children. They may also bring before the court any child who is subjected to cruel treatment, abuse or neglect, or any child under sixteen years of age found in a house of ill-fame, and the court may commit such child to an orphan asylum or other public charitable institution, and any person wilfully or cruelly maltreating, or wrongfully employing such child, is liable to punishment. 23 Stat. L. 302.

Cruelty to animals is an indictable offence. A defendant was convicted of a misdemeanor for tying the tongue of a calf so near the root as to prevent its sucking, in order to sell the cow at a greater price, by giving to her udder the appearance of being full of milk while affording the calf all it needed; Morris & Clark's Cases, 6 City H. Rec. (N. Y.) 62. A man may be indicted for cruelly beating his horse; U. S. v. Jackson, 4 Cra. C. C. 483, Fed. Cas. No. 15,453; 9 L. T. R. (N. S.) 175; Com. v. Lufkin, 7 Allen (Mass.) 579; 3 B. & S. 382; State v. Avery, 44 N. H. 392; Collier v. State, 4 Tex. App. 12; Uecker v. State, 4 Tex. App. 234; State v. Bogardus, 4 Mo. App. 215; State v. Haley, 52 Mo. App. 520; Swartzbaugh v. People, 85 Ill. 457; Com. v. Curry, 150 Mass. 509, 23 N. E. 212; See Com. v. McClellan, 101 Mass. 34; State v. Porter, 112 N. C. 887, 16 S. E. 915; Tinsley v. State (Tex.) 22 S. W. 39; or for cruel treatment of a hen; State v. Neal, 120 N. C. 613, 27 S. E. 81, 58 Am. St. Rep. 810.

Under 12 and 13 Vict. c. 92, § 2, dishorning cattle is not an offence where the operation is skilfully performed; 16 Cox, Cr. Cas. 101. This practice is allowed in Pennsylvania; Act Pa. 1895, June 25, P. L. 286. In Massachusetts it was held that a fox is an animal in the sense of the statute, and a person letting loose a captive fox to be subjected to unnecessary suffering (for the purpose of being hunted by dogs) was liable to punishment; Com. v. Turner, 145 Mass. 296, 14 N. E. 130.

Malice toward the owner is not an ingredient of the offense created by a statute providing for the punishment of every person who shall wilfully and maliciously maim the horse of another; People v. Tessmer, 171 Mich. 522, 41 L. R. A. (N. S.) 433, 137 N. W. 214.

CRUISE. A voyage or expedition in quest of vessels or fleets of the enemy which may be expected to sail in any particular track at a certain season of the year. The region in which these cruises are performed is usually termed the rendezvous, or cruising-latitude.

When the ships employed for this purpose, which are accordingly called *cruisers*, have arrived at the destined station, they traverse the sea backwards and forwards, under an easy sail, and within a limited space, conjectured to be in the track of their expected adversaries. Wesk. Ins.; Lex Merc. Red. 271, 284; Dougl. 509; Marsh. Ins. 196, 199, 520; The Brutus, 2 Gall. 526, Fed. Cas. No. 2,060.

CRY DE PAYS, CRY DE PAIS. A hue and cry raised by the country. This was allowable in the absence of the constable when a felony had been committed.

CRYER. See CRIER.

CUCKING-STOOL. An engine or machine for the punishment of scolds and unquiet women.

Called also a trebucket, tumbrel, and castigatory. Bakers and brewers were formerly also liable to the same punishment. Being fastened in the machine, they were immersed over head and ears in some pool; Blount; Co. 3d Inst. 219; 4 Bla. Com. 168.

CUI ANTE DIVORTIUM (L. Lat. The full phrase was, *Cui ipsa ante divortium contradicere non potuit*, whom she before the divorce could not gainsay). A writ which anciently lay in favor of a woman who had been divorced from her husband, to recover lands and tenements which she had in fee-simple, fee-tail, or for life, from him to whom her husband had aliened them during marriage, when she could not gainsay it; Fitzh. N. B. 240; 3 Bla. Com. 183, n.; Stearns, Real Act. 143; Booth, Real Act. 188. Abolished in 1833.

CUI IN VITA (L. Lat. The full phrase was, *Cui in vita sua ipsa contradicere non potuit*, whom in his lifetime she could not gainsay). A writ of entry which lay for a widow against a person to whom her husband had in his lifetime aliened her lands. Fitzh. N. B. 193. It was a method of establishing the fact of death, being a trial with witnesses, but without a jury. The object of the writ was to avoid a judgment obtained against the husband by confession or default. It is obsolete in England by force of 32 Hen. VIII. c. 28, § 6. See 6 Co. 8, 9. As to its use in Pennsylvania, see 3 Binn. Appx.; Rep. Comm. on Penn. Civ. Code, 1835, 90. Abolished in England, 1833. Blackstone is said to have shown little knowledge of its history; Thayer, Evidence.

CUL DE SAC (Fr. bottom of a bag). A street which is open at one end only.

It may be a highway; L. R. 16 Ch. Div. 449; Bartlett v. Bangor, 67 Me. 460; Adams v. Harrington, 114 Ind. 66, 14 N. E. 603; Penick v. Morgan County, 131 Ga. 385, 62 S. E. 300; L. R. 16 Eq. 108. The earlier authorities are generally to the contrary. See 11 East 376, note; 5 Taunt. 137; 5 B. & Ald. 454; Holdane v. Village of Cold Spring, 23 Barb. (N. Y.) 103; Hawk. Pl. Cr. b. 1, c. 76, s. 1; Dig. 50. 16. 43; 43. 12. 1. § 13; 47, 10, 15, § 7. It may be said that *prima facie* it is not a highway; see 18 Q. B. 870; State v. Gross, 119 N. C. 868, 26 S. E. 91.

CULPA. A fault; negligence. Jones, Bailm. 8.

Culpa is to be distinguished from *dolus*, the latter being a trick for the purpose of deception, the former merely a negligence. There are three degrees of *culpa: lata culpa*, gross fault or neglect; *levis culpa*, ordinary fault or neglect; *levissima culpa*, slight fault or neglect; and the definitions of these degrees are precisely the same as those in our law. Story, Bailm. § 18; Waltham Bank v. Wright, 8 Allen (Mass.) 122; Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526. See NEGLIGENCE.

CULPABLE. This means not only criminal but censurable; and when the term is applied to the omission by a person to preserve the means of enforcing his own rights, censurable is more nearly equivalent. As he has merely lost a right of action which he might voluntarily relinquish, and has wronged nobody but himself, culpable neglect would seem to convey the idea of neglect for which he was to blame and is ascribed to his own carelessness, improvidence or folly. Waltham Bank v. Wright, 8 Allen (Mass.) 122.

CULPRIT. A person who is guilty, or supposed to be guilty, of a crime.

When a prisoner is arraigned, and he pleads not guilty, in English practice, the clerk, who arraigns him on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove the accusation. This is done by writing two monosyllabic abbreviations,—*cul. prit.* 4 Bla. Com. 339; 1 Chit. Cr. Law 416. See Christian's note to Bla. Com. cited; 3 Sharsw. Bla. Com. 340, n. 9. The technical meaning has disappeared, and the compound is used in the popular sense as above given.

CULVERTAGE. A base kind of slavery. The confiscation or forfeiture which takes

place when a lord seizes his tenant's estate. Blount; Du Cange.

CUM ONERE (Lat.). With the burden; subject to the incumbrance; subject to the charge. A purchaser with knowledge of an incumbrance takes the property *cum onere*. Co. Litt. 231 *a*; 7 East 164.

CUM TESTAMENTO ANNEXO (Lat.). With the will annexed. The term is applied to administration when there is no executor named in a will, or if he who is named is incapable of acting, or where the executor named refuses to act. If the executor has died, an administrator *de bonis non cum testamento annexo* (of the goods not [already] administered upon with the will annexed) is appointed. Often abbreviated d. b. n. c. t. a.

CUMULATIVE EVIDENCE. That which goes to prove what has already been established by other evidence. Waller v. Graves, 20 Conn. 305; Glidden v. Dunlap, 28 Me. 379; Parker v. Hardy, 24 Pick. (Mass.) 246; Parshall v. Klinck, 43 Barb. (N. Y.) 203; Able & Co. v. Frazier, 43 Iowa, 175.

Newly discovered evidence, if cumulative merely, is not sufficient ground for a new trial; Hill v. Helman, 33 Neb. 731, 51 N. W. 128; Johnson v. Palmour, 87 Ga. 244, 13 S. E. 637; White v. Ward, 35 W. Va. 418, 14 S. E. 22; Link v. R. Co., 3 Wyo. 680, 29 Pac. 741; Louisville, N. O. & T. Ry. Co. v. Crayton, 69 Miss. 152, 12 South. 271; Davis v. Mann, 43 Ill. App. 301.

CUMULATIVE LEGACY. See LEGACY.

CUMULATIVE REMEDY. A remedy created by statute in addition to one which still remains in force.

CUMULATIVE SENTENCE. A second or additional judgment given against one who has been convicted, the execution or effect of which is to commence after the first has expired. Clifford v. Dryden, 31 Wash. 545, 72 Pac. 96.

Thus, where a man is sentenced to an imprisonment for six months on conviction of larceny, and afterwards he is convicted of burglary, he may be sentenced to imprisonment for the latter, to commence after the expiration of the first imprisonment: this is called a cumulative judgment. And if the former sentence is shortened by a pardon, or by reversal on writ of error, it expires, and the subsequent sentence takes effect, as if the former had expired by lapse of time; Kite v. Com., 11 Metc. (Mass.) 581. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment of equal duration, held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count; 15 Q. B. 594.

Upon an indictment for misdemeanor containing two counts for distinct offences, the defendant may be sentenced to imprisonment for consecutive terms of punishment, although the aggregate of the punishments may exceed the punishment allowed by law for one offence, and this rule is in many states prescribed by statute; 1 Bish. New Crim. Proc. § 1327 (2); Whart. Cr. Pl. & Pr. § 932; In re White, 50 Kan. 299, 32 Pac. 36; In re Walsh, 37 Neb. 454, 55 N. W. 1075; In re Wilson, 11 Utah, 114, 39 Pac. 498. But it may in some cases be the means of perpetrating great injustice. See O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450, where a justice of the peace imposed a fine of $6638, and on failure to pay it, a sentence of nearly 60 years' imprisonment, for selling intoxcating liquors. The Supreme Court of the United States refused to interfere. See 31 Am. L. Reg. 619.

In the absence of a statute, it is generally held that the court has power to impose cumulative sentences upon conviction under separate indictments for separate offences, the imprisonment under one to commence at the termination of that under the other; Howard v. U. S., 75 Fed. 986, 21 C. C. A. 586, 34 L. R. A. 509, 43 U. S. App. 673; Simmons v. Coal Co., 117 Ga. 315, 43 S. E. 780, 61 L. R. A. 739; In re Breton, 93 Me. 39, 44 Atl. 125, 74 Am. St. Rep. 335; Rigor v. State, 101 Md. 465, 61 Atl. 631, 4 Ann. Cas. 719; State v. Hamby, 126 N. C. 1066, 35 S. E. 614; *Contra*, Ex parte Meyers, 44 Mo. 279; Lockwood v. Dills, 74 Ind. 57. A statute giving this authority is *ex post facto;* Baker v. State, 11 Tex. App. 262; where a court imposes sentences exceeding, in the aggregate, its jurisdiction, only the excess is void; Harris v. Lang, 27 App. D. C. 84, 7 L. R. A. (N. S.) 124, 7 Ann. Cas. 141. If the second conviction of three is erroneous, the third at once follows the first; U. S. v. Carpenter, 151 Fed. 214, 81 C. C. A. 194, 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509.

Upon an indictment for perjury charging offences committed in different suits, the defendant, upon conviction, may be sentenced to distinct punishments, although the suits were instituted with a common object; 5 Q. B. Div. 490.

Where, upon trial of an indictment—containing several counts—charging separate and distinct misdemeanors, identical in character, a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding in the aggregate what is prescribed by statute as the maximum punishment for one offence of the character charged; People v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211; but this case is said to stand alone. See 1 Bish. New Cr. Proc. § 1327 (2); 6 App. Cas. 241.

CUMULATIVE VOTING. A method of voting in which a voter, in voting for a class of officers, can distribute his votes among the candidates in such proportion as he sees fit. It does not exist except by a constitutional or statutory provision; State v. Stockley, 45 Ohio St. 304, 13 N. E. 279; this appears to be the settled rule; the cases found in the books are all on statutory provisions.

The right of a stockholder to vote cumulatively cannot be exercised on a single proposition, such as a question of adjournment; Bridgers v. Staton, 150 N. C. 216, 63 S. E. 892; the motives in exercising this right cannot be inquired into; Chicago Macaroni Mfg. Co. v. Boggiano, 202 Ill. 312, 67 N. E. 17. The law providing for cumulative voting of stock is not applicable to an election of managers of a partnership association; Attorney General v. McVichie, 138 Mich. 387, 101 N. W. 552.

CUNEATOR. A coiner. Du Cange. *Cuneare*, to coin. *Cuneus*, the die with which to coin. *Cuneata*, coined. Du Cange; Spelman, Gloss.

CUR. ADV. VULT. See CURIA ADVISARE VULT.

CURATE. One who represents the incumbent of a church, parson or vicar, and takes care of the church and performs divine services in his stead. An officiating temporary minister in the English church who represents the proper incumbent. Burn, Eccl. Law; 1 Bla. Com. 393. See CURE OF SOULS.

CURATIO (Lat.). **In Civil Law.** The power or duty of managing the property of him who, either on account of infancy or some defect of mind or body, cannot manage his own affairs. The duty of a curator or guardian. Calvinus, Lex.

CURATOR. **In Civil Law.** One legally appointed to take care of the interests of one who, on account of his youth, or defect of his understanding, or for some other cause, is unable to attend to them himself; a guardian.

There are curators *ad bona* (of property), who administer the estate of a minor, take care of his person, and intervene in all of his contracts; curators *ad litem* (of suits), who assist the minor in courts of justice, and act as curators *ad bona* in cases where the interests of the curator are opposed to the interests of the minor. There are also curators of insane persons, and of vacant successions and absent heirs.

In Missouri the term has been adopted from the civil law and it is applied to the guardian of the ward's estate, as distinct from the guardian of his person; Duncan v. Crook, 49 Mo. 117. In Scotland, it is pronounced Cúrator.

Under the Roman law, the guardian of a minor, both as to person or property, was called a tutor *(q. v.)*; and if, after being of an age to exercise his rights, he needed a person to look after his rights, such person was called a curator. Sandars, Inst. Just. Introd. xl. A person who had attained the age of puberty was not required to have a curator, but if he had much property he was almost certain to have one, as it was part of his tutor's duty to urge him to do so; *id.* 74; Dig. xxvi. 7. 5. 5.

Interim Curator. In England. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the crown of an administrator for the same purpose; Stat. 33 & 34 Vict. c. 23; 4 Steph. Com. 462.

CURATOR BONIS (Lat.). **In Civil Law.** A guardian to take care of the property. Calvinus, Lex.

In Scotch Law. A guardian for minors, lunatics, etc. Halkers, Tech. Terms; Bell, Dict.

CURATOR AD HOC. A guardian for this special purpose.

A *curator ad hoc* can be appointed to proceed against the tutor for an accounting or his removal only when there is no undertutor; Welch v. Baxter, 45 La. Ann. 1062, 13 South. 629.

CURATOR AD LITEM (Lat.). Guardian for the suit. In English law, the corresponding phrase is guardian *ad litem*.

CURATORSHIP. The office of a curator.

Curatorship differs from tutorship *(q. v.)* in this, that the latter is instituted for the protection of property in the first place, and secondly, of the person; while the former is intended to protect, first, the person, and, secondly, the property. 1 *Leçons Elem. du Droit Civ. Rom.* 241.

CURATRIX. A woman who has been appointed to the office of a curator.

CURE BY VERDICT. See AIDER BY VERDICT.

CURE OF SOULS. The ordinary duties of an officiating clergyman.

Curate more properly denotes the incumbent in general who hath the *cure of souls;* but more frequently it is understood to signify a clerk not instituted to the *cure of souls,* but exercising the spiritual office in a parish under the rector or vicar. 2 Burn, Eccl. Law 54; 1 H. Bla. 424.

CURFEW (French, *couvre,* to cover, and *feu,* fire). This is generally supposed to be an institution of William the Conqueror, who required, by ringing of the bell at eight o'clock in the evening, that all lights and fires in dwellings should then be extinguished. But the custom is evidently older than the Norman; for we find an order of King Alfred that the inhabitants of Oxford should at the ringing of that bell cover up their fires and go to bed. And there is evidence that the same practice prevailed at this period in France, Normandy, Spain, and probably in most of the other countries of Europe. Henry, Hist. of Britain, vol. 3, 567. It was doubtless intended as a precaution against fires, which were very frequent and destructive when most houses were built of wood.

That it was not intended as a badge of infamy is evident from the fact that the law was of equal obligation upon the nobles of court and upon the native-born serfs. And yet we find the name of *curfew law* employed as a by-word denoting the most odious tyranny.

The curfew is spoken of in 1 Social England 373, as having been ordained by William I. in order to prevent nightly gatherings of the people of England.

It appears to have met with so much opposition that in 1103 we find Henry I. repealing the enactment of his father on the subject; and Blackstone says that, though it is mentioned a century afterwards, it is rather spoken of as a time of night than as a still subsisting custom. Shakespeare frequently refers to it in the same sense. This practice is still pursued, in many parts of England (Lincoln's Inn, among them) and of this country, as a very convenient mode of apprising people of the time of night. It was enacted in Utah (1903) and other states.

CURIA. **In Roman Law.** One of the divisions of the Roman people. The Roman people were divided by Romulus into three tribes and thirty *curiæ:* the members of each *curia* were united by the tie of common religious rites, and also by certain common political and civil powers. Dion. Hal. l. 2, p. 82; Liv. l. 1, cap. 13; Plut. *in Romulo,* p. 30; Festus Brisson, *in verb.*

In later times the word signified the senate or aristocratic body of the provincial cities of the empire. Brisson, *in verb.*; Or-

tolan, *Histoire*, no. 25, 408; Ort. Inst. no. 125.

The senate-house at Rome; the senate-house of a provincial city. Cod. 10. 31. 2; Spelman, Gloss.

In English Law. The king's court; the palace; the royal household. The residence of a noble; a manor or chief manse; the hall of a manor. Spelman, Gloss.

A court of justice, whether of general or special jurisdiction. Fleta, lib. 2, l. 72, § 1; Feud. lib. 1, 2, 22; Spelman; Cowell; 3 Bla. Com. c. iv. See COURT.

A court-yard or enclosed piece of ground; a close. Stat. Edw. Conf. 1, 6; Bracton, 76, 222 *b*, 335 *b*, 356 *b*, 358; Spelman, Gloss. See CURIA CLAUDENDA.

The civil or secular power, as distinguished from the church. Spelman, Gloss.

CURIA ADVISARE VULT (Lat.). The court wishes to consider (the matter).

The entry formerly made upon the record to indicate the continuance of a cause until final judgment should be rendered.

It is commonly abbreviated thus: *cur. adv. vult*, or *c. a. v.* Thus, in 2 B. & C. 172, after the report of the argument we find "*cur. adv. vult*," then, "on a subsequent day judgment was delivered," etc.

CURIA CLAUDENDA. See DE CURIA CLAUDENDA.

CURIA MILITARIS. See COURT OF CHIVALRY; COURT-MARTIAL; Harcourt, His Grace the Steward, etc.

CURIA REGIS (Lat.). The king's court.

In English Law. A court established in England by William the Conqueror in his own hall.

It was the "great universal" court of the kingdom; from the dismemberment of which are derived the present four *superior courts* in England, viz.: the High Court of Chancery, and the three *superior courts of common law*, to-wit, The Queen's Bench, Common Pleas, and Exchequer. It was composed of the king's great officers of state resident in his palace and usually attendant on his person; such as the lord high constable and lord marescal (who chiefly presided in matters of honor and of arms), the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor (whose peculiar duty it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority), and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice in matters of great moment and difficulty. These, in their several departments, transacted all secular business, both civil and criminal, and all matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. This court was bound to follow the king's household in all his expeditions; on which account the trial of common causes in it was found very burdensome to the people, and accordingly the 11th chapter of *Magna Charta* enacted that "*communia placita non sequantur curiam regis, sed teneantur in aliquo certo loco*," which certain place was established in Westminster Hall (where the *aula regis* originally sat, when the king resided in that city), and there it has ever since continued, under the name of Court of Common Pleas, or Common Bench. It was under the reign of Edward I. that the other several officers of the chief justiciar were subdivided and broken into distinct courts of judicature. A court of chivalry, to regulate the king's domestic servants, and an august tribunal for the trial of delinquent peers, were erected; while the barons reserved to themselves in parliament the right of reviewing the sentences of the other courts in the last resort; but the distribution of common justice between man and man was arranged by giving to the court of chancery jurisdiction to issue all original writs under the great seal to other courts; the exchequer to manage the king's revenue, the common pleas to determine all causes between private subjects, and the court of king's bench retaining all the jurisdiction not cantoned out to the other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes. 3 Steph. Com. 397; 3 Bla. Com. 38; Bract. l. 3. tr. 1, c. 7; Fleta, Abr. 2, cc. 2, 3; Gilbert, Hist. C. Pleas, Introd. 13; 1 Reeve, Hist. E. L. 48.

The Council of the King. Its early nature is not well understood. Probably its working body consisted of the king's great officers of state and the judges; perhaps others were added to it on particular occasion. It transacted business of state, sometimes taxation and legislation. It was a court of appeal and exercised original jurisdiction. It answered petitions, which was its chief duty. It might send the petition to one of the ordinary courts or lay it before the king. It came to provide new remedies for new wrongs and distribute justice for each man's deserts. Later it was tending to become an executive body.

Formerly the Chancellor was the leading legal member of the Council. By the end of the Middle Ages the Chancery has become a court, but its connection with the Council is so close that in most cases the Council gives the judgment of the court. In the Tudor period the Council was re-organized and the Chancery became separate from it.

At the end of the 13th and the beginning of the 14th century, Parliament gradually became separate from the Council; a hundred years later a division began to take place within the Council—into the Privy or Ordinary Council, the great officers of state and certain other trusted advisers of the king, and the Great Council, which consisted of the Privy Council and the great body of the nobility, spiritual and temporal. The early records speak of the *Council;* about the time of Henry VI the term *Privy Council* is met with.

The royal authority was exercised through the Council.

Towards the end of the 16th century, a committee of practically the whole Council sitting in the Star Chamber gradually absorbed the judicial work of the Council, but the process was gradual and there are few data. The Star Chamber had the title of the "Lords of the Council Sitting in the Star

Chamber." Every member of the Privy Council had the right to sit there.

At the beginning of the Tudor period the court of Star Chamber had begun to present the appearance of a court more or less separate from the Council acting as an executive body.

The Long Parliament abolished the greater part of the judicial business of the Council but only as to English bills or petitions. Its appellate jurisdiction as to places outside the ordinary English law was retained.

The act of 1833 provided "for the better administration of justice in His Majesty's Privy Council."

The Judicial Committee of the Privy Council is a committee of an Executive Council. Though spoken of as a court, it has not a self-contained and independent judicial function; its legal operation receives its final consummation and sole efficacy from the direct official action of the sovereign in council.

Historically it is the oldest of the royal courts. The act of the crown in allowing or dismissing an appeal, according to the advice contained in the report of the Judicial Committee, is the direct lineal descendant of the judgment given by the king in person in the Curia Regis. See 1 Holdsw. Hist. E. L. 23.

See JUDICIAL COMMITTEE OF THE PRIVY COUNCIL; COURT OF STAR CHAMBER; Dicey, Privy Council. A collection of cases (1616–1626) called *Abbreviatio Placitorum* contains the earliest information of the working of the Curia Regis. See REPORTS; 2 Sel. Essays, Anglo-Amer. L. H. 209.

See Procedure in the Curia Regis, by G. B. Adams (13 Columb. L. Rev. 277).

CURRENCY. A term commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes. Osgood v. McConnell, 32 Ill. 74; Cockrill v. Kirkpatrick, 9 Mo. 697; Dugan v. Campbell, 1 Ohio 115, 119; Pilmer v. Bank, 16 Ia. 323; Klauber v. Biggerstaff, 47 Wis. 560, 3 N. W. 357, 32 Am. Rep. 773.

CURRENT MONEY. That which is in general use as a medium of exchange.

It means the same thing as currency of the country. Miller v. McKinney, 5 Lea (Tenn.) 96.

The adjective "current," when qualifying money, is not the synonym of "convertible." It is employed to describe money which passes from hand to hand, and is generally received. Money is current which is received in the common business transactions, and is the common medium in barter and trade; Stalworth v. Blum, 41 Ala. 321.

Current money means that money which is commonly used and recognized as such; current bank notes, such as are convertible into specie at the counter where they were issued. Wharton v. Morris, 1 Dall. (U. S.) 125, 1 L. Ed. 65; Pierson v. Wallace, 7 Ark. 282; see Fry v. Dudley, 20 La. Ann. 368; Kupfer v. Marc, 28 Ill. 388; Conwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; McChord v. Ford, 3 T. B. Monr. (Ky.) 166; Warren v. Brown, 64 N. C. 381; Stalworth v. Blum, 41 Ala. 321.

CURSITOR. A junior clerk in the court of chancery, whose business it formerly was to write out from the register those forms of writs which issued of course. 1 Poll. & M. Hist. Engl. Law 174.

Such writs were called writs *de cursu* (of course), whence the name, which had been acquired as early as the reign of Edward III. The body of cursitors constituted a corporation, each clerk having a certain number of counties assigned to him. Coke, 2d Inst. 670; 1 Spence, Eq. Jur. 238. The office was abolished by 5 & 6 Will. IV. c. 82.

CURSITOR BARON. An officer of the court of exchequer, appointed by patent under the great seal to be one of the barons of the exchequer. Abolished by 19 & 20 Vict. c. 86. Wharton, Dict.

CURTESY. The estate to which by common law a man is entitled, on the death of his wife, in the lands or tenements of which she was seised in possession in fee simple or in tail during their coverture, provided they have had lawful issue born alive which might have been capable of inheriting the estate. Chal. R. P. 314.

An estate for life which a husband takes at the death of his wife, having had issue by her born alive during coverture, in all lands of which she was seised in fact of an inheritable estate during coverture.

The right of the husband to enjoy during his life land of which his wife is at any time during coverture seised in fee simple (absolute or defeasible) or in fee tail, provided there was issue, born alive, of the marriage. Demb. Land Tit. § 109.

It is a freehold estate for the term of his natural life. 1 Washb. R. P. 127. In the common law the word is used in the phrases *tenant by curtesy*, or *estate by curtesy*, but seldom alone; while in Scotland of itself it denotes the estate. The phrase "tenant by the law of England" was also used, and is said to have been of earlier origin; 2 Poll. & M. Hist. E. L. 412.

Some question has been made as to the derivation both of the custom and its name. It is said that the term is derived from *curtis*, a court, and that the custom, in England at least, is of English origin, though a similar custom existed in Normandy, and still exists in Scotland. 1 Washb. R. P. 128, n.; Wright, Ten. 192; Co. Litt. 30 *a*; 2 Bla. Com. 126; Ersk. Inst. 380; Grand Cout. de Normandie, c. 119. But this derivation "is considered more ingenious than satisfactory," and it is suggested that it is possible to explain the phrase by "some royal concession," as "being reasonable enough." 2 Poll. & M. Hist. E. L. 412.

A husband has an estate by curtesy after

the death of his wife in lands which he had voluntarily settled upon her, if he did not expressly or by implication relinquish such rights in the settlement; Depue v. Miller, 65 W. Va. 120, 64 S. E. 740, 23 L. R. A. (N. S.) 775; In re Kaufmann, 142 Fed. 898; Meacham v. Bunting, 156 Ill. 586, 41 N. E. 175, 28 L. R. A. 618, 47 Am. St. Rep. 239; *contra*, Ratliff v. Ratliff, 102 Va. 887, 47 S. E. 1007. He has curtesy in the equity of redemption of the wife's lands; Jackson v. Printing Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454. That an estate was purchased by funds from the wife's separate estate and conveyed to the husband and wife jointly will not deprive him of his curtesy in the property; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724. A surviving husband is entitled to curtesy out of a determinable fee owned by his wife with issue born alive notwithstanding the contingency upon which the fee is to terminate exists at the time of her death; Carter v. Couch, 157 Ala. 470, 47 South. 1006, 20 L. R. A. (N. S.) 858; Hatfield v. Sneden, 54 N. Y. 280; Webb v. First Baptist Church, 90 Ky. 117, 13 S. W. 362; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641.

In Pennsylvania, by act of April 8, 1833, issue of the marriage is no longer necessary, so that the husband gains a freehold by the marriage itself; Lancaster County Bank v. Stauffer, 10 Pa. 399; but the law applies only when the estate is devisable, not to an estate tail or defeasible fee; McMasters v. Negley, 152 Pa. 303, 25 Atl. 641. That the wife's title to real estate is not acquired until after the death of the only child of the marriage will not deprive the husband of curtesy in the property; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621, 20 L. R. A. (N. S.) 825, 128 Am. St. Rep. 458, 15 Ann. Cas. 724. Ohio, Illinois, Kentucky, and Maine reduce the husband's life estate to one-third, calling it "dower," and dispense with birth of issue alive, while dower remains unchanged. In South Carolina and Georgia, curtesy has gone out of use, the husband having under the law greater benefits. Demb. Land Tit. § 109. Louisiana, Texas, California, Nevada, Washington, and Idaho, and Arizona and New Mexico have the "community" system and no curtesy; *id.* § 111. And in Indiana, Iowa, Minnesota, the Dakotas, Kansas, Colorado, Wyoming, and Mississippi, dower is applied by a forced lienship of the widow and there is no curtesy; *id.* § 108. See DOWER.

CURTILAGE. The enclosed space immediately surrounding a dwelling-house, contained within the same enclosure.

It is defined by Blount as a yard, backside, or piece of ground near a dwelling-house, in which they sow beans, etc., yet distinct from the garden. Blount; Spelman. By others it is said to be a waste piece of ground so situated. Cowell.

It has also been defined as "a fence or enclosure of a small piece of land around a dwelling-house, usually including the buildings occupied in connection with the dwelling-house, the enclosure consisting either of a separate fence or partly of a fence and partly of the exterior of buildings so within this enclosure." Com. v. Barney, 10 Cush. (Mass.) 480.

It usually includes the yard, garden, or field which is near to and used in connection with the dwelling. Cook v. State, 83 Ala. 62, 3 South. 849, 3 Am. St. Rep. 688. See Ivey v. State, 61 Ala. 58.

The term is used in determining whether the offence of breaking into a barn or warehouse is burglary. See 4 Bla. Com. 224; 1 Hale Pl. Cr. 558; 2 Russell, Cr. 13; Russ. & R. 289; 1 C. & K. 84.

In Michigan the meaning of curtilage has been extended to include more than an enclosure near the house. People v. Taylor, 2 Mich. 250. See Coddington v. Dry Dock & Wet Dock Co., 31 N. J. L. 485; State v. Shaw, 31 Me. 523.

CURTILLUM. The area or space within the enclosure of a dwelling-house. Spelman, Gloss.

CURTIS. The area about a building; a garden; a hut or farmer's house; a farmer's house with the land enrolled with it.

A village or a walled town containing a small number of houses.

The residence of a nobleman; a hall or palace.

A court; a tribunal of justice. 1 Washb. R. P. 120; Spelman, Gloss.; 3 Bla. Com. 320.

CUSTODES. Keepers; guardians; conservators.

Custodes pacis (guardians of the peace). 1 Bla. Com. 349.

Custodes libertatis Angliæ auctoritate parliamenti (guardians of the liberty of England by authority of parliament). The style in which writs and all judicial process ran during the grand rebellion, from the death of Charles I. till Cromwell was declared Protector. Jacob, Law Dict.

CUSTODIA LEGIS. In the custody of the law.

When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise; Gilman v. Williams, 7 Wis. 334, 76 Am. Dec. 219.

Where a sheriff has taken under attachment more than enough property to satisfy it, the property is not in *custodia legis* in a sense that will prevent a levy by a U. S. marshal in a suit in the federal court, so as to give the latter creditor a lien on the excess after satisfying the first attachment; Goodbar v. Brooks, 57 Ark. 450. Nor are executions issued on void judgments and their returns admissible against subsequent attaching creditors, to show that the goods were *in custodia legis;* Burr v. Mathers, 51 Mo. App. 470.

For cases on property and funds in the custody of the courts not subject to attachment, see Curtis v. Ford, 10 L. R. A. 529, note.

CUSTODY. The detainer of a person by virtue of a lawful authority. 3 Chit. Pr. 355.

The care and possession of a thing.

Custody has been held to mean nothing less than actual imprisonment; Smith v. Com., 59 Pa. 320; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. See CUSTODIA LEGIS.

As to custody of children, see PARENT AND CHILD; INFANT; DIVORCE.

CUSTOM. Such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter, to which it relates.

Custom is a law established by long usage. Wilcox v. Wood, 9 Wend. (N. Y.) 349. See Pollock, 1st Bk. of Jurispr. 263.

It differs from prescription, which is personal and is annexed to the person of the owner of a particular estate; while the other is local, and relates to a particular district. An instance of the latter occurs where the question is upon the manner of conducting a particular branch of trade at a certain place; of the former, where a certain person and his ancestors, or those whose estates he has, have been entitled to a certain advantage or privilege, as to have common of pasture in a certain close, or the like. 2 Bla. Com. 263. The distinction has been thus expressed: "While prescription is the making of a right, custom is the making of a law;" Laws. Us. & Cust. 15, n. 2.

General customs are such as constitute a part of the common law of the country and extend to the whole country.

Particular customs are those which are confined to a particular district; or to the members of a particular class; the existence of the former are to be determined by the court, of the latter, by the jury. Laws. Us. & Cust. 15, n. 3; see Bodfish v. Fox, 23 Me. 90, 39 Am. Dec. 611.

In general, when a contract is made in relation to matter about which there is an established custom, such custom is to be understood as forming part of the contract, and may always be referred to for the purpose of showing the intention of the parties in all those particulars which are not expressed in the contract; 2 Pars. Contr. 652, 663; Fulton Bank of New York v. Benedict, 1 Hall (N. Y.) 602; Van Ness v. Pacard, 2 Pet. (U. S.) 138, 7 L. Ed. 374; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; 1 M. & W. 476; L. R. 17 Eq. 358; Robinson v. Fiske, 25 Me. 401; Bragg v. Bletz, 7 D. C. 105.

Evidence of a usage is admissible to explain technical or ambiguous terms; 3 B. & Ad. 728; Lane v. Bank, 3 Ind. App. 299, 29 N. E. 613; Nonantum Worsted Co. v. Mfg. Co., 156 Mass. 331, 31 N. E. 293. But evidence of a usage contradicting the terms of a contract is inadmissible; 2 Cr. & J. 244; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Farmers' & Mechanics' Nat. Bank of Buffalo v. Logan, 74 N. Y. 586; Exchange Bank of Virginia v. Cookman, 1 W. Va. 69; Gilbert v. McGinnis, 114 Ill. 28, 28 N. E. 382; De Cernea v. Cornell, 1 Misc. 399, 20 N. Y. Supp. 895; Globe Milling Co. v. Elevator Co., 44 Minn. 153, 46 N. W. 306. Nor can a local usage affect the meaning of the terms of a contract unless it is known to both contracting parties; Chateaugay Ore & Iron Co. v. Blake, 144 U. S. 476, 12 Sup. Ct. 731, 36 L. Ed. 510; nor can it affect a contract made elsewhere; Insurance Co. of North America v. Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517.

"Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract, without altering its effect more or less. To fall within the exception of repugnancy the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent;" *Per cur.* in 3 E. & B. 715. See Leake, Contr. 197; 7 E. & B. 274.

In order to establish a custom, it will be necessary to show its existence for so long a time that "the memory of man runneth not to the contrary," and that the usage has continued without any interruption of the right; for, if it has ceased for a time for such a cause, the revival gives it a new beginning, which will be what the law calls within memory. It will be no objection, however, that the exercise of the right has been merely suspended. 1 Bla. Com. 76; 2 *id.* 31; Freary v. Cooke, 14 Mass. 488; L. R. 7 Q. B. 214; Ulmer v. Farnsworth, 80 Me. 500, 15 Atl. 65. See Hyde v. News Co., 32 Mo. App. 298. It must not have begun within legal memory, i. e. A. D. 1189; L. R. [1905] 2 Ch. 538; but a jury may find an immemorial custom upon proof of a period of twenty years or so; 21 L. J. Q. B. 196.

It must also have been peaceably acquiesced in and not subject to dispute; for, as customs owe their origin to common consent, their being disputed, either at law or otherwise, shows that such consent was wanting; Wood v. Hickok, 2 Wend. (N. Y.) 501; Rapp v. Palmer, 3 Watts (Pa.) 178. In addition to this, customs must be reasonable and certain. A custom, for instance, that land shall descend to the most worthy of the owner's blood is void; for how shall this be determined? But a custom that it shall descend to the next male of the blood, exclusive of females, is certain, and therefore good; 2 Bla. Com. 78; Browne, Us. & Cust. 21. See Minis v. Nelson, 43 Fed. 777.

Evidence of usage is never admissible to oppose or alter a general principle or rule of law so as, upon a given state of facts, to make the legal right and liabilities of the parties other than they are by law; Browne, Us. & Cust. 135, n; Stoever v. Whitman's Lessee, 6 Binn. (Pa.) 416; 16 C. B. N. S. 646; Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987; Warren v. Ins. Co., 104 Mass. 518; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 South. 317, 2 L. R. A. 836, 7 Am. St. Rep. 73; Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771; but the rule is said by Lawson to extend no further than to usages which "conflict with an established rule of public policy, which it is not to the general interest to disturb."

Laws. Us. & Cust. 486. With respect to a usage of trade, however, it is sufficient if it appears to be known, certain, uniform, reasonable, and not contrary to law; Collings v. Hope, 3 Wash. C. C. 150, Fed. Cas. No. 3,003; U. S. v. Macdaniel, 7 Pet. (U. S.) 1, 8 L. Ed. 587; Lowry v. Russell, 8 Pick. (Mass.) 360; 4 B. & Ald. 210; 1 C. & P. 59; Grissom v. Bank, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669. See Pickering v. Weld, 159 Mass. 522, 34 N. E. 1081. But if not directly known to the parties to the transaction, it will still be binding upon them if it appear to be so general and well established that knowledge of it may be presumed; Smith v. Wright, 1 Cai. (N. Y.) 43, 2 Am. Dec. 162; 4 Stark. 452; 1 Dougl. 510. A usage of trade is sufficiently long continued if it has existed so long as to show that the parties to a contract meant to employ the expression in the sense defined by it; Hyde v. News Co., 32 Mo. App. 298. And one who seeks to avoid the effect of a notorious and uniform usage of trade must show that he was ignorant of it; Robertson v. S. S. Co., 139 N. Y. 416, 34 N. E. 1053. Whether a trade custom is established by the evidence in a case, and whether, if so, it was known to the party contracting or was so well established that he must be presumed to have known of it and contracted with reference to it, are questions for the jury; New Roads Oilmill & Mfg. Co. v. Kline, Wilson & Co., 154 Fed. 296, 83 C. C. A. 1.

Parties to a contract may contract to exclude a custom of trade therefrom; *id.* To read a usage into a contract, it must be consistent with the terms of the writing; *id.*

In an action for negligence, proof of a custom on the part of engine drivers to uncouple the locomotive and run ahead a short distance was offered to show the measure of duty. It was held that such a custom, to have the force of law, or to furnish a standard for the rights and acts of men, must be certain and uniform and so well known that no man dealing with the subject would be ignorant of it; per Sanborn, C. J., in Chicago, M. & St. P. Ry. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18 (C. C. A., Eighth Circuit).

A local custom is usage which has obtained the force of law and is in truth the binding law in a particular district or at a particular place of the persons or things that it concerns; 9 A. & E. 421. A local custom, so far as it extends, supersedes the local law; 5 Bingh. 253; but it cannot prevail against an express act of parliament; [1899] App. Cas. 41. The particular custom must have been asserted openly and acquiesced in by the persons who were affected and the enjoyment must have been peaceable. It must have been reasonable. It ought to be certain.

A local custom cannot supersede or modify a statute; Gore v. Lewis, 109 N. C. 539, 13 S. E. 909; Palmer v. Transportation Co., 76 Hun 181, 27 N. Y. Supp. 561.

See 26 L. J. Ex. 219; Stevens v. Reeves, 9 Pick. (Mass.) 198; Seagar v. Sligerland, 2 Cai. (N. Y.) 219; 2 F. & F. 131; Metcalf v. Weld, 14 Gray (Mass.) 210; Renner v. Bank, 9 Wheat. (U. S.) 582, 6 L. Ed. 166; Gordon v. Little, 8 S. & R. (Pa.) 533, 11 Am. Dec. 632; Dougl. 201; 4 Taunt. 848; Waring v. Grady's Ex'r, 49 Ala. 465, 20 Am. Rep. 286; Goodenow v. Tyler, 7 Mass. 36, 5 Am. Dec. 22; L. R. 2 Ex. 101; Cooper v. Kane, 19 Wend. (N. Y.) 386, 32 Am. Dec. 512; Raisin v. Clark, 41 Md. 158, 20 Am. Rep. 66. See Lawson; Browne; Us. & Cust.; note to Wiglesworth v. Dallison, 1 Sm. Lead. Cas. 900; [1892] Prob. 411; Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816. See USAGE.

CUSTOM-HOUSE. A place appointed by law, in ports of entry, where importers of goods, wares, and merchandise are bound to enter the same, in order to pay or secure the duties or customs due to the government.

CUSTOM-HOUSE BROKER. A person authorized to act for parties, at their option, in the entry or clearance of ships and the transaction of general business. Wharton. See act of July 13, 1866, § 9, 14. U. S. Stat. L. 117.

CUSTOM OF LONDON. Particular regulations in force within the city of London, in regard to trade, apprentices, widows and orphans, etc., which form part of the common law. 1 Bla. Com. 75; 3 Steph. Com. 588. See DEAD MAN'S PART. The custom of London, as regards intestate succession, was abolished by 19 & 20 Vict. c. 94; as regards foreign attachment, it was extended to all England and Wales by the Common Law Procedure Act of 1854, and is the basis of the law on that subject in this country. See ATTACHMENT.

Their influence on the early institutions of Pennsylvania was very great; Com. v. Hill, 185 Pa. 392, 39 Atl. 1055.

CUSTOM OF MERCHANTS. A system of customs acknowledged and taken notice of by all nations, and which are, therefore, a part of the general law of the land. See LAW MERCHANT; 1 Chit. Bla. Com. 76, n. 9.

CUSTOM OF THE REALM. A current description of the common law of England, which is said not to be unhistorical. Pollock, First Book of Jurispr. 252. See James C. Carter, Law, Its Origin, etc.

CUSTOM OF YORK. A custom of intestacy in the province of York similar to that of London. Abolished by 19 & 20 Vict. c. 94.

CUSTOMARY COURT BARON. See COURT BARON.

CUSTOMARY ESTATES. Estates which owe their origin and existence to the custom

of the manor in which they are held. 2 Bla. Com. 149.

CUSTOMARY FREEHOLD. A class of freeholds held according to the custom of the manor, derived from the ancient tenure in villein socage. Holders of such an estate have a freehold interest, though it is not held by a freehold tenure. 2 Bla. Com. 149. In reference to customary freehold, outside the ancient demesne all the tenures of the non-freeholding peasantry are in law one tenure, tenure in villeinage; 1 Poll. & M. Hist. Engl. Law 384.

CUSTOMARY SERVICE. A service due by ancient custom or prescription only. Such is, for example, the service of doing suit at another's mill, where the persons resident in a particular place, by usage, time out of mind have been accustomed to grind corn at a particular mill. 3 Bla. Com. 234.

CUSTOMARY TENANTS. Tenants who hold by the custom of the manor. 2 Bla. Com. 149.

CUSTOMS. Taxes levied upon goods and merchandise imported or exported. Story, Const. § 949; Bacon, Abr. *Smuggling.*

The duties, toll, tribute, or tariff payable upon merchandise exported or imported. These are called customs from having been paid from time immemorial. Expressed in law Latin by *custuma*, as distinguished by *consuetudines*, which are usages merely. 1 Bla. Com. 314.

Nine general appraisers are appointed by the president (not more than five from the same political party). They are employed at such ports and within such limits as the Secretary of the Treasury shall prescribe. Three of them constitute a board of general appraisers at the port of New York. It is a part of their duties to make reappraisements of the dutiable value of goods on demand of the importer, etc., or the collector. There is an appeal from the appraiser or person acting as such, or from the general appraiser in cases of reappraisement (either by the importer, etc., or by the collector) to the general board in New York or another board of three general appraisers designated by the Secretary.

The collector fixes the rate and amount of duties chargeable. If an importer, etc., gives the required notice, the papers are then transmitted to the general board in New York, or to another such board designated by the Secretary. From its decision, an appeal lies to the district court in the district, which may, upon request of the importer, etc., the Secretary, or the collector, direct a general appraiser to procure further evidence. The court then determines the classification and the rate of duty. It may, if it deems the case of such importance, allow an appeal to the Supreme Court, and shall allow one whenever the Attorney-General requests it within 30 days from a decision. Provision is made for giving publicity to the rulings of the general appraisers and the boards. Act of June 10, 1890, as amended Aug. 5, 1909.

See SMUGGLING; TARIFF; PROTEST, PAYMENT UNDER.

CUSTOS BREVIUM (Lat.). Keeper of writs. An officer of the court of common pleas whose duty it is to receive and keep all the writs returnable to that court and put them upon file, and also to receive of the prothonotaries all records of *nisi prius*, called *posteas*. Blount. An officer in the king's bench having similar duties. Cowell; *Termes de la Ley.* The office is now abolished.

CUSTOS MARIS (Lat.). Warden or guardian of the seas. Among the Saxons, an admiral. Spelman, Gloss. *Admiralius.*

CUSTOS MORUM. Applied to the court of king's bench, as "the guardian of the morals" of the nation. 4 Steph. Com. 311.

CUSTOS PLACITORUM CORONÆ (Lat.). Keeper of the Pleas of the Crown (the criminal records). Said by Blount and Cowell to be the same as the *Custos Rotulorum.*

CUSTOS ROTULORUM (Lat.). Keeper of the rolls of the peace. The principal justice of the peace of a county, who is the keeper of the records of the county. 1 Bla. Com. 349. He is always a justice of the peace and *quorum*, is the chief civil officer of the king in the county, and is nominated under the king's sign-manual. He is rather to be considered a minister or officer than a judge. Cowell; Lambard, Eiren. 373; 4 Bla. Com. 272; 3 Steph. Com. 37. The office has come to be united with that of the lord-lieutenant of the county. Maitland, Justice, etc., 82.

CUSTUMA. Duties. See CONSUETUDO.

CUSTUMA ANTIQUA SIVE MAGNA (Lat. ancient or great duties). The duties on wool, sheepskin or wool-pelts and leather exported were so called, and were payable by every merchant, stranger as well as native, with the exception that merchant strangers paid one-half more than natives. 1 Bla. Com. 314.

CUSTUMA PARVA ET NOVA (Lat.). An impost of threepence in the pound sterling on all commodities exported or imported by merchant strangers. Called at first the alien's duty, and first granted by stat. 31 Edw. I. Maddox, Hist. Exch. 526, 532; 1 Bla. Com. 314.

CUT. A wound made with a sharp instrument. State v. Patza, 3 La. Ann. 512; 1 Russ. & R. 104. See Binns v. Lawrence, 12 How. (U. S.) 9, 13 L. Ed. 871.

CYNEBOTE. A mulct anciently paid, by one who killed another, to the kindred of the deceased. Spelman, Gloss.

CY PRES (L. Fr. as near as). The rule of construction applied to a will (but not to a deed) by which, where the testator evinces a general intention to be carried into effect in a particular mode which cannot be followed, the words shall be so construed as to give effect to the general intention. 3 Hare 12; 2 Term 254; 2 Bligh 49; Sugd. Pow. 60; 1 Spence, Eq. Jur. 532; Bisph. Eq. § 126; McGrath, *Cy Pres*.

The doctrine of approximation, whereby the intent of the testator or grantor, which is impracticable to carry out literally, is carried out as near as possible. Mott v. Morris, 249 Mo. 137, 155 S. W. 434.

As commonly understood it has two features—one the right to exercise prerogative authority, enabling a court to deal with a bequest to a charitable use having no designated particular purpose as a bequest to charity generally, treating the purpose as the legatee, or a bequest for an illegal purpose, or some purpose impossible of execution for some reason; and the other, the right by liberal rules of construction to deal with a trust having a designated particular purpose, though in general terms, and enforce it within the limits of such purpose, supplying the trustee if necessary; Tincher v. Arnold, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917; Harrington v. Pier, 105 Wis. 485, 82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924.

The principle is applied to sustain wills in which perpetuities are attempted to be created, so that, if it can possibly be done, the devise is not regarded as utterly void, but is expounded in such a manner as to carry the testator's intention into effect as far as the law respecting perpetuities will allow. This is called a construction *cy pres*. Its rules are vague, and depend chiefly upon judicial discretion applied to the particular case. Sedgwick, Stat. Law 265; Story, Eq. Jur. § 1167. A limitation void because it offends the doctrine of perpetuity will be void altogether, and cannot be held under the *cy pres* rule of construction to be good as to that part which keeps within the period of perpetuity, and void only as to the excess; Post v. Rohrbach, 142 Ill. 606, 32 N. E. 687.

It is also applied to sustain devises and bequests for charities (*q. v.*). In its origin the doctrine was applied, in the exercise of the royal prerogative, delegated to the Lord Chancellor under the sign manual of the crown. Where there was a definite charitable purpose which was illegal and could not take place, the chancellor would substitute another. The judicial doctrine under this name is that if charity be the general substantial intention, though the mode provided for its execution fails, the English chancery will find some means of effectuating it, even by applying the fund to a different purpose from that contemplated by the testator, but as near to it as possible, provided only it be charitable; Bisph. Eq. § 129; Boyle, Char. 147, 155; Shelf, Mortm. 601; 3 Bro. C. C. 379; 7 Ves. 69, 82. Where a legacy is given to a charitable institution which exists at the testator's death, but ceases to exist before the legacy is paid over, it becomes the property of the charity on the death of the testator, and upon the charity ceasing to exist it is applicable to charitable purposes according to the doctrine of *cy pres;* [1891] 2 Ch. 236. Most of the cases carry the doctrine beyond what is allowed where private interests are concerned, and have in no inconsiderable degree to draw for their support on the prerogative of the crown and the statute of charitable uses; 43 Eliz. c. 4. This doctrine does not universally obtain in this country to the disinherison of heirs and next of kin. See CHARITABLE USES; Jackson v. Phillips, 14 Allen (Mass.) 580; Vidal v. Philadelphia, 2 How. (U. S.) 127, 11 L. Ed. 205; Perin v. Carey, 24 How. (U. S.) 465, 16 L. Ed. 701; Loring v. Marsh, 6 Wall. (U. S.) 337, 18 L. Ed. 802; Williams v. Williams, 8 N. Y. 548.

The doctrine of *cy pres* with reference to charitable trusts is that where a definite function or duty is to be performed, which cannot be done in exact conformity with the plan of the person who has provided therefor, such function or duty will be performed with as close approximation to the original plan as is reasonably practicable; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; MacKenzie v. Trustees, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227.

In cases where there has been an intention to make an unconditional gift to a nonexistent corporation or society, then the gift will be regarded as immediate supported upon the doctrine of *cy pres;* Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; Swasey v. American Bible Soc., 57 Me. 523; Cumming v. Reid Memorial Church, 64 Ga. 105; Andrews v. Andrews, 110 Ill. 223; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103. In some states, however, the power to administer a charitable trust *cy pres* is declared not to exist, and therefore gifts to corporations not in being are void for remoteness; Shipman v. Rollins, 98 N. Y. 311; Little v. Willford, 31 Minn. 173, 17 N. W. 282; Methodist Church of Newark v. Clark, 41 Mich. 730, 3 N. W. 207; Barnum v. Council of Baltimore, 62 Md. 275, 50 Am. Rep. 219; Williams v. Pearson, 38 Ala. 299. Though the disallowance of charitable gifts to corporations not in being seems to be the logical consequence of repudiating the doctrine of *cy pres*, yet there are some states whose courts repudiate the doctrine of *cy pres* and yet support such gifts; Literary Fund v. Dawson, 10 Leigh (Va.) 147; Bridges v. Pleasants, 39 N. C. 30, 44 Am. Dec. 94; Zeisweiss v. James, 63 Pa. 465, 3 Am. Rep. 558.

Upon the dissolution of a charitable corporation, its property will be appropriated by the court to the purpose most nearly akin to the intent of the donors and will not be distributed to the donors; In re Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

Where the perpetuity is attempted to be created by deed, all the limitations based upon it are void; Cruise, Dig. t. 38, c. 9, § 34. See, 1 Vern. 250; 2 Ves. 336, 337, 364, 380; 3 *id.* 141, 220; 4 *id.* 13; Com. Dig. *Condition* (L, 1); 1 Roper, Leg. 514; Dane, Abr. Index; Domat, Lois Civ. liv. 6, t. 2, § 1; Shelf, Mortm.; Highmore, Mortm.; 8 H. L. R. 69.

The *cy pres* doctrine has been repudiated by the states of Alabama, Iowa, Indiana, Maryland, Michigan, Minnesota, North Carolina, Tennessee, South Carolina, Virginia, West Virginia and Wisconsin (*quære*). But the doctrine has been approved in all the New England states, also Pennsylvania and New York; in Mississippi and Illinois, and in some other states, the question has not been decided. Bisph. Eq. § 130; Eliot's Appeal, 74 Conn. 586, 51 Atl. 544; Duggan v. Slocum, 83 Fed. 244; Lennig's Estate, 154 Pa. 209, 25 Atl. 1049; Allen v. Stevens, 161 N. Y. 122, 55 N. E. 568; Howard v. Society, 49 Me. 302.

In England, a gift to a charity which failed in the testator's lifetime is not within the doctrine; [1898] 1 Ch. 19; otherwise, if the charity never existed; [1902] 1 Ch. 276; or if the name be left blank; [1896] 2 Ch. 451, C. A. It applies where there is a gift to a charity which has failed, though there be a gift over to a second charity; 1 Myl. & K. 410. It does not apply if the gift is not charitable; 1 De G. F. & J. 399; or in case of a gift for masses; 2 Drew. 425. The *cy pres* scheme will be settled as near as possible to the testator's intention; 10 Cl. & F. 908.

CYROGRAPHARIUS. In Old English Law. A cyrographer. An officer of the common pleas court.

CYROGRAPHUM. A chirograph, which see.

D

D. B. N., or D. B. N. C. T. A. See EXECUTORS AND ADMINISTRATORS.

D. S. B. See DEBET SINE BREVE.

D. V. N. See DEVISAVIT VEL NON.

DACION. In Spanish Law. The real and effective delivery of an object in the execution of a contract.

DAILY. Every day; day by day. Web.

Where a statute requires an advertisement to be published in a daily newspaper it is such if it uses the term "daily newspaper" in contradistinction to the term "weekly," "semi-weekly," or "tri-weekly" newspaper. The term was used and is to be understood in its popular sense, and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a daily newspaper; otherwise a paper which is published every day except Sunday would not be a daily newspaper. Richardson v. Tobin, 45 Cal. 30. It may include a legal journal; Kellogg v. Carrico, 47 Mo. 157.

DAM. A construction of wood, stone, or other materials, made across a stream of water for the purpose of confining it; a mole. See People v. Gaige, 23 Mich. 93; Colwell v. Water Power Co., 19 N. J. Eq. 245.

It is an instrument for turning the water of a stream to the use of a mill; Burnham v. Kempton, 44 N. H. 78.

The word is sometimes used for the pond formed by the obstruction; Colwell v. Water Power Co., 19 N. J. Eq. 245; Natoma Water & Mining Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334; Hutchinson v. Ry. Co., 37 Wis. 582; and it is held to be synonymous with dyke; Com. v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414. The water collected by a dam is not properly termed a reservoir, as its object is not storage of water; Natoma Water & Mining Co. v. Hancock, 101 Cal. 42, 31 Pac. 112, 35 Pac. 334.

The construction of dams in floatable streams to facilitate their use is in some states authorized by statute; Brooks v. River Imp. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41; Field v. Log Driving Co., 67 Wis. 569, 31 N. W. 17; McLaughlin v. Mfg. Co., 103 N. C. 100, 9 S. E. 307; and incidental injuries to land of riparian proprietors thereby damaged are held to be consequential injuries incident to their proprietorship; Brooks v. River Imp. Co., 82 Me. 17, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459. See LOGS; RIPARIAN RIGHTS.

The owner of a stream not navigable may erect a dam across it, provided he do not thereby materially impair the rights of the proprietors above or below to the use of the water in its accustomed flow; Gould, Waters 110, n.; Tyler v. Wilkinson, 4 Mas. 401, Fed. Cas. No. 14,312; Vandenburgh v. Van Bergen, 13 Johns. (N. Y.) 212; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Boynton v. Rees, 9 Pick. (Mass.) 528; Wadsworth v. Tillotson, 15 Conn. 366, 39 Am. Dec. 391; Hetrich v. Deachler, 6 Pa. 32; Shrunk v. Nav. Co., 14 S. & R. (Pa.) 71; Scott v. Willson, 3 N. H. 321; Daniels v. Sav. Inst., 127 Mass. 534; Voter v. Hobbs, 69 Me. 19; Hanna v. Clarke, 31 Gratt. (Va.) 36; Decorah Woolen Mill Co. v. Greer, 49 Ia. 490; 28 Am. L. Reg. 147, n. He may even detain the water for the purposes of a mill, for a reasonable time, to the injury of an older mill,—the reasonableness of the detention in each particular case being a question for the jury; Hartzall v. Sill, 12 Pa. 248; Thomas v. Brackney, 17 Barb. (N. Y.) 654; Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723; Parker v. Hotchkiss, 25 Conn. 321; Phillips v. Sherman, 64 Me. 171; Drake v. Woolen Co., 99 Mass. 574; Hoxsie v. Hoxsie, 38 Mich. 77; Holden v. Lake Co., 53 N. H. 552. But he must not unreasonably detain the water; Dilling v. Murray, 6 Ind. 324, 63 Am. Dec. 385; and the jury may find the constant use of the water by night and a detention of it by day to be an unreasonable use, though there be no design to injure others; Barrett v. Parsons, 10 Cush. (Mass.) 367; see Bullard v. Mfg. Co., 77 N. Y. 525. Nor has such owner the right to raise his dam so high as to cause the stream to flow back upon the land of supra-riparian proprietors; 1 B. & Ald. 258; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287; Union Canal Co. v. Keiser, 19 Pa. 134; Pitman v. Poor, 38 Me. 237; Ellington v. Bennett, 59 Ga. 286; Drew v. Inhabitants of Westfield, 124 Mass. 461. And see BACK-WATER. These rights may, of course, be modified by contract or prescription.

An owner maintaining a dam across a floatable stream is entitled to an injunction against the operation of a splash dam by an upper riparian owner in such manner as to interfere materially with the continuity of his power and to fill his pond and race with dirt; Trullinger v. Howe, 53 Or. 219, 97 Pac. 548, 99 Pac. 880, 22 L. R. A. (N. S.) 545.

A mill proprietor may erect and maintain dams in a floatable stream, but he must keep open, for the use of those that wish, a convenient and considerable passageway for logs through or by his dam; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; Connecticut River Lumber Co. v. Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826; Powell v. Lumber Co., 12 Idaho, 723, 88 Pac. 97; he may erect dividing piers to separate

his logs from the common mass, but he must make reasonable provision for the passage of other logs without unreasonable hindrance; A. C. Conn. Co. v. Mfg. Co., 74 Wis. 652, 43 N. W. 660.

One erecting fences and culverts across a stream is not liable for injuries to an upper riparian proprietor because they are not sufficient to pass an extraordinary flood, due to the giving way of a dam or to an unprecedented rainfall; American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773. Riparian owners upon navigable fresh water lakes may construct in the shore waters in front of their lands wharves, piers, landings, and booms; Revell v. People, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257; Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 South. 976, 13 L. R. A. (N. S.) 352, 127 Am. St. Rep. 34.

A state has full power, in the absence of legislation by congress, to authorize dams across interior streams although previously navigable to the sea; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

If there be no license or act from which a license will necessarily follow, a person erecting a dam so as to flood the land of another, is a trespasser and acts at his peril; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

When one side of the stream is owned by one person and the other by another, neither, without the consent of the other, can build a dam which extends beyond the *filum aquæ*, thread of the river, without committing a trespass; Cro. Eliz. 269; Tyler v. Wilkinson, 4 Mas. 397, Fed. Cas. No. 14,312; Lindeman v. Lindsey, 69 Pa. 93, 8 Am. Rep. 219. See *Lois des Bât.* p. 1, c. 3, s. 1, a. 3; Pothier, *Traité du Contrat de Société*, second app. 236; Stiles v. Hooker, 7 Cow. (N. Y.) 266; McCalmont v. Whitaker, 3 Rawle (Pa.) 90, 23 Am. Dec. 102; Anthony v. Lapham, 5 Pick. (Mass.) 175; Goodwin v. Gibbs, 70 Me. 243.

Many of the states have statutes enabling persons to build dams on their own land, although in so doing the land of a higher riparian owner may be overflowed; and in some cases this permission is given although the party may own the land on one side only. In all these instances, however, a remedy is provided for assessing the damages resulting from such dam. See Angell, Waterc. §§ 482, 484.

Where the natural flow of water has been collected by a permanent artificial dam into an artificial channel, and such condition has continued for more than twenty years, the riparian owners acquire a prescriptive right to have the water remain at such high stage, and the person who placed the permanent obstruction in the stream, and all other persons claiming under him are estopped from restoring the water to its original state; 4 Hurlst. & C. 714; Jones, Easem. 808; Washb. Easem. § 47; Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344; Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577; Shepardson v. Perkins, 58 N. H. 354; Delaney v. Boston, 2 Harr. (Del.) 489; Mathewson v. Hoffman, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349; Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30; Murchie v. Gates, 78 Me. 300, 4 Atl. 698; Canton Iron Co. v. Biwabik Bessemer Co., 63 Minn. 367, 65 N. W. 643; City of Reading v. Althouse, 93 Pa. 400; Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332, where the owner of the dam acquired his right to maintain it by prescription. The owners of the land flooded by the dam had improved their property with reference to the changed conditions, the court held that a reciprocal right accrued to the owners of the flooded lands to have the dam remain, and that the person who maintained it could not by any affirmative act restore the stream to its original condition. The decision is criticised, as are certain expressions to the same effect in Belknap v. Trimble, 3 Paige Ch. (N. Y.) 577, as not being in accord with the weight of authority; Farnham, Waters 2399; Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527. It is of the essence of such an easement (to divert a stream by an artificial way) that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot create a new right for the benefit of the servient owner. Like any other right its exercise may be discontinued if it becomes onerous or ceases to be beneficial to the party entitled; L. R. 6 Q. B. 578. In Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527, it is said that decisions upholding the rights of the servient owner may be upheld under the doctrines of dedication and estoppel.

The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of injury which will be likely to result to third persons provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to great freshets, these must likewise be guarded against; and the measure of care required in such cases is that which a discreet person would use if the whole risk were his own; Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; Washb. Easem. *288; Bristol Hydraulic Co. v. Boyer, 67 Ind. 236; State v. Water Co., 51 Conn. 137.

If a mill-dam be so built that it causes a watercourse to overflow the surrounding

country, where it becomes stagnant and unwholesome, so that the health of the neighborhood is sensibly impaired, such dam is a public nuisance, for which its owner is liable to indictment; Douglass v. State, 4 Wis. 387.

The owners of a mill dam cannot interfere with the right of the public to float logs on a stream; Lancey v. Clifford, 54 Me. 487, 92 Am. Dec. 561; but one injuring the dam of a riparian owner by running logs down a stream must show that the stream was navigable; 26 U. C. C. P. 539. As to the right of a riparian proprietor on a navigable stream to recover for injuries to his dam by the floating of logs down stream, see LOGS, which see also as to the conflicting rights of dam owners and log driving companies. See Carlson v. Imp. Co., 73 Minn. 128, 75 N. W. 1044, 41 L. R. A. 372, 72 Am. St. Rep. 610; Coyne v. Boom Co., 72 Minn. 533, 75 N. W. 748, 41 L. R. A. 494, 71 Am. St. Rep. 508. So it is an indictable nuisance to erect a dam so as to overflow a highway; State v. Phipps, 4 Ind. 515; Com. v. Fisher, 6 Metc. (Mass.) 433; see Stone v. Peckham, 12 R. I. 27; or so as to obstruct the navigation of a public river; Newark Plank Road Co. v. Elmer, 9 N. J. Eq. 754; Tyrrell v. Lockhart, 3 Blackf. (Ind.) 136; Williams v. Beardsley, 2 Ind. 591; Morgan v. King, 18 Barb. (N. Y.) 277; Bacon v. Arthur, 4 Watts (Pa.) 437; Hoxsie v. Hoxsie, 38 Mich. 77; Lagrone v. Trice, 57 Miss. 227; Ellis v. Harris' Ex'r, 32 Gratt. (Va.) 684. See IRRIGATION; RIVER; WATERCOURSE; RIPARIAN PROPRIETOR; POLICE POWER.

DAMAGE. The loss caused by one person to another, or to his property, either with the design of injuring him, or with negligence and carelessness, or by inevitable accident.

In England, in the common law courts, it was held that neither in common parlance nor in legal phraseology is the word "damage" used as applicable to injuries done to property; 40 L. J. Q. B. 218; 41 L. J. C. P. 128.

The admiralty courts on the other hand contended that the word did include claims for personal injury and even for loss of life; 37 L. J. Adm. 14; 38 *id.* 12, 50; 46 L. J. P. D. & A. 71; 2 P. D. 8.

But the House of Lords construing section 7 of the Admiralty Court Act, 24 Vict. c. 10, providing that "the High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship" established the former doctrine, and held that a claim for loss of life under Lord Campbell's Act is not a claim for damage within the provisions of the Admiralty Court Act; 54 L. J. P. D. & A. 9; 10 App. Cas. 59.

But the word may be controlled by the context and can mean personal injury; 52 L. J. Q. B. 395; and there seems in this country to be no distinction between the meaning of the words damage and injury.

Damage to the person as used in the Massachusetts statute relating to survival of actions, does not extend to torts not directly affecting the person, but includes every action the substantial cause of which is bodily injury, as the negligent sale of deadly poison for a harmless drug as the result of which a man dies; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298.

He who has caused the damage is bound to repair it; and if he has done it maliciously he may be compelled to pay beyond the actual loss; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270. When damage occurs by accident without blame to any one, the loss is borne by the owner of the thing injured: as, if a horse run away with his rider, without any fault of the latter, and injure the property of another person, the injury is the loss of the owner of the thing. When the damage happens by the act of God, or inevitable accident, as by tempest, earthquake, or other natural cause, the loss must be borne by the owner. See Comyns, Dig.; Sedgwick; Mayne; Sutherland; Joyce; Hale; Field, Damages; 1 Rutherf. Inst. 399; COMPENSATION; DAMAGES; MEASURE OF DAMAGES.

DAMAGE CLEER. The tenth part in the common pleas, and the twentieth part in the king's bench and exchequer courts, of all damages beyond a certain sum, which was to be paid the prothonotary or chief officer of the court in which they were recovered before execution could be taken out. At first it was a gratuity, and of uncertain proportions. Abolished by stat. 17 Car. II. c. 6. Cowell; *Termes de la Ley.*

DAMAGE FEASANT (French, *faisant dommage*, doing damage). A term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there, treading down his grass, corn, or other production of the earth. 3 Bla. Com. 6; Co. Litt. 142, 161; Com. Dig. *Pleader* (3 M, 26).

It "is the strictest distress, for the thing distrained must be taken in the very act;" Lord Holt in 12 Mod. 658; 3 Bla. Com. 6, 7. By the common law, a distress of animals or things damage feasant is allowed. Gilb. Distr. 21; Poll. Torts 473, 478. It was also allowed by the ancient customs of France. 11 Toullier 402; Merlin, *Répert. Fourriere;* 1 Fournel, *Abandon.* See ANIMAL.

DAMAGED GOODS. Goods subject to duties, which have received some injury either in the voyage home, or while bonded in warehouse.

DAMAGES. The indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, through the act or default of another.

The sum claimed as such indemnity by a plaintiff in his declaration.

The injury or loss for which compensation is sought.

Compensatory damages. Those allowed as a recompense for the injury actually received. They cannot include an allowance for inconvenience as well as injuries; Jenson v. R. Co., 86 Wis. 589, 57 N. W. 359, 22 L. R. A. 680.

Consequential damages. Those which, though directly, are not immediately, consequential upon the act or default complained of.

Double or treble damages. See MEASURE OF DAMAGES.

Exemplary damages. Those allowed for torts committed with fraud, actual malice, or deliberate violence or oppression, as a punishment to the defendant, and as a warning to other wrong doers. Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58; Hale, Dam. 200; MEASURE OF DAMAGES.

General damages. Those which necessarily and by implication of law result from the act or default complained of.

They are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained, except the opinion and judgment of a reasonable man. They are such as by competent evidence are directly traceable to a failure to discharge a contract, obligation or duty imposed by law. Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84, 23 L. R. A. 190.

Liquidated damages. See that title.

Nominal damages. See that title.

Punitive damages. See MEASURE OF DAMAGES.

Special damages. Such as arise directly, but not necessarily or by implication of law, from the act or default complained of.

These are either superadded to general damages, arising from an act injurious in itself, as when some particular loss arises from the uttering of slanderous words, actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as when the words become actionable only by reason of special damage ensuing.

Unliquidated damages. See LIQUIDATED DAMAGES.

Vindictive damages. See MEASURE OF DAMAGES.

In modern law, the term damages is not used in a legal sense to include the costs of the suit; though it was formerly so used. Co. Litt. 267 *a;* Dougl. 751.

The various classes of damages here given are those commonly found in the text-books and in the decisions of courts of common law. Other terms are of occasional use (as *resulting,* to denote consequential damages), but are easily recognizable as belonging to some one of the above divisions. The question whether damages are to be limited to an allowance compensatory merely in its nature and extent, or whether they may be assessed as a punishment upon a wrong-doer in certain cases for the injury inflicted by him upon the plaintiff, received much attention from the courts and was very fully and vigorously discussed by Greenleaf and Sedgwick, the latter of whom, though supporting the doctrine admitted that it was exceptional and anomalous and could not be logically supported; Sedgw. Dam. § 353. He attributes the origin of the principle to the rule making juries the judges of the damages; *id.* § 354. In cases of aggravated wrong there were large verdicts and the courts were powerless, although the early cases consisted mainly of setting them aside. Originating in the unrestrained expressions of judges in justifying verdicts, there grew up this doctrine of exemplary damages characterized as "a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine." The current of authorities set strongly (in numbers, at least) in favor of allowing punitive damages; Day v. Woodworth, 13 How. (U. S.) 363, 14 L. Ed. 181; and that rule of decision has prevailed in most of the states, though in some it is repudiated entirely; Stilson v. Gibbs, 53 Mich. 280, 18 N. W. 815; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Greeley, S. L. & P. R. Co. v. Yeager, 11 Colo. 345, 18 Pac. 211; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; and in others the doctrine is also denied but exemplary damages were permitted on the ground that they were compensatory merely for mental suffering; Quigley v. R. Co., 11 Nev. 350, 21 Am. Rep. 757; Union Pac. R. R. Co. v. Hause, 1 Wyo. 27. This rule prevailed in West Virginia; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. 485; Beck v. Thompson, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; but has been over-ruled; Mayer v. Frobe, 40 W. Va. 246, 22 S. E. 58. The argument against such damages was based on the objection that it admits of the infliction of pecuniary punishment to an almost unlimited extent by an irresponsible jury, a view which is theoretically more obnoxious (supposing that there is no practical difference) than that which considers damages merely as a compensation, of the just amount of which the jury may well be held to be proper judges. It also seemed to savor somewhat of judicial legislation in a criminal department to extend such damages beyond those cases where an injury is committed to the feelings of an innocent plaintiff. See 2 Greenl. Ev. § 253; 2 Sedgw. Dam. 323; 1 Kent 630; Grand Trunk R. R. Co. v. Richardson, 91 U. S. 465, 23 L. Ed. 356; Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, where the terms exemplary, vindictive and punitive or punitory are considered as synonymous, and the cases and authorities are exhaustively reviewed.

Direct is here used in opposition to *remote,* and *immediate* to *consequential.*

In Pleading. In personal and mixed actions (but not in penal actions, for obvious reasons), the declaration must allege, in conclusion, that the injury is to the damage of the plaintiff, and must specify the amount of damages; Com. Dig. *Pleader* (C. 84); 10 Co. 116 *b.*

In personal actions there is a distinction between actions that sound in damages and those that do not; but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that, in the former case, damages are the main object of the suit, and are, therefore, always laid high enough to cover the whole demand; but in the latter, the liquidated debt, or the chattel demanded, being the main object, damages are claimed in respect of the detention only of such debt or chattel, and are, therefore, usually laid at a small sum. The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration; Com. Dig. *Pleader* (C. 84); 10 Co. 117 *a, b;* Viner, Abr. *Damages* (R.); 1 Bulstr. 49; 2 W. Bla. 1300; Curtiss v. Lawrence, 17 Johns. (N. Y.) 111; Fish v. Dodge, 4 Denio (N. Y.) 311, 47 Am. Dec. 254; Fowlkes v. Webber, 8 Humphr. (Tenn.) 530; New Jersey Flax Cotton Wool Co. v. Mills, 26 N. J. L. 60. See AD DAMNUM. A verdict

for larger damages than are alleged or proved should be set aside; Texas & P. R. Co. v. Morin, 66 Tex. 133, 18 S. W. 345.

In real actions no damages are to be laid, because in these the demand is specially for the land withheld, and damages are in no degree the object of the suit; Steph. Pl. 426; 1 Chit. Pl. 397–400.

General damages need not be averred in the declaration; nor need any specific proof of damages be given to enable the plaintiff to recover. The legal presumption of injury in cases where it arises is sufficient to maintain the action. Whether special damage be the gist of the action, or only collateral thereto, it must be particularly stated in the declaration, as the plaintiff will not otherwise be permitted to go into evidence of it at the trial, because the defendant cannot also be prepared to answer it. See 2 Sedgw. Dam. 606; 4 Q. B. 493; 7 C. & P. 804; Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303; Patten v. Libbey, 32 Me. 379; Town of Troy v. R. Co., 23 N. H. 83, 55 Am. Dec. 177; Brizsee v. Maybee, 21 Wend. (N. Y.) 144; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Nunan v. San Francisco, 38 Cal. 689; Tomlinson v. Town of Derby, 43 Conn. 562; Parker v. Burgess, 64 Vt. 442, 24 Atl. 743; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Roberts v. Graham, 6 Wall. (U. S.) 578, 18 L. Ed. 791.

In Practice. To constitute a right to recover damages, the party claiming damages must have sustained a loss; the party against whom they are claimed must be chargeable with a wrong; the loss must be the natural and proximate consequence of the wrong.

There is no right to damages, properly so called, where there is no *loss*. A sum in which a wrong-doer is mulcted simply as punishment for his wrong, and irrespective of any loss caused thereby, is a "fine," or a "penalty," rather than damages. Damages are based on the idea of a loss to be compensated, a damage to be made good; Yates v. Joyce, 11 Johns. (N. Y.) 136; Smith v. Sherwood, 2 Tex. 460; Allison v. McCune, 15 Ohio 726, 45 Am. Dec. 605; Webb v. Mfg. Co., 3 Sumn. 192, Fed. Cas. No. 17,322; Linton v. Hurley, 104 Mass. 353; 16 Q. B. D. 613. See Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642; Hale, Dam. 3. This loss, however, need not always be distinct and definite, capable of exact description or of measurement in dollars and cents. A sufficient loss to sustain an action may appear from the mere nature of the case itself. The law in many cases presumes a loss where a wilful wrong is proved; and thus also damages are awarded for injured feelings, bodily pain, grief of mind, injury to reputation, and for other sufferings which it would be impossible to make subjects of exact proof and computation in respect to the amount of the loss sustained; Tilden v. Metcalf, 2 Day (Conn.) 259; Johnson v. Courts, 3 H. & McH. (Md.) 510; Ratliff v. Huntly, 27 N. C. 545; Wilkins v. Gilmore, 2 Humphr. (Tenn.) 140; Huntley v. Bacon, 15 Conn. 267; Jennings v. Maddox, 8 B. Monr. (Ky.) 432; Hatt v. News Ass'n, 94 Mich. 119, 54 N. W. 766; White v. Barnes, 112 N. C. 323, 16 S. E. 922; Lake Erie & W. R. Co. v. Christian, 39 Ill. App. 495; Hale v. Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850. See MENTAL SUFFERING. The rule is not that a loss must be proved by evidence, but that one must appear, either by evidence or by presumption, founded on the nature of the case.

There is no right to damages where there is no *wrong*. It is not necessary that there should be a tort, strictly so called,—a wilful wrong, an act involving moral guilt. The wrong may be either a wilful, malicious injury, as in the case of assault and battery, libel, and the like, or one committed through mere motives of interest, as in many cases of conversion of goods, trespasses on land, etc.; or it may consist in a mere neglect to discharge a duty with suitable skill or fidelity, as where a surgeon is held liable for malpractice, a sheriff for the escape of his prisoner, or a carrier for the neglect to deliver goods; or a simple breach of contract, as in case of refusal to deliver goods sold, or to perform services under an agreement; or it may be a wrong of another person for whose act or default a legal liability exists, as where a master is held liable for an injury done by his servant or apprentice, or a railroad company for an accident resulting from the negligence of its engineer. But there must be something which the law recognizes as a wrong, some breach of a legal duty, some violation of a legal right, some default or neglect, some failure in responsibility, sustained by the party claiming damages. For the sufferer by accident or by the innocent or rightful acts of another cannot claim indemnity for his misfortune. It is called *damnum absque injuria*,—a loss without a wrong, for which the law gives no remedy; Pollock, Torts 22, 175; Bartholomew v. Bentley, 15 Ohio 659, 45 Am. Dec. 596; 11 M. & W. 755; Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623; Marshall v. Welwood, 38 N. J. L. 339, 20 Am. Rep. 394; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Chase v. Silverstone, 62 Me. 175, 16 Am. Rep. 419; Trustees, etc., of Village of Delhi v. Youmans, 50 Barb. (N. Y.) 316; Baltimore & P. R. Co. v. Reaney, 42 Md. 119; Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; L. R. 3 H. L. 330; Egan v. Hart, 45 La. Ann. 1358, 14 South. 244; Booth v. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552.

See DAMNUM ABSQUE INJURIA.

The obligation violated must also be one *owed to the plaintiff*. The neglect of a duty,

which the plaintiff had no legal right to enforce, gives no claim to damages, though perhaps it is better said, gives no right of action. Thus where a postmaster was required by law to advertise in the newspaper in his city having the largest circulation, and chose another newspaper, it was merely a breach of a duty he owed to the public and not to the owner of the newspaper having the largest circulation; Strong v. Campbell, 11 Barb. (N. Y.) 135.

Whether when the law gives judgment on a contract to pay money—*e. g.* on a promissory note—this is to be regarded as enforcing performance of the promise, or as awarding damages for the breach of it, is a question on which jurisconsults have differed. Regarded in the latter point of view, the default of payment is the wrong on which the award of damages is predicated.

The loss must be the *natural and proximate consequence* of the wrong; 2 Greenl. Ev. § 256; 2 Sedgw. Dam. 362; Field, Dam. 42; Hale, Dam. 4. Smith v. Bolles, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279. Or, as others have expressed the idea, it must be the "direct and necessary," or "legal and natural," consequence. It must not be "remote" or "consequential." The loss must be the *natural* consequence. Every man is expected —and may justly be—to foresee the usual and natural consequences of his acts, and for these he may justly be held accountable; but not for consequences that could not have been foreseen; Dickinson v. Boyle, 17 Pick. (Mass.) 78, 28 Am. Dec. 281; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Vedder v. Hildreth, 2 Wis. 427; Walker & Langford v. Ellis & Moore, 1 Sneed (Tenn.) 515; Young v. Tustin, 4 Blackf. (Ind.) 277; 6 Q. B. 928; Fritts v. R. Co., 62 Conn. 503, 26 Atl. 347; Swain v. Schieffelin, 134 N. Y. 471, 31 N. E. 1025, 18 L. R. A. 385. See Malone v. R. R., 152 Pa. 390, 394, 25 Atl. 638; Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440, 3 L. R. A. 587. It must also be the *proximate* consequence. Vague and indefinite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It cannot be certainly known that they are attributable to the wrong, or whether they are not rather connected with other causes; Hatchell v. Kimbrough, 49 N. C. 163; 1 Sm. L. Cas. 302. See Engelsdorf v. Sire, 64 Hun 209, 18 N. Y. Supp. 907; Brooke v. Bank, 69 Hun 202, 23 N. Y. Supp. 802.

In cases of tort the rule has been thus stated: "The question is not what cause was nearest in time or place to the catastrophe. This is not the meaning of the maxim *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that sets the other causes in operation. The causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster;" Ætna Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395. See CAUSA PROXIMA NON REMOTA SPECTATUR.

"The true inquiry is, whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated;" Derry v. Flitner, 118 Mass. 131. See L. R. 10 Q. B. 111; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Lake Erie & W. R. Co. v. Close, 5 Ind. App. 444, 32 N. E. 588.

The foregoing are the general principles on which the right to recover damages is based. Many qualifying rules have been established, of which the following are among the more important instances. In an action for damages for an injury caused by negligence, the plaintiff must himself appear to have been free from fault; for if his own negligence in any degree contributed directly to produce the injury, he can recover nothing. The law will not attempt to apportion the loss according to the different degrees of negligence of the two parties; 1 C. & P. 181; Miller v. Trustees of Mariner's Church, 7 Me. 51, 20 Am. Dec. 341; Loker v. Damon, 17 Pick. (Mass.) 284; Hay v. Cohoes Co., 3 Barb. (N. Y.) 49; Murphy v. Diamond, 3 La. Ann. 441; Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581; though this rule has in some cases been relaxed in favor of the plaintiff; L. R. 1 Ap. Ca. 754; *e. g.*, if the injury would have occurred although the plaintiff had been free from negligence; 8 C. B. N. S. 115; Newhouse v. Miller, 35 Ind. 463; Walsh v. Transp. Co., 52 Mo. 434; Lindsey v. Town of Danville, 45 Vt. 72; or if the injury is wilful; Cook v. R. & Bank. Co., 67 Ala. 533; Terre Haute & I. R. Co. v. Graham, 95 Ind. 286, 48 Am. Rep. 719; Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. See NEGLIGENCE. There is no right of action by an individual for damages sustained from a public nuisance, so far as he only shares the common injury inflicted on the community; 5 Co. 72. For any special loss suffered by himself alone, he may recover; 4 Maule & S. 101; 2 Bingh. 263; 1 Bingh. N. C. 222; 2 *id.* 281; Baxter v. Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778; Mayor, etc., of Pittsburgh v. Scott, 1 Pa. 309; O'Brien v. R. Co., 17 Conn. 372; but in so far as the whole neighborhood suffer together, resort must he had to the public remedy; 7 Q. B. 339; Proprietors of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276, 39 Am. Dec. 778; Barr v. Stevens, 1 Bibb (Ky.) 293. Judicial officers are not liable in damages for erroneous decisions. See JUDGE; LAST CLEAR CHANCE.

Where the wrong committed by the defendant amounted to a felony, the English rule was that the private remedy by action was stayed till conviction for the felony was had. This was in order to stimulate the exertions of private persons injured by the commission of crimes to bring offenders to justice. This rule has, however, been changed in some of the United States. Thus, in New York it is enacted that when the violation of a right admits of both a civil and criminal remedy, one is not merged in the other. And see Boardman v. Gore, 15 Mass. 336; Ocean Ins. Co. v. Fields, 2 Stor. 59, Fed. Cas. No. 10,406; Turner's Case, Ware 78, Fed. Cas. No. 14,248. A criminal prosecution and conviction for an assault and battery is not a bar to the recovery of punitive damages in a civil action for the same offence; but it may be shown in mitigation of damages; Rhodes v. Rodgers, 151 Pa. 634, 24 Atl. 1044; but see Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989. When a servant is injured through the negligence of a fellow-servant employed in the same enterprise or avocation, the common employer is not liable for damages. The servant, in engaging, takes the risk of injury from the negligence of his fellow-servants; McKinn. Fellow-Serv. 18; Farwell v. R. Corporation, 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Hubgh v. R. Co., 6 La. Ann. 495; Ryan v. R. Co., 23 Pa. 384; Coon v. R. Co., 5 N. Y. 493; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Honner v. R. Co., 15 Ill. 550; Cleveland, C. & C. R. Co. v. Keary, 3 Ohio St. 201; 5 Exch. 343. But this rule does not exonerate the master from liability for negligence of a servant in a different employment. See MASTER AND SERVANT. But this rule has been altered in some states, and by act of congress in certain cases; see EMPLOYERS' LIABILITY ACTS.

By the common law, no action was maintainable to recover damages for the death of a human being; 1 Campb. 493; Carey v. R. Co., 1 Cush. (Mass.) 475, 48 Am. Dec. 616; Hendrick v. Walton, 69 Tex. 192, 6 S. W. 749. As to the right under statutes, see DEATH.

Excessive or inadequate damages. Even in that large class of cases in which there is no fixed measure of damages, but they are left to the discretion of the jury, the court has a certain power to review the verdict, and to set it aside if the damages awarded are grossly excessive or unreasonably inadequate. The rule is, however, that a verdict will not be set aside for excessive damages unless the amount is so large as to satisfy the court that the jury have been misled by passion, prejudice, ignorance, or partiality; Field, Dam. 683; Clapp v. R. Co., 19 Barb. (N. Y.) 461; Treanor v. Donahoe, 9 Cush. (Mass.) 228; Kountz v. Brown, 16 B. Monr. (Ky.) 577; Nicholson v. R. Co., 22 Conn. 74, 56 Am. Dec. 390; Bell v. Morrison, 27 Miss. 68; Lang v. Hopkins, 10 Ga. 37; Marshall v. Gunter, 6 Rich. (S. C.) 419; Payne v. Steamship Co., 1 Cal. 33; George v. Law, *id.* 363; Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. Dec. 666; Dwyer v. R. Co., 52 Fed. 87; City of Delphi v. Lowery, 74 Ind. 520, 39 Am. Rep. 98; Gale v. R. Co., 76 N. Y. 594; Tennessee Coal & Railroad Co. v. Roddy, 85 Tenn. 400, 5 S. W. 286. But this power is very sparingly used; and cases are numerous in which the courts have expressed themselves dissatisfied with the verdict, but have refused to interfere, on the ground that the case did not come within this rule. See Potter v. Thompson, 22 Barb. (N. Y.) 87; Woodson v. Scott, 20 Mo. 272; Sexton v. Brock, 15 Ark. 345; Barnette v. Hicks, 6 Tex. 352; Spencer v. McMasters, 16 Ill. 405; Whipple v. Mfg. Co., 2 Sto. 661, Fed. Cas. No. 17,516; Vreeland v. Berry, 21 N. J. L. 183; McDermott v. Ry. Co., 85 Wis. 102, 55 N. W. 179; Slette v. Ry. Co., 53 Minn. 341, 55 N. W. 137.

As a general rule, in actions of tort the court will not grant a new trial on the ground of the smallness of damages; 12 Mod. 150; 2 Stra. 940; 24 E. L. & Eq. 406. But they have the power to do so in a proper case; and in a few instances in which the jury have given no redress at all, when some was clearly due, the verdict has been set aside; Richards v. Sandford, 2 E. D. Sm. (N. Y.) 349; 4 Q. B. 917.

An important case sustaining this view is reported in 5 Q. B. D. 78; there two verdicts of £7,000 and £16,000, respectively, were successively set aside as inadequate.

In the cases in which there is a fixed legal rule regulating the measure of damages, it must be stated to the jury by the presiding judge upon the trial. His failure to state it correctly is ground of exception; and if the jury disregard the instructions of the court on the subject, their verdict may be set aside. In so far, however, as the verdict is an honest determination of questions of fact properly within their province, it will not, in general, be disturbed. Sedgw. Dam. 604. See CONSEQUENTIAL DAMAGES; MEASURE OF DAMAGES; DAMAGE.

DAME. A woman of rank, high social position, or culture; specifically, in Great Britain, the legal title of the wife or widow of a knight or baronet. Cent. Dict.

DAMNA (Lat. *damnum*). Damages, both inclusive and exclusive of costs.

DAMNATUS. In Old English Law. Condemned; prohibited by law; unlawful. *Damnatus coitus*, an unlawful connection. Black, L. Dict.

DAMNI INJURIÆ ACTIO (Lat.). In Civil Law. An action for the damage done by one who intentionally injured the beast of another. Calvinus, Lex.

DAMNOSA HÆREDITAS. A name given by Lord Kenyon to that species of property of a bankrupt which, so far from being valuable, would be a charge to the creditors: for

example, a term of years where the rent would exceed the revenue.

The assignees are not bound to take such property; but they must make their election, and having once entered into possession they cannot afterwards abandon the property; 7 East 342; 3 Campb. 340.

DAMNUM (Lat.). That which is taken away; loss; damage; legal hurt or harm. Anderson, L. Dict.

DAMNUM ABSQUE INJURIA (Lat. injury without wrong). A wrong done to a man for which the law provides no remedy. Broom, Max. 1. See DAMAGES.

Injuria is here to be taken in the sense of *legal injury;* and where no malice exists, there are many cases of wrong or suffering inflicted upon a man for which the law gives no remedy; 2 Ld. Raym. 595; 11 M. & W. 755; Lamb v. Stone, 11 Pick. (Mass.) 527. Thus, if the owner of property, in the prudent exercise of his own right of dominion, does acts which cause loss to another, it is *damnum absque injuria;* Gardner v. Heartt, 2 Barb. (N. Y.) 168; Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Trout v. McDonald, 83 Pa. 144; see Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445; 10 M. & W. 109. A railroad company which exercises due care in blasting on its own land, in order to lay its tracks, is not liable for injury to adjoining property arising merely from the incidental jarring; Booth v. R. Co., 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552. See BLASTING. The location and operation of a railroad in a street, the bed of which does not belong to an abutting property owner, is, as to him, *damnum absque injuria;* otherwise if he own the bed of the street; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306. The ringing of bells, sounding of whistles and other noises, and the emission of smoke by railroads, are *damnum absque injuria;* Aldrich v. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237.

So, too, acts of public agents within the scope of their authority, if they cause damage, cause simply *damnum absque injuria (q. v.);* Sedgw. Dam. 29, 111; Callender v. Marsh, 1 Pick. (Mass.) 418; Bridge over River Lehigh v. Nav. Co., 4 Rawle (Pa.) 9, 26 Am. Dec. 111; Graves v. Otis, 2 Hill (N. Y.) 466; Hollister v. Union Co., 9 Conn. 436, 25 Am. Dec. 36; Hatch v. R. Co., 25 Vt. 49; Miller v. New York, 109 U. S. 395, 3 Sup. Ct. 228, 27 L. Ed. 971; Hamilton v. R. Co., 119 U. S. 284, 7 Sup. Ct. 206, 30 L. Ed. 393; Hart v. Aqueduct Corp., 133 Mass. 489; 2 B. & Ald. 646. See Ashby v. White, 1 Smith, Lead. Cas. 244; and Weeks, Doc. of Dam. Abs. Inj.

The state, in locating its public levees, acts in the exercise of its police powers, and private injury resulting therefrom is *damnum absque injuria;* Egan v. Hart, 45 La. Ann. 1358, 14 South. 244.

See MENTAL SUFFERING.

DAMNUM FATALE. In Civil Law. Damages caused by a fortuitous event or inevitable accident; damages arising from the act of God.

Among these were included losses by shipwreck, lightning, or other casualty; also losses by pirates, or by *vis major*, by fire, robbery, and burglary; but theft was not numbered among these casualties. In general, bailees are not liable for such damages; Story, Bailm. 471.

DANEGELD. A tax or tribute imposed upon the English when the Danes got a footing in their island. From about the year 991 the Danegeld was levied and paid to the Danes as a tribute. In its later form, from 1012, it was a tax levied to pay the wages of a Danish fleet in the service of the English crown. It was abolished about 1051. It was levied again by William in 1083–4, and it was with a view of amending its assessment that the survey of the kingdom called Domesday was undertaken; 2 Holdsw. Hist. E. L. 119. A detailed history of the Danegeld cannot be written; Maitl. Domesday and Beyond 3.

DANE LAGE, or DANE LAW. The laws of the Danes which obtained in the eastern counties and part of the midland counties of England in the eleventh century. 1 Bla. Com. 65.

DANGEROUS WEAPON. One dangerous to life. Cosby v. Com., 115 Ky. 221, 72 S. W. 1089. One likely to produce death. State v. Johns, 6 Pennewill (Del.) 174, 65 Atl. 763; or great bodily injury; People v. Fuqua, 58 Cal. 245. This must often depend upon the manner of using it; Hunt v. State, 6 Tex. App. 663; and the question should go to the jury. A distinction is made between a dangerous and a deadly weapon; United States v. Small, 2 Curt. 241, Fed. Cas. No. 16,314. It is said to be anything with which death can be easily and readily produced, with a reference to the manner in which it was used and the part of the body upon which the blow was struck with it; Acers v. U. S., 164 U. S. 388, 17 Sup. Ct. 91, 41 L. Ed. 481. The following have been held to be deadly weapons: A chisel; Com. v. Branham, 8 Bush (Ky.) 387; a heavy iron weight or other ponderous instrument; State v. West, 51 N. C. 506; Killer v. Com., 124 Pa. 92, 16 Atl. 495; McReynolds v. State, 4 Tex. App. 327; a sledgehammer; Philpot v. Com., 86 Ky. 595, 6 S. W. 455; a heavy pistol used as a bludgeon; Prior v. State, 41 Ga. 155; a club; State v. Phillips, 104 N. C. 786, 10 S. E. 463; a piece of timber; State v. Alfred, 44 La. Ann. 582, 10 South. 887; a pocket knife; State v. Scott, 39 La. Ann. 943, 3 South. 83; a razor; Scott v. State, 42 Tex. Cr. R. 607, 62 S. W. 419; an axe; Dollarhide v. U. S., Morris (Ia.) 233, 39 Am. Dec. 460; State v. Shields, 110 N. C. 497, 14 S. E. 779; but where its size, weight, character and kind are not shown, it is held that it cannot be so regarded; Melton v. State, 30 Tex. App. 273, 17 S. W. 257; Gladney v. State (Tex.) 12 S. W. 868. A jacknife may be a dangerous weapon in fact, but whether it was such as matter of law was not decided; Com. v. O'Brien, 119 Mass. 342, 20 Am. Rep. 325. A heavy oak stick, three feet long and an inch thick, is a dangerous weapon but not a "deadly" weapon in the sense that from the use of it alone an attack would be as matter of law an aggravated assault under a Texas statute; Pinson v. State, 23 Tex. 579. See ARMS; WEAPONS. And to the same effect,

People v. Perales, 141 Cal. 581, 75 Pac. 170; Renon v. State, 56 Tex. Cr. R. 343, 120 S. W. 174; Taylor v. State, 108 Ga. 384, 34 S. E. 2; Kelly v. State, 68 Miss. 343, 8 South. 745.

In one way it may be true that sticks or clubs are not deadly weapons. Carrying them does not import any hostile intent, nor, even in view of an expected affray, a design to take life. But when a fight is actually going on, they may become weapons of a very deadly character; Allen v. U. S., 157 U. S. 675, 15 Sup. Ct. 720, 39 L. Ed. 854. When its size and the manner of its use is shown, it may be left to the jury to say whether a stick or club or piece of plank is a deadly weapon of a character likely to produce death or great bodily harm; State v. Nueslein, 25 Mo. 111; Allen v. State, 148 Ala. 588, 42 South. 1006; State v. Brown, 67 Ia. 289, 25 N. W. 248. A weapon cannot be said as a matter of law to be deadly, without reference to the manner of its use; Crow v. State, 55 Tex. Cr. R. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497, where a baseball bat is held not to be *per se* a deadly weapon, though it has been said, if viciously used, it would probably be so considered; State v. Brown, 67 Ia. 289, 25 N. W. 248. A piece of gas pipe 4 feet long and weighing about 4 pounds was held a deadly weapon *per se;* State v. Drumm, 156 Mo. 216, 56 S. W. 1086; as was a hoe; Hamilton v. People, 113 Ill. 34, 55 Am. Rep. 396; Krchnavy v. State, 43 Neb. 337, 61 N. W. 628; a pitchfork; Evans v. Com., 12 S. W. 767, 11 Ky. L. Rep. 551. a stone may be; State v. Wilson, 16 Mo. App. 550; North Carolina v. Gosnell, 74 Fed. 734. Whether a rock used for a missile was a deadly weapon was held to be for the jury; State v. Shipley, 174 Mo. 512, 74 S. W. 612; Tribble v. State, 145 Ala. 23, 40 South. 938; but in State v. Speaks, 94 N. C. 865, the question was said to be one of law. An indictment for assault with a deadly weapon, to wit, a brick, sufficiently charges the use of a deadly weapon; State v. Sims, 80 Miss. 381, 31 South. 907. But it was held that whether a brickbat is a deadly weapon is for the jury; State v. Harper, 69 Mo. 425. Pushing a pin down the throat of an infant is a killing with a deadly weapon; State v. Norwood, 115 N. C. 789, 20 S. E. 712, 44 Am. St. Rep. 498. A stocking loaded with salt and plaster which had been hardened by wetting, used by a prisoner in assaulting his jailer while attempting to escape, may be found by the jury to be a deadly weapon; People v. Valliere, 123 Cal. 576, 56 Pac. 433. And one may be found guilty of an assault with a deadly weapon who has placed a tin box filled with gunpowder in the stove of the prosecuting witness, where it exploded; People v. Pape, 66 Cal. 366, 5 Pac. 621. See Crow v. State, 55 Tex. Cr. R. 200, 116 S. W. 52, 21 L. R. A. (N. S.) 497.

A mere trespass on land does not justify an assault with a deadly weapon; Montgomery v. Com., 98 Va. 840, 36 S. E. 371; State v. Lightsey, 43 S. C. 114, 20 S. E. 975; State v. Zellers, 7 N. J. L. 220; as where one threw down a fence and drove over a wheat field, on account of snow drifts; State v. Talley, 9 Houst. (Del.) 417, 33 Atl. 181; or where one tore down and carried away a fence; State v. Matthews, 148 Mo. 185, 49 S. W. 1085, 71 Am. St. Rep. 594; or went on another's land to remove crops; Rauck v. State, 110 Ind. 384, 11 N. E. 450. Other cases hold that if force be necessary, a deadly weapon may be used; People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52; or if the owner has reasonable ground for believing that he is in danger; People v. Dann, 53 Mich. 490, 19 N. W. 159, 51 Am. Rep. 151. If the trespasser assault him, he may be justified in killing; Ayers v. State, 60 Miss. 709; he may oppose force with force; Wenzel v. State, 48 Tex. Cr. R. 625, 90 S. W. 28; in the defence of his house; People v. Coughlin, 67 Mich. 466, 35 N. W. 72; so if the killing is believed, in good faith and upon reasonable grounds, to be necessary in order to repel the assailant or prevent his forcible entry; State v. Peacock, 40 Ohio St. 333. In ejecting a trespasser or preventing a trespass, a deadly weapon is not justified unless the owner reasonably believes that he is in danger of personal violence; State v. Howell, 21 Mont. 165, 53 Pac. 314; Sage v. Harpending, 49 Barb. (N. Y.) 166. In Pryse v. State, 54 Tex. Cr. R. 523, 113 S. W. 938, it was held that a person may use all the force necessary to protect his property, and if in danger of death or serious injury he may kill. In Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. Rep. 428, it was held that effectual means, by shooting or otherwise, was justifiable to drive away a charivari party who were causing fright to the owner's family and endangering their lives.

DANGERS OF THE RIVER. In a bill of lading this term means only the natural accidents incident to river navigation, and does not embrace such as may be avoided by the exercise of that skill, judgment, and foresight which are demanded from persons in a particular occupation. Hill v. Sturgeon, 35 Mo. 212, 86 Am. Dec. 149. See Hibernia Ins. Co. v. Transp. Co., 17 Fed. 478.

DANGERS OF THE SEA. See PERILS OF THE SEA.

DAPIFER. The name of the first officer of state in France until 1191, after which it was never conferred. The name came to England with the Normans, but the office was less important, and there was a staff of dapifers. After the accession of Richard I. the style Seneschal began to take its place. Harcourt, The Steward and Trial of Peers.

DARREIN (Fr. *dernier*). Last. *Darrein continuance*, last continuance. See PUIS DARREIN CONTINUANCE; CONTINUANCE.

DARREIN PRESENTMENT. See ASSIZE OF DARREIN PRESENTMENT.

DARREIN SEISIN (L. Fr. last seisin). A plea which lay in some cases for the tenant in a writ of right. Hunt v. Hunt, 3 Metc. (Mass.) 184; Jackson, Real Act. 285. See 1 Roscoe, Real Act. 206; 2 Prest. Abstr. 345.

DATE. The designation or indication in an instrument of writing of the time and place when and where it was made.

In the Anglo-Saxon land charters dates were given by the year of the *Indiction (q. v.)*. Dating by the year of our Lord was invented in 532. At a council in 816 it was adopted for the acts of the synod and became general in documents from that date; 2 Holdsw. Hist. E. L. 19. Some early charters were not dated; some referred to the regnal year, or a church festival, or a remarkable event; 3 *id.* 196.

When the place is mentioned in the date of a deed, the law intends, unless the contrary appear, that it was executed at the place of the date; Plowd. 7 *b*. The word is derived from the Latin *datum* (given); because when the instruments were in Latin the form ran *datum*, etc. (given the —— day of, etc.).

A date is necessary to the validity of a policy of insurance; but where there are separate underwriters, each sets down the date of his own signing, as this constitutes a separate contract; Marsh. Ins. 336; 2 Pars. Marit. Law 27. Written instruments generally take effect from the day of their date, but the actual date of execution may be shown, though different from that which the instrument bears; and it is said that the date is not of the essence of a contract, but is essential to the identity of the writing by which it is to be proved; 2 Greenl. Ev. §§ 12, 489, n.; Cloyes v. Sweetser, 4 Cush. (Mass.) 403; Jackson v. McKenny, 3 Wend. (N. Y.) 233, 20 Am. Dec. 690; Gammon v. Freeman, 31 Me. 243; Bement v. Mfg. Co., 32 N. J. L. 513; McSparran v. Neeley, 91 Pa. 17; 17 E. L. & Eq. 548. See Knisely v. Sampson, 100 Ill. 573; 19 L. J. Q. B. 435. And if the written date is an impossible one, the time of delivery must be shown; Shepp. Touchst. 72; Cruise, Dig. c. 2, s. 61.

An indictment charging the commission of a crime on an impossible date (in the year 18903) was held fatally defective; Terrell v. State, 165 Ind. 443, 75 N. E. 884, 2 L. R. A. (N. S.) 251, 112 Am. St. Rep. 244, 6 Ann. Cas. 851; see also State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584; State v. Litch, 33 Vt. 67; even when the mistaken date appears to have been merely a clerical error; Robles v. State, 5 Tex. App. 347; and one charging the commission of an offense upon a date not yet arrived was held to allege no offense as having been already committed; Com. v. Doyle, 110 Mass. 103. Where the date alleged for the commission of a statutory offense occurred before the statute was enacted, and even before the state became a member of the Union, it was held an impossible date; State v. O'Donnell, 81 Me. 271, 17 Atl. 66. See INDICTMENT; TIME.

A date in a note or bill is required only for the purpose of fixing the time of payment. If the time of payment is otherwise indicated, no date is necessary; 1 Ames, Bills and Notes 145, citing Brewster v. McCardell, 8 Wend. (N. Y.) 478; Walker v. Geisse, 4 Whart. (Pa.) 252, 33 Am. Dec. 60. When a note payable at a fixed period after date has no date, a holder may fill the date with the day of issue; *ibid.*

It is usually presumed that a deed was delivered on the day of its date; but proof of the date of delivery must be given if the circumstances were such that collusion might be practised; Steph. Dig. Ev. 138; Raines v. Walker, 77 Va. 92; Harman v. Oberdorfer, 33 Gratt. (Va.) 497; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319. See 6 Bing. 296; Ellsworth v. R. Co., 34 N. J. L. 93; Cutts v. Mfg. Co., 18 Me. 190. But this presumption does not hold in respect to deeds in fee, unattested and unacknowledged; Genter v. Morrison, 31 Barb. (N. Y.) 155. Parol evidence is admissible to show that the date stated in the *in testimonium* clause of a mortgage deed of personal property is not its true date; Shaughnessey v. Lewis, 130 Mass. 355; Orcutt v. Moore, 134 Mass. 52, 45 Am. Rep. 278. There is a presumption as to a note that it was delivered on the day of its date; Cranson v. Goss, 107 Mass. 439, 9 Am. Rep. 45.

Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month governs; Minor v. Michie, Walker (Miss.) 27.

DATION. In Civil Law. The act of giving something. It differs from donation, which is a gift; dation, on the contrary, is giving something without any liberality; as, the giving of an office.

DATION EN PAIEMENT. In Civil Law. A giving by the debtor and receipt by the creditor of something in payment of a debt instead of a sum of money.

It is somewhat like the accord and satisfaction of the common law. 16 Toullier, n. 45; Pothier, *Vente*, n. 601. *Dation en paiement* resembles in some respects the contract of sale; *dare in solutum est quasi vendere*. There is, however, a very marked difference between a sale and a *dation en paiement*. *First*. The contract of sale is complete by the mere agreement of the parties; the *dation en paiement* requires a delivery of the thing given; Donoven & Daley v. Travers, 122 La. 458, 47 South. 769. *Second*. When the debtor pays a certain sum which he supposed he was owing, and he discovers he did not owe so much, he may recover back the excess; not so when property other than money has been given in payment. *Third*. He who has in good faith sold a thing of which he believed himself to be the owner, is not precisely required to transfer the property of it to the buyer; and while he is not troubled in the possession of the thing, he cannot pretend that the seller has not fulfilled his obligations. On the contrary, the *dation en paiement* is good only when the debtor transfers to the creditor the property in the thing which he has agreed to take in payment;

and if the thing thus delivered be the property of another, it will not operate as a payment. Pothier, *Vente*, nn. 602, 603, 604. See 1 Low. C. 53; Keough v. J. Meyers & Co., 43 La. Ann. 952, 9 South. 913.

DATIVE. A word derived from the Roman law, signifying "appointed by public authority." Thus, in Scotland, an executor-dative is an executor appointed by a court of justice, corresponding to an English *administrator*. Mozley & W. Dict.

DAUGHTER. A female child; an immediate female descendant.

DAUGHTER-IN-LAW. The wife of one's son.

DAY. The space of time which elapses while the earth makes a complete revolution on its axis.

A portion of such space of time which, by usage or law, has come to be considered as the whole for some particular purpose.

The space of time which elapses between two successive midnights. 2 Bla. Com. 141.

That portion of such space of time during which the sun is shining.

Generally, in legal signification, the term included the time elapsing from one midnight to the succeeding one; 2 Bla. Com. 141; Kane v. Commonwealth, 89 Pa. 522, 33 Am. Rep. 787; see Helphenstine v. Bank, 65 Ind. 589, 32 Am. Rep. 86; but it is also used to denote those hours during which business is ordinarily transacted (frequently called a *business* day); Hinton v. Locke, 5 Hill (N. Y.) 437; as well as that portion of time during which the sun is above the horizon (called, sometimes, a *solar* day), and, in addition, that part of the morning or evening during which sufficient of its light is above for the features of a man to be reasonably discerned; Co. 3d Inst. 63; Trull v. Wilson, 9 Mass. 154. Where a party is required to take action within a given number of days in order to secure or assert a right, the day is to consist of twenty-four hours, that is the popular and legal sense of the term; Zimmerman v. Cowan, 107 Ill. 631, 47 Am. Rep. 476; also in a marine insurance policy "for 30 days after arrival" means thirty successive periods of twenty-four hours each, "commencing as soon as moored at anchor"; [1904] 1 K. B. 40.

By custom, the word *day* may be understood to include working-days only; 3 Esp. 121; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650. In a similar manner only, a certain number of hours less than the number during which the work actually continued each day. Hinton v. Locke, 5 Hill (N. Y.) 437.

Sundays and other public holidays falling within the number of days specified by a statute for the performance of an act, are often omitted from the computation, as not being judicial days; Abrahams v. Comm., 1 Rob. (Va.) 676; Michie v. Michie's Adm'r, 17 Gratt. (Va.) 109; Neal v. Crew, 12 Ga. 93; National Bank of the Metropolis v. Williams, 46 Mo. 17; Caupfield v. Cook, 92 Mich. 626, 52 N. W. 1031; McChesney v. People, 145 Ill. 614, 34 N. E. 431; Danielson v. Fuel Co., 55 Fed. 49; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650. But see Miles v. McDermott, 31 Cal. 271. Where the last day of the six months within which an appeal or writ of error may be taken to review in the circuit court of appeals, the judgment or decree of a lower court, falls on Sunday, the appeal cannot be taken or the writ sued out on any subsequent day; Johnson v. Meyers, 54 Fed. 417, 4 C. C. A. 393. When the day of performance of contracts, other than instruments upon which days of grace are allowed, falls on Sunday, or other public holiday, it is not counted, and the contract may be performed on Monday; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Stryker v. Vanderbilt, 27 N. J. L. 68; Johnson v. Merritt, 50 Minn. 303, 52 N. W. 863. See Broome v. Wellington, 1 Sandf. (N. Y.) 664.

The time for completing commercial contracts is not limited to banking hours; Price v. Tucker, 5 La. Ann. 514.

A day is generally, but not always, regarded in law as a point of time; and fractions will not be recognized; 2 B. & Ald. 586; In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407; Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183; State v. Winter Park, 25 Fla. 371, 5 South. 818. And see Brainard v. Bushnell, 11 Conn. 17; 3 Op. Att. Gen. 82; Phelan v. Douglass, 11 How. Pr. (N. Y.) 193; Duffy v. Ogden, 64 Pa. 240. See FRACTION OF A DAY.

It is said that there is no general rule in regard to including or excluding days in the computation of time from the day of a fact or act done, but that it depends upon the reason of the thing and the circumstances of the case; 9 Q. B. 141; 6 M. & W. 55; Presbrey v. Williams, 15 Mass. 193; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; Taylor v. Brown, 5 Dak. 335, 40 N. W. 525. And see, also, 5 Co. 1 *a*; Dougl. 463; 4 Nev. & M. 378; Atkins v. Ins. Co., 5 Metc. (Mass.) 439, 39 Am. Dec. 692; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Blake v. Crowninshield, 9 N. H. 304; Ewing v. Bailey, 4 Scam. (Ill.) 420; Marys v. Anderson, 24 Pa. 272; State v. Water Co., 56 N. J. L. 422, 28 Atl. 578. Perhaps the most general rule is to exclude the first day and include the last; Weld v. Barker, 153 Pa. 465, 26 Atl. 239; Miner v. Tilley, 54 Mo. App. 627; Seward v. Hayden, 150 Mass. 159, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183; 12 A. & E. 635; Blackman v. Nearing, 43 Conn. 56, 21 Am. Rep. 634; Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70. Such is the rule as to negotiable paper; 1 Dan. Neg. Instr. 496; Mark's Ex'rs v. Russell, 40 Pa. 372. See, generally, 2 Sharsw. Bla. Com. 141, n.; and so in the Uniform Negotiable Instruments Act, § 86.

The rule now generally followed seems to be that not only in mercantile contracts, but also in wills and other instruments, and in the construction of statutes, the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; People v. R. Co., 23 Barb. (N. Y.) 284; Hahn v. Dierkes, 37 Mo. 574; Faure v. Exp. Co., 23 Ind. 48.

A statutory rule for computing time does not apply to ascertain the day, or the last day, on which a thing may be done, where such day is expressed by its date; Northwestern Guaranty Loan Co. v. Channell, 53 Minn. 269, 55 N. W. 121.

See TIME.

DAY BOOK. An account-book in which merchants and others make entries of their daily transactions. This is generally a book of original entries, and, as such, may be giv-

en in evidence to prove the sale and delivery of merchandise or of work done.

DAY RULE. In English Practice. A rule or order of the court by which a prisoner on civil process, and not committed, is enabled, in term-time, to go out of the prison and its rule or bounds. Tidd. Pr. 961. Abolished by 5 & 6 Vict. c. 22.

DAYS IN BANK. In English Practice. Days of appearance in the court of common pleas, usually called *bancum*. They are at the distance of about a week from each other, and are regulated by some festival of the church.

By the common law, the defendant is allowed three full days in which to make his appearance in court, exclusive of the day of appearance or return-day named in the writ; 3 Bla. Com. 278. Upon his appearance, time is usually granted him for pleading; and this is called giving him day, or, as it is more familiarly expressed, a continuance. 3 Bla. Com. 316. When the suit is ended by discontinuance or by judgment for the defendant, he is discharged from further attendance, and is said to go thereof *sine die*, without day. See CONTINUANCE.

DAYS OF GRACE. Certain days allowed to the acceptor of a bill or the maker of a note in which to make payment, in addition to the time contracted for by the bill or note itself.

They are so called because formerly they were allowed as a matter of favor; but the custom of merchants to allow such days of grace having grown into law, and been sanctioned by the courts, all bills of exchange are by the law merchant entitled to days of grace as of right. The statute of Anne making promissory notes negotiable confers the same right on those instruments. This act has been generally adopted throughout the United States; and the days of grace allowed are three; Thomas v. Shoemaker, 6 W. & S. (Pa.) 179; Chitty, Bills; Byles, Bills.

The Uniform Negotiable Instruments Act passed in most of the states abolishes days of grace, but three days of grace are allowed on sight drafts in the Rhode Island Act, and on notes, acceptances, and sight drafts in the North Carolina act; the Massachusetts act was amended so as to allow days of grace on sight drafts; also by the English Bills of Exchange Act (1882); Selover, Negot. Instr. 253. The following cases are retained as having at least historical interest:

Bank checks are due on presentation and are not entitled to days of grace; Wood River Bank v. Bank, 36 Neb. 744, 55 N. W. 239.

The principle deducible from all the authorities is, that, as to every bill not payable on demand, the day on which payment is to be made to prevent dishonor is to be determined by adding three days of grace, where the bill itself does not otherwise provide, to the time of payment as fixed by the bill. This principle is formulated into a statutory provision in England in the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, § 14; Bell v. Bank, 115 U. S. 383, 6 Sup. Ct. 105, 29 L. Ed. 409; President, etc., of Bank of Washington v. Triplett, 1 Pet. (U. S.) 31, 7 L. Ed. 37.

Where there is an established usage of the place where the bill is payable to demand payment on the fourth or other day instead of the third, the parties to it will be bound by such usage; Renner v. President, etc., of Bank, 9 Wheat. (U. S.) 582, 6 L. Ed. 166; Price v. Earl of Torrington, 1 Smith, Lead. Cas. 417. When the last day of grace happens on Sunday or a general holiday, as the Fourth of July, Christmas day, etc., the bill is due on the day previous, and must be presented on that day in order to hold the drawer and indorsers; Big. Bills & N. 90; Mechanics' & Farmers' Bank v. Gibson, 7 Wend. (N. Y.) 460; Bank of North America v. Pettit, 4 Dall. (U. S.) 127, 1 L. Ed. 770; Fisher v. Evans, 5 Binn. (Pa.) 541; Brown v. Lusk, 4 Yerg. (Tenn.) 210; McRae v. Kennon, 1 Ala. 295, 34 Am. Dec. 777; Leavitt v. Simes, 3 N. H. 14; *contra*, First Nat. Bank of Hastings v. McAllister, 33 Neb. 646, 50 N. W. 1040; unless changed by statute as in some states. Days of grace are, for all practical purposes, a part of the time the bill has to run, and interest is charged on them; President, etc., of the Bank of Utica v. Wager, 2 Cow. (N. Y.) 712; 1 Dan. Neg. Instr. 489. According to the usage and custom of merchants to fix the liability of the indorser of negotiable paper, it should be protested on the last day of grace; Carey Lombard Lumber Co. v. Bank, 86 Tex. 299, 24 S. W. 260.

In computing the days of grace allowed in a bond for the payment of interest, the day when the interest became payable will not be counted; Serrell v. Rothstein, 49 N. J. Eq. 385, 24 Atl. 369. A bill payable in thirty days having been drawn and accepted on February 11th, of a leap year, the last day of grace falls on March 15th, the 29th of February being counted as a distinct day; Helphenstine v. Bank, 65 Ind. 582, 32 Am. Rep. 86.

Our courts always assume that the same number of days are allowed in other countries; and a person claiming the benefit of a foreign law or usage must prove it; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550; Ripley v. Greenleaf, 2 Vt. 129; President, etc., of the Farmers' Bank of Maryland v. Duvall, 7 Gill & J. (Md.) 78; President, etc., of the Bank of Alexandria v. Swann, 9 Pet. (U. S.) 33, 9 L. Ed. 40; Wood v. Corl, 4 Metc. (Mass.) 203. When properly proved, the law of the place where the bill or note is payable prescribes the number of days of grace and the manner of calculating them; Dollfus v. Frosch, 1 Denio (N. Y.) 367; Story, Pr. Notes §§ 216, 247. The tendency to adopt as laws local usages or customs has been materially checked; Bowen v. Newell, 8 N. Y. 190.

DAYS OF THE WEEK. The courts will always take judicial notice of the days of the week; for example, when a writ of inquiry was stated in the pleadings to have been executed on the fifteenth of June, and upon an examination it was found to be Sunday, the proceeding was held to be defective; Fortesc. 373; Stra. 387.

DAYSMAN. An arbitrator, umpire, or elected judge. Cowell.

DAYWERE. As much arable land as could be ploughed in one day's work. Cowell.

DE ADMENSURATIONE or AMENSURACIONE, in Maitland (2 Sel. Essays in Anglo-Amer. L. H. 585). Of admeasurement.

Used of the writ of admeasurement of dower, which lies where the widow has had more dower assigned to her than she is entitled to. It is said by some to lie where either an infant heir or his guardian made such assignment at suit of the infant heir whose rights are thus prejudiced. 2 Bla. Com. 136; Fitzh. N. B. 348. It seems, however, that an assignment by a guardian binds the infant heir, and that after such assignment the heir cannot have his writ of admeasurement; Boyers v. Newbanks, 2 Ind. 388; Jones v. Brewer, 1 Pick. (Mass.) 314; Young v. Tarbell, 37 Me. 509; 1 Washb. R. P. 226.

Used also of the writ of admeasurement of pasture, which lies where the quantity of common due each one of several having rights thereto, has not been ascertained. 3 Bla. Com. 38. See ADMEASUREMENT OF DOWER.

DE ÆTATE PROBANDA (Lat. for proving age). A writ which lay to summon a jury for the purpose of determining the age of the heir of a tenant *in capite* who claimed his estate as being of full age. Fitzh. N. B. 257.

DE ALLOCATIONE FACIENDA (Lat. for making an allowance). A writ to allow the collectors of customs, and other such officers having charge of the king's money, for sums disbursed by them.

It was directed to the treasurer and barons of the exchequer.

DE ALTO ET BASSO (Of high and low). A phrase anciently used to denote the absolute submission of all differences to arbitration. Cowell.

DE ANNUA PENSIONE (Lat. of annual pension). A writ by which the king, having due unto him an annual pension from any abbot or prior for any of his chaplains which he will name who is not provided with a competent living, demands it of the said abbot or prior for the one that is named in the writ. Fitzh. N. B. 231; *Termes de la Ley, Annua Pensione.*

DE ANNUO REDITU (Lat. for a yearly rent). A writ to recover an annuity, no matter how payable. 2 Reeve, Hist. Eng. Law 258.

DE APOSTATA CAPIENDO (Lat. for taking an apostate). A writ directed to the sheriff for the taking the body of one who, having entered into and professed some order of religion, leaves his order and departs from his house and wanders in the country. Fitzh. N. B. 233; *Termes de la Ley, Apostata Capiendo.*

DE ARBITRATIONE FACTA (Lat. of arbitration had). A writ formerly used when an action was brought for a cause which had been settled by arbitration. Watson, Arb. 256.

DE ASSISA PROROGANDA (Lat. for proroguing assize). A writ to put off an assize issuing to the justices where one of the parties is engaged in the service of the king.

DE ATTORNATO RECIPIENDO (Lat. for receiving an attorney). A writ to compel the judges to receive an attorney and admit him for the party. Fitzh. N. B. 156 *b*. Sometimes *de attornato faciendo;* see Maitland, 2 Sel. Essays in Anglo-Amer. L. H. 576.

DE AVERIIS CAPTIS IN WITHERNAM (Lat. for cattle taken in withernam). A writ which lies to take other cattle of the defendant where he has taken and carried away cattle of the plaintiff out of the country, so that they cannot be reached by replevin. *Termes de la Ley;* 3 Bla. Com. 149.

DE AVERIIS REPLEGIANDIS (Lat.). A writ to replevy beasts. 3 Bla. Com. 149.

DE AVERIIS RETORNANDIS (Lat. for returning cattle). Used of the pledges in the old action of replevin. 2 Reeve, Hist. Eng. Law 177.

DE BENE ESSE (Lat. formally; conditionally; provisionally). A technical phrase applied to certain acts deemed for the time to be well done, or until an exception or other avoidance. It is equivalent to provisionally, with which meaning the phrase is commonly employed. For example, a declaration is filed or delivered, special bail is put in, a witness is examined, etc., *de bene esse*, or provisionally; 3 Bla. Com. 383.

The examination of a witness *de bene esse* takes place where there is danger of losing the testimony of an important witness from death by reason of age or dangerous illness, or where he is the only witness to an important fact; Lingan v. Henderson, 1 Bland, Ch. (Md.) 238; Ails v. Sublit, 3 Bibb (Ky.) 204; Clark v. Dibble, 16 Wend. (N. Y.) 601; 13 Ves. 261; May's Heirs v. May's Adm'r, 28 Ala. 141. In such case, if the witness be alive at the time of trial, his examination is not to be used; 2 Dan. Ch. Pr. 1111. See Haynes, Eq. 183; Mitf. Eq. Pl. 52, 149.

To declare *de bene esse* is to declare in a bailable action subject to the contingency of bail being put in; and in such case the declaration does not become absolute till this is done; Grah. Pr. 191.

When a judge has a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse;* which verdict, if the court shall afterwards be of opinion that it ought to have been found,

shall stand. Bac. Abr. *Verdict* (A). See, also, Blair v. Weaver, 11 S. & R. (Pa.) 84.

DE BIEN ET DE MAL. See DE BONO ET MALO.

DE BIENS LE MORT (Fr.). Of the goods of the deceased. Dyer 32.

DE BONIS ASPORTATIS (Lat. for goods carried away). The name of the action for trespass to personal property is trespass *de bonis asportatis.* Bull. N. P. 836; 1 Tidd, Pr. 5.

DE BONIS NON. See EXECUTORS AND ADMINISTRATORS.

DE BONIS PROPRIIS (Lat. of his own goods). A judgment against an executor or administrator which is to be satisfied from his own property.

When an executor or administrator has been guilty of a *devastavit*, he is responsible for the loss which the estate has sustained *de bonis propriis.* He may also subject himself to the payment of a debt of the deceased *de bonis propriis* by his false plea when sued in a representative capacity; as, if he plead *plene administravit* and it be found against him, or a release to himself when false. In this latter case the judgment is *de bonis testatoris si, et si non, de bonis propriis.* 1 Wms. Saund. 336 *b*, n. 10; Bacon, Abr. *Executor* (B, 3).

DE BONIS TESTATORIS (Lat. of the goods of the testator). A judgment rendered against an executor which is to be satisfied out of the goods or property of the testator; distinguished from a judgment *de bonis propriis.*

DE BONIS TESTATORIS AC SI (Lat. from the goods of the testator, *if he has any*, and, if *not, from those of the executor).* A judgment rendered where an executor falsely pleads any matter as a release, or, generally, in any case where he is to be charged in case his testator's estate is insufficient. 1 Wms. Saund. 366 *b;* Bacon, Abr. *Executor* (B, 3); 2 Archb. Pr. 148.

DE BONO ET MALO (Lat. for good or ill). A writ which apparently allowed a person to be delivered from gaol if he were willing to put himself upon a jury. The French phrase *de bien et de mal* has the same meaning.

A special writ of gaol delivery, one being issued for each prisoner: now superseded by the general commission of gaol delivery. 4 Bla. Com. 270.

DE CALCETO REPARANDO (Lat.). A writ for repairing a highway, directed to the sheriff, commanding him to distrain the inhabitants of a place to repair the highway. Reg. Orig. 154; Blount.

DE CARTIS REDDENDIS (Lat. for restoring charters). A writ to secure the delivery of charters; a writ of detinue. Reg. Orig. 159 *b.*

DE CATALLIS REDDENDIS (Lat. for restoring chattels). A writ to secure the return specifically of chattels detained from the owner. Cowell.

DE CAUTIONE ADMITTENDA (Lat. for admitting bail). A writ directed to a bishop who refused to allow a prisoner to go at large on giving sufficient bail, requiring him to admit him to bail. Fitzh. N. B. 63 *c.* It seems to have been applicable only to secure the release of a person who had been taken on a writ of *de excommunicato capiendo (q. v.)* and who was willing to purge himself of contumacy.

DE CERTIFICANDO. A writ requiring a thing to be certified. A kind of certiorari. Reg. Orig. 152.

DE COMMUNI DIVIDENDO. In Civil Law. A writ of partition of common property. See COMMUNI DIVIDENDO.

DE COMPUTO. Writ of account. A writ commanding a defendant to render a reasonable account to the plaintiff, or show cause to the contrary. The foundation of the modern action of account. Blount; Registr. Br. 135.

DE CONTUMACE CAPIENDO. A writ issuing from the English court of chancery for the arrest of a defendant who is in contempt of the ecclesiastical court. 1 N. & P. 685; 5 Dowl. 213, 646; 5 Q. B. 335.

DE CURIA CLAUDENDA (Lat. of enclosing a court). An obsolete writ, to require a defendant to fence in his court or land about his house, where it was left open to the injury of his neighbor's freehold. 1 Crabb, R. P. 314; Rust v. Low, 6 Mass. 90.

DE CURSU. See CURSITOR.

DE DOMO REPARANDA (Lat.). The name of an ancient common-law writ, by which one tenant in common might compel his co-tenant to concur in the expense of repairing the property held in common. 8 B. & C. 269; 1 Thomas, Co. Litt. 216, note 17, and p. 787.

DE DONIS, THE STATUTE (more fully, *De Donis Conditionalibus;* concerning conditional gifts). The statute of Westminster the Second. 13 Edw. I. c. 1.

The object of the statute was to prevent the alienation of estates by those who held only a partial interest in the estate in such a manner as to defeat the estate of those who were to take subsequently. This was effected by providing that, in grants to a man and the heirs of his body or the heirs male of his body, the will of the donor should be observed according to the form expressed in the deed of gift *(per formam doni);* that the tenements so given should go, after the grantee's death, to his issue (or

issue male), if there were any, and if none, should revert to the donor. This statute was the origin of the estate in fee tail, or estate tail, and by introducing perpetuities, it built up great estates and strengthened the power of the barons. See Bac. Abr. *Estates Tail;* 1 Cruise, Dig. 70; 1 Washb. R. P. 271. See CONDITIONAL FEE TAIL.

DE DOTE ASSIGNANDA (Lat. for assigning dower). A writ commanding the king's escheator to assign dower to the widow of a tenant *in capite*. Fitzh. N. B. 263, c.

DE DOTE UNDE NIHIL HABET (Lat. of dower in that whereof she has none). A writ of dower which lay for a widow where no part of her dower had been assigned to a widow. It is now much disused; but a form closely resembling it is still used in the United States. 4 Kent 63; Stearns, Real Act. 302; 1 Washb. R. P. 230.

DE EJECTIONE CUSTODIÆ. A writ which lay for a guardian who had been forcibly ejected from his wardship. Reg. Orig. 162; Black, L. Dict.

DE EJECTIONE FIRMÆ. A writ which lay at the suit of the tenant for years against the lessor, reversioner, remainderman, or stranger who had himself deprived the tenant of the occupation of the land during his term. 3 Bla. Com. 199. Originally lying to recover damages only, it came to be used to recover the rest of the term, and then generally the possession of lands. Involving, in the question of who should have possession, the further question of who had the title, it gave rise to the modern action of ejectment. Brooke, Abr.; Adams, Ejectm.; 3 Bla. Com. 199 *et seq.*

DE ESTOVERIIS HABENDIS (Lat. to obtain estovers). A writ which lay for a woman divorced *a mensa et thoro* to recover her alimony or estovers. 1 Bla. Com. 441.

DE EXCOMMUNICATO CAPIENDO (Lat. for taking one who is excommunicated). A writ commanding the sheriff to arrest one who was excommunicated, and imprison him till he should become reconciled to the church. 3 Bla. Com. 102.

DE EXCOMMUNICATO DELIBERANDO (Lat. for freeing one excommunicated). A writ to deliver an excommunicated person, who has made satisfaction to the church, from prison. 3 Bla. Com. 102.

DE EXONERATIONE SECTÆ. A writ to free the king's ward from suit in any court lower than the court of common pleas during the time of such wardship.

DE FACTO. Actually; in fact; in deed. A term used to denote a thing actually done.

An officer *de facto* is one who performs the duties of an office with apparent right, and under claim and color of an appointment, but without being actually qualified in law so to act. Brown v. Lunt, 37 Me. 423.

One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. 6 East 368, where Lord Ellenborough and a full court of K. B. adopted this definition of Lord Holt in 1 Raym. 658, which it is said "has never been questioned since in England," per Butler, C. J., in the leading case of State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, where the common-law learning on the subject is collected.

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public; McDowell v. U. S., 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271.

An officer in the actual exercise of executive power would be an officer *de facto*, and as such distinguished from one who, being legally entitled to such power, is deprived of it,—such a one being an officer *de jure* only. An officer holding without strict legal authority; 2 Kent 295.

An officer *de facto* is frequently considered an officer *de jure*, and legal validity allowed his official acts; State v. Anderson, 1 N. J. L. 318, 1 Am. Dec. 207; Com. v. Fowler, 10 Mass. 290; Laver v. McGlachlin, 28 Wis. 364; Conover v. Devlin, 24 Barb. (N. Y.) 587; Whiting v. City of Ellsworth, 85 Me. 301, 27 Atl. 177; Petition of Town of Portsmouth, 19 N. H. 115; Burton v. Patton, 47 N. C. 124, 62 Am. Dec. 194; Gregg Tp. v. Jamison, 55 Pa. 468; Kimball v. Alcorn, 45 Miss. 151; Hussey v. Smith, 99 U. S. 20, 25 L. Ed. 314; People v. Weber, 86 Ill. 283; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Davis, 111 N. C. 729, 16 S. E. 540; State v. Lee, 35 S. C. 192, 14 S. E. 395; Zabel v. Harshman, 68 Mich. 273, 42 N. W. 44; 7 L. R. H. L. 894. But this is so only so far as the rights of the public and third persons are concerned. In order to sue or defend in his own right as a public officer, he must be so *de jure;* People v. Weber, 89 Ill. 347. An officer *de facto* incurs no liability by his mere omission to act; Olmstead v. Dennis, 77 N. Y. 378; Snyder v. Schram, 59 How. Pr. (N. Y.) 404; but see Thayer v. Printing Co., 108 Mass. 523; Providence Steam-Engine Co. v. Hubbard, 101 U. S. 192, 25 L. Ed. 786.

An officer *de facto* must be submitted to as such until displaced by a regular direct proceeding for that purpose; Ex parte Moore, 62 Ala. 471; 4 East 327; Buncombe Turnpike Co. v. McCarson, 18 N. C. 306; he is a legal officer until ousted; Board of Auditors of Wayne County v. Benoit, 20 Mich. 176, 4 Am. Rep. 382.

An officer acting under an unconstitutional law, acts by color of title, and is an officer *de facto;* Com. v. McCombs, 56 Pa. 436;

Watson v. McGrath, 111 La. 1097, 36 South. 204; State v. Gardner, 54 Ohio St. 31, 42 N. E. 999, 31 L. R. A. 660; Lang v. City of Bayonne, 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961; State v. Poulin, 105 Me. 224, 74 Atl. 119, 24 L. R. A. (N. S.) 408, 134 Am. St. Rep. 543; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Donough v. Dewey, 82 Mich. 309, 46 N. W. 782; Cocke v. Halsey, 16 Pet. (U. S.) 71, 10 L. Ed. 891, where the office was an existing one; *contra*, Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, where the office was created by the same act. The discussion of this point has in almost every case included the consideration of what may be assumed to be a rule, when properly understood, that there cannot be a *de facto* officer without a *de jure* office; Dill. Mun. Corp. § 276. In one case it was said that a *de facto* office cannot exist under a constitutional government; Hawver v. Seldenridge, 2 W. Va. 274, 94 Am. Dec. 532; and speaking through Mr. Justice Field in the much discussed case of Norton v. Shelby County, above cited from 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178, the court held that acts done by officers appointed under an unconstitutional statute before it was declared unconstitutional were void. In an L. R. A. note to the New Jersey case above cited, which may be referred to for a collection of cases, it is assumed that the doctrine of the Supreme Court case is supported by a "decided preponderance of authority." The cases cited in the note, however, while making a strong showing for a rule that there must be a *de jure* office, seem to establish an overwhelming weight of authority in support of the doctrine above stated, that until the act is declared unconstitutional there is a *de jure* office and therefore a *de facto* officer whose acts are to be considered valid. The opinions in the Connecticut, New Jersey and Maine cases, the last two of which take direct issue with Mr. Justice Field, and the first of which was decided before it, seem to leave no logical support for his opinion.

When a special judge is duly elected, qualifies, and takes possession of the office according to law, he becomes judge *de facto*, though his official oath is not filed as required by law; and the proceedings of the court, if unchallenged during his incumbency, cannot afterwards be questioned collaterally; State v. Miller, 111 Mo. 542, 20 S. W. 243. See In re Powers' Estate, 65 Vt. 399, 26 Atl. 640; Keith v. State, 49 Ark. 439, 5 S. W. 880; Campbell v. Com., 96 Pa. 344; People v. Weber, 86 Ill. 283.

A notary who continues to act after his commission has expired, long enough to afford a reasonable presumption of reappointment, is a *de facto* notary; Cary v. State, 76 Ala. 78; and so of one who has failed to file his bond; Keeney v. Leas, 14 Ia. 464; and of an alien appointed a notary; Wilson v. Kimmel, 109 Mo. 260, 19 S. W. 24. But where a notary's commission had expired seven months before he took an acknowledgment, and it did not appear that he had continued to act and hold himself out as a notary, he was not a *de facto* notary; Sandlin v. Dowdell, 143 Ala. 518, 39 South. 279, 5 Ann. Cas. 459.

There can be no *de facto* officer in the case of an office abolished by statute; Stenson v. Koch, 152 N. Y. 89, 46 N. E. 176; People v. Welsh, 225 Ill. 364, 80 N. E. 313; Walker v. Ins. Co., 62 Mo. App. 223; Gorman v. People, 17 Colo. 596, 31 Pac. 335, 31 Am. St. Rep. 350; Farrier v. Dugan, 48 N. J. L. 613, 7 Atl. 881, affirming Dugan v. Farrier, 47 N. J. L. 383, 1 Atl. 751; but there are cases *contra*, which, however, appear to be all cases of municipal officers; Adams v. Lindell, 5 Mo. App. 197; Hilgert v. Pav. Co., 107 Mo. App. 385, 81 S. W. 496; Keeling v. R. Co., 205 Pa. 31; 54 Atl. 485; Perkins v. Fielding, 119 Mo. 149, 24 S. W. 444, 27 S. W. 1100.

An injunction does not lie to restrain a *de facto* officer from performing the duties of his office, on account of irregularity of election, his acts being valid as to third persons; Chambers v. Adair, 110 Ky. 942, 62 S. W. 1128; but a mandamus may be directed to one, to compel him to perform the duties of his office, and he cannot set up in defense that he is not in possession of his office *de jure;* Kelly v. Wimberly, 61 Miss. 548; Harvey v. Philbrick, 49 N. J. L. 374, 8 Atl. 122.

Where the defects in the title of the officer are notorious, such as to make those relying on his acts chargeable with such knowledge, persons relying upon such acts will not be protected; Oliver v. Jersey City, 63 N. J. L. 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228. Officers of a corporation cease to be officers *de facto* after a judgment of a court of last resort adjudging that they have no rightful title (notwithstanding an appeal pending to the supreme court of the United States and no judgment of ouster appearing of record); Rochester & G. V. R. Co. v. Bank, 60 Barb. (N. Y.) 234.

Contracts and other acts of *de facto* directors of corporations are valid; Green's Brice, *Ultra Vires*, 522, n. c.; Atlantic, T. & O. R. Co. v. Johnston, 70 N. C. 348; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Delaware & H. Canal Co. v. Coal Co., 21 Pa. 131.

An officer *de facto* is *prima facie* one *de jure;* Allen v. State, 21 Ga. 217, 68 Am. Dec. 457.

When the inspectors of an election fail to issue a certificate of election, one who has received the highest number of legal votes cast, and holding over as the present incumbent, has sufficient apparent authority or color of title to be considered an officer

de facto; Montgomery v. O'Dell, 67 Hun 169, 22 N. Y. Supp. 412.

A government *de facto* signifies one completely, though only temporarily, established in the place of the lawful government; Thomas v. Taylor, 42 Miss. 651, 703, 2 Am. Rep. 625; Chisholm v. Coleman, 43 Ala. 204, 94 Am. Dec. 677. See DE JURE; Austin, Jur. Lect. vi. p. 336.

A wife *de facto* only is one whose marriage is voidable by decree; 4 Kent 36.

Blockade *de facto* is one actually maintained; 1 Kent 44.

De Facto Corporations. A colorable corporate organization of persons intending in good faith to form a corporation, under a law authorizing it, who have failed to comply with one or more provisions of the statute, but have used some of the powers which, if a *de jure* corporation, it would have possessed.

An apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative fiat of the law. In re Gibbs' Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276.

There must have been: (1) A colorable corporate organization; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; Abbott v. Refining Co., 4 Neb. 416; Finnegan v. Noerenberg, 52 Minn. 243, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; McLeary v. Dawson, 87 Tex. 524, 538, 29 S. W. 1044; Tulare Irr. District v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773. An agreement to do business as a corporation, fulfilling part of the requisites but purposely stopping short of complete incorporation is not sufficient; Card v. Moore, 173 N. Y. 598, 66 N. E. 1105.

(2) A statute authorizing the proposed corporation; American Loan & Trust Co. v. R. Co., 157 Ill. 641, 42 N. E. 153; Imperial B'l'g Co. v. Board of Trade, 238 Ill. 100, 87 N. E. 167; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Bradley v. Reppill, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841, 54 Am. St. Rep. 685; Duke v. Taylor, 37 Fla. 64, 19 South. 172, 31 L. R. A. 484, 53 Am. St. Rep. 232; Davis v. Stevens, 104 Fed. 235; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Tulare Irr. District v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773; which, though in most cases a general incorporation act, may be a special charter, of which there has been a failure to perform some condition; Utica Ins. Co. v. Tilman, 1 Wend. (N. Y.) 555; Bank of Manchester v. Allen, 11 Vt. 302; Society of Middlesex Husbandmen & Manufacturers v. Davis, 3 Metc. (Mass.) 133; Buncombe Turnpike Co. v. M'Carson, 18 N. C. 306; Gaines v. Bank of Mississippi, 12 Ark. 769; and it may be under a law passed by a *de facto* legislature; U. S. v. Ins. Companies, 22 Wall. (U. S.) 99; or under a law passed subsequently to the organization providing for the recognition of existing corporations on filing a certificate, which it failed to do; Tennessee Automatic Lighting Co. v. Massey (Tenn.) 56 S. W. 35; or if there is a law authorizing it, and the attempt was under a different law, it is sufficient; Georgia S. & F. R. Co. v. Trust Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153. But where two corporations of different states attempted to merge, without any enabling statute, it was a nullity and they did not become a corporation *de facto;* Whaley v. Bankers' Union of the World, 39 Tex. Civ. App. 385, 88 S. W. 259; American Loan & Trust Co. v. R. Co., 157 Ill. 641, 42 N. E. 153.

(3) A user of corporate powers conferred; Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; Emery v. De Peyster, 77 App. Div. 65, 78 N. Y. Supp. 1056; Tulare Irr. Dist. v. Shepard, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773.

(4) Good faith in the transaction; Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; Williamson v. Loan Fund Ass'n, 89 Ind. 389; Hasselman v. Mortgage Co., 97 Ind. 365; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Elizabethtown Gaslight Co. v. Green, 49 N. J. Eq. 329, 338, 24 Atl. 560; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357; American Loan & Trust Co. v. R. Co., 157 Ill. 641, 652, 42 N. E. 153; Stanwood v. Metal Co., 107 Ill. App. 569; Gilkey v. Town of How, 105 Wis. 41, 45, 81 N. W. 120, 49 L. R. A. 483; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Haas v. Bank, 41 Neb. 754, 60 N. W. 85.

The second and third conditions were given as a sufficient definition in Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482, and this was adopted in Trustees of East Norway Lake Norwegian Evangelical Lutheran Church v. Froislie, 37 Minn. 447, 35 N. W. 260; but criticised in Finnegan v. Noerenberg, 52 Minn. 243, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552, where the first was added and the definition, so amended, repeated in Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147, was, in preference to that of the New York court, adopted in Gibbs' Estate, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. It is believed, however, that the fourth must be added to make a definition completely expressing all the conditions which are required by due consideration of the authorities which create and support the doctrine of *de facto* corporations. Indeed in Tulare Irr. Dist. v. Shepard, 185 U. S. 1, 14, 22 Sup. Ct. 531, 46 L. Ed. 773, Peckham, J., while enumerating the first three conditions as the requisites proceeds in the same paragraph to state the "*bona fide* attempt to organize" under a general law, and "actual user of the corporate franchise" as the elements which constituted the defendant a *de facto* corporation. The four conditions are given substantially as requisites in many

cases; Clark v. Coal Co., 35 Ind. App. 65, 73 N. E. 727; Mackay v. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768; Marsh v. Mathias, 19 Utah 350, 56 Pac. 1074; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Stevens v. History Co., 140 App. Div. 570, 125 N. Y. Supp. 573; and are all combined under three heads in Stanwood v. Metal Co., 107 Ill. App. 569.

The mere carrying on, under a company name, of a business of such character as may well be conducted by an individual, or partnership, does not constitute a *de facto* corporation; Elgin Nat. Watch Co. v. Loveland, 132 Fed. 41; nor is a bank, exclusively owned by one person, such a corporation; Longfellow v. Barnard, 59 Neb. 455, 81 N. W. 307.

Such corporations are recognized by the same rule which recognizes *de facto* officers, and this is necessary for public and private security; Clement v. Everest, 29 Mich. 19. There cannot be a corporation *de facto* where it could not exist *de jure;* Davis v. Stevens, 104 Fed. 235; Brown v. Power Co., 113 Ga. 462, 39 S. E. 71; State v. Stevens, 16 S. D. 309, 92 N. W. 420; Evenson v. Ellingson, 67 Wis. 634, 31 N. W. 342; nor can one exist under an unconstitutional statute; Clark v. Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

The state only can proceed against such corporation, by *quo warranto* to test the validity of its corporate existence; Hon v. State, 89 Ind. 249; Savings Bank Co. v. Miller, 24 Ohio C. C. 198; Los Angeles Holiness Band v. Spires, 126 Cal. 541, 58 Pac. 1049; Armour v. E. Bement's Sons, 123 Fed. 56, 62 C. C. A. 142; Mayor, etc., of City of Wilmington v. Addicks, 8 Del. Ch. 310, 43 Atl. 297; Wyandotte Electric-Light Co. v. City of Wyandotte, 124 Mich. 43, 82 N. W. 821; and this is a rule of public policy; Continental Trust Co. v. R. Co., 82 Fed. 642, 649; and the *de facto* corporation may be made sole defendant in such proceeding without joining the associates; New Orleans Debenture, etc., Co. v. Louisiana, 180 U. S. 320, 21 Sup. Ct. 378, 45 L. Ed. 550; and a decree at the suit of the state avoiding the charter does not deny to the incorporators the equal protection of the laws or take away their property without due process of law; *id.;* but a private individual cannot institute proceedings by *quo warranto* for the forfeiture of a corporate charter; Attorney General v. Adonai Shomo Corp., 167 Mass. 424, 45 N. E. 762; Appeal of Western Pennsylvania R. Co., 104 Pa. 399; Com. v. Bank, 2 Grant, Cas. (Pa.) 392; North v. State, 107 Ind. 356, 8 N. E. 159; State v. Turnpike Co., 21 N. J. L. 9. An action instituted on behalf of the state to vacate a charter for non-compliance with the act under which it purports to have organized may be instituted by "the attorney-general," without a relator, and it is strictly a people's action; People v. Cement Co., 131 N. Y. 143, 29 N. E. 947, 15 L. R. A. 240.

The corporate existence may not be attacked by the associates who have acted as a corporation and are sued as such by one with whom they have dealt as such; Racine & M. R. Co. v. Trust Co., 49 Ill. 331, 95 Am. Dec. 595; Hamilton v. R. Co., 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; Rush v. Steamboat Co., 84 N. C. 702; Empire Mfg. Co. v. Stuart, 46 Mich. 482, 9 N. W. 527; Toledo, St. L. & K. C. R. Co. v. Trust Co., 95 Fed. 497, 507, 36 C. C. A. 155; *contra;* Boyce v. Trustees of M. E. Church, 46 Md. 359; or by one of the associates as against the others; Curtis v. Tracy, 169 Ill. 233, 48 N. E. 399, 61 Am. St. Rep. 168; Lincoln Park Chapter No. 177 Royal Arch Masons v. Swatek, 204 Ill. 228, 68 N. E. 429; Franke v. Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Merchants' & Planters' Line v. Waganer, 71 Ala. 581, 585; Heald v. Owen, 79 Ia. 23, 44 N. W. 210; Foster v. Moulton, 35 Minn. 458, 29 N. W. 155; or by all the others as against one; Meurer v. Protective Ass'n, 95 Mich. 451, 54 N. W. 954; or by an associate or organizer as against one who is induced by him to deal with the corporation (as to sell property to it); Smith v. Mayfield, 163 Ill. 447, 45 N. E. 157; or by one who deals or contracts with it as a corporation; Commercial Bank of Keokuk, Ia., v. Pfeiffer, 108 N. Y. 242, 15 N. E. 311; Seven Star Grange No. 73, Patrons of Husbandry, v. Ferguson, 98 Me. 176, 56 Atl. 648; Hudson v. Seminary Corp., 113 Ill. 618; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298; Bartlett v. Wilbur, 53 Md. 485, 498; Butchers' & Drovers' Bank of St. Louis v. McDonald, 130 Mass. 264; Bibb v. Hall, 101 Ala. 79, 14 South. 98; Canfield v. Gregory, 66 Conn. 9, 33 Atl. 536; Way v. Grease Co., 60 N. J. Eq. 263, 47 Atl. 44; Lincoln Park Chapter No. 177 Royal Arch Masons v. Swatek, 204 Ill. 228, 68 N. E. 429; nor can one who contracts with the associates as a corporation hold them individually liable for a breach; Whitford v. Laidler, 94 N. Y. 145, 151, 46 Am. Rep. 131; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933; Love v. Ramsey, 139 Mich. 47, 102 N. W. 279; Larned v. Beal, 65 N. H. 184, 23 Atl. 149; Tennessee Automatic Lighting Co. v. Massey (Tenn.) 56 S. W. 35; Richards v. Bank, 75 Minn. 196, 77 N. W. 822; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Owensboro Wagon Co. v. Bliss, 132 Ala. 253, 31 South. 81, 90 Am. St. Rep. 907; unless under a statute making persons who unlawfully assume corporate powers personally liable; Loverin v. McLaughlin, 161 Ill. 417, 434, 44 N. E. 99; Sweney Bros. v. Talcott, 85 Ia. 103; Thornton v. Balcom, 85 Ia. 198, 52 N. W. 190.

It is a general rule that the validity of the corporate organization cannot be collat-

erally attacked; Doty v. Patterson, 155 Ind. 60, 56 N. E. 668; Gilkey v. Town of How, 105 Wis. 41, 46, 81 N. W. 120, 49 L. R. A. 483; Cochran v. Arnold, 58 Pa. 399; Monongahela Bridge Co. v. Traction Co., 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685; State v. Fuller, 96 Mo. 165, 9 S. W. 583; Keene v. Van Reuth, 48 Md. 184; Saunders v. Farmer, 62 N. H. 572; People v. La Rue, 67 Cal. 526, 8 Pac. 84; Atchison, T. & S. F. R. Co. v. Com'rs of Sumner County, 51 Kan. 617, 33 Pac. 312; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. (Unof.) 179, 95 N. W. 327; Terry v. Packing & Provision Co., 105 Ill. App. 663; People v. Irr. Dist., 128 Cal. 477, 61 Pac. 86; Harris v. Land Co., 128 Ala. 652, 29 South. 611. Collateral attack has been permitted in a suit to enjoin the collection of assessments for turnpike construction on the ground of want of legal organization; Busenback v. Road Co., 43 Ind. 265; also as a defense to a suit against an original associate for his stock subscription; Indianapolis Furnace & Mining Co. v. Herkimer, 46 Ind. 142; Dorris v. Sweeney, 60 N. Y. 463 (where it was said that one contracting with a *de facto* corporation after its formation cannot set up its invalidity); and where capital stock agreed upon is not fully subscribed, a subscriber who has not participated in, or had notice of, the organization, is not estopped from setting up the illegality of the assessment for his subscriptions; Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481. In Buffalo & A. R. Co. v. Cary, 26 N. Y. 75, it was held that very slight proof of user (election of officers by the persons calling themselves directors) was sufficient to prevent a subscriber from setting up the defense of defective organization in a suit against him for his stock subscription. The validity of a conveyance to or by a corporation *de facto* cannot be questioned in a collateral proceeding; Finch v. Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383, where it was said that "this rule is not based on estoppel . . . but on the requirements of public policy that the security of titles be not impaired."

Collateral attack is usually permitted in defence against an attempt by a *de facto* corporation to exercise the right of eminent domain; Tulare Irrigation District v. Shepard, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; In re Union El. R. Co. of Brooklyn, 112 N. Y. 61, 19 N. E. 664, 2 L. R. A. 359; Williamson v. Bldg. & Loan Fund Ass'n, 89 Ind. 389; Kinston & C. R. Co. v. Stroud, 132 N. C. 413, 43 S. E. 913 (see Wellington & P. R. Co. v. Lumber Co., 114 N. C. 690, 19 S. E. 646); Powers v. R. Co., 33 Ohio St. 429; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Hampton v. Water Supply Co., 65 N. J. L. 158, 46 Atl. 650; *contra*, Eddleman v. Power Co., 217 Ill. 409, 75 N. E. 510; Terre Haute & P. R. Co. v. Robbins, 247 Ill. 376, 93 N. E. 398; Detroit & T. S. L. R. Co. v. Campbell, 140 Mich. 384, 103 N. W. 856; Central of Georgia R. Co. v. R. Co., 144 Ala. 639, 39 South. 473, 2 L. R. A. (N. S.) 144; Postal Tel. Cable Co. v. R. Co., 23 Utah 474, 65 Pac. 735, 90 Am. St. Rep. 705; and see Portland & G. Turnpike Co. v. Bobb, 88 Ky. 226, 10 S. W. 794; and it is open to collateral attack where there is no law under which it could become a corporation *de jure;* Clark v. Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217. As to the right of a *de facto* corporation to exercise the power of eminent domain, see 2 L. R. A. (N. S.) 144, note.

In some cases where a tort was committed for which the remedy would have been against the corporation, if *de jure*, because of the defective organization the associates were held personally liable; Vredenburg v. Behan, 33 La. Ann. 627; Smith v. Warden, 86 Mo. 382; and a similar remedy against associates has been given for breach of contract where the intention was for corporate action, but the other party did not know it; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 247; New York Nat. Exch. Bank v. Crowell, 177 Pa. 313, 35 Atl. 613 (see Vanhorn v. Corcoran, 127 Pa. 255, 268, 18 Atl. 16, 4 L. R. A. 386); Christian & Craft Grocery Co. v. Lumber Co., 121 Ala. 340, 25 South. 566; Slocum v. Head, 105 Wis. 431, 81 N. W. 673, 50 L. R. A. 324; Field v. Cooks, 16 La. Ann. 153; but if he elects to proceed against them as a corporation and fails he is estopped afterwards to sue them as individuals; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933.

The immunity from personal liability of the associates who form a *de facto* corporation is limited to transactions with those who deal with them as a corporation, entered into in good faith, and it is based upon that and the estoppel arising from the dealing with the supposed organization as a corporation, generally believed to be and treated as such; Slocum v. Head, 105 Wis. 431, 434, 81 N. W. 673, 50 L. R. A. 324; Gartside Coal Co. v. Maxwell, 22 Fed. 197.

An injunction has been refused against a *de facto* corporation exercising powers which would belong to it if *de jure;* Elizabethtown Gas Light Co. v. Green, 49 N. J. Eq. 329, 331, 332, 24 Atl. 560; but equity has assumed jurisdiction to ascertain whether the organization of a corporation is legal; Union Water Co. v. Kean, 52 N. J. Eq. 111, 27 Atl. 1015.

Such a corporation may "maintain an action against any one, other than the state, who has contracted with the corporation, or who has done it a wrong;" Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 572, 11 Sup. Ct. 185, 34 L. Ed. 784; Tar River Nav. Co. v. Neal, 10 N. C. 520, 537; and in some states there are statutes forbidding one suing or sued by a corporation to set up the lack of legal organization, as *e. g.* Ia-

Code (1897) § 1636; Ky. Comp. St. 1903, § 566; Comp. Laws S. D. § 2892, which last statute is held to be merely declaratory of the law as it previously existed; Davis v. Stevens, 104 Fed. 235.

It may seek an injunction to restrain irreparable injury to property; Williams v. Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; Cincinnati, L. & C. R. Co. v. Ry. Co., 75 Ill. 113; or sue any one, other than the state, either for breach of contract or a wrong done to it; Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 572, 11 Sup. Ct. 185, 34 L. Ed. 784; as for infringement of a patent; American Cable Ry. Co. v. City of New York, 68 Fed. 227; for the protection of its property from a tortfeasor; Searsburgh Turnpike Co. v. Cutler, 6 Vt. 315, 323; for trespass on personal property; Persse & Brooks Paper Works v. Willett, 1 Rob. (N. Y.) 131; for conversion; Remington Paper Co. v. O'Dougherty, 65 N. Y. 570; or as indorsee or assignee of a note or *chose* in action; Wilcox v. R. Co., 43 Mich. 584, 590, 5 N. W. 1003; Cozzens v. Brick Co., 166 Ill. 213, 46 N. E. 788; Haas v. Bank, 41 Neb. 754, 60 N. W. 85; or for use and occupation of land; Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225.

Where the existence of the corporation is only collaterally in issue, slight proof only is required to make a *prima facie* case of *de facto* incorporation; Lucas v. Bank, 2 Stew. (Ala.) 147; Memphis & St. F. Plank Road Co. v. Rives, 21 Ark. 302; Mix v. Bank, 91 Ill. 20, 33 Am. Rep. 44; Eakright v. R. Co., 13 Ind. 404; Merchants' Nat. Bank v. Glendon Co., 120 Mass. 97; United States Vinegar Co. v. Schlegel, 143 N. Y. 537, 543, 38 N. E. 729; President, etc., of Bank of Manchester v. Allen, 11 Vt. 302.

A *de facto* corporation may be a conduit of title, to protect a mortgagee; Hackensack Water Co. v. De Kay, 36 N. J. Eq. 559; Duggan v. Inv. Co., 11 Colo. 113, 17 Pac. 105; Georgia S. & F. R. Co. v. Trust & Deposit Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208, 47 Am. St. Rep. 153; or a grantee; Society Perun v. Cleveland, 43 Ohio St. 481, 3 N. E. 357 (where the state had maintained *quo warranto*); or a lessee; City of Denver v. Mullen, 7 Colo. 358, 3 Pac. 693; and the grantee of such corporation has maintained a writ of entry; Saunders v. Farmer, 62 N. H. 572; Lusk v. Riggs, 70 Neb. 713, 97 N. W. 1033; *id.*, 70 Neb. 718, 102 N. W. 88; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; or ejectment; Finch v. Ullman, 105 Mo. 255, 16 S. W. 863, 24 Am. St. Rep. 383; though against one who has not dealt with the associates as a corporation; Chiniquy v. Catholic Bishop, 41 Ill. 148; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

A *de facto* corporation may proceed against its grantor for reformation of a deed; Otoe County Fair & Driving Park Ass'n v. Doman, 1 Neb. (Unof.) 179, 95 N. W. 327; or to have land discharged from the lien of a judgment against its grantor; Keyes v. Smith, 67 N. J. L. 190, 51 Atl. 122; and may acquire, hold and convey land; New York, B. & E. R. Co. v. Motil, 81 Conn. 466, 71 Atl. 563.

If the associates deal as partners and continue to do so after being incorporated, without giving notice, they are still liable as partners; Perkins v. Rouss, 78 Miss. 343, 29 South. 92; Martin v. Fewell, 79 Mo. 401, 412; and where one has no knowledge of the existence of a charter, and there is nothing to put him on inquiry, he may hold the supposed incorporators personally liable as partners; Guckert v. Hacke, 159 Pa. 303, 28 Atl. 249.

The theory that a *de facto* corporation has no real existence has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, *a corporation;* Society Perun v. Cleveland, 43 Ohio St. 481, 490, 3 N. E. 357.

See discussions of *de facto* corporations in 20 Harv. L. Rev. 456; 25 *id.* 623.

De Facto Court. A court established by statute apparently valid, which has organized with a judge appointed, and has exercised authority as a court. Burt v. R. Co., 31 Minn. 472, 18 N. W. 285, 289.

"A *de facto* court cannot exist by virtue of a statute under a written constitution which ordains one supreme court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. The attempt of the legislature to abolish the constitutional court of appeals and establish a new one was ineffectual to create either a *de facto* or *de jure* court for want of legislative power"; Hildreth's Heirs v. McIntire's Devisee, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61.

De Facto Judge. One duly elected, qualified and acting as such, under conditions on which one might be properly appointed, but who failed to comply with some necessary act to qualify him, as taking the oath of office. State v. Miller, 111 Mo. 542, 20 S. W. 243. There must be a duly constituted office and a vacancy therein before the election or appointment; Caldwell v. Barrett, 71 Ark. 310, 74 S. W. 748.

One has been recognized as a *de facto* judge, though the statute under which he was appointed was unconstitutional and void, when the office was originally created under a valid law; Walcott v. Wells, 21 Nev. 47, 24 Pac. 367, 9 L. R. A. 59, 37 Am. St. Rep. 478. And when the incumbent was ill and an acting judge was appointed, qualified, assumed the duties and the public acquiesced, he was held to be a *de facto* judge; Dredla v. Baache, 60 Neb. 655, 83 N. W. 916.

DE FAIRE ÉCHELLE. In French Law. A clause commonly contained in French in-

surance policies, which is equivalent to a license for a vessel to touch and trade at intermediate ports. American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 491.

DE HÆRETICO COMBURENDO (Lat. for burning a heretic). A writ which lay where a heretic had been convicted of heresy, had refused to abjure or had abjured, and had relapsed into heresy. 4 Bla. Com. 46.

DE HOMINE CAPTO IN WITHERNAM (Lat. for taking a man in withernam). A writ to take a man who had carried away a bondman or bondwoman into another country beyond the reach of a writ of replevin. 3 Bla. Com. 129.

DE HOMINE REPLEGIANDO (Lat. for replevying a man). A writ which lies to replevy a man out of prison, or out of the custody of a private person, upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. Fitzh. N. B. 66; 3 Bla. Com. 129. If the latter eloigned his captive he could be summarily imprisoned by a *capias in withernam*. It was inefficient against wrongful imprisonment because it excepted the party if he had been arrested on the king's order.

The statute—which had gone nearly out of use, having been superseded by the writ of *habeas corpus*—has been revived within a few years in some of the United States in an amended and more effectual form. It can be used only for the benefit of the person imprisoned. 1 Kent 404, n.; Hutchings v. Van Bokkelen, 34 Me. 126.

See MAINPRIZE.

A case is mentioned in Jackson & Gross, Land. & Ten. § 788, where this writ was issued by the supreme court of Pennsylvania while the writ of *habeas corpus* was suspended during the war between the states.

DE IDIOTA INQUIRENDO. An old common-law writ, long obsolete, to inquire whether a man be an idiot or not. 2 Steph. Com. 509.

DE INCREMENTO (Lat. of increase). Costs *de incremento*, costs of increase—that is, which the court assesses in addition to the damages established by the jury. See COSTS DE INCREMENTO.

DE INJURIA (Lat. The full term is, *de injuria sua propria absque tali causa*, of his own wrong without such cause; or, where part of the plea is admitted, *absque residuo causæ*, without the rest of the cause).

In Pleading. The replication by which in an action of tort the plaintiff denies the effect of excuse or justification offered by the defendant.

It can only be used where the defendant pleads matter merely in excuse and not in justification of his act. It is confined to those instances in which the plea neither denies the original existence of the right which the defendant is charged with having violated, nor alleges that it has been released or extinguished, but sets up some new matter as a sufficient excuse or cause for that which would otherwise and in its own nature be wrongful. It cannot, therefore, be properly used when the defendant's plea alleges any matter in the nature of title, interest, authority, or *matter of record;* 8 Co. 66; 1 B. & P. 76; Hyatt v. Wood, 4 Johns. (N. Y.) 159, note, 4 Am. Dec. 258; Griswold v. Sedgwick, 1 Wend. (N. Y.) 126; Oystead v. Shed, 12 Mass. 506; Ridgefield Park R. Co. v. Ruckman, 38 N. J. L. 98; Steph. Pl. 276; Pepper, Pl. 35.

The English and American cases are at variance as to what constitutes such legal authority as cannot be replied to by *de injuria.* Most of the American cases hold that this replication is bad whenever the defendant insists upon a right, no matter from what source it may be derived; and this seems to be the more consistent doctrine.

If the plea in any sense *justifies* the act, instead of merely excusing it, *de injuria* cannot be used; Coburn v. Hopkins, 4 Wend. (N. Y.) 577; Stickle v. Richmond, 1 Hill (N. Y.) 78; Allen v. Scott, 13 Ill. 80. The English cases, on the other hand, hold that an authority derived from a court *not of record* may be traversed by the replication *de injuria;* 3 B. & Ad. 2.

The plaintiff may confess that portion of a plea which alleges an authority in law or an interest, title, or matter of record, and aver that the defendant did the act in question *de injuria sua propria absque residuo causæ*, of his own wrong without the residue of the cause alleged; Stickle v. Richmond, 1 Hill (N. Y.) 78; Curry v. Hoffman, 2 Am. Law Reg. 246; Steph. Pl. 276.

The replication *de injuria* puts in issue the whole of the defence contained in the plea; and evidence is, therefore, admissible to disprove any material averment in the whole plea; McKelv. Pl. 50; 8 Co. 66; 11 East 451; 10 Bingh. 157; Tubbs v. Caswell, 8 Wend. (N. Y.) 129; Erskine v. Hohnbach, 14 Wall. (U. S.) 613, 20 L. Ed. 745. See 2 Cr. M. & R. 338. In England, however, by a uniform course of decisions in their courts, evidence is not admissible under the replication *de injuria* to a plea, for instance, of *moderate castigavit* or *molliter manus imposuit*, to prove that an excess of force was used by the defendant; but it is necessary that such excess should be specially pleaded. There must be a new assignment; 2 Cr. M. & R. 338; 1 Bingh. 317; 1 Bingh. N. C. 380; 3 M. & W. 150.

In this country, on the other hand, though some of the earlier cases followed the English doctrine, later cases decide that the plaintiff need not plead specially in such a case. It is held that there is no new cause to assign when the act complained of is the same that is attempted to be justified by plea. Therefore the fact of the act being

moderate is a part of the plea, and is one of the points brought in issue by *de injuria;* and evidence is admissible to prove an excess; Hannen v. Edes, 15 Mass. 351; Bennett v. Appleton, 25 Wend. (N. Y.) 371; Elliot v. Kilburn, 2 Vt. 474; Bartlett v. Churchill, 24 Vt. 218; Vreeland v. Berry, 21 N. J. L. 183.

Though a direct traverse of several points going to make up a single defence in a plea will be bad for duplicity, yet the general replication *de injuria* cannot be objected to on this ground, although putting the same number of points in issue; 3 B. & Ad. 1; Marshall v. Aiken, 25 Vt. 330; 2 Bingh. N. C. 579; 3 Tyrwh. 491. Hence this mode of replying has a great advantage when a special plea has been resorted to, since it enables the plaintiff to traverse all the facts contained in any single point, instead of being obliged to rest his cause on an issue joined on one fact alone.

In England it is held that *de injuria* may be replied in assumpsit; 2 Bingh. N. C. 579.

In this country it has been held that the use of *de injuria* is limited to actions of tort; Coffin v. Bassett, 2 Pick. (Mass.) 357. But in New Jersey it may be used in actions *ex contractu* wherever a special plea in excuse of the alleged breach of contract can be pleaded, as a general traverse to put in issue every material allegation in the plea; Ridgefield Park R. Co. v. Ruckman, 38 N. J. L. 98. Whether *de injuria* can be used in actions of replevin seems, even in England, to be a disputed question. The following cases decide that it may be so used; 9 Bingh. 756; 3 B. & Ad. 2; *contra*, 1 Chit. Pl. 622.

The improper use of *de injuria* is held to be only a ground of general demurrer; 6 Dowl. 502; but see 3 M. & W. 230; Coffin v. Bassett, 2 Pick. (Mass.) 357. Where it is improperly employed, the defect will be cured by a verdict; Lytle v. Lee, 5 Johns. (N. Y.) 112; Hob. 76; 1 T. Raym. 50. See Crogate's Case, 1 Sm. Lead. Cas. 247.

DE JUDAISMO, STATUTUM. The name of a statute passed in the reign of Edward I., which enacted severe penalties against the Jews. Barringt. Stat. 197.

DE JURE. Rightfully; of right; lawfully; by legal title. Contrasted with *de facto* (which see). 4 Bla. Com. 77.

Of right: distinguished from *de gratia* (by favor). By law: distinguished from *de æquitate* (by equity).

The term is variously applied; as, a king or officer *de jure*, or a wife *de jure*.

A government *de jure*, but not *de facto*, is one deemed lawful, which has been supplanted; a government *de jure* and also *de facto* is one deemed lawful, which is present or established; a government *de facto* is one deemed unlawful, but which is present or established. Any established government, be it deemed lawful or not, is a government *de facto*. Austin, Jur. sec. vi. 336. See DE FACTO.

DE LA PLUS BELLE (Fr. of the fairest). A kind of dower; so called because assigned from the best part of the husband's estate. It was connected with the military tenures, and was abolished, with them, by stat. 12 Car. II. cap. 24. Littleton § 48; 2 Bla. Com. 132, 135; Scrib. Dower 18; 1 Washb. R. P. 149, n. See DOWER. In Law French, *de la pluis beale*.

DE LIBERTATIBUS ALLOCANDIS (Lat. for allowing liberties). A writ, of various forms, to enable a citizen to recover the liberties to which he was entitled. Fitzh. N. B. 229; Reg. Orig. 262.

DE LUNATICO INQUIRENDO (Lat. to inquire as to lunacy). The name of a writ directed to the sheriff, directing him to inquire by good and lawful men whether one therein named is a lunatic or not. See Hutchinson v. Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; Den v. Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Hart v. Deamer, 6 Wend. (N. Y.) 497; In re McAdams, 19 Hun (N. Y.) 292; In re Kings County Insane Asylum, 7 Abb. N. C. (N. Y.) 425; In re Hill, 31 N. J. Eq. 203.

An inquisition in lunacy proceedings must show that the imbecility of the mind is such as to render the imbecile unfit for the government of himself and his property; In re Lindsley, 44 N. J. Eq. 564, 15 Atl. 1, 6 Am. St. Rep. 913.

The English practice is now regulated by the Lunacy Acts (16 & 17 Vict. c. 70, and 25 & 26 Vict. c. 86), under which the lord chancellor, upon petition or information, grants a *commission* in the nature of this writ; 2 Steph. Com. 511. In the U. S. the practice is similar, and a commission of lunacy is appointed. See Ray's Med. Jur. Ins.; Ordron. Jud. Asp. Ins. 225; In re Staudermann, 3 Abb. N. C. (N. Y.) 187.

DE MANUCAPTIONE (Lat. of mainprize). A writ, now obsolete, directed to the sheriff, commanding him to take sureties for the prisoner's appearance,—usually called mainpernors—and to set him at large. Fitzh. N. B. 250; 1 Hale, Pl. Cr. 141; Coke, *Bail & Mainp.* c. 10; Reg. Orig. 268 *b*. According to its form, it was only available for persons indicted for larceny before the sheriff by inquest of office.

DE MEDIETATE LINGUÆ. A jury half aliens and half natives. See JURY.

DE MEDIO (Lat. of the *mesne*). A writ in the nature of a writ of right, which lies where upon a subinfeudation the *mesne* (or middle) lord suffers his under-tenant or tenant *paravail* to be distrained upon by the lord paramount for the rent due him from the *mesne* lord. Booth, Real Act. 136; Fitzh. N. B. 135; 3 Bla. Com. 234; Co. Litt. 100 *a*.

DE MELIORIBUS DAMNIS (Lat.). Of the better damages. When a plaintiff has sued several defendants, and the damages

have been assessed severally against each, he has the choice of selecting the best, as he cannot recover the whole. This is done by making an election *de melioribus damnis*.

DE MERCATORIBUS, THE STATUTE. The statute of Acton Burnell. See ACTON BURNELL.

DE MINIS. Writ of threats. A writ which lay where a person was threatened with personal violence, or the destruction of his property, to compel the offender to keep the peace. Reg. Orig. 88 *b*. 89; Fitzh. Nat. Brev. 79, G. 80; Black, L. Dict.

DE MODO DECIMANDI (Lat. of a manner of taking tithes).

A prescriptive manner of taking tithes, different from the general law of taking tithes in kind. It is usually by a compensation either in work or labor, and is generally called a *modus;* Cro. Eliz. 446; 2 P. Wms. 462; 2 Russ. & M. 102; 4 Y. & C. 269, 283; 2 Bla. Com. 29; 3 Steph. Com. 130.

DE NATURA BREVIUM (Lat.). Concerning the Nature of Writs. The title of more than one text-book of English Mediæval law. Maitland, 2 Sel. Essays in Anglo-Amer. Leg. Hist. 549. See REGISTER OF WRITS.

DE NON DECIMANDO (Lat. of not taking tithes). An exemption by custom from paying tithes is said to be a prescription *de non decimando*. A claim to be entirely discharged of the payment of tithes, and to pay no compensation in lieu of them. Cro. Eliz. 511; 3 Bla. Com. 31.

DE NOVI OPERIS NUNCIATIONE (Lat.). In Civil Law. A form of injunction or interdict which lies in some cases for the party aggrieved, where a thing is intended to be done against his right. Thus, where one buildeth a house contrary to the usual and received form of building, to the injury of his neighbor, there lieth such an injunction, which being served, the offender is either to desist from his work or to put in sureties that he shall pull it down if he do not in a short time avow, *i. e.* show, the lawfulness thereof. Ridley, Civ. & Eccl. Law, pt. 1, c. 1, 8.

DE NOVO (Lat.). Anew; afresh. When a judgment upon an issue in part is reversed on error for some mistake made by the court in the course of the trial, a *venire de novo* is awarded, in order that the case may again be submitted to a jury.

DE ODIO ET ATIA (Lat. of hatred and ill will). A writ directed to the sheriff, commanding him to inquire whether a person charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam;* and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail. 3 Bla. Com. 128. "A writ for one who says he is imprisoned on a false accusation of crime." Maitland, in 2 Sel. Essays in Anglo-Amer. Leg. Hist. 589.

This was one of the many safeguards by which the English law early endeavored to protect the innocent against the oppression of the powerful through a misuse of its forms. The writ was to issue of course to any one, without denial, and *gratis*. Bracton, l. 3, tr. 2, ch. 8; Magna Carta, c. 26; Stat. Westm. 2 (13 Edw. I.), c. 29. It has now passed out of use. 3 Bla. Com. 129. It was superseded by *habeas corpus*. See ASSIZE; HABEAS CORPUS.

DE PARCO FRACTO (Lat. of pound-breach). A writ which lay where cattle taken in distress were rescued by their owner after being actually impounded. Fitzh. N. B. 100; 3 Bla. Com. 146; Reg. Orig. 116 *b*; Co. Litt. 47 *b*.

DE PARTITIONE FACIENDA (Lat. for making partition). The ancient writ for the partition of lands held by tenants in common.

DE PERAMBULATONE FACIENDA (Lat. for making a perambulation). A writ which lay where there was a dispute as to the boundaries of two adjacent lordships or towns, directed to the sheriff, commanding him to take with him twelve discreet and lawful knights of his county and make the perambulation and set the bounds and limits in certainty. Fitzh. N. B. 309, D. A similar provision existed in regard to town-lines in Connecticut, Maine, Massachusetts, and New Hampshire, by statute. See PERAMBULATION.

DE PLEGIIS ACQUIETANDIS (Lat. for clearing pledges). A writ which lay where one had become surety for another to pay a sum of money at a specified day, and the principal failed to pay it. If the surety was obliged to pay, he was entitled to this writ against his principal. Fitzh. N. B. 37 C; 3 Reeve, Hist. Eng. Law 65.

DE PRÆROGATIVA REGIS (Lat. of the king's prerogative). The statute 17 Edw. I. st. 1, c. 9, defining the prerogatives of the crown on certain subjects, but especially directing that the king shall have ward of the lands of idiots, taking the profits without waste and finding them necessaries. 2 Steph. Com. 509.

DE PROCEDENDO AD JUDICIUM. A writ proceeding out of chancery and ordering the judges of any court to proceed to judgment. 3 Bla. Com. 109.

DE PROPRIETATE PROBANDA (Lat. for proving property). A writ which issues in a case of replevin, when the defendant claims property in the chattels replevied and the sheriff makes a return accordingly. The writ directs the sheriff to summon an inquest to determine on the validity of the claim; and, if they find for the defendant, the sheriff merely returns their finding. The plain-

tiff is not concluded by such finding; he may come into the court and traverse it. Hamm. N. P. 456.

This writ has been superseded in England by the "summons to interplead;" in Pennsylvania and Delaware the "claim property bond" is a convenient substitute for the old practice, and similar to this is the practice under the New York Code. Morr. Repl. 304.

It was pointed out in Weaver v. Lawrence, 1 Dall. (U. S.) 156, 1 L. Ed. 79, that in England there were two kinds of replevin—when the writ issued out of chancery, and under the statute of Marlbridge, which enabled the sheriff to replevin without a writ; in the latter case the writ *de proprietate probanda* issued at once on claim of property being presented and was tried by inquest; if the finding was for defendant, the sheriff forbore.

In replevin at common law the writ *de proprietate probanda* did not issue until after return on a *pluries* writ of replevin and the finding on it for defendant, being only an inquest of office, did not prevent a new replevin.

DE QUOTA LITIS (Lat.). In Civil Law. A contract by which one who has a claim difficult to recover agrees with another to give a part, for the purpose of obtaining his services to recover the rest. 1 Duval, n. 201. See CHAMPERTY.

DE RATIONABILI PARTE BONORUM (Lat. of a reasonable part of the goods). A writ, long since obsolete, to enable the widow and children of a decedent to recover their proper shares of his personal estate. 2 Bla. Com. 492. The writ is said to be founded on the customs of the counties, and not on the common-law allowance. Fitzh. N. B. 122, L. See CUSTOM OF LONDON.

DE RATIONABILIBUS DIVISIS (Lat. for reasonable boundaries). A writ which lies to determine the boundaries between the lands of two proprietors which lie in different towns. The writ is to be brought by one against the other. Fitzh. N. B. 128, M; 3 Reeve, Hist. Eng. Law 48.

DE RECTO DE ADVOCATIONE (Lat. of right of advowson; called, also, *le droit de advocatione*). A writ which lay to restore the right of presentation to a benefice, for him who had an advowson, to himself and heirs in fee simple, if he was disturbed in the presentation. Year B. 39 Hen. VI. 20 *a;* Fitzh. N. B. 30, D.

DE REPARATIONE FACIENDA (Lat.). The name of a writ which lies by one tenant in common against the other, to cause him to aid in repairing the common property. 8 B. & C. 269.

DE RETORNO HABENDO (Lat.). The name of a writ issued after a judgment has been given in replevin that the defendant should have a return of the goods replevied. The judgment for defendant at common law is *pro retorno habendo.* Plaintiff's pledges are also so called. See Morr. Repl.; REPLEVIN.

DE SALVA GUARDIA (Lat. of safeguard). A writ to protect the persons of strangers seeking their rights in English courts. Reg. Orig. 26.

DE SCUTAGIO HABENDO (Lat. of having scutage). A writ which lay in case a man held lands of the king by knight's service, to which homage, fealty, and escuage were appendant, to recover the services or fee due in case the knight failed to accompany the king to the war. It lay also for the tenant *in capite,* who had paid his fee, against his tenants. Fitzh. N. B. 83, C.

DE SECTA AD MOLENDINUM (Lat. of suit to a mill). A writ which lieth to compel one to continue his custom of grinding at a mill. 3 Bla. Com. 235; Fitzh. N. B. 122, M; 2 Reeve, Hist. Eng. Law 55.

DE SON TORT (Fr.). Of his own wrong. This term is usually applied to a person who, having no right to meddle with the affairs or estate of a deceased person, yet undertakes to do so, by acting as executor of the deceased. See EXECUTORS AND ADMINISTRATORS.

DE SON TORT DEMESNE (Fr.). Of his own wrong. See DE INJURIA.

DE SUPERONERATIONE PASTURÆ (Lat. of surcharge of pasture). A writ lying where one who had been previously impleaded in the county court was again impleaded in the same court for surcharging common of pasture, and the cause was removed to Westminster Hall. Reg. Jur. 36 *b.*

DE TALLAGIO NON CONCEDENDO (Lat. of not allowing talliage). The name given to the statutes 25 and 34 Edw. I., restricting the power of the king to grant talliage. Co. 2d Inst. 532; 2 Reeve, Hist. Eng. Law 104. See TALLIAGE.

DE UNA PARTE (Lat.). A deed *de una parte* is one where only one party grants, gives, or binds himself to do a thing to another. It differs from a deed *inter partes* (*q. v.*). See DEED POLL.

DE UXORE RAPTA ET ABDUCTA (Lat. of a wife ravished and carried away). A kind of writ of trespass. Fitzh. N. B. 89, O; 3 Bla. Com. 139.

DE VENTRE INSPICIENDO (Lat. of inspecting the womb). A writ to inspect the body where a woman feigns to be pregnant, to see whether she is with child. It lies for the heir presumptive to examine a widow suspected to be feigning pregnancy in order to enable a supposititious heir to obtain the estate. 1 Bla. Com. 456; 2 Steph. Com. 287; Cro. Eliz. 556; Cro. Jac. 685; 2 P. Wms. 693; 21 Viner, Abr. 547. There was a like procedure in Rome in cases of divorce; Voet. Com. 25, 42.

A jury of 12 matrons was impanelled to decide whether she was quick with child; if so found, sentence was suspended; Archb. Cr. Pr. 23d ed. 229.

It lay also where a woman sentenced to death pleaded pregnancy; 4 Bla. Com. 395. This writ has been recognized in America; 2 Chandl. Am. Cr. Tr. 381.

DE VICINETO (Lat. from the neighborhood). The sheriff was anciently directed in some cases to summon a jury *de vicineto;* 3 Bla. Com. 360.

DE WARRANTIA CHARTÆ (Lat. of warranty of charter). This writ lieth properly where a man doth enfeoff another by deed and bindeth himself and heirs to warranty. Now, if the defendant be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions he cannot vouch, then he shall have the writ against the feoffor or his heirs who made such warranty; Fitzh. N. B. 134, D; Cowell; *Termes de la Ley;* 3 Reeve, Hist. Eng. Law 55. Abolished by 3 & 4 Will. IV. c. 27.

DE WARRANTIA DIEI. A writ which lay for a party in the service of the king who was required to appear in person on a certain day, commanding the justices not to record his default, the king certifying to the fact of such service. Fitzh. N. B. 36.

DEACON. The lowest degree of holy orders in the Church of England. 2 Steph. Com. 660.

DEAD BODY. A corpse.

There is no right of property, in the ordinary sense of the word, in a dead human body; Co. Inst. 202; 4 Bla. Com. 235; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667; 3 Edw. Ch. 155; 5 W. R. 318; 2 Wms. on Ex., 7th Am. ed. 165 n.; but there are rights attached to it which the law will protect; 10 Cent. L. J. 304; and for the health and protection of society, it is a rule of the common law, and this has been confirmed by statutes in civilized states and countries, that public duties are imposed upon public officers, and private duties upon the husband or wife and the next of kin of the deceased, to protect the body from violation and see that it is properly interred, and to protect it after it is interred; 1 Witthaus & Becker's Med. Jur. 297.

It has been suggested that the right of the living in their dead might be classified with those rights which arise out of the family relation; 5 Harv. L. Rev. 285; 13 *id.* 63; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. In Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 667, it is said there is a quasi property right. The clear legal right of exemption from wrongful acts is in itself the property. An injury to such right need not include an injury to physical property, or to person or to character, but is of itself sufficient to support an action; Koerber v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956. Executors have a right to possession of it and it is their duty to bury it; 2 Wms. on Ex. 7th Am. ed. 165; Hapgood v. Houghton, 10 Pick. (Mass.) 154; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506; but this case is referred to in a subsequent one in the same court as not deciding what is stated in the syllabus, which is characterized as "much too broad and as an improvident generalization"; Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795.

The right of the widow to control the place of burial is also sustained in other cases; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; Buchanan v. Buchanan, 28 Misc. Rep. 261, 59 N. Y. Supp. 810, which, while recognizing the right of the widow, held that she could not maintain replevin for the body against one who had caused it to be properly buried; and where the decedent did not in his lifetime live with his wife and there was no executor or administrator, the sister was held entitled to control the burial. It was also held in Louisville & N. R. Co. v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Ann. Cas. 128, that the widow has an interest in the unburied body of her deceased husband which the courts will recognize. The right to make testamentary direction concerning the disposal of the body has been conferred by statute in several states; *e. g.* New York, Maine, Oklahoma, and Minnesota. The question of the right of disposal of the body is ably discussed by Mr. R. S. Guernsey in 10 Cent. L. J. 303, 325, and he concludes upon the authorities that in the absence of testamentary disposition the right and duty of burial devolves upon relatives "as follows: 1. Husband or wife. 2. Children. 3. If none—(1) Father (2) Mother. 4. Brothers and sisters. 5. Next of kin according to the course of the common law, according to the law of descent of personal property;" *id.* 327. Probably the rule may be fairly stated that there being no husband or wife of the deceased, the nearest of kin in order of right to administration is charged with the duty of burial. And to the same effect it is said: First, the paramount right is in the surviving husband or widow, and if the parties were living in the normal relations of marriage, it will require a very strong case to justify a court in interfering with the wishes of the survivor. Secondly, if there is no surviving husband or wife, the right is in the next of kin in the order of their relation to the decedent, as, children of a proper age, parents, brothers and sisters, or more distant kin, modified, it may be, by circumstances of special intimacy or association with the decedent.

Thirdly, how far the desires of the decedent should prevail against those of a surviving husband or wife is an open question, but as against remoter connections, such wishes, especially if strongly and recently expressed, should usually prevail. Fourthly, with regard to a re-interment in a different place, the same rules should apply, but with a presumption against removal growing stronger with the remoteness of connection with the decedent and reserving always the right of the court to require reasonable cause to be shown for it; Pettigrew v. Pettigrew, 207 Pa. 313, 56 Atl. 878, 64 L. R. A. 179, 99 Am. St. Rep. 795.

Where a deceased person had not lived with his wife and there was no executor or administrator, his sister was permitted to control his burial; Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

The leaving unburied the corpse of a person for whom the defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial; 2 Den. C. C. 325; or preventing a dead body from being buried; 2 Term 734; 4 East 460; 1 Russ. Cr. 415, n.; or interring one found in a river without first sending for the coroner; 1 Ld. Ken. 250; or to cast one into a river; Kanavan's Case, 1 Greenl. (Me.) 226. And every householder in whose house a dead body lies is bound by the common law, if he has the means to do so, to inter the body decently; and this principle applies where a person dies in the house of a parish or a union; 12 A. & E. 773. The expense for such burial may be paid out of the effects of deceased; 3 Camp. 298.

It is the duty of the coroner after death by violence to cause an autopsy to be made; the surgeon who makes it can recover from the county for his labor; Allegheny County v. Shaw, 34 Pa. 301; Board of Com'rs of Bartholomew County v. Jameson, 86 Ind. 154. If the work be done with ordinary care, he is not liable to the family for a mutilation of the body, even though acting without their consent; Young v. College of Physicians & Surgeons, 81 Md. 358, 32 Atl. 177, 31 L. R. A. 540; and though he removes and keeps in his possession by direction of the coroner, portions of the body; Palmer v. Broder, 78 Wis. 483, 47 N. W. 744. Where a rule of a board of health requires a certificate as to the cause of death before issuing a burial permit, an attending physician is not liable for performing an autopsy without the family's consent; Meyers v. Clarke, 122 Ky. 866, 90 S. W. 1049, 93 S. W. 43, 5 L. R. A. (N. S.) 727; so where a mere incision was made to ascertain the cause of death, as authorized by the board of health and a city ordinance; Rushing v. Medical College, 4 Ga. App. 823, 62 S. E. 563.

The purchaser of land upon which is located a burial ground may be enjoined from removing bodies therefrom against the wishes of the relatives or next of kin of the deceased. Every interment is a concession of the privilege which cannot afterward be repudiated, and the purchaser's title to the ground is fettered with the right of burial; First Presbyterian Church v. Church, 2 Brewster (Pa.) 372. But the right of municipal or state authorities, with the consent of the owner of the burial lot or in the execution of eminent domain, to remove dead bodies from cemeteries is well settled; Craig v. Church, 88 Pa. 42, 32 Am. Rep. 417; Hamilton v. City of New Albany, 30 Ind. 482; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481.

The law of Indiana (2 R. S. p. 473) prohibits the removal of a dead body without the consent of a near relative or of the deceased in his lifetime. It is held there that the bodies of the dead belong to the surviving relations in the order of inheritance, as property; Bogert v. Indianapolis, 13 Ind. 134. The laws of Louisiana, California, Connecticut, Vermont, and Ohio, recognize the interest of the relatives of a deceased person in his body.

In 4 Bradf. Sur. (N. Y.) 502, a learned report by S. B. Ruggles lays down these conclusions, substantially:

1. Neither a corpse nor its burial is subject to ecclesiastical cognizance.

2. The right to bury a corpse and preserve it is a legal right.

3. Such right, in the absence of testamentary disposition, is in the next of kin (so in Bogert v. Indianapolis, 13 Ind. 138).

4. The right to protect the corpse includes the right to preserve it by burial, to select the place of sepulture, and to change it at pleasure.

5. If the burial-place be taken for public use, the next of kin must be indemnified for removal and reinterring, etc. Approved by the Sup. Ct. N. Y. (1856).

The exhumation of the body of the deceased should be ordered, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished, as where an insurance company has exhausted every other legal means of exposing a fraud; Grangers' Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446. But the right of interment and the right to disinter are subordinate to public health, and disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened; or where an examination may disclose facts which prove an accused person innocent of a crime; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

In a murder trial, the court may, at the prisoner's instance, order an exhumation and autopsy, if in the interest of justice; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; such order was

refused in Moss v. State, 152 Ala. 30, 44 South. 598, because it appeared that two reputable physicians, available at the trial, had examined the body before burial. There is said to be no law requiring a court, at the prisoner's request, but at the expense of the state, to order exhumation; Salisbury v. Com., 79 Ky. 425. In Com. v. Grether, 204 Pa. 203, 53 Atl. 753, the court refused to set aside a conviction of murder in the first degree because the district attorney and not the coroner had caused the body to be exhumed. In an insurance case, exhumation was ordered to obtain evidence bearing on the question of suicide; the marshal was directed to exhume the body and the court appointed a pathologist and a chemist to make the examination; it was held also that such order could only be made in a case where the widow was a party; Mutual Life Ins. Co. of New York v. Griesa, 156 Fed. 398. The right to make the order in an insurance case was recognized in People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; Grangers' Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; but in the latter case the order was refused on the ground of delay; see Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

To disinter a dead body, without lawful authority, even for the purpose of dissection, is a misdemeanor, for which the offender may be indicted at common law; 1 D. & R. 13; State v. McClure, 1 Blackf. (Ind.) 328; Com. v. Slack, 19 Pick. (Mass.) 304; Kanavan's Case, 1 Greenl. (Me.) 226. This offence is punished by statute in most of the states; see 1 Russ. 414, n. A; as is its unauthorized sale for gain and profit; Thompson v. State, 105 Tenn. 177, 58 S. W. 213, 51 L. R. A. 883, 80 Am. St. Rep. 875. To seize a dead body on pretence of arresting for debt is *contra bonos mores;* 4 East 460. There can be no larceny of a dead body; 2 East, Pl. Cr. 652; 12 Co. 106; but may be of the clothes or shroud upon it; Wonson v. Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691; 12 Co. 113; Co. 3d Inst. 110; Kanavan's Case, 1 Greenl. (Me.) 226; State v. Doepke, 68 Mo. 208, 30 Am. Rep. 785.

After the right of burial has once been exercised by the person charged with the duty of burial, or where such person has consented to the burial by another person, no right to the corpse remains except to protect it from unlawful interference; Peters v. Peters, 43 N. J. Eq. 140, 10 Atl. 742; Lowrie v. Plitt, 11 Phila. (Pa.) 303; 10 B. & S. 298. But see Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465. It has been held that it then becomes a part of the ground to which it has been committed; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Wilson v. Read, 74 N. H. 322, 68 Atl. 37, 16 L. R. A. (N. S.) 332, 124 Am. St. Rep. 973; *contra,* Cohen v. Congregation Shearith Israel in City of New York, 85 App. Div. 65, 82 N. Y. Supp. 918. In England, where a son had removed, without leave, the body of his mother from the burial-ground of a congregation of Protestant dissenters, to bury it in church ground, it was held that he was guilty of a misdemeanor at common law, and that it was no defence that his motives were pious and laudable; 1 Dearsl. & B. 160, 7 Cox C. C. 214.

A widow who allows her husband to be buried in a certain place may not disturb his remains; her right to the body of her deceased husband being terminated by the burial, and any further disposition of such body belonging thereafter exclusively to his next of kin; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506; but see a criticism of that case *supra.* Where one in accordance with his own wishes was buried in his own lot by his widow, and she removed his remains, she was ordered, in equity to restore them; Pierce v. Proprietors of Swan Point Cemetery, 10 R. I. 227, 14 Am. Rep. 672, and note. A son is not allowed to remove his father's remains against his mother's wishes; Johnston v. Marinus, 18 Abb. N. C. (N. Y.) 78. After interment, the control over a dead body is in the next of kin living. But if they differ about its disposal, equity will not help its removal. Where a corpse has been properly buried, it is doubtful if even the next of kin can remove it; Lowry v. Plitt, 16 Am. L. Reg. 155, and note. Where a wife allowed her husband's remains to be placed temporarily in a vault in New York, and his father removed them to his own vault, held, that, in the absence of a request by the deceased husband in his lifetime, the widow might control the place of burial, but that she could not, under the circumstances, disturb their repose and take them to Kentucky; Southworth v. Southworth, in the New York Supreme Court, 1881, not reported, referred to in an article in 17 Can. L. J. 184. The husband having in a time of great distress of mind after his wife's death consented to her burial in a lot of the husbands of two of her sisters, and sought to remove her body to the lot owned by himself and his co-heirs, the defendants, being the lot owners, refused permission, and on application for injunction to restrain their interference, it was held that he had never consented to her burial in the lot as a final resting place, and that the defendants might be required by a court of chancery to permit the removal. Chief Justice Gray said: Neither the husband nor the next of kin, have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are, in this country where there are no ecclesiastical courts, within the jurisdiction of a court of equity; Weld v. Walker, 130 Mass. 423, 33 Am. Rep. 465; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759;

2 Bla. Com. 429; Snyder v. Snyder, 60 How. Pr. (N. Y.) 368.

Where a widow ordered a funeral of her husband, it was held that she was liable for the expense, although she was an infant at the time, the court holding that the expenses fell under the head of necessaries, for which infants' estates are liable; 13 M. & W. 252.

See Bingh. Christ. Antiq.; Tyler, Am. Eccl. Law; Burton, The Burial Question; Cooley, Torts 280; The Law of Burials, Anon.; 1 Witthaus & Becker, Med. Jur. 297; note in Johnston v. Marinus, 18 Abb. N. C. (N. Y.) 75, containing a list of law literature on this and kindred topics; notes to Moak's Eng. Rep. 656; CEMETERY; CREMATION; MEASURE OF DAMAGES; FUNERAL EXPENSES.

DEAD-BORN. A dead-born child is to be considered as if it had never been conceived or born; in other words, it is presumed it never had life, it being a maxim of the common law that *mortuus exitus non est exitus* (a dead birth is no birth). Co. Litt. 29 *b*. See Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35, 21 Am. Dec. 66; 4 Ves. 334.

This is also the doctrine of the civil law, Dig. 50. 16. 129. *Non nasci, et natum mori, paria sunt* (not to be born, and to be born dead, are equivalent). La. Civ. Code, art. 28; Domat, liv. prél. t. 2, s. 1, nn. 4, 6.

DEAD FREIGHT. The amount paid by a charterer for that part of the vessel's capacity which he does not occupy although he has contracted for it.

When the charterer of a vessel has shipped part of the goods on board, and is not ready to ship the remainder, the master, unless restrained by his special contract, may take other goods on board, and the amount which is not supplied, required to complete the cargo, is considered *dead freight*. The dead freight is to be calculated according to the actual capacity of the vessel. 3 Chit. Com. Law 399; 2 Stark. 450; McCull. Com. Dic. See L. R. 6 Q. B. 528. See FREIGHT.

DEAD LETTER. Acts that have become obsolete by long disuse are often so called. See OBSOLETE.

DEAD LETTERS. Letters transmitted through the mails according to direction, and remaining for a specified time uncalled for by the persons addressed, are called dead letters.

DEAD MAN'S PART. That portion of the personal estate of a person deceased which by the custom of London became the administrator's.

If the decedent left wife and children, this was one-third of the residue after deducting the widow's chamber; if only a widow, or only children, it was one-half; 1 P. Wms. 341; Salk. 246; if neither widow nor children, it was the whole; 2 Show. 175. This provision was repealed by the statute 1 Jac. II, c. 17, and the same made subject to the statute of distributions. 2 Bla. Com. 518. See CUSTOMS OF LONDON; LEGITIME.

DEAD'S PART. In Scotch Law. The part remaining over beyond the shares secured to the widow and children by law. Of this the testator had the unqualified disposal. Stair, Inst. lib. iii. tit. 4, § 24; Bell Dict.; Paterson, Comp. §§ 674, 848, 902. It obtained in the province of York till 1692. See LEGITIME.

DEAD-PLEDGE. A mortgage; *mortuum vadium*.

DEADLY WEAPON. See DANGEROUS WEAPON; ARMS.

DEAF AND DUMB. A person deaf and dumb is *doli capax;* but with such persons who have not been educated, and who cannot communicate their ideas in writing, a difficulty sometimes arises on the trial.

A case occurred of a woman deaf and dumb who was charged with a crime. She was brought to the bar, and the indictment was then read to her; and the question, in the usual form, was put, Guilty or not guilty? The counsel for the prisoner then rose, and stated that he could not allow his client to plead to the indictment until it was explained to her that she was at liberty to plead guilty or not guilty. This was attempted to be done, but was found impossible, and she was discharged from the bar *simpliciter*. Case of Jean Campbell, 1 Wh. & St. Med. Jur. § 468. When the party indicted is deaf and dumb, he may, if he understands the use of signs, be arraigned and the meaning of the clerk who addresses him conveyed to him by signs, and his signs in reply explained to the court, so as to justify his trial and the infliction of punishment; Com. v. Hill, 14 Mass. 207; 1 Leach 102; 1 Chit. Cr. L. 417. See State v. Harris, 53 N. C. 136, 78 Am. Dec. 272. It was formerly said that persons deaf and dumb were presumably idiots; 1 Hale, P. C. 34; but that doctrine was formulated at a period when the subject of the education of such unfortunate persons had received little or no attention. One deaf and dumb is not *consequently* insane, nor is he presumed to be an idiot; Alexier v. Matzke, 151 Mich. 36, 115 N. W. 251, 123 Am. St. Rep. 255, 14 Ann. Cas. 52; and his capacity appearing, he may be tried; 1 Bish. Cr. L. § 395; the ordinary presumption of sound mind and criminal responsibility, as was said by Gilpin, C. J., in a case of homicide by a person so afflicted, "does not apply to a deaf and dumb person when charged with the commission of a crime. On the contrary, the legal presumption is then directly reversed; for in such case it is incumbent upon the prosecution to prove to the satisfaction of the jury that the accused had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act at the time when it was committed by him,

and had a knowledge and consciousness that the act he was doing was wrong and criminal and would subject him to punishment; 1 Houst. Cr. Rep. 291. In that case the prisoner was acquitted "under circumstances wherein plainly they would not have done it if he had been endowed with hearing and speech;" 1 Bish. Cr. L. § 395.

A person deaf and dumb may be examined as a witness, provided he can be sworn; that is, if he is capable of understanding the terms of the oath, and assents to it, and if, after he is sworn, he can convey his ideas, with or without an interpreter, to the court and jury; Phill. Ev. 14. If he is able to communicate his ideas perfectly by writing, he will be required to adopt that as the more satisfactory method; but, if his knowledge of that method is imperfect, he will be permitted to testify by means of signs; 1 Greenl. Ev. § 366; Tayl. Ev. 1170.

Such person may execute a deed; 1 H. L. Cas. 724; Barnett v. Barnett, 54 N. C. 221; but it is said in an old case that he is prima facie unable to make a contract or deed; Brown v. Brown, 3 Conn. 299, 8 Am. Dec. 187; in Culley v. Jones, 164 Ind. 168, 73 N. E. 94, the question of capacity was left to the jury. See a note in 14 Ann. Cas. 52.

Where a defendant is deaf and dumb and cannot hear the testimony of the witnesses of the state, the presiding judge should permit some reasonable mode of having their evidence communicated to him; Ralph v. State, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509; where it was said that in such case opportunity should be given for the communication to the defendant of the testimony, but the exact method of doing it must be left to the discretion of the court.

A deaf person was convicted of murder. Held due process of law; Felts v. Murphy, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689.

DEAF, DUMB, AND BLIND. See IDIOT.

DEAFFOREST, DISAFFOREST. **In Old English Law.** To discharge from being forest. To free from forest laws.

DEALER. A dealer in the popular, and therefore in the statutory sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. Norris v. Com., 27 Pa. 494; Com. v. Campbell, 33 Pa. 385.

DEAN. An ecclesiastical officer, who derives his name from the fact that he presides over ten canons, or prebendaries, at least. He is addressed as Very Reverend.

There are several kinds of deans, namely: deans of chapters; deans of peculiars; rural deans; deans in the colleges; honorary deans; deans of provinces.

DEAN AND CHAPTER. **In Ecclesiastical Law.** The council of a bishop, to assist him with their advice in the religious and also in the temporal affairs of the see. 3 Co. 75; 1 Bla. Com. 382; Co. Litt. 103, 300; *Termes de la Ley*; 2 Burn, Eccl. Law 120.

DEAN OF THE ARCHES. The presiding judge of the court of the arches. He was also an assistant judge in the court of admiralty. 1 Kent 371; 3 Steph. Com. 727. See DOCTORS COMMONS; COURT OF THE ARCHES.

DEATH. The cessation of life. The ceasing to exist.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them, is considered as dead.

A person convicted and attainted of felony and sentenced to the state prison for life is, in the state of New York, in consequence of the act of 29th of March, 1799, and by virtue of the conviction and sentence of imprisonment for life, to be considered as civilly dead; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 118; Troup v. Wood, 4 Johns. Ch. (N. Y.) 228, 260. And a similar doctrine anciently prevailed in other cases at common law in England. See Co. Litt. 133; 1 Sharsw. Bla. Com. 132, n.

Natural death is the cessation of life.

It is also used to denote a death which occurs by the unassisted operation of natural causes, as distinguished from a *violent* death, or one caused or accelerated by the interference of human agency.

In Medical Jurisprudence. The cause, phenomena, and evidence of violent death are of importance.

An ingenious theory as to the cause of death has been brought forward by Philip, in his work on Sleep and Death, in which he claims that to the highest form of life three orders of functions are necessary,—viz.: the muscular, nervous, and sensorial; that of these the two former are independent of the latter, and continue in action for a while after its cessation; that they might thus continue always, but for the fact that they are dependent on the process of respiration; that this process is a voluntary act, depending upon the will, and that this latter is embraced in the sensorial function. In this view, death is the suspension or removal of the sensorial function, and that leads to the suspension of the others through the cessation of respiration. Philip, Sleep & D.; Dean, Med. Jur. 413 *et seq.*

Its phenomena, or signs and indications. Real is distinguishable from apparent death by the absence of the heart-beats and respiration. These conditions are, however, not always easy to determine positively when the following tests may be applied:— 1. Temperature of body the same as the surrounding air. 2. Intermittent shocks of electricity at different tensions give no indications of muscular irritability. 3. Movements of the joints of the extremities and of the jaw showing more or less *rigor-mortis*. 4. A bright needle plunged into the muscles and left there showing no signs of oxidation on withdrawal (Cloquet's test). 5. The opening of a vein showing that the blood vessels are empty, or that in the veins of dependent parts of the body the blood has coagulated. 6. The subcutaneous injection of ammonia causing a dirty brown stain (Monte Verde's test). 7. A fillet applied to the arm causing no filling of the veins on the distal side of the fillet (Richardson's test). 8. "Diaph-

anous test"; after death there is an absence of the translucence seen in the living when the hand is held before a strong light with the fingers extended and in contact. 9. "Eye test"; after death there is loss of pupillary reaction to light and to *mydriatics*, and there is also loss of corneal transparency; H. P. Loomis in Witthaus & Becker, Med. Jur.

Its evidence when produced by violence. This involves the inquiry as to the cause of death in all cases of the finding of bodies divested of life through unknown agencies. It seeks to gather all the evidence that can be furnished by the body and surrounding circumstances bearing upon this difficult and at best doubtful subject. It more immediately concerns the duties of the coroner, but is liable to come up subsequently for a more thorough and searching investigation. As this is a subject of great, general, and growing interest, no apology is deemed necessary for presenting briefly some of the points to which inquiry should be directed, together with a reference to authorities where the doctrines are more thoroughly discussed.

The first point for determination is, whether the death was the act of God or the result of violence. Sudden death is generally produced by a powerful invasion of the living forces that develop themselves in the *heart*, *brain*, or *lungs*—the first being called *syncope*, the second *apoplexy*, and the third *asphyxia*. Dean, Med. Jur. 426.

The last two are the most important to be understood in connection with the subject of persons found dead.

In *death from apoplexy*, the sudden invasion of the brain by effused blood destroys innervation, by which the circulation is arrested. Death from apoplexy is disclosed by the appearances revealed by dissection, particularly in the brain.

Death by asphyxia is still more important to be understood. It is limited to cases where the heart's action is made to cease through the interruption of the respiration. It is accomplished by all the possible modes of excluding atmospheric air from the lungs. The appearances in the body indicating death from asphyxia are, violet discolorations, eyes prominent, firm, and brilliant, cadaveric rigidity early and well marked, venous system of the brain full of blood, lungs distended with thick dark-colored blood, liver, spleen, and kidneys gorged, right cavities of the heart distended, left almost empty.

Many indications as to whether the death is the act of God or the result of violence may be gathered from the position and circumstances in which the body is found. As thorough an examination as possible should be first made of the body before changing its position or that of any of the limbs, or varying in any respect its relations with surrounding bodies. This is more necessary if the death has been apparently caused by wounds. Then the wounds require a special examination before any change is made in position, in order from their nature, character, form, and appearance to determine the instrument by which they were inflicted, and also their agency in causing the death. Their relations with external objects may indicate the direction from which they were dealt, and, if incised, their extent, depth, vessels severed, and hemorrhage produced may be conclusive as to the cause of death.

A thorough examination should be made of the clothes worn by the deceased, and any parts torn or presenting any unusual appearance should be carefully noted. A list should be made of all articles found on the body, and of their state and condition. The body itself should undergo a very careful examination. This should have reference to the color of the skin, the temperature of the body, the existence and extent of the cadaveric rigidity of the muscular system, the state of the eyes and of the sphincter muscles, noting at the same time whatever swellings, ecchymoses, or livid, black, or yellow spots, wounds, ulcers, contusions, fractures, or luxations, may be present. The fluids that have exuded from the nose, mouth, ears, sexual organs, etc., should be carefully examined: and when the deceased is a female, it will be proper to examine the sexual organs with care, with a view of ascertaining whether before death the crime of rape had or had not been committed.

Another point to which the attention should be directed is, the state of the body in reference to the extent and amount of decomposition that may have taken place in it, with the view of determining when the death took place. This is sometimes important to identify the murderer. The period after death at which putrefaction supervenes became a subject of judicial examination in Desha's case, reported in Dean, Med. Jur. 423 *et seq.*, and more fully in 2 Beck, Med. Jur. 44 *et seq.* Another interesting inquiry, where persons are found drowned, is presented in the inquiry as to the existence of *adipocere*, a compound of a yellowish-white color, consisting of calcareous or ammoniacal soap, which is formed in bodies immersed in water in from eight weeks to three years from the cessation of life. Tayl. Med. Jur., Hartsh. ed. 542; 1 Ham. Leg. Med. 104.

Another point towards which it is proper to direct examination regards the situation and condition of the place where the body is found, with the view of determining two facts: *First*, whether it be a case of homicide, suicide, or visitation of God; and *second*, whether, if one of homicide, the murder occurred there or at some other place, the body having been brought there and left. The points to be noted here are whether the ground appears to have been disturbed from its natural condition; whether there are any,

and what, indications of a struggle; whether there are any marks of footsteps, and, if any, their size, number, the direction to which they lead, and whence they came; whether any traces of blood or hair can be found; and whether any, or what, instruments or weapons, which could have caused death, are found in the vicinity; and all such instruments should be carefully preserved, so that they may be identified. Dean, Med. Jur. 257; 2 Beck, Med. Jur. 107, nn. 136, 250.

As the decision of the question relating to the cause of death is often important and difficult to determine, it may be proper to notice some of its signs and indications in a few of the most prominent cases where it is induced by violence.

Death by drowning is caused by asphyxia from suffocation, by nervous or syncopal asphyxia, or by asphyxia from cerebral congestion.

In the first, besides other indications of asphyxia, the face is pale or violet, a frothy foam at the mouth, froth in the larynx, trachea, and bronchi, water in the trachea and, sometimes, in the ramifications of the bronchi, and also in the stomach. In the second, the face and skin are pale, the trachea empty, lungs and brain natural, no water in the stomach. In the third, the usual indications of death by apoplexy are found on examination of the brain. See 1 Ham. Leg. Med. 120.

Death by hanging is produced by asphyxia, suspending respiration by compressing the larynx, by apoplexy, pressing upon the veins and preventing the return of blood from the head, by fracture of the cervical vertebræ, laceration of trachea or larynx, or rupture of the ligaments of the neck, or by compressing the nerves of the neck. The signs and indications depend upon the cause of death. Among these are, face livid and swollen, lips distorted, eyelids swollen, eyes red and projecting, tongue enlarged, livid, compressed, froth about the lips and nostrils, a deep ecchymosed mark of the cord about the neck, sometimes ecchymosed patches on different parts of the body, fingers contracted or clenched.

Death by strangulation presents much the same appearances, the mark of the cord being lower down on the neck, more horizontal, and plainer and more distinctly ecchymosed.

Death by cold leaves few traces in the system. Pale surface, general congestion of internal organs, sometimes effused serum in the ventricles of the brain.

Death by burning may show the usual signs consequent upon exposure to great heat, redness, blistering, charring. The unaffected part of the body is usually pale. The extent of the body surface burnt, not the degree of burning, determines death.

Death by lightning usually exhibits a contused or lacerated wound where the electric fluid entered and passed out. Sometimes an extensive ecchymosis appears.

Death by starvation produces general emaciation; eyes and cheeks sunken; bones projecting; face pale and ghastly; eyes red and open; skin, mouth, and fauces dry; stomach and intestines empty; gall-bladder large and distended; body exhaling a fetid odor; heart, lungs, and large vessels collapsed; early commencement of the putrefactive process.

These and all other questions relating to persons found dead will be found fully discussed in works on medical jurisprudence.

The Legal Consequences. Persons who have been once shown to have been in life are always presumed thus to continue until the contrary is shown; so that the burden is on the party asserting the death to make proof of it; 2 East 312; 2 Rolle 461. But proof of a long continued absence unheard from and unexplained will lay a foundation for a presumption of death; Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088; Bank of Louisville v. Board of Trustees of Public Schools, 83 Ky. 219, 5 S. W. 735. Various periods of time are found in the adjudged cases to warrant such presumption. It was held to arise after twenty-seven years; 3 Bro. C. C. 510; twenty years, sixteen years; 5 Ves. 458; Marden v. Boston, 155 Mass. 359, 29 N. E. 588; fourteen years; Miller v. Beates, 3 S. & R. (Pa.) 490, 8 Am. Dec. 651; twelve years; King v. Paddock, 18 Johns. (N. Y.) 141; eleven years; Baden v. McKenny, 7 Mackey (D. C.) 268. The general rule, as now understood, is that the presumption of the duration of life ceases at the expiration of seven years from the time when the person was last known to be living; and after the lapse of that period there is a presumption of death; Smith v. Knowlton, 11 N. H. 197; Clarke's Ex'rs v. Canfield, 15 N. J. Eq. 119; Eagle v. Emmet, 4 Bradf. Sur. (N. Y.) 117; Chamb. Best Ev. 304, note, collecting the cases; Francis v. Francis, 180 Pa. 644, 37 Atl. 120, 57 Am. St. Rep. 668; 4 U. C. Q. B. 510; 1 Greenl. Ev. § 41; 5 B. & Ad. 86; Henderson v. Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219; French v. McGinnis, 69 Tex. 19, 9 S. W. 323. In most of the states the subject is regulated by statute. It is held also that there must be diligent inquiry among those who would probably hear from such absentee, to raise this presumption; Modern Woodmen of America v. Gerdom, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809; Wentworth v. Wentworth, 71 Me. 74; In re Morrison's Estate, 183 Pa. 155, 38 Atl. 895; In re Board of Education of N. Y., 173 N. Y. 321, 66 N. E. 11. See Modern Woodmen of America v. Gerdom, 72 Kan. 391, 82 Pac. 1100, 2 L. R. A. (N. S.) 809, and cases cited. In In re Freeman's Estate, 18 Pa. Dist. R. 194, it was said that a pre-

sumption of death in consonance with the English rule arises at the end of an unexplained absence of seven years, but contrary to the English rule, a counter-presumption also arises of a continuance of life during and up to the very end of that period, subject to be modified by proof of the presence of imminent peril which menaced the life of the absent one and probably terminated it within the period.

There are cases, however, where a presumption of death may be raised from even a shorter absence; Waite v. Coaracy, 45 Minn. 159, 47 N. W. 537; Cambrelleng v. Purton, 125 N. Y. 610, 26 N. E. 907; Fidelity Mut. Life Assn. v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; and while seven years is the period in which the presumption of continued life ceases, yet this period may be shortened by proof of such facts and circumstances as, submitted to the test of experience, would produce a conviction of death within a shorter period; Northwestern Mut. Life Ins. Co. v. Stevens, 71 Fed. 258, 18 C. C. A. 107; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Hyde Park v. Canton, 130 Mass. 505; Cox v. Ellsworth, 18 Neb. 664, 26 N. W. 460, 53 Am. Rep. 827.

Though there is controversy on the point, the better opinion is that there is no presumption as to the time of death; Davie v. Briggs, 97 U. S. 628, 24 L. Ed. 1086; Chamb. Best Ev. 305; 2 Brett, Com. 941; 2 M. & W. 894; and the *onus* is on the person whose case requires proof of death at a particular period; Howard v. State, 75 Ala. 27; Whiteley v. Assurance Society, 72 Wis. 170, 39 N. W. 369; Spencer v. Roper, 35 N. C. 333; 8 U. C. Q. B. 291. It seems that such continued absence for seven years from the particular state of his residence, without showing an absence from the U. S., is sufficient; Newman v. Jenkins, 10 Pick. (Mass.) 515; Innis v. Campbell, 1 Rawle (Pa.) 373; Spurr v. Trimble, 1 A. K. Marsh. (Ky.) 278; Wambaugh v. Schenk, 2 N. J. L. 229; Woods v. Woods' Adm'rs, 2 Bay (S. C.) 476; and to establish the presumption of death, the last known place of residence is the place to look for the person; Morrison's Estate, 183 Pa. 155, 38 Atl. 895; but the statutory presumption of the death of a person will not be received until all reasonable doubt of his death, at a given time, is removed; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9. There are cases, however, in which an absence of seven years will not raise a presumption of death without issue, as where it is probable that the failure to communicate with friends is intentional; In re Taylor, 66 Hun 626, 20 N. Y. Supp. 960; Doe v. Stockley, 6 Houst. (Del.) 447, where the court refused to instruct the jury that there was a presumption of the death of an entire family after an absence of forty-five or fifty years. And the statutory presumption of death after seven years does not apply to children of tender years incapable of voluntary absence or concealment; Manley v. Pattison, 73 Miss. 417, 19 South. 236, 55 Am. St. Rep. 543. As to this presumption generally, see 8 Eng. Rul. Cas. 512.

The common-law presumption of death after a lapse of years is not sufficient in a criminal prosecution to prove that the wife was unmarried; People v. Weinstock, 140 N. Y. Supp. 453. See ESCHEAT; ABSENTEE, as to the power of the legislature to provide for the administration of estates of persons absent and presumed to be dead.

The record of the probate of a will is not competent evidence of death except where all parties to a subsequent action were also parties before the surrogate; Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144, and note. But it is held that where a foreign court of competent jurisdiction has made a grant of administration on the presumption of death, such grant may be accepted by the court of probate as sufficient proof; [1892] Prob. 255.

Letters of administration were held to be evidence of death; Ruoff v. Bank, 40 Misc. 549, 82 N. Y. Supp. 881; Aultman, Miller & Co. v. Timm, 93 Ind. 158. So is a certificate of the register of births and deaths; Succession of Jones, 12 La. Ann. 397.

A letter contained in an envelope requesting a return to the writer, if not called for, and showing the post office stamp that it had been returned to the writer, is admissible as affording ground for an inference, more or less strong, of the death of the addressee; Hurlburt v. Hurlburt's Estate, 63 Vt. 667, 22 Atl. 850.

Questions of difficulty have arisen where several persons, respectively entitled to inherit from one another, happen to perish all together by the same event, such as a shipwreck, a battle, or a conflagration, without any possibility of ascertaining who died first. In such cases the French civil code and the civil code of Louisiana lay down rules (the latter copying from the former) which are deduced from the probabilities resulting from the strength, age, and difference of sex of the parties.

If those thus perishing together were under fifteen, the eldest shall be presumed the survivor. If they were all above sixty, the youngest shall be presumed the survivor. If some were under fifteen and others above sixty, the former shall be presumed the survivors. If those who have perished together had completed the age of fifteen and were under sixty, the male shall be presumed the survivor where the ages are equal or the difference does not exceed one year. If they were of the same sex, that presumption shall be admitted which opens the succession in the order of nature; and thus the younger must be presumed to have survived the elder. French Civ. Code, arts. 720–722; La. Civ. Code, arts. 930–933; Hollister v. Cordero, 76 Cal. 649, 18 Pac. 855.

The English common law has never adopted these provisions, or gone into the refinement of reasoning upon which they are based. It requires the survivorship to be proved by facts, and not by any settled legal rule or prescribed presumption. In some of the cases that have arisen involving this bare question of survivorship, the court have advised a compromise, denying that there was any legal principle upon which it could be decided. In others, the decision has been that they all died together, and that none could transmit rights to others; 1 W. Bla. 640; Fearne, Posth. Works 38, 39; 2 Phill. 261; Cro. Eliz. 503; 3 Hagg. Eccl. 748; 5 B. & Ad. 91; 1 Y. & C. Ch. 121; Russell v. Hallet, 23 Kan. 276; Stinde v. Goodrich, 3 Redf. (N. Y.) 87; [1892] Prob. 142; Ash v. Hare, 73 Me. 403; that is, the one who bears the burden of proof of survivorship fails in his case; Newell v. Nichols, 75 N. Y. 78, 31 Am. Rep. 424; Russell v. Hallett, 23 Kan. 276. Where a mother and daughter die in the same year, but there is no evidence of the precise date of the death of the mother, an assumption that she died before the daughter is not warranted; Cook v. Caswell, 81 Tex. 678, 17 S. W. 385. Each case must be determined upon its own peculiar facts and circumstances, whenever the evidence is sufficient to support a finding as to survivorship; Estate of Ehle, 73 Wis. 445, 41 N. W. 627.

As to contracts. These are, in general, not affected by the death of either party. The executors or administrators of the decedent are required to fulfil all his engagements, and may enforce all those in his favor. But to this rule there are the following exceptions, in which the contracts are terminated by the death of one of the parties:—

The contract of marriage. See MARRIAGE.

The contract of partnership. See PARTNERSHIP.

Those contracts which are altogether personal: as, where the deceased has agreed to accompany the other party to the contract on a journey, or to serve another; Pothier, Obl. c. 7, art. 3, §§ 2, 3; Howe Sewing-Mach. Co. v. Rosensteel, 24 Fed. 583; Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; or to instruct an apprentice; Bacon, Abr. *Executor*, P; 1 Burn, Eccl. Law 82; Ans. Contr. 325; Shields v. Owens, 1 Rawle (Pa.) 61; also an instance of this species of contract in 2 B. & Ad. 303. In all those cases where one is acting for another and by his authority, such as agencies and powers of attorney, where the agency or power is not coupled with an interest, the death of the party ordinarily works a revocation; Hunt v. Rousmanier, 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Lehigh Coal & Nav. Co. v. Mohr, 83 Pa. 228, 24 Am. Rep. 161. Where the power is to transfer stock, signed by the seller of the stock, it is not revoked by his death; Fisher v. Coal Co., 31 W. N. C. (Pa.) 502. See PRINCIPAL AND AGENT.

The continued existence of both parties for the stipulated term is the basis of a contract; and on the death of a master no action will lie against the administrator for refusing to continue a contract of employment; Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Lacy v. Getman, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806; L. R. 4 C. P. 744; Burdett v. Yale, 6 Allen (Mass.) 125; Harris v. Johnson, 98 Ga. 434, 25 S. E. 525; Babcock v. Goodrich, 3 How. Pr. N. S. (N. Y.) 52. But in Harrison v. Conlan, 10 Allen (Mass.) 85, the pastor of a church employed an organist to play for three months for $50. The employer died and the organist did not play thereafter, though ready to do so. It was held in an action against the personal representatives of the pastor that the obligation to pay was not discharged by his death, but that the organist could recover only *pro rata* compensation for the portion of the three months during which he had played. Where a landowner hired another for a specified term to raise crops, the contract was held not to end with the employer's death, but to be binding on his personal representatives, if the employment was continued; though most of the services were rendered after the employer's death, the employee was entitled to recover his compensation: Pugh v. Baker, 127 N. C. 2, 37 S. E. 82. In Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 21 L. R. A. (N. S.) 914, 17 Ann. Cas. 179, a buyer paid cash and notes for the implements and good will of the seller's dentistry business and for the seller's agreement to render for a specified time personal service in that business; the seller died before the expiration of the period and the buyer was held to have a right to counterclaim against his liability on the notes the damages he had suffered by failure to receive the services.

As to torts. In general, when the tort feasor or the party injured dies, the cause of action dies with him; but when the deceased might have waived the tort and maintained assumpsit against the defendant, his personal representative may do the same thing. See ACTIO PERSONALIS MORITUR CUM PERSONA, where this subject is more fully examined. As to the right of action for death by wrongful act, see *infra*.

As to crimes. When a person accused of crime dies before trial, no proceedings can be had against his representatives or his estate.

As to inheritance. By the death of a person seised of real estate or possessed of personal property, his property real and personal, after satisfying his debts, vests, when he has made a will, as he has directed by that instrument; but if he dies intestate, his real estate goes to his heirs at law under the statute of descents, and his personal to his

administrators, to be distributed to the next of kin, under the statute of distributions.

In suits. At common law an original suit abated by reason of the death of the plaintiff; 6 Wait, Act. & Def. 400; Torry v. Robertson, 24 Miss. 192; but in most of the states and England it is otherwise, and the personal representatives may become parties and prosecute the suit; Wms. Ex., 7th Am. ed. pt. ii. b. iii. ch. 4, and American note thereto, pp. 91, 99. The English practice and rules under the procedure acts will be found in the chapter of Williams on Executors above cited and a reference to the American statutes in the note thereto. In case of the death of a plaintiff the usual practice is to make a suggestion of it to the court which is entered of record; and in case of the death of a defendant his executor or administrator may be made a party, either by *scire facias*, or motion for an order of revivor, or other proceeding for giving due notice to the representative, according to the varying practice of the several states. See ABATEMENT.

As to the death of one of the parties in a divorce suit, see DIVORCE.

The death of a defendant will discharge the special bail; Tidd, Pr. 243; but when he dies after the return of the *ca. sa.* and before it is filed, the bail are fixed; 6 Term 284; Boggs v. Teackle, 5 Binn. (Pa.) 332; Champion v. Noyes, 2 Mass. 485; Davidson v. Taylor, 12 Wheat. (U. S.) 604, 6 L. Ed. 743; Olcott v. Lilly, 4 Johns. (N. Y.) 407; Goodwin v. Smith, 4 N. H. 29.

At common law there was no right of action for death by wrongful act; Green v. R. Co., 28 Barb. (N. Y.) 9; Major v. Ry. Co., 115 Ia. 309, 88 N. W. 815; Duncan v. St. Luke's Hospital, 113 App. Div. 68, 98 N. Y. Supp. 867.

Lord Ellenborough, in Baker v. Bolton, 1 Campb. 493, held that "in a civil court the death of a human being cannot be complained of as an injury." Homicide is always a purely criminal matter. In the early English law it was regarded more as a civil than a criminal offence, and damages were paid to the family of the decedent known as wergilds. As, during the continuance of this custom, a process for the recovery of the wergilds was certainly given, it seems that when these offences grew no longer redeemable, the private process was still continued, in order to secure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation; Jac. L. Dict. tit. *Appeal.* This process was known as an appeal of murder, and was permitted by statute to co-exist with the criminal action. The defendant, if found guilty did not pay any damages to the plaintiff, but was punished as in a criminal case. The real advantage to the plaintiff lay in the fact that he could release his rights, and that such releases were frequently of great pecuniary value; 7 Harv. L. Rev. 170. This appeal for murder existed as late as 1818 in the case of Ashford v. Thornton, 1 B. & Ald. 405, where the court held that the appellor had a right to bring the case by writ of appeal, but that the appellee had an equal right to his plea of wager of battel. The appellor declined to accept the decision of the court giving the appellee trial by battel and the latter was discharged. This led to the enactment of a statute the next year abolishing appeal of murder, treason, etc., as well as wager of battel (59 Geo. III. ch. 46). Until 1846 there was no civil remedy. In that year Lord Campbell's Act was passed (9 & 10 Vict. ch. 93), known as the Fatal Accidents Act, allowing a recovery for death caused by negligence or wrongful act. See APPEAL.

In the United States, like statutes have been passed modelled on this act. They differ principally in respect of the person who may bring the action. Their purpose is to provide the means for recovering damages caused by that which is essentially and in its nature a tort. Such statutes are not penal but remedial—for the benefit of the persons injured by the death.

An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found; Stewart v. R. Co., 168 U. S. 448, 18 Sup. Ct. 105, 42 L. Ed. 537. It may well be that, where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common-law obstacle to a recovery for what is admitted to be a tort, it would seem not unreasonable to hold that an action for that tort can be maintained where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced; Stewart v. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537, citing Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958.

Where the negligence which causes the accident occurs in one state or country, and the accident itself in another, it is the law of the latter place that governs; Rundell v. La Compagnie Gén. Trans., 100 Fed. 655, 40 C. C. A. 625, 49 L. R. A. 92 (in admiralty). It is held that a new action is created for the benefit of the persons named in the statute, and not a continuation of a right of action belonging to decedent before his death; In re Mayo's Estate, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. So a cause of action for personal injuries which survives is held distinct from a cause of ac-

tion in favor of surviving relatives; Brown v. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579; Lubrano v. Mills, 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797; the two actions, though prosecuted by the same personal representative, are not in the same right, and a recovery in one is not a bar to a recovery in the other; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893. That there is but one ground of liability, the wrongful act, and as all claims for damages grow out of the one wrong, it is unreasonable to say that the legislature intended there should be two causes of action based upon it, was held in Holton v. Daly, 106 Ill. 131. In Brown v. R. Co., 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, it is said of that case: "True, in the circumstances named, there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the survivor. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives by or in their right, the causes of action are clearly distinct." "If several persons are made to suffer pecuniary loss by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him, and, generally, in order to do complete justice, in the absence of some provision for a recovery for the benefit of all and a distribution of the proceeds, separate causes of action must necessarily exist."

The principles on which the decedent's cause of action rested at common law are the same irrespective of the cause of his death. It died with him, but is revived by the statute in favor of his administrator. It includes nothing more than the intestate's cause of action. That act simply revives but does not enlarge the common-law right of the decedent. The provision for surviving relatives introduced principles wholly unknown to the common law, namely, that the value of a man's life to his wife and next of kin constitute part of his estate; Needham v. R. Co., 38 Vt. 294, where it is said that the damages to the widow and next of kin begin where the damage to the intestate ended—with his death. In Clare v. R. Co., 172 Mass. 211, 51 N. E. 1083, it was held that a judgment in an action by an administrator for personal injuries suffered by plaintiff's intestate, and not for his death, is not a bar to the prosecution of an action for damages for his death. But it was further held that where one has both a common-law and a statutory right of action for injuries, and has elected to pursue the statutory remedy, an action on the other is barred; and while the right to maintain the statutory action for death is recognized, yet where damages have already been recovered under the common-law remedy, the statutory right is barred.

It has been held that where the death is instantaneous an action cannot be maintained under the survival statutes; Sweetland v. R. Co., 117 Mich. 329, 75 N. W. 1066, 43 L. R. A. 568; and where the decedent survived the injury about twelve hours, it was held by a divided court that a judgment based on the death act could not be sustained, as that act could apply only to cases where the death was instantaneous, and that in other cases the action must be based on what was termed the survival act; Dolson v. R. Co., 128 Mich. 444, 87 N. W. 629; Belding v. R. Co., 3 S. D. 369, 53 N. W. 750; Sawyer v. Perry, 88 Me. 42, 33 Atl. 660.

Where the plaintiff's husband released the defendant from liability for personal injuries received by her such a release was held a bar to a recovery, when five years later such injuries resulted in her death, on the ground that the wife was privy to the husband, and therefore estopped by his release; and that payment, like pardon, relates back to the original act; Southern Bell Telephone & Telegraph Co. v. Cassin, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694.

Collateral relations must show that they suffered pecuniary loss in order to permit a recovery of more than nominal damages; Anderson v. R. Co., 35 Neb. 95, 52 N. W. 840; Paulmier v. R. Co., 34 N. J. L. 151; In re California Nav. & Imp. Co., 110 Fed. 670; Burk v. R. Co., 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; Serensen v. R. Co., 45 Fed. 407; or reasonable expectation thereof; Thomas v. R. Co., 6 Civ. Proc. R. (N. Y.) 353; The O. L. Hallenbeck, 119 Fed. 468. The amount the deceased would probably have added to his estate has been adopted as the measure of recovery; Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701; and probabilities, not possibilities, of benefits; Cleveland, C., C. & St. L. R. Co. v. Drumm, 32 Ind. App. 547, 70 N. E. 286.

The loss of parental care will not be considered in awarding damages; McCabe v. Lighting Co., 27 R. I. 272, 61 Atl. 667; *contra*, Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109. As to whether the pain and suffering of the deceased or the grief and wounded feelings of his surviving relatives will be considered in the estimate of damages, see MENTAL SUFFERING.

The mother of an illegitimate child cannot recover; McDonald v. R. Co., 71 S. C. 352, 51 S. E. 138, 2 L. R. A. (N. S.) 640, 110 Am. St. Rep. 576; where the statute gives the right to the mother and other specified relatives; Alabama & V. Ry. Co. v. Williams, 78 Miss. 209, 28 South. 853, 51 L. R. A. 836, 84 Am. St. Rep. 624; Marshall v. R. Co., 46

Fed. 269; although by statute, an illegitimate child and his mother may inherit from each other; Harkins v. R. Co., 15 Phila. (Pa.) 286. These cases follow the English rule, which denies the right of action on the ground that "child" in an act of parliament always applies exclusively to a legitimate child; 2 Hurlst. & C. 735.

On the other hand, where the statute allowed an illegitimate child and its mother to inherit from each other, the mother should be permitted to recover; Marshall v. R. Co., 120 Mo. 275, 25 S. W. 179; so also where the statute gave the right of recovery to the widow and next of kin; Security Title & Trust Co. v. R. R. Co., 91 Ill. App. 332.

When the legislature has created a right of action for wrongful death for the benefit of the next of kin, and has declared that the father, if living, is the next of kin of minor children who leave neither widow nor children, an action for the death of such child must be for the sole benefit of the father, although he has deserted his family, to whose support the deceased child was at the time of his death contributing; Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; Pineo v. R. Co., 99 N. Y. 644, affirming 34 Hun (N. Y.) 80. It is said, however that he may have only nominal damages in such case; Cook v. Gunpowder Co., 70 N. J. L. 65, 56 Atl. 114; and his right to recover at all is denied in Southern R. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160.

At common law, neither husband nor wife may recover damages for the negligent killing of the other where death is instantaneous, either for loss of services or consortium; Armstrong v. Beadle, Fed. Cas. No. 541; Howell v. Board of Com'rs, 121 N. C. 362, 28 S. E. 362; Johnson v. Electric Co., 39 Wash. 211, 81 Pac. 705; Wyatt v. Williams, 43 N. H. 102; Grosso v. R. Co., 50 N. J. L. 317, 13 Atl. 233; Womack v. Banking Co., 80 Ga. 132, 5 S. E. 63; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; Mowry v. Chaney, 43 Ia. 609; Sherlag v. Kelley, 200 Mass. 232, 86 N. E. 293, 19 L. R. A. (N. S.) 633, 128 Am. St. Rep. 414; Green v. R. Co., 28 Barb. (N. Y.) 9, where it is said no action for loss of service can be sustained in case of instantaneous death, because there is no time during her life when it can be said that the husband has lost the society and service of his wife in consequence of the injury complained of. Recovery can be had if death is not instantaneous; Eden v. R. Co., 14 B. Monr. (Ky.) 204; Hyatt v. Adams, 16 Mich. 180; Green v. R. Co., 28 Barb. (N. Y.) 9. See McMillan v. Lumber Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947. In Ohio the action can be maintained in the courts of that state only when the deceased was an Ohio citizen; Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012, affirmed in Chambers v. R. Co., 207 U. S. 142, 28 Sup. Ct. 34, 52 L. Ed. 143, where it was held that the plaintiff was not denied access to the Ohio courts because she was not a citizen of that state, but because her cause of action was not cognizable in those courts.

Generally, under the statutes, the remedy is open to non-residents; In re Mayo's Estate, 60 S. C. 401, 38 S. E. 634, 54 L. R. A. 660. Non-resident aliens are within the operation of such statute permitting the father, mother, widow or next of kin of one killed by another's negligence (or the personal representatives of the deceased, for their benefit) to maintain an action, although the statute does not expressly declare that they shall be entitled to its benefit; Rietveld v. R. Co., 129 Ia. 249, 105 N. W. 515; Trotta's Adm'r v. Johnson, 121 Ky. 827, 90 S. W. 540, 12 Ann. Cas. 222; Mascitelli v. Union Carbide Co., 151 Mich. 693, 115 N. W. 721; Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 85 Am. St. Rep. 191; Atchison, T. & S. F. Ry. Co. v. Fajardo, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681; Ferrara v. Mining Co., 43 Colo. 496, 95 Pac. 952, 17 L. R. A. (N. S.) 964; Gaska v. Car & Foundry Co., 127 Mo. App. 169, 105 S. W. 3; Low Moor Iron Co. v. La Bianca's Adm'r, 106 Va. 83, 55 S. E. 532, 9 Ann. Cas. 1177; Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; Kellyville Coal Co. v. Petraytis, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; Szymanski v. Blumenthal, 3 Pennewill (Del.) 558, 52 Atl. 347; Renlund v. Min. Co., 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; Bonthron v. Fuel Co., 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563; Alfson v. Bush Co., 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; Pittsburgh, C., C. & St. L. R. Co. v. Naylor, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; Cetofonte v. Coke Co., 78 N. J. L. 662, 75 Atl. 913, 27 L. R. A. (N. S.) 1058; Patek v. Refining Co., 154 Fed. 190, 83 C. C. A. 284, 21 L. R. A. (N. S.) 273 (Colorado); Mahoning Ore & Steel Co. v. Blomfelt, 163 Fed. 827, 91 C. C. A. 390 (Minnesota); Kaneko v. Ry. Co., 164 Fed. 263 (California); Anustasakas v. Contract Co., 51 Wash. 119, 98 Pac. 93, 21 L. R. A. (N. S.) 267, 130 Am. St. Rep. 1089. The courts of Pennsylvania, Wisconsin and Indiana denied this right; Deni v. R. Co., 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; Maiorano v. R. Co., 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778; affirmed in 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792; McMillan v. Lumber Co., 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947; Cleveland, C., C. & St. L. R. Co. v. Osgood (Ind.) 70 N. E. 839. The federal courts sitting in Pennsylvania followed the Pennsylvania courts; Zeiger v. R. Co., 151 Fed. 348, affirmed in

158 Fed. 809, 86 C. C. A. 69. In Brannigan v. Mining Co., 93 Fed. 164, the United States circuit court for Colorado followed the Pennsylvania decisions in construing the Colorado statute.

In England, too, the rulings have been conflicting. It was held that Lord Campbell's Act does not give a right of action for the benefit of a non-resident alien; [1898] 2 Q. B. 430; but a later case disapproved this ruling and a right of recovery on behalf of a non-resident alien widow was sustained; [1901] 2 K. B. 606.

It was sought in Maiorano v. R. Co., 216 Pa. 402, 65 Atl. 1077, 21 L. R. A. (N. S.) 271, 116 Am. St. Rep. 778, to overrule the earlier Pennsylvania decisions by contending that the plaintiff was protected by the existing treaty between the United States and Italy providing that citizens of Italy shall enjoy in states of the Union in the protection and security of their persons and property the same rights which are enjoyed by citizens of the United States. But it was held that such a treaty conferred such rights only upon those citizens of Italy who bring their persons or property within the jurisdiction of the United States; that the plaintiff in this case, being a citizen and resident of Italy, could not recover damages for her husband's death. This was affirmed by the United States Supreme Court; 213 U. S. 268, 29 Sup. Ct. 424, 53 L. Ed. 792.

In New York it was held that since in Pennsylvania no right of action for wrongful death existed in favor of non-resident aliens, upon the principles of comity nonresidents could not maintain an action in New York and recover for the death of a person in Pennsylvania; Gurofsky v. R. Co., 121 App. Div. 126, 105 N. Y. Supp. 514.

By a treaty between United States and Italy of 1913, non-resident aliens are given a right of action for injury or death caused by negligence or fault, and they enjoy the same rights as are granted to United States citizens, under like conditions.

It was held in The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, that no damages can be recovered in admiralty for the death by negligence of a human being on the high seas, or on waters navigable from the seas, in the absence of an act of congress or a state statute. The maritime law, of this country, at least, gives no such right; Butler v. Steamship Co., 130 U. S. 555, 9 Sup. Ct. 612, 32 L. Ed. 1017. It was held that where the law of a state to which a vessel belonged (the law of the domicil or flag) gives a right of action for wrongful death if such death occurred on the high seas, such right of action will be enforced in admiralty as a claim against the fund arising in a proceeding to limit liability; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264. In La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973, it was held that the law of France, which authorizes recovery for loss of life against a vessel in fault, will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be in fault for a collision in a fog on the high seas, although the French courts, in applying to the facts found the international rule as to the speed of vessels in a fog, had held such vessel not to be in fault. See 21 Harv. L. Rev. 1, as to the enforcement of a right of action acquired under foreign law for death upon the high seas.

DEATH-BED DEED. A deed made by one who was at the time sick of a disease from which he afterwards died. Bell, Dict.

DEATH DUTIES. Used in England to designate inheritance taxes. See TAX.

DEATH'S PART. See DEAD'S PART; DEAD MAN'S PART.

DEATH WARRANT. See EXECUTION.

DEBAUCH. To corrupt one's manners, to make lewd, to mar or spoil; to seduce and vitiate a woman. Koenig v. Nott, 2 Hilt. (N. Y.) 329.

In an action for damages for crim. con., the allegation being that defendant seduced and debauched the plaintiff's wife, *whereby* her affections were alienated, etc., if the charge of adultery be not proved, the word debauch in the petition will not support a verdict for damages for alienation of affection; Wood v. Mathews, 47 Ia. 409.

It is a word of French origin which has come into use in our language in the sense of enticing and corrupting.

DEBENTURE (from *debentur mihi*, Lat., with which various old forms of acknowledgments of debt commenced). A certificate given in pursuance of law, by the collector of a port of entry, for a certain sum due by the United States, payable at a time therein mentioned, to an importer for drawback of duties on merchandise imported and exported by him, provided the duties on the said merchandise shall have been discharged prior to the time aforesaid. U. S. Rev. Stat. §§ 3037–40.

In some government departments a term used to denote a bond or bill by which the government is charged to pay a creditor or his assigns the money due on auditing his account.

An instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property, payable to a given person, etc., and usually constituting one of a series of similar instruments. Cavanagh, Mon. Sec. 267. See 56 L. J. R. Ch. D. 815; Brice, *Ultra Vires* (2d ed.) 279.

A charge in writing on certain property, with the repayment at a time fixed, of money lent by a person therein named at a given interest.

It is frequently resorted to by public com-

panies to raise money for the prosecution of their undertakings.

Any instrument (other than a covering or trust deed) which either creates or agrees to create a debt in favor of one person or corporation, or several persons or corporations, or acknowledges such debt. Simonson, Debentures, 5, where this is given as the result of a critical examination and discussion of the cases bearing on the definition of the term.

As a rule, both text writers and courts content themselves with a statement of inability to define them. An English writer says: "No one seems to know exactly what debenture means;" Buckley, Companies Act 169; and Chitty, J., said in one case that "a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture;" 37 Ch. D. 260, 264; but in the same case North, J., would not go so far. In another case the same judge (Chitty) said: "The term itself imports a debt and acknowledgment of a debt, and generally if not always imports an obligation to pay;" 36 Ch. D. 215; and again in another case he thus expresses the doubt existing as to the exact legal idea involved in the expression: "So far as I am aware, the term debenture has never received any precise legal definition. It is, comparatively speaking, a new term. I do not mean a new term in the English language, because there is a passage in Swift (quoted in Latham's Dict.) where the term debenture is used." The lines referred to are:

"You modern wits, should each man bring his claim,
Have desperate *debentures* on your fame:
And little would be left you, I'm afraid,
If all your debts to Greece and Rome were paid."

And the judge continued: "But although it is not a term with any legal definition, it is a term which has been used by lawyers frequently with reference to instruments under acts of parliament, which, when you turn to the acts themselves, are not so described;" 56 L. J. Ch. 817.

"Debentures, which are the commonest form of security issued by English corporations, are defined to be instruments under seal creating a charge according to their wording upon the property of the corporation, and to that extent conferring a priority over subsequent creditors and over existing creditors not possessed of such charge. This is the true and proper use of the term; although it is frequently applied on the one hand to instruments which do not confer a charge and which are nothing more nor less than ordinary unsecured bonds, and on the other to instruments which are more than a mere charge, being in effect mortgages, and are properly termed mortgage debentures." Jones, Corp. B. & M. § 32.

In the case of an instrument engaging for the payment of "the amount of this debenture," with coupons for interest payable half-yearly, Grove, J., said: "In the several dictionaries which we are in the habit of consulting, no satisfactory definition can be found, and neither of the learned counsel has been able to afford us any. I do not remember the term being used otherwise than in an acknowledgment of indebtedness by a corporate body having power by act of parliament or otherwise to increase its capital by borrowing money." It was something different from a promissory note, having a different stamp duty, different form, and a special mode of paying interest. The paper was held a debenture and subject to a higher stamp duty than a promissory note. In the same case Lindley, J., said that what were known as debentures were of various kinds;—mortgage debentures which were charges on some kinds of property, debenture bonds which were not, debentures which were nothing more than an acknowledgment of indebtedness and "a thing like this which is something more." 7 Q. B. D. 165.

Manson, treating of "The Growth of the Debenture" in 13 L. Q. R. 418, says that its origin was a mere acknowledgment of indebtedness from the crown, first for wages, etc., of servants, then to soldiers for arrears due them, and in various cases for amounts due from the exchequer and the custom house; it was in its primitive meaning just what its derivation from debentur implies—an admission of indebtedness, importing, as quoted supra from Chitty, J., an obligation or covenant to pay. From this root, slender as it is," continues the same writer, "have branched all the variety of forms. . . . Debentures to Bearer, Registered Debentures, Perpetual Debentures, Mortgage Debentures, Debenture Bonds, Debenture Stock, Trust or Covering Deeds, Debenture Stock Certificate to Bearer." Originally not one of a series, now inseparably connected with serial form. "An issue of debentures is in effect one great contributory charge made up of a series of securities, identical in form and amount." *id.*

Its character springs from its genesis, as the writer above quoted remarks, and is moulded by the combination of necessities: (1) Of giving security to the holders; (2) of leaving the company free to manage its business. From this combination arises the idea of the "floating charge" which binds the property of the company and the continuance of which as a mere charge is based upon the continued existence of the company as a going concern. See FLOATING CHARGE. The property charged, changing as it does in *specie* from time to time is by English courts termed the UNDERTAKING, which title see.

If the company makes by default or is wound up or "ceases to be a going concern," the right of the holders arises to ask for a receiver and to realize their interest; 56 L. J. Ch. 536, 35 W. R. 574; L. R. 15 Ch. D. 465. A sale of its entire property assets, good will, etc., is not in the ordinary course of business and was enjoined; *id.*

"A floating charge, though it nets all the available assets, is only an equitable security, and . . . may vanish altogether. Hence, where the sum borrowed is large, it has become usual to supplement the floating charge by a mortgage of specific property embodied in what is commonly called a covering or trust deed;" 13 L. Q. R. 422; which has two purposes: (1) To fasten the security upon the property; (2) to organize the debenture holders into a compact body and name trustees to act for them; *id.*

The mere fact that an instrument is on its face termed a debenture does not make it such, if on an examination of its substance it is found not to contain an acknowledgment of, or agreement to pay, a debt; 36 Ch. D. 215; 37 *id.* 260.

Debentures may be issued by a single person, a firm, or corporation, and it is an attribute implied in the definition of debenture that the holders are entitled without priority among themselves. They are, it is said, usually made a primary charge on the corporate property or undertaking, and as such will have priority over judgments obtained by general creditors and over the claims of shareholders; Cav. Mon. Sec. 358.

"Such debentures are in effect statutory mortgages. . . . In England each creditor is secured by a separate mortgage, while in America one secures all; and by statute in England, holders of mortgage debentures have no priority *inter se*." Jones, Corp. B. & M. Sec. 32.

Sometimes the nature of a debenture holder's charge is that of a floating mortgage or security attaching only to the subjects which are for the time being the property of the company, and not preventing the latter from disposing of the subject charged free from

incumbrance; *id.;* L. R. 15 Ch. D. 465; 10 *id.* 530.

A debenture is distinguished (1) from a mortgage which is an actual transfer of property, (2) from a bond which does not directly affect property, and (3) from a mere charge on property which is individualized and does not form part of a series of similar charges; Cav. Mon. Sec. 267, citing L. R. 10 Ch. D. 530, 681; 15 *id.* 465; 21 *id.* 762; L. R. 7 App. Cas. 673. Debentures strictly so called differ from mortgages in not conferring on the grantee the legal title or any of the ordinary rights of ownership of the property upon which the charge is created. A leading American writer says of this class of securities as understood in England that the charge created by them confers only equitable rights either as against other creditors or as against the corporation creating them. It is a test whether an instrument is a debenture or mortgage to ascertain whether the holder has any legal right to interfere with the company's use or control of the property in whatever way it pleases. If the instrument confers a charge which can be protected and enforced only in equity it is strictly a debenture; Jones, Corp. B. & M. § 32. See 10 H. L. C. 191. Of course, the effect and extent of the charge depend entirely upon the language used; L. R. 2 Ch. D. 337.

A debenture holder in England differs from a mortgagee in that the latter has a lien upon tolls and traffic receipts and may have a receiver appointed while the former has not; Jones, Corp. B. & M. § 232; 2 Ir. Eq. 524; L. R. 7 Ch. 655.

Debentures issued by an English company owning land in Italy and binding their "assets, property, and effects" were held to create no mortgage or lien; 26 W. R. 123; and debenture bonds, principal and interest payable to bearer, secured by mortgage of the company to certain persons as trustees for the holders, which was void for non-recording, were held to create no charge; 19 Q. B. D. 568.

Where a company had power "to issue bonds, debentures, or mortgage debentures," which would entitle holders to be paid *pari passu* out of the company's property, evidences of debt expressed as "obligations" by which the company bound "themselves and their successors and all their estate property, etc.," were held to be debentures and to create a charge; 10 Ch. Div. 530.

As issues of debentures are frequently, if not in most cases, made payable to the bearer, the question has been much litigated in England whether in that form they are transferable by delivery. There being no statute under which they are negotiable, they must be so if at all under the law merchant *(q. v.).* Debentures were at first held not negotiable under that law; L. R. 8 Q. B. 374; but in the Exchequer Chamber upon a critical examination the decision was otherwise; L. R. 10 Ex. 346; which was affirmed by the House of Lords, which distinguished the cases and did not review the earlier case; 1 App. Cas. 476; and finally it was held that debentures issued in England by a home company payable to bearer are negotiable by the law merchant and their transfer gives a good title against anybody to a *bona fide* purchaser; [1898] Q. B. 658. The same ruling was applied to those of a foreign company, commonly treated as negotiable in the market; [1892] 3 Ch. 527.

Where a number of debentures are sealed one after another in numerical order they *prima facie* rank in priority accordingly, but if it is so provided, they rank *pari passu;* 21 Ch. D. 762; 38 *id.* 156, 171; Buckley, Companies Acts 172. They are generally issued in a series, but need not be so, as a single debenture may be issued to one man; 36 Ch. D. 221.

Debentures are not issued until they are delivered; *id.;* 34 Ch. D. 58. A contract to make or take debentures will not be specifically enforced, but the party is left to his action for damages; [1897] 1 Q. B. 692, affirmed [1898] A. C. 309.

The exact nature of debentures has been much discussed in England as arising in cases where the question was whether a paper required registration under the Bills of Sales Act which excepted from its provisions "debentures" issued by any mortgage, loan, or other incorporated company and secured upon the capital stock of goods, chattels, and effects of such company.

A memorandum of agreement which contained a covenant by a company to pay to each of nine persons, who were mentioned in it as lenders, the sum set opposite their names *pari passu,* and charged all the property of the company, was a debenture; 36 Ch. D. 215; and the covering deed which usually accompanies debentures as a security for the payment of the debentures when due is not a debenture; 34 Ch. D. 43; though why it should be so held, it has been remarked, it is difficult to see in view of the judicial definitions of the word "debenture" quoted *supra;* Simonson, Debentures, 4 (and see remarks of Lord North; 37 Ch. D. 281, 291); but it need not be registered under the Bills of Sales Act; [1891] 1 Ch. (A. C.) 627; [1896] 2 Ch. 212.

A mere memorandum in writing by a coal and fireclay working and brick-making company, of a deposit with bankers of title deeds, as a security for balances due or to become due, but which did not admit any specific debt, or contain an agreement to pay otherwise than by an agreement to execute a legal mortgage, was not a debenture; 37 Ch. D. 281.

The act referred to speaks of "debentures issued . . . and secured upon," and an

English writer of authority considers that this means a borrowing money for the benefit of several lenders; Buckley, Companies Acts 170; but it has been held that the statutory term debenture applied when there were several lenders but only one security given for the benefit of all; 36 Ch. D. 215; it may consist of one document, not necessarily of a series of documents; *id.;* and a single security to a single lender, not purporting in terms to be a debenture, was one in law; 37 Ch. D. 260. A security to a lender on some part of a company's property is not one, while an issue secured upon its entire stock in trade and undertaking is, and between these two is to be sought the line of demarcation; Buckley, Companies Acts 172.

The remedy upon a default was formerly by an action to realize the security commenced by one holder on behalf of all and the appointment of a receiver and manager to carry on the business; this was followed by a winding up petition, but more recently the proceeding has been for a decree of foreclosure; [1897] 1 Ch. 11. A power of sale may be, and usually is, included in the trust deed; 13 L. Q. Rev. 424.

Debenture holders with a floating charge were held to be superior to execution creditors; [1891] 1 Ch. 627, C. A. 3 *id.* 260.

As to *spent* debentures, see BONDS. See COVERING DEED. See PROMISSORY NOTES as to *sealed* debentures.

See Simonson, Debentures.

DEBENTURE BONDS. See DEBENTURES.

DEBENTURE STOCK. An issue of stock usually irredeemable and transferable in any amount, not including a fraction of a pound.

The terminability and fixity in amount of debentures being inconvenient to lenders has led to their being in many cases superseded by debenture stock. Whart. Lex.

The issue of debenture stock is not borrowing at all; it is the sale, in consideration of a sum of money, of the right to receive a perpetual annuity; 9 Ch. D. 337; Buckley, Companies Acts 172; and none the less so if redeemable at the option of the company; *id.*

DEBET ET DETINET (Lat. he owes and withholds). An action of *debt* is said to be in the *debet et detinet* when it is alleged that the defendant owes and unjustly withholds or detains the debt or thing in question. The action is so brought between the contracting parties. See DETINET.

DEBET ET SOLET (Lat. he owes and is used to). Where a man sues in a writ of right or to recover any right of which he is for the first time disseised, as of a suit at a mill or in case of a writ of *quod permittat*, he brings his writ in the *debet et solet*. Reg. Orig. 144 *a;* Fitzh. N. B. 122, M.

DEBET SINE BREVE (Lat. He owes without declaration filed). Used in relation to a confession of judgment.

DEBIT. A term used in book-keeping, to express the left hand page of the ledger, or of an account to which are carried all the articles supplied or amounts paid on the subject of an account, or that are charged to that account.

The balance of an account where it is shows that something remains due to the party keeping the account.

An amount which is set down as a debt or owing.

DEBITA LAICORUM (Lat.). Debts of the laity. Those which may be recovered in civil courts.

DEBITUM IN PRÆSENTI SOLVENDUM IN FUTURO (Lat.). An obligation of which the binding force is complete and perfect, but of which the performance cannot be required till some future period.

DEBT (Lat. *debere*, to owe; *debitum*, something owed). **In Contracts.** A sum of money due by certain and express agreement. 3 Bla. Com. 154. See Fisher v. Consequa, 2 Wash. C. C. 386, Fed. Cas. No. 4,816.

All that is due a man under any form of obligation or promise. Gray v. Bennett, 3 Metc. (Mass.) 522. See Appeal of City of Erie, 91 Pa. 402.

Active debt. One due to a person. Used in the civil law.

Ancestral debt. One of an ancestor which the law compels the heir to pay. Watkins v. Holman, 16 Pet. (U. S.) 25, 10 L. Ed. 873; A. & E. Encyc.

Doubtful debt. One of which the payment is uncertain. *Clef des Lois Romaines.*

Fraudulent debt. A debt created by fraud implies confidence and deception. It implies that it arose out of a contract, express or implied, and that fraudulent practices were employed by the debtor, by which the creditor was defrauded. Howland v. Carson, 28 Ohio St. 628.

Hypothecary debt. One which is a lien upon an estate.

Judgment debt. One which is evidenced by matter of record.

Liquid debt. One which is immediately and unconditionally due.

Passive debt. One which a person owes.

Privileged debt. One which is to be paid before others in case a debtor is insolvent.

The privilege may result from the *character* of the *creditor*, as where a debt is due to the United States; or the *nature* of the *debt*, as funeral expenses, etc. See PREFERENCE; PRIVILEGE; LIEN; PRIORITY; DISTRIBUTION.

Specialty. A debt by specialty or special contract is one whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal; 2 Bla. Com. 465; Probate Court for Dist. of Orleans v. Child, 51 Vt. 86.

A debt may be evidenced by matter of record, by a contract under seal, or by a simple contract. The distinguishing and necessary feature is that a fixed and specific amount is owing and no future valuation is required to settle it; 3 Bla. Com. 154; Matter of Denny, 2 Hill (N. Y.) 220.

See ACCORD AND SATISFACTION; BANKRUPTCY; COMPENSATION; CONFUSION; DEFEASANCE; DELEGATION; DISCHARGE OF A CONTRACT; EXTINCTION; EXTINGUISHMENT; FORMER RECOVERY; LAPSE OF TIME; NOVATION; PAYMENT; RELEASE; RESCISSION; SET-OFF.

In Practice. A form of action which lies to recover a sum certain. 2 Greenl. Ev. 279; Andr. Steph. Pl. 77, n.

It lies wherever the sum due is certain or ascertained in such a manner as to be readily reduced to a certainty, without regard to the manner in which the obligation was incurred or is evidenced; Crockett v. Moore, 3 Sneed (Tenn.) 145; Lee v. Gardiner, 26 Miss. 521; Home v. Semple, 3 McLean, 150, Fed. Cas. No. 6,658; Bullard v. Bell, 1 Mas. 243, Fed. Cas. No. 2,121; U. S. v. Claflin, 97 U. S. 546, 24 L. Ed. 1082; Baum v. Tonkin, 110 Pa. 569, 1 Atl. 535.

It is thus distinguished from *assumpsit*, which lies as well where the sum due is uncertain as where it is certain, and from *covenant*, which lies only upon contracts evidenced in a certain manner.

It is said to lie in the *debet* and *detinet* (when it is stated that the defendant owes and detains) or in the *detinet* (when it is stated merely that he detains). Debt in the *detinet* for goods differs from detinue, because it is not essential in this action, as in detinue, that the specific property in the goods should have been vested in the plaintiff at the time the action is brought. Dy. 24 *b*.

It is used for the recovery of a debt *eo nomine* and *in numero;* though damages, which are in most instances merely nominal, are usually awarded for the detention; 1 H. Bla. 550; Cowp. 588.

The action lies in the debet and detinet to recover money due, on a *record* or a *judgment* of a court of record; Salk. 109; Eby v. Burkholder, 17 S. & R. (Pa.) 9; Allen v. Lyman, 27 Vt. 20; Austin v. Townes, 10 Tex. 24; although a foreign court; Moore v. Adie's Adm'r, 18 Ohio 430; McIntire v. Caruth, 3 Brev. (S. C.) 395; Jordan v. Robinson, 15 Me. 167; Cole v. Driskell, 1 Blackf. (Ind.) 16; Williams v. Preston, 3 J. J. Mar. (Ky.) 600, 20 Am. Dec. 179; McKim v. Odom, 12 Me. 94; on *statutes* at the suit of the party aggrieved; Vaughan v. Thompson, 15 Ill. 39; Morrison v. Bedell, 22 N. H. 234; Garman v. Gamble, 10 Watts (Pa.) 382; Israel v. President, etc., of Town of Jacksonville, 1 Scam. (Ill.) 290; Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; Reed v. Davis, 8 Pick. (Mass.) 514; Chaffee v. U. S., 18 Wall. (U. S.) 516, 21 L. Ed. 908; or a common informer; Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177; Sims v. Alderson, 8 Leigh (Va.) 479; including awards by a statutory commission; Knowles v. Inhabitants of Eastham, 11 Cush. (Mass.) 429; on *specialties;* 1 Term 40; Little v. Mercer, 9 Mo. 218; Salter v. Richardson, 37 B. Monr. (Ky.) 204; Allen v. R. Co., 32 N. H. 446; Nash v. Nash, 16 Ill. 79; including a recognizance; Dowlin v. Standifer, 1 Hempst. 290, Fed. Cas. No. 4,041 a; Bentley v. Lyman, 21 Conn. 81; State v. Folsom, 26 Me. 209; see Pate v. People, 15 Ill. 221; Gale v. Boyle, 6 Cush. (Mass.) 138; Nesbitt v. Ware, 30 Ala. 68; on a promissory note; Bentley v. Dickson, 1 Ark. 165; Loose v. Loose, 36 Pa. 538; on a bill of exchange; Hollingsworth v. Milton, 8 Leigh (Va.) 50; on *simple contracts*, whether express; Lee v. Gardiner, 26 Miss. 521; Barclay v. Moore, 17 Ala. 634; Gift v. Hall, 1 Humphr. (Tenn.) 480; although the contract might have been discharged on or before the day of payment in articles of merchandise; Young v. Hawkins, 4 Yerg. (Tenn.) 171; or implied; Bull. N. P. 167; Van Deusen v. Blum, 18 Pick. (Mass.) 229, 29 Am. Dec. 582; Thompson v. French, 10 Yerg. (Tenn.) 452; Houghton v. Stowell, 28 Me. 215; Dillingham v. Skein, 1 Hempst. 181, Fed. Cas. No. 3,912 a; Gray v. Johnson, 14 N. H. 414; to recover a specific reward offered; Disborough v. Outcalt, 1 N. J. Eq. 310. An action of debt is the proper remedy of a landlord against his tenant in possession to recover a statutory penalty for willfully cutting trees without the owner's consent; Rogers v. Brooks, 99 Ala. 31, 11 South. 753; and also in favor of the beneficiaries in a certificate of membership in a mutual benefit association; Abe Lincoln Mut. Life & Accident Society v. Miller, 23 Ill. App. 341; but it does not lie on a decree of foreclosure, which orders the money secured by the mortgage to be paid, or in default thereof the mortgaged premises to be sold and the proceeds paid into court; Burges v. Souther, 15 R. I. 202, 2 Atl. 441.

It lies in the detinet for goods; Dy. 24 *b*; Dowlin v. Standifer, 1 Hempst. 290, Fed. Cas. No. 4,041 a; Snell v. Kirby, 3 Mo. 21, 22 Am. Dec. 456; and by an executor for money due the testator; 1 Wms. Saund. 1; see Brown's Adm'r v. Brown, 10 B. Monr. (Ky.) 247; or against him on the testator's contracts; Childress v. Emory, 8 Wheat. (U. S.) 642, 5 L. Ed. 705.

The *declaration*, when the action is founded on a *record*, need not aver consideration. When it is founded on a *specialty*, it must contain the specialty; Huber v. Burke, 11 S. & R. (Pa.) 238; but need not aver consideration; Nash v. Nash, 16 Ill. 79; Barrett v. Carden, 65 Vt. 431, 26 Atl. 530, 36 Am. St. Rep. 876; but when the action is for rent, the deed need not be declared on; Gray v. Johnson, 14 N. H. 414. When it is founded on a simple contract, the consideration must be averred; and a liability or agreement, though not necessarily an express promise to pay, must be stated; 2 Term 28, 30.

The *plea* of *nil debet* is the general issue when the action is on a simple contract, on statutes, or where a specialty is matter of inducement merely; Stilson v. Tobey, 2 Mass. 521; Minton v. Woodworth, 11 Johns. (N. Y.) 474; King v. Ramsay, 13 Ill. 619;

McConnell v. Bank, 6 Ark. 250; Dyer v. Cleaveland, 18 Vt. 241; U. S. v. Cumpton, 3 McLean 163, Fed. Cas. No. 14,902; Hyatt v. Robinson, 15 Ohio 372; Trustees of Dartmouth College v. Clough, 8 N. H. 22; Clark v. Mann, 33 Me. 268; Stipp v. Cole, 1 Ind. 146; Matthews v. Redwine, 23 Miss. 233. *Non est factum* is the common plea when on specialty, denying the execution of the instrument; 2 Ld. Raym. 1500; Chambers v. Games, 2 G. Greene (Ia.) 320; Brooks v. Bobo, 4 Strobh. (S. C.) 38; People v. Rowland, 5 Barb. (N. Y.) 449; Brobst v. Welker, 8 Pa. 467; Utter v. Vance, 7 Blackf. (Ind.) 514; Boynton v. Reynolds, 3 Mo. 79; and *nul tiel record* when on a record, denying the existence of the record; Mervin v. Kumbel, 23 Wend. (N. Y.) 293; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356. As to the rule when the judgment is one of another state, see Clark v. Mann, 33 Me. 268; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246; Lanning v. Shute, 5 N. J. L. 778; Clarke's Adm'r v. Day, 2 Leigh (Va.) 172; as well as the titles FOREIGN JUDGMENT, CONFLICT OF LAWS.

As to the situs of a debt in attachment and garnishment proceedings, see LEX REI SITÆ.

Other matters must, in general, be pleaded specially; Hays v. Muir, 1 Ind. 174.

The *judgment* is, generally, that the plaintiff receive his debt and costs when for the plaintiff, and that the defendant receive his costs when for the defendant; Chapman v. Wright, 20 Ill. 120; Rutter v. State, 1 Ia. 99; Downs v. Ladd, 4 How. (Miss.) 40. It is reversible error to render judgment not only for the debt sued on, but for damages, as in assumpsit and for interest on the judgment; Reece v. Knott, 3 Utah 451, 24 Pac. 757. See JUDGMENT.

DEBTEE. One to whom a debt is due; a creditor: as, debtee executor. 3 Bla. Com. 18.

DEBTOR. One who owes a debt; he who may be constrained to pay what he owes.

DEBTOR'S ACT, 1869. The statute 32 & 33 Vict. c. 62, abolishing imprisonment for debt in England, and for the punishment of fraudulent debtors. 2 Steph. Com. 159–164. (Not to be confounded with the Bankruptcy Act of 1869.) Mozl. & W. Dict.

DEBTOR'S SUMMONS. In English Law. A summons issuing from a court having jurisdiction in bankruptcy, upon the creditor proving a liquidated debt of not less than £50, which he has failed to collect after reasonable effort, stating that if the debtor fail, within one week if a trader, and within three weeks if a non-trader, to pay or compound for the sum specified, a petition may be presented against him, praying that he may be adjudged a bankrupt. Bkcy. Act, 1869, s. 7; Robson, Bkcy.; Mozl. & W. Dict.

DECALOGUE. The ten commandments.

DECANATUS, DECANIA, DECANA (Lat.). A town or tithing, consisting originally of ten families of freeholders. Ten tithings compose a hundred. 1 Bla. Com. 114; Medley, Orig. Illus. Eng. Const. Hist.

Decanatus, a deanery, a company of ten. Spelman, Gloss.; Calvinus, Lex.

Decania, Decana, the territory under the charge of a dean.

DECANUS (Lat.). A dean; an officer having charge of ten persons. In Constantinople, an officer who has charge of the burial of the dead. Nov. Jus. 43, 59; Du Cange. The term is of extensive use, being found with closely related meanings in the old Roman, the civil, ecclesiastical, and old European law. It is used of civil and ecclesiastical as well as military affairs. There were a variety of *decani*.

Decanus monasticus, the dean of a monastery.

Decanus in majori ecclesia, dean of a cathedral church.

Decanus militaris, a military captain of ten soldiers.

Decanus episcopi, a dean presiding over ten parishes.

Decanus friborgi, dean of a fribourg, tithing, or association of ten inhabitants. A Saxon officer, whose duties were those of an inferior judicial officer. Du Cange; Spelman, Gloss.; Calvinus, Lex.

DECAPITATION (Lat. *de*, from, *caput*, a head). The act of beheading. In some countries a method of capital punishment. See CAPITAL PUNISHMENT.

DECEDENT. A deceased person.

The signification of the word has become more extended than its strict etymological meaning. Strictly taken, it denotes a dying person, but is always used in the more extended sense given, denoting any deceased person, testate or intestate.

See EXECUTORS AND ADMINISTRATORS.

DECEIT. A fraudulent misrepresentation or contrivance, by which one man deceives another, who has no means of detecting the fraud, to the injury and damage of the latter. It need not be made in words, if the impression be made on the mind of the other party, upon which he acts, without the exact expression in words of the understanding sought to be created; 17 C. B. N. S. 482; Mizner v. Kussell, 29 Mich. 229. Suspicion by the maker that his statements are false is the legal equivalent of knowledge of their falsity and fraudulency; Shackett v. Bickford, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933.

Fraud, or the intention to deceive, is the very essence of this injury; Stewart v. Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32

L. Ed. 439; for if the party misrepresenting was himself mistaken, no blame can attach to him; Poll. Torts 353; Farmers' Stock-Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. 978; Wachsmuth v. Wachsmuth, 45 Ill. App. 244. The representation must be made *malo animo;* but whether or not the party is himself to gain by it is wholly immaterial.

It may be by the deliberate assertion of a falsehood to the injury of another, by failure to disclose a latent defect, or by concealing an apparent defect; but, as a rule, mere silence on the part of one party to a transaction as to facts which are important to the other is not deceit, if he is under no obligation to disclose them; Big. Torts 12; L. R. 6 H. L. 377.

Where the seller asked the buyer whether there was any news (of the treaty of Peace in 1815) that would enhance the price of tobacco and the buyer remained silent, it should have gone to the jury to say whether any imposition was practised, the court saying that while the buyer need not, as matter of law, communicate special information known only to him, he must take care not to impose on the seller; Laidlaw v. Organ, 2 Wheat. 178, 4 L. Ed. 214. In U. S. v. Bell Telephone Co., 128 U. S. 323, 9 Sup. Ct. 90, 32 L. Ed. 450, it was held that if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact which he is in good faith bound to disclose, that is evidence of or equivalent to a false representation. General assertions, by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although, such assertions turn out to be untrue, are not misrepresentations amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action of deceit may be based, but rather as expressions of opinions or beliefs; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; or as prophecies as to financial prosperity; Kimber v. Young, 137 Fed. 744, 70 C. C. A. 178; Deming v. Darling, 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743.

The party deceived must have been in a situation such as to have no means of detecting the deceit. But see Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798.

A person cannot sustain an action for deceit where no harm comes to him; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Roonie v. Jennings, 2 Misc. 257, 21 N. Y. Supp. 938, nor can he where he does not rely on the misrepresentations; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085.

In order to constitute deceit it is necessary either that the false representations should be known by the person making them to be untrue, or that he should have no reason to believe them true. Mere ignorance of their falsity is no excuse; Burge v. Stroberg, 42 Ga. 88; see Carondelet Iron Works v. Moore, 78 Ill. 65; Hess v. Young, 59 Ind. 379; Cooper v. Lovering, 106 Mass. 77; Beebe v. Knapp, 28 Mich. 53; Newell v. Horn, 45 N. H. 422; Long v. Warren, 68 N. Y. 426. Deceit may be committed not only with the careful intention of one who knows what he asserts to be true or false, but also with the reckless intention of one who does not know what he represents to be true or false, but who, for one reason or another, is willing that his reckless representations should be believed; Stimson v. Helps, 9 Colo. 33, 10 Pac. 290; Smith v. Richards, 13 Pet. (U. S.) 26, 10 L. Ed. 42; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360.

The mere expression of opinion is not deceit, though untrue and made in most positive language; 3 T. R. 51; 2 East 92; Credle v. Swindell, 63 N. C. 305; Hazard v. Irwin, 18 Pick. (Mass.) 95; but the expression of opinion as knowledge may render one liable for fraud; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313; or where the means of forming a correct opinion are within the reach of one party only; Hedin v. Medical & Surgical Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628; and the rule has been avoided by the court's finding in a statement of opinion some implied representation of fact; Spead v. Tomlinson, 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432. Thus a cattle-dealer who expresses an apparent opinion as to the weight of cattle he desires to sell, knowing it to be untrue, is guilty of deceit; Birdsey v. Butterfield, 34 Wis. 62.

Though false representations as to the value of land are not alone sufficient to sustain an action for damages, yet if made in connection with others as to the net revenues derived, they are sufficient to support such an action; Henderson v. Henshall, 54 Fed. 320, 4 C. C. A. 357; and an action for false representation as to title, in a sale of lands, may be maintained though the deed contains no covenants; Barnes v. Ry. Co., 54 Fed. 87, 4 C. C. A. 199.

An action for deceit can only be based upon the misrepresentation of matters of fact, not of matters of law; unless the party who made the misrepresentation did it with knowledge both of the law and of the other's ignorance of it; Townsend v. Cowles, 31 Ala. 434; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Burt v. Bowles, 69 Ind. 1; L. R. 4 Ch. D. 702; Moreland v. Atchison, 19 Tex. 303; Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203.

If the party complaining of misrepresentations had the same sources of information as the one who made them, he must avail himself of his means of knowledge, or he cannot recover; Slaughter v. Gerson, 13 Wall. (U. S.) 379, 20 L. Ed. 627; Brown v. Leach, 107 Mass. 364; Pigott v. Graham, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Warner v.

Benjamin, 89 Wis. 290, 62 N. W. 179. A clause in a contract providing that the plaintiff should verify defendant's plans does not as a matter of law bar the plaintiff's recovery; but whether or not the plaintiff acted in reliance on the defendant's plans is a question for the jury; [1907] A. C. 351.

But a contracting party may rely upon *express* statements of fact, the truth of which is known or presumed to have been known to the other party, even where the means of information are open to him; Big. Torts 26; especially when the representation has a natural tendency to prevent investigation or is made the basis of the contract; *id.;* where one contracting party has a mental or physical infirmity, or where the parties do not stand upon an equal footing, the duty of investigating the truth of statements may be less; *id.* 28.

The plaintiff must also have acted upon the representation, and sustained injury by so doing; 4 H. & N. 225; Wells v. Waterhouse, 22 Me. 131; Lindsey v. Lindsey, 34 Miss. 432; Phipps v. Buckman, 30 Pa. 401; Enfield v. Colburn, 63 N. H. 218; and they must have been made to him; Iasigi v. Brown, 17 How. (U. S.) 183, 15 L. Ed. 208; Lindsey v. Lindsey, 34 Miss. 432; Hunnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733. One who purchases stock in the market, upon the faith of a prospectus received from persons not connected with the corporation, cannot enforce a liability against the directors for false representations therein; L. R. 6 H. L. 377; but where a prospectus is put out by a company to sell its stock, any one of the public may act on it; Big. Torts 33.

The false representations upon which deceit is predicated must also, in order to support the action, be material and relevant, and be the determining factor of the transactions; L. R. 2 Ch. 611; 5 De G., M. & G. 126; Bond v. Ramsey, 89 Ill. 29; Noel v. Horton, 50 Ia. 687; Teague v. Irwin, 127 Mass. 217; Miller v. Barber, 66 N. Y. 558. It must appear that the fraud was an inducing cause of the contract; 9 App. Cas. 190.

Where the effect of the misrepresentations was to bring the parties into relations with each other, express evidence of an intent to defraud is unnecessary; but where by false representations one suffers damage in a transaction with a third person, there must be express evidence that the party making the representation intended it to be acted on, or that the plaintiff was justified in assuming that he so intended; Big. Torts 31. It is sufficient if the representation was made with the direct intent that it should be communicated to the plaintiff, or to a class of which he was one; L. R. 6 H. L. 377.

In order to sustain an action for deceit there must be proof of fraud and nothing short of that will suffice. *Secondly.* Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false; Lord Herschell, in Derry v. Peek, 14 App. Cas. 337. Although treating the second and third as distinct cases, he says: "I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief of the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. *Thirdly.* If fraud be proved, the motive of the guilty person is immaterial. It matters not that there was no intention to cheat or to injure the person to whom the statement was made." In that case (Derry v. Peek) a special act incorporating a tramway company provided that carriages might be moved by animal power and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special act the company had a right to use steam power, which statement was made in the honest belief that it was true, and the Board of Trade having refused their consent to the use of steam power, persons who had taken shares on the faith of the statement brought an action of deceit against the directors; the House of Lords, reversing the Court of Appeal, held that the defendants were not liable.

In an action of deceit the plaintiff must prove that the untrue statement of the defendant was made with a fraudulent intent; [1912] A. C. 186. It is not sufficient that there is blundering carelessness, however gross, unless there is willful recklessness; [1891] 2 Ch. 449. Recklessly making a statement, intending it to be acted upon, not caring whether it is true or false, may be said to show that a man has a wicked mind and is acting fraudulently; [1893] 1 Q. B. 491, Lord Esher, M. R. His mind is wicked not because he is negligent, but because he is dishonest in not caring about the truth of his statement; *id.*, per Bowen, L. J.; Shackett v. Bickford, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; the grounds of belief and the means of knowledge in possession of the person making the statement are to be considered in determining the honesty of the belief; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 C. C. A. 108.

Derry v. Peek was followed in Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651, where it was held that where an act is attributable to an honest belief, a fraudulent intent is lacking and a charge of deceit fails. In Watson v. Jones, 41 Fla. 241, 25 South. 878, the leading English case was not followed;

it was there held that the defendant's situation or means of knowledge made it his duty to know; to the same effect, Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. Rep. 592; Munroe v. Pritchett, 16 Ala. 785, 50 Am. Dec. 203; Jordan v. Pickett, 78 Ala. 331; Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629.

There may be a duty to use care in the accuracy of representations where the plaintiffs are reasonable in relying upon them and the defendants knew that they would do so and would be damaged if such representations were false; Harriott v. Plimpton, 166 Mass. 585, 44 N. E. 992; Edwards v. Lamb, 69 N. H. 599, 45 Atl. 480, 50 L. R. A. 160; L. R. 5 Exch. 1.

As society becomes more complex and the consequences of negligence more far reaching, the obligation of using care becomes stricter in morals, and will have to become stricter in law, notwithstanding Derry v. Peek; 7 L. Q. R. 107. See 14 Harv. L. R. 184, as to liability for the negligent use of language.

In Nash v. Trust Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489, it was held that a defendant who had written a letter reasonably to be understood as warranting a title, might show that the letter was intended to convey another meaning. Field, C. J., and Holmes, J., dissented, arguing, as does Sir Frederic Pollock in 5 L. Q. R. 410, that a man should be bound by a reasonable interpretation of his words when he knows others will act upon them. See 9 Harv. L. Rev. 214.

One who makes a representation positively, without knowing whether it is false or true, is liable for deceit; L. R. 7 H. L. 102; Stone v. Covell, 29 Mich. 359.

To tell half the truth and to conceal the other half, amounts to a false statement, and differs in no respect from the case of false representations; Mitchell v. McDougall, 62 Ill. 501; Stewart v. Ranche Co., 128 U. S. 383, 388, 9 Sup. Ct. 101, 32 L. Ed. 439; Williams v. Spurr, 24 Mich. 335; L. R. 6 H. L. 403; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625.

An action of tort for deceit in the sale of property does not lie for false and fraudulent representations concerning profits that may be made from it in the future; Pedrick v. Porter, 5 Allen (Mass.) 324.

While an honest belief in the truth of representations is a defence to an action for deceit at common law, it is no defence to a bill in equity to set aside the transaction; 7 Beav. 149; Seeley v. Reed, 25 Fed. 361; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560. It is also a ground for objecting to the enforcement of the contract, and even for a rescission of the contract upon the ground of mistake; Big. Torts 23.

Private corporations are held liable for the wrongful acts and neglect of their agents or servants, done in the course of their employment; Lamm v. Homestead Ass'n, 49 Md. 241, 33 Am. Rep. 246. In England the rule is that if the person has been induced to purchase shares of a corporation by misrepresentations of its directors and suffers damage thereby, he must bring an action of deceit against such directors individually; while in the U. S. it seems to be the rule that a corporation may be sued in such cases; Fogg v. Griffin, 2 Allen (Mass.) 1; Peebles v. Guano Co., 77 N. C. 233, 24 Am. Rep. 447; Zabriskie v. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488; Planters' Rice-Mill Co. v. Olmstead, 78 Ga. 586, 3 S. E. 647; Moran v. Miami County, 2 Black (U. S.) 722, 17 L. Ed. 342; Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581. "If the director of a company puts shares forth into the world, and deliberately adopts a scheme of falsehood and fraud, the effect of which is that parties buy the shares in consequence of the falsehood," the action for deceit lies; Pollock, C. B., in 4 H. & N. 538; 2 Q. B. D. 48. See also 2 M. & W. 519; 3 B. & Ad. 114.

The general principles on which the right of action for deceit is based are thus stated in Webb's Poll. Torts 355:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"It is untrue in fact.

"The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

"There is no cause of action without both fraud and actual damage, or the damage is the gist of the action.

"And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

"The statement must be in writing and signed in one class of cases, namely, where it amounts to a guaranty; but this requirement is statutory, and as it did not apply to the court of chancery, does not seem to apply to the high court of justice in its equitable jurisdiction."

The remedy for a deceit, unless the right of action has been suspended or discharged, is by an action of trespass on the case. The old writ of deceit was brought for acknowledging a fine, or the like, in another name, and, this being a perversion of law to an

evil purpose and a high contempt, the act was laid *contra pacem*, and a fine imposed upon the offender. See Brooke, Abr. *Disceit;* Viner, Abr. *Disceit.*

When two or more persons unite in a deceit upon another, they may be indicted for a conspiracy. See, generally, 1 Rolle, Abr. 106; Com. Dig.; 1 Viner, Abr. 560; 8 *id.* 490; Bigelow, Torts 9; Cooley, Torts 554.

It has been held that an action will not lie for fraudulent misrepresentations of a vendor of real estate as to the price he paid therefor; Mooney v. Miller, 102 Mass. 217; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755; Wilkinson v. Clauson, 29 Minn. 91, 12 N. W. 147; Hartman v. Flaherty, 80 Ind. 472; nor ordinarily for false statements as to value of stock; Ellis v. Andrews, 56 N. Y. 83, 11 Am. Rep. 379; Boulden v. Stillwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258, nor for a false certificate of classification of a sailing yacht; 60 L. J. Q. B. 526; nor a representation that a stallion would not produce sorrel colts; Scroggin v. Wood, 87 Ia. 497, 54 N. W. 437; nor generally for a broken promise; Fenwick v. Grimes, 5 Cra. C. C. 603, Fed. Cas. No. 4734; Dickinson v. Atkins, 100 Ill. App. 401; Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640; Curdy v. Berton, 79 Cal. 425, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157. In Harrington v. Rutherford, 38 Fla. 321, 21 South. 283, the rule was followed, though the promise was broken without excuse. A fraudulent representation, to vitiate a contract induced by it, is a representation of a past or existing fact, but a promise is not a representation, and, when not a part of the contract, will not affect it; Estes v. Shoe Co., 155 Mo. 577, 56 S. W. 316; and there is a distinction between a representation of an existing fact which is untrue, and a promise to do or not to do something in the future. In order to avoid a contract, the former must be relied upon; Sleeper v. Wood, 60 Fed. 888, 9 C. C. A. 289; McConnell v. Pierce, 116 Ill. App. 103; Love v. Teter, 24 W. Va. 741. If deceit, in order to be actionable, must relate to existing or past facts, it is evident that a promise made in the course of negotiations, if never performed, is not of itself either fraud or the evidence of fraud; Hubbard v. Long, 105 Mich. 442, 63 N. W. 644. Many cases hold that a promise made without intent to perform, and with the secret intent not to perform, is fraudulent, and that an action of deceit will lie; Traber v. Hicks, 131 Mo. 180, 32 S. W. 1145; Dowd v. Tucker, 41 Conn. 197; Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640. A promise to do an act in the future certainly carries with it a representation of present intention to perform; see 9 Harv. L. Rev. 424; and that "a representation of present intention is a statement of fact has rarely been disputed since Bowen, L. J., declared in L. R. 29 Ch. Div. 459, that 'the state of a man's mind is as much a fact as the state of his digestion.' If, then, this misrepresentation of a present fact is accompanied by the other elements of deceit, it seems clear, on principle, that the action should be allowed;" see 9 Harv. L. Rev. 424; Bigelow, Fraud 484.

It is, too, generally held that a preconceived design in a buyer not to pay for the goods is such fraud as will vitiate the sale; Stewart v. Emerson, 52 N. H. 301. The real fraud is the express or implied false representation of an intention to pay; Ayres v. French, 41 Conn. 142; Chicago, T. & M. C. Ry. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Goodwin v. Horne, 60 N. H. 485; Wilson v. Eggleston, 27 Mich. 257; Gross v. McKee, 53 Miss. 536.

It has been held that an action for deceit would lie for breach of promise of marriage; Pollock v. Sullivan, 53 Vt. 507, 38 Am. Rep. 702, where the defendant was married at the time. An action for deceit will lie against one who fraudulently induces a woman to enter into a void marriage relation with him, by assurances that an existing marriage with another is void: Sears v. Wegner, 150 Mich. 388, 114 N. W. 224, 14 L. R. A. (N. S.) 819.

"Treating a promise to perform some act in the future as a statement of intention, and treating intention as an existing fact, it follows that if at the time the promise was made there was an intention to perform, subsequent non-performance would constitute fraud; while, on the other hand, if at the time the promise was made no such intention existed there would be a false representation of a material fact;" see 57 Am. L. Reg. 325.

False representations concerning the financial responsibility of another, made for the purpose of procuring him credit, negligently and carelessly, without investigation, when investigation would disclose their falsity, are held to imply a fraudulent intent and are actionable; Nevada Bank of San Francisco v. Bank, 59 Fed. 338; but not when made by a friendly adviser acting without compensation; Knight v. Rawlings, 205 Mo. 412, 104 S. W. 38, 13 L. R. A. (N. S.) 212, 12 Ann. Cas. 325.

In an action of deceit in inducing plaintiff by false representations to take an assignment of a lease executed by one who has no title to the land, no offer of restitution need be made; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750. But one who seeks to rescind a contract of sale because of fraud, but retains the property so sold, cannot maintain an action for deceit; Roome v. Jennings, 2 Misc. 257, 21 N. Y. Supp. 938; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419; Schagun v. Mfg. Co., 162 Fed. 209, 89 C. C. A. 189; St. John v. Hendrickson, 81 Ind. 350.

As to a principal's liability for an agent's deceit, where there has been no authorization, express or implied, there are numerous conflicting decisions. In 19 Harv. L. Rev. 391, it is said the question commonly arises in litigation for damages caused by the over-issue of stock certificates, or by the fraudulent issue of bills of lading. In these cases there is no apparent authority given by the principal to do the acts complained of. Yet some cases have allowed a recovery on the ground that the agent had apparent authority by his own representations, so that the principal is estopped to deny absence of authority. The English doctrine, followed by the supreme court in the case of bills of lading and approved of in the case of fraudulent issue of stock, denies liability because of the absence of any authority whatever in the agent; Robertson v. Salomon, 130 U. S. 415, 9 Sup. Ct. 559, 32 L. Ed. 995. As, however, the act complained of is not contractual in its nature, but tortious, the question of liability should depend, not upon authority conferred or apparently conferred, but solely on whether the agent is acting in the course of his employment—the ordinary rule in cases of tort. "The difficulty, then, is to determine whether the agent is in fact acting within the scope of his employment. In the case of the over-issue of stock, it would appear to be plainly the duty of the agent to give just such information as that upon which the holder of the spurious stock has relied, since one of the chief purposes for which a corporation is organized is to enable the shares to be transferred freely"; 19 Harv. L. Rev. 391. "In view of the wide-spread use of the bill of lading as a symbol of property, it seems better to regard it as analogous to a negotiable instrument, relied upon by third parties in much the same way as stock certificates;" *id.*

In Cornfoot v. Fowke, 6 M. & W. 358, it was held that where an agent unknowingly makes an untrue statement, not expressly authorized by the principal, but the true state of facts are, however, known by the principal, the principal is not liable. But it is said that if this case is not overruled by the remarks since made upon it in 2 Sm. L. Cas. 81, 86, and by Willes, J., in (1867) L. R. 2 Ex. 262, it has been cut down to a decision on a point of pleading, which perhaps cannot, and certainly will not, ever arise; Wald's Pollock on Contracts, Williston's ed. 700; and in the last edition of Leake on Contracts it is said in the preface that "the time has now arrived when Cornfoot v. Fowke may be consigned to oblivion."

See an article in 4 Mich. L. Rev. 199; BILL OF LADING.

DECEM TALES (Lat. ten such). A writ requiring the sheriff to appoint ten like men (*apponere decem tales*), to make up a full jury when a sufficient number do not appear. See TALES DE CIRCUMSTANTIBUS.

DECEMVIRI LITIBUS JUDICANDIS. In Roman Law. Ten judges (five being senators and five knights), appointed by Augustus to act as judges in certain cases. Calvinus, Lex.; Anthon, Rom. Ant.

DECENNARIUS (Lat.). One who held one-half a virgate of land. Du Cange. One of the ten freeholders in a *decennary*. Du Cange; Calvinus, Lex.

Decennier. One of the *decennarii*, or ten freeholders making up a tithing. Spelman, Gloss.; Du Cange, *Decenna;* 1 Bla. Com. 114. See DECANUS.

DECENNARY (Lat. *decem*, ten). A district originally containing ten men with their families.

King Alfred, for the better preservation of the peace, divided England into counties, the counties into hundreds, and the hundreds into tithings or decennaries: the inhabitants whereof, living together, were sureties or pledges for each other's good behavior. One of the principal men of the latter number presided over the rest, and was called the chief pledge, borsholder, borrow's elder, or tithingman.

DECEPTIONE. A writ that lieth properly against him that deceitfully doth anything in the name of another, for one that receiveth damage or hurt thereby. It is either original or judicial. Fitzh. N. B.

DECIES TANTUM (Lat.). An obsolete writ, which formerly lay against a juror who had taken money for giving his verdict. Called so, because it was sued out to recover from him ten times as much as he took.

DECIMÆ (Lat.). The tenth part of the annual profit of each living, payable formerly to the pope. There were several valuations made of these livings at different times. The *decimæ* (tenths) were appropriated to the crown, and a new valuation established, by 26 Hen. VIII, c. 3; 1 Bla. Com. 284.

DECIMATION. The punishment of every tenth soldier by lot.

DECINERS. Those that had the oversight and check of ten friburgs for the maintenance of the king's peace. Cunningham.

DECISION. A judgment given by a competent tribunal. The French lawyers call the opinions which they give on questions propounded to them, decisions. See Inst. 1. 2. 8; Dig. 1. 2. 2; Hanna v. Com'rs of Putnam County, 29 Ind. 170; Estey v. Sheckler, 36 Wis. 434; also JUDGMENT.

This word is variously defined. It is said that the decision of a court is its judgment; Adams v. R. Co., 77 Miss. 194, 24 South. 200, 317, 28 South. 956, 60 L. R. A. 33; its opinion is the reason given therefor or the views of the judge in relation to a certain subject; In re Estate of Winslow, 12 Misc. 254, 34 N. Y. Supp. 637. The two words are sometimes used interchangeably; Pierce v. State, 109

Ind. 535, 10 N. E. 302; Estey v. Sheckler, 36 Wis. 434; Board of Education of City of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466. The judgment is recorded upon its rendition, and can be changed only through an application to the court. The decision is the property of the judges, subject to modification until transcribed in the records; Houston v. Williams, 13 Cal. 27, 73 Am. Dec. 565; Coffey v. Gamble, 117 Ia. 545, 91 N. W. 813. The term decision is held to be a popular and not a technical word and to mean little more than a concluded opinion. It does not by itself amount to judgment or order as used in section 29 of the Local Government Act of 1888. It is an exercise of a consultative jurisdiction and is not appealable; [1891] 1 Q. B. 725.

The word decision includes: Dismissal of an action for insufficiency of evidence; Volmer v. Stagerman, 25 Minn. 234; dismissal of appeal; Estey v. Sheckler, 36 Wis. 434; the findings of the court upon which a decree or judgment may be entered; Matter of Winslow, 12 Misc. 254, 34 N. Y. Supp. 637; an order of a probate court classifying a demand against the estate; Wolfley v. McPherson, 61 Kan. 492, 59 Pac. 1054; a subsequent order vacating it and relegating the demand to a different class; *id.*

It is, among other things, an order determining the judgment to be entered; Garr, Scott & Co. v. Spaulding, 2 N. D. 414, 51 N. W. 867. It has a broader significance than judgment; Wolfley v. McPherson, 61 Kan. 492, 59 Pac. 1504. A "decision upon the merits" is one upon the justice of the case and not upon technical grounds merely; Mulhern v. R. Co., 2 Wyo. 465. "Surely a non-suit is not a decision;" *id.* A ruling upon the admission of evidence is not included in the words "decision or intermediate order"; State v. O'Brien, 18 Mont. 1, 43 Pac. 1091, 44 Pac. 399; the word is sometimes treated as synonymous with judgment; Estey v. Sheckler, 36 Wis. 434; Board of Education of City of Emporia v. State, 7 Kan. App. 620, 52 Pac. 466; Pierce v. State, 109 Ind. 535, 10 N. E. 302; it has been said that "in an abstract sense there is a shade of difference between the import of the word 'decision' and the word 'judgment'"; the former "is the resolution of the principles which determine the controversy; the judgment is the formal paper applying them to the rights of the parties"; Buckeye Pipe Line Co. v. Fee, 62 Ohio St. 543, 555, 57 N. E. 446, 78 Am. St. Rep. 743. As used in a statute characterizing the findings of fact and conclusions of law as a "written decision" it means something which must precede the judgment and upon which it is entered as upon a verdict; Corbett v. Job, 5 Nev. 201.

The decisions of courts are not the law, but only evidences of the law, stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissension of the judges, the solidity of the reasons, and the perspicuity and precision with which the reasons are expressed; Yates v. Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; United States Savings & Loan Co. v. Harris, 113 Fed. 27; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865; Phipps v. Harding, 70 Fed. 468, 17 C. C. A. 203, 30 L. R. A. 513; Falconer v. Simmons, 51 W. Va. 172, 41 S. E. 193.

But on the other hand the term "law" is said to include the decisions of the courts; Miller v. Dunn, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67. Possibly, if not probably, the difference is one of expression rather than of substance.

DECISORY OATH. See OATH.

DECLARANT. One who makes a declaration.

DECLARATION. In Pleading. A specification, in a methodical and logical form, of the circumstances which constitute the plaintiff's cause of action. 1 Chit. Pl. 248; Co. Litt. 17 *a*, 303 *a*; Bacon, Abr. *Pleas* (B); Comyns, Dig. *Pleader*, C, 7; Lawes, Pl. 35; Steph. Pl. 36; Dixon v. Sturgeon, 6 S. & R. (Pa.) 28.

In real actions, it is most properly called the *count;* in a personal one, the declaration; Steph. Pl. 36; *Doctr. Plac.* 83; Lawes, Pl. 33. See Fitzh. N. B. 16 *a*, 60 *d*. The latter, however, is now the general term,—being that commonly used when referring to real and personal actions without distinction; 3 Bouvier, Inst. n. 2815.

In an action at law, the declaration answers to the bill in chancery, the libel *(narratio)* of the civilians, and the allegations of the ecclesiastical courts.

It may be *general* or *special:* for example, in debt on a bond, a declaration counting on the penal part only is *general;* one which sets out both the bond and the condition and assigns the breach is *special;* Gould, Pl. c. 4, § 50.

The *parts* of a declaration are the *title* of the court and term; the *venue*, see VENUE; the *commencement*, which contains a statement of the names of the parties and the character in which they appear, whether in their own right, the right of another, in a political capacity, etc., the mode in which the defendant has been brought into court, and a brief recital of the form of action to be proceeded in; 1 Saund. 318, n. 3, 111; 6 Term 130; the *statement* of the cause of action, which varies with the facts of the case and the nature of the action to be brought, and which may be made by means of one or of several counts; 3 Wils. 185; Neal v. Lewis, 2 Bay (S. C.) 206, 1 Am. Dec. 640; one count may incorporate, by reference, certain general averments which are in a previous count in the same pleading; Green v. Clifford, 94 Cal. 49, 29 Pac. 331; see COUNT; the *conclusion*, which in personal and mixed actions should be to the damage (*ad damnum*, which title see) of the plaintiff; Com-

yns, Dig. *Pleader* (C, 84); 10 Co. 116 *b*, 117 *a*; 1 M. & S. 236; unless in *scire facias* and in penal actions at the suit of a common informer, but which need not repeat the capacity of the plaintiff; Martin v. Smith, 5 Binn. (Pa.) 16, 21, 6 Am. Dec. 395; the *profert* of letters testamentary in case of a suit by an executor or administrator; Bacon, Abr. *Executor* (C); Dougl. 5, n.; Webb v. Danforth, 1 Day (Conn.) 305; and the *pledges of prosecution*, which are generally disused, and, when found, are only the fictitious persons, John Doe and Richard Roe.

The *requisites* or *qualities* of a declaration are that it must correspond with the process; and a variance in this respect was formerly the subject of a plea in abatement, see ABATEMENT; it must contain a statement of all the facts necessary in point of law to sustain the action, and no more; Co. Litt. 303 *a*; Plowd. 84, 122; Pep. Pl. 8. See Coffin v. Coffin, 2 Mass. 363; Cowp. 682; 6 East 422; Viner, Abr. *Declaration;* Barrett v. Lingle, 45 La. Ann. 935. The omission of a complaint to allege a material fact is cured where such fact is shown by the answer.

The circumstances must be stated with certainty and truth as to *parties;* Bentley v. Smith, 3 Cal. (N. Y.) 170; 1 M. & S. 304; Simonds v. Speed, 6 Rich. (S. C.) 390; Jackson v. Alexander, 8 Tex. 109; Totty's Ex'r v. Donald, 4 Munf. (Va.) 430; *time* of occurrence, and in personal actions it must, in general, state a time when every material or traversable fact happened; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Givan v. Swadley, 3 Ind. 484; Haven v. Shaw, 23 N. J. L. 309; Hyslop v. Jones, 3 McLean, 96, Fed. Cas. No. 13,953; and when a venue is necessary, time must also be mentioned; 5 Term 620; Com. Dig. *Pleader* (C. 19); Barnes v. Matteson, 5 Barb. (N. Y.) 375; though the precise time is not material; U. S. v. Vigol, 2 Dall. (U. S.) 346, 1 L. Ed. 409; Cheetham v. Lewis, 3 Johns. (N. Y.) 43; Simpson v. Talbot, 25 Ala. 469; unless it constitute a material part of the contract declared upon, or where the date, etc., of a written contract is averred; 2 Campb. 307; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; Haven v. Shaw, 23 N. J. L. 309; or in ejectment, in which the demise must be stated to have been made after the title of the lessor of the plaintiff and his right of entry accrued; 2 East 257; Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 283, 1 Am. Dec. 113; the place, see VENUE; and, generally, as to particulars of the demand, sufficient to enable the defendant to ascertain precisely the plaintiff's claim; 2 B. & P. 265; 2 Saund. 74 *b*; Posey v. Hair, 12 Ala. 567; Van Rensselaer v. Jones, 2 Barb. (N. Y.) 643; Corey v. Bath, 35 N. H. 530; Heirn v. McCaughan, 32 Miss. 17, 66 Am. Dec. 588; Fulwood v. Graham, 1 Rich (S. C.) 493.

In Evidence. A statement made by a party to a transaction, or by one having an interest in the existence of some fact in relation to the same.

Such declarations are regarded as original evidence and admissible as such—*first*, when the fact that the declaration was made is the point in question; Bartlet v. Delprat, 4 Mass. 702; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Phelps v. Foot, 1 Conn. 387; 2 B. & Ad. 845; 9 Bingh. 359; 1 Br. & B. 269; *second*, including expressions of bodily feeling, where the existence or nature of such feelings is the object of inquiry, as expressions of affection in actions for crim. con.; 1 B. & Ald. 90; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; see 2 C. & P. 22; Roosa v. Loan Co., 132 Mass. 439; representations by a sick person of the nature, symptoms, and effects of the malady under which he is laboring; 6 East 188; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; see 9 C. & P. 275; Bacon v. Inhabitants of Charlton, 7 Cush. (Mass.) 581; Wilkinson v. Moseley, 30 Ala. 562; Feagin v. Beasley, 23 Ga. 17; Wadlow v. Perryman's Adm'r, 27 Mo. 279; State v. Davidson, 30 Vt. 377, 73 Am. Dec. 312; Collins v. Waters, 54 Ill. 485; in prosecution for rape, the declarations of the woman forced; 1 Russ. Cr. 565; 2 Stark. 241; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444; *third*, in cases of pedigree, including the declarations of deceased persons nearly related to the parties in question; 2 C. & K. 701; 1 De G. & S. 40; Jewell v. Jewell, 1 How. (U. S.) 231, 11 L. Ed. 108; Jackson v. Browner, 18 Johns. (N. Y.) 37; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Waldron v. Tuttle, 4 N. H. 371; Dupoyster v. Gagani, 84 Ky. 403; 1 S. W. 652; 5 Ont. 638; 33 U. C. Q. B. 613; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Gehr v. Fisher, 143 Pa. 311, 22 Atl. 859; Harland v. Eastman, 107 Ill. 535; family records; 5 Cl. & F. 24; 7 Scott, N. R. 141; Douglass v. Sanderson, 2 Dall. (U. S.) 116, 1 L. Ed. 312; Watson v. Brewster, 1 Pa. 381; Jackson v. Cooley, 8 Johns. (N. Y.) 128; *fourth*, cases where the declaration may be considered as a part of the *res gestæ;* Tucker v. Peaslee, 36 N. H. 167; Banfield v. Parker, *id.* 353; George v. Thomas, 16 Tex. 74; 67 Am. Dec. 612; Hardee v. Langford, 6 Fla. 13; 14 Cox, Cr. Cas. 341; Clayton v. Tucker, 20 Ga. 452; Deveney v. Baxter, 157 Mass. 9, 31 N. E. 690; Mobile & B. R. Co. v. Worthington, 95 Ala. 598, 10 South. 839; Lake Shore & M. S. R. Co. v. Herrick, 49 Ohio St. 25, 29 N. E. 1052; Hermes v. R. Co., 80 Wis. 590, 50 N. W. 584, 27 Am. St. Rep. 69; Chick v. Sisson, 95 Mich. 412, 54 N. W. 895; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; State v. Martin, 124 Mo. 527, 28 S. W. 12 (in which the cases are reviewed); including those made by persons in the possession of land; 5 B. & Ad. 223; 16 M. & W. 497; Inhabitants of West Cambridge v. Inhabitants of Lexington, 2 Pick. (Mass.) 536; Weidman v.

Kohr, 4 S. & R. (Pa.) 174; Snelgrove v. Martin, 2 McCord (S. C.) 241; Crane v. Marshall, 16 Me. 27, 33 Am. Dec. 631; Perkins v. Webster, 2 N. H. 287; Doe v. Campbell, 23 N. C. 482; Abney v. Kingsland & Co., 10 Ala. 355, 44 Am. Dec. 491; Stark v. Boswell, 6 Hill (N. Y.) 405, 41 Am. Dec. 752; Hayward Rubber Co. v. Duncklee, 30 Vt. 29; Brush v. Blanchard, 19 Ill. 31; Sharp v. Maxwell, 30 Miss. 589; Cunningham v. Fuller, 35 Neb. 58, 52 N. W. 836; and entries made in the ordinary course of business by those whose duty it was to make such entries; as field-book entries by a deceased surveyor; [1905] 2 Ch. 164; reversing [1904] 2 Ch. 525. The question on which the two courts differed was whether the case was within the principle of Price v. Torrington, 1 Salk. 285, 1 Smith, Leading Cases 139, which was recognized as the leading case for the admission of such entries made by a deceased person. But it must be shown that it was the duty of the deceased person to do the particular thing and to record contemporaneously the fact of having done it; [1904] 2 Ch. 534; 2 Ont. App. 247; 8 *id.* 564. The limitation of duty thus adhered to in England and Canada, though suggested in earlier American cases; Nichols v. Goldsmith, 7 Wend. (N. Y.) 161; "did not with us survive"; 2 Wigm. Ev. § 1524.

Such entries have been admitted in this country in a great variety of cases; as a private memorandum of marriages kept by a clergyman and the baptismal registry of a church; Blackburn v. Crawford, 3 Wall. (U. S.) 175, 18 L. Ed. 186; American Life Ins. Co. & Trust Co. v. Rosenagle, 77 Pa. 507; Hunt v. Order of Chosen Friends, 64 Mich. 671, 31 N. W. 576, 8 Am. St. Rep. 855; Kennedy v. Doyle, 10 Allen (Mass.) 161; Meconce v. Mower, 37 Kan. 298, 15 Pac. 155; Weaver v. Leiman, 52 Md. 708; the minutes of a church conference; Pettyjohn's Ex'r v. Pettyjohn, 1 Houst. (Del.) 332; Rayburn v. Elrod, 43 Ala. 700; Nason v. First Church, 66 Me. 100; the diary of an attorney; Burke v. Baker, 188 N. Y. 561, 80 N. E. 1033; a log book; U. S. v. Mitchell, 3 Wash. C. C. 95, Fed. Cas. No. 15,792; *contra*, Cameron v. Rich, 5 Rich. L. (S. C.) 352, 52 Am. Dec. 747; a physician's entries in the ward book of an asylum; State v. Hinkley, 9 N. J. L. J. 118; a school register; Falls v. Gamble, 66 N. C. 455; a diploma to show that a physician had his degree; Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567.

The following have been held inadmissible as such entries: Commercial rating of a commercial agency; Richardson v. Stringfellow, 100 Ala. 416, 14 South. 283; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36; Henderson v. Miller, 36 Ill. App. 232; the book of a car inspector; Hicks v. Southern Ry., 63 S. C. 559, 41 S. E. 753; a nurse's record of what transpired at the testator's sick bed; In re Flint's Estate, 100 Cal. 391, 34 Pac. 863; a school catalogue; State v. Daniels, 44 N. H. 383; the certificate of a weigher's assistant, not himself an official; Prew v. Donahue, 118 Mass. 438. See 1 Greenl. Ev. § 115.

Originally such statements, to be admissible, must have been in writing, and the first authority for the admission of oral statements is a dictum of Lord Campbell in the Sussex Peerage Case, 11 Cl. & Fin. 113, for which the only authority cited, 3 B. & Ad. 890, was a case of written evidence, but it was followed by the admission of a statement in the nature of a report by a constable to his superior officer; 13 Cox C. C. 293. Oral statements of deceased physicians were admitted to show the disease of which the insured had died in a suit on a life insurance policy; McNair v. Ins. Co., 13 Hun (N. Y.) 144; but such statements as to the nature of her illness, when offered by respondent in a petition for dissolution of marriage in support of cross charges, were rejected as not made in the course of duty; 22 T. L. R. 52; and verbal reports of a foreman to a superintendent as to matters material to the issue were admitted; Williams v. Walton & Whann Co., 9 Houst. (Del.) 322, 32 Atl. 726. See 19 Harv. L. Rev. 301.

Declarations by a party of his intention, where that is of itself a distinct and material fact in a chain of circumstances, are admissible; Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; such declarations being acts from which intention may be inferred; Com. v. Trefethen, 157 Mass. 189, 31 N. E. 961, 24 L. R. A. 235; Buel v. State, 104 Wis. 149, 80 N. W. 78.

Declarations regarded as secondary evidence or hearsay are yet admitted in some cases: *first*, in matters of general and public interest, common reputation being admissible as to matters of public interest; 6 M. & W. 234; Noyes v. Ward, 19 Conn. 250; but reputation amongst those only connected with the place or business in question, in regard to matters of general interest merely; 1 Cr. M. & R. 929; 2 B. & Ad. 245; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475; Southwest School Dist. v. Williams, 48 Conn. 504; McCall v. U. S., 1 Dak. 320, 46 N. W. 608; and the matter must be of a *quasi* public nature; 10 B. & C. 657; Ellicott v. Pearl, 10 Pet. (U. S.) 412, 9 L. Ed. 475; Brander v. Ferriday, 16 La. 296; see REPUTATION; *second*, in cases of ancient possession where ancient documents are admitted, if found in a place in which and under the care of persons with whom such papers might reasonably (in the opinion of the trial judge; 1 Chase Steph. Dig. Evid. 156) be expected to be found; Inhabitants of Greenfield v. Inhabitants of Camden, 74 Me. 56; Applegate v. Lexington & C. County Min. Co., 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892; Quinn v. Eagleston, 108 Ill. 248; if they purport to be a part of the transaction to which they relate; 1 Greenl. Ev. § 144;

see ANCIENT WRITINGS; *third*, in case of declarations and entries made against the interest of the party making them, whether made concurrently with the act or subsequently; 3 B. & Ad. 893; Cramer v. Gregg, 40 Ill. App. 442; Irish-American Bank v. Ludlum, 49 Minn. 255, 51 N. W. 1047; Keesey v. Old, 82 Tex. 22, 17 S. W. 928; Potter v. Ogden, 136 N. Y. 384, 33 N. E. 228; but such declarations and entries, to be so admitted, must appear or be shown to be against the pecuniary interest of the party making them; 11 Cl. & F. 85; 2 Jac. & W. 789; 3 Bingh. N. C. 308; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451, 15 L. R. A. (N. S.) 190; and if so they may be admitted, whether or not made in the ordinary course of business, as where a solicitor charges himself with receipts on his client's behalf; 53 W. R. 169; but letters written and signed by one deceased, or a memorandum made by him, are not admissible by a party claiming under him if not shown to have been communicated to the party claiming adversely; Elsberg v. Sewards, 66 Hun 28, 21 N. Y. Supp. 10; it was established by the Sussex Peerage Case, 1 Cl. & Fin. 85, that the interest must be either pecuniary or proprietary; this excluded the admission by a clergyman that he had unlawfully solemnized a marriage, which was so far against his interest that it would have subjected him to punishment; this ruling has been generally accepted, but that it is so has been said to be "highly unfortunate"; 1 Gr. on Ev. (16th Ed. by Wigmore) § 152 d; *fourth*, dying declarations.

Dying declarations, made in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations, are admissible; 2 B. & C. 605; 2 Mood. & R. 53; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; Wilson v. Boerene, 15 Johns. (N. Y.) 286; Anthony v. State, Meigs (Tenn.) 265, 33 Am. Dec. 143; if made under a sense of impending death; 2 Leach 563; Montgomery v. State, 11 Ohio 424; Dunn v. State, 2 Ark. 229, 35 Am. Dec. 54; Com. v. McPike, 3 Cush. (Mass.) 181, 50 Am. Dec. 727; Smith v. State, 9 Humphr. (Tenn.) 9; Logan v. State, *id.* 24; State v. Umble, 115 Mo. 452, 22 S. W. 378; State v. Aldrich, 50 Kan. 666, 32 Pac. 408; Wallace v. State, 90 Ga. 117, 15 S. E. 700; State v. Cronin, 64 Conn. 293, 29 Atl. 536. And see 3 C. & P. 269; 6 *id.* 386; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695; State v. Poll, 8 N. C. 442, 9 Am. Dec. 655; State v. Whitson, 111 N. C. 695, 16 S. E. 332; King v. State, 91 Tenn. 617, 20 S. W. 169; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. Ordinarily they are admissible only in trials for homicide of the declarant, but they have been admitted on trial for attempted abortion on the woman who made them; State v. Meyer, 65 N. J. L. 237, 47 Atl. 486, 86 Am. St. Rep. 634; Montgomery v. State, 80 Ind. 338, 41 Am. Rep. 815, where the question is discussed at large and the conclusion reached that because death resulted and that fact entered into the statutory crime, they were admissible. It was held otherwise in People v. Davis, 56 N. Y. 95, and in State v. Harper, 35 Ohio St. 78, 35 Am. Rep. 596, such declarations were excluded because, although the woman died, her death was not the subject of the charge. The declarations must have been made by the person alleged to have been murdered; State v. Bohan, 15 Kan. 418; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740, where husband and wife were killed and it was held error to admit declarations of the latter on trial for murder of the former; but it has also been held that, where two or more were killed at the same time, declarations of one were admissible at the trial for the murder of the other; State v. Terrell, 12 Rich. (S. C.) 321; 2 Moo. & Rob. 53. In the Pennsylvania case the court distinguished it from these cases, "supposing them to be good law." The declarations must be connected with the death which is the subject of the trial; People v. Wong Chuey, 117 Cal. 624, 49 Pac. 833; and must concern the *res gestæ*, not previous relations; People v. Smith, 172 N. Y. 242, 64 N. E. 814. They must be made under an actual apprehension of impending death; People v. Evans, 40 Hun (N. Y.) 492; People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436 (in both of which statements were rejected because declarants had not wholly abandoned hope); State v. Hennessy, 29 Nev. 320, 90 Pac. 221, 13 Ann. Cas. 1122 (where they were admitted); after hope of recovery is gone; Small v. Com., 91 Pa. 304; and even a faint hope excludes them; Com. v. Roberts, 108 Mass. 296; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; but subsequent lingering, with some expression of hope, does not, if at the time they were made there was no hope; Swisher v. Com., 26 Gratt. (Va.) 963, 21 Am. Dec. 330. A statement made in writing before hope was abandoned and confirmed afterwards was admissible; Wilson v. Com., 60 S. W. 400, 22 Ky. L. Rep. 1251; State v. McEvoy, 9 S. C. 208. The fear of death need not be expressed to the person who receives the declaration, if its existence is otherwise established; Worthington v. State, 92 Md. 222, 48 Atl. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506. A statement reduced to writing may be supplemented by others made orally at the same time; Herd v. State, 43 Tex. Cr. R. 575, 67 S. W. 495 (criticised, 11 Y. L. J. 430); *contra;* 1 Str. 499; Whart. Hom. § 766; Gr. Ev. § 160.

Although the time elapsing between the declarations and death is proper to be considered, they will not be made inadmissible by a few subsequent hours of life; People v. Weaver, 108 Mich. 649, 66 N. W. 567; State v. Reed, 53 Kan. 767, 37 Pac. 174, 42 Am.

St. Rep. 322; or even some days; 6 C. & P. 386; Com. v. Haney, 127 Mass. 455; Jones v. State, 71 Ind. 66; State v. Jones, 38 La. Ann. 792; Baxter v. State, 15 Lea (Tenn.) 657; State v. Yee Wee, 7 Idaho, 188, 61 Pac. 588.

It is not necessary that the declarant state that he is expecting immediate death; it is enough if, from all the circumstances, it satisfactorily appears that such was the condition of his mind at the time of the declarations; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; but there must be a belief that there is no hope of recovery; Com. v. Roberts, 108 Mass. 296; People v. Brecht, 120 App. Div. 769, 105 N. Y. Supp. 436; State v. Welsor, 117 Mo. 570, 21 S. W. 443; 65 J. P. 426; 67 *id.* 151, where the expression "I'm dying" was used and the declarations were excluded, while in 71 *id.* 152, the same expression was used and they were admitted; as they were also when declarant said he did not know what expectation of recovery he had; State v. Thompson, 49 Or. 46, 88 Pac. 583, 124 Am. St. Rep. 1015. The belief that death is inevitable supplies the place of an oath; Tracy v. People, 97 Ill. 106; People v. Sanford, 43 Cal. 29; Dixon v. State, 13 Fla. 636. Accordingly, although the common law rule was said to require that declarant should have a belief in God and a future state; 1 Str. 499; 17 Y. L. J. 403; that rule was considered abrogated in the cases just cited and the want of such belief has been held to be no ground for excluding declarations; State v. Hood, 63 W. Va. 182, 59 S. E. 971, 15 L. R. A. (N. S.) 448, 129 Am. St. Rep. 964; while other cases hold otherwise, though belief is presumed until the contrary is proved; Donnelly v. State, 26 N. J. L. 463; but if admitted in such case, they should not be relied on; State v. Elliott, 45 Ia. 486. Reckless and profane language will not render declarations inadmissible; Kirby v. State, 151 Ala. 66, 44 South. 38; but will affect their credibility; Nesbit v. State, 43 Ga. 238; and cross-examination will be allowed as to that, as being material in showing both a reckless and irreverent state of mind and hostility towards the accused; Tracy v. People, 97 Ill. 105.

The declaration may have been made by signs; 1 Greenl. Ev. § 161 *b*; and in answer to questions; 7 C. & P. 238; 2 Leach 563; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695. They may be in writing; State v. Kindle, 47 Ohio St. 358, 24 N. E. 485; King v. State, 91 Tenn. 617, 20 S. W. 169. The substance only need be given by the witness; Montgomery v. State, 11 Ohio, 424; Ward v. State, 8 Blackf. (Ind.) 101; but the declaration must have been complete; Vass v. Com., 3 Leigh (Va.) 786, 24 Am. Dec. 695; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; and the circumstances under which it was made must be shown to the court; 3 C. & P. 629; 7 *id.* 187; State v. Poll, 8 N. C. 444, 9 Am. Dec. 655; Hill v. Com., 2 Gratt. (Va.) 594; McDaniel v. State, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93.

It is for the court to determine whether the preliminary conditions make the evidence admissible; State v. Cronin, 64 Conn. 293, 29 Atl. 536; State v. Doris, 51 Or. 136, 94 Pac. 44, 16 L. R. A. (N. S.) 660; and this includes the question of impending death; Roten v. State, 31 Fla. 514, 12 South. 910; 1 Stark. 521, and note (where the case of Rex v. Woodcock, Leach 593, *contra*, is discredited); People v. Smith, 104 N. Y. 491, 504, 10 N. E. 873, 58 Am. Rep. 537; and this decision of the court comprises both fact and law, as to the first of which it is final and as to the second subject to review; State v. Williams, 67 N. C. 12; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560 (Holmes, C. J.); but having been admitted, the weight of the evidence is for the jury; State v. Sexton, 147 Mo. 89, 48 S. W. 452; and this includes consideration of the circumstances under which they were made; Bush v. State, 109 Ga. 120, 34 S. E. 298; State v. Phillips, 118 Ia. 660, 92 N. W. 876; and it is error to charge that they should be treated as of the same weight and value as evidence produced under the usual tests and safeguards; People v. Kraft, 148 N. Y. 631, 43 N. E. 80. The conclusions of the trial court, as to the admissibility of the declarations, should not be disturbed unless it is manifest that the facts did not warrant them; Gipe v. State, 165 Ind. 433, 75 N. E. 881, 1 L. R. A. (N. S.) 419, 112 Am. St. Rep. 238; Swisher v. Com., 26 Gratt. (Va.) 963, 21 Am. Rep. 330.

Such declarations are inadmissible when the witness does not pretend to give either the words or substance of what the deceased said, or all that he said; State v. Johnson, 118 Mo. 491, 24 S. W. 229, 40 Am. St. Rep. 405. The admissibility of the declaration is not affected by the fact that subsequently to their being made and before death the declarant entertained a belief in recovery; 14 Cox, Cr. Cas. 565, 28 Engl. Rep. 587, and note; State v. Shaffer, 23 Or. 555, 32 Pac. 545.

Dying declarations must be confined to the statement of facts, not conclusions; State v. Horn, 204 Mo. 528, 103 S. W. 69; or opinions; State v. Horn, 204 Mo. 528, 103 S. W. 69 (where a statement that declarant shot the accused in self-defense was excluded as a mere conclusion); although it is to be noted that the application of the "opinion rule" to such declarations has been vigorously disputed; 2 Wigm. Ev. § 1447. It is also to be noted that the controversy usually turns on whether *the expression used* is fact or opinion.

The admission of dying declarations has been uniformly held not to contravene the constitutional right of the accused to be confronted with the witnesses against him;

Mattox v. U. S., 156 U. S. 237, 243, 15 Sup. Ct. 337, 39 L. Ed. 409; Brown v. Com., 73 Pa. 321, 13 Am. Rep. 740; State v. Dickinson, 41 Wis. 299; Robbins v. State, 8 Ohio St. 131; Com. v. Carey, 12 Cush. (Mass.) 246; 2 Wigm. Ev. § 1398, and note, citing the cases.

They are admitted either for or against the accused; Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; State v. Saunders, 14 Or. 300, 12 Pac. 441.

It has been held that they may be discredited by evidence of previous contradictory statements; State v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; but with expressions of doubt and one judge dissenting, and the case has been criticised; 9 Harv. L. Rev. 432.

For full discussion of dying declarations and collections of cases, see 2 Wigm. Ev. §§ 1430–1451; 56 L. R. A. 353, note; also an article by Wilbur Larremore urging that their admission should be abolished by statute; 41 Am. L. Rev. 660.

Other Declarations. Declarations as to the physical or mental condition of the declarant are sometimes admitted as an exception to the rule against hearsay, as the natural and necessary evidence of bodily or mental feelings, where those are material as facts to be proved. The underlying principle is thus expressed by Mellish, L. J., in the St. Leonard's Will case: "Whenever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, then you may prove what he said, because that is the only means by which you can find out what his intentions were." L. R. 1 P. Div. 154, 251. Thus such declarations as to one's own physical condition, as of the existence of pain, have been admitted in a suit by declarant because, as it was said, they "in their very nature must be evidence, though emanating from the party himself who seeks to prove them in his own favor"; Phillips v. Kelly, 29 Ala. 628. Exclamations of pain and suffering were held properly admitted because "this is the natural and ordinary mode in which physical pain and suffering are made known to others, and the only mode by which their nature and extent can be ascertained"; Hyatt v. Adams, 16 Mich. 180, which was an action against a surgeon for malpractice causing death. Such declarations or exclamations are admitted when made to a physician in the course of treatment; State v. Gedicke, 43 N. J. L. 86; but not when he was "called in, not to give medical aid, but to make up medical testimony," and the time was *post litem motam;* Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537, 31 Am. Rep. 321; Consolidated Traction Co. v. Lambertson, 60 N. J. L. 452, 38 Atl. 683, where declarations were held clearly incompetent, though even under such circumstances natural expressions of present pain might not be.

It is suggested in a note on the last two cases that such testimony is admissible without the qualifications of being made to a physician and before the controversy arose; 11 Harv. L. Rev. 467. As to the former point the Alabama case sustains the contention, but the tendency is to extend the cases to which the *post litem motam* rule is to be applied and, as appears *infra*, its limitations are too narrowly stated in the note cited. In the Michigan case, Judge Christiancy leaves the question open whether it applies to this class of cases.

Declarations, to be admissible as original evidence, must have been made at the time of doing the act to which they relate; Enos v. Tuttle, 3 Conn. 250; Scaggs v. State, 8 Smedes & M. (Miss.) 722; In re Taylor, 9 Paige Ch. (N. Y.) 611; Cherry v. McCall, 23 Ga. 193; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; Banfield v. Parker, 36 N. H. 353; Tompkins v. Saltmarch, 14 S. & R. (Pa.) 275; 1 B. & Ad. 135. For cases of entries in books, see Sterrett v. Bull, 1 Binn. (Pa.) 234; Ingraham v. Bockius, 9 S. & R. (Pa.) 285, 11 Am. Dec. 730; Faxon v. Hollis, 13 Mass. 427; Hamilton v. State, 36 Ind. 280, 10 Am. Rep. 22.

To authorize their admission as secondary evidence, the declarant must be dead: 11 Price 162; 1 C. & K. 58; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; and the declaration must have been made before any controversy arose; 3 Campb. 444; 10 B. & C. 657; 4 M. & S. 486; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; Elliott v. Peirsol, 1 Pet. (U. S.) 328, 7 L. Ed. 164. The rule that such declarations must have been made *ante litem motam* was applied to cases of pedigree in the Berkeley Peerage Case, 4 Camp. 401; and to matters of public interest in 3 *id.* 444; and, *pari ratione*, the Connecticut cases above cited apply the same principle to boundary cases, the latest one in date excluding declarations made after the controversy arose which would have contradicted those of the same person made before it, which were admitted. In the opinion of the supreme court approving this ruling, Judge Baldwin said that, while it may seem hard that the earlier declarations could not be met by proof of the later inconsistent ones, "the latter, having been uttered after the dispute which resulted in this suit had arisen, do not carry that absolute assurance of sincerity and impartiality on which is rested this exception to the rule excluding hearsay evidence." And yet the opinion had stated that at the time of the later declarations, which were thus excluded, suit had not been brought, and there was no claim that declarant knew of any dispute.

It must also appear that the declarant

was in a condition or situation to know the facts, or that it was his duty to know them; 9 B. & C. 935; 2 Sm. Lead. Cas. 193, note. The test to be applied to dying declarations to determine their admissibility is whether a living witness would have been permitted to testify to the matters contained in the declaration; State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

The declarations of an agent respecting a subject-matter, with regard to which he represents the principal, bind the principal; Story, Ag. §§ 134–137; 2 Q. B. 212; Batchelder v. Emery, 20 N. H. 165; Winter v. Burt, 31 Ala. 33; Wellington v. R. R., 158 Mass. 185, 33 N. E. 393; if made in the line of his duty and within the scope of his authority; Weeks v. Inhabitants of Needham, 156 Mass. 289, 31 N. E. 8; Pittsburgh & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252, 52 N. W. 628; Van Doren v. Bailey, 48 Minn. 305, 51 N. W. 375; if made during the continuance of the agency with regard to a transaction then pending; 8 Bingh. 451; Mechanics' Bank v. Bank of Columbia, 5 Wheat. (U. S.) 336, 5 L. Ed. 100; Hannay v. Stewart, 6 Watts (Pa.) 487; Woods v. Banks, 14 N. H. 101; Hayward Rubber Co. v. Duncklee, 30 Vt. 29; Raiford v. French, 11 Rich. (S. C.) 367; Winter v. Burt, 31 Ala. 33; Burgess v. Inhabitants of Wareham, 7 Gray (Mass.) 345; Vail v. Judson, 4 E. D. Smith (N. Y.) 165; Idaho Forwarding Co. v. Forwarding Ins. Co., 8 Utah, 41, 29 Pac. 826, 17 L. R. A. 586; and similar rules extend to partners' declarations; 1 Greenl. Ev. § 112; Fail v. McArthur, 31 Ala. 26; Tucker v. Peaslee, 36 N. H. 167; Slipp v. Hartley, 50 Minn. 118, 52 N. W. 386, 36 Am. St. Rep. 629. See PARTNER.

Where several defendants are interested in the relief prayed against them, admissions of one of them, made against his own interest, are admissible in evidence to affect him, although they would not be evidence to affect his co-defendants. See Grace v. Nesbitt, 109 Mo. 9, 18 S. W. 1118; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Roberts v. Kendall, 3 Ind. App. 339, 29 N. E. 487.

As to declarations made over a telephone, see TELEPHONE.

When more than one person is concerned in the commission of a crime, as in cases of riots, conspiracies, and the like, the declarations of either of the parties, made *while acting in the common design*, are evidence against the whole; 3 B. & Ald. 566; Com. v. Crowninshield, 10 Pick. (Mass.) 497; State v. Thibeau, 30 Vt. 100; Mack v. State, 32 Miss. 405; Poole v. Gerrard, 9 Cal. 593; McKenzie v. State, 32 Tex. Cr. R. 568, 25 S. W. 426, 40 Am. St. Rep. 795; People v. Collins, 64 Cal. 293, 30 Pac. 847; but the declarations of one of the rioters or conspirators made *after the accomplishment of their object* and when they no longer acted together, are evidence only against the party making them; 2 Russ. Cr. 572; 1 Mood. & M. 501; Brown v. U. S., 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010; Sparf v. U. S., 156 U. S. 58, 15 Sup. Ct. 273, 39 L. Ed. 343. And see 2 C. & P. 232; Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1; Com. v. Ingraham, *id.* 46. If one of two persons accused of having together committed a crime of murder makes a voluntary confession in the presence of the other, under such circumstances that he would naturally have contradicted it if he did not assent, the confession is admissible in evidence against both; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343.

See HEARSAY EVIDENCE; BOUNDARY; MARRIAGE; DOMICIL; REPUTATION; PEDIGREE; CONFESSION. And for an extensive collection of cases on the points herein stated see Chamb. Best. Ev. §§ 496–505 and the American notes thereto.

In Scotch Law. The prisoner's statement before a magistrate.

When used on trial, it must be proved that the prisoner was in his senses at the time of making it, and made it of his own free will; 2 Hume 328; Alison, Pr. 557. It must be signed by the witnesses present when it was made; Alison, Pr. 557, and by the prisoner himself; Arkl. Just. 70. See Paterson, Comp. §§ 952, 970.

DECLARATION OF INDEPENDENCE. A public act by which, through the Continental Congress, the thirteen British colonies in America declared their independence, in the name and by the authority of the people, on the fourth day of July, 1776, wherein are set forth:—

Certain natural and inalienable rights of man; the uses and purposes of governments; the right of the people to institute or to abolish them; the sufferings of the colonies, and their right to withdraw from the tyranny of the king of Great Britain;

The various acts of tyranny of the British king;

The petitions for redress of those injuries, and the refusal to redress them; the recital of an appeal to the people of Great Britain, and of their being deaf to the voice of justice and consanguinity;

An appeal to the Supreme Judge of the world for the rectitude of the intentions of the representatives;

A declaration that the United Colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is and ought to be dissolved;

A pledge by the representatives to each other of their lives, their fortunes, and their sacred honor.

The effect of this declaration was the establishment of the government of the United States as free and independent.

DECLARATION OF INTENTION. The act of an alien who goes before a court of record and in a formal manner declares that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whereof at the time he may be a citizen or subject. See Act of June 29, 1906; R. S. § 2174.

This declaration must, in ordinary cases, be made at least two years before his admission. *Id.* But there are exceptions to this rule. See NATURALIZATION.

DECLARATION OF LONDON. A declaration concerning the laws of naval war, agreed upon February 26, 1909, by the powers assembled at the London Naval Conference. The preamble states that the Declaration was made in view of the desirability of an agreement upon the rules to be applied by the International Prize Court established by the Second Hague Conference. A preliminary provision states that it is agreed that the rules adopted "correspond in substance with the generally recognized principles of international law." The subjects dealt with by the Declaration include Blockade, Contraband, Un-neutral Service, Destruction of Neutral Prizes, Transfer to Neutral Flag, Enemy Character, Convoy, Search, and Compensation. The Declaration was signed by all the powers represented at the Conference, but ratifications have not yet been exchanged. Higgins, 538–613.

DECLARATION OF PARIS. A declaration respecting international maritime law set forth by the leading powers of Europe at the Congress of Paris April 16, 1856. The several articles are:

1. Privateering is and remains abolished.

2. The neutral flag covers enemy's goods, except contraband of war.

3. Neutral goods, except contraband of war, are not liable to confiscation under a hostile flag.

4. Blockades, to be binding, must be effective.

The states not represented at the Congress were invited to adhere to the Declaration, and the majority did so. The United States refused to accept the Declaration, owing to the rejection by the Congress of the "Marcy Amendment" exempting private property from capture at sea. But the United States adhered to the rules of the Declaration during the war with Spain in 1898. The Convention Relative to the Conversion of Merchant-Ships into War-Ships, adopted at The Hague in 1907, was directed against a threatened evasion of the Declaration of Paris in the form of Volunteer Navies. Higgins, 1–4.

DECLARATION OF ST. PETERSBURG. A declaration made at St. Petersburg in 1868 on behalf of certain of the powers in relation to the prohibition of the use of explosive bullets in time of war.

DECLARATION OF TRUST. The act by which an individual acknowledges that a property, the title of which he holds, does in fact belong to another, for whose use he holds the same.

The instrument in which such an acknowledgment is made.

Such a declaration is not always in writing; though it is highly proper it should be so; Hill, Trust. 49, note y; Sugden, Pow. 200; 1 Washb. R. P. See Tiedm. Eq. Jur. 296; FRAUDS, STATUTE OF; TRUST.

It differs from a declaration of a use. (1) The word "use" is restricted and refers only to real estate. (2) Use was of common occurrence in times when there existed no method by which the moral rights and claims of the *cestui que use* could be enforced, whereas trust, when employed in *pari materia* with use, has always contained within it a necessary implication that the rights and claims of the *cestui que trust* would be enforced in equity, and, since the coming into operation of the Judicature Act of 1873, in England, in courts of law also; Stroud Jud. Dict. See USES.

DECLARATION OF WAR. The public proclamation of the government of a state, by which it declares itself to be at war with the foreign power mentioned, and which forbids all and every one to aid or assist the common enemy.

The power of declaring war is vested in congress by the constitution, art. 1, s. 8, § 12. There is no form or ceremony necessary except the passage of the act. A manifesto stating the causes of the war is usually published; but war exists as soon as the act takes effect.

The necessity of a declaration of war has long been a subject of controversy between publicists. In ancient times it was customary to precede hostilities by a public declaration communicated to the enemy, and to send a herald to demand satisfaction. II Phillipson 197. In modern times wars have more often begun without any declaration, but several instances of declarations during the 19th century show a return to the former practice. At the Hague Conference of 1907 a convention was adopted providing that the contracting powers should not commence hostilities "without a previous and unequivocal warning, which shall take the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war." Higgins, 198–205.

DECLARATORY. Something which explains or ascertains what before was uncertain or doubtful: as, a declaratory statute, which simply declares or explains the

law or the right, as it stood previous to the statute; Sedgw. Stat. & Const. L. 28; they are usually passed to put an end to a doubt as to what the law is, and declare what it is and what it has been. 1 Bla. Com. 86. Very many of the state statutes in this country are declaratory of the common law, and were not passed to quiet a doubt but to incorporate into the law of the state well-settled common-law principles. As to declaratory statutes, see STATUTES.

DECLARE. Often used of making a positive statement, as "declare and affirm." Bassett v. Denn, 17 N. J. L. 432. To assert; to publish; to utter; to announce clearly some opinion or resolution. Knecht v. Ins. Co., 90 Pa. 121, 35 Am. Rep. 641. For its use in pleading, see DECLARATION.

DECLINATORY PLEA. A plea of sanctuary or of benefit of clergy. 4 Bla. Com. 333. Abolished, 6 & 7 Geo. IV. c. 28, s. 6; Mozl. & W. Dict. See BENEFIT OF CLERGY.

DECOCTION. The operation of boiling certain ingredients in a fluid for the purpose of extracting the parts soluble at that temperature; the product of this operation.

In a case in which the indictment charged the prisoner with having administered to a woman a decoction of a certain shrub called savin, it appeared that the prisoner had administered an *infusion*, and not a decoction. The prisoner's counsel insisted that he was entitled to an acquittal on the ground that the medicine was misdescribed; but it was held that infusion and decoction are *ejusdem generis*, and that the variance was immaterial. 3 Camp. 74, 75.

DECOCTOR. **In Roman Law.** A bankrupt; a person who squandered the money of the state. Calvinus, Lex.

DECOLLATIO. Decollation; beheading.

DÉCONFES. **In French Law.** A name formerly given to those persons who died without confession, whether they refused to confess or whether they were criminals to whom the sacrament was refused. *Droit de Canon*, par M. l'Abbé André; Dupin, Gloss. to Loisel's Institutes.

DECOY. A pond used for the breeding and maintenance of water-fowl. 11 Mod. 74, 130; 3 Salk. 9; Holt 14; 11 East 571.

DECOY LETTER. A letter prepared and mailed on purpose to detect offenders against the postal and revenue laws. U. S. v. Whittier, 5 Dill. 39, Fed. Cas. No. 16,688.

The use of decoy letters by inspectors of mails for the purpose of ascertaining the depredations upon the mails is proper and justifiable as a means to that end; U. S. v. Dorsey, 40 Fed. 752.

A postal employé who takes from the mail under his charge a package containing things of value, though placed in the mail as a decoy and addressed to a person having no existence, is punishable, under R. S. secs. 3891, 5467, for taking a letter or package entrusted to him; U. S. v. Wight, 38 Fed. 106; U. S. v. Dorsey, 40 Fed. 752; *contra*, U. S. v. Denicke, 35 Fed. 407; U. S. v. Matthews, 35 Fed. 890, 1 L. R. A. 104. The fact that they were decoy letters is immaterial on a prosecution for embezzlement; Walster v. U. S., 42 Fed. 891.

The offence of sending letters by mail giving information where obscene pictures can be obtained does not lose its criminal character, though the letters were sent in response to a decoy letter, since it does not appear that the accused was solicited to use the mails and thus to commit an offence; U. S. v. Grimm, 50 Fed. 528.

A decoy letter placed in a sealed envelope and addressed to a fictitious person in a place where there was no post-office was wrapped up in a newspaper, enclosed in an ordinary paper wrapper, sealed and properly stamped and directed as the envelope inside the packet, and in this condition was handed by a post-office inspector and placed by him as a decoy in a basket kept for improperly illegibly addressed mail matter. It was held that this was not a mailing of the packet, and that it did not become mail matter; U. S. v. Rapp, 30 Fed. 818. A letter with a fictitious address which cannot be delivered is "not intended to be conveyed by mail" within the meaning of R. S. sec. 3891, providing a penalty for embezzling; U. S. v. Denicke, 35 Fed. 407.

Decoys are permissible to entrap criminals, or to present opportunity to those having criminal intent to, or who are willing to, commit crime, but not to create criminals; U. S. v. Healy, 202 Fed. 349 (selling liquor to an Indian).

DECREE. The judicial decision of a litigated cause by a court of equity. It is also applied to the determination of a cause in courts of admiralty and probate. It is accurate to use the word judgment as applied to courts of law and decree to courts of equity, although the former term is now used in a larger sense to include both. There is, however, a distinction between the two which is well understood, and may wisely be preserved as tending to keep before the mind the distinction betwen the two jurisdictions—quite as fundamental with respect to the final determination of a cause as to the forms of procedure and the principles of jurisprudence applied by the two tribunals. Even the modern tendency of courts of law to avail themselves of equitable forms of procedure and principles of decision has left undisturbed the well-defined line of demarcation between the *judgment* at law and the *decree* in equity. It is stated by an able writer, thus: "A judgment at law was either simply for the plaintiff or for the defendant. There could be no qualifications or modifications of the judgment. But such a judgment does not always touch the true justice of the cause or put the

parties in the position they ought to occupy. While the plaintiff may be entitled, in a given case, to general relief, there may be some duty connected with the subject of litigation which he owes to the defendant, the performance of which, equally with the fulfilment of *his* duty by the defendant, ought, in a perfect system of remedial law, to be exacted. This result was attained by the *decree* of a court of equity which could be so moulded, or the execution of which could be so controlled and suspended, that the relative duties and rights of the parties could be secured and enforced;" Bisph. Eq. § 7.

It necessarily springs from the nature of the chancery jurisdiction that its determinations should be cast in a mould differing, *toto cœlo*, from a judgment at law, and it would hardly be an exaggeration to say that the essential character of the decree, as described by the author quoted, is to be found in the literal application of the fundamental maxim, "He who seeks equity must do equity." Accordingly, it is said that a court of equity will always reach, by a direct decree, what would otherwise be accomplished by a circuity of proceedings; Dodd v. Wilson, 4 Del. Ch. 410. And even when a complainant is entitled to relief which it is inequitable to grant except upon a condition to be performed by him springing from an obligation of equity and good conscience, though not from legal right, a chancellor may make a decree only upon such condition; Willard v. Tayloe, 8 Wall. (U. S.) 557, 19 L. Ed. 501; Bisph. Eq. § 43. In such case, when something remains to be done by the party in order to entitle him to relief, while no present decree can be made, as the decree must be absolute and final and not contingent, the court will enter an interlocutory decree and suspend the entry of a final decree until the performance of such condition; Pleasanton v. Raughley, 3 Del. Ch. 124; and in default thereof in a reasonable time dismiss the bill; Pleasanton v. Raughley, 4 Del. Ch. 43. The doctrine of the wife's equity is a familiar instance of this principle.

Decrees are either interlocutory or final. This distinction is well recognized and important; Cornely v. Marckwald, 131 U. S. 159, 9 Sup. Ct. 744, 33 L. Ed. 117; Richmond v. Atwood, 52 Fed. 10, 2 C. C. A. 607, 17 L. R. A. 615 (citing many cases and discussing the distinction at large). In the strictest sense all decrees are interlocutory until signed and enrolled; 2 Dan. Ch. Pr. 6th Am. ed. 987, n. 1; but it is not in this sense that the terms are in practice used. But while there is a distinction well understood, it is not always easy of exact definition. The existence of the two classes is, however, necessary in American chancery courts, as the right of appeal is frequently confined to final decrees, as in the federal courts. The former is entered on some plea or issue arising in the cause which does not decide the main question; the latter settles the matter in dispute; and a final decree has the same effect as a judgment at law; 2 Madd. 462; 1 Ch. Ca. 27; 2 Vern. 89; 4 Brown, P. C. 287. See 7 Viner, Abr. 394; 7 Comyns, Dig. 445; 1 Belt, Suppl. Ves. 223; McGarrahan v. Maxwell, 28 Cal. 75, 85. For forms of decrees, see Seton, Decrees; 2 Dan Ch. Pr. 986.

The federal equity rule No. 71 (in effect Feb. 1, 1913, 33 Sup. Ct. xxxviii) provides that decrees shall not recite the pleadings nor any other prior proceedings.

Final Decree. One which finally disposes of a cause, so that nothing further is left for the court to adjudicate. See 2 Dan. Ch. Pr. 994, n.

A decree which determines the particular cause. It is not confined to those which terminate all litigation on the same right. 1 Kent 316.

A decree which leaves the case in such condition that, if on appeal there be an affirmance, nothing remains for the court below, but to execute it. Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; Mower v. Fletcher, 114 U. S. 127, 5 Sup. Ct. 799, 29 L. Ed. 117; see Haseltine v. Central Bank, 183 U. S. 131, 22 Sup. Ct. 49, 46 L. Ed. 117.

A decree which disposes ultimately of the suit. Ad. Eq. 375. After such decree has been pronounced, the cause is at an end, and no further hearing can be had; *id.* 388; Lakin v. Lawrence, 195 Mass. 27, 80 N. E. 578.

No court can reverse or annul its decree after the term in which it was entered, nor can a decree be changed or modified so as substantially to vary or affect it; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440, citing prior cases; [1904] 1 K. B. 6; Bissell Carpet-Sweeper Co. v. Sweeper Co., 72 Fed. 545, 19 C. C. A. 25; Marshall Engine Co. v. Engine Co., 203 Mass. 410, 89 N. E. 548; nor even on petition for rehearing where error in the findings is shown; Pettit v. One Steel Lighter, 104 Fed. 1002; except to correct clerical mistakes; Cameron v. McRoberts, 3 Wheat. 591; Illinois v. R. Co., 184 U. S. 77, 22 Sup. Ct. 300, 46 L. Ed. 440; [1901] 1 K. B. 694; or to reinstate a cause dismissed by mistake; *id.* The Palmyra, 12 Wheat. 10, 6 L. Ed. 531; and a mistake in an order may be rectified while an appeal is pending; [1903] P. 88. In equity jurisdiction of the cause is sometimes retained to make further orders for executing the decree which may result in modifying details of the original decree; Mootry v. Grayson, 104 Fed. 613, 44 C. C. A. 83; and in admiralty a bill of review may be allowed after the term, on petition of the libellant, who, being himself free from fraud or negligence, is the victim of what is equivalent to fraud; Hall v. Chisholm, 117 Fed. 807, 55 C. C. A. 31,

where the cases are reviewed; in this case certiorari was refused; Chisholm v. Hall, 191 U. S. 571, 24 Sup. Ct. 843, 48 L. Ed. 307.

A decree may be impeached for fraud in obtaining it, but for this purpose a bill of review is not available, being a continuance of the original litigation; an original bill must be resorted to as a new and independent litigation and it will lie pending an appeal from the original decree; Dowagiac Mfg. Co. v. Mfg. Co., 155 Fed. 524, 84 C. C. A. 38. In such case relief can be granted only on the ground of fraud in procuring the decree and not of error in granting it; McSherry Mfg. Co. v. Mfg. Co., 160 Fed. 948, 89 C. C. A. 26.

Prior to the establishment of the circuit courts of appeals there was an appeal to the United States supreme court only from final decrees of the circuit courts; U. S. Rev. Stat. § 692; and the same is still true of appeals from those courts; U. S. Rev. Stat. 1 Supp. 903; except that special provision is made for an appeal within a limited time directly to the circuit court of appeals from an order granting or refusing an interlocutory injunction or appointing a receiver, notwithstanding that an appeal from a final decree might be taken directly to the supreme court; Jud. Code § 129, U. S. Comp. St. Supp. (1911) 194. An order modifying an interlocutory decree for a broad perpetual injunction, so as to permit a limited sale of the articles of which the sale was restrained, is appealable under this act; Bissell Carpet-Sweeper Co. v. Sweeper Co., 72 Fed. 545, 19 C. C. A. 25, where the right of appeal and the different kinds of decrees in England and the United States are elaborately discussed. The omission of the word "final" in section 5 of the Act of March 3, 1891, does not extend the right of appeal to any question of jurisdiction in advance of final judgment or decree; McLish v. Roff, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893. Accordingly, the question what is a final decree is one of constant occurrence and importance as determining the jurisdiction of the appellate courts. The same question arises under the constitutional and statutory regulations of appeals in many of the states, although in some of them the right of appeal is not limited to final decrees; *e. g.* Delaware, where it is extended to interlocutory decrees or orders, if prayed before the first day of the following term, while it may be taken from a final decree within two years after it is signed.

Another reason why the distinction is important is that a final decree, entered of record and not directed to be without prejudice is a bar to another bill filed between the same parties for the same subject-matter; Cochran v. Couper, 2 Del. Ch. 27.

In England the question whether a decree or order is final or interlocutory is in many cases material, as affecting the right or the time of appeal, and it has been much discussed with some contrariety of opinion. In [1903] 1 K. B. 547 (C. A.), Lord Alverstone, C. J., stated "the real test" to be whether the order did in fact finally dispose of the right of the parties, without respect to what would have been the effect of the order if the case had been decided the other way, and the court of appeal unanimously so decided, following the decision in 9 Q. B. D. 62, and disapproving a later ruling in [1891] 1 Q. B. (C. A.) 734, where it was held that an order would be considered interlocutory unless "whichever way it went it would finally determine the right of the parties," and which was cited as authority in [1902] 1 Ch. 29. Subsequently it was said by Cozens-Hardy, M. R., in [1907] 2 Ch. 145, that only a short time before the full court was summoned "with a view to laying down some definite pronouncement or rule" on the question "what order is interlocutory and what is final," characterized by him as "undoubtedly one of very great difficulty," but the court had declined to do so, confining itself to the decision of the particular case, and this course he proposed to follow. In the case to which he referred, [1906] 2 K. B. 569, Collins, M. R., emphatically disapproved of "the enunciation of any general rule on the question what orders are final and what interlocutory," and considered that it should only be done by general rule of court.

In this country the same difficulty of exact definition was expressed by Mr. Justice Brown, who said that "probably no question of equity practice has been the subject of more frequent discussion in this court," and he reviewed the cases, remarking that they "are not altogether harmonious"; McGourkey v. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; the principal ones being also collected by Mr. Justice Blatchford in Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275.

Where the whole law of a case is settled by a decree, and nothing remains to be done, unless a new application be made at the foot of the decree, the decree is a final one so far as respects a right of appeal; French v. Shoemaker, 12 Wall. (U. S.) 86, 20 L. Ed. 270; and so is a decree dismissing a bill with costs, although they be afterwards taxed and decree entered for them; Fowler v. Hamill, 139 U. S. 549, 11 Sup. Ct. 663, 35 L. Ed. 266; but a decree of foreclosure and sale is not final, in the sense which allows an appeal from it, so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined; North Carolina R. Co. v. Swasey, 23 Wall. (U. S.) 405, 23 L. Ed. 136; see Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; nor is an order remanding a case to the state court; Joy v. Adelbert College, 146 U. S. 355, 13 Sup. Ct. 186, 36 L. Ed. 1003; but a decree for foreclosure and sale of mortgaged

premises is final and may be appealed from without waiting for the return and confirmation of the sale by a decretal order; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076. And so is a decree ordering the dismissal of a libel if not amended within ten days, where an appeal is taken without amending it; The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897. When the finality is in doubt, and was negatived by the court below, but is claimed in the Supreme Court, the doubt will be resolved against finality; McGourkey v. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079.

A decree fixing the priority of claims against an insolvent corporation, and directing the sale of its property for their payment, is a final decree within equity rule 88, relating to rehearings; Hoffman v. Knox, 50 Fed. 484, 1 C. C. A. 535. A decree is final which disposes of every matter of contention between the parties, except as to the amount of one severable item, not relating to appellant, and refers the case to a master to ascertain that; Hill v. R. Co., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. Ed. 331.

If the decree decides the rights to property and orders it to be delivered up or sold, or adjudges a sum of money to be paid, and the party is entitled to have such decree carried into immediate execution, it is a final decree; Forgay v. Conrad, 6 How. (U. S.) 203, 12 L. Ed. 404. In such cases it is held that the decree is final upon the merits, and the ulterior proceedings, as in the foreclosure case, constitute but a mode of executing the original decree; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. Ed. 1076.

The multiplicity of cases on this subject is too great for citation here, but the principle applied is illustrated by those cited, and as to a particular case the course of decisions must be critically examined. Cases will be found collected in notes to U. S. Rev. Stat. § 692 and to 2 Dan. Ch. Pr., 6th Am. ed. ch. XXVI. sec. 1. See JUDGMENT.

A consent decree binds only the consenting parties; Myllius v. Smith, 53 W. Va. 173, 44 S. E. 542; and is not binding upon the court; Ex parte Loung June, 160 Fed. 259. It cannot be modified without consent, even at the same term; Seiler v. Mfg. Co., 50 W. Va. 208, 40 S. E. 547; and the consent may be withdrawn before entry; Herold v. Craig, 59 W. Va. 353, 53 S. E. 466.

Interlocutory Decree. An adjudication or order made upon some point arising during the progress of a cause which does not determine finally the merits of the question or questions involved. Neither the courts nor the text-writers have satisfactorily defined this term. As was well said by Baldwin, J., "The difficulty is in the subject itself; for, by various gradations, the interlocutory decree may be made to approach the final decree, until the line of discrimination becomes too faint to be readily perceived." Cocke's Adm'r v. Gilpin, 1 Rob. (Va.) 27. The real matter of importance is to define what is a final decree, and that being done, it may be generally stated that every other order or decree made during the progress of a cause in chancery is interlocutory. The test which is to be derived from the cases can hardly be better stated than in a late case, thus:

Where something more than the ministerial execution of the decree as rendered is left to be done, the decree is interlocutory, and not final, even though it settles the equities of the bill; Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153.

As every decree *inter partes* is either final or interlocutory, all that has been said upon the former head, with the citations, must also be read in connection with this.

Decree Pro Confesso. An order or decree of a court of chancery that the allegations of the bill be taken as confessed, as against a defendant in default, and permitting the plaintiff to go on to a hearing *ex parte*.

"A decree *pro confesso* is one entered when the defendant has made default by not appearing in the time prescribed by the rules of court. A decree *nisi* is drawn by the plaintiff's counsel, and is entered by the court as it is drawn. A decree, when the bill is taken *pro confesso*, is pronounced by the court after hearing the pleadings and considering the plaintiff's equity;" Freem. Judg. § 11.

Such a decree is also entered when the defendant, having appeared, has not answered. The effect of such a decree is that the facts set forth in the bill are taken as true, and a decree made thereon according to the equity of the case. It was formerly the practice to put the plaintiff to his proof of the substance of the bill; Rose v. Woodruff, 4 Johns. Ch. (N. Y.) 547; 1 Dan. Ch. Pr., 5th Am. ed. 517, n.; but the practice of taking the bill *pro confesso* is now generally established; *id.* 518; and the subject is, in most courts of chancery, regulated by rule of court.

In such decree, in admiralty as well as in equity, the amount of damages must be ascertained from the evidence and not from the allegations of the libel or bill; Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435, 33 C. C. A. 161.

The usual modern practice is substantially that provided in Equity Rules 16, 17, of the United States courts (33 Sup. Ct. XXIII). Upon motion, it appearing from the record that the facts warrant it, an *order* is entered that the bill be taken *pro confesso*, and the cause proceeds *ex parte*, and the court may proceed to a final decree after thirty days from the entry of the order.

Such a decree cannot be entered when the bill contains a great lack of precision; Marshall v. Tenant, 2 J. J. Marsh. (Ky.) 155, 19 Am. Dec. 126; but only when the allegations of the bill are specific, and the defendant

has been properly served; Harmon v. Campbell, 30 Ill. 25; Boston v. Nichols, 47 Ill. 353; Colerick v. Hooper, 3 Ind. 316, 56 Am. Dec. 505; Russell v. Lathrop, 122 Mass. 302.

When only one defendant answers, but he disproves the whole case made by the bill, a decree *pro confesso* cannot be entered against those who fail to answer; Ashby v. Bell's Adm'r, 80 Va. 811.

A decree *pro confesso* cannot be safely entered against an infant; 30 Beav. 148; Bank of U. S. v. Ritchie, 8 Pet. (U. S.) 128, 8 L. Ed. 890; Daily's Adm'r v. Reid, 74 Ala. 415; Quigley v. Roberts, 44 Ill. 503; Tucker v. Bean, 65 Me. 352; Wells v. Smith, 44 Miss. 296; Mills v. Dennis, 3 Johns. Ch. (N. Y.) 367; though this is sometimes done on consent of his solicitor; Walsh v. Walsh, 116 Mass. 377, 17 Am. Rep. 162.

Equity Rule 8 (S. C. of U. S.; 33 Sup. Ct. xxi) provides: "If a mandatory order, injunction, or decree for specific performance of any act or contract be not complied with, the court or a judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration, may by order direct that the act required to be done, be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him." See WRIT OF ASSISTANCE.

In Legislation. In some countries, as in France, some acts of the legislature or of the sovereign, which have the force of law are called *decrees:* as, the Berlin and Milan decrees.

DECREE NISI. **In English Law.** A decree for a divorce, not to take effect till after such time, not less than six months from the pronouncing thereof, as the court shall from time to time direct. During this period any person may show cause why the decree should not be made absolute; 29 Vict. c. 32, s. 3; 23 & 24 Vict. c. 144, s. 7; 2 Steph. Com. 281; Mozl. & W. Dict.

The term is also sometimes applied to a decree entered provisionally to become final at a time therein named, unless cause is shown to the contrary.

DECREPIT (Fr. *décrépit;* Lat. *decrepitus*). Infirm; disabled, incapable, or incompetent, from either physical or mental weakness or defects, whether produced by age or other cause, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. Hall v. State, 16 Tex. App. 11, 49 Am. Rep. 824.

DECRETAL ORDER. An order made by the court of chancery, upon a motion or petition, in the nature of a decree. 2 Dan. Ch. Pr. 638.

DECRETALES BONIFACII OCTAVI. A supplemental collection of the canon law, published by Boniface VIII. in 1298, called, also, *Liber Sextus Decretalium* (Sixth Book of the Decretals). 1 Kaufm. Mackeldey, Civ. Law 82, n. See DECRETALS.

DECRETALES GREGORII NONI. The decretals of Gregory the Ninth. A collection of the laws of the church, published by order of Gregory IX. in 1227. It is composed of five books, subdivided into titles, and each title is divided into chapters. They are cited by using an X (or *extra);* thus, *Cap.* & X *de Regulis Juris*, etc. 1 Kaufm. Mackeld. Civ. Law 83, n.; Butler, Hor. Jur. 115.

DECRETALS. Canonical epistles, written by the pope alone, or by the pope and cardinals, at the instance or suit of one or more persons, for the ordering and determining of some matter in controversy, and which have the authority of a law in themselves.

The decretals were published in three volumes. The first volume was collected by Raymundus Barcinius, chaplain to Gregory IX., about the year 1227, and published by him to be read in schools and used in the ecclesiastical courts. The second volume is the work of Boniface VIII., compiled about the year 1298, with additions to and alterations of the ordinances of his predecessors. The third volume is called the Clementines, because made by Clement V., and was published by him in the council of Vienna, about the year 1308. To these may be added the Extravagantes of John XXII. and other bishops of Rome, which, relatively to the others, are called *Novellæ Constitutiones.* Ridley's View, etc. 99, 100; 1 Fournel, *Hist. des Avocats* 194, 195.

The false decretals were forged in the names of the early bishops of Rome, and first appeared about A. D. 845-850. The author of them is not known. They are mentioned in a letter written in the name of the council of Quierzy, by Charles the Bald, to the bishops and lords of France. See Van Espen Fleury, *Droit de Canon,* by André.

The decretals constitute the second division of the *Corpus Juris Canonici.*

DECRETUM GRATIANI. A collection of ecclesiastical law made by Gratian, a Bolognese monk, in 1139–1152. It is the oldest of the collections constituting the *Corpus Juris Canonici.* 1 Kaufm. Mackeld. Civ. Law 81; 1 Bla. Com. 82; Butler, Hor. Jur. 113.

DECURIO. **In Roman Law.** One of the chief men or senators in the provincial towns. The *decuriones,* taken together, had the entire management of the internal affairs of their towns or cities, with powers resembling in some degree those of our modern city councils. 1 Spence, Eq. Jur. 54; Calvinus, Lex.

DEDBANA. An actual homicide or manslaughter. Toml.

DEDI (Lat. I have given). A word used in deeds and other instruments of conveyance when such instruments were made in Latin.

The use of this word formerly carried with it a warranty in law, when in a deed; for example, if in a deed it was said, "*dedi* (I have given), etc., to A B," there was a warranty to him and his heirs. But this is no longer so. 8 & 9 Vict. c. 106, s. 4. Brooke,

Abr. *Guaranty*, pl. 85. The warranty thus wrought was a special warranty, extending to the heirs of the feoffee during the life of the donor only. Co. Litt. 384 *b*; 4 Co. 81; 5 *id.* 17; 3 Washb. R. P. 671. *Dedi* is said to be the aptest word to denote a feoffment; 2 Bla. Com. 310. The future, *dabo*, is found in some of the Saxon grants. 1 Spence, Eq. Jur. 44. See GRANT.

DEDI ET CONCESSI (Lat. I have given and granted). The aptest words to work a feoffment. They are the words ordinarily used, when instruments of conveyance were in Latin, in charters of feoffment, gift, or grant. These words were held the aptest; though others would answer; Co. Litt. 384 *b*; 1 Steph. Com. 114; 2 Bla. Com. 53, 316. See COVENANT.

DEDICATION. An appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. Barteau v. West, 23 Wis. 416; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Brown v. Gunn, 75 Ga. 441.

The intentional appropriation of land by the owner to some proper public use, reserving to himself no rights therein inconsistent with the full exercise and enjoyment of such use. Northport Wesleyan Grove Camp Meeting Ass'n v. Andrews, 104 Me. 342, 71 Atl. 1027, 20 L. R. A. (N. S.) 976.

It was unknown to the civil law; New Orleans v. U. S., 10 Pet. (U. S.) 662, 9 L. Ed. 573; and is said to have been the only method of conferring certain rights on the public at common law; Post v. Pearsall, 22 Wend. (N. Y.) 425; Stevens v. Nashua, 46 N. H. 192.

It need not be by deed or in writing, but may be by act *in pais*, and the fee need not pass, since it has reference to possession and not to ownership; Benn v. Hatcher, 81 Va. 25, 59 Am. Rep. 645. See cases collected in 9 L. R. A. 551, note.

Express dedication is that made by deed, vote, or declaration.

Implied dedication is that presumed from an acquiescence in the public use, or from some act of the owner which operates against him by way of estoppel *in pais*; Wood v. Seely, 32 N. Y. 116; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255.

To be valid it must be made by the owner of the fee; 5 B. & Ald. 454; Ward v. Davis, 3 Sandf. (N. Y.) 502; 4 Campb. 16; Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; or, if the fee be subject to a naked trust, by the equitable owner; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Williams v. Society, 1 Ohio St. 478; and to the public at large; Post v. Pearsall, 22 Wend. (N. Y.) 425; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; New Orleans v. U. S., 10 Pet. (U. S.) 662, 9 L. Ed. 573; Doe v. Jones, 11 Ala. 63. The existence of a corporation as grantee is not required, as the public is an ever-existing grantee capable of taking for public use; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; Rutherford v. Taylor, 38 Mo. 317; Town of Warren v. Town of Jacksonville, 15 Ill. 236, 58 Am. Dec. 610.

In making the appropriation, no particular formality is required, but any act or declaration, whether written or oral, which clearly expresses an intent to dedicate, will amount to a dedication, if accepted by the public, and will conclude the donor from ever after asserting any right incompatible with the public use; Washb. Easem. 133; 11 M. & W. 827; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; Post v. Pearsall, 22 Wend. (N. Y.) 450; Hobbs v. Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; Trustees of Dover v. Fox, 9 B. Monr. (Ky.) 201; Mayor & Council of Macon v. Franklin, 12 Ga. 239; Missouri Institute for Education of Blind v. How, 27 Mo. 211; Oswald v. Grenet, 22 Tex. 94; Smith v. City of San Luis Obispo, 95 Cal. 463, 30 Pac. 591; Dobson v. Hohenadel, 148 Pa. 367, 23 Atl. 1128; Taylor v. Philippi, 35 W. Va. 554, 14 S. E. 130; Land v. Smith, 44 La. Ann. 931, 11 South. 577; Western Ry. of Alabama v. R. Co., 96 Ala. 272, 11 South. 483, 17 L. R. A. 474; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; the vital principle of the dedication being the intention *(animus dedicandi)*, which must be unequivocally manifested, and clearly and satisfactorily appear; Harding v. Jasper, 14 Cal. 642; Village of White Bear v. Stewart, 40 Minn. 284, 41 N. W. 1045; Baker v. Vanderburg, 99 Mo. 378, 12 S. W. 462; Shellhouse v. State, 110 Ind. 509, 11 N. E. 484; Waugh v. Leech, 28 Ill. 491; Lee v. Lake, 14 Mich. 12, 90 Am. Dec. 220; Forney v. Calhoun County, 84 Ala. 215, 4 South. 153; Hope v. Barnett, 78 Cal. 9, 20 Pac. 245; State v. Adkins, 42 Kan. 203, 21 Pac. 1069. But it must be determined from the acts and explanatory declarations of the party in connection with the surrounding circumstances; he cannot subsequently testify as to what were his real intentions; Fossion v. Landry, 123 Ind. 136, 24 N. E. 96; Lamar County v. Clements, 49 Tex. 347. If there be doubt as to whether there was a dedication to public use, or only for a temporary purpose, the intention of the owner may be proved; Lamar County v. Clements, 49 Tex. 347.

A mere acquiescence by the owner of land in its occasional and varying use for travel by the public is insufficient to establish a dedication thereof, as a street by adverse user; Com. v. R. Co., 135 Pa. 256, 19 Atl. 1051. And, without any express appropriation by the owner, a dedication may be presumed from twenty years' use of his land by the public, with his knowledge; Hoole v. Atty.

Gen., 22 Ala. 190; Noyes v. Ward, 19 Conn. 250; Larned v. Larned, 11 Metc. (Mass.) 421; Smith v. State, 23 N. J. L. 130; Green v. Oakes, 17 Ill. 249; Com. v. Cole, 26 Pa. 187; or from any shorter period, if the use be accompanied by circumstances which favor the presumption, the fact of dedication being a conclusion to be drawn, in each particular case, by the jury, who as against the owner have simply to determine whether by permitting the public use he has intended a dedication; 5 Taunt. 125; Denning v. Roome, 6 Wend. (N. Y.) 651; Irwin v. Dixion, 9 How. (U. S.) 10, 13 L. Ed. 25; State v. Hill, 10 Ind. 219; Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980; Dimon v. People, 17 Ill. 416; 4 El. & Bl. 737. Public use of a right of way over public land for seven years is sufficient under U. S. R. S. § 2477; O'Kanogan County v. Cheetham, 37 Wash. 682, 80 Pac. 262, 70 L. R. A. 1027. But this presumption, being merely an inference from the public use, coupled with circumstances indicative of the owner's intent to dedicate, is open to rebuttal by the proof of circumstances indicative of the absence of such an intent; Bowers v. Mfg. Co., 4 Cush. (Mass.) 332; State v. Inhabitants of Strong, 25 Me. 297; Irwin v. Dixion, 9 How. (U. S.) 10, 13 L. Ed. 25; 7 C. & P. 578; City of St. Louis v. Wetzel, 110 Mo. 260, 19 S. W. 534; McKey v. Hyde Park, 134 U. S. 84, 10 Sup. Ct. 512, 33 L. Ed. 860. Mere non-user for less than the statutory period is not enough unless coupled with evidence of intention; Wood v. Hurd, 34 N. J. L. 91; Hoole v. Atty. Gen., 22 Ala. 190; 3 Bing. 447.

The statute of frauds does not apply to the dedication of lands to the public; Godfrey v. City of Alton, 12 Ill. 29, 52 Am. Dec. 476; Rees v. Chicago, 38 Ill. 338; Harding v. Jasper, 14 Cal. 642.

Before acceptance, a dedication may be revoked; Bridges v. Wyckoff, 67 N. Y. 130; San Francisco v. Canavan, 42 Cal. 541; but only when no rights of other persons intervene. The death of the owner is a revocation of a proffered dedication of streets, and an acceptance thereafter by the village gives it no right in the streets; People v. Kellogg, 67 Hun 546, 22 N. Y. Supp. 490. Where one who has offered to dedicate land for a public street, conveys such land before his offer is accepted, the conveyance operates as a revocation of the offer; Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774; Schmitt v. San Francisco, 100 Cal. 302, 34 Pac. 961.

There must be acceptance of either a common-law or a statutory dedication, either of which is incomplete without it; Schmitz v. Village of Germantown, 31 Ill. App. 284; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600. The American courts differ to some extent as to whether an acceptance must be more or less formal, by some competent authority, or may be shown by general public use or indirect official recognition or both. The underlying principles are discussed in the leading case of Cincinnati v. White's Lessee, which held that no particular form or ceremony of acceptance is essential, but that "all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation"; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. Ed. 452; David's Heirs v. New Orleans, 16 La. Ann. 404, 79 Am. Dec. 586; Cole v. Sprowl, 35 Me. 161, 56 Am. Dec. 696; but the acts which amount to it must be plain and unequivocal; Baker v. Johnston, 21 Mich. 349. It need not be by the town or other municipal corporation, nor need it be very specific, but acts by the public at large are sufficient; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; as the construction of sewers through land dedicated for a street, and filing liens against abutting owners; Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873; or general ordinance or resolution accepting all streets and parks dedicated, where land is marked as such on a recorded plat; Los Angeles v. McCollum, 156 Cal. 148, 103 Pac. 914; or sold under the description of bounding on a certain street; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; but the *use* of a street by the public, to constitute acceptance, must be under a claim of right; City of Eureka v. Croghan, 81 Cal. 524, 22 Pac. 693.

Acceptance is presumed if beneficial, and this is shown by user; Abbott v. Cottage City, 143 Mass. 521, 10 N. E. 325, 58 Am. Rep. 143; Guthrie v. New Haven, 31 Conn. 308; San Francisco v. Canavan, 42 Cal. 541; Boyce v. Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Summers v. State, 51 Ind. 201. The dedication of a private way to the public without acceptance does not constitute a public way; Slater v. Gunn, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; Bell v. City of Burlington, 68 Ia. 296, 27 N. W. 245; St. Louis v. University, 88 Mo. 155; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141.

There is no established standard as to what use by the public will be sufficient to constitute an acceptance of a dedication; it is such use as would naturally follow from the character of the place; Winslow v. Cincinnati, 9 Ohio S. & C. P. Dec. 89; the use need only be such as the public needs demand; Taraldson v. Town of Lime Springs, 92 Ia. 187, 60 N. W. 658. Use by a comparatively small number of persons on foot during the summer season of a short way from a street to the seashore, being the kind of use intended by the dedicator, is sufficient; Phillips v. City of Stamford, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114; otherwise of an alley through private land, used in bringing in household supplies and removing

refuse; Brinck v. Collier, 56 Mo. 160; of a wood so grown up with brush as to be impassable by wagons and but little used; Rosenberger v. Miller, 61 Mo. App. 422; of a road to some extent for two or three weeks; Laughlin v. City of Washington, 63 Ia. 652, 19 N. W. 819; a use by a few persons only and merely for local purposes; Green v. Town of Canaan, 29 Conn. 157; and a permitted use by neighbors for hauling wagons; Fairchild v. Stewart, 117 Ia. 734, 89 N. W. 1075. Long continued use by a few persons does not necessarily show an intention on the part of the public authorities to accept the dedication; City of Rock Island v. Starkey, 189 Ill. 515, 59 N. E. 971. See Phillips v. City of Stamford, 81 Conn. 408, 71 Atl. 361, 22 L. R. A. (N. S.) 1114.

In the case of a highway, the question has been raised whether the public itself, as the body charged with the repair, is the proper party to make the acceptance. In England, it has been decided that an acceptance by the public, evidenced by mere use, is sufficient to bind the parish to repair, without any adoption on its part; 5 B. & Ad. 469; 2 N. & M. 583. In this country there are cases in which the English rule seems to be recognized; Remington v. Millerd, 1 R. I. 93; though the weight of decision is to effect that the towns are not liable, either for repair or for injuries occasioned by the want of repair, until they have themselves adopted the way thus created, either by a formal acceptance or by indirectly recognizing it, as by repairing it or setting up guide-posts therein; Thomp. Highw. 52; Page v. Town of Weathersfield, 13 Vt. 424; Com. v. Kelly, 8 Gratt. (Va.) 632; Common Council of Indianapolis v. McClure, 2 Ind. 147; Wright v. Tukey, 3 Cush. (Mass.) 290; Colbert v. Shepherd, 89 Va. 401, 16 S. E. 246; Philadelphia v. Thomas' Heirs, 152 Pa. 494, 25 Atl. 873; Gage v. R. Co., 84 Ala. 224, 4 South. 415; City of Galveston v. Williams, 69 Tex. 449, 6 S. W. 860; Rozell v. Andrews, 103 N. Y. 150, 8 N. E. 513; Bell v. City of Burlington, 68 Ia. 296, 27 N. W. 245; City of St. Louis v. University, 88 Mo. 155; Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141. It has been held that the acceptance, improvement, and user by a city of a street or a portion of a street as platted is equivalent to an acceptance of the whole tract platted; Heitz v. City of St. Louis, 110 Mo. 618, 19 S. W. 735.

The authorities on this subject relate largely to the dedication of land for a highway. Such was the subject matter in the English cases on which the doctrine rests; Dovaston v. Payne, 2 H. Bl. 527, 2 Sm. L. Cas. 1388; 11 East 376, where eight years user was held to show sufficient acceptance; and 2 Str. 909, where four years was held insufficient; while in a much litigated case six years sufficed; 18 Q. B. 870. The English cases have not shown a disposition to extend the principle of dedication except so far as to recognize it in the case of charitable uses (*q. v.*) under 43 Eliz. c. 4, or the general equity jurisdiction. There are cases of bridges; 14 East 317; 1 Man. & Gr. 392; 3 M. & S. 526; and one over a ditch; 2 Str. 1004; and a wharf or landing; 5 B. & Ald. 268; but all these are closely allied to roads or ways.

But in this country there has grown up what is often referred to as the American doctrine, greatly extending the scope and operation of the doctrine of dedication under which it is applied equally well to any other purpose which is for the benefit of the public at large, as for a square, a common, a landing, a cemetery, a school, or a monument; and the principles which govern in all these cases are the same, though they may be somewhat diversified in the application, according as they are invoked for one or another of these objects; Hunter v. Trustees of Sandy Hill, 6 Hill (N. Y.) 407; Klinkener v. School Directors of McKeesport, 11 Pa. 444; Huber v. Gazley, 18 Ohio 18; Langley v. Town of Gallipolis, 2 Ohio St. 107; Mayor, etc., of the City of Macon v. Franklin, 12 Ga. 239; Olcott v. Banfill, 4 N. H. 537; Den v. Drummer, 20 N. J. L. 86, 40 Am. Dec. 213; Rowan's Ex'rs v. Town of Portland, 8 B. Monr. (Ky.) 234; Ward v. Davis, 3 Sandf. (N. Y.) 502; Doe v. Town of Attica, 7 Ind. 641; Gardiner v. Tisdale, 2 Wis. 153, 60 Am. Dec. 407; Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Attorney General v. Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251; Board of Com'rs of Miami County v. Wilgus, 42 Kan. 457, 22 Pac. 615; Carpenteria School District v. Heath, 56 Cal. 478; Beatty v. Kurtz, 2 Pet. (U. S.) 566, 7 L. Ed. 521; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560; Redwood Cemetery Ass'n v. Bandy, 93 Ind. 246; Village of Mankato v. Willard, 13 Minn. 13 (Gil. 1), 97 Am. Dec. 208.

As to cases upon which rests the extension of the doctrine to large parks and cemeteries, see note in 16 Harv. L. Rev. 128.

It is usually said that land dedicated for one purpose cannot be used for another; so land dedicated for a public square cannot be used for the erection of a city hall; Church v. City of Portland, 18 Or. 73, 22 Pac. 528, 6 L. R. A. (N. S.) 259 and note.

Equity will enjoin the diversion of land from the purpose to which it was dedicated; Le Clercq v. Trustees of Town of Gallipolis, 7 Ohio, 217, pt. 1, 28 Am. Dec. 641; and the legislature cannot divert it to a different use; *id.;* but land dedicated for a specific public use may be used for other purposes reasonably in accord therewith, as modified by changed conditions and circumstances; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980, where an act authorizing a subway under a part of Boston Common was held not a diversion of the

property from the purpose of its dedication "for the common use of the inhabitants of Boston as a training field and cow pasture."

A promise to donate land for public purposes has been enforced, as where the promisee has made improvements; L. R. 4 Ch. D. 73; Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Neale v. Neale, 9 Wall. (U. S.) 1, 19 L. Ed. 590; or where a school house was erected on the faith of the promise; Greenwood v. School Dist. No. 4, 126 Mich. 81, 85 N. W. 241. As the inchoate right of dower is defeated by condemnation of lands to public use; see EMINENT DOMAIN; it seems to be held that dower is barred by the dedication of land to such use; Venable v. R. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; French v. Lord, 69 Me. 537; Gwynne v. Cincinnati, 3 Ohio 24, 17 Am. Dec. 576; see 18 L. R. A. 79, note.

The doctrine of dedication has been characterized as an anomaly in our law, due to the public policy of effectuating individual action for public benefit; 21 Harv. L. Rev. 356. And again, it is said that, so far from being hampered in its application by mere technical distinctions, the doctrine was called into existence for the very purpose of escaping from technical rules and limitations. Its very vital breath and its justification for existence lie in the disregard of existing technical limitations and in recognition of the necessity for a resort to broad views. Consequently, as fast as any new subject or phase of public rights has been presented to the courts, they have never hesitated to apply the doctrine to the new situation; 16 Harv. L. Rev. 338, where it is urged that it should be extended to rights not merely of using another's real estate, but of stripping it (or having it stripped) by or for the use of the general public of portions of the soil—as of coal or oil; and it is suggested that on compliance with certain conditions, viz.: 1. Of leaving the private owners in possession and management (as in the case of a public easement acquired by dedication over a private wharf), and, 2. Of paying for the coal or oil as taken, such a dedication might be required by legislation.

A common method of dedicating land for public purposes, particularly in connection with laying out towns, is by recording plats on which are marked streets, public squares and the like, and this is held either by statute or, where there is none, at common law, to be a sufficient dedication to the public; City of Madison v. Mayers, 97 Wis. 399, 73 N. W. 43, 40 L. R. A. 635, 65 Am. St. Rep. 127; London & S. F. Bank v. City of Oakland, 90 Fed. 691, 33 C. C. A. 237; and such dedication upon a plat acknowledged and recorded of land for county buildings has been held to vest the fee in the county, although the town failed to become the county seat; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255. So the sale of land by plat designating streets and public squares operates as a dedication; Price v. Stratton, 45 Fla. 535, 33 South. 644; Florida E. C. R. Co. v. Worley, 49 Fla. 297, 38 South. 618; Corning & Co. v. Woolner, 206 Ill. 190, 69 N. E. 53; Marsh v. Village of Fairbury, 163 Ill. 401, 45 N. E. 236; Van Duyne v. Mfg. Co., 71 N. J. Eq. 375, 64 Atl. 149; Weisbrod v. R. Co., 18 Wis. 35, 86 Am. Dec. 743; Com. v. Beaver Borough, 171 Pa. 542, 33 Atl. 112; Baltimore v. Frick, 82 Md. 77, 33 Atl. 435; Meier v. R. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856. And see 9 L. R. A. 551, note. But that it may so operate at common law there must be an acceptance by the public in a reasonable time; Village of Grandville v. Jenison, 84 Mich. 54, 47 N. W. 600.

To constitute a common-law dedication by plat requires the same certainty of description (or accuracy of indication on the plat) as in other forms of conveyance; Sanders v. Village of Riverside, 118 Fed. 720, 55 C. C. A. 240, where it is said that "a dedication is a mode of conveyance." When a plat has been altered before filing so as apparently to cut off one half of the street shown on it as originally drawn, it operates as a dedication of what remains only; Elliot v. Atlantic City, 149 Fed. 849.

An offer to dedicate, followed by public user under a claim of right, is a sufficient dedication and acceptance; Delaware, L. & W. R. Co. v. City of Syracuse, 157 Fed. 700; Cook v. Harris, 61 N. Y. 448; Kennedy v. Le Van, 23 Minn. 513; Buchanan v. Curtis, 25 Wis. 99, 3 Am. Rep. 23; Price v. Town of Breckenridge, 92 Mo. 378, 5 S. W. 20; and where the intention is clear a dedication was held complete without acceptance or user; Point Pleasant Land Co. v. Cranmer, 40 N. J. Eq. 81.

The mere making of a survey or a map of a plat, which is not recorded or exhibited to the public and upon which no lots are sold, is not a dedication of the streets thereon; Kruger v. Constable, 128 Fed. 908, 63 C. C. A. 634; and filing maps on which a street was laid out did not make such a street a public highway so far as the public was concerned; Loughman v. R. Co., 83 App. Div. 629, 81 N. Y. Supp. 1097. But filing the plat in a public repository or publishing it and selling lots by reference to it is a dedication; Kruger v. Constable, 116 Fed. 722; and if the lots are sold with reference to a plat showing streets, the purchasers are entitled to have them remain open, whether accepted by the public or not; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378; Conrad v. Land Co., 126 N. C. 776, 36 S. E. 282; and so of a park; Florida E. C. R. Co. v. Worley, 49 Fla. 297, 38 South. 618. Where lots are sold bounded on an unopened street, the public has a right to the street, though there was no acceptance or user by the public; Harrington v. City of Manchester, 76 N. H. 347, 82 Atl. 716.

The sale by plat is a dedication; Cummings v. St. Louis, 90 Mo. 259, 2 S. W. 130; and acceptance is presumed from purchases by various persons; Carter v. City of Portland, 4 Or. 339; and the plat need not be acknowledged or recorded; Meier v. Ry. Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856. After a sale by plat there can be no revocation;

Brown v. Stark, 83 Cal. 636, 24 Pac. 162. The dedication by plat may apply either to a town site or a small tract. In the former the purchasers and the public are identical, but in the latter there may be an estoppel in favor of purchasers and no acceptance by the public; 9 Harv. L. Rev. 488; but the private rights of the purchasers cannot be enforced by the municipality; Village of Augusta v. Tyner, 197 Ill. 242, 64 N. E. 378.

With respect to the rule that the purchaser of lots by plat is entitled to have streets kept open as shown on a plat, a question may arise whether his right applies only to adjoining streets or to all streets on the plat. As to the former his right is unquestioned, and many cases hold it to be clear in the latter class; Collins v. Land Co., 128 N. C. 563, 39 S. E. 21, 83 Am. St. Rep. 720; Wolfe v. Town of Sullivan, 133 Ind. 331, 32 N. E. 1017; Taylor v. Com., 29 Gratt. (Va.) 780; In re Opening of Pearl St., 111 Pa. 565, 5 Atl. 430; *contra;* 11 Ont. App. 416; Mahler v. Brunder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695; Hawley v. Baltimore, 33 Md. 270; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731, 21 Am. St. Rep. 426.

The mere filing of a map purporting to show the original plan of a town, but never authenticated nor proved in any manner to be such, is not sufficient evidence of dedication; Terrell v. Town of Bloomfield, 20 S. W. 289, 14 Ky. L. Rep. 577; but the streets of a defective plat may be dedicated to the public by conveyances made of lots according to the plat; Smith v. City of St. Paul, 72 Minn. 472, 75 N. W. 708.

Whether a corporation may dedicate land to a public use is a question not extensively discussed. It seems to be permitted when the dedication is for a use consistent with the object for which the charter is granted; Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N. E. 866; Mayor, etc., of Jersey City v. Banking Co., 12 N. J. Eq. 547; but not otherwise; Stacy v. Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133, 8 L. R. A. (N. S.) 966, and note; and a railroad may, by dedication, establish a street or road across its tracks; Northern Pac. R. Co. v. City of Spokane, 64 Fed. 506, 12 C. C. A. 246; Green v. Town of Canaan, 29 Conn. 157; Southern Pac. Co. v. City of Pomona, 144 Cal. 339, 77 Pac. 929; Central R. Co. of New Jersey v. City of Bayonne, 52 N. J. L. 503, 20 Atl. 69. A trustee of a town site located on public land (under U. S. R. S. § 2387) has no right to dedicate land for a street as against the individual occupants for whom he takes title; McCloskey v. Pacific Coast Co., 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

Reservations, conditions and restrictions are in some cases sustained, the courts sometimes going to great lengths; Hughes v. Bingham, 135 N. Y. 347, 32 N. E. 78, 17 L. R. A. 454; 11 M. & W. 827; Bayard v. Hargrove, 45 Ga. 342; City of Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77; Warren v. City of Grand Haven, 30 Mich. 24; Rutherford v. Taylor, 38 Mo. 315; but the growing tendency is to hold the condition void; Trustees of M. E. Church of Hoboken v. City of Hoboken, 33 N. J. L. 13, 97 Am. Dec. 696; 5 Q. B. 26. The limitation may be sufficient to defeat the dedication by showing an absence of the *animus dedicandi;* White v. Bradley, 66 Me. 254; so the reservation of a right to revoke and devote the land to other uses was held not a good dedication; City of San Francisco v. Canavan, 42 Cal. 541. See 21 Harv. L. Rev. 356, where cases on restrictions and conditions are discussed.

See STREET; HIGHWAY; PARK; BRIDGE, and a general note in 27 Am. Dec. 559.

DEDIMUS ET CONCESSIMUS (Lat. we have given and granted). Words used by the king, or where there were more grantors than one, instead of *dedi et concessi.*

DEDIMUS POTESTATEM (Lat. we have given power). The name of a writ to commission private persons to do some act in the place of a judge: as, to administer an oath of office to a justice of the peace, to examine witnesses, and the like. Cowell; Com. Dig. *Chancery* (K, 3), (P, 2), *Fine* (E, 7); Dane, Abr. Index; 2 Bla. Com. 351.

DEDIMUS POTESTATEM DE ATTORNO FACIENDO (Lat.). The name of a writ which was formerly issued by authority of the crown in England to authorize an attorney to appear for a defendant, without which a party could not, until the statute of Westminster 2, appear in court by attorney. By that statute, 13 Edw. I. c. 10, all persons impleaded may make an attorney to sue for them, in all pleas moved by or against them, in the superior courts there enumerated. 3 M. & G. 184, n.

DEDITITII (Lat.). **In Roman Law.** Criminals who had been marked in the face or on the body with fire or an iron so that the mark could not be erased, and were subsequently manumitted. Calvinus, Lex.

DEDUCTION FOR NEW. The allowance (usually one-third) on the cost of repairing a damage to the ship by the extraordinary operation of the perils of navigation, the renovated part being presumed to be better than before the damage. In some parts, by custom or by express provision in the policy, the allowance is not made on a new vessel during the first year, or on a new sheathing, or on an anchor or chain-cables; 1 Phill. Ins. § 50; 2 *id.* §§ 1369, 1431; Gray v. Waln, 2 S. & R. (Pa.) 229, 7 Am. Dec. 642; Fisk v. Ins. Co., 18 La. 77; Orrok v. Ins. Co., 21 Pick. (Mass.) 456, 32 Am. Dec. 271; Depau v. Ins. Co., 5 Cow. (N. Y.) 63, 15 Am. Dec. 431.

DEED. A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee.

Co. Litt. 171; 2 Bla. Com. 295; Shepp. Touchst. 50.

A writing containing a contract sealed and delivered to the party thereto. 3 Washb. R. P. 239.

A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. 2 Bla. Com. 294.

A writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. American Button-Hole Overseaming S. M. Co. v. Burlack, 35 W. Va. 647, 14 S. E. 319. See Baker v. Westcott, 73 Tex. 129, 11 S. W. 157.

Any instrument in writing under seal, whether it relates to the conveyance of real estate or to any other matter,—as, for instance, a bond, single bill, agreement, or contract of any kind,—is as much a deed as is a conveyance of real estate, and, after delivery and acceptance, is obligatory; Taylor v. Glaser, 2 S. & R. (Pa.) 504; Taylor v. Morton, 5 Dana (Ky.) 365; Davis v. Brandon, 1 How. (Miss.) 154. The term is, however, often used in the latter sense above given, and perhaps oftener than in its more general signification.

Deeds of feoffment. See FEOFFMENT.

Deeds of grant. See GRANT.

Deeds indented are those to which there are two or more parties who enter into reciprocal and corresponding obligations to each other. See INDENTURE.

Deeds of release or of quitclaim. See RELEASE; QUITCLAIM.

Deeds poll are those which are the act of a single party and which do not require a counterpart. See DEED POLL.

Deeds under the statute of uses. See BARGAIN AND SALE; COVENANT TO STAND SEISED; LEASE AND RELEASE.

According to Blackstone, 2 Com. 313, deeds may be considered as *conveyances at common law*,—of which the original are feoffment; gift; grant; lease; exchange; partition: the derivative are release; confirmation; surrender; assignment; defeasance, —or *conveyances which derive their force by virtue of the statute of uses;* namely, covenant to stand seized to uses; bargain and sale of lands; lease and release; deed to lead and declare uses; deed of revocation of uses.

For a description of the various forms in use in United States, see 2 Washb. R. P. 607.

Requisites of. Deeds must be upon *paper* or parchment; Warren v. Lynch, 5 Johns. (N. Y.) 246; must be completely written before delivery: Perminter v. McDaniel, 1 Hill (S. C.) 267, 26 Am. Dec. 179; 6 M. & W. 216, Am. ed. note; 3 Washb. R. P. 239; but see Cribben v. Deal, 21 Or. 211, 27 Pac. 1046, 28 Am. St. Rep. 746; BLANK; and filing in grantee's name after delivery in escrow is sufficient; Burk v. Johnson, 146 Fed. 209, 76 C. C. A. 567; they may be partly written and partly printed, or entirely printed; must be between competent *parties*, see PARTIES; and certain classes are excluded from holding lands, and, consequently, from being grantees in a deed; see 1 Washb. R. P. 73; 2 *id.* 564; must have been made without restraint; Inhabitants of Worcester v. Eaton, 13 Mass. 371, 7 Am. Dec. 155; 2 Bla. Com. 291; must contain the *names* of the grantor and grantee; Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577; Morse v. Carpenter, 19 Vt. 613; Shaw v. Loud, 12 Mass. 447; Boone v. Moore, 14 Mo. 420; Games v. Dunn, 14 Pet. (U. S.) 322, 10 L. Ed. 476; Dunn v. Games, 1 McLean 321, Fed. Cas. No. 4,176; Elliot v. Sleeper, 2 N. H. 525; but a variance in the names set forth in the deed will not invalidate it; Jenkins v. Jenkins, 148 Pa. 216, 23 Atl. 985; must relate to suitable property; Browne, Stat. Frauds § 6; 3 Washb. R. P. 331; must contain the *requisite parts*, see *infra;* must at common law be *sealed;* Sicard v. Davis, 6 Pet. (U. S.) 124, 8 L. Ed. 342; Thornt. Conv. 205; see Stanley v. Green, 12 Cal. 166; Munds v. Cassidey, 98 N. C. 558, 4 S. E. 353, 355 (*i. e.* in order to constitute it a *deed*, though an unsealed instrument may operate as a conveyance of land; Mitchell, R. P. 453; Barnes v. Multnomah County, 145 Fed. 695); and should, for safety, be *signed*, even where statutes do not require it; 3 Washb. R. P. 239; but see Newton v. Emerson, 66 Tex. 142, 18 S. W. 348. Previous to the Statute of Frauds, signing was not essential to a deed, provided it was sealed. The statute makes it so; 2 Bla. Com. 306; *contra*, Shep. Touch. n. (24), Preston's ed., which latter is of opinion that the statute was intended to affect parol contracts only, and not deeds. See Wms. R. P. 152; 2 Q. B. 580. Sir F. Pollock (Contracts 171) is of opinion that a deed does not require a signature, citing 4 Ex. 631; 3 Bla. Com. 306. Where the grantor is present and authorizes another, either expressly or impliedly, to sign his name to a deed, it then becomes his deed, and is as binding upon him; Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740; Kime v. Brooks, 31 N. C. 218; Frost v. Deering, 21 Me. 158.

They must be *delivered* (see DELIVERY; ESCROW; delivery is said not to be necessary in the case of a body corporate, for the affixing of the common seal to the deed is tantamount to delivery; L. R. 2 H. L. 296); and *accepted;* Canning v. Pinkham, 1 N. H. 353; Buffum v. Green, 5 N. H. 71, 20 Am. Dec. 562; Jackson v. Bodle, 20 Johns. (N. Y.) 187; 13 Cent. L. J. 222; Richardson v. Grays, 85 Ia. 149, 52 N. W. 10; Schwab v. Rigby, 38 Minn. 395, 38 N. W. 101. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both; Flint v. Phipps, 16 Or. 437, 19 Pac. 543. Deeds conveying real estate must by statute in some states be *acknowledged and recorded*; Lewis v. Herrera, 208 U. S. 309, 28 Sup. Ct. 412, 52 L. Ed. 506. See ACKNOWLEDGMENT; RECORD. In Pennsylvania this is unnecessary to its validity as between the parties; Cable v. Cable, 146 Pa. 451, 23 Atl. 223.

"A deed is irrevocable and binding on the

promisor from the moment of its delivery by him, even before any acceptance by the promisee. The promisor does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound. The very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof; Pollock, Contr. 7.

The requisite number of *witnesses* is also prescribed by statute in most of the states.

Formal parts. The *premises* embrace the statement of the parties, the consideration, recitals inserted for explanation, description of the property granted, with the intended exceptions. The *habendum* begins at the words "to have and to hold," and limits and defines the estate which the grantee is to have. The *reddendum*, which is used to reserve something to the grantor, see EXCEPTION; the *conditions*, see CONDITION; the *covenants*, see COVENANT; WARRANTY; and the *conclusion*, which mentions the execution, date, etc., properly follow in the order observed here; 3 Washb. R. P. 365.

The *construction* of deeds is favorable to their validity; the principal includes the incident; punctuation is not regarded; a false description does not harm; the construction is least favorable to the party making the conveyance or reservation; the *habendum* is rejected if repugnant to the rest of the deed. Shepp. Touchst. 89; 3 Kent 422. There is a tendency in the modern decisions to uphold conveyances where not clearly repugnant to some well defined rule of law; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; Abbott v. Holway, 72 Me. 298; Dismukes v. Parrott, 56 Ga. 513; Uhl v. R. Co., 51 W. Va. 106, 41 S. E. 340; Sherwood v. Whiting, 54 Conn. 330, 8 Atl. 80, 1 Am. St. Rep. 116; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334, where an instrument conveying lands to the grantor's children, but the estate not to vest in them until the death of the grantor, was held not to be testamentary, but to be a deed presently passing an estate in remainder to the grantees, reserving a life estate to the grantor. To the same effect; Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788.

The true test in such cases is the intention of the maker; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; Nolan v. Otney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317; Hunt v. Hunt, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788, where it is said to be the sounder policy in case of doubt to declare the instrument a deed, and thus make it effectual, when holding it to be testamentary would, for want of the requisite number of witnesses, render it nugatory; West v. Wright, 115 Ga. 277, 41 S. E. 602. Such an instrument was held a deed, though the delivery was made dependent upon the performance of a condition as well as upon the happening of a contingency; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483, 103 Pac. 497, where the condition (that the grantee should give the grantor a respectable burial) was incapable of performance in the lifetime of the grantor; so in McCurry v. McCurry (Tex.) 95 S. W. 35; but a conveyance reciting that the grantee should come into possession of the property after the death of the grantor on condition that the grantee should care for the grantor as long as he should live, was held to be testamentary; Culy v. Upham, 135 Mich. 131, 97 N. W. 405, 106 Am. St. Rep. 388; in Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, held, that if the grantor reserves the right to recall the deed, the transaction is testamentary; and so in Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291, it is held no valid delivery can be accomplished by the deposit of a deed with a custodian who is directed to hold it, not only until the grantor dies, but until the grantee does something on his part, and then deliver it, unless the required act is one intended to be performed or capable of performance while the grantor is yet alive.

An undelivered deed may not be proved to be a will by extrinsic evidence that it was executed with testamentary intent; Noble v. Fickes, 230 Ill. 594, 82 N. E. 950, 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282. An instrument using words of conveyance *in præsenti* will be considered as an agreement to convey, and not a conveyance, if it is manifest that further conveyance was contemplated; Williams v. Paine, 169 U. S. 55, 18 Sup. Ct. 279, 42 L. Ed. 658, cited in Mineral Development Co. v. James, 97 Va. 414, 34 S. E. 37. The question is one of intention; Phillips v. Swank, 120 Pa. 76, 13 Atl. 712, 6 Am. St. Rep. 691; Jackson v. Moncrief, 5 Wend. (N. Y.) 26.

All the terms of a deed should be construed together; Lowdermilk Bros. v. Bostick, 98 N. C. 299, 3 S. E. 844; Bradley v. Zehmer, 82 Va. 685; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941; and the words therein should be taken most strongly against the party using them; Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53; Homer v. Schonfeld, 84 Ala. 313, 4 South. 105; where two clauses in a deed are repugnant, the first prevails; Blair v. Muse, 83 Va. 238, 2 S. E. 31; and if possible a deed should be so construed as to give it effect; Cleveland v. Sims, 69 Tex. 153, 6 S. W. 634.

"Sells" in a deed does not pass title; Taylor v. Burns, 203 U. S. 120, 27 Sup. Ct. 40, 51 L. Ed. 116.

A deed speaks from the time of its delivery, not from its date; U. S. v. Le Baron, 19 How. (U. S.) 73, 15 L. Ed. 525; District of Columbia v. Camden Iron Works, 181 U. S. 454, 21 Sup. Ct. 680, 45 L. Ed. 948; and parol evidence may be admitted to show de-

livery at a date subsequent to that shown on the face of the instrument; *id.*

The *lex rei sitæ* governs in the conveyance of lands, both as to the requisites and forms of conveyance. See LEX REI SITÆ.

Recitals in deeds of payment of the considerations expressed therein are not proof of such payments as against persons not parties thereto; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; nor is a consideration always necessary to the validity of a deed of land; Baker v. Westcott, 73 Tex. 129, 11 S. W. 157. An alteration in the description of property in a deed cannot be made without re-execution, reacknowledgment, and redelivery, after the deed has been delivered and recorded; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350.

In the Reading Railroad Company Receivership (1895) the court ordered the trustees to execute six original deeds, for convenience in recording, any one of which might be recorded, each to be an original, and all to constitute one deed.

The grantee in a deed is bound by its covenant, though he does not sign; Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291; 21 Harv. L. Rev. 587.

See DELIVERY; ESCROW; LOST INSTRUMENT; ATTESTATION; ALIENATION; ANCIENT WRITING.

DEED TO DECLARE USES. A deed made after a fine or common recovery, to show the object thereof.

DEED TO LEAD USES. A deed made before a fine or common recovery, to show the object thereof.

DEED POLL. A deed which is made by one party only.

A deed in which only the party making it executes it or binds himself by it as a deed. 3 Washb. R. P. 311.

The term is now applied in practice mainly to deeds by sheriffs, executors, administrators, trustees, and the like.

The distinction between deed poll and indenture has come to be of but little importance. The ordinary purpose of a deed poll is merely to transfer the rights of the grantor to the grantee. It was formerly called *charta de una parte*, and usually began with these words, *Sciant præsentes et futuri quod ego*, A, etc.; and now begins, "Know all men by these presents (taken from the early language of writs; 3 Holdsw. Hist. E. L. 193) that I, A B, have given, granted, and enfeoffed, and by these presents do give, grant, and enfeoff," etc. Cruise, Dig. tit. 32, c. 1, s. 23. See INDENTURE.

DEED OF SETTLEMENT. A deed formerly used in England for the formation of joint stock companies constituting certain persons trustees of the partnership property and containing regulations for the management of its private affairs. They are now regulated by articles of association.

DEEM. To decide; to judge; to sentence. When by statute certain acts are deemed to be crimes of a particular nature, they are such crimes, and not a semblance of it, nor a mere fanciful approximation to or designation of the offence. Com. v. Pratt, 132 Mass. 247.

When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else; 60 L. J. Q. B. 380. When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to; 50 L. J. Ch. 662.

DEEMSTERS. Judges in the Isle of Man, who decide all controversies without process, writings, or any charges. They were chosen by the people, and are said by Spelman to be two in number. Spelman, Gloss.; Camden, Brit.; Cowell.

DEFACE. To mar or disfigure. It has been held that to write on a license anything, whether true or false, other than the particulars required, defaces it; 15 L. J. C. P. 18; [1895] 1 Q. B. 639.

DEFALCATION. The act of a defaulter. The reduction of the claim of one of the contracting parties against the other, by deducting from it a smaller claim due from the former to the latter.

The law operates this reduction in certain cases; for, if the parties die or are insolvent, the balance between them is the only claim; but if they are solvent and alive, the defendant may or may not defalcate at his choice. See SET-OFF. For the etymology of this world, see Brackenbridge, Law Misc. 126. Defalcation was unknown at common law; Com. v. Clarkson, 1 Rawle (Pa.) 291.

DEFAMATION. The speaking or writing words of a person so as to hurt his good fame, *de bona fama aliquid detrahere.* Written defamation is termed libel, and oral defamation slander, which titles see. It is a term more used in England than in this country.

See LIBEL; SLANDER.

DEFAULT. The non-performance of a duty, whether arising under a contract or otherwise. In its largest and most general sense, it seems to mean failing. 1 B. & P. 258.

The non-appearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defence.

When the plaintiff makes default, he may be nonsuited; and when the defendant makes default, judgment by default may be rendered against him. Comyns, Dig. *Pleader*, E 42, B. 11. See JUDGMENT BY DEFAULT; 7 Viner, Abr. 429; *Doctr. Plac.* 208; Grah. Pr. 631.

DEFEASANCE. An instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a condition; and that which is in another deed is a defeasance. Comyns, Dig. *Defeasance.*

The defeasance may be subsequent to the

deed in case of things executory; Co. Litt. 237 *a*; 2 Saund. 43; but must be a part of the same transaction in case of an executed contract; Co. Litt. 236 *b*; Lund v. Lund, 1 N. H. 39, 8 Am. Dec. 29; Swetland v. Swetland, 3 Mich. 482; Kelly v. Thompson, 7 Watts (Pa.) 401. Yet, where an instrument of defeasance is executed subsequently in pursuance of an agreement made at the time of making the original deed, it is sufficient; 2 Washb. R. P. 489; as well as where a deed and the defeasance bear different dates but are delivered at the same time; Devl. Deeds 1102; Bodwell v. Webster, 13 Pick. (Mass.) 411; Reitenbaugh v. Ludwick, 31 Pa. 131; Hale v. Jewell, 7 Greenl. (Me.) 435, 22 Am. Dec. 212; Freeman v. Baldwin, 13 Ala. 246. The instrument of defeasance must *at law* be of as high a nature as the principal deed; Eaton v. Green, 22 Pick. (Mass.) 526; Jaques v. Weeks, 7 Watts (Pa.) 261; Kelly v. Thompson, 7 Watts (Pa.) 401; Richardson v. Woodbury, 43 Me. 206. It must recite the deed it relates to, or at least the most material part thereof; and it is to be made between the same persons that were parties to the first deed; Shaw v. Erskine, 43 Me. 371. Defeasances of deeds conveying real estate are generally subject to the same rules as deeds, as to record and notice to purchasers; Brown v. Dean, 3 Wend. (N. Y.) 208; Friedley v. Hamilton, 17 S. & R. (Pa.) 70, 17 Am. Dec. 638; Purrington v. Pierce, 38 Me. 447; but in some states actual notice is not sufficient without recording; Mich. Rev. Stat. 261; Minn. Stat. at L. 1873, 34, § 23.

In equity, a defeasance could be proved by parol and a deed, absolute on its face, shown to be in legal effect a mortgage; Pearson v. Sharp, 115 Pa. 254, 9 Atl. 38; but such evidence must be clear, explicit, and unequivocal, and the parol defeasance must be shown to have been contemporaneous with the deed; *id.* In Pennsylvania, all defeasances are now required to be in writing, executed as deeds and recorded within sixty days after the deed. Act of June 8, 1881.

DEFECT. A lack or absence of something essential to completeness. 66 L. J. Q. B. The want of something required by law.

In pleading, matter sufficient in law must be deduced and expressed according to the forms of law. Defects in matters of substance cannot be cured, because it does not appear that the plaintiff is entitled to recover; but when the defects are in matter of form, they are cured by a verdict in favor of the party who committed them; Robinson v. Clifford, 2 Wash. C. C. 1, Fed. Cas. No. 11,948; Hunnicutt v. Carsley, 1 Hen. & M. (Va.) 153; Read v. Inhabitants of Chelmsford, 16 Pick. (Mass.) 128; Worster v. Proprietors of Canal Bridge, *id.* 541; Russell v. Slade, 12 Conn. 455; Minor v. Bank, 1 Pet. (U. S.) 76, 7 L. Ed. 47; Stanley v. Whipple, 2 McL. 35, Fed. Cas. No. 13,286; Bacon, Abr. *Verdict*, X. See Neil v. Board of Trustees, 31 Ohio St. 15; Richtmyer v. Richtmyer, 50 Barb. (N. Y.) 55; Great Western Compound Co. v. Ins. Co., 40 Wis. 373.

DEFECTUM, CHALLENGE PROPTER. See CHALLENGE.

DEFECTUM SANGUINIS. See ESCHEAT.

DEFENCE. Torts. A forcible resistance of an attack by force.

A man is justified in defending his person, that of his wife, children, and servants, and for this purpose he may use as much force as may be necessary, even to killing the assailant, remembering that the means used must always be proportioned to the occasion, and that an excess becomes itself an injury; 3 M. & W. 150; Jamison v. Moseley, 69 Miss. 478, 10 South. 582; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Kelly v. State, 27 Tex. App. 562, 11 S. W. 627; Duncan v. State, 49 Ark. 543, 6 S. W. 164; Estep v. Com., 86 Ky. 39, 4 S. W. 820, 9 Am. St. Rep. 260; but it must be in defence, and not in revenge; 1 C. & M. 214; Poll. Torts 255; State v. McGraw, 35 S. C. 283, 14 S. E. 630; for one is not justified in shooting another, if such other party is retreating or has thrown away his weapon; Meurer v. State, 129 Ind. 587, 29 N. E. 392; nor is a mere threat to take one's life, with nothing more, a sufficient defence or excuse for committing homicide; State v. Howard, 35 S. C. 197, 14 S. E. 481.

A man may also repel force by force in defence of his personal property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, as robbery, by any force short of taking the aggressor's life; 1 Bish. New Cr. L. § 875; or short of wounding or the employment of a dangerous weapon; Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591. In the latter case Holmes, J., said: "We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which can hardly stand on the right of self-defence, but involve other considerations of policy." See Powers v. People, 42 Ill. App. 427.

With respect to the defence or protection of the possession of real property, although it is justifiable even to kill a person in the act of attempting to commit a forcible felony, as burglary or arson, yet this justification can only take place when the party in possession is wholly without fault; 1 Hale, Pl. Cr. 440, 444; 1 East, Pl. Cr. 259, 277. And where an illegal forcible attack is made upon a dwelling-house with the intention merely of committing a trespass, and not with any felonious intent, it is generally lawful for the rightful occupant to oppose it by

force; 7 Bing. 305; 20 Eng. C. L. 139. See, generally, 1 Chit. Pr. 589; Grotius, lib. 2, c. 1; Rutherford, Inst. b. 1, c. 16; 2 Whart. Cr. L. § 1019; Bishop; Clark; Wharton, Criminal Law; Thompson, Cases of Self-Defence; ASSAULT; SELF-DEFENCE; JUSTIFICATION.

In Pleading and Practice. The denial of the truth or validity of the complaint. A general assertion that the plaintiff has no ground of action, which is afterwards extended and maintained in the plea. 3 Bla. Com. 296; Co. Litt. 127; Wilson v. Poole, 33 Ind. 448.

In this sense it is similar to the *contestatio litis* of the civilians, and does not include justification. In a more general sense it denotes the means by which the defendant prevents the success of the plaintiff's action, or, in criminal practice, the indictment. The word is commonly used in this sense in modern practice.

Half defence was that which was made by the form "defends the force and injury, and says" (*defendit vim et injuriam, et dicit*).

Full defence was that which was made by the form "defends the force and injury when and where it shall behoove him, and the damages, and whatever else he ought to defend" (*defendit vim et injuriam quando et ubi curia considerabit, et damna et quicquid quod ipse defendere debet, et dicit*), commonly shortened into "defends the force and injury when," etc. 3 B. & P. 9, n.; Co. Litt. 127 *b*; Willes 41. It follows immediately upon the statement of appearance, "comes" (*venit*), thus: "comes and defends." By a general defence the propriety of the writ, the competency of the plaintiff, and the jurisdiction of the court were allowed; by defending the force and injury, misnomer was waived; by defending the damages, all exceptions to the person of the plaintiff; and by defending either when, etc., the jurisdiction of the court was admitted. 3 Bla. Com. 298.

The distinction between the forms of half and full defence was first lost sight of; 8 Term 633; Willes 41; 3 B. & P. 9; 2 Saund. 209 *c*; and no necessity for a technical defence exists, under the modern forms of practice.

DEFENDANT. A party sued in a personal action. The term does not in strictness apply to the person opposing or denying the allegations of the demandant in a real action, who is properly called the tenant. The distinction, however, is very commonly disregarded; and the term is further frequently applied to denote the person called upon to answer, either at law or in equity, and as well in criminal as civil suits.

See Clagget v. Blanchard, 8 Dana (Ky.) 41; Schuyler County v. Mercer County, 4 Gilman (Ill.) 20; Almy v. Platt, 16 Wis. 169; Leavitt v. Lyons, 118 Mass. 470; Com. v. Certain Intoxicating Liquors, 122 Mass. 8; 56 L. J. Ch. D. 400; Waddell v. Lanier, 54 Ala. 440.

DEFENDANT IN ERROR. The distinctive term appropriate to the party against whom a writ of error is sued out.

DEFENDARE. To answer for; to be responsible for. Medley.

DEFENDEMUS (Lat. we will defend). A word anciently used in feoffments or gifts, whereby the donor and his heirs were bound to *defend* the donee against any servitude or incumbrance on the thing granted, other than contained in the donation. Cowell.

DEFENDER. In Scotch and Canon Law. A defendant.

DEFENDER (Fr.). To deny; to defend; to conduct a suit for a defendant; to forbid; to prevent; to protect.

DEFENDER OF THE FAITH. A title originally given to the kings of England by the Pope. It was first given by Leo X. to Henry VIII. It is still part of the title.

DEFENERATION. The act of lending money on usury. Wharton.

DEFENSA. A park or place fenced in for deer, and defended as a property and peculiar for that use and service. Cowell.

DÉFENSE AU FOND EN DROIT (called, also, *défense en droit*). A demurrer. 2 Low. C. 278. See, also, 1 Low. C. 216.

DÉFENSE AU FOND EN FAIT. The general issue. 3 Low. C. 421.

DEFENSIVE ALLEGATION. In Ecclesiastical Practice. The answer of the party defending to the allegations of the party moving the cause. 3 Bla. Com. 100.

DEFENSIVE WAR. A war in defence of national right,—not necessarily defensive in its operations. 1 Kent 50.

DEFENSOR. In Civil Law. A defender; one who takes upon himself the defence of another's cause, assuming his liabilities.

An advocate in court. In this sense the word is very general in its signification, including *advocatus*, *patronus*, *procurator*, etc. A tutor or guardian. Calvinus, Lex.

In Old English Law. A guardian or protector. Spelman, Gloss. The defendant; a warrantor. Bracton.

In Canon Law. The advocate of a church. The patron. See ADVOCATUS. An officer having charge of the temporal affairs of the church. Spelman, Gloss.

DEFENSOR CIVITATIS (Lat. defender of the state). **In Roman Law.** An officer whose business it was to transact certain business of the state.

Those officers were so called who, like the tribunes of the people at first, were chosen by the people in the large cities and towns, and whose duty it was to watch over the order of the city, protect the people and the *decuriones* from all harm, protect sailors and naval people, attend to the complaints of those who had suffered injuries, and discharge various

cther duties. As will be seen, they had considerable judicial power. Du Cange; Schmidt, Civ. Law, Introd. 16.

DEFENSUM. A prohibition; an enclosure. Medley, Eng. Const. Hist.

DEFERRED STOCK. See STOCK.

DEFICIT (Lat. is wanting). The deficiency which is discovered in the accounts of an accountant, or in the money which he has received.

DEFICIT, DEFICIENCY. That part of a debt which a mortgage was given to secure and not realized from the sale of the mortgaged property. Goldsmith v. Brown, 35 Barb. (N. Y.) 492. See Johnson v. McKinnon, 54 Fla. 221, 45 South. 23, 13 L. R. A. (N. S.) 874, 127 Am. St. Rep. 135, 14 Ann. Cas. 180.

DEFINE. In legislation, to determine or fix. People v. Bradley, 36 Mich. 452 (as applied to boundaries). To enumerate. U. S. v. Smith, 5 Wheat. (U. S.) 160, 5 L. Ed. 57. To declare that a certain act shall constitute an offence is defining that offence; U. S. v. Arjona, 120 U. S. 488, 7 Sup. Ct. 628, 30 L. Ed. 728.

DEFINITE. Bounded; determinate; fixed. A definite failure of issue occurs when a precise time is fixed by a will for a failure of issue. An indefinite failure of issue is the period when the issue of the first taker shall become extinct and when there shall no longer be any issue of the grantee, but without reference to a particular time or event; Huxford v. Milligan, 50 Ind. 546.

DEFINITION. An enumeration of the principal ideas of which a compound idea is formed, to ascertain and explain its nature; that which denotes and points out the substance of a thing. Ayliffe, Pand. 59.

Definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so: *omnis definitio in jure civili periculosa est, parum est enim ut non subverti possit.*

All ideas are not susceptible of definition, and many legal terms cannot be defined. This inability is frequently supplied, in a considerable degree, by descriptions.

It has been said that a definition is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them; a correct use renders definition unnecessary. 20 Sol. Journ. 869, quoted in Thayer, Evid. 190, with a comment that legal scholarship will be best used to clarify and restate the law.

The meaning of ordinary words, when used in acts of parliament, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained; L. R. 1 Ex. D. 143; for words used with reference to one set of circumstances may convey an intention quite different from what the selfsame set of words used in reference to another set of circumstances would or might have produced; L. R. 3 App. Cas. 68.

"A general dictionary of the English language is not authority to show, on a trial, the meaning of a word which is relied on as deriving a peculiar meaning from mercantile usage;" 7 C. & P. 701; approved in L. R. 5 Exch. 179, 184.

The definitions of the standard lexicographers are authority as indicating the popular use of words; Burnam v. Banks, 45 Mo. 351. Regard must always be had to the circumstances under which a word is used in a statute; Pennsylvania R. Co. v. Price, 96 Pa. 267. Where inconsistent with code statutes, a definition is modified; Ellis v. Prevost, 13 La. 230. Legal definitions for the most part are generalizations derived from judicial experience. To be complete and adequate they must sum up the results of all that experience; Mickle v. Miles, 31 Pa. 21.

DEFINITIVE. That which terminates a suit; final. A definitive sentence or judgment is put in opposition to an interlocutory judgment.

A distinction has been drawn in the United States supreme court between a final and a definitive judgment in regard to the condemnation of a prize in a court of admiralty; U. S. v. The Peggy, 1 Cra. (U. S.) 103, 2 L. Ed. 49; but for all practical purposes a definitive judgment or decree is final; Appeal of Gesell, 84 Pa. 238. See DECREE; JUDGMENT.

DEFLORATION. The act by which a woman is deprived of her virginity.

When this is done unlawfully and against her will, it bears the name of rape (which see); when she consents, it is fornication (which see); or if the man be married it is adultery on his part; 2 Greenl. Ev. § 48; Com. v. Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; State v. Hutchinson, 36 Me. 261; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; Respublica v. Roberts, 2 Dall. (U. S.) 124, 1 L. Ed. 316.

DEFORCEMENT. The holding any lands or tenements to which another has a right.

In its most extensive sense the term includes any withholding of any lands or tenements to which another person has a right; Co. Litt. 277; Phelps v. Baldwin, 17 Conn. 212; so that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, by which the owner of the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him who has the right of property as falls within none of the injuries above mentioned; 3 Bla. Com. 173; Archb. Civ. Pl. 13; Dane, Abr. Index.

DEFORCIANT. One who wrongfully keeps the owner of lands and tenements out of the possession of them. 2 Bla. Com. 350.

DEFORCIARE. To withhold lands or tenements from the rightful owner. This is a word of art which cannot be supplied by any other word. Co. Litt. 331 *b*; 3 Thomas, Co. Litt. 3; Bract. lib. 4, 238; Fleta, lib. 5, c. 11.

DEFOSSION. The punishment of being buried alive. Black, L. Dict.

DEFRAUD. To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice. Burdick v. Post, 12 Barb. (N. Y.) 186. It is not synonymous with "hinder and delay"; Crow v. Beardsley, 68 Mo. 435. See FRAUD.

DEFRAUDACION. **In Spanish Law.** The crime committed by a person who fraudulently avoids the payment of some public tax.

DEGRADATION. The act of depriving a priest of his orders or benefices or of both, either by word of mouth or by public reproach, and a solemn ceremony of stripping from the offender the vestments of his office.

The mode of proceeding in the trial of clergymen is determined by canons in the various dioceses.

The same term is applied to the loss, by a peer, of his rank as such, as when he is deprived thereof by act of parliament. 2 Steph. Com. 608. Degradation must be distinguished from disqualification for bankruptcy, under stat. 34 & 35 Vict. c. 50.

DEGRADING. Sinking or lowering a person in the estimation of the public.

As to compelling a witness to answer questions tending to degrade him, see WITNESS; 13 Howell, St. Tr. 17, 334; 16 *id.* 161; 1 Phill. Ev. 269. To write or print of a man what will degrade him in society is a libel; 1 Dowl. 674; 2 M. & R. 77. See INCRIMINATION.

DEGREE (Fr. *degré*, from Lat. *gradus*, a step in a stairway; a round of a ladder).

A remove or step in the line of descent or consanguinity.

As used in law, it designates the distance between those who are allied by blood: it means the relations descending from a common ancestor, from generation to generation, as by so many steps. Hence, according to some lexicographers, we obtain the word pedigree *(q. v.) par degrez* (by degrees), the descent being reckoned *par degrez*. Minshew. Each generation lengthens the line of descent one degree; for the degrees are only the generations marked in a line by small circles or squares, in which the names of the persons forming it are written. See CONSANGUINITY; LINE; Ayliffe, Parerg. 209; Toullier, *Droit Civ. Franc.* liv. 3, t. 1, c. 3, n. 158; Aso & M. Inst. b. 2, t. 4, c. 3, § 1.

In criminal law, the word is used to distinguish different grades of guilt and punishment attached to the same act, committed under different circumstances, as murder in the first and second degrees.

The state or civil condition of a person. State v. Bishop, 15 Me. 122.

The ancient English statute of additions, for example, requires that in process, for the better description of a defendant, his *state, degree,* or *mystery* shall be mentioned.

An honorable state or condition to which a student is advanced in testimony of proficiency in arts and sciences. See COLLEGE; DIPLOMA.

They are of pontifical origin. See 1 Schmidt, Thesaurus, 144; Vicat, *Doctores;* Minshew, Dict. *Bacheler;* Merlin, *Répertoire Univ.;* Van Espen. pt. 1, tit. 10; Giannone, *Istoria di Napoli,* lib. xi. c. 2, for a full account of this matter.

For the degrees of negligence, see NEGLIGENCE; BAILEE; BAILMENT.

DEHORS (Fr. out of; without). Something out of the record, agreement, will, or other thing spoken of; something foreign to the matter in question. See ALIUNDE.

DEI GRATIA. By the grace of God. An expression used in the titles of sovereigns denoting a claim of authority derived from divine right. It was anciently a part of the titles of inferior magistrates and other officers, civil and ecclesiastical, but was afterwards considered a prerogative of royalty. Abbott; A. M. Eaton, in Report of Am. Bar Assoc. (1902) 313.

DEI JUDICIUM. See JUDICIUM DEI.

DEJACION. **In Spanish Law.** A general term applicable to the surrender of his property to his creditors by an insolvent. The renunciation of an inheritance. The release of a mortgage upon payment, and the abandonment of the property insured to the insurer.

DEL CREDERE COMMISSION. One under which the agent, in consideration of an additional payment, engages to become surety to his principal for not only the solvency of the debtor, but the punctual discharge of the debt. 21 W. R. 465; L. R. 6 Ch. App. 397. He is liable, in the first instance, without any demand from the debtor. The principal cannot sue the *del credere* factor until the debtor has refused or neglected to pay; 1 Term 112; Paley, Ag. 39. See Pars. Contr.; Story; Wharton; Mechem, Agency.

He is virtually a surety; 8 Ex. 40; and the purchaser is the primary debtor; Gindre v. Kean, 7 Misc. 582, 28 N. Y. Supp. 4. He is distinguished from other agents by the fact that he guarantees that those persons to whom he sells shall perform the contracts which he makes with them; L. R. 6 Ch. 403.

DELATE. **In Scotch Law.** To accuse. Bell, Dict.

DELATIO. **In Civil Law.** An accusation or information. Du Cange.

DELATOR. An accuser or informer. Du Cange.

DELATURA. In Old English Law. An accusation. Cunningham. The reward of an informer. Whishaw.

DELAWARE. The name of one of the original states of the United States of America, being the first to adopt the constitution.

In 1623, Cornelius May, with some Dutch emigrants, established a trading-house, but the settlers soon removed to North river. Ten years afterwards De Vries arrived at Cape Henlopen, but the natives shortly destroyed the settlement. In the spring of 1633 the Swedes under Minuit established a settlement at the mouth of the Minquas river, which was called by them the Christiana, in honor of their queen. They purchased all the lands from Cape Henlopen to the falls near Trenton, and named the country New Sweden. Stuyvesant, the Dutch governor of New York, ended the Swedish authority in 1654. The Dutch held the country until 1664, when it fell into the hands of the English, and was granted by Charles II. to his brother James, Duke of York. In 1682, William Penn obtained a patent from the Duke of York, releasing all his title claimed through his patent from the crown to a portion of the territory. By this grant Penn became possessed of New Castle and the land lying within a circle of twelve miles around it, and subsequently of a tract of land beginning twelve miles south of New Castle and extending to Cape Henlopen. In consequence of a dispute between Penn and Lord Baltimore, the south and west lines, dividing his possessions from Maryland, were traced in 1761, under a decree of Lord-Chancellor Hardwicke, by the surveyors Mason and Dixon; and this line, extended westward between Maryland and Pennsylvania, has become historical as *Mason and Dixon's Line (q. v.)*.

Delaware was divided into three counties, called New Castle, Kent, and Sussex, and by enactment of Penn was annexed to Pennsylvania under the name of the Three Lower Counties upon Delaware. These counties remained for twenty years a part of Pennsylvania, each county sending six delegates to the general assembly. They separated in 1703, with the consent of the proprietary, and were governed by a separate legislature of their own, pursuant to the liberty reserved to them by a clause of their original charter.

Delaware was the first state to ratify the federal constitution, on December 7, 1787.

In 1776 a state constitution was framed, a second in 1792, and a third in 1831, which remained in force until 1897. The agitation for constitutional changes was begun before 1850, and in 1853 a convention was held and a constitution adopted which was, on submission to a popular vote, defeated. After the civil war the efforts to obtain a convention were resumed, but were unsuccessful until 1896.

The present constitution was adopted June 4, 1897, by a constitutional convention which was duly called to meet in December, 1896, delegates having been elected at the general election of that year. The constitution contains the usual declaration of rights, no change being made in that article. Minor amendments were adopted in 1913, relating to the legislative journals and the judiciary.

DELAY. To procrastinate; detain or stop; to prolong.

See HINDER AND DELAY.

As to delay in presenting checks, see CHECK.

As to delay in the execution of contract work, see NEGLIGENCE; BREACH OF CONTRACT; PERFORMANCE; TIME.

DELECTUS PERSONÆ (Lat. the choice of the person). The right of a partner to decide what new partners, if any, shall be admitted to the firm. Story, Partn. §§ 5, 195.

This doctrine excludes even executors and representatives of partners from succeeding to the state and condition of partners; Kingman v. Spurr, 7 Pick. (Mass.) 237; 3 Kent 55; Lindl. Partn. 590.

DELEGATE. One authorized by another to act in his name; an attorney.

A person elected, by the people of an organized territory of the United States, to congress, who has a seat in congress and a right of debating, but not of voting. Ord. July 13, 1787; 2 Story, U. S. Laws 2076.

A person chosen to any deliberative assembly. It is, however, in this sense generally limited to occasional assemblies, such as conventions and the like, and does not usually apply to permanent bodies, as houses of assembly, etc. In Maryland the more numerous branch of the Legislature is called the House of Delegates.

As to its meaning when used as a verb, see DELEGATION.

DELEGATION. In Civil Law. A kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. See NOVATION.

Perfect delegation exists when the debtor who makes the obligation is discharged by the creditor.

Imperfect delegation exists when the creditor retains his rights against the original debtor. 2 Duvergnoy, n. 169.

It results from the definition that a delegation is made by the concurrence of at least three parties, viz.: the party delegating—that is, the former debtor who procures another debtor in his stead; the party delegated, who enters into the obligation in the place of the former debtor, either to the creditor or to some other person appointed by him; and the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating. Sometimes there intervenes a fourth party; namely, the person indicated by the creditor in whose favor the person delegated becomes obliged, upon the indication of the creditor and by the order of the person delegating. Pothier, Obl. pt. 3, c. 2, art. 6; Adams v. Power, 48 Miss. 454. See La. Civ Code 2188, 2189; Kellogg v. Richards, 14 Wend. (N. Y.) 116; Buster v. Newkirk, 20 Johns. (N. Y.) 76; Wentworth v. Wentworth, 5 N. H. 410; Sterling v. Trading Co., 11 S. & R. (Pa.) 179.

The party delegated is commonly a debtor of the person delegating, and, in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. Pothier, *ut supra*.

In general, where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him in case of the substitute's insolvency. There is an exception to this rule when it is agreed that the debtor shall at *his own risk* delegate another person; but even in that case the creditor must not have omitted using proper diligence to obtain payment whilst the substitute continued solvent. Pothier.

Delegation differs from transfer and simple indication. The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer to the other, who receives it, and only takes place between these two persons, without the consent of the debtor necessarily intervening. Again, when the debtor indicates to the creditor a person from whom he may receive payment of the debt, and to whom the debtor gives the creditor an order for the purpose, it is merely a mandate, and neither a transfer nor a novation. So, where the creditor indicates a person to whom his debtor may pay the money, the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication. Pothier. See NOVATION.

At Common Law. The transfer of authority from one or more persons to one or more others.

Any person, *sui juris*, may delegate to another in authority to act for him in a matter which is lawful and otherwise capable of being delegated; Comyns, Dig. *Attorney*, c. 1; 9 Co. 75 *b*; Story, Ag. § 6.

When a bare power or authority has been given to another, the latter cannot, in general, delegate that authority, or any part of it, to a third person, for the obvious reason that the principal has relied upon the intelligence, skill, and ability of his agent, and cannot have the same confidence in a stranger; Story, Ag. § 13; 2 Kent 633; Broom, Leg. Max. 839; Shankland v. Washington, 5 Pet. (U. S.) 390, 8 L. Ed. 166; Ex parte Winsor, 3 Sto. 411, 425, Fed. Cas. No. 17,884; Entz v. Mills, 1 McMull. (S. C.) 453; Brewster v. Hobart, 15 Pick. (Mass.) 303; Wilson v. R. Co., 11 Gill & J. (Md.) 58; Mason v. Wait, 4 Scam. (Ill.) 127, 133; Smith v. Lowther, 35 W. Va. 300, 13 S. E. 999; Whitlock v. Washburn, 62 Hun 369, 17 N. Y. Supp. 60. A power to delegate his authority may, however, be given to the agent by express terms of substitution; Commercial Bank of Lake Erie v. Norton, 1 Hill (N. Y.) 505. If the power of the agent is created by writing, he cannot go beyond it; Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625.

Sometimes such power is implied, as in the following cases: *First*, when, by the law, such power is indispensable in order to accomplish the end proposed: as, for example, when goods are directed to be sold at auction, and the law forbids such sales except by licensed auctioneers; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440. *Second*, when the employment of such substitute is in the ordinary course of trade: as, where it is the custom of trade to employ a shipbroker or other agent for the purpose of procuring freight and the like; 2 M. & S. 301; Gray v. Murry, 3 Johns. Ch. (N. Y.) 167; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440. *Third*, when it is understood by the parties to be the mode in which the particular thing would or might be done; 9 Ves. 234, 251, 252; 2 M. & S. 301, 303, note. See the Guiding Star, 53 Fed. 936. *Fourth*, when the powers thus delegated are merely mechanical in their nature; Commercial Bank of Lake Erie v. Norton, 1 Hill (N. Y.) 501; Sugd. Pow. 176. See PRINCIPAL AND AGENT.

As to the form of the delegation, for most purposes it may be either in writing, not under seal, or verbally without writing; or the authority may be implied. When, however, the act is required to be done under seal, the delegation must also be under seal unless the principal is present and verbally or impliedly authorizes the act; Story, Ag. § 51; Mech. Ag. 81; Gardner v. Gardner, 5 Cush. (Mass.) 483, 52 Am. Dec. 740.

Judicial power cannot be delegated; Cohen v. Hoff, 3 Brev. (S. C.) 500; Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69; a statute authorizing an attorney to sit in the place of a judge who was disqualified, by reason of prejudice or interest, is void; Van Slyke v. Ins. Co., 39 Wis. 390, 20 Am. Rep. 50.

Of Legislative Power. It is the general rule that legislative power cannot be delegated by the legislature to any other body or authority; Brewer Brick Co. v. Brewer, 62 Me. 62, 16 Am. Rep. 395; Farnsworth Co. v. Lisbon, 62 Me. 451; Willis v. Owen, 43 Tex. 41; Appeal of Locke, 72 Pa. 491, 13 Am. Rep. 716; State v. Wilcox, 45 Mo. 458; State v. Parker, 26 Vt. 362; Rice v. Foster, 4 Harring. (Del.) 479; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Cooley, Const. Lim. 141; U. S. v. Bridge Co., 45 Fed. 178; City of St. Joseph v. Wilshire, 47 Mo. App. 125; see Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; but the taking effect of a statute may be made to depend upon some subsequent event; The Aurora v. U. S., 7 Cra. (U. S.) 382, 3 L. Ed. 378; Mayor, etc., of Baltimore v. Clunet, 23 Md. 449; Lothrop v. Stedman, 42 Conn. 583, Fed. Cas. No. 8,519.

It has often been said that it is elementary law that legislative power cannot be delegated. The difficulty is in determining what authority or discretion may be conferred on a body other than the legislature without

contravening constitutional principle. The general question was the subject of extended discussion in a case sustaining the validity of an act conferring upon railroad commissioners the power to determine what are reasonable rates for transportation; State v. Ry. Co., 38 Minn. 281, 37 N. W. 782.

In that case the court quotes from a previous decision (State v. Young, 29 Minn. 474, 9 N. W. 737) the general rule against the delegation of legislative power, as requiring the legislature to pass upon two things, the authority to make, and the expediency of, the enactment. The court then proceeds to lay down a limitation for the rule growing out of the necessity of the exercise of discretion and judgment in the exercise of certain powers. Attention is directed to the difficulty in many cases of discriminating between what is properly legislative and what may be executive or administrative duty, and it is said that, while still recognizing the difference between the departments of government, "the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253. The principle is repeatedly recognized by all courts that the legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution." A number of examples are given of statutes granting discretionary powers to officers charged with the execution of the laws; power given to boards in control of public institutions to make contracts, adopt rules, etc.; the assessment of property for the purpose of taxation; the exercise of the police power in requiring and granting licenses, and the conclusion is stated in the exact words of Judge Ranney, quoted *infra*.

The decision of the Minnesota case was reversed upon grounds not affecting this general statement of the doctrine of the delegation of legislative power; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.

This question was elaborately considered by the supreme court in Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294. In this case it was held that the authority conferred by a tariff act upon the president to suspend by proclamation the free introduction of sugar, etc., when he should be satisfied that any country producing such articles imposed duties or other exactions upon agricultural or other products of the United States, did not conflict with the recognized principle that congress could not delegate its legislative power to the president. The law was complete when it was declared that the suspension should take effect upon a named contingency, the president was the mere agent to ascertain the event upon which the legislative will was to take effect. The court quotes with approval the language, often cited, of Ranney, J., in Cincinnati, W. & Z. R. Co. v. County Com'rs, 1 Ohio St. 88: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Two Pennsylvania cases are quoted with approval as follows: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." Moers v. City of Reading, 21 Pa. 188, 202. "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction, the court said, was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be subject to inquiry and determination outside of the halls of legislation." Appeal of Locke, 72 Pa. 491, 498, 13 Am. Rep. 716.

While it is difficult to define the line which separates legislative power to make laws and and administrative authority to make regulations, congress may delegate power to fill up details where it has indicated its will in the statute, and it may make violations of such regulations punishable as indicated in the statute. Regulations of the secretary of agriculture as to grazing sheep on forest reserves have the force of law; and violation thereof is punishable under R. S. Sec. 5388; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. The authority given by congress to the secretary of war to prescribe rules and regulations for the use, administration, and control of canals, etc., owned or operated by the United States, is held not to be a delegation of legislative power, and rules made pursuant thereto have the force of law; U. S. v. Ormsbee, 74 Fed. 207. So authority given to the same officer to decide as to whether bridges over navigable rivers interfere with navigation is not a delegation of legislative power; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; U. S. v. City of Moline, 82 Fed. 592; and see Miller v. New York, 109 U. S. 385,

3 Sup. Ct. 228, 27 L. Ed. 971; nor is the determination of the treasury department of standards of teas that may be imported; Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Congress may confer upon the department of commerce and labor the power to determine the right of a Chinese person to enter the United States and may make the decision of that department conclusive on the federal courts in *habeas corpus* proceedings even where citizenship is the ground on which the right of entry is claimed; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

Where the decision of questions of fact is committed by congress to the judgment of the head of a department, his decision is conclusive; and even upon mixed questions of law and fact, or of law alone, there is a strong presumption of its correctness and the courts will not ordinarily review it, although they may occasionally do so; Bates & Guild Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, where the court refused to interfere with the decision of the postmaster general as to the postal rates to be charged on a certain publication. The findings of the land department are treated by the courts as conclusive, though such proceedings involve, to a certain extent, the exercise of judicial power; Burfenning v. R. Co., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Johnson v. Drew, 171 U. S. 93, 18 Sup. Ct. 800, 43 L. Ed. 88. And since the land department is constituted a special tribunal with judicial functions, neither injunction nor mandamus will lie against an officer of that department to control him in discharging an official duty requiring the exercise of his judgment and discretion; U. S. v. Hitchcock, 190 U. S. 316, 23 Sup. Ct. 698, 47 L. Ed. 1074, citing Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800; Gaines v. Thompson, 7 Wall. (U. S.) 347, 19 L. Ed. 62; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811.

There seems to be a presumption that officers of state making rules under statutory powers have not exceeded their authority; Lord Esher in (1887) 18 Q. B. Div. 383, 400.

The legislature may confer upon commissions the power to determine for what purposes, and upon what terms, conditions, and limitations, an increase of capital stock may be made by railroad corporations; State v. Ry. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250. It may not authorize such commission to allow an increase of capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it; this being an attempt to delegate legislative power; *id.*

It may provide, in appeals from orders of the state railroad commission, that the burden of proof shall rest upon the party seeking to set aside the decision of the commissioners of showing that the order is unreasonable and unjust, and that the record shall be *prima facie* evidence that the order is just and reasonable; Chicago, R. I. & P. R. Co. v. Ry. Commission, 85 Neb. 818, 124 N. W. 477, 26 L. R. A. (N. S.) 444.

It may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials, within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose; State v. R. Co., 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639.

The legislature may confer upon the state auditor the right to issue licenses for bookmaking on horse races to persons of good character; State v. Williams, 160 Mo. 333, 60 S. W. 1077; may require consent of park commissioners for orations in a park; Com. v. Abrahams, 156 Mass. 57, 30 N. E. 79; or of a city committee for orations on a common; Com. v. Davis, 140 Mass. 485, 4 N. E. 577; or of the clerk of a market for the use of a stand on the street; In re Nightingale, 11 Pick. (Mass.) 168; may require a permit in writing from the board of health to keep swine; Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; or from the commissioners of the town to erect wooden buildings; Commissioners of Easton v. Covey, 74 Md. 262, 22 Atl. 266; or from the president of the board of trustees of a municipality to beat drums in the travelled streets of a city; In re Flaherty, 105 Cal. 558, 38 Pac. 981, 27 L. R. A. 529. A commission may be authorized to select and adopt a uniform series of text-books for the schools of a state; Leeper v. State, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 167; or voting machines for use in elections; Elwell v. Comstock, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; The McTammany Voting Machine, 23 R. I. 630, 50 Atl. 265; City of Detroit v. Board of Inspectors of Election, 139 Mich. 548, 102 N. W. 1029, 69 L. R. A. 184, 111 Am. St. Rep. 430; Lynch v. Malley, 215 Ill. 574, 74 N. E. 723, 2 Ann. Cas. 837; Opinion of Justices to House of Representatives, 178 Mass. 605, 60 N. E. 129, 54 L. R. A. 430 (by a divided court). A statute authorizing measures preventive of smallpox confers authority upon a board to compel vaccination during an epidemic; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; and one giving general sanitary power authorizes a board to keep adulterated milk out of a city; Polinsky v. People, 73 N. Y. 65.

A provision that a boiler inspector's act shall not apply to boilers inspected by insurance companies and certified by their authorized inspectors to be safe; State v. McMahon, 65 Minn. 453, 68 N. W. 77; and an act providing that hogs shall not run at

large in a county, if the county courts on petition of voters direct that the act be enforced therein; Haigh v. Bell, 41 W. Va. 19, 23 S. E. 666, 31 L. R. A. 131; are valid.

Acts held not to be a delegation of legislative power and therefore valid, are authorizing the fish commissioners to give permits to take fish for propagation at times and by methods otherwise prohibited; People v. Brooks, 101 Mich. 98, 59 N. W. 444; requiring carriers of passengers to furnish their agents with certificates of authority to sell tickets, on which a license shall be issued by the state; State v. Corbett, 57 Minn. 347, 59 N. W. 317, 24 L. R. A. 498; authorizing a court to issue certificates of incorporation to municipalities; In re Town of Union Mines, 39 W. Va. 179, 19 S. E. 398; permitting the board of supervisors of counties to determine whether a county shall come within or remain without the provisions of an act to establish law libraries; Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Atl. 244; providing that an act in relation to public roads shall not go into effect until recommended by the grand jury; Haney v. Bartow County Com'rs, 91 Ga. 770, 18 S. E. 28; authorizing railroad and warehouse commissioners to make a schedule of a maximum rate of charges for each railroad company in the state; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; authorizing the union of two railroad companies and that the united company may discontinue such operations of the road as the directors deem necessary; Farnum v. R. R., 66 N. H. 569, 29 Atl. 541; authorizing railroad commissioners to regulate freights; Georgia R. R. v. Smith, 70 Ga. 694; or to make reasonable regulations for the prevention of excessive charges and unjust discrimination; Atlantic Exp. Co. v. R. Co., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805; or to fix rates; Michigan Cent. R. Co. v. Railroad Commission, 160 Mich. 355, 125 N. W. 549; Oregon R. & Nav. Co. v. Campbell, 173 Fed. 957; Southern Indiana Ry. Co. v. Railroad Commission, 172 Ind. 113, 87 N. E. 966; Trustees of Village of Saratoga Springs v. Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; or to order a company to remove grade crossings and on its failure to do so to determine the portion of the expense thereof which is to be paid by the company; Appeal of New York & N. E. R. Co., 62 Conn. 527, 26 Atl. 122; to provide that the mayors of cities of a certain class may be elected by the people or appointed by the council as provided by ordinance; Brown v. Holland, 30 S. W. 629, 17 Ky. L. Rep. 149; to authorize park commissioners to determine where and of what material sidewalks and road beds shall be constructed; Turner v. City of Detroit, 104 Mich. 326, 62 N. W. 405; to authorize a state medical board to exercise powers of registration and examination; France v. State, 57 Ohio St. 1, 47 N. E. 1041, 38 Ohio L. J. 239.

A legislative body may delegate to an official the power to find some fact or situation on which the operation of the law is conditioned and to make and enforce regulations for enforcing the act; St. Louis Merchants' Bridge Terminal R. Co. v. U. S., 188 Fed. 191, 110 C. C. A. 63 (C. C. A. 8th). It cannot delegate its lawmaking power or its indispensable discretion to modify a statute; *id.*

Statutes declaring that railroad rates and service shall be reasonable, and creating a commission with power to investigate existing rates and service, and to fix and determine what rates and what service are reasonable, the statute then providing that the rates and service so fixed shall be in force, have been generally upheld, as a valid exercise of the legislative power; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Georgia R. R. v. Smith, 70 Ga. 694; Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278; Hopper v. Ry. Co., 91 Ia. 639, 60 N. W. 487; State v. R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514; Railroad Commission of Texas v. Ry. Co., 90 Tex. 340, 38 S. W. 750; Michigan Cent. R. Co. v. Railroad Commission, 160 Mich. 355, 125 N. W. 549.

The legislature may declare the general rule of law to be in force and take effect upon the subsequent establishment of the facts necessary to make it operative, or to call for its application, as the bankruptcy law of the United States with reference to legislative action regarding exemption laws existing or to be thereafter enacted; Hanover Nat. Bank v. Moyses, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. Ed. 1113; or a law may be made to take effect conditionally, depending upon the action of the legislature of another state fixing the amount to be enacted; Phœnix Ins. Co. of New York v. Welch, 29 Kan. 672; or it may be conditioned upon the legislative act of a city council; Adams v. City of Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; or upon action of the executive; In re Griner, 16 Wis. 424; Marshall Field & Co. v. Clark, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; or upon judicial action involving the determination of questions of fact; In re Incorporation of Village of North Milwaukee, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638; or upon administrative action; State v. Burdge, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. Rep. 123; or upon a declaration of fact or the creation of a condition by vote of the electors of a municipality; State v. Hinkel, 131 Wis. 103, 111 N. W. 217.

Authority to transfer cases pending in a

territorial court to the federal courts may be delegated to a constitutional convention, upon the admission of the territory as a state; Hecht v. Metzler, 82 Fed. 340.

Acts held invalid as an improper delegation by the legislature of the police power are: An act directing the insurance commissioner to prescribe a standard policy and forbidding the use of any other; O'Neil v. Ins. Co., 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650; acts authorizing insurance commissioners to adopt a printed form of fire policy with conditions indorsed thereon, which, as nearly as possible, in type and form shall conform to that adopted by another state; Dowling v. Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; Anderson v. Fire Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400, in which it was admitted that an act similar to that of Pennsylvania would be invalid, but it was unsuccessfully contended that the legislative direction to conform as nearly as possible to a specified policy would take the case out of the principle laid down by the Pennsylvania court. So also was an act permitting a justice to put a person charged with drunkenness as a disorderly person under recognizance to take the treatment of a private corporation administering a cure for drunkenness, and providing that on reports showing compliance, he should be acquitted and discharged; Senate of Happy Home Clubs v. Board of Supervisors, 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144.

A law providing for the adjustment of state bonds, and authorizing judges to decide which of two sections of the act should take effect, gives them legislative power and is void; State v. Young, 29 Minn. 474, 9 N. W. 737; in this case the subject was very elaborately argued, and the distinction between legislative and judicial power is very clearly stated by the court. See *supra*.

The legislature cannot leave to commissioners the power to decide in what proportion the expense of laying out and opening a public avenue should be imposed on townships of a county or wards of a city; State v. County Com'rs, 37 N. J. L. 12.

The legislature may not delegate the power to make a law prescribing a penalty, but it is competent for the legislature to authorize the railroad commission to prescribe duties upon which the law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. Where a penalty is imposed by law, it may be incurred for the penal violation of a rule prescribed by the railroad commission within their express authority; State v. R. Co., 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639, where the commissioners adopted a rule that all railroads would be liable to the shipper to a charge of $1 per day for detaining cars. Such a charge was held not a penalty, but a monetary obligation incurred for breach of duty that may be enforced by the shipper.

Congress may not delegate its general legislative power to the District of Columbia; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; nor its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts with a view to making orders in a particular matter within the rules laid down by the congress; Interstate Commerce Commission v. Transit Co., 224 U. S. 215, 32 Sup. Ct. 436, 56 L. Ed. 729, citing Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

Leaving to the interstate commerce commission the carrying out of details in the exercise of its discretion is not a delegation of legislative authority; Interstate Commerce Commission v. Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729. The commission may require common carriers to adopt a uniform system of accounting and bookkeeping and to make annual reports embracing not only their joint rail and water business, but the other business of the carriers as well, such as their port to port business, both intrastate and interstate, and the business of operating amusement parks; Interstate Commerce Commission v. Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729.

It is said that the power vested in boards of health to forbid by general regulations the exercise within their respective towns of any trade which is a nuisance is in its nature quasi-judicial. Its exercise requires the officers charged with the duty to use their discretion and judgment in adjudicating on the subject-matter. This is the decisive test that the authority vested in them is judicial and not ministerial merely; Belcher v. Farrar, 8 Allen (Mass.) 325. In Nelson v. State Board of Health, 186 Mass. 330, 71 N. E. 693, it is said there are two classes of regulations—the general and the special. The general regulations are said to be quasi-legislative, while those regarding a particular case are termed quasi-judicial. Where commissioners determined that sawdust from a particular mill might not be discharged into a stream because of injury to fish therein, the court held the commissioners' order to be a legislative one and so valid without notice or hearing; Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630. Since the decision in this case, a Massachusetts Act requires commissioners before mak-

ing an order forbidding the discharge of sawdust into a stream, to give notice thereof and a hearing thereon and giving to persons aggrieved thereby a right of appeal to the superior court sitting in equity. See 20 Harv. L. R. 116, where the query is made: Have the commissioners become judicial since the passage of the Act?

Power may be conferred upon a state officer, as such, to execute a duty imposed under an act of congress; Dallemagne v. Moisan, 197 U. S. 169, 25 Sup. Ct. 422, 49 L. Ed. 709.

The legislature may delegate to a commission the power to determine the boundaries of the sections of a city in which buildings of different heights as determined by the legislature shall be erected; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160; it may confer upon examining boards appointed by the mayors in certain cities in the state, the power to examine plumbers as to their fitness; People v. Warden of City Prison, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; but it cannot delegate to a board authority to require a knowledge of embalming as a condition to receiving an undertaker's license; Wyeth v. Board of Health, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. See MUNICIPAL CORPORATION.

It may empower the courts on the application of local authorities and, after notice to railway companies, to order that gates be erected at the intersection of a railroad and a street; People v. R. Co., 134 N. Y. 506, 31 N. E. 873.

Sir F. Pollock (First Book of Jurisp. 244) points out the difference in constitutional law between delegated and devolved, applying the latter term, for instance, to the powers given by parliament to the legislatures of British colonies which are plenary within the appointed limits, such a legislature not being "a mere delegate or agent of the imperial parliament."

As to the delegation of power by directors of a corporation to an executive committee, or of a bank to its executive officers, see DIRECTORS; NATIONAL BANK; OFFICER; CASHIER.

As to the delegation of legislative power in the government of the Phillipine Islands, see PHILLIPINES.

As to questions relating to the submission of legislation to a popular vote, see LEGISLATIVE POWER, and see also INITIATIVE, REFERENDUM, AND RECALL.

DÉLESTAGE. In French Marine Law. A discharging of ballast from a vessel.

DELIBERATE. To examine, to consult, in order to form an opinion. Thus, a jury deliberate as to their verdict.

DELIBERATION. The act of the understanding by which a party examines whether a thing proposed ought to be done or not to be done, or whether it ought to be done in one manner or another.

The deliberation relates to the end proposed, to the means of accomplishing that end, or to both. It is a presumption of law that all acts are done with due deliberation,—that the party intended to do what he has done. But he may show the contrary. In contracts, for example, he may show that he has been taken by surprise; and when a criminal act is charged, he may prove that it was an accident and not with deliberation,—that, in fact, there was no intention or will. See 18 Am. Dec. 778, n.

By the use of this word in describing the crime of murder in the first degree, the idea is conveyed that the perpetrator weighs the motives for the act, and its consequences, the nature of the crime, or other things connected with his intentions, with a view to a decision thereon, that he carefully considers all these, and the act is not suddenly committed; State v. Boyle, 28 Ia. 524. See State v. Wieners, 66 Mo. 13; Nye v. People, 35 Mich. 16; INTENT; MURDER; MALICE; COOLING TIME; WILL.

In Legislation. Counsel or consultation touching some business in an assembly having the power to act in relation to it.

DELICT. **In Civil Law.** The act by which one person, by fraud or malignity, causes some damage or tort to some other.

In its most enlarged sense, this term includes all kinds of crimes and misdemeanors, and even the injury which has been caused by another, either voluntarily or accidentally, without evil intention. But more commonly by delicts are understood those small offences which are punished by a small fine or a short imprisonment.

Private delicts are those which are directly injurious to a private individual.

Public delicts are those which affect the whole community in their hurtful consequences.

Quasi delicts are the acts of a person, who, without malignity, but by an inexcusable imprudence, causes an injury to another. Pothier, Obl. n. 116; Erskine, Pr. 4. 4. 1.

DELICTUM (Lat.). A crime or offence; a tort or wrong, as in actions *ex delicto*. 1 Chit. Pl. A challenge of a juror *propter delictum* is for some crime or misdemeanor that affects his credit and renders him infamous. 3 Bla. Com. 363; 2 Kent 241. Some offence committed or wrong done. 1 Kent 552; Cowp. 199, 200. A state of culpability. Occurring often, in the phrase *"in pari delicto melior est conditio defendentis."* So, where both parties to a broken contract have been guilty of unlawful acts, the law will not interfere, but will leave them *in pari delicto*. 2 Greenl. Ev. § 111.

DELIMIT. To mark or lay out the limits or boundary line of a territory or country.

DELINQUENT. One who has been guilty of some crime, offence, or failure of duty.

DELIRIUM FEBRILE. In Medical Jurisprudence. A form of mental aberration incident to febrile disease, and sometimes to the last stages of chronic diseases.

The aberration is mostly of a subjective character, maintained by the inward activity of the mind rather than by outward impressions. "Regardless of persons or things around him, and scarcely capable of recognizing them when aroused by his attendants, the patient retires within himself, to dwell upon the scenes and events of the past, which pass before him in wild and disorderly array, while the tongue feebly records the varying impressions, in the form of disjointed, incoherent discourse, or of senseless rhapsody." Ray, Med. Jur. 346. It comes on gradually, being first manifested by talking while asleep, and by a momentary forgetfulness of persons and things on waking. Fully aroused, however, the mind becomes clear and tranquil, and so continues until the return of sleep, when the same incidents recur. Gradually the mental disorder becomes more intense, and the intervals between its returns of shorter duration, until they disappear altogether. Occasionally the past is revived with wonderful vividness, and acquirements are displayed which the patient, before his illness, had entirely forgotten. Instances are related of persons speaking in a language which, though acquired in youth, had long since passed from their memory. See the definition of delirium by Bland, Ch., in Owing's case, 1 Bland, (Md.) Ch. 386, 17 Am. Dec. 311.

The only acts which are liable to be affected by delirium are wills, which are often made in the last illness during the periods when the mind is apparently clear. Under such circumstances it may be questioned whether the apparent clearness was or was not real; and it is a question not always easily answered. In the early stages of delirium the mind may be quite clear no doubt, in the intervals, while it is no less certain that there comes a period at last when no really lucid interval occurs and the mind is reliable at no time. The person may be quiet, and even answer questions with some degree of pertinence, while a close examination would show the mind to be in a dreamy condition and unable to appreciate any nice relations. In all these cases the question to be met is, whether the delirium which confessedly existed before the act left upon the mind no trace of its influence; whether the testator, calm, quiet, clear, and coherent as he seemed, was not quite unconscious of the nature of the act he was performing. The state of things implied in these questions is not fanciful. In every case it may possibly exist, and the questions must be met.

After obtaining all the light which can be thrown on the mental condition of the testator by nurses, servants, and physicians, then the character of the act itself and the circumstances which accompany it require a careful investigation. If it should appear that the mind was apparently clear, and that the act was a rational act rationally done, consistent one part with another, and in accordance with wishes or instructions previously expressed, and without any appearance of foreign influence, then it would be established. A different state of things would to that extent raise suspicion and throw discredit on the act. Yet at the very best it will occasionally happen, so dubious sometimes are the indications that the decision will be largely conjectural. 1 Hagg Eccl. 146, 256, 502, 577; 2 *id.* 142; 3 *id.* 790; 1 Lee Eccl. 130; 2 *id.* 229. See INSANITY.

DELIRIUM TREMENS (called, also, *mania-a-potu*). In Medical Jurisprudence. A form of mental disorder, usually accompanied by tremor, incident to habits of intemperate drinking, which generally appears as a sequel to a period of unusual excess or after a few days' abstinence from stimulating drink. It may also be caused in intemperate subjects by an accident, fright, or acute inflammatory disease, such as pneumonia.

The nature of the connection between this disease and abstinence is not yet clearly understood. Where the former succeeds a broken limb, or any other severe accident that confines the patient to his bed and obliges him to abstain, it would seem as if its development were favored by the constitutional disturbance then existing. In other cases, where the abstinence is apparently voluntary, there is some reason to suppose that it is really the incubation of the disease, and not its cause.

Its approach is generally indicated by a slight tremor and faltering of the hands and lower extremities, a tremulousness of the voice, a certain restlessness and sense of anxiety which the patient knows not how to describe or account for, disturbed sleep, and impaired appetite. These symptoms having continued two or three days, at the end of which time they have usually increased in severity, the patient ceases to sleep altogether, and soon becomes delirious at intervals. After a while the delirium becomes constant, as well as the utter absence of sleep. There is usually an elevation of temperature of two or three degrees. This state of watchfulness and delirium continues three or four days, when, if the patient recover, it is succeeded by sleep, which at first appears in uneasy and irregular naps, and lastly in long, sound, and refreshing slumbers. If sleep does not supervene about this time, the disease may prove fatal.

The mental aberration of delirium tremens is marked by some peculiar characters. Almost invariably the patient manifests feelings of fear and suspicion, and labors under continual apprehensions of being made the victim of sinister designs and practices. He imagines that people have conspired to rob and murder him, and insists that he can hear them in an adjoining room arranging their plans and preparing to rush upon him, or that he is forcibly detained and prevented from going to his own home. One of the most common hallucinations in this disease is that of constantly seeing devils, snakes, or vermin around him and on him. Under the influence of the terrors inspired by these notions, the wretched patient often endeavors to cut his throat, or jump out of the window, or murder his wife, or some one else whom his disordered imagination identifies with his enemies.

Delirium tremens must not be confounded with other forms of mental derangement which occur in connection with intemperate habits. Hard drinking may produce a paroxysm of maniacal excitement, or a host of hallucinations and delusions, which disappear after a few days' abstinence from drink and are succeeded by the ordinary mental condition. In U. S. v. McGlue, 1 Curt. cc. 1, Fed. Cas. No. 15,679, for instance, the prisoner was defendant on the plea that the homicide for which he was indicted was committed in a fit of delirium tremens. There was no doubt that he was laboring under some form of insanity; but the fact, which appeared in evidence, that his reason returned before the recurrence of sound sleep, rendered it very doubtful whether the trouble was delirium tremens, although in every other respect it looked like that disease.

By repeated decisions the law has been settled in this country that delirium tremens annuls responsibility for any act that may be committed under its influence: provided, of course, that the mental condition can stand the tests applied in other forms of insanity. The law does not look to the remote causes of the mental affection; and the rule on this point is, that if the act is not committed under the immediate influence of intoxicating drinks, the plea of insanity is not invalidated by the fact that it is the result of drinking at some previous time. Such drinking may be morally wrong; but the same may be said of other vicious indulgences which give rise to much of the insanity which exists in the world; Whart. Cr. L. § 48; Beasley v. State, 50 Ala. 149, 20 Am. Rep. 292; Cluck v. State, 40 Ind. 263; Roberts v. People, 19 Mich. 401; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Fisher v. State, 64 Ind.

435; U. S. v. McGlue, 1 Curt. cc. 1, Fed. Cas. No. 15,679; U. S. v. Drew, 5 Mas. 28, Fed. Cas. No. 14,993; State v. Wilson, Ray, Med. Jur. 520; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052; Ayres v. State (Tex.) 26 S. W. 396. In England, the existence of delirium tremens has been admitted as an excuse for crime for the same reasons; Reg v. Watson and Reg v. Simpson, 2 Tayl. Med. Jur. 599; 14 Cox, Cr. Cas. 565. In the case of Birdsall, 1 Beck, Med. Jur. 803, it was held that delirium tremens was not a valid defence, because the prisoner knew, by repeated experience, that indulgence in drinking would probably bring on an attack of the disease; see also in Roberts v. People, 19 Mich. 401. See DRUNKENNESS.

DELIVERANCE. In Practice. A term used by the clerk in court to every prisoner who is arraigned and pleads *not guilty*, to whom he wishes a good *deliverance*. In modern practice this is seldom used.

DELIVERY. The transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of his right to recall it at his option.

An *absolute* delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor.

A *conditional* delivery is one which passes the deed from the possession of the grantor, but is not to be completed by possession in the grantee, or a third person as his agent, until the happening of a specified event. A delivery in this manner is an *escrow (q. v.)*.

No particular form is required to effect a delivery. It may be by acts merely, by words merely, or by both combined; but in all cases an intention that it shall be a delivery must exist; Com. Dig. *Fait* (A); 6 Sim. 31; Lindsay v. Lindsay, 11 Vt. 621; Arrison v. Harmstead, 2 Pa. 191; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; Mills v. Gore, 20 Pick. (Mass.) 28; Hughes v. Easten, 4 J. J. Marsh. (Ky.) 572, 20 Am. Dec. 230; Hayes v. Boylan, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; Nazro v. Ware, 38 Minn. 443, 38 N. W. 359; Steffian v. Bank, 69 Tex. 513, 6 S. W. 623; Flint v. Phipps, 16 Or. 437, 19 Pac. 543. The unconditional delivery of a deed to a third person for the use of a lunatic grantee, not under guardianship, followed by circumstances indicating acceptance by the grantee, is valid; Campbell v. Kuhn, 45 Mich. 513, 8 N. W. 523, 40 Am. Rep. 479. "Anything which signifies the intention of the grantor to part with his control or dominion over the paper, so that it may become a muniment of title in the grantee, operates as a legal delivery. With respect to the measure of proof required, a difference is recognized in the cases depending upon the character of the deed, whether it be voluntary or made to give effect to a sale. In the former case the intention to part with the control of the deed is not presumed and a delivery must be proved strictly. . . . But if the conveyance be for a valuable consideration and absolute on its face, the intention to consummate the conveyance by the delivery of the deed as a muniment of title is inferred from the grantor's parting with the possession of it, whether it be to the grantee directly or to some third person—if he part with it without any condition or reservation." Bates, Ch., in Jamison v. Craven, 4 Del. Ch. 326. In the absence of direct evidence, the delivery of a deed will be presumed from the concurrent acts of the parties recognizing a transfer of title; Gould v. Day, 94 U. S. 405, 24 L. Ed. 232; Turner v. Warren, 160 Pa. 336, 28 Atl. 781; Williams v. Williams, 148 Ill. 426, 36 N. E. 104. So long as a deed is within the control and subject to the dominion of the grantor, there is no delivery, without which there can be no deed; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Lang v. Smith, 37 W. Va. 725, 17 S. E. 213. The possession of a deed by the grantee therein, is *prima facie* evidence of its delivery; Campbell v. Carruth, 32 Fla. 264, 13 South. 432; McClellan v. Zwingli, 70 Hun 600, 24 N. Y. Supp. 371; Lewis v. Watson, 98 Ala. 479, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82. The deed of a corporation was said to be delivered by affixing the corporate seal; Co. Litt. 22, n., 36, n.; Cro. Eliz. 167; 2 Rolle, Abr. *Fait* (I); L. R. 2 H. L. 296.

It may be made by an agent as well as by the grantor himself; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; 5 B. & C. 671; or to an agent previously appointed; Western R. Corp. v. Babcock, 6 Metc. (Mass.) 356; or subsequently recognized; Turner v. Whidden, 22 Me. 121; Shirley's Lessee v. Ayres, 14 Ohio, 307, 45 Am. Dec. 546; but a subsequent assent on the part of the grantee will not be presumed; Hulick v. Scovil, 4 Gilman (Ill.) 177; Canning v. Pinkham, 1 N. H. 353; Church v. Gilman, 15 Wend. (N. Y.) 656, 30 Am. Dec. 82. Where a father in purchasing land has the deed executed in the name of his minor son, the delivery of the deed to the father is sufficient delivery to the son; Hall v. Hall, 107 Mo. 101, 17 S. W. 811.

The delivery of a deed to a third person for the grantee's benefit, followed by an assertion of title by the grantee, is a good delivery; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; as is also such a delivery where the third person is to be custodian, but where the deed is not to go into force until after the grantor's death; Campbell v. Morgan, 68 Hun 490, 22 N. Y. Supp. 1001.

The cases holding that a deed delivered to a third person to take effect on the death of the grantor is valid are collected by Mr. Jones in his work on Real Property, vol. 2, § 1234; see also Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Gish v. Brown, 171 Pa. 479, 33 Atl. 60; Baker v. Baker, 159 Ill.

394, 42 N. E. 867; Benzler v. Rieckhoff, 97 Ia. 75, 66 N. W. 147; Haeg v. Haeg, 53 Minn. 33, 55 N. W. 1114; Hutton v. Cramer, 10 Ariz. 110, 85 Pac. 483, 103 Pac. 497; and there are authorities which uphold such transfers even though the grantor reserves a right to recall the deed at any time before his death, provided he does not do so; Belden v. Carter, 4 Day (Conn.) 66, 4 Am. Dec. 185; but it is held that these cases are indefensible on principle, and that such a transaction is testamentary; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258; Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945. Actual delivery passes title, and such title is thereafter as much beyond the control of the grantor as though he had never owned the land; *id.;* Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258, citing Connard v. Colgan, 55 Ia. 538, 8 N. W. 351; Seibel v. Rapp, 85 Va. 28, 6 S. E. 478; Douglas v. West, 140 Ill. 455, 31 N. E. 403. For this reason it has been held that the declarations of the grantor subsequent to an alleged delivery are not competent to impeach it. If he has in fact transferred the title, he cannot, by his unsworn declarations made in his own interest, in effect lay the foundation for securing a restoration of the title without the act or even consent of the grantee; Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478.

When the maker of a deed parts with the possession of it to anybody, there is a presumption that it was delivered; and it is for the maker to show that it was delivered in escrow; Robbins v. Rascoe, 120 N. C. 79, 26 S. E. 807, 38 L. R. A. 238, 58 Am. St. Rep. 774. As to delivery to a third person to take effect on the grantor's death, some of the cases proceed on the theory that the fee does not pass to the grantee until the delivery of the deed to him, and that then his title relates back to the original delivery. But the better rule is said to be that the deed is immediately operative as against the grantor, and that the condition that delivery to the grantee shall not be made until after the grantor's death is equivalent to the reservation of a life estate in his favor in the land itself; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258. In Taft v. Taft, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291, it is said a deed of conveyance in present terms is inconsistent with the retention of a life estate, and from the time when the deed is delivered as a conveyance the whole title goes with it and becomes irrevocable.

To complete a delivery, acceptance must take place, which may be presumed from the grantee's possession; Clarke v. Ray, 1 Har. & J. (Md.) 319; Ward v. Lewis, 4 Pick. (Mass.) 518; Canning v. Pinkham, 1 N. H. 353; Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359; Pitts v. Sheriff, 108 Mo. 110, 18 S. W. 1071; from the relationship of a person holding the deed to the grantee; Bryan v. Wash, 2 Gilman (Ill.) 557; Souverbye v. Arden, 1 Johns. Ch. (N. Y.) 240; Methodist Episcopal Church v. Jaques, 1 Johns. Ch. (N. Y.) 456; and from other circumstances; Merrills v. Swift, 18 Conn. 257, 46 Am. Dec. 315; McKinney v. Rhoads, 5 Watts (Pa.) 343. The execution and recording of a deed, and delivery of it to the register for that purpose, do not vest the title in the grantee; he must first ratify these acts; Younge v. Guilbeau, 3 Wall. (U. S.) 636, 18 L. Ed. 262; Maynard v. Maynard, 10 Mass. 456, 6 Am. Dec. 146; Hutton v. Smith, 88 Ia. 238, 55 N. W. 326; but see Glaze v. Ins. Co., 87 Mich. 349, 49 N. W. 595; but they are *prima facie* evidence of delivery; Kille v. Ege, 79 Pa. 15; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957; Knox v. Clark, 15 Colo. App. 356, 62 Pac. 334.

Ratification of the Recording of an Undelivered Deed. An undelivered deed wrongfully recorded passes no title; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; Gulf Coal & Coke Co. v. Coal & Coke Co., 145 Ala. 228, 40 South. 397; Everts v. Agnes, 6 Wis. 453; Smith v. Bank, 32 Vt. 341, 76 Am. Dec. 179; but a deed secured by the grantee and placed on record without delivery may be ratified by the grantor by treating the property as belonging to the grantee, and inducing him to assert title under the belief that he has the title; Phelps v. Pratt, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N. S.) 945; such a delivery was held to have been ratified by the grantor where he had notice of the recording and remained quiet for several years; McNulty v. McNulty, 47 Kan. 208, 27 Pac. 819; Pittman v. Sofley, 64 Ill. 155; and where he received and retained the purchase money or a portion thereof; Harkness v. Cleaves, 113 Ia. 140, 84 N. W. 1033; and where the grantor assents to the grantee's raising money to be secured by a mortgage upon the property; Lyman v. Smith, 4 Lack. Leg. News (Pa.) 207; to the same effect, Mays v. Shields, 117 Ga. 814, 45 S. E. 68, where it is said the grantor cannot recognize the grantee's possession as valid for some purposes, and disclaim it for others; and to the same effect, Dixon v. Bank, 102 Ga. 461, 31 S. E. 96, 66 Am. St. Rep. 193.

Negligence by the grantor of an undelivered deed in keeping it in a place to which the grantee had access will not estop him from denying its validity as against a purchaser in good faith from the grantee, where the latter surreptitiously abstracted the deed and recorded it; Garner v. Risinger, 35 Tex. Civ. App. 378, 81 S. W. 343; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546. It has been held that nothing short of an explicit ratification by the grantor of the delivery, or

such acquiescence after full knowledge of the facts as would raise a presumption of an express ratification, could give the deed vitality; Hadlock v. Hadlock, 22 Ill. 388. And it has been held that failure of successors in title to one whose undelivered deed to real estate has been recorded by the grantee to bring suit to remove it from the record will not estop them from denying the title of a stranger who purchases the property in reliance upon the record; Gulf Coal & Coke Co. v. Coal & Coke Co., 145 Ala. 228, 40 South. 397.

See 14 Harv. L. Rev. 456; ASSENT.

There can ordinarily be but one valid delivery; Verplank v. Sterry, 12 Johns. (N. Y.) 536, 7 Am. Dec. 348; which can take place only after complete execution; McKee v. Hicks, 13 N. C. 379; Moelle v. Sherwood, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. But there must be one; Stiles v. Brown, 16 Vt. 563; 2 Washb. R. P. 581; and from that one the deed takes effect; Geiss v. Odenheimer, 4 Yeates (Pa.) 278, 2 Am. Dec. 407; Cutts v. Mfg. Co., 18 Me. 190. Elsey v. Metcalf, 1 Denio (N. Y.) 323. Where the date of acknowledgment of a mortgage differed from its date, delivery will be of the former date, in the absence of any evidence; Guaranty Trust Co. of New York v. R. Co., 107 Fed. 311, 46 C. C. A. 305.

See ESCROW; RECORD; DEED.

In Contracts. The transfer of the possession of a thing from one person to another.

Originally, delivery was a clear and unequivocal act of giving possession, accomplished by placing the subject to be transferred in the hands of the transferree or his agent, or in their respective warehouses, vessels, carts, and the like; but in modern times it is frequently symbolical, as by delivery of the key to a room containing goods; Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364; Leedom v. Philips, 1 Yeates (Pa.) 529; 2 Ves. Sen. 445; see, also, 7 East 558; 3 B. & P. 233; Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706; by marking timber on a wharf, or goods in a warehouse, or by separating and weighing or measuring them; Barney v. Brown, 2 Vt. 374, 19 Am. Dec. 720; Hurff v. Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Farmers' Phosphate Co. v. Gill, 69 Md. 537, 16 Atl. 214, 1 L. R. A. 767, 9 Am. St. Rep. 443; or otherwise constructive, as by the delivery of a part for the whole; Chamberlain v. Farr, 23 Vt. 265; Leggett v. Rogers, 9 Barb. (N. Y.) 416; Packard v. Dunsmore, 11 Cush. (Mass.) 282; Vining v. Gilbreth, 39 Me. 496; 3 B. & P. 69. And see, as to what constitutes a delivery; President, etc., of Portland Bank v. Stacey, 4 Mass. 661, 3 Am. Dec. 253; Burrows v. Whitaker, 71 N. Y. 291, 27 Am. Rep. 42; Gravett v. Mugge, 89 Ill. 218; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; Deming v. Cotton-Press Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Brewster v. Reel, 74 Ia. 506, 38 N. W. 381; [1892] 1 Q. B. 582.

Where goods are ordered by a foreign merchant, the title passes, on a delivery to a carrier for shipment, subject only to the right of stoppage *in transitu;* Philadelphia & R. R. Co. v. Wireman, 88 Pa. 264; Smith v. Edwards, 156 Mass. 221, 30 N. E. 1017; Seaman v. Adler, 37 Fed. 268; Rechtin v. McGary, 117 Ind. 132, 19 N. E. 731; First Nat. Bank v. McAndrews, 7 Mont. 150, 14 Pac. 763; Meyer Bros. Drug Co. v. McMahon, 50 Mo. App. 18; Foley v. Felrath, 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39. *Prima facie* proof of delivery is made out by proof of delivery to a carrier; Brod v. Dering, 139 Ill. App. 107; but such is not a delivery to the vendee where he dies before they reach their destination; Smith v. Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867. Where the vendor takes the bill of lading deliverable to the order of himself, or of his agent, it prevents the property from passing to the intended vendee until delivery; Berger v. State, 50 Ark. 20, 6 S. W. 15; Blackb. Sales 130.

Delivery is not necessary at common law to complete a sale of personal property as between the vendor and vendee; Benj. Sales § 315; as a sale passes title as soon as the bargain is struck without any delivery or payment; Briggs v. U. S., 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; but as against third parties possession retained by the vendor raises a presumption of fraud conclusive according to some authorities; Hamilton v. Russell, 1 Cra. (U. S.) 309, 2 L. Ed. 118; Alexander v. Deneale, 2 Munf. (Va.) 341; Hudnal v. Wilder, 4 McCord (S. C.) 294, 17 Am. Dec. 744; Ragan v. Kennedy, 1 Ov. (Tenn.) 91; Jarvis v. Davis, 14 B. Monr. (Ky.) 533, 61 Am. Dec. 166; Bowman v. Herring, 4 Harr. (Del.) 458; Thornton v. Davenport, 1 Scam. (Ill.) 296, 29 Am. Dec. 358; Chumar v. Wood, 6 N. J. L. 155; Patten v. Smith, 5 Conn. 196; Wilson v. Hooper, 12 Vt. 653, 36 Am. Dec. 366; Gibson v. Love, 4 Fla. 219; Sturtevant v. Ballard, 9 Johns. (N. Y.) 337, 6 Am. Dec. 281; 1 Campb. 332; Gould v. Hunlley, 73 Cal. 399, 15 Pac. 24; Freedman v. Mfg. Co., 122 Pa. 25, 15 Atl. 690; others holding it merely strong evidence of fraud to be left to the jury; 3 B. & C. 368; Land v. Jeffries, 5 Rand. (Va.) 211; Terry v. Belcher, 1 Bail. (S. C.) 568; Callen v. Thompson, 3 Yerg. (Tenn.) 475, 24 Am. Dec. 587; Hundley v. Webb, 3 J. J. Marsh. (Ky.) 643, 20 Am. Dec. 189; Thompson v. Blanchard, 4 N. Y. 303; Griswold v. Sheldon, *id.* 581; Marden v. Babcock, 2 Metc. (Mass.) 99; Cutter v. Copeland, 18 Me. 127; Erwin v. Bank, 5 La. Ann. 1; Bryant v. Kelton, 1 Tex. 415; but delivery *is* necessary, in general, where the property in goods is to be transferred in pursuance of a previous contract; 1 Taunt. 318; Bean v. Simpson, 16 Me. 49; and also in case of

a *donatio causa mortis;* Wells v. Tucker, 3 Binn. (Pa.) 370; 2 Ves. Ch. 120; 9 *id.* 1; Daniel v. Smith, 64 Cal. 346, 30 Pac. 575; Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706; Kirk v. McCusker, 3 Misc. 277, 22 N. Y. Supp. 780. To give validity to a gift, there must be such a delivery of the subject thereof as works an immediate change in the dominion of the property; Gartside v. Pahlman, 45 Mo. App. 160. The rules requiring actual full delivery are subject to modification in the case of bulky articles; Girard v. Taggart, 5 S. & R. (Pa.) 19, 9 Am. Dec. 327; Bean v. Simpson, 16 Me. 49. See, also, Bailey v. Ogdens, 3 Johns. (N. Y.) 399, 3 Am. Dec. 509; De Ridder v. McKnight, 13 Johns. (N. Y.) 294; Dutilh v. Ritchie, 1 Dall. (U. S.) 171, 1 L. Ed. 86; Currier v. Currier, 2 N. H. 75, 9 Am. Dec. 43; Smith v. Wheeler, 7 Or. 49, 33 Am. Rep. 698; Billingsley v. White, 59 Pa. 464; 2 Kent 508; BAILMENT; SALE; C. O. D.; PLACE OF DELIVERY.

The word delivery is used in different senses, which should be borne in mind in considering the cases. Sometimes it denotes transfer of *the property in* the chattel and sometimes transfer of *the possession of* the chattel. When used in the latter sense it may refer either to the *formation* of the contract, or to the *performance* of it. When it refers to the delivery of possession in the performance of the contract, the buyer is sometimes spoken of as being in *possession* although he has only the right of possession, while the actual custody remains with the vendor.

A condition requiring delivery may be annexed as a part of any contract of transfer; Savage Mfg. Co. v. Armstrong, 19 Me. 147.

In the absence of contract, the amount of transportation to be performed by the seller to constitute delivery is determined by general usage.

The delivery of a contract in writing is necessary to its validity; Ligon v. Wharton (Tex.) 120 S. W. 930.

See ESCROW.

In Medical Jurisprudence. The act of a woman giving birth to her offspring.

Pretended delivery may present itself in three points of view. *First,* when the female who feigns has never been pregnant. When thoroughly investigated, this may always be detected. There are signs which must be present and cannot be feigned. An enlargement of the orifice of the uterus, and a tumefaction of the organs of generation, should always be present, and if absent are conclusive against the fact. 2 *Annales d'Hygiène,* 227. *Second,* when the pretended pregnancy and delivery have been preceded by one or more deliveries. In this case attention should be given to the following circumstances: the mystery, if any, which has been affected with regard to the situation of the female; her age; that of her husband; and, particularly, whether aged or decrepit. *Third,* when the woman has been actually delivered, and substitutes a living for a dead child. But little evidence can be obtained on this subject from a physical examination.

Concealed delivery generally takes place when the woman either has destroyed her offspring or it was born dead. In suspected cases the following circumstances should be attended to: *First,* the proofs of pregnancy which arise in consequence of the examination of the mother. When she has been pregnant, and has been delivered, the usual signs of delivery, mentioned below, will be present. A careful investigation as to the woman's appearance before and since the delivery will have some weight; though such evidence is not always to be relied upon, as such appearances are not unfrequently deceptive. *Second,* the proofs of recent delivery. *Third,* the connection between the supposed state of parturition and the state of the child that is found; for if the age of the child do not correspond to that time, it will be a strong circumstance in favor of the mother's innocence. A redness of the skin and an attachment of the umbilical cord to the navel indicate a recent birth. Whether the child was living at its birth, belongs to the subject of infanticide.

The usual signs of delivery are very well collected in Beck's excellent treatise on Medical Jurisprudence, and are here extracted:

If the female be examined within three or four days after the occurrence of delivery, the following circumstances will generally be observed: greater or less weakness, a slight paleness of the face, the eye a little sunken and surrounded by a purplish or dark-brown colored ring, and a whiteness of the skin like that of a person convalescing from disease. The belly is soft, the skin of the abdomen is lax, lies in folds, and is traversed in various directions by shining reddish and whitish lines, which especially extend from the groin and pubes to the navel. These lines have sometimes been termed *lineæ albicantes,* and are particularly observed near the umbilical region, where the abdomen has experienced the greatest distension. The breasts become tumid and hard, and, on pressure, emit a fluid which at first is serous and afterwards gradually becomes whiter. The areolæ round the nipples are dark colored. The external genital organs and vagina are dilated and tumefied throughout the whole of their extent, from the pressure of the fœtus. The uterus may be felt through the abdominal parietes, voluminous, firm, and globular, and rising nearly as high as the umbilicus. Its orifice is soft and tumid, and dilated so as to admit two or more fingers. The fourchette, or anterior margin of the perinæum, is sometimes torn, or it is lax, and appears to have suffered considerable distension. A discharge (termed the lochial) commences from the uterus, which is distinguished from the menses by its pale color, its peculiar and well-known smell, and its duration. The lochia are at first of a red color, and gradually become lighter until they cease.

These signs may generally be relied upon as indicating recent delivery: yet it requires much experience in order not to be deceived by appearances.

The lochial discharge might be mistaken for menstruation, or leucorrhea, were it not for its peculiar smell; though this is not absolutely characteristic.

Relaxation of the soft parts arises as frequently from menstruation as from delivery; but in these cases the os uteri and vagina are not so much tumefied, nor is there that tenderness and swelling. The parts are found pale and flabby when all signs of contusion disappear, after delivery, and this circumstance does not follow menstruation.

The presence of milk, though a usual sign of delivery, is not always to be relied upon; for this secretion may take place independent of pregnancy.

The wrinkles and relaxations of the abdomen which follow delivery may be the consequence of dropsy, or of lankness following great obesity. This state of the parts is also seldom striking after the birth of the first child, as they shortly resume their natural state. Positive proof of the occurrence of birth is furnished only by the discovery of parts of the ovum. In most cases the demonstration by the microscope of shreds of the deciduæ with large, nucleated and fatty cells is of itself a sure proof; Winckle, quoted by Witthaus & Becker.

See, generally, 1 Beck, Med. Jur. c. 7, p. 206; 1 Chit. Med. Jur. 411; Ryan, Med. Jur. c. 10, p. 133; 1 Briand, *Méd. Lég.* lière partie, c. 5; Whart. & S.; Witthaus & Becker, Med. Jur.

DELIVERY BOND. An obligation for the return of goods or the payment of their value, taken into the possession of the law, as in seizures under revenue laws. Douglass v. Douglass, 21 Wall. (U. S.) 98, 22 L. Ed. 479; Krippendorf v. Hyde, 110 U. S. 280, 4 Sup. Ct. 27, 28 L. Ed. 145. See FORTHCOMING BOND.

DELIVERY ORDER. An order by the owner of goods to a person holding them on his behalf, requesting him to deliver them to a person named in the order. Such an order is not a document of title and therefore does not transfer the property or divest the vendor's lien for the purchase money until the holder obtains actual delivery, the issue of a dock warrant in his name, or an entry of his title in the wharfinger's books. 2 H. L. Cas. 309; 5 Ch. D. 195.

DELUSION. In Medical Jurisprudence. A perversion of the judgment, obviously erroneous and persistent. A symptom of mental disease, in which persons believe things to exist which exist only, or in the degree they are conceived of only, in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary. A faulty belief concerning a subject capable of physical demonstration, out of which the person cannot be reasoned by adequate means for the time being. 1 Wood, American Text Book of Med. See HALLUCINATION.

The individual is, of course, insane. For example, should a parent unjustly persist, without the least ground, in attributing to his daughter a coarse vice, and use her with uniform unkindness, there not being the slightest pretence or color of reason for the supposition, a just inference of insanity or delusion would arise in the minds of a jury; because a supposition long entertained and persisted in, after argument to the contrary, and against the natural affections of a parent, suggest that he must labor under some morbid mental delusion; Whart. Cr. L. § 37; Whart. & S. Med. Jur.; 1 Redf. Wills; Ray, Med. Jur. § 20; Shelf. Lun. 296; 3 Add. Eccl. 70, 90, 180; 1 Hagg. Eccl. 27. See Guiteau's Case, 10 Fed. 170; Mann, Med. Jur. of Insan. 58.

Where one "labors under a partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment." This is the rule as stated by the English judges, cited in 1 Whart. Cr. L. § 37. Shaw, C. J., in Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, says: "Monomania may operate as an excuse for a criminal act," when "the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defence. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

Where a testator was laboring under a delusion that his brother was exercising his muscle preparatory to killing him, that of itself would not justify a rejection of his will on the ground of unsound mind; In re Fricke, 64 Hun 639, 19 N. Y. Supp. 315. A person persistently believing supposed facts which have no real existence, against all evidence and probability, and conducting himself on the assumption of their existence, is, so far as such facts are concerned, under an insane delusion; Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566.

See PARANOIA.

DEMAIN. See DEMESNE.

DEMAND. A claim; a legal obligation.

Demand is a term of art of an extent greater in its signification than any other word except claim. Co. Litt. 291; In re Denny, 2 Hill (N. Y.) 220; Scott v. Morris, 9 S. & R. (Pa.) 124; Murphy's Appeal, 6 W. & S. (Pa.) 226.

A release of all demands is, in general, a release of all covenants, real or personal, conditions, whether broken or not, annuities, recognizances, obligations, contracts, and the like; In re Denny, 2 Hill (N. Y.) 220; but does not discharge rent before it is due, if it be a rent incident to the reversion; for the rent was not only not due, but the consideration—the future enjoyment of the lands—for which the rent was to be given was not executed; 1 Lev. 99; Bac. Abr. *Release*, I. See 10 Co. 128; Bordman v. Osborn, 23 Pick. (Mass.) 295; Martin v. Martin, 7 Md. 375, 61 Am. Dec. 364; Favors v. Johnson, 79 Ga. 555, 4 S. E. 925.

In Practice. A requisition or request to do a particular thing specified under a claim of right on the part of the person requesting.

In causes of action arising ex contractu it is frequently necessary, to enable plaintiff to bring an action, that he should make a demand upon the party bound to perform the contract or discharge the obligation. Thus, where property is sold to be paid for on delivery, a demand must be made before bringing an action for non-delivery, and proved on trial; 5 Term 409; 3 M. & W. 254; Little v. Banks, 67 Hun 505, 22 N. Y. Supp.

512; but not if the seller has incapacitated himself from delivering; 5 B. & Ald. 712; Wilmouth v. Patton, 2 Bibb (Ky.) 280; Robbins v. Luce, 4 Mass. 474; and this rule and exception apply to contracts for marriage; 2 Dowl. & R. 55; 1 Chit. Pr. 57, note (n), 438, note (e). Nor is a demand necessary where it is to be presumed that it would have been unavailing; Davenport v. Ladd, 38 Minn. 545, 38 N. W. 622; Bogle v. Gordon, 39 Kan. 31, 17 Pac. 857. Where a selling price has been agreed on, the bringing of a suit therefor is a sufficient demand for the money claimed; Maguire v. Durant, 1 Misc. 509, 20 N. Y. Supp. 617. A demand of rent is necessary before re-entry for nonpayment; Parks v. Hays, 92 Tenn. 161, 22 S. W. 3. But where rent is payable on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor; Clarke v. Charter, 128 Mass. 483. See RE-ENTRY. No demand is in general necessary on a promissory note before bringing an action; but after a tender demand must be made of the sum tendered; 1 Campb. 181, 474; 1 Stark. 323. A note payable "on call" may be sued on without demand; Mobile Sav. Bank v. McDonnell, 83 Ala. 595, 4 South. 346; but a demand and notice of non-payment are essential to fix the liability of endorsers unless waived; Presbrey v. Thomas, 1 App. D. C. 171. Where a mortgagor has resolved to default on an interest coupon and provides no funds to pay it, the holder is not required to present it for payment before bringing suit; Conshohocken Tube Co. v. Equipment Co., 161 Pa. 391, 28 Atl. 1119.

Cases in which a demand was held necessary before action were suits upon a partnership; Codman v. Rogers, 10 Pick. 112; moneys received but not accounted for by an attorney to his client; Sheaf v. Dodge, 161 Ind. 270, 68 N. E. 292; Banner v. D'Auby, 34 Misc. 525, 69 N. Y. Supp. 891; Madden v. Watts, 59 S. C. 81, 37 S. E. 209; Taylor v. Bates, 5 Cow. (N. Y.) 376; Sneed v. Hanley, Hemp. 659, Fed. Cas. No. 13,136; moneys received by a corporation officer not accounted for; Landis v. Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; claim of reinstatement in a body from which one was illegally expelled; Meherin v. Produce Exchange, 117 Cal. 215, 48 Pac. 1074; money realized by a sheriff on execution but not paid over; Keithler v. Foster, 22 Ohio St. 27; a certificate of deposit issued by a bank which by its terms was payable on its return properly endorsed; Elliott v. Bank, 128 Ia. 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198; Hillsinger v. Bank, 108 Ga. 357, 33 S. E. 985, 75 Am. St. Rep. 42; but in another case it was held that action would lie without demand on a certificate of deposit; McGough v. Jamison, 107 Pa. 336. See Elliott v. Bank, 1 L. R. A. (N. S.) 1130, n. A demand is also required before action to recover a deposit in a bank; Johnson v. Bank, 1 Harring. (Del.) 117; Sickles v. Herold, 149 N. Y. 332, 43 N. E. 852; Tobias v. Morris, 126 Ala. 535, 28 South. 517.

A demand is not necessary before suit for rent, whether payable in money in advance; Clarke v. Charter, 128 Mass. 483; or in labor or property payable at a fixed time and place; Packer v. Cockayne, 3 G. Greene (Ia.) 111; and in a suit for rent the demand need not be proved even where pleaded; Gruhn v. Gudebrod Bros. Co., 21 Misc. 528, 47 N. Y. Supp. 714; for articles charged on land devised to and accepted by residuary devisee; Wiggin v. Wiggin, 43 N. H. 561, 80 Am. Dec. 192; for boarding a man under a contract; Chappell v. Woods, 9 Wash. 134, 37 Pac. 286; for fees of an attorney; Foster v. Newbrough, 66 Barb. (N. Y.) 645; Gibbs v. Davis, 11 Or. 288, 3 Pac. 677; but in New Jersey the rendering of an account is a condition precedent to a suit; Truitt v. Darnell, 65 N. J. Eq. 221, 55 Atl. 692.

In cases arising ex delicto, a demand is frequently necessary. Thus, when the wife, apprentice, or servant of one person has been harbored by another, the proper course is to make a demand of restoration before an action brought, in order to constitute the party a wilful wrong-doer unless the plaintiff can prove an original illegal enticing away; 2 Lev. 63; 5 East 39; 4 J. B. Moo. 12.

So, too, in cases where the taking of goods is lawful but their subsequent detention becomes illegal, it is absolutely necessary, in order to secure sufficient evidence of a conversion on the trial, to give a formal notice of the owner's right to the property and possession, and to make a formal demand in writing of the delivery of such possession to the owner. See TROVER; CONVERSION. And when a nuisance has been erected or continued by a man on his own land, it is advisable, particularly in the case of a private nuisance, to give the party notice, and request him to remove it, either before an entry is made for the purpose of abating it or an action is commenced against the wrong-doer; and a demand is always indispensable in cases of a continuance of a nuisance originally created by another person; 2 B. & C. 302; Cro. Jac. 555; Poll. Torts 314; 5 Co. 100; 5 Viner, Abr. 506; 1 Ayliffe, Pand. 497; Bac. Abr. *Rent*, I.

In cases of contempts, as where an order to pay money or to do any other thing, has been made a rule of court, a demand for the payment of the money or performance of the thing must be made before an attachment will be issued for a contempt; 1 Cr. M. & R. 88, 459; 4 Tyrwh. 369; 2 Scott 193.

Demand should be made by the party having the right, or his authorized agent; 2 B. & P. 464 *a*; West v. Tupper, 1 Bail. (S. C.) 193; Watt v. Potter, 2 Mas. 77, Fed. Cas. No.

17,291; Clough v. Unity, 18 N. H. 75; Sebrell v. Couch, 55 Ind. 122; of the person in default, in cases of torts; 8 B. & C. 528; Shotwell v. Few, 7 Johns. (N. Y.) 302; Bridgeport Bank v. R. Co., 30 Conn. 237; in case of rent; 2 Washb. R. P. 321 and at a proper time and place in case of rents; Jackson v. Kipp, 3 Wend. (N. Y.) 230; Jackson v. Harrison, 17 Johns. (N. Y.) 66; McMurphy v. Minot, 4 N. H. 251; Mackubin v. Whetcroft, 4 Harr. & McH. (Md.) 135; Bradstreet v. Clark, 21 Pick. (Mass.) 389; Pay v. Shanks, 56 Ind. 554; in cases of notes and bills of exchange; Pars. Notes & B.

As to the allegation of a demand in a declaration, see 1 Chit. Pl. 322; 2 *id.* 84; 1 Wms. Saund. 33, note 2; Bunn v. Lett, 65 Hun 43, 19 N. Y. Supp. 728; Com. Dig. *Pleader.*

DEMAND IN RECONVENTION. A demand which the defendant institutes in consequence of that which the plaintiff has brought against him. Used in Louisiana. La. Pr. Code, art. 374.

DEMANDANT. The plaintiff or party who brings a real action. Co. Litt. 127; Com. Dig. See REAL ACTION.

DEMENS (Lat.). Dement. One who has lost his mind through illness or some other cause. One whose faculties are enfeebled. Dean, Med. Jur. 481. See DEMENTIA.

DEMENTIA. In Medical Jurisprudence. That form of insanity which is characterized by mental weakness and decrepitude, and by total inability to reason correctly or incorrectly.

Memory is lost; language is incoherent; actions are inconsistent. The thoughts succeed one another without any obvious bond of association. Delusions, if they exist, are transitory, and leave no permanent impression: and for everything recent the memory is exceedingly weak. In mania, the action of the mind is marked by force, hurry, and intensity; in dementia, by slowness and weakness. It is the natural termination of many forms of insanity. Occasionally it occurs in an acute form in young subjects; and here only it is curable. In old men, in whom it often occurs, it is called senile dementia, and it indicates the breaking down of the mental powers in advance of the bodily decay. Here we may find memory of conditions long since past and some mental power. It is this form of dementia only which gives rise to litigation; for in the others the incompetency is too patent to admit of question. It cannot be described by any positive characters, because it differs in the different stages of its progress, varying from simple lapse of memory to complete inability to recognize persons or things. And it must be borne in mind that often the mental infirmity is not so serious as might be supposed at first sight. Many an old man who seems to be scarcely conscious of what is passing around him, and is guilty of frequent breaches of decorum, needs only to have his attention aroused to a matter in which he is deeply interested, to show no lack of vigor or acuteness. In other words, the mind may be damaged superficially (to use a figure), while it may be sound at the core. And therefore it is that one may be quite oblivious of names and dates, while comprehending perfectly well his relations to others and the interests in which he was concerned. It follows that the impressions made upon casual or ignorant observers in regard to the mental condition are of far less value than those made upon persons who have been well acquainted with his habits and have had occasion to test the vigor of his faculties.

Senile dementia or the imbecility caused by the decay of old age is often the ground on which the wills of old men are contested, and the conflicting testimony of observers, the proofs of foreign influence, and the indications of mental capacity all combine to render it no easy task to arrive at a satisfactory conclusion. The only general rule of much practical value is that competency must be always measured, not by any fancied standard of intellect, but solely by the requirements of the act in question. A small and familiar matter would require less mental power than one complicated in its details and somewhat new to the testator's experience. Less capacity would be necessary to distribute an estate between a wife and child than between a multitude of relatives with unequal claims upon his bounty. Such is the principle; and the ends of justice cannot be better served than by its correct and faithful application. Of course, there will always be more or less difficulty; but generally by discarding all legal and metaphysical subtleties and following the leading of common sense, it will be satisfactorily surmounted.

The legal principles by which the courts are governed are not essentially different whether the mental incapacity proceed from dementia or mania. If the will coincides with the previously expressed wishes of the testator, if it recognizes the claims of those who stood in near relation to him, if it shows no indication of undue influence,—if, in short, it is a rational act rationally done,—it will be established though there may have been considerable impairment of mind. 2 Phill. Eccl. 449; Harrison v. Rowan, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Fluck v. Rea, 51 N. J. Eq. 233, 27 Atl. 636; Matter of Jones, 5 Misc. 199, 25 N. Y. Supp. 109; Matter of Pike's Will, 83 Hun 327, 31 N. Y. Supp. 689; Taylor v. Trich, 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679.

This species of *dementia* is also frequently alleged and proved as a ground of impeaching deeds. This particular form of mental disease may result either in total incompetency, such as is produced by any form of insanity, or a greatly defective capacity, though short of total insanity, in which the court scrutinizes the act, and sustains it only when there is found to have been capacity sufficient for the act in question and entire freedom of will. Consequently such cases usually include the two elements of mental incompetency of some degree and undue influence; and probably a majority of the cases in which the aid of equity is sought to set aside deeds on the ground of

undue influence involve also the question of the existence of *senile dementia* to a greater or less extent. The principle upon which courts of equity deal with this class of persons is neither as a matter of course to affirm or avoid their acts, but to protect them in the exercise of such capacity as they have. It will scrutinize their transactions; considering the nature of the act done, the inducements leading to it, and the attending circumstances and influences. If the conscience of the court is satisfied that such a grantor comprehended the nature and consequences of the transaction, and exercised a deliberate and free judgment, it will be sustained; but if the nature of the act or the attending circumstances justify the conclusion that the grantor's weakness has been taken advantage of, the deed will be set aside in equity however valid it might be at law; 1 Bro. Ch. 560; 1 Knapp 73; Cruise v. Christopher's Adm'r, 5 Dana (Ky.) 181; Wilson v. Oldham, 12 B. Monr. (Ky.) 55; Tracy v. Sacket, 1 Ohio St. 54, 59 Am. Dec. 610; Gass v. Mason, 4 Sneed (Tenn.) 497. "It may be stated as settled law, that whenever there is great weakness of mind in a person executing a conveyance of law, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate—a court of equity will . . . interfere and set the conveyance aside;" Allore v. Jewell, 94 U. S. 511, 24 L. Ed. 260; 1 Sto. Eq. Jur. § 238; Bisph. Eq. 288. For a thorough examination and discussion of the subject in a case of *senile dementia* in which a deed was set aside, see Jones v. Thompson, 5 Del. Ch. 374. In that case Saulsbury, Ch., thus stated the principle upon which courts of equity deal with such cases: "In cases of alleged mental incapacity, the test is whether the party had the ability to comprehend in a reasonable manner the nature of the affair in which he participated. This is the rule in the absence of fraud. . . . This ability so to comprehend necessarily implies the power to understand the character, legal conditions, and effect of the act performed. . . . The cause of mental weakness is immaterial. It may arise from injury to the mind, temporary illness, or excessive old age. In such cases any unfairness will be promptly redressed." In a very similar case a deed was set aside on the ground of mental incapacity of the grantor by reason of senile dementia or dotage, by Bland, Ch., whose opinion contains an elaborate discussion of the different species of dementia, which he classifies as, Idiocy, Delirium, Lunacy, and Dotage, under which latter term he describes senile dementia.

See INSANITY.

DEMESNE (Lat. *dominicum*). Lands of which the lord had the absolute property or ownership; as distinguished from feudal lands, which he held of a superior. 2 Bla. Com. 104; Cowell. Lands which the lord retained under his immediate control, for the purpose of supplying his table and the immediate needs of his household; distinguished from that farmed out to tenants, called among the Saxons *bordlands*. Blount; Co. Litt. 17 *a*.

Own; original. *Son assault demesne*, his (the plaintiff's) original assault, or assault in the first place. 2 Greenl. Ev. § 633; 3 Bla. Com. 120, 306.

DEMESNE AS OF FEE. A man is said to be seised *in his demesne as of fee* of a corporeal inheritance, because he has a property *dominicum* or *demesne* in the *thing* itself. 2 Bla. Com. 106. But when he has no dominion in the thing itself, as in the case of an incorporeal hereditament, he is said to be *seised* as of fee, and not in his *demesne* as of fee; Littleton § 10; Barnet v. Ihrie, 17 S. & R. (Pa.) 196; Jones, Land Tit. 166.

Formerly it was the practice in an action on the case—*e. g.* for a nuisance to real estate—to aver in the declaration the seisin of the plaintiff in demesne as of fee; and this is still necessary, in order to estop the record with the land, so that it may run with or attend the title; Archb. Civ. Pl. 104; Co. Entr. 9, pl. 8; 1 Saund. 346. But such an action may be maintained on the possession as well as on the seisin; although the effect of the record in this case upon the title would not be the same; Steph. Pl. 322; 4 Term 718; 2 Wms. Saund. 113 *b*; Cro. Car. 500, 575.

DEMESNE LANDS. A phrase meaning the same as *demesne*.

DEMESNE LANDS OF THE CROWN. That share of lands reserved to the crown at the original distribution of landed property, or which came to it afterwards by forfeiture or otherwise. 1 Bla. Com. 286; 2 Steph. Com. 550.

DEMIDIETAS. A word used in ancient records for a moiety, or one-half.

DEMI-MARK. A sum of money (6*s.* 8*d.*, 3 Bla. Com. App. v.) tendered and paid into court in certain cases in the trial of a writ of right by the grand assize. Co. Litt. 294 *b*; Booth, Real Act. 98.

It was paid by the tenant to obtain an inquiry by the grand assize into the time of the demandant's seisin; 1 Reeve, Hist. Eng. Law 429; Stearns, Real Act. 378. It compelled the demandant to begin; 3 Chit. Pl. 1373. It is unknown in American practice; Bradstreet v. Supervisors of Oneida County, 13 Wend. (N. Y.) 546.

DEMI-VILL. Half a tithing.

DEMISE. A conveyance, either in fee, for life, or for years.

A lease or a conveyance for a term of years. According to Chief Justice Gibson,

the English word demise, though improperly used as a synonym for *concessi* or *demisi*, strictly denotes a posthumous grant, and no more. Hemphill v. Eckfeldt, 5 Whart. (Pa.) 278. See 4 Bingh. N. C. 678; Voorhees v. Presbyterian Church, 5 How. Pr. (N. Y.) 71. Other words may be used; 18 L. Q. R. 338.

In a conveyance, the word "demise" imports in law a covenant for quiet enjoyment; Crouch v. Fowle, 9 N. H. 219, 32 Am. Dec. 350; 1 M. G. & S. 429; it implies a power to lease; Grannis v. Clark, 8 Cow. (N. Y.) 36. See O'Connor v. Daily, 109 Mass. 235; COVENANT. As to the covenants implied, see [1895] 1 Q. B. 820.

See DEMISE OF THE CROWN.

DEMISE OF THE CROWN. The natural dissolution of the king.

The term is said to denote in law merely a transfer of the property of the crown. 1 Bla. Com. 249. By demise of the crown we mean only that, in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. Plowd. 117, 234.

A similar result, viz.: the perpetual and continuous existence of the office of president of the United States, has been secured by the constitution and subsequent statutes. 1 Sharsw. Bla. Com. 249.

DEMISE AND RE-DEMISE. An old form of conveyance by mutual leases made from one to another on each side of the same land, or of something issuing from it. A lease for a given sum—usually a mere nominal amount—and a release for a larger rent. Toullier; Whishaw; Jacob.

DEMOCRACY. That form of government in which the people rule.

But the multitude cannot actually rule: an unorganic democracy, therefore, one that is not founded upon a number of institutions each endowed with a degree of self-government, naturally becomes a one-man government. The basis of the democracy is equality, as that of the aristocracy is privilege; but equality of itself is no guarantee for liberty, nor does equality constitutes liberty. Absolute democracies existed in antiquity and the middle ages: they have never endured for any length of time. On their character, Aristotle's Politics may be read to the greatest advantage. Lieber, in his Civil Liberty, dwells at length on the fact that mere equality, without institutions of various kinds, is adverse to self-government; and history shows that absolute democracy is anything rather than a convertible term for liberty. See ABSOLUTISM; GOVERNMENT.

DEMOLISH. To destroy totally or to commence the work of total destruction with the purpose of completing the same. 50 L. J. M. C. 141.

DEMONETIZE. To divest of the character of standard money; to withdraw from use as currency. Stand. Dict.

DEMONSTRATIO (Lat.). Description; addition; denomination. Occurring often in the phrase *falsa demonstratio non nocet* (a false description does not harm). 2 Bla. Com. 382, n.; 2 P. Wms. 140; 1 Greenl. Ev. § 291; Wigr. Wills 208, 233.

DEMONSTRATION (Lat. *demonstrare*, to point out). Whatever is said or written to designate a thing or person.

Several descriptions may be employed to denote the same person or object; and the rule of law in such cases is that if one of the descriptions be erroneous it may be rejected, if, after it is expunged, enough will remain to identify the person or thing intended, for *falsa demonstratio non nocet*. The meaning of this rule is, that if there be an adequate description with convenient certainty of what was contemplated, a subsequent erroneous addition will not vitiate it. The complement of this maxim is, *non accipi debent verba in demonstrationem falsam quæ competent in limitationem veram;* which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some object wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation to ascertain that person or thing whereof all the circumstances are true; 4 Exch. 604; 8 Bingh. 244; Broom, L. Max. 490; Pettis v. Kellogg, 7 Cush. (Mass.) 460.

Parol and extrinsic evidence for the construction of wills misdescribing the subject of the devise is admitted. Its office is to enable a court to reject whatever part of the description is false; Fairfield v. Lawson, 50 Conn. 501, 47 Am. Rep. 669; Doe v. Roe, 1 Wend. (N. Y.) 541; Benham v. Hendrickson, 32 N. J. Eq. 441; Rose v. Hale, 185 Ill. 379, 56 N. E. 1073, 76 Am. St. Rep. 40; Fitzpatrick v. Fitzpatrick, 36 Ia. 674, 14 Am. Rep. 538; Wales v. Templeton, 83 Mich. 177, 47 N. W. 238; Seebrock v. Fedawa, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488; but not where there is a property which every part of the description fits; 16 C. B. N. S. 698; nor where the will contains no language to connect the description in such devise with any land of the testator; *id;* Lomax v. Lomax, 218 Ill. 629, 75 N. E. 1076, 6 L. R. A. (N. S.) 942.

The rule that *falsa demonstratio* does not vitiate an otherwise good description applies to every kind of statement of fact. Some of the particulars of an averment in a declaration may be rejected if the declaration is sensible without them and by their presence is made insensible or defective; Yelv. 182.

In Evidence. That proof which excludes all possibility of error.

Demonstrative evidence of negligence has been applied to that kind of negligence which is usually expressed by *res ipsa loquitur* (which see). See EVIDENCE.

DEMONSTRATIVE LEGACY. A pecuniary legacy coupled with a direction that it be paid out of a specific fund.

A bequest of a sum of money payable out of a particular fund or thing. A pecuniary legacy given generally, but with a demonstration of a particular fund as the source of its payment. Roquet v. Eldridge, 118 Ind. 147, 20 N. E. 733; Glass v. Dunn, 17 Ohio St. 413. See Harper v. Bibb, 47 Ala. 547; Kunkel v. Macgill, 56 Md. 120.

Such a bequest differs from a specific legacy in this, that if the fund out of which it is payable fails for any cause, it is nevertheless entitled "to come on the estate as a general legacy; and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies." Armstrong's Appeal, 63 Pa. 312, per Sharswood, J. A bequest of "$2,000 of the South Ward Loan of Chester," where the testator owned $10,000 of the loan at the date of the will, which was paid off before death, was held demonstrative; Ives v. Canby, 48 Fed. 718. So, also, "25 shares of capital stock of the State Bank," etc., the testator owning 25 shares; Davis v. Cain's Ex'r, 36 N. C. 309; had the testator said "my" 25 shares, it would have been a specific legacy; *id.* So of a gift of 25½ canal shares of which the testator owned 15½, all of which he sold before his death; 2 Beav. 515. The criterion in all the cases is whether it was the testator's intention to give the specific security then owned by him, or, on the other hand, to give nothing distinctly severed from his estate, but rather such a sum as would suffice to buy the securities named; *id.* See 2 White & T. Lead. Cas. 646; 2 Y. & C. 90; Newton v. Stanley, 28 N. Y. 61; Dryden v. Owings, 49 Md. 356.

DEMPSTER. In Scotch Law. A doomsman. One who pronounced the sentence of court. 1 Howell, St. Tr. 937.

DEMURRAGE. The delay of a vessel by the freighter beyond the time allowed for loading, unloading, or sailing.

Payment for such delay.

The amount due by the freighter or charterer to the owner of the vessel for such delay. 5 E. & B. 755; Abb. Adm. Dec. 548; Gronn v. Woodruff, 19 Fed. 144.

Demurrage may become due either by the ship's detention for the purpose of loading or unloading the cargo, either before or during or after the voyage, or in waiting for convoy; 3 Kent 159; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Donaldson v. McDowell, 1 Holmes 290, Fed. Cas. No. 3,985; Creighton v. Dilks, 49 Fed. 107; Porter, Bills of L. 356.

Where neither the charter nor the bill of lading contained any provisions as to demurrage, and the master made no formal protest against the delay, but signed the bill of lading without objection and did not bring suit until long after, demurrage could not be recovered; McKeen v. Morse, 49 Fed. 253, 1 C. C. A. 237; Gage v. Morse, 12 Allen (Mass.) 410, 90 Am. Dec. 155; and it is said the English authorities are uniformly against such a liability; *id.* 5 El. & B. 755, 589; 10 C. B. N. S. 802. Here the courts have not generally followed the English rule. It is held that maritime demurrage may be collected, even though not provided for in the contract, and that a lien on the cargo for demurrage may be enforced; Donaldson v. McDowell, Fed. Cas. No. 3,985; The Hyperion's Cargo, *id.* 6,987; 275 Tons of Mineral Phosphates, 9 Fed. 209; Hawgood v. 1,310, Tons of Coal, 21 Fed. 681; and in England it is held that a lien for demurrage may be given by contract; L. R. 8 Exch. 101; L. R. 15 Q. B. Div. 247.

Under the terms of a charter where demurrage was to be paid for each working day beyond the days allowed for loading, the time lost by reason of storms before the beginning of the lay days, or after their expiration, could not be deducted in computing the demurrage; Wold v. Keyser, 52 Fed. 169, 2 C. C. A. 656.

The term "working days" in maritime affairs means calendar days, on which the law permits work to be done, and excludes Sundays and legal holidays, but not stormy days; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650. But see Baldwin v. Timber Co., 142 N. Y. 279, 36 N. E. 1060, where it was held that Sundays are properly included in computing demurrage, when demurrage has begun to run. Where there are no agreed demurrage days for loading the case is one of implied contract to load with reasonable diligence; Randall v. Sprague, 74 Fed. 247, 21 C. C. A. 334.

Where a charter party excepted delays by strikes, it was held to apply to the charterer's own workmen; Wood v. Keyser, 84 Fed. 688; but not to a strike of coal operators which overtaxed the capacity of the harbor and caused delay; W. K. Niver Coal Co. v. S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

Demurrage, though a maritime term, has been adopted in railroad practice. A railroad company may charge $2 a day for the detention of cars after 24 hours, as a general rule of the company known to consignees; Miller v. Mansfield, 112 Mass. 260; so in Norfolk & W. R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916, where it was said to be not a transportation, nor storage, nor terminal charge, but a charge by the carrier as bailee of the goods after its duties as a carrier had ceased. Where a statute gives a lien for freight and storage, the lien extends to demurrage charges; New Orleans & N. E. R. Co. v. George, 82 Miss. 710, 35 South. 193. A lien was upheld in Southern R. Co. v. Mfg. Co., 142 Ala. 322, 37 South. 667, 68 L. R. A. 227,

110 Am. St. Rep. 32, 4 Ann. Cas. 12; Darlington v. R. Co., 99 Mo. App. 1, 72 S. W. 122; Schumacher v. R. Co., 207 Ill. 199, 69 N. E. 825. It is held, however, that a carrier has no lien; Nicolette Lumber Co. v. Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550, 5 Ann. Cas. 387; Wallace v. R. Co., 216 Pa. 311, 65 Atl. 665.

A state cannot enact that a consignee shall have 3 days to unload and as many more as he chooses at $1 a day; Pennsylvania R. Co. v. M. O. Coggins Co., 38 Pa. Super. Ct. 129.

See 3 L. R. A. (N. S.) 327, n. See LAY DAYS; LIEN.

DEMURRER (Lat. *demorari*, Old Fr. *demorrer*, to stay; to abide). **In Pleading.** An allegation, that, admitting the facts of the preceding pleading to be true, as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further. A declaration that the party demurring will *go no further*, because the other has shown nothing against him. 5 Mod. 232; Co. Litt. 71 *b*. It imports that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do. Co. Litt. 71 *b*; Steph. Pl. 61; Pepper, Pl. 11.

In Equity. An allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that as therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer; or that, for some reason apparent on the face of the bill, or on account of the omission of some matter which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer to the whole bill, or to some certain part thereof. Mitf. Eq. Pl. 107.

A demurrer was said to be an answer in law to a bill, though not technically an answer in the common language of practice; New Jersey v. New York, 6 Pet. (U. S.) 323, 8 L. Ed. 414. The purpose of a demurrer being to raise the question whether the case presented by the bill would, if proved, entitle the plaintiff to the relief sought, it necessarily proceeds upon the theory that the truth of the bill is admitted. It is therefore settled that all facts well pleaded in the bill, but no others, are taken to be true, for the purposes of the argument and decision upon the demurrer; Commercial Bank v. Buckner, 20 How. (U. S.) 108, 15 L. Ed. 862; Griffing v. Gibb, 2 Black (U. S.) 519, 17 L. Ed. 353; Goble v. Andruss, 2 N. J. Eq. 66; 1 Ves. Jr. 72; 1 Dan. Ch. Pr. 545. It does not admit conclusions of law stated in the bill; Bryan v. Spruill, 57 N. C. 27; Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; nor can it supply defects in substance, nor cure a defective title, nor yet establish one defectively set forth; Mills v. Brown, 2 Scam. (Ill.) 549; nor does it admit any allegations repugnant to facts of which the court takes judicial notice; 1 Dan. Ch. Pr. 546; nor a fact manifestly or legally impossible; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922; nor an averment contrary to the facts set forth in the bill; 3 Ves. 4; Redmond v. Dickerson, 9 N. J. Eq. 507, 59 Am. Dec. 418; nor inferences of other facts from those stated; Dike v. Greene, 4 R. I. 285; nor the construction of a statute; Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426; nor of any instrument set forth in or annexed to the bill; Dillon v. Barnard, 21 Wall. (U. S.) 430, 22 L. Ed. 673; Interstate Land Co. v. Land Grant Co., 139 U. S. 569, 11 Sup. Ct. 656, 35 L. Ed. 278; Lea v. Robeson, 12 Gray (Mass.) 280; Dillon v. Barnard, 1 Holmes 389, Fed. Cas. No. 3,915; U. S. v. Ames, 99 U. S. 35, 25 L. Ed. 295. It admits only facts well pleaded, but not the conclusions of law, nor the correctness of the pleader's opinion as to future results; Equitable Life Assur. Soc. v. Brown, 213 U. S. 26, 29 Sup. Ct. 404, 53 L. Ed. 682; as a rule of evidence it was never supposed that a demurrer admitted anything; Havens v. R. Co., 28 Conn. 69.

As a rule these limitations upon the effect of a demurrer in equity, as admissions, apply equally at law.

Allegations on information and belief are not admitted by a demurrer to be facts; Trimble v. Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912; 1 Ves. 56; 5 Beav. 620; Sto. Eq. Pl. §§ 241, 256; Cameron v. Abbott, 30 Ala. 416; but in a subsequent case it was held that, although the averment that complainant is informed and believes that the fact exists is insufficient, he may state the existence of the fact with the additional words "as he is informed and believes"; Lucas v. Oliver, 34 Ala. 626; and see also Christian v. Mortgage Co., 92 Ala. 130, 9 South. 219; and Drennen v. Deposit Co., 115 Ala. 592, 23 South. 164, 39 L. R. A. 623, 67 Am. St. Rep. 72. An allegation that the complainant "is informed and believes, and therefore avers," is sufficient; Wells v. Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250; and so is an allegation that he is informed and believes the fact to be true, followed by a statement that he therefore charges the fact to be true, where it related to matter necessarily within the knowledge of the defendant; Campbell v. R. Co., 71 Ill. 611.

In Kansas v. Colorado, 185 U. S. 125, 22 Sup. Ct. 552, 46 L. Ed. 838, the court said that "sitting, as it were, as an international, as well as a domestic tribunal" they were "unwilling in this case to proceed on the mere technical admissions made by the demurrer," and they accordingly overruled it without prejudice and forebore to proceed until all the facts were before the court on the evidence.

By Federal Equity Rule 29, 33 Sup. Ct. xxvi (in effect February 1, 1913), demurrers (and pleas) are abolished; every defence in law shall be made by motion to dismiss or in the answer; every such point of law going to the whole or a material part of the cause of action may be disposed of before final hearing at the discretion of the court.

A demurrer may be either to the relief asked by the bill, or to both the relief and the discovery; Higinbotham v. Burnet, 5 Johns. Ch. (N. Y.) 184; Brownell v. Curtis, 10 Paige Ch. (N. Y.) 210; but not to the discovery alone where it is merely incidental to the relief; 2 Bro. C. C. 123; 1 Y. & C. 197; 1 S. & S. 83. It is said by Langdell (Eq. Pl. 60) that every proper demurrer is to relief alone; and that while it always, if well taken, protects the defendant from giving any discovery, that is a legal consequence merely. As to exceptions to avoid self-crimination, see Sharp v. Sharp, 3 Johns. Ch. (N. Y.) 407; Patterson v. Patterson, 2 N. C. 167; Wolf v. Wolf's Ex'r, 2 H. & G. (Md.) 382, 18 Am. Dec. 313. If it goes to the whole of the relief, it generally defeats the discovery if successful; 2 Bro. C. C. 319; Souza v. Belcher, 3 Edw. Ch. (N. Y.) 117; Miller v. Ford, 1 N. J. Eq. 358; Welles v. R. Co., Walk. Ch. (Mich.) 35; Pool v. Lloyd, 5 Metc. (Mass.) 525; otherwise, if to part only; Ad. Eq. 334; Story, Eq. Pl. § 545; Brownell v. Curtis, 10 Paige, Ch. (N. Y.) 210.

It may be brought either to original or supplemental bills; and there are peculiar causes of demurrer in the different classes of supplemental bills; 2 Madd. 387; 4 Sim. 76; 3 Hare, 476; 3 P. Wms. 284; Dias v. Merle, 4 Paige Ch. (N. Y.) 259; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 250; Whiting v. Bank, 13 Pet. (U. S.) 6, 14, 10 L. Ed. 33; Story, Eq. Pl. § 611.

Demurrers are *general*, where no particular cause is assigned except the usual formulary that there is no equity in the bill, or *special*, where the particular defects are pointed out; Story, Eq. Pl. § 455; Dan. Ch. Pr. 586. General demurrers are used to point out defects of substance; special, to point out defects in form. "The terms have a different meaning [in equity] from what they have at common law;" Langd. Eq. Pl. 58.

The defendant may demur to part of the bill; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; and plead or answer to the residue, or both plead and answer to separate parts thereof; 3 P. Wms. 80; Clark v. Phelps, 6 Johns. Ch. (N. Y.) 214; Bull v. Bell, 4 Wis. 54; taking care so to apply them to different and distinct parts of the bill that each may be consistent with the others; 3 M. & C. 653; Gray v. Regan, 23 Miss. 304; Story, Eq. Pl. § 442; but if it be to the whole bill, and a part be good, the demurrer must be overruled; Graves v. Hull, 27 Miss. 419; Barnawell v. Threadgill, 40 N. C. 86; Burns v. Hobbs, 29 Me. 273; Robinson v. Guild, 12 Metc. (Mass.) 323; Gay v. Skeen, 36 W. Va. 582, 15 S. E. 64. If it is to the whole bill it cannot be sustained if, for any equity apparent in the bill, complainants are entitled to relief; George v. Banking Co., 101 Ala. 607, 14 South. 752; Merriam v. Pub. Co., 43 Fed. 450. A general demurrer to a bill must be overruled unless it appears that on no possible state of the evidence could a decree be made; Failey v. Talbee, 55 Fed. 892; Darrah v. Boyce, 62 Mich. 480, 29 N. W. 102.

Demurrers lie only for matter apparent on the face of the bill, and not upon any new matter alleged by the defendant; Beames, Ord. in Ch. 26; 6 Sim. 51; 2 Sch. & L. 637; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Black v. Shreeve, 7 N. J. Eq. 440; Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189. A demurrer which alleges, as cause of demurrer, new matter, in addition to what is contained in the bill, is termed a *speaking demurrer* and must be overruled; 4 Bro. C. C. 254; 4 Drew. 306; Brooks v. Gibbons, 4 Paige Ch. (N. Y.) 374; Ramage v. Towles, 85 Ala. 589, 5 South. 342; Stewart v. Masterson, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. Ed. 114; and so also where an attempt to sustain a demurrer is made by the averment of some fact in an answer it is of the same nature and is not aided thereby; Kuypers v. Reformed Dutch Church, 6 Paige Ch. (N. Y.) 570. To constitute a speaking demurrer, the averment must be necessary to support the demurrer; 2 Mol. 295; Saxon v. Barksdale, 4 Desaus. (S. C.) 522; and cases *supra;* and not mere immaterial matter which, though improper as surplusage, is not fatal to the demurrer, 1 Sim. 5; 2 Sim. & Stu. 127.

The term "speaking demurrer" originated with Lord Hardwicke in Brownswood v. Edwards, 2 Ves. 243, 245, and it was used by the reporters in the syllabi of that case and of Edsill v. Buchanan, 4 Bro. C. C. 254, nearly fifty years later. The editor of Tyler's edition of Mitford, in a note to the word in his index, assumes that Mitford ignored the term because Lord Hardwicke had used it in ridicule and not as a new technical distinction. However that may be, it seems to have been too generally adopted by courts and text-writers to be now disregarded as an apt characterization of what it was meant to express.

A defendant may at the hearing of a demurrer orally assign another cause, different from or in addition to those on the record, which is termed a demurrer *ore tenus*, and may be sustained, although that on the record is overruled; Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 149; Wright v. Dame, 1 Metc. (Mass.) 237; Chase v. Searles, 45 N. H. 512; 8 Ves. 405; as, on demurrer to general relief, the objection of non-joinder may be made *ore tenus;* Garlick v. Strong, 3 Paige Ch. 440; 6 Ves. 779. Causes of demurrer *ore tenus* must be coextensive with those on the record, and if the latter apply to the whole bill, the former will not be allowed to part of it; 1 De G., J. & S. 38; and a cause

overruled cannot be repeated *ore tenus;* 1 Anst. 1; but see 12 W. R. 394; nor, after demurrer to the whole bill has been overruled, can part of it be demurred to *ore tenus;* 2 Yo. & J. 490; Clark v. Davis, Harring. Ch. (Mich.) 227.

Demurrers are not applicable to pleas or answers. If a plea or answer is bad in substance, it may be shown on hearing; and if the answer is insufficient in form, exceptions should be filed; Story, Eq. Pl. §§ 456, 864; Langd. Eq. Pl. 58; Winters v. Claitor, 54 Miss. 341; Travers v. Ross, 14 N. J. Eq. 254.

If the bill contains an allegation of fraud, it must be denied by answer, whatever defence may be adopted to other parts of the bill; because fraud gives jurisdiction to the court and lays a foundation for relief; hence a general demurrer to a bill containing such an allegation cannot be allowed; Niles v. Anderson, 5 How. (Miss.) 366.

Demurrers to relief are usually brought for causes relating to the *jurisdiction,* as that *the subject* is not cognizable *by any court,* as in some cases under political treaties; 1 Ves. 371; Foster v. Neilson, 2 Pet. (U. S.) 253, 7 L. Ed. 415; but see Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25; U. S. v. Clarke, 8 Pet. (U. S.) 436, 8 L. Ed. 1001; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; Carneal v. Banks, 10 Wheat. (U. S.) 181, 6 L. Ed. 297; Gordon v. Kerr, 1 Wash. C. C. 322, Fed. Cas. No. 5,611.

It is frequently said that by demurring to a bill in chancery, for want of equity, the defendants submit to the jurisdiction of the court, as if that question were to be raised it should have been presented by plea; Bank of Bellows Falls v. R. Co., 28 Vt. 470; 1 Atk. 543, where Lord Hardwicke is represented as having said: "The defendant should not have demurred for want of jurisdiction, for a demurrer is always in bar, and goes to the merits of the case; and therefore it is informal and improper in that respect, for he should have pleaded to the jurisdiction." In a note to section 456 of Sto. Eq. Pl. after quoting these words it is said: "This language is loose and inaccurate. If the court has no jurisdiction, the objection may be taken by demurrer, if it is apparent on the face of the bill; Mitf. Eq. Pl. by Jeremy, 110, 216; 2 Sim. & Stu. 431. And a demurrer may be for causes not going to the merits." This note in Sumner's edition, the first after Judge Story's death, appears from the editor's prefatory note to be the author's own comment. Such objection on demurrer is allowed in the federal courts; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Peale v. Coal Co., 172 Fed. 639; but if one cause assigned goes to the merits it operates as a waiver of the objection to the jurisdiction; *id.*

In some states, where the jurisdiction in equity is more or less restricted, it is held that the question of jurisdiction may be raised by general demurrer; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97; Earle v. Humphrey, 121 Mich. 518, 80 N. W. 370; and that it is the proper method of raising it; Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 Atl. 100; Love v. Robinson, 213 Pa. 480, 62 Atl. 1065.

So demurrers to relief will lie in certain cases of confiscation; 3 Ves. 424; 10 *id.* 354; see Ware v. Hylton, 3 Dall. (U. S.) 199, 1 L. Ed. 568; and questions of boundaries; Story, Eq. Pl. 347; 1 Ves. 446; as to law in the United States, see Massie v. Watts, 6 Cra. (U. S.) 158, 3 L. Ed. 181; N. Y. v. Connecticut, 4 Dall. (U. S.) 3, 1 L. Ed. 715; State v. People, 5 Pet. (U. S.) 284, 8 L. Ed. 127; State v. State, 14 Pet. (U. S.) 210, 10 L. Ed. 423; or *that it is not cognizable* by a court of equity; Taylor v. Buchan, 16 Ga. 541; Groves' Heirs v. Fulsome, 16 Mo. 543, 57 Am. Dec. 247; Box v. Stanford, 13 Smedes & M. (Miss.) 93, 51 Am. Dec. 142; L. R. 8 Ch. App. 369; *or that some other* court of equity has jurisdiction properly; Trustees of Philadelphia Baptist Ass'n v. Hart's Ex'rs, 4 Wheat. (U. S.) 1, 4 L. Ed. 499; Mays v. Taylor, 7 Ga. 243; 1 Ves. 203; *or that some other court* has jurisdiction properly; Bingham v. Cabot, 3 Dall. (U. S.) 382, 1 L. Ed. 646; Wallace v. Fletcher, 30 N. H. 444; Louisville, C. & C. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. Ed. 353; *to the person,* as that the plaintiff is not entitled to sue, by reason of personal disability, as infancy, idiocy, etc.; Jac. 377; bankruptcy and assignment; 1 Y. & C. 172; or has no title to sue in the character in which he sues; 2 P. Wms. 369; Livingston v. Lynch, 4 Johns. Ch. 575; or that the relief prayed is barred by limitation; Mercantile Nat. Bank v. Carpenter, 101 U. S. 567, 25 L. Ed. 815; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Nash v. Ingalls, 101 Fed. 645; or a portion of it; City of Memphis v. Cable Co., 145 Fed. 602, 76 C. C. A. 292; *to the substance of the bill,* as that the matter is *too trivial;* Moore v. Lyttle, 4 Johns. Ch. (N. Y.) 183; Carr v. Iglehart, 3 Ohio St. 457; 1 Vern. 359; that the *plaintiff* has *no interest* in the matter; Mitf. Eq. Pl. 154; 2 S. & S. 592; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305; Haskell v. Hilton, 30 Me. 419; Barr v. Clayton, 29 W. Va. 256, 11 S. E. 899; Keyser v. Renner, 87 Va. 249, 12 S. E. 406; or that the *defendant* has no such *interest;* 2 Bro. C. C. 332; 5 Madd. 19; Wakeman v. Bailey, 3 Barb. Ch. (N. Y.) 485; De Wolf v. Johnson, 10 Wheat. (U. S.) 384, 6 L. Ed. 343; or that the bill is *to enforce a penalty;* 4 Bro. Ch. 434; *to the frame and form of the bill,* as that there is a defect or want of form; Mitf. Eq. Pl. 206; 5 Russ. 42; Ulrici v. Papin, 11 Mo. 42; or that the bill is multifarious; Story, Eq. Pl. § 530, n.; 2 S. & S. 79; Layton v. State, 4 Harring. (Del.) 9; White v. Curtis, 2 Gray (Mass.) 471; Oliver v. Piatt, 3 How. (U. S.) 412, 11 L. Ed. 622; McDermott v. McGown, 4 Edw. (N. Y.) 592; that there is a want or misjoinder

of plaintiffs; 1 P. Wms. 428; Mitchell v. Lenox, 2 Paige, Ch. (N. Y.) 281; Wormley v. Wormley, 8 Wheat. (U. S.) 451, 5 L. Ed. 651; Southern Life Ins. & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; White v. Curtis, 2 Gray (Mass.) 467; Betton v. Williams, 4 Fla. 11; but only when it appears from the facts disclosed by the bill; Farson v. Sioux City, 106 Fed. 278; Walling v. Thomas, 133 Ala. 426, 31 South. 982; for a misjoinder of parties defendant where those only can demur who are improperly joined; Bigelow v. Sanford, 93 Mich. 657, 57 N. W. 1037; or where laches affirmatively appear on the face of a bill; Hinchman v. Kelley, 54 Fed. 63, 4 C. C. A. 189; Thurmond v. Ry. Co., 140 Fed. 697, 72 C. C. A. 191; Tetrault v. Fournier, 187 Mass. 58, 72 N. E. 351; Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795; Hawley v. Pound, 76 Neb. 130, 106 N. W. 458; or staleness of claim; Hubbard v. Manhattan Trust Co., 87 Fed. 51, 30 C. C. A. 520; but only when it appears on the face of the bill; Marsh v. Marsh, 78 Vt. 399, 63 Atl. 159; but laches as an equitable defence cannot be raised on demurrer; Drake v. Wild, 65 Vt. 611, 27 Atl. 427; Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966.

A demurrer to an answer or plea in equity is improper; Pennsylvania Co. v. Bay, 138 Fed. 203; and is not permitted; Stokes v. Farnsworth, 99 Fed. 836. The sufficiency of an answer is properly questioned by setting the cause down for hearing on bill and answer; Barrett v. Twin City Power Co., 111 Fed. 45; or of a plea by setting it down for argument; Roundtree v. Gordon, 8 Mo. 19; but a demurrer to an answer filed and not objected to has been treated as an application to set the cause down on bill and answer; Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498.

Demurrers to discovery may be brought for most of the above causes; 12 Beav. 423; Ocean Ins. Co. v. Fields, 2 Sto. 59, Fed. Cas. No. 10,406; and, generally, that the plaintiff has no right to demand the discovery asked for, either in whole or in part; 8 Ves. 398; 2 Russ. 564; or to ask it of the defendant; Story, Eq. Pl. § 570. "A demurrer to discovery is not, in its nature, a pleading at all, but a mere statement in writing that the defendant refuses to answer certain allegations or charges in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out." Langd. Eq. Pl. 61. See DISCOVERY.

The effect of a demurrer when allowed is to put an end to the suit, unless it is confined to a part of the bill, or the court gives the plaintiff leave to amend; Fleece v. Russell, 13 Ill. 31; it is within the discretion of the court whether the defendant will be ruled to answer after overruling a demurrer; and it may enter a decree against him at once, or hear evidence, or refer to a master to take evidence before entering a decree; Iglehart v. Miller, 41 Ill. App. 439; Bruschke v. Der Nord Chicago Schuetzen Verein, 145 Ill. 433, 34 N. E. 417. If overruled, the defendant must make a fresh defence by answer; Cole County v. Angney, 12 Mo. 132; unless he obtain permission to put in a plea; Ad. Eq. 336. Since, as shown *supra*, the demurrer does not admit the truth of the bill, but only assumes it for the sake of argument, if the demurrer is overruled the plaintiff must proceed to prove his bill; Langd. Eq. Pl. 104. The court will sometimes disallow the demurrer without deciding that the bill is good, reserving that question till the hearing; *id.* 106.

Equity rules usually provide for a certificate of the opinion of counsel that the demurrer is well founded in law, and an affidavit by defendant that it is not interposed for delay.

At Law. A *general* demurrer is one which excepts to the sufficiency of a previous pleading in general terms, without showing specifically the nature of the objection; and such demurrer is sufficient when the objection is on matter of substance; Steph. Pl. 159; Co. Litt. 72 *a*; Flanagan v. Ins. Co., 25 N. J. L. 506; Gordon v. State, 11 Ark. 12; Coffin v. Knott, 2 G. Greene (Ia.) 582, 52 Am. Dec. 537; Tyler v. Canaday, 2 Barb. (N. Y.) 160; Cheek v. Herndon, 82 Tex. 146, 17 S. W. 763. A court, after overruling a general demurrer to a complaint on the ground that it does not state a cause of action, may in its discretion enter final judgment on the demurrer; Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491.

A *special demurrer* is one which excepts to the sufficiency of the pleadings on the opposite side, and shows specifically the nature of the objection and the particular ground of exception; Co. Litt. 72 *a*. An objection to a complaint, on the ground of ambiguity or uncertainty, can be taken only by special demurrer; Kirsch v. Derby, 96 Cal. 602, 31 Pac. 567; as must be a demurrer to a plea on the ground of duplicity; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; but see Corpening v. Worthington & Co., 99 Ala. 541, 12 South. 426.

It is necessary where the objection is to the form, by the statutes 27 Eliz. c. 5 and 4 Anne, c. 16; Blakeney v. Ferguson, 18 Ark. 347; Mitchell v. Williamson, 6 Md. 210; Lyon v. Fish, 20 Ohio, 100. Under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all objections in substance.

It is not enough that a special demurrer object in general terms, that the pleading is "uncertain, defective, and informal," or the like, but it is necessary to show in what respect it is uncertain, defective, and informal; 1 Wms. Saund. 161, n. 1, 337 *b*, n. 3; Steph. Pl. 159, 161; 1 Chit. Pl. 642.

A demurrer may be for insufficiency either

in substance or in form; that is, it may be either on the ground that the case shown by the opposite party is essentially insufficient, or on the ground that it is stated in an inartificial manner; Hob. 164; Richmond v. Brookings, 48 Fed. 241. But such a demurrer does not raise the question of the jurisdiction of the court; Saxton v. Seiberling, 48 Ohio St. 554, 29 N. E. 179. It lies to any of the pleadings, except that there may not be a demurrer to a demurrer; Salk. 219; Bacon, Abr. *Pleas* (N 2). But it will not lie to a supplemental complaint; Lewis v. Rowland, 131 Ind. 37, 30 N. E. 796; while it will to a supplemental answer; Eckert v. Binkley, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441. Demurrer may be to the whole or a part of the pleading; but if to the whole, and a part be good, the demurrer will be overruled; 13 East 76; Backus v. Richardson, 5 Johns. (N. Y.) 476; Brown v. Castles, 11 Cush. (Mass.) 348; Tucker v. Hart, 23 Miss. 548; Brown v. Duchesne, 2 Curt. C. C. 97, Fed. Cas. No. 2,003; Walton v. Stephenson, 14 Ill. 77; Scott v. State, 2 Md. 284; Pinkum v. City of Eau Claire, 81 Wis. 301, 51 N. W. 550; Alabama Great Southern R. Co. v. Tapia, 94 Ala. 226, 10 South. 236. But see Barbee v. Road Co., 6 Fla. 262; Whiting v. Heslep, 4 Cal. 327; State v. Clark, 9 Ind. 241; Henderson v. Stringer, 6 Gratt. (Va.) 130; Com. v. Hughes, 8 B. Monr. (Ky.) 400. The objection must appear on the face of the pleadings; 2 Saund. 864; Town of Hartland v. Town of Windsor, 29 Vt. 354; or upon oyer of some instrument defectively set forth therein; 2 Saund. 60, n.; Williams v. Boyle, 1 Misc. 364, 20 N. Y. Supp. 720. A joint demurrer by two defendants to a declaration for want of a cause of action should be overruled if the declaration sets forth a cause of action as to either of them; May v. Jones, 88 Ga. 308, 14 S. E. 552, 15 L. R. A. 637, 30 Am. St. Rep. 154; Lancaster v. Roberts, 144 Ill. 213, 33 N. E. 27.

A demurrer does not reach vagueness and uncertainty in a complaint, but they must be remedied by a motion to make more specific and certain; Sheeks v. Erwin, 130 Ind. 31, 29 N. E. 11; Sluyter v. Ins. Co., 3 Ind. App. 312, 29 N. E. 608; Chamberlain v. Mensing, 51 Fed. 669.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, declaration or complaint, it may be taken advantage of by demurrer; Southern P. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Hagstoz v. Ins. Co., 179 Fed. 569; and the same is true of the statute of limitations; Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807; Kendall v. U. S., 107 U. S. 123, 2 Sup. Ct. 277, 27 L. Ed. 437.

For the various and numerous causes of demurrer, reference must be had to the law of each state.

As to the effect of a demurrer. It admits all such matters of fact as are sufficiently pleaded; Com. Dig. *Pleader* (A 5); Jones v. Ireland, 4 Ia. 63; Roberts v. State, 14 Ga. 8, 58 Am. Dec. 528; Pierson v. Wallace, 7 Ark. 282; Soule v. Seattle, 6 Wash. 315, 33 Pac. 384, 1080; Jorgensen v. Ministers of Church, 7 Misc. 1, 27 N. Y. Supp. 318. Its office was to test the sufficiency of the preceding pleading both as to form and substance, and it was resorted to by either party who believed that the pleading of the other party was insufficient either because the declaration did not show a good cause of action or the plea did not set up a legal defence; but it does not admit mere epithets charging fraud and allegations of legal conclusions; Kent v. R. & I. Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. Ed. 352; nor an erroneous averment of law; Dickerson v. Winslow, 97 Ala. 491, 11 South. 918.

The demurrer reaches back to the first error in the pleading; Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537; but not where the defect is of form and not of substance; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354. On demurrer the court consider the whole record, and give judgment according to the legal right for the party who on the whole seems best entitled to it; 4 East 502; Pickett v. Bank, 8 Ark. 224; Wales v. Lyon, 2 Mich. 276; Townsend v. Jemison, 7 How. (U. S.) 706, 12 L. Ed. 880; Shaw v. White, 28 Ala. 637; Claggett v. Simes, 31 N. H. 22; Freeman v. Freeman, 39 Me. 426; Peoria & O. R. Co. v. Neill, 16 Ill. 269. For example, on a demurrer to the replication, if the court think the replication bad, but perceive substantial fault in the plea, they will give judgment, not for the defendant, but for the plaintiff; 2 Wils. 150; Townsend v. Jemison, 7 How. (U. S.) 706, 12 L. Ed. 880; provided the declaration be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant; 5 Co. 29 *a*. The court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground; 5 B. & Ald. 507. If, however, the plaintiff demur to a plea in abatement, and the court decide against the plea, they will give judgment of respondeat ouster, without regard to any defect in the declaration; Carth. 172; Ellis v. Ellis, 4 R. I. 110; Knott v. Clements, 13 Ark. 335; Ryan v. May, 14 Ill. 49. A party waives his demurrer by not calling for action thereon; Phœnix Ins. Co. v. Boren, 83 Tex. 97, 18 S. W. 484.

In Practice. *Demurrer upon evidence* is a declaration that the party making it, generally the defendant, will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue; Shaw v. White, 28 Ala. 637.

It is said that, although generally superseded by motion for nonsuit, binding instructions, or to exclude the evidence from the

jury, the practice is recognized "in nearly half the states" in civil cases; 15 H. L. Rev. 738. Nevertheless, the proceeding is so hedged about with technicalities that it is infrequently resorted to and when invoked has been the subject of the continuing disapproval of the courts ever since it was said by Chief Justice Tilghman that "he who demurs to parol evidence engages in an uphill business"; Dickey v. Schreider, 3 S. & R. (Pa.) 416; and Emery, J., characterized it as "unusual and antiquated practice"; State v. Soper, 16 Me. 293, 33 Am. Dec. 665. In 1859 it had long been out of use in New York and refusal to allow it was not cause of exception; Colegrove v. R. Co., 20 N. Y. 492, 75 Am. Dec. 418.

Upon joinder by the opposite party, the jury is generally discharged from giving any verdict; 1 Archb. Pr. 186; and the demurrer being entered on record is afterwards argued and decided by the court in banc; and the judgment there given upon it may ultimately be brought before a court of error; Andr. Steph. Pl. 180. It admits the truth of the evidence given and the legal deductions therefrom; Davis v. Steiner, 14 Pa. 275, 53 Am. Dec. 547; Hopkins v. Bowers, 111 N. C. 175, 16 S. E. 1; Doe v. Rue, 4 Blackf. (Ind.) 263, 29 Am. Dec. 368; but only such inferences as the jury might have drawn; Union S. S. Co. v. Nottinghams, 17 Gratt. (Va.) 115, 91 Am. Dec. 378; MacKinley v. McGregor, 3 Whart. (Pa.) 369, 31 Am. Dec. 522. An offer, in a civil case, so to demur, is not *stricti juris*, but is allowable only in the discretion of the court and should be refused if there is not colorable cause for it; Jones v. Ireland, 4 Ia. 63; it may be tendered by either party and the court may compel a joinder, but the power should be exercised with discretion, and when exercised, the action of the court is open to review; Eubank's Ex'r v. Smith, 77 Va. 206. See Plant v. Edwards, 85 Ind. 588. All facts proved and legitimate inferences therefrom must be admitted; Hopkins v. R. R., 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; Illinois Cent. R. Co. v. Brown, 96 Tenn. 559, 35 S. W. 560; and until the party demurring does this, the party offering the evidence is not required to join in demurrer; 2 H. Bl. 189 (where the subject and the practice thereon was elaborately considered in the House of Lords); and if the evidence is *prima facie* insufficient the demurrer is sustained; State v. Goetz, 131 Mo. 675, 33 S. W. 161; otherwise if there is some evidence on each material point; Hagan v. B'l'g & Loan Ass'n, 2 Kan. App. 711, 43 Pac. 1138; Cherokee & P. Coal & Mining Co. v. Britton, 3 Kan. App. 292, 45 Pac. 100. "Since it was determined that a demurrer to evidence could not be resorted to as a matter of right, it has fallen into disuse; and as long ago as 1813 (Young v. Black, 7 Cra. (U. S.) 565, 3 L. Ed. 440) it was regarded as an unusual proceeding, and one to be allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case;" Suydam v. Williamson, 20 How. (U. S.) 427, 436, 15 L. Ed. 978. A bill of exceptions is more comprehensive, in that it permits the review of rulings upon the admission of evidence, objection to which is waived by the demurrer; *id.* An offer of an instruction to find for the defendant, submitted at the close of the plaintiff's evidence, is equivalent to a demurrer to the evidence; Mitchell v. Ry. Co., 82 Mo. 106; Baker v. State, 31 Ohio St. 314.

The result of a demurrer to evidence must be final judgment for one party or the other —for the defendant if his demurrer were sustained or for the plaintiff if it were overruled, and in the latter case judgment would be given on the verdict if a conditional one had been taken, or if not, a writ of inquiry would issue to assess the damages. This practice appears from the cases already cited and is well stated in Obaugh v. Finn, 4 Ark. 110, 37 Am. Dec. 773, where it was held to be error to retain the jury after joinder in demurrer to evidence and to submit the case to the jury after overruling the demurrer. It would seem therefore that after that has been done the defendant demurrant is precluded from introducing evidence; State v. Groves, 119 N. C. 822, 25 S. E. 819; although it appears to have been done in an Oklahoma case in which, on writ of error, the United States Supreme Court held that where the defendant, after his demurrer to the evidence was overruled, had introduced evidence in his own behalf, he waived any supposed error in the decision on the demurrer; McCabe & Steen Const. Co. v. Wilson, 209 U. S. 275, 28 Sup. Ct. 558, 52 L. Ed. 788. And it was also done in Oglesby v. R. Co., 177 Mo. 272, 76 S. W. 623, where, after a demurrer to evidence was overruled, the defendant put in its testimony, which, with the plaintiff's, was considered as a whole and reviewed on appeal, and the court declined to review the judgment that the case was one to go to the jury.

In criminal trials it is entirely discretionary with the court whether it will entertain a demurrer to the evidence, even though counsel for the prisoner and state should both consent to it; Duncan v. State, 29 Fla. 439, 10 South. 815. In some courts, the propriety of the proceeding, in criminal cases, is denied; Nelson v. State, 47 Miss. 621; Miller v. State, 79 Ind. 198; Baker v. State, 31 Ohio St. 314; Doss v. Com., 1 Gratt. (Va.) 557; State v. Alderton, 50 W. Va. 101, 40 S. E. 350; while in others it is allowed but not encouraged; Martin v. State, 62 Ala. 240; State v. Soper, 16 Me. 293, 33 Am. Dec. 665. If allowed, it must state facts, and not evidence tending to prove those facts; Crowe v. People, 92 Ill. 231 (and this applies also in civil causes; Story, J., in Fowle v. Alexandria, 11 Wheat. [U. S.] 320, 6 L. Ed. 484);

and if it is resorted to by an accused, and overruled, he cannot introduce further evidence to controvert that which he has admitted; State v. Groves, 119 N. C. 822, 25 S. E. 819.

A demurrer to the evidence in equity has the same effect as at law, and concedes every fact which such evidence tends to prove, and every inference fairly deducible from the facts proved; Healey v. Simpson, 113 Mo. 340, 20 S. W. 881.

For a full discussion of the subject see 32 L. R. A. 354.

Demurrer to interrogatories is the reason which a witness tenders for not answering a particular question in interrogatories; 2 Swanst. 194. It is not, strictly speaking, a demurrer, except in the popular sense of the word; Gresl. Eq. Ev. 61. The court are judicially to determine its validity. The witness must state his objection very carefully; for these demurrers are held to strict rules, and are readily overruled if they cover too much; 2 Atk. 524; 1 Y. & J. 132.

DEMURRER BOOK. In English Practice. A transcript of all the pleadings that have been filed or delivered between the parties made upon the formation of an issue at law. 3 Steph. Com. 511; Lush, Pr. 787.

DEMURRER UPON EVIDENCE. See DEMURRER.

DEMY SANKE, DEMY SANGUE. Half-blood. A corruption of *demi-sang*.

DEN AND STROND. Liberty for ships and vessels to run aground or come ashore (strand themselves). Cowell.

DENARII. An ancient general term for any sort of *pecunia numerata*, or ready money. The French use the word *denier* in the same sense; *payer de ses propres deniers*.

DENARIUS DEI. God's penny; earnest money. A certain sum of money which is given by one of the contracting parties to the other as a sign of the completion of the contract. See EARNEST; GOD'S PENNY.

It differs from *arrhæ* in this, that the latter is a part of the consideration, while the *denarius Dei* is no part of it. 1 Duvergnoy, n. 132; 3 *id.* n. 49; *Répert. de Jur., Denier à Dieu.*

DENATIONALIZATION. See EXPATRIATION.

DENIAL. In Pleading. A traverse of the statement of the opposite party; a defence.

DENIER À DIEU. In French Law. A sum of money which the hirer of a thing gives to the other party as evidence, or for the consideration of the contract, which either party may annul within twenty-four hours, the one who gave the *denier à Dieu* by demanding, and the other by returning it. See DENARIUS DEI.

Earnest Money. Bellow's Dict.

DENIZATION. The act by which a foreigner becomes a subject of a country, but without the rights either of a natural-born subject or of one who has become naturalized. It has existed from an early period, and is effected only by letters patent from the sovereign. Denization has no retrospective operation; a denizen is in an intermediate position between an alien and a natural-born subject, and partakes of both these characters. He may ordinarily take lands by purchase, but not by inheritance; and his issue born before denization cannot inherit from him, but his issue born after it may; Cockburn, Nationality 27; Morse, Citizenship 106. See Priest v. Cummings, 20 Wend. (N. Y.) 352.

The difference between denization and naturalization is that the denizen becomes a British subject from the date of the letters while a naturalized person is placed in a position equivalent to that of a natural-born subject; Dicey, Confl. Laws 164.

DENIZEN. An alien born who has obtained, *ex donatione legis*, letters patent to make him an English subject.

He is intermediate between a natural-born subject and an alien. He may take lands by purchase or devise,—which an alien cannot; but he is incapable of taking by inheritance. 1 Bla. Com. 374.

In South Carolina, and perhaps in other states, this civil condition is well known to the law, having been created by statute.

The right of making denizens is not exclusively vested in the king, for it is possessed by parliament, but is scarcely ever exercised but by royal power. It may be effected by conquest; 7 Co. 6 *a*; 2 Ventr. 6; Com. Dig. *Alien* (D 1); Chitty, Com. Law 120. See DENIZATION.

In the common law, the word denizen is sometimes applied to a natural-born subject. Co. Litt. 129 *a*; Levy v. McCartee, 6 Pet. (U. S.) 102, 116, 8 L. Ed. 334.

DENOUNCE. A term frequently used in regard to treaties, indicating the act of one nation in giving notice to another nation of its intention to terminate an existing treaty between the two nations. The French *dénoncer* means to declare, to lodge an information against. Bellows, Fr. Dict.

DENOUNCEMENT. In Mexican Law. A judicial proceeding for the forfeiture of land held by an alien. See De Merle v. Mathews, 26 Cal. 477; Von Schmidt v. Huntington, 1 Cal. 63; Craig v. Leslie, 3 Wheat. (U. S.) 563, 4 L. Ed. 460.

DENUNCIATION. In Civil Law. The act by which an individual informs a public officer, whose duty it is to prosecute offenders, that a crime has been committed. See 1 Bro. Civ. Law 447; Ayliffe, Parerg. 210; Pothier, Proc. Cr. sect. 2, § 2.

The giving of an information in the ecclesiastical courts by one who was not the accuser.

DENUNTIATIO. In Old English Law. A public notice or summons. Bracton 202 *b*.

DEODAND. Any personal chattel whatever, animate or inanimate, which is the immediate cause of the death of a human creature. It was forfeited to the king to be distributed in alms by his high almoner "for the appeasing," says Coke, "of God's wrath." The word comes from *Deo dandum*, a thing that must be offered to God.

A Latin phrase which is attributed to Bracton has, by mistranslation, given rise to some erroneous statements in some of the authors as to what are deodands. *Omnia quæ ad mortem movent*, although it evidently means all things which *tend* to produce death, has been rendered *move to death*,—thus giving rise to the theory that things in motion only are to be forfeited. A difference, however, according to Blackstone, existed as to how much was to be sacrificed. Thus, if a man should fall from a cartwheel, the cart being stationary, and be killed, the wheel only would be deodand: while, if he was run over by the same wheel in motion, not only the wheel but the cart and the load became deodand. And this, even though it belonged to the dead man. Horses, oxen, carts, boats, mill-wheels, and cauldrons were the commonest deodands. The common name for it was the "bana," the slayer. In the thirteenth century the common practice was that the thing itself was delivered to the men of the township where the death occurred, and they had to account to the king's officers. In very early records the justices in eyre named the charitable purpose, to which the money was to be applied; 2 Poll. & Maitl. 471. In 1840, a railway company in England was amerced £2,000, as a deodand. Deodands were not abolished till 1846. See 1 Bla. Com. 301; 2 Steph. Com. 551; Holmes, C. L. 24.

No deodand accrues in the case of a felonious killing; 1 Q. B. 818; 1 G. & D. 211, 481; Dow. 1048. Deodands, as droits formerly attaching to the office of the Lord High Admiral, are defined as "things instrumental to the death of a man on shipboard, or goods found on a dead body cast on shore." See 2 Browne, Civ. L. 56.

DEPART. To divide or separate actively. The departers of gold and silver were no more than the dividers and refiners of those metals. Cowell.

DEPARTMENT. A portion of a country. In France, the country is divided into departments, which are somewhat similar to the counties in this country. The United States have been divided into military departments, including certain portions of the country. Parker v. U. S., 1 Pet. (U. S.) 293, 7 L. Ed. 150.

A portion of the agents employed by the executive branch of the United States government, to whom a specified class of duties is assigned. They are appointed by the president, by and with the advice of the senate.

The *Department of State* is intrusted with such matters relating to correspondence, commissions, and instructions to or with public ministers and consuls of the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such matters respecting foreign affairs as the president shall assign to said department. U. S. R. S. § 202. It has custody and charge of the seal of the United States, and of the seal of the department of state, and of all of the books, papers, records, etc., in and appertaining to the department, or any that may hereafter be acquired by it; *id.* § 203.

The principal officer is a secretary; he shall conduct the business of the department in such manner as the president shall direct. There are three assistant secretaries of state.

The *Department of the Treasury* has charge of the services relating to the finances. It is the duty of the secretary to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant, under limitations established by law, all warrants for moneys to be issued from the treasury in pursuance of appropriations by law; to make report and give information to either branch of the legislature, in person or in writing, respecting all matters referred to by the senate or house of representatives, or which shall appertain to his office; and, generally, to perform all such services relative to the finances as he shall be directed to perform. The department includes internal revenue; the mint; life saving service; engraving and printing; national banking system; revenue marine; customs; supervising architect. There are three assistant secretaries.

The *Department of War* is intrusted with duties relating to the land forces. There is an assistant secretary. U. S. R. S. § 214. It has charge of the Military Academy.

The *Department of Justice* is presided over by the attorney-general, who is assisted by the solicitor-general and four assistant attorneys-general, and by solicitors for certain departments. There is provision for the employment of special counsel in certain cases.

The attorney-general is required to give his advice and opinion upon questions of law whenever required by the president or the head of any executive department, and on behalf of the United States to procure proper evidence for, and conduct, prosecute or defend all suits in the supreme court or in the court of claims, in which the United States or any officer thereof, as such officer, is a party or may be interested. He exercises general superintendence and direction over the attorneys and marshals of all the districts in the United States and territories, and has power to employ and retain such attorneys and counsellors-at-law as he may

think necessary to assist the district attorneys in the discharge of their duties. U. S. R. S. § 346.

The *Post Office Department* has the general charge of matters relating to the postal service, the establishment of post-offices, appointment of postmasters, and the like. The head of the department is the postmaster-general and there are four assistant postmasters-general. U. S. R. S. §§ 394–396; 1 Supp. 927.

The *Department of the Navy* is intrusted with the charge of the navy. There is an assistant secretary and a judge advocate-general. There are in the navy department certain bureaus: Yards and docks; equipment and recruiting; navigation; ordnance; construction and repair; steam engineering; provisions and clothing; medicine and surgery. It includes the Marine Corps and the Naval Academy.

The *Department of the Interior* has general supervisory and appellate powers over the office of the commissioner of patents, and charge of the land office, Indian affairs, pensions, education, mines, geological survey, government hospitals and asylums and capitol buildings. There is an assistant secretary.

The *Department of Agriculture* is presided over by a secretary of agriculture. The design and duties of this department are to acquire and diffuse useful information on subjects connected with agriculture, and to procure, propagate, and distribute among the people new and valuable seeds and plants; Act Feb. 9, 1889; by act of 1890 the Weather Bureau was added. There is an assistant secretary.

The *Department of Commerce* was provided by Act of Feb. 14, 1903, as the Department of Commerce and Labor; upon the creation (*infra*) of the Department of Labor, it became the Department of Commerce. The department includes supervision of corporations, lighthouses, the census, steamship inspection, standards, navigation and foreign and domestic commerce.

The *Department of Labor* was created by Act of March 4, 1913, to promote the welfare of the wage earners of the United States, to improve their working conditions, etc. It includes immigration, naturalization, labor statistics and children's bureau.

As to the succession to the presidency, see CABINET.

DEPARTURE. **In Maritime Law.** A deviation from the course prescribed in the policy of insurance. See DEVIATION.

In Pleading. The statement of matter in a replication, rejoinder, or subsequent pleading, as a cause of action or defence, which is not pursuant to the previous pleading of the same party, and which does not support and fortify it. 2 Wms. Saund. 84 *a*, n. 1; Co. Litt. 304 *a*. It is not allowable, as it prevents reaching an issue; Kimberlin v. Carter, 49 Ind. 111; White v. Joy, 13 N. Y. 83, 89; 2 Wms. Saund. *a*, n. 1; Steph. Pl. 410.

A replication in tort following a declaration in contract is a departure; 1 B. & S. 836; and so it is when evidence of an entirely different character is required to support the declaration and the reply; Johnson v. Bank, 59 Kan. 250, 52 Pac. 860. The change of an immaterial point is no departure; 1 Stra. 21; nor is it if one of the later pleadings merely fortifies the former; 1 Lev. 81; nor where the replication merely answers a *prima facie* defence set up by the plea, as a statute against a claim of common-law right; 2 B. & S. 402; nor the allegation in reply of new matter necessary to meet the allegations of the answer, if not contradictory to the facts stated in the original pleading; Hunter Milling Co. v. Allen, 74 Kan. 679, 88 Pac. 252, 8 L. R. A. (N. S.) 291; McLachlin v. Barker, 64 Mo. App. 511; Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; McFadden v. Schroeder, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711; nor the setting out of previous averments in greater detail; Zorn v. Livesley, 44 Or. 501, 75 Pac. 1057.

It is to be taken advantage of by demurrer, general; 5 D. & R. 295; Sterns v. Patterson, 14 Johns. (N. Y.) 132; Keay v. Goodwin, 16 Mass. 1; or special; 2 Saund. 84; Com. Dig. *Pleader* (F 10); Hanover Fire Ins. Co. of City of New York v. Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

A departure is cured by a verdict in favor of him who makes it, if the matter pleaded by way of departure is a sufficient answer in substance to what has been before pleaded by the opposite party; that is, if it would have been sufficient if pleaded in the first instance; 2 Saund. 84; 1 Lilly, Abr. 444.

DEPARTURE IN DESPITE OF COURT. This took place where the tenant, having once made his appearance in court upon demand, failed to reappear when demanded; Co. Litt. 139 *a*. As the whole term is, in contemplation of law, but a single day, an appearance on any day, and a subsequent failure to reappear at any subsequent part of the term, is such a departure; 8 Co. 62 *a*; 1 Rolle, Abr. 583; Metc. Yelv. 211.

DEPENDENCY. A territory distinct from the country in which the supreme sovereign power resides, but belonging rightfully to it, and subject to the laws and regulations which the sovereign may think proper to prescribe.

It differs from a *colony*, because it is not settled by the citizens of the sovereign or mother state; and from *possession*, because it is held by other title than that of mere conquest. For example, Malta was considered a dependency of Great Britain in the year 1813. U. S. v. The Nancy, 3 Wash. C. C. 286, Fed. Cas. No 15,854. See Act of Cong. Mch. 1, 1809, commonly called the non-importation law; TERRITORY; INDIANS.

DEPENDENT. One who derives support from another. Ballou v. Gile, 50 Wis. 618, 7 N. W. 561; Supreme Council American Legion of Honor v. Perry, 140 Mass. 590, 5 N. E. 634; not merely persons who derive a benefit from the earnings of the deceased; [1899] 1 Q. B. 1005. A father is in part dependent on his child, however young, if the wages of the child form part of the common fund to maintain the home; [1900] A. C. 358; Alexander v. Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187 (where the term is used with reference to benevolent associations). See DEATH.

DEPENDENT PROMISE. One which it is not the duty of the promisor to perform until some obligation contained in the same agreement has been performed by the other party. Hamm. Partn. 17, 29, 30, 109; Harr. Cont. 152. See CONTRACT; COVENANT; INDEPENDENT PROMISE.

DEPONENT. One who gives information, on oath or affirmation, respecting some facts known to him, before a magistrate or other person entitled to administer an oath; he who makes a deposition. Bliss v. Shuman, 47 Me. 248. See AFFIANT.

DEPORTATION. In Roman Law. A perpetual banishment, depriving the banished of his rights as a citizen: it differed from relegation (*q. v.*) and exile (*q. v.*). 1 Bro. Civ. Law, 125, n.; Inst. 1. 12. 1; Dig. 48. 22. 14. 1.

In Modern Law. "The removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." Fong Yue Ting v. U. S., 149 U. S. 709, 13 Sup. Ct. 1016, 37 L. Ed. 905. It differs from *transportation* (*q. v.*), which is by way of punishment of one convicted of an offence against the laws of the country; and from *extradition* (*q. v.*), which is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished; *id.* It is not a criminal proceeding; U. S. v. Hing Quong Chow, 53 Fed. 233.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, which holds, by a divided court, that this right exists even though such persons be subjects of a friendly power and have acquired a domicile in this country. This case follows Vattel, Law of Nations § 230; Ortolan, *Dipl. de la Mer* 297; 1 Phill. Int. L. § 220; Bar, Int. Law (Gillespie's ed.) 708. None of the guaranties of the United States constitution, first amendment, respecting freedom to worship, speak, publish or petition, are infringed by the immigration act of March 3, 1903, for the exclusion and deportation of alien anarchists; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979.

So the child of an alien, born abroad, whose father afterwards comes here and is naturalized, can be excluded and deported if found to be suffering from a contagious disease; Zartarian v. Billings, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428.

Deportation is an inherent sovereign power; Tiaco v. Forbes, 228 U. S. 549, 33 Sup. Ct. 585, 57 L. Ed. —. Congress has the power to deport aliens whose presence is deemed hurtful, and this applies to prostitutes, regardless of how long they have been here; Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. —.

In England, the only question has been whether deportation could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament. See 2 Inst. 57; 1 Bla. Com. 260; 6 Law Quart. Rev. 27. A British colonial governor has exercised it; 1 Moore, P. C. 460. See App. Cas. (1891) 272.

Congress may exercise the power through the executive, or may call in the judiciary to ascertain contested facts; Fong You Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

See ALIEN-LABOR; ANARCHIST; CHINESE; CITIZEN; NATURALIZATION; RENVOI.

Under the act of August 18, 1894, the decision of the secretary of commerce of the right of a person of Chinese descent to enter the United States is conclusive on the federal courts, though citizenship, and not domicil, is the ground on which the right of entry is claimed; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. If he enters unlawfully, he may be deported by the secretary of commerce; Prentis v. Seu Leung, 203 Fed. 25, 121 C. C. A. 389.

"Moral turpitude," as ground of exclusion of an alien, means an act of baseness, vileness or depravity in the private and social duties which one owes to society, and as applied to offences includes only such crimes as manifest personal depravity or baseness; U. S. v. Uhl, 203 Fed. 152; publishing a criminal libel against King George V, of which the person seeking entrance had been convicted and sentenced to one year's imprisonment in England is not ground of exclusion; *id.*, affirmed, U. S. v. Uhl, 210 Fed. 860.

DEPOSE. To deprive an individual of a public employment or office against his will. Wolffius, Inst. § 1063. The term is usually applied to the deprivation of all authority of a sovereign.

To give testimony under oath. See DEPOSITION.

DEPOSIT. A naked bailment of goods to be kept for the depositor without reward, and to be returned when he shall require it. Jones, Bailm. 36, 117; Bellows Falls Bank v. Bank, 40 Vt. 380.

A bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. Story, Bailm. § 41; Richardson v. Futrell, 42 Miss. 544.

A contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously and obliges himself to return it when he shall be requested. See 3 L. R. P. C. C. 101.

An *irregular deposit* arises where one deposits money with another for safekeeping, in cases where the latter is to return, not the specific money deposited, but an equal sum.

A *quasi deposit* arises where one comes lawfully into possession of the goods of another by finding.

A depositary is bound to take only ordinary care of the deposit, which will of course vary with the character of the goods to be kept, and other circumstances; Edw. Bailm. 43. See Vickroy v. Skelley, 14 S. & R. (Pa.) 375; Foster v. Bank, 17 Mass. 479, 9 Am. Dec. 168; Tracy v. Wood, 3 Mas. 132, Fed. Cas. No. 14,130; 1 B. & Ald. 59. While gross negligence on the part of a gratuitous bailee is not fraud, it is in effect the same thing; First Nat. Bank v. Graham, 100 U. S. 699, 25 L. Ed. 750. He has, in general, no right to use the thing deposited; Bac. Abr. *Bailment*, D; unless in cases where permission has been given or may from the nature of the case be implied; Story, Bailm. § 90; Jones, Bailm. 80, 81. He is bound to return the deposit *in individuo*, and in the same state in which he received it: if it is lost, or injured, or spoiled, by his fraud or gross negligence, he is responsible to the extent of the loss or injury; Jones, Bailm. 36, 46, 120; Foster v. Bank, 17 Mass. 479, 9 Am. Dec. 168; Stanton v. Bell, 9 N. C. 145, 11 Am. Dec. 744; 1 Dane, Abr. c. 17, arts. 1 and 2; Hubbell v. Blandy, 87 Mich. 209, 49 N. W. 502, 24 Am. St. Rep. 154. He is also bound to restore, not only the thing deposited, but any increase or profits which may have accrued from it; if an animal deposited bear young, the latter are to be delivered to the owner; Story, Bailm. § 99.

In the case of irregular deposits, as those with a bank, the relation of the bank to its customer is that of debtor and creditor, and does not partake at all of a fiduciary character. It ceases altogether to be the money of the depositor, and becomes the money of the bank. It is his to do what he pleases with it, and there is no trust created; Edw. Bailm. 41, 45; Commercial Bank of Albany v. Hughes, 17 Wend. (N. Y.) 94; 1 Mer. 568; Bank of Marysville v. Brewing Co., 50 Ohio St. 151, 33 N. E. 1054, 40 Am. St. Rep. 660; American Exchange Nat. Bank v. Gregg, 138 Ill. 596, 28 N. E. 839, 32 Am. St. Rep. 171; Collins v. State, 33 Fla. 429, 15 South. 214; Central Nat. Bank v. Ins. Co., 104 U. S. 64, 26 L. Ed. 693. See Jacobus v. Jacobus, 37 N. J. Eq. 18. In Law's Estate, 144 Pa. 507, 22 Atl. 831, 14 L. R. A. 103, it was held to be "a temporary disposition of money for safekeeping," not creating the relation of debtor and creditor; nor is it a loan; *id.;* Elliott v. State Bank, 128 Ia. 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198. If the jury believe from the evidence that the parties intended that a bank should not receive a check as cash, but only as an agent for collection, then title to the check does not vest in the bank at the time of the deposit; Fayette Nat. Bank v. Summers, 105 Va. 689, 54 S. E. 862, 7 L. R. A. (N. S.) 694.

Where a commission merchant deposits his principal's money in his own account in bank, it cannot be applied to the payment of the former's debt to the bank; Boyle v. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917, 1 L. R. A. (N. S.) 1110, 110 Am. St. Rep. 844, citing Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724.

As to deposits in savings banks, etc., for another, see DONATIO MORTIS CAUSA.

See CHECK; INDORSEMENT; NATIONAL BANK.

The legal remedy is a suit at law for debt: the balance cannot be reached by a bill in equity; 2 H. L. Cas. 39; except in some cases of insolvency, when a fund can be followed; Voight v. Lewis, 11 Phila. (Pa.) 511, Fed. Cas. No. 16,989. See *infra.* A bank is not liable for interest unless expressly contracted for; and the deposit is subject to the statute of limitations; 2 H. L. Cas. 39; McLoghlin v. Bank, 139 N. Y. 514, 34 N. E. 1095. Otherwise, in the case of a certificate of deposit payable on demand; Hartman's Appeal, 107 Pa. 333.

The general rule that the title passes upon the deposit does not apply when the subject of the deposit is a sight draft and the bank at the time of the acceptance was insolvent and its officers knew it to be so; St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683. The acceptance of a deposit by a bank irretrievably insolvent will constitute such fraud as will entitle the depositor to his drafts or their proceeds; *id.;* Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; Bruner v. Bank, 97 Tenn. 540, 37 S. W. 286, 34 L. R. A. 532. When checks are received by a bank hopelessly insolvent and not collected until after it closes its doors, the owner may recover the checks or their proceeds; City of Somerville v. Beal, 49 Fed. 790; he may rescind the transfer and stop payment of the check; First Nat. Bank of Meridian v. Strauss, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; or reclaim it from

the hands of the assignee; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. Rep. 9; or of a third person who did not give value for it; National Citizens' Bank v. Howard, 3 How. Pr. N. Y. (N. S.) 511; but not if the check has been turned over to a *bona fide* purchaser for value; Grant v. Walsh, 81 Hun 449, 31 N. Y. Supp. 60. If the subject of the deposit is money and is in a separate package, the depositor may recover it from the receiver; In re Commercial Bank, 1 Ohio N. P. 358; Chaffee v. Fort, 2 Lans. (N. Y.) 81; Furber v. Stephens, 35 Fed. 17; but if it has passed into the hands of the assignee and been mingled with the other funds of the bank, and cannot be traced, the depositor is not entitled to a preference; Lotze v. Hoerner, 25 Ohio L. J. 31; Wilson v. Coburn, 35 Neb. 530, 53 N. W. 466; Blake v. Bank, 12 Wash. 619, 41 Pac. 909; In re North River Bank, 60 Hun 91, 14 N. Y. Supp. 261. It has been held that if money and checks are deposited a few minutes before the doors of the bank are closed and the checks are subsequently collected, so that the specific money deposited and the proceeds of the checks come to the hands of the receiver, the owner may recover them from him. The fact that the money cannot be identified will not prevent its recovery if it is still in the mass in the receiver's hands; Wasson v. Hawkins, 59 Fed. 237, followed in Lake Erie & W. R. Co. v. Bank, 65 Fed. 690.

Deposits in the civil law are divisible into two kinds—necessary and voluntary. A necessary deposit is such as arises from pressing necessity; as, for instance, in case of a fire, a shipwreck, or other overwhelming calamity; and thence it is called *miserabile depositum*. La. Civ. Code 2935. A voluntary deposit is such as arises without any such calamity, from the mere consent or agreement of the parties. Dig. 16. 3. 2.

This distinction was material in the civil law in respect to the remedy, for involuntary deposits the action was only *in simplum*, in the other *in duplum*, or twofold, whenever the depositary was guilty of any default. The common law has made no such distinction. Jones, Bailm. 48.

Deposits are again divided by the civil law into simple deposits and sequestrations: the former is when there is but one party depositor (of whatever number composed), having a common interest; the latter is where there are two or more depositors, having each a different and adverse interest. These distinctions do not seem to have become incorporated into the common law. See Story, Bailm. § 41. See BAILMENT.

Deposit is sometimes used as equivalent to or in the sense of earnest (*q. v.*), when made by way of a forfeiture to bind a bargain. In such case it is forfeited on a breach "even if as a deposit and in part payment of the purchase money," and it cannot be recovered back unless circumstances make it unequitable to retain it; 53 L. J. Ch. 1061; 27 Ch. D. 89.

See GIFT; CERTIFICATE OF DEPOSIT.

DEPOSITARY. A person entrusted with anything by another for safekeeping; a trustee; fiduciary; one to whom goods are bailed to be held without recompense. Stand. Dict.

DEPOSITION. The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice. Stimpson v. Brooks, 3 Blatchf. 456, Fed. Cas. No. 13,454; State v. Dayton, 23 N. J. L. 49, 53 Am. Dec. 270.

Depositions were not formerly admitted in common-law courts, and were afterwards admitted from necessity, where the oral testimony of a witness could not be obtained. But in courts of chancery this was formerly the only method of taking testimony; Ad. Eq. 363. In some of the states, however, both oral testimony and depositions are used, the same as in courts of common law.

In criminal cases, depositions cannot be used without the consent of the defendant; 3 Greenl. Ev. § 11; Dominges v. State, 7 Smedes & M. 475, 45 Am. Dec. 315; McLane v. State, 4 Ga. 335. This is a necessary consequence of the provision of the constitution of the United States that in all criminal prosecutions "the accused shall enjoy the right to be confronted with the witnesses against him." Amend. art. 6. This principle is recognized in the constitutions or statutes of most of the states of the Union. 3 Greenl. Ev. § 11; Cooley, Const. Lim. 387.

In some of the states, provision is made for the taking of depositions by the accused. Conn. Comp. Stat. art. 6, § 162; 3 Greenl. Ev. § 11.

Provision has been made for taking depositions to be used in civil cases, by an act of congress and by statutes in most of the states.

U. S. Rev. Stat. §§ 863-876, direct that when, in any civil cause depending in any district in any court of the United States, the testimony of any person shall be necessary who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, or interested in the event of the cause; provided that a notification in writing from the party or his attorney, to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest. And in all cases *in rem*, the person having the agency or possession of the property at the time of the seizure shall be deemed the adverse party until a claim shall have been put in; and whenever, by reason of the absence from the district, and want of an

attorney of record, or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice, as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose, as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify to *the whole truth*, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any given, to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is siting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. Provided that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice,—which power they shall severally possess; nor to extend to depositions taken *in perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the United States, a circuit court, on application thereto, made as a court of equity, may, according to the usages in chancery, direct to be taken.

In any cause before a court of the United States, it shall be lawful for such court, in its discretion to admit in evidence any deposition taken *in perpetuam rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.

The act of January 24, 1827, authorizes the clerk of any court of the United States within which a witness resides, or where he is found, to issue a subpœna to compel the attendance of such witness; and a neglect of the witness to attend may be punished by the court whose clerk has issued the subpœna, as for a contempt. And when papers are wanted by the parties litigant, the judge of the court within which they are may issue a subpœna *duces tecum*, and enforce obedience by punishment as for a contempt. R. S. §§ 863-875; see Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521; Bates Fed. Eq. Proc.

No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition, nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna. See R. S. § 870, etc.

R. S. § 863, above quoted, relating to depositions *de bene esse*, applies to equity as well as to common-law causes; Stegner v. Blake, 86 Fed. 133. When a party is represented by counsel at the taking of a deposition and takes part in the examination, that must be regarded as a waiver of irregularities in taking it; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; and after having been read in evidence, without objection, its regularity cannot afterwards be challenged; Evans v. Hettich, 7 Wheat. (U. S.) 453, 5 L. Ed. 496; Brown v. Tarkington, 3 Wall. (U. S.) 377, 18 L. Ed. 255. Objections must be taken, and noted at the time, to the competency of a witness; Shutte v. Thompson, 15 Wall. (U. S.) 151, 21 L. Ed. 123; or to irregularities or defects which might have been remedied by retaking the deposition, and mere formal objections must be raised when the deposition is taken or on motion to suppress and not at the trial; Doane v. Glenn, 21 Wall. (U. S.) 33, 22 L. Ed. 476; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819; York Mfg. Co. v. R. Co., 3 Wall. (U. S.) 107, 18 L. Ed. 170; unless the time after the return and before trial is too brief; *id.*; otherwise they are waived; Howard v. Mfg. Co., 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; Clogg v. McDaniel, 89 Md. 420, 43 Atl. 795; American Pub. Co. v. C. E. Mayne Co., 9 Utah, 321, 34 Pac. 247; Sugar Pine Lumber Co. v. Garrett, 28 Or. 171, 42 Pac. 129.

A deposition *de bene esse* cannot be read, if objected to, if the witness is present in court; Whitford v. Clark County, 119 U. S. 522, 7 Sup. Ct. 306, 30 L. Ed. 500; or can be produced; The Samuel, 1 Wheat. (U. S.) 9, 4 L. Ed. 23; or, if an away-going witness, a subpœna has not been taken out and effort made to serve it; Mifflin v. Bingham, 1 Dall. (U. S.) 272, 1 L. Ed. 133; and it must be shown that the disability to attend continues; Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604, 8 L. Ed. 243; cross-examination is a waiver of objection to the regularity of the deposition; Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299, 7 L. Ed. 152; Northern Pacific R. Co. v. Urlin, 158 U. S. 274, 15 Sup. Ct. 840, 39 L. Ed. 977; but not to the competency of the witness; Mifflin v. Bingham, 1 Dall. (U. S.) 272, 1 L. Ed. 133.

A clerical mistake in making out a commission, which in no way misled the opposite party or affected his rights, is no valid ground for the suppression of the deposition; Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819. If the deponent is not satisfied with his first deposition, it is his right, without any order of the court, to make a second one; Nash v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254. The subject was fully considered by Shipman, C. J., in White v. R. Co., 79 Fed. 133, 24 C. C. A. 467. The judiciary act of 1789 provided for the examination of witnesses in open court in equity as well as at law. The act of April 29, 1802, provided that testimony in equity might be taken by depositions in states where that was the practice. The act of August 23, 1842, empowered the Supreme Court to make rules for taking testimony. The former 67th Rule in Equity was formulated in 1861. As amended it enlarged the statutory practice and provided for taking equity evidence orally or by special examiners and for securing the attendance of witnesses, which may be compelled by the court of a district to which the examiner is sent. See, also, Stevens v. R. Co., 104 Fed. 934. The judge of such district may pass on the materiality of evidence and compel answers; In re Allis, 44 Fed. 216.

The United States act of March 9, 1892, authorizing depositions to be taken in the mode prescribed by the state laws, merely provided an additional *method* and did not confer any additional rights to take testimony; National Cash Register Co. v. Leland, 77 Fed. 242.

Reasonable notice under R. S. §§ 863, 865, depends upon the circumstances of the par-

ticular case; distance, number of witnesses, and facility of communication are chiefly important; American Exch. Nat. Bank v. Nat. Bank, 82 Fed. 961, 27 C. C. A. 274. Notice of taking proofs in three different states on the same day is not reasonable; Eillert v. Craps, 44 Fed. 792.

A subpœna *duces tecum* may issue to a witness whose testimony is to be taken under R. S. § 863; Davis v. Davis, 90 Fed. 791.

In connection with question of adjournment on the ground that counsel cannot attend, it was said in Uhle v. Burnham, 44 Fed. 729, that the law does not contemplate that a litigant shall be required to go to the expense of hiring numerous counsel to represent him. An examiner may adjourn a meeting for illness and absence; Shapleigh v. Light & Power Co., 47 Fed. 848.

A witness may test the validity of proceedings by refusing to be sworn. He is then in contempt and his rights will be contested under contempt procedure; In re Spofford, 62 Fed. 443.

In taking depositions *de bene esse* in another district under R. S. § 863, the witness may assert his privilege of refusing to testify or produce documents, and in such a case he has the right to be heard before the court of that district. Taking depositions before an examiner in equity is not a judicial trial; the public have no right to be present; U. S. v. Shoe Machinery Co., 198 Fed. 870.

A deposition is not admissible in evidence if the witness was not sworn till after his testimony was reduced to writing; Armstrong v. Burrows, 6 Watts (Pa.) 266, per Gibson, C. J.

See Street, Fed. Practice.

The new Equity Rules of the Supreme Court of the United States have considerably changed the practice. In all equity trials the testimony is to be taken orally, in open court, except as otherwise provided by statute or other rules. The court may permit the deposition of named witnesses to be used before the court or upon a reference to a master to be taken before an examiner, etc. The district court may order that the testimony in chief of expert witnesses may be set forth in affidavits, with the right of cross-examination and re-examination before the court at the trial. See EXPERT.

Objections to the evidence before an examiner, etc., must be in short form. The testimony of each witness, after being reduced to writing, must be read over to or by him and be signed by him in the presence of the officer. If the witness refuses to sign, the officer shall sign the deposition, stating thereon the reason for refusal. Objections to questions must be noted by the officer, but he is without power to pass on competency, etc.

Where witnesses live within the district, whose testimony may be taken out of court by the rules, they may be summoned before a commissioner or master or examiner. Their refusal to appear is contempt of court and an attachment may thereupon issue as in the case of contempt for not attending or for refusing to give testimony in court.

In a state criminal trial in Louisiana, reading a deposition taken before a committing magistrate in the presence of the accused, and subject to his counsel's cross-examination, the witness being permanently absent from the state, does not deprive the accused of his liberty without due process; West v. Louisiana, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965.

In Ecclesiastical Law. The act of depriving a clergyman, by a competent tribunal, of his clerical orders, to punish him for some offence and to prevent his acting in future in his clerical character. Ayliffe, Parerg. 206.

DEPOSITO. **In Spanish Law.** A real contract by which one person confides to the custody of another an object on the condition that it shall be returned to him whenever he shall require it.

DEPOSITOR. He who makes a deposit.

DEPOSITUM. A species of bailment. See DEPOSIT.

DEPOT. Within the meaning of statutes obliging railroad companies to fence their tracks excepting depot grounds, mere distance from depots has been held not to be the controlling consideration in determining how far they extend; Rabidon v. R. Co., 115 Mich. 390, 73 N. W. 386, 39 L. R. A. 405. Public convenience is held to be the limit of such an exception; Greeley v. Ry. Co., 33 Minn. 136, 22 N. W. 179, 53 Am. Rep. 16. They may include the terminals and switch stands of all switches or side tracks at all stations; Gulf, C. & S. F. Ry. Co. v. Blankenbeckler, 13 Tex. Civ. App. 249, 35 S. W. 331; ground necessary to take in wood and water; Fowler v. Loan Co., 21 Wis. 77; Jeffersonville, M. & I. R. Co. v. Beatty, 36 Ind. 19; Harvey v. Southern Pac. Co., 46 Or. 505, 80 Pac. 1061; or for switches; Illinois Cent. R. Co. v. Finney, 42 Ill. App. 390; a tract of five or six acres has been held to be included in depot grounds; Davis v. R. Co., 26 Ia. 549.

A place where military supplies and stores are kept. Caldwell's Case, 19 Wall. (U. S.) 264, 22 L. Ed. 114.

DEPRIVATION. A censure by which a clergyman is deprived of his parsonage, vicarage, or other ecclesiastical promotion or dignity. See Ayliffe, Parerg. 206; 1 Bla. Com. 393. See DEGRADATION.

DEPRIVE. Referring to property taken under the power of eminent domain, it means the same as "take." Sharpless v.

Mayor of Philadelphia, 21 Pa. 167, 59 Am. Dec. 759.

The constitution contains no definition of this word "deprive" as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection; Munn v. Illinois, 94 U. S. 123, 24 L. Ed. 77. See DUE PROCESS OF LAW; EMINENT DOMAIN; PRIVILEGES AND IMMUNITIES; FOURTEENTH AMENDMENT.

DEPUTY. One authorized by an officer to exercise the office or right which the officer possesses, for and in place of the latter.

In general, ministerial officers can appoint deputies, Comyns, Dig. *Officer* (D 1), unless the office is to be exercised by the ministerial officer in person; and when the office partakes of a judicial and ministerial character, although a deputy may be made for the performance of ministerial acts, one cannot be made for the performance of a judicial act; a sheriff cannot, therefore, make a deputy to hold an inquisition, under a writ of inquiry, though he may appoint a deputy to serve a writ. Sometimes, however, a general deputy or under-sheriff is appointed, who possesses, by virtue of his appointment, authority to execute all the ordinary duties of sheriff, and may even appoint, in the name of the sheriff, a special deputy; Allen v. Smith, 12 N. J. L. 159; Tillotson v. Cheetham, 2 Johns. (N. Y.) 63.

In general, a deputy has power to do every act which his principal might do; but a deputy cannot appoint a deputy. See Abrams v. Ervin, 9 Ia. 87; Lewis v. Lewis, 9 Mo. 183, 43 Am. Dec. 540; Confiscation Cases, 20 Wall. (U. S.) 111, 22 L. Ed. 320.

A deputy should always act in the name of his principal. The principal is liable for the deputy's acts performed by him as such, and for the neglect of the deputy; 3 Dane, Abr. c. 76, a. 2; and the deputy is liable himself to the person injured for his own tortious acts; Dane, Abr. Index; Com. Dig. *Officer* (D), *Viscount* (B). See 7 Viner, Abr. 556; L. R. 3 Q. B. Div. 741; Willis v. Melvin, 53 N. C. 62.

DERAIGN. The literal meaning of the word seems to be, to disorder or displace, as deraignment out of religion; stat. 31, Hen. VIII, c. 6. But it is generally used in the common law for to prove, as, to deraign the warranty; Glanv., lib. 2, c. 6. See Jacob L. Dict., where the word is discussed. It is used as referring to a decree "which deraigns his title from a false source." Paxson v. Brown, 61 Fed. 874, 884, 10 C. C. A. 135.

DERELICT. Abandoned; deserted; cast away.

Land left uncovered by the receding of water from its former bed. 2 Rolle, Abr. 170; 2 Bla. Com. 262; 1 Crabb, R. P. 109.

Personal property abandoned or thrown away by the owner in such manner as to indicate that he intends to make no further claim thereto. 2 Bla. Com. 9; 1 C. B. 112; Broom, Max. 261; Goodenow v. Tappan, 1 Ohio 81; Jones's Adm'rs v. Nunn, 12 Ga. 473.

Dereliction or renunciation properly requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship is not dereliction, as there is no intention of abandoning the property in the case of salvage. Nor does the mere intention of abandonment constitute dereliction of property without a throwing away or removal, or some other external acts; Livermore v. White, 74 Me. 455, 43 Am. Rep. 600.

It applies as well to property abandoned at sea as on land; Rowe v. The Brig, 1 Mas. 373, Fed. Cas. No. 12,093; The Emulous, 1 Sumn. 207, Fed. Cas. No. 4,480; The Boston, 1 Sumn. 336, Fed. Cas. No. 1,673; 2 Kent 357. A vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions, is derelict; 20 E. L. & Eq. 607; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 2 L. Ed. 266; The John Gilpin, Olc. 77, Fed. Cas. No. 7,345; Evans v. The Charles, 1 Newb. 329, Fed. Cas. No. 4,556; Montgomery v. The T. P. Leathers, 1 Newb. 421, Fed. Cas. No. 9,736; The Attacapas, 3 Ware, 65, Fed. Cas. No. 637; The Laura, 14 Wall. (U. S.) 336, 20 L. Ed. 813.

The title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there; Murphy v. Dunham, 38 Fed. 503; "because as goods lying at the bottom, they always await their owner;" *id.;* after another has taken them, the owner must follow them within a year and a day; *id.;* 5 Co. 105; 1 B. & Ad. 141, where the law is fully discussed; 3 Black Book, Adm. 439.

A vessel at least six miles from shore submerged from midship to bow, her running rigging overboard and snarled fast, her boat gone, her cabin, etc., full of water, a distress flag set, and deserted by her crew, who had left no sign of an intention to return and were not visible, is *prima facie* derelict, though she was anchored and her master was intending to return to save her and had telegraphed for a wrecking vessel; The Ann L. Lockwood, 37 Fed. 233.

However long goods thrown overboard may have been on the ocean, they do not become derelict by time, but will be restored on the payment of salvage, unless there was a voluntary intention to abandon them; Bee 82. The finder can only hold possession to enforce a lien for salvage; Whitwell v. Wells, 24 Pick. (Mass.) 30. See SALVAGE; ABANDONMENT.

DERIVATIVE. Coming from another; taken from something preceding; secondary; as, derivative title, which is that acquired from another person.

There is considerable difference between an original and a derivative title. When the acquisition is original, the right thus acquired to the thing becomes property, which must be unqualified and unlimited, and, since no one but the occupant has any right to the thing, he must have the whole right of disposing of it. But with regard to derivative acquisition it may be otherwise; for the person from whom the thing is acquired may not have an unlimited right to it, or he may convey or transfer it with certain reservation of right. Derivative title must always be by contract.

Derivative conveyances are those which presuppose some precedent conveyance, and serve only to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. 3 Bla. Com. 324.

DEROGATION. The partial abrogation of a law. To derogate from a law is to enact something which impairs its utility and force; to abrogate a law is to abolish it entirely.

DEROGATORY CLAUSE. A sentence or secret character inserted in a will by the testator, of which he reserves the knowledge to himself, with a condition that no will he may make thereafter shall be valid, unless this clause be inserted word for word. This is done as a precaution against later wills being extorted by violence or otherwise improperly obtained. Whart.

DESAFUERO. In Spanish Law. An irregular action committed with violence against law, custom, or reason.

DESCEND. To pass by succession; as when the estate vests by operation of law in the heirs immediately upon the death of the ancestor. Dove v. Torr, 128 Mass. 40. See DESCENT AND DISTRIBUTION.

DESCENDANTS. Those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree. Ambl. 327; 2 Bro. C. C. 30, 230; 1 Roper, Leg. 115.

The descendants from what is called the direct descending line. The term is opposed to that of ascendants.

There is a difference between the number of ascendants and descendants which a man may have; every one has the same order of ascendants, though they may not be exactly alike as to numbers, because some may be descended from a common ancestor. In the line of descendants they fork differently according to the number of children, and continue longer or shorter as generations continue or cease to exist. Many families become extinct, while others continue: the line of descendants is, therefore, diversified in each family.

DESCENT AND DISTRIBUTION. The division among those legally entitled thereto of the real and personal property of intestates, the term *descent* being applied to the former and *distribution* to the latter. *Descent* is the devolution of real property to the heir or heirs of one who dies intestate; the transmission by succession or inheritance.

Title by descent is the title by which one person, upon the death of another, acquires the real estate of the latter as his heir at law. 2 Bla. Com. 201; Com. Dig. *Descent.*

It was one of the principles of the feudal system that on the death of the tenant in fee the land should *descend*, and not *ascend.* Hence the title by inheritance is in all cases called descent, although by statute law the title is sometimes made to ascend.

The English doctrine of primogeniture, by which by the common law the eldest son takes the whole real estate, has been universally abolished in this country. So, with few exceptions, has been the distinction between male and female heirs.

The rules of descent are applicable only to real estates of inheritance. Estates for the life of the deceased, of course, terminate on his death; estates for the life of another are governed by peculiar rules.

Distribution is the division by order of the court or legal representative having authority, among those entitled thereto, of the residue of the personal estate of an intestate, after payment of the debts and charges.

The term is sometimes used to denote the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will, but neither use is accurate, the term being technically applied only to personal estate.

The title to real estate vests in the heirs by the death of the owner; the legal title to personal estate, by such death, vests in the executor or administrator, and is transferred to the persons beneficially interested, by the distribution; Roorbach v. Lord, 4 Conn. 347.

Terms of years, and other estates less than freehold, are regarded as personal estate, and, on the death of the owner, vest in his executor or administrator.

The rules of descent and distribution are prescribed by the statute laws of the several states; and, although they correspond in some respects, it is doubtful whether in any two they are precisely alike.

As to the right of a murderer to take by descent from his victim, see MURDER. And see, generally, NEXT OF KIN; KINDRED; HEIR; EXECUTORS AND ADMINISTRATORS.

DESCENT CAST. Another name for what the older writers called a "descent which tolls entry." When a person had acquired land by disseisin, abatement, or intrusion, and died seised of the land, the descent of it to his heir took away or tolled the real owner's right of entry, so that he could only recover the land by an action. Co. Litt. 237 *b*; Rap. & L. Dict.

DESCENT OF CROWN LANDS. All lands whereof the king is seised *in jure coronæ* attend upon and follow the crown; so

that to whomsoever the crown descends those lands and possessions descend also. And if the heir of the crown be attainted of treason, yet shall the crown descend to him, and without any reversal the attainder is avoided. Plowd. 247; Co. Litt. 15.

DESCENT OF DIGNITIES. A dignity differs from common inheritances, and goes, not according to the rules of the common law, for it descends to the half-blood, and there is no co-partnership in it, but the eldest takes the whole. Co. Litt. 27.

DESCRIPTIO PERSONÆ. Description of the person. In wills, it frequently happens that the word heir is used as a *descriptio personæ:* it is then a sufficient designation of the person. In criminal cases, a mere *descriptio personæ* or addition, if false, can be taken advantage of only by plea in abatement; Com. v. Lewis, 1 Metc. (Mass.) 151. A legacy "to the eldest son" of A would be a designation of the person. See 1 Roper, Leg. c. 2.

The description contained in a contract of the persons who are parties thereto.

In all contracts under seal there must be some *designatio personæ.* In general, the names of the parties appear in the body of the deed, "between A B, of, etc., of the one part, and C D, of, etc., of the other part," being the common formula. But there is a sufficient designation and description of the party to be charged if his name is written at the foot of the instrument; 1 Ld. Raym. 2; 1 Salk. 214; 2 B. & P. 339.

When a person is described in the body of the instrument by the name of James, and he signs the name of John, on being sued by the latter name he cannot deny it; 3 Taunt. 505; Cro. Eliz. 897, n. (*a*). See 11 Ad. & E. 594; 3 P. & D. 271.

DESCRIPTION. An account of the accidents and qualities of a thing. Ayliffe, Pand. 60.

A written account of the state and condition of personal property, titles, papers, and the like. It is a kind of inventory, but is more particular in ascertaining the exact condition of the property, and is without any appraisement of it.

In Pleading. One of the rules which regulate the law of variance is that allegations of matter of *essential description* should be proved as laid. It is impossible to explain with precision the meaning of these words; and the only practical mode of understanding the extent of the rule is to examine some of the leading decisions on the subject, and then to apply the reasoning or ruling contained therein to other analogous cases. With respect to criminal law, it is clearly established that the name or nature of the property stolen or damaged is matter of essential description. Thus, for example, if the charge is one of firing a stack of hay, and it turns out to have been a stack of wheat, or if a man is accused of stealing a drake, and it is proved to have been a goose, or even a duck, the variance is fatal. 1 Tayl. Ev. § 233; Steph. Cr. Proc. 177.

The strict rule of pleading which formerly required exact accuracy in the description of premises sought to be recovered, has been relaxed, and a general description held to be good. The provisions of state statutes as to the description of the premises by metes and bounds have been held to be only directory, and a description by name where the property is well known is often sufficient; Glacier Mountain Silver Min. Co. v. Willis, 127 U. S. 480, 8 Sup. Ct. 1217, 32 L. Ed. 172.

See BOUNDARY.

DESERTION. An offence which consists in the abandonment of the public service, in the army or navy, without leave.

An absence without leave, with the intention of returning, will not amount to desertion; Inhabitants of Hanson v. Inhabitants of South Scituate, 115 Mass. 336; Cloutman v. Tunison, 2 Sumn. 373, Fed. Cas. No. 2,907; Coffin v. Jenkins, 3 Sto. 108, Fed. Cas. No. 2,948. An unauthorized absenting of himself from the military service by an officer or soldier with the intention of not returning. It may consist in an original absenting without authority, or in an overstaying of a defined leave of absence. Davis Mil. L. 420. To establish the offense, the *fact* of the unauthorized voluntary withdrawal, and the *intent* permanently to abandon the service, must both be proved; Dig. J. Adv. Gen. 337.

In the navy absence without leave, with a probability that the person does not intend to desert, shall at first be regarded as straggling, but at the end of ten days as desertion. Reg. Navy 815.

A deserter from the navy is, upon conviction, forever incapable of holding any office of trust or profit under the United States or of exercising any rights of citizens thereof. R. S. §§ 1996, 1998. In time of war, the punishment may be death, or as the court-martial may adjudge, and in time of peace, the above.

The act by which a man abandons his wife and children, or either of them.

Wilful desertion, as the term is applied in actions for divorce, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 820. If the wife leaves the husband in consequence of a mere expression on his part that she can go where she likes, and refuses to return at his request, the husband is not guilty of desertion; 84 L. T. 272; 65 J. P. 246.

On proof of desertion, the courts possess the power under statute, in many states, to compel support of the wife. And a continued desertion by either husband or wife,

after a certain lapse of time, entitles the party deserted to a divorce, in most states.

There must, however, be an actual and intentional withdrawal from matrimonial cohabitation for a statutory period, against the consent of the abandoned party and without justification; Tiffany, Dom. Rel. 181; and an intention to desert in the mind of the offender; Bennett v. Bennett, 43 Conn. 313; Latham v. Latham, 30 Gratt. (Va.) 307; Appeal of Sowers, 89 Pa. 173; Bish. Mar. Div. & Sep. 1687; 5 Q. B. D. 31; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; where parties continue to live together as husband and wife and other marital duties are observed, a refusal to occupy the same bed does not by itself constitute desertion; Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492.

Desertion is established by proof of a refusal to commence cohabitation; Pilgrim v. Pilgrim, 57 Ia. 370, 10 N. W. 750; a refusal to renew cohabitation, on request of the other party; Hanberry v. Hanberry, 29 Ala. 719; Fellows v. Fellows, 31 Me. 342; Newing v. Newing, 45 N. J. Eq. 498, 18 Atl. 166; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; Sowers's Appeal, 89 Pa. 173; causing a separation, by driving the other away, or by cruel conduct which has that effect; 14 Ct. of Sess. Cas. (4th Series) 443; Kinsey v. Kinsey, 37 Ala. 393; Johnson v. Johnson, 125 Ill. 510, 16 N. E. 891; Shrock v. Shrock, 4 Bush (Ky.) 682; Lynch v. Lynch, 33 Md. 328; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; McVickar v. McVickar, 46 N. J. Eq. 490, 19 Atl. 249, 19 Am. St. Rep. 422; a refusal by the wife to follow the husband when he changes his residence; Hardenbergh v. Hardenbergh, 14 Cal. 654; Kennedy v. Kennedy, 87 Ill. 250; Hunt v. Hunt, 29 N. J. Eq. 96; Beck v. Beck, 163 Pa. 649, 30 Atl. 236; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851; Schuman v. Schuman, 93 Mo. App. 99; unless there be good reason; Buell v. Buell, 42 Wash. 277, 84 Pac. 821; the mere refusal is not enough; Horn v. Horn, 17 Pa. Super. Ct. 486. But a separation by mutual consent is not desertion; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; Chipchase v. Chipchase, 48 N. J. Eq. 549, 22 Atl. 588; Ingersoll v. Ingersoll, 49 Pa. 249, 88 Am. Dec. 500; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. 289; Thompson v. Thompson, 53 Wis. 153, 10 N. W. 166; neither is non-cohabitation; Jones v. Jones, 13 Ala. 145; Pidge v. Pidge, 3 Metc. (Mass.) 257; Scott v. Scott, Wright (Ohio) 469; Burk v. Burk, 21 W. Va. 445; to render it desertion withdrawal of consent must be shown; Currier v. Currier, 68 N. J. Eq. 797, 64 Atl. 1133; nor a refusal by the husband to follow the wife to a new residence; for it is her duty to follow him; Frost v. Frost, 17 N. H. 251.

Mere non-support is not always desertion; Bourquin v. Bourquin, 33 N. J. Eq. 7; Davis v. Davis, 1 Hun (N. Y.) 444; but if the husband have the means to support his wife, and does not do so, this is a wilful desertion; James v. James, 58 N. H. 266; but see Van Dyke v. Van Dyke, 135 Pa. 459, 19 Atl. 1061.

Refusal of sexual intercourse is not desertion; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543; Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42; Prall v. Prall, 58 Fla. 496, 50 South. 867, 26 L. R. A. (N. S.) 577; Pratt v. Pratt, 75 Vt. 432, 56 Atl. 86 (even for three years and without physical excuse); Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381, Ann. Cas. 1912A, 889; physical condition may justify refusal; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618, 119 Am. St. Rep. 608, 12 Ann. Cas. 543; other cases hold it desertion; Raymond v. Raymond (N. J.) 79 Atl. 430; Graves v. Graves, 88 Miss. 677, 41 South. 384 (desertion for three years, followed by return and refusal); Sisemore v. Sisemore, 17 Or. 542, 21 Pac. 667; 83 L. T. R. 224. A wife who, without cause, refuses, cannot set up "desertion without reasonable cause;" [1901] P. 317.

Involuntary absence, on account of sickness or business, if not prolonged beyond such a time as is reasonable or necessary, will not constitute desertion; 1 Swab. & T. 88; Neely v. Neely, 131 Pa. 552, 20 Atl. 311; or the confinement of a wife in a lunatic asylum; Pile v. Pile, 94 Ky. 308, 22 S. W. 215. There can be no such thing as desertion by both parties; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537. When a wife is deserted, she need not hunt for her husband or go to the place whence he has fled; Millowitsch v. Millowitsch, 44 Ill. App. 357.

Where parties marry clandestinely and on an agreement to live separately for the present, the separate living is not a desertion by the husband until the wife demands that they should live together; McAllister v. McAllister, 71 N. J. Eq. 13, 62 Atl. 1131.

In England it is held that if a wife refuses to live under the same roof with her husband, except upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion without reasonable excuse, even though he may have committed adultery while separated from her; [1901] P. 317.

Desertion is not to be tested merely by ascertaining which of the parties left the matrimonial home first. That fact may be immaterial. The party who by his or her act intends bringing the cohabitation to an end commits the desertion; [1899] P. 278. There is no substantial difference between a husband who puts an end to cohabitation by leaving his wife, and a husband who puts an end to it by persisting in a course of con-

duct which obliges his wife to leave him; [1899] P. 221, 278, where it was held that a husband's conduct amounted to desertion although he did not abandon her or actually force her to leave his house, but refused her request to discharge a servant with whom he had immoral relations or to discontinue such relations. In such a case it is held the husband must be taken to intend the consequences of his own act. The situation is the same as if he had left her, and if the attitude of the parties remain the same for two years the desertion is complete; 33 L. J. P. 66; 62 L. T. 330; 68 L. J. P. 91.

If husband and wife have ceased to cohabit whether by the adverse act of the husband or wife or by the mutual consent of both, desertion becomes from that moment impossible to either, at least until their common life and home have been resumed. There cannot be a desertion by the husband unless the cohabitation is broken by some act of desertion; [1904] P. 389.

The Family Desertion Act has been passed in Kansas, Wisconsin, Massachusetts and North Dakota.

See 9 L. R. A. 696, note; Tiffany; Schouler, Dom. Rel.; DIVORCE; LEGAL CRUELTY.

DESERTION OF A SEAMAN. The abandonment, by a sailor, of a vessel in which he had engaged to perform a voyage, before the expiration of his time, and without leave.

Where a seaman signs articles for a voyage, agreeing to go to the port where the vessel is lying to join her, and fails to do so, he is a deserter; In re Sutherland, 53 Fed. 551; Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, where a Russian sailor, sent to the United States as one of the force ordered to man a cruiser then building, was held a deserter within the meaning of the treaty of 1832 with Russia, though he never set foot on the vessel and it had not been commissioned.

Desertion without just cause renders the sailor liable on his shipping articles for damages, and, will, besides, work a forfeiture of his wages previously earned; 3 Kent 155. It has been decided in England that leaving the ship before the completion of the voyage is not desertion, in case,—*first*, of the seaman's entering the public service, either voluntarily or by impressment; and, *second*, when he is compelled to leave it by the inhuman treatment of the captain; 2 Esp. 269; 1 Bell, Com. 514; 2 C. Rob. 232. And see Cloutman v. Tunison, 1 Sumn. 373, Fed. Cas. No. 2,907; Sims v. Mariners, 2 Pet. Adm. 393, Fed. Cas. No. 12,893; Coffin v. Jenkins, 3 Sto. 109, Fed. Cas. No. 2,948.

To justify the forfeiture of a seaman's wages for absence for more than forty-eight hours, under the provisions of the act of congress of July 20, 1790, an entry in the log-book of the fact of his absence, made by the officer in charge of it on the day on which he absented himself, and giving the name of the absent seaman as absent without permission, is indispensable; 2 Pars. Sh. & Adm. 101; The Phœbe v. Degnum, 1 Wash. C. C. 48, Fed. Cas. No. 11,110; Gilp. 212, 296.

Receiving a marine again on board, and his return to duty with the assent of the master, is a waiver of the forfeiture of wages previously incurred; Whitton v. The Commerce, 1 Pet. Adm. 160, Fed. Cas. No. 17,604.

DESERVING. Worthy or meritorious, without regard to condition or circumstances. In no sense of the word is it limited to persons in need of assistance, or objects which come within the class of charitable uses. Nichols v. Allen, 130 Mass. 211, 39 Am. Rep. 445.

DESIGN. As a term of art, "the giving of a visible form to the conceptions of the mind, or in other words to the invention." Binns v. Woodruff, 4 Wash. C. C. 48, Fed. Cas. No. 1,424. See COPYRIGHT; PATENTS.

Plan, scheme, or intention carried into effect. Catlin v. Fire Ins. Co., 1 Sumn. 434, Fed. Cas. No. 2,522. A project, an idea. 3 H. & N. 301.

As used in an indictment for having in one's possession materials for counterfeiting it may refer to the purpose for which the materials were originally designed, and not to criminal intent in the defendant to use them; Commonwealth v. Morse, 2 Mass. 128.

DESIGNATIO PERSONÆ. See DESCRIPTIO PERSONÆ.

DESIGNATION. The expression used by a testator to denote a person or thing, instead of the name itself.

A bequest of the farm which the testator bought of a person named, or of a picture which he owns, painted by a certain artist, would be a designation of the thing.

DESIRE. The word desire, in a will, raises a trust, where the objects of that desire are specified; Vandyck v. Van Beuren, 1 Cai. (N. Y.) 84. See PRECATORY WORDS.

DESPATCHES. Official communications of official persons on the affairs of government.

In general, the bearer of despatches is entitled to all the facilities that can be given him, in his own country, or in a neutral state; but a neutral cannot, in general, be the bearer of despatches of one of the belligerent parties; 6 C. Rob. 465. See 2 Dods. 54; 1 Edw. 274.

DESPERATE. Of which there is no hope. This term is used frequently in making an inventory of a decedent's effects, when a debt is considered so bad that there is no

hope of recovering it. It is then called a desperate debt, and, if it be so returned, it will be *prima facie* considered as desperate. See Toll. Ex. 248; 2 Wms. Ex. 644; 1 Chitt. Pr. 580; Schultz v. Pulver, 11 Wend. (N. Y.) 365.

DESPOIL. This word involves in its signification, violence or clandestine means, by which one is deprived of that which he possesses. Sunol v. Hepburn, 1 Cal. 268.

DESPOT. This word, in its original and most simple acceptation, signifies *master and supreme lord;* it is synonymous with monarch; but taken in bad part, as it is usually employed, it signifies a tyrant.

DESPOTISM. That abuse of government where the sovereign power is not divided, but united in the hands of a single man, whatever may be his official title. It is not, properly, a form of government. Toullier, Dr. Civ. Fr. tit. prél. n. 32; Rutherf. Inst. b. 1, c. 20, § 1. See GOVERNMENT.

DESTINATION. The intended application of a thing.

For example, when a testator gives to a hospital a sum of money to be applied in erecting buildings, he is said to give a destination to the legacy. Mill-stones taken out of a mill to be picked, and to be returned, have a destination, and are considered real estate, although detached from the freehold. Heirlooms, although personal chattels, are, by their destination, considered real estate; and money agreed or directed to be laid out in land is treated as real property; Craig v. Leslie, 3 Wheat. (U. S.) 577, 4 L. Ed. 460; 2 Bell, Com. 2; Erskine, Inst. 2. 2. 14; Fonbl. Eq. b. 1, c. 6, § 9. See EASEMENT; FIXTURES.

In Common Law. The port at which a ship is to end her voyage is called her port of destination. Pardessus, n. 600.

The phrases "port of destination" and "port of discharge" are not equivalent; U. S. v. Barker, 5 Mason 404, Fed. Cas. No. 14,516. See Sheridan v. Ireland, 66 Me. 65.

Sending goods to their destination means sending them to a particular place, to a particular person who is to receive them there; not sending them to a particular place without saying to whom; 15 A. B. D. 43.

DESTROY. In the act of congress punishing with death any one destroying vessels, it means to unfit the vessel for service, beyond the hopes of recovery, by ordinary means. U. S. v. Johns, 1 Wash. C. C. 363, Fed. Cas. No. 15,481; U. S. v. Johns, 4 Dall. (U. S.) 412, 1 L. Ed. 888.

A will burned, cancelled, or torn, *animo revocandi* is *destroyed;* Johnson v. Brailsford, 2 Nott & McC. (S. C.) 272, 10 Am. Dec. 601. The scratching out of the signature with a knife, in England, has been held to be tearing or otherwise *destroying* a will in the sense of the statute; 56 L. J. R. Pr. & D. 96.

DETACHIARE. By writ of attachment or course of law, to seize or take into custody another's goods or person. Cunningham.

DETAIL. One who belongs to the army, but is only detached, or set apart, for the time to some particular duty or service, and who is liable at any time, to be recalled to his place in the ranks. In re Strawbridge, 39 Ala. 379.

DETAINER. Detention. The act of keeping a person against his will, or of withholding the possession of goods or other personal or real property from the owner.

Detainer and detention are very nearly synonymous. If there be any distinction, it is perhaps that detention applies rather to the act considered as a fact, detainer to the act considered as something done by some person. Detainer is more frequently used with reference to real estate than in application to personal property.

All illegal detainers of the person amount to false imprisonment, and may be remedied by *habeas corpus.* Hurd, Hab. Corp. 209.

A detainer or detention of goods is either lawful or unlawful; when lawful, the party having possession of them cannot be deprived of it. It is legal when the party has a right to the property, and has come lawfully into possession. It is illegal when the taking was unlawful, as in the case of forcible entry and detainer, although the party may have a right of possession; but in some cases the detention may be lawful, although the taking may have been unlawful; Moore v. Shenk, 3 Pa. 20, 45 Am. Dec. 618. So also the detention may be unlawful although the original taking was lawful: as when goods were distrained for rent, and the rent was afterwards paid; or when they were pledged, and the money borrowed and interest was afterwards paid; or if one borrow a horse, to ride from A to B, and afterwards detain him from the owner, after demand, such detention is unlawful, and the owner may either retake his property, or have an action of replevin or detinue; 1 Chit. Pr. 135. In these and many other like cases the owner should make a demand, and, if the possessor refuses to restore them, trover, detinue, or replevin will lie, at the option of the plaintiff. In some cases the detention becomes criminal although the taking was lawful, as in embezzlement.

There may also be a detainer of land; and this is either lawful and peaceable, or unlawful and forcible. The detainer is lawful where the entry has been lawful and the estate is held by virtue of some right. It is unlawful and forcible where the entry has been unlawful and with force, and it is retained by force against right; or even where the entry has been peaceable

and lawful, if the detainer be by force and against right; as, if a tenant at will should detain with force after the will has determined, he will be guilty of a forcible detainer; 2 Chitt. Pr. 238; Com. Dig. *Detainer*, B 2; People v. Rickert, 8 Cow. (N. Y.) 226; People v. Anthony, 4 Johns. (N. Y.) 198; Carpenter v. Shepherd, 4 Bibb (Ky.) 501. See Ladd v. Dubroca, 45 Ala. 421; May v. Luckett, 54 Mo. 437; Doty v. Burdick, 83 Ill. 473. A forcible detainer is a distinct offence from a forcible entry; People v. Rickert, 8 Cow. (N. Y.) 226. See FORCIBLE ENTRY AND DETAINER.

In Practice. A writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. A detainer may be lodged against one within the walls of a prison, on what account soever he is there; Com. Dig. *Process*, E (3 B). This writ was superseded by 1 & 2 Vict. c. 110, §§ 1, 2. See HABEAS CORPUS.

DETECTIVE. One whose business it is to watch, and furnish information concerning, alleged wrongdoers by adroitly investigating their haunts and habits. In England they are usually police officers in plain clothes, and are the successors of the Bow Street runners. In this country there are usually detectives in the police department of the large cities, but the term is applied more particularly to the persons engaged in the detection of crime and the prosecution of such investigations as in England are made through the private inquiry offices. The latter correspond to the private detective agencies in the United States.

Where a detective is employed to arrest and prosecute persons engaged in unlawful acts, the employer will be liable for the detective's arrest of an innocent person; Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102. It has been said the question is not whether the particular act was authorized, but whether the servant was engaged in the master's business, and acting within the general scope of his authority; Clark v. Starin, 47 Hun (N. Y.) 345. In Chicago City R. Co. v. McMahon, 103 Ill. 485, 42 Am. Rep. 29, a detective, employed to gather evidence in a pending case, offered a bribe to a witness, and it was held to be the act of the employer. Where a detective was employed with general instructions not to make an arrest without first consulting the attorneys of a railroad, but with authority to make an arrest if the proof was clear, the company was held liable for the arrest of an innocent person; Eichengreen v. R. R., 96 Tenn. 229, 34 S. W. 219, 31 L. R. A. 702, 54 Am. St. Rep. 833.

One who joins a conspiracy for the purpose of robbery, in order to expose it, and honestly carries out the plan, is not an accessory before the fact, though he encourages the others to the commission of the crime, with the intent that they shall be punished; Com. v. Hollister, 157 Pa. 13, 27 Atl. 386, 25 L. R. A. 349. See Campbell v. Com., 84 Pa. 187; Tayl. Ev. § 971; Whart. Cr. Ev. § 440.

A detective may aid in the commission of an offence in conjunction with a criminal, and the mere fact will not exonerate the guilty party. The detective must not prompt or urge, or lead in the commission of the offense. The defendant must act freely of his own motion; State v. Currie, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687. The assistance of a detective in a burglary is no defence to a person who himself does every act essential to constitute a burglary; *id.* A man may direct his servant to appear to encourage the design of a thief and lead him on until the offense is complete, so long as he does not induce the original intent, but only provides for discovery; McAdams v. State, 8 Lea (Tenn.) 456; Thompson v. State, 18 Ind. 386, 81 Am. Dec. 364; Varner v. State, 72 Ga. 745; State v. Adams, 115 N. C. 775, 20 S. E. 722. But if the scheme was concocted, and the particular building selected (with the consent of the proprietor), and the defendant was persuaded by the detective to assist in breaking and entering no burglary was committed; State v. Douglass, 44 Kan. 618, 26 Pac. 476.

Open "shadowing," so as to proclaim the person a suspect, is actionable; Schultz v. Ins. Co., 151 Wis. 537, 139 N. W. 386, 43 L. R. A. (N. S.) 520.

DETENTION. The act of retaining and preventing the removal of a person or property.

The detention may be occasioned by accidents, as the detention of a ship by calms, or by ice; or it may be hostile, as the detention of persons or ships in a foreign country by order of the government. In general, the detention of a ship does not change the nature of the contract; and therefore sailors will be entitled to their wages during the time of the detention; 1 Bell, Com., 5th ed. 517; Mackeldey, Civ. Law § 210; 2 Pars. Sh. & Adm. 63. See DETAINER.

DETERMINABLE. Liable to come to an end by the happening of a contingency: as, a determinable fee.

DETERMINABLE FEE (also called a *qualified* or *base fee*). One which has a qualification subjoined to it, and which must be determined whenever the qualification annexed to it is at an end. A limitation to a man and his heirs on the part of his father affords an example of this species of estate; Littleton § 254; Co. Litt. 27 *a*, 220; 1 Prest. Est. 449; 2 Bla. Com. 109; Cruise, Dig. tit. 1, § 82. See 1 Washb. R. P. 62; McLane v. Bovee, 35 Wis. 36.

DETERMINATE. That which is ascer-

tained; what is particularly designated: as, if I sell you my horse Napoleon, the article sold is here determined. This is very different from a contract by which I sell you a horse, without a particular designation of any horse.

DETERMINATION. The decision of a court of justice. See DECREE; JUDGMENT.

The end, the conclusion, of a right or authority: as, the determination of a lease, Com. Dig. *Estates by Grant* (G 10, 11, 12). The phrase "determination of will" is used of the putting an end to an estate at will. 2 Bla. Com. 146.

The determination of an authority is the end of the authority given; the end of the return-day of a writ *determines* the authority of the sheriff; the death of the principal *determines* the authority of a mere attorney.

DETERMINE. To come to an end. To bring to an end. 2 Bla. Com. 121; 1 Washb. R. P. 380.

DETINET (Lat. *detinere*, to detain; *detinet*, he detains). **In Pleading.** An action of *debt* is said to be in the *detinet* when it is alleged merely that the defendant withholds or unjustly detains from the plaintiff the thing or amount demanded.

The action is so brought by an executor, 1 Wms. Saund. 1; and so between the contracting parties when for the recovery of such things as a ship, horse, etc.; 3 Bla. Com. 156.

An action of *replevin* is said to be in the detinet when the defendant retains possession of the property until after judgment in the action; Bull. N. P. 52; Chit. Pl. 145.

It is said that anciently there was a form of writ adapted to bringing the action in this form; but it is not to be found in any of the books; 1 Chit. Pl. 145.

In some of the states the defendant is allowed to retain possession upon giving a bond similar to that required of the plaintiff in the common-law form; the action is then in the detinet; 3 Sharsw. Bla. Com. 146, n.; Bower v. Tallman, 5 W. & S. (Pa.) 556; Beebe v. De Baun, 8 Ark. 510; Zachrisson v. Ahman, 2 Sandf. (N. Y.) 68; Ingalls v. Bulkley, 13 Ill. 315; Boswell v. Green, 25 N. J. L. 390. The jury are to find the value of the chattels in such case, as well as the damage sustained. See DEBET ET DETINET; DETINUIT.

DETINUE (Lat. *detinere*, to withhold). **In Practice.** A form of action which lies for the recovery, in specie, of personal chattels from one who acquired possession of them lawfully but retains it without right, together with damages for the detention. 3 Bla. Com. 151.

It is generally laid down as necessary to the maintenance of this action that the orignal taking should have been lawful, thus distinguishing it from replevin, which lies in case the original taking is unlawful. Brooke, Abr. *Detinue*, 21, 36, 63. It is said, however, by Chitty, that it lies in cases of tortious taking, except as a distress, and that it is thus distinguished from replevin, which lay originally only where a distress was made, as was claimed, wrongfully; 1 Chit. Pl. 112. See 3 Sharsw. Bla. Com. 152. In England this action has yielded to the more practical and less technical action trover, but was formerly much used for the recovery of slaves; Kent v. Armistead, 4 Munf. (Va.) 72; Mansell's Adm'r v. Israel, 3 Bibb (Ky.) 510; Hooper's Adm'r v. Hooper, 1 Ov. (Tenn.) 187; Foscue v. Eubank, 32 N. C. 424.

In detinue these points are necessary: 1. The plaintiff must have property in the thing sought to be recovered. 2. He must have the right to its immediate possession. 3. It must be capable of identification. 4. That the property be of some value. 5. The defendant must have had possession at some time prior to the institution of the action. Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961.

The action lies only to recover such goods as are capable of being identified and distinguished from all others; Andr. Steph. Pl. 79, n.; Com. Dig. *Detinue*, B, C; Co. Litt. 286 *b*; Lewis v. Hoover, 1 J. J. Marsh. (Ky.) 500, 19 Am. Dec. 120; Hail v. Reed, 15 B. Monr. (Ky.) 479; Wright v. Ross, 2 G. Greene (Ia.) 266; Goff v. Gott, 5 Sneed. (Tenn.) 562; in cases where the defendant had originally lawful possession, which he retains without right; Melton v. McDonald, 2 Mo. 45, 22 Am. Dec. 437; Spaulding v. Scanland, 4 B. Monr. (Ky.) 365; Stoker v. Yerby, 11 Ala. 322; as where goods were delivered for application to a specific purpose; 4 B. & P. 140; but a tort in taking may be waived, it is said, and detinue brought; Owings v. Frier, 2 A. K. Marsh. (Ky.) 268, 12 Am. Dec. 393; Schulenberg v. Campbell, 14 Mo. 491; O'Neill v. Henderson, 15 Ark. 235, 60 Am. Dec. 568. That it lies whether the taking was tortious or not, see Beazley v. Mitchell, 9 Ala. 780; Overfield v. Bullitt, 1 Mo. 749. It may be maintained for the recovery of a policy of insurance where it has been paid for, but is withheld by the agent; Robinson v. Peterson, 40 Ill. App. 132; or to recover a promissory note; Hefner v. Fidler, 58 W. Va. 159, 52 S. E. 513, 3 L. R. A. (N. S.) 138, 112 Am. St. Rep. 961; Brown v. Pollard, 89 Va. 696, 17 S. E. 6. The property must be in existence at the time; Caldwell v. Fenwick, 2 Dana (Ky.) 332; Lindsey v. Perry, 1 Ala. 203; Bethea v. McLennon, 23 N. C. 523; see Haile v. Hill, 13 Mo. 612; but need not be in the possession of the defendant; Pool v. Adkisson, 1 Dana (Ky.) 110; Haley v. Rowan, 5 Yerg. (Tenn.) 301, 26 Am. Dec. 268; Gaines v. Harvin, 19 Ala. 491; Barksdale v. Appleberry, 23 Mo. 389; Easley's Ex'rs v. Easley, 18 B. Monr. (Ky.) 86.

The plaintiff must have had actual possession, or a right to immediate possession; Melton v. McDonald, 2 Mo. 45, 22 Am. Dec. 437; Burnley v. Lambert, 1 Wash. (Va.) 308; Smart v. Clift, 4 Bibb (Ky.) 518; Haynes v. Crutchfield, 7 Ala. 189; Miles v. Allen, 28 N. C. 88; O'Neal v. Baker, 47 N. C.

168; Hughes v. Jones, 2 Md. Ch. Dec. 178; but a special property, as that of a bailee, with actual possession at the time of delivery to the defendant, is sufficient; 2 Wms. Saund. 47 *b;* Boyle v. Townes, 9 Leigh (Va.) 158; Spaulding v. Scanland, 4 B. Monr. (Ky.) 365; Melton v. McDonald, 2 Mo. 45, 22 Am. Dec. 437; Bryan v. Smith, 22 Ala. 534. A mere equitable claim reserved by a vendor on the sale of personal property for the unpaid purchase money, is not sufficient title to authorize a recovery in detinue; Lucas v. Pittman, 94 Ala. 616, 10 South. 603. Either want of title in the plaintiff or the absence of actual possession in defendant, when the action was brought, will prevent plaintiff's recovery, as constructive possession in defendant from the fact that he had the title is not sufficient; Burns v. Morrison, 36 W. Va. 423, 15 S. E. 62. A demand is not requisite except to entitle the plaintiff to damages for detention between demand and the commencement of the action; Cole v. Cole's Adm'r, 4 Bibb (Ky.) 340; Schulenberg v. Campbell, 14 Mo. 491; Jones v. Henry, 3 Litt. (Ky.) 46; Mortimer v. Brumfield, 3 Munf. (Va.) 122; Dunn v. Davis, 12 Ala. 135; Eastman v. Burke County Com'rs, 114 N. C. 524, 19 S. E. 599.

The *declaration* may state a bailment or trover; though a simple allegation that the goods came to the defendant's hands is sufficient; Brooke, Abr. *Detinue*, 10. The bailment or trover alleged is not traversable; Brooke, Abr. *Detinue*, 1, 2, 50. It must describe the property with accuracy; Felt v. Williams, 1 Scam. (Ill.) 206; March v. Leckie, 35 N. C. 172, 55 Am. Dec. 431; Wright v. Ross, 2 Greene (Ia.) 266.

The *plea* of *non detinet* is the general issue, and special matter may be given in evidence under it; Co. Litt. 283; 16 E. L. & Eq. 514; Stratton v. Minnis, 2 Munf. (Va.) 329; Morrow v. Hatfield, 6 Humphr. (Tenn.) 108; Lucas v. Pittman, 94 Ala. 616, 10 South. 603; including title in a third person; Tanner v. Allison, 3 Dana (Ky.) 422; McCurry v. Hooper, 12 Ala. 823, 46 Am. Dec. 280; eviction, or accidental loss by a bailee; Rucker v. Hamilton, 3 Dana (Ky.) 36. The plea of not guilty is not appropriate; Robinson v. Peterson, 40 Ill. App. 132.

The defendant in this action frequently prayed garnishment of a third person, who he alleged owned or had an interest in the thing demanded; but this he could not do without confessing the possession of the thing demanded, and making privity of bailment; Brooke, Abr. *Garnishment*, 1, *Interpleader*, 3. If the prayer of garnishment was allowed, a *sci. fa.* issued against the person named as garnishee. If he made default, the plaintiff recovered against the defendant the chattel demanded, but no damages. If the garnishee appeared, and the plaintiff made default, the garnishee recovered. If both appeared, and the plaintiff recovered, he had judgment against the defendant for the chattel demanded, and a distringas in execution; and against the garnishee a judgment for damages, and a *fi. fa.* in execution.

The judgment is in the alternative that the plaintiff recover the goods, or the value thereof if he cannot have the property itself; Haynes v. Crutchfield, 7 Ala. 189; Garland v. Bugg, 5 Munf. (Va.) 166; Daniel v. Prather, 1 Bibb (Ky.) 484; Thompson v. Thompson's Ex'rs, 7 B. Monr. (Ky.) 421; Waite v. Dolby, 8 Humphr. (Tenn.) 406; Mulliken v. Greer, 5 Mo. 489; Murphy v. Moore, 39 N. C. 118; Wilson v. Buchanan, 7 Gratt. (Va.) 343; Blakely's Adm'r v. Duncan, 4 Tex. 184; Arthur v. Ingles, 34 W. Va. 639, 12 S. E. 872, 11 L. R. A. 557; with damages for the detention; Bethea v. McLennon, 23 N. C. 523; Haile v. Hill, 13 Mo. 612; Hunt's Adm'r v. Martin's Adm'r, 8 Gratt. (Va.) 578; Cole v. Conolly, 16 Ala. 271; and full costs. One cannot recover as damages both hire and the ordinary wear and tear of the property sued for, as hire includes ordinary wear and tear; White v. R. Co., 90 Ala. 253, 7 South. 910.

The verdict and judgment must be such that a special remedy may be had for a recovery of the goods detained, or a satisfaction in value for each parcel in case they or either of them cannot be returned; Haynes v. Crutchfield, 7 Ala. 189; Bell v. Pharr, 7 Ala. 807; Goodman v. Floyd, 2 Humphr. (Tenn.) 59; Glascock v. Hays, 4 Dana (Ky.) 58; Penny v. Davis, 3 B. Monr. (Ky.) 313.

See CONVERSION; TROVER; REPLEVIN.

DETINUE OF CHARTERS. A man may have detinue for deeds and charters concerning land, but if they concern the freehold, it must be in C. B. and no other court. Cunningham.

DETINUE OF GOODS IN FRANK MARRIAGE. A writ formerly available to a wife after a divorce, for the recovery of the goods given with her in marriage. Moz. & W. Dict.

DETINUIT (Lat. he detained). **In Pleading.** An action of replevin is said to be in the *detinuit* when the plaintiff acquires possession of the property claimed by means of the writ. The right to retain is, of course, subject in such case to the judgment of the court upon his title to the property claimed; Bull. N. P. 521. The declaration in such case need not state the value of the goods; Britton v. Morss, 6 Blackf. (Ind.) 469; Haynes v. Crutchfield, 7 Ala. 189.

The judgment in such case is for the damage sustained by the unjust taking or detention, or both, if both were illegal, and for costs; 4 Bouvier, Inst. n. 3562.

DEUTEROGAMY. A second marriage after the death of a former husband or wife.

DEVASTATION. Wasteful use of the property of a deceased person: as, for extravagant funeral or other unnecessary expenses. 2 Bla. Com. 508.

DEVASTAVIT. The mismanagement and waste by an executor, administrator, or other trustee, of the estate and effects trusted to him as such, by which a loss occurs.

Devastavit by direct abuse takes place when the executor, administrator, or trustee sells, embezzles, or converts to his own use goods intrusted to him; Com. Dig. *Administration* (I 1); Smith v. Ayer, 101 U. S. 327, 25 L. Ed. 955; releases a claim due to the estate; 3 Bacon, Abr. 700; Cro. Eliz. 43; De Diemar v. Van Wagenen, 7 Johns. (N. Y.) 404; Dawes v. Boylston, 9 Mass. 352, 6 Am. Dec. 72; or surrenders a lease; People v. Pleas, 2 Johns. Cas. (N. Y.) 376; 3 P. Wms. 330; Camp v. Smith, 68 N. C. 537; below its value. These instances sufficiently show that any wilful waste of the property will be considered a direct *devastavit*. See Lacoste v. Splivalo, 64 Cal. 35, 30 Pac. 571.

Devastavit by mal-administration most frequently occurs by the payment of claims which were not due nor owing, or by paying others out of the order in which they ought to be paid, or by the payment of legacies before all the debts are satisfied; Thomas v. Riegel, 5 Rawle (Pa.) 266; Chapin v. Waters, 110 Mass. 195; Lewis v. Mason's Adm'r, 84 Va. 731, 10 S. E. 529.

Devastavit by neglect. Negligence on the part of an executor, administrator, or trustee may equally tend to the waste of the estate as the direct destruction or mal-administration of the assets, and render him guilty of a *devastavit*. The neglect to sell the goods at a fair price, within a reasonable time, or, if they are perishable goods, before they are wasted, will be a *devastavit;* and a neglect to collect a doubtful debt which by proper exertion might have been collected will be so considered. Bacon, Abr. *Executors*, L. See Matter of Childs, 5 Misc. 560, 26 N. Y. Supp. 721; Baer's Appeal, 127 Pa. 360, 18 Atl. 1, 4 L. R. A. 609; Mills' Adm'r v. Talley's Adm'r, 83 Va. 361, 5 S. E. 368; Sterling v. Wilkinson, 83 Va. 791, 3 S. E. 533; Adkins v. Hutchings, 79 Ga. 260, 4 S. E. 887.

The law requires from trustees good faith and due diligence, the want of which is punished by making them responsible for the losses which may be sustained by the property intrusted to them: when, therefore, a party has been guilty of a *devastavit*, he is required to make up the loss out of his own estate. See Com. Dig. *Administration*, I; Belt, Suppl. to Ves. 209; In re Strong's Estate, 160 Pa. 13, 28 Atl. 480; Franklin v. Low, 1 Johns. (N. Y.) 396; Bacon, Abr. *Executors*, L; 11 Toullier 58.

The return of *nulla bona testatoris nec propria* and *a devastavit* to the writ of execution *de bonis testatoris*, in an action against an executor or administrator, is called a *devastavit*. Upon this return the plaintiff may forthwith sue out an execution against the person or property of the executor or administrator in as full a manner as in an action against him sued in his own right. This is not, however, a common use of the word; Brown, Dict.

DEVENERUNT (Lat. *devenire*, to come to). A writ, now obsolete, directed to the king's escheators when any one of the king's tenants *in capite* dies, and when his son and heir dies within age and in the king's custody, commanding the escheat, or that by the oaths of twelve good and lawful men they shall inquire what lands or tenements by the death of the tenant have come to the king. Dy. 360; Keilw. 199 *a;* Blount; Cowell.

DEVEST or DIVEST. To deprive, to take away; opposite to *invest*, which is to deliver possession of anything to another. Wharton.

DEVIATION. Varying from the risks insured against, as described in the policy, without necessity or just cause, after the risk has begun. 1 Phill. Ins. § 977.

Any unnecessary or unexcused departure from the usual or general mode of carrying on the voyage insured. 15 Am. L. Rev. 108. See also Coffin v. Ins. Co., 9 Mass. 436.

A voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage in reference to the terms of a policy of marine insurance. Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568.

The mere intention to deviate is not a deviation, and if not carried into effect will not vitiate a policy or exempt insurers from a loss happening before the vessel arrives at the dividing port; Marine Ins. Co. v. Tucker, 3 Cra. (U. S.) 357, 2 L. Ed. 466; Maryland Ins. Co. v. Woods, 6 Cra. (U. S.) 29, 3 L. Ed. 143. Usage, in like cases, has a great weight in determining the manner in which the risk is to be run,—the contract being understood to have implied reference thereto in the absence of specific stipulations to the contrary; Folsom v. Ins. Co., 38 Me. 414; Winter v. Ins. Co., 30 Pa. 334; Fletcher v. Ins. Co., 18 Mo. 193; De Peyster v. Ins. Co., 19 N. Y. 272, 75 Am. Dec. 331; Hostetter v. Gray, 11 Fed. 181; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568. To touch and stay at a port out of its course is not a deviation if such departure is within the usage of the trade; *id;* Marande v. Ry. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. A variation from risks described in the policy from a necessity which is not inexcusably incurred does not forfeit the insurance; 1 Phill. Ins. § 1018; as to seek an intermediate port for repairs necessary for the prosecution of the voyage; 1 Phill. Ins. § 1019; changing the course to avoid disaster; Haven v. Holland, 2 Mas. 234, Fed. Cas. No. 6,229; delay in order to succor the distressed at sea; 6 East 54; Mason v. The Blaireau, 2 Cra. (U. S.) 240, 258, 2 L. Ed. 266; if the object is to save life, otherwise,

to save property merely; Crocker v. Jackson, 1 Spra. 141, Fed. Cas. No. 3,398; Bond v. The Cora, 2 Wash. C. C. 80, Fed. Cas. No. 1,621; The Boston, 1 Sumn. 328, Fed. Cas. No. 1,673; damage merely in defence against hostile attacks; 1 Phill. Ins. § 1030; or in taking measures to repel such attacks; Haven v. Holland, 2 Mas. 230, Fed. Cas. No. 6,229. "Liberty to touch" at a particular port, reserved in the policy, does not imply liberty to remain for trading, which, if it involves delay, may amount to deviation; Maryland Ins. Co. v. Le Roy, 7 Cra. (U. S.) 26, 3 L. Ed. 257; nor to touch and stay at a port out of the course when within the usage of the trade; Bulkley v. Ins. Co., 2 Pai. 82, Fed. Cas. No. 2,118; Bentaloe v. Pratt, Wall. C. C. 58, Fed. Cas. No. 1,330.

Necessity alone will sanction a deviation, and the latter must be strictly commensurate with the power compelling; Maryland Ins. Co. v. Le Roy, 7 Cra. (U. S.) 26, 3 L. Ed. 257; the smallest deviation without necessity discharges the underwriters, though the loss be not the immediate consequence of the deviation; Martin v. Ins. Co., 2 Wash. C. C. 254, Fed. Cas. No. 9,161. The same doctrine is applicable in the case of a bill of lading. Shipowners are held to be deprived of the exemptions contained therein, even where the deviation was not the cause of the damage; 23 T. L. R. 89.

See article in 15 Am. L. Rev. 108.

The effect of a deviation in all kinds of insurance is to discharge the underwriters, whether the risk is thereby enhanced or not; the doctrine applies to lake and river navigation as well as ocean; 1 Phill. Ins. § 987. See INSURANCE; DEPARTURE; HARTER ACT.

In the law of railways, a lateral alteration of the line of a railway. The railways clauses act in England authorizes a company which is subject to its provisions to deviate on the line marked on the deposited plans within the limits delineated thereon. Hodg. Railw. 341.

In Contracts. A change made in the progress of a work from the original plan agreed upon.

When the contract is to build a house according to the original plan, and a deviation takes place, the contract must be traced as far as possible, and the additions, if any have been made, must be paid for according to the usual rate of charging; 3 B. & Ald. 47. And see 14 Ves. 413; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Chit. Contr. 168.

DEVICE. That which is devised or formed by design, a contrivance, an invention. Henderson v. State, 59 Ala. 91; Armour Packing Co. v. U. S., 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681, where the word as used in the Elkins Act was construed and the above definition adopted. The court held that the act sought to reach all means by which unlawful preferences might be given or received; that it was not the intention of congress to limit the obtaining of such preferences to fraudulent schemes, and that the term "device" includes anything which is a plan or contrivance. See PATENT.

DEVILLING. A term used in London of a barrister recently admitted to the bar, who assists a junior barrister in his professional work, without compensation and without appearing in any way in the matter.

DEVISAVIT VEL NON. The name of an issue sent out of a court of chancery, or one which exercises chancery or probate jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will; 7 Bro. P. C. 437; 2 Atk. 424; Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713.

An application for an issue *devisavit vel non* is properly denied where the decided weight of evidence is in favor of the testamentary capacity of testatrix, and it appears that the two sons in whose favor the will was made cared for their mother and her estate, while the two who had been disinherited, attempted to have her declared insane; In re Pensyl's Estate, 157 Pa. 465, 27 Atl. 669.

DEVISE. A gift of real property by a last will and testament.

The term devise, properly and technically, applies only to real estate; 1 Hill, Abr. c. 36, 62; Dickerman v. Abrahams, 21 Barb. (N. Y.) 561. But it is also sometimes improperly applied to a bequest or legacy. See 4 Kent 489; 8 Viner, Abr. 41; Com. Dig. *Estates by Devise;* Rountree v. Pursell, 11 Ind. App. 522, 39 N. E. 747. The terms "bequest" and "devise" are used indifferently, and legatees may take under a devise of lands, if the context of the will shows that such was the testator's intention; Ladd v. Harvey, 21 N. H. 515; In re Fetrow's Estate, 58 Pa. 427.

A general devise of lands will pass a reversion in fee, even though the testator has other lands which will satisfy the words of the devise, and although it be highly improbable that he had in mind such reversion; 3 P. Wms. 56; 3 Bro. P. C. 408; 4 Bro. C. C. 338; Steel v. Cook, 1 Metc. (Mass.) 281; 8 Ves. 256.

A general devise will pass leases for years, if the testator have no other real estate upon which the will may operate; but if he have both lands in fee and lands for years, a devise of all his lands and tenements will commonly pass only the lands in fee-simple; Cro. Car. 293; Bowen v. Idley, 1 Ed. Ch. (N. Y.) 151; 6 Sim. 99. But if a contrary intention appear from the will, it will prevail; 5 Ves. 540; 9 East 448.

Testator "gave, devised and bequeathed all his furniture, goods, chattels and effects, whatsoever the same may be and wheresoever situate." It was held that giving ex-

pression to the word "devise," in connection with the other terms of the will, that the gift passed all the property of the testator, whether real or personal; [1891] 3 Ch. 389.

A devise in a will can never be regarded as the execution of a power, unless that intention is manifest: as, where the will would otherwise have nothing upon which it could operate. But the devise to have that operation need not necessarily refer to the power in express terms. But where there is an *interest* upon which it can operate, it shall be referred to that, unless some other intention is obvious; 6 Co. 176; 6 Madd. 190; 4 Kent 334; 1 Jarm. Wills 628.

The devise of all one's lands will not generally carry the interest of a mortgagee, in premises, unless that intent is apparent: 2 Vern. 621; 3 P. Wms. 61; 1 Jarm. Wills, 633. The fact that the mortgagee is in possession is sometimes of importance in determining the purpose of the devise. But many cases hold that the interest of a mortgagee or trustee will pass by a general devise of all one's land, unless a contrary intent be shown; Jackson v. De Lancy, 13 Johns. (N. Y.) 537, 7 Am. Dec. 403; 8 Ves. 407: 1 J. & W. 494. But see 9 B. & C. 267. This is indeed the result of the modern decisions, 4 Kent 539; 1 Jarm. Wills 638. It seems clear that a devise of one's mortgages will pass the beneficial title of the mortgagee; 4 Kent 539.

Devises may be contingent or vested, after the death of the testator. They are contingent when the vesting of any estate in the devisee is made to depend upon some future event, in which case, if the event never occur, or until it does occur, no estate vests under the devise. But when the future event is referred to merely to determine the time at which the devisee shall come into the use of the estate, this does not hinder the vesting of the estate at the death of the testator; 1 Jarm. Wills, c. xxvi., and numerous cases cited. The law favors that construction of the will which will vest the estate; Olney v. Hull, 21 Pick. (Mass.) 311; King v. King, 1 W. & S. (Pa.) 205, 37 Am. Dec. 459. But this construction must not be carried to such an extent as to defeat the manifest intent of the testator; Olney v. Hull, 21 Pick. (Mass.) 311; Richardson v. Wheatland, 7 Metc. (Mass.) 171. Where the estate is given absolutely, but only the time of possession is deferred, the devisee or legatee acquires a transmissible interest although he never arrive at the age to take possession; 1 Ves. Sen. 44, 59, 118; Bowers v. Porter, 4 Pick. (Mass.) 198; Richardson v. Wheatland, 7 Metc. (Mass.) 173. See LAPSED DEVISE; WILL; LEGACY; CHARGE.

DEVISEE. A person to whom a devise has been made.

All persons who are *in rerum natura*, and even embryos, may be devisees, unless excepted by some positive law. But the devisee must be in existence, except in case of devises to charitable uses; 2 Washb. R. P. 688; Philadelphia Baptist Ass'n v. Hart, 4 Wheat. (U. S.) 33, 49, 4 L. Ed. 499. See CHARITABLE USES. In general, he who can acquire property by his labor and industry may receive a devise; Cam. & N. 353. *Femes covert*, infants, aliens, and persons of nonsane memory may be devisees; 4 Kent 506; 2 Wms. Ex. 269, n.; Doe v. Roe, 1 Harr. (Del.) 524. Corporations in England and in some of the states can be devisees only to a limited extent; 2 Washb. R. P. 687.

A devisee may mean a legatee; People v. Petrie, 191 Ill. 497, 61 N. E. 499, 85 Am. St. Rep. 268.

DEVISOR. A testator. One who devises real estate.

Any person who can sell an estate may, in general, devise it; and there are some disabilities as to a sale which are not such as to a devise.

DEVOIR. Duty. It is used in the statute of 2 Ric. II. c. 3, in the sense of duties or customs.

DEVOLUTION. In Ecclesiastical Law. The transfer, by forfeiture, of a right and power which a person has to another, on account of some act or negligence of the person who is vested with such right or power; for example, when a person has the right of presentation and he does not present within the time prescribed, the right devolves on his next immediate superior. Ayliffe, Parerg. 331. See 3 App. Cas. 520.

DEVOLVE. To pass from a person dying to a person living. 1 Mylne & K. 648. See DELEGATION.

DI COLONA. The contract which takes place between the owner of a ship, the captain, and the mariners, who agree that the voyage shall be for the benefit of all. The term is used in the Italian law. Targa, cc. 36, 37; Emerigon, Mar. Loans, s. 5. The New England whalers owned and navigated were under this species of contract. The captain and his mariners were all interested in the profits of the voyage in certain proportion, in the same manner as the captain and crew of a privateer, according to the agreement between them. Such agreements were very common in former times. It is necessary to know this in order to understand many of the provisions of the laws of Oleron and of Wisbuy, the Consolato del Mare, and other ancient codes of maritime and commercial law. Hall, Mar. Loans 42.

DICTATE. To pronounce, word by word, what is meant to be written by another. It is thus defined in the Louisiana code, which provides that the testator may dictate his will; Hamilton v. Hamilton, 6 Mart. N. S. (La.) 143. The presentation, by testator, of an instrument which he has caused to be written, declaring it to be his will, may some-

times supply the want of dictation; Prendergast v. Prendergast, 16 La. Ann. 219, 79 Am. Dec. 575.

DICTATOR. In Roman Law. A magistrate at Rome invested with absolute power. His office continued but for six months. Hist. de la Jur. Dig. 1. 2. 18, 1. 1. 1.

DICTORES. Arbitrators.

DICTUM (also, *Obiter Dictum*). An opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it.

It frequently happens that, in assigning its opinion upon a question before it, the court discusses collateral questions and expresses a decided opinion upon them. Such opinions, however, are frequently given without much reflection or without previous argument at the bar; and as, moreover, they do not enter into the adjudication of the point at issue they have only that authority which may be accorded to the opinion, more or less deliberate, of the individual judge who announces it. Chase, Bla. Com. 36, n. It may be observed that in recent times, particularly in those jurisdictions where appeals are largely favored, the ancient practice of courts in this respect is much modified. Formerly, judges aimed to confine their opinion to the precise point involved, and were glad to make that point as narrow as it might justly be. Where appeals are frequent, however, a strong tendency may be seen to fortify the judgment given with every principle that can be invoked in its behalf,—those that are merely collateral, as well as those that are necessarily involved. In some courts of last resort, also, when there are many judges, it is not unfrequently the case that, while the court come to one and the same conclusion, the different judges may be led to that conclusion by different views of the law, so that it becomes difficult to determine what is to be regarded as the principle upon which the case was decided and what shall be deemed mere *dicta*.

It is not easy to define the term with such precision as to afford an exact criterion by which to decide when the language of a court or judge is entitled to be considered as a precedent and followed as an authority. Judicial references to the subject indicate that expressions which would be included under the term *dicta* are nevertheless afterwards treated by other courts with respect if not with the binding force of adjudicated cases. Possibly no better definition can be found than that of Folger, J., in Rohrbach v. Ins. Co., 62 N. Y. 58, 20 Am. Rep. 451: "*Dicta* are the opinions of a judge which do not embody the resolution or determination of the court, and, made without argument or full consideration of the point, are not the professed, deliberate determinations of the judge himself; *obiter dicta* are such opinions uttered by the way, not upon the point or question pending, as if turning aside for the time from the main topic of the case to collateral subjects."

The general rule, broadly stated by the United States supreme court, is that to make an opinion a decision "there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, . . . and, therefore, this court has never held itself bound by any part of an opinion which was not needful to the ascertainment of the question between the parties." Per Curtis, J., in Carroll v. Carroll, 16 How. 287, 14 L. Ed. 936. And in Cohens v. Virginia, when the case of Marbury v. Madison, 1 Cra. 137, 2 L. Ed. 60, was very earnestly pressed upon the attention of the court, Marshall, C. J., said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent case when the very point is presented;" 6 Wheat. 399, 5 L. Ed. 257. In In re City Bank, 3 How. 292, 11 L. Ed. 603, Catron, J., dissenting, strongly criticised the majority of the court for a long discussion of the power of a court as to which they decided that they had no authority to review its decisions. In a later case the same court said, in reference to an allusion to the opinion in a case previously decided, "This was the only question before the court and the decision is authority only to the extent of the case before it; . . . if more was intended by the judge who delivered the opinion it was purely *obiter*;" U. S. v. County of Clark, 96 U. S. 211, 24 L. Ed. 628. The great powers and peculiar functions included in the constitutional powers of that court, as well as the conclusiveness of its judgments as declarations of constitutional construction, make it not only proper but essential that its decisions should be confined to the points necessarily involved in the case and embraced in the argument. And the same reasons not only warrant but require a rigid exclusion of mere *dicta* from the category of authorities. The reason for the enforcement of the rule, as against expressions of opinion upon points not fairly raised by the case, is stated by the supreme court of Pennsylvania: "What I have said or written outside of the case trying, or shall say or write in such circumstances, may be taken as my opinion at the time, without argument or full consideration; but I will not consider myself bound by it when the point is fairly trying and fully argued and considered." Per Huston, J., Frants v. Brown, 17 S. & R. 287.

According to the more rigid rule, any expression of opinion however deliberate upon a question however fully argued, if not essential to the disposition that was made of the case, may be regarded as a *dictum;* but it is, on the other hand, said that it is difficult to see why, in a philosophical point of view, the opinion of the court is not so persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point; 1 Abbott, N. Y. Dig. pref. iv. And a text writer has said that "the line must not be too sharply drawn"; Wells, Res. Adj. & Sta. Dec.

§ 581. The fact that a decision might have been rested upon a different ground, and even a more satisfactory one, does not place the actual decision, on a ground arising, in the category of a *dictum;* Clark v. Thomas, 4 Heisk. (Tenn.) 419.

But even when the point ruled was not directly and necessarily in issue, there are distinctions drawn as to the relative authority of judicial expressions of opinion comprehended under the general term *dicta*, as used in its broadest sense. An expression of opinion upon a point involved in a case, argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the case, if a *dictum*, should be considered as a judicial *dictum* as distinguished from a mere *obiter dictum*, i. e. an expression originating alone with the judge writing the opinion, as an argument or illustration; Buchner v. Ry. Co., 60 Wis. 264, 19 N. W. 56. What was, in strictness, a *dictum* of Mr. Justice McLean has been extensively commented on, treated, and in several cases followed, as an authority. The suit was on a bond of a United States officer, and the question was as to when a resignation took effect, it being claimed that for default after resignation the surety was not liable. The court held the resignation to be a conditional one, and went on to discuss the right of resignation and the necessity of acceptance or power of rejection, reaching the conclusion that an unqualified resignation required no acceptance and would have discharged the surety; U. S. v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775. This case having been cited to that point it was contended that it was a mere *dictum*. After defining *dictum* the supreme court of Nevada held "that while technically such, it was not liable to the objections usually urged,—it was the expression of opinion on a point argued, and entitled to far more weight than an ordinary *dictum* on a point not discussed and remotely connected with the case." State v. Clarke, 3 Nev. 566. The same case was followed in People v. Porter, 6 Cal. 28; State v. Fitts, 49 Ala. 402; and is commented on and treated as an authority without being characterized as a *dictum* in Edwards v. U. S., 103 U. S. 471, 26 L. Ed. 314 and Reeves v. Ferguson, 31 N. J. L. 107.

So also it has been held, with respect to a court of last resort, that all that is needed to render its decision authoritative is that there was an application of the judicial mind to the precise question adjudged; and that the point was investigated with care and considered in its fullest extent; Alexander v. Worthington, 5 Md. 488; and that when a question of general interest is involved, and is fully discussed and submitted by counsel, and the court decides the question with a view to settle the law, the decision cannot be considered a *dictum; id.*

When a question is involved in the case, though not in the particular phase of it, at the time before the court, the language of the court is not a mere *dictum*. When a will was offered for probate the question of its validity, so far as regarded charitable uses, was involved, and what was said as to that was not *obiter;* Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; although a point may not have been exhaustively argued a decision upon it cannot be said to be *obiter dictum* when it was upon a question raised by a demurrer upon which the court distinctly expressed an opinion; Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106.

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*." Union Pac. R. Co. v. Railroad Co., 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. Ed. 134; Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. Ed. 327; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 332, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The expressions of courts and judges which fall within the general designation of *dicta* are accorded more or less weight as they agree with, or run counter to, the current of authority, and, like the adjudications of courts in other jurisdictions, not direct authorities, they are always considered with reference to the judicial reputation and experience of their authors. Referring to a case cited in a *dictum* Lord Mansfield said, "This *dictum* of Lord Holt's is no formed decisive resolution; no adjudication; no professed or deliberate determination . . ."; then after citing cases *contra* he continued, "therefore this mere *obiter dictum* ought not to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way." 2 Burr. 2064. "*Dicta* of judges upon matters not argued or directly before them, have had more importance attached to them than, in my opinion, they ought to have had; but such expressions, falling from such a man as Lord Hardwicke, may be safely relied upon to show that, at that time, the idea of a larger legacy being adeemed by a smaller portion was not familiar to his mind. It is the more important to keep this *dictum* of Lord Hardwicke in mind because another *dictum* of that very eminent judge . . . is relied upon in support of the supposed rule." Ld. Ch. Cottenham, in 1 Russ. 27. The doctrine of the courts of France on this subject is stated in 11 Toullier 177, n. 133.

See PRECEDENT.

In French Law. The report of a judgment made by one of the judges who has given it. Pothier, Proc. Civ. pl. 1, c. 5, art. 2.

DIEM CLAUSIT EXTREMUM (Lat. he has closed his last day,—died). A writ

which formerly lay on the death of a tenant *in capite*, to ascertain the lands of which he died seised, and reclaim them into the king's hands. It was directed to the king's escheators. Fitzh. N. B. 251, K; 2 Reeve, Hist. Eng. Law 327.

A writ of the same name, issuing out of the exchequer after the death of a debtor of the king, to levy the debt of the lands or goods of the heir, executor, or administrator. *Termes de la Ley.* This writ is still in force in England. 3 Steph. Com. 667.

DIES (Lat.). A day; days. Days for appearance in court. Provisions or maintenance for a day. The king's rents were anciently reserved by so many days' provisions. Spelman, Gloss.; Cowell; Blount.

DIES AMORIS (Lat.). A day of favor. If obtained after a default by the defendant, it amounted to a waiver of the default. Co. Litt. 135 *a;* 2 Reeve, Hist. Eng. Law 60. The appearance day of the term, or *quarto die post*, was also so called.

DIES COMMUNES IN BANCO (Lat.). Regular days for appearance in court; called, also, common return-days. 2 Reeve, Hist. Eng. Law 57.

DIES DATUS (Lat. a day given). A day or time given to a defendant in a suit, which is in fact a continuance of the cause. It is so called when given before a declaration. When it is allowed afterwards, it assumes the name of imparlance, which see.

Dies datus in banco, a day in bank. Co. Litt. 135. *Dies datus partibus*, a continuance; *dies datus prece partium*, a day given on prayer of the parties.

DIES DOMINICUS. The Lord's day; Sunday.

DIES FASTI (Lat.). In Roman Law. Days on which courts might be held and judicial and other business legally transacted. Calvinus, Lex.; Anthon, Rom. Ant. 3 Bla. Com. 275, 424.

DIES GRATIÆ (Lat.). In Old English Law. Days of grace. Co. Litt. 134 *b*.

DIES NEFASTI (Lat.). In Roman Law. Days on which it was unlawful to transact judicial affairs, and on which the courts were closed. Anthon, Rom. Ant.; 1 Kaufm. Mackeld. 24; 3 Bla. Com. 275.

DIES NON (Lat.). An abbreviation of the phrase *dies non juridicus*, universally used to denote non judicial days. Days during which courts do not transact any business; as, Sunday, or the legal holidays. 3 Chitty, Gen. Pr. 104; W. Jones 156. Sunday was the original *dies non*, but in many states days declared by statute to be legal holidays are also such, but the decisions on this subject depend largely upon the terms and scope of the statutes, many of which apply solely to the presentment and payment of commercial paper, and others include a prohibition of judicial business and provide for the closing of public offices.

A distinction was made in 9 Co. 66 between judicial and ministerial acts performed on a *dies non;* this was overruled in 1 Stra. 387; but the distinction now obtains; 5 Cent. L. J. 26. And under a statute forbidding the transaction of any judicial business on Sunday or a legal holiday, the issuing on such a day of an attachment by a county judge for a claim not due was held to be "judicial" business and void; Merchants' Nat. Bank of Omaha v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316; but an attachment for a claim past due was held to be valid, as a ministerial, and not a judicial act; Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, 20 L. R. A. 313, 38 Am. St. Rep. 742.

It has usually been held that a verdict may be received on a *dies non;* Huidekoper v. Cotton, 3 Watts (Pa.) 56; McCorkle v. State, 14 Ind. 39; Powers v. State, 23 Tex. App. 42, 5 S. W. 153; Brown v. State, 32 Tex. Cr. R. 119, 22 S. W. 596; but a judgment entered on such verdict on the same day is void; Baxter v. People, 3 Gilman (Ill.) 368; Hoghtaling v. Osborn, 15 Johns. (N. Y.) 119. See Webber v. Merrill, 34 N. H. 202; Johnson v. Day, 17 Pick. (Mass.) 106; State v. Ricketts, 74 N. C. 187; Elrod v. Lumber Co., 92 Tenn. 476, 22 S. W. 2; Merchants' Nat. Bank of Omaha v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316. A judgment by confession entered upon December 25, a legal holiday, is not void; Bradley v. Claudon, 45 Ill. App. 326. In Kentucky although Thanksgiving day is a legal holiday, it is not treated as Sunday, except as to commercial paper, and where money becomes due on such a day, the debtor is in default if he fails to pay on that day; National Mut. Ben. Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900. A bill of exceptions signed on Sunday is void; Roberts v. Bank, 137 Ind. 697, 36 N. E. 1091. Warrants for treason, felony, and breach of the peace may be executed on Sunday; State v. Ricketts, 74 N. C. 187. Where public policy or the prevention of irremediable wrong requires it, the courts may sit on Sunday and issue process; Langabier v. Fairbury, P. & N. W. R. R. Co., 64 Ill. 243, 16 Am. Rep. 550. It is no longer uncommon for courts to sit on legal holidays in some jurisdictions. See a full article on this title in 7 So. L. Rev. N. S. 697; SUNDAY; HOLIDAYS.

DIES NON JURIDICUS (Lat.). Non-judicial days. See DIES NON.

DIES PACIS (Lat. day of peace). The year was formerly divided into the days of the peace of the church and the days of the peace of the king,—including in the two divisions all the days of the year. Crabb, Hist. Eng. Law 35.

DIES A QUO (Lat.). In Civil Law. The

day from which a transaction begins. Calvinus, Lex.; 1 Kaufm. Mackeld. Civ. Law 168.

DIES UTILES (Lat.). Useful or available days. Days in which an heir might apply to the judge for an inheritance. Cooper, Inst.; Calvinus, Lex.; Du Cange.

DIET. A general assembly is sometimes so called on the continent of Europe. 1 Bla. Com. 147.

DIETA (Lat.). A day's journey; a day's work; a day's expenses. A reasonable day's journey is said to be twenty miles, by an old computation. Cowell; Spelman, Gloss.; Bracton 235 *b*; 3 Bla. Com. 218.

DIFFERENCE. A contention over a question of truth, or fact, or law, as distinguished from a non-agreement over a question of valuation. 28 L. J. Ch. 184.

DIGEST. A compilation arranged in an orderly manner.

The name is given to a great variety of topical compilations, abridgments, and analytical indices of reports, statutes, etc. When reference is made to *the Digest*, the Pandects of Justinian are intended, they being the authoritative compilation of the civil law. As to this Digest and the mode of citing it, see PANDECTS. Other digests are referred to by their distinctive names. For some account of digests of the civil and canon law, and those of Indian law, see CIVIL LAW, CODE, and CANON LAW.

The digests of English and American law are for the most part deemed not authorities, but simply manuals of reference, by which the reader may find his way to the original cases which are authorities. 1 Burr. 364; 2 Wils. 1, 2. Some of them, however, which have been the careful work of scholarly lawyers, possess an independent value as original repositories of the law. Bacon's Abridgment, which has long been deservedly popular in this country, and Comyns's Digest, also often cited, are examples of these. The earlier English digests are those of Statham (Hen. VI.), Fitzherbert, 1516, Brooke, 1573, Rolle, Danvers, Nelson, Viner, and Petersdorf. Of these Rolle and Viner are still not infrequently cited, and some others rarely. The several digests by Coventry & Hughes, Harrison, Fisher, Jacobs, and Chitty, together with the subsequent annual digests of Emden and of Mews, afford a convenient index for the American reader to the English reports. In most of the United States one or more digests of the state reports have been published, and in some of them digests or topical arrangements of the statutes. There are also digests of the federal statutes. The American Digest, Century Edition, covers the reports of the federal and state courts from 1658 to 1896, inclusive, brought down to cover 1906 by the Decennial Edition, and brought down to date by the American Digest, Key-Number Series. The Federal Reporter Digest digests the series of Federal Reporters to vol. 200 and the United States Supreme Court decisions from vols. 106 to 225 U. S., comprised in vols. 21-32 Supreme Court Reporter. The latter, to 225 U. S., are also digested in the Digest of United States Supreme Court Reports. Dane's Abridgment of American Law has been commended by high authority (Story's article in N. Am. Rev. July, 1826), but it has not maintained a position as a work of general use. There are also numerous digests of cases on particular titles of the law.

DIGNITARY. An ecclesiastic who holds a dignity or benefice which gives him some pre-eminence over mere priests and canons, such as a bishop, archbishop, prebendary, etc. Burn, Law Dict.

DIGNITIES. In English Law. Titles of honor.

They are considered as incorporeal hereditaments. The character of our government forbids their admission into the republic.

DILACION. In Spanish Law. The time granted by law or by the judge to parties litigant for the purpose of answering a demand or proving some disputed fact.

DILAPIDATION. A species of ecclesiastical waste which occurs whenever the incumbent suffers any edifices of his ecclesiastical living to go to ruin or decay. It is either voluntary, by pulling down or permissive, by suffering the church, parsonage-houses, and other buildings thereunto belonging, to decay. And the remedy for either lies either in the spiritual court, where the canon law prevails, or in the courts of common law. It is also held to be good cause of deprivation if the bishop, parson, or other ecclesiastical person dilapidates buildings or cuts down timber growing on the patrimony of the church, unless for necessary repairs; and that a writ of prohibition will also lie against him in the common-law courts. 3 Bla. Com. 91.

DILATORY DEFENCE. In Chancery Practice. One the object of which is to dismiss, suspend, or obstruct the suit, without touching the merits, until the impediment or obstacle insisted on shall be removed.

DILATORY PLEA. One which goes to defeat the particular action brought, merely, and which does not answer as to the general right of the plaintiff. See PLEA.

DILIGENCE. The degree of care and attention which the law exacts from a person in a particular situation or a given relation to another person. The word finds its most frequent application in the law of Bailments and of Negligence. Indeed it may be termed the correlative of negligence.

DIME (Lat. *decem*, ten). A silver coin of the United States, of the value of ten cents, or one-tenth of the dollar.

DIMINUTION OF THE RECORD. Incompleteness of the record of a case sent up from an inferior to a superior court.

When this exists, the parties may suggest a diminution of the record, and pray a writ of *certiorari* to the court below to certify the whole record; Bassler v. Niesly, 1 S. & R. (Pa.) 472; Co. Entr. 232; 8 Viner, Abr. 552; Cro. Jac. 597; Cro. Car. 91; Den v. Carr. 15 N. C. 575; State v. Reid, 18 N. C. 382, 28 Am. Dec. 572; Hooper v. Royster, 1 Munf. (Va.) 119. See ALLEGING DIMINUTION; CERTIORARI.

DINING CARS. While in the act of making its interstate journey, such car is under the control of congress, and equally it is so when waiting for the train to be made up for the next trip; Johnson v. Southern Pac. Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363.

See INTERSTATE COMMERCE COMMISSION; COMMON CARRIER; MASTER AND SERVANT; EMPLOYER'S LIABILITY.

DIOCESE. The territorial extent of a bishop's jurisdiction. The circuit of every bishop's jurisdiction. Co. Litt. 94; 1 Bla. Com. 111; 2 Burn, Eccl. Law 158.

Dioceses were divided into archdioceses and those into rural deaneries, which were divided into parishes.

DIOCESAN COURTS. See CONSISTORY COURTS; CHURCH OF ENGLAND.

DIONYSIUS. The *Collectio Dionysiana* was a collection and translation of the canons of Eastern councils by a monk named Dionysius Exiguus, living in Rome, but Scythian by birth, about 500 A. D. It helped to spread the notion that the popes can declare, even if they cannot make the law for the universal church, and thus to contract the sphere of secular jurisprudence. 14 L. Q. R. 20.

DIPLOMA. An instrument of writing, executed by a corporation or society, certifying that a certain person therein named is entitled to a certain distinction therein mentioned. It is usually granted by learned institutions to their members or to persons who have studied in them.

Proof of the seal of a medical institution and of the signatures of its officers thereto affixed, by comparison with the seal and signatures attached to a diploma received by the witness from the same institution, has been held to be competent evidence of the genuineness of the instrument, although the witness never saw the officers write their names; Finch v. Gridley's Ex'rs, 25 Wend. (N. Y.) 469.

A diploma is evidence that a physician received a degree from a medical institution; Holmes v. Halde, 74 Me. 28, 43 Am. Rep. 567.

This word, which is also written duploma, in the civil law signifies letters issued by a prince. They are so called it is supposed, *a duplicatis tabellis*, to which Ovid is thought to allude, 1 Amor, 12, 2, 27, when he says, *Tunc ego vos duplices rebus pro nomine sensi.* Sueton. in Augustum, c. 26. Brissonius p. 367. Seals also were called Diplomata. Vicat, *Diploma.* See COLLEGE.

DIPLOMACY. The science which deals with the means and methods by which the intercourse between states is carried on. See DIPLOMATIC AGENTS.

DIPLOMATIC AGENTS. Public officers who have been commissioned according to law to superintend and transact the affairs of the government which has employed them, in a foreign country. Vattel, liv. 4, c. 5.

The agents were formerly regarded as divided into two general classes or orders. Those of the first order were almost the perfect representatives of the government by which they were commissioned: such were legates, nuncios, internuncios, ambassadors, ministers, plenipotentiaries. Those of the second order did not so fully represent their government: they were envoys, residents, ministers, *chargés d'affaires*, and consuls. The classification of these agents, now so far sanctioned as to be considered a rule of international law, was agreed upon at the Congress of Vienna in 1815 and modified by that of Aix-la-Chapelle in 1818. Under this classification diplomatic agents rank as follows: (1) Ambassadors, ordinary and extraordinary, legates, and nuncios; (2) envoys, ministers, or others accredited to sovereigns; (3) ministers resident, accredited to sovereigns; (4) *chargés d'affaires*, and other diplomatic agents accredited to ministers of foreign affairs (whether bearing the title of minister or not), and consuls charged with diplomatic duties. See the several titles and Davis, Int. Law ch. vii.

DIPLOMATICS. The art of judging of ancient charters, public documents, or diplomas, and discriminating the true from the false. Encyc. Lond.

DIPSOMANIA. In Medical Jurisprudence. A mental disease characterized by an uncontrollable desire for intoxicating drinks. An irresistible impulse to indulge in intoxication, either by alcohol or other drugs. Ballard v. State, 19 Neb. 614, 28 N. W. 271. As to how far the law will hold a party responsible for acts committed while the mind is overwhelmed by the effects of liquor, see DRUNKENNESS.

DIRECT. Straightforward; not collateral. The Onrust, 6 Blatchf. 533, Fed. Cas. No. 10,540. The direct line of descent is formed by a series of relationships between persons who descend successively one from the other.

Evidence is termed *direct* which applies immediately to the fact to be proved, without any intervening process as distinguished from *circumstantial*, which applies immediately to collateral facts supposed to have a connection, near or remote, with the fact in controversy.

The examination in chief of a witness is called the direct examination.

DIRECT TAX. In Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, it was said that in order to determine whether a tax be direct within the meaning of the constitution it must be ascertained whether the one upon whom, by law, the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct, and hence, however obvious in other respects it might be a duty, impost or excise, it cannot be levied by the rule of uniformity and must be apportioned. This was said in Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969, to be a disputable theory. It is said direct taxes within the constitution are only capitation taxes, as ex-

pressed in that instrument, and taxes on real estate; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253; but the inclusion of rentals from real estate was held to make it direct to that extent; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, where it is said, although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words duties, imposts and excises, such a tax for more than a hundred years has as yet remained undiscovered.

Direct taxes include those assessed upon property, person, business, income, etc., of those who pay them; while indirect taxes are levied upon commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity. Under the second head may be classed the duties upon imports, and the excise and stamp duties levied upon manufactures; Cooley, Taxation 10.

See TAX; EXCISE.

DIRECTING A VERDICT. See VERDICT; JURY.

DIRECTION. The order and government of an institution; the persons who compose the board of directors are jointly called the direction.

Direction, in another sense, is nearly synonymous with instruction (*q. v.*).

In Practice. The instruction of a jury by a judge on a point of law, so that they may apply it to the facts before them. See CHARGE.

That part of a bill in chancery which contains the address of the bill to the court: this must, of course, contain the appropriate and technical description of the court. See BILL.

DIRECTOR OF THE MINT. An officer appointed by the president of the United States, by and with the advice and consent of the senate. He is the chief officer of the bureau of the mint and is under the general direction of the secretary of the treasury. R. S. § 343.

DIRECTORS. Persons appointed or elected according to law to manage and direct the affairs of a corporation or company. The directors collectively form the board of directors.

They are generally invested with certain powers by the charter of the corporation, and it is believed that there is no instance of a corporation created by statute without provision for such a board of control, whether under the name of directors, or, as they are sometimes termed, managers or trustees,—the latter designation being more frequent in religious or charitable corporations. A comprehensive work on corporations states that the author has likewise found no instance in which these officers were wanting; 3 Thomp. Corp. § 3850. The power to elect directors has been held to be inherent and not dependent upon statute; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852.

As to the nature of the office and its powers very different views have been held, and each is sustained by high authority. They have been held to be the corporation itself "to all purposes of dealing with others" and not to "exercise a delegated authority in the sense which applies to agents or attorneys;" Shaw, C. J., in Burrill v. Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. Another view, and probably the one which is the best settled conclusion of judicial opinion in this country, is that they are general agents; Simons v. Min. Co., 61 Pa. 202, 100 Am. Dec. 628; State v. Smith, 48 Vt. 266; Chetlain v. Ins. Co., 86 Ill. 220; President, etc., of Mechanics' Bank v. R. Co., 13 N. Y. 599; Goodwin v. Ins. Co., 24 Conn. 591. The question is of importance with respect to the power of directors to act outside of the home state of the corporation, in order to do which, they must act as agents; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Wright v. Bundy, 11 Ind. 398; McCall v. Mfg. Co., 6 Conn. 428. They are undoubtedly, in a certain sense, agents, but they are agents of the corporation, not of the stockholders; they derive their powers from the charter. They alone have the management of the affairs of the corporation, free from direct interference on the part of the stockholders; Dana v. Bank, 5 W. & S. (Pa.) 246; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 113, 6 L. Ed. 552; Dayton & C. R. Co. v. Hatch, 1 Disn. (Ohio) 84. The stockholders cannot perform any acts connected with the ordinary affairs of the corporation; Conro v. Iron Co., 12 Barb. (N. Y.) 27, 63; the delegation of powers to the directors excludes control by the stockholders; Union Gold Min. Co. v. Nat. Bank, 2 Colo. 565. See Fleckner v. Bank, 8 Wheat. (U. S.) 357, 5 L. Ed. 631; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607.

In England it is held that the directors of a company are in the position of managing partners, and their mandate is the mandate of the whole body of shareholders, not of the majority only. A simple majority of the shareholders cannot alter the mandate and override the discretion of the directors; [1906] 2 Ch. 34. The ultimate determination of the management rests with the stockholders, when by the charter the powers of the corporation are vested in them, or when it is silent on that question and does not commit the exclusive control to the directors; Union Pac. R. Co. v. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. In this case the stockholders had adopted a by-law providing that the board should have the whole management of the property of the company, and that they might delegate power to the executive committee. The latter authorized

the president to execute a contract and the stockholders approved it and the action of the committee, but the board never formally acted; it was held that, as they had full knowledge of it, they would be presumed to have ratified it.

It has been said that directors are special agents of the corporation, and not general agents; Adriance v. Roome, 52 Barb. (N. Y.) 399; and this is the view which it is said that in England "the ingenuity of the bench has been taxed to demonstrate;" 3 Thomp. Corp. § 3969; Lindl. Partn. (4th ed.) 249. Among the cases relied on as supporting this view are, 6 Exch. 796; 8 C. B. 849; 6 H. L. Cas. 401; L. R. 5 Eq. 316; but the distinction has been said not to be very satisfactory; per Comstock, J., in President, Directors & Co. of Mechanics' Bank v. R. Co., 13 N. Y. 599. See Green's Brice, *Ultra Vires* 470, n. Although the weight of authority is as stated, it is nevertheless important to keep in view the different theories held, in order to weigh accurately the authorities upon the powers of directors, and to distinguish between them when they are to be applied to a particular case. Directors have no common-law powers; 3 Thomp. Corp. § 3978; but only granted ones, although in dealing with corporations courts sometimes ascribe to the directors certain powers, termed implied powers, which, however, in fact amount to no more than a recognition by the courts of the usages of business and acts done in the course of business; *id.* But they have no power to make changes in the fundamental law of the corporation, their relation to it being analogous to that of a legislature to the constitution of the state; *id.* § 3979. Accordingly, their power to make such changes must be derived from the charter. They may not change the membership or capital of the corporation by increasing either; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902; Com. v. Gill, 3 Whart. (Pa.) 228; Gill v. Balis, 72 Mo. 424; or reducing the capital; Percy v. Millaudon, 3 La. 568; Hartridge v. Rockwell, R. M. Charlt. 260; nor make by-laws unless specially authorized; Watson v. Printing Co., 56 Mo. App. 145; nor request or accept amendments to the charter; Stark v. Burke, 9 La. Ann. 341; State v. Adams, 44 Mo. 570; Zabriskie v. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Marlborough Mfg. Co. v. Smith, 2 Conn. 579 (but see *contra*, Dayton & C. R. Co. v. Hatch, 1 Disney (Ohio) 84, which is doubted, 3 Thomp. Corp. § 3980, n. 7). They may alien property in the course of business; 3 Thomp. Corp. § 3984 (and see note on this subject; Garrett v. Plow Co., 59 Am. Rep. 466); or mortgage corporate property; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Miller v. R. Co., 36 Vt. 452; Augusta Bank v. Hamblet, 35 Me. 491; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; or make an assignment for the benefit of creditors; Merrick v. Trustees of Bank, 8 Gill (Md.) 59; and see Thomp. Corp. chs. 145, 146, which discuss this subject and the validity of preferential assignments by directors in favor of others and of themselves. They cannot give away corporate property; Bedford R. Co. v. Bowser, 48 Pa. 29; Frankfort Bank v. Johnson, 24 Me. 490; nor sell the stock at less than par; Sturges v. Stetson, 1 Biss. 246, Fed. Cas. No. 13,568; in money or money's worth; Chouteau, Harrison & Valle v. Dean, 7 Mo. App. 210 (but see Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; 2 Thomp. Corp. § 1665; STOCK); nor, as a general rule, become surety, accommodation indorser, or guarantor; 3 Thomp. Corp. § 3990; but under urgent necessity their assumption of a debt of another to secure from the common creditors an extension for themselves has been held justified; Leach v. Blakely, 34 Vt. 134. See Zabriskie v. R. Co., 23 How. (U. S.) 381, 16 L. Ed. 488. In the usual course of business they have a general power to borrow money; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Ridgway v. Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681; and secure it by assigning securities owned by the corporation; North Hudson Mut. Bldg. & Loan Ass'n v. Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; and one so dealing with them is not affected with knowledge of a breach of trust by them; Borland v. Haven, 37 Fed. 394. They may make, accept, or indorse negotiable paper; Stevens v. Hill, 29 Me. 133; but a single director is not authorized to make corporate notes; Lawrence v. Gebhard, 41 Barb. (N. Y.) 575. They may determine the salaries of officers of the corporation; Waite v. Min. Co., 37 Vt. 608. Under the English decisions the powers of corporations with respect to borrowing money and making notes are now restricted; 3 Thomp. Corp. § 3989, n. 3.

While directors are not strictly trustees, yet they occupy a fiduciary position; Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. Ed. 492; European & N. A. Ry. Co. v. Poor, 59 Me. 277; Hoyle v. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Koehler v. Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 513; Covington & L. R. Co. v. Bowler's Heirs, 9 Bush (Ky.) 468; Hale v. Bridge Co., 8 Kan. 466; Black v. Canal Co., 24 N. J. Eq. 463; Sweeny v. Refining Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. Rep. 88; Moraw. Priv. Corp. 516; and by some leading authorities they are termed trustees; Walworth, Ch., in Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Hardwicke, Ld. Ch., in 2 Atk. 400; Bent v. Priest, 86 Mo. 475.

Directors, in buying shares from other stockholders, when there is a possibility of reselling at a profit, are not bound to discover all the facts; their fiduciary character does not extend that far; [1902] 2 Ch. 421. But a director upon whose action the value of shares depends cannot avail of the knowledge of what his own action will be to acquire shares from those whom he intentionally keeps in ignorance of his expected action and the resulting value of the shares. This rule was applied in view of the special circumstances: That the director owned three-fourths of the stock, was at the time of his purchase administrator general of the company, with large powers, and engaged in negotiations which finally led to a sale of the company's land to the government at a price which greatly enhanced the value of the stock; Strong v. Repide, 213 U. S. 419, 29 Sup. Ct. 521, 53 L. Ed. 853, citing Stewart v. Harris, 69 Kan. 498, 77 Pac. 277, 66 L. R. A. 261, 105 Am. St. Rep. 178, 2 Ann. Cas. 873, and Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232, and not deciding as to whether the rule applied to the bare relationship between director and shareholder.

They are charged with trustees' duties and bound to care for corporation property and manage its affairs in good faith; and for violation of that duty, resulting in waste of its assets, injury to its property, or unlawful gain to themselves, they are liable to account in equity the same as ordinary trustees; Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667, where the directors conspired to wreck the corporation. They are held not trustees in the strict and technical sense; Booth v. Robinson, 55 Md. 419; Wallace v. Savings Bank, 89 Tenn. 649, 15 S. W. 448, 24 Am. St. Rep. 625; at most directors of a bank can only be considered implied trustees; Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114; Landis v. Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403; Appeal of Spering, 71 Pa. 11, 10 Am. Rep. 684; the liability of a bank director is held to be that of a mandatary or gratuitous bailee, who undertakes without compensation to do something for another, and he is therefore held only to that degree of care which prudent men in like circumstances ordinarily give to the same duties. In Swentzel v. Bank, 147 Pa. 140, 23 Atl. 405, 415, 15 L. R. A. 305, 30 Am. St. Rep. 718, the position of Judge Sharswood in the earlier case is approved and the court said: "The ordinary care of a business man in his own affairs means one thing; the ordinary care of a gratuitous mandatary is quite another matter. The one implies an oversight and knowledge of every detail of his business; the other suggests such care only as a man can give in a short space of time to the business of other persons, for which he receives no compensation." The customs and methods of a community in which a banking business is done are, for such community, a standard of prudence and diligence by which the responsibility of bank officers and directors are to be tested; Wheeler v. Bank, 75 Fed. 781. The degree of care, skill and judgment depends upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business; North Hudson Mut. Bldg. & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; Killen v. Barnes, 106 Wis. 546, 82 N. W. 536; Savings Bank of Louisville's Assignee v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. Rep. 488; Warren v. Robison, 19 Utah, 289, 57 Pac. 287, 75 Am. St. Rep. 734. The question of negligence is ultimately a question of fact under all the circumstances; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

Knowledge of all the affairs of a bank cannot be imputed to the directors to charge them with liability; Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240. They cannot be held civilly liable to one deceived to his injury by false representations as to the bank's financial condition, contained in the official report to the comptroller of the currency, made and published under U. S. R. S. § 5211, where they merely negligently participated in or assented to such representations, since the exclusive test of their liability is furnished by U. S. R. S. § 5239, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability; Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002.

In many other cases the degree of care required is held to be that which a prudent man exercises about his own affairs; Wallace v. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Marshall v. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Union Nat. Bank v. Hill, 148 Mo. 380, 49 S. W. 1012, 71 Am. St. Rep. 615; Ackerman v. Halsey, 37 N. J. Eq. 356; Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56. It is said they are not merely required to be honest, but they must also bring to the discharge of the duties they undertake ordinary competency. They cannot excuse imprudence or indifference by showing honesty of intention coupled with gross ignorance and inexperience, or coupled with an absorption of their time and attention in their private affairs; Warner v. Penoyer, 91 Fed. 587, 33 C. C. A. 222, 44 L. R. A. 761; Williams v. McKay, 46 N. J. Eq. 25, 18 Atl. 824. The ordinary care and prudence required of bank directors is held to include something more than officiating as figureheads. They may commit the business as defined to duly authorized officers, but this does not absolve them from the duty of reasonable supervision; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; nor ought they to be per-

mitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

It is the duty of the directors of a national bank to maintain a supervision of its affairs; to have a general knowledge of the manner in which its business is conducted and of the character of that business, and to have at least such a degree of intimacy with its affairs as to know to whom and upon what security its large lines of credit are given; and generally to know of and give directions as to the important and general affairs of the bank, of which the cashier executes the details; Gibbons v. Anderson, 80 Fed. 345; they cannot shift such duties upon the executive officers; Warren v. Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. Rep. 734. They will be presumed to have known what they ought to have known; Marshall v. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49.

Directors also occupy a fiduciary relation to creditors, for whom they have been said to be *quasi* trustees, and when the corporation becomes insolvent, they become trustees for the creditors and stockholders; Bradley v. Farwell, 1 Holmes 433, Fed. Cas. No. 1,779; Clark v. San Francisco, 53 Cal. 306; Good v. Sherman, 37 Tex. 660. Where directors of an insolvent corporation confessed a judgment against it in favor of one of themselves to give him an advantage by priority of lien over another creditor, about to obtain judgment, the two judgments were placed upon the same footing; Coons v. Tome, 9 Fed. 532. See Thomp. Liab. of Dir. 397; Goodin v. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. Directors are held personally responsible for acts of misfeasance or gross negligence, or for fraud and breach of trust; L. R. 5 H. L. 480; Lewis v. Steel Works, 50 Vt. 477; Appeal of Spering, 71 Pa. 11, 10 Am. Rep. 684; 68 Law T. 380; Mutual Bldg. Fund & Dollar Sav. Bank v. Bosseiux, 3 Fed. 817. An action to enforce this responsibility must be brought on behalf of all the stockholders, and not by a single one; Craig v. Gregg, 83 Pa. 19; and cannot be brought by a creditor; Zinn v. Mendel, 9 W. Va. 580; *contra*, Tate v. Bates, 118 N. C. 287, 24 S. E. 482, 54 Am. St. Rep. 719, where it is held that an action will lie against them for any injury to the corporation or a creditor by their fraud, deceit, neglect, or other misconduct. It is held to be the duty of bank directors to see that the directions of the banking laws are complied with and that depositors may, in the absence of a statute to the contrary, maintain an action to recover losses resulting from a breach of such duty; Boyd v. Schneider, 131 Fed. 223, 65 C. C. A. 209, reversing 124 Fed. 239. In Brinckerhoff v. Bostwick, 88 N. Y. 52, it was said the liability of directors for violations of their duty, and the jurisdiction of equity to afford redress to the corporation and its shareholders, exist independently of statute. This was a proceeding by a shareholder; and in Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894, it was referred to to show that an action in equity will lie by a shareholder, and it was said: There is a wide and vital difference between such a case and one where the action is by the corporation against its delinquent directors.

A director is an agent of the corporation, and accounts primarily with the corporation, which holds the legal title to the assets; but there is no privity at law between a stockholder and the directors, and hence equity is generally the proper tribunal in which to enforce his rights, which are equitable and not legal; Emerson v. Gaither, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114, where it was held that a receiver may proceed in equity to hold bank directors liable for losses caused by their permitting illegal loans and declaring improper dividends. See also North Hudson Mut. Building & Loan Ass'n v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57; Robinson v. Hall, 63 Fed. 222, 12 C. C. A. 674; Hodges v. Screw Co., 1 R. I. 312, 53 Am. Dec. 624; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Cockrill v. Cooper, 86 Fed. 7, 29 C. C. A. 529. In the last case it was said the office of a director is so much akin to those of a trustee that in many cases no substantial reason can be given for exempting directors from that degree of control by a court of chancery which such courts ordinarily exercise over trustees; and to the same effect Bosworth v. Allen, 168 N. Y. 157, 61 N. E. 163, 55 L. R. A. 751, 85 Am. St. Rep. 667, where the charge against the directors was waste of corporate assets and unlawful gain to themselves. Other New York cases restricted the right of a receiver to bring an action against directors in equity where the charge against them was negligent and wasteful conduct and a violation of the banking laws in many respects, and held that an action at law was the proper remedy; Dykman v. Keeney, 154 N. Y. 483, 48 N. E. 894, following O'Brien v. Fitzgerald, 143 N. Y. 377, 38 N. E. 371; Stephens v. Overstolz, 43 Fed. 771. In a case in which it did not appear that an accounting was necessary, it was held that the remedy of a receiver was at law; Thompson v. Greeley, 107 Mo. 577, 17 S. W. 962.

Directors are not liable for the fraud of agents employed by them; 26 W. R. 147; Thomp. Liab. of Dir. 355. Directors of a national bank are not insurers of the fidelity of its agents, and are not responsible for losses resulting from the wrongful act or omission of other directors or agents, un-

less the loss is a consequence of their own neglect of duty; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662.

It is their duty to use their best efforts to promote the interests of the stockholders, and they cannot acquire any adverse interests; Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; Farmers' & Merchants' Bank of Los Angeles v. Downey, 53 Cal. 466, 31 Am. Rep. 62; European & N. A. Ry. Co. v. Poor, 59 Me. 277; Ryan v. R. Co., 21 Kan. 365. A director may become a creditor of a corporation, where his action is not tainted with fraud or other improper act; Borland v. Haven, 37 Fed. 394. It is said to be the rule that contracts made by a director with his company are voidable; L. R. 6 H. L. 189; Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; Appeal of Rice, 79 Pa. 168; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; President & Trustees of City of San Diego v. R. Co., 44 Cal. 106. In many instances the courts have held them absolutely void. In a leading English case it was held that the directors were agents of the corporation and could not be permitted to enter into engagements or have any personal interest which might possibly conflict with the interests of the corporation, and that no question could be raised as to the fairness of such a contract; 1 McQ. H. L. (Sc.) 461; and in several American cases taking this view it is considered that directors were subject to the rule applying to all persons standing in relations of trust and involving duties inconsistent with their dealing with the trust property as their own; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Port v. Russell, 36 Ind. 60, 10 Am. Rep. 5; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184. A high authority says, "there is no sound principle of law or equity which prohibits" such contracts, if entered into in good faith, and where there is a quorum of directors on the other side of the contract present, so that the adoption of the measure does not depend on the vote of the interested director, and even in the latter case the contract is good at law. Because, however, he is on both sides of it, equity will closely scrutinize it and set it aside if it violates the good faith which the circumstances require; 3 Thomp. Corp. § 4059; but in many cases contracts of a corporation with directors, fairly made, have been upheld; Jesup v. R. Co., 43 Fed. 483; Barr v. Glass Co., 51 Fed. 33; Illinois Pneumatic Gas Co. v. Berry, 113 U. S. 322, 5 Sup. Ct. 525, 28 L. Ed. 1003; Barnes v. Brown, 80 N. Y. 527; Smith v. Skeary, 47 Conn. 47. The true rule to be ascertained from the cases is probably, that as to such contract there is a presumption of invalidity which casts upon the party claiming under such contracts the burden of showing that no undue advantage was taken or resulted from the relation, and the evidence must clearly show such fairness and good faith; Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; Wardell v. R. Co., 103 U. S. 651, 26 L. Ed. 509. Accordingly, the more reasonable view is that first stated, and it is supported by the weight of American authority; 3 Thomp. Corp. § 4061; but courts holding the extreme view that such contracts are void will not enforce the fairest contract if the corporation exercises the option to set it aside; *id.*

Some courts take the view that in all cases of such contracts their nature and terms and the circumstances under which they were made must be taken into consideration, and that after having been subjected to careful scrutiny they will be enforced if for the benefit of the corporation; Stewart v. R. Co., 41 Fed. 736; Appeal of Hammond, 123 Pa. 503, 16 Atl. 419. A corporation acting in good faith and with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper at a time when it is in fact a going business and expects to continue in business, although its assets may not in fact equal its indebtedness; Sandford Fork & Tool Co. v. Howe, Browne & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713. See, generally, 3 Thomp. Corp. §§ 4059 to 4075; note by J. C. Harper; Cook v. Sherman, 20 Fed. 175, and one by Dr. Francis Wharton; Meeker v. Iron Co., 17 Fed. 53. This rule extends even to cases where a majority of directors in one corporation contract with another corporation in which they are directors; Green's Brice, *Ultra Vires* 479, n.; Attaway v. Bank, 93 Mo. 485, 5 S. W. 16. A railroad company desired to purchase the entire property of a canal company, both companies having the same president, who by a purchase of a majority of the stock of the canal company at nominal rates obtained the election of directors favorable to the railroad company. Through collusive legal proceedings the railroad company purchased the canal property at a price which was grossly inadequate. The sale was set aside as a sale by a trustee to himself, neither in good faith nor for an adequate consideration; Goodin v. Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. The same principles are supported by many authorities; Koehler v. Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339; Cook v. Mill Co., 43 Wis. 433; Stewart v. R. Co., 38 N. J. L. 505; Rice's Appeal, 79 Pa. 168.

In some cases the question has arisen as to the effect of a minority only of the directors being interested in both companies. A contract made between two corporations through their respective boards of directors is not voidable at the suit of one of the parties thereto from the mere circumstance that

a minority of its board of directors are also directors of the other company; U. S. Rolling Stock Co. v. R. R., 34 Ohio St. 450, 32 Am. Rep. 380, where the court said it had found no case holding such a contract invalid from the mere fact that a minority of the directors of one company are also directors of the other company, and, "in our judgment, where a majority of the board are not adversely interested and have no adverse employment, the right to avoid the contract or transaction does not exist without proof of fraud or unfairness;" *id.;* Flagg v. Ry. Co., 10 Fed. 413; Harts v. Brown, 77 Ill. 226. This rule is criticised by Mr. Harper in a note to Cook v. Sherman, 20 Fed. 180, upon the ground that the corporation is entitled to a full board of disinterested directors. In another case it was said: "A director whose personal interests are adverse to those of the corporation has no right to be or act as a director. As soon as he finds that he has personal interests in conflict with those of the company he ought to resign;" Goodin v. Canal Co., 18 Ohio St. 183, 98 Am. Dec. 95. In considering the same subject McCrary, J., said: "Besides, where shall we draw the line? If the presence of two interested directors in the board at the time of the ratification does not vitiate the act, would the presence of a larger number of such directors have that effect, and, if so, what number." Thomas v. R. Co., 2 Fed. 879. On appeal his judgment was affirmed and the supreme court per Miller, J., said, "We concur with the circuit judge that no such contract as this can be enforced in a court of equity where it is resisted and its immorality is brought to light. . . . Such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud. It may often occur that, notwithstanding the vice of the transaction, namely, the directors or trustees, or a majority of them, being interested in opposition to the interest of those whom they represent, and in reality parties to both sides of the contract, that it may be one which those whose confidence is abused may prefer to ratify or submit to. It is, therefore, at the option of these latter to avoid it, and, until some act of theirs indicates such a purpose, it is not a nullity." Thomas v. R. Co., 109 U. S. 524, 3 Sup. Ct. 315, 27 L. Ed. 1018.

Arrangements made by directors of a railroad company to secure from it unusual advantages through the medium of a new company in which they are to be stockholders, and which is to receive valuable contracts from the railroad company, are not to be enforced by the courts; Wardell v. R. Co., 103 U. S. 651, 26 L. Ed. 509, affirming Wardell v. R. Co., 4 Dill. 330, Fed. Cas. No. 17,164; such contracts cannot be made or ratified by a board of directors including members of the construction company and are void; Thomas v. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; but a recovery may be had on such a contract for work actually benefiting the railroad company, on a *quantum meruit; id.*

Third parties, without notice, are not bound to know of limitations placed upon directors by by-laws or otherwise; Brice, *Ultra Vires* 474; L. R. 5 Ch. 288; Fay v. Noble, 12 Cush. (Mass.) 1; but see Risley v. R. Co., 62 N. Y. 240; Salem Bank v. Bank, 17 Mass. 1, 9 Am. Dec. 111. When convened as a board, the directors are held to possess all the corporate powers; Hoyt v. Thompson's Ex'r, 19 N. Y. 207; Burrill v. Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395. As principals they can delegate the performance of acts which they themselves can perform; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436, where it is held that without statutory authority directors have the power to delegate to agents, officers or executive committees the power to transact, not only ordinary business, but business requiring the highest degree of judgment. These agents or managing officers have incidental power to employ all assistants and to do all acts necessary properly to conduct the business over which they have charge. Formal action of the board of directors is not necessary in order to confer the authority. The power expressly given by statute to appoint such subordinate officers and agents as the business of the company may require does not limit nor diminish the common-law power to delegate authority.

Where the charter does not otherwise provide, it is held that a banking corporation may be represented by its cashier in transactions outside of his ordinary duties, without his authority to do so being in writing or appearing upon the record of the proceedings of the directors. His authority may be by parol and inferred from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed to conduct its affairs. It may be implied from the conduct or acquiescence of the directors; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; Putnam v. U. S., 162 U. S. 713, 16 Sup. Ct. 923, 40 L. Ed. 1118. Statutes requiring a corporation to be managed by directors, but authorizing them to appoint such subordinate officers and agents as the business may require, do not prevent the directors from entrusting the entire management of the business to a president, as this is not a delegation of corporate powers, but a mere authorization to perform the business for and in the name of the corporation; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436.

This may be done either by express resolution or by acquiescence in a course of dealing. A person dealing with the president of a corporation in the usual manner, and within the powers which the president has been accustomed to exercise without the dissent of the directors, would be entitled to assume that the president had actually been invested with those powers; Morawetz, Priv. Corp. § 538; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436.

It has, however, been contended that, as the directors are agents, they cannot delegate their authority; Gillis v. Bailey, 21 N. H. 149; Charlestown Boot & Shoe Co. v. Dunsmore, 60 N. H. 85; and see Canada-Atlantic & Plant S. S. Co. v. Flanders, 145 Fed. 875, 76 C. C. A. 1 *(dictum);* 20 Harv. L. Rev. 225, where it is said there is curiously little authority on this point.

The powers of directors of eleemosynary corporations are much greater than those of moneyed corporations; State v. Adams, 44 Mo. 570. Unless the charter provides otherwise, directors need not be chosen from among the stockholders; L. R. 5 Ch. Div. 306; State v. McDaniel, 22 Ohio St. 354.

Directors *de facto* are, presumably, directors *de jure*, and their acts bind the company; L. R. 7 Ch. 587. A director who is permitted to act as such after he has sold all his stock, is a director *de facto;* Wile & Brickner Co. v. Land Co., 4 Misc. 570, 25 N. Y. Supp. 794. See DE FACTO.

Their liability for acts expressly prohibited by the company's charter is not created by force of statutory prohibition. The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises and the directors to criminal liability; but this would not render them civilly liable for damages. Their liability to the corporation for damages caused by unauthorized acts rests upon the common-law rule, which renders every agent liable who violates his authority, to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed; Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; Hicks v. Steel, 142 Mich. 292, 105 N. W. 767, 4 L. R. A. (N. S.) 279, where the liability of a bank director for inducing the bank to extend credit to an individual beyond the statutory limit was denied, though he made false representations as to notes offered for discount, on proof that he acted at the time as agent for the borrower, and not as a director.

Directors of a national bank, who merely negligently participated in or assented to false representations as to the bank's condition contained in its official report to the comptroller of the currency, under R. S. § 5211, cannot be held civily liable to one deceived by such report, since the exclusive test of such liability is under R. S. § 5239, which makes a knowing violation of the national bank act a prerequisite to such liability; Yates v. Bank, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, where it was held that this excludes common-law liability, and that a *scienter* must be proved in order to sustain an action; *id.;* to the same effect, State v. Allison, 155 Mo. 332, 56 S. W. 467; Cowley v. Smyth, 46 N. J. L. 380, 50 Am. Rep. 432. It has been held that a director is an insurer of the truth of his report; Gerner v. Mosher, 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244. In Houston v. Thornton, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699, bank directors were held liable to one who purchased bank stock relying upon a published statement of the condition of the bank which was false.

The publication of an advertisement in a newspaper by savings bank directors that directors and stockholders are personally responsible for its debts does not constitute a contract with the depositors, but, if intentionally false, affords the basis of an action for deceit; Westervelt v. Demarest, 46 N. J. L. 37, 50 Am. Rep. 400.

Directors of a corporation, who falsely represent its condition to a stockholder, knowing that he seeks information to guide his decision as to selling his stock, are liable for the damages sustained by him on account of their misrepresentations, although they were not made for the purpose of inducing a sale; Rothmiller v. Stein, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148. An action for deceit will lie against a director of a corporation, banking or otherwise (there is no difference), who has made false and fraudulent representations as to its condition, whereby others have been misled and damaged. Such representations need not be personally made, but may consist of voluntary reports or prospectuses which are false and are fraudulently published; Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. Rep. 436. Morawetz, Priv. Corp. (2d ed.) § 573.

Where a bank certified under oath to the insurance commissioner that an insurance company seeking a license had a certain deposit, which was false, it was held that one who bought shares in such company in reliance upon such certificate, could not recover against the bank; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; nor will an action for deceit lie upon a statement made for the mere purpose of obtaining a charter; Webb v. Rockefeller, 195 Mo. 57, 93 S. W. 778, 6 L. R. A. (N. S.) 872.

Mere matters of opinion as to the prospect of future profits cannot be misrepresentations; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; and where an officer of a corporation purchases stock from another officer by

inducing the latter to believe the value of the shares would decrease, he cannot be held liable for deceit when the stock in fact was resold at a profit; Boulden v. Stilwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258. Where an officer of a corporation procured a transfer of stock to himself by stating that it was worthless, when it was in fact valuable, it was held not a breach of any fiduciary relation and not a ground for avoiding a sale; Krumbhaar v. Griffiths, 151 Pa. 223, 25 Atl. 64, denying the existence of any confidential or fiduciary relation between an officer of a corporation and a person from whom such officer purchases stock. *Caveat vendor* is as sound a rule of law, as *caveat emptor*, though less frequently invoked; Boulden v. Stilwell, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258; and where a director bought stock from a stockholder without disclosing facts known to him as director which, if known, would enhance its market value, it was held that the sale would not be set aside; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; see *supra*.

A director may purchase unmatured obligations of the corporation at a discount, and enforce them at par, if the corporation has not a sinking fund for the same purpose; Glenwood Mfg. Co. v. Syme, 109 Wis. 355, 85 N. W. 432; St. Louis, Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51, 12 Pac. 303; Marshall v. Carson, 38 N. J. Eq. 250, 48 Am. Rep. 319. When he forecloses a mortgage on corporate property, he has a right to purchase; Lucas v. Friant, 111 Mich. 426, 69 N. W. 735; and it is held he may buy corporate property at an execution sale on a judgment held by him; Marr v. Marr, 72 N. J. Eq. 797, 66 Atl. 182; but see Sebring v. Association, 2 Pa. Dist. Rep. 629, where it is held the director of a corporation cannot buy corporate property at a judicial sale. He may bid on the foreclosure sale of corporate property; McKittrick v. Ry. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. Ed. 518.

The president and general manager of a corporation were held personally liable for damages caused to a riparian proprietor from the long continued discharge of muddy water into a stream from ore washers operated by the company with their sanction, they having had knowledge of the damage caused thereby; Nunnelly v. Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421. The president of a corporation, who was also a director, was held personally liable for the wrongful use by his company of a toll bridge, which diverted business from another bridge; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407. The president of an irrigation company was held liable for damage to land caused by ditches, which he, as president, had ordered to be dug across another's land; Bates v. Van Pelt, 3 Tex. Civ. App. 185, 20 S. W. 949. In some cases an action has been sustained against officers of a company, together with the corporation itself, for infringement of a patent; see National Car-Brake Shoe Co. v. Mfg. Co., 19 Fed. 514; and an injunction against infringement of a patent; Goodyear v. Phelps, 3 Blatchf. 91, Fed. Cas. No. 5,581; Iowa Barb Steel Wire Co. v. Barbed-Wire Co., 30 Fed. 123; Cahoone Barnet Manuf'g Co. v. Harness Co., 45 Fed. 582, but the later cases usually hold otherwise.

In the absence of a provision of the charter or of a special contract, a director is not entitled to compensation; Ogden v. Murray, 39 N. Y. 202; Gridley v. Ry. Co., 71 Ill. 200; Citizens' Nat. Bank v. Elliott, 55 Ia. 104, 7 N. W. 470, 39 Am. Rep. 167; and he cannot recover therefor even where a resolution to compensate him has been passed after the services were rendered; Accommodation Loan & Saving Fund Ass'n v. Stonemetz, 29 Pa. 534; Kilpatrick v. Bridge Co., 49 Pa. 118, 88 Am. Dec. 497; Manx Ferry Gravel Road Co. v. Branegan, 40 Ind. 361; New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; unless the services were outside of the line of his duty as an officer, as obtaining a right of way, soliciting subscriptions, etc.; Lafayette, B. & M. Ry. Co. v. Cheeney, 87 Ill. 447; Sargent v. Granite Co., 3 Misc. 325, 23 N. Y. Supp. 886; Ten Eyck v. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. Rep. 633. But it has been held that, when no salary is prescribed, one appointed to an executive office, like that of cashier, is entitled to reasonable compensation for his services, and that the directors have power to fix the salary after the expiration of the term of office, and this, though such appointee is also a director, and continues to be such while holding the independent office; 20 Fed. 183, note.

There is no implied promise to pay such an officer either for regular or extra services; to subject the corporation to liability, it must be shown that the services were rendered under such circumstances as to raise a fair presumption that the parties intended and understood they were to be paid for; Pew v. Bank, 130 Mass. 391, followed in Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608.

See Pierce, Railr. 31, with cases.

To constitute a legal board of directors, they must meet at a time when and a place where every other director has the opportunity of attending; and there must be a quorum; Percy v. Millaudon, 3 La. 574. See President, etc., of Northampton Bank v. Pepoon, 11 Mass. 288; Hughes v. Bank, 5 Litt. (Ky.) 45; Ridgway v. Bank, 12 S. & R. (Pa.) 256, 14 Am. Dec. 681; Minor v. Bank, 1 Pet. (U. S.) 46, 7 L. Ed. 47. The fact that notice of a special meeting of the board was not given as provided by the by-laws of a corporation is immaterial, if all the members of the board were in fact present and participated in the proceedings; Minneapolis

Times Co. v. Nimocks, 53 Minn. 381, 55 N. W. 546. See Taylor County Court v. R. Co., 35 Fed. 161.

They cannot separately make a contract which will bind the corporation; Limer v. Traders Co., 44 W. Va. 175, 28 S. E. 730; Peirce v. Building Co., 94 Me. 406, 47 Atl. 914.

Action of directors in the corporate name, in bad faith, and detrimental to its interest, is, with respect to them, the act of the corporation in name only; Pennsylvania Sugar Refining Co. v. Refining Co., 166 Fed. 254, 92 C. C. A. 318.

The directors of a company which declares dividends, thereby impairing its capital, are liable therefor to the company, though ignorant of its condition as to which they are bound to inform themselves; Cornell v. Seddinger, 237 Pa. 389, 85 Atl. 446.

A director is entitled to access to all the corporate books; Lawton v. Bedell (N. J.) 71 Atl. 490.

Where directors are required to be stockholders, "qualification" shares may be transferred for that purpose; this suffices if the director holds them during his term, but not if he returns them to the owner with a power of attorney for transfer; In re Ringler & Co., 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036.

DIRECTORY STATUTE. See STATUTE.

DIRIMANT IMPEDIMENTS. Those bars which annul a consummated marriage.

DISABILITY. The want of legal capacity. "Incapacity to do a legal act." It would include the resignation of a judge before signing a bill of exceptions; McIntyre v. Modern Woodmen of America, 200 Fed. 1, 121 C. C. A. 1. See ABATEMENT; DEVISE; DEED; INFANCY; INSANITY; LIMITATION; MARRIAGE; PARTIES.

DISABLING STATUTES (also called the *Restraining Statutes*). The acts of 1 Eliz. c. 19, 13 Eliz. c. 10, 14 Eliz. cc. 11, 14, 18 Eliz. c. 11, and 43 Eliz. c. 29, by which the power of ecclesiastical or eleemosynary corporations to lease their lands was restricted. 2 Bla. Com. 319, 321; Co. Litt. 44 *a*; 2 Steph. Com. 735.

DISAFFIRMANCE. The act by which a person who has entered into a voidable contract, as, for example, an infant, disagrees to such contract and declares he will not abide by it.

Disaffirmance is expressed or implied:—the former, when the declaration that the party will not abide by the contract is made in terms; the latter, when he does an act which plainly manifests his determination not to abide by it: as, where an infant made a deed for his land, and on coming of age he made a deed for the same land to another; 2 D. & B. 320; Tucker v. Moreland, 10 Pet. (U. S.) 58, 9 L. Ed. 345; Inhabitants of Worcester v. Eaton, 13 Mass. 371, 375, 7 Am. Dec. 155.

DISAFFOREST. To restore to their former condition lands which have been turned into forests. To remove from the operation of the forest laws. 2 Bla. Com. 416.

DISAVOW. To deny the authority by which an agent pretends to have acted, as when he has exceeded the bounds of his authority.

It is the duty of the principal to fulfil the contracts which have been entered into by his authorized agent; and when an agent has exceeded his authority he ought promptly to disavow such act, so that the other party may have his remedy against the agent. See AGENT; PRINCIPAL.

DISBAR. In England, to expel a barrister from the bar. Wharton. This is in England a colloquial term. The particular Inn of Court, in a case requiring its action, "vacates the call" to their own Inn. The judges give and take away the "right of audience." See COUNCIL OF THE BAR, GENERAL; and BARRISTER, as to disbarring barristers; LAW SOCIETY, as to the practice of striking solicitors from the rolls in England.

In the United States, to deprive a person of the right to practise as an attorney at law.

Courts have jurisdiction and power upon their own motion without formal complaint or petition, in a proper case, to strike the name of an attorney from the roll, provided he has had reasonable notice and an opportunity to be heard; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637; In re Orton, 54 Wis. 379, 11 N. W. 584; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552.

A lawyer may be disbarred only for misdemeanor in his professional capacity, or affecting his professional character, but not for a criminal offence without formal indictment, trial and conviction. His office as attorney is property of which he cannot be deprived except by judgment of his peers and by the law of the land; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. But while this is true as a general rule, it is not an inflexible one, and there may be cases where it is proper for the court to proceed without such previous conviction; In re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. In this case the proof was clear, there was a failure to offer any counter proof, and an evasive denial of the charge which was that the attorney was engaged in a tumultuous and riotous gathering for the purpose of lynching.

Courts have no inherent power to disbar an attorney for conviction of crime in a foreign jurisdiction, where the legislature has expressly provided what convictions shall result in disbarment and has not included those in foreign jurisdictions; In re Ebbs,

150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592. In the absence of restrictive legislation, courts have an inherent power to strike from their rolls names of attorneys who are found, by reason of their conduct, unfit and unworthy; State v. Kirke, 12 Fla. 278, 95 Am. Dec. 314.

A judgment of disbarment by a divided court in another state, no order of disbarment being made, pending on appeal to a higher court, is insufficient as a ground for a revocation of an attorney's license; In re Baum, 10 Mont. 223, 25 Pac. 99.

An attorney may be disbarred for charging a judge with corrupt practices; Matter of Murray, 58 Hun 604, 11 N. Y. Supp. 336; In re Robinson, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415 (notwithstanding the withdrawal of the charge and an apology, but in view of that the attorney was merely suspended for six months); discussing a court's decision in a disrespectful way; In re Breen, 30 Nev. 164, 93 Pac. 1004; State Board of Law Examiners v. Hart, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197; embodying in his brief in the appellate court "contemptuous, unbearable and unwarranted language" designed to influence a decision of the court by base appeals to the supposed timidity of the justices; In re Philbrook, 105 Cal. 471, 38 Pac. 511, 884, 45 Am. St. Rep. 59 (where the attorney was suspended for three years); libelous charges against a judge; U. S. v. Green, 85 Fed. 857; unwarrantably charging a judge and another attorney with bribery and unprofessional conduct; People v. Green, 9 Colo. 506, 13 Pac. 514; In re Maines, 121 Mich. 603, 80 N. W. 714; or on conviction and fine in the United States court for unlawful use of the mails; People v. Weeber, 26 Colo. 229, 57 Pac. 1079; or on conviction of felony or misdemeanor involving moral turpitude; In re Kirby, 10 S. D. 414, 73 N. W. 908; or for fighting a duel and killing his antagonist, and being indicted for murder in another state; Smith v. State, 1 Yerg. (Tenn.) 228; or for procuring admission or license to practice law fraudulently; People v. Gilmore, 214 Ill. 569, 73 N. E. 737, 69 L. R. A. 701; People v. Campbell, 26 Cal. 481, 58 Pac. 591; State Board of Law Examiners v. Williams, 116 Tenn. 51, 92 S. W. 521; for gross disrespect to the court; Sharon v. Hill, 24 Fed. 726; or for any breach of fidelity to the court; In re Eldridge, 82 N. Y. 161, 37 Am. Rep. 558; Strout v. Proctor, 71 Me. 288; perjury or subornation of perjury; 10 M. & W. 28; violation of the confidence of a client; Strout v. Proctor, 71 Me. 288. So also for an advertisement as a divorce lawyer, signed or unsigned; People v. Goodrich, 79 Ill. 148; Smith v. People, 32 Colo. 251, 75 Pac. 914; People v. Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; employing runners to hunt up cases and charging fictitious expenses; Appeal of Maires, 189 Pa. 99, 41 Atl. 988; being bookmaker at races in England; 40 Am. L. Rev. 104, cited from 40 L. Jour. 856; appearing for both parties in actions involving the same issue, using legal process in an abusive and oppressive manner, and aiding and counseling bribery of a city officer; In re O'Connell, 174 Mass. 253, 53 N. E. 1001, 54 N. E. 558; receiving money from a woman to secure pardon for her husband under promise to return half of it if he did not succeed, and after failure appropriating it to his own use; In re O'Sullivan, 122 App. Div. 527, 107 N. Y. Supp. 462; bringing a divorce suit without authority and acting in fraudulent collusion with the husband to procure the divorce without knowledge of the wife; Dillon v. State, 6 Tex. 55. For any unprofessional conduct disbarment or suspension may be inflicted; In re Smith, 73 Kan. 743, 85 Pac. 584; State Board of Examiners in Law v. Reynolds, 98 Minn. 44, 107 N. W. 144; State v. Harber, 129 Mo. 271, 31 S. W. 889.

The complaint must affect the official character of the attorney; Wooldridge v. Gage, 68 Ill. 157; Ex parte Steinman, 95 Pa. 220, 40 Am. Rep. 637. The offence need not be an indictable one; but its character must be such as to show the attorney unfit to be trusted with the powers of the profession; 30 L. J. (Q. B.) 32; Baker v. Com., 10 Bush (Ky.) 592; U. S. v. Porter, 2 Cra. C. C. 60, Fed. Cas. No. 16,072; In re Austin, 5 Rawle (Pa.) 191, 28 Am. Dec. 657. But ignorance of the law is not a cause for disbarment; Bryant's Case, 24 N. H. 149.

On being convicted of felony an attorney loses his right to practise in court without an order removing him; In re Niles, 5 Daly (N. Y.) 465. Neither pardon for felony nor a satisfactory settlement with the injured party affects the court's power to disbar; Sanborn v. Kimball, 64 Me. 140; In re Davies, 93 Pa. 116, 39 Am. Rep. 729; Weeks, Attys. § 83.

Disbarment is not by way of punishment, but in the exercise by the court of its discretion to determine whether one admitted as an attorney is a proper person to be continued on the roll; In re Adriaans, 17 App. D. C. 39; In re Palmer, 15 Ohio Cir. Ct. 94; or for the protection of the court, the proper administration of justice, the public good and the protection of clients; Ex parte Finn, 32 Or. 519, 52 Pac. 756, 67 Am. St. Rep. 550; it leaves to the attorney his full rights of citizenship; In re Thatcher, 83 Ohio St. 246, 93 N. E. 895, Ann. Cas. 1912A, 810.

The enumeration in a statute of causes of disbarment or suspension does not limit the common-law power of the court in that respect and the penalty may be inflicted for other than statutory grounds; In re Smith, 73 Kan. 743, 85 Pac. 584; Bar Ass'n of Boston v. Greenhood, 168 Mass. 169, 46 N. E.

568; State v. Gebhardt, 87 Mo. App. 542; *contra*, In re Collins, 147 Cal. 8, 81 Pac. 220. The power to disbar is not arbitrary and despotic, to be exercised at the pleasure of the court or from passion, prejudice, or personal hostility, but in a sound judicial discretion; State v. Stiles, 48 W. Va. 425, 37 S. E. 620. The manner of proceeding is said to be largely in the discretion of the court, so long as it is exercised without oppression and injustice, and to be used reasonably with moderation and caution; it is judicial in its character, but the inquiry is not the trial of an action or suit, but an investigation by the court into the conduct of one of its own officers in the exercise of the disciplinary jurisdiction which it has over them; In re Durant, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539.

A proceeding for disbarment of an attorney is civil in its character and not criminal; Keithley v. Stevens, 238 Ill. 199, 87 N. E. 375, 128 Am. St. Rep. 120; State v. Fourchy, 106 La. 743, 31 South. 325; In re Burnette, 73 Kan. 609, 85 Pac. 575; In re Crum, 7 N. D. 316, 75 N. W. 257; In re Ebbs, 150 N. C. 44, 63 S. E. 190, 19 L. R. A. (N. S.) 892, 17 Ann. Cas. 592; Garfield v. U. S., 32 App. D. C. 109; In re Biggers, 24 Okl. 842, 104 Pac. 1083, 25 L. R. A. (N. S.) 622; In re Spencer, 137 App. Div. 330, 122 N. Y. Supp. 190; Wernimont v. State, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156; but in one case it was said that such a proceeding, while not strictly criminal, is *quasi* criminal; State v. Quarles, 158 Ala. 54, 48 South. 499.

Proceedings at common law for disbarment or suspension should be in the name of the state, but under a statute directing suspension for not paying over money collected, no method of proceeding being prescribed, the client for whom the money was collected is the proper party; Wilson v. Popham, 91 Ky. 327, 15 S. W. 859.

A disbarred attorney's election as attorney-general is void; Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

See ATTORNEY.

DISBURSEMENT. Money paid out by an executor, guardian, or trustee, on account of the fund in his hands. The necessary expenditures incurred in an action, and which, under the codes of procedure of some of the states, are included in the costs, are also so called. But see Wright's Adm'rs v. Wilkerson, 41 Ala. 267; Case v. Price, 9 Abb. Pr. (N. Y.) 111.

DISCEPTATIO CAUSÆ (Lat.). **In Roman Law.** The argument of a cause by the counsel on both sides. Calvinus, Lex.

DISCHARGE. The act by which a person in confinement under some legal process, or held on an accusation of some crime or misdemeanor, is set at liberty; the writing containing the order for his being so set at liberty is also called a discharge.

The discharge of a defendant, in prison under a *ca. sa.*, when made by the plaintiff, has the operation of satisfying the debt, the plaintiff having no other remedy; 4 Term 526.

But when the discharge is in consequence of the insolvent laws, or the defendant dies in prison, the debt is not satisfied. In the first case the plaintiff has a remedy against the property of the defendant acquired after his discharge, and in the last case against the executors or administrators of the debtor. Bacon, Abr. *Execution*, D; Bingham, *Execution* 266.

The word has still other uses. Thus, we speak of the discharge of a surety, whereby he is released from his liability; of a debt; of a contract; of lands, or money in the funds, from an incumbrance; of an order of a court of justice, when such order is vacated; 2 Steph. Com. 107, 161. We also speak of a discharge in bankruptcy; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; Scott v. Ellery, 142 U. S. 381, 12 Sup. Ct. 233, 35 L. Ed. 1050; Fowle v. Park, 48 Fed. 789.

DISCHARGE OF CONTRACT. A contract may be discharged in the following ways: Performance according to its terms; a breach of such a nature as to justify the innocent party in treating the contract as rescinded or as giving rise to a right of action for breach of the entire contract; rescission of a voidable contract, at the will of one party, as for fraud, mistake, duress; release; rescission by parol agreement; accord and satisfaction; cancellation and surrender; alteration (of a written contract); merger (in judgment); arbitration and award; impossibility; bankruptcy; statutes of limitation, though the latter generally only bars the remedy. A *right of action* on a contract may be discharged in any of these ways except where a breach justifies the innocent party in treating the contract as rescinded, or as giving rise to a right of action, or in the case of impossibility. Williston's Wald's Pollock on Contracts. An executed contract cannot be discharged except by release under seal or by performance, except that a promissory note or a bill of exchange stands on a different footing; 6 Exch. 851, per Parke, B.; but only, in the United States, when the note or bill has been surrendered; Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; it is said here to have become extinguished; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168.

Discharge may be by payment under the contract, or, after breach, by an agreement which is effectual as an accord and satisfaction (*q. v.*). Tender of performance, such as by delivery of goods, discharges the party;

but tender of a sum of money due under the contract does not work a discharge; the party must stand ready and willing to pay the debt, and, if sued, must pay the money into court. A substantial performance will suffice; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 608, but if the deviation is not slight, or is willful, it is otherwise; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; and one to whom a sum of money is tendered must not be called upon to make change; Anson, Contr. 349.

Discharge may be by breach, though a breach, while it always gives a right of action, does not always discharge the contract, for it may be broken in whole or in part, and if the latter, the breach may not be important enough to work a discharge, or the other party may not regard it as a breach but may continue to carry out the contract. See BREACH.

Where a contract between A and X is discharged by default of X, A may (1) consider himself exonerated from any further performance and successfully defend an action brought for non-performance; (2) sue at once upon the contract for such damages as he has sustained by the breach without being obliged to show that such performance has been done or tendered by him; (3) if he has done all or a portion of that which he promised, so as to have a claim to a money payment for such performance, he may treat such a claim as due upon a new contract arising upon the promise which is understood from the acceptance of an executed consideration; Anson, Contr. 352. Prof. Huffcut in his edition of Anson's Contr. points out that the first two propositions are illustrated in Davison v. Von Lingen, 113 U. S. 40, 5 Sup. Ct. 346, 28 L. Ed. 885; and that the second is discussed in Lake Shore & M. S. Ry. Co. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; also that A may elect and keep the contract for both parties, thus giving X a period for repentance; Kadish v. Young, 108 Ill. 170, 43 Am. Rep. 548; but he cannot thereby increase the damages; Dillon v. Anderson, 43 N. Y. 231.

A party may break a contract by renouncing his liabilities under it, or by making it impossible that he should fulfill them, or by failing totally or partially to perform what he has promised. As to anticipatory breaches, see BREACH.

Where one party has, before performance is due, created an impossibility of performance, this is equivalent to a renunciation of the contract; Anson, Contr. 356; U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46. So where, during performance, one party has made it impossible for the other to perform; Western Union Telegraph Co. v. Semmes, 73 Md. 9, 20 Atl. 127; Woodberry v. Warner, 53 Ark. 488, 14 S. W. 67; Bing. 14; [1895] 2 Q. B. 70.

As to breaches of contracts containing conditional and independent promises, see BREACH.

A contract may contain the elements of its own discharge, which may be by non-fulfilment of a condition precedent, by the occurrence of a condition subsequent, or by the exercise of an option to determine the contract reserved to one of the parties by its terms; Anson, Contr. 338. Of the first, a case in L. R. 7 Exch. 7, is in point, where a horse was warranted to have been hunted with the Bicester hounds and if it did not answer to its description, the buyer might return it. It did not answer to its description and had never been so hunted. Held, that the buyer might return it, though injured without his fault; the sale vested the property in the buyer subject to a right of rescission in a particular event; the depreciation in value must fall upon the person in whom the property revested. In such case the buyer may refuse to receive the article if he discovers that the term is not fulfilled; Ganson v. Madigan, 13 Wis. 67; or on discovery he may return it; but not, it was held, if injured while in his possession; Ray v. Thompson, 12 Cush. (Mass.) 281, 59 Am. Dec. 187. Instances of conditions subsequent are bonds defeasible upon a condition expressed therein and the "excepted risks" of charter parties.

If a statute requires the contract to be in writing, there is authority for saying that a discharge may be by word of mouth; 5 B. & A. 66; Anson, Contr. 343; Wulschner v. Ward, 115 Ind. 219, 17 N. E. 273. "But if the discharge be not a simple rescission, but such an implied discharge as arises from the making of a new agreement inconsistent with the old one, then there must be writing in accordance with the requirements of the statute;" Anson, Contr. 343; Hill v. Blake, 97 N. Y. 216; Burns v. Real Estate Co., 52 Minn. 31, 53 N. W. 1017; *contra*, Stearns v. Hall, 9 Cush. (Mass.) 31.

See ESTOPPEL.

DISCHARGE OF A JURY. See JURY.

DISCLAIMER. A disavowal; a renunciation; as, for example, the act by which a patentee renounces part of his title of invention.

Of Estates. The act by which a party refuses to accept an estate which has been conveyed to him. Thus, a trustee is said to disclaim who releases to his fellow-trustees his estate, and relieves himself of the trust; 1 Hill, R. P. 354; Watson v. Watson, 13 Conn. 83; Jackson v. Richards, 6 Cow. (N. Y.) 617.

Of Tenancy. The act of a person in possession, who denies holding the estate of the person who claims to be the owner. 2 Nev.

& M. 672. An affirmation, by pleading or otherwise, in a court of record, that the reversion is in a stranger. It works a forfeiture of the lease at common law; Co. Litt. 251; 1 Cruise, Dig. 109; but not, it is said, in the United States; 1 Washb. R. P. 93. Equity will not aid a tenant in denying his landlord's title; Peyton v. Stith, 5 Pet. (U. S.) 486, 8 L. Ed. 200.

In Patent Law. A declaration in writing, filed under the patent laws, by an inventor whose claim as filed covers more than that of which he was the original inventor, renouncing such parts as he does not claim to hold. See PATENT.

In Pleading. A renunciation by the defendant of all claim to the subject of the demand made by the plaintiff.

IN EQUITY. It must, in general be accompanied by an answer; Ellsworth v. Curtis, 10 Paige, Ch. (N. Y.) 105; 2 Russ. 458; 2 Y. & C. 546; Worthington v. Lee, 2 Bland, Ch. (Md.) 678; and always when the defendant has so connected himself with the matter that justice cannot be done otherwise; 9 Sim. 102. It must renounce all claim in any capacity and to any extent; Bentley v. Cowman, 6 G. & J. (Md.) 152. It may be to part of a bill only, but it must be clearly a separate and distinct part of the bill; Story, Eq. Pl. § 839. A disclaimer may, in general, be abandoned, and a claim put in upon subsequent discovery of a right; Cooper, Eq. Pl. 310.

AT LAW. *In real actions*, a disclaimer of tenancy or estate is frequently added to the plea of non-tenure; Littleton § 391; Porter v. Rummery, 10 Mass. 64. The plea may be either in abatement or in bar; Prescott v. Hutchinson, 13 Mass. 439; Olney v. Adams, 7 Pick. (Mass.) 31; as to the whole or any part of the demanded premises; Stearns, Real Act. 193.

At common law it is not pleaded as a bar to the action, nor is it strictly a plea in abatement, as it does not give the plaintiff a better writ. It contains no prayer for judgment, and is not concluded with a verification. It is in effect an offer by the plaintiff to yield to the claim of the demandant and admit his title to the land; Stearns, Real Act. 193. It cannot, in general, be made by a person incapable of conveying the land. It is equivalent to a judgment in favor of the demandant, except when costs are demanded; Prescott v. Hutchinson, 13 Mass. 439; in which case there must be a replication by the demandant; Favour v. Sargent, 6 Pick. (Mass.) 5; no formal replication is requisite; Bratton v. Mitchell, 5 Watts (Pa.) 70. See 1 Washb. R. P. 93.

DISCONTINUANCE. In Pleading. The chasm or interruption which occurs when no answer is given to some material matter in the preceding pleading, and the opposite party neglects to take advantage of such omission. See Com. Dig. *Pleader*, W.; Bac. Abr. *Pleas*, P. It is distinguished from insufficient pleading by the fact that the pleading does not profess to answer all the preceding pleading in a case of discontinuance; 1 Wms. Saund. 28, n. It constitutes error, but may be cured after verdict, by 32 Hen. VIII. c. 80, and after judgment by *nil dicit*, confession, or *non sum informatus* under 4 Anne, c. 16. See, generally, 1 Saund. 28; 4 Rep. 62 *a*; Taft v. Transp. Co., 56 N. H. 414.

In Practice. The chasm or interruption in proceedings occasioned by the failure of the plaintiff to continue the suit regularly from time to time, as he ought; 3 Bla. Com. 296; Germania Fire Ins. Co. v. Francis, 52 Miss. 467, 24 Am. Rep. 674; Taft v. Transp. Co., 56 N. H. 416. The entry upon record of a discontinuance has the same effect. The plaintiff cannot discontinue after demurrer joined and entered, or after verdict or writ of inquiry, without leave of court; Cro. Jac. 35; 1 Lilly, Abr. 473; 8 C. C. App. 437; but see Lowman v. West, 7 Wash. 407, 35 Pac. 130; although he can notwithstanding the interposition of a counterclaim; Felix v. Vanslooten, 17 N. Y. Sup. 844; and is generally liable for costs when he discontinues, though not in all cases. Leave to discontinue will be refused when proofs had been taken and closed at large expense to defendant, when no other ground is shown except a desire to relitigate in a new suit the questions involved; American Steel & Wire Co. v. Mayer & Englund Co., 121 Fed. 127. See Hart v. Storey, 1 Johns. (N. Y.) 143; Ludlow v. Hackett, 18 Johns. (N. Y.) 252; Lackey v. McDonald, 1 Cai. (N. Y.) 116; Thurman v. James, 48 Mo. 235; Etheridge v. Osborn, 12 Wend. (N. Y.) 402; Com. Dig. *Pleader* (W 5); Bac. Abr. *Plea* (5 P).

DISCONTINUANCE OF ESTATES. An alienation made or suffered by the tenant in tail, or other tenant seised in *autre droit*, by which the issue in tail, or heir, or successor, or those in reversion or remainder, are driven to their action, and cannot enter.

The term discontinuance is used to distinguish those cases where the party whose freehold is ousted can restore it only by action, from those in which he may restore it by entry; Co. Litt. 325 *a*; 3 Bla. Com. 171; Ad. Ej. 35; Bac. Abr.; Viner, Abr.

It was a survival of the old law which rigidly protected seizure even against the true owner. 2 Holdsw. Hist. E. L. 496.

Discontinuances of estates, prior to their express abolition, had long become obsolete, and they are now abolished by 3 & 4 Will. IV. c. 27, and 8 & 9 Vict. c. 106; Moz. & W. Dic.; 1 Steph. Com. 510, n.

DISCONTINUOUS SERVITUDE. An easement made up of repeated acts instead of

one continuous act, such as right of way, drawing water, etc. See EASEMENT.

DISCOUNT. Interest reserved from the amount loaned at the time of making a loan. An allowance sometimes made for prompt payment. As a verb, it is used to denote the act of giving money for a bill of exchange or promissory note, deducting the interest. Dunkle v. Renick, 6 Ohio St. 527; Niagara County Bank v. Baker, 15 Ohio St. 87; Philadelphia Loan Co. v. Towner, 13 Conn. 249; State v. Savings Institution, 48 Mo. 189; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Saltmarsh v. Bank, 14 Ala. 677; Weckler v. Bank, 42 Md. 592, 20 Am. Rep. 95.

Discounting means to take interest in advance; McLean v. Bank, 3 McLean 597, Fed. Cas. No. 8,888. It is a mode of loaning money; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; Weckler v. Bank, 42 Md. 592, 20 Am. Rep. 95. As to whether discounting includes buying and selling, the cases are not uniform. It is held to be another name for buying at a discount; Tracy v. Talmage, 18 Barb. (N. Y.) 456; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 5 L. Ed. 631; Pape v. Bank, 20 Kan. 450, 27 Am. Rep. 183; *contra*, First Nat. Bank of Rochester v. Pierson, 24 Minn. 141, 31 Am. Rep. 341; Niagara County Bank v. Baker, 15 Ohio St. 87. See 16 L. R. A. 223, note.

In an ordinary commercial document, discount means rebate of interest and not "true" or mathematical discount; [1896] 2 Ch. 320.

A discount by a bank means *ex vi termini* a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. It is the difference between the price and the amount of the debt, the evidence of which is transferred; National Bank v. Johnson, 104 U. S. 276, 26 L. Ed. 742; Fleckner v. Bank, 8 Wheat. (U. S.) 338, 350, 5 L. Ed. 631.

The taking of legal interest in advance is not usurious; but it is only allowed for the benefit of trade and where the bill or note discounted is meant for circulation and is for a short term; New York Firemen Ins. Co. v. Ely, 2 Cow. (N. Y.) 678; President, etc., of Bank of Utica v. Wager, 2 Cow. (N. Y.) 712; Bank of Utica v. Phillips, 3 Wend. (N. Y.) 408.

There is a difference between *buying* a bill and *discounting* it. The former word is used when the seller does not indorse the bill and is not accountable for its payment; McElwee v. Collins, 20 N. C. 350; but the discount of negotiable paper at more than a lawful rate of interest includes purchase of such paper as well as loans; Danforth v. Bank, 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622.

The *bona fide* sale of a note, made in good faith for full value in its inception, is valid and not usurious, but if in its origin it was only a nominal negotiation, it is invalidated by a subsequent usurious transaction; Nichols v. Fearson, 7 Pet. (U. S.) 103, 8 L. Ed. 623; Junction R. Co. v. Bank, 12 Wall. (U. S.) 226, 20 L. Ed. 385.

The discount of a note at more than legal interest, for an indorser who was neither maker nor payee, is not usurious; Gaul v. Willis, 26 Pa. 259; Moore v. Baird, 30 Pa. 138; Cram v. Hendricks, 7 Wend. (N. Y.) 569 (but it must be a *bona fide* sale and not a device to cover usury and it may be indorsed by the transferor; French v. Grindle, 15 Me. 163; Roark v. Turner, 29 Ga. 455; National Bank of Michigan v. Green, 33 Ia. 140); but this rule only applies to business paper, since the sale of accommodation paper at a discount of more than legal interest is usurious; Belden v. Lamb, 17 Conn. 441; in some cases it is held that if the vendor indorses or guarantees or otherwise becomes liable for the payment of the bill or note, the transaction is usurious; National Bank v. Johnson, 104 U. S. 271, 26 L. Ed. 742; Cowles v. McVickar, 3 Wis. 725, where, however, it was also held that the indorsement was valid to pass a good title to the holder as against the maker though usurious as against the indorser; the note, being valid in its inception, was not vitiated by the subsequent transaction except as against the indorser. The last ruling, however, was said to be *obiter dictum*, but, the question arising for adjudication, the view was approved and the subsequent case so decided; Armstrong v. Gibson, 31 Wis. 61, 11 Am. Rep. 599.

The discounting of negotiable paper under the national bank act is synonymous with loans; National Bank v. Johnson, 104 U. S. 271, 26 L. Ed. 742, citing Niagara County Bank v. Baker, 15 Ohio St. 68, to the effect that to discount paper is "only a mode of loaning money with the right to take the interest allowed by law in advance." See NATIONAL BANKS.

Where in an act of incorporation the exercise of banking powers was prohibited, it was held that thereby the discounting of notes was forbidden; United German Bank v. Katz, 57 Md. 128, 139; Sewell, Banking.

The true discount for a given sum, for a given time, is such a sum as will in that time amount to the interest of the sum to be discounted. Wharton.

In Practice. A set-off or defalcation in an action. Viner, Abr. *Discount.* But see Trabue's Ex'r v. Harris, 1 Metc. (Ky.) 597.

In common-law actions there was a plea of discount, but it is little used. In Delaware, where the common-law pleading is closely adhered to and short pleas are frequently used, it was said that there was

never any definite idea connected with the plea of discount in the Delaware practice; that they could not "give it the force or meaning of a plea of set-off." Glazier v. McCallister, 5 Harring. (Del.) 41. Hence that plea is rather intended for use when matter which constitutes a deduction or defalcation of or from the plaintiff's claim is introduced to reduce it.

DISCOVERT. Not covert; unmarried. The term is applied to a woman unmarried, or widow,—one not within the bonds of matrimony.

DISCOVERY. The act of finding an unknown country.

The nations of Europe adopted the principle that the discovery of any part of America gave title to the government by whose subjects or by whose authority it was made, as against all European governments. This title was to be consummated by possession; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; Martin v. Waddell, 16 Pet. (U. S.) 367, 10 L. Ed. 997; 2 Washb. R. P. 518.

By the law of nations, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest; Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

An invention or improvement. See PATENT. Also used of the disclosure by a bankrupt of his property for the benefit of creditors.

In Practice. The disclosure of facts resting in the knowledge of the defendant, or the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in some other suit or proceeding.

It was originally an equitable form of procedure, and a bill of discovery, strictly so called, was brought to assist parties to suits in other courts. Every bill in equity is in some sense a bill of discovery, since it seeks a disclosure from the defendant, on his oath of the truth of the circumstances constituting the plaintiff's case as propounded in his bill; Story, Eq. Jur. § 1483; but the term is technically applied as defined above. See De Wolf v. De Wolf, 4 R. I. 450. Many important questions have arisen out of the exercise of this power by equity; but these are of comparatively little practical importance in England and many of the states, where parties may be made witnesses and compelled to produce books and papers in courts of law.

Such bills are greatly favored in equity, and are sustained in all cases where some well-founded objection does not exist against the exercise of the jurisdiction; Story, Eq. Jur. § 1488; Skinner v. Judson, 8 Conn. 528, 21 Am. Dec. 691; Wolf v. Wolf's Ex'r, 2 H. & G. (Md.) 382, 18 Am. Dec. 313. Some of the more important of the objections are,—*first*, that the subject is not cognizable in any municipal court of justice; Story, Eq. Jur. § 1489; *second*, that the court will not lend its aid to obtain a discovery for the particular court for which it is wanted, where the court can itself compel a discovery; 2 Ves. 451; Fitzhugh v. Everingham, 2 Edw. Ch. (N. Y.) 605; Wheeler v. Wadleigh, 37 N. H. 55; *third*, that the plaintiff is not entitled by reason of personal disability; *fourth*, that the plaintiff has no title to the character in which he sues; Lansing v. Pine, 4 Paige, Ch. (N. Y.) 639; *fifth*, that the value of the suit is beneath the dignity of the court; *sixth*, that the plaintiff has no interest in the subject-matter or title to the discovery required; 2 Bro. C. C. 321; Coombs v. Warren, 17 Me. 404; Marion Nat. Bank v. Abell's Adm'x, 88 Ky. 428, 11 S. W. 300, 10 Ky. L. Rep. 980; or that an action for which it is wanted will not lie; 3 Bro. C. C. 155; 1 Bligh, N. S. 120; 3 Y. & C. 255; *seventh*, that the defendant is not answerable to the plaintiff, but that some other person has a right to call for the discovery; *eighth*, that the policy of the law exempts the defendant from the discovery, as on account of the peculiar relations of the parties; 2 Y. & C. 107; City Bank v. Bangs, 3 Paige, Ch. (N. Y.) 36; in case of arbitrators; 2 Vern. 380; 3 Atk. 529; *ninth*, that the defendant is not bound to discover his own title; Bisph. Eq. 561; 1 Vern. 105; Mange v. Guenat, 6 Whart. (Pa.) 141; see Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977; or that he is a *bona fide* purchaser without notice of the plaintiff's claim; 8 Sim. 153; McNeil v. Hill, 5 Mas. 269, Fed. Cas. No. 8,915; Wood v. Mann, 1 Sumn. 506, Fed. Cas. No. 17,951; Vattier v. Hinde, 7 Pet. (U. S.) 252, 8 L. Ed. 675; Varick v. Briggs, 6 Paige, Ch. (N. Y.) 323; and see Hart v. Bank, 33 Vt. 252; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371; *tenth*, that the discovery is not material in the suit; 2 Ves. 491; Gelston v. Hoyt, 1 Johns. Ch. (N. Y.) 548; *eleventh*, that the defendant is a mere witness; 2 Bro. C. C. 332; Geer v. Kissom, 3 Edw. Ch. (N. Y.) 129; but see 2 Ves. 451; 1 Sch. & L. 227; 11 Sim. 305; Vermilyea v. Bank, 1 Paige, Ch. (N. Y.) 37; *twelfth*, that the discovery called for would criminate the defendant; Noyes v. Thorpe, 73 N. H. 481, 62 Atl. 787, 12 L. R. A. (N. S.) 636, where a demurrer to a bill in aid of an action for libel was sustained upon that ground, the discovery sought being the name of the author of the article complained of. In L. R. 24 Q. B. D. 445, note, the English court of appeal refused to compel the same discovery on the ground that it was a "fishing" interrogatory.

The suit must be of a purely civil nature, and may not be a criminal prosecution; Lofft 1; 19 How. St. Tr. 1154; Broadbent v. State, 7 Md. 416; a penal action; 1 Keen 329; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; a suit partaking of this character; U. S. v. Bank, 1 Pet. (U. S.) 100, 7 L. Ed. 69; Northrop v. Hatch, 6 Conn. 361; Higdon v. Heard, 14 Ga. 255; or a case involving moral turpitude. See 1 Bligh, N. S. 96; 2 E. L. & Eq. 117; 5 Madd. 229; 11 Beav. 380; 1 Sim. 404; Pleasants v. Glasscock, 1 S. & M. Ch. (Miss.) 17. In a civil action for conspiracy a discovery of material documents cannot be refused merely because they tend to crim-

inate one or to involve him in a criminal charge; [1906] A. C. 434; and in a suit against a newspaper proprietor for both libel and conspiracy the discovery cannot be avoided on the ground either of privilege or self-crimination; [1899] 2 Ir. Rep. Q. B. 199.

Workmen pledged to secrecy and employed in a factory in which the business is conducted in private, to secure secrecy as to the method of manufacture, will not be compelled, in a suit against their employer, to disclose such secrets; Dobson v. Graham, 49 Fed. 17.

A corporation not a party to a suit will not be compelled to open its records which it is claimed will disclose something of importance to the litigation; Henry v. Ins. Co., 35 Fed. 15; nor is an adverse examination of a defendant before trial allowable for the purpose of discovering a cause of action; Britton v. MacDonald, 3 Misc. 514, 23 N. Y. Supp. 350; Nathan v. Whitehill, 67 Hun 398, 22 N. Y. Supp. 63.

An infant party to an action cannot be compelled to make discovery of documents; [1892] 2 Q. B. 178.

The court has power to allow a party to an action to take photographs of documents in the possession of the other party; [1893] 2 Q. B. 191.

It seems to be settled that a bill will lie against a corporation and its officers to compel a discovery from the officers, to aid a plaintiff or a defendant in maintaining or defending a suit brought against or by the corporation alone; McComb v. R. Co., 7 Fed. 426, 19 Blatchf. 69; 1 Ch. D. 71; Post v. R. Co., 144 Mass. 347, 11 N. E. 540, 59 Am. Rep. 86. Since it answers under its seal and not upon oath, there can be no discovery by a corporation unless its officers or agents who know the facts are made parties; Manchester Fire Assur. Co. v. Agricultural Works, 38 Fed. 378; Vaughn v. R. Co., 1 Flip. 621, Fed. Cas. No. 16,898; but an officer of a corporation cannot be joined as defendant in a bill of discovery where he did not derive the desired information in his official capacity; McComb v. R. Co., 7 Fed. 426.

In the sense in which the word is used with respect to equity suits generally, there was, until a comparatively recent period, a failure to recognize the distinction between the two functions of an answer in chancery, viz.: discovery and defence. These two were in the civil law entirely separated, while in chancery they were indiscriminately commingled. The distinction is very clearly put in Langdell's Equity Pleadings, 2d ed. § 68, where the author attributes to Wigram (Disc., 2d ed. § 17) and Hare (Disc. 223) the simultaneous notice of what he terms "the unnatural union." The distinction is important because, when it is borne in mind, the "rule for determining what discovery the defendant must give in his answer becomes simple and uniform. He must answer categorically every material allegation and charge in the bill, unless he has some objection which would be good in the mouth of a witness." In a note to his second edition, Professor Langdell characterizes this rule as too narrow, and sets forth cases in which a defendant may object to answer as to matters which as a witness he could not. Among these are the cases of a defendant against whom no case is made and no relief prayed; one joined because he has a conflicting claim against another defendant, which must be set up by cross-bill; or where a defendant may refuse to answer parts of the bill relating wholly to other defendants. With respect to particular cases the rule must be deduced from the decisions most nearly applicable, and the cases will be found to be collected and examined with discrimination in the work cited. See also Ad. Eq. b. 1, ch. 1.

A bill in equity which waives an oath to the answer is demurrable; Starkweather v. Williams, 21 R. I. 55, 41 Atl. 1003; and the complainant cannot have discovery upon such a bill; Tillinghast v. Chace, 121 Fed. 435 (where the cases are collected and those *contra* criticised); Huntington v. Saunders, 120 U. S. 78, 7 Sup. Ct. 356, 30 L. Ed. 580; Ward v. Peck, 114 Mass. 121; Torrent v. Rodgers, 39 Mich. 85; Stettauer v. Dwight, 54 Ill. App. 194; otherwise if the bill prays both discovery and relief; Manley v. Mickle, 55 N. J. Eq. 563, 37 Atl. 738. Where the oath is waived in a bill of discovery, the defendant may decline to answer, but if he undertakes to answer, he must state whether he had knowledge or information, but not his belief; Victor G. Bloede Co. v. Carter, 148 Fed. 127. A bill of discovery will not lie against a mere witness; Post v. Boardman, 10 Paige Ch. (N. Y.) 580; as a general rule; Howell v. Ashmore, 9 N. J. Eq. 82, 57 Am. Dec. 371. Nor is there equitable jurisdiction in a suit where discovery and relief are sought, but the only ground for equitable relief is discovery of evidence to be used in enforcing a purely legal demand; Safford v. Mfg. Co., 120 Fed. 480, 56 C. C. A. 630. A simple bill of discovery will now hardly be resorted to in the United States courts because unnecessary when state statutes available in those courts furnish the remedies formerly sought only in equity; In re Boyd, 105 U. S. 647, 26 L. Ed. 1200; Scott v. Neely, 140 U. S. 109, 11 Sup. Ct. 712, 35 L. Ed. 358; or the relief sought is available under U. S. R. S. § 724, providing for production of books, etc., in suits at law.

Statutory provisions enlarging the jurisdiction of courts of law, such as to provide for discovery at law, have been held to be merely cumulative and not to abridge the jurisdiction of equity to compel a discovery (unless otherwise specifically provided by statute), even though, by enlargement of their jurisdiction, the courts of law could afford

similar relief; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Kurtz v. Brown, 152 Fed. 372, 81 C. C. A. 498, 11 Ann. Cas. 576; 3 K. & J. 433; Union Passenger Ry. Co. v. Mayor, etc., 71 Md. 238, 17 Atl. 933; Reynolds v. Fibre Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535; Miller v. Casualty Co., 61 N. J. Eq. 110, 47 Atl. 509; Clark v. Locomotive Works, 24 R. I. 307, 53 Atl. 47; Nixon v. Lumber Co., 150 Ala. 602, 43 South. 805, 9 L. R. A. (N. S.) 1255. But in other jurisdictions (where possibly the distinctive systems of law and equity are less closely adhered to) it is held otherwise; Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135; Baylis v. Mfg. Co., 59 App. Div. 576, 69 N. Y. Supp. 693; Bond v. Worley, 26 Mo. 253; Warren v. Baker, 43 Me. 570; Chapman v. Lee, 45 Ohio St. 356, 13 N. E. 736; Riopelle v. Doellner, 26 Mich. 102; Cleveland v. Burnham, 60 Wis. 16, 17 N. W. 126, 18 N. W. 190; Hall v. Joiner, 1 S. C. 186 (where the decision is put upon the ground that, in that state, the jurisdiction of equity for want of an adequate remedy at law, rests on a statute); though probably, where separate courts of law and equity are maintained, it is generally held that the equitable remedy is not abridged; 1 Pom. Eq. Jur. § 193.

Courts of equity which have once obtained jurisdiction for purposes of discovery will dispose of a cause finally, if proper for the consideration of equity, though the remedy at law is fully adequate; 1 Story, Eq. Jur. 64 *k;* Chichester's Ex'r v. Vass' Adm'r, 1 Munf. (Va.) 98, 4 Am. Dec. 531; Traip v. Gould, 15 Me. 82; Wood v. Hudson, 96 Ala. 469, 11 South. 530.

DISCREDIT. To deprive one of credit or confidence.

In general, a party may discredit a witness called by the opposite party, who testifies against him, by proving that his character is such as not to entitle him to credit or confidence, or any other fact which shows he is not entitled to belief. It is clearly settled, also, that the party voluntarily calling a witness cannot afterwards impeach his character for truth and veracity; 3 B. & C. 746; Chism v. State, 70 Miss. 742, 12 South. 852; Erwin v. State, 32 Tex. Cr. R. 519, 24 S. W. 904. If a party call a witness who turns out unfavorable, he may call another to prove the same point; 2 Campb. 556; 4 B. & A. 193; Meyer Bros. Drug Co. v. McMahan, 50 Mo. App. 18. The rule that a party cannot discredit his own witness is not violated by proving facts contrary to the testimony of such witness; Chester v. Wilhelm, 111 N. C. 314, 16 S. E. 229.

Where the evidence of a witness is a surprise to the party calling him, the trial judge, in the exercise of discretion, may permit him to be cross-examined by such party to show that his previous statements and conduct were at variance with his testimony; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 418, 40 Am. St. Rep. 3. Proof of contradictory statements by one's own witness, voluntarily called and not a party, is in general not admissible, although the party calling him may have been surprised by them; but he may show that the facts were not as stated, although these may tend incidentally to discredit the witness; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

DISCREPANCY. A difference between one thing and another, between one writing and another; a variance.

A material discrepancy exists when there is such a difference between a thing alleged and a thing offered in evidence as to show they are not substantially the same: as, when the plaintiff in his declaration for a malicious arrest averred that "the plaintiff, in that action, did not prosecute his said suit, but therein made default," and the record was that he obtained a rule to discontinue.

An immaterial discrepancy is one which does not materially affect the cause: as, where a declaration stated that a deed bore date in a certain year of our Lord, and the deed was simply dated "March 30, 1701." 2 Salk. 658; Henry v. Brown, 19 Johns. (N. Y.) 49; Wade v. Grimes, 7 How. (Miss.) 428; Drake v. Fisher, 2 McLean, 69, Fed. Cas. No. 4,061; 2 B. & Ald. 301.

DISCRETION. That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

"Discretion when applied to a court of justice means sound discretion guided by law." 4 Burr. 529. Judicial discretion is a mere legal discretion—a discretion in discerning the course presented by law; and what that has discerned it is the duty of the court to follow. Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204. "The discretion is not wilful or arbitrary, but legal [to set aside a judicial sale], and though its exercise be not purely a matter of law, yet it involves a matter of law or legal inference." Lovinier v. Pearce, 70 N. C. 167. "A legal discretion is one that is regulated by well known and established principles of law." Detroit Tug & Wrecking Co. v. Circuit Judge, 75 Mich. 360, 42 N. W. 968.

Bishop on Mar. & Div. § 830, defines it as "denoting a sort of individual liberty, a sort of liberty in the collective judges and an adherence to legal principles blended in such a way as shall constitute an established

course of justice bending to the circumstances of the case instead of requiring the cases to bend to it."

"But if the word discretion in this connection [injunction] is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, at his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power;" Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

It would tend to clearness and exactness if discretion were used only with reference to those matters where the action of the trial judge is final; Jenkins v. Brown, 21 Wend. (N. Y.) 454.

Whether or not a particular question is one of discretion is in almost every case a matter of settled law, and the individual court or judge has no power to place it within or without that category. It is only when a question arises which, according to precedent, is treated as such that the judicial discretion is invoked and its exercise cannot be reviewed.

The discretion of a judge is said by Lord Camden to be the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion to which human nature is liable. *Optima lex quæ minimum relinquit arbitrio judicis: optimus judex qui minimum sibi.* Bacon, Aph.; 2 Bell, Suppl. to Ves. 391; Toullier, liv. 3, n. 338; 1 Lilly, Abr. 447. But the prevailing opinion is that discretion must not be arbitrary, fanciful, and capricious; it must be legal and regular, governed by rule, not by humor; 4 Burr. 25; Judges of Oneida Common Pleas v. People, 18 Wend. (N. Y.) 99.

Many matters relating to the trial such as the order of giving evidence, etc., are properly left mainly or entirely to the discretion of the judge; Utsey v. R. Co., 38 S. C. 399, 17 S. E. 141; Winklemeir v. Daiber, 92 Mich. 621, 52 N. W. 1036; Coffin v. Hydraulic Co., 136 N. Y. 655, 32 N. E. 1076; Northern Pac. R. Co. v. Charless, 51 Fed. 562, 2 C. C. A. 380; Estis v. Jackson, 111 N. C. 145, 16 S. E. 7, 32 Am. St. Rep. 784.

Decisions upon matters within the absolute discretion of a court are not reviewable in courts of appeal; Harrington v. Ry. Co., 157 Mass. 579, 32 N. E. 955; Perry v. Shedd, 159 Mass. 200, 34 N. E. 174; Pittsburgh, C. & St. L. R. Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; but the discretion in granting or refusing a writ of mandamus must be exercised under legal rules, and is reviewable in an appellate court; People v. Common Council of Syracuse, 78 N. Y. 56. Such a writ will not be granted to regulate the exercise of discretion on the part of an official; State v. Van Ness, 15 Fla. 317; Ex parte Harris, 52 Ala. 87, 23 Am. Rep. 559.

A testator may leave it to his executor to construe the provisions of his will, and to decide doubtful questions concerning his intentions; American Board of Com'rs of Foreign Missions v. Ferry, 15 Fed. 696; and the donor of a power may leave its execution to the discretion of the donee; 4 D. J. & S. 614.

In Criminal Law. The ability to know and distinguish between good and evil,—between what is lawful and what is unlawful.

In most modern criminal statutes the amount of punishment is usually left to the discretion of the court. See INDETERMINATE SENTENCES.

As to the age at which children are said to arrive at discretion, see AGE; DOLI CAPAX.

DISCRETIONARY TRUSTS. Those which cannot be duly administered without the application of a certain degree of prudence and judgment: as, when a fund is given to trustees to be distributed in certain charities to be selected by the trustees.

DISCRIMINATION. This word is now generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike. It is applied to inequality in both rates of fare and rates of freight, and may also be practised by inequality in the facilities afforded to different consignors. See FACILITIES; INTERSTATE COMMERCE COMMISSION; RATES; REBATE; RAILROADS.

As to discrimination in the distribution of cars to shippers, see RAILROADS.

DISCUSSION. In Civil Law. A proceeding on the part of a surety by which the property of the principal debtor is made liable before resort can be had to the sureties: this is called the *benefit of discussion.* This is the law in Louisiana. See Domat, 3, 4, 1–4; Burge, Suretyship 329, 343, 348; 5 Toullier 544; 7 *id.* 93.

DISENTAILING ASSURANCE. A deed executed under stat. 3 & 4 Will. 4, c. 74, whereby the tenant in tail is enabled to alienate the land for an estate in fee-simple or any less estate, and thus destroy the entail. The deed must be duly enrolled in the court of chancery within six months of its execution; 1 Steph. Com. 250, 575.

DISFRANCHISEMENT. The act of depriving a member of a corporation of his right as such, by expulsion.

It differs from amotion (*q. v.*), which is applicable to the removal of an officer from office, leaving him his rights as a member; Willc. Corp. n. 708; Ang. & A. Corp. 237; 10 H. L. Cas. 404; State v. Adams, 44 Mo. 570; White v. Brownell, 2 Daly (N. Y.) 329.

The power of disfranchisement extends only to societies not owning property or organiz-

ed for gain; unless the power be given by the charter; Evans v. Philadelphia Club, 50 Pa. 107; Green's Brice, *Ultra Vires* 45; 41 L. T. N. S. 490; People v. Board of Trade of Chicago, 80 Ill. 134; People v. New York Cotton Exchange, 8 Hun (N. Y.) 216; Ang. & A. Corp. § 410. It extends to the expulsion of members who have proved guilty of the more heinous crimes, as to which there must first be a conviction by a jury; Com. v. Benevolent Society, 2 Binn. (Pa.) 448, 4 Am. Dec. 4; Society for Visitation of Sick v. Com., 52 Pa. 125, 91 Am. Dec. 139. It is said that the power exists where members do not observe certain duties to the corporation, especially where the breach tends directly or indirectly to the forfeiture of the corporate rights, and franchises, and the destruction of the corporation; Green's Brice, *Ultra Vires* 45; People v. Board of Trade of Chicago, 45 Ill. 112; Hussey v. Gallagher, 61 Ga. 86; Sale v. Baptist Church, 62 Ia. 26, 17 N. W. 143, 49 Am. Rep. 136. A member is entitled to notice of the charges against him, and to an opportunity to be heard; Evans v. Philadelphia Club, 50 Pa. 107; People v. Sailors' Snug Harbor, 54 Barb. (N. Y.) 532; State v. Board of Management, 40 N. J. L. 295; People v. Benevolent Society, 24 How. Pr. (N. Y.) 216; State v. Adams, 44 Mo. 570; Gregg v. Medical Society, 111 Mass. 185, 15 Am. Rep. 24. See ASSOCIATION; EXPULSION.

Except in cases authorized by constitutional provisions, a citizen entitled to vote cannot be disfranchised, or deprived of his right by any action of the public authorities, and a law having such effect is void; Cooley, Const. Lim. 776; as an act creating a new county and leaving part of its territory unorganized so that the voters of that portion could not participate in the election; People v. Maynard, 15 Mich. 471. A citizen who has been convicted of bribery at an election and has undergone the punishment is qualified to vote, without a pardon; Osborne v. County Court, 68 W. Va. 189, 69 S. E. 470, 32 L. R. A. (N. S.) 418.

The present use of the word in England is the depriving an individual of his right of voting, or a constituency of their right of returning a member to parliament. May's Parl. Pr.

DISGRACE. Ignominy; shame; dishonor. No witness is required to disgrace himself. 13 How. St. Tr. 17, 334; 16 *id.* 161. See CRIMINATE.

DISGUISE.

A person lying in ambush is not in disguise within the meaning of a statute declaring a county liable in damages to the next of kin of any one murdered by persons in disguise; Dale County v. Gunter, 46 Ala. 118, 142.

DISHERISON. Disinheritance; depriving one of an inheritance. Obsolete. See DISINHERISON.

DISHERITOR. One who disinherits, or puts another out of his freehold. Obsolete.

DISHONOR. A term applied to the nonfulfillment of commercial engagements. To dishonor a bill of exchange, or a promissory note, is to refuse or neglect to pay it at maturity.

The holder is bound to give notice to the parties to such instruments of its dishonor; and his laches will discharge the indorsers; Chit. Bills 256, 394; 1 Pars. N. & B. 506, 520.

DISINHERISON. In Civil Law. The act of depriving a forced heir of the inheritance which the law gives him.

In Louisiana, forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, for just cause. The disinherison must be made in proper form, by name and expressly, and for a just cause; otherwise it is null. See FORCED HEIRS; LEGITIME.

DISINHERITANCE. The act by which a person deprives his heir of an inheritance, who, without such act, would inherit.

By the common law (since the statute of wills) any one may give his estate to a stranger, and thereby disinherit his heir apparent. Cooper, Justin. 495; 7 East 106.

An heir cannot be disinherited by mere words of exclusion, but the entire property of the testator must be given to some one else by express words or by necessary implication; Phillips v. Phillips, 93 Ky. 498, 20 S. W. 541; Chamberlain v. Taylor, 105 N. Y. 185, 11 N. E. 625; Gallagher v. Crooks, 132 N. Y. 338, 30 N. E. 746; Hancock's Appeal, 112 Pa. 532, 5 Atl. 56; and where a will provides that a gift therein is to be the entire share of an heir, he is not excluded from a share of property not disposed of by the will; Sutherland v. Sydnor, 84 Va. 880, 6 S. E. 480, even though the will shows that the testator believed he was disposing of all his property; *id.* A testamentary writing which revokes all other wills, and excludes a son from any share of the estate, for reasons given, but does not dispose of the property, does not affect the rights of such son; Coffman v. Coffman, 85 Va. 459, 8 S. E. 672, 2 L. R. A. 848, 17 Am. St. Rep. 69.

In a case of doubt the law leans to a distribution of the estate of a deceased person as nearly conforming to the rules of inheritance as possible.

DISINTERESTED WITNESS. One who has no interest in the cause or matter in issue, and who is lawfully competent to testify.

DISINTERMENT. See DEAD BODY.

DISJUNCTIVE ALLEGATIONS. Allegations which charge a party disjunctively, so as to leave it uncertain what is relied on as the accusation against him.

An indictment, information, or complaint which charges the defendant with one or other of two offences, in the disjunctive, as

that he murdered *or* caused to be murdered, forged *or* caused to be forged, wrote and published *or* caused to be written and published, is bad for uncertainty; 1 Salk. 342, 371; 2 Stra. 900; 5 B. & C. 251; 1 C. & K. 243; 1 Y. & J. 22. An indictment which averred that S. made a forcible entry into two closes of meadow *or* pasture was held to be bad; 2 Rolle, Abr. 81. A complaint which alleges an unlawful sale of "spirituous *or* intoxicating liquor" is bad for uncertainty; Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476. So is an information which alleges that N. sold beer *or* ale without an excise license; 6 Dowl. & R. 143. And the same rule applies if the defendant is charged in two different characters in the disjunctive: as, *quod A existens servus sive deputatus*, took, etc.; 2 Rolle, Abr. 263.

DISJUNCTIVE TERM. One which is placed between two contraries, by the affirming of one of which the other is taken away: it is usually expressed by the word *or*. See 3 Ves. 450; 1 P. Wms. 433; 2 Cox, Ch. 213; 2 Atk. 643; 2 Ves. Sen. 67; Cro. Eliz. 525; 1 Bingh. 500; Ayliffe, Pand. 56.

In the civil law, when a legacy is given to Caius *or* Titius, the word *or* is considered *and*, and both Caius and Titius are entitled to the legacy in equal parts. 6 Toullier, n. 704. See COPULATIVE TERM; CONSTRUCTION.

DISME. Dime, which see.

DISMISS. To remove. To send out of court. Formerly used in chancery of the removal of a cause out of court without any farther hearing. The term is now used in courts of law also.

It signifies a final ending of a suit, not a final judgment on the controversy, but an end of that proceeding; Taft v. Transp. Co., 56 N. H. 417; Conner v. Drake, 1 Ohio St. 170. It is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action; Smith v. McNeal, 109 U. S. 429, 3 Sup. Ct. 319, 27 L. Ed. 986.

After a decree, whether final or interlocutory, has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant; Chicago & A. R. R. Co. v. Mill Co., 109 U. S. 713, 3 Sup. Ct. 594, 27 L. Ed. 1081.

The effect of dismissals under the codes of some of the United States, has been much discussed. Thus in New York, "a final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced," does not prevent a new action for the same cause of action, unless it expressly declares that it is rendered upon the merits.

DISMISSED. A judgment of "Dismissed," without qualifying words indicating a right to take further proceedings, is presumed to be dismissed on the merits; Durant v. Essex Co., 7 Wall. (U. S.) 107, 19 L. Ed. 154. But a bill "dismissed" on motion of complainant does not bar a second suit; Ex parte Loung June, 160 Fed. 259.

A judgment of dismissal because plaintiff fails to observe a rule of court does not become *res judicata;* Ryan v. R. Co., 89 Fed. 397; so of a dismissal by consent of the parties; Rincon Water & Power Co. v. Water Co., 115 Fed. 543. But circumstances obviously might lead to a different rule.

DISORDERLY HOUSE. A house the inmates of which behave so badly as to become a nuisance to the neighborhood. State v. Grosofski, 89 Minn. 343, 94 N. W. 1077; Hawkins v. Lutton, 95 Wis. 493, 70 N. W. 483, 60 Am. St. Rep. 131. It has a wide meaning, and includes bawdy houses, common gaming houses, and places of a like character; 1 Bish. Cr. L. § 1106; U. S. v. Gray, 2 Cra. C. C. 675, Fed. Cas. No. 15,251; Com. v. Cobb, 120 Mass. 356. Any place of public resort in which illegal practices are carried on, involving moral turpitude or not; State v. Martin, 77 N. J. L. 652, 73 Atl. 548, 24 L. R. A. (N. S.) 507, 134 Am. St. Rep. 814, 18 Ann. Cas. 986, where a person making usurious loans was convicted of keeping a disorderly house. In order to constitute it such it is not necessary that there be acts violative of the peace of the neighborhood, or boisterous disturbance and open acts of lewdness; Beard v. State, 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675, 17 Am. St. Rep. 536; but a single act of lewdness of a man and woman in a house, does not constitute the offence of keeping a house of prostitution; People v. Gastro, 75 Mich. 127, 42 N. W. 937. And receiving unmarried people who present themselves as husband and wife at a hotel is not sufficient to convict the proprietor of keeping a disorderly house without proof of *scienter;* People v. Drum, 127 App. Div. 241, 110 N. Y. Supp. 1096.

The keeper of such house may be indicted for keeping a public nuisance; Hardr. 344; People v. Clark, 1 Wheel. Cr. Cas. (N. Y.) 290; Com. v. Stewart, 1 S. & R. (Pa.) 342; Bacon, Abr. *Nuisances*, A; 4 Sharsw. Bla. Com. 167, 168, note; King v. People, 83 N. Y. 587; Ex parte Birchfield, 52 Ala. 377. The husband must be joined with the wife in an indictment to suppress a disorderly house; 1 Show. 146.

See Words and Phrases, vol. 3, pp. 2108–2110.

DISORDERLY PERSONS. A class of offenders described in the statutes which punish them. See 4 Bla. Com. 169.

DISPARAGEMENT. In Old English Law. An injury by union or comparison with some person or thing of inferior rank or excellence.

Marriage without *disparagement* was marriage to one of suitable rank and character.

2 Bla. Com. 70; Co. Litt. 82 *b*. The guardian in chivalry had the right of disposing of his infant ward in matrimony; and provided he tendered a marriage without *disparagement* or inequality, if the infant refused, he was obliged to pay a *valor maritagii* to the guardian.

Disparagare, to connect in an unequal marriage. Spelman, Gloss. *Disparagatio*, disparagement. Used in Magna Carta (9 Hen. III.), c. 6. *Disparagation*, disparagement. Kelham. *Disparage*, to marry unequally. Used of a marriage proposed by a guardian between those of unequal rank and injurious to the ward.

DISPAUPER. In English Law. To deprive a person of the privilege of suing *in forma pauperis*.

When a person has been admitted to sue *in forma pauperis*, and before the suit is ended it appears that the party has become the owner of a sufficient estate real, or personal, or has been guilty of some wrong, he may be *dispaupered*.

DISPENSARY LAW. See LIQUOR.

DISPENSATION. A relaxation of law for the benefit or advantage of an individual. In the United States, no power exists, except in the legislature, to dispense with law; and then it is not so much a dispensation as a change of the law.

DISPLACE. Used in shipping articles, and, when applied to an officer, meaning properly to disrate, not to discharge. Potter v. Smith, 103 Mass. 68.

DISPOSE. To alienate or direct the ownership of property, as, disposition by will. Elston v. Schilling, 42 N. Y. 79; see Fling v. Goodall, 40 N. H. 219; Phelps v. Harris, 101 U. S. 380, 25 L. Ed. 855. Used also of the determination of suits; In re Russell, 13 Wall. (U. S.) 664, 20 L. Ed. 632. Called a word of large extent; Freem. 177.

DISPOSSESSION. Ouster; a wrong that carries with it the amotion of possession. An act whereby the wrong-doer gets the actual occupation of the land or hereditament. It includes abatement, intrusion, disseisin, discontinuance, deforcement. 3 Bla. Com. 167.

DISPUTATIO FORI (Lat.). Argument in court. Du Cange.

DISPUTE. A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. Appeal of Knight, 19 Pa. 494.

DISQUALIFY. To incapacitate, to disable, to divest or deprive of qualifications. Matter of Maguire, 57 Cal. 606, 40 Am. Rep. 125.

DISRATIONARE. To clear oneself from accusation; to make good a legal claim; to prove. Martin, Record Interpreter.

DISSAISINA. A disseisin or dispossession; an ejectment. Skene.

DISSECTION. The act of cutting into pieces an animal or vegetable for the purpose of ascertaining the structure and use of its parts; anatomy; the act of separating into constituent parts for the purpose of critical examination. Webster. See DEAD BODY; AUTOPSY; DEATH.

DISSEISEE. One who is wrongfully put out of possession of his lands; one who is disseised.

DISSEISIN. A privation of seisin. A usurpation of the right of seisin and possession, and an exercise of such powers and privileges of ownership as to keep out or displace him to whom these rightfully belong. 2 Washb. R. P. 283; Mitch. R. P. 259.

It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the commencement of a new estate in the wrong-doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin properly so called. Every dispossession is not a disseisin. A disseisin, properly so called, requires an ouster of the freehold. A disseisin at election is not a disseisin in fact; 2 Pres. Abstr. Titles 279; but by admission only of the injured party, for the purpose of trying his right in a real action; Co. Litt. 277; Little v. Libby, 2 Greenl. (Me.) 242, 11 Am. Dec. 68; Doe v. Thompson, 5 Cow. (N. Y.) 371; Jackson v. Huntington, 5 Pet. (U. S.) 402, 8 L. Ed. 170; Poignard v. Smith, 6 Pick. (Mass.) 172.

Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold: as if a man enters, by force or fraud, into the house of another, and turns, or, at least, keeps, him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession; for the subject itself is neither capable of actual bodily possession or dispossession; 3 Bla. Com. 169, 170. See Poignard v. Smith, 6 Pick. (Mass.) 172; Smith v. Burtis, 6 Johns. (N. Y.) 197, 5 Am. Dec. 218; Ellicott v. Pearl, 10 Pet. (U. S.) 414, 9 L. Ed. 475; Stetson v. Veazie, 11 Me. 408.

In the early law every disseisin was a breach of the peace; if perpetrated with violence it was a serious breach. The disseisor was amerced never less than the amount of the damage; if it were by force of arms he was sent to prison and fined. Besides he gave the sheriff an ox,—"the disseisin ox,"—or five shillings. If he disseised one who has already recovered possession from him by the assize, this was a still graver offence, for which he was imprisoned by statute. The

offender was a redisseisor; 2 Poll. & Maitl. Hist. of Eng. Law 45.

See BUYING TITLES.

DISSEISITUS. One who has been disseised.

DISSEISOR. One who puts another out of the possession of his lands wrongfully.

DISSENT. A disagreement to something which has been done. It is express or implied.

The law presumes that every person to whom a conveyance has been made has given his assent to it, because it is supposed to be for his benefit. To rebut the presumption, his dissent must be expressed. See Brooks v. Marbury, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; Wilt v. Franklin, 1 Binn. (Pa.) 502, 2 Am. Dec. 474; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140; Crain v. Wright, 114 N. Y. 307, 21 N. E. 401. ASSENT.

In Ecclesiastical Law. A refusal to conform to the rites and ceremonies of the established church. 2 Burn, Eccl. Law 165.

DISSENTER. One who refuses to conform to the rites and ceremonies of the established church; a non-conformist. 2 Burn, Eccl. Law 165.

DISSENTIENTE (Lat. dissenting). Used with the name or names of one or more judges, it indicates a dissenting opinion in a case. *Nemine dissentiente.* No one dissenting; unanimous.

DISSENTING OPINIONS. See PRECEDENT.

DISSOLUTION. The dissolution of a contract is the annulling its effects between the contracting parties.

The dissolution of a partnership is the putting an end to the partnership. Its dissolution does not affect contracts made between the partnership and others; so that it is entitled to all its rights, and liable on its obligations, as if it had not been dissolved. See PARTNERSHIP.

Of Corporations. Dissolution of corporations takes place by act of legislature (but in America only by consent of the corporation, or where the power to dissolve has been reserved by the legislature); by the loss of all the members, or an integral part of them; by a surrender of the charter; by the expiration of the period for which it was chartered; by proceedings for the winding up of the company under the law; or by a forfeiture of the franchises, for abuse of its powers. Where a method of procedure for dissolution has been prescribed by statute, as is now usual, such method is exclusive; Kohl v. Lilienthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520.

The loss of members will not work a dissolution, so long as enough members remain to fill vacancies; State v. Trustees, 5 Ind. 77; McGinty v. Reservoir Co., 155 Mass. 183, 29 N. E. 510; nor does a failure to elect officers; Com. v. Cullen, 13 Pa. 133, 53 Am. Dec. 450; Evarts v. Mfg. Co., 20 Conn. 447; United States Electric Lighting Co. v. Leiter, 19 D. C. 575; Rose v. Turnpike Co., 3 Watts (Pa.) 46; or trustees; Speer v. Colbert, 200 U. S. 131, 26 Sup. Ct. 201, 50 L. Ed. 403; so of an eleemosynary corporation; Vincennes University v. Indiana, 14 How. (U. S.) 268, 14 L. Ed. 416; nor does the resignation of all the officers of a corporation work a dissolution; Muscatine Turn Verein v. Funck, 18 Ia. 469; but it is said that a municipal or charitable corporation may be dissolved by the loss of all its members, although this mode of dissolution cannot take place in the case of business corporations which have a transferable joint stock, because the corporate shares, being personal property, must always belong to some person, and such person must of necessity be a member of the corporation; 5 Thomp. Corp. § 6652; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. And even where all the shares of stock pass into the hands of less than the prescribed number of stockholders, there is no dissolution, even though they may have passed into the hands of *two* members; Russell v. McLellan, 14 Pick. (Mass.) 63; or of a *single* person; Newton Mfg. Co. v. White, 42 Ga. 148; and such person could carry on the corporate business; *id.* See STOCKHOLDERS.

Ordinarily, a corporation may by a majority vote surrender its franchises; McCurdy v. Myers, 44 Pa. 535; Black v. Canal Co., 22 N. J. Eq. 404; Treadwell v. Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; State v. Woolen Mills Co., 115 Tenn. 266, 89 S. W. 741, 2 L. R. A. (N. S.) 493, 112 Am. St. Rep. 825; Hitch v. Hawley, 132 N. Y. 221, 30 N. E. 401; but such a surrender must be accepted by the state; Wilson v. Proprietors of Central Bridge, 9 R. I. 590; excepting where the stockholders are liable for the debts; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 420. A corporation is not dissolved or its franchises forfeited by its insolvency and assignment of its assets for the benefit of its creditors, where the state brings no proceedings to have the charter forfeited, and there is no surrender thereof by act of the shareholders; State v. Butler, 86 Tenn. 614, 8 S. W. 586; Breene v. Bank, 11 Colo. 97, 17 Pac. 280; Adams v. Milling Co., 35 Fed. 433.

A non-user of corporate powers does not of itself work a dissolution, even though it be for twenty years; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463; but see Strickland v. Prichard, 37 Vt. 324, where there had been no corporate acts performed for 23 years and it was held there was a dissolution. The question is one of fact and intent; 5 Thomp. Corp. § 6659. The fact that a corporation has ceased to do business and has made an assignment of all its prop-

erty for the payment of its debts and for several years held no annual meetings or elected directors, does not work a dissolution to the extent of preventing its maintaining an action for a debt due it; *id.* § 6660. The sale of the property and franchises of a corporation in foreclosure proceedings does not, *ipso facto*, work a dissolution. It will pass the franchise of the company to operate or enjoy the particular property foreclosed, but not its primary franchise to be a corporation; 5 Thomp. Corp. § 6662 (but that the corporation is extinguished by such a sale, see 37 Mo. 131). The insolvency of a corporation or the appointment of a receiver therefor does not work a dissolution; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

As to dissolution by consolidation, see MERGER.

The forfeiture of a charter by misuser or nonuser is complete only upon a final adjudication thereof in a competent court, upon proper proceedings at the suit of the government which created the corporation, and in the courts of such government; Moraw. Priv. Corp. 959, 1015; the existence of the charter cannot be attacked collaterally, or by an individual; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Chesapeake & O. Canal Co. v. R. Co., 4 G. & J. (Md.) 1. But when the legislature has reserved the right to revoke a charter for abuse of its privileges or failure to perform a condition, it may enact the repeal at the proper time; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Erie & N. E. R. Co. v. Casey, 26 Pa. 287; and such repealing act will be held constitutional unless the company can show by plain and satisfactory evidence that the privileges granted under the charter were not misused or abused; *id.* The courts will not presume that the power of repeal has been improperly exercised; 5 Thomp. Corp. § 6579. Where the legislature reserves the unqualified right of repeal upon the happening of a certain condition, it is exclusively within its power to determine whether the condition has happened, and a previous judicial determination of that fact is not necessary; *id.;* Erie & N. E. R. Co. v. Casey, 26 Pa. 287; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549. And so where there is a right of repeal in the legislature in case the corporation misuses its franchises; Erie & N. E. R. Co. v. Casey, 26 Pa. 287. Such misuse or abuse of corporate privileges consists in any positive act in violation of the charter and in derogation of public right, wilfully done or caused to be done by those appointed to manage the general concerns of the corporation; *id.* Where a franchise is granted with a provision that if not exercised in a specified time it shall be void, upon the expiration of the time without the performance of the condition, the charter falls without any action on the part of the state to declare its forfeiture; Com. v. Water Co., 110 Pa. 391, 2 Atl. 63; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; In re Brooklyn, W. & N. Ry. Co., 81 N. Y. 69. But other cases hold that the charter is not forfeited until action by the state either legislative or judicial; Hovelman v. R. Co., 79 Mo. 632; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Chicago City Ry. Co. v. People, 73 Ill. 541. The former view is strongly maintained in 5 Thomp. Corp. § 6586. If the charter or the statute under which it is granted names a definite period for the life of the corporation, the corporation is dissolved *ipso facto*, upon the expiration of that period without any action either on the part of the state or of the members of the corporation; People v. R. Co., 76 Cal. 190, 18 Pac. 308; Scanlan v. Crawshaw, 5 Mo. App. 337. "The incapacity to revive or resuscitate the powers of a corporation may arise from three causes: 1. The absence of the necessary officers who are required to be present when the deficiency is supplied, or their incapacity or neglect to do some act which is requisite to the validity of the appointment; 2. The want of the necessary corporators who are required to unite in the appointment; 3. The want of the proper persons from whom the appointment is to be made." 5 Thomp. Corp. § 6658.

Upon a dissolution, the assets of all kinds are a trust fund for the payment of debts, and afterwards for distribution among the stockholders; Lathrop v. Stedman, 13 Blatch. 134, Fed. Cas. No. 8,519; Blake v. R. Co., 39 N. H. 435; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; Late Corporation of Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; Temperance Mut. Ben. Ass'n v. Society, 187 Pa. 38, 40 Atl. 1100; 15 Harv. L. Rev. 743; 15 L. Q. Rev. 115.

The ancient rule of the common law was supposed to be that upon the termination of a corporation its real estate reverted to the grantor and its personalty to the sovereign; Titcomb v. Ins. Co., 79 Me. 315, 9 Atl. 732; Kent (13th ed.) 307. See Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400. This rule has long been obsolete, if it ever was the law, except as regards public or religious corporations; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478. It has been repudiated in the United States as to business corporations; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400; Baldwin v.

Johnson, 95 Tex. 85, 65 S. W. 171; Morawetz, Priv. Corp. § 1032; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 10 Sup. Ct. 792, 34 L. Ed. 478; Bacon v. Robertson, 18 How. (U. S.) 480, 15 L. Ed. 499.

In England it is said there is no instance on record that the doctrine was ever applied by any English court; [1899] 1 Q. B. 325. But it is said that the doctrine that at dissolution the lands of a corporation revert to the donor was almost universally accepted in the English cases before 1800. Prof. Williston, in Business Corp. before 1800, 3 Sel. Essays, Anglo-Amer. Leg. Hist. 233.

As to a public or charitable corporation the ancient rule still prevails that upon dissolution its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership and becomes subject to the disposal of the sovereign authority, while the real estate reverts to the grantor or donor unless it is otherwise provided by statute; Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 47, 10 Sup. Ct. 792, 34 L. Ed. 478, where it was held that the property of the Mormon church became vested in the United States.

On the dissolution of a Louisiana corporation owning land in Texas, it was held that the stockholders became tenants in common of such land; Baldwin v. Johnson, 95 Tex. 85, 65 S. W. 171. The title to the land of an eleemosynary corporation reverts on its dissolution to the original owner without any act on his part; Mott v. Danville Seminary, 129 Ill. 403, 21 N. E. 927. But it is held that, upon the dissolution of a charitable corporation, the property must be appropriated by the court to the purposes most nearly akin to the intent of the donors; it does not revert to the donors; Centennial & Memorial Ass'n of Valley Forge, 235 Pa. 206, 83 Atl. 683.

Actions at law brought against a private corporation abate upon its dissolution; Life Ass'n v. Goode, 71 Tex. 90, 8 S. W. 639; *contra*, Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; Breene v. Bank, 11 Colo. 97, 17 Pac. 280. Dissolution puts an end to all existing contracts. It works a breach of the contract; Green's Brice, *Ultra Vires* 803. See State Bank v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 239; Schleider v. Dielman, 44 La. Ann. 462, 10 South. 934.

Since the dissolution of a corporation, either by its own limitation or by the decree of a court of competent jurisdiction, puts an end to its legal existence, it can thereafter neither prosecute nor defend an action. Accordingly, in the absence of statutory reservations (which, however, generally exist), upon the dissolution of a corporation all actions pending against it abate; Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. Ed. 945; First Nat. Bank v. Colby, 21 Wall. (U. S.) 609, 22 L. Ed. 687; City Ins. Co. v. Bank, 68 Ill. 348; Merrill v. Bank, 31 Me. 57, 50 Am. Dec. 649; Thornton v. R. Co., 123 Mass. 32; McCulloch v. Norwood, 58 N. Y. 562; Life Ass'n v. Goode, 71 Tex. 90, 8 S. W. 639; and if the suit has been commenced by attachment, the dissolution will destroy the attachment lien; Wilcox v. Ins. Co., 56 Conn. 468, 16 Atl. 244; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; unless ripened into a judgment at the time of the dissolution, and this, whether the attachment is original or is sued out in aid of a pending action.

Under the statutes providing for the keeping alive of actions which would otherwise abate on the dissolution of a corporation, it is not quite settled whether the same principles apply as those which apply to the survival of actions on the death of a natural person; but the weight of authority is in favor of the affirmative; Hepworth v. Ferry Co., 62 Hun 257, 16 N. Y. Supp. 692; Milwaukee Mut. Fire Ins. Co. v. Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627.

See FORFEITURE OF CHARTER; FRANCHISE.

In Practice. The act of rendering a legal proceeding null, or changing its character; as where an attachment is dissolved so far as it is a lien on property by entering bail or security to the action; or as injunctions are dissolved by the court.

DISSUADE. To dissuade a witness from giving evidence against a person indicted is an indictable offence at common law; Hawk. Pl. Cr. b. 1, c. 21, s. 15. The mere attempt to stifle evidence is also criminal although the persuasion should not succeed, on the general principle that an incitement to commit a crime is in itself criminal; 2 East 5, 21; 6 *id.* 454; 2 Stra. 904; 2 Leach 925.

DISTANCE. The rule is that the distance between given points should be measured in a straight line; 5 E. & B. 92; 6 *id.* 350; 8 L. R. Exch. 32. But in a rule of court as to service the distance has been taken by the usual road; Smith v. Ingraham, 7 Cow. (N. Y.) 419.

DISTILLERY. A place or building where alcoholic liquors are distilled or manufactured. See U. S. v. Tenbroek, Pet. C. C. 180, Fed. Cas. No. 16,446; Act July 13, 1866, 14 Stat. L. 117; Atlantic Dock Co. v. Libby, 45 N. Y. 499; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

DISTRACTED PERSON. A term used in the statutes of Illinois, Rev. Laws 1833, p. 332, and New Hampshire, Dig. Laws 1830, p. 339, to express a state of insanity.

DISTRACTIO. In Civil Law. The sale of a pledge by a debtor. The appropriation of the property of a ward by a guardian. Calvinus, Lex.

DISTRAHERE. To withdraw; to sell. *Distrahere controversias*, to diminish and settle quarrels; *distrahere matrimoniam*, to dissolve marriage; to divorce. Calvinus, Lex.

DISTRAIN. To take as a pledge property of another, and keep the same until he performs his obligation or until the property is replevied by the sheriff. It was used to secure an appearance in court, payment of rent, performance of services, etc. 3 Bla. Com. 231; Fitzh. N. B. 32 (B) (C), 223; Boyd v. Howden, 3 Daly (N. Y.) 455. See DISTRESS.

DISTRESS (Fr. *distraindre*, to draw away from; Lat. *districtio*). The taking of a personal chattel out of the possession of a wrong-doer into the custody of the party injured, to procure satisfaction for the wrong done. 3 Bla. Com. 6; Hard v. Nearing, 44 Barb. (N. Y.) 488. It is generally resorted to for the purpose of enforcing the payment of rent, taxes, or other duties, as well as to exact compensation for such damages as result from the trespasses of cattle. Correctly speaking, one distrains a man by *(per)* a thing. 2 Poll. & Maitl. 576.

This remedy is of great antiquity, and is said by Spelman to have prevailed among the Gothic nations of Europe from the breaking up of the Roman Empire. But in a recent work the opinion is expressed that distress before judicial proceedings had been taken is not very old. 1 Poll. & Maitl. Hist. Engl. Law 334. Distress was not a means whereby the distrainor could satisfy the debt due him; *ibid.* After distress the lord might not sell the goods; they were not in his possession, but were *in custodia legis*, and he must be ready to give them up if the tenant tendered arrears or offered gage and pledge that he would contest the claim in a court of law. The lord could not take what he liked best among the chattels that he found; 2 *id.* 574. The English statutes since the days of Magna Charta have, from time to time, extended and modified its features to meet the exigencies of the times. Our state legislatures have generally, and with some alterations, adopted the English provisions, recognizing the old remedy as a salutary and necessary one, equally conducive to the security of the landlord and to the welfare of society. As a means of collecting rent, however, it has become unpopular in some states as giving an undue advantage to landlords over other creditors in the collection of debts. See Woglam v. Cowperthwaite, 2 Dall. (U. S.) 68, 1 L. Ed. 292; Hartshorne v. Kierman, 7 N. J. L. 29; Garrett v. Hughlett, 1 Harr. & J. (Md.) 3; Charleston v. Price, 1 McCord (S. C.) 299; Owens v. Conner, 1 Bibb (Ky.) 607; Mayo v. Winfree, 2 Leigh (Va.) 370; Burket v. Boude, 3 Dana (Ky.) 209.

In the New England states the law of attachment on *mesne process* has superseded the law of distress; Potter v. Hall, 3 Pick. (Mass.) 368, 15 Am. Dec. 226; 4 Dane, Abr. 126. New York has expressly abolished it by statute. Acts of 1846, ch. 274. This statute was held constitutional and valid as against a lease of prior date which provided for the remedy; Van Rensselaer v. Snyder, 13 N. Y. 299; Conkey v. Hart, 14 N. Y. 22, it being held a mere change of remedy; but such a statute would not apply when the goods had been seized; Dutcher v. Culver, 24 Minn. 584. The courts of North Carolina hold it to be inconsistent with the spirit of her laws and government, and declare that the common process of distress does not exist in that state; Youngblood v. Lowry, 2 McCord (S. C.) 39, 13 Am. Dec. 698; Dalgleish v. Grandy, 1 N. C. 249; to the same effect are the laws of Missouri; Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684. In Ohio, Tennessee, and Alabama there are no statutory provisions on the subject, except in the former state to secure to the landlord a share of the crops in preference to an execution creditor, and one in the latter, confining the remedy to the city of Mobile; McLeod v. McDonnel, 6 Ala. 239. Mississippi has abolished it by statute; but property cannot be taken in execution on the premises unless a year's rent, if it be due, is first tendered to the landlord, who has also a lien on the growing crop; Arbuckle v. Nelms, 50 Miss. 556; to the same effect are the statutes of Wisconsin; Wis. Laws 1866, p. 77. In Colorado a landlord cannot distrain unless in pursuance of an express agreement; Herr v. Johnson, 11 Colo. 393, 18 Pac. 342.

To authorize a distress there must be a fixed rent in money, produce or services; it may be by parol and, if not certain, it must be capable of being reduced to a certainty; Co. Litt. 96 *a*; Miles v. Stevens, 3 Pa. 31, 45 Am. Dec. 621; Jacks v. Smith, 1 Bay (S. C.) 315; and hence it will not lie on an agreement to pay no rent, but make repairs of uncertain value; Grier v. Cowan, Add. (Pa.) 347; a distress for a rent of a certain quantity of grain, may name the value in case of tender of arrears or sale of the property; Warren v. Forney, 13 S. & R. (Pa.) 52. See Jones v. Gundrim, 3 W. & S. (Pa.) 531.

A distress can only be taken for rent in arrear, and not until the day after it is due (which may be in advance); Russell v. Doty, 4 Cow. (N. Y.) 576; Williams v. Howard, 3 Munf. (Va.) 277; First Nat. Bank of Joliet v. Adam, 138 Ill. 483, 28 N. E. 955. But no previous demand is necessary, except where the lease requires it; Almand v. Scott, 83 Ga. 402, 11 S. E. 653. Nor will the right be extinguished either by an unsatisfied judgment for the rent or by taking a promissory note therefor, unless such note has been accepted in absolute payment of the rent; Bates v. Nellis, 5 Hill (N. Y.) 651.

It may be taken for any kind of rent, the detention of which beyond the day of payment is injurious to him who is entitled to receive it.

At common law, the distrainer must have possessed a reversionary interest in the premises out of which the distress issued, unless he had expressly reserved a power to distrain when he parted with the reversion; Cornell v. Lamb, 2 Cow. (N. Y.) 652; 1 Term 441; Co. Litt. 143 *b*. But the English statute of 4 Geo. II. c. 28, substantially abolished all distinctions between rents, and gave the remedy in all cases where rent is reserved upon a lease. The effect of the statute was to separate the right of distress from the reversion to which it had before been incident, and to place every species of rent upon the same footing as if the power of distress had been expressly reserved in each case.

A distress may be made by each one of several joint tenants for the whole rent or they may all join together; 4 Bingh. 562; 2 Ball & B. 465; by tenants in common, each for his separate share; 1 McCl. & Y. 107; Cro. Jac. 611; unless the rent be entire, as of a house, in which case they must all join; Co. Litt. 197 *a*; 5 Term 246; a husband as

tenant by the curtesy for rent due to his wife, although due to her as executrix or administratrix; 2 Saund. 195; a widow after dower has been admeasured for her third of the rent; Co. Litt. 32 *a*; an heir at law, or devisee, for that which becomes due to them respectively, after the death of the ancestor, in respect to their reversionary estate; Wright v. Williams, 5 Cow. (N. Y.) 501; 1 Saund. 287; and guardians, trustees, or agents who make leases in their own names, as well as the assignee of the reversion which is subject to a lease; Slocum v. Clark, 2 Hill (N. Y.) 475; 5 C. & P. 379. Payment of rent is sufficient attornment to enable the party to whom the payment is made to make a distress; Walker v. McDonald, 28 Ill. App. 643.

Generally all goods found upon the premises, whether of tenant, under-tenant, or stranger, may be distrained for rent in arrear; Spencer v. McGowen, 13 Wend. (N. Y.) 256; Kessler v. McConachy, 1 Rawle (Pa.) 435; Howard v. Ransay, 7 H. & J. (Md.) 120; Davis v. Payne's Adm'r, 4 Rand. (Va.) 334; Reeves v. McKenzie, 1 Bail. (S. C.) 497; Com. Dig. *Distress* (B 1). Thus, a gentleman's chariot in a coach-house of a livery-stable keeper was distrainable by the landlord of the livery-stable keeper; 3 Burr. 1498; cattle put on the tenant's land by consent of the owners of the beasts, are distrainable by the landlord immediately after for rent in arrear; 3 Bla. Com. 8; and furniture leased to a tenant, and used by him on the demised premises, is subject to the landlord's right of distress for rent; Myers v. Esery, 134 Pa. 177, 19 Atl. 488. The necessity of this rule is justified by the consideration that the rights of the landlord would be liable to be defeated by a great variety of frauds and collusions, if his remedy should be restricted to such goods only as he could prove to be the property of the tenant.

Goods of a person who has some interest in the land jointly with the distrainor, as those of a joint tenant, although found upon the land, cannot be distrained; nor goods of executors and administrators, or of the assignee of an insolvent regularly discharged according to law, in Pennsylvania, for more than one year's rent. Nor can the goods of a former tenant, rightfully on the land, be distrained for another's rent, as emblements, or growing crops of a tenant at will quitting on notice, even after they are reaped, if they remain on the land for the purpose of husbandry; Willes 131; or in the hands of a vendee they cannot be distrained although the purchaser allow them to remain uncut after they have come to maturity; 2 Ball & B. 362; 5 J. B. Moo. 97. If a tenant seek to remove from the premises any portion of the crops before the rent is due, he is subject to distraint immediately; Daniel v. Harris, 84 Ga. 479, 10 S. E. 1013.

As a distress is only of the property of the tenant, things wherein he can have no absolute property, as cats, dogs, rabbits, and animals *feræ naturæ*, cannot be distrained; yet deer, which are of a wild nature, kept in a private enclosure for sale or profit, may be distrained for rent; 3 Bla. Com. 7. There can be no distress of such things as cannot be restored to the owner in the same plight as when taken, as milk, fruit, and the like; 3 Bla. Com. 9; or things affixed or annexed to the freehold, as furnaces, windows, doors, and the like; Co. Litt. 47 *b*; or essentially part of the freehold although for a time removed therefrom, as a millstone removed to be picked; or an anvil fixed in a smith's shop; 6 Price 3; 1 Q. B. 895; 3 *id.* 961.

Goods are also privileged in cases where the proprietor is either compelled from *necessity* to place his goods upon the land, or where he does so for *commercial* purposes; Brown v. Sims, 17 S. & R. (Pa.) 139; Hoskins v. Paul, 9 N. J. L. 110, 17 Am. Dec. 455; Himely v. Wyatt, 1 Bay (S. C.) 102; Phaelon v. McBride, 1 Bay (S. C.) 170; Youngblood v. Lowry, 2 McCord (S. C.) 39, 13 Am. Dec. 698; 3 Ball & B. 75; 6 J. B. Moo. 243; 2 C. & P. 353. In the first case, the goods are exempt because the owner has no option: as goods of a traveller in an inn; 7 Hen. VII. M. 1, p. 1; 1 W. Bla. 483; 3 Burr. 1408. In the other, the interests of the community require that commerce should be encouraged; and adventurers will not engage in speculations if the property embarked is to be made liable for the payment of debts they never contracted. Hence goods landed at a wharf, or deposited in a warehouse on storage; Brown v. Sims, 17 S. & R. (Pa.) 138; Richardson v. Merrill, 21 Me. 47; Connah v. Hale, 23 Wend. (N. Y.) 462; goods of a third person consigned to an agent to be sold on commission (and if the landlord knows that the goods are so owned and has them sold under distress, he is liable to the owner in trespass; Brown v. Stackhouse, 155 Pa. 582, 26 Atl. 669, 35 Am. St. Rep. 908); a horse standing in a smith's shop to be shod, or in a common inn, or cloth at a tailor's house to be made into a coat, or corn sent to a mill to be ground; 3 Bla. Com. 8; cannot be distrained; neither can goods of a boarder, for rent due by the keeper of a boarding-house; Riddle v. Welden, 5 Whart. (Pa.) 9; unless used by the tenant with the boarder's consent and without that of the landlord; Matthews v. Stone, 1 Hill (N. Y.) 565.

In this country whether the tenant conducts a regular trade or business seems to have been considered immaterial with respect to exemption of things on the premises in the way of trade; Howe Sewing Mach. Co. v. Sloan, 87 Pa. 438, 30 Am. Rep. 376; McCreery v. Clafflin, 37 Md. 435, 11 Am. Rep. 542. See list of exemptions allowed under this rule; 2 Tiffany, Landl. & Ten. 2007.

At common law, goods delivered to a common carrier, or other person, to be conveyed for hire, or goods on the premises of an auctioneer, for the purpose of sale are privileged; 1 Cr. & M. 380.

Goods taken in execution cannot be distrained. The law in some states gives the landlord the right to claim payment out of the proceeds of an execution for rent not exceeding one year, and he is entitled to payment up to the day of seizure, though it be in the middle of a quarter; Binns v. Hudson, 5 Binn. (Pa.) 505; but he is not entitled to the day of sale. See Trappan v. Morie, 18 Johns. (N. Y.) 1. The usual practice is to give notice to the sheriff that there is a certain sum due to the landlord as arrears of rent,—which notice ought to be given to the sheriff, or person who takes the goods in execution upon the premises; for the sheriff is not bound to find out whether rent is due, nor is he liable to an action unless there has been a demand of rent before the removal; Com. Dig. *Rent* (D 8); Alexander v. Mahon, 11 Johns. (N. Y.) 185. This notice can be given by the immediate landlord only. A ground-landlord is not entitled to his rent out of the goods of the under-tenant taken in execution; 2 Stra. 787. And where there are two executions, the landlord is not entitled to a year's rent on each. See 2 Stra. 1024. Goods distrained and replevied may be distrained by another landlord for subsequent rent; Woglam v. Cowperthwaite, 2 Dall. (U. S.) 68, 1 L. Ed. 292. Where a tenant makes an assignment in the usual form, for the benefit of creditors, the assigned property is no longer his in his own right, and it cannot be seized under a distress warrant for rent; Ex parte Knobebloch, 26 S. C. 333, 2 S. E. 612; Bischoff v. Trenholm, 36 S. C. 75, 15 S. E. 346.

By statute in some states tools of a man's trade, some designated household furniture, school-books, and the like, are exempted from distress, execution, or sale. In Pennsylvania, property to the value of $300, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school-books in use in the family, are exempted from distress for rent. Also sewing-machines in private families.

There are also goods conditionally privileged, as beasts of the plough, which are exempt if there be a sufficient distress besides on the land whence the rent issues; Co. Litt. 47 *a*; implements of trade, as a loom in actual use, where there is a sufficient distress besides; 4 Term 565; other things in actual use, as a horse whereon a person is riding, an axe in the hands of a person cutting wood, and the like; Co. Litt. 47 *a*.

The leading case upon exemptions from distress, Simpson v. Hartopp, Willes 512, 1 Sm. L. Cas. (9th Am. ed.) 721, has been the subject of critical review in England after the lapse of 150 years with respect to a curious application of one of its exceptions to the rule subjecting to distress all property on the premises, including that of third persons. The exception declared by Willes, J., of "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ," was the subject of construction in [1908] 1 Ch. 49, where pictures sent to an art club for exhibition were held not to be within it, because the owner could not show that the pictures were delivered to the club "for the purposes of trade, his trade being a public trade." In this judgment, Neville, J., says that it seems extraordinary that in the year 1907 "it should be possible in a country which boasts of civilization, which purports to protect the property of the law-abiding citizen, to raise such question. But so it is. The rule that the landlord is entitled to distrain on the property of third persons upon the premises, subject to certain exceptions, has up to the present day escaped the zeal of the legal reformer and therefore I have to deal with the law as I find it." He then proceeds to find "it impossible," as is remarked by an annotator, "to extend an irrational exception, formulated towards the middle of the eighteenth century, from a still less reasonable rule which has been a part of the law of landlord and tenant ever since leasehold interests have been known to the law;" 24 L. Q. Rev. 49. The Court of Appeal affirmed the decision, but on the ground that the exception was laid down by Willes, J., in 1744 "with great accuracy" and must be adhered to as a definition, and the word "managed" used by him was equivalent to "disposed of," which would not apply to the case. Thus, though reaching the same result, they differed from Neville, J., who put the case on the ground that "public trade" meant that which was open to all buyers and not to those only of the club.

At common law a distress could not be made after the expiration of the lease. This evil was corrected by statute in Pennsylvania in 1772. Similar legislative enactments exist in most of the other states. In Philadelphia, the landlord may, under certain circumstances, apportion his rent, and distrain before it becomes due.

A distress may be made either upon or off the land. It generally follows the rent, and is, consequently, confined to the land out of which it issues; Woodf. Landl. & T. 456. If two pieces of land, therefore, are let by two separate demises, although both be contained in one lease, a joint distress cannot be made for them; for this would be to make the rent of one issue out of the other; Rep. t. Hardw. 245; 2 Stra. 1040. But where lands lying in different counties are let together by one demise at one entire rent, and it does not appear that the lands are separate from each other, one distress may be

made for the whole rent; 1 Ld. Raym. 55; 12 Mod. 76. And where rent is charged upon land which is afterwards held by several tenants, the grantee or landlord may distrain for the whole upon the land of any of them; because the whole rent is deemed to issue out of every part of the land; Rolle, Abr. 671. If there be a house on the land, the distress may be made in the house. If the outer door or window be open, a distress may be taken out of it; Rolle, Abr. 671. If an outer door be open, an inner door may be broken for the purpose of taking a distress, but not otherwise; Cas. t. Hard. 168. In levying a distress for rent entrance was obtained into the courtyard through a gate, and being there, the bailiff broke open the main door of the warehouse and distrained therein; the court held the distress illegal, for the reason that the door that was broken was the outer door; 68 Law T. 742. A distress was held lawful where a party climbed over the wall surrounding the yard of a house and entered the house by an open window; [1894] 1 Q. B. 119. Barges on a river, attached to the leased premises (a wharf) by ropes, cannot be distrained; 6 Bingh. 150.

By an act of 1772 in Pennsylvania copied from the act of 11 Geo. II. c. 19, where a tenant fraudulently removes his goods from the premises to prevent a distress, the landlord may distrain on them within 30 days after removal, but not on goods previously sold *bona fide* and for a valuable consideration to one not privy to the fraud. To bring a case within the act, the removal must take place *after* the rent becomes due, and must be *secret*, not made in open day; for such removal cannot be said to be clandestine within the meaning of the act; Grace v. Shively, 12 S. & R. (Pa.) 217; 7 Bingh. 423; 1 Mood. & M. 535. This English statute has been re-enacted in many of the states, but the period during which the goods may be followed varies in different states. In Louisiana the landlord may follow goods removed from his premises for fifteen days after removal, provided they continue to be the property of the tenant; La. Civ. Code 2675; Tayl. Landl. & T. § 538. It has been made a question whether goods are protected that were fraudulently removed on the night before the rent had become due; 4 Campb. 135. The goods of a stranger cannot be pursued; they can be distrained only while they are on the premises; Adams v. La Comb, 1 Dall. (U. S.) 440, 1 L. Ed. 214.

A distress for rent may be made either by the person to whom it is due, or, which is the preferable mode, by a constable or bailiff, or other officer properly authorized by him. If made by a constable or bailiff, he must be properly authorized to make it; for which purpose the landlord should give him a written authority, usually called a warrant of distress; but a subsequent assent and recognition given by the party for whose use the distress has been made is sufficient; Hamm. N. P. 382.

Being thus provided with the requisite authority to make a distress, he seizes the tenant's goods, or some of them in the name of the whole, and declares that he takes them as a distress for the sum expressed in the warrant to be due by the tenant to the landlord, and that he takes them by virtue of the said warrant; which warrant he ought, if required, to show; 1 Leon. 50. When making the distress, it ought to be made for the whole rent; but if goods cannot be found at the time sufficient to satisfy the whole, or the party mistake the value of the thing distrained, he may make a second distress; Bradb. Distr. 129, 130. It must be taken in the daytime after sunrise and before sunset; except for damage feasant, which may be in the night; Co. Litt. 142 *a*.

As soon as a distress is made, an inventory of the goods should be made, and a copy of it delivered to the tenant, together with a notice of taking such distress, with the cause of taking it, and an opportunity thus afforded the owner to replevy or redeem the goods. This notice of taking a distress is not required by the statute to be in writing; and, therefore, parol or verbal notice may be given either to the tenant on the premises, or to the owner of the goods distrained; 12 Mod. 76. And although notice is directed by the act to specify the cause of taking, it is not material whether it accurately state the period of the rent's becoming due; Dougl. 279; or even whether the true cause of taking the goods be expressed therein; 7 Term 654. If the notice be not personally given, it should be left in writing at the tenant's house, or, according to the directions of the act, at the mansion-house, or other most notorious place on the premises charged with the rent distrained for.

The distrainor may leave or impound the distress on the premises for the five days mentioned in the act, but becomes a trespasser after that time; Woglam v. Cowperthwaite, 2 Dall. (U. S.) 69, 1 L. Ed. 292. As in many cases it is desirable, for the sake of the tenant, that the goods should not be sold as soon as the law permits, it is usual for him to sign an agreement or consent to their remaining on the premises for a longer time, in the custody of the distrainor, or of a person by him appointed for that purpose. While in his possession, the distrainor cannot use or work cattle distrained, unless it be for the owner's benefit, as to milk a cow, or the like; 5 Dane, Abr. 34. Goods distrained for rent may be replevied by a claimant thereof before sale; Lardner v. Ins. Co., 32 W. N. C. (Pa.) 62.

Before the goods are sold, they must be appraised by two reputable freeholders, who shall take an oath or affirmation, to be ad-

ministered by the sheriff, under-sheriff, or coroner, in the words mentioned in the act. The next requisite is to give public notice of the time and place of sale of the things distrained; see Whitton v. Milligan, 153 Pa. 376, 26 Atl. 22; after which, if they have not been replevied, they may be sold by the proper officer, who may apply the proceeds to the payment and satisfaction of the rent, and the expenses of the distress, appraisement, and sale; Woodf. Landl. & T. 1322. The overplus, if any, is to be paid to the tenant. A distrainor has always been held strictly accountable for any irregularity he might commit, although accidental, as well as for the taking of anything more than was reasonably required to satisfy the demand; Bradb. Dist.; Gilbert, Rent.

At common law a landlord who had distrained could not sell the goods; Davis v. Davis, 128 Pa. 108, 18 Atl. 514.

DISTRESS INFINITE. In English Practice. A process commanding the sheriff to distrain a person from time to time, and continually afterwards, by taking his goods by way of pledge to enforce the performance of something due from the party distrained upon. In this case no distress can be immoderate, because, whatever its value may be, it cannot be sold, but is to be immediately restored on satisfaction being made; 3 Bla. Com. 231. It was the means anciently resorted to to compel an appearance. See ATTACHMENT; ARREST.

DISTRIBUTEES. The persons who are entitled under the statute of distribution to the personal estate of one who has died intestate. Henry v. Henry, 31 N. C. 279.

DISTRIBUTION. See EXECUTORS AND ADMINISTRATORS.

DISTRICT. A certain portion of the country, separated from the rest for some special purpose.

The United States is divided into judicial districts, in each of which is established a district court; they are also divided into election districts, collection districts, etc.

It may be construed to mean territory; Com. v. Dumbauld, 97 Pa. 305; and in the revenue laws the words "district" and "port" are often used in the same sense; Ayer v. Thacher, 3 Mas. 155, Fed. Cas. No. 684.

DISTRICT ATTORNEY. District attorneys of the United States are appointed for a term of four years in each judicial district, whose duty it is to prosecute, in such district, all delinquents, for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except in the supreme court, in the district in which the court shall be holden. R. S. § 767. He must appear upon the record for the United States as plaintiff, in order that the United States should be recognized as such on the record; U. S. v. Doughty, 7 Blatch. 424, Fed. Cas. No. 14,986; U. S. v. Blaisdell, 3 Ben. 132, Fed. Cas. No. 14,608; U. S. v. McAvoy, 4 Blatch. 418, Fed. Cas. No. 15,654. They are under the direction of the attorney-general and must report to him.

The officer who represents the state in criminal proceedings within a particular county is also, in some of the states, called district attorney. As a prosecuting attorney he is a *quasi* judicial officer and stands indifferent between the accused and any private interest; People v. Bemis, 51 Mich. 422, 16 N. W. 794.

See PROSECUTION; PROSECUTOR.

DISTRICT COURTS. See UNITED STATES COURTS.

DISTRICT MESSENGER SERVICE. The service is not that of a common carrier, but the furnishing of messengers to be used by the employer in any way in which they could be properly employed, in the course of which the messenger becomes for the time the servant of the employer and the company is not liable for his dishonesty in the ordinary course of his employment unless there was failure to use proper care in his selection; Haskell v. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A. (N. S.) 1091, 112 Am. St. Rep. 324, 5 Ann. Cas. 796.

DISTRICT OF COLUMBIA. A portion of the country, originally ten miles square, which was ceded to the United States by the states of Virginia and Maryland, over which the national government has exclusive jurisdiction.

Under the constitution, congress is authorized to "exercise exclusive jurisdiction in all cases whatsoever, over such district, not exceeding ten miles square, as may, by cession of particular states and the acceptance of congress, become the seat of government of the United States." In pursuance of this authority, the states of Maryland and Virginia ceded to the United States a small territory on the banks of the Potomac, and congress, by the act of July 16, 1790, accepted the same, for the permanent seat of the government of the United States.

By the act of July 11, 1846, congress ceded back the county of Alexandria, part of the District of Columbia, to the state of Virginia.

The seat of government was removed from Philadelphia to the District in December, 1800. As it exists at present, it constitutes but one county, called the county of Washington.

By act of Congress of Feb. 21, 1871, a territorial government was created for the District; 16 Stat. L. 419; which was not a mere municipality in its restricted sense, but was held to be placed upon the same footing with that of the states or territories within the limits of the act; Grant v. Cooke, 7 D. C. 165. This government was, however, abolished by act of June 20, 1874, and a temporary government by commissioners was thereby created, which existed until by act of June 11, 1878, provision was made for the continuance of the District "as a municipal corporation" and its control by the federal government through these commissioners, two of whom are appointed by the president and confirmed by the senate, and the other is an engineer officer of the army to be detailed for that service by the president. It is a municipal corporation having a right to sue and be sued, and is subject to the ordinary rules that govern the law of procedure between pri-

vate persons. The sovereign power is lodged in the government of the United States, and not in the corporation of the District; Metropolitan R. Co. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231. Congress is its local legislature; Gibbons v. District of Columbia, 116 U. S. 404, 6 Sup. Ct. 427, 29 L. Ed. 680; and exercises over it full and entire jurisdiction both of a political and municipal nature; Shoemaker v. U. S., 147 U. S. 282, 300, 13 Sup. Ct. 361, 37 L. Ed. 170; Parsons v. District of Columbia, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943; and it may legislate with respect to people and property therein as may the legislature of a state over any of its municipalities; Mattingly v. District of Columbia, 97 U. S. 687, 690, 24 L. Ed. 1098.

The District differs from a territory in that the latter is the fountain from which rights ordinarily flow, though congress may intervene, while in the former the body of private rights is created and controlled by congress and not by a legislature of the District; Kawananakoa v. Polyblank, 205 U. S. 349, 354, 27 Sup. Ct. 526, 51 L. Ed. 834.

The District of Columbia and the territorial districts of the United States are not states within the meaning of the constitution and of the Judiciary Act, so as to enable a citizen thereof to sue a citizen of one of the states in the federal courts; Hepburn v. Ellzey, 2 Cra. (U. S.) 445, 2 L. Ed. 332; New Orleans v. Winter, 1 Wheat. (U. S.) 91, 4 L. Ed. 44; Seton v. Hanham, R. M. T. Charlt. (Ga.) 374. Kent says: "However extraordinary it might seem to be, that the courts of the United States, which were open to aliens, and to the citizens of every state, should be closed upon the inhabitants of those districts (territories and the District of Columbia), on the construction that they were not citizens of a state, yet as the court observed, this was a subject for legislative, and not for judicial consideration." 1 Com. 349. It might be suggested as a consideration not here adverted to, that the theory on which this right of suing in federal courts is based is possible prejudice to the rights of a citizen of another state or an alien in the state court. In the District of Columbia and territories this would not apply, as their courts are created by the federal government.

For the judiciary, see UNITED STATES COURTS.

DISTRICTIO. A distraint, or distress. Cowell.

DISTRINGAS. A writ directed to the sheriff, commanding him to distrain a person of his goods and chattels to enforce a compliance with what is required of him.

It is used to compel an appearance where the party cannot be found, and in equity may be availed of to compel the appearance of a corporation aggregate. 4 Bouvier, Inst. n. 4191; Comyns, Dig. *Process* (D 7); Chitty, Pr.; Sellon, Pr.

A form of execution in the actions of detinue and assize of nuisance. Brooke, Abr. pl. 26; Barnet v. Ihrie, 1 Rawle (Pa.) 44.

DISTRINGAS JURATORES (Lat. that you distrain jurors). A writ commanding the sheriff to have the bodies of the jurors, or to *distrain* them by their lands and goods, that they may appear upon the day appointed. 3 Bla. Com. 354. It issues at the same time with the *venire*, though in theory afterwards, founded on the supposed neglect of the juror to attend. 3 Steph. Com. 590.

DISTRINGAS NUPER VICE COMITEM (Lat. that you distrain the late sheriff). A writ to distrain the goods of a sheriff who is out of office, to compel him to bring in the body of a defendant, or to sell goods attached under a *fi. fa.*, which he ought to have done while in office, but has failed to do. 1 Tidd, Pr. 313.

It can only issue after a return of seizure of goods to the value, etc.; Kline v. Church, 16 Pa. Dist. R. 559, where the practice was considered, although the writ has long fallen into disuse, and cases in 6 Mod. 295, and Zane v. Cowperthwaite, 1 Dall. (U. S.) 312, 1 L. Ed. 152, were cited.

DISTURBANCE. A wrong done to an incorporeal hereditament by hindering or disquieting the owner in the enjoyment of it. 3 Bla. Com. 235; Downing v. Baldwin, 1 S. & R. (Pa.) 298; Files v. Magoon, 41 Me. 104. The remedy for a disturbance is an action on the case, or, in some instances in equity, by an injunction.

DISTURBANCE OF COMMON. Any act done by which the right of another to his common is incommoded or hindered. The remedy is by distress (where beasts are put on his common) or by an action on the case, provided the damages are large enough to admit of his laying an action with a *per quod*. Cro. Jac. 195; Co. Litt. 122; 3 Bla. Com. 237; 1 Saund. 546; 4 Term 71.

DISTURBANCE OF FRANCHISE. Any acts done whereby the owner of a franchise has his property damnified or the profits arising thence diminished. The remedy for such disturbance is a special action on the case; Cro. Eliz. 558; 2 Saund. 113 *b*; 3 Sharsw. Bla. Com. 236; Bassett v. Mfg. Co., 28 N. H. 438.

Equity will grant an injunction against disturbance of a franchise in certain cases; Mohawk Bridge Co. v. R. Co., 6 Paige Ch. (N. Y.) 554; Georgetown v. Canal Co., 12 Pet. (U. S.) 91, 9 L. Ed. 1012; President, etc., of Delaware & M. R. Co. v. Stump, 8 G. & J. (Md.) 479, 29 Am. Dec. 561.

DISTURBANCE OF PATRONAGE. The hindrance or obstruction of the patron to present his clerk to a benefice. 3 Bla. Com. 242. The principal remedy was a writ of right of advowson; and there were also writs of *darrein presentment* and of *quare impedit*. Co. 2d Inst. 355; Fitzh. N. B. 31.

DISTURBANCE OF PUBLIC WORSHIP. The interference with the good order of religious assemblies has been described as disturbance, and in some of the states statutes have been passed to meet the offence; State v. Oskins, 28 Ind. 364; Wall v. Lee, 34 N. Y. 141; Cockreham v. State, 7 Humph. (Tenn.) 11; Owen v. Henman, 1 W. & S. (Pa.) 548, 37 Am. Dec. 481; Taffe v. State, 90 Ga. 459, 16 S. E. 204; State v. Karnes, 51 Mo. App. 293; Williams v. State, 83 Ala. 68, 3 South. 743; Ball v. State, 67 Miss. 358, 7 South. 353.

It is not necessary to constitute the offence that the congregation shall be actually

engaged in acts of religious worship at the time of the disturbance, but it is sufficient if they are assembled for the purpose of worship; State v. Ramsay, 78 N. C. 448; State v. Lusk, 68 Ind. 264.

To support a conviction for disturbing public worship, the evidence must show a wilful disturbance; Prucell v. State, (Tex.) 19 S. W. 605; Richardson v. State, 5 Tex. App. 470; Lancaster v. State, 53 Ala. 398, 25 Am. Rep. 625; State v. Lusk, 68 Ind. 264; State v. Bryson, 82 N. C. 576.

A Christmas festival is not a religious assembly; Layne v. State, 4 Lea (Tenn.) 199; nor is a church business meeting; Wood v. State, 11 Tex. App. 318. A Sunday school is not divine service; Appeal of Gass, 73 Pa. 39, 13 Am. Rep. 726.

DISTURBANCE OF TENURE. Breaking the connection which subsists between lord and tenant. 3 Bla. Com. 242; 2 Steph. Com. 513.

DISTURBANCE OF WAYS. This happens where a person who hath a right of way over another's ground by grant or prescription is obstructed by enclosures or other obstacles, or by ploughing across it, by which means he cannot enjoy his right of way, or at least in so commodious a manner as he might have done; 3 Bla. Com. 242; Pope v. Devereaux, 5 Gray (Mass.) 409; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; Shroder v. Brenneman, 23 Pa. 348; Okeson v. Patterson, 29 Pa. 22.

DITCH. The words "ditch" and "drain" have no technical or exact meaning. They both may mean a hollow place in the ground, natural or artificial, where water is collected or passes off. Goldthwait v. Inhabitants of East Bridgewater, 5 Gray (Mass.) 64. See EASEMENT; DRAIN.

DIVERSION. A turning aside or altering the natural course of a thing. The term is chiefly applied to the unauthorized changing the course of a water-course to the prejudice of a lower proprietor. Rap. & Lawr. L. Dict. See Parker v. Griswold, 17 Conn. 299, 42 Am. Dec. 739; 6 Price 1.

One who has a natural gas well on his place may explode nitroglycerine therein for the purpose of increasing the flow, though it has the effect of drawing the gas from the land of another; Greenfield Gas. Co. v. Gas Co., 131 Ind. 599, 31 N. E. 61.

The owner of land through which flows a stream of water, may recover damages from one who diverts the water, for any actual injury suffered therefrom in the enjoyment of his land; Clark v. R. Co., 145 Pa. 438, 22 Atl. 989, 27 Am. St. Rep. 710; Case v. Hoffman, 84 Wis. 438, 54 N. W. 793, 20 L. R. A. 40, 36 Am. St. Rep. 937. The fact that one diverts water maliciously is of no importance in determining whether a legal right of plaintiff has been violated; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99. See RIPARIAN PROPRIETORS; WATER-COURSE; GAS; OIL.

DIVERSITY OF PERSON. The plea of a prisoner in bar of execution that he is not the person convicted. 4 Steph. Com. 368; Moz. & W. Law Dict.

DIVERSO INTUITU. From a different view or point of view; with a different view, design, or purpose; by a different course or process. 1 W. Bla. 89; 9 East 311; D'Wolf v. Rabaud, 1 Pet. (U. S.) 500, 7 L. Ed. 227; 4 Kent, Com. 211 (b).

DIVEST. See DEVEST.

DIVIDED COURT. See PRECEDENT.

DIVIDEND. A portion of the principal or profits divided among several owners of a thing. Williston v. R. Co., 13 Allen (Mass.) 400; Taft v. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Attorney General v. Bank, 21 N. C. 545; Cary v. Sav. Union, 22 Wall. (U. S.) 38, 22 L. Ed. 779. See Rose v. Barclay, 191 Pa. 594, 43 Atl. 385, 45 L. R. A. 392.

As confined to corporations it is "that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively." 2 Thomp. Corp. § 2126; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793.

In the commonest use of the term dividends are a sum which a corporation sets apart from its profits to be divided among its members. Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; which, for the purpose of declaring a dividend, consist of the excess of its cash and other property on hand over its liabilities; Hubbard v. Weare, 79 Ia. 678, 44 N. W. 915.

Dividends cannot usually be paid out of the capital but only from the profits. The former is a trust fund for the stockholders; 2 Thomp. Corp. § 2152; which each of them is entitled to have preserved intact; Slayden v. Coal Co., 25 Mo. App. 439; but this principle does not apply when the capital from its nature is liable to waste and depreciation, as in case of companies to work a mine or a patent; 41 Ch. Div. 1.

Where dividends are *required* to be declared out of *profits merely* of a railroad company, the rule for ascertaining the profits is to exclude from consideration all debts other than what are commonly understood by the term funded debts, but to treat as deductions debts incurred and due for engines, rails, and the like, which should and would have been paid at the time if the funds had been in hand and are necessary

deductions from the property; 29 Beav. 272; and as to what are net earnings in the sense of surplus profits and therefore susceptible of definition, see Union Pac. R. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274; 99 Am. Dec. 762, note; Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44.

In England it was held that dividends must be payable in money; L. R. 14 Eq. 517; and it has been said there that the whole of the profits of a corporation must be divided periodically; L. R. 4 Ch. 494; but this is perhaps too broadly stated; Green's Brice, *Ultra Vires* 201. Neither of the above rules obtains in America: here stock and scrip dividends are very common; Leland v. Hayden, 102 Mass. 542; Lord v. Brooks, 52 N. H. 72; Howell v. Ry. Co., 51 Barb. (N. Y.) 378; State v. R. Co., 6 Gill (Md.) 363; Moraw. Priv. Corp. 448; and in the absence of statutory restriction are lawful; Williams v. Telegraph Co., 93 N. Y. 162; Rand v. Hubbell, 115 Mass. 471, 15 Am. Rep. 121; Com. v. Ry. Co., 74 Pa. 83; and bonds may be issued to the stockholders of a railroad corporation in place of cash, as the dividends representing earnings appropriated to the construction account, and these dividends, having been duly earned, may be declared for four years at once instead of each year; Wood v. Lary, 47 Hun (N. Y.) 550.

The declaration of dividends is within the implied scope of the authority of the directors, and unless controlled by the action of the corporation itself they have authority, in their sole discretion, to declare dividends and to fix the time and place of payment within the limits of reason and good faith with the stockholders; State v. Bank, 6 La. 745; Union Pac. Ry. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Park v. Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 762; Excelsior Water & Mining Co. v. Pierce, 90 Cal. 131, 27 Pac. 44; Williams v. Telegraph Co., 93 N. Y. 162; and as to time and place; King v. R. Co., 29 N. J. L. 82. See Belfast & M. L. R. Co. v. City of Belfast, 77 Me. 445, 1 Atl. 362; New York, L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363.

Where stockholders, including directors, met and agreed to a division of profits, but without formally declaring a dividend, their action was equivalent to such declaration; Spencer v. Lowe, 198 Fed. 961, 117 C. C. A. 497. Generally courts will not interfere in behalf of a common stockholder to compel the declaration of a dividend except in case of fraud or abuse of discretion; Howell v. R. Co., 51 Barb. (N. Y.) 378; Pratt v. Pratt, Read & Co., 33 Conn. 446; Smith v. Mfg. Co., 29 Ala. 503; Hunter v. Roberts, Throp & Co., 83 Mich. 63, 47 N. W. 131; nor will equity restrain the declaration of a dividend where the propriety of declaring one is fairly within the discretion of the directors; 41 Ch. Div. 1. Dividends may be applied by the corporation to debts due by the stockholder where the right of set-off would exist with respect to other creditors; Ex parte Winsor, 3 Sto. 411, Fed. Cas. No. 17,884; but this right exists only where the dividend has been declared and therefore a stockholder cannot refuse to pay interest due to the corporation in anticipation that a dividend will be declared; Ely v. Sprague, 1 Clarke, Ch. (N. Y.) 351. It has been held that unpaid dividends are assets of the corporation available for creditors in case of its insolvency; Curry v. Woodward, 44 Ala. 305; but this view is disapproved and declared unsound; 2 Thomp. Corp. § 2134. Dividends improperly declared may be recalled; *id.* § 2135; and even if paid, it has been held that they may be reclaimed; Lexington Life, Fire & Marine Ins. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; but this decision is doubted; 2 Thomp. Corp. § 2135; although approved in a case which did not require the court to go so far but only to hold that the dividend, not having been paid, was not collectible; Slayden v. Coal Co., 25 Mo. App. 439.

But where the directors, in fraud of a stockholder, set aside all the earnings for working capital, equity required the directors to declare a dividend out of the net earnings not needed for the corporate business; Lawton v. Bedell (N. J.) 71 Atl. 490. Equity will order a surplus of earnings of a life insurance company to be distributed to stockholders, if not needed for its business and the directors have arbitrarily or unreasonably withheld them; Blanchard v. Ins. Co., 78 N. J. Eq. 471, 79 Atl. 533.

When the fact that a dividend has been voted by the directors is not made public or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded; Ford v. Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. Rep. 462. There can be no discrimination among stockholders of the same class in respect to dividends, but if one stockholder is discriminated against, he cannot recover his share ratably from the others, until at least he has established his right as a creditor of the company and pursued his remedy against it; Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392.

A stockholder cannot recover the profits made by a corporation until a dividend has been declared; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Lockhart v. Van Alstyne, 31 Mich. 78, 18 Am. Rep. 156; Appeal of Moss, 83 Pa. 269, 24 Am. Rep. 164; Goodwin v. Hardy, 57 Me. 143, 99 Am. Dec. 758; Beveridge v. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; but after a dividend has been declared, and a *demand made therefor* by a stockholder, he may sue in assumpsit for the amount due him; Jones v. R. Co., 57 N. Y. 196; Brown v. Nav. Co., 49 Pa. 270; and

a stockholder has been allowed to follow the amount of his dividend into the hands of the receiver of the company; In re Le Blanc, 14 Hun 8; Beers v. Spring Co., 42 Conn. 17; the declaration of the dividend is an admission of indebtedness in money; Ehle v. Bank, 24 N. Y. 548; and it is no defence to show that the earnings were received in other property; *id.* The earnings of the corporation are part of the corporate property, and, until separated from the general mass, the interest of the stockholders therein passes with the transfer of the stock; and this is irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass and are appropriated to the then stockholders, who become creditors of the corporation for the amount of the dividend. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who, at the time of the declaration of the dividend, was the owner of the stock. That the dividend is payable at a future date makes no distinction in the right. The debt exists from the time of the declaration of the dividend, though payment be postponed. This right could of course be transferred, by special agreement, with the stock, but not otherwise. The dividend would not pass as an incident of the stock; Wheeler v. Sleigh Co., 39 Fed. 347; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716.

Mandamus will not lie to compel the payment of dividends declared by a private corporation; Van Norman v. Mfg. Co., 41 Mich. 166, 49 N. W. 925.

Dividends must be so declared as to give each stockholder his proportional share of profits; Jones v. R. R. Co., 57 N. Y. 196; Ryder v. R. Co., 13 Ill. 516; L. R. 3 Ch. 262; Atlantic & O. Telegraph Co. v. Com., 3 Brewst. (Pa.) 366; and if one person is excepted, he may sue for his dividends, for the reason that such exception is void; Hill v. Coal & Min. Co. (Mo.) 21 S. W. 508. They can properly be declared only out of profits actually earned; and when improperly declared and paid, they may be recovered back; Comstock v. Drohan, 71 N. Y. 9.

It is said that in Great Britain it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525. Where a company, by a majority of the votes, has decided not to divide the money, but to turn it all into capital, it must be held capital from that time; L. R. 29 Ch. Div. 635; L. R. 12 App. Cas. 385. The same principle was established in Massachusetts before the last cited English case had come before the courts of England; Atkins v. Albree, 12 Allen (Mass.) 359; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Daland v. Williams, 101 Mass. 571; Leland v. Hayden, 102 Mass. 542; Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121. And in Connecticut, Rhode Island and Maine a dividend of new shares representing accumulated earnings is held to be capital and not income; Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 618; Boardman v. Mansfield, 79 Conn. 634, 66 Atl. 169, 12 L. R. A. (N. S.) 793, 118 Am. St. Rep. 178; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Richardson v. Richardson, 75 Me. 570, 46 Am. Rep. 428. A stock dividend is held not to distribute property; Kalbach v. Clark, 133 Ia. 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; but simply dilutes the shares as they existed before; Williams v. Telegraph Co., 93 N. Y. 189. In In re Kernochan, 104 N. Y. 618, 11 N. E. 149, the court applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust, rejected the test of determining what part of a cash dividend should be deemed principal and what part income, by ascertaining how much was earned before and how much after the death of the testator, approved the English doctrine above cited, and said that from the shares in question no income could accrue, no profit arise to the holder until declared by the company, and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court upon an investigation of the business of the company.

Where the votes of the corporation left the stockholders at liberty to take the cash dividend or to take new stock and treat the dividend as payment for it, it cannot be said to be a stock dividend; Davis v. Jackson, 152 Mass. 58, 25 N. E. 21, 23 Am. St. Rep. 801. In Lord v. Brooks, 52 N. H. 72, it was held that the surplus earnings of a corporation that were not divided at the date of a trust deed belonged to the corpus of the trust as a part of the capital of the trust fund, and that dividends declared out of surplus earnings accrued since the date of the trust deed were income for the life tenant.

Stock which a corporation has acquired from its stockholder in payment of a debt, and which it distributes among its remaining stockholders as surplus earnings, goes to the life tenant, and not to the remainder-

man; Green v. Bissell, 79 Conn. 547, 65 Atl. 1056, 8 L. R. A. (N. S.) 1011, 118 Am. St. Rep. 156, 9 Ann. Cas. 287.

In Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768, it is said the method to be pursued is to inquire into the actual nature and source of the dividend. If it is found to represent surplus earnings accrued since the creation of the trust, it is income and goes to the life tenant. If it is found to represent earnings accrued prior to the creation of the trust, it is capital and goes to the corpus of the trust. And if it is found in whole or in part to represent the increase in value of the corporate plant and business, whether it took place before or after the trust was created, it is also to that extent capital, citing Jones v. Railroad, 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650; Van Blarcom v. Dager, 31 N. J. Eq. 783; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. As the court in making the inquiry concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it, the fact that a dividend is distributed in cash or stock is of little, if of any, importance in determining whether it is capital or income. The inquiry is largely one of fact, and the dividend is capital or income as the fact discloses into which of the above enumerated classes it falls. That it is said is the logic of the decision of the case in Lord v. Brooks, 52 N. H. 72, *supra*, and to be supported by the great weight of authority in this country; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Ashhurst v. Field's Adm'r, 26 N. J. Eq. 1; Appeal of Earp, 28 Pa. 368; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Hite's Devisees v. Hite's Ex'r, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189; Pritchitt v. Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

In Pennsylvania it is held that when stock is bequeathed in trust for the use of one for life with remainder over, surplus profits accumulated during the testator's life, but not divided until after his death, belong to the corpus of his estate; while dividends of earnings made after his death, whether in cash, stock, or scrip, go to the tenant for life; Smith's Estate, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237. In Appeal of Earp, 28 Pa. 368, the earnings from which a stock dividend was declared had accumulated partly before and partly after the death of the testator, and the court held that such dividend should be apportioned between the corpus and income in the proportion that the value of the stock at the testator's death bore to the value of the stock, including the new shares, after the dividend. The principle of apportionment of extraordinary dividends, earned partly before and partly after the inception of the life estate, has also been recognized and applied; Thomas v. Gregg, 78 Ind. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Pratt v. Douglas, 38 N. J. Eq. 541. In Hawaii, the court, after discussing the various rules, adopted the doctrine which treats stock and cash dividends alike, holding that only so much of the new stock allotted to the trustee as was of the par value of the stock so allotted should be apportioned to the life tenant, and the rest should be held as part of the corpus; 12 Haw. 309.

The value of a right to subscribe to additional stock, which depends on the earnings of the corporation since the creation of a trust for the benefit of a life tenant and remainderman, is income; Holbrook v. Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768.

In England it was at first held that all extra dividends belonged to the remainderman; 10 Ves. 185; 4 Ves. 800; but the House of Lords finally determined that stock dividends should pass to the remainderman and cash dividends to the life tenant, except in the case of companies which could not legally increase their capital stock, and extra dividends should go to the remainderman; 12 App. Cas. 385.

When arising under a will, the testator's intention must be ascertained, and this is ordinarily that the life tenant shall have the income and bonuses declared by the company; [1893] 3 Ch. 337 (C. A.), following 12 App. Cas. 385, where, upon an examination of many authorities, it was held that a reserved fund set apart out of profits and afterwards distributed as a bonus dividend, to be applied by stockholders in part payment of a new allotment of shares partly paid up, was held capital. Bramwell, L. J., said he could deduce no principle from the authorities.

A note in 26 Harv. L. Rev. 77, classifies the cases as follows: In Massachusetts and a number of cases following the rule of that state, it was held that stock dividends pass to the remaindermen and cash dividends from earnings to the life tenant; Lyman v. Pratt, 183 Mass. 58, 66 N. E. 423; Boardman v. Mansfield, 79 Conn. 634, 66 Atl. 169; DeKoven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Bryan v. Aikin (Del.) 82 Atl. 817. In Pennsylvania and states following the same rule, the courts have distinguished between the life tenant and remainderman with respect to dividends representing earnings before or since the creation of the trust fund; Earp's Appeal, 28 Pa. 368; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Thomas v. Gregg, 78 Md. 545, 28 Atl. 565, 44 Am. St. Rep. 310; Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739; Miller v. Payne, 150 Wis. 354, 136 N.

W. 811; Pritchitt v. Trust Co., 96 Tenn. 472, 36 S. W. 1064, 33 L. R. A. 856.

Another rule adopted in New York and Kentucky gives the dividends to the life tenant, whether they be of stock or cash representing accumulated earnings; McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Hite's Devisees v. Hite's Ex'rs, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189. Other cases follow so much of the Massachusetts rule as treats stock dividends as part of the principal; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; In re Brown, 14 R. I. 371, 51 Am. Rep. 397; Kaufman v. Woolen Mills Co., 93 Va. 673, 25 S. E. 1003. The conclusion is reached by the writer (26 Harv. L. Rev. 77) that while all the rules stated are open to objections, that of the Massachusetts courts is the most workable.

See 42 Amer. L. Rev. 25, for a discussion of the subject.

As used in the United States Corporation Tax Act (August 5, 1909), the so-called dividends of a mutual life insurance company doing business on the level premium plan, consisting merely of the portion of the loading of a premium charged in excess of the cost of insurance and returned annually after the first year to the policy holders to reduce their subsequent premiums, are not income and therefore not taxable under that act; Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199 (an instructive case on the practice of life insurance companies in this respect); to the same effect, Mutual Benefit Life Ins. Co. v. Com., 128 Ky. 174, 107 S. W. 802; Fuller v. Ins. Co., 70 Conn. 647, 41 Atl. 4; L. R. 14 App. Cas. 381.

In another sense, according to some old authorities, dividend signifies one part of an indenture.

DIVINE RIGHT OF KINGS. This theory "was in its origin directed, not against popular liberty, but against papal and ecclesiastical claims to supremacy in temporal as well as spiritual affairs." Figgis, "The Theory of the Divine Right of Kings."

DIVINE SERVICE. The name of a feudal tenure, by which the tenants were obliged to do some special divine services in certain, as to sing so many masses, etc. 2 Bla. Com. 102; Mozl. & W. Dict.

In its modern use the term does not include Sunday schools; Appeal of Gass, 73 Pa. 39, 13 Am. Rep. 726.

DIVISA. In Old English. A device, award, or decree; also a devise; bounds or limits of division of a parish or farm. Also a court held on the boundary, in order to settle disputes of the tenants. Wharton.

DIVISIBLE. That which is susceptible of being divided.

A contract cannot, in general, be divided in such a manner that an action may be brought, or a right accrue, on a part of it; Shaw v. Turnpike Co., 2 Pen. & W. (Pa.) 454. But some contracts are susceptible of division: as, when a reversioner sells a part of the reversion to one man and a part to another, each shall have an action for his share of the rent which may accrue on a contract to pay a particular rent to the reversioner; Thomas v. Smith, 3 Whart. (Pa.) 404. See APPORTIONMENT. But when it is to do several things at several times, an action will lie upon every default; Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611. See Aldrich v. Fox, 1 Greenl. (Me.) 316; Symmes v. Frazier, 6 Mass. 344, 4 Am. Dec. 142; PERFORMANCE.

DIVISION. In English Law. A particular and ascertained part of a county. In Lincolnshire division means what riding does in Yorkshire.

DIVISION OF OPINION. Disagreement among those called upon to decide a matter.

When, in a company or society, the parties having a right to vote are so divided that there is not a plurality of the whole in favor of any particular proposition, or when the voters are equally divided, it is said there is division of opinion. The term is especially applied to a disagreement among the judges of a court such that no decision can be rendered upon the matter referred to them.

When the judges of a court are divided into three classes, each holding a different opinion, that class which has the greatest number shall give the judgment: for example, on a *habeas corpus*, when a court is composed of four judges, and one is for remanding the prisoner, another is for discharging him on his own recognizance, and the two others are for discharging him absolutely, the judgment will be that he be discharged; Rudyard's Case; Bacon, Abr. *Habeas Corpus* (B 10), *Court*, 5.

A certificate under the act of 1891 should contain a proper statement of the facts on which the question of law arises; the entire record should not be transmitted; Emsheimer v. New Orleans, 186 U. S. 33, 22 Sup. Ct. 770, 46 L. Ed. 1042.

DIVISUM IMPERIUM. A divided jurisdiction. Applied *e. g.* to the jurisdiction of courts of common law and equity over the same subject. 1 Kent 366.

DIVORCE. The dissolution or partial suspension, by law, of the marriage relation.

The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii;* the suspension, divorce from bed and board, *a mensa et thoro.* The former divorce puts an end to the marriage; the later leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.

The more correct modern usage, however, confines the signification of divorce to the *dissolution*

of a *valid* marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio*, and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptation of the term. For the other branches of the subject, see SEPARATION A MENSA ET THORO; NULLITY OF MARRIAGE.

Marriage, being a legal relation, and not (as sometimes supposed) a mere contract, can only be dissolved by legal authority.

The relation originates in the consent of the parties, but, once entered into, it must continue until the death of either husband or wife, unless sooner put an end to by the sovereign power. In Maynard v. Hill, 125 U. S. 210, 8 Sup. Ct. 723, 31 L. Ed. 654, it is said that whilst marriage is often termed by text writers and in decisions of courts a civil contract, it is something more. When the contract to marry is executed by the marriage, a relation between the parties is created which cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties, but not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. The supreme court then approves the views laid down in Adams v. Palmer, 51 Me. 483, where it is said that when the contracting parties have entered into the marriage state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common; they are of law, not of contract. It was of contract that the relation should be established, but being established the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign as evidenced by the law. They can neither be modified nor changed by any agreement of the parties. It is a relation for life and the parties cannot terminate it at any shorter period by virtue of any contract they may make. "Marriage has been said to be something more than a mere contract, religious or civil; to be an institution"; L. R. 1 P. & D. 130. In England, until the middle of the last century no authority existed in any of the judicial courts to grant a divorce in the strict sense of the term. The subject of marriage and divorce generally belonged exclusively to the various ecclesiastical courts; and they were in the constant habit of granting what were termed divorces *a mensa et thoro*, for various causes, and of pronouncing sentences of nullity; but they had no power to dissolve a marriage, valid and binding in its origin for causes arising subsequent to its solemnization. For that purpose recourse must be had to parliament; 2 Burn, Eccl. Law 202; Macq. Parl. Pr. 470 (after having first obtained an ecclesiastical decree *a mensa et thoro* and recovered damages against the adulterer in an action of *crim. con.* This practice began about 1669). But in 1857 a court was created, "The Court for Divorce and Matrimonial Causes," upon which was conferred exclusively all jurisdiction over matrimonial matters then vested in the various ecclesiastical courts, and also the jurisdiction theretofore exercised by parliament in granting divorces. At present divorce causes are heard, in the first instance, in the Probate, Divorce and Admiralty Division of the High Court of Justice, whence an appeal lies to the Court of Appeal.

In Ireland there is no divorce *a vinculo*, except by act of parliament.

In this country the usage has been various. Formerly it was common for the various state legislatures, like the English parliament, to grant divorces by special act. This practice is now much less common. In many states it has been expressly prohibited by state constitutions; 1 Bish. Mar. & D. § 1471. Such an act is constitutional; Wright v. Wright's Lessee, 2 Md. 429, 56 Am. Dec. 723; Berthelemy v. Johnson, 3 B. Monr. (Ky.) 90, 38 Am. Dec. 179; and does not offend against the constitutional provision which forbids laws impairing the obligation of contracts, even though there was no valid ground for divorce and the wife was not notified; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654, where the husband was a resident of the territory. See also State v. Duket, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928. Generally, at the present time, the jurisdiction to grant divorces is conferred by statute upon courts of equity, or courts possessing equity powers, to be exercised in accordance with the general principles of equity practice, subject to such modifications as the statute may direct. The action is statutory only; there is no common-law jurisdiction over the subject of divorce; Ackerman v. Ackerman, 200 N. Y. 73, 93 N. E. 192. The practice of the English ecclesiastical courts, which is also the foundation of the practice of the new court for divorce and matrimonial causes in England, has never been adopted to any considerable extent in this country; but it is said that in some jurisdictions the principles and practice of the ecclesiastical courts are followed so far as they are applicable to our altered conditions and in accord with the spirit of our laws; 2 Bish. Mar. & Div. 460. See Le Barron v. Le Barron, 35 Vt. 365; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183.

Numerous and difficult questions are constantly arising in regard to the validity in one state of divorces granted by the courts or legislature of another state. The subject is treated in 2 Bish. Mar. Div. and Sep. § 128. The learned author there states the

following propositions, which he elaborates with great care: *First*, the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offence may have occurred, if neither of the parties has an actual *bona fide* domicil within its territory; *secondly*, to entitle the court to take jurisdiction, it is sufficient for one of the parties to be domiciled in the country; both need not be, neither need the citation, when the domiciled party is plaintiff, be served personally on the defendant, if such personal service cannot be made, but there should be reasonable constructive notice, at least; *thirdly*, the place where the offence was committed, whether in the country in which the suit is brought or a foreign country, is immaterial; *fourthly*, the domicil of the parties at the time of the offence committed is of no consequence, the jurisdiction depending on their domicil when the proceeding is instituted and the judgment is rendered; *fifthly*, it is immaterial to this question of jurisdiction in what country or under what system of divorce laws the marriage was celebrated; *sixthly*, without a citation within the reach of process, or an appearance, the jurisdiction extends only to the status and what depends directly thereon, and not to collateral rights.

The doctrine of the first proposition is said not to have been thoroughly established in England; 2 Bish. Mar. D. & Sep. § 43; but it is fully established in America; Davis v. Com., 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Armington, 25 Minn. 29; People v. Smith, 13 Hun (N. Y.) 414; Cast v. Cast, 1 Utah, 112; Smith v. Smith, 43 La. Ann. 1140, 10 South. 248; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Watkins v. Watkins, 135 Mass. 83; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Appeal of Platt, 80 Pa. 501; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807. Mr. Bishop maintains the second proposition as fully supported on principle and authority; see especially Ditson v. Ditson, 4 R. I. 87; Thompson v. State, 28 Ala. 12; Wakefield v. Ives, 35 Ia. 238; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604; Richards v. Richards, 19 D. C. 431; but see People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Story, Confl. Laws, Redf. ed. As to the third proposition, which is said by the same author to be universal, see Hanberry v. Hanberry, 29 Ala. 719; Clark v. Clark, 8 N. H. 21; Holmes v. Holmes, 57 Barb. (N. Y.) 305; Pawling v. Willson, 13 Johns. (N. Y.) 192. The fifth proposition is universally recognized; see Dorsey v. Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767; Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Thompson v. State, 28 Ala. 12; Standridge v. Standridge, 31 Ga. 223. See, however, 2 Cl. & F. 568.

When both husband and wife are domiciled in the state where the divorce is granted, the decree of divorce is without doubt valid everywhere; Leith v. Leith, 39 N. H. 38; Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; Garner v. Garner, 56 Md. 128; Hunt v. Hunt, 72 N. Y. 237, 28 Am. Rep. 129; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200; Hubbell v. Hubbell, 3 Wis. 664, 62 Am. Dec. 702; Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. Ed. 298; Barrett v. Failing, 111 U. S. 524, 4 Sup. Ct. 598, 28 L. Ed. 505; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81. See L. R. 6 P. D. 35.

If the court making the decree had jurisdiction, it will be held conclusive in other states; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; People v. Allen, 40 Hun (N. Y.) 611; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Shaw v. Shaw, 98 Mass. 158; and jurisdiction will be presumed; Knowlton v. Knowlton, 155 Ill. 158, 39 N. E. 595; unless want of it appears upon the record; Werner v. Werner, 30 Ill. App. 159; Collins v. Collins, 80 N. Y. 1; Morey v. Morey, 27 Minn. 265, 6 N. W. 783; or it may be shown as against the record; Reed v. Reed, 52 Mich. 117, 17 N. W. 720, 50 Am. Rep. 247; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275.

As to the right of the wife to acquire a different domicil from that of the husband for the purpose of jurisdiction in a suit for divorce, see DOMICIL.

There has been much difference of opinion as to the extra-territorial effect of constructive service by publication as between states. If both parties are domiciled within the state the decree is of force in other states; Hood v. Hood, 11 Allen (Mass.) 196, 87 Am. Dec. 709; Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; but if only one, the decree determines his or her status; Pennoyer v. Neff, 95 U. S. 714, 734, 24 L. Ed. 565; Shafer v. Bushnell, 24 Wis. 372; Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275. Where the custody of children is involved it is held that constructive service of summons cannot give jurisdiction where the defendant and the children are out of the state and do not appear, even if their domicil is within the state; De la Montanya v. De la Montanya, 112 Cal. 101, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165.

The view cited from Bishop concerning the extra-territorial operation of the decree under the constitution is held in Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Anthony v. Rice, 110 Mo. 233, 19 S. W. 423; Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; Thompson v. Thompson, 91 Ala. 591, 8

South. 419, 11 L. R. A. 443; the contrary view is taken in Van Inwagen v. Van Inwagen, 86 Mich. 333, 49 N. W. 154; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; Flower v. Flower, 42 N. J. Eq. 152, 7 Atl. 669; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703; Com. v. Steiger, 12 Pa. Co. Ct. 334; [1893] Prob. 89.

Where the husband removed to Minnesota and there secured a divorce on constructive service of notice on the wife, who did not appear, it was held in a subsequent suit for divorce by the wife in New York that the Minnesota decree was invalid; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; and to the same effect are O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274. The ground of these cases is that the court rendering the decree under such circumstances, though having jurisdiction to establish the status of the parties in the state where the divorce is granted, yet has no jurisdiction over their status in New York; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650, which case was reversed in Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, where it was held that actual notice need not be given to a non-resident defendant to bind her by a decree of divorce, if reasonable efforts to give her actual notice as required by the statutes of the state granting the decree are made. The decision in this case was expressly placed on the ground that the suit was brought in the state of the matrimonial domicil. A later case in the supreme court held that the mere domicil within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the federal constitution, against a non-resident who did not appear and was only constructively served with notice of the action; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The court in this case made the following classification: (a) States where the power to decree a divorce is recognized, based upon the mere domicil of the plaintiff, although the decree when rendered will be but operative within the borders of the state, wholly irrespective of any force which may be given such decree in other states. Under this heading all of the states are embraced with the possible exception of Rhode Island. (b) States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other states, when the court rendering the same had jurisdiction over only one of the parties. Under this heading is embraced Massachusetts, New Jersey (with the qualification made by the decision in Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, 83 Am. St. Rep. 612), and New York. (c) States which, whilst giving some effect to decrees of divorce rendered against its citizens, in other states where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes Alabama, Maine, Ohio, and Wisconsin. (d) Cases which, although not actually so deciding, yet lend themselves to the view that *ex parte* decrees of divorce rendered in other states would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

This analysis and classification, the court said, serves conclusively to demonstrate that the limited recognition which is given in most of the states to such *ex parte* decrees of divorce rendered in other states is wholly inconsistent with the theory that such limited recognition is based upon the operation of the full faith and credit clause of the constitution, and on the contrary is consistent only with the conception that such limited recognition as is given is based upon state comity. In Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1, it was held that a decree of divorce rendered in Connecticut, where the husband had his domicil, against a non-resident defendant who had never been domiciled in that state, was not, by virtue of the full faith and credit clause, enforceable in all the other states.

This decision was by a divided court. In 19 Harv. L. Rev. 586, it is elaborately criticised, but the supreme court of Utah (*infra*), in deciding whether it was justified in granting a divorce, or whether it had jurisdiction, where the husband had abandoned his matrimonial domicil in that state, was constructively served with notice, and failed to appear, followed the Haddock Case and in a careful analysis of it, to determine if under its ruling the decision of the Utah court would be entitled to full faith and credit, held that it would; that a man cannot change the matrimonial domicil by abandoning his wife and going into another state to reside, and laid down the following propositions deduced from it:

Divorces may be granted by state courts, upon constructive service, where statutory cause and residence co-exist, which become binding upon the parties, the courts of all states, and upon all persons: (1) In cases

where the parties are residents of the state at the time of the marriage and thus established a domicil of matrimony in that state and the complaining party continues this domicil up to the time of the action. (2). In all cases where the parties are married out of the state, but come to reside in the state afterwards and recognize the marriage relation within the state and thus establish a domicil of matrimony therein, and the party bringing the action continues this marital domicil up to the time of bringing the action. (3) In all cases where a statutory cause and residence co-exist where personal service is had; State v. Morse, 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127.

Where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry, and if there was no jurisdiction either of the subject-matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause, to enforce such decree; Haddock v. Haddock, 201 *id.* 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

Where substituted service was made upon a non-resident defendant in accordance with the laws of the state granting the divorce, it has been held in New York that the decree of divorce was entitled to full extra-territorial validity under the full faith and credit clause of the federal constitution; North v. North, 47 Misc. 180, 93 N. Y. Supp. 512; but the deserted spouse had acquired a *bona fide* domicil in the state granting the decree. It is said that this case marks an important development in this branch of the New York law (19 Harv. L. Rev. 61), rendered necessary by the decision of the supreme court in the Atherton Case, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794, reversing 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650, which, following the New York rule that divorce is a proceeding *in personam*, required that the defendant should be personally served with process within the jurisdiction of the divorce court.

A provision in the Georgia Code of 1895, § 5237, that records and judicial proceedings, properly authenticated, shall have such faith and credit given them in every court within the United States as they have by law or usage in the court from which they were taken, was held not to apply to a decree of divorce granted in Kansas based on constructive and not actual service of process on a wife who remained in Georgia; but, it not appearing that any fraud or concealment was practiced by the husband, the Georgia courts, recognized the validity of the decree on the ground of comity; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647, 127 Am. St. Rep. 220.

A decree of a state court, having jurisdiction of the parties, that a divorce granted in another state is valid, is held binding in a third state in an attack there upon such decree; Bidwell v. Bidwell, 139 N. C. 402, 52 S. E. 55, 2 L. R. A. (N. S.) 324, 111 Am. St. Rep. 797, where a North Dakota decree was assailed for lack of jurisdiction and for duress and fraud by the husband in obtaining it. The Massachusetts court, in which the wife sued for divorce, held the Dakota decree valid, as did the court in North Carolina, where after six years she again sued for divorce and it was held that the validity of the North Dakota divorce was established by the Massachusetts court and the plaintiff was estopped by the Massachusetts decree from further questions concerning the one in Dakota.

In New Jersey it was held that a court of chancery, on a bill filed by a wife, had jurisdiction to enjoin the husband from prosecuting a suit for divorce in another state, the jurisdiction of which he had invoked on a false and fraudulent allegation of his residence in that state; Kempson v. Kempson, 58 N. J. Eq. 94, 43 Atl. 97; Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682. The defendant in this suit had disregarded the injunction and obtained a final decree of divorce. He returned to New Jersey with a new wife, and was committed for contempt. The Vice Chancellor reported a decree that the defendant should be fined and be imprisoned until he should have the decree of the North Dakota court set aside. On appeal, the order of the Vice Chancellor was so far modified as to require the defendant to present the truth to the court in North Dakota and in good faith to urge that its decree be set aside, as only that court could vacate its decree, and the defendant clearly had no power to insure the result. And see Kittle v. Kittle, 8 Daly (N. Y.) 72, where a defendant in a divorce suit was enjoined from prosecuting a subsequent suit in another state for a divorce which he intended to press to judgment, before the former was terminated, where all the witnesses were in the former state, and the wife was pecuniarily unable to defend a suit in the other state.

In several states divorces are by statute inoperative when a person goes out of the state and obtains elsewhere a divorce for a cause not valid in the state from which he goes. And in Massachusetts the courts have held invalid decrees, for causes not cognizable in that state, granted in another state, for a divorce when the party went there to procure it; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; or to annul a marriage; Loker v. Gerald, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252; and such a decree does not violate the full faith and credit clause of the United States con-

stitution; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; and such a divorce was held invalid as against public policy, in Wisconsin, where the marriage in another state was considered as having been entered into for the purpose of evading the statute; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. Rep. 1085; but where it was not shown that the party went to the other state for that purpose and the wife had executed a release to the husband, she was not permitted to impeach the decree; Loud v. Loud, 129 Mass. 14; and so where an appearance was entered in the other state; Elliott v. Wohlfrom, 55 Cal. 384; or where there has been obtained a *bona fide* domicil elsewhere; Gregory v. Gregory, 76 Me. 535.

The supreme court of the United States has no jurisdiction to re-examine the judgment of a state court, recognizing as valid the decree of a court of a foreign country annulling a marriage; Roth v. Ehman, 107 U. S. 319, 2 Sup. Ct. 312, 27 L. Ed. 499. See Whart. Confl. Laws.

It was never the practice of the English parliament to grant a divorce for any other cause than adultery; and it was the general rule to grant it for simple adultery only when committed by the wife, and upon the application of the husband. To entitle the wife, other circumstances must ordinarily concur, simple adultery committed by the husband not being sufficient; Macq. Parl. Pr. 473. The English statute of 20 & 21 Vict. c. 85, before referred to, prescribes substantially the same rule,—it being provided, § 27, that the husband may apply to have his marriage dissolved "on the ground that his wife has, since the celebration thereof, been guilty of adultery," and the wife, "on the ground that, since the celebration thereof, her husband has been guilty of incestuous bigamy, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards."

In this country the question depends upon the statutes of the several states, the provisions of which are far from uniform. In some of the states, also, the matter is left wholly or in part to the discretion of the court. See Bish. Mar. D. & Sep.; Weber v. Weber, 16 Or. 163, 17 Pac. 866. For more specific information, recourse must be had to the statutes of the several states.

Some of the more important grounds for divorce are: *desertion;* for a statutory period; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Millowitsch v. Millowitsch, 44 Ill. App. 357; Hemenway v. Hemenway, 65 Vt. 623, 27 Atl. 609 (see DESERTION); *abandonment;* McLean v. Janin, 45 La. Ann. 664, 12 South. 747; *adultery;* Carter v Carter, 37 Ill. App. 219; McGrail v. McGrail, 48 N. J. Eq. 532, 22 Atl. 582; *cruelty;* De Zwaan v. De Zwaan, 91 Mich. 279, 51 N. W. 998; Day v. Day, 84 Ia. 221, 50 N. W. 979; Mayhew v. Mayhew, 61 Conn. 233, 23 Atl. 966, 29 Am. St. Rep. 195; 69 Law T. 152; Glass v. Wynn, 76 Ga. 319; Myers v. Myers, 83 Va. 806, 6 S. E. 630 (see LEGAL CRUELTY); *habitual drunkenness;* McBee v. McBee, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613; De Lesdernier v. De Lesdernier, 45 La. Ann. 1364, 14 South. 191; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054; *conviction of crime*, in most states; *incurable insanity*, in some states; *failure to support;* and *impotence, relationship, incapacity* to enter into the contract, *fraud, duress*, etc.

Fraud in the contract is an offence or wrong done by one spouse to another, so affecting the essential conditions of the marriage status as practically to destroy that relation, and render the continuance of the bond an injury to the state as well as to the parties. The wrong becomes complete on the completion of the marriage contract. It may consist in false statements as to existing facts which affect one or more of the essential purposes of the status. The injured spouse may however condone the injury and accept the relation or, upon discovery of the wrong, may apply for a divorce; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531.

Concealment of epilepsy is a fraud within the meaning of a statute allowing divorce for fraud in the contract of marriage, where the statute forbids an epileptic to marry under penalty of imprisonment. Such statute is valid and a marriage in disregard of it is voidable, not void; *id.*

Where a statute gave a court of chancery sole cognizance to decree a marriage null and void where either of the parties was at the time insane, drunkenness was held not insanity for which a divorce could be granted; Elzey v. Elzey, 1 Houst. (Del.) 308; nor was an excessive indulgence in morphine considered a ground for divorce under a statute permitting divorce for habitual drunkenness; Youngs v. Youngs, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313; Dawson v. Dawson, 23 Mo. App. 169. It is said there must be an involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence; McBee v. McBee, 22 Or. 329, 29 Pac. 887, 29 Am. St. Rep. 613; Burns v. Burns, 13 Fla. 369. As an independent ground, drunkenness is held in Maryland to furnish no cause for divorce; Shutt v. Shutt, 71 Md. 193, 17 Atl. 1024, 17 Am. St. Rep. 519; Mason v. Mason, 131 Pa. 161, 18 Atl. 1021. Where the statute coupled habitual intemperance with intolerable cruelty as a cause for divorce, it was said the habitual use of intoxi-

cating liquor, though producing excitement, will not justify a divorce. The habit must be so gross as to produce suffering or want in the family to a degree which cannot be reasonably borne. The term cannot well be defined, but must be applied to cases as they arise by inclusion or exclusion, and the existence of the condition in question decided as a matter of fact; Dennis v. Dennis, 68 Conn. 186, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95, where it is said: "While there may be, on the one hand, such a clear case of intemperate habits as to justify the court in saying that such and such facts constitute a condition of habitual intemperance, or, on the other hand, such an entire absence of proof, beyond an occasional indulgence in the use of ardent spirits, as to warrant the opposite conclusion, yet the main field of inquiry and the determination of the question must be submitted to the jury, and the questions on this submission must be decided by them."

If at the time of the marriage the wife was with child by another man, it may be ground for divorce; Baker v. Baker, 13 Cal. 87; or the marriage may be declared null and void *ab initio;* Reynolds v. Reynolds, 3 Allen (Mass.) 605; Carris v. Carris, 24 N. J. Eq. 516; *contra*, [1897] P. D. 263; but where the wife concealed the fact that she had been previously married and divorced and had a child, it was not such fraud as to entitle the husband to a sentence of nullity; Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892.

The existence of venereal disease at the time of marriage is held ground for annulment; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (where there was refusal to consummate and the court confined its decision to that case, considering it the stronger because of the prompt action); and it is also, during marriage, cause for divorce, being put upon the ground that the communication of such disease to the other spouse is extreme cruelty; Cook v. Cook, 32 N. J. Eq. 475; 28 E. L. & Eq. 603, 29 L. J. Mat. 57; L. R. 1 P. & D. 702, Curt. 678; McMahen v. McMahen, 186 Pa. 485, 40 Atl. 795, 41 L. R. A. 802; Morehouse v. Morehouse, 70 Conn. 420, 39 Atl. 516; Holthoefer v. Holthoefer, 47 Mich. 260, 643, 11 N. W. 150 (where the doctrine is sustained, though the divorce was refused in a case termed by Cooley, J., as "quite peculiar," the wife being found diseased, with no suspicion against her chastity, and the husband found on examination to have no signs of it); and having the disease has been held sufficient cause without communicating it; 1 Hagg. Eccl. 765; Canfield v. Canfield, 34 Mich. 519; Hanna v. Hanna, 3 Tex. Civ. App. 51, 21 S. W. 720; where the court was not prepared to say that it would not entitle the wife to a divorce, if the husband were diseased, without proof that he had communicated it to her; a reasonable apprehension of injury is sufficient; 1 Hagg. Con. 35. The libellant must have been ignorant as to the existence and nature of the disease, otherwise there may be waiver and condonation; Rehart v. Rehart (Or.) 25 Pac. 775; but if she was ignorant, the divorce will be granted; Wilson v. Wilson, 16 R. I. 122, 13 Atl. 102.

Charges held not to be grounds of divorce are that the wife entered into love-making, secret correspondence and meetings with young men and the like, which the court characterized as "flirting"; Hancock v. Hancock, 55 Fla. 680, 45 South. 1020, 15 L. R. A. (N. S.) 670; the refusal of a man to permit his wife actively to control his business, though it result in the inability to live harmoniously together; Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740. The practice of Christian Science as a doctor by a wife may give her husband ground for divorce under a statute authorizing divorce for treatment seriously injuring health or endangering reason, even though such alleged injury is due to the husband's abnormal sensitiveness; Robinson v. Robinson, 66 N. H. 600, 23 Atl. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632.

In the Philippine Islands adultery of the husband must be accompanied by public scandal and disgrace to entitle the wife to a divorce; De La Rama v. De La Rama, 201 U. S. 303, 26 Sup. Ct. 485, 50 L. Ed. 765.

The Uniform Divorce Act has been passed in Delaware, New Jersey, and Wisconsin.

See ABANDONMENT; ADULTERY; LEGAL CRUELTY; HABITUAL DRUNKARD; INSANITY; IMPOTENCE. As to divorce laws in all countries, see 3 Burge, Colonial Law, by Renton & Phillimore.

Some of the principal defences in suits for divorce are: *Connivance*, or the corrupt consent of a party to the conduct of the other party, whereof he afterwards complains. This bars the right of divorce, because no injury was received; for what a man has consented to he cannot say was an injury; 2 Bish. Mar. & D. § 204. See Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St. Rep. 823; Pettee v. Pettee, 77 Hun 595, 28 N. Y. Supp. 1067. And this may be passive as well as active; 3 Hagg. Eccl. 87. See Morrison v. Morrison, 136 Mass. 310. See CONNIVANCE. *Collusion*, which is an agreement between husband and wife for one of them to commit, or appear to commit, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act has not been done, collusion is a real or attempted fraud upon the court; where it has, it is also a species of connivance; in either case it is a bar to any claim for divorce; 2 Bish. Mar. & D. § 251. See COLLUSION. *Condonation*, or the conditional forgiveness or remis-

sion by the husband or wife of a matrimonial offence which the other has committed. While the condition remains unbroken, condonation, on whatever motive it proceeded, is an absolute bar to the remedy for the particular injury condoned; 2 Bish. Mar. & D. § 268; Farmer v. Farmer, 86 Ala. 322, 5 South. 434; 60 Law J. Prob. 73; O'Connor v. O'Connor, 109 N. C. 139, 13 S. E. 887; Nullmeyer v. Nullmeyer, 49 Ill. App. 573. For the nature of the condition, and other matters, see CONDONATION. *Recrimination*, which is a defence arising from the complainant's being in like guilt with the one of whom he complains. It is incompetent for one of the parties to a marriage to come into court and complain of the other's violation of matrimonial duties, if the party complaining is guilty likewise; Redington v. Redington, 2 Colo. App. 8, 29 Pac. 811. When the defendant sets up such violation in answer to the plaintiff's suit, this is called, in the matrimonial law, recrimination; 2 Bish. Mar. & D. § 340. See RECRIMINATION.

The foregoing defences, though available in all divorce causes, are more frequently applicable where a divorce is sought on the ground of adultery.

The consequences of divorce are such as flow from the sentence by operation of law, or flow from either the sentence or the proceeding by reason of their being directly ordered by the court and set down of record. In regard to the former, they are chiefly such as result immediately and necessarily from the definition and nature of a divorce. Being a dissolution of the marriage relation, the parties have no longer any of the rights, nor are subject to any of the duties, pertaining to that relation. They are henceforth single persons to all intents and purposes. It is true that the statutes of some of the states contain provisions disabling the guilty party from marrying again; but these are in the nature of penal regulations, collateral to the divorce, and which leave the latter in full force.

In regard to rights of property as between husband and wife, a sentence of divorce leaves them as it finds them. Consequently, all transfers of property which were actually executed, either in law or fact, continue undisturbed; for example, the personal estate of the wife, reduced to possession by the husband, remains his after the divorce the same as before. On the termination of a tenancy by the entirety, created by a conveyance to husband and wife, by an absolute divorce, they afterward hold the land as tenants in common without survivorship; Stelz v. Shreck, 128 N. Y. 263, 28 N. E. 510, 13 L. R. A. 325, 26 Am. St. Rep. 475. See Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120. But it puts an end to all rights depending upon the marriage and not actually vested; as, dower in a wife, all rights of the husband in the real estate of the wife, and his right to reduce to possession her choses in action; Lawson v. Shotwell, 27 Miss. 630; Gould v. Crow, 57 Mo. 200; Whitsell v. Mills, 6 Ind. 229; Clark v. Clark, 6 W. & S. (Pa.) 85; Townsend v. Griffin, 4 Harr. (Del.) 440; Starr v. Pease, 8 Conn. 541; Legg v. Legg, 8 Mass. 99; Renwick v. Renwick, 10 Paige, Ch. (N. Y.) 420; Doe v. Brown, 5 Blackf. (Ind.) 309; Oldham v. Henderson, 5 Dana (Ky.) 254; Arrington v. Arrington, 102 N. C. 491, 9 S. E. 4; American Legion of Honor v. Smith, 45 N. J. Eq. 466, 17 Atl. 770; Maynard v. Hill, 125 U. S. 216, 8 Sup. Ct. 723, 31 L. Ed. 654; Barrett v. Failing, 111 U. S. 525, 4 Sup. Ct. 598, 28 L. Ed. 505; Lamkin v. Knapp, 20 Ohio St. 454. In respect to dower, however, it should be observed that a contrary doctrine has been settled in New York, it being there held that immediately upon the marriage being solemnized the wife's right to dower becomes perfect, provided only she survives her husband; Wait v. Wait, 4 N. Y. 95; Forrest v. Forrest, 6 Duer (N. Y.) 102.

Courts will annul or vacate decrees of divorce on sufficient showing after the death of one or both of the parties thereto, where property rights are involved; Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193; Lawrence v. Nelson, 113 Ia. 277, 85 N. W. 84, 57 L. R. A. 583; Wood v. Wood, 136 Ia. 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. Rep. 223; Shafer v. Shafer, 30 Mich. 163; or where it is shown that the divorce was fraudulently obtained; Appeal of Fidelity Ins. Co., 93 Pa. 242 (where the rule to vacate it was not filed until thirteen years after the decree was obtained and after the death of the party obtaining it); Brown v. Grove, 116 Ind. 84, 18 N. E. 387, 9 Am. St Rep. 823 (twenty years after the date of the decree and long after the death of the party obtaining it); or where lack of jurisdiction to grant the decree is shown; Rine v. Hodgson, 9 Ohio Dec. Reprint 275; Willman v. Willman, 57 Ind. 500.

One against whom a divorce is obtained who accepts the benefit of the decree, and acts in a way which would be illegal but for the divorce so granted, cannot, after a long lapse of time and after the death of the other party, deny its validity, or assert that it was obtained without due notice; In re Richardson's Estate, 132 Pa. 292, 19 Atl. 82; Mohler v. Shank's Estate, 93 Ia. 273, 61 N. W. 981, 34 L. R. A. 161, 57 Am. St. Rep. 274; nor can one who invokes the jurisdiction of a state and submits himself thereto be heard to question such jurisdiction; Matter of Morrisson, 52 Hun 102, 5 N. Y. Supp. 90, affirmed in 117 N. Y. 638, 22 N. E. 1130; and his representatives can occupy no better position than he would have, if living; *id.* If the defendant in a divorce decree cannot attack it because it was obtained by his own fraud,

his administrator cannot attack it because of such fraud; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. In Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064, where no property rights were involved, it was held that, by the death of a party, a suit for a divorce was absolutely abated, and that the purpose of the action being to change the personal *status* of the plaintiff in her relations to her husband after her death, there was none which could be changed by judgment; and in Barney v. Barney, 14 Ia. 189, there being no property in which the husband, except for the divorce, would have had an interest at the death of the wife, and no fraud being alleged, it was held that the suit abated. Where in an action for dower in Ohio the defence was set up that the deceased had previously obtained a divorce in an Indiana court, of which it was proved that the wife had no knowledge until after the death of the husband, and the record did not show the ground upon which the decree was based, it was held that the decree acted only on the marital relations, and having been rendered without jurisdiction of the person of the wife, her property rights in Ohio were unaffected; Doerr v. Forsythe, 50 Ohio St. 726, 35 N. E. 1055, 40 Am. St. Rep. 703.

The death of the complainant in a divorce suit, before a writ of error, was held not to destroy the subject-matter of the suit, as respects the jurisdiction of the court of review; although the record fails to show that any property right was involved; Chatterton v. Chatterton, 231 Ill. 449, 83 N. E. 161, 121 Am. St. Rep. 339, where the court approved of decisions denying that, by the death of a party in such suit, the marriage *status* was forever destroyed and that there was no subject matter of which a court of review could assume jurisdiction; Danforth v. Danforth, 111 Ill. 236, where the writ of error was taken before the death of the party and a motion to amend the record, so as to give effect to the judgment as of a prior term, was allowed; Wren v. Moss, 2 Gilman (Ill.) 72, where it was held that a writ of error might be prosecuted after the death of the other party, to reverse the decree; Wren v. Moss, 1 Gilman (Ill.) 560, where a motion to abate the suit as to alimony and to make the executor a party for a writ of error was allowed.

A decree of divorce may be reviewed after the death of a party, either on a writ of error; Israel v. Arthur, 6 Colo. 85; or appeal; Shafer v. Shafer, 30 Mich. 163. Such a decree was properly vacated and annulled by the court, after the death of the husband who had obtained it, there being evidence of fraud and imposition on the part of the libellant; Appeal of Boyd, 38 Pa. 241. A case constantly cited to the effect that a divorce obtained by fraud may be set aside after the death of a party has been properly characterized as merely a *dictum*, since the decision was upon other grounds and that question was not involved; 57 L. R. A. 583, 589, note, where the cases to that date upon the right to contest the validity of a divorce decree, after the death of a party, are collected and reviewed with discrimination. But where a divorce had been obtained by the plaintiff who subsequently died, a motion to set aside the judgment for fraud was properly denied and it was suggested that the proper course was an action in the nature of a bill of revivor bringing before the court all the heirs at law and others interested in the property left by decedent; Watson v. Watson, 1 Hun (N. Y.) 267; and to the same effect is Groh v. Groh, 35 Misc. 354, 71 N. Y. Supp. 985. These cases having been in New York, where the writ of error was abolished, the method of review suggested was doubtless the only one available. In Michigan, where the practice, it is believed, is very similar to that of New York, there is a similar case; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; and a precisely similar case citing and relying upon the Michigan case is Roberts v. Roberts, 19 R. I. 349, 33 Atl. 872; and in a later Michigan case it was held that in simple divorce proceedings aimed at no independent relief after the death of one party, no decree could be made relating back to his lifetime; Wilson v. Wilson, 73 Mich. 620, 41 N. W. 817. Where the plaintiff in a suit for divorce dies pending the trial, before submission to the jury, if the issues are found in his favor, judgment of divorce will be entered as of the first day of the term while he was alive; Webber v. Webber, 83 N. C. 280. Cases which hold that the action is of a personal nature and abates with the death of the party bringing it are Hunt v. Hunt, 75 Misc. 209, 135 N. Y. Supp. 39; Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 1 L. R. A. (N. S.) 551, 111 Am. St. Rep. 919, 5 Ann. Cas. 890 (where it was held that the decree could not be set aside for want of jurisdiction); Wood v. Wood, 1 Boyce (Del.) 134, 74 Atl. 560 (where the court refused to make absolute a decree *nisi* and set it aside on the petition and affidavit of the defendant suggesting the death of the plaintiff); In re Crandall, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874; Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Hite v. Trust Co., 156 Cal. 765, 106 Pac. 102; but where the plaintiff died, after the entry of a interlocutory judgment by default, the court had power to render its final decree in accordance therewith after the death of the party; John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53 (this being exactly the reverse of the Delaware case cited).

Of those consequences which result from the direction or order of the court, the most important are: *Alimony*, or the allowance

which a husband, by order of court, pays to his wife, living separate from him, for her maintenance. The allowance may be for her use either during the pendency of a suit,—in which case it is called alimony *pendente lite*,—or after its termination, called permanent alimony. As will be seen from the foregoing definition, alimony, especially permanent alimony, pertains rather to a separation from bed and board than to a divorce from the bond of matrimony. Indeed, it is generally allowed in the latter case only in pursuance of statutory provisions.

A court has no authority to grant a decree of divorce in favor of a libellant after he has moved the court that no decree be entered; Milliman v. Milliman, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. Rep. 181; see, also, Adams v. Adams, 57 Misc. 150, 106 N. Y. Supp. 1064, where it appeared that the defendant had denied the marriage and the court refused to dismiss the suit on libellant's motion; Winans v. Winans, 124 N. Y. 140, 26 N. E. 293. See Milliman v. Milliman, 45 Colo. 291, 101 Pac. 58, 22 L. R. A. (N. S.) 999, 132 Am. St. Rep. 181.

As a general rule of practice, the uncorroborated evidence of a co-respondent is held not sufficient to grant a divorce; Delaney v. Delaney, 71 N. J. Eq. 246, 65 Atl. 217, reversing 69 N. J. Eq. 602, 61 Atl. 266; Herrick v. Herrick, 31 Mich. 298; Evans v. Evans, 93 Ky. 512, 20 S. W. 605; but the court may act upon it, if satisfied that the story told is true and that there is no collusion; 21 T. L. R. 676; (1907) P. 334. The denial of the adultery by defendant and the co-respondent is competent and, although of little weight against clear proof, in the absence of it, was held sufficient; Mayer v. Mayer, 21 N. J. Eq. 246.

As to the Effect on a Will. It has been held that a divorce alone does not revoke a previously executed will; In re Brown's Estate, 139 Ia. 219, 117 N. W. 260; Baacke v. Baacke, 50 Neb. 21, 69 N. W. 303; Charlton v. Miller, 27 Ohio St. 298, 22 Am. Rep. 307; Card v. Alexander, 48 Conn. 492, 40 Am. Rep. 187; L. R. 22 Ch. Div. 597; L. R. 25 Ch. Div. 685. It is said that it is probable that a divorce granted at the suit of the wife with alimony expressly decreed to be in lieu of all her rights in the property of her husband, testamentary and otherwise, would by implication of law revoke the will of her husband in so far as it made provision for her; 1 Underhill, Wills 265. In a Michigan case it is held that when at the time a decree of divorce is granted, the parties to the action settle and adjust their property rights by mutual agreement, without mentioning wills theretofore made by them, the decree of divorce and settlement constituted an implied revocation of the will so theretofore made. The court said that by the decree of divorce and the property settlement the parties became strangers to each other, neither thereafter owing to the other either legal or moral obligations or duties, and that there was therefore a complete change in their relations, within the rule of implied revocation of wills; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, followed in Donaldson v. Hall, 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 541. In Baacke v. Baacke, 50 Neb. 18, 69 N. W. 303, however, it was held that the doctrine of revocation by implication of law was based upon a presumed alteration of intention, arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under altered circumstances, and that a settlement of a woman's property rights upon obtaining a divorce from her husband does not work a revocation of a will previously executed by the husband.

As to questions arising from divorce relating to the custody of children, see PARENT AND CHILD.

By the civil law, the child of parents divorced is to be brought up by the innocent party at the expense of the guilty party. Ridley's View, pt. 1, c. 3, § 9, citing 8th Collation.

DO UT DES. I give that you may give. See CONSIDERATION.

DO UT FACIAS. I give that you may do. See CONSIDERATION.

DOCK. The enclosed space occupied by prisoners in a criminal court.

The space between two wharves. See City of Boston v. Lecraw, 17 How. (U. S.) 434, 15 L. Ed. 118. The owner of a dock is liable to a person who, by his invitation, and in the exercise of due care, places a vessel in the dock, for injury to the vessel caused by a defect thereon which the owner negligently allows to exist; Nickerson v. Tirrell, 127 Mass. 236.

DOCK WARRANT. A negotiable instrument, in use in England, given by the dock-owners to the owner of goods imported and warehoused in the docks, as a recognition of his title to the goods, upon the production of the bills of lading, etc. Pulling on the Customs of London.

DOCKAGE. The sum charged for the use of a dock. In the case of a dry dock, it has been held in the nature of rent. Ives v. The Buckeye State, 1 Newb. 69, Fed. Cas. No. 7117. See WHARFAGE.

DOCKET. A formal record of judicial proceedings; a brief writing. A small piece of paper or parchment having the effect of a larger. Blount. An abstract. Cowell.

To docket is said to be by Blackstone to abstract and enter into a book; 3 Bla. Com. 397. The essential idea of a modern docket, then, is an entry in brief in a proper book of all the important acts done

in court in the conduct of each case from its commencement to its conclusion. See Colby, Pr. 154.

In common use, it is the name given to the book containing these abstracts. The name of trial-docket is given to the book containing the cases which are liable to be tried at a specified term of court, called also calendar, or list.

The docket should contain the names of the parties and a minute of every proceeding in the case. It is kept by the clerk or prothonotary of the court. The docket entries form the record until the technical record is made up in proper form; State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; McGrath v. Seagrave, 2 Allen (Mass.) 443, 79 Am. Dec. 797; Leathers v. Cooley, 49 Me. 337; Tracy v. Maloney, 105 Mass. 90; and this is true of the entries in the docket of a justice of the peace; Davidson v. Slocomb, 18 Pick. (Mass.) 464; Ellsworth v. Learned, 21 Vt. 535. A sheriff's docket is not a record; Thomas v. Wright, 9 S. & R. (Pa.) 91; Stevenson v. Weisser, 1 Bradf. (N. Y.) 343.

DOCKMASTERS. Officers appointed to direct the mooring of ships, so as to prevent the obstruction of dock entrances.

DOCTOR. Means commonly a practitioner of medicine, of whatever system or school. Corsi v. Maretzek, 4 E. D. Smith (N. Y.) 1. See PHYSICIANS.

DOCTORS COMMONS. An institution near St. Paul's Cathedral in London, where the ecclesiastical and admiralty courts were held until the year 1857. 3 Steph. Com. 306, n.

In 1768 a royal charter was obtained by virtue of which the members of the society and their successors were incorporated under the name and title of "The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts." The College consists of a president (the dean of the arches for the time-being) and of those doctors of laws who, having regularly taken that degree in either of the universities of Oxford and Cambridge, and having been admitted advocates in pursuance of the rescript of the archbishop of Canterbury, shall have been elected fellows of the college in the manner prescribed by the charter.

DOCUMENT OF TITLE. By the Factors' Act 56, Vict. c. 39, § 4, it is stated to mean any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate warrant, or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented. Benj. Sales 788.

DOCUMENTS. The deeds, agreements, title-papers, letters, receipts, and other written instruments used to prove a fact. See Hazard v. Durant, 12 R. I. 99.

If a document is lost, secondary evidence of its contents may be given, after laying a proper foundation therefor by proving its former existence, and its due execution, and satisfactorily accounting for the failure to produce it. The burden of proving all these facts rests on the party who seeks to introduce secondary evidence of the document claimed to have been lost; Earley v. Euwer, 102 Pa. 338; Elwell v. Cunningham, 74 Me. 127. See American Life Insurance & Trust Co. v. Rosenagle, 77 Pa. 507. See LOST INSTRUMENT.

In Civil Law. Evidence delivered in the forms established by law, of whatever nature such evidence may be. The term is, however, applied principally to the testimony of witnesses. Savigny, Dr. Rom. § 165. See EVIDENCE.

DOE, JOHN. The name of the fictitious plaintiff in the action of ejectment. 3 Steph. Com. 618.

DOG. See ANIMAL; EXPEDITATION.

In almost all languages this word is used as a term or name of contumely or reproach. See 3 Bulstr. 226; 2 Mod. 260; 1 Leon. 148; and the title *Action on the Case for Defamation* in the Digests.

A tax on dogs is constitutional, and so is a provision that in case of refusal to pay the tax, the dog may be killed; Blair v. Forehand, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94; Mowery v. Town of Salisbury, 82 N. C. 175; *contra*, Archer v. Baertschi, 8 Ohio Cir. Ct. R. 12; Jenkins v. Ballantyne, 8 Utah 245, 30 Pac. 760, 16 L. R. A. 689. A proceeding of the most stringent character for the destruction of dogs kept contrary to municipal regulations is constitutional; Julienne v. City of Jackson, 69 Miss. 34, 10 South. 43, 30 Am. St. Rep. 526.

DOGMA. **In Civil Law.** The word is used in the first chapter, first section, of the second Novel, and signifies an ordinance of the senate. See, also, Dig. 27. 1. 6.

DOING BUSINESS. See FOREIGN CORPORATION.

DOLE. A part or portion. *Dole-meadow*, that which is shared by several. Spelman, Gloss.; Cowell.

DOLÉANCE. A peculiar appeal in the Channel Islands. It is a personal charge against a judicial officer, either of misconduct or of negligence. L. R. 6 P. C. 155. It still exists in a modified form. L. R. 5 A. C. 348. See 48 L. Jour. 281.

DOLI CAPAX. Capable of mischief; having knowledge of right and wrong. 4 Bla. Com. 22, 23; 1 Hale, Pl. Cr. 26, 27.

DOLI INCAPAX (Lat.). Incapable of distinguishing good from evil. A child under seven is absolutely presumed to be *doli incapax;* between seven and fourteen is, *prima facie, incapax doli*, but may be shown to be *capax doli*. 4 Bla. Com. 23; Broom, Max. 310; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536; People v. Randolph, 2 Park. Cr. R. (N. Y.) 174. See DISCRETION; AGE.

DOLLAR (Germ. *Thaler*). The money unit of the United States.

It was established under the confederation by resolution of congress, July 6, 1785. This was originally represented by a silver piece only; the coinage of which was authorized by the act of congress of Aug. 8, 1786. The same act also established a decimal system of coinage and accounts. But the coinage was not effected until after the passage of the act

of April 2, 1792, establishing a mint, 1 U. S. Stat. L. 246; and the first coinage of dollars commenced in 1794. The law last cited provided for the coinage of "dollars or units, each to be of the value of a Spanish milled dollar, as the same was then current, and to contain three hundred and seventy-one grains and four-sixteenth parts of a grain of pure silver, or four hundred and sixteen grains of standard silver."

The Spanish dollar known to our legislation was the dollar coined in Spanish America, North and South, which was abundant in our currency, in contradistinction to the dollar coined in Spain, which was rarely seen in the United States. The intrinsic value of the two coins was the same; but, as a general (not invariable) distinction, the American coinage bore *pillars*, and the Spanish an escutcheon or shield; all kinds bore the royal effigy.

The *milled dollar*, so called, is in contradistinction to the irregular, misshapen coinage nicknamed *cob*, which a century ago was executed in the Spanish-American provinces,—chiefly Mexican. By the use of a milling machine the pieces were figured on the edge, and assumed a true circular form. The pillar dollar and the milled dollar were in effect the same in value, and, in general terms, the same coin; though there are pillar dollars ("cobs") which are not milled, and there are milled dollars (of Spain proper) which have no pillars.

The weight and fineness of the Spanish milled and pillar dollars is eight and one-half pieces to a Castilian mark, or four hundred and seventeen and fifteen-seventeenths grains Troy. The limitation of four hundred and fifteen grains in our law of 1806, April 10, 2 U. S. Stat. L. 374, was to meet the loss by wear. The legal fineness of these dollars was ten dineros, twenty granos, equal to nine hundred and two and seven-ninths thousandths: the actual fineness was somewhat variable, and always below. The Spanish dollar and all other foreign coins are ruled out by the act of congress of Feb. 21, 1857, 11 U. S. Stat. 1856-57, 163, they being no longer a legal tender. But the statements herein given are useful for the sake of comparison: moreover, many contracts still in existence provide for payment (of ground-rents, for example) in Spanish milled or pillar dollars. The following terms, or their equivalent, are frequently used in agreements made about the close of the last and the beginning of the present century: "silver milled dollars, each dollar weighing seventeen pennyweights and six grains at least." This was equal to four hundred and fourteen grains. The standard fineness of United States silver coin from 1792 to 1836 was fourteen hundred and eighty-five parts fine silver in sixteen hundred and sixty-four. Consequently, a piece of coin of four hundred and fourteen grains should contain three hundred and sixty-nine and forty-six hundredths grains pure silver.

By the act of Jan. 18, 1837, § 8, 5 U. S. Stat. 137, the standard weight and fineness of the dollar of the United States was fixed as follows: "of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy," the alloy to consist of copper; and it was further provided that the weight of the silver dollar should be four hundred and twelve and one-half grains (412 1-2).

The weight of the silver dollar has not been changed by subsequent legislation; but the proportionate weight of the lower denomination of silver coins has been diminished by the act of Feb. 21, 1853, 11 U. S. Stat. L. 160. By this act the half-dollar (and the lower coins in proportion) is reduced in weight fourteen and one-quarter grains below the previous coinage: so that the silver *dollar* which was embraced in this act weighs twenty-eight and one-half grains more than *two* half-dollars. The silver dollar then, consequently, ceased to be current in the United States; but it continued to be coined to supply the demands of the West India trade and a local demand for cabinets, etc.

But the act of Feb. 28, 1878, 20 U. S. Stat. L. c. 20, restored the standard silver dollar of the act of Jan. 18, 1837, as a legal tender for all debts except where otherwise stipulated in the contract, and required the monthly purchase of not less than two million and not more than four million dollars worth of silver bullion and the coinage of the same into standard silver dollars, but this latter clause was repealed by act of July 14, 1890. The act of Feb. 12, 1873, introduced the *trade-dollar*, of the weight of four hundred and twenty grains Troy, intended chiefly, if not wholly, to supplant the Mexican dollar in trade with China and the East. It has found its way, however, all over the United States, and, as it has been declared by a joint resolution of congress of July 22, 1876, 19 Stat. L. p. 215, not to be a legal tender, has led to great inconvenience. The coinage of the *trade-dollar* was terminated and its redemption and recoinage in standard dollars was directed by the act of March 3, 1887, 24 Stat. L. 634. See also U. S. R. S. 1 Supp. 563, 774.

By the act of November 1, 1893, it is declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. It is further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts.

By the act of March 3, 1849, a *gold* dollar was authorized to be coined at the mint of the United States and the several branches thereof, conformably in all respects to the standard of gold coins now established by law, except that on the reverse of the piece the figure of the eagle shall be omitted. It is of the weight of 25.8 grains, and of the fineness of nine hundred thousandths. This dollar was made the unit of value by act of congress Feb. 12, 1873, and it was further provided that such dollar, when worn by natural abrasion, and so reduced in weight after twenty years of circulation (as evidenced by date on the face of such coin), will be redeemed by the United States Treasury or its offices, subject to such regulations as the Secretary of the Treasury may prescribe for the protection of the Government against fraudulent abrasions and other practices; U. S. Rev. Stat. §§ 3505, 3511. Its coinage was discontinued by act of September 26, 1890.

A charge of one-fifth per centum was formerly made for converting gold bullion into coin, but by act of Jan. 14, 1875, this law was repealed.

The one dollar and the three dollar gold pieces are no longer coined. See 26 Stat. L. 485.

When the word dollars is used in a bequest or in any instrument for the payment of money, the amount is payable in whatever the United States declares to be legal tender, whether coin or paper money, but not in real or personal property in which money has been invested; Halsted v. Meeker's Ex'rs, 18 N. J. Eq. 136; Lanning v. Sisters of St. Francis, 35 N. J. Eq. 396; Bank of State v. Burton, 27 Ind. 426; Miller v. Lacy, 33 Tex. 351; Hart v. Flyn's Ex'rs, 8 Dana (Ky.) 190; Morris v. Bancroft, 1 U. N. C. (Pa.) 223.

DOLO. The Spanish form of *dolus*.

DOLUS (Lat.). **In Civil Law.** A fraudulent address or trick used to deceive some one; a fraud. Dig. 4. 3. 1. Any subtle contrivance by words or acts with a design to circumvent. 2 Kent 560; Code 2. 21.

Dolus differs from *culpa* in this, that the latter proceeds from an error of the understanding, while to constitute the former there must be a will or intention to do wrong. Wolffius, Inst. § 17.

As opposed to *dolus*, *culpa* imports negligence, heedlessness, or temerity, as well as indirect intention (*i. e.* of consequence intended but not desired). G. Campbell, Analysis of Austin 78. See CULPA. It seems doubtful, however, whether the general use of the word *dolus* in the civil law is not rather

that of very great negligence, than of fraud, as used in the common law. A distinction was also made between *dolus* and *fraus*, the essence of the former being the intention to deceive, while that of the latter was actual damage resulting from the deceit.

Such acts or omissions as operate as a deception upon the other party, or violate the just confidence reposed by him, whether there be a deceitful intent (*malus animus*) or not. Pothier, *Traité de Dépôt*, nn. 23, 27; Story, Bailm. § 20 *a*; Webb's Poll. Torts 18; 2 Kent 506, n.

DOLUS MALUS (Lat.). Fraud. Deceit with an evil intention. Distinguished from *dolus bonus*, justifiable or allowable deceit. Calvinus, Lex.; Broom, Max. 349; 1 Kaufmann, Mackeld. Civ. Law 165. Misconduct. *Magna negligentia culpa est, magna culpa dolus est* (great negligence is a fault, a great fault is fraud). 2 Kent 560, n.

DOM. PROC. An abbreviation of *Domus Procerum*, the House of Lords.

DOMAIN. Dominion; territory governed. Possession; estate. Land about the mansion-house of a lord. The right to dispose at our pleasure of what belongs to us.

A distinction has been made between property and domain. The former is said to be that quality which is conceived to be in the thing itself, considered as belonging to such or such person, exclusively of all others. By the latter is understood that right which the owner has of disposing of the thing. Hence domain and property are said to be correlative terms; the one is the active right to dispose of, the other a passive quality which follows the thing and places it at the disposition of the owner. 3 Toullier, n. 83. But this distinction is too subtle for practical use. Puffendorff, *Droit de la Nat.* l. 4. c. 4, 106 § 2. See 1 Bla. Com. 105; *Clef des Lois Rom.*; Domat; 1 Hill, Abr. 24; 2 *id.* 237; EMINENT DOMAIN.

DOMBOC (spelled, also, often *dombec*. Sax.). The name of codes of laws among the Saxons. Of these King Alfred's was the most famous. 1 Bla. Com. 46; 4 *id.* 411.

The *domboc* of king Alfred is not to be confounded with the domesday-book of William the Conqueror.

DOME (Sax.). Doom; sentence; judgment. An oath. The homager's oath in the black book of Hereford. See DOOM.

DOMESDAY-BOOK. The record of the survey of England instituted by William the Conquerer and effected by inquests of local jurors. It was begun in 1085 and completed in 1086.

It was primarily a fiscal survey—the liability for paying "gild" in the past and the liability for paying "geld" in the future were the chief points to be ascertained. It has been called "a great rate book." Incidentally it gives a marvelously detailed picture of the legal, social, and economic state of England, but a picture which, in some respects, is not easily interpreted; Maitl. 2 Sel. Essays, Anglo-Amer. L. H. 76. It is preserved in two manuscript volumes; the second deals with the counties of Essex, Norfolk, and Suffolk; the first with the rest of England. The first is a folio of 382 leaves; the second is a quarto volume of 450 leaves. It is probable that the second was compiled first; Round, Feud. Engl. 140. It was printed by royal command in 1783. A third volume, containing a general introduction and indexes, and a fourth, containing various documents supposed to be connected with the survey, were published in 1816.

It early acquired the name of "Domesday." The *Dialogus de Scaccario* ascribes the name to the fact that the people were reminded by it of the Day of Judgment. Hales' theory (Domesday of St. Paul's XI) is that the name was derived from the fact that the inquisitions on which it was based were held on the "Domes-days," or law-days, of the various hundreds.

"If English history is to be understood, the law of Domesday Book must be mastered. We have here an absolutely unique account of feudalism in two different stages of its growth, the more trustworthy, though the more puzzling, because it gives us particulars and not generalities." Maitland, Domesday and Beyond 3. It is not a collection of laws; nor a register of title; it is a "geld" book; *id.* For a partial bibliography, see 2 Sel. Essays, Anglo-Amer. L. H. 77. See Round, Feudal England; 11 Engl. Hist. Rev. 209 (Pollock); Ellis, General Introd. to Domesday; Ballard, Domesday Boroughs; Ballard, Domesday Inquest; 2 Holdsworth, Hist. E. L. 118; 1 Soc. Engl. 236; Domesday Studies (papers read at the Domesday Commemoration, 1886); Maitland, Domesday Book and Beyond.

DOMESMEN (Sax.). An inferior kind of judges. Men appointed to doom (judge) in matters in controversy. Cowell. Suitors in a court of a manor in ancient demesne, who are judges there. Blount; Whishaw; *Termes de la Ley*. See JURY.

DOMESTIC ATTACHMENT. See ATTACHMENT.

DOMESTIC MANUFACTURES. This term in a state statute is used, generally, of manufactures within its jurisdiction. Com. v. Giltinan, 64 Pa. 100.

DOMESTIC PORT. See HOME PORT.

DOMESTICS. Those who reside in the same house with the master they serve. The term does not extend to workmen or laborers employed out-of-doors. Ex parte Meason, 5 Binn. (Pa.) 167; Cook v. Dodge, 6 La. Ann. 276; Richardson v. State, 43 Tex. 456; Merlin, *Répert.* The act of congress of April 30, 1790, s. 25, used the word domestic in this sense. This term does not extend to a servant whose employment is out of doors and not in the house; Wakefield v. State, 41 Tex. 556.

Formerly this word was used to designate those who resided in the house of another, however exalted their station, who performed services for him. Voltaire, in writing to the French queen, in 1748, says, "Deign to consider, madam, that I am one of the domestics of the king, and consequently yours, my companions, the gentlemen of the king," etc.; but librarians, secretaries, and persons in such honorable employments would not probably be considered domestics, although they might reside in the houses of their respective employers.

Pothier, to point out the distinction between a

domestic and a servant, gives the following example:—A literary man who lives and lodges with you, solely to be your companion, that you may profit by his conversation and learning, is your domestic; for all who live in the same house and eat at the same table with the owner of the house are his domestics; but they are not *servants*. On the contrary, your valet-de-chambre, to whom you pay wages, and who sleeps out of your house, is not, properly speaking, your domestic, but your servant. Pothier, Proc. Cr. sect. 2, art. 5, § 5; Pothier, Obl. 710, 823; 9 Toullier, n. 314; H. de Pansey, *Des Justices de Paix*, c. 30, n. 1.

DOMICIL. That place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. White v. Crawford, 10 Mass. 188; Tanner v. King, 11 La. 175; Crawford v. Wilson, 4 Barb. (N. Y.) 505; White v. Brown, Wall. Jr. 217, Fed. Cas. No. 17,538; Horne v. Horne, 31 N. C. 99; Holliman's Heirs v. Peebles, 1 Tex. 673; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Hayes v. Hayes, 74 Ill. 312.

The domicil of a person is that place or country in which his habitation is fixed, without any present intention of removing therefrom. [1892] 3 Ch. 180; Story, Confl. L. § 43.

Dicey defines domicil as, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law; Dicey, Dom. 42; and again as "that place or country either (1) in which he in fact resides with the intention of residence (*animus manendi*); or (2) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence; or (3) with regard to which, having so resided there, he retains the intention of residence, though he, in fact, no longer resides there;" *id.* 44. The same definition substantially is given in Dicey, Confl. Laws (Moore's ed.) 727. It is there said not to include cases of domicil created by operation of law.

Domicil is "a habitation fixed in some place with the intention of remaining there alway." Vattel, *Droit des Gens*, liv. i, c. xix, s. 218, *Du Domicile*.

"The place where a person has established the principal seat of his residence and of his business." Pothier, *Introd. Gen. Cout. d'Orleans*, ch. 1, s. 1, art. 8.

"That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]." Savigny, S. 353.

"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time." Phillimore, Int. Law 49.

"That place is properly the domicil of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home." 28 L. J. Ch. 361, 366, per Kindersley, V. C. It is said to be a relation between an individual and a particular locality or country. 22 Harv. L. Rev. 220; In re Reed's Will, 48 Or. 500, 87 Pac. 763.

It has been said that there is no precise definition of the word; 25 L. J. Ch. 730; but Dicey (Domicil, App. and in his Confl. Laws 731) dissents from this statement. In the latter work the learned writer says that "the attempts which have been made to define domicil, and of the criticisms upon such attempts, lead to results which may be summed up as follows:

"First. Domicil, being a complex term, must, from the nature of things, be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analyzing it into its elements.

"Secondly. All the best definitions agree in making the elements of domicil 'residence' and '*animus manendi*.'

"Thirdly. Several of these definitions—such, for example, as Story's Phillimore's, or Vice-Chancellor Kindersley's—have succeeded in giving an explanation of the meaning of domicil, which, even if not expressed in the most precise language, is substantially accurate.

"Fourthly. The reason why English courts have been inclined to hold that no definition of domicil is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta (an officer in the service of the East India Company; an Englishman acquiring a domicil in another country; and a person residing in another country for his health). When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicil now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicil." Dicey, Confl. Laws 735.

A person must have a domicil for purposes of taxation; Thorndike v. City of Boston, 1 Metc. (Mass.) 242; Borland v. City of Boston, 132 Mass. 89, 42 Am. Rep. 424; Church v. Rowell, 49 Me. 367; for jurisdiction; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366; Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 867; Ayer v. Weeks, 65 N. H. 248, 18 Atl. 1108, 6 L. R. A. 716, 23 Am. St. Rep. 37; for succession; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Merrill's Heirs v. Morrissett, 76 Ala. 433; Dupuy v. Wurtz, 53 N. Y. 556; for adminis-

tration; Hindman's Appeal, 85 Pa. 466; for pauper settlement; Abington v. North Bridgewater, 23 Pick. (Mass.) 177; for loyal character; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; for homestead exemption; Shepherd v. Cassiday, 20 Tex. 24, 70 Am. Dec. 372; for attachment; Morgan v. Nunes, 54 Miss. 308; Hicks v. Skinner, 72 N. C. 1. A person can, however, have but one domicil at a time; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; Shaw v. Shaw, 98 Mass. 158; Evans v. Payne, 30 La. Ann. 502; Dupuy v. Wurtz, 53 N. Y. 556; Abington v. North Bridgewater, 23 Pick. (Mass.) 170; but Cockburn (Nationality) says that it is quite possible for a person to have two domicils. See Morse, Citizenship 100. And it is said that a person may have both a civil and a commercial domicil; Dicey, Confl. Laws 740.

A bachelor cannot claim the place where he takes his meals as his residence for voting purposes, when he keeps a business office and sleeping apartments in connection therewith in another place, where he spends most of his time; State v. Savre, 129 Ia. 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452; Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704 (where an engineer had a room in one state and took his meals in another); Carter v. Putnam, 141 Ill. 138, 30 N. E. 681 (where an unmarried man was in business in one town and took the greater number of his meals with his father, who lived in another, keeping part of his clothing in each place); Longhammer v. Munter, 80 Md. 518, 31 Atl. 300, 27 L. R. A. 330.

Where a house was located on the line between two towns, it was said by Shaw, C. J., that if it could be ascertained where the occupant usually slept, this would be a preponderating circumstance, and, in the absence of other proof, decisive; Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. (Mass.) 170.

Domicil may be either national or domestic. In deciding the question of national domicil, the point to be determined will be in which of two or more distinct nationalities a man has his domicil. In deciding the matter of domestic domicil, the question is in which subdivision of the nation does the person have his domicil. Thus, whether a person is domiciled in England or France would be a question of national domicil, whether in Norfolk or Suffolk county, a question of domestic domicil. The distinction is to be kept in mind, since the rules for determining the two domicils, though frequently, are not necessarily, the same; see 2 Kent 449; Story, Confl. Laws § 39; Westl. Priv. Int. Law 15; Wheat. Int. Law 123.

The Romanists and civilians seem to attach about equal importance to the place of business and of residence as fixing the place of domicil; Pothier, Introd. *Gen. Cout. d'Orleans*, c. 1, art. 1, § 8; Story, Confl. Laws § 42. This may go far towards reconciling the discrepancies of the common law and civil law as to what law is to govern in regard to contracts.

Legal residence, inhabitancy, and domicil are generally used as synonymous; Isham v. Gibbons, 1 Bradf. Surr. (N. Y.) 70; Del Hoyo v. Brundred, 20 N. J. L. 328; Bartlett v. Brisbane, 2 Rich. (S. C.) 489; Moore v. Wilkins, 10 N. H. 452; Cooper v. Galbraith, 3 Wash. C. C. 555, Fed. Cas. No. 3,193; Crawford v. Wilson, 4 Barb. (N. Y.) 505; Holmes v. Greene, 7 Gray (Mass.) 299; Church v. Crossman, 49 Ia. 447; but much depends on the connection and purpose; In re Thompson, 1 Wend. (N. Y.) 43; Lyman v. Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Inhabitants of Exeter v. Inhabitants of Brighton, 15 Me. 58; "residence" has a more restricted meaning than "domicil;" Chariton County v. Moberly, 59 Mo. 238; Foster v. Hall, 4 Humph. (Tenn.) 346; Borland v. Boston, 132 Mass. 89, 42 Am. Rep. 424. So also in insolvency statutes; Cobb v. Rice, 130 Mass. 231; those relating to administration and distribution; White v. Tennant, 31 W. Va. 790, 8 S. E. 596, 13 Am. St. Rep. 896; testamentary matters; In re Zerega's Will, 20 N. Y. Supp. 417; eligibility for public office; People v. Platt, 50 Hun 454, 3 N. Y. Supp. 367; attachment statutes; Labe v. Brauss, 12 Pa. Co. Ct. Rep. 255; and matters of jurisdiction; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Bradley v. Fraser, 54 Ia. 289, 6 N. W. 293; Penfield v. R. Co., 29 Fed. 494. Within divorce statutes, residence has been construed as equivalent to domicil; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; Downs v. Downs, 23 App. D. C. 381; Hinds v. Hinds, 1 Ia. 36; but it must be an actual residence; Hamill v. Talbott, 81 Mo. App. 210. Besides mere bodily presence within the state, there must be the present bona fide purpose of abiding there indefinitely as a home; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; mere length of time during which a person has lived in a particular locality is not controlling; and if he remain there longer than the period of time required to give him a legal residence, but without any intention of making it his permanent place of residence, he does not become a resident thereof; Sylvester v. Sylvester, 109 Ia. 401, 80 N. W. 547.

The term citizenship ordinarily conveys a distinct idea from that of domicil; State v. Adams, 45 Ia. 99, 24 Am. Rep. 760; but it is often construed in the sense of domicil; Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690; Comitis v. Parkerson, 56 Fed. 556, 22 L. R. A. 148.

Two things must concur to establish domicil,—the fact of residence and the intention of remaining. These two must exist or must have existed in combination; State v. Hallett, 8 Ala. 159; Crawford v. Wilson, 4 Barb.

(N. Y.) 504; Shelton v. Tiffin, 6 How. (U. S.) 163, 12 L. Ed. 387; Lyman v. Fiske, 17 Pick. (Mass.) 231, 28 Am. Dec. 293; Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Leach v. Pillsbury, 15 N. H. 137; City of Hartford v. Champion, 58 Conn. 268, 20 Atl. 471. There must have been an actual residence; Roosevelt v. Kellogg, 20 Johns. (N. Y.) 208; Hennen v. Hennen, 12 La. 190; Desesbats v. Berquier, 1 Binn. (Pa.) 349, 2 Am. Dec. 448. The character of the residence is of no importance; Inhabitants of Waterborough v. Inhabitants of Newfield, 8 Greenl. (Me.) 203; Bradley v. Lowry, Speers, Eq. (S. C.) 3, 39 Am. Dec. 142; 5 E. L. & Eq. 52; Verret v. Bonvillain, 33 La. Ann. 1304; and if it has once existed, mere temporary absence will not destroy it, however long continued; 7 Cl. & F. 842; Sherwood v. Judd, 3 Bradf. Surr. (N. Y.) 267; Boyd v. Beck, 29 Ala. 703; McIntyre v. Chappell, 4 Tex. 187; Inhabitants of Knox v. Inhabitants of Waldoborough, 3 Greenl. (Me.) 455; Shattuck v. Maynard, 3 N. H. 123; Fain v. Crawford, 91 Ga. 30, 16 S. E. 106; Chariton County v. Moberly, 59 Mo. 238; Ross v. Ross, 103 Mass. 576; as in the case of a soldier in the army; Inhabitants of Brewer v. Inhabitants of Linnaeus, 36 Me. 428; Crawford v. Wilson, 4 Barb. (N. Y.) 522. And the law favors the presumption of a continuance of domicil; 5 Ves. 750; President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370; White v. Brown, 1 Wall. Jr. 217, Fed. Cas. No. 17,538; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Hood's Estate, 21 Pa. 106; Ferguson v. Wright, 113 N. C. 537, 18 S. E. 691. The original domicil continues till it is fairly changed for another; 5 Madd. 232, 370; Jennison v. Hapgood, 10 Pick. (Mass.) 77; State v. Hallett, 8 Ala. 159; Layne v. Pardee, 2 Swan (Tenn.) 232; Holliman's Heirs v. Peebles, 1 Tex. 673; Burnham v. Rangeley, 1 Woodb. & M. 8, Fed. Cas. No. 2,176; Inhabitants of Exeter v. Inhabitants of Brighton, 15 Me. 58; Baird v. Byrne, 3 Wall. Jr. 11, Fed. Cas. No. 757; and revives on an intention to return; 1 Curt. Eccl. 856; Frost v. Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; The Venus, 8 Cra. (U. S.) 278, 3 L. Ed. 553; 3 C. Rob. 12; The Friendschaft, 3 Wheat. (U. S.) 14, 4 L. Ed. 322; State v. Hallett, 8 Ala. 159; Miller's Estate, 3 Rawle (Pa.) 312, 24 Am. Dec. 345; The Ann Green, 1 Gall. 275, Fed. Cas. No. 414; Catlin v. Gladding, 4 Mas. 308, Fed. Cas. No. 2,520; L. R. 1 H. L. Sc. 44; In re Wrigley, 8 Wend. (N. Y.) 134. This principle of revival, however, is said not to apply where both domicils are domestic; 5 Madd. 379; Am. Lead. Cas. 714. Where a young man left the state of his original domicil to go to another state to fill a definite engagement for a year and for his health, and at the end of such engagement, returned to the domicil of his origin, it was held that if he had ever renounced his domicil of origin, he had regained it by reverter, it not appearing that he had a domicil elsewhere; Mayo v. Society, 71 Miss. 590, 15 South. 791.

Mere taking up residence is not sufficient, unless there be an intention to abandon a former domicil; Bradley v. Lowry, Speers Eq. (S. C.) 1, 39 Am. Dec. 142; 6 M. & W. 511; Inhabitants of Wayne v. Inhabitants of Greene, 21 Me. 357; Putnam v. Johnson, 10 Mass. 488; 1 Curt. Eccl. 856; People v. Peralta, 4 Cal. 175; Bartlett v. City of New York, 5 Sandf. (N. Y.) 44; Price v. Price, 156 Pa. 617, 27 Atl. 291; State v. Dayton, 77 Mo. 678; nor is it even *prima facie* evidence of domicil when the nature of the residence either is inconsistent with, or rebuts the presumption of the existence of an *animus manendi;* Dicey, Dom. Rule 19; 34 L. J. Ch. 212. Nor is intention of constituting domicil alone, unless accompanied by some acts in furtherance of such intention; Chaine v. Wilson, 1 Bosw. (N. Y.) 673; Ringgold v. Barley, 5 Md. 186, 59 Am. Dec. 107; Wright v. Boston, 126 Mass. 161; Carey's Appeal, 75 Pa. 201; Morris v. Gilmer, 129 U. S. 328, 9 Sup. Ct. 289, 32 L. Ed. 690. A subsequent intent may be grafted on a temporary residence; 2 C. Rob. 322. Removal to a place with an intention of remaining there for an indefinite period and as a place of fixed present domicil, constitutes domicil, though there be a floating intention to return; 2 B. & P. 228; 3 Hagg. Eccl. 374. Both inhabitancy and intention are to a great extent matters of fact, and may be gathered from slight indications; Pearce v. State, 1 Sneed (Tenn.) 63, 60 Am. Dec. 135; Berry v. Hull, 6 N. M. 643, 30 Pac. 936. A statute as to acquiring a residence will be strictly construed, and where a person spends part of his time in one state and the other part at his home in another, and where he has no business in the former but appears to be gaining a residence for the purpose of divorce only, he is not a *bona fide* resident; Albee v. Albee, 43 Ill. App. 370. The place where a person lives is presumed to be the place of domicil until facts establish the contrary; 2 B. & P. 228, n.; 2 Kent 532; Shepard v. Wright, 113 N. Y. 582, 21 N. E. 724. A decedent is presumed to have been domiciled at the place where he died; King v. U. S., 27 Ct. Cl. 529; see 5 Ves. Jr. 750; but where he was a non-resident of the state for many years and until within two months prior to his death, the presumption is that he was a non-resident at the time of his death; Price v. Price, 156 Pa. 617, 27 Atl. 291.

Proof of domicil does not depend upon any particular fact, but upon whether all the facts and circumstances taken together tend to establish the fact; Inhabitants of Abington v. Inhabitants of North Bridgewater, 23 Pick. (Mass.) 170; Appeal of Hindman, 85 Pa. 466. Engaging in business and voting in a particular place are evidence of domicil there; Myr. Prob. Cal. 237; voting

in a place is evidence, though not conclusive; Hayes v. Hayes, 74 Ill. 312; Inhabitants of East Livermore v. Inhabitants of Farmington, 74 Me. 154; Easterly v. Goodwin, 35 Conn. 279, 95 Am. Dec. 237; Smith v. Croom, 7 Fla. 81; Hewes v. Baxter, 48 La. Ann. 1303, 20 South. 701, 36 L. R. A. 531. That it will be given decisive weight, see Wolf v. McGavock, 23 Wis. 518; that it will turn the scale in a case where a man has two places of residence at different times of the year, see Hairston v. Hairston, 27 Miss. 704, 61 Am. Dec. 530; Chariton County v. Moberly, 59 Mo. 238. The mere act of registration as a voter is not conclusive as to change of residence; Mallard v. Bank, 40 Nebr. 784, 59 N. W. 511; but see Fulham v. Howe, 60 Vt. 351, 14 Atl. 652, apparently *contra;* is a circumstance to be considered with others; Lyman v. Fiske, 17 Pick. (Mass.) 231, 38 Am. Dec. 293; so of a poll tax; Chase v. Chase, 66 N. H. 588, 29 Atl. 553; payment of taxes; so is the execution of one's will in accordance with the laws of a particular place; Dupuy v. Wurtz, 53 N. Y. 556; attending a particular church; Fulham v. Howe, 62 Vt. 386, 20 Atl. 101. But the ownership of real estate in a place not coupled with residence therein is of no value; Price v. Price, 156 Pa. 617, 27 Atl. 291; Holliman's Heirs v. Peebles, 1 Tex. 673. Declaring an intent to become a citizen is not sufficient to prove an intention to adopt a domicil in the place where the declaration is made; Bremme's Estate, 13 Pa. C. C. R. 177. Declarations made at the time of change of residence are evidence of a permanent change of domicil, but a person cannot, by his own declarations, make out a case for himself; Doyle v. Clark, 1 Flipp. 536, Fed. Cas. No. 4,053; Viles v. City of Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Ayer v. Weeks, 65 N. H. 248, 18 Atl. 1108, 6 L. R. A. 716, 23 Am. St. Rep. 37; but see as to the latter, L. R. 2 P. & M. 435. Declarations of the party are admissible to prove domicil; Gundlin v. Packet Co., 6 Misc. 620, 26 N. Y. Supp. 73; Hulett v. Hulett, 37 Vt. 586; Reeder v. Holcomb, 105 Mass. 94; Rucker v. Bolles, 80 Fed. 504, 25 C. C. A. 600; Kemna v. Brockhaus, 5 Fed. 762, 10 Biss. 128; but acts are said to be more important than words; Firth v. Firth, 50 N. J. Eq. 137, 24 Atl. 916.

A finding that a person intended to fix his domicil in the city wherein he was taxed for personal property was sustained on evidence that he had actually resided there for four years and had built an expensive house with the evident intention of making it his permanent home; and this against his own testimony as to his intention; Beecher v. Common Council of Detroit, 114 Mich. 228, 72 N. W. 206.

Domicil is said to be of three kinds,—domicil of origin, or by birth, domicil by choice, and domicil by operation of law. The place of birth is the *domicil by birth* if at that time it is the domicil of the parents; 2 Hagg. Eccl. 405; Hardy v. De Leon, 5 Tex. 211. See Sasportas v. De La Motta, 10 Rich. Eq. (S. C.) 38. If the parents are on a journey, the actual domicil of the parents will generally be the place of domicil; 5 Ves. 750; Westl. Priv. Int. Law 17. Children of ambassadors; 14 Beav. 441; 31 L. J. 24, 391; and consuls; L. R. 1 Sc. App. 441; 4 P. D. 1; and children born on seas, take the domicil of their parents; Story, Confl. Laws § 48.

The domicil of an illegitimate child is that of the mother; 23 L. J. Ch. 724; Inhabitants of Houlton v. Inhabitants of Lubec, 35 Me. 411; Inhabitants of Blackstone v. Inhabitants of Seekonk, 8 Cush. (Mass.) 75; but it has been thought better to "regard the father who acknowledges his illegitimate children, or who is adjudged to be such by the law, as imparting his domicil to such children;" Whart. Confl. L. 37; L. R. 1 Sc. App. 441; see Westl. Priv. Int. Law 272, where it is said that the place of birth of a child whose parents are unknown, is its domicil; if that is unknown, the place where it is found. The domicil of a legitimate child is that of its father; L. R. 1 P. & D. 611; Inhabitants of Freetown v. Inhabitants of Taunton, 16 Mass. 52; Lacy v. Williams, 27 Mo. 280; Kennedy v. Ryall, 67 N. Y. 379; Dresser v. Illuminating Co., 49 Fed. 257; Kelly v. Garrett, 67 Ala. 304; 2 Hagg. Eccl. 405; Blumenthal v. Tannenholz, 31 N. J. Eq. 194; Desesbats v. Berquier, 1 Binn. (Pa.) 349, 2 Am. Dec. 448; 5 Ves. 786; see De Jarnett v. Harper, 45 Mo. App. 415. Westlake (Int. Law) maintains that a posthumous child takes its mother's domicil; but see Whart. Confl. Laws § 35. The domicil by birth of a minor continues to be his domicil till changed; Overseers of Paterson Tp. v. Overseers of Byram Tp., 23 N. J. L. 394; Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481. See Dresser v. Illuminating Co., 49 Fed. 257. It changes with that of the father; Allgood v. Williams, 92 Ala. 551, 8 South. 722; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; even though there was an agreement between the parents upon their separation that the mother should have the control of the child; Lanning v. Gregory, 100 Tex. 310, 99 S. W. 542, 10 L. R. A. (N. S.) 690, 123 Am. St. Rep. 809.

A student does not change his domicil by residence at college; Granby v. Amherst, 7 Mass. 1; Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698; Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; and a prisoner removed from his domicil for temporary imprisonment does not acquire a new domicil; Barton v. Barton, 74 Ga. 761; Young v. Pollak, 85 Ala. 439, 5 South. 279; Topsham v. Lewiston, 74 Me. 237, 43 Am. Rep. 584; or a convict for a long term; Topsham v. Lewiston, 74 Me. 237, 43 Am. Rep. 584; or a

fugitive from justice though intending never to return; Cobb v. Rice, 130 Mass. 231; but see Young v. Pollak, 85 Ala. 439, 5 South. 279. A change of residence for purposes of health does not generally establish a new domicil; Ex parte Blumer, 27 Tex. 734; Still v. Woodville, 38 Miss. 646. Absence in the service of the government does not necessarily affect the domicil; Hannon v. Grizzard, 89 N. C. 115; Dennis v. State, 17 Fla. 389; In re Town of Highlands, 22 N. Y. Supp. 137; depending, of course, on the intention of the party; Darragh v. Bird, 3 Or. 229; Wood v. Fitzgerald, *id.* 568; Mooar v. Harvey, 128 Mass. 219. A diplomatic representative residing abroad does not change his domicil; Com. v. Jones, 12 Pa. 365; or a consul; Wooldridge v. Wilkins, 3 How. (Miss.) 360; or one in the military or naval service; Brewer v. Linnaeus, 36 Me. 428; Mooar v. Harvey, 128 Mass. 219; nor a sailor absent on duty; Hallet v. Bassett, 100 Mass. 167.

It was held, however, in Tennessee, on a suit for divorce, that the acquisition of an actual home in Washington, by the petitioner, with the intention of remaining there for an indefinite time, countervailed declarations of intention to return to Tennessee upon the happening of an uncertain future event; Sparks v. Sparks, 114 Tenn. 666, 88 S. W. 173; so one who left a state for the purpose of teaching school (the question arising as to the statute of limitations); Dignam v. Shaff, 51 Wash. 412, 98 Pac. 1113, 22 L. R. A. (N. S.) 996; Redfearn v. Hines, 123 Ga. 391, 51 S. E. 407.

The domicil of origin always remains in abeyance, as it were, to be resorted to the moment the domicil of choice is given up. If one leaves a domicil of choice, with the intention of acquiring a new one, his domicil of origin attaches the moment he leaves the former, and persists until he acquires the latter; L. R. 1 Sc. App. 441; Marks v. Marks, 75 Fed. 321; Dicey, Dom. 92. This, however, can only be true of national, as distinguished from local domicil; when a local domicil of choice is acquired, it certainly persists until a new one is adopted.

Domicil by choice is that domicil which a person of capacity of his free will selects to be such.

Domicil is conferred in many cases by *operation of law*, either expressly or consequentially. The domicil of the husband is that of the wife; Hanberry v. Hanberry, 29 Ala. 719; McAfee v. University, 7 Bush (Ky.) 135; Wingfield v. Rhea, 77 Ga. 84; Babbitt v. Babbitt, 69 Ill. 277; Mason v. Homer, 105 Mass. 116; Baldwin v. Flagg, 43 N. J. L. 495; 7 H. L. C. 390; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078. A woman on marriage takes the domicil of her husband, and a husband, if entitled to a divorce, may obtain it though the wife be actually resident in a foreign state; 2 Cl. & F. 488; Parrett v. Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; Turner v. Turner, 44 Ala. 437; Sewall v. Sewall, 122 Mass. 162, 23 Am. Rep. 299; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706. But, where it is necessary for her to do so, the wife may acquire a separate domicil, which may be in the same jurisdiction; Cheever v. Wilson, 9 Wall. (U. S.) 108, 19 L. Ed. 604; Dutcher v. Dutcher, 39 Wis. 659; Gould v. Crow, 57 Mo. 204; Chapman v. Chapman, 129 Ill. 386, 21 N. E. 806; Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226; *contra*, 2 Cl. & F. 488; Dicey, Dom. 104. She may rest on her husband's domicil for the purpose of obtaining a divorce; Masten v. Masten, 15 N. H. 159; Williamson v. Parisien, 1 Johns. Ch. (N. Y.) 389; Fickle v. Fickle, 5 Yerg. (Tenn.) 203; Person v. Person, 6 Humphr. (Tenn.) 148; McDermott's Appeal, 8 W. & S. (Pa.) 251. See Wood v. Wood, 54 Ark. 172, 15 S. W. 459; 30 Am. L. Rev. 604; DIVORCE.

A wife divorced *a mensa et thoro* may acquire a separate domicil so as to sue her husband in the United States courts; Barber v. Barber, 21 How. (U. S.) 582, 16 L. Ed. 226; so where the wife is deserted; Moffatt v. Moffatt, 5 Cal. 280; 2 E. L. & Eq. 52; 2 Kent 573; but the right to do so springs from the necessity for its exercise; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Atherton v. Atherton, 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. Rep. 650; Cheever v. Wilson, 9 Wall. (U. S.) 123, 19 L. Ed. 604; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The wife of an insane person may change her domicil; McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162.

Where a husband and wife had an established permanent residence in Minnesota, and the wife was compelled by her husband's threats to remove to Massachusetts, compliance with his commands was held not to constitute an abandonment of her domicil in Minnesota, though she remained in Massachusetts several years; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883, 12 L. R. A. (N. S.) 1100; so a wife's absence from the city, after being deserted by her husband, without the intention of making her home elsewhere, was held not sufficient to change her domicil in a suit for divorce; Humphrey v. Humphrey, 115 Mo. App. 361, 91 S. W. 405. Where the domicil of matrimony was in a particular state, and the husband abandoned his wife and went into another state to avoid his marital obligations, such other state did not become a new domicil of matrimony, and therefore was not to be treated as the actual or constructive domicil of the wife; Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1.

A British subject born in England had resided in France under such circumstances that the English law would deem him domi-

ciled there, although he did not acquire a domicil which the French law would recognize. He died leaving a will disposing of movables in England; held that the will should be governed by the English law; 22 T. L. R. 711, following [1903] 1 Ch. 821. Under somewhat similar circumstances, the personal property of a decedent was held to be subject to the law of France, which recognizes a conjugal domicil analogous to what is known in our law as a matrimonial domicil, and is distinguished from that domicil which is required for the purpose of contracting a lawful marriage; Harral v. Harral, 39 N. J. Eq. 279, 51 Am. Rep. 17, where it was held that the government authorization required by the French code to establish a domicil in France is not necessary to establish a conjugal domicil, citing Le Breton v. Nouchet, 3 Mart. O. S. (La.) 60, 5 Am. Dec. 736; Kneeland v. Ensley, Meigs (Tenn.) 620, 33 Am. Dec. 168; Glenn v. Glenn, 47 Ala. 204; Mason v. Homer, 105 Mass. 116, to the point that with respect to the property rights of husband or wife in the personal property of the other, derived from the marriage relation, the place where the marriage was celebrated is not decisive; these rights depend on the matrimonial domicil. An English case held that where the matrimonial domicil was English, the English courts had jurisdiction to entertain a suit for judicial separation, though the domicil of the parties was German; 23 T. L. R. 539. So in suits for nullity, residence and not domicil is the test of jurisdiction; 48 L. J. P. 1; 71 *id.* 74; [1902] P. 143.

Divorce is regulated by the law of the domicil of the parties; [1895] A. C. 517. A domicil for this purpose requires both the animus and the factum; L. R. 1 H. L. Sc. 307; and the intention is itself a question of fact, to be determined by evidence, the declarations of the party not being conclusive; [1892] 3 Ch. 180.

The domicil of a widow remains that of her deceased husband until she makes a change; Story, Confl. Laws § 46; Mifflin Tp. v. Elizabeth Tp., 18 Pa. 17.

Commercial domicil. There may be a commercial domicil acquired by maintenance of a commercial establishment in a country, in relation to transactions connected with such establishments; 1 Kent 82; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340; U. S. v. Chin Quong Look, 52 Fed. 203. See Dicey, Dom. 341; The Dos Hermanos, 2 Wheat. (U. S.) 76, 4 L. Ed. 189.

This is such a residence in a country for purposes of trade as makes a person's trade or business contribute to or form part of the resources of such country. The question is whether he is or is not residing in such country with the purpose of continuing to trade there; Dicey, Confl. Laws 737. The intention of remaining in the commercial domicil is the intention to continue to reside and trade there for the present; *id.* 738. Commercial domicil is not forfeited by temporary absence at the domicil of origin; Lau Ow Bew v. U. S., 144 U. S. 63, 12 Sup. Ct. 517, 36 L. Ed. 340; but if a person go into a foreign country and engage in trade there, he is, by the law of nations, to be considered a merchant of that country, and subject for all civil purposes, whether that country be hostile or neutral; 3 B. & P. 113; 3 C. Rob. 12; 1 Hagg. 103, 104; U. S. v. Gillies, 1 Pet. C. C. 159, Fed. Cas. No. 15,206; Murray v. The Charming Betsy, 2 Cra. (U. S.) 64, 2 L. Ed. 208; and this whether the effect be to render him hostile or neutral in respect to his *bona fide* trade; 1 Kent 75; 3 B. & P. 113; 1 C. Rob. 249.

Corporations. If the term domicil can apply to corporations, they have their domicil wherever they are created; L. R. 1 Ex. 428; 5 H. L. 416; City of St. Louis v. Ferry Co., 40 Mo. 580; see North & South Rolling Stock Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; irrespective of the residence of the officers or the place where the business is transacted; Merrick v. Van Santvoord, 34 N. Y. 208. If the charter does not fix the domicil, and the directors hold their meetings in several places, the domicil for taxing purposes will be where the by-laws require the stockholders to hold their meetings; Grundy County v. Coal Co., 94 Tenn. 295, 29 S. W. 116. The New York rule is that it is to be where the principal place of business is situated; Austen v. Telephone Co., 73 Hun 96, 25 N. Y. Supp. 916. The place where the business is done and where its personal property is situated is the situs of such property for taxation; Atlantic & P. R. Co. v. Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244, 2 Interst. Com. Rep. 189.

A permanent foreign agency of an insurance company may create an independent domicil in the place of the agency, for the purpose of enforcing legal obligation; Martine v. Life Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529. See Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130. See FOREIGN CORPORATION; CITIZEN.

Change of domicil. Any person, *sui juris*, may make any *bona fide* change of domicil at any time; 5 Madd. 379; President, etc., of Harvard College v. Gore, 5 Pick. (Mass.) 370; 35 E. L. & Eq. 532. And the object of the change does not affect the right, if it be a genuine change with real intention of permanent residence; Cooper v. Galbraith, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; Case v. Clarke, 5 Mas. 70, Fed. Cas. No. 2,490; Catlett v. Ins. Co., 1 Paine 594, Fed. Cas. No. 2,517; Young v. Pollak, 85 Ala. 439, 5 South. 279. Domicil is not lost by going to another state to seek a home, but continues until the home is obtained; Labe v. Brauss, 12 Pa. Co. Ct. R. 255. Where the parties had abandoned

their domicil and were on their way to their future home, the former domicil was not lost before their arrival at the place of the new domicil; Shaw v. Shaw, 98 Mass. 158. Until a new domicil is obtained, the old one is not lost; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959; Inhabitants of Monson v. Inhabitants of Fairfield, 55 Me. 117; but is presumed to continue until shown to have been changed; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Desmare v. U. S., 93 U. S. 605, 23 L. Ed. 959.

To constitute a change of domicil three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicil; and (3) an intention of acquiring a new one; or as some writers express it there must be an *animus non revertendi* and an *animus manendi*, or *animus et factum;* Berry v. Wilcox, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706; Hayes v. Hayes, 74 Ill. 312; 34 L. J. Ch. N. S. 212; 10 H. L. Cas. 272; In re Reed's Will, 48 Or. 500, 87 Pac. 763.

The *factum* is the transfer of the bodily presence, and the *animus* is the intention of residing permanently or for an indefinite period. A wife's removal into another state for the benefit of her husband's health and a residence there for twelve years will not change the original domicil; In re Reed's Will, 48 Or. 500, 87 Pac. 763; Ensor v. Graff, 43 Md. 291; Cruger v. Phelps, 21 Misc. 252, 47 N. Y. Supp. 61; Still v. Corp. of Woodville, 38 Miss. 646; 10 Cl. & F. 42; Isham v. Gibbons, 1 Bradf. (N. Y.) 69. In 73 L. J. K. B. N. S. 613, reversing 85 L. T. N. S. 508, 65 J. P. 819, the House of Lords held that the burden of proving that one whose domicil of origin was in the United States had changed his domicil was not overcome by proof that he originally came to England on account of his health, and lived there for twenty-seven years, describing himself as an American citizen, purchasing property in the United States in the hope of finally making his home there, etc. The Lord Chancellor said that if the decedent intended to make England his permanent home, that country would become his domicil, notwithstanding that such intention was formed on account of the condition of his health, but that he could not bring himself to a conclusion from the facts whether the decedent entertained that intention or not, and expressly rested his opinion against a change of domicil upon the fact that the burden was upon the party asserting a change of domicil to establish it.

In the acquisition of a new domicil, more is required than a mere change of residence; there must be a fixed intention to renounce birthright in the place of original domicil and to adopt the political and municipal status involved by permanent residence of choice elsewhere; [1906] A. C. 56; 94 L. T. 33 (an Englishman who lived the greater part of each year for thirty years in Scotland); and a case in 23 Ch. Div. 532, denies the acquisition of a domicil of choice by a British subject in any part of China, on account of differences of religion, customs, etc. See 24 L. Q. R. 440, where the case of British diplomatic agents, etc., residing in India is discussed, and the view taken that their home domicil is not lost. But it is held in Mather v. Cunningham, 105 Me. 326, 74 Atl. 809, 29 L. R. A. (N. S.) 761, 18 Ann. Cas. 692, that the usual law of domicil applies to an American as to acquiring a domicil in Shanghai.

A native of the United States, who had lived twenty-seven years in England, but always described himself as an American citizen, and had bought property in Baltimore in the hope of finally making his home there, though from the state of his health a voyage across the Atlantic was impracticable, was held not to have abandoned his domicil of origin; [1904] A. C. 287. But a Scotchman who for thirty years had lived in Ceylon, where he was engaged in business, and who never spoke of any intention of taking up his residence in Great Britain, but frequently expressed his dislike for the Scottish climate and people, was held to have, *animo et facto*, abandoned his domicil of origin in Scotland and acquired a domicil of choice in Ceylon; [1907] Sc. 333, Ct. of Sess.

There are limitations to the power to change a minor child's domicil in the case of alien parents; 5 East 221; People v. Mercein, 8 Paige Ch. (N. Y.) 47; 2 Kent 226; and of the mother, if a widow; Burge 38; Carlisle v. Tuttle, 30 Ala. 613; see Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; Dē Jarnett v. Harper, 45 Mo. App. 415; however, if she acquires a new domicil by remarriage, the child's domicil does not change; Ryall v. Kennedy, 40 N. Y. Sup. Ct. 347; Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; Inhabitants of Walpole v. Inhabitants of Marblehead, 8 Cush. (Mass.) 528; Allen v. Thomason, 11 Humphr. (Tenn.) 536, 54 Am. Dec. 55. See [1893] 3 Ch. 490; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; Johnson v. Copeland's Adm'r, 35 Ala. 521. If a father abandons his children, who are cared for and live with their grandmother for several years, and he subsequently removes them against her will, the residence of the children is not changed; Guardianship of Vance, 92 Cal. 195, 28 Pac. 229; Dresser v. Illuminating Co., 49 Fed. 257.

The guardian is said to have the same power over his ward that a parent has over his child; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Wheeler v. Hollis, 33 Tex. 512; Pedan v. Robb's Adm'r, 8 Ohio 227; 1 Binn. 349, n.; 2 Kent 237. But see *contra*, Hiestand v. Kuns, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481. The point is not settled in England; Dicey, Dom. 133. See 3 Mer. 67; Appeal of Taney, 9 W. N. C. (Pa.)

564. "It has been generally held that a guardian can change the ward's domicil from one county to another in the same state; Anderson v. Anderson's Estate, 42 Vt. 350, 1 Am. Rep. 334; L. R. 5 Q. B. 325. It is doubtful, to say the least, whether the guardian can remove the ward's domicil out of the state in which he was appointed; L. R. 12 Eq. 617; Daniel v. Hill, 52 Ala. 430. A guardian appointed in a state where the ward is temporarily residing cannot change the ward's domicil from one state to another;" Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751. But see Woodward v. Woodward, 87 Tenn. 644, 11 S. W. 892. The mere appointment of a guardian will not prevent the ward from changing his domicil where he has sufficient mental capacity to do so; Mowry v. Latham, 17 R. I. 480, 23 Atl. 13; Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254. It may be considered questionable whether the guardian can change the national domicil of his ward; 2 Kent 226; Story, Confl. Laws § 506.

The domicil of a lunatic may be changed by the direction or with the assent of his guardian; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; Anderson v. Anderson's Estate, 42 Vt. 350, 1 Am. Rep. 334; In re Kingsley, 160 Fed. 275; *contra*, Inhabitants of Pittsfield v. Inhabitants of Detroit, 53 Me. 442. See L. R. 1 P. & M. 611; 3 Ves. Jr. 198; 9 W. R. 764. If the incompetent has enough mind left to form an *animus manendi*, the assent of the guardian to a change of domicil has been held immaterial; Appeal of Culver, 48 Conn. 165; Talbot v. Chamberlain, 149 Mass. 57, 20 N. E. 305, 3 L. R. A. 254; see 22 Harv. L. R. 220.

The husband may not change his domicil after committing an offence which entitles the wife to a divorce, so as to deprive her of her remedy; Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Republic of Texas v. Skidmore, 2 Tex. 261. And it is said the wife may not in the like case acquire a new domicil; Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Harding v. Alden, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; Sawtell v. Sawtell, 17 Conn. 284; Fickle v. Fickle, 5 Yerg. (Tenn.) 203; Richardson v. Richardson, 2 Mass. 153; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742.

The law of the place of domicil governs as to all acts of the parties, when not controlled by the *lex loci contractus* or *lex rei sitæ*. Personal property of the woman follows the law of the domicil upon marriage. It passes to the husband, if at all, in such cases as a legal assignment by operation of the law of domicil, but one which is recognized extra-territorially; 2 Rose 97; Holmes v. Remsen, 20 Johns. (N. Y.) 267, 11 Am. Dec. 269; Story, Confl. Laws § 423.

The state and condition of the person according to the law of his domicil will generally, though not universally, be regarded in other countries as to acts done, rights acquired, or contracts made in the place of his native domicil; but as to acts, rights, and contracts done, acquired, or made out of his domicil, the *lex loci* will generally govern in respect to his capacity and condition; 2 Kent 234. See Lex Loci.

The disposition of, succession to, or distribution of the personal property of a decedent, wherever situated, is to be made in accordance with the law of his actual domicil at the time of his death; 8 Sim. 310; Grattan v. Appleton, 3 Sto. 755, Fed. Cas. No. 5,707; Rankin v. Holloway, 3 Smedes & M. (Miss.) 617; Bradley v. Lowry, Speers, Eq. (S. C.) 3, 39 Am. Dec. 142; Graham v. Public Adm'r, 4 Bradf. Surr. (N. Y.) 127; Leach v. Pillsbury, 15 N. H. 137.

The principle applies equally to cases of voluntary transfer, of intestacy, and of testaments; 5 B. & C. 451; Grattan v. Appleton, 3 Sto. 755, Fed. Cas. No. 5,707; 3 Hagg. 273; Harrison v. Nixon, 9 Pet. (U. S.) 503, 9 L. Ed. 201; De Sobry v. De Laistre, 2 Harr. & J. (Md.) 191, 3 Am. Dec. 535; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; French v. Hall, 9 N. H. 137, 32 Am. Dec. 341; In re Roberts' Will, 8 Paige, Ch. (N. Y.) 519; Harvey v. Richards, 1 Mas. 381, Fed. Cas. No. 6,184; Thomas v. Tanner, 6 T. B. Monr. (Ky.) 52.

Wills are to be governed by the law of the domicil as to the capacity of parties; 1 Jarm. Wills 3; and as to their validity and effect in relation to personal property; Irving v. McLean, 4 Blackf. (Ind.) 53; Conover v. Chapman, 2 Bail. (S. C.) 436; Smith v. Bank, 5 Pet. (U. S.) 519, 8 L. Ed. 212; Barnes' Adm'r v. Brashear, 2 B. Monr. (Ky.) 382; 3 Curt. Eccl. 468; Goodall v. Marshall, 11 N. H. 88, 35 Am. Dec. 472; Hunter v. Bryson, 5 Gill & J. (Md.) 483, 25 Am. Dec. 313; Dupuy v. Wurtz, 53 N. Y. 556; Johnson v. Copeland's Adm'r, 35 Ala. 521; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Appeal of Carey, 75 Pa. 201; but by the *lex rei sitæ* as to the transfer of real property; Calloway v. Doe, 1 Blackf. (Ind.) 372; Robertson v. Barbour, 6 T. B. Monr. (Ky.) 527; Potter v. Titcomb, 22 Me. 303; Bailey v. Bailey, 8 Ohio 239; U. S. v. Crosby, 7 Cra. (U. S.) 115, 3 L. Ed. 287; Applegate v. Smith, 31 Mo. 166; Holman v. Hopkins, 27 Tex. 38; 14 Ves. 541; Appeal of Carey, 75 Pa. 201. See Lex Rei Sitæ.

The forms and solemnities of the place of domicil must be observed; 4 M. & C. 76; De Sobry v. De Laistre, 2 H. & J. (Md.) 191, 3 Am. Dec. 535; Desesbats v. Berquier, 1 Binn. (Pa.) 336, 2 Am. Dec. 448; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Harvey v. Richards, 1 Mas. 381, Fed. Cas. No. 6,184; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; Johnson v. Copeland's Adm'r, 35 Ala. 521.

The local law is to determine the character

of property; Chapman v. Robertson, 6 Paige, Ch. (N. Y.) 630, 31 Am. Dec. 264; Story, Confl. Laws § 447; Erskine, Inst. b. 3, tit. 9, § 4. And it is held that a state may regulate the succession to personal as well as real property within its limits, without regard to the *lex domicilii;* Jones v. Marable, 6 Humphr. (Tenn.) 116.

The interpretation of a will of movables is to be according to the law of the place of the last domicil of the testator; L. R. 3 H. L. 55; Appeal of Freeman, 68 Pa. 151; 4 Bligh 502; Harrison v. Nixon, 9 Pet. (U. S.) 483, 9 L. Ed. 201. But so far as its validity is concerned, it does not matter that after the will was made in one domicil the testator obtained a new domicil, where he died; Whart. Confl. Laws § 592; Story, Confl. Laws § 479 *g*. See Dupuy v. Wurtz, 53 N. Y. 556. But it must be valid under the law of the new domicil.

In England, by statute, a will does not become invalid nor is its construction altered by reason of the testator's change of domicil after making it; Dicey, Dom. 308. It has been said that the rules as to construction of wills apply whether they be of real or personal property, unless in case of real property it may be clearly gathered from the terms of the will that the testator had in view the *lex rei sitæ;* Story, Confl. Laws § 479 *h;* 2 Bligh 60; 4 M. & C. 76. But see, *contra*, Whart. Confl. Laws § 597. See CONFLICT OF LAWS; LEX REI SITÆ; WILL.

Uniform acts have been passed in some states providing that a will executed outside a state is good in a state if valid in the state of its execution (Colorado, Kansas, Louisiana, Massachusetts, Michigan, Rhode Island, Washington, Wisconsin, Alaska).

Distribution of the personal property of an intestate is governed exclusively by the law of his actual domicil at the time of his death; 5 B. & C. 438; Dannelli v. Dannelli's Adm'r, 4 Bush (Ky.) 51; Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472; De Sobry v. De Laistre, 2 H. & J. (Md.) 193, 3 Am. Dec. 535; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Harvey v. Richards, 1 Mas. 418, Fed. Cas. No. 6,184; Leach v. Pillsbury, 15 N. H. 137. This includes the ascertainment of the person who is to take; Story, Confl. Laws § 481; 2 Ves. 35; 2 Keen 293. The *descent* of real estate depends upon the law of the place of the real estate; 8 L. R. Ch. 842; Harvey v. Ball, 32 Ind. 99; Kerr v. Moon, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; 14 Ves. 541; Grimball v. Patton, 70 Ala. 626; Pratt v. Douglas, 38 N. J. Eq. 516; Keegan v. Geraghty, 101 Ill. 26. The question whether debts are to be paid by the administrator from the personalty or realty is to be decided by the law of his domicil; 9 Mod. 66; 2 Keen 293.

Insolvents and bankrupts. An assignment of property for the benefit of creditors valid by the law of the domicil is generally recognized as valid everywhere; Bish. Insolv. Debt. 385; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 471, 8 Am. Dec. 581; 2 Rose 97; 1 Cr. M. & R. 296; Train v. Kendall, 137 Mass. 366; Ackerman v. Cross, 40 Barb. (N. Y.) 465; Appeal of Smith, 104 Pa. 381; Van Winkle v. Armstrong, 41 N. J. Eq. 402, 5 Atl. 449; in the absence of positive statute to the contrary; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Oliver v. Townes, 2 Mart. N. S. (La.) 93, 100; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; but not to the injury of citizens of the foreign state in which property is situated; 5 East 131; Saul v. His Creditors, 5 Mart. N. S. (La.) 596, 16 Am. Dec. 212; Milne v. Moreton, 6 Binn. (Pa.) 360, 6 Am. Dec. 466; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Johnson v. Parker, 4 Bush (Ky.) 149; Kidder v. Tufts, 48 N. H. 125; Burk v. McClain, 1 H. & McH. (Md.) 236; Moore v. Willett, 35 Barb. (N. Y.) 663. But a compulsory assignment by force of statute is not of extra-territorial operation; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269; Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466; Blake v. Williams, 6 Pick. (Mass.) 286, 17 Am. Dec. 372; Wood v. Parsons, 27 Mich. 159. Distribution of the effects of insolvent or bankrupt debtors is to be made according to the law of the domicil, subject to the same qualifications; Story, Confl. Laws § 323, 423 *a*. See, generally, 13 Am. L. Rev. 261; Whart. Confl. Laws; Morse, Citizenship; Tiffany; Schouler, Domestic Relations; CONFLICT OF LAWS; BANKRUPT; FOREIGN CORPORATION; INSOLVENCY.

DOMINANT. That to which a servitude or easement is due, or for the benefit of which it exists. Distinguished from *servient*, that from which it is due.

DOMINICUM (Lat. domain; demain; demesne). A lordship. That of which one has the lordship or ownership. That which remains under the lord's immediate charge and control.

In this sense it is equivalent to the Saxon *bordlands*. Spelman, Gloss.; Blount. In regard to lands for which the lord received services and homage merely, the *dominicum* was in the tenant.

In Domesday Book it meant the home farm as distinguished from the holdings of the tenants. Vinogradoff, Engl. Soc. in Eleventh Century 353.

Property; domain; anything pertaining to a lord. Cowell.

In Ecclesiastical Law. A church, or any other building consecrated to God. Du Cange.

DOMINION. Ownership or right to property. 2 Bla. Com. 1. "The holder has dominion of the bill." 8 East 579.

Sovereignty or lordship, as the dominion of the seas. Black, L. Dict. See DOMINIUM.

DOMINIUM (Lat.). Perfect and complete property or ownership in a thing.

Plenum in re dominium,—plena in re potestas. This right is composed of three principal elements: The right to use, the right to enjoy, and the right to dispose of the thing, to the exclusion of every other person. To use a thing, *jus utendi tantum,* consists in employing it for the purposes for which it is fit, without destroying it, and which employment can therefore be repeated; to enjoy a thing, *jus fruendi tantum,* consists in receiving the fruits which it yields, *quidquid ex re nascitur;* to dispose of a thing, *jus abutendi,* is to destroy it, or to transfer it to another. Thus, he who has the use of a horse may ride him, or put him in the plow to cultivate his own soil; but he has no right to hire the horse to another and receive the fruits which he may produce in that way.

On the other hand, he who has the enjoyment of a thing is entitled to receive all the profits or revenues which may be derived from it.

And, lastly, he who has the right of disposing of a thing, *jus abutendi,* may sell it, or give it away, etc., subject, however, to the rights of the usuary or usufructuary, as the case may be.

These three elements, *usus, fructus, abusus,* when united in the same person, constitute the *dominium;* but they may be, and frequently are, separated, so that the right of disposing of a thing may belong to *Primus,* and the rights of using and enjoying to *Secundus,* or the right of enjoying alone may belong to *Secundus,* and the right of using to *Tertius.* In that case, *Primus* is always the owner of the thing, but he is the naked owner, inasmuch as for a certain time he is actually deprived of all the principal advantages that can be derived from it. *Secundus,* if he has the use and enjoyment, *jus utendi et fruendi simul,* is called the usufructuary, *ususfructuarius;* if he has the enjoyment only *jus fruendi tantum,* he is the *fructuarius;* and *Tertius,* who has the right of use, *jus utendi tantum,* is called the usuary,—*usuarius.* But this dismemberment of the elements of the *dominium* is essentially temporary; if no shorter period has been fixed for its duration, it terminates with the life of the usuary, fructuary, or usufructuary; for which reason the rights of use and usufruct are called personal servitudes. Besides the separation of the elements of the *dominium* among different persons, there may also be a *jus in re,* or dismemberment, so far as real estates are concerned, in favor of other estates. Thus, a right of way over my land may exist in favor of your house; this right is so completely attached to the house that it can never be separated from it, except by its entire extinction. This class of *jura in re* is called predial or real servitudes. To constitute this servitude, there must be two estates, belonging to different owners; these estates are viewed in some measure as juridical persons, capable of acquiring rights and incurring obligations. The estate in favor of which the servitude exists is the creditor-estate; and the estate by which the servitude is due, the debtor-estate. See Hunter, Roman Law 231; EMINENT DOMAIN.

DOMINIUM DIRECTUM (Lat.). Legal ownership. Ownership as distinguished from enjoyment.

DOMINIUM DIRECTUM ET UTILE (Lat.). Full ownership and possession united in one person.

DOMINIUM UTILE (Lat.). The beneficial ownership. The use of the property.

DOMINUS (Lat.). The lord or master; the owner. Ainsworth, Lat. Lex. The owner or proprietor of a thing, as distinguished from him who uses it merely. Calvinus, Lex. A master or principal, as distinguished from an agent or attorney. Story, Ag. § 3; Ferriere, Dict.

In Civil Law. A husband. A family. Vicat, Voc. Jur.

DOMINUS LITIS (Lat.). The master of suit. The client, as distinguished from an attorney.

And yet it is said that, although he who has appointed an attorney is properly called *dominus litis,* the attorney himself, when the cause has been tried, becomes the *dominus litis.* Vicat.

DOMINUS NAVIS. In Civil Law. The absolute owner of a ship. Wharton.

DOMITÆ (Lat.). Tame; subdued; not wild.

Applied to domestic animals, in which a man may have an absolute property. 2 Bla. Com. 391.

DONATARIUS (L. Lat.). One to whom something is given. A donee.

DONATIO (Lat.). A gift. A transfer of the title to property to one who receives it without paying for it. Vicat. The act by which the owner of a thing voluntarily transfers the title and possession of it from himself to another person, without any consideration. See Indiana N. & S. R. W. Co. v. City of Attica, 56 Ind. 476; Georgia Penitentiary Co. No. 2 v. Nelms, 65 Ga. 499, 38 Am. Rep. 793.

A donation is never perfected until it has been accepted; for an acceptance is requisite to make the donation complete. See ASSENT; Ayl. Pand. tit. 9; *Clef des Lois Rom.;* 2 Kent 438; Penfield v. Thayer, 2 E. D. Sm. (N. Y.) 305; Ivey's Adm'r v. Owens, 28 Ala. N. S. 641. In old English law and in the modern law, in several phrases, the word retains the extended sense it has in the civil law.

Its literal translation, gift, has acquired in real property law a more limited meaning, being applied to the conveyance of estates tail. 2 Bla. Com. 316; Littleton § 59; West, Symb. § 254; 4 Cruise, Dig. 51. There are several kinds of *donatio:* as, *donatio simplex et pura* (simple and pure gift without compulsion or consideration); *donatio absoluta et larga* (an absolute gift); *donatio conditionalis* (a conditional gift); *donatio stricta et coarctura* (a restricted gift, as, an estate tail).

DONATIO INTER VIVOS (Lat. a gift between living persons). A contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title of it to the donee, gratuitously, and the donee who accepts and acquires the legal title to it. See GIFT; DONATIO MORTIS CAUSA.

DONATIO MORTIS CAUSA (Lat. a gift in prospect of death). A gift made by a person in sickness, or other immediate peril, who, apprehending his death as near, delivers, or

causes to be delivered, to another, the possession of any personal goods, to keep as his own in case of donor's decease. 2 Bla. Com. 514; Gourley v. Linsenbigler, 51 Pa. 345.

The civil law defines it to be a gift under apprehension of death: as, when anything is given upon condition that if the donor die the donee shall possess it absolutely, or return it if the donor should survive or sould repent of having made the gift, or if the donee should die before the donor. Adams v. Nicholas, 1 Miles (Pa.) 109.

It differs from a legacy, inasmuch as it does not require proof in the court of probate; 2 Stra. 777; see 1 Bligh, N. S. 531; and no assent is required from the executor to perfect the donee's title; 2 Ves. 120; 1 S. & S. 245. It differs from a gift *inter vivos* because it is ambulatory and revocable during the donor's life because it may be made to the wife of the donor, and because it is liable for his debts, and it requires actual delivery; Poullain v. Poullain, 79 Ga. 11, 4 S. E. 81. This division of gifts is taken from the Roman law, as are also the rules by which they are governed. 2 Kent 439. See also as to these distinctions Brett, L. Cas. Mod. Eq. 33.

The donor need not be *in extremis;* Larrabee v. Hascall, 88 Me. 511, 34 Atl. 408, 51 Am. St. Rep. 440. It has been considered essential to the validity of the gift that the donor should die of the very malady from which death was apprehended at the time of making the gift; Williams v. Chamberlain, 165 Ill. 210, 46 N. E. 250; Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368; but the better opinion is that while it is not a requisite that he should die from the very disease or peril from which he apprehended death, yet there must be no intervening recovery, and it is essential that his death ensue as a result of some disease or peril existing or impending at the time the gift was made; Peck v. Scofield, 186 Mass. 108, 71 N. E. 109; Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 11 L. R. A. 684, 21 Am. St. Rep. 758. A soldier ordered to the seat of war is not in such imminent peril as will justify his making a gift *causa mortis;* Linsenbigler v. Gourley, 56 Pa. 166, 94 Am. Dec. 51; but such gifts have been held valid where the donor never returned alive, but fell in battle or died in camp; Virgin v. Gaither, 42 Ill. 89; Gass v. Simpson, 4 Coldw. (Tenn.) 288. A gift made in contemplation of suicide is utterly void as against public policy; Duryea v. Harvey, 183 Mass. 429, 67 N. E. 351.

A delivery of more than was intended to be given cannot overrule the donor's intention, and the donee can take only as much as was intended to be given; Crippen v. Adams, 132 Mich. 31, 92 N. W. 496. The delivery need not be made to the donee personally, but may be made to another as his agent or trustee, and that without his knowledge at the time of making the gift; Sheedy v. Roach, 124 Mass. 472, 26 Am. Rep. 680; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366. Where actual manual tradition cannot be made, either from their nature or their situation at the time, in such cases the delivery may be constructive, although in all cases it must be as nearly perfect and complete as the nature of the property and attendant circumstances and conditions will permit; Newman v. Bost, 122 N. C. 524, 29 S. E. 848. Technically, there must be an acceptance by the donee as well as a delivery by the donor; Yancy v. Field, 85 Va. 756, 8 S. E. 721; Ammon v. Martin, 59 Ark. 191, 26 S. W. 826; but this is a matter of slight practical importance, for where the gift is beneficial to the donee an acceptance will be presumed; Devol v. Dye, 123 Ind. 321, 24 N. E. 246, 7 L. R. A. 439; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026.

To constitute a good *donatio mortis causa: first,* the thing given must be personal property; Wells v. Tucker, 3 Binn. (Pa.) 370; a bond; Wells v. Tucker, 3 Binn. (Pa.) 370; 2 Ves. Sen. 431; 3 Madd. 184; bank notes; Michener v. Dale, 23 Pa. 59; 2 Bro. C. C. 612; White v. Wager, 32 Barb. (N. Y.) 250; 3 P. Wms. 356; certificates of stock; Walsh v. Sexton, 55 Barb. (N. Y.) 251; a policy of life insurance; 1 B. & S. 109; Gourley v. Linsenbigler, 51 Pa. 345; and a check offered for payment during the life of the donor; 4 Bro. C. C. 286; will be so considered; but a check not so presented, which had not passed into the hands of a *bona fide* holder, is revoked by the death of the decedent; L. R. 6 Eq. 198; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Simmons v. Society, 31 Ohio St. 457, 27 Am. Rep. 521; Matter of Smither, 30 Hun (N. Y.) 632; Beals v. Crowley, 59 Cal. 665; *aliter,* as to a check given abroad; L. R. 5 Ch. Div. 730. See Taylor's Estate, 154 Pa. 183, 25 Atl. 1061, 18 L. R. A. 855. A check to a wife expressing that it was to enable her to buy mourning, was held under peculiar circumstances a valid *donatio mortis causa;* 1 P. Wms. 441. A note not negotiable, or if negotiable, not indorsed, but delivered, passes by such a donation; 1 Dan. Neg. Inst. § 24; Tiedm. Com. Pap. 252; Chase v. Redding, 13 Gray (Mass.) 418; but in Bradley v. Hunt, 5 Gill & J. (Md.) 54, 23 Am. Dec. 597, this is limited to bank notes and notes payable to bearer. A certificate of deposit which is delivered to a person for the use of a third party, though not indorsed, is a valid gift; Conner v. Root, 11 Colo. 183, 17 Pac. 773; Reed v. Barnum, 36 Ill. App. 525; *contra,* Dunn v. Bank, 109 Mo. 90, 18 S. W. 1139; see Daniel v. Smith, 64 Cal. 346, 30 Pac. 575. A check cannot be the subject of a *donatio mortis causa,* unless paid in the donor's lifetime; death revokes the bank's authority to pay; 4 Bro. C. C. 286; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567; Second Nat. Bank of Detroit v. Williams, 13 Mich. 282. But in such case a check has been considered as of a testamentary character; 3 Curt. Eccl. 650; and see 1 P. Wms. 441 (*supra*). Where a man made a gift of his check to his son to be collected after his death, and the bank, knowing the drawer was dead, paid the check, it must pay the amount of the check to the personal

representatives; Pullen v. Bank, 138 Cal. 169, 66 Pac. 740, 71 Pac. 83, 94 Am. St. Rep. 19. A check or note or other negotiable instrument of a person other than the donor may be the subject of such gift; L. R. 15 Ch. D. 651; L. R. 6 Eq. 198; Burke v. Bishop, 27 La. Ann. 465, 21 Am. Rep. 567. Though unaccepted by the bank, a check for the entire amount of the drawer's balance delivered to a person as a gift of the money, operates as an assignment of the fund and is valid as a gift *mortis causa;* Varley v. Sims, 100 Minn. 331, 111 N. W. 269, 8 L. R. A. (N. S.) 828, 117 Am. St. Rep. 694, 10 Ann. Cas. 473. There must be a parting with the dominion over the subject matter of the gift, with a present design that the title shall pass out of the donor and to the donee; Liebe v. Battmann, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705.

A husband cannot gratuitously dispose of his personalty in this way to defeat the widow's statutory rights therein; Hatcher v. Buford, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; and the same is true as to the wife; Baker v. Smith, 66 N. H. 422, 23 Atl. 82.

Title to the property passes to the donee upon its delivery to him, but remains subject to defeasance while the donor lives; Chase v. Redding, 13 Gray (Mass.) 418; Nicholas v. Adams, 2 Whart. (Pa.) 17; Basket v. Hassell, 107 U. S., 602, 2 Sup. Ct. 415, 27 L. Ed. 500. A gift of this nature cannot avail against creditors and the donee takes subject to the right of personal representative to reclaim it if necessary for the payment of deceased's debts; Dunn v. Bank, 109 Mo. 90, 18 S. W. 1139.

The delivery of a savings-bank book passes the money in bank; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Sheedy v. Roach, 124 Mass. 412, 26 Am. Rep. 680; Pierce v. Bank, 129 Mass. 425, 37 Am. Rep. 371; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; Tillinghast v. Wheaton, 8 R. I. 536, 5 Am. Rep. 621, 94 Am. Dec. 126; *contra*, Walsh's Appeal, 122 Pa. 177, 15 Atl. 470, 9 Am. St. Rep. 83, 1 L. R. A. 535; see Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848. A banker's deposit note is a good subject of gift; 44 Ch. Div. 76; but where the bank book is already in the hands of the donee, a statement by the donor that his wife may have it is not sufficient; Drew v. Hagerty, 81 Me. 231, 17 Atl. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255. See 36 Cent. Law J. 354; 31 Am. Law Reg. 681; 34 *id.* 85, for discussions and annotations on this subject. A mortgage is a good gift; 5 Madd. 351; 1 Bligh, N. S. 497; a policy of insurance; 1 Best & Sm. 109; 33 Beav. 619; a receipt for money; 4 De G. & Sm. 517; bonds; 3 Atk. 214; 1 Bligh, N. S. 497; bank notes; 2 Eden 125; Sel. Ch. Cas. 14; 3 P. Wms. 356; 2 Bro. C. C. 612.

A promissory note of the sick man made in his last illness is not a valid donation; 5 B. & C. 501; Parish v. Stone, 14 Pick. (Mass.) 204, 25 Am. Dec. 378; Craig v. Craig, 3 Barb. Ch. (N. Y.) 76; Smith v. Kittridge, 21 Vt. 238; Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449. See Flint v. Pattee, 33 N. H. 520, 66 Am. Dec. 742; Brown v. Brown, 18 Conn. 410, 46 Am. Dec. 328; Waring Adm'r v. Edmonds, 11 Md. 424; Sessions v. Moseley, 4 Cush. (Mass.) 87; Graves v. Safford, 41 Ill. App. 659; 6 Harv. L. Rev. 36. In England, bills delivered on a deathbed but without consideration, are valid donations; 27 Beav. 303; but a gift of the donor's own cheque, if not payable until after his death, is not valid; 27 Ch. D. 631. See also 5 Ch. D. 730; 4 D. M. & G. 249. As to a gift of money, see Corle v. Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157.

Second, the gift must be made by the donor in peril of death, and to take effect only in case the giver dies; Bisph. Eq. 70; Wells v. Tucker, 3 Binn. (Pa.) 370; 1 Bligh, N. S. 530; Blanchard v. Sheldon, 43 Vt. 513; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Kirk v. McCusker, 3 Misc. 277, 22 N. Y. Supp. 780; a gift made in apprehension of death from a surgical operation is valid; Ridden v. Thrall, 125 N. Y. 572. There is quite a conflict of authority as to whether a gift by a soldier about to join the army is a valid *donatio causa mortis*, with the weight of authority against sustaining them. They have been upheld, it may possibly be considered, in Virgin v. Gaither, 42 Ill. 39; but this case is explained in Travis on Sales as a gift *inter vivos* on condition; a case cited as upholding them, Baker v. Williams, 34 Ind. 547, is overruled if it does so hold; Smith v. Dorsey, 38 Ind. 451, 10 Am. Rep. 118; which holds them invalid, as do also Gourley v. Linsenbigler, 51 Pa. 345; Irish v. Nutting, 47 Barb. (N. Y.) 370; Dexheimer v. Gautier, 5 Rob. (N. Y.) 216 (Barbour, J., dissenting). See Gass v. Simpson, 4 Cold. (Tenn.) 288.

Such a gift is only good when made in relation to the death of the person by illness affecting him at the time; 2 Ves. Jr. 121; but if it appear that the donation was made when the donor was ill and only a few days or weeks before his death, it will be presumed that it was made in the last illness and in contemplation of death; 1 Wms. Ex. 845; Dole v. Lincoln, 31 Me. 422.

When a gift was made in contemplation of death, but the donor so far recovered as to be able to attend to his business, and then died of the same disease, *held* not a good *donatio;* Weston v. Hight, 17 Me. 287, 35 Am. Dec. 250. That the donor lived fourteen days; Nicholas v. Adams, 2 Whart. (Pa.) 17; three days; Wells v. Tucker, 3 Binn. (Pa.) 370; Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357; six hours; Michener v. Dale, 23 Pa. 63; after making the gift, does not invalidate it. There seems to be no rule limiting the time within which the gift must be made before death; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313.

Third, there must be an actual delivery of the subject to or for the donee, in cases where such delivery can be made; Pennington v. Gittings, 2 Gill & J. (Md.) 208; Mil-

ler v. Jeffress, 4 Gratt. (Va.) 472; Dole v. Lincoln, 31 Me. 422; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Cutting v. Gilman, 41 N. H. 147; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683; L. R. 6 Eq. 474; Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; McCord's Adm'r v. McCord, 77 Mo. 166, 46 Am. Rep. 9; Kiff v. Weaver, 94 N. C. 274, 55 Am. Rep. 601. The delivery must be as complete as the nature of the property will admit of; Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464, where taking the key of a trunk, putting goods into the trunk and returning the key to its place at the request of the owner, who expressed a desire, in his last illness, to make the trunk and its contents a *donatio mortis causa*, was held not to be a sufficient delivery.

Where one about to commit suicide indorsed a promissory note and placed it in an envelope directed to a friend in the same house and then shot himself, held no delivery; Liebe v. Battmann, 33 Or. 241, 54 Pac. 179, 72 Am. St. Rep. 705. The gift of the keys of a box deposited in a vault of a bank containing bonds, etc., is a sufficient constructive delivery of the contents of the box; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; 2 Ves. Sen. 431; Prec. Ch. 300; [1891] W. N. 201 (where donor delivered the keys of a trunk to donee, and said the trunk and its contents were donee's); Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706; but see Goulding v. Horbury, 85 Me. 227, 27 Atl. 127, 35 Am. St. Rep. 357. An intention to give is sufficiently manifested from the fact that a person *in extremis* hands a package of bonds to another saying, "These bonds are for you;" Vandor v. Roach, 73 Cal. 614, 15 Pac. 354. Delivery can be made to a third person for the use of a donee; Wells v. Tucker, 3 Binn. (Pa.) 370; Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 340; Southerland v. Southerland's Adm'r, 5 Bush (Ky.) 591; but not if the third party is the agent of the giver; 2 Coll. 356. The acceptance is presumed, unless the contrary appear; In re Dunlap's Estate, 94 Mich. 11, 53 N. W. 788.

To make such a gift valid there must be a renunciation by the donor and an acquisition by the donee, of all interest and title to the property intended to be given; Wetmore v. Brooks, 18 N. Y. Supp. 852.

To constitute such a gift, the subject must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift; Daniel v. Smith, 75 Cal. 548, 17 Pac. 683.

It is an unsettled question whether such kind of gift appearing in writing, without delivery of the subject, can be supported; 2 Ves. 120; Smith v. Downey, 38 N. C. 268; but Lord Hardwicke expressed the opinion that it could be; 2 Ves. Sen. 440; 1 *id.* 314; *contra*, 1 Wms. Ex. 855. And see Thompson v. Thompson, 12 Tex. 327. By the Roman and civil law, a gift *mortis causa* might be made in writing; Dig. lib. 39, t. 6, l. 28; 2 Ves. Sen. 440; 1 *id.* 314.

Upon the recovery of the donor and his consequent ability to comply with the statute, the dispensation from its requirements ceases and the gift *mortis causa*, though valid when made, becomes of no further force. No expression to this effect is necessary; Robson v. Jones, 3 Del. Ch. 63; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848.

The essentials are also thus stated: 1. It must be in view of donor's death. 2. With express or implied intention that it shall only take effect by reason of existing disorder. 3. Delivery by the donor to the donee or some one on his behalf; Brett, L. Cas. Mod. Eq. 33; but this is not so satisfactory as the well-settled enumeration above given.

A *donatio mortis causa* does not require the executor's assent; 2 Ves. Jr. 120; is revocable by the donor during his life; Bloomer v. Bloomer, 2 Bradf. Surr. (N. Y.) 339; Parker v. Marston, 27 Me. 196; Lee v. Luther, 3 Woodb. & M. 519, Fed. Cas. No. 8,196; Jones v. Brown, 34 N. H. 439; Doran v. Doran, 99 Cal. 311, 33 Pac. 929; by recovery; 3 Macn. & G. 664; Wms. Ex. 651; or resumption of possession; 2 Ves. Sen. 433; but not by a subsequent will; Prec. Chanc. 300; *contra*, Jayne v. Murphy, 31 Ill. App. 28; but may be satisfied by a subsequent legacy; 1 Ves. Sen. 314. And see Shirley v. Whitehead, 36 N. C. 130. It may be of any amount of property; Meach v. Meach, 24 Vt. 591. It is liable for the testator's debts; Dunn v. Bank, 109 Mo. 90, 18 S. W. 1139; Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. Rep. 543; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; a gift providing for the payment of certain bills and a division of the remaining property is valid; Loucks v. Johnson, 70 Hun 565, 24 N. Y. Supp. 267.

A gift *mortis causa* is none the less valid because it embraces the entire personal estate of the donor, and the testimony of one credible witness is sufficient to establish such a gift; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. 389, 18 L. R. A. 170, 37 Am. St. Rep. 848; Meach v. Meach, 24 Vt. 591; but see Headley v. Kirby, 18 Pa. 326; Marshall v. Berry, 13 Allen (Mass.) 43; and a gift accompanied by the condition that part thereof is to be applied to the payment of the donor's debts is good; Wetmore v. Brooks, 18 N. Y. Sup. 852.

For a thorough discussion of this subject, see Robson v. Jones, 3 Del. Ch. 51; 36 Am. L. Reg. 247, 289; note to Ward v. Turner, Wh. & T. L. C. Eq.; 36 Cent. Law J. 354; 32 *id.* 27.

DONATIO PROPTER NUPTIAS (Lat. gift on account of marriage). In Roman

Law. A gift made by the husband as a security for the marriage portion. The effect of the act of making such a gift was different according to the relation of the parties at the time. Vicat, Voc. Jur. Called, also, a mutual gift.

The name was originally applied to a gift made before marriage, and was then called a *donatio ante nuptias;* but in process of time it was allowed to be made after marriage as well, and was then called a *donatio propter nuptias.*

DONATION. See DONATIO.

DONATIVE. See ADVOWSON.

DONEE. One to whom a gift is made or a bequest given; one who is invested with a power of appointment: he is sometimes called an appointee. 4 Kent 316.

DONIS, STATUTE DE. See DE DONIS, THE STATUTE.

DONOR. One who makes a gift. One who gives lands in tail. *Termes de la Ley.*

DONUM (Lat.). A gift.

The difference between *donum* and *munus* is said to be that *donum* is more general, while *munus* is specific. *Munus* is *said* to mean *donum* with a cause for the giving (though not a legal consideration), as on account of marriage, etc. *Donum* is said to be that which is given from no necessity of law or duty, but from free will, "from the absence of which, if they are not given, no blame arises; but if they are given, praise is due." Vicat, Voc. Jur.; Calvinus, Lex.

DOOM. Judgment.

DOOM OF THE ASSESSOR. See ASSESSMENT.

DOOR. The place of usual entrance into a house, or into a room in the house.

To authorize the breach of an outer door in order to serve process, the process must be of a criminal nature; and even then a demand of admittance must first have been refused; 5 Co. 94; State v. Smith, 1 N. H. 346; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; Kelsy v. Wright, 1 Root (Conn.) 83; State v. Shaw, 1 Root (Conn.) 134; Banks v. Farwell, 21 Pick. (Mass.) 156; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Cahill v. People, 106 Ill. 621; Hawkins v. Com., 14 B. Monr. (Ky.) 395, 61 Am. Dec. 147. The outer door may also be broken open for the purpose of executing a writ of *habere facias;* 5 Co. 93; Bac. Abr. *Sheriff* (N 3).

An outer door cannot, in general, be broken for the purpose of serving civil process; Oystead v. Shed, 13 Mass. 520, 7 Am. Dec. 172; Snydacker v. Brosse, 51 Ill. 357, 99 Am. Dec. 551; Hooker v. Smith, 19 Vt. 151, 47 Am. Dec. 679; 1 M. & W. 336; Curtis v. Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; but after the defendant has been arrested, and he takes refuge in his own house, the officer may justify breaking an outer door to take him; Fost. 320; 1 Rolle 138; Cro. Jac. 555; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564. When once an officer is in the house, he may break open an inner door to make an arrest; Fitch v. Loveland, Kirb. (Conn.) 386; Hubbard v. Mace, 17 Johns. (N. Y.) 127; 13 M. & W. 52; Prettyman v. Dean, 2 Harr. (Del.) 494. See 1 Toullier, n. 214, p. 88; L. R. 2 Q. B. 593; or break the outer door to get out; 7 A. & E. 826.

DORMANT. Sleeping; silent; not known; not acting. One whose name and transactions as a partner are professedly concealed from the world; Mitchell v. Dall, 2 H. & G. (Md.) 159; Kelley v. Hurlburt, 5 Cow. (N. Y.) 534; Pitts v. Waugh, 4 Mass. 424; National Bank of Salem v. Thomas, 47 N. Y. 15. Coll. Partn. § 4. The term is applied, also, to titles, rights, judgments, and executions. As to the latter, see Storm v. Woods, 11 Johns. (N. Y.) 110; Kimball v. Munger, 2 Hill (N. Y.) 364.

DORMANT JUDGMENT. One that has become inoperative so far as the right to issue execution thereon is concerned. General Electric Co. v. Hurd, 171 Fed. 984. See JUDGMENT.

DOS (Lat.). **In Roman Law.** That which is received by or promised to the husband from the wife, or any one else by her influence, for sustaining the burdens of matrimony. There are three classes of *dos. Dos profectitia* is that which is given by the father or any male relative from his property or by his act; *dos adventitia* is that which is given by any other person or from the property of the wife herself; *dos receptitia* is where there is a stipulation connected with the gift relating to the death of the wife. Vicat; Calvinus, Lex.; Du Cange; 1 Washb. R. P. 147.

In English Law. The portion bestowed upon a wife at her marriage by her husband. 1 Washb. R. P. 147; 1 Cruise, Dig. 152.

Dower generally. The portion which a widow has in the estate of her husband after his death. Park, Dower.

This use of the word in the English law, though, as Spelman shows, not strictly correct, has still the authority of Tacitus (*de Mor. Germ.* 18) for its use. And if the general meaning of marriage portion is given to it, it is strictly as applicable to a gift from the husband to the wife as to one from the wife to the husband. It occurs often, in the phrase *dos de dote peti non debet* (dower should not be sought of dower). 1 Washb. R. P. 209.

DOS RATIONABILIS (Lat.). A reasonable marriage portion. A reasonable part of her husband's estate, to which every widow is entitled, of lands of which her husband may have endowed her on the day of marriage. Co. Litt. 336. Dower, at common law. 2 Bla. Com. 134.

DOSSIER (Fr.). A brief; a bundle of papers.

DOT (a French word adopted in Louisiana). The fortune, portion, or dowry which a woman brings to her husband by the mar-

riage. Buisson v. Thompson, 7 Mart. La. (N. S.) 460.

DOTAGE. That feebleness of the mental faculties which proceeds from old age. A diminution or decay of that intellectual power which was once possessed. 1 Bland, Ch. 389. See DEMENTIA.

DOTAL PROPERTY. By the civil law in Louisiana, by this term is understood that property which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry. La. Civ. Code, art. 2335.

The effect of marriage under the civil law as found in the digest was that the wife brought her *dos* and the husband his antidos into the marriage. In all other property belonging to them they each retained the rights of owners in their separate capacities uncontrolled by their relation of husband and wife; Ballinger, Community Property § 2. See COMMUNITY.

DOTATION. In French Law. The act by which the founder of a hospital, or other charity, endows it with property to fulfil its destination.

DOTE. In Spanish Law. The property and effects which a woman brings to her husband for the purpose of aiding him with the rents and revenues thereof to support the expenses of the marriage. Las Partidas, 4. 11. 1. "*Dos*," says Cujas, "*est pecunia marito, nuptiarum causa, data vel promissa.*" The dower of the wife is inalienable, except in certain specified cases, for which see Escriche, Dic. Raz. *Dote.*

As an English verb it has been defined to be delirious, silly or insane. Gates v. Meredith, 7 Ind. 441.

DOTE ASSIGNANDA. In English Law. A writ which lay in favor of a widow, when it was found by office that the king's tenant was seized of tenements in fee or fee-tail at the time of his death, and that he held of the king in chief. Such widows were called king's widows.

DOTE UNDE NIHIL HABET. A writ which lies for a widow to whom no dower has been assigned. 3 Bla. Com. 182. By 23 and 24 Vict. c. 126, an ordinary action commenced by writ of summons has taken its place; but it remains in force in the United States, and under the designation of dower *unde nihil habet*, is the form in common use for the recovery of dower at law; 1 Washb. R. P. 290; 4 Kent 63.

DOUBLE AVAIL OF MARRIAGE. See DUPLEX VALOR MARITAGII.

DOUBLE COMPLAINT. See DUPLEX QUERELA.

DOUBLE COSTS. See COSTS.

DOUBLE EAGLE. A gold coin of the United States, of the value of twenty dollars or units.

It is so called because it is twice the value of the eagle, and, consequently, weighs five hundred and sixteen grains of standard fineness, namely, nine hundred thousandths fine. It is a legal tender for twenty dollars to any amount. Act of March 3, 1849, 6 Stat. L. 397. U. S. Rev. Stat. §§ 3511, 3514. The double eagle is in value the largest coin issued in the United States. The first issue was made in 1849. See act of Feb. 12, 1873, 17 Stat. L. p. 426; EAGLE.

DOUBLE INSURANCE. Where divers insurances are made upon the same interest in the same subject against the same risks in favor of the same assured, in proportions exceeding the value. 1 Phill. Ins. §§ 359, 366.

See INSURANCE, sub-title, *Double Insurance.*

A like excess in one policy is over-insurance. If the valuation of the whole interest in one policy is double that in another, and half of the value is insured in each policy according to the valuation in that policy, it is not a double insurance; its being so or not depends on the aggregate of the proportions, one-quarter, one-half, etc., insured by each policy, not upon the aggregate of the amounts.

Where the insurance is on the interests of different persons, though on the same goods, it is not double insurance; Wells v. Ins. Co., 9 S. & R. (Pa.) 107; nor is it where carrier and shipper each insure; Royster v. Roanoke N. & B. S. B. Co., 26 Fed. 492.

In case of double insurance, the assured may sue upon all the policies and is entitled to judgment upon all, *but he is entitled to but one satisfaction;* therefore, if during the pendency of suits on several policies concerning the same risk and interest, the loss is paid in full by one company, the actions against the others must fail, and the insurer paying the loss has a remedy against the other insurers for a proportionate share of the loss. If there be any doubt as to whether the policies cover the same property or interest, evidence is admissible to show the fact; Wiggin v. Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Vose v. Ins. Co., 39 Barb. (N. Y.) 302; Peoria Marine & Fire Ins. Co. v. Lewis, 13 Ill. 553; Sloat v. Ins. Co., 49 Pa. 14, 88 Am. Dec. 477; Merrick v. Ins. Co., 54 Pa. 277; May, Ins. § 13.

The question of double insurance does not generally arise in life insurance, as there is no fixed value to the life, and the person in each case is to pay a fixed sum without regard to other insurance. But where the insurable interest has an ascertainable value the question may arise, as where two policies are taken out in different offices, by a creditor, on the life of a debtor, and for the same debt. Then only the value of the interest can be recovered and the amount recovered on the first policy is to be deducted from the amount payable on the second; May, Ins. § 440. See INSURANCE.

DOUBLE PLEA. The alleging, for one single purpose, two or more distinct grounds of defence, when one of them would be as effectual in law as both or all. See DUPLICITY.

By the statute 4 Anne, c. 16, in England, and by similar statutes in most if not all of the states, any defendant in any suit, and

any plaintiff in replevin in any court of record, may plead as many several matters as may be necessary for a defence, with leave of court. This statute allows double pleading; but each plea must be single, as at common law; Lawes, Pl. 131; 1 Chit. Pl. 512; Andr. Steph. Pl. 320; and the statute does not extend to the subsequent pleadings; Com. Dig. *Pleader* (E 2); Story, Pl. § 72; Gould, Pl. c. 8; *Doctrina Plac.* 222. In criminal cases a defendant cannot plead a special plea in addition to the general issue; 7 Cox, Cr. Cas. 85.

DOUBLE POSSIBILITY. A possibility upon a possibility. 2 Bla. Com. 170. See CONTINGENT REMAINDER.

DOUBLE RENT. In English Law. Rent payable by a tenant who continues in possession after the time for which he has given notice to quit, until the time of his quitting possession. Stat. 11 Geo. II. c. 19; Fawcett, L. & T. 304. The provisions of this statute have been re-enacted in New York, and some other states, though not generally adopted in this country.

DOUBLE TAX. See TAX.

DOUBLE OR TREBLE DAMAGES. See MEASURE OF DAMAGES.

DOUBLE USE. A term used in patent law to indicate that a later device is merely a new application of an older device, not involving the exercise of the inventive faculty.

In construing letters patent for new applications of old devices, if the new use be so nearly analogous to the former one that it would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them are remote, and especially if the use of the old device produce a new result, it *may* involve an exercise of the inventive faculty—much depending upon the nature of the changes required to adapt the device to its new use; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. See PATENT.

DOUBLE VOUCHER. A voucher which occurs when the person first vouched to warranty comes in and vouches over a third person. See a precedent, 2 Bla. Com. App. V. p. xvii.; VOUCHER.

The necessity for double voucher arises when the tenant in tail is not the tenant in the writ, but is tenant by warranty; that is, where he is vouched, and comes in and confesses the warranty. Generally speaking, to accomplish this result a previous conveyance is necessary, by the tenant in tail, to a third person, in order to make such third person tenant to a writ of entry. Pres. Conv. 125, 126.

DOUBLE WASTE. When a tenant bound to repair suffers a house to be wasted, and then unlawfully fells timber to repair it, he is said to commit double waste. Co. Litt. 53. See WASTE.

DOUBT. The uncertainty which exists in relation to a fact, a proposition, or other thing; an equipoise of the mind arising from an equality of contrary reasons. Ayliffe, Pand. 121.

Some rules, not always infallible, have been adopted in doubtful cases, in order to arrive at the truth. 1. In civil cases, the doubt ought to operate against him who, having it in his power to prove facts to remove the doubt, has neglected to do so. In cases of fraud, when there is a doubt, the presumption of innocence ought usually to remove it. 2. In criminal cases, whenever a reasonable doubt exists as to the guilt of the accused, that doubt ought to operate in his favor. In such cases, particularly when the liberty, honor, or life of an individual is at stake, the evidence to convict ought to be clear and devoid of all reasonable doubt.

The term reasonable doubt is often used, but not easily defined. Failure to explain reasonable doubt in a charge is not error; Thigpen v. State, 11 Ga. App. 846, 76 S. E. 596. The words require no definition; Buchanan v. State, 11 Ga. App. 756, 76 S. E. 73. It is a better practice not to define it; Holmes v. State (Tex.) 150 S. W. 926; State v. Reed, 62 Me. 129. "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." Per Shaw, C. J., in Com. v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711; Schmidt v. Ins. Co., 1 Gray (Mass.) 534; Bethell v. Moore, 19 N. C. 311; State v. Goldsborough,

Houst. Cr. Rep. (Del.) 316. In approving the opinion of Shaw, C. J., the court in People v. Wreden, 59 Cal. 395, says: "There can be no 'reasonable doubt' of a fact after it has been clearly established by satisfactory proof." No man should be deprived of life under the form of law unless the jury can say upon their conscience that the evidence is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499.

Reasonable doubt is the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises; thus one is a cause and the other an effect. To say that one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusions upon the proof actually before them; Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. It must be an actual, substantial doubt, arising from the evidence or want of evidence in the case; Langford v. State, 32 Neb. 782, 49 N. W. 766.

If the evidence produced in a criminal action be of such a convincing character that the jurors would unhesitatingly be governed by it in the weighty and important matters of life, they may be said to have no *reasonable doubt* respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. Therefore, a charge to the jury that if after an impartial comparison and consideration of all the evidence, they can truthfully say that they have an abiding conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, is not erroneous; Hopt v. Utah, 120 U. S. 431, 7 Sup. Ct. 614, 30 L. Ed. 708.

Proof "beyond a reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible; Com. v. Costley, 118 Mass. 24. It must be founded on a consideration of all the circumstances and evidence, and not on mere conjecture or speculation; Kennedy v. State, 107 Ind. 144, 6 N. E. 305, 57 Am. Rep. 99; and must not be a mere mistaking of the imagination or misplaced sympathy; State v. Murphy, 6 Ala. 845; but natural and substantial, not forced or fanciful; State v. Bodekee, 34 Ia. 520; such an honest uncertainty existing in the minds of a candid, impartial and diligent jury as fairly strikes the conscientious mind and clouds the judgment; Com. v. Drum, 58 Pa. 9. It must not be a mere fanciful, vague, speculative or possible doubt, but a reasonable, substantial doubt, remaining after the consideration of all the evidence; State v. Uzzo, 6 Pennew. (Del.) 212, 65 Atl. 775. The subject is discussed in an address by J. S. Burger, before the State Bar Association of Kansas; 11 Am. Lawy. 440; and the history of the doctrine is stated, as well as the difficulty and danger of trying to define it, though the doctrine itself is strongly urged "as the shield of innocence and the champion of liberty." It is said to have been first used in the treason trials in Dublin in 1798.

A much quoted and much criticized definition is that of Dillon, J., in State v. Ostrander, 18 Ia. 437, approved in Polin v. State, 14 Neb. 540, 16 N. W. 898. Other attempts to define reasonable doubt are State v. Hayden, 45 Ia. 17; State v. Nelson, 11 Nev. 334; 4 F. & Fin. 383; U. S. v. Jackson, 29 Fed. 503; State v. Kearley, 26 Kan. 77, per Brewer, J.; People v. Finley, 38 Mich. 482; Lane v. State, 41 Tex. Cr. R. 560, 55 S. W. 831; State v. Swain, 68 Mo. 605. The difficulty of a satisfactory definition is discussed in 57 Am. L. Reg. 419, where C. J. Shaw's definition is criticized and that in Com. v. Costley, 118 Mass. 1, *supra*, is suggested as better. And in Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708, it was approved as contrasted with C. J. Shaw's definition. The whole subject was there considered and the necessity was stated of allowing the trial judge considerable latitude in the way of explanation.

In the Tichborne Case Lord Cockburn charged the jury: "It is the business of the prosecution to bring home guilt to the accused to the satisfaction of the jury. But the doubt of which the accused is entitled to the benefit must be the doubt that a rational —that a sensible—man may fairly entertain, not the doubt of a vacillating mind that has not the moral courage to decide, but shelters itself in vain scepticism." 14 Harv. L. Rev. 87.

An instruction that "reasonable doubt is a doubt you can give a reason for" is erroneous; Abbott v. Territory, 20 Okl. 119, 94 Pac. 179, 16 L. R. A. (N. S.) 260, 129 Am. St. Rep. 818; Pettine v. New Mexico, 201 Fed. 489, 119 C. C. A. 581. It is said that to require an affirmative reason for a reasonable doubt of guilt places upon the defendant the burden of furnishing to every juror a reason why he is not satisfied as to guilt, with

the certainty which the law requires; also, that such an instruction casts on the defendant the burden of furnishing reasons for not finding him guilty, whereas it is on the prosecution to make out a case excluding all reasonable doubt; State v. Cohen, 108 Ia. 208, 78 N. W. 857, 75 Am. St. Rep. 213. So in Carr v. State, 23 Neb. 749, 37 N. W. 630; Darden v. State, 73 Ark. 315, 84 S. W. 507. In State v. Sauer, 38 Minn. 438, 38 N. W. 355, it was said that there is a serious objection to requiring a juror to be able to express in words the ground of his doubt, because he might well have a reasonable doubt and yet find it difficult to give a reason for it.

But a contrary view is held in Butler v. State, 102 Wis. 364, 78 N. W. 590: "A doubt cannot be reasonable unless there is a reason for it, and if such reason exists, it can be given." To the same effect: People v. Guidici, 100 N. Y. 503, 3 N. E. 493; State v. Rounds, 76 Me. 123. In State v. Jefferson, 43 La. Ann. 995, 10 South. 199, it was held to be a "serious, sensible doubt such as you could give a good reason for." The doubt ought not to be a capricious one, but a substantial doubt, which the jury could give a reason for; Marshall v. U. S., 197 Fed. 511, 117 C. C. A. 65.

In Alabama there are numerous and conflicting cases.

There are also cases which, though criticizing the rule that requires the jury to have a reason for a doubt, have held that its application in a charge is not a reversible error, if it be part of a charge defining the difference between a reasonable and a vague doubt; Thibert v. Supreme Lodge, 78 Minn. 450, 81 N. W. 220, 47 L. R. A. 136, 79 Am. St. Rep. 412; Klyce v. State, 78 Miss. 450, 28 South. 827; People v. Stubenvoll, 62 Mich. 329, 28 N. W. 883.

The cases are collected in 16 L. R. A. (N. S.) 260, note.

DOVE. See ANIMAL.

DOWAGER. A widow endowed; one who has a jointure.

In England, this is a title or addition given to the widow of a prince, duke, earl, or other nobleman, to distinguish her from the wife of the heir, who has the right to bear the title; 1 Bla. Com. 224.

DOWER (from Fr. *douer*, to endow). The provision which the law makes for a widow out of the lands or tenements of her husband, for her support and the nurture of her children. Co. Litt. 30 *a*; 2 Bla. Com. 130; 4 Kent 35; Washb. R. P. 146.

There were five species of dower in England (Littleton § 51):

1. *Dower ad ostium ecclesiæ*, where a man of full age, on coming to the church-door to be married, endowed his wife of a certain portion of his lands.

2. *Dower ex assensu patris*, which differed from dower *ad ostium ecclesiæ* only in being made out of the lands of the husband's father and with his consent.

3. *Dower by common law*, where the widow was entitled during her life to a third part of all the lands and tenements of which her husband was seised in law or in fact of an inheritable estate, at any time during the coverture, and which any issue she might have had might by possibility have inherited.

4. *Dower by custom*, where a widow became entitled to a specified portion of her husband's lands in consequence of some local or particular custom.

5. *Dower de la plus belle* (*de la pluis beale*), where the widow on suing the guardian in chivalry for dower, was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence; 2 Bla. Com. 132, n.

Of these, the first and second were created by the act of the parties, the third and fourth by the law. The two classes represent the old order and the new. 3 Holdsw. Hist. E. L. 157. In later days the former class was superseded by the latter class or by jointures.

By the Dower Act in England (1833) the widow is entitled to dower out of equitable estates as well as legal, but only out of those estates to which the husband is beneficially entitled at his death.

Dower in the United States, although regulated by statutes differing from each other in many respects, conforms substantially to that at the common law; 1 Washb. R. P. 149; see Schoul. Hus. & W. 455.

Where a statute provided that no estate in dower be allotted to the wife on the death of her husband, it took away a wife's inchoate right of dower in lands previously alienated by her husband without joining her in the deed; Richards v. Land Co., 47 Fed. 854; the inchoate right of the wife is not such a vested right or interest as cannot be taken away by legislative action; Richards v. Land Co., 54 Fed. 209, 4 C. C. A. 290.

Of what estates the wife is dowable. Her right to dower is always determined by the laws of the place where the property is situate; Duncan v. Dick, Walker (Miss.) 281; O'Ferrall v. Simplot, 4 Ia. 381; Lamar v. Scott, 3 Strobh. (S. C.) 562.

She is entitled to one-third of all lands, tenements, or hereditaments, corporeal and incorporeal, of which her husband may have been seized during the coverture, in fee or in tail; 2 Bla. Com. 131; Gorham v. Daniels, 23 Vt. 611.

She was not dowable of a term for years, however long; Park, Dow. 47; Spangler v. Stanler, 1 Md. Ch. Dec. 36.

The inheritance must be an entire one,

and one of which the husband may have corporeal seisin or the right of immediate corporeal seisin; Plowd. 506; Caruthers v. Wilson, 1 Sm. & M. (Miss.) 527.

Dower does not attach in an estate held in joint tenancy; but the widow of the survivor has dower; Co. Litt. § 45; Mayburry v. Brien, 15 Pet. (U. S.) 21, 10 L. Ed. 646. But where the principle of survivorship is abolished, this disability does not exist; Davis v. Logan, 9 Dana (Ky.) 185; Reed v. Kennedy, 2 Strobh. (S. C.) 67.

An estate in common is subject to dower; Wilkinson v. Parish, 3 Paige, Ch. (N. Y.) 653; Totten v. Stuyvesant, 3 Edw. Ch. (N. Y.) 500; Pynchon v. Lester, 6 Gray (Mass.) 314; Clift v. Clift, 87 Tenn. 17, 9 S. W. 198, 360; Parrish v. Parrish, 88 Va. 529, 14 S. E. 325; Chew v. Chew, 1 Md. 172. But the dower in land owned by the husband in common with others is divested by partition thereof in a suit to which the husband is a party, though the wife is not joined; Holley v. Glover, 36 S. C. 404, 15 S. E. 605, 16 L. R. A. 776, 31 Am. St. Rep. 883. See 2 Can. L. T. 15.

In the case of an exchange of lands, the widow may claim dower in either, but not in both; Co. Litt. 31 *b*; if the interests are unequal, then in both; Wilcox v. Randall, 7 Barb. (N. Y.) 633; Mosher v. Mosher, 32 Me. 412; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36.

She is entitled to dower in mines belonging to her husband, if opened by him in his lifetime on his own or another's land; 1 Taunt. 402; Coates v. Cheever, 1 Cow. (N. Y.) 460; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263; Moore v. Rollins, 45 Me. 493. See In re Seager's Estate, 92 Mich. 186, 52 N. W. 299, where she was held to be entitled whether the mines were opened before or after her husband's death; Black v. Min. Co., 49 Fed. 549; *id.* 52 Fed. 859, 3 C. C. A. 312. See also Seager v. McCabe, 92 Mich. 186, 52 N. W. 299, 16 L. R. A. 247. But in Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601 she was held to have no right to operate for oil or gas, where such operations had not commenced during the lifetime of her husband. Where a statute gave the surviving husband or wife a one-third interest in the real estate of the other, the life tenant is entitled only to the income upon one-third of the oil produced; Swayne v. Oil Co., 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117.

She had the right of dower in various species of incorporeal hereditaments: as, rights of fishing, and rents; Co. Litt. 32 *a*; 2 Bla. Com. 132; Chase's Case, 1 Bland, Ch. (Md.) 227, 17 Am. Dec. 277; but the rents should be estates of inheritance; 2 Cruise, Dig. 291.

In most of the states she is dowable of wild lands; Chapman v. Schroeder, 10 Ga. 321; Macaulay's Ex'r v. Land Co., 2 Rob. (Va.) 507; Hickman v. Irvine's Heirs, 3 Dana (Ky.) 121; Allen v. McCoy, 8 Ohio, 418; Pike v. Underhill's Adm'r, 24 Ark. 124; Brown v. Richards, 17 N. J. Eq. 32; Joyner v. Speed, 68 N. C. 236, *contra*, Kuhn v. Kaler, 14 Me. 409; Johnson v. Perley, 2 N. H. 56, 9 Am. Dec. 35.

She has no right of dower in a pre-emption claim; Well's Guardian v. Moore, 16 Mo. 478; Davenport v. Farrar, 1 Scam. (Ill.) 314.

At law there was nothing to prevent her from having dower in lands which her husband held as trustee. But, as she would take it subject to the trust, courts of equity were in the habit of restraining her from claiming her dower in lands which she would be compelled to hold entirely to another's use, till it was finally established, both in England and the United States, that she is not entitled in such case to dower; Firestone v. Firestone, 2 Ohio St. 415; Bartlett v. Gouge, 5 B. Monr. (Ky.) 152; Park, Dow. 105.

At common law she was not dowable of the estate of a *cestui que trust;* 2 Sch. & L. 387; 4 Kent 43; Lenox v. Notrebe, Hempst. 251, Fed. Cas. No. 8,246c. See Watson's Estate, 139 Pa. 461, 22 Atl. 638. But by the Dower Act this restriction was removed in England; 3 & 4 Will. IV. c. 105; 1 Spence, Eq. Jur. 501. The common-law rule that a widow could only have dower in the legal estates of the husband has been either expressly or impliedly changed by statute in the majority of states, and she now has a right of dower in his equitable estates as well, but only in those of which he died seised; In re Ransom, 17 Fed. 233; Morse v. Thorsell, 78 Ill. 604; and if the husband has aliened an equitable estate, although his wife may not have consented, the dower is defeated; Taylor v. Kearn, 68 Ill. 341; Miller v. Stump, 3 Gill (Md.) 304. In Delaware a widow is not dowable out of an equitable estate of her deceased husband, except in intestate lands; Cornog v. Cornog, 3 Del. Ch. 407, but the law upon this subject is not uniform; Stelle v. Carroll, 12 Pet. (U. S.) 201, 9 L. Ed. 1056; Hamlin v. Hamlin, 19 Me. 141; Shoemaker v. Walker, 2 S. & R. (Pa.) 554; Rowton v. Rowton, 1 Hen. & M. (Va.) 92. In some states, dower in equitable estates is given by statutes; while in others the severe common-law rule has not been strictly followed by the courts; Hawley v. James, 5 Paige, Ch. (N. Y.) 318; Lawson v. Morton, 6 Dana (Ky.) 471; Lewis v. James, 8 Humphr. (Tenn.) 537; Thompson v. Thompson, 46 N. C. 430; Miller v. Stump, 3 Gill (Md.) 304.

A mortgagee's wife, although her husband has the technical seisin, had no dowable interest till the estate becomes irredeemable; 4 Dane, Abr. 671; 4 Kent 42; Foster v.

Dwinel, 49 Me. 53, 2 Ves. Jr. 631; Waller v. Waller's Adm'r, 33 Gratt. (Va.) 83.

A widow was not dowable of an equity of redemption under the common law; In re Ransom, 17 Fed. 331; L. R. 6 Ch. D. 218; Cox v. Garst, 105 Ill. 342; Glenn v. Clark, 53 Md. 607; Pickett v. Buckner, 45 Miss. 243; Hopkinson v. Dumas, 42 N. H. 296; Eddy v. Moulton, 13 R. I. 105; nor did the English courts admit the doctrine until the statute of 1833; Ld. Ch. Redesdale in 2 S. & L. 388; but, as was said by Chancellor Bates in Cornog v. Cornog, 3 Del. Ch. 407, the American courts, being free to carry the equitable view of mortgaged estates to its logical results, have uniformly allowed dower in an equity of redemption; Mayburry v. Brien, 15 Pet. (U. S.) 38, 10 L. Ed. 646; Simonton v. Gray, 34 Me. 50; Newton v. Cook, 4 Gray (Mass.) 46; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Taylor v. McCrackin, 2 Blackf. (Ind.) 262; Heth v. Cocke, 1 Rand. (Va.) 344; Fish v. Fish, 1 Conn. 559; Hastings v. Stevens, 29 N. H. 564; Hinchman v. Stiles, 9 N. J. Eq. 361; but after the surplus proceeds of sale have been applied by the sheriff to a judgment against the husband, it is too late to assert the widow's claim to equitable dower; Gemmill v. Richardson, 4 Del. Ch. 599. See on this subject 11 Can. L. T. 281.

In reference to her husband's contracts for the purchase of lands, the rule seems to be, in those states where dower is allowed in equitable estates, that her right attaches to her husband's interest in the contract, if at his death he was in a condition to enforce specific performance; Hawley v. James, 5 Paige, Ch. (N. Y.) 318; Smith v. Addleman, 5 Blackf. (Ind.) 406; Rowton v. Rowton, 1 Hen. & M. (Va.) 92; Robinson v. Miller, 1 B. Monr. (Ky.) 93; Reed v. Whitney, 7 Gray (Mass.) 533; Owen v. Robbins, 19 Ill. 545; Thompson v. Thompson, 46 N. C. 430. If his interest has been assigned before his death, or forfeited, or taken on execution, her dower-right is defeated; Pritts v. Ritchey, 29 Pa. 71; Secrest v. McKenna, 6 Rich. Eq. (S. C.) 72; Dean's Heirs v. Michell's Heirs, 4 J. J. Marsh. (Ky.) 451; Heed v. Ford, 16 B. Monr. (Ky.) 114; Rowton v. Rowton, 1 Hen. & M. (Va.) 91.

She is entitled to dower in lands actually purchased by her husband and upon which the vendor retains a lien for the unpaid purchase-money, subject to that lien; McClure v. Harris, 12 B. Monr. (Ky.) 261; Crane v. Palmer, 8 Blackf. Ind. 120; Ellicott v. Welch, 2 Bland. Ch. (Md.) 242; Williams v. Woods, 1 Humphr. (Tenn.) 408; or upon which her husband has given a mortgage to secure the purchase-money, subject to that mortgage; Henagan v. Harllee, 10 Rich. Eq. (S. C.) 285. See Seibert v. Todd, 31 S. C. 206, 9 S. E. 822, 4 L. R. A. 606.

She is not entitled to dower in partnership lands purchased by partnership funds and for partnership purposes, until the partnership debts have been paid; Burnside v. Merrick, 4 Metc. (Mass.) 537; Woolridge v. Wilkins, 3 How. (Miss.) 372; Loubat v. Nourse, 5 Fla. 350; Duhring v. Duhring, 20 Mo. 174; Drewry v. Montgomery, 28 Ark. 259; Willet v. Brown, 65 Mo. 148, 27 Am. Rep. 265; Campbell v. Campbell, 30 N. J. Eq. 417. She has been denied dower in land purchased by several for the purposes of sale and speculation; Coster v. Clarke, 3 Edw. Ch. (N. Y.) 428; it has been treated as personalty so far as was necessary to settle the partnership affairs, the right of dower being subject to the debts of the firm; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Mallory v. Russell, 71 Ia. 63, 32 N. W. 102, 60 Am. Rep. 776; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

Sometimes she is allowed dower out of money, the proceeds of real estate sold by order of court, or by the wrongful act of an agent or trustee; Jennison v. Hapgood, 14 Pick. (Mass.) 345; Beavers v. Smith, 11 Ala. 33; Church v. Church, 3 Sandf. Ch. (N. Y.) 434; Willet v. Beatty, 12 B. Monr. (Ky.) 172; Thompson v. Cochran, 7 Humphr. (Tenn.) 72, 46 Am. Dec. 68.

Her claim for dower has been held not subject to mechanics' liens; Shaeffer v. Weed, 3 Gilman (Ill.) 511; Nazareth Literary & Benevolent Inst. v. Lowe, 1 B. Monr. (Ky.) 257.

The principle of equitable contribution applies equally to dower, as to other incumbrances; Eliason v. Eliason, 3 Del. Ch. 260.

She is not entitled to dower in an estate *pur auter vie;* Gillis v. Brown, 5 Cow. (N. Y.) 388; or in a vested remainder; Fisk v. Eastman, 5 N. H. 240; Moore v. Esty, 5 N. H. 479; Blow v. Maynard, 2 Leigh (Va.) 29; Reynolds v. Reynolds, 5 Paige, Ch. (N. Y.) 161; or in reversion of the husband, where he dies before the termination of the life estate; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254.

In some states she has dower only in what the husband died seised of; Winstead v. Winstead's Heirs, 2 N. C. 243; 4 Kent 41.

The wife's dower will be protected against the voluntary conveyance of the husband made pending a marriage engagement, under the same circumstances in which the husband is relieved against an ante-nuptial settlement by the wife; Chandler v. Hollingsworth, 3 Del. Ch. 99. This case is considered by Washburn and Bishop as the leading case and is approved by both authors; 3 Washb. R. P. 359; 2 Bish. M. W. § 343, note 2, quoting the greater portion of the opinion of Bates, Ch.

Requisites of. Three things are usually said to be requisite to the consummation of a title to dower, viz.: marriage, seisin of the husband, and his death; 4 Kent 36; 1 Washb. R. P. 169; King v. King, 61 Ala. 481; Wait v. Wait, 4 N. Y. 99.

The marriage must be a legal one; though, if voidable and not void, she will have her dower unless it is dissolved in his lifetime; Smart v. Whaley, 6 Smedes & M. (Miss.) 308; Co. Litt. 33 *a*; 1 Cruise, Dig. 164; Higgins v. Breen, 9 Mo. 501; Jones v. Jones, 28 Ark. 21.

The husband must have been seised in the premises of an estate of inheritance at some time during the coverture. It may not be an actual seisin; a seisin in law with the right of immediate corporeal seisin is sufficient; Eldredge v. Forrestal, 7 Mass. 253; Mann v. Edson, 39 Me. 25; Dunham v. Osborn, 1 Paige, Ch. (N. Y.) 635; Shoemaker v. Walker, 2 S. & R. (Pa.) 554; 1 Cruise, Dig. 166; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Houston v. Smith, 88 N. C. 312. Possession by a widow of the mansion house of her husband, and her unassigned right of dower, do not prevent the heir from being seised thereof so that his widow may acquire dower therein; Null v. Howell, 111 Mo. 273, 20 S. W. 24. It is not necessary that the seisin of the husband should be a rightful one. The widow of a disseisor may have dower against all who have not the rightful seisin; Scribn. Dow. 702. See Toomey v. McLean, 105 Mass. 122.

So, although the estate is a defeasible one, provided it is one of inheritance, she may claim her dower until it is defeated; Co. Litt. 241; Doughty v. Doughty, 7 N. J. Eq. 241; 10 Co. 95.

The seisin is not required to remain in the husband any particular length of time. It is sufficient if he is seised but an instant, to his own benefit and use; Young v. Tarbell, 37 Me. 509; 2 Bla. Com. 132; Kade v. Lauber, 48 How. Pr. (N. Y.) 382; but a mere instantaneous seisin for some other purpose than proprietorship will not give the wife dower; Stanwood v. Dunning, 14 Me. 290; Wooldridge v. Wilkins, 3 How. (Miss.) 369; Edmondson v. Welsh, 27 Ala. 578; McCauley v. Grimes, 2 G. & J. (Md.) 318, 20 Am. Dec. 434; Emerson v. Harris, 6 Metc. (Mass.) 475.

Where he purchases land and gives a mortgage at the same time to secure the purchase-money, such incumbrance takes precedence of his wife's dower; Stow v. Tifft, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; Reed v. Morrison, 12 S. & R. (Pa.) 18; Holbrook v Finney, 4 Mass. 566, 3 Am. Dec. 243; Moore v. Esty, 5 N. H. 479; Griggs v. Smith, 12 N. J. L. 22; Bogie v. Rutledge, 1 Bay (S. C.) 312; Smith v. Stanley, 37 Me. 11, 58 Am. Dec. 771.

The death of the husband. 1 Cruise, Dig. 168. What was known as civil death in England did not give the wife right of dower; 2 Crabb. R. P. 130; Wooldridge v. Lucas, 7 B. Monr. (Ky.) 51; Platner v. Sherwood, 6 Johns. Ch. (N. Y.) 129. Imprisonment for life is declared civil death in some of the states.

How dower may be prevented or defeated. At common law, *alienage* on the part of the husband or wife prevented dower from attaching; 2 Bla. Com. 131; Priest v. Cummings, 16 Wend. (N. Y.) 617; Stokes v. O'Fallon, 2 Mo. 32. This disability is partially done away with in England, 7 & 8 Vict. c. 66, and is almost wholly abolished in the United States. See ALIEN.

It is well established that the wife's dower is defeated whenever the seisin of her husband is defeated by a paramount title; Co. Litt. 240 *b*; 4 Kent 48.

The foreclosure of a mortgage given by the husband before marriage, or by the wife and husband after marriage, will defeat her right of dower; Stow v. Tifft, 15 Johns. (N. Y.) 458, 8 Am. Dec. 266; Reed v. Morrison, 12 S. & R. (Pa.) 18; Nottingham v. Calvert, 1 Ind. 527; Bisland v. Hewett, 11 Smedes & M. (Miss.) 164; Wilson v. Davisson, 2 Rob. (Va.) 384; Ingram v. Morris, 4 Harr. (Del.) 111; Shope v. Schaffner, 140 Ill. 470, 30 N. E. 872; Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456. And in Pennsylvania, whether the wife joined or not. Like force would be given to a vendor's lien or mortgage for the purchase-money, or to a judgment lien outstanding at the time of marriage.

Her right to dower in the estate which she has joined with her husband in mortgaging is good against every one but the mortgagee; Whitehead v. Middleton, 2 How. (Miss.) 692; Eaton v. Simonds, 14 Pick. (Mass.) 98; Hastings v. Stevens, 29 N. H. 564; Young v. Tarbell, 37 Me. 509. The same is true in regard to an estate mortgaged by her husband before coverture; Eaton v. Simonds, 14 Pick. (Mass.) 98. In neither case would the husband have the right to cut off her claim for dower by a release to the mortgagee, or an assignment of his equity of redemption; Titus v. Neilson, 5 Johns. Ch. (N. Y.) 452; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Eaton v. Simonds, 14 Pick. (Mass.) 98; McIver v. Cherry, 8 Humphr. (Tenn.) 713; Heth v. Cocke, 1 Rand. (Va.) 344; Simonton v. Gray, 34 Me. 50; Harrison v. Eldridge, 7 N. J. L. 392. As to a purchase and mortgage for the purchase-money before marriage, in which the husband releases the equity of redemption after marriage, see Jackson v. Dewitt, 6 Cow. (N. Y.) 316.

An agreement on the part of the husband to convey before dower attaches, if enforced, will extinguish her claim; Adkins v. Hohmes, 2 Ind. 197; Bowie v. Berry, 3 Md. Ch. 359.

Dower will not be defeated by the determination of the estate by natural limitation; as, if the tenant in fee die without heirs, or the tenant in tail; 8 Co. 34; 4 Kent 49; Northcut v. Whipp, 12 B. Monr. (Ky.) 73. Whether it will be defeated by a conditional limitation by way of executory devise or shifting use, is not yet fully settled; Co. Litt. 241 *a*, Butler's note 170; Sugd. Pow. 333; 3

B. & P. 652. But it seems that the weight of American authority is in favor of sustaining dower out of such estates; Evans v. Evans, 9 Pa. 190; Milledge v. Lamar, 4 Desaus. (S. C.) 617. See 1 Washb. R. P. 216.

Dower will be defeated by operation of a collateral limitation: as, in the case of an estate to a man and his heirs so long as a tree shall stand, and the tree dies; 3 Prest. Abstr. 373; 4 Kent 49.

In some states it will be defeated by a sale on execution for the debts of the husband; Gardiner v. Miles, 5 Gill (Md.) 94; London v. London, 1 Humphr. (Tenn.) 1; Kennerly v. Ins. Co., 11 Mo. 204; Den v. Frew, 14 N. C. 3, 22 Am. Dec. 708; but see Thomas v. Thomas, 73 Ia. 657, 35 N. W. 693. In Missouri it is defeated by a sale in partition; Lee v. Lindell, 22 Mo. 202, 64 Am. Dec. 262. See Jackson v. Edwards, 22 Wend. (N. Y.) 498; Van Gelder v. Post, 2 Edw. Ch. (N. Y.) 577. See 25 Alb. L. J. 387.

It is defeated by a sale for the payment of taxes; Jones v. Devore, 8 Ohio St. 430.

It is also defeated by exercise of the right of eminent domain during the life of the husband. Nor has the widow the right of compensation for such taking. The same is true of land dedicated by her husband to public use; Gwynne v. City of Cincinnati, 3 Ohio 24, 17 Am. Dec. 576.

How dower may be barred. A divorce from the bonds of matrimony was at common law a bar to dower; 2 Bla. Com. 130; Wait v. Wait, 4 Barb. (N. Y.) 192; Hinson v. Bush, 84 Ala. 368, 4 South. 410; Pullen v. Pullen, 52 N. J. Eq. 9, 28 Atl. 719; but the woman's right to dower, or something equivalent to it, is reserved by statutes in most of the states, if she be the innocent party; Forrest v. Forrest, 6 Duer (N. Y.) 102. A judgment of divorce in another state, for cause other than adultery, which has the effect to deprive the wife of dower in the state where rendered, will not have such effect in New York; the United States constitution makes a judgment in another state conclusive as to the fact of divorce, but gives no extra-territorial effect on land of the husband; Van Cleaf v. Burns, 133 N. Y. 540, 30 N. E. 661, 15 L. R. A. 542.

By the common law neither adultery alone nor with elopement was a bar to dower; 2 Scrib. Dow. 531; but by the statute of Westminster 2d, a wife who eloped and lived in adultery forfeited her dower-right. This provision has been re-enacted in several of the states and recognized as common law in others; Lecompte v. Wash, 9 Mo. 555; Stegall v. Stegall, 2 Brock. 256, Fed. Cas. No. 13,351; Cogswell v. Tibbetts, 3 N. H. 41; Walters v. Jordan, 35 N. C. 361, 57 Am. Dec. 558; 4 Dane, Abr. 676; Bell v. Nealy, 1 Bailey (S. C.) 312, 19 Am. Dec. 686; *contra*, Schiffer v. Pruden, 64 N. Y. 47; Lakin v. Lakin, 2 Allen (Mass.) 45; Littlefield v. Paul, 69 Me. 527; Bryan v. Batcheller, 6 R. I. 543, 78 Am. Dec. 454. Dower is not barred even if the wife commit adultery, if she be abandoned by her husband and he be profligate and intemperate and an adulterer; Rawlins v. Buttel, 1 Houst. (Del.) 224; nor if she be deserted by her husband, will her subsequent seduction and adultery operate as a bar; Appeal of Nye, 126 Pa. 341, 17 Atl. 618; 6 U. C. C. P. 310; Shaffer v. Richardson's Adm'r, 27 Ind. 122. For an analysis of decisions and reference to state statutes on this subject, see 2 Scrib. Dow. 531.

A widow who had been convicted as accessory before the fact to her husband's murder was held entitled to dower; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

Dower is barred by an annuity given the wife in a divorce decree, and charged on the husband's real estate, where the wife had taken her maintenance under the decree; Adams v. Storey, 135 Ill. 448, 26 N. E. 582, 11 L. R. A. 790, 25 Am. St. Rep. 392.

The widow of a convicted traitor could not recover dower; 2 Bla. Com. 130; but this principle is not recognized in this country; Wms. R. P. 103, n.

Nor does she in this country, as at common law, forfeit her dower by conveying in fee the estate assigned to her; 4 Kent 82; Wms. R. P. 121, 125, n.; Robinson v. Miller, 1 B. Monr. (Ky.) 88.

The most common mode formerly of barring dower was by jointure; Scrib. Dow. 389; Craig's Heirs v. Walthall, 14 Gratt. (Va.) 518; Stilley v. Folger, 14 Ohio 610; West v. Walker, 77 Wis. 557, 46 N. W. 819. Marriage is a sufficient consideration to support an ante-nuptial contract for release of dower; Shea's Appeal, 121 Pa. 302, 15 Atl. 629, 1 L. R. A. 422; Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673. Now it is usually done by joining with her husband in conveying the estate. Formerly this was done by levying a fine, or suffering a recovery; 4 Kent 51; 2 Bla. Com. 137; now it is by deed executed with her husband and acknowledged in the form required by statute; Wms. R. P. 189; Coburn v. Herrington, 114 Ill. 104, 29 N. E. 478; Mitch. R. P. 156; which is the mode prevailing in the United States. The husband must usually join in the act; Moore v. Tisdale, 5 B. Monr. (Ky.) 352; Ulp v. Campbell, 19 Pa. 361; Page v. Page, 6 Cush. (Mass.) 196; Shaw v. Russ, 14 Me. 432.

Words of grant will be sufficient although no reference is made in the deed to dower *eo nomine;* Dundas v. Hitchcock, 12 How. (U. S.) 256, 13 L. Ed. 978; Smith v. Handy, 16 Ohio 236.

In most of the states her deed must be acknowledged, and in the form pointed out by statute; Williams v. Robson, 6 Ohio St. 510; Kirk v. Dean, 2 Binn. (Pa.) 341; Scanlan v. Turner, 1 Bail. (S. C.) 421; Clark v. Redman, 1 Blackf. (Ind.) 379; which must appear in the certificate; Elwood v. Klock, 13 Barb. (N. Y.) 50. She should be of age

at the time; Jones v. Todd, 2 J. J. Marsh. (Ky.) 359; Thomas v. Gammel, 6 Leigh (Va.) 9; Cunningham v. Knight, 1 Barb. (N. Y.) 399; Markham v. Merrett, 7 How. (Miss.) 437, 40 Am. Dec. 76. She cannot release her dower by parol; see Wood v. Lee, 5 T. B. Monr. (Ky.) 57; Keeler v. Tatnell, 23 N. J. L. 62. A parol sale of lands in which the husband delivers possession does not exclude dower; Williams v. Dawson, 3 Sneed (Tenn.) 316. But it has been held that she may bar her claim for dower by her own acts operating by way of estoppel; Heth v. Cocke, 1 Rand. (Va.) 344; Dougrey v. Topping, 4 Paige, Ch. (N. Y.) 94; Reed v. Morrison, 12 S. & R. (Pa.) 18; Gardiner v. Miles, 5 Gill (Md.) 94.

A release of dower by a wife direct to her husband will not enable him by his sole deed to convey the land free of dower right, for, if the release is at all effectual, the husband becomes vested with a fee simple and the dower-right immediately reattaches by operation of law; House v. Fowle, 22 Or. 303, 29 Pac. 890; but where the wife has power to release her dower by an attorney in fact, she may constitute her husband attorney for the purpose; Wronkow v. Oakley, 133 N. Y. 505, 31 N. E. 521, 16 L. R. A. 209, 28 Am. St. Rep. 661.

A release of dower has been presumed after a long lapse of time; Barnard v. Edwards, 4 N. H. 321; Evans v. Evans, 3 Yeates (Pa.) 507.

At common law there was no limitation to the claim for dower; 4 Kent 70. As to the statutes in the different states, see *id.* note; 1 Washb. R. P. 217. Adverse possession for seven years with claim and color of title and payment of taxes will bar a claim of dower; Brian v. Melton, 125 Ill. 647, 18 N. E. 318; Null v. Howell, 111 Mo. 275, 20 S. W. 24; but see Boling v. Clark, 83 La. 481, 50 N. W. 57.

The right to dower does not depend on the existence of the family relation at the death of the husband and is not barred by desertion; Nye's Appeal, 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873.

Upon the doctrine of *dos de dote*, see 1 Washb. R. P. 209.

In some states the wife may elect to take half of the husband's estate in lieu of dower under certain contingencies; Welch v. Anderson, 28 Mo. 293; or she may accept a devise in lieu of dower; Nelson v. Brown, 66 Hun 311, 20 N. Y. Supp. 978; Stone v. Vandermark, 146 Ill. 312, 34 N. E. 150; Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612; Goodrum v. Goodrum, 56 Ark. 532, 20 S. W. 353.

It seems that a contract to marry on condition that the wife should receive no portion of the husband's lands may be valid; Spiva v. Jeter, 9 Rich. Eq. (S. C.) 434.

How and by whom dower may be assigned. Her right to have dower set out to her accrues immediately upon the death of her husband; but until it is assigned she has no right to any specific part of the estate; 2 Bla. Com. 139. She was allowed by Magna Carta to occupy the principal mansion of her husband for forty days after his death, if it were on dowable lands. This right is variously recognized in the states; Stokes v. McAllister, 2 Mo. 163; Doe v. Carrol, 16 Ala. 148; Chaplin v. Simmons' Heirs, 7 T. B. Monr. (Ky.) 337; Stedman v. Fortune, 5 Conn. 462. In some states, she may remain in possession of the principal mansion-house and messuages thereto belonging until dower has been assigned; Grimes v. Wilson, 4 Blackf. (Ind.) 331. This makes her tenant in common with the heir to the extent of her right of dower; and an assignment only works a severance of the tenancy; 4 Kent 62; Stokes v. McAllister, 2 Mo. 163.

There were two modes of assigning dower; one by "common right," where the assignment was by legal process; the other "against common right," which rested upon the widow's assent and agreement.

Dower of "common right" must be assigned by metes and bounds, where this is possible, unless the parties agree to a different form; 2 Penning, 521; 1 Rolle, Abr. 683; Style 276; Perkins 407.

If assigned "against common right," it must be by indenture to which she is a party; Co. Litt. 34 *b*; Jones v. Brewer, 1 Pick. (Mass.) 314.

Where assigned of common right, it must be unconditional and absolute; Co. Litt. 34 *b*, n. 217; 1 Rolle, Abr. 682; and for her life; 1 Bright, Husb. & W. 379.

Where it is assigned not by legal process, it must be by the tenant of the freehold; Co. Litt. 35 *a*. It may be done by an infant; 2 Bla. Com. 136; McCormick v. Taylor, 2 Ind. 336; or by the guardian of the heir; 2 Bla. Com. 136; Young v. Tarbell, 37 Me. 509. Dower may be assigned in partition; Thomas v. Thomas, 73 Ia. 657, 35 N. W. 693.

As between the widow and heir, she takes her dower according to the value of the property at the time of the assignment; Thompson v. Morrow, 5 S. & R. (Pa.) 290, 9 Am. Dec. 358; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Mosher v. Mosher, 15 Me. 371; Green v. Tennant, 2 Harr. (Del.) 336; Summers v. Babb, 13 Ill. 483.

As between the widow and the husband's alienee, she takes her dower according to the value at the time of the alienation; Hale v. James, 6 Johns. Ch. (N. Y.) 258, 10 Am. Dec. 328; Tod v. Baylor, 4 Leigh (Va.) 498. This was the ancient and well-established rule; Humphrey v. Phinney, 2 Johns. (N. Y.) 484; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56. But in this country the rule in respect to the alienee seems now to be that if the land had been enhanced in value by his labor and improvements, the widow shall not share in these; Thompson v. Morrow, 5

S. & R. (Pa.) 289, 9 Am. Dec. 358; Catlin v. Ware, 9 Mass. 218, 6 Am. Dec. 56; Tod v. Baylor, 4 Leigh (Va.) 498; Wilson v. Oatman, 2 Blackf. (Ind.) 223; Barney v. Frowner, 9 Ala. 901; Baden v. McKenny, 7 Mackey (D. C.) 268; Felch v. Finch, 52 Ia. 563, 3 N. W. 570; McGehee v. McGehee, 42 Miss. 747; if it has been enhanced by extraneous circumstances, such as the rise and improvement of property in the neighborhood, she is to have the full benefit of this; Smith v. Addleman, 5 Blackf. (Ind.) 406; Powell v. M'f'g Co., 3 Mas. 375, Fed. Cas. No. 11,356; Johnston v. Vandyke, 6 McLean, 422, Fed. Cas. No. 7,426; Wms. R. P. 191, n.

There seems to be no remedy for her now in either country where the land has deteriorated in value by the waste and mismanagement of the alienee or by extraneous circumstances; McClanahan v. Porter, 10 Mo. 746; see Westcott v. Campbell, 11 R. I. 378; but she must be content to take her dower in the property as it was at the time of her husband's death; 1 Washb. R. P. 239. See Sanders v. McMillian, 98 Ala. 144, 11 South. 750, 18 L. R. A. 425, 39 Am. St. Rep. 19. Where the widow dies without asserting her claim, neither her personal representatives, nor those of her assignee of such dower right, can maintain an action to have dower admeasured or for a gross sum in lieu thereof; Howell v. Newman, 59 Hun 538, 13 N. Y. Supp. 648; Pollitt v. Kerr, 49 N. J. Eq. 66, 22 Atl. 800.

Dower may also be recovered in equity, the jurisdiction of which, as Chancellor Kent says, "has been thoroughly examined, clearly asserted, and definitively established;" 4 Kent 71; and nearly half a century later this language is repeated as correctly expressing the result of the authorities; Bisph. Eq. § 495. The jurisdiction was asserted in the U. S. at an early period; Grayson v. Moncure, 1 Leigh (Va.) 449; Kendall v. Honey, 5 T. B. Monr. (Ky.) 284; Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64, 20 Am. Dec. 205; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Badgley v. Bruce, 4 Paige, Ch. (N. Y.) 98; and although in New Jersey in the time of Kent the equitable jurisdiction was denied; 4 Kent 72; Harrison v. Eldridge, 7 N. J. L. 392; it was afterwards asserted and sustained; 1 Green Ch. 349. The jurisdiction is concurrent with that of courts of law, which must settle the legal title when that is in controversy, "but if that be admitted or settled, full and effectual relief can be granted to the widow in equity both as to the assignment of dower and the damages;" 4 Kent 71; and in many respects the remedy in equity possesses great advantages over that at law; Bisph. Eq. § 496. As to the remedies afforded both by law and equity for the enforcement of dower, see 1 Washb. R. P. 226; 4 W. R. 459.

Nature of the estate in dower. Until the death of her husband, the wife's right of dower is not an interest in real estate of which value can be predicated; Moore v. City of New York, 8 N. Y. 110, 59 Am. Dec. 473. And although on the death of her husband this right becomes consummate, it remains a chose in action until assignment; 4 Kent 61; Green v. Putnam, 1 Barb. (N. Y.) 500; Johnson v. Shields, 32 Me. 424; Shield's Heirs v. Batts, 5 J. J. Marsh. (Ky.) 12; McClanahan v. Porter, 10 Mo. 746; Hilleary v. Hilleary's Lessee, 26 Md. 289.

During coverture a wife has such an interest in her husband's lands which have been conveyed by him without her joining in the deed, as will make a release by her a valuable consideration; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313. See Brooks v. McMeekin, 37 S. C. 285, 15 S. E. 1019.

Until assignment, she has no estate which she can convey or which can be taken on execution for her debts; 2 Keen 527; Tompkins v. Fonda, 4 Paige, Ch. (N. Y.) 448; Gooch v. Atkins, 14 Mass. 378; Summers v. Babb, 13 Ill. 483; Rausch v. Moore, 48 Ia. 611, 30 Am. Rep. 412; Webb v. Boyle, 63 N. C. 271; *contra*, Powell v. Powell, 10 Ala. 900.

But where she does sell or assign this right of action, equity will protect the rights of the assignee and sustain an action in the widow's name for his benefit; Lamar v. Scott, 4 Rich. (S. C.) 516; Powell v. Powell, 10 Ala. 900; Potter v. Everitt, 42 N. C. 152; Parton v. Allison, 109 N. C. 674, 14 S. E. 107. She may mortgage her undivided dower interest, which is valid in equity; Herr v. Herr, 90 Ia. 538, 58 N. W. 897.

She can release her claim to one who is in possession of the lands, or to whom she stands in privity of estate; Blain v. Harrison, 11 Ill. 384; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Johnson v. Shields, 32 Me. 424; Saltmarsh v. Smith, 32 Ala. 404; Saunders v. Blythe, 112 Mo. 1, 20 S. W. 319; 8 L. R. Q. B. D. 31; Weaver v. Sturtevant, 12 R. I. 537.

But as soon as the premises have been set out and assigned to her, and she has entered upon them, the freehold vests in her by virtue of her husband's seisin; Co. Litt. 239 *a*; Inhabitants of Windham v. Inhabitants of Portland, 4 Mass. 384; Norwood v. Marrow, 20 N. C. 578. Her estate is a continuation of her husband's by appointment of the law; Conant v. Little, 1 Pick. (Mass.) 189; Baker v. Baker, 4 Greenl. (Me.) 67; Love v. McClure, 99 N. C. 290, 6 S. E. 247, 250.

The legislature may change the relative rights of husband and wife after marriage, and may substitute for inchoate dower another and larger estate to be carved out of that of the husband after his death; Noel v. Ewing, 9 Ind. 37; but not after the husband's death; Bottorff v. Lewis, 121 Ia. 27, 95 N. W. 262; nor as against one who has contracted for a judgment lien on the husband's property, although such judgment was not entered until after the statute was

passed; Davidson v. Richardson, 50 Or. 323, 91 Pac. 1080, 17 L. R. A. (N. S.) 319, 126 Am. St. Rep. 738. And it is held that a statute enlarging dower by extending it to the husband's equitable estate did not apply to a widow married before the statute was passed; Slingluff v. Hubner, 101 Md. 652, 61 Atl. 326.

See Scribner, Dower; Dembitz, Land Titles; Tudor; Washburn; Cruise; Tiedeman, Real Property; DIVORCE; ELECTION OF RIGHTS; ASSIGNMENT OF DOWER; QUARANTINE.

DOWRESS. A woman entitled to dower. See DOWER.

DOWRY. Formerly applied to mean that which a woman brings to her husband in marriage: this is now called a portion. This word is sometimes confounded with dower. See Co. Litt. 31; La. Civ. Code; Dig. 23. 3. 76; Code 5. 12. 20; Buard v. De Russy, 6 Rob. (La.) 111; Gates v. Legendre, 10 Rob. (La.) 74; De Young v. De Young, 6 La. Ann. 786; Cutter v. Waddingham; 22 Mo. 254.

DRAFT. An order for the payment of money, drawn by one person on another. Wildes v. Savage, 1 Sto. 30, Fed. Cas. No. 17,653. It is said to be a *nomen generalissimum*, and to include all such orders. *Ibid.*, per Story, J. It is frequently used in corporations where one agent draws on another; in such case it may be treated either as an accepted bill or a promissory note; 1 Dan. Neg. Inst. 350; Tiedeman, Com. Pap. § 128. Drafts come within a statutory provision respecting "bills and notes for the direct payment of money;" Gilstrap v. R. Co., 50 Mo. 491. They are frequently given for mere convenience in keeping accounts, and providing concurrent vouchers, and it is not necessary to present such a draft to the drawee or to give notice of non-payment before suing the corporation; 1 Dan. Neg. Inst. 350; Dennis v. Water Co., 10 Cal. 369; Mobley v. Clark, 28 Barb. (N. Y.) 391; Shaw v. Stone, 1 Cush. (Mass.) 256. A draft by directors of an assurance company on its cashier was said to contain all that is essential to constitute a promissory note; 9 C. B. 574. Drafts are frequently used between municipal officers, and are not usually negotiable instruments; 1 Dan. Neg. Inst. 352. But it has been held that municipal warrants or orders for the payment of debts, if authorized and drawn in negotiable language, may be sued on by the transferee; *id.* 353; Kelley v. City of Brooklyn, 4 Hill. (N. Y.) 265. They must be presented for payment before suit; Pease v. Inhabitants of Cornish, 19 Me. 193; *contra*, Steel v. Davis County, 2 G. Greene (Ia.) 469.

Draft, in a commercial sense, is an allowance to the merchant where the duty is ascertained by weight, to insure good weight to him; it is a small allowance in weighable goods, made by the king to the importer; it is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight. Napier v. Barney, 5 Blatchf. 192, Fed. Cas. No. 10,009.

Also the rough copy of a legal document before engrossing.

DRAGO DOCTRINE. The principle asserted by Luis Drago, Minister of Foreign Affairs of the Argentine Republic, in a letter to the Argentine Minister at Washington, December 29, 1902, that the forcible intervention of states to secure the payment of public debts due to their citizens from foreign states is unjustifiable and dangerous to the security and peace of the nations of South America. The doctrine was not new, but became associated with the name of Drago, owing to his publication of an elaborate exposition of it shortly before the Second Hague Conference. The subject was brought before the Conference by the United States and a Convention was adopted in which the contracting powers agreed, with some restrictive conditions, not to have recourse to armed force for the recovery of contract debts claimed by their nationals against a foreign state. Higgins, 184–197.

DRAGOMAN. An interpreter employed in the east, and particularly at the Turkish court.

DRAIN. To conduct water from one place to another, for the purpose of drying the former.

The right of draining water through another man's land. This is an easement or servitude acquired by grant or prescription. See 3 Kent 436; 7 M. & G. 354.

In Goldthwait v. Inhabitants of East Bridgwater, 5 Gray (Mass.) 63, it was said that the word drain has no technical or exact meaning. It was considered fully in People v. Parks, 58 Cal. 639.

A state may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The expenses of such works may be charged against parties specially benefited and be made a lien upon their property; *id.* The law under which such an assessment is made does not deprive one of property without due process of law; *id.* Taylor v. Crawford, 72 Ohio St. 560, 74 N. E. 1065, 69 L. R. A. 805. See DUE PROCESS OF LAW; EMINENT DOMAIN; TAXATION; LEGISLATIVE POWER; ASSESSMENT.

DRAINAGE DISTRICT. The organization of a drainage district is within the power of the state; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; for the exclusive benefit of the territory

within the district; Commissioners of Union Drainage Dist. No. 3 v. Com'rs, 220 Ill. 176, 77 N. E. 71; and the lands within the district may be assessed to pay the entire cost, on the theory that they alone are benefited; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904. It is correct to say that a drainage district is a quasi-corporation, if the act under which it is organized does not make it a corporation in fact; but it is not created for political purposes or for the administration of civil government. It is not liable for the unauthorized acts of its commissioners, but the district has the power of eminent domain for the purposes of its organization; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904. They have been classed as municipal corporations; Commissioners of Havana Tp. Drainage Dist. No. 1 v. Kelsey, 120 Ill. 482, 11 N. E. 256.

Where, in the construction of a levee, an upper owner was damaged by having the water thrown back on his lands, and there was no negligence on the part of the district in the performance of the work, he could not recover; Bradbury v. Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904; Lamb v. Reclamation Dist., 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775 (where a lower owner was damaged by overflow, caused by the necessary work of a reclamation district). See POLICE POWER; ASSESSMENT; RIVERS.

DRAM. A liquid containing alcohol; something that can intoxicate. Lacy v. State, 32 Tex. 228. See Wright v. People, 101 Ill. 134.

DRAW. To drag (on a hurdle) to the place of execution. Anciently no hurdle was allowed, but the criminal was actually dragged along the road to the place of execution. A part of the ancient punishment of traitors was to be thus drawn. 4 Bla. Com. 92, 377.

DRAWBACK. An allowance made by the government to merchants on the re-exportation of certain imported goods liable to duties, which in some cases consists of the whole, in others of a part, of the duties which had been paid upon the importation. Goods can thus be sold in a foreign market at their natural cost in the home market. See U. S. R. S. tit. 34, c. 9.

DRAWEE. A person to whom a bill of exchange is addressed, and who is requested to pay the amount of money therein mentioned. See BILL OF EXCHANGE.

DRAWER. The party who makes a bill of exchange.

DRAWING. Every person who applies for a patent for an invention is required to furnish a drawing or drawings illustrative of that invention: provided from the nature of the case the invention can be so illustrated. Drawings are also required on application for a patent for a design. See PATENT.

DRAWLATCHES. Thieves; robbers. Cowell.

DREDGE. Formerly applied to a net or drag for taking oysters; now a machine for cleansing canals and rivers. To dredge is to gather or take with a dredge, to remove sand, mud, and filth from the beds of rivers, harbors, and canals, with a dredging machine. 15 Can. L. T. 268.

DREIT DREIT. Droit droit. Double right. A union of the right of possession and the right of property. 2 Bla. Com. 199.

DRENGAGE. A variety of feudal tenure by *serjeanty (q. v.)*, often occurring in the northern counties of England, involving a kind of general service. Vinogradoff, Engl. Soc. in Eleventh Cent. 62. Little is known of it; 3 Holdsw. Hist. E. L. 132.

DRIFTWAY. A road or way over which cattle are driven. 1 Taunt. 279; Selw. N. P. 1037; Woolr. Ways 1. The term is in use in Rhode Island. 2 Hilliard, Abr. Prop. 33.

DRIP. The right of drip is an easement by which the water which falls on one house is allowed to fall upon the land of another.

Unless the owner has acquired the right by grant or prescription, he has no right so to construct his house as to let the water drip over his neighbor's land; 1 Rolle, Abr. 107. See 3 Kent 436; Dig. 43. 23. 4. 6; 11 Ad. & E. 40.

DRIVER. One employed in conducting a coach, carriage, wagon, or other vehicle with horses, mules, or other animals.

The law requires that a driver should possess reasonable skill and be of good habits; if, therefore, he is not acquainted with the road he undertakes to drive; 3 Bing. 314, 321; drives with reins so loose that he cannot govern his horse; 2 Esp. 533; does not give notice of any serious danger on the road; 1 Campb. 67; takes the wrong side of the road; 4 Esp. 273; incautiously comes in collision with another carriage; 1 Stark. 423; 1 Campb. 167; or does not exercise a sound and reasonable discretion in travelling on the road to avoid dangers and difficulties, and any accident happens by which any passenger is injured, both the driver and his employers will be responsible; Barnes v. Hurd, 11 Mass. 57; 6 Term 659; 1 East 106; 4 B. & Ald. 590; Maury v. Talmadge, 2 McLean, 157, Fed. Cas. No. 9,315.

It has been held that the conductor of a street railway is not a driver; Isaacs v. R. Co., 47 N. Y. 122, 7 Am. Rep. 418; and one who drove a wagon loaded with calves and drawn by horses was held not to be "driving or conducting" cattle; L. R. 1 Q. B. 259.

DROF-LAND (*Drift-land*). A yearly pay-

ment made by some to their landlords for driving their cattle through the manor to fairs and markets. Cowell.

DROIT (Fr.). **In French Law.** Law. The whole body of law, written and unwritten.

A right. No law exists without a duty. Toullier, n. 96; Pothier, *Droit.*

In English Law. Right. Co. Litt. 158.

A person was said to have *droit droit, plurimum juris,* and *plurimum possessionis,* when he had the freehold, the fee, and the property in him. Crabb, Hist. E. L. 406.

Recht, Droit, Diritto.—These terms are all closely connected with each other and with the English *right.* The French and Italian words are derivatives of the Latin *directus* and *rectus,* these being cognate with *recht* and *right;* 15 L. Q. R. 369.

DROIT-CLOSE. The name of an ancient writ directed to the lord of ancient demesne, and which lies for those tenants in ancient demesne who hold their lands and tenements by charter in fee-simple, in fee-tail, for life, or in dower. Fitzh. N. B. 23.

DROIT COUTUMIER. In French Law. Common law.

DROIT D'ACCESSION. In French Law. That property which is acquired by making a new form out of the material of another. The civil law rule is that if the thing can be reduced to the former matter it belongs to the owner of the matter, *e. g.* a statue made of gold; but if it cannot so be reduced it belongs to the person who made it, *e. g.* a statue made of marble. This subject is treated of in the *Code Civil de Napoléon,* art. 565, 577; Merlin, *Répert. Accession;* Malleville's Discussion, art. 565. See ACCESSION.

DROIT D'AUBAINE. A rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato* or under a will of the deceased. Finally abolished in 1819. Boyd's Wheat. Int. Laws § 82.

The word *aubaine* signifies *hospes loci, peregrinus advena,* a stranger. It is derived, according to some, from *alibi,* elsewhere, *natus,* born, from which the word *albinus* is said to be formed. Others, as Cujas, derive the word directly from *advena,* by which word aubains or strangers are designated in the capitularies of Charlemagne. See Du Cange; Trévoux, Dict.

DROIT DE NAUFRAGE. In French Law. The right of a seignieur, who owns the seashore, or the king, when a vessel is wrecked, to take possession of the wreckage and to kill the crew or sell them as slaves. 14 Yale L. Jour. 129.

DROIT NATUREL (Fr.). The law of nature. See JURISPRUDENCE.

DROITS OF ADMIRALTY. Rights claimed by the government over the property of an enemy. In England, it has been usual in maritime wars for the government to seize and condemn, as droits of admiralty, the property of an enemy found in her ports at the breaking out of hostilities. 1 C. Rob. 196; 13 Ves. 71; 1 Edw. 60; 3 Bos. & P. 191. The power to exercise such a right has not been delegated to, nor has it ever been claimed by, the United States government; Benedict, Adm. § 33; Brown v. U. S., 8 Cra. 110, 3 L. Ed. 504.

The droits formerly attaching to the office of Lord High Admiral consisted of flotsam, jetsam, ligan, treasure, deodands, derelicts, all goods picked up at sea, fines, etc., sturgeons and all such large fish, all ships and goods of an enemy coming into any port, creek or road, all ships seized at sea, salvage, and a share of prizes. 2 Sel. Essays in Anglo-Amer. Leg. Hist. 318. The Droit Book of the High Court, 1618–1737, is extant. See 15 L. Q. R. 359; Marsden, Admiralty, Droits and Salvage.

For a case of the condemnation to the Crown of goods taken from convicted pirates, see 1 W. Rob. 423.

DROITS CIVILS. In French Law.

Private rights, the exercise of which is independent of the status (*qualité*) of citizen. Foreigners enjoy them, and the extent of that enjoyment is determined by the principle of reciprocity. Conversely, foreigners, although not resident in France, may be sued on contracts made by them in France, and (unless possessed of sufficient real property in France) are obliged to give security; 12 C. B. 801; Brown, Law Dict.

DROITURAL. What belongs of right; relating to right: as, real actions are either droitural or possessory,—*droitural* when the plaintiff seeks to recover the property. Finch, Law 257. See WRIT OF RIGHT.

DRUGGIST. One who deals in medicinal substances, vegetable, animal, or mineral, uncompounded. State v. Holmes, 28 La. Ann. 765, 26 Am. Rep. 110.

In America the term druggist is used synonymously with apothecary, although, strictly speaking, a druggist is one who deals in medicinal substances, vegetable, animal, or mineral, before being compounded, while composition and combination are really the business of the apothecary. The term is here used in its double sense, and throughout this article is to be read as if druggist *or* apothecary. In England an apothecary was formerly a subphysician, or privileged practitioner. He was the ordinary medical man, or family medical attendant, in that country.

Druggists are subject to the general rule of law that persons who hold themselves out to the world as possessing skill and qualification for a particular trade or profession are bound to reasonable skill and diligence in the performance of their duties. Accordingly the law implies an undertaking on the part of apothecaries that they shall use a reasonable degree of care and skill in the treatment of their customers; Chit. Contr. 553; Gwynn v. Duffield, 66 Ia. 708, 24 N. W. 523, 55 Am. Rep. 286; Walton v. Booth, 34 La. Ann. 913; Beckwith v. Oatman, 43 Hun (N. Y.) 265. This rule is probably more strict here than in England; Webb's

Poll. Torts 26, note. A druggist, whether under a license or not, holds himself out as competent for that business, but not to prescribe as a physician; and for any lack of capacity or for negligence, he is answerable in damages to the person injured, the same principles of law applying to him as to a medical practitioner; Bish. Non-Contr. L. § 716. In dispensing poisons, he is required to exercise the highest degree of care for the safety of his customers; Sutton's Adm'r v. Wood, 120 Ky. 23, 85 S. W. 201, 8 Ann. Cas. 894.

Where a customer asked for a preparation for a specified purpose (corrosive sublimate for external application to kill lice) and the druggist made the solution so strong (85 per cent.) as to cause severe injury, he was held liable, though it was labelled "Poison Carbolic Acid"; it was the druggist's duty to give proper instructions; Goldberg v. Hegeman & Co., 60 Misc. 107, 111 N. Y. Supp. 679. Where a solution was called for to cleanse a wound, plaintiff had a right to assume that that which was furnished would be at least harmless, if not efficient, and could be applied without further injury; Horst v. Walter, 53 Misc. 591, 103 N. Y. Supp. 750.

A druggist is required to know the properties of the medicines he sells and to employ capable assistants; Smith v. Hays, 23 Ill. App. 244; it is no defence that he used ordinary care; Fleet v. Hollenkemp, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563; or that the clerk who negligently put up the prescription was a competent pharmacist; Burgess v. Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359. The highest degree of skill is not to be expected nor can it reasonably be required of all; Simonds v. Henry, 39 Me. 156, 63 Am. Dec. 611.

Perhaps a higher degree of skill than is the usual rule was required in Fleet v. Hollenkemp, 13 B. Monr. (Ky.) 219; where it was held that any mistake made by the druggist, if the result of ignorance or carelessness, renders him liable to the injured party; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. Where one, whether an apothecary or not, negligently gave a customer poison and the customer swallowed it and was injured, he who negligently gave the poison was guilty of a tort, and liable for the injury to the customer unless the latter was also guilty of negligence which contributed to the injury; Gwynn v. Duffield, 61 Ia. 64, 15 N. W. 594, 47 Am. Rep. 802. If a druggist negligently sells a deadly poison as a harmless medicine to A, who administers it to B and B takes it as a medicine and dies in a few hours by reason thereof, a right of action against the druggist survives to B's administrator; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298. The sale of an article in itself harmless, which becomes dangerous only by being used in combination with some other article, without any knowledge on the part of the vendor that it was to be used in such combination, does not render him liable to an action by one who purchased the article from the original vendee and is injured while using it in a dangerous combination, although by mistake the article sold was different from that which was intended to be sold; Davidson v. Nichols, 11 Allen (Mass.) 514.

A druggist who sells to one person for the use of another a hair wash made by himself and represented not to be injurious, is liable to the person for whom it was purchased when used as directed, for injuries arising from such use, the intended use by the third person being known to the vendor; L. R. 5 Ex. 1. The maker of a proprietary medicine recommended for the cure of a certain disease, the bottle having on it directions for use, who sells the medicine, so put up, to a druggist, is liable to one who buys it from the druggist and is injured by its use according to the directions on the bottle; Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324.

Where a druggist selling a poisonous medicine, fully and clearly warned the person of its nature and gave him accurate directions as to the quantity which he could safely take, and the person was injured or killed by taking an overdose in disregard of the directions, the druggist is not liable for negligence simply because he failed to put a label marked "Poison" on the package as directed by statute. The customer disregarding the warning and direction of the vendor was guilty of negligence; Wohlfahrt v. Beckert, 92 N. Y. 490, 44 Am. Rep. 406.

An unlicensed druggist who conducts a drug store cannot escape the penalty of the law for the unlawful sale of intoxicating liquors by showing that the sales were made for medicinal purposes by his clerk, who was a licensed pharmacist; State v. Norton, 67 Ia. 641, 25 N. W. 842. A druggist is not liable if he compounds carefully another's prescription; Ray v. Burbank, 61 Ga. 505, 34 Am. Rep. 103. But if he sell one medicine for another and an injury result therefrom, it is no defence for him to show that the case was negligently treated; Brown v. Marshall, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728. An apothecary, if guilty of criminal negligence, and fatal results follow, may be convicted of manslaughter; 1 Lew. Cr. Cas. 169. See PHYSICIAN.

DRUGS. Substances used in the composition of medicines or in dyeing and in chemical operations. Webst. Dict.

"Drugs and Medicines," when used in insurance policies, include saltpetre; Collins v. Ins. Co., 79 N. C. 279, 28 Am. Rep. 322. It is a question of fact whether benzine is a drug; Carrigan v. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

Where a druggist was charged with selling peppermint lozenges on Sunday, it appeared that the statute permitted the selling of "drugs and medicines" on that day. They were held *prima facie* within the statute; 33 U. C. Q. B. 543. So a mixture of rosewater and prussic acid to be used as a lotion is within the same terms; L. R. 4 Q. B. 296.

For pure food and drug law, see FOOD AND DRUGS.

DRUMMER. A travelling salesman. One who solicits custom. Thomas v. City of Hot Springs, 34 Ark. 553, 36 Am. Rep. 34. "Commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather, taking orders for goods to be shipped to the retail merchant." Singleton v. Fritsch, 4 Lea (Tenn.) 93. See COMMERCIAL TRAVELLER; COMMERCE.

DRUNKENNESS. In Medical Jurisprudence. The condition of a man whose mind is affected by the immediate use of intoxicating drinks.

This condition presents various degrees of intensity, ranging from a simple exhilaration to a state of utter unconsciousness and insensibility. In the popular phrase, the term drunkenness is applied only to those degrees of it in which the mind is manifestly disturbed in its operations. In the earlier stages it frequently happens that the mind is not only not disturbed, but acts with extraordinary clearness, promptitude, and vigor. In the latter the thoughts obviously succeed one another without much relevance or coherence, the perceptive faculties are active, but the impressions are misconceived, as if they passed through a distorting medium, and the reflective powers cease to act with any degree of efficiency. Some of the intermediate stages may be easily recognized; but it is not always possible to fix upon the exact moment when they succeed one another. In some persons peculiarly constituted, a fit of intoxication presents few if any of these successive stages, and the mind rapidly loses its self-control, and for the time is actually frenzied, as if in a maniacal paroxysm, though the amount of the drink may be comparatively small. The same phenomenon is observed sometimes in persons who have had some injury of the head, who are deprived of their reason by the slightest indulgence.

The habitual abuse of intoxicating drinks is usually followed by a pathological condition of the brain, which is manifested by a degree of intellectual obtuseness, and some insensibility to moral distinctions once readily discerned. The mind is more exposed to the force of foreign influences, and more readily induced to regard things in the light to which others have directed them. In others it produces a permanent mental derangement, which, if the person continue to indulge, is easily mistaken by common observers for the immediate effects of hard drinking. These two results—the mediate and the immediate effects of drinking—may coexist; but it is no less necessary to distinguish them from each other, because their legal consequences may be very different. Moved by the latter, a person goes into the street and abuses or assaults his neighbors; moved by the former, the same person makes his will, and cuts off with a shilling those who have the strongest claims upon his bounty. In a judicial investigation, one class of witnesses will attribute all his extravagances to drink, while another will see nothing in them but the effect of insanity. The medical jurist should not be misled by either party, but be able to refer each particular act to its proper source.

Drunkenness may be the result of dipsomania. Rather suddenly, and perhaps without much preliminary indulgence, a person manifests an insatiable thirst for strong drink, which no considerations of propriety or prudence can induce him to control. He generally retires to some secluded place, and there, during a period of a few days or weeks, he swallows enormous quantities of liquor, until his stomach refuses to bear any more. Vomiting succeeds, followed by sickness, depression, and disgust for all intoxicating drinks. This affection is often periodical, the paroxysms recurring at periods varying from three months to several years. Sometimes the indulgence is more continuous and limited, sufficient, however, to derange the mind, without producing sickness, and equally beyond control. Dipsomania may result from moral causes, such as anxiety, disappointment, grief, sense of responsibility; or physical, consisting chiefly of some anomalous condition of the stomach. Esquirol, Mal. Men. ii. 73; Marc, *de la Folie*, ii. 605; Ray, Med. Jur. 497; Macnish, Anatomy of Drunkenness, chap. 14.

The common law showed but little disposition to afford relief, either in civil or criminal cases, from the immediate effects of drunkenness. It has never considered that mere drunkenness alone as a sufficient reason for invalidating any act. In Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519, it was said that the early cases held that relief could not be granted against a contract made by one who was intoxicated, unless the intoxication was brought about by the other party, but that that rule had been changed; that courts will not interfere to assist a person on the ground of intoxication merely, but will, if any unfair advantage has been taken of his situation. To the same effect, Baird v. Howard, 51 Ohio St. 57, 36 N. E. 732, 22 L. R. A. 846, 46 Am. St. Rep. 550, but such contracts have been held void where it appeared that actual intoxication dethroned the reason or that the party's understanding was so impaired as to render him mentally unsound; Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176, 100 Am. St. Rep. 895; Wright v. Fisher, 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886; that the drunkenness must have been such as to have drowned reason, memory and judgment and to have impaired the mental faculties to such an extent as to render the party non compos mentis for the time being; Martin v. Harsh, 231 Ill. 384, 83 N. E. 164, 13 L. R. A. (N. S.) 1000; that at the time the party did not fully understand the nature of the transaction; 7 Idaho 292; that the party was incapable of knowing or understanding the nature or quality of the act; Benton v. Sikyta, 84 Neb. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; so destitute of reason as not to know the consequences of his contract; Fowler v. Water Co., 208 Pa. 473, 57 Atl. 959; incapable of knowing what he was doing; Cook v. Timber Co., 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251.

It has been held that there must be a degree of drunkenness which may be called excessive, where a party is so far deprived of his reason as to render him incapable of understanding the consequences of his act; J.

I. Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970; Conant v. Jackson, 16 Vt. 335; Johns v. Fritchey, 39 Md. 258; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Taylor v. Purcell, 60 Ark. 606, 31 S. W. 567; Kuhlman v. Wieben, 129 Ia. 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666; Drummond v. Hopper, 4 Harr. (Del.) 327; Fowler v. Water Co., 208 Pa. 473; or where it is of such a degree as to make his mind similar to that of an idiot or a lunatic; Harbison v. Lemon, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; when he is in such a condition as to be unable to understand the nature of the transaction; Ryan v. Schutt, 135 Ill. App. 554; or is deprived entirely of his reason; Bing v. Bank, 5 Ga. App. 578, 63 S. E. 652. It must be so extreme that the party sought to be charged was incapable of assenting; Wade v. Colvert, 2 Mill, Const. (S. C.) 26, 12 Am. Dec. 652; because the very essence of a contract is the assent of the party; *id.;* Longhead v. Commission Co., 64 Mo. App. 559. That one may plead his intoxication in avoidance of a contract is held in Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271.

The leading English case is 13 M. & W. 623, which holds that there is a class of contracts from which a party cannot be released, even by proof of complete drunkenness at the time they were entered into. This class embraces transactions where the law raises the assent essential to their execution, such as actions for money had and received to the plaintiff's use, or paid by him to the defendant's use. So a tradesman who supplies a drunken man with necessaries may recover the price of them if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. The contract may be ratified by him when he becomes sober; L. R. 8 Exch. 132, where it was said that the judges in 13 M. & W. 623, used the word *void*, but that they did not mean absolutely void, but only that a drunken man's contract could not be enforced against his will, not that it was incapable of ratification. To the same effect, McClure v. Mausell, 4 Brewst. (Pa.) 119; Birmingham Ry., Light & Power Co. v. Hinton, 158 Ala. 470, 48 South. 546; Eaton's Adm'r v. Perry, 29 Mo. 96; Brockway v. Jewell, 52 Ohio St. 187, 39 N. E. 470 (holding that a drunken man may be bound on an implied contract).

The contract of a drunken man is not void but voidable only; 8 Am. Rep. 251, note. See also 1 Ames, Cas. on Bills and Notes 558; Carpenter v. Rodgers, 61 Mich. 384, 28 N. W. 156, 1 Am. St. Rep. 595; see Rice v. Peet, 15 Johns. (N. Y.) 503; Joest v. Williams, 42 Ind. 565, 13 Am. Rep. 377; Bates v. Ball, 72 Ill. 108. The party must rescind the contract within a reasonable time after recovery; Fowler v. Water Co., 208 Pa. 473, 57 Atl. 959; Shaw v. R. Co., 126 App. Div. 210, 110 N. Y. Supp. 362; Kelly v. R. Co., 154 Ala. 573, 45 South. 906; Case Threshing Mach. Co. v. Meyers, 78 Neb. 685, 111 N. W. 602, 9 L. R. A. (N. S.) 970. If a person when sober agree to sign a contract, he cannot avail himself of intoxication at the time of signature as a defence; Strickland v. Parlin & Orendorf Co., 118 Ga. 213, 44 S. E. 997; Fagan v. Wiley, 49 Or. 480, 90 Pac. 910. When carried so far as to deprive the party of all consciousness, a strong presumption of fraud is raised; and on that ground courts may interfere; 1 Ves. 19; 18 *id.* 12; Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486; Jones v. McGruder, 87 Va. 360, 12 S. E. 792. In equity it is not so much the drunkenness of one party as the fraud and imposition of the other; Cook v. Bagnell Timber Co., 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251; Calloway v. Witherspoon, 40 N. C. 128. Drunkenness in such a degree as to render the testator unconscious of what he is about, or less capable of resisting the influence of others, avoids a will; Shelf. Lun. 274, 304; Dimond's Estate, 3 Pa. D. R. 554; but not if at the time the testator could comprehend the nature of his act; Bannister v. Jackson, 45 N. J. Eq. 702, 17 Atl. 692.

In actions for torts, drunkenness is not regarded as a reason for mitigating damages; Co. Litt. 247 *a*; Webb, Poll. Torts 59, n. See Hanvey v. State, 68 Ga. 612. Courts of equity, too, have declined to interfere in favor of parties pleading intoxication in the performance of some civil act; but they have not gone the length of enforcing agreements against such parties; 1 Story, Eq. § 232; Youn v. Lamont, 56 Minn. 216, 57 N. W. 478; 18 Ves. Jr. 12; 1 Ves. 19. "A drunkard who is *voluntarius dæmon*," says Coke, "hath no privilege thereby: Whatever ill or hurt he doth, his drunkenness doth aggravate it." Lawyers have occasionally shown a disposition to distinguish between the guilt of one who commits an offence unconsciously, though in consequence of vicious indulgence, and that of another who is actuated by malice aforethought and acts deliberately and coolly. In Pennsylvania, as early as 1794, it was remarked that, as drunkenness clouds the understanding and excites passion, it may be evidence of passion only, and of want of malice and design; Add. Pa. 257. See Meyers v. Com., 83 Pa. 144. In 1819, Justice Holroyd decided that the fact of drunkenness might be taken into consideration in determining the question whether the act was premeditated or done only with sudden heat and impulse; Rex v. Grundley, 1 Russ. Cr. 8. This particular decision, however, was, a few years afterwards, pronounced to be not correct law; 7 C. & P. 145. Again, it was held that drunkenness, by rendering the party more excitable under provocation, might be taken into consid-

eration in determining the sufficiency of the provocation; 7 C. & P. 817. In Rex v. Monkhouse, 4 Cox, Cr. Cas. 55, it was declared that there might exist a state of drunkenness which takes away the power of forming any specific intention.

In this country, courts have gone still further in regarding drunkenness as incompatible with some of the elements of crime. It has been held, where murder was defined to be wilful, deliberate, malicious, and premeditated killing, that the existence of these attributes is not compatible with drunkenness; State v. Bullock, 13 Ala. 413; Swan v. State, 4 Humphr. (Tenn.) 136; Haile v. State, 11 Humphr. (Tenn.) 154; State v. McCants, 1 Speers (S. C.) 384; and when a man's intoxication is so great as to render him unable to form a wilful, deliberate, and premeditated design to kill, or of judging of his acts and their legitimate consequences, then it reduces what would otherwise be murder in the first degree to murder in the second degree; People v. Harris, 29 Cal. 678; Com. v. Jones, 1 Leigh (Va.) 612; People v. Robinson, 2 Park C. R. (N. Y.) 235; Ayres v. State (Tex.) 26 S. W. 396; Mooney v. State, 33 Ala. 419; State v. Johnson, 41 Conn. 584; Rafferty v. People, 66 Ill. 118; Jones v. Com., 75 Pa. 403. See Bernhardt v. State, 82 Wis. 23, 51 N. W. 1009; State v. Zorn, 22 Or. 591, 30 Pac. 317; People v. Vincent, 95 Cal. 425, 30 Pac. 581. But where one who intends to kill another becomes voluntarily intoxicated for the purpose of carrying out the intention, the intoxication will have no effect upon the act; Garner v. State, 28 Fla. 113, 9 South. 835, 29 Am. St. Rep. 232; Springfield v. State, 96 Ala. 81, 11 South. 250, 38 Am. St. Rep. 85. See People v. Young, 102 Cal. 411; 36 Pac. 770; and if one person gets another drunk and persuades him to commit a crime, he is legally responsible; McCook v. State, 91 Ga. 740, 17 S. E. 1019.

Intoxication does not excuse crime, but may show an absence of malice; Wilkerson v. Com., 88 Ky. 29, 9 S. W. 836, 10 Ky. L. Rep. 656; Engelhardt v. State, 88 Ala. 100, 7 South. 154; and the burden of proof is on the defendant to show intoxication to such an extent as to render him incapable of malice; State v. Hill, 46 La. Ann. 27, 14 South. 294, 49 Am. St. Rep. 316.

If one commits robbery while so drunk as not to know what he was doing, he will not be deemed to have taken the property with a felonious intent; Keeton v. Com., 92 Ky. 522, 18 S. W. 359.

It has been already stated that strong drink sometimes, in consequence of injury to the head, or some peculiar constitutional susceptibility, produces a paroxysm of frenzy immediately, under the influence of which the person commits a criminal act. Cases of this kind have been too seldom tried to make it quite certain how they would be regarded in law. It is probable, however, that the plea of insanity would be deprived of its validity by the fact that, sane or insane, the party was confessedly drunk. In a case where injury of the head had been followed by occasional paroxysms of insanity, in one of which the prisoner killed his wife, it appeared that he had just been drinking, and that intoxication had sometimes brought on the paroxysms, though they were not always preceded by drinking. The court ruled that if the mental disturbance were produced by intoxication it was not a valid defence; and accordingly the prisoner was convicted and executed. Trial of M'Donough, Ray, Med. Jur. 514. The principle is that if a person voluntarily deprives himself of reason, he can claim no exemption from the ordinary consequences of crime; 3 Par. & Fonbl. Med. J. 39; and the courts hold that voluntary intoxication is no justification or excuse for crime; State v. O'Neil, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; People v. Bell, 49 Cal. 485; State v. Bullock, 13 Ala. 413; Estes v. State, 55 Ga. 31; State v. Tatro, 50 Vt. 483; Colbath v. State, 4 Tex. App. 76. Milder views have been advocated by writers of note, and have appeared in judicial decisions. Alison, referring to the class of cases just mentioned, calls it inhuman to visit them with the extreme punishment otherwise suitable. Prin. of Crim. Law of Scotland 654. See, also, 23 Am. Jur. 290. When a defendant sets up the defence of *delirium tremens*, and there is evidence to support the plea, the court in charging the jury is bound to set forth the law applicable to such a defence; 12 Rep. 701. This disease is a species of insanity, and one who labors under it is not responsible for his acts; 1 Wh. & Stillé, Med. Jur. § 202. While drunkenness is no excuse for crime, *mania a potu* is; State v. Potts, 100 N. C. 457, 6 S. E. 657. See People v. Williams, 43 Cal. 344; Fisher v. State, 64 Ind. 435; Lanergan v. People, 50 Barb. (N. Y.) 266. Where dipsomania affects the intellect and not merely the will, it may be a defence; 3 Witth. & Beck. Med. Jur. 506. See Flanigan v. People, 86 N. Y. 559, 40 Am. Rep. 556; People v. Leary, 105 Cal. 486, 39 Pac. 24. Where a person, in regard to a particular act, though knowing right from wrong, has lost his power to discriminate, in consequence of mental disease, he will be exempt from crime; 3 Witth. & Beck. 507. See State v. McDaniel, 115 N. C. 807, 20 S. E. 622. Dipsomania would hardly be considered, in the present state of judicial opinion, a valid defence in a capital case, though there have been decisions which have allowed it, holding the question whether there is such a disease, and whether the act was committed under its influence, to be questions of fact for the jury; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; State v. Johnson, 40 Conn. 136; 1 Bish. Cr. Law § 409.

The law does recognize two kinds of in-

culpable drunkenness, viz.: that which is produced by the "unskilfulness of the physician," and that which is produced by the "contrivance of enemies." Russ. Cr. 8. To these there may perhaps also be added that above described, where the party drinks no more liquor than he has habitually used without being intoxicated, but which exerts an unusually potent effect on the brain, in consequence of certain pathological conditions. See Com. v. Whitney, 5 Gray (Mass.) 86; 1 Benn. & H. Lead. Cr. Cas. 113. See INSANITY; DELIRIUM TREMENS.

DRY EXCHANGE. A term invented for disguising and covering usury,—in which something was pretended to pass on both sides, when in truth nothing passed on one side; whence it was called *dry*. Stat. 3 Hen. VII. c. 5; Wolffius, Ins. Nat. § 657.

DRY RENT. Rent-seck; a rent reserved without a clause of distress.

DRY TRUST. A passive trust; one which requires no action on the part of the trustee beyond turning over the money or property to the *cestui que trust*. Black, L. Dict. See TRUST.

DUBITANTE. Doubting. Affixed in law reports to a judge's name, to signify that he doubts the correctness of a decision.

DUCAT. The name of a foreign coin.

The ducat, or sequin, was originally a gold coin of the middle ages, apparently a descendant from the bezant of the Greek-Roman Empire. For many centuries it constituted the principal international currency, being intended, or supposed, to be made of pure gold, though subsequently settled at a basis a little below. It is now nearly obsolete in every part of the world. Its average value is about $2.26 of our money. It is said they appeared earliest in Venice, and that they bore the following motto: *Sit tibi, Christe, datus, quem tu regis, iste Ducatus* (Let this Duchy which thou rulest be dedicated to thee, O Christ)—whence the name ducat.

The silver ducat was formerly a coin of Naples, weighing three hundred and forty-eight grains, eight hundred and forty-two thousandths fine; consequent value, in our money, about eighty-one cents; but it now exists only as a money of account.

DUCES TECUM LICET LANGUIDUS. A writ directing the sheriff to bring a person whom he returned as so sick that he could not be brought without endangering his life. Cowell. Now obsolete.

DUCKING-STOOL. A stool or chair in which common scolds were formerly tied and plunged into water. The ducking-stool is mentioned in the Domesday Book; it was extensively in use throughout Great Britain from the fifteenth till the beginning of the eighteenth century. Cent. Dict. The last recorded instance in England was in 1809. See CASTIGATORY; PUNISHMENT.

DUE. Just and proper, as due care, due rights. Ryerson v. Boorman, 8 N. J. Eq. 701; Jones v. Inhabitants of Andover, 10 Allen (Mass.) 18; Butterfield v. Western R. Corp., 10 Allen (Mass.) 532, 87 Am. Dec. 678. A due presentment and demand of payment must be made. See Bank of Pennsylvania v. McCalmont, 4 Rawle (Pa.) 307; Collins's Adm'x v. Janey, 3 Leigh (Va.) 389; Simms v. Slacum, 3 Cra. (U. S.) 300, 2 L. Ed. 446.

What ought to be paid; what may be demanded.

It differs from *owing* in this, that sometimes what is owing is not due: a note payable thirty days after date is owing immediately after it is delivered to the payee, but it is not due until the thirty days have elapsed. But see Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542; Scudder v. Scudder, 10 N. J. L. 340; U. S. v. Bank of North Carolina, 6 Pet. (U. S.) 36, 8 L. Ed. 308.

The word "due," unlike "arrears," has more than one signification, and expresses two distinct ideas. At times it signifies a simple indebtedness without reference to the time of payment; at others it shows that the day of payment has passed; Wiggin v. Knights of Pythias, 31 Fed. 125; Scudder v. Scudder, 10 N. J. L. 345.

DUE-BILL. An acknowledgment of a debt in writing. This instrument differs from a promissory note in many particulars: it is not payable to order, nor is it assignable by mere indorsement. Byles, Bills *11, n. (t). See I. O. U.; PROMISSORY NOTES.

DUE CARE. Reasonable care adapted to the circumstances of the case. Butterfield v. Western R. Corp., 10 Allen (Mass.) 532; Baltimore & P. R. Co. v. State, 54 Md. 656. See BAILMENT; NEGLIGENCE.

DUE COURSE OF LAW. This phrase is synonymous with "due process of law," or "the law of the land," and means law in its regular course of administration through courts of justice. Kansas Pac. Ry. Co. v. Dunmeyer, 19 Kan. 542. But see DUE PROCESS OF LAW.

DUE PROCESS OF LAW. Law in its regular course of administration through courts of justice. 3 Story, Const. 264, 661; Miller, Const. 664; Wynehamer v. People, 13 N. Y. 378.

This definition embodies the earlier conception; 2 Co. Inst. 51; but it was long ago held too narrow; Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. (U. S.) 272, 15 L. Ed. 372, where a distress warrant to collect a balance due from a collector of customs, under executive authority, prescribed by law, was held due process within the Vth Amendment; and the same ruling is made under the XIVth Amendment; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, where it was said that the phrase, "has never been defined. It does not always mean proceedings in court. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded," and the ruling in Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 (*infra*) is approved.

Any legal proceeding enforced by public

authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice. Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

This term is considered by Coke as equivalent to the phrase "law of the land" (used in Magna Carta, c. 29), and is said by him to denote "indictment or presentment of good and lawful men." Co. 2d Inst. 50. Amendment V. of the Constitution of the United States provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." Amendment XIV. prohibits a state from depriving a person of life, liberty, or property, without due process of law. A similar provision exists in all the state constitutions; the phrases "due course of law" and "the law of the land" are sometimes used; but all three of these phrases have the same meaning; and that implies conformity with the ancient and customary laws of the English people or laws indicated by parliament; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Cooley, Const. Lim. 437, where the provisions in the various state constitutions are set forth. Miller, J., says, in that case that a general definition of the phrases which would cover every case would be most desirable, but that, apart from the risk of failure to make the definition perspicuous and comprehensive, there is a wisdom in ascertaining the extent and application of the phrase by the judicial process of exclusion and inclusion as the cases arise. In that case, however, he says also, that it must be confessed that the constitutional meaning or value of the phrase remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions of the several states and of the United States. And in a much later case it was said that the phrase has never been precisely defined; while its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case. Proceedings in court are not always essential; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461, where it was held that personal service of liens for taxes and assessments on real estate on resident owners, and constructive service by publication on non-resident owners, may be required by statute, the land being accountable to the state and the owner charged with knowledge of laws affecting it.

The liberty guaranteed is that of natural and not of artificial persons; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; where it was said "a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States against being abridged or impaired by the law of a state"; the same principle was laid down in Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104 and Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650. But corporations are persons as well as with respect to this guaranty as to that of equal protection of the laws; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970.

The full significance of the clause "law of the land" is said by Ruffin, C. J., to be that statutes which would deprive a citizen of the rights of person or property without a regular trial according to the course and usage of the common law would not be the law of the land; Hoke v. Henderson, 15 N. C. 15, 25 Am. Dec. 677. Mr. Webster's explanation of the meaning of these phrases in the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, is: "By the law of the land is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

General Principles. The adoption of the XIVth Amendment completed the circle of protection against violations of the provision of Magna Carta, which guaranteed to the citizen his life, liberty and property against interference except by the "law of the land," which phrase was coupled in the Petition of Right with due process of law. The latter phrase was then used for the first time, but the two are generally treated as meaning the same. This security is provided as against the United States by the XIVth and Vth Amendments and as against the states by the XIVth Amendment; Davidson v. New Orleans, 96 U. S. 97, 101, 24 L. Ed. 616, which declined to attempt its precise definition; Freeland v. Williams, 131 U. S. 405, 418, 9 Sup. Ct. 763, 33 L. Ed. 193; the supreme court has frequently declared in general terms its appreciation of the value of this constitutional guaranty; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 244, 4 L. Ed. 559; Yick Wo v. Hopkins, 118 U. S. 370, 6 Sup. Ct. 1064, 30 L. Ed. 220; Holden v. Hardy, 169 U. S. 366, 389, 18 Sup. Ct. 383, 42 L. Ed. 780. The meaning of the phrase is discussed generally in Kennard v.

Louisiana, 92 U. S. 480, 23 L. Ed. 478; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; Hagar v. Reclamation District No. 108, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986. It does not refer to any general system of law, but must be construed with reference to the historical developments of the law in each state; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; and it means according to the system of law in each state and not any general one; Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; but see Wynehamer v. People, 13 N. Y. 378.

The prohibition applies to all instrumentalities of a state; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; it is sufficient if the legislation is general, in its operation and enforceable by usual methods adapted to the case; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. What is due process of law in a particular state is regulated by the law of the state; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; although a state cannot make due process of law of anything which it chooses to declare such by its own legislation; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616.

Due process of law means such acts of government as settled maxims of law and custom sanction and permit; Ex parte Ah Fook, 49 Cal. 402; in the regular course of administration according to the prescribed forms; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; according to the law of the land; Walker v. Sauvinet, 92 U. S. 93, 23 L. Ed. 678; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; and with respect to taxation, as to which the question is so frequently raised, it has been said that the assessment of taxes is necessarily summary and need not be by judicial proceeding; so a levy by a collector under a state law is valid; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Sears v. Cottrell, 5 Mich. 251, where the subject is fully treated; and taxation for railroad aid bonds; Talcott v. Pine Grove, 1 Flipp. 120, Fed. Cas. No. 13,735; the clause has reference to the modes of ascertaining rights, not to the objects and purposes of a statute; *id.*

Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable by usual methods adapted to the nature of the case; Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. As was said by Field, J., in Bartemeyer v. Iowa, 18 Wall. (U. S.) 129, 21 L. Ed. 929: "No one has ever pretended, that I am aware of, that the XIVth Amendment interferes in any respect with the police power of the state." In that case it was held that the right to sell liquor, as far as it exists, is not a right growing out of citizenship of the United States.

The Distinction Between the Two Amendments. While the language of the Vth and XIVth Amendments is the same, yet as they were engrafted upon the Constitution at different times and under widely different circumstances, it may be that questions may arise in which different constructions and applications of their provisions may be proper; French v. Pav. Co., 181 U. S. 324, 328, 21 Sup. Ct. 625, 45 L. Ed. 879; citing Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; then quoting from Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616 as follows: "It is not a little remarkable that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government for nearly a century, and while during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the XIVth Amendment." The court then stated that it would "proceed in the present case on the assumption that the legal import of the phrase due process of law is the same in both amendments." See Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; Pittsburgh, C., C. & St. L. Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

It was not intended by the XIVth Amendment to impose on the states, when exercis-

ing their power of taxation, any more rigid or stricter curb than that imposed on the federal government, in the exercise of a similar power by the Vth Amendment. French v. Paving Co., 181 U. S. 324, 329, 21 Sup. Ct. 625, 45 L. Ed. 879. And in another case the court said: "It by no means follows that a long and consistent construction put upon the Vth Amendment relating to public improvements within the District of Columbia is to be deemed overruled by a decision concerning the operation of the XIVth Amendment as controlling state legislation." Wight v. Davidson, 181 U. S. 371, 384, 21 Sup. Ct. 616, 45 L. Ed. 900.

The privileges and immunities of citizens of the United States, protected by the XIVth Amendment, are those arising out of the nature and essential character of the federal government, and granted or secured by the constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government; Duncan v. Missouri, 152 U. S. 382, 14 Sup. Ct. 570, 38 L. Ed. 485; Hurtado v. California, 110 U. S. 535, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; due process of law in the XIVth Amendment refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state exerted within the limits of those fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. It implies conformity with the natural and inherent principles of justice and forbids the taking of one's property without compensation, and requires that no one shall be condemned in person or property without opportunity to be heard; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; the proceedings need not be in a court of justice, but according to the forms thereof; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616. The proceedings must be appropriate to the case and just to the parties affected, and pursued in the ordinary manner and adapted to the end to be attained, with opportunity to be heard, when necessary, for the just protection of rights; Turpin v. Lemon, 187 U. S. 51, 23 Sup. Ct. 20, 47 L. Ed. 70. See editorial notes on What is Due Process of Law in 24 L. Ed. 436; 42 L. Ed. 865. Appropriate regulation of property is not deprivation of due process of law; Richmond, F. & P. R. Co. v. Richmond, 96 U. S. 521, 24 L. Ed. 734.

In Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. Ed. 559, Johnson, J., says: "As to the words from Magna Carta incorporated in the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this,—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights;" Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; but not necessarily judicial proceedings; it may include summary proceedings, if not arbitrary or unequal, as for collection of taxes; McMillen v. Anderson, 95 U. S. 37, 24 L. Ed. 335; nor is the right of appeal essential; where a statute has fixed the time and place of meeting of any board or tribunal, no special notice to parties interested is required; Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563.

Law in its regular course of administration through courts of justice is due process; and when secured by the law of the state, the constitutional requirement is satisfied; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225. The phrase as used in the constitution does not "mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you chose to do it;'" per Bronson, J., in Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274. "The meaning of these words is that no man shall be deprived of his property without being heard in his own defence." Kinney v. Beverly, 2 Hen. & M. (Va.) 318, 336.

Cooley (Const. Lim. 441) says: "Due process of law in each particular case means, such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Taking property under the taxing power is taking it by due process of law; High v. Shoemaker, 22 Cal. 363; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253. In this connection, it is said in State v. Allen, 2 McCord (S. C.) 56: "We think that any legal process which was originally founded in necessity, has been consecrated by time, and approved and acquiesced in by universal consent, . . . is embraced in the alternative 'law of the land.'" In Brown v. Levee Com'rs, 50 Miss. 479, it is said that these constitutional provisions do not mean the general body of

the law as it was at the time the constitution took effect; but they refer to certain fundamental rights which that system of jurisprudence of which ours is derivative has always recognized; if any of these are disregarded in the proceedings by which a person is condemned to the loss of property, etc., then the deprivation has not been by due process of law. And it has been held that the state cannot deprive a person of his property without due process of law through the medium of a constitutional convention any more than it can through an act of the legislature; Clark v. Mitchell, 69 Mo. 627. Exaction of tolls under a state statute for the use of an improved waterway, is not a deprivation of property within the federal constitution; Sands v. Improv. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149.

It follows necessarily, from the confessed inability of the courts to form a general definition and their settled rule of dealing with each case separately upon its own facts, that in a discussion of the subject it is convenient to illustrate the course of decisions by a selection of them showing different phases of the application of the principle.

Limitations on the Legislation of the States. Acts of a municipal corporation are not wanting in due process of law if such acts, when done or ratified by the state, would not be inconsistent with the Amendment, the latter being not intended to bring under federal control everything done by states illegally under state laws, but only the acts of states or their instrumentalities in violations of rights secured by the Constitution of the United States; Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38, 26 Sup. Ct. 249, 50 L. Ed. 361; it does not control mere forms of procedure in state courts or regulate their practice. It only requires that the person condemned has had sufficient notice and an adequate opportunity to defend; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747. The guaranty is secured within the meaning of the Amendment if the law operates on all alike and does not subject the individual to an arbitrary exercise of the powers of government; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; it requires only that a person accused of crime shall be subjected to law in the regular course of the administration in courts of justice; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; that the accused be present at every stage of the trial, but not in the appellate court, when he has counsel, and when that court is merely deciding as to prejudicial error below; Dowdell v. U. S., 221 U. S. 325, 31 Sup. Ct. 590, 55 L. Ed. 753.

"No right, privilege, or immunity in respect of due process, at any stage in the duty of affording it arises under the XIVth Amendment unless there be denial of the right by the state or its officers;" no immunity is secured against the lawlessness of private individuals who take a prisoner from the custody of the state officers and murder him to prevent his having the benefits of a trial by operation of the state's established course of judicial procedure; U. S. v. Powell, 151 Fed. 648, a very comprehensive opinion by Jones, D. J., in the circuit court of Alabama.

While the XIVth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent legislation intended to regulate useful occupations, which, because of their nature and location, may prove injurious or offensive to the public. It does not prevent a municipality from prohibiting any business which is inherently vicious and harmful; nor does it prevent a state from regulating or prohibiting a non-useful occupation which may become harmful to the public, and the regulation or prohibition need not be postponed until the evil is flagrant; Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153. There is nothing in the XIVth Amendment to prevent a state from requiring individuals to make, on receiving due compensation, such concessions to each other as the public welfare demands, and a statute permitting the exercise of the right of eminent domain for railways, etc., for working mines, was held to be constitutional and to authorize condemnation of the right to cross the land of a private owner by an aërial bucket line, necessary for the working of a mine; Strickley v. Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

Acts and Proceedings Held Valid. Statutes or ordinances which have been held valid as not being deprivations of liberty or property without due process of law are: Prohibiting the carrying of dangerous weapons; Miller v. Texas, 153 U. S. 535, 14 Sup. Ct. 874, 38 L. Ed. 812; creating a board of registration for physicians; Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563 (where it was said that due process of law is not necessarily judicial process and the right of appeal is not essential to it); taxing stocks of railroads in other states (held not unconstitutional because no similar tax was laid upon stock of domestic railroads or foreign railroads doing business in Alabama, the property of the former class of railroads being untaxed and that of the latter two classes being taxed by the state); Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; imposing a personal tax on all property in or out of the state; Glidden v. Harrington, 189 U. S. 255, 23 Sup. Ct. 574, 47 L. Ed. 798 (where it was said that what is required by the XIVth Amendment, in the assessment of ordinary annual taxes

on personal property, should be construed liberally, and while notice may be required, it need not be personal, but may be by publication or by posting at polling places, and it was also held in another case that in condemning property for municipal purposes, it is sufficient to give notice by publication, with opportunity for hearing; Wight v. Davidson, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900). So the right is not infringed by imposing liabilities on particular classes, as an act making persons driving herds over a highway liable for damages done to it; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; or sheep owners for grazing on the public domain; Bacon v. Walker, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. Ed. 499; or making railroads liable to employés for the negligence of fellow employés; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; or for fires caused by locomotives; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; or requiring railroads to pay damages for the diminution in value of farms by the company's failure to put up fences and cattle guards; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769; requiring log owners to pay fees of state officer for surveying and scaling logs; Lindsay & P. Co. v. Mullen, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400; making mine owners liable for defaults of mine managers and examiners selected by them under a state law; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708; requiring railroad stockholders to pay their just proportion of bonded debt; Union Pac. R. Co. v. U. S., 99 U. S. 700, 25 L. Ed. 496; the exaction of tolls for the use of an improved water way; Sands v. Imp. Co., 123 U. S. 288, 8 Sup. Ct. 113, 31 L. Ed. 149; subjecting buildings used for gaming to the payment of money lost at play; Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157; authorizing the destruction of nets used in illegal fishing; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; subjecting a railroad corporation to a rule of negligence prescribed by a general act under which it is incorporated; Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 22 Sup. Ct. 229, 46 L. Ed. 339; taking private property under state law authorizing the exercise of the right of eminent domain for taking private property; Missouri Pac. R. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; as corporate franchises; Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961; for flooding lands; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274; construction of a levee; Eldridge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490; condemnation of a right of way across a placer mining claim; Strickley v. Min. Co., 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; constructing a dam in a stream not navigable, paying the damage to owners; Head v. Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; condemnation of shares of stock of a railroad for its improvement under a state law; Offield v. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231; acts imposing special burdens on public service corporations, as requiring an electric company to pay salaries to commissioners to supervise them; New York v. Squire, 145 U. S. 175, 12 Sup. Ct. 880, 36 L. Ed. 666; compelling a railroad company to pay for the removal of a grade crossing; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; requiring the removal of a bridge and culvert; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; requiring the lowering or removal of a tunnel which had become an obstruction to navigation since its construction; West Chicago St. R. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; requiring a railroad company to pay for examiners as to competency of its employés; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; requiring railroad to furnish track connections at intersections; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; requiring a gas company to change the location of its pipes; New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831.

So the guaranty is not infringed by compulsory vaccination; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; prohibition against sales of options on grain; Booth v. Illinois, 184 U. S. 425; regulating charges of warehousemen; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; the danger that testimony taken in a proceeding under a state law may incriminate the witness in a possible prosecution under the federal anti-trust law; Jack v. Kansas, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234, 4 Ann. Cas. 689; or by the destruction of the value of property by statute forbidding the manufacture or sale of intoxicating liquors; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; or of oleomargarine; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 22 Sup. Ct. 120, 46 L. Ed. 171; or by taxing artificially colored oleomargarine, even if the tax will suppress the manufacture; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; making water rents a prior lien on land; Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; subordinating claims of non-resident mortgagee to those of resident creditors of a foreign corporation; Sully v. Bank, 178 U. S. 289, 20 Sup. Ct. 935, 44 L. Ed. 1072; the appointment of a receiver in a railroad fore-

closure suit; St. Louis, G. & Ft. S. Ry. Co. v. Missouri, 156 U. S. 478, 15 Sup. Ct. 443, 39 L. Ed. 502; precluding defense by life insurance company based on false and fraudulent statement in application unless the matter represented actually contributed to the death of the insured; Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 27 Sup. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104 (where it was said that liberty means liberty of natural and not artificial persons); assessment for opening streets on the front foot rule, held not void because levied after the work was completed or because, when the work was ordered, the city could under a statute repealed after the work was completed and before assessment, include part of the expenses in general taxes and levy the assessment on a valuation basis under which a smaller amount would have been assessed against these lands; City of Seattle v. Kelleher, 195 U. S. 351, 25 Sup. Ct. 44, 49 L. Ed. 232; the imposition of some duty on transfer of stock; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; limiting to eight hours a day the period of work in under-ground mines; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; a New York tax on a Pennsylvania fire insurance company on premiums received in New York, being the same that was required in Pennsylvania; Fire Ass'n of Philadelphia v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342 (where it was held a condition precedent to doing business in the state).

The grant by a state to a corporation of the exclusive right or privilege of maintaining slaughter houses, guarded by proper limitation of prices to be charged and imposing the duty of providing ample conveniences, with permission to all owners of stock to land, and to all butchers to slaughter, at those places is valid; Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

Among the statutes and judicial or administrative proceedings which have been held not to be obnoxious to the XIVth Amendment, as deprivation of property without due process of law, are the following: Providing for the widening of a street; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; regulating contests between persons claiming judicial offices; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; making water rates a charge on lands prior to liens; Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. 612, 28 L. Ed. 1102; authorizing any person to erect and maintain a mill dam in a navigable stream, paying to the owners of the lands affected damages assessed in a judicial proceeding; Head v. Mfg. Co., 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; providing for drainage of low lands, damages to be assessed by commissioners after notice and hearing; Wurts v. Hoagland, 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229; a tax law giving notice to the taxable by requiring statement of his property, with public sessions when he has a right to be present and to be heard, with an opportunity in a suit at law to contest the validity of the proceeding; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; for valuation and classification of property with different provisions as to different classes for ascertaining the value and a right of appeal, applying the same means and methods to individuals of each class; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; requiring railroads to erect and maintain cattle guards and in default thereof to be liable for double damages; Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; or to fence a track under penalty of double damages; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Spealman v. Ry. Co., 71 Mo. 434; the imposition upon property of a tax or other burden for reclamation of swamp lands; Reclamation Dist. No. 108 v. Hagar, 4 Fed. 366; and see Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; a paving law originating proceedings on petition of two-thirds of the owners of lots bordering on a street, and taxing abutting owners; Schaefer v. Werling, 188 U. S. 516, 23 Sup. Ct. 449, 47 L. Ed. 570; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; and as to back-lying property; Voris v. Glass Co., 163 Ind. 599, 70 N. E. 249; Cleveland, C., C. & St. L. R. Co. v. Porter, 210 U. S. 177, 28 Sup. Ct. 647, 52 L. Ed. 1012 (where it was held that the legislature may create back taxing districts of property extending back); assessment for paving, etc., not void because lot is not benefited by the improvements owing to its present use; the land must be considered simply in its general relations and apart from its particular use at the time; Louisville & N. R. Co. v. Paving Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819; charging the cost of paving against lots fronting on a street according to the frontage, the XIVth Amendment being held not applicable; French v. Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; providing for the assessment of damages for laying out, etc., streets upon owners of land benefited thereby and determining the amount of tax and also what lands are benefited, with notice to and hearing of each owner at some stage of the proceeding upon the question of his proportion of the tax to be assessed; People v. City of Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; an order of

drainage commissioners requiring a railroad company at its own expense to remove a bridge and culvert over a natural water course and to erect a new one in conformity with the regulations established by the commissioners; C., B. & Q. Ry. v. People, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; making railroad companies liable for damage to employés caused by the negligence of fellow servants; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; authorizing a city to open and improve streets and assess damages against the owners of adjacent lots; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; converting an appearance d. b. e. into a general appearance and submission to jurisdiction; Birmingham v. R. Co., 137 N. Y. 15, 32 N. E. 995, 18 L. R. A. 764; if it does not attempt to restrain the suitor from fully protecting his life, liberty and property against any attempt to enforce a judgment against him without due process of law; Kauffman v. Wooters, 138 U. S. 285, 11 Sup. Ct. 298, 34 L. Ed. 962; a municipal ordinance prohibiting a private market within six squares of any public market under penalty of trial by magistrate; Natal v. Louisiana, 139 U. S. 621, 11 Sup. Ct. 636, 35 L. Ed. 288; an ordinance closing laundries between 10 p. m. and 6 a. m., it being held merely a police regulation and not a violation of the XIVth Amendment; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; so also a statute forbidding inn-keepers, common carriers, theatres, schools and cemetery associations from excluding any person by reason of race or color; People v. King, 110 N. Y. 418, 18 N. E. 245, 1 L. R. A. 293, 6 Am. St. Rep. 389; a statute requiring an annual license tax from foreign corporations which do not invest and use their capital within the state; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; an affirmance on appeal of death sentence in the absence of the accused and his counsel and without notice to either; Schwab v. Berggren, 143 U. S. 442, 12 Sup. Ct. 525, 36 L. Ed. 218; punishment of death by electricity; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971; trials without a jury if according to the settled course of proceedings; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Gibson v. Mason, 5 Nev. 283; Janes v. Reynolds' Adm'rs, 2 Tex. 250; whether by motion or action, if sanctioned by state law and with opportunity for hearing; Iowa C. Ry. Co. v. Iowa, 160 U. S. 389, 16 Sup. Ct. 344, 40 L. Ed. 467; and the hearing need not be according to the practice of the courts, but by appropriate judicial proceedings; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; the decisions of administrative officers under the immigration acts; Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; trial and sentence by a judge *de facto* of a court *de jure*, though appointed by the governor without authority; In re Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264; conviction before a *de facto* officer; In re Ah Lee, 5 Fed. 899, 6 Sawy. 410; altering the mode of fixing water rates in a city; Spring Valley Water-Works v. Bartlett, 16 Fed. 615, 8 Sawy. 555; validating *ultra vires* contracts; Gross v. U. S. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795; trebling taxation as a penalty for fraud; State v. Moss, 69 Mo. 495; limiting municipal taxation to prevent payment of a judgment; State v. Mayor of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; proceeding by information; Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559; Hurtado v. People, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232, as explained and affirmed in Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; Hodgson v. Vermont, 168 U. S. 262, 18 Sup. Ct. 80, 42 L. Ed. 461; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; Davis v. Burke, 179 U. S. 399, 21 Sup. Ct. 210, 45 L. Ed. 249; *contra*, Shaw, C. J., in Jones v. Robbins, 8 Gray (Mass.) 329; see also State v. Starling, 15 Rich. (S. C.) 120; the trial of cases without a jury; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; the principle with respect to such details being that the provision against taking property without due process of law does not apply where the party has had a fair trial in a court of justice according to the modes of proceeding applicable to such case; Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; the fact that the judgment of a commissioner is final does not operate as a deprivation of due process of law; Ex Parte Ah Fook, 49 Cal. 402; nor does the entry of a judgment on forfeited recognizance; People v. Quigg, 59 N. Y. 83; a statute authorizing the immigration commissioner to prevent the landing of lewd women; Ex Parte Ah Fook, 49 Cal. 402; prohibiting any person from making or mending burglars' tools; Ex parte Roberts, 166 Mo. 207, 65 S. W. 726; prohibiting saloons from selling liquor in places where women are permitted to enter; Cronin v. Adams, 192 U. S. 108, 24 Sup. Ct. 219, 48 L. Ed. 365 (where the court said: "There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or of a citizen of the United States); a statute making the owner of premises on which liquor is sold with his knowledge liable for all damages resulting from the intoxication of any person purchasing the liquor; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; an ordinance prohibiting the keeping of billiard halls (not unconstitutional

either as depriving the owner of his property without due process of law, or as depriving him of the equal protection of the laws); Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; (and the classification regulating billiard halls based on hotels having twenty-five rooms is reasonable; Murphy v. California, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153); the discharge of a jury in a murder trial for cause shown before being sworn; Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421 (where it was held that the amendment was not intended to interfere with the power of the state to protect life, liberty or property of citizens, or with the power of adjudication of its courts, in administering process provided by the state law); regulation by the state of admission of persons to places of amusement, with the provision that persons holding tickets therefor shall be admitted if not under the influence of liquor, boisterous or of immoral character; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; statutes authorizing the administration on the estates of absentees if the period of absence be fixed and not unreasonably brief; Cunnius v. School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, affirming *id.*, 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; a municipal ordinance providing for the inspection of good products kept in storage and for the summary seizure and destruction of what is unfit for use; North American Cold Storage Co. v. Chicago, 151 Fed. 120; the restriction of the right of appeal to an intermediate appellate court in lieu of the state supreme court; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; a review by an appellate court of final judgment in a criminal case not being necessary to constitute due process; McKane v. Durston, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. Ed. 867; the entry of a judgment on a bond which is forfeited is not invalid; Janes v. Reynolds' Adm'rs, 2 Tex. 250; nor the entry of a judgment for money which is void for want of proper service; York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; authorizing the sale of animals running at large; Campau v. Langley, 39 Mich. 451, 33 Am. Rep. 414; making a garnishee liable to pay a judgment if he fails to render a sworn account; Vaughan v. Furlong, 12 R. I. 127; conviction and sentence to death of a prisoner when after the verdict one of the jurors was insane, the court having upon inquiry found that he was of sufficient mental capacity during the trial to act as a juror; Jordan v. Massachusetts, 225 U. S. 167, 32 Sup. Ct. 651, 56 L. Ed. 1038.

A transfer or succession tax is valid; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Magoun v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; it does not violate either the XIVth Amendment or sec. 10 of art. I, of the constitution; Orr v. Gilman, 183 U. S. 278, 22 Sup. Ct. 213, 46 L. Ed. 196 (where it was held that the opinion in Carpenter v. Pennsylvania, 17 How. [U. S.] 456, 15 L. Ed. 127, though prior to the XIVth Amendment, correctly defines the limits of jurisdiction between the state and federal governments in respect of controlling the assets of decedents both before and after that amendment); nor does a state inheritance tax; Campbell v. California, 200 U. S. 87, 26 Sup. Ct. 182, 50 L. Ed. 382 (where it was said that the XIVth Amendment does not deprive the state of the right to regulate and burden the right of inheritance, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion and be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority); a provision in the California constitution that "all contracts for the sales of shares of capital stock of any corporation or association on margin shall be void and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction," directed against sales on margins; Ottis v. Parker, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323. A tax law which gives a right to be heard, but does not extend a rehearing on appeal to railroad companies, though it does to ordinary taxpayers, is valid; Pittsburgh, C., C. & St. L. R. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, where Brewer, J., says: "The power of a state to make classifications in judicial or administrative proceedings carries with it the right to make such a classification as will give to parties belonging to one class two hearings and to parties belonging to a different class only a single hearing;" and on this authority a statute making final the decision of an inferior court in a local option election contest was held valid; Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L. R. A. (N. S.) 377. See EQUAL PROTECTION OF THE LAWS.

An erroneous decision does not deprive the unsuccessful party of liberty without due process of law; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; nor do mere errors in the administration of a state statute not unconstitutional; Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825, 35 L. Ed. 419; nor imprisonment under a valid law, though there was error in the proceedings; In re Ah Lee, 5 Fed. 899; nor error in a charge to a jury in a criminal case; Davis v. Texas, 139 U. S. 651, 11 Sup. Ct. 675, 35 L. Ed. 300. The guaranty is not violated by an order requiring an attorney to defend an accused person gratuitously; Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876. The XIVth Amendment did not

change the law as held prior to it that regulation of the use, or even of the price of the use, of private property, was not depriving the owner of it without due process of law; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77.

Acts and Proceedings Which Violate the Guaranty of Due Process of Law. Acts of a state held to infringe the guaranty of due process of law are: Taking property by the state for public use without compensation; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Chicago, B. & Q. R. Co. v. Drainage Com'rs, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596; and so also if taken under a judgment of the state court though authorized by statute; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; but if compensation was provided for before a proper tribunal there is due process of law; Backus v. Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; Otis Co. v. Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696. The exclusion of colored men on account of race from the grand jury was held a denial of rights under the XIVth Amendment; Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257, 48 L. Ed. 417.

Other acts held unconstitutional were: One forbidding the manufacture of cigars in tenement houses; In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; and a New York statute respecting the sale of oleomargarine; People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285 (on the other hand the constitutionality of the Pennsylvania act on the same subject was affirmed; Powell v. Commonwealth, 114 Pa. 265); a prohibition against laundries except of brick or stone, without the consent of the supervisors, because clearly intended for discrimination against the Chinese; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; a statute requiring every member of a firm of plumbers to be a registered plumber, whether his duties require him to have knowledge of that trade or not, is an unwarranted interference with liberty and property; Schnaier v. Importation Co., 182 N. Y. 83, 74 N. E. 561, 70 L. R. A. 722, 108 Am. St. Rep. 790; State v. Smith, 42 Wash. 237, 84 Pac. 851, 5 L. R. A. (N. S.) 674, and note, 114 Am. St. Rep. 114, 7 Ann. Cas. 577; so is a statute forbidding women to work in a factory before 6 a. m. or after 9 p. m.; People v. Williams, 189 N. Y. 131, 81 N. E. 778, 12 L. R. A. (N. S.) 1130, 121 Am. St. Rep. 854, 12 Ann. Cas. 798; and one limiting hours of labor for employés of bakers; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, reversing People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773 (the bake shop case); but it was held otherwise as to limiting hours of labor in employments when health is involved, as in underground mines; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; Ex parte Kair, 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 893; State v. Mfg. Co., 34 Mont. 571, 87 Pac. 980, 9 Ann. Cas. 204; State v. Cantwell, 179 Mo. 245, 78 S. W. 569; or for a woman to work in a factory, laundry or mechanical establishment more than ten hours a day; Muller v. State of Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957, affirming State v. Muller, 48 Or. 252, 85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; or limiting hours of work for children under sixteen; State v. Shorey, 48 Or. 396, 86 Pac. 881, 24 L. R. A. (N. S.) 1121; In re Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

Denial of due process of law by municipal authorities while acting as a board of equalization amounts to a denial by the state; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; the guaranty is denied by imprisonment under a void ordinance; In re Lee Long, 18 Fed. 253; but not under a valid law by reason of error in the proceedings; In re Ah Lee, 5 Fed. 899, 6 Sawy. 410.

Statutes authorizing the destruction of property used for unlawful gaming were held void; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; so also the sale of land to satisfy void street assessments which the legislature has unconstitutionally attempted to validate; Brady v. King, 53 Cal. 44; the commitment to the workhouse of an alleged pauper by two overseers *ex parte* and without hearing; City of Portland v. City of Bangor, 65 Me. 120, 20 Am. Rep. 681, reversing earlier cases before the adoption of the XIVth Amendment. A judgment *in personam* without service within the jurisdiction is void; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; see York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604; no judgment of a court is due process of law if rendered without jurisdiction or notice to the party; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896. A statute providing that the use of an easement shall not be evidence of a right thereto is unconstitutional as to rights acquired prior thereto; Reynolds v. Randall, 12 R. I. 522; and so is an act purporting to make a tax deed conclusive evidence of title; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410 (it may be made *prima facie* evidence); an act fixing absolute liability on a corporation to make compensation for injuries done to property without fault, when no one else would be liable under the general law; Zeigler v. R. Co., 58 Ala. 594; an act authorizing a lien on a tombstone and its sale for non-payment without provision for adjusting the rights of the parties; Brooks v.

Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445; a statute dispensing with personal service in proceedings where it is practicable and usual, the parties being within the jurisdiction; Brown v. Board of Levee Com'rs, 50 Miss. 468; imposing an assessment for local improvement without notice or an opportunity for hearing; it is not enough that the owner may have notice and hearing, the law must provide for it; Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289; Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 847; Violett v. Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382, 53 Am. St. Rep. 825.

The proceedings of a board of equalization of state taxes, its decision being conclusive, are reviewable in the federal courts at the suit of one claiming that he was deprived thereby of due process of law; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, where a tax was held to be an illegal discrimination against property of the same class where it was so great as to cause insolvency.

A state statute requiring that no railroad company shall require a stipulation from its employés waiving damages for injury violates their liberty of contract, and is also void as class legislation in violation of the Ohio constitution; Shaver v. Pennsylvania Co., 71 Fed. 931.

A county ordinance, of which the manifest purpose is to limit the number of any kind of game to be killed or taken by one person in a day, and making it a misdemeanor to use a repeating shotgun or magazine gun, is void; In re Marshall, 102 Fed. 323 (but such prohibition is valid when directed against aliens, and is not in contravention of the treaty between Italy and the United States; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928).

In Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, it was held that taking private property under a rule which excluded any inquiry as to special benefits, the necessary operation of which was to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, was a taking of private property for private use without compensation.

A state statute establishing a board of medical examiners and conditions under which persons will be licensed to practice osteopathy does not deprive one who refuses to apply for a license therein of his property under due process of law or deny him the equal protection of the law; Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286, 56 L. Ed. 439; nor does a state statute making entries in public records *prima facie*, but not conclusive, evidence of the validity of the proceedings referred to; Reitler v. Harris, 223 U. S. 437, 32 Sup. Ct. 248, 56 L. Ed. 497.

Contempt of Court. A commitment for contempt of court is not obnoxious to this constitutional provision; State v. Becht, 23 Minn. 411; Eikenberry v. Edwards, 67 Ia. 619, 25 N. W. 832, 56 Am. Rep. 360; In re Clayton, 59 Conn. 510, 21 Atl. 1005, 13 L. R. A. 66, 21 Am. St. Rep. 128; State v. Shepherd, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; Com. v. Gibbons, 9 Pa. Super. Ct. 527; In re Barnes, 204 N. Y. 108, 97 N. E. 508; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; whether under the inherent power of courts or under statutes authorizing summary punishment; In re Barnes, 147 App. Div. 396, 132 N. Y. Supp. 908; Brown v. Powers (Ia.) 134 N. W. 73; nor is a commitment for failure to pay a tax, not resorted to until other means of collection have failed, and then only upon a showing of property possessed, not accessible to levy, but enabling the owner to pay if he chooses; Palmer v. McMahon, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; but a person summarily adjudged guilty of contempt by a court without a hearing or service upon him of any process, for an act not committed in the presence of the court, and imprisonment for non-payment of the fine imposed, is deprived of his liberty without due process of law; Ex parte Stricker, 109 Fed. 145.

To punish for contempt by striking an answer from the files and condemning as by default is denial of due process of law; but, under the power conferred by statute, the answer of a foreign corporation was stricken from the files and a judgment rendered as by default because of the failure or refusal of the corporation defendant to produce books and papers from outside of the state as required by the statute; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; which decision on this point, was based upon the undoubted right of the legislature to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses, or fails to produce, evidence when legally called upon to produce it.

Where a railroad rate statute was held unconstitutional by a federal court and all the defendants, including the attorney general, were enjoined from enforcing it, and the attorney general refused to comply with the order, and was fined and committed for contempt, the supreme court refused to discharge him on *habeas corpus*, it being considered that he was a state officer charged with the duty of enforcing the statute, if constitutional, and therefore was properly joined as a defendant; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

Notice. Guarantee by the XIVth Amendment does not require a state to adopt a particular form of procedure, so long as the accused has had sufficient notice and an adequate opportunity to defend himself, and a

state may determine, free from federal interference or control, in what courts crime may be prosecuted and by what courts the prosecution may be reviewed; Rogers v. Peck, 199 U. S. 425, 26 Sup. Ct. 87, 50 L. Ed. 256.

The essential elements of due process of law are notice and opportunity to defend; Simon v. Craft, 182 U. S. 427, 436, 21 Sup. Ct. 836, 45 L. Ed. 1165; "in determining whether such rights were denied we are governed by the substance of things and not by mere form;" *id.*, citing Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747; it is not necessary that the proceedings in a state court should be by particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunity to defend against it"; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165, citing Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 20 Sup. Ct. 620, 44 L. Ed. 747.

While the essential element of due process is opportunity to be heard, a necessary condition of which is notice; Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; personal notice is not always necessary; Jacob v. Roberts, 223 U. S. 261, 32 Sup. Ct. 303, 56 L. Ed. 429.

It is necessary that a tax payer be afforded a hearing, of which he must have notice, and this requirement is not satisfied by the mere right to file objections in writing; Londoner v. Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103, where it was held that the legislature may authorize municipal improvements without any petition of land owners who are to be assessed therefor and the proceedings of the municipality in accordance with the charter and without hearings, do not deny due process of law to land owners who are afforded a hearing on the assessment itself.

Federal courts follow state courts in deciding as to notice and service under a state statute; Ballard v. Hunter, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461.

A statute providing for the taking of private property for a railroad and for the assessment of damages by commissioners, need not, under the Delaware constitution, provide for notice to the owner of the time and place of meeting of the commissioners, nor need it secure to the owner a hearing; the United States constitution and amendments impose no restraint upon the states in the exercise of the right of eminent domain, and the words, "due course of law," in the state constitution do not apply thereto; Wilson v. R. Co., 5 Del. Ch. 524, in which case the authorities are collected and the construction of these words exhaustively considered by Saulsbury, Ch. But as to this and some other cases, holding that notice is not required, see EMINENT DOMAIN, *subtit. Notice and Procedure.*

As to the doctrine of due process before the civil war, see articles by E. S. Corwin in 24 Harv. L. Rev. 366, 460.

See 27 Am. Law Reg. 611, 700; 28 *id.* 129; 31 Am. St. Rep. 104; 48 Am. Dec. 269; Le Grand v. U. S., 12 Fed. 583; San Mateo County v. Southern Pac. R. Co., 13 Fed. 783; 3 L. R. A. 194; 4 L. R. A. 724; 21 L. R. A. 789.

As to assessments for improvements or benefits, see ASSESSMENTS; EMINENT DOMAIN.

DUELLING. The fighting of two persons, one against the other, at an appointed time and place, upon a precedent quarrel. It differs from an affray in this, that the latter occurs on a sudden quarrel, while the former is always the result of design.

When one of the parties is killed, the survivor is guilty of murder; 1 Russ. Cr. 443; Smith v. State, 1 Yerg. (Tenn.) 228; as the deliberate killing of another in a duel is not a killing in a heat of passion which will mitigate the crime, however grievous the provocation may have been; 3 East 581; 8 Carr. & P. 644; but evidence of a mutual willingness to fight upon the part of persons, one of whom killed the other in a fight, has been held to authorize an instruction that the offence was murder in the second degree; Wiley v. State (Tex.) 65 S. W. 190.

Fighting a duel, even where there is no fatal result, is of itself a misdemeanor. See 2 Com. Dig. 252; Clark, Cr. L. 340; Co. 3d Inst. 157; Const. 167; Barker v. People, 20 Johns. (N. Y.) 457; State v. Herriott, 1 McMull. (S. C.) 126. For cases of mutual combat upon a sudden quarrel, see 1 Russ. Cr. 495; 2 Bish. Cr. Law § 311. Under the constitutions of some states, any one directly or indirectly engaged in a duel is forever disqualified from holding public office. See Com. v. Jones, 10 Bush (Ky.) 725; Barker v. People, 20 Johns. (N. Y.) 457; Moody v. Com., 4 Metc. (Ky.) 1; State v. Dupont, 2 McCord (S. C.) 334; Royall v. Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335; CHALLENGE.

DUELLUM. Trial by battle. Judicial combat. Spelman, Gloss. See WAGER OF BATTEL.

DUES. When used of a corporation it includes, in the Kansas constitution, all contractual liabilities, but not, as against a stockholder, an *ultra vires* contract. Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456.

DUKE. The title given to those who are in the highest rank of nobility in England. First held by the Black Prince, as a superior kind of earldom.

DUKE OF YORK'S LAWS. A body of laws compiled in 1665 for the government of the colony of New York.

DUM SE BENE GESSERIT (Lat. while he shall conduct himself well). These words signify that a judge or other officer shall hold his office during good behavior, and not at the pleasure of the crown nor for a certain limited time.

DUM FUIT IN PRISONA (L. Lat.). A writ which lay for a man who had aliened lands under duress by imprisonment, to restore to him his proper estates. Co. 2d Inst. 482. Abolished by stat. 3 & 4 Will. IV. c. 27.

DUM FUIT INFRA ÆTATEM (Lat.). The name of a writ which lay when an infant had made a feoffment in fee of his lands or for life, or a gift in tail. Abolished by stat. 3 & 4 Will. IV. c. 27.

It could be sued out by him after he came of full age, and not before; but in the meantime he could enter, and his entry remitted him to his ancestor's rights; Fitzh. N. B. 192; Co. Litt. 247, 337.

DUM NON FUIT COMPOS MENTIS (Lat.). The name of a writ which the heirs of a person who was *non compos mentis*, and who aliened his lands, might have sued out to restore him to his rights. Abolished by 3 & 4 Will. IV. c. 27.

DUM SOLA (Lat. while single or unmarried). A phrase to denote that something has been done, or may be done, while a woman is or was unmarried. Thus, when a judgment is rendered against a woman *dum sola*, and afterward she marries, the *scire facias* to revive the judgment must be against both husband and wife.

DUM SOLA ET CASTA (Lat. while unmarried and chaste). Decrees for alimony sometimes provide that it shall be paid only so long as the divorced wife remains unmarried and chaste. See DIVORCE.

DUMB. Unable to speak; mute. See DEAF AND DUMB.

DUMB-BIDDING. In sales at auction, when the amount which the owner of the thing sold is willing to take for the article is written, and placed by the owner under a candlestick, or other thing, and it is agreed that no bidding shall avail unless equal to that, this is called dumb-bidding. Babington, Auct. 44.

DUN. One who duns or urges for payment; a troublesome creditor. A demand for payment, whether oral or written. Stand. Dict.

DUNGEON. A cell under ground; a place in a prison built under ground, dark, or but indifferently lighted.

DUNNAGE. Pieces of wood placed against the sides and bottom of the hold of a vessel, to preserve the cargo from the effect of leakage, according to its nature and quality. Abbott, Shipp. 227.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other; Great Western Ins. Co. v. Thwing, 13 Wall. (U. S.) 674, 20 L. Ed. 607.

DUODECIMA MANUS (Lat.). Twelve hands. The oaths of twelve men, including himself, by whom the defendant was allowed to make his law. 3 Bla. Com. 343.

DUPLEX QUERELA (Lat.). A complaint in the nature of an appeal from the ordinary to his next immediate superior for delaying or refusing to do justice in some ecclesiastical cause. 3 Bla. Com. 247.

DUPLEX VALOR MARITAGII (Lat. double the value of a marriage). Guardians in chivalry had the privilege of proposing a marriage for their infant wards, provided it were done without disparagement, and if the wards married without the guardian's consent they were liable to forfeit double the value of marriage. Co. Litt. 82 *b*; 2 Sharsw. Bla. Com. 70.

DUPLICATE (Lat. *duplex*, double). The double of anything. A document which is essentially the same as some other instrument. 7 Mann. & G. 93; Benton v. Martin, 40 N. Y. 345,

A duplicate writing has but one effect. Each duplicate is complete evidence of the intention of the parties. When a duplicate is destroyed, for example, in the case of a will, it is presumed both are intended to be destroyed; but this presumption possesses greater or less force, owing to circumstances. When only one of the duplicates is in the possession of the testator, the destruction of that is a strong presumption of any intent to revoke both; but if he possessed both, and destroys but one, it is weaker; when he alters one, and afterwards destroys it, retaining the other entire, it has been held that the intention was to revoke both; 1 P. Wms. 346; 13 Ves. 310. But that seems to be doubted; 3 Hagg. Eccl. 548. See Com. v. Beamish, 81 Pa. 389; 49 E. C. L. 94; 103 *id.* 29; Nelson v. Blakey, 54 Ind. 29. As to the execution of a number of deeds, all to constitute one deed, see DEED.

In English Law. The certificate of discharge given to an insolvent debtor who takes the benefit of the act for the relief of insolvent debtors.

DUPLICATIO (Lat. a doubling). The defendant's second answer; that is, the answer to the plaintiff's replication.

DUPLICATUM JUS (Lat. a twofold or double right). Words which signify the same as *dreit dreit*, or *droit droit*, and which are applied to a writ of right, patent, and such

other writs of right as are of the same nature, and do as it were flow from it as the writ of right. Booth, Real Act. 87.

DUPLICITY (Lat. *duplex*, twofold; double). The union of more than one cause of action in one count in a writ, or more than one defence in one plea, or more than a single breach in a replication. Jackson v. Rundlet, 1 W. & M. 381, Fed. Cas. No. 7,145.

The union of several facts constituting together but one cause of action, or one defence, or one breach, does not constitute duplicity; Torrey v. Field, 10 Vt. 353; Harker v. Brink, 24 N. J. L. 333; Holland v. Kibbe, 16 Ill. 133; Beckley v. Moore, 1 McCord (S. C.) 464; State v. Bank, 33 Miss. 474; Gulf, C. & S. F. Ry. Co. v. Buford, 2 Tex. Civ. App. 115, 21 S. W. 272; State v. Christmas, 101 N. C. 749, 8 S. E. 361; Merriman v. Mach. Co., 86 Wis. 142, 56 N. W. 743; State v. Warren, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; Tracy v. Com., 87 Ky. 578, 9 S. W. 822. Though the joinder of two or more distinct offences in one count of an indictment is faulty, yet where the acts imputed are component parts of the same offence the pleading is not objectionable for duplicity; Farrell v. State, 54 N. J. L. 416, 24 Atl. 723; nor is it where one of the two offences charged is insufficiently set out; State v. Henn, 39 Minn. 476, 40 N. W. 572. It must be of causes on which the party relies, and not merely matter introduced in explanation; Dunning v. Owen, 14 Mass. 157. In trespass it is not duplicity to plead to part and justify or confess as to the residue; Parker v. Parker, 17 Pick. (Mass.) 236. If only one defence be valid, the objection of duplicity is not sustained; Porter v. Brackenridge, 2 Blackf. (Ind.) 385.

It may exist in any part of the pleadings; the declaration; Morse v. Eaton, 23 N. H. 415; Jarman v. Windsor, 2 Harr. (Del.) 162; pleas; Welch v. Jamison, 1 How. (Miss.) 160; replication; Benner v. Elliott, 5 Blackf. (Ind.) 451; Calhoun v. Wright, 3 Scam. (Ill.) 74; Bennett v. Martin, 6 Mo. 460; or subsequent pleadings; Tebbets v. Tilton, 24 N. H. 120; United States v. Gurney, 1 Wash. C. C. 446, Fed. Cas. No. 15,271; and was at common law a fatal defect; Robinson v. Rice, 20 Mo. 229; to be reached on demurrer only; Cunningham v. Smith, 10 Gratt. (Va.) 255, 60 Am. Dec. 333; King v. Howard, 1 Cush. (Mass.) 137; Gardiner v. Miles, 5 Gill (Md.) 94; Benner v. Elliott, 5 Blackf. (Ind.) 451; People v. Clement, 4 Cal. Unrep. 493, 35 Pac. 1022. The rules against duplicity did not extend to dilatory pleas so as to prevent the use of the various classes in their proper order; Co. Litt. 304 *a*; Steph. Pl. App. n. 56.

Owing to the statutory changes in the forms of pleading, duplicity seems to be no longer a defect in many of the states, either in declarations; Blakeney v. Ferguson, 18 Ark. 347; pleas; King v. Howard, 1 Cush. (Mass.) 137; Bryan v. Buford, 7 J. J. Marsh. (Ky.) 335; or replications; Zehnor v. Beard, 8 Ind. 96; though in some cases it is allowed only in the discretion of the court, for the furtherance of justice.

It is too late after verdict to object to duplicity in an information for a misdemeanor; State v. Armstrong, 106 Mo. 395, 16 S. W. 604, 13 L. R. A. 419, 27 Am. St. Rep. 361.

DURANTE ABSENTIA. See EXECUTORS AND ADMINISTRATORS.

DURANTE BENE PLACITO (Lat.). During good pleasure. The ancient tenure of English judges was *durante bene placito*, at the pleasure of the king. See JUDGE. 1 Bla. Com. 267, 342.

DURANTE MINORE ÆTATE (Lat.). During the minority. An infant can enter into no contracts during his minority, except those for his benefit. If he should be appointed an executor, administration of the estate will be granted, *durante minore ætate*, to another person. 2 Bouvier, Inst. n. 1555.

DURANTE VIDUITATE (Lat.). During widowhood.

DURATION. Extent, limit or time. People v. Hill, 7 Cal. 102.

DURBAR. In India, a court, audience, or levee.

DURESS. Personal restraint, or fear of personal injury or imprisonment. Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445.

Duress of imprisonment exists where a man actually loses his liberty. If a man be illegally deprived of his liberty until he sign and seal a bond, or the like, he may allege this duress and avoid the bond; Heaps v. Dunham, 95 Ill. 583; Rollins v. Lashus, 74 Me. 218; Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141. But if a man be legally imprisoned, and, either to procure his discharge, or on any other fair account, seal a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it; Co. 2d Inst. 482; Eddy v. Herrin, 17 Me. 338, 35 Am. Dec. 261; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170. Where the proceedings at law are a mere pretext, the instrument may be avoided; Aleyn 92; 1 Bla. Com. 136.

Duress per minas, which is either for fear of loss of life, or else for fear of mayhem or loss of limb, must be upon a sufficient reason; 1 Bla. Com. 131. In this case, a man may avoid his own act. Coke enumerates four instances in which a man may avoid his own act by reason of menaces: For fear of *loss of life; of member; of mayhem; of imprisonment;* Co. 2d Inst. 483; 2 Rolle, Abr. 124; Bac. Abr. *Duress, Murder*, A; 2 Ld. Raym. 1578; Savigny, Dr. Rom. § 114;

Motz v. Mitchell, 91 Pa. 114; Brown v. Pierce, 7 Wall. (U. S.) 205, 19 L. Ed. 134.

It has been held that restraint of goods under circumstances of hardship will avoid a contract; Collins v. Westbury, 2 Bay (S. C.) 211, 1 Am. Dec. 643; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409; 11 Exch. 878. But see Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445; Maisonnaire v. Keating, 2 Gall. 337, Fed. Cas. No. 8,978; Block v. U. S., 8 Ct. Cl. 461; Lehman v. Shackleford, 50 Ala. 437.

The duress to avoid a deed is that which compels the grantor to do what he would not do voluntarily; Savage v. Savage, 80 Me. 472, 15 Atl. 43; Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Griffith v. Sitgreaves, 90 Pa. 161. If a contract is made under duress and subsequently ratified, it becomes valid; Ferrari v. Board of Health, 24 Fla. 390, 5 South. 1; Belote v. Henderson, 5 Coldw. (Tenn.) 471, 98 Am. Dec. 432.

The violence or threats must be such as are calculated to operate on a person of ordinary firmness and inspire a just fear of great injury to person, reputation, or fortune. See Seymour v. Prescott, 69 Me. 376; McClair v. Wilson, 18 Colo. 82, 31 Pac. 502; Bosley v. Shanner, 26 Ark. 280; Mollere v. Harp, 36 La. Ann. 471. The resisting power which any man is bound to exercise for his own protection was measured, in the common law, by the standard of a man of courage, as a part of the law itself; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. There is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining it, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence of threats, must be taken into consideration; 1 Ky. L. Rep. 137; Parmentier v. Pater, 13 Or. 121, 9 Pac. 59; U. S. v. Huckabee, 16 Wall. (U. S.) 432, 21 L. Ed. 457.

Violence or threats will amount to duress not only where they are exercised on the contracting party, but when the wife, the husband, or children of the party are the object of them; Eadie v. Slimmon, 26 N. Y. 12, 82 Am. Dec. 395; Harris v. Carmody, 131 Mass. 51, 41 Am. Rep. 188. The defence was sustained where a father was coerced into executing a mortgage to secure restitution of his son's defalcation by threats of prosecution; Williamson, Halsell, Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; McCormick Harvesting Mach. Co. v. Hamilton, 73 Wis. 486, 41 N. W. 727; Bryant v. Peck & Whipple Co., 154 Mass. 460, 28 N. E. 678; where a father gave a note to avoid prosecution of his son and son-in-law; Folmar v. Siler, 132 Ala. 297, 31 South. 719; National Bank of Oxford v. Kirk, 90 Pa. 49; where a wife gave a note and mortgage to prevent prosecution of her husband, he being already under arrest; Jones v. Dannenberg Co., 112 Ga. 426, 37 N. E. 729, 52 L. R. A. 271 (even though the note was in the hands of a *bona fide* holder, etc.); Harris v. Webb, 101 Ga. 84, 28 S. E. 620; but not, where a son-in-law was threatened with prosecution, the father-in-law, with deliberation, gave his notes and agreed with his daughter that they should constitute an advancement; Loud v. Hamilton (Tenn.) 51 S. W. 140, 45 L. R. A. 400; or where a mortgage was given to stop a threatened prosecution of the mortgagor's husband, but no promise was given not to prosecute; Moyer v. Dodson, 212 Pa. 344, 61 Atl. 937; or where one agreed not to prosecute his agent if he would make restitution of his embezzled funds; Allen v. Dunham, 92 Tenn. 257, 21 S. W. 898.

If the violence used be only a legal constraint, or the threats only of doing that which the party using them had a right to do, they shall not invalidate the contract. A just and legal imprisonment, or threats of any measure authorized by law and the circumstances of the case, are of this description. See Norris, Peake's Ev. 440, and the cases cited; also, Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Thorn v. Pinkham, 84 Me. 103, 24 Atl. 718, 30 Am. St. Rep. 335; Hilborn v. Bucknam, 78 Me. 482, 7 Atl. 272, 57 Am. Rep. 816. A man lawfully arrested on a warrant for seduction, who, to procure his discharge marries the woman, cannot have the marriage declared void; Marvin v. Marvin, 52 Ark. 425, 12 S. W. 875, 20 Am. St. Rep. 191; Lacoste v. Guidroz, 47 La. Ann. 295, 16 South. 836; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24; Sickles v. Carson, 26 N. J. Eq. 440; Blankenmiester v. Blankenmiester, 106 Mo. App. 390, 80 S. W. 706; Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937, 14 Ann. Cas. 866. A marriage between cousins, upon the threat of the man that if the woman would not marry him he would blow out his brains, would not be set aside, where the woman went through the marriage ceremony without any sign of unwillingness, though the marriage was never consummated, and the man admitted that he had only married her for her money, and she was of a weak character; [1891] P. 369. To constitute duress which will be regarded as sufficient to make a payment involuntary there must be some actual or threatened exercise of power possessed or believed to be possessed by the

party exacting the payment over the person or property of another, for which the latter has no other means of immediate relief than by making the payment; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409. There is no ironclad rule which confines an involuntary payment to cases of duress. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle; Buckley v. Mayor, 30 App. Div. 463, 52 N. Y. Supp. 452. One who negotiates a loan to take up an existing mortgage upon which foreclosure proceedings have been begun, and who is required under protest to pay an illegal bonus to secure a discharge of the mortgage, acts under duress in so doing, and can recover the amount paid; Kilpatrick v. Ins. Co., 183 N. Y. 163, 75 N. E. 1124, 2 L. R. A. (N. S.) 574, 110 Am. St. Rep. 722.

As to other contracts it is said that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public. One who has overcome the will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them; Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Burton v. McMillan, 52 Fla. 469, 42 South. 849, 8 L. R. A. (N. S.) 991, 120 Am. St. Rep. 220, 11 Ann. Cas. 380; Gorringe v. Reed, 23 Utah, 120, 63 Pac. 902, 90 Am. St. Rep. 692; Hargreaves v. Korcek, 44 Neb. 660, 62 N. W. 1086; and to the same effect, Lomerson v. Johnston, 44 N. J. Eq. 93, 13 Atl. 8; Coffman v. Bank, 5 Lea (Tenn.) 232, 40 Am. Rep. 31; Bell v. Campbell, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; Heaton v. Bank, 59 Kan. 281, 52 Pac. 876.

In the early common law, duress, strictly so called, was a matter of law. It was pleadable as a defence or as material to a cause of action, by alleging the existence of specific circumstances legally sufficient to constitute duress. Oppression of one person by another, causing such person to surrender something of value to another, not amounting to duress within the rigorous rules of law, regardless of whether the oppression actually deprived the oppressed party of the exercise of his free will, was remediless except by an appeal to equity, where a remedy was obtainable on the ground of unlawful compulsion; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417, where it is said that the real foundation principle of duress is that it is the condition of mind of the wronged person at the time of the act sought to be avoided, not the means by which such a condition was produced. In its broad sense duress is now said to include all instances where a condition of mind of a person caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power; Williamson v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion; Galusha v. Sherman, 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417.

Threats of unlawful imprisonment are not necessary to constitute duress. It was never contemplated in the law that either the actual use or misuse of criminal process, legal or illegal, should be resorted to for the purpose of compelling the payment of a mere debt, or to coerce the making of contracts. Ample civil remedies are afforded in the law to enforce the payment of debts and the performance of contracts; but the criminal law and the machinery for its enforcement have a wholly different purpose and cannot be employed to interfere with that wise and just policy of the law that all contracts and agreements shall be founded upon the exercise of the free will of the parties, which is the real essence of all contracts; Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 20 South. 651; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7, 6 L. R. A. 491, 15 Am. St. Rep. 447; Henry v. Bank, 131 Ia. 97, 107 N. W. 1034; Williamson, Halsell Frazier Co. v. Ackerman, 77 Kan. 502, 94 Pac. 807, 20 L. R. A. (N. S.) 484; Burton v. McMillan, 52 Fla. 228, 42 South. 879, 11 L. R. A. (N. S.) 159.

Excessive charges paid to railroad companies refusing to carry or deliver goods, unless these payments were made voluntarily, have been recovered on the ground of duress; 27 L. J. Ch. 137; 32 *id.* 225; 30 L. J. Exch. 361; 28 *id.* 169. Where the carrier refuses to transport stock until a special contract is signed limiting its liability, it does not bind the shipper; Atchison, T. & S. F. R. Co. v. Dill, 48 Kan. 210, 29 Pac. 148.

Where, in addition to money penalties for delay in payment of a tax, there is forfeiture of the right to do business and risk of having contracts declared illegal for non-payment thereof, payment is made under duress. "Courts sometimes perhaps have been a little too slow to recognize the implied duress under

which payment is made" of taxes; Atchison, T. & S. F. Ry. Co. v. O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; Gaar, Scott & Co. v. Shannon, 223 U. S. 468, 32 Sup. Ct. 236, 56 L. Ed. 510.

The burden of proving duress is on the party alleging it; Horton v. Bloedorn, 37 Neb. 666, 56 N. W. 321.

There is said to be some conflict in the authorities upon the question whether the defence of duress by threats can be successfully urged against a *bona fide* holder for value of negotiable paper, and that the better opinion and weight of authority is that such defence stands upon the same footing as other defences which may be made as between the original parties, but is cut off when the paper reaches the hands of a *bona fide* holder; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; Farmers' Bank of Grand Rapids v. Butler, 48 Mich. 192, 12 N. W. 36; Clark v. Pease, 41 N. H. 414; Beals v. Neddo, 2 Fed. 41, 1 McCrary 206. If such a contract be simply a voidable one, then it follows naturally that, when the contract consists of negotiable paper, the defence is cut off by transfer to a *bona fide* purchaser before maturity, in the same manner that other defences upon the ground of fraud are cut off; Mack v. Prang, 104 Wis. 1, 79 N. W. 770, 45 L. R. A. 407, 76 Am. St. Rep. 848. Is a defense to all save the gravest crimes, and one cannot, under compulsion kill another person, even in order to save his own life; 8 C. & P. 616.

DURHAM. See COUNTY PALATINE.

DURSLEY. **In Old English Law.** Blows without wounding or bloodshed; dry blows. Blount.

DUTIES. In its most enlarged sense, this word is nearly equivalent to taxes; State v. Telegraph Co., 73 Me. 518; Blake v. People, 109 Ill. 504; embracing all impositions or charges levied on persons or things; in its more restrained sense, it is often used as equivalent to *customs*, or *imposts*. Story, Const. § 949. In common use, an indirect tax imposed on the importation or consumption of goods. Pollock v. Trust Co., 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.

DUTY. A human action which is exactly conformable to the laws which require us to obey them.

That which is right or due from one to another. A moral obligation or responsibility.

It differs from a legal obligation, because a duty cannot always be enforced by the law: it is our duty, for example, to be temperate in eating, but we are under no legal obligation to be so; we ought to love our neighbors, but no law obliges us to love them.

DWELLING-HOUSE. A building inhabited by man. A house usually occupied by the person there residing, and his family. The apartment, building, or cluster of buildings in which a man with his family resides. 2 Bish. Cr. Law § 104.

The importance of an exact signification for this word is often felt in criminal cases; and yet it is very difficult to frame an exact definition which will apply to all cases. It is said to be equivalent to mansion-house; Com. v. Pennock, 3 S. & R. (Pa.) 199; State v. Sutcliffe, 4 Strobh. (S. C.) 372; 7 Mann. & G. 122. See 14 M. & W. 181; 4 C. B. 105; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560.

Judge Cooley, in Stearns v. Vincent, 50 Mich. 219, 15 N. W. 86, 45 Am. Rep. 37, says that in the law of burglary the dwelling-house is deemed to include whatever is within the curtilage, even though not inclosed with the dwelling, if used with it for domestic purposes; People v. Taylor, 2 Mich. 250; Pitcher v. People, 16 Mich. 142.

It must be a permanent structure; 1 Hale, Pl. Cr. 557; 1 Russ. Cr. 798; must be inhabited at the time; 2 Leach 1018, n.; State v. Warren, 33 Me. 30; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; Com. v. Barney, 10 Cush. (Mass.) 479; People v. Cotteral, 18 Johns. (N. Y.) 115; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; Scott v. State, 62 Miss. 782. It is sufficient if a part of the structure only be used for an abode; Russ. & R. 185; Stedman v. Crane, 11 Metc. (Mass.) 295; Cole v. State, 9 Tex. 42; 2 B. & P. 508; Dale v. State, 27 Ala. 31. How far a building may be separate is a difficult question; Com. v. Estabrook, 10 Pick. (Mass.) 293; State v. Langford, 12 N. C. 253; Armour v. State, 3 Humphr. (Tenn.) 379; State v. Ginns, 1 N. & McC. (S. C.) 583; Com. v. Sanders, 5 Leigh (Va.) 751; People v. Dupree, 98 Mich. 26, 56 N. W. 1046; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Chase v. Ins. Co., 20 N. Y. 52; 18 Q. B. 783; 22 Ir. L. T. Rep. 30; State v. Clark, 89 Mo. 430, 1 S. W. 332; Davis v. State, 38 Ohio St. 506; State v. Mordecai, 68 N. C. 207.

A suite of rooms in a college of the University of Cambridge is a dwelling-house; L. R. 4 C. P. 539. Six separate tenants occupied a house of ten rooms, each having exclusive possession of his part of the premises and the owner did not reside there. The outer and street door had no lock or bolt and was always kept open. The entry, stairway, and an ashpit and other conveniences were used in common. Two of the judges held that each of the six tenants occupied a "dwelling-house," and two held otherwise; L. R. 6 C. P. 327.

DWELLING-PLACE. See RESIDENCE; DOMICIL.

DYING DECLARATIONS. Dying declaration of one who did not believe in a Supreme Being are admissible, but are thereby discredited. Gambrell v. State, 92 Miss. 728, 46 South. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. 549, 16 Ann. Cas. 147. See DECLARATION.

DYING WITHOUT ISSUE. Not having issue living at the death of the decedent.

Van Vechten v. Pearson, 5 Paige, Ch. (N. Y.) 514; Fairchild v. Crane, 13 N. J. Eq. 105. In England this is the signification, by statutes 7 Will. IV.; 1 Vict. c. 26, § 29. But the old English rule, that the words, when applied to real estate, import an indefinite failure of issue, has been generally adhered to in this country; Den v. Allaire, 20 N. J. L. 6; Wilson v. Wilson, 32 Barb. (N. Y.) 328; Wallis v. Woodland, 32 Md. 101. See 2 Washb. R. P. 362; 4 Kent 273.

DYNASTY. A succession of kings in the same line or family.

DYSNOMY. Bad legislation; the enactment of bad laws.

DYSPEPSIA. The group of symptoms resulting from alterations in the process of digestion due either to functional or organic diseases of the stomach.

Dyspepsia is not, in general, considered as a disease which tends to shorten life, so as to make a life uninsurable, unless the complaint has become organic dyspepsia, or was of such a degree at the time of the insurance as by its excess to tend to shorten life; 4 Taunt. 763.

E

E CONVERSO (Lat.). On the other hand; on the contrary. Equivalent to *e contra.*

EAGLE. A gold coin of the United States of the value of ten dollars.

It weighs two hundred and fifty-eight grains of standard fineness; that is to say, of one thousand parts by weight, nine hundred shall be of pure metal and one hundred of alloy, the alloy consisting of silver and copper.

The act of February 12, 1873, Rev. Stat. § 3514, fixes the proportion of silver at in no case more than one-tenth of the whole alloy.

For all sums whatever the eagle is a legal tender for ten dollars. U. S. Rev. Stat. § 3585.

EALDORMAN (Sax.). A Saxon title of honor. It was a mark of honor very widely applicable, the ealdormen being of various ranks. The chief of them were the rulers almost of provinces. After the Conquest they disappeared and the term earl became a mere title. It is the same as alderman.

See Seebohm, Tribal Customs; 2 Freeman, Norm. Conq. 51.

EARLDORMAN. Said to be a false spelling for *ealdorman.* Cent. Dict. But see 2 Holdsw. Hist. E. L. 29, giving Earldorman.

EAR-MARK. A mark put upon a thing for the purpose of distinction. Money in a bag tied and labelled is said to have an ear-mark. 3 Maule & S. 575.

Also used in equity in respect of property or a fund in the hands of a third party, which is capable of identification as belonging to the claimant out of possession.

The doctrine that money has no ear-mark is no longer law. Property entrusted to a person in a fiduciary capacity may be followed as long as it may be traced, and where a person holding money as trustee or in a fiduciary character mixed it with his own and draws out of the mixed fund for his own purposes, the court presumes that his own drawings are to come out of his own money; 13 Ch. D. 696. And see note to this case citing leading English cases in Brett's Lead. Cas. Mod. Eq. 179.

Where police officers, in arresting bank burglars, took the stolen money from them and claimed to hold it for an assignee of the burglars (their attorney for his services) and for a reward offered, it was held that an indemnity company which had indemnified the bank could recover the specific money from the police officers; Ætna Indemnity Co. v. Malone, 89 Neb. 260, 131 N. W. 200.

EAR-WITNESS. One who attests to things he has heard himself.

EARL. In English Law. A title of nobility next below a marquis and above a viscount.

Earls were anciently called *comites,* because they were wont *comitari regem,* to wait upon the king for counsel and advice. They were also called *shiremen,* because each earl had the civil government of a shire. After the Norman conquest they were called *counts,* whence the shires obtained the names of counties. They have now nothing to do with the government of counties, their duties having devolved on the sheriff, the earl's deputy, or *vice-comes.* 1 Bla. Com. 398.

EARL MARSHAL. An officer who formerly was of great repute in England. He held the court of chivalry alone as a court of honor, and in connection with the lord high constable as a court having criminal jurisdiction. 3 Bla. Com. 68; 4 *id.* 268. The duties of the office now are restricted to the settlement of matters of form merely. It would appear, from similarity of duties and from the derivation of the title, to be a relic of the ancient office of alderman of all England. See COURT OF THE EARL MARSHAL.

EARL'S PENNY. See ARLES.

EARL'S THIRD PENNY. In the county court and in every hundred court the king was entitled to but two-thirds of the proceeds of justice and the earl got the other third, except perhaps in some exceptional cases. Maitl., Domesday and Beyond 95.

EARLDOM. The dignity or jurisdiction of an earl. The dignity only remains now, as the jurisdiction has been given over to the sheriff; 1 Bla. Com. 339.

EARNEST. The payment of a sum of money or delivery of a thing or token, upon the making of a contract for the sale of goods, to bind the bargain, the delivery and acceptance of which marks the final and conclusive assent of both parties to the contract.

The payment of a part of the price of goods sold, or the delivery of part of such goods, for the purpose of binding the contract. Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306.

It has been stated in a general way that the effect of earnest is to bind the goods sold; and, upon their being paid for without default, the buyer is entitled to them; but, notwithstanding the earnest, the money must be paid upon taking away the goods, because no other time for payment is appointed; earnest only binds the bargain, and gives the buyer a right to demand, but a demand without payment of the money is void; after earnest given, the vendor cannot sell the goods to another without a default in the vendee, and therefore if the latter does not come and pay, and take the goods, the vendor ought to go and request him, and then, if he does not come, pay for the goods, and take them away in convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person; 2 Bla. Com. 447; 2 Kent, Com. 495; 2 H. Bla. 316; 3 Campb. 426; Neil v. Cheves, 1 Bailey (S. C.) 537.

There is great difference of opinion as to the exact definition of this word. It had a signification at common law sufficiently well understood to warrant its use in the statute of frauds of 29 Car. II. § 17, which makes parol sales of goods, etc., void unless there is a delivery, or the buyer "give something in earnest to bind the bargain, or in part payment."

The Roman law included two kinds of earnest, one being a contract prior to that of sale and independent of it, which was practically the payment of a sum of money for what we should now call an

option to purchase, to be forfeited by the purchaser if he did not buy, while, if the other party was unwilling to sell, he must return the earnest and pay an equal amount as a forfeit. The other kind of earnest was that afterwards found in the common law and might be a *thing*, usually a ring, which either party, generally the buyer, gave to the other as a token. It is important in reading the civil law on this topic to bear in mind these two classes. Benj. Sales § 195. Justinian changed the law on this subject by providing that either party might rescind the sale by forfeiting the amount of the earnest money; Inst. l. 3. 23. 1. At least the text appears to be susceptible of no other meaning, but Pothier maintains that, after earnest, neither party could avoid the obligation; in this he is not followed by the later civilians. The same controversy has arisen upon a similar provision of the French code. The conclusion above stated is that of Benjamin, who cites the authorities; Sales, §§ 198-200.

In Scotland the word arles is used for earnest, and is usually applied to a small sum given to a servant on hiring, as earnest that the wage will be paid.

The word earnest "has been supposed to flow from a Phœnician source, through the ἀρραβών of the Greeks, the *arra* or *arrha* of the Latin, and the *arrhes* of the French. . . . The general rule appears to have been that expressed in the Institutes III. 23: *'Is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arris nihil expressum est.'* Furthermore, the *earnest* did not lose that character, because the same thing might also avail as part payment: *'Datur autem arrha vel simpliciter* (says Vinnius, on Inst. III. 24) *ut sit argumentum duntaxat et probatio emptionis contractæ, veluti si annulus detur; vel ut simul postea cedat in partem pretii, data certa pecunia.'* From the Roman law the principles relating to the *earnest* appear to have passed to the earlier jurisprudence of England: *'Item cum arrarum nomine* (says Bracton ii. 27) *aliquid datum fuerit ante traditionem, si emptorem emptionis pœnituerit, et a contractu resilire voluerit, perdat quod dedit: si autem venditorem, quod arrarum nomine receperit, emptori restituat duplicatum.'* Though the liability of the vendor to return to the purchaser twice the amount of the deposit has long since departed from our law, the passage in question seems an authority for the proposition that the *earnest* is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the 17th section of the statute of frauds, where they are treated as separate acts, each of which is sufficient to give validity to a parol contract." Fry, L. J., in 53 L. J. Ch. 1055, 1061.

Kent says it is *only one mode* of binding the bargain, and giving the buyer a right to the goods on payment; 2 Com. 495; it is a token or pledge passing between the parties by way of evidence or ratification of the sale. . . . It is mentioned in the statute of frauds, and in the French code, as an efficient act; but it has fallen into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It was omitted in the New York Revised Statutes; *id.* (14th ed.) 495, n. *(b)*. That it has fallen into disuse is true as to the giving of earnest in its ancient, strict, and technical sense, and its having fallen into disuse has been attributed the tendency to treat earnest and part payment as meaning the same thing, though the language of the statute of frauds implies that the former is something to bind the bargain while no part payment can be made until the contract has been closed; Benj. Sales § 189.

One definition is: "Specifically, in law, a part of the price of goods or service bargained for, which is paid at the time of the bargain to evidence the fact that the negotiation has ended in an actual contract. Hence it is said to bind the bargain." Cent. Dict. And another is: "Something given by a buyer to a seller by way of token or pledge to bind the bargain; a part or portion of goods delivered into the possession of the buyer at the time of the sale as a pledge or security for the complete fulfilment of the contract; a handsel." Encyc. Dict. And the latter authority illustrates the function of earnest as *evidence* of the conclusion of the contract by the Scotch law which holds a party who resiles, to fulfil the contract as well as to forfeit the earnest paid.

It is sometimes said that the question whether the earnest shall count as part of the price or wage depends on the intention of the parties, which, in the absence of direct evidence, will be inferred from the proportion which it bears to the whole sum. Int. Cyc. "If a shilling be given in the purchase of a ship or of a box of diamonds, it is presumed to be given merely in evidence of the bargain, or, in the common way of speaking, is dead earnest; but if the sum be more considerable it is reckoned up in the price." Ersk. Inst. b. iii. tit. iii. § 5.

Another writer considers "that the original view of earnest in England was, that it was a payment of a small portion of the price or wage, in token of the conclusion of the contract; and as this view seems to have been adhered to, the sum, however small, would probably then be counted as a part payment." Sto. Sales 216.

It has been a mooted question whether at common law either earnest or delivery was necessary to perfect a sale of chattels; in a case where it was objected that because there was neither, there could not be a recovery for the breach of a parol contract of sale, it was said: Earnest paid is not necessary to complete a parol contract of sale; when made, it only prevents the vendor, under any circumstances, from rescinding the contract without the assent of the vendee; and this by common law, and not by any statute; Hurlburt v. Simpson, 25 N. C. 236.

It has been much discussed whether the giving of earnest has any effect to pass the title to the property sold; and in earlier cases of the sale of specific chattels it was so held; Shep. Touchst. 224; 5 Term 409; 7 East 558; Noy, Max. 87–89; 2 Bla. Com. 447; but see the analysis of these authorities; Benj. Sales § 355. It is said by this learned writer on the subject, that there is no case in which this has been held when a complet-

ed bargain, if in writing, would not have altered the property; *id.* § 357; and it is concluded that the true legal effect of earnest is simply to afford conclusive evidence of a bargain actually completed with the mutual intention that it should be binding on both; and whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of earnest; *id.* Hence with respect to the remedy of the seller, if the buyer refuse to take the property sold, the law of earnest, properly speaking, is not concerned; but it is to be treated as in the case of contracts otherwise legally evidenced. See 2 Kent, Com. Lacey's ed. 496, note 51; SALES.

To constitute earnest to bind the bargain something must be paid or given. An instance is reported where, the buyer having drawn a shilling across the palm of the seller and returned it to his own pocket, according to a custom alleged to exist in the north of England, it was held that the statute was not satisfied; 7 Taunt. 597. This has been said to be the only reported case; Benj. Sales § 191; but it has been held that money left in the hands of a third person as a forfeiture is not sufficient; Howe v. Hayward, 108 Mass. 54, 11 Am. Rep. 306; much less a deposit of a check; Jennings v. Dunham, 60 Mo. App. 635; Noakes v. Morey, 30 Ind. 103. The three cases last cited are usually referred to in connection with the subject of earnest. In the Massachusetts case, the question was as to the recovery of money deposited as a forfeiture, which it was argued was earnest to bind the bargain in case of a refusal to take the goods, and the court said that earnest, as used in the statute of frauds, was part payment. On the strength of this case a text-writer on the law of that state adopts the statement as a definition of earnest; Usher, Sales Per. Prop. § 113. So an authoritative writer on the statute of frauds uses the terms, earnest and part payment, as interchangeable, and discusses the question of when earnest must be paid mainly upon New York cases, although in that state the exception is confined to part payment, the "giving something in earnest" being omitted; Reed, Stat. Fr. § 226. While, therefore, the clear and philosophical definitions of the nature and effect of earnest cited from Benjamin on Sales unquestionably commend themselves as better satisfying the apparent purpose of the statute to designate two distinct acts, it must be admitted that they are constantly referred to by American courts and writers as alternative expressions of the same thing. Consequently the cases cited in text-books as laying down rules as to earnest are usually found, on examination, to be in fact cases of part payment, and they must be so read. This use of the words, interchangeably, makes unavoidable a reference to the cases just referred to, especially since the word earnest, in addition to what has been indicated as its real signification, has, in this country, certainly, an acquired meaning too general to be disregarded.

In part payment something having value must pass from the buyer to the seller; 16 M. & W. 302; Brand v. Brand, 49 Barb. (N. Y.) 348; an unaccepted tender to the vendor on a call for part payment by him will not suffice to bind him, as when a remittance by mail of a check was returned to the sender; Edgerton v. Hodge, 41 Vt. 676; nor the promissory note of the buyer; Combs v. Bateman, 10 Barb. (N. Y.) 573; Hooker v. Knab, 26 Wis. 511; Krohn v. Bantz, 68 Ind. 278; even if there were an express agreement that the note should be received as part payment, which in this instance there was not; *id.;* in this case it was held that the note was not only ineffectual as part payment, but that it could not be regarded as earnest, sufficient to bind the bargain. After referring to the Massachusetts decision, *supra*, that, as used in the statute of frauds, earnest was regarded as part payment of the price, the court said: "But, conceding that it may be something distinct from payment, it is quite clear that it must have some value. The note has no value whatever, because it had no consideration to support it, and its payment could not, therefore, have been enforced. To say that such a note has value, is but grasping at a shadow, and losing sight of the substance. The contract for the sale of the hogs not being valid, the note given in consideration of the agreement therefor was based upon no valid consideration;" *id.;* Ely v. Ormsby, 12 Barb. (N. Y.) 570. But see 13 M. & W. 58; Byles, Bills *386. But when the contract was partly performed by compliance with a condition, and a note was tendered for the price, it was considered that the statute was satisfied; Gray v. Payne, 16 Barb. (N. Y.) 277. A note of a third person accepted as payment is sufficient; Combs v. Bateman, 10 Barb. (N. Y.) 573; or a check if paid is a payment relating back to the time when given; Hunter v. Wetsell, 17 Hun (N. Y.) 135; a stipulation that borrowed money owing from the seller to the buyer shall be treated as part payment will avail; Mattice v. Allen, 33 Barb. (N. Y.) 543; but not an agreement to credit an account due from the seller and send goods for the balance; Galbraith v. Holmes, 15 Ind. App. 34, 43 N. E. 575; or a promise to pay a part of the purchase money to a creditor of the vendor or credit it in the account against him; Artcher v. Zeh, 5 Hill (N. Y.) 204; but if such debt be actually paid it is good; 21 U. C. Q. B. 340; or if accepting the promise the creditor discharge the vendor; Cotterill v. Stevens, 10 Wis. 425; but the payment must be made at the time of the agreement; Paine v. Fulton, 34 Wis. 83; and if there was no entry in the account stating

that the credit was given on account of the transactions in suit it was insufficient; Teed v. Teed, 44 Barb. (N. Y.) 96. A mere agreement that the price shall go in settlement of an existing account is not sufficient without more; Brabin v. Hyde, 30 Barb. (N. Y.) 265; 16 M. & W. 302; 16 L. J. Ex. 120; nor is an agreement to sell one article and take another in part payment; Chapin v. Potter, 1 Hilt. (N. Y.) 366. Part payment may be by the actual delivery of anything of value, as a chattel; Dow v. Worthen, 37 Vt. 108; but a delivery of goods must be sufficient within the statute of frauds if they were in litigation; Walrath v. Ingles, 64 Barb. (N. Y.) 275.

With respect to the time at which part payment must be made, it is in some states required to be at the time of making the contract; Crosby Hardwood Co. v. Tester, 90 Wis. 412, 63 N. W. 1057. It was so held in New York; Sprague v. Blake, 20 Wend. (N. Y.) 63; though in a later case the question was raised and not determined; Hawley v. Keeler, 53 N. Y. 119; the same day is sufficient; Brabin v. Hyde, 30 Barb. (N. Y.) 265; and so was a payment asked and received on the following day, the contract being held to be then made for the first time; Bissell v. Balcom, 39 N. Y. 281. And when a check is given and paid upon presentation it is a payment at the time; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; so also a check upon a deposit in bank; McLure v. Sherman, 70 Fed. 190. In some cases it has been held that payment is not so restricted; 7 U. C. C. P. 133; Thompson v. Alger, 12 Metc. (Mass.) 435; Davis v. Moore, 13 Me. 424; Gault v. Brown, 48 N. H. 189, 2 Am. Rep. 210. It is to be observed that this question of time arises with more frequency under the New York statute which does not provide for earnest *eo nomine*, but only for part payment "*at the time*," as does also the Wisconsin statute.

See Benjamin; Blackburn; Story, Sales; Browne; Reed, Statute of Frauds; FRAUDS, STATUTE OF; SALES; GOD'S PENNY.

EARNINGS. The word has been used to denote a larger class of credits than would be included in the term wages. Jenks v. Dyer, 102 Mass. 235; Somers v. Keliher, 115 Mass. 165. See Jason v. Antone, 131 Mass. 534. It also means gains derived from services or labor without the aid of capital. Brown v. Hebard, 20 Wis. 330, 91 Am. Dec. 408.

Surplus earnings is an amount owned by a company, over and above the capital and actual liabilities. People v. Board of Com'rs, 76 N. Y. 74.

Net earnings, generally speaking, are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. Union Pac. R. Co. v. U. S., 99 U. S. 420, 25 L. Ed. 274.

They include "tips"; [1908] 1 K. B. 766. See DIVIDENDS.

EARTH. Clay, gravel, loam and the like, in distinction from the firm rock. The term also includes hard-pan, which is a hard stratum of earth. Dickinson v. City of Poughkeepsie, 75 N. Y. 76.

EASEMENT. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. 2 Washb. R. P. 25; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358.

A privilege which the owner of one adjacent tenement hath of another, existing in respect of their several tenements, by which that owner against whose tenement the privilege exists is obliged to suffer or not to do something on or in regard to his own land for the advantage of him in whose land the privilege exists. *Termes de la Ley, Easements;* Downing v. Baldwin, 1 S. & R. (Pa.) 298; 3 B. & C. 339; Lawton v. Rivers, 2 M'Cord (S. C.) 451, 13 Am. Dec. 741; Com. v. Low, 3 Pick. (Mass.) 408; Forbes v. Balenseifer, 74 Ill. 183; Oliver v. Hook, 47 Md. 301; Strong v. Wales, 50 Vt. 361; Howell v. Estes, 71 Tex. 690, 12 S. W. 62; Koenigs v. Jung, 73 Wis. 178, 40 N. W. 801.

Although the terms are sometimes used as if convertible, properly speaking *easement* refers to the right enjoyed by one and *servitude* the burden imposed upon the other.

An interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

In the civil law, the land against which the privilege exists is called the servient tenement; its proprietor, the servient owner; he in whose favor it exists, the dominant owner; his land, the dominant tenement. And, as these rights are not personal and do not change with the persons who may own the respective estates, it is very common to personify the estates as themselves owning or enjoying the easements; Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72; Hills v. Miller, 3 Paige, Ch. (N. Y.) 254, 24 Am. Dec. 218; Boston Water Power Co. v. R. Co., 16 Pick. (Mass.) 522.

There are said to be in England five different classes of rights which one man may have over the land of another: Easements, profits à prendre, personal licenses, customary rights, and natural rights. Odgers C. L. 561. This classification is apparently observed in the English cases. Of these subdivisions, profits à prendre and licenses are treated under these titles. "Customary rights" are referred to below. They are more common in England than here. "Natural rights" do not depend upon grant or prescription, but are really incident to property in land. Such are the right of lateral

support to land by adjacent land, the right to the flow of water, and the right to air free from noxious smells. These rights, of course, exist without grant. See LATERAL SUPPORT; RIPARIAN PROPRIETORS; NUISANCE.

These distinctions have not always been fully observed in the cases here. The distinction between an ordinary easement and an easement in gross is that in the former there is and in the latter there is not a dominant tenement; Jones, Easements 25. Lord Cairns, L. J., said in Rangeley v. Midland R. Co., L. R. 3 Ch. 311, that there is no such thing in the civil law or in England as an easement in gross—an easement not connected with a dominant tenement. Mr. Jones (Easements 25) states that he uses the term "easement in gross" because it is in general use here by legal writers, judges and the profession, and it is useless to attempt to establish a refinement of definition intended to do away with it.

On the other hand, Sharswood, C. J., said: "That there may be the grant of an easement in gross personal to the grantee is not to be denied." Tinicum Fishing Co. v. Carter, 61 Pa. 21, 38, 100 Am. Dec. 597. To the same effect are 3 Kent 420; Washb. Easem. 8; Fisher v. Fair, 34 S. C. 203, 13 S. E. 470, 14 L. R. A. 333, with note citing other cases, in which the statement that "there is no such thing known to the law" as an easement in gross is characterized as a "refinement attempted to be established" by Gale (Easem. 5) and Goddard (Easem. 6).

The essential qualities of easements, properly so called, may be thus distinguished: 1. Easements are incorporeal. 2. They are imposed upon corporeal property. 3. They confer no right to a participation in the profits arising from it. 4. They must be imposed for the benefit of corporeal or incorporeal hereditaments, and are usually imposed for the benefit of corporeal. 5. There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed. 6. By the civil law it is also required that the cause must be perpetual. Gale, Easem. (8th ed.) 8.

Easements in gross are personal, are not assignable, and will not pass by a deed of conveyance; Washb. Easem. 12; Tinicum Fishing Co. v. Carter, 61 Pa. 38, 100 Am. Dec. 597; Kuecken v. Voltz, 110 Ill. 268. See 14 L. R. A. 333, n. They are not inheritable; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Hall v. Armstrong, 53 Conn. 554, 4 Atl. 113; but in Hankey v. Clark, 110 Mass. 262; Poull v. Mockley, 33 Wis. 482; Lonsdale Co. v. Moies, 21 Law Rep. 658, they are held to be assignable and inheritable. A way is never presumed to be in gross when it can be construed to be appurtenant to the land; French v. Williams, 82 Va. 462, 4 S. E. 591; Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, 14 L. R. A. 300.

Easements are also classified as continuous and discontinuous, the distinction between them being thus stated: "Continuous are those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water." Lampman v. Milks, 21 N. Y. 505. Of the former the right to light and air would be an example, of the latter, the right to use a pump; Chase's Bla. Com. 232, note, which see as to Easements generally.

There must be two tenements owned by distinct proprietors: the dominant, to which the privilege is attached; the servient, upon which it is imposed. Tudor, Lead. Cas. 108; Grant v. Chase, 17 Mass. 443, 9 Am. Dec. 161; Meek v. Breckenridge, 29 Ohio St. 642.

Easements confer no right to any profits arising from the servient tenement; Waters v. Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; 30 E. L. & Eq. 189; Pierce v. Keator, 70 N. Y. 419, 26 Am. Rep. 612. They are incorporeal. Like other incorporeal hereditaments they have been held not to pass without a grant; 3 Kent 434; Orleans Nav. Co. v. New Orleans, 2 Mart. La. (O. S.) 214. They are specifically distinguished from other incorporeal hereditaments by the absence of all right to participate in the profits of the soil charged with them; Gale, Easem. (8th ed.) 10.

By the common law, they may be temporary; by the civil law, the cause must be perpetual. They impose no duty on the servient owner, except not to change his tenement to the prejudice or destruction of the privilege; Gale, Easem. (8th ed.) 9; Washb. Easem. 5.

Easements are as various as the exigencies of domestic convenience or the purposes to which buildings and lands may be applied. The following attach to land as incidents or appurtenances, viz.: The right—

Of pasture on other land; of fishing in other waters; of taking game on other land; of way over other land; of receiving air, light, or heat from or over other land; of receiving or discharging water over, or having support to buildings from, other land; 3 E., B. & E. 655; of a right to take ice on a pond; Hoag v. Place, 93 Mich. 450, 53 N. W. 617, 18 L. R. A. 39; of going on other land to clear a mill-stream, or repair its banks, or draw water from a spring there, or to do some other act not involving ownership; of carrying on an offensive trade; 2 Bingh. N. C. 134; Dana v. Valentine, 5 Metc. (Mass.) 8; of burying in a church, or a particular vault; 8 H. L. Cas. 362; 11 Q. B. 666; Long v. Weller's Ex'or., 29 Gratt. (Va.) 347; Canny v. Andrews, 123 Mass. 155; Central Wharf & Wet Dock Corp. v. India Wharf, 123 Mass. 562; Onthank v. R. Co., 71 N. Y. 194, 27 Am. Rep. 35. See CEMETERY.

The right to maintain a building or other permanent structure upon the land of another cannot be acquired by custom; Attor-

ney General v. Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

Open visible ditches; Thayer v. Payne, 2 Cush. (Mass.) 327; McElroy v. McSeay, 71 Vt. 396, 45 Atl. 898; Stuyvesant v. Early, 58 App. Div. 242, 68 N. Y. Supp. 752; Sanderlin v. Baxter, 76 Va. 299, 44 Am. Rep. 165; Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; a furnace flue; Ingals v. Plamondon, 75 Ill. 118; an alley way; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; Burns v. Gallagher, 62 Md. 462; a water ditch and water rights; Cave v. Crafts, 53 Cal. 135; rights of way; Ellis v. Bassett, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; stairways in a building; Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Geible v. Smith, 146 Pa. 276, 23 Atl. 437, 28 Am. St. Rep. 796; a flow of water forced from the vendor's premises through pipes to the premises of the vendee; Toothe v. Bryce, 50 N. J. Eq. 589, 25 Atl. 182; a portion of a building projecting upon the land retained by the vendor; N. Y. C. & H. R. R. Co. v. Needham, 29 Misc. 435, 61 N. Y. Supp. 992; have all been held the subject of implied easements. Rights to a several fishery in the adjoining sea enjoyed by grantees of land and their predecessors in title from time immemorial were held to pass under a royal patent, though the *habendum* clause recited that they were to have and to hold "the above granted land," which standing alone might not include a fishing right; Damon v. Hawaii, 194 U. S. 158, 24 Sup. Ct. 617, 48 L. Ed. 916, reversing 14 Hawaiian Rep. 465. The fact that the particular method of exercising this alleged right, while prevailing in Hawaii, differed from those known to the common law, was held to make no difference; Carter v. Hawaii, 200 U. S. 255, 26 Sup. Ct. 248, 50 L. Ed. 470.

A covenant to erect and maintain a fence on a railroad, contained in a grant of a right of way, was held to run with the land, because the covenant gave to the grantee an interest in the nature of an easement in the adjoining land of the grantor; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; cited in Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843. An easement may be created by way of exception or reservation; Claflin v. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; and rights in the nature of an easement may be created by statute; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, where an act restricted the height of buildings bordering on a public square under the power of eminent domain and provided compensation to the abutting owners. The court said that the act added to the public park rights in light and air and view over adjacent land which were "in the nature of an easement created by the statute and annexed to the park." It was further said "it would be hard to say that this statute might not have been passed in the exercise of the police power," but that, in providing compensation, it conformed to an exercise of the right of eminent domain. A similar right secured by statute is that of lateral support.

An easement of private way over land must have a particular, definite line; Crosier v. Brown, 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174. To establish an easement of a private way by prescription, the use must be continuous and uninterrupted under a *bona fide* claim of right adverse to the owner of the land and with his knowledge and silence. If the use is by his permission or if he denies the right, the title does not accrue; *id.;* verbal protests against the use prevent its accruing; Reid v. Garnett, 101 Va. 47, 43 S. E. 182; but it is held that mere verbal denial by the owner does not tend to prove that the enjoyment of the way was interrupted or had been under the owner's license; Okeson v. Patterson, 29 Pa. 22. See 25 L. R. A. (N. S.) 174, note.

Mere knowledge by a railway company that the public and an adjoining owner are passing over its right of way will not create a right of way, especially when the company erects signs notifying the public that it is railroad property; Andries v. Ry. Co., 105 Mich. 557, 63 N. W. 526.

Forbidding an adjoining owner from using a way over his land and beginning to put up a fence will not in law prevent such adjoining owner from acquiring a right of way, when the latter with threats prevented the erection of a fence and the owner took no proceedings to establish his rights; Connor v. Sullivan, 40 Conn. 26, 16 Am. Rep. 10.

Some of these are affirmative or positive, —*i. e.*, authorizing the commission of acts on the lands of another actually injurious to it; as, a right of way,—or negative, being only consequentially injurious; as, forbidding the owner from building to the obstruction of light to the dominant tenement. Tudor, Lead. Cas. 107; 2 Washb. R. P. 26.

All easements must originate in a grant or agreement, express or implied, of the owner of the servient tenement; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. The evidence of their existence, by the common law, may be by proof of the agreement itself, or by prescription, requiring an uninterrupted enjoyment immemorially, or for upwards of twenty years, to the extent of the easement claimed, from which a grant is implied. A negative easement does not admit of possession; and, by the civil law, it cannot be acquired by prescription, and can only be proved by grant. Use, therefore, is not essential to its existence; Gale, Easem. 23, 81, 128; 2 Bla. Com. 263. An easement can only be created by a conveyance under seal or by long user, from which such conveyance is presumed; Cagle v. Parker, 97 N. C. 271, 2

S. E. 76; see Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753; or by necessity; Butterworth v. Crawford, 46 N. Y. 349, 7 Am. Rep. 352; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; and the burden is on one claiming that it was by virtue of a license, to prove that fact; Colburn v. Marsh, 68 Hun 269, 22 N. Y. Supp. 990. As to the creation of easements by deed, see 8 L. R. A. 617, note; and by implication, see O'Brien v. R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126.

Where the owner of a tract of land fronting upon a public highway sells a portion thereof which is entirely surrounded by the land of the grantor and of strangers with no outlet, except over the lands of the grantor, the grantee is entitled to a right of way over the grantor's land, unless the situation of the land or the object for which it is used and conveyed shows that no grant of such right was intended; Mead v. Anderson, 40 Kan. 203, 19 Pac. 708. See Kinney v. Hooker, 65 Vt. 333, 26 Atl. 690, 36 Am. St. Rep. 864.

In case of a division of an estate consisting of two or more heritages, the question whether an easement or convenience, which may have been used in favor of one in or over the other by the common owner of both, shall become attached to the one or charged upon the other in the hands of separate owners, by a grant of one or both of those parts, or upon a partition thereof, must depend, where there are no words limiting or defining what is intended to be embraced in the deed or partition, upon whether the easement is necessary for the reasonable enjoyment of the part of the heritage claimed as an appurtenance.

The scope of the doctrine of implication of an easement over one portion of a grantor's lands in favor of the other portion, either granted or reserved upon the sale of either portion, is said to be in much confusion in the United States. The rule in England, as quoted and adopted in perhaps the most cited of the earlier American cases, Lampman v. Milks, 21 N. Y. 505, is, in effect, that where the owner of two tenements sells one of them, the purchaser takes the portion sold, with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. . . . The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts. The rule has been applied in Dixon v. Schermeier, 110 Cal. 582, 42 Pac. 1091; Fremont, E. & M. V. R. Co. v. Gayton, 67 Neb. 263, 93 N. W. 163; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Cihak v. Klekr, 117 Ill. 643, 7 N. E. 111; Dunklee v. R. Co., 24 N. H. 489; Henry v. Koch, 80 Ky. 391, 44 Am. Rep. 484; Cannon v. Boyd, 73 Pa. 179; John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; Lammott v. Ewers, 106 Ind. 310, 6 N. E. 636, 55 Am. Rep. 746. In the states where the rule has been adopted in terms, its application has been quite limited, and in some of them an early tendency to liberality has been followed by a later strictness of limitation; Griffiths v. Morrison, 106 N. Y. 165, 12 N. E. 580; Whyte v. Builders' League of New York, 164 N. Y. 429, 58 N. E. 517; Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80.

It is said that this rule has its reason in intended permanence of real estate arrangements supposed to be in the minds of grantor and grantee. But, whatever may be true in older communities, it would be difficult to find justification for any such presumption in a new and developing country, and especially in cities. There, instead of permanence, change is to be expected, and there can be but a slight reason to suppose that, upon a sale of that part of an entire tract on which stands a house, it is intended permanently to subject other parts of the tract to such obsolescent uses, although the owner of the whole had so devoted them; Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327, where it is said: "The English rule, above quoted, if applied to the full extent of its words, would be against public policy." In Dillman v. Hoffman, 38 Wis. 359, doubt is suggested whether any enlargement of the doctrine of implied easements, beyond rights of way strictly necessary to the use of the dominant estate, is at all wise. Largely on the authority of that case, necessary rights of way have been implied in several cases; Jarstadt v. Smith, 51 Wis. 96, 8 N. W. 29; Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. 262, 56 Am. Rep. 616; Johnson v. Borson, 77 Wis. 593, 46 N. W. 815, 20 Am. St. Rep. 146; Benedict v. Barling, 79 Wis. 551, 48 N. W. 670; but no other easement than a right of way has been held implied in that state; Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327, where the conclusion is reached that even if, in some extreme cases, there must be any easement other than right of way implied from necessity, that necessity must be so clear and absolute that, without the easement, the grantee cannot, in any reasonable sense, be said to have acquired that which is expressly granted.

In New York the rule of strict necessity is applied to reservations, but not to grants; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99. The reservation of an easement will not be implied except in cases where it was apparent, continuous, and strictly necessary; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978; Whyte v. Builders' League of New York, 164 N. Y. 429, 58 N. E. 517. The former case was approved and followed in Walker v. Clifford, 128 Ala. 67, 29 South. 588, 86 Am. St. Rep. 74. In Stuyve-

sant v. Early, 58 App. Div. 242, 68 N. Y. Supp. 752, a distinction between an implied grant and an implied reservation was recognized. It was there held that a right to drain through the grantor's premises passed by implication, on the ground that the easement was visible and apparent. The court said that, if the owner had conveyed the servient tenement first, no easement would have been implied.

In New Jersey, there is no distinction between an implied grant and an implied reservation; Greer v. Van Meter, 54 N. J. Eq. 270, 33 Atl. 794; so in Seibert v. Levan, 8 Pa. 383, 49 Am. Dec. 525, the distinction between an implied grant and an implied reservation was denied, following the rule in Gale & Whately, Easem. 52: "It is true that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property; but he obtains the same object by the exercise of another right, the general right of property; but he has, nevertheless, thereby altered the quality of the two parts of his heritage, and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if the alterations thus made are palpable and manifest, that a purchaser should take the land, burdened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it."

In Burns v. Gallagher, 62 Md. 464, the test was said to be that the doctrine of reservation of an easement would be invoked when the necessity is so strict that it would be unreasonable to suppose the parties intended the easement in question should not be used. Where the owner of a lot, bounded on one side by a highway and on the other by the ocean, sold that half of the estate which adjoined the highway, without expressly reserving a way across it from the highway to the part he retained, and no access could be had to the unsold portion except by the ocean or by crossing the land of other owners, it was held, following the English rule, that the ocean was a public highway, and, as all communication was not shown to be cut off, the grantor must in future rely on such access as the sea afforded. Hildreth v. Googins, 91 Me. 227, 39 Atl. 550.

Where it is not necessary, it requires descriptive words of grant or reservation in the deed to create it; Washb. Easem. 95; 36 Am. Rep. 415. The common-law rule requiring the word "heirs" in the creation of an estate of inheritance by deed is inapplicable in creating a permanent easement; Chappell v. R. Co., 62 Conn. 195, 24 Atl. 997, 17 L. R. A. 420; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791. See Claflin v. R. Co., 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638. The use of the word appurtenances is not sufficient to create an easement where none existed before; Bonelli v. Blakemore, 66 Miss. 136, 5 South. 228, 14 Am. St. Rep. 550.

An easement in land held in common cannot be acquired by one of the tenants in common in favor of land held by him in severalty, as a right of flowage over common property by a tenant owning a dam; Great Falls Co. v. Worster, 15 N. H. 412; or a right of way over the common land by the tenant to a lot in the rear owned by him; Boyd v. Hand, 65 Ga. 468.

There are many rights which in their mode of enjoyment partake of the character of easements, such as a custom for the inhabitants of a village to dance upon a particular close at all times of the year; 1 Lev. 176; for the inhabitants of a parish to play at all kinds of lawful games in a close at all seasonable times of the year; 2 H. Bl. 393; for the freemen and citizens of a town on a particular day of the year to enter upon a close and have horse races thereon; 1 H. & C. 729; that every inhabitant of a town shall have a way over certain land either to church or to market; 6 Co. Rep. 59; a right to use a strip of land as a promenade; [1900] 1 Ir. 302; a custom for victuallers to erect booths on the waste of a manor at the time of fairs; 6 A. & E. 745; for the inhabitants of a township to go on a close and take water from a spring; 4 E. & B. 702; to move vessels in a navigable tidal estuary of the Thames; [1897] 2 Q. B. 318; to deposit oysters dredged from oyster fisheries upon the foreshore in another part of the fishery; [1901] 2 K. B. 870; for all the fishermen of a parish to dry their nets on a particular close; [1904] 2 Ch. 534; [1905] 2 Ch. 538; for the inhabitants of a burgh (in Scotland) to use a strip of ground for recreation and for drying clothes; [1904] A. C. 73. As, however, the existence and validity of these rights generally depend on some local custom excluding the operation of the general rules of law *(consuetudo tollit communem legem)* and they are sometimes entirely independent of any express or implied agreement between the parties, they generally stand upon a different footing, and are not in all respects governed by the same principles as those which determine the boundaries of private easements. When claims of this kind are unreasonable, they are disallowed even in cases where they might possibly have formed the subject of a valid grant. When it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed immemorially, must have resulted from accident or indulgence, and not from any right conferred in ancient times on the party setting up the custom; 9 H. L. Cas. 692.

The general public cannot acquire by user a right to visit a monument or other object

of interest on private property (Stonehenge); [1905] 2 Ch. Div. 188. See JUS SPATIANDI.

Easements are extinguished: by release; by merger, when the two tenements in respect of which they exist are united under the same title and to the same person; Parsons v. Johnson, 68 N. Y. 62, 23 Am. Rep. 149; by necessity, or abandonment, as by a license to the servient owner to do some act inconsistent with its existence; Cartwright v. Maplesden, 53 N. Y. 622; by cessation of enjoyment, when acquired by prescription,—the non-user being evidence of a release where the abandonment has continued at least as long as the user from which the right arose. In some cases a shorter time will suffice; 2 Washb. R. P. 56, 82, 453. An easement acquired by grant cannot be lost by mere non-user, though it may be by non-user coupled with an intention of abandonment; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535; Edgerton v. McMullan, 55 Kan. 90, 39 Pac. 1021; Tabbutt v. Grant, 94 Me. 371, 47 Atl. 899; Cox v. Forrest, 60 Md. 74. A presumption of a way resting in grant will not be created by the fact that it is not continuously used by the dominant owner; Bombaugh v. Miller, 82 Pa. 203; [1893] A. C. 162; Tyler v. Cooper, 47 Hun (N. Y.) 94. The destruction of an easement of a private right of way for public purposes is a taking of the property of the dominant owner for which he must be compensated; U. S. v. Welch, 217 U. S. 333, 30 Sup. Ct. 527, 54 L. Ed. 787, 28 L. R. A. (N. S.) 385, 19 Ann. Cas. 680.

Prescription does not run against the exercise of a servitude in favor of one who resisted and prevented its exercise; Sarpy v. Hymel, 40 La. Ann. 425, 4 South. 439. Mere non-user must be accompanied by adverse use of the servient estate; Welsh v. Taylor, 134 N. Y. 450, 31 N. E. 896, 18 L. R. A. 535, with note on the effect of non-user generally. One cannot acquire a prescriptive right over his own lands or the lands of another which he occupies as tenant; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734.

An easement in favor of land held in common will be extinguished by a partition, if nothing is said about it; Livingston v. Ketcham, 1 Barb. (N. Y.) 592. As to the loss or extinguishment of easements, see 1 L. R. A. 214, note.

The remedy at common law for interference with a right of easement is an action of trespass, or where it is for consequential damages and for an act not done on plaintiff's own land, of case; Brenton v. Davis, 8 Blackf. (Ind.) 317, 44 Am. Dec. 769; Ganley v. Looney, 14 Allen (Mass.) 40. Where the act complained of is done in one county, but the injurious consequences thereof are felt in another, the action may be brought in the latter; Thompson v. Crocker, 9 Pick. (Mass.) 59; Worster v. Lake Co., 25 N. H. 525. Redress may also, as a general proposition, be obtained through a court of equity, for the infringement of an easement and an injunction will be granted to prevent the same; Washb. Easem. 747.

As to the distinction between an easement and a license, see LICENSE.

See Washburn, Easements; ABANDONMENT; AIR; ANCIENT LIGHTS; BACKWATER; COMMON; DAM; HIGHWAYS; LATERAL SUPPORT; PARTY-WALL; PROFIT À PRENDRE; SERVITUDE; STREET; SUPPORT; WAY.

EASTER TERM. In English Law. Formerly one of the four movable terms of the courts, but afterwards a fixed term, beginning on the 15th of April and ending on the 8th of May in every year, though sometimes prolonged so late as the 13th of May, under stat. 11 Geo. IV. and 1 Will. IV. c. 70. See TERM.

EASTERLY. When this word is used alone it will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case it means precisely what the qualifying word makes it mean; Fratt v. Woodward, 32 Cal. 227, 91 Am. Dec. 573.

EAT INDE SINE DIE. Words used on an acquittal, or when a prisoner is to be discharged, *that he may go without day;* that is that he be dismissed. Dane, Abr. Index.

EAVES-DROPPERS. In Criminal Law. Such persons as wait under walls or windows or the eaves of a house, to listen to discourses and thereupon to frame mischievous tales.

The common-law punishment for this offence is fine and finding sureties for good behavior; 4 Bla. Com. 167; State v. Williams, 2 Ov. (Tenn.) 108. See Com. v. Lovett, 4 Clark (Pa.) 5; 1 Bish. Cr. L. § 112; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771; 8 Haz. Pa. Reg. 305.

EBB AND FLOW. An expression used formerly in this country to denote the limits of admiralty jurisdiction. As to jurisdiction as founded on ebb and flow of tide, see ADMIRALTY.

EBEREMURDER. See ABEREMURDER.

ECCHYMOSIS. In Medical Jurisprudence. Localized discoloration in and under the skin. An extravasation of blood by rupture of capillary vessels, and hence it follows contusion; but it may exist, as in cases of scurvy, asphyxiation and other morbid conditions, without the latter. Ryan Med. Jur. 172. Ecchymoses produced by blows upon a body but a few hours dead cannot be distinguished from those produced during life. 1 Witth. & Beck. Med. Jur. 485; 2 Beck, Med. Jur. 22.

ECCLESIA (Lat.). An assembly. A Christian assembly; a church. A place of religious worship. Spelman, Gloss.

In the civil law this word retains its classical meaning of an assembly of whatever character. Du Cange; Calvinus, Lex.; Vicat. Voc. Jur.; Acts xix. 39. Ordinarily in the New Testament the word denotes a Christian assembly, and is rendered into English by the word *church*. It occurs twice in the gospels, Matt. xvi. 18, xviii. 17, but frequently in the other parts of the New Testament, beginning with Acts ii. 47. *Ecclesia* there never denotes the building, however, as its English equivalent *church* does. In the law, generally, the word is used to denote a place of religious worship, and sometimes a parsonage. Spelman, Gloss. See CHURCH.

ECCLESIASTIC. A clergyman; one destined to the divine ministry: as, a bishop, a priest, a deacon.

ECCLESIASTICAL COMMISSIONERS. In English Law. A body appointed to consider the state of the revenues, and the more equal distribution of episcopal duties, in the several dioceses. They were first appointed as royal commissioners in 1835; were incorporated in 1836, and now comprise all the bishops of England and Wales and the Lord Chief Justice, and other persons of distinction. 2 Steph. Com. 798.

ECCLESIASTICAL CORPORATIONS. Such corporations as are composed of persons who take a lively interest in the advancement of religion, and who are associated and incorporated for that purpose. Ang. & A. Corp. § 36.

Corporations whose members are spiritual persons are distinguished from *lay* corporations; 1 Bla. Com. 470.

They are generally called *religious corporations* in the United States. 2 Kent 274; Ang. & A. Corp. § 37.

In the earlier times, the church became a large property owner. Before the device of a corporation sole was known to the law, there was the greatest uncertainty as to who the owner of church property really was. Property given to the church was given to the patron saint—the gift was in the first place to God and the saint, and only in the second place to the ecclesiastic in charge of it. But it was managed by a group of persons and they were perpetual because their numbers were always being renewed. Gradually the theory that they were *personæ fictæ* was evolved by the Canonists. They became persons created by law—distinct from their members, and perpetual. The change was gradually accepted by the common-law lawyers and was extended to other groups which had nothing to do with the church. The growing definiteness of the conception of the corporation had reacted upon those ecclesiastical corporations which had originally introduced the idea of *persona ficta*. The corporation was a person. Gifts were made to a parson for the benefit of the church and no longer to a saint. The parson became a corporation sole and gradually that theory obtained recognition at the common law; 3 Holdsw. Hist. E. L. 367; see 16 L. Q. R. 336, where Prof. Maitland suggests that "corporation sole" was first applied to a parson by Brooke, author of the Abridgment, who died in 1558. See, as to corporations sole, CORPORATION.

See ASSOCIATION; RELIGIOUS SOCIETIES; CHURCH.

ECCLESIASTICAL COURTS (called, also, *Courts Christian*). The generic name for certain courts in England having cognizance mainly of spiritual matters.

In 1857 they were deprived of their jurisdiction in probate and divorce cases and they now deal only with clergymen of the Church of England in their professional character. Even over clergymen their power on questions of heresy is very limited. It is not an ecclesiastical offense to deny that the whole of the Scriptures are inspired, or to reject parts thereof as inherently incredible, etc., so long as they do not contradict the Articles or Formularies of the Church of England. Odgers, Com. L. 206.

See COURTS OF ENGLAND; CHURCH OF ENGLAND; COURT OF ARCHES; COURT OF CONVOCATION; COURT OF FACULTIES; COURT OF PECULIARS; CONSISTORY COURTS; ARCHDEACON'S COURT; PREROGATIVE COURT; PRIVY COUNCIL.

ECCLESIASTICAL LAW. The law of the church.

The existence in England of a separate order of ecclesiastical courts, and a separate system of law by them administered, may be traced back to the time of William the Conqueror, who separated the civil and the ecclesiastical jurisdictions, and forbade tribunals of either class from assuming cognizance of cases pertaining to the other. The elements of the English ecclesiastical law are the canon law, the civil law, the common law of England, and the statutes of the realm. The jurisdiction of the ecclesiastical tribunals extended to matters concerning the order of clergy and their discipline, and also to such affairs of the laity as "concern the health of the soul;" and under this latter theory it grasped also cases of marriage and divorce, and testamentary causes. But in more recent times, 1830-1858. these latter subjects have been taken from these courts, and they are now substantially confined to administering the judicial authority and discipline incident to a national ecclesiastical establishment. See CANON LAW; ECCLESIASTICAL COURTS; ASSOCIATION; CHURCH; RELIGIOUS SOCIETY.

ECHOUEMENT. In French Marine Law. Stranding.

ECLAMPSIA PARTURIENTIUM. In Medical Jurisprudence. Puerperal convulsions. Convulsive movements, loss of consciousness, and coma occurring during pregnancy, parturition or the puerperium. The attack closely resembles the convulsions of epilepsy. The disease is often fatal, causing the death of the patient in about one-fourth of all the cases, and fœtal death in about one-half. Mental defects may result from eclampsia, and are occasionally permanent. American Text-book of Obstetrics.

The word eclampsia is of Greek origin *Significat splendorem, fulgorem, effulgentiam, et emicationem quales ex oculis aliquando prodeunt. Metaphorice sumitur de emicatione flammæ vitalis in pubertate et ætatis vigore.* Castelli, Lex. Medic.

There can be but little doubt that many of the tragical cases of infanticide proceed from this cause. The criminal judge and lawyer cannot inquire with too much care into the symptoms of this disease, in order to discover the guilt of the mother, where it exists, and to ascertain her innocence, where it does not. See two well-reported cases of this kind in the Boston Medical Journal, vol. 27, no. 10, p. 161.

EDICT (Lat. *edictum*). A law ordained by the sovereign, by which he forbids or

commands something: it extends either to the whole country or only to some particular provinces.

Edicts are somewhat similar to public proclamations. Their difference consists in this,—that the former have authority and form of law in themselves, whereas the latter are, at most, declarations of a law before enacted.

Among the Romans this word sometimes signified a citation to appear before a judge. The edicts of the emperors, also called *constitutiones principium*, were new laws which they made of their own motion, either to decide cases which they had foreseen, or to abolish or change some ancient laws. They were different from rescripts or decrees, which were answers given in deciding questions brought before them. These edicts contributed to the formation of the Georgian, Hermogenian, Theodosian, and Justinian codes. See Dig. 1. 4. 1. 1; Inst. 1. 2. 7; Code 1. 1; Nov. 139.

A special edict was a judgment in a case; a general edict was in effect a statute. The prætor, at the commencement of his year of office, published a body of rules as to the remedies he would grant. In the reign of Hadrian (A. D. 131) a codified edict was published, made by Salvius Julianus, and called the *Edictum Salvianum* or *Perpetuum*.

EDICTS OF JUSTINIAN. Thirteen constitutions or laws of this prince, found in most editions of the *Corpus Juris Civilis* after the Novels. Being confined to matters of police in the provinces of the empire, they are of little use.

EDICTUM PERPETUUM. See EDICT.

EDITION. The term applies to every quantity of books put forth to the bookselling trade at one time by the publisher; 4 K. & J. 656. A new edition is published whenever, having in his warehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade is done, as is well known, periodically, and if, after printing 20,000 copies, a publisher should think it expedient for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word; 4 K. & J. 667; Short, Literature.

EDITOR. The term is held to include not only the person who writes or selects the articles for publication, but he who publishes a paper and puts it in circulation. Pennoyer v. Neff, 95 U. S. 721, 24 L. Ed. 565; Bunce v. Reed, 16 Barb. (N. Y.) 350.

EDITUS. In Old English Law. Put forth or promulgated when speaking of the passage of a statute; and brought forth or born, when speaking of the birth of a child. Black, L. Dict.

EDMUNDS ACT. An act of congress of March 22, 1882, punishing polygamy, which see.

EDUCATE. Includes proper moral, as well as intellectual and physical, instruction. Ruohs v. Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598. See Williams v. MacDougall, 39 Cal. 80; Merrill v. Emery, 10 Pick. (Mass.) 507; Peck v. Claflin, 105 Mass. 420; De Camp v. Dobbins, 29 N. J. Eq. 36.

EDUCATION. It may be directed particularly to either the mental, moral, or physical powers and faculties, but in its broadest and best sense it refers to them all. Mt. Hermon Boys' School v. Gill, 145 Mass. 146, 13 N. E. 354.

Legal Education. This subject has been for many years receiving earnest and extended attention in England and the United States. It has been elaborately treated at various times by committees of the American Bar Association, in which a report was made in 1879 by Carleton Hunt, chairman, and subsequent reports in 1881, 1890, 1891, and 1892. See the annual reports of those years. In 1893 the association formed a section of legal education, which has held yearly conferences for the reading of papers and discussion on the subject, which has been ably and elaborately treated. Its work in 1894 was published by the United States in the reports of the Commissioner of Education.

In 1901, an Association of American Law Schools was organized in connection with that Association, which has also held annual meetings.

The subject has also been much discussed by various State Bar Associations, as will appear by reference to their published reports.

An interesting address by Lord Russell, Lord Chief Justice of England, was delivered before the Benchers of Lincoln's Inn, October, 1895. See also a paper by Austen G. Fox on the work of the New York State Board of Examiners (Am. Bar Ass'n Report, 1896, p. 543, and 10 Harv. L. Rev. 199). The following is a partial list of books and papers on the subject:

Legal Education, by Gerald B. Finch, London, 1885; 1 Jurid. Soc. Papers 385; Hoffman's Course of Legal Studies; Warren's Introd. to Law Studies; Jones, Legal Educ. in France; Parliamentary Reports on Inns of Court, 1855, and on Legal Educ., 1846; Sir R. Palmer's Address before the Legal Educ. Association, 1871; Reports of Incorporated Law Society, 1893, 1894, 1895, 1896; Bar Examinations in Canada, 18 Legal News (Can.) 275; 3 Amer. Lawy. 55, 283, 288; 33 Am. Law Reg. 689; N. Y. State Bar Association Report, 1894; 7 Harv. Law Rev. 203; Sir F. Pollock's Advice to Students, 95 Law Times 552; Existing Questions, by Austin Abbott, 26 Chi. Leg. News 72; Methods of Study, by J. N. Field, 48 Alb. L. J. 264; 34 *id.* 84; 24 Am. L. Rev. 211, 1027; Address by Lawrence Maxwell, Jr., 30 Weekly L. Bull. 41; 48 Alb. L. J. 81–88; 47 *id.* 496; 28 Can. L. J. 605; 9 Scot. L. Rev. 122; 9 Harv. L. Rev. 169; Case System, 27 Am.

L. Reg. 416; 23 Am. L. Rev. 1; 25 *id.* 234; 22 *id.* 756; In Germany, 8 Am. L. Rec. 200; In Japan, 5 G. B. 17, 18; Inns of Court, 1 *id.* 68. See numerous other references in Jones's Index of Legal Periodicals.

EFFECT. The operation of a law, of an agreement, or an act, is called its effect. Maize v. State, 4 Ind. 342.

By the laws of the United States, a patent cannot be granted for an effect only, but it may be for a new mode or application of machinery to produce effects; Whittemore v. Cutter, 1 Gall. 478, Fed. Cas. No. 17,601. See Gray v. James, 1 Pet. C. C. 394, Fed. Cas. No. 5,718.

EFFECTS. Property, or worldly substance. As thus used, it denotes property in a more extensive sense than goods. 2 Bla. Com. 284. See The Alpena, 7 Fed. 361. Indeed the word may be used to embrace every kind of property, real and personal, including things in action; as, a ship at sea; Welsh v. Parish, 1 Hill (S. C.) 155; a bond; Banning v. Sibley, 3 Minn. 389 (Gil. 282); 16 East 222; shares of capital stock; Union Nat. Bank v. Byram, 131 Ill. 92, 22 N. E. 842.

In a will, "effects" may carry the whole personal estate; 5 Madd. 72; 15 Ves. 507; but not real estate; Andrews v. Applegate, 223 Ill. 535, 79 N. E. 176, 12 L. R. A. (N. S.) 661, 7 Ann. Cas. 126; Appeal of Price, 169 Pa. 294, 32 Atl. 455; unless the word "real" be added; 15 M. & W. 450; Foxall v. McKenney, 3 Cranch C. C. 206, Fed. Cas. No. 5,016; Schouler, Wills § 509. "Effects either real or personal," in the residuary clause of a will, have been held to embrace real estate; 22 L. J. Ch. N. S. 236; Page v. Foust, 89 N. C. 447. When preceded or followed in a will by words of narrower import, if the bequest is not residuary, it will be confined to species of property of the same kind *(ejusdem generis)* with those previously described; 13 Ves. 39; Rop. Leg. 210. See 2 Sharsw. Bla. Com. 384, n. Generally speaking the word "effects" in a will, is equivalent to "property" or "worldly substance"; but the interpretation may be restricted to articles *ejusdem generis* with those previously enumerated or specified; 1 Ves. Jr. 143; 15 Ves. 500.

When "the effects" passes realty, and when personalty, in a will, see 1 Jarm. Wills 585, 590; Ennis v. Smith, 14 How. (U. S.) 400, 420, 14 L. Ed. 472; 1 Cowp. 307; L. R. 8 Ch. Div. 561; WILL.

In a treaty between the United States and the Netherlands, "effects" was held to include real estate; Dowd v. Seawell, 14 N. C. 188; and in a treaty between Sweden and the United States "*fonds et biens*" (translated goods and effects) was held to embrace all kinds of property; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454. But these words in this treaty were held to apply to personalty only in Meier v. Lee, 106 Ia. 303, 76 N. W. 712.

EFFIGY. The figure or representation of a person.

To make the effigy of a person with an intent to make him the object of ridicule, is libel *(q. v.)*. Hawk. Pl. Cr. b. 1, c. 73, s. 2; 14 East 227; 2 Chitty, Cr. Law 866.

In France an execution by effigy or in effigy was adopted in the case of a criminal who has fled from justice. By the public exposure or exhibition of a picture or representation of him on a scaffold, on which his name and the decree condemning him are written, he is deemed to undergo the punishment to which he has been sentenced. Since the adoption of the Code Civil, the practice has been to affix the names, qualities, or addition, and the residence, of the condemned person, together with an extract from the sentence of condemnation, to a post set upright in the ground, instead of exhibiting a portrait of him on the scaffold. Répert. *de Villargues;* Biret, Vocab.

EFFRACTOR. One who breaks through; one who commits a burglary.

EGO. I, myself. This term is used in forming genealogical tables, to represent the person who is the object of inquiry.

EGYPT. As to courts established by the Christian Powers in Egypt, see MIXED TRIBUNALS.

EIGHT HOUR LAWS. Statutes making eight hours a day's labor for workmen, laborers, and mechanics.

Acts regulating the hours of labor for women and children are generally upheld; Com. v. Mfg. Co., 120 Mass. 383; Com. v. Beatty, 15 Pa. Super. Ct. 5; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; but *contra*, Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, where the Massachusetts case was expressly disapproved. See Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; LIBERTY OF CONTRACT. Such statutes have been upheld in three classes of cases: (1) Occupations injurious to the health of employés; (2) occupations in which women and children are employed; (3) occupations involving the public safety and welfare. Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. Ed. 780.

An act providing that in contracting for municipal work the contractor should bind himself not to accept more than eight hours as a day's work to be performed within nine consecutive hours or, except in case of necessity, not to employ any one for more than eight hours in twenty-four consecutive hours, was held not to violate either the federal or the New York constitution; People v. Warren, 77 Hun 120, 28 N. Y. Supp. 303; People v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473, reversed on other grounds in People v. Beck, 144 N. Y. 225, 39 N. E. 80.

Other courts have held that statutes limiting a day's work for all classes of mechan-

ics, servants and laborers (except farm and domestic workers) to eight hours are invalid as interfering with the constitutional right to contract; Low v. Printing Co., 41 Neb. 127, 59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670; In re Bill Providing That Eight Hours Shall Constitute a Day's Labor, 21 Colo. 29, 39 Pac. 328; City of Cleveland v. Const. Co., 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670; Fiske v. People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; State v. McNally, 48 La. Ann. 1450, 21 South. 27, 36 L. R. A. 533. And a similar municipal ordinance was held invalid; Ex parte Kuback, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226; City of Seattle v. Smyth, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. Rep. 939.

By act of congress of August 1, 1892, the employment of all laborers and mechanics employed by the United States, the District of Columbia or by any contractor upon any of the public works of the United States or the District of Columbia is limited to eight hours in any one calendar day, except in cases of extraordinary emergency. A violation of this act is made punishable by fine and imprisonment or both. The act was upheld; Ellis v. U. S., 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, 11 Ann. Cas. 589. A statute somewhat similar was passed June 19, 1912. A similar statute of Kansas was held not to infringe the freedom to contract, nor deny the equal protection of the laws; Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, affirming State v. Atkin, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343. A statute limiting to eight hours a day's work for men in underground mines, or in the smelting, refining or reduction of metals, is constitutional; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, affirming State v. Holden, 14 Utah 71, 46 Pac. 756, 37 L. R. A. 103; *contra*, In re Bill Providing that Eight Hours shall Constitute a Day's Labor, 21 Colo. 29, 39 Pac. 328.

The emergency which permits days of more than eight hours' work is something more than contemplated emergencies necessarily inhering in the work; U. S. v. Garbish, 222 U. S. 257, 32 Sup. Ct. 77, 56 L. Ed. 190. See LABOR LAWS.

EIGNE. A corruption of the French word *aîné*. Eldest or first-born.

It is frequently used in our old law-books; *bastard eigne* signifies an elder bastard when spoken of two children, one of whom was born before the marriage of his parents and the other after; the latter is called *mulier puisne*. Littleton, sect. 399.

EINETIUS. In English Law. The oldest; the first-born. Spelman, Gloss.

EIRE, or EYRE. In English Law. A journey. See EYRE.

EISNE. The senior; the oldest son. Spelled, also, *eigne, einsne, aisne, eign. Termes de la Ley;* 1 Kelham.

EISNETIA, EINETIA (Lat.). The share of the oldest son. The portion acquired by primogeniture. *Termes de la Ley;* Co. Litt. 166 *b*; Cowell.

EITHER. May be used in the sense of each. Chidester v. Ry. Co., 59 Ill. 87.

EJECTION. Turning out of possession. 3 Bla. Com. 199. See EJECTMENT.

EJECTIONE CUSTODIÆ (Lat.). A writ of which lay for a guardian to recover the land or person of his ward, or both, where he had been deprived of the possession of them. Fitzh. N. B. 139, L.; Co. Litt. 199.

EJECTIONE FIRMÆ (Lat. ejectment from a farm). This writ lay where lands or tenements were let for a term of years, and afterwards the lessor, reversioner, remainderman, or a stranger ejected or ousted the lessee of his term. The plaintiff, if he prevailed, recovered the term with damages. Hence Blackstone calls this *a mixed* action, somewhat between real and personal; for therein are two things recovered, as well restitution of the "term of years," as damages for the ouster or wrong. This writ is the original foundation of the action of ejectment. 3 Sharsw. Bla. Com. 199; Fitzh. N. B. 220, F, G; Gibson, Eject. 3; Stearn, Real Act. 53, 400.

EJECTMENT (Lat. *e*, out of, *jacere*, to throw, cast). A form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained.

A form of action which lies to regain the possession of real property, with damages for the unlawful detention.

In its origin, during the reign of Edw. III., this action was an action of trespass which lay for a tenant for years, to recover damages against a person who had ousted him of his possession without right. To the judgment for damages the courts soon added a judgment for possession, upon which the plaintiff became entitled to a writ of possession. The action of *de ejectione firmæ* (*q. v.*), was framed to meet the case of the termor, and just at the close of the middle ages it was held that under it he could recover his term. As to its history see 2 Poll. & Maitl. 105. As the disadvantages of real actions as a means of recovering land for the benefit of the real owner from the possession of one who held them without title became a serious obstacle to their use, this form of action was taken advantage of by Ch. J. Rolle to accomplish the same result.

In the original action, the plaintiff had been obliged to prove a *lease* from the person shown to have *title*, an *entry* under the *lease*, and an *ouster* by some third person. The modified action as sanctioned by Rolle was brought by a fictitious person as lessee against another fictitious person (the casual ejector) alleged to have committed the ouster. Service was made upon the tenant in possession, with a notice annexed from the casual ejector to appear and defend. If the tenant failed to do this, judgment was given by default and the claimant put in possession. If he did appear, he was allowed to defend only by entering into the *consent rule*, by which he confessed the fictitious *lease, entry*, and *ouster* to have been made, leaving only the *title* in

question. The tenant by a subsequent statute was obliged, under heavy penalties, to give notice to his lessor of the pendency of the action.

The action has been superseded in England under the Common Law Procedure Act (1852 §§ 170-220) by a writ, in a prescribed form, addressed, on the claimant's part, to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described; commanding such of them as deny the claimant's title to appear in court and defend the possession of the property. Not only the person to whom the writ is directed, but any other person (on filing an affidavit that he or his tenant is in possession, and obtaining the leave of the court or a judge), is allowed to appear and defend.

In England, since the Judicature Act, ejectment has given place to a new action for the recovery of land.

Ejectment has been materially modified in many of the states, though still retaining the name; but is retained in its original form in others, and in the United States courts for those states in which it existed when the circuit courts were organized. In some of the states it has never been in use. See 3 Bla. Com. 198.

The action lies for the recovery of corporeal hereditaments only; Carmalt v. Platt, 7 Watts (Pa.) 318; People v. Mauran, 5 Denio (N. Y.) 389; including a room in a house; White v. White, 16 N. J. L. 202, 31 Am. Dec. 232; upon which there may have been an entry and of which the sheriff can deliver possession to the plaintiff; Jackson v. Buel, 9 Johns. (N. Y.) 298; Nichols v. Lewis, 15 Conn. 137; and not for incorporeal hereditaments; Den v. Craig, 15 N. J. L. 191; Parker v. Packing Co., 17 Or. 510, 21 Pac. 822, 5 L. R. A. 61; or rights of dower; Jackson v. Vanderheyden, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378; Jones v. Hollopeter, 10 S. & R. (Pa.) 326; or a right of way; Taylor v. Gladwin, 40 Mich. 232; or a rent reserved; Van Rensselaer v. Hayes, 5 Denio (N. Y.) 477; or for an easement to use land for a public park; Canton Co. of Baltimore v. City of Baltimore, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. (N. S.) 129; or to put the public in possession of land appropriated for streets; Bay County v. Bradley, 39 Mich. 163, 33 Am. Rep. 367; City of Racine v. Crotsenberg, 61 Wis. 481, 21 N. W. 520, 50 Am. Rep. 149; or of an ocean beach; Trustees of the Freeholders and Commonalty of Southampton v. Betts, 163 N. Y. 454, 57 N. E. 762. Ejectment may be maintained for the possession of a street dedicated to the public use; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, 23 Pac. 1085; City and County of San Francisco v. Grote, 120 Cal. 59, 52 Pac. 127, 41 L. R. A. 335, 65 Am. St. Rep. 155. So in Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; City of Winona v. Huff, 11 Minn. 119 (Gil. 24). It is said that the right to the possession, use and control of highways is primarily in the state, and that the state, having by express grants vested in the cities and villages of the state the possession, use and control of their streets and alleys, the right of possession, use and control is regarded as a legal and not a mere equitable right, and that in that view, no reason exists why the action of ejectment may not be maintained, though the city or village had not the legal title; Village of Lee v. Harris, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176; and see City of Cleveland v. R. Co., 93 Fed. 113 (reversed on other grounds in City of Cleveland v. R. Co., 147 Fed. 171, 77 C. C. A. 467, holding that ejectment will lie by a city for the recovery of possession of its streets, though the effect of the dedication was to give the city only an easement.

One is liable in ejectment for the projection of his roof over another's land; Murphy v. Bolger, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309; *contra*, Rasch v. Noth, 99 Wis. 285, 74 N. W. 820, 40 L. R. A. 577, 67 Am. St. Rep. 858; or for the encroachment of the foundations of a building on the land of another, though entirely below the surface; Wachstein v. Christopher, 128 Ga. 229, 57 S. E. 511, 11 L. R. A. (N. S.) 917, 119 Am. St. Rep. 381; or to secure the removal of wires strung through the air over one's property, though the supports are on adjoining land; Butler v. Tel. Co., 186 N. Y. 486, 79 N. E. 716, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858.

It may be brought upon a right to an estate in fee-simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff; McMillan's Lessee v. Robbins, 5 Ohio, 28; Matthews v. Ward, 10 Gill & J. (Md.) 443; Miller v. Shackleford, 3 Dana (Ky.) 289; Middleton v. Johns, 4 Gratt. (Va.) 129; Batterton v. Yoakum, 17 Ill. 288; Sears v. Taylor, 4 Cal 38; but the title must be a legal one; Wright v. Douglass, 3 Barb. (N. Y.) 554; Botts v. Shield's Heirs, 3 Litt. (Ky.) 32; Thompson v. Wheatley, 5 Smedes & M. (Miss.) 499; Middleton v. Johns, 4 Gratt. (Va.) 129; Foster v. Mora, 98 U. S. 425, 25 L. Ed. 191; Hollingsworth v. Walker, 98 Ala. 543, 13 South. 6; Collins v. Ballow, 72 Tex. 330, 10 S. W. 248; Anson v. Townsend, 73 Cal. 415, 15 Pac. 49; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412 (but in Pennsylvania a valid equitable title will sustain ejectment, on the ground, as has been said, that there is no court of chancery in that state; Peebles v. Reading, 8 S. & R. [Pa.] 484; Chase v. Irvin, 87 Pa. 286); which existed at the commencement of the suit; Carroll v. Norwood's Heirs, 5 Harr. & J. (Md.) 155; McCulloch v. Cowher, 5 W. & S. (Pa.) 427; Pitkin v. Yaw, 13 Ill. 251; Laurissini v. Doe, 25 Miss. 177, 57 Am. Dec. 200; Layman v. Whiting, 20 Barb. (N. Y.) 559; Collins v. Ballow, 72 Tex. 330, 10 S. W. 248; Green v. Jordan, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; Buxton v. Carter, 11 Mo.

481 (but he cannot recover if the title is terminated pending the action; Brunson v. Morgan, 86 Ala. 318, 5 South. 495); at the date of the demise; Anderson v. Turner, 3 A. K. Marsh. (Ky.) 131; Hargrove v. Powell, 19 N. C. 97; Wood v. Morton, 11 Ill. 547; Scisson v. McLaws, 12 Ga. 166; Fenn v. Holme, 21 How. (U. S.) 481, 16 L. Ed. 198; and at the time of trial; Ratcliff v. Trimble, 12 B. Monr. (Ky.) 32; Beach v. Beach, 20 Vt. 83; Cresap's Lessees v. Hutson, 9 Gill (Md.) 269; and it must be against the person having actual possession; Den v. Stephens, 18 N. C. 5; Den v. Oliver, 10 N. C. 479; McDowell v. King, 4 Dana (Ky.) 67; McDaniel v. Reed, 17 Vt. 674; Huff v. Lake, 9 Humphr. (Tenn.) 137; Hyde v. Folger, 4 McLean 255, Fed. Cas. No. 6,971; Lucas v. Johnson, 8 Barb. (N. Y.) 244; Losee v. McFarland, 86 Pa. 33. A railroad company which has condemned lands for railroad purposes has a sufficient title to sustain an action; Pittsburgh, Ft. W. & C. Ry. Co. v. Peet, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467.

Plaintiff in ejectment may recover as against a mere trespasser, on proof of his former possession only, without regard to his title; Green v. Jordan, 83 Ala. 220, 3 South. 513, 3 Am. St. Rep. 711; Wilson v. Fine, 38 Fed. 789; Nolan v. Pelham, 77 Ga. 262, 2 S. E. 639; Ratcliff v. Iron Works Co., 87 Ky. 559, 10 S. W. 365; Parker v. Ry. Co., 71 Tex. 132, 8 S. W. 541; Bradshaw v. Ashley, 180 U. S. 59, 21 Sup. Ct. 297, 45 L. Ed. 423.

The real plaintiff must recover on the strength of his own title; King v. Mullins, 171 U. S. 404, 18 Sup. Ct. 925, 43 L. Ed. 214; and cannot rely on the weakness of the defendant's; 1 East 246; Lane v. Reynard, 2 S. & R. (Pa.) 65; Boardman v. Bartlett, 6 Vt. 631; Den v. Sinnickson, 9 N. J. L. 149; Winton v. Rodger's Lessee, 2 Ov. (Tenn.) 185; Hall v. Gittings' Lessee, 2 H. & J. (Md.) 112; Doe v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; Clarke v. Diggs, 28 N. C. 159, 44 Am. Dec. 73; Woodworth v. Fulton, 1 Cal. 295; Garrett v. Lyle, 27 Ala. 586; Jones v. Lofton, 16 Fla. 189; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. 214; Dunbar v. Green, 198 U. S. 166, 25 Sup. Ct. 620, 49 L. Ed. 998; and must show an injury which amounts in law to an ouster or dispossession; Cooley v. Penfield, 1 Vt. 244; Moore v. Gilliam, 5 Munf. (Va.) 346; Edwards v. Bishop, 4 N. Y. 61; Lykens v. Whelan, 15 Pa. 483; an entry under a contract which the defendant has not fulfilled being equivalent; Jackson v. Moncrief, 5 Wend. (N. Y.) 26; Marlin v. Willink, 7 S. & R. (Pa.) 297; Harle v. McCoy, 7 J. J. Marsh. (Ky.) 318, 23 Am. Dec. 407; Dennis v. Warder, 3 B. Monr. (Ky.) 173; Den v. Westbrook, 15 N. J. L. 371, 29 Am. Dec. 692; Baker v. Gittings' Lessee, 16 Ohio 485; Prentice v. Wilson, 14 Ill. 91.

It may be maintained by one joint tenant or tenants in common against another who has dispossessed him; White's Lessee v. Sayre, 2 Ohio 110; Barnitz v. Casey, 7 Cra. (U. S.) 456, 3 L. Ed. 403; Clark v. Vaughan, 3 Conn. 191; Den v. Bordine, 20 N. J. L. 394; Edwards v. Bishop, 4 N. Y. 61; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 444; Avery v. Hall, 50 Vt. 11. Co-tenants need not join as against a mere disseisor; Smith v. Starkweather, 5 Day (Conn.) 207; Chesround v. Cunningham, 3 Blackf. (Ind.) 82; Craig v. Taylor, 6 B. Monr. (Ky.) 457; but mere tenants in common may; Hicks v. Rogers, 4 Cra. (U. S.) 165, 2 L. Ed. 583; Innis v. Crawford, 4 Bibb (Ky.) 241; Camp v. Homesley, 35 N. C. 211. It may be maintained by the wife against the husband to recover her separate real estate; Crater v. Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161.

A court of law will not uphold or enforce an equitable title to land as a defence to an action of ejectment; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; Doe v. Aiken, 31 Fed. 393; *contra*, Brolaskey v. McClain, 61 Pa. 146; but see, Brame v. Swain, 111 N. C. 542, 15 S. E. 938; Hamilton v. Williford, 90 Ga. 210, 15 S. E. 753. In Pennsylvania, ejectment lies on an equitable title and is the full equivalent of a bill in equity; Winpenny v. Winpenny, 92 Pa. 440.

Where a defendant has entered a disclaimer of title and possession, he cannot defend his possession as agent of his wife without first showing a title in her; Duncan v. Sherman, 121 Pa. 520, 15 Atl. 565.

Where a defendant in ejectment repudiates a tenancy and claims a title in fee, he dispenses with the necessity of notice to quit; McGinnis v. Fernandes, 126 Ill. 228, 19 N. E. 44; Simpson v. Applegate, 75 Cal. 342, 17 Pac. 237.

Plaintiff in ejectment in proving title need not go further back than the common source of title, where the defendant claims under the same person; Johnson v. Cobb, 29 S. C. 372, 7 S. E. 601; Luen v. Wilson, 85 Ky. 503, 3 S. W. 911; Laidley v. Land Co., 30 W. Va. 505, 4 S. E. 705; Blalock v. Newhill, 78 Ga. 245, 1 S. E. 383; Drake v. Happ, 92 Mich. 580, 52 N. W. 1023.

In case title is denied, it cannot be proved by merely producing a deed, but when such a deed is produced from a grantor who was in possession, or where possession was taken and held under such deed, and the premises in the deed are clearly identified, then a *prima facie* title is shown; Hartley v. Ferrell, 9 Fla. 374; McFarlane v. Ray, 14 Mich. 465; Hall v. Kellogg, 16 Mich. 135; Cottrell v. Pickering, 32 Utah 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

The plea of not guilty raises the general issue; Zeigler v. Fisher's Heirs, 3 Pa. 365; King v. Kent's Heirs, 29 Ala. 542.

The judgment is that the plaintiff recover his term and damages; Battin v. Bigelow, Pet. C. C. 452, Fed. Cas. No. 1,108; Congrega-

tional Soc. in Newport v. Walker, 18 Vt. 600; Livingston v. Tanner, 12 Barb. (N. Y.) 481; Carroll v. Carroll, 16 How. (U. S.) 275, 14 L. Ed. 936; or damages merely where the the term expires during suit; Jackson v. Davenport, 18 Johns. (N. Y.) 295.

Where the fictitious form is abolished, however, the possession of the land generally is recovered, and the recovery may be of part of what the demandant claims; Treon's Lessee v. Emerick, 6 Ohio 391; Thornton's Lessee v. Edwards, 1 H. & McH. (Md.) 158; Vrooman v. Weed, 2 Barb. (N. Y.) 330; Lenoir v. South, 32 N. C. 237; Little v. Bishop, 9 B. Monr. (Ky.) 240; Loard v. Philips, 4 Sneed (Tenn.) 566; Messick v. Thomas, 84 Va. 891, 6 S. E. 482.

The damages are, regularly, nominal merely; and in such case an action of trespass for mesne profits lies to recover the actual damages; Baron v. Abeel, 3 Johns. (N. Y.) 481, 3 Am. Dec. 515; Shipley v. Alexander, 3 Harr. & J. (Md.) 84, 5 Am. Dec. 421; Miller v. Melchor, 35 N. C. 439; Davis v. Doe, 25 Miss. 445; Saunders v. Lee, 101 N. C. 3, 7 S. E. 590; Gooch v. Botts, 110 Mo. 419, 20 S. W. 192; Roach v. Heffernan, 65 Vt. 485, 27 Atl. 71. See TRESPASS FOR MESNE PROFITS; ADVERSE POSSESSION.

In some states, however, full damages may be assessed by the jury in the original action; Congregational Soc. in Newport v. Walker, 18 Vt. 600; Livingston v. Tanner, 12 Barb. (N. Y.) 481; Jenkins v. Means, 59 Ga. 55; Emrich v. Ireland, 55 Miss. 390; Whissenhunt v. Jones, 78 N. C. 361; and the verdict is conclusive as to the damages; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

For the history of ejectment, see 3 Sel. Essays in Anglo-Amer. L. Hist. 611.

EJECTUM. That which is thrown up by the sea. Warder v. La Belle Creole, 1 Pet. Adm. Dec. 43, Fed. Cas. No. 17,165. See JETSAM.

EJERCITORIA. In Spanish Law. The action which lies against the owner of a vessel for debts contracted by the master, or contracts entered into by him, for the purpose of repairing, rigging, and victualling the same.

EJUSDEM GENERIS (Lat.). Of the same kind.

In the construction of laws, wills, and other instruments, general words following an enumeration of specific things are usually restricted to things of the same kind (*ejusdem generis*) as those specifically enumerated.

So, in the construction of wills, when certain articles are enumerated, the term *goods* is to be restricted to those *ejusdem generis*. Bacon, Abr. *Legacies*, B; Minor's Ex'x v. Dabney, 3 Rand. (Va.) 191; 2 Atk. 113; 3 *id.* 61. See INTERPRETATION; ET CÆTERA.

ELDER BRETHREN. A distinguished body of men, elected as masters of Trinity House, an institution incorporated in the reign of Henry VIII., charged with numerous important duties relating to the marine, such as the superintendence of lighthouses. Mozl. & W. Dict.; 2 Steph. Com. 502. The full title of the corporation is Elder Brethren of the Holy and Undivided Trinity. It consists of a master, deputy master, a certain number of acting elder brethren, and of honorary elder brethren, with an unlimited number of younger brethren, the master and honorary elder brethren being chosen on account of eminent social position, and are elected by the court of elder brethren. The deputy master and elder brethren are chosen from such of the younger brethren as have been commanders in the navy four years previously, or have served as master in the merchant service on foreign voyages for at least four years. The younger brethren are chosen from officers of the navy or the merchant shipping service who possess certain qualifications. Their action is subject to an appeal to the Board of Trade. Two of the elder brethren assist the court of admiralty at the hearing of every suit for collision, and occasionally in suits for salvage. Their duty is to guide the court by advice only; though influential, their opinion is not legally binding on the judges.

ELDEST. He or she who has the greatest age.

The eldest son of a man is his first-born, the *primo-genitus;* L. R. 2 App. Cas. 698; L. R. 12 Ch. Div. 171. See PRIMOGENITURE.

ELECTED. In its ordinary signification this word carries with it the idea of a vote, generally popular, sometimes more restricted, and cannot be held the synonym of any other mode of filling a position. State v. Irwin, 5 Nev. 121; Magruder v. Swann, 25 Md. 214.

ELECTION. Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.

The word, in its ordinary signification, carries the idea of a vote, and cannot be held the synonym of any other mode of filling a position; State v. Irwin, 5 Nev. 111. See People v. Molitor, 23 Mich. 341; APPOINTMENT. Election has often been construed to mean the act of casting and receiving the ballots,—the actual time of voting, not the date of the certificate of election. State v. Tucker, 54 Ala. 205.

Both houses of congress, and parliamentary bodies in general, claim to be the sole judges of the election of their own members. This right seems to be derived from the declaration of rights, delivered by the commons to the king in 1604. Brown, Law Dict.

In the United States this power is vested in congress and the state legislatures by the federal and state constitutions, and chancellor Kent considers that "there is no other body known to the constitution to which such power might safely be trusted. It is requisite to preserve a pure and genuine representation, and to control the evils of irregular, corrupt, and tumultuous elections; and as each house acts in these cases in a judicial character, its decisions, like the decisions of any other court of justice, ought to be regulated by known principles of law, and strictly adhered to for the sake of uniformity and certainty;" 1 Com. 235. On the other hand, experience of the temptation to defeated mem-

bers, which makes contests, in reliance (unfortunately too often well-founded) upon the irresponsibility of party majorities, leads Mr. Justice Miller to remark that: "This provision . . . seems, from the experience of the past, to have been one of those principles adopted from the English house of commons which has not worked well with our institutions, and which the house of commons itself has been obliged to abandon. Contested elections are now, by the law of England, tried before the judiciary, and the judgment of the court is conclusive upon the subject. It is conceded on all hands that justice is in this way more nearly administered with accuracy than it was under the former system. Both in that country and in this, under the former method, the result of a contested election has been very generally forecast by a knowledge of the relations of the parties contesting to the political majority or minority of the house in which the contest is carried on. As this is a constitutional provision, however, there exists no power in the legislature, without an amendment of that instrument, to refer these contested cases to the judiciary. The increasing number of contested election cases arising out of frauds supposed to be perpetrated at the elections themselves, the investigation of which is always difficult, and the uncertainty of a fair and impartial decision . . . render it doubtful whether the entire provision on this subject is of any value." Miller, Const. 193.

Much may be said in support of the views of each of these learned commentators, and there is a possible middle ground practicable under existing constitutional conditions, which might be suggested. That would be to provide for a judicial determination of the contest in the first instance, reserving to the legislative body the final decision only on exception or appeal under such limitations as would preserve and emphasize the judicial character of the proceeding. This would, on the one hand, preserve the absolute independence of the legislature as one of three co-ordinate branches of the government,—a basic principle, it may be remarked, of American and not of English governmental policy,—and at the same time add to the difficulty and probably lessen the frequency of partisan decisions, contrived in the comparative secrecy of committee rooms and consummated by the mere brute force of a majority.

Election of Public Officers. The right to vote is not a natural one but is derived from constitutions and statutes; it is not a privilege protected by the Fourteenth Amendment; Minor v. Happersett, 21 Wall. 163, 22 L. Ed. 627. Each state determines for itself the qualifications of its voters, and the United States adopts the state law upon the subject as the rule in federal elections in accordance with Section 2, article 1 of the Constitution of the United States, which provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications required for electors of the most numerous branch of the state legislature."

The power of the state governments, however, to prescribe the qualifications of electors is limited by the Fifteenth Amendment of the Constitution which provides "that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state, on account of race, color, or previous condition of servitude." This provision renders void all provisions of a state constitution or a state law which come in conflict with it or with any act of congress passed to enforce it; McCrary, Elections 2; Ex parte Yarbrough, 110 U. S. 663, 4 Sup. Ct. 152, 28 L. Ed. 274. In the territories the right to vote is regulated by congress.

The right to vote, if once given by a state constitution, cannot be impaired or taken away by legislation. But the legislature can regulate the right to vote in a reasonable way by prescribing questions to be propounded to voters to test their qualifications; State v. Lean, 9 Wis. 279; or by requiring them to swear to support the Constitution of the United States, or by requiring registration. But regulations must not in any way impair the right to vote, and hence it has been held that an act prohibiting from voting those who, having been drafted into the military service and duly notified, had failed to report for duty, was void; McCafferty v. Guyer, 59 Pa. 109. An act requiring the voter to declare under oath that he is not guilty of any crime and has not voluntarily borne arms against the United States has also been held void; Rison v. Farr, 24 Ark. 161, 87 Am. Dec. 52. But see Randolph v. Good, 3 W. Va. 551. The right to vote can, however, be limited to male citizens or extended to females, but only upon the same terms and conditions as are applied to males; U. S. v. Anthony, 11 Blatch. 200, Fed. Cas. No. 14,459; Minor v. Happersett, 53 Mo. 58; Wheeler v. Brady, 15 Kan. 26; Lyman v. Martin, 2 Utah, 136. Different qualifications for persons to vote upon the question of licensing the sale of intoxicating liquors, from those prescribed in a state constitution for electors of public officers, may be prescribed by a legislative act; Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009; but the legislature may not prescribe additional qualifications for voters to those fixed in the constitution; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662.

The qualifications of voters in the different states are usually citizenship, residence for a given period, age (21 years), sometimes payment of taxes, ownership of land, and education, and mental capacity. See GRANDFATHER CLAUSE.

As to woman suffrage, see that title.

See CITIZEN; RESIDENCE; NATURALIZATION; DOMICIL.

Elections must be held at the time and place required by law. Legislative or constitutional provisions on this question are mandatory; Chase v. Miller, 41 Pa. 403; Opinion of the Judges, 30 Conn. 591; and votes cast by soldiers in the field, outside of the state, under a statute permitting it, are not valid, when the constitution requires a citizen to vote at his place of residence. In the absence of any constitutional provision

a statute providing that soldiers in service may vote is valid; Morrison v. Springer, 15 Ia. 304.

A soldier making his permanent residence at a soldiers' home does not thereby acquire a right to vote in the precinct where the institution is situated; Powell v. Spackman, 7 Idaho 692, 65 Pac. 503, 54 L. R. A. 378.

If polls are moved to a place not authorized, the election becomes void; Melvin's Case, 68 Pa. 333; if the polls are not kept open as required by law, the election will be set aside, if enough votes were thereby excluded to change or render doubtful the result; Knowles v. Yates, 31 Cal. 82; Melvin's Case, 68 Pa. 333; but see State v. Smith, 4 Wash. 661, 30 Pac. 1064; but it is doubtful whether a few minutes' delay in opening the polls will avoid an election; 5 Eng. El. Cas. 387; 4 *id.* 378. Closing polls too soon; Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273; or during the dinner hour will not vitiate the election; Fry v. Booth, 19 Ohio St. 25. But the casting of enough votes after the proper hour for closing to change the result will; Contested Election of Locust Ward, 4 Pa. L. J. 341. See 3 Cong. El. Cas. 564.

Generally speaking, notice is essential to the validity of an election; McCrary, Elect. 87; and all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting, even though only a minority of those entitled to vote really do vote; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; but formalities or even the absence of notice may be dispensed with, where there has been an actual election by the people; Dishon v. Smith, 10 Ia. 212. See Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; Woodward v. Sanitary Dist., 99 Cal. 554, 34 Pac. 239; but it would seem that, if by a default of notice, enough voters were deprived of a chance to vote, to change the result, the election would be void; McCrary, Elect. 88. The fact that an order providing for an election of the board of education was passed by less than a quorum of the board, does not affect the validity of the election, where it is held at the time provided by statute and there is no statute provision requiring the order to be made; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381. In California, in a much considered case, it was held that voters must take notice of general elections prescribed by law, and in such cases provisions of the laws as to notice are merely directory; but that in elections to fill vacancies, the requirements as to notice must be fully complied with; People v. Weller, 11 Cal. 49, 70 Am. Dec. 754. In this case it was further held that, without statutory regulations, no election can be held. See also People v. Martin, 12 Cal. 409; Com. v. Smith, 132 Mass. 289; City of Lafayette v. State, 69 Ind. 218; Jones v. Gridley, 20 Kan. 584; Bolton v. Good, 41 N. J. L. 296; People v. Crissey, 91 N. Y. 616. An election to fill a vacancy cannot be held where such vacancy did not occur long enough before the election to enable due notice to be given; Beal v. Ray, 17 Ind. 554; People v. Martin, 12 Cal. 409. A failure to give more than three days' notice may not be fatal to the election, if there was full knowledge thereof and a full vote; State v. Carroll, 17 R. I. 591, 24 Atl. 835.

Slight irregularities in the manner of conducting elections, if not fraudulent, will not avoid an election; Paine, Elect. 502. For instance, the presence of one of the candidates in the room where the election was held, and the fact that he intermeddled with the ballots, was held not to vitiate the poll, there not appearing to have been any actual fraud; Bright. Elect. Cas. 268. Irregularities which do not tend to affect results, will not defeat the will of the majority; Juker v. Com., 20 Pa. 493. Where a special election was not called by legal authority, the fact that the people voted for the several candidates, will not render the election valid; People v. Palmer, 91 Mich. 283, 51 N. W. 999.

A majority of voters is necessary to pass a constitutional amendment, by a popular vote, but it will be presumed that the number of those who voted is the number of the qualified voters; 22 Alb. L. J. 147; see as to the latter point, St. Joseph Township v. Rogers, 16 Wall. (U. S.) 644, 21 L. Ed. 328. But there may be a constitutional or statutory method prescribed for ascertaining a majority, in which case the presumption stated does not apply. Thus, in Delaware, a majority to determine whether a constitutional convention shall be called is to be ascertained by the highest vote cast at any one of the last three preceding elections; Const. 1831.

As to whether, when the person receiving the highest number of votes is ineligible, the person receiving the next highest number of votes is thereby elected: In England it is held that the second highest is elected only when it is affirmatively shown that the voters for the candidate highest in votes had such actual knowledge of his ineligibility that they must be taken to have thrown away their votes wilfully; L. R. 3 Q. B. 629; so in People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508. But in other cases this distinction has not been regarded, and it has been held that the election is void; Saunders v. Haynes, 13 Cal. 145; Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338; People v. Molitor, 23 Mich. 341; State v. Bell, 169 Ind. 61, 82 N. E. 69, 13 L. R. A. (N. S.) 1013, 124 Am. St. Rep. 203. The better opinion is stated by Cooley (Const. Lim.) and Dillon (Mun. Corp.) to be in accordance with this view. This rule was followed in Rhode Island in the presidential election of 1876; In re Corliss, 16 Am. L. Reg. 15, with a note by Judge Mitchell. It was therein also held that the ineligibility at the time of election cannot be removed by

a subsequent resignation of the office which constituted the ineligibility.

Where a candidate who receives the highest number of votes dies on election day, that candidate for the same office who receives the next highest number of votes is not elected; State v. Speidel, 62 Ohio St. 156, 56 N. E. 871.

Where there is a tie vote and one of the candidates refuses to participate in the drawing prescribed by statute, the office cannot thereby be declared vacant, and an appointment to fill such alleged vacancy is invalid; Com. v. Meanor, 167 Pa. 292, 31 Atl. 552.

The legislative precedents as to the effect of ineligibility are not uniform. See Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338; People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

An act providing for the registration of voters, either local or general in its operation, is within the legislative power and constitutional; Cowan v. Prowse, 93 Ky. 156, 19 S. W. 407.

The election laws of the United States of 1870 and 1871, for supervising the election of representatives, now repealed, were constitutional; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

A wager upon the result of an election, being contrary to public policy, is void; Bunn v. Riker, 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; Johnston v. Russell, 37 Cal. 670; Reynolds v. McKinney, 4 Kan. 94, 89 Am. Dec. 602. All contracts tending to corrupt elections are also void; Nichols v. Mudgett, 32 Vt. 546. In Pennsylvania and other states one betting on the result of an election is disfranchised as a voter thereat.

See Corrupt Practices.

Election Officers. Canvassing officers and return judges are ministerial officers only; they exercise no judicial or discretionary function; Cooley, Const. Lim. 783; State v. Steers, 44 Mo. 223; Morgan v. Quackenbush, 22 Barb. (N. Y.) 72; Clark v. Board of Examiners of Hampden County, 126 Mass. 282. It is said they may judge whether the returns are in due form; People v. Head, 25 Ill. 328. The acts of such officer, within the scope of his authority, are presumed to be correct; Littell v. Robbins, 1 Bartl. 138. In some states, canvassing officers have the power to revise the returns, hear testimony, and reject illegal votes; it is so in Texas, Alabama, Louisiana, and Florida; McCrary, Elect. 67. Where election officers have enforced an erroneous view as to the qualifications of voters, whereby legal voters are not permitted to vote, an election may be set aside, especially if it appear that such votes would have changed or rendered doubtful the result of the election; Bright. Elect. Cas. 455; McCrary, Elect. 68. A canvassing board which has counted a vote and declared the result, is *functus officio*. It cannot make a recount; Bowen v. Hixon, 45 Mo. 340; Hadley v. City of Albany, 33 N. Y. 603, 88 Am. Dec. 412; State v. Donnewirth, 21 Ohio St. 216.

It is a general rule that the errors of a returning officer shall not prejudice the rights of innocent voters; Cl. & H. 329; (see Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704; Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381); as where it was the duty of the officer to return the votes sealed and he returned them unsealed, it was held that in the absence of any suspicion of fraud the return was good. Also where a state prescribed a certain form of certificate to be executed by the election officer, it is sufficient if the certificate is substantially in that form, and if an election officer insert by accident the wrong name in his return of the persons voted for, the mistake may be corrected; Cl. & H. Elect. Cas. 229, 369.

But it has also been held that where a statute requires the election officer to place on each ballot the number corresponding with the number of the voter, the failure so to number will deprive the voter of his rights; Ledbetter v. Hall, 62 Mo. 422; West v. Ross, 53 Mo. 350. All regulations intended to secure the purity of elections are of vital importance and must be enforced to the letter; Jones v. State, 1 Kan. 273, 279; Gilleland v. Schuyler, 9 Kan. 569. Regulations which affect the time and place of the election and the legal qualifications of the voters are usually matters of substance, while those relating to the recording and return of the votes received and the mode and manner of conducting the details of the election are directory.

A statute requiring an official act, for public purposes, to be done by a given day, is directory only; People v. Allen, 6 Wend. (N. Y.) 486. A representative in the legislature cannot be deprived of his seat by the failure of mere election officers to make the return required by law to the secretary of state; see opinion of the judges in Maine; Me. Laws, 1880, p. 225, where many election questions are considered fully. Mere irregularity on the part of election officers, or their omission to observe some merely directory provision of the law, will not vitiate the poll; Anderson v. Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307; nor is an election invalid because the election officers *de facto* were disqualified; Quinn v. Markoe, 37 Minn. 439, 35 N. W. 263; State v. Goowin, 69 Tex. 55, 5 S. W. 678; so also irregularities which do not tend to affect results are not allowed to defeat the will of the majority, which must be respected, even when irregularly expressed; Lane v. Cary, 19 Barb. (N. Y.) 540; Juker v. Com., 20 Pa. 493; Morris v. Vanlaningham, 11 Kan. 269; Ranney v. Brooks, 20 Mo. 107; People v. Bates, 11 Mich. 362,

83 Am. Dec. 745; McKinney v. O'Connor, 26 Tex. 5; Keller v. Chapman, 34 Cal. 635; Bright. Elect. Cas. 448, 449, 450.

By the laws of some states separate boxes are kept at the voting polls for the reception of ballots for different officers, and the question has arisen whether a ballot dropped into the wrong box can be counted. There is some conflict of authority on this point, but it has been held by the supreme court of Michigan that a voter cannot be deprived of his vote by the mistake or fraud of an officer in depositing it in the wrong box, if the intention of a voter can be ascertained with reasonable certainty; and for the same reason a ballot should not be rejected because put in the wrong box by the honest mistake of the voter himself; People v. Bates, 11 Mich. 362, 83 Am. Dec. 745.

An election officer who wilfully and corruptly refuses to any qualified citizen the right to vote or to register is liable in damages to the person injured; Ashby v. White, 1 Sm. L. Cas. (7th ed.) 455; 2 Ld. Raym. 958; Bernier v. Russell, 89 Ill. 60. Equity will not interpose to protect the right to vote, it being a mere political right; Shoemaker v. City of Des Moines, 129 Ia. 244, 105 N. W. 520, 3 L. R. A. (N. S.) 382. In England and in most of the states proof of a malicious or a corrupt purpose on the part of the officer is necessary; Weckerly v. Geyer, 11 S. & R. (Pa.) 35; but in Massachusetts it is not necessary to show malice, and this rule has been followed in Ohio and Wisconsin. But even in Massachusetts the officer is not liable if he acted under a mistake into which he was led by the conduct of the plaintiff; Lincoln v. Hapgood, 11 Mass. 350; Gillespie v. Palmer, 20 Wis. 544. See Jenkins v. Waldron, 11 Johns. (N. Y.) 114, 6 Am. Dec. 359; State v. Smith, 18 N. H. 91; State v. Robb, 17 Ind. 536.

Exemplary damages may be recovered if the refusal was wilful, corrupt, and fraudulent; Elbin v. Wilson, 33 Md. 135. Equity may upon the relation of the Attorney General, the Governor and the state committee chairman, restrain by injunction election officials from committing illegal and fraudulent acts, though the acts charged, if committed, constitute criminal offences; People v. Tool, 35 Colo. 225, 86 Pac. 224, 229, 231, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198.

The jurisdiction to hear and determine election cases, though by common law in courts having ordinary common-law jurisdiction, is generally regulated by special statutes in most of the states.

Where a court can reach a conclusion as to the actual legal vote cast at a precinct, on a contest of an election, it can give effect to it notwithstanding the election officers may have been guilty of misconduct; Lucky v. Police Jury, 46 La. Ann. 679, 15 South. 89.

Ballots. Voting by ballots is by a ticket or ball and secrecy is an essential part of this manner of voting; State v. Shaw, 9 S. C. 94; Brisbin v. Cleary, 26 Minn. 107, 1 N. W. 825; L. R. 10 C. P. 753; therefore a statute which provides for numbering ballots is repugnant to a constitutional provision that elections shall be by ballot; Williams v. Stein, 38 Ind. 89, 10 Am. Rep. 97; *contra*, State, v. Connor, 86 Tex. 133, 23 S. W. 1103; People v. Bidelman, 69 Hun 596, 23 N. Y. Supp. 954; Ex parte Owens, 148 Ala. 402, 42 South. 676, 8 L. R. A. (N. S.) 888, 121 Am. St. Rep. 67; unnumbered ballots are not void although the omission to number them is a misdemeanor; Montgomery v. Henry, 144 Ala. 629, 39 South. 507, 1 L. R. A. (N. S.) 656, 6 Ann. Cas. 965.

Ballots are frequently deposited which do not clearly indicate the voter's intention; for instance, by misspelling the name of a candidate, etc. The rule in such cases is thus stated in Cooley, Const. Lim. 611: "We think evidence of such facts as may be called the circumstances surrounding the election,—such as, who were the candidates brought forward by the nominating conventions; whether other persons of the same name resided in the district from which the officer was to be chosen; and if so, whether they were eligible or had been named for the office; if the ballot was printed imperfectly, how it came to be so printed, and the like,—is admissible for the purpose of showing that an imperfect ballot was intended for a particular candidate, unless the name is so different that to thus apply it would be to contradict the ballot itself, or unless the ballot is so defective that it fails to show any intention whatever, in which case it is inadmissible." See on this point, Attorney-General v. Ely, 4 Wis. 430; People v. Pease, 27 N. Y. 64, 84 Am. Dec. 242. The case in People v. Tisdale, 1 Dougl. (Mich.) 65, which is *contra*, was overruled in People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141, and the rule above laid down by Judge Cooley approved and followed. Thus votes for "E. M. Braxton," "Elliot Braxton," and "Braxton" have been counted for Elliot M. Braxton in the 42d Congress. See McCrary, Elect. 296. Ballots cast for "D. M. Carpenter," "M. D. Carpenter," "M. I. Carpenter," and "Carpenter" were counted for Mathew H. Carpenter; Attorney-General v. Ely, 4 Wis. 430. Ballots for "Judge Ferguson" were counted for Fenner Ferguson; 1 Bartl. 267. Ballots cast for "E. Clark" and "Clark" were counted for E. E. Clark; those cast for "W. E. Robso," "Robertson," "Robers," and "Robin—" were counted for W. E. Robinson. Where the only candidates for an office were Caleb Gumm and Joel D. Hubbard, votes for "J. D. Huba," "J. D. Hubba," "J. D. Hub," and also one for "Huber," and one for "D. Huber," are properly counted for Hubbard; Gumm v. Hubbard, 97 Mo. 311, 11 S. W. 61, 10 Am. St.

Rep. 312. See opinion of judges of supreme court of Maine, printed in Maine Laws, 1880, App. p. 225.

A ballot containing the names of two candidates for the same office is bad as to both, but is not thereby vitiated as to other names of candidates on the same ballot; Attorney-General v. Ely, 4 Wis. 420; State v. Foxworthy, 29 Neb. 341, 45 N. W. 632; where a ballot contains the names of three persons for the same office, and there is only one vacancy to be filled, it should be rejected; Montgomery v. O'Dell, 67 Hun 169, 22 N. Y. Supp. 412.

Where there are statutory provisions as to the marking of ballots, the paper on which they are printed, etc., a ballot not complying with the law should not be received; the direction is mandatory; Com. v. Woelper, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; but see People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769, where the law required white paper without any marks, and blue-tinted paper, ruled, was used, and the ballot declared legal; and where the law required the marking of the ballots with ink, if otherwise regular and marked with a pencil, they were counted; State v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am. St. Rep. 625. In Kirk v. Rhoads, 46 Cal. 398, the court held, in this connection, that as to those things over which the voter has control, provisions as to the appearance of ballots are mandatory; and as to those things that are not under his control, such provisions are directory. Ballots on which a printed name is erased and another name written in its place are valid; People v. Saxton, 22 N. Y. 309, 78 Am. Dec. 191; Fenton v. Scott, 17 Or. 189, 20 Pac. 95, 11 Am. St. Rep. 801; but see State v. McElroy, 44 La. Ann. 796, 11 South. 133, 16 L. R. A. 278, 32 Am. St. Rep. 355.

Where a law provides that the voter may insert in the blank space provided therefor any name not already on the ballot, it was held that such insertion might be made by the use of a "sticker" as well as by writing the name of the candidate; De Walt v. Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814.

The fact that some of the ballots cast at an election were marked, and thereby rendered void by the election law, does not invalidate the ballots that were regular; People v. Bidelman, 69 Hun 596, 23 N. Y. Supp. 954.

Australian Ballot. This system, the leading features of which have now been adopted in many of the states, is the first important gift to civilization from the continent of Australasia. It revives the secret ballot in the time of Cicero, under the Gabinian Law. It originated in South Australia soon after the beginning of the present century as the result of the efforts of Mr. Francis S. Dutton, and thence passed from state to state in Australasia, then to the mother country in Europe, afterward to Canada, and eastward to continental countries, and finally westward again to the United States. It has been said that a somewhat similar system had been in vogue in England in Maryport for many years before the modern system was introduced in Australasia. But the Australasian system seems to have been purely indigenous, and was developed without any copying or even knowledge of the system at Maryport.

The cardinal features of the system, as everywhere adopted, are an arrangement for polling by which compulsory secrecy of voting is secured and an official ballot printed and distributed by government authority containing the names of all candidates. The details of the system include methods by which candidates may be nominated, prescribing the number of persons necessary to nominate a candidate, forms in which the various party nominations and information for the voters shall be printed on the ballots, arrangements for small closets or rooms into which the voter can retire and mark his ballot in secret, regulations for allowing him to take into the closet with him when he so desires a person to assist him in marking his ballot, and regulations for the numbering and counting of the ballots. See Wigmore, Australian Ballot System.

The system now generally in vogue in the United States is in most cases not the Australian ballot pure and simple. One feature of that system is the enumeration of candidates for a particular office alphabetically and without designation of party name or emblem. This was adopted in Massachusetts. But in most states the plan, better adapted for the American states, is to use an official ballot, but, when many officers are voted for on a single ballot, to have the column of each party indicated by name or sign or both, and permit the voter to vote a "straight" ticket by a single mark for all officers voted for. This, in various forms, may be termed the American modification of the Australian ballot.

The novel features of this system of voting have given rise to much litigation, and a considerable body of law has already accumulated, which involves not so much new principles as the application of old ones to new conditions. It is, nevertheless, desirable to consider these decisions separately from those under the old system, as thereby a clearer impression is received, both of the system and the method of its enforcement, which is necessarily committed very largely to the courts, and, like cases of railroad receiverships, devolves upon the courts the

exercise of functions often to some extent administrative as well as judicial.

It may be said without reserve that the courts have, as a rule, been true to the fundamental doctrines of the law of elections: to give effect to the intention of the voter, where it can be done without defeating the purpose of the legislation,—to enforce party rules with respect to nominations and test the integrity and fairness of those made by petition,—to disregard mere technical irregularities and hold valid elections carried on in good faith rather than to permit them to be defeated by the carelessness, ignorance, or fraud of officials,—to enforce rigidly the safeguards against bribery and intimidation, and the provisions to secure the secrecy of the ballot which lie at the foundation of the system.

For an extended discussion of the Australian ballot laws of England and some of the American states, see Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491, in which it is held that the system should be construed in subordination to the constitution and laws of the state wherein it is adopted.

Such laws have been held constitutional; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; De Walt v. Bartley, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814; Attorney-General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Ransom v. Black, 54 N. J. L. 446, 24 Atl. 489, 1021, 16 L. R. A. 769; Miner v. Olin, 159 Mass. 487, 34 N. E. 721; Slaymaker v. Phillips, 5 Wyo. 453, 40 Pac. 971, 42 Pac. 1049, 47 L. R. A. 842; Pearson v. Board of Sup'rs, 91 Va. 322, 21 S. E. 483. The objections taken will be found to include general ones and also features of particular statutes. The statute forbidding the counting of a ballot not officially stamped and marked with the initials of a judge of election is in conflict with the constitutional provision that all persons duly qualified are entitled to vote and that all elections shall be by ballot; Moyer v. Van De Vanter, 12 Wash. St. 377, 41 Pac. 60, 29 L. R. A. 670; 50 Am. St. Rep. 900. In Illinois the new ballot law was held to have repealed all other laws respecting voting on municipal affairs and ballots; Union County v. Ussery, 147 Ill. 204, 35 N. E. 618; but it is held to apply only to the election of officers and not to special elections to determine other matters, in Wisconsin; State v. City of Janesville, 90 Wis. 157, 62 N. W. 933; and Pennsylvania; Evans v. Willistown Township, 3 Pa. Dist. Rep. 395. A statutory provision that a local option election shall be conducted according to the rules provided for general elections requires that it shall be by ballot, where the constitution requires general elections to be so conducted; State v. Board of Canvassers, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

Questions as to the regularity of nomination papers under the Australian ballot system are usually settled by the courts either under express statutory provisions or under their general jurisdiction when applicable. A number of such questions decided in reference to the then pending election are reported in Tilbrook's and Semmen's Nominations, 5 Pa. Dist. Rep. 660; Hendley v. Reeder, 5 Pa. Dist. Rep. 677.

Where conflicting nominations have each certain claims to superiority, if technical rules only are applied, the court will give weight to the fact that one candidate carried the district by a decisive majority. The desire of the court in such cases is to reach what is substantial; Tilbrook's and Semmen's Nominations, 5 Pa. Dist. Rep. 660. If, under the rules of the party, the county committee has power to fill vacancies and did not act, but only certain members of it residing within the representative district, such action is a clear violation of the party rules and the nomination by such irregular body is void; Stucker's Nomination, 5 Pa. Dist. Rep. 660. Where congressional conferees from one county of a congressional district were appointed in violation of the party rules, the conference in which they took part was not a regular body, and the nomination made by it was void; Klugh's Nomination, 5 Pa. Dist. Rep. 661. Nominations attended by fraud and the exercise of arbitrary power will not be upheld by the courts. A minority of delegates cannot nominate, and a faction may not arbitrarily select their meeting-place in defiance of a clear majority of the ward executive committee; Saunders' and Roberts' Nominations, 5 Pa. Dist. Rep. 661. Where persons who are not delegates are permitted upon the floor of a convention and the evidence justifies the conclusion that their presence was not harmless, the nomination is invalid; Boger's and Sterr's, Laubach's and Hessler's Nominations, 5 Pa. Dist. Rep. 662. A nomination paper which attempts to name presidential electors, representatives at large in congress, and other state officers, as well as candidates for separate congressional, senatorial, and representative districts, by a single paper is bad; Crow Anti-Combine Party Nomination Paper, 5 Pa. Dist. Rep. 665. A court will, not, however, in the exercise of its equitable powers, enjoin the printing of a certain column on the official ballot on a mere allegation that the nomination papers are defective, false, and fraudulent. Proof of such allegation must be made before the court will find it so as a fact; Hendley v. Reeder, 5 Pa. Dist. Rep. 677. Where an adequate remedy exists and a sufficient opportunity has been given to present to the court objections to a nomination paper, the court will not intervene by injunction in relief of a complainant who has failed to avail himself

of such a remedy; Cassin v. Reeder, 5 Pa. Dist. Rep. 681.

Whenever an official ballot is provided for by statute the secretary of state will not decide which of two rival conventions of the same organization is the regular one, but all such nominations should be certified and left to the voters for their decision; State v. Allen, 43 Neb. 651, 62 N. W. 35; People v. District Court, 18 Colo. 26, 31 Pac. 339; Shields v. Jacob, 88 Mich. 164, 50 N. W. 105, 13 L. R. A. 760; Matter of Redmond, 5 Misc. 369, 25 N. Y. Supp. 381; nominations by a bolting convention are invalid; In re Nomination of Gibbons, 5 Pa. Dist. Rep. 194; in case of a tie vote in a nominating convention neither the candidates nor the election officers can determine the result by lot; Beck v. Board of Election Com'rs, 103 Mich. 192, 61 N. W. 346. Where the People's Independent party had been generally known as the "Populist Party," that name could not be adopted by a new political organization; Porter v. Flick, 60 Neb. 773, 84 N. W. 262.

The offence of falsely making or signing a nomination certificate must be charged in the words of the statute, being unknown at common law, and the want of criminal intent is no defence, and the voter must sign in person, or be present, and request it to be done; Com. v. Connelly, 163 Mass. 539, 40 N. E. 862.

As to defects in statement of names of candidates in nomination papers, see L. R. 1 C. P. Div. 596; L. R. 15 Q. B. Div. 273; 12 *id.* 257; they are not invalidated by ordinary abbreviations of names; 10 N. S. Wales L. R. 59.

Provisions as to filling vacancies are not always mandatory, and after a fair election, an irregularity will not be permitted to invalidate it; Stackpole v. Hallahan, 16 Mont. 40, 40 Pac. 80, 28 L. R. A. 502.

For the form of ballots prescribed in a number of states, see Talcott v. Philbrick, 59 Conn. 472, 20 Atl. 436, 10 L. R. A. 150. For inserting names under the Australian ballot law in the official ballot, not legally entitled to insertion, see Bowers v. Smith, 35 Cent. L. J. 305.

Courts will not interfere with the discretion of the officer charged with the preparation of the official ballot, as to details; Woods v. State, 44 Neb. 430, 63 N. W. 23.

Prohibiting the printing of the name of a candidate in more than one column is constitutional; Todd v. Election Com'rs, 104 Mich. 474, 480, 62 N. W. 564, 64 N. W. 496, 29 L. R. A. 330; but where the act provides that names shall be grouped by parties, a candidate named by more than one party is entitled to have his name appear in the column of each; Williams v. Dalrymple, 132 Mo. 62, 33 S. W. 447; *contra*, Sawin v. Pease, 6 Wyo. 91, 42 Pac. 750.

A construction which makes the error of a single official disfranchise large bodies of voters must be avoided if the language is susceptible of any other; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; and where, by the negligence of the officer, the name of a candidate and of the office is omitted from the ballot, the voter may write them, and his vote will be valid; People v. President, etc., of Wappingers Falls, 144 N. Y. 616, 39 N. E. 641.

The provision requiring the voter to make a cross with a stamp *opposite* each name voted for is mandatory; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447; Sego v. Stoddard, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468; Curran v. Clayton, 86 Me. 42, 29 Atl. 930; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; but in other states the courts are disposed to be more liberal and permit marking outside of the square if to the right of the name; In re Vote Marks, 17 R. I. 812, 21 Atl. 962; Weidknecht v. Hawk, 13 Pa. Co. Ct. 41; Contested Election for Mayor of City of York, 13 Pa. Co. Ct. 205; Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; Lynip v. Buckner, 22 Nev. 426, 41 Pac. 762, 30 L. R. A. 354; Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180, 186; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; Houston v. Steele, 98 Ky. 596, 34 S. W. 6 (in which cases the subject of marks is fully considered). A provision for marking with ink is directory only, and pencil will answer; State v. Russell, 34 Neb. 116, 51 N. W. 465, 15 L. R. A. 740, 33 Am. St. Rep. 625; a blanket paster is not legal in Pennsylvania, but a single sticker may be used; Little Beaver Tp. School Directors' Election, 165 Pa. 233, 30 Atl. 955, 27 L. R. A. 234. As to what distinguishing marks on ballots will vitiate them see Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227; Zeis v. Passwater, 142 Ind. 375, 41 N. E. 796; Rutledge v. Crawford, 91 Cal. 526, 27 Pac. 779, 13 L. R. A. 761, 25 Am. St. Rep. 212; People v. Board of County Canvassers, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624; Hanscom v. State, 10 Tex. Civ. App. 638, 31 S. W. 547; and where by mistake "spoiled ballots" were counted the result was not thereby ascertained and the returns of the county clerk were *prima facie* evidence which should be considered by the court; Hendee v. Hayden, 42 Neb. 760, 60 N. W. 1034; voters are not confined to the names on the official ballot but may write other names thereon; Sanner v. Patton, 155 Ill. 553, 40 N. E. 290; signing a ballot invalidates it; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227. The failure of a voter to retire to the booth to mark the ballot does not make the marking illegal if not wilful; Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97. In Michigan the supreme court have with much detail considered this subject and enumerate seven methods of marking which are defective by reason of their

being in effect distinguishing marks; Attorney-General v. Glaser, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828.

The provision that an officer or person designated by law *may assist* a voter physically or educationally unable to vote should be liberally construed; Pearson v. Board of Supervisors, 91 Va. 322, 21 S. E. 483; the voter is the sole judge of his disability; Beaver County Elections, 12 Pa. Co. Ct. 227; *contra*, under the same statute; Election Instructions, 2 Pa. Dist. Rep. 1; the disability must be one contemplated by the statute and not drunkenness or ignorance; *id.;* nor that he left his glasses at home; State v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; a ballot is good if the voter asks assistance though he can read; Montgomery v. Oldham, 143 Ind. 34, 42 N. E. 474; where the voter is required to make oath, this is mandatory, and failure to take it invalidates the vote; Attorney-General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; but if no form of oath is prescribed any sufficient form of words will suffice; State v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; if the statute does not restrict the voter's choice of an assistant the election officers cannot do so; Beaver County Elections, 12 Pa. Co. Ct. 227; but when the statute designates a particular officer, it is mandatory; Pearson v. Board of Supervisors, 91 Va. 322, 21 S. E. 483; and irregularities in the services of the voter's assistant, as having one where two were required, or if the assistant had received money from a candidate, will not invalidate the vote; Hanscom v. State, 10 Tex. Civ. App. 638, 31 S. W. 547; if the assistant prepares a ballot contrary to the direction of the voter, if fraudulently done, it will avoid the vote, but if it does not appear whether it was fraud of the assistant or mistake of the voter it will not be rejected; *id.*

When an interpreter was permitted by law but not asked for, the presence of one inside the railing, conversing with voters was held to vitiate the election; Attorney-General v. Stillson, 108 Mich. 419, 66 N. W. 388.

Irregularities in taking the ballot must be gross to defeat the election; L. R. 16 Q. B. Div. 739; 7 Can. S. C. 247. When the statute declares a certain irregularity fatal courts will give effect to it, otherwise they will ignore such innocent irregularities as are free from fraud and have not interfered with a fair expression of the voter's will; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491.

Irregularities which have been held harmless, are: Where there were two voting places in a precinct entitled to one; Wildman v. Anderson, 17 Kan. 347; Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 16 L. R. A. 754, 33 Am. St. Rep. 491; where ballots were received by officers near a house appointed whose owner refused to permit its use; Preston v. Culbertson, 58 Cal. 198; errors or irregularities in printing; Allen v. Glynn, 17 Colo. 338, 29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304; Miller v. Pennoyer, 23 Or. 364, 31 Pac. 830; ballots improperly prepared by the officers and not "marked" ballots may be counted; People v. Wood, 148 N. Y. 142, 42 N. E. 536.

When candidates and voters have participated in an election and *acquiesced* in the result failure to give notice may be disregarded; Adsit v. Board of State Canvassers, 84 Mich. 420, 48 N. W. 31, 11 L. R. A. 534; and other irregularities may be so far acquiesced in by the defeated candidate that he will be disqualified to complain; L. R. 1 Q. B. 433; Allen v. Glynn, 17 Colo. 338, 29 Pac. 670, 15 L. R. A. 743, 31 Am. St. Rep. 304.

Contested Elections. At common law the right to an office was tried by a writ of *quo warranto;* in modern practice, an information in the nature of *quo warranto* is usual in the absence of a statute; McCrary, Elect. 196. See 3 Bla. Com. 263; 2 Jurist N. S. 114. An act for trying contested elections without a jury is not unconstitutional; Ewing v. Filley, 43 Pa. 389. An act providing for the appointment of an election commission with power over contests, by the legislature, is an invasion of the executive power and unconstitutional; Pratt v. Breckinridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405. As to whether the declarations not under oath of illegal voters is evidence as to the votes cast by them, is doubtful, see State v. Olin, 23 Wis. 319; 1 Bartl. 19, 230; Gilleland v. Schuyler, 9 Kan. 569; People v. Pease, 27 N. Y. 45, 84 Am. Dec. 242. The ordinary rules of evidence apply to election cases; McCrary, Elect. 231; Paine, Elect. 824. A legal voter may refuse to testify for whom he voted, but he may waive this privilege; Kneass' Case, 2 Pars. (Pa.) 580. It is competent for witnesses to testify that they were under age at the time of voting, and that their votes were cast for the candidate receiving the largest number; Crabb v. Orth, 133 Ind. 11, 32 N. E. 711. A voter who participates in an election which is not secret, although required by statute to be by ballot, does not waive his right to contest the result, as such waiver would be contrary to public policy; State v. Board of Canvassers, 78 S. C. 461, 59 S. E. 145, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

In all contested elections, the tribunal will look beyond the certificate of the returning board; People v. Vail, 20 Wend. (N. Y.) 12. See State v. Townsley, 56 Mo. 107.

In purging the poll of illegal votes, unless it be shown for whom the illegal votes were cast, they will be deducted from the total vote; In re Contested Elections of 1868, 2 Brewst. (Pa.) 128.

Where the laws have been entirely disre-

garded by the election officers and the returns are utterly unworthy of credit, the entire poll will be thrown out, but legal votes, having been properly proved, may be counted; Bright. Elect. Cas. 493. "Nothing short of the impossibility of determining for whom the majority of votes were given ought to vacate an election;" Cl. & H. 504.

Where another than the person returned as elected is found to have received the highest number of legal votes given, he is entitled to the office; Varney v. Justice, 86 Ky. 596, 6 S. W. 457.

Primary Elections. After an election, the right of successful candidates to their offices is not affected by the unconstitutionality of the primary act under which they were nominated; People v. Strassheim, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135; such an act may not curtail, subvert or add to the constitutional qualifications of voters; *id.* Primary elections may be provided by statute for political parties which cast at least 10 per cent. of the vote at the last general election, and such statute does not deprive any person of the equal protection of the laws; State v. Felton, 77 Ohio St. 554, 84 N. E. 85, 12 Ann. Cas. 65. They are not within the meaning of a statute permitting the use of voting machines at all state, etc., elections, Line v. Board of Election Canvassers, 154 Mich. 329, 117 N. W. 730, 18 L. R. A. (N. S.) 412, 16 Ann. Cas. 248.

A law requiring the payment of a fee as a condition precedent to having a candidate's name printed on the official primary election ballot, except as may be reasonable for the services of an auditor for filing petition, is unconstitutional; Johnson v. Grand Forks County, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662.

In 1868, jurisdiction over contested elections to the House of Commons was transferred to the Court of Common Pleas and is now vested in the High Court of Justice, the cases being heard by two judges. Their decision is certified to the Speaker of the House.

See BALLOT; ELIGIBILITY; MAJORITY; VOTER; VOTING MACHINE.

ELECTION OF RIGHTS OR REMEDIES.

The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims, in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. 2 Sto. Eq. Jur. § 1075.

A choice shown by an overt act between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Bierce v. Hutchins, 205 U. S. 346, 27 Sup. Ct. 524, 51 L. Ed. 828.

Etymologically, election denotes choice, selection *out of* the number of those choosing. Thus, the election of a governor would be the choice of some individual from the body of the electors to perform the duties of governor. In common use, however, it has come to denote such a selection made by a distinctly defined body—as a board of aldermen, a corporation, or state—conducted in such a manner that each individual of the body choosing shall have an equal voice in the choice, but without regard to the question whether the person to be chosen is a member of the body or not. The word occurs in law frequently in such a sense, especially in governmental law and the law of corporations.

But the term has also acquired a more technical signification, in which it is oftener used as a legal term, which is substantially the choice of one of two rights or things, to each one of which the party choosing has equal right, but both of which he cannot have. This option occurs in fewer instances at law than in equity, and is in the former branch, in general, a question of practice.

At Law. In contracts, when a debtor is obliged in an alternative obligation to do one of two things, as to pay one hundred dollars or deliver one hundred bushels of wheat, he has the choice to do one or the other until the time of payment; he has not the choice, however, to pay a part in each. Pothier, Obl. part 2, c. 3, art. 6, no. 247; Smith v. Sanborn, 11 Johns. (N. Y.) 59. Or, if a man sell or agree to deliver one of two articles, as a horse or an ox, he has the election till the time of delivery,—it being a rule that, "in case an election be given of two several things, always he which is the first agent, and which ought to do the first act, shall have the election;" Co. Litt. 145 *a;* McNitt v. Clark, 7 Johns. (N. Y.) 465; Fleming v. Harrison's Devisees, 2 Bibb (Ky.) 171, 4 Am. Dec. 691. On the failure of the person who has the right to make his election in proper time, the right passes to the opposite party; Co. Litt. 145 *a;* Reid v. Smith, 1 Des. Ch. (S. C.) 460; Overbach v. Heermance, Hopk. Ch. (N. Y.) 337, 14 Am. Dec. 546; Waggoner v. Cox, 40 Ohio St. 539; Corbin v. Fairbanks Co., 56 Vt. 538; Husson v. Oppenheimer, 66 How. Pr. (N. Y.) 306; Marlor v. R. Co., 21 Fed. 383.

When one party renounces a contract the other party may elect to rescind at once, except so far as to sue upon it and recover for the breach, and he may immediately bring an action, without waiting for the time of performance to arrive or elapse (in such case he cannot treat the contract as subsisting for any other purpose); L. R. 7 Exch. 114; L. R. 16 Q. B. 460; Hocking v. Hamilton, 158 Pa. 107, 27 Atl. 836; Lovell v. Ins. Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423; Dingley v. Oler, 11 Fed. 372; *contra,* as to a contract for the sale of land, Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384. See the cases collected, Ans. Cont. (8th ed.) 355, n. 1. It is a maxim of law that, an election once made and pleaded, the party is concluded; *electio semel facta et placitum testatum non patitur regressum;* Co. Litt. 146; Lawrence v. Ins. Co., 11 Johns. (N. Y.) 241.

But an action for enforcing the benefits due under a contract conveying property in consideration of support does not preclude an action to rescind on subsequent breaches;

Gall v. Gall, 126 Wis. 390, 105 N. W. 953, 5 L. R. A. (N. S.) 603.

In many cases of voidable contracts there is a right of election to affirm or disavow them, after the termination of the disability, the existence of which makes this contract voidable. So all contracts of an infant, except for necessaries, may be avoided by him within a reasonable time after he comes of age, but they are voidable only, and he must elect not to be bound by them; Heath v. Stevens, 48 N. H. 251; Philpot v. Mfg. Co., 18 Neb. 54, 24 N. W. 428. See Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87. And bringing suit is an election to rescind; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Pakas v. Racy, 13 Daly (N. Y.) 227. See INFANT.

Whenever, by law or contract, a party has laid before him a variety of steps, the taking of one of which excludes another, or the rest, he must choose between them. After his choice is made, and by words or acts expressed in a manner suited to the particular case, he cannot reverse it; he is said to have elected the one step, and waived the other; Bish. Cont. § 808.

Other cases in law arise: as in case of a person holding land by two inconsistent titles; 1 Jenk. Cent. Cas. 27; dower in a piece of land and that piece for which it was exchanged; 3 Leon 271. See Sugd. Pow. 498.

In Equity. A choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of, in favor of a third party, by virtue of the same paper. The doctrine of election pre-supposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other; 1 Swanst. 394; 3 Woodd. Lect. 491; 2 Rop. Leg. 480; Snell, Pr. Eq. 237.

The doctrine of election rests upon the principle that he who seeks equity must do equity, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it; Peters v. Bain, 133 U. S. 695, 10 Sup. Ct. 354, 33 L. Ed. 696.

Where an express and positive election is required, there is no claim, either at law or in equity, to but one of the objects between which election is to be made; but in many cases there is apparent, from the whole of an instrument, the intention that the party to be benefited shall be benefited on certain conditions. In such cases, equity will require the party to elect; Bisph. Eq. sec. 295.

Where a testator gives money or land to A, and by the same will gives something of A's to B, A must elect either to give effect to the will by allowing B to have the property which the testator intended should go to him, or if he chooses to disregard the will and retain his own property, he must make good the value of the gift to the disappointed beneficiary; Bisph. Eq. sec. 295. This doctrine is principally applied to cases of wills; but it is applicable also to voluntary deeds, to contracts for value resting upon articles, and to contracts completely executed by conveyance and assignment. This is a case of implied election. An express election is where a condition is annexed to a gift, a compliance with which is distinctly made one of the terms by which alone the gift can be enjoyed. In a case of express condition the result of a non-compliance is a forfeiture; whereas in elections growing out of an implied duty, the person who declines to make good the gift does not absolutely lose the benefit which is bestowed upon him, but is compelled only to give up so much of it as will amount to compensation for the disappointed beneficiary; Bisph. Eq. sec. 296.

Where a testator purports to give property to A which in fact belongs to B, and at the same time out of his own property confers benefits on B, the literal construction and application of the will would allow B to keep his property to the disappointment of A and also to take the benefits given him by the will. In such circumstances, however, B is not allowed to take the full benefit given him by the will unless he is prepared to carry into effect the whole of the testator's dispositions; 1 Swan. 359, 394. If he elects to take under the will, he is bound and may be ordered to convey his own property to A; 1 Ves. 514; 1 Swan. 409, 420. If he elects to take against the will and keep his own property, and disappoints A, then he cannot take any benefits under the will without compensating A to the extent of the value of the property as to which A is disappointed; 5 Ch. D. 163; 4 Bro. C. C. 21.

The question whether an election is required occurs most frequently in case of devises; "because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires;" L. R. 8 Ch. 578; but it extends to deeds; 1 Swanst. 400; 2 Story, Eq. Jur. § 1075, n.; and it has been held to apply to "voluntary deeds, to cases of contracts for valuable consideration resting in articles, to contracts for value completely executed by conveyance and assignments"; L. R. 8 Ch. 578, where the authorities are collected. The doctrine also applies to powers of appointment; L. R. 9 Eq. 519; 22 Ch. D. 555; 34 *id.* 160.

In the case, not strictly of election, but

often so treated, of two distinct gifts of a testator's own property, one onerous and the other not, it is the general rule that the donee may take one and reject the other, unless it appear that it was the testator's intention that the option should not exist; 22 Ch. D. 573, 577; and where a gift is made by a deed of which the consideration is partly invalid by reason of the disability of the parties, the parts of the deed are read together and the burden is treated as the consideration for the benefit; Brett, L. Cas. Mod. Eq. 263. Where a married woman made a valid appointment by will to her husband under a power, and also bequeathed personal property (not her separate estate) to another person to which the power did not extend, the husband was not put to his election, but took both under the power and *jure mariti*, as to the property ineffectually bequeathed; 9 Ves. 369.

There must be a clear intention by the testator to give that which is not his property; Scott v. Depeyster, 1 Edw. Ch. (N. Y.) 532; L. R. 7 Eq. 291. And if the testator has some interest in the thing disposed, the presumption that he intended to dispose only of his interest must be overruled in order to make a case of election; 6 Dow. 149, 179; 1 Ves. 515; and evidence is not admissible to enlarge the devise so as to include property belonging to another; McDonald v. Shaw, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657.

The intention of the testator to put the devisee to his election must appear from the will itself; McDonald v. Shaw, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657; but surrounding circumstances may be shown by parol; Fitzhugh v. Hubbard, 41 Ark. 64; 30 Beav. 14. The time in which election may be exercised must be reasonable; 30 Beav. 235; Cooper v. Cooper's Ex'r, 77 Va. 198; 19 Ves. 663; Reaves v. Garrett's Adm'r, 34 Ala. 558; U. S. v. Duncan, 4 McLean 99, Fed. Cas. No. 15,002.

The doctrine applies to every species of property or interest, whether the donor does or does not know of his right to dispose of it; Wats. Comp. Eq. 177; cases of transactions involving property of the wife; 23 Beav. 457; Gregory v. Gates, 30 Gratt. (Va.) 83; satisfaction of dower; Fuller v. Yates, 8 Paige, Ch. (N. Y.) 325; 2 Sch. & L. 452; 14 Sim. 258. The doctrine does not apply to creditors; 12 Ves. 354.

As to the right or duty of election by persons under disability, there is much apparent confusion in the cases both as to theory and practice. Story states the rule generally that married women, infants, and lunatics are not bound by election; 2 Eq. Jur. § 1097. The statement would seem too broad even before the great changes made in all matters affecting the property rights and powers of married women by recent legislation, and before the changes characterized as a "brand new invention of equity not fifty years old, and made exclusively for the benefit of married women under the old law—a breed which is rapidly becoming extinct;" Brett, L. Cas. Mod. Eq. 257. This writer considers the old and true doctrine of election to apply only to the acceptance of gifts under an instrument made by another, while the new doctrine involves the confirmation or repudiation of voidable instruments made by the person electing, who, in the cases referred to, is always a married woman. The rule, so far as there is one, has been stated thus: —Parties competent to make an election must usually be *sui juris*, but election may sometimes be made by a court of equity on behalf of infants and married women; Bisph. Eq. § 304; but this is really no rule and probably none can be exactly defined; the cases must be resorted to, and a large measure of judicial discretion has been exercised in dealing with them as they arose. In some it is held that a married woman may be permitted to elect; 4 Kay & J. 409; Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289, 48 Am. Rep. 532; Kennedy v. Johnston, 65 Pa. 451, 3 Am. Rep. 650; in others that she cannot; 3 Myl. & Cr. 171; Lord Cairns in L. R. 7 H. L. 67; 9 Ch. D. 363; but it may be referred to a master to inquire what is best for her; 2 Ves. 60; L. R. 7 H. L. 67 (but in this case there were also infants). It was held by Lord Hatherly that she must elect; in 2 J. & H. 344 (which Brett says "led to the new departure"); followed in 28 Ch. D. 124; *contra;* by Sir George Jessel in 18 Ch. D. 531; followed by Chitty, L. J., in 27 Ch. D. 606. The decisions of Lord Hatherly and Sir George Jessel were referred to without disapproval by Lord Selborne, one in L. R. 8 Ch. 578, and the other in 8 App. Cas. 420. Finally in 31 Ch. D. 275, (reversing 28 Ch. Div. 124,) it was held that the wife would not be compelled to elect, but was entitled to retain both funds, on the ground that the settled fund had a restraint on anticipation. This case reviews the conflicting decisions and considers that they leave the question to be determined on principle. It is treated as deciding that but for the fact on which the case was put it was one for election; Snell, Pr. Eq. 247; and it assumed without discussion that election applied to married women, and thereby as Brett considers "sealed the triumph of the new election"; Lead. Cas. Mod. Eq. 257.

With regard to infants, the practice has varied very much, and the cases are collected in 1 Swanst. 413, note (*c*). The infant has been permitted to elect after coming of age in some cases; cas. *t.* Talbot 176; *id.* 130; 3 Bro. P. C. 173; in others an inquiry has been directed; 2 Sch. & Lef. 266; and this may be considered the usual practice; 1 Bro. P. C. 300; though the court has elected for them without reference; 26 L. J. N. S. Ch. 148; Addison v. Bowie, 2 Bland,

Ch. (Md.) 606; and the same practice is adopted when the persons to elect are unborn; Brett, L. Cas. Mod. Eq. 260. See, generally, on this subject, Serrell, Equit. Doct. Elect. 184.

Persons not under disabilities are bound to elect; Prentice v. Janssen, 79 N. Y. 478. Positive acts of acceptance or renunciation are not indispensable, but the question is to be determined from the circumstances of each case as it arises; 21 Beav. 447; 1 McClel. 541; Tiernan v. Roland, 15 Pa. 429. And the election need not be made till all the circumstances are known; 2 V. & B. 222; 1 McCl. & Y. 569. See, generally, 2 Story, Eq. Jur. § 1075; 1 Swanst. 402, note; 2 Rop. Leg. 480; Bisph. Eq. 295.

A widow has a right, regulated by statute in the several states, to declare her election between the provisions in her favor under the will of her husband and her right of dower. When bound to elect she is entitled to full information and ascertainment of the values of the two interests, and she may file a bill in equity to obtain them; 2 Scribn. Dow. 497, and cases cited at large in note 1. The right must be exercised by the widow herself, being purely personal; Sherman v. Newton, 6 Gray (Mass.) 307; Hinton v. Hinton, 28 N. C. 274; and the rule is not subject to exception even if she is insane; Lewis v. Lewis, 29 N. C. 72; Collins v. Carman, 5 Md. 503. After the widow's death within forty days without election, her representatives could not make a renunciation of the will; Boone's Representatives v. Boone, 3 Har. & McH. (Md.) 95; Millikin v. Welliver, 37 Ohio St. 460; Eltzroth v. Binford, 71 Ind. 455; Appeal of Crozier, 90 Pa. 384, 35 Am. Rep. 666; and the right to a legacy in her favor vests in her executor; Flynn v. McDermott, 183 N. Y. 62, 75 N. E. 931, 2 L. R. A. (N. S.) 959, 110 Am. St. Rep. 687, 5 Ann. Cas. 81; and attacking a will on the ground of lack of testamentary capacity is not an election by the widow; *id.* For the statutory provisions on the subject see 2 Scribn. Dow. 505, notes.

There must be an intention to elect and knowledge of her rights so as to constitute a deliberate choice; Bradford v. Kent, 43 Pa. 474; and an election made under a mistake does not conclude her; 1 Bro. C. C. 445; 12 Ves. Jr. 136; Snelgrove v. Snelgrove, 4 Dessaus. (S. C.) 274; but if she is acquainted with the material facts the election will bind her even though she do not understand her legal rights; Light v. Light, 21 Pa. 407. But see McDaniel v. Douglas, 6 Humph. (Tenn.) 220; Davis v. Davis, 11 Ohio St. 386. Nor is she concluded by an election procured by fraud; Smart v. Waterhouse, 10 Yerg. (Tenn.) 94; Morrison v. Morrison's Widow, 2 Dana (Ky.) 13. In some cases an election is implied, but so much difficulty is found to exist with respect to what constitutes an implied election that it will generally remain to be determined by the circumstances of each case. See 1 Lead. Cas. in Eq. 537, 570, and cases cited; Blunt v. Gee, 5 Call (Va.) 481; Upshaw v. Upshaw, 2 Hen. & Mun. (Va.) 381, 3 Am. Dec. 632; Reed v. Dickerman, 12 Pick. (Mass.) 146; Bradford v. Kent, 43 Pa. 474; Thompson's Lessee v. Hoop, 6 Ohio St. 480; Craig's Heirs v. Walthall, 14 Gratt. (Va.) 518. A widow's administrator cannot sell land originally belonging to her, where her husband by his will dealt with it as his, and she for nine years had elected to take under his will; Hoggard v. Jordan, 140 N. C. 610, 53 S. E. 220, 4 L. R. A. (N. S.) 1065, 6 Ann. Cas. 332.

In many states, if deprived of the provision given in lieu of dower, the widow is entitled to demand her dower; 2 Scribn. Dow. 525; Thompson v. Egbert, 17 N. J. L. 459; if the deprivation be substantial though not total; Hastings v. Clifford, 32 Me. 132; or if a previous application for dower has been refused; Thompson v. McGaw, 1 Metc. (Mass.) 66; or the statutory period for demand has passed before she was advised of the failure of her provision; Hastings v. Clifford, 32 Me. 132; or she had previously elected to take under the will; Hone's Ex'rs v. Van Schaick, 20 Wend. (N. Y.) 564. In taking a testamentary provision in lieu of dower the widow becomes a purchaser for a valuable consideration; 1 Lead. Cas. in Eq. 511, 570; 2 Scribn. Dow. 527; Warren v. Morris, 4 Del. Ch. 289.

In cases not covered by statute a widow may be required to elect upon general equitable principles. In the case last cited, she being also a legatee of one-third of the estate "according to law," was held to be put to her election, not under the statute but under the general doctrine of equity which is thus stated by Bates, Ch. "This doctrine precludes a party taking a benefit by deed or will from asserting any title or claim clearly inconsistent with the provisions of the instrument under which he takes —putting him to his election between the two. In its application to dower it is nowhere better stated than by our court of appeals in Kinsey v. Woodward, 3 Harr. (Del.) 464. 'In regard to dower it seems from all the cases to be an established rule that a court of equity will not compel the widow to make her election, unless it be shown by the express words of the testator, that the devise or bequest was given in lieu or satisfaction of dower; or unless it appears that such was the testator's intention, by clear and manifest implication arising from the fact that the dower is plainly inconsistent with the devise or bequest, and so repugnant to the will as to defeat its provisions. If both claims can stand consistently together, the widow is entitled to both, although the claim under the will may be much greater in value than her dower.'" 2 S. & L. 451; 3 Ves. Jr. 249; 1 Drew. 411; Dru. & War. 107; 3 Kay & J. 257; Adsit v. Adsit, 2 John. Ch. (N. Y.) 451, 7 Am. Dec. 539.

If a beneficiary elects to take against the will, the amount of compensation to be paid to a disappointed legatee must be ascertained as of the time of testator's death, and not the date of election; [1905] 1 Ch. 16.

Of Remedies. A choice between two or more means of redress for an injury or the punishment of a crime allowed by law.

The selection of one of several forms of action allowed by law.

The choice of remedies is a matter demanding practical judgment of what will, upon the whole, best secure the end to be attained. Thus, a remedy may be furnished by law or equity, and at law, in a variety of actions resembling each other in some particulars. Actually, however, the choice is greatly narrowed by statutory regulations in modern law, in most cases. See 1 Chit. Pl. 207-214.

Where a party has two inconsistent remedies, and brings suit on one with knowledge of the facts and his rights therein, he cannot thereafter sue on the other; A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511. But it is held that where a wrong has been inflicted, and the party is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one; Rankin v. Tygard, 198 Fed. 795. Supreme Court Equity Rule 25 provides that relief in a bill may be sought in alternative forms.

A person may often choose whether he will sue in tort or contract. If his goods are taken from him by fraud he may sue for the price in assumpsit, or bring an action of replevin or trover; Pike v. Bright, 29 Ala. 332; Watson v. Stever, 25 Mich. 386; Hudson v. Gilliland, 25 Ark. 100; Roberts v. Evans, 43 Cal. 380; Phelps v. Conant, 30 Vt. 277; Rogers v. Inhabitants of Greenbush, 57 Me. 441. But where a principal had recovered from a fraudulent agent for money had and received, it was held he could later sue the third party who had bought from the agent, in conversion; [1900] 1 K. B. 54; criticized in 16 L. Q. Rev. 160. And when two actions are pending at law or in equity between the same persons and for the same subject-matter, the plaintiff is usually compelled to elect which one he will maintain; Central R. Co. of New Jersey v. R. Co., 32 N. J. Eq. 67; Hause v. Hause, 29 Minn. 252, 13 N. W. 43; McRae v. Singleton, 35 Ala. 297. But an election is not usually compelled between domestic and foreign suits; In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1,417; Wood v. Lake, 13 Wis. 94; and a foreclosure of a mortgage and a suit on the bond or note secured by it as well as actions to enforce admiralty liens and at the same time recover on the debt are also exceptions; Morgan v. Sherwood, 53 Ill. 171; Russell v. Alvarez, 5 Cal. 48; The Kalorama, 10 Wall. (U. S.) 204, 19 L. Ed. 941; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

It may be laid down as a general rule that when a statute prescribes a new remedy the plaintiff has his election either to adopt such remedy or proceed at common law. Such statutory remedy is cumulative, unless the statute expressly or by necessary implication takes away the common-law remedy; Miles v. O'Hara, 1 S. & R. (Pa.) 32; Booker's Ex'rs v. McRoberts, 1 Call (Va.) 243; Bear-Camp-River Co. v. Woodman, 2 Greenl. (Me.) 404; Mayor, etc., of Baltimore v. Howard, 6 Har. & J. (Md.) 383; Coxe v. Robbins, 9 N. J. L. 384.

The commencement and trial of an action on a contract is not such an election of remedies as would estop plaintiff from suing on the notes; Fifield v. Edwards, 39 Mich. 267; Kingsbury v. Kettle, 90 Mich. 476, 51 N. W. 541.

Where a plaintiff has separate and concurrent remedies against a number of parties, he loses no rights by suing some and afterwards discontinuing his action; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075. See Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807. An unsatisfied judgment on a note will not bar an action on notes taken as collateral security; Black v. Reno, 59 Fed. 917.

By joining his wife in a suit for her legacy, a husband exercises his election to treat it as joint property; Wingate v. Parsons, 4 Del. Ch. 117.

After a suit in replevin has been discontinued before judgment without obtaining any benefit, because plaintiff has paid the value of the goods to satisfy his replevin bond, this suit does not constitute such an election of remedy as to stop him from claiming payment of the purchase price out of the assets of the purchaser's estate; Bolton Mines Co. v. Stokes, 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789. Bringing trover for possession of goods by mistake will not preclude a subsequent action of assumpsit for their purchase price; Clark v. Heath, 101 Me. 530, 64 Atl. 913, 8 L. R. A. (N. S.) 144.

In Criminal Law. The choice or determination by a prosecuting officer, upon which of several charges, or counts, in an indictment he will proceed to trial.

No objection can be raised, either on demurrer or in arrest of judgment, though the defendant or defendants be charged in different counts of an indictment with different offences of the same kind. Indeed, on the face of the record, every count purports to be for a separate offence, and in misdemeanors it is the daily practice to receive evidence of several libels, several assaults, several acts of fraud, and the like, upon the same indictment. In cases of felony, the courts, in the exercise of a sound discretion, are accustomed to quash indictments containing several distinct charges, when it appears, before the defendant has pleaded and the jury are charged, that the inquiry is to include several crimes. When this circumstance is discovered during the progress of the trial, the prosecutor is usually called upon to select one felony, and to confine himself to that, unless the offences, though in law distinct, seem to constitute in fact but parts of one continuous transaction. Thus, if a prisoner is charged with receiving several articles, knowing them to have been stolen, and it is proved that they were received at separate times, the prosecutor may

be put to his election; but if it is possible that all the goods may have been received at one time, he cannot be compelled to abandon any part of his accusation; 1 Mood. 146; 2 Mood. & R. 524. In another case, the defendant was charged in a single count with uttering twenty-two forged receipts, which were severally set out and purported to be signed by different persons, with intent to defraud the king. His counsel contended that the prosecutor ought to elect upon which of these receipts he would proceed, as amidst such a variety it would be almost impossible for the prisoner to conduct his defence. As, however, the indictment alleged that they were all uttered at one and the same time, and the proof corresponded with this allegation, the court refused to interfere; and all the judges subsequently held that a proper discretion had been exercised; 2 Leach 877; 2 East, Pl. Cr. 934. See 11 Cl. & F. 155; Harman v. Com., 12 S. & R. (Pa.) 69; Burk v. State, 2 Har. & J. (Md.) 426; People v. Rynders, 12 Wend. (N. Y.) 426; Com. v. Bennett, 118 Mass. 443; Van Sickle v. People, 29 Mich. 61; State v. Mallon, 75 Mo. 355.

The state need not elect on which count of an indictment it will proceed to trial, where the several counts relate to the same transaction; State v. Houx, 109 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686.

The artificial distinction between felonies and misdemeanors is, in most jurisdictions, obsolete, and in most states several distinct offences to which a similar punishment is attached may be joined. It usually rests with the court whether it will compel a prosecuting officer to elect which count to proceed on; State v. Hood, 51 Me. 363; Com. v. Sullivan, 104 Mass. 552; Beasley v. People, 89 Ill. 571; State v. Green, 66 Mo. 632; Whart. Crim. Pl. & Pr. § 293. The election should be made before opening the case of the defence; Gilbert v. State, 65 Ga. 449.

ELECTION DISTRICT. A subdivision of territory, whether of state, county, or city, the boundaries of which are fixed by law, for convenience in local or general elections. Chase v. Miller, 41 Pa. 403.

ELECTIONS IN CORPORATIONS. The power of election by corporations may apply either to corporate officers generally, or to the selection of new members to fill vacancies in those corporations, whose nature and composition require them to consist of members and not of holders of capital stock, as eleemosynary corporations. The election of members of a corporation of the former class is, in general, regulated by the charter, or other constituent law of the corporation, or by its by-laws, and their provisions must be strictly followed. In the absence of express regulations it is a general principle that the power of election of new members, or when the number is limited, of supplying vacancies, is an inherent power necessarily implied in every corporation aggregate. It is said to result from the principle of self-preservation; 2 Kent 293; 1 Rolle, Abr. 513; 8 East 272.

If the right and power of election is not adequately prescribed by the charter, a corporation has power to make by-laws consistent with the charter, and not contrary to law, regulating the time and manner of elections and the qualifications of electors, and manner of proving the same; 3 Term 189; Com. v. Woelper, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360; and if there be no by-law established usage will be resorted to; Juker v. Com., 20 Pa. 484. In many states there are general statutes on this subject, and in such case they must be strictly followed; 1 Thomp. Corp. § 745.

Unless under express provision as to special meetings, or filling vacancies, elections of officers are held at regular meetings of the corporation. The *time* is nearly, if not always, regulated by statute, charter, or by-laws, and such cases as are found on the subject are not as to any general principle; 1 Thomp. Corp. § 701; the date cannot be changed by directors so as, by postponement of an annual election, to lengthen their terms; Mottu v. Primrose, 23 Md. 482; a business meeting of a benevolent corporation may be held on Sunday; People v. Benev. Society, 65 Barb. (N. Y.) 357; and a charter provision requiring the choice of directors at an annual meeting was held to be directory and not exclusive; Hughes v. Parker, 20 N. H. 58.

The *place* of meeting for elections is also usually regulated by the law of the corporation itself, and if there be none, it should unquestionably be done at its usual and principal place of business, or where it exercises its corporate functions. This is for corporate purposes its domicil, *(q. v.)* and the term residence is also applied to corporations, as the place where its business is done; Bristol v. R. Co., 15 Ill. 436; Chicago, D. & V. R. Co. v. Bank, 82 Ill. 493; while it is a citizen only of the state by which it was created; *id.* In the latter state only may constituent acts be done; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274; Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 476, 20 L. Ed. 199; Hilles v. Parrish, 14 N. J. Eq. 380. See also Arms v. Conant, 36 Vt. 750; Ohio & M. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128. Accordingly it has been held that votes and similar acts outside of the state creating it are void; Miller v. Ewer, 27 Me. 509. 46 Am. Dec. 619; even under a provision authorizing the calling of a first meeting at such a time or place as they think proper; *id.;* but the appointment in one state of a secretary, by the directors of a manufacturing corporation of another state, has been held valid; McCall v. Mfg. Co., 6 Conn. 428; and a corporation created by a concurrent

legislation of two states may hold meetings for elections in either; Covington & C. Bridge Co. v. Mayer, 31 Ohio St. 317. In some states, as Minnesota, the Dakotas, and Colorado, the holding of such meetings is permitted outside of the state; and in the latter state it is held that the fact that the annual meeting was held outside of the state cannot be raised in a collateral proceeding; Humphreys v. Mooney, 5 Colo. 282. Under an authority to call special meetings on notice of time and place, they may be called by the president at a place other than the regular place of business; Corbett v. Woodward, 5 Sawy. 403, Fed. Cas. No. 3,223; and at such a meeting an election may be held if otherwise legal. Where no place is named in the charter, the directors may designate it, and officers elected at such meeting will be such *de facto;* Com. v. Smith, 45 Pa. 59.

Meetings for the election of officers following the law of the corporation must be *called by* the person or persons designated for that purpose; Congregational Society of Bethany v. Sperry, 10 Conn. 200; Reilly v. Oglebay, 25 W. Va. 36; though it has been held that it need not always be by formal action or with strictness of procedure if it is done by their direction; Hardenburgh v. Bank, 3 N. J. Eq. 68; Citizens' Mut. Fire Ins. Co. v. Sortwell, 8 Allen (Mass.) 217; *contra;* Reilly v. Oglebay, 25 W. Va. 36; Goulding v. Clark, 34 N. H. 148; Third School District in Stoughton v. Atherton, 12 Metc. (Mass.) 105; they must be duly *assembled;* German Evangelical Congregation v. Pressler, 14 La. Ann. 799; whether of stockholders; Peirce v. Building Co., 9 La. 397, 29 Am. Dec. 448; or directors; Despatch Line of Packets v. Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Elliot v. Abbot, 12 N. H. 549, 37 Am. Dec. 227; Herrington v. District Tp. of Liston, 47 Ia. 11; upon due *notice;* 5 Burr. 2681; in accordance with charter or by-laws; Cogswell v. Bullock, 13 Allen (Mass.) 90; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Stockholders of Shelby R. Co. v. R. Co., 12 Bush (Ky.) 62; and when there is no provision as to method, personal notice is proper; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; or according to general statute law, if there be such; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; but, though it is safer and better practice to give notice, in case of stated meetings for regular elections, notice is not required, but the members are charged with notice of them; Sampson v. Mill Corp., 36 Me. 78; 4 B. & C. 441; Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; while of *special* meetings there must always be notice; 2 H. L. Cas. 789; People v. Batchelor, 22 N. Y. 128; Com. v. Guardians of Poor of Philadelphia, 6 S. & R. (Pa.) 469; and the failure to notify a single member will avoid the proceedings, 5 Burr. 2681; 4 B. & C. 441; 4 A. & E. 538; People v. Batchelor, 22 N. Y. 128; unless notice is waived by *attendance,* as, if all are present, each of them waives the want or irregularity of notice; Jones v. Turnpike Co., 7 Ind. 547; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104. Such waiver will not operate as against a positive direction of the charter; 1 Dill. Mun. Corp. § 264; and when there is no provision as to notice it must be personal; Savings Bank of New Haven v. Davis, 8 Conn. 191; Wiggin v. First Freewill Baptist Church, 8 Metc. (Mass.) 301; Harding v. Vandewater, 40 Cal. 77.

As to what constitutes a *quorum* at elections, see MEETINGS; QUORUM.

As to all the details of the *conduct* of elections, the provisions of state statutes, charters, or by-laws, must be strictly pursued and will generally be found to cover the subject. Where a statute provided for three *inspectors,* it was held that two could act; In re Excelsior Fire Ins. Co., 16 Abb. Pr. (N. Y.) 8. The method of appointment prescribed must be strictly followed; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; though in certain emergencies the corporators may appoint; Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361; and a candidate has been held not disqualified; Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; but this is so contrary to well settled and judicious legal principles that it cannot be considered desirable. An election otherwise valid will not be avoided because inspectors were not sworn; In re Chenango County Mut. Ins. Co., 19 Wend. (N. Y.) 635; or the oath taken not subscribed by them; Matter of Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361. In the absence of a statute to the contrary, their duties are ministerial, and they cannot act upon the challenge of a vote except to follow the transfer books; In re Long Island R. Co., 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; or put the challenged party on oath; *id.* note; or pass judicially upon proxies regular on their face; In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529; because not acknowledged or witnessed; In re Cecil, 36 How. Pr. (N. Y.) 477; but this would be otherwise if, as is often the case, the charter requires witnesses. They may not reject votes once received; Hartt v. Harvey, 10 Abb. Pr. (N. Y.) 321; nor go beyond the ballot to ascertain the intention of the voter; Loubat v. Le Roy, 15 Abb. N. C. (N. Y.) 16. *Ballots* in which only the initials of a candidate were inserted have been held sufficient when it was determined by a verdict who was intended thereby; People v. Seaman, 5 Denio (N. Y.) 409. If the statutes provide that only a certain number are to be chosen, ballots containing more names will not be counted; State v. Thompson, 27 Mo. 365;

2 Burr. 1020; votes for ineligible candidates were formerly held to be "thrown away;" 2 Burr. 1021 note; but it has been held in a later case that such votes will not give the election to a minority candidate unless the voters knew of the ineligibility; In re Election of Directors of St. Lawrence Steamboat Co., 44 N. J. L. 529.

There is no common-law right to vote by *proxy*, except in England in the House of Lords; 1 Bla. Com. 168; Com. v. Detwiller, 131 Pa. 623, 18 Atl. 919, 992, 7 L. R. A. 357, 360; and in public or municipal corporations, voting can only be done in person; 2 Kent 294; in private corporations, the right of voting by proxy is usually conferred by charter and the weight of authority is that, if not so conferred, it may be done by by-law; *id.* 295; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 919, 992, 7 L. R. A. 357, 360; People v. Crossley, 69 Ill. 195; Moraw. Corp. § 486; *contra;* People v. Twaddell, 18 Hun (N. Y.) 427; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33. A proxy may be revoked, even if given for a valuable consideration, if about to be used fraudulently; Reed v. Bank, 6 Paige Ch. (N. Y.) 337; and voting by proxy in fraud or violation of the charter may be restrained by injunction; Campbell v. Poultney, Ellicott & Co., 6 Gill & J. (Md.) 94, 26 Am. Dec. 559. A *certificate* of election is not essential; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; but it is, when valid on its face, *prima facie* evidence of election; Hartt v. Harvey, 10 Abb. Pr. (N. Y.) 321; but a court on *quo warranto*, may go behind it; People v. Vail, 20 Wend. (N. Y.) 12.

It is probable that at common law each stockholder is entitled to but one vote without respect to the number of shares held. In public and municipal corporations undoubtedly each member has but one vote, and it is said in connection with the statement of this principle: "This rule has been applied to stockholders in a private corporation, and it has been held that such a shareholder has but one vote; Cook, Stock & Stockholders, § 608. But this writer, after adverting to the almost universal practice of providing by constitution, statute, or charter for a vote to each share of stock adds, "at the present day it is probable that no court, even in the absence of such provision, would uphold a rule which disregards the number of shares which the shareholder holds in the corporation;" *id.* And after a reference to the same common-law rule it is said: "But there are good reasons for holding that this rule has no application to ordinary joint stock business corporations of the present day;" Moraw. Corp. § 476. Where the charter declared that the by-laws may make provision for the conduct of elections, it was held that a corporation might enact a by-law giving to stockholders a vote for each share of stock; Com. v. Detwiller, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

See MEETINGS; PROXY; QUORUM; CUMULATIVE VOTING.

ELECTOR. One who has the right to make choice of public officers; one who has a right to vote. See Taylor v. Taylor, 10 Minn. 107, (Gil. 81). See PRESIDENTIAL ELECTORS.

One who exercises the right of election in equity. The term is sometimes used in this sense. Brett, L. Cas. Mod. Eq. 257.

In the German Empire the name was given to those great princes who had the right to elect the emperor or king. The office of elector in some instances became hereditary and was connected with territorial possessions as, elector of Saxony.

ELECTORAL COLLEGE. A name given to the presidential electors, when met to vote for president and vice-president of the United States, by analogy to the college of cardinals, which elects the pope, or the body which formerly selected the German emperor. It is, according to the more general usage, applied to the electors chosen by a single state, but is also used to designate those chosen throughout the United States.

This term has no strict legal or technical meaning, and being unknown to the constitution and laws of the United States, its use is purely colloquial. Accordingly the term is not clearly defined, and it is employed by approved writers in both the senses stated, though more frequently when reference is made to the entire body of electors the plural is employed, as, "the expectations of the public . . . (have) been so completely frustrated as in the practical operation of the system, so far as relates to the independence of the electors in the electoral colleges;" 2 Sto. Const. § 1463; ". . . would be chosen as electors, and would, after mature deliberation in their respective colleges," etc.; 1 Hare, Am. Const. L. 219; "the electoral colleges have sunk so low"; *id.* 221. So in speaking of the electors the phrase "state colleges" is used by Stevens, Sources of the Constitution of the U. S. 153, note. Following this view is the following definition: A name informally given to the electors of a single state when met to vote for president and vice-president of the United States, and sometimes to the whole body of electors. Cent. Dict.

On the other hand, the other use is well sustained by authority, and we find this definition: The body of electors chosen by the people to elect their president. Encyc. Dict. This is supported by Webster and Worcester as well as some authorities on constitutional law. "The presidential electors chosen as therein directed, constitute what is commonly called the 'electoral college';" Black, Const. L. 86; and again, "by an electoral college appointed or elected in the several states"; *id.* "In case the electoral college fails to choose a vice-president, the power devolves on the senate to make the selection from the two candidates having the highest number of votes." 1 Calhoun's Works, 175. See PRESIDENTIAL ELECTORS.

ELECTORAL COMMISSION. A commission created by an act of congress of January 29, 1877, to decide certain questions arising out of the presidential election of November, 1876, in which Hayes and Wheeler had been candidates of the republican party

and Tilden and Hendricks of the democratic party. The election was very close, and depended on the electoral votes of South Carolina, Florida, and Louisiana. It was feared that there would be much trouble at the final counting of the votes by the president of the senate according to the plan laid down in the Constitution. The republicans had a majority in the senate and the democrats had a majority in the house of representatives. A resolution was adopted by congress for the appointment of a committee of seven members by the speaker to act in conjunction with a similar committee that might be appointed by the senate to prepare a report and plan for the creation of a tribunal to count the electoral votes whose authority no one would question and whose decision all would accept as final. The joint committee thus appointed reported a bill providing for a commission of fifteen members, to be composed of five members from each house appointed *viva voce*, with four associate justices of the supreme court, which latter would select another of the justices of the supreme court, the entire commission to be presided over by the associate justice longest in commission. This body has since been known as the Electoral Commission.

Justices Clifford, Miller, Field, and Strong were named in the act as members, and they chose as the fifth justice Justice Bradley. The other members were Senators Bayard, Edmunds, Frelinghuysen, Morton, and Thurman, and Representatives Abbott, Garfield, Hoar, Hunton, and Payne.

The commission began its sessions February 1, and completed its work March 2, 1877. Various questions came before it in regard to the electoral vote of South Carolina, Florida, and Louisiana, as to which of two state returns was valid, and as to the eligibility of certain of the presidential electors. The most important decision of the commission and the one which has caused most comment and criticism was to the effect that the regular returns from a state must be accepted, and that the commission had no power to go behind these returns; or, as the commission itself expressed it, "that it is not competent under the Constitution and the law as it existed at the date of the passage of said act, to go into evidence *aliunde* the papers opened by the president of the senate in the presence of the two houses, to prove that other persons than those regularly certified to by the governor of the state of Florida in and according to the determination and declaration of their appointment by the Board of State Canvassers of said state prior to the time required for the performance of their duties, had been appointed electors, or by counter-proof to show that they had not, and that all proceedings of the courts or acts of the legislature or of the executive of Florida subsequent to the casting of the votes of the electors on the prescribed day are inadmissible for any such purpose." 2 Curtis, Const. Hist. of U. S., 419.

The result of the controversy over the election of 1876 was the passage, after long and earnest consideration, of the Act of Feb. 3, 1887, to regulate the counting of the electoral votes for president and vice-president. U. S. R. S. 1 Supp. 525. See PRESIDENTIAL ELECTORS; PRESIDENT OF THE UNITED STATES; 38 Am. L. Rev. 1.

ELECTRIC COMPANIES. Such companies, although not public corporations in the sense that the term is applied to municipal corporations; Croswell Elec. § 20; and being unable without statutory authority to claim an exemption of property from the ordinary mechanic's lien; Badger Lumber Co. v. Power Co., 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; are held to exercise a public use and are of a public character similar to telegraph and telephone companies; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214. Poles and wires erected for lighting city streets are a public use and constitute no additional burden; Tuttle v. Illuminating Co., 50 N. Y. Super. Ct. 464; People v. Thompson, 65 How. Pr. (N. Y.) 407, affirmed in 32 Hun (N. Y.) 93; Tiffany & Co. v. Illuminating Co., 51 N. Y. Super. Ct. 286; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716; Gulf Coast Ice & Mfg. Co. v. Bowers, 80 Miss. 570, 32 South. 113; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859; Loeber v. Electric Co., 16 Mont. 1, 39 Pac. 912, 50 Am. St. Rep. 468; but not where a pole shut off free access to a store; Tiffany & Co. v. Illuminating Co., 51 N. Y. Super. Ct. 280. The same general rule may be applied to rural highways; Palmer v. Electric Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672; *contra*, Haverford Electric Light Co. v. Hart, 13 Pa. Co. Ct. 369. In the case of private lighting, such use entitles the owner to compensation; Callen v. Electric Light Co., 66 Ohio 166, 64 N. E. 141, 58 L. R. A. 782. See, generally, Joyce on Electric Law.

They are held to be manufacturing companies with reference to taxation; People v. Wemple, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708 (reversing People v. Wemple, 15 N. Y. Supp. 718); Beggs v. Illuminating Co., 96 Ala. 295, 11 South. 381, 38 Am. St. Rep. 94; People v. Wemple, 129 N. Y. 664, 29 N. E. 812; *contra*, Evanston Electric Illuminating Co. v. Kochersperger, 175 Ill. 26, 51 N. E. 719; Frederick Electric Light & Power Co. v. Frederick City, 84 Md. 599,

36 Atl. 362, 36 L. R. A. 130; Com. v. Light & Power Co., 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107; Com. v. Electric Light Co., 145 Pa. 131, 22 Atl. 841, 845, 27 Am. St. Rep. 683; Com. v. Electric Light Co., 145 Pa. 147, 22 Atl. 844. See Globe Mut. Life Ins. Ass'n v. Ahern, 191 Ill. 170, 60 N. E. 806.

Charter authority to such a company to enter upon any public street of a city for the purpose of its business is held to include the right to lay conduits beneath the sidewalks; Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 Atl. 72, 9 L. R. A. (N. S.) 404.

Implied Powers of the Municipality. The right of a municipality to light the streets is generally conceded as a part of the police power and while usually enumerated in the charters, its omission would not deprive the city of such right, whether by electricity or other means; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; State v. City of Hiawatha, 53 Kan. 477, 36 Pac. 1119; Hamilton Gaslight & Coke Co. v. City of Hamilton, 37 Fed. 832; Hamilton Gas Light & Coke Co. v. Hamilton City, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; and the right of the municipality, not only to own, operate, and control an electric light plant, but to raise money for such purpose by taxation has been upheld; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; State v. City of Hiawatha, 53 Kan. 477, 36 Pac. 1119; and to issue bonds for that purpose; Rushville Gas Co. v. City of Rushville, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; Hequembourg v. City of Dunkirk, 49 Hun 550, 2 N. Y. Supp. 447. The contrary view of such implied powers was taken in Spaulding v. Inhabitants of Peabody, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, where the court decided that the existing statute giving towns the right to maintain street lamps and to raise money by taxation for such purpose did not carry with it the right to maintain the more costly electric light plant, and that to authorize such a purchase an express statute must be passed, thus settling a question raised but not decided in Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487. The Massachusetts case was followed in Posey v. Town of North Birmingham, 154 Ala. 511, 45 South. 663, 15 L. R. A. (N. S.) 711.

Commercial Lighting by the Municipality. Where the right of maintaining an electric light plant has been conferred upon towns by statute, it has been usually held to apply as well to private property as to public highways; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; but where it has been only implied from existing statutes the implication will not extend to a commercial use; Mauldin v. City Council of Greenville, 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Rushville Gas Co. v. City of Rushville, 121 Ind. 212, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388. Statutes conferring such rights are constitutional; Opinion of the Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; Linn v. Chambersburg Borough, 160 Pa. 511, 28 Atl. 842, 25 L. R. A. 217; Hequembourg v. City of Dunkirk, 49 Hun 550, 2 N. Y. Supp. 447; State v. Allen, 178 Mo. 555, 77 S. W. 868; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157, 67 Am. St. Rep. 468; Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825.

In so far as municipal corporations are engaged in the discharge of the powers and duties imposed upon them by the legislature as governmental agencies of the state, they are not liable for breach of duty by their officers; in that respect the officers are the agents of the state, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents and officers; and it is immaterial whether such servant, agent or officer be a corporation or an individual; City of Owensboro v. Knox's Adm'r, 116 Ky. 451, 76 S. W. 191; Emery v. Philadelphia, 208 Pa. 492, 57 Atl. 977; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; City of Emporia v. Burns, 67 Kan. 523, 73 Pac. 94; Moffitt v. Asheville, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810; Fisher v. City of New Bern, 140 N. C. 506, 53 S. E. 342, 5 L. R. A. (N. S.) 542, 111 Am. St. Rep. 857, where a commission was established by the legislature to have charge of the electric light, water and sewer systems of a city. It was held that, though one of the purposes of the company in the construction of the electric light plant was the illumination of the streets (which possibly might be considered a governmental function), yet the selling the power for profit to shops, residences, etc., would place such a corporation upon the same footing as private individuals engaged in the same business. The city was held responsible for the negligence of the commission in leaving a live, broken electrict light wire on a pole in a much used street, where one stepped upon it and was killed. And to the same effect that a city is liable in the exercise of its business powers, see Davoust v. City of Alameda, 149 Cal.

69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Esberg Cigar Co. v. City of Portland, 34 Or. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651; City of Henderson v. Young, 119 Ky. 224, 83 S. W. 583, 26 Ky. L. Rep. 1152; Twist v. City of Rochester, 165 N. Y. 619, 59 N. E. 1131; Bullmaster v. City of St. Joseph, 70 Mo. App. 60.

It has been held that the duty of a city to see that its highways are in a safe condition does not extend to the inspection of the insulation of wires owned by a private corporation, and that recovery cannot be had from the city for a death caused by a hanging wire charged by the defective insulation of a wire belonging to an electric company; Fox v. Village of Manchester, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474. But see, to the contrary, Gladdon v. Borough of Duncannon, 23 Pa. Co. Ct. R. 81, where a borough, manufacturing electricity for the use of its inhabitants, was held not to become thereby an electric light company, so as to be liable under an act providing for the recovery of damage to trees by such companies.

As to Rights and Privileges. A municipality may grant a franchise to an electric light company to use its streets without making such right an exclusive one; Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; Hanson v. Electric Light Co., 86 Ia. 722, 48 N. W. 1005, 53 N. W. 84; but it must have legislative authority to grant such franchise; Brush Electric Light Co. v. Electric Light Co., 5 Ohio Cir. Ct. 340; Grand Rapids E. L. & P. Co. v. Gas Co., 33 Fed. 659; and in Iowa it must be submitted to a vote of qualified electors; Hanson v. Electric Light Co., 86 Ia. 722, 48 N. W. 1005, 53 N. W. 84; City of Keokuk v. Electric Co., 90 Ia. 67, 57 N. W. 689. It may confer the right on one company to use poles erected by another company; Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; and may fix the compensation to the latter for their use; Toledo Electric St. Ry. Co. v. Power Co., 10 Ohio Cir. Ct. 531; but unless the limit of such use is fixed and the manner of stringing the wires prescribed such a permission is unreasonable and void; Citizens' Electric Light & Power Co. v. Sands, 95 Mich. 551, 55 N. W. 452, 20 L. R. A. 411; and a company will be enjoined from use of another's poles without permission from the city, the court, or the other company; Hauss Electric Lighting Power Co. v. Electric Co., 23 Wkly. Law Bul. 137. A contract with a gas company to light the streets with gas was held not to deprive the city of the power to contract with another company to furnish electric lights for the same purpose; Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S. E. 650; Saginaw Gas-Light Co. v. City of Saginaw, 28 Fed. 529. The right of the city to grant franchises for electric lighting carries with it the right to purchase or operate a plant even if there be an existing organized corporation and the city violates no contract by so doing; Thompson-Houston Electric Co. v. City of Newton, 42 Fed. 723. As a rule, however, the statutes provide for the purchase of an existing plant by the municipality and for arbitration in case of disagreement as to the price. In Massachusetts an existing company is not compelled to sell its property to the town; Citizens' Gas Light Co. v. Wakefield, 161 Mass. 432, 37 N. E. 444, 31 L. R. A. 457.

Conflicting Electrical Companies. Where a telegraph and an electric light company had each obtained a franchise for the use of the same street, it was held that the company which first obtained the franchise was entitled to priority, and the other company must so adjust its wires as to prevent danger from juxtaposition or interference with the business of the first company; Western Union Tel. Co. v. Light Co., 46 Mo. App. 120; and that where the street was already occupied by the telegraph company the electric light company would be enjoined from placing its wires so near as to interfere with the transmission of messages; *id.* In the case of a telephone and an electric light company, both having valid franchises, the telephone company was refused an injunction against the latter company on the ground that they had first occupied the streets, but on streets not occupied by either company, the electric light company was enjoined from using the same side of the street for lights and from stringing wires within such a distance as to injure the service of the telephone company; Nebraska Telephone Co. v. Gas & Electric Light Co., 27 Neb. 284, 43 N. W. 126; 12 Ont. 571; Paris Electric Light & Ry. Co. v. Telegraph & Telephone Co. (Tex.) 27 S. W. 902. If two electric light companies have the use of the same street, the first to occupy them has the prior right, and the second company will be restrained from stringing its wires so near as to interfere with the business of the first company or cause danger to the public; Consolidated Electric Light Co. v. Electric Light & Gas Co., 94 Ala. 372, 10 South. 440 (where the decision was based rather on the ground that such juxtaposition of the wires was dangerous to public safety). An electric light corporation, contracting to light a building, must exercise the highest degree of care in the installation of its wires and fixtures, and is liable for injuries sustained by a person handling in the usual way an ordinary incandescent light bulb; Alexander v. Light Co., 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475; to the same effect, Gilbert v. Electric Co., 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; Memphis Consol. Gas & Electric Co. v. Letson, 135 Fed. 969, 68 C.

C. A. 453; Southern Telegraph & Telephone Co. v. Evans, 54 Tex. Civ. App. 63, 116 S. W. 418; such a company must use reasonable care to prevent a secondary current from being charged with a high voltage current; Witmer v. Electric Light & Power Co., 187 N. Y. 572, 80 N. E. 1122; and is bound to see that its fixtures are securely attached; Fish v. Electric Light & Power Co., 189 N. Y. 336, 82 N. E. 150, 13 L. R. A. (N. S.) 226; and to keep the wires properly insulated; Griffin v. Light Co., 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477. The test of the liability of a company is whether injury to persons might reasonably be anticipated; Guinn v. Telephone Co., 72 N. J. L. 276, 62 Atl. 412, 3 L. R. A. (N. S.) 988, 111 Am. St. Rep. 668. Where the apparatus is installed by other parties, the company has been held bound to make a reasonable inspection of it before furnishing current; Hoboken Land & Imp. Co. v. Electric Co., 71 N. J. L. 430, 58 Atl. 1082; but they are held not liable for defective apparatus where other persons did the work of wiring; Harter v. Power Co., 124 Ia. 500, 100 N. W. 508; Brunelle v. Light Corp., 188 Mass. 493, 74 N. E. 676; National Fire Ins. Co. v. Electric Co., 16 Colo. App. 86, 63 Pac. 949; Minneapolis General Electric Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816. A city ordinance requiring all splices or joints on electric wires to be perfectly insulated is a contract with every inhabitant fixing a standard of duty, failure to observe which will constitute negligence; Clements v. Light Co., 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348.

The liability extends to trespassers; Nelson v. Lighting & Water Co., 75 Conn. 548, 54 Atl. 303; Newark Electric Light & Power Co. v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; Lynchburg Telephone Co. v. Booker, 103 Va. 595, 50 S. E. 148; *contra*, Augusta Ry. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203; McCaughna v. Electric Co., 129 Mich. 407, 89 N. W. 73, 95 Am. St. Rep. 441; Stark v. Traction & Lighting Co., 141 Mich. 575, 104 N. W. 1100, 1 L. R. A. (N. S.) 822; Cumberland Telegraph & Telephone Co. v. Martin's Adm'r, 116 Ky. 554, 76 S. W. 394, 77 S. W. 718, 63 L. R. A. 469, 105 Am. St. Rep. 229; Minneapolis General Electric Co. v. Cronon, 166 Fed. 651, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816.

Equity, at the suit of a state, will enjoin an electric railway company from permitting the escape of electricity into the ground, injuring municipal water pipes; Dayton v. Ry. Co., 26 Ohio Cir. Ct. R. 736. One who discharges electricity into the earth is liable for damages caused by the current just as if he had discharged a stream of water. Where a railway company did so under order of the Board of Trade and used the best known system, it was not responsible for the injury; [1893] 2 Ch. 186.

Equity cannot prescribe by injunction a particular system of circuit or negative return of the electric current to be used by an electric railway company, although it is shown that the system in use results in continuous injury to the water pipes of a water company; but it will act by injunction upon the continuance of the injury, leaving it to the discretion of the company to prevent it. In this case it appeared that the railway company's system could not entirely prevent electrolysis, but that it was suggesting other means which would practically prevent serious injury. The court enjoined the continuance of the injury, but left the defendant free to adopt the proper system within a reasonable time; Peoria Waterworks Co. v. R. Co., 181 Fed. 990 (C. C. Ill.), per Sanborn, C. J.

See generally Causa Proxima; Joyce, Electric Law; Eminent Domain; Highways; Impairing Obligation of Contracts; Streets; Telegraph; Telephone.

ELECTROCUTION. A method of punishment of death inflicted by causing to pass through the body of the convicted person a current of electricity of sufficient force and continuance to cause death. See 1 Witth. & Beck. Med. Jur. 663.

It was enacted in New York in 1888, in Ohio in 1896, and in Pennsylvania in 1913, and in one or two other states.

Punishment by electrocution is not within the meaning of the Constitution of the United States, which prohibits the infliction of unusual and cruel punishments; and while the infliction of the death penalty by a new agency is unusual, the adoption of such an agency which is not a certainly prolonged or extreme procedure is not violative of this constitutional provision; People v. Durston, 119 N. Y. 569, 24 N. E. 6, 7 L. R. A. 715, 16 Am. St. Rep. 859.

This act of New York is not repugnant to the Constitution of the United States when applied to a convict who committed the crime after the act took effect; In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519. See Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513.

ELECTROLYSIS. See Electrical Companies.

ELEEMOSYNARIUS (Lat.). An almoner. There was formerly a lord almoner to the kings of England, whose duties are described in Fleta, lib. 2, cap. 23. A chief officer who received the eleemosynary rents and gifts, and in due method distributed them to pious and charitable uses. Cowell.

ELEEMOSYNARY CORPORATIONS. Such private corporations as are instituted for purposes of charity, their object being the distribution of the bounty of the founder of

them to such persons as he directed. Of this kind are hospitals for the relief of the impotent, indigent, sick, and deaf or dumb; Ang. & A. Corp. § 39; American Asylum at Hartford v. Bank, 4 Conn. 172, 10 Am. Dec. 112; McKim v. Odom, 3 Bland (Md.) 407; 1 Ld. Raym. 5; 2 Term 346. The nature of eleemosynary corporations is discussed in the Dartmouth College case. They are in no sense ecclesiastical corporations as understood in the classification of Blackstone. Marshall, C. J., said, in distinguishing the college from a public corporation employed for the purposes of government, that it was in fact a private eleemosynary institution endowed with capacity to take property for objects unconnected with government, whose funds were bestowed by individuals on the faith of the charter—none the less so because for public education; Dartmouth College v. Woodward, 4 Wheat. 518, 630, 4 L. Ed. 629. And in the same case, Story, J., discussed at length the nature of these corporations, defining them as "such as are constituted for the perpetual distribution of the free alms and bounty of the founder in such manner as he has directed"; and then, after pointing out the division of corporations into public and private, he goes on to explain that eleemosynary corporations are private corporations although dedicated to general charity, and that the argument that because the charity is public, the corporation is public, "manifestly confounds the popular with the strictly legal sense of the terms." He also calls attention to the fact that "to all eleemosynary corporations a visitorial power attaches as a necessary incident." See VISITATION.

In the same opinion it is said that a private eleemosynary corporation, when created by the charter of the crown, is subject to no other control of the crown unless power be reserved for that purpose, and this he characterizes as "one of the most stubborn and well-settled doctrines of the common law"; but nevertheless such corporations, like all others, are subject to the general law of the land. See, also, Society for Propagation of Gospel v. New Haven, 8 Wheat. (U. S.) 464, 5 L. Ed. 662; 1 Bla. Com. 471.

"In the English law corporations are divided into *ecclesiastical* and *lay;* and lay corportions are again divided into eleemosynary and civil. It is doubtful how far clear conceptions of the law are promoted by keeping in mind these divisions. They seem, for us at least, to have an historical, rather than a practical, value. In a country where the church is totally disassociated from the state, there is little room for a division of corporations into ecclesiastical and lay; and while charitable corporations have many features which distinguish them from other private corporations, as will hereafter appear, it is very seldom that the word 'civil' is used in our American books of reports in order to distinguish corporations other than charitable."

ELEGIT (Lat. *eligere*, to choose). A writ of execution directed to the sheriff, commanding him to make delivery of a moiety of the party's land and all his goods, beasts of the plough only excepted.

The sheriff, on the receipt of the writ, holds an inquest to ascertain the value of the lands and goods he has seized, and then they are delivered to the plaintiff, who retains them until the whole debt and damages have been paid and satisfied. During that term he is called tenant by eligit; Co. Litt. 289. See Pow. Mort.; Wats. Sheriff 206; 1 C. B. N. S. 568; 3 Holdsw. Hist. E. L. 113; 2 Poll. & Maitl. 122.

The name was given because the plaintiff has his choice to accept either this writ or a *fi. fa.*

By statute, in England, the sheriff is to deliver the whole estate instead of the half; see 3 Bla. Com. 418; and by act of 1883 it no longer extends to goods. The writ is still in use in the United States, to some extent, and with somewhat different modifications in the various states adopting it; 4 Kent 431, 436; McCance v. Taylor, 10 Gratt. (Va.) 580; Morris v. Ellis, 3 Ala. 560.

ELEMENTS. A term popularly applied to fire, air, earth and water, anciently supposed to be the four simple bodies of which the world was composed. Encyc. Dict. Often applied in a particular sense to wind and water, as "the fury of the elements." Cent. Dict. It has been said that "damages by the elements," and "damages by the act of God," are convertible expressions; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115.

ELEVATED RAILWAYS. See RAILROADS.

ELEVATOR. A building containing one or more mechanical elevators, especially a warehouse for the storage of grain; a hoisting apparatus; a lift; a car or cage for lifting and lowering passengers or freight in a hoistway. Cent. Dict.

A landlord who runs an elevator for the use of his tenants and their visitors thereby becomes a common carrier; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700; Morgan v. Saks, 143 Ala. 139, 38 South. 848; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610; Lee v. Knapp & Co., 155 Mo. 610, 56 S. W. 458; Fox v. Philadelphia, 208 Pa. 127, 57 Atl. 356, 65 L. R. A. 214; Oberfelder v. Doran, 26 Neb. 118, 41 N. W. 1094, 18 Am. St. Rep. 771; Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. He is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants; Marker v. Mitchell, 54 Fed. 637; Treadwell v. Whittier, 80 Cal. 595, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. That such a carrier of passengers is not an insurer, but is required to exercise the highest degree of care; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33;

Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655; Edwards v. Burke, 36 Wash. 107, 78 Pac. 610. Other cases do not subject him to the same responsibility as common carriers; Edwards v. Building Co., 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974; Griffen v. Manice, 166 N. Y. 197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384.

Where the owner is in the habit of permitting a person to accompany freight on an elevator, he owes him the duty of a carrier; Orcutt v. Building Co., 201 Mo. 424, 99 S. W. 1062, 8 L. R. A. (N. S.) 929. Where a municipal ordinance imposed upon owners of elevators the duty to employ competent persons, the owner of an apartment house was held liable for injuries to the child of his tenant, who, finding the elevator unguarded, attempted to run it; Shellaberger v. Fisher, 143 Fed. 937, 75 C. C. A. 9, 5 L. R. A. (N. S.) 250. A hotel-keeper owes the same duty to persons visiting his guests, and, in general, to all persons lawfully in the hotel and in the elevator, as to his guests; McCracken v. Meyers, 75 N. J. L. 935, 68 Atl. 805, 16 L. R. A. (N. S.) 290, citing Siggins v. McGill, 72 N. J. L. 263, 62 Atl. 411, 3 L. R. A. (N. S.) 316, 111 Am. St. Rep. 666.

The right of any person to ride on an elevator is held to be based on the implied invitation which the owner is deemed to have extended to all who have business on his premises; such owner must see that the premises are in a reasonable, safe, condition; the measure of duty is reasonable care and prudence; Griffen v. Manice, 166 N. Y. 197, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; Burgess v. Stowe, 134 Mich. 204, 96 N. W. 29.

A hotel-keeper is not bound to the same degree of care with respect to his employés as to his guests in operating his elevator. His duty as to them is ascertained by the general rules governing the relation of master and servant. In Illinois, where the proprietor of an elevator is held to be a carrier of passengers; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; Beidler v. Branshaw, 200 Ill. 425, 65 N. E. 1086; Masonic Fraternity Temple Ass'n v. Collins, 210 Ill. 482, 71 N. E. 396; yet where a waitress was injured on a hotel elevator, the proprietor was held not to owe her the duty of a common carrier; Walsh v. Cullen, 235 Ill. 91, 85 N. E. 223, 18 L. R. A. (N. S.) 911. To the same effect, Sievers v. Lumber Co., 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152, 43 Am. St. Rep. 541.

The owner of an office building has been held not to owe the duty of keeping closed the doors to the elevator wells in respect to one who enters the building seeking information about one not a tenant of or employed in it, since he is a mere licensee; Stanwood v. Clancey, 106 Me. 72, 75 Atl. 293; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; as such he goes into the building at his own risk and is bound to take the premises as he finds them; Beehler v. Daniels, 18 R. I. 563, 29 Atl. 6, 27 L. R. A. 512, 49 Am. St. Rep. 790; Faurot v. Grocery Co., 21 Okl. 104, 95 Pac. 463, 17 L. R. A. (N. S.) 136; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261. This rule was applied where a policeman, in the exercise of his duty to protect the property of an express company from strikers, was killed from falling down an elevator shaft; Casey v. Adams, 234 Ill. 350, 84 N. E. 933, 17 L. R. A. (N. S.) 776, 123 Am. St. Rep. 105; and also where a fireman entered a building for the purpose of protecting property therein from fire and was injured while using an elevator in such building; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, 17 L. R. A. 588, 36 Am. St. Rep. 376; and where the wife of the janitor of a building used the elevator for the purpose of showing a tenant therein the roof; Billows v. Moors, 162 Mass. 42, 37 N. E. 750.

As to licensees by invitation or affirmative consent, it is held that the owner of an elevator owes the duty of exercising ordinary care; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800. Thus a child, who with the knowledge or implied consent of an elevator operator, rides on the top of the car, is held not a trespasser; Davis' Adm'r v. Trust Co., 127 Ky. 800, 106 S. W. 843, 15 L. R. A. (N. S.) 402. As to licensees by permission or on mere sufferance, the owner owes no duty except to refrain from acts of actual negligence; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Amerine v. Porteous, 105 Mich. 347, 63 N. W. 300; McCarvell v. Sawyer, 173 Mass. 540, 54 N. E. 259, 73 Am. St. Rep. 318; McManus v. Thing, 194 Mass. 362, 80 N. E. 487; Leavitt v. Shoe Co., 69 N. H. 597, 45 Atl. 558. Where one has been forbidden to use the elevator and sustains an injury, he cannot recover; Ferguson v. Truax, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L. R. A. (N. S.) 350, 13 Ann. Cas. 1092.

An elevator should have constant care and inspection; Bier v. Mfg. Co., 130 Pa. 446, 18 Atl. 637; McGuigan v. Beatty, 186 Pa. 329, 40 Atl. 490; that the machinery was oiled once a week and the elevator looked at by a fellow servant does not fulfil the requirement that it should be inspected regularly; Swenson v. R. Co., 78 App. Div. 379, 80 N. Y. Supp. 281; or where it has been inspected two weeks before an accident, and a defect overlooked; Corn Products Refining Co. v.

King, 168 Fed. 892, 94 C. C. A. 304; or where an accident was caused by the breaking of a shaft, the defective condition of which might have been discovered by inspection; Reinhardt v. Lard Co., 74 N. J. L. 9, 64 Atl. 990. But one is not liable for an accident to an employé if he regularly employs a competent firm to inspect the elevator; Young v. Stable Co., 193 N. Y. 188, 86 N. E. 15, 21 L. R. A. (N. S.) 592, 127 Am. St. Rep. 939. In case of a casualty, it is not enough to show that the elevator is one of a kind in ordinary use; McCormick Harvesting Machine Co. v. Burandt, 136 Ill. 170, 26 N. E. 588. But the absence of safety appliances is said not to be conclusive evidence of negligence; Shattuck v. Rand, 142 Mass. 83, 7 N. E. 43. An elevator is not supposed to be a place of danger, to be approached with great caution; Zieman v. Mfg. Co., 90 Wis. 497, 63 N. W. 1021; but when the door is opened a passenger may enter it without stopping to make a special examination; Tousey v. Roberts, 114 N. Y. 312, 21 N. E. 399, 11 Am. St. Rep. 655.

See 9 L. R. A. 640, note; Mitchell v. Marker, 62 Fed. 139, 10 C. C. A. 306, 25 L. R. A. 33; Webb, Elevators.

The business of handling grain in elevators is of such a nature as to subject it to regulations which would be entirely unjustifiable if applied to a purely private business. Because the business is of a quasi-public nature, even the owner of a country elevator, who buys for himself alone and is his own grader and weighmaster, may be required to secure a license from the state; State v. W. W. Cargill Co., 77 Minn. 223, 79 N. W. 962; W. W. Cargill Co. v. Minnesota, 180 U. S. 402, 21 Sup. Ct. 423, 45 L. Ed. 619. For the same reason the legislature may make a weighmaster's certificate prima facie evidence of what is stated therein; Vega Steamship Co. v. Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484.

As to grain in a grain elevator, see CONFUSION OF GOODS.

ELIGIBILITY. The constitution of the United States provides that no person holding any office under the United States shall be a member of either house. The acceptance by a member of congress of a commission as a volunteer in the army vacates his seat; Cl. & H. 122, 395, 637. But by a decision of the second comptroller of the treasury, of Feb. 24, 1894, it was held that there was no incompatibility of office between that of a member of the house of representatives and the military office held by an officer of the United States army on the retired list, and that he was entitled to pay for both offices. A centennial commissioner holds an office of trust or profit under the United States, and is thereby ineligible as a presidential elector; In re Corliss, 11 R. I. 638, 23 Am. Rep. 538. A state cannot by statute provide that certain state officers are ineligible to a federal office; Turney v. Marshall, 1 Bartl. 167; Trumbull's Election, 1 Bartl. 619.

Duelling has been made in some states a disqualification for office; see DUELLING. In Kentucky, it was held that the doing of any of the prohibited acts was a disqualification for office without a previous conviction; Cochrane v. Jones, 14 Am. L. Reg. N. S. 22; but this opinion has been questioned in a note to that case. See McCrary, Elect. 189.

An alien cannot, even in the absence of any provision forbidding it, *hold* an office; State v. Van Beek, 87 Ia. 569, 54 N. W. 525, 19 L. R. A. 622, 43 Am. St. Rep. 397. See Cooley, Const. Lim. 748, n.; but he may be *elected* to an office; State v. Murray, 28 Wis. 96, 9 Am. Rep. 489; State v. Trumpf, 50 Wis. 103, 5 N. W. 876, 6 N. W. 512. And members elect of congress, who were ineligible on account of participation in the rebellion, have been admitted to a seat, their disqualification having been subsequently removed; McCrary, Elect. 193.

The word *eligibility*, used in connection with an office, where there are no explanatory words indicating that it is used with reference to the time of election, refers to the qualification to hold the office rather than to be elected; Bradfield v. Avery, 16 Idaho 769, 102 Pac. 687, 23 L. R. A. (N. S.) 1228; Hoy v. State, 168 Ind. 506, 81 N. E. 509, 11 Ann. Cas. 944.

As to the effect of the ineligibility of the candidate having the highest number of votes, see ELECTION.

ELIGIBLE. This term relates to the capacity of holding as well as that of being elected to an office; Carson v. McPhetridge, 15 Ind. 327. See Searcy v. Grow, 15 Cal. 117; State v. Clarke, 3 Nev. 566; State v. Smith, 14 Wis. 497.

ELISORS. Two persons appointed by the court to return a jury when the sheriff and coroner have been challenged as incompetent, either because they are parties to the suit, or are related to either party. 3 Bla. Com. 354; Allen v. Com., 12 S. W. 582, 11 Ky. L. Rep. 555; or because they are partial; 5 Bac. Abr. 318; 3 East 141; Fortesc. de Laudibus LL. 53; Alc. & Nap. 113; or interested; Tidd, Prac. 723, 780; People v. Fellows, 122 Cal. 233, 54 Pac. 830; State v. Hultz, 106 Mo. 41, 16 S. W. 940; Harriman v. State, 2 G. Greene (Ia.) 270. They return the writ of venire directed to them with a panel of the jurors' names, and their return is final and no challenge is allowed to the array. But a party may have his challenge to the poll; Co. Litt. 158 *a*.

Elisors may be appointed to serve process other than that of returning a jury; Bruner v. Superior Court, 92 Cal. 239, 28 Pac. 341. An attachment may be directed to elisors against the coroners for not attaching a disobedient sheriff who has not brought the

defendant into court; 2 Wm. Bla. 911; 2 *id.* 1218; Tidd, Prac. 314; or for not returning an execution; People v. Palmer, 1 Cow. (N. Y.) 32; but such appointment will be refused where it is a matter of mere service of process; 10 Moore 266.

Authority to appoint elisors need not be given by statute; Wilson v. Roach, 4 Cal. 362; though the legislature may authorize the governor to appoint officers with the powers of sheriff to enforce liquor laws; Gilmore v. Penobscot County, 107 Me. 345, 78 Atl. 454.

Elisors were named by the prothonotary and appointed by the court; Barnes 465; named by plaintiff and approved by prothonotary; 2 Wm. Bla. 911; or named by the master in the King's Bench, or prothonotary in the Common Pleas; Tidd, Prac. 151.

A sheriff is incompetent if he is part of a defendant corporation, in which case elisors will be appointed; 1 Ir. L. Rec. O. S. 281; but where the sheriff and coroner were members of a corporation defending another similar suit against the same plaintiff, elisors were not appointed; Jackson v. Rathbone, 3 Cow. (N. Y.) 296.

Elisors are usually two clerks of the court or residents of the county, and are sworn; 3 Bla. Com. 354; Fortesc. de Laud. LL. 53; but a person residing in a county other than that in which the defendant resides may be appointed under peculiar circumstances; Anonymous, 23 Wend. (N. Y.) 102; so may one who has served under the sheriff as bailiff to the petit jury in other causes; State v. Bodly, 7 Blackf. (Ind.) 355; and only one need be appointed to serve a summons; Reed v. Moffatt, 62 Ill. 300; and he need not be sworn; *id.*

Notice of the appointment of elisors must be given to the opposite party; 1 Stra. 235.

The appointment by a judge having competent jurisdiction is presumed to be proper; Turner v. Billagram, 2 Cal. 520; or by a clerk to serve a writ of replevin; Beach v. Schmultz, 20 Ill. 185. If it is irregular, a motion to quash the levy should be made in the court to which the writ is returnable; Turner v. Billagram, 2 Cal. 520. It rests in the discretion of the trial judge and will not be disturbed unless arbitrary and unjust; State v. Hultz, 106 Mo. 41, 16 S. W. 940. A venire for a grand jury was directed to elisors, the sheriff being disqualified, and not to the coroner; held legal; State v. Zeller, 83 N. J. L. 666, 85 Atl. 237.

Absence of the coroner from the parish when the sheriff is a party to the suit will not warrant the appointment of an elisor; Whitehead v. Brigham, 1 La. Ann. 317. A new sheriff will not be awarded process, though he be impartial, if it has already been given to elisors; Co. Litt. 158 *a*; *contra*, Anonymous, 23 Wend. (N. Y.) 102.

An elisor may be appointed to take charge of a jury retiring to deliberate upon a verdict, when both sheriff and coroner are disqualified or unable to act; People v. Fellows, 122 Cal. 233, 54 Pac. 830; People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

By act of parliament elisors have free access to jurors' books in Ireland; Huband, Grand Jury in Ireland 1084.

See Umfreville, Lex Coronatoria 237, 241; Huband, Grand Jury in Ireland 480; Woodward, Coroners in Pennsylvania 140, 233.

ELKINS' ACT. See RATES.

ELL. A measure of length.

In old English the word signifies *arm*, which sense it still retains in the word *elbow*. Nature has no standard of measure. The cubit, the ell, the span, palm, hand, finger (being taken from the individual who uses them), are variable measures. So of the foot, pace, mile, or *mille passuum*. See Report on Weights and Measures, by the secretary of state of the United States, Feb. 22, 1821.

ELLENBOROUGH'S ACT. An English statute (43 Geo. III. c. 58) punishing offenses against the person. See ABORTION.

ELOGIUM (Lat.). **In Civil Law.** A will or testament.

ELOIGNE (Fr. *éloigner*, to remove to a distance). **In Practice.** A return to a writ of replevin, when the chattels have been removed out of the way of the sheriff.

ELONGATA. The return made by the sheriff to a writ of replevin, when the goods have been removed to places unknown to him. See, for the form of this return, Wats. Sheriff, Appx. c. 18, s. 3, p. 454; 3 Bla. Com. 148.

On this return the plaintiff is entitled to a capias in withernam. See WITHERNAM; Wats. Sheriff 300, 301. The word *éloigné* is sometimes used as synonymous with *elongata*.

ELONGATUS. The sheriff's return to a writ *de homine replegiando*, *q. v.*

ELOPEMENT. The departure of a married woman from her husband and dwelling with an adulterer. Cowell; Tomlin.

To constitute elopement the wife must not only leave the husband, but go beyond his actual control. For if she abandon the husband, and go and live in adultery in a house belonging to him, it is said not to be an elopement; Cogswell v. Tibbetts, 3 N. H. 42; 1 Rolle, Abr. 680.

When a wife elopes the husband is no longer liable for her support, and is not bound to pay debts of her contracting, when the separation is notorious; and whoever gives her credit does so, under these circumstances, at his peril; Hunter v. Boucher, 3 Pick. (Mass.) 289; 6 Term 603; McCutcheon v. McGahay, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; Bull. N. P. 135.

It has been said that the word has no legal sense; 2 W. Bla. 1080; but it is frequently

used, as is here shown, with a precisely defined meaning. An action may be maintained by the husband, against a third person, for enticing away his wife, where nothing in the nature of criminal conversation is alleged. See Schoul. Hus. & W. 64; ALIENATION OF AFFECTION; ENTICE.

ELSEWHERE. In another place.

Where one devises all his land in A, B, and C, three distinct towns, and *elsewhere,* and had lands of much greater value than those in A, B, and C, in another county, the lands in the other county were decreed to pass by the word "elsewhere"; and by Lord Chancellor King, assisted by Raymond, C. J., and other judges, the word "elsewhere" was adjudged to be the same as if the testator had said he devised all his lands in the three towns particularly mentioned, or in any other place whatever. 3 P. Wms. 56. See, also, Chanc. Prec. 202; 1 Vern. 4, n.; Cowp. 360, 803; 5 Bro. P. C. 496; 1 East 456.

As to the effect of the word "elsewhere" in the case of lands not purchased at the time of making the will, see 3 Atk. 254; 2 Ventr. 351. The words "or elsewhere" have been held not to include lands in another state; Atkinson v. Schilman, 60 Fla. 39, 53 South. 844, 56 South. 274. As to the construction of the words "or elsewhere" in shipping articles, see Brown v. Jones, 2 Gall. 477, Fed. Cas. No. 2,017.

ELUVIONES. Spring-tides.

EMANCIPATION. An act by which a person who was once in the power or under the control of another is rendered free.

This is of importance mainly in relation to the emancipation of minors from the parental control. See 3 Term 355; 8 *id.* 479; Varney v. Young, 11 Vt. 258; Tillotson v. McCrillis, *id.* 477; Haugh, Ketcham & Co. Iron Works v. Duncan, 2 Ind. App. 264, 28 N. E. 334; Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30. See Cooper, Justin. 441, 480; Cowperthwaite v. Jones, 2 Dall. (U. S.) 57, 1 L. Ed. 287; Ferrière, *Dict. de Jurisp. Emancipation;* MANUMISSION.

An infant husband is entitled to his own wages, so far as necessary for the support of himself and family, even though he married without his father's consent; Com. v. Graham, 157 Mass. 73, 31 N. E. 706, 16 L. R. A. 578, 34 Am. St. Rep. 255. Where children contract for, collect, and use their own earnings, emancipation is to be inferred; Geringer v. Heinlein, 29 Wkly. Law Bul. 339; and so when they become of age, no other facts being shown; Baldwin v. Worcester, 66 Vt. 54, 28 Atl. 633.

The desertion of children by their father emancipates them; Thompson v. Ry. Co., 104 Fed. 845, where, in an action by the father as next of kin for the death of the child, it was held that there could be no recovery as by reason of the emancipation the father had no right to the earnings. See also for other authorities note in Wilson v. McMillan, 62 Ga. 16, 35 Am. Rep. 117; Rodg. Dom. Rel. § 467. This presumption of emancipation from desertion has been termed "the presumption of necessity." Schoul. Dom. Rel. § 267.

EMANCIPATION PROCLAMATION. See BONDAGE.

EMBARGO. A proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state, until further order. The William King, 2 Wheat. (U. S.) 148, 4 L. Ed. 206.

A *civil* embargo is the act of a state detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it usually is, by a closing of its ports to foreign vessels. A *hostile* embargo is a detention, as before mentioned, of foreign vessels and property which may be in the ports of the wronged state. The detention is by way of reprisal *(q. v.)* and is thus distinguished from a detention of foreign vessels upon other grounds. If hostile embargo is followed by war, the vessels detained are confiscated. The term *embargo* is sometimes applied to the detention of foreign merchant vessels after the outbreak of war. It had been customary for belligerents to allow enemy vessels in their ports at the outbreak of hostilities to depart freely, and this custom finds a limited expression in the Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, adopted at the Hague Convention of 1907, which provides that it is *desirable* that such vessels be allowed to depart freely.

The detention of ships by an embargo is such an injury to the owner as to entitle him to recover on a policy of insurance against "arrests or detainments." And whether the embargo be legally or illegally laid, the injury to the owner is the same, and the insurer is equally liable for the loss occasioned by it. Marsh. Ins. b. 1, c. 12, s. 5; 1 Kent 60; 1 Bell, Dict. 517.

An embargo detaining a vessel at the port of departure, or in the course of the voyage, does not of itself work a dissolution of a charter-party, or of the contract with the seamen. It is only a temporary restraint imposed by authority for legitimate political purposes, which suspends for a time the performance of such contracts, and leaves the rights of parties untouched; 1 Bell, Dict. 517.

EMBASSAGE or EMBASSY. The message or commission given by a sovereign or state to a minister called an "ambassador," empowered to treat or communicate with another sovereign or state; also the establishment of an ambassador. Black, L. Dict.

EMBEZZLEMENT. The fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another. Fagnan v. Knox, 40 N. Y. Super. Ct. 41.

The fraudulent appropriation of property by a person to whom it has been intrusted or to whose hands it has lawfully come; it

is distinguished from larceny in the fact that the original taking of the property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. Moore v. U. S., 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422. See Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130; People v. Tomlinson, 102 Cal. 19, 36 Pac. 506.

The principles of the common law not being found adequate to protect general owners against the fraudulent conversion of property by persons standing in certain fiduciary relations to those who were the subject of their peculations, certain statutes have been enacted, as well in England as in this country, creating new criminal offences and annexing to them their proper punishments. The general object of these statutes doubtless was to define and embrace, as criminal offences punishable by law, certain cases where, although the moral guilt was quite as great as in larceny, yet the technical objection arising from the fact of a possession lawfully acquired by the party screened him from punishment. Com. v. Stearns, 2 Metc. (Mass.) 345; Com. v. Simpson, 9 Metc. (Mass.) 142. See State v. Wolff, 34 La. Ann. 1153.

In order to constitute embezzlement, it must distinctly appear that the party acted with felonious intent, and made an intentionally wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over money intrusted to such party as agent for investment is not sufficient, if this intent is not plainly apparent; People v. Hurst, 62 Mich. 276, 28 N. W. 838. The money *appropriated* need not have been intrusted to the accused by the owner; it is sufficient if it were intrusted to the employer of the accused and appropriated by the latter; Com. v. Clifford, 96 Ky. 4, 27 S. W. 811; and that the money was taken without any attempt at concealment is no defence to the charge of embezzlement; People v. Connelly, 4 Cal. Unrep. Cas. 858, 38 Pac. 42. There must be a relation of special trust in regard to the article appropriated, and it must be by virtue of such trust that the servant has access to, or control or possession of, it; Colip v. State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322; followed in State v. Winstandley, 155 Ind. 290, 58 N. E. 71. Whether the lack of authority to receive the money in the first instance will necessarily defeat a prosecution for embezzlement is a subject much discussed. The better view seems to be that if, by virtue of his employment, the money came into his possession, its embezzlement is within the meaning of the statute; Ker v. State, 110 Ill. 629, 51 Am. Rep. 706; Smith v. State, 53 Tex. Cr. R. 117, 109 S. W. 118, 17 L. R. A. (N. S.) 531, 15 Ann. Cas. 435; McAleer v. State, 46 Neb. 116, 64 N. W. 358; State v. Costin, 89 N. C. 511; State v. Jennings, 98 Mo. 493, 11 S. W. 980; but some cases hold that, if there was no authority to receive the money, its conversion will not constitute embezzlement; Brady v. State, 21 Tex. App. 659, 1 S. W. 462; State v. Johnson, 49 Ia. 141.

Embezzlement being a statutory offence, reference must be had to the statutes of the jurisdiction for the classes of persons and property affected by them. It has been held that there may be embezzlement of bank bills; Com. v. King, 9 Cush. (Mass.) 284; municipal bonds; Bork v. People, 91 N. Y. 5; State v. White, 66 Wis. 343, 28 N. W. 202; grain; State v. Stoller, 38 Ia. 321; an animal; Washington v. State, 72 Ala. 272; commercial securities; State v. Orwig, 24 Ia. 102; [1891] 1 Q. B. 112; and of a mortgage; Com. v. Concannon, 5 Allen (Mass.) 502; and by public officers, placed in a fiduciary relation as such; Com. v. Tuckerman, 10 Gray (Mass.) 173; People v. McKinney, 10 Mich. 54. See Ex parte Hedley, 31 Cal. 108; People v. Dalton, 15 Wend. (N. Y.) 581; Com. v. Morrisey, 86 Pa. 416; State v. Munch, 22 Minn. 67; Lewis v. Kendall, 6 How. Pr. (N. Y.) 59; State v. King, 81 Ia. 587, 47 N. W. 775; State v. Noland, 111 Mo. 473, 19 S. W. 715. Where one withdraws from the money drawer of a cash register money that he had deposited a moment before without registering, he is guilty of embezzlement; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364. 15 L. R. A. 317, 31 Am. St. Rep. 560. Where an attorney collects money for his client, he acts as agent and attorney, and in either case, if he appropriate the money collected to his own use with the intention of depriving the owner of the same, he is guilty of embezzlement; People v. Converse, 74 Mich. 478, 42 N. W. 70, 16 Am. St. Rep. 648. In a prosecution for the embezzlement of money held by defendant as bailee, it is immaterial that it was deposited in a bank for a time, so that the money actually converted was not the identical bills delivered to the bailee; Com. v. Mead, 160 Mass. 319, 35 N E. 1125.

A taking is requisite to constitute a larceny, and embezzlement is in substance and essentially a larceny, aggravated rather than palliated by the violation of a trust or contract, instead of being, like larceny, a trespass. The administration of the common law has been not a little embarrassed in discriminating between the two offences. But they are so far distinct in their character that, under an indictment charging merely a larceny, evidence of embezzlement is not sufficient to authorize a conviction; and in cases of embezzlement the proper mode is to allege sufficient matter in the indictment to apprise the defendant that the charge is for embezzlement. And it is often no less difficult to distinguish this crime from a mere breach of trust. Although the statutes declare that a party shall be deemed to have committed the crime of simple larceny, yet

it is a larceny of a peculiar character, and must be set forth in its distinctive character; Com. v. Wyman, 8 Metc. (Mass.) 247; Com. v. Simpson, 9 Metc. (Mass.) 138; Com. v. King, 9 Cush. (Mass.) 284; Kribs v. People, 82 Ill. 425; State v. Newton, 26 Ohio St. 265.

The word *embezzle* implies a fraudulent intent, and the addition of the word *fraudulently* is mere surplusage; Reeves v. State, 95 Ala. 31, 11 South. 158; U. S. v. Lancaster, 2 McLean 431, Fed. Cas. No. 15,556; State v. Wolff, 34 La. Ann. 1153; State v. Trolson, 21 Nev. 419, 32 Pac. 930; State v. Combs, 47 Kan. 136, 27 Pac. 818.

When money is embezzled, the owner has a right to settle as for an implied contract, and such settlement is no bar to a criminal prosecution; Fagnan v. Knox, 66 N. Y. 526; State v. Noland, 111 Mo. 473, 19 S. W. 715.

A partner is not guilty of embezzlement in appropriating the funds of the firm to his own use; Gary v. Masonic Aid Ass'n, 87 Ia. 25, 53 N. W. 1086. See Napoleon v. State, 3 Tex. App. 522; 12 Cox, C. C. 96.

When an embezzlement of a part of the cargo takes place on board of a ship, either from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to the reparation of the loss, in proportion to their wages. So too the embezzlement of property saved is a bar to salvage. When the embezzlement is fixed on any individual, he is solely responsible; when it is made by the crew, or some of the crew, but the particular offender is unknown, and, from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute. The presumption of innocence is always in favor of the crew; and the guilt of the parties must be established beyond all reasonable doubt before they can be required to contribute; Spurr v. Pearson, 1 Mas. 104, Fed. Cas. No. 13,268; 4 B. & P. 347; Lewis v. Davis, 3 Johns. (N. Y.) 17; Dane, Abr. Index; Wesk. Ins. 194; 3 Kent 151. See Pars. Sh. & Adm.

A prima facie case of embezzlement is made out, sufficient to warrant the surrender of one in extradition proceedings, when it was shown that a check was delivered to him with instructions to draw the money from the bank and take it to a railway station to be forwarded to another city, and that he subsequently converted the same to his own use; Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130.

Stringent provisions are made by several acts of congress against the embezzlement of arms, munitions, and habiliments of war, property stored in public storehouses, letters, precious metals, and coins from the mint.

EMBLEMENTS (Fr. *embler*, or *emblaver*, to sow with corn. The profits of the land sown). The right of a tenant to take and carry away, after his tenancy has ended, such annual products of the land as have resulted from his own care and labor. The term is also applied to the crops themselves. Co. Litt. 55 *b*; 4 H. & J. 139; 3 B. & Ald. 118; Reiff v. Reiff, 64 Pa. 134.

It is a privilege allowed to tenants for life, at will, or from year to year, because of the uncertainty of their estates and to encourage husbandry. If, however, the tenancy is for years, and its duration depends upon no contingency, a tenant when he sows a crop must know whether his term will continue long enough for him to reap it, and is not permitted to re-enter and cut it after his term has ended; 4 Bingh. 202; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 361; Debow v. Colfax, 10 N. J. L. 128; Gossett v. Drydale, 48 Mo. App. 430. Whenever a tenancy, other than at sufferance, is from the first of uncertain duration and is unexpectedly terminated without fault of the tenant, he is entitled to emblements; Gardner v. Lanford, 86 Ala. 508, 5 South. 879.

This privilege extends to cases where a lease has been unexpectedly terminated by *the act of God or the law;* that is, by some unforeseen event which happens without the tenant's agency; as, if a lease is made to husband and wife so long as they continue in that relation, and they are afterwards divorced by a legal sentence, the husband will be entitled to emblements; Oland's case, 5 Co. 116 *b*; or where the lessee of a tenant for life has growing crops unharvested at the time of the latter's death, he is entitled to them; Bradley v. Bailey, 56 Conn. 374, 15 Atl. 746, 1 L. R. A. 427, 7 Am. St. Rep. 316; Edghill v. Mankey, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; Hoagland v. Crum, 113 Ill. 365, 55 Am. Rep. 424. A similar result will follow if the landlord, having the power, terminates the tenancy by notice to quit; Cro. Eliz. 460; but not where, under the terms of the lease, the landlord re-enters and takes possession because the tenant fails to pay rent; Gregg v. Boyd, 69 Hun 588, 23 N. Y. Supp. 918. See other cases of uncertain duration, Stewart v. Doughty, 9 Johns. (N. Y.) 112; 8 Viner, Abr. 364. But it is otherwise if the tenancy is determined by an act of the tenant which works a forfeiture; as if, being a woman, she has a lease for a term of years provided she remains so long single, and she terminates it by marrying; 2 B. & Ald. 470; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105. A landlord who re-enters for a forfeiture takes the emblements; 7 Bingh. 154. Where a tenant wrongfully retains possession of land after his term has expired, crops planted by him so long as they remain unsevered, belong to the landlord; Kleimann v. Geiselmann, 45 Mo. App. 505. See LANDLORD AND TENANT.

All such crops as in the ordinary course of things return the labor and expense bestowed upon them within the current year

become the subject of emblements,—consisting of grain, peas, beans, hemp, flax, and annual roots, such as parsnips, carrots, turnips, and potatoes as well as the artificial grasses, which are usually renewed like other crops. But such things as are of spontaneous growth, as roots and trees not annual, and the fruit on such trees, although ripe, and grass growing, even if ready to cut, or a second crop of clover, although the first crop taken before the end of the term did not repay the expense of cultivation, do not fall within the description of emblements; Cro. Car. 515; Cro. Eliz. 463; Whitmarsh v. Cutting, 10 Johns. (N. Y.) 361; Co. Litt. 55 *b*; Tayl. Landl. & T. § 534; Woodf. Landl. & T. 750.

But although a tenant for years may not be entitled to emblements *as such*, yet by the custom of the country, in particular districts, he may be allowed to enter and reap a crop which he has sown, after his lease has expired; Dougl. 201; 16 East 71; 7 Bingh. 465. The parties to a lease may, of course, regulate all such matters by an express stipulation; but in the absence of such stipulation it is to be understood that every demise is open to explanation by the general usage of the country where the land lies, in respect to all matters about which the lease is silent; and every person is supposed to be cognizant of this custom and to contract in reference to it; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411. The rights of tenants, therefore, with regard to the *away-going crop*, will differ in different sections of the country; thus, in Pennsylvania and New Jersey a tenant is held to be entitled to the grain sown in the autumn before the expiration of his lease, and coming to maturity in the following summer; Mitch. R. P. 24; Clark v. Harvey, 54 Pa. 142; Hudson v. Porter, 13 Conn. 59; Howell v. Schenck, 24 N. J. L. 89; while in Delaware the same custom is said to prevail with respect to wheat, but not as to oats; Templeman v. Biddle, 1 Harr. (Del.) 522; and trespass will lie against one who interferes with the land to the injury of the outgoing tenant; Clark v. Banks, 6 Houst. (Del.) 584.

Of a similar nature would be the tenant's right to remove the manure made upon the farm during the last year of the tenancy. Good husbandry requires that it should either be used by the tenant on the farm, or left by him for the use of his successor; and such is the general rule on the subject in England as well as in this country; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Goodrich v. Jones, 2 Hill (N. Y.) 142. A different rule has been laid down in North Carolina; 2 Ired. 326; but it is clearly at variance with the whole current of American authorities upon this point. See MANURE. Straw, however, is incidental to the crop to which it belongs, and may be removed in all cases where the crop may be; Fobes v. Shattuck, 22 Barb. (N. Y.) 568; Craig v. Dale, 1 W. & S. (Pa.) 509, 37 Am. Dec. 477.

There are sometimes, also, mutual privileges, in the nature of emblements, which are founded on the common usage of the neighborhood where there is no express agreement to the contrary, applicable to both outgoing and incoming tenants. Thus, the outgoing tenant may by custom be entitled to the privilege of retaining possession of the land on which his away-going crops are sown, with the use of the barns and stables for housing and carrying them away; while the incoming tenant has the privilege of entering during the continuance of the old tenancy for the purposes of ploughing and manuring the land. But, independently of any custom, every tenant who is entitled to emblements has a right of ingress, egress, and regress to cut and carry them away, and the same privilege will belong to his vendee,—neither of them, however, having any exclusive right of possession. See Wintermute v. Light, 46 Barb. (N. Y.) 278; Tayl. Landl. & T. § 543; Woodf. Landl. & T. 754; LANDLORD AND TENANT; AWAY-GOING CROP; GROWING CROPS.

EMBRACEOR. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and, having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a cause for their clients. Co. Litt. 369; *Termes de la Ley.*

EMBRACERY. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to one side than to the other, by money, promises, threats, or persuasions, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. Pl. Cr. 259; Co. Litt. 157 *b*, 369 *a*; 11 Mod. 111, 118; Gibbs v. Dewey, 5 Cow. (N. Y.) 503; 2 Bish. Cr. L. § 389; State v. Sales, 2 Nev. 268; Grannis v. Branden, 5 Day (Conn.) 260, 5 Am. Dec. 143; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Such an attempt is a misdemeanor at common law; Cl. Cr. L. 326.

See JURY.

EMENDA (Lat.) Amends. That which is given in reparation or satisfaction for a trespass committed; or, among the Saxons, a compensation for a crime. Spelman, Gloss.

EMENDALS. In English Law. This ancient word is said to be used in the accounts of the Inner Temple, where so much in emendals at the foot of an account signifies so much in bank, or stock, for the supply of emergencies. Cunningham, Law Dict. But

Spelman says it is what is contributed for the reparation of losses. Cowell.

EMENDATIO PANIS ET CERVISIÆ. The power of supervising and correcting the weights and measures of bread and ale. Cowell.

EMERGENCY. An unforeseen occurrence or condition. See ACCIDENT.

EMIGRANT. One who quits his country for any lawful reason, with a design to settle elsewhere, and who takes his family and property, if he has any, with him. Vattel, b. 1, c. 19, § 224. See McIlvaine v. Coxe, 2 Cra. (U. S.) 302, 2 L. Ed. 279.

EMIGRANT AGENT. As used in a Georgia statute taxing emigrant agents, a person engaged in hiring laborers in a state to be employed beyond its limits. Williams v. Fears, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186, affirming 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685. See EMPLOYMENT AGENCIES.

EMIGRATION. The act of removing from one place to another.

It is sometimes used in the same sense as expatriation; but there is some difference in the signification. Expatriation is the act of abandoning one's country; while emigration is, perhaps not strictly, applied to the act of removing from one part of the country to another. See 2 Kent 34, 44; EXPATRIATION.

EMINENCE. A title of honor given to cardinals.

EMINENT DOMAIN. The superior right of property subsisting in a sovereignty, by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner.

The power to take private property for public use. West River Bridge Co. v. Dix, 6 How. (U. S.) 536, 12 L. Ed. 535.

The right of every government to appropriate otherwise than by taxation and its police authority (which are distinct powers), private property for public use. Dill. Mun. Corp. § 584.

History and Nature of the Power. The phrase "eminent domain" appears to have originated with Grotius, who carefully describes its nature; Lewis, Em. Dom. § 3, n.; Mills, Em. Dom. § 5; 1 Thayer, Cas. Const. L. 945. The power is a universal one and as old as political society, and the American constitutions do not change its scope or nature but simply embody it, as described by Grotius, in positive, fundamental law.

The language of Grotius is: "We have elsewhere said, that the property of subjects is under the eminent domain of the state; so that the state, or he who acts for it, may use, and even alienate and destroy such property; not only in case of extreme necessity, in which even private persons have a right over the property of others; but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute." Grotius, *Bel. ac Pac.* lib. iii. c. 20. In the last clause quoted there seems to be an expression thus early of the doctrine which commonly forms a part of later legislation in the exercise of the right of eminent domain of the assessment of benefits on the person whose property is taken.

The term used by Grotius has been objected to by other writers, as, for example Bynkershoek, who prefers the terms *imperium eminens* rather than *dominium eminens*, considering the former as more accurately expressing the idea of *supreme* power. At the same time that he advocates the use of a terminology to give more emphatic expression to the sovereign nature and character of the power, this writer discusses the question whether it may be exercised only for necessity as he conceives Puffendorf to urge, or also on the ground of convenience or, to use the exact phrase of Grotius, utility. Bynkershoek considers either ground sufficient, but he also lays down the principle of requiring compensation not merely for a taking, but for "every loss which private persons bear for the common necessity or utility," thus anticipating the doctrine not recognized by writers of his time, but accepted by modern constitution makers, under the name of consequential damages for injury to, as well the direct loss occasioned by, the taking private property. *Quest. Jur. Pub.* lib. ii. c. 15. Puffendorf also criticises the term employed by Grotius. He divides the term control (*potestas*) into *dominium* as used in respect to what is one's own, and *imperium*, with respect to what belongs to others. Accordingly he would consider that *imperium eminens* is more accurate than *dominium eminens; De Jure Naturæ et Gentium*, lib. 1. c. 1. s. 19. So Heinneccius says: "We confess that this use of the word is not quite apt, for the conception of *dominium* and that of *imperium* are different things; it is the latter and not the former which belongs to rulers," but he adds, that as there is no doubt about the absolute right, it is useless to condemn the word when once it has been accepted; *Elem. Jur. Nat. et Gent.* lib. ii. c. 8, s. 168.

All these writers agree that the power is exercised as an attribute of sovereignty, and in this conclusion there is a general concurrence. Vattel says: "In political society everything must give way to the common good; and if even the person of the citizens is subject to this rule, their property cannot be excepted. The state cannot live, or continue to administer public affairs in the most advantageous manner, if it have not the power, on occasion, to dispose of every kind of property under its control. It should be presumed that when the nation takes possession of a country, property in specific things is given up to individuals only upon this reservation." So it was said by the U. S. Supreme Court: "The power to take private property for public use, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, requires no constitutional recognition;" Field, J., U. S. v. Jones, 109 U. S. 513, 518, 3 Sup. Ct. 346, 27 L. Ed. 1015.

Blackstone rests the doctrine upon necessity, and considers the recognized right to compensation as evidence of the great regard of the law for private property; while the good of the individual must yield to that of the community, the legislature alone may interpose to compel the individual to acquiesce, but such interposition is not arbitrary but only upon full indemnification and equivalent for the injury thereby sustained. The nature of the transaction he states thus: "All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power which the legislature indulges with

caution, and which nothing but the legislature can perform." 1 Sharsw. Bla. Com. 139, n. 19.

This statement by Blackstone of English law is to be borne in mind hereafter in considering the nature and origin of the right to compensation. Here we have the right defined with the same limitation which, as will be seen, is sometimes claimed to rest solely on express provisions of written constitutions. And the force of this statement is strengthened not weakened, by the observation of Buller, J., that there were many cases in which an injury is suffered by individuals for which there is no right of action, as in a case of the destruction of private property in time of war for the public defence; *id.*; 4 Term 794; 3 Wils. 461; 6 Taunt. 29.

Notwithstanding this recognition of the nature of the power the subject of eminent domain as understood in the United States is practically eliminated from English law and the title itself is usually not to be found in digests or text books of that country. "That there is no eminent domain in English jurisprudence," says a recent writer on the subject, "is because the power is included, and the obligation to compensate lost, in the absolutism of parliament." "The only technical term approximating to eminent domain, is compulsory power, as used in acts enabling municipal and other corporations to take property for their use. The multiplication of such acts led to the enactment of several general laws, notably the Lands Clauses Consolidation Act (*q. v.*), which is a complete code. This act or one of the others of a similar class, as the Railway Clauses Consolidation Act, is incorporated by reference in the various special acts;" Rand. Em. Dom. § 7.

It follows of necessity that English decisions do not apply to the vast number of constitutional questions constantly arising in this country, though the adherence of English legislation to the same great principle of compensation necessarily results in producing a body of law in England covering most of the questions which are adjudicated in our own country respecting the construction and application of statutes under which the power is exercised.

The subject is treated at length in 6 Halsbury, Laws of England 1, under the title of Compulsory Purchase of Land, where (p. 12) it is pointed out that the earliest act appears to be one for supplying Gloucester with water in 1541-42, called "The Bill for the Conduyttes at Gloucester"; and that there was a similar act in 1543-44 for rebuilding London after the Great Fire.

Different theories are advanced as to the precise nature of the power, and it has been defined to be the right retained by the people or government over the estate of individuals, to reclaim the same for public use,—a kind of reserved right or estate remaining in the sovereign as paramount to the individual title. This conception of the right was at one time very generally accepted. The result of this view is to consider the right, theoretically at least, as so much of the original proprietorship retained by the sovereign power in granting lands or franchises to individuals or corporations, wherever the common-law theory of original proprietorship prevails. An argument by analogy in support of this view is derived from the able examination and explanation of the origin of the *jus publicum* in Com. v. Alger, 7 Cush. (Mass.) 90. See, also, remarks of Daniell, J., in West River Bridge Co. v. Dix, 6 How. (U. S.) 533, 12 L. Ed. 535. Perhaps no better statement of this doctrine is to be found than this: "The highest and most exact idea of property remaining in the government, or in the aggregate body of the people in their sovereign capacity, giving a right to resume the possession of the property in the manner directed by the constitution and the laws of the state whenever the public good requires it." Beekman v. R. Co., 3 Paige, Ch. (N. Y.) 73, 22 Am. Dec. 679; or, "The true theory and principle of the matter is, that the legislature resume dominion over the property, and having resumed it, instead of using it by their agents, to effect the intended public good, and to avoid entanglement in the common business of life, they revest it in other individuals or corporations to be used by them in such manner as to effect, directly or indirectly, or incidentally, as the case may be, the public good intended." Todd v. Austin, 34 Conn. 78; see also Harding v. Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546; Heyward v. City of New York, 8 Barb. (N. Y.) 486; In re Union El. R. Co., 113 N. Y. 275, 21 N. E. 81; Biddle v. Hussman, 23 Mo. 597.

But this theory of resumption of original proprietorship is disapproved by the most authoritative writers, and with reason; the weight of authority and of argument are both against it. In this country the right is exercised by two governments, each sovereign, operating on the same property; the federal power can, upon no hypothesis, be based upon original grant in the older states, nor perhaps the state power, in the new states; a new sovereignty by acquiring territorial rights succeeds to this right over property, of which the original grant was from the prior one; property may be appropriated a second time after the power has been already exercised and, upon the theory under consideration, necessarily exhausted; personal property is subject to the right, although the doctrine of reserved right cannot apply to it, while the reversion of the state will supply no argument, as it applies equally to personal property in which the state never had any title; and any paramount or reserved right could be granted, but this right never can; Sholl v. Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; New York, H. & N. R. Co. v. R. Co., 36 Conn. 196. All these considerations are inconsistent with the theory suggested and seem to leave no alternative but to recognize the right as an attribute of sovereignty and in no sense an interest or estate. See Lewis, Em. Dom. § 3; Rand. Em. Dom. § 3; Noll v. R. Co., 32 Ia. 66; Raleigh & G. R. Co. v. Davis, 19 N. C. 451; Bloodgood v. R. Co., 18 Wend. (N. Y.) 9, 57, 31 Am. Dec. 313; 2 Redf. Railw. 229.

It is an inherent power which belongs to the states and was not surrendered to the United States, and it is untouched by any provision of the federal constitution. It extends to tangible and intangible property, to a chose in action, a charter or any kind of contract, as well as to land and movables. It is not limited by the inhibition against impairing the obligation of contracts. The obligation of a contract is not impaired by being taken under eminent domain if compensation be made. Every contract between the state and the individual or between individuals is subject to this law; City of Cincinnati v. R. Co., 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481.

One of the inalienable rights of sovereignty; Hollister v. State, 9 Ida. 8, 71 Pac. 541; Central Branch U. P. R. Co. v. R. Co., 28 Kan. 453; Woodmere Cemetery v. Roulo, 104 Mich. 595, 62 N. W. 1010; Painter v. St. Clair, 98 Va. 85, 34 S. E. 989; and may be exercised for public purposes in the absence of any constitutional restriction; Anderson v. Draining Co., 14 Ind. 199, 77 Am. Dec. 63. It lies dormant in the state until legislative action determines the occasion, mode, conditions, and agencies for its exercise; Allen v. Jones, 47 Ind. 438; St. Louis, H. & K. C. R. Co. v. Union Depot Co., 125 Mo. 82, 28 S. W. 483; the legislature may determine the estate or quantity of interest in lands which may be taken; Cleveland, C., C. & I. R. Co. v. R. Co., 91 Ind. 557; the power is recognized but not granted by the constitution; Samish

River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; by which it is limited; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; it is the "offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law"; Searl v. School Dist. No. 2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740, cited in Adams v. Henderson, 168 U. S. 574, 18 Sup. Ct. 179, 42 L. Ed. 584.

Distinction between Eminent Domain and Other Powers. The constitutional requirement that compensation be made for property taken for public use does not restrict the inherent power of the state under reasonable regulation to protect the lives and secure the safety of the people; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; instances of taking or destruction of property which have been sustained are: the change of boundaries of municipal corporations; Little Rock v. North Little Rock, 72 Ark. 195, 79 S. W. 785; restriction on a mill site which another one had previously appropriated; Otis Comp. v. Mfg. Co., 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696, affirming Otis Co. v. Ludlow Mfg. Co., 186 Mass. 89, 70 N. E. 1009, 104 Am. St. Rep. 563; the construction and operation of a water works plant by a city in competition with a company which had constructed works under a franchise from the city; City of Meridian v. Loan & Trust Co., 143 Fed. 67, 74 C. C. A. 221, 6 Ann. Cas. 599; the destruction of a fruit tree affected with the "yellows"; State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; abatement of a public nuisance and the assessment of the benefits of such abatement to the owner; Rude v. St. Marie, 121 Wis. 634, 99 N. W. 460; the restrictions imposed by game laws; Ex parte Fritz, 86 Miss. 210, 38 South. 722, 109 Am. St. Rep. 700; State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; reasonable health regulations; State v. Robb, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275.

"Acts done in the exercise of governmental powers and not directly encroaching upon private property, though their consequences may be to impair its use, are universally held not to be a taking" within the fifth amendment; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Union Bridge Co. v. U. S., 204 U. S. 390, 27 Sup. Ct. 367, 51 L. Ed. 523. So of the change of location of gas pipes under a municipal regulation enacted for the public safety under the police power; Union Bridge Co. v. U. S., 204 U. S. 395, 27 Sup. Ct. 367, 51 L. Ed. 523; and an ordinance requiring a railroad company to lower its tunnel under the Chicago river to afford increased depth of water for navigation; West Chicago Street Ry. Co. v. Illinois, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; so of an order of the secretary of war requiring a bridge over a navigable river to be raised in aid of navigation; Union Bridge Co. v. U. S., 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523.

This right is distinguished from public domain, which is property owned absolutely by the state in the same manner as an individual holds his property; 19 (No. 37) Am. Jur. 121; 2 Kent 339; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 389; West River Bridge Co. v. Dix, 6 How. (U. S.) 540, 12 L. Ed. 535; termed by Cooley "the ordinary domain of the state"; Const. Lim. 642.

The right of eminent domain is not to be confounded with cases in which there exists a sovereign right to take or destroy private property without making compensation. The familiar case of taxation is readily distinguished. An owner is not entitled to compensation for damage or loss to property taken or destroyed during war. As to the distinction between the war power and eminent domain see 13 Am. L. Reg. 265, 337, 401; Mills, Em. Dom. § 3. So property may be taken under a controlling necessity, or to prevent the spread of a fire; 12 Co. 63; Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am. Rep. 613; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Mayor, etc., of New York v. Lord, 18 Wend. (N. Y.) 126; Amer. Print Works v. Lawrence, 21 N. J. L. 248.

In trespass for destruction of goods, destroyed by the blowing up a building to prevent the spread of fire in a city, ordered by defendant as Mayor of New York, the common-law plea of necessity is good in justification and it need not be averred that the defendant was a resident of or owner of property, in the city, or that his own property was in danger; American Print Works v. Lawrence, 23 N. J. L. 590, 57 Am. Dec. 420. And similarly are treated proceedings under the police power, to abate a nuisance *(q. v.)*; Com. v. Alger, 7 Cush. (Mass.) 53 (in which Shaw, C. J., draws the distinction between the police power and eminent domain); Bancroft v. Cambridge, 126 Mass. 438; or by restraining the owner of land from making a noxious use of it; Chicago & A. R. Co. v. R. Co., 105 Ill. 388, 44 Am. Rep. 799; or by removing sand, etc., from beaches; Com. v. Tewksbury, 11 Metc. (Mass.) 55; compelling railroads to erect cattle guards; Thorpe v. R. Co., 27 Vt. 140, 62 Am. Dec. 625; or holding them responsible for damages by fire *(q. v.)* from locomotives; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; compelling riparian owners to keep up a levee; Bouligny v. Dormenon, 2 Mart. N. S. (La.) 455; or changing the course of a river; Green v. Swift, 47 Cal. 536; or as a forfeiture for violation of law; State v. Snow, 3 R. I. 64; People v. Hawley, 3 Mich. 330; Erie & N. E. R. Co. v. Casey, 26 Pa. 287; Guillotte v. New Orleans, 12 La. Ann. 432.

The Right of Compensation. Though not included in the definitions of the power as usually given, the necessity for compensation is recognized by the most authoritative writers as an incident to the right, an original element of its existence, and not a superimposed limitation.

Accordingly eminent domain is said with more precision to be the right of the nation or the state, or of those to whom the power has been lawfully delegated, to condemn private property to public use, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law; Black, Const. L. 350.

So far as the federal constitution is concerned, a state may authorize the taking possession of property for a public use, prior to any payment therefor, or even the determination of the amount of compensation, provided adequate provision is made for such compensation; Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559.

Nearly if not all of the American constitutions provide for compensation. Professor Thayer states that "now (1895) only three constitutions, New Hampshire, North Carolina, and Virginia are without a clause expressly requiring compensation." The provisions of the several then constitutions are given in Randolph, Em. Dom. 401 to 416, and Lewis, Em. Dom. §§ 14 to 52 (the latter including the prior as well as the last state constitutions). Nichols, Em. Dom. (1909) gives the provisions of twenty-seven state constitutions requiring prepayment; § 267. In one of these states a statute providing that possession might be taken after the money was paid into court and before the amount of the compensation was ascertained was held unconstitutional on the ground that the owner was entitled to hold the land until he received the money; Steinhart v. Superior Court, 137 Cal. 575, 70 Pac. 629, 59 L. R. A. 404, 92 Am. St. Rep. 183.

With respect to compensation, Kent says: "This principle, in American constitutional jurisprudence, is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law;" 2 Com. 339.

It would seem to be the most satisfactory conclusion both upon reason and authority that neither the right of the state to take nor the right of the individual to compensation required a constitutional assertion. The right to take private property for public use does not depend on constitutional provisions, but is an attribute of sovereignty; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; Raleigh & G. R. Co. v. Davis, 19 N. C. 451; it (the right) exists, and the only limitation upon its exercise is that imposed by the state or federal constitution; Wilson v. R. Co., 5 Del. Ch. 524.

So also the *right to compensation* is an incident to the exercise of the power, inseparably connected with it; Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184; "this is an affirmance of a great doctrine established by the common law for the protection of private property;" 2 Story, Const. § 1790; "the obligation attaches to the exercise of the power, though it is not provided for by the state constitution, or that of the United States had not enjoined it;" Bonaparte v. R. Co., Baldw. C. C. 220, Fed. Cas. No. 1,617. "If by the assertion that this right existed at common law independent of the declaration of rights, is meant that compensation in such case is required by a plain dictate of natural justice, it must be conceded. The bill of rights declares a great principle; the particular law prescribes a practical rule by which the remedy for the violation of right is to be sought and afforded;" Shaw, C. J., in Hazen v. Essex Co., 12 Cush. (Mass.) 475. In New Hampshire, although the constitution did not contain an express provision requiring compensation, "yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the state, that the legislature cannot constitutionally authorize such taking without compensation;" Eaton v. R. R., 51 N. H. 504, 12 Am. Rep. 147. It is a condition precedent to its exercise under a statute that it make reasonable provision for compensation to the owner of the property taken; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526.

There are *dicta* which countenance the opinion that compensation is not of the essence of eminent domain, that the usual constitutional clause is restrictive, not declaratory, so that, were it omitted, the state could properly take property without paying for it; Rand. Em. Dom. § 226, citing Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; Clark v. Town of Saybrook, 21 Conn. 313; Wilson v. R. Co., 5 Del. Ch. 524; In re Furman St., 17 Wend. (N. Y.) 649; Orr v. Quimby, 54 N. H. 590, 647. In one of these cases the language used is "the provision found in the federal and state constitutions for just compensation for property taken is no part of the power itself, but merely a limitation upon the use of it, a condition upon which it may be exercised;" U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015.

One of the text writers on the subject takes this view; Lewis, Em. Dom. § 10; and argues it with great earnestness, treating it as the same question discussed by Sedgwick and Cooley and referred to *supra* under the title Constitutional *(q. v.)*, whether there are limitations of legislative power other than those contained in the constitutions, federal and state. The real question involved in the relation of compensation to eminent domain is a different one. It is not whether the sovereign

powers of government exercised by American state legislatures are subject to undefined limitations not embodied in the written constitution, but what is the sovereign power which we term eminent domain, as recognized and exercised by governments long before written constitutions were known. It is true that some courts in discussing this subject have fallen into the same confusion of ideas, but the distinction none the less exists and should be borne in mind. Is it the right to take private property arbitrarily, or only to take it on making compensation? Lewis thinks "the question has lost most of its practical interest from the fact that all states except one (North Carolina), now have an express limitation in their organic law touching the exercise of this power." It is submitted, however, that the precise definition and true limitation of so autocratic a governmental power can never become a matter of indifference. So long as one state constitution is silent on the subject of compensation it remains a practical question in American constitutional law and the existence of a reserved power to amend or abolish any existing constitution, coupled with the prevalent tendency to attack and impair the right to private property, must necessarily keep it such, independently of the theoretical interest in maintaining correct definitions of the inherent rights of sovereignty.

Suggestions in the line of the cases cited by Randolph and the views expressed by Lewis, led to practical results in but few cases:—In South Carolina land was taken for roads without compensation; Lindsay v. Street Com'rs, 2 Bay (S. C.) 38; State v. Dawson, 3 Hill (S. C.) 100; but in New York, taking wild land without compensation was held unconstitutional; Wallace v. Karlenowefski, 19 Barb. (N. Y.) 118. In New Jersey and Pennsylvania, the subject rested on a statutory rather than a constitutional basis, because the grants by the proprietors included an extra allowance for roads; Simmons v. City of Passaic, 42 N. J. L. 619; Workman v. Mifflin, 30 Pa. 362; and this was held compensation; East Union Tp. v. Comrey, 100 Pa. 362. See Wagner v. Salzburg Tp., 132 Pa. 636, 19 Atl. 294. Under the New Jersey constitution, land might be taken for highways without compensation until otherwise directed by the legislature. In Louisiana land on the Mississippi River can be taken without compensation for the construction of a public levee under the old French law, and this applies to the land of a citizen of another state, provided he receive the same measure of right as citizens of Louisiana in regard to their property similarly situated; Eldridge v. Trezevant, 160 U. S. 452, 16 Sup. Ct. 345, 40 L. Ed. 490.

Mr. James B. Thayer (Cases, Const. L. 953) discusses this subject in a very interesting note and reaches the somewhat metaphysical conclusion that the right to compensation is not a component part of the right to take, though it arises at the same time and the latter cannot exist without it, the two being compared to shadow and substance.

He argues that the right of the state springs from the necessity of government, while the obligation to reimburse stands upon the natural rights of the individual. "These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the state and the individual, that the former shall have the property, if it will make compensation; the right is no mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent. But there is a right to take, and attached to it, as an incident, an obligation to make compensation; this latter, morally speaking, follows the other, indeed, like a shadow, but it is yet distinct from it, and flows from another source." From this he argues that for the taking the citizen cannot complain; if recompense is not made, the duty of the sovereign is violated and the individual "has an eternal claim against the state, which can never be blotted out except only by satisfaction; but this claim is for compensation, and not for his former property," and, "in the absence of constitutional provisions," the loss "must be regarded as *damnum absque injuria.*"

The distinction between this theory and the doctrine that the right to compensation is an inherent attribute rather than a subsequent limitation of the original right would seem to be rather ingenious than practical. The citations in the same note from the civilians show clearly that, in their view, compensation was essential, and even in the states whose organic law was, at the time of the decision, either silent or contained merely a general declaration as to private rights the necessity of compensation has been recognized; Rand. Em. Dom. § 227, citing Bristol v. New Chester, 3 N. H. 524; In re Mt. Washington Road Co., 35 N. H. 134; Harness v. Canal Co., 1 Md. Ch. 248; Bonaparte v. R. Co., Baldw. C. C. 205, Fed. Cas. No. 1,617; Johnston v. Rankin, 70 N. C. 550; Staton v. R. Co., 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838; Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; see also Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Hazen v. Essex Co., 12 Cush. (Mass.) 475. The mistaken idea that the fifth amendment of the constitution of the U. S., applied to the states, seems to have contributed to this opinion in some cases; Gardner v. Village of Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Scudder v. Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756. "The true doctrine is, in the writer's opinion," says the author last cited, "that which requires the payment of compensation whether it be expressly enjoined or not. The modern concept of a constitutional state as realized in the United States has no room for spoliation of the individual." The same view is supported in Mills, Em. Dom. § 1.

Whatever view may be taken of the general doctrine of the law on this subject the necessity of compensation is firmly imbedded in American constitutional law.

It may be considered settled that the exercise of the right is not justifiable, where the statute fails to provide compensation; and the courts will, in general, substantially declare such an act unconstitutional; Sweet v. Rechel, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188; Richmond v. Telegraph Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162; U. S. v. Lynah, 188 U. S. 445, 485, 23 Sup. Ct. 349, 47 L. Ed. 539; Barron v. City of Memphis, 113 Tenn. 89, 80 S. W. 832, 106 Am. St. Rep. 810; Clifton v. Town of Weston, 54 W. Va. 250, 46 S. E. 360; Smith v. City of Sedalia, 152 Mo. 283, 53 S. W. 907, 48 L. R. A. 711; East Shore Land Co. v. Peckham, 33 R. I. 541, 82 Atl. 487; Higginson v. Com'rs, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215; Sea Cliff Grove & Metropolitan Camp Ground Ass'n v. Steamboat Co., 70 Misc. 97, 127 N. Y. Supp. 1021; Kent 339, n.; *dicta* in 4 Term 794; Louisville, C. & C. R. R. Co. v. Chappell, Rice (S. C.) 383; Stokes v. Upper Appomatox Co., 3 Leigh (Va.) 337; Eastman v. Mfg. Co., 44 N. H. 143, 82 Am. Dec. 201; Wells v. R. Co., 47 Me. 345; Watkins v. Walker County, 18 Tex. 585, 70 Am. Dec. 298; Watson's Ex'r v. Trustees of Pleasant Tp., 21 Ohio St. 667; Shute v. R. Co., 26 Ill. 436; Georgia M. & G. R. Co. v. Ry. Co., 89 Ga. 205, 15 S. E. 305; Calder v. Police Jury, 44 La. Ann. 173, 10 South. 726; Webster v. Ry. Co., 116 Mo. 114, 22 S. W. 474; Monongahela Nav. Co. v. U. S., 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; Searl v. School Dist. No.

2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740. See *contra*, Hart v. Board of Levee Com'rs, 54 Fed. 559. Such statute may be treated by the land owner as void; Boston & L. R. Co. v. R. Co., 2 Gray (Mass.) 1; and he has the same rights against a trespasser under color of such authority as if it did not exist; *id.;* Proprietors of Piscataqua Bridge Co. v. Bridge Co., 7 N. H. 35. Such an act is, however, said not to be so far void as not to warrant the acquisition of the property by purchase; Carbon Coal & Min. Co. v. Drake, 26 Kan. 345. This compensation must be in money; Com. v. Peters, 2 Mass. 125; Vanhorne v. Dorrance, 2 Dall. (U. S.) 304, 1 L. Ed. 391; Murphy v. De Grott, 44 Cal. 51; Chicago, M. & St. P. Ry. Co. v. Melville, 66 Ill. 329; State v. Sewer Com'rs, 39 N. J. L. 665.

In constitutional construction the words "just," "ample," "full," "adequate," "due," etc., prefixed to the word "compensation," has been said to lend no appreciable additional weight; Rand. Em. Dom. § 223; but much stress has often been put upon it by courts. The word "just" in the fifth amendment excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner; Monongahela Nav. Co. v. U. S., 148 U. S. 326, 13 Sup. Ct. 622, 37 L. Ed. 463. The word "just" is not used as an antithesis of unjust, but "evidently to intensify the meaning of the word compensation;" Virginia & T. R. Co. v. Henry, 8 Nev. 165; it means recompense "all circumstances considered;" McIntire v. State, 5 Blackf. (Ind.) 384, "to save the owner from suffering in his property or estate . . . as far as compensation in money can go;" Bangor & P. R. Co. v. McComb, 60 Me. 290; "making the owner good by an equivalent in money;" Bigelow v. R. Co., 27 Wis. 478.

The Federal Power. All lands held by private owners everywhere within the geographical limits of the United States are subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; Cherokee Nation v. R. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295. The federal government exercises its own right of eminent domain subject to the constitutional limitations requiring compensation; it does not proceed under the right of the state and the measure of compensation in each case may be different; Town of Nahant v. U. S., 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723, modified in U. S. v. Town of Nahant, 153 Fed. 520, 82 C. C. A. 470; Alexander v. U. S., 39 Ct. Cl. 383; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; the consent of the state is not necessary for the condemnation, but only for the transfer of jurisdiction; People v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94. It has the right in territory acquired either by purchase or conquest; People v. Folsom, 5 Cal. 373.

The right of eminent domain is one of the powers of the federal government essential to its independent existence and perpetuity. Among the purposes for which it is exercised are the acquisition of lands for forts, armories, arsenals, navy yards, light-houses, custom-houses, post-offices, court-houses, and other public uses. The right may be exercised within the states without application to them for permission to exercise it; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; the fact that the power has not been exercised adversely does not disprove its existence, nor does the fact that in some instances the states have condemned lands for the use of the general government; *id.* It is a right belonging to a sovereignty to take private property for its own public uses but not for those of another; hence the power of the United States must be complete in itself, it can neither be enlarged nor diminished, nor can the manner of its exercise be regulated by the state whose consent is not a condition precedent to its enjoyment; *id.*

Originally the method of proceeding was usually for the state to condemn lands for the United States when needed by the latter; Orr v. Quimby, 54 N. H. 590; U. S. v. Dumplin Island, 1 Barb. (N. Y.) 24; Gilmer v. Lime Point, 18 Cal. 229; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; and the power has been delegated by the state to the United States within a comparatively recent period; In re Certain Land in Lawrence, 119 Fed. 453; but this method is not only unnecessary, but is not based on correct principles, since the absolute and unqualified power belongs to the federal government, and that method has been disapproved; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; In re Appointment of U. S. Com'rs, 96 N. Y. 227. When the taking of property is authorized by congress, the proceedings are carried on under federal law; Town of Nahant v. U. S., 136 Fed. 273, 70 C. C. A. 641, 69 L. R. A. 723.

The United States cannot take state property devoted to a public use and the loss of which would interfere with the performance of its duties by the state. It was on this principle that the right to tax a state judicial officer upon his salary was denied to the United States; The Collector v. Day, 11 Wall. (U. S.) 113, 20 L. Ed. 122; but the United States may acquire an easement in the property of a state which does not interfere with its ordinary use, as by the placing of telegraph poles, under a federal authority, upon state roads; City of St. Louis v. Telegraph Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; City of Richmond v. Telegraph

Co., 174 U. S. 761, 19 Sup. Ct. 778, 43 L. Ed. 1162.

It has been said that a necessity of the federal government would override the right of the state to the occupancy of property for public use—that what was devoted to a local public use might be taken for a higher national use; New Orleans v. U. S., 10 Pet. (U. S.) 662, 723, 9 L. Ed. 573; and it was said by Bradley, J., that "If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it"; Stockton v. R. Co., 32 Fed. 9; it has paramount authority in the matter of taking any property within its borders for those public uses which are within the constitutional reservations to the general government; U. S. v. City of Tiffin, 190 Fed. 279; and in the Northern Securities Case it was said that state legislation, even if in the exercise of its unquestioned power, must yield, in case of conflict, to the supremacy of the United States constitution and the acts of congress passed pursuant to it; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. As to the nature and extent of power of condemnation of the United States, see note, 70 C. C. A. 653.

On the other hand, the state cannot condemn land held by the United States and used for public purposes; U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660; nor can a territory; Pratt v. Brown, 3 Wis. 603. With respect to land not used for public purposes of which the United States is considered as a private proprietor, it has been held that such land might be taken; Hendricks v. Johnson, 6 Port. (Ala.) 472; U. S. v. R. Bridge Co., 6 McLean 517, Fed. Cas. No. 16,114, approved by a dictum in U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660, and apparently disapproved in Van Brocklin v. Tennessee, 117 U. S. 151, 6 Sup. Ct. 670, 29 L. Ed. 845, where Gray, J. suggests that the question, will, when raised, require careful consideration. When the state has ceded land to the federal government it has lost its jurisdiction entirely; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; U. S. v. Cornell, 2 Mas. 60, Fed. Cas. No. 14,867; People v. Godfrey, 17 Johns. (N. Y.) 225; Mitchell v. Tibbetts, 17 Pick. (Mass.) 298; Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397; and hence the state cannot condemn land within the ceded district; U. S. v. Ames, 1 Woodb. & M. 76, Fed. Cas. No. 14,441; In re Opinion of the Justices, 1 Metc. (Mass.) 580. But when land has been acquired by the United States without the consent of the state, the state retains its jurisdiction and may act with respect to it, so far as it does not interfere with the use of the property by the United States; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264; but whether in the exercise of this jurisdiction there is included the power of condemnation remains an open question; Nichols, Em. Dom. § 25.

The state may condemn for another public use the land of an interstate railroad chartered by congress if it does not interfere with its operation; Union Pac. Ry. Co. v. R. Co., 3 Fed. 106; Northern Pac. Ry. Co. v. Ry. Co., 3 Fed. 702; Union Pac. Ry. Co. v. R. Co., 29 Fed. 728.

A federal court may require proceedings to condemn a crossing over a railroad, in the hand of a receiver appointed by it, to be brought within its jurisdiction; Buckhannon & N. R. Co. v. Davis, 135 Fed. 707, 68 C. C. A. 345; and when the owner of the land and the party seeking to condemn it are citizens of the same state, the condemnation proceedings may be begun in, or removed to, the federal court; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Madisonville Traction Co. v. Min. Co., 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; Kansas City v. Hennegan, 152 Fed. 249; Deepwater R. Co. v. Lumber Co., 152 Fed. 824; but it must follow the procedure of the state statute; East Tennessee, Va. & Ga. R. Co. v. Telegraph Co., 112 U. S. 306, 5 Sup. Ct. 168, 28 L. Ed. 746; Broadmoor Land Co. v. Curr, 142 Fed. 421, 73 C. C. A. 537.

This right exists in the District of Columbia, the territories, and lands within the United States acquired through cession; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170.

The power of eminent domain in the general government as exercised for local purposes in the District of Columbia is the same as that exercised by a state within its own territory; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; there and in the territories it exists in all cases in which a similar power could be exercised by the states; First Nat. Bank v. County of Yankton, 101 U. S. 129, 25 L. Ed. 1046. It is among the powers derived by the territorial governments immediately from the United States; Swan v. Williams, 2 Mich. 427; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Newcomb v. Smith, 1 Chand. (Wis.) 71.

Within the states the United States has the right of eminent domain for federal purposes; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Cherokee Nation v. Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295. This power has been exercised to condemn land for military posts; U. S. v. Chicago, 7 How. (U. S.) 185, 12 L. Ed. 660; fortification; Gilmer v. Lime Point, 18 Cal. 229; navigation work; King v. U. S., 59 Fed. 9; lighthouse and coast survey purposes; Orr v. Quimby, 54 N. H. 590; Chappell v. U. S., 160 U. S. 499, 16 Sup. Ct. 397, 40 L. Ed. 510; the construction of interstate railroads; Cali-

fornia v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; water supply; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; post-office; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; a national cemetery at Gettysburg; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576. The weight of authority is in favor of the exercise of the right by the United States directly when property is required for federal purposes and not through the right of eminent domain of the state; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550; In re Appointment of United States Commissioners, 96 N. Y. 227; though the latter method is upheld in some cases; U. S. v. Dumplin Island, 1 Barb. (N. Y.) 24; Burt v. Ins. Co., 106 Mass. 356, 8 Am. Rep. 339; Orr v. Quimby, 54 N. H. 590; but it is held that the United States may delegate to a tribunal created under the laws of the state the power to fix and determine the amount of compensation to be paid by the federal government for private property taken by it in the exercise of the right of eminent domain; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015. The United States circuit court has jurisdiction to entertain proceedings instituted by the United States to appropriate land for a post-office; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449. In this case there was no act of congress relating to the subject except the appropriation of money, and a direction to the secretary of the treasury to purchase a site, and the jurisdiction was objected to. The supreme court held that the proceedings were a suit at law and cognizable under the general provisions of the judiciary act. As to the federal right, see Chattarol Ry. Co. v. Kinner, 14 Am. & Eng. R. R. Cas. 30; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449. The state cannot condemn for the United States and bind the latter as to compensation; People v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94, in which the whole subject of the exercise of this right by state and federal governments was considered by Cooley, J. Proceedings may be in the United States courts, or in state courts, in the name of the United States, and state practice should be followed; In re Appointment of United States Commissioners, 96 N. Y. 227; Jones v. U. S., 48 Wis. 385, 4 N. W. 519; U. S. v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; or may by act of congress be made to follow some state statute; Darlington v. U. S., 82 Pa. 382, 22 Am. Rep. 766.

Public uses of the federal government have been held to be public uses of the state; Reddall v. Bryan, 14 Md. 444, 74 Am. Dec. 550.

Proceedings under state laws for condemnation of lands, involving the ascertainment by judicial proceedings of the value of property to be paid as compensation, may be removed to the United States court; Searl v. School Dist. No. 2, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Sugar Creek, P. B. & P. C. R. Co. v. McKell, 75 Fed. 34; if they take the form of a proceeding before the courts; Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; the preliminary proceedings are in the nature of an inquest and not a "suit," but when transferred into the state court by appeal it becomes one; *id.*; Hastings Lumber Co. v. Garland, 115 Fed. 18, 52 C. C. A. 609. As to removal of such proceedings, see 25 Am. L. Reg. 183.

The Power of the States. The right of eminent domain is also an attribute or part of the sovereignty of the states, and is by them exercised for a great and constantly increasing variety of purposes, some of which are for governmental uses either of the state at large or of local municipal bodies, or by private persons or corporations authorized to exercise some function of such public character, technically known as a public use.

It is also true that a state cannot condemn property within its borders for the use of another state; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; and a state statute is constitutional which forbids a riparian owner from diverting the water of a river for the use of a city in another state; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; but a statute of one state authorizing condemnation of a water supply for use in a canal in another state was sustained on the ground that the work was also of great benefit to the former state; In re Townsend, 39 N. Y. 171.

When the right of eminent domain is conferred upon private persons or corporations the right is termed by some writers the delegated power of eminent domain; 4 Thomp. Corp. ch. cxxii.; and such person or corporation is the agent of the state for its exercise.

Delegation of Power. The power may be delegated; Brayton v. City of Fall River, 124 Mass. 95; but it can only be exercised by a private individual or corporation by express legislative authority; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; it may be conferred upon a municipality for laying out and establishing streets; St. Louis & S. F. R. Co. v. Fayetteville, 75 Ark. 534, 87 S. W. 1174 (but it is not implied from a mere grant of authority to establish new streets; Georgia R. & B. Co. v. Mayor, etc., of Union Point, 119 Ga. 809, 47 S. E. 183); constructing drains; Hutchins v. Drainage Dist., 217 Ill. 561, 75 N. E. 354; establishing water works; In re Petition of Board of Water Com'rs of Village of White Plains, 176 N. Y. 239, 68 N. E. 348; Dallas v. Hallock, 44 Or. 246, 75 Pac. 204; laying out parks and parkways; City of Memphis v. Hastings, 113 Tenn. 142, 86 S. W. 609, 69 L. R. A. 750 (but a municipal corporation cannot exercise the right beyond its corporate limit without express legisla-

dive authority; City of Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215); a railroad company for obtaining gravel and other material; Hopkins v. R. Co., 97 Ga. 107, 25 S. E. 452; for building bridges and approaches thereto; Southern I. & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; and tunnels; McEwan v. R. Co., 72 N. J. L. 419, 60 Atl. 1130. Railroad companies may acquire a title in fee simple if the legislature authorizes it to do so; Challiss v. R. Co., 16 Kans. 117. A *de facto* railroad corporation may exercise the right inasmuch as its legal existence can only be questioned by the state in a direct proceeding for that purpose; Reisner v. Strong, 24 Kans. 410.

Strictly speaking it is not accurate to say that the state delegates a right of sovereignty, of which it cannot divest itself, hence it is more exact to speak of it as exercising the power through an agent. While corporations are usually selected for such agency, it may be and sometimes is conferred upon *individuals;* Young v. Buckingham, 5 Ohio 485; Ash v. Cummings, 50 N. H. 591; Calking v. Baldwin, 4 Wend. (N. Y.) 667, 21 Am. Dec. 168; Moran v. Ross, 79 Cal. 159, 21 Pac. 833; and where incorporation and a franchise were granted to an individual "and associates" it was held that he need not associate any one with him; Day v. Stetson, 8 Greenl. (Me.) 365. It has also been held that an individual as purchaser of a railroad and franchises at the foreclosure sale acquired the right to condemn lands; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860. In one case it is said that a statute neither did nor *could* confer this right "upon private persons, but only corporations organized for public purposes can be clothed with such privileges;" Finney v. Somerville, 80 Pa. 59; but this expression, so far as it concerns the power of the legislature, was *obiter;* and a case often cited with this only decides that under a general act, then under construction, the power could not be exercised by individuals, because there was no provision of law for its exercise by individuals; Coe v. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

The exercise of the power by such agencies is governed in the main by the same principles and limitations as when it is directly exerted by the federal or state government, and the exceptions to this rule readily disclose themselves in the consideration of the natural divisions of the subject. When its exercise by a private corporation is authorized it has been termed not a *franchise* but a means to the enjoyment of corporate franchises; Coe v. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; but the contrary view was expressed by Bradley, J., in California v. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150; "a power conferred upon certain corporations, which is not possessed by the citizens generally, and which is in derogation of their rights, so nearly resembles a franchise as to justify its treatment" under that title; 4 Thomp. Corp. § 5587. The use of the term franchise is not defined, by those who most use it, with sufficient precision to be conclusive against either view. It is as much a franchise, if one at all, if exercised by an individual as a corporation, though the writer quoted seems to overlook the possibility of this. It is, however, a grant of power or privilege from the sovereign to the citizen or subject, to do what would but for the grant be unlawful, and it undoubtedly does come within the usually accepted definition of the word franchise *(q. v.).* As is true with respect to franchises generally, the grant of the power is *never presumed* unless the intent to part with it is clearly expressed; *id.* § 5588; Lewis, Em. Dom. § 240; Appeal of Pennsylvania R. Co., 93 Pa. 150; Butler v. Mayor, etc., of Thomasville, 74 Ga. 570; Schmidt v. Densmore, 42 Mo. 225; Chamberlain v. Steam Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775; and its exercise by the state may determine a preceding contract made by the state without impairing the obligation of such contract, the right itself being always reserved by implication, if not expressly; Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697.

It is no objection to a grant of the power to a corporation that the latter is seeking to effect its own *private gain;* 4 Thomp. Corp. § 5589; for that is said to be merely compensation for the risk assumed for the benefit of the public; Concord R. R. v. Greely, 17 N. H. 47. When unrestrained by constitutional provision, the discretion of the legislature in selecting agents through whom the power is to be exercised is absolute. In a state whose constitution prohibits its exercise by *foreign corporations* they cannot of course act unless domesticated in the state; St. Louis & S. F. R. Co. v. Foltz, 52 Fed. 627; but otherwise they may do so; New York, N. H. & H. R. Co. v. Welsh, 143 N. Y. 411, 38 N. E. 378, 43 Am. St. Rep. 734; New York & E. R. Co. v. Young, 33 Pa. 175; Dodge v. City of Council Bluffs, 57 Ia. 560, 10 N. W. 886; but a constitutional incapacity cannot be avoided by acting through a domestic corporation; Koening v. R. Co., 27 Neb. 699, 43 N. W. 423 (see State v. Scott, 22 Neb. 628, 36 N. W. 121); though by consolidating with a domestic corporation it may exercise the power; Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; In re St. Paul & N. P. R. Co., 36 Minn. 85, 30 N. W. 432; as thereby the consolidated company becomes a corporation of the state; Trester v. R. Co., 33 Neb. 171, 49 N. W. 1110.

Foreign Corporations. A state cannot confer upon any corporation, public, *quasi* public or private, the power to exercise the right of eminent domain outside of its own limits; St. Louis & S. F. R. Co. v. Telegraph

Co., 121 Fed. 276, 58 C. C. A. 198; Chestatee Pyrites Co. v. Mining Co., 119 Ga. 354, 46 S. E. 422; 100 Am. St. Rep. 174; Helena Power Co. v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055; Duke v. Cable Co., 71 S. C. 95, 50 S. E. 675; but the fact that a corporation duly organized under the law of the state is subsidiary to a foreign corporation does not affect its right to exercise such power; Oregon Short Line R. Co. v. Cable Co., 111 Fed. 842, 49 C. C. A. 663. A domesticated foreign corporation may, in the absence of constitutional prohibition, be authorized by statute to exercise the power within a state; Columbus Water Works Co. v. Long, 121 Ala. 245, 25 South. 702; Illinois State Trust Co. v. R. Co., 208 Ill. 419, 70 N. E. 357; Southern Illinois & M. Bridge Co. v. Stone, 174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301; In re New York & N. H. Co. (In re Marks) 53 Hun 633, 6 N. Y. Supp. 105; Abbott v. Railroad, 145 Mass. 450, 15 N. E. 91; New York & Erie R. Co. v. Young, 33 Pa. 175; or the district of Alaska; St. Louis & S. F. R. Co. v. Telephone & Telegraph Co., 121 Fed. 276, 58 C. C. A. 198.

Statutes conferring the power of eminent domain are to be construed strictly; Goddard v. Ry. Co., 202 Ill. 362, 66 N. E. 1066; Chesapeake & O. Ry. Co. v. Walker, 100 Va. 69, 40 S. E. 633, 914; State v. Superior Court for Chelan County, 36 Wash. 381, 78 Pac. 1011; City of Puyallup v. Lacey, 43 Wash. 110, 86 Pac. 215; *aliter*, Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756.

The power can only be delegated for a public use; People v. R. Co., 2 McCarty, Civ. Pro. (N. Y.) 345; a statute authorizing a telegraph company to construct, maintain, and operate its lines over and along any military or post road of the United States does not confer authority to condemn a right of way over private property; Western Union Telegraph Co. v. R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. Ed. 312, 1 Ann. Cas. 517; land may be taken for a private road if it is open to the public; County of Madera v. Granite Co., 139 Cal. 128, 72 Pac. 915; the laying out of private roads may be authorized; Dickinson Township Road, 23 Pa. Super. Ct. 34; *contra*, Beaudrot v. Murphy, 53 S. C. 118, 30 S. E. 825; Varner v. Martin, 21 W. Va. 534.

How the Question of Public Use is Determined. It is well settled that the power exists only in cases where the public exigency demands its exercise. See remarks of Woodbury, J., and cases cited by him in West River Bridge Co. v. Dix, 6 How. (U. S.) 545, 12 L. Ed. 535. But the practice of all the states and of the federal government, since this decision, in condemning land for purposes of public convenience but not necessity, has been so frequent that the legislative control over the necessity and the particular location is almost universally conceded. Mills, Em. Dom. § 11; Nichols, Em. Dom. ch. liii. In a proceeding to condemn land, the term "necessary" does not mean that it is indispensable or imperative, but only that it is convenient and useful; and if an improvement is useful, and a convenience and benefit to the public sufficient to warrant the expense in making it, then it is necessary; Com'rs of Parks and Boulevards of City of Detroit v. Moesta, 91 Mich. 149, 51 N. W. 903; but it is no ground for a right to take land that its resources could be utilized at a much less expense than the land already owned; Spring Valley Water Works v. San Mateo Water Works, 64 Cal. 123, 28 Pac. 447. In 4 Thomp. Corp. § 5593, in concluding a discussion of the various theories as to what uses are public uses, the author says: "But it is a sound conclusion that the use must be a public use in the sense that it is open to such members of the public as may choose to use it upon the performance of reasonable or proper conditions; or in the sense of satisfying a great public want or exigency. On the other hand, where the public use is not compulsory, but is optional with the private corporation seeking the condemnation, it is not a public use." In U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576, it was said: "The constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as 'You shall not exercise this power except for public use.'"

The legislature cannot so determine that the use is public as to make its determination conclusive on the courts, and the existence of a public use in any class of cases is a question for the courts; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Varner v. Martin, 21 W. Va. 534; McQuillen v. Hatton, 42 Ohio St. 202; New Central Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537; Consolidated Channel Co. v. R. Co., 51 Cal. 269; Sadler v. Langham, 34 Ala. 311.

The Missouri constitution provides, as do those of Colorado, Mississippi, and Washington, that it shall be a judicial question whether the use contemplated is public, and that question will be determined without the aid of a jury; City of Savannah v. Hancock, 91 Mo. 54, 3 S. W. 215.

The Massachusetts Bill of Rights uses the term "public exigency" and the existence of one was said by Shaw, C. J., to be made by implication a prerequisite; Harback v. City of Boston, 10 Cush. (Mass.) 295. There is a similar provision in Maine, and in both states the rule making the necessity a legislative question is followed as in other states; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402; Hayford v. City of Bangor, 102 Me. 340, 66 Atl. 731, 11 L. R. A.

(N. S.) 940. The Michigan constitution requires the necessity of all takings, except by the state, to be determined by a jury, and in Wisconsin a similar provision applies to condemnation by municipal corporations.

The presumption is in favor of the public character of a use declared so by the legislature; Appeal of Edgewood R. Co., 79 Pa. 257; Varner v. Martin, 21 W. Va. 534; and unless it is clear that it is not possible for the use to be public, the courts cannot interfere; Mills, Em. Dom. § 10.

In an early case it was said that in general the question whether a particular structure, as a bridge, or a lock, canal, or road, is for the public use, is a question for the legislature, and it may be presumed to have been decided by them; Hazen v. Essex Co., 12 Cush. (Mass.) 475; citing Com. v. Breed, 4 Pick. (Mass.) 463; but in a later case when this position was broadly urged, it was held to be obviously untenable, and that, where the power was exercised, it necessarily involved an inquiry into the rightful authority of the legislature under the organic law, and that the legislature had no power to determine finally upon the extent of its authority over private rights; Talbot v. Hudson, 16 Gray (Mass.) 417. In this case what is probably the true doctrine was stated, that it is the duty of the courts to make all reasonable presumptions in favor of the validity of the legislative act. But this is simply the application to *this* particular subject of the general presumption of the constitutionality of legislative acts.

This right of the courts to determine the question of public use was maintained in In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; but if the court determine the matter in question to be a public use, their power is exhausted and the extent to which property shall be taken for it is wholly in the legislative discretion; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170. Whether the necessity exists for taking the property is a legislative question; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402.

The grant of the right is a determination on the part of the legislature that the object is necessary; Central R. Co. of New Jersey v. R. Co., 31 N. J. Eq. 475; and of this it is the judge; Tracy, etc., v. R. Co., 80 Ky. 259; In re Application of Jacobs, 98 N. Y. 109, 50 Am. Rep. 636; North Missouri R. Co. v. Gott, 25 Mo. 540; and parties cannot be heard on the question of necessity; Holt v. City Council of Somerville, 127 Mass. 408. If it is a public use there is no restraint on legislative discretion and the judicial function is gone; Mills, Em. Dom. § 11. If the use is certainly public courts will not interfere; only, when there is an attempt to evade the law and procure condemnation for private uses will courts declare it void; Mills, Em. Dom. § 11; Baltimore & O. R. Co. v. R. Co., 17 W. Va. 812. The fact that a railroad has located its line across certain land, is *prima facie* proof that it is necessary for it to take that land for the use of its road; O'Hare v. R. Co., 139 Ill. 151, 28 N. E. 923. Whether the land is reasonably required is a question of fact to be determined by the court or jury, and the burden of proof is on the plaintiff; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

It has been held that when under the constitution a federal question arises, the supreme court will determine the law without reference to state decisions; Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (U. S.) 432, 14 L. Ed. 997. See Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. Ed. 382; People v. Batchellor, 53 N. Y. 128, 13 Am. Rep. 480. But in determining what is a taking of property, the federal courts will accept the definition of the word property by the state court, where it is clearly settled; Pumpelly v. Canal Co., 13 Wall. (U. S.) 166, 20 L. Ed. 557; D. M. Osborne & Co. v. R. Co., 147 U. S. 248, 13 Sup. Ct. 299, 37 L. Ed. 155; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984; even following reversals by the latter; Leffingwell v. Warren, 2 Black. (U. S.) 599, 17 L. Ed. 261; Green v. Neal, 6 Pet. (U. S.) 291, 8 L. Ed. 402; Olcott v. Fond du Lac County, 16 Wall. (U. S.) 678, 21 L. Ed. 382.

What is a Public Use. There has not been and probably never will be a satisfactory comprehensive definition of the term "public use." There is a fundamental difficulty in framing one, arising from the double meaning of the word "use." It may be either employment or advantage, and courts have divided in resting their efforts at a definition upon either one or the other of these terms. The subject is discussed at length and the cases examined in Nichols, Em. Dom. §§ 206–211, and the conclusion of this author is that neither view as based upon the words mentioned, is entirely satisfactory or sufficiently broad to justify taking land for all the purposes for which it has been permitted.

Property taken for public use need not be taken by the public as a body into its direct possession, but for public usefulness, utility, or advantage, or purposes productive of general benefit or great advantage to the community; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221. It is not necessary that the entire community, or any considerable portion of it, should participate in an improvement to constitute a public use; Talbot v. Hudson, 16 Gray (Mass.) 417; County Court of St. Louis County v. Griswold, 58 Mo. 175; it may be limited to the inhabitants of a small locality; but the benefit must be in common, not to particular persons or estates; Gilmer v. Lime Point, 18 Cal. 229. See Mills, Em. Dom. § 12. If a considerable number will be benefited the use is public; Riche v. Water Co., 75 Me. 91; Ross v. Davis, 97 Ind. 79; as a school available for use by a portion of the community taxed to pay

for the property taken; Williams v. School Dist., 33 Vt. 271.

The legislature determines the number of people to be benefited to make the use public; Aldridge v. R. Co., 2 Stew. & P. (Ala.) 199, 23 Am. Dec. 307; but the incidental benefit of additional facilities for business, etc., will not make use public; In re Eureka Basin Warehouse & Mfg. Co. of Long Island, 96 N. Y. 42.

It was formerly considered that a public use must be for material needs, and not mere æsthetic gratification; Nichols, Em. Dom. § 232, citing Bynk. Jur. Pub. lib. ii. c. 15; Boston & R. Mill Dam Corp. v. Newman, 12 Pick. (Mass.) 467, 480, 23 Am. Dec. 662; Town of Woodstock v. Gallup, 28 Vt. 587; but this doctrine has been practically abandoned; Nichols, Em. Dom. § 232; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.

It has been judicially decided that the following are public uses: an almshouse; Heyward v. City of New York, 7 N. Y. 314; a public bath; Poillon v. City of Brooklyn, 101 N. Y. 132, 4 N. E. 191; a schoolhouse; Reed v. Inhabitants of Acton, 117 Mass. 384; Williams v. School Dist., 33 Vt. 271; Peckham v. School Dist., 7 R. I. 545; Township Board of Education v. Hackmann, 48 Mo. 243; Long v. Fuller, 68 Pa. 170; a market; In re Cooper, 28 Hun (N. Y.) 515; Henkel v. City of Detroit, 49 Mich. 249, 13 N. W. 611, 43 Am. Rep. 464; telegraph and telephone lines; Lockie v. Telegraph Co., 103 Ill. 401; State v. Telephone Co., 53 N. J. L. 341, 21 Atl. 460, 11 L. R. A. 664; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; New Orleans, M. & T. R. Co. v. Telegraph Co., 53 Ala. 211; Spring Valley Water Works v. Drinkhouse, 92 Cal. 528, 28 Pac. 681; water-works for a town; Bailey v. Inhabitants of Woburn, 126 Mass. 416; Lake Pleasanton Water Co. v. Water Co., 67 Cal. 659, 8 Pac. 501; water supply for a town; Burden v. Stein, 27 Ala. 104, 62 Am. Dec. 758; Martin v. Gleason, 139 Mass. 183, 29 N. E. 664; Cheyney v. Water Works Co., 55 N. J. L. 235, 26 Atl. 95; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 17 Sup. Ct. 718, 41 L. Ed. 1165; City of Chicago v. Smith, 204 Ill. 356, 68 N. E. 395; Denver Power & Irr. Co. v. R. Co., 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383 (but not where the creation of a water power and plant is for the purpose of supplying power for private enterprises; Berrien Springs Water-Power Co. v. Circuit Judge, 133 Mich. 48, 94 N. W. 379, 103 Am. St. Rep. 438; Minnesota Canal & Power Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; Peifly v. Water Supply Co., 214 Pa. 340, 63 Atl. 751); the improvement of the navigation of a river; Hazen v. Essex County, 12 Cush. (Mass.) 475; and the creation of a wholly artificial system of navigation by canals; *Id.*; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, Fed. Cas. No. 2,649; Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364; In re Townsend, 39 N. Y. 171; drainage; Willson v. Marsh Co., 2 Pet. (U. S.) 245, 7 L. Ed. 412; Cleveland, C., C. & St. L. Ry. Co. v. Drainage Dist., 213 Ill. 83, 72 N. E. 684; Sisson v. Board of Sup'rs of Buena Vista County, 128 Ia. 442, 104 N. W. 454, 70 L. R. A. 440; *contra*, Nickey v. Stearns Ranchos Co., 126 Cal. 150, 58 Pac. 459; Henry v. Thomas, 119 Mass. 583; Anderson v. Baker, 98 Ind. 587; sewers; Hildreth v. City of Lowell, 11 Gray (Mass.) 345; wharves; Curran v. City of Louisville, 83 Ky. 628; Kingsland v. City of New York, 110 N. Y. 569, 18 N. E. 435; In re City of New York, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825; ferries; Day v. Stetson, 8 Greenl. (Me.) 365; Stark v. McGowen, 1 N. & McC. (S. C.) 387; irrigation; Umatilla Irr. Co. v. Barnhart, 22 Or. 389, 30 Pac. 37; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Gutierres v. Land & Irr. Co., 188 U. S. 545, 23 Sup. Ct. 338, 47 L. Ed. 588; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; Borden v. Irr. Co., 204 U. S. 667, 27 Sup. Ct. 785, 51 L. Ed. 671; Irrigation Co. v. Klein, 63 Kan. 484, 65 Pac. 684; Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; levees; Missouri, K. & T. Ry. Co. v. Cambern, 66 Kan. 365, 71 Pac. 809; forts, armories or arsenals; Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449; U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192; Gilmer v. Lime Point, 18 Cal. 229; navy yards; In re League Island, 1 Brewst. (Pa.) 524; military camps; Morris v. Comptroller, 54 N. J. L. 268, 23 Atl. 664; turnpikes; In re Mount Washington Road Co., 35 N. H. 134; State v. Maine, 27 Conn. 641, 71 Am. Dec. 89; bridges; Young v. Buckingham, 5 Ohio 485; In re Towanda Bridge Co., 91 Pa. 216; Young v. McKenzie, 3 Ga. 31; Crosby v. Hanover, 36 N. H. 404; Palmer v. State, Wright (Ohio) 364; the criterion being, whether the public may use by right, or only by permission, and not to whom the tolls are paid; Arnold v. Bridge Co., 1 Duv. (Ky.) 372; cemeteries; Edgecumbe v. City of Burlington, 46 Vt. 218; Balch v. County Com'rs, 103 Mass. 106; Edwards v. Cemetery Ass'n, 20 Conn. 466; even if the price of the lots therein differ; Evergreen Cemetery Ass'n of New Haven v. Beecher, 53 Conn. 551, 5 Atl. 353; but not if used exclusively for members of a private corporation; In re Deansville Cemetery Ass'n, 66 N. Y. 569, 23 Am. Rep. 86; a restaurant at a summer resort; Prospect Park & C. I. R. Co. v. Williamson, 91 N. Y. 552; parks; City of Lexington v. Assembly, 114 Ky. 781, 71 S. W. 943; In re Mayor, etc., of City of New York, 99 N. Y. 569, 2 N. E. 642; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; Holt v. City Council, 127 Mass.

408; Gilman v. City of Milwaukee, 55 Wis. 328, 13 N. W. 266; Cook v. South Park Com'rs, 61 Ill. 115; Kerr v. South Park, 117 U. S. 379, 6 Sup. Ct. 801, 29 L. Ed. 924; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; even if paid for by a county, though beneficial only or mainly to a neighboring city; St. Louis County Court v. Griswold, 58 Mo. 175; acquiring private property within 200 feet of city parks and parkways in order to protect the same by resale in fee for private use; Penna. Mut. Life Ins. Co. v. Philadelphia, 22 Pa. Dist. R. 195, per Sulzberger, J.; the erection of a memorial hall or monumental statues, arches, and the like, the publication of town histories, decorations on public buildings, parks designed to provide for fresh air or recreation, educate the public taste, or inspire patriotism; Kingman v. City of Brockton, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123. As to playgrounds, or places of public recreation, the law is not fully settled; Nichols, Em. Dom. § 234; it was held not valid for a theatre; Sugar v. City of Monroe, 108 La. 677, 32 South. 961, 59 L. R. A. 723; or a private right of fishing in an island pond to provide for fishing as a pastime; Albright v. Park Commission, 71 N. J. L. 303, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48.

Restrictions on the height of buildings, while valid under the police power; Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 23 L. R. A. (N. S.) 1160, 118 Am. St. Rep. 523; have been also upheld to prevent disfiguring the surroundings, when compensation is made; Attorney General v. Williams, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314, affirmed Williams v. Parker, 188 U. S. 491, 23 Sup. Ct. 440, 47 L. Ed. 559; American Unitarian Ass'n v. Com., 193 Mass. 470, 79 N. E. 878; but not otherwise; Nichols, Em. Dom. § 235, giving cases.

A highway is a public use; Dronberger v. Reed, 11 Ind. 420; Haverhill Bridge Proprietors v. Commissioners, 103 Mass. 120, 4 Am. Rep. 518; but it must connect with another highway; In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; Moore v. Roberts, 64 Wis. 538, 25 N. W. 564; Appeal of Waddell, 84 Pa. 90; though at one end only; Schatz v. Pfeil, 56 Wis. 429, 14 N. W. 628; Peckham v. Town of Lebanon, 39 Conn. 231; People v. Kingman, 24 N. Y. 559. It may, however, terminate on private property; Atkinson v. Bishop, 39 N. J. L. 226; Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49; Goodwin v. Town of Wethersfield, 43 Conn. 437; or at a river; Moore v. Auge, 125 Ind. 562, 25 N. E. 816; or at a church; West Pikeland Road, 63 Pa. 471. So the improvement of a harbor is a public use, (but not the extension of harbor lines to prevent the placing of buildings on either side of a bridge); Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590; and the reclamation of flat land; 1 Thayer, Cas. Const. L. 1025, n. citing cases. Gas works; Bloomfield & R. Nat. Gaslight Co. v. Richardson, 63 Barb. (N. Y.) 437; Appeal of Pittsburgh, 123 Pa. 374, 16 Atl. 621; Providence Gas Co. v. Thurber, 2 R. I. 15, 55 Am. Dec. 621; a state military encampment; State v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; a public urinal; Badger v. City of Boston, 130 Mass. 170, are public uses. So has been held the production of electric power or light; Story v. Power Co., 166 Ind. 316, 76 N. E. 1057; Minnesota C. & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182; In re East Canada Creek Electric L. & P. Co., 49 Misc. 565, 99 N. Y. Supp. 109; In re Niagara, L. & O. Power Co., 111 App. Div. 686, 97 N. Y. Supp. 853; Rockingham County L. & P. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; Jones v. Electric Co., 125 Ga. 618, 54 S. E. 85, 6 L. R. A. (N. S.) 122, 5 Ann. Cas. 526; though some courts have doubted whether the transmitting of water power into electricity was such a public use as would warrant the exercise of the right of eminent domain; State v. Power Co., 39 Wash. 648, 82 Pac. 150, 2 L. R. A. (N. S.) 842, and note, 4 Ann Cas. 987; Minnesota Canal & P. Co. v. Koochiching Co., 97 Minn. 429, 107 N. W. 405, 5 L. R. A. (N. S.) 638, 7 Ann. Cas. 1182. A department store is not a public use; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. Rep. 441; and see Hatfield v. Straus, 189 N. Y. 208, 82 N. E. 172.

Other instrumentalities of commerce held to be public uses are, pipe lines for the transportation of oil or natural gas; W. Va. Transp. Co. v. Coal Co., 5 W. Va. 382; City of La Harpe v. Power Co., 69 Kan. 97, 76 Pac. 448; City of Rushville v. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321; Charleston Nat. Gas Co. v. Lowe, 52 W. Va. 662, 44 S. E. 410; dams for booms used in logging; Patterson v. Boom Co., 3 Dill 465, Fed. Cas. No. 10,829; Lawler v. Baring Boom Co., 56 Me. 443; Schoff v. Imp. Co., 57 N. H. 110; Maffet v. Quine, 93 Fed. 347; *contra*, Brewster v. Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495; Matthews v. Mfg. Co., 35 Wash. 662, 77 Pac. 1046; see also Mississippi & R. R. Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; Weaver v. Boom Co., 28 Minn. 534, 11 N. W. 114; Appeal of Bennett's Branch Imp. Co., 65 Pa. 242; a flume for the transportation of lumber; Dallas Lumbering Co. v. Urquhart, 16 Or. 67, 19 Pac. 78. As to the condemnation of land to facilitate mining operations there is a conflict of decisions. In some of the states the courts have refused to permit it; Amador Queen Min. Co. v. Dewitt, 73 Cal. 482, 15 Pac. 74; Appeal of Waddell, 84 Pa. 90; Woodruff v. Min. Co., 18 Fed. 753; while in others they have considered it justifiable on the

ground of public utility; Hand Gold Min. Co. v. Parker, 59 Ga. 419; Overman Silver Min. Co. v. Corcoran, 15 Nev. 147; and the owner of a mine may have land condemned for a railroad for the transportation of the products of his mine to the nearest thoroughfare by rail or water, provided such a railway shall be free to all who wish to use it; Hays v. Risher, 32 Pa. 169; Hibernia Underground R. Co. v. De Camp, 47 N. J. L. 518, 4 Atl. 318, 54 Am. Rep. 197; New Central Coal Co. v. Coal & Iron Co., 37 Md. 537; Colorado E. R. Co. v. R. Co., 41 Fed. 294; and this latter provision will be implied from the statute authorizing the condemnation; Phillips v. Watson, 63 Ia. 28, 18 N. W. 659; but it has been held that a mine-owner cannot condemn land solely for the transportation of his own products; Appeal of Stewart, 56 Pa. 413; Appeal of McCandless, 70 Pa. 210; Sholl v. Coal Co., 118 Ill. 427, 10 N. E. 199, 59 Am. Rep. 379; State v. R. Co., 40 Ohio St. 504; or to take water to the mines; Lorenz v. Jacob, 63 Cal. 73.

The right to condemn land for mill sites has been frequently granted; Hankins v. Laurence, 8 Blackf. (Ind.) 266; Harding v. Goodlett, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546; Boston & R. Mill Dam. Corp. v. Newman, 12 Pick. (Mass.) 467, 23 Am. Dec. 622; Inhabitants of Andover v. Sutton, 12 Metc. (Mass.) 182; Tyler v. Beacher, 44 Vt. 648, 8 Am. Rep. 398; Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221. In the last case it was urged that it was against public policy to allow such great agencies as streams capable of propelling machinery to go to waste, and that to utilize such power, even for the erection of private mills, promotes the wealth of the state and is of incidental benefit to the people. But although courts have recognized this right to a certain extent; Holyoke Co. v. Lyman, 15 Wall. (U. S.) 500, 21 L. Ed. 133, it has been with reluctance and it will not now probably be sustained; Mills, Em. Dom. § 15; it has been doubted; Powers v. Bears, 12 Wis. 213, 78 Am. Dec. 733; and by some denied; Jordan v. Woodward, 40 Me. 317; Hay v. Cohoes Co., 3 Barb. (N. Y.) 42; Sadler v. Langham, 34 Ala. 311; Ryerson v. Brown, 35 Mich. 333, 24 Am. Rep. 564; in which, after reviewing the authorities, Judge Cooley holds the question not one of necessity but of comparative cost. A general statute, delegating to individuals the power to condemn land and locate mills, was held unconstitutional; Loughbridge v. Harris, 42 Ga. 500. See generally as to the exercise of the power in aid of private enterprises, including mining, mills, etc., including an historical review of the cases, Nichols, Em. Dom. ch. xliv, §§ 236–254.

A railroad is a public use; Cherokee Nation v. Ry. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; Whiteman's Ex'x v. R. Co., 2 Harring. (Del.) 514, 33 Am. Dec. 411; Swan v. Williams, 2 Mich. 427; In re Long Island R. Co., 143 N. Y. 67, 37 N. E. 636; even where used for freight only; State v. R. Co., 47 N. J. L. 43; so also are all appurtenances essential to the reasonable, convenient, and proper construction, maintenance, and operation of the road, such as yard-room; Eldridge v. Smith, 34 Vt. 484; and terminals; Spofford v. R. Co., 66 Me. 26; turnouts, engine-houses, depots, shops, turntables; Chicago, B. & Q. R. Co. v. Wilson, 17 Ill. 123; Giesy v. R. Co., 4 Ohio St. 308; and repair shops, stock-yards; Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 469, 35 L. Ed. 73; Hannibal & St. J. R. Co. v. Muder, 49 Mo. 165; paint-shop, lumber, and timber sheds; Low v. R. Co., 18 Ill. 324; wharves; In re New York Cent. & H. R. Co., 77 N. Y. 248; a place of deposit for waste earth; Lodge v. R. Co., 8 Phila. (Pa.) 345; but not shops for manufacturing new rolling stock; New York & H. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; or tenement houses for employés; *id.*; State v. Commissioners of Mansfield, Tp., 23 N. J. L. 510, 57 Am. Dec. 409; as to an ordinary warehouse, it was doubted; Cumberland Val. R. Co. v. McLanahan, 59 Pa. 23; but a building for handling freight was not a mere warehouse; In re New York Cent. & H. R. R. Co., 77 N. Y. 248; so land for a track to an elevator could be taken; Clarke v. Blackmar, 47 N. Y. 150; but not for a railroad constructed solely to convey passengers to see the Niagara River and whirlpool for revenue to a private person; In re Niagara Falls & Whirlpool R. Co., 108 N. Y. 375, 15 N. E. 429. See Lewis, Em. Dom. § 170; Rand. Em. Dom. § 45.

Having obtained its franchises and right of way subject to the right of the state to extend public streets and highways across its track, a railway company is not entitled to compensation for interruption of its business, or increased expense or risk involved in the construction of such highway; Boston & M. R. Co. v. County Com'rs, 79 Me. 386, 10 Atl. 113; Lake Shore & M. S. Ry. Co. v. City of Chicago, 148 Ill. 509, 37 N. E. 88. Legislative authority to construct streets and highways across such right of way does not violate the constitutional prohibition against taking private property for public use without compensation; Albany N. R. Co. v. Brownell, 24 N. Y. 345; People v. R. Co., 156 N. Y. 570, 51 N. E. 312; Rochester & H. V. R. Co. v. City of Rochester, 163 N. Y. 608, 57 N. E. 1123. But the company is entitled to compensation under such circumstances and its right is considered property; Hook v. R. Co., 133 Mo. 314, 34 S. W. 549; New York & L. B. R. Co. v. Capner, 49 N. J. L. 555, 9 Atl. 781; Kansas Cent. R. Co. v. Commissioners of Jackson County, 45 Kan. 716, 26 Pac. 394; Illinois Cent. R. Co. v. Highway Com'rs of Town of Mattoon, 161 Ill. 247, 43 N. E. 1100; St. Louis S. W. Ry. Co. v. Royall, 75 Ark. 530, 88 S. W. 555; Louisville &

N. R. R. Co. v. City of Louisville, 131 Ky. 108, 114 S. W. 743, 24 L. R. A. (N. S.) 1213.

It is not a public use to provide for fencing a large tract of land subject to floods which carried off the fences; Scuffletown Fence Co. v. McAllister, 12 Bush (Ky.) 312; or to acquire swamp land and build docks, warehouses, factories, etc.; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; or to settle private controversies concerning title by transferring the land of one to another; Vanhorne v. Dorrance, 2 Dall. (U. S.) 304, 1 L. Ed. 391; Lessee of Pickering v. Rutty, 1 S. & R. (Pa.) 511. The latter cases arose under legislation to settle titles and adjust controversies in Pennsylvania under the Connecticut grant.

It is settled that the legislature cannot authorize the taking of property for a private use, but the decisions conflict as to the case of private ways, or roads laid out under statutes existing in many states. By many courts they are held unconstitutional as being a private use; Taylor v. Porter, 4 Hill (N. Y.) 140, 40 Am. Dec. 274; Bankhead v. Brown, 25 Ia. 540; Richards v. Wolf, 82 Ia. 358, 47 N. W. 1044, 31 Am. St. Rep. 501; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Dickey v. Tennison, 27 Mo. 373; Crear v. Crossly, 40 Ill. 175; but in others such roads are held to be a public use, and the word private is construed as a word of classification and not technical or describing the use; Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700; In re Hickman, 4 Harring. (Del.) 580; Sadler v. Langham, 34 Ala. 311; Shaver v. Starrett, 4 Ohio St. 494; Denham v. County Com'rs of Bristol, 108 Mass. 202; Appeal of Waddell, 84 Pa. 90; In re Killbuck Private Road, 77 Pa. 39; Perrine v. Farr, 22 N. J. L. 356.

The doctrine as to taking under this power for the assistance of private enterprise is thus stated: "The power of eminent domain cannot be constitutionally employed to enable individuals to cultivate their land or carry on their business to better advantage even if the prosperity of the community will be enhanced by their success; but when the public welfare depends upon an undertaking which cannot succeed without taking rights in private land, the courts will allow such taking, especially if it is sanctioned by usage contemporary with the adoption of the constitution." Nichols, Em. Dom. 274; People v. Township Board of Salem, 20 Mich. 452, 4 Am. Rep. 400; Citizens' Sav. & Loan Ass'n v. Topeka, 20 Wall. (U. S.) 655, 22 L. Ed. 455; Allen v. Inhabitants of Jay, 60 Me. 127, 11 Am. Rep. 185.

"The taking by a state of the private property of one person without the owner's consent for the private use of another is not due process of law and is a violation of the fourteenth article of amendment of the constitution of the United States." An act authorizing a board of transportation to require a railroad corporation to grant to private persons a location on the right of way of a railroad for the purpose of erecting a third elevator is invalid; Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489. The prohibition is against taking without due process of law. So at the same term the court say: "There is no specific prohibition of the Federal Constitution which acts upon the states with regard to their taking private property for any but a public use;" Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject-matter. See notes on this subject in which the cases are collected; 91 Am. Dec. 585.

What may be taken. Every kind of property may be taken under this power. It "is attribute of sovereignty, and whatever exists in any form, whether tangible or intangible, may be subjected to the exercise of its power, and may be seized and appropriated to public uses when necessity demands it." Lewis, Em. Dom. § 262; Metropolitan City Ry. Co. v. Ry. Co., 87 Ill. 317, 324; Alabama & F. R. Co. v. Kenney, 39 Ala. 307; New York, H. & N. R. Co. v. R. Co., 36 Conn. 196; Water Works Co. of Indianapolis v. Burkhart, 41 Ind. 364; Eastern R. Co. v. Railroad, 111 Mass. 125, 15 Am. Rep. 13. The general rule to be gathered from all the authorities, considered together, is, that a legislative grant of power to condemn property, expressed in general terms, confers on the grantee power to take all kinds of property except property already devoted to public use and necessary for the exercise of such use; 27 Cent. L. J. 207; it makes no difference whether corporeal property, as land, or incorporeal, as a franchise, is to be affected; Bloodgood v. R. Co., 14 Wend. (N. Y.) 51; Bonaparte v. R. Co., 1 Baldw. C. C. 205, Fed. Cas. No. 1,617; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576; see Louisville, C. & C. R. Co. v. Chappell, Rice (S. C.) 383; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 454, 44 Am. Dec. 556; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; State v. Dawson, 3 Hill (S. C.) 109; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; Pocantico Water Works Co. v. Bird, 130 N. Y. 249, 29 N. E. 246; Turner v. Nye, 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; Louisville, N. O. & T. Ry. Co. v. Telegraph Cable Co., 68 Miss. 806, 10 South. 74; Spring Valley Water Works Co. v. Drinkhouse, 92 Cal. 528, 28 Pac. 681.

The property which may be taken includes: Estates successive in point of time, as remainders and reversions; Alexander v. U.

S., 39 Ct. Cl. 383; Charleston & W. C. Ry. Co. v. Reynolds, 69 S. C. 481, 48 S. E. 476; life-tenancy; Austin v. R. Co., 45 Vt. 215; Chicago, K. & N. Ry. Co. v. Ellis, 52 Kan. 41, 33 Pac. 478; tenancy for years; Chicago & E. R. Co. v. Dresel, 110 Ill. 89; Kearney v. Ry. Co., 129 N. Y. 76, 29 N. E. 70; or at will; Sheehan v. City of Fall River, 187 Mass. 356, 73 N. E. 544; easements, if impaired by the new use; State v. Superior Court of King County, 26 Wash. 278, 66 Pac. 385; even a prescriptive right to pollute a stream; Sprague v. Dorr, 185 Mass. 10, 69 N. E. 344; profits à prendre; Carville v. Com., 192 Mass. 570, 78 N. E. 735; mortgages; Bank of Auburn v. Roberts, 44 N. Y. 192; Wooster v. R. Co., 57 Wis. 311, 15 N. W. 401; South Park Com'rs v. Todd, 112 Ill. 379; *contra*, Whiting v. City of New Haven, 45 Conn. 303; Goodrich v. Board, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; Farnsworth v. City of Boston, 126 Mass. 1; (but not general liens; Watson v. R. Co., 47 N. Y. 157, or ground rents; Workman v. Mifflin, 30 Pa. 362;) dower; French v. Lord, 69 Me. 537; Venable v. Ry. Co., 112 Mo. 103, 20 S. W. 493, 18 L. R. A. 68; buildings and fixtures; Williams v. Com., 168 Mass. 364, 47 N. E. 115 (but only such fixtures as cannot be removed without injury to the freehold or to the owner; In re City of New York, 192 N. Y. 295, 84 N. E. 1105, 18 L. R. A. [N. S.] 423, 127 Am. St. Rep. 903). As to who are proper parties see *infra;* and as to what is property within the constitutional use of the word, see Nichols, Em. Dom. § 173 *et seq.* An inchoate right of dower is defeated by condemnation for a public use; Moore v. Mayor, etc., 8 N. Y. 110, 59 Am. Dec. 473; Duncan v. City of Terre Haute, 85 Ind. 104; Wheeler v. Kirtland, 27 N. J. Eq. 534; Chouteau v. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; French v. Lord, 69 Me. 537; it is said that the dower right in the land is cut off but transferred to the proceeds; Bonner v. Peterson, 44 Ill. 253; In re Central Park Extension, 16 Abb. Pr. (N. Y.) 56; but the statutory purchase of land by a railroad corporation for depots, etc., does not extinguish the inchoate right of dower therein; Nye v. R. Co., 113 Mass. 277.

The power has been held to exist: To build a railroad over basins maintained by a water power company for public purposes, and its franchise is not thereby destroyed; Boston Water Power Co. v. Boston & W. R. Corp., 23 Pick. (Mass.) 360; to take for a public road the property, easement, and franchise of a bridge company; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; to build a railroad over the land of a gas company not then in use but likely to become necessary; New York C. & H. R. R. Co. v. Gas-Light Co., 63 N. Y. 326; over the lands and right of way of a canal company; Tuckahoe Canal Co. v. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Board of Trustees of Illinois & M. Canal v. R. Co., 14 Ill. 314; over lands of a state asylum for deaf and dumb; Indiana Cent. Ry. Co. v. State, 3 Ind. 421; over a turnpike which would not be materially injured; White River Turnpike Co. v. R. Co., 21 Vt. 590; but not over lands, not necessary for the railway, owned and used by the state for an institution for the blind; St. Louis, J. & C. R. Co. v. Trustees, 43 Ill. 303. In a proceeding by a railroad company to condemn for terminal warehouses the land of a steamboat company, the test whether the defendant held its land for such use as to exempt it from condemnation was said to be not what the defendant "does or may choose to do, but what under the law it must do, and whether a public trust is impressed upon it. It does not so hold its property impressed with a trust for the public use unless its charter puts that character upon it and so that it cannot be shaken off;" In re New York, L. & W. Ry. Co., 99 N. Y. 12, 1 N. E. 27. Any property belonging to a railway not in actual use or necessary to the proper exercise of the franchise thereof may be taken for the purpose of another railroad under a general power; Baltimore & O. R. Co. v. R. Co., 17 W. Va. 812; Chicago & N. W. Ry. Co. v. R. Co., 112 Ill. 589; In re Poughkeepsie & E. R. Co., 63 Barb. (N. Y.) 151; Providence & W. R. R. Co. v. R. Co., 138 Mass. 277; Pittsburgh Junction R. Co. v. R. Co., 146 Pa. 297, 23 Atl. 313; but not where the loss of the property to be taken is necessary to the exercise of the franchise of its owner; Central City Horse Ry. Co. v. Ry. Co., 81 Ill. 523; Oregon Cascade R. Co. v. Baily, 3 Or. 164. The same general principles are applied to cases where a municipal corporation attempts to condemn railroad property; if the property is not necessary to the new use and the latter is destructive of the old one it is not permitted to be taken; Baltimore & O. C. R. Co. v. North, 103 Ind. 486, 3 N. E. 144, 23 A. & E. R. R. Cas. 36; s. c. Baltimore & O. & C. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Winona & St. P. Ry. Co. v. City of Watertown, 4 S. D. 323, 56 N. W. 1077; otherwise, if it will leave the franchise unimpaired; New Jersey Southern R. Co. v. Com'rs, 39 N. J. L. 28. A market house has been condemned for a railway terminal station, reached by an elevated railroad, and its approaches; Twelfth-St. Market Co. v. R. Co., 142 Pa. 580, 21 Atl. 902, 989; but one corporation cannot take the franchise of another which is in use unless expressly authorized by the legislature, and then only by regular condemnation, and cannot take it at all, if this will materially affect its use; Fidelity Trust & Safety Vault Co. v. Ry. Co., 53 Fed. 687. So a street may be taken; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 19 Pac. 661, 2 L. R. A. 59; a bridge; 39 Am. & Eng. Corp. Cas. 36, n.; or land in custody of the law; 14 Am. L. Rev. 131.

Where the power in a charter to condemn lands is limited so as to exclude land or property of any other corporation existing under the law of the state, this restriction was not confined to lands of corporations existing at the passage of the act, but applies to those thereafter incorporated; and another corporation which acquired lands after the first corporation had filed a survey thereof according to the requirements of the laws, but before any petition for the appointment of commissioners had been presented, could claim exemption from condemnation under the limitations; In re American Transp. & Nav. Co., 58 N. J. L. 109, 32 Atl. 74.

See review of cases on this general subject, of the taking of a franchise; 27 Cent. L. J. 207, 231; and as to corporate property; 14 Am. & Eng. R. R. Cas. 41, n.

Claims of citizens against a foreign power may be taken by the national government for the purpose of adjusting its relations with such power; Meade v. U. S., 2 Ct. of Cl. 224; and a claim for damages to land by reason of an unlawful entry may be taken and adjusted in a proceeding to take the land itself; Morris Canal & Banking Co. v. Townsend, 24 Barb. (N. Y.) 658.

It has been held that money cannot be taken; Field, J., Burnett v. City of Sacramento, 12 Cal. 76, 73 Am. Dec. 518; *contra*, Cary Library v. Bliss, 151 Mass. 364, 25 N. E. 92, 7 L. R. A. 765; only as to money taken by the state in time of war; Mitchell v. Harmony, 13 How. (U. S.) 115, 14 L. Ed. 75; Wellman v. Wickerman, 44 Mo. 484; and without any such limitation; Sharswood, J., in Hammett v. Philadelphia, 65 Pa. 152, 3 Am. Rep. 615, who says that "the public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion." "Such," the opinion continues, "would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great public calamity, as famine or pestilence, contribution could be levied on banks, corporations, or individuals."

Buildings on land condemned are parts of the realty and pass with the land, and the owner must be paid for them in full, and being so paid cannot recover from the company damages for the removal of them; Forney v. R. Co., 23 Neb. 465, 36 N. W. 806; nor can the owner remove them; Finn v. Gas & Water Co., 99 Pa. 640. See, generally, as to structures, 3 Am. R. R. & Corp. Cas. 181, n.

An act for the extinguishment of irredeemable ground rents was held not to be an exercise of the right of eminent domain and therefore unconstitutional; Appeal of Palairet, 67 Pa. 479, 5 Am. Rep. 450. Generally a city may not condemn property beyond its territorial limits; Bank of Augusta v. Earle, 13 Peters (U. S.) 519, 10 L. Ed. 274; Crosby v. Hanover, 36 N. H. 404; or a corporation in a different state from that of its incorporation; Saunders v. Imp. Co., 58 Fed. 133; but there are exceptions to the rule as in case of a city which may condemn property beyond its orders where the necessity exists, as for a park; Thompson v. Moran, 44 Mich. 602, 7 N. W. 180; St. Louis County Court v. Griswold, 58 Mo. 175; a sewer; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N. E. 704; or waterworks; Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238; State v. City of Newark, 54 N. J. L. 62, 23 Atl. 129; but in such case the property must be sufficiently near to the municipality to be serviceable for the purpose for which it is condemned; In re City of New York, 99 N. Y. 569, 2 N. E. 642.

Reversion on abandonment and change of public use. Where land is taken for one purpose, it reverts to the owner if that use is abandoned; Miller v. R. Co., 43 Ind. App. 540, 88 N. E. 102; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Kimball v. City of Kenosha, 4 Wis. 321; Newton v. M'f'g's Ry. Co., 115 Fed. 781, 53 C. C. A. 599; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223 (under constitutional provision); Canton Co. of Baltimore v. R. Co., 99 Md. 202, 57 Atl. 637; Neitzel v. Ry. Co., 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522; and he can restrain the unlawful use of it; Appeal of Lance, 55 Pa. 16, 93 Am. Dec. 722; since the nature of the right exercised subjects the statutes conferring it to a strict construction; Washington Cemetery v. R. Co., 68 N. Y. 591; and unless the statute clearly authorizes greater latitude the power to take is only for the public use indicated; Attorney General v. Aqueduct Corp., 133 Mass. 361. When the public use is discontinued, the land owner holds his title unincumbered as before condemnation; McCombs v. Stewart, 40 Ohio St. 647; Chambers v. Power Co., 100 Minn. 214, 110 N. W. 1128; Gross v. Jones, 85 Neb. 77, 122 N. W. 681, 32 L. R. A. (N. S.) 47; Lyford v. Laconia, 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1062, 139 Am. St. Rep. 680; but to constitute abandonment there must be intention to abandon as well as actual relinquishment; Canton Co. of Baltimore v. R. Co., 99 Md. 202, 57 Atl. 637; Corr v. Philadelphia, 212 Pa. 123, 61 Atl. 808; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 418, 66 N. E. 223; and the expression of an intention not to abandon is not conclusive, but is to be considered with other evidence of action and conduct; *id.* It has been held that the legislature may change the use to another of the same nature; Chase v. Mfg. Co., 4 Cush. (Mass.) 152; Eldridge v. City of Binghamton, 120 N. Y. 309, 24 N. E. 462; Malone v. City of Toledo, 28 Ohio St. 643; but it is probably the better opinion that compensation must be given for another or additional burden; State v. Laverack, 34 N.

J. L. 201; Lahr v. Ry. Co., 104 N. Y. 268, 10 N. E. 528; Wagner v. Ry. Co., 104 N. Y. 665, 10 N. E. 535; Wead v. R. Co., 64 Vt. 52, 24 Atl. 361; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184, 12 L. R. A. 259; Town of Hazlehurst v. Mayes, 84 Miss. 7, 36 South. 33, 64 L. R. A. 805. In some cases payment for the damage caused by the change of use is sufficient; Lucas v. Power Co., 92 Neb. 550, 138 N. W. 761.

Indirect or consequential damages. The principle that a right of compensation exists wherever private property is *taken* for public use does not extend to the case of one whose property is indirectly *damaged* by the lawful use of property already belonging to the public. For example, it was held that an adjoining or abutting owner was not entitled to compensation for damages resulting from the change of a grade of a street; 4 Term 794; Proctor v. Stone, 158 Mass. 564, 33 N. E. 704; Brooks v. Improvement Co., 82 Me. 1, 19 Atl. 87, 7 L. R. A. 460, 17 Am. St. Rep. 459; Rauenstein v. R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768. Callender v. Marsh, 1 Pick. (Mass.) 418, was the leading American case, and gave rise to a statute to remedy the wrong suggested by it. In Pennsylvania the doctrine of these cases was followed in a case in which Gibson, C. J., expressed regret that such injustice was remediless; O'Connor v. Pittsburgh, 18 Pa. 187 (a case referred to by the same court as of a class intended to be remedied by the constitution of 1874; O'Brien v. Philadelphia, 150 Pa. 589, 24 Atl. 1047, 30 Am. St. Rep. 832). These and the other authorities were reviewed by the United States Supreme Court, and the same conclusion reached as being "well settled both in England and in this country;" Smith v. Corporation of Washington, 20 How. (U. S.) 135, 15 L. Ed. 858. Of the law at this period, it was said that the limitation of the term "taking" to an actual physical appropriation or divesting of title was "far too narrow to answer the purpose of justice;" Sedg. Const. L. (2d ed.) 456. See 1 Thayer, Cas. Const. L. 1053, 1055; 2 Am. R. & Corp. Cas. 435, n. The law on this specific subject of change of grades became firmly settled, except as changed by constitutional or statutory enactments, but on the general subject of what constitutes a "taking" of property, it has since undergone very great changes, and the narrow rule of physical appropriation has ceased to afford a criterion of decision. An illustration of the tendency to treat this question liberally, rather than technically, is a decision that it is a "taking" of property to prohibit an owner of land on a boulevard from building, beyond a certain limit, on the front part of the lot; City of St. Louis v. Hill, 116 Mo. 527, 22 S. W. 861, 21 L. R. A. 226; City of Philadelphia v. Linnard, 97 Pa. 242; In re Chestnut Street, 118 Pa. 593, 12 Atl. 585. See Vanderlip v. Grand Rapids, 73 Mich. 522, 41 N. W. 677, 3 L. R. A. 247, 16 Am. St. Rep. 597; Memphis & C. R. Co. v. R. Co., 96 Ala. 571, 11 South. 642, 18 L. R. A. 166. The older cases rested upon a narrow, the later ones upon a liberal, meaning of the word "property" in the constitutions. Of the latter, Eaton v. Railroad Co., 51 N. H. 504, 12 Am. Rep. 147, is the leading case on the subject of the right to compensation where property is injured and not physically taken. Plaintiff's land was overflowed during a freshet as the result of the construction of the defendant's railroad. Damages for the land actually taken for the railroad had been paid as the result of condemnation proceedings. It was held that the right to use the land undisturbed really constituted the property in it, rather than the physical possession of the land itself, and that even if the land itself were the "property," a physical interference with it which abridged the right to use it was in fact a taking of the owner's property to that extent. The opinion of Smith, J., in this case is said to have contributed more than any other towards the change in the law extending the effect of the word *taking;* Lewis, Em. Dom. § 58. See also Thompson v. Imp. Co., 54 N. H. 545; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123; Weaver v. Boom Co., 28 Minn. 534, 11 N. W. 114; 14 Ch. Div. 58; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Earl, J., dissenting in Story v. R. R. Co., 90 N. Y. 122, 43 Am. Rep. 146. It is now quite settled that the flowing of lands, against the owner's consent and without compensation, is a taking; Eaton v. R. R., 51 N. H. 504, 12 Am. Rep. 147; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 321. See also, Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392; Pettigrew v. Village of Evansville, 25 Wis. 223, 3 Am. Rep. 50, Pumpelly v. Canal Co., 13 Wall. (U. S.) 166, 20 L. Ed. 557. In the latter case, Miller, J., after referring to the decisions that there is no remedy for a consequential injury from the improvements of roads, streets, rivers, etc., said: "But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further." This was afterwards said by the court to be a case of "physical invasion of the real estate of the private owner, a practical ouster of his possession";

Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206.

The danger to which the occupants of the remaining land and the stock thereon will be exposed by the operation of a railway upon the land taken cannot be considered in assessing damages; Indianapolis Traction Co. v. Larrabee, 168 Ind. 237, 80 N. E. 413, 10 L. R. A. (N. S.) 1003, and note, 11 Ann. Cas. 695, on the general question of the danger to the owner of the property, or his family, or his live stock, as an element of damages. The conclusion is that the cases disagree too much to form a settled rule and they are collected, dealing with the subject from all points of view.

The interference with the rights of abutting owners by building an elevated railroad on a street was held a taking of private property for public use without compensation, to restrain which the plaintiff was entitled to an injunction; Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146. This case was decided by four judges against three dissenting, whose views were expressed by Earl, J., in an opinion much referred to, contending that it was a use of the street properly incident to its purpose as a public highway. An effort to secure a re-examination of the doctrine of this case resulted in its affirmance; Lahr v. Ry. Co., 104 N. Y. 268, 10 N. E. 528. In a subsequent case the New York court of appeals stated the law of that state to be that, although the abutting owner might have an injunction, and in the same proceeding recover full compensation for the permanent injury, he could not, in an action at law, recover permanent damages measured by the diminution in value of the property, but only such temporary damages as he had sustained at the time of commencing the action; Pond v. Ry. Co., 112 N. Y. 190, 19 N. E. 487, 8 Am. St. Rep. 734.

In a leading case the construction of an ordinary commercial railroad along a street in front of a lot without impairing ingress and egress, but resulting in the usual injuries to the lot from steam, smoke, dust, smells, interference with light and air, jarring the ground, etc., was held to be an appropriation of the street for what was not a proper street use, for which damages were recoverable, but limited to the injury resulting from the operation of the road in front of the lot, and not including any accruing from operating it on other parts of the street; Adams v. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644.

The Maryland court of appeals, in reviewing the decisions on the subject, and particularly the New York cases, mentions as the only other cases holding that opinion, Crawford v. Village of Delaware, 7 Ohio St. 460; Adams v. R. Co., 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644; Theobold v. Ry. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; and considers that its own decision in Mayor, etc., of Cumberland v. Willison, 50 Md. 148, 33 Am. Rep. 304, and O'Brien v. R. Co., 74 Md. 363, 22 Atl. 141, 13 L. R. A. 126, should be adhered to as being in accord with the decided weight of judicial opinion. The conclusion is thus stated: "The New York doctrine involves this inextricable dilemma, viz., if the grading of a street by a municipal corporation cuts off all access to a person's house, albeit his property is thereby destroyed and rendered valueless, it is not taken in the constitutional sense; but if a railroad company in lawfully constructing its road does precisely the same thing that the city did in grading a street, then the abutter's property is taken, though not physically entered upon at all. The structure is therefore a lawful one. But it does not destroy the street as a street, though it may cause the plaintiff greater inconvenience in gaining access to his lots than he encountered before it was built. But this and other injuries complained of are purely incidental and consequential, though the appellant, under the statutes of Maryland, is not without a remedy therefor; Garrett v. Ry. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396.

The question what constitutes a taking, under the older constitutional provisions, was much considered with respect to the use of streets and highways by many other modern appliances, such as gas and water pipes, steam and electric railroads, and poles for telegraph, telephone, and electric light wires. In this class of cases, of which the elevated railroad cases have been used as an illustration, the question has turned on the consideration whether the proposed use was a legitimate incidental use of the street *as such*, and the tendency of the cases is in favor of a very liberal construction of the rights of the public, at least in streets of cities. In some states a distinction is made between city streets and country roads, and the public easement in the latter is much more restricted, and the rights of abutting owners to damages consequently more extended; Bloomfield & Rochester Nat. Gas Light Co. v. Calkins, 62 N. Y. 386; Appeal of Sterling, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246; Pennsylvania R. Co. v. Railway, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; Kincaid v. Gas Co., 124 Ind. 577, 24 N. E. 1066, 8 L. R. A. 602, 19 Am. St. Rep. 113. See IMPAIRING THE OBLIGATION OF CONTRACTS.

In a general view of the subject nothing more is practicable than a mere indication or illustration of the tendency of the decisions which must be resorted to and examined for application to a special case. City streets are legitimately used, from necessity, for sewers and drains; Cone v. City of Hartford, 28 Conn. 363; Leeds v. City of Richmond, 102 Ind. 372, 1 N. E. 711; Traphagen v. Mayor, etc., of Jersey City, 29 N. J. Eq.

206; White v. Corporation of Yazoo City, 27 Miss. 357; water pipes; Crooke v. Water-Works Co., 29 Hun (N. Y.) 245; gas pipes, as a practical necessity, in cities, are not questioned but indirectly sanctioned; Story v. R. Co., 90 N. Y. 161, 43 Am. Rep. 146; Tompkins v. Hodgson, 2 Hun (N. Y.) 146. See City of Boston v. Richardson, 13 Allen (Mass.) 146, 160. As to steam railroads, from a great conflict of decisions (difficult if not impossible to reconcile), it would seem to be the best opinion that it is not a legitimate use of the street; see Rand. Em. Dom. § 405; Lewis, Em. Dom. § 111, with notes citing the cases at large; a horse railway is almost universally held to be a proper use of streets; Rand. Em. Dom. § 402; Lewis, Em. Dom. § 124; the only substantial dissent being in New York; Craig v. R. Co., 39 N. Y. 404; unless the fee is in the public; Kellinger v. R. Co., 50 N. Y. 206. See Cincinnati & Spring Grove Ave. St. Ry. Co. v. Village of Cumminsville, 14 Ohio St. 523; Hobart v. R. Co., 27 Wis. 194, 9 Am. Rep. 461. With respect to electric railways in cities, the doctrine of "the right of the public to use the streets by means of street cars" was said to be "now so thoroughly settled as to be no longer open to debate," and it was extended to the poles and wires of the new system; Halsey v. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859; and see Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; Koch v. Ry. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377; Farrell v. R. Co., 61 Conn. 127, 23 Atl. 757; Rafferty v. Traction Co., 147 Pa. 579, 23 Atl. 884, 30 Am. St. Rep. 763; but not along a country road; Pennsylvania R. Co. v. Railway, 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659. See Rand. Em. Dom. § 403. Electric light poles are usually treated as proper, on the same basis as the older lamp posts; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716; but not telegraph and telephone poles, according to the weight of authority; Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113; Western Union Tel. Co. v. Williams, 86 Va. 696, 11 S. E. 106, 8 L. R. A. 429, 19 Am. St. Rep. 908; Taggart v. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; St. Louis v. Tel. Co., 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; though in some cases it is held otherwise, and of these the leading case considered the subject within the principle of Callender v. Marsh, 1 Pick. (Mass.) 418; the opinion of the court and the dissenting one of two judges present the two views of the question very fully; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7. See also Julia Bldg. Ass'n v. Tel. Co., 88 Mo. 258, 57 Am. Rep. 398.

In the cases relating to the use of streets and highways a great diversity of decision is occasioned by the distinctions drawn between the rights of an abutting owner who has the fee and one owning merely an easement of access over a street of which the soil belongs to the public. The question is further complicated by the varied application of the doctrine that an owner whose land was taken for a street or highway is presumed to anticipate the future uses to which it may be put both over and under the surface. The confusion of the decisions is well stated by a writer on the subject: "Laying aside constitutional and statutory declarations of liability for consequential injuries we find the following anticipations imputed to one whose land is affected by a street easement. In every state except Ohio he anticipates that he may be obliged to enter his house by a second-story window when the grade is raised, or by a ladder when the grade is lowered. In New York he does not foresee any improved method of transportation from the horse-car to the electric motor; but in Pennsylvania he anticipates all methods. The Massachusetts man seems to be the only one who has clearly anticipated the telegraph and telephone. Judged by results there is no working rule of general application deducible from a presumed anticipation of future use." Rand. Em. Dom. § 414.

In some states there are constitutional provisions covering this subject, sixteen of them requiring compensation when property is damaged by such proceedings generally, and three others when the delegated power of eminent domain is exercised by corporations. Under these provisions compensation is required for property "damaged" as well as "taken," and the former word is held to include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property; City of Omaha v. Kramer, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; City of Atlanta v. Green, 67 Ga. 386; Chicago & W. I. R. Co. v. Ayres, 106 Ill. 511; Hot Springs R. Co. v. Williamson, 45 Ark. 429.

The treatment by the courts of the subject of consequential damages is illustrated by the course of decisions under two constitutions of Illinois, by the supreme court of that state, which is very elaborately reviewed in a judgment of the supreme court of the United States. The constitution of 1848 prohibited the taking or application to public use of property without just compensation; and the rule adopted by the courts was that any physical injury to private property, by the erection, etc., of a public improvement, in or along a public highway, whereby its use was materially interrupted, was to be regarded as a *taking*, within the meaning of the constitution. The constitution of 1870 provided that private property should not be *taken* or *damaged* without just compensation, and upon this it was held that the property owner was protected against any *substantial damage*, though consequential, and that it did not require a trespass or actual physical invasion; Rigney v. City of Chicago, 102 Ill. 64; City of Chicago v. Bldg. Ass'n, 102 Ill. 379, 40 Am. Rep. 598; Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638. In the judgment last cited Harlan, J., said: "We concur in that construction" and "we regard that case (Rigney v. City of Chicago, 102 Ill. 64) as conclusive of this question."

This constitution of Illinois was the first in which the word "damaged" was inserted, but in 1894 the supreme court of Colorado enumerated fourteen other states which had then adopted the word; City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789, 24 L. R. A. 392, 46 Am. St. Rep. 273.

In awarding damages to one, a part of whose land is sought to be condemned for public use, for injury to his remaining land, injury to tracts not connected with, and held under different titles from, although adjoining, that from which the parts are taken, cannot be considered; Sharpe v. U. S., 112 Fed. 893, 50 C. C. A. 597, 57 L. R. A. 932, where Gray, J., upon careful examination of the question, says that it is right and proper to include the damages, in the shape of deterioration of value, to the residue of the tract, but that, to apply this rule, "regard is had to the integrity of the tract as a unitary holding" and, where the holding from which the part is taken is "of such a character that its integrity as an individual tract shall have been destroyed by the taking, depreciation in the value of the residue . . . may properly be considered allowable damages in adjusting the compensation to be given to the owner for the land taken. It is often difficult, when part of a tract is taken, to determine what is an independent tract, but the character of the holding, and the distinction between the residue of a tract, whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner, must be kept in mind." The case is accompanied in the last citation by a note in which the cases are examined and which concludes that "the general rule is that when property is so situated that it is used as a unit, and each part is dependent upon the other, the damages will not be limited in eminent domain to the particular piece taken, but will extend to the whole." Substantially this rule has been applied in a great variety of cases to both country and city property; Gorgas v. R. Co., 215 Pa. 501, 64 Atl. 680, 114 Am. St. Rep. 974; Jeffery v. Osborne, 145 Wis. 351, 129 N. W. 931; Union Traction Co. v. Pfeil, 39 Ind. App. 51, 78 N. E. 1052; St. Louis, Memphis & S. E. R. Co. v. Realty & Investment Co., 205 Mo. 167, 103 S. W. 977, 120 Am. St. Rep. 724; West Skokie Drainage Dist. v. Dawson, 243 Ill. 175, 90 N. E. 377, 17 Ann. Cas. 776; In re Lehigh Valley R. Co., 78 N. J. L. 699, 76 Atl. 1067; State v. Superior Court of Clarke County, 44 Wash. 108, 87 Pac. 40; Chicago & W. M. Ry. Co. v. Huncheon, 130 Ind. 529, 30 N. E. 636; Union Elevator Co. v. R. Co., 135 Mo. 353, 36 S. W. 1071; Rudolph v. R. Co., 186 Pa. 541, 40 Atl. 1083, 47 L. R. A. 782; and see Bauman v. Ross, 167 U. S. 568, 17 Sup. Ct. 966, 42 L. Ed. 270, where the cases are considered by Gray, J. But this rule did not apply when a man owned one parcel in severalty and he and his wife the other in entirety, even if the two were used for a common purpose; Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234; and it has been held that the rule does not apply to parcels, not used as a whole for one purpose, when separated by highways; Baker v. R. Co., 236 Pa. 479, 84 Atl. 959; or to such parcels separated by a railroad; Kansas City, M. & O. R. Co. v. Littler, 70 Kan. 556, 79 Pac. 114; or a stream of water; St. Louis, M. & S. E. R. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 116 Am. St. Rep. 499, 8 Ann. Cas. 822, 9 L. R. A. (N. S.) 426, and note which repeats the conclusion of that above cited, that the right to have the parcels treated as one must depend on unity of use and dependence of each parcel on the other; Baker v. R. Co., 236 Pa. 479, 84 Atl. 959, *supra*.

See, generally, as to land injured; 2 Am. R. & C. Cas. 94; 5 *id.* 201; property damaged; 25 Am. L. Rev. 924; taken or damaged; 27 Am. L. Reg. 391; Harman v. City of Omaha, 21 Cent. L. J. 130.

What estate is acquired. Where the constitution contains no restriction, a fee or any less estate may be taken, in the discretion of the legislature; Dingley v. City of Boston, 100 Mass. 544; Prather v. Telegraph Co., 89 Ind. 501; Malone v. City of Toledo, 34 Ohio St. 541; Patterson v. Boom Co., 3 Dill. 465, Fed. Cas. No. 10,829; Sweet v. Ry. Co., 79 N. Y. 293; Roanoke City v. Berkowitz, 80 Va. 616; Lewis, Em. Dom. § 277; Rand. Em. Dom. § 205; Cooley, Const. Lim. 688.

It is within the power of the legislature to determine the interest to be taken; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325; and it may authorize the taking of a fee simple; Wood v. City of Mobile, 107 Fed. 846, 47 C. C. A. 9; In re City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335; *contra*, Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; if a fee is taken under the statute, the land may afterwards be devoted to other uses; *id.;* Rand. Em. Dom. § 209. If the state condemn, a fee is presumed; Haldeman v. R. Co., 50 Pa. 425; Craig v. City of Allegheny, 53 Pa. 477; but not when a private corporation does so; Rand. Em. Dom. § 206; when the act authorized a railroad company to take the fee for a *right* of way, it was a qualified estate which would revert; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Kellogg v. Malin, 62 Mo. 429; but a railroad may be authorized to take a fee; Raleigh & G. R. Co. v. Davis, 19 N. C. 451. The purpose is sometimes said to indicate the estate taken; Holt v. City Council of Somerville, 127 Mass. 408; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; but this is an unsafe criterion of the interest, and the better opinion is that it merely defines the use. See New Orleans Pac. Ry. Co. v. Gay, 31 La. Ann. 430; Commissioners of Parks and Bou-

levards of City of Detroit v. R. Co., 90 Mich. 385, 51 N. W. 447; New York S. & W. R. Co. v. Trimmer, 53 N. J. L. 1, 20 Atl. 761. Under a provision that the title should vest, a city took a fee for sewers; Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; but a turnpike company only an easement; Dunham v. Williams, 36 Barb. (N. Y.) 136. An absolute power of alienation, the ear-mark of untrammelled and unconditional ownership has been supported in land held by a municipal corporation for a park; In re City of Rochester, 137 N. Y. 243, 33 N. E. 320; or an almshouse; Heyward v. City of New York, 7 N. Y. 314; De Varaigne v. Fox, 2 Blatchf. 95, Fed. Cas. No. 3,836; when a street which had been taken for a canal was abandoned, the right of the public and the abutters revived in the street; City of Logansport v. Shirk, 88 Ind. 563; and land taken for a canal was afterwards used for a street; Eldridge v. City of Binghamton, 42 Hun (N. Y.) 202; Malone v. City of Toledo, 34 Ohio St. 541. It is said that a municipal corporation can condemn the fee-simple title of land for streets, but only so as to acquire the absolute control for that purpose and not a proprietary right to sell or devote it to a private use; Fairchild v. City of St. Paul, 46 Minn. 540, 49 N. W. 325. When the fee is taken and the use ceases, the state may authorize a sale for other uses, but when only an easement, the land reverts; Lewis, Em. Dom. 596, citing cases; and so if there is an abandonment; *id.* 597.

The time when payment must be made varies according to the exact terms of the constitutional provision under which proceedings are taken. In the majority of states where there is no express provision it is held that compensation need not be concurrent in time with the taking, it is sufficient if an adequate and certain remedy is provided by which the owner may compel payment of damages; In re Appointment of U. S. Com'rs, 96 N. Y. 227; and this means reasonable legal certainty; Sage v. City of Brooklyn, 89 N. Y. 189; or if there is a definite provision or security for the payment of the compensation; Commissioners' Court of Loundes County v. Boure, 34 Ala. 461; Cairo & F. R. Co. v. Turner, 31 Ark. 494, 25 Am. Rep. 564; Moody v. R. Co., 20 Fla. 597; Briggs v. Canal Co., 137 Mass. 71; Orr v. Quimby, 54 N. H. 590 (but Ash v. Cummings, 50 N. H. 591, seems *contra*); Hawley v. Harrall, 19 Conn. 142; Ferris v. Bramble, 5 Ohio St. 109; In re Yost, 17 Pa. 524 (*contra*, as to private roads; In re Clowes' Private Road, 31 Pa. 12); Tuckahoe Canal Co. v. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Foster v. Bank, 57 Vt. 128; State v. McIver, 88 N. C. 686; Smeaton v. Martin, 57 Wis. 364, 15 N. W. 403; Great Falls Mfg. Co. v. Garland, 25 Fed. 521. The same rule was formerly followed, in some states in which later constitutions provided for prior payment, or required compensation where none was provided for before, as Maryland; Compton v. Railroad, 3 Bland, Ch. (Md.) 386; Powers v. Armstrong, 19 Ga. 427; People v. R. Co., 3 Mich. 496; Prather v. R. Co., 52 Ind. 16; other states require that the owner shall receive compensation before entry; Brady v. Bronson, 45 Cal. 640 (see Fox v. R. Co., 31 Cal. 538, which reviewed the cases, established a different rule, and was overruled); Vilhac v. R. Co., 53 Cal. 208; City of Paris v. Mason, 37 Tex. 447; Harness v. Canal Co., 1 Md. Ch. 248; Hall v. People, 57 Ill. 307; Chicago, St. L. & W. R. Co. v. Gates, 120 Ill. 86, 11 N. E. 527; but in Maine, while title does not pass, possession may be taken before payment, and a reasonable time—three years being so held—allowed therefor; Cushman v. Smith, 34 Me. 247; Riche v. Water Co., 75 Me. 91. It has been held that the state when acting directly may provide that title shall pass when the amount is ascertained, it being presumed that payment will be made by the state; Ballou v. Ballou, 78 N. Y. 325; but any such declaration in a statute is controlled by the constitution, and it was held in a New York case that payment must be prior to or concurrent with the taking; Garrison v. New York, 21 Wall. (U. S.) 196, 22 L. Ed. 612. In many state constitutions there is a distinction between the direct exercise of the power by the government and the delegated power conferred on private corporations. Under such a provision it was said that in both cases the sovereign power is coupled with the correlative duty; State v. City of Perth Amboy, 52 N. J. L. 132, 18 Atl. 670; but municipal corporations must settle first when exercising delegated power; *id.*; Loweree v. City of Newark, 38 N. J. L. 151. And it is said by a writer of authority, "the almost invariable, and certainly the just, course being to require payment to precede or accompany the act of appropriation;" 2 Dill. Mun. Corp. 615. Generally, however, when the compensation is to be paid by the state or is a charge upon the funds of a municipality that is held sufficient; Haverhill Bridge Proprietors v. County Com'rs, 103 Mass. 120, 4 Am. Rep. 518; State v. McIver, 88 N. C. 686; Mayor, etc., of Pittsburgh v. Scott, 1 Pa. 309; In re Mayor, etc., of City of New York, 99 N. Y. 569, 2 N. E. 642; Jeffersonville, M. & I. R. Co. v. Daugherty, 40 Ind. 33; Brock v. Hishen, 40 Wis. 674; Long v. Fuller, 68 Pa. 170; but if the available resources are shown to be insufficient an entry may be enjoined; Keene v. Borough of Bristol, 26 Pa. 46.

The fact that there is a limitation of the amount to be expended does not invalidate the law for taking property; U. S. v. Ry. Co., 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576.

When the title passes. It naturally follows that no title can be acquired under the proceedings until the compensation is paid

or so secured as to be treated in law as the equivalent of payment. Accordingly when the title is permitted to vest before payment, it is said to be subject to a claim for compensation in the nature of a vendor's lien enforcible in equity; Lewis, Em. Dom. § 620, and note citing cases. And a sale or mortgage of the property could only be made subject to such prior right of the landowner, which is maintained by some courts on the theory of a lien, and by others on that of title remaining in the owner; *id.* § 621. In Pennsylvania, however, an extreme doctrine prevails; the appropriation is valid and effectual where compensation is paid or secured; Levering v. R. Co., 8 W. & S. (Pa.) 459; McClinton v. R. Co., 66 Pa. 404; Dimmick v. Brodhead, 75 Pa. 464; and title passes when the bond is approved by the court under the statute; Fries v. Mining Co., 85 Pa. 73; and remains vested even if the bond is found to be valueless; Wallace v. R. Co., 138 Pa. 168, 22 Atl. 95; and there is no lien for compensation; Appeal of Hoffman, 118 Pa. 512, 12 Atl. 57. By the *act of location* the corporation acquires a conditional title as against the land-owner, which becomes absolute upon making or securing compensation; Williamsport & N. B. R. Co. v. R. Co., 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; as against third parties there is a valid location after entry made, lines run, map prepared, and a report made to the directors and adopted by them; Pittsburgh, V. & C. Ry. Co. v. R. Co., 159 Pa. 331, 28 Atl. 155; but running a line, making a map, and a report to the directors, not acted on, did not confer title to the location to justify an injunction to restrain another company from taking the land for a railway, though the land was owned by the plaintiff company; Williamsport R. Co. v. R. Co., 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220.

If a land-owner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he cannot maintain either trespass or ejectment, and will be restricted to a suit for damages; Roberts v. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

The actual cash market value, at the time, of property actually taken must be allowed; Burt v. Wigglesworth, 117 Mass. 302; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206. It has been said that the true criterion of market value is the sum which the property would bring if sold at auction, conducted in the fairest possible way; Low v. Railroad, 63 N. H. 557, 3 Atl. 739; but this is not the result of the best considered cases. "Market value means the fair value of the property as between one who wants to purchase and one who wants to sell an article; not what could be obtained for it under peculiar circumstances; not its speculative value; not a value obtained from the necessity of another. Nor is it to be limited to that price which the property would bring when forced off at auction under the hammer;" Lawrence v. Boston, 119 Mass. 126; it is measured by the difference between what it would have sold for before the injury, and what it would have sold for as affected by it; Setzler v. R. Co., 112 Pa. 56, 4 Atl. 370; what would be accepted by one desiring but not obliged to sell and paid by one under no necessity of buying; Pittsburgh, V. & C. Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; it is not to be measured by the interest or necessity of the particular owner; Pittsburgh & L. E. R. Co. v. Robinson, 95 Pa. 426; nor, on the other hand, by those of the appropriator; Montgomery County v. Bridge Co., 110 Pa. 54, 20 Atl. 407; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; Selma, R. & D. R. Co. v. Keith, 53 Ga. 178; Everett v. R. Co., 59 Ia. 243, 13 N. W. 109; when these principles are fairly applied due consideration may be given to auction value; Pittsburgh, V. & C. Ry. Co. v. Vance, 115 Pa. 325, 8 Atl. 764; but its availability for other special purposes to which it is particularly adapted by reason of "its natural advantages, or its artificial improvements, or its intrinsic character," may be considered as an element of value; Lewis, Em. Dom. § 479, and cases cited; as, for railroad approaches to a large city; Webster v. R. Co., 116 Mo. 114, 22 S. W. 474; Mississippi River Bridge Co. v. Ring, 58 Mo. 491; or for a bridge site; Young v. Harrison, 17 Ga. 30; Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51; or a mill site; Louisville, N. O. & T. R. Co. v. Ryan, 64 Miss. 404, 8 South. 173; so also its situation and surroundings for railroad purposes; Currie v. R. Co., 52 N. J. L. 391, 20 Atl. 56, 19 Am. St. Rep. 452; Cohen v. R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; Johnson v. R. Co., 111 Ill. 413; or market-gardening; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; or subdivision into village lots; Watson v. Ry. Co., 57 Wis. 332, 15 N. W. 468; South Park Com'rs v. Dunlevy, 91 Ill. 49; Cincinnati & S. Ry. Co. v. Longworth's Ex'rs, 30 Ohio St. 108; or in case of a pond, for ice or milling, there being no other one near; Trustees of College Point v. Dennett, 5 Thomp. & C. (N. Y.) 217; or for warehouse purposes; Russell v. R. Co., 33 Minn. 210, 22 N. W. 379. When the water of a stream

running through a farm was taken by a village for its waterworks, the owner was entitled to damages, not only for being deprived of the water for farm purposes, but also for being deprived of the opportunity to sell water rights to prospective purchasers of village lots plotted out for sale in a part of the farm; Bridgeman v. Village of Hardwick, 67 Vt. 653, 31 Atl. 33. The pollution of a stream so as to render it unfit for use in a paper mill, resulting from the opening of a railroad through the land, was a proper element to be considered in estimating the damages; Rudolph v. R. Co., 186 Pa. 541, 40 Atl. 1083, 47 L. R. A. 782. So its adaptability for the particular purpose for which the condemnation is bought may be shown, as islands well situated for boom purposes; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; or the bed of an old canal desired for a railroad; In re New York, L. & W. R. Co., 27 Hun (N. Y.) 116. But mere speculative opinions and considerations will be excluded from consideration; Gardner v. Brookline, 127 Mass. 358; Tide Water Canal Co. v. Archer, 9 G. & J. (Md.) 479; Chicago & E. R. Co. v. Blake, 116 Ill. 163, 4 N. E. 488; Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 461; Watson v. R. Co., 57 Wis. 332, 15 N. W. 468; New Jersey R. Co. v. Suydam, 17 N. J. L. 25.

See, generally, Peoria Gas Light & Coke Co. v. R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; 57 Am. & Eng. R. R. Cas. 508, n; 2 Am. R. R. & Corp. Rep. 744, n.

Assessment of benefits on the remainder of a tract of which part is taken is prohibited by the constitution in some states, either generally, as in Iowa and Ohio, in favor of any corporation, as in Arkansas, Kansas, and South Carolina, or any other than municipal, as in California, North Dakota, and Washington. In the other states there is a diversity of decisions which have been thus classified, as: 1. Not considered. 2. Special benefit is set off against damages to the remainder but not against the value of the part taken. 3. General or special, as in the last class. 4. Special, against both damages to remainder and value of part taken. 5. General and special, as in the last class. Lewis, Em. Dom. § 465.

In the first class the benefit is excluded because compensation is held to be money; Brown v. Beatty, 34 Miss. 227, 241, 69 Am. Dec. 389; Board of Levee Com'rs for Yazoo-Mississippi Delta v. Harkleroads, 62 Miss. 807; Burlington & C. R. Co. v. Schweikart, 10 Cal. 178, 14 Pac. 329; Dulaney v. Nolan County, 85 Tex. 225, 20 S. W. 70; Jones v. R. Co., 30 Ga. 43; Paducah & M. R. Co. v. Stovall, 12 Heisk. (Tenn.) 1. In some states the constitution prohibits the deduction of benefits; though in some of them it is permitted in favor of public corporations; Nichols, Em. Dom. § 278, where these states are enumerated.

The second rule which obtains has been justly criticised as illogical; Lewis, Em. Dom. § 467; but it rests upon the theory that for the part *taken* compensation in money is required, while for incidental damage the legislature may prescribe the rule of compensation. This was the doctrine laid down in Tennessee which, with several other states, adheres to it; Woodfolk v. R. Co., 2 Swan (Tenn.) 422; Robbins v. R. Co., 6 Wis. 636; Shipley v. R. Co., 34 Md. 336; Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585, 10 N. W. 491; Chicago, K. & N. R. Co. v. Wiebe, 25 Neb. 542, 41 N. W. 297.

The third class rests upon the same idea of requiring compensation in money for the part taken, but treating the claim for damage to the remainder as consequential and properly subject to the set-off of all advantages; and in Kentucky, from which comes the leading case, a judgment was reversed for an instruction excluding general benefits; Henderson & N. R. Co. v. Dickerson, 17 B. Monr. (Ky.) 173, 66 Am. Dec. 148; City Council of Augusta v. Marks, 50 Ga. 612 (but see Young v. Harrison, 17 Ga. 30, in which a different doctrine was applied, which was passed without mention in Jones v. Wills Val. R. Co., 30 Ga. 43, which laid down the rule afterwards adhered to); Buffalo, B., B. & C. R. Co. v. Ferris, 26 Tex. 588; Tait v. Matthews, 33 Tex. 112; City of Paris v. Mason, 37 Tex. 447; Texas & St. L. R. Co. v. Matthews, 60 Tex. 215; but see Bourgeois v. Mills, 60 Tex. 76; New Orleans Pac. Ry. Co. v. Gay, 31 La. Ann. 430.

The fourth rule allows special benefits against both the value of the part taken and damage to the remainder, because just compensation is construed to mean recompense for the net resulting injury, and excludes a share of the general advantage, because to allow it would be to distribute it unequally, charging those whose land is taken for that which the rest of the community enjoy without cost; Adden v. R. R., 55 N. H. 413, 20 Am. Rep. 220; Meacham v. R. Co., 4 Cush. (Mass.) 291; Clark v. City of Worcester, 125 Mass. 226; Cross v. Plymouth County, 125 Mass. 557; Trinity College v. City of Hartford, 32 Conn. 452; Gautier v. Board, 55 N. J. L. 88, 25 Atl. 322, 17 L. R. A. 785; Setzler v. R. Co., 112 Pa. 56, 4 Atl. 370 (which lays down the rule with great clearness not only on this point but in confining the consideration of inconvenience and advantage to the effect of both upon the market value); Freedle v. R. Co., 49 N. C. 89; Wyandotte, K. C. & N. W. Ry. Co. v. Waldo, 70 Mo. 629; Daugherty v. Brown, 91 Mo. 26, 3 S. W. 210; Winona & St. P. R. Co. v. Waldron, 11 Minn. 515, (Gil. 392), 88 Am. Dec. 100; Arbrush v. Town of Oakdale, 28 Minn. 61, 9 N. W. 30; Beekman v. Jackson County, 18 Or. 283, 22 Pac. 1074 (but see Putnam v. Douglas County, 6 Or. 328, 25 Am. Rep. 527). See L. R. 2 C. P. 638.

The last class permits all benefits to be set off against all damages of either kind, placing the rule on natural equity, and in a leading case (Young v. Harrison, 17 Ga. 30, afterwards apparently overruled as stated *supra*), it is argued that the term compensation comes from the civil law which so construes it. This rule is accepted by many courts which, among other reasons, hold that compensation does not mean money but includes any means of recompense; California Pac. R. Co. v. Armstrong, 46 Cal. 85; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Kramer v. Ry. Co., 5 Ohio St. 140; Platt v. Pennsylvania Co., 43 Ohio St. 228, 1 N. E. 420 (before the constitution of 1851); Ross v. Davis, 97 Ind. 79; Rassier v. Grimmer, 130 Ind. 219, 23 N. E. 866, 29 N. E. 918; Greenville & C. R. Co. v. Partlow, 5 Rich. (S. C.) 428; White v. R. Co., 6 Rich. (S. C.) 47. See Bourgeois v. Mills, 60 Tex. 76. In New York this rule applies to cases where land is taken by the state and municipal corporations; Genet v. City of Brooklyn, 99 N. Y. 296, 1 N. E. 777; Eldridge v. City of Binghampton, 120 N. Y. 309, 24 N. E. 462; but in the case of private corporations the third rule seems to apply; Washington Cemetery v. R. Co., 68 N. Y. 591; Newman v. Ry. Co., 118 N. Y. 618, 23 N. E. 901, 7 L. R. A. 289; Bohm v. R. Co., 129 N. Y. 576, 29 N. E. 802, 14 L. R. A. 344. See Heath v. Barmore, 50 N. Y. 302. In Illinois the cases prior to 1870 were under the fifth rule; Alton & S. R. Co. v. Carpenter, 14 Ill. 190; and since the constitution of that year and a subsequent statute it has been held that benefits were prohibited as against the value of land taken; Carpenter v. Jennings, 77 Ill. 250; that general benefits cannot be set off against either value or damage; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; and that special damage may be charged against the damage to the residue; Lewis, Em. Dom. § 470, where the cases are collected and analyzed.

The last rule enumerated seems to be approved by the federal courts; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, Fed. Cas. No. 2,649; Kennedy v. Indianapolis, 103 U. S. 599, 26 L. Ed. 550; and upon candid consideration it must be admitted that if benefits are to be allowed at all it is the only logical doctrine. This seems also to be the conclusion of the writer whose classification of the decisions is here given, and to whose discussion of the whole subject reference may profitably be made; Lewis, Em. Dom. § 471. The subject was considered in the United States Supreme Court at length by Gray, J., who held that in applying the law to the District of Columbia it was proper to "take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken;" Bauman v. Ross, 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. This view also prevailed in In re City of New York, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (N. S.) 335; Taber v. R. Co., 28 R. I. 269, 67 Atl. 9.

Damage to property injured but not physically taken. A question of great importance arises either under the later constitutional provisions for compensation for injury as well as actual taking, or under the extension of the meaning of the word taking to include consequential damages so called, when the injury to property is so great and permanent as practically to deprive the owner of all use and enjoyment of it.

In such cases the only remedy of the property owner, in the absence of legislation, is a common-law action, and for permanent or continuing injury trespass is totally inadequate, as is evidenced by the fact that to restrain it when continuous is a recognized ground of equitable interference. In many cases it is held that prospective damages cannot be recovered, and the property owner is thus put to the necessity of resorting to repeated actions, but when the trespass is the result of the exercise of a public use authorized by statute this remedy is not only unsatisfactory but illogical. Accordingly it is held in many cases that such damage being of a permanent nature there should be but one recovery for all damages past, present, and future; and it has been held that they may be allowed. An action on the case is the proper remedy in such cases, but the measure of damages applied is not uniform, though when the liberal rule referred to is adopted the payment vests in the defendant a right to maintain its works and operates as a bar to further suits. In some cases such an action has also been held to have the effect of statutory proceedings for the assessment of compensation; Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Penn. Mut. Life Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. 138, 33 Am. St. Rep. 273. This subject is, however, involved in great confusion, which should undoubtedly be removed by legislative enactments providing for the acquisition of the right to cause, and the assessment of compensation for, permanent injury to property whenever consequential damages are provided for by constitution or statute, or recognized by the courts. As to this subject, see discussions with copious citations of cases in Lewis, Em. Dom. § 624; Rand. Em. Dom. § 308; 26 Am. L. Reg. 281, 345.

Who are proper and necessary parties. The compensation must be paid to the true owner as on that the title depends; Hatch v. Mayor, 82 N. Y. 436; South Park Com'rs v. Todd, 112 Ill. 379; Searl v. School Dist., 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; and if paid to the wrong person, it may be recovered from him by one having an inter-

est; De Peyster v. Mali, 92 N. Y. 262; Sherwood v. City of Lafayette, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; but if title is doubtful, it may be paid into court; Jones v. R. Co., 41 Fed. 70; In re Department of Parks, 73 N. Y. 560; and if afterwards paid out wrongly the person who paid it in is not liable; U. S. v. Dunnington, 146 U. S. 338, 13 Sup. Ct. 79, 36 L. Ed. 996.

The general principle is that the necessary parties to a proceeding, independent of statutory requirements, are all persons having an interest in the property taken, as proprietors, or such as is recognized by the law of the state as property; Lewis, Em. Dom. § 317. When the ownership is divided, each is entitled to his share, as life-tenant and remainderman; Miller v. City of Asheville, 112 N. C. 759, 16 S. E. 762; Kansas City, S. & M. R. Co. v. Weaver, 86 Mo. 473; dowress after admeasurement; Borough of York v. Welsh, 117 Pa. 174, 11 Atl. 390; but not before the dower is assigned; Todemier v. Aspinwall, 43 Ill. 401; and only as against the award when it is inchoate; Wheeler v. Kirtland, 27 N. J. Eq. 534. The interest of a tenant must be compensated; Frost v. Earnest, 4 Whart. (Pa.) 86; if the lease has actual value to him; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; sometimes separately; Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; and sometimes by apportionment of the entire amount; Edmands v. Boston, 108 Mass. 535.

When part of land under lease is taken, the lease is not terminated or the tenant discharged; Stubbings v. Village of Evanston, 136 Ill. 37, 26 N. E. 577, 11 L. R. A. 839, 29 Am. St. Rep. 300; but both he and the lessor are entitled to compensation for their respective losses; Patterson v. City of Boston, 20 Pick. (Mass.) 159; Foote v. City of Cincinnati, 11 Ohio 408, 38 Am. Dec. 737; Workman v. Mifflin, 30 Pa. 362; 1 Thayer, Cas. Const. L. 968. See Rand. Em. Dom. § 304; Corrigan v. City of Chicago, 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212, with note on rights of tenants, etc., in such cases; 5 Am. R. R. & Corp. Cas. 208, note, as to grantor and grantee, and 29 Am. St. Rep. 304, note, as to leased premises. See also 29 Am. L. Rev. 351, as to the abatement of rent when leased premises are appropriated.

As to mortgagees the decisions lack both uniformity and consistency, and this result is largely due to the differing views taken of the position of a mortgagee before the law. As between the parties to the mortgage the award takes the place of the land and the lien attaches to it; Astor v. Miller, 2 Paige Ch. (N. Y.) 68; Gimbel v. Stolte, 59 Ind. 453; Chicago, M. & St. P. R. Co. v. Baker, 102 Mo. 560, 15 S. W. 64; Union Mut. Life Ins. Co. v. Slee, 123 Ill. 95, 13 N. E. 222; as to all rights and interests; Utter v. Richmond, 112 N. Y. 610, 20 N. E. 554. The damages should be apportioned by the jury between owner, lessee, mortgagee, etc.; Rentz v. Detroit, 48 Mich. 547, 12 N. W. 694, 911. In some cases the remainder of the land must be exhausted before the mortgagee can resort to the fund; Bank of Auburn v. Roberts, 44 N. Y. 192; or to the condemned land; Dodge v. R. Co., 20 Neb. 281, 29 N. W. 936; and the mortgagee, if not a party to the proceedings, may appropriate the fund; Sawyer v. Landers, 56 Ia. 422, 9 N. W. 341; Bright v. Platt, 32 N. J. Eq. 370; but when the land has been sold and bought in by the mortgagee he loses all claim to the fund and new proceedings must be taken to condemn his interest; Lehigh Coal & Nav. Co. v. R. Co., 35 N. J. Eq. 379. As affecting the title of the appropriator who has been said to take no better title than an innocent purchaser for value; Severin v. Cole, 38 Ia. 463; and must protect himself against the claim of the mortgagee; Wooster v. R. Co., 57 Wis. 311, 15 N. W. 401; the more reasonable opinion would seem to be that the mortgagee is a necessary party; if in possession he certainly is; In re Parker, 36 N. H. 84; Ballard v. Ballard Vale Co., 5 Gray (Mass.) 468; or after condition broken; Adams v. R. R. Co., 57 Vt. 248; in other cases to be bound he must have notice; Siman v. Rhoades, 24 Minn. 25; Platt v. Bright, 29 N. J. Eq. 128; Warwick Institution for Savings v. City of Providence, 12 R. I. 144; Wade v. Hennessy, 55 Vt. 207; Sherwood v. City of Lafayette, 109 Ind. 411, 10 N. E. 89, 58 Am. Rep. 414; Wilson v. Ry. Co., 67 Me. 358; L. R. 1 Eq. 145; *contra*, Parish v. Gilmanton, 11 N. H. 293; Keystone Bridge Co. v. Summers, 13 W. Va. 476; Whiting v. City of New Haven, 45 Conn. 303; Farnsworth v. City of Boston, 126 Mass. 1; Read v. City of Cambridge, *id.* 427; Schumacker v. Toberman, 56 Cal. 508; Bank of Auburn v. Roberts, 44 N. Y. 192. See Lewis, Em. Dom. § 324; 18 L. R. A. 113, note. It was held that the appropriator must see to the discharge of the mortgage and may pay it off or keep the money until it is due; In re John & Cherry Sts., 19 Wend. (N. Y.) 659; and he may require or provide for its satisfaction; Devlin v. City of New York, 131 N. Y. 127, 30 N. E. 45. It has even been held that a mortgagee cannot move for consequential damages to mortgaged property when the mortgagor has without fraud settled with the company; Knoll v. Ry. Co., 121 Pa. 467, 15 Atl. 571, 1 L. R. A. 366.

Judgment liens may be divested by the proceedings, and the creditor need not be made a party; Watson v. R. Co., 47 N. Y. 157, 162. This is the leading case and well states the reasons on which this settled principle is based. See also Gimbel v. Stolte, 59 Ind. 446; Bean v. Kulp, 7 Phila. (Pa.) 650; Lewis, Em. Dom. § 325; Rand. Em. Dom. §§ 302, 340. As to what interests may be condemned, see, further, *supra*.

Notice and procedure. It is a general rule

that notice of proceedings must be given to the owner of property to be taken; Lewis, Em. Dom. § 363; Rand. Em. Dom. § 333; though a few cases hold contrary to the otherwise uniform course of decisions; Wilson v. R. Co., 5 Del. Ch. 524; George's Creek Coal & Iron Co. v. Coal Co., 40 Md. 425, 437; New Orleans, J. & G. N. R. Co. v. Hemphill, 35 Miss. 17; Johnson v. R. Co., 23 Ill. 202. In the Delaware case there was actual notice, though it was held that the act need not require it; in the Mississippi case the proceeding is considered as *in rem*, which is treated as actual notice, and the Illinois case is in effect though not expressly overruled in Wilson v. R. Co., 59 Ill. 273, and Chicago & A. R. Co. v. Smith, 78 Ill. 96. These cases have been termed "sporadic decisions," by which the current of authority is not disturbed; Rand. Em. Dom. § 333. See DUE PROCESS OF LAW. See also Lewis, Em. Dom. § 364; where the cases are cited, and, for other cases cited in support of the view that notice need not be required in the act; People v. Smith, 21 N. Y. 595; Harper v. R. Co., 2 Dana (Ky.) 227; Kramer v. R. Co., 5 Ohio St. 140; Beekman v. R. Co., 3 Paige (N. Y.) 45, 22 Am. Dec. 679. The questions whether the property shall be taken and what compensation shall be paid need not be tried by a jury; Raleigh & G. R. Co. v. Davis, 19 N. C. 451; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; the constitution does not describe the mode or means by which compensation shall be ascertained; these therefore can only be prescribed by the legislature; Wilson v. R. Co., 5 Del. Ch. 524; under the constitution of the United States, a jury is not necessary; U. S. v. Engerman, 46 Fed. 176; and it cannot be demanded as a matter of right; State v. Lyle, 100 N. C. 497, 6 S. E. 379; Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664.

It was recently held that due process of law is furnished and equal protection of the law given in such proceedings when the course pursued for the assessment and collection of taxes is that customarily provided in the state, for then the party charged has an opportunity to be heard; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; and where by state law a burden is imposed upon property for the public use, "whether it be for the whole state or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections;" *id.*

As to procedure generally, see Rand. Em. Dom. ch. xi.; Lewis, Em. Dom. chs. xvii.–xix.; Mills, Em. Dom. ch. xi.; San Diego Land & Town Co. v. Neale, 3 L. R. A. 83; 14 A. & E. R. R. Cas. 378, 384, 392, note; and for some cases as to the necessity of notice and a hearing to constitute due process of law, see 2 L. R. A. (Ind.) 655, note; 3 L. R. A. (Mont.) 194, note; 11 L. R. A. 224, note.

The power need not be exhausted in the first instance; New York, H. & N. R. Co. v. R. Co., 36 Conn. 196; and a railroad may subsequently take land for laying additional tracks when necessary; Railway Co. v. Petty, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; or a canal company for a new supply of water; Proprietors of Sudbury Meadows v. Canal, 23 Pick. (Mass.) 36; or a company may take more than at present required, having view to future and other needs, and use of part is not an abandonment; Pittsburgh, Ft. W. & C. R. v. Peet, 152 Pa. 488, 25 Atl. 612, 19 L. R. A. 467.

See, generally, Mills, Lewis, Randolph, Nichols, Eminent Domain; Cooley, Const. Lim. ch. xv.; Gould, Waters, ch. viii.; Redfield, Railways, Part 3; Wood, Railways, ch. xiv.; Harris, Damages; Thompson, Highways; POLICE POWER; TAXATION; RAILROAD; DUE PROCESS OF LAW; DEDICATION.

EMISSION. **In Medical Jurisprudence.** The act by which any matter whatever is thrown from the body: thus, it is usual to say, emission of urine, emission of semen, etc.

Emission is not necessary in the commission of a rape to complete the offence; 1 Hale, P. C. 628; 4 C. & P. 249; 9 *id.* 31; Rodgers v. State, 30 Tex. App. 510, 17 S. W. 1077; Territory v. Edie, 6 N. M. 555, 30 Pac. 851; State v. Dalton, 106 Mo. 463, 17 S. W. 700; [1891] 2 Q. B. 149. It is, however, essential in sodomy; 12 Co. 36; People v. Hodgkin, 94 Mich. 27, 53 N. W. 794, 34 Am. St. Rep. 321. But see Com. v. Thomas, 1 Va. Cas. 307. As to adultery, see that title.

EMIT. To put out; to send forth.

The tenth section of the first article of the constitution contains various prohibitions, among which is the following: "No state shall emit bills of credit." To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. Craig v. Missouri, 4 Pet. (U. S.) 410, 432, 7 L. Ed. 903; Briscoe v. Bank, 11 Pet. (U. S.) 257, 9 L. Ed. 709; Ramsey v. Cox, 28 Ark. 369; Linn v. Bank, 1 Scam. (Ill.) 87, 25 Am. Dec. 71; Story, Const. § 1358. See BILLS OF CREDIT.

EMMENAGOGUES. **In Medical Jurisprudence.** The name of a class of medicines which are believed to have the power of favoring the discharge of the menses. These are "*savine* (see *Juniperus Sabina*), *black hellebore, aloes, gamboge, rue, madder, stinking goosefoot (chenopodium olidum), gin, parsley* (and its active principle, *apiol*), *per-*

manganate of potassium, cantharides, and borax, and for the most part substances which, in large doses, act as drastic purgatives or stimulating diuretics." They are sometimes used for the criminal purpose of producing abortion *(q. v.)*. They always endanger the life of the woman. 1 Beck, Med. Jur. 316; Dunglison, Med. Dict.; Parr, Med. Dict.; 3 Par. & F. Med. Jur. 88; Taylor's Med. Jur. 184.

EMOLUMENT. The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private. Webster. It imports any perquisite, advantage, profit or gain arising from the possession of an office. Apple v. Crawford County, 105 Pa. 303, 51 Am. Rep. 205. See Peeling v. County of York, 113 Pa. 108, 5 Atl. 67.

EMOTIONAL INSANITY. See INSANITY.

EMPANEL. See IMPANEL; JURY.

EMPEROR. This word is synonymous with the Latin *imperator*: they are both derived from the verb *imperare*. Literally, it signifies *he who commands*.

EMPHYTEUSIS. In Civil Law. The name of a contract, in the nature of a perpetual lease, by which the owner of an uncultivated piece of land granted it to another, either in perpetuity or for a long time, on condition that he should improve it, by building on, planting, or cultivating it, and should pay for it an annual rent, with a right to the grantee to alienate it, or transmit it by descent to his heirs, and under a condition that the grantor should never re-enter as long as the rent should be paid to him by the grantee or his assigns. Inst. 3, 25, 3; 18 Toullier, n. 144.

EMPHYTEUTA. The grantee under a contract of *emphyteusis* or *emphyteosis*. Vicat, Voc. Jur.; Calvinus, Lex.; 1 Hallam, c. ii. p. 1.

EMPIRE (Lat. *Imperium*). Supreme power in governing; imperial power; dominion; sovereignty.

The country, region, or union of states or territories under the dominion of an emperor. Cent. Dict.

It was in the sense of the first of these definitions that Chief Justice Marshall is said to have at one time used the phrase "the American Empire." See Downes v. Bidwell, 182 U. S. 279, 21 Sup. Ct. 770, 45 L. Ed. 1088.

It is used on a tablet over the door of the old Friends' Library at Philadelphia: "The Fourth Year of the Empire."

EMPLAZAMIENTO. In Spanish Law. The citation given to a person by order of the judge, and ordering him to appear before his tribunal on a given day and hour.

EMPLOYÉ or EMPLOYEE. A term of rather broad signification for one who is employed, whether his duties are within or without the walls of the building in which the chief officer usually transacts his business. Mallory v. U. S., 3 Ct. Cl. 257; Stone v. U. S., 3 Ct. Cl. 260. It is not usually applied to higher officers of corporations or to domestic servants, but to clerks, workmen, and laborers, collectively.

Strictly and etymologically, it means "a person employed," but in practice, in the French language, it ordinarily is used to signify a person in some official employment, and as generally used with us, though perhaps not confined to any official employment, it is understood to mean some permanent employment or position. It may be any one who renders service to another; Watson v. Mfg. Co., 30 N. J. Eq. 588; and has been extended so far as to embrace attorney and counsel; Gurney v. Ry. Co., 58 N. Y. 358. The servant of a contractor for carrying mail is an employé of the department of the post-office; U. S. v. Belew, 2 Brock. 280, Fed. Cas. No. 14,563; also one who received five per cent. of the cost for superintending the erection of a warehouse was held an employé; Moore v. Heaney, 14 Md. 558. See MASTER AND SERVANT.

EMPLOYED. The act of doing a thing, and the being under contract or orders to do it. U. S. v. Morris, 14 Pet. (U. S.) 464, 475, 10 L. Ed. 543; U. S. v. The Catherine, 2 Paine 721, Fed. Cas. No. 14,755.

Where persons were employed "in and about the works," it was held that although their work as miners was at the bottom of a mine, the term covered them as employés until they arrived safely at the top, even although they discharged themselves; 2 C. P. Div. 397.

EMPLOYERS AND WORKMEN ACT. The English statute of 38 and 39 Vict. c. 90, regulating the jurisdiction of certain courts over disputes between masters and employés. See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACTS. The English act, 1880, gives to all workmen, except domestic or menial servants and seamen, a right of action if injured by reason of the defective condition of machinery, etc., if the defect was attributable to the negligence of the employer or his agent; to the negligence of his superintendent or one to whom he has given authority over the workman; to some act or omission by a fellow workman in obedience to the employer's by-laws, or to the particular instruction of one placed in authority over him; or to a fellow workman in charge of any railroad signal, locomotive or train. The act abolishes the fellow servant rule, but not the contributory

negligence rule. The employer may set up the defence that the workman knew of the defect but did not complain. A contract not to claim compensation under the act is lawful; Griffiths v. Earl of Dudley, 9 Q. B. D. 357.

The act of congress of June 11, 1906, was declared unconstitutional in the Employers' Liability Case (Howard v. R. Co.) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, Harlan, Holmes, Moody, and Lurton, JJ., dissenting. The act of April 22, 1908, as amended April 5, 1910, provides for the liability of common carriers engaged in interstate or foreign commerce to their employees injured in such commerce, or in case of death gives a right of action to their personal representatives for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee. There shall be only one recovery for the same injury; St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. ——. It does away with the fellow servant rule, the contributory negligence rule, except that damages shall be diminished in proportion to the amount of contributory negligence attributable to the employee, and the rule that an employee is held to have assumed the risk of his employment in any case where the violation, by the carrier, of any statute enacted for the safety of employees contributed to the injury or death of such employee. Acceptance of relief, such as railway relief, is no bar to an action though agreed to, but simply reduces the damages *pro tanto*.

The following cases define what is interstate commerce within the act. In Johnson v. Great Northern R. R. Co., 178 Fed. 643, 102 C. C. A. 89 (8th Cir.), it was held that an employee charged with the duty of coupling cars and airbrake pipes upon cars standing upon a switch track, some of which cars were engaged in interstate commerce, was himself employed in interstate commerce. In Zikos v. Navigation Co., 179 Fed. 893 (C. C., E. D. Wash.), it was held that a section hand, while driving a spike on the track of a railroad over which both interstate and intrastate commerce moved, was employed in interstate commerce. In Central R. Co. of New Jersey v. Colasurdo, 192 Fed. 901, 113 C. C. A. 379 (2d Cir.), where the plaintiff was injured while repairing an interstate road over which interstate commerce and freight, and cars and engines engaged in interstate commerce were constantly passing, he was considered as being engaged in interstate commerce. In Pedersen v. R. Co., 197 Fed. 537, 117 C. C. A. 33 (3d Cir.), the plaintiff was an iron worker on a bridge on which an additional track was being placed. In getting rivets for the bridge he went upon the main east-bound track of the road, where he was struck and injured by a local, intrastate train coming from the other direction; and it was held that neither by operating such local train, nor by building an additional track or bridge, nor by sending the man for the rivets, was the carrier engaged in interstate commerce; nor was the plaintiff, by helping to build such bridge or by going upon a track which the company was not using in interstate commerce employed by such carrier in such commerce. The case was reversed in Pedersen v. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Holmes, Lamar and Lurton, JJ., dissenting. The court held there was evidence to sustain a finding that at the time of the injury the defendant was engaged, and the plaintiff was employed by it, in interstate commerce. In Illinois Cent. R. Co. v. Porter, 207 Fed. 311 (C. C. A., 6th Cir.) a truckman employed by the railroad to wheel interstate freight from a warehouse into a car to be transported in interstate commerce was held to be engaged in such commerce.

An action cannot be maintained under section 1 of the above act where the complainant neither alleges nor pleads facts showing that defendant is a common carrier; Shade v. Northern Pac. R. Co., 206 Fed. 353 (D. C., W. D. Wash.). Where a train of cars was hauled by a switch engine over certain tracks and switches from one part of the railroad yard to another, that they might be classified, inspected, and assembled, they were not engaged in interstate commerce; U. S. v. R. Co., 205 Fed. 428 (D. C., W. D. N. Y.). A workman, killed while employed by a railroad company engaged in interstate commerce in repairing a bridge on a line over which such commerce was carried on, was held to be employed in interstate commerce; Thomson v. R. Co., 205 Fed. 203.

A locomotive fireman in the employment of an interstate railroad, who was ordered to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company also operating an interstate train, was within the act; Lamphere v. Oregon R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156 (9th Cir.). So of one injured when employed in repair shops connected with an interstate track, in repairing a car used indiscriminately in both interstate and intrastate commerce, but which was at the time engaged in interstate commerce; Northern Pac. R. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237 (9th Cir.). The judgment in the Pedersen Case, *supra*, will doubtless affect some of these decisions in lower courts.

The following cases were held not within act: Bennett v. R. Co., 197 Fed. 578 (D. C., E. D. Pa.), where an employee was killed while riding to his home by permission on one of the company's trains, but who was

not at the time, and, so far as appeared, had not just previously been, employed in interstate commerce, was not within the act; Heimbach v. R. Co., 197 Fed. 579 (D. C., E. D. Pa.); where an employee, who was injured while repairing a car of another company which had reached the end of its run, been unloaded, and was lying at a station awaiting orders, was not within the act; Feaster v. R. Co., 197 Fed. 580 (D. C., E. D. Pa.); and where an extra conductor, directed, on reporting for work, to ride to another point within the same state for service on a work train, and who was injured while proceeding to his train, was not at the time employed in interstate commerce; Taylor v. So. R. Co., 178 Fed. 380 (C. C., N. D. Ga.), where a member of a bridge gang who was injured while repairing a bridge forming a most necessary part of the track of a railroad used for both interstate and intrastate commerce, was not within the act.

A fireman on a switch engine which was ordinarily employed in interstate commerce, though mingled with intrastate commerce, was held engaged in interstate commerce; Behrens v. R. Co., 192 Fed. 581 (D. C., E. D. La.). Where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was part of a train carrying both interstate and intrastate freight, his injury did not occur while engaged in interstate commerce; Van Brimmer v. Ry. Co., 190 Fed. 394 (C. C., E. D. Tex.). The causal negligence of a co-employee may be that of one not engaged in interstate commerce; In re Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

A Workman's Compensation Act was passed in England in 1897. It provides that in certain trades and works the employer shall be liable to compensate any workman injured by an accident in the course of his employment, whether the employer or any of his subordinates had been guilty of negligence or had committed any breach of duty or not. This act was repealed in 1906, by an act which provides for compensation for injury from any accident in the course of employment unless attributable to the serious or willful misconduct of the workman, but this exception does not extend to injury resulting in death or serious and permanent disablement. Compensation can also be claimed by one who has suffered from certain specified "industrial diseases"; on the event of his death, his dependants may claim. The utmost amount recoverable is one pound a week during total incapacity to work or three hundred pounds in case of death. Contributory negligence is no defence, nor the voluntary assumption of a known risk, nor the negligence of a fellow servant. Where a principal has engaged a contractor for the work, the act makes the principal liable for compensation although there is no direct relation between him and the injured workman.

A workman injured in the course of his employment has three different modes of procedure open to him: He may sue for damages at common law; he may sue for damages under the Employers' Liability Act of 1880; or he may claim compensation under the Workman's Compensation Act of 1906. Under the Act of 1906, disputed questions are settled by arbitration in the County Courts. See Odgers C. L. 854.

Workmen's Compensation Acts were passed in 1911 in New Jersey, California, Wisconsin, Kansas and Nevada, and in 1912 in Illinois, Michigan, Arizona, New Hampshire and Rhode Island. Under such acts the employer is liable for the compensations to injured workmen. The only negligence recognized on the part of either the employer or the employee, speaking generally, is that of willful negligence. If the employer is guilty of such he is penalized; if the employee is, then his compensation is denied or reduced. The amount of the compensation is determined with a maximum and minimum limit by specified schedules of compensation and graded on a basis of a certain percentage of the loss or impairment of the injured worker's average weekly wage. Jury trials are largely eliminated and the compensation to which the injured worker is entitled under the act is determined by a board of arbitration, a judge of some court or a board of awards created as specified by the act.

Workmen's Industrial Insurance Acts were passed in 1911 in Washington, in 1912 in Massachusetts, Maryland and Ohio, and in 1913 in West Virginia.

The injured workman's claim under a state insurance act is against a fund created by contributions paid by employers, employees and the state or by any of them, in the form of an insurance premium which is collected by the taxing power of the state through the exercise of its police power. The employer's liability to his employees for personal injuries occurring in the course of their employment is discharged when he has paid the premium as provided by the act. The right of trial by jury is entirely eliminated in such cases, excepting the case where the employee is denied compensation of any kind, and in that case he may sue the board of administration created by the act and have his case tried before a jury as heretofore, but cannot sue his employer. No negligence is recognized excepting willful negligence on the part of either. The compensation is paid in installments based upon a certain percentage—usually 50 to 60 per cent—of the impairment of wages caused by the injury. The act usually fixes the length of time that such compensation

may run, and also a maximum and minimum total compensation. In the enactment of these statutes the state exercises its police power for the protection of the peace, safety and general welfare of the public.

The following states have by statute abrogated the fellow servant rule either generally or in particular industries: Arkansas, Colorado, Florida, Georgia, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Wisconsin.

In the following states the rule is modified: California, Mississippi, Maryland, Ohio, Oregon, South Carolina, Utah, Virginia.

See MASTER AND SERVANT; NEGLIGENCE; DEATH; WORKMEN'S COMPENSATION ACTS.

Compensation Acts were passed by congress May 30, 1908, March 4, 1911, and March 11, 1912, providing that artisans or laborers engaged in any of the government manufacturing establishments, arsenals or navy-yards, or in the construction of river and harbor or fortification work, or in hazardous employment or construction work in the reclamation of arid lands or the management or control of the same, or in hazardous employment under the Isthmian Canal Commission, or in any hazardous work under the Bureau of Mines or Forestry Service shall receive compensation from the government for injuries sustained in the course of their employment, and if the employee should die by reason of such injury then his widow or children under sixteen, or a dependent parent shall be entitled to receive as compensation the same pay for one year as if he continued to be employed, unless if only injured he sooner be able to resume work.

EMPLOYMENT AGENCY. A municipal ordinance licensing and regulating employment agencies is a valid exercise of the police power; People v. Warden of City Prison of City, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306. The Illinois act was held void because forbidding a free employment agency to furnish help to persons whose employees were on a strike or locked out, or to refuse them access to the names of applicants for service, whilst allowing this privilege to other employers; Mathews v. People, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241.

EMPRÉSTITO. In Spanish Law. A loan. Something lent to the borrower at his request. *Las Partidas*, pt. 3, tit. 18, l. 70.

EMPTIO, EMPTOR (Lat. *emere*, to buy). *Emptio*, a buying. *Emptor*, a buyer. *Emptio et venditio*, buying and selling.

In Roman Law. The name of a contract of sale. Du Cange; Vicat, Voc. Jur.

EN AUTRE DROIT (Fr.). In the right of another.

EN DECLARATION DE SIMULATION. A form of action used in Louisiana. It is one of revendication *(q. v.)*, and has for its object to have the contract declared judicially a simulation and a nullity; Erwin v. Bank, 5 La. Ann. 1; Edwards v. Ballard, 20 La. Ann. 169.

EN DEMEURE (Fr.). In default. Used in Louisiana. Bryan v. Cox, 3 Mart. La. (N. S.) 574.

EN OWEL MAIN (L. Fr.). In equal hand. The word *owel* occurs also in the phrase *owelty* of partition. See 1 Washb. R. P. 427.

EN VENTRE SA MÈRE (Fr.). In its mother's womb. For certain purposes, indeed for all beneficial purposes, a child *en ventre sa mère* is to be considered as born; 5 T. R. 49; 1 P. Wms. 329. It is regarded as *in esse* for all purposes beneficial to itself, but not to another; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; Gillespie v. Nabors, 59 Ala. 441, 31 Am. Rep. 20; [1908] 1 Ch. 4; [1907] A. C. 139. Formerly this rule would not be applied if the child's interests would be injured thereby; 2 De G., J. & S. 665; but, for the purpose of the rule against perpetuities, such a child is now regarded as a life in being, even though it is prejudiced by being considered as born; [1903] 1 Ch. 894; [1907] A. C. 139. Its civil rights are equally respected at every period of gestation; it is capable of taking under a will, by descent, or under a marriage settlement, may be appointed executor, may have a guardian assigned to it, may obtain an injunction to stay waste; Stedfast v. Nicoll, 3 Johns. Cas. (N. Y.) 18; Swift v. Duffield, 5 S. & R. (Pa.) 38; 1 Ves. 81; 2 Atk. 117; Bacon, Abr. *Infancy* (B); 2 H. Bla. 399; 2 Vern. 710; 4 Ves. Jr. 227. Such a child is to be considered as living so as to vest in the parent on the death of the life tenant a devise made by a testator to A for life, and on her death to the parent of the child, "for her absolute use and benefit in case she has issue living at the death" of A, "but in case she has no issue then living," then over, when the parent was *enceinte* at the time of A's death; [1895] 2 Ch. 497. The right of an unborn infant to take property by descent or otherwise has been said to be an inchoate right, which will not be completed by a *premature* birth; 1 Sharsw. Bla. Com. 130, n.; but as the word premature is used in the authorities, the rule accurately stated is that it must be born alive or after such period of fœtal existence that it might reasonably be expected to survive; Harper v. Archer, 4 Smedes & M. (Miss.) 99, 43 Am. Dec. 472; Swift v. Duffield, 5 S. & R. (Pa.) 38; 4 Kent 248; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

A bastard *en ventre sa mère* is not regarded as *in esse* because, as it was said, such

child could not take "until they have gained a name by reputation" and "that reputation could not be gained before the child was born"; 1 P. Wms. 529; but in a case decided long afterwards Lord Eldon (with whom, he stated, Sir William Grant concurred) held that a bequest to an illegitimate child *en ventre sa mère* was valid if there were a sufficient description to identify it; 1 Mer. 141; and the court of appeal followed this (though with Selborne, L. C. dissenting); 9 Ch. App. 147, which case was followed in [1906] 1 Ch. 542, and [1905] P. 137. The question whether an illegitimate child *en ventre sa mère* at the testator's death, but not when his will was made, might take as his reputed child, was left undecided; 31 Ch. D. 542; and a bequest to an illegitimate child *en ventre sa mère* at the date of the will was held good and not contrary to public policy; 3 Ch. D. 773. These questions derive special interest in England because they frequently arise in case of marriages with a deceased wife's sister.

Such unborn child may have an injunction to stay waste, have a guardian, and take under a charge of a portion, or be executor; 2 Ves. Jr. 319; but it is held that an infant may not recover damages for injuries received before its birth; Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242.

See an elaborate article on unborn infants, action by, when they take, conveyance to, degree of development necessary and rights of action in detail; 61 C. L. J. 364. And see Tyler, Inf. & Cov. ch. xiv.; 21 Harv. L. Rev. 360; POSTHUMOUS CHILD; FŒTUS; NEGLIGENCE; UNBORN CHILD.

ENABLE. To give power to do something. In the case of a person under disability as to dealing with another, "enable" has the primary meaning of removing that disability; not of conferring a compulsory power as against that other; 66 L. J. Ch. 208; [1897] A. C. 647.

ENABLING POWERS. A term used in equity. When the donor of a power, who is the owner of the estate, confers upon persons not seised of the fee the right of creating interests to take effect out of it, which could not be done by the donee of the power unless by such authority, this is called an *enabling power.*

ENABLING STATUTE. The act of 32 Henry VIII. c. 28, by which tenants in tail, husbands seised in right of their wives, and others, were empowered to make leases for their lives or for 21 years, which they could not do before. 2 Bla. Com. 319; Co. Litt. 44 *a.* The phrase is also applied to any statute enabling persons or corporations to do what before they could not.

As to enabling acts of territories, see TERRITORY.

ENACT. To establish by law; to perform or effect; to decree. The usual formula in a statute is, *Be it enacted.*

ENAJENACION. In Spanish Law. The act by which one person transfers to another a property, either gratuitously, as in the case of a donation, or by an owner's title, as in the case of a sale or an exchange.

In Mexican Law. This word is used in conveyancing to convey the fee, and not a mere servitude upon the land. Mulford v. Le Franc, 26 Cal. 88.

ENCEINTE (Fr.). Pregnant. See PREGNANCY.

ENCLOSURE. An artificial fence around one's estate. Keith v. Bradford, 39 Vt. 34; Porter v. Aldrich, 39 Vt. 326; Taylor v. Welbey, 36 Wis. 42. See CLOSE.

ENCOMIENDA. A charge or mandate conferring certain important privileges on the four military orders of Spain, to wit, those of Santiago, Calatrava, Alcantara, and Montesa. In the legislation of the Indias, it signified the concession of a certain number of Indians for the purpose of instructing them in the Christian religion and defending their persons and property.

ENCOURAGE. To intimate, to incite to anything, to give courage to, to inspirit, to embolden, to raise confidence, to make confident. 7 Q. B. Div. 258.

ENCROACH. To gain unlawfully upon the lands, property, or authority of another: as if one man presseth upon the grounds of another too far, or if a tenant owe two shillings rent-service and the lord exact three. So, too, the Spencers were said to encroach the king's authority. Blount; Plowd. 94 *a.* Quite a memorable instance of punishment for encroaching (accroaching) royal power took place in 21 Edw. III. 1 Hale, Pl. Cr. 80. Taking fees by clerks of the courts has been held encroaching; 1 Leon. 5.

ENCUMBRANCE. See INCUMBRANCE.

ENDORSE. See INDORSEMENT.

ENDOWMENT. Now generally used of a permanent provision for any public object, as a school or hospital. By the endowment of such institutions is commonly understood, not the building or providing sites for them, but the providing of a fixed revenue for their support. 25 L. J. Ch. 82; 6 De G., M. & G. 87; State v. Lyon, 32 N. J. L. 361. But more technically, of the assigning dower to a woman, or the severing of a sufficient portion for a vicar towards his perpetual maintenance. 1 Bla. Com. 387; 2 *id.* 135; 3 Steph. Com. 99; French v. Pratt, 27 Me. 381; State v. Lyon, 32 N. J. L. 360; Runkel v. Winemiller, 4 Harr. & McH. (Md.) 429, 1 Am. Dec. 411.

ENDOWMENT INSURANCE. See INSURANCE.

ENEMY. A nation which is at war with another. A citizen or a subject of such a nation. Any of the subjects or citizens of a state in amity with another state who have commenced or have made preparations for commencing hostilities against the latter state, and also the citizens or subjects of a state in amity with another state who are in the service of a state at war with it. See Salk. 635; Bacon, Abr. *Treason*, G; Monongahela Ins. Co. v. Chester, 43 Pa. 491.

By the term enemy is also understood a person who is desirous of doing injury to another. The Latins had two terms to signify these two classes of persons: the first, or the public enemy, they called *hostis*, and the latter, or the private enemy, *inimicus*.

An enemy subject cannot, as a general rule, enter into any contract which can be enforced in the courts of law; but the rule is not without exceptions: as, for example, in suits brought upon ransom bills (*q. v.*), bills of exchange drawn by prisoners of war, contracts entered into under licenses to trade with the enemy granted by a belligerent to its citizens; Scholefield v. Eichelberger, 7 Pet. (U. S.) 586, 8 L. Ed. 793; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142.

United States citizens in Cuba during the war with Spain were enemies, and cannot recover from the United States for property destroyed; Juragua Iron Co. v. U. S., 212 U. S. 297, 29 Sup. Ct. 385, 53 L. Ed. 520. See PUBLIC ENEMY.

ENFEOFF. To make a gift of any corporeal hereditaments to another. See FEOFFMENT.

ENFRANCHISE. To make free; to incorporate a man in a society or body politic. Cun. Dict.

ENFRANCHISEMENT. Giving freedom to a person. Admitting a person to the freedom of a city. A denizen of England, or a citizen of London, is said to be enfranchised. So, too, a villein is enfranchised when he obtains his freedom from his lord. *Termes de la Ley;* 11 Co. 91.

The word is now used principally either of the manumission of slaves (*q. v.*), of giving to a borough or other constituency a right to return a member or members to parliament, or of the conversion of copyhold into freehold. Moz. & W. L. Dict.

ENFRANCHISEMENT OF COPYHOLD. The change of the tenure by which lands are held from copyhold to freehold, as by a conveyance to the copyholder or by a release of the seignorial rights. 1 Watk. Copy. 362; 1 Steph. Com. 632; 2 *id.* 51.

ENGAGED. Within the meaning of a by-law of a fraternal order, one is engaged in the sale of liquor who is a partner in the saloon business, though he performs no labor in or about the saloon and takes no active part in the business. Graves v. Knights of Maccabees of the World, 199 N. Y. 397, 92 N. E. 792, 139 Am. St. Rep. 912.

ENGAGEMENT. In French Law. A contract. The obligations arising from a *quasi* contract.

The terms *obligation* and *engagement* are said to be synonymous; 17 Toullier, n. 1; but the Code seems specially to apply the term engagement to those obligations which the law imposes on a man without the intervention of any contract, either on the part of the obligor or the obligee; art. 1370. An engagement to do or omit to do something amounts to a promise; Rue v. Rue, 21 N. J. L. 369.

Promises or debts of a married woman, not expressly charged on her separate estate, are termed her *general engagements*, not binding it unless made with reference to and upon the credit of it. L. R. 4 C. P. 593; L. R. 2 Eq. 182; 3 De G., F. & J. 513. See AGREEMENT; CONTRACT; PROMISE.

ENGLAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

ENGLESHIRE. A law was made by Canute, for the preservation of his Danes, that, when a man was killed, the hundred or town should be liable to be amerced, unless it could be proved that the person killed was an Englishman. This proof was called *Engleshire*. It consisted, generally, of the testimony of two males on the part of the father of him who had been killed, and two females on the part of his mother. 1 Hale, Pl. Cr. 447; 4 Bla. Com. 195; Spelman, Gloss.

ENGLISH MARRIAGE. This phrase may refer to the place where the marriage was solemnized, or it may refer to the nationality and domicil of the parties between whom it was solemnized, the place where the union so created was to have been enjoyed. 6 Prob. Div. 51.

ENGRAVING. See COPYRIGHT.

ENGROSS. To copy the rude draught of an instrument in a fair, large hand. To write out, in a large, fair hand, on parchment. The term is applied to statutes, which, after being read and acted on a sufficient number of times, are ordered to be engrossed. Anciently, also, used of the process of making the indenture of a fine. 5 Co. 39 *b*.

In Criminal Law. To buy up such large quantities of an article as to obtain a monopoly of it for the purpose of selling at an unreasonable price. The tendency of modern law is very decidedly to restrict the application of the law against engrossing; and is very doubtful if it applies at all except to obtaining a monopoly of provisions; 1 East 143. And now the common-law offence of the total engrossing of any commodity is abolished by Stat. 7 & 8 Vict. c. 24. Merely buying for the purpose of selling again is not necessarily engrossing. 14 East 406; 15 *id.* 511. See COMBINATIONS; RESTRAINT OF TRADE; MONOPOLY.

ENGROSSER. One who engrosses or writes on parchment in a large, fair hand.

One who purchases large quantities of any commodity in order to have the command of the market and to sell them again at high prices.

ENGROSSING. The offence committed by an *engrosser*.

ENHANCED. Taken in an unqualified sense, it is equivalent to "increased," and comprehends any increase in value however caused or arising. Thornburn v. Doscher, 32 Fed. 812.

ENITIA PARS (L. Lat.). The part of the eldest. Co. Litt. 166; Bacon, Abr. *Coparceners* (C).

When partition is voluntarily made among coparceners in England, the eldest has the first choice, or *primer election (q. v.)*; and the part which she takes is called *enitia pars*. This right is purely personal, and descends: it is also said that even her assignee shall enjoy it; but this has been doubted. The word *enitia* is said to be derived from the old French *eisne*, the eldest; Bac. Abr. *Coparceners* (C); Keilw. 1 *a*, 49 *a*; Cro. Eliz. 18.

ENJOIN. To command; to require: as, private individuals are not only permitted, but enjoined, by law, to arrest an offender when present at the time a felony is committed or a dangerous wound given, on pain of fine and imprisonment if the wrong-doer escape through their negligence. 1 Hale, Pl. Cr. 587; 1 East, Pl. Cr. 298; Ry. & M. 93.

To command or order a defendant in equity to do or not to do a particular thing by writ of injunction. See 55 Ch. Div. 418; INJUNCTION.

ENLARGE. To extend: as, to enlarge a rule to plead is to extend the time during which a defendant may plead. To enlarge means, also, to set at liberty: as, the prisoner was enlarged on giving bail.

ENLARGING. Extending, or making more comprehensive: as, an enlarging statute, which is one extending the common law. Enlarging an estate is the increasing an estate in land, as where A. has an estate for life with remainder to B. and his heirs, and B. releases his estate to A. 2 Bla. Com. 324. See RELEASE.

ENLISTMENT. The act of making a contract to serve the government in a subordinate capacity, either in the army or navy. The contract so made is also called an enlistment. A drafted man is said to be "enlisted" as well as a volunteer, but the term does not apply to one entering the army under a commission; Inhabitants of Sheffield v. Inhabitants of Otis, 107 Mass. 282; Hilliard v. Stewartstown, 48 N. H. 280. The contract of enlistment involves a change in the status of the recruit, which he cannot throw off at will, though he may violate his contract; In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636.

Fraudulent enlistment is an offense punishable by general court-martial; Act March 3, 1893. Boys between the ages of 16 and 18 are authorized to enlist if they have the consent of their parents or guardians; R. S. § 1419. But a minor who has been enlisted in either service without the consent of his parents or guardian is both *de facto* and *de jure* in the service, and is liable to be tried and punished for any infraction of the regulations. The lack of such consent will require his discharge from the service, but it will not absolve him from punishment for offences committed while in the service; Dillingham v. Booker, 163 Fed. 696, 90 C. C. A. 280, 18 L. R. A. (N. S.) 956, 16 Ann. Cas. 127; U. S. v. Reaves, 126 Fed. 127, 60 C. C. A. 675; In re Scott, 144 Fed. 79, 75 C. C. A. 237; In re Lessard, 134 Fed. 305. But in Ex parte Lisk, 145 Fed. 860, it was held that where the statute required the consent of the parents, and such consent was not given, the minor was not a person "belonging to the navy," and the naval authorities could not detain him in custody with a view to having him tried by a naval court-martial for fraudulent enlistment, when the real issue was his legal right to enter the navy, and whether he was lawfully therein or not; followed in Dillingham v. Bakley, 152 Fed. 1022, 82 C. C. A. 659, affirming Ex parte Bakley, 148 Fed. 56.

Where the jurisdiction of the civil courts has attached in habeas corpus proceedings before charges are preferred against a minor for fraudulent enlistment and an arrest made, he is entitled to be discharged; Ex parte Houghton, 129 Fed. 239; *contra*, Ex parte Lewkowitz, 163 Fed. 646. In U. S. v. Wright, 5 Phila. 299, Fed. Cas. No. 16,778, it was held the enlistment of a minor without his parents' consent was illegal, and his subsequent desertion was but a disclaimer of his contract, which he had a right to make, citing and following Com. v. Fox, 7 Pa. 336. But the right to a discharge is denied to a minor, himself the petitioner, on the ground that the contract was valid so far as the minor himself is concerned; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; In re Hearn, 32 Fed. 141. See 22 H. L. R. 144. A federal court may discharge on *habeas corpus;* Ex parte Schmeid, 1 Dill. 587, Fed. Cas. No. 12,461; but not a state court; Tarble's Case, 13 Wall. (U. S.) 397, 20 L. Ed. 597.

The receipt of pay seems to be tantamount to an enlistment or perhaps evidence thereof. Art. of War 47 provides for the punishment of "any soldier who, having received pay or having been duly enlisted," etc., "deserts," etc. In Re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636, it was held that taking the oath of enlistment "was the pivotal fact which operated to change the status."

ENORMIA (Lat.). Wrongs. See ALIA ENORMIA.

ENQUETE or ENQUEST. In Canon Law. An examination of witnesses in the presence of a judge authorized to sit for this purpose, taken in writing, to be used as evidence in the trial of a cause. The day of hearing must be specified in a notice to the opposite party; 9 Low. C. 392. It may be opened, in some cases, before the trial; 10 Low. C. 19.

ENROLL. To register; to enter on the rolls of chancery, or other courts; to make a record.

ENROLMENT. The registering or entering on the rolls of chancery, king's bench, common pleas, or exchequer, or by the clerk of the peace in the records of the quarter sessions, of any lawful act; as, a recognizance, a deed of bargain and sale, and the like. Jacob, Law Dict. For the terms "enrolment" and "registration" as used in the United States merchant shipping laws, see R. S. tit. 50; 21 Stat. L. 271; 18 *id.* 30; The Mohawk, 3 Wall. (U. S.) 566, 18 L. Ed. 67; VESSEL.

ENS LEGIS. A being of the law; a legal entity. Used of corporations.

ENTAIL. A fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs. 1 Washb. R. P. 66; 2 Bla. Com. 112, n.; Wms. R. P. 61.

To restrict the inheritance of lands to a particular class of issue. 1 Washb. R. P. 66; 2 Bla. Com. 113. See FEE-TAIL.

ENTENCION. In Old English Law. The plaintiff's declaration.

ENTER. To go upon lands for the purpose of taking possession; to take possession. In a strict use of terms, entry and taking possession would seem to be distinct parts of the same act; but, practically, entry is now merged in taking possession. 1 Washb. R. P. 10, 32; Stearn, Real Act. 2.

To cause to be put down upon the record. An attorney is said to enter his appearance, or the party himself may enter an appearance. See ENTRY.

ENTERTAINMENT. Something connected with the enjoyment of refreshment rooms, tables, and the like. It is something beyond refreshments; it is the accommodation provided whether that includes musical or other amusements or not. L. R. 10 Q. B. 595. It is synonymous with board; Scattergood v. Waterman, 2 Miles (Pa.) 323; but it may include refreshment, without seating accommodation; 1 Ex. Div. 385. See PLACE OF AMUSEMENT.

ENTICE. To solicit, persuade, or procure. Nash v. Douglass, 12 Abb. Pr. N. S. (N. Y.) 187. The enticing desertions from the army or navy or arsenals of the United States is punishable by fine and imprisonment. R. S. §§ 1553, 1668, 5455, 5525.

A *husband* may recover compensation for enticing his wife away; French v. Deane, 19 Colo. 504, 36 Pac. 609, 24 L. R. A. 387; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468. It is no defence to show that they had not lived happily together, though it may go in mitigation of damages; Hadley v. Heywood, 121 Mass. 236; Bailey v. Bailey, 94 Ia. 598, 63 N. W. 341. Stronger evidence is required where a parent harbors his daughter; it ought to appear that there were improper motives; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Schoul. Husb. & W. § 64; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085; White v. Ross, 47 Mich. 172, 10 N. W. 188. So of a wife's action against her husband's parents for enticing him away from her; Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; and probably of a brother's harboring his sister; Glass v. Bennett, 89 Tenn. 479, 14 S. W. 1085. It has been held that neither at common law nor under statutes giving a *wife* the right to sue has she a right of action for enticing away her husband; Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79; Doe v. Roe, 82 Me. 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499; Hester v. Hester, 88 Tenn. 270, 12 S. W. 446; but the weight of authority is that the action will lie at common law; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Waldron v. Waldron, 45 Fed. 315; Hodgkinson v. Hodgkinson, 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; 9 H. L. Cas. 577. See Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L. R. A. 545. See ALIENATION OF AFFECTION.

A *parent* has a right of action against one who improperly entices his minor child away from him; Grand Rapids & I. R. R. Co. v. Showers, 71 Ind. 451; Caughey v. Smith, 50 Barb. (N. Y.) 351; L. R. 2 C. P. 615; in tort or assumpsit; Tiffany, Pers. & Dom. Rel. 284. The action is on the theory of loss of services, and the relation of master and servant, either actual or constructive, must be proven; *id.;* Magee v. Holland, 27 N. J. L. 86, 72 Am. Dec. 341.

A *master* has a right of action for knowingly enticing his servant; 2 El. & Bl. 216; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475 and note; Jones v. Blocker, 43 Ga. 331; Duckett v. Pool, 33 S. C. 238, 11 S. E. 689; even though the contract of employment was one which the servant could terminate at will; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; L. R. 2 C. P. 615; but not where it had expired by its own limitations; Boston Glass Manufactory v. Binney, 4 Pick. (Mass.) 425. The doctrine extends to all kinds of employés; Walker v. Cronin, 107 Mass. 555; though it has been held to apply, at common law, only to domestic servants

and apprentices; Huff v. Watkins, 15 S. C. 82, 40 Am. Rep. 680.

Where one after notice continues to employ another's servant, the latter has a right of action, though at the time he hired him the second master did not know that he was hiring another man's servant; Schoul. Dom. Rel. § 487; but in Lumley v. Gye, 2 El. & Bl. 216, which was an action for damages caused by the enticement of Wagner, a celebrated singer, from one theatre to another, the majority of the court thought the action would lie.

Enticement in some states renders one liable to criminal prosecution; Bryan v. State, 44 Ga. 328; Roseberry v. State, 50 Ala. 160; State v. Daniel, 89 N. C. 553. See Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367.

ENTIRE. That which is not divided; that which is whole.

When a contract is entire, it must, in general, be fully performed before the party can claim the compensation which was to have been paid to him: for example, when a man hires to serve another for one year, he will not be entitled to leave him at any time before the end of the year, and claim compensation for the time unless it be done by the consent or default of the party hiring; Hair v. Bell, 6 Vt. 35; Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; McClure v. Pyatt, 4 McCord (S. C.) 26; Byrd v. Boyd, 4 McCord (S. C.) 246, 17 Am. Dec. 740; Rounds v. Baxter, 4 Greenl. (Me.) 454; Hoar v. Clute, 15 Johns. (N. Y.) 224; Watkins v. Hodges, 6 H. & J. (Md.) 38. See Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273. A contract is entire if the consideration be single and entire, notwithstanding the subject of the contract consists of several distinct items; 2 Pars. Cont. 517. See DIVISIBLE.

An *entire day* is an undivided day, from midnight to midnight; Robertson v. State, 43 Ala. 325; Haines v. State, 7 Tex. App. 30; Lawrence v. State, 7 Tex. App. 192. The words "entire use, benefit," etc., in a trust deed for the benefit of a married woman, have been construed as equivalent to "sole and separate use"; Heathman v. Hall, 38 N. C. 414. *Entire tenancy* "is contrary to *several tenancy*, signifying a sole possession in one man, whereas the other signifieth joint or common in more." Cowell.

ENTIRETY. This word denotes the whole, in contradistinction to moiety, which denotes the half part. A husband and wife, when jointly seized of land, are seized by entireties *per tout* and not *per my et per tout*, as joint tenants are. Jacob, Law Dict.; 2 Kent 132. See In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64. PER TOUT ET NON PER MY.

The same words of conveyance that would make two other persons joint tenants will make the husband and wife tenants of the entirety; Georgia, etc., R. Co. v. Scott, 38 S. C. 34, 16 S. E. 185, 839; Oglesby v. Bingham, 69 Miss. 795, 13 South. 852; Noblitt v. Beebe, 23 Or. 4, 35 Pac. 248; Chambers v. Chambers, 92 Tenn. 707, 23 S. W. 67.

Such an estate has the quality of survivorship, whereby the heirs of the survivor take, to the exclusion of the heirs of the first deceased; Marburg v. Cole, 49 Md. 402, 33 Am. Rep. 266; Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450. There can be no partition between tenants by entireties; Chandler v. Cheney, 37 Ind. 391; no interest in it can be sold on execution for the debts of the husband or wife; *id.;* Almond v. Bonnell, 76 Ill. 537. But in Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762, a purchaser at a mortgage foreclosure sale which covered the property held in entirety and in which the wife did not join was held to become a tenant in common with the wife as to such property; and to the same effect Washburn v. Burns, 34 N. J. L. 18. In Buttlar v. Rosenblath, 42 N. J. Eq. 651, 9 Atl. 695, 59 Am. Rep. 52, an act which in terms preserves to a married woman her separate right of property was held to change the status of an estate by entirety to the extent of limiting the rights of the creditors of the husband to subject the use of only his half of such an estate to the payment of his debts.

That a judgment against the husband is not a lien on real estate owned by himself and wife by entirety, and that they can convey it free and clear of an unsatisfied judgment lien against him (valid on land owned by him personally), is held; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471, where it is said: "As between husband and wife, there is but one owner, and that is neither the one nor the other, but both together. The estate belongs as well to the wife as to the husband." The husband cannot therefore possess any interest separate from his wife, nor can he alienate or encumber the estate. From the peculiar nature of this estate and from the legal relation of the parties, there must be unity of estate, unity of possession, unity of control, and unity in conveying or encumbering it; and it necessarily results that it cannot be seized and sold upon execution for the separate debts of either the husband or the wife; followed in Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64; Barren Creek Ditching Co. v. Beck, 99 Ind. 247; and to the same effect, Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137; Dickey v. Converse, 117 Mich. 449, 76 N. W. 80, 72 Am. St. Rep. 568; Bank v. Corder, 32 W. Va. 232, 9 S. E. 220; Cole Mfg. Co. v. Collier, 95 Tenn. 115, 31 S. W. 1000, 30 L. R. A. 315, 49 Am. St. Rep. 921; Ray v. Long, 132 N. C. 891, 44 S. E. 652.

Where a husband and wife sold land owned by them as tenants by entirety, taking a

mortgage to husband and wife, the wife died, and the bond was paid, it was held that one-half the proceeds belonged to the wife's legal representatives; In re Baum, 121 App. Div. 496, 106 N. Y. Supp. 113.

Where a wife pays for land and consents that the title may be taken in the name of herself and husband, they hold as tenants in entirety, and a conveyance by the husband passes the rights to the possession of the land during their joint lives, and to the fee in case the husband survive; Hiles v. Fisher, 67 Hun 229, 22 N. Y. Supp. 795; Phelps v. Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430.

In Merritt v. Whitlock, 200 Pa. 50, 49 Atl. 786, it was said it might be considered as still an open question whether husband and wife may not, since the married woman's acts, take, as well as hold in common, if there be a clear actual intent, notwithstanding the presumption to the contrary. But a later case in the same state holds that as the quality of the estate is determined at its inception, that estate could not be stripped of any of its incidents except by express statutory provision existing at the time of its inception; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137.

This estate, where it exists as at common law, is not affected by the statutes for the protection of married women, nor by statutes providing that conveyances to two or more persons shall be deemed to create a tenancy in common and not a joint tenancy; Kunz v. Kurtz, 8 Del. Ch. 404, 68 Atl. 450.

As to the effect of the married woman's acts on estates held by entirety, see MARRIED WOMAN.

The divorce of the parties will not sever an estate by entirety; Alles v. Lyon, 216 Pa. 604, 66 Atl. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 139; *contra*, Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918, 5 Ann. Cas. 534; Hayes v. Horton, 46 Or. 597, 81 Pac. 386 (by changing it into a tenancy in common).

ENTITLE. To give a right to. L. R. 20 Eq. 534.

ENTRY. **In Common Law.** The act of setting down the particulars of a sale, or other transaction, in a merchant's or tradesman's account-books: such entries are, in general, *prima facie* evidence of the sale and delivery, and of work done; but unless the entry be the original one, it is not evidence. See SHORT ENTRY; SINGLE ENTRY.

In Revenue Law. The submitting to the inspection of officers appointed by law, to collect customs, goods imported into the United States, together with a statement or description of such goods, and the original invoices of the same, for the purpose of estimating the duties to be paid thereon.

The term "entry" in the acts of congress is used in two senses. In many of the acts it refers to the bill of entry,—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used to denote, not a document, but a transaction; a series of acts which are necessary to the end to be accomplished, viz. the entering of the goods; U. S. v. Cargo of Sugar, 3 Sawy. 46, Fed. Cas. No. 14,722.

In Criminal Law. The act of entering a dwelling-house, or other building, in order to commit a crime. See BURGLARY.

Upon Real Estate. The act of going upon the lands of another, or lands claimed as one's own, with intent to take possession. See Guion v. Anderson, 8 Humph. (Tenn.) 306.

In general, any person who has a right of possession may assert it by a peaceable entry, without the formality of a legal action, and, being so in possession, may retain it, and plead that it is his soil and freehold; 3 Term 295. A notorious act of ownership of this kind was always equivalent to a feodal investiture by the lord, and is now allowed in all cases where the original entry of a wrong-doer was unlawful. But, in all cases where the first entry was lawful and an apparent right of possession was thereby gained, the owner of the estate cannot thus enter, but is driven to his action at law; 3 Bla. Com. 175. See RE-ENTRY; FORCIBLE ENTRY.

At common law, no person could make a valid sale of land unless he had lawfully entered, and could make livery of seisin,—that is, could make an actual delivery of possession to the purchaser. This provision was early incorporated into the English statutes, to guard against the many evils produced by selling pretended titles to land. A pretended title within the purview of the law is where one person claims land of which another is in possession holding adversely to the claim; 1 Plowd. 88 *a*; Littleton § 347; Livingston v. Iron Co., 9 Wend. (N. Y.) 511. And now in most of the states, every grant of land, except as a release, is void as an act of maintenance, if, at the time it is made, the lands are in the actual possession of another person claiming under a title adverse to that of the grantor; 4 Kent 446; Williams v. Jackson, 5 Johns. (N. Y.) 489; Wolcot v. Knight, 6 Mass. 418; Cornwell v. Clement, 87 Hun 50, 33 N. Y. Supp. 866; Sneed v. Hope (Ky.) 30 S. W. 20; *contra*, Hadduck v. Wilmarth, 5 N. H. 181, 20 Am. Dec. 570; Stoever v. Whitman's Lessee, 6 Binn. (Pa.) 420; Matthews v. Hevner, 2 App. Cas. D. C. 349. See CHAMPERTY; BUYING TITLES.

In a more limited sense, an entry signifies the simply going upon another person's premises for some particular purpose. The right to land is exclusive, and every unwarranted entry thereon without the owner's leave, whether it be enclosed or not, or unless the person entering have an authority given him

by law, is a trespass; Adams v. Freeman, 12 Johns. (N. Y.) 408, 7 Am. Dec. 327; Wells v. Howell, 19 Johns. (N. Y.) 385. But the owner's license will sometimes be presumed, and then will continue in force until it is actually revoked by the owner; Dexter v. Hazen, 10 Johns. (N. Y.) 246; Willes 195; Tayl. L. & T. 766. See LICENSE.

Authority to enter upon lands is given by law in many cases. See ARREST.

The proprietor of chattels may under some circumstances enter the land of another upon which they are placed, and remove them, provided they are there without his default: as, where his tree has blown down into the adjoining close by the wind, or his fruit has fallen from a branch which overhung it; 20 Vin. Abr. 418; 2 Greenl. Ev. § 627.

A landlord also may enter, to distrain or to demand rent, to see whether waste has been committed, or repairs made, and may go into the house for either purpose, provided the outer door be open; Cro. Eliz. 876; 2 Greenl. Ev. § 627. So, if he is bound to repair, he has a right of entry given him by law for that purpose; Moore 889. Or if trees are excepted out of a demise, the lessee has a right of entering to prune or fell them; 11 Co. 53; Tayl. L. & T. § 767. A tenant becomes a trespasser after the expiration of his term, though his holding is in good faith under color of a reasonable claim of right; and the landlord may forcibly enter thereon and eject him without legal process; Freeman v. Wilson, 16 R. I. 524, 17 Atl. 921; Allen v. Kelly, 17 R. I. 731, 24 Atl. 776, 16 L. R. A. 798, 33 Am. St. Rep. 905.

So any man may throw down a public nuisance; and a private one may be thrown down by the party grieved, and this before any prejudice happens, but only from the probability that it may happen; Webb, Poll. Torts 513; 5 Co. 102. And see 1 Brownl. 212; 12 Mod. 510; W. Jones 221; 1 Stra. 683; Kiefer v. Carrier, 53 Wis. 404, 10 N. W. 562. To this end, the abator has authority to enter the close in which it stands. See NUISANCE.

In Practice. The placing on record the various proceedings in an action, in technical language and order. The extreme strictness of the old practice is somewhat relaxed, but the term entry is still used in this connection. "Books of Entries" were formerly much relied on, containing forms or precedents of the proceedings in various actions as they appear on record.

In the law books the words entry and entered are frequently used as synonymous with recorded; Lent v. Ry. Co., 130 N. Y. 504, 29 N. E. 988. See Blatchford v. Newberry, 100 Ill. 484; McLaughlin v. Doherty, 54 Cal. 519.

For entry of public lands, see PRE-EMPTION RIGHT. For the terms entry of judgment, entry of appearance, entry for copyright, see JUDGMENT; APPEARANCE; COPYRIGHT.

ENTRY AD COMMUNEM LEGEM. A writ which lay in favor of the reversioner, when the tenant for term of life, tenant for term of another's life, tenant by the curtesy, or tenant in dower had aliened and died. Tomlin, Law Dict. Long obsolete, and abolished in 1833.

ENTRY, WRIT OF. **In Old Practice.** A real action brought to recover the possession of lands from one who wrongfully withholds possession thereof.

Such writs were said to be in the *Quibus*, where the suit was brought against the party who committed the wrong; in the *Per*, where the tenant against whom the action was brought was either heir or grantee of the original wrong-doer; in the *Per and Cui*, where there had been two descents, two alienations, or descent and an alienation; in the *Post*, where the wrong was removed beyond the degrees mentioned.

The above designations are derived from significant Latin words in the respective forms adapted to the cases given. A descent or alienation on the part of the disseisor constituted a degree (see Co. Litt. 239 *a*); and at common law the writ could be brought only within the degrees (two), the demandant after that being driven to his writ of right. By the statute of Marlbridge *(q. v.)*, 52 Hen. III. c. 30 (A. D. 1267), however, a writ of entry, after *(post)* those degrees had been passed in the alienation of the estate, was allowed. Where there had been no descent and the demandant himself had been dispossessed, the writ ran, *Præcipe A quod reddat B sex acras terræ, etc. de quibus idem A, etc.* (command A to restore to B six acres of land, etc., *of which* the said A, etc.); if there had been a descent after the description came, the clause, *in quod idem A non habet ingressum nisi per C qui illud ei demisit* (into which the said A, the tenant, has no entry but *through* C, who demised it to him); where there were two descents, *nisi per D cui C illud demisit* (but by D, to whom C demised it); where it was beyond the degrees, *nisi post disseisinam quam C* (but *after* the disseisin which C, the original disseisor, did, etc.).

The writ was of many varieties, also, according to the character of the title of the claimant and the circumstances of the deprivation of possession. Booth enumerates and discusses twelve of these, of which some are *sur disseisin, sur intrusion, ad communem legem, ad terminum qui preterit, cui in vita, cui ante divortium*, etc. Either of these might, of course, be brought in any of the four degrees, as the circumstances of the case required. The use of writs of entry has been long since abolished in England; but they are still in use in a modified form in some states, as the common means of recovering possession of realty against a wrongful occupant; Emerson v. Thompson, 2 Pick. (Mass.) 473; Tilson v. Thompson, 10 Pick. (Mass.) 359; Bean v. Moulton, 5 N. H. 450; Rowell v. Mitchell, 68 Me. 21; Day v. Philbrook, 85 Me. 90, 26 Atl. 999; Cole v. Inhabitants of Eastham, 124 Mass. 307; Wilbur v. Ripley, 124 Mass. 468; Pettingell v. Boynton, 139 Mass. 244, 29 N. E. 655; Tappan v. Power Co., 157 Mass. 24, 31 N. E. 703, 16 L. R. A. 353. See Stearn, Real Act.; Booth, R. A.; Co. Litt. 238 *b*.

To maintain a writ of entry, the demandant who declares on his own seisin, and alleges a disseisin, is required to prove only that he has a right of entry and need not prove an actual wrongful dispossession or an adverse possession by the tenants; Twomey v. Linnehan, 161 Mass. 91, 36 N. E. 590.

ENURE. To take or have effect. To serve to the use, benefit, or advantage of a person. The word is often written *inure*. A release to the tenant for life *enures* to him in reversion; that is, it has the same effect for him as for the tenant for life. A discharge of the principal enures to the benefit of the surety.

ENVOY. In International Law. A diplomatic agent sent by one state to another.

In accordance with the rules adopted at the Congress of Vienna, in 1815, envoys are placed among diplomatic agents of the second class. They are not regarded as representing the person and dignity of their sovereigns, and thus they rank below ambassadors. On the other hand, they are accredited to the sovereign of the state and, except for the obsolete privilege of treating with the head of the foreign state personally, their position is not substantially different from that of an ambassador (*q. v.*). 1 Opp. 443–446.

EO INSTANTI. At that instant; at the very or same instant; immediately. 1 Bla. Com. 196, 249; 1 Co. 138; Black, L. Dict.

EORLE (Sax.). An earl. Blount; 1 Bla. Com. 398. The governor of a province.

EPILEPSY. A disease of the brain, which occurs in paroxysms with uncertain intervals between them.

These paroxysms are characterized by the loss of sensation, and convulsive motions of the muscles. When long continued and violent, this disease is very apt to end in dementia. It gradually destroys the memory and impairs the intellect, and is one of the causes of an unsound mind.

A statute forbidding the marriage of epileptics is held not unconstitutional as unjustly discriminating against certain persons; Gould v. Gould, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531. As to the effect of concealment of epilepsy under this statute, see DIVORCE.

EPIQUEYA. In Spanish Law. The benignant and prudent interpretation of the law according to the circumstances of the time, place, and person. This word is derived from the Greek, and is synonymous with the word equity. See Murillo, nn. 67, 68.

EPISCOPACY. A form of government by diocesan bishops; the office or condition of a bishop.

EPISCOPALIA. Synodals, or payments due the bishop.

EPISCOPUS (L. Lat.). In Civil Law. A superintendent; an inspector. Those in each municipality who had the charge and oversight of the bread and other provisions which served the citizens for their daily food were so called. Vicat; Du Cange.

A bishop. These bishops, or *episcopi*, were held to be the successors of the apostles, and have various titles at different times in history and according to their different duties. It was applied generally to those who had authority or were of peculiar sanctity. After the fall of the Roman empire they came to have very considerable judicial powers. Du Cange; Vicat; Calvinus, Lex.

EPISTOLÆ (Lat.). In Civil Law. Rescripts; opinions given by the emperors in cases submitted to them for decision.

Answers of the emperors to petitions.

The answers of counsellors (*juris-consulta*), as Ulpian and others, to questions of law proposed to them, were also called *epistolæ*.

Opinions written out. The term originally signified the same as *literæ*. Vicat.

EQUAL PROTECTION OF THE LAWS. The fourteenth amendment of the constitution of the United States, among other provisions respecting the life, liberty, and property of citizens, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision has been subjected to much judicial construction. The protection extends to "acts of the state whether through its legislative, its executive, or its judicial authorities"; Scott v. McNeal, 154 U. S. 45, 14 Sup. Ct. 1108, 38 L. Ed. 896; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567. In Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, Harlan, J., for the court, said: "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition, and, as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'" See Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. That amendment conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty, and property that previously existed under all state constitutions. Prior to the passage of this amendment "the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws by any state; and there is no doubt that class legislation is forbidden;" State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103. "What must constitute a denial of the equal protection

of the law will depend, in this view, in a large measure, upon what rights of the law have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, the proposition that each case must, to an extent, depend upon its own facts, is especially applicable to this class of cases. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered;" Nashville, C. & St. L. Ry. v. Taylor, 86 Fed. 168, 185. See PRIVILEGES AND IMMUNITIES; CIVIL RIGHTS; DUE PROCESS OF LAW.

The guaranties of due process of law and of equal protection of the laws are rights secured to all persons whether citizens or not. The two are in most cases treated together, though occasionally differentiated. The guaranty means as well equal exemption from all burdens as equal accessibility to the courts; In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; San Mateo County v. R. Co., 13 Fed. 722; Santa Clara County v. R. Co., 18 Fed. 385; and it is not confined to citizens, but applies to all persons, native or foreign, within this country; Fraser v. Torley Co., 82 Fed. 257; In re Ah Fong, 3 Sawy. 144, Fed. Cas. No. 102; though not non-residents; Steed v. Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789. But in State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138, it was said to be only for the benefit of persons physically present within the territorial jurisdiction of the state. A corporation is not a citizen within the meaning of the amendment securing privileges and immunities, but it is a person under the equal protection clause; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; McQuire v. R. Co., 131 Ia. 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; Hammond Beef & Provision Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528; and so is a railroad corporation; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; and a mutual insurance company; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400. But a private corporation not created by the laws of the state nor doing business in it is not within its jurisdiction so as to invoke the protection of the 14th Amendment; Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432; Hawley v. Hurd, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. (N. S.) 195, 82 Am. St. Rep. 922; the only limitation being when the corporation is in the employment of the federal government or in business which is strictly interstate commerce; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650.

The amendment "was not intended to compel the state to adopt an iron rule of equal taxation," nor "to prevent a state from adjusting its system of taxation in all proper and reasonable ways"; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892. Taxation must be equal and uniform as well as regards the mode of assessment as in the rate of charge; San Mateo County v. R. Co., 13 Fed. 722; Santa Clara County v. R. Co., 18 *id.* 385; but this may be done by different officers if the method is uniform; San Francisco & N. P. R. Co. v. State Board of Equalization, 60 Cal. 12.

The prohibition against the denial of equal protection of the laws does not require that the law shall have an equality of operation, in the sense of an indiscriminate operation on persons merely as such, but on persons according to their relation. It does not prevent states from distinguishing, selecting and classifying objects of legislation within a wide range of discretion, provided only that the discretion must be based upon some reasonable ground; Interstate Consol. St. Ry. Co. v. Massachusetts, 207 U. S. 79, 28 Sup. Ct. 26, 52 L. Ed. 111, 12 Ann. Cas. 555; affirming Com. v. Ry. Co., 187 Mass. 436, 73 N. E. 530, 11 L. R. A. (N. S.) 973, 2 Ann. Cas. 419; some difference which bears a just and proper relation to the classification and not a mere arbitrary selection; Magown v. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037; Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987. Legislation which regulates business may well make distinctions dependent upon the degrees of evil without being unreasonable or in conflict with the equal protection of the laws; Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. The mere fact of classification will not relieve; it must be based on reasonable grounds and not mere arbitrary selection; but it suffices if the statute is applicable to all persons under like circumstances and does not subject individuals to an arbitrary exercise of power; Jones v. Brim, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677; or if a law operates alike upon all persons similarly situated; Walston v. Nevin, 128 U. S. 578, 9 Sup. Ct. 192, 32 L. Ed. 544; or a law or course of proceedings has been applied to any other person in the state under similar circumstances and conditions; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91. Legislation may be limited as to objects or territory if

all persons subject to it are treated alike under like circumstances and conditions; Hayes v. Missouri, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; Giles v. Teasley, 193 U. S. 148, 24 Sup. Ct. 359, 48 L. Ed. 655. It cannot discriminate in taxation against foreign corporations lawfully doing business within the state; Southern R. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247.

"Classification must have relation to the purpose of the legislature, but logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion even though it result in 'ill-advised, unequal and oppressive legislation';" Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236, quoting Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238.

In order to avoid denial of equal protection of the laws the police power must be exercised reasonably and not arbitrarily; Yick Wo v. Hopkins, 118 U. S. 365, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The guaranties for equal protection of the laws and of due process of law are not violated by discrimination in the statute; Clark v. Kansas City, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392.

As there is no vested right in procedure, the guaranty of equal protection of the laws is not violated by change of previous decisions of the state court on questions of procedure; Backus v. Union Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853.

What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the law means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances." Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 558, 22 Sup. Ct. 431, 46 L. Ed. 679, quoting Bowman v. Lewis, 101 U. S. 22, 25 L. Ed. 989; In re Doo Woon, 18 Fed. 898.

The South Carolina supreme court, in reference to the law imposing special liability for fires caused by locomotives, thus comments on the federal cases "Let it be noted . . . the classification for the imposition of special liability was not affected by the fact that there were other common carriers operating with steam which might communicate fire or whose employés might sustain injury through the negligence of their fellow servants; thus showing that a classification need not include all engaged in a general business, as the business of carrying freight and passengers, it may simply embrace a more limited class, who carry freight and passengers in a particular way, or by particular instrumentalities." McCandless v. R. Co., 38 S. C. 116, 16 S. E. 429, 18 L. R. A. 440.

State laws or official action held not to deny the equal protection of the laws are: Prescribing rules of evidence, as by preventing Chinese from testifying in a case where a white person is a party; People v. Brady, 40 Cal. 198, 6 Am. Rep. 604 (but under the Civil Rights Bill, negroes were entitled to the benefit of this law; People v. Washington, 36 Cal. 658); prohibiting the landing of lewd women from passenger steamers; Ex parte Ah Fook, 49 Cal. 402; regulating slaughter houses; Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; authorizing the recovery of double value for property destroyed by railroad trains; Tredway v. R. Co., 43 Ia. 527; excluding women from employment in saloons or other places where intoxicating liquor is sold; Ex parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701; Foster v. Board of Police Com'rs, 102 Cal. 483, 37 Pac. 763, 41 Am. St. Rep. 194; State v. Reynolds, 14 Mont. 383, 36 Pac. 449; City of Hoboken v. Goodman, 68 N. J. L. 217, 51 Atl. 1092; Bergman v. Cleveland, 39 Ohio St. 651; State v. Considine, 16 Wash. 358, 47 Pac. 755; In re Considine, 83 Fed. 157; but *contra*, In re Maguire, 57 Cal. 604, 40 Am. Rep. 125 (and an ordinance making it a misdemeanor for any woman to go into a bulding where liquor is sold, or to stand within fifty feet of such a building, was held an unnecessary interference with individual liberty; Gastenau v. Com., 108 Ky. 473, 56 S. W. 705, 49 L. R. A. 111, 94 Am. St. Rep. 386); prohibiting women from frequenting places for the sale of intoxicating liquors; Ex parte Smith, 38 Cal. 709; People v. Case, 153 Mich. 98, 116 N. W. 558, 18 L. R. A. (N. S.) 657; Cronin v. Adams, 192 U. S. 108, 24 Sup. Ct. 219, 48 L. Ed. 365, affirming Adams v. Cronin, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; imposing more severe penalties for adultery between persons of different races; Ellis v. State, 42 Ala. 525; Ford v. State, 53 Ala. 150; Green v. State, 58 Ala. 190, 29 Am. Rep. 739; Pace v. Alabama, 106 U. S. 583. 1 Sup. Ct. 637, 27 L. Ed. 207; forbidding marriages between whites and blacks; Hoover v. State, 59 Ala. 57; Ex parte Francois, 3 Woods 367, Fed. Cas. No. 5,047; Ex parte Kinney, 3 Hughes 9, Fed. Cas. No. 7,825; or declaring such marriages null and void; In re Hobbs, 1 Woods 537, Fed. Cas. No. 6,550; regulating the charges of storage warehouses; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Munn v. People, 69 Ill. 80; providing for territorial and municipal regulations for different parts

of the state; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989; forbidding bankers and brokers, knowing that they are insolvent, to receive money; Baker v. State, 54 Wis. 368, 12 N. W. 12; imposing a tax on corporations measured by the amount of dividends paid, part of such dividends being derived from capital invested in United States bonds exempted from taxation; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; the provision of the Mississippi constitution prescribing a test of literacy for voting; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012; an order dismissing a writ of *habeas corpus* and remanding to custody a prisoner held in contempt when it appeared that the same procedure would be applied to any other person in the state under similar circumstances and conditions; Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91; as a penalty for non-compliance with police regulations; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; allowing a reasonable attorney's fee as part of a judgment against a railroad company for damage by fire; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909 (distinguishing Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where a statute, allowing such fees in suits against railroad companies, for ordinary claims, was held unconstitutional); allowing a defendant on trial for homicide a less number of challenges with a struck jury than an ordinary one; Brown v. New Jersey, 175 U. S. 172, 20 Sup. Ct. 77, 44 L. Ed. 119; prohibiting any person, corporation or firm from issuing any order, etc., payable otherwise than in money —what are commonly known as store orders; Johnson, Lytle & Co. v. Spartan Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409; Frorer v. People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; establishing separate schools for colored children; Bertonneau v. Board, 3 Woods 177, Fed. Cas. No. 1,361; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; State v. McCann, 21 Ohio St. 198; Chrisman v. City of Brookhaven, 70 Miss. 477, 12 South. 458; Corey v. Carter, 48 Ind. 327, 17 Am. Rep. 738; see Marshall v. Donovan, 10 Bush. (Ky.) 681; denial of injunction against maintaining a high school for white children while failing to maintain one for colored children; Cumming v. County Board of Education, 175 U. S. 528, 20 Sup. Ct. 197, 44 L. Ed. 262; imposing upon railroad companies future liabilities for damages to employees by negligence of their fellow servants, etc., since it met a particular necessity, and all railroad companies without distinction were made subject to the same liability; Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Tullis v. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, making railroad companies liable for property destroyed by fire communicated by their locomotives, even though the liability did not depend on any negligence of the railroad company; St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; McCandless v. R. Co., 38 S. C. 116, 16 S. E. 429, 18 L. R. A. 440; giving damages for sheep grazing on public lands; Bown v. Walling, 204 U. S. 320, 27 Sup. Ct. 292, 51 L. Ed. 503; taxing transfers of corporate stock; New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736; the separation of white and black persons in public conveyances; Chilton v. Ry. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; West Chester & P. R. Co. v. Miles, 55 Pa. 209, 93 Am. Dec. 744; Anderson v. R. Co., 62 Fed. 46; or in theatres if equally good seats were provided for both; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558, 33 Am. St. Rep. 527 (but to require colored persons to occupy particular seats was held a violation of the Illinois Civil Rights Act of June 10, 1885; Baylies v. Curry, 128 Ill. 287, 21 N. E. 595).

In Adair v. U. S., 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann. Cas. 764, reversing U. S. v. Adair, 152 Fed. 737, it was held that congress could not make it a criminal offence against the United States for a carrier engaged in interstate commerce to discharge an employé simply because of membership in a labor organization, and that the provision to that effect in section 10 of the Act of June 1, 1898, was an invasion of personal liberty as well as of the right of property guaranteed by the Vth Amendment to the constitution and therefore unenforceable.

Statutes held to violate the guaranty of "equal protection of the laws are: A law taxing miners, which discriminates between persons of different races; U. S. v. Jackson, 3 Sawy. 59, Fed. Cas. No. 15,459; excluding colored children from the benefits of the public school system; Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405; or from sharing in the use of the common school fund; Dawson v. Lee, 83 Ky. 49 (but not establishing separate schools, see *supra*); discriminating against non-residents, with respect to legal remedies; Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276; discriminating between Chinese and other aliens; Baker v. Portland, 5 Sawy. 566, Fed. Cas. No. 777; In re Parrott, 6 Sawy. 349, 1 Fed. 481; a city ordinance requiring the cutting of a prisoner's hair, it being considered more degrading to the Chinese; Ho Ah Kon v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; forbidding the employment of Chinese; In re Parrott, 1 Fed. 481, 6 Sawy. 349; prohibiting aliens incapable of acquiring citizenship from fishing in public waters; In re Ah Chong, 6 Sawy. 451, 2 Fed. 733; authorizing the overseers of the poor to commit paupers and vagrants to the workhouse without trial;

City of Portland v. City of Bangor, 65 Me. 120, 20 Am. Rep. 681; prescribing a penalty and counsel fees in suits on insurance policies; Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; St. Louis, I. M. & S. Ry. Co. v. Williams, 49 Ark. 492, 5 S. W. 883; San Antonio & A. R. Ry. Co. v. Wilson (Tex.) 19 S. W. 910; Wilder v. Ry. Co., 70 Mich. 382, 38 N. W. 289; Lafferty v. Ry. Co., 71 Mich. 35, 38 N. W. 660; New York Life Ins. Co. v. Smith (Tex.) 41 S. W. 680. But it is said in a dissenting opinion in Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666: "The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee as part of the judgment in particular classes of actions selected by the legislature appears to have been upheld by the courts of most of the states in which it has been challenged; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Kansas Pac. Ry. Co. v. Yanz, *id.* 583; Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; Peoria, D. & E. Ry. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718; Perkins v. Ry. Co., 103 Mo. 52, 15 S. W. 320, 11 L. R. A. 426; Burlington, C. R. & N. Ry. Co. v. Dey, 82 Ia. 312, 48 N. W. 98, 12 L. R. A. 436, 31 Am. St. Rep. 477; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Gulf, C. & S. F. Ry. Co. v. Ellis, 87 Tex. 19, 26 S. W. 985; Cameron v. Ry. Co., 63 Minn. 384, 65 N. W. 652, 31 L. R. A. 553; Morris-Scarboro-Moffit Co. v. Express Co., 146 N. C. 167, 59 S. E. 667, 15 L. R. A. (N. S.) 983; Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, where it is further said: "The legislature of a state must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied, from observation and experience, that railroad corporations within the state were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and means of the claimants by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand."

An act was held void providing that a prisoner who escaped and was retaken should be punished by imprisonment for a term equal to his original one; In re Mallon, 16 Idaho 737, 102 Pac. 374, 22 L. R. A. (N. S.) 1123; so also a statutory provision for the imprisonment of one who after receiving advances commits a breach of a contract for farm labor; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242 with note, 14 Ann. Cas. 1105; and a statute regulating railroad rates, in which the penalties for violation were so excessive and enormous as to deter and intimidate parties affected from testing its validity in the courts; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 1164.

When a state, either through its legislature, courts, or administrative officers, excludes persons of the African race, solely because of race or color, from serving as grand jurors in the prosecution of a person of that race, the equal protection of the laws is denied him and a judgment of the state court, sustaining the conviction will be reversed; Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 905, 40 L. Ed. 1075; but statutes prescribing counsel fees have been in some distinguishing cases upheld, as in the case of wrongfully discharged railroad employees; St. Louis, I. M. & S. Ry. Co. v. Paul, 173 U. S. 409, 19 Sup. Ct. 419, 43 L. Ed. 746; or statutes against railroad companies for damage by fire from locomotives; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; and a law requiring monthly payment of corporation employees; Skinner v. Min. Co., 96 Fed. 743; or compelling railroad companies to pay employees at the time of discharge; St. Louis, I. M. & S. Ry. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154; or to furnish free return transportation to shippers of live stock; George v. Ry. Co., 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690; an act punishing any one who by threats or extortion obtains money from citizens or residents of a state; Greene v. State, 83 Neb. 84, 119 N. W. 6, 131 Am. St. Rep. 626; making it a misdemeanor to admit a child under sixteen to theatres except entertainments on piers; In re Van Horne, 74 N. J. Eq. 600, 70 Atl. 986; giving the owner of live stock accidentally killed or destroyed on a railroad track double its value; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356; one requiring owners and operators of coal mines to weigh coal in a certain specified manner; Millett v. People, 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869.

Probably the most numerous cases requiring the construction of this guaranty have arisen under statutes establishing some classification of persons, property or occupations.

The classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed, and can never be made arbitrarily and without any

such basis. . . . But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, quoted in Connolly v. Pipe Co., 184 U. S. 540, 560, 22 Sup. Ct. 431, 46 L. Ed. 679; Cotting v. Stock Yards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92; Bachtel v. Wilson, 204 U. S. 41, 27 Sup. Ct. 243, 51 L. Ed. 357.

"The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of an individual is, without compensation, wrested from him for the benefit of another or of the public." Cotting v. Stock Yards Co., 183 U. S. 79, 87, 22 Sup. Ct. 30, 46 L. Ed. 92 (quoting Reagan v. Loan & Trust Co., 154 U. S. 362, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014), where it was held that a classification between stockyards doing a large business and those doing a small business was invalid.

A state may without violating the guaranty put into one class all engaged in business of a special and public character and require them to perform a duty which they can do better and more quickly than others, and impose a penalty for non-performance; Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; where a penalty for the failure of a railroad to adjust and average claims within forty days was held constitutional.

Mere direction of the state law that under given circumstances the venue shall be changed does not violate the equal protection of the laws; Cincinnati Street Ry. Co. v. Snell, 193 U. S. 30, 24 Sup. Ct. 319, 48 L. Ed. 604; where it was said: "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords a fair opportunity to be heard before the issues are decided." "It is fundamental rights which the Fourteenth Amendment safeguards and not the mere form which a state may see proper to designate for the enforcement and protection of such rights."

The following statutes have been held to enact a reasonable classification, valid as not denying equal protection of the laws: Distinguishing between street railways and steam railroads in imposing a tax; Savannah, T. & I. of H. Ry. Co. v. Savannah, 198 U. S. 392, 25 Sup. Ct. 690, 49 L. Ed. 1097; between life and health companies and fire, marine and inland insurance companies with respect to taxation; Fidelity Mut. Life Ass'n v. Mettler, 185 U. S. 308, 22 Sup. Ct. 662, 46 L. Ed. 922; between bituminous coal mines and block coal mines as to working; Barrett v. Indiana, 229 U. S. 26, 33 Sup. Ct. 692, 57 L. Ed. ——; a distinction in inheritance tax laws between lineal and collateral relatives; Billings v. Illinois, 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 400; as also the exemption of step-children from the collateral inheritance tax on bequests and devises from step-parents; Com. v. Randall, 225 Pa. 197, 73 Atl. 1109; the exemption in a medical registration act of those who had practiced before a certain date or gratuitously or in a hospital; Watson v. Maryland, 218 U. S. 173, 30 Sup. Ct. 644, 54 L. Ed. 987; between individuals and corporations, the classification between the two being approved because of the difference of the power which the state may exercise over the doing of business within its borders by an individual on the one hand or a corporation on the other; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; of a municipal ordinance distinguishing between those having cows inside and those outside a city; Adams v. City of Milwaukee, 228 U. S. 572, 33 Sup. Ct. 610, 57 L. Ed. ——; a provision of one gas rate act for the municipality and another for individual consumers; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034; a discrimination between the residential and commercial portions of a city as to the height of buildings based on practical and not merely æsthetic grounds; Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. Ed. 923; or excepting churches from a statute limiting the height of buildings; Cochran v. Preston, 108 Md. 220, 70 Atl. 113, 23 L. R. A. (N. S.) 1163, 129 Am. St. Rep. 432, 15 Ann. Cas. 1048; a discrimination by a municipal corporation for the purpose of taxation between automobiles and other vehicles; Kersey v. Terre Haute, 161 Ind. 471, 68 N. E. 1027; classification of distilled spirits in bond as distinguished from other property in regard to the payment of interest on taxes; Thompson v. Kentucky, 209 U. S. 340, 28 Sup. Ct. 533, 52 L. Ed. 822.

So of the following: A state statute imposing a license tax on persons compounding, rectifying, adulterating or blending distilled spirits does not deny equal protection of the laws because it discriminates in favor of the distilleries and rectifiers or straight distilled spirits; Brown-Forman Co. v. Commonwealth of Kentucky, 217 U. S. 563, 30 Sup. Ct. 578, 54 L. Ed. 883, where the court accepted the construction by the highest

court of the state that the tax in question was not a property tax but a license tax imposed on the doing of a business. Other classifications held valid are one prohibiting drumming or soliciting on trains for any hotel, lodging house, eating house, bath house, physician, masseur, surgeon or other medical practitioner; Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, affirming 85 Ark. 470, 108 S. W. 838, 26 L. R. A. (N. S.) 482, 122 Am. St. Rep. 47 (where as in some other cases the statute was said by the court to meet an existing condition which was required to be met); of express companies with railroad and telegraph companies as subject to the unit rule; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, where the court said that there was "doubtless a distinction between the property of railroad and telegraph companies and that of express companies, the physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for one specific purpose and there are the same elements of value arising from such use." The case involved the constitutionality of an act requiring the apportionment of the value of the property of the express companies among the several counties, in which they did business, in the proportion which the gross receipts in each county bore to the gross receipts in the state and provided for a tax for county purposes on such proportion.

A statute defining express companies as those carrying on the business of transportation under contracts with steamboat companies or railroads did not invidiously discriminate as to express companies by exempting other companies from carrying express matter in vehicles of their own; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; nor did a state license tax on the business of refining sugar and molasses, by exempting planters and farmers refining their own sugar and molasses, deny equal protection of the laws; American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102; nor those which adjust the revenue laws of the state to favor certain industries; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; nor a collateral inheritance tax imposing a higher rate on strangers in blood and on larger sums; Magoun v. Sav. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037. The objection must come from one claiming to be discriminated against; Darnell v. Indiana, 226 U. S. 390, 33 Sup. Ct. 120, 57 L. Ed. 267, following New York v. Reardon, 204 U. S. 152, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736, distinguishing Spraigue v. Thompson, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115.

A state statute providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering even in the absence of bodily injury or pecuniary loss for negligence in receiving, transmitting or delivering messages" is based upon a reasonable and not an arbitrary classification and is not an unconstitutional discrimination against telegraph companies; Ivy v. Tel. Co., 165 Fed. 371; nor is one which recognizes a difference between ordinary vehicles and electric cars; Detroit, Ft. W. & B. I. Ry. v. Osborn, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860, where it was held that the commissioner of railroads had power to require an electric company to install safety devices and share the cost with the steam railroad on the same street notwithstanding the latter was the junior occupant. The exception of newspapers, etc., in a law forbidding the use of the flag for advertising purposes, does not violate the prohibition; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525; nor does singling out the milk business, in a city, as a proper subject of regulation; New York v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305; nor the selection of mine owners as a class to be subjected to responsibility for the defaults of certain employees; Wilmington Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708.

Classification was held proper between itinerant dealers in sewing machines and those selling in regularly established places of business; Singer Sewing Mach. Co. v. Brickell, 199 Fed. 654; and also one of railroad employees as distinct from those of other carriers; Mondou v. R. Co., 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; and a statute prohibiting the sale of adulterated milk; St. John v. New York, 201 U. S. 633, 26 Sup. Ct. 554, 50 L. Ed. 896, 5 Ann. Cas. 909; and one regulating the sale of mixed paints and requiring a label showing the ingredients is not an unconstitutional discrimination against the manufacture and sale of paste paint, which is a substantial part of the paint business; Heath & Milligen Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; nor a statute forbidding the employment of workingmen for more than eight hours a day in mines and in the smelting reduction or refining of ores and metals; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780 (and see comments thereon in Johnson, Lytle & Co. v. Mills, 68 S. C. 339, 47 S. E. 695, 1 Ann. Cas. 409); a statute requiring, for the safety of persons employed therein, the owner or agent of every coal mine or colliery to make an accurate map of the workings; Daniels v. Hilgard, 77 Ill. 640; and another prohibiting the employment of persons under eighteen and of women from laboring more than sixty hours a week; Com. v. Mfg. Co., 120 Mass. 383; a statute making eight hours a

day's work for all laborers except farm and domestic; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201; one authorizing a state commission to fix the maximum price to be charged for service by gas and electric light companies, and an order of the commission fixing the maximum price of gas or electricity for three years was held to be reasonable and valid, but the further provision that the rate so fixed should continue indefinitely thereafter until fixed anew on complaint made was inequitable and violated the guaranty of equal protection of the laws, inasmuch as the statute did not confer equal rights on both parties, authorizing only certain municipal officers or a designated number of consumers to make complaint, and giving no opportunity to the company at the end of three years, or at any time thereafter, to apply for a new adjustment of rates; Village of Saratoga Springs v. Power Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. An act requiring the substitution of water-closets for school sinks in tenement houses; Tenement House Dep't of New York v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439; one providing that having in possession more than a quart of liquor, without license to sell, shall be *prima facie* evidence of intent to make an illegal sale thereof; State v. Barrett, 138 N. C. 630, 50 S. E. 506, 1 L. R. A. (N. S.) 626, and note; an act regulating the keeping of employment agencies in cities of first and second class; People v. Warden of City Prison, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325; an act imposing heavier punishment on criminals for a second offence; McDonald v. Com., 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301; Ughbanks v. Armstrong, 208 U. S. 481, 28 Sup. Ct. 372, 52 L. Ed. 582; one imposing a license tax on all laundries not run by steam; Quong Wing v. Kirkendall, 223 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350; an act requiring certain public service corporations to pay employees each week in lawful money; Lawrence v. R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; an act imposing on railroad companies the weekly payment of wages; Skinner v. Min. Co., 96 Fed. 735 (but see *infra*); were all held valid.

A statute was held valid requiring an examination of graduates of *foreign* medical colleges as a prerequisite to obtaining a license to practice medicine, the same not being required of graduates of colleges in the state; State v. Currens, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; and so were statutes recognizing the diploma of some named medical schools as sufficient for permission to practice medicine; Shaw, C. J., in Hewitt v. Charier, 16 Pick. (Mass.) 353; Wright v. Lanckton, 19 Pick. (Mass.) 288; Bibber v. Simpson, 59 Me. 181; Brooks v. State, 88 Ala. 122, 6 South. 902; and statutes accepting as sufficient the approval of a state dental association for practicing dentistry; Wilkins v. State, 113 Ind. 514, 16 N. E. 192; or the fact of practicing in the state at the date of the law as a sufficient reason for exemption from examination to practice medicine; State v. Creditor, 44 Kan. 565, 24 Pac. 346, 21 Am. St. Rep. 306; and one which distinguished between graduates of a university or college authorized to grant diplomas in dental surgery and those of a regular college of dentistry; State v. Knowles, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695.

The legal duty of persons, firms or corporations operating railroads may be of a peculiar nature, and essentially different from the duties of other persons, firms or corporations, or even different from other common carriers, such, for example, as the fencing of tracks, the operation of trains, construction of tracks, maintenance or operation of terminals, depots, or crossings, protection of employees, and the like. As to such matters peculiar to railroads, they may be separately classified for the purposes of legislative regulation; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Missouri Pac. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; Tullis v. R. Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; Pittsburgh, C., C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033, and other cases *supra*. That the peculiar rights, duties and responsibilities of common carriers justifies a classification including only common carriers is held in Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; but where the particular subject of legislative regulation discriminates against one class of common carriers (in this case railroad companies were required to pay for the loss of or damage to any shipment the sum of 25 per cent per annum on the principal sum of the claim) it was held unreasonable, as imposing upon one class of carriers a burden to which others are not subjected; Seaboard A. L. R. Co. v. Simon, 56 Fla. 545, 47 South. 1001, 20 L. R. A. (N. S.) 126, 16 Ann. Cas. 1234. Where, however a statute imposed a penalty on railroad companies for delay in the delivery of freight, it was held not an unwarranted discrimination against such carriers as singling them out from all other carriers engaged in the same business, as carriage by water is subject to many contingencies which do not affect carriage by rail-

roads, and it would not be reasonable to subject both alike to the same regulations as to time; McCutchen v. R. Co., 81 S. C. 71, 61 S. E. 1108.

Statutes held void as against both guaranties of the 14th Amendment are those imposing a high privilege tax on lenders of money upon furniture etc.; Rodge v. Kelly, 88 Miss. 209, 40 South. 552, 11 L. R. A. (N. S.) 635, 117 Am. St. Rep. 733; Ex parte Sohncke, 148 Cal. 262, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; (*aliter* as to a statute limiting the amount of interest; State v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L. R. A. [N. S.] 174; or requiring certain specifications in the instrument securing the loan; In re Home Discount Co., 147 Fed. 538; or requiring a license to do the business; City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881; Cowart v. City Council of Greenville, 67 S. C. 35, 45 S. E. 122; State v. Wickenhoefer, 6 Pennewill [Del.] 120, 64 Atl. 273).

Among the acts held void as against the equality clause are those forbidding store orders in payment of wages; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; State v. Coal & Coke Co., 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. Rep. 891; requiring weekly payment of wages by certain corporations; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. Rep. 206 (*contra*, Skinner v. Mining Co., 96 Fed. 735); imposing on private corporations a liability for injuries to employees as being an abrogation of the fellow servant rule which does not exist in case of individuals; Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 N. E. 529, 14 L. R. A. (N. S.) 418; an ordinance prohibiting the use of property for business on certain streets; City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; an act forbidding combinations in restraint of trade, except agricultural products and live stock in the hands of the producer; In re Grice, 79 Fed. 627; an ordinance allowing four livery stables in the business centre of the city while the fifth and all others must be relegated and confined to a remote district; Town of Crowley v. West, 52 La. Ann. 526, 27 South. 53, 47 L. R. A. 652, 78 Am. St. Rep. 355; a Missouri statute prescribing a different registration law for St. Louis from that of other cities in the state; Mason v. Missouri, 179 U. S. 328, 21 Sup. Ct. 125, 45 L. Ed. 214; a classification for taxation distinguishing between retail and wholesale dealers; Cook v. Marshall County, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471; or between different occupations; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; an act permitting water from coal mines and tunnels and city sewage to flow into streams and prohibiting individuals and corporations to do the same; Com. v. Emmers, 221 Pa. 298, 70 Atl. 762; an act setting apart mineral springs bored in the rock as a class by themselves; Hathorn v. Gas Co., 128 App. Div. 33, 112 N. Y. Supp. 374; forbidding barbers, and barbers only, from keeping open their shops or working their trade on Sundays; Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; City of Tacoma v. Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68 (*contra*, McClelland v. City of Denver, 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas. 1014; Ex parte Northrup, 41 Or. 489, 69 Pac. 445); providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city; Durkee v. City of Janesville, 28 Wis. 464, 9 Am. Rep. 500; authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature; City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808, 20 Am. St. Rep. 123; prohibiting persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as was specified in the act; State v. Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; limiting recovery in suits brought for libel in certain cases to actual damages as defined in the act; Park v. Free Press Co., 72 Mich. 560, 40 N. W. 731, 1 L. R. A. 599, 16 Am. St. Rep. 544; providing that no damages for injury to persons or property caused by a defect in the highway could be recovered of any city or town by any person, who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not, by the laws of that country recoverable; Pearson v. City of Portland, 69 Me. 278, 31 Am. Rep. 276.

In Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, the court said: "The specific regulations for one kind of business which may be necessary for the protection of the public can never be a just ground of complaint because like restrictions are not imposed upon a business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions."

Whether a classification under a statute is a denial of equal protection of the laws "is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the distinctions void, though they may not consider

it on a sound basis. The test is not wisdom, but good faith in the classification." Seabolt v. Com'rs of Northumberland County, 187 Pa. 318, 41 Atl. 22; Com. v. Randall, 225 Pa. 197, 73 Atl. 1109.

The effect of the prohibition is that a state is hereby prevented from depriving particular persons or classes of persons of equal and impartial justice under the law; Caldwell v. Texas, 137 U. S. 692, 11 Sup. Ct. 224, 34 L. Ed. 816; as was said by the court in other cases, "no person or class shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances," quoted from Missouri v. Lewis, 101 U. S. 22, 31, 25 L. Ed. 989, in Connolly v. Sewer Pipe Co., 184 U. S. 540, 559, 22 Sup. Ct. 431, 46 L. Ed. 679, where the Illinois Anti-Trust Act of 1893 was held unconstitutional.

Congress may not by penal statutes enforce the guaranty of equal protection of the laws, as it is directed against legislation by the states; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290.

The classification of crimes should be natural and not arbitrary and should be made with reference to the heinousness of the crime and not to matters disconnected therewith; In re Mallon, 16 Idaho 737, 102 Pac. 374, 22 L. R. A. (N. S.) 1123.

EQUALITY. Likeness in possessing the same rights and being liable to the same duties. See 1 Toullier, nn. 170, 193.

The word *equal* implies, not identity, but duality; the use of one thing as the measure of another. Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 624, 2 L. R. A. 289; Little Rock & M. R. Co. v. R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192.

Judges in court, while exercising their functions, are all upon an equality, it being a rule that *inter pares non est potestas:* a judge cannot, therefore, punish another judge of the same court for using any expression in court, although the words used might have been a contempt in any other person. Bacon, Abr., *Of the Court of Sessions, Of Justices of the Peace.*

In contracts, the law presumes that the parties act upon a perfect equality: when, therefore, one party uses any fraud or deceit to destroy this equality, the party grieved may avoid the contract. In case of a grant to two or more persons jointly, without designating what each takes, they are presumed to take in equal proportions; Treadwell v. Bulkley, 4 Day (Conn.) 395, 4 Am. Dec. 225; Henderson v. Womack, 41 N. C. 437; Appeal of Young, 83 Pa. 59.

It is a maxim that when the equity of the parties is equal, the law must prevail; Johnson v. Brown, 3 Call (Va.) 259; and that as between different creditors, equality is equity; De La Vergne v. Evertson, 1 Paige, Ch. (N. Y.) 181, 19 Am. Dec. 411. See Kames, Eq. 75; EQUITY.

Equalization in revenue statutes means to bring the assessment of different parts of a taxing district to the same relative standard; Huidekoper v. Hadley, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505.

See TAX.

EQUINOX. The name given to two periods of the year when the days and nights are equal; that is, when the space of time between the rising and setting of the sun is one-half of a natural day. The *vernal* equinox occurs about March 21, the *autumnal* about September 23.

EQUIPMENT. Furnishings for the required purposes. In a legacy to be applied toward the rebuilding and equipment of a hospital it was held equipment meant everything required to convert an empty building into a hospital; 75 L. J. Ch. 163.

EQUITABLE ASSETS. Such assets as are chargeable with the payment of debts or legacies in equity, and which do not fall under the description of legal assets.

Those portions of the property which by the ordinary rules of law are exempt from debts, but which the testator has voluntarily charged as assets, or which, being non-existent at law, have been created in equity. Ad. Eq. 254.

They are so called because they can be reached only by the aid and instrumentality of a court of equity, and because their distribution is governed by a different rule from that which governs the distribution of legal assets. 2 Fonb. Eq. b. 4, pt. 2, c. 2, § 1, and notes; 2 Vern. 763; Willes 523; 3 Woodd. Lect. 486; Story, Eq. Jur. § 552.

The doctrine of equitable assets has been much restricted in the United States generally, and has lost its importance in England since the act of 1870, providing that simple contract and specialty creditors are, in future, payable *pari passu* out of both legal and equitable assets; Bisph. Eq. § 531; Benson v. Le Roy, 4 Johns. Ch. (N. Y.) 651; Backhouse v. Patton, 5 Pet. (U. S.) 160, 8 L. Ed. 82; Black v. Scott, 2 Brock. 325, Fed. Cas. No. 1,464; Hopkins v. Morgan's Ex'r, 3 Dana (Ky.) 18; Speed's Ex'r v. Nelson's Ex'r, 8 B. Monr. (Ky.) 499; Henderson v. Burton's Ex'r, 38 N. C. 259.

EQUITABLE ASSIGNMENT. An assignment of a *chose in action,* a thing not *in esse,* as a mortgage of personal property to be acquired in the future, and a mere contingency which, though not good at law, equity will recognize. Bisph. Eq. § 164; 10 H. L. Cas. 209; Butt v. Ellett, 19 Wall. (U. S.) 544, 22 L. Ed. 183; Shephard v. Clark, 38 Ill. App. 66; Bacon v. Bonham, 33 N. J. Eq. 614; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96. In making such an assignment, no particular form of words is necessary; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Noyes v. Brown, 33 Vt. 431; Gage v. Dow, 59 N. H.

383; Bower v. Stone Co., 30 N. J. Eq. 171; but the property must be specifically pointed out; Morrill v. Noyes, 56 Me. 465, 96 Am. Dec. 486; Benj. Sales 62; and there must be an appropriation or separation, and the mere intent to appropriate is not sufficient; Putnam Sav. Bank v. Beal, 54 Fed. 577; Shannon v. Mayor, etc., of Hoboken, 37 N. J. Eq. 123. A valid assignment may be made of a portion of the contract price of a building contracted to be erected by the assignor, but not yet erected, and such assignment need not be written nor accompanied by any transfer of the contract itself; Lanigan's Adm'r v. Bradley & Currier Co., 50 N. J. Eq. 201, 24 Atl. 505. The assignee of a *chose in action* takes it subject to existing equities in favor of third persons, as well as to those between the original parties; Schafer v. Reilly, 50 N. Y. 67; 3 Lead. Cas. Eq. 372, n. Equity will not recognize the assignment of certain kinds of property as against the policy of the law, such as, mere litigious rights, pensions, salaries of judges, commissions of officers in the army or navy, claims against the United States, and the like; 1 E. L. & Eq. 153; Appeal of Elwyn, 67 Pa. 369; L. R. 7 Ch. 109; 8 *id.* 76; Wanless v. U. S., 6 Ct. Cl. 123; Bates v. U. S., 4 Ct. Cl. 569; St. Paul & D. R. Co. v. U. S., 112 U. S. 733, 5 Sup. Ct. 366, 28 L. Ed. 861. The assignment of secured notes carries with it an equitable assignment of the security; Himrod v. Bolton, 44 Ill. App. 516. See ASSIGNMENT; EXPECTANCY.

EQUITABLE CONVERSION. See CONVERSION.

EQUITABLE DEFENCE. A defence to an action on grounds which, prior to the passing of the Common Law Procedure Act (17 and 18 Vict. c. 125), would have been cognizable only in a court of equity. Moz. & W. The codes of procedure and the practice in some of the states likewise permit both a legal and equitable defence to the same action.

EQUITABLE ELECTION. See ELECTION OF RIGHTS.

EQUITABLE ESTATE. A right or interest in land, which, not having the properties of a legal estate, but being merely a right of which courts of equity will take notice, requires the aid of such court to make it available.

These estates consist of uses, trusts, and powers. They possess in some respects the qualities of legal estates in modern law; Davis v. Mason, 1 Pet. (U. S.) 508, 7 L. Ed. 239; Houghton v. Hapgood, 13 Pick. (Mass.) 154; Ege v. Medlar, 82 Pa. 86; Dunscomb v. Dunscomb, 1 Johns. Ch. (N. Y.) 508, 7 Am. Dec. 504; 2 Vern. 536; 1 Bro. C. C. 499; Wms. R. P. 134; 1 Spence, Eq. Jur. 501; 1 Washb. R. P. 130, 161.

A contract for the sale of land gives the buyer an equitable estate; an interest which he can resell, or dispose of by will, etc.; his title is good against every one except a "purchaser for value without notice"; Pollock, First Book of Jurispr. 212.

EQUITABLE ESTOPPEL. See ESTOPPEL.

EQUITABLE MORTGAGE. A lien upon real estate of such a character that it is recognized in equity as a security for the payment of money and is treated as a mortgage. A mortgage of a merely equitable estate or interest is also so called.

Such a mortgage may exist by a deposit with the lender of money of the title-deeds to an estate; Story, Eq. Jur. § 1020; Bisph. Eq. 161; 1 Bro. Ch. C. 269; 17 Ves. 230; Mandeville v. Welch, 5 Wheat. (U. S.) 277, 5 L. Ed. 87; 20 Beav. 607. They must have been deposited as a present, *bona fide* security; 1 Washb. R. P. 503; and the mortgagee must show notice to affect a subsequent mortgagee of record; Hall v. McDuff, 24 Me. 311; 3 Hare 416; Story, Eq. Jur. § 1020. Such mortgages are recognized in some states; Hall v. McDuff, 24 Me. 311; Williams v. Stratton, 10 Smedes & M. (Miss.) 418; Hackett v. Reynolds, 4 R. I. 512; but under the usual system of the registration of deeds are of infrequent occurrence.

The doctrine is repudiated in many jurisdictions; Lehman, Durr & Co. v. Collins, 69 Ala. 127; Pierce v. Parrish, 111 Ga. 725, 37 S. E. 79; Gothard v. Flynn, 25 Miss. 58; Bloomfield State Bank v. Miller, 55 Neb. 243, 75 N. W. 569, 44 L. R. A. 387, 70 Am. St. Rep. 381; Harper v. Spainhour, 64 N. C. 629; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; on the ground that it would tend to embarrass lands with secret trusts; Lehman, Durr & Co. v. Collins, 69 Ala. 127; as coming in conflict with the statute of frauds, which provides that all agreements for the sale of land, etc., should be in writing, etc.; Williams v. Stratton, 10 Smedes & M. (Miss.) 418; and as being contrary to acts for the recording of mortgages, and for recording liens for public information; Shitz v. Dieffenbach, 3 Pa. 233. In Georgia the code declares that the delivery of title deeds creates no pledge; Davis v. Davis, 88 Ga. 191, 14 S. E. 194. When, however, a written agreement accompanies the deposit of the title deeds, such agreement may become the basis for an equitable lien; Woodruff v. Adair, 131 Ala. 530, 32 South. 515.

No particular formality is necessary in order to make a valid mortgage between the parties thereto; Frick v. Fritz, 115 Ia. 438, 88 N. W. 961, 91 Am. St. Rep. 165. If the transaction resolves itself into a security, whatever may be its form, in equity it is a mortgage; Flagg v. Mann, 2 Sumn. 533, Fed. Cas. No. 4,847. A lien created by contract and not sufficient as a legal mortgage, will generally be regarded as partaking of the nature of an equitable mortgage; Kyle v. Bellenger, 79 Ala. 516. Though a lien may not be expressed in terms, equity will imply a security from

the nature of the transaction, and give effect to it, as such, in furtherance of the agreement of the parties, if there appears an intention to create a security; Wood v. Holly Mfg. Co., 100 Ala. 326, 13 South. 948, 46 Am. St. Rep. 56. The form of the writing is not important provided it sufficiently appears that it was thereby intended to create a security; Howard v. Iron & Land Co., 62 Minn. 298, 64 N. W. 896; and to the same effect, Higgins v. Manson, 126 Cal. 467, 58 Pac. 907, 77 Am. St. Rep. 192; Martin v. Bowen, 51 N. J. Eq. 452, 26 Atl. 823; Dulaney v. Willis, 95 Va. 606, 29 S. E. 324, 64 Am. St. Rep. 815; Hackett v. Watts, 138 Mo. 502, 40 S. W. 113.

To place in the hands of another a deed to real estate, together with a written memorandum stating that the property is pledged to secure the other against loss from becoming a surety for the owner, will create an equitable lien enforceable against the owner's assignee for creditors; In re Snyder, 138 Ia. 553, 114 N. W. 615, 19 L. R. A. (N. S.) 206.

Such a mortgage has been said to exist in favor of the vendor of real estate as security for purchase-money due from the purchaser; in which case a lien is recognized in some jurisdictions; 15 Ves. 339; 1 Bro. Ch. C. 420, 424, n. It is occasionally spoken of as an equitable mortgage; Moreton v. Harrison, 1 Bland (Md.) 491, though it is doubtful if it is to be so considered. It is properly termed vendor's lien, which see. See also LIEN.

EQUITABLE WASTE. See WASTE.

EQUITATURA. **In Old English Law.** Needful equipments for riding or travelling.

EQUITY. A branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

In the broad sense in which this term is sometimes used it signifies natural justice.

In a more limited application, it denotes equal justice between contending parties. This is its moral signification, in reference to the rights of parties having conflicting claims; but applied to courts and their jurisdiction and proceedings, it has a more restrained and limited signification.

One division of courts is into courts of law and courts of equity. And equity, in this relation and application, is a branch of remedial justice by and through which relief is afforded to suitors in the courts of equity.

The difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render; because the pleadings cannot fully present all the matters in controversy, nor can the judgments be adapted to the special exigencies which may exist in particular cases. It is not uncommon, also, for cases to fail in those courts, from the fact that too few or too many persons have been joined as parties, or because the pleadings have not been framed with sufficient technical precision.

The remedial process of the courts of equity, on the other hand, admits, and, generally, requires, that all persons having an interest shall be made parties, and makes a large allowance for amendments by summoning and discharging parties after the commencement of the suit. The pleadings are usually framed so as to present to the consideration of the court the whole case, with its possible legal rights, and all its equities,—that is, all the grounds upon which the suitor is or is not entitled to relief upon the principles of equity. And its final remedial process may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exists, by "commanding what is right, and prohibiting what is wrong." In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, either by commanding what is to be done, or prohibiting what is threatened to be done.

The principles upon which, and the modes and forms by and through which, justice is administered in the United States, are derived to a great extent from those which were in existence in England at the time of the settlement of this country; and it is therefore important to a correct understanding of the nature and character of our own jurisprudence, not only to trace it back to its introduction here on the early settlement of the colonies, but also to trace the English jurisprudence from its earliest inception as the administration of law, founded on principles, down to that period. It is in this way that we are enabled to explain many things in our own practice which would otherwise be entirely obscure. This is particularly true of the principles which regulate the jurisdiction and practice of the courts of equity, and of the principles of equity as they are now applied and administered in the courts of law which at the present day have equitable jurisdiction conferred upon them by statutes passed for that purpose. And for the purpose of a competent understanding of the course of decisions in the courts of equity in England, it is necessary to refer to the origin of the equitable jurisdiction there, and to trace its history, inquiring upon what principles it was originally founded, and how it has been enlarged and sustained.

The study of equity jurisprudence, therefore, comprises an inquiry into the origin and history of the courts of equity; the distinctive principles upon which jurisdiction in equity is founded; the nature, character, and extent of the jurisdiction itself; its peculiar remedies; the rules and maxims which regulate its administration; its remedial process and proceedings and modes of defence; and its rules of evidence and practice.

"The meaning of the word 'equity,' as used in its technical sense in English jurisprudence, comes back to this: that it is simply a term descriptive of a certain field of jurisdiction exercised in the English system, by certain courts, and of which the extent and boundaries are not marked by lines founded upon principle so much as by the features of the original constitution of the English scheme of remedial law, and the accidents of its development." Bisph. Eq. § 11.

ORIGIN AND HISTORY. The courts of equity may be said to have their origin as far back as the Aula or Curia Regis, the great court in which the king administered justice in person, assisted by his counsellors. Of the officers of this court, the chancellor was one of great trust and confidence, next to the king himself; but his duties do not distinctly appear at the present day. On the dissolution of that court, he exercised separate duties.

On the introduction of seals, he had the keeping of the king's seal, which he affixed to charters and deeds; and he had some authority in relation to the king's grants,—perhaps annulling those which were alleged

to have been procured by misrepresentation or to have been issued unadvisedly.

As writs came into use, it was made his duty to frame and issue them from his court, which, as early as the reign of Henry II., was known as the chancery. And it is said that he exercised at this period a sort of equitable jurisdiction by which he mitigated the rigor of the common law,—to what extent it is impossible to determine. He is spoken of as one who "annuls unjust laws, and executes the rightful commands of the pious prince, and puts an end to what is injurious to the people or to morals,"—which would form a very ample jurisdiction; but it seems probable that this was according to the authority or direction of the king, given from time to time in relation to particular cases. He was a principal member of the king's council, after the conquest, in which, among other things, all applications for the special exercise of the prerogative in regard to matters of judicial cognizance were discussed and decided upon. In connection with the council, he exercised a separate authority in cases in which the council directed the suitors to proceed in chancery. The court of chancery is said to have sprung from this council. But it may be said that it had its origin in the prerogative of the king, by which he undertook to administer justice, on petitions to himself, without regard to the jurisdiction of the ordinary courts, which he did through orders to his chancellor. The great council, or parliament, also sent matters relating to the king's grants, etc., to the chancery; and it seems that the chancellor, although an ecclesiastic, was the principal actor as regards the judicial business which the select or king's council, as well as the great council, had to advise upon or transact. In the reign of Edward I. the power and authority of the chancellor were extended by the statute of Westminster 2d.

In the time of Edward III. proceedings in chancery were commenced by petition or bill, the adverse party was summoned, the parties were examined, and chancery appears as a distinct court for giving relief in cases which required extraordinary remedies, the king having, "by a writ, referred all such matters as were of *grace* to be dispatched by the chancellor or by the keeper of the privy seal."

It may be considered to have been fully established as a separate and permanent jurisdiction, from the 17th of Richard II.

In the time of Edward IV. the chancery had come to be regarded as one of the four principal courts of the kingdom. From this time its jurisdiction and the progress of its jurisdiction become of more importance to us.

It is the tendency of any system of legal principles, when reduced to a practical application, to fail of effecting such justice between party and party as the special circumstances of a case may require, by reason of the minuteness and inflexibility of its rules and the inability of the judges to adapt its remedies to the necessities of the controversy under consideration. This was the case with the Roman law; and, to remedy this, edicts were issued from time to time, which enabled the consuls and prætors to correct "the scrupulosity and mischievous subtlety of the law;" and from these edicts a code of equitable jurisprudence was compiled.

So the principles and rules of the common law, as they were reduced to practice, became in their application the means of injustice in cases where special equitable circumstances existed, of which the judge could not take cognizance because of the precise nature of its titles and rights, the inflexible character of its principles, and the technicality of its pleadings and practice. And in a manner somewhat analogous to the Roman mode of modification, in order to remedy such hardships, the prerogative of the king or the authority of the great council was exercised in ancient times to procure a more equitable measure of justice in the particular case, which was accomplished through the court of chancery.

This was followed by the "*invention*" of the writ of subpœna by means of which the chancery assumed, upon a complaint made directly to that court, to require the attendance of the adverse party, to answer to such matters as should be objected against him. Notwithstanding the complaints of the commons, from time to time, that the course of proceeding in chancery "was not according to the course of the common law, but the practice of the holy church," the king sustained the authority of the chancellor, the right to issue the writ was recognized and regulated by statute, and other statutes were passed conferring jurisdiction where it had not been taken before. In this way, without any compilation of a code, a system of equitable jurisprudence was established in the court of chancery, enlarging from time to time; the decisions of the court furnishing an exposition of its principles and of their application. It is said that the jurisdiction was greatly enlarged under the administration of Cardinal Wolsey, in the time of Henry VIII. The courts of equity also began to act *in personam* and to enjoin plaintiffs in common-law courts from prosecuting inequitable suits. A controversy took place between Lord Chancellor Ellesmere and Lord Coke, Chief Justice of the King's Bench, in the time of James I., respecting the right of the chancellor to interfere with any of the proceedings and judgments of the courts of law. The king sustained the chancellor; and from that time the jurisdiction then claimed has been maintained. See The Earl of Oxford's Case, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 601; Bisph. Eq. § 407; 1 Poll. & Maitl. 172; 1 Hallam, Const. Hist. 472; CANCELLARIUS.

It is from the study of these decisions and

the commentaries upon them that we are enabled to determine, with a greater or less degree of certainty, the time when and the grounds upon which jurisdiction was granted or was taken in particular classes of cases, and the principles upon which it was administered. And it is occasionally of importance to attend to this; because we shall see that, chancery having once obtained jurisdiction, that jurisdiction continues until expressly taken away, notwithstanding the intervention of such changes in common-law practice and rules as, if they had been made earlier, would have rendered the exercise of jurisdiction in equity incompatible with the principles upon which it is founded.

A brief sketch of some of the principal points in the origin and history of the court of chancery may serve to show that much of its jurisdiction exists independently of any statute, and is founded upon an assumption of a power to do equity, having its first inception in the prerogative of the king, and his commands to do justice in individual cases, extending itself through the action of the chancellor, to the issue of a writ of summons to appear in his court without any special authority for that purpose, and, upon the return of the subpœna, to the reception of a complaint, to a requirement upon the party summoned to make answer to that complaint, and then to a hearing and decree, or judgment, upon the merits of the matters in controversy, according to the rules of equity and good conscience.

It appears as a noticeable fact that the jurisdiction of the chancery proceeded originally from and was sustained by successive kings of England against the repeated remonstrances of the commons, who were for adhering to the common law; though not, perhaps, approving of all its rigors, as equity had been to some extent acknowledged as a rule of decision in the common-law courts.

This opposition of the commons may have been owing in part to the fact that the chancellor was in those days usually an ecclesiastic, and to the existing antipathy among the masses of the people to almost everything Roman.

The master of the rolls, who for a long period was a judicial officer of the court of chancery, second only to the chancellor, was originally a clerk or keeper of the rolls or records, but seems to have acquired his judicial authority from being at times directed by the king to take cognizance of and determine matters submitted to him.

Distinctive Principles. It is quite apparent that some principles other than those of the common law must regulate the exercise of such a jurisdiction. That law could not mitigate its rigor upon its own principles. And as, down to the time of Edward III., and, with few exceptions, to the 21st of Henry VIII., the chancellors were ecclesiastics, much more familiar with the principles of the Roman law than with those of the common law, it was but a matter of course that there should be a larger adoption of the principles of that law; and the study of it is of some importance in this connection. Still, that law cannot be said to be of *authority* even in equity proceedings. The commons were jealous of its introduction. "In the reign of Richard II. the barons protested that they would never suffer the kingdom to be governed by the Roman law, and the judges prohibited it from being any longer cited in the common-law tribunals."

This opposition of the barons and of the common-law judges furnished very sufficient reasons why the chancellors should not profess to adopt that law as the rule of decision. In addition to this, it was not fitted, in many respects, to the state of things existing in England; and so the chancellors were of necessity compelled to act upon equitable principles as expounded by themselves. In later times the common-law judges in that country have resorted to the Roman law for principles of decision to a much greater extent than they have given credit to it.

Since the time of Henry VIII. the chancery bench has been occupied by some of the ablest lawyers which England has produced, and they have given to the proceedings and practice in equity definite rules and forms, which leave little to the personal discretion of the chancellor in determining what equity and good conscience require. The discretion of the chancellor is a judicial discretion, to be exercised according to the principles and practice of the court. See Discretion.

The avowed principle upon which the jurisdiction was at first exercised was the administration of justice according to honesty, equity, and conscience,—which last, it is said, was unknown to the common law as a principle of decision.

In the 15th of Richard II. two petitions, addressed to the king and the lords of parliament, were sent to the chancery to be heard, with the direction, "Let there be done, by the authority of parliament, that which right and reason and good faith and good conscience demand in the case."

These may be said to be the general principles upon which equity is administered at the present day.

Although in its origin the result of efforts to avoid hardships sometimes resulting from the rigorous application of legal rules and processes, it has in modern times developed into a settled system; McElroy v. Masterson, 156 Fed. 36, 84 C. C. A. 202; and as was said in [1903] 2 Ch. 174, 195, it is not a court of conscience, in the sense that there being no question of legal liability, ripe for discussion, there was no occasion for judicial action.

The distinctive principles of the courts of equity are shown, also, by the classes of cases in which they exercise jurisdiction and

give relief,—allowing it to be sought and administered through process and proceedings of less formality and technicality than are required in proceedings at law. This, however, has its limitations, some of its rules of pleading in defence being quite technical. And it is another peculiar feature that the relief is administered by a decree or process adapted to the exigencies of the particular case.

It was said by Jessel, M. R., in L. R. 13 Ch. D. 696, 710: "It must not be forgotten that the rules of the court of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but they were invented. Take such things as these: The separate use of a married woman, the restraint on alienation, the modern rule against perpetuities, and the rules of equitable waste. We can name the chancellors who first invented them, and state the date when they were first introduced into equity jurisprudence; and, therefore, in cases of this kind, the older precedents in equity are of very little value. The doctrines are progressive, refined and improved; and if we want to know what the rules of equity are, we must look, of course, rather to the more modern than the more ancient cases."

Jurisdiction. It is difficult to reduce a jurisdiction so extensive and of such diverse component parts to a rigid and precise classification. But an approach to it may be made. The general nature of the jurisdiction has already been indicated. It exists—

First, for the purpose of compelling a *discovery* from the defendant, respecting the truth of the matters alleged against him, by an appeal to his conscience to speak the truth. The discovery is enforced by requiring an answer to the allegations in the plaintiff's complaint, in order that the plaintiff may use the matters disclosed in the answer, as admissions of the defendant, and, thus, evidence is secured for the plaintiff, either in connection with and in aid of other evidence offered by the plaintiff, or to supply the want of other evidence on his part; or it may be to avoid the expense to which the plaintiff must be put in procuring other evidence to sustain his case.

When the plaintiff's complaint, otherwise called a bill, prays for relief in the same suit, the statements of the defendant in his answer are considered by the court in forming a judgment upon the whole case. A party, if uncertain to what specific relief he is entitled, may frame his bill with an alternative prayer for relief; Hardin v. Boyd, 113 U. S. 756, 763, 5 Sup. Ct. 771, 28 L. Ed. 1141; but he may not recognize a transaction and pray for the enforcement of his rights thereunder and ask that it be set aside as a fraud, particularly without specifying in what particular; Cella v. Brown, 144 Fed. 742, 75 C. C. A. 608.

To a certain extent, the statements of the defendant in answer to the bill are evidence for himself also.

The discovery which may be required is not only of facts within the knowledge of the defendant, but may, also, be of deeds and other writings in his possession.

The right to discovery is not, however, an unlimited one: as, for instance, the defendant is not bound to make a discovery which would subject him to punishment, nor, ordinarily, to discover the title upon which he relies in his defence; nor is the plaintiff entitled to require the production of all papers which he may desire to look into. The limits of the right deserve careful consideration. The discovery, when had, may be the foundation of equitable relief in the same suit, in which case it may be connected with all the classes of cases in which relief is sought; or it may be for the purpose of being used in some other court, in which case the jurisdiction is designated as an assistant jurisdiction. Since the new statutes on the admission of evidence of parties, bills of discovery have practically fallen into disuse. See Discovery.

Second, where the courts of law do not, or did not, recognize any right, and therefore could give no remedy, but where the courts of equity recognize equitable rights and, of course, give equitable relief. This has been denominated the exclusive jurisdiction. In this class are *trusts, charities, forfeited and imperfect mortgages, penalties* and *forfeitures, imperfect consideration.*

Uses and trusts have been supposed to have had their origin in the restrictions laid by parliament upon conveyances in mortmain,—that is, to the church for charitable, or rather for ecclesiastical, purposes.

It may well be that the doctrine of equitable titles and estates, unknown to the common law but which could be enforced in chancery, had its origin in conveyances to individuals for the use of the church in order to avoid the operation of these restrictions,—the conscience of the feofee being bound to permit the church to have the use according to the design and intent of the feoffment.

But conveyances in trust for the use of the church were not by any means the only cases in which it was desirable to convey the legal title to one for the use of another. In many instances, such a conveyance offered a convenient mode of making provision for those who, from any circumstances, were unable to manage property advantageously for themselves, or to whom it was not desirable to give the control of it; and the

propriety in all such cases of some protection to the beneficiary is quite apparent. The court of chancery, by recognizing that he had an interest of an equitable character which could be protected and enforced against the holder of the legal title, exercised a jurisdiction to give relief in cases which the courts of common law could not reach, consistently with their principles and modes of procedure.

Mortgages, which were originally estates conveyed upon condition, redeemable if the condition were performed at the day, but absolute on non-performance, the right to redeem being thereby forfeited, owe their origin, in the modern conception of the term, to the court of chancery; which, acting at first, perhaps, in some cases where the non-performance was by mistake or accident, soon recognized an equitable right of redemption after the day, as a general rule, in order to relieve against the forfeiture. This became known as an equity of redemption,—a designation, in use at the present day, although there has long been a legal right of redemption in such cases.

Relief against penalties and forfeitures also was formerly obtained only through the aid of the court of chancery.

In most of the cases which fall under this head, courts of law now exercise a concurrent jurisdiction.

Third, where the courts of equity administer equitable relief for the infraction of legal rights, in cases in which the courts of law, recognizing the right, give a remedy according to their principles, modes, and forms, but the remedy is deemed by equity inadequate to the requirements of the case. This is sometimes called the concurrent jurisdiction. This class embraces *fraud*, *mistake*, *accident*, *administration*, *legacies*, *contribution*, and cases where justice and conscience require the *cancellation*, *or reformation of instruments*, *or the rescission*, *or the specific performance of contracts*. (See these several titles.)

The adequate remedy at law to oust equitable jurisdiction must be as certain, prompt and efficient to attain the ends of justice as the remedy in equity; Boyce v. Grundy, 3 Pet. (U. S.) 210, 7 L. Ed. 655; Williams v. Neely, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 516, 8 Ann. Cas. 660; for example, an action requiring submission to jury of matters requiring accounting is insufficient; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 76 C. C. A. 171, 8 Ann. Cas. 660; Butler Bros. Shoe Co. v. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; and so, for another instance, if damages for breach of contract are too uncertain to be assessed the failure to provide for liquidated damages does not give an equitable cause for action; Utz v. Wolf, 159 Fed. 696, 86 C. C. A. 564.

The courts of law relieve against fraud, mistake, and accident where a remedy can be had according to their modes and forms; but there are many cases in which the legal remedy is inadequate for the purposes of justice.

The modes of investigation and the peculiar remedies of the courts of equity are often of the greatest importance in this class of cases.

Transfers to defeat or delay creditors, and purchases with notice of an outstanding title, come under the head of fraud.

It has been said that there is a less amount of evidence required to prove fraud, in equity, than there is at law; but the soundness of that position may well be doubted.

The court does not relieve in all cases of accident and mistake.

In many cases the circumstances are such as to require the cancellation or reformation of written instruments or the specific performance of contracts, instead of damages for the breach of them.

Fourth, where the court of equity administers a remedy because the relations of the parties are such that there are impediments to a legal remedy. *Partnership* furnishes a marked instance. *Joint-tenancy and marshalling of assets* may be included. (See these titles.)

From the nature of a partnership, there are impediments to suits at law between the several partners and the partnership in relation to matters involved in the partnership; and impediments of a somewhat similar character exist in other cases.

Fifth, where the forms of proceeding in the courts of law are not deemed adequate to the due investigation of the particulars and details of the case. This class includes *account*, *partition*, *dower*, *ascertainment of boundaries*.

Sixth, where, from a relation of trust and confidence, or from consanguinity, the parties do not stand on equal ground in their dealings with each other: as, the relations of *parent* and *child*, *guardian* and *ward*, *attorney* and *client*, *principal* and *agent*, *executor* or *administrator* and *legatees* or *distributees*, *trustee* and *cestui que trust*, etc.

Seventh, where the court grant relief from considerations of public policy, because of the mischief which would result if the court did not interfere. *Marriage-brokage agreements*, *contracts in restraint of trade*, *buying* and *selling public offices*, *agreements founded on corrupt considerations*, *usury*, *gaming*, and *contracts with expectant heirs*, are of this class.

Many cases of this and the preceding class are sometimes considered under the head of *constructive fraud*.

Eighth, where a party from incapacity to take care of his rights is under the special

care of the court of equity, as *infants, idiots,* and *lunatics.*

This is a branch of jurisdiction of very ancient date, and of a special character, said to be founded in the prerogative of the king.

In this country the court does not, in general, assume the guardianship, but exercises an extensive jurisdiction over guardians, and may hold a stranger interfering with the property of an infant accountable as if he were guardian.

Ninth, where the court recognizes an obligation on the part of a husband to make provision for the support of his wife, or to make a settlement upon her, out of the property which comes to her by inheritance or otherwise.

This jurisdiction is not founded upon either trust or fraud, but is derived originally from the maxim that he who asks equity should do equity.

Tenth, where the equitable relief appropriate to the case consists in restraining the commission or continuance of some act of the defendant, administered by means of a writ of *injunction.*

Eleventh, the court aids in the procuration or preservation of evidence of the rights of a party, to be used, if necessary, in some subsequent proceeding, the court administering no final relief.

See a full note as to equity jurisdiction in 19 Am. L. Reg. N. S. 563.

Peculiar Remedies, and the Manner of Administering them. Under this head are *—specific performance of contracts; re-execution, reformation, rescission,* and *cancellation* of contracts or instruments; restraint by *injunction; bills quia timet; bills of peace;* protection of a party liable at law, but who has no interest, by bill of *interpleader; election* between two inconsistent legal rights; *conversion; priorities; tacking; marshalling of securities; application of purchase-money.* (See these several titles.)

In recent periods, the principles of the court of chancery have in many instances been acted on and recognized by the courts of law (as, for instance, in relation to mortgages, contribution, etc.) so far as the rules of the courts of law admitted of their introduction.

In some states the entire jurisdiction has, by statute, been conferred upon the courts of law, who exercise it as a separate and distinct branch of their authority, upon the principles and according to the modes and forms previously adopted in chancery.

In a few, the jurisdictions of the courts of law and of equity have been amalgamated, and an entire system has been substituted, administered more according to the principles and modes and forms of equity than the principles and forms of the common law.

It is to be noted, however, that the equity system is not abolished or abridged by the changes in the courts which administer it, and it is held that the constitutional grant of equity powers to certain courts cannot be impaired by the legislature, so that acts requiring the trial by jury of facts in chancery cases are unconstitutional; Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438; Callanan v. Judd, 23 Wis. 343. So, in an act requiring the court of chancery to direct an issue in suits to quiet title, a provision authorizing that court to set aside a verdict and order a new trial is not unconstitutional as violating the division of powers between courts of equity and law; Brady v. Realty Co., 70 N. J. Eq. 748, 64 Atl. 1078, 8 L. R. A. (N. S.) 866, 118 Am. St. Rep. 778. See an admirable discussion of this head of equitable jurisdiction in the opinion of Philips, J., in Big Six Development Co. v. Mitchell, 138 Fed. 286, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, affirmed in the Circuit Court of Appeals in s. c. 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332 (with note), and certiorari denied in *id.,* 199 U. S. 606, 26 Sup. Ct. 746, 50 L. Ed. 330.

Rules and Maxims. In the administration of the jurisdiction, there are certain rules and maxims which are of special significance.

First. Equity having once had jurisdiction of a subject-matter because there was no remedy at law, or because the remedy is inadequate, *does not lose the jurisdiction* merely because the courts of law afterwards give the same or a similar relief.

Second. Equity follows the law. This is true as a general maxim. Equity follows the law, except in relation to those matters which give a title to equitable relief because the rules of law would operate to sanction fraud or injustice in the particular case.

Third. Between equal equities, the law must prevail. The ground upon which the suitor comes into the court of equity is that he is entitled to relief there. But if his adversary has an equally equitable case, the complainant has no title to relief.

It has been said that the maxim that where equities are equal relief will be denied does not apply to a suit to reform a deed; Union Ice Co. v. Doyle, 6 Cal. App. 284, 92 Pac. 112.

Fourth. Equality is equity: applied to cases of contribution, apportionment of moneys due among those liable or benefited by the payment, abatement of claims on account of deficiency of the means of payment, etc.

Fifth. He who seeks equity must do equity. A party cannot claim the interposition of the court for relief unless he will do what it is equitable should be done by him as a condition precedent to that relief. See the eleventh maxim, *infra.*

See General Proprietors of Eastern Division of New Jersey v. Force's Ex'rs, 72 N. J. Eq. 56, 127, 68 Atl. 914. This maxim applies

to one seeking equitable relief, whether he be plaintiff or defendant; Union Stock Yards Nat. Bank v. Day, 79 Neb. 845, 113 N. W. 530 (where in an action of ejectment an equitable defence was pleaded). It was also applied in refusing to permit plaintiff to dismiss after having acquired advantage from the suit; Johnson City Southern Ry. Co. v. R. Co., 148 N. C. 59, 61 S. E. 683.

Sixth. Equity considers that as done which ought to have been done. A maxim of much more limited application than might at first be supposed from the broad terms in which it is expressed. In favor of parties who would have had a benefit from something contracted to be done, and who have an equitable right to have the case considered as if it had been done, equity applies this maxim. Illustration: when there is an agreement for a sale of land, and the vendor dies, the land may be treated as money, and the proceeds of the sale, when completed, go to the distributees of personal estate, instead of to the heir. If the vendee die before the completion of the purchase, the purchase-money may be treated as land for the benefit of the heir.

Seventh. Equity will not permit a wrong without a remedy.

Eighth. Equity regards the spirit and not the letter, the intent and not the form, the substance rather than the circumstance, as it is variously expressed by different courts. See Moring v. Privott, 146 N. C. 558, 60 S. E. 509; Clinton v. Winnard, 135 Ill. App. 274; Curtin v. Krohn, 4 Cal. App. 131, 87 Pac. 243.

Ninth. Where equities are equal the first in time prevails—qui prior est in tempore, potior est in jure.

Tenth. Equity imputes an intention to perform an obligation.

Eleventh. He who comes into equity must come with clean hands. The inequity which deprives a suitor of a right to relief in a court of equity is not general iniquitous conduct unconnected with the cause of action, but evil practice or wrong-doing in the particular matter as to which judicial protection or redress is sought; Liverpool & London & Globe Ins. Co. v. Clunie, 88 Fed. 160; Woodward v. Woodward, 41 N. J. Eq. 224, 4 Atl. 424; or where there is some duty springing from the relations of the parties; Cunningham v. Pettigrew, 169 Fed. 335, 94 C. C. A. 457. A good illustration is found in Toledo Computing Scale Co. v. Scale Co., 142 Fed. 919, 74 C. C. A. 89, where it was held that the manufacturers of a "butcher's computing scale," who advertised it as making a profit for butchers by counting fractions against the purchaser, could not have equitable relief against a competitor for calling attention to the fraudulent character of such scale. See CLEAN HANDS.

Twelfth. It is to the vigilant and not to those who sleep upon their rights, that Equity leads assistance—vigilantibus et non dormientibus equitas subvenit. This is a mere adaptation or limitation of the general maxim, *vigilantibus et non dormientibus jura* (or *leges*) *subveniunt.*

Thirteenth. Equity acts in personam and not in rem. As a result of this principle, jurisdiction of the person gives power to affect by the decree property outside the jurisdiction; Wilhite v. Skelton, 149 Fed. 67, 78 C. C. A. 635; Massie v. Watts, 6 Cra. (U. S.) 159, 3 L. Ed. 181; Carpenter v. Strange, 141 U. S. 105, 11 Sup. Ct. 960, 35 L. Ed. 640; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. 146. This power was notably exercised in the great case of Penn v. Lord Baltimore, 1 Ves. 444, where the Chancellor made a decree for the specific performance of a contract relating to land in the colonies.

Fourteenth. Equity delights to do justice and not by halves.

Most of these maxims are given by Francis or Story and all but the first and last by Indermaur and Pomeroy; all of them are recognized and stated by approved writers on Equity and they are here collected as including all those principles which have been by competent authority selected as fundamental and designated as maxims of equity.

Story only enumerates the first six, and of those he states the first, not as a maxim strictly so termed, but as a doctrine of equity. The last one is given by Story in his Eq. Pl. § 72, where he quotes it from Talbott, Ld. Ch., in 3 P. Wms. 331.

Francis sets out fourteen maxims, as he terms them, but those numbered by him VII, VIII, IX, XI, XII, inclusive, are not stated *supra*, because they are mere statements of equitable rules of decision, or doctrines, rather than maxims. These, briefly stated, are that he who received the benefit should make, and he who sustained the loss should receive, satisfaction; Francis, Max. IV & V; that equity relieves against accidents, prevents mischief and multiplicity of suits; *id.* VII, VIII, IX; and that equity will not suffer a double satisfaction nor permit advantage to be taken of a forfeiture when satisfaction can be made; *id.* XI, XII.

To the above authorities reference may be made for the cases which gave early expression to these maxims, which have been so universally recognized as fundamental that, except in a few cases of special application or limitation, the citations are omitted.

REMEDIAL PROCESS, AND DEFENCE. A suit in equity is ordinarily instituted by a complaint, or petition, called a bill; and the defendant is served with a writ of summons, requiring him to appear and answer, called a subpœna.

In Pennsylvania the suit is begun by filing and serving a copy of the bill, the subpœna having been dispensed with by a rule of court.

The forms of proceedings in equity are

such as to bring the rights of all persons interested before the court; and, as a general rule, all persons interested should be made parties to the bill, either as plaintiffs or defendants.

There may be amendments of the bill; or a supplemental bill,—which is sometimes necessary when the case is beyond the stage for amendment.

In case the suit fails by the death of the party, there is a bill of revivor, and after the cause is disposed of, there may be a bill of review.

The defence is made by demurrer, plea, or answer. If the defendant has no interest, he may disclaim. Discovery may be obtained from the plaintiff, and further matter may be introduced, by means of a cross-bill, brought by the defendant against the plaintiff, in order that it may be considered at the same time. Issue is joined by the plaintiff's filing a replication to the defendant's answer; Sto. Eq. Pl. § 878 n. But the new Equity Rule 31 (1913) of the United States Supreme Court (33 Sup. Ct. xxvii) does away with a replication unless required by a special order of the court. New or affirmative matter in the answer is deemed to be denied by the plaintiff. If the answer includes a set-off or counter-claim, the party against whom it is asserted must reply within 10 days. In some states, as Delaware, the replication is entered as of course without filing; and special replications are now as a rule not used.

The final process is directed by the decree, which being a special judgment can provide relief according to the nature of the case. This is sometimes by a perpetual injunction.

There may be a bill to execute, or to impeach, a decree.

Evidence and Practice. The rules of evidence, except as to the effect of the answer and the taking of the testimony, are, in general, similar to the rules of evidence in cases at law. But to this there are exceptions.

The answer, if made on oath, is evidence for the defendant, so far as it is responsive to the calls of the bill for discovery, and as such it prevails, unless it is overcome by something more than what is equivalent to the testimony of one witness. If without oath, it is a mere pleading, and the allegations stand over for proof.

If the answer is incomplete or improper, the plaintiff may except to it, and it must, if the exceptions are sustained, be so amended as to be made sufficient and proper.

The case may be heard on the bill and answer, if the plaintiff so elects, and sets the case down for a hearing thereon.

If the plaintiff desires to controvert any of the statements in the answer, he files a replication by which he denies the truth of the allegations in the answer, and testimony is taken.

The testimony, according to the former practice in chancery, is taken upon interrogatories filed in the clerk's office, and propounded by the examiner, without the presence of the parties. But this practice has been very extensively modified. Equity rule 46 (33 Sup. Ct. xxxi) of the United States Supreme Court (in effect February 1, 1913), provides that the testimony of witnesses shall be taken in open court except as otherwise provided by statute or by the equity rules.

If any of the testimony is improper, there is a motion to suppress it.

The case may be referred to a master to state the accounts between the parties, or to make such other report as the case may require; and there may be an examination of the parties in the master's office. Exceptions may be taken to his report.

The hearing of the case is before the equity judge, who may make interlocutory orders or decrees, and who pronounces the final decree or judgment. There may be a rehearing, if sufficient cause is shown.

At the present day, wherever equity forms are used, the proceedings have become very much simplified.

The system of two distinct sets of tribunals administering different rules for the adjudication of causes has been changed in England. By the Judicature Acts of 1873 and 1876, the courts of law and equity were consolidated into one Supreme Court of Judicature, in which equitable rights and defences are recognized in all proceedings to the same effect as a court of chancery would have recognized them before the passing of the act. Equitable remedies are substantially applied.

In America, the federal courts have equity powers under the constitution, where an adequate remedy at law does not exist; R. S. § 723; Smyth v. Banking Co., 141 U. S. 656, 12 Sup. Ct. 113, 35 L. Ed. 891; Whitehead v. Shattuck, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873. The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress; McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932. The equity jurisdiction conferred on the federal courts is the same as that of the former court of chancery in England, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the states; Mississippi Mills v. Cohn, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; Kirby v. R. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Smith v. Burnham, 2 Sumn. 612, Fed. Cas. No. 13,018; but these are only the powers which are judicial in their character, and not such as belong to the chancellor of England as the keeper of the conscience of the king, as representing his person and administering as his agent his pre-

rogatives and duties; Gallego's Ex'rs v. Attorney General, 3 Leigh (Va.) 450, 24 Am. Dec. 650.

In the administration of that jurisdiction the federal courts are not to "look only to the statutes of congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases"; U. S. v. Lumber Co., 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, where it was held that even "in passing upon transactions between the government and its vendees" the principles of equity must be borne in mind and applied, and that although, while the legal title to land remains in the government, the holder of an equitable title may not be able to enforce his equity by reason of inability to sue the government except upon contract, he may protect that equity when sued by the government.

Equity jurisdiction does not accrue to the federal courts because it is thought that the law as administered in equity is more favorable to a party seeking its aid than the law as administered by the courts of a state in which such party has been sued; Cable v. Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188.

Courts of chancery were constituted in some of the states after 1776; and in Pennsylvania, for a short time, as early as 1723, a court of chancery existed; see Rawle, Eq. in Penna.; and in most of the colonies before the revolution; Bisph. Eq. § 14, n.

In colonial Pennsylvania, and until the act of June 16, 1836, equity, in the absence of courts of equity, was administered through common-law forms. It is pointed out in Rawle, Equity in Penna., that it was not first and only in Pennsylvania that common-law courts enforced equitable principles, and he mentions several heads going back to the Year Books. But the Pennsylvania courts administered under common-law forms all the principles and doctrines of equity. The earliest reported case is Riche v. Broadfield, 1 Dall. 16, 1 L. Ed. 18 (1768). The subject is treated in Laussat's Equity in Penna. and by Sidney G. Fisher in 1 L. Q. R. 455 (2 Sel. Essays in Anglo-Amer. L. H. 810). See also Brightly, Eq. in Penna. A paper in the Report of the Texas Bar Assoc. (1896) states that "Texas was unquestionably the first state in the American Union controlled by common-law principles to abolish the distinction between law and equity in the enforcement of private rights and redress of private wrongs."

At the present time, distinct courts of chancery now exist in but six states: Alabama, Arkansas, Delaware, Mississippi, New Jersey and Tennessee. In the greater number of states chancery powers are exercised by judges of common-law courts according to the ordinary practice in chancery. In the remaining states, the distinctions between actions at law and suits in equity have been abolished, but certain equitable remedies are still administered under the statutory form of the civil action. See Bisph. Eq. § 15.

EQUITY EVIDENCE. See EQUITY; EVIDENCE.

EQUITY PLEADING. See EQUITY; ANSWER; BILL; DEMURRER; PLEA.

EQUITY OF REDEMPTION. A right which the mortgagor of an estate has of redeeming it after it has been forfeited at law by the non-payment at the time appointed of the money secured by the mortgage to be paid, by paying the amount of the debt, interest, and costs.

The phrase of equity of redemption is indiscriminately, though often incorrectly, applied to the right of the mortgagor to regain his estate, both *before* and *after* breach of condition. In North Carolina, by statute, the former is called a *legal right of redemption*, and the latter the *equity of redemption*, thereby keeping a just distinction between these estates; 1 N. C. Rev. Stat. 266; State v. Laval, 4 McCord (S. C.) 340. The interest is recognized at law for many purposes: as a subsisting estate, although the mortgagor in order to enforce his right is obliged to resort to an equitable proceeding, administered generally in courts of equity, but in some states by courts of law; Anderson v. Neff, 11 S. & R. (Pa.) 223; or in some states may pay the debt and have an action at law; Jackson v. Davis, 18 Johns. (N. Y.) 7; Den v. Spinning, 6 N. J. L. 466; Morgan's Lessee v. Davis, 2 H. & McH. (Md.) 9.

This estate in the mortgagor is one which he may devise or grant; 2 Washb. R. P. 40; and which is governed by the same rules of devolution or descent as any other estate in lands; Chamberlain v. Thompson, 10 Conn. 243, 26 Am. Dec. 390; 2 Hare 35. He may mortgage it; Bigelow v. Willson, 1 Pick. (Mass.) 485; and it is liable for his debts; Fox v. Harding, 21 Me. 104; Pierce v. Potter, 7 Watts. (Pa.) 475; Freeby v. Tupper, 15 Ohio 467; United States Bank v. Huth, 4 B. Monr. (Ky.) 429; Curtis v. Root, 20 Ill. 53; Punderson v. Brown, 1 Day (Conn.) 93, 2 Am. Dec. 53; State v. Laval, 4 McCord (S. C.) 336; but see Palmer v. Foote, 7 Paige Ch. (N. Y.) 437; Goring's Ex'x v. Shreve, 7 Dana (Ky.) 67; Powell v. Williams, 14 Ala. 476, 48 Am. Dec. 105; Baldwin v. Jenkins, 23 Miss. 206; Buck v. Sherman, 2 Dougl. (Mich.) 176; Thornton v. Pigg, 24 Mo. 249; Van Ness v. Hyatt, 13 Pet. (U. S.) 294, 10 L. Ed. 168; and in many other cases, if the mortgagor still retains possession, he is held to be the owner; 5 Gray 470, note; Parish v. Gilmanton, 11 N. H. 293; City of Norwich v. Hubbard, 22 Conn. 587; Ralston v. Hughes, 13 Ill. 469.

Any person who is interested in the mortgaged estate, or any part of it, having a legal estate therein, or a legal or equitable lien thereon, provided he comes in as privy in estate with the mortgagor, may exercise the right; including heirs, devisees, executors, administrators, and assignees of the

mortgagor; Sheldon v. Bird, 2 Root (Conn.) 509; Craik's Adm'rs v. Clark, 3 N. C. 22; Merriam v. Barton, 14 Vt. 501; Coombs v. Warren, 34 Me. 89; Bell v. Mayor, etc., of New York, 10 Paige, Ch. (N. Y.) 49; Smith v. Manning, 9 Mass. 422; H. B. Claflin Co. v. Banking Co., 113 Fed. 958; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; subsequent incumbrancers; Burnett v. Denniston, 5 Johns. Ch. (N. Y.) 35; Cooper v. Martin, 1 Dana (Ky.) 23; Farnum v. Metcalf, 8 Cush. (Mass.) 46; Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; judgment creditors; Dabney v. Green, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503; Elliot v. Patton, 4 Yerg. (Tenn.) 10; Kent v. Laffan, 2 Cal. 595; Bowen v. Van Gundy, 133 Ind. 670, 33 N. E. 687; Schroeder v. Bauer, 140 Ill. 135, 29 N. E. 560; tenants for years; Loud v. Lane, 8 Metc. (Mass.) 517; even if only tenant of a portion of the land mortgaged; Kebabian v. Shinkle, 26 R. I. 505, 59 Atl. 743; one having an easement; Bacon v. Bowdoin, 22 Pick. (Mass.) 401; one having an interest as a partner; Emerson v. Atkinson, 159 Mass. 356, 34 N. E. 516; a jointress; 1 Vern. 190; 2 Wh. & T. Lead. Cas. 752; dowress and tenant by curtesy; Eaton v. Simonds, 14 Pick. (Mass.) 98; Jackson v. Mfg. Co., 86 Ark. 591, 112 S. W. 161, 20 L. R. A. (N. S.) 454; Davis v. Mason, 1 Pet. (U. S.) 503, 7 L. Ed. 239; Gatewood v. Gatewood, 75 Va. 407; Wilkins v. French, 20 Me. 111; Denton v. Nanny, 8 Barb. (N. Y.) 618; Wade v. Miller, 32 N. J. L. 296; Hart v. Chase, 46 Conn. 207; Robinson v. Lakenan, 28 Mo. App. 135 (but to be endowed by the law, the widow must pay the mortgage; Rossiter v. Cossit, 15 N. H. 38); a widow who had joined in the mortgage; McArthur v. Franklin, 15 Ohio St. 485; Posten v. Miller, 60 Wis. 494, 19 N. W. 540; McGough v. Sweetser, 97 Ala. 361, 12 South. 162, 19 L. R. A. 470; 34 U. C. Q. B. 389; or where the husband had mortgaged prior to the marriage; Merselis v. Van Riper, 55 N. J. Eq. 618, 38 Atl. 196; or where she had joined in the mortgage but the equity of redemption was reserved to the husband alone; [1894] 2 Ch. 133; and where she had released her dower, she was entitled to redeem as dowress, though the dower had not been assigned; Gibson v. Crehore, 5 Pick. (Mass.) 146 (followed in McCabe v. Bellows, 1 Allen [Mass.] 269); Simonton v. Gray, 34 Me. 50; also where she did not join in the mortgage, which was for purchase money; May v. Fletcher, 40 Ind. 575 (overruling Fletcher v. Holmes, 32 *id.* 497); Wing v. Ayer, 53 Me. 138; Wheeler v. Morris, 2 Bosw. (N. Y.) 524; and she may redeem where the husband alone had given a second mortgage; Hays v. Cretin, 102 Md. 695, 62 Atl. 1028, 4 L. R. A. (N. S.) 1039; so a widow, though not entitled under the statute to redeem as such, may do so when the mortgage property is the family homestead; Walden v. Speigner, 87 Ala. 379, 6 South. 81; and where she had not joined in a mortgage during coverture, she was held, on a bill to redeem, dowable of the whole premises and not merely in the equity of redemption and she was not required to redeem; Opdyke v. Bartles, 11 N. J. Eq. 133.

A wife is entitled by reason of her inchoate right of dower to redeem during the lifetime of her husband; Lamb v. Montague, 112 Mass. 352; Mackenna v. Trust Co., 184 N. Y. 411, 77 N. E. 721, 3 L. R. A. (N. S.) 1068, 112 Am. St. Rep. 620, 6 Ann. Cas. 471; Gatewood v. Gatewood, 75 Va. 413; and her equity of redemption is stronger in case of homestead property; Moore v. Smith, 95 Mich. 71, 54 N. W. 701; Smith v. Hall, 67 N. H. 200, 30 Atl. 409.

A mortgagee for adequate value and in good faith may acquire the equity of redemption; Wilson v. Vanstone, 112 Mo. 315, 20 S. W. 612; and a second mortgagee who purchases such equity is entitled to any payments that may have been made on the first mortgage, but which were not credited thereon; Babbitt v. McDermott (N. J.) 26 Atl. 889.

Where the necessary amount has been tendered within the statutory period for redemption, it can be followed up by suit to redeem at any time before the right to bring suit is barred; Wood v. Holland, 57 Ark. 198, 21 S. W. 223. A court of equity has the discretion governed by the equities of each case, to name terms on which it will let in a party to redeem; Hannah v. Davis, 112 Mo. 599, 20 S. W. 686.

Where a bill to redeem is filed before the debt is due, it must be dismissed, although the hearing is not had until after the debt is due; Bernard v. Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465.

Any provision or stipulation in a mortgage which will fetter or "clog the equity of redemption" (as the phrase goes) is void; [1902] A. C. 24; [1903] A. C. 253; and these two cases in the House of Lords may be considered as settling the question in England after many and varying decisions since the leading case of Howard v. Harris, 1 Vern. 33. The same doctrine prevails in this country; Parmer v. Parmer, 74 Ala. 285; Walling v. Aiken, 1 McMul. Eq. (S. C.) 1; Clark v. Henry, 2 Cow. (N. Y.) 324; Quartermous v. Kennedy, 29 Ark. 544; Baxter v. Child, 39 Me. 110; Stover's Heirs v. Bounds' Heirs, 1 Ohio St. 107; Bayley v. Bailey, 5 Gray (Mass.) 505; Hazeltine v. Granger, 44 Mich. 503, 7 N. W. 74. The "equity of redemption is inseparably connected with a mortgage and the right cannot be abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage"; Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; the rule protecting the equity of redemption is "well settled" and "characterized by a jealous and salutary policy," and a sale by the mortgagor must be almost as closely examined as one

by a *cestui que trust;* Villa v. Rodriguez, 12 Wall. (U. S.) 323, 20 L. Ed. 406.

The doctrine that equity will not permit the parties to a mortgage to "clog the equity of redemption" is only another expression of the maxim "once a mortgage always a mortgage"; 1 Vern. 33 (where the latter expression seems to have originated).

The provision is invalid, not only if contained in the mortgage, but also if there is a separate contract which is part of the same transaction, whether in writing or by parol; Mooney v. Byrne, 163 N. Y. 86, 57 N. E. 163; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834; Wright v. Bates, 13 Vt. 341; [1904] A. C. 323; 11 Ir. Ch. 367; [1892] A. C. 1; Plummer v. Ilse, 41 Wash. 5, 82 Pac. 1009, 2 L. R. A. (N. S.) 627, 111 Am. St. Rep. 997; First Nat. Bank of David City v. Sargeant, 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296; Ind. Rep. Allahabad Series 559 (where the rule was enforced in India); though not necessarily of the same date; Batty v. Snook, 5 Mich. 231; Tennery v. Nicholson, 87 Ill. 464; Bradbury v. Davenport, 114 Cal. 593, 46 Pac. 1062, 55 Am. St. Rep. 92; but a separate and independent agreement, *subsequent* to the mortgage, depriving the mortgagor, in effect, of his right to redeem, has been held valid; [1902] A. C. 461; Gleason's Adm'x v. Burke, 20 N. J. Eq. 300; Wynkoop v. Cowing, 21 Ill. 570; Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Trull v. Skinner, 17 Pick. (Mass.) 213 (where the subject is discussed by Shaw, C. J.); Shouler v. Bonander, 80 Mich. 531, 45 N. W. 487; McMillan v. Jewett, 85 Ala. 478, 5 South. 145; though it "will be closely scrutinized to guard the debtor from oppression" and there must be a new and adequate consideration; Linnell v. Lyford, 72 Me. 280; Brown v. Gaffney, 28 Ill. 149; and indeed cases may be found which treat the subject wholly with respect to the question whether the transaction was unconscionable; Pritchard v. Elton, 38 Conn. 434; or deny that there is any fiduciary relation between a mortgagor and mortgagee; De Martin v. Phelan, 115 Cal. 538, 47 Pac. 356, 56 Am. St. Rep. 115. See MORTGAGE.

Many of the cases cited *supra* are those of absolute conveyances held to be mortgages carrying an equity of redemption and this fact may be shown by parol; Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167; Cullen v. Carey, 146 Mass. 50, 15 N. E. 131; Miller v. Thomas, 14 Ill. 428.

So where the parties to a mortgage negotiated an absolute sale for a larger amount, with conveyance in fee and a lease with an option to purchase if rent were punctually paid, a default was held fatal to the right to repurchase; 1 Russ. & M. 506; it being no debt, but a conditional sale, which carries no equity of redemption; Conway v. Alexander, 7 Cra. (U. S.) 218, 3 L. Ed. 321; Haynie v. Robertson, 58 Ala. 37; Robinson v. Cropsey, 2 Edw. Ch. (N. Y.) 138; but the transaction will be closely scrutinized; Spence v. Steadman, 49 Ga. 133. See a full discussion of the "The Clog on the Equity of Redemption" by Prof. Bruce Wyman in 21 Harv. L. Rev. 459.

Where a mortgagee of the equitable interest of the beneficiary in a resulting trust purchased the equity of redemption of such beneficiary, they did not merge where such merger was not for the interest of the mortgagee; Coryell v. Klehm, 157 Ill. 463, 41 N. E. 864.

A foreclosure sale without redemption may be decreed in case of a mortgage of a railroad or a business plant, of which the value is in keeping it in its entirety; Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. Ed. 1111; even when a state statute provides that all sales of real estate shall be subject to redemption; Pacific Northwest Packing Co. v. Allen, 116 Fed. 312, 54 C. C. A. 648; Sioux City Terminal R. & Warehouse Co. v. Trust Co., 82 Fed. 124, 27 C. C. A. 73.

See MORTGAGE.

EQUIVALENT. Of the same value. Sometimes a condition must be literally accomplished in *forma specifica;* but some may be fulfilled by an equivalent, *per æquipolens,* when such appears to be the intention of the parties: as, if I promise to pay you one hundred dollars, and then die, my executor may fulfill my engagement; for it is equivalent to you whether the money be paid to you by me or by him. Rolle, Abr. 451. For its meaning in patent law, see Tyler v. Boston, 7 Wall. (U. S.) 327, 19 L. Ed. 93; PATENT.

EQUIVOCAL. Having a double sense.

In the construction of contracts, it is a general rule that when an expression may be taken in two senses, that shall be preferred which gives it effect. See CONSTRUCTION; INTERPRETATION.

EQUULEUS (Lat.). A kind of rack for extorting confessions. Encyc. Lond.

ERASURE. The obliteration of a writing. The effect of an erasure is not *per se* to destroy the writing in which it occurs, but is a question for the jury, and will render the writing void or not, under the same circumstances as an interlineation. See 11 Co. 88; 5 Bingh. 183; Bailey v. Taylor, 11 Conn. 531, 29 Am. Dec. 321; Solibellas v. Reeves' Curator, 3 La. 56; Brooks v. Allen, 62 Ind. 401; Whittlesey v. Hughes, 39 Mo. 34; Cole v. Hills, 44 N. H. 227; Page v. Donaher, 43 Wis. 221; Dodge v. Haskell, 69 Me. 429; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324. See ALTERATION; INTERLINEATION.

ERCISCUNDUS (Lat. *erciscere*). For dividing. *Familiæ erciscundæ actio.* An action for dividing a way, goods, or any matter of inheritance. Vicat, Voc. Jur.; Calvinus, Lex.

ERECTION. This term is generally used of a completed building. McGary v. People, 45 N. Y. 153; Shaw v. Hitchcock, 119 Mass. 254; but it is held to be of wider import; it may include trade fixtures; 17 W. R. 153; or a fence; 36 J. P. 743.

The repairing, alteration, and enlarging, or the removal from one spot to another, of a building, is not erection within the meaning of a statute forbidding the erection of wooden buildings; Brown v. Hunn, 27 Conn. 332, 71 Am. Dec. 71; Douglass v. Com., 2 Rawle (Pa.) 262; Martine v. Nelson, 51 Ill. 422. The moving of a building is not an erection of a building; Trask v. Searle, 121 Mass. 229; but the painting of a house has been held to be part of the erection; Martine v. Nelson, 51 Ill. 422. See LIEN.

EREGIMUS (Lat. we have erected). A word proper to be used in the creation of a new office by the sovereign. Bac. Abr. *Offices*, E.

EROSION. The gradual eating away of the soil by the operation of currents or tides. Mulry v. Norton, 100 N. Y. 433, 3 N. E. 581, 53 Am. Rep. 206. See RIPARIAN PROPRIETOR; ACCRETION.

EROTIC MANIA, EROTOMANIA. In Medical Jurisprudence. A name given to a morbid activity of the sexual propensity. It is a disease or morbid affection of the mind, which fills it with a crowd of voluptuous images, and hurries its victim to acts of the grossest licentiousness, often in the absence of any lesion of the intellectual powers. It is to be distinguished from Nymphomania and Satyriasis. See Krafft-Ebing, Psycopathia Sexualis, Chaddock's ed.; MANIA.

ERRANT (Lat. *errare*, to wander). Wandering. Justices in eyre were formerly said to be *errant* (itinerant). Cowell.

ERRONEOUS. Deviating from the law. Thompson v. Doty, 72 Ind. 338.

ERROR. A mistake in judgment or deviation from the truth in matters of fact, and from the law in matters of judgment.

Error of fact will excuse the party acting illegally but honestly, in many cases, will avoid a contract in some instances, and when mutual will furnish equity with a ground for interference; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Eagle Bank of New Haven v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Bond v. Hays, 12 Mass. 36. See MISTAKE; IGNORANCE.

Error in law will not, in general, excuse a man for its violation. A contract made under an error in law is, in general, binding; for, were it not so, error would be urged in almost every case; Bisph. Eq. 187. 2 East 469. See Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 10 Am. Dec. 316; Waite v. Leggett, 8 Cow. (N. Y.) 195, 18 Am. Dec. 441; 2 J. & W. 249; 1 Y. & C. 232; 6 B. & C. 671. But a foreign law will for this purpose be considered as a fact; Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; 2 Pothier, Obl. 369, etc.

ERROR, CONFESSION OF. See APPEAL AND ERROR.

ERROR, WRIT OF. See APPEAL AND ERROR.

ESCAMBIO. A writ granting power to an English merchant to draw a bill of exchange on another who is in a foreign country. Reg. Orig. 194. Abolished by Stats. 59 Geo. III. c. 49, and 26 & 27 Vict. c. 125.

ESCAMBIUM. Exchange, which see.

ESCAPE. The deliverance of a person who is lawfully imprisoned, out of prison, before such a person is entitled to such deliverance by law. Colby v. Sampson, 5 Mass. 310.

The voluntarily or negligently allowing any person lawfully in confinement to leave the place. 2 Bish. Cr. L. § 917.

Departure of a prisoner from custody before he is discharged by due process of law.

Escape takes place without force; prison-breach, with violence; rescue, through the intervention of third parties.

Actual escapes are those which take place when the prisoner in fact gets out of prison and unlawfully regains his liberty.

Constructive escapes take place when the prisoner obtains more liberty than the law allows, although he still remains in confinement. Bac. Abr. *Escape* (B); Plowd. 17; Colby v. Sampson, 5 Mass. 310; Steere v. Field, 2 Mas. 486, Fed. Cas. No. 13,350.

Negligent escape takes place when the prisoner goes at large, unlawfully, either because the building or prison in which he is confined is too weak to hold him, or because the keeper by carelessness lets him go out of prison.

Voluntary escape takes place when the prisoner has given to him voluntarily any liberty not authorized by law. Colby v. Sampson, 5 Mass. 310; Lowry v. Barney, 2 D. Chip. (Vt.) 11.

When a man is imprisoned in a proper place under the process of a court having jurisdiction in the case, he is lawfully imprisoned, notwithstanding the proceedings may be irregular; 1 Crawf. & D. 203; see Com. v. Barker, 133 Mass. 399; but if the court has not jurisdiction the imprisonment is unlawful, whether the process be regular or otherwise. Bacon, Abr. *Escape in Civil Cases* (A 1); Scott v. Shaw, 13 Johns. (N. Y.) 378; Ontario Bank v. Hallett, 8 Cow. (N. Y.) 192; Austin v. Fitch, 1 Root (Conn.) 288. See State v. Leach, 7 Conn. 452, 18 Am. Dec. 113.

Letting a prisoner, confined under final process, out of prison for any, even the

shortest, time, is an escape, although he afterwards return; 2 W. Bla. 1048; Browning's Ex'r v. Rittenhouse, 40 N. J. L. 230; Servis v. Marsh, 38 Fed. 794; De Grand v. Hunnewell, 11 Mass. 160; and this may be (as in the case of imprisonment under a *ca. sa.*) although an officer may accompany him; 3 Co. 44 *a;* 1 B. & P. 24. Where an insolvent debtor whose discharge has been refused by the court, surrenders himself to the keeper of a prison, who will not receive him because he has no writ or record showing that he is an insolvent debtor and is not in charge of an officer, the surrender is not sufficient to make the keeper liable for the debt in case of the debtor's escape; Saunders v. Perkins, 140 Pa. 102, 21 Atl. 257.

In criminal cases, the prisoner is indictable for a misdemeanor, whether the escape be negligent or voluntary; 2 Hawk. Pl. C. 189; Cro. Car. 209; State v. Doud, 7 Conn. 384; State v. Brown, 82 N. C. 585; and the officer is also indictable; Martin v. State, 32 Ark. 124; State v. Ritchie, 107 N. C. 857, 12 S. E. 251. If the offence of the prisoner was a felony, a voluntary escape is a felony on the part of the officer; 2 Hawk. Pl. C. c. 19, § 25; if negligent, it is a misdemeanor only in any case; 2 Bish. Cr. L. § 925. See State v. Sparks, 78 Ind. 166. It is the duty of the officer to rearrest after an escape; Clark v. Cleveland, 6 Hill (N. Y.) 344; People v. Hanchett, 111 Ill. 90; 1 Russ. Cr. 572.

In civil cases, a prisoner may be arrested who escapes from custody on mesne process, and the officer will not be liable if he rearrest him; Cro. Jac. 419; but if the escape be voluntary from imprisonment on mesne process, and in any case if the escape be from final process, the officer is liable in damages to the plaintiff, and is not excused by retaking the prisoner; 2 B. & A. 56; Doane v. Baker, 6 Allen (Mass.) 260. Nothing but an act of God or the enemies of the country will excuse an escape. Fairchild v. Case, 24 Wend. (N. Y.) 381; Rainey's Ex'rs v. Dunning, 6 N. C. 386; Shattuck v. State, 51 Miss. 575. See Lash v. Ziglar, 27 N. C. 702; Shuler v. Garrison, 5 W. & S. (Pa.) 455.

Attempts to escape by one accused of crime are presumptive of guilt, and the conduct of a defendant in arrest, either before or after being accused of the crime, may be competent evidence against him, as indicating a guilty mind; Bowles v. State, 58 Ala. 335; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401. Where a prisoner being in the corridor of a jail unlocks a door between the corridor and a cell, and thence escapes, he commits prison breach; Randall v. State, 53 N. J. L. 488, 22 Atl. 46. An unsuccessful attempt at prison breach is indictable; People v. Rose, 12 Johns. (N. Y.) 339.

On an escape and recapture, the party has a day in court to deny his identity as the person sentenced; Com. v. Hill, 185 Pa. 397, 39 Atl. 1055.

See Whart. Cr. L. § 1667; 26 Am. L. Reg. 345; FLIGHT; PRISONER.

ESCAPE WARRANT. A warrant addressed to all sheriffs throughout England, to retake an escaped prisoner for debt, and commit him to gaol till the debt is satisfied.

ESCHEAT (Fr. *escheoir*, to happen). An accidental reverting of lands to the original lord.

Coke says the word "signifieth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated." And he enumerates the instances of failure of blood on the one hand and *per delictum tenentis*, i. e., for felony, on the other. Co. Litt. 13a.

An obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee; 2 Bla. Com. 244 et seq.

Care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord; which by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law, as a part of punishment for an offence, and does not at all relate to the feodal system, nor is the consequence of any seigniory or lordship paramount; but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures, a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

The doctrine of escheat upon attainder, taken singly, is this: That the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feodal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: In case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in the regular course of escheat, as it would have done to the heir of the felon in case the feodal tenures had never been introduced. 2 Bla. Com. 251.

See YEAR, DAY AND WASTE.

The estate itself which so reverted was called an escheat. Spelman. The term included also other property which fell to the lord; as, trees which fell down, etc. Cowell.

All escheats under the English laws are declared to be strictly feudal and to import

the extinction of tenure. Wr. Ten. 115; 1 W. Bla. 123.

It was not until after the statute of *quia emptores* that the title of the reversioner became distinct from that of the lord who took by escheat. Before that statute "revert" and "escheat" were used indiscriminately to express the fact that the land went back to the lord who gave it; 3 Holdsw. Hist. E. L. 115.

That if the ownership of a property become vacant, the right must necessarily subside into the whole community in which, when society first assumed the elements of order and subordination, it was originally vested, is a principle which lies at the foundation of property; 4 Kent 425; and this seems to be the universal rule of civilized society. Domat, *Droit Pub.* lib. 1, t. 6, s. 3, n. 1. See 10 Viner, Abr. 139; 1 Bro. Civ. Law 250; Lock v. Lloyd's Estate, 5 Binn. (Pa.) 375; McCaughal v. Ryan, 27 Barb. (N. Y.) 376; People v. Folsom, 5 Cal. 373; Armstrong v. Bittinger, 47 Md. 103; Appeal of Olmsted, 86 Pa. 284. It was recognized by Justinian, and by the civil law an officer was appointed, called the escheator, whose duty it was to assert the right of the emperor to the *hæreditas jacens* or *caduca* when the owner left no heirs or legatee to take it. Code 10, 10, 1. By the earlier English usages the estate of the vassal escheated to his lord when there were no representatives in the seventh degree, and this custom was later extended to include male descendants *ad infinitum;* Lib. Feud. I. 1, s. 4.

In case of escheat by failure of heirs, by corruption of blood, or by conviction of certain crimes, the feud fell back into the lord's hands by a termination of the tenure. 1 Washb. R. P. 24. At the present day, in England, escheat can only arise from the failure of heirs. By the Felony Act, 33 and 34 Vict. c. 23, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se,* shall cause any forfeiture or escheat; 3 Steph. Com. 660. An action of ejectment, commenced by writ of summons, has taken the place of an ancient *writ of escheat,* against the person in possession on the death of the tenant without heirs.

The early English law is thus stated: "By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the king as the sovereign lord; but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees; 8 App. Cas. 767, 772; 2 Bla. Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse in the nature of a plea or defense to the king's claim, and not in the nature of an original suit; Lord Somers in 14 How. St. Tr. 1, 83; 6 Ves. 809; 4 Madd. 281; L. R. 2 Eq. 95; People v. Cutting, 3 Johns. (N. Y.) 1; Briggs v. Light-Boat Upper Cedar Point, 11 Allen (Mass.) 157, 172. The inquest of office was a proceeding *in rem;* when there was proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor; Bayley, J., in 12 East 96, 103; 16 Vin. Abr. 86, pl. 1." Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

In mediæval law there was an escheat to the lord *propter defectum sanguinis,* if the tenant died without heirs; and *propter delictum tenentis,* if the tenant committed any gross breach of the feudal bond. The right to escheat depended on tenure alone.

In this country, however, the state steps in, in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction; 4 Kent 424. See Matthews v. Ward, 10 Gill & J. (Md.) 450; 3 Dane, Abr. 140. And it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office according to the law of the particular state; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691; Smith v. Doe, 111 N. Y. Supp. 525. See 21 Harv. L. Rev. 452. It is, perhaps, questionable how far this incident exists at common law in the United States generally. In Maryland the lord proprietor was originally the owner of the land, as the crown was in England. In most of the states the right to an escheat is secured by statute; 4 Kent 424; 1 Washb. R. P. 24, 27; 2 *id.* 443.

Such a statute is "not unconstitutional, but only asserts an indisputable, but long-neglected and dormant right in the commonwealth;" Com. v. Blanton's Ex'rs, 2 B. Mon. (Ky.) 393; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; and the state, in a just and proper exercise of its police power, may declare new causes of escheat of lands within its territory; Com. v. R. Co., 124 Ky. 497, 99 S. W. 596.

In Indiana and Missouri it was held that at common law, if a bastard died intestate, his property escheated; Doe v. Bates, 6 Blackf. (Ind.) 533; Bent's Adm'r v. St. Vrain, 30 Mo. 268; but this is now otherwise by statute in those states and in most of the others. See BASTARD. So at common law there was an escheat if the purchaser or heirs of the decedent were aliens; Montgomery v. Dorion, 7 N. H. 475; Co. Litt. 2 *b;* but it is usually otherwise by the statutes of the several states. See ALIEN.

Hereditaments which, although they may be held in fee-simple, are not strictly subjects of tenure, such as fairs, markets, commons in gross, rents charge, rents seck, and the like, do not escheat, but become extinct upon a failure of heirs of the tenant; Challis, R. P. 30.

The method of proceeding, and *subject-matter.* To determine the question of escheat a proceeding must be brought in the nature of an inquest of office or office found; Jackson v. Adams, 7 Wend. (N. Y.) 367; People v. Folsom, 5 Cal. 373; Gresham v. Rickenbacher, 28 Ga. 227; State v. Tilghman, 14 Ia. 474; Louisville School Board v. King, 127 Ky. 824, 107 S. W. 247, 15 L. R. A. (N. S.) 379; In re Miner's Estate, 143 Cal. 194, 76 Pac. 968; and to give the inquisition the effect of a lien the same must be filed, as the record of it is the only competent evidence by which title by escheat can be established; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430; People v. Cutting, 3 Johns. (N. Y.) 1; and such action must also be taken to recover escheated lands held in adverse possession; after which an entry must be made

to give the state a right of possession; Jackson v. Adams, 7 Wend. (N. Y.) 367; Com. v. Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226; Reid v. State, 74 Ind. 252; and the facts which support the escheat must be stated; Catham v. State, 2 Head (Tenn.) 553; Appeal of Ramsey, 2 Watts (Pa.) 228, 27 Am. Dec. 301; a bill of information must be filed and a *scire facias* issued against all alleged to have, hold, claim, or possess such estate; Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519; and the names of all persons in possession of the premises, and all who were known to claim an interest therein, must be set forth and the *scire facias* served on them personally; to all other persons constructive notice is sufficient; *id.* In Texas, no proceedings can be had, except under and according to an act of the legislature; Wiederanders v. State, 64 Tex. 133; Hamilton v. Brown, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691.

In many of the states, however, the doctrine in force is, that land cannot remain without an owner; it must vest somewhere, and on the death of an intestate without heirs it becomes *eo instante* the property of the state; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; Hall v. Gittings' Lessee, 2 Harr. & J. (Md.) 112; State v. Reeder, 5 Neb. 203; Montgomery v. Dorion, 7 N. H. 475; Rubeck v. Gardner, 7 Watts (Pa.) 455; Haigh v. Haigh, 9 R. I. 26; Colgan v. McKeon, 24 N. J. L. 566. In Wallahan v. Ingersoll, 117 Ill. 123, 7 N. E. 519, it was held that on the death of an intestate without heirs, the title to his estate devolves immediately upon the state, but, in order to make that title available, it must be established in the manner prescribed by law by proceedings in the proper court, in the name of the people, for the purpose of establishing by judicial determination the title of the state. After a long lapse of time an inquest will be presumed; Doe v. Roe, 26 Ga. 582. A right of action for the recovery of lands is vested in the state at the death of the owner whose property escheats; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753. Persons claiming as heirs may come in under the statute and obtain leave to make up an issue at law to have their rights determined; Ex parte Williams, 13 Rich. (S. C.) 77; In re Alton's Estate, 220 Pa. 258, 69 Atl. 902; State v. Knott, 54 Fla. 138, 44 South. 744. The legislature is under no constitutional obligation to leave the title to such property in abeyance, and a judicial proceeding for ascertaining an escheat on due notice, actual to known, and constructive to all possible unknown, claimants, is due process of law; and a statute, providing for such proceeding does not impair the obligation of any contract, contained in the grant under which the former owner held whether from the state or a private person; Hamilton v. Brown, 161 U. S. 256, 275, 16 Sup. Ct. 585, 40 L. Ed. 691.

Not only do estates in possession escheat, but also those in remainder, if vested; People v. Conklin, 2 Hill (N. Y.) 67; and equitable as well as legal estates; Cross v. De Valle, 1 Wall. (U. S.) 5, 17 L. Ed. 515; Atkins v. Kron, 40 N. C. 207; 3 Washb. R. P. 446; Matthews v. Ward, 10 Gill & J. (Md.) 443; 4 Kent 424; (in many states this provision is statutory, but the rule in England is contrary; 1 Eden 177;) also those held in trust, when the trust expires; In re Linton's Estate, 198 Pa. 438, 48 Atl. 298; and an equity of redemption; Seitz v. Messerschmitt, 117 App. Div. 401, 102 N. Y. Supp. 732; and lands subject to dower, and the right is not waived by the appearance of the attorney-general of the state in an action to admeasure dower; Smith v. Doe, 111 N. Y. Supp. 525; also property devised by a void will, and the state is the proper party to contest the will; State v. Lancaster, 119 Tenn. 638, 105 S. W. 858, 14 L. R. A. (N. S.) 991, 14 Ann. Cas. 953; and duly constituted officials may intervene; Gombault v. Public Adm'r, 4 Bradf. Sur. (N. Y.) 226; *contra*, Hopf v. State, 72 Tex. 281, 10 S. W. 589.

Proceedings to traverse an inquest. An inquisition is traversable, the traverser being considered as a defendant, and being only required to show failure of title in the state and bare possession in himself; People v. Cutting, 3 Johns. (N. Y.) 1; *contra*, in Pennsylvania, where such traverser is in the position of plaintiff in ejectment and must show a title superior to the commonwealth; proceedings may be brought by any one claiming an interest and including an administratrix in possession; Com. v. Compton, 137 Pa. 138, 20 Atl. 417; In re Alton's Estate, 220 Pa. 258, 69 Atl. 902; it is a proceeding at law and not in equity; In re Fenstermacher v. State, 19 Or. 504, 25 Pac. 142; and the court of common pleas has jurisdiction over it; Com. v. Compton, 137 Pa. 138, 20 Atl. 417; the traverser being allowed to begin and conclude to the jury; Com. v. Desilver, 2 Ashm. (Pa.) 163. And if only one of those notified appear, he is entitled to a separate trial of his traverse; In re Malone's Estate, 21 S. C. 435; but such traverser has no precedence over others on the dockets of cases; Lance v. Dobson, Riley (S. C.) 301.

When all the members of a partnership have died intestate and without heirs, the property escheats to the state, but the heirs or kindred of any one of the partners may traverse the inquisition; Com. v. Land Co., 57 Pa. 102.

The law favors the presumption of the existence of heirs, and there must be something shown by those claiming by virtue of escheat to rebut that presumption; Appeal of Ramsey, 2 Watts (Pa.) 228, 27 Am. Dec. 301; State v. Teulon's Estate, 41 Tex. 249; but see *contra*, Brown v. State, 36 Tex. 283; Hammond's Lessee v. Inloes, 4 Md. 138; University of North Carolina v. Harrison, 90 N. C. 385, overruling as to this point University

of North Carolina v. Johnston, 2 N. C. 373. Proceedings for an escheat for want of heirs or devisees, like ordinary provisions for the administration of his estate, presuppose that he is dead; if he is still alive, the court is without jurisdiction and its proceedings are null and void, even in a collateral proceeding; Hamilton v. Brown, 161 U. S. 256, 267, 16 Sup. Ct. 585, 40 L. Ed. 691, citing Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; Hall v. Claiborne, 27 Tex. 217.

Equity cannot enjoin proceedings to have an escheat declared, where every question presented could be decided on a traverse should such escheat be found; Appeal of Olmsted, 86 Pa. 284; and an *amicus curiæ* cannot move to quash an inquisition, unless he has an interest himself or represents some one who has; Dunlop v. Com., 2 Call. (Va.) 284.

Disposition of escheated lands by the state. Where the state takes the title of escheated land, it is entitled to the rights of the last owner; therefore, such lands cannot be taken up by location as vacant land; Hughes v. State, 41 Tex. 13; or be regarded as ungranted land; but it must be sold pursuant to the statute; Bodden v. Speigner, 2 Brev. (S. C.) 321; Straub v. Dimm, 27 Pa. 36; and a grant of such lands by the state before office found is valid; Rubeck v. Gardner, 7 Watts (Pa.) 456; Colgan v. McKeon, 24 N. J. L. 566; McCaughal v. Ryan, 27 Barb. (N. Y.) 376; as is also a grant of land to escheat *in futuro;* Nettles v. Cummings, 9 Rich. Eq. (S. C.) 440; but no authority is vested in officers of the land office to issue warrants for the taking up of escheated lands. After seven years from the inquisition they shall be sold at auction; Straub v. Dimm, 27 Pa. 36; and the power to order the sale of the property is vested in the district court; Hughes v. State, 41 Tex. 10. The disposition of funds secured by the sale of such property must be strictly in conformity with the state statute; and the legislature of a state can pass no act diverting the funds to another purpose; State v. Reeder, 5 Neb. 203; where the constitution gives to the legislature the power to provide methods to enforce the forfeiture, there can be no proceedings until the legislature acts; Wiederanders v. State, 64 Tex. 133.

In addition to the escheat for want of heirs of a decedent, there are in some states provisions for forfeiture to the state of lands held by corporations under certain circumstances; in Kentucky, property of a corporation not necessary to its business and held for more than five years is forfeited for the benefit of schools; Com. v. Property Co., 128 Ky. 790, 109 S. W. 1183; in Pennsylvania it is provided that land held by or for corporations, either directly or indirectly, unless specially authorized by statute, shall "escheat" to the state, but land belonging to a mining company, all of whose stock was held by a railroad company, was held not to be within the mischief of such statute; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634. Corporate property so forfeited is taken however subject to the payment of debts of the corporation; War Eagle Consol. Min. Co. v. Dickie, 14 Idaho 534, 94 Pac. 1034. Though in passing or construing such statutes as these, both legislatures and courts have employed the term "escheat," it would appear to be a departure from its precise meaning as used in the common law.

In some states statutes provided that certain unclaimed funds held by corporations shall go to the state; such acts are constitutional; Deaderick v. Washington County Court, 1 Coldw. (Tenn.) 202.

A statute, providing that all moneys remaining in the registry of the United States courts unclaimed for ten years or longer shall be paid over to the government, is unconstitutional; the United States cannot be regarded as a *parens patriæ*, and the right of escheat belongs only to the states; American Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775.

See, generally, American Mortgage Co. of Scotland v. Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529; ALIEN; BASTARD; DISSOLUTION; FOREIGN CORPORATION.

ESCHEATOR. The name of an officer whose duties are generally to ascertain what escheats have taken place, and to prosecute the claim of the sovereign for the purpose of recovering the escheated property. 10 Vin. Abr. 158; Co. Litt. 13 *b;* Toml. L. D. His office was to be retained but one year; and no one person could hold the office more than once in three years.

This office has fallen into desuetude. There was formerly an escheator-general in Pennsylvania but his duties have been transferred to the auditor-general, and in most of the states the duties of this office devolve upon the attorney-general.

ESCRIBANO. **In Spanish Law.** The public officer who is lawfully authorized to reduce to writing and verify by his signature all judicial acts and proceedings as well as all acts and contracts entered into between private individuals.

ESCROW. A deed delivered to a stranger, to be by him delivered to the grantee upon the happening of certain conditions, upon which last delivery the transmission of title is complete.

The delivery must be to a stranger; Fairbanks v. Metcalf, 8 Mass. 230. See 9 Co. 137 *b;* Foley v. Cowgill, 5 Blackf. (Ind.) 18, 32 Am. Dec. 49; Gilbert v. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Den v. Partee, 19 N. C. 530; Simonton's Estate, 4 Watts (Pa.) 180; Jackson v. Sheldon, 22 Me. 569; for when delivered directly to the grantee; Campbell v. Jones, 52 Ark. 493, 12 S. W. 1016, 6 L. R. A. 783; Stevenson v. Crapnell, 114 Ill. 19, 28 N. E. 379; East Texas Fire Ins. Co. v. Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277; Hubbard v. Greeley, 84 Me. 340,

24 Atl. 799, 17 L. R. A. 511; or to the agent or attorney of the grantee; Day v. Lacasse, 85 Me. 242, 27 Atl. 124; it cannot be treated as an escrow; but see McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Shelby v. Tardy, 84 Ala. 327, 4 South. 276.

In Cincinnati, W. & Z. R. Co. v. Iliff, 13 Ohio St. 235, the court, after giving Kent's definition, says: "The phrase 'a stranger' used in this definition, or the phrase 'a third person' which in many of the books is used interchangeably with it, it seems to me can mean no more than this, a stranger to the deed as not being a party to it; or at most this, a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duties as a depositary to both parties, without involving a breach of duty to either." It was there held that an agent of one party was not incapacitated from becoming the depositary of an escrow. An officer of a corporation may receive a deed in escrow though the corporation be a party thereto; Southern Life Ins. & Trust Co. v. Cole, 4 Fla. 359; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106. The second delivery must be conditioned, and not merely postponed; O'Kelly v. O'Kelly, 8 Metc. (Mass.) 436; 2 B. & C. 82; Shep. Touch. 58. Care should be taken to express the intent of the first delivery clearly; Clark v. Gifford, 10 Wend. (N. Y.) 310; Fairbanks v. Metcalf, 8 Mass. 230; Jackson v. Sheldon, 22 Me. 569; White v. Bailey, 14 Conn. 271. An escrow has no effect as a deed till the performance of the condition; Hinman v. Booth, 21 Wend. (N. Y.) 267; Gaston v. City of Portland, 16 Or. 255, 19 Pac. 127; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Patrick v. McCormick, 10 Neb. 1, 4 N. W. 312; and takes effect from the second delivery; Green v. Putnam, 1 Barb. (N. Y.) 500. See Foster v. Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; Jackson v. Rowland, 6 Wend. (N. Y.) 666, 22 Am. Dec. 557; Stiles v. Brown, 16 Vt. 563; Rhodes v. School Dist., 30 Me. 110; Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; White Star Line Steamboat Co. v. Moragne, 91 Ala. 610, 8 South. 867. But where the parties announce their intention that the escrow shall, after the performance of the condition, take effect from the date of the deed, such intention will control; Devl. Deeds 329; Price v. R. Co., 34 Ill. 13.

A deed delivered in escrow cannot be revoked; McDonald v. Huff, 77 Cal. 279, 19 Pac. 499.

The term, though usually applied to deeds, is sometimes applied to any written instrument; Andrews v. Thayer, 30 Wis. 228; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Stewart v. Anderson, 59 Ind. 375; Ortmann v. Bank, 49 Mich. 56, 12 N. W. 907; Kemp v. Walker, 16 Ohio, 118; 12 Q. B. 317; Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375; Clark v. Campbell, 23 Utah, 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716. They are usually cases of incomplete instruments, not strictly escrow. As to negotiable instruments the law aims to secure their free and unrestrained circulation and to protect the rights of persons taking them bona fide without notice. It therefore places the consequences which follow from the negotiation of promissory notes and bills of exchange, through the fraud, deception or mistake of the persons to whom they are intrusted by the maker, on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value without notice; Fearing v. Clark, 16 Gray (Mass.) 74, 77 Am. Dec. 394, followed in Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156. To the same effect Burson v. Huntington, 21 Mich. 415, 4 Am. Rep. 497; Vallett v. Parker, 6 Wend. (N. Y.) 615; Long Island Loan & Trust Co. v. Ry. Co., 65 Fed. 455.

It is held a delivery in escrow for one person to sign a note as surety upon the express condition that another person's signature is also to be obtained, and to deliver the note to the maker for that purpose; Perry v. Patterson, 5 Humph. (Tenn.) 133, 42 Am. Dec. 424. But it is held that signing a note and placing it in the hands of one of the signers, with direction to deliver it only on condition that it should be signed by other designated persons, is not a delivery in escrow, but of an incomplete instrument, and there can be no recovery against those executing it when it has not been executed by all; Keener v. Crago, 81 Pa. 166.

It has been held that notes cannot be delivered in escrow to the agent of the payee to hold until the maker could investigate the indebtedness for which they were given; Murray v. W. W. Kimball Co., 10 Ind. App. 184, 37 N. E. 734; *id.*, 10 Ind. App. 141, 37 N. E. 736; *contra*, Stewart v. Anderson, 59 Ind. 375; or so as to make the signature of another person essential to its validity; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823. But it is held that if the deposit is of such character as to negative its being delivered to the grantee, it may nevertheless operate as a delivery in escrow, although placed in the hands of the grantee's solicitor, if he was intended to hold it as an incomplete instrument; L. R. 20 Eq. 262; Ashford v. Prewitt, 102 Ala. 264, 14 South. 663, 48 Am. St. Rep. 37.

As a general rule, when an instrument is placed in the hands of a third person in escrow, it takes effect from the second delivery; but such a rule does not apply where either justice or necessity requires a resort to a fiction in order to avoid injury (as in case of intervening rights between the first and second delivery, it shall take effect from its first delivery); Shirley's Lessee v. Ayres, 14 Ohio 307, 45 Am. Dec. 546; Bank v. Lum-

ber Co., 32 W. Va. 357, 9 S. E. 243. In such a case, much depends on the intent of the parties to be collected from the nature of the transaction; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826. This fiction is adopted to prevent a manifest hardship; Craddock v. Barnes, 142 N. C. 89, 54 S. E. 1003; and there is no reason why it should not be invoked to effectuate the lawful intent of the parties; *id.*

In Gish v. Brown, 171 Pa. 479, 33 Atl. 60, the fiction of relation back was adopted where the grantor delivered the deed to a third person with absolute instructions to hold it until his death and then deliver it to the grantee. So where one of the parties has come under a disability such as mental incapacity; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; and where a woman, after delivering a bond on condition, marries before the happening of the condition; 1 Ves. Jr. 275; and where the condition was capable of performance within the lifetime of the grantor, though the instrument, delivered to a third person, provided that it should not take effect until the death of the grantor; Nolan v. Otney, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, where the provision was construed to mean that the title was to vest at once, and only the enjoyment to be postponed until the death of the grantor.

It is the performance of the condition and not the second delivery that gives it vitality as a deed; State Bank at Trenton v. Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826. No title passes until the condition is performed; Calhoun County v. Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; but the instant the conditions are performed the instrument takes effect, though the depositary has not formally delivered it; Taylor v. Thomas, 13 Kan. 217; Missouri Pac. R. Co. v. Atkison, 17 Mo. App. 484. The depositary then holds possession for the grantee; Cannon v. Handley, 72 Cal. 133, 13 Pac. 315.

Where dividends are declared on stock deposited in escrow, they are the property of the seller; Clark v. Campbell, 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508, 90 Am. St. Rep. 716.

One acting in escrow acts at his peril with either party without the consent of the other; Citizens' Nat. Bank of Roswell, N. M., v. Davisson, 229 U. S. 212, 33 Sup. Ct. 625, 57 L. Ed. ——.

See, generally, Shirley's Lessee v. Ayres, 14 Ohio 309, 45 Am. Dec. 546; Ruggles v. Lawson, 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; Carr v. Hoxie, 5 Mas. 60, Fed. Cas. No. 2,438; Evans v. Gibbs, 6 Humph. (Tenn.) 405; Foster v. Mansfield, 3 Metc. (Mass.) 412, 37 Am. Dec. 154; Crane v. Hutchinson, 3 Ill. App. 30; Clements v. Hood, 57 Ala. 459; Miller v. Sears, 91 Cal. 282, 27 Pac. 589, 25 Am. St. Rep. 176; Minah Consol. Min. Co. v. Briscoe, 47 Fed. 276; 10 L. R. A. 469, n.

As to the validity of a deed to take effect at the death of the grantor, see DELIVERY.

ESCUAGE. In Old English Law. Service of the shield. Tenants who hold their land by escuage hold by knight's service. 1 Thomas, Co. Litt. 272; Littleton § 95, 86 *b*. Abolished by Stat. 12 Car. II. c. 24. SCUTAGE.

ESKETORES. Robbers or destroyers of other men's lands and fortunes. Cowell.

ESKIPPAMENTUM. Tackle or furniture; outfit. Certain towns in England were bound to furnish certain ships at their own expense and with double *skippage* or tackle. The modern word outfit would seem to render the passage quite as satisfactorily; though the conjecture of Cowell has the advantage of antiquity.

ESKIPPER, ESKIPPARE. To ship. Kelh. Norm. L. D.; Rast. 409.

ESKIPPESON. Shippage, or passage by sea. Spelled, also, *skippeson*. Cowell.

ESNECY. Eldership. In the English law, this word signifies the right which the eldest coparcener of lands has to choose first one of the parts of the estate after it has been divided.

ESPERA. The period fixed by a competent judge within which a party is to do certain acts, as, *e. g.*, to effect certain payments, present documents, etc.; and more especially the privilege granted by law to debtors, allowing them certain time for the payment of their indebtedness.

ESPLEES. The products which the land or ground yields; as, the hay of the meadows, the herbage of the pasture, corn or other produce of the arable, rents, and services. See Witherow v. Keller, 11 S. & R. (Pa.) 275; Dane, Abr. Index; Fosgate v. Mfg. & Hydraulic Co., 9 Barb. (N. Y.) 293.

ESPOUSALS. A mutual promise between a man and a woman to marry each other at some other time: it differs from a marriage, because then the contract is completed. Wood, Inst. 57. See BETROTHMENT.

ESQUIRE. A title applied by courtesy to officers of almost every description, to members of the bar, and others. No one is entitled to it by law; and therefore it confers no distinction in law.

In England, it is a title next above that of a gentleman and below that of a knight. Camden reckons up four kinds of esquires particularly regarded by the heralds: the eldest sons of knights, and their eldest sons in perpetual succession; the eldest sons of the younger sons of peers, and their eldest sons in like perpetual succession; esquires created by the king's letters patent, or other investiture, and their eldest sons; esquires by virtue of their office, as justices of the peace, and others who bear any office of trust under the crown. 2 Steph. Com. 673. A miller or a farmer may be an esquire; L. R. 2 Eq. 235.

ESSART. In Forest Law. The destruction of the forest and the reduction of it to a state of cultivation. 1 Holdsw. Hist. E. L. 342.

ESSE. See IN ESSE.

ESSENDI QUIETAM DE TOLONEO (Lat. of being quit of toll). A writ which lay anciently for the citizens or burgesses of a town which was entitled to exemption from toll, in case toll was demanded of them. Fitzh. N. B. 226, I.

ESSOIN, ESSOIGN. In Old English Law. An excuse for not appearing in court at the return of the process. Presentation of such excuse. Spelman, Gloss.; 1 Sell. Pr. 4; Com. Dig. *Exoine*, B 1. *Essoin* is not now allowed at all in personal actions. 2 Term 16; 3 Bla. Com. 278, n.

ESSOIN DAY. Formerly, the first day in the term was essoin day; now practically abolished. Dowl. 448; 3 Bla. Com. 278, n.

ESSOIN ROLL. The roll containing the *essoins* and the day of adjournment. Rosc. R. Act. 162 *et seq.*

ESTABLISH. This word occurs frequently in the constitution of the United States, and it is there used in different meanings. 1. To settle firmly, to fix unalterably: as, to establish justice, which is the avowed object of the constitution. 2. To make or form: as, to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies,—which evidently does not mean that these laws shall be unalterably established as justice. 3. To found, to create, to regulate: as, Congress shall have power to establish postroads and post-offices. 4. To found, recognize, confirm, or admit: as, Congress shall make no law respecting an establishment of religion. 5. To create, to ratify, or confirm: as, We, the people, etc., do ordain and establish this constitution. 1 Story, Const. § 454.

For decisions upon the scope and meaning of the word, see Ketchum v. City of Buffalo, 14 N. Y. 356; People v. Lowber, 28 Barb. (N. Y.) 65; Wartman v. City of Philadelphia, 33 Pa. 202; Com. v. Simonds, 11 Gray (Mass.) 306; Smith v. Forrest, 49 N. H. 230; Succession of Weigel, 18 La. Ann. 49.

The Established Church in England is the Church of England; so of Wales. The Irish Church has been disestablished.

ESTABLISHMENT, ETABLISSEMENT. An ordinance or statute. Especially used of those ordinances or statutes passed in the reign of Edw. I. Co. 2d Inst. 156; Britt. c. 21. That which is instituted or established for public or private use, as the trading establishments of a government.

Etablissement is also used to denote the settlement of dower by the husband upon his wife. Britt. c. 102.

ESTADAL. In Spanish Law. A measure of land of sixteen square varas, or yards. 2 White, Rec. 139.

ESTADIA. In Spanish Law. Called, also, *Sobrestadía.* The time for which the party who has chartered a vessel, or is bound to receive the cargo, has to pay demurrage on account of his delay in the execution of the contract.

ESTATE (Lat. *status*, the condition or circumstances in which the owner stands with reference to his property). The degree, quantity, nature, and extent of interest which a person has in real property.

It signifies the quantity of interest which a person has, from absolute ownership down to naked possession; Jackson v. Parker, 9 Cow. (N. Y.) 81.

This word has several meanings. 1. In its most extensive sense, it is applied to signify every thing of which riches or fortune may consist, and includes personal and real property: hence we say, personal estate, real estate; 8 Ves. 504; Jackson v. Robins, 16 Johns. (N. Y.) 587; Deering v. Tucker, 55 Me. 284; Bates v. Sparrell, 10 Mass. 323; Archer v. Deneale, 1 Pet. (U. S.) 585, 7 L. Ed. 272; Donovan's Lessee v. Donovan, 4 Harr. (Del.) 177; Andrews v. Brumfield, 32 Miss. 107; Blewer v. Brightman, 4 McCord (S. C.) 60; Den v. Snitcher, 14 N. J. L. 53. 2. In its more limited sense, the word estate is applied to lands. It is so applied in two senses. The first describes or points out the land itself, without ascertaining the extent or nature of the interest therein: as, "my estate at A." Godfrey v. Humphrey, 18 Pick. (Mass.) 537, 29 Am. Dec. 621. The second, which is the proper and technical meaning of estate, is the degree, quantity, nature, and extent of interest which one has in real property: as, an estate in fee, whether the same be a free-simple or fee-tail, or, an estate for life or for years, etc. Coke says, Estate signifies such inheritance, freehold, term of years, tenancy by statute merchant, staple, eligit, or the like, as any man hath in lands or tenements, etc. Co. Litt. §§ 345, 650 *a*. See Jones, Land Off. Titles in Penna. 165. Estate does not include rights in action; Pippin v. Ellison, 34 N. C. 61, 55 Am. Dec. 403; McIntyre v. Ingraham, 35 Miss. 25; In re Sibbald's Estate, 18 Pa. 249. But as the word is commonly used in the settlement of estates, it does include the debts as well as the assets of a bankrupt or decedent, all his obligations and resources being regarded as one entirety. See Davis's Heirs v. Elkins, 9 La. 135. Also the status or condition in life of a person; State v. Bishop, 15 Me. 122. See ESTATES OF THE REALM.

ESTATE AT WILL. An estate in lands which the tenant has, by entry made thereon under a demise, to hold during the joint wills of the parties to the same. Co. Litt. 55 *a*; Tud. L. Cas. R. P. 10; 2 Bla. Com. 145; 4 Kent 110. Estates properly at will are of very infrequent occurrence, being generally turned into estates for years or from year to year by decisions of the courts or by statute; 4 Kent 115; Tud. L. Cas. R. P. 14; Lesley v. Randolph, 4 Rawle (Pa.) 123; 1 Term 159.

They may be created by express words or may arise by implication of law. Where created by express contract, the writing necessarily so indicates, and reserves the right of termination to either party, as where the lease provides that the tenant shall occupy the premises so long as agreeable to both parties; 4 Taunt. 128; Say v. Stoddard, 27 Ohio St. 478. They arise by implication of law where no definite time is stated in the

contract, or where the tenant enters into possession under an agreement to execute a contract for a specific term and he subsequently refuses to do so, or where one enters under a void lease, or where he holds over pending negotiations for a new lease; Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575. The chief characteristics of this form of tenancy are (1) uncertainty respecting the term and (2) the right of either party to terminate it by proper notice. See TENANCY AT SUFFERANCE.

ESTATE BY ELEGIT. See ELEGIT.

ESTATE BY STATUTE MERCHANT. See STATUTE MERCHANT.

ESTATE BY STATUTE STAPLE. See STATUTE STAPLE.

ESTATE BY THE CURTESY. That estate to which a husband is entitled upon the death of his wife in the lands or tenements of which she was seised in possession, in fee-simple, or in fee-tail during their coverture; provided they have had lawful issue born alive and possibly capable of inheriting her estate. Co. Litt. 30 *a;* 2 Bla. Com. 126; 4 Kent 29; Leach v. Leach, 21 Hun (N. Y.) 381; Crumley v. Deake, 8 Baxt. (Tenn.) 361; Carter v. Dale, 3 Lea. (Tenn.) 710, 31 Am. Rep. 660; McKee v. Cattle, 6 Mo. App. 416; Tremmel v. Kleiboldt, 6 Mo. App. 549; [1892] 2 Ch. 336. See CURTESY.

ESTATE DUTY. A duty imposed in England (act of 1894) superseding probate duty, taxing not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Hansen, Death Duties 63. It is leviable on property which was left untouched by probate duty, such as real estate, yet it is in substance of the same nature as the old probate duty; *id.* See TAX.

ESTATE FOR LIFE. A freehold estate, not of inheritance, but which is held by the tenant for his own life or the life or lives of one or more other persons, or for an indefinite period, which may endure for the life or lives of persons in being, and not beyond the period of a life. 1 Washb. R. P. 88; Co. Litt. 42 *a;* Bract. lib. 4, c. 28, § 207; Hurd v. Cushing, 7 Pick. (Mass.) 169; Chal. R. P. 89. When the measure of duration is the tenant's own life, it is called simply an estate "for life;" when the measure of duration is the life of another person, it is called an estate "*per* (or *pur*) *autre vie;*" 2 Bla. Com. 120; Co. Litt. 41 *b;* 4 Kent 23, 24.

Estates for life may be created by act of law or by act of the parties: in the former case they are called legal, in the latter conventional. The legal life estates are estates-tail after possibility of issue extinct, estates by dower, estates by curtesy, jointures; Mitch. R. P. 118, 133; Eldridge v. Preble, 34 Me. 151; Dejarnatte v. Allen, 5 Gratt. (Va.) 499; Fay v. Fay, 1 Cush. (Mass.) 95; Irwin v. Covode, 24 Pa. 162; 3 E. L. & Eq. R. 345; Miller v. Williamson, 5 Md. 219; Gourley v. Woodbury, 51 Vt. 37; Brooks v. Brooks, 12 S. C. 422; Slemmer v. Crampton, 50 Ia. 302; Rountree v. Talbot, 89 Ill. 246; Noe v. Miller's Ex'rs, 31 N. J. Eq. 234. A life estate may be created by implication; Nicholson v. Drennan, 35 S. C. 333, 14 S. E. 719.

A right given by a will to occupy, at a specified rent, certain premises as long as the devisee "may desire to occupy the same as a drug store," was held to amount to an estate for life; and to the same effect Warner v. Tanner, 38 Ohio St. 118; Jones v. Mason, 5 Rand. (Va.) 584, 16 Am. Dec. 761; as was a grant "so long as the waters of the Delaware shall run"; Foster v. Joice, 3 Wash. C. C. 498, Fed. Cas. No. 4,974; and a lease at a specified monthly rent of certain premises whilst the defendant continued to wish to live in a certain city; Thompson v. Baxter, 107 Minn. 122, 119 N. W. 797, 21 L. R. A. (N. S.) 575. A devise of the use and improvement of the testator's real estate, so long as the devisee should choose personally to occupy and improve any portion of the estate, was held to create a life estate, though terminable by the tenant ceasing to occupy; Wilmarth v. Bridges, 113 Mass. 407.

The chief incidents of life estates are a right to take reasonable estovers, and freedom from injury by a sudden termination or disturbance of the estate; Smith v. Jewett, 40 N. H. 532. A tenant for life may not operate for oil or gas, or make an oil or gas lease, unless operations for oil or gas were commenced before the life estate accrued; Marshall v. Mellon, 179 Pa. 371, 36 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601; nor can the owner of such an estate maintain an action of partition against the owners of the estate in remainder; Love v. Blauw, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334. Under-tenants have the same privileges as the original tenant; and acts of the original tenant which would destroy his own claim to these privileges will not affect them; see Neel v. Neel, 19 Pa. 323.

Their right, however, does not of course, as against the superior lord, extend beyond the life of the original tenant; 2 Bla. Com. 122; 1 Rolle, Abr. 727; Co. Litt. 41 *b.*

ESTATE FOR YEARS. An interest in lands by virtue of a confract for the possession of them for a definite and limited period of time. 2 Bla. Com. 140; 2 Crabb, R. P. § 1267; Bac. Abr. *Leases;* Wms. R. P. 195. Such estates are frequently called terms. See TERM. The length of time for which the estate is to endure is of no importance in ascertaining its character, unless otherwise declared by statute; Chapman v. Gray, 15 Mass. 439; Brewster v. Hill, 1 N. H. 350; Diller v. Roberts, 13 S. & R. (Pa.) 60, 15 Am. Dec. 578; Brown's Adm'rs v. Bragg, 22 Ind. 122; 4 Kent 93.

ESTATE FROM YEAR TO YEAR. It is an example of an estate for years. It is of later origin and is not found in Littleton (see § 381). It exists in cases where the parties stipulate for it, and also where the parties by their conduct have placed themselves in the relation of landlord and tenant without adopting any other term. If a tenant has been allowed to hold over after the expiration of his term in such a way as to preclude the possibility of his becoming a tenant on sufferance, it is a tenancy from year to year. Jenks, Mod. Land Law 88.

A tenancy from year to year exists where both landlord and tenant are entitled to notice before the tenancy can be terminated by either. At common law such notice must be given at least one-half year before the expiration of the current year. The tenant must occupy for a certain number of complete years; Odger, C. L. 869. A tenancy from year to year in England lasts as long only as both parties please; it is terminable by either at the end of any year on a half year's notice; 7 Q. B. 958.

It was originally a development of a tenancy at will, by which the tenancy was terminable only at the time of the year at which it began, and on notice.

ESTATE IN COMMON. An estate held in joint possession by two or more persons at the same time by several and distinct titles. 1 Washb. R. P. 415; 2 Bla. Com. 191; 1 Pres. Est. 139. This estate has the single unity of possession, and may be of real or personal property; Harvey v. Cherry, 76 N. Y. 436; Jones v. Cohen, 82 N. C. 75; Withrow v. Biggerstaff, 82 N. C. 82; Stookey v. Carter, 92 Ill. 129; Kean v. Connelly, 25 Minn. 222, 33 Am. Rep. 458; Goell v. Morse, 126 Mass. 480; Ennis v. Hutchinson, 30 N. J. Eq. 110; Butler v. Roys, 25 Mich. 53, 12 Am. Rep. 218.

Where one dies intestate, the joint ownership of his property by his children is generally that of tenants in common; Fenton v. Miller, 94 Mich. 204, 53 N. W. 957.

ESTATE IN COPARCENARY. An estate which several persons hold as one heir, whether male or female. In the latter case, it arises at common law, when an estate descends to two or more females; in the former, when an estate descends to all the males in equal degree by particular custom. This estate has the three unities of time, title, and possession; but the interests of the coparceners may be unequal. 1 Washb. R. P. 414; 2 Bla. Com. 188; 4 Kent 366; Flynn v. Herye, 4 Mo. App. 360. See COPARCENARY, ESTATES IN.

ESTATE IN DOWER. See DOWER.

ESTATE IN EXPECTANCY. An estate giving a present or vested contingent right of future enjoyment. One in which the right to pernancy of the profits is postponed to some future period. Such are estates in remainder and reversion. Lawrence v. Bayard, 7 Paige, Ch. (N. Y.) 70, 76; Underhill v. R. Co., 20 Barb. 455. See EXPECTANCY.

ESTATE IN FEE-SIMPLE. See FEE-SIMPLE.

ESTATE IN FEE-TAIL. See FEE-TAIL.

ESTATE IN JOINT TENANCY. See JOINT TENANCY.

ESTATE IN POSSESSION. An estate where the tenant is in actual pernancy or receipt of the rents and other advantages arising therefrom. 2 Crabb, R. P. § 2322; 2 Bla. Com. 163. See Campau v. Campau, 19 Mich. 116; Valle v. Clemens, 18 Mo. 486; EXPECTANCY.

ESTATE IN REMAINDER. See REMAINDER.

ESTATE IN REVERSION. See REVERSION.

ESTATE IN SEVERALTY. See SEVERALTY, ESTATE IN.

ESTATE IN VADIO. See MORTGAGE.

ESTATE OF FREEHOLD or FRANK-TENEMENT. Any estate of inheritance, or for life, in either a corporeal or incorporeal hereditament, existing in or arising from real property of free tenure. 2 Bla. Com. 104. It thus includes all estates but copyhold and leasehold, the former of which has never been known in this country. Freehold *in deed* is the real possession of land or tenements in fee, fee-tail, or for life. Freehold *in law* is the right to such tenements before entry. The term has also been applied to those offices which a man holds in fee or for life. Mozl. & W. Dict.; 1 Washb. R. P. 71, 637. See Gage v. Scales, 100 Ill. 221; State v. Ragland, 75 N. C. 12, L. R. 11 Eq. 454; LIBERUM TENEMENTUM.

ESTATE OF INHERITANCE. An estate which may descend to heirs. 1 Washb. R. P. 51; 1 Steph. Com. 218.

All freehold estates are estates of inheritance, except estates for life. Crabb, R. P. § 945.

ESTATE PUR AUTRE VIE. An estate for the life of another. It arises most frequently when a tenant for his own life conveys his estate to a third person. He can only convey what he has, and his grantee takes an estate during the life of the grantor. If the tenant died during the life of the grantor (who was called the *cestui que vie*), at common law the residue of the estate went to the first person who took it, termed a general occupant. If the original gift was to the tenant and his heirs, the heir took it as special occupant. By statute in England, if there is no special occupant, the estate goes to the executors as personalty, if not disposed of by will. This rule has been adopted in most of the United States, except a few, where it still descends

as personalty; 1 Washb. R. P. 88; 2 Bla. Com. 120.

Where two estates come to one person, so that if in the same right they would merge, if one of them be *in autre droit*, there will be no merger. 2 Bla. Com. 177, but see Sharsw. note 17.

ESTATE TAIL. See FEE-TAIL.

ESTATE UPON CONDITION. See CONDITION.

ESTATES OF THE REALM. The lords spiritual, the lords temporal, and the commons of Great Britain. 1 Bla. Com. 153; 3 Hallam, ch. 6, pl. 3. Sometimes called the three estates.

ESTER IN JUDGMENT. To appear before a tribunal either as plaintiff or defendant. Kelh. Norm. L. D.

ESTIMATE. A word used to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation. People v. Clark, 37 Hun (N. Y.) 203.

ESTOPPEL. The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.

A preclusion, in law, which prevents a man from alleging or denying a fact, in consequence of his own previous act, allegation, or denial of a contrary tenor. Steph. Pl. 239.

A plea which neither admits nor denies the facts alleged by the plaintiff, but denies his right to allege them. Gould, Pl. c. 2, § 39.

A special plea in bar, which happens where a man has done some act or executed some deed which precludes him from averring anything to the contrary. 3 Bla. Com. 308.

Where a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another so that it cannot be denied without a breach of good faith, the law enforces the rule of good morals as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions; Douglass v. Scott, 5 Ohio 199; Rawle, Cov. 407.

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse, nor confession and avoidance, viz.: a pleading that, waiving any question of fact, relies merely on the estoppel, and, after stating the previous act, allegation, or denial of the opposite party, prays judgment if he shall be received or admitted to aver contrary to what he before did or said. This pleading is called a pleading by way of estoppel. Steph. Pl. 240; Blackington v. Johnson, 126 Mass. 21; Andrews v. Ins. Co., 18 Hun (N. Y.) 163; Cross v. Levy, 57 Miss. 634; Byrne v. Bank, 31 La. Ann. 81; Stephenson v. Walker, 8 Baxt. (Tenn.) 289; Hull v. Johnston, 90 Ill. 604; Walker v. Baxter, 6 Wash. 244, 33 Pac. 426.

Formerly the questions regarding estoppel arose almost entirely in relation to transfers of real property, and the rules in regard to one kind of estoppel were quite fully elaborated. In more modern time the principle has come to be applied to all cases where one by words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position; 2 Exch. 653; Den v. Baldwin, 21 N. J. L. 403; Titus v. Morse, 40 Me. 348, 63 Am. Dec. 665. See, as to the reason and propriety of the doctrine, Co. Litt. 352 *a*; Pelletreau v. Jackson, 11 Wend. (N. Y.) 117; Jones v. Sasser, 18 N. C. 464; Blake v. Tucker, 12 Vt. 44.

"The correct view of estoppel is that taken in a recent work (Bigelow, Est.). 'Certain admissions,' it is there said, 'are indisputable, and estoppel is the agency of the law by which evidence to controvert their truth is excluded.' In other words, when an act is done, or a statement made by a party the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel will be given to what would otherwise be a mere matter of evidence. The law of estoppel, therefore, is a branch of the law of evidence, it has become a part of the jurisdiction of chancery, simply because in equity alone, or rather by equitable construction alone, has that full effect been given to this species of evidence which is necessary to the due administration of justice." Bisph. Eq. § 280. See Tiedm. Eq. Jur. 106.

"Estoppel is only a rule of evidence and you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something he has said." (1891) 3 Ch. 82, 105, per Bowen, L. J. The doctrine of estoppel was applied to a case of the transfer of shares upon a forged order; L. R. 3 Q. B. 584.

Where there is an attempt to apply the doctrine of estoppel, one essential in such a case is that the party in whose favor it is invoked must himself act in good faith; Vaughn v. Hixon, 50 Kan. 773, 32 Pac. 358; and it is of the essence of estoppels that they must be mutual and certain to every intent; Sutton v. Dameron, 100 Mo. 141, 13 S. W. 497; Sullivan v. R. Co., 128 Ala. 97, 30 South. 528; and they cannot rest on argument or inference; *id.* They arise out of matters of fact, not of law; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415.

Estoppels are of three kinds. 1. By deed. 2. By matter of record. 3. By matter *in pais*, which last are also termed equitable estoppels.

BY DEED. Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny any thing stated therein which has operated upon the other party: as, the inducement to accept and act under such deed; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Green v. Clark, 13 Vt. 158; Douglass v. Scott, 5 Ohio 199; Bennett v. Conant, 10 Cush. (Mass.) 163; Reinhard v. Min. Co., 107 Mo. 616, 18 S. W. 17, 28 Am. St. Rep. 441; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Craig v. Reeder, 3 McCord (S. C.) 411; including a deed made with covenant of warranty, which estops even as to a subsequently acquired title; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91, 6 Am. Dec. 355; Baxter v. Bradbury, 20 Me. 260, 37 Am. Dec. 49; Blake v. Tucker, 12 Vt. 39; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812; Moore v. Crawford, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; Ayer v. Brick Co., 157 Mass. 57, 31 N. E. 717; Woods v. Bonner, 89 Tenn. 411, 18 S. W. 67; but, while this is the general rule, there is

no estoppel where the deed is a release with a covenant of restricted warranty merely of the title granted; Comstock v. Smith, 13 Pick. (Mass.) 116, 23 Am. Dec. 670; nor will a deed of release without covenant of warranty estop the grantor from contesting the seisin of the grantor and showing seisin in himself by an older and better title; Ham v. Ham, 14 Me. 351; so a conveyance of all of the grantor's right, title and interest does not convey more than he has at the time and the covenants apply only to the grant and do not enlarge it; Coe v. Persons Unknown, 43 Me. 432. A grantor who covenants against incumbrances without reservation is estopped to sue for obstruction to a right of way across the granted premises; De Rochemont v. R. R., 64 N. H. 500, 15 Atl. 131. A grantor whose deed recites or affirms his seisin of the estate granted, either expressly or by implication, is estopped to deny that such estate passed, though there is no warranty; Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317; but while he may not show that he had no such estate as the deed purported to convey, he is not estopped to show a subsequently acquired, independent title consistent with the deed; Cuthrell v. Hawkins, 98 N. C. 203, 3 S. E. 672; and a conveyance with warranty by one who had no title, but who afterwards acquired title as trustee, did not operate by estoppel so as to make the latter enure to the former grantee, since an estoppel arises only when the new title is taken in the same right; Dewhurst v. Wright, 29 Fla. 229, 10 South. 682. The doctrine of estoppel by deed has been applied to one who, having as agent leased land for a term of years, was not permitted to set up want of authority to make the lease; Lee v. Lee, 83 Ia. 565, 50 N. W. 33; to a vendor who, having only a certificate of purchase at a tax sale, and having given bond to make a quitclaim deed on payment of the purchase money, was precluded from acquiring any title by virtue of the tax sale, as was also one claiming from him by descent or as a purchaser with notice; Jernigan v. Flowers, 94 Ala. 508, 10 South. 437; to a tenant for life who, having recognized the right of the remainderman in a bequest of personal property and executed a deed of trust therefor, could not afterwards deny the right; Welsch v. Bank, 94 Ill. 191; to one who attempts to convey title to the property as executor or administrator; Millican v. McNeill, 102 Tex. 189, 114 S. W. 106, 132 Am. St. Rep. 863, 20 Ann. Cas. 74, 21 L. R. A. (N. S.) 60, and note in which are collected many cases and the conclusion reached that the question is to be determined by the general principles of the law of estoppel and not by any considerations peculiar to this class of cases.

There was held to be no estoppel against the setting up of a subsequently acquired title by one who quitclaimed lands in which at that time he had no interest; Jackson v. Peek, 4 Wend. (N. Y.) 300; where, after the purchase of a mortgage, the premises were conveyed subject to it, and the deed had contained a covenant to pay it, the grantee was permitted to insist, as against the purchaser of the mortgage, that he was not liable; Real Estate Trust Co. v. Balch, 45 N. Y. Super. Ct. 528, in which the court held that the case presented no one of the necessary elements of an estoppel, and critically examined the New York cases on the question of liability under such covenants. A partition deed between tenants in common and assignment thereunder does not estop one of the parties from setting up an after-acquired title to land so assigned; Doane v. Willcutt, 5 Gray (Mass.) 328, 66 Am. Dec. 369.

"Where under the law there is an entire lack of power to do the act in question, it cannot be made good by estoppel. But if the power to do the act existed, and there was a way in which it could be lawfully exercised, and it purports to have been done in a lawful way, a person who has induced another to act upon the assumption that it was in fact done, may be estopped from questioning its validity." Mut. Life Ins. Co. v. Corey, 135 N. Y. 326, 334, 31 N. E. 1095.

A corporation accepting conveyance of a water works plant by deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, is thereby estopped from questioning the validity of the mortgages; American Waterworks Co. of Illinois v. Loan & Trust Co., 73 Fed. 956, 20 C. C. A. 133. So also a city taking property by eminent domain subject to liens is estopped to deny their validity; City Safe Deposit & Agency Co. v. City of Omaha, 79 Neb. 446, 112 N. W. 598, 23 L. R. A. (N. S.) 72. And a corporation may be estopped to deny the execution of a mortgage when the directors assented, but, by reason of the absence of some, there was no formal action of the board directing the signing and sealing by the officers; Nevada Nickel Syndicate v. Nickel Co., 96 Fed. 133.

To create an estoppel, the deed must be good and valid in its form and execution; 2 Washb. R. P. 41; Alt v. Banholzer, 32 Minn. 511, 40 N. W. 830, 12 Am. St. Rep. 681, and must convey no title upon which the warranty can operate in case of a covenant; Jackson v. Hoffman, 9 Cow. (N. Y.) 271; 2 Pres. Abs. 216.

Estoppels affect only parties and privies in blood, law, or estate; 6 Bing. N. C. 79; Corbett v. Norcross, 35 N. H. 99; Patterson's Lessee v. Pease, 5 Ohio 190; Phelps v. Blount, 13 N. C. 177; Wark v. Willard, 13 N. H. 389; Calhoun v. Pierson, 44 La. Ann. 584, 10 South. 880; Campbell v. Carruth, 32 Fla. 264, 13 South. 432. See Knight v. Thayer, 125 Mass. 25; Stockstill v. Bart, 47 Fed. 231. Estop-

pels, it is said, must be reciprocal; Co. Litt. 352 *a;* Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808. But see Winlock v. Hardy, 4 Litt. (Ky.) 272; Small v. Procter, 15 Mass. 499; Crittenden v. Woodruff, 11 Ark. 82; 2 Sm. L. C. 664. And see 2 Washb. R. P. 458.

The rule requiring mutuality is subject to exceptions which are discussed at large by Van Devanter, J., in Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63, 85 C. C. A. 393, 16 L. R. A. (N. S.) 677, and note. Persons claiming under a common source of title are mutually estopped to deny its validity; Gilliam v. Bird, 30 N. C. 280, 49 Am. Dec. 379, and note in which the cases are collected.

An estoppel relating to an interest in land passes with the land, and an estoppel by deed creates what in law is termed a title by estoppel; Mutual Life Ins. Co. v. Corey, 135 N. Y. 326, 335, 31 N. E. 1095.

A grantor is not estopped by recitals in his deed of payment of consideration, from suing for the unpaid purchase money; Smith v. Arthur, 110 N. C. 400, 15 S. E. 197; nor are recitals an estoppel when the deed containing them is not operative; Wallace's Lessee v. Miner, 6 Ohio 366. But one who defended his possession on the sole ground that one of the grantors in the series of deeds had no title was bound by the recitals of the deed to the same extent as if he were privy to the grantor; Kinsman's Lessee v. Loomis, 11 Ohio 475; and a ward after coming of age was held bound by the recitals of a deed made by her guardian; Esterbrook v. Savage, 21 Hun (N. Y.) 145. A recital in a bond that it was under seal estops the obligor from denying that it was so executed; Metropolitan Life Ins. Co. v. Bender, 124 N. Y. 47, 26 N. E. 345, 11 L. R. A. 708. A grantee cannot enter and hold under a deed and at the same time repudiate the title thereby conveyed; Kelso v. Stigar, 75 Md. 376, 24 Atl. 18. See White v. R. Co., 156 Mass. 181, 30 N. E. 612; Raby v. Reeves, 112 N. C. 688, 16 S. E. 760; Oglesby v. Foley, 46 Ill. App. 119; Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.

The doctrine of estoppel by deed did not at common law apply to a married woman, except as to her equitable separate estate; Big. Est. 371, citing the cases; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850; Jones v. Reese, 65 Ala. 134; but under the statutes enabling married women to deal with their own property, her liability to be estopped is doubtless coterminous with her capacity to contract; Neal v. Bleckley, 36 S. C. 468, 478, 15 S. E. 733; Appeal of Powell, 98 Pa. 403, 413; Knight v. Thayer, 125 Mass. 25. Nor is an infant estopped by his deed unless ratified after majority; Cook v. Toumbs, 36 Miss. 685; Houston v. Turk, 7 Yerg. (Tenn.) 13.

It has been held that a state may be estopped by deed; Com. v. Andre's Heirs, 3 Pick. (Mass.) 224; Bartlett Land & Lumber Co. v. Saunders, 103 U. S. 316, 26 L. Ed. 546; State v. Ober, 34 La. Ann. 359; Penrose v. Griffith, 4 Binn. (Pa.) 231; and this is said to be "perhaps the better opinion"; Big. Est. 371; but there are expressions to the contrary, though generally qualified so as not to conflict with the doctrine that the state may be estopped by legislative action; State v. Williams, 94 N. C. 891; Alexander v. State, 56 Ga. 478; People v. Brown, 67 Ill. 435; but not by official laches or error; State v. Brewer, 64 Ala. 287; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 735, 6 L. Ed. 199; The Floyd Acceptances, 7 Wall. (U. S.) 676, 19 L. Ed. 169.

By Matter of Record. Such as arises from the adjudication of a competent court. Judgments of courts of record, and decrees and other final determinations of ecclesiastical, maritime, and military courts, work estoppels; 2 B. & Ald. 362; Buck v. Collins, 69 Me. 445; Bradner v. Howard, 75 N. Y. 417; Adams v. Adams, 25 Minn. 72; Butterfield v. Smith, 101 U. S. 570, 25 L. Ed. 868; Henning v. Warner, 109 N. C. 406, 14 S. E. 317; Denver City Irr. & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234. Admissions in pleadings, either express or implied, cannot afterwards be controverted in a suit between the same parties; Com. Dig. *Estoppel* A 1. It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment; De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956; Nashua & L. R. Corp. v. R., 164 Mass. 226, 41 N. E. 268, 49 Am. St. Rep. 454; Empire State Nail Co. v. Button Co., 74 Fed. 868, 21 C. C. A. 152. See Res Judicata, where the subject of estoppel by matter of record is treated.

Estoppels by deed and by record are common-law doctrines.

By Matter in Pais. Such as arises from the acts and declarations of a person by which he designedly induces another to alter his position injuriously to himself; Brown v. Wheeler, 17 Conn. 345, 44 Am. Dec. 550; Kinney v. Farnsworth, 17 Conn. 355; Frost v. Ins. Co., 5 Denio (N. Y.) 154, 49 Am. Dec. 234; Ensel v. Levy, 46 Ohio St. 255, 19 N. E. 597; Tousley v. Board of Education, 39 Minn. 419, 40 N. W. 509; Pennypacker v. Latimer, 10 Idaho 618, 81 Pac. 55; Harrison National Bank of Cadiz, Ohio, v. Austin, 65 Neb. 632, 91 N. W. 540, 59 L. R. A. 294, 101 Am. St. Rep. 639. See Humphreys v. Finch, 97 N. C. 303, 1 S. E. 870, 2 Am. St. Rep. 293; Joyce v. Ry. Co., 43 Ill. App. 157; Valle v. City of Independence, 116 Mo. 333, 22 S. W. 695; Westbrook v. Guderian, 3 Tex. Civ. App. 406, 22 S. W. 59. Equitable estoppel, or estoppel by conduct, is said to have its foundation in fraud, considered in its most general sense; Bisph. Eq. § 282. It is said (Bigelow, Estop. 437) that the following elements must be present in order to constitute an estoppel by

conduct: 1. There must have been a representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. Ergenbright v. Henderson, 72 Kan. 29, 82 Pac. 524; Blodgett v. Perry, 97 Mo. 263, 10 S. W. 891, 10 Am. St. Rep. 307. See Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; Tiedm. Eq. Jur. 107. The rule of equitable estoppel is, that where one by his acts, declarations, or silence where it is his duty to speak, has induced another, in reliance on such acts, declarations, or silence, to enter into a transaction, he shall not, to the prejudice of the person misled, impeach the transaction; per Bates, Ch., in Marvel v. Ortlip, 3 Del. Ch. 9; Woodruff v. Morristown Instit. for Savings, 34 N. J. Eq. 174; Miles v. Lefi, 60 Ia. 168, 14 N. W. 233; Stowe v. U. S., 19 Wall. (U. S.) 13, 22 L. Ed. 144; Davis v. Williams, 49 Ia. 83; Griffin v. City of Lawrence, 135 Mass. 365; Given v. Printing Co., 114 Fed. 92, 52 C. C. A. 40; Linton v. Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Greer v. Mitchell, 42 W. Va. 494, 26 S. E. 302. "He who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, where an estoppel *in pais* in regard to real estate was held to have been created by a letter disavowing intention to claim the same.

Representations, in order to constitute an estoppel must be made to induce the other party to act, and he must have been induced so to act; Booth v. Lenox, 45 Fla. 191, 34 South. 566; Welty v. Vulgamore, 24 Ohio C. C. 572; to his injury; Appeal of Columbus, S. & H. R. Co., 109 Fed. 177, 48 C. C. A. 275. They must amount to misrepresentation or concealment of material facts; Brian v. Bonvillain, 111 La. 441, 35 South. 632; Mining Co. v. Juab County, 22 Utah 395, 62 Pac. 1024; Atkinson v. Plum, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; of which the other party is actually and permissively ignorant; City of Ft. Scott v. Brokerage Co., 117 Fed. 51, 54 C. C. A. 437; or such negligence as amounts to fraud in law; Dye v. Crary, 13 N. Mex. 439, 85 Pac. 1038; 9 L. R. A. (N. S.) 1136, affirmed, 208 U. S. 515, 28 Sup. Ct. 360, 52 L. Ed. 595. In some cases it is held that there need not be intent to deceive; Maxon v. Lane, 124 Ind. 592, 24 N. E. 683; Rogers v. St. Ry., 100 Me. 86, 60 Atl. 713, 70 L. R. A. 574; Vanneter v. Crossman, 42 Mich. 465, 4 N. W. 216; Lydick v. Gill, 68 Neb. 273, 94 N. W. 109; Globe Nav. Co. v. Casualty Co., 39 Wash. 299, 81 Pac. 826; *contra*, see Stiff v. Ashton, 155 Mass. 130, 29 N. E. 203; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904; Centennial Eureka Min. Co. v. Juab County, 22 Utah 395, 62 Pac. 1024. There is no estoppel by acts *in pais* done under a misapprehension of facts induced by the party setting up the estoppel; Mason v. St. Albans Furniture Co., 149 Fed. 898.

In some cases representations as to future conduct may be the basis of estoppel, if their purpose and effect involves the abandonment of an existing right and affects the conduct of another; Union Mut. Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674; Edison Electric Light Co. v. Electric Co., 59 Fed. 691, 699; Shields v. Smith, 37 Ark. 47; Stayton v. Graham, 139 Pa. 1, 21 Atl. 2; but in England it is otherwise; 5 H. L. Cas. 185, 214; 8 App. Cas. 467; [1902] A. C. 117, 130.

In the leading case on this subject (Pickard v. Sears, 6 Ad. & El. 469) a mortgagee of personalty was held to be estopped from asserting his title under the mortgage because he had passively acquiesced in a purchase of the same by the defendant under an execution against the mortgagor. The rule of that case was that an estoppel arose from *wilfully* causing another to believe in a certain state of facts, and to act on that belief; in Gregg v. Wells, 9 A. & E. 97, Lord Denman stated the rule more broadly as subjecting to an estoppel one who negligently and culpably stands by and allows another to contract on the faith of a fact which he can contradict; and in Freeman v. Cooke, 2 Exch. 654, it was said by Parke, B., that the rule of Pickard v. Sears must be considered as established, but that by the term "wilfully" it must be understood, "if not that the party represents that to be true which he knows to be untrue, at least, that he *means* his representations to be acted upon, and that it is acted upon accordingly." The establishment of the rule as thus limited was followed by Folger, J., in Continental Nat. Bank v. Bank, 50 N. Y. 575, where the principle was recognized that doing an act and the omission to act are the same; Howard v. Hudson, 2 El. & Bl. 1; Knights v. Wiffen, L. R. 5 Q. B. 660; Casco Bank v. Keene, 53 Me. 103. Cases of estoppel by silence are numerous; Appeal of Thompson, 126 Pa. 367, 17 Atl. 643; Silloway v. Ins. Co., 12 Gray (Mass.) 73; Blake v. Ins. Co., 12 Gray (Mass.) 265; 35 Can. Sup. Ct. 133 (criticised at length; 19 Harv. L. Rev. 113); but silence does not always amount to fraud; Lawrence v. Luhr, 65 Pa. 241; and there is no estoppel by silence where a party has had no opportunity to speak; National Newark Banking Co. v. Bank, 63 Pa. 417. See Carroll v. Tucker, 2 Misc. Rep. 397, 21 N. Y. Supp. 952.

The estoppel will be limited to the acts which were based upon the representations out of which the estoppel arose; thus, where a sheriff had a writ against A, but took B

into custody, upon B's representations that she was A, but detained her after he was informed that she was not A, B was estopped to recover damages for the false arrest but not for the subsequent detention; 2 C. B. N. S. 495. See Burney v. Collins, 50 Ga. 90; Tilton v. Nelson, 27 Barb. (N. Y.) 595; Bisph. Eq. § 292.

The acts alleged as an estoppel must be executed and not merely executory; Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; as when a statement is not accepted and acted upon, it does not constitute an estoppel; Nosler v. R. Co., 73 Ia. 268, 34 N. E. 850; Gilbert v. Vail, 60 Vt. 261, 14 Atl. 542.

The doctrine of estoppel *in pais* is applied at law as well as in equity; Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618 (where the early cases are cited); Drexel v. Berney, 122 U. S. 241, 253, 7 Sup. Ct. 1200, 30 L. Ed. 1219; Wehrman v. Conklin, 155 U. S. 327, 15 Sup. Ct. 129, 39 L. Ed. 167; Tracy v. Roberts, 88 Me. 317, 34 Atl. 68, 51 Am. St. Rep. 394; Hagan v. Ellis, 39 Fla. 472, 22 South. 727, 63 Am. St. Rep. 167; Duke v. Griffith, 9 Utah 476, 35 Pac. 512; Marine Iron Works v. Wiess, 148 Fed. 145, 78 C. C. A. 279; Campbell v. Min. Co., 141 Fed. 610, 73 C. C. A. 260; and therefore it is neither necessary nor permissible to resort to equity to obtain the benefit of it; Barnard v. German American Seminary, 49 Mich. 444, 13 N. W. 811; Vermont Copper Min. Co. v. Ormsby, 47 Vt. 709, 713; Anglo-American Land, Mortgage & Agency Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89; to be available it must be specifically pleaded; *id.* A title by estoppel has been held sufficient to maintain ejectment or defend against it; George v. Tate, 102 U. S. 570, 26 L. Ed. 232; where the subject of acquiring title to land by estoppel is fully considered. See Adverse Possession.

Whether "title by estoppel," so called, may be acquired to personal property is the subject of interesting discussion in the English courts in cases of registration of a forged transfer of stock. Such a transfer was held to work an estoppel in favor of subsequent transferees; L. R. 3 Q. B. 584; but not in favor of the holder under the forged transfer; 49 L. J. Q. B. N. S. 392, where Brett, L. J., said that "an estoppel gives no title to that which is the subject-matter of it." He considered that the meaning of the phrase "legal title by estoppel," as used in the older cases, is simply an expression of the recognition of the doctrine of estoppel by the courts of law as much as in those of equity, and while "the estoppel assumes that the reality is contrary to that which the person is estopped from denying, it has no effect whatever upon the reality of the circumstances."

It is said that the contract of a person under disability cannot be made good by estoppel; Bisph. Eq. § 293. See Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; Merriam v. R. Co., 117 Mass. 241; Glidden v. Strupler, 52 Pa. 400. It makes no difference that the person, if a married woman, falsely represented herself to be *sole;* 9 Ex. 422; Weathersbee v. Farrar, 97 N. C. 107, 1 S. E. 616. But estoppel may operate to prevent such a person from enforcing a right. For instance, if a married woman were to induce A to buy property from B, knowing that the title was not in B, but in herself, she would be estopped from asserting her title against A; Connolly v. Branstler, 3 Bush (Ky.) 702, 96 Am. Dec. 278; Brinkerhoff v. Brinkerhoff, 23 N. J. Eq. 477; Drake v. Glover, 30 Ala. 382. The same principle would extend to similar acts on the part of an infant; 3 Hare 503; Whittington v. Doe, 9 Ga. 23; but not unless the conduct was intentional and fraudulent; Harmon v. Smith, 38 Fed. 482; but infancy, being in law a shield and not a sword, cannot be pleaded to avoid liability for frauds, trespasses or torts; 1 Lev. 169; International Land Co. v. Marshall, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056, where the cases are discussed by Williams, C. J. See notes in 57 L. R. A. 684; 9 L. R. A. (N. S.) 1117; 16 L. R. A. 672.

"Equitable estoppel is not applied in favor of a volunteer;" [1898] 1 Ch. 82. An unexecuted contract void as against public policy cannot be validated by invoking the doctrine of estoppel; Robinson v. Patterson, 71 Mich. 141, 39 N. W. 21; McKinney v. Development Co., 167 Fed. 770, 93 C. C. A. 258.

The doctrine that estoppels bind not only parties, but privies of blood, law, and estate, is said to apply equally to this class of estoppels; Bigelow, Estop. 554, 629; but a ward cannot be estopped by an act of his guardian which the other party to the agreement knew to be unauthorized; Heisen v. Heisen, 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.

An agent or attorney having received money for his principal is in general estopped to deny his liability to pay it over to him, but it is a good defence that he was divested of the property or required to pay over the money by one having a paramount title; Moss Mercantile Co. v. Bank, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657, and note, 8 Ann. Cas. 569.

One who accepts a benefit under a will is thereby estopped to deny its validity; Drake v. Wild, 70 Vt. 52, 39 Atl. 248; Branson v. Watkins, 96 Ga. 55, 23 S. E. 204; Fry v. Morrison, 159 Ill. 244, 42 N. E. 774; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; though ignorant of the rule of law on the subject; *id.*

At common law there was no estoppel against the sovereign; 10 Mod. 199, and the doctrine is applied in some states; State v. Williams, 94 N. C. 891; but, as appears *supra*, the state has been held estopped by matter of record and by deed. The weight of authority is against the estoppel of the govern-

ment by matter *in pais*, though it has been questioned whether there should not be; 19 Harv. L. Rev. 126; and where the sovereign asserts a pecuniary demand in court, it has been applied, though with hesitation; Walker v. U. S., 139 Fed. 409, where it was held that acts of officers of the United States, authorized to shape its conduct as to the transaction, may work an estoppel against the government. As to estoppels against the state or the United States, see note to State of Michigan v. Jackson, L. & S. R. Co., 16 C. C. A. 353.

Estoppel has been sustained as against a municipal corporation; Beadles v. Smyser, 209 U. S. 393, 28 Sup. Ct. 522, 52 L. Ed. 849; and it has been held that an estoppel *in pais* (by reason of a mistake of an officer which misled a person searching records) cannot be set up against a municipal government; Philadelphia Mortgage & Trust Co. v. Omaha, 63 Neb. 280, 88 N. W. 523, 93 Am. St. Rep. 442; but in a note on this case it is contended that the doctrine of estoppel is available as against the sovereign; 15 Harv. L. Rev. 737. It is sometimes said, though usually denied, that there can be no estoppel against alleging unconstitutionality, and for an examination of cases on this point, see 21 Harv. L. Rev. 133. It is also held that parties cannot estop themselves by a contract "in the face of an act of parliament"; 14 Ch. D. 432.

An estoppel against one of two joint plaintiffs, whose right is to a joint recovery, will defeat the action; McIntosh v. Dierken, 222 Pa. 612, 72 Atl. 232; one who applies for company shares in a fictitious name will not be permitted to deny liability as a shareholder; 5 Manson 336.

Where the facts are undisputed, the question whether they amount to an estoppel is one of law for the court; Keating v. Orne, 77 Pa. 89; Cox v. Rogers, 77 Pa. 160; Lewis v. Carstairs, 5 W. & S. (Pa.) 205. Otherwise the facts are of course to be submitted to the jury under proper instructions as to what will constitute an estoppel.

The maxim *vigilantibus non dormientibus leges adjuvant* specially applies to a claim of equitable estoppel, since in such cases the interposition of equity is extraordinary and restrictive of what but for the estoppel would be a clear legal right; Marvel v. Ortlip, 3 Del. Ch. 9. The representations must be such as to lead a reasonably prudent man to act on them and he must have done this in ignorance of the truth and in good faith; Davis v. Pryor, 112 Fed. 274, 50 C. C. A. 579.

This principle has been applied to cases of dedication of land to the public use; Cincinnati v. White, 6 Pet. (U. S.) 438, 8 L. Ed. 452; Hobbs v. Inhabitants of Lowell, 19 Pick. (Mass.) 405, 31 Am. Dec. 145; of the owner's standing by and seeing land improved; Favill v. Roberts, 50 N. Y. 222; Smith v. McNeal, 68 Pa. 164; Truesdail v. Ward, 24 Mich. 134; Forbes v. McCoy, 24 Neb. 702, 40 N. W. 132; Alabama G. S. R. Co. v. R. Co., 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878; Marines v. Goblet, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22; or sold; Epley v. Witherow, 7 Watts (Pa.) 168; Thompson v. Sanborn, 11 N. H. 201, 35 Am. Dec. 490; Morrison v. Morrison's Widow, 2 Dana (Ky.) 13; Snodgrass v. Ricketts, 13 Cal. 359; Shapley v. Rangeley, 1 Woodb. & M. 213, Fed. Cas. No. 12,707; Titus v. Morse, 40 Me. 348, 63 Am. Dec. 665; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616; without making any claim; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616; Winters v. Armstrong, 37 Fed. 508; Griffeth v. Brown, 76 Cal. 260, 18 Pac. 372; Weinstein v. Bank, 69 Tex. 38, 6 S. W. 171, 5 Am. St. Rep. 23; Bynum v. Preston, 69 Tex. 287, 6 S. W. 428, 5 Am. St. Rep. 49; McMartin v. Ins. Co., 41 Minn. 198, 42 N. W. 934; Irvine v. Scott, 85 Ky. 260, 3 S. W. 163. But the owner is not estopped by the unlawful occupation of a trespasser for less than the legal period of limitation; Woll v. Voight, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. (N. S.) 270, and note.

What is termed an *estoppel by negligence* occurs when one who is under a legal duty, either to the person injured or to the public, to act with due care, fails to do so, and such failure is the natural and proximate cause of misleading that person to alter his position; but to create the estoppel all these elements must concur; Bradford v. Ins. Co., 102 Fed. 48, 43 C. C. A. 310, 49 L. R. A. 530; Andrus v. Bradley, 102 Fed. 54; Central R. R. Co. of New Jersey v. McCartney, 68 N. J. L. 165, 52 Atl. 575; Brown & Co. v. Ins. Co., 42 Md. 384, 20 Am. Rep. 90; Nye v. Denny, 18 Ohio St. 246, 98 Am. Dec. 118; Tisher v. Beckwith, 30 Wis. 55, 11 Am. Rep. 546; 1 C. P. D. 578; [1905] 1 K. B. 677 (where, however, payment of a stolen cheque with a forged indorsement was held good under the law of Austria where the transaction occurred though it would not have been good in England).

But this doctrine does not apply between original parties, or where the defence is that, by reason of fraud, the writing, on which the estoppel is claimed, does not embrace the contract as originally made; Ward v. Spelts, 39 Neb. 809, 58 N. W. 426; Spelts v. Ward, 2 Neb. (Unof.) 177, 96 N. W. 56.

The phrase "estoppel by negligence" has been characterized as "an expression usual but not accurate, since negligence prevents a right of action accruing, estoppel a right that has accrued from being set up"; 2 Beven, Negl. 1332, where, however, a chapter is devoted to the subject. So also Bigelow treats the doctrine as above stated as a recognized branch of estoppel; Big. Est. (6th ed.) 711; and while considering it quite clear that "cases of estoppel arising out of negligence with-

out a representation must be uncommon," thinks it well settled that "negligence when naturally and directly tending to indicate intention" is equivalent to it in creating an estoppel.

See an interesting discussion of the doctrine, with critical examination of the English cases, by John S. Ewart in 15 L. Q. R. 384.

As to whether the doctrine of estoppel has any place in criminal law, see 12 Harv. L. Rev. 56; 2 Bish. Cr. L. § 364; State v. Spaulding, 24 Kan. 1; Moore v. State, 53 Neb. 831, 74 N. W. 319.

QUASI-ESTOPPEL. A term used by Bigelow to cover a group of cases in which a party is precluded from occupying inconsistent positions, either in litigations or in ordinary dealings; Big. Est. (6th ed.) 732. The principle covers a variety of cases under wills where a party who elects to take a benefit is required to give effect to an otherwise void devise; 31 Ch. D. 466; or appointment; 2 Atk. 88; or one taking a benefit under it cannot dispute the validity of a deed; Pickett v. Bank, 32 Ark. 346; Robinson v. Pebworth, 71 Ala. 240; Jacobs v. Miller, 50 Mich. 119, 15 N. W. 42; Wood v. Seely, 32 N. Y. 105; or of a contract of affreightment; The Water Witch, 1 Black (U. S.) 494, 17 L. Ed. 155. So also a person who has procured the enactment of a statute and received benefits under it, is precluded from alleging its unconstitutionality; Vose v. Cockcroft, 44 N. Y. 415; Sherman v. McKeon, 38 N. Y. 266; Cloud v. Coleman, 1 Bush (Ky.) 548; one who has petitioned for opening a street or acquiesced in it cannot dispute the validity of the assessment for it; City of Burlington v. Gilbert, 31 Ia. 356, 7 Am. Rep. 143; Appeal of Ferson, 96 Pa. 140.

It has been held that a party, who in a cause applies for affirmative relief, is estopped from setting up an original lack of jurisdiction; Thompson v. Greer, 62 Kan. 522, 64 Pac. 48; Chandler v. Bank, 149 Ind. 601, 49 N. E. 579; Lower v. Wilson, 9 S. D. 252, 68 N. W. 545, 62 Am. St. Rep. 865; F. C. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 Pac. 293; Champion v. R. Co., 145 Mich. 676, 108 N. W. 1078; Montague v. Marunda, 71 Neb. 805, 99 N. W. 653; *contra*, Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; State v. Dist. Court of Second Judicial Dist., 34 Mont. 226, 85 Pac. 1022; and it is suggested that the latter view should prevail upon the principle that consent can never give jurisdiction; 20 Harv. L. Rev. 150, 237.

It is to be noted that in the cases grouped under this title the courts have generally used the simple term "estoppel" which, it has been suggested, is a questionable use of terms, since many of the cases are mere instances of ratification or acquiescence; Big. Est. 755.

Estoppel *in pais* need not be pleaded, but this rule is altered in many states; Big. Est. 763.

The doctrine of estoppel is said to be the basis of another equitable doctrine, that of election; Bisph. Eq. § 294. See ELECTION.

ESTOVERS (*estouviers*, necessaries; from *estoffer*, to furnish). The right or privilege which a tenant has *to furnish himself* with so much wood from the demised premises as may be sufficient or necessary for his fuel, fences, and other agricultural operations. 2 Bla. Com. 35; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639, 25 Am. Dec. 582.

Any tenant may claim this right, whether he be a tenant for life, for years, or at will; and that without waiting for any special leave or assignment of the lessor, unless he is restrained by some provision contained in his lease; Shepp. Touchst. 3, n. 1; Chal. R. P. 311. Nor does it appear to be necessary that the wood should all be consumed upon the premises, provided it is taken in good faith for the use of the tenant, and in reasonable quantities, with the further qualification, also, that no substantial injury be done to the inheritance; Gardner v. Dering, 1 Paige, Ch. (N. Y.) 573.

Where several tenants are granted the right of estovers from the same estate, it becomes *a common of estovers;* but no one of such tenants can, by underletting his land to two or more persons, apportion this right among them; for in this way he might surcharge the land, and the rights of his cotenants, as well as those of the landlord, would be thereby invaded. In case, therefore, of the division of a farm among several tenants, neither of the under-tenants can have estovers, and the right, consequently, becomes extinguished; Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 650, 25 Am. Dec. 582; 4 Co. 36; 8 *id.* 78. There is much learning in the old books relative to the creation, apportionment, suspension, and extinguishment of these rights, very little of which, however, is applicable to the condition of things in this country, except perhaps in New York, where the grants of the manor-lands have led to some litigation on the subject. Tayl. Landl. & T. § 220. See 4 Washb. R. P. 99; 7 Bing. 640; Padelford v. Padelford, 7 Pick. (Mass.) 152; Richardson v. York, 14 Me. 221; Dalton v. Dalton, 42 N. C. 197; Owen v. Hyde, 6 Yerg. (Tenn.) 334, 27 Am. Dec. 467; Loomis v. Wilbur, 5 Mas. 13, Fed. Cas. No. 8,498.

The alimony allowed to a wife was called at common law, *estovers*. See DE ESTOVERIIS HABENDIS; COMMON.

ESTRAY. Cattle whose owner is unknown. Spelman, Gloss.; Walters v. Glats, 29 Ia. 437; Roberts v. Barnes, 27 Wis. 422; Shepherd v. Hawley, 4 Or. 206; Lyman v. Gipson, 18 Pick. (Mass.) 426; but see Worthington v. Brent, 69 Mo. 205; State v. Apel, 14 Tex. 431. Any beast, not wild, found with-

in any lordship, and not owned by any man. Cowell; 1 Bla. Com. 297; 2 *id.* 14. These belonged to the lord of the soil. Britt. c. 17.

An animal turned on a range by its owner is not an estray, although its immediate whereabouts is unknown to the owner, unless it wanders from the range and becomes lost; Stewart v. Hunter, 16 Or. 62, 16 Pac. 876, 8 Am. St. Rep. 267.

It is used of flotsam at sea. 15 L. Q. R. 357.

See ANIMAL; RUNNING AT LARGE.

ESTREAT. A true copy or note of some original writing or record, and especially of fines and amercements imposed by a court, *extracted* from the record, and certified to a proper officer or officers authorized and required to collect them. Fitzh. N. B. 57, 76. A forfeited recognizance taken out from among the other records for the purpose of being sent up to the exchequer, that the parties might be sued thereon, was said to be estreated. 4 Bla. Com. 253.

ESTREPEMENT. A common-law writ for the prevention of waste.

The same object being attainable by a motion for an injunction in chancery, the writ became obsolete in England, and was abolished by 3 & 4 Will. IV. c. 27.

The writ lay at common law to prevent a party in possession from committing waste on an estate the title to which was disputed, after judgment obtained in any real action and before possession was delivered by the sheriff.

But, as waste might be committed in some cases pending the suit, the statute of Gloucester gave another writ of estrepement *pendente placito*, commanding the sheriff firmly to inhibit the tenant *"ne faciat vastum vel strepementum pendente placito dicto indiscusso."* By virtue of either of these writs, the sheriff may resist those who commit waste or offer to do so; and he might use sufficient force for the purpose; 3 Bla. Com. 225, 226.

The writ was sometimes directed to the sheriff and the party in possession of the lands, in order to make him amenable to the court as for a contempt in case of his disobedience to the injunction of the writ. At common law the process proper to bring the tenant into court is a *venire facias*, and thereon an attachment. Upon the defendant's coming in, the plaintiff declares against him. The defendant usually pleads "that he has done no waste contrary to the prohibition of the writ." The issue on this plea is tried by a jury, and in case they find against the defendant they assess damages which the plaintiff recovers. But, as this verdict convicts the defendant of a contempt, the court proceed against him for that cause as in other cases; Co. 2d Inst. 329; Rast. 317; 1 B. & P. 121; 2 Lilly, Reg. *Estrepement;* 5 Co. 119; Reg. Brev. 76.

In Pennsylvania, by statute, the remedy by estrepement is extended for the benefit of any owner of lands leased for years or at will, at any time during the continuance or after the expiration of such demise, and due notice given to the tenant to leave the same, agreeably to law; or for any purchaser at sheriff or coroner's sale of lands, etc., after he has been declared the highest bidder by the sheriff or coroner; or for any mortgagee or judgment-creditor, after the lands bound by such judgment or mortgage shall have been condemned by inquisition, or which may be subject to be sold by a writ of *venditioni exponas* or *levari facias*. See 10 Viner, Abr. 497; Woodf. Landl. & T. 447; Arch. Civ. Pl. 17; 7 Com. Dig. 659; Irwin v. Covode, 24 Pa. 162; Byrne v. Boyle, 37 Pa. 260.

ET ADJOURNATUR (Lat.). And it is adjourned. A phrase used in the old reports, where the argument of a cause was adjourned to another day, or where a second argument was had. 1 Keb. 692, 754.

ET ALIUS (Lat.). And another. The abbreviation *et al.*, sometimes in the plural written *et als.*, is affixed to the name of the first plaintiff or defendant, in entitling a cause, where there are several joined as plaintiffs or defendants.

On an appeal from a judgment in favor of two or more parties, a bond payable to one of the appellees *et al.* will be good; Conery v. Webb, 12 La. Ann. 282. But where a summons should state the parties to the action, the name of one followed by the words *et al.* is not sufficient; Lyman v. Milton, 44 Cal. 630.

ET CÆTERA (Lat.). And others; and other things. See Lathers v. Keogh, 39 Hun (N. Y.) 576; Agate v. Lowenbein, 4 Daly (N. Y.) 62.

The addition of the abbreviation etc. to some minor provisions of an agreement for a lease does not introduce such uncertainty as to prevent a decree for specific performance where the material points are clear; 2 De G. & J. 559; but such an agreement "for letting and taking coals, etc.," was too indefinite a statement of the *subject-matter* of the agreement to admit of such a decree; 1 De G. M. & G. 80; an agreement "to do all the painting, papering, repairing, decorating, etc., during the term of the lease" was not so uncertain as to prevent a specific performance; 21 L. J. R. 185.

Under a bequest of "all her household furniture and effects, plate, linen, china, glass, books, wearing apparel, etc.," it was claimed that the testatrix had disposed of the general residue of her estate, but she was held by Romilly, M. R., to be intestate "except as to the articles specified in the will and those which are *ejusdem generis;*" 26 Beav. 220; and the same judge held the words good-will, etc., in a contract, to include "such other things as are necessarily connected with and belong to the good-will, . . . for instance, the use of trade-marks," and a covenant not to engage in similar business in Great Britain for a reasonable time to be limited in the conveyance having regard to the nature of such undertakings.

"All these things would be included in the words *et cætera;*" 28 L. J. Ch. 212; "all my furniture, etc.," passed only property *ejusdem generis* and not shares of a waterworks company; L. R. 11 Eq. 363; a bequest to his widow of "all my money, cattle, farming implements, etc., she paying" certain sums named to testator's two brothers, was sufficient to make the widow residuary legatee of real and personal estate, the latter being insufficient to pay debts; Jessel, M. R., L. R. 4 Ch. Div. 800.

The abbreviation etc. was formerly much used in pleading to avoid the inconveniences attendant upon making full and half defence. See DEFENCE. It is not generally to be used in solemn instruments; see Com. v. Ross, 6 S. & R. (Pa.) 427; when used in pleadings to avoid repetition, it usually refers to things unnecessary to be stated; Dano v. R. Co., 27 Ark. 564.

Where the sense of the abbreviation may be gathered from the preceding words there is sufficient certainty; but where the abbreviation cannot be understood and affects a vital part of the contract or instrument the uncertainty will be fatal.

See Hayes v. Wilson, 105 Mass. 21; Gray v. R. Co., 11 Hun (N. Y.) 70; EJUSDEM GENERIS.

ET DE HOC PONIT SE SUPER PATRIAM (Lat.). And of this he puts himself upon the country. The Latin form of concluding a traverse. See 3 Bla. Com. 313.

ET HOC PARATUS EST VERIFICARE (Lat.). And this he is prepared to verify. The form of concluding a plea in confession and avoidance; that is, where the defendant has confessed all that the plaintiff has set forth, and has pleaded new matter in avoidance. 1 Salk. 2.

ET HOC PETIT QUOD INQUIRATUR PER PATRIAM (Lat.). And this he prays may be inquired of *by the country.* The conclusion of a plea tendering an issue to the country. 1 Salk. 3.

ET INDE PRODUCIT SECTAM (Lat.). And thereupon he brings suit. The Latin conclusion of a declaration, except against attorneys and other officers of the court. 3 Bla. Com. 295.

ET MODO AD HUNC DIEM (Lat.). And now at this day. The Latin form of the commencement of the record on appearance of the parties.

ET NON (Lat.). And not. These words are sometimes employed in pleading to convey a pointed denial. They have the same effect as "without this," *absque hoc.* 2 Bouvier, Inst., 2d ed. n. 2985, note.

ET SIC AD PATRIAM (Lat.). And so to the country. A phrase used in the Year Books, to record an issue to the country.

ET UXOR (Lat. and wife). Used to show that the wife of the grantor is a party to the deed. The abbreviation is *et ux.*

ETHICS, LEGAL. That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his client.

Perhaps the most comprehensive and satisfactory treatment of the subject is the essay of Judge Sharswood, originally embodied in a series of lectures to the law school of the University of Pennsylvania, in 1854. The republication of the fifth edition, forty-two years after the issue of the first, attests the interest of the profession in the work. It was republished by the American Bar Association in 1907. From it the following is mainly extracted:

The relation of the profession to the public is so intimate and far-reaching, that it "can hardly be over-estimated." This arises from its influence both on legislation and jurisprudence; the latter of which it controls entirely and "the former almost entirely." Accordingly there is involved the study of the true ends of society and government and the conservation of life, liberty, and property, and as means to these ends it is the office of the Bar to diffuse sound principles among the people, to aid in forming correct public opinion, "to maintain the ancient landmarks, to respect authority, and to guard the integrity of the law as a science."

The responsibilities, legal and moral, of the lawyer, arising from his relations to the court, to his professional brethren, and to his client, are thus treated: "Fidelity to the court, fidelity to the client, fidelity to the claims of truth and honor: these are the matters comprised in the oath of office."

"*Fidelity to the court* requires outward *respect* in words and actions. The oath, as it has been said, undoubtedly looks to nothing like allegiance to the person of the judge; unless in those cases where his person is so inseparable from his office, that an insult to the one is an indignity to the other. In matters collateral to official duty, the judge is on a level with the members of the Bar, as he is with his fellow-citizens; his title to distinction and respect resting on no other foundation than his virtues and qualities as a man." Per Gibson, C. J., in In re Austin, 5 Rawle (Pa.) 204, 28 Am. Dec. 657.

"There are occasions, no doubt, when duty to the interests confided to the charge of the advocate demands firm and decided opposition to the views expressed or the course pursued by the court, nay, even manly and open remonstrance; but this duty may be faithfully performed, and yet that outward respect be preserved, which is here inculcated. Counsel should ever remember how necessary it is for the dignified and honorable administration of justice, upon which the dignity and honor of their profession entirely depend, that the courts and the members of the courts should be regarded with respect by the suitors and people; that on all occasions of difficulty or danger to that department of government, they should have the good opinion and confidence of the public on their side."

"Indeed it is highly important that the *temper* of an advocate should be always equal. He should most carefully aim to repress everything like excitability or irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things done, which the parties afterwards wish could be unsaid or undone. Equanimity and self-possession are qualities of unspeakable value."

"Another plain duty of counsel is to present everything in the cause to the court *openly* in the course of the public discharge of its duties. It is not often, indeed, that gentlemen of the Bar so far forget themselves as to attempt to exert privately an influence upon the judge, to seek private interviews, or take occasional opportunities of accidental or social meetings to make *ex parte* statements, or to endeavor to impress their views. . . . They

know that such conduct is wrong in itself, and has a tendency to impair confidence in the administration of justice, which ought not only to be pure but unsuspected. A judge will do right to avoid social intercourse with those who obtrude such unwelcome matters upon his moments of relaxation."

"There is one thing, however, of which gentlemen of the Bar are not sufficiently careful,—*to discourage and prohibit their clients* from pursuing a similar course. The position of the judge in relation to a cause, under such circumstances, is very embarrassing, especially, as is often the case, if he hears a good deal about the matter before he discovers the nature of the business and object of the call upon him."

"Counsel should set their faces against all *undue influences* of the sort; they are unfaithful to the court if they allow any improper means of the kind to be resorted to. *Judicem nec de obtinendo jure orari oportet nec de injuria exorari.* It may be in place to remark here that the counsel in a cause ought to avoid all unnecessary communication with the jurors before or during any trial in which he may be concerned. He should enforce the same duty upon his client."

"There is another duty to the court, and that is, *to support* and *maintain it* in its proper province wherever it comes in conflict with the co-ordinate tribunal—the jury."

"It need hardly be added that a practitioner ought to be particularly cautious, in all his dealings with the court, to use no *deceit, imposition,* or *evasion*—to make no statements of facts which he does not know or believe to be true—to distinguish carefully what lies in his own knowledge from what he has merely derived from his instructions—to present no paper-books intentionally garbled. 'Sir Matthew Hale abhorred,' says his biographer, 'those too common faults of misreciting witnesses, quoting precedents or books falsely, or asserting anything confidently; by which ignorant juries and weak judges are too often wrought upon.' "

"The topic of *fidelity to the client* involves the most difficult questions in the consideration of the duty of a lawyer."

"He is legally responsible to his client only for the want of ordinary care and ordinary skill. That constitutes gross negligence. It is extremely difficult to fix upon any rule which shall define what is negligence in a given case. The habits and practice of men are widely different in this regard. It has been laid down that if the ordinary and average degree of diligence and skill could be determined, it would furnish the true rule. Though such be the extent of legal liability, that of moral responsibility is wider. Entire devotion to the interest of the client, warm zeal in the maintenance and defence of his rights, and the exertion of his utmost learning and ability,—these are the higher points which can only satisfy the truly conscientious practitioner."

"But what are the limits of his duty when the legal demands or interests of his client conflict with his own sense of what is just and right? This is a problem by no means of easy solution. That lawyers are as often the ministers of injustice as of justice, is the common accusation in the mouth of gainsayers against the profession. It is said there must be a right and a wrong side to every lawsuit. In the majority of cases it must be apparent to the advocate on which side is the justice of the cause; yet he will maintain, and often with the appearance of warmth and earnestness, that side which he must know to be unjust, and the success of which will be a wrong to the opposite party. Is he not then a participator in the injustice? It may be answered in general: Every case is to be decided, by the tribunal before which it is brought for adjudication, upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence."

"Now the lawyer is not merely the agent of the party; he is an officer of the court. The party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of the judges which can legitimately bear upon the question. This is the office which the advocate performs. He is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor. The court or jury ought certainly to hear and weigh both sides; and the office of the counsel is to assist them by doing that which the client in person, from want of learning, experience, and address, is unable to do in a proper manner. The lawyer who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."

"As an answer to any sweeping objection made to the profession in general, the view thus presented may be quite satisfactory. It by no means follows, however, as a principle of private action for the advocate, that all causes are to be taken by him indiscriminately, and conducted with a view to one single end, success. It is much to be feared, however, that the prevailing tone of professional ethics leads practically to this result. He has an undoubted right to refuse a retainer, and decline to be concerned in any cause, at his discretion. It is a discretion to be wisely and justly exercised. When he has once embarked in a case, he cannot retire from it without the consent of his client or the approbation of the court."

"Lord Brougham, in his justly celebrated defence of the Queen, went to very extravagant lengths upon this subject; no doubt he was led by the excitement of so great an occasion to say what cool reflection and sober reason certainly never can approve. 'An advocate,' said he, 'in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.' "

"On the other hand, and as illustrative of the practical difficulty which this question presented to a man with as nice a perception of moral duty as perhaps ever lived, it is said by Bishop Burnet of Sir Matthew Hale: 'If he saw a cause was unjust, he for a great while would not meddle further in it, but to give his advice that it was so; if the parties after that would go on, they were to seek another counsellor, for he would assist none in acts of injustice; if he found the cause doubtful or weak in point of law, he always advised his clients to agree their business. Yet afterwards he abated much of the scrupulosity he had about causes that appeared at first unjust, upon this occasion: there were two causes brought him which, by the ignorance of the party or their attorney, were so ill-represented to him that they seemed to be very bad; but he inquiring more narrowly into them, found they were really very good and just; so after this he slackened much of his former strictness of refusing to meddle in causes upon the ill circumstances that appeared in them at first.' "

"There is a distinction to be made between the case of prosecution and defence for crimes; between appearing for a plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence. He is entitled, therefore, to the benefit of counsel to conduct his defence, to cross-examine the witnesses for the State, to scan, with legal knowledge, the forms of the proceeding against him, to present his defence in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as

to his guilt, and to see that if he is convicted, it is according to law."

As to contingent fees Judge Sharswood says:

"Regard should be had to the general usage of the profession, especially as to the rates of commission to be charged for the collection of undefended claims. Except in this class of cases, agreements between counsel and client that the compensation of the former shall depend upon final success in the lawsuit—in other words, contingent fees—however common such agreements may be, are of a very dangerous tendency, and to be declined in all ordinary cases. In making his charge, after the business committed to him has been completed, as an attorney may well take into consideration the general ability of his client to pay, so he may also consider the pecuniary benefit which may have been derived from his services. For a poor man, who is unable to pay at all, there may be a general understanding that the attorney is to be liberally compensated in case of success. What is objected to is an agreement to receive a certain part or proportion of the sum or subject-matter, in the event of a recovery, and nothing otherwise."

He considers that the practice should be discouraged not necessarily on the consideration of unlawfulness but of morality and its effect on the lawyer.

"It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and would find it difficult to persuade himself no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it."

"He has now an interest, which gives him a right to speak as principal, not merely to advise as to the law, and abide by instructions. It is either unfair to him or unfair to the client. If he thinks the result doubtful, he throws all his time, learning, and skill away upon what, in his estimation, is an uncertain chance. He cannot work with the proper spirit in such a case. If he believes that the result will be success, he secures in this way a higher compensation than he is justly entitled to receive.

"It is an undue encouragement to litigation. Men, who would not think of entering on a lawsuit, if they knew that they must compensate their lawyers whether they win or lose, are ready upon such a contingent agreement to try their chances with any kind of a claim. It makes the law more of a lottery than it is.

"The worst consequence is yet to be told,—its effect upon professional character. It turns lawyers into higglers with their clients. Of course it is not meant that these are always its actual results; but they are its inevitable tendencies, in many instances its practical working. To drive a favorable bargain with the suitor in the first place, the difficulties of the case are magnified and multiplied, and advantage taken of that very confidence which led him to intrust his interests to the protection of the advocate. The parties are necessarily not on an equal footing in making such a bargain. A high sense of honor may prevent counsel from abusing his position and knowledge; but all have not such high and nice sense of honor. If our example goes towards making the practice of agreements for contingent fees general, we assist in placing such temptations in the way of our professional brethren of all degrees—the young, the inexperienced, and the unwary, as well as those whose age and experience have taught them that a lawyer's honor is his brightest jewel, and to be guarded from being sullied, even by the breath of suspicion, with the most sedulous care."

On the same subject Mr. Eli K. Price, in an essay on Limitations and Liens, thus expresses his opinion: "And further permit me to advise and earnestly to admonish you, for the preservation of professional honor and integrity, to avoid the temptation for bargaining for fees or shares of any estate or other claim, contingent upon a successful recovery. The practice directly leads to a disturbance of the peace of society, and to an infidelity to the professional obligation promised to the court, in which is implied an absence of desire or effort of one in the ministry of the temple of justice, to obtain a success that is not just as well as lawful. It is true, as a just equivalent for many cases honorably advocated and incompetently paid by the poor, a compensation may and will be received, the more liberal because of the ability produced by success; but let it be the result of no bargain, exacted as a price before the service is rendered, but rather the grateful return for benefits already conferred. If rigid in your terms, in protection of the right of the profession to a just and honorable compensation, let it rather be in the amount of the required retainer, when it will have its proper influence in the discouragement of litigation." See CHAMPERTY.

"The boundaries of professional privilege and professional obligation are clearly defined and in no way doubtful. Counsel represents the prisoner to defend his rights. In so doing he is bound to exercise competent learning, and to be faithful, vigilant, resolute. But he is at the same time an officer of the court, part of the system which the law provides for the preservation of individual rights in the administration of justice, and bound by his official oath to fidelity as well to the court as to the client. It was well said by the Chief Justice in Com. v. Jongrass, 181 Pa. 172, 37 Atl. 207: 'There is no code of professional ethics which is peculiar to the criminal courts. There are no methods of practice to be tolerated there that are not equally entitled to recognition in the civil courts.' The duty of the counsel is to see that his client is tried with proper observance of his legal rights, and not convicted except in strict accordance with law. His duty to his client requires him to do this much, his duty to the court forbids him to do more. An independent and fearless bar is a necessary part of the heritage of a people free by the standards of Anglo-Saxon freedom, and courts must allow a large latitude to the individual judgment of counsel in determining his action, but it must never be lost sight of that there is a corresponding obligation to the court, which is violated by excessive zeal or perverted ingenuity that seeks to delay or evade the due course of legal justice." Com. v. Hill, 185 Pa. 387, 39 Atl. 1055, per Mitchell, J.

In an address of Joseph B. Warner before the American Bar Association (1896) on "The Responsibilities of the Lawyer," will be found a discussion of this subject. It is said upon the much-discussed question of how an honorable man can advocate what he knows to be a bad cause, that it is important to look at the profession from the non-professional standpoint, and that the familiar argument that every man has the right to have the law fairly applied to his case is a solution, less satisfactory in theory than in practice, of the problem as it confronts the individual lawyer. This assumes the presentation of a cause by an official spokesman before a competent and impartial tribunal. The theory might fit a mere intermediary in the public function of the administration of justice, but does not answer when, as in modern practice, it concerns the intimate and confidential adviser of the client who is thoroughly identified with the client at the inception and during the preparation for the progress of the trial at every stage. "Such being the lawyer's immersion in his client's cause, it is out of the question to consider him merely as a perfunctory representative. His responsibility for litigation in its inception, its progress, and its results, must be, to some extent at least, commensurate with his identification with the cause. If he wholly adopts the client he must acknowledge the relationship. This leaves the lawyer's responsibility where he chooses to put it. He may limit it by limiting his relations to those external services which are guardedly professional; he may, on the other hand,

enter so far into the case as to become as answerable for it as the client is, or even more. This is, I think, the position which the lawyer must accept. He cannot make a case his own, and push it as if he were a party, and yet disclaim responsibility for it on the ground that his connection with it is wholly official. He must openly accept the consequences of whatever he does, and expect no shelter from any theory of the professional relation which does not squarely recognize all the facts."

Nor does Mr. Warner consider that the unavoidable influence of powerful counsel on courts is to be disregarded as a disturbing factor in the cause of justice. While the danger may be slight as to courts, with juries it is by no means so, and "in proportion as the lawyer purposely carries a jury against the facts, or beyond the facts, so far the verdict is his act. To that responsibility he must be held." The shadowy impression of an obligation to undertake any cause is dismissed as untenable and inconsistent with present conditions. The counsel is in a measure responsible for the cause he has chosen to take. It is true he is not required to settle all doubts against his client, and due regard is to be had for the uncertainty of the law and the unquestioned fact that the lawyer must administer it as it is, and not in each case sit in judgment upon its wisdom or policy. The law, therefore, he does not control, but as to facts there is grave responsibility. No special rule can be formulated to distinguish between true and false advocacy, and allowance is to be made for the avowedly partisan attitude of the counsel, but "from a piece of false evidence, or a false statement in argument, every decent lawyer starts back. . . . Certainly nothing could be worse than to give any sanction whatever to a theory which, though never avowed, may sometimes be tacitly assumed, that the practice of the law is a game, or a species of warfare, in which there may be a few rules agreed on, but in the main there is but one thing to consider, and that is victory. As in the strange, unethical ethics of war you may not use poisoned bullets, but may use explosive shells, and may not poison the well in the besieged city, but may destroy the provision train on its way thither, so in a court of law, on this monstrous theory, though you may not actually suborn witnesses, you may take advantage of every piece of falsehood which in any other way can pass in, undetected, in evidence or argument. But if law is a game, it is a game in which the stakes are human happiness and character; if it is war, it is not a war for plunder, but one for principles, which cannot be set up with glory in the end if they have been first defiled and trampled under foot by the victors." The subject is thus fairly summed up: "At last the moralities of the practice of the law must rest on the individual lawyer, and perhaps little more can be said by way of particular rules for professional conduct than that the lawyer is under all the obligations which the highest standard, rightly understood, imposes on any man. From these he neither gets, nor claims, an exemption by reason of any convention which would permit falsehood, nor by reason of working within a system which, to some extent, settles conduct by general rules of law without regard to the moral aspect of particular cases."

Our system is not devised primarily to discover truth, nor is the lawyer chiefly a searcher after truth. If he were, his methods would seem strange, indeed. Our administration of law is made, or rather has grown, by forces which are virtually the great forces of nature, to meet human needs, to control the elemental passions of men, to regulate the affairs of life. . . . It has the imperfections and the contradictions of all human things. It does not always conform to rules, however unquestionable and right. It touches all of life and takes on both good and evil by the contact. In its critical moments, when it is centred in a trial in court, it is the modern phase of all ancient strife, the visible struggle, old as the world, of all the passions of anger, hate, greed, and avarice, less wild than of old, but still full of their inherited spirit, and now forced into an arena which, excepting war itself, is left as the only battlefield for the irrepressible fighting instincts of the race.

That these contests should not always proceed in irreproachable methods and infallibly end in right results, is not to be wondered at: that the men who engage in them as trained contestants sometimes fight with indefensible tactics must be laid to traits which yet survive in the human animal. The vigorous participation in affairs, with a purpose to do right, is the most wholesome moral tonic that our nature can have. This way lies open in the practice of the law. It cannot be said to be free from perplexities. The practitioner will not find himself in a plain way in which the fool cannot err. But he will find himself in the midst of abundant opportunities for service to mankind, will see before him ideals among the highest which our minds can reach, and will have the encouragement of examples which are not behind the farthest mark that human nature has touched in its approach to justice.

Among numerous works and articles, the following may be referred to: Virginia State Bar Assoc. Reports, 1894; Butler, Lawyer & Client, 1871; Eaton, Public Relations, etc., of the Legal Profession, 1882; Hearn, Legal Duties & Rights, 1883; Hill, The Bar; Its Ethics, 1881; Hoffman, Legal Studies; Pollock, Essays in Jurispr. & Ethics, 1882; Sedgwick, Relation & Duty of the Lawyer to the State, 1892; Warren, Professional Duties, 1870; F. C. Brewster's Address before the Phila. Law Academy, 1861; Woolworth, Duty, etc., of the Profession, Nebraska State Bar Assoc. 1877; Lord Herschell, Rights & Duties of an Advocate, Glasgow Jurid. Soc. 1890; The Responsibilities of the Lawyer, by Joseph B. Warner, Amer. Bar. Assoc. 1896; Henry Wade Rogers, 16 Yale L. J. 225.

Canons of legal ethics have been published by several State Bar Associations. As to the civil law, see ADVOCATI.

EUGENICS. Acts forbidding marriage except upon proof of the good health of one or both of the parties have recently been passed in a few states. The Wisconsin act has been declared invalid in an unreported case.

EUNDO, MORANDO ET REDEUNDO (Lat.). This Latin phrase signifies going, remaining, and returning. It is employed in cases where a person is privileged from arrest, in order to give him the freedom necessary to the performance of his respective obligations, to signify that he is protected from arrest *eundo, morando et redeundo.*

EUNOMY. Equal laws and a well-adjusted constitution of government.

EVASION (Lat. *evadere*, to avoid). A subtle device to set aside the truth or escape the punishment of the law: as, if a man should tempt another to strike him first, in order that he might have an opportunity of returning the blow with impunity. He is, nevertheless, punishable, because he becomes himself the aggressor in such a case. Hawk. Pl. Cr. c. 31, §§ 24, 25; Bac. Abr. *Fraud*, A.

EVENT. The consequences of anything, the issue, conclusion, end; that in which an action, operation, or series of operations, terminates. Fitch v. Bates, 11 Barb. (N. Y.) 473.

EVERY. All the separate individuals who constitute the whole regarded one by one. State v. Penny, 19 S. C. 221. See ALL.

EVICTION. Deprivation of the possession of lands or tenements.

Originally and technically, the dispossession must be by judgment of law; if otherwise, it was an *ouster;* Lansing v. Van Alstyne, 2 Wend. (N. Y.) 563, note; Webb v. Alexander, 7 Wend. (N. Y.) 285; but the necessity of legal process was long ago abandoned in England; 4 Term 617; and in this country also it is settled that there need not be legal process; Greenvault v. Davis, 4 Hill (N. Y.) 645; Grist v. Hodges, 14 N. C. 200; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360. The word is difficult to define with technical accuracy; 17 C. B. 30; but it may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction; Rawle, Cov. § 133.

Total eviction takes place when the possessor is wholly deprived of his rights in the premises. Partial eviction takes place when the possessor is deprived of only a portion of them; as, if a third person comes in and ejects him from the possession of half his land, or establishes a right to some easement over it, by a title which is prior to that under which he holds.

With respect to the demised premises, an eviction consists in taking from a tenant some part of the premises of which he was in possession, not in refusing to put him in possession of something which by the agreement with his landlord he should have enjoyed; Etheridge v. Osborn, 12 Wend. (N. Y.) 529. And in order to effect a suspension of rent there must be something equivalent to an expulsion from the premises, and not a mere trespass, or disturbance in the enjoyment of them; Allen v. Pell, 4 Wend. (N. Y.) 505; City of New York v. Price, 5 Sandf. (N. Y.) 542; T. Jones 148; Nelson v. Allen, 1 Yerg. (Tenn.) 379; Bartlett v. Farrington, 120 Mass. 284. The entry of a landlord upon demised premises for the purpose of rebuilding does not operate as an eviction, where it was with the tenant's assent and not to his entire seclusion; Heller v. Ins. Co., 151 Pa. 101, 25 Atl. 83.

It is not necessary, however, in order to produce the eviction of a tenant, that there should be an actual physical expulsion; for a landlord may do many acts tending to diminish the enjoyment of the premises, short of an expulsion, which will amount to an eviction in law: as if he intentionally disturb the tenant's enjoyment to such an extent as to injure his business or destroy the comfort of himself and family, or render the premises unfit for the purposes for which they were leased, it will amount to an eviction; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Edmison v. Lowry, 3 S. D. 77, 52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774; Duff v. Hart, 16 N. Y. Supp. 163; O'Neill v. Manget, 44 Mo. App. 279; Hoeveler v. Fleming, 91 Pa. 322; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117; Wade v. Herndl, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591.

Constructive eviction may arise from any wrongful act of the lessor which deprives the tenant of the full enjoyment of the leased premises: as, by forbidding an undertenant to pay rent to the tenant; Leadbeater v. Roth, 25 Ill. 587; building a fence in front of the premises to cut off the tenant's access thereto; see Boston & W. R. Co. v. Ripley, 13 Allen (Mass.) 421; erecting a permanent structure which renders unfit for use two rooms; Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; refusal to do an act indispensably necessary to enable the tenant to carry on the business for which the premises were leased: as, when premises were let for a grog-shop, the landlord refused to sign the necessary documents required by statute to enable the tenant to obtain a license; Grabenhorst v. Nicodemus, 42 Md. 236; *contra,* Kellogg v. Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; also where lessor tears down an adjoining building, making it evident that lessee's building would fall; Snow v. Pulitzer, 142 N. Y. 263, 36 N. E. 1059. And when a landlord, who owned another building adjoining that occupied by a tenant, the two being constructed together, tore the former down, rendering the latter unsafe for occupancy, and then procured its condemnation and destruction by the city authorities, these acts constituted an eviction; Silber v. Larkin, 94 Wis. 9, 68 N. W. 406. So also failure to furnish elevator service to an office building; McCall v. Ins. Co., 201 Mass. 223, 87 N. E. 582, 21 L. R. A. (N. S.) 38; Lawrence v. Marble Co., 1 Misc. 105, 20 N. Y. Supp. 698; Ess-Eff Realty Co. v. Buttenheim, 125 N. Y. Supp. 401; and such failure together with a failure to heat the premises; Minneapolis Co-Operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986, 38 Am. St. Rep. 473; leasing part of a building to an automobile company whose work caused vibrations, to the disturbance of an artist; Wade v. Herndl, 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591; renting a floor to lewd and disorderly persons; Lay v. Bennett, 4 Colo. App. 252, 35 Pac. 748; renting a lower floor for a laundry, as against a florist on an upper floor; Duff v. Hart, 16 N. Y. Supp. 163; or for a noisy and disorderly saloon; Halligan v. Wade, 21 Ill. 470, 74 Am. Dec. 108; permitting rats and offensive odors in a part of a building; Barnard Realty Co. v. Bonwit, 155 App. Div. 182, 139 N. Y. Supp. 1050.

But a mere failure of the landlord to make repairs, although such act may cause the

place to be untenantable, will not amount to an eviction; Coddington v. Dunham, 35 N. Y. Super. Ct. 412; Bussman v. Ganster, 72 Pa. 285. See Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117. Nor the presence of vermin; Jacobs v. Morand, 59 Misc. 200, 110 N. Y. Supp. 208. If the objectionable acts are done on an adjoining property it is not eviction; Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. Supp. 754; Kellogg v. Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; Gray v. Gaff, 8 Mo. App. 329.

The doctrine of constructive eviction amounts only to a right to abandon the premises; it is not a defence against an action for rent when the tenant waives the eviction and remains in possession; Edgerton v. Page, 20 N. Y. 281.

The ownership of adjacent premises, and the doing of an act, solely as owner of such premises, which injures a tenant's use of his land, do not infringe a right of the tenant and will not amount to a constructive eviction; Palmer v. Wetmore, 2 Sandf. (N. Y.) 316; Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. Supp. 754; Kellogg v. Lowe, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; Gray v. Gaff, 8 Mo. App. 329.

The remedy for an eviction depends chiefly upon the covenants in the deed under which the party held. When the grantee suffers a total eviction, if he has a covenant of seisin or for quiet enjoyment, he recovers from the grantor the consideration-money which he paid for the land, with interest, and not the enhanced value of the premises, whether such value has been created by the expenditure of money in improvements thereon, or by any other more general cause; Kinney v. Watts, 14 Wend. (N. Y.) 38; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61. And this seems to be the general rule; Bennet v. Jenkins, 13 Johns. (N. Y.) 50; Bender v. Fromberger, 4 Dall. (U. S.) 441, 1 L. Ed. 898; Talbot v. Bedford's Heirs, Cooke (Tenn.) 447; Lowther v. Com., 1 Hen. & M. (Va.) 202; Stewart v. Drake, 9 N. J. L. 139; Cox's Heirs v. Strode, 2 Bibb (Ky.) 273, 5 Am. Dec. 603.

With respect to a lessee, however, who pays no purchase-money, the rule of damages upon an eviction is different; for he recovers nothing, except such expenses as he has been put to in defending his possession; and as to any improvements he may have made upon the premises, he stands upon the same general footing with a purchaser. The rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. Upon an eviction the rent ceases, and the lessee is thereby relieved from a burden which must be deemed equal to the benefit he would have derived from the continued enjoyment of the property; Kelly v. Dutch Church, 2 Hill (N. Y.) 105; The Richmond v. Cake, 1 App. D. C. 447; Holmes v. Guion, 44 Mo. 164; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117; McClurg v. Price, 59 Pa. 420, 98 Am. Dec. 356; Leadbeater v. Roth, 25 Ill. 587. It is no defence, however, to an action for rent which was due at the time of the eviction; Johnson v. Barg, 8 Misc. 307, 28 N. Y. Supp. 728.

When the eviction is only *partial*, the damages to be recovered under the covenant of seisin are a ratable part of the original price, and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded, so as to entitle the vendee to the whole consideration-money, but only to the amount of the relative value of the part lost; Guthrie v. Pugsley, 12 Johns. (N. Y.) 126; 4 Kent 462. See 6 Bac. Abr. 44; 1 Saund. 204, 322 *a*; Colburn v. Morrill, 117 Mass. 262, 19 Am. Rep. 415; Tunis v. Grandy, 22 Gratt. (Va.) 109; Hunter v. Reiley, 43 N. J. L. 480; Home Life Ins. Co. v. Sherman, 46 N. Y. 370. See MEASURE OF DAMAGES.

EVIDENCE. That which tends to prove or disprove any matter in question, or to influence the belief respecting it. Belief is produced by the consideration of something presented to the mind. The matter thus presented, in whatever shape it may come, and through whatever material organ it is derived, is evidence. Prof. Parker, Lectures on Medical Jurisprudence, in Dartmouth College.

The word evidence, in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 1 Greenl. Ev. c. I. § 1; Will, Cir. Ev. 1. Testimony is not synonymous with evidence; Harvey v. Smith, 17 Ind. 272; the latter is the more comprehensive term; Whart. Cr. L. § 783; and includes all that may be submitted to the jury whether it be the statement of witnesses, or the contents of papers, documents, or records, or the inspection of whatever the jury may be permitted to examine and consider during the trial; Will, Cir. Ev. 2; Jones v. Gregory, 48 Ill. App. 230.

The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. Cal. Code Civ. Proc. § 1823. And the law of evidence is declared to be a collection of general rules established by law:

1. For declaring what is to be taken as true without proof.

2. For declaring the presumptions of law, both disputable and conclusive.

3. For the production of legal evidence.

4. For the exclusion of what is not legal.

5. For determining in certain cases the value and effect of evidence. *Id.* § 1825.

"The rules of evidence," says a discriminating writer, "are the maxims which the

sagacity and experience of ages have established, as the best means of discriminating truth from error, and of contracting as far as possible the dangerous power of judicial discretion." Will, Cir. Ev. 2.

That which is legally submitted to a jury, to enable them to decide upon the questions in dispute, or issue, as pointed out by the pleadings, and distinguished from all comment and argument, is termed evidence. 1 Stark. Ev. pt. 1, § 3.

Evidence may be considered with reference to its *instruments*, its *nature*, its *legal character*, its *effect*, its *object*, and the *modes of its introduction*.

The instruments of evidence, in the legal acceptation of the term, are:

1. *Judicial notice* or *recognition*. There are divers things of which courts take judicial notice, without the introduction of proof by the parties: such as the territorial extent of their jurisdiction, local divisions of their own countries, seats of courts, all public matters directly concerning the general government, the ordinary course of nature, divisions of time, the meanings of words, and, generally, of whatever ought to be generally known in the jurisdiction. If the judge needs information on subjects, he will seek it from such sources as he deems authentic. See JUDICIAL NOTICE.

2. *Public records;* the registers of official transactions made by officers appointed for the purpose; as, the public statutes, the judgments and proceedings of courts, etc.

3. *Judicial writings:* such as inquisitions, depositions, etc.

4. *Public documents* having a semi-official character: as, the statute-books published under the authority of the government, documents printed by the authority of congress, etc.

5. *Private writings:* as, deeds, contracts, wills.

6. *Testimony of witnesses.*

7. *Personal inspection*, by the jury or tribunal whose duty it is to determine the matter in controversy: as, a view of the locality by the jury, to enable them to determine the disputed fact, or the better to understand the testimony, or inspection of any machine or weapon which is produced in the cause.

Real evidence is evidence of the thing or object which is produced in court. When, for instance, the condition or appearance of any thing or object is material to the issue, and the thing or object itself is produced in court for the inspection of the tribunal, with proper testimony as to its identity, and, if necessary, to show that it has existed since the time at which the issue in question arose, this object or thing becomes itself "real evidence" of its condition or appearance at the time in question. 1 Greenl. Ev. § 13 *a*, note. For a full discussion of this species of evidence, see Gaunt v. State, 50 N. J. L. 491, 14 Atl. 600.

There are rules prescribing the limits and regulating the use of these different instruments of evidence, appropriate to each class.

In its *nature*, evidence is *direct*, or *presumptive*, or *circumstantial*.

Direct evidence is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact.

It is that evidence which, if believed, establishes the truth of a fact in issue, and does not arise from any presumption. Evidence is direct and positive when the very facts in dispute are sworn to by those who have the actual knowledge of them by means of their senses. 1 Stark. Ev. 19; Tayl. Ev. 84. In one sense, there is but little direct or positive proof, or such proof as is acquired by means of one's own sense; all other evidence is presumptive; but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.

Extrinsic evidence is external evidence, or that which is not contained in the body of an agreement, contract, and the like.

It is a general rule that extrinsic evidence cannot be admitted to contradict, explain, vary, or change the terms of a contract or of a will, except in a latent ambiguity, or to rebut a resulting trust; Mann v. Mann, 14 Johns. (N. Y.) 1, 7 Am. Dec. 416; Spalding v. Huntington, 1 Day (Conn.) 8. Excepting where evidence is admissible to vary a written contract on the ground that it does not represent the actual contract between the parties. See Wigram, Extrinsic Evidence; 14 L. R. A. 459, note.

Presumptive evidence is that which shows the existence of one fact, by proof of the existence of another or others, from which the first may be inferred; because the fact or facts shown have a legitimate tendency to lead the mind to the conclusion that the fact exists which is sought to be proved.

Presumptive evidence has been divided into presumptions of law and presumptions of fact.

Presumptions of law, adopted from motives of public policy, are those which arise in certain cases by force of the rules of law, directing an inference to be drawn from proof of the existence of a particular fact or facts. They may be conclusive or inconclusive.

Conclusive presumptions are those which admit of no averment or proof to the contrary. Thus, the records of a court, except in some proceeding to amend them, are conclusive evidence of the matter there recorded, being presumed to be rightly made up.

Inconclusive or *disputable* presumptions of law are those where a fact is presumed to exist, either from the general experience

of mankind, or from policy, or from proof of the existence of certain other facts, until something is offered to show the contrary. Thus, the law presumes a man to be sane until the contrary appears, and to be innocent of the commission of a crime until he is proved to be guilty. So, the existence of a person, or of a particular state of things, being shown, the law presumes the person or state of things to continue until something is offered to conflict with the presumption. See Best, Presumption, ch. ii.

But the presumption of life may be rebutted by another presumption. Where a party has been absent from his place of residence for the term of seven years, without having been heard of, this raises a presumption of his death, until it is encountered by some evidence showing that he is actually alive, or was so within that period.

Presumptions of fact are not the subject of fixed rules, but are merely natural presumptions, such as appear, from common experience, to arise from the particular circumstances of any case. Some of these are "founded upon a knowledge of the human character, and of the motives, passions, and feelings by which the mind is usually influenced." 1 Stark. Ev. 27.

They may be said to be the conclusions drawn by the mind from the natural connection of the circumstances disclosed in each case, or, in other words, from circumstantial evidence.

Circumstantial evidence is the proof of facts which usually attend other facts sought to be proved; that which is not direct evidence. For example, when a witness testifies that a man was stabbed with a knife, and that a piece of the blade was found in the wound, and it is found to fit exactly with another part of the blade found in the possession of the prisoner, the facts are directly attested, but they only prove circumstances; and hence this is called circumstantial evidence.

Circumstantial evidence is of two kinds, namely, certain and uncertain. It is *certain* when the conclusion in question necessarily follows: as, where a man had received a mortal wound, and it was found that the impression of a bloody *left* hand had been made on the *left* arm of the deceased, it was certain some other person than the deceased must have made such mark; 14 How. St. Tr. 1334. But it is *uncertain* whether the death was caused by suicide or by murder, and whether the mark of the bloody hand was made by the assassin, or by a friendly hand that came too late to the relief of the deceased.

Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offence charged to the defendant, but it must always rise to that degree of convincing power which satisfies the mind beyond reasonable doubt of guilt. This can never be the case when the evidence, as produced, is entirely consistent with innocence in a given transaction; Hayes v. U. S., 169 Fed. 101, 94 C. C. A. 449. When the evidence can be reconciled either with the theory of innocence or of guilt, the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted; Vernon v. U. S., 146 Fed. 121, 76 C. C. A. 547, citing People v. Ward, 105 Cal. 335, 38 Pac. 945; Asbach v. Ry. Co., 74 Ia. 248, 37 N. W. 182; Smith v. Bank, 99 Mass. 605, 97 Am. Dec. 59. It is not a question of the weakest link of a chain, but the weakest strand of a rope cable; Ex parte Hayes, 6 Okl. Cr. 321, 118 Pac. 609.

While it has thus been contended that, in order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused; Wills, Cir. Ev. 300; Stark. Ev. 160; 1 Crim. L. Mag. 234; State v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137; other writers have held that the distinction between this species of evidence and that which is direct is merely one of logic, and of no practical significance; that all evidence is more or less circumstantial; all statements of witnesses, all conclusions of juries, are the results of inference; or as it was expressed by Gibson, C. J., "the difference being only in degree;" Com. v. Harman, 4 Pa. 269. See U. S. v. Gibert, 2 Sumn. 27, Fed. Cas. No. 15,204; Com. v. Harman, 4 Pa. 269; Whart. Cr. Ev. § 10. Even in its strictest sense, circumstantial evidence is legal evidence, and when it is satisfactory beyond reasonable doubt, a jury is bound to act upon it as if it were the most direct; 1 Greenl. Ev. § 13; 3 Rice, Ev. 544. See CIRCUMSTANCES; EVIDENCE.

Circumstantial evidence is sometimes used as synonymous with presumptive evidence, but not with strict accuracy; for presumptive evidence is not necessarily and in all cases what is usually understood by circumstantial evidence. The latter is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency, from the laws of nature, the usual connection of things, and the ordinary transactions of business, etc., to lead the mind to a conclusion that the fact exists which is sought to be established. See 1 Stark. Ev. 478; Whart. Ev. 1, 2, 15.

A writer on this subject, already quoted, thus states the distinction: the word presumption, *ex vi termini*, imports an inference from facts known, based upon previous experience of the ordinary connection between the two, and, the word itself implies a certain relation between fact and inference. Circumstances, however, generally but not necessarily lead to particular inferences; for the facts may be indisputable, and yet their relation to the principal fact may be only

apparent, not real; and even where the connection is real, the deduction may be erroneous. Circumstantial and presumptive evidence differ therefore as genus and species. Will, Cir. Ev. 17.

Presumptive evidence may sometimes be the result, to some extent, of any arbitrary rule—as in the case of the presumption of death after an absence of seven years without being heard of—derived by analogy from certain statutes.

The judge and the jury draw conclusions from circumstantial evidence, and find one fact from the existence of other facts shown to them,—some of the presumptions being so clear and certain that they have become fixed as rules of law, and others having greater or less weight according to the circumstances of the case, leaving the matter of fact inquired about in doubt until the proper tribunal to determine the question draws the conclusion.

In its *legal character*, evidence is *primary* or *secondary*, and *prima facie* or *conclusive*.

Primary evidence is the best evidence, or that proof which most certainly exhibits the true state of facts to which it relates. The law requires this, and rejects secondary or inferior evidence when it is attempted to be substituted for evidence of a higher or superior nature. For example, when a written contract has been entered into, and the object is to prove what it was, it is requisite to produce the original writing, if it is to be attained; and in that case no copy or other inferior evidence will be received.

This is a rule of policy, grounded upon a reasonable suspicion that the substitution of inferior for better evidence arises from sinister motives, and an apprehension that the best evidence, if produced would alter the case to the prejudice of the party. This rule relates not to the measure and quantity of evidence, but to its quality when compared with some other evidence of superior degree.

To this general rule there are several exceptions. 1. As it refers to the *quality* rather than to the *quantity* of evidence, it is evident that the fullest proof that every case admits of is not requisite: if, therefore, there are several eye-witnesses to a fact, it may be sufficiently proved by one only. 2. It is not always requisite, when the matter to be proved has been reduced to writing, that the writing should be produced: as, if the narrative of a fact to be proved has been committed to writing, it may yet be proved by parol evidence. A receipt for the payment of money, for example, will not exclude parol evidence of payment; 4 Esp. 213. And see 3 B. & Ald. 566; Meade v. Keane, 3 Cra. C. C. 51, Fed. Cas. No. 9,373; Bonesteel v. Gardner, 1 Dak. 372, 46 N. W. 590; Chapin v. Dobson, 78 N. Y. 82, 34 Am. Rep. 512. The evidence of a father and mother, cognizant of their child's birth, is primary evidence of its date or the age of the child, although there is a written record thereof in the family Bible; State v. Woods, 49 Kan. 237, 30 Pac. 520; Hawkins v. Taylor, 1 McCord (S. C.) 164; Hermann v. State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789. A stenographer's notes of the testimony of a witness are not the best evidence of such testimony, so as to prevent any other person who was present from testifying in relation thereto; Brice v. Miller, 35 S. C. 537, 15 S. E. 272; Nasanowitz v. Hanf, 17 Misc. 157, 39 N. Y. Supp. 327. Documentary evidence is not the best evidence of marriage; People v. Perriman, 72 Mich. 184, 40 N. W. 425. Oral admissions of a party against himself as to the contents of a writing are primary evidence; Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611.

Secondary evidence is that species of proof which is admissible when the primary evidence cannot be produced, and which becomes by that event the best evidence that can be adduced. Armstrong's Lessee v. Morgan, 3 Yeates (Pa.) 530.

But before such evidence can be allowed it must be clearly made to appear that the superior evidence is not to be had; Phillips v. O'Neal, 87 Ga. 727, 13 S. E. 819; Curtis v. Wilcox, 91 Mich. 229, 51 N. W. 992. The person who possesses it must be applied to, whether he be a stranger or the opposite party: in the case of a stranger, a subpœna and attachment, when proper, must be taken out and served; and in the case of a party, notice to produce such primary evidence must be proved before the secondary evidence will be admitted; Patton's Adm'rs v. Ash, 7 S. & R. (Pa.) 116; 3 B. & Ald. 296; Susquehanna & W. V. R. & Coal Co. v. Quick, 61 Pa. 328; Gallagher v. Assur. Corp., 149 Pa. 25, 24 Atl. 115; King Optical Co. v. Treat, 72 Mich. 599, 40 N. W. 912; 7 Exch. 639; Louisville & N. R. Co. v. Orr, 94 Ala. 602, 10 South. 167; De Barie v. Pardo, 6 Sadler (Pa.) 148, 8 Atl. 876, where this rule is discussed at large by Arnold, J., whose views were affirmed without an opinion. "If there are several sources of information of the same fact, it is not ordinarily necessary to show that all have been exhausted before secondary evidence can be resorted to." Smith v. Brown, 151 Mass. 338, 24 N. E. 31. See Kleimann v. Geiselmann, 45 Mo. App. 497; McCormick v. Anderson, 83 Ala. 401, 3 South. 796; McClure v. Campbell, 25 Neb. 57, 40 N. W. 595. Secondary evidence of the contents of a written contract is inadmissible in the absence of proper diligence to secure the original; Low v. Tandy, 70 Tex. 745, 8 S. W. 620; Whaun & Co. v. Atkinson, 84 Ala. 592, 4 South. 681. After proof of the due execution of the original, the contents should be proved by a counterpart, if there be one, for this is the next best evidence; and it seems that no evidence of a copy is admissible until proof has been given that the counterpart cannot be produced; 6 Term

236. If there be no counterpart, a copy may be proved in evidence by any witness who knows that it is a copy, from having compared it with the original; Meyer v. Barker, 6 Binn. (Pa.) 234; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105. If regularly recorded, an office copy may be given in evidence. If there be no copy, the party may produce an abstract, or even give parol evidence of the contents of a deed; 6 Term 556. A transcribed telegraphic message which is actually delivered is primary evidence, and if lost or destroyed its contents may be proved by parol; Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660. See Terre Haute & I. R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650; Anheuser-Busch Brewing Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 4 L. R. A. 575. Letterpress copies of writings are secondary evidence; Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. App. 200, 30 S. W. 454; and where there were such, next to the originals, they were the best evidence and oral evidence should have been rejected; Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; and as to copies of documents made by mechanical means, as originals, see 12 L. R. A. (N. S.) 343, note.

If books or papers necessary as evidence in the courts of one state be in the possession of a person living in another state, secondary evidence without further showing may be given to prove the contents of such papers, and notice to produce them is unnecessary; Burton v. Driggs, 20 Wall. (U. S.) 125, 22 L. Ed. 299. See Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. Rep. 536. Where the attesting witness to a deed lives out of the state, secondary evidence of its execution is admissible; Trustees of Smith Charities v. Connolly, 157 Mass. 272, 31 N. E. 1058.

It has been decided in England that there are no degrees in secondary evidence; and when a party has laid the foundation for such evidence, he may prove the contents of a deed by parol, although it appear that an attested copy is in existence; 6 C. & P. 206; 8 *id.* 389; 7 M. & W. 102. It is urged on the one hand that the rule requiring the best evidence has reference to its nature, not to its strength, and the argument *ab inconvenienti* is invoked against the extension of the rule recognizing degrees. On the other hand it is contended that such an extension is an equitable one and rests on the same principle which forbids the introduction of any secondary evidence while the primary is available. English cases cited in favor of the recognition of degrees are said to be not so much decisions of the point as *dicta*, as they refer to it as a rule existing but not involved in the case; 2 Atk. 71; 1 Nev. & Per. 8. But in the latter case the rule is doubted, and in 6 C. & P. 359 impliedly denied by Patteson, J., as it is also by Parke, J.; 6 C. & P. 81; *id.* 206. See 8 Dowl. 389; 3 Scott, N. R. 577. The question is not settled in the United States; Greenl. Ev. § 84, note; and the United States Supreme Court, declining to adopt the English rule without qualification, observe that the secondary evidence "must be the best the party has in his power to produce" and also that the rule of exclusion or admission must be so applied as to promote the ends of justice, and guard against fraud, surprise, and imposition; Cornett v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254. This doctrine was followed in Johnson v. Arnwine, 42 N. J. L. 458, 36 Am. Rep. 532; Jaques v. Horton, 76 Ala. 246. See Kentzler v. Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; Florida Cent. & P. R. Co. v. Bucki, 68 Fed. 864, 16 C. C. A. 42. The American doctrine seems to be "that if from the nature of the case itself it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that when the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove that it was known to the other party in time to have been produced at the trial;" 1 Gr. Ev. § 84, note; Lewis v. San Antonio, 7 Tex. 315; Lane v. Jones, 2 Cold. (Tenn.) 321; Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344; Graham v. Campbell, 56 Ga. 258; Illinois Land & Loan Co. v. Bonner, 75 Ill. 315; Nason v. Jordan, 62 Me. 480; Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266.

Cases holding that there are no degrees in secondary evidence are Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469; Smith v. Brown, 151 Mass. 338, 24 N. E. 31; Dra. K. B. U. C. 357; at least unless it appears that there is better evidence than is offered; Eslow v. Mitchell, 26 Mich. 500. Cases holding that there are such degrees are Coman v. State, 4 Blackf. (Ind.) 241; Cornett v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254; Williams v. Waters, 36 Ga. 454, where it was said that the same rule applies as in the case of primary evidence; Dillon v. Howe, 98 Mich. 168, 57 N. W. 102.

Prima facie evidence is that which appears to be sufficient proof respecting the matter in question, until something appears to controvert it, but which may be contradicted or controlled.

Conclusive evidence is that which, while uncontradicted, establishes the fact: as in the instance of conclusive presumptions; it is also that which cannot be contradicted.

The record of a court of common law jurisdiction is conclusive as to the facts therein stated; Shelton v. Barbour, 2 Wash. (Va.) 64; Dennison v. Hyde, 6 Conn. 508. But the judgment and record of a prize-court is not conclusive evidence in the state courts, unless it had jurisdiction of the subject-matter; and whether it had or not, the state courts may decide; Slocum v. Wheeler, 1

Conn. 429. See, as to the conclusiveness of the judgments of foreign courts of admiralty; Maley v. Shattuck, 3 Cra. (U. S.) 458, 2 L. Ed. 498; Pollard v. Dwight, 4 Cra. (U. S.) 421, 2 L. Ed. 666; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; Bourke v. Granberry, Gilm. (Va.) 16, 9 Am. Dec. 589; Groning v. Ins. Co., 1 Nott & McC. (S. C.) 537.

Evidence may be conclusive for some purposes but not for others.

Admissibility of evidence. In considering the legal character of evidence, we are naturally led to the rules which regulate its competency and admissibility, although it is not precisely accurate to say that evidence is in its legal character competent or incompetent; because what is incompetent for the consideration of the tribunal which is to pronounce the decision is not, strictly speaking, evidence.

But the terms incompetent evidence and inadmissible evidence are often used to designate what is not to be heard as evidence: as, witnesses are spoken of as competent or incompetent.

The admissibility of evidence is not affected by the fact that it was obtained by unfair means; Williams v. State, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; 14 East 302; Com. v. Dana, 2 Metc. (Mass.) 329; 1 Gr. Ev. § 254a; as when illegally seized by a public official; Starchman v. State, 62 Ark. 538, 36 S. W. 940; State v. Flynn, 36 N. H. 64; Com. v. Henderson, 140 Mass. 303, 5 N. E. 832; or a private detective; Gindrat v. People, 138 Ill. 103, 27 N. E. 1085; or surreptitiously taken by a person unknown; Firth Sterling Steel Co. v. Steel Co., 199 Fed. 353. But evidence was held to be inadmissible because obtained in violation of rights secured by the IVth and Vth Amendments of the Constitution either by production under order of the court; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; or by means of an illegal search by a custom officer; U. S. v. Wong Quong Wong, 94 Fed. 832. In criminal cases personal property is sometimes introduced in evidence as burglar's tools, appliances used in counterfeiting, gaming and the like. See SEARCH.

Evidence of experiments to throw light upon any question at issue is admissible or not, largely in the discretion of the trial court. Evidence of experiments made eight years after as to what sound could be heard through a wall, to show that a certain conversation could not have been heard through it, was rejected; Dow v. Bulfinch, 192 Mass. 281, 78 N. E. 416.

It is competent on a second trial of a civil case in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject; Nome Beach Lighterage & Transp. Co. v. Ins. Co., 156 Fed. 484; Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409; it is not necessary to prove the precise language of the deceased witness, but only to express clearly the substance; Ruch v. Rock Island, 97 U. S. 693, 24 L. Ed. 1101; and in a criminal case where the witness was dead and had been cross-examined, his evidence was held admissible; U. S. v. Macomb, 5 McLean 286, Fed. Cas. No. 15,702; Brown v. Com., 73 Pa. 326, 13 Am. Rep. 740; State v. Able, 65 Mo. 371; but where the proof was insufficient to connect the present respondent with the defense in the prior suit, the deposition of a deceased witness was held inadmissible; Rumford Chemical Works v. Chemical Co., 154 Fed. 65, 83 C. C. A. 177. The notes of testimony on a former trial by deceased and absent witnesses are admissible when the accuracy of the copy is agreed to; Emerson v. Burnett, 11 Colo. App. 86, 52 Pac. 752; or admitted; Chicago, St. P. M. & O. R. Co. v. Myers, 80 Fed. 365, 25 C. C. A. 486; but not when there is no proof of accuracy other than the certificate of the stenographer; Williams v. Min. Co., 37 Colo. 62, 86 Pac. 337, 7 L. R. A. (N. S.) 1170, 11 Ann. Cas. 111.

As the common law excludes certain classes of persons from giving testimony in particular cases, because it deems their exclusion conducive, in general, to the discovery of the truth, so it excludes certain materials and statements from being introduced as testimony in a cause, for a similar reason. Thus, as a general rule, it requires witnesses to speak to facts within their own knowledge, and excludes hearsay evidence.

Hearsay is the evidence, not of what the witness knows himself, but of what he has heard from others.

It is the general rule that hearsay is inadmissible; Central Pac. R. Co. v. Feldman, 152 Cal. 303, 92 Pac. 849; and evidence which appears to be hearsay should be excluded; Moore v. Maxwell & Delhomme, 155 Ala. 299, 46 South. 755; so also facts which the witness could know only by hearsay are inadmissible. See HEARSAY.

Such mere recitals or assertions cannot be received in evidence for many reasons, but principally for the following: First, that the party making such declarations is not on oath; and, secondly, because the party against whom it operates has no opportunity of cross-examination; 1 Phil. Ev. 185. See, for other reasons, 1 Stark. Ev. pt. 1, p. 44; Tayl. Ev. 508. The general rule excluding hearsay evidence does not apply to those declarations to which the party is privy, or to admissions which he himself has made.

Many facts, from their very nature, either absolutely or usually exclude direct evidence to prove them, being such as are either necessarily or usually imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, pre-

scription, custom, boundary, and the like; as also questions which depend upon the exercise of particular skill and judgment. Such facts, some from their nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses: and, consequently, resort must be had to the best means of proof which the nature of the case affords. The rule permitting a resort to hearsay evidence, however, in cases of pedigree extends only to the admission of declarations by deceased persons who were related by blood or marriage to the person in question, and not to declarations by servants, friends, or neighbors; Flora v. Anderson, 75 Fed. 217. And "general reputation in the family," which is admissible in matters of pedigree, or to establish the facts of birth, marriage, or death, is confined to declarations of deceased members of the family, and family history and traditions handed down by declarations of deceased members, in either case made *ante litem motam*, and originating with persons presumed to have competent knowledge of the facts stated; and evidence of the opinion or belief of living members of a family as to the death of another member, or of general reputation among a person's living friends and acquaintances as to his death, is not within the rule, and is inadmissible; In re Hurlburt's Estate, 68 Vt. 366, 35 Atl. 77, 35 L. R. A. 794. See BOUNDARY; CUSTOM; PEDIGREE; PRESCRIPTION.

Admissions are the declarations which a party by himself, or those who act under his authority, make of the existence of certain facts. But where an admission is made the foundation of a claim, the whole statement must be taken together; Perkins v. Lane, 82 Va. 59. See Bryan v. Kelly, 85 Ala. 569, 5 South. 346; ADMISSIONS.

A statement of all the distinctions between what is to be regarded as hearsay and what is to be deemed original evidence would extend this article too far. The general principle is that the mere declaration, oral or written, of a third person, as to a fact, standing alone, is inadmissible.

Res gestæ. But where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible, as part of the *res gestæ;* Sessions v. Little, 9 N. H. 271; Steph. Dig. Ev. §§ 2, 7. See RES GESTÆ.

So, declarations of third persons, in the presence and hearing of a person, which tend to affect his interest, may be shown in order to introduce his answer or to show an admission by his silence, but this species of evidence must be received with great caution; 1 Greenl. Ev. 236.

Confessions of guilt in criminal cases come within the class of admissions, provided they have been voluntarily made and have not been obtained by the hope of favor or by the fear of punishment. And if made under such inducements as to exclude them, a subsequent declaration to the same effect, made after the inducement has ceased to operate, and having no connection with the hopes or fears which have existed, is admissible as evidence; State v. Howard, 17 N. H. 171. Actions as well as verbal declarations may constitute a confession, and the same rule as to admissibility applies to both; State v. Crowson, 98 N. C. 595, 4 S. E. 143. There is, however, a growing unwillingness to rest convictions on confessions unless supported by corroborating circumstances, and in all cases there must be at least proof of the *corpus delicti*, independently of the confession; 1 Whart. Cr. Law, § 683; Cooley, Const. Lim. 385; Tayl. Ev. 744. See ADMISSIONS; CONFESSION; RES GESTÆ.

Dying declarations are an exception to the rule excluding hearsay evidence, and are admitted, under certain limitations in cases of homicide, so far as the circumstances attending the death and its cause are the subject of them. See DECLARATION; DYING DECLARATIONS.

Opinions of persons of skill and experience, called experts, are also admissible in certain cases, when, in order to the better understanding of the evidence or to the solution of the question, a certain skill and experience are required which are not ordinarily possessed by jurors. A non-expert witness on the question of the sanity of one accused of crime "after stating such particulars as he can remember,—generally only the more striking facts,— . . . is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced;" Queenan v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175. See EXPERT; OPINION.

In several instances proof of facts is excluded from public policy; as professional communications between lawyer and client, and physician and patient; secrets of state, proceedings of grand juror, and communications between husband and wife. See CONFIDENTIAL COMMUNICATIONS; PRIVILEGED COMMUNICATIONS.

The *effect* of evidence. As a general rule, a judgment rendered by a court of competent jurisdiction directly upon a point in issue is a bar between the same parties; 1 Phill. Ev. 242; and privies in blood, as an heir; 3 Mod. 141; or privies in estate; 1 Ld. Raym. 730; Bull. N. P. 232, stand in the same situation as those they represent: the verdict and judgment may be used for or against them, and is conclusive. See RES JUDICATA; JUDGMENT.

The constitution of the United States, art. 4, s. 1, declares that "full faith and credit shall be given in each state to the public

acts, records, and judicial proceedings of every other state. And congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." See Hampton v. M'Connel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; Com. v. Green, 17 Mass. 546; Stephenson v. Bannister, 3 Bibb (Ky.) 369; Manwaring v. Griffing, 5 Day (Conn.) 563; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133; 2 Black, Judg. § 857; FOREIGN JUDGMENT.

Statutes defining what shall be held conclusive are, in general, unconstitutional, as a deprivation of due process of law, and as depriving the courts of their function of determining the weight and sufficiency of evidence; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Wantlan v. White, 19 Ind. 470; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. Rep. 663; Cooley Const. Lim. (5th ed.) 453; but the legislature may make the deliberate statement of a party conclusive evidence against him; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552.

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law; Dickerson v. Matheson, 50 Fed. 73. See FOREIGN LAW. For the force and effect of foreign judgments, see FOREIGN JUDGMENT.

The *object* of evidence is next to be considered. It is to ascertain the truth between the parties. It has been discovered by experience that this is done most certainly by the adoption of the following rules, which are now binding as law: 1. The evidence must be confined to the point in issue. 2. The substance of the issue must be proved; but only the substance is required to be proved. 3. The affirmative of the issue must be proved.

It is a general rule, both in civil and criminal cases, that *the evidence shall be confined to the point in issue.* Justice and convenience require the observance of this rule, particularly in criminal cases; for when a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and which alone he has come prepared to answer; 2 Russ. Cr. 694; 1 Phill. Ev. 166.

To this general rule there are several exceptions, and a variety of cases which do not fall within the rule. In general, evidence of collateral facts is not admissible; but when such a fact is material to the issue joined between the parties, it may be given in evidence: as, for example, in order to prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had general authority from him to fill up bills with the name of a fictitious payee, evidence may be given to show that he had accepted similar bills before they could, from their date, have arrived from the place of date; 2 H. Bla. 288.

When special damage sustained by the plaintiff is not stated in the declaration, it is not one of the points in issue, and, therefore, evidence of it cannot be received; yet a damage which is a necessary result of the defendant's breach of contract may be proved notwithstanding it is not in the declaration; 11 Price 19.

In general, evidence of the character of either party to a suit is inadmissible; yet in some cases such evidence may be given. See CHARACTER.

When evidence incidentally applies to another person or thing not included in the transaction in question, and with regard to whom or to which it is inadmissible, yet if it bear upon the point in issue it will be received; 8 Bing. 376. And see 4 B. & P. 92; State v. Watkins, 9 Conn. 47, 21 Am. Dec. 712; 1 Whart. Cr. Law § 649.

The *acts* of others, as in the case of conspirators, may be given in evidence against the prisoner, when referable to the issue; but *confessions* made by one of several conspirators after the offence has been completed, and when the conspirators no longer act in concert, cannot be received. See Livermore v. Herschell, 3 Pick. (Mass.) 33; Mackaboy v. Com., 2 Va. Cas. 269; Reitenbach v. Reitenbach, 1 Rawle (Pa.) 362, 18 Am. Dec. 638; Wilbur v. Strickland, 1 Rawle (Pa.) 458; Martin v. Com., 2 Leigh (Va.) 745; Gardner v. Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91; 2 B. & Ald. 573, 574; Perigo v. State, 25 Tex. App. 533, 8 S. W. 660; CONSPIRACY; CONFESSION.

In criminal cases, when the offence is a cumulative one, consisting itself in the commission of a number of acts, evidence of those acts is not only admissible, but essential to support the charge. On an indictment against a defendant for a conspiracy to cause himself to be believed a man of large property, for the purpose of defrauding tradesmen after proof of a representation to one tradesman, evidence may thereupon be given of a representation to another tradesman at a different time; 1 Campb. 399; Gardner v. Preston, 2 Day (Conn.) 205, 2 Am. Dec. 91; Snell v. Moses, 1 Johns. (N. Y.) 99.

Evidence of similar occurrences is admissible, to show the quality of the act, in many cases, as the value of land, the dangerous character of a drug, or the reasonableness of the act; 17 Harv. L. Rev. 349, where the principles regulating the subject are discussed, and the decisions are said to be chaotic

and arbitrary, as a result of the rule that the admissibility is made to depend on the opinion of the judge as to whether it raises a multiplicity of issues or occasions undue surprise. In civil cases such evidence seems to be admitted in very few instances. It is inadmissible to prove negligence; Missouri, K. & T. Ry. Co. v. Johnson, 92 Tex. 380, 48 S. W. 568; but, to prove due care, evidence of a general custom of switchmen to ride on the side of a freight car was admitted; Boyce v. Lumber Co., 119 Wis. 642, 97 N. W. 563. So it has been admitted to prove similarity of conditions, as the effect of the passing of trains over a certain curve; Louisville & N. R. Co. v. Sandlin, 125 Ala. 585, 28 South. 40; or the supply of gas to other houses, where the appliances were such as to furnish as much or more gas than those in dispute; Indiana Natural & Illuminating Gas Co. v. Anthony, 26 Ind. App. 307, 58 N. E. 868; or the relative quantity of water obtained under similar conditions in other pastures, where the action was for an insufficient supply in the case of a contract to pasture cattle; Tuttle v. Robert Moody & Son (Tex.) 94 S. W. 134. In criminal cases such evidence is admissible to show mental condition; [1899] 1 Q. B. D. 77; 12 Cox, C. C. 612; Com. v. Coe, 115 Mass. 481, 501. In prosecutions for crime, evidence of similar offences is not admissible except for the purpose of showing the intent; Topolewski v. State, 130 Wis. 244, 109 N. W. 1037, 7 L. R. A. (N. S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627; Lightfoot v. People, 16 Mich. 507; Olson v. U. S., 133 Fed. 849, 67 C. C. A. 21; U. S. v. Flemming, 18 Fed. 907; Dillard v. U. S., 141 Fed. 303, 72 C. C. A. 451; Com. v. Russell, 156 Mass. 196, 30 N. E. 763; Packer v. U. S., 106 Fed. 906, 46 C. C. A. 35; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; or some element of the present charge; Paulson v. State, 118 Wis. 89, 94 N. W. 771; but evidence of previous offences is not admissible to raise the presumption of present guilt; Lightfoot v. People, 16 Mich. 507; 2 Can. L. Rev. 689; 20 Harv. L. Rev. 151; but evidence otherwise admissible is not rendered inadmissible merely because likely to raise a prejudice; [1894] A. C. 57; and when a guilty knowledge or intent is an essential part of the offence, commission of similar acts may be proved to raise an inference of such knowledge or intent; 2 Can. L. Rev. 690; where a prisoner had passed a counterfeit dollar, evidence that he had other counterfeit dollars in his possession is evidence to prove the guilty knowledge; State v. Odel, 2 Const. (S. C.) 758; State v. Antonio, *id.* 776; State v. Houston, 1 Bail. (S. C.) 300; Martin v. Com., 2 Leigh (Va.) 745; People v. Lagrille, 1 Wheel. Cr. Cas. (N. Y.) 415; Russ. & R. 132; Finn v. Com., 5 Rand. (Va.) 701; and when a wife was tried for poisoning her husband by arsenic, evidence was admitted of the death of two sons and similar illness of the third from same cause, to show that the husband died of arsenical poisoning, and not accidentally; 18 L. J. M. C. 215; 15 Cox, Cr. C. 403; and see People v. Molineaux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, where both in the opinions and in an extended note the subject is discussed from every point of view, and the cases are collected.

Where the crime charged is part of a plan or system of criminal action, evidence of other crimes near to it in time, and of similar character, is relevant and admissible to show the knowledge and intent of the accused, and that the act charged was not the result of accident or inadvertence; Griggs v. U. S., 158 Fed. 572, 85 C. C. A. 596; or where the other and independent criminal acts of themselves form the motive for committing the crime alleged in the case on trial; Thompson v. U. S., 144 Fed. 14, 75 C. C. A. 172, 7 Ann. Cas. 62; or is an incident to, or part of, or leads up to the latter; People v. McLaughlin, 150 N. Y. 365, 44 N. E. 1017; but as such evidence, if wrongfully admitted, would greatly prejudice the prisoner, its relevancy should be carefully scrutinized; Com. v. Shepard, 1 Allen (Mass.) 575, 581; hence its admission upon an issue as to which it is not relevant will be prejudicial and therefore reversible error; People v. Collins, 144 Mich. 121, 107 N. W. 1114.

The substance of the issue joined between the parties *must be proved;* 1 Phill. Ev. 190; Tayl. Ev. 233. Under this rule will be considered the *quantity* of evidence required to support particular averments in the declaration or indictment.

And, *first*, of *civil* cases. 1. It is a fatal variance in a contract if it appear that a party who ought to have been joined as plaintiff has been omitted; 1 Saund. 291 *h*, n.; 2 Term 282; and so where a bill for specific performance alleges the execution of a contract in a certain year, and the proof shows that it was made in another; Johnston v. Jones, 85 Ala. 286, 4 South. 748. But it is no variance to omit a person who might have been joined as defendant; because the non-joinder ought to have been pleaded in abatement; 1 Saund. 291 *d*, n. 2. The consideration of the contract must be proved; but it is not necessary for the plaintiff to set out in his declaration, or prove on the trial, the several parts of a contract consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration of the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance; 6 East 568; 4 B. & Ald. 387.

Second. In *criminal* cases, it may be laid down that it is, in general, sufficient to prove what constitutes the offence. 1. It is enough to prove so much of the indictment as shows that the defendant has committed a sub-

stantive crime therein specified; 2 Campb. 585; U. S. v. Vickery, 1 H. & J. (Md.) 427, Fed. Cas. No. 16,619. See Daniels v. State, 78 Ga. 98, 6 Am. St. Rep. 238; People v. Wakely, 62 Mich. 297, 28 N. W. 871. If a man be indicted for robbery, he may be found guilty of larceny and not guilty of the robbery; 2 Hale, Pl. Cr. 302. The offence of which the party is convicted must, however, be of the same class with that of which he is charged; 1 Leach 14; 2 Stra. 1133.

2. When the intent of the prisoner furnishes one of the ingredients in the offence, and several intents are laid in the indictment, each of which, together with the act done, constitutes an offence, it is sufficient to prove one intent only; 3 Stark. 35.

3. When a person or thing necessary to be mentioned in an indictment is described with circumstances of greater particularity than is requisite, yet those circumstances must be proved; U. S. v. Porter, 3 Day (Conn.) 283, Fed. Cas. No. 16,074; Clark v. State, 26 Tex. App. 486, 9 S. W. 767. For example, if a party be charged with stealing a *black* horse, the evidence must correspond with the averment, although it was unnecessary to make it; Hooker v. State, 4 Ohio 350; Berrien v. State, 83 Ga. 381, 9 S. E. 609; but see People v. Monteith, 73 Cal. 7, 14 Pac. 373, where an indictment charging a murder with a "bludgeon" is supported by proof that death was produced by a blow with a bolt or club; Long v. State, 23 Neb. 33, 36 N. W. 310. See State v. Weddington, 103 N. C. 364, 9 S. E. 577; Douglass v. State, 26 Tex. App. 109, 9 S. W. 489, 8 Am. St. Rep. 459.

4. The name of the prosecutor or party injured must be proved as laid; and the rule is the same with reference to the name of a third person introduced into the indictment, as descriptive of some person or thing. See Robinson v. Com., 88 Ky. 386, 11 S. W. 210, 10 Ky. L. Rep. 972; State v. Quinlan, 40 Minn. 55, 41 N. W. 299.

The affirmative of the issue must be proved. The general rule with regard to the burden of proving the issue requires that the party who asserts the affirmative should prove it. But this rule ceases to operate the moment the presumption of law is thrown into the other scale. When the issue is on the legitimacy of a child, therefore, it is incumbent on the party asserting the illegitimacy to prove it; 2 Selw. N. P. 709. Or where an answer admits all the averments of the complaint, and sets up a counter-claim as a defence, the affirmative of all the issues raised by the pleadings is on the defendant; Hamilton Coal Co. v. Bernhard, 61 Hun 624, 16 N. Y. Supp. 55. See ONUS PROBANDI; PRESUMPTION; U. S. v. Hayward, 2 Gall. 485, Fed. Cas. No. 15,336; State v. Geuing, 1 McCord (S. C.) 573; 2 So. L. Rev. (N. S.) 126; Delachaise v. Maginnis, 44 La. Ann. 1043, 11 South. 715.

Modes of proof. Records are to be proved by an exemplification, duly authenticated according to law, in all cases where the issue is *nul tiel record.* In other cases, an examined copy, duly proved, will, in general, be evidence; Leathers v. Wrecking, etc., Co., 2 Woods 680, Fed. Cas. No. 8,164. Foreign laws are proved in the mode pointed out under the article FOREIGN LAW. See *supra.*

Incompetent and irrelevant evidence cannot be rendered competent and relevant by being contained in an official document; U. S. v. Corwin, 129 U. S. 381, 9 Sup. Ct. 318, 32 L. Ed. 710.

Private writings are proved by producing the attesting witness; or in case of his death, absence, or other legal inability to testify, as if after attesting the paper he becomes infamous, his handwriting may be proved. When there is no witness to the instrument, it may be proved by the evidence of the handwriting of the party, by a person who has seen him write, or who in a course of correspondence or business relations has become acquainted with his hand. See Munns v. De Nemours, 3 Wash. C. C. 31, Fed. Cas. No. 9,926; Arnold v. Gorr, 1 Rawle (Pa.) 223; 4 Am. L. Rev. 625; Berg v. Peterson, 49 Minn. 420, 52 N. W. 37. As to the question whether the genuineness of a signature may be proved or disproved by comparison, or the signature to documents not a part of the case be proven for the purpose of using them as standards of comparison with the signature to the instrument sued on, see HANDWRITING.

Books of original entry, when duly proved, are *prima facie* evidence of goods sold and delivered, and of work and labor done. See ORIGINAL ENTRY.

A full opinion laid down some general rules in relation to the use of the ballots as evidence in an election contest, which present the law in that regard in a very terse and lucid form. It holds (1) that one who has received a certificate of election to office is not estopped in case of contest from going behind the returns from ballot boxes which were counted without objection by either party, and which formed the basis of the certificate; (2) that in an election contest, the ballots of a certain box, which had been opened before a legislative committee after the election, are admissible when it appears that the opportunity for the ballots to have been tampered with was a mere possibility; and (3) that the fact that a discrepancy exists between the returns of the votes counted from that ballot box and a recount made by the court in an election contest does not indicate that there was any alteration in the ballots after being voted, nor tend to cast suspicion thereon, when the evidence shows that, when the count was concluded by the election officers, there were discrepancies between the tally sheets of the different clerks of the election, which it was attempted to reconcile by guessing at the result, and making

changes accordingly; Henderson v. Albright, 12 Tex. Civ. App. 368, 34 S. W. 992. See ELECTION.

Proof by witnesses. The testimony of witnesses is called oral evidence, or that which is given *viva voce*, as contradistinguished from that which is written or documentary. Testimony is oral evidence as distinguished from documentary or written. Proof is the effect of evidence and evidence is the means or medium of proof; Elliot, Ev. § 9, and cases cited. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law; or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for by doing so, oral testimony would be admitted to usurp the place of evidence decidedly superior in degree; Christ v. Diffenbach, 1 S. & R. (Pa.) 464, 7 Am. Dec. 624; Querry v. White, 1 Bibb (Ky.) 271; Stackpole v. Arnold, 11 Mass. 30, 6 Am. Dec. 150; Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; Chemical Electric Light & Power Co. v. Howard, 150 Mass. 496, 23 N. E. 317; Butler v. Trust Co., 122 Ga. 371, 50 S. E. 132; Colton v. Vandervolgen, 87 Ind. 361; Charlton Ice Co. v. Ice Co., 129 Ia. 523, 105 N. W. 1014; O'Connor v. Green, 60 App. Div. 553, 69 N. Y. Supp. 1097; Town of Kane v. Farrelly, 192 Ill. 521, 61 N. E. 648; Milwaukee Carnival Ass'n v. King Co., 112 Wis. 647, 88 N. W. 598; Northern Assur. Co. v. Building Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213 (where many cases are considered), criticised, 15 Harv. L. Rev. 575; but this rule does not apply in suits between persons not parties to the writing; Williams v. Fisher, 8 Misc. 314, 28 N. Y. Supp. 739; Clapp v. Banking Co., 50 Ohio St. 528, 35 N. E. 308; Brown v. Thurber, 77 N. Y. 613; Kellogg v. Tompson, 142 Mass. 76, 6 N. E. 860.

But parol evidence is admissible to defeat a written instrument, on the ground of fraud, mistake, etc., or to apply it to its proper subject-matter, or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. Such evidence is admissible if the contract was obtained by fraud; Cass v. Brown, 68 N. H. 85, 44 Atl. 86; Cushwa v. Imp. Loan & Bldg. Ass'n, 45 W. Va. 490, 32 S. E. 259; McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Moore v. Harmon, 142 Ind. 555, 41 N. E. 599; or false representations; Machin v. Trust Co., 210 Pa. 253, 59 Atl. 1073; Davis v. Driscoll, 22 Tex. Civ. App. 14, 54 S. W. 43; or if the written contract is ambiguous or obscure so that the intent of the parties cannot be ascertained; Jacobs v. Parodi, 50 Fla. 541, 39 South. 833; Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Stone v. Mulvaine, 217 Ill. 40, 75 N. E. 421; Gregory v. Lake Linden, 130 Mich. 368, 90 N. W. 29; but the ambiguity must be a latent one; Okie v. Person, 23 App. D. C. 170; Hogan v. Wallace, 166 Ill. 328, 46 N. E. 1136; Camden & T. R. Co. v. Adams, 62 N. J. Eq. 656, 51 Atl. 24; Armstrong v. Ferguson, 54 N. Y. 659; if patent on the face of the deed, parol evidence is not admissible; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Holman v. Whitaker, 119 N. C. 113, 25 S. E. 793; Gatewood v. Burrus, 3 Call (Va.) 194. Where the contract is obscurely expressed, so that a knowledge of the subject-matter and relation of the parties becomes necessary, parol evidence, as to that, may be admitted; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; so also it may be admitted to show the meaning of words used, where they have some other than the ordinary sense; Richmond Union Pass. R. Co. v. R. Co., 95 Va. 386, 28 S. E. 573; McIntosh v. Miner, 53 App. Div. 240, 65 N. Y. Supp. 735; Wilcox v. Baer, 85 Mo. App. 587; or the identification of parties, where that does not appear certain by the instrument, as that the grantees in a deed were husband and wife; McLaughlin v. Rice, 185 Mass. 212, 70 N. E. 52, 102 Am. St. Rep. 339; Aplin v. Fisher, 84 Mich. 128, 47 N. W. 574; or that the words "bodily heirs" meant children; Edins v. Murphree, 142 Ala. 617, 38 South. 639; or that one of the contractors was a partnership and not a corporation; Hubbard v. Chappel, 14 Ind. 601; or where the identity of the parties is not clear; Haskell v. Tukesbury, 92 Me. 551, 43 Atl. 500, 69 Am. St. Rep. 529; or where a signature is made with initials only; Sanborn v. Flagler, 9 Allen (Mass.) 474; or to establish the liability of an undisclosed principal; City Trust, Safe-Deposit & Surety Co. of Philadelphia v. Brewing Co., 174 N. Y. 486, 67 N. E. 62; Smith v. Felter, 63 N. J. L. 30, 42 Atl. 1053; Heywood Bros. & Wakefield Co. v. Andrews, 89 Ill. App. 195; Belt v. Power Co., 24 Wash. 387, 64 Pac. 525; *contra*, Vail v. Life Ins. Co., 192 Ill. 567, 61 N. E. 651; Finan v. Babcock, 58 Mich. 301, 25 N. W. 294; David Belasco Co. v. Klaw, 48 Misc. 597, 97 N. Y. Supp. 712; or whether the notes were made by individuals or a firm; In re L. B. Weisenberg & Co., 131 Fed. 517; Huguenot Mills v. George F. Jempson & Co., 68 S. C. 363, 47 S. E. 687, 102 Am. St. Rep. 673; Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474; Daugherty v. Heckard, 189 Ill. 239, 59 N. E. 569; or where two persons have the same name; Simpson v. Dix, 131 Mass. 179; or there is a mistake or variance in the name; Hicks v. Ivey, 99 Ga. 648, 26 S. E. 68; or where evidence is necessary to identify the subject-matter; Ætna Ins. Co. v. Strout, 16 Ind. App. 160, 44 N. E. 934; Axford v. Meeks, 59 N. J. L. 502, 36 Atl. 1036; and, in some cases, evidence of conversations between the par-

ties during negotiations is competent to show the construction of the contract; Hart v. Thompson, 10 App. Div. 183, 41 N. Y. Supp. 909; or to explain an ambiguity; Sabin v. Kendrick, 58 App. Div. 108, 68 N. Y. Supp. 546; Wright v. Gas Co., 2 Pa. Super. Ct. 219; Wussow v. Hase, 108 Wis. 382, 84 N. W. 433; but not to change the terms of the contract; Hart v. Hart, 117 Wis. 639, 94 N. W. 890.

But parol evidence is not admissible to contradict the terms of the agreement or show the intent of the parties; Delaware Indians v. Cherokee Nation, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646; Packer v. Roberts, 140 Ill. 671, 29 N. E. 668; Willis v. Weeks, 129 Ia. 525, 105 N. W. 1012; or to construe a term which may be done without extrinsic evidence; Sullivan v. R. Co., 138 Ala. 650, 35 South. 694; or to explain away or destroy the effect of the agreement; King v. Ins. Co., 45 Ind. 43.

Extrinsic evidence is inadmissible to contradict or control court records; Bent v. Stone, 184 Mass. 92, 68 N. E. 46; Marrow v. Brinkley, 85 Va. 55, 6 S. E. 605, in which an appeal was dismissed; Marrow v. Brinkley, 129 U. S. 178, 9 Sup. Ct. 267, 32 L. Ed. 654; Cook v. Penrod, 111 Mo. App. 128, 85 S. W. 676; or to supply, extend or modify the record of judicial action by a municipal board; Kidson v. City of Bangor, 99 Me. 139, 58 Atl. 900; and this rule extends to official records generally; Ferguson v. Brown, 75 Miss. 214, 21 South. 603; Austin v. Rodman, 8 N. C. 71; legislative journals and records; Auditor General v. Board, 89 Mich. 552, 51 N. W. 483; Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023; municipal records; Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931; corporation records; State v. Hancock, 2 Pennewill (Del.) 252, 45 Atl. 851 (at least in the absence of fraud or mistake); Snyder v. Lindsey, 157 N. Y. 616, 52 N. E. 592; *contra*, Rose v. Independent Chevra Kadisho, 215 Pa. 69, 64 Atl. 401; Hequembourg v. Edwards, 155 Mo. 514, 56 S. W. 490. If there be no fraud, accident, or mistake, a deed cannot be contradicted or varied by parol evidence; Kruse v. Koelzer, 124 Wis. 536, 102 N. W. 1072; Wishart v. Gerhart, 105 Mo. App. 112, 78 S. W. 1094; nor can an official deed; Bower v. Chess & Wymand Co., 83 Miss. 218, 35 South. 444; Wells v. Savannah, 181 U. S. 531, 21 Sup. Ct. 697, 45 L. Ed. 986; or a sealed instrument generally; Finck v. Bauer, 40 Misc. 218, 81 N. Y. Supp. 625.

See a "Brief History of the Parol Evidence Rule," by Wigmore; 4 Colum. L. Rev. 338; 20 L. Q. R. 245; 9 L. R. A. (N. S.) 967, note; [1898] 2 Q. B. 487; also as to contracts against public policy and good in part; 16 Y. L. J. 531; and where the writing was delivered conditionally; 18 L. R. A. (N. S.) 434, note.

In these cases, the parol evidence does not usurp the place, or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give to the instrument its legal effect; Smith v. Williams, 5 N. C. 426, 4 Am. Dec. 564; White v. Eagan, 1 Bay (S. C.) 247; Querry v. White, 1 Bibb (Ky.) 271; Stackpole v. Arnold, 11 Mass. 30, 6 Am. Dec. 150. See Gilpins v. Consequa, Pet. C. C. 85, Fed. Cas. No. 5,452; Barnet v. Gilson, 3 S. & R. (Pa.) 340; Otis v. Von Storch, 15 R. I. 41, 23 Atl. 39; Olds v. Conger, 1 Okl. 232, 32 Pac. 337; Bradley Fertilizer Co. v. Caswell, 65 Vt. 231, 26 Atl. 956; Bulkeley v. House, 62 Conn. 459, 26 Atl. 352, 21 L. R. A. 247; O'Leary v. McDonough, 2 Misc. 219, 23 N. Y. Supp. 665; Lonergan v. Buford, 148 U. S. 581, 13 Sup. Ct. 684, 37 L. Ed. 569; Shepherd v. Busch, 154 Pa. 149, 26 Atl. 363, 35 Am. St. Rep. 815. Where the facts do not appear on the face of the judgment, oral evidence is admissible to show how credits thereon come to be allowed, and what they were allowed for; Humphreys v. Bank, 75 Fed. 852, 21 C. C. A. 538. And parol evidence has been admitted to establish a contemporaneous oral agreement which induced the execution of the written contract though the effect be to alter or reform the latter; Cullmans v. Lindsay, 114 Pa. 170, 6 Atl. 332; Cake v. Bank, 116 Pa. 270, 9 Atl. 302, 2 Am. St. Rep. 600; so when the contract was a letter "confirming our verbal contract," proof of the latter was permitted although inconsistent with the letter; Holt v. Pie, 120 Pa. 439, 14 Atl. 389. As a general rule the withdrawal of evidence from the consideration of the jury, by direction of the court, cures any error caused by its admission; Pennsylvania Co. v. Roy, 102 U. S. 452, 26 L. Ed. 141; Hopt v. Utah, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. Ed. 708; but there are exceptions, as where too strong an impression has been made to be cured by the withdrawal; *id.*; or where the language of the withdrawal is insufficient to identify clearly what is withdrawn; Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

It was held to be no cause of action to give false evidence negligently but not wilfully or corruptly, whereby the plaintiff was convicted of a criminal offence, the conviction still standing; [1902] 1 K. B. 467; which was based on a long line of authorities ending with Basely v. Mathews, L. R. 2 C. P. 684, which is said to be a novel case, and that there would probably be no cause of action even if the conviction were reversed; 18 L. Q. R. 107. See PERJURY.

As to the distinction between *évidence*, which corresponds with *probatio*, and *preuve*, see PREUVE.

See, generally, the treatises on Evidence, of Gilbert, Phillipps, Starkie, Roscoe, Swift, Bentham, Macnally, Peake, Greenleaf, Wharton, Stephen, Rice; Wigmore; Chamberlayne; McKelvey; Jones; Best on Presumption; Browne, Parol Ev.; Will, Circ. Ev.; TELEGRAPH AND TELEPHONE.

EVIDENCE, CIRCUMSTANTIAL. See EVIDENCE.

EVIDENCE, CONCLUSIVE. See EVIDENCE.

EVIDENCE, DIRECT. See EVIDENCE.

EVIDENCE, EXTRINSIC. See EVIDENCE.

EVIDENTIA. See PREUVE.

EVOCATION. In French Law. The act by which a judge is deprived of the cognizance of a suit over which he had jurisdiction, for the purpose of conferring on other judges the power of deciding it. It is like the process by writ of *certiorari*.

EWAGE. A toll paid for water-passage. Cowell. The same as *aquagium*.

EWBRICE. Adultery; spouse-breach; marriage-breach. Cowell; Tomlin, Law Dict.

EX ÆQUO ET BONO (Lat.). In justice and good dealing. 1 Story, Eq. Jur. § 965.

EX CONTRACTU (Lat.). From contract. A division of actions is made in the common and civil law into those arising *ex contractu* (from contract) and *ex delicto* (from wrong or tort). 3 Bla. Com. 117; 1 Chit. Pl. 2; 1 Mackeldey, Civ. Law § 195.

EX DEBITO JUSTITIÆ (Lat.). As a debt of justice. As a matter of legal right. 3 Bla. Com. 48.

EX DELICTO (Lat.). Actions which arise in consequence of a crime, misdemeanor, or tort are said to arise *ex delicto:* such are actions of case, replevin, trespass, trover. 1 Chit. Pl. 2; See EX CONTRACTU; ACTIONS.

EX DOLO MALO (Lat.). Out of fraud or deceit. When a cause of action arises from fraud or deceit, it cannot be supported; *ex dolo malo non oritur actio.* See MAXIMS.

EX EMPTO. Out of purchase; founded on purchase. A term of the civil law, adopted by Bracton. Inst. 4, 6, 28; Brac. fol. 102; Black, L. Dict.

EX GRATIA (Lat.). Of favor. Of grace. Words used formerly at the beginning of royal grants, to indicate that they were not made in consequence of any claim of legal right.

EX INDUSTRIA (Lat.). Intentionally. From fixed purpose.

EX MALEFICIO (Lat.). On account of misconduct. By virtue of or out of an illegal act. Used in the civil law generally, and sometimes in the common law. Browne, Stat. Frauds 110, n.; Broom, Leg. Max. 351.

EX MERO MOTU (Lat.). Of mere motion. The term is derived from the king's letters patent and charters, where it signifies that he grants them of his own mere motion, without petition. To prevent injustice, the courts will, *ex mero motu*, make rules and orders which the parties would not strictly be entitled to ask for. See EX GRATIA; EX PROPRIO MOTU.

EX MORA (Lat.). From the delay; from the default.

EX MORE (Lat.). According to custom.

EX NECESSITATE LEGIS (Lat.). From the necessity of law.

EX NECESSITATE REI (Lat.). From the necessity of the thing. Many acts may be done *ex necessitate rei* which would not be justifiable without it; and sometimes property is protected *ex necessitate rei* which under other circumstances would not be so, or a way of necessity will be allowed; Bass v. Edwards, 126 Mass. 445. Property put upon the land of another from necessity cannot be distrained for rent. See DISTRESS.

EX OFFICIO (Lat.). By virtue of his office.

Many powers are granted and exercised by public officers which are not expressly delegated. A judge, for example, may be *ex officio* a conservator of the peace and a justice of the peace.

EX OFFICIO INFORMATION. A criminal information filed by the attorney-general *ex officio* on behalf of the crown, in the court of queen's bench, for offences more immediately affecting the government, and to be distinguished from informations in which the crown is the nominal prosecutor. 4 Steph. Com. 372.

EX OFFICIO OATH. An oath used in the Ecclesiastical Courts, by which the person who took it swore to make true answer to all such questions as should be demanded of him. Stephen, Cr. Proc.

EX PARTE (Lat.). Of the one part. Many things may be done *ex parte*, when the opposite party has had notice. An affidavit or deposition is said to be taken *ex parte* when only one of the parties attends to taking the same. An injunction is granted *ex parte* when but one side has had a hearing. The term *ex parte* implies an examination in the presence of one of the parties and the absence of the other. Lincoln v. Cook, 2 Scam. (Ill.) 62.

"*Ex parte*," in the title of a reported case, signifies that the name following is that of the party upon whose application the case is heard.

EX PARTE MATERNA (Lat.). On the mother's side. The words *ex parte materna* and *ex parte paterna* have a well-known signification in the law. They are found used in the books to denote the line, or blood of the mother or father, and have no such restricted or limited sense, as from the mother or father, exclusively; Banta v. Demarest, 24 N. J. L. 433; 2 Bla. Com. 224.

EX PARTE PATERNA (Lat.). On the father's side. See Ex Parte Materna; Descent and Distribution.

EX POST FACTO (Lat.). From or by an after act: by subsequent matter. The correlative term is *ab initio*. An estate granted may be made good or avoided by matter *ex post facto*, when an election is given to the party to accept or not to accept; 1 Coke 146. A remainderman or reversioner may confirm *ex post facto* a lease granted by a life-tenant to last beyond his own life.

EX POST FACTO LAW. A statute which would render an act punishable in a manner in which it was not punishable when it was committed. Fletcher v. Peck, 6 Cra. (U. S.) 138, 3 L. Ed. 162; 1 Kent 408.

A law made to punish acts committed before the existence of such law, which had not been declared crimes by preceding laws. Mass. Declar. of Rights, pt. 1, s. 24; Md. Decl. of Rights, art. 15.

A law passed after the commission of the offence charged, which inflicts a greater punishment than was annexed to the crime at the time of commission, or which alters the situation of the accused to his disadvantage. In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94.

A law which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage. U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285; see Lindzey v. State, 65 Miss. 542, 5 South. 99, 7 Am. St. Rep. 674; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558; Ratzky v. People, 29 N. Y. 124; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061; In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835.

Parliament, in virtue of its supreme power, may pass such laws, being sustained by discretion alone; 1 Bla. Com. 46, 160.

By the constitution of the United States, congress is forbidden to pass *ex post facto* laws. U. S. Const. art. 1, § 9. And by § 10 of the same instrument, as well as by the constitutions of most, if not all, of the states, a similar restriction is imposed upon the state legislatures. Such an act is void as to those cases in which, if given effect, it would be *ex post facto;* but so far only. In cases arising after it, it may have effect; for as a rule for the future, it is not *ex post facto.*

There is a distinction between *ex post facto* laws and *retrospective* or *retroactive* laws: every *ex post facto* law must necessarily be retrospective, but not every retrospective law is an *ex post facto* law; in general, *ex post facto* laws only are prohibited.

Ex post facto laws differ from *retroactive* laws. The latter, when imposing taxes or providing for their assessment and collection, are not forbidden by the constitution; the former, in that constitution, has reference to criminal punishment only; Kentucky Union Co. v. Kentucky, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 137. Retrospective laws are prohibited by the constitutions of the states of New Hampshire and Ohio. See Rairden v. Holden, 15 Ohio St. 207; John v. Bridgman, 27 Ohio St. 22; Blackburn v. State, 50 Ohio 428, 36 N. E. 18; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; White v. Wayne, T. U. P. Charlt. 94.

It is fully settled that the term *ex post facto*, as used in the constitution, is to be taken in a limited sense as referring to criminal or penal statutes alone, and that the policy, the reason, and the humanity of the prohibition against passing *ex post facto* laws do not extend to civil cases, to cases that merely affect the private property of citizens. But the prohibition cannot be evaded by giving a civil form to what is, in substance, criminal; Cummings v. Missouri, 4 Wall. (U. S.) 277, 18 L. Ed. 356; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; Burgess v. Salmon, 97 U. S. 385, 24 L. Ed. 1104; Green v. Shumway, 39 N. Y. 418; Hare, Am. Const. L. 547. Divorce not being a punishment may be authorized for causes happening previous to the passage of the divorce act; Carson v. Carson, 40 Miss. 349.

The constitution does not prohibit the states from passing retrospective laws generally. Some of the most necessary acts of legislation are, on the contrary, founded upon the principles that private rights must yield to public exigencies; Carpenter v. Pennsylvania, 17 How. (U. S.) 463, 15 L. Ed. 127; Watson v. Mercer, 8 Pet. (U. S.) 88, 8 L. Ed. 876; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 421, 9 L. Ed. 773; Satterlee v. Matthewson, 2 Pet. (U. S.) 380, 7 L. Ed. 458; Bank of Hamilton v. Dudley, 2 Pet. (U. S.) 523, 7 L. Ed. 496; Dash v. Van Kleeck, 7 Johns. (N. Y.) 488, 5 Am. Dec. 291; Com. v. Lewis, 6 Binn. (Pa.) 271; Wellshear v. Kelley, 69 Mo. 343; United States Mortg. Co. v. Gross, 93 Ill. 483; Cooley, Const. Lim. 265; Callahan v. Callahan, 36 S. C. 454, 15 S. E. 727. See Drake v. Jordan, 73 Ia. 707, 36 N. W. 653; Campbell v. Manderscheid, 74 Ia. 708, 39 N. W. 92.

Test oaths of past loyalty to the government have been held void as *ex post facto;* In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; except as pre-requisites to the exercise of the elective franchise; Green v. Shumway, 39 N. Y. 418. A law prohibiting the sale of intoxicating liquors is not *ex post facto*, State v. Paul, 5 R. I. 185; or a law imposing a retrospective tax; Bonny v. Reed, 31 N. J. L. 133; Stockdale v. Ins. Co., 20 Wall. (U. S.) 323, 22 L. Ed. 348; see, Carpenter v. Pennsylvania, 17 How. (U. S.) 456, 15 L. Ed. 127; Pullen v. Com'rs of Wake

County, 66 N. C. 361; or a law providing for the infliction of the death penalty by means of electricity which did not apply to crimes committed before it took effect; People v. Nolan, 115 N. Y. 660, 21 N. E. 1060; or a law authorizing a divorce for past offences; Carson v. Carson, 40 Miss. 349; Clark v. Clark, 10 N. H. 380, 34 Am. Dec. 165; compare Dickinson v. Dickenson, 7 N. C. 327, 9 Am. Dec. 608; or a law providing that the punishment of future crimes shall be increased by reason of past offences; State v. Woods, 68 Me. 409.

Statutes providing for the revocation of licenses of physicians of bad moral character by state boards have been questioned as being *ex post facto*, but the case of People v. Hawker, 152 N. Y. 234, 46 N. E. 607, affirmed Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002, is said to have settled that they are not; People v. Reetz, 127 Mich. 87, 86 N. W. 396, affirmed Reetz v. Michigan, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; Meffert v. Board of Medical Registration, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed Meffert v. Packer, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350. See POLICE POWER.

Where an act provided that one who has been convicted of crime shall no longer engage in the practice of medicine, it was held not to be an additional punishment for past offences or *ex post facto*, but that it simply prescribed the qualifications for the position and the appropriate evidence of such qualification; Hawker v. New York, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002.

Corporations cannot pass *ex post facto* by-laws; People v. Fire Dept., 31 Mich. 458.

Laws under the following circumstances are to be considered *ex post facto* laws within the words and intent of the prohibition: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed (though it would be otherwise of a law mitigating the punishment; 3 Story, Const. 212). 4. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender; Calder v. Bull, 3 Dall. (U. S.) 390, 1 L. Ed. 648. This construction, it is said, "has been accepted and followed as correct by the courts ever since"; Cooley, Const. Lim. 325; its substance remains unchanged; Com. v. Kalck, 239 Pa. 533, 87 Atl. 61. See People v. McNulty, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; Com. v. Graves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256.

This classification has been generally adopted as accurate and complete, but is not entirely so. Thus a law has been decided to be *ex post facto* which was intended to punish a criminal act, prosecution as to which was already barred by a statute of limitations; Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558; but an act which reduces a punishment is not *ex post facto* as to crimes committed prior to its enactment; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. Rep. 572; State v. Kent, 65 N. C. 311; Dolan v. Thomas, 12 Allen (Mass.) 421; McInturf v. State, 20 Tex. App. 335. The statement under the fourth head also requires modification. Convictions under changes in the rules of evidence have been held not unconstitutional; Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492; Jacquins v. Com., 9 Cush. (Mass.) 279; State v. Williams, 14 Rich. (S. C.) 281; Mrous v. State, 31 Tex. Cr. R. 597, 21 S. W. 764, 37 Am. St. Rep. 834; Maguiar v. Henry, 84 Ky. 1, 4 Am. St. Rep. 182; Robinson v. State, 84 Ind. 452; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204; though it seems to be settled that a law requiring a *less* degree of evidence cannot be applied to a previous offence. But changes in the forms, in the manner of passing sentence, or the qualifications of jurors, do not fall within the prohibition; Com. v. Phillips, 11 Pick. (Mass.) 28; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; In re Wright, 3 Wyo. 478, 27 Pac. 565, 13 L. R. A. 748, 31 Am. St. Rep. 94; City Council of Anderson v. O'Donnell, 29 S. C. 355, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728; nor will a provision reducing the number of peremptory challenges on a prosecution for a capital offence, though applied to cases where the offence was committed before the change was made; Mathis v. State, 31 Fla. 291, 12 South. 681; South v. State, 86 Ala. 617, 6 South. 52; nor an amendment which confers jurisdiction in a criminal cause upon a division of the supreme court less in numbers and different in personnel from the court as organized when the crime was committed; Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485. A change of criminal procedure applied to the trial of crimes committed before it took effect is not *ex post facto*, unless it affects some substantial right to which the accused was entitled when the alleged offence was committed; State v. Carter, 33 La. Ann. 1214; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506.

Statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition; Duncan v. Missouri, 152 U. S. 378, 14 Sup. Ct. 570, 38 L. Ed. 485; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204. A statute admitting evidence of a particular kind in a criminal case upon an issue of fact, which was not

admissible under the rules of evidence at the time the offence was committed, is not *ex post facto;* Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204; though in his classification of *ex post facto* laws Mr. Justice Chase, in Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648, includes every law that alters the legal rules of evidence, and requires less or different testimony than the law required at the time of the commission of the offence in order to convict the offender.

In Missouri, after conviction of a capital offence and verdict set aside because of the admission of papers for comparison of handwriting merely, the legislature changed the law so as to admit such papers; on a new trial, it was held merely a change of a rule of evidence, which could be applied in the trial of an offence committed before its enactment; Thompson v. Missouri, 171 U. S. 380, 18 Sup. Ct. 922, 43 L. Ed. 204.

The supreme court of the United States has decided that a constitutional provision, requiring all grand and petit jurors to be qualified electors, able to read and write, and enjoining on the legislature to provide by law for listing and drawing persons so qualified, but declaring that, until otherwise provided by law, all crimes should be tried as though no change had been made (Const. Miss. 1890), went into effect immediately on its adoption, so far as the qualifications of jurors were concerned; that one who committed a crime after the adoption of the constitution, but before the legislature passed a new jury law, could be tried, after the passage of such a law, by a jury selected under its provisions; and that, as the new law did not aggravate the crime previously committed, or inflict a greater punishment, or alter the rules of evidence, its application to the trial of the accused did not make it an *ex post facto* law; Gibson v. Mississippi, 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075. But where the constitution of Utah provided for the trial in courts of general jurisdiction of criminal cases not capital by a jury of eight, it was held *ex post facto* in its application to felonies committed before the territory became a state, because the constitution of the United States, gave the accused, at the time of the commission of the offence, the right to be tried by a jury of twelve persons, and made it unlawful to deprive him of his liberty except by the unanimous verdict of such a jury; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061.

For a review of the history of the *ex post facto* clause of the constitution in connection with its adoption, and with its subsequent construction by the federal and state courts, see Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506.

See also In re Medley, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; Cooley, Const. Lim. ch. ix.; Sto. Const. §§ 1345, 1373; Wade, Retro. L.; Pat. Fed. Restr. ch. vi.; Johnson, Ex Post Facto Laws; Black, Const. Prohibitions; Pomeroy, Const. Law; 4 L. Mag. & Rev., 4th 59; Savigny, Confl. Laws; 22 Am. L. Rev. 523; Myer, Vested Rights; 3 L. R. A. 181, note; 1 L. R. A. 632, note; Fisher, Evolution of Const.; RETROSPECTIVE.

EX PROPRIO MOTU (Lat.). Of his own accord.

EX PROPRIO VIGORE (Lat.). By its own force. 2 Kent 457.

EX REL. See EX RELATIONE.

EX RELATIONE (Lat.). At the information of; by the relation. A bill in equity, for example, may in many cases be brought for an injunction to restrain a public nuisance *ex relatione* (by information of) the parties immediately interested in or affected by the nuisance; 18 Ves. 217; Van Bergen v. Van Bergen, 2 Johns. Ch. (N. Y.) 382; Corning v. Lowerre, 6 Johns. Ch. (N. Y.) 439; Pennsylvania v. Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; Georgetown v. Canal Co., 12 Pet. (U. S.) 91, 9 L. Ed. 1012.

It is frequently abbreviated *ex rel.* See RELATOR.

EX TEMPORE (Lat.). From the time; without premeditation.

EX VI TERMINI (Lat.). By force of the term.

EX VISCERIBUS (Lat. from the bowels). From the vital part, the very essence of the thing. 10 Co. 24 *b;* Homer v. Shelton, 2 Metc. (Mass.) 213. *Ex visceribus verborum* (from the mere words and nothing else); 1 Story, Eq. § 980.

EX VISITATIONE DEI (Lat.). By or from the visitation of God. In the ancient law, upon a prisoner arraigned for treason or felony standing mute, a jury was impanelled to inquire whether he stood obstinately mute, or was dumb *ex visitatione Dei;* 4 Steph. Com. 391. This phrase is frequently employed in inquisitions by the coroner, where it signifies that the death of the deceased is a natural one.

EXACTION. A wilful wrong done by an officer, or by one who, under color of his office, takes more fee or pay for his services than the law allows.

Between *extortion* and *exaction* there is this difference: that in the former case the officer extorts more than his due, when something is due to him; in the latter, he exacts what is not his due, when there is nothing due to him. Co. Litt. 368.

EXACTOR. In Old English and Civil Law. A collector. *Exactor regis* (collector for the king). A collector of taxes or revenue. Vicat, Voc. Jur.; Spelman, Gloss. The term exaction early came to mean the wrong done by an officer, or one pretending to have authority, in demanding or taking any reward or fee for that matter, cause, or thing which the law allows not. *Termes de la Ley.*

EXAMINATION. In Criminal Law. The investigation by an authorized magistrate of the circumstances which constitute the grounds for an accusation against a person arrested on a criminal charge, with a view to discharging the person so arrested, or to securing his appearance for trial by the proper court, and to preserving the evidence relating to the matter.

Practically, it is accomplished by bringing the person accused, together with witnesses, before a magistrate (generally a justice of the peace), who thereupon takes down in writing the evidence of the witnesses, and any statements which the prisoner may see fit to make. If no cause for detention appears, the party is discharged from arrest. If sufficient cause of suspicion appears to warrant putting him on trial, he is committed, or required to give bail or enter into a recognizance to appear at the proper time for trial. The witnesses are also frequently required to recognize for their appearance; though in ordinary cases only their own recognizance is required. The magistrate signs or certifies the minutes of the evidence which he has taken, and it is delivered to the court before whom the trial is to be had. The object of an examination is to enable the judge and jury to see whether the witnesses are consistent, and to ascertain whether the offence is bailable. 2 Leach 552. And see 4 Sharsw. Bla. Com. 296.

At common law, the prisoner could not be interrogated by the magistrate; but under the statutes 1 & 2 Phil. & M. c. 13, 2 & 3 Phil. & M. c. 10, the provisions of which have been substantially adopted in most of the states, the magistrate is to examine the prisoner as well as the witnesses. 1 Greenl. Ev. § 224; 4 Bla. Com. 296; Rosc. Cr. Ev. 44; Ry. & M. 432.

The examination should be taken and completed as soon as the nature of the case will admit; Cro. Eliz. 829; 1 Hale, Pl. Cr. 585; 2 *id.* 120. The prisoner must not be put upon oath, but the witnesses must; 1 Phil. Ev. 106; Archb. Cr. Pr. & Pl. 386. The prisoner formerly had no *right* to the assistance of an attorney; but the privilege was granted at the discretion of the magistrate; 2 Dowl. & R. 86; 1 B. & C. 37. Now, however, a prisoner is permitted to have counsel as a matter of course. The magistrate's return and certificate are conclusive evidence, and exclude parol evidence, of what the prisoner said on that occasion with reference to the charge; 2 C. & K. 223; 5 C. & P. 162; 1 Mood. & M. 403. See CONFESSION; RECOGNIZANCE.

In Practice. The interrogation of a witness, in order to ascertain his knowledge as to the facts in dispute between parties.

The *examination in chief* is that made by the party calling the witness; the *cross-examination* is that made by the other party. In the examination in chief the counsel cannot ask leading questions, except in particular cases. See CROSS-EXAMINATION; LEADING QUESTIONS.

The examination is to be made in open court, when practicable; but when, on account of age, sickness, absence from the jurisdiction, or other cause, the witness cannot be so examined, then in civil causes it may be made before authorized commissioners.

The interrogation of a person who is desirous of performing some act, or availing himself of some privilege of the law, in order to ascertain if all the requirements of the law have been complied with, conducted by and before an officer having authority for the purpose.

There are many acts which can be of validity and binding force only upon an examination. Thus, in many states, a married woman must be privately examined as to whether she has given her consent freely and without restraint to a deed which she appears to have executed; see ACKNOWLEDGMENT; an insolvent who wishes to take the benefit of the insolvent laws, one who is about to become bound for another in legal proceedings, a bankrupt, etc., must submit to an examination.

EXAMINED COPY. A phrase applied to designate a paper which is a copy of a record, public book, or register, and which has been compared with the original. 1 Campb. 469.

Such examined copy is admitted in evidence, because of the public inconvenience which would arise if such record, public book, or register were removed from place to place, and because any fraud or mistake made in the examined copy would be so easily detected; 1 Greenl. Ev. § 91; 1 Stark. Ev. 189. But in an answer in chancery on which the defendant was indicted for perjury, or where the original must be produced in order to identify the party by proof of handwriting, an examined copy would not be evidence; 1 Mood. & R. 189. See COPY.

EXAMINERS. See EXAMINATION; SPECIAL EXAMINER.

EXAMINERS IN CHANCERY. Officers who examine, upon oath, witnesses produced on either side upon such interrogatories as the parties to any suit exhibit for that purpose. Cowell.

The examiner is to administer an oath to the party, and then repeat the interrogatories one at a time, writing down the answer himself; 2 Dan. Ch. Pr. 1062. Anciently, the examiner was one of the judges of the court; hence an examination before the examiner is said to be an examination in court; 1 Dan. Ch. Pr. 1053.

EXANNUAL ROLL. A roll containing the illeviable fines and desperate debts, which was read yearly to the sheriff (in the ancient way of delivering the sheriff's accounts), to see what might be gotten. Hale, Sheriffs 67; Cowell.

EXCAMB. In Scotch Law. To exchange. *Excambion*, exchange. The words are evidently derived from the Latin *excambium*. Bell, Dict. See EXCHANGE.

EXCAMBIATOR. An exchanger of lands; a broker. Obsolete.

EXCAMBIUM (Lat.). **In English Law.** Exchange; a recompense. 1 Reeve, Hist. Eng. Law 442.

EXCELLENCY. A title given by courtesy to the governors of the states, to the President of the United States, and to ambassadors.

EXCEPTIO REI JUDICATÆ. A Roman law term equivalent to a plea of former judgment. Bigelow, Estoppel 41.

EXCEPTION (Lat. *excipere: ex*, out of, *capere*, to take). A clause in a deed by which the lessor excepts something out of that which he before granted by the deed.

The exclusion of something from the effect or operation of the deed or contract which would otherwise be included.

An *exception* differs from a *reservation (q. v.)*,—the former being always of part of the thing granted, the latter of a thing not *in esse*, but newly created or reserved; the exception is of the whole of the part excepted; the reservation may be of a right or interest in the particular part affected by the reservation. See Ballou v. Harris, 5 R. I. 419; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219; State v. Wilson, 42 Me. 9; Adams v. Morse, 51 Me. 498; Gould v. Glass, 19 Barb. (N. Y.) 192; 2 B. & C. 197. The two words, however, are often used indiscriminately; Stockwell v. Couillard, 129 Mass. 231; Barnes v. Burt, 38 Conn. 541. An exception differs, also, from an explanation, which, by the use of a *videlicet, proviso*, etc., is allowed only to explain doubtful clauses precedent, or to separate and distribute generals into particulars; Cutler v. Tufts, 3 Pick. (Mass.) 272. See RESERVATION.

To make a valid exception, these things must concur: *first*, the exception must be by apt words, as, "saving and excepting," etc.; see Keeler v. Wood, 30 Vt. 242; Ballou v. Harris, 5 R. I. 419; Hammond v. Woodman, 41 Me. 177, 66 Am. Dec. 219; Midgett v. Wharton, 102 N. C. 14, 8 S. E. 778; *second*, it must be of part of the thing previously described, and not of some other thing; *third*, it must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted; Richardson v. Milburn, 11 Md. 339; Adams v. Warner, 23 Vt. 395; an exception, therefore, in a lease which extends to the whole thing demised is void; *fourth*, it must be of such thing as is severable from the demised premises, and not of an inseparable incident; Backenstoss v. Stahler's Adm'rs, 33 Pa. 251, 75 Am. Dec. 592; Goodrich v. R. R., 37 N. H. 167; *fifth*, it must be of such a thing as he that excepts may have, and which properly belongs to him; *sixth*, it must be of a particular thing out of a general, and not of a particular thing out of a particular thing; *seventh*, it must be particularly described and set forth; a lease of a tract of land except one acre would be void, because that acre was not particularly described; Co. Litt. 47 *a*; Hay v. Storrs, Wright (Ohio) 711; Jackson v. Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500; Darling v. Crowell, 6 N. H. 421; Altman v. McBride, 4 Strobh. (S. C.) 208; see Painter v. Water Co., 91 Cal. 74, 27 Pac. 539. Exceptions against common right and general rules are construed as strictly as possible; Hays v. Askew, 50 N. C. 63. When a grantor makes a valid exception, the thing excepted remains the property of himself or his heirs; but if he has no valid title to it, neither he nor his heirs can recover; Fisher v. Min. Co., 97 N. C. 95, 4 S. E. 772.

In Equity Practice. The allegation of a party, in writing, that some pleading or proceeding in a cause is insufficient.

In Civil Law. A plea. Merlin, *Répert.*

Declinatory exceptions are such dilatory exceptions as merely decline the jurisdiction of the judge before whom the action is brought. La. Code Proc.

Dilatory exceptions are such as do not tend to defeat the action, but only to retard its progress.

Declinatory exceptions have this effect, as well as the exception of discussion offered by a third possessor or by a surety in an hypothecary action, or the exception taken in order to call in the warrantor. Noble v. Martin, 7 Mart. N. S. (La.) 282; Howard v. The Columbia, 1 La. 420.

Peremptory exceptions are those which tend to the dismissal of the action.

Some relate to forms, others arise from the law. Those which relate to forms tend to have the cause dismissed, owing to some nullities in the proceedings. These must be pleaded *in limine litis*. Peremptory exceptions founded on law are those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished. These may be pleaded at any time previous to definitive judgment; Pothier. Proc. Civ. pt. 1, c. 2, ss. 1, 2, 3. These, in the French law, are called *Fins de non recevoir*.

In Practice. Objections made to the decisions of the court in the course of a trial. See BILL OF EXCEPTION.

EXCEPTION TO BAIL. An objection to the special bail put in by the defendant to an action at law made by the plaintiff on grounds of the insufficiency of the bail. 1 Tidd, Pr. 255.

EXCESS. When a defendant pleaded to an action of assault that the plaintiff trespassed on his land, and he would not depart when ordered, whereupon he *molliter manus imposuit*, gently laid hands on him, the replication of excess was to the effect that the defendant used more force than necessary. Wharton.

EXCESSIVE BAIL. Bail which is *per se* unreasonably great and clearly disproportionate to the offence involved, or which under the peculiar circumstances appearing is shown to be so in the particular case. Ex parte Ryan, 44 Cal. 558; Ex parte Duncan, 53 Cal. 410.

EXCHANGE. In Commercial Law. A negotiation by which one person transfers to another funds which he has in a certain place, either at a price agreed upon or which is fixed by commercial usage.

This transfer is made by means of an instrument which represents such funds and is well known by the name of a bill of exchange (*q. v.*). The price above the par value of the funds so transferred is

called the *premium* of exchange, and if under that value the difference is called the *discount*,—either being called the *rate* of exchange.

The par of exchange is the value of the money of one country in that of another, and is either real or nominal. The nominal par is that which has been fixed by law or usage, and, for the sake of uniformity, is not altered, the rate of exchange alone fluctuating. The real par is that based on the weight and fineness of the coins of the two countries, and fluctuates with changes in the coinage. The nominal par of exchange in this country on England, settled in 1799 by act of congress, was four dollars and forty-four cents for the pound sterling; but by successive changes in the coinage this value has been increased, the real mint par at present being $4.86½. The *course* of exchange means the quotations for any given time.

The transfer of goods and chattels for other goods and chattels of equal value. This is more commonly called barter. Where a party deposits wheat with a mill company, expecting to receive a proportionate amount of flour, it constitutes an exchange and not a sale; Martin v. Mill Co., 49 Mo. App. 23. One cannot, as having been defrauded thereby, rescind an exchange of property, without tendering a return of his property to the other, unless it is absolutely worthless; Johnson v. Flynn, 97 Mich. 581, 56 N. W. 939.

The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred, and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property; Com. v. Clark, 14 Gray (Mass.) 372.

The profit which arises from a maritime loan, when such profit is a percentage on the money lent, considering it in the light of money lent in one place to be returned in another, with a difference in amount in the sum borrowed and that paid, arising from the difference of time and place. The term is commonly used in this sense by French writers. Hall, Mar. Loans 56, n.

The place where merchants, captains of vessels, exchange-agents, brokers, etc., assemble to transact their business. *Code de Comm.* art. 71. See STOCK EXCHANGE.

In Conveyancing. A mutual grant of equal interests in land, the one in consideration of the other. 2 Bla. Com. 323; Littleton 62; Shep. Touchst. 289; Digby, R. P. 368. It is said that exchange in the United States does not differ from bargain and sale. 1 Bouvier, Inst. n. 2059.

There are five circumstances necessary to an exchange. That the estates given be equal. That the word *excambium*, or exchange, be used,—which cannot be supplied by any other word, or described by circumlocution. That there be an execution by entry or claim in the life of the parties. That if it be of things which lie in grant, it be by deed. That if the lands lie in several counties, or if the thing lie in grant, though they be in one county, it be by deed indented. In practice this mode of conveyancing is nearly obsolete.

See Cruise, Dig. tit. 32; Com. Dig.; Co. Litt. 51; 1 Washb. R. P. 159; Cass v. Thompson, 1 N. H. 65, 8 Am. Dec. 36; Maydwell v. Carroll, 3 Harr. & J. (Md.) 361; Stroff v. Swafford Bros., 79 Ia. 135, 44 N. W. 293; Close v. Crossland, 47 Minn. 500, 50 N. W. 694; Williamson v. Woten, 132 Ind. 202, 31 N. E. 791; Gunter v. Leckey, 30 Ala. 591; REAL ESTATE BROKER.

EXCHANGE, BILLS OF. See BILLS OF EXCHANGE.

EXCHEQUER (Law Lat. *scaccarium*; Nor. Fr. *eschequier*). **In English Law.** A department of the government which has the management of the collection of the king's revenue.

The name is said to be derived from the chequered cloth which covered the table on which some of the king's accounts were made up and the amounts indicated by counters.

It consisted of two divisions, one for the receipt of revenue, the other for administering justice. Co. 4th Inst. 103; 3 Bla. Com. 44, 45. See COURT OF EXCHEQUER; COURT OF EXCHEQUER CHAMBER.

EXCHEQUER BILLS. Bills of credit issued by authority of parliament.

They constitute the medium of transaction of business between the bank of England and the government. The exchequer bills contain a guarantee from government which secures the holders against loss by fluctuation. Wharton; McCulloch, Comm. Dict.

EXCISE. An inland imposition, paid sometimes upon the consumption of the commodity, and frequently upon the retail sale. 1 Bla. Com. 318; Story, Const. § 950; Cooley, Tax. 4. See Oliver v. Washington Mills, 11 Allen (Mass.) 268.

Excises are a species of taxes, consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.

In Art. I, sec. 8, of the constitution congress has power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States, but all du-

ties, imposts and excises shall be uniform throughout the United States. The power of congress under this clause is co-extensive with the territory of the United States and extends to the territories; Loughborough v. Blake, 5 Wheat. (U. S.) 317, 5 L. Ed. 98; The Cherokee Tobacco, 11 Wall. (U. S.) 616, 20 L. Ed. 227.

Duties, imposts, and excises were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481. "Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries;" Knowlton v. Moore, 178 U. S. 41, 88, 20 Sup. Ct. 747, 44 L. Ed. 969.

Taxes held to be excises, and to be distinguished from direct taxes, are: Upon the business of an insurance company; Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433, 19 L. Ed. 95; on the circulation of state banks; Veazie Bank v. Fenno, 8 Wall. (U. S.) 533, 19 L. Ed. 482; or notes of any town, city, or municipal corporation paid out by any bank or banker; Merchants' Nat. Bank v. U. S., 101 U. S. 1, 25 L. Ed. 979; a succession tax; Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; on the interest paid by a corporation on its bonds; Michigan C. R. Co. v. Collector, 100 U. S. 595, 25 L. Ed. 647; on carriages; Hylton v. U. S., 3 Dall. (U. S.) 171, 1 L. Ed. 556; on passing title to real estate; Scholey v. Rew, 23 Wall. 331, 23 L. Ed. 99; internal revenue tax; U. S. v. Vassar, 5 Wall. (U. S.) 462, 18 L. Ed. 497; Springer v. U. S., 102 U. S. 586, 26 L. Ed. 253; stamp duties; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713; on oleomargarine or artificial butter; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; on sales of property at an exchange; Nicol v. Ames, 173 U. S. 509, 19 Sup. Ct. 522, 43 L. Ed. 786; on the business of sugar refining; Spreckels Sugar Refin. Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496; on contracts of sale of stock; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481; on agreements to sell shares of stock, denominated *calls* by New York stockbrokers; Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853; on tobacco manufactured for consumption; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713.

Taxes held not valid as excises are: On the occupation of an importer the same as on the imports; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; on the income of United States securities the same as a tax on the securities; Weston v. Charleston, 2 Pet. (U. S.) 449, 7 L. Ed. 481; income from an office the same as a tax on the office; Minis v. U. S., 16 Pet. (U. S.) 435, 10 L. Ed. 791; on a bill of lading the same as a duty on the article represented by it; Almy v. California, 24 How. (U. S.) 169, 16 L. Ed. 644; a tax upon interest on bonds as upon the security; Northern C. R. Co. v. Jackson, 7 Wall. (U. S.) 262, 19 L. Ed. 88; on auction sales of goods as a tax on the goods sold; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015; tax on income from interstate commerce as a tax on the commerce; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311; tax on the rents or income of real estate is a direct tax; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; tax upon income from municipal bonds; *id.;* license fees on certain lines of business in a single territory; Binns v. U. S., 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087.

It is within the power of congress to increase an excise as well as a property tax, and such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer; and it is no part of the function of the court to inquire into the reasonableness of the excise, either as respects the amount or the property upon which it is imposed; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713. See TAX.

Though an excise tax be so onerous that it amounts to a destruction of the business, or even if intended to do so, it is within the power of congress and the courts have no power to revise its judgment; McCray v. U. S., 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78; Patton v. Brady, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. Ed. 713, where it was said "that it is no part of the function of a court to inquire into the reasonableness of the excise, either as respects the amount, or the property upon which it is imposed."

Territory acquired as a result of the Spanish War became territory appurtenant to the United States, but not a part of it within the revenue clause of the constitution; Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; Dooley v. U. S., 183 U. S. 153, 22 Sup. Ct. 62, 43 L. Ed. 128.

EXCLUSIVE (Lat. *ex*, out, *claudere*, to shut). Not including; debarring from participation. Shut out; not included.

An exclusive right or privilege, as a copyright or patent, is one which may be ex-

ercised and enjoyed only by the person authorized, while all others are forbidden to interfere.

EXCOMMUNICATION. An ecclesiastical sentence pronounced by a spiritual judge against a Christian man, by which he is excluded from the body of the church, and disabled to bring any action or sue any person in the common-law courts. Bac. Abr.; Co. Litt. 133, 134; Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

In early times it was the most frequent and the most severe method of executing ecclesiastical censure, although proper to be used, said Justinian (Nov. 123), only upon grave occasions. The effect of it was to remove the excommunicated person not only from the sacred rites, but from the society of men. In a certain sense it interdicted the use of fire and water, like the punishment spoken of by Cæsar (lib. 6, *de Bell. Gall.*) as inflicted by the Druids. Innocent IV. called it the nerve of ecclesiastical discipline. On repentance, the excommunicated person was absolved and received again to communion. These are said to be the powers of binding and loosing,—the keys of the kingdom of heaven. This kind of punishment seems to have been adopted from the Roman usage of interdicting the use of fire and water. Fr. Duaren, *De Sacris Eccles. Ministeriis*, lib. 1, cap. 3. See Ridley, View of the Civil and Ecclesiastical Law 245.

It was the process by which the English ecclesiastical courts enforced their process. If the excommunicate did not submit within 40 days, the court signified the fact to the crown and thereon a writ *excommunicato capiendo* issued to the sheriff, who took and imprisoned the offender till he submitted. When he submitted, the bishop signified this fact, and a writ *de excommunicato deliberando* (to release an excommunicate) issued. An excommunicate could not serve upon juries, be a witness in any court, or bring an action, real or personal. In 1813 the writ *de contumace capiendo* was substituted to enforce appearance and punish contempt, the rules applicable being the same as before. Excommunication is still a punishment by the earlier writ for offences of ecclesiastical cognizance, but the only penalty is imprisonment not exceeding six months; 1 Holdsw. Hist. E. L. 400. For the form of the writ see *id.* 433.

EXCOMMUNICATO CAPIENDO (Lat. for taking an excommunicated person). **In Ecclesiastical Law.** A writ issuing out of chancery, founded on a bishop's certificate that the defendant had been excommunicated, returnable to the king's bench. 4 Bla. Com. 415; Bac. Abr. *Excommunication*, E. See Cro. Eliz. 224, 680; Cro. Car. 421; Cro. Jac. 567; 1 Salk. 293.

EXCULPATION. See LETTERS OF EXCULPATION.

EXCUSABLE HOMICIDE. The killing of a human being, when the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to have been partly induced by his own act. 1 East, Pl. Cr. 220. See HOMICIDE.

EXCUSATIO (Lat.). **In Civil Law.** Excuse. A cause from exemption from a duty, such as absence, insufficient age, etc. Vicat, *Voc. Jur.*, and reference there given.

EXCUSE. A reason alleged for the doing or not doing a thing.

This word presents two ideas, differing essentially from each other. In one case an excuse may be made in order to show that the party accused is not guilty; in another, by showing that though guilty he is less so than he appears to be. Take, for example, the case of a sheriff who has an execution against an individual, and who, in performance of his duty, arrests him: in an action by the defendant against the sheriff, the latter may prove the facts, and this shall be a sufficient excuse for him; this is an excuse of the first kind, or a complete justification; the sheriff was guilty of no offence. But suppose, secondly, that the sheriff has an execution against Paul, and by mistake, and without any malicious design, he arrests Peter instead of Paul: the fact of his having the execution against Paul and the mistake being made will not justify the sheriff, but it will extenuate and excuse his conduct, and this will be an excuse of the second kind.

Persons are sometimes excused for the commission of acts which ordinarily are crimes, either because they had no intention of doing wrong, or because they had no power of judging, and therefore had no criminal will, or, having power of judging, they had no choice, and were compelled by necessity. Among the first class may be placed infants under the age of discretion, lunatics, and married women committing certain offences in the presence of their husbands. Among acts of the second kind may be classed the beating or killing another in self-defence, the destruction of property in order to prevent a more serious calamity, as the tearing down of a house on fire to prevent its spreading to the neighboring property, and the like. See Dalloz, Dict.

EXCUSSIO (Lat.). **In Civil Law.** Exhausting the principal debtor before proceeding against the surety. Discussion is used in the same sense in Scotch law. Vicat, *Excussionis Beneficium.*

EXECUTE. To complete; to make; to perform; to do; to follow out.

The term is frequently used in law; as, to *execute* a deed, which means to make a deed, including especially signing, sealing, and delivery. To execute a contract is to perform the contract. To execute a use is to merge or unite the equitable estate of the *cestui que use* in the legal estate, under the statute of uses. To execute a writ is to do the act commanded in the writ. To execute a criminal is to put him to death according to law, in pursuance of his sentence.

EXECUTED. Done; completed; effectuated; performed; fully disclosed; vested; giving present right of employment.

EXECUTED CONSIDERATION. See CONSIDERATION.

EXECUTED CONTRACT. One which has been fully performed. The statute of frauds does not apply to such contracts; Anderson School Tp. v. Milroy Lodge F. & A. M., 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Harris v. Harper, 48 Kan. 418, 29 Pac. 697; Brown v. Bailey, 159 Pa. 121, 28 Atl. 245; Lagerfelt v. McKie, 100 Ala. 430, 14 South. 281; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Showalter v. McDonnell, 83 Tex. 158, 18 S. W. 491. See CONTRACTS.

EXECUTED ESTATE. An estate whereby a present interest passes to and resides in the tenant, not dependent upon any subsequent circumstance or contingency. They

are more commonly called estates in *possession*. 2 Bla. Com. 162.

An estate where there is vested in the grantee a present and immediate right of present or future enjoyment. An estate which confers a present right of present enjoyment.

When the right of enjoyment in possession is to arise at a future period, only the estate is executed; that is, it is merely vested in point of interest: where the right of immediate enjoyment is annexed to the estate, then only is the estate vested in possession. 1 Prest. Est. 62; Fearne, Cont. Rem. 392.

Executed is synonymous with vested. 1 Washb. R. P. 11.

EXECUTED REMAINDER. One giving a present interest, though the enjoyment may be future. Fearne, Cont. Rem. 31; 2 Bla. Com. 168. See REMAINDER.

EXECUTED TRUST. A trust of which the scheme has in the outset been completely declared. Ad. Eq. 151. One in which the devise or trust is *directly and wholly declared* by the testator or settler, *so as to attach* on the lands immediately under the deed or will itself. 1 Greenl. Cruise, Dig. 385; 1 Jac. & W. 570. "A trust in which the estates and interest in the subject-matter of the trust are completely limited and defined by the instrument creating the trust, and require no further instruments to complete them." Bisph. Eq. 31. See TRUST; EXECUTORY TRUST.

Also used when, by the statute of uses, the property passes directly to the beneficiary, being *executed* by the statute. See EXECUTED USE.

EXECUTED USE. A use with which the possession and legal title have been united by the statute of uses. 1 Steph. Com. 339; 2 Sharsw. Bla. Com. 335, note; 7 Term 342; 12 Ves. Ch. 89; 4 Mod. 380.

EXECUTED WRIT. A writ the command in which has been obeyed by the person to whom it was directed.

EXECUTION. The accomplishment of a thing; the completion of an act or instrument; the fulfilment of an undertaking. Thus, a contract is executed when the act to be done is performed; a deed is executed when it is signed, sealed, and delivered. See Gaskill v. King, 34 N. C. 221. Where the party is present and directs another to sign for him, no written authority is necessary; Mut. Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 193; McMurtry v. Brown, 6 Neb. 368; Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Fitzpatrick v. Engard, 175 Pa. 393, 34 Atl. 803; Reed, St. of Fr. § 1063.

In Criminal Law. Putting a convict to death, agreeably to law, in pursuance of his sentence. This is to be performed by the sheriff or his deputy; (see 4 Bla. Com. 403;) or under the laws of the United States, by the marshal. Under the Pennsylvania practice, the governor issues a mandate to execute the sentence of death. The origin of the custom and the forms of mandate and return thereto are found in Com. v. Hill, 185 Pa. 385, 39 Atl. 1055, per Mitchell, J. He points out that the superior courts at Westminster issued warrants of death, and the Court of King's Bench, being held before the king himself, had further power to issue execution of judgments on attainder in parliament or in other courts. The practice of mandates prevails in other states. See Com. v. Costley, 118 Mass. 35; Lowenberg v. People, 27 N. Y. 336; In re Dyer, 56 Kan. 489, 43 Pac. 783; Holden v. Minnesota, 137 U. S. 483, 11 Sup. Ct. 143, 34 L. Ed. 734; State v. Oscar, 13 La. Ann. 297.

Where a day of execution is fixed by the court and is an integral part of the sentence, and the day has passed, the court should fix a new day; Com. v. Hill, 185 Pa. 397, 39 Atl. 1055; Ex parte Howard, 17 N. H. 545; Nicholas v. Com., 91 Va. 813, 22 S. E. 507; State v. Cardwell, 95 N. C. 643; In re Cross, 146 U. S. 271, 13 Sup. Ct. 109, 36 L. Ed. 969 (apparently on a statutory direction). See CRIMES; ELECTROCUTION; GARROTE; GUILLOTINE; HANGING.

In Practice. Putting the sentence of the law in force. 3 Bla. Com. 412. The act of carrying into effect the final judgment or decree of a court.

The writ which directs and authorizes the officer to carry into effect such judgment.

Final execution is one which authorizes the money due on a judgment to be made out of the property of the defendant.

Execution *quousque* is such as tends to an end, but is not absolutely final: as, for example, a *capias ad satisfaciendum*, by virtue of which the body of the defendant is taken, to the intent that the plaintiff shall be satisfied of his debt, etc., the imprisonment not being absolute, but until he shall satisfy the same. 6 Co. 87.

Execution, in civil actions, is the mode of obtaining the debt or damages or other thing recovered by the judgment; and it is either for the *plaintiff* or *defendant*. For the *plaintiff* upon a judgment in *debt*, the execution is for the debt and damages; or in *assumpsit*, *covenant*, *case*, *replevin*, or *trespass*, for the damages and costs; or in *detinue*, for the goods, or their value, with damages and costs. For the *defendant* upon a judgment in *replevin*, the execution at common law is for a return of the goods, to which damages are superadded by the statutes 7 Hen. VIII. c. 4, § 3, and 21 Hen. VIII. c. 19, § 3; and in other actions upon a judgment of *non pros.*, *non suit*, or verdict, the execution is for the costs only; Tidd, Pr. 993.

After final judgment signed, and even before it is entered of record, the plaintiff may, in general, at any time within a year and a day, and whilst the parties to the judgment continue the same, take out exe-

cution; provided there be no writ of error depending or agreement to the contrary, or, where this is allowed, security entered for stay of execution. But after a year and a day from the time of signing judgment the plaintiff cannot regularly take out execution without reviving the judgment by *scire facias*, unless a *fieri facias*, or *capias ad satisfaciendum*, etc., was previously sued out, returned, and filed, or he was hindered from suing it out by a writ of error; and if a writ of error be brought, it is, generally speaking, a *supersedeas* of execution from the time of its allowance; provided bail, when necessary, be put in and perfected, in due time. See Tidd, Pr. 994; Elliott v. Mayfield, 3 Ala. 223.

Writs of execution are judicial writs issuing out of the court where the record is upon which they are grounded. Hence, when the record has been removed to a higher court by writ of error or *certiorari*, or on appeal, either the execution must issue out of that court, or else the record must be returned to the inferior court by a *remittitur* (*q. v.*) for the purpose of taking out execution in the court below. The former is the practice in England; the latter, in some of the United States.

The object of execution in personal actions is effected in one or more of the three following ways. 1. By the seizure and sale of personal property of the defendant. 2. By the seizure of his real property, and either selling it or detaining it until the issues and profits are sufficient to satisfy the judgment. 3. By seizing his person and holding him in custody until he pays the judgment or is judicially declared insolvent.

These proceedings, though taken at the instance and under the direction of the party for whom judgment is given, are considered the act of the law itself, and are in all cases performed by the authorized minister of the law. The party or his attorney obtains, from the office of the court where the record is, a writ, based upon and reciting the judgment, and directed to the sheriff (or, where he is interested or otherwise disqualified, to the coroner) of the county, commanding him, in the name of the sovereign or of the state, that of the goods and chattels or of the lands and tenements of the defendant in his bailiwick he cause to be *made* or *levied* the sum recovered, or that he seize the person of the defendant, as the case may be, and have the same before the court at the return day of the writ. This writ is delivered by the party to the officer to whom it is directed, who thenceforth becomes responsible for his performance of its mandate, and in case of omission, mistake, or misconduct is liable in damages to the person injured, whether he be the plaintiff, the defendant, or a stranger to the writ.

When property is sold under execution, the proceeds are applied to the satisfaction of the judgment and the costs and charges of the proceedings; and the surplus, if there be any, is paid to the defendant in execution.

Execution against personal property When the property consists of goods and chattels, in which are included terms for years, the writ used is the *fieri facias* (*q. v.*). If, after levying on the goods, etc., under a *fieri facias*, they remain unsold for want of buyers, etc., a supplemental writ may issue, which is called the *venditioni exponas*. At common law, goods and chattels might also be taken in execution under a *levari facias;* though now perhaps the most frequent use of this writ is in executions against real property.

Where it is sought to reach an equitable interest a bill in equity is sometimes filed in aid of an execution; Lant v. Manley, 75 Fed. 627, 21 C. C. A. 457.

When the property consisted of *choses in action*, whether debts due the defendant or any other sort of credit or interest belonging to him, it could not be taken in execution at common law; but now, under statutory provisions in many of the states, such property may be reached by a process in the nature of an attachment, called an *attachment execution* or *execution attachment*. See ATTACHMENT; CREDITORS' BILL.

Execution against real estate. Where lands are absolutely liable for the payment of debts, and can be sold in execution, the process is by *fieri facias* and *venditioni exponas*. In Pennsylvania the land cannot be sold in execution unless the sheriff's jury, under the *fieri facias*, find that the profits will not pay the debt in seven years. But, practically, lands are almost never extended. And, in general, under common-law practice, lands are not subject to sale under execution, until after a levy has been made under the *fieri facias*, and they are appraised under an inquisition. They are then liable to be sold under a *venditioni exponas*.

There are in England writs of execution against land which are not in general use here. The extent (*q. v.*), or *extendi facias*, is the usual process for the king's debt. The *levari facias* (*q. v.*) is also used for the king's debt, and for the subject on a *recognizance* or *statute staple* or *merchant* (*q. v.*), and on a judgment in *scire facias*, in which latter case it is also generally employed in this country.

Execution against the person. This is effected by the writ of *capias ad satisfaciendum*, under which the sheriff arrests the defendant and imprisons him till he satisfies the judgment or is discharged by process of law; Freem. Ex. 451. See INSOLVENCY. This execution is not final, the imprisonment not being absolute; whence it has been called an execution *quousque;* 6 Co. 87.

Besides the ordinary judgment for the

payment of a sum certain, there are specific judgments, to do some particular thing. To this the execution must correspond: on a judgment for plaintiff in a real action, the writ is a *habere facias seisinam;* in ejectment it is a *habere facias possessionem;* for the defendant in replevin, as has already been mentioned, the writ is *de retorno habendo.*

Still another sort of judgment is that *in rem*, confined to a particular thing: such are judgments upon mechanics' liens and municipal claims, and, in the peculiar practice of Pennsylvania, on *scire facias* upon a mortgage. In such cases the execution is a writ of *levari facias.* A confession of judgment upon warrant of attorney, with a restriction of the lien to a particular tract, is an analogous instance; but in such case there is no peculiar form of execution; though if the plaintiff should, in violation of his agreement, attempt to levy on other land than that to which his judgment is confined, the court on motion would set aside the execution.

An execution issued in direct violation of an express agreement not to do so, except in a certain contingency which has not happened, will be set aside; Feagley v. Norbeck, 127 Pa. 238, 17 Atl. 900.

The lien of an execution from the judgment or decree of a court of record relates to its teste, and attaches to all personalty owned by the debtor between the teste and the levy so as to defeat the title of all intermediate purchasers; Edwards v. Thompson, 85 Tenn. 720, 4 S. W. 913, 4 Am. St. Rep. 807; not only in the county in which judgment was rendered, but everywhere in the state; Cecil v. Carson, 86 Tenn. 139, 5 S. W. 532. A sale under execution transmits only the debtor's estate, in the same plight and subject to all the equities under which he held it; Threadgill v. Redwine, 97 N. C. 241, 2 S. E. 526.

In Connecticut, Massachusetts, and Maine by common law and immemorial usage, under a judgment against a town, the property of any inhabitant may be taken in execution; Bloomfield v. Bank, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. Ed. 923.

See EXEMPTION; FIERI FACIAS; HOMESTEAD; SHERIFF.

EXECUTION PAREE. In French Law. A right founded on an act passed before a notary, by which the creditor may immediately, without citation or summons, seize and cause to be sold the property of his debtor, out of the proceeds of which to receive his payment. It imports a confession of judgment, and is not unlike a warrant of attorney. La. Code of Proc. art. 732; 6 Toullier, n. 208; 7 *id.* 99.

EXECUTIONER. The name given to him who puts criminals to death, according to their sentence; a hangman.

In the United States there are no executioners by profession. It is the duty of the sheriff or marshal to perform this office, or to procure a deputy to do it for him.

EXECUTIVE. That power in the government which causes the laws to be executed and obeyed.

It is usually confided to the hands of the chief magistrate; the president of the United States is invested with this authority under the national government; and the governor of each state has the executive power of the state in his hands.

The officer in whom the executive power is vested.

EXECUTIVE COMMITTEE. See DIRECTORS.

EXECUTIVE POWER. Authority exercised by that department of government which is charged with the administration or execution of the laws as distinguished from the legislative and judicial functions.

"'Executive power,' which the constitution declares shall be 'vested' in the president, includes power to carry into execution the national laws—and including such other powers, not legislative or judicial in their nature, as might from time to time be delegated to the president by congress—as the prosecution of war when declared—and to take care that the law be faithfully executed." 1 Curtis, Const. Hist. 578.

The separation of the three primary governmental powers as found in the constitution of the United States and of the separate states is the culmination of a revolution which had long been in progress in Europe. As is pointed out by a recent writer all governmental power was formerly united in the monarch of the middle ages. As the result of experience there was a separation of the state from the government, the former being termed the constitution-making power and the latter the instrumentalities by which administration was from time to time set in motion and carried on. Further advances in experience indicated the necessity of the distribution of powers by which there should be a deliberative body for the formulation of the rules and regulations under which the state should exist and its affairs be administered; another which should be the medium by which these rules and regulations forming the body of municipal law should be carried into effect; and a third to which should be committed the functions known in the science of government as judicial. The latter, under the government of the United States, has reached its highest development and exercises an authority in some instances over the other two departments of the government elsewhere unknown, even going so far as to define the limits of their authority and to declare void legislative acts. See CONSTITUTIONAL. This theory of the distribution of the powers of government among three distinct authorities, independent of each other, was first formulated by Montesquieu, *Esprit des Lois,* b. xi. c. vi. The absolute independence of the three branches of government which was advocated by Montesquieu has not been found entirely practicable in practice, and, although the threefold division of powers is the basis of the American constitution, there are many cases in which the duties of one department are to a certain extent devolved upon and shared by another. This is illustrated in the United States and in many of the states by the veto power which vests in the executive a part of the legislative authority, and on the other hand by the requirement of the confirmation by one branch of the legislature of executive appointments. The practical

difficulty in the way of an exact division of powers is thus well expressed: "Although the executive, legislative, and supreme judicial powers of the government ought to be forever separate and distinct, it is also true that the science of government is a practical one; therefore, while each should firmly maintain the essential powers belonging to it, it cannot be forgotten that the three co-ordinate parts constitute one brotherhood whose common trust requires a mutual toleration of the occupancy of what seems to be a 'common because of vicinage' bordering on the domains of each;" Brown v. Turner, 70 N. C. 93, 102. In England, there is in parliament a practical union of all the governmental powers, that body having absolute power of selecting the agents through whom, in fact, is exercised the executive power theoretically vested in the crown, and the final judicial authority on appeal remaining in the House of Lords. There is, notwithstanding, a complete recognition of the threefold nature of governmental power which is not lost nor destroyed by the unity of the final depositary of it all.

While the science of government in modern times may be said to accept the general theory of the separation of powers, subject to limitations and exceptions suggested, the application of the theory has not been uniform. Great difficulty has been found in practice in determining the depositary of executive power and whether it should be vested in one man or a board of control, the latter being supposed to insure deliberation and possibly to prevent tyranny, and the other being more conducive to efficient administration. See 2 Sto. Const. §§ 1419-23; Montesq. *Espr. de L.* b. xi. ch. vi.; De Lolme, Const. Eng. b. 2, ch. 2; Federalist No. 70; 1 Kent 271. The necessity for the latter has led to the almost universal adoption of the plan of having a single executive head, and the principal remaining difficulty has been the extent and character of the power to be entrusted to it. This is in part the result of the effort to apply too rigidly the theory of the absolute separation of powers already shown to be impracticable. Another difficulty has been said to arise from the failure to recognize that executive power really comprises two functions, the political or governmental and the administrative. The former concerns the relations of the chief executive authority with the great powers of government, the latter relates to the practical management of the public service. It has been said that the executive authority, as understood in the American states, is mainly a political chief, that in France and to a less extent in England its position as an administrator is more important, while in the federal government in this country it is both, as it is also in Germany; 1 Goodnow, Comp. Adm. L. 51.

The proper treatment of this subject involves the consideration of the systems of executive administration developed in the principal countries of the world which have adopted the principle of the distribution of powers. Only the briefest summary, however, is here practicable.

The general theory of the distribution of powers in Great Britain is very much like that in the princely governments of Germany. The residuum of governmental powers is in the crown, and the crown may exercise all authority not expressly otherwise delegated, but it rests with parliament to decide ultimately what powers shall be exercised by the crown and how it shall exercise them; herein it differs from the German system. From the comprehensive Norman idea of royalty which combined all the sovereign powers of the Saxon and Dane with those of the feudal theory of monarchy exemplified at the time in France, there developed at first hereditary and despotic power which was gradually limited by the necessity of the concurrent action of parliament for the imposition of taxes and the enactment of laws affecting the ordinary relations of individuals. Later it was considered that a law once enacted could not be changed without the consent of parliament, and finally the latter body assumed the right to initiate as well as approve laws, and the crown lost its original power of veto which has certainly become obsolete, though it has been said to be merely dormant and susceptible of being revived; 2 Todd, Parl. Govt. in Eng. 390. See 1 Stubbs, Const. Hist. of Eng. 338. The result of this development is that parliament has assumed most of the legislative power, though many matters not regulated by it are controlled by the crown which exercises a large ordinance power both independent and supplementary. The crown has lost both the taxing power and the judicial power, but retains in large part its old executive powers, and its action is controlled very largely by a body whose power has gradually developed, viz., the privy council. The crown may do anything which it is not forbidden to do and possesses the administrative as well as the political power. It may create offices as well as fill them, and both remove and direct the incumbents. The crown is, therefore, the chief both of the administrative and political departments of the executive power, its position being modified by the principle that its advisers, without whom it cannot act, must possess the confidence of the majority in the house of commons. The principle of parliamentary responsibility puts the crown in the position of reigning but not governing; but so long as it possesses the confidence of the house of commons it has very extensive executive powers, and in council may declare war and make treaties, which in other countries can be done only with the consent of the legislature. The crown is in theory irresponsible, but when its ministers are in a minority in the house of common it chooses new ministers who will have the confidence of parliament, or dissolves parliament in the hope that the new body will have confidence in the existing ministers, but the theory is that in all cases the crown and not parliament administers. See Pom. Const. Law § 176; 1 Goodn. Comp. Adm. L. ch. vi.

In France the executive power is vested in a president elected by the legislature. His position is said by a recent writer, probably on account of the monarchical traditions in France, to be more important from the administrative point of view and less from a political point of view than that of the President of the United States, he having no veto power. He has quite an unlimited power of appointment and also a very extensive power of removal, not only of officers appointed by himself, but of local administrative officers; as mayors of communes; Law, Apr. 5, 1884; and he may dissolve local and municipal legislative bodies in the departments and communes; LL. Aug. 10, 1871, and Apr. 5, 1884. In addition to his power of executing laws, he has in many cases authority to supplement the law without any delegation of legisative power by what are known as decrees. This supplemental power is accorded to him under a constitutional provision that he shall watch over and secure the execution of the laws, and the difference between the interpretation put upon this and the similar provision in the United States constitution is accredited to the monarchical traditions of the country, and the resulting idea that the residuary governmental power is vested in the executive and not, as in this country, in congress. The president is also held to a greater responsibility for his action than in the American system. 1 Goodnow, Comp. Adm. L. ch. iv.

In Germany the conception of executive power is much broader than in the United States, and it is more important from the administrative point of view. There are important constitutional limitations on the action of the Prince, or executive head of the subdivisions of the empire; but in the absence of such limitations he is recognized as having the governmental power, being as in France the possessor of the residuum of the governmental power. The limitations upon his action by the constitution are found in the requirement of legislative consent for the validity of legislative acts affecting freedom of person and property and the financial affairs of the government, judicial power administered by courts independent of the control of the executive, and the necessity that each of his official acts must be countersigned by a minister who is responsible for it either to the legislature

or to the criminal courts. The administrative powers are very extensive, including that of appointment and removal, and a very wide power of direction, together with the authority to make decrees or ordinances as to all matters not regulated in detail by legislation.

In the imperial government, the Emperor occupies, from the administrative point of view, about the same position as the President of the United States. He has a general power of appointment and of administrative direction, which latter is, however, exercised under the responsibility of the chancellor, who must countersign all acts by which it is exercised; but just what the responsibility of the latter officer is seems to be undefined other than that he may be called upon to defend his policy before the federal council. The Emperor does not have any ordinance power except such as is expressly mentioned in the constitution or delegated by the legislature, and in the exercise of it he often requires the consent of the federal council. He is entirely irresponsible. *id.* ch. v. A leading German commentator regards the governmental form of the empire as a republic; 1 Zorn, *Das Reichsstaatsrecht*, 162.

In the United States, the federal executive power is vested in the president. In all the states the chief executive is the governor. With respect to the power of the latter the differences in the state constitutions make it necessary, for brief statements of the executive officers and their duties, to refer for more detailed information to the constitutions of the states, while comparative views of the provisions on particular points may be found in Stimson, Am. Stat. Law. Many features are common to most of the states and, making due allowance for differences of detail, the character of the officer is substantially the same. In general, it may be noted that he is commander of the state militia, subject to the paramount federal constitutional control when it is in the actual service of the United States: he has in most cases a pardoning power (except in some states for treason), as to which, however, there is a growing tendency to limit it by requiring the recommendation of a board of pardons, either such in name or effect, usually composed of several executive officers, *virtute officii;* he has usually a veto power which compels the reconsideration of legislation by a two-thirds vote in most cases, but in some, three-fifths, and in others a mere majority; in most of the states he has power to summon the legislature in extra session, and to adjourn its sessions when the two houses disagree as to the time. As a rule, the governor's power of appointment is confined to minor state officials, and he has no power of removal except for cause and after a hearing. He is usually charged with the duty of sending messages to the legislature containing his views and recommendations upon public questions. The constitutional powers vested in the governor alone are addressed to and regulated by his own uncontrolled discretion; for example, where an officer assuming to act as governor, in his absence, had issued a proclamation convening the legislature in extraordinary session, the governor having returned previous to the time named for the meeting, and issued a second proclamation, revoking the first, it was held that, the power of convening the legislature being discretionary, the call might be recalled before the meeting took place; People v. Parker, 3 Neb. 409, 19 Am. Rep. 634.

Under the United States constitution the governor of a state may call upon the president, when necessary, for aid in the enforcement of the laws.

His limited power of removal makes his power of direction and administration very slight. He is in effect a political rather than an administrative officer, his powers of the former class having increased while those of the latter class have been gradually curtailed. In this respect his relative position is quite the reverse of that of the president. For a discriminating review of this subject, see 1 Goodn. Comp. Adm. L. ch. iii.

The right of the executive officers named in the constitution to exercise all the powers properly belonging to the executive department is given indisputably by the constitution; State v. Savage, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. They may, unless limited by constitution or statute, determine as to the time and place where the exercise of their jurisdiction is necessary, and the people and local officers of that locality have no constitutional or statutory right to be heard on that question; Gilmore v. Penobscot, 107 Me. 345, 78 Atl. 454.

The executive power possessed by the president must be considered historically in order to reach an adequate view, both of its present scope and limitations and its growth since the adoption of the constitution. It is to be observed primarily that in the United States there is the fundamental condition that the executive power, whether of president or governor, is expressly granted, and the residuum of sovereignty is in the legislature, either federal or state as the case may be, and not in the executive, as in France and Germany, actually so, or, as in England, theoretically so. This remark is equally true as to its general results, notwithstanding decisions, that the *express* grant of executive power carries with it certain *implied* powers. These were still powers of executing the laws, and not, as in the countries named, of supplementing or adding to them.

Though it is often said that the framers of the United States constitution, in creating the office of president, had in view, as a model, the English king; Pom. Const. Law § 176, a more recent and probably correct view is that the office was rather modelled upon the colonial governor; 1 Goodnow, Comp. Adm. L. 52, and 1 Bryce, Am. Com. 36. An examination of the powers of the executive in each of the three colonies of New York, Massachusetts, and Virginia leads Professor Goodnow to the conclusion that the American constitutional executive power was that which has been called the political or governmental power, and which had usually been exercised by the colonial governor, to which was added the carrying on of foreign relations, which,

in the colonial period, were under the control of the mother country, and afterwards of the continental congress. The fact that the constitution, in vesting in the president the executive power, used the term as one whose meaning would be readily understood, undoubtedly leads to the conclusion that the general powers so characterized were such as people of the states were accustomed to have exercised by the governors, first of the colonies and then of the states. But see Stevens, Sources Const. U. S. ch. vi.

The specific powers conferred by the constitution in addition to the general provision vesting the executive power in him, are that he shall be commander-in-chief of the army and navy and the militia of the states when in service; that he may require the opinions of the officers of the executive departments; grant reprieves and pardons, except in cases of impeachment; make treaties with the advice and consent of the senate, two-thirds thereof concurring, and, the senate consenting, appoint ambassadors, judges, and other officers whose appointment is not otherwise provided for by law; give information to congress; convene both houses, or either, and adjourn them, when they disagree with respect to the time of adjournment, to such time as he shall think proper; receive ambassadors and other public ministers; take care that the laws be faithfully executed; and commission all officers; Const. art. ii. §§ 1, 2, 3.

This grant is said to have conferred upon the president the political power of an executive and one administrative power, viz., the power of appointment, beyond which he had no control over the administration; 1 Goodnow, Comp. Adm. L. 63; Pom. Const. L. § 633.

The original powers of the president, under the constitution, have been increased by acts of congress conferring specific powers upon him and by decisions that his power is not limited by the express terms of legislative acts but includes certain "rights, duties, and obligations growing out of the constitution itself, our international relations, and all the protection implied by the nature of the government under the constitution"; In re Neagle, 135 U. S. 1, 64, 10 Sup. Ct. 658, 34 L. Ed. 55. Under this implied power it was held that the president could take measures to protect a United States judge or a mail-carrier in the discharge of his duty without an act of congress authorizing him to do so; In re Neagle, 135 U. S. 67, 10 Sup. Ct. 658, 34 L. Ed. 55; or, in the same manner, to place guards upon the public lands to protect the property of the government. As an illustration of the exercise of this power the supreme court cites the executive action which resulted in the release of Koszta from a foreign prison where he was confined in derogation of his rights as a person who had declared his intention to become an American citizen; In re Neagle, 135 U. S. 64, 10 Sup. Ct. 658, 34 L. Ed. 55. He may remove obstructions to interstate commerce and the transportation of the mails; and enforce the full and free exercise of all national powers and the security of all rights under the constitution; In re Debs, 158 U. S. 568, 15 Sup. Ct. 900, 39 L. Ed. 1092.

Another increase of the administrative power of the president was due to his power of removal, which was not expressed in the constitution, but it was held by a majority vote in the first congress to be a part of the executive power; 1 Lloyd's Debates 351, 366, 450, 480–600; 2 *id.* 1–12; 5 Marsh. Life of Washington, ch. 3, 196; and this construction of the constitution was judicially approved; U. S. v. Avery, Deady 204, Fed. Cas. No. 14,481; and was undoubtedly the recognized practice of the government until the passage of the Tenure of Office Acts of 1867–9; U. S. R. S. §§ 1767 to 1769; which were repealed in 1887. See 2 Sto. Const. §§ 1537–43; Paper of W. A. Dunning on the Impeachment and Trial of President Johnson; 4 Papers Am. Hist. Assoc. 491; 1 Kent 310; Pom. Const. L. §§ 647–657. To the power of removal thus recognized has been attributed the evolution of "the president's power of direction and supervision over the entire national administration" and "the recognition of the possession by the president of the administrative power"; 1 Goodnow, Comp. Adm. L. 66. Whatever theories may be formed of the conception of the office in the minds of the framers of the constitution, and however the result may have been brought about, it cannot be doubted that the executive head of the federal government is now in fact the depositary of the complete executive power, as it is understood to comprehend both political and administrative power. He is authorized to appoint certain officers in the executive departments, the discharge of whose duties is under his direction; Marbury v. Madison, 1 Cra. (U. S.) 165, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181; U. S. v. Kendall, 5 Cra. C. C. 163, Fed. Cas. No. 15,517. This is considered by the writer last cited to be a great enlargement of the American conception; and this view seems to be well supported by the considerations already suggested. It is true that at the time of the adoption of the constitution the powers conferred upon the president were considered by many to be so great as to endanger the stability of the Union, and it is considered by one of the ablest authorities on constitutional law that no one of the three great departments "has been more shorn of its just powers, or crippled in the exercise of them, than the presidency;" Miller, Const. U. S. 20, 95. But the context shows that this has reference solely to the encroachments on the appointing power by the extra-legal participation of members of congress therein—an evil much mitigated by the extension of the civil serv-

ice system to the greater number of offices which were formerly not subject to its operation.

The administrative power of the president includes not only the control of the personnel of the public service but also the vast number of powers brought into action in the course of the administration of the government growing out of powers vested in the president by his duty under the constitution to see that the laws are faithfully executed. These duties, aside from this specific enumeration in the constitution as already stated, are those imposed upon the president by act of congress, and may be either of a special or general character, as the promulgation of regulations for the control of particular branches of the public service, such as consular regulations and the civil service rules; but in most cases such executive regulations proceed from the heads of departments and not from the president directly, although they are in law presumed to proceed from him; Wilcox v. Jackson, 13 Pet. (U. S.) 498, 513, 10 L. Ed. 264; U. S. v. Eliason, 16 Pet. (U. S.) 291, 10 L. Ed. 968; The Confiscation Cases, 20 Wall. (U. S.) 92, 109, 22 L. Ed. 320; U. S. v. Farden, 99 U. S. 10, 19, 25 L. Ed. 267; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915. Executive acts, as to the manner of doing which there is no provision of law, may be done through the head of the proper department whose acts are the acts of the president in contemplation of law; Jones v. U. S., 137 U. S. 202, 217, 11 Sup. Ct. 80, 34 L. Ed. 691. The president may act in special cases by directions to his subordinate officers, either directly or through the head of a department, or by his decision on appeal from either of them, though, as a rule, he is not considered to be authorized to entertain such appeals except as to the jurisdiction of the officer appealed from; 15 Op. Atty. Gen. 94, 100, reviewing opinions on this question. In other cases the appeal does not go beyond the head of the department; 4 *id.* 515; 9 *id.* 462; 10 *id.* 526.

Nearly if not all the state constitutions contain provisions similar to that of the United States making it the duty of the chief executive to see that the laws are faithfully executed. This provision has been drawn into construction by the supreme court of Mississippi. The governor believed that a contract made by a state board of which the attorney-general was a member was contrary to the constitution, and, having ineffectually endeavored to induce the attorney-general to act in the matter, brought suit himself in the name of the state and the court dismissed the bill, the majority opinion being that no warrant could be found in the constitution or laws of the state for the action of the governor; Henry v. State, 87 Miss. 1, 39 South. 856. See note on this case; 1 The Law 806. In that state the right of the governor to sue in a foreign state is given by statute; Rev. Code (1892) § 2167.

A governor, being under the constitutional injunction to see that the laws are executed, appears to have no right to execute them himself; Shields v. Bennett, 8 W. Va. 74; In re Fire & Excise Com'rs, 19 Colo. 482, 36 Pac. 234; Cahill v. Board, 127 Mich. 487, 86 N. W. 950, 55 L. R. A. 493. As to his right to employ counsel for the state, see 55 L. R. A. 493, n. There are state statutes authorizing the governor to employ other counsel in certain cases, where the attorney-general is under a disability; State v. Dubuclet, 25 La. Ann. 161; Orton v. State, 12 Wis. 509. A governor has also been permitted to bring action on bonds payable to him for the use of the state; Governor v. Allen, 8 Humph. (Tenn.) 176. See note on this subject; 19 Harv. L. Rev. 524.

In most if not all of the states, the governor has a veto power, and in such case an act of the legislature is not valid unless presented to him for approval, the opportunity for his action being essential to the validity of the law; Wartman v. City of Philadelphia, 33 Pa. 202; Burritt v. Com'rs of State Contracts, 120 Ill. 322, 11 N. E. 180; State v. Newark, 25 N. J. L. 399. In some cases not only a bill but an order or resolution must be presented to the executive, but in most cases adjournment is excepted; Trammell v. Bradley, 37 Ark. 374.

Some question has arisen as to whether the veto power of the governor extends to proposals for the amendment of the constitution. In Delaware, the governor's power over such proposals is recognized in the constitution, and in some other states they are exempted, but as a general rule there is no mention of the governor in connection with such proposals. It has been held that the veto power of the executive does not apply to them in Com. v. Griest, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Warfield v. Vandiver, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; but it has also been held that, while proposing constitutional amendments is not legislation in the ordinary sense, it is such so far as that it must be included in the governor's proposals for legislation in a special session in order to be valid; People v. Curry, 130 Cal. 82, 62 Pac. 516.

The practice of the federal government is that proposals by congress of amendments to the constitution are not submitted to the president for his approval. Of the seventeen amendments thus far adopted, none have been approved by the president except the XIIIth. The resolution proposing that particular amendment is published with the note at the foot, "Approved February 1st, 1865"; 13 Stat. 567; but this does not appear in the resolution as published by the secretary of state in his announcement of its ratification. Prior to the XIIIth, no res-

olution proposing amendments, as published, has any note at the foot. Subsequent to the XIIIth they appear with "Received at Department of State" or "Deposited in Department of State," noted at the foot of the resolution as published in the Statutes at Large. The only exception to the general practice of having no approval by the president is the XIIIth which seems to have been inadvertence.

In Hollingsworth v. Virginia, 3 Dall. (U. S.) 380, 1 L. Ed. 644, it was argued by W. Tilghman and Rawle, upon the question whether the XIth amendment did, or did not, supersede all pending suits against states, that the amendment was not proposed in due form because never submitted for approval of the president. When Lee, Atty. Gen., answered that the same course had been pursued relative to all the other amendments, Chase, J., interrupted: "There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the constitution."

The date is no necessary part of executive approval of a bill either by the president; Gardner v. The Collector, 6 Wall. (U. S.) 499, 18 L. Ed. 890 (where it is said that neither the constitution nor any act of congress requires him to affix a date to his signature); nor in the case of a governor; State v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; and the signature in any place on the bill is sufficient; National Land & Loan Co. v. Mead, 60 Vt. 257, 14 Atl. 689.

Where the constitution provides that measures submitted for executive approval "shall be presented" to him, it is held that it is unnecessary that they should be presented to him in person; but it is sufficient that they be left at the executive chamber, or other place determined by usage where communications are made to the governor; Opinion of Justices, 45 N. H. 607; otherwise, as was said *arguendo*, the executive, by simply absenting himself, could defeat any law; Hamilton v. State, 61 Md. 14; on the other hand, it is said that it is not sufficient that the bill is sent to the secretary of state; Opinion of Justices, 99 Mass. 636; or the governor's private secretary, who returned it as not properly signed; Monroe v. Green, 71 Ark. 527, 76 S. W. 199; and see Lyth v. City of Buffalo, 48 Hun (N. Y.) 175, and Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432, where it was held that merely exhibiting a measure to the governor was not a proper presentation; which must be such as to notify the executive that it is intended to secure his final action; State v. Newark, 25 N. J. L. 399. The presentation must be of the same bill which was passed; State v. Wendler, 94 Wis. 369, 68 N. W. 759; Padavano v. Fagan, 66 N. J. L. 167, 48 Atl. 998; and if the title has been changed it is material, particularly where the title is required to express the substance of the bill; Simpson v. Stockyards Co., 110 Fed. 799; People v. Onondaga Sup'rs, 16 Mich. 254; the presentation must be within a reasonable time before the expiration of the time limit for approval; State v. Michel, 52 La. Ann. 936, 57 South. 565, 49 L. R. A. 218, 78 Am. St. Rep. 364. In the absence of any express provision for the approval of bills after the adjournment of the legislature, it has been held that the power of the executive is at an end and the legislation void; Fowler v. Peirce, 2 Cal. 165; Hardee v. Gibbs, 50 Miss. 802, overruled in State v. Sup'rs of Coahoma County, 64 Miss. 358, 1 South. 501; but where the constitution provided that a bill should become a law if not returned within ten days, and that within five days after adjournment the governor might sign any act passed within the last five days of the session, his signature within ten days after the passage of the bill, although it was passed more than five days before adjournment, was valid; City of Detroit v. Chapin, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391 (where the cases are examined at large in the opinion and a note); but where he is allowed five days and returns it in less time with a notification that he does not sign it, it will become a law, as the five days allowed is a matter of privilege; Hunt v. State, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34, 2 Ann. Cas. 33. Of course, this question is settled by a constitutional provision authorizing executive action after the adjournment, and such action has been sustained upon the basis of long-established custom; Solomon v. Com'rs of Cartersville, 41 Ga. 157. On the other hand, custom to the contrary was held to be abrogated by a single departure from it by the president; U. S. v. Weil, 29 Ct. Cl. 523. But when that question arose in a case before the supreme court, that court held that an act was not invalid by reason of its being signed during a recess of Congress, but it declined to decide whether the president could sign after the final adjournment; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

Where there were rival bodies each claiming to be the legislature, it has been held that the recognition of the governor is not effective to determine between them; Ex parte Screws, 49 Ala. 57; In re Gunn, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519; but under the United States constitution, the president, by virtue of the guaranty to the states against domestic violence, upon the application of the legislature, and his authority to suppress insurrection, necessarily has the power to determine who constitute the legislature, as it was held in Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581.

In the absence of constitutional authority to the contrary, the governor must approve or veto a bill as a whole; Porter v. Hughes, 4 Ariz. 1, 32 Pac. 165, where without such authority the governor vetoed part of an appropriation bill, but his signature affixed to it was held to be an approval of the whole bill; but in State v. Holder, 76 Miss. 158, 23 South. 643, the contrary was held and the action of the executive was treated as a nullity; where, however, he is authorized to veto separate items, he may also veto a part of an item; Com. v. Barnett, 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882; but he may not veto some items before adjournment and others after it; Pickle v. McCall, 86 Tex. 212, 24 S. W. 265. Where the governor inadvertently approved one bill believing it to be another and recalled his action, it was held valid so long as the bill was before him, but would not have been so if returned to the legislature; People v. Hatch, 19 Ill. 283; Allegany County v. Warfield, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446. Where he had deposited the bill in the office of the secretary of state with his approval endorsed on it, it had passed beyond his control, and he had no authority afterwards to veto it; People v. McCullough, 210 Ill. 488, 71 N. E. 602. The return of a bill to either house, or notification of its approval, is a matter of courtesy only and not required by law; State v. Whisner, 35 Kan. 271, 10 Pac. 852.

Whether a measure may be recalled by the legislature after having been sent to the executive is in doubt; Wolfe v. McCaull, 76 Va. 876, where its return is said to be "a mere act of courtesy"; and see People v. Devlin, 33 N. Y. 269, 88 Am. Dec. 377. An opinion of the attorney-general of Wisconsin holds the practice of the surrender of bills by the executive as questionable, and doubts whether, if returned, it may be changed by the legislature; Op. Atty. Gen. Wis. Sen. Jour. (1897) 690. See also Smith v. Jennings, 67 S. C. 324, 45 S. E. 821; In re Duffy, 4 Brewst. (Pa.) 533; Sank v. City of Philadelphia, 8 Phila. (Pa.) 117. The return of a bill after veto must put it clearly in the possession of the legislature and out of the control of the executive; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; but the return must be before final adjournment; Opinion of Justices, 45 N. H. 607.

The approval or veto by the governor is held in some cases to be a legislative act; Trustees of School District No. 1 v. County Com'rs, 1 Nev. 335; Thornburg v. Hermann, 1 Nev. 473; Fowler v. Peirce, 2 Cal. 165; State v. Deal, 24 Fla. 293, 4 South. 899, 12 Am. St. Rep. 204; Opinion on Governor's Communication, 23 Fla. 298, 6 South. 925; Hardee v. Gibbs, 50 Miss. 802; State v. Fagan, 22 La. Ann. 545; Arnold v. McKellar, 9 S. C. 335; Weis v. Ashley, 59 Neb. 494, 81 N. W. 318, 80 Am. St. Rep. 704; *contra*, People v. Bowen, 30 Barb. (N. Y.) 24; U. S. v. Weil, 29 Ct. Cl. 523. It is said by way of conclusion, after an examination of the cases, in an article in 41 Am. L. Rev. 396, cited *infra*: "Usually the controversy has been entirely unnecessary to a decision of a case. Though the legislative character of the executive's action would seem to be obvious enough, insisting on this truth has been very 'unfruitful,' since the same results could generally have been obtained without it, and when pushed to the extreme, unreasonable results are likely to follow."

The power of a governor to summon the legislature in extraordinary sessions, expressed in various terms in the state constitutions, is held to leave the occasion wholly to the discretion of the executive; Whiteman's Ex'x v. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; State v. Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897; and in one case it was held that the governor had power to revoke his proclamation; People v. Parker, 3 Neb. 409, 19 Am. Rep. 634. Where the constitution authorized the governor to limit the subject-matters of legislation at the special session, they must be presented in writing and a "parol request" or a mere reference to the subject is insufficient; Manor Casino v. State (Tex.) 34 S. W. 769; Jones v. Theall, 3 Nev. 233; but it has been decided by the United States senate that the election of a senator, which has failed at a regular session, may take place at a special session, though not named by the governor as one of the purposes; Taft, El. Cas. 722. The governor's proclamation need not be specific as to the details of particular legislation, as to which the general subject is recommended; In re Governor's Proclamation, 19 Colo. 333, 35 Pac. 530; Chicago, B. & Q. R. Co. v. Wolfe, 61 Neb. 502, 86 N. W. 441; Parsons v. People, 32 Colo. 221, 76 Pac. 666.

In many states the executive has the power to convene the legislature at a place other than its usual place of meeting, in the case of grave emergency, the existence of which must be determined by him, and in one case, that of Alabama, he has power to remove it after it has convened, but the ordinary provision is held to apply only to the place of assembly and not to a subsequent change; Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177, 49 L. R. A. 258, 94 Am. St. Rep. 357.

The usual provision of state constitutions authorizing the governor to adjourn the legislature in case of disagreement between the two houses is held to vest the decision whether such occasion exists in the executive; In re Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716, where it was held that the governor might disregard a certificate of disagreement and examine the records of the two houses to ascertain whether one existed. In another case the power of the governor was not determined, as it was deem-

ed sufficient by the court that the legislature had in fact adjourned; People v. Hatch, 33 Ill. 9. See an interesting discussion of "The Executive Control of the Legislature," by James B. Barnett, 41 Am. L. Rev. 215, 384.

Congress may impose on any executive officer any duty which is not repugnant to any right which is secured and protected by the constitution; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181. With respect to certain executive functions which spring from the legislation of congress, after the occasion is created by the passage of a law, the authority of the legislature is ended, and the uncontrolled discretion of the executive attaches and is exercised independently of the other departments of the government. In the exercise of such powers the discretion of the subordinate officer, within his sphere, is the discretion of the president. Of this character are the control of the military resources of the government; the pardoning power and the power of appointment, all of which are dormant until legislation has been enacted for creating an army and navy, or defining crimes and punishments and the creation of offices. As to another class of executive powers which depend entirely upon the legislation of congress both for their existence and their scope, the president merely executes the law. Within this class necessarily fall the greater number of executive functions, and they differ from the other classes in that, with respect to them, the president may be deprived of all discretion.

The power to appoint to an office is an executive function, but may be exercised by the legislature or the courts as an incident of the principal power; that is, where necessary to the exercise of full legislative or judicial power; State v. Hyde, 121 Ind. 20, 22 N. E. 644.

A law providing that the governor, lieutenant governor and attorney-general shall constitute a board to appoint members of a railroad commission is not the appointment of those officers to a new office, but merely imposing new duties upon them and is valid; Southern Pac. Co. v. Bartine, 170 Fed. 725; and the same was held to be the effect of a similar designation of certain executive officers to act as a state board of elections to appoint election officers; Richardson v. Young, 122 Tenn. 471, 125 S. W. 664.

Where the executive has the power and duty of appointing the fish and game commissioner, an act appropriating money for the department and providing that no part of the appropriation shall be available, so long as the present commissioner remains in office, is unconstitutional as an encroachment upon the appointing power of the executive; State v. Gordon, 236 Mo. 142, 139 S. W. 403.

A constitutional provision prohibiting the legislative department from exercising executive powers is violated when the legislature attempts to interfere with an action taken by the executive under existing laws; In re Opinion of the Justices, 208 Mass. 610, 94 N. E. 852.

The authority, vested by the constitution in the legislature, to make laws, may be exercised, leaving, in the particular instance, to an executive officer, or some other agency, the duty of determining questions of fact essential to the application thereof which involves administrative discretion; State v. Chittenden, 127 Wis. 468, 107 N. W. 500. See LEGISLATIVE POWER; and as to powers, duties, acts of executive officers, boards or commissions under legislative authority, see DELEGATION.

In some cases the courts may go behind the execution of statutory power by an executive officer as: Where, a statute authorizing the summary killing of diseased animals, with no provision for compensation to the owner, an adjudication of the cattle commissioners is not conclusive and an order issued by them for killing an animal, not in fact infected, is no defense to those executing the order in a subsequent action by the owner for compensation; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850; so in case of the destruction of property when required to secure the public safety, where there is a statute authorizing it, the destruction of the property is conclusive, so far as the *res* is concerned; Salem v. R. Co., 98 Mass. 431, 96 Am. Dec. 650; but the right is preserved to the owner for a hearing in a subsequent proceeding for compensation; Miller v. Horton, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 850.

In other cases the courts will not go behind the decision of the officer charged with the execution of a statute as, under the Chinese exclusion and immigration laws, the finding of the designated officer, when approved on appeal by the secretary of commerce and labor, will not be reviewed by the courts, but is treated by them as final and conclusive; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

The executive powers which are derived directly from the constitution would still remain if all the legislative acts of congress were repealed. As to these the president is clothed with unrestrained discretion, and his acts in pursuance of them are purely political. He cannot be controlled nor can his powers be enlarged or diminished by legislation, though through the medium of proper laws he may be aided in the performance of the duties thus imposed upon him. For example, an attempt to limit the pardoning power or control its effect has been held unconstitutional, where the supreme court having declared that the power of the president dispensed with the necessity of proof of loyalty

in cases authorizing claims for the value of property seized as captured or abandoned during the war; congress subsequently enacted that such proof should be required irrespective of any executive pardon or amnesty. This the court held unconstitutional, saying:—"Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end." U. S. v. Klein, 13 Wall. (U. S.) 128, 148, 20 L. Ed. 519. But when a claim was made against the government for payment for supplies furnished before the war, it was held that the prohibitory legislation of congress prevented a recovery, because the disability of the claimant to receive a debt from the United States did not arise as a consequence of any offence but out of a state of war, and ended with the close of the war, and not by reason of the pardon, which operated only to relieve him from punishment for his acts and gave him no new rights; Hart v. U. S., 118 U. S. 62, 6 Sup. Ct. 961, 30 L. Ed. 96.

The question has been considered from time to time of the extent of the power of the president over newly acquired territory. After the acquisition of territory it has been generally considered in countries governed by the English law that the temporary powers of government are vested in the executive until it is assumed by the legislative branch of the government; Cowp. 204; Leitensdorfer v. Webb, 20 How. (U. S.) 176, 15 L. Ed. 891; Cross v. Harrison, 16 How. (U. S.) 164, 14 L. Ed. 889, where after the Mexican war the exercise by the president of what were really legislative powers, in relation to customs, was sustained by the supreme court. And after the acquisition of the canal zone on the Isthmus of Panama, in the absence of congressional action with respect to its government, the president exercised all the power of government. See 21 Harv. L. Rev. 547, where this subject is discussed and the conclusion reached that the action of the president was warranted.

As to his express powers the president is equally independent of the courts and can be held for maladministration of them only by impeachment; Marbury v. Madison, 1 Cra. (U. S.) 165, 2 L. Ed. 60; Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181; U. S. v. Kendall, 5 Cra. C. C. 163, Fed. Cas. No. 15,517.

The command of the army and navy is essentially an executive power; 2 Sto. Const. § 149; 2 Kent 282; though it did not pass without criticism; 2 Elliot, Deb. 365; 3 *id.* 103, 108; the power to call out the militia is discretionary and his judgment of the necessity is final; Martin v. Mott, 12 Wheat. (U. S.) 29, 6 L. Ed. 537; and he may delegate the command of it; Rawle, Const. 193; 2 Sto. Const. (5th ed.) § 1492, n. 2. See Dillingham v. Snow, 5 Mass. 548.

The power to require opinions from the heads of departments has been termed a mere redundancy; Federalist, No. 74; but it is said to be not without its use and frequently acted upon; 2 Sto. Const. § 1493; especially in two notable instances, by President Washington, 1793, relative to the condition of affairs between France and Great Britain, and by President Grant in 1873 in reference to the subject of expatriation; Miller, Const. U. S. 185.

The pardoning power of the president extends to any case in which it might have been exercised under the English law; U. S. v. Wilson, 7 Pet. (U. S.) 150, 8 L. Ed. 640; In re Wells, 18 How. (U. S.) 307, 15 L. Ed. 421; and includes the power to grant a conditional pardon; In re Garland, 4 Wall. (U. S.) 333, 18 L. Ed. 366; to relieve against forfeiture of property under a confiscation act; Armstrong's Foundry, 6 Wall. (U. S.) 766, 18 L. Ed. 882; or release from fines, penalties, and forfeiture which accrue from the offence; Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388; or contempt of court; State v. Sauvinet, 24 La. Ann. 119, 13 Am. Rep. 115; it includes amnesty; U. S. v. Klein, 13 Wall. (U. S.) 128, 20 L. Ed. 519; and a general amnesty proclamation includes domiciled aliens; Carlisle v. U. S., 16 Wall. (U. S.) 148, 21 L. Ed. 426. The power of the president to issue a proclamation of general amnesty has been much drawn into question, and it was denied in a report of the judiciary committee of the senate made Feb. 17, 1869, that he could do it without the authority or assent of congress. It was the subject of legislation, an express power being granted to the president by section 13 of the act of June 17, 1862, which was repealed by act of Jan. 19, 1867. It was, however, generally considered that the subject was within the power of the executive, and it was exercised by Presidents Washington, Adams, Madison, Lincoln, and Johnson, and independently of congressional action. See an extended discussion of the subject in 8 Am. Law Reg. N. S. 513, 577. The president may act on pardons immediately, or first refer them to the executive departments; 14 Op. Att. Gen. 20.

The president has no power to interfere with a public prosecution, except to put an end to it and discharge the accused. He may not change the proceedings or place of trial; U. S. v. Corrie, Fed. Cas. No. 14,869; 1 Brunner, Col. Cas. 686.

The executive cannot, except as permitted by the constitution, grant a reprieve or fix a day for the execution of a convicted criminal, that being a judicial power; Clifford

v. Heller, 63 N. J. L. 105, 42 Atl. 155, 57 L. R. A. 312. His pardoning power is not affected by a provision in an act giving one-half of the fine imposed to an informer; Meul v. People, 198 Ill. 258, 64 N. E. 1106; nor by a provision authorizing the commutation of sentence for good conduct and defining the credit to be given; Fite v. Snider, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108; or a provision for indeterminate sentences; People v. Cook, 147 Mich. 127, 110 N. W. 514; or release on parole; People v. Madden, 120 App. Div. 338, 105 N. Y. Supp. 554; People v. Nowasky, 254 Ill. 146, 98 N. E. 242; so that in none of these cases was the act considered unconstitutional as an invasion of the pardoning power of the executive. So an act creating a medical council and state boards of medical examiners whereby the appointing power of the governor was limited by restricting the choice to a certain class of applicants was valid; In re Registration of Campbell, 197 Pa. 581, 47 Atl. 860; and, since the power of appointment to office is not exclusively an executive prerogative, so was an act making officers of the board of agriculture elective by general assembly; Cunningham v. Sprinkle, 124 N. C. 638, 33 S. E. 138; but the legislature has no power to authorize a state board of auditors to determine the guilt or innocence of a person convicted of crime, as the result of such action would be to constitute such board a court of appeals without any constitutional warrant therefor; Allen v. Board, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. Rep. 573.

The constitutional pardoning power of a governor does not apply to penalties for the violation of municipal ordinances, and consequently a statute authorizing the mayor, with the consent of the aldermen, to remit such penalties, is not invalid as an interference with the pardoning power of the governor; Allen v. McGuire, 100 Miss. 781, 57 South. 217, 38 L. R. A. (N. S.) 196.

The power to make treaties "embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debt; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." 2 Sto. Const. sec. 1508. This power is plenary; Holmes v. Jennison, 14 Pet. (U. S.) 540, 614, 10 L. Ed. 579; U. S. v. Forty-Three Gallons of Whiskey, etc., 93 U. S. 188, 23 L. Ed. 846; it includes removing the disabilities of aliens to inherit; 5 Cal. 381; or enabling them to purchase and hold lands in the United States; Chirac v. Chirac, 2 Wheat. (U. S.) 259, 4 L. Ed. 234.

An important question has frequently arisen as to the effect of this power where legislation was required to give effect to a treaty. "In regard to this, any serious difficulty has been averted by the wisdom and forbearance of the house of representatives;" Miller, Const. U. S. 168. See also *id.* 181, and authorities cited; Pom. Const. L. §§ 676–681; 1 Kent 286; TREATIES.

In the La Abra Mining Case, it was held no interference with the constitutional functions of the president, in connection with matters involved in the relations between this country and Mexico, that provision was made by act of congress for a suit in the court of claims to determine whether there had been fraud in obtaining the award, the amount of which had been paid by Mexico to the United States for the claimants; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

The power of appointment includes nomination and appointment, and the power to commission is distinct, but when the commission is signed and sealed, the legal right of the officer is vested and delivery of the commission is not essential; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; U. S. v. Le Baron, 19 How. (U. S.) 74, 15 L. Ed. 575. See CONSTITUTION OF THE UNITED STATES. The nomination is a recommendation in writing; Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60; 7 Op. Att. Gen. 186; and the senate can only affirm or reject; 3 Op. Att. Gen. 188; congress cannot by law designate the person to fill an office; U. S. v. Ferreira, 13 How. (U. S.) 40, 14 L. Ed. 42.

It was held by Cadwalader, J., in the Case of the District Attorney, 2 Cadw. Cas. 138, 7 Am. L. Reg. (N. S.) 786, Fed. Cas. No. 3,924, that the president cannot make a temporary appointment in a recess, if the senate was in session when or since the vacancy occurred; but Woods, J., held directly *contra* in a case also involving the right to a similar office; In re Farrow, 4 Woods 491, 3 Fed. 112, where he cited the opinions of ten attorney-generals which are treated as authoritative and declared "to outweigh" the opinion of Judge Cadwalader. The latter, however, disputes the statement of an unbroken practice or an acquiescence of the senate and considers the executive opinions to have been based upon erroneous assumptions of both. The two opinions appear to present fully the arguments on each side of the question and no other case has been found except a decision that an original recess appointment cannot be made to fill an office created at the previous session; Schenck v. Peay, 1 Dill. 268, Fed. Cas. No. 12,451, where the opinion of Cadwalader, J., is said to dispense with further argument.

Judge Woods cited the opinions of at least ten attorney-generals, beginning with Wirt and ending with Evarts. Since that time opinions to the same effect have been given by Attorney-General Williams; 14 Opin. 563 (where he said, "So far as this department is concerned, the question is settled"); Stan-

bery, 12 Opin. 32 (where the power of the president to make recess appointments to fill vacancies was said to be "without any limitation as to the time when they first occurred"); Devens, 15 Opin. 207; 16 *id.* 522 (where alone among these opinions is a reference to Judge Cadwalader's decision as the opinion of a single judge of admitted ability, but of a subordinate court and "not of great authority or weight against the opinions cited"); he also, citing Cushing, holds that "may happen" means may *happen to exist;* quoted by Hoyt; 26 Opin. 234; following Devens, as conclusive, is Brewster, 17 Opin. 530; 18 *id.* 29; and Miller, 19 *id.* 261.

Nor can a governor appoint a senator to fill a vacancy which occurred during a previous recess, a session of the senate having intervened. This was determined in the Cases of Johns, Williams and Phelps (1 Cont. El. Cas. 874; 2 *id.* 612 and 613), all of which were cited by Judge Cadwalader as pertinent by reason of the use in both sections of the constitution of the words "may happen" which he interprets as meaning *occur* and not *exist;* and no vacancy can occur in an office until it has once been filled; Ex parte Dodd, 11 Ark. 152; *contra,* State v. Irwin, 5 Nev. 111, where it was held that when a new office is created and no person appointed to fill it, there is a vacancy, and this was the view taken by Attorney-General Miller, who said that a vacancy means that an office exists of which there is no incumbent; 19 Opin. 261.

With respect to state offices it has also been held that a governor cannot make a recess appointment unless the vacancy occurred since the adjournment of the general assembly; People v. Forquer, 1 Breese (Ill.) 104; but where the sittings of the senate are terminated by a long adjournment, it is not "in session," and an appointment by the governor during such adjournment is valid; People v. Fancher, 50 N. Y. 288. Atty. Gen. Knox, however, decided that the president cannot make a recess appointment in a holiday adjournment, and that a recess means the period after the final adjournment of congress; 23 Opin. 599.

Whether a newly created office, not before filled, is a *vacancy,* within the constitutional power of the president to make temporary appointments, is a question upon which courts and attorneys-general have differed. The most reasonable conclusion and that best supported by authority seems to be that it is not; Cooley, Const. Law 104, n. 5; Ordronaux, Const. Leg. 107; and it is said that if the senate is in session when offices are created by law and no appointment is made, no vacancy exists in such sense that the president can appoint during the recess; *id.;* 2 Sto. Const. § 1559; Case of District Attorney of United States, 7 Am. L. Reg. (N. S.) 786, Fed. Cas. No. 3,924; In re Farrow, 3 Fed. 112.

Strictly speaking, an appointment to office is an executive act; Taylor v. Com., 3 J. J. Marsh. (Ky.) 404; 2 Goodn. Comp. Adm. L. 22; but in many cases it has been held that it may be exercised by the legislative power, and this in the absence of negative constitutional limitation is held valid; *id.;* Cooley, Const. Lim. 115, n.; Mayor, etc., of Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; People v. Mahaney, 13 Mich. 481; People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Bridges v. Shallcross, 6 W. Va. 562; *contra,* State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; State v. Kennon, 7 Ohio St. 546; State v. Covington, 29 Ohio St. 102.

See, generally, as to the president's power of appointment and removal, 2 Sto. Const. §§ 1545–1553; Rawle, Const. 166; Sergeant, Const. ch. 29; Miller, Const. U. S. 156; Pom. Const. L. §§ 642–651.

Among the executive powers of first importance vested in the president is the management of foreign affairs, including the treaty power, to be exercised with the consent of the senate, and the power to appoint and receive foreign ministers, both of which are expressed in the constitution.

A question much discussed prior to the war with Spain is whether the recognition of a foreign revolutionary government is a matter entrusted, under the constitution, to the discretion of the president acting alone, or whether it is vested in congress, or requires the joint action of both of the political departments of the government. It has been contended on the one hand that this power "rests exclusively with the executive," and that, "a resolution on the subject by the senate or by the house, by both bodies or by one, whether concurrent or joint, is inoperative as legislation, and is important only as advice of great weight voluntarily tendered to the executive regarding the manner in which he shall exercise his constitutional functions."

Such is the view said to have been expressed by Secretary Olney in a public statement, which, although not an official document, was generally accepted as a fit expression of the opinion of those who take the extreme view of the prerogative of the executive on this subject. The occasion of this utterance was a unanimous report of the Committee on Foreign Affairs of the Senate, recommending the passage of a joint resolution, "That the independence of the Republic of Cuba be, and the same is, hereby acknowledged by the United States of America."

This precise view was maintained by Secretary Seward in an instruction to Minister Dayton, *infra.*

The opposite opinion is based upon the idea that, because the constitution vests in congress the power to declare war (which is liable to be a consequence of the recognition of a new government) not only is the action of that body necessary, but it is the proper department of the government to act in such

case. At least it is contended that congress has the power to act even if its power is not exclusive.

The argument in favor of the absolute and exclusive control of the subject by congress is substantially this: The recognition of the independence of a people is from its very nature the creation of obligations arising from international law, and therefore must belong to the law-making power; it is also a supreme act of sovereignty and must be done by that department of the government in which the national sovereignty resides. Under the constitution, congress is invested with almost all the prerogatives of sovereignty, the only one granted to the president being the pardoning power, and even that is denied in cases of impeachment. The power in question is not directly granted to the president; therefore, is not one of his functions unless necessary to the full and proper exercise of some power directly granted to him or inherent in the office. His general inherent function is to *execute the laws*, to which this power of recognition has no relation, unless it be exercised in pursuance of law. The only expressed power from which it is sought to imply this far-reaching authority is that of receiving ambassadors and ministers, and that, it is urged, is simply a ceremonial duty, imposed upon him as the medium through which the government communicates with foreign governments. As the power of receiving ambassadors and ministers can be exercised pursuant to the direction of congress in doubtful cases, the power to determine the existence or independence of a nation is not necessarily involved in the constitutional grant of power to receive ambassadors, etc. If this power is vested in the executive, it is unlimited and involves the authority, so far as this government is concerned, to alter the map of the world, change the relation of this government to other governments, and involve the country in war. That such uncontrolled executive power over foreign relations was intended, it is contended, cannot be reconciled with the fact that the president cannot declare war, or make a treaty, or appoint an ambassador or consul without the consent of the senate.

The argument from this point of view is very forcibly stated in a speech by Senator Bacon, Jan. 13, 1897, in the United States senate, made expressly to take issue with the position taken by Secretary Olney, *supra*.

A third view, as stated in the preliminary statement of the question in the Hale memorandum, is that, under the constitution and according to precedent,

"the recognition of the independence of a new foreign power is an act of the executive (president alone, or president and senate), and not of the legislative branch of the government, although the executive branch may properly first consult the legislative. While the legislative branch of the government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature (and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign power, it is most advisable as well as proper for the executive first to consult the legislative branch as to its wishes and postpone its own action if not assured of legislative approval." Cong. Rec. 54th Cong. 2d Sess. 663.

The basis of the argument in favor of legislative participation in such action is mainly the power to declare war and, as particularly urged by Mr. Clay, as quoted in the Hale memorandum (*id.* 681), the power to regulate commerce. The argument in favor of exclusive executive power is found in the general control of foreign relations, as to which the only expressed powers are to "make treaties" and to "receive ambassadors and other ministers." The argument of greater force in favor of executive control is, however, not that the power in question is included in the specific powers named but that it is a part of the general grant of executive power; that all duties in connection with foreign relations, not otherwise specified, are placed upon the executive, and that the two powers enumerated are merely illustrative and not exclusive. This third view is thus stated in a memorandum submitted to the United States senate by Senator Hale in connection with resolutions pending for the recognition of Cuba, and printed as Ex. Doc. No. 56, 2d Sess. 54th Cong.

"It is in the light of this conception of the executive character of foreign negotiations and acts concerning foreign relations that our constitution gave the president power to send and receive ministers and agents to or from any country he sees fit, and when he sees fit, and not to send or receive any, as he may think best. Also, the power to make treaties; that is, to negotiate with or without agents, as he may prefer, when he may prefer, or not at all, if he prefer; to draw up such articles as may suit him; and to ratify the acts of his plenipotentiaries, instructed by him, the only qualification of his power being the advice and consent of the states in the senate to the treaty he makes. These grants confirm the executive character of the proceedings, and indicate an intent to give all the power to the president, which the federal government itself was to possess—the general control of foreign relations.

At the time of the presentation to the senate of the Hale memorandum, Senator Hoar, after remarking that it was not the time for full debate, said:

"Therefore, I wish to bring out distinctly, if I can, by a question to the senator from Maine, whether, in his researches into the history of this country for a hundred years, in which we must have recognized foreign governments more than a hundred times, taking all the numbers of the governments of the world and their political changes and revolutions which have established new governments—

"Mr. HALE. Over a hundred.

"Mr. HOAR. There must be over a hundred cases, as the senator says. Is there a single instance where in fact our relations with the foreign country have not been determined by the act of recognition by the president of the United States and without congress? Has there been a single one?

"Mr. HALE. As the result of some considerable, and what I have tried to make faithful, examination of the subject and of what others have done

for me, I answer the senator from Massachusetts that I do not find one.

"Mr. ALLEN. As this question is very important and going out to the country to be criticised, I ask the senator from Maine whether he will not state to the senate whether he finds any instance in the history of this country where the question of independency was determined to belong to the executive department exclusively?

"Mr. HALE. In every one of the cases that have been referred to by the senator from Massachusetts (Mr. Hoar) the recognition was made by the executive department, acted upon, submitted to, and not questioned." Cong. Rec. 54th Cong., 2nd Sess. 682.

The extent of executive control of foreign relations was the subject of an extended debate in congress in 1796, upon a resolution calling upon the president for details of the negotiations leading up to the Jay treaty with England, the exact question, however, being the effect of a treaty when negotiated. See TREATY.

With respect to the express power of the executive to make treaties, that is shared with the senate and there is no precedent for the primary act of recognition of a new foreign state, by the joint action of president and senate under the treaty-making power. As to the power to "receive ambassadors and other ministers," though it was much debated as giving the president too much power, the only comments on it in the Federalist are the following:

"This, though it has been a rich theme of declamation, is more a matter of dignity than of authority. It is a circumstance which will be without consequence in the administration of the Government; and it was far more convenient that it should be arranged in this manner, than that there should be necessity for convening the legislature, or one of its branches, upon every arrival of a foreign minister; though it were merely to take the place of a departed predecessor." Federalist, No. 69, p. 326.

"Except some cavils about the power of . . . receiving ambassadors, no objection has been made to this class of authorities; nor could they possibly admit of any. . . . As to the reception of ambassadors, what I have said in a former paper will furnish a sufficient anwer." *id.* No. 77, p. 362.

The executive can alone appoint a diplomatic representative to a new government, but to do this there is required congressional action to provide for the payment of his salary, and it might be an inference from the practice of the government that the creation of an office, either directly or by provision for compensation to its incumbent, is a prerequisite to the appointment of a person to exercise any public functions. It has been argued, on the other hand, that such an officer, appointed by the president and senate, and his position as an officer having been established, might serve gratuitously or be paid out of the contingent fund. It would seem, however, that it might be urged with more force that merely from an appointment authorized by the constitution, there would arise an obligation to provide compensation, of the same character as those created in many cases without the direct action of congress, notably under the power to make a treaty *(q. v.)*.

In 1798 a discussion arose as to this power, in which was considered the possible clashing between the appointing power of the president and the appropriating financial power of congress. In the course of debate Mr. Otis concluded his remarks with some observations not less pertinent to the present question than to that to which they were addressed: "It was owing to the apparent contradictions arising from a theoretical view of constitutions like ours that they were pronounced to be impracticable by some of the best writers of antiquity. And these abstract questions and extreme cases were not calculated to reconcile the minds of our citizens to our excellent form of government. It is a plain and conclusive reply, by which all such objections are obviated, that the constitution is not predicated upon a presumed abuse of power by any department, but on the more reasonable confidence that each will perform its duty within its own sphere with sincerity, that division of sentiment will yield to reason and explanation, and that extreme cases are not likely to happen."

And Attorney-General Cushing objected to an act in which it was provided that the president "shall" appoint a consul at Port au Prince, that it involved the diplomatic recognition of the Haytien empire, which rested entirely within the discretion of the president. 7 Op. Attys. Gen. 242.

Turning to the *precedents*, the right to recognize a foreign power was first discussed in 1818 with reference to the South American republics. The matter first came up on an appropriation to pay a minister, which was defeated, after a debate, in which Mr. Clay maintained that recognition might be either by the president in receiving or sending a minister, or by congress under the commerce clause; and the relation of the two powers of government to the subject was much considered; Ann. of Cong. (1818), pp. 1468-1608-1655. The subject was at this time much discussed both in congress and between the president and individual members, so much so that Mr. Adams, the secretary of state, in his memoirs, mentions jocular remarks made in the cabinet in that connection about the power of impeachment; 4 Memoirs, J. Q. Adams 204-206. Subsequently the subject was revived in the house and various resolutions were considered, with the result of a request for information from the president, which was responded to by the message of March 8, 1822, in which he said it was his duty to invite the attention of congress to a very important subject, and to communicate the sentiments of the executive on it; that, should congress entertain other sentiments, then there might be such co-operation between the two departments of the government as their respective rights and duties might require. And after stating that in his judgment the time had come to recognize the republics, he said: "Should congress concur in the view herein presented, they will doubtless see the propriety of making the necessary appropriations for carrying it into effect.' The house then resolved that it "concur in the opinion expressed by the president in his message of the 8th of March, 1822, that the late American provinces of Spain which have declared their independence and are in the enjoyment of it, ought to be recognized by the United States as independent nations," and directed an appropriation "to enable the President of the United States to give due effect to such recognition." The Hale memorandum concludes a review of this matter with a protest against the conclusion which has been drawn that President Monroe, after all the discussion, had admitted the power of recognition in congress, but concedes that he did acknowledge "the importance of consulting the legislative branch when a step was about to be taken whose expediency might be doubted, and which would necessarily result in a request for appropriations."

In June, 1836, in reporting a resolution declaring that the independence of Texas ought to be recognized, the committee on foreign affairs of the senate

made a report in which it was said: "The recognition of Texas as an independent power may be made by the United States in various ways: First, by treaty; second, by the passage of a law regulating commercial intercourse between the two powers; third, by sending a diplomatic agent to Texas with the usual credentials; or, lastly, by the executive receiving and accrediting a diplomatic representative from Texas, which would be a recognition as far as the executive only is competent to make it. . . . The President of the United States, by the constitution, has the charge of their foreign intercourse. Regularly he ought to take the initiative in the acknowledgment of the independence of any new power, but in this case he has not yet done it, for reasons which he, without doubt, deems sufficient. If in any instance the president should be tardy, he may be quickened in the exercise of his power by the expression of the opinion, or by other acts, of one or both branches of congress, as was done in relation to the republics formed out of Spanish America." Quoted in Senate Report, No. 1160, 54th Cong. 2d Sess.

President Jackson, in his message of Dec. 21, 1836, after referring to the resolution, said that there had never been any deliberate inquiry as to where belonged the power of recognizing a new state,—a power in some instances equivalent to a declaration of war, and nowhere expressly given, but only as it is implied from some of the great powers given to congress or in that given to the president to make treaties and receive and appoint ministers. Then he continues: "In the preamble to the resolution of the house of representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the executive, either apart from or in conjunction with the senate, over the subject. It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the executive and the legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the constitution and most safe that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to congress, which represents in one of its branches the states of this Union, and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted."

As to this message the Hale memorandum, which, it is to be remembered, is an argument for the absolute and unqualified *power* of the executive (but modified only by what might be termed a moral *duty* to consult congress in extreme cases) remarks:

"President Jackson plainly was of the opinion that, in a doubtful case, when international complications might be involved, the president should not recognize a revolutionary government without the assent of congress. His language is so carefully guarded that no inference can be made with entire confidence as to the proper course if the executive were strongly of the opinion that facts justifying the recognition of independence did not exist."

With respect to other expressions on this subject from the executive department of the government, Secretary Seward wrote to Minister Dayton, April 7, 1864: "The question of recognition of foreign revolutionary or reactionary governments is one exclusively for the executive, and cannot be determined internationally by congressional action." This had reference to the action of the house of representatives, which had unanimously adopted a resolution protesting against the establishment of an empire in Mexico under Maximilian. The senate did not act on it. The French government asked an explanation, and the secretary of state, using the expression quoted, said that a vote of the house or the senate could neither coerce the executive to modify its policy nor deprive it of its freedom of action. In Dec., 1864, the house by a large majority affirmed their right to advise on questions of foreign policy; but, as was remarked by an intelligent foreign writer, this declaration does not appear to have had any influence on the course of the administration. Chambrun, Exec. Pow. in the U. S. 101.

On the other hand, Secretary Clayton, writing to Mr. Mann, a special agent to investigate the Hungarian insurrection, says: "Should the new government prove to be, in your opinion, firm and stable, the president will cheerfully recommend to congress, at their next session, the recognition of Hungary; and you might intimate, if you should see fit, that the president would in that event be gratified to receive a diplomatic agent from Hungary in the United States by or before the next meeting of congress, and that he entertains no doubt whatever that in case her new government should prove to be firm and stable, her independence would be speedily recognized by that enlightened body." In his Digest of International Law, from which the foregoing is quoted, Dr. Wharton concludes his statement of precedents on this subject as follows: "As to this it is to be remarked that while Mr. Webster, who shortly afterwards, on the death of President Taylor, became secretary of state, sustained the sending of Mr. Mann as an agent of inquiry, he was silent as to this paragraph, and suggests, at the utmost, only a probable congressional recognition in case the new government should prove to be firm and stable. In making congress the arbiter, President Taylor followed the precedent of President Jackson, who, on March 3, 1837, signed a resolution of congress for the recognition of the independence of Texas. The recognition, however, by the United States, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American states who have from time to time declared themselves independent of prior governments, has been primarily by the executive, and such also has been the case in respect to the recognition of the successive revolutionary governments of France.

The conclusion of the extended discussion of Cuban affairs, which covered the subject of the recognition of a new government in a foreign state and intervention in its affairs, was reached in 1898 when President McKinley sent a special message dated April 11, recommending intervention and stating the grounds on which he did so. And on April 20 congress passed a joint resolution declaring that the people of Cuba were free and independent, and demanding that the government of Spain relinquish its authority and government in the island, and authorizing the president to use the entire land and naval forces of the United States to carry the resolutions into effect. There was also a disclaimer of any purpose to exercise sovereignty or control over the island except for its pacification. The result was that diplomatic relations between this country and Spain were immediately broken off and war followed. 6 Moore Int. L. Dig. Sec. 909.

The action of our government in this case does not bear upon the direct question as to which department of the government is directly charged with the recognition of new states, except that it shows that President McKinley acted in accordance with the views, already cited, of his predecessors, Presidents Monroe and Jackson, in consult-

ing congress and securing its joint action in a case which was likely to result in war.

Since the settlement of the affairs of Cuba, it is believed that the question of executive power with relation to new or insurrectionary governments has not been raised or discussed.

In 1899, a revolutionary government having been established in Venezuela, the United States minister was authorized by the department of state to recognize it, and, when he had done so, his action was approved; 1 Moore, Int. L. Dig. sec. 52. In the same year similar action was taken with respect to a successful insurrection in Bolivia; *id.* sec. 53.

Early in 1911, a revolution occurred in Portugal which resulted in the abdication of the king and the proclamation of a republic. On the 6th of June, 1911, the American minister in Lisbon was instructed, as soon as the constituent assembly, which was to meet on the 19th of June, should have expressed the voice of the people and settled upon the form of government to be adopted by Portugal, to inform the minister of foreign affairs of its official recognition by the government of the United States. The minister was to do this, if possible, on the day on which the constituent assembly took definite and final action.

On the following day, the American minister was explicitly instructed that the government of the United States desired to recognize the republic of Portugal as soon as it should be officially proclaimed by the constituent assembly, without awaiting the choice of a president or the adoption of a constitution. On June 19, the constituent assembly met and definitely proclaimed the republic. On the same day the diplomatic representative of the United States handed to the minister of foreign affairs a note stating that the government of the Portuguese republic was on that day officially recognized by the government of the United States.

It may be remarked that the republic of Portugal had previously been recognized by Switzerland.

Late in the same year there occurred a revolution in China which resulted in the establishment by the insurgent military leaders in the various Yangtze provinces and in southern China, of a cabinet form of government with headquarters at Nanking, and an assembly convoked in that city, which on December 29, 1911, elected a provisional president of the republic of China, who was inaugurated as such on New Year's day. On February 12, 1912, the throne abdicated in favor of a republic and conferred full power to organize such a government on Yuan Shih-kai, who three days later was elected by the Nanking assembly provisional president. The resignation of the provisional president and his cabinet was accepted to take effect on the inauguration of Yuan, which occurred at Peking March 10, 1912. The provisional government meanwhile had notified the American minister that the Chinese minister in the United States would continue in the discharge of his functions as "provisional diplomatic agent." On March 10, the date of the inauguration, a provisional constitution, previously approved by the Peking authorities, was adopted by the Nanking assembly, under which it was provided that within ten months the provisional president should convene a representative national assembly to adopt a permanent constitution and elect a president.

President Taft in his annual message of December, 1912, announced to congress the course of events in China and stated that the United States was, according to precedent, maintaining full and friendly *de facto* relations with the provisional government.

On April 6, 1913, the American diplomatic representative at Peking was instructed that upon the convening of the national assembly with a quorum, organized for business by the election of officers, he should communicate to the president of China as coming from the president of the United States a message recognizing the new government and welcoming the new China into the family of nations. This message of the president of the United States was delivered on May 2, and on the same day the new president, Yuan Shih-kai, sent an appreciative message to the president of the United States acknowledging his greeting and thanking him for his sentiments of amity and good will.

Meanwhile none of the European governments had recognized the Chinese republic.

The courts have frequently had occasion to determine whether the independence of a foreign country should be recognized as existing for the purpose of the pending case, but not to pass upon the question of power as between the executive and legislative departments. In an early case Marshall, C. J., said that before a nation

"could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." U. S. v. Hutchings, 2 Wh. Cr. Cas. (N. Y.) 543, Fed. Cas. No. 15,429.

A little later, on certificate of division, the supreme court had before it the direct question of the rights of a revolting colony, or portion of a nation which has declared its independence. The case was the trial for piracy of one of the revolutionary subjects.

Marshall, C. J., speaking for the court, said:

"Those questions which respect the rights of a part of a foreign empire, which asserts and is contending for its independence, and the conduct which must be observed by the courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult . . .

Such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations, than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it." The certificate of opinion was ". . . The court is further of opinion that when a civil war rages in a foreign nation, a part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." U. S. v. Palmer, 3 Wheat. (U. S.) 610, 4 L. Ed. 471.

In a case involving the question of the right of citizens of the United States to the use of the seal fisheries at the Falkland Islands claimed by Buenos Ayres, Williams v. Ins. Co., 3 Sumn. 270, 273, Fed. Cas. No. 17,738, Mr. Justice Story said,

"It is very clear that it belongs exclusively to the executive department of our government to recognize from time to time any new governments which may arise in the political revolutions of the world; and until such new governments are so recognized they cannot be admitted by our courts of justice to have or to exercise the common rights and prerogatives of sovereignty."

He adds that "this doctrine was fully recognized by the supreme court" in Gelston v. Hoyt; which was one of those cases cited *infra* in which the court had referred to the recognition of independence, by the "government." On appeal from Judge Story's decision the supreme court held that the action, of the executive department of the government, on the question to whom the sovereignty of the islands belonged was binding and conclusive on the courts, and it was enough that in the exercise of his constitutional functions the president had decided that question; Williams v. Ins. Co., 13 Pet. (U. S.) 417, 420, 10 L. Ed. 226. In several cases the court has said that the question of the recognition of belligerency or independence is one for the *government* of the United States; The Divina Pastora, 4 Wheat. (U. S.) 52, 4 L. Ed. 512; The Nueva Anna, 6 Wheat. (U. S.) 193, 5 L. Ed. 239; Gelston v. Hoyt, 3 Wheat. (U. S.) 324, 4 L. Ed. 381; Rose v. Himely, 4 Cra. (U. S.) 241, 272, 2 L. Ed. 608; and again congress and the president are referred to as "those departments" having the control of such matters; U. S. v. Lynde, 11 Wall. (U. S.) 632, 638, 20 L. Ed. 230. On a bill to enforce an agreement the validity of which turned on the question whether at its date Texas was, or was not, independent, Taney, C. J., said that "was a question for that part of our government which is charged with our foreign relations," and it was held that the court could not inquire whether it had not in fact become an independent sovereign state before its recognition as such by the treaty-making power; Kennett v. Chambers, 14 How. (U. S.) 38, 51, 14 L. Ed. 316.

In the Prize Cases, 2 Black (U. S.) 635, 17 L. Ed. 459, much later than any of those above cited (relating not to foreign but to domestic relations, and therefore not strictly applicable), this language is used:

"As in the case of an insurrection, the President must, in the absence of congressional action, determine what degree of force the crisis demands, and as in political matters the courts must be governed by the decisions and acts of the political department to which this power is entrusted, the proclamation of blockade by the president is of itself conclusive evidence that a state of war existed which demanded and authorized recourse to such a measure."

In this case, the court terms the executive the political department of the government, and in a later case it so designates congress; U. S. v. Yorba, 1 Wall. (U. S.) 412, 17 L. Ed. 635. More recently in a case in which the president was authorized, by act of congress, to declare that a guano island belonged to the United States, the court said:

"Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government;" Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

With reference to the status of the revolutionary party of Chile, the circuit court of appeals said that it was to be regarded by the courts as determined by the executive department of the United States; The Itata, 56 Fed. 505, 5 C. C. A. 608; affirming U. S. v. Trumbull, 48 Fed. 99.

The earliest reference to this subject by a text-writer is by Rawle, who says:

"The power of receiving foreign ambassadors carries with it, among other things, the right of judging in the case of a revolution in a foreign country, whether the new ruler ought to be recognized. The legislature, indeed, possesses a superior power, and may declare its dissent from the executive recognition or refusal, but until their sense is declared, the act of the executive is binding. The judicial power can take no notice of a new government, until one or the other of those two departments has acted on it. Circumstances may render the decision of great importance to the interests and peace of the country. A precipitate acknowledgment of the independence of part of a foreign nation, separating itself from its former head, may provoke the resentment of the latter; a refusal to do so may disgust the former, and prevent the attainment of amity and commerce with them if they succeed. The principle on which the separation takes place must also be taken into consideration, and if they are conformable to those which led to our own independence, and appear likely to be preserved, a strong impulse will arise in favor of recognition. . . . The power of congress on this subject cannot be controlled; they may, if they think proper, acknowledge a small and helpless community, though with a certainty of drawing war upon our country; but greater circumspection is required from the president, who, not having the constitutional power to declare war, ought ever to abstain from a measure likely to produce it." Rawle, Const. 195.

A little later Story wrote:

"The exercise of this prerogative of acknowledging new nations or ministers is, therefore, under such circumstances, an executive function of great delicacy, which requires the utmost caution and deliberation. . . . If such recognition is made, it is conclusive upon the nation, unless indeed, it can be reversed by an act of congress repudiating it. If,

on the other hand, such recognition has been refused by the executive, it is said that congress may, notwithstanding, solemnly acknowledge the sovereignty of the nation or party (citing Rawle). These, however, are propositions which have hitherto remained as abstract statements under the constitution, and therefore can be propounded, not as absolutely true, but as still open to discussion if they should ever arise in the course of our foreign diplomacy. The constitution has expressly invested the executive with power to receive ambassadors and other ministers. It has not expressly invested congress with the power either to repudiate or acknowledge them." 2 Sto. Const. § 1566.

In connection with this treatment of the subject is to be considered the judicial utterance of Judge Story, before cited from Williams v. Ins. Co., 3 Sumn. 270, Fed. Cas. No. 17,738. Pomeroy is also cited in Senator Hale's memorandum as an authority in favor of the exclusive executive control, which he does assert strongly with reference to foreign relations, and the treaty-making power in general, but he does not discuss the particular question under consideration; while he enforces with great earnestness the necessity of harmonious action of congress and the executive, and of their co-operation in giving due effect to the powers confided to each; Pom. Const. Law § 675.

Dr. Wharton, in his Digest of International Law, in discussing the subject of the recognition of various revolutionary governments, entitles section vii. of chap. iii., vol. 1, thus: "Such recognition determinable by executive," thus implying the opinion that the right rests with the executive alone. The author states the proposition embodied in his caption more fully thus:

"In political matters the courts follow the department of the government to which those matters may be committed, and will not recognize the existence of a new government until it has been recognized by the executive." Most of the cases, however, which are cited by him under this caption are among the authorities upon the proposition already noted, that it is not a matter for the judicial department of the government, but that the courts will not take cognizance of the existence of a new government until it has been recognized by the *political* department of the government, without discriminating between the executive and legislative branches of the government.

From an examination of all the decisions touching this question by the judicial department, no precise principle can be deduced unless it be that the references to it rest upon an assumption of entire harmony of action between the executive and legislative departments. And the fact that the direct issue arising from the claim of exclusive control by one of those two departments has not heretofore been made, will readily account for the absence of direct judicial authority or authoritative expression of opinion by text-writers. The duties and powers of what the supreme court frequently terms the political departments are so closely interwoven that it is unlikely that such an issue will be sharply drawn. Every approach to it hitherto has resulted, after discussion, in the recognition by congress of the right of the executive to full control of foreign relations and to the initiative in the practical recognition of a new foreign power, and, on the other hand, by a prudent disposition on the part of the executive not to act in a doubtful case or one likely to create a *casus belli* without ascertaining the disposition of congress. This has been simply the application to this particular subject of the principle of mutual recognition of the distribution of powers, and at the same time, the interdependence of the executive and congress which, with the prudent reserve of the judiciary in keeping closely within the limits of its own sphere, has enabled the government to avoid the dangers of mere theoretical construction alluded to by Otis in the quotation made from his remarks upon the subject. The undoubted constitutional powers of both departments bearing upon the question make harmony of action as necessary in dealing with this subject as with most, if not all, of the ordinary details of the government. While the president may undoubtedly recognize a foreign government, as has frequently been done, such action, if it involved war, would still require the action of congress to make it effective, and doubtless the precedents established by Presidents Jackson and Monroe, neither of whom was indifferent to the respect due to his office, will always have very great, if not controlling, weight. Again, the question recently raised of the right of congress by independent action and against the views of the president, to recognize the independence of a new nation, is more likely to be met hereafter, as heretofore, in the spirit of co-operation and full recognition of the executive control of foreign relations than to be asserted, to the extent of making a direct issue, as it would need to be by a majority of two-thirds of each house.

The United States government has always held, and, on occasion, exercised, the right in case of disturbances of the peace, either general or local in foreign countries, to land forces and adopt all necessary measures to protect the life and property of our citizens, whenever menaced by lawless acts, which the general or local authority is unwilling or impotent to prevent. This power has always been exercised by the executive department of the government. The power was asserted in a dispatch of Mr Toucey, secretary of the navy, to Captain Jarvis, U. S. N., March 13, 1860, with reference to the unsettled state of affairs in Mexico; by Mr. Adee, acting secretary of state to the Korean minister, July 8, 1895, with reference to the affairs in Korea; by President McKinley in his annual message of Dec. 5, 1899, with reference to disturbances in China, and the power was also asserted with reference to disturbances in that country, by Mr. Hill, acting secretary of state to the secretary of the navy, Sept. 11, 1900; and by a dispatch

from Mr. Merry, United States minister to Nicaragua, Feb. 27, 1899, with reference to disturbances in that country and the landing of American and English forces. See 2 Moore, Int. L. Dig. 400–402.

Executive officers, including the president, are required to execute the laws as enacted by the legislature or congress, and can in no case nullify them by refusing to execute them so long as their unconstitutionality or invalidity has not been judicially established, for, until this is done, the constitutionality is presumed, and in the judicial power alone resides the power to decide as to the validity of a statute; Pom. Const. L. secs. 148, 662–668; Martin v. Hunter, 1 Wheat. (U. S.) 304, 4 L. Ed. 97; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. Ed. 257; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169.

The question whether an executive officer has, under any circumstances, the right to question the constitutionality of an act of congress, and to make this decision the basis of acting upon claims to be passed upon by him, was the subject of consideration and extended discussion in the sugar bounty case lately pending before the comptroller of the treasury. It was contended on the one hand that every law must be considered valid until declared otherwise by the supreme court, and that although the comptroller is an independent officer, and not a mere subordinate of the secretary of the treasury or the president, such an exercise of jurisdiction would be a dangerous usurpation by an executive officer of judicial authority, which is confided by the constitution exclusively to the courts. On the other hand, it was urged that the constitution is the supreme law, and that an executive officer is responsible for a wrongful act under an unconstitutional statute. It was replied that his responsibility is political. The claim was disallowed by the comptroller upon the ground that the act was unconstitutional and the case sent to the court of claims under the authority of U. S. Rev. Stat. § 1065. The act in question had been held unconstitutional, but not by the court of last resort; U. S. v. Carlisle, 5 App. D. C. 138. Subsequently the act was held to be constitutional by the supreme court, but the question of the power of the comptroller was not determined; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215. This decision of the comptroller and the questions involved have been elaborately discussed by Mr. Black, the writer on constitutional law, who, after an examination of the authorities, reaches the conclusion that the power of an executive officer to judge of the constitutionality of a statute (in advance of a determination by the courts) is confined to cases in which it is necessary for the regulation of his own conduct, and that where the rights of others are involved he must enforce the law; 29 Am. L. Rev. 801. See also 11 Op. Atty. Gen. 214; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; U. S. v. Kaufman, 96 U. S. 567, 24 L. Ed. 792; U. S. v. Bank, 104 U. S. 728, 26 L. Ed. 908; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Huntington v. Worthen, 120 U. S. 102, 7 Sup. Ct. 469, 30 L. Ed. 588.

The same principle is applied in the state governments. In a recent case in Louisiana it was held that the executive officers of the state government have no authority to decline the performance of purely ministerial duties imposed upon them by a statute, on the ground that it is unconstitutional. An executive officer cannot nullify a law by neglecting or refusing to act under it; State v. Heard, 47 La. Ann. 1679, 18 South. 746, 47 L. R. A. 512.

The so-called war powers of the executive, so much discussed during the Civil War, do not now present a practical subject for discussion, and may be passed, with this quotation from a judicious writer on the subject:

"During our Civil War, many powers were claimed and exercised by the president under a stringency of circumstances for which no provision had been made in the constitution. Secession being the outgrowth of the doctrine of states governed by compact and not by law, it became necessary, in the complication growing out of the war, whether in the form of military occupancy and blockade, legislative reconstruction, or judicial protection of persons and property in the seceded states, to find by implication, in the executive department, certain war powers not hitherto contemplated and never before invoked. While the general results of their exercise doubtless contributed to the restoration of the Union, and the re-establishment of the government of the United States over all its territory, these powers were so far anomalous in their assumption as to afford no justifiable precedents for the government of the executive, in the ordinary circumstances of our federal administration. A formal discussion of their scope and application has accordingly been omitted, because they present exceptions in the body of our constitutional legislation that are never again likely to be repeated." Ordronaux, Const. Leg. 109. See Whiting, War Powers under the Constitution; Campbell, Collection of Pamphlets on *Habeas Corpus*, Martial Law, etc.

The president is not responsible to the courts, civil or criminal; Durand v. Hollins, 4 Blatchf. 451, Fed. Cas. No. 4,186; nor are his acts reviewable by them to the extent of bringing them into conflict with him; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; except that they may declare void an order or regulation in excess of his powers; U. S. v. The Franklin, 1 Gall. 137, Fed. Cas. No. 10,585; 9 Am. Law Reg. 524; but with respect to all of his political functions growing out of the foreign relations, the control of military officers, and his relations with congress, it is settled that the courts have no control whatever; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 20, 8 L. Ed. 25; Luther v. Borden, 7 How. (U. S.) 1, 12 L. Ed. 581; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; 1 Goodn. Comp. Adm. L. 34, 73; Pom. Const. L. § 633. See also 1 Ves. 467; 1 Ves. Jr. 375; 2 *id.* 56.

All the acts of the president by which his political powers are exercised are considered equally political, and are only brought within the scope of judicial examination where the act of some inferior ministerial officer, who is the direct instrument for exercising the executive function, is submitted to the scrutiny of the courts. This usually occurs where the constitutionality of a law is questioned by the judicial examination of the act of some officer who has attempted to carry the law into execution. In such a case there is not a direct judicial examination of the president's acts, or those of his subordinates, but merely the determination of the question whether there is a valid law; *id.* 419; Marbury v. Madison, 1 Cranch (U. S.) 137, 2 L. Ed. 60; Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437; Pom. Const. Law § 633.

So, as a necessary incident of the power to perform his executive duties, must be included freedom from any obstruction or impediments; accordingly, the president cannot be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability; 2 Sto. Const. § 1569.

Whether in any case a court may issue a mandamus to the governor of a state is a question on which the decisions are not uniform. In some states it is held that, although conceding the independence of the executive from the control of the judiciary with respect to political duties and powers, as to ministerial duties imposed upon the executive, which might have been committed to another officer, the writ may be resorted to; Cotten v. Ellis, 52 N. C. 545; State v. Chase, 5 Ohio St. 528; Harpending v. Haight, 39 Cal. 189, 2 Am. Rep. 432; Groome v. Gwinn, 43 Md. 572; Greenwood Cemetery Land Co. v. Routt, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284; Tennessee & C. R. Co. v. Moore, 36 Ala. 371; State v. Thayer, 31 Neb. 82, 47 N. W. 704; Chumasero v. Potts, 2 Mont. 242; Martin v. Ingham, 38 Kan. 641, 17 Pac. 162. But the weight of authority would seem to be in favor of the contrary opinion; In re Dennett, 32 Me. 508, 54 Am. Dec. 602; Mauran v. Smith, 8 R. I. 192, 5 Am. Rep. 564; People v. Cullum, 100 Ill. 472; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; Hovey v. State, 127 Ind. 588, 27 N. E. 175, 11 L. R. A. 763, 22 Am. St. Rep. 663; State v. Governor, 25 N. J. L. 331; State v. Towns, 8 Ga. 360; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; Hawkins v. Governor, 1 Ark. 571, 33 Am. Dec. 346; People v. Governor, 29 Mich. 320, 18 Am. Rep. 89; State v. Drew, 17 Fla. 67; State v. Warmoth, 22 La. Ann. 1, 2 Am. Rep. 712; Rice v. Austin, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330; Vicksburg & M. R. Co. v. Lowry, 61 Miss. 102, 48 Am. Rep. 76.

In some cases it is held that the courts have no power, "in the absence of express constitutional provisions, to control the action of the governor, or to compel him by mandamus to perform any duty either political or municipal, and whether commanded by the constitution or by law"; State v. Stone, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705; State v. Huston, 27 Okl. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380; but the mayor of a city is not such an executive officer as is exempt from judicial control; State v. Noonan, 59 Mo. App. 524.

As to other executive officers, such as secretary of state, treasurer, auditor, and the like, though some conflict exists, the better-considered doctrine, and that supported by the great weight of authority, is properly said to be that courts will apply the general principle of law and issue the writ in the case of purely ministerial acts; High, Ext. Leg. Rem. §§ 124*a*–126, where the cases are collected.

The same principle is applied to determine how far the courts will interfere in like manner with the heads of executive departments, or bureaus thereof, of the federal government. If the act is purely ministerial the writ will issue; Kendall v. U. S., 12 Pet. (U. S.) 524, 9 L. Ed. 1181; Ballinger v. U. S., 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464; Garfield v. U. S., 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168; U. S. v. Bayard, 16 D. C. 428; but it must be an act not growing out of the inherent powers of the officer; U. S. v. Guthrie, 17 How. (U. S.) 284, 15 L. Ed. 102; and in no case where the act involves the exercise of discretion will the court interfere; Holloway v. Whiteley, 4 Wall. (U. S.) 522, 18 L. Ed. 335; Secretary v. McGarrahan, 9 Wall. (U. S.) 298, 19 L. Ed. 579; Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677; U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354; U. S. v. Blaine, 139 U. S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183; U. S. v. Lamont, 155 U. S. 303, 15 Sup. Ct. 97, 39 L. Ed. 160; and findings of fact by an executive officer are conclusive in the absence of palpable error; Central Trust Co. v. Trust Co., 216 U. S. 251, 30 Sup. Ct. 341, 54 L. Ed. 469, 17 Ann. Cas. 1066.

See, generally, Desty; Rawle; Story; Miller; Black, Constitution; Sergeant; Sedgwick, Const. Law; Thayer, Cas. Const. L.; Cooley, Const. Lim.; Elliot's Debates; Elmes, Executive Departments; Kent, Com. Lect. XIII.; Stubbs, Const. Hist. Eng.; Todd, Parl. Gov. in Eng.; Lowell, Gov't of England; Von Holst, Hist. U. S.; Whiting, War Powers; Ordronaux, Const. Leg. 99–110; Goodnow, Comp. Adm. Law; Bryce, Am. Com.; Chambrun, Executive Power in the U. S.; Fisher, Evolution of the Const.; Stevens, Sources

Const. U. S.; Wilson, Legislative Government; Farrand; Willoughby; Watson; Dicey, Constitution; JUDICIAL POWER; LEGISLATIVE POWER; PRESIDENT OF THE UNITED STATES.

EXECUTOR DE SON TORT. One who attempts to act as executor without lawful authority.

A person who, without any authority, intermeddles with the estate of a decedent and does such acts as properly belong to the office of executor or administrator, thereby becoming a sort of *quasi* executor, though only for the purpose of being sued or made liable for the assets with which he has intermeddled. Grace v. Seibert, 235 Ill. 190, 85 N. E. 308, 22 L. R. A. (N. S.) 301; and such executor, having assumed a representative character, cannot deny it, and therefore suffers all the liabilities of an executor without acquiring the rights or privileges of such office; *id.*

If a stranger takes upon him to act as executor without any just authority (as, by intermeddling with the goods of the deceased, and many other transactions), he is called in law an executor of his own wrong, *de son tort;* 2 Bla. Com. 507; Bacon v. Parker, 12 Conn. 213; Wilbourn v. Wilbourn, 48 Miss. 38; 14 E. L. & Eq. 510; Johnston v. Duncan, 3 Litt. (Ky.) 163, 14 Am. Dec. 54; White v. Cooper, 3 Pa. 130; Brown v. Walter, 58 Ala. 310; Barron v. Burney, 38 Ga. 264. If a man kill the cattle of the testator, or take his goods to satisfy a debt, or collect money due him, or pay out such money, or carry on his business, or take possession of his house, etc., he becomes an executor *de son tort.* Where a person with whom a will had been left filed it, but took out no letters with the will annexed, or any other legal authority to administer on the estate, he became an executor *de son tort;* Morrow v. Cloud, 77 Ga. 114.

But a stranger may perform many acts in relation to a testator's estate without becoming liable as executor *de son tort.* Such are locking up his goods for preservation, burying the deceased in a manner suitable to his fortune, paying for the funeral expenses and those of the last sickness, making an inventory of his property to prevent loss or fraud solely, feeding his cattle, milking his cows, repairing his houses, etc. Such acts are held to be offices of kindness and charity; Magner v. Ryan, 19 Mo. 196; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622. Nor does paying the debts of the deceased with one's own money make one an executor *de son tort;* Carter v. Robbins, 8 Rich. (S. C.) 29; Bogue v. Watrous, 59 Conn. 247, 22 Atl. 31. Nor does one become executor *de son tort* by obtaining payment of a debt from an executor *de son tort;* 65 L. T. N. S. 709. The fact that a widow has taken possession of community property is not sufficient to authorize suit against her on a note of her deceased husband; Vela v. Guerra, 75 Tex. 595, 12 S. W. 1127. As to what acts will render a person so liable, see Godolphin, Orph. Leg. 91; 1 Wms. Exec. 299; 1 Dane, Abr. 561; Bull. N. P. 48; Com. Dig. *Administration* (C 3); Rattoon v. Overacker, 8 Johns. (N. Y.) 126; In re Huff's Estate, 15 S. & R. (Pa.) 39; White v. Mann, 26 Me. 361; Chandler v. Davidson, 6 Blackf. (Ind.) 367.

An executor *de son tort* is liable only for such assets as come into his hands, and is not liable for not reducing assets to possession; Kinard's Adm'r v. Young, 2 Rich. Eq. (S. C.) 247; Roumfort v. McAlarney, 82 Pa. 193. And it has been held that he is only liable to the rightful administrator; Muir v. Trustees of Orphan House, 3 Barb. Ch. (N. Y.) 477; Brown v. Walter, 58 Ala. 310. But see Hansford v. Elliott, 9 Leigh (Va.) 79; Swift v. Martin, 19 Mo. App. 488; which imply that he is also liable to the heir at law. He cannot be sued except for fraud, and he must be sued as executor; Buckminster v. Ingham, Brayt. (Vt.) 116; Francis v. Welch, 33 N. C. 215; Nass v. Vanswearingen, 10 S. & R. (Pa.) 144; Brown's Ex'rs v. Durbin's Adm'r, 5 J. J. Marsh. (Ky.) 170. But in general he is liable to all the trouble of an executorship, with none of its profits. And the law on this head seems to have been borrowed from the civil-law doctrine of *pro hærede gestio.* See Heineccius, Antiq. Syntagma, lib. 2, tit. 17, § 16, p. 468.

An executor *de son tort* is an executor only for the purpose of being sued, and not for the purpose of suing; Francis v. Welch, 33 N. C. 215. He is sued as if rightful executor. But if he defends as such he becomes thereby also an executor *de son tort;* Lawes, Pl. 190, note; Davis v. Connelly's Ex'rs, 4 B. Monr. (Ky.) 136; Gregory's Ex'rs v. Forrester, 1 McCord, Ch. (S. C.) 318; Hill v. Henderson, 13 Smedes & M. (Miss.) 688; Norfolk's Ex'r v. Gantt, 2 H. & J. (Md.) 435. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful administrator when the goods came into his hands; Magner v. Ryan, 19 Mo. 196; Shillaber v. Wyman, 15 Mass. 325; Rattoon v. Overacker, 8 Johns. (N. Y.) 126. But see, *contra,* Clements v. Swain, 2 N. H. 475. A voluntary sale by an executor *de son tort* confers only the same title on the purchaser that he himself had; 6 Exch. 164; 20 E. L. & Eq. 145; Carpenter v. Going, 20 Ala. 587; Meigan v. McDonough, 10 Watts (Pa.) 287.

It is held that in regard to land no man can be an executor *de son tort;* Green v. Dewit, 1 Root (Conn.) 183; Nass v. Vanswearingen, 7 S. & R. (Pa.) 192; *id.,* 10 S. & R. (Pa.) 144. In Arkansas it is said that there is no such thing as a technical executor *de son tort;* Barasien v. Odum, 17 Ark. 122; Rust v. Witherington, *id.* 129; and so in

Missouri; Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187. See, on this subject, Smith v. Porter, 35 Me. 287; Leach v. Pillsbury, 15 N. H. 137; Grave's Adm'r v. Poage, 17 Mo. 91; Hardy v. Thomas, 23 Miss. 544, 57 Am. Dec. 152; Josey v. Rogers, 13 Ga. 478; Woolfork's Adm'r v. Sullivan, 23 Ala. 548, 58 Am. Dec. 305; Simonton v. McLane's Adm'r, 25 Ala. 353; Morrison v. Smith, 44 N. C. 399; Walworth v. Ballard, 12 La. Ann. 245; Lee v. Wright, 1 Rawle (Pa.) 149; Schoul. Ex'rs & Adm'rs § 184.

EXECUTORS AND ADMINISTRATORS. The person or persons to whom is committed the administration of the estates of decedents, the first being that of a person named in a will to execute its provisions, the latter that of the officer designated under the law to administer the estate of one who has died intestate.

An *executor* is one to whom another man commits by his last will the execution of that will, and testament. 2 Bla. Com. 503.

A person to whom a testator by his will commits the *execution*, or putting in force, of that instrument and its codicils. Fonbl. Rights and Wrongs 307. See LETTERS TESTAMENTARY; HÆRES.

An *administrator* is a person authorized to manage and distribute the estate of an intestate, or of a testator who has no executor. In South African law the term is used as equivalent to trustee.

An administrator is merely the agent or trustee of the estate of the decedent, acting under the immediate direction of the law prescribing his duties, regulating his conduct and limiting his powers; Collamore v. Wilder, 19 Kan. 67.

ADMINISTRATION. The management of the estate of an intestate, or of a testator who has no executor. 2 Bla. Com. 494; 1 Williams, Ex. 401. The term is applied broadly to denote the management of an estate by an executor, and also the management of estates of minors, lunatics, etc., in those cases where trustees have been appointed by authority of law to take charge of such estates in place of the legal owners.

No administration is necessary where there are no creditors and the heirs divide the assets in kind or otherwise by mutual agreement; McCracken v. McCaslin, 50 Mo. App. 85; Cadmus v. Jackson, 52 Pa. 307; Brown v. Baxter, 77 Kan. 97, 94 Pac. 155, 574; or where the property of the intestate is exempt; Rivera v. R. Co. (Tex.) 149 S. W. 223; or where the widow is sole legatee and all debts and expenses are paid; Block v. Butt, 41 Ind. App. 487, 84 N. E. 357; or where persons in interest settle their rights outside of the probate court; Prichard v. Mulhall, 140 Ia. 1, 118 N. W. 43; and, in some states, such settlement, without administration, is authorized by statute; Rogan v. Arnold, 233 Ill. 19, 84 N. E. 58.

The controlling place of administration is the domicile of the testator; Higgins v. Eaton, 188 Fed. 938.

The right of administration is a valuable one and not to be taken away, except as provided by statute; Williams v. Williams, 24 App. D. C. 214.

Originally in England the crown claimed the right of administering the personal property of intestates and exercised it by its ministers, or granted it as a franchise to lords of manors or others and afterwards to prelates, who greatly abused the trust, until, under the Statute of Westminster II, the ordinary was bound to pay the debts of the deceased so far as his goods would extend, but still the ecclesiastical persons who were entrusted with the duty, appropriated large portions of them upon the pretext of pious uses, until they were required by Stat. 31 Edw. III. c. 11, § 1, to grant administration to "the next of kin and most lawful friends of the dead person intestate," who were held accountable in the common-law court as executors were. The administration of personal estates then became assimilated to carrying out the provisions of wills, and the function of the ecclesiastical courts was merely the grant of letters and the supervision of their execution. Next, under 21 Hen. VIII., the ordinary could appoint the widow or next of kin, or both, at his discretion. The jurisdiction in England was taken away from the ecclesiastical court by Stat. 20 & 21 Vic. c. 77, and vested in a judge of probate. The court of probate is now part of the Probate, Divorce and Admiralty Division of the High Court of Justice.

In the United States, what is known as probate jurisdiction is exercised generally by courts known as probate courts held by surrogates, judges of probate, registers of wills, etc.

There are various kinds of administration:

Ad colligendum. That which is granted for collecting and preserving goods about to perish (*bona peritura*). The only power over these goods is under the form prescribed by statute.

Ancillary. That which is subordinate to the principal administration taken out in another state or country where there are assets; Appeal of Barry, 88 Pa. 131; Stevens v. Gaylord, 11 Mass. 256; Rosenthal v. Renick, 44 Ill. 202; Trimble v. Dzieduzyiki, 57 How. Pr. (N. Y.) 208. In the absence of a statute allowing it (as in some states) an administrator in one state cannot sue as such in another, unless ancillary letters are taken out; Noonan v. Bradley, 9 Wall. (U. S.) 394, 19 L. Ed. 757; and this may be done by amendment after the bill is filed; Black v. Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433. One who is both ancillary and domiciliary administratrix of the same estate cannot be called on, in one jurisdiction, to account for assets received in

the other; Hamilton v. Carrington, 41 S. C. 385, 19 S. E. 616.

Executors in the state of testator's domicil are not bound, under the full faith and credit clause, by a decree of the court of another state against an administrator c. t. a., in a case submitted to arbitration before the testator's death; Brown v. Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966.

Cæterorum. That which is granted as to the residue of an estate, which cannot be administered under the limited power already granted; 4 Hagg. Eccl. 382, 386; 4 M. & G. 398; 1 Curt. Eccl. 286.

It differs from administration *de bonis non* in this, that in *cæterorum* the full power granted is exercised and exhausted, while in the other the power is, for some cause, not fully exercised.

Cum testamento annexo. That which is granted where no executor is named in the will, or where the one named dies, or is incompetent or unwilling to act. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will; Ex parte Brown, 2 Bradf. (N. Y.) 22; Farwell v. Jacobs, 4 Mass. 634; Stacy v. Thrasher, 6 How. (U. S.) 59, 12 L. Ed. 337. The residuary legatee is appointed such administrator rather than the next of kin; Estate of Donnelly, 2 Phil. (Pa.) 54; Thornton v. Winston, 4 Leigh (Va.) 152; 2 Add. 352.

De bonis non. That which is granted when the first administrator dies before having fully administered. The person so appointed has in general the powers of a common administrator; Bacon, Abr. *Executors*, B, 1; Rolle, Abr. 907; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; State v. Porter, 9 Ind. 342; Thomas v. Stanley, 4 Sneed (Tenn.) 411; Watson v. Jacobs, 29 Vt. 170; Johnson v. Bank, 11 Md. 412; Coffin v. Heath, 6 Metc. (Mass.) 78; Wiggin v. Swett, 6 Metc. (Mass.) 198, 39 Am. Dec. 716; Prusa v. Everett, 78 Neb. 250, 110 N. W. 568; Prusa v. Everett, 78 Neb. 251, 113 N. W. 571.

A residuary legatee has sufficient interest in an estate to request the appointment of an administrator d. b. n. to collect debts, whether it will make the estate solvent or not; Mallory's Appeal from Probate, 62 Conn. 218, 25 Atl. 109.

De bonis non cum testamento annexo. That which is granted when an executor dies leaving a part of the estate unadministered. Comyns, Dig. Adm. B, 1; Ellmaker's Estate, 4 Watts (Pa.) 34, 38, 39. It cannot be based on a will made in a foreign country if invalid there because of defective execution; Coleman's Estate, 13 Pa. Co. Ct. 81.

Durante absentia. That which subsists during the absence of the executor and until he has proved the will. In England, by statute, such an administration is raised during the absence of the executor, and is not determined by the executor's dying abroad; 4 Hagg. Eccl. 360; 3 Bos. & P. 26; see Willing v. Perot, 5 Rawle (Pa.) 264.

Durante minori ætate. That which is granted when the executor is a minor. It continues until the minor attains his lawful age to act, which at common law is seventeen years; 5 Coke 29. When an infant is sole executor, the statute 38 Geo. III. c. 87, s. 6 provides that probate shall not be granted to him until his full age of twenty-one years, and that *adm. cum test. annexo* shall be granted in the mean time to his guardian or other suitable person. A similar statute provision exists in most of the United States. This administrator may collect assets, pay debts, sell *bona peritura*, and perform such other acts as require immediate attention. He may sue and be sued; Bacon, Abr. *Executor*, B, 1; Cro. Eliz. 718; 2 Bla. Com. 503; 5 Coke 29; Taylor v. Barron, 35 N. H. 484, 493.

Where there are no creditors or heirs of age, the tutor of minor heirs has a right to take possession of succession property and administer their interests in it; Succession of Bourgeois, 43 La. Ann. 247, 9 South. 34.

Foreign administration. That which is exercised by virtue of authority properly conferred by a foreign power.

The general rule in England and the United States is that letters granted in one jurisdiction, give no authority to sue or be sued in another jurisdiction, though they may be ground for new probate authority; 5 Ves. 44; Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Doe v. M'Farland, 9 Cra. (U. S.) 151, 3 L. Ed. 687; Armstrong v. Lear, 12 Wheat. (U. S.) 169, 6 L. Ed. 589; Perkins v. Williams, 2 Root (Conn.) 462; Dangerfield's Ex'x v. Thurston's Heirs, 8 Mart. (N. S.) [La.] 232; M'Cullough v. Young, 1 Binn. (Pa.) 63; Matthews v. Douthitt, 27 Ala. 273, 62 Am. Dec. 765; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; State v. Price, 21 Mo. 434; Cocke v. Finley, 29 Miss. 127; Dickinson v. M'Craw, 4 Rand. (Va.) 158; Allsup v. Allsup's Heirs, 10 Yerg. (Tenn.) 283; Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; Taylor v. Barron, 35 N. H. 484; Wood v. Gold, 4 McLean C. C. 577, Fed. Cas. No. 17,947; Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. Ed. 639; Hill v. Tucker, 13 How. (U. S.) 458, 14 L. Ed. 223; Black v. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Farrington v. Trust Co., 9 N. Y. Supp. 433. Hence, when persons are domiciled and die in one country as A, and have personal property in another as B, the authority must be had in B, but exercised according to the laws of A; Story, Confl. Laws 23, 447; Leach v. Pillsbury, 15 N. H. 137; Spraddling v. Pipkin, 15 Mo. 118; Williams v. Williams, 5 Md. 467; Ex parte McComb, 4 Bradf. (N. Y.) 151; King v. U. S., 27 Ct. Cl. 529; Rutherford v. U. S., 27 Ct. Cl. 539; and see DOMICIL.

There is no legal privity between admin-

istrators in different states; nor between executors of a will in one state and administrators c. t. a. in another; Wilson v. Ins. Co., 164 Fed. 817, 90 C. C. A. 593, 19 L. R. A. (N. S.) 553. The principal administrator is to act in the intestate's domicil, and the ancillary is to collect claims and pay debts in the foreign jurisdiction and pay over the surplus to his principal; Pond v. Makepeace, 2 Metc. (Mass.) 114; 3 Hagg. Eccl. 199; Jones v. Marable, 6 Humph. (Tenn.) 116; Lawrence v. Kitteridge, 21 Conn. 577, 56 Am. Dec. 385; Stokely's Estate, 19 Pa. 476; Riley v. Riley, 3 Day (Conn.) 74, 3 Am. Dec. 260; The Boston, 1 Blatchf. & H. 309, Fed. Cas. No. 1,669; Kilpatrick v. Bush, 23 Miss. 199; 2 Curt. Eccl. 241; Carmichael v. Ray, 1 Rich. (S. C.) 116.

Payment to an ancillary administrator is no bar to a suit by the administrator of the domicile; Maas v. Bank, 36 Misc. 154, 72 N. Y. Supp. 1068; nor is it a defence to a prior action by the domiciliary administrator in another state, of which the defendant had knowledge before payment; Steele v. Ins. Co., 160 N. Y. 703, 57 N. E. 1125. For other cases see 15 Harv. L. Rev. 412. But in Quebec a foreign administrator is recognized; 12 Harv. L. Rev. 287; as well as foreign guardians and receivers, and this rule is said to be satisfactory in operation; *id.*, citing Lafleur, Confl. L.

An administrator appointed in Michigan cannot sue a resident of New York in the United States circuit court in that state when he had not taken out letters of administration in New York; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

But some courts hold that the probate of a will in a foreign state, if duly authenticated, dispenses with the necessity of taking out new letters in their state; Lancaster v. McBryde, 27 N. C. 421; Gray v. Patton, 2 B. Monr. (Ky.) 12; Rice v. Jones, 4 Call (Va.) 89; Vaughan v. Northup, 15 Pet. (U. S.) 1, 10 L. Ed. 639; Ives v. Allyn, 12 Vt. 589; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

Where a deceased plaintiff was domiciled in another state, an executor appointed in the domicil will be preferred to a temporary administrator appointed in the state of the forum, as the new party; Norman v. Goode, 113 Ga. 121, 38 S. E. 317.

It has been held that possession of property may be taken in a foreign state, but a suit cannot be brought without taking out letters in that state; Watt's Ex'rs v. Sheppard, 2 Ala. 429; Trotter v. White, 10 Smedes & M. (Miss.) 607; Suarez v. City of New York, 2 Sandf. Ch. (N. Y.) 173. In Arizona suit may be brought upon a foreign judgment without taking out new letters of administration; Arizona Cattle Co. v. Huber, 4 Ariz. 69, 33 Pac. 555. See CONFLICT OF LAWS.

For the purpose of administration, the *situs* of a debt is the domicil of the debtor and not the place where the evidence of the debt is located; Michigan Trust Co. v. Probasco, 29 Ind. App. 109, 63 N. E. 255; Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971, 87 Am. St. Rep. 90, where it was said that in this respect certificates of stock do not differ from other choses in action. The *situs*, as property, of corporate stock owned by a nonresident decedent is within the county where the corporate property is or where the corporation has its principal place of business; In re Arnold, 114 App. Div. 244, 99 N. Y. Supp. 740.

Pendente lite. That which is granted pending the controversy respecting an alleged will or the right of appointment. An officer of the court is appointed to take care of the estate only till the suit terminates; 2 P. Will. 589; 1 Hagg. Eccl. 313; Bergin v. McFarland, 26 N. H. 533; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; Barksdale v. Cobb, 16 Ga. 13; Cole v. Wooden, 18 N. J. L. 15. He may maintain suits, but cannot distribute the assets; 1 Ball & B. 192; Cain v. Warford, 7 Md. 282; Appeal of Patton, 31 Pa. 465; Rogers v. Dively, 51 Mo. 193.

Public. That which the public administrator performs. This is in many of the states by statute in those cases where persons die intestate, without leaving any who are entitled to apply for letters of administration; Ferrie v. Public Administrator, 3 Bradf. (N. Y.) 151; Public Adm'rs v. Burdell, 4 *id.* 252.

In many states there is provision of law for the appointment of a public administrator whose duty it is to administer upon the estate of any person found dead within his jurisdiction. Such officer is competent to administer on the estate within his county of any decedent irrespective of the place of his death; In re Richardson's Estate, 120 Cal. 344, 52 Pac. 832; and such administrator has no authority to refuse to enter upon or to continue the administration of an estate, which by law he should administer. He cannot retain the office and choose for himself which of its duties he will perform; State v. Kennedy, 73 Mo. App. 384.

The authority of a public administrator to take charge of an estate cannot be collaterally questioned; Dunn v. German-American Bank, 109 Mo. 90, 18 S. W. 1139; Weir v. Monahan, 67 Miss. 434, 7 South. 291.

Special. That which is limited either in time or in power. Such administration does not come under the statutes of 31 Edw. III. c. 11, and 21 Hen. VIII. c. 5, on which the modern English and American laws are founded. A judgment against a special administrator binds the estate; 1 Sneed 430; although there is no property but merely a right of action, and if there is delay in granting the administration, a special administrator might be appointed where immediate settlement could be made; Groce v. Helm, 91 Mich. 450, 51 N. W. 1106. In the

United States, administration is a subject charged upon courts of civil jurisdiction. A multiplicity of statutes defines the powers of such courts in the various states. The public officer authorized to delegate the trust is called surrogate, judge of probate, register of wills, etc. In some states, these courts are of special jurisdiction, while in others the power is vested in county courts.

Death of the intestate must have taken place, or the court will have no jurisdiction. Probate proceedings on the estate of a person who is not dead are void; Fay v. Costa, 2 Cal. App. 241, 83 Pac. 275; Steele's Unknown Heirs v. Belding (Tex.) 148 S. W. 592. A decree of the court is *prima facie* evidence of his death, and puts the burden of disproof upon the party pleading in abatement; 3 Term 130; Munro v. Merchant, 26 Barb. (N. Y.) 383; Barkaloo's Adm'r v. Emerick, 18 Ohio 268.

Estates of absentees. Statutes authorizing administration on the estate of an absentee after a fixed period, as if he were dead, have been held void as a deprivation of property without due process of law; Carr v. Brown, 20 R. I. 215, 38 Atl. 9, 38 L. R. A. 294, 78 Am. St. Rep. 855; Lavin v. Bank, 1 Fed. 641, 18 Blatchf. 1; Clapp v. Houg, 12 N. D. 600, 98 N. W. 710, 65 L. R. A. 757, 102 Am. St. Rep. 589; Savings Bank of Baltimore v. Weeks, 103 Md. 601, 64 Atl. 295, 6 L. R. A. (N. S.) 690; Selden v. Kennedy, 104 Va. 826, 52 S. E. 635, 4 L. R. A. (N. S.) 944, 113 Am. St. Rep. 1076, 7 Ann. Cas. 879; in the absence of a statute; Scott v. McNeal, 154 U. S. 49, 14 Sup. Ct. 1108, 38 L. Ed. 896; Springer v. Shavender, 118 N. C. 53, 23 S. E. 976, 54 Am. St. Rep. 708; Devlin v. Com., 101 Pa. 273, 47 Am. Rep. 710; subsequently a statute was passed in Pennsylvania and held constitutional; Cunnius v. School Dist., 206 Pa. 469, 56 Atl. 16, 98 Am. St. Rep. 790; this judgment was affirmed in 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, where the court distinguished the case from that in 154 U. S., *supra*, upon the ground that in the former case there was no statute, and that in the present one, a statute having been passed and the period of absence being fixed and not unreasonably brief, it was valid and not open to the objection of want of due process of law; and similar statutes have been held valid; Barton v. Kimmerley, 165 Ind. 609, 76 N. E. 250, 112 Am. St. Rep. 252; Roderigas v. Savings Inst., 63 N. Y. 460, 20 Am. Rep. 555, which appeared for a time to stand alone and was frequently referred to as having been decided by a mere majority of the court. The same statute was held invalid by the federal court in Lavin v. Savings Bank, 18 Blatchf. 1, 1 Fed. 641. So far as the federal constitution is concerned, the Pennsylvania case in Cunnius v. School Dist., 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, would seem to settle the question, at least so far as to determine that such statutes are not obnoxious to the XIVth Amendment of the federal constitution. So far as the state constitutions are concerned the cases differ, as appears by the above citations. The case in Maryland is put mainly upon the ground that the act contained no provision requiring that before the distribution of the property of the absentee, security should be given for its refund if he should prove to be alive.

Appointment of Executors and Administrators and the Letters Testamentary or of Administration. The appointment of executors and administrators is made upon application to the proper officer having jurisdiction, in some states by a petition followed by a citation to the interested parties, to be served upon them or published according to law. Any one of such interested parties may appear and show cause against the appointment. In other states the appointment is made without notice, upon proof to the probate officer of the jurisdictional facts. The evidence of appointment which is delivered to the appointee is termed, in the case of administrators, *Letters of Administration*, and in the case of executors, *Letters Testamentary*. In either case the letters certify that there is given to the executor or administrator, as the case may be, full power of administration of the goods, chattels, rights, and credits which were of the deceased, and the person appointed is required to make an inventory and file the same, to pay the debts of the deceased so far as the property will extend, in the legal order of payment, and render a true and just account of his transactions in the administration of the trust. In respect to all matters relating thereto, there is little or no difference in the law relating to letters of administration or letters testamentary. The grant of such letters is a judicial act and recorded as such, and the letters themselves should be duly authenticated under the seal of the court; Schoul. Ex. & Ad. § 118. For the form of letters, see Smith, Prob. Pract. App.; Witzel v. Pierce, 22 Ga. 112.

In most of the states it is provided by law that both executors and administrators shall be required to give bond before receiving their letters from the probate authority. Such requirements have been held to impose on the executors and administrators no new duties, but their effect is merely to give additional remedy to creditors, legatees, and distributees; Eaton v. Benefield, 2 Blackf. (Ind.) 52. In some jurisdictions it is quite usual to find a provision in the will dispensing with the giving of the bond by the executors and such indication of the will of the testator is respected. It has been held, however, that a provision of a will that the executor may act without executing a bond is at all times subject to the control of the courts; Busch v. Rapp, 63 S. W. 479, 23 Ky. L. Rep. 605. One who is not interested in

the assets of the estate can raise no question as to the sufficiency or legality of the bond which has been accepted; Jones v. Smith, 120 Ga. 642, 48 S. E. 134. The failure of an administrator to give a bond is ground for removal; Toledo, St. L. & K. C. R. Co. v. Reeves, 8 Ind. App. 667, 35 N. E. 199; but the fact that an executor's bond is invalid, is no ground for his removal; Barricklow v. Stewart, 31 Ind. App. 446, 68 N. E. 316.

Executors and administrators are charged with a trust, and liable for the want of due care such as prudent men exercise in managing their own affairs; State v. Dickson, 213 Mo. 66, 111 S. W. 817; In re Chadbourne, 15 Cal. App. 363, 114 Pac. 1012.

The grant of letters has been held to be *prima facie* evidence of all the essential jurisdictional facts; Davis v. Swearingen, 56 Ala. 31; but it is generally considered that the probate court, in granting letters of administration does not adjudicate that the person is dead, but that letters shall be granted to the applicant; Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144; Newman v. Jenkins, 10 Pick. (Mass.) 515; and the letters are not legal evidence of the death; Mutual Ben. Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314. Letters of administration upon the estate of a person who is in fact alive have no validity or effect as against him; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

As to the grant of letters of administration upon the estate of a person presumed to be dead, see *supra*.

A grant of letters which includes two estates under one administration would be irregular and objectionable, but it has been held not to be void; Grande v. Herrera, 15 Tex. 533; the letters should be signed by the judge or other probate officer; Succession of Carlon, 26 La. Ann. 329; Matthews v. Joyce, 85 N. C. 258; and they are not void though the seal of the court is affixed in the wrong place; Sharp v. Dye, 64 Cal. 9, 27 Pac. 789.

Letters testamentary and of administration are, according to their terms and extent, conclusive as to personal property while they remain unrevoked. They cannot be questioned in a court of law or of equity, and cannot be impeached, even by evidence of fraud or forgery. Proof that the testator was insane, or that the will was forged, is inadmissible; 12 Ves. 298; Broderick's Will, 21 Wall. (U. S.) 503, 22 L. Ed. 599; Hall v. Woodman, 49 N. H. 295; Appeal of Hegarty, 75 Pa. 503; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433; Jackson v. Le Grange; 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; Irwin v. Scriber, 18 Cal. 499; Carroll v. Carroll, 60 N. Y. 123, 19 Am. Rep. 144; Moore's Estate v. Moore, 33 Neb. 509, 50 N. W. 443; O'Connor v. Huggins, 113 N. Y. 511, 21 N. E. 184; Robinson v. Epping, 24 Fla. 237, 4 South. 812. But if the nature of the plea raise the issue, it may be shown that the court granting the supposed letters had no jurisdiction, and that its action is therefore a nullity; 3 Term 130; see Knox v. Nobel, 77 Hun 230, 28 N. Y. Supp. 355; or that the seal attached to the supposed probate has been forged, or that the letters have been revoked, or that the testator is alive; In re Huff's Estate, 15 S. & R. (Pa.) 42; Griffith v. Frazier, 8 Cra. (U. S.) 9, 3 L. Ed. 471; Jochumsen v. Bank, 3 Allen (Mass.) 87; Duncan v. Stewart, 25 Ala. 408, 60 Am. Dec. 527; Harwood v. Wylie, 70 Tex. 538, 7 S. W. 789. Where an executor qualified and acted for many years under his appointment, he will not be allowed to dispute the recitation in his appointment that citation to the heirs was issued and served; In re Moore, 95 Cal. 34, 30 Pac. 106.

Though the probate court has exclusive jurisdiction of the grant of letters, yet where a legacy has been obtained by fraud, or the probate has been procured by fraud on the next of kin, a court of equity would hold the legatee or wrong-doer as bound by a trust for the party injured; Wms. Ex. 552. While a court of equity cannot remove an executor; Mannhardt v. Staats Zeitung Co., 90 Ill. App. 315; it may restrain him from acting, though such restraint will incidentally prevent him from performing his duties as executor; Bentley v. Dixon, 60 N. J. Eq. 353, 46 Atl. 689; and even take the estate out of his hands and place it in the custody of a receiver; Bolles v. Bolles, 44 N. J. Eq. 385, 14 Atl. 593.

Letters may be revoked by the court which made the grant, or on appeal to a higher tribunal, reversing the decision by which they were granted. Special or limited administration will be revoked on the occasion ceasing which called for the grant. An executor or administrator will be removed when the letters were obtained improperly; Wms. Ex. 571.

Of their effect in a state other than that in which legal proceedings were instituted.

In view of the rule of the civil law, that *personalia sequuntur personam*, certain effect has been given by the comity of nations to a foreign probate granted at the place of the domicil of the deceased, in respect to the personal assets in other states. At common law, the *lex loci rei sitæ* governs as to real estate, and the foreign probate has no validity; but as to personalty the law of the domicil governs both as to testacy and intestacy. It is customary, therefore, on a due exemplification of the probate granted at the place of domicil, to admit the will to probate, and issue letters testamentary, without requiring original or further proof.

A foreign probate at the place of domicil has in itself no force or effect beyond the jurisdiction in which it was granted, but on its production fresh probate will be granted thereon in all other jurisdictions where assets

are found. This is the general rule, but is liable to be varied by statute, and is so varied in some of the states of the United States.

Letters testamentary or of administration confer no power beyond the limits of the state in which they are granted, and do not authorize the person to whom they are issued to maintain any suit in the state or federal courts in any other state; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; the executor or administrator has therefore, as such, no right of control over property in another state or country; Mansfield v. Turpin, 32 Ga. 260; Upton v. Adam's Ex'rs, 27 Ind. 432; Wood v. Gold, 4 McLean 577; Fed. Cas. No. 17,947; Lewis v. McMillen, 41 Barb. (N. Y.) 431; Carmichael v. Ray, 40 N. C. 365; he cannot interfere with assets, collect or discharge debts, control lands, sue or be sued; Schoul. Ex. & Ad. § 173. The principle is, that a grant of power to administer the estate of a decedent operates only as of right within the jurisdiction which grants the letters, and in order that a foreign representative may exercise any such function he must be clothed with authority from the jurisdiction into which he comes, and conform to the requirements imposed by local law; Moore v. Fields, 42 Pa. 467; Beckham v. Wittkowski, 64 N. C. 464; Price v. Morris, 5 McLean, 4, Fed. Cas. No. 11,414; Bell's Adm'r v. Nichols, 38 Ala. 678; Graveley v. Graveley, 25 S. C. 1, 60 Am. Rep. 478; Laurence v. Nelson, 143 U. S. 215, 12 Sup. Ct. 440, 36 L. Ed. 130; Duchesse d'Auxy v. Porter, 41 Fed. 68; Reynolds v. McMullen, 55 Mich. 568, 22 N. W. 41, 54 Am. Rep. 386. In most, probably all, of the states there is statutory provision, either for the grant of ancillary letters or for authorizing and regulating suits by foreign executors and administrators. In many of them these officers, properly qualified abroad, are permitted to sue for and recover local assets without other qualification, within the new jurisdiction, than putting on record their authority as conferred by the home jurisdiction, and such authority must be strictly followed. In many of the states there is authority to sue and defend without ancillary administration; Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279; Banta v. Moore, 15 N. J. Eq. 97; Marrett v. Babb's Ex'r, 91 Ky. 88, 15 S. W. 4; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Tyer v. Melling Co., 32 S. C. 598, 10 S. E. 1067; and this right to sue has been extended to a foreign corporation duly authorized to act in its own jurisdiction; Deringer's Adm'r v. Deringer's Adm'r, 5 Houst. (Del.) 416, 1 Am. St. Rep. 150; in some statutes there is express authority to defend suits; Moss v. Rowland, 3 Bush (Ky.) 505; but it has been held that statutory authority to sue does not imply capacity to be sued; Jones v. Lamar, 77 Ga. 149; nor to sue for intestate lands where they were made by statute assets in the hands of a domestic administrator; Fairchild v. Hagel, 54 Ark. 61, 14 S. W. 1102; but to sue for the grant of local administration; Gibson v. Ponder, 40 Ark. 195; where no suit is necessary a foreign executor or administrator has been permitted to remove personal property and carry it away for the purpose of administration; Petersen v. Bank, 32 N. Y. 21, 88 Am. Dec. 298; Putnam v. Pitney, 45 Minn. 242, 47 N. W. 790, 11 L. R. A. 41; McNamara v. McNamara, 62 Ga. 200; Selleck v. Rusco, 46 Conn. 370; and in the absence of local administration payment to a foreign representative is recognized; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Wyman v. Halstead, 109 U. S. 656, 3 Sup. Ct. 417, 27 L. Ed. 1068; Parsons v. Lyman, 20 N. Y. 103.

The latter may assign choses in action belonging to the estate, and the assignee may sue thereon in his own name in another state, unless prevented by its laws respecting assignments from so doing; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Campbell v. Brown, 64 Ia. 425, 20 N. W. 745, 52 Am. Rep. 446; Solinsky v. Bank, 82 Tex. 244, 17 S. W. 1050; Petersen v. Bank, 32 N. Y. 21, 88 Am. Dec. 298; he may also sue in another state on a judgment there recovered; Talmage v. Chapel, 16 Mass. 71; Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. Ed. 315; Trecothick v. Austin, 4 Mas. 16, Fed. Cas. No. 14,164; Barton v. Higgins, 41 Md. 539; or he may sue in his individual capacity in another state, on a judgment recovered by him in his official capacity in his own state, Tittman v. Thornton, 107 Mo. 500, 17 S. W. 979, 16 L. R. A. 410; Arizona Cattle Co. v. Huber, 4 Ariz. 69, 33 Pac. 555; and upon a contract made with himself as such a foreign executor or administrator may sue; Barrett v. Barrett, 8 Greenl. (Me.) 346; Du Val v. Marshall, 30 Ark. 230; Sto. Confl. L. §§ 513–516. The term foreign as applied to executors and administrators refers to the jurisdiction from which their authority is derived and not to residence; Fugate v. Moore, 86 Va. 1045, 11 S. E. 1063, 19 Am. St. Rep. 926; Hopper v. Hopper, 125 N. Y. 400, 26 N. E. 457, 12 L. R. A. 237. The estate of a deceased person is substantially one estate, in which those entitled to the residue are interested as a whole, even though situated in various jurisdictions, and although each distinct part of it must be settled in the jurisdiction by which letters were granted whether for the purpose of ancillary or principal administration; Schoul. Ex. & Ad. § 174; ordinarily it is the practice to recognize the person appointed executor or administrator at the domicil of the deceased as the person to whom ancillary letters will be granted; In re Blancan, 4 Redf. (N. Y.) 151; Whart. Confl. L. § 608; but there is no privity between persons appointed in differ-

ent jurisdictions whether they be different or the same, and the executor or administrator in one state is not concluded in a subsequent suit by the same plaintiff in another state against a person having administration on the estate of the deceased; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112; Braithwaite v. Harvey, 14 Mont. 208, 36 Pac. 38, 27 L. R. A. 101, 43 Am. St. Rep. 625; Jones v. Jones, 39 S. C. 247, 17 S. E. 587, 802. But a different rule has been applied where different executors are appointed by the will in different states, and they are held to be in privity with each other, and a judgment against those in one state is evidence against those in another; Hill v. Tucker, 13 How. (U. S.) 458, 14 L. Ed. 223; Goodall v. Tucker, 13 How. (U. S.) 469, 14 L. Ed. 227.

When any surplus remains in the hands of a foreign or ancillary appointee after the discharge of all debts in that jurisdiction, it is usually, as a matter of comity, ordered to be paid over to the domiciliary appointee; Wright v. Phillips, 56 Ala. 69; 50 L. J. Ch. 740; and in his hands becomes applicable to debts, legacies, and expenses; Schoul. Ex. & Ad. § 174. It is the policy of the law with respect to these matters to encourage the spirit of comity in subordination to the rights of local creditors who are considered to be entitled to the benefit of assets within their own jurisdiction, rather than to be driven to the assertion of their claims in a foreign state or country; *id.;* but see LEX FORI.

As a general rule it is the duty of the principal personal representative to collect and make available to the estate all such assets as are available to him consistently with foreign law; 4 M. & W. 171; 1 Cr. & J. 157; even to the extent of seeing that foreign letters are taken out for the collection of foreign assets; or of collecting and realizing upon property and debts so far as it may be done by him, without resort to a foreign jurisdiction; Trecothick v. Austin, 4 Mas. 33, Fed. Cas. No. 14,164; In re Butler, 38 N. Y. 397; Merrill v. Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; but the domestic representative is not to be held in this respect to too onerous a responsibility with respect to foreign property which he cannot realize by virtue of his appointment. See Sto. Confl. L. § 514 *a;* Schoul. Ex. & Ad. § 175. It is the policy of the courts to sustain, if possible, even irregular acts of executors or administrators done in good faith and without detriment of the estate; Duffy v. McHale (R. I.) 85 Atl. 36.

There is some difference of opinion as to whether a voluntary surrender of assets to the domiciliary representative protects the debtor against claims made by virtue of an administration within his own jurisdiction. The United States supreme court, supported by the current of American authority, maintains that, as between the states such payment or delivery of assets is sufficient to discharge the local debtor in the absence of local administration; U. S. v. Cox, 18 How. (U. S.) 104, 15 L. Ed. 299; Wilkins v. Ellett, 9 Wall. (U. S.) 740, 19 L. Ed. 586; Wilkins v. Ellett, 108 U. S. 256, 2 Sup. Ct. 641, 27 L. Ed. 718; Hatchett v. Berney, 65 Ala. 39; Ramsay v. Ramsay, 97 Ill. App. 270; In re Williams' Estate, 130 Ia. 553, 107 N. W. 608; Maas v. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689; Dexter v. Berge, 76 Minn. 216, 78 N. W. 1111; Gardiner v. Thorndike, 183 Mass. 82, 66 N. E. 633; Maas v. Bank, 176 N. Y. 377, 68 N. E. 658, 98 Am. St. Rep. 689 (where it was also held that failure to inquire whether a resident administrator had been appointed was negligence sufficient to charge a bank making payment with the knowledge which inquiry would have furnished). But, as a rule, the power of the executor or administrator is confined to the state appointing; In re Crawford's Estate, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648. The domiciliary administrator will sometimes be recognized *ex comitate* by courts of another state; State v. Fulton (Tenn.) 49 S. W. 297. The English doctrine is otherwise; Whart. Confl. L. 626; Sto. Confl. L. 515 *a*. See Dicey, Confl. L. ch. X. (c), ch. XVII. (B), with Moore's American notes. So, by agreement of the parties, he was allowed to become a party in his representative capacity; Ellis v. Ins. Co., 100 Tenn. 177, 43 S. W. 766; though it was held that he should not sue in New York for the wrongful death of his intestate without taking out ancillary letters; Dodge v. North Hudson, 188 Fed. 489.

EXECUTORS. An executor is, as above defined, a person charged with the administration of the estate of one who leaves a will.

Lord Hardwicke, in 3 Atk. 301, says, "The proper term in the civil law, as to goods, is *hæres testamentarius;* and executor is a barbarous term, unknown to that law." And again, "What we call executor and residuary legatee is, in the civil law, universal heir." *Id.* 300.

The word executor, taken in its broadest sense, has three acceptations. 1. *Executor a lege constitutus.* He is the ordinary of the diocese. 2. *Executor ab episcopo constitutus* or *executor dativus;* and that is he who is called an administrator to an intestate. 3. *Executor a testatore constitutus,* or *executor testamentarius;* and that is he who is usually meant when the term executor is used. 1 Wms. Ex. 185. See ORDINARY.

The power of an executor under modern probate law is derived not so much from the will of the testator as from the appointment of the court and the powers conferred upon it by law; Lamb v. Helm, 56 Mo. 420. While he is a trustee in the broadest sense, he is not such in the general acceptation of the term; In re Hibbler, 78 N. J. Eq. 217, 78 Atl. 188, affirmed In re Hibbler's Estate, 79 N. J. Eq. 230, 81 Atl. 1133.

If the executor be legally competent and accepts the trust, it is the duty of the probate court to grant letters testamentary to him; Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, 105 Am. St. Rep. 127, where it was said

that legally competent meant of legal age, sound mind and memory and not convicted of crime.

One should not be appointed an executor pending a suit by him on a claim against the estate; Cogswell v. Hall, 183 Mass. 575, 67 N. E. 638. The renunciation of an executor may be by oral statement in open court; In re Baldwin's Will, 27 App. Div. 506, 50 N. Y. Supp. 872. Where one declines the appointment and another person is appointed, the former has no legal right thereafter; Briggs v. Probate Court, 23 R. I. 125, 50 Atl. 335.

A general executor is one who is appointed to administer the whole estate, without any limit of time or place, or of the subject-matter.

A rightful executor is one lawfully appointed by the testator, by his will. Deriving his authority from the will, he may do most acts before he obtains letters testamentary; but he must be possessed of them before he can declare in an action brought by him as such; 1 P. Wms. 768; Wms. Ex. 173.

An instituted executor is one who is appointed by the testator without any condition, and who has the first right of acting when there are substituted executors.

A substituted executor is a person appointed executor if another person who has been appointed refuses to act.

An example will show the difference between an instituted and a substituted executor. Suppose a man makes his son his executor, but if he will not act he appoints his brother, and if neither will act, his cousin: here the son is the instituted executor in the first degree, the brother is said to be substituted in the second degree, the cousin in the third degree, and so on. See Swinb. Wills, pt. 4, s. 19, pl. 1.

An executor de son tort is one who, without lawful authority, undertakes to act as executor of a person deceased. See EXECUTOR DE SON TORT.

A special executor is one who is appointed or constituted to administer either a part of the estate, or the whole for a limited time, or only in a particular place.

An executor to the tenor is a person who is not directly appointed by the will an executor, but who is charged with the duties which appertain to one: as, "I appoint A B to discharge all lawful demands against my will;" 3 Phill. Eccl. 116; 1 Eccl. 374; Swinb. Wills 247; Wentw. Ex. pt. 4, s. 4, p. 230; [1892] Prob. 227, 380; 66 Law T. N. S. 382.

Qualification. Generally speaking, all persons who are capable of making wills, and many others besides, may be executors; 2 Bla. Com. 503. The king may be an executor. So may a corporation sole. So may a corporation aggregate; Toller, Exec. 30; Schoul. Ex. & Ad. 32. So may an alien, if he be not an alien enemy residing abroad or unlawfully continuing in the country. See McGregor v. McGregor, 3 Abb. Dec. (N. Y.) 92. So may married women and infants; and even infants unborn, or *en ventre sa mère*, may be executors; 1 Dane, Abr. c. 29 *a* 2, § 3; Swift v. Duffield, 5 S. & R. (Pa.) 40. But in England an infant cannot act solely as executor until his full age of twenty-one years. Meanwhile, his guardian or some other person acts for him as administrator *cum test. ann.* See Christopher v. Cox, 25 Miss. 162; Schoul. Dom. Rel. § 416; ADMINISTRATION. It was held that a married woman cannot be executrix without her husband's consent; Appeal of Stewart, 56 Me. 300; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40; and that a man by marrying an executrix became executor in her right, and was liable to account as such; 2 Atk. 212; Lindsay v. Lindsay's Adm'rs, 1 Des. (S. C.) 150.

Persons attainted, outlaws, insolvents, and persons of bad moral character may be qualified as executors, because they act *en autre droit* and it was the choice of the testator to appoint them; 6 Q. B. 57; Berry v. Hamilton, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515; Sill v. McKnight, 7 W. & S. (Pa.) 244; 3 Salk. 162. It is the duty of the court, when a will has been proven, to grant letters testamentary to the person named in it upon application, if he is not disqualified by statute; Holladay v. Holladay, 16 Or. 147, 19 Pac. 81. Poverty or insolvency is no ground for refusing to qualify an executor; but an insolvent executor may be compelled to give security; Longberger's Estate, 148 Pa. 564, 24 Atl. 120. In some states a bond is required from executors, similar to or identical with that required from administrators. The testator may, by express direction, exempt from the obligation of giving a bond with sureties any trustees whom he appoints or directs to be appointed, but not his executor, unless permitted to do so by state statute; because the creditors of the estate must look to the funds in the executor's hands.

Idiots and lunatics cannot be executors; and an executor who becomes *non compos* may be removed; 1 Salk. 36. In Massachusetts, when any executor shall become insane, or otherwise incapable of discharging his trust, or *evidently unsuitable therefor*, the judge of probate may remove him; Thayer v. Homer, 11 Metc. (Mass.) 104. A drunkard may perform the office of executor; Berry v. Hamilton, 12 B. Monr. (Ky.) 191, 54 Am. Dec. 515; Sill v. McKnight, 7 W. & S. (Pa.) 244; but in some states, as Massachusetts and Pennsylvania, there are statutes providing for his removal.

Appointment. Executors can be appointed only by will or codicil; but the word "executor" need not be used. He may be appointed and designated, by committing to his charge those duties which it is the province of an executor to perform; 3 Phill. Eccl. 118; Myers v. Daviess, 10 B. Monr. 394; Ex parte McDonnell, 2 Bradf. Surr. (N. Y.) 32; State v. Watson, 2 Speers (S. C.) 97; Carpenter v. Cameron, 7 Watts (Pa.) 51. Even a direction

to keep accounts will, in the absence of any thing to the contrary, constitute the person addressed an executor. A testator may project his power of appointment into the future and exercise it after death through an agent pointed out by name or by his office; Bishop v. Bishop, 56 Conn. 208, 14 Atl. 808.

The appointment of an executor may be absolute, qualified, or conditional. It is *absolute* when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects or limitation in point of time; Toller, Ex. 36. It may be *qualified* as to the time or place wherein, or the subject-matters whereon, the office is to be exercised; 1 Will. Ex. 204. Thus, a man may be appointed executor, and his term made to begin or end with the marriage of testator's daughter; or his authority may be limited to the state: or to one class of property, as if A be made executor of goods and chattels in possession, and B of *choses* in action; Swinb. Wills, pt. 4, s. 17, pl. 4; 3 Phill. Eccl. 424. Still, as to creditors, three limited executors all act as one executor, and may be sued as one; Cro. Car. 293. Finally, an executor may be appointed *conditionally*, and the condition may be precedent or subsequent. Such is the case when A is appointed in case B shall resign. Godolphin, Orph. Leg. pt. 2, c. 2, § 1. As to appointment, see Manning v. Leighton, 65 Vt. 84, 26 Atl. 258, 24 L. R. A. 684; 39 Sol. J. 228, 244.

Removal. An executor who fails to keep proper accounts or to render any account for a long period, who retains the trust funds mixed with his own and who makes improper investments, should be dismissed; Simon's Estate, 155 Pa. 215, 26 Atl. 424; but failure to account is not compulsory ground of removal; Cosby v. Weaver, 107 Ga. 761, 33 S. E. 656; and the mere delay of an executor to convert real estate into personalty when the same has increased in value, is not such misconduct as to warrant his removal; Wilcox v. Quinby, 65 Hun 621, 20 N. Y. Supp. 5. He may be removed, however, where he has any conflicting personal interest; Putney v. Fletcher, 148 Mass. 247, 19 N. E. 370.

Assignment. An executor cannot assign his office. In England, if he dies having proved the will, his own executor becomes also the original testator's executor. But if he dies intestate, an administrator *de bonis non* of the first testator succeeds to the executorship. And an administrator *de bonis non* succeeds to the executorship in both these events, in the United States generally, wherever a trust is annexed to the office of executor; Hendren v. Colgin, 4 Munf. (Va.) 231; Patterson v. High, 43 N. C. 52; Vance v. Vance, 17 Me. 204; In re Van Wyck, 1 Barb. Ch. (N. Y.) 565; Lott v. Meacham, 4 Fla. 144.

Acceptance. The appointee may accept or refuse the office of executor; 3 Phill. Eccl. 577; Stebbins v. Lathrop, 4 Pick. (Mass.) 33; Williams v. Cushing, 34 Me. 370; Leavitt v. Leavitt, 65 N. H. 102, 18 Atl. 920. His acceptance may be implied by acts of authority over the property which evince a purpose of accepting, and by any acts which would make him an executor *de son tort*, which see. So his refusal may be inferred from his keeping aloof from all management of the estate; Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388; Ayres v. Weed, 16 Conn. 291; Marr v. Peay, 6 N. C. 85, 5 Am. Dec. 521; Ralston's Estate, 158 Pa. 645, 28 Atl. 139. But he cannot be compelled to accept and qualify or renounce in some formal manner; Cable v. Cable, 76 Ia. 163, 40 N. W. 700. If one of two or more appointees accepts, and the other declines or dies, or becomes insane, he becomes sole executor; Croft v. Steele, 6 Watts (Pa.) 373. An administrator *de bonis non* cannot be joined with an executor.

Acts before probate. The will itself is the sole source of an executor's title. Probate is the evidence of that title. See Wolfe v. Underwood, 97 Ala. 375, 12 South. 234; Clapp v. Stoughton, 10 Pick. (Mass.) 463; Shirley v. Healds, 34 N. H. 407. Before probate, an executor may do nearly all the acts which he can do after. He can receive payments, discharge debts, collect and recover assets, sell bank-stock, give or receive notice of dishonor, initiate or maintain proceedings in bankruptcy, sell or give away goods and chattels, and pay legacies. And when he has acted before probate he may be sued before probate; 6 Term 295; Rand v. Hubbard, 4 Metc. (Mass.) 252. He may commence, but he cannot maintain, suits before probate, except such suits as are founded on his actual possession; 3 C. & P. 123; Hutchins v. Adams, 3 Greenl. (Me.) 174; Strong v. Perkins, 3 N. H. 517; 2 Atk. 285. So in some states he cannot sell land without letters testamentary; Kerr v. Moon, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; or transfer a mortgage; Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149; or remain in his own state and sue by attorney elsewhere; Hutchins v. Bank, 12 Metc. (Mass.) 423; or indorse a note so as to be sued, in some states; Stearns v. Burnham, 5 Greenl. (Me.) 261, 17 Am. Dec. 228; Thompson v. Wilson, 2 N. H. 291. And see Harper v. Butler, 2 Pet. (U. S.) 239, 7 L. Ed. 410; Byles, Bills 40; Story, Pr. Notes 304; Story, Bills 250; Horn v. Johnson, 87 Ga. 448, 13 S. E. 633.

Co-executors. Co-executors are regarded in law as one individual; and hence, in general, the acts of one are the acts of all; Com. Dig. *Administration* (B, 12); Gates v. Whetstone, 8 S. C. 244, 28 Am. Rep. 284; Armstrong v. O'Brien, 83 Tex. 635, 19 S. W. 268; Viele v. Keeler, 129 N. Y. 190, 29 N. E. 78. Hence the assent of one executor to a legacy is sufficient, and the sale or gift of one is the sale or gift of all. So a payment by or to

one is a payment by or to all; Herald v. Harper, 8 Blackf. (Ind.) 170; Hoke's Ex'rs v. Fleming, 32 N. C. 263; Adair v. Brimmer, 74 N. Y. 539; a release by one binds all; Devling v. Little, 26 Pa. 502. But each is liable only for the assets which have come into his own hands; Douglass v. Satterlee, 11 Johns. (N. Y.) 21. So he alone who is guilty of tort or negligence is answerable for it, unless his co-executor has connived at the act or helped him commit it; Estate of Sanderson, 74 Cal. 199, 15 Pac. 753. An executor is not liable for a *devastavit* of his co-executor; Anderson v. Earle, 9 S. C. 460. A power to sell land, conferred by will upon several executors, must be executed by all who proved the will; Wasson v. King, 19 N. C. 262. But if only one executor consents to act, his sale under a power in the will would be good, and such refusal of the others may be *in pais;* Cro. Eliz. 80; Ross v. Clore, 3 Dana (Ky.) 195; Herrick v. Carpenter, 92 Mich. 440, 52 N. W. 747. If the will gives no direction to the executors to sell, but leaves the sale to the discretion of the executors, all must join. But see less strict rules in Miller v. Meetch, 8 Pa. 417; Meakings v. Cromwell, 2 Sandf. (N. Y.) 512; Taylor v. Morris, 1 N. Y. 341. Where all the executors must unite to make a valid conveyance, no valid contract to convey can be made by a part of them; Crowley v. Hicks, 72 Wis. 539, 40 N. W. 151. One executor cannot bind his co-executors by a confession of judgment without their consent; Karl v. Black's Ex'rs, 2 Pittsb. (Pa.) 19. On the death of one or more of several joint executors, their rights and powers survive to the survivor; Bac. Abr. *Executor* (D); Shepp. Touchst. 484.

ADMINISTRATOR. The appointment of an administrator is required in the case of one who dies intestate.

The appointment of the administrator must be lawfully made with his consent, and by an officer having jurisdiction. If an improper administrator be appointed, his acts are not void *ab initio*, but are good, usually, until his power is rescinded by authority. But they are void if a will had been made, and a competent executor appointed under it; Griffith v. Frazier, 8 Cra. (U. S.) 23, 3 L. Ed. 471; 1 Dane, Abr. 556–561; Beers v. Shannon, 73 N. Y. 292. But, in general, anybody may be administrator who can make a contract. An infant cannot; McGooch v. McGooch, 4 Mass. 348; a *feme covert* may at common law with her husband's permission; 4 Bac. Abr. 67; In re Gyger's Estate, 65 Pa. 311; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40. Improvident persons, drunkards, gamblers, and the like are in some states disqualified by statute; McMahon v. Harrison, 6 N. Y. 443.

Failure to apply for administration within the time prescribed is a waiver by the party entitled to it under the statute; In re Sprague's Estate, 125 Mich. 357, 84 N. W. 293; and the right of a creditor to be appointed administrator as "particular creditor" is waived by his signing a petition for the appointment of another person; In re Sullivan's Estate, 25 Wash. 430, 65 Pac. 793.

The formalities and requisites in regard to valid appointments and rules, as to notice, defective proceedings, etc., are widely various in the different states. If letters appear to have been unduly granted, or to an unfaithful person, they will be revoked; Cole v. Dial, 12 Tex. 100; Jeroms v. Jeroms, 18 Barb. (N. Y.) 24; Marcy v. Marcy, 6 Metc. (Mass.) 370; as they may be where it appears that the estate has been wasted or mismanaged; Taylor v. Taylor, 154 Ill. App. 258.

The personal property of a decedent is appropriated to the payment of his debts, so far as required, and must be first resorted to by creditors. And, by statutes, courts may grant an administrator power to sell, lease, or mortgage land, when the personal estate of the deceased is not sufficient to pay his debts; Ferguson v. Broome, 1 Bradf. (N. Y.) 10; Farrington v. King, 1 Bradf. (N. Y.) 182; Renwick v. Renwick, 1 Bradf. (N. Y.) 234; Matheson's Heirs v. Hearin, 29 Ala. 210; In re Estate of Godfrey, 4 Mich. 308; Weed v. Edmonds, 4 Ind. 468; McCoy v. Morrow, 18 Ill. 519, 68 Am. Dec. 578. The court may direct lands to be sold in order to pay taxes levied against decedent's property; Sales v. Cosgrove (Ky.) 25 S. W. 594.

Persons holding certain relations to the intestate are considered as entitled to an appointment to administer the estate in established order of precedence; Bradley v. Bradley, 3 Redf. (N. Y.) 512.

Order of appointment.—*First in order of appointment.*—The husband has his wife's personal property, and takes out administration upon her estate. But in some states it is not granted to him unless he is to receive the property eventually. So the widow can ordinarily claim sole administration, though in the discretion of the judge it may be refused her, or she may be joined with another; 2 Bla. Com. 504; Stearns v. Fiske, 18 Pick. (Mass.) 26; Edelen v. Edelen, 10 Md. 52; Jones v. Ritter's Adm'r, 56 Ala. 270; Scanlon's Estate, 2 Pa. Dist. R. 742. The widow is entitled to preference though she was not living with her husband at the time; Ross' Estate, 11 Pa. Co. Ct. R. 601.

Second in order of appointment are the next of kin. Kinship is usually computed by the civil-law rule. The English order, which is adopted in some states, is, *first*, husband or wife; *second*, sons or daughters; *third*, grandsons or granddaughters; *fourth*, great-grandsons or great-granddaughters; *fifth*, father or mother; *sixth*, brothers or sisters; *seventh*, grandparents; *eighth*, uncles, aunts, nephews, nieces, etc.; 1 P. Will. 41; 2 Add. Eccl. 352; Succession of Sloane, 12 La. Ann. 610; 2 Kent 514; Davis v. Swearingen, 56 Ala. 539.

In New York the order is, the widow; the

children; the father; the brothers; the sisters; the grandchildren; any distributee being next of kin; McCosker v. Golden, 1 Bradf. (N. Y.) 64; Peters v. Public Adm'r, 1 Bradf. (N. Y.) 200; In re Com'rs of Emigration, 1 Bradf. (N. Y.) 259.

When two or three are in the same degree, the probate judge may decide between them; and in England he is usually guided by the wishes of the majority of those interested. This discretion, however, is controlled by certain rules of priority as to persons of equal grades, which custom or statute has made. *Males* are generally preferred to females, though from no superior right. *Elder* sons are preferred to younger, usually, and even when no doctrine of primogeniture subsists. So *solvent* persons to insolvent, though the latter may administer. So *business* men to others. So *unmarried* to married women. So relations of the *whole* blood to those of the half blood. So *distributees* to all other kinsmen. As between kindred of equal degree a son will be preferred to a daughter; In re Hill's Estate, 55 N. J. Eq. 764, 37 Atl. 952; and although generally men of the same degree are preferred to women, a niece is preferred to a grand-nephew, being one degree nearer; In re Hawley's Estate, 37 Misc. 667, 76 N. Y. Supp. 461. The next of kin having the right of administration and not desiring to exercise it may nominate another in his stead, who shall be nominated if fit and suitable under the same rules which would be applied to the next of kin himself; In re Wooten's Estate, 114 Tenn. 289, 85 S. W. 1105; a non-resident may be an administrator; Fulgham v. Fulgham, 119 Ala. 403, 24 South. 851; Jones v. Smith, 120 Ga. 642, 48 S. E. 134.

The appointment in all cases is voidable when the court did not give a chance to all parties to come in and claim it.

Third in order of appointment.—Creditors (and, ordinarily, first the largest one) have the next right; 67 Law T. (N. S.) 503. A creditor has no right of administration if there are next of kin; In re Barr's Estate, 38 Misc. 355, 77 N. Y. Supp. 935; but if there be no widow and next of kin, a creditor is entitled to administration; Stebbins v. Palmer, 1 Pick. (Mass.) 71, 11 Am. Dec. 146. To prevent fraud, a creditor may be appointed when the appointee of the two preceding classes does not act within a reasonable time. A creditor may make oath of his account to prove his debt, but no rule establishes the size of the debt necessary to be proved before appointment; Arnold v. Sabin, 1 Cush. (Mass.) 525. After creditors, any suitable person may be appointed. Generally, consuls administer for deceased aliens; and this is sometimes provided by treaties, which see.

Where all the persons applying for appointment are equally qualified, and competent, the court must appoint the one having a prior right under the statute, and it has no discretion; In re Nickals, 21 Nev. 462, 34 Pac. 250.

Co-administrators, in general, must be joined in suing and in being sued; but, like executors, the acts of each, in the delivery, gift, sale, payment, possession, or release of the intestate's goods, are the acts of all, for they have joint power; Bac. Abr. *Exec.* C. 4; Com. Dig. *Administration* (B, 12); 1 Dane, Abr. 383; Saunders' Heirs v. Saunders' Ex'rs, 2 Litt. (Ky.) 315; Turner's Ex'rs v. Wilkins, 56 Ala. 173. If one is removed by death, or otherwise, the whole authority is vested in the survivor; Lewis' Ex'rs v. Brooks, 6 Yerg. (Tenn.) 167; Treadwell v. Cordis, 5 Gray (Mass.) 341; Shippen's Heirs v. Clapp, 29 Pa. 265. Each is liable only for the assets which have come into his hands, and is not liable for the torts of others except when guilty of negligence or connivance; 2 Ves. 267; Appeal of Jones, 8 Watts & S. (Pa.) 143, 42 Am. Dec. 282; Hall v. Carter, 8 Ga. 388; Smith's Ex'rs v. Chapman's Ex'r, 5 Conn. 19; Appeal of Hengst, 24 Pa. 413; Boudereau v. Montgomery, 4 Wash. C. C. 186, Fed. Cas. No. 1,694; Banks v. Wilkes, 3 Sandf. Ch. (N. Y.) 99; Atcheson v. Robertson, 3 Rich. Eq. (S. C.) 132, 55 Am. Dec. 634.

A note payable to two administrators for a debt due the estate may be transferred by the endorsement of one; Mackay v. St. Mary's Church, 15 R. I. 121, 23 Atl. 108, 2 Am. St. Rep. 881; a surviving administrator has full power to act alone; Saul v. Frame, 3 Tex. Civ. App. 596, 22 S. W. 984.

Powers and Duties of an Executor or Administrator. *The duty of an administrator* is in general to do the things set forth in his bond; and for this he is generally obliged to give security; Baldwin v. Buford, 4 Yerg. (Tenn.) 20; Colwell v. Alger, 5 Gray (Mass.) 67.

The *duties of an executor* are the same, so far as concerns the collection of the assets and up to the point at which the estate is ready for distribution. It is then to be disposed of, if an administrator, according to law, and if an executor, pursuant to the will. See *infra*.

An executor or administrator, coming into possession of property by virtue of his position, is estopped, while in possession, from disputing the title of his intestate or testator; Wiseman v. Swain (Tex.) 114 S. W. 145.

Duties. They may be thus summarized. Those of an executor and administrator are alike except so far as those of the former spring from the will.

First. He must be responsible for the burial of the deceased in a manner suitable to the estate; 2 Bla. Com. 508. But no unreasonable expenses will be allowed, nor any unnecessary expenses if there is any danger of the estate proving insolvent; 2 C. & P. 207; Barclay's Estate, 2 W. N. C. (Pa.) 447; Succession of Hearing, 28 La. Ann. 149; Pat-

terson v. Patterson, 59 N. Y. 582, 17 Am. Rep. 384. The estate and not the widow is liable for funeral expenses; Compton v. Lancaster (Ky.) 114 S. W. 260; but she may order the interment on a scale proportionate to the financial condition of the deceased and the estate will be liable; Wagoner Undertaking Co. v. Jones, 134 Mo. App. 101, 114 S. W. 1049. See FUNERAL EXPENSES.

Second. The executor must prove the will, and take out letters testamentary, and an administrator must procure his letters of administration; see *supra.* In England, there are two ways of proving a will,—in *common form*, and in *form of law*, or solemn form. In the former, the executor *propounds* the will,—*i. e.* presents it to the registrar, in the absence of all other interested parties. In the latter, all parties interested are summoned to show cause why probate should not be granted.

Third. Ordinarily, he must make an inventory of personal property at least, and, in some states, of real estate also; Griswold v. Chandler, 5 N. H. 492; Freeman v. Anderson, 11 Mass. 190; Bourne v. Stevenson, 58 Me. 499; Pursel v. Pursel, 14 N. J. Eq. 514. This duty rests on executors and not on adult legatees; Mills v. Smith, 65 Hun 619, 19 N. Y. Supp. 854.

Fourth. He must give notice of his appointment in the statute form, and should advertise for debts and credits; Gilbert's Adm'r v. Little's Adm'r, 2 Ohio St. 156; but the giving or not giving it does not affect the statute of limitations, nor does the failure to publish, affect a creditor who did not present his claim; McMillan v. Hayward, 94 Cal. 357, 29 Pac. 774.

Fifth. He must collect the goods and chattels, and the claims inventoried, with reasonable diligence. And he is liable for a loss by the insolvency of a debtor, if it results from his gross delay; Long's Estate, 6 Watts (Pa.) 46; Dean v. Rathbone's Adm'r, 15 Ala. 328.

Sixth. The personal effects he must deal with as the will directs, and the surplus must be turned into money *and divided as if there were no will.* The safest method of sale is a public auction.

Seventh. He must collect the outstanding claims and convert property into money; 2 Kent 415; Bailey v. Dilworth, 10 Smedes & M. (Miss.) 404, 48 Am. Dec. 760; 1 Mylne & C. 8; Evans v. Iglehart, 6 Gill & J. (Md.) 171; Bogart v. Van Velsor, 4 Edw. Ch. (N. Y.) 718; Moore v. Hamilton, 4 Fla. 112; Smyth v. Burns' Adm'rs, 25 Miss. 422; Weyer v. Bank, 57 Ind. 198; Roumfort v. McAlarney, 82 Pa. 193; but he cannot occupy or lease the lands of the estate, or receive rents or profits therefrom, as these descend to the heir; Estate of Merkel, 131 Pa. 584, 18 Atl. 931.

Eighth. He must keep the money of the estate safely, but not mixed with his own, or he may be charged interest on it. He is also charged when he has misemployed funds or let them lie idle, provided a want of ordinary prudence is proved against him; Hammond v. Hammond, 2 Bland, Ch. (Md.) 306; Sullivan v. Winthrop, 1 Sumn. 14, Fed. Cas. No. 13,600; Hite's Ex'r v. Hite's Legatees, 2 Rand. (Va.) 409; Lake v. Park, 19 N. J. L. 109; Darrell v. Eden, 3 Des. (S. C.) 241, 4 Am. Dec. 613; Appeal of Mayberry, 33 Pa. 258; In re Myers, 131 N. Y. 409, 30 N. E. 135. When a debtor is appointed executor of the creditor's will, equity will presume that the debt has been paid, and will treat it as an asset in the executor's hands; Crow v. Conant, 90 Mich. 247, 51 N. W. 450, 30 Am. St. Rep. 427. And generally, interest is to be charged on all money received by an executor and not applied to the use of the estate; McCaw v. Blewitt, Bailey, Eq. (S. C.) 98; Arnett v. Linney, 16 N. C. 369; Thompson v. Sanders' Heirs, 6 J. J. Marsh. (Ky.) 94; Lloyd's Estate, 82 Pa. 143. See Good's Estate, 150 Pa. 301, 24 Atl. 624. But an executor cannot be charged with interest on money allowed him for commission; Brinton's Estate, 10 Pa. 408; he is not chargeable with compound interest; Appeal of Light, 24 Pa. 180. Where investments have been made contrary to the requirements of the will, on personal security, they are at the executor's risk, and he must answer personally for any loss; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271. See INTEREST; INVESTMENTS.

Ninth. He must be at all times ready to account to the proper authorities, and must actually file an account at the end of the year generally prescribed by statute. The burden of proving items of a discharge in an accounting is upon the accountant; Brewster v. Demarest, 48 N. J. Eq. 559, 23 Atl. 271.

Tenth. He must pay the debts and legacies in the order required by law. There is no universal order of payment adopted in the United States; but debts of the last sickness and the funeral are preferred debts everywhere; Bacon, Abr. Ex. L. 2; 2 Kent 416; Lawson's Adm'rs v. Hansborough, 10 B. Monr. (Ky.) 147; Moye v. Albritton, 42 N. C. 62; Burruss v. Fisher, 23 Miss. 228; Johnston v. Morrow, 28 N. J. Eq. 327; Chapman v. Barnes, 29 Ill. App. 184.

Next to these, as a general rule, debts due the state or the United States are privileged. This priority of the United States only extends to the net proceeds of the property of the deceased, and therefore the necessary expenses of the administration are first paid. The act of burial and its accompaniments may be done by third parties, who have a preferred claim therefor, if reasonable; 3 Nev. & M. 512; 8 Ad. & E. 348; U. S. v. Eggleston, 4 Sawy. 199, Fed. Cas. No. 15,027. A claim for costs recovered by a creditor in an action to establish his claim is entitled to priority over the debts of the estate; In

re Randell's Estate, 8 N. Y. Supp. 652. If the administrator pays debts of a lower degree first, he will be liable out of his own estate in case of a deficiency of assets; 2 Kent 419. If he pays decedent's debts from his own funds he is entitled to repayment from the proceeds of lands originally liable for such debt; Doty v. Cox (Ky.) 22 S. W. 321.

A valid claim against an estate cannot be defeated on the ground that the estate had been settled before the claim was filed; Ury v. Bush, 85 Ia. 698, 52 N. W. 666.

Powers. The authority of the executor or administrator dates from the moment of death; Com. Dig. *Administration* (B, 10); 2 W. Bla. 692; 10 Ad. & El. 212. When once probate is granted, his acts are good until formally reversed by the court; 3 Term 125; Appeal of Peebles, 15 S. & R. (Pa.) 39. In some states he has power over both real and personal estate; Goodwin v. Jones, 3 Mass. 514, 3 Am. Dec. 173; Stearns v. Stearns, 1 Pick. (Mass.) 157. In the majority, he has power over the real estate only when expressly empowered by the will, or when the personal estate is insufficient; see *infra.*

His power is that of a mere trustee, who must apply the goods for such purposes as are sanctioned by law; 4 Term 645; 9 Co. 88; Co. 2d Inst. 236; Warfield v. Brand's Adm'r, 13 Bush (Ky.) 77; Ferris v. Van Vechten, 9 Hun (N. Y.) 12. The personal representative has the legal title to the *choses* in action of the deceased, and may transfer, discharge, or compound them as if he were the absolute owner; Curry v. Peebles, 83 Ala. 225, 3 South. 622; Kahl v. Schober, 35 N. J. Eq. 461; and having at common law absolute power of disposal of the personal effects, he may compromise any claim; Olston v. R. Co., 52 Or. 343, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915. But where an executor pledged goods belonging to an estate, not holding himself out to act as executor, and the pledgee having no notice that he was such, no title passed and the pledgee was required to surrender the goods; [1912] 1 Ch. 451.

In order that he may be enabled to reduce them to possession the executor or administrator acquires a property in the assets of the intestate. As to what constitutes assets, see ASSETS, and for a definition of "asset," within the administration laws, see Louisville & N. R. Co. v. Herb, 125 Tenn. 408, 143 S. W. 1138.

His right is not a personal one, but an incident to his office; Weeks v. Gibbs, 9 Mass. 74; Dawes v. Boylston, 9 Mass. 352, 6 Am. Dec. 72; Hillman v. Stephens, 16 N. Y. 278. He owns all his intestate's personal property from the day of death, and for any cause of action accruing after that day may sue in his own name; Patchen v. Wilson, 4 Hill (N. Y.) 57; Manwell v. Briggs, 17 Vt. 176; Cullen v. O'Hara, 4 Mich. 132; Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013. This happens by *relation* to the day of death; Hutchins v. Bank, 12 Metc. (Mass.) 425; 7 Jur. 492; Shirley v. Healds, 34 N. H. 407. An administrator is a trustee, who holds the legal property but not the equitable. If he is a debtor to the estate, and denies the debt, he may be removed; but if he inventories it, it is cancelled by the giving of his bond; Stevens v. Gaylord, 11 Mass. 268.

He may declare, whenever the money when received will be assets; and he may sue on a judgment once obtained, as if the debt were his own. He may summon supposed debtors or holders of his intestate's property to account, and has the right to an investigation in equity. He may bind the estate by arbitration; Kendall v. Bates, 35 Me. 357; Appeal of Peters, 38 Pa. 239. He may assign notes, etc. See Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Griswold v. Clark, 28 Vt. 661; Miller v. Henderson, 10 N. J. Eq. 320; Patterson v. Edwards, 29 Miss. 70; Thomas v. Reister, 3 Ind. 369; Walker v. Craig, 18 Ill. 116; Shoenberger's Ex'rs v. Sav. Inst., 28 Pa. 459; Morris' Ex'r v. Duke's Adm'r, 2 Patt. & H. (Va.) 462. Nearly all debts and actions survive to the administrator. But he has no power over the firm's assets, as to which his intestate was a partner, until the debts are paid; Thomson v. Thomson, 1 Bradf. (N. Y.) 24; he should merely refer in his inventory to the intestate's interest in the partnership without attempting to give the items of property, as he can have no control over it until the affairs of the partnership are settled; Loomis v. Armstrong, 63 Mich. 355, 29 N. W. 867.

At common law the executor or administrator has no power over real estate; Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573; Wilson v. Hamilton, 9 S. & R. (Pa.) 431; Livingston v. Bird, 2 Root (Conn.) 438; Egerton's Adm'r v. Conklin, 25 Wend. (N. Y.) 224; Sorrell v. Ham, 9 Ga. 55; Smith v. Smith's Adm'r, 27 N. J. Eq. 445; Hankins v. Kimball, 57 Ind. 42; nor is the probate even admissible as evidence that the instrument is a will, or is an execution of a power to charge land; Wms. Ex. 562. By statute, in some states, the probate is made *prima facie* or conclusive evidence as to realty; Brown v. Wood, 17 Mass. 68; Fortune v. Buck, 23 Conn. 1; Darby v. Mayer, 10 Wheat. (U. S.) 470, 6 L. Ed. 367; Jones v. McKee, 3 Pa. 498, 45 Am. Dec. 661; Singleton v. Singleton, 8 B. Monr. (Ky.) 340; Lewis' Heirs v. His Executor, 5 La. 388. In some states the probate is made after the lapse of a certain time conclusive as to realty; Tarver v. Tarver, 9 Pet. (U. S.) 180, 9 L. Ed. 91; Appeal of Hegarty, 75 Pa. 512; Bailey v. Bailey, 8 Ohio, 246; Hardy v. Hardy's Heirs, 26 Ala. 524; Parker's Ex'rs v. Brown's Ex'rs, 6 Gratt. (Va.) 564; Kenyon v. Stewart, 44 Pa. 189. Land in England under the Land Title

and Transfer Act of 1897 goes to the executor or administrator.

The administrator has no interest in the decedent's real estate unless the personal property is insufficient to pay debts and expenses; Pratt v. Millard, 154 Mich. 112, 117 N. W. 552; and an executor has, ordinarily, no power to sell land unless it is expressly given or necessarily implied in the will; Hanson v. Hanson, 149 Ia. 82, 127 N. W. 1032; but one to whom all the testator's residuary estate is devised, "in trust to receive, hold, invest and reinvest," has, by implication, power to sell real estate; Powell v. Wood, 149 N. C. 235, 62 S. E. 1071.

The will may direct the executor to sell lands to pay debts, but the money resulting is usually held to be equitable assets only; 9 B. & C. 489; Haskell v. House, 3 Brev. (S. C.) 242; Speed's Ex'r v. Nelson's Ex'r, 8 B. Monr. (Ky.) 499; Smith v. Knoebel, 82 Ill. 392; Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; but the title and right of possession to the land remain in the heirs until the sale, and they are the proper parties to maintain ejectment; Cohea v. Jemison, 68 Miss. 510, 10 South. 46; but see Smathers v. Moody, 112 N. C. 791, 17 S. E. 532; and to collect the rents; Appeal of Pennsylvania Co. for Insurance on Lives & Granting Annuities, 168 Pa. 431, 32 Atl. 25, 47 Am. St. Rep. 893. In equity, the testator's intention will be regarded as to whether the surplus fund, after a sale of the real estate and payment of debts, shall go to the heir; 1 Wms. Ex. 555, Am. note.

Chattels real pass to the executor or administrator, and such is the interest of the tenant of a farm from year to year; In re Ring's Estate, 132 Ia. 216, 109 N. W. 710. But the wife's chattels real, unless taken into possession by her husband during his lifetime, do not pass to his executor; 1 Wms. Ex. 579, n; In re Hind's Estate, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Pitts v. Curtis, 4 Ala. 350; Wade v. Grimes, 7 How. (Miss.) 425. The husband's act of possession must effect a complete alteration in the nature of the joint interest of husband and wife in her chattels real, or they will survive to her.

Chattels personal go to the executor; Harris v. Meyer, 3 Redf. (N. Y.) 450; Kahl v. Schober, 35 N. J. Eq. 461; Highnote v. White, 67 Ind. 596; Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580. Such are emblements; Brooke, Abr. *Emblements;* Bevans v. Briscoe, 4 H. & J. (Md.) 139; Kesler v. Cornelison, 98 N. C. 383, 3 S. E. 839; but see Wright v. Watson, 96 Ala. 536, 11 South. 634. Heirlooms and fixtures go to the heir; and as to what are fixtures, see FIXTURES, and 1 Wms. Ex. 615; 2 Sm. L. Cas., 9th Am. ed. 1450; Crosw. Ex. & Ad. 352. The widow's separate property and paraphernalia go to her. For elaborate collections of cases on the effect of nuptial contracts about property upon the executor's right, see 1 Wms. Ex. *660, Am. note 2; 2 *id.* 636, note 1; 1 Sm. Lead. Cas. 65. Donations *mortis causa* go to the donee at once, and not to the executor; Murdock v. McDowell, 1 Nott & McC. (S. C.) 237, 9 Am. Dec. 684; Michener v. Dale, 23 Pa. 59; Rockwood v. Wiggin, 16 Gray (Mass.) 403; Hatch v. Atkinson, 56 Me. 327, 96 Am. Dec. 464.

An executor may sell terms for years, and may even make a good title against a specific legatee, unless the sale be fraudulent. So he may underlet a term. He may indorse a promissory note or a bill payable to the testator or his order; Miller v. Helm, 2 Smedes & S. (Miss.) 687. The rule that executors have no power to confess judgment is not applicable to offers of judgments to firm creditors, by a firm composed of a surviving member and the executor of a deceased member, conducting the interests of the deceased therein; Columbus Watch Co. v. Hodenpyl, 61 Hun 557, 16 N. Y. Supp. 337; but they may compromise claims; Bacon v. Crandon, 15 Pick. (Mass.) 79; Chase v. Bradley, 26 Me. 531; or submit matters in dispute to arbitration; Wills v. Rand's Adm'rs, 41 Ala. 198; Wood v. Tunnicliff, 74 N. Y. 38. Without the sanction of the probate court, he has no power to bind the estate by contract, even for the necessities of infant devisees; Roscoe v. McDonald, 91 Mich. 270, 51 N. W. 939. His right to employ counsel depends upon the right to litigate; In re Riviere's Estate, 8 Cal. App. 773, 98 Pac. 46.

Wife's choses. In general, *choses* in action given to the wife either before or after marriage survive to her, provided her husband have not reduced them to possession before his death. A promissory note given to the wife during coverture comes under this rule in England; 12 M. & W. 355; 7 Q. B. 864; but not so in this country generally; Jones' Adm'r v. Warren's Adm'r, 4 Dana (Ky.) 333; Fourth Ecclesiastical Society in Middletown v. Mather, 15 Conn. 587; Savage v. King, 17 Me. 301. Mere intention to reduce *choses* into possession is not a reduction, nor is a mere appropriation of the fund; 5 Ves. 515; Petrie v. Clark, 11 S. & R. (Pa.) 377, 14 Am. Dec. 636; In re Hinds' Estate, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Wardlow v. Tray's Adm'r, 2 Hill, Eq. (S. C.) 644; Pitts v. Curtis, 4 Ala. 350; Curry v. Fulkinson's Ex'rs, 14 Ohio 100.

A statutory right of a husband to sue for a *chose* in action of his wife without administration is confined to the cases expressly declared by the statute and will not be extended by construction; Ferguson v. R. Co., 6 App. D. C. 525.

When the same persons are both executors and trustees, and as executors have paid the debts and passed their final account, they no longer hold the assets as executors but as trustees; [1913] A. C. 76. But where the same person was appointed executor and tes-

tamentary trustee, and he qualified as executor, but gave no undertaking as trustee and secured no order for his discharge as executor, and he had failed to file current accounts until compelled to render a final account, it was held that his relation as executor remained and that the court was empowered to direct the final accounting; In re Roach's Estate, 50 Or. 179, 92 Pac. 118.

SUITS BY OR AGAINST EXECUTORS AND ADMINISTRATORS. 1. *By.* In general, a right of action founded on a tort or malfeasance dies with the person. But personal actions founded upon any obligation, contract, debt, covenant, or other duty to be performed, survive, and the executor may maintain them; Cowp. 375; 1 Wms. Saund. 216, n. See Brannock v. Stocker, 76 Ind. 573; 5 B. & Ad. 78. By statutes in England and the United States this common-law right is much extended. An executor may now have trespass, trover, etc., for injuries done to the intestate during his lifetime. Except for slander, for libels, and for injuries inflicted on the person, executors may bring personal actions, and are liable in the same manner as the deceased would have been; 2 Brod. & B. 102; Van Rensselaer's Ex'rs v. Platner's Ex'rs, 2 Johns. Cas. (N. Y.) 17; Kennerly v. Wilson, 1 Md. 102; Tait v. Parkman, 15 Ala. 253; Martin v. Baker, 5 Blackf. (Ind.) 232; Rice's Heirs v. Spotswood's Heirs, 6 T. B. Monr. (Ky.) 40, 17 Am. Dec. 115; Backus' Adm'rs v. McCoy, 3 Ohio 211, 17 Am. Dec. 585; Hagarty v. Morris, 2 W. N. C. (Pa.) 154. See Coleman v. Woodworth, 28 Cal. 567; Manwell v. Briggs, 17 Vt. 176; Richardson v. R. Co., 98 Mass. 85. Should his death have been caused by the negligence of any one, they may bring an action for the benefit of the family in some states. Executors may also sue for stocks and annuities, as being personal property. A right of action for the breach of a parol contract for the sale of land survives to the executors; Irwin v. Hamilton, 6 S. & R. (Pa.) 208. So they may sue for an insurance policy.

The courts of New Jersey will enforce the Pennsylvania statute giving a right of action to the widow of one who dies of injuries inflicted by the wrongful act of another, that statute not being repugnant to the policy of the former state; but such an action cannot be brought in New Jersey by the personal representative of the deceased, as required by the laws of that state in similar cases; Lower v. Segal, 59 N. J. L. 66, 34 Atl. 945.

For actions accruing after the testator's death, the executor may sue either in his own name or as executor. This is true of actions for tort, as trespass or trover, actions on contract and on negotiable paper; 3 Nev. & M. 391; Patchen v. Wilson, 4 Hill (N. Y.) 57; Williams v. Moore, 9 Pick. (Mass.) 432; Hailey v. Wheeler, 49 N. C. 159. So he may bring replevin in his own name; Branch v. Branch, 6 Fla. 314; and so, in short, wherever the money, when recovered, will be assets, the executor may sue as executor; Flower's Ex'rs v. Garr, 20 Wend. (N. Y.) 668; Sheets v. Pabody, 6 Blackf. (Ind.) 120, 38 Am. Dec. 132; Biddle v. Wilkins, 1 Pet. (U. S.) 686, 7 L. Ed. 315. See Pope's Heirs v. Boyd's Adm'x, 22 Ark. 535; Linsenbigler v. Gourley, 56 Pa. 166, 94 Am. Dec. 51. An executor cannot recover in ejectment without producing the will; Mays v. Killen, 56 Ga. 527; Horn v. Johnson, 87 Ga. 448, 13 S. E. 633.

2. *Against.* An action of trespass *quare clausum fregit* survives against the executor; McCallion v. Gegan, 9 Phila. (Pa.) 240. So also in causes of action wholly occurring after the testator's death, the executor is liable individually; Kerchner v. McRae, 80 N. C. 219. The actions of trespass and trover do not survive against the executors of deceased defendants. But the action of replevin does. The general rule is that causes of action *ex contractu* survive, while those *ex delicto* do not. "Executors and administrators are the representatives of the personal property of the deceased and not of his wrongs except so far as the tortious act complained of was beneficial to his estate;" 2 Kent 416.

As an administrator merely stands in place of the deceased, and does not represent creditors, he cannot file a bill to set aside a conveyance in fraud of creditors, the right to do so being in the creditors defrauded; Hoyt v. Northup, 256 Ill. 604, 100 N. E. 164.

The statute prescribes a fixed time for settling estates within which the executor or administrator cannot be sued, or compelled to file an account, unless he waives the right; Moses v. Jones, 2 Nott & McC. (S. C.) 259; Baggott v. Boulger, 2 Duer (N. Y.) 160. If he makes payments erroneously, supposing the estate to be solvent, he may recover them, it being a mistake of fact; Walker v. Bradley, 3 Pick. (Mass.) 261; Swope v. Chambers, 2 Gratt. (Va.) 319.

As to whether an executor or administrator is bound to plead the statute of limitation, the decisions are not uniform. That he is not bound to do so is held in Hodgdon v. White, 11 N. H. 208; Wiggins v. Lovering's Adm'r, 9 Mo. 262; Semmes v. Magruder, 10 Md. 242; Batson v. Murrell, 10 Humph. (Tenn.) 301, 51 Am. Dec. 707; Conway's Ex'r v. Reyburn's Ex'rs, 22 Ark. 290; Chambers v. Fennemore's Adm'r, 4 Harr. (Del.) 368; Appeal of Ritter, 23 Pa. 95; Barnawell v. Smith, 58 N. C. 168; Woods v. Irwin, 141 Pa. 278, 21 Atl. 603, 23 Am. St. Rep. 282; In re Baumhover's Estate, 151 Ia. 146, 130 N. W. 817; but a different rule applies when the personal estate is insufficient to pay the debts and a resort to the realty is necessary; Pollard v. Scears' Adm'r, 28 Ala. 484, 65 Am. Dec. 364. That it is his duty to plead the statute is held in Patterson v. Cobb, 4 Fla. 481 (and if he does not he is liable for a devastavit); Tunstall v. Pollard's Adm'r, 11

Leigh (Va.) 1; Matter of Milligan's Estate, 112 App. Div. 373, 98 N. Y. Supp. 480. But the executor was held bound by a waiver of the statute contained in the will; Glassell v. Glassell, 147 Cal. 510, 82 Pac. 42. If one co-administrator declines to plead it, the other may do so; Scull v. Wallace's Ex'rs, 15 S. & R. (Pa.) 231, and if the administrator does not plead it, the next of kin may do so; In re Clarke's Estate, 1 Phila. (Pa.) 356; or a creditor interested in the estate; Smith v. Pattie, 81 Va. 654. The bar of the statute having attached to a claim against an estate, it cannot be waived by an acknowledgment of the debt by the personal representative; Lee's Adm'r v. Downey, 68 Ala. 98; Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Burnett v. Noble, 5 Redf. Sur. (N. Y.) 69; Seig v. Acord's Ex'r, 21 Gratt. (Va.) 365, 8 Am. Rep. 605. And the executor or administrator cannot waive the statute as against a claim in his own favor; Grinnell v. Baxter, 17 Pick. (Mass.) 383; In re Brown's Estate, 77 Misc. 507, 137 N. Y. Supp. 978; Clayton v. Dinwoodey, 33 Utah 251, 93 Pac. 723, 14 Ann. Cas. 926; or the next of kin may set in up; Willcox v. Smith, 26 Barb. (N. Y.) 316. He is, in some states, chargeable with interest, *first*, when he receives it upon assets put out at interest; *second*, when he uses them himself; *third*, when he has large sums paid him which he ought to have put out at interest; Griswold v. Chandler, 5 N. H. 497; Wyman v. Hubbard, 13 Mass. 232; but he is not liable where he has funds which he holds pending legal proceedings to determine the rights of the remaindermen; In re Howard's Estate, 3 Misc. 170, 23 N. Y. Supp. 836. In some cases of need, as to relieve an estate from sale by a mortgagee, he may lend the estate money and charge interest thereon; Jennison v. Hapgood, 10 Pick. (Mass.) 77. The widow's support is usually decreed by the judge. But the administrator is not liable for the education of infant children, or for mourning-apparel for relatives and friends of the deceased; Johnson v. Corbett, 11 Paige Ch. (N. Y.) 265; Appeal of Flintham, 11 S. & R. (Pa.) 16.

The liability is in general measured by the amount of assets. On his contracts he may render himself liable personally, or as administrator merely, according to the terms of the contract which he makes; 7 B. & C. 450; Murrell v. Wright, 78 Tex. 519, 15 S. W. 156. But to make him liable personally for contracts about the estate, a valid consideration must be shown; 3 Sim. 543; 2 Brod. & B. 460. And, in general, assets or forbearance will form the only consideration; 5 My. & C. 71; Bank of Troy v. Topping & Holme, 13 Wend. (N. Y.) 557. But a bond of itself imports consideration; and hence a bond given by administrators to submit to arbitration is binding upon them personally; Ten Eyck v. Vanderpoel, 8 Johns. (N. Y.) 120; Robinson v. Lane, 14 Smedes & M. (Miss.) 161. He may compromise a suit brought for the widow and next of kin, for the death of the intestate; Washington v. R. Co., 136 Ill. 49, 26 N. E. 653. In general, he is not liable when he has acted in good faith, and with that degree of caution which prudent men exhibit in the conduct of their own affairs; In re Bosio's Estate, 2 Ashm. (Pa.) 437.

An administrator cannot ratify decedent's void transactions, nor make any contracts for him; Smith v. Brennan, 62 Mich. 349, 28 N. W. 892, 4 Am. St. Rep. 867.

An administrator is liable for torts and for gross negligence in managing his intestate's property. This species of misconduct is called in law a *devastavit;* Cartwright v. Cartwright, 4 Hayn. (Tenn.) 134; Jeffreys v. Yarborough, 16 N. C. 516; In re Holladay's Estate, 18 Or. 168, 22 Pac. 750. Such is negligence in collecting notes or debts; In re Merkel's Estate, 131 Pa. 584, 18 Atl. 931; an unnecessary sale of property at a discount; Pinckard v. Woods, 8 Gratt. (Va.) 140; paying undue funeral expenses; 1 B. & Ad. 260; and the like mismanagements. So he may be liable for not laying out assets for the benefit of the estate, or for turning the money to his own profit or advantage. In such cases he is answerable for both principal and interest. In England he may be charged with increased interest for money withheld by fraud; 2 Cox, Ch. 113; 4 Ves. 620; and he is sometimes made chargeable with compound interest in this country; Jennison v. Hapgood, 10 Pick. (Mass.) 77. Finally, a refusal to account for funds, or an unreasonable delay in accounting, raises a presumption of a wrongful use of them; Johnson v. Beauchamp, 5 Dana (Ky.) 70; Evans v. Iglehart, 6 Gill & J. (Md.) 186. If he receives rents and profits of land for a long period without accounting, he is liable to the heirs for the reasonable rental value of the land for the entire period; Shuffler v. Turner, 111 N. C. 297, 16 S. E. 417.

Where real estate is sold by executors to a co-executor, the sale is voidable at the instance of those interested in the estate; In re Richard's Estate, 154 Cal. 478, 98 Pac. 528. One executor may sue another where questions arise between the latter and the estate, jeopardizing the rights of parties in interest; Monmouth Inv. Co. v. Means, 151 Fed. 159, 80 C. C. A. 527.

After the debts have been paid and the final account passed, and a legacy ordered paid, an action will lie against the executor to recover it; Anderson v. Patty, 168 Ill. App. 151.

An insolvent bank cannot sue an executor for an assessment on the stock of his decedent, which was levied after a final decree for the distribution of the estate; Union Savings Bank of San Jose v. De Laveaga, 150 Cal. 395, 89 Pac. 84.

DISTRIBUTION. The distribution or disposal of the estate by an executor is as directed

by the will. The administrator *must distribute* the residue among those entitled to it, under direction of the court and according to law; Lamb v. Carroll, 28 N. C. 4; Appeal of Stewart, 86 Pa. 149; Appeal of Kline, 86 Pa. 363; Marshall v. Hitchcock, 3 Redf. (N. Y.) 461. But if he recognizes a claim as proper to be paid, and subsequently finds that there is no legal foundation for it, it is not binding upon the estate; Webster v. Le Compte, 74 Md. 249, 22 Atl. 232. And even after action brought against him by a creditor he may apply the assets in payment of the debt of another creditor; 24 Q. B. Div. 364.

The great rule is, that personal property is regulated by the law of the domicil. The rights of the distributees vest as soon as the intestate dies, but cannot be sued for till the lapse of the statute period of distribution. See 118th Novel of Justinian, Cooper's trans. 393: DISTRIBUTION; CONFLICT OF LAWS.

Compensation. An executor cannot pay himself. His compensation must be ordered by the court; Collins v. Tilton, 58 Ind. 374. Faithful service by an executor is a condition to the right of commissions. Misappropriation of funds may forfeit the right; In re Clauser's Estate, 84 Pa. 51.

Commissions are not allowed on a legacy given in trust to an executor; Westerfield v. Westerfield, 1 Bradf. Surr. (N. Y.) 198; Ames v. Downing, 1 Bradf. Surr. (N. Y.) 321. Reasonable expenses are always allowed an executor; Thacher v. Dunham, 5 Gray (Mass.) 26; Wilson v. Bates, 28 Vt. 765; Ord v. Little, 3 Cal. 287; Noel v. Harvey, 29 Miss. 72. When one of two co-executors has done nothing, he should get no commission; White v. Bullock, 20 Barb. (N. Y.) 91. Where a stranger was appointed administrator, upon his statement that his service would be gratuitous, he should not be allowed commissions; Hilton v. Hilton's Adm'r, 109 S. W. 905, 33 Ky. L. Rep. 276. In England, executors cannot charge for personal trouble or loss of time, and can only be paid for reasonable expenses.

An administrator receives no compensation in England; 3 Mer. 24; but in this country he is paid in proportion to his services, and all reasonable expenses are allowed him; Appeal of Culbertson, 84 Pa. 303. Additional allowance may be made where extraordinary services have been rendered; In re Moore's Estate, 96 Cal. 522, 31 Pac. 584. An administrator cannot pay himself. His compensation must be ordered by the court; Collins v. Tilton, 58 Ind. 374. If too small a compensation be awarded him, he may appeal; Jewett v. Woodward, 1 Edw. Ch. (N. Y.) 195; Edelen v. Edelen, 11 Md. 415; Ord v. Little, 3 Cal. 287; Andrew's Ex'rs v. Andrew's Adm'rs, 7 Ohio St. 143; Fowler v. Lockwood, 3 Redf. (N. Y.) 465. Allowance by a probate court cannot be impeached in a court of equity unless fraud or deception has been practiced; Smith v. Worthington, 53 Fed. 977, 4 C. C. A. 130. He cannot buy the estate, or any part of it, when sold by a common auctioneer to pay debts; but he may when the auctioneer is a state officer, and the sale public and *bona fide;* Toler's Adm'r v. Toler, 2 Patt. & H. (Va.) 71; Weeks v. Gibbs, 9 Mass. 75; Babbitt v. Doe, 4 Ind. 355; Barrington v. Alexander, 6 Ohio St. 189.

Federal Jurisdiction. Matters of pure probate are not within the jurisdictions of courts of the United States; but where a state law gives citizens of the state, in an action or suit *inter partes*, the right to question the probate of a will, federal courts, at the suit of citizens of other states or aliens will enforce such remedies; Farrell v. O'Brien, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

The possession of a state court which will exclude the exercise of power by the federal court, and *vice versa*, must be the possession of some thing, corporeal or incorporeal, which has been taken under the dominion of the court. A controversy or inquiry is not such a thing, and the pendency of a suit or proceeding in one court, involving a question, controversy, or inquiry, is no bar to the exercise of jurisdiction in the determination of the same question, etc., in the other; Ball v. Tompkins, 41 Fed. 486; American Baptist Home Mission Society v. Stewart, 192 Fed. 976; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

The right to administer property left by a foreigner within the jurisdiction of a state is primarily committed to state law and the public administrator is entitled to administer the estate of an Italian subject dying and leaving an estate in California, in preference to the Italian Consul General, who claimed the right under treaty; In re Ghio's Estate, 157 Cal. 552, 108 Pac. 516, 37 L. R. A. (N. S.) 549, 137 Am. St. Rep. 145, affirmed in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, where the question whether it is within the treaty-making power to provide for administration upon the estates of foreigners dying within a state, by the consul of their country, was suggested but not discussed or decided. See TREATY.

See Schouler; Williams; Croswell, Exrs. and Admrs.; Woerner, Law of Adm.; 2 Lawson, Rights & Rem. 889–1008; Holmes, Executors in Early English Law, 3 Sel. Essays in Anglo-Amer. L. H. 736 (9 Harv. L. R. 42); Caillemer, The Executor in England and on the Continent, *id.* 746.

EXECUTORY. Performing official duties; contingent; also, personal estate of a deceased; whatever may be executed,—as, an executory sentence or judgment.

EXECUTORY CONSIDERATION. Something which is to be done after the promise

is made, for which it is the legal equivalent. See CONSIDERATION.

EXECUTORY CONTRACT. One in which some future act is to be done: as, where an agreement is made to build a house in six months, or to do any act at a future day. See CONTRACT; PERFORMANCE.

An agreement to sell and convey land, which is not a conveyance, operating as a present transfer of legal estate and seisin, is wholly executory, though it contains the words "grant, bargain and sell;" and produces no effect upon the estates and titles of the parties; and creates no lien or charge on the land itself; Simpson v. Breckenridge, 32 Pa. 287; Stewart's Adm'rs v. Lang, 37 Pa. 201, 78 Am. Dec. 414; Watson v. Coast, 35 W. Va. 463, 14 S. E. 249.

EXECUTORY DEVISE. Such a limitation of a future estate in lands or chattels as the law admits in case of a will, though contrary to the rules of limitation in conveyances at common law.

It is a limitation by will of a future estate or interest in lands or chattels. In re Brown's Estate, 38 Pa. 294.

By the executory devise no estate vests at the death of the devisor or testator, but only on the future contingency. It is only an indulgence to the last will and testament which is supposed to be made by one *inops consilii*. When the limitation by devise is such that the future interest falls within the rules of contingent remainders, it is a contingent remainder, and not an executory devise. 4 Kent 257; 3 Term 763.

If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the latter limitation cannot take effect as a remainder, but may operate as an executory devise: *e. g.*, if land be devised to A for life, and after his decease to B in fee, B takes a (vested) remainder, because his estate is immediately connected with, and commences on, the limitation of A's estate. If land be limited to A for life, and one year after his decease to B in fee, the limitation to B is not such a one as will be a remainder, but may operate as an executory devise. Fearne, Cont. Rem. 399. If land be limited to A for life, and after his decease to B and his heirs, with a proviso that if B survive A and die, without issue of his body living at his decease; then to C and his heirs, the limitation to B, etc., prevents an immediate connection of the estate limited to C with the life estate of A, and prevents its commencement on the death of A. It must operate, if at all, as an executory devise; Butler's note (c) to Fearne, Cont. Rem. 397. If a chattel interest be bequeathed for life, with remainder over, this latter disposition cannot take effect as a remainder, but may as an executory devise, or more properly bequest; *id.* 407.

An executory devise differs from a remainder in three very material respects:

First. It needs no particular estate to support it. *Second.* By it a fee-simple or other less estate may be limited on a fee-simple. *Third.* By it a remainder may be limited of a chattel interest after a particular estate for life created in the same.

The first is a case of freehold commencing *in futuro*. A makes a devise of a future estate on a certain contingency, and till the contingency happens does not dispose of the fee-simple, but leaves it to descend to his heirs at law. 1 T. Raym. 82; 1 Salk. 226; 1 Lutw. 798.

The second case is a fee upon a fee. A devises to A and his heirs forever, which is a fee-simple, and then, in case A dies, before he is twenty-one years of age, to B and his heirs. Cro. Jac. 590; 10 Mod. 420.

The third case: a limitation in a term of years after a life estate. A grants a term of one thousand years to B for life, remainder to C. The common law regards the term for years as swallowed up in the grant for life, which, being a freehold, is a greater estate, and the grantee of such a term for life could alien the whole. A similar limitation in a will may take effect, however, as an executory bequest; Scott v. Price, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629; Logan v. Ladson's Ex'r, 1 Des. (S. C.) 271; Clifton v. Haig's Ex'rs, 4 Des. (S. C.) 330.

It is not a mere possibility, but a substantial interest, and in respect to its transmissibility stands on the same footing with a contingent remainder; Medley v. Medley, 81 Va. 268.

In order to prevent perpetuities, the rule has been adopted that executory interests must be so limited that from the time of their limitation they will necessarily vest in right (not necessarily in possession) at a period not exceeding that occupied by the life or lives of a person or persons then living, or *in ventre matris*, and the minority of any person or persons born or *in ventre matris* prior to the decease of such first named person or persons, or at a period not exceeding that occupied by the life or lives of such first named person or persons, and an absolute term of twenty-one years afterwards, or within, or at the expiration of an absolute term of twenty-one years without reference to any life. For example, lands are devised to such unborn son of a *feme covert* as shall first reach the age of twenty-one years. The utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son. Such an executory devise is therefore good. If, however, such limitation had been to the first unborn son who shall attain the age of twenty-five years, the rule against perpetuities would be infringed and the limitations bad; Smith, Ex. Int. 391; 2 Bla. Com. 174.

An executory devise limited after an indefinite failure of issue is bad as leading to a perpetuity; 4 Kent 273; and so of an executory bequest, but the courts are in the latter case much less apt to construe limitations as contemplating a definite failure of issue; 4 Kent 281; 1 P. Wms. 663; Gray, Perpet. 212.

An executory devise is generally indestructible by any alteration in the estate out of or after which it is limited. But if it is limited on an estate tail the tenant in tail can bar it, as well as the entail, by common recovery or by deed enrolled, etc., where such deed is by statute given the force and effect of a common recovery; Butler's note to Fearne, Cont. Rem. 562; Wms. R. P. 319.

EXECUTORY ESTATES. Interests which depend for their enjoyment upon some subsequent event or contingency. Such estate

may be an *executory devise*, or an *executory remainder*, which is the same as a contingent remainder, because no present interest passes.

EXECUTORY PROCESS (*Via Executoria*). In Louisiana, a process which can be resorted to in two cases, namely: 1. When the right of the creditor arises from an act importing confession of judgment, and which contains a privilege or mortgage in his favor. 2. When the creditor demands the execution of a judgment which has been rendered by a tribunal different from that within whose jurisdiction the execution is sought. Code of Practice, art. 732.

EXECUTORY TRUSTS. A trust is called *executory* when some further act is requisite to be done by the author of the trust to give it its full effect. See Bisph. Eq. 31; Lewin, Tr. 144.

The distinction between executed and executory trusts is well settled; Dennison v. Goehring, 7 Pa. 177, 47 Am. Dec. 505; though once doubted in England; 1 Ves. 142; but see 2 Ves. 323. The test is said to be: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is? or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? per Lord St. Leonards, Ld. Ch., in 4 H. L. Cas. 210; see Tillinghast v. Coggeshall, 7 R. I. 383; Bisph. Eq. 86.

In the case of articles made in contemplation of marriage, and which are, therefore, preparatory to a settlement, so in the case of a will directory of a future conveyance to be made or executed by the trustees named therein, it is evident that something remains to be done. The trusts are said to be executory, because they require an ulterior act to raise and perfect them: *i. e.* the actual settlement is to be made or the conveyance to be executed. They are instructions, rather than complete instruments, in themselves.

The court of chancery will, in promotion of the supposed views of the parties or the testator and to support their manifest intention, give to the words a more enlarged and liberal construction than in the case of legal limitations or trusts executed; 1 Fonbl. Eq. b. 1; White, Lead. Cas. 18. Where a voluntary trust is executory and not executed, if it could not be enforced at law because it is a defective conveyance, it is not helped in favor of a volunteer in a court of equity; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 498, 500; Acker v. Phœnix, 4 Paige, Ch. (N. Y.) 305; Dawson v. Dawson, 16 N. C. 93, 18 Am. Dec. 573. But where the trust, though voluntary, has been executed in part, it will be sustained or enforced in equity; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; Dennison v. Goehring, 7 Pa. 175, 178, 47 Am. Dec. 505. White, Lead. Cas. 176; 6 Ves. 656; 18 *id.* 140; 1 Keen 551; 3 Beav. 238.

EXECUTORY USES. Springing uses which confer a legal title corresponding to an executory devise.

Thus, when a limitation to the use of A in fee is defeasible by a limitation to the use of B to arise at a future period, contingency, or event, these contingent or springing uses differ herein from an executory devise: there must be a person seized to such uses at the time the contingency happens, else they can never be executed by the statute. Therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; 1 Co. 134, 138; Cro. Eliz. 439; whereas by an executory devise the freehold itself is transferred to the future devisee. In both cases, a fee may be limited after a fee; 10 Mod. 423.

EXECUTRIX. A woman who has been appointed by will to execute such will or testament. See EXECUTOR.

EXECUTRY. In Scotch Law. The movable estate of a person dying, which goes to his nearest of kin. So called as falling under the distribution of an executor. Bell, Dict.

EXEMPLARY DAMAGES. See MEASURE OF DAMAGES.

EXEMPLIFICATION. A perfect copy of a record or office-book lawfully kept, so far as relates to the matter in question. See, generally, 1 Stark. Ev. 151; 1 Phill. Ev. 307; Mills v. Duryee, 7 Cra. (U. S.) 481, 3 L. Ed. 411; Drummond v. Magruder, 9 Cra. (U. S.) 122, 3 L. Ed. 677; Hampton v. M'Connel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; Baker v. Field, 2 Yeates (Pa.) 532; Elmore v. Mills, 2 N. C. 359; Smith v. Blagge, 1 Johns. Cas. (N. Y.) 238; Schaben v. U. S., 6 Ct. Cl. 230; Thomas v. Stewart, 92 Ind. 246; Cox v. Jones, 52 Ga. 438. As to the mode of authenticating records of other states, see FOREIGN JUDGMENTS.

EXEMPLUM (Lat.). **In Civil Law.** A copy. A written authorized copy. Used also in the modern sense of example: *ad exemplum constituti singulares non trahi* (exceptional things must not be taken for examples). Calv. Lex. *Exempli gratia*, for the sake of example. Abb. *e. g.*

EXEMPTION. The right given by law to a debtor to retain a portion of his property without its being liable to execution at the suit of a creditor, or to a distress for rent.

In general, the sheriff may seize and sell all the property of a defendant which he can find, except such as is exempted by the common law or by statute. The common law was very niggardly of these exceptions: it allowed only the necessary wearing apparel; and it was once holden that if a defendant had two gowns the sheriff might sell one of them; Comb. 356. But in mod-

ern times, with perhaps a prodigal liberality, a considerable amount of property, both real and personal, is exempted from execution by the statutes of the several states; 19 Am. L. Reg. 1; 4 So. L. Rev. N. S. 1; In re Radway, 3 Hughes 609, Fed. Cas. No. 11,523; Carlton v. Watts, 82 N. C. 212; Mapp v. Long, 62 Ga. 568; Singletary v. Singletary, 31 La. Ann. 374; Rutledge v. Rutledge, 8 Bax. (Tenn.) 33; Creath v. Dale, 69 Mo. 41; Vanderhorst v. Bacon, 38 Mich. 669, 31 Am. Rep. 328; Murphy v. Harris, 77 Cal. 194, 19 Pac. 377; In re Robb, 99 Cal. 202, 33 Pac. 890, 37 Am. St. Rep. 48; Carter v. Davis, 6 Wash. 327, 33 Pac. 833; Bean v. Ins. Co., 54 Minn. 366, 56 N. W. 127; Hamberger v. Marcus, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719; and there is now hardly a state or nation which has not by statute made certain exemptions designed as a protection for the family; Woodward v. Murray, 18 Johns. (N. Y.) 403; and such statutes are to be liberally construed; Butner v. Bowser, 104 Ind. 259, 3 N. E. 889; Kuntz v. Kinney, 33 Wis. 510; Good v. Fogg, 61 Ill. 449, 14 Am. Rep. 71; Carty v. Drew, 46 Vt. 346; Allison v. Brookshire, 38 Tex. 199; Seeley v. Gwillim, 40 Conn. 106. Some of the exemptions are the following: household furniture; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726; Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755; Dunlap v. Edgerton, 30 Vt. 224; Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480; Heidenheimer v. Blumenkron, 56 Tex. 308; tools of trade; Atwood v. De Forest, 19 Conn. 513; Enscoe v. Dunn, 44 Conn. 93, 26 Am. Rep. 430; Boston Belting Co. v. Ivens & Co., 28 La. Ann. 695; Wicker v. Comstock, 52 Wis. 315, 9 N. W. 25; work horses; Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 40 South. 9, 3 L. R. A. (N. S.) 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776; Forsyth v. Bower, 54 Cal. 639; Jaquith v. Scott, 63 N. H. 5, 56 Am. Rep. 476; Steele v. Lyford, 59 Vt. 230, 8 Atl. 736 (but this will not include high bred horses used for pleasure and to drive to and from business; Tishomingo Sav. Inst. v. Young, 87 Miss. 473, 40 South. 9, 3 L. R. A. [N. S.] 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776); the interest of a legatee in lands, until the court has held it to be a charge on such, although the legacy is given with a view that it shall be such a charge; Hiscock v. Fulton, 63 Hun 624, 17 N. Y. Supp. 408; curtesy initiate; Bruce v. Nicholson, 109 N. C. 202, 13 S. E. 790, 26 Am. St. Rep. 562; property held in trust; Mosher v. Neff, 33 Neb. 770, 51 N. W. 138; the bridge of a public corporation; Overton Bridge Co. v. Means, 33 Neb. 857, 51 N. W. 240, 29 Am. St. Rep. 514; blackberries while growing; Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St. Rep. 571; trade-mark, apart from the articles it has served to identify; Prince Mfg. Co. v. Paint Co., 20 N. Y. Supp. 462; a vendor's lien reserved for the purchase price of lands conveyed; Willis & Bro. v. Sommerville, 3 Tex. Civ. App. 509, 22 S. W. 781; the interest of a *cestui que trust* under a trust for maintenance and support; Brooks v. Raynolds, 59 Fed. 923, 8 C. C. A. 370; the interest of the grantor in property transferred in fraud of creditors; Stonebridge v. Perkins, 141 N. Y. 1, 35 N. E. 980. State exemption laws are inapplicable to debts due from a citizen to the United States; U. S. v. Howell, 9 Fed. 674. See Fink v. O'Neil, 106 U. S. 280, 1 Sup. Ct. 325, 27 L. Ed. 196.

Exemption laws are not a part of the contract; they are part of the remedy and subject to the law of the forum; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; Mineral Point R. Co. v. Barron, 83 Ill. 365; Carson v. Ry. Co., 88 Tenn. 646, 13 S. W. 588, 8 L. R. A. 412, 17 Am. St. Rep. 921; Conley v. Chilcote, 25 Ohio St. 320; Albrecht v. Treitschke, 17 Neb. 205, 22 N. W. 418; Moore v. R. Co., 43 Ia. 385; Broadstreet v. Clark, 65 Ia. 670, 22 N. W. 919; Stevens v. Brown, 20 W. Va. 450. That a debt is exempt from judicial process in the state where it was created will not make it exempt in another jurisdiction. The exemption does not follow the debt as an incident thereto; Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144.

See, generally, BANKRUPTCY; DISTRESS; EXECUTION; HOMESTEAD; FAMILY; TOOLS; TAX.

EXEMPTS. Persons who are not bound by law, but excused from the performance of duties imposed upon others.

By act of congress Feb. 24, 1864, it was enacted that such persons as were rejected as physically or mentally unfit for the service, all persons actually in the military or naval service of the United States at the time of the draft, and all persons who had served in the military or naval service two years during the then war and been honorably discharged therefrom, and no others, were exempt from enrolment and draft under said act, and act of congress, March 3, 1863.

EXEQUATUR (Lat.). **In French Law.** A Latin word which was, in the ancient practice, placed at the bottom of a judgment emanating from another tribunal, and was a permission and authority to the officer to execute it within the jurisdiction of the judge who put it below the judgment.

We have something of the same kind in our practice. When a warrant for the arrest of a criminal is issued by a justice of the peace of one county, and he flies into another, a justice of the latter county may indorse the warrant, and then the ministerial officer may execute it in such county. This is called *backing* a warrant.

In International Law. An official recognition of a consul or commercial agent, made by the foreign department of the state to which he is accredited, authorizing him to exercise his power. He cannot act without it, and it may be refused or revoked at the pleasure of the same government. 3 Chit. Com. Law 56; 3 M. & S. 290; 5 Pardessus,

n. 1445; Twiss, Law of Nations; 1 Halleck, Int. Law 351.

EXERCITOR MARIS (Lat.). **In Civil Law.** One who fits out and equips a vessel, whether he be the absolute or qualified owner, or even a mere agent. Emerigon, Mar. Loans, c. 1, s. 1. We call him *exercitor* to whom all the returns come. Dig. 14. 1. 1. 15; 14. 1. 7; 3 Kent 161; Molloy, de Jur. Mar. 243.

The managing owner, or ship's husband. These are the terms in use in English and American laws, to denote the same as *exercitor maris*. See SHIP'S HUSBAND.

EXERCITORIA ACTIO (Lat.). **In Civil Law.** An action against a managing owner (*exercitor maris*), founded on acts of the master. 3 Kent 161; Vicat, Voc. Jur.

EXFESTUCARE (Lat.). To abdicate; to resign by passing over a staff. Du Cange. To deprive one's self of the possession of lands, honors, or dignities, which was formerly accomplished by the delivery of a staff or rod. Said to be the origin of the custom of *surrender* as practised in England formerly in courts baron. Spelman, Gloss. See also, Vicat, Voc. Jur.; Calvinus, Lex.

EXHÆREDATIO (Lat.). **In Civil Law.** A disinheriting. The act by which a forced heir is deprived of his legitimate or legal portion. In common law, a disherison. Occurring in the phrase, in Latin pleadings, *ad exhæredationem* (to the disherison), in case of abatement.

EXHÆRES (Lat.). **In Civil Law.** One disinherited. Vicat, Voc. Jur.; Du Cange.

EXHIBERE (Lat.). To present a thing corporeally, so that it may be handled. Vicat, Voc. Jur. To appear personally to conduct the defence of an action at law.

EXHIBIT. To produce a thing publicly, so that it may be taken possession of and seized. Dig. 10. 4. 2.

To file of record. Thus, it is the practice in England in personal actions, when an officer or prisoner of the king's bench is defendant, to proceed against such defendant in the court in which he is an officer, by *exhibiting*, that is, *filing*, a bill against him. Steph. Pl. 52, n. (*l*); 2 Sellon, Pr. 74; Newell v. State, 2 Conn. 38.

A paper or writing proved on motion or other occasion.

A supplemental paper referred to in the principal instrument, identified in some particular manner, as by capital letter, and generally attached to the principal instrument. 1 Stra. 674; 2 P. Wms. 410; Gresl. Eq. Ev. 98.

A paper referred to in, and filed with the bill, answer, or petition in a suit in equity, or with a deposition. Brown v. Redwyne, 16 Ga. 68.

In the absence of a positive statutory provision, exhibits properly identified need not be attached to the deposition in connection with which they are offered in evidence; Toby v. R. Co., 98 Cal. 490, 33 Pac. 550. It has been held that the exhibits filed with a petition form no part thereof, and cannot be considered in determining its sufficiency on demurrer; Pomeroy v. Fullerton, 113 Mo. 440, 21 S. W. 19; and if the exhibit is not the foundation for the cause of action or of the defence, it will not be considered; Barnes v. Mowry, 129 Ind. 568, 28 N. E. 535.

Documents and other things, produced by a witness on cross-examination and marked for identification, are not before the court unless offered and admitted; Byerley v. Sun Co., 181 Fed. 138.

EXHIBITANT. A complainant in articles of the peace. 12 Ad. & E. 599.

EXHIBITION. **In Scotch Law.** An action for compelling the production of writings. See DISCOVERY.

EXHUMATION. The exhumation of a body should be ordered, if at all, only on a strong showing that, without its examination, a fraud is likely to be accomplished which an insurance company has exhausted every other legal means of exposing; Granger's Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446. Disinterment may be compelled by public authorities whenever conditions become such as that the public health is threatened, or in the interest of justice; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; or for the purpose of ascertaining whether a crime has been committed; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483; or where an examination may disclose facts which prove an accused person innocent of crime; Gray v. State, 55 Tex. Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

Such an order was refused in Moss v. State, 152 Ala. 30, 44 South. 598, because it appeared that two reputable physicians, available at the trial, had examined the body before burial. There is said to be no law requiring a court, at the prisoner's request, but at the expense of the state, to order the body to be exhumed in order to furnish him with evidence; Salisbury v. Com., 79 Ky. 425. In Com. v. Grether, 204 Pa. 203, 53 Atl. 753, the court refused to set aside a conviction of murder in the first degree because the district attorney and not the coroner had caused the body to be exhumed. In an insurance case, exhumation was ordered, to obtain evidence bearing on the question of suicide; the marshal was directed to exhume the body and the court appointed a pathologist and a chemist to make the examination; it was held, also, that such order could be made only in a case where the widow was a party; Mutual Life Ins. Co. of New York v. Griesa, 156 Fed. 398. The right to make the order, in an insurance case, was recognized in People v. Fitzgerald, 105 N. Y. 146, 11 N.

R. 378, 59 Am. Rep. 483; Grangers Life Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446; but in the latter case the order was refused on the ground of delay. See 22 L. R. A. (N. S.) 513, note.

EXIGENDARY. In English Law. An officer who makes out exigents.

EXIGENT, EXIGI FACIAS. See OUTLAWRY; Com. v. Hagerman, 2 Va. Cas. 244; Fitzh. N. B. 236; Rawle, Exmoor 55. See Appeal of Coleman, 75 Pa. 456.

EXIGENT LIST. A phrase used to indicate a list of cases set down for hearing upon various incidental and ancillary motions and rules.

EXIGENTER. An officer who made out exigents and proclamations. Cowell. The office is now abolished. Holthouse.

EXIGIBLE. Demandable; that which may be exacted.

EXILIUM (Lat.). In Old English Law. Exile. Setting free or wrongly ejecting bond-tenants. *Waste* is called *exilium* when bondmen (*servi*) are set free or driven wrongfully from their tenements. Co. Litt. 536. Destruction; waste. Du Cange. Any species of waste which drove away the inhabitants, into exile, or had a tendency to do so. Bac. Abr. *Waste* (*a*); 1 Reeve, Hist. Eng. Law 386.

EXISTIMATIO (Lat.). The reputation of a Roman citizen. The decision of arbiters. Vicat, Voc. Jur.; 1 Mackeldey, Civ. Law § 123.

EXISTING. The force of this word is not necessarily confined to the present. Thus a law for regulating "all existing railroad corporations" extends to such as are incorporated after as well as before its passage, unless exception is provided in their charters; Indianapolis & St. L. R. Co. v. Blackman, 63 Ill. 117; Lawrie v. State, 5 Ind. 525; Fox v. Edwards, 38 Ia. 215.

EXIT WOUND. The wound made in coming out by a weapon which has passed through the body or any part of it. 2 Beck. Med. Jur. 119.

EXITUS (Lat.). An export duty. Issue, child, or offspring. Rent or profits of land. In Pleading. The issue or the end, termination or conclusion, of the pleadings; so called because an issue brings the pleadings to a close. 3 Bla. Com. 314.

EXLEX (Lat.). An outlaw. Spelman, Gloss.

EXOINE. In French Law. An act or instrument in writing which contains the reasons why a party in a civil suit, or a person accused, who has been summoned, agreeably to the requisitions of a decree, does not appear. Pothier, *Procéd. Crim.*, s. 3, art. 3. See ESSOIN.

EXONERATION. The taking off a burden or duty. The usual use of the word is in the rule in the distribution of an intestate's estate that the debts which he himself contracted and for which he mortgaged his land as security, shall be paid out of the personal estate in exoneration of the real.

But when the real estate is charged with the payment of a mortgage at the time the intestate buys it, and the purchase is made subject to it, the personal estate is not in that case to be applied in exoneration of the real estate; 2 Pow. Mortg. 780; Hurt v. Reeves, 5 Hayw. (Tenn.) 57; Duke of Cumberland v. Codrington, 3 Johns. Ch. (N. Y.) 229, 8 Am. Dec. 492; 1 Lead. Cas. in Eq. n. *646; Appeal of Hirst, 92 Pa. 491.

But the rule for exonerating the real estate out of the personal does not apply against specific or pecuniary legatees, nor the widow's right to paraphernalia, and, with reason, not against the interest of creditors; 2 Ves. 64; 1 P. Wms. 693; 3 *id.* 367. See 26 Beav. 522; Appeal of Clery, 35 Pa. 54; Canfield v. Bostwick, 21 Conn. 550.

Like the right of contribution between those equally liable for the same debt, the right of exoneration exists between debtors successively liable. A surety who discharges an obligation is entitled to look to the principal for reimbursement, and to invoke the aid of a court of equity for this purpose, and a subsequent surety, who, by the terms of the contract, is responsible only in the case of the default of the principal and a prior surety, may claim exoneration at the hands of either; Bisph. Eq. § 331; 3 Pom. Eq. Jur. § 1416.

As to exoneration of simple contract debts, see 1 Sm. L. Cas., 9th Am. ed. 614.

EXONERETUR (Lat.). In Practice. A short note entered on a bail-piece, that the bail is exonerated or discharged in consequence of having fulfilled the condition of his obligation, made by order of the court or of a judge upon a proper cause being shown. See RECOGNIZANCE.

EXPATRIATION. The voluntary act of abandoning one's country and becoming the citizen or subject of another.

The right of expatriation is the right of a person to transfer his allegiance from the country of which he is a citizen to another country.

This right has been much discussed. The question has been settled in the United States by the act of July 27, 1868, which declares the right of expatriation to be the inherent right of all people, disavows the claim made by foreign states that naturalized American citizens are still the subjects of such states, and extends to such naturalized citizens, while in foreign countries, the same protection accorded to native-born citizens. R. S. §§ 1999, 2000. This declaration comprehends our own citizens as well as those of

other countries; 14 Op. Atty. Gen. 295. Since the passage of this act, the United States has entered into treaties with nearly all the nations of Europe by which the contracting powers mutually concede to subjects and citizens the right of expatriation *on conditions and under qualifications.* And in case of conflict between the above act of congress and any treaty, it would seem the treaty must be held paramount; Morse, Citizenship § 179. See TREATY. To be legal, the expatriation must be for a purpose which is not unlawful nor in fraud of the duties of the emigrant at home.

Most foreign governments permit their citizens to become naturalized in other countries, but generally upon condition of the prior fulfilment of military service. Hershey 243–244. In Switzerland the consent of the canton is required, and a like rule exists in Japan; Meilli, Intern. C. & C. 121.

A citizen may acquire in a foreign country commercial privileges attached to his domicil, and be exempted from the operation of commercial acts embracing only persons resident in the United States or under its protection. See DOMICIL; NATURALIZATION. See also Miller, Const. U. S. 285, 297; Murray v. The Charming Betsy, 2 Cra. (U. S.) 120, 2 L. Ed. 208; 2 Kent 36; Grotius, b. 2, c. 5, s. 24; Puffendorff, b. 8, c. 11, ss. 2, 3; Vattel, b. 1, c. 19, ss. 218, 223, 224, 225; U. S. v. Gillies, 1 Pet. C. C. 161, Fed. Cas. No. 15,206; Ainslie v. Martin, 9 Mass. 461; 21 Am. L. Reg. 77; 11 *id.* 447; 3 Can. L. T. 463, 511; 25 Law Mag. & Rev. 124; Lawrence's Wheat. Int. L. 891.

By act of March 2, 1907, a citizen who is naturalized in any foreign state is expatriated; also a naturalized citizen who has resided two years in his native state or five years in any other foreign state, except upon presenting satisfactory evidence to a diplomatic or consular agent under the rules of the state department, and no citizen can be expatriated in time of war.

A Pennsylvania court, following her constitution framed by Franklin, first declared the right of expatriation an original and indefeasible right of man. Baldwin's Modern Political Institutions 241, citing Murray v. McCarty, 2 Munf. (Va.) 393; Wharton's State Trials 652.

For the doctrine of the English courts on this subject, see 1 Barton, Conv. 31, note; Vaugh. 227, 281; 7 Co. 16; Dy. 2, 224, 298 *b*, 300 *b*; 2 P. Wms. 124; 1 Hale, Pl. Cr. 68; 1 Wood, Conv. 382; Westl. Priv. Int. Law; Story, Confl. Laws; Cockburn, Nationality.

See ALIEN; NATURALIZATION.

EXPECTANCY. Contingency as to possession. That which is expected or hoped for. Frequently used to imply an estate in expectancy.

Estates are said to be *in possession* when the person having the estate is in actual enjoyment of that in which his estate subsists, or *in expectancy,* when the enjoyment is postponed, although the estate or interest has a present legal existence.

A bargain in relation to an expectancy is, in general, considered invalid, unless the proof of good faith is strong; 2 Ves. 157; 1 Bro. C. C. 10; Jeremy, Eq. Jur. 397; McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335.

But it is well settled in equity that a deed which purports to convey property, which is in expectancy or to be subsequently acquired, or which is not the subject of grant at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by a valid consideration, whenever the grantor is in a condition to give it effect; per Strong, J., in Bayler v. Com., 40 Pa. 37, 43, 80 Am. Dec. 551; Varick v. Edwards, 11 Paige (N. Y.) 290; McWilliams v. Nisly, 2 S. & R. (Pa.) 507, 7 Am. Dec. 654; Bailey v. Hoppin, 12 R. I. 560, 568; 10 H. L. Cas. 189, 211; East Lewisburg Lumber & Mfg. Co. v. Marsh, 91 Pa. 96; Ruple v. Bindley, *id.* 296; Fritz's Estate, 160 Pa. 156, 28 Atl. 642; Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917; Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819; Betts v. Harding, 133 Ia. 7, 109 N. W. 1074; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748. So it is said that an estate in expectancy, though contingent, is a fair subject of contract, and an agreement by an expectant heir in respect thereto, fairly made upon valuable considerations, will be enforced in equity; Parsons v. Ely, 45 Ill. 232; Varick v. Edwards, 1 Hoffm. Ch. (N. Y.) 382; McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; a mere agreement to appropriate the money when received from a legacy will not operate as an assignment of it; Appeal of Wylie, 92 Pa. 196. An executory agreement between the husbands of two expectant legatees to divide equally what should be left to either of them has been enforced; 2 P. Wms. 182; 2 Sim. 183. Such assignments are prohibited by statute in California; Cal. Civ. Code 700, 1045; In re Wickersham's Estate, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437; and in Louisiana; Succession of Jacobs, 104 La. 447, 29 South. 241; and in some states have been held unenforceable; thus an attempted conveyance by heirs-apparent of their interest in the property of an ancestor, even with the latter's consent, has been held void; Wheeler's Ex'rs v. Wheeler, 2 Metc. (Ky.) 474, 74 Am. Dec. 421; McCall's Adm'r v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335; on the ground that it is essential to the legal validity of the thing sold that it have an actual or potential existence, and that a mere possibility or contingency, not founded on a right or coupled with an interest, cannot be the subject of a sale or assignment; Spears v. Spaw, 118 S. W. 275, 25 L. R. A. (N. S.) 436; and

on the ground that, as no one can be the heir of a living person, a transaction based on the idea of a future right to the succession of a living person is devoid of consideration and can have no effect, notwithstanding the agreement is valid under the law of a foreign state where it was made; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175.

An assignment without consideration by a married woman of an expectant interest in her father-in-law's estate, which was contingent upon her surviving her husband, in order to secure her husband's indebtedness, is not valid at law, although, when based upon a sufficient consideration, it might be enforced in equity when the interest became vested in the assignor; In re Baeder's Estate, 224 Pa. 452, 73 Atl. 915; and see, to the same effect, Bayler v. Com., 40 Pa. 37, 80 Am. Dec. 551.

That a grant by an expectant is simply a covenant to convey; 1 P. Wms. 387 (Lord Chancellor Hardwicke); McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; and that chancery will give effect to the assignment of an expectancy or possibility, not as a grant, but as a contract entitling the assignee to a specific performance as soon as the assignor has the power to perform it; are held too well established to be disregarded; McDonald v. McDonald, 58 N. C. 211, 75 Am. Dec. 434; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596. Such a sale may be enforced as against the heir through the doctrine of estoppel springing from his covenants contained in the deed of assignment; Johnson v. Johnson, 170 Mo. 34, 70 S. W. 241, 59 L. R. A. 748, citing Steele v. Frierson, 85 Tenn. 430, 3 S. W. 649; Bohon v. Bohon, 78 Ky. 408; Somes v. Skinner, 3 Pick. (Mass.) 52; Robertson v. Wilson, 38 N. H. 48; House v. McCormick, 57 N. Y. 310; Habig v. Dodge, 127 Ind. 31, 25 N. E. 182; followed and approved; Jerauld v. Dodge, 127 Ind. 600, 25 N. E. 186; Fairbanks v. Williamson, 7 Greenl. (Me.) 96; Stover v. Eycleshimer, 46 Barb. (N. Y.) 84; Rosenthal v. Mayhugh, 33 Ohio St. 155.

The general doctrine is undoubtedly to treat such an assignment as a contract enforcible in equity, but Pomeroy considers it inadequate; 3 Pom. Eq. Jur. § 1287, n. 2; and prefers the theory that it is an actual transfer of the ownership of an equitable property right which ripens into an absolute title; *id.* § 1271.

Equity will, in general, relieve a party from unequal contracts for the sale or pledge of expectancies, as they are in fraud of the ancestor. See 2 P. Wms. 182; 2 Sim. 183, 192; 5 *id.* 524; 1 Sto. Eq. Jur. § 342. But relief will be granted only on equitable terms; for he who seeks equity must do equity; *id.*

In dealing with such cases, the rule applied by courts of equity is, as laid down in Chesterfield v. Janssen, to scrutinize them carefully according to the circumstances of each; 2 Ves. Sr. 125; and, if upon inadequate consideration, or otherwise fraudulent, they will be relieved against and wholly or partially set aside; *id.*; 1 L. Cas. in Eq. 773; 2 Pom. Eq. Jur. § 953, and note, where the cases are collected.

In a leading English case the principle is thus stated: "The court will relieve 'expectant heirs' against bargains relating to their reversionary or expectant interest in cases of undervalue, of weakness due to age or poverty, and of the absence of independent advice. But all these circumstances must co-exist in order to entitle them to relief;" L. R. 8 Ch. 484. In that case it was held that the repeal of the usury laws in England has not altered the doctrine by which the court of chancery affords relief against improvident and extravagant bargains. In the opinion Lord Selborne directed attention to the fact that concealment was usually a feature of these cases, but agreed with Lord St. Leonards that it was not an indispensable condition of equitable relief; Sugd. Vend. & Pur., 11th ed. 316; differing, as to this point, with Lord Brougham; 2 Myl. & K. 456. The independent advice of a father seems to rebut the presumption of fraud; 2 App. Cas. 814; but old age or youth increases it; 2 Giff. 157; 4 D. J. & S. 388; or poverty and ignorance; L. R. 10 Ch. 389; 40 Ch. D. 312. In the first of these two cases, Jessel, M. R., thus defined the term "expectant heir": "The phrase is used not in its literal meaning, but as including every one who has either a vested remainder, or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason, merely, of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen. So that the doctrine not only included the class mentioned, who in some popular sense might be called 'expectant heirs,' but also all remaindermen and reversioners."

The principle has been held to include younger sons of peers; 15 Ch. D. 679. As to what is a reversionary interest for this purpose, see 11 Eq. 265, 276; L. R. 2 Ch. 542; and as to what is independent advice, see 10 Eq. 641, in which the borrower, though accompanied by a friend who was a solicitor but did not act as such, or know the terms of the contract, was held not to have independent advice.

Undervaluation is not alone a sufficient ground for setting aside a contract, conveyance, or mortgage of a reversion, otherwise

fair; Stat. 31 Vict. c. 4; 2 Ch. Cas. 136; 35 Beav. 570; 32 L. J. Ch. 201.

By the civil law, such contracts are held *contra bonos mores*, and they are forbidden in general terms; Code 2, 3, *de pactis* 30; and in the French code it is forbidden to sell the succession of a living person, even with his consent; art. 1600; the same is the rule of the Italian code; art. 1460; and of that of Austria; § 879.

As to expectancy of life, see LIFE TABLES.

See, generally, 2 Lead. Cas. in Eq., 4th Am. ed. 1530, 1559, 1605; 3 Pom. Eq. Jur. ch. 8, sec. 3; Brett, L. Cas. Mod. Eq. 3d ed. 69, n.; 9 Harv. L. Rev. 476; CATCHING BARGAIN; POST OBIT.

EXPECTANT. Contingent as to enjoyment.

EXPEDITATION. A cutting off the claws or ball of the fore-feet of mastiffs, to prevent their running after deer; a practice for the preservation of the royal forests. Cart. de For. c. 17; Spelman, Gloss.; Cowell. See COURT OF REGARD.

EXPENDITORS. Paymasters. Those who expend or disburse certain taxes. Especially the sworn officer who supervised the repairs of the banks of the canals in Romney Marsh. Cowell.

EXPENSÆ LITIS (Lat.). Expenses of the suit; the costs, which are generally allowed to the successful party.

EXPERTS (Lat. *experti*, instructed, proved by experience). Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinions. Merlin, *Répert.*

Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue.

Persons professionally acquainted with the science or practice in question. Strickl. Ev. 408. Persons conversant with the subject-matter on questions of science, skill, trade, and others of like kind. Best, Ev. § 346.

The qualification of a witness as an expert is largely within the discretion of the trial judge; Mutual Fire Ins. Co. of New York v. Alvord, 61 Fed. 752, 9 C. C. A. 623; Ballard v. R. Co., 126 Pa. 141, 19 Atl. 35; Slocovich v. Ins. Co., 108 N. Y. 61, 14 N. E. 802; City of Fort Wayne v. Coombs, 107 Ind. 84, 7 N. E. 743. Such a witness may be asked whether the examination made by him was superficial or otherwise; Northern Pac. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; he need not be engaged in his profession, it is sufficient that he has studied it; Tullis v. Kidd, 12 Ala. 648.

Dealers in precious stones are not competent to testify to the uses of imitation precious stones; Lorsch v. U. S., 119 Fed. 476. One who has been a practicing physician for eight years is competent to testify as an expert whether a death was caused by arsenic, though he never had a case of arsenical poisoning; State v. Kammel, 23 S. D. 465, 122 N. W. 420.

Experts alone can give an opinion based on facts shown by others, assuming them to be true; State v. Potts, 100 N. C. 457, 6 S. E. 657.

"It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better understand and appreciate it than the jury; but to warrant its introduction, the subject of the inquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study and experience may be supposed to have more skill and knowledge than jurors of average intelligence may generally be presumed to have;" Ferguson v. Hubbell, 97 N. Y. 511, 49 Am. Rep. 544; and not only may they testify to facts but they may give their opinions on them as experts; Van Wycklen v. City of Brooklyn, 118 N. Y. 429, 24 N. E. 179. The practical result of the rule admitting such testimony is far from satisfactory; its principal defect being that such witnesses are usually called because their known theories are understood to support the fact which the party calling them wishes to prove; Grigsby v. Water Co., 40 Cal. 405. "They come," says Lord Campbell, speaking of scientific witnesses, "with a bias on their minds to support the cause in which they are embarked, and hardly any weight should be given to their evidence;" 10 Cl. & F. 154. It is said to be generally safer to take the judgments of unskilled jurors than the hired and biassed opinions of experts; Ferguson v. Hubbell, 97 N. Y. 511, 49 Am. Rep. 544.

A jury is not bound by the opinions of experts on an issue of insanity; U. S. v. Chisholm, 149 Fed. 284; Mitchell v. State, 6 Ga. App. 554, 65 S. E. 326; but should form their own judgment from all the proof in the case; U. S. v. Chisholm, 153 Fed. 808. It has been said that they "are generally mere arguments in behalf of the side calling them"; Ideal Stopper Co. v. Seal Co., 131 Fed. 249, 65 C. C. A. 436; and such testimony is frequently characterized by the courts as of little value; American Middlings Purifier Co. v. Christian, 3 Bann. & A. 42, Fed. Cas. No. 307; King v. Cement Co., 6 Fish. 336, Fed. Cas. No. 7,798; L. R. 6 Ch. Div. 415, n.

On the other hand, the necessity of such testimony in certain classes of cases, particularly those involving patent law, is thus set forth in 3 Rob. Pat. § 1012:

"Notwithstanding the strictures passed upon expert testimony by many jurists on each side of the Atlantic, and the truth of the assertions by which these censures have been justified, it is still certain that in most patent cases expert evidence is, and must always be, indispensable. That the expert is consulted before he is summoned as a witness; that when his opinion is unfavorable to the party who consults him he is not produced in court, at least

on that side of the case; that when called as a witness his testimony is expected to support, and generally does support, the claims of the litigant on whose behalf he is presented,—are no doubt true; but this is only what occurs in every other trial where counsel have properly prepared their case. The error lies with those who ascribe judicial functions to the patent-expert, and demand of him such freedom from partisanship as the exercise of judicial powers requires. That there are experts in other departments of affairs upon whose opinion the court is forced to rely as the foundation of its own judgments, because incapable of forming an opinion for itself, and that such experts consequently fill the places of judges and should be beyond the influence and control of parties, must be conceded. But such is not the case with patent-experts, whose opinion is received in evidence only in connection with the reasons on which it is based, and is to be accepted or rejected by the jury according to their own view of its fallacy or truth. The patent-expert, considered in his real character, is an explorer, gifted with unusual powers of discernment and apprehension; a chronicler, trained to preserve the recollection of the essential attributes of things; an expositor, fitted to embody those essential attributes in accurate and intelligible language; a monitor, able to suggest the conclusions which follow from the premises he has described. His relation to the jury is not unlike that which counsel sustain to the court, as guides to a correct decision of the issues severally confided to their judgments,—the one pointing out facts and applying them in support of the claims advanced by his employer, as the other produces his authorities and applies them to the maintenance of his claims of law."

Such assistance, it is suggested, it would not be wise in any tribunal to undervalue or reject; 3 Rob. Pat. § 1012.

The fact that the opinions of experts in patent cases are often diametrically opposite does not necessarily discredit their testimony but merely emphasizes the fact that their opinions are to be regarded as *opinions*, merely, and a decision rendered between them; Conover v. Roach, 4 Fish. 12, Fed. Cas. No. 3,125. A patent expert is in effect an "auxiliary counsel" who argues upon the law and the facts; Steam-Gauge & Lantern Co. v. Mfg. Co., 28 Fed. 618.

The practice of introducing a large number of expert witnesses in patent causes is not to be commended, one competent witness on each side being usually sufficient to insure a full and fair elucidation of what is recondite in the case; American Stove Co. v. Foundry Co., 158 Fed. 978, 86 C. C. A. 182. While expert evidence is not conclusive on the jury; Many v. Sizer, 1 Fish. 17, Fed. Cas. No. 9,056; and is to be judged by the same standards as ordinary evidence; May v. Fond du Lac County, 27 Fed. 691; Carter v. Baker, 4 Fish. 404, Fed. Cas. No. 2,472, 1 Sawyer 512; Page v. Ferry, 1 Fish. 298, Fed. Cas. No. 10,662; and to be accorded by the jury such weight as they see fit; Johnson v. Root, 1 Fish. 351, Fed. Cas. No. 7,411; Allen v. Hunter, 6 McLean 303, Fed. Cas. No. 225; Brooks v. Jenkins, 3 McLean 432, Fed. Cas. No. 1,953; it is nevertheless of great value in patent cases; French v. Rogers, 1 Fish. 133, Fed. Cas. No. 5,103; Carr v. Rice, 1 Fish. 198, Fed. Cas. No. 2,440; Morris v. Barrett, 1 Fish. 461, Fed. Cas. No. 9,827; Parker v. Stiles, 5 McLean 44, Fed. Cas. No. 10,749; Allen v. Blunt, 3 Sto. 742, Fed. Cas. No. 216; Brooks v. Jenkins, 3 McLean 432, Fed. Cas. No. 1,953.

It has been held that, without explanatory evidence, the defense of anticipation will not be considered in a patent case, where it is supported by prior patents for complicated machinery; Bell v. MacKimmon, 149 Fed. 205, 79 C. C. A. 163.

The value of such testimony depends on the skill, not the number; Brooks v. Bicknell, 4 McLean 70, Fed. Cas. No. 1,946; and is to be measured by their reasons; U. S. Annunciator v. Sanderson, 3 Blatchf. 184, Fed. Cas. No. 16,790; Whipple v. Baldwin Mfg. Co., 4 Fish. 29, Fed. Cas. No. 17,514; Parham v. American Mfg. Co., 4 Fish. 468, Fed. Cas. No. 10,713.

There are said to be two classes of patent experts, scientific and mechanical, each having a distinct sphere. The scientific expert is one familiarized by his studies and experiments with the principles of a science and qualified to understand, distinguish, and explain the subject-matter and application thereto of such science. His services are invoked to determine the character and scope of an invention with reference to the condition of the art at the date of its production. His testimony is directed to the question whether the alleged invention is the result of an inventive act; whether it embraces or excludes a different invention or is substantially the same in principle, function, or effect with any other. The mechanical expert represents the skilled workman in his art, who by practical training in it could comprehend and apply to it various instruments and methods. His evidence will bear upon the defence of want of novelty, prior patent, inutility of the invention, or ambiguity of the description in the specification of the patent. One person may appear in both capacities. 3 Rob. Pat. § 1013. See Curt. Pat. § 479.

Expert testimony is admissible upon questions for the court as well as upon those for the jury, where it can be properly applied to the subject-matter of the question as the construction of the patent and whether a prior patent covers the same invention; 3 Rob. Pat. § 1014. In dealing with such questions the court is at liberty to admit expert evidence, but cannot be compelled to do so, and it is not error to refuse it; *id.;* Day v. Stellman, 1 Fish. 487, Fed. Cas. No. 3,690; Winans v. R. Co., 21 How. (U. S.) 88, 16 L. Ed. 68.

The opinions of experts are admissible to prove insanity; U. S. v. Chisholm, 153 Fed. 808; to prove indebtedness by the general results shown by books of account; Brown v. U. S., 142 Fed. 1, 73 C. C. A. 187; to show whether a writing is genuine or disguised; Rinker v. U. S., 151 Fed. 755, 81 C. C. A. 379; or whether a child had passed through

the full period of gestation based upon the appearance of the child at the age of 13 months; People v. Johnson, 70 Ill. App. 634; or the cause of a death from facts stated by other witnesses and without personal examination; State v. Kammel, 23 S. D. 465, 122 N. W. 420; but such evidence is inadmissible to destroy the plain and obvious meaning of a contract where the words used are plain and unambiguous; Bowers Dredging Co. v. U. S., 211 U. S. 176, 29 Sup. Ct. 77, 53 L. Ed. 136; nor is it admissible upon the question of damages; Lincoln v. R. Co., 23 Wend. (N. Y.) 425; Bain v. Cushman, 60 Vt. 343, 15 Atl. 171; Chandler v. Bush, 84 Ala. 102, 4 South. 207; nor as to whether they were caused by negligence; East Tennessee, V. & G. R. v. Wright, 76 Ga. 532; International & G. N. Ry. Co. v. Kuehn, 2 Tex. Civ. App. 210, 21 S. W. 58; Hankins v. Watkins, 77 Hun 360, 28 N. Y. Supp. 867. See OPINION.

It has been a matter of grave discussion whether an expert is bound to testify on matters of *opinion* without extra compensation, the weight of decisions being that he is not bound to do so; 1 C. & K. 25; Ex parte Roelker, Sprague 276, Fed. Cas. No. 11,995; Dills v. State, 59 Ind. 15; Clark County v. Kerstan, 60 Ark. 508, 30 S. W. 1046; *contra*, Ex parte Dement, 6 Cent. L. J. 11; U. S. v. Cooper, 21 D. C. 491; Buchman v. State, 59 Ind. 1, 26 Am. Rep. 75; Dills v. State, 59 Ind. 15; 6 So. Law Rev. 706. In the absence of statutory authority, an expert for the state cannot demand extra compensation, at least when not compelled to make any preliminary examination or preparation, or to attend and listen to the testimony; Flinn v. Prairie County, 60 Ark. 204, 29 S. W. 459, 27 L. R. A. 669, 46 Am. St. Rep. 168; and when no demand is made in advance for special compensation, he can recover only the statutory witness fees; Board of Com'rs of County of Larimer v. Lee, 3 Colo. App. 177, 32 Pac. 841; Tiffany v. Iron Works, 59 Misc. 113, 109 N. Y. Supp. 754. When an expert is required to make a preliminary examination or to prepare specially for his testimony, he is allowed extra compensation in addition to the ordinary witness fees; Keller v. Harrison, 151 Ia. 320, 128 N. W. 851, 131 N. W. 53, Ann. Cas. 1913A, 300; Gordon v. Conley, 107 Me. 286, 78 Atl. 365, 33 L. R. A. (N. S.) 336; Burnett v. Freeman, 125 Mo. App. 683, 103 S. W. 121; Schofield v. Little, 2 Ga. App. 286, 58 S. E. 666; Philler v. Waukesha County, 139 Wis. 211, 120 N. W. 829, 25 L. R. A. (N. S.) 1040, 131 Am. St. Rep. 1055, 17 Ann. Cas. 712; and it has been held that a physician testifying as an expert comes within such rule; People v Board of Sup'rs, 148 App. Div. 584, 132 N. Y. Supp. 868; but usually a physician is required to give expert testimony without extra compensation; People v. Conte, 17 Cal. App. 771, 122 Pac. 450, 457; State v. Bell, 212 Mo. 111, 111 S. W. 24; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463, affirmed in 182 Ill. 9, 54 N. E. 1006, 74 Am. St. Rep. 157; especially when the physician is attending professionally one of the parties; Anderson v. Ry. Co., 103 Minn. 184, 114 N. W. 744; Burnett v. Freeman, 134 Mo. App. 709, 115 S. W. 488. It is held that an expert who testifies on a subject requiring special knowledge and skill is entitled only to the statutory fee; Main v. Sherman County, 74 Neb. 155, 103 N. W. 1038; and so where a witness had knowledge common to persons in a particular neighborhood, not based on study or investigation, and in spite of a special contract for extra compensation; Ramschasel's Estate, 24 Pa. Super. Ct. 262. Expenses of expert witnesses cannot be allowed as between the parties at a rate exceeding the usual fees; [1900] 1 Ir. Rep. 22; Randall v. Journal Ass'n, 22 Misc. 715, 49 N. Y. Supp. 1064; Linforth v. Gas Co., 9 Cal. App. 434, 99 Pac. 716.

Under equity rule 48 (S. C. of U. S., in effect Feb. 1, 1913, 33 Sup. Ct. xxxi), the district court, in a case involving the scope or validity of a patent or trade-mark, may, upon petition, order that the examination in chief of the experts be set forth in affidavits and filed: Those of plaintiff within 40 days after the cause is at issue; those of defendant 20 days after plaintiff's time has expired; and rebutting affidavits 15 days after the time for filing the originals has expired. The court or a judge may direct the cross-examination and any re-examination before the court at the trial. If the expert be not produced, the affidavit shall not be used.

A statute providing for the appointment of expert witnesses by the court without notice to the respondent or prosecuting attorney in cases of homicide was declared unconstitutional in People v. Dickerson, 164 Mich. 148, 129 N. W. 199, 33 L. R. A. (N. S.) 917, Ann. Cas. 1912B, 688.

In Germany expert witnesses are appointed by the court and are regarded as assistants to the trial judge. The judge decides whether they shall be called or not; he may inform himself from other sources upon the questions raised. There are lists of experts made under local laws; they are usually nominated by the various trades and professions. They are sworn in and need not be sworn in the particular case. If the parties have agreed upon an expert, he must be examined together with others designated by the judge if he so desires.

Frequently the experts furnish a written opinion and are not examined. The rules are the same in civil and criminal cases.

In France in civil cases each court selects expert witnesses and publicly announces their names. They are classified under 49 different categories. Usually three are examined; but the parties may agree to examine only one. If the parties cannot agree within three days on their choice of the ex-

perts to be called, the court appoint. They report in writing signed by all. If they differ in opinion, the grounds of difference must be stated, but not the name of the dissentient. The report need not be sworn to.

In criminal cases the experts are selected by the procureur (district-attorney) or they may be called by the examining magistrate or the trial judge.

Lists of experts of various professions are published by the official registrars of the courts and are appointed by the minister of justice with the advice of the presidents of the courts and the district attorney. They are entitled to ask for any fee they consider due for their services, there being no fixed schedule. Each profession is considered on its merits. Sometimes an expert not on the list may be selected by the judge. The rule that there must be an uneven number of experts does not apply in the criminal courts.

See OPINION; PATENT; HYPOTHETICAL QUESTION.

EXPILATION. **In Civil Law.** The crime of abstracting the goods of a succession.

This is said not to be a theft, because the property no longer belongs to the deceased, nor to the heir before he has taken possession. In the common law, the grant of letters testamentary, or letters of administration, relates back to the time of the death of the testator or intestate: so that the property of the estate is vested in the executor or administrator from that period.

EXPIRATION. Cessation; end: as, the expiration of a lease, of a contract or statute.

In general, the expiration of a contract puts an end to all the engagements of the parties, but not to the obligations which arise from the non-fulfilment of obligations created during its existence. See PARTNERSHIP; CONTRACT.

The term is specially used to denote the day upon which the risk of an insurance policy terminates. When before the expiration of policies the companies agreed to "hold" the policies for renewal, and after the expiration the agent of the insured told them to continue to hold them until the form could be arranged, the policies were held to be in force; Baker v. Assur. Co., 162 Mass. 358, 38 N. E. 1124. Temporary insurance from one day "until" a certain other date, includes all of the day of expiration; Thompson v. Ins. Co., 4 Pa. Dist. R. 382. See INSURANCE.

When a statute is limited as to time, it expires by mere lapse of time, and then it has no force whatever; and, if such a statute repealed or supplied a former statute, the first statute is, *ipso facto*, revived by the expiration of the repealing statute; Collins v. Smith, 6 Whart. (Pa.) 294, 36 Am. Dec. 228; unless it appear that such was not the intention of the legislature; 3 East 212; Bacon. Abr. *Statute* (D).

EXPIRY OF THE LEGAL. **In Scotch Law.** The expiration of the term within which the subject of an adjudication may be redeemed on payment of the debt adjudged for. Bell, Dict.; 3 Jurid. Styles, 3d ed. 1107.

EXPLICATIO (Lat.). **In Civil Law.** The fourth pleading; equivalent to the sur-rejoinder of the common law. Calvinus, Lex.

EXPLOSION. A sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 348, 10 Am. Rep. 735.

There is no difference in ordinary use between "explode" and "burst." The ordinary idea is that the explosion is the cause, while the rupture is the effect; Evans v. Ins. Co., 44 N. Y. 151, 4 Am. Rep. 650; Mitchell v. Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74. See INSURANCE.

The insurer against fire is not liable for loss or damage to a building caused by explosion; Hustace v. Ins. Co., 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651; Briggs v. Ins. Co., 53 N. Y. 446; German Fire Ins. Co. v. Roost, 55 Ohio St. 587, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; Heuer v. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; Phœnix Ins. Co. v. Greer, 61 Ark. 509, 33 S. W. 840. See INSURANCE also as to liability for fire caused by explosions, and for explosions caused by fire; FIRE.

EXPLOSIVES. The standard form of policy issued by the New York fire insurance companies includes benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 pounds in quantity, nitro-glycerin, or other explosives. Blasting powder is held to be included by the words "other explosives" within the meaning of such a policy; Penman v. Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. Ed. 493; St. Paul Fire & Marine Ins. Co. v. Penman, 151 Fed. 961, 81 C. C. A. 151.

A person in possession of dynamite is bound to exercise the highest degree of care to take every reasonable precaution to prevent explosion; Sowers v. McManus, 214 Pa. 244, 63 Atl. 601.

The regulations of The Hague tribunal of 1899 forbid the throwing of explosives from balloons or other airships. Inasmuch as this provision is only binding upon the contracting powers, it is provided that, if either of the nations at war form an alliance with a non-contracting power, the prohibition shall be null.

See BLASTING; DANGEROUS GOODS; FIRE.

EXPORTS. Goods and merchandise sent from one country to another. 2 M. & G. 155; 3 *id.* 959.

While the word *export* technically includes the landing in as well as the shipment to a foreign country, it is often used as meaning only the shipment from this country, and it will be so construed when used in a suit the manifest purpose of which would be defeated by limiting the word to its strict techni-

cal meaning; U. S. v. Chavez, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. ——, where the word is construed as used in the joint resolution of March 14, 1912.

In order to preserve equality among the states in their commercial relations, the constitution provides that "no tax or duty shall be laid on articles exported from any state." Art. 1, s. 9. And, to prevent a pernicious interference with the commerce of the nation, the tenth section of the first article of the constitution contains the following prohibition: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress." See Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; IMPORTATION.

EXPOSÉ. A French word, sometimes applied to a written document containing the reasons or motives for doing a thing. The word occurs in diplomacy.

EXPOSE. To cast out to chance, to place abroad, or in a situation unprotected; Shannon v. People, 5 Mich. 90.

EXPOSURE OF PERSON. Such an intentional exposure, in a public place, of the naked body, as is calculated to shock the feelings of chastity or to corrupt the morals.

This offence is indictable on the ground that every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law. 1 Bish. Cr. Law § 1125; State v. Rose, 32 Mo. 560. An indecent exposure, though in a place of public resort, if visible by only one person, is not indictable as a common nuisance. An omnibus is a public place sufficient to support the indictment; Clark, Cr. L. 306, n.; 1 Den. 338; Templ. & M. 23; 2 C. & K. 933; 2 Cox, Cr. Cas. 376; 3 *id.* 183; Dearsl. 207. But see State v. Roper, 18 N. C. 208; State v. Pepper, 68 N. C. 259, 12 Am. Rep. 637. An ordinance making it an offence to expose the person indecently without reference to the intent which accompanies the act, is a valid exercise of police power; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6.

See, generally, 1 Benn. & H. Lead. Cr. Cas. 442; Knowles v. State, 3 Day (Conn.) 103; Fowler v. State, 5 Day (Conn.) 81; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Com. v. Catlin, 1 Mass. 8; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632; Miller v. People, 5 Barb. (N. Y.) 203

See INDECENCY.

EXPRESS. Stated or declared, as opposed to implied. That which is made known and not left to implication. It is a rule that when a matter or thing is expressed it ceases to be implied by law; *expressum facit cessare tacitum.* Co. Litt. 183.

EXPRESS ABROGATION. A direct repeal in terms by a subsequent law referring to that which is abrogated.

EXPRESS ASSUMPSIT. A direct undertaking. See ASSUMPSIT; ACTION.

EXPRESS COMPANIES. Companies organized to carry small and valuable packages expeditiously in such manner as not to subject them to the danger of loss and damage which to a greater or less degree attends the transportation of heavy or bulky articles of commerce. Southern Express Co. v. R. Co., 10 Fed. 213.

A common carrier that carries at regular and stated times, over fixed and regular routes, money and other valuable packages, which cannot be conveniently or safely carried as common freight; and also other articles and packages of any description which the shipper desires or the nature of the article requires should have safe and rapid transit and quick delivery, transporting the same in the immediate charge of its own messenger on passenger steamers and express and passenger railway trains, which it does not own or operate, but with the owners of which it contracts for the carriage of its messengers and freights; and within cities and towns or other defined limits, it collects from the consignors and delivers to the consignees at other places of business the goods which it carries. Pacific Exp. Co. v. Seibert, 44 Fed. 310. The right to use the facilities afforded by a railroad depends entirely on contract; St. Louis, I. M. & S. R. Co. v. Express Co., 117 U. S. 3, 6 Sup. Ct. 542, 628, 29 L. Ed. 791. In St. Louis, I. M. & S. R. Co. v. Express Co., 117 U. S. 1, 6 Sup. Ct. 542, 628, 29 L. Ed. 791; it was held that a railroad company might make an exclusive contract with a single express company, and this has been followed by many state courts; but it is held that under the anti-trust laws such exclusive contract is not valid; State v. R. Co., 99 Tex. 516, 91 S. W. 214, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

They are common carriers; Southern Express Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; U. S. Express Co. v. Backman, 28 Ohio St. 144; notwithstanding a declaration in their bill of lading that they are not to be so considered; Bank of Kentucky v. Express Co., 93 U. S. 174, 23 L. Ed. 872; Christenson v. Express Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122.

In section 1 of the Railroad Rate Act (June 29, 1906), it is provided that the term "common carrier" in that act should include express companies; State v. Express Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A. (N. S.) 93, where it was said that congress has assumed jurisdiction over interstate traffic by express down to the point where the transit is entirely at an end; and a state statute requiring such companies to make free deliveries of parcels committed to their care was held void.

The Interstate Commerce Act and its amendments provide that the term "common

carrier" as used in the act shall include express companies; U. S. Comp. St. Stat. Supp. 1911, 1285; and in an indictment of express companies under that act it was held that where a joint stock company did a general interstate express business and had filed a schedule of its rates with the Interstate Commerce Commission it was a *quasi* corporation and subject to indictment as a legal entity; U. S. v. Am. Express Co., 199 Fed. 321.

See COMMON CARRIERS.

Like all other common carriers they must receive all goods offered for transportation, on being paid or tendered the proper charge; Jordan v. R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44; and if they cannot transport them within a reasonable time, must refuse them or be responsible for loss caused by the delay; Condict v. R. Co., 54 N. Y. 500; Tierney v. R. Co., 76 N. Y. 305; Illinois Cent. R. Co. v. Cobb, 64 Ill. 128. They may also refuse to receive dangerous articles for transportation; Parrot v. Wells, 15 Wall. (U. S.) 524, 21 L. Ed. 206; Boston & A. R. Co. v. Shanly, 107 Mass. 568.

An express company insures the safe delivery of goods received at the destination, if on its own route; if not, safe delivery at the end of its route to the next carrier; and will be relieved only by act of God or of the public enemy; Stephens & C. Transp. Co. v. Tuckerman, Milligan & Co., 33 N. J. L. 543; U. S. Exp. Co. v. Hutchins, 58 Ill. 44; Southern Exp. Co. v. Craft, 49 Miss. 480, 19 Am. Rep. 4; Babcock v. Ry. Co., 49 N. Y. 491; American Exp. Co. v. Bank, 69 Pa. 394, 8 Am. Rep. 268; Hadd v. Exp. Co., 52 Vt. 335, 36 Am. Rep. 757.

An express company may by special contract limit its liability for the value of goods lost; Oppenheimer v. Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Magnin v. Dinsmore, 62 N. Y. 35, 20 Am. Rep. 442; Baldwin v. Steamship Co., 74 N. Y. 125, 30 Am. Rep. 277; U. S. Exp. Co. v. Backman, 28 Ohio St. 144; except for losses due to its own negligence or misconduct; Bank of Kentucky v. Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Boscowitz v. Exp. Co., 93 Ill. 523, 34 Am. Rep. 191; Harvey v. R. Co., 74 Mo. 538; Whitworth v. Ry. Co., 87 N. Y. 413. A contract between an express company and its messenger exempting it from liability for injury to him by the negligence of the carrier, is valid and may extend so far as to authorize the express company to contract with the carrier against liability to the messenger; but such contract will not enure to the benefit of the carrier having no knowledge of it or not having availed itself of it by contracting with the express company; Louisville, N. A. & C. Ry. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

An express company is liable for damages to perishable freight injured by delay; Adams Exp. Co. v. Williams (Ark.) 14 S. W. 40; but a delay, to create a liability, must be "an unreasonable delay which is such as involves some want of ordinary care or diligence"; Adams Exp. Co. v. Bratton, 106 Ill. App. 563.

Where it was a habit to carry large sums of money for hire and keep the same for several hours after its transportation before called for, the liability for its loss is as a warehouseman and not as a common carrier; President, etc., of Conway Bank v. Exp. Co., 8 Allen (Mass.) 512. The liability of an express company as a common carrier terminates on the safe carriage of the goods to their destination and notice to the consignee; Hasse v. Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; and where goods are sent C. O. D., and the consignee refuses to accept them, and the shipper on notice directs the company to hold them until called for, its liability is only that of a warehouseman; Byrne v. Fargo, 36 Misc. 543, 73 N. Y. Supp. 943; but it is held that in the absence of a special contract the duty of the company is not completed on the arrival of the goods, but includes delivery; Burr v. Exp. Co., 71 N. J. L. 263, 58 Atl. 609; or constructive delivery by notice to the consignee; Rogers v. Fargo, 47 Misc. 155, 93 N. Y. Supp. 550; where there is such local usage; Hutchinson v. Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393, and note on delivery.

An express company is not denied the equal protection of the laws by classifying it with railroad and telegraph companies as subject to the unit rule of taxation, which estimates the value of the whole plant, though situated in different states, as an entirety, for the purpose of determining the value of the property in one state; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *id.*, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; and a state statute, requiring foreign express companies to file a statement before doing business and an agreement in reference to suits brought against them, did not give them a vested right to carry on business subject to the then existing laws or exempt them from future legislative control; Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033.

Under a state statute providing that one who offers to carry persons, property or messages is a common carrier of what he thus offers to carry, an express company offering to carry money for hire is a common carrier thereof; Platt v. Le Cocq, 150 Fed. 391, where it was held that the railroad commissioners' order requiring it to receive money, of which it held itself out to be a common carrier, at all reasonable business hours preceding the departure of trains, was reasonable. A state statute regulating express companies by requiring equal terms to all, without discrimination, does not violate the XIVth amendment of the United States con-

stitution; Am. Express Co. v. Express Co., 167 Ind. 292, 78 N. E. 1021.

In some states statutes relating to the transportation of property by railroad companies are applicable to express companies; MacMillan v. Express Co., 123 Ia. 236, 98 N. W. 629; but a statute prescribing the duties of railroads with reference to intersecting lines relates to the mere physical connection of the tracks and has no application to express companies; Southern Ind. Express Co. v. Ex. Co., 92 Fed. 1022, 35 C. C. A. 172.

See an epitome of the law on this subject at that date by Judge Redfield in 5 Am. Law Reg. N. S. 1; and three articles on express companies as common carriers; *id.* 449, 513, 648.

See RAILROAD; COMMON CARRIERS.

EXPRESS CONSIDERATION. A consideration expressed or stated by the terms of the contract.

EXPRESS CONTRACT. One in which the terms are openly uttered and avowed at the time of making. 2 Bla. Com. 443; 1 Pars. Contr. 4. One made in express words. 2 Kent 450. See CONTRACT.

EXPRESS COVENANTS. Those stated in words more or less distinctly expressing the intent to covenant. McDonough v. Martin, 88 Ga. 675, 16 S. E. 59, 18 L. R. A. 343.

EXPRESS TRUST. One declared in express terms. See TRUSTS.

EXPRESS WARRANTY. One expressed by particular words. 2 Bla. Com. 300. The statements in an application for insurance are usually construed to constitute an express warranty. 1 Phil. Ins. 346. See WARRANTY.

EXPROMISSIO (Lat.). **In Civil Law.** The species of novation by which a creditor accepts a new debtor, who becomes bound instead of the old, the latter being released. See NOVATION.

EXPROMISSOR. In Civil Law. The person who alone becomes bound for the debt of another, whether the latter were obligated or not. He differs from a surety, who is bound together with his principal. Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64. 4; 38. 1. 37. 8.

EXPROPRIATION. A taking of private property for public use upon providing compensation. Brownsville v. Pavazos, 2 Woods 293, Fed. Cas. No. 2,043. It corresponds to the right of eminent domain in our law. In Louisiana expropriation is used as is taking under eminent domain in most of the other states. In England "compulsory purchase" is used; Halsbury, Laws of England.

In French Law. The compulsory realization of a debt by the creditor out of the lands of a debtor, or the usufruct thereof; confined first to lands (if any) in *hypothéque*, and then extending to others. Black, L. Dict.

EXPULSION (Lat. *expellere*, to drive out). The act of depriving a member of a body politic or corporate, or of a society, of his right of membership therein, by the vote of such body or society, for some violation of his duties as such, or for some offence which renders him unworthy of longer remaining a member of the same.

By the constitution of the United States, art. 1, s. 5, § 2, each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member. In the case of John Smith, a senator from Ohio, who was expelled from the senate in 1807, the committee made a report which embraces the following points:

First. That the senate may expel a member for a high misdemeanor, such as a conspiracy to commit treason. Its authority is not confined to an act done in its presence.

Second. That a previous conviction is not requisite in order to authorize the senate to expel a member from their body for a high offence against the United States.

Third. That although a bill of indictment against a party for treason and misdemeanor has been abandoned, because a previous indictment against the principal party had terminated in an acquittal, owing to the inadmissibility of the evidence upon that indictment, yet the senate may examine the evidence for themselves, and if it be sufficient to satisfy their minds that the party is guilty of a high misdemeanor it is sufficient ground of expulsion.

Fourth. That the fifth and sixth articles of the amendments of the constitution of the United States, containing the general rights and privileges of the citizens as to criminal prosecutions, refer only to prosecutions at law, and do not affect the jurisdiction of the senate as to expulsion.

Fifth. That before a committee of the senate, appointed to report an opinion relative to the honor and privileges of the senate, and the facts respecting the conduct of the member implicated, such member is not entitled to be heard in his defence by counsel, to have compulsory process for witnesses, or to be confronted with his accusers. It is before the senate that the member charged is entitled to be heard.

Sixth. In determining on expulsion the senate is not bound by the forms of judicial proceedings or the rules of judicial evidence; nor, it seems, is the same degree of proof essential which is required to convict of a crime. The power of expulsion must, in its nature, be discretionary, and its exercise of a more summary character. 1 Hall, Law Journ. 459, 465; Anderson v. Dunn, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; Cooley, Const. Lim. 162.

Corporations have the right of expulsion in certain cases, as such power is necessary to the good order and government of corporate bodies; and the cases in which the inherent power may be exercised are classified by Lord Mansfield as follows: 1. When an offence is committed which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men; such as the offences of perjury, forgery, and the like. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury according to the law of the land. 2. When the offence is against his duty as a corporator, in which case he may be expelled on trial and conviction before the corporation. 3. The third is of a mixed nature, against the member's duty as a corpo-

rator, and also indictable by the law of the land; 1 Burr. 517; Diligent Fire Co. v. Com., 75 Pa. 291; Evans v. Philadelphia Club, 50 Pa. 107; Gregg v. Medical Society, 111 Mass. 185, 15 Am. Rep. 27.

The decisions of any kind of a voluntary association in admitting, disciplining, suspending or expelling members are of a quasi-judicial character; the courts will not interfere in such cases except to ascertain whether or not the proceeding was pursuant to the rules of the society, in good faith, and not in violation of the law of the land. If so found, the proceeding is conclusive, like that of a judicial proceeding; Connelly v. Masonic Ass'n, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296. Upon questions of doctrine and policy the society is the sole and exclusive judge; Grand Lodge, K. P. v. People, 60 Ill. App. 550.

Rules enacted for the government of its members must be conformed to by it in all matters relating to the disciplining of the members; Green v. Board of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474; Farmer v. Board of Trade, 78 Mo. App. 557. When suspension or expulsion results necessarily in affecting the financial standing of the complainants as well as depriving them of the use of property that is common to all, however insignificant its value, there is no reason to deny relief by injunction; Huston v. Reutlinger, 91 Ky. 333, 15 S. W. 867, 34 Am. St. Rep. 225. So where it appears that the complainant, unless aided by the courts, will be expelled from an association for some cause which under no circumstances can justify his expulsion; Otto v. Tailors' Union, 75 Cal. 315, 17 Pac. 217, 7 Am. St. Rep. 156.

A mutual benefit society cannot expel a member or deprive him of his rights in the society without giving him notice and a full opportunity to be heard in defence of the charges against him, and the proceeding for his expulsion must be conducted fairly and in good faith; State v. Temperance Soc., 42 Mo. App. 485; Berkhout v. Royal Arcanum, 62 N. J. L. 103, 43 Atl. 1; Wachtel v. Benev. Soc., 84 N. Y. 28, 38 Am. Rep. 478; People v. Alpha Lodge, 13 Misc. 677, 35 N. Y. Supp. 214, affirmed 8 App. Div. 591, 40 N. Y. Supp. 1147. Irregularities in the proceedings by which a member was suspended will not afford ground for relief in equity, where they were waived by the member's appearance and failure to raise them before the tribunals of the society; Sperry's Appeal, 116 Pa. 391, 9 Atl. 478. If the rules authorize the expulsion of a member, and he is given an opportunity to be heard, and the investigation is conducted in good faith, the decision of the association is conclusive upon the court in mandamus proceedings to compel his restoration; Lewis v. Wilson, 121 N. Y. 284, 24 N. E. 474; White v. Brownell, 2 Daly (N. Y.) 329.

It is generally held that persons who join churches, secret societies, benevolent associations, or temperance societies, etc., voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof subject themselves to the tribunals established by those bodies to pass upon such questions; if aggrieved by a decision against them, made in good faith by such judicatories, they must seek their redress within the organization, as provided by its laws and regulations; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239; Shannon v. Frost, 3 B. Monr. (Ky.) 253; Grosvenor v. Society of Believers, 118 Mass. 78.

A complaining member should exhaust the remedies provided by the laws of the organization before applying to the courts; Union Fraternal League of Boston v. Johnston, 124 Ga. 902, 53 S. E. 241; Beeman v. Supreme Lodge, 215 Pa. 627, 64 Atl. 792; Weigand v. Fraternities Order, 97 Md. 443, 55 Atl. 530; but where those laws provide no remedy, and the organization provides none, it becomes a question for the courts to determine whether or not the member has done all that could reasonably be expected of him; Schneider v. Local Union No. 60, 116 La. 270, 40 South. 700, 5 L. R. A. (N. S.) 891, 114 Am. St. Rep. 549, 7 Ann. Cas. 868. His compensatory remedies against an association which denies him some property right to which he is entitled are the same as if he were entitled to some right or property from a natural person or a private corporation which has refused to concede it. If the contingencies have arisen in which the association has agreed to pay him a sum of money, an action may be maintained therefor as in the case of any other creditor against a debtor; Supreme Sitting Order of Iron Hall v. Stein, 120 Ind. 270, 22 N. E. 136; Supreme Lodge of Ancient Order of United Workmen v. Zuhlke, 129 Ill. 298, 21 N. E. 789.

See Barbour on Parties; 2 L. R. A. (N. S.) 789, n.; By-Law; Club; Religious Society; Church; Beneficial Society; Association; Amotion; Disfranchisement. The subject is treated with fulness in Thomps. Corp. 806–930. See State v. Chamber of Commerce, 47 Wis. 670.

EXTENSION. This term is applied among merchants to signify an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment. It is often done by the issue of notes of various maturities.

Among the French, a similar agreement is known by the name of attermoiement. Merlin, *Répert.* mot *Attermoiement.*

EXTENSION OF PATENT (sometimes termed *Renewal of Patent*). Under the earlier patent acts (1836 and 1848) a patent was granted for the term of fourteen years. But the law made provision that when any patentee, without neglect or fault on his part, had failed to obtain a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use, he might obtain an extension of such patent for the term of seven years longer. No extension could be granted after the patent had once expired. The extension was intended for the sole benefit of the inventor; and where it was made to appear that he would receive no benefit therefrom, it would not be granted. The assignee, grantee, or licensee of an interest in the original patent retained no right in the extension, unless by reason of some stipulation to that effect. Where any person had a right to use a specific machine under the original patent he still retained that right after the extension. By act March 2, 1861, it was provided that patents should be granted for the term of seventeen years and further extension was forbidden. Congress may still extend a patent.

EXTENT. A writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment.

It is so called because the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff. Fitzh. N. B. 131. The writ originally lay to enforce judgments in case of recognizances or debts acknowledged on statutes merchant or staple; see stat. 13 Edw. I. *de Mercatoribus;* 27 Edw. III. c. 9; and by 33 Hen. VIII. c. 39, was extended to debts due the crown. The term is sometimes used in the various states of the United States to denote writs which give the creditor possession of the debtor's lands for a limited time till the debt be paid. Roberts v. Whiting, 16 Mass. 186.

Extent in aid is an extent issued at the suit or instance of a crown-debtor against a person indebted to himself. This writ was much abused, owing to some peculiar privileges possessed by crown-debtors, and its use was regulated by stat. 57 Geo. III. c. 117. See 3 Bla. Com. 419.

Extent in chief is an extent issued to take a debtor's lands into the possession of the crown.

Manorial extent. A survey of a manor made by a jury of tenants, often of unfree men sworn to sit for the particulars of each tenancy, and containing the smallest details as to the nature of the service due.

These manorial extents "were made in the interest of the lords, who were anxious that all due services should be done; but they imply that other and greater services are not due, that the customary tenants, even though they be unfree men, owe these services for their tenements, no less and no more. Statements that the tenants are not bound to do services of a particular kind are not very uncommon;" 1 Poll. & Maitl. 343. "Many admissions against their own (the lords) interests the extent of their manors may contain; they suffer it to be recorded that a 'day's work' ends at noon, that in return for some works they must provide food, even that the work is not worth the food that has to be provided; but they do not admit that for certain causes, and for certain causes only, may they take there tenements into their own hands. As a matter of fact it is seldom of an actual ejectment that the peasant has to complain;" *id.* 359. Many examples of the manorial extents have been preserved in the monastic cartularies and elsewhere. "Among the most accessible are the Boldon Book (printed at the end of the official edition of the Domesday); the Black Book of Peterborough, the Domesday of St. Paul's, the Worcester Register, the Battle Cartulary, all published by the Camden Society; the Ramsey, Gloucester, and Malmesbury Cartularies or registers published in the Rolls series; the Burton Cartulary of the Salt Society and the Yorkshire Inquisitions of the Yorkshire Record Society;" *id.* 189.

The "extents" of manors are descriptions which give the numbers and names of the tenants, the size of their holdings, the legal kind of their tenure and the kind and amount of their service; Maitland, Material for Hist. E. L. in 2 Sel. Essays in Anglo-Amer. Leg. Hist. 87.

EXTENUATION. That which renders a crime or tort less heinous than it would be without it. It is opposed to aggravation.

In general, extenuating circumstances go in mitigation of punishment in criminal cases, or of damages in those of a civil nature.

EXTERRITORIALITY. The exemption from the operation of the ordinary laws of the state accorded to foreign monarchs temporarily within the state and their retinue, to diplomatic agents and the members of their household, to consuls in non-Christian states, and to foreign men of war in port. 1 Opp. 460–469. See AMBASSADOR; CONFLICT OF LAWS; PRIVILEGE FROM ARREST.

EXTINGUISHMENT. The destruction of a right or contract. The act by which a contract is made void. The annihilation of a collateral thing or subject in the subject itself out of which it is derived. Prest. Merg. 9. For the distinction between an extinguishment and passing a right, see 2 Sharsw. Bla. Com. 325.

An extinguishment may be by matter of fact and by matter of law. It is by matter of fact either express, as when one receives satisfaction and full payment of a debt and the creditor releases the debtor; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; or implied, as when a person hath a yearly rent out of lands and becomes owner, either by descent or purchase, of the estate subject to the payment of the rent, and the latter is extinguished; Martin v. Searcy, 3 Stew. (Ala.) 50, 20 Am. Dec. 64; but the person must have as high an estate in the land as in the rent, or the rent will not be extinct; Co. Litt. 147 *b*.

There are numerous cases where the claim is extinguished by operation of law: for example where two persons are jointly but not severally liable for a simple contract-debt, a judgment obtained against one is at common

law an extinguishment of the claim on the other debtor; Willings v. Consequa, 1 Pet. C. C. 301, Fed. Cas. No. 17,767; Tom v. Goodrich, 2 Johns. (N. Y.) 213.

A conveyance of mortgaged land by the mortgagor to the mortgagee extinguishes the mortgage; Lyman v. Gedney, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871. Taking a note for the amount due does not deprive a claimant of his right to a lien, but merely suspends its enforcement until the note is payable; Keogh Mfg. Co. v. Eisenberg, 7 Misc. 79, 27 N. Y. Supp. 356.

See Co. Litt. 147 *b;* Morris v. Brady, 5 Whart. (Pa.) 541; Derby Bank v. Landon, 3 Conn. 62; Jackson v. Shaffer, 11 Johns. (N. Y.) 513; Cattel v. Warwick, 6 N. J. L. 190; McMurphy v. Minot, 4 N. H. 251; Caldwell v. Fulton, 31 Pa. 475, 72 Am. Dec. 760; Boston & P. R. Corp. v. Doherty, 154 Mass. 314, 28 N. E. 277; Fitzpatrick v. R. R., 84 Me. 33, 24 Atl. 432; Sowles v. Witters, 54 Fed. 568; I. Smith & Son Co. v. Parsons, 37 Neb. 677, 56 N. W. 326.

EXTINGUISHMENT OF COMMON. Loss of the right to have common. This may happen from various causes; by the owner of the common right becoming owner of the fee; by severance from the land; by release; by approvement; 2 Steph. Com. 41; Co. Litt. 280; 1 Bacon, Abr. 628; Cro. Eliz. 594.

EXTINGUISHMENT OF COPYHOLD. This takes place by a union of the copyhold and freehold estate in the same person; also by an act of the tenant showing an intention not to hold any longer of his lord; Hutt. 81; Cro. Eliz. 21; Wms. R. P. 287; Watk. Copyh.

EXTINGUISHMENT OF A DEBT. Destruction of a debt. This may be by the creditor's accepting a higher security; 1 Salk. 304; Davidson v. Kelly, 1 Md. 492; Brewer v. Branch Bank, 24 Ala. 439. A judgment recovered extinguishes the original debt; Gibbs v. Bryant, 1 Pick. (Mass.) 118. A trust deed given to secure the payment of a bond is not affected by the rendition of a judgment on the bond, since the original debt is not thereby merged, but only the form of the evidence of the debt charged; Gibson v. Green's Adm'r, 89 Va. 524, 16 S. E. 661, 37 Am. St. Rep. 888. A debt evidenced by a note may be extinguished by a surrender of the note; Bryant v. Smith, 10 Cush. (Mass.) 169; Albert's Ex'rs v. Ziegler's Ex'rs, 29 Pa. 50; Sherman v. Sherman, 3 Ind. 337. As to the effect of payment in extinguishing a debt, see PAYMENT.

EXTINGUISHMENT OF RENT. A destruction of the rent by a union of the title to the lands and the rent in the same person. *Termes de la Ley;* Cowell; 3 Sharsw. Bla. Com. 325, note. A ground rent in Pennsylvania is usually extinguished by a conveyance thereof from the owner of the ground rent to the terre-tenant.

EXTINGUISHMENT OF WAYS. Destruction of a right of way, effected usually by a purchase of the close over which it lies by the owner of the right of way. 2 Washb. R. P.

EXTORSIVELY. A technical word used in indictments for extortion.

When a person is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own; 4 Cox, Cr. Cas. 387. In North Carolina the crime may be charged without using this word; State v. Dickens, 2 N. C. 406.

EXTORTION. The unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. 4 Bla. Com. 141; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610; 1 Hawk. Pl. Cr. c. 68, s. 1; 1 Russ. Cr.* 144; 2 Bish. Cr. L. 390; U. S. v. Deaver, 14 Fed. 595.

At common law, any oppression by color of right; but technically the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. The obtaining of money by force or fear is not extortion; People v. Barondess, 61 Hun 571, 16 N. Y. Supp. 436; Whart. Cr. L. 833.

In a large sense the term includes any oppression under color of right; but it is generally and constantly used in the more limited technical sense above given.

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer; Kitby v. State, 57 N. J. L. 320, 31 Atl. 213.

To constitute extortion, there must be the receipt of money or something of value; the taking a promissory note which is void is not sufficient to make an extortion; Com. v. Cony, 2 Mass. 523; Com. v. Pease, 16 Mass. 93. See Bacon, Abr.; Co. Litt. 168. It is extortion and oppression for an officer to take money for the performance of his duty, even though it be in the exercise of a discretionary power; 2 Burr. 927. See People v. Whaley, 6 Cow. 661; Helser v. Pott, 3 Pa. 183; Com. v. Saulsbury, 152 Pa. 554, 25 Atl. 610; Com. v. Bagley, 7 Pick. (Mass.) 279; 4 Cox, Cr. Cas. 387. See Brackenridge v. State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360; People v. Barondess, 133 N. Y. 649, 31 N. E. 240.

EXTRA-DOTAL PROPERTY. In Louisiana this term designates that property which forms no part of the dowry of a woman, and which is also called paraphernal property. Civ. Code, art. 2315.

EXTRA-JUDICIAL. That which does not belong to the judge or his jurisdiction, notwithstanding which he takes cognizance of it. Extra-judicial judgments and acts are absolutely void. See CORAM NON JUDICE; Merlin, *Répert., Excès de Pouvoir.*

EXTRA QUATUOR MARIA (Lat. beyond four seas). Out of the realm. 1 Bla. Com. 157. See BEYOND SEA.

EXTRA SERVICES. When used with reference to officers it should be construed to embrace all services rendered by such for which no compensation is given by law. Board of Com'rs of Miami Co. v. Blake, 21 Ind. 32.

EXTRA TERRITORIUM. Beyond or outside of the territorial limits of a state. Milne v. Moreton, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

EXTRA VIAM. Out of the way. When, in an action of trespass, the defendant pleads a right of way, the defendant may reply *extra viam*, that the trespass was committed beyond the way, or make a new assignment. 16 East 343, 349.

EXTRACT. A part of a writing. In general, an extract is not evidence, because the *whole* of the writing may explain the part extracted, so as to give it a different sense; but sometimes extracts from public books are evidence, as extracts from the registers of births, marriages, and burials, kept according to law, when the whole of the matter has been extracted which relates to the cause or matter in issue.

EXTRADITION. (Lat. *ex*, from, *traditio*, handing over). The surrender by one sovereign state to another, on its demand, of persons charged with the commission of crime within its jurisdiction, that they may be dealt with according to its laws; the surrender of persons by one federal state to another, on its demand, pursuant to their federal constitution and laws.

Without treaty stipulations. Public jurists are not agreed as to whether extradition, independent of treaty stipulations, is a matter of imperative duty or of discretion merely. Some have maintained the doctrine that the obligation to surrender fugitive criminals is perfect, and the duty of fulfilling it is, therefore, imperative, especially where the crimes of which they are accused affected the peace and safety of the state; but others regard the obligation as imperfect in its nature, and a refusal to surrender such fugitives as affording no ground of offence. Of the former opinion are Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent; the latter opinion is maintained by Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, Heffter, and Wheaton.

Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a matter of comity, not of obligation; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425.

Many nations have practised extradition without treaty engagements to that effect, as the result of mutual comity and convenience; others have refused. The United States has always declined to surrender criminals unless bound by treaty to do so; 1 Kent 39 n.; 1 Opin. Attys. Gen. 511; 6 *id.* 85, 431; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; Ex parte Holmes, 12 Vt. 631. The existence of an extradition treaty does not prohibit the surrender by either country of a person charged with a crime not enumerated in the treaty; Ex parte Foss, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. St. Rep. 182. No state has an absolute right to demand of another the delivery of a fugitive criminal, though it has what is called an *imperfect* right, but a refusal to deliver the criminal is no just cause of war. Per Tilghman, C. J., in Com. v. Deacon, 10 S. & R. (Pa.) 125.

Under treaty stipulations. The sovereignty of the United States, as it respects foreign states, being vested by the constitution in the federal government, it appertains to it exclusively to perform the duties of extradition which, by treaties, it may assume; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, 30 L. Ed. 425; and, to enable the executive to discharge such duties, congress passed the acts of Aug. 12, 1848, July 12, 1889, and June 6, 1900. The general government alone has the power to enact laws for the extradition of foreign criminals. It possesses that power under the treaty power in the constitution; Holmes v. Jennison, 14 Pet. (U. S.) 540, 10 L. Ed. 579; People v. Curtis, 50 N. Y. 321, 10 Am. Rep. 483; In re De Giacomo, 12 Blatch. 391, Fed. Cas. 3,747.

While a violation of an extradition treaty with Italy might render the treaty denounceable by the United States, it does not render it void and of no effect. The refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty but of merely placing the government in the position of having the right to denounce it; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. ——.

In the absence of a treaty, it has been said the president has no power as well as no duty to surrender a fugitive; Ex parte McCabe, 46 Fed. 363, 12 L. R. A. 589. As to whether congress has this power was said in Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448, to be an undecided question. It was there said to be competent for congress to enforce or give efficacy to the provisions of the treaty between the U. S. and Spain with respect to Cuba, and that the act of June 6, 1900, providing for the extradition of criminals in certain cases "to foreign countries or territories" occupied by or under the control of the United States was constitutional. See 14 Harv. L. Rev. 607.

Treaties have been made between the United States and many foreign powers for the

mutual surrender of persons charged with certain crimes. These treaties may be found in full in the United States Statutes at Large, in 2 Moore on Extradition 1072; Haswell, Treaties, etc., U. S.; see 4 Moore, Int. L. Dig.

The United States interstate extradition laws extend to Porto Rico; People v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286; and to any portion of the country not within the limits of a state, but organized under the laws of congress, with an executive, legislative and judicial system of its own; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219; this does not include the Cherokee Nation; Ex parte Morgan, 20 Fed. 298, approved in People v. Bingham, 211 U. S. 468, 29 Sup. Ct. 190, 53 L. Ed. 286; nor (at that time) Oklahoma; In re Lane, 135 U. S. 443, 10 Sup. Ct. 760, 34 L. Ed. 219.

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both countries. For nearly all crimes, the laws of the states, and not the enactments of congress, must be looked to for the definition of the offence; Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948; Pettit v. Walshe, 194 U. S. 210, 24 Sup. Ct. 657, 48 L. Ed. 938. Where a British fugitive was demanded in New York, and the British and New York statutes both covered the publication of fraudulent statements by corporate officers, it was held that the two statutes were substantially analogous under an extradition treaty relating to fraud by corporate officers; Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948.

In the construction and carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Proceedings for surrender simply demand of the accused that he shall do what all good citizens are required and ought to be willing to do, viz. submit themselves to the law of their country. Care should be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality should not be allowed to stand in the way of a faithful discharge of our obligations; Grin v. Shine, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130.

When a person is held in custody as a fugitive from justice under an extradition warrant in proper form and showing upon its face all that is required by law to be shown, he should not be discharged from custody until it is made clearly to appear that he is not a fugitive from justice within the meaning of the constitution and laws of the United States; People v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; Ex parte Massee, 95 S. C. 315, 79 S. E. 97.

The extradition act of Canada provides that a prisoner shall be surrendered only upon such evidences of criminality as would, under the Canadian law, justify his committal for trial if the crime had been committed in Canada. Canadian law should determine whether the act alleged constitutes one of the extradition crimes; 6 B. & S. 522; 4 U. C. P. R. 215. The further question as to whether the act must also be shown to be a crime according to the laws of the demanding country was raised but not decided in 31 Can. L. J. 594.

The preliminary examination of a person sought to be extradited under the treaties of August 9, 1842, and July 12, 1889, between the United States and Great Britain on a conviction of murder, must be had in the state where he was arrested, in view of the tenth article of the earlier treaty providing that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his arrest and commitment for trial if the crime had been committed there, and of the proviso in the sundry civil appropriations act of August 18, 1894, by which it is made the duty of a marshal arresting a person charged with any offence to take him before the nearest United States commissioner, or judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial, notwithstanding those parts of the act of August 12, 1848, and of R. S. § 5270, which provide for bringing the accused in extradition proceedings before the justice, judge or commissioner who issued the warrant of arrest; Pettit v. Walshe, 194 U. S. 205, 24 Sup. Ct. 657, 48 L. Ed. 938.

Desertion from a foreign army or navy is said not to be an extraditable offence; 15 Harv. L. Rev. 657; but in Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, where the provisions of the treaty with Russia for the extradition of deserters from ships of war and merchant vessels were under consideration, it was held that a deserting seaman might be extradited, though the vessel to which he had been assigned was in the course of building and had not yet been accepted by the Russian government.

The treaties enumerate the crimes for which persons may be surrendered, and in some other particulars limit their own application. They also contain some provisions relating to the mode of procedure; but, as it was doubted whether such stipulations had the force of law; Park. Cr. Cas. 108; congress passed the act of August 12, 1848, entitled "An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders." 9 Stat. L.

302. This has since been amended; and the statutes on the subject are found in U. S. R. S. §§ 5270–5277, as amended June 6, 1900.

These acts embody those provisions contained in the treaties relating to the procedure, and contain others designed to facilitate the execution of the duty assumed by treaty.

The following are the main provisions of the law relating to the practice: 1. A complaint under oath or affirmation charging the person with the commission of one of the enumerated crimes. 2. A warrant may be issued by any of the justices of the supreme court or judges of the several circuit or district courts of the United States, or of a court of record of general jurisdiction of any state, or the commissioners authorized so to do by any of the courts of the United States. 3. The person arrested is to be brought before the officer issuing the warrant, to the end that the evidence of criminality may be considered. 4. Copies of the depositions upon which an original warrant in the country demanding the fugitive may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person apprehended. 5. The degree of evidence must be such as, according to the laws of the place where the person arrested shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed. 6. If the evidence is deemed sufficient, the officer hearing it must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, and commit the prisoner to the proper gaol until the surrender be made, which must be within two calendar months. 7. The secretary of state, on the proper demand being made by the foreign government, orders, under his hand and seal of office, in the name and by authority of the president, the person so committed to be delivered to such person as may be authorized, in the name and on behalf of such foreign government, to receive him. 8. The demand must be made by and upon those officers who represent the sovereign power of their states. 7 Op. Attys. Gen. 6; 8 *id.* 521. By act of Aug. 3, 1882, it is directed that all extradition cases under treaties shall be heard publicly; 22 Stat. 215.

The usual method is for some police officer or other special agent, after obtaining the proper papers in his own country, to repair to the foreign country, carry the case through with the aid of his minister, receive the fugitive, and conduct him back to the country having jurisdiction of the crime; 8 Op. Attys. Gen. 521. In all the treaties the parties stipulate upon mutual requisitions, etc., to deliver up to justice all persons who, being charged with crime, shall seek an asylum or shall be found in the territories of the other. The terms of the stipulation embrace cases of absence without flight as well as those of actual flight; 8 Op. Attys. Gen. 306.

The treaties of the United States do not guarantee an asylum to a fugitive from any foreign country. They only provide how he shall be deprived of an asylum; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421. See as to the right of asylum 6 L. Mag. & Rev. 4th, 262. If the prisoner escapes, he may be retaken in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape shall be retaken on an escape; U. S. R. S. § 5272. The expense of the apprehension and delivery shall be borne by the party making the requisition.

Between the several states. By art. iv. sec. ii. of the constitution of the United States, it is provided that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having the jurisdiction of the crime."

The act of congress of Feb. 12, 1793, U. S. R. S. §§ 5278, 5279, prescribed the mode of procedure in such cases. It requires, on demand of the executive authority of a state and production of a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state from whence the person so charged fled, that the executive authority of the state or territory to which such person shall have fled shall cause the person charged to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and cause the fugitive to be delivered to such agent when he shall appear; but if such agent do not appear within six months, the prisoner shall be discharged. It further provides that if any person shall by force set at liberty or rescue the fugitive from such agent while transporting the fugitive to the state or territory from which he fled, the person so offending shall, on conviction, be fined not exceeding five hundred dollars and be imprisoned not exceeding one year, and that all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive shall be paid by the state or territory making the demand. U. S. Rev. Stat. § 5278–9.

In the execution of the obligation imposed by the constitution, the following points deserve attention:—

The crime, other than treason or felony, for which a person may be surrendered.

Some difference of opinion has prevailed on this subject, owing to some diversity of the criminal laws of the several states; but the better opinion appears to be that the terms of the constitution extend to all acts which by the laws of the state where committed are made criminal; 1 Kent 42; Johnston v. Riley, 13 Ga. 97; In re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Kentucky v. Dennison, 24 How. (U. S.) 107, 16 L. Ed. 717; People v. Brady, 56 N. Y. 187. The word "crime" embraces every species of indictable offence; Kentucky v. Dennison, 24 How. (U. S.) 99, 16 L. Ed. 717; including an act not criminal at the time the constitution was adopted but made so afterwards; Howe v. Treasurer, 37 N. J. L. 147; People v. Brady, 56 N. Y. 182; and an act which is criminal under the law of the state from which the accused has fled, but is not so under the law of the state into which he has fled; Kentucky v. Dennison, 24 How. (U. S.) 103, 16 L. Ed. 1717.

That the courts of the asylum state have jurisdiction to pass upon the sufficiency of the requisition papers has been held; Jones v. Leonard, 50 Ia. 110, 32 Am. Rep. 116; People v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706, affirmed Hyatt v. New York, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; In re Waterman, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 926; that the accused should be permitted to show that the indictment or affidavit accompanying the requisition charged no crime under the laws of the demanding state, see Barriere v. State, 142 Ala. 72, 39 South. 55; Ex parte Slauson, 73 Fed. 666.

In Hyatt v. New York, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, it is said: Upon the executive of the state in which the accused is found rests the responsibility of determining whether he is a fugitive from the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him by competent proof that the accused is in fact a fugitive from the justice of the demanding state; and in People v. Brady, 56 N. Y. 182, that the courts have jurisdiction to interfere by *habeas corpus*, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another state is issued, and in case the papers are defective and insufficient, to discharge the prisoner.

It must appear to the governor of the asylum state, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the demanding state, by an indictment or an affidavit certified as authentic by the governor of the demanding state; and, second, that the person demanded is a fugitive from the justice of the demanding state; Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544. The first of these prerequisites is a question of law and is always open on the face of the papers to judicial inquiry under an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the governor of the asylum state must decide. How far his decision may be reviewed judicially by *habeas corpus*, or whether it is not conclusive, are said to be questions not settled by harmonious judicial decisions, nor by any authoritative judgment by the Supreme Court; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161; but it is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal, until the presumption in its favor is overthrown; In re Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161.

The motives which prompt the governor to issue his warrant are held not proper subjects of judicial inquiry; In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214; Com. v. Superintendent of Philadelphia County Prison, 220 Pa. 401, 69 Atl. 916, 21 L. R. A. (N. S.) 939. Jurisdiction to take the action complained of is the test; *id.* The governor need not demand independent proof, apart from the requisition papers, that accused was a fugitive from justice; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148. When the person for whom a requisition is made is in prison in the asylum state under conviction of crime, the governor cannot deliver him up; Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799, and note.

An indictment is not a prerequisite to extradition; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113. Extradition is a mere proceeding in securing arrest and attention; a complaint before a committing magistrate is a charge of crime; In re Strauss, 197 U. S. 324, 25 Sup. Ct. 535, 49 L. Ed. 774.

The indictment, in order to constitute a sufficient charge of crime to warrant interstate rendition, need show no more than that the accused was substantially charged with crime; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113. If more were required, it would impose upon courts at the trial under writs of *habeas corpus* the duty of a critical examination of the laws of the states with whose jurisprudence and criminal procedure they can have but a general acquaintance.

If the accusation is by affidavit, it should be sufficiently full and explicit to justify arrest and commitment for hearing; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; In re Heyward, 1 Sandf. (N. Y.) 701; In re

Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; State v. Patterson, 116 Mo. 505, 22 S. W. 696; In re Hooper, 52 Wis. 699, 58 N. W. 741. The demand must be made by the governor of the state; Com. v. Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

The accused must have fled from the state in which the crime was committed; and of this the executive authority of the state upon which the demand is made should be reasonably satisfied. This is sometimes done by affidavit. The governor upon whom the demand is made acts judicially, so far as to see whether the case is a proper one; In re Greenough, 31 Vt. 279; but he cannot look behind the indictment in which the crime is charged; In re Voorhees, 32 N. J. L. 145; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287. The duty to surrender the fugitive is obligatory; Kentucky v. Dennison, 24 How. (U. S.) 103, 16 L. Ed. 717; Taylor v. Taintor, 16 Wall. (U. S.) 370, 21 L. Ed. 287. But in the case of a conflict of jurisdiction between the two states the surrender may be postponed; Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. Ed. 287; In re Briscoe, 51 How. Pr. (N. Y.) 422; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475.

It is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found or for the purpose of escaping a prosecution anticipated or begun; Ex parte Brown, 28 Fed. 653; but simply that having committed a crime within a state, when he is sought to be subjected to its criminal process, he has left its jurisdiction and is found within another state; In re Reggal, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Renaud v. Abbott, 116 U. S. 287, 6 Sup. Ct. 1194, 29 L. Ed. 629; Streep v. U. S., 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365; Moyer v. Nichols, 203 U. S. 221, 27 Sup. Ct. 121, 51 L. Ed. 160; Ex parte Brown, 28 Fed. 653; In re Cook, 49 Fed. 833; In re White, 55 Fed. 54, 5 C. C. A. 29; In re Bloch, 87 Fed. 981; Kingsbury's Case, 106 Mass. 223. Whether the motive for leaving was to escape prosecution or not, his return to answer the charges against him is equally within the spirit and purpose of the statute; and the simple fact that he was not within the state to answer its criminal process, when required, renders him a fugitive from justice, regardless of his purpose in leaving; State v. Richter, 37 Minn. 436, 35 N. W. 9. That the accused did not believe he had committed any crime against the demanding state will not prevent his being a fugitive from justice; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; or that he commits a crime within a state and then simply returns to his own home in another state; Ex parte Swearingen, 13 S. C. 74; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63. He is held not to be a fugitive from justice if he has never been in the demanding state, but is alleged to have obtained money by false pretences through the mails; State of Tennessee v. Jackson, 36 Fed. 258, 1 L. R. A. 370. In In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378, the court ordered the discharge of a prisoner because he had been forcibly brought into the state without requisition papers; and to the same effect, State v. Simmons, 39 Kan. 262, 18 Pac. 177. Crimes which are not actually, but only constructively, committed within the demanding state do not fall within the class of cases embraced by the constitution or acts of congress. Not that the jurisdiction to try the crime is lacking, but that no one can in any sense be alleged to have fled from a state in which he has never been corporally present since the commission of the crime; In re Mohr, 73 Ala. 503, 49 Am. Rep. 63; In re Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; State v. Hall, 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289, 44 Am. St. Rep. 501, where the constructive presence of a murderer in the state, where the victim was struck by a bullet fired across the state boundary, was held not sufficient to make him a fugitive from that state when found in the state from which the shot was fired.

In criminal cases, a forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such offence, and presents no valid objection to his trial in such court; Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421; Ex parte Scott, 9 Barn. & C. 446; State v. Smith, 1 Bail. (S. C.) 283, 19 Am. Dec. 679; Dows' Case, 18 Pa. 37. Although it has been frequently held that if a defendant *in a civil case* be brought within the presence of the court by a trick or a device, the service will be set aside, and he will be discharged from custody; Wells v. Gurney, 8 Barn. & C. 769; Metcalf v. Clark, 41 Barb. (N. Y.) 45. The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103.

As between the states, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offences than that for which his return was demanded, without violating any rights secured by the constitution or laws of the United States; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283; Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. Ed. 549, affirming *id.*, 90 Ga. 347, 16 S. E. 945,

35 Am. St. Rep. 216; State v. Glover, 112 N. C. 896, 17 S. E. 525; People v. Cross, 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; Com. v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; State v. Patterson, 116 Mo. 505, 22 S. W. 696; Waterman v. State, 116 Ind. 51, 18 N. E. 63; State v. Kealy, 89 Ia. 94, 56 N. W. 283; Carr v. State, 104 Ala. 4, 16 South. 150; State v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. St. Rep. 388; Ham v. State, 4 Tex. App. 645; Williams v. Weber, 1 Colo. App. 191, 28 Pac. 21; In re Brophy, 2 Ohio N. P. 230; Harland v. Territory, 3 Wash. Ty. 131, 13 Pac. 453; *contra*, In re Baruch, 41 Fed. 472; In re Fitton, 45 Fed. 471; State v. Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200; State v. Meade, 56 Kan. 690, 44 Pac. 619; In re Cannon, 47 Mich. 481, 11 N. W. 280. In some states the courts have overruled former decisions, bringing themselves in accord with the United States supreme court; Petry v. Leidigh, 47 Neb. 126, 66 N. W. 308; see In re Robinson, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378; In re Brophy, 2 Ohio N. P. 230; Ex parte McKnight, 3 Ohio N. P. 255; *id.*, 48 Ohio St. 588, 28 N. E. 1034, 14 L. R. A. 128. See 12 Harv. L. Rev. 532.

Habeas corpus will not lie to release from custody one who has been forcibly abducted from another state and brought to trial into the jurisdiction of a tribunal having jurisdiction of the offence charged; Ex parte Davis, 51 Tex. Cr. R. 608, 103 S. W. 891, 12 L. R. A. (N. S.) 225, 14 Ann. Cas. 522; and to the same effect Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, where the prisoner was kidnapped in Peru, without any pretence of authority under the treaty or from the United States, and brought to Illinois; his trial in the state courts was held not to involve a violation of the due process clause of the constitution, nor of the treaty with Peru. The principle upon which the judgment rested was that when a criminal is brought into, or is in fact within, the custody of the state, charged with a crime against its laws, the state may, so far as the constitution and laws of the United States are concerned, proceed against him for the crime, and need not inquire as to the particular methods employed to bring him into the state. In meeting the contention that the accused, by virtue of the treaty with Peru, acquired by his residence a right of asylum, it was said: "There is no language in this treaty, or in any other treaty made by this country on the subject of extradition of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled." The right of a government voluntarily to give an asylum is different from the right to demand security in such asylum. The treaty, so far as it regulates the right of asylum at all, is intended to limit this right in one who is proved to be a criminal fleeing from justice, so that on proper demand and proceedings had therein the government of the country of the asylum shall deliver him up to the country where the crime was committed. To this extent, and to this alone, the treaty does regulate or impose a restriction upon the right of the government of the country of the asylum to protect the criminal from removal therefrom. In Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, the governor of Kentucky made a requisition upon the governor of West Virginia for one charged with the crime of murder in Kentucky, alleged to have fled from its jurisdiction and taken refuge in West Virginia. While the two governors were in correspondence on the subject, a body of armed men without warrant or other legal process, arrested the accused in West Virginia and delivered him to the jailor of Pike county, Kentucky, in the courts of which he stood indicted for murder. Thereupon the governor of West Virginia, on behalf of that state, applied to the district court of the United States for the Kentucky district for a writ of *habeas corpus* and his return to the jurisdiction of West Virginia. The supreme court held that no mode is provided by which a person unlawfully abducted from one state to another can be restored to the state from which he was taken, if held upon any process of law for offences against the state to which he has been carried. The decision was by a divided court, but its authority is said to be none the less controlling; Moyer v. Nichols, 203 U. S. 221, 27 Sup. Ct. 121, 51 L. Ed. 160; affirming In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214. In Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934, it was said that the cases of Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, established two propositions: 1. That that court will not interfere to relieve persons who have been arrested and taken by violence from one state to another, where they are held under process legally issued from the courts of the latter state. 2. That the question of the applicability of this doctrine to a particular case is as much the province of the state courts as a question of common law, or of the law of nations, as it is of the courts of the United States. If a forcible abduction from another state and conveyance within the jurisdiction of the court holding him is no objection to his detention and trial for the offence charged, no more is the objection allowed if the abduction has been accomplished under the forms of law. The act complained of does not relate to the restraint from which the petitioner seeks to be relieved, but to the means by which he was brought

within the jurisdiction of the court under whose process he is held; Pettibone v. Nichols, 203 U. S. 192, 27 Sup. Ct. 111, 51 L. Ed. 148, where conspiracy was charged against the governors of the states of Idaho and Colorado and other officers to secure the presence of Pettibone in the former state. It was held that the fundamental question was whether a United States circuit court, when asked upon *habeas corpus* to discharge a person held in actual custody by a state for trial in one of its courts, under an indictment charging a crime against its laws, can properly take into account the methods whereby the state obtained such custody, and that that question had been determined in the negative in Ker v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, and Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. Ed. 283, supra.

See 15 L. R. A. 177 n.; 12 L. R. A. (N. S.) 225 n.

The constitutional provision for interstate rendition warrants a surrender after conviction; In re Hope, 7 N. Y. C. R. R. 406, 10 N. Y. Supp. 28; but after serving his sentence the convict cannot be surrendered under a requisition from another state until he has had reasonable time to return to the state from which he was extradited; *id.*

Extradition proceedings may be made the basis of a suit for malicious prosecution; Castro v. De Uriarte, 16 Fed. 93.

See FUGITIVE FROM JUSTICE.

EXTRA JUDICIUM. Extra-judicial; out of the proper cause. Judgments rendered or acts done by a court which has no jurisdiction of the subject, or where it has no jurisdiction, are said to be *extra-judicial.*

EXTRANEUS. In Old English Law. One foreign born; a foreigner. 7 Rep. 16.

In Roman Law. An heir not born in the family of the testator. Those of a foreign state. The same as *alienus.* Vicat, Voc. Jur.; Du Cange.

EXTRAORDINARY. Beyond or out of the common order or rule; not usual, regular, or of a customary kind; not ordinary; remarkable; uncommon; rare. Ten Eyck v. Episcopal Church, 29 Abb. N. C. (N. Y.) 154, 20 N. Y. Supp. 157; The Titania, 19 Fed. 103.

EXTRATERRITORIALITY. A term formerly used to express the exemption from the obligation of the laws of a state granted to foreign diplomatic agents, war-ships, etc. Wheaton, § 224. It has now been generally replaced by the term "Exterritoriality" *(q. v.).* See also FOREIGN JUDGMENT; FOREIGN LAW; EQUITY. The term is used to indicate jurisdiction exercised by a nation in other countries, by treaty, as, by the United States in China or Egypt; or by its own ministers or consuls in foreign lands. Crime is said to be extraterritorial when committed in a country other than that of the forum in which the party is tried. See 2 Moore, Int. L. Dig.

EXTRAVAGANTES. In Canon Law. The name given to the constitutions of the popes posterior to the Clementines.

They are thus called, *quasi vagantes extra corpus juris,* to express that they were out of the canonical law, which at first contained only the decrees of Gratian: afterwards the Decretals of Gregory IX., the Sexte of Boniface VIII., the Clementines, and at last the Extravagantes, were added to it. There are the Extravagantes of John XXII., and the common Extravagantes. The first contain twenty epistles, decretals, or constitutions of that pope, divided under fifteen titles, without any subdivision into books. The others are epistles, decretals, or constitutions of the popes who occupied the holy see either before or after John XXII. They are divided into books, like the decretals.

EXTREMIS (Lat. in extremity). When a person is sick beyond the hope of recovery, and near death, he is said to be *in extremis.*

A will made in this condition, if made without undue influence, by a person of sound mind, is valid. As to the effect of declarations of persons *in extremis,* see DYING DECLARATIONS; DECLARATIONS.

EYE-WITNESS. One who saw the act or fact to which he testifies. When an eye-witness testifies, and is a man of intelligence and integrity, much reliance must be placed on his testimony.

EYOTT. A small island arising in a river. Fleta, l. 3, c. 2, s. b; Bracton, l. 2, c. 2. See ISLAND.

EYRE. A journey; a court of itinerant justices. In old English law applied to the judges who traveled on circuit to hold courts in the different counties. See JUSTICES IN EYRE.

EYRER. To go about. See EYRE.

F

F. The sixth letter of the alphabet. A fighter or maker of frays, if he had no ears, and a felon on being admitted to clergy, was to be branded in the cheek with this letter. Cowell; Jacob. Those who had been guilty of falsity were to be so marked. 2 Reeve, Hist. Eng. L. 392.

F. O. B. Free on board. A term frequently inserted in contracts for the sale of goods to be conveyed by ship, signifying that the buyer will be responsible for the cost of shipment. In London, when goods are so sold, the buyer is considered as the shipper and the goods are shipped at his risk; 3 Hurlst. & N. 484; 4 *id.* 822; 29 L. J. C. P. 213; Knapp Electrical Works v. Wire Co., 157 Ill. 456, 42 N. E. 147.

Its use extends to all carriers.

The ordinary effect is to pass title on delivery to the carrier; Hoffman v. Gosline, 172 Fed. 113, 96 C. C. A. 318; Murphy v. Lumber Co., 125 Wis. 363, 103 N. W. 1113; the railroad is the buyer's agent; Blakeslee Mfg. Co. v. Hilton, 5 Pa. Super. Ct. 184. Where machinery is sold f. o. b. cars at place of manufacture, title passes on delivery to the railroad; Dentzel v. Island Park Ass'n, 229 Pa. 403, 78 Atl. 935, 33 L. R. A. (N. S.) 54. Otherwise when f. o. b. at destination; Havens v. Fuel Co., 41 Neb. 153, 59 N. W. 681.

See FRAIS JUSQU'À BORD.

FABRIC LANDS. In English Law. Lands given for the repair, rebuilding, or maintenance of cathedrals or other churches.

It was the custom, says Cowell, for almost every one to give by will more or less to the *fabric* of the cathedral or parish church where he lived. These lands so given were called fabric lands, because given *ad fabricam ecclesiæ reparandam* (for repairing the fabric of the church). Called by the Saxons *timber-lands*. Cowell; Spelman, Gloss.

FABRICARE (Lat.). To make. Used in an indictment for forging a bill of lading; 1 Salk. 341.

FABRICATE. To invent; to devise falsely. Invent is sometimes used in a bad sense, but fabricate never in any other. To fabricate a story implies that it is so contrary to probability as to require the skill of a workman to induce belief in it. Crabbe, Syn. The word implies fraud or falsehood; a false or fraudulent concoction, knowing it to be wrong. L. R. 10 Q. B. 162.

FABULA. In old European law, a contract or covenant. Also, in the laws of the Lombards and Visigoths, a nuptial contract; a will. Burrill.

FACE. The outward appearance or aspect of a thing.

The words of a written paper in their apparent or obvious meaning, as, the face of a note, bill, bond, check, draft, judgment, record, or contract, which titles see. The face of a judgment is the sum for which it was rendered, exclusive of interest. Osgood v. Bringolf, 32 Ia. 265.

FACIAS (Lat. *facere*, to make, to do). That you cause. Occurring in the phrases *scire facias* (that you cause to know), *fieri facias* (that you cause to be made), etc. Used also in the phrases *Do ut facias* (I give that you may do), *Facio ut facias* (I do that you may do), two of the four divisions of considerations made by Blackstone, 2 Com. 444.

FACILITIES. A name formerly given to certain notes of some of the banks in the state of Connecticut, which were made payable in two years after the close of the war of 1812. President, etc., of Springfield Bank v. Merrick, 14 Mass. 322.

As to facilities in transportation, see INTERSTATE COMMERCE COMMISSION.

FACIO UT DES (Lat. I do that you may give). An expression applied in the civil law to the consideration of that species of contract by which a person agrees to perform anything for a price either specifically mentioned or left to the determination of the law to set a value on it; as, when a servant hires himself to his master for certain wages or an agreed sum of money. 2 Bla. Com. 445. See CONSIDERATION.

FACIO UT FACIAS (Lat. I do that you may do). An expression used in the civil law to denote the consideration of that species of contract by which I agree with a man

to do his work for him if he will do mine for me; or if two persons agree to marry together, or to do any other positive acts on both sides; or it may be to forbear on one side in consideration of something done on the other. 2 Bla. Com. 444. See CONSIDERATION.

FACSIMILE. An exact copy or accurate imitation of an original instrument.

In England, where the construction of a will may be affected by the appearance of the original paper, the court will order the probate to pass in *facsimile* as it may possibly help to show the meaning of the testator; 1 Wms. Ex. (7th ed.) 331, 386, 566. See PROBATE.

FACT (Lat. *factum*). An action; a thing done. A circumstance.

Fact (*factum, fait*) stands in lawbooks for: 1. An act; 2. For a completed and operative transaction brought about by sealing and executing a certain sort of writing, and so for the instrument itself, a deed (*factum*); 3. As designating what exists, in contradistinction to what should exist (*de facto* as contrasted with *de jure*); 4. As indicating things, events, actions, conditions, as happening, existing, really taking place. Thayer, Evid. 190.

Material facts are those which are essential to the right of action or defence. See Boggs & Leathe v. Ins. Co., 30 Mo. 68; Clark v. Ins. Co., 40 N. H. 338, 77 Am. Dec. 721.

Immaterial facts are those which are not essential to the right of action or defence. Material facts must be shown to exist; immaterial facts need not. As to what are questions of law for the court and of fact for the jury, see Wells, Law and Fact. As to pleading material facts, see Gould, Pl. c. 3, § 28.

Facts constituting a cause of action are those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of such facts. Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592.

See Ram; Moore, Facts.

FACTIO TESTAMENTI (Lat.). **In Civil Law.** The power of making a will, including right and capacity. Also, the power of receiving under a will. Vicat, Voc. Jur.

FACTOR. An agent employed to sell goods or merchandise consigned or delivered to him, by or for his principal, for a compensation, commonly called factorage or commission. Pal. Ag. 13; Sto. Ag. § 33; Com. Dig. *Merchant*, B; Malynes, Lex Merc. 81; Beawes, Lex Merc. 44; 3 Chit. Com. L. 193; 2 Kent 622; 1 Bell, Comm. 385, § 408; 2 B. & Ald. 143.

An agent for the sale of goods in his possession or consigned to him. Lawson, R. & Rem. § 227.

A *factor* or *commission merchant* is one who has the actual or technical possession of goods or wares of another for sale. A merchandise broker is one who negotiates the sale of merchandise without having it in his possession or control. He is simply an agent with very limited powers; J. M. Robinson, Norton & Co. v. Cotton Factory, 124 Ky. 435, 99 S. W. 305, 102 S. W. 869, 8 L. R. A. (N. S.) 474, 14 Ann. Cas. 802.

When the agent accompanies the ship, taking a cargo aboard, and it is consigned to him for sale, and he is to purchase a return cargo out of the proceeds, such agent is properly called a factor; he is, however, usually known by the name of a supercargo (*q. v.*). Beawes, Lex Merc. 44; Livermore, Ag. 69; 1 Domat, b. 1, t. 16, § 3, art. 2.

A factor differs from a broker in some important particulars: namely, he may buy and sell for his principal in his own name, as well as in the name of his principal; on the contrary, a broker acting as such should buy and sell in the name of his principal; 2 B. & Ald. 143; 3 Kent 622; Slack v. Tucker, 23 Wall. (U. S.) 321, 23 L. Ed. 143; Ward v. Brandt, 11 Mart. O. S. (La.) 331, 13 Am. Dec. 352. Again, a factor is intrusted with possession, management, disposal, and control of the goods to be bought and sold, and has a special property and a lien on them; the broker, on the contrary, has usually no such possession, management, control, or disposal of the goods, nor any such special property or lien; Paley, Ag. 13; 1 Bell, Com. 385. The business of factors in the United States is usually done by commission merchants, who are known by that name, and the term factor is but little used; 1 Pars. Contr. 78. The term factor, however, is largely used in the Southern States in the cotton business, and in a different sense from commission merchant; Fordyce v. Peper, 16 Fed. 516. He not only sells cotton, but makes advances to the merchant or planter, in cash or goods, to be paid when the crop comes in. He thus has a lien upon the crop before it is shipped to him. In Alabama the term "commission merchant" as used in the revenue laws is synonymous with "factor"; Perkins v. State, 50 Ala. 154.

A domestic factor is one who resides in the same country with his principal.

By the usages of trade, or intention of law, when *domestic* factors are employed in the ordinary business of buying and selling goods, it is presumed that a reciprocal credit among the principal and the agent and third persons has been given. When a purchase has been made by such a factor, he, as well as his principal, is deemed liable for the debt; and in case of a sale the buyer is responsible both to the factor and principal for the purchase-money; but this presumption may be rebutted by proof of exclusive credit; Story, Ag. § 267, 291, 293; Paley, Ag. 243, 371; 9 B. & C. 78; 15 East 62.

A foreign factor is one who resides in a different country from his principal. 1 Term 112; 4 Maule & S. 576.

Foreign factors are held personally liable upon all contracts made by them for their employers, whether they describe themselves in the contract as agents or not. In such cases the presumption is that the credit is given exclusively to the factor. But this presumption may be rebutted by proof of a contrary agreement; Story, Ag. § 268; Mech. Ag. 1051; Bull, N. P. 130; 1 B. & P. 398; 9 B. & C. 78.

His duties. He is required to use reasonable skill and ordinary diligence in his vocation; 1 Ventr. 121; De Bavier v. Funke, 66 Hun 633, 21 N. Y. Supp. 410; Foster v. Bush, 104 Ala. 662, 16 South. 625. If for any reason not tortious, he delays selling the goods consigned to him, he is not liable for a subsequent loss occurring through an act of God; Dunbar v. Gregg, 44 Ill. App. 527. He is bound to obey his instructions; Marfield v. Goodhue, 3 N. Y. 62; Clark v.

Cumming & Co., 77 Ga. 64, 4 Am. St. Rep. 72; 5 C. B. 895; but when he has none he may and ought to act according to the general usages of trade; Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. Ed. 550; 7 Taunt. 164; Judson v. Sturgis, 5 Day (Conn.) 556; Liotard v. Graves, 3 Caines (N. Y.) 226; Forrestier v. Bordman, 1 Story, 43, Fed. Cas. No. 4,945; to sell for cash when that is usual, or to give credit on sales when that is customary; Daylight Burner Co. v. Odlin, 51 N. H. 56, 12 Am. Rep. 45. He is bound to render a just account to his principal, and to pay him the moneys he may receive for him. The mere fact that one sells products as a factor, does not impose upon him the burden of proving due diligence in the sale; Govan v. Cushing, 111 N. C. 458, 16 S. E. 619.

His rights. He has the right to sell the goods in his own name; and, when untrammelled by instructions, he may sell them at such times and for such prices as, in the exercise of a just discretion, he may think best for his employer; 3 C. B. 380; Bessent v. Harris, 63 N. C. 542; but he must obey instructions if given; Ernest v. Stoller, 5 Dill. 438, Fed. Cas. No. 4,520; Scott v. Rogers, 31 N. Y. 676; but when the instructions are to wait until a certain law has produced its effect on the market, a certain discretion as to time may be exercised; Milbank v. Dennistoun, 21 N. Y. 386. He may sell on credit when such is the usage of the market; Forrestier v. Bordman, 1 Sto. 43, Fed. Cas. No. 4,945; but if he sell on change he is held to a high degree of diligence to ascertain the solvency of the purchaser; Foster v. Waller, 75 Ill. 464. In the absence of instructions he may give a warranty; Schuchardt v. Allens, 1 Wall. (U. S.) 359, 17 L. Ed. 642; and he may insure the goods of the principal in his own name; Johnson v. Campbell, 120 Mass. 449.

He is, for many purposes, between himself and third persons, to be considered as the owner of the goods. He may, therefore, recover the price of goods sold by him in his own name, and, consequently, he may receive payment and give receipts, and discharge the debtor, unless, indeed, notice has been given by the principal to the debtor not to pay. But the title to goods consigned to a factor to be sold remains in the principal until sold, and may not be sold on execution to pay debts of the factor; Barnes Safe & Lock Co. v. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846. He has a lien on the goods for advances made by him, and for his commissions; this exists by law and apart from any agreement; Plattner Implement Co. v. International Harvester Co., 133 Fed. 376, 66 C. C. A. 438; but he is not to be considered as the owner, beyond the extent of his lien; *id.*; Haebler v. Luttgen, 61 Minn. 315, 63 N. W. 720; U. S. v. Villalonga, 23 Wall. (U. S.) 35, 23 L. Ed. 64. He has no right to barter the goods of his principal; Wheeler & Wilson Mfg. Co. v. Givan, 65 Mo. 89; Victor Sewing Mach. Co. v. Heller, 44 Wis. 265; nor to pledge them for the purpose of raising money for himself, nor to secure a debt he may owe; Odiorne v. Maxcy, 13 Mass. 178; Berry v. Allen, 59 Ill. App. 149; Bowie v. Napier, 1 McCord (S. C.) 1, 10 Am. Dec. 641; Van Amringe v. Peabody, 1 Mas. 440, Fed. Cas. No. 16,825; Rodriguez v. Heffernan, 5 Johns. Ch. (N. Y.) 429; Macky v. Dillinger, 73 Pa. 85; L. R. 10 C. P. 354. See Factor's Acts. But he may pledge them for advances made to his principal, or for the purpose of raising money for him, or in order to reimburse himself to the amount of his own lien; 2 Kent 625; Urquhart v. McIver, 4 Johns. (N. Y.) 103; 7 East 5; Story, Bailm. § 325; Field v. Farrington, 10 Wall. (U. S.) 141, 19 L. Ed. 923. He may raise money by pledging the goods for the payment of duties or any other charge or purpose allowed or justified by the usages of the trade; Evans v. Potter, 2 Gall. (U. S.) 13, Fed. Cas. No. 4,569; Laussatt v. Lippincott, 6 S. & R. (Pa.) 386, 9 Am. Dec. 440; 3 Esp. 182. A custom in the diamond trade, that it is not usual for agents employed to sell diamonds to pledge them, cannot be set up to prevent the application of the factors act to a pledge by such an agent; [1907] 1 K. B. 510. See Pledge. He has a lien upon the goods of his principal in his possession, to protect himself against unpaid drafts drawn and accepted in the course of the agency; State v. Thompson, 120 Mo. 12, 25 S. W. 346; and such lien is personal to the factor; Barnes S. & L. Co. v. Tobacco Co., 38 W. Va. 158, 18 S. E. 482, 22 L. R. A. 850, 45 Am. St. Rep. 846. Where a factor disobeys instructions in selling grain which he has bought for his principal, he thereby loses his lien on money deposited with him as security; Jones v. Marks, 40 Ill. 313.

It may be laid down as a general rule that when the property is found distinguishable in the hands of the factor, capable of being traced by a clear and connected chain of identity, in no one link of it degenerating from a specific trust into a general debt, the creditors of the factor who has become bankrupt have no right to the specific property; 2 Stra. 1182; 3 Maule & S. 562; even where it is money in the factor's hands; 2 Burr. 1369; Hall v. Boardman, 14 N. H. 38; Price v. Ralston, 2 Dall. (U. S.) 60, 1 L. Ed. 289; Denston v. Perkins, 2 Pick. (Mass.) 86. He may sell to reimburse advances; Brown v. McGran, 14 Pet. (U. S.) 479, 10 L. Ed. 550; unless restrained by an agreement with his principal, but if he has agreed to hold for a given time he is bound to do so; Fordyce v. Peper, 16 Fed. 516. And where the factor dies insolvent, before remitting to the shipper, the latter is entitled to satisfaction out of the proceeds of the sale or deposit in

bank, as against the claim of the bank on an unmatured note; Ewart v. Bank, 70 Hun 90, 23 N. Y. Supp. 1124. And see 1 B. & P. 539, 648, for the rule as to promissory notes. Stock ordered of a broker on margin contracts belongs not to the broker, but to the customer, and may be redeemed by him from an assignee of the broker for benefit of creditors; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102.

But the rights of third persons dealing *bona fide* with the factor as a principal, where the name of the principal is sunk entirely, are to be protected; 7 Term 360; 3 Bingh. 139; 6 Maule & S. 14.

See, generally, 58 Am. Dec. 156, note; Lawson, Rights & Rem. §§ 227–230; 3 Wait, Act. & Def. 289; 2 Sm. L. Cas. 118; 1 Am. L. Cas. 788; Fordyce v. Peper, 16 Fed. 516, note; LIEN; AGENT; STOCK BROKER; REAL ESTATE BROKER; DEL CREDERE COMMISSION.

FACTOR'S ACTS. A name given to legislative enactments in England and the United States designed to mitigate the hardships of the common-law rule governing dealings with factors, and especially with respect to pledges made by them of the goods of the principal. The object of the English legislation known under this general designation is the protection of persons dealing with those having possession of goods or documents representing the title thereto. The first acts were 4 Geo. IV. c. 84 and 6 Geo. IV. c. 94, and these were confined to persons entrusted with documents of title, not with the goods themselves. This defect was remedied by 5 & 6 Vict. c. 39, of which the Ontario act is merely a copy; R. S. Ont. c. 121. The subject was again dealt with in 40 & 41 Vict. c. 39, under which many of the decisions under the former acts were practically set aside. As to the provisions of the English acts and decisions thereunder, see 5 Can. L. T. 145.

In the United States the rule of the common law that a factor cannot pledge the property of his principal has been largely altered by statute in many of the states, founded generally it is said upon the statutes of 6 Geo. IV. c. 94; 3 Wait, Act. & Def. 300. See, as to legislation in this country, 58 Am. Dec. 165, note. See also FACTOR.

FACTORAGE. The wages or allowances paid to a factor for his services; it is more usual to call this commissions.

FACTORIZING PROCESS. A process for attaching effects of the debtor in the hands of a third party. It is substantially the same process known as the *garnishee process*, *trustee process*, process by *foreign attachment;* Drake, Attach. § 451.

FACTORY. A building or group of buildings appropriated to the manufacture of goods, including the machinery necessary to produce the goods, and the engine or other power by which the machinery is propelled; the place where workers are employed in fabricating goods, wares, or utensils. Cent. Dict. The term includes the fixed machinery when used in a policy of insurance; Mayhew v. Hardesty, 8 Md. 479.

FACTORY ACTS. Laws enacted for the purpose of regulating the hours of work, and the sanitary condition, and preserving the health and morals, of the employés, and promoting the education of young persons employed at such labor. See LABOR LAWS; EIGHT HOUR LAWS; EMPLOYER'S LIABILITY.

FACTORY PRICES. The prices at which goods may be bought at factories, as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers. Whipple v. Levett, 2 Mas. 90, Fed. Cas. No. 17,518.

FACTUM. A deed; a man's own act and deed. A culpable or criminal act; an act not founded in law. A deed; a written instrument under seal: called, also, *charta.* Spelman, Gloss.; 2 Bla. Com. 295.

The difference between *factum* and *charta* originally would seem to have been that *factum* denoted the thing done, and *charta* the evidence thereof; Co. Litt. 9 b. When a man denies by his plea that he made a deed on which he is sued, he pleads *non est factum* (it is not his deed).

In wills, *factum* seems to retain an active signification and to denote a making. See Weatherhead's Lessee v. Baskerville, 11 How. (U. S.) 358, 13 L. Ed. 717.

A fact. *Factum probandum* (the fact to be proved). 1 Greenl. Ev. § 13.

A portion of land granted to a farmer; otherwise called a hide, *bovata*, etc. Spelm. See FACT.

In French Law. A memoir which contains concisely set down the fact on which a contest has happened, the means on which a party founds his pretensions, with the refutation of the means of the adverse party. See Vicat, Voc. Jur.

FACULTY. **In Canon Law.** A license; an authority. For example, the ordinary, having the disposal of all seats in the nave of a church, may grant this power, which when it is delegated is called a faculty, to another.

Faculties are of two kinds: first, when the grant is to a man and his heirs in gross; second, when it is to a person and his heirs as appurtenant to a house which he holds in the parish; 1 Term 429, 432; 12 Co. 106.

In Scotch Law. Ability or power. The term faculty is more properly applied to a power founded on the consent of the party from whom it springs, and not founded on property; Kames, Eq. 504.

FACULTY OF ADVOCATES. See ADVOCATES.

FACULTIES, MASTER OF THE. An official in the archdiocese of Canterbury who

granted dispensations. 4 Inst. 337. See COURT OF THE ARCHES.

FADERFIUM. A marriage gift coming from the father or brother of the bride. Spelman, Gloss.

FAEDERFEOH. The portion brought by a wife to her husband, and which reverted to a widow in case the heir of her deceased husband refused his consent to her second marriage. Cyclopedic L. Dict.

FAESTING-MEN. Approved men who were strong-armed. Subsequently the word seems to have been used in the sense of *rich*, and hence it probably passed into its later and common meaning of pledges or bondsmen, which, by Saxon custom, were bound to answer for each other's good behavior. Cowell; Du Cange.

FAGGOT. A badge, worn in medieval times by persons who had recanted their heretical opinions, designed to show what they considered they had merited but had escaped. Cowell.

FAGGOT VOTE. A term applied to votes manufactured by nominally transferring land to persons otherwise disqualified from voting for members of parliament.

FAIDA. **In Saxon Law.** Great and open hostility which arose on account of some murder committed. The term was applied only to that deadly enmity in deference to which, among the Germans and other northern nations, if murder was committed, punishment might be demanded from any one of kin to the murderer by any one of the kin of the murdered man. Du Cange; Spelman, Gloss.

FAIL. To leave unperformed; to omit; to neglect, as distinguished from refuse, which latter involves an act of the will, while the former may be an act of inevitable necessity. Taylor v. Mason, 9 Wheat. (U. S.) 344, 6 L. Ed. 101.

FAILLITE (Fr.). **In French Law.** Bankruptcy; failure. The condition of a merchant who ceases to pay his debts. 3 Massè, *Droit Comm.* 171; Guyot, *Répert.*

FAILURE. In legal parlance, the neglect of any duty may be a failure, and the commission of any fault a delinquency. When applied to a mercantile concern, it means an inability to meet its debts from insolvency. It is synonymous with insolvency, which see. Boyce v. Ewart, 1 Rice (S. C.) 126.

FAILURE OF CONSIDERATION. See CONSIDERATION.

FAILURE OF EVIDENCE. A failure to offer proof, either positive or inferential, to establish one or more of the many facts, the establishment of all of which is indispensable to the finding of the issue for the plaintiff. Cole v. Hebb, 7 Gill & J. (Md.) 28.

FAILURE OF ISSUE. A want of issue to take an estate limited over by an executory devise.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but, if he dies without issue living *at the time of his death*, then to another, this is a failure of issue *definite*. An *indefinite* failure of issue is a general failure whenever it may happen, without fixing any time, or a certain and definite period, within which it must happen. 4 Kent 275. An executory devise in fee, with remainder over, to take effect on an indefinite failure of issue is void for remoteness, and hence courts are astute to devise some construction which shall restrain the failure of issue to the term of limitation allowed; *id.* 276, n. See Appeal of Bedford, 40 Pa. 18; 2 Redf. Wills 276, n.; EN VENTRE SA MERE; SHELLEY'S CASE, RULE IN.

FAILURE OF JUSTICE. An expression used to denote the deprivation of a right or the loss of reparation for an injury as the result of the lack or inadequacy of a legal remedy. It is also colloquially applied to the miscarriage of justice which occurs when the result of a trial is so palpably wrong as to shock the moral sense.

FAILURE OF RECORD. The neglect to produce the record after having pleaded it. When a defendant pleads a matter and offers to prove it by the record, and the plaintiff pleads *nul tiel record*, a day is given to the defendant to bring in the record; if he fails to do so, he is said to fail *of his record*, and, there being a *failure of record*, the plaintiff is entitled to judgment. *Termes de la Ley.* See the form of entering it; 1 Wms. Saund. 92, n. 3.

FAILURE OF TITLE. The entire or partial loss of title suffered by a grantee or one who has contracted to purchase property, resulting from failure or inability of the grantor or vendor to pass a satisfactory title.

FAILURE OF TRUST. The lapse or inability to execute a trust, whether from the legal insufficiency or defective execution of the instrument creating it, the uncertainty of the object, or the lack of a person to take as *cestui que trust*. It is a doctrine of equity that a trust shall not fail for want of a trustee. See TRUST.

FAINT PLEADER. A false, fraudulent, or collusory manner of pleading, to the deception of a third person.

FAIR. A public mart or place of buying or selling. 1 Bla. Com. 274. A greater species of market, recurring at more distant intervals.

Though etymologically signifying a market for buying and selling exhibited articles, it includes a place for the exhibition

of agricultural and mechanical products. State v. Long, 48 Ohio St. 509, 28 N. E. 1038.

Where a fair association maintains on its grounds a track for horse racing, it must use reasonable care to keep such track free from danger to patrons when they are invited or permitted to cross and while they are thus crossing; Higgins v. Agricultural Society, 100 Me. 565, 62 Atl. 708, 3 L. R. A. (N. S.) 1132.

Where a city authorized the use of a street for a carnival or street fair, it was held liable for injurious consequences to one injured by a defective structure therein; Van Cleef v. City of Chicago, 240 Ill. 318, 88 N. E. 815, 23 L. R. A. (N. S.) 636, 130 Am. St. Rep. 275.

A fair is usually attended by a greater concourse of people than a market, for the amusement of whom various exhibitions are gotten up. McCulloch, Comm. Dict.; Wharton, Dict.

A solemn or greater sort of market, granted to any town by privilege, for the more speedy and commodious provision of such things as the subject needeth, or the utterance of such things as we abound in above our own uses and occasions. Cowell; Cunningham, Law Dict. A privileged market.

A fair is a franchise which is obtained by a grant from the crown. 2d Inst. 220; 3 Mod. 123; 1 Ld. Raym. 341; 2 Saund. 172; 1 Rolle, Abr. 106; Tomlin; Cunningham, Law Dict.

In the Middle Ages, the right to hold a fair meant the right to hold a court of pie-powder for the fair. Sometimes these courts were held by the mayor of a corporate town; sometimes they belonged to a lord. The law merchant was administered in addition to many other kinds of jurisdiction, civil and criminal. Of these, the Lord Mayor's Court in London, the Tolzey Court, and a branch of it sitting in fair time as a pie-powder court, at Bristol, are examples of survivals. There are many others: Derby, Exeter, Newark, Norwich, etc.; 1 Holdsw. Hist. E. L. 308.

Fairs are usually recognized and regulated by statute. See AGRICULTURAL SOCIETY; FRANCHISE.

FAIR ABRIDGMENT. See COPYRIGHT.

FAIR COMMENT. See LIBEL.

FAIR CRITICISM. See CRITICISM.

FAIR KNOWLEDGE OR SKILL. A reasonable degree of knowledge or measure of skill. Jones v. Angell, 95 Ind. 382.

FAIR-PLAY MEN. A local irregular tribunal which at one time existed in Pennsylvania.

About the year 1769 there was a tract of country in Pennsylvania, situate between Lycoming creek and Pine creek, in which the Proprietaries prohibited the making of surveys, as it was doubtful whether it had or had not been ceded by the Indians. Although settlements were forbidden, yet adventurers settled themselves there. Being without the pale of ordinary authorities, the inhabitants annually elected a tribunal, in rotation, of three of their number, whom they denominated *fair-play men*, who had authority to decide all disputes as to boundaries. Their decisions were final, and enforced by the whole community *en masse*. Their decisions are said to have been just and equitable. 2 Smith, Pa. Laws 195; Sergeant, Land Laws, 77.

FAIR PLEADER. The name of a writ given by the statute of Marlebridge, 52 Hen. III. c. 11. See BEAU PLEADER.

FAIR PREPONDERANCE. Of evidence, a preponderance which is apparent upon fair consideration. State v. Grear, 29 Minn. 225, 13 N. W. 140; Bryan v. R. Co., 63 Ia. 466, 19 N. W. 295; City Bank's Appeal, 54 Conn. 274, 7 Atl. 548.

FAIR SALE. A sale conducted with fairness as respects the rights of all parties affected. Lalor v. McCarthy, 24 Minn. 419. A sale at a price sufficient to warrant confirmation or approval when it is required. See SALE.

FAIR VALUE. In a contract by a city to purchase a waterworks plant at "fair and equitable value," the amount is to be determined not by capitalization of the earnings nor limited to the cost of reproducing the plant, but allowance should be made for the additional value created by connection with and supply of buildings, although the company did not own the connections. National Waterworks Co. v. Kansas City, 62 Fed. 863, 10 C. C. A. 653.

FAIRLY. Reasonably; justly; equitably. It is not synonymous with "truly," and the latter should not be substituted for it in a commissioner's oath to take testimony fairly. Language may be "truly," yet unfairly, reported, and it may be fairly reported, yet not in accordance with strict truth; Lawrence v. Finch, 17 N. J. Eq. 234; but it may be deemed synonymous with "equitably"; Satcher v. Satcher's Adm'r, 41 Ala. 40, 91 Am. Dec. 498. "Fairly merchantable" conveys the idea of mediocrity in quality, or something just above it; Warner v. Ice Co., 74 Me. 479.

FAIRWAY. Used to indicate the middle and deepest or most navigable channel. See THALWEG.

FAIT. Anything done.

A deed lawfully executed. Comyns, Dig. *Fait.* See FACT.

Femme de fait. A wife *de facto.*

FAIT ENROLLE. A deed of bargain and sale, etc. 1 Keb. 568.

FAIT JURIDIQUE. In French Law. A judicial fact. One of the factors or elements constitutive of an obligation.

FAITH. A term used in the law only in connection with the adjectives good and bad, as expressing the belief, intent, or purpose with which a transaction has been entered into or completed. See GOOD FAITH.

FAITH AND CREDIT. See CONFLICT OF LAWS; FOREIGN JUDGMENTS.

FAITHFUL. As respects temporal affairs, diligently, and without unnecessary delay; but it does not include the idea of impartiality. Den v. Thompson, 16 N. J. L. 72.

FAITOURS. Idle persons; idle livers; vagabonds. *Termes de la Ley*; Cowell; Blount; Cunningham, Law Dict.

FAKIR. A term applied among the Mohammedans to a kind of religious ascetic or beggar, whose claim is that he "is in need of mercy, and poor in the sight of God, rather than in need of worldly assistance." Hughes, Dict. of Islam. Sometimes spelled *Faqueer* or *Fakeer*. It is in common use to designate a person engaged in some useless or dishonest business. Fake is also so used and also to designate the quality of such business.

FALCARE (Lat.). To cut or mow down. *Falcare prata*, to cut or mow down grass in meadows *hayed* (laid in for hay), was a customary service for the lord by his inferior tenants. Kennett, Gloss.

Falcator. The tenant performing the service.

Falcatura. A day's mowing. *Falcatura una.* Once mowing the grass.

Falcatio. A mowing.

Falcata. That which was mowed. Kennett, Gloss; Cowell; Jacobs.

FALCIDIA. In Spanish Law. The fourth portion of an inheritance, which legally belongs to the heir, and for the protection of which he has the right to reduce the legacies to three-fourth parts of the succession, in order to protect his interest.

FALCIDIAN LAW. In Roman Law. A statute or law restricting the right of disposing of property by will, enacted by the people during the reign of Augustus, on the proposition of Falcidius, who was a tribune, in the year of Rome 714.

Its principal provision gave power to fathers of families to bequeath three-fourths of their property, but deprived them of the power to give away the other fourth, which was to descend to the heir. Inst. 2. 22. This fourth was termed the Falcidian portion.

A similar principle exists in Louisiana.

See LEGITIME.

As to the early history of testamentary law, see Maine, Ancient Law.

In some of the states the statutes authorizing bequests and devises to charitable corporations limit the amount which a testator may give, to a certain fraction of his estate.

FALDAGE. The privilege which anciently several lords reserved to themselves of setting up folds for sheep in any fields within their manors, the better to manure them, and this not only with their own but their tenants' sheep. Called, variously, *secta faldare, fold-course, free-fold, faldagii.* Cunningham, Law Dict.; Cowell.

FALDFEY. A compensation paid by some customary tenants that they might have liberty to fold their own sheep on their own land. Cunningham, Law Dict.

FALDISDORY. The bishop's seat or throne within the chancel.

FALDSOCA. Liberty or privilege of foldage.

FALDSTOOL. A folding seat similar to a camp stool, made either of wood or metal, sometimes covered with silk or other material. It was used by a bishop when officiating in other than his own cathedral church. Encyc. Dic.

FALDWORTH. A person reckoned old enough to become a member of the decennary, and so subject to the law of frankpledge. Spelm.

FALESIA. In Old English Law. A hill or down by the sea-side. Co. Litt. 5 *b;* Domesday.

FALK-LAND. See FOLC-LAND.

FALL. In Scotch Law. To loose. To fall from a right is to loose or forfeit it. 1 Kames, Eq. 228.

FALL OF LAND. In English Law. A quantity of land six ells square.

FALLO. In Spanish Law. The final decree or judgment given in a lawsuit.

FALLOW LAND. Land ploughed, but not sown, and left uncultivated for a time, after successive crops; land left untilled for a year or more.

FALLUM. In Old English Law. An unexplained term for some particular kind of land. Jacob, L. Dic.

FALSA DEMONSTRATIO. In Civil Law. False designation; erroneous description of a person or a thing in a written instrument. Inst. 2, 20, 30.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect; [1898] 2 Ch. 551.

See DEMONSTRATION; LATENT AMBIGUITY; WILL.

FALSA DEMONSTRATIO NON NOCET. See MAXIMS; DEMONSTRATIO.

FALSA MONETA. In the Civil Law. Counterfeit money. Cod. 9, 24.

FALSARE. In Old English Law. To counterfeit. Bract. fol. 276 *b. Falcarious*, a counterfeiter.

FALSE. Applied to the intentional act of a responsible being, it implies a purpose to deceive. State v. Smith, 63 Vt. 201, 22 Atl. 604; 18 U. C. C. P. 19. In a statute prescribing punishment for false statements in making an entry of imported goods, "false" means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue; United States v. Ninety-Nine Diamonds, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185.

FALSE ACTION. See FEIGNED ACTION.

FALSE AND PRETENDED PROPHECIES. When made with intent to disturb the public peace they are punishable under

33 Hen. VIII. c. 14, 3 & 4 Edw. VI. c. 15, and 5 Eliz. c. 15. These statutes, although unrepealed, are not likely to be enforced.

FALSE CHARACTER. To personate the master or mistress of a servant or his or her representative and give a false character to the servant, is an offence punishable by fine, by 32 Geo. III. c. 56. See PERSONATE.

FALSE CLAIM. A claim made by a man for more than his due. An instance is given where the prior of Lancaster claimed a tenth part of the venison *in corio* as well as *in carne*, where he was entitled to that *in carne* only. Manw. For. Laws, cap. 25, num. 3.

FALSE DECRETALS. A collection of canon law, dated about the middle of the 9th century, probably by a Frankish ecclesiastic who called himself Isadon. It continued to be the chief repertory of the canon law till the 15th century when its untrustworthy nature was demonstrated.

FALSE IMPRISONMENT. Any unlawful restraint of a man's liberty, whether in a place made use of for imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever. 1 Bish. Cr. Law § 553; Webb's Poll. Torts 259; State v. Rollins, 8 N. H. 550; Smith v. State, 7 Humphr. (Tenn.) 43; Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250; 7 Q. B. 742; Wood v. Kinsman, 5 Vt. 588; Adams v. Freeman, 9 Johns. (N. Y.) 117; Webber v. Kenny, 1 A. K. Marsh. (Ky.) 345; Fotheringham v. Express Co., 36 Fed. 252, 1 L. R. A. 474; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000; Callahan v. Searles, 78 Hun 238, 28 N. Y. Supp. 904.

The total, or substantially total, restraint of a man's freedom of locomotion, without authority of law, and against his will. Big. Torts 113. Partial and conditional restraint is held not to constitute false imprisonment; Crossett v. Campbell, 122 La. 659, 48 South. 141, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362; 7 Q. B. 742; Sullivan v. R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513; as where the restraint was voluntary, in that it rested with the plaintiff to terminate it by desisting from the doing of an unlawful act; Crossett v. Campbell, 122 La. 659, 48 South. 141, 20 L. R. A. (N. S.) 967, 129 Am. St. Rep. 362; but where one is restrained until he shall make certain promises; Hildebrand v. McCrum, 101 Ind. 61; Bonesteel v. Bonesteel, 28 Wis. 245; or statements; McNay v. Stratton, 9 Ill. App. 215; or payments; Smith v. State, 7 Humph. (Tenn.) 43; it is usually held an imprisonment.

Arresting the wrong person under a warrant constitutes false imprisonment; F. Moo. 457; so if there is a misnomer in the warrant, even though the person actually intended was arrested; Scott v. Ely, 4 Wend. (N. Y.) 555; and if the officer makes the arrest out of his bailiwick, or detains the person unduly; 4 B. & C. 596; an arrest under a void writ constitutes a false imprisonment; Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242. A writ may be void because defective in language, because the court had no jurisdiction of the proceedings, or because the court had no jurisdiction to issue the writ; Big. Torts 122; Nixon v. Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506. The clerk of the court who issues a defective writ, or one not authorized by the court, is liable; and so is a judge who orders a writ which he had no right to issue, or where he had no jurisdiction. Both the attorney and his client may be liable if the former ordered the arrest, and even when the arrest has been ordered by a judge, *i. e.* in a case where they participate in making the arrest; Big. Torts 128; or where the writ was issued by the misconduct of the attorney; *id.* 129.

A judge of a superior court can never be liable for an act done by him in his official capacity; [1895] 1 Q. B. 668. Otherwise of a judge of an inferior court, if he acted beyond his jurisdiction; 1 B. & C. 169; and it must appear that he knew or had means of knowing that he was doing so; 3 Bing. 78; a mistake of law will not protect him; 19 L. J. Q. B. 70.

If the writ be voidable it must be set aside before an action for false imprisonment will lie, but otherwise if it be void; *id.* 131.

Every imprisonment of a man is *prima facie* a trespass, and in an action to recover damages therefor, if the imprisonment is admitted or proved, the burden of justifying it is on the defendant; Bassett v. Porter, 10 Cush. (Mass.) 418; Jackson v. Knowlton, 173 Mass. 94, 53 N. E. 134; McCarthy v. De Armit, 99 Pa. 63; McAleer v. Good, 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, 116 Am. St. Rep. 782; Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698; Barker v. Anderson, 81 Mich. 508, 45 N. W. 1108. Where the arrest was under a warrant lawfully issued and by a person entitled to issue it, then a justification is made out and the burden is on the plaintiff to show that the warrant was wrongly issued; Snow v. Weeks, 75 Me. 105; Petit v. Colmery, 4 Pennewill (Del.) 266, 55 Atl. 344.

An arrest and detention, without a warrant, of one acting in a disorderly manner in a public place, by one clothed with the authority of a police officer, is not a false imprisonment; Erie R. Co. v. Reigherd, 166 Fed. 247, 92 C. C. A. 590, 20 L. R. A. (N. S.) 295, 16 Ann. Cas. 459. Where the accused pleads guilty, his right to recover for false arrest is barred; Billington v. Hoverman, 18 Ohio C. P. 637; Williamson v. Wilcox, 63 Miss. 335; Howe Mach. Co. v. Lincoln, 24 Kan. 123; Williams v. Shillaber, 153 Mass. 541, 27 N. E. 767; Ilsley v. Harris, 10 Wis. 96; Jones v. Foster, 43 App. Div. 33, 59 N.

Y. Supp. 738; Maxwell v. Deens, 46 Mich. 35, 8 N. W. 561.

Malice is not an element of false imprisonment; Hewitt v. Newburger, 66 Hun 230, 20 N. Y. Supp. 913; Gillingham v. R. Co., 35 W. Va. 588, 14 S. E. 243, 14 L. R. A. 798, 29 Am. St. Rep. 827; except so far as it affects the measure of damages; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995.

In order to be restored to liberty, the remedy is, by writ of *habeas corpus*. An action of trespass *vi et armis* lies. To punish the wrong done to the public by the false imprisonment of an individual, the offender may be indicted; 4 Bla. Com. 218; 2 Burr. 993. See Bacon, Abr. *Trespass* (D, 3); Pike v. Hanson, 9 N. H. 491; State v. Guest, 6 Ala. 778; Click v. State, 3 Tex. 282; Allen v. Shed, 10 Cush. (Mass.) 375.

One cannot maintain an action for false imprisonment where he is arrested by a proper officer, under a warrant lawful on its face, and issued by proper authority; Leib v. Shelby Iron Co., 97 Ala. 626, 12 South. 67; Johnson v. Morton, 94 Mich. 1, 53 N. W. 816. Justification is not available as a defence unless pleaded; Wilson v. R. Co., 2 Misc. 127, 20 N. Y. Supp. 852.

Damages may be recovered against a charitable institution for false imprisonment and the question of good intention is immaterial; Gallon v. House of Good Shepherd, 158 Mich. 363, 122 N. W. 631, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387.

FALSE JUDGMENT. The name of a writ which lies when a false judgment has been given in the county court, court baron, or other courts not of record. Fitzh. N. B. 17, 18.

FALSE LATIN. When legal proceedings were conducted in Latin, if a word were significant, though not good Latin, yet an indictment, declaration, or fine should not be made void by it; but if the word were not Latin, nor allowed by the law, and it were in a material point, it made the whole vicious. 5 Coke 121.

FALSE LIGHTS AND SIGNALS. Lights and signals falsely and maliciously displayed for the purpose of bringing a vessel into danger. Exhibiting false lights or signals, with intent to bring any ship into danger, is felony, punishable, in England, with penal servitude for life; stat. 24 & 25 Vict. c. 97, § 47; and in the United States by imprisonment; U. S. R. S. § 5358.

FALSE NEWS. Spreading false news, whereby discord may grow between the queen of England and her people, or the great men of the realm, or which may produce other mischiefs, still seems to be a misdemeanor under Stat. 3 Edw. I. c. 34; Steph. Cr. Dig. § 95.

FALSE OATH. See PERJURY.

FALSE PERSONATION. See PERSONATION.

FALSE PLEA. See SHAM PLEA.

FALSE PRETENCES. False representations and statements, made with a fraudulent design to obtain "money, goods, wares, and merchandise," with intent to cheat. 2 Bouvier, Inst. n. 2308.

A representation of some fact or circumstance calculated to mislead, which is not true. Com. v. Drew, 19 Pick. (Mass.) 184.

Such a fraudulent representation of fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value. It may relate to quality, quantity, the nature or other incident of the article offered for sale, whereby the purchaser buying it, is defrauded; Jackson v. People, 126 Ill. 139, 18 N. E. 286.

They must relate to the past or present; Biddle v. U. S., 156 Fed. 764, 84 C. C. A. 415; People v. Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Cook v. State, 71 Neb. 243, 98 N. W. 810. Any representation or assurance in relation to a future transaction may be a promise, or covenant, or warranty, but cannot amount to a statutory false pretence; Com. v. Drew, 19 Pick. (Mass.) 185; 3 Term 98; but one will be guilty if there are false representations of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property; Pearce v. State, 115 Ala. 115, 22 South. 502; State v. Gordon, 56 Kan. 64, 42 Pac. 346; Taylor v. Com., 94 Ky. 281, 22 S. W. 217; Thomas v. People, 34 N. Y. 351; Holton v. State, 109 Ga. 127, 34 S. E. 358; State v. Fooks, 65 Ia. 196, 452, 21 N. W. 561, 773. It must be such as to impose upon a person of ordinary strength of mind; State v. Simpson, 10 N. C. 620; Com. v. Wilgus, 4 Pick. (Mass.) 178; People v. Haynes, 11 Wend. (N. Y.) 557. But, although it may be difficult to restrain false pretences to such as an ordinarily prudent man may avoid, yet it is not every absurd or irrational pretence which will be sufficient. See Cowen v. People, 14 Ill. 348; State v. Mills, 17 Me. 211; Russ. & R. 127. Where the statements were absurd or irrational, the offence is not made out; State v. Cameron, 117 Mo. 641, 23 S. W. 767; State v. Jackson, 128 Ia. 543, 105 N. W. 51; Com. v. Beckett, 119 Ky. 817, 84 S. W. 758, 27 Ky. L. Rep. 265, 68 L. R. A. 638, 115 Am. St. Rep. 285; State v. Stewart, 9 N. D. 409, 83 N. W. 869; unless the defrauded person was weak and ignorant; People v. Bird, 126 Mich. 631, 86 N. W. 127; State v. Southall, 77 Minn. 296, 79 N. W. 1007; People v. Cole, 137 N. Y. 530, 33 N. E. 336; Bowen v. State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71. It is not necessary that all the pretences should be false, if one of them, *per se*, is sufficient to constitute the offence; People v. Haynes,

14 Wend. (N. Y.) 547, 28 Am. Dec. 530. And although other circumstances may have induced the credit, or the delivery of the property, yet it will be sufficient if the false pretences had such an influence that without them the credit would not have been given or the property delivered; People v. Haynes, 11 Wend. (N. Y.) 557; People v. Haynes, 14 Wend. (N. Y.) 547, 28 Am. Dec. 530. The false pretences must have been used before the contract was completed; People v. Gates, 13 Wend. (N. Y.) 311. Extra-judicial admissions and statements of the defendant alone as to the falsity of the statement are not sufficient to warrant a conviction, as the falsity is in the nature of a *corpus delicti* which requires other proof; People v. Simonsen, 107 Cal. 345, 40 Pac. 440.

If the person defrauded was deceived by false statements, it is no defence that he might have ascertained by investigation that they were false; State v. Keyes, 196 Mo. 136, 93 S. W. 801, 6 L. R. A. (N. S.) 369, 7 Ann. Cas. 23; Crawford v. State, 117 Ga. 247, 43 S. E. 762; Jenkins v. State, 97 Ala. 66, 12 South. 110; State v. Trisler, 49 Ohio St. 583, 31 N. E. 881; State v. Penley, 27 Conn. 589; *contra*, Com. v. Grady, 13 Bush (Ky.) 285, 26 Am. Rep. 192; Cowan v. State, 41 Tex. Cr. R. 617, 56 S. W. 751.

The question is modified in the different states by the wording of the statutes, which vary from each other somewhat. It may be laid down as the general rule of the interpretation of the words "by any false pretence," which are in the statutes, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the acts. See 1 Den. Cr. Cas. 559; 3 C. & K. 98; Com. v. Henry, 22 Pa. 253; People v. Wieger, 100 Cal. 352, 34 Pac. 826.

It is a false pretence where a man falsely represents himself to be in a situation or business in which he is not; Higler v. People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; Taylor v. Com., 94 Ky. 281, 22 S. W. 217; Com. v. Stevenson, 127 Mass. 446; Pearce v. State, 115 Ala. 115, 22 South. 502; Thomas v. People, 34 N. Y. 351; Boscow v. State, 33 Tex. Cr. R. 390, 26 S. W. 625; State v. Briggs, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904; or that he possesses the power to produce the spirits of the dead; Com. v. Keeper of County Prison, 15 W. N. C. (Pa.) 282; or that he possesses extraordinary and supernatural power to cure; Jules v. State, 85 Md. 305, 36 Atl. 1027; or to wear a badge or emblem of an order or society to which he does not belong; Hammer v. State, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 140 Am. St. Rep. 248, 21 Ann. Cas. 1034; for a minor to state falsely that he is over twenty-one years of age, for the purpose of inducing one to enter into a contract with him; Com. v. Ferguson, 135 Ky. 32, 121 S. W. 967, 24 L. R. A. (N. S.) 1101, 21 Ann. Cas. 434; to obtain money as a charity upon false statements; Com. v. Whitcomb, 107 Mass. 486; Bink v. State, 50 Tex. Cr. R. 445, 98 S. W. 863; Baker v. State, 120 Wis. 135, 97 N. W. 566; State v. Matthews, 91 N. C. 635; State v. Styner, 154 Ind. 131, 56 N. E. 98; *contra*, People v. Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303. To induce one to cash a check on a bank in which the maker has no funds, is obtaining money under false pretences; State v. Hammelsy, 52 Or. 156, 96 Pac. 865, 17 L. R. A. (N. S.) 244, 132 Am. St. Rep. 686; People v. Wasservogle, 77 Cal. 173, 19 Pac. 270; Com. v. Drew, 19 Pick. (Mass.) 179; although the drawer did not expressly say the check was good; *id.;* but where the statute provides that before a conviction for false pretences can be had there must be a distinct and certain representation of an existing fact, the mere drawing and passing a check on a bank in which the drawer has no funds is held not a representation that such check is good; Ayers v. State, 37 Tex. Cr. R. 1, 38 S. W. 792. So it was not a false pretence where a bank cashier drew and certified a check on his bank which he exchanged for property, when he told the seller that such check was not collectible; State v. Miller, 47 Or. 562, 85 Pac. 81, 6 L. R. A. (N. S.) 365; it is essential that the person injured must have relied upon a false representation in parting with his property; *id.;* Therasson v. People, 82 N. Y. 238; People v. Baker, 96 N. Y. 340; People v. Turpin, 233 Ill. 452, 84 N. E. 679, 17 L. R. A. (N. S.) 276; Baker v. State, 120 Wis. 135, 97 N. W. 566; Mitchell v. State, 70 Ark. 30, 65 S. W. 935; Stifel v. State, 163 Ind. 628, 72 N. E. 600; State v. Cameron, 117 Mo. 641, 23 S. W. 767.

There must be an intent to cheat or defraud some person; Russ. & R. 317; State v. Garris, 98 N. C. 733, 4 S. E. 633; State v. Jackson, 112 Mo. 585, 20 S. W. 674. This may be inferred from a false representation; People v. Herrick, 13 Wend. (N. Y.) 87. The intent is all that is requisite; it is not necessary that the party defrauded should sustain any loss; People v. Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; 1 C. & M. 516, 537; Com. v. Wilgus, 4 Pick. (Mass.) 177. The offence is not proven where the representations were not relied on; People v. Gibbs, 98 Cal. 661, 33 Pac. 630.

See DECEIT; FRAUD.

FALSE REPRESENTATION. A representation which is untrue, wilfully made to deceive another to his injury. See DECEIT; MISREPRESENTATION; FRAUD; FALSE PRETENCES.

FALSE RETURN. A return made by the sheriff, or other ministerial officer, to a writ, in which is stated a fact contrary to the

truth, and injurious to one of the parties or some one having an interest in it.

In this case the officer is liable for damages to the party injured; 2 Esp. 475. When the sheriff has levied on property sufficient to satisfy an execution, and yet returns it unsatisfied, he is *prima facie* liable to the plaintiff for the full amount of the judgment, and he must show such facts as will exonerate or excuse him; Ansonia Brass & Copper Co. v. Babbitt, 74 N. Y. 395. In some states, every return of process, untrue in fact, is held to expose the sheriff to all the penalties of a false return; Peebles v. Newsom, 74 N. C. 473; Finley v. Hayes, 81 N. C. 368. But when the actual damage is the result of the negligence of the party complaining, the sheriff will only be liable for nominal damages; Tutein v. Hurley, 98 Mass. 211, 93 Am. Dec. 154; Carter v. Towne, 103 Mass. 507; Parker v. City of Cohoes, 10 Hun (N. Y.) 531. See RETURN OF WRITS.

FALSE SWEARING. In English Law. The misdemeanor committed by a person who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing would have amounted to perjury if committed in a judicial proceeding; as where a person makes a false affidavit under the Bills of Sale Acts. Steph. Cr. Dig. 84.

FALSE TOKEN. A false document or sign of the existence of a fact,—in general used for the purpose of fraud. See 3 Term 98; 2 Starkie, Ev. 563; 1 Bish. Cr. L. 585; People v. Gates, 13 Wend. (N. Y.) 311; People v. Haynes, 14 Wend. (N. Y.) 570, 28 Am. Dec. 530; People v. Stone, 9 Wend. (N. Y.) 182. See FALSE PRETENCES.

FALSE VERDICT. One obviously opposed to the principles of right and justice.

The false verdict of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and, therefore, exemplarily punished by attaint, but by 6 Geo. IV. c. 50 the writ of attaint was wholly abolished and superseded by the practice of setting aside the first verdict and granting new trials; 3 Bla. Com. 402.

FALSE WEIGHTS AND MEASURES. Weights and measures which do not conform to those established by law.

In the laws of King Edgar, nearly a century before the Conquest, we find an injunction that one measure kept at Winchester should be observed throughout the realm. In England the prerogative of fixing the standard anciently vested in the crown; in Normandy in the duke. "The regulation of weights and measures cannot, however, with propriety be referred to the king's prerogative; for from Magna Carta to the present time there are about twenty acts of parliament to fix and establish the standard and uniformity of weights and measures." 1 Bla. Com. 274, n. In a case before the Court of King's Bench it was held that although it was the custom of the town to sell eighteen ounces in a pound of butter, yet the jury of the court-leet were not justified in seizing the butter of a person who sold pounds less than that, but more than sixteen ounces each, the statutable weight; 3 T. R. 271; and it has been determined that no practice or usage could countervail the statutes 22 Car. II. c. 8 and 22 & 23 Car. II. c. 12, which enact that if any person shall either buy or sell salt or grain by any other measure than the Winchester bushel, he shall forfeit forty shillings and also the value of the grain or salt so sold or bought; one-half to the poor, the other to the informer; 4 T. R. 750; 5 *id.* 353. In this country the power to fix the standard of weights and measures is in congress; Const. U. S. art. 1, c. 8. See WEIGHTS; MEASURES.

FALSEHOOD. Any untrue assertion or proposition. A wilful act or declaration contrary to the truth. See Putnam v. Osgood, 51 N. H. 207.

It has been said that the use of the term falsehood does not always and necessarily imply a lie or wilful untruth, but is generally used in the second sense here given. It is committed either by the wilful act of the party, or by dissimulation, or by words. It is wilful, for example, when the owner of a thing sells it twice, by different contracts to different individuals, unknown to them; for in this the seller must wilfully declare the thing is his own when he knows that it is not so. It is committed by dissimulation when a creditor, having an understanding with his former debtor, sells the land of the latter, although he has been paid the debt which was due to him. Falsehood by word is committed when a witness swears to what he knows not to be true.

Crabbe thus distinguishes between falsehood and untruth: "The latter is an untrue saying, and may be unintentional, in which case it reflects no disgrace on the agent. A falsehood and a lie are intentional false sayings, differing only in degree of the guilt of the offender; falsehood being not always for the express purpose of deceiving, but a lie always for the worst of purposes." See Rosc. Cr. Ev. 362; DECEIT; FRAUD; MISREPRESENTATION.

FALSELY. Under a statute making it a misdemeanor "wilfully to make a false answer," an indictment charging that one "falsely and fraudulently answered," is bad for omitting "wilfully;" 1 Den. C. C. 157.

In an indictment for forgery the averment that defendant swore falsely was held insufficient, without the additional words "corruptly and wilfully;" Cro. Eliz. 201; and "falsely and corruptly" were held insufficient without "wilfully;" *id.* 143; and falsely and maliciously were held insufficient without "wilfully and corruptly," with a *quere* whether one of the last two words would suffice without the other; 7 D. & R. 665; but in Cox's Case, Leach 69, it was held that wilfully was not required at common law but was necessary under stat. 5 Eliz. c. 9. An indictment for perjury was held good without the averment that the defendant did falsely, corruptly, and wilfully swear, etc., and the court said: "The words falsely, corruptly, and wilfully . . . are mere expletives to swell the sentence, in the language of Lord Hardwicke, 1 Atk. 50;" Respublica v. Newell, 3 Yeates (Pa.) 407, 413, 2 Am. Dec. 381. In obtaining money under false pretences it is not enough to charge that the defendant falsely pretended by certain pretences set forth, without specially averring the falsity of the pretences; 2 M. & S. 379.

The use of the word falsely in a statute (against counterfeiting) implies that there

must be a fraudulent or criminal intent in the act; U. S. v. King, 5 McLean 208, Fed. Cas. No. 15,535. See also 4 B. & C. 329; 6 Com. Dig. 58; Stark. Cr. Pl. 86.

In an action for libel, "wrongfully and falsely published" will, it seems, amount to maliciously published, but it is better to add falsely and maliciously; 1 Chit. Pl. 421; the word falsely must have great stress laid on it in an action for slander; 2 Wils. 300, 301. Case will lie for falsely and maliciously suing out a commission in bankruptcy; 2 Wils. 145; or for falsely, maliciously, and without probable cause procuring a search warrant; 1 D. & R. 97. In an action on the case for conspiracy or for malicious prosecution, the allegation that the prosecution was false and malicious is not sufficient without averring a want of probable cause; Kirtley v. Deck, 2 Munf. (Va.) 10, 5 Am. Dec. 445; *contra* as to conspiracy; Griffith v. Ogle, 1 Binn. (Pa.) 172.

FALSI CRIMEN. See CRIMEN FALSI.

FALSIFICATION. **In Equity Practice.** The showing an item in the debit of an account to be either wholly false or in part erroneous. 1 Sto. Eq. Jur. § 525.

FALSIFY. To prove that an item in an account before the court, which is inserted to the debit of the person falsifying, should have been omitted.

When a bill to open an account has been filed, the plaintiff is sometimes allowed to surcharge and falsify such account; and if anything has been inserted that is a wrong charge, he is at liberty to show it; and that is a *falsification*. 2 Ves. 565; Armstrong v. Toler, 11 Wheat. (U. S.) 237, 6 L. Ed. 468. See SURCHARGE.

In Criminal Law. To alter or make false.

The alteration or making false of a record is punishable at common law or by statute in the states, and, if of records of the United States courts, by act of congress of April 30, 1790; U. S. Rev. Stat. § 5394.

In Practice. To prove a thing to be false. Co. Litt. 104 *b*.

FALSIFYING A RECORD. A crime against public justice punishable in England by 24 & 25 Vict. c. 98, and by statute in the several states and District of Columbia. See ALTERATION.

FALSIFYING JUDGMENTS. A term sometimes used for reversing judgments. See 4 Steph. Com. 553.

FALSING OF DOOMS. **In Scotch Law.** Protesting against a sentence and taking an appeal to a higher tribunal. Bell, Dict.

An action to set aside a decree. Skene.

FALSO RETORNO BREVIUM (L. Lat.). **In Old English Law.** The name of a writ which might have been sued out against a sheriff for falsely returning writs. Cunningham, Law Dict.

FALSONARIUS. A person guilty of forgery; a counterfeiter.

FALSUS. Deceiving; fraudulent; erroneous. In the first two senses it is applied to persons in respect to their acts and conduct, as well as to things; and in the third sense it is applied to persons on the question of personal identity.

FAMACIDE. A killer of reputation; a slanderer.

FAMILIA (Lat.). **In Roman Law.** A family.

This word had four different acceptations in the Roman law. In the first and most restricted sense it designated the *pater-familias*,—his wife, his children, and other descendants subject to his paternal power. In the second and more enlarged sense it comprehended all the *agnates*,—that is to say, all the different families who would all be subject to the paternal authority of a common chief if he were still living. Here it has the same meaning as *agnatio*. In a third acceptation it comprises the slaves and those who are *in mancipio* of the chief, —although considered only as things, and without any tie of relationship. And, lastly, it signifies the whole fortune or patrimony of the chief. See PATER-FAMILIAS; 1 Ortolan 28.

In Old English Law. A household. All the servants belonging to one master. Du Cange; Cowell. A sufficient quantity of land to maintain one family. The same quantity of land is called sometimes *mansa* (a manse), *familia*, *carucata*. Du Cange; Cunningham, Law Dict.; Cowell; Creasy, Church Hist. See MANSIO.

FAMILIÆ EMPTOR. **In Roman Law.** An intermediate person who purchased the aggregate inheritance when sold *per æs et libram*, in the progress of making a will under the twelve tables. The purchaser was merely a man of straw, transmitting the inheritance to the *hæres* proper. Brown.

FAMILIÆ ERCISCUNDÆ (Lat.). **In Civil Law.** An action which lay for any of the coheirs for the division of what fell to them by inheritance. Stair, Inst. l. 1, tit. 7, § 15.

FAMILIARES REGIS. Persons of the king's household. The ancient titles of the six clerks of chancery in England. 2 Reeve, Hist. Eng. Law 249, 251.

FAMILY. Father, mother, and children. All the individuals who live under the authority of another, including the servants of the family. Poor v. Ins. Co., 2 Fed. 432. All the relations who descend from a common ancestor or who spring from a common root. La. Code, art. 3522, no. 16; 9 Ves. 323. The primary meaning of a testator's "family" in a will is children; 3 Ch. Div. 672.

In common parlance it consists of those who live under the same roof with the *pater-familias*. When they branch out and become the heads of new establishments, they cease to be part of the father's family. 4 Term 797; Dodge v. R. Co., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318.

While usually importing a household, in-

cluding parents, children, and servants, it is not necessary, to sustain the family relation between parents and children, that they should reside together; Putman v. Southern Pac. Co., 21 Or. 230, 27 Pac. 1033.

Where the mother of an insured person did not live with him and was not dependent upon him for support, it was held she was not a member of his family; Western Commercial Travelers' Ass'n v. Tennent, 128 Mo. App. 541, 106 S. W. 1073.

It is said to mean, in the Texas constitution, "every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interests and social happiness." Wilson v. Cochran, 31 Tex. 680, 98 Am. Dec. 553. "A family is the collective body of persons who live in one house, under one head or manager." Tyson v. Reynolds, 52 Ia. 431, 3 N. W. 469; Arnold v. Waltz, 53 Ia. 706, 6 N. W. 40, 36 Am. Rep. 248.

Those members of the household who are dependent on the householder to whom he owes some duty. Brokaw v. Ogle, 170 Ill. 115, 48 N. E. 394.

The meaning of the term is frequently a matter of statutory or constitutional interpretation. An unmarried woman keeping house and taking care of two children of a deceased sister is the head of a family; Arnold v. Waltz, 53 Ia. 706, 6 N. W. 40, 36 Am. Rep. 248; a widower without children, who takes his mother to live with him; Parsons v. Livingston, 11 Ia. 104, 77 Am. Dec. 135; an unmarried man who succeeds his father in taking care of his minor sisters may be deemed the head of a family; Greenwood v. Maddox, 27 Ark. 658; an unmarried man supporting his widowed sister and her small children; Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; an unmarried man whose widowed sister lived with him and kept his house; Bailey v. Comings, Fed. Cas. No. 733; an unmarried woman with her illegitimate child; Ellis v. White, 47 Cal. 73. But not a man who has no family; Abercrombie v. Alderson, 9 Ala. 981; Woodworth v. Comstock, 10 Allen (Mass.) 425. A single person in the actual occupancy of a homestead, although not the head of a family, is entitled to a homestead exemption as a family; Hesnard v. Plunkett, 6 S. D. 73, 60 N. W. 159.

Husband and wife constitute a family under homestead and exemption laws; Williams v. Young, 17 Cal. 403; Oppenheim v. Myers, 99 Va. 582, 39 S. E. 218; Chafee v. Rainey, 21 S. C. 11; Dye v. Cooke, 88 Tenn. 275, 12 S. W. 631, 17 Am. St. Rep. 882; Trotter v. Dobbs, 38 Miss. 198; Miller v. Finegan, 26 Fla. 29, 7 South. 140, 6 L. R. A. 813; Cox v. Stafford, 14 How. Pr. (N. Y.) 519; Kitchell v. Burgwin, 21 Ill. 45; a widow constitutes a family on the death of her husband, though her children were all of age; Aultman, Miller & Co. v. Price, 68 Kan. 640, 75 Pac. 1019; and a widow without children; Moore v. Parker, 13 S. C. 490; and one whose children had all reached majority, where one of them had lived in her house and was dependent on her for support; Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139, 4 L. R. A. (N. S.) 365; a deserted wife without children was head of a family; Berry v. Hanks, 28 Ill. App. 51; and so was a widower with whom lived his son and his son's wife and a servant; Tyson v. Reynolds, 52 Ia. 431, 3 N. W. 469; or a widower and a grown-up daughter; Cox v. Stafford, 14 How. Pr. (N. Y.) 521; or merely a widower; In re Lamb's Estate, 95 Cal. 397, 30 Pac. 568; and where the homestead had been acquired, a widower having a son and daughter of age was entitled to the exemption; Webb v. Cowley, 5 Lea (Tenn.) 722; so where there were no children, but a widower kept house with a housekeeper; Ellis v. Davis, 90 Ky. 183, 14 S. W. 74; but a widower keeping house with a female relative, to whom he owes no duty of support, has no family; Whitehead v. Nickelson, 48 Tex. 517.

Under homestead laws: (1) Family relates to social status, not a mere contract; (2) legal or moral obligations on the head of the family to support the other members must be considered; and (3) corresponding state of dependence on the part of the other members for this support; Roco v. Green, 50 Tex. 488.

In the payment of mutual benefits to the family of the holder of a certificate, a stepfather, not a member of the insured's household, was held not a member of his family; Supreme Lodge Order of Mutual Protection v. Dewey, 142 Mich. 666, 106 N. W. 140, 3 L. R. A. (N. S.) 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681. In mutual benefit statutes "family" is an expression of great flexibility. It may mean the husband and wife, having no children and living alone together, or it may mean children or wife and children, or blood relatives, or any group constituting a distinct domestic or social body; Carmichael v. Ben. Ass'n, 51 Mich. 494, 16 N. W. 871. It may apply to blood relatives, even though living apart from the applicant and having families of their own. It may apply to those who are neither relatives by consanguinity or affinity, provided they are of the household of the applicant and maintaining the relations usual in families united by blood; Carmichael v. Ben. Ass'n, 51 Mich. 494, 16 N. W. 871; Simcoke v. Grand Lodge of A. O. U. W. of Iowa, 84 Ia. 383, 51 N. W. 8, 15 L. R. A. 114; Spear v. Robinson, 29 Me. 531; Klotz v. Klotz, 22 S. W. 551, 15 Ky. L. Rep. 183; Appeal of Folmer, 87 Pa. 133; Danielson v. Wilson, 73 Ill. App. 287; Carpenter v. Ins. Co., 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; Norwegian Old People's Home Society v. Wilson, 176 Ill. 94, 52 N. E. 41.

In the construction of wills, the word fam-

ily, when applied to personal property, is synonymous with *kindred* or *relations*. It may, nevertheless, be confined to particular relations by the context of the will, or may be enlarged by it, so that the expression may in some cases mean children, or next of kin, and in others may even include relations by marriage; Schoul. Wills 537. The primary meaning of the word family is children, and it must be so construed in all cases unless the context shows that it was used in a different sense; Phillips v. Ferguson, 85 Va. 509, 8 S. E. 241, 1 L. R. A. 837, 17 Am. St. Rep. 78. It has been more commonly held that parents are not included in the term; 8 Ves. 604; 2 Redf. Wills 73; 5 Maule & S. 126; Spencer v. Spencer, 11 Paige (N. Y.) 159; it may include a wife as well as children; Bowditch v. Andrew, 8 Allen (Mass.) 339. A statute providing that real estate shall not go "out of the family" restricts the descent to the issue of the ancestor; Den v. D'Hart, 3 N. J. L. 481. See HEAD OF A FAMILY.

FAMILY ARRANGEMENT. An agreement made between a father and his son, or children, or between brothers, to dispose of property in a different manner to that which would otherwise take place.

In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chitty, Pr. 67; 1 Turn. & R. 13; Boyd v. Robinson, 93 Tenn. 1, 23 S. W. 72; De Hatre v. De Hatre, 50 Mo. App. 1.

Such an arrangement may be upheld, although there were no rights in dispute at the time of making it, and the court will not be disposed to scan with much nicety the quantum of the consideration; L. R. 2 Ch. 294. It is said that a family arrangement is not by itself a valuable consideration; Brett, L. C. in Mod. Eq. 294. Wherever doubts and disputes have arisen with regard to the rights of different members of a family (especially when relating to legitimacy) and fair compromises have been entered into to preserve harmony, they have been sustained, though, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers; 2 Dr. & War. 503. The impossibility of estimating money considerations in family arrangements has led to their exemption from the rules which affect other arrangements; 7 Cl. & F. 280.

In ordinary cases a father's dealings with his child who has just come of age are open to suspicion, and so are dealings with a reversioner, but if these are in the nature of a family arrangement, the court will regard them, not with suspicion, but with favor; 2 Giff. 232. It is not essential that the son should have independent advice, nor will inquiry be made as to how far the father's influence was exerted. At the same time any unusual benefit secured to the father will be scrutinized and perhaps expunged; 41 Ch. D. 200; and only the usual provisions should be inserted. It seems that resettlements under a family arrangement will justify the execution of a power under which the donee retains some benefit, which would otherwise be a fraud on the power. See 1 Swans. 129. An agreement between the children of a testator that the shares of the children shall be considered as vesting at the death of the testator divested of the survivorship clause contained in the will, will be upheld in equity; Ralston's Estate, 172 Pa. 104, 33 Atl. 273.

Evidence of circumstances to show a family arrangement at the execution of deeds is admissible, and a deed otherwise invalid would be good evidence if it formed a component part of such arrangement; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724. See FAMILY MEETING.

FAMILY BIBLE. A Bible containing a record of the births, marriages, and deaths of the members of a family.

An entry by a father, made in a Bible, stating that Peter, his eldest son, was born in lawful wedlock, of Maria, his wife, at a time specified, is evidence to prove the legitimacy of Peter; 4 Campb. 401. But the entry in order to be evidence must be an original entry; and, when it is not so, the loss of the original must be proved before the copy can be received; Curtis v. Patton, 6 S. & R. (Pa.) 135. See Carskadden v. Poorman, 10 Watts (Pa.) 82, 36 Am. Dec. 145.

A family Bible, containing entries of family incidents, where the parties who made the entries are dead, will be received in evidence; Whart. Ev. § 219; Tayl. Ev. 572; 1 Greenl. Ev. § 104; L. R. 1 Ex. 255; Greenleaf v. R. Co., 30 Ia. 301; Southern Life Ins. Co. v. Wilkinson, 53 Ga. 535. See 11 Cl. & F. 85; Town of Union v. Town of Plainfield, 39 Conn. 563. In order to make an entry evidence as to the birth or death of a child, it must be shown that the entry is in the handwriting of a parent; Greenleaf v. R. Co., 30 Ia. 301. But it is held that entries in a family Bible are admissible in evidence without proof that they have been made by a parent or relative; Weaver v. Leiman, 52 Md. 709.

FAMILY COUNCIL. See FAMILY ARRANGEMENT; FAMILY MEETING.

FAMILY EXPENSES. Obligations incurred for something intended for the use or comfort of the collection spoken of as the family, as distinguished from individual or personal expenses. Vose v. Myott, 141 Ia. 506, 120 N. W. 58, 21 L. R. A. (N. S.) 277. Medical services furnished to a member of the family are such; Mueller v. Kuhn, 59 Ill. App. 353; Russell v. Graumann, 40 Wash. 667, 82 Pac. 998, 5 Ann. Cas. 830; Murdy v. Skyles, 101 Ia. 549, 70 N. W. 714,

63 Am. St. Rep. 411; wages of servants and domestics; Perkins v. Morgan, 36 Colo. 360, 85 Pac. 640; the rent of a house; Houghteling v. Walker, 100 Fed. 253; an article of jewelry is held not, though sometimes worn by members of the family; Hyman v. Harding, 162 Ill. 357, 44 N. E. 754; but *contra* Neasham v. McNair, 103 Ia. 695, 72 N. W. 773, 38 L. R. A. 847, 64 Am. St. Rep. 202; nor is the cost of keeping an insane husband in an asylum; Blackhawk County v. Scott, 111 Ia. 190, 82 N. W. 492.

FAMILY MEETING (called, also, *family council*). In Louisiana. Meetings of at least five relations of minors or other persons on whose interest they are called upon to deliberate, or, in default of relations, then of the friends of such minors or other persons. See Lemoine v. Ducote, 45 La. Ann. 857, 12 South. 939.

The appointment of the members of the family meeting is made by the judge. The selection must be from among those domiciliated in the parish in which the meeting is held: the relations are selected according to their proximity, beginning with the nearest. The relation is preferred to the connection in the same degree; and among relations of the same degree the eldest is preferred. The undertutor must also be present. Commaux v. Barbin, 6 Mart. La. (N. S.) 455.

The family meeting is held before a justice of the peace, or notary public, appointed by the judge for the purpose. It is called for a fixed day and hour, by citations delivered at least three days before the day appointed for that purpose.

The members of the family meeting, before commencing their deliberations, take an oath before the officer before whom the meeting is held, to give their advice according to the best of their knowledge touching the interests of the person respecting whom they are called upon to deliberate. The officer before whom the family meeting is held must make a particular procès-verbal of the deliberations, cause the members of the family meeting to sign it, if they know how to sign, and must sign it himself, and deliver a copy to the parties that they may have it homologated.

FAMILY PHYSICIAN. A physician who regularly attends and is consulted by the members of the family as their medical adviser; but he need not attend in all cases or be consulted by all the members of the family. Price v. Ins. Co., 17 Minn. 519 (Gil. 473), 10 Am. Rep. 166; Reid v. Ins. Co., 58 Mo. 424. See PHYSICIAN.

FAMILY USE. That use ordinarily made by and suitable for the members of a household whether as individuals or collectively. Spring Valley Water Works v. San Francisco, 52 Cal. 120. The supply of water in a municipal corporation for family use includes the supply of gaols, hospitals, almshouses, schools, and other municipal institutions; *id.* See GROCERIES.

FAMOSUS (Lat.). Defamatory; slanderous; scandalous. Used in civil and old English law to express that which affected injuriously the character or reputation.

FAMOSUS LIBELLUS (Lat.). Among the civilians these words signified that species of *injuria* which corresponds nearly to libel or slander.

FANATIC. A religious enthusiast; a bigot; a person entertaining wild and extravagant notions, or affected by zeal or enthusiam, especially upon religious subjects. The word was formerly defined in English law as a person pretending to be inspired, and was said to be a term applied to "Quakers, Anabaptists, and all other sectaries, and factious dissenters from the church of England." Jac. L. Dict. See Stat. 13 Car. II. c. 6.

FANEGA. In Spanish Law. A measure of land, which is not the same in every province. *Diccionario de la Acad.;* 2 White, Recop. 49. In Spanish America, the fanega consisted of six thousand four hundred square varas, or yards. 2 White, Recop. 138.

FARDEL. The fourth part of a yardland. Spelman, Gloss. According to others, the eighth part. Noy, Complete Lawyer 57; Cowell. See Cunningham, Law Dict.

FARDING-DEAL. The fourth part of an acre of land. Spelm. Gloss.

FARE. A voyage or passage. The money paid for a voyage or passage. The latter is the modern signification. See Chase v. R. Co., 26 N. Y. 526; TICKET; PASSENGER.

In case of a water company it means the tax or compensation which the company may charge for furnishing a supply of water. McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743. See RATES.

FARLEY or FARLEU. Money paid in lieu of a heriot (*q. v.*). Applied also to the best chattel as distinguished from heriot,—the best beast. Cowell.

FARLINGARII. Whoremongers; adulterers.

FARM. A certain amount of provision reserved as the rent of a messuage. Spelman, Gloss.

Rent generally which is reserved on a lease; when it was to be paid in money, it was called *blanche firme.* Spelman, Gloss.; 2 Bla. Com. 42.

A term. A lease of lands; a leasehold interest. 2 Sharsw. Bla. Com. 17; 1 Reeve, Hist. Eng. Law 301, n.; 2 Chit. Pl. 879, n. e. The land itself, let to farm or rent. 2 Bla. Com. 368.

A portion of land used for agricultural purposes, either wholly or in part. Winn v. Cabot, 18 Pick. (Mass.) 553; Com. v. Carmalt, 2 Binn. (Pa.) 238.

A body of land, usually under one ownership, devoted to agriculture; either to the raising of crops, or pasturage, or both. It is not understood to have any necessary relation to, or to be circumscribed by, political subdivisions. A farm may consist of any number of acres, of one quarter section or less, or many quarter sections; of one field, or many fields; may lie in one township and county, or in more than one; People v. Caldwell, 142 Ill. 434, 32 N. E. 693. See Kendall v. Miller, 47 How. Pr. (N. Y.) 446.

Usually the chief messuage in a village or town whereto belongs a great demesne of all sorts. Cowell; Cunningham, Law Dict.; *Termes de la Ley.*

A large tract or portion of land taken by a lease under a yearly rent payable by the tenant. Tomlin, Law Dict.

From this latter sense is derived its common modern signification of a large tract used for cultivation or other purposes, as raising stock, whether hired or owned by the occupant, including a messuage with out-buildings, gardens, orchard, yard, etc. Plowd. 195; Touchst. 93.

In American law, the word has almost exclusively this latter meaning of a portion of land used for agricultural purposes, either wholly or in part. Com. v. Carmalt, 2 Binn. (Pa.) 238; Winn v. Cabot, 18 Pick. (Mass.) 553; Wheeler v. Randall, 6 Metc. (Mass.) 529.

By the conveyance of a farm will pass a messuage, arable land, meadow, pasture, wood, etc., belonging to or used with it; Co. Litt. 5 *a;* Shepp. Touchst. 93; 4 Cruise, Dig. 321; Plowd. 167.

In a will, the word farm may pass a freehold, if it appear that such was the intention of the testator; 6 Term 345; 9 East 448. See 6 East 604, n.; 8 *id.* 339.

FARM LET. Technical words in a lease creating a term for years. Co. Litt. 45 *b;* 1 Washb. R. Pr. Index, *Lease.*

FARM OUT. To rent for a certain term. The collection of the revenue among the Romans was farmed out to persons called *publicani.* The same system existed in France before the revolution of 1789; and in England the excise taxes were farmed out, and thereby their evils were greatly aggravated. The farming of the excise was abolished in Scotland by the union, having been before that time abandoned in England. In all these cases the custom gave rise to great abuse and oppression of the people, and in France most of the farmers-general, as they were called, perished on the scaffold.

Charter authority to a railroad company to farm out the right of transportation authorizes a lease of the road; Hill v. R. Co., 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606.

FARMER. The lessee of a farm. It is said that every lessee for life or years, although it be but of a small house and land, is called *farmer.* This word implies no mystery, except it be that of husbandman. Cunn. Law Dict.; Cowell; 3 Sharsw. Bla. Com. 318.

In common parlance, and as a term of description in a deed, farmer means one who cultivates a farm, whether he owns it or not. There may also be a farmer of the revenue or of other personal property as well as lands. Plowd. 195; Cunn. Law Dict.

FARMER GENERAL. See FARM OUT.

FARRAGO LIBELLI (Lat.). An ill-composed book containing a collection of miscellaneous subjects not properly associated or scientifically arranged. Whart.

FARRIER. One who takes upon himself the public employment of shoeing horses.

Like an innkeeper, a common carrier, and other persons who assume a *public* employment, a farrier is bound to serve the public as far as his employment goes, and an action lies against him for refusing, when a horse is brought to him at a reasonable time for such purpose, if he refuses; Oliph. Horses 131; and he is liable for the unskilfulness of himself or servant in performing such work; 1 Bla. Com. 431; but not for the malicious act of the servant in purposely driving a nail into the foot of the horse with the intention of laming him; 2 Salk. 440; Hanover, Horses 215.

FARTHING. In English Law. The one-fourth part of a penny (*q. v.*).

FARTHING OF GOLD. An ancient coin of the value of one-fourth part of a noble. 9 Hen. V. c. 7.

FARTHING OF LAND. A great quantity of land, differing much from farding-deal, *q. v.*

FARVAND. Standing by itself, this word signifies "passage by sea or water." In charter-parties, it means voyage or passage by water. 18 C. B. 880.

FARYNDON INN. The ancient designation of Serjeants' Inn, Chancery Lane, London. See INNS OF COURT.

FAS (Lat.). Right; justice. 3 Bla. Com. 2. See PER FAS ET NEFAS.

In primitive times it was the will of the gods, embodied in rules regulating not only ceremonials but the conduct of all men. Taylor, Science of Jurispr. 65.

FAST BILL OF EXCEPTIONS. One which may be taken in Georgia in injunction cases and the like, in time and manner to secure speedy hearing. It is certified within twenty days after the decision. Sewell v. Edmonston, 66 Ga. 353.

FAST-DAY. A day of penitential observance and religious abstinence. As to counting it in legal proceedings, see 1 Chit. Archb. Pr., 12th ed. 160; HOLIDAY.

FAST ESTATE. Real property. A term sometimes used in wills. Jackson v. Merrill,

6 Johns. (N. Y.) 185, 5 Am. Dec. 213; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706.

FASTERMANNES. Securities. Bondsmen. Spelman, Gloss. Men *fast* bound as sureties of the peace for each other under the Saxon law. Encyc. Lond.

FASTI. See DIES FASTI.

FATHER. He by whom a child is begotten. See PARENT AND CHILD; INFANT.

FATHER-IN-LAW. The father of one's spouse.

FATHOM. A measure of length, equal to six feet. Used as a nautical measure.

The word is probably derived from the Teutonic word *fad*, which signifies the thread or yarn drawn out in spinning to the length of the arm, before it is run upon the spindle. Webster; Minsheu.

FATUA MULIER. A whore. Du Fresne.

FATUM. **In Civil Law.** Fate. An overruling power. An event which can neither be anticipated nor prevented. See DAMNUM FATALE.

FATUOUS PERSON. **In Scotch Law.** One entirely destitute of reason; *is qui omnino desipit.* Erskine, Inst. b. 1, tit. 7, s. 48. An idiot. Jacob. One who is incapable of managing his affairs, by reason of a total defect of reason. He is described as having uniform stupidity and inattention of manner and childishness of speech. Bell's Law. Dict.

FATUUM JUDICIUM. A foolish judgment or verdict. As applied to the latter it is one rather false by reason of folly than criminally so as amounting to perjury. Bract. f. 289.

FATUUS. An idiot or fool. Bract. f. 420 b. Silly; ill-considered; foolish; indiscreet.

FAUBOURG. A district or part of a town adjoining the principal city; as a faubourg of New Orleans. City Council of Lafayette v. Holland, 18 La. 286.

FAUCES TERRÆ (Lat. jaws of the land). Projecting headlands or promontories, including arms of the sea. Such arms of the sea are said to be inclosed within the *fauces terræ*, in contradistinction to the open sea. 1 Kent 367. See ARM OF THE SEA; KING'S CHAMBER; TERRITORIAL WATERS; 16 Yale L. J. 471.

FAULT. An improper act or omission, which arises from ignorance, carelessness, or negligence. The act or omission must not have been meditated, and must have caused some injury to another. *Leç. Elém.* § 783.

In legal literature it is the equivalent of "negligence." An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act. Louisville, E. & St. L. R. Co. v. Berry, 2 Ind. App. 427, 28 N. E. 714.

Gross fault or neglect consists in not observing that care towards others which a man the least attentive usually takes of his own affairs. Such fault may, in some cases, afford a presumption of fraud, and in very gross cases it approaches so near as to be almost undistinguishable from it, especially when the facts seem hardly consistent with an honest intention. But there may be a gross fault without fraud; 2 Stra. 1099; Story, Bailm. § 18; Toullier, l. 3, t. 3, § 231.

Ordinary fault consists in the omission of that care which mankind generally pay to their own concerns; that is, the want of ordinary diligence.

A slight fault consists in the want of that care which very attentive persons take of their own affairs. This fault assimilates itself to, and in some cases is scarcely distinguishable from, mere accident or want of foresight.

This division has been adopted by common lawyers from the civil law. Although the civilians generally agree in this division, yet they are not without a difference of opinion. See Pothier, *Observation générale sur le précédent Traité et sur les suivants*, printed at the end of his *Traité des Obligations*, where he cites Accussus, Alciat, Cujas, Duaren, D'Avezan, Vinnius, and Heineccius, in support of this division. On the other side the reader is referred to Thomasius, tom. 2, *Dissertationem*, page 1006; Le Brun, cited by Jones, Bailm. 27; and Toullier, *Droit Civil Francais*, liv. 3, tit. 3, § 231.

These principles established, different rules have been made as to the responsibilities of parties for their faults in relation to their contracts. They have been reduced to three. See BAILMENT; DOLUS; NEGLIGENCE.

See 2 Sto. Bailm. 24, for a discussion of the definition and classification of fault from Ayliffe, Pand.

FAUTOR. **In Spanish Law.** Accomplice; the person who aids or assists another in the commission of a crime.

FAUX. **In French Law.** A falsification or fraudulent alteration or suppression of a thing by words, by writings, or by acts without either. Biret, *Vocabulaire des Six Codes.*

Toullier says (tom. 9, n. 188), "*Faux* may be understood in three ways: in its most extended sense, it is the alteration of truth, with or without intention; it is nearly synonymous with lying; in a less extended sense, it is the alteration of truth, accompanied with fraud, *mutatio veritatis cum dolo facta;* and lastly, in a narrow, or rather the legal, sense of the word, when it is a question to know if the *faux* be a crime, it is the fraudulent alteration of the truth in those cases ascertained and punished by the law." See CRIMEN FALSI.

FAVOR. Bias; partiality; lenity; prejudice.

The grand jury are sworn to inquire into all offences which have been committed and into all violations of law, without fear, *favor*, or affection. See GRAND JURY. When a juror is influenced by bias or prejudice, so that there is not sufficient ground for a principal challenge, he may nevertheless be challenged for favor. See CHALLENGE; Bac.

Abr. *Juries*, E; Queen v. Hepburn, 7 Cranch (U. S.) 290, 3 L. Ed. 348.

FEAL. Truthful; true. The tenants by knight's service used to swear to their lords to be feal and leal. *Feal homager*, faithful subject.

FEAL AND DIVOT. A right in Scotland, similar to the right of turbary in England for fuel, etc. Wharton.

It is a predial servitude peculiar to the law of Scotland, in virtue of which the proprietor of the dominant tenement possesses the right of turning up and carrying off turf from the servient tenement for the purpose of building fences, roofing houses, and the like. This, as well as the servitude of fuel, implies the right of using the nearest ground of the servient tenement on which to lay and dry the turf peats or fuel. These servitudes do not extend beyond the ordinary uses of the actual occupants of the dominant tenements, and cannot be taken advantage of for such a purpose as to burn limestone for sale. They are not included in the servitude of pasturage, but must be constituted either by express grant, or by possession following on the usual clause of parts and pertinents; Ersk. ii. tit. ix. s. 17. The etymology of these words has been much disputed. *Feal* or *fail* is said to come from the Suio-Gothic *wall*, any grassy part of the surface of the ground; and Jamieson derives divot from *delve* (Sax. *delfan* or *delvan*), or, as another alternative, says that it may have been formed by the monkish writers of old charters from *defodere*, to dig the earth. The former is the more probable conjecture. Int. Cyc.

FEALTY. That duty which every man who holds lands of another owes to him of whom he holds.

Under the feudal system, every owner of lands held them of some superior lord, from whom or from whose ancestors the tenant had received them. By this connection the lord became bound to protect the tenant in the enjoyment of the land granted to him; and, on the other hand, the tenant was bound to be faithful to his lord and to defend him against all his enemies. This obligation was called *fidelitas* or fealty; 1 Bla. Com. 263; 2 *id.* 86; Co. Litt. 67 *b*.

This fealty was of two sorts: that which is general, and is due from every subject to his prince; the other special, and required of such only as in respect of their fee are tied by this oath to their landlords; 1 Bla. Com. 367; Cowell.

The oath or obligation of fealty was one of the essential requisites of the feudal relation; 2 Sharsw. Bla. Com. 45, 86; Littleton §§ 117, 131; Wright, Ten. 35; *Termes de la Ley;* 1 Washb. R. P. 19; see 1 Poll. & Maitl. 277-287, and was as follows: "Hear this ye good people that I (such a one by name) faith will bear to our lord King Edward from this day forward of life and limb, of body and chattels and earthly honor, and the services which belong to him for the fees and tenements which I hold of him will lawfully perform to him as they become due to the best of my power, so help me God and the saints." Stubbs, Const. Hist. § 462 n. Fealty was due alike from freeholders and tenants for years as an incident to their estates to be paid to the reversioner; Co. Lit. 67 *b*. Chal. R. P. 13. Tenants at will did not have fealty; 2 Burton, R. P. 395, n.; 1 Washb. R. P. 371. It has now fallen into disuse, and is no longer exacted; 3 Kent 510; Wright, Ten. 35, 55; Cowell.

FEAR. Dread; consciousness of approaching danger.

Fear in the person robbed is one of the ingredients required to constitute a robbery from the person; and without this the felonious taking of the property is a larceny. It is not necessary that the owner of the property should be in fear of his own person; but fear of violence to the person of his child; 2 East, Pl. Cr. 718; or to his property; *id.* 731; 2 Russ. Cr. 72; is sufficient; 2 Russ. Cr. 71. See Bonsall v. State, 35 Ind. 460; State v. Howerton, 58 Mo. 581; DURESS; PUTTING IN FEAR; THREAT.

FEASANCE. A doing; a performing or performance. *Feasant*, doing or making,—as *damage feasant* (*q. v.*). *Feasor*, doer, maker,—as *feasors del estatute*, makers of the statute; Dyer 3 *b*.

FEASTS. Certain established periods in the Christian church. Formerly the days of the feasts of saints were used to indicate the dates of instruments and memorable events; 8 Toullier, n. 81. The feasts of the English church were formerly used to divide the terms of the legal year, but this division was abolished by the judicature act. See TERMS.

FECIAL LAW. A branch of Roman jurisprudence concerned with embassies, declarations of war, and treaties of peace; so called from *feciales* (*q. v.*), who were charged with its administration. It more nearly resembles the international law of modern times than any other department of the Roman law.

FECIALES. Amongst the ancient Romans, that order of priests who discharged the duties of ambassadors. Subsequently their duties appear to have related more particularly to the declaring war and peace. Calvinus, Lex.

FEDERAL. A term commonly used to express a league or compact between two or more states.

In the United States the central government of the Union is federal. The constitution was adopted "to form a more perfect union" among the states, for the purpose of self-protection and for the promotion of their mutual happiness. Freeman's Hist. Fed. Govt.; Austin, Jurispr. Lect. 6; see U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

FEDERAL COURTS. See UNITED STATES COURTS.

FEDERAL GOVERNMENT. A union or confederation of sovereign states, created either by treaty, or by the mutual adoption of a federal constitution, for the purpose of presenting to the world the appearance of a single state, while retaining the rights and power of internal regulation and administration, or at least of local self-government.

The more extended the renunciation of individual sovereignty, the more powerful does the new government become and the more nearly does it approach to a substantial union. No real diminution of sovereignty is necessarily involved except the relinquishment of the power of conducting independent relations with foreign powers.

"There are two different modes of organizing a federal union. The federal authorities may represent the governments solely, and their acts may be obligatory only on the governments as such, or they

may have the power of enacting laws and issuing orders which are binding directly on individual citizens. The former is the plan of the (old) German so-called confederation, and of the Swiss constitution previous to 1847. It was tried in America for a few years immediately following the war of independence. The other principle is that of the existing constitution of the United States, and has been adopted within the last dozen years by the Swiss confederacy. The federal congress of the American union is a substantive part of the government of every individual state. Within the limits of its attributions, it makes laws which are obeyed by every citizen individually, executes them through its own officers, and enforces them by its own tribunals. This is the only principle which has been found, or which is even likely to produce an effective federal government. A union between the governments only is a mere alliance, and subject to all contingencies which render alliances precarious." Mills, Representative Government 301.

A primary difficulty, it has been said, in framing a federal government and a source of danger to its permanence, is liability to disagreements between the constituent governments or between one or more of the local governments and the federal government as to the limits of their respective powers. The scheme adopted in the American system as a provision for such cases has been thus described: "Under the more perfect mode of federation, where every citizen of each particular state owes obedience to two governments—that of his own state, and that of the federation—it is evidently necessary not only that the constitutional limits of the authority of each should be precisely and clearly defined, but that the power to decide between them in any case of dispute should not reside in either of the governments, or in any functionary subject to it, but in an umpire independent of both. There must be a supreme court of justice, and a system of subordinate courts in every state of the union, before whom such questions shall be carried, and whose judgment on them, in the last stage of appeal, shall be final. Every state of the union, and the federal government itself, as well as every functionary of each, must be liable to be sued in those courts for exceeding their powers, or for non-performance of their federal duties, and must in general be obliged to employ those courts as the instruments for enforcing their federal rights. This involves the remarkable consequence, actually realized in the United States, that a court of justice, the highest federal tribunal, is supreme over the various governments, both state and federal, having the right to declare that any new law made, or act done by them, exceeds the powers assigned to them by the federal constitution, and in consequence has no legal validity." "The tribunals which act as umpires between the federal and state governments naturally also decide all disputes between two states, or between a citizen of one state and the government of another. The usual remedies between nations, war and diplomacy, being precluded by the federal union, it is necessary that a judicial remedy should supply the place. The supreme court of the federation dispenses international law, and is the first great example of what is now one of the most prominent wants of civilized society, a real international tribunal." *Id.* 305. See Freeman, Fed. Gov't.

The American union is the most striking illustration of federal government in existence, and its permanent character was settled by the civil war which finally determined its indestructibility by action of individual states. In Europe, the empire of Germany and the republic of Switzerland are instances of the operation of successful federal governments, as are most of the South American States; while in the British Empire the Dominion of Canada, the Australian federation, and South Africa, as also the Greater Republic of Central America, are indications of a tendency in that direction which existing conditions are likely to increase very rapidly. See these several titles, and also UNITED STATES OF AMERICA; GOVERNMENT.

FEDERAL QUESTION. A term used to designate a case of which the federal court has jurisdiction because it requires a construction of the constitution or some law of the United States or of a treaty made under its authority. Bryan v. Kennett, 113 U. S. 190, 5 Sup. Ct. 407, 28 L. Ed. 908.

The existence or non-existence of a federal question determines the original jurisdiction in many cases of the district court, now the only federal court of first instance, and the appellate jurisdiction of the supreme court in cases from the state courts.

The judiciary act of March 3, 1887, as amended Aug. 13, 1888, conferred jurisdiction upon the federal courts in "cases arising under the constitution or laws of the United States," or, as commonly expressed by the profession, in cases involving a "federal question"; In re Sievers, 91 Fed. 366. And the same jurisdiction is conferred by the Judicial Code of March 3, 1911, in section 24 as to the district court, and in section 237 as to cases taken to the supreme court from the state courts; U. S. Comp. Laws (1911) p. 135.

If, from the questions involved in a case, it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the constitution, or of a law or treaty of the United States, or sustained by the opposite construction, the case will be one arising under the constitution or laws of the United States, and involves a federal question; Starin v. New York, 115 U. S. 257, 6 Sup. Ct. 28, 29 L. Ed. 388; Provident Sav. Life Assur. Society v. Ford, 114 U. S. 641, 5 Sup. Ct. 1104, 29 L. Ed. 261; Kansas P. R. Co. v. R. Co., 112 U. S. 416, 5 Sup. Ct. 208, 28 L. Ed. 794; Ames v. Kansas, 111 U. S. 462, 4 Sup. Ct. 437, 28 L. Ed. 482. Where it does not appear from the record that a federal question was actually presented or in any way relied on before final judgment below, the supreme court is without jurisdiction; Simmerman v. Nebraska, 116 U. S. 54, 6 Sup. Ct. 333, 29 L. Ed. 535; as it must appear on the record that it was raised and decided, or that its decision was necessary to the judgment or decree rendered; Detroit City R. Co. v. Guthard, 114 U. S. 133, 5 Sup. Ct. 811, 29 L. Ed. 118; McManus v. O'Sullivan, 91 U. S. 578, 23 L. Ed. 390; Chouteau v. Gibson, 111 U. S. 200, 4 Sup. Ct. 340, 28 L. Ed. 400; Harrison v. Morton, 171 U. S. 38, 18 Sup. Ct. 742, 43 L. Ed. 63. See Kaukauna Water Power Co. v. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004.

Whether there is a federal question must be determined by the record alone; Miller v. Nicholls, 4 Wheat. (U. S.) 311, 4 L. Ed. 578; Davidson v. Starcher, 154 U. S. 566, 14 Sup. Ct. 1200, 19 L. Ed. 52; Goodenough Horse-Shoe Mfg. Co. v. Horse-Shoe Co., 154 U. S. 635, 14 Sup. Ct. 1180, 24 L. Ed. 368; where it must appear by the plaintiff's pleading;

Spencer v. Silk Co., 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; Bankers' Mut. Casualty Co. v. R. Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484; and the supreme court cannot indulge in presumptions to supply omissions from the record; Downham v. Alexandria, 10 Wall. (U. S.) 173, 19 L. Ed. 929; nor can it resort to judicial knowledge to raise controversies not presented by the record; Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 23 Sup. Ct. 375, 47 L. Ed. 480; nor can the court resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised in and decided by the state courts; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, 10 L. Ed. 105; nor is it bound to search the statutes to find one violating the obligation of a contract, when none is set up in pleadings or opinion; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 41, 21 Sup. Ct. 256, 45 L. Ed. 415.

Where the record discloses that no authority was cited or argument advanced in support of an alleged constitutional objection and the decision was based upon other than legal grounds the decision of the state court will not be reversed; Harding v. Illinois, 196 U. S. 78, 25 Sup. Ct. 176, 49 L. Ed. 394.

No particular form of words or phrases in which a claim of federal rights must be asserted in the state court has ever been declared necessary by the supreme court, but it is sufficient if it appears from the record that such rights were specially set up or claimed there in such a way as to bring the subject to the attention of the state court; Green Bay & M. Canal Co. v. Paper Co., 172 U. S. 66, 19 Sup. Ct. 97, 43 L. Ed. 364; as where the constitutionality of a state statute is directly attacked in the answer; Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53, 24 Sup. Ct. 396, 48 L. Ed. 614. The federal question must be distinctly raised in the state court, and a mere claim, which amounts to no more than a vague and inferential suggestion that a right under the constitution of the United States had been denied, is not sufficient; Thomas v. Iowa, 209 U. S. 258, 28 Sup. Ct. 487, 52 L. Ed. 782; and it is too late to raise it for the first time in the petition for writ of error to the state court, or in the assignment of errors in the supreme court; *id.;* Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490; Mallers v. Trust Co., 216 U. S. 613, 30 Sup. Ct. 438, 54 L. Ed. 638; so also in a petition for rehearing in the state court of last resort, unless (and it must so appear) that court actually entertains the motion and passes upon the federal question; Mallett v. North Carolina, 181 U. S. 589, 21 Sup. Ct. 730, 45 L. Ed. 1015; Leigh v. Green, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; McCorquodale v. Texas, 211 U. S. 432, 29 Sup. Ct. 146, 53 L. Ed. 269; Forbes v. State Council of Virginia, 216 U. S. 396, 30 Sup. Ct. 295, 54 L. Ed. 534; but it is sufficient if this appears in a motion for a new trial and in an assigment of error in the state supreme court; San Jose Land & Water Co. v. Ranch Co., 189 U. S. 177, 23 Sup. Ct. 487, 47 L. Ed. 765, where also it appeared from the opinion of the court that a federal question was raised. Such question, not raised by the pleadings, cannot be availed of on a motion to dismiss; Illinois C. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410. The federal question is raised in time when the plaintiff in error, defendant below, after filing the general issue, moves to amend, claiming rights under the XIVth amendment, and at the trial asks an instruction based thereon; National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823.

One who relies upon a federal right must specially set it up, and the certificate of the presiding judge of the state court may make more certain and specific what is too general and indefinite in the record, but cannot give jurisdiction where there is nothing in the record by way of a federal question; Louisville & N. R. Co. v. Smith Co., 204 U. S. 551, 27 Sup. Ct. 401, 51 L. Ed. 612; but such certificate that a federal question was raised, though insufficient to give jurisdiction, may be resorted to, in the absence of an opinion, to show that a federal question, which is otherwise raised in the record, was actually passed upon by the court; Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86.

Notwithstanding the claim that a federal question was set up in the state court, if it appears to the supreme court to have no foundation or substance, there is no jurisdiction; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936.

Where a federal question is raised in the state courts, the party who brings the case to the supreme court cannot raise there another question which was not raised below; Chapin v. Fye, 179 U. S. 127, 21 Sup. Ct. 71, 45 L. Ed. 119.

In an action in a state court for taxes, where a federal question was not set up in defense until after judgment and reversal by the supreme court of the state, and a new trial was had below in which the question was raised, it was held too late; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. Ed. 395.

"Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal question will upon a proper proceeding attach. . . . And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the state, or to the inferior court whose judgment is reversed;"

Williams v. Bruffy, 102 U. S. 248, 26 L. Ed. 135.

The court will not disturb the judgment of a state court resting on federal and non-federal grounds if the latter are sufficient to sustain the decision; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; McQuade v. Trenton, 172 U. S. 636, 19 Sup. Ct. 292, 43 L. Ed. 581; White v. Leovy, 174 U. S. 91, 19 Sup. Ct. 604, 43 L. Ed. 907; Harrison v. Morton, 171 U. S. 38, 18 Sup. Ct. 742, 43 L. Ed. 63; Hammond v. Ins. Co., 150 U. S. 633, 14 Sup. Ct. 236, 37 L. Ed. 1206; nor where the decision is upon non-federal ground sufficient to sustain it; Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, 29 Sup. Ct. 227, 53 L. Ed. 431; nor will it review the final judgment of the highest court of a state, even if it denied some title of right, privilege, or immunity of the unsuccessful party, unless it appear from the record that such right, privilege or immunity "was specially set up or claimed" in the state court by force of the constitution or some treaty, statute, commission or authority of the United States; and in order to comply with the condition that the right invoked must have been specially set up or claimed it must appear that such claim was made unmistakably; Union Mut. Life Ins. Co. v. Kirchoff, 169 U. S. 111, 18 Sup. Ct. 260, 42 L. Ed. 677; F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 17 Sup. Ct. 709, 41 L. Ed. 1149; Capital Nat. Bank v. Bank, 172 U. S. 425, 19 Sup. Ct. 202, 43 L. Ed. 502.

The state courts are competent to decide federal questions arising before them and it is their duty to do so and there is a presumption that they will do what the constitution and laws require of them; if error intervenes the remedy is a writ of error to the state court, and the federal courts cannot be called on to interpose in a controversy properly pending in the state courts on the ground that the state court might so decide as to render their final action unconstitutional; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

The jurisdiction of the supreme court to review a judgment of a state court depends upon the assertion of a right, privilege, or immunity under the federal constitution or laws set up and denied in state courts, and the latter are not amenable to review for the administration of the common law according to their own understanding and interpretation thereof; Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, affirming Hughes v. R. Co., 202 Pa. 222, 51 Atl. 990, 63 L. R. A. 513, 97 Am. St. Rep. 713. Although a federal right may not have been specially set up in the original petition or earlier proceedings, if it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue and was actually decided against the federal claim and such decision was essential to the judgment rendered, the decision is reviewable by the United States supreme court; Montana v. Rice, 204 U. S. 291, 27 Sup. Ct. 281, 51 L. Ed. 490. It has been held that federal questions are involved in suits brought by corporations created by acts of congress; Union Pac. Ry. Co. v. Myers, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; to determine the validity of a railroad consolidation authorized by act of congress; Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; to enjoin the erection of a bridge across a navigable river authorized by act of congress; Miller v. New York, 13 Blatch. 479, Fed. Cas. No. 9,585; whether full faith and credit were given to a judgment in another state; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; where the supreme court of a state failed to give proper effect to a decree of the circuit court of the United States; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; where a federal officer is sued in trespass to real estate which he claims to have possession for and under authority of the United States; Stanley v. Schwalby, 147 U. S. 508, 13 Sup. Ct. 418, 37 L. Ed. 259. So, of course, are suits for infringement of patents and copyrights. (For a discussion of the jurisdiction in patent cases, see Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645.) So also of cases in which it is claimed that a state law is invalid because in conflict with the constitution or laws of the United States or as depriving one of some right, privilege, or immunity thereby guaranteed, and criminal prosecutions for violations of federal laws.

A federal question arises in a case in which the correct decision depends upon the construction of a section of the federal constitution; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 26 L. Ed. 96; New Orleans Water-Works Co. v. Water-Works Co., 14 Fed. 194; or where it is to be decided whether a judgment of the federal court was a lien on land when the state law was changed after the enactment of the federal law making such judgments liens in all cases where they were such by the laws of the state; Cooke v. Avery, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209; or where on the whole record there is a controversy involving the construction of either the federal constitution or laws; Van Allen v. R. Co., 3 Fed. 545; Leonard v. City of Shreveport, 28 Fed. 257; or where the defence depends wholly on the federal constitution and laws; Hodgson v. Millward, 3 Grant Cas. 418, Fed. Cas. No. 6,568; and cases arising out of legislation of congress whether constituting a right or privilege, or claim or protection, or defence, in whole or in part, of the party by whom it is

asserted; Ellis v. Norton, 16 Fed. 4; when the controversy turns upon the existence, effect or operation of a law of the United States, as a suit by a riparian owner to enjoin the construction of a bridge, upon the ground that the defendant was not authorized to build it by an act of congress under which it claimed the right; Hughes v. Ry. Co., 18 Fed. 106; whether by force of the Ordinance of 1787 and treaties with the Miami Indians certain lands were exempt from taxation; Wau-pe-man-qua v. Aldrich, 28 Fed. 489; an action to enforce the trusts of a will bequeathing property situated on a United States reservation at Fortress Monroe, where the question was whether the federal constitution and law had segregated the territory from the state of Virginia and conferred jurisdiction over it on the federal courts; Woodfin v. Phoebus, 30 Fed. 289; when the complainant invokes the protection of a federal law and the case depends on the construction of that law; Richards v. Town of Rock Rapids, 31 Fed. 505; where the case involves the validity of a state tax alleged to be in violation of the federal constitution; U. S. Exp. Co. v. Allen, 39 Fed. 712; whether the marshal's proceedings to enforce a lien under the state law, adopted by rule of the federal court under R. S. § 916, were in conformity with the rule; Sowles v. Witters, 46 Fed. 497; a claim for damages for conspiracy to disbar an attorney from practicing in the state court because he had filed a bill in the federal courts charging defendants with misconduct and corruption in certain litigations pending in the state courts; Green v. Rogers, 56 Fed. 220; a municipal ordinance attacked as unconstitutional because of unreasonable rates, even though their reasonableness cannot be decided from the inspection of the ordinance but needs extrinsic testimony; Capital City Gas Co. v. City of Des Moines, 72 Fed. 818; where the title in litigation involved an examination of the government survey of a lake whose meander line was a part thereof; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800; where the bill set up a contract with the state in a railway charter and averred that it had been impaired by subsequent legislation; Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. Ed. 410; where a state court denied the contention of the plaintiff in error that a state statute as applied to interstate commerce was in conflict with the commercial clause of the constitution; Adams Exp. Co. v. Kentucky, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; where the plaintiff in error claimed and set up a right under the constitution of the United States and the decision of the supreme court of the state was tantamount to a denial of that right; Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; and where the answer in an action in the state court to enforce a lien created by a reassessment of taxes sets up that notice of the reassessment was insufficient and thereby property would have been taken without due process of law; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 19 Sup. Ct. 205, 43 L. Ed. 460.

Whether executors in one state of a testator there domiciled are bound by the decree of the court of another state against an administrator c. t. a. in a case submitted to arbitration before the testator's death under the full faith and credit clause is a federal question; Brown v. Fletcher's Estate, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966; where it was held that they were not bound. Such question also exists where the state court expressly decides adversely to the contention of the plaintiff in error, that a United States statute does not preclude others from asserting rights against him but does preclude him from asserting rights against them; Hammond v. Whittredge, 204 U. S. 538, 27 Sup. Ct. 396, 51 L. Ed. 606; and where not only the scope and applicability of the doctrine of subrogation is involved, but also the extent to which a common carrier is protected by the laws of the United States in paying customs duties on goods in transit over its own lines; Wabash R. Co. v. Pearce, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397.

Where a state court refuses to give effect to a judgment of a federal court which adjudicates that one of the parties has a contract within the protection of the federal constitution, it denies a right secured by the judgment of the federal court upon matters wherein its decision is final; Deposit Bank v. Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276.

It has been held that there was no federal question in cases involving questions of property rights established by the Ordinance of 1787 for the government of the Northwest Territory; Menard v. Aspasia, 5 Pet. 505, 8 L. Ed. 207; an action for damages for conspiracy to disbar an attorney from the state courts, his right to practice in the federal courts not being affected thereby; Green v. Elbert, 63 Fed. 308, 11 C. C. A. 207; an action to recover possession of an office from which plaintiff has been ejected after his title was established by election, except when the sole question as to title to office arises out of the denial to citizens of a right to vote on account of race, etc.; Johnson v. Jumel, 3 Woods, 69, Fed. Cas. No. 7,392; a creditor's bill to enforce the collection of an admiralty judgment in the district court; Winter v. Swinburne, 8 Fed. 49; whether the objectionable part of a state local option law having been separated, the rest may stand alone; Ex parte Kinnebrew, 35 Fed. 52; the liability for an assessment for the improvement of a street before the complainant be-

came owner of abutting property; Murdock v. City of Cincinnati, 44 Fed. 726; the arrest by order of the president of a person not subject to military law is not warranted by law so far as to give federal courts jurisdiction of a case arising thereupon; Clark v. Storrs, 4 Barb. (N. Y.) 563; the question who is entitled to the alluvion caused by the recession of the Mississippi river; Sweringen v. St. Louis, 185 U. S. 38, 22 Sup. Ct. 569, 46 L. Ed. 795; an action for personal injuries in which it was sought to draw in question the question of the constitutionality of the act of congress incorporating the defendant; Northern Pac. R. Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506; where the only question is the construction of a charter or contract and subsequent statutes which might have been, but were not, relied on as impairing its obligation; Yazoo & M. V. R. Co. v. Adams, 180 U. S. 41, 21 Sup. Ct. 256, 45 L. Ed. 415. The mere construction of a state statute does not itself present a federal question, nor is there one where the constitutionality of a state statute is admitted and only its applicability to the fact is denied; Knop v. Coke Co., 211 U. S. 485, 29 Sup. Ct. 188, 53 L. Ed. 294; nor when a state statute was assailed in the state court as invalid under the constitution of the state, upon grounds that might have been urged as to its validity under the United States constitution, where the latter objection was first stated on taking the writ of error; Osborne v. Clark, 204 U. S. 565, 27 Sup. Ct. 319, 51 L. Ed. 619.

The mere construction by a state court of a statute of another state and its operation elsewhere, without questioning its validity, does not necessarily involve a federal question or deny to the statute full faith and credit in order to give jurisdiction for a review by the United States supreme court; Allen v. Alleghany Co., 196 U. S. 463, 25 Sup. Ct. 311, 49 L. Ed. 551; nor does a mere contest over a state office depending for its solution exclusively upon the application of the constitution of the state or the construction of a state law; Elder v. Colorado ex rel. Badgley, 204 U. S. 85, 27 Sup. Ct. 223, 51 L. Ed. 381, where it was said that the fact that a state court has considered a federal question may serve to elucidate whether a federal issue properly arises, but that doctrine has no application where the controversy is inherently not federal and is incapable of presenting a federal question.

A *quo warranto* to forfeit the charter of a corporation for an abuse of its privileges involves no federal question; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936.

The amount of benefits resulting from an improvement and assessed under a state statute which the United States supreme court has declared to be constitutional, is a question of fact and a decision of the board making the assessment raises no federal question; Hibben v. Smith, 191 U. S. 310, 24 Sup. Ct. 88, 48 L. Ed. 195; and there is none in a suit for damages for the loss of a registered mail package wherein the plaintiff relied on the general law of negligence; Bankers' Mut. Casualty Co. v. Ry. Co., 192 U. S. 371, 24 Sup. Ct. 325, 48 L. Ed. 484.

Where the state court has construed a state statute so as to bring it into harmony with the federal and state constitutions, there is no power given to the supreme court to review the decision on the ground that the state court exercised legislative power in construing the statute in that manner and thereby violated that amendment; Londoner v. City & County of Denver, 210 U. S. 373, 28 Sup. Ct. 708, 52 L. Ed. 1103; and the construction of a state statute as to whether a contract is created by it and whether the statute is constitutional under the state constitution, is not, in the absence of any claim that the contract, if any, has been impaired by subsequent state action, a federal question; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 28 Sup. Ct. 650, 52 L. Ed. 1016. The right of the accused under the Missouri law to an endorsement of the names of witnesses against him on the indictment is not a common-law right, but rests on the state statute, and whether the provision is complied with is not a federal question; Barrington v. Missouri, 205 U. S. 483, 27 Sup. Ct. 582, 51 L. Ed. 890.

The federal courts cannot, on *habeas corpus*, inquire into the truth of an allegation presenting mixed questions of law and fact in the indictment on which the demand for the petitioner's interstate extradition is based; and *quære* whether it may inquire whether such indictment was or was not found in good faith; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113.

Where the plaintiff claims on no federal right, a defence that the transaction was prohibited by federal law does not make a case of federal jurisdiction; Williams v. Bank, 216 U. S. 582, 30 Sup. Ct. 441, 54 L. Ed. 625; nor does the fact that the court of one state construes a statute of another raise a federal question; Louisville & N. R. Co. v. Melton, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921; nor does one arise in an action against a receiver of a state corporation simply because he was appointed by a federal court; Gableman v. Ry. Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220, where the subject of actions against receivers appointed by those courts is considered at large.

A federal question may have been so explicitly decided as to afford no basis for a writ of error from the supreme court to a state court; Leonard v. R. Co., 198 U. S. 416, 25 Sup. Ct. 750, 49 L. Ed. 1108; and the question must be a real and not a fictitious federal question; Millingar v. Hartupee, 6 Wall. (U. S.) 258, 18 L. Ed. 829; New Or-

leans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Hamblin v. Land Co., 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267; Illinois C. R. Co. v. Chicago, 176 U. S. 646, 20 Sup. Ct. 509, 44 L. Ed. 622; State of Iowa v. Rood, 187 U. S. 87, 23 Sup. Ct. 49, 47 L. Ed. 86; Sawyer v. Piper, 189 U. S. 154, 23 Sup. Ct. 633, 47 L. Ed. 757, where the only federal question alleged was that the refusal of the state court to permit the filing of a supplementary answer in a foreclosure suit, was taking a property without due process of law and a denial of the equal protection of the laws; as the trial court had not abused its discretion no real federal question was involved.

Where the questions raised are frivolous and without merit, assumption of jurisdiction by the supreme court will not be justified by the mere assertion of a federal right; American R. Co. v. Castro, 204 U. S. 453, 27 Sup. Ct. 466, 51 L. Ed. 564; Deming v. Packing Co., 226 U. S. 102, 33 Sup. Ct. 80, 57 L. Ed. 140; Gring v. Ives, 222 U. S. 365, 32 Sup. Ct. 167, 56 L. Ed. 235; nor by the mere fact that a constitutional question is alleged in order to secure a direct appeal from the lower federal court; Goodrich v. Ferris, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. Ed. 914; Farrell v. O'Brien, 199 U. S. 100, 25 Sup. Ct. 727, 50 L. Ed. 101.

A merely colorable claim under a federal statute, or the necessity of referring to a federal statute to explain a contract or local law, does not give federal jurisdiction; St. Paul, M. & M. Ry. Co. v. R. Co., 68 Fed. 2, 15 C. C. A. 167; such a question cannot be raised in the supreme court if it did not arise below, and where no federal question is otherwise raised, and the only provision of the constitution referred to in the assignment of errors in the state court has no application, an averment of its violation creates no real federal question; Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 24 Sup. Ct. 431, 48 L. Ed. 675; there is no original jurisdiction in the federal court in an action arising out of a contract or dealings of parties, although on the trial questions may arise respecting the construction of a law of the United States; Dowell v. Griswold, 5 Sawy. 39, Fed. Cas. No. 4041.

A circuit court has jurisdiction without regard to the citizenship of the parties; Fischer v. Neil, 6 Fed. 89; Crescent City Live Stock, Landing & Slaughter House Co. v. Slaughter House Co., 12 Fed. 225; Sawyer v. Parish of Concordia, 12 Fed. 754; where the federal questions raised by the bill are not merely colorable but are raised in good faith and not in a fraudulent attempt to give jurisdiction to the circuit court, that court has jurisdiction and can decide the case on local or state questions only, and it will not lose its jurisdiction of the case by omitting to decide the federal questions or deciding them adversely to the party claiming their benefit; Siler v. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753.

A federal court should not, unless plainly required so to do by the constitution, assume a duty the exercise of which might lead to a miscarriage of justice prejudicial to the interest of a state; Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113.

Where judgment was given on a general demurrer entered for the defendant, and a motion was made to set aside the judgment on the ground that the ordinance of the state upon which it rested was unconstitutional as in conflict with the XIVth Amendment, the constitutional question so raised was set up in time and the supreme court had jurisdiction; Meyer v. Richmond, 172 U. S. 82, 93, 19 Sup. Ct. 106, 43 L. Ed. 374; where the cases are reviewed.

The jurisdiction of the supreme court in cases brought up by writ of error to a state court does not extend to questions of fact or of local laws, which are merely preliminary to or the possible basis of a federal question; Telluride Power Transmission Co. v. Ry. Co., 175 U. S. 639, 20 Sup. Ct. 245, 44 L. Ed. 305. Where rights based on a judgment obtained in one state are asserted in the courts of another under the full faith and credit clause, the power exists in the latter courts to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another state; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897; and where such rights are in due time asserted, the power to decide whether the federal question was raised was rightly disposed of in the court below exists in and involves the exercise of jurisdiction of the supreme court; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366. When the question of the validity of a state statute, with reference to the federal constitution, has been first raised in a federal court, that court has a right to decide it to the exclusion of all other courts; Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

See UNITED STATES COURTS.

FEE. A reward or wages given to one for the execution of his office, or for professional services, as those of a counsellor or physician. Cowell.

Fees differ from costs in this, that the former are, as above mentioned, a recompense to the officer for his services; and the latter, an indemnification to the party for money laid out and expended in his suit; Musser v. Good, 11 S. & R. (Pa.) 248. See Lyon v. McManus, 4 Binn. (Pa.) 167. Fees are synonymous with charges; McPheters v. Morrill, 66 Me. 124.

See CHAMPERTY; ETHICS, LEGAL; ATTORNEY.

That which is held of some superior on condition of rendering him services.

A fee is defined by Spelman (Feuds, c. 1) as the right which the tenant or vassal has to the *use* of lands while the absolute property remains in a superior. But this early and strict meaning of the

word speedily passed into its modern signification of *an estate of inheritance;* 2 Bla. Com. 106; Cowell; *Termes de la Ley;* 1 Washb. R. P. 51; Co. Litt. 1 *b;* 1 Prest. Est. 420; 3 Kent 514. The term may be used of other property as well as lands; Old Nat. Brev. 41.

The term is generally used to denote as well the land itself so held, as the estate in the land, which seems to be its stricter meaning. Wright, Ten. 19, 49; Cowell. The word fee is explained to signify that the land or other subject of property belongs to its owner, and is transmissible, in the case of an individual, to those whom the law appoints to succeed him, under the appellation of heirs; and, in the case of corporate bodies, to those who are to take on themselves the corporate function, and, from the manner in which the body is to be continued, are denominated successors; 1 Co. Litt. 271 *b;* Wright, Ten. 147, 150; 2 Bla. Com. 104, 106.

The compass or circuit of a manor or lordship. Cowell.

A *fee-simple* is an estate limited to a man and his heirs absolutely. See FEE-SIMPLE.

A *fee-tail* is one limited to particular classes of heirs. See FEE-TAIL.

A *determinable fee* is one which is liable to be determined, but which may continue forever. See DETERMINABLE FEE.

A *qualified fee* is an interest given to a man *and certain of his heirs* at the time of its limitation. See QUALIFIED FEE; Kelso v. Stigar, 75 Md. 397, 24 Atl. 18.

A *conditional fee* includes one that is either to commence or determine on some condition; 10 Co. 95 *b;* Prest. Est. 476; Fearne, Cont. Rem. 9. See CONDITIONS; SHELLEY'S CASE, RULE IN.

FEE AND LIFE-RENT. In Scotch Law. Two estates in land—the first of which is the full right of proprietorship, the second the limited right of usufruct during life—may be held together, or may co-exist in different persons at the same time. See Bell, Prin. § 1712; Ersk. Prin. 420; FIAR.

FEE-BILL. A schedule of the fees to be charged by clerks of courts, sheriffs, or other officers, for each particular service in the line of their duties.

FEE EXPECTANT. A name sometimes applied to an estate created where lands are given to a man and his wife and the heirs of their bodies. See also FRANK MARRIAGE.

FEE-FARM. Land held of another in fee, —that is, in perpetuity by the tenant and his heirs at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feoffment. Cowell. Fealty, however, was incident to a holding in fee-farm, according to some authors. Spelman, Gloss.; *Termes de la Ley.*

Land held at a perpetual rent. 2 Bla. Com. 43.

"This term (fee-farm) has difficulties of its own, for it appears in many different guises. A feoffee is to hold *in feofirma, in feufirmam, in fei firmam, in feudo firmam, in feudo firma, ad firmam feodalem,* but most commonly *in feodi firma.* The old English language had both of the words of which this term is compounded, both *feoh* (property) and *feorm* (rent). (But the latter seems to be derived from Low Latin, in which *firma* came to mean a fixed rent or tribute. Skeat, *s. v. farm*). So in the language of France, and in Norman documents, the term may be found in various shapes, *firmam fedium, feudi firmam.* But whatever may be the precise history of the phrase, to hold in fee-farm means to hold heritably at a rent. The fee, the inheritance, is let to farm. This term long struggled to maintain its place by the side of *socage.* The victory of the latter was not complete even in Bracton's day. The complete merger of fee-farm in socage may be due to a statute of Edward I., though the way for it had long been prepared." 1 P. & M. Hist. E. L. 293.

It appears as a separate tenure in Magna Carta and in Bracton and Britton; in the course of the 14th and 15th centuries it became merged in socage. 3 Holdsw. Hist. E. L. 46.

FEE-FARM RENT. The rent reserved on granting a fee-farm. It might be one-fourth the value of the land, according to Cowell; one-third, according to other authors. Spelman, Gloss.; *Termes de la Ley.*

FEE-SIMPLE. An estate of inheritance. Co. Litt. 1 *b;* 2 Bla. Com. 106. The word simple adds no meaning to the word fee standing by itself. But it excludes all qualification or restriction as to the persons who may inherit it as heirs, thus distinguishing it from a fee-tail, as well as from an estate which, though inheritable, is subject to conditions or collateral determination. 1 Washb. R. P. 51; Wright, Ten. 146; 1 Prest. Est. 420; Littleton § 1.

It is the largest possible estate which a man can have, being an absolute estate. It is where lands are given to a man and to his heirs absolutely, without any end or limitation put to the estate. Plowd. 557; 2 Bla. Com. 106; Chal. R. P. 191. See Brackett v. Ridlon, 54 Me. 426; Haynes v. Bourn, 42 Vt. 686.

Where the granting clause of a deed conveys an estate in fee-simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void as a restriction or alienation, general as to time and person, and therefore repugnant to the estate created; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Wilkins v. Norman, 139 N. C. 40, 51 S. E. 797, 111 Am. St. Rep. 767.

In modern estates the terms fee, fee-simple, and fee-simple absolute are substantially synonymous; Jecko v. Taussig, 45 Mo. 170.

The word "heirs" is necessary, in a conveyance, to the creation of a fee-simple, and no expression of intention, in substituted terms, will have an equivalent effect; Sisson v. Donnelly, 36 N. J. L. 434; Edwardsville R. Co. v. Sawyer, 92 Ill. 377; Merritt v. Disney, 48 Md. 344; but see Cole v. Woolen Mfg. Co., 54

N. H. 290; Cromwell v. Winchester, 2 Head (Tenn.) 389; but it is otherwise in a will; Hill v. Hill, 74 Pa. 173, 15 Am. Rep. 545; Arnold v. Brown, 7 R. I. 188.

In the absence of statute, a conveyance of property to a trustee, with power to sell and convey the fee, vests in such trustee an estate in fee-simple, without the use of the word "heirs;" Ewing v. Shannahan, 113 Mo. 188, 20 S. W. 1065. The common-law rule that a fee-simple cannot be conveyed without the word "heirs" does not apply to an exception, or an easement appurtenant to other land of the grantor or of the right to take profit in the soil; Engel v. Ayer, 85 Me. 448, 27 Atl. 352.

FEE-TAIL (Fr. *tailler*, to shorten). An inheritable estate which can descend to certain classes of heirs only. It is necessary that they should be heirs "of the body" of the ancestor, and these are proper words of limitation. It corresponds with the *feudum talliatum* of the feudal law. The estate itself is said to have been derived from the Roman system of restricting estates. 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 66; 2 Bla. Com. 112, n. See, also, Co. 2d Inst. 333; Tudor, Lead. Cas. 607; 4 Kent 14; Chal. R. P. 259; and it is said to exist by virtue of the statute *de donis;* Crabb, R. P. § 971. See, generally, Wight v. Thayer, 1 Gray (Mass.) 286; Jewell v. Warner, 35 N. H. 176; Bone v. Tyrrell, 113 Mo. 175, 20 S. W. 796; Durant v. Muller, 88 Ga. 251, 14 S. E. 612; Brown v. Addison Gilbert Hospital, 155 Mass. 323, 29 N. E. 625; Ray v. Alexander, 146 Pa. 242, 23 Atl. 383.

An estate-tail may be general, *i. e.* limited to the heirs of the body merely; or special, *i. e.* limited to a special class of such heirs, *e. g.* heirs male or heirs female, or those begotten of a certain wife named; Newton v. Griffith, 1 H. & G. (Md.) 111. In the last case specified, if the wife died without issue, the husband was called tenant in tail after possibility of issue extinct.

The restrictions against alienation could be evaded at common law by levying a fine, suffering a recovery. In this country, an entail can generally be barred by deed.

In Pennsylvania, by statute, words which, at common law, would create a fee tail, are to be taken to create a fee simple.

FEED. This word is used in its ordinary sense with reference to cattle and hogs which are said to be made marketable by feeding. Brockway v. Rowley, 66 Ill. 102.

It is also used in the sense of lending additional strength or subsequent support, as "the estate which becomes vested feeds the estoppel;" 5 Man. & Ry. 202, 207; so a subsequent title acquired by the mortgagor is said "to feed the mortgage." See GRAFT.

It is also used in the phrase *feeding of a cow by and on the land* to signify from the land while there is food on it, and with hay by the owner of the land at other times; 2 Q. B. Div. 49.

FEGANGI. An escaping thief caught with stolen goods in his possession. Spel. Gloss.

FEHMGERICHTE. An irregular tribunal which existed and flourished in Westphalia during the thirteenth and fourteenth centuries.

From the close of the fourteenth century its importance rapidly diminished; and it was finally suppressed by Jerome Bonaparte in 1811. See Bork, *Geschichte der Westphalichen Vehmgerichte;* Paul Wigand, Das Fehmgericht Westphaleus.

FEIGNED ACTION. An action brought on a pretended right, when the plaintiff has no true cause of action, for some illegal purpose. In a feigned action the words of the writ are true; it differs from *false action*, in which case the words of the writ are false. Co. Litt. 361, § 689. See FICTITIOUS ACTIONS.

FEIGNED DISEASES. Simulated maladies. Diseases are generally feigned from one of three causes—fear, shame, or the hope of gain. Thus a man engaged in the military or naval service may pretend to be afflicted with various maladies, in order to escape the performance of military duty; the mendicant, to avoid labor and to impose on public or private beneficence; the criminal, to prevent the infliction of punishment. The spirit of revenge, and the hope of receiving exorbitant damages, have also induced some to magnify slight ailments into alarming illness. On this subject, Fodere (vol. ii, 452) observes, at the time when the conscription was in full force in France, "that it is at present brought to such perfection as to render it as difficult to detect a feigned disease as to cure a real one." Zacchias has given five rules for detecting feigned diseases. (1) Inquiry should be made of the relatives and friends of the suspected individual as to his physical and moral habits, and as to the state of his affairs and what may possibly be the motive for feigning disease, particularly whether he is not in immediate danger of some punishment, from which this sickness may excuse him. (2) Compare the disease under examination with the causes capable of producing it; such as the age, temperament, and mode of life of the patient. (3) The aversion of persons feigning disease to take proper remedies. This indeed will occur in real sickness; but it rarely happens when severe pain is present. (4) Particular attention should be paid to the symptoms present, and whether they necessarily belong to the disease. (5) Follow the course of the complaint, and attend to the circumstances which successively occur. Wharton.

FEIGNED ISSUE. An issue brought by consent of the parties, or by the direction of a court of equity, or of such courts as possess equitable powers, to determine before a jury

some disputed matter of fact which the court has not the power or is unwilling to decide. A series of pleadings was arranged between the parties, as if an action had been commenced at common law upon a *bet* involving the fact in dispute. 3 Bla. Com. 452. This is still the practice in most of the states retaining the distinction between the procedure in law and in equity. Under the reformed codes of some states issues may be framed in certain exceptional cases. In England, the practice has been disused since the passing of the stat. 8 and 9 Vict. c. 109, s. 19, permitting any court to refer any question of fact to a jury in a direct form. The act 21 and 22 Vict. c. 27, provided for trial by jury in the court of chancery.

FELAGUS (Lat.). One bound for another by oath; a sworn brother. Du Cange. A friend bound in the decennary for the good behavior of another. One who took the place of the deceased. Thus, if a person was murdered, the recompense due from the murderer went to the father or mother of the deceased; if he had none, to the lord; if he had none, to his *felagus*, or sworn brother. Cunningham, Law Dict.; Cowell; Du Cange.

FELE. See FEAL.

FELLOW. A co-worker. A partaker or sharer of. A companion; associate; comrade. One united in a legal relation. An incorporated member of a college or collegiate foundation (whether in a university or otherwise).

FELLOW-HEIR. A co-heir.

FELLOW-SERVANTS. Those engaged in the same common pursuit, under the same general control. Cooley, Torts 541.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants who take the risk of each other's negligence. Thomp. Negl. 1026. As to the rights and liabilities growing out of this relation, see MASTER AND SERVANT; EMPLOYERS' LIABILITY.

FELO DE SE (Lat.). A felon of himself; a self-murderer. See SUICIDE.

FELON. One convicted and sentenced for a felony.

A felon is infamous, and cannot fill any office or become a witness in any case unless pardoned, except in cases of absolute necessity for his own preservation and defence: as, for example, an affidavit in relation to the irregularity of a judgment in a cause in which he is a party; 2 Stra. 1148; ——— v. Kimborough, 1 N. C. 25; Stark. Ev. pt. 2, tit. *Infamy*. A conviction in one state where the witness is offered in another does not affect his competency; see Com. v. Green, 17 Mass. 515; State v. Ridgely, 2 H. & McH. (Md.) 120, 1 Am. Dec. 372; Clark's Lessee v. Hall, 2 H. & McH. (Md.) 378; Cole's Lessee v. Cole, 1 Harr. & J. (Md.) 572.

A person who has committed a felony, been convicted, served his sentence, and been discharged, has been held to be no longer a felon; 3 Exch. Div. 352.

FELONIA (Lat.). Felony. The act or offence by which a vassal forfeited his fee. Spelman, Gloss.; Calvinus, Lex. *Per feloniam*, with a criminal intention. Co. Litt. 391.

Felonice was formerly used also in the sense of feloniously. Cunningham, Law Dict. See next title.

FELONICE. Feloniously. Cun. Dict. Anciently it was said that this word must be used in all indictments for felony; 4 Bla. Com. 407; and Lord Coke includes it among the *voces artis*,—words of art, which cannot be dispensed with by any periphrasis or circumlocution. 4 Coke 39; Co. Litt. 391 *a*. See FELONIOUSLY.

FELONIOUS. Having the quality of a felony; malignant; malicious; villainous; perfidious. In a legal sense, done with intent to commit a crime, of the nature of a felony; done with deliberate purpose to commit a crime; in a felonious manner, with deliberate intention to commit a crime. State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607.

FELONIOUS HOMICIDE. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com. 188. The mere intention to commit homicide was anciently held to be equally guilty with the commission of the act; Foster, Cr. L. 193; 1 Russ. Cr. 46, note; but it is said that in ancient law the mere attempt to commit a crime was not punishable; 2 Poll. & Maitl. 507. See HOMICIDE; ATTEMPT.

FELONIOUSLY. This is a technical word which at common law was essential to every indictment for a felony, charging the offence to have been committed feloniously; no other word nor any circumlocution could supply its place; Com. Dig. *Indictment* (G 6); Bac. Abr. *Indictment* (G 1); 2 Hale, Pl. Cr. 172, 184; 1 Ben. & H. Lead. Cr. Cas. 154. It is still necessary in describing a common-law felony, or where its use is prescribed by statute; Whart. Cr. Pl. § 260; Bowler v. State, 41 Miss. 570; Cain v. State, 18 Tex. 387; State v. Feaster, 25 Mo. 324; State v. Rucker, 68 N. C. 211; Carder v. State, 17 Ind. 307; State v. Gove, 34 N. H. 510. An indictment for burglary which does not allege that the breaking and entering was "feloniously and burglariously" done is bad, and the defect is not cured by verdict; State v. McClung, 35 W. Va. 280, 13 S. E. 654. In an indictment it is equivalent to purposely or unlawfully; State v. Bush, 47 Kan. 201, 27 Pac. 834, 13 L. R. A. 607.

FELONY. An offence which occasions a total forfeiture of either lands or goods, or both, at common law, to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bla. Com. 94; 1 Russ. Cr. 78; Co. Litt. 391; 1 Hawk. Pl. Cr. c. 37; U. S. v. Smith, 5 Wheat. (U. S.) 153, 5 L. Ed. 57. The essential distinction between felony and misdemeanor is lost in England since the Felony Act of 1870. The distinction there is perfectly arbitrary. At the present day in this country it simply denotes the degree or class of crime committed; 1 Bish. New Cr. L. § 616.

Blackstone derives it from the Saxon *peo* or *peoh*, fee or feud, and the German *lon*, price, as being a crime punishable with the loss of the feud or benefice. 4 Com. 95. But it is observed that this Saxon word originally signified money or goods, and only in a translated sense feud or inheritance; Lye, Sax. Dict.; and another commentator remarks, "as in petit larceny the lands are not liable to escheat, and petit larceny has always been ranked among felonies, a later writer seems inclined to derive it from *pœlen* in the sense of offending. 2 Wooddes. 510." Bac. Abr. *Felony*. In 2 Holdsw. Hist. E. L. 302, it is said to be derived, probably, from the Latin *fell* or *fel*, meaning gall—an offence which is venomous or poisonous, citing 2 Poll. & Maitl. 463. Pothier defines felony as an atrocious wrong committed by a vassal towards his lord, by which the former forfeited his fief to the latter.

In American law the word has no clearly defined meaning at common law, but includes offences of a considerable gravity; People v. Van Steenburgh, 1 Park. Cr. Rep. (N. Y.) 39; Matthews v. State, 4 Ohio St. 542. In general, what is felony under the English common law is such under ours; 1 Bish. Cr. L. § 617; Clark, Cr. L. 33. A crime is not a felony unless so declared by statute, or it was such at the common law; State v. Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. If a statute creates a non-capital offence, not declaring it to be felony, the law will give it the lower grade of misdemeanor; State v. Hill, 91 N. C. 561.

The United States Revised Statutes contain no definition of the word, and the meaning of § 4090, referring to "offences against the public peace amounting to felony under the laws of the United States," is not altogether clear. But in the United States Criminal Code, § 335, all offences punishable by death or by imprisonment for over one year are felonies; all other offenses are misdemeanors. It is defined by statute in many of the states, usually, in effect, that all offences punishable either by death or imprisonment in the state prison shall be felonies. People v. Hughes, 137 N. Y. 29, 32 N. E. 1105; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; U. S. v. Coppersmith, 4 Fed. 198, 2 Flip. 551. Express words or necessary implication are required and doubtful words will not suffice; 1 Bish. New Cr. L. § 622. "When an act of congress makes punishable a crime which under the common law is felony, *a fortiori* when directly or by necessary implication, it declares a thing to be felony, it is felony; but where a national statute creates a non-capital offence, and is silent as to its grade, it is misdemeanor." 1 Bish. New Cr. L. § 671. See U. S. v. Wynn, 9 Fed. 886, which holds that common-law felonies are not within the purview of the constitution unless congress so enacts.

Where a statute permits a milder punishment than imprisonment or death, this discretion does not prevent the offence being felony; People v. War, 20 Cal. 117; State v. Melton, 117 Mo. 618, 23 S. W. 889. See Benton v. Com., 89 Va. 570, 16 S. E. 725; State v. Harr, 38 W. Va. 58, 17 S. E. 794; *contra* in Illinois; Lamkin v. People, 94 Ill. 501. It has also been held that common-law felonies, punishable less severely than the statutory standard, do not, therefore, cease to be felonies; Drennan v. People, 10 Mich. 169; Ward v. People, 3 Hill (N. Y.) 395; but see Carpenter v. Nixon, 5 Hill (N. Y.) 260; 1 Bish. Cr. L. § 620.

Receiving stolen goods was a felony so as to justify arrest without a warrant; Rohan v. Sawin, 5 Cush. (Mass.) 281; Wakely v. Hart, 6 Binn. (Pa.) 316, 2 Term 77. The following have been held not: Adultery; State v. Brunson, 2 Bail. (S. C.) 149; Anderson v. Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; State v. Cooper, 16 Vt. 551; assault with intent to murder; State v. Boyden, 35 N. C. 505; impeding an officer in the discharge of his duty; State v. Noyes, 25 Vt. 415; involuntary manslaughter by negligence; Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698; Com. v. Gable, 7 S. & R. (Pa.) 423; mayhem; Adams v. Barrett, 5 Ga. 404; Com. v. Newell, 7 Mass. 245; perjury; A. v. B., 1 R. M. Charlt. (Ga.) 228; 5 Exch. 378; piracy; 1 Salk. 85; Manro v. Almeida, 10 Wheat. (U. S.) 495, 6 L. Ed. 369. In England none of the maritime crimes were felony; Story, Const. § 1162.

One may be guilty of misprision of felony, but not of a misdemeanor. In misdemeanor or treason one may commit the crime of a principal by procuring another to do the action in his absence; but in felony such person is only an accessory before the fact. A person against whose property a misdemeanor has been committed may sue the offender at once, but in case of felony he must by the better opinion first begin prosecution; 1 Bish. New Cr. L. § 609. Felonies cannot be prosecuted by information; U. S. v. Wynn, 9 Fed. 893. See COMPOUNDING A FELONY.

FELONY ACT. The stat. 33 & 34 Vict. c. 23, abolishing forfeitures for felony, and sanctioning the appointment of *interim curators* and *administrators* of the property of felons. 4 Steph. Com. 10, 459.

FEMALE. The sex which bears the young.

It is a general rule that the young of female animals which belong to us are ours; *fœtus ventrem sequitur*. Inst. 2. 1. 19; Dig. 6. 1. 5. 2. The rule was, in general, the same with regard to slaves; but when a female

slave came into a free state, even without the consent of her master, and was there delivered of a child, the latter was free.

FEME COVERT. A married woman. See MARRIED WOMAN; COVERTURE.

FEME, FEMME. A woman.

FEME SOLE. A single woman, including those who have been married, but whose marriage has been dissolved by death or divorce, and, for most purposes, those women who are judicially separated from their husbands. 2 Steph. Com. 250.

FEME SOLE TRADER. A married woman, who, by the custom of London, trades on her own account, independently of her husband; so called, because, with respect to her trading, she is the same as a *feme sole*. Jacob, Dict.; 1 Cro. 63; 3 Keb. 902; 2 Bish. M. W. § 528. The custom was recognized as common law in South Carolina, but did not extend beyond trading in merchandise; McDaniel v. Cornwell, 1 Hill (S. C.) 429; Newbiggin v. Pillans, 2 Bay (S. C.) 164; under it a woman could not be a *feme sole* carrier; Ewart v. Nagel, 1 McMullan (S. C.) 50. By statute in several states a similar custom is recognized; thus in Pennsylvania, by act of Feb. 22, 1718, the wives of mariners who had gone to sea were recognized as *feme sole* traders when engaged in any work for their livelihood, and by act of May 4, 1855, the benefits of this act are extended to all those wives whose husbands, from drunkenness, profligacy, or other cause, neglect or refuse to provide for them, or desert them; 2 P. & L. Dig. 2895. By the latter act she may make application to the court of common pleas and obtain a decree and certificate that she is authorized to do business under said act; *id.* The act is remedial, and to be construed benignly; Black v. Tricker, 59 Pa. 13; People's Sav. Bank v. Denig, 131 Pa. 241, 18 Atl. 1083. She may convey her real estate by deed in which her husband does not join; Elsey v. McDaniel, 95 Pa. 472. The husband is liable for necessaries. Actual residence with her husband does not take away her privileges under the act; Appeal of Ewing, 101 Pa. 371; and so in South Carolina; Newbriggin v. Pillans, 2 Bay 162.

In North Carolina the doctrine has been rejected; McKinnon v. McDonald, 57 N. C. 1, 72 Am. Dec. 574. In an appeal from the District of Columbia it was said that "the law seems to be settled that when a wife, left by her husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts," whether the husband was banished for crime or abandoned her; but her deed of real estate acquired while a *feme sole* trader was held void; Rhea v. Rhenner, 1 Pet. (U. S.) 105, 7 L. Ed. 72. In California under a sole trader act, excluding from the benefits of the act a married woman carrying on business in her own name, but managed by her husband, it was held that she could not escape liability as sole trader on the ground that she permitted such management; Porter v. Gamba, 43 Cal. 105. See Swett v. Penrice, 24 Miss. 416.

A married woman, authorized by statute to carry on trade on her sole and separate account, is liable on a note given for property purchased for business purposes; the power to make contracts in such business implies the right to conduct it by the means usually employed; Bodine v. Killeen, 53 N. Y. 93; Frecking v. Rolland, *id.* 422; Noel v. Kinney, 106 N. Y. 74, 12 N. E. 351, 60 Am. Rep. 423.

See, generally, Husb. Married Women, c. xi.; 2 Bish. M. W. c. xlii.

FEMICIDE. The killing of a woman. One who kills a woman. See HOMICIDE.

FEMININE. Of or belonging to females.

When the feminine is used, it is generally confined to females; as, if a man bequeathed all his mares to his son, his horses would not pass. See State v. Dunnavant, 3 Brev. (S. C.) 9, 5 Am. Dec. 530.

FENATIO, or FEONATIC. In Forest Law. The fawning of deer; the fawning season. Spelm. Gloss.

FENCE. A building or erection between two contiguous estates, so as to divide them, or on the same estate, so as to divide one part from another. It may be of any material presenting a sufficient obstruction; Allen v. Tobias, 77 Ill. 169; and has been held to include a gate; Estes v. R. Co., 63 Me. 308. See 19 Can. L. J. 204.

Fences are regulated by local laws. At common law a landowner is not bound to fence against cattle; Collins v. Lundquist, 154 Mich. 658, 118 N. W. 596; Wood v. Snider, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912. In general fences on boundaries are to be built on the line, and the cost, when made no more expensively than is required by law, is borne equally between the parties; Norris v. Adams, 2 Miles (Pa.) 337; White v. Snyder, *id.* 395; Heath v. Ricker, 2 Greenl. (Me.) 72; Burrell v. Burrell, 11 Mass. 294; Holladay v. Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678; Sharp v. Curtiss, 15 Conn. 526; Peschongs v. Mueller, 50 Ia. 237. For modifications of the rule, see Palmer v. Silverthorn, 32 Pa. 65; Climer v. Wallace, 28 Mo. 556, 75 Am. Dec. 135. One adjoining land-owner can compel another to contribute to the expense of maintaining a partition fence only when the fence completes an inclosure which contains no other lands than those of the latter; Kingman v. Williams, 50 Ohio St. 722, 36 N. E. 667; Alma Coal Co. v. Cozad, 79 Ohio St. 348, 87 N. E. 172, 20 L. R. A. (N. S.) 1092; Bouchereau v. Guilne, 116 La. 534, 40 South. 863. A partition fence is presumed to be the common property of both owners of the land; 8 B. & C. 257; McCor-

mick v. Tate, 20 Ill. 334; Boenig v. Hornberg, 24 Minn. 307. When built upon the land of one of them it is his; but if it were built equally upon the land of both, at their joint expense, each would be the owner in severalty of the part standing on his own land; 5 Taunt. 20; 2 Greenl. Ev. § 617. See 2 Washb. R. P. 79.

It was held in Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472, and note, that maliciously to erect a fence on one's property to cut off light and air from his neighbor's property is actionable. The opinion of the court and a dissenting opinion discuss the subject on both sides very fully, the latter taking the ground that "malice disconnected with the infringement of a legal right is not actionable."

The same rule was laid down in Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; and in Burke v. Smith, 69 Mich. 380, 37 N. W. 838, Campbell, J., dissenting. The contrary rule was sustained in Koblegard v. Hale, 60 W. Va. 37, 53 S. E. 793, 116 Am. St. Rep. 868, 9 Ann. Cas. 732; Giller v. West, 162 Ind. 17, 69 N. E. 548. The subject is regulated by statute in some states. See Horan v. Byrnes, 72 N. H. 93, 54 Atl. 945, 62 L. R. A. 602, 101 Am. St. Rep. 670; Healey v. Spaulding, 104 Me. 122, 71 Atl. 472; Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Scott v. Wilson, 82 Conn. 289, 73 Atl. 781; Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; Smith v. Morse, 148 Mass. 407, 19 N. E. 393. Under such statutes "malevolence must be the dominant motive"; Barger v. Barringer, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N. S.) 831, 19 Ann. Cas. 472.

A class of cases has arisen, in this country, regarding the *responsibility of railroad companies* for protecting their tracks by fences. In some cases they are required by statute to do so, but unless so required they are not under any obligation to do so, having no other duty than other land-owners; 3 Wood, R. R. 1843; Carper v. Receivers of Norfolk & W. R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135. A railroad company, when not required by law to fence its tracks, in doing so only exercises extraordinary diligence to prevent danger to cattle, and is not liable if it fails to maintain such fence; Chicago, R. I. & P. Ry. Co. v. Woodworth, 1 Ind. T. 20, 35 S. W. 238. When the company is required by statute to fence its track, it is only bound to the exercise of reasonable care in maintaining it; Coe v. R. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. (N. S.) 228, 11 Ann. Cas. 429; Case v. R. Co., 75 Mo. 670; Hendrickson v. R. Co., 68 N. J. L. 612, 54 Atl. 831; a failure renders it liable to an employé for an injury caused thereby; Atchison, T. & S. F. R. Co. v. Reesman, 60 Fed. 370, 9 C. C. A. 20, 23 L. R. A. 768; and see 25 L. R. A. 320, note.

A statutory requirement to fence railroad tracks "to prevent the entrance of cattle upon the road" imposes no duty except as to adjoining owners; Byrnes v. R. Co., 181 Mass. 322, 63 N. E. 897. In New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103, it was held (following the last cited case) that in the absence of legislation there is no legal duty imposed on a railroad company to safeguard children trespassing on its land; and to the same effect, Nolan v. R. Co., 53 Conn. 461, 4 Atl. 106; Western & A. R. Co. v. Rogers, 104 Ga. 224, 30 S. E. 804; Lake Shore & M. S. Ry. Co. v. Liidtke, 69 Ohio St. 384, 69 N. E. 653; McCabe v. Woolen Co., 124 Fed. 287. That such a statute is for the protection of persons as well as live stock is held in some jurisdictions; Rosse v. Ry. Co., 68 Minn. 216, 71 N. W. 20, 37 L. R. A. 591, 64 Am. St. Rep. 472; Nickolson v. Ry. Co., 80 Minn. 508, 83 N. W. 454, where it is said, as the duty to fence is absolute, a violation of such duty is evidence of negligence; Hayes v. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410.

That a landowner must fence his land, if he has reason to think that children may trespass thereon and be injured, is not an established rule of general law to be applied by federal courts, or at the discretion of a jury in such courts, even when sitting in a district where such rule of law prevails; New York Cent. & H. R. R. Co. v. Price, 159 Fed. 330, 86 C. C. A. 502, 16 L. R. A. (N. S.) 1103.

The Virginia fence act was held to impose a duty only to the owners of stock and not to the railroad's employés; and the violation of the act was held no ground of recovery for the death of an employé, killed by the derailing of his train by cattle which came upon the track at a place where the right of way was not fenced. Carper v. R. Co., 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135. The court distinguished the cases of Briggs v. Ry. Co., 111 Mo. 173, 20 S. W. 32; Dickson v. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527, as arising under a special statute.

Mandamus is the proper remedy to compel the performance of the statutory duty; 12 L. R. A. 180, note.

The power of the states to require such fencing by statute is fully sustained; Gulf, C. & S. F. Ry. Co. v. Rowland, 70 Tex. 298, 7 S. W. 718; 35 Am. & Eng. R. R. Cas. 286; and the extent and manner of it are within the legislative discretion; Chicago, M. & St. P. R. Co. v. Dumser, 109 Ill. 402; such statutes are valid under the police power; Chicago, M. & St. P. R. Co. v. Dumser, 109 Ill. 402; Peoria, D. & E. Ry. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619; Chicago & N. W. Ry. Co. v. City of Chicago, 140 Ill. 309, 29 N. E. 1109; Emmons v. Ry. Co., 35 Minn. 503, 29 N. W. 202; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Pennsylvania R. Co. v. Riblet, 66 Pa. 164, 5 Am. Rep. 360; Gorman v. R. R.,

26 Mo. 441, 72 Am. Dec. 220; (a leading case collecting authorities and approving Thorpe v. R. Co., 27 Vt. 141, 62 Am. Dec. 625;) and are not unconstitutional as imposing expense on one for the sole benefit of another; Barnett v. R. Co., 68 Mo. 56, 30 Am. Rep. 773.

As a means of compelling railroads to fence their tracks statutes have been enacted in many states making them absolutely liable in damages for killing stock, by analogy to the similar statutes respecting damage by fires from locomotives (*q. v.*); but such statutes have generally been construed to require only that railroad companies should use reasonable care; Antisdel v. Ry. Co., 26 Wis. 145, 7 Am. Rep. 44; Murray v. R. Co., 3 Abb. App. Dec. (N. Y.) 339; Coe v. Ry. Co., 101 Minn. 12, 111 N. W. 651, 11 L. R. A. (N. S.) 228, 11 Ann. Cas. 429; Zeigler v. R. R. Co., 58 Ala. 594; Jensen v. Ry. Co., 6 Utah 253, 21 Pac. 994, 4 L. R. A. 724; Bielenberg v. Ry. Co., 8 Mont. 271, 20 Pac. 314, 2 L. R. A. 813; Thompson v. R. Co., 8 Mont. 279, 21 Pac. 25; State v. Divine, 98 N. C. 778, 4 S. E. 477; Wadsworth v. Ry. Co., 18 Colo. 600, 33 Pac. 515, 23 L. R. A. 812, 36 Am. St. Rep. 309; Kansas Pac. Ry. Co. v. Mower, 16 Kan. 573; Oregon Ry. & Nav. Co. v. Smalley, 1 Wash. 206, 23 Pac. 1008, 22 Am. St. Rep. 143, 25 L. R. A. 320, note.

In some states the common law requiring the owner of cattle to keep them within a sufficient enclosure is held not to be in force; Buford v. Houtz, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618; and in such case a railroad company, while not required to fence, and fully authorized to transact its lawful business on its track, must exercise reasonable care to avoid injuring cattle which have wandered on their premises, and is liable for accidents which by ordinary care could have been prevented; New Orleans, J. & G. N. R. Co. v. Field, 46 Miss. 573; Alabama G. S. Ry. Co. v. McAlpine, 71 Ala. 545; Isbell v. R. Co., 27 Conn. 393, 71 Am. Dec. 78; Western Maryland R. Co. v. Carter, 59 Md. 306; Trow v. R. Co., 24 Vt. 487, 58 Am. Dec. 191; Donovan v. R. Co., 89 Mo. 147, 1 S. W. 232. Where it is the duty of the company, arising out of the contract, to fence its track, a failure to comply with the terms of such contract renders the company liable for all injuries to animals consequent thereon. See DEPOT GROUNDS.

See, generally, as to fencing railroads; 3 Wood, R. R. §§ 417, 421, where the cases are collected; 5 L. R. A. 737, note, and 8 L. R. A. 135, note, both citing statutes and decisions; 11 L. R. A. 427, note (Missouri statutes and decisions); Whart. Negl. 892; Parker v. Ry. Co., 93 Mich. 607, 53 N. W. 834; Chicago, B. & Q. R. Co. v. Finch, 42 Ill. App. 90; Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051, 7 L. R. A. 527; Dickson v. R. Co., 124 Mo. 140, 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429.

It is held that one is not necessarily negligent in using a barbed wire fence, but it should be so used and cared for as not to endanger persons and property, and the use of such fences imposes upon those who use them care reasonably proportionate to their danger; Sisk v. Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213; a railroad company using barbed fences must use due diligence in running its trains, not only to avoid killing stock, but to avoid precipitating them by fright against the fence to be mangled or bruised; Atlanta & W. P. R. Co. v. Hudson, 62 Ga. 680. On his own land one may maintain such a fence, and it is not illegal; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520, affirming Davis v. Davis, 70 Tex. 123, 7 S. W. 826; and expressly disapproving Williams v. Mudgett, 2 Tex. Unrep. Cas. 254; s. c. 2 Tex. L. Rev. 338 (commented on, 29 Alb. L. J. 23), in which it was held that "such fences are dangerous unless constructed with planks in connection with the wire." But this case was also reviewed with all analogous cases in 8 Ont. H. B. Div. 583; where it was held that it was not negligence *per se* to maintain such fences and they were not a nuisance. The owner is bound to keep the wires properly stretched and not hanging loose; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395; Sisk v. Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213. See 10 N. J. L. J. 43. One who has allowed the use of his land by the public before stretching a barbed wire fence across the way is bound to give notice, in order to escape liability for injury resulting from ignorance of the obstruction; Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559. If it was negligence to maintain such a fence near a private road, it would be negligence in a person riding a horse difficult to control, to approach it; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520. See ANIMAL.

In Scotch Law. To hedge in or protect by certain forms. *To fence a court*, to open in due form. Pitcairn, Cr. Law, pt. 1, p. 75.

FENCE-MONTH. A month in which it is forbidden to hunt in the forest. It begins fifteen days before midsummer and ends fifteen days after. Manw. For. Laws, c. 23. There were also fence-months for fish. Called, also *defence-month*, because the deer are then defended from "scare or harm." Cowell; Spelman, Gloss.

FENDER. A guard or protection against danger. Cape May, D. B. & S. P. R. Co. v. Cape May, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653. To require their use on electric cars is within the powers conferred on a city council. *id.* See MUNICIPAL ORDINANCE.

FENERATION. The action or practice of lending on interest; usury. In some modern dictionaries, applied to interest on money lent. See Colebrook, Dig. Hindu Law, I. 7.

FENGELD (Sax.). A tribute exacted for repelling enemies. Spelman, Gloss.

FEOD. Said to be compounded of the two Saxon words *feoh* (stipend) and *odh* (property); by others, to be composed of *feoh* (stipend) and *hod* (condition). 2 Bla. Com. 45; Spelman, Gloss. See FEE; FEUD.

FEODAL. Belonging to a fee or feud; feudal. More commonly used by the old writers than *feudal*.

FEODAL ACTIONS. Real actions. 3 Bla. Com. 117.

FEODAL LAW. Feodal system. See FEUDAL LAW.

FEODALITY. Fidelity or fealty. Cowell. See FEALTY.

FEODARUM, or FEUDARAM CONSUETUDINES. See FEUDAL LAWS.

FEODARY. An officer in the court of wards, appointed by the master of that court, by virtue of the statute 32 Hen. VIII. c. 46, to be present with the escheator at the finding offices and to give in evidence for the king as to value and tenure. He was also to survey and receive rents of the ward-lands and assign dower to the king's widows. The office was abolished by stat. 12 Car. II. c. 24; Kennett, Gloss.; Cowell.

FEODATORY, or FEUDATORY. The grantee of a feud or fee. The tenant or vassal who held an estate by feudal service. *Termes de la Ley;* 2 Bla. Com. 46.

FEODI FIRMA (L. Lat.). Fee-farm, which see.

FEODUM. The form in use by the old English law-writers instead of *feudum*, and having the same meaning. *Feudum* is used generally by the more modern writers and by the *feudal* law-writers. Littleton § 1; Spelman, Gloss. There were various classes of *feoda*. See FEUDUM.

FEOFFAMENTUM. A feoffment. 2 Bla. Com. 310.

FEOFFARE. To bestow a fee. 1 Reeve, Hist. Eng. Law 91.

FEOFFATOR. A feoffor; he who gives or grants a fee, or who makes a feoffment. Bract. fols. 12 *b*, 81.

FEOFFATUS. A feoffee; one to whom a fee is given or a feoffment made. Bract. fols. 17 *b*, 44 *b*.

FEOFFEE. He to whom a fee is conveyed. Littleton § 1; 2 Bla. Com. 20.

FEOFFEE TO USES. A person to whom land was conveyed for the use of a third party. One holding the same position with reference to a use that a trustee does to a trust. 1 Greenl. Cruise, Dig. 333. He answers to the *hæres fiduciarius* of the Roman law. See FEOFFMENT TO USE.

FEOFFMENT. A gift of any corporeal hereditaments to another. It operates by transmutation of possession; and it is essential to its completion that the seisin be passed. Watk. Conv. 183.

The conveyance of a corporeal hereditament either by investiture or by livery of seisin. 1 Sullivan, Lect. 143; 1 Washb. R. P. 33; Chal. R. P. 363.

A gift of a freehold interest in land accompanied by livery of seisin. In mediæval days it was the normal mode of transferring a freehold interest in land of free tenure. The essential part is the livery of seisin. 3 Holdsw. Hist. E. L. 187.

The instrument or deed by which such hereditament is conveyed.

This was one of the earliest modes of conveyance used in the common law. It signified originally the grant of a fee or feud; but it came in time to signify the grant of a free inheritance in fee, respect being had rather to the perpetuity of the estate granted, than to the feudal tenure; 1 Reeve, Hist. Eng. Law 90. The feoffment was likewise accompanied by livery of seisin; 1 Washb. R. P. 33. The conveyance by feoffment with livery of seisin has become infrequent, if not obsolete, in England, and in this country has not been used in practice; Dane, Abr. c. 104; Stearn, Real Act. 2; Green v. Liter, 8 Cra. (U. S.) 229, 3 L. Ed. 545.

Formerly the use of writing was the exception; after the Conquest it became more frequent. Writing was not required until the statute of frauds; 3 Holdsw. Hist. E. L. 187.

FEOFFMENT TO USE. A feoffment of lands made to one person for the benefit or to the use of another. In such case the feoffee was bound in conscience to hold the lands according to the use, and could himself derive no benefit. Sometimes such feoffments were made to the use of the feoffer. The effect of such conveyance was entirely changed by the statute of uses. See Wms. R. P. (6th ed.) 155; USE. Since that statute, a feoffment directed to operate to the use of any other person than the feoffee, though it be a common-law conveyance, so far as it conveys the land to the feoffee, derives its effect from the statute of uses, so far as the use is limited by it to the person or persons in whose favor it is declared. Thus, if A be desirous to convey to B in fee, he may do so by enfeoffing a third person, C, to hold to him and his heirs to the use of B and his heirs, the effect of which will be to convey the legal estate in fee-simple to B. For since the statute of uses, the legal estate passes to the feoffee by means of the livery as it would have done before; but no sooner has this taken place than the limitation to uses begins to operate, and C thereby becomes seised to the use defined or limited, the consequence of which is that by force of the legislative enactment the legal

estate is *eo instanti* taken out of him, and vests in B, for the like interest as was limited in the use. B thus becomes the legal tenant as effectually as if the feoffment had been made to himself, and without the intervention of a trustee. This method is not much practised in consequence of the livery of seisin, which has become obsolete. See 2 Sand. Us. 13; Watk. Conv. 288; FEOFFMENT.

FEOFFOR. He who makes a feoffment. 2 Bla. Com. 20; Litt. § 1.

FEOH (Sax.). A reward; wages; a fee. The word was in common use in these senses. Spelman, Feuds.

FEORME. A certain portion of the produce of the land due by the grantee to the lord according to the terms of the charter. Spelman, Feuds c. 7.

FERÆ BESTIÆ. Wild beasts.

FERÆ NATURÆ (Lat. of a wild nature; untamed). A term used to designate animals not usually tamed, or not regarded as reclaimed so as to become the subject of property.

Such animals belong to the person who has captured them only while they are in his power; for if they regain their liberty his property in them instantly ceases, unless they have *animum revertendi*, which is to be known only by their habit of returning; 2 Bla. Com. 386; Wallis v. Mease, 3 Binn. (Pa.) 546; Brooke, Abr. *Propertie* 37; Com. Dig. *Biens*, F; 7 Co. 17 *b*; Inst. 2. 1. 15; [1896] 1 Q. B. 166.

Property in animals *feræ naturæ* is not acquired by hunting them and pursuing them; if, therefore, another person kills such animal in the sight of the pursuer, he has a right to appropriate it to his own use; Pierson v. Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264. But if the pursuer brings the animal within his own control, as by entrapping it or wounding it mortally, so as to render escape impossible, it then belongs to him; *id.*; though if he abandons it another person may afterwards acquire property in the animal; Buster v. Newkirk, 20 Johns. (N. Y.) 75. The owner of land has a qualified property in animals *feræ naturæ* when, in consequence of their inability and youth, they cannot go away. See Year B. 12 Hen. VIII. (9 B, 10 A); 2 Bla. Com. 394; Bacon, Abr. *Game*.

A Louisiana statute was held constitutional which prescribed that dogs are only to be regarded as personal property when recorded on assessment rolls. The court said: "The very fact that they are without protection of the criminal laws shows that property in dogs is an imperfect or qualified nature, and that they stand, as it were, between animals *feræ naturæ*, in which until subdued there is no property, and domestic animals, in which the right of property is complete." Sentell v. R. Co., 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169. See GAME; ANIMALS.

FERDELLA TERRÆ. A fardel land; ten acres; or perhaps a yard-land. Cowell.

FERDINGUS. Apparently a freeman of the lowest class, being named after the *cotseti*. Anc. Inst. Eng.

FERDWITE. An acquittance of manslaughter committed in the army; also a fine imposed on persons for not going forth on a military expedition. Cowell.

FERIA (Lat.). **In Old English Law.** A week-day; a holiday; a day on which process may not be served; a fair; a ferry. Du Cange; Spelman, Gloss.; Cowell; 4 Reeve, Hist. Eng. Law 17.

FERIÆ (Lat.). **In Civil Law.** Holidays. Numerous festivals were called by this name in the early Roman empire. In the later Roman empire the single days occurring at intervals of a week apart, commencing with the seventh day of the ecclesiastical year, were so called. Du Cange.

All *feriæ* were *dies nefasti*. They were divided into two classes,—"*feriæ publicæ*" and "*feriæ privatæ*." The latter were only observed by single families or individuals in commemoration of some particular event which had been of importance to them or their ancestors. Smith, Dict. Antiq.

FERIAL DAYS. Originally and properly, days free from labor and pleading. In statute 27 Hen. VI. c. 5, working-days. Cowell.

FERLING. In English Law. The fourth part of a penny; also, the quarter of a ward in a borough.

FERLINGATA. A fourth part of a yard-land.

FERLINGUS, or FERLINGUM. A furlong. Co. Litt. 5 *b*.

FERM, or FEARM. A house or land, or both, let by lease. Cowell.

FERME (Sax.). A farm; a rent; a lease; a house or land, or both, taken by indenture or lease. Plowd. 195; Vicat, Voc. Jur.; Cowell. See FARM.

FERMER, FERMOR. A lessee; a farmer. One who holds a term, whether of lands or an incorporeal right, such as customs or revenue.

FERMIER. In French Law. One who farms any public revenue.

FERMISONA. The winter season for killing deer.

FERNIGO. In English Law. A waste ground or place where ferns grow. Cowell.

FERRATOR. A farrier (*q. v.*).

FERRIAGE. The toll or price paid for the transportation of persons and property across a ferry. People v. R. Co., 35 Cal. 606.

FERRUERE. The shoeing of horses. Kelham.

FERRY. A liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. State v. Wilson, 42 Me. 9; State v. Freeholders of Hudson County, 23 N. J. L. 206; Woolr. Ways 217. The term is also used to designate the place where such liberty is exercised; Chapelle v. Wells, 4 Mart. La. (N. S.) 426. Ferry properly means a place of transit across a river or arm of the sea; but in law it is treated as a franchise, and defined as the exclusive right to carry passengers across a river, or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another. It is not a servitude or easement. It is wholly unconnected with the ownership or occupation of land, so much so that the owner of the ferry need not have any property in the soil adjacent on either side. 12 C. B. N. S. 32.

In a strict sense a ferry is a continuation of a highway from one side of the water to the other and is for the transportation of passengers, vehicles and other property; Mayor, etc., of New York v. Starin, 106 N. Y. 11, 12 N. E. 631; Broadnax v. Baker, 94 N. C. 675, 55 Am. Rep. 633. A boat equipped with tracks for railroad cars and exclusively used for their transportation as a part of a through railroad line is not an ordinary ferry, but is essentially a part of interstate commerce; St. Clair County v. Transfer Co., 192 U. S. 454, 24 Sup. Ct. 300, 48 L. Ed. 518.

The point of departure was held to be the home of the ferry where it crossed the river which was the boundary between Ohio and West Virginia, although the jurisdiction of West Virginia extended to low-water mark on the Ohio side; State v. Faudre, 54 W. Va. 122, 46 S. E. 269, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104.

An exclusive right of ferry exists where one acquires the sole and exclusive privilege of taking tolls for such service. The element of receiving payment is essential, as one may lawfully transport his own goods in a boat, where an exclusive right of ferry is held by another; Alexandria, W. & K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535.

In England, ferries are established by royal grant or by prescription, which is an implied grant; in the United States, by legislative authority, exercised either directly or by a delegation of powers to courts, commissioners, or municipalities; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; *id.*, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Wethersfield v. Humphrey, 20 Conn. 218; Day v. Stetson, 8 Greenl. (Me.) 365; Cloyes v. Keatts, 18 Ark. 19. Without such authority no one, though he may be the owner of both banks of the river, has the right to keep a public ferry; Stark v. Miller, 3 Mo. 470; Trustees of Schools v. Tatman, 13 Ill. 27; Young v. Harrison, 6 Ga. 130; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Willes 508; though after twenty years' uninterrupted use such authority will be presumed to have been granted; Pipkin v. Wynns, 13 N. C. 402; Stark v. McGowen, 1 N. & McC. (S. C.) 389; Mills v. St. Clair County Com'rs, 3 Scam. (Ill.) 53; Williams v. Turner, 7 Ga. 348; but see Scott v. Wilson, 11 S. W. 303, 10 Ky. L. Rep. 940. The franchise of a ferry will, in preference, be granted to the owner of the soil, but may be granted to another; and by virtue of the right of eminent domain the soil of another may be condemned to the use of the ferry, upon making just compensation; 6 B. & C. 703; Allen v. Farnsworth, 5 Yerg. (Tenn.) 189; Sparks v. White, 7 Humph. (Tenn.) 86; Pipkin v. Wynns, 13 N. C. 403; Harrison v. Young, 9 Ga. 359; Harvie v. Cammack, 6 Dana (Ky.) 242; Warner v. Mfg. Co., 123 Ky. 103, 93 S. W. 650, 12 L. R. A. (N. S.) 667; Day v. Stetson, 8 Greenl. (Me.) 365; In re Hanson, 2 Cal. 262. If the *termini* of the ferry be a highway, the owner of the fee will not be entitled to compensation; 3 Kent 421; Chosen Freeholders of Hudson County v. State, 24 N. J. L. 718; Somerville v. Wimbish, 7 Gratt. (Va.) 205; though in Pennsylvania and other states a different doctrine prevails; Cooper v. Smith, 9 S. & R. (Pa.) 31, 11 Am. Dec. 658; Chess v. Manown, 3 Watts (Pa.) 219; Pearsall v. Post, 20 Wend. (N. Y.) 111; 4 Am. L. Reg. N. S. 520; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 387. See EMINENT DOMAIN.

One state has the right to establish ferries over a navigable river separating it from another state or from a foreign territory, though its jurisdiction may extend only to the middle of such river; and the exercise of this right does not conflict with the provision in the constitution of the United States conferring upon congress the power "to regulate commerce with foreign nations and among the several states," nor with any law of congress upon that subject; Corporation of Memphis v. Overton, 3 Yerg. (Tenn.) 387; State v. Freeholders of Hudson County, 23 N. J. L. 206; Mills v. County of St. Clair, 2 Gilm. (Ill.) 197; Tugwell v. Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. In Conway v. Taylor, 1 Black (U. S.) 603, 17 L. Ed. 191, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side. In Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 2 Sup. Ct. 257, 27 L. Ed. 419, a state was held to have the power to impose a license fee upon ferry keepers living in the state for boats which they owned and used in convey-

ing from a landing in the state passengers and goods across a navigable river to another state, and this was not a regulation of commerce; but a tax upon persons owning and running tow boats from the Gulf of Mexico to New Orleans was held void as a regulation of commerce; Moran v. New Orleans, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653. In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158, Pennsylvania attempted to tax the capital stock of a corporation the business of which was the ferrying of passengers and freight across the Delaware river to New Jersey. The ferry boats were registered in New Jersey and were taxable there. The court held it to be an interference with interstate commerce. In Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513, a Kentucky corporation operating a ferry across the Ohio river was held to be deprived of its property without due process of law by the action of Kentucky in including for purposes of taxation in the valuation of the franchise derived by the corporation from Kentucky the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired. No portion of the business of a ferry which is part of an interstate railway is under the control of the state; the state authorities have no power to regulate the fares of passengers whether railroad passengers or not; New York Cent. & H. R. R. Co. v. Board of Freeholders, 227 U. S. 248, 33 Sup. Ct. 269, 57 L. Ed. ——, reversing New York Cent. & H. R. R. Co. v. Board of Freeholders, 76 N. J. L. 664, 74 Atl. 954, 16 Ann. Cas. 858. The granting of a temporary license to operate a ferry within the city limits, is valid; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884. A state may at its pleasure erect a new ferry so near an older ferry as to impair or destroy the value of the latter by drawing away its custom, unless the older franchise be protected by the terms of its grant; In re Fay, 15 Pick. (Mass.) 243; Carter v. Kalfus, 6 Dana (Ky.) 43; Shorter v. Smith, 9 Ga. 517; West River Bridge Co. v. Dix, 6 How. (U. S.) 507, 12 L. Ed. 535; Fanning v. Gregoire, 16 How. (U. S.) 524, 14 L. Ed. 1043; Mills v. St. Clair County, 2 Gil. (Ill.) 197; Green v. Ivey, 45 Fla. 338, 33 South. 711; Davis v. Police Jury, 1 La. Ann. 288; Mayor, etc., of City of Columbus v. Rodgers, 10 Ala. 37; Costar v. Brush, 25 Wend. (N. Y.) 628. See Bridgewater Ferry Co. v. Bridge Co., 145 Pa. 404, 22 Atl. 1039; Wheeling & B. Bridge Co. v. Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

A ferry franchise is not infringed by the grant of a bridge franchise, though the bridge diverts the travel from an ancient ferry; [1908] 1 Ch. 41. But if an individual, without authority from the state, erect a new ferry so near an older ferry, lawfully established, as to draw away the custom of the latter, such individual will be liable to an action on the case for damages, or to a suit in equity for an injunction in favor of the owner of the latter; 6 M. & W. 234; Nixon v. Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315; Harrell v. Ellsworth, 17 Ala. 584; City of Newport v. Taylor's Ex'rs, 16 B. Monr. (Ky.) 699; Taylor v. R. Co., 49 N. C. 277; Long v. Beard, 7 N. C. 57; but he may transport his own goods in his own boats where another has an exclusive right of ferry; Alexandria, W. & K. Ferry Co. v. Wisch, 73 Mo. 655, 39 Am. Rep. 535; Capital City Ferry Co. v. Transp. Co., 51 Mo. App. 228; Tugwell v. Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654. He may not, however, offer the free use of his boats to his customers as an inducement to secure their trade where he thereby diverts their patronage from a lawfully established ferry; Inhabitants of Peru & Dixfield v. Barrett, 100 Me. 213, 60 Atl. 968, 70 L. R. A. 567, 109 Am. St. Rep. 494. The grant to a city by the legislature of the right of licensing ferries, does not empower the city to grant exclusive ferry privileges; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

The franchise of a ferry is an incorporeal hereditament, and as such it descends to heirs, is subject to dower, may be leased, sold, and assigned; 5 Com. Dig. 291; 12 East 334; Bowman v. Wathen, 2 McLean, 376, Fed. Cas. No. 1,740; Stark v. Miller, 3 Mo. 470; Garrett v. Ricketts, 9 Ala. 529; Capital City Ferry Co. v. Transp. Co., 51 Mo. App. 228; McCearly v. Swayze, 65 Miss. 351, 3 South. 657; and when created by act of the legislature can be conveyed only by deed; Gunterman v. People, 138 Ill. 518, 28 N. E. 1067; but, nevertheless, being a franchise in which the public have rights and interests, it is subject to legislative regulation for the enforcement and protection of such rights and interests; Cooley, Const. Lim. 732; Benson v. Mayor, etc., 10 Barb. (N. Y.) 223; Chosen Freeholders of Hudson Co. v. State, 24 N. J. L. 718; City of New Newport v. Taylor's Heirs, 11 B. Monr. (Ky.) 361.

The owners of ferries are common carriers, and liable as such for the carriage of the goods and persons which they receive upon their boats. They are bound to have their ferries furnished with suitable boats, and to be in readiness at all proper times to transport all who apply for a passage; Ang. High. 437; Wallen v. McHenry, 3 Humphr. (Tenn.) 245; Pomeroy v. Donaldson, 5 Mo. 36; Fisher v. Clisbee, 12 Ill. 344; May v. Hanson, 5 Cal. 360, 63 Am. Dec. 135; 10 M. & W. 161; Evans v. Rudy, 34 Ark. 383; Koretke v. Irwin, 100 Ala. 323, 13 South. 943, 21 L. R. A. 787. They must have their flats so made and so guarded with railings that all drivers with horses and carriages may safely enter thereon; and as soon as the carriage and horses are fairly on the drops or

slips of the flat, and during their transportation, although driven by the owner or his servant, they are in the possession of the ferryman, and the owners of the ferry are answerable for the loss or injury of the same unless occasioned by the fault of the driver; Cohen v. Hume, 1 McCord (S. C.) 439; 16 E. L. & Eq. 437; Albright v. Penn, 14 Tex. 290; Richards v. Fuqua's Adm'rs, 28 Miss. 792, 64 Am. Dec. 121; Wilson v. Hamilton, 4 Ohio St. 722; White v. Winnisimmet Co., 7 Cush. (Mass.) 155; they are not required to have railings at the end of their boats when not in actual use, so as to prevent runaway teams from entering and passing over the same to the river; Evans v. Goodrich, 46 Minn. 388, 49 N. W. 188; see NEGLIGENCE; but it is also well settled that if the owner retains control of the property himself and does not surrender the charge to the ferryman, such strict liability does not attach, and he is only responsible for actual negligence; Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Wyckoff v. Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650; 10 M. & W. 546; 36 Am. Rep. 504, n. See Printup v. Patton, 91 Ga. 422, 18 S. E. 311. If the ferry be rented, the tenant and not the owner is subject to these liabilities, because such tenant is *pro hac vice* the owner; Biggs v. Ferrell, 34 N. C. 1; Norton v. Wiswall, 26 Barb. (N. Y.) 618; Felton v. Deall, 22 Vt. 170, 54 Am. Dec. 61. See article in 4 Am. L. Reg. N. S. 517; 19 *id.* 148; Washb. Easements; Ang. Water Courses.

See COMMERCE; TAXATION; RATES.

FERRYMAN. One employed in taking persons across a river or other stream, in boats or other contrivances, at a ferry. Covington Ferry Co. v. Moore, 8 Dana (Ky.) 158.

FERTILIZERS. The manufacture of fertilizer is a lawful business. The materials necessary to its composition, though objectionable and unwholesome, are property. So long as a municipal corporation allows such an industry within its limits, it cannot forbid the importation of materials requisite for its production; Fulton v. Norteman, 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. (N. S.) 1196. But a board of health may forbid the use of certain materials for fertilizing purposes, if injurious to the public health; Naccari v. Rappelet, 119 La. 272, 44 South. 13, 13 L. R. A. (N. S.) 640.

FESTA IN CAPPIS. In Old English Law. Grand holidays, on which choirs were accustomed to wear caps. Jac. L. Dict.

FESTING-MAN. A bondsman; a surety; a pledge; a frank-pledge. It was one privilege of monasteries that they should be free from *festing-men*, which Cowell explains to mean not to be bound for any man's forthcoming who should transgress the law. Cowell.

FESTING-PENNY. Earnest (*q. v.*) given to servants when hired or retained. The same as *arles-penny*. Cowell.

FESTINUM REMEDIUM (Lat. a speedy remedy). A term applied to those cases where the remedy for the redress of an injury is given without any unnecessary delay. Bacon, Abr. *Assise*, A. The action of dower is *festinum remedium*, and so is that of assise.

FESTUCA. In Frankish Law. A rod or staff or (as described by other writers) a stick, on which imprecatory runs were cut, which was used as a gage or pledge of good faith by a party to a contract, or for symbolic delivery in the conveyance or quit-claim of land, before a court of law, anterior to the introduction of written documents by the Romans. 2 Poll. & Maitl. 86, 184, 190; Maitl. Domesday Book and Beyond 323.

FESTUM (Lat.). A feast, a holiday, a festival.

FETTERS. A sort of iron put on the limbs of a malefactor or a person accused of crime.

When a prisoner is brought into court to plead, he shall not be put in fetters; Co. 2d Inst. 315; Co. 3d Inst. 34; 2 Hale, Pl. Cr. 119; Kel. 10; 1 Chitty, Cr. Law 417; 4 Bla. Com. 322; it is usual to remove them at the trial; Faire v. State, 58 Ala. 74; State v. Lewis, 19 Kan. 260, 27 Am. Rep. 113; to retain them is justifiable only where a reasonable necessity exists; 59 J. P. 393, per Russell, C. J.; or where it is necessary to prevent an escape; 4 B. & C. 596. In commenting on these cases, it is said that it is justified only with a prisoner of notoriously bad character, or dangerous, or the offense is grave, or there is an attempt to escape; 29 Chi. L. News 88.

In the first case in this country in which the old common-law doctrine was considered and enforced, the court held that to try a prisoner in shackles was to deprive him of his rights, and that a conviction, under such circumstances, would be reversed; People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296, followed in State v. Kring, 64 Mo. 591 (affirming State v. Kring, 1 Mo. App. 438). A single expression on this subject seems to be opposed to these cases. An English writer, commenting on the action of a barrister who withdrew and refused to proceed with a case because the judge ordered his client fettered during the trial, considers the removal of fetters to be a mere matter of courtesy, being designed to relieve the prisoner, so far as is practicable, from all that might enlist prejudice against him or disturb his self-possession, and that such removal cannot be considered a matter of right; 43 L. T. 390.

An officer having arrested a defendant on a civil suit, or a person accused of a

crime, has no right to handcuff him unless it is necessary or he has attempted to make his escape; 4 B. & C. 596. It is not conclusive on a question of escape that the arresting officer did not handcuff the prisoner; State v. Hunter, 94 N. C. 829. See PRISONER.

FEU. **In Scotch Law.** A holding or tenure where the vassal in place of military service makes his return in grain or money. Distinguished from wardholding, which is the military tenure of the country. Bell, Dict.; Erskine, Inst. lib. ii. tit. 3, § 7.

FEU ANNUALS. **In Scotch Law.** The *reddendo*, or annual return from the vassal to a superior in a feu holding. Wharton, Dict., 2d Lond. ed.

FEU ET LIEU (Fr.). **In Old French Canadian Law.** Hearth and home, meaning actual settlement by a tenant on the land.

FEU HOLDING. A holding by tenure of rendering grain or money in place of military service. Bell, Dict.

FEUAR. **In Scotch Law.** The tenant or vassal of a feu. Bell, Dict.

FEUD. Land held of a superior on condition of rendering him services. 2 Bla. Com. 106.

A hereditary right to use lands, rendering services therefor to the lord, while the property in the land itself remains in the lord. Spelman, Feuds c. 1.

The same as *feod*, fief, and *fee*. 1 Sullivan, Lect. 128; 1 Spence, Eq. Jur. 34; Dalrymple, Feud. Pr. 99; 1 Washb. R. P. 18; Mitch. R. P. 80.

In Scotland and the north of England, a combination of all the kin to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley;* Whishaw. See FEUDUM.

FEUDA. Fees.

FEUDAL ACTIONS. See FEODAL ACTIONS.

FEUDAL COURTS. In the 12th century a lord *qua* lord, had the right to hold a court for his tenants; in the 13th century, they became of less importance and for three reasons: The feudal principle would have led to a series of courts one above the other, and the dominions of the large landowners were usually scattered, so that great feudal courts became impossible. The growth of the jurisdiction of the king's court removed the necessity for feudal courts. All the incidents of the feudal system came to be regarded in a commercial spirit—as property. Its jurisdiction became merely appendant to landowning. 1 Holdsw. Hist. E. L. 64.

FEUDAL LAW, FEODAL LAW. A system of tenures of real property which prevailed in the countries of western Europe during the Middle Ages, arising from the peculiar political condition of those countries, and radically affecting the law of personal rights and of movable property.

Although the feudal system has never obtained in this country, and is long since extinct throughout the greater part of Europe, some understanding of the theory of the system is essential to an accurate knowledge of the English constitution, and of the doctrines of the common law in respect to real property. The feudal tenure was a right to lands on the condition of performing services and rendering allegiance to a superior lord. It had its origin in the military immigrations of the Northmen, who overran the falling Roman empire. Many writers have sought to trace the beginning of the system in earlier periods, and resemblances more or less distinct have been found in the tenures prevailing in the Roman republic and empire, in Turkey, in Hindustan, in ancient Tuscany, as well as in the system of Celtic clanship. Hallam, Mid. Ag. vol. 1; Stuart, Soc. in Europe; Robertson, Hist. of Charles V.; Pinkerton, Diss. on the Goths; Montesquieu, *Esp. des Lois*, livre xxx. c. 2; Meyer, *Esprit, Origine et Progrès des Inst. judiciaires*, tom. 1, p. 4.

But the origin of the feudal system is so obvious in the circumstances under which it arose, that perhaps there is no other connection between it and these earlier systems than that all are the outgrowth of political conditions somewhat similar. It has been said that the system is nothing more than the natural fruit of conquest; but the fact that the conquest was by immigrants, and that the conquerors made the acquired country their permanent abode, is an important element in the case, and in so far as other conquests have fallen short of this, the military tenures resulting have fallen short of the feudal system. The military chieftains of the northern nations allotted the lands of the countries they occupied among themselves and their followers, with a view at once to strengthen their own power and ascendency and to provide for their followers.

Some lands were allotted to individuals as their own proper estates, and these were termed allodial; but, for the most part, those lands which were not retained by the chieftain he assigned to his *comites*, or knights, to be held by his permission, in return for which they assured him of their allegiance and undertook for him military service.

It resulted that there was a general dismemberment of the political power into many petty nations and petty sovereignties. The violence and disorders of the times rendered it necessary both for the strong to seek followers and for the weak to seek a protecting allegiance; and this operated on the one hand to lead the vassals to divide again among their immediate retainers the lands which they had received from the paramount lord, upon similar terms, and by this subinfeudation the number of fiefs was largely increased; and the same circumstances operated on the other hand to absorb the allodial estates by inducing allodial proprietors to surrender their lands to some neighboring chieftain and receive them again from him under feudal tenure. Every one who held lands upon a feudal tenure was bound, when called upon by his benefactor or immediate lord, to defend him, and such lord was, in turn, subordinate to his superior, and bound to defend him, and so on upwards to the paramount lord or king, who in theory of the law was the ultimate owner of all the lands of the realm. The services which the vassals were bound to render to their lords were chiefly military; but many other benefits were required, such as the power of the lord or the good will of the tenant would sanction.

This system came to its height upon the continent in the empire of Charlemagne and his successors. It was completely established in England in the time of William the Norman and William Rufus, his son; and the system thus established may be said to be the foundation of the English law of real property and the position of the landed aristocracy, and of the civil constitution of the realm. And when we reflect that in the Middle Ages real property had a relative importance far

beyond that of movable property, it is not suprising that the system should have left its traces for a long time upon the law of personal relations and personal property. The feudal tenures were originally temporary, at the will of the lord, or from year to year; afterwards they came more commonly to be held for the life of the vassal; and gradually they acquired an inheritable quality, the lord recognizing the heir of the vassal as the vassal's successor in his service.

The chief incidents of the tenure by military service were: *Aids,*—a pecuniary tribute required by the lord in an emergency, *e. g.* a ransom for his person if taken prisoner, or money to make his son a knight or to marry his daughter. *Reliefs,*—the consideration which the lord demanded upon the death of a vassal for allowing the vassal's heir to succeed to the possession; and connected with this may be mentioned *primer seisin,* which was the compensation that the lord demanded for having entered upon the land and protected the possession until the heir appeared to claim it. *Fines upon alienation,*—a consideration exacted by the lord for giving his consent that the vassal should transfer the estate to another, who should stand in his place in respect to the services owed. *Escheat.*—Where on the death of the vassal there was no heir, the land reverted to the lord; also, where the vassal was guilty of treason; for the guilt of the vassal was deemed to taint the blood, and the lord would no longer recognize him or his heirs. *Wardship and Maritage.*—Where the heir was a minor, the lord, as a condition of permitting the estate to descend to one who could not render military service, assumed the guardianship of the heir, and, as such, exercised custody both of his person and of the property, without accounting for the profits, until the heir, if a male, was twenty-one and could undertake the military services, or, if a female, until she was of a marriageable age, when on her marriage her husband might render the services. The lord claimed, in virtue of his guardianship, to make a suitable match for his ward, and if wards refused to comply they were mulcted in damages.

As a system of government, feudalism was doomed from the day of the Great Assize of Henry II., and only dragged out a lingering existence till the legislation of Edward I. dealt it a final blow. Green, 1 Sel. Essays in Anglo-Amer. L. H. 131.

Feudal tenures were abolished in England by the statute 12 Car. II. c. 24; but the principles of the system still remain at the foundation of the English and American law of real property. Although in many of the states all lands are held to be allodial (see ALOD), it is the theory of the law that the ultimate right of property is in the state; and in most of the states escheat is regulated by statute. "The principles of the feudal system are so interwoven with every part of our jurisprudence," says Ch. J. Tilghman, "that to attempt to eradicate them would be to destroy the whole." Dunwoodie v. Reed, 3 S. & R. (Pa.) 447; Lyle v. Richards, 9 S. & R. (Pa.) 333. "Though our property is allodial," says Ch. J. Gibson, "yet feudal tenures may be said to exist among us in their consequences and the qualities which they orginally imparted to estates; as, for instance, in precluding every limitation founded on an abeyance of the fee." McCall v. Neely, 3 Watts (Pa.) 71; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Hubley v. Vanhorne, 7 S. & R. (Pa.) 188.

Many of these incidents are rapidly disappearing, however, by legislative changes of the law.

The principles of the feudal law will be found in Littleton's Ten.; Wright's Tenures; 2 Bla. Com. c. 5; Dalrymple's Hist. of Feudal Property; Sullivan's Lectures; Book of Fiefs; Spelman's Treatise of Feuds and Tenures; Cruise's Digest; *Le Grand Coutumier;* the Salic Laws; the Capitularies; *Les Établissements de St. Louis; Assise de Jérusalem;* Pothier, *des Fiefs;* Merlin, *Rép. Féodalité;* Dalloz, Dict. *Féodalité;* Guizot, *Essais sur l'Histoire de France,* Essai 5ème; Introduction to Robertson's Charles V.; Poll. & Maitl. Hist. Eng. Law; Stubbs, Const. Hist.; Round, Feudal England; Encycl. Br.; Holdsworth, History of English Law; VILLENAGE.

The principal original collection of the feudal law of continental Europe is a digest compiled at Milan in the twelfth century, *Feudorum Consuetudines,* which is the foundation of many of the subsequent compilations. The American student will perhaps find no more convenient source of information than Blackstone's Commentaries, Sharswood's ed., vol. 2, 43, and Greenleaf's Cruise, Dig. Introd.

FEUDARY. A tenant who holds by feudal tenure. Held by feudal service. Relating to feuds or feudal tenures. See FEODARY.

FEUDBOTE. A recompense for engaging in a feud, and the damages consequent, it having been the custom in ancient times for all the kindred to engage in their kinsman's quarrel. Jac. L. Dict.

FEUDE, or DEADLY FEUD. A German word, signifying implacable hatred, not to be satisfied but with the death of the enemy. Such was that among the people in Scotland and in the northern part of England, which was a combination of all the kindred to revenge the death of any of the blood upon the slayer and all his race. *Termes de la Ley.* See BLOOD-FEUD.

FEUDIST. A writer on feuds, as Cujacius. Spel. Gloss.

FEUDO. In Spanish Law. Feud or fee. White, New Recop. b. 2, tit. 2, c. 2.

FEUDORUM LIBRI. The Books of Feuds published during the reign of Henry III., about the year 1152. The particular customs of Lombardy as to feuds began about that time to be the standard of authority to other nations, by reason of the greater refinement with which that branch of learning had been there cultivated. This compilation was probably known in England, but does not appear to have had any other effect than to influence English lawyers to the more critical study of their own tenures, and to induce them to extend the learning of real property so as to embrace more curious matter of similar kind. "Thus, tenures in England continued a peculiar species of feuds, partaking of certain qualities in common with others; but when once established here, growing up with a strength and figure entirely their own. While most of the nations of Europe referred to the Books of Feuds as the grand code of law by which to correct and amend the imperfections in their own tenures, there is not in English law books any allusion that intimates the existence of such a body of constitutions." 2 Reeves, Hist. Eng. Law 55.

FEUDUM. A feud, fief, or fee. A right of using and enjoying forever the lands of another, which the lord grants on condition that the tenant shall render fealty, military duty, and other services. Spelman, Gloss. It is not properly the land, but a right in the land. This form of the word is used by the feudal writers. The earlier English writers generally prefer the form *feodum;* but

the meaning is the same. There was an older word *feum*.

Its use by the Normans is exceedingly obscure. "Feudal" was not in their vocabulary. Usually it denoted a stretch of land, rarely a tenure or mass of rights. It came to be applied to every person who had heritable rights in land. Maitl. Domesday Book and Beyond 152.

Feudum antiquum. A fee descended from the tenant's ancestors. 2 Bla. Com. 212. One which has been possessed by the relations of the tenant for four generations. Spelman, Gloss.

Feudum apertum. A fee which the lord might enter upon and resume either through failure of issue of the tenant or any crime or legal cause on his part. Spelman, Gloss. 2 Bla. Com. 245.

Feudum francum. A free feud. One which was noble and free from talliage and other subsidies to which the *plebeia feuda* (vulgar feuds) were subject. Spelman, Gloss.

Feudum hauberticum. A fee held on the military service of appearing fully armed at the *ban* and *arrière ban*. Spelman, Gloss.

Feudum improprium. A derivative fee.

Feudum individuum. A fee which could descend to the eldest son alone. 2 Bla. Com. 215.

Feudum laicum. A lay fee.

Feudum ligium. A liege fee. One where the tenant owed fealty to his lord against all other persons. Spelman, Gloss.; 1 Bla. Com. 367.

Feudum maternum. A fee descending from the mother's side. 2 Bla. Com. 212.

Feudum militare. A knight's fee, held by knight service and esteemed the most honorable species of tenure. 2 Bla. Com. 62.

Feudum nobile. A fee for which the tenant did guard and owed fealty and homage. Spelman, Gloss.

Feudum novum. One which began with the person of the feudatory, and did not come to him by descent.

Feudum novum ut antiquum. A new fee held with the qualities and incidents of an ancient one. 2 Bla. Com. 212; Wms. R. P. 126.

Feudum paternum. A fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. One descendible to heirs on the paternal side only. 2 Bla. Com. 223. One which might be held by males only. Du Cange.

Feudum proprium. A genuine original feud or fee, of a military nature, in the hands of a military person. 2 Sharsw. Bla. Com. 57.

Feudum talliatum. A restricted fee. One limited to descend to certain classes of heirs. 2 Bla. Com. 112, n.; 1 Washb. R. P. 66; Spelman, Gloss.

The distinction between *feodum antiquum* and *feodum novum* has had an important bearing upon the law of descent with respect to the admission of collaterals and the exclusion of ascendants. The theory of Blackstone, which is characterized by both Christian and Pollock & Maitland as "ingenious," will be found fully stated in 2 Com. 211, while for a criticism of it and other theories on the subject, see 2 Poll. & Maitl. 285.

FEUM. An older form of *feudum*, Maitl. Domesday Book and Beyond 152.

FEW. An indefinite expression for a small or limited number. In cases where exact description is required, the use of the word will not answer; Butts v. Town of Stowe, 53 Vt. 603; 2 Car. & P. 300; Black, L. Dict.

FIANCER. To pledge one's faith. Kelham.

FIANZA (Span.) Surety. The contract by which one person engages to pay the debt or fulfil the obligations of another if the latter should fail to do so.

FIAR. In Scotch Law. One whose property is charged with a life-rent. Where a right is taken to a husband and wife in conjunct fee and life-rent, the husband, as the *persona dignior*, is the only fiar. Ersk. Prin. 421.

FIAT. An order of a judge or of an officer whose authority, to be signified by his signature, is necessary to authenticate the particular acts. A short order or warrant of the judge, commanding that something shall be done. See 1 Tidd, Pr. 100.

FIAT IN BANKRUPTCY. An order of the lord chancellor that a commission of bankruptcy shall issue. 1 Deac. Bank. 106.

Fiats are abolished by 12 & 13 Vict. c. 116.

FIAUNT. An order; command. See FIAT.

FICTION. The legal assumption that something which is or may be false is true.

The expedient of fictions is sometimes resorted to in law for the furtherance of justice. Corkran Oil & Development Co. v. Arnaudet, 199 U. S. 194, 26 Sup. Ct. 41, 50 L. Ed. 143. The law-making power has no need to resort to fictions: it may establish its rules with simple reference to the truth; but the courts, which are confined to the administration of existing rules, and which lack the power to change those rules, even in hard cases, have frequently avoided the injustice that their application to the actual facts might cause, by assuming, in behalf of justice, that the actual facts are different from what they really are. Thus, in English law, where the administration of criminal justice is by prosecution at suit of the crown, the courts, rather than disregard the rules under which all other parties stand in respect to their neglect to appear and prosecute their suits, adopt the fiction that the king is legally ubiquitous and always in court, so that he can never be non-suited. The employment of fictions is a singular illustration of the justice of the common law, which did not hesitate to conceal or affect to conceal the fact, that a rule of law has undergone alteration, its letter remaining unchanged.

Fictio in the old Roman law was properly a term of pleading and signified a false averment on the part of the plaintiff which the defendant was not allowed to traverse; as that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of the fiction was to give the court jurisdiction; Maine, Anc. Law 25.

Fictions are to be distinguished on the one hand from presumptions of law, and on the other hand

from estoppels. A presumption is a rule of law prescribed for the purpose of getting at a certain conclusion, though arbitrary, where the subject is intrinsically liable to doubt from the remoteness, discrepancy, or actual defect of proofs.

Thus, an infant under the age of seven years is conclusively presumed to be without discretion. Proof that he had discretion the court will not listen to. In the nature of the subject, there must be a limit, which it is better should be a general though arbitrary one than be fluctuating and uncertain in each case. An estoppel, on the other hand, is the rule by which a person is precluded from asserting a fact by previous conduct inconsistent therewith on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to question.

This distinction is thus expressed by a Scotch writer: A *fictio juris* differs from a presumption. Things are presumed which are likely to be true; but a fiction of law assumes for truth what is either false, or at least is as probably false as true. Thus, an heir is feigned or considered in law as the same person with his ancestor; thus, also, writings against which certification is obtained in a reduction-improbation are judged to be false *fictione juris*, though the most convincing proof shall be brought that they once existed and were genuine. Fictions of law must in all their effects be always limited to the special purpose of equity for which they were introduced. Ersk. Prin. 531.

The familiar fictions of the civil law and of the earlier common law were very numerous; but the more useful of them have either been superseded by authorized changes in the law or have gradually grown as it were into distinct principles, forming exceptions or modifications of those principles to evade which they were at first contrived. As there is no just reason for resorting to indirection to do that which might be done directly, fictions are rapidly disappearing before the increasing harmony of our jurisprudence. See 4 Benth. Ev. 300; 2 Pothier, Obl., Evans' ed. 43. But they have doubtless been of great utility in conducing to the gradual amelioration of the law; and, in this view, fiction, equity, and legislation have been named together as the three instrumentalities in the improvement of the law. They have been employed historically in the order here given. Sometimes two of them will be seen operating together, and there are legal systems which have escaped the influence of one or the other of them. But there is no instance in which the order of their appearance has been changed or inverted. Maine, Anc. Law 24.

Theoretical writers have classified fictions as of five sorts: *abeyance*, when the fee of land is supposed to exist for a time without any particular owner during an outstanding freehold estate; 2 Bla. Com. 107; 1 Cruise, Dig. 67; 1 Com. Dig. 175; 1 Viner, Abr. 104; the doctrine of *remitter*, by which a party who has been disseised of his freehold, and afterwards acquires a defective title, is remitted to his former good title; that one thing done to-day is considered as done at a preceding time by the doctrine of *relation;* that, because one thing is proved, another shall be presumed to be true, which is the case in all *presumptions;* that the heir, executor, or administrator stand by *representation* in place of the deceased.

Again, they have been classified as of three kinds: positive, when a fact which does not exist is assumed; negative, when a fact which does exist is ignored; and fictions by relation, when the act of one person is taken as if it were the act of a different person,—*e. g.*, that of a servant as the act of his master; when an act at one time or place is treated as if performed at a different time or place; and when an act in relation to a certain thing is treated as if it were done in relation to another thing which the former represents,—*e. g.*, where delivery of a portion of goods sold is treated as giving possession of the whole; Best, Pres. 27. Fictions being resorted to simply for the furtherance of justice; Co. Litt. 150; 10 Co. 42; 1 Cowp. 177; several maxims are fundamental to them. *First*, that that which is impossible shall not be feigned; D'Aguesseau, *Œuvres*, tome iv. pp. 427, 447 *c*, *Plaidoyer;* 2 Rolle 502. *Second*, that no fiction shall be allowed to work an injury; 3 Bla. Com. 43; Low v. Little, 17 Johns. (N. Y.) 348. *Third*, a fiction is not to be carried further than the reasons which introduced it necessarily require; 1 Lilly, Abr. 610; 2 Hawk. Pl. Cr. 320; Best, Pres. § 20.

Consult Dalloz, Dict.; Burg. Ins. 139; Ferguson, Moral Phil. pt. 5, c. 10, § 3; 1 Toullier 171, n. 203; 2 *id.* 217, n. 203; 11 *id.* 10, n. 2; Maine, Anc. Law; Benth. Jud. Ev.; 1 Poll. & Maitl. 469.

FICTITIOUS ACTION. A suit brought on pretence of a controversy when no such controversy in truth exists. Such actions have usually been brought on a pretended wager, for the purpose of obtaining the opinion of the court on a point of law. Courts of justice are not bound to answer impertinent questions which persons think proper to ask them in the form of an action on a wager; 12 East 248. Such an attempt has been held to be a contempt of court; and Lord Hardwicke in such a case committed the parties and their attorneys; Rep. *t.* Hardw. 237. A court will not consider itself bound to entertain a case stated for its opinion when there is reason to believe that the action is not brought in good faith for the purpose of determining a matter in controversy between the parties; 6 C. B. 100; or where the decision is sought upon a fictitious interest created for the express purpose of obtaining a decision; 4 Ch. D. 169. Where a contract was made between a county and a bidder to enter a feigned suit to determine the validity of the bonds prior to their issue, it was held void as against public policy, the court saying that "the practice is in every point of view vicious. It involves . . . a conspiracy to deceive the courts, by presenting cases for decision involving no real controversy;" Van Horn v. Kittitas County, 112 Fed. 1. The practice of bringing such suits has been severely condemned by the courts; Lord v. Veazie, 8 How. (U. S.) 251, 12 L. Ed. 1067; Connoly v. Cunningham, 2 Wash. T. 242, 5 Pac. 473.

See, also, Comb. 425; 1 Co. 83; Fletcher v. Peck, 6 Cra. (U. S.) 147, 3 L. Ed. 162; FEIGNED ACTIONS; MOOT CASES.

FICTITIOUS PARTY. Where a suit is brought in the name of one who is not in being, or of one who is ignorant of the suit and has not authorized it, it is said to be brought in the name of a fictitious plaintiff. To bring such a suit is deemed a contempt of court; 4 Bla. Com. 133.

FICTITIOUS PAYEE. When a contract, such as negotiable paper, is drawn in favor of a fictitious person, and has been indorsed in such name, it is deemed payable to bearer as against all parties who are privy to the transaction; and a holder in good faith may recover on it against them; Pars. Bills & N. 591, n.; 2 H. Bla. 178, 288; 19 Ves. 311; Tittle v. Thomas, 30 Miss. 122, 64 Am. Dec. 154; Hunter v. Blodget, 2 Yeates (Pa.) 480.

The maker of such a note, by negotiating it, transfers title to it without indorsement, and it is presumed that the note came into the possession of the holder with the names of all the indorsers on it, and *prima facie* he is treated as a holder for value; Plets v. Johnson, 3 Hill (N. Y.) 112; provided that the acceptor or indorser be ignorant of the fact that the payee is fictitious; Forbes v. Espy, 21 Ohio St. 483; 1 Camp. 130; and to entitle the holder of such a note to a recovery it must appear affirmatively that he was ignorant of the fact that the payee was a fictitious person; Maniort v. Roberts, 4 E. D. Sm. (N. Y.) 83. As between the original parties who put it into circulation with a knowledge of the fiction, it might be held void as an inoperative instrument, but if money from the holder actually gets into the hands of the acceptor it may be recovered back as money had and received; 1 Camp. 130. See also Sto. Prom. Notes 39. In the hands of a *bona fide* holder the note or bill is good against the maker; Irving National Bank v. Alley, 79 N. Y. 536; Lane v. Krekle, 22 Ia. 404; Farnsworth v. Drake, 11 Ind. 103; Blodgett v. Jackson, 40 N. H. 21.

A *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person and indorsed in that name by the drawer may recover the amount of it in an action against the acceptor for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill; 3 Term 174; and the mere fact of the acceptance of such a bill is evidence that the value has been received for it; *id.* 182; in this case three judges thought that the bill was to be considered as payable to bearer, and in the leading case of Minet v. Gibson that view was taken and it was held that a recovery from the acceptor may be had upon a count upon a bill payable to bearer, where such acceptor is aware that the payee is a fictitious person; 3 Term 481. This judgment was affirmed by the House of Lords, though with a dissent by Eyre, C. B., and Heath, J., with whom Lord Thurlow concurred; 1 H. Bla. 569; s. c. 6 Bro. P. C. 235. The case has been termed "anomalous" by a text writer who quotes the dissenting opinion of Eyre, C. B., as one "whose reasoning, it is conceived, has never been refuted;" 2 Ames, Bills & Notes 864. But the same writer admits that "the doctrine of the case has been generally adopted." In an action on such a bill, to show that the acceptor is aware that the payee is a fictitious person, evidence is admissible to show the circumstances under which he had received other bills payable to fictitious persons; 2 H. Bla. 187, 288. See also 18 C. B. N. S. 694; L. R. 1 C. P. 463.

When a note is made payable to the name of some person not having any interest, and not intended to become a party to the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious; Foster v. Shattuck, 2 N. H. 446; [1891] A. C. 107; [1908] 1 K. B. 13; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250; Phillips v. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Snyder v. Bank, 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780.

If the maker did not know that the payee was a fictitious or non-existent person, and did not intend to make the paper payable to such person, the instrument cannot be treated as payable to bearer, for the intention of the maker or drawer is the test; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. In Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336, it was held that the drawer's belief that the person named was the real payee will prevent the application of the rule that an order to a fictitious payee is an order to bearer. If a check is drawn to an existing person intended by the drawer to be the payee, the latter is not "fictitious" within the Bills of Exchange act, no matter how much the drawer may have been deceived; [1906] 2 K. B. 718, affirmed [1908] 1 K. B. 13, where it is said: "The word 'fictitious' implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that the check should be paid to that person only."

The Uniform Negotiable Instruments act provides that where the drawee is a fictitious person, the holder of the instrument may treat it either as a bill or note.

A note payable to a company or firm having no existence legal or *de facto*, has been held to be such a note; Farnsworth v. Drake, 11 Ind. 101; Blodgett v. Jackson, 40 N. H. 21; Maniort v. Roberts, 4 E. D. Smith (N. Y.) 83; Stevens v. Strang, 2 Sandf. (N. Y.) 138; one made payable to the estate of a

deceased person; Scott v. Parker, 5 N. Y. Supp. 753; checks drawn to the order of an existing person, whose indorsement is forged; Jordan Marsh Co. v. Bank, 201 Mass. 397, 87 N. E. 740, 22 L. R. A. (N. S.) 250. See Douglass v. Wilkeson, 6 Wend. (N. Y.) 637; Byles, Bills, Wood's ed. 383.

FICTITIOUS PERSON. A United States patent for land to a fictitious person is void; and a *bona fide* purchaser is not protected; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90.

FIDE-JUBERE. In Civil Law. To become *fide-jussor;* to pledge one's self; to act as surety for another. Among the words designated as words of obligation or forms of stipulation. *Fide-jubes?* do you make yourself *fide-jussor? Fide-jubeo*, I do make myself *fide-jussor.* Inst. 3. 15. 1.

FIDE-JUSSIO. An act by which any one binds himself as an additional security for another. This giving security does not destroy the liability of the principal, but adds to the security of the surety. Vicat, Voc. Jur.; Hallifax, Annals, b. 2, c. 16, n. 10.

FIDE-JUSSOR. In Civil Law. One who becomes security for the debt of another, promising to pay it in case the principal does not do so. 3 Bla. Com. 108, 291.

He differs from a co-obligor in this, that the latter is equally bound to a debtor, with his principal, while the former is not liable till the principal has failed to fulfil his engagement; Dig. 12. 4. 4; 16. 1. 13; 24. 3. 64; 38. 1. 37; 50. 17. 110; 6. 14. 20; Hall, Pr. 33; Dunl. Adm. Pr. 300; Clerke, Prax. tit. 63.

The obligation of the fide-jussor was an accessory contract; for, if the principal obligation was not previously contracted, his engagement then took the name of mandate. *Lec. Elém.* § 872; *Code Nap.* 2012.

FIDE-PROMISSOR. See FIDE-JUSSOR.

FIDEI-COMMISSARIUS (L. Lat.). In Civil Law. One who has a beneficial interest in an estate which, for a time, is committed to the faith or trust of another. This term has nearly the same meaning as *cestui que trust* has in the common law. 1 Greenl. Cruise, Dig. 295; Story, Eq. Jur. § 966.

Fidei-commissary and *fide-commissary*, anglicized forms of this term, have been proposed to take place of the phrase *cestui que trust*, but do not seem to have met with any favor.

According to Du Cange, the term was sometimes used to denote the executor of a will.

FIDEI-COMMISSUM (L. Lat.). In Civil Law. A trust. A devise was made to some person (*hæres fiduciarius*), and a request annexed that he should give the property to some one who was incapable of taking directly under the will. Inst. 2. 23. 1; 1 Greenl. Cruise, Dig. 295; McDonogh v. Murdoch, 15 How. (U. S.) 367, 407, 409, 14 L. Ed. 732. A gift which a man makes to another through the agency of a third person, who is requested to perform the will of the giver. The Louisiana civil code prohibits *fidei-commissa;* Ducloslange v. Ross, 3 La. Ann. 432; thus abolishing express trusts, but not affecting implied trusts; Gaines v. Chew, 2 How. (U. S.) 619, 11 L. Ed. 402.

The rights of the beneficiary were merely rights in curtesy, to be obtained by entreaty or request. Under Augustus, however, a system was commenced, which was completed by Justinian, for enforcing such trusts. The trustee or executor was called *hæres fiduciarius*, and sometimes *fide-jussor.* The beneficial heir was called *hæres fidei-commissarius.*

The uses of the common law are said to have been borrowed from the Roman *fidei-commissa;* 1 Greenl. Cruise 295; Bacon, Read. 19; see Bisph. Eq. 50; 1 Madd. 446; Story, Eq. Jur. § 966. The *fidei-commissa* are supposed to have been the origin of the common-law system of entails; 1 Spence, Eq. Jur. 21; 1 Washb. R. P. 60. This has been doubted by others. See SUBSTITUTION.

FIDELITAS. Fealty; fidelity.

FIDELITY INSURANCE. See INSURANCE.

FIDEM MENTIRI (Lat.). To break faith. Used when a tenant does not keep that fealty which he has sworn to the lord. Leg. Hen. I. c. 53.

FIDES. Faith; honesty; confidence. See GOOD FAITH.

FIDES FACTA. Among the Franks and Lombards undertakings were guaranteed by "making one's faith"—*fides facta.* This was symbolized by such formal acts as the giving of a rod; in suretyship giving the "festuca" or "vadium." 2 Holdsw. Hist. E. L. 73.

FIDUCIA (Lat.). In Civil Law. A contract by which we sell a thing to some one—that is, transmit to him the property of the thing, with the solemn forms of emancipation—on condition that he will sell it back to us. This species of contract took place in the emancipation of children, in testaments, and in pledges. Pothier, Pand.

FIDUCIARIUS TUTOR. See PUPIL; TUTOR.

FIDUCIARY. This term is borrowed from the civil law. The Roman laws called a fiduciary heir the person who was instituted heir, and who was charged to deliver the succession to a person designated by the testament. Merlin, *Répert.* But Pothier, Pand. vol. 22, says that *fiduciarius hæres* properly signifies the person to whom a testator has sold his inheritance under the condition that he should sell it to another. Fiduciary may be defined in trust, in confidence.

The law forbids one standing in such a position making any profit at the expense of the party whose interests he is bound to

protect, without full disclosure; Bisph. Eq. § 238; 10 H. L. Cas. 26, 31, 45. What constitutes a fiduciary relation is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Appeal of Watts, 78 Pa. 392; agent; Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; medical or religious adviser; In re Greenfield's Estate, 24 Pa. 232; article in 10 Jur. N. S. 91; husband and wife; Appeal of Darlington, 86 Pa. 512, 27 Am. Rep. 726; or a son; 13 Ch. Div. 338. See L. R. 3 Eq. 461; Hill, Trustees 547. Many cases have arisen in New York under the laws allowing arrest for debts incurred in a fiduciary capacity. The term seems to refer rather to the good faith than the ability of the party; Stoll v. King, 8 How. Pr. (N. Y.) 298. See Burhans v. Casey, 4 Sandf. (N. Y.) 707; Holbrook v. Homer, 6 How. Pr. (N. Y.) 86; Turner v. Thompson, 2 Abb. Pr. (N. Y.) 444; Ostell v. Brough, 24 How. Pr. (N. Y.) 274; Warner v. Transp. Co., 5 Rob. (N. Y.) 502. Under the bankrupt laws of 1841, and March 2, 1867, § 33, providing that debts contracted in a fiduciary capacity should not be barred by a discharge, the following cases fall within the act; an agent who appropriates money put into his hands for a specific purpose of investment; 1 Edm. 206; collector of city taxes who retains money officially collected; Morse v. City of Lowell, 7 Metc. (Mass.) 152; one who receives a note or other security for collection; White v. Platt, 5 Denio (N. Y.) 269; commission merchant; Meador v. Sharpe, 54 Ga. 125; and it does not alter the rule that the debt has been reduced to judgment before the discharge; Wade v. Clark, 52 Ia. 158, 2 N. W. 1039, 35 Am. Rep. 262. This exception from the operation of a discharge in bankruptcy relates to technical trusts, not merely such as the law implies from the contract, but those actually and expressly constituted; Mulock v. Byrnes, 129 N. Y. 23, 29 N. E. 244. In the following cases the debt has been held not a fiduciary one; a factor who retains the money of his principal; Chapman v. Forsyth, 2 How. (U. S.) 202, 208, 11 L. Ed. 236; Commercial Bank of Manchester v. Buckner, 2 La. Ann. 1023; Cronan v. Cotting, 104 Mass. 245, 6 Am. Rep. 232; an agent under an agreement to account and pay over monthly; Grover & Baker Sewing Mach. Co. v. Clinton, 5 Biss. 324, Fed. Cas. No. 5,845; one with whom a general deposit of money is made; Hervey v. Devereux, 72 N. C. 463; a debt created by a person acting as an attorney in fact; Woodward v. Towne, 127 Mass. 41, 34 Am. Rep. 337; Desobry v. Tête, 31 La. Ann. 809, 33 Am. Rep. 232; Treadwell v. Holloway, 46 Cal. 547. See, also, Com'rs of Wilkes County v. Staley, 82 N. C. 395; Green v. Chilton, 57 Miss. 598, 34 Am. Rep. 483; Pierce v. Shippee, 90 Ill. 371.

FIDUCIARY CONTRACT. An agreement by which a person delivers a thing to another on the condition that he will restore it to him. The following formula was employed: *Ut inter bonos agier oportet et sine fraudatione.* Cicero, *de Offic.* lib. 3, cap. 17; *Leç. du Dr. Civ. Rom.* § 237. See Chapman v. Forsyth, 2 How. (U. S.) 202, 11 L. Ed. 236; Fisk v. Sarber, 6 W. & S. (Pa.) 18; McGinn v. Shaeffer, 7 Watts (Pa.) 415.

FIEF. A fee, feod, or feud.

FIEF D'HAUBERK. A fee held on the military tenure of appearing fully armed on the *ban* and *arrière-ban.* *Feudum hauberticum.* Spelman, Gloss.; Calvinus, Lex.; Du Cange. A knight's fee. 2 Bla. Com. 62.

FIEF TENANT. The holder of a fief or fee.

FIEL. In Spanish Law. An officer who keeps possession of a thing deposited under authority of law. *Las Partidas,* pt. 3, tit. 9, l. 1.

FIELD. A cultivated tract of land. State v. McMinn, 81 N. C. 585; Com. v. Josselyn, 97 Mass. 412; but not a one-acre lot used for cultivating vegetables; Simons v. Lovell, 7 Heisk. (Tenn.) 510.

FIELD-ALE, or FILKDALE. The drinking of ale by bailiffs and other officers in the *field,* at the expense of the hundred; an old English custom long since prohibited. Toml

FIELDAD. In Spanish Law. Sequestration. This is allowed in six cases by the Spanish law where the title to property is in dispute. *Las Partidas,* pt. 3, tit. 3, l. 1.

FIERDING COURTS. Ancient Gothic courts "in the lowest instance;" so called because four were instituted within every superior district or hundred. Their jurisdiction was limited within forty shillings, or three marks; 3 Steph. Com. 393; 3 Bla. Com. 34; Stiernhook, *De Jure Goth.* l. 1, c. 2.

FIERI FACIAS (Lat. that you cause to be made). A writ directing the sheriff to cause to be made of the goods and chattels of the judgment-debtor the sum or debt recovered.

It receives its name from the Latin words in the writ (*quod fieri facias de bonis et catallis,* that you cause to be made of the goods and chattels). It is the form of execution in common use in levying upon the judgment-debtor's personal property.

The foundation of this writ is a judgment for debt or damages; and the party who has recovered such a judgment is generally entitled to it, unless he is delayed by a stay of execution which the law allows in certain cases after the rendition of the judgment, or by proceedings in error.

The execution, being founded on the judgment, must, of course, follow and be warranted by it; 2 Saund. 72 *h, k;* Bingh. Judg. 186; Oakley v. Becker, 2 Cow. (N. Y.) 454.

Hence, where there is more than one plaintiff or defendant, it must be in the name of all the plaintiffs against all the defendants; 6 Term 525. It is either for the plaintiff or the defendant. When it is against an executor or administrator for a liability of the testator or intestate, it is conformable to the judgment, and must be only against the goods of the deceased, unless the defendant has made himself personally liable by his false pleading, in which case the judgment is *de bonis testatoris, et si non, de bonis propriis;* Todd v. Todd's Ex'rs, 1 S. & R. (Pa.) 453; Swearinger's Ex'r v. Pendleton's Ex'r, 4 S. & R. (Pa.) 394; Lansing v. Lansing's Ex'x, 18 Johns. (N. Y.) 502; Burnside v. Green, 3 N. C. 112.

At common law, the writ bound the goods of the defendant or party against whom it was issued, from the teste day; by which is to be understood that the writ bound the property against the party himself, and all claiming by assignment from or by representation under him; 4 East 538; so that a sale by the defendant of his goods to a *bona fide* purchaser did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff till after the sale; Cro. Eliz. 174; Cro. Jac. 451; 1 Sid. 271; but by the statute of frauds, 29 Car. II. c. 3, § 16, it was enacted "that no writ or *fieri facias*, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution issued forth, but from the time that such writ shall be delivered to the sheriff," etc., who must "indorse upon the back thereof the day of the month and year whereon he or they received the same;" and the same or similar provisions have been enacted in most of the states; Lewis v. Smith, 2 S. & R. (Pa.) 157; Beals v. Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; Layton v. Steel, 3 Harr. (Del.) 512; State v. Blundin, 32 Mo. 387. The property in the goods is not altered, but remains in the defendant until the *actual* execution of the writ; Wats. Sher. 176.

The execution of the writ is made by levying upon the goods and chattels of the defendant or party against whom it is issued; and, in general, seizing a part of the goods in the name of the whole on the premises is a good seizure of the whole; 1 Ld. Raym. 725; Bullitt's Ex'rs v. Winston, 1 Munf. (Va.) 269; Van Wyck v. Pine, 2 Hill (N. Y.) 666; Barham v. Massey, 27 N. C. 192; Cobb v. Cage, 7 Ala. 619. But see Burchard v. Rees, 1 Whart. (Pa.) 377; Lloyd v. Wyckoff, 11 N. J. L. 218. It may be executed at any time before and on the return-day; Towns v. Harris, 13 Tex. 507; but not on Sunday, where it is forbidden by statute (29 Car. II. c. 7, which has been substantially followed in the United States); Watson, Sher. 173; 5 Co. 92; Com. Dig. *Execution*, C 5. After the death of the defendant, the sheriff may execute a *fi. fa.* tested in his lifetime, and under it seize his goods in the hands of his executor or administrator; Wats. Sher. 173.

The sheriff cannot break the outer door of a house for the purpose of executing a *fieri facias;* 5 Co. 92; nor unlatch an outer door; Curtis v. Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; nor can a window be broken for this purpose; W. Jones 429. He may, however, enter the house, if it be open, and, being once lawfully entered, he may break open an inner door or chest to seize the goods of the defendant, even without any request to open them; 4 Taunt. 619; 3 B. & P. 223; Cowp. 1; Troub. & H. Pr. 1116. Although the sheriff is authorized to enter the house of the party to search for goods, he cannot enter that of a stranger for that purpose, without being guilty of a trespass, unless the defendant's goods are actually in the house; Comyns, Dig. *Execution* (C 5). The sheriff may break the outer door of a barn; 1 Sid. 186; 1 Kebl. 689; or of a store disconnected with the dwelling-house and forming no part of the curtilage; Haggerty v. Wilbur, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321. See 1 Sm. L. Cas., 9th Am. ed. 228, with note on the subject; BREAKING.

At common law a *fi. fa.* did not authorize a sheriff to seize bank-bills, checks, or promissory notes; but it is otherwise now, by stat. 1 & 2 Vict. c. 110, § 12, and 3 & 4 Vict. c. 82; and this is now the law of many of the states; Steele v. Brown, 2 Va. Cas. 246; Means v. Vance, 1 Bailey (S. C.) 39; Reno v. Wilson, Hempst. 91, Fed. Cas. No. 11,700a; Spencer v. Blaisdell, 4 N. H. 198, 17 Am. Dec. 412; Appeal of Herron, 29 Pa. 240. So money may be taken; Means v. Vance, 1 Bailey (S. C.) 39; Turner v. Fendall, 1 Cra. (U. S.) 117, 2 L. Ed. 53; Handy v. Dobbin, 12 Johns. (N. Y.) 220. The writ applies generally to goods and chattels, but the common-law rules as to what may be taken are very much extended.

For the form of the writ, see 3 Sharsw. Bla. Com. App. xxvii.; as to proceeding in equity in aid of executions at law, see CREDITORS' BILL. See, generally, Murfree; Freeman, Executions, ch. X; Watson, Sheriff; EXECUTION; LEVY; SHERIFF.

FIERI FECI (L. Lat.). **In Practice.** The return which the sheriff or other proper officer makes to certain writs, signifying, "I have caused to be made."

When the officer has made this return, a rule may be obtained upon him after the return-day, to pay the money into court, and, if he withholds payment, an action of debt may be had on the return, or assumpsit for money had and received may be sustained against him; Dumond's Adm'rs v. Carpenter, 3 Johns. (N. Y.) 183.

FIFTEENTHS. An aid; aid granted from time to time to the crown by parlia-

ment, consisting of a fifteenth part of the personal property in every township, borough, and city in the kingdom. In the eighth year of Edward III. the valuation of the kingdom was fixed and a record made in the exchequer of the amount (twenty-nine thousand pounds). This valuation was not increased as the property in the kingdom increased in value; whence the name came in time to be a great misnomer. Co. 2d Inst. 77; 1 Poll. & Maitl. 604; 2 Bla. Com. 309; Cowell.

FIFTY DECISIONS. Ordinances of Justinian (529–532) upon the authority of which all moot points were settled in the preparation of the second edition of the Code. Taylor, Science of Jurispr. 144.

FIGHT. Does not necessarily imply that both parties should give and take blows. It is sufficient that they voluntarily put their bodies in position with that intent; State v. Gladden, 73 N. C. 155; Tate v. State, 46 Ga. 148. See PRIZE-FIGHT.

FIGHTWITE (Sax.). A mulct or fine for making a quarrel to the disturbance of the peace. Called also by Cowell *forisfactura pugnæ*. The amount was one hundred and twenty shillings. Cowell.

A payment to a lord possessing soc over a place where a wrong was done. 2 Holdsw. Hist. E. L. 35.

FIGURES. Numerals. They are either Roman, made with letters of the alphabet: for example, MDCCLXXVI; or they are Arabic, as follows: 1776.

Roman figures may be used in contracts and law proceedings, and they will be held valid; but Arabic figures, probably owing to the ease with which they may be counterfeited or altered, have been holden not to be sufficient to express the sum due on a contract; but it seems that if the amount payable and due on a promissory note be expressed in figures or ciphers, it will be valid. Story, Bills § 42, note; Story, Pr. Notes § 21.

Figures to express numbers are not allowable in indictments; but all numbers must be expressed in words at length, except in setting forth a copy of a written instrument. And complaints are governed by the same rule in cases over which magistrates have final jurisdiction. But the decisions on this point are not uniform. And in most of them the proper distinction between the use of figures in the caption and in the body of an indictment has not been observed. In America, perhaps the weight of authority is contrary to the law as above stated. But, at all events, a contrary practice is unclerical, uncertain, and liable to alteration; and the courts which have sustained such practice have uniformly cautioned against it. See 13 Viner, Abr. 210; 1 Chitty 319; State v. Tuller, 34 Conn. 280; State v. Reed, 35 Me. 489, 58 Am. Dec. 727.

Bills of exchange, promissory notes, checks, and agreements of every description are usually dated with Arabic figures: it is, however, better to date deeds and other formal instruments by writing the words at length. See 5 Toullier, n. 336; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 233; Serpentine v. State, 1 How. (Miss.) 256; Finch v. State, 6 Blackf. (Ind.) 533; President, etc., of Middlebury College v. Cheney, 1 Vt. 336.

FILACER. An officer of the common pleas, king's bench, and exchequer, whose duty it was to file the writs on which he made process. There were fourteen of them; and it was their duty to make out all original process. Cowell; Blount; Jacob L. Dict. It is used in 8 Mod. 284. The office was abolished in 1837.

FILARE. **In Old English Practice.** To file. Townsh. Pl. 67.

FILE (Lat. *Filum*). A thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe-keeping and ready turning to the same. Spelman, Gloss.; Cowell; Tomlin, Law Dict. Papers put together and tied in bundles. A paper is said also to be filed when it is delivered to the proper officer, and by him received to be kept on file. 13 Viner, Abr. 211; 1 Littleton 113; 1 Hawk. Pl. Cr. 7, 207. See where filed by a wife as agent; Reed v. Inhabitants of Acton, 120 Mass. 130.

The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the string or wire; Phillips v. Beene's Adm'r, 38 Ala. 248.

Filing a paper, in modern usage, consists in placing it in the custody of the proper official by the party charged with the duty, and the making of the proper indorsement by the officer. Stone v. Crow, 2 S. Dak. 525, 51 N. W. 335. In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; People v. Peck, 67 Hun 560, 22 N. Y. Supp. 576. The "file" in a cause includes original subpœnas and all papers belonging thereto. Jackson v. Mobley, 157 Ala. 408, 47 South. 590.

FILIATE. To declare whose child a bastard is. 2 W. Bla. 1017.

FILIATION. **In Civil Law.** The descent of son or daughter, with regard to his or her father, mother, and their ancestors.

Nature always points out the mother by evident signs, and, whether married or not, she is always certain: *mater semper certa est, etiamsi vulgo conceperit*. There is not the same certainty with

regard to the father, and the mother may not know or may feign ignorance as to the paternity; the law has therefore established a legal presumption to serve as a foundation for paternity and filiation.

When the mother is or has been married, her husband is presumed to be the father of the children born during the coverture, or within a competent time afterwards, whether they were conceived during the coverture or not: *pater is est quem nuptiæ demonstrant.*

This rule is founded on two presumptions: one on the cohabitation before the birth of the child; and the other that the mother has faithfully observed the vow she made to her husband.

This presumption may, however, be rebutted by showing either that there has been no cohabitation, or some physical or other impossibility that the husband could be the father. See ACCESS; BASTARD; GESTATION; NATURAL CHILDREN; PATERNITY; PUTATIVE FATHER.

FILICETUM. **In English Law.** A ferny or bracky ground; a place where fern grows. Co. Litt. 4 *b;* Shep. Touch. 95.

FILIOUS. **In Old Records.** A godson. Spel. Glos.

FILIUS (Lat.). A son. A child.

As distinguished from heir *filius* is a term of nature, *hæres* a term of law. 1 Powell, Dev. 311. In the civil law the term was used to denote a child generally. Calvinus, Lex.; Vicat, Voc. Jur. Its use in the phrase *nullius filius* would seem to indicate a use in the sense of legitimate son, a bastard being the legitimate son of nobody; though the word is usually rendered a son, whether legitimate or illegitimate. Vicat, Voc. Jur.

FILIUS FAMILIAS (Lat.). A son who is under the control and power of his father. Story, Confl. Laws § 61; Vicat, Voc. Jur.

FILIUS MULIERATUS (Lat.). The first legitimate son born to a woman who has had a bastard son by her husband before her marriage. Called, also, *mulier, mulier puisné.* 2 Bla. Com. 248.

FILIUS NULLIUS (Lat. son of nobody). A bastard. Called, also, *filius populi* (son of the people). 1 Bla. Com. 459; 6 Co. 65 *a.*

FILIUS POPULI. A son of the people; a natural child.

FILL. To occupy the whole capacity or extent of, so as to leave no space vacant.

To possess and discharge the duties of an office. The election of a person to an office constitutes the essence of his appointment, but the office cannot be considered as actually filled until his acceptance, either expressed or implied; Johnston v. Wilson, 2 N. H. 202, 9 Am. Dec. 50.

In a subscription for shares in a corporation, the word "fill" amounts to a promise to pay assessments; Bangor Bridge Co. v. McMahon, 10 Me. 478. As to the use of the word in connection with a doctor's prescription, see Ray v. Burbank, 61 Ga. 505, 34 Am. Rep. 103; DRUGGIST.

FILLY. A young mare; a female colt. An indictment charging the theft of a "filly" is not sustained by proof of the larceny of a "mare;" Lunsford v. State, 1 Tex. App. 448, 28 Am. Rep. 414.

FILTRATION. Where its franchise requires a water company to furnish filtered water, a neglect or refusal to do so entitles the municipality to a decree compelling it to comply with such requirement; City of Burlington v. Water Co., 86 Ia. 266, 53 N. W. 246; or it may annul the franchise; City of St. Cloud v. Water, Light & Power Co., 88 Minn. 329, 92 N. W. 1112; or may refuse to pay hydrant rentals until the filtering process shall be provided; Illinois Trust & Savings Bank v. City of Pontiac, 212 Ill. 326, 72 N. E. 411. Where the contract was to furnish pure water, and the company had erected filtering appliances, it was required to filter it to a reasonable degree of purity; Brace Bros. v. Water Co., 7 Pa. Dist. R. 71. But where the source of supply was furnished by the municipality, and such source of supply became impure without the fault of the company, it was held the company could not be compelled to go to the additional expense of furnishing a filtering plant, the contract being silent on that subject; City of Georgetown v. Water Co., 134 Ky. 608, 121 S. W. 428, 24 L. R. A. (N. S.) 303.

FILUM AQUÆ (Lat. a thread of water). This may mean either the middle line or the outer line. *Altum filum* denotes high-water mark. Blount. *Filum* is, however, used almost universally in connection with *aquæ* to denote the middle line of a stream. *Medium filum* is sometimes used with no additional meaning. The common-law rule was that conveyances of land bounded on streams, above tide water, extend *usque ad filum aquæ.* See RIVER; WATER-COURSE.

FILUM FORESTÆ (Lat.). The border of the forest. 2 Bla. Com. 419; 4 Inst. 303; Manw. *Purlieu.*

FILUM VIÆ (Lat.). The middle line of a road; a term used to indicate the middle line or thread of a street or road. 2 Sm. L. Cas. 98. See Peck v. Denniston, 121 Mass. 18; Motley v. Sargent, 119 Mass. 231; Spackman v. Steidel, 88 Pa. 453; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; City of Chicago v. Rumsey, 87 Ill. 348. Where a description of land gives a street or road as a boundary, it is presumed that the title passes *ad medium filum viæ;* Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584. See BOUNDARY; HIGHWAY; STREET.

FIN. End; limit; period of limitation.

FIN DE NON RECEVOIR. **In French Law.** An exception or plea founded on law, which

without entering into the merits of the action shows that the plaintiff has no right to bring it, either because the time during which it ought to have been brought has elapsed, which is called *prescription*, or that there has been a compromise, accord, and satisfaction, or any other cause which has destroyed the right of action which once subsisted. Pothier, *Proc. Civ.* pt. 1, c. 2, s. 2, art. 2; Story, Confl. Laws § 580.

FINAL. Last; conclusive; pertaining to the end. In law it is usually employed in contrast with interlocutory (*q. v.*) with respect to pendency of suits.

FINAL COSTS. Such costs as are to be paid at the end of the suit; costs, the liability for which depends upon the final result of the litigation.

FINAL DECISION. One from which no appeal or writ of error can be taken. Moore v. Mayfield, 47 Ill. 167; 6 El. & Bl. 408.

FINAL DECREE. See DECREE.

FINAL DISPOSITION. Such a conclusive determination of the subject-matter embraced in a submission to arbitrators, that after the award is made nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation can arise thereon.

Such an award that the party against whom it is given may perform it without any further ascertainment of rights or obligation. See Colcord v. Fletcher, 50 Me. 401.

FINAL HEARING. The trial of an equity case upon the merits, as distinguished from the hearing of any preliminary questions arising in the cause, which are termed interlocutory. Akerly v. Vilas, 24 Wis. 171, 1 Am. Rep. 166.

FINAL JUDGMENT. See JUDGMENT.

FINAL PASSAGE. The vote on a passage of a bill or resolution in either house of the legislature after it has received the prescribed number of readings and has been subjected to such action as is required by the fundamental law governing the body or its own rule. See State v. Buckley, 54 Ala. 613.

FINAL PROCESS. Writs of execution. So called to distinguish them from *mesne process*, which includes all process issuing before judgment rendered. 3 Steph. Com. 489.

FINAL RECOVERY. The ultimate judgment of a court. Hunt v. Taft, 100 Mass. 91. It has also been construed as referring to the verdict, as distinguished from the judgment. Joannes v. Pangborn, 6 Allen (Mass.) 243. See DECREE.

FINAL SENTENCE. One which puts an end to a case. Distinguished from interlocutory See SENTENCE.

FINAL SETTLEMENT. The final account of an executor or administrator closing the business of the estate, with the order of the court thereon approving it and discharging the accountant. Roberts v. Spencer, 112 Ind. 85, 13 N. E. 131; Bartels v. Gove, 4 Wash. 632, 30 Pac. 675; Stevens v. Tucker, 87 Ind. 114; Sims v. Waters, 65 Ala. 442.

FINALIS CONCORDIA (Lat.). A decisive agreement. A fine. A final agreement.

A final agreement entered by the parties by permission of court in a suit actually brought for lands. Subsequently, the bringing suit, entry of agreement, etc., became merely formal, but its entry upon record gave a firm title to the plaintiff; 1 Washb. R. P. 70; 1 Spence, Eq. Jur. 143; Tudor, Lead. Cas. 689.

Finis est amicabilis compositio et finalis concordia ex consensu et concordia domini regis vel justiciarum (a fine is an amicable settlement and decisive agreement by consent and agreement of our lord the king or his justices). Glanville, lib. 8, c. 1.

Talis concordia finalis dicitur eo quod finem imposuit negotio, adeo ut neutra pars litigantium ab eo de cetero poterit recidere (such concord is called final because it puts an end to the business, so that neither of the litigants can afterwards recede from it). Glanville, lib. 9, c. 3; Cunningham, Law Dict.

FINANCES. The public revenue or resources of a government or state. The income or means of an individual or corporation. It is somewhat like the *fiscus* of the Romans. The word is generally used in the plural.

Money resources generally. The state of the finances of an individual or corporation, being his condition in a monetary point of view. The cash he has on hand, and that which he expects to receive, as compared with the engagements he has made to pay.

FINANCIER. One who manages the finances or public revenue. Persons skilled in matters appertaining to the judicious management of money affairs.

FIND. See FINDER; FINDING.

FINDER. One who lawfully comes to the possession of another's personal property, which was then lost.

The finder of lost property at common law had a valid claim to the same against all the world except the true owner; 1 Stra. 504; Lawrence v. Buck, 62 Me. 275; Mathews v. Harsell, 1 E. D. Sm. (N. Y.) 393; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Tancil v. Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293. Generally the place in which the property is found creates no exception to the general rule; Hoagland v. Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740; Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, 129 Am. St. Rep. 390, 15 Ann. Cas. 1156; money or property found on the premises of

another has been held, in the case of a servant in a hotel, as against the proprietor, to belong to the finder; Hamaker v. Blanchard, 90 Pa. 377, 35 Am. Rep. 664; to the same effect; Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627, where an employee found money hidden and abandoned on his employer's premises. So a stranger who finds money in a shop may retain it as against the shop-owner; 21 L. J. Q. B. 75; unless it has been simply laid aside and left by mistake; McAvoy v. Medina, 11 Allen (Mass.) 548, 87 Am. Dec. 733; Loucks v. Gallogly, 1 Misc. 22, 23 N. Y. Supp. 126; or a conductor who finds money on the cars may retain it as against the company; New York & H. R. Co. v. Haws, 56 N. Y. 175; or an employé in a mill, who finds bank-notes among old papers bought to be manufactured over; Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172. Drift-logs found on the banks of a river may be rightfully retained by the finder as against the riparian owner; Deaderick v. Oulds, 86 Tenn. 14, 5 S. W. 487, 6 Am. St. Rep. 812; but an aerolite which buries itself in the ground belongs rather to the owner of the soil on which it falls than to one who observes it and digs it out; Goddard v. Winchell, 86 Ia. 71, 52 N. W. 1124, 17 L. R. A. 788, 41 Am. St. Rep. 481. So gold-bearing quartz found buried in the earth, where it was placed by some unknown person, belongs to the owner of the soil as against the finder; Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. A prehistoric boat found by a gas company while excavating on land leased by it belongs to the lessor; 33 Ch. D. 566. Chattels lying upon private lands are, *prima facie*, in the possession of the owner of the land; [1896] 2 Q. B. 44. Money found in furniture belonging to the estate of a deceased person belongs to the administrator as against the finder; Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700; that the finder of a thing in a private place has no title against the owner of the place, see 39 Am. L. Rev. 922 and cases cited.

Where a workman employed by a corporation to clear out a pool on its land found two rings in the mud at the bottom of the pool, the corporation was held entitled to recover the rings in an action of detinue; [1896] 2 Q. B. 44. In that case Lord Russell, C. J., put the decision on the ground that the possession of land carried with it everything attached to it, or under it, and he expressly distinguished the last English case above cited, which, he said, stood by itself on the special ground that the notes being dropped in the public part of the shop were never in the custody of the shopkeeper; accordingly he says: "It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employé of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*."

A commentator upon these cases says: "This language applies to land with respect to which the public has no easement, which differentiates the case from findings in shops and other public places. The real distinction, however, is this, that those things belong to the owner of the premises in which they are found, which, either from their nature, or from the circumstances attending the loss, become practically part and parcel of the freehold, such as the rings, covered by the water and mud, which undoubtedly belonged to the owner of the land, and the aerolite which buried itself in the ground to the depth of three feet; or, to use the language of some of the cases, those things belong to the owner which may be regarded as *accretions* to his land, such as the aerolite, the rings, or drift-logs; though the latter may be pursued and taken by a former finder, from whom they have escaped." 36 Am. L. Reg. N. S. 588; Ferguson v. Ray, 44 Or. 557, 77 Pac. 600, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1. The contrary view is taken by some courts, which hold that the owner of the soil acquires no title to treasure trove by virtue of his ownership; Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 19 L. R. A. (N. S.) 1201, 120 Am. St. Rep. 390, 15 Ann. Cas. 1156 (coins found buried in the earth); Danielson v. Roberts, 44 Or. 108, 74 Pac. 913, 65 L. R. A. 526, 102 Am. St. Rep. 627 (coins secreted in an old building).

Where a man buys a chattel which, unknown to himself and the vendor, contains valuable property, he will, as to that, be considered merely as a finder. When a person purchased at a public auction a bureau, and appropriated to his own use a purse containing money, found in a secret drawer, the existence of which at the time of the sale was not known to any one, it was held that there was a delivery of the bureau but not of the purse and money, and it was a simple case of finding and subject to the law in such cases; 7 M. & W. 623. See Br. Leg. Max. 8th Am. ed. 807.

The finder is entitled to certain rights, and liable to duties which he is obliged to perform. This is a species of deposit, which, as it does not arise *ex contractu*, may be called a *quasi* deposit; and it is governed by the same general rules as common deposits. The finder is required to take the same reasonable care of the property found as any voluntary

depositary *ex contractu;* Doctor & Stud. Dial. 2, c. 38; 2 Bulstr. 306, 312; 1 Rolle 125.

The finder is not bound to take the goods he finds; yet, when he does undertake the custody, he is required to exercise reasonable diligence in preserving the property; and he will be responsible as a bailee for gross negligence. Some of the old authorities laid down that "if a man find butter, and by his negligent keeping it putrefy, or if a man find garments, and by his negligent keeping they be moth-eaten, no action lies." So it is if a man find goods and then lose them again. Bacon, Abr. *Bailment*, D; and in support of this position, Leon. 123, 223; Ow. 141; 2 Bulstr. 21, are cited. But these cases, if carefully examined, will not, perhaps, be found to decide the point as broadly as it is stated in Bacon. A finder would be held responsible for gross negligence, or fraud; Story, Bailm. § 85.

On the other hand, the finder of an article is entitled to recover all expenses which have necessarily occurred in preserving the thing found; Domat, l. 2, t. 9, s. 2, n. 2. But unlike salvors by water, he can claim nothing beyond this; 2 H. Bla. 254; Marvin v. Treat, 37 Conn. 96, 9 Am. Rep. 307; Trustees of Millcreek Tp. v. Brighton Stock Yards Co., 27 Ohio St. 435; Shoul. Bailm. 28.

Where money was found upon a body floating in the water and paid into the admiralty court by the salvors, they were awarded half of the amount as salvage, and the public administrator of the county in which the court was located was held entitled to the balance as against the finders, or the United States, claiming under its prerogative rights of a sovereign; Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552. The public administrator was considered to represent the true owner in like manner as would an ordinary administrator.

When the owner does not reclaim the goods lost, they belong to the finder; 1 Bla. Com. 296; 2 *id.* 9; 2 Kent 290; and should there be several finders, they share in common; Keron v. Cashman (N. J.) 33 Atl. 1055, 19 N. J. L. J. 54. The acquisition of treasure by the finder is evidently founded on the rule that what belongs to none naturally becomes the property of the first occupant: *res nullius naturaliter fit primi occupantis.* Money or goods that are *lost* are the only kind that can be said to be *found.* It is property that the owner has involuntarily parted with, and not property that he has intentionally concealed in the earth for safekeeping; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293.

To the same effect when property is found concealed in other property, such as bureaus, safes, machinery, stoves, etc. It is held in many cases not to be lost in the sense of abandoned, unless it appears to have been casually or accidentally placed there; Durfee v. Jones, 11 R. I. 588, 23 Am. Rep. 528; Huthmacher v. Harris's Adm'rs, 38 Pa. 491, 80 Am. Dec. 502; Warren v. Ulrich, 130 Pa. 413, 18 Atl. 618. Money found under such conditions is held to constitute treasure trove; Livermore v. White, 74 Me. 456, 43 Am. Rep. 600; Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; Kuykendall v. Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700. Money left on a desk in a bank, provided for the use of the depositors, is not lost so as to entitle the finder to the same, as against the bank; Loucks v. Gallogly, 1 Misc. (N. Y.) 22, 23 N. Y. Supp. 126. It seems that the title of the owner to property lying at the bottom of the sea is not divested, however long it may remain there, and no other person can acquire such title except by condemnation and sale in admiralty; Murphy v. Dunham, 38 Fed. 503. One who finds property at sea is only a salvor. When a ship was almost becalmed in high seas a floating chest was found and with but little trouble taken on board. It contained 70 doubloons. It was held that the finders were not entitled to the whole property, though no claims or marks of ownership, but should be compensated by a moiety as for salvage services. The other moiety was directed to be paid into court; Hollingsworth v. Seventy Doubloons, etc., Fed. Cas. No. 6,620. And to the same effect, Gardner v. Ninety-Nine Gold Coins, 111 Fed. 552, where money was found on a dead body floating in the water. See *supra.*

In a German case a woman, eating an oyster in a restaurant, found a pearl in it, which it was held belonged to her escort, who paid for the food; 39 Am. L. Rev. 443.

As to the criminal responsibility of the finder, the result of the authorities is that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny; Baker v. State, 29 Ohio St. 184, 23 Am. Rep. 731; 2 C. & K. 841; Wolfington v. State, 53 Ind. 343; Flemister v. State, 121 Ga. 146, 48 S. E. 910; State v. Stevens, 2 Pennewill (Del.) 486, 49 Atl. 174; State v. Hoshaw, 89 Minn. 307, 94 N. W. 873.

If a finder attempts to retain lost property as against the owner, or converts it to his own use, when he knows the owner, he will be guilty of larceny; Lawrence v. State, 1 Humph. (Tenn.) 228, 34 Am. Dec. 644; Pritchett v. State, 2 Sneed. (Tenn.) 285, 62 Am. Dec.

468. See as to this rule and its qualification Broom, Com., 4th ed. 955; Porter v. State, Mart. & Y. (Tenn.) 226. There must be a felonious intent; Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138, and note. Though it is the duty of the finder to seek out the owner and restore the property with due diligence; State v. Hoshaw, 89 Minn. 307, 94 N. W. 873; Pen. Code N. Y. § 539; yet the want of promptness on the part of the finder does not prove felonious intent in keeping the property; Peters v. Bourneau, 22 Ill. App. 177. The question is, whether the finder, when he came into possession, believed the owner could be found; 2 Green. Cr. L. Rep. 35. In Regina v. Thurborn, Parke, B., observes that it cannot be doubted that if, at this day, the punishment of death was assigned to theft and usually carried into effect, the misappropriation of lost goods would never be held to constitute that offence. Whart. Cr. L. § 901. See LARCENY; BAILMENT; SALVAGE; TREASURE TROVE.

FINDING. The result of the deliberations of a jury or a court. Todd v. Potter, 1 Day (Conn.) 238; Denslow v. Moore, 2 Day (Conn.) 12; U. S. v. Moller, 16 Blatchf. 65, Fed. Cas. No. 15,794.

The word find or finding does not always imply the same thing in legal proceedings. Where a cause is tried by the court, the finding means the fact which the court considers the evidence establishes, but find, as used in a statute in respect to the truth of a complaint for the revocation of a license, implies that the board is satisfied from the evidence, and the conclusion may be informally expressed. State v. Beloit, 74 Wis. 267, 42 N. W. 110.

Under the Act of March 3, 1865, R. S. § 649, it was provided that issues of fact in civil cases might be tried and determined by the court without the intervention of a jury upon the filing by the parties of a stipulation in writing waiving a jury, and that the finding of the court upon the facts might be either general or special and should have the same effect as the verdict of the jury; 1 Comp. Stat. (1901) 525. This provision seems to be undisturbed by the enactment of the judicial code, and it is omitted from the list of sections of the Revised Statutes repealed by it. The supreme court, in construing the statute above cited, lays down the following principles with respect to findings as being settled (citing a number of cases to each proposition): "1. The facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings, upon which we are authorized to pass, are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury. 2. That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained. 3. If the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case, the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court." The City of New York, 147 U. S. 76, 13 Sup. Ct. 211, 37 L. Ed. 84.

As to the findings of a master, see MASTER IN CHANCERY.

Where a case is tried by a court without a jury, its findings upon questions of fact are conclusive, in the United States supreme court; Stanley v. Albany County, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460, 30 L. Ed. 373. Errors in the findings of fact by the court are not subject to revision if there is any evidence upon which such findings could be made; Hathaway v. Bank, 134 U. S. 494, 10 Sup. Ct. 608, 33 L. Ed. 1004.

A finding without evidence is arbitrary and useless, and an act of congress authorizing any body to make such finding would be inconsistent with justice, and an exercise of arbitrary power; Interstate Commerce Commission v. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. ——.

FINE. In Conveyancing. An amicable composition or agreement of a suit, either actual or fictitious, by leave of the court, by which the lands in question become, or are acknowledged to be, the right of one of the parties. Co. Litt. 120; 2 Bla. Com. 349; Bacon, Abr. *Fines and Recoveries.* Fines were abolished in England by stat. 3 & 4 Wm. IV. c. 74. Their use was not unknown in the United States, but has been either expressly abolished or become obsolete. See 1 Steph. Com. 514.

A fine is so called because it puts an *end* not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Such concords, says Doderidge (Eng. Lawyer 84), have been in use in the civil law, and are called transactions, whereof they say thus: *Transactiones sunt de eis quæ in controversia sunt, a lite futura aut pendente ad certam compositionem reducuntur, dando aliquid vel accipiendo.* Or shorter, thus: *Transactio est de re dubia et lite ancipite ne dum ad finem ducta, non gratuita pactio.* It is commonly defined an assurance by matter of record, and is founded upon a supposed previously existing right, and upon a writ requiring the party to perform his covenant; although a fine may be levied upon any writ by which lands may be demanded, charged, or bound. It has also been defined an acknowledgment on record of a previous gift or feoffment, and *prima facie* carries a fee, although it may

be limited to an estate for life or in fee-tail. Prest. Conv. 200, 202, 268, 269; 2 Bla. Com. 348.

The stat. 18 Edw. I., called *modus levandi fines*, declares and regulates the manner in which they should be levied and carried on; and that is as follows: The party to whom the land is conveyed or assured commences an action at law against the other, generally an action of covenant, by suing out a writ of *præcipe*, called a writ of covenant, that the one shall convey the lands to the other, on the breach of which agreement the action is brought. The suit being thus commenced, then follows the *licentia concordandi*, or leave to compromise the suit. The *concord*, or agreement itself, after leave obtained by the court: this is usually an acknowledgment from the deforciants that the lands in question are the lands of the complainants. The *note* of the fine, which is only an abstract of the writ of covenant and the concord; naming the parties, the parcels of land, and the agreement. The foot of the fine, or the conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. See Cruise, Fines; Bacon, Abr. *Fines and Recoveries;* Comyns, Dig. *Fine.*

In Criminal Law. Pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. See Shepp. Touchst. 2; Bacon, Abr. *Fines and Amercements;* 1 Bish. Cr. L. § 940. It may include a forfeiture or penalty recoverable in a civil action; Hanscomb v. Russell, 11 Gray (Mass.) 373; Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356. A fine abates if unpaid at the death of the offender; U. S. v. Mitchell, 163 Fed. 1014.

The amount of the fine is frequently left to the discretion of the court, who ought to proportion the fine to the offence. To prevent the abuse of excessive fines, the constitution of the United States directs that "excessive bail shall not be required, nor excessive fines imposed." VIIIth Amendment; Cooley, Const. Lim. 377. This applies to national and not to state legislation; Pervear v. Massachusetts, 5 Wall. (U. S.) 480, 18 L. Ed. 608. The supreme court cannot, on *habeas corpus*, revise the sentence of an inferior court on the ground that the fine was excessive; In re Watkins, 7 Pet. (U. S.) 568, 8 L. Ed. 786.

The power to fine reposed in a court of last resort is not unlimited, but is limited by the obligation not to impose excessive fines; Standard Oil Co. of Indiana v. State of Missouri, 224 U. S. 271, 32 Sup. Ct. 406, 56 L. Ed. 760.

FINE AND RECOVERY ACT. The statute 3 & 4 Will. IV. c. 74. This act abolished fines and recoveries. 2 Sharsw. Bla. Com. 364, n.; 1 Steph. Com. 514. See FINE.

FINE CAPIENDO PRO TERRIS. An obsolete writ which lay for a person who, upon conviction by jury, had his lands and goods taken, and his body imprisoned, to be remitted his imprisonment, and have his lands and goods redelivered to him, on obtaining favor of a sum of money, etc. Reg. Orig. 142.

FINE FOR ALIENATION. A sum of money which a tenant by knight's service, or a tenant *in capite* by socage tenure, paid to his lord for permission to alienate his right in the estate he held to another, and by that means to substitute a new tenant for himself. 2 Bla. Com. 71, 89; De Peyster v. Michael, 6 N. Y. 467, 495, 57 Am. Dec. 470. These fines are now abolished.

FINE FOR ENDOWMENT. A fine anciently payable to the lord by the widow of a tenant without which she could not be endowed of her husband's lands. Abolished under Henry I., and by Magna Carta. Moz. & W.

FINE NON CAPIENDO PRO PULCHRE PLACITANDO. An obsolete writ to prohibit officers of court from taking fines for fair pleading.

FINE PRO REDISSEISINA CAPIENDO. An old writ which lay for the release of one imprisoned for a redisseisin, on payment of a reasonable fine. Reg. Orig. 222.

FINE ROLLS. See OBLATE ROLLS.

FINE SUR COGNIZANCE DE DROIT COME CEO QUE IL AD DE SON DONE. A fine upon acknowledgment of the right of the cognizee as that which he hath of the gift of the cognizor. By this the deforciant acknowledges in court a former feoffment or gift in possession to have been made by him to the plaintiff. 2 Bla. Com. 352; Cunningh. L. Dict.; Shepp. Touchst. c. 2; Com., Dig. *Fine.*

FINE SUR COGNIZANCE DE DROIT TANTUM. A fine upon acknowledgment of the right merely. Generally used to pass a reversionary interest which is in the cognizor. 2 Bla. Com. 351; Jacob, Law Dict.; Com., Dig.

FINE SUR CONCESSIT. A fine granted where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the consignee an estate *de novo*, usually for life or years, by way of a supposed composition. 2 Bla. Com. 353; Shepp. Touchst. c. 2.

FINE SUR DONE, GRANT ET RENDER. A double fine, comprehending the fine *sur cognizance de droit come ceo* and the fine *sur concessit.* It may be used to convey particular limitations of estates and to persons who are strangers or not named in the writ of covenant; whereas the fine *sur cognizance de droit come ceo*, etc., conveys nothing but an absolute estate, either of inheritance, or at least freehold. Salk. 340. In this last species of fines the cognizee, after the right is acknowledged to be in him, grants back again or renders to the cognizor, or perhaps to a stranger, some other estate in the premises. 2 Bla. Com. 353; Viner, Abr. *Fine;* Comyns, Dig. *Fine;* 1 Washb. R. P. 33.

FINE-FORCE. An absolute necessity or inevitable constraint. Old N. B. 78; Plowd. 94; 6 Co. 11; Cowell.

FINEM FACERE (Lat.). To make or pay a fine. Bracton 106; Skene.

FINES LE ROY. In Old English Law. A sum of money which any one is to pay the king for any contempt or offence; which fine any one that commits any trespass, or is convict that he falsely denies his own deed, or did anything in contempt of the law, shall pay to the king. *Termes de la Ley;* Cunningham, Law Dict.

FINGER PRINTS. See ANTHROPOMETRY.

FINIRE. In English Law. To fine, or pay a fine. Cowell. To end or finish a matter.

FINIS. End; conclusion; limit.

FINITIO. An ending; death as the end of life. Blount; Cowell.

FINIUM REGUNDORUM ACTIO. In Civil Law. An action for regulating boundaries. 1 Mackeldey, Civ. Law § 271.

FINORS. Those that purify gold and silver, and part them by fire and water from coarser metals; and therefore in the statute of Hen. VII. c. 2, they are also called "parters." *Termes de la Ley.*

FIRDFARE. In English Law. A summoning forth to a military expedition (*indictio ad profectionem militarem*). Spelman, Gloss.

FIRDSOCNE (Sax.). Exemption from military service. Spelman, Gloss.

FIRDWITE (Sax.). A mulct or penalty imposed on military tenants for their default in not appearing in arms or coming to an expedition. Cowell. A penalty imposed for murder committed in the army. Cowell.

FIRE. The effect of combustion. Webster, Dict.

The legal sense of the word is the same as the popular. 1 Pars. Marit. Law 231.

Where an insurance policy excluded liability for damages caused by explosions, unless fire ensues, a lighted match causing an explosion is not a fire; Mitchell v. Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74; nor is a lighted lamp; United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; and to the same effect, Transatlantic Fire Ins. Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Briggs v. Ins. Co., 53 N. Y. 446.

Fire is not a peril of the sea. In Scotch law, however, fire is an inevitable accident. Bell, Dict.

The ordinary meaning of the word as used in an insurance policy includes the idea of visible heat or light. Damage to wool by spontaneous combustion with smoke and great heat, but without any visible flame or glow, is held not to be fire. The "fire is always caused by combustion, but combustion does not always cause fire." Western Woolen Mill Co. v. Assurance Co., 139 Fed. 637, 72 C. C. A. 1.

When a fire becomes uncontrollable and dangerous to the public, the destruction of a house is justified for the protection of the neighborhood; for the maxim *salus populi est suprema lex* applies in such case; 11 Co. 13. See ACCIDENT; EMINENT DOMAIN; 3 Wms. Saund. 422 *a*, note 2; 3 Co. Litt. 57 *a*, n. 1; 1 Cruise, Dig. 151, 152; 1 Rolle, Abr. 1; Bacon, Abr. *Action on the Case*, F; 2 *Lois des Bâtim.* 124; 1 Term 310; 6 *id.* 489; Ambl. 619.

When real estate is let, and the tenant covenants to pay the rent during the term, unless there are proper exceptions to such covenants, and the premises are afterwards destroyed by fire during the term, the rent must be paid although there be no enjoyment; for the common rule prevails, *res perit domino.* The tenant, by the accident, loses his term; the landlord, the residence; Story, Eq. Jur. § 102; Woodf. L. & T. 408.

The owner of property may kindle and have a fire on his own premises for any lawful purpose, such as burning waste in husbandry, without liability for injury to the property of another, if it is done with due care as to time, manner, and circumstances, and with respect to casual fires, also having due regard to the conditions of weather, wind, and proximity of inflammable material; Thomas, Negl. 640; Webb, Poll. Torts 616, and note. Even in the extreme case of one who had been warned of the danger that his haystack would take fire and endanger others, the contention that the question should have been put to the jury whether he had acted *bona fide*, to the best of his judgment, and that the standard of ordinary prudence was too uncertain as a criterion, was unsuccessfully pressed, and the care of a prudent man was held to be the proper measure of duty; 3 Bing. N. C. 468.

Very early in England, the duty of every man to safely keep his own fire was a stringent "custom of the realm," *i. e.* at common law; Y. B. 2 Hen. IV. 18, pl. 5; and this, it is said, may be founded on ancient German custom, when a man carries fire more than nine feet from his hearth, only at his peril; Ll. Langob, cc. 147, 148 (A. D. 643); Poll. Torts 616. The rule applied as well to out-door fires, and in "a case grounded upon the common custom of the realm for negligently keeping his fire"; 1 Ld. Raym. 264; s. c. 1 Salk. 13. Liability for domestic fires begun accidentally and without accident is removed in England by stats. of Anne and Geo. III.; 11 Q. B. 347. The rule of modern times is affected by the increase of uses to which fire is applied, such as for mills, railroads, and the like, and in England the leading case of Rylands v. Fletcher, L. R. 3 H. L. 330 (which itself concerned a reservoir, but the application of which has passed far beyond the class of facts on which it was determined), laid down the rule "that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." This principle was expressly applied to railroads; L. R. 3 Q. B. 733; and to an engine brought on a highway; 5 Q. B. Div. 597.

It may be safely asserted as a rule that "a man who negligently sets fire on his own land, and keeps it negligently, is liable to

an action at common law for any injury done by the spreading or communication of the fire directly from his own land to the property of another, whether through the air or along the ground and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated;" Higgins v. Dewey, 107 Mass. 494, 90 Am. Rep. 63; Hays v. Miller, 70 N. Y. 112; Krippner v. Biebl, 28 Minn. 139, 9 N. W. 671; Jesperson v. Phillips, 46 Minn. 147, 48 N. W. 770; Needham v. King, 95 Mich. 303, 54 N. W. 891; Cleland v. Thornton, 43 Cal. 437. Where one negligently allows fire to escape from his premises and in an action for damages, for loss resulting therefrom, asserts that a sudden shift of the wind caused the fire to spread, he must show that it was extraordinary; Mahaffey v. Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263. One accidently but not negligently firing his house is not liable for the spread of the fire by wind; Pennsylvania Co. v. Whitlock, 99 Ind. 16, 50 Am. Rep. 71; Beckham v. Ry. Co., 127 Ga. 550, 56 S. E. 638, 12 L. R. A. (N. S.) 476. The spreading of a fire does not raise a presumption of negligence; Catron v. Nichols, 81 Mo. 80, 51 Am. Rep. 222; if there was none in starting it; Merchants' Wharfboat Ass'n v. Wm. Wood & Co., 64 Miss. 661, 2 South. 76, 60 Am. Rep. 76; Read v. R. Co., 44 N. J. L. 280. As to setting fire and restraining it, the rule is that ordinary prudence, honest motives, in the one, and due diligence as to the other, exempt one from liability; Hanlon v. Ingram, 3 Ia. 81; and the burden of proof is on the plaintiff; Bachelder v. Heagan, 18 Me. 32.

The owner of a threshing machine is bound to use the safest spark arrester and not merely one in common use; Martin v. McCrary, 115 Tenn. 316, 89 S. W. 324, 1 L. R. A. (N. S.) 530.

The right to operate a railroad includes the use of fire in locomotives; Philadelphia & R. Co. v. Schultz, 93 Pa. 341; Babcock v. R. Co., 140 N. Y. 308, 35 N. E. 596; and, if every *reasonable* precaution has been observed to prevent injury, the railroad company will not be liable; Baltimore & S. R. Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72; yet it must show the absence of negligence on its part, at least so far as concerns safety of construction and care in the operation of its locomotives, and the freedom of the track from combustibles (see *infra*); Webb, Poll. Torts 561, n.; Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441; Jefferis v. R. Co., 3 Houst. (Del.) 447; Edrington v. Ry. Co., 41 La. Ann. 96, 6 South. 19; Hagan v. R. Co., 86 Mich. 615, 49 N. W. 509. In some states this burden is put upon the company by statute; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Small v. R. Co., 50 Ia. 338; Chicago & A. R. Co. v. Clampit, 63 Ill. 95; and in others by decisions adopting the rule; Campbell v. R. Co., 58 Mo. 498; Wiley v. R. Co., 44 N. J. L. 247; Lawton v. Giles, 90 N. C. 374; Burlington & M. R. R. v. Westover, 4 Neb. 268; Hull v. R. Co., 14 Cal. 387, 73 Am. Dec. 656; in other states the plaintiff must fix upon defendant both the origin of the fire, and negligence in one of the points referred to; Garrett v. Ry. Co., 36 Ia. 121; Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143; Flinn v. R. Co., 142 N. Y. 11, 36 N. E. 1046; Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356. But the owner is, in the absence of statute, held to the duty of ordinary care, and his negligence will defeat recovery; Marquette, H. & O. R. Co. v. Spear, 44 Mich. 169, 6 N. W. 202, 38 Am. Rep. 242; or if the spreading of the fire was due to the negligence of the servants of the owner there is no liability; Illinois Cent. R. Co. v. McKay, 69 Miss. 139, 12 South. 447. It has been held that the fact that fire has been communicated by a passing locomotive is *prima facie* evidence of negligence; Wise v. R. Co., 85 Mo. 178; Union Pac. R. Co. v. Keller, 36 Neb. 189, 54 N. W. 420; Mobile & O. R. Co. v. Gray, 62 Miss. 383; Wabash R. Co. v. Smith, 42 Ill. App. 527; Niskern v. R. Co., 22 Fed. 811. See 11 L. R. A. 506, note. The company must exercise as great a degree of care to protect the public from injury by fire as is required in favor of its patrons; Babcock v. R. Co., 67 Hun (N. Y.) 469, 22 N. Y. Supp. 449; and the failure to provide the *best* appliances to prevent injury to property by fire is want of ordinary care; Watt v. R. Co., 23 Nev. 154, 44 Pac. 423, 46 Pac. 52, 726, 62 Am. St. Rep. 772; *contra*, Paris, M. & S. P. R. Co. v. Nesbitt, 11 Tex. Civ. App. 608, 33 S. W. 280; but see Gulf, C. & S. F. R. Co. v. Reagan (Tex.) 32 S. W. 846, where it was held that the rule is that the company is only bound to exercise due care with respect to providing the best appliances. See Babcock v. R. Co., 140 N. Y. 308, 35 N. E. 596; Flinn v. R. Co., 142 N. Y. 11, 36 N. E. 1046; where it was held that compliance with a statute requiring a guard against the emission of sparks, except during certain months, does not exempt the company from the exercise of that care to which they are bound in law, to avoid injuring the property of their neighbor; T. & O. C. Ry. Co. v. Wickenden, 11 Ohio Cir. Ct. 378.

A question, the settlement of which has caused much litigation, was whether a railroad company was liable for damage to property *not adjoining* the track, nor set on fire *directly* from the locomotive, but by the spreading of the fire from the property first ignited. The rule now firmly established is that the company is liable for such injury naturally and by the ordinary course of events resulting from the fire started by the locomotive; Hooksett v. R. R., 38 N. H. 242; Martin v. R. Co., 62 Conn. 331, 25 Atl. 239; Pratt v. R. Co., 42 Me. 579; Perley v. R. Co.,

98 Mass. 414, 96 Am. Dec. 645; even where the property was at a considerable distance from the track; C. P. 98; s. c. 6 *id.* 14; Hoyt v. Jeffers, 30 Mich. 181; or if several owners intervene; Hart v. Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Mahaffey v. Lumber Co., 61 W. Va. 571, 56 S. E. 893, 8 L. R. A. (N. S.) 1263.

The stubborn resistance to the establishment of this rule and its extended discussion by the courts of so many jurisdictions is accounted for by the fact that early decisions in New York and Pennsylvania were made the basis of strong contention against it in every state when the question first arose. Ryan v. N. Y. C. R. Co., 35 N. Y. 210, 91 Am. Dec. 49, and Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, where the cases sustained the position that where the fire communicated from the sparks to a house near the track, and thence extended to another at a distance, the company was not liable for the loss of the latter, notwithstanding its negligence in allowing the sparks to escape. In the New York case it was determined that the negligence was too remote, and the injury not the natural and probable result; but later in the same court, in an action against a railroad company for fire, resulting from the ignition of a tie by coal from a locomotive, an effort was made to distinguish the case, and it was held that the question of proximate cause was properly left to the jury; Webb v. R. Co., 49 N. Y. 420, 10 Am. Rep. 389. It was further shaken (usually upon the idea of distinguishing it), in Lowery v. Ry. Co., 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; and its weight as authority practically ended by O'Neill v. Ry. Co., 115 N. Y. 579, 22 N. E. 217, 5 L. R. A. 591; and Read v. Nichols, 118 N. Y. 224, 23 N. E. 468, 7 L. R. A. 130.

The Pennsylvania case was also "distinguished" in a case in which the same court held that where sparks from an engine fired a railroad tie and it resulted in burning two fields and fences, the proximity of the cause is a question for the jury, who must determine whether the facts constituted a continuous succession of events so linked as to be a natural whole, or whether the chain is so broken as to become independent, and the final result cannot be said to be the natural and probable consequence of the negligence of the defendants, and that it *might* and ought to have been foreseen under the circumstances; Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; but Pa. R. R. Co. v. Kerr was expressly approved and followed in a later case in which damage by a fire, spread by burning oil carried by a running stream, was held too remote, and the stream was considered to be an intervening agent; in this case the court said that the facts were ascertained and there was nothing to put to the jury, and on this theory it was distinguished from the case in 80 Pa. This case had what the chancellor of New Jersey termed substantially its counterpart in that state, in a claim for damages against a receiver operating a railroad, and strong disapproval of the Pennsylvania case and the earlier case in New York was expressed. The stream was considered similar to other material forces, and a natural link in the chain of causation, and the receiver was held liable, the rule as applied being thus stated: "When a fire originates in the negligence of a defendant, and is carried by a material force, whether it be the wind, the law of gravitation, combustible matter existing in a state of nature, or other means, to the plaintiff's property and destroys it, and it appears that no object intervened between the point where the fire started and the injury, which would have prevented the injury, if due care had been taken, the defendant is legally answerable for the loss;" Kuhn v. Jewett, 32 N. J. Eq. 647. The only point which suggested difficulty in applying to this class of cases the general doctrine of liability for the result of negligence is brought out with distinctness in the different views taken by the Pennsylvania and New Jersey courts of cases precisely similar as to the facts, and that difference may be considered as concerning rather the doctrine of proximate cause than as having special relation to fires from locomotives.

The cases of Ryan v. R. Co., 35 N. Y. 214, 91 Am. Dec. 49, and Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431, are said to "stand alone" and to be "in conflict with every English or American case as yet reported"; Fent v. Ry. Co., 59 Ill. 349, 14 Am. Rep. 13; "much shaken" and "each qualified and explained in its own jurisdiction, by later decisions so as to take from its weight"; Martin v. R. Co., 62 Conn. 331, 25 Atl. 239; and finally the United States supreme court, speaking through a Pennsylvania justice says of the two cases: "Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrong-doer, they have not been accepted as authority for such doctrine, even in the states where the decisions were made." Strong, J., in Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, citing Webb v. R. Co., 49 N. Y. 420, 10 Am. Rep. 389, and Pennsylvania R. Co. v. Hope, 80 Pa. 373, 21 Am. Rep. 100; and cases *contra* of other states.

The result is to settle the rule as stated that, whether the fire is traceable to its negligence directly or indirectly, the company is liable when the fire started by its loco-

motive was the proximate cause of the injury complained of, and this applies as well to the class of cases hereafter noted in this title. The application of the doctrine is illustrated by a case which held that when the fire negligently set was carried by moderately high wind, though not unusual, the wind was not the proximate cause, and the company was liable; Union Pac. Ry. Co. v. McCollum, 2 Kan. App. 319, 43 Pac. 97. When the fire is communicated indirectly, the question as to what is the proximate cause of the injury is ordinarily not one of science or of legal knowledge, but of fact for the jury to determine, in view of the accompanying circumstances; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Fent v. Ry. Co., 59 Ill. 349, 14 Am. Rep. 13; Toledo, W. & W. Ry. Co. v. Muthersbaugh, 71 Ill. 572; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Perry v. R. Co., 50 Cal. 578; Clemens v. R. Co., 53 Mo. 366, 14 Am. Rep. 460; Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 252; and, notwithstanding the earlier cases discussed *supra*, Grace v. R. Co., 143 N. Y. 182, 38 N. E. 102; and Lehigh Val. R. Co. v. McKeen, 90 Pa. 122, 35 Am. Rep. 644.

A railroad company has the right to keep its right of way free from combustibles by burning off grass, etc., but in such case it is bound at its peril to keep such fire within bounds; Indiana, B. & W. Ry. Co. v. Overman, 110 Ind. 538, 10 N. E. 575. See 11 L. R. A. 506, note.

Indeed, though not an insurer, the railroad company must keep its track reasonably clear of such danger; Briant v. R. Co., 104 Mich. 307, 62 N. W. 365; Gulf, C. & S. F. Ry. Co. v. Rowland (Tex.) 23 S. W. 421; St. Johns & H. R. Co. v. Ransom, 33 Fla. 406, 14 South. 892; Pierce v. R. Co., 105 Mass. 199 (but see Union Pac. Ry. Co. v. Gilland, 4 Wyo. 395, 34 Pac. 953); and is liable for damages from fire, caused by its negligence with respect to a fire which spreads from the track; Black v. R. Co., 115 N. C. 667, 20 S. E. 713, 909; and the care exercised in constructing and operating the engine is no defence; Toledo, P. & W. R. Co. v. Endres, 57 Ill. App. 69; Stacy v. R. Co., 85 Wis. 225, 54 N. W. 779; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; nor is the diligence of the company in attempting to quench the fire; Austin v. R. Co., 93 Wis. 496, 67 N. W. 1129; it is for the jury to determine the question of negligence or care with respect to allowing weeds to grow on the right of way; Richmond & D. R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; Gibbons v. R. Co., 58 Wis. 335, 17 N. W. 132; or the time and manner of setting and guarding the fire; Cole v. R. Co., 105 Mich. 549, 63 N. W. 647; or whether fire was started by sparks from a locomotive; Marande v. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487; the company must exercise ordinary care which is proportioned to, and measured by, the amount of danger, and is liable for the want of it; Martin v. R. Co., 87 Tex. 117, 26 S. W. 1052; such fire if started for a lawful purpose is itself no evidence of negligence, which must be proved by the person complaining; Mattoon v. R. Co., 6 S. D. 301, 60 N. W. 69; nor is unlawful speed of a train unless the fire would not otherwise have occurred; Bennett v. R. Co., 11 Tex. Civ. App. 423, 32 S. W. 834.

It has been held that when a fire is caused by the sparks of a locomotive, communicating with dried grass which a railroad company has permitted to accumulate in the line of its track, and thence spreading to the property of an adjacent land-owner, it is a question for a jury whether the company was guilty of negligence, irrespective of any question as to negligence or omission of duty on the part of the land-owner; Kellogg v. R. Co., 26 Wis. 223, 7 Am. Rep. 69; Flynn v. R. Co., 40 Cal. 14, 6 Am. Rep. 695; *contra*, Chicago & N. W. R. Co. v. Simonson, 54 Ill. 504, 5 Am. Rep. 155; Snyder v. R. Co., 11 W. Va. 14; Mississippi Home Ins. Co. v. R. Co., 70 Miss. 119, 12 South. 156. Direct evidence of the accumulation of such inflammable material was held sufficient evidence of defendant's liability; Sibilrud v. R. Co., 29 Minn. 58, 11 N. W. 146; Troxler v. R. Co., 74 N. C. 377; Ohio & M. R. Co. v. Porter, 92 Ill. 437; but allowing such accumulation is not negligence *per se*, unless such as a prudent man having regard to the same hazard would not permit; Kesee v. R. Co., 30 Ia. 78, 6 Am. Rep. 643; Louisville, N. A. & C. R. Co. v. Stevens, 87 Ind. 198; and there must be a connection between the negligence and the injury and no intervening cause (such as in this case a high wind carrying a burning brand over a ridge to a marsh adjoining plaintiff's); Marvin v. Ry. Co., 79 Wis. 140, 47 N. W. 1123, 11 L. R. A. 506. As to how far a properly equipped locomotive will set fire by sparks is a proper subject for expert evidence; Kansas City, F. S. & M. R. Co. v. Blaker, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81, 1 Ann. Cas. 883; Babbitt v. R. Co., 108 App. Div. 74, 95 N. Y. Supp. 429.

Generally the accumulation of inflammable material near the track by the plaintiff is contributory negligence; Omaha Fair & Exposition Ass'n v. R. Co., 42 Neb. 105, 60 N. W. 330; T. & P. Ry. Co. v. Tankersley, 63 Tex. 57; but it is not so to permit the natural growth of stubble and grass to remain; Patton v. Ry. Co., 87 Mo. 117, 56 Am. Rep. 446; nor to deposit wood near the track under a contract with the company; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; but if the defendant permits inflammable rubbish to accumulate and remain on its right of way it is negligence; Hawley v. Ry. Co., 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; erecting a wooden building

near a railroad track is not negligence *per se;* Cincinnati, N. O. & T. P. R. Co. v. Barker, 94 Ky. 71, 21 S. W. 347; but the owner assumes the risks incident thereto, and cannot recover if it is burned without fault on the part of the company; Briant v. R. Co., 104 Mich. 307, 62 N. W. 365. The storage of cotton, on a platform for that purpose, near the depot of a railroad company, is not an assumption of risk by its owner, if the company is using an engine with a defective spark arrester; Texas & P. Ry. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, affirming *id.*, 112 Fed. 402, 50 C. C. A. 230.

In Indiana a plaintiff must not only aver freedom from fault but absence on his part of contributory negligence; Wabash, St. L. & P. Ry. Co. v. Johnson, 96 Ind. 40; *id.*, 96 Ind. 62. Formerly the Illinois negligence rule was: Where fire is ignited on the right of way of a railroad, by reason of an accumulation of grass left there, and communicated to the adjoining field by the negligence of the owner in not keeping it free from combustible materials, the owner cannot recover for the injury thereby occasioned, unless the negligence of the company is greater than his own; Chicago & N. W. Ry. Co. v. Simonson, 54 Ill. 504, 5 Am. Rep. 155. But later cases in that state overrule this doctrine, and a statute provides that it shall not be considered negligence on the part of the owner of property, injured by fire originating from the operation of a railroad, that he uses the same in the manner it would have been used had no railroad passed through or near the property so injured; American Strawboard Co. v. R. Co., 177 Ill. 513, 53 N. E. 97; Cleveland, C., C. & St. L. Ry. Co. v. Stephens, 173 Ill. 430, 51 N. E. 69; Cleveland, C., C. & St. L. Ry. Co. v. Tate, 104 Ill. App. 615.

In many states statutes have been passed making railroad companies absolutely liable for damage caused by fires from locomotives, and such statutes have been almost uniformly held to be constitutional; Pierce v. R. Co., 105 Mass. 199; Bassett v. R. Co., 145 Mass. 129, 13 N. E. 370, 1 Am. St. Rep. 443; Chapman v. R. R. Co., 37 Me. 92; Thatcher v. R. Co., 85 Me. 502, 27 Atl. 519; Grissell v. R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. Rep. 138. Such a statute does not violate the constitution of the United States; St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909. Such statutes apply to property not adjoining the right of way, if set on fire by intervening property ignited by the locomotive; Hunter v. R. R. Co., 41 S. C. 86, 19 S. E. 197; Union Pac. Ry. Co. v. Arthur, 2 Colo. App. 159, 29 Pac. 1031; and are not void as interfering with the federal jurisdiction over interstate commerce; Smith v. R. R., 63 N. H. 25; McCandless v. R. Co., 38 S. C. 103, 16 S. E. 429, 18 L. R. A. 440. Under such a statute it was held that the company was *prima facie* liable; Small v. R. Co., 50 Ia. 340; and that contributory negligence on the part of the plaintiff is no defense to such an action; West v. Ry. Co., 77 Ia. 654, 35 N. W. 479, 42 N. W. 512; to the same effect; Mathews v. Ry. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, affirmed St. Louis & S. F. Ry. Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611. Where, however, a railroad company leased land on its right of way to a cold storage company, stipulating that it would not be liable for fires, it was held such a contract was not against public policy, though in contravention of the state statute; Hartford Fire Ins. Co. v. Ry. Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; and the company is liable for the spreading of the fire even when the person whose property was first set on fire requested the railroad men to let it burn, as he wished to burn up the bogs; Simmonds v. R. Co., 52 Conn. 264, 52 Am. Rep. 587.

As to liability for damages from fires by reason of the failure to furnish water to extinguish them, see WATER COMPANIES.

See 1 L. R. A. 625, note; 21 *id.* 255, note; NEGLIGENCE; RAILROAD.

As to the right of a city to order the destruction of property to prevent the spread of fire, see EMINENT DOMAIN.

FIRE AND SWORD. Letters of fire and sword were the ancient means for dispossessing a tenant who retained possession contrary to the order of the judge and diligence of the law. They were directed to the sheriff, and ordered him to call the assistance of the county to dispossess the tenant. Bell, Dict.; Erskine, Inst. lib. iv. tit. 3, § 17.

FIRE-ARM. An instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded within it.

In 1637 a royal charter was granted to the gunmakers of London empowering them to search for, prove, and mark hand guns, pistols, etc., and by the statutes of 1818 and 1855 the proving of all fire-arms was made compulsory. These statutes have been superseded by the gun-barrel proof act 31 and 32 Vict., which regulates the duties and powers of the London and Birmingham proof-houses, and which makes the forging or counterfeiting of proof-marks or stamps, and the selling, or having in possession for the purpose of sale, of fire-arms bearing such forged or counterfeited mark or stamp, a misdemeanor.

As to what constitutes a fire-arm, the decisions have been somewhat conflicting. A pistol so dilapidated that it could not be discharged by the trigger has been held to be a fire-arm and a deadly weapon; Atwood v. State, 53 Ala. 508; so where the mainspring was so disabled as not to allow it to be discharged in the regular way; Williams v. State, 61 Ga. 417, 34 Am. Rep. 102; but not so where the weapon could not be discharged by a cap on the tube; Evins v. State, 46 Ala. 88. The separate parts of a pistol found on the offender's person were held a fire-arm;

Hutchinson v. State, 62 Ala. 3, 34 Am. Rep. 1. See ARMS; WEAPON.

FIRE DEPARTMENT. A city is not liable to an employee of the fire department for the negligence of those in charge of that department in furnishing vicious horses, where such employee without knowledge of such viciousness is injured by the horse; Lynch v. City of North Yakima, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; nor for injuries to an engineer of a fire engine due to the gross negligence and incompetency of the driver; Shanewerk v. City of Ft. Worth, 11 Tex. Civ. App. 271, 32 S. W. 918; nor in such a case for injury to one on the street; Higgins v. Superior, 134 Wis. 264, 114 N. W. 490, 13 L. R. A. (N. S.) 994; nor for injuries to an employee caused by negligence in permitting the hose reel on which he was required to ride to get out of repair; Peterson v. Wilmington, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959; nor for the negligence of an employee of the department who, in recklessly moving scales used in weighing coal, injured the plaintiff; Manske v. Milwaukee, 123 Wis. 172, 101 N. W. 377; or of one who caused injuries whilst practicing with the water tower in the public streets; Frederick v. Columbus, 58 Ohio St. 538, 51 N. E. 35; or by negligently leaving a ladder truck standing so that a ladder projected across the sidewalk; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781, 33 Am. St. Rep. 901; or for frightening a horse by negligently ringing a bell; Saunders v. Ft. Madison, 111 Ia. 102, 82 N. W. 428; or for damaging a stock of goods by water negligently thrown by firemen; Davis v. City of Lebanon, 108 Ky. 688, 57 S. W. 471.

FIRE-ESCAPE. An apparatus constructed to afford a safe and convenient method of escape from a burning building.

Regulations have been enacted in most of the states, often by municipal ordinances, providing that all factories, hotels, schools, buildings, theatres, hospitals, public buildings, and flat or tenement houses shall be equipped with safe and suitable means of escape in case of fire. Such regulations are of a highly penal character, and are to be strictly construed; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Keely v. O'Conner, 106 Pa. 321; Maker v. Mill & Power Co., 15 R. I. 112, 23 Atl. 63. They are not of such a character as to interfere with the use and enjoyment of private property; Fire Department of New York v. Chapman, 10 Daly (N. Y.) 377. They are the subject of a proper police regulation; Roumfort Co. v. Delaney, 230 Pa. 374, 79 Atl. 653.

The original duty to provide fire-escapes rests with the owner or proprietor; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; and the fact that he has erected them in compliance with the statute will not exempt him from providing additional ones when ordered so to do; Fire Deparment of New York v. Chapman, 10 Daly (N. Y.) 377; but in some states it has been held that when the owner has leased his premises the tenant in actual occupancy and possession, who places his operatives in a position of danger and enjoys the benefit of their services, becomes responsible under the law; Schott v. Harvey, 105 Pa. 222, 51 Am. Rep. 201; Keely v. O'Conner, 106 Pa. 321; Lee v. Smith, 42 Ohio St. 458, 51 Am. Rep. 839; (*contra*, Abrayan v. Bank, 16 N. Y. St. Rep. 750.) But these cases seem to place the question of liability more on the ground of the relation of master and servant, it being held that as an absolute duty is laid upon the owner by statute, a servant sustaining an injury by breach of such duty may maintain an action ; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; Williams v. Tripp, 11 R. I. 451. A building becomes a public nuisance if not supplied with such appliances as required by statute; 16 Abb. 195. And the mere relation of landlord and tenant will not bar the action; Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536. It is not the duty of the tenant to search for defects and report them to the owner; *id.;* nor will the owner be permitted to wait until he is officially directed to provide fire-escapes; *id.;* McLaughlin v. Armfield, 58 Hun 376, 12 N. Y. Supp. 164; although no such obligation existed at common law; Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661.

They must be reasonably secure, although they need not be the best that can be devised; Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; and the number required depends on the size of the building, the number of employees, and the inflammable character of the materials there used; Pauley v. Lantern Co., 61 Hun 254, 16 N. Y. Supp. 820; having erected a reasonably safe fire-escape, the owner is not responsible if a fire cuts off access to it; Keely v. O'Conner, 106 Pa. 321. See Thomas, Negl. 772; Ray, Neg. Imp. Dut. 660; NEGLIGENCE.

FIRE INSURANCE. See INSURANCE.

FIRE ORDEAL. See ORDEAL.

FIRE POLICY. See INSURANCE; POLICY.

FIRE-PROOF. Incombustible; not in danger from the action of fire.

A statement that a building is fire-proof necessarily excludes the idea that it is of wood, and necessarily implies that it is constructed of some substance fitted for the erection of fire-proof buildings. The characterization of one portion of a building as fire-proof suggests a comparison with other portions of the same building, and warrants the conclusion that the specified portion is different from the remainder; Hickey v. Mor-

rell, 102 N. Y. 459, 7 N. E. 321, 55 Am. Rep. 824.

In an insurance policy, a condition that books be kept in a fire-proof safe is complied with if the safe be of the kind commonly regarded as fire-proof; Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393. The insured does not by this clause warrant his safe to preserve the books; *id.* Such a clause, commonly called the iron-safe clause, is a warranty the breach of which avoids the policy; Standard Fire Ins. Co. of Kansas City v. Willock (Tex.) 29 S. W. 218; Home Ins. Co. of New Orleans v. Cary, 10 Tex. Civ. App. 300, 31 S. W. 321. See INSURANCE.

FIRE RAISING. In Scotch Law. The wilfully setting on fire buildings, growing or stored cereals, growing wood, or coalheughs. Ersk. Pr. 577. See ARSON.

FIRE-WORKS. A contrivance of inflammable and explosive materials combined of various proportions for the purpose of producing in combustion beautiful or amusing scenic effects, or to be used as a night signal on land or sea, or for various purposes in war. Cent. Dict.

Percussion caps for signalling railway trains are held to be explosive preparations, although the court considered they were not "fireworks" as the latter term is known to commerce; 3 B. & S. 128. Under a clause in an insurance policy forbidding the keeping of gunpowder, fireworks are not prohibited; Tischler v. Ins. Co., 66 Cal. 178, 4 Pac. 1169. Where a display of fireworks was made by private persons, under a permit given by the mayor, the city was held liable for injuries on the ground that it consented to a nuisance; Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727, 21 L. R. A. 641, 36 Am. St. Rep. 664; followed Landau v. City of New York, 180 N. Y. 48, 72 N. E. 631, 105 Am. St. Rep. 709. The liability of the town for such injuries has been denied, however, on the ground that the act was a simple violation of an ordinance; Ball v. Town of Woodbine, 61 Ia. 83, 15 N. W. 846, 47 Am. Rep. 805; Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; and a borough would not be liable for the negligence of its police officers in permitting unlawful acts; Borough of Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771; Morehead Banking Co. v. Morehead, 116 N. C. 413, 21 S. E. 191; Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. Rep. 817.

It is not contributory negligence to be present at exhibitions of fireworks; Mullins v. Blaise, 37 La. Ann. 92; Bradley v. Andrews, 51 Vt. 530; *contra*, Frost v. Josselyn, 180 Mass. 389, 62 N. E. 469.

See INSURANCE; RISKS AND PERILS; CAUSA PROXIMA NON REMOTA SPECTATUR.

FIREBOTE. An allowance of wood or *estovers* to maintain competent firing for the tenant. A sufficient allowance of wood to burn in a house. 1 Washb. R. P. 99. Tenant for life or years is entitled to it; 2 Bla. Com. 35. Cutting more than is needed for present use is waste; 3 Dane, Abr. 238; Sackett v. Sackett, 8 Pick. (Mass.) 312; Cro. Eliz. 593; 7 Bingh. 640. The rules in England and in this country are different in relation to the kind of trees which the tenant may cut; Padelford v. Padelford, 7 Pick. (Mass.) 152; Jackson v. Brownson, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; Kidd v. Dennison, 6 Barb. (N. Y.) 9; Morehouse v. Cotheal, 22 N. J. L. 521; Crockett v. Crockett, 2 Ohio St. 180; McCullough v. Irvine's Ex'rs, 13 Pa. 438; 3 Leon. 16.

FIRKIN. A measure of capacity, equal to nine gallons. The word firkin is also used to designate a weight, used for butter and cheese, of fifty-six pounds avoirdupois.

FIRLOT. A Scotch measure of capacity containing two gallons and a pint. Spelman.

FIRM. The persons composing a partnership, taken collectively.

The name or title under which the members of a partnership transact business.

The word is used as synonymous with partnership. The words "house," "concern," and "company" are also used in the same sense. This name is in point of law conventional, and applicable only to the persons who, on each particular occasion when the name is used, are members of the firm. A firm is usually described, in legal proceedings, as certain persons trading or carrying on business under and using the name, style, and firm of, etc. See 9 Q. B. 361; 9 M. & W. 347; 1 Chitty, Bailm. 49.

As to the nature and characteristics of firms and firm names and the law of the subject, see PARTNERSHIP.

FIRM NAME. The name or title of a firm in business. See PARTNERSHIP.

FIRMA (L. Lat.). A farm or rent reserved on letting lands, anciently frequently reserved in provisions. Spelman, Gloss.; Cunningham, Law Dict.

A banquet; supper; provisions for the table. Du Cange.

A tribute or custom paid towards entertaining the king for one night. Domesday; Cowell.

A rent reserved to be paid in money, called then *alba firma* (white rents, money rents). Spelman, Gloss.

A lease. A letting. *Ad firmam tradidi* (I have farm let). Spelman, Gloss.

A messuage with the house, garden, or lands, etc., connected therewith. Co. Litt. 5 *a;* Shepp. Touchst. 93. See FARM.

FIRMA BURGI. The right, in mediæval days, to take the profits of a borough, paying for them a fixed sum to the crown or other lord of the borough. 2 Holdsw. Hist. E. L. 276.

FIRMA FEODI (L. Lat.). Fee-farm. See FEODI-FIRMA.

FIRMAN. A passport granted by the Great Mogul to captains of foreign vessels to trade within the territories over which he has jurisdiction; a permit.

FIRMARATIO. The right of a tenant to his lands and tenements. Cowell.

FIRMARIUS (L. Lat.). A fermor. A lessee of a term. *Firmarii* comprehend all such as hold by lease for life or lives or for year, by deed or without deed. Co. 2d Inst. 144, 145; 1 Washb. R. P. 107; Sackett v. Sackett, 8 Pick. (Mass.) 312; 7 Ad. & E. 637.

FIRMITAS. In English Law. An assurance of some privilege, by deed or charter.

FIRMLY. Where a statute requires an affidavit that an appellant from an award of a board of arbitrators "firmly believes injustice has been done," it is not sufficient to express belief, omitting the word firmly. The word is a strong expression intended to put the affiant on his guard. It cannot be dispensed with without substituting something equal to it in substance; as to what shall be so considered, there may be liberal construction. Verily is as strong a word as firmly, and is sufficient; Thompson v. White, 4 S. & R. (Pa.) 135.

FIRMURA. Liberty to scour and repair a mill-dam, and carry away the soil, etc. Blount.

FIRST. In a will the word "first" may not import precedence of one bequest over another. Everett v. Carr, 59 Me. 330; Swasey v. American Bible Society, 57 Me. 523.

FIRST-CLASS. Occupying the highest standing in a particular classification. In a contract for "first-class" work, it is for the jury to decide as to whether the terms were substantially complied with; Boughton v. Smith, 67 Hun 652, 22 N. Y. Supp. 148. A stipulation in a contract that the title of the vendor shall be first-class means simply that it shall be marketable; Vought v. Williams, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634.

FIRST-CLASS MATTER. Matter received at the United States post-offices, in writing or sealed against inspection.

FIRST-CLASS MISDEMEANANT. Under the Prisons Act (28 & 29 Vict. c. 126, s. 67) prisoners in the county, city, and borough prisons convicted of misdemeanor and not sentenced to hard labor, are divided into two classes, one of which is called the first division; and it is in the discretion of the court to order that such a prisoner be treated as a *misdemeanant of the first division*, usually called "first-class misdemeanant," and as such not to be deemed a criminal prisoner, *i. e.* a prisoner convicted of a crime.

FIRST FRUITS. The first year's whole profits of the spiritual preferments. There were three valuations *(valor beneficium)* at different times, according to which these first fruits were estimated, made in 1253, 1288, and 1318. A final valuation was made by the 26 Hen. VIII. c. 3.

They now form a perpetual fund, called Queen Anne's bounty, the income of which is used for the augmentation of poor livings. 1 Sharsw. Bla. Com. 284, and notes; 2 Burn, Eccl. Law 260.

FIRST IMPRESSION (Lat. *primæ impressionis*). First examination. First presentation to a court for examination or decision. A cause which presents a new question for the first time, and for which, consequently, there is no precedent applicable in all respects, is said to be a case of the first impression. Austin, Jur. sect. xxv. *ad fin.* See JUDGE-MADE LAW.

FIRST INSTANCE. See COURT OF FIRST INSTANCE.

FIRST PURCHASER. In the English law of descent, the first purchaser was he who first acquired an estate in a family which still owns it. A purchase of this kind signifies any mode of acquiring an estate, except by descent. 2 Bla. Com. 220.

FISCAL. Belonging to the fisc, or public treasury. A fiscal agent does not necessarily imply a depositary of the public funds, so as, by the simple use of it in a statute without any directions in this respect to make it the duty of the state treasurer to deposit with him any moneys in the treasury; State v. Dubuclet, 27 La. Ann. 29.

FISCUS. In Civil Law. The treasury of a prince; the public treasury. 1 Low C. 361. In France, fisc.

Hence, to *confiscate* a thing is to appropriate it to the *fisc*. Paillet, *Droit Public*, 21, n., says that *fiscus*, in the Roman law, signified the treasury of the prince, and *ærarium* the treasury of the state. This distinction was not observed in France. In course of time the *fiscus* absorbed the *ærarium* and became the treasury of the state. Gray, Nature and Sources of Law 58. See Law 10, ff. *De jure Fisci.*

FISH. An animal which inhabits the water, breathes by means of gills, swims by the aid of fins, and is oviparous.

Fishes in rivers and in the sea are considered as animals *feræ naturæ;* consequently, no one has any property in them until they have been captured; Percy Summer Club v. Welch, 66 N. H. 180, 28 Atl. 22; Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; Gentile v. State, 29 Ind. 409; and, like other wild animals, if, having been taken, they escape and regain their liberty, the captor loses his property in them. See FISHERY.

FISH COMMISSIONER.

The Act of February 9, 1871, provides for the appointment of a commissioner of fish and fisheries, with all necessary powers looking to the preservation and increase of food fishes throughout the country. U. S. Rev. Stat. § 4395.

FISH ROYAL. A whale, porpoise, or sturgeon thrown ashore on the coast of England belonged to the king as a branch of his prerogative. Hence these fish are termed royal fish. Hale, *De Jure Mar.* pt. 1, c. 7; 1 Sharsw. Bla. Com. 290; Plowd. 305; Bracton, l. 3, c. 3.

FISHERIES ARBITRATION. The right of the United States to fish upon the coastal waters of the British colonies on the Atlantic had been a subject of negotiation from the Treaty of Peace between the two countries in 1783 down to the year 1910, when the long standing dispute between them was finally settled by arbitration. By the Treaty of Peace with England, in 1783, the United States obtained the "right" to fish on the banks of Newfoundland and the "liberty" to fish on the coasts, bays, and creeks of the British Dominions in America. In 1814, when the Treaty of Peace was being signed at Ghent, Great Britain refused to re-concede the privilege granted by the Treaty of 1783. In 1815, the United States maintained that the general provisions of the Treaty of 1783 were of a character not to be annulled by a subsequent war, whereas England declared that what was described as a "liberty" in the Treaty of 1783 was terminated by the war of 1812. By the Treaty of 1818 the United States obtained the right to fish on certain specified coasts of British America without reference to the distance from shore, while as to all other coasts, they were excluded from fishing within three marine miles from the shore. The Treaty of Washington, of 1871, removed the restrictions upon inshore fisheries. Art. XIX. yields a corresponding right to all British subjects as to the Atlantic coasts of the United States north of the 39th parallel, and concedes to each nation the right to import, free of duty, fish and fish oils into the ports of the other. The treaty was to continue in operation for ten years, and further until two years' notice from either party. In Art. XXII. it is stated that the British government asserts that these provisions of the treaty would work to her disadvantage. Provision was accordingly made, by the same article, for the appointment of a commission, which was known as the *Fisheries Commission*, to determine the amount of compensation to be paid by the United States. The tribunal, consisting of three members, met at Halifax, N. S., June 15, 1877, and awarded the sum of $5,500,000 to Great Britain.

In 1883 the United States gave notice of the termination, after two years, of the articles of the Treaty of 1871 relating to fisheries. Disputes had arisen as to the following points: What were the "bays" intended by the Treaty of 1818; were the three miles to be measured from sinuosities of the coast, or from a line drawn from headland to headland; and how far could American vessels traffic in their catch when putting into the harbor?

In 1898 the fisheries question was considered by the Quebec Commission, but without result. Finally, on January 27, 1909, an agreement was signed by the two countries referring the matter to arbitration by the Permanent Court at The Hague. On five of the seven questions presented to the court, the award was favorable to the United States. For the future the reasonableness of the regulations defining the seasons when fish may be taken on the treaty coasts, and the methods and instruments to be used, shall be determined by a Mixed Commission appointed by the two countries.

FISHERY. A place prepared for catching fish with nets or hooks. This is commonly applied to the place of drawing a seine or net. Hart v. Hill, 1 Whart. (Pa.) 131.

A common of fishery is not an exclusive right, but one enjoyed in common with certain other persons. 3 Kent 329.

A free fishery is said to be a franchise in the hands of a subject, existing by grant or prescription, distinct from an ownership in the soil. It is an exclusive right, and applies to a public navigable river, without any right in the soil. 3 Kent 329.

A several fishery is one by which the party claiming it has the right of fishing, independently of all other, so that no person can have a coextensive right with him in the object claimed; but a partial and independent right in another, or a limited liberty, does not derogate from the right of the owner. 5 Burr. 2814.

A distinction has been made between a common fishery (*commune piscarium*), which may mean for all mankind, as in the sea, and a common of fishery (*communium piscariæ*), which is a right, in common with certain other persons, in a particular stream. 3 Taunt. 183. Angell seems to think that *common of fishery* and *free fishery* are convertible terms. Law of Watercourses, c. 6, ss. 3, 4.

Woolrych says that sometimes a free fishery is confounded with a several, sometimes it is said to be synonymous with common, and again it is treated as distinct from either. Law of Waters, etc., 97.

A several fishery, as its name imports, is an exclusive property; this, however, is not to be understood as depriving the territorial owner of his right to a several fishery when he grants to another person permission to fish; for he would continue to be the several proprietor, although he should suffer a stranger to hold a coextensive right with himself. Woolr. Wat. 96.

These distinctions in relation to several, free, and common of fishery are not strongly marked, and the lines are sometimes scarcely perceptible. "Instead of going into the black-letter books to learn what was a fishery, and a free fishery, and a several fishery," says Huston, J., "I am disposed to regard our own acts, even though differing from old feudal law." Hart v. Hill, 1 Whart. (Pa.) 132.

The right of fishery is to be considered with reference to navigable waters and to waters not navigable; meaning, by the former, those in which the tide ebbs and flows; by the latter, those in which it does not. By the common law of England the fisheries in all the navigable waters of the realm belong to the crown by prerogative, in such way, neverthe-

less, as to be common to all the subjects: so that an individual claiming an exclusive fishery in such waters must show it strictly by grant or prescription. Such a grantee may not use a right of fishery in such a manner as to interfere with navigation, which belongs to all the subjects of the realm; 20 C. B. N. S. 1. In that country navigable waters meant tide-waters; [1891] 2 Ch. 681; but different conditions in this country have resulted in the application of the rule *cessat ratio cessat lex*, and while the same principle is recognized that navigable waters belong to the state and non-navigable ones to the riparian proprietor, the recognition of tide-water as the test of navigability is abandoned.

By Magna Carta, c. 16, "no river banks shall be guarded from henceforth, but such as were in defence at the time of King Henry, our grandfather, by the same places and in the same bounds as they were wont to be in his time." That this chapter limited the right of the crown to grant several fisheries was contended by Coke; 2 Inst. 30. Lord Hale, however, construed it to apply only to the custom of putting fresh as well as salt rivers in defence for the king's recreation, and to limit the right of the crown to the use of such rivers as were in defence in the time of Henry II. *De Jure Mar.* c. 2. That the Great Charter restrained the king from granting exclusive rights of fishery in navigable waters is held in some cases; Lowndes v. Dickerson, 34 Barb. (N. Y.) 586; 23 L. T. N. S. 732; Arnold v. Mundy, 6 N. J. L. 4, 10 Am. Dec. 356; Gough v. Bell, 21 N. J. L. 156; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597. That the crown may grant exclusive rights of fishery in tide-waters is held in Rogers v. Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493. That Magna Carta was only intended to restrain the king from granting exclusive rights of fishery disconnected with the soil, in disregard of the rights of the owner of the soil, was held in Trustees of Brookhaven v. Strong, 60 N. Y. 56 (followed in Robins v. Ackerly, 91 N. Y. 98). In Martin v. Waddell, 16 Pet. (U. S.) 367, 10 L. Ed. 997, it was said, following Lord Hale's construction, "The true rule on the subject is that *prima facie* a fishery in a navigable river is common, and he who sets up an exclusive right must show title either by grant or prescription," and that this is the doctrine of the King's Bench in England in the case in 4 Burr. 2163.

See NAVIGABLE WATERS.

In rivers *not navigable* the fisheries belong to the owners of the soil or to the riparian proprietors; 2 Bla. Com. 39; Gould, Wat. 42, 48; Hale, *De Jure Mar.* c. 4; 4 Burr. 2162; Dav. 155; 7 Co. 16 *a*; Plowd. 154 *a*. In such rivers the owner of the adjoining soil has an exclusive right of fishery in front of his land to the thread of the river, except so far as this right has been qualified by legislative regulation; but this right is limited to the taking of fish, and does not carry with it the right to prevent the passage of fish to lakes and ponds for breeding purpose; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386. The common-law doctrine accepting the tide-water test of navigability has been declared to be the law in several of the United States; People v. Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Lay v. King, 5 Day (Conn.) 72; Bennett v. Boggs, 1 Baldw. 60, Fed. Cas. No. 1,319; Smith v. Miller, 5 Mas. 191, Fed. Cas. No. 13,080; Adams v. Pease, 2 Conn. 481; Com. v. Vincent, 108 Mass. 446, 447; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57. But in some states the right of fishery in the great rivers of those states, though not tide-waters, is held to be vested in the state and open to all the world; Shrunk v. Nav. Co., 14 S. & R. (Pa.) 71; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am. Dec. 597; Collins v. Benbury, 25 N. C. 277, 38 Am. Dec. 722; Sloan v. Biemiller, 34 Ohio St. 492; See Harvey v. Vandegrift, 89 Pa. 346; People v. Doxtater, 75 Hun 472, 27 N. Y. Supp. 481. This modification of the common-law doctrine has been applied not to the abandonment of the distinction between the public and private rights of fisheries as affected by navigability, but to the establishment of a different test of navigability, made necessary by the difference of physical conditions in the two countries already alluded to. So in the leading Pennsylvania case the point of the decision was that neither the quality of fresh or salt water, nor the flux or reflux of the tide, would determine whether a river should be considered navigable or not; Carson v. Blazer, 2 Binn. (Pa.) 475, 4 Am. Dec. 463. After changing the test of navigability, these cases applied the rule of the public character of streams actually navigable which had been in England determined by the mere test of tide water. Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566.

It is for the states to determine the question of the title to the beds of navigable *non-tidal* waters between the state and the riparian owner; Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224. Each state has the exclusive control of fisheries in the tide-waters and beds of tide-waters within its jurisdiction, subject to the paramount right of navigation; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159. The jurisdiction of a state is coextensive with its territory, coextensive with its legislative powers, and, within what are generally recognized as the territorial limits of a state, by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties; U. S. v. Bevans, 3 Wheat. (U. S.) 386, 4 L. Ed. 404.

In the control of fisheries within a state, the state government is supreme; U. S. v.

Packer's Ass'n, 79 Fed. 152; Martin v. Waddell, 16 Pet. (U. S.) 369, 10 L. Ed. 997; Marsh v. Colby, 39 Mich. 626, 33 Am. Rep. 439. It may regulate public rights of fishing; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; or make grants of exclusive rights which do not impair any private rights already vested; Smith v. Look, 108 Mass. 141; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; it may prohibit the taking of fish during certain seasons of the year or with certain implements; Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400; Matthews v. Treat, 75 Me. 597; Donnell v. Joy, 85 Me. 118, 26 Atl. 1017; even on the part of private individuals from waters in which as riparian owners they have the exclusive right of fishing, if such waters connect with the public waters of the state; People v. Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; People v. Lumber Co., 116 Cal. 397, 48 Pac. 374, 39 L. R. A. 581, 58 Am. St. Rep. 183; Barrows v. McDermott, 73 Me. 441; or a state may prohibit all such acts as would render the public right less valuable or destroy it altogether; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269. It may prohibit the taking of oysters and shell fish in its public waters by the citizens of other states, without infringing on the privileges and immunities of citizens of other states; State v. Medbury, 3 R. I. 138; New England Oyster Co. v. McGarvey, 12 R. I. 385; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; or without discrimination against them; State v. Tower, 84 Me. 444, 24 Atl. 898; People v. Lowndes, 130 N. Y. 455, 29 N. E. 751. The rights, privileges and immunities secured by the constitution of the United States to the inhabitants of the several states do not include, in favor of the inhabitants of any state, right in the common property of the inhabitants of the other states; Com. v. Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475. No rights under the commerce clause of the federal constitution are infringed by a state act under which a conviction may be had for using a dredge in tidal waters of a state for the purpose of catching oysters upon lands leased by another person; Lee v. New Jersey, 207 U. S. 67, 28 Sup. Ct. 22, 52 L. Ed. 106. A state may require a license fee from all persons engaged in fishing for profit in the navigable waters of Lake Erie; State v. Hanlon, 77 Ohio St. 19, 82 N. E. 662, 13 L. R. A. (N. S.) 539, 122 Am. St. Rep. 472. It may provide for forfeiture of a vessel violating the fishing laws; Boggs v. Com., 76 Va. 989; Haney v. Compton, 36 N. J. L. 507; Smith v. Maryland, 18 How. (U. S.) 71, 15 L. Ed. 269. It may confiscate nets used in illegal fishing; Daniels v. Homer, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, affirming *id.*, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134, 16 Am. St. Rep. 813. It extends to the preservation of fish not used as food for human beings, but as food for other fish; Com. v. Manchester, 152 Mass. 230, 25 N. E. 113, 9 L. R. A. 236, 23 Am. St. Rep. 820. The states, by surrendering to the federal government the right to regulate commerce, did not part with the ownership of the fish in the tidal waters within their borders, or with the right to regulate and control their taking; State v. Corson, 67 N. J. L. 178, 50 Atl. 780; nor did the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government surrender to the United States the power, vested in the several states before the adoption of the constitution, to regulate the fisheries belonging to them and to punish those who should transgress their regulations; Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230. The assumption by a state of control over fisheries within the bays leading from the ocean is not in contravention of the authority of the United States; State v. Thompson, 85 Me. 189, 27 Atl. 97. That congress never assumed control over fisheries is persuasive evidence that the right to control them remained in the states; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159.

A club may not enjoin members of the public from fishing on navigable waters; Bodi v. Shooting Club, 57 Ohio St. 226, 48 N. E. 944.

One driving stakes in a navigable river may not enjoin their removal by persons injured thereby; Hettrick v. Page, 82 N. C. 65; but those engaged in fishing in such waters may enjoin one from driving stakes which interfere with their fishing; Skinner v. Hettrick, 73 N. C. 53; Cherry Point Fish Co. v. Nelson, 25 Wash. 558; Morris v. Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33.

The control of fisheries to the extent of at least a marine league from the shore belongs to the nation on whose coast the fisheries are prosecuted. Bays wholly within the territory of a nation, not exceeding two marine leagues in width at the mouth, are within its territorial jurisdiction; Manchester v. Massachusetts, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. Ed. 159.

By the award of the arbitrators under the treaty with Great Britain (27 Stat. L. 948), it was settled that the United States had no exclusive jurisdiction in Behring Sea outside the ordinary three-mile limit, and no right of property in, or protection over, the fur seals frequenting the islands of the United States when found outside of such three-mile limit. Therefore the act of March 2, 1889, declaring that R. S. sec. 1956, which forbids the killing of fur-bearing animals in Alaska and the waters thereof, shall apply to "all the dominion of the United States in the waters of Behring Sea," must be construed to mean the waters within three miles of the shores of Alaska; Whitelaw v. U. S., 75 Fed. 513, 21 C. C. A. 434.

The right to take fur seals under a so-called lease from the government, which is expressly subject to such regulations of the business as the United States may make, does not entitle the lessee to any damages for a reduction of the catch allowed by the regulations, for which a deduction of rental is provided; North American Com. Co. v. U. S., 171 U. S. 110, 18 Sup. Ct. 817, 43 L. Ed. 98.

The right of private fishery may exist not only in the riparian proprietor, but also in another who has acquired it by grant or otherwise; Co. Litt. 122 *a*, n. 7; Ang. Waterc. 184; Cobb v. Davenport, 33 N. J. L. 223, 97 Am. Dec. 718. But see 2 Salk. 637. Such a right is held subject to the use of the waters as a highway; Ang. Tide-Wat. 80; Post v. Munn, 4 N. J. L. 67, 7 Am. Dec. 570; Lewis v. Keeling, 46 N. C. 299, 62 Am. Dec. 168; 1 Campb. 516; Hart v. Hill, 1 Whart. (Pa.) 136; and to the free passage of the fish; 7 East 195; Boatwright v. Bookman, 1 Rice (S. C.) 447; Com. v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Shaw v. Crawford, 10 Johns. (N. Y.) 236; Hyde v. Russell, 2 Cush. (Mass.) 251. See as to right of fishery; 9 L. R. A. 236, 807, notes, 60 L. R. A. 486, note.

A definite "fishing right in the adjoining sea," described in the granting clause of a royal patent as "attached to this land" and which right is of a sort long recognized by the Hawaiian laws as private property, is included in the grant, although the *habendum* is to have and to hold "the above granted land," which, standing alone, might not include a fishing right; Damon v. Hawaii, 194 U. S. 154, 24 Sup. Ct. 617, 48 L. Ed. 916. In Hawaii the land was formerly an incident to the fishery, and though the right claimed was different from those recognized by the common law, it was regarded as an easement or *profit à prendre*. A later case also held that the grantees of land in Hawaii under a royal patent were entitled to a fishery right in the adjoining sea which they and their predecessors in title had enjoyed from time immemorial; Carter v. Hawaii, 200 U. S. 255, 26 Sup. Ct. 248, 50 L. Ed. 470. Where fishing rights were secured to the Yakima Indians on the Columbia river by the treaty of 1859, such rights were held paramount to the powers acquired by the state of Washington on its admission to the Union in and over the shore lands; U. S. v. Winans, 198 U. S. 371, 25 Sup. Ct. 662, 49 L. Ed. 1089. The treaty was held not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. It imposed a servitude upon the land. See, as to prescriptive rights of fishery, 14 L. R. A. (N. S.) 386, note.

The free right of fishery in navigable waters extends to the taking of shell-fish between high and low water-mark; 2 B. & P. 472; Peck v. Lockwood, 5 Day (Conn.) 22; Moulton v. Libbey, 37 Me. 472, 50 Am. Dec. 57; Proctor v. Wells, 103 Mass. 217.

See as to river and lake fisheries, 14 Law Mag. & Rev. 4th 220; France and Canada; 15 *id.* 301; United States and Canada; 13 *id.* 282; 21 Am. L. Rev. 369, 431; 1 Rev. Crit. 38.

FISHGARTH. A dam or weir in a river for taking fish. Cowell.

FISHING BANKS. A fishing ground of comparative shoal water in the sea. Parker v. Thomson, 21 Or. 523, 28 Pac. 502.

FISHING-BILL. A term used in equity for a bill that seeks a discovery upon general, loose, and vague allegations. Story, Eq. Pl. § 325; on that ground alone, such a bill will be at once dismissed; In re Pacific Ry. Commission, 32 Fed. 263.

FISK. In Scotch Law. The revenue of the crown. Generally used of the personal estate of a rebel which has been forfeited to the crown. Bell, Dict.

FISTUCA. See FESTUCA.

FIT. Suitable; appropriate; conformable to a duty. Fit for cultivation refers to that condition of soil which will enable a farmer with a reasonable amount of skill to raise regularly and annually, by tillage, grain or other staple crops; Keeran v. Griffith, 34 Cal. 581; State v. Allen, 35 N. C. 37; Barrett v. Nelson, 29 Kan. 596.

FIVE MILE ACT. An act of parliament passed in 1665, forbidding nonconformists who refused to take the oath of non-resistance to come within five miles of any corporation in which they had preached since the passing of the act of oblivion in 1660, nullified by act of 1689.

FIX. To determine; to settle. Bunn v. Kingsbury County, 3 S. D. 87, 52 N. W. 673. A constitutional provision to the effect that the general assembly shall fix the compensation of officers, means that it shall prescribe the rule by which such compensation is to be determined. Goodin v. State, 18 Ohio 9.

FIXING BAIL. Rendering absolute the liability of special bail.

The bail are fixed upon the issue of a *ca. sa.* (*capias ad satisfaciendum*) against the defendant; Broader v. Welsh, 2 N. & McC. 569; Gillespie v. White, 16 Johns. (N. Y.) 117; Drake v. Cochrane, 18 N. J. L. 9; and a return of *non est* thereto by the sheriff; Collins v. Cook, 4 Day (Conn.) 1; Saunders v. Bobo, 2 Bail. (S. C.) 492; Rosenberg v. McKain, 3 Rich. (S. C.) 145; Howe v. Ranson, 1 Vt. 276; Branch v. Webb, 7 Leigh (Va.) 371; made on the return-day; Rowland v. Seymour, 2 Metc. (Mass.) 590; Ancrum v. Sloan, 1 Rich. (S. C.) 421; unless the defendant be surrendered within the time allowed *ex gratia* by the practice of the court; Edwards v. Gunn, 3 Conn. 316; McClurg v. Bowers, 9 S. & R. (Pa.) 24; Brownelow v. Forbes, 2 Johns. (N. Y.) 101; Dick v. Stoker, 12 N. C. 91; Dunbar v. Conway, 11 Gill & J. (Md.) 92; Allen

v. Breslauer, 8 Cal. 552; Shannon v. Hyde, 17 Ga. 88.

In New Hampshire; Hamilton v. Dunklee, 1 N. H. 172; Massachusetts; Champion v. Noyes, 2 Mass. 485; Missouri; State v. Millsaps, 69 Mo. 359; Tennessee; White v. State, 5 Yerg. 183; and Texas; Pearson v. State, 7 Tex. App. 279; bail is not fixed till judgment on a *sci. fa.* is obtained against them, except on the death of the defendant after a return of *non est* to an execution against him.

The death of the defendant after a return of *non est* by the sheriff prevents a surrender, and fixes the bail inevitably; Boggs v. Teackle, 5 Binn. (Pa.) 332; Olcott v. Lilly, 4 Johns. (N. Y.) 407; Gordon v. Liepman's Adm'r, 3 McCord (S. C.) 49; Bradford v. Earle, 4 Pick. (Mass.) 120; Goodwin v. Smith, 4 N. H. 29; Davidson v. Taylor, 12 Wheat. (U. S.) 604, 6 L. Ed. 743. See White's Ex'rs v. Cummins, 1 Ov. (Tenn.) 224; Bank of Mt. Pleasant v. Pollock's Adm'rs, 1 Ohio 35; Griffin v. Moore, 2 Ga. 331.

In Georgia and North Carolina, bail are not fixed till judgment is obtained against them; Granberry v. Pool, 14 N. C. 155; Rich v. Colquitt, 61 Ga. 197. See BAIL.

FIXTURES. Personal chattels affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. There is much dispute among the authorities as to what is a proper definition. Bro. Fixt. 1; Tyler's Fixt. 35; 6 Am. L. Rev. 412, where various definitions are reviewed. A "fixture" formerly meant any chattel which on becoming affixed to the soil became a part of the realty. It now means those things which formed an exception to that rule and can be removed by the person who affixed them to the soil; L. R. 4 Ex. 328.

Anything fixed or attached to a building, and used in connection with it, movable or immovable. Whenever the appendage is of such a nature that it is not part and parcel of the building, but may be removed without injury to the building, then it is a movable fixture and does not pass with a conveyance of the freehold. If, however, it be so connected with the building, that it cannot be severed from it without injury to the building, then it is part of the realty and passes with the conveyance of the soil; Capital City Ins. Co. v. Caldwell, 95 Ala. 77, 10 South. 355.

To entitle a tenant to the value of trade fixtures attached by him to property, it is not necessary that they can be removed without injury to the fixtures. The true test is that they can be removed without injury to the freehold; In re City of New York, 192 N. Y. 295, 84 N. E. 1105, 18 L. R. A. (N. S.) 423, 127 Am. St. Rep. 903.

The annexation may be actual or constructive. 1st, By actual annexation is understood every mode by which a chattel can be joined or united to the freehold. The article must not be merely laid upon the ground; it must be fastened, fixed, or set into the land, or into some such erection as is unquestionably a part of the realty; otherwise it is in no sense a fixture; Bull. N. P. 34; 3 East 38; Walker v. Sherman, 20 Wend. (N. Y.) 636; Taffe v. Warnick, 3 Blackf. (Ind.) 111, 23 Am. Dec. 383. Locks, iron stoves set in brickwork, posts, window-blinds, and a mirror firmly attached to the chimney breast by molding, afford examples of actual annexation; see Pillow v. Love, 5 Hayw. (Tenn.) 109; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Kirwan v. Latour, 1 Harr. & J. (Md.) 289, 2 Am. Dec. 519; McClintock v. Graham, 3 McCord (S. C.) 553; Swift v. Thompson, 9 Conn. 63, 21 Am. Dec. 718; Goddard v. Chase, 7 Mass. 432; McFadden v. Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894; Spinney v. Barbe, 43 Ill. App. 585.

Machinery in a planing mill, securely fastened, belongs to the realty; Kansas City Southern R. Co. v. Anderson, 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784; lace looms bolted to the floor and fastened by iron stays to the roof; 5 F. Ct. Sess. 214; electric light fittings in a hotel; Canning v. Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 858; and metallic gutters attached to the roof of a house with water pipes laid under ground; Wright v. Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

2d, by constructive annexation. Some things have been held to be parcel of the realty, which are annexed or fastened to it; for example, deeds or chattels which relate to the title of the inheritance and go to the heir; Shep. Touch. 469; Beardsley v. Bank, 31 Barb. (N. Y.) 632; Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780. Cars used in connection with a drier in a brickyard, and which are indispensable to the use of the drier, are part of the realty, and a mechanic's lien will attach thereto; Curran v. Smith, 37 Ill. App. 69. So wires and insulators used in forming and completing the connection between an electric light and power plant and the places supplied with light and heat by such plant; Hughes v. Power Co., 53 N. J. Eq. 435, 32 Atl. 69; Badger Lumber Co. v. Light & Power Co., 48 Kan. 182, 29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301; gas burners, chandeliers, and the like; Keeler v. Keeler, 31 N. J. Eq. 181; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. (Ky.) 357, 83 Am. Dec. 475; 18 L. T. N. S. 300.

Doors, mantels, and other building materials which have been purchased for an unfinished building and placed therein, but not attached, are not part of the realty; Blue v. Gunn, 114 Tenn. 414, 87 S. W. 408, 69 L. R. A. 892, 108 Am. St. Rep. 912, 4 Ann. Cas. 1157; the main belt of a mill connecting a drive wheel with the main shaft is realty; Friedly v. Giddings, 119 Fed. 438; where the

owner replaced the ordinary fixed grate in the house with others, which were not physically attached to the main structure, it was held they were realty, since they were placed to improve the inheritance; [1901] 1 Q. B. 205.

Tubs, vats, and casks placed in a brewery with a design of permanent use therein and which are too large to pass out of any existing opening are part of the realty; Equitable Trust Co. v. Christ, 47 Fed. 756; and a gasoline engine on a stone foundation in a permanent building; State Security Bank v. Hoskins, 130 Ia. 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376. So deer in a park, fish in a pond, and doves in a dove-house, go to the heir, and not to the executor, being, like keys and heirlooms, constructively annexed to the inheritance; Shep. Touch. 90; Pothier, *Traité des Choses* § 1. But loose, movable machinery used in prosecuting any business to which the freehold is adapted cannot be considered part of the real estate nor in any way appurtenant to it; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 503; 6 Exch. 295; McLaughlin v. Nash, 14 Allen (Mass.) 136, 92 Am. Dec. 741; Brown v. Power Co., 55 Fed. 229. See, however, Voorhis v. Freeman, 2 W. & S. (Pa.) 116, 37 Am. Dec. 490; Pyle v. Pennock, 2 W. & S. (Pa.) 390, 37 Am. Dec. 517.

Chairs hired for use in a hippodrome and screwed to the floor do not cease to be chattels; [1903] 2 K. B. 135; boilers, engines, shafts and heating apparatus placed in a building for business purposes and easily removable are not part of the realty; Bergh v. Safe Co., 136 Fed. 368, 69 C. C. A. 212, 70 L. R. A. 756; electric fixtures installed by a tenant for his personal comfort and convenience are domestic fixtures, if they can be readily detached without injury to the premises; Raymond v. Strickland, 124 Ga. 504, 52 S. E. 619, 3 L. R. A. (N. S.) 69; a gas stove is not realty; Hook v. Bolton, 199 Mass. 244, 85 N. E. 175, 17 L. R. A. (N. S.) 699, 127 Am. St. Rep. 487.

The criterion of an irremovable fixture is the united application of three requisites: (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471.

The general rule is, that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions: as, first, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate; second, where it has been annexed merely for the purpose of carrying on a trade; 3 East 88; Lemar v. Miles, 4 Watts (Pa.) 330; for the fact that it was put up for such a purpose indicates an intention that the thing should not become part of the freehold. See 1 H. Bla. 260. Buildings may, by agreement of parties, be erected upon land without becoming affixed thereto; Kinkead v. U. S., 150 U. S. 483, 14 Sup. Ct. 172, 37 L. Ed. 1152. But if there is a clear intention that the thing should be permanently annexed to the realty, its being used for purposes of trade would not, perhaps, bring the case within one of the exceptions; 1 H. Bla. 260. The tendency of modern authorities is to make the intention of the parties the general rule for deciding whether an article is realty or personalty; L. R. 7 C. P. 328; Snedeker v. Warring, 12 N. Y. 170; 17 Am. Dec. 690, note; Langston v. State, 96 Ala. 44, 11 South. 334. But the intention must be definitely expressed by words or acts; mere unexpressed mental intention is of no avail; Cook v. Whiting, 16 Ill. 480; Burnside v. Twitchell, 43 N. H. 390. See Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446, and note. This intention will prevail except as against innocent purchasers; Binkley v. Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Machinery used in a manufacturing plant and intended to be used for the benefit of the realty is realty as between mortgagor and mortgagee; In re Eagle Horseshoe Co., 163 Fed. 699, 90 C. C. A. 283; but where a person placed a frame factory upon the land of another with his consent, and there was no agreement respecting the ownership of the factory, the presumption is that the building is still the property of the party annexing it, and is removable by him; King v. Morris, 74 N. J. L. 810, 68 Atl. 162, 14 L. R. A. (N. S.) 439, 12 Ann. Cas. 1086.

With respect to the different classes of persons who claim the right to remove a fixture, it has been held that where the question arises between *an executor and the heir at law* the rule is strict that whatever belongs to the estate to which the fixture appertains will go to the heir; but if the ancestor manifested an intention (which it is said may be inferred from circumstances) that the things affixed should be considered personalty, they will be so treated, and will go to the executor. See Bac. Abr. *Executor, Administrator;* 1 P. Wms. 94; Bull. N. P. 34; 12 Cl. & F. 312; Morrison v. Berry, 42 Mich. 389, 4 N. W. 731, 36 Am. Rep. 446.

As between *a vendor and a vendee* the same strictness applies as between an executor and an heir at law; for all fixtures which belong to the premises at the time of the sale, or which have been erected by the vendor, whether for purposes of trade or manufacture or not, as potash-kettles for manufacturing ashes, and the like, chandeliers and gas-brackets, pass to the vendee of

the land, unless they have been expressly reserved by the terms of the contract; Miller v. Plumb, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Ewell, Fixt. 271; Tyler, Fixt. 519 (see also Shaw v. Lenke, 1 Daly [N. Y.] 487; Montague v. Dent, 10 Rich. L. [S. C.] 135, 67 Am. Dec. 572); a faucet attached to a hot-water boiler and a rosebush in the yard pass by deed of the realty; Kirchman v. Lapp, 19 N. Y. Supp. 831; but a filter capable of delivering 105 gallons of water per minute, resting loosely on a factory floor, is a fixture; Sayles v. Purifying Co., 62 Hun 618, 16 N. Y. Supp. 555.

Where the vendee under a contract for the purchase of land is in possession and allows a third party to erect thereon a small building, agreeing that it should be personalty, and subsequently the contract for the purchase of land is rescinded, the building may still be removed by the third party; Brannon v. Vaughan, 66 Ark. 87, 48 S. W. 909.

The same rule applies as between *mortgagor* and *mortgagee;* Southbridge Sav. Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; 1 Atk. 477; Preston v. Briggs, 16 Vt. 124; Despatch Line of Packets v. Manuf'g Co., 12 N. H. 205, 37 Am. Dec. 203; Ewell, Fixt. 271. The same rule as to ownership of property in chattels annexed to realty prevails between a mortgagor and mortgagee as between a grantor and grantee; and in either case it operates more strongly in favor of the mortgagee or grantee than the landlord where his title is assailed by a lessee; Kinnear v. Railways Co., 223 Pa. 390, 72 Atl. 808.

Wires for conducting an electrical current to lamps pass as fixtures under a mortgage of the electric light plant; Fechet v. Drake, 2 Ariz. 239, 12 Pac. 694; and the annunciator and all the wires of an electric-bell system are part of the realty of a hotel and pass as fixtures under a mortgage; Capehart v. Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582; in which case steam radiators and an office-desk attached to the building were held to be fixtures, while gas-burners and chandeliers were held not to pass as such to the mortgagee; *contra,* as to the last point; Manning v. Ogden, 70 Hun 399, 24 N. Y. Supp. 70; and in National Bank of Catasauqua v. North, 160 Pa. 303, 28 Atl. 694, it was held that steam radiators and valves were not annexed to the realty, but, being exactly analogous to gas fixtures were severable from the realty.

Where chattels are sold under conditional sale and annexed to the realty, the seller may assert his title as against a subsequent mortgagee of the land; Adams Mach. Co. v. Ass'n, 119 Ala. 97, 24 South. 857; Davis v. Bliss, 187 N. Y. 77, 79 N. E. 851, 10 L. R. A. (N. S.) 458; and so where the owner of a greenhouse leased the land and sold the greenhouse and subsequently mortgaged the land, the mortgagee was not entitled to the greenhouse; Royce v. Latshaw, 15 Colo. App. 420, 62 Pac. 627; but where a furnace was sold and installed under similar circumstances, and the premises were bought in under a foreclosure sale under a prior mortgage, it was held that the furnace passed with the realty; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 867; in England, machines bought on conditional sale and attached to the floor become part of the realty; [1903] 1 K. B. 87, affirmed [1904] App. Cas. 466; but where the mortgagee is only an equitable mortgagee, it was held that the vendor of the machine had a prior equitable interest which could not be defeated; [1907] 1 Ch. 575.

The question whether ranges, hot-water boilers, sinks, and wash-tubs are fixtures under a mortgage depends on when and how they are attached to the house; Manning v. Ogden, 70 Hun 399, 24 N. Y. Supp. 70; and as between a *devisee and the executor,* things permanently annexed to the realty at the time of the testator's death pass to the devisee,—his right to fixtures being similar to that of a vendee; 2 B. & C. 80; Ferard, Fixt. 246. Tapestry which has been cut and pieced so as to cover the walls of a room and the space left by the doors and mantelpiece, and was nailed to wooden buttons let into the plaster and nailed to the brick work, passed as a fixture under the devise of the mansion-house; [1896] 2 Ch. 497; see also 3 L. R. Eq. 382, where, under a will, tapestry, pictures, and frames filled with satin and attached to the walls, and also statues, figures, vases, and stone garden seats set in place by the testator who was tenant for life, which were essentially part of the house or the architectural designs of the building or grounds, however fastened, were fixtures, and could not be removed, but glasses and pictures not in panels, not being part of the building, were not fixtures.

Tapestries fixed by a tenant for life to the walls of a house and easily removable therefrom do not pass to the remainderman; [1901] 1 Ch. 523, affirmed [1902] App. Cas. 157; where a life tenant leases the premises and covenants with his tenant to purchase all additional machinery added thereto, which he does, at the expiration of the term for years, on his death, his widow is entitled to the machinery as against the remainderman; [1905] 1 Ch. 406.

Where a husband, managing his wife's property as her agent, voluntarily, at his own expense, places thereon a boiler, engine, and connections for furnishing power, and subsequently joins his wife in executing a mortgage on the land, the boiler and engine are not trade fixtures, and the husband, as against the purchasers at sheriff's sale on proceeding, under the mortgage, has no right

to remove them; Albert v. Uhrich, 180 Pa. 283, 36 Atl. 745.

But as between a *landlord and his tenant* the strictness of the ancient rule has been much relaxed. The rule here is understood to be that a tenant, whether for life, for years, or at will, may sever at any time before the expiration of his tenancy, and carry away all such fixtures of a chattel nature as he has himself erected upon the demised premises for the purposes of *ornament, domestic convenience*, or *to carry on trade;* provided, always, that the removal can be effected without material injury to the freehold; Beers v. St. John, 16 Day (Conn.) 322; Pemberton v. King, 13 N. C. 376; Fairis v. Walker, 1 Bail. (S. Car.) 541; Ombony v. Jones, 19 N. Y. 234; Harkey v. Cain, 69 Tex. 146, 6 S. W. 637; Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471; Powell v. Bergner, 47 Ill. App. 33; and this is so whether it be made of wood or brick; Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055. There have been adjudications to this effect with respect to bakers' ovens; saltpans; carding-machines; cider mills and furnaces; steam-engines; soap-boilers' vats and copper stills; mill-stones; Dutch barns standing on a foundation of brick-work set into the ground; a varnish-house built upon a similar foundation, with a chimney; and to a ball-room, erected by the lessee of an inn, resting upon stone posts slightly imbedded in the soil; and also in regard to things ornamental or for domestic convenience: as, furnaces; stoves; cupboards and shelves; bells and bell-pulls; gas-fixtures; portable hot-air furnace; Towne v. Fiske, 127 Mass. 125, 34 Am. Rep. 353; Heysham v. Dettre, 89 Pa. 506; Brown v. Power Co., 55 Fed. 229; pier and chimney-glasses, although attached to the wall with screws; marble chimney-pieces; grates; window-blinds and curtains. The decisions, however, are adverse to the removal of hearth-stones, doors, windows, locks and keys; because such things are peculiarly adapted to the house in which they are affixed; also, to all such substantial additions to the premises as conservatories, greenhouses (except those of a professional gardener), stable, pig-styes and other outhouses, shrubbery and flowers planted in a garden. Nor has the privilege been extended to erections for agricultural purposes; though it is difficult to perceive why such fixtures should stand upon a less favored basis than trade fixtures, when the relative importance of the two arts is considered; Tayl. Landl. & Ten. § 544; 3 East 38; McCullough v. Irvine's Ex'rs, 13 Pa. 438. But some American authorities question the correctness of the doctrine; Van Ness v. Pacard, 2 Pet. (U. S.) 137, 7 L. Ed. 374; Holmes v. Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; 2 Ferard, Fixt. 60. A railroad company, occupying land under an agreement, on the termination of such, may remove the rails which have been laid; Wiggins Ferry Co. v. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055.

Ordinary trade fixtures removable without material injury do not pass to the landlord by act of renewing the term; Smusch v. Kohn, 22 Misc. 344, 49 N. Y. Supp. 176; Bernheimer v. Adams, 70 App. Div. 114, 75 N. Y. Supp. 93; *contra*, Ogden v. Garrison, 82 Neb. 302, 117 N. W. 714, 17 L. R. A. (N. S.) 1135; Precht v. Howard, 187 N. Y. 136, 79 N. E. 847, 9 L. R. A. (N. S.) 483; Wadman v. Burke, 147 Cal. 351, 81 Pac. 1012, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330, where the tenant renewed without expressly reserving to himself the right to the fixtures installed by him. When the lessee is in bankruptcy, the trade fixtures ordinarily go to his trustee as against the lessor; Montello Brick Co. v. Trexler, 167 Fed. 482, 93 C. C. A. 118.

The time for exercising the right of removal is a matter of some importance. A tenant for years may remove them at any time during his term and afterwards, if he is in possession and holding over rightfully; 7 M. & W. 14; Merritt v. Judd, 14 Cal. 59; Allen v. Kennedy, 40 Ind. 142; Brown v. Power Co., 55 Fed. 229. But tenants for life or at will, having uncertain interests in the land, have, after the determination of their estates not occasioned by their own fault, a reasonable time within which to remove their fixtures; 3 Atk. 13; Ombony & Dain v. Jones, 19 N. Y. 238; Antoni v. Belknap, 102 Mass. 193; but a tenant at will whose tenancy can only be terminated after reasonable notice, has not this privilege; Erickson v. Jones, 37 Minn. 459, 35 N. W. 267.

If a tenant quits possession of the land without removing such fixtures as he is entitled to, the property in them immediately vests in the landlord, and though they are subsequently severed, the tenant's right to them does not revive; 1 B. & Ad. 394; 2 M. & W. 450; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; L. R. 8 Eq. 626; but it is said that a person claiming under a tenant may apparently have more time for removal than the tenant; see [1904] 1 Ch. 819. The rights of parties with respect to particular articles are sometimes regulated by local customs, especially as between outgoing and incoming tenants; and in cases of this kind it becomes a proper criterion by which to determine the character of the article, and whether it is a fixture or not.

See, generally, Vin. Abr. *Landl. and Tenant* (A); Bac. Abr. *Executors*, etc. (H 3); Com. Dig. *Biens* (B, C); 2 Sharsw. Bla. Com. 281, n. 23; Pothier, *Traité des Choses;* 4 Co. 63, 64; Co. Litt. 53 *a*, and note 5, by Hargrave; F. Moore 177; 2 Washb. R. P.; Brown; Amos & Ferard; Tyler; Ewell, Fixtures; 6 Am. L. Rev. 412; 17 Am. Dec. 686,

note; 24 Alb. Law J. 314; 10 L. R. A. 723, note.

FLAG. A symbol of nationality carried by soldiers, ships, etc., and used in many places where such a symbol is necessary or proper.

Nationality is determined by the flag when all other requisites are complied with; 5 East 398; 3 B. & P. 201; 1 C. Rob. Adm. 1; 1 Dods. Adm. 81, 131; The Nereide, 9 Cra. (U. S.) 388, 3 L. Ed. 769.

A ship navigating under the flag and pass of a foreign country is to be considered as bearing the national character of the country under whose flag she sails; Wheat. Int. L., 3d Eng. ed. § 340.

A cargo documented as foreign property in the same manner as the ship by which it is carried, and covered by a foreign flag, is not, under the English rule, the subject of capture; 5 Rob. Rep. 2; *id.* 5, note. In that country, although the ship is held to be bound by the character imposed upon it by the authority of the government from which all the documents issue, yet goods which have no dependence upon the authority of the state may be differently considered; and if the goods be laden in time of peace, though sailing under a foreign flag, they are not subjects of capture; *id.;* but these licenses are construed with great liberality in the British courts of admiralty; Stew. Vice. Adm. 360.

The doctrine of the courts in this country has been very strict as to this point, and it has been frequently decided that sailing under the license and passport of protection of the enemy in furtherance of his views and interests was, without regard to the object of the voyage or the port of destination, such an act of illegality as subjected both ship and cargo to confiscation as prize of war; The Julia, 8 Cra. (U. S.) 181, 3 L. Ed. 528; The Aurora, 8 Cra. (U. S.) 203, 3 L. Ed. 536; The Hiram, 8 Cra. (U. S.) 444, 3 L. Ed. 619; The Ariadne, 2 Wheat. (U. S.) 143, 4 L. Ed. 205; The Sybil, 4 Wheat. (U. S.) 100, 4 L. Ed. 522. These decisions placed the objection to such licenses on the ground of pacific dealing with an enemy and as amounting to a contract that the party to whom the license is given should, for that voyage, withdraw himself from the war and enjoy the repose and blessings of peace. The illegality of such intercourse was strongly condemned; and it was held that, the moment a vessel sailed on a voyage with an enemy's license on board, the offence was irrevocably committed and consummated, and that the *delictum* was not done away even by the termination of the voyage, but the vessel and cargo might be seized after arrival in a port of the United States and condemned as lawful prize. See 1 Kent 85, 164; Wheat. Int. L. (3d Eng. ed.) 340.

By the rules of the United States Navy the use of a foreign flag to deceive an enemy is permissible, but it must be hauled down before a shot is fired, and under no circumstances will it be allowable to commence an action or to fight a battle without the display of the national flag; Snow, Int. L. 96.

Law of the Flag. An expression applied to the municipal law of the country to which a ship belongs of which the flag is the symbol, when that law is resorted to in preference to the *lex loci contractus* for the construction and effect of a contract or the determination of a liability affecting the ship or her cargo.

The law of the flag is "to regulate the liabilities and regulations which arise among the parties to the agreement, be it of affreightment or by hypothecation, upon this principle, that the ship-owner who sends his vessel into a foreign port gives a notice by his flag to all who enter into contracts with the shipmaster, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all;" Foote, Priv. Int. L. 408; and in England this rule is usually followed, the tendency being that, in the absence of indication of the intention of the parties, the presumption is in favor of the law of the ship's flag; Scrutton, Chart. Part. 11; but in 3 Moo. P. C. N. S. 272; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; 12 Q. B. D. 589; 10 *id.* 540, it was held that the *lex loci contractus* must prevail. In his treatise on merchant shipping (3d ed. 170) MacLachlin thus states the rule as to the *effect of the law of the flag on the authority of the master.* "The agency of the master is devolved upon him by the law of the flag. The same law that confers his authority, ascertains its limits, and the flag at the mast-head is notice to all the world of the extent of such power to bind the owners or freighters by his act. The foreigner who deals with this agent has notice of that law, and, if he be bound by it, there is no injustice. His notice is the national flag which is hoisted on every sea and under which the master sails into every port, and every circumstance that connects him with the vessel isolates that vessel in the eyes of the world, and demonstrates his relation to the owners and freighters as their agent for a specific purpose and with power well defined under the national maritime law;" *id.;* this was suggested by the author quoted as a possible explanation of the apparently anomalous exception of bottomry bonds from the general rule that the *lex loci contractus* prevails.

This rule was followed in Lloyd v. Guibert, where the question was as to the master's authority to bind the *ship-owner;* L. R. 1 Q. B. 115; s. c. 6 B. & S. 100, and 33 L. J. Q. B. 245; s. c. on appeal 35 *id.* 74; 6 B. & S. 120.

In this case, in the Queen's Bench, Blackburn, J., in language almost exactly following that above quoted, applied the law of

the flag (French), which did not recognize a personal liability of the owner in a bottomry bond, as against the *lex loci contractus* (Danish), or the laws of the place of performance (English), or those of the place when the cargo was loaded (Haytien). The court, after noting the "singular absence of authority," said that two American cases had been cited; Arayo v. Currel, 1 La. 528, 20 Am. Dec. 286, and Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274, adding that "neither of these decisions is binding on us, but we have derived very great assistance from them." As to the last of these cases there follows this comment: "The very learned judgment of Mr. Justice Story just referred to affords a complete answer to a plausible argument in which was suggested that the general maritime law clothed the master with power to bind his owners absolutely, and that the municipal law of the owner's country was analogous to secret restrictions in the ostensible authority of a partner or other agent clothed with general power." In the Exchequer Chamber, where the judgment was affirmed, Willes, J., said: "The general rule, that where the contract of affreightment does not provide otherwise, there, as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern, seems to be not only in accordance with the probable intention of the parties, but also most consistent and intelligible, and therefore most convenient to those engaged in commerce." The same doctrine was applied by the English Court of Appeal to the master's control over the cargo as well as the ship, by Brett, L. J., in L. R. 7 P. D. 137; by Dr. Lushington in Br. & L. 38, and in a later case by Sir J. Hannen, who sustained a sale of part of a damaged cargo, where it was shown *by the result* to have been unnecessary, such sale being authorized by the law of the flag; [1891] Prob. 328. But see Malpica v. McKown, 1 La. 249, 20 Am. Dec. 279; Arayo v. Currel, 1 La. 528, 20 Am. Dec. 286, where the *lex loci contractus* was held to prevail.

In Pope v. Nickerson, 3 Sto. 465, Fed. Cas. No. 11,274, although the law of the flag was, in fact, enforced, the decision cannot be said to have followed the rule laid down by MacLachlin, as in that case the particular point decided was as to liability of the owner to the freighter, when the former was a citizen of a state the laws of which did not recognize such liabilities, while by the law of the state in which the freighter resided and also of the foreign port where the cargo was shipped, such a liability existed, and the *lex domicilii* of the ship-owners was held to govern the contract. See also The Virgin v. Vyfhius, 8 Pet. (U. S.) 8 L. Ed. 1036; Bottomry.

As to the effect of the law of the flag upon the *construction of a contract of affreightment*, the decisions in this country as a rule are usually governed by the *lex loci contractus*. In The Brantford City (S. D. of N. Y.) 29 Fed. 373, 383, Brown, J., thus stated this rule: "The 'law of the flag' . . . does not embody any rule of legal construction. Literally, it is but a concise phrase to express a simple fact, namely, the law of the country to which the ship belongs, and whose flag she bears, whether it accords with the general maritime law or not. In so far, however, as the law of the flag does not represent the general maritime law, it is but the municipal law of the ship's home. It has, therefore, no force abroad, except by comity. But foreign law is not adopted by comity, unless some good reason appear in the particular case why it should be preferred to the law of the former. The most frequent and controlling reasons are the actual or presumed intent of the parties or the evident justice of the case arising from its special circumstances."

On this ground, the law of the ship's home is applied by comity, to regulate the mutual relations of the ship, her owner, master, and crew, as among themselves; their liens for wages, and modes of discipline; 1 W. Rob. 35; The Enterprise, 1 Low. 455, Fed. Cas. No. 4,498; Covert v. The Wexford, 3 Fed. 577; The J. L. Pendergast, 29 Fed. 127. For the same reason it is also applied, by comity, to torts on the high seas, as between vessels of the same nation, or vessels of different nations subject to similar laws, though not if they are subject to different laws; The Scotland, 105 U. S. 24, 26 L. Ed. 1001. Independently of the intent of the parties, the law of the flag has no application to cases of tort, as between ships or persons of different nationalities and conflicting laws; and federal law, by which stipulations of a common carrier exempting him from the consequence of his own negligence are held to be against public policy and void, is controlling in suits brought here upon shipments made here on board foreign ships under bills of lading signed by foreign masters, though such stipulations be valid by the law of the ship's flag. The Brantford City, 29 Fed. 373.

This case is expressly approved by the supreme court in a case upon the same point, which is the leading American case upon this branch of the subject; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 461, 9 Sup. Ct. 469, 32 L. Ed. 788. See comments on this case by the circuit court of appeals; Phinney v. Ins. Co., 67 Fed. 493. The contrary view, under almost identical circumstances, was held in the case of The Missouri and the doctrine of Lloyd v. Guibert was held to extend to this particular point; 41 Ch. Div. 321. Where both the law of the flag and the *lex loci contractus* were British, the law of England was held to govern the contract; The Carib Prince, 63 Fed. 266; The

Majestic, 60 Fed. 627, 9 C. C. A. 161, 23 L. R. A. 746, affirming 56 Fed. 247. In a shipment of goods in England, in an English vessel, on an ordinary bill of lading, the liability of the vessel is to be determined according to the law of the place of shipment, as the law of the flag; The Titania, 19 Fed. 101. So also where the bill of lading was made expressly subject to "a live stock contract," and there was an express provision in that contract that all questions relating to the bill of lading should be determined by British law; The Oranmore, 24 Fed. 922. But the circuit court of appeals, in a similar case, where *the bill of lading* contained the "so-called flag clause" (that liability should be determined by the law of England, but there was *no reference to this in the charter*, made in this country), held it no evidence to modify the latter and that it was ineffective to substitute the law of the flag for the *lex loci contractus* with respect to the stipulation for exemption from liability for negligence; The Energia, 66 Fed. 607, 13 C. C. A. 653, affirming 56 Fed. 126.

Generally it may be said that the doctrine of The Missouri is in conflict with the current of authority in England, it being usually held in that country that as to such stipulations in the bill of lading, the *lex loci contractus* prevails; 9 Q. B. D. 118; 10 *id.* 521, 540; 12 *id.* 596; 3 Moo. P. C. N. S. 272; and to the same effect and under precisely similar circumstances is a judgment of the court of cassation in France, imperfectly stated in a note to the case last cited and fully reported in 75 *Journal du Palais* (1864) 225, and see 1 Dalloz 449. This question, it may be remarked, is as yet scarcely to be considered as settled by any hard-and-fast rule of law, and the only certain guide, says Bowen, L. J. (12 Q. B. D. 589), "is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself with a view to discovering from it the true intention of the parties."

Flag of Truce. A white flag displayed by one of two belligerent parties to notify the other party that communication and a cessation of hostilities are desired.

Although each party has the right to send such a flag, there is no obligation on the commander of the enemy's forces to receive it; Snow, Int. L. 96; although it is usual to do so except in very exceptional cases; Davis, Int. L. 238; but if he receive the flag he may take all reasonable precautions to protect himself from any injury that may result from the presence of an enemy within his lines; he may detain the messenger at the outposts or may cause him to be blindfolded, but such messenger is entitled, if the bearer of a *bona fide* message, to complete inviolability of person; but during an engagement, firing is not necessarily to cease on the appearance of a flag of truce, unless it be made clear that it is exhibited as a token of submission; Snow, Int. L. 97. The rules of war justly forbid the sending of flags of truce for the purpose of obtaining information either directly or indirectly, and a messenger forfeits his inviolability of person and may be detained and subjected to punishment as a spy if he take advantage of his mission to abet an act of treachery. The more important of the foregoing rules have now been embodied in Articles 32, 33, 34 of the Convention Concerning the Laws and Customs of War on Land, adopted by The Hague Peace Conference in 1907, which were substantially a re-statement of the rules laid down in the Draft of an International Declaration Concerning the Laws and Customs of War, signed by the delegates to the Brussels Convention of 1874, but never ratified by their governments. II Opp. 278–282.

In naval operations the senior officer alone is authorized to dispatch or admit flags of truce. The firing of a gun from the senior officer's vessel is generally understood as a warning to approach no nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer having a white flag plainly displayed from the time of leaving until her return, and the same precautions must be observed in dispatching such a flag; Snow, Int. L. 97.

FLAG OF THE UNITED STATES. By the act entitled "An act to establish the flag of the United States," passed April 4, 1818, 3 Story, U. S. Laws 1667, it is enacted—

§ 1. That from and after the fourth day of July next, the flag of the United States be thirteen horizontal stripes, alternate red and white; that the union be twenty stars, white in a blue field.

§ 2. That, on the admission of every new state into the Union, one star be added to the union of the flag; and that such addition shall take effect on the fourth day of July then next succeeding such admission. See Preble, Hist. of Amer. Flag.

It has been held in an unreported case in Illinois that a statute requiring the national flag to be floated over every school-house during school hours is unconstitutional, on the ground that it transcended the police power of the state, Wright, J., contending that the legislature could not enact a statute with penal sanctions unless it had for its object "the maintenance of the police authority of the state, the morals of the state, or the health of the state. The question that arose in this case was whether, in a group of college buildings, each building was compelled to display a separate flag, and the decision that one flag floated from a flagstaff for the group of buildings, was not a compliance with the law is severely criticised in 30 Am. L. Rev. 746.

A state statute (Nebraska), punishing the

desecration of the flag and its use for advertising purposes, is not invalid although it excepts periodicals, etc., in which it is used unconnected with advertising matter; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696. But in Ruhstrat v. People, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30, a like statute was held invalid as not being a proper exercise of the police power. In People v. Van De Carr, 178 N. Y. 425, 70 N. E. 965, 66 L. R. A. 189, 102 Am. St. Rep. 516, a flag act was held invalid as applied to property in existence when it went into effect. The act of congress of Feb. 20, 1905, forbids the grant of a trademark bearing the simulation of the United States flag.

FLAGELLAT. Whipped; scourged. An entry on old Scotch records. 1 Pitc. Crim. Tr. pt. 1, p. 7.

FLAGRANS (Lat.). Burning; raging; in actual perpetration. *Flagrante bello*, while war is actually in progress. *Flagrant necessity*, an urgent and immediate peril or emergency which will excuse an act under other circumstances unlawful.

FLAGRANS CRIMEN. In Roman Law. A term denoting that a crime is being or has just been committed: for example, when a crime has just been committed and the *corpus delictum* is publicly exposed, or if a mob take place, or if a house be feloniously burned, these are severally *flagrans crimen*.

The term used in France is *flagrant delit*. The Code of Criminal Instruction gives the following concise definition of it, art. 41; "Le délit qui se commet actuellement ou qui vient de se commettre, est un flagrant délit."

FLAGRANTE DELICTO (Lat.). In the very act of committing the crime. 4 Bla. Com. 307.

FLAT. When used as a description of anything respecting an arm of the sea, it means a level place over which the water stands or flows. Church v. Meeker, 34 Conn. 424.

A floor or separate division of a floor, fitted for housekeeping and designed to be occupied by a single family. Cent. Dict.

A building, the various floors of which are fitted up as flats, either residential or business.

A flat is in law a house, though in fact only a part of one in the ordinary sense; L. R. 8 Q. B. D. 423; and the contract between the owner and the occupier is classed among "contracts for permissive use." Holland, Jur. 254.

The owner of a building who rents flats therein retains control of all portions not actually demised to tenants; [1893] Q. B. 177; Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; he is bound to keep such portions in a reasonable state of repair, and a failure so to do renders him liable in damages; Quinn v. Perham, 151 Mass. 162, 23 N. E. 735; Sawyer v. McGillicuddy, 81 Me. 318, 17 Atl. 124, 3 L. R. A. 458, 10 Am. St. Rep. 260; Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238; 3 C. P. 326; but the owner is not an insurer, and when he has constructed his roofs, pipes, or drains with the reasonable foresight commonly exercised by prudent men, he will not be responsible for a latent defect or an unusual stress of circumstances; L. R. 6 Ex. 217; Fitch v. Armour, 14 N. Y. Supp. 319; 5 Q. B. D. 602. Where the upper rooms only are leased, a covenant is implied on the part of the lessor to give such rooms the necessary support; Graves v. Berdan, 26 N. Y. 498; Ward v. Fagan, 28 Mo. App. 116; and he is under a negative duty to do nothing to lessen or decrease such support, or to render it insecure; Judd v. Cushing, 50 Hun 181, 2 N. Y. Supp. 836; Butler v. Cushing, 46 Hun (N. Y.) 521.

As to elevator service, see ELEVATOR.

As regards the furnishing of artificial light in halls and passage-ways, it has been held that in the absence of contractual obligation there is no legal duty on the part of the owner to furnish such light; Hilsenbeck v. Guhring, 131 N. Y. 674, 30 N. E. 580; *contra*, Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140.

The janitor, being controlled by the owner, is, when engaged in the discharge of his general duties, the landlord's servant. Any particular tenant may sue the owner for damages, if the general services so contracted for are not rendered, but when a janitor is engaged by a tenant on some special service, such tenant becomes *dominus pro tempore*, and as such he incurs a liability similar to the landlord's; so when he attempts to interfere with or assume the direction of the janitor when the latter is discharging any general duty. See [1893] 1 Ch. 1. In either case his duties and liabilities are regulated by the general principles of the law of Master and Servant.

The distinction between the tenants of flats and lodgers and guests at a hotel is, that while the latter may have the exclusive enjoyment of their lodgings or rooms, they have not, as have the tenants of flats, the exclusive possession; 30 L. J. M. C. 74.

See, generally, APARTMENT; LEASE; LANDLORD AND TENANT.

FLAVIANUM JUS (Lat.). A treatise on civil law, which takes its name from its author, Cneius Flavius. It contains forms of actions. Vicat, Voc. Jur.

FLEDUITE. A discharge or freedom from amercements where one having been an outlawed fugitive cometh to the place of our lord of his own accord. *Termes de la Ley.*

The liberty to hold court and take up the amercements for beating and striking. Cowell.

The fine set on a fugitive as the price of

obtaining the king's freedom. Spelman, Gloss.

FLEDWITE. A discharge from amercements where one having been a fugitive came to peace with the king of own accord or with license. *Termes de la Ley;* Cun. L. Dict. But some authorities add to this definition a *quære* whether it is not rather a fine set upon a fugitive to be allowed to return to the king's place. Cowell; Holthouse.

FLEE FROM JUSTICE. To leave one's home, residence, or known place of abode, or to conceal one's self therein, with intent in either case to avoid detection or punishment for some public offence. State v. Washburn, 48 Mo. 240; U. S. v. O'Brian, 3 Dill. 381, Fed. Cas. No. 15,908.

FLEET. A place of running water where the tide or float comes up.

A famous prison in London, so called from a river or ditch which was formerly there, on the side of which it stood. It was used especially for debtors and bankrupts, and persons charged with contempt of the courts of chancery, exchequer, and common pleas. Abolished in 1842 and pulled down in 1845. Such persons as had been sent there were thereafter sent to the Marshalsea. Moz. & W.; Hayden's Dict. Dates.

FLEET MARRIAGES. There were in the neighborhood of the Fleet prison about sixty marriage houses, some of which were public houses and others not. They were known by having a sign-board, with joined hands, in addition to the public house sign. At the doors of these houses persons called Pliers solicited the passers-by to come in and be married, and in these houses persons who were, or pretended to be, clergymen performed the marriage ceremony and made entries in registers that were kept at the respective houses. There is little doubt that many entries had false dates, that persons who were married personated others, and that women who wished to plead a plea of coverture or hide their shame were married to men who, for a trifling gratuity, married any woman who would pay them, though they had previously married others. Such marriages also took place in the neighborhood of the King's Bench prison, at the Savoy, in the Mint, in the Borough, and at the Mayfair Chapel.

It is said in 1 Peake N. P. C. 303, that a marriage in the Fleet was considered *at that time* good and legal. In 8 Carr. & P. 581 (34 E. C. L. R.), Patteson, J., said: "I shall not receive the Fleet Registry in evidence for any purpose whatever." They were refused in 1 Peake N. P. C. 303. A collection of over a thousand Fleet registers have been deposited in the Registry of the Bishop of London.

See extracts from these registers and a historical note in 34 E. C. L. R. 534; Burns, Fleet Registers.

FLEM. A fugitive bondman or villein. Spelman. The possession of the goods of such fugitives was called *Flemeswite.* Fleta, lib. 1, c. 147.

FLET. A house or home. Cowell.

FLETA. The title of an ancient lawbook, supposed to have been written by a judge while confined in the Fleet Prison; written about 1290.

It is written in Latin, and is divided into six books. The author lived in the reigns of Edward II. and Edward III. See lib. 2, cap. 66, § *Item quod nullus;* lib. 1, cap. 20, § *que cœperunt;* 10 Coke, pref. Edward II. was crowned A. D. 1306. Edward III. was crowned 1326, and reigned till A. D. 1377. During this period the English law was greatly improved, and the lawyers and judges were very learned. Hale, Hist. Comm. Law 162; 4 Bla. Com. 427, says of this work "that it was for the most part law until the alteration of tenures took place." The same remark he applies to Britton and Hengham. "It is little better than an ill-arranged epitome." 1 Poll. & M. Hist. Engl. Law 188. "The nebulous Fleta." 21 L. Q. R. 393.

FLICHWITE. A fine on account of brawls or quarrels. Spel. Gloss.

FLIGHT. The evading the course of justice by a man's voluntarily withdrawing himself. Formerly, if the jury found that the party *fled for it,* whether he were found guilty or not of the principal charge, he forfeited his goods and chattels. 4 Bla. Com. 387. Evidence of the flight of an accused person has a tendency to establish guilt; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528. See FUGITIVE FROM JUSTICE; EXTRADITION.

FLIGHTWITE. The same as FLEDWITE *(q. v.).*

FLOAT. A certificate authorizing the party possessing it to enter a certain amount of public land. Marks v. Dickson, 20 How. (U. S.) 504, 15 L. Ed. 1002.

A Mexican grant of quantity, as of a certain number of leagues of land lying within a larger tract, whose boundaries are given, is a float, subject to location within the tract by the government before it can attach to any specific lands; Carr v. Quigley, 149 U. S. 652, 13 Sup. Ct. 961, 37 L. Ed. 885; U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, 32 L. Ed. 213.

FLOATABLE. A stream capable of floating logs, etc., is said to be floatable. Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

FLOATING CAPITAL. Capital retained for the purpose of meeting current expenditure.

It includes raw materials destined for fabrication, such as wool and flax products in the warehouses of merchants or manufacturers; such as cloth or linen and money for wages and stores. De Laveleye, Pol. Ec.

FLOATING DEBT. That mass of lawful and valid claims against a corporation, for the payment of which there is no money in the corporate treasury specifically designed,

nor any system of taxation or other means of providing money to pay, particularly provided. People v. Wood, 71 N. Y. 374.

FLODEMARK. High-tide mark. Blount. The mark which the sea at highest tides makes upon the shore. And. 189; Cunningham.

FLOGGING. Thrashing or beating with a whip or lash. This system of punishment was abolished in the army by act of Aug. 5, 1861; U. S. Rev. Stat. § 1342; in the navy June 6, 1872; *id.* § 1642. See WHIPPING.

FLOOD. An inundation of water over land not usually covered by it. Such an accident is an Act of God. McHenry v. R. Co., 4 Harr. (Del.) 449. See ACT OF GOD.

FLOOR. The section of a building between horizontal planes. Lowell v. Strahan, 145 Mass. 8, 12 N. E. 401, 1 Am. St. Rep. 422. In a lease the words "first floor" are equivalent to the "first story" of a building and include the walls unless other words control the meaning; Lowell v. Strahan, 145 Mass. 8, 12 N. E. 401, 1 Am. St. Rep. 422.

FLORENTINE PANDECTS. A name applied to a copy of the Pandects erroneously said to have been discovered at Amalfi, Italy, but afterwards removed to Florence. See CIVIL LAW.

FLORIDA. The name of one of the states of the United States of America, being the fourteenth admitted to the Union. It was discovered by Ponce de Leon in 1513; settled by Huguenots in 1562, and permanently settled by Spaniards at St. Augustine in 1565; and ceded to Great Britain in 1763, to Spain in 1783, and to United States in 1819. The Americans took possession in 1821.

It was admitted into the Union in 1845 by virtue of the act of congress entitled: "An act for the admission of the states of Iowa and Florida into the Union," approved March 3, 1845, and the present constitution was adopted Feb. 25, 1868, and amended in 1896.

July 1, 1911, Article XIX amended, prohibiting sale and manufacture of intoxicating liquors.

FLORIN (called also *Guilder*). A coin, originally made at Florence.

The name formerly applied to coins, both of gold and silver, of different values in different countries. In many parts of Germany, the florin, which is still the integer or money-unit in those countries, was formerly a gold piece, value about two dollars and forty-two cents. It afterwards became a silver coin, variously rated at from forty to fifty-six cents, according to locality; but by the German conventions of 1837 and 1838 the rate of nine-tenths fine and one hundred and sixty-three and seven-tenths grains troy per piece was adopted, making the value forty-one cents. This standard is the only one now used in Germany; and the florin or guilder of the Netherlands is, also, coined at nearly the same standard (weight, one hundred and sixty-six grains; fineness, eight hundred and ninety-six thousandths), the value being the same. The florin of Tuscany is only twenty-seven cents in value.

FLOTAGES. Things which float by accident on the sea or great rivers. Blount. The commissions of water-bailiffs. Cunningham, Law Dict.

FLOTSAM, FLOTSAN. A name for the goods which float upon the sea when cast overboard for the safety of the ship, or when a ship is sunk. Distinguished from *Jetsam* and *Ligan*. Bracton, lib. 2, c. 5; 5 Co. 106; Comyns, Dig. *Wreck*, A; Bacon, Abr. *Court of Admiralty*, B; 1 Bla. Com. 292. See JETTISON; LIGAN.

FLOUD-MARKE. Flode-mark, which see.

FLOWAGE. The natural flowage of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, though the flowage be not in a natural watercourse with well defined banks; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163. Where one drains water from his land into the highway, causing another's crops to be damaged by flowage through a drain connected with the highway, he is liable; Larkin v. Lamping, 44 Ill. App. 649. See EMINENT DOMAIN; RIPARIAN RIGHTS; WATER; WATERCOURSE.

FLOWING LANDS. Raising and settling back water on another's land by a dam placed across a stream or watercourse which is the natural drain and outlet for the surplus water on such land. Call v. Com'rs of Middlesex County, 2 Gray (Mass.) 235. See EMINENT DOMAIN; WATER; WATERCOURSE.

FLUCTUS. Flood; flood tide. Bracton fol. 255.

FLUMEN (L. Lat.). **In Civil Law.** The name of a servitude which consists in the right of turning the rain-water, gathered in a spout, on another's land. Erskine, Inst. b. 2, t. 9, n. 9; Vicat, Voc. Jur. See STILLICIDIUM.

FLUMINÆ VOLUCRES. Wild fowl; water fowl. 11 East 571.

FLUVIOUS. A public river; flood tide.

FLY FOR IT. Anciently, it was the custom in a criminal trial to inquire after a verdict, "Did he fly for it?" After the verdict, even if not guilty, forfeiture of goods followed conviction upon such inquiry. Abolished by 7 & 8 Geo. IV. c. 28. Wharton.

FLYING SWITCH. This is made by uncoupling the cars from the locomotive while in motion, and throwing the cars on to the side track, by turning the switch, after the engine has passed it, upon the main track. Greenleaf v. R. Co., 29 Ia. 39, 4 Am. Rep. 181. See RAILROAD.

FLYMA. One escaped from justice; a fugitive. Anc. Inst. *Flyman Frymth*, was the offence of harboring a fugitive; *id.*

FOCAGE. Housebote; firebote. Cowell.

FOCALE (L. Lat.). **In Old English Law.** Firewood. The right of taking wood for the fire. *Fire-bote.* Cunningham, Law Dict.

FODERTORIUM. Provisions to be paid by custom to the royal purveyors. Cowell.

FODERUM (L. Lat.). Food for horses or other cattle. Cowell.

In feudal law, fodder and supplies provided as a part of the king's prerogative for use in his wars or other expeditions. Cowell.

FŒDUS (Lat.). A league; a compact.

FŒMINA VERO CO-OPERTA. A feme covert.

FŒNERATION. See FENERATION.

FŒNUS NAUTICUM (Lat.). The name given to marine interest.

The amount of such interest is not limited by law, because the lender runs so great a risk of losing his principal. Erskine, Inst. b. 4, t. 4, n. 76. See MARINE INTEREST.

FŒSA. Herbage; grass. Cowell

FŒTICIDE. In Medical Jurisprudence. Of late years this term has been applied to designate the act by which criminal abortion is produced. 1 Beck, Med. Jur. 288; Guy, Med. Jur. 133. See INFANTICIDE.

FŒTURA (L. Lat.). **In Civil Law.** The produce of animals, and the fruit of other property, which are acquired to the owner of such animals and property by virtue of his right. Bowyer, Mod. C. L. c. 14, p. 81.

FŒTUS (Lat.). **In Medical Jurisprudence.** An unborn child. An infant *in ventre sa mère.*

An arbitrary distinction is made by some writers between *fœtus* and *embryo,* the latter term being used for the product of conception up to the fourth month of gestation and the former term after the fourth month.

Although it is often important to know the age of the fœtus, there is great difficulty in ascertaining the fact with the precision required in courts of law.

The great difference between children at birth, as regards their weight and size, is an indication of their condition while within the womb, and is a sufficient evidence of the difficulty as to the age of the fœtus by its weight and size at different periods of its existence.

Thousands of healthy infants have been weighed immediately after birth, and the extremes have been found to be two and eighteen pounds. It is very rare indeed to find any weighing as little as two pounds, but by no means uncommon to find them weighing four pounds. So it is with the length, which varies as much as that of the adult does from the average height of the race.

Neither can anything positive be learned from the progress of development; for although the condition of the bones, cartilages, and other parts will generally mark with tolerable accuracy the age of a healthy fœtus, yet an uncertainty will arise when it is found to be unhealthy. It has been clearly proved, by numerous dissections of new-born children, that the fœtus is subject to diseases which interfere with the proper formation of parts, exhibiting traces of previous departure from health, which had interfered with the proper formation of parts and arrested the process of development.

Interesting as the different periods of development may be to the philosophical inquirer, they cannot be of much value in legal inquiries from their extreme uncertainty in denoting precisely the age of the fœtus by unerring conditions.

See Amer. Text Book Obstetrics; 1 Beck, Med. Jur. 249; Billord on Infants, Stewart trans. 36, 37, and App.; Ryan, Med. Jur. 137; 1 Chitty, Med. Jur. 403; Dean, Med. Jur.; 2 Witth & Beck. Med. Jur. 291. And see the articles BIRTH; DEAD-BORN; EN VENTRE SA MERE; FŒTICIDE; INFANTICIDE; LIFE; PREGNANCY; QUICKENING; VIABILITY.

FOG. Every vessel must, in a fog, mist, falling snow, or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687. A speed of six miles per hour is excessive for a steamer in a dense fog, where she is emerging from New York harbor and is likely to meet vessels from many points of the compass; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637.

The owner of a sailing vessel cannot substitute for the fog-horn which she is required by the sailing regulations to carry, an instrument blown by steam, and in their opinion more efficient than the fog-horn; The Parthian, 55 Fed. 426, 5 C. C. A. 171, 5 U. S. App. 314. See The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637. A vessel is not properly equipped at sea which has no spare mechanical fog-horn; The Trave, 55 Fed. 117.

A steamer failing to slack its speed in a fog is at fault in case of collision; 5 U. S. App. 314; 1 *id.* 614; The Lawrence, 54 Fed. 542, 4 C. C. A. 501; The Fulda, 52 Fed. 400; [1892] Prob. 105. See COLLISION.

FOI. In French Feudal Law. Faith; fealty. Guyot, Inst. Feod. c. 2.

FOINISUM. The fawning of deer. Spel. Gloss.

FOITERERS. Vagabonds. Blount.

FOLC-GEMOTE (spelled, also, *folkmote, folcmote, folkgemote;* from *folc,* people, and *gemote,* an assembly).

A general assembly of the people in a town, burgh, or shire.

During the time at which the separate tribal nations of Britain were under the control or supremacy of the kingdoms of Northumbria, York, and West Saxony successively, the term was applied to the *concilium* of the freeholders of each village. Tacitus calls it the nation assembled in arms. Their meetings were held each fortnight, and the members bound themselves reciprocally to the peaceable behavior of themselves, their families, and their dependents; 2 Burke, Abr. Eng. Hist. ch. 7. They chose their rulers, the folc kings, at this tribal moot, settled matters of unjust trading, the common tillage and pasturage, and all things that concerned the common householder; 1 Soc. Eng. 125, 136. The conqueror so far as possible endeavored to preserve the customs of the people, but with the growth of the royal power the most important questions were referred to the councillors of the king, comprising the bishops, abbots, and eorldermen who succeeded the folc kings in the folks or shires and designated the witenagemote or council of the wise men; this in turn dissolved into the *curia regis;* Inderwick, King's Peace. About this period the spelling of the word changes from folc-moot to

folk-moot. The meeting of the folk-moot was then transferred to London, and was held thrice a year, and the principal duties that devolved upon it were to hear royal proclamations and statutes, to choose mayors and burgesses, and to pronounce upon offenders the sentence of outlawry; 1 Poll. and Maitl. 642. The folk-moot and the witenagemote are said to have been the foundation of the English Parliament. See Stubbs, Sel. Chars. 10-13; Inderwick, King's Peace; Bagehot, Physics and Politics; Manwood, For. Laws; Spelman, Gloss.; De Brady, Gloss.; PARLIAMENT; WITENA-GEMOTE.

FOLC-RIGHT. The common right of all the people. A law common to all the realm, mentioned by King Edward the elder. It is doubtless in the same sense that the phrase common law originated. 1 Bla. Com. 65, 67.

FOLCLAND (Sax.). Land of the people. Spelman, Gloss.

The subject of land-tenure among the Anglo-Saxons is very obscure. Doubtless all land was originally held in common by the tribe or kingdom, and out of this after a time portions of it were disposed of to individuals. Individual ownership was generally designated by the term *alod*, which comprised original allotments which had the name *ethel*, and those which were carved out of the common lands by grant or charter. The tenure of the latter was designated by the term bocland, which is described as "land which is held under a book, under a privilegium, modelled on Roman precedents, expressed in Latin words, armed with ecclesiastical sanctions, and making for alienation and individualism." 8 Eng. Hist. Rev. 1-17. The folcland which was not granted as bocland could be let out for temporary occupation as *laenland*. A late theory maintained, in the review quoted, by Dr. Vinogradoff is that folcland indicated an estate, not *belonging* to the folk, but *held by* folk-right or customary law, and not subject to disposition of the holder. *id.*; Medley, Eng. Const. Hist. 16. On this theory the modern copy-holders are termed the historical successors of the owners of folcland; *id.* 36; Pollock, Land Laws 43. Nothing is certain except that the terms referred to were used, but their precise scope is the merest speculation, and successive writers invent new theories with the freedom which is invited by the lack of definite historical or documentary information. The subject affords ample scope for theorizing, as most of what is written upon the subject is of this character, and it is said that the word folkland is only found technically used three times in Anglo-Saxon documents.

The theory of Vinogradoff above stated is earnestly supported by Maitland (Domesday Book and Beyond). He says, referring to the author cited: "His argument has convinced us: but as it is still new we will take leave to repeat it with some few additions of our own." The subject of book-land and folk-land is elaborately discussed and the three documents in which the latter word occurs, as above stated, are fully described. The conclusion is thus stated: "Land, it would seem, is either book-land or folk-land. Book-land is land held by book, by a royal and ecclesiastical *privilegium*. Folk-land is land held without book, by unwritten title, by the folk-law. 'Folk-land,' is the term which modern historians have rejected in favour of the outlandish *alod*. The holder of folk-land is a free land owner, though at an early date the king discovers that over him and his land there exists an alienable superiority. Partly by alienations of this superiority, partly perhaps by gifts of land of which the king is himself the owner, book-land is created. Edward's law speaks as though it were dealing with two different kinds of land. But really it is dealing with two different kinds of title . . . the same land might be both book-land and folk-land, the book-land of the minster, the folk-land of the free men who were holding, not indeed 'of' but still 'under' the minster. They or their ancestors had held under the king, but the king had booked their land (which also in a certain sense was his land) to a church. . . . 'Bookland' is a briefer term than 'land held by book-right'; 'folk-land' is a briefer term than 'land held by folk-right.' The same piece of land may be held by book-right and by folk-right; it may be book-land and folk-land too."

See Stubbs, Const. Hist. 86; 1 Poll. and Maitl. 33; Kemble, Sax. in Eng. 306; Lodge, Essays in Anglo Saxon Law 68; Maitland, Domesday Book 226-258; 1 Sel. Essays in Anglo-Amer. Leg. Hist. 105.

FOLD-COURSE. In English Law. Land used as a sheep-walk.

Land to which the sole right of folding the cattle of others is appurtenant: sometimes it means merely such right of folding. The right of folding on another's land, which is called common foldage. Co. Litt. 6 *a*, note 1; W. Jones 375; Cro. Car. 432; 2 Ventr. 139.

FOLD-SOKE. A feudal service which consisted in the obligation of the tenant not to have a fold of his own but to have his sheep lie in the lord's fold. He was said to be *consuetus ad foldam*, tied to his lord's fold. The basis of this service is thus expressed by a recent writer: "It is manure that the lord wants; the demand for manure has played a large part in the history of the human race." Maitland, Domesday Book 76. In East Anglia the peasants had sheep enough to make this an important social institution; *id.* 442.

FOLDAGE. A privilege possessed in some places by the lord of a manor, which consists in the right of having his tenants' sheep to feed on his fields, so as to manure the land. The name of foldage is also given in parts of Norfolk to the customary fee paid to the lord for exemption at certain times from this duty. Elton, Com. 45, 46. See FOLD-SOKE.

FOLGARII. Menial servants; followers. Bract.

FOLGERE. In Old English Law. A freeman who has no house or dwelling of his own, but is the follower or retainer of another (heorthfaest), for whom he performs certain predial services. Anc. Inst. Eng.

FOLGERS. Menial servants or followers. Cowell.

FOLGOTH. Official dignity.

FOLIO. A leaf. The references to the writings of the older law-authors are usually made by citing the folio, as it was the ancient custom to number the folio instead of the page, as is done in modern books.

A certain number of words specified by statute as a *folio*. Wharton. Originating, undoubtedly, in some estimate of the number of words which a *folio* ought to contain.

In Michigan it has been held that a legal *folio* is one hundred words; Thornton v. Village of Sturgis, 38 Mich. 639; and that number is generally made a *folio* by statute; U. S. R. S. § 828.

FOLK-LAND. See FOLC-LAND.

FOLK-MOOT. See FOLC-GEMOTE; WITENA-GEMOTE.

FOLLOWING BASIS. An agreement that an adjustment in general average shall be made on the "following basis," followed by a statement of the amount to be contributed for the valuation of the ship after collision, and the valuation of the freight and the cargo, does not mean that the freight shall be assessed on its gross valuation, but merely that the valuation shall be taken as the foundation upon which the adjustment shall be made according to law; and if the law applicable prescribes that the freight shall be assessed at one half its gross value, as in California, this will prevail. Minor v. Assur. Co., 58 Fed. 801.

FONDS PERDUS. In French Law. Capital is said to be invested *à fonds perdus* when it is stipulated that in consideration of the payment of an amount as interest, higher than the normal rate, the lender shall be repaid his capital in this manner. The borrower, after having paid the interest during the period determined, is free as regards the capital itself. Arg. Fr. Merc. Law 560.

FOOD AND DRUG ACTS. It is an indictable offence at common law to expose for sale unwholesome provisions; State v. Snyder, 44 Mo. App. 429; and also for a baker to furnish bread in which alum is known by him to have been mixed; Rex v. Dixon, 3 M. & S. 11. Pure food acts, in the interest of public health, are a valid exercise of the police power and are not obnoxious to the XIVth Amendment; Powell v. Com., 114 Pa. 265, 7 Atl. 913, 60 Am. Rep. 350, affirmed *id.*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253; North American Cold Storage Co. v. Chicago, 211 U. S. 206, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276; so of acts regulating the sale of drugs and provisions; Bertram v. Com., 108 Va. 902, 62 S. E. 969; Saddler v. People, 188 Ill. 243, 58 N. E. 906. Statutes regulating the sale of food for domestic animals are within the scope of the state police power; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182; and a requirement that the manufacturer disclose ingredients and the minimum percentage of fat and proteins is valid; *id.* Statutes prohibiting the manufacture and sale of milk and of butter or substances imitative of articles of food are within the police power; State v. Snow, 81 Ia. 642, 47 N. W. 777, 11 L. R. A. 355; Pierce v. State, 63 Md. 592; Com. v. Evans, 132 Mass. 11; even though the right to manufacture and sell such articles is a natural right guaranteed by the constitution; State v. Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; or, in the case of the sale of milk, is a lawful business; City of St. Louis v. Dairy Co., 190 Mo. 492, 89 S. W. 617, 1 L. R. A. (N. S.) 936; so of the manufacture of any article of food to which is added a substance injurious or poisonous; Com. v. Kervin, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613.

An act prohibiting the sale of alum baking powders is within the police power, the articles not being considered to be so wholesome and innocuous that judicial notice may be taken thereof; State v. Layton, 160 Mo. 474, 61 S. W. 171, 62 L. R. A. 163, 83 Am. St. Rep. 487. An ordinance forbidding the sale of milk and cream containing a preservative not injurious to health is valid; City of St. Louis v. Schuler, 190 Mo. 524, 89 S. W. 621, 1 L. R. A. (N. S.) 928; but in People v. Biesecker, 169 N. Y. 53, 61 N. E. 990, 57 L. R. A. 178, 88 Am. St. Rep. 534, it was held that the use of a harmless preservative cannot be forbidden, and that an act prohibiting the sale of butter containing a preservative, except in certain cases, cannot be sustained as a health regulation, since it does not purport to be such, but is apparently directed against fraudulent practices. The regulation of this subject is generally within the legislative control; Powell v. Com., *supra;* but it is held that an act forbidding the sale of a harmless article (oleomargarine) is invalid; People v. Marx, 99 N. Y. 386, 2 N. E. 29, 52 Am. Rep. 34; and that if the prohibited article is universally conceded to be so wholesome and innocuous that the courts may take judicial notice of the fact, its sale cannot be prohibited, but if that fact is in dispute, the legislature can regulate or prohibit its sale; City of St. Louis v. Liessing, 190 Mo. 464, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112. An ordinance is valid prohibiting the sale of cream containing less than twenty per cent. of butter fat; State v. Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464; so of cream containing less than twelve per cent. of butter fat; City of St. Louis v. Reuter, 190 Mo. 514, 89 S. W. 628; and an ordinance prohibiting the sale of milk unless it contains not less than three per cent. of butter fat; City of St. Louis v. Dairy Co., 190 Mo. 507, 89 S. W. 627, 1 L. R. A. (N. S.) 926; and an act prohibiting the sale of an article made in imitation of milk or butter and not made of milk; State v. Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395; a city may prohibit the sale of skimmed milk; City of Kansas v. Cook, 38 Mo. App. 660; and pass an ordinance prohibiting the sale of milk containing coloring matter; St. Louis v. Polinsky, 190 Mo. 516, 89 S. W. 625; a statute is valid prohibiting removal of any part of the cream from milk sold as natural milk to a factory in which milk is used as a material; Mantel v. State, 55 Tex. Cr. R. 456, 117 S. W. 855, 131 Am. St. Rep. 818.

Acts intended to prevent fraud in the sale of impure milk, so far as they prevent the sale of milk offered as pure which does not

conform to the prescribed standards, are constitutional; People v. Bowen, 182 N. Y. 1, 74 N. E. 489. An act requiring a milkman to subject his cows to the tuberculin test before receiving a license to sell milk is valid; State v. Nelson, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. Rep. 399; so is an ordinance requiring an inspection of milk, cows and stables; Walton v. Toledo, 23 Ohio Cir. Ct. R. 547.

The fact that the legitimate as well as the illegitimate article is required to be tagged does not affect the reasonableness of the provision; People v. Bishopp, 106 App. Div. 266, 94 N. Y. Supp. 773. An act requiring renovated butter to be labeled, so as to distinguish it, is valid; Com. v. Seiler, 20 Pa. Super. Ct. 260.

Statutes requiring articles of food to bear a label stating ingredients are valid; Savage v. Scovell, 171 Fed. 566; Steiner v. Ray, 84 Ala. 93, 4 South. 172, 5 Am. St. Rep. 332; or stating the name and residence of the manufacturer; State v. Sherod, 80 Minn. 446, 83 N. W. 417, 50 L. R. A. 660, 81 Am. St. Rep. 268; People v. Windholz, 92 App. Div. 569, 86 N. Y. Supp. 1015; or stating that the product is an imitation; Woolner & Co. v. Rennick, 170 Fed. 662 (whiskey); Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429 (butter and cheese); or that renovated butter is not creamery butter; Com. v. Seiler, 20 Pa. Super. Ct. 260; Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889 (renovated butter); People v. Abrahamson, 137 App. Div. 549, 122 N. Y. Supp. 115; or stating the age of a calf when slaughtered; People v. Bishopp, 106 App. Div. 266, 94 N. Y. Supp. 773.

In an act referring to cider vinegar, "pure" means "free from mixture or contact with that which is deleterious, impairs, vitiates or pollutes; People v. Heinz Co., 90 App. Div. 408, 86 N. Y. Supp. 141. An act relating to the adulteration of food does not make the adulteration of drinks an offence; Com. v. Kebort, 212 Pa. 289, 61 Atl. 895. An article of food shall be deemed to be adulterated if it contains any added substance which is poisonous or injurious to health; Com. v. Kevin, 202 Pa. 23, 51 Atl. 594, 90 Am. St. Rep. 613. Its sale may be prohibited if its quality is not up to a fixed standard, though no adulterant be used; State v. Smyth, 14 R. I. 100, 51 Am. Rep. 344; State v. Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419; State v. Stone, 46 La. Ann. 147, 15 South. 11; City of Kansas v. Cook, 38 Mo. App. 660; State v. Creamery Co., 83 Minn. 284, 86 N. W. 107, 54 L. R. A. 466, 85 Am. St. Rep. 464; People v. West, 106 N. Y. 293, 12 N. E. 610, 60 Am. St. Rep. 452; and though the substance used for an adulterant be wholesome; People v. Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595.

Under an act against adulterating food, a dealer who puts a substance containing poison into food cannot set up that he did not know it contained poison; Lansing v. State, 73 Neb. 124, 102 N. W. 254; want of knowledge by the vendor of the character of the article he is selling is no defence; People v. Meyer, 44 App. Div. 1, 60 N. Y. Supp. 415; the question of the vendor's intent is immaterial; People v. Laesser, 79 App. Div. 384, 79 N. Y. Supp. 470; People v. Kibler, 106 N. Y. 321, 12 N. E. 795; so of a hotel keeper furnishing oleomargarine to a guest without knowledge that it is not butter; State v. Ryan, 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629. An act may create a crime of selling adulterated food or drink independent of the seller's knowledge; People v. Snowberger, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449.

An ordinance making it unlawful to cover with a colored netting, etc., any package of fruit exposed for sale is unreasonable and void; Frost v. Chicago, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301.

The fact that the article is manufactured under United States letters patent does not prevent it from coming under the exercise of the police power; Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864.

The legislature may delegate to boards of health the duty of making rules and prescribing tests in the execution of pure food laws; Isenhour v. State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; People v. Van De Carr, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305.

The state has a right to seize and destroy food which is unfit to use, and is not required to give previous notice and an opportunity to be heard; but the owner has a right of action after the destruction if the state has acted improperly; North American Cold Storage Co. v. Chicago, 211 U. S. 306, 29 Sup. Ct. 101, 53 L. Ed. 195, 15 Ann. Cas. 276.

It is immaterial that some value may remain in the food for other purposes if kept to be sold at some time as food; *id.*

No state statute which even affects incidentally interstate commerce is valid if it is repugnant to the federal Food and Drugs Act; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

The principal purpose of the United States Food and Drugs Act of June 30, 1906, is to prohibit adulteration and misbranding. It applies to the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, or shipment to any foreign country, of adulterated or misbranded drugs. It makes the act an offence. No article is included when packed for export to any foreign country according to the specifications or directions of the foreign purchaser, when no substance is used in the preparation or packing thereof

in conflict with the laws of the foreign country. Specimens are examined in the bureau of chemistry of the department of agriculture; if found obnoxious to the act, notice is given to the party from whom the sample was obtained, who is given an opportunity to be heard; if it appears that the act has been violated, the secretary of agriculture certifies the fact to the proper United States district attorney, who shall proceed in the federal court to enforce the penalties.

The term "drug," as used in the act, includes "all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals." The term "food" means "all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed or compound."

What is adulteration is specified at great length in the act. No dealer shall be prosecuted when he can establish a guarantee signed by the wholesaler, jobber or manufacturer or other party residing in the United States, from whom he purchased the articles, to the effect that the article is not adulterated or misbranded. Obnoxious articles, when transported or in unbroken packages, are liable to proceedings and confiscation in the court of the district where found. The articles may be destroyed or may be sold and the proceeds, less costs, paid into the treasury of the United States. The proceedings are by libel conformably as near as may be to those in admiralty, but either party may demand a jury trial.

The act went into effect January 1, 1907. It extends to food for man and all other animals; U. S. v. One Car Load, etc., 188 Fed. 453.

This act is not an exercise of the police power, but is a proper regulation of interstate commerce; Shawnee Milling Co. v. Temple, 179 Fed. 517; U. S. v. 420 Sacks of Flour, 180 Fed. 518. That is the only ground of federal control; U. S. v. J. L. Hopkins & Co., 199 Fed. 649.

This statute, making it a criminal offence to sell articles so misbranded, was held valid as to one who sold and delivered such goods within the state, since it enabled an innocent purchaser, relying on the false certificate, to sell the same in interstate commerce; U. S. v. Specialty Co., 175 Fed. 299.

The act is not void for uncertainty because no standard of quality is prescribed, but the determination of the standard is left to the courts; U. S. v. 420 Sacks of Flour, 180 Fed. 518.

There can be no seizure by a private person and no seizure prior to the institution of proceedings; U. S. v. Two Barrels of Desiccated Eggs, 185 Fed. 302.

Such misbranded goods may be confiscated after they have reached their destination, while they are in the original unbroken packages; Hipolite Egg Co. v. U. S., 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364.

The preliminary examination by the department of agriculture of a food or drug product is not a necessary condition precedent for the filing of a libel for the condemnation thereof; U. S. v. 50 Barrels of Whisky, 165 Fed. 966; U. S. v. Morgan, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198.

Proceedings are by libel in the district court, the practice conforming as nearly as may be to admiralty practice; the review is by writ of error; Four Hundred and Forty-Three Cans of Frozen Egg Product v. U. S., 226 U. S. 172, 33 Sup. Ct. 50, 57 L. Ed. 174.

As to the definition of original packages, the following have been held to be such under other acts: Single bottles of beer and whiskey sealed in pasteboard or wooden boxes; In re Beine, 42 Fed. 546; Guckenheimer v. Sellers, 81 Fed. 997. These instances are given as perhaps the minimum; more elaborate packages might therefore be held within the definition. See ORIGINAL PACKAGE.

In U. S. v. Johnson, 221 U. S. 488, 31 Sup. Ct. 627, 55 L. Ed. 823, it was held under the act of 1906 that the act was aimed at false statements as to identity, possibly including strength, quality and purity, and not at statements as to curative effect (cancer), even if misleading. Upon the decision in this case the act of August 23, 1912, was passed to cover statements as to curative effects.

The act of March 3, 1913, provided that, if goods be in package form, the contents must be "plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count," but that reasonable variations be permitted, etc. In Lexington Mill & Elevator Co. v. U. S., 202 Fed. 615, 121 C. C. A. 23, it was held that the addition to an article of food of an ingredient which, in sufficient quantity, is poisonous, is not an adulteration unless the quantity used is sufficient to render the article "injurious to health"; this judgment was affirmed in the supreme court on Feb. 24, 1914, 34 Sup. Ct. 337, 232 U. S. 383, 58 L. Ed. —.

See Thornton, Pure Food and Drugs (1912), containing the regulations and rulings of the department of agriculture, and the opinion of President Taft on blended whisky.

FOOT. A measure of length, containing one-third of a yard, or twelve inches. See ELL. Figuratively it signifies the conclusion, the end; as, the foot of the fine, the foot of the account. See Williston v. Morse, 10 Metc. (Mass.) 26; Charge to Grand Jury, 5 McLean, 306, Fed. Cas. No. 18,267.

FOOT OF THE FINE. The fifth part or the conclusion of a fine. It includes the whole matter, reciting the names of the parties, day, year, and place, and before whom it was acknowledged or levied. 2 Bla. Com. 351.

FOOTGELD. An amercement for not cutting out the ball or cutting off the claws of a dog's feet (expeditating him). To be quit of *footgeld* is to have the privilege of keeping dogs in the forest *unlawed* without punishment or control. Manw. For. Laws, pt. 1, p. 86; Crompton, Jur. 197; *Termes de la Ley;* Cunningham, Law Dict.; EXPEDITATION.

FOOTPRINTS. Impressions made by the feet of persons, or their shoes, boots, or other covering for the feet, on the ground, snow, or other surface. In the same category are also impressions of shoenails, patches, abrasions, or other peculiarities therein. When found at or near the scene of a crime they often lead to the identification of guilty parties.

"The presumption founded on these circumstances has been appealed to by mankind in all ages, and in inquiries of every kind, and it is so obviously the dictate of reason, if not of instinct, that it would be superfluous to dwell upon its importance." Wills, Circ. Ev. 194. It is said that evidence of footprints and their correspondence with defendant's feet may be proved even when his agency is disputed, not as alone convincing, or indeed, available, but as tending to establish a case; Whart. Cr. Ev. § 795; even where the defendant's proof tended to establish an *alibi;* Williams v. State, 33 Tex. Cr. R. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21. Evidence of footprints alone has been held insufficient to convict; 1 F. & F. 354; State v. Johnson, 19 Ia. 230; Green v. State, 17 Fla. 669; and unless the measurement is careful and accurate, or there is some peculiarity shown, the probative force is slight; Whetston v. State, 31 Fla. 240, 12 South. 661; People v. Newton, 3 N. Y. Cr. Rep. 406; Shannon v. State, 57 Ga. 482; State v. Reed, 89 Mo. 168, 1 S. W. 225; but in many cases such peculiarities have been shown and evidence of the footprints admitted; Preston v. State, 8 Tex. App. 30; Schoolcraft v. People, 117 Ill. 271, 7 N. E. 649; Griggs v. State, 59 Ga. 738; State v. Grebe, 17 Kan. 458; 10 Crim. L. Mag. 890; but a conviction on such evidence will be reversed for refusal to admit proof for the defendant that he has never worn a shoe which would make such a print; Stone v. State, 12 Tex. App. 219; the discovery and comparison should be prompt with relation to the crime; McDaniel v. State, 53 Ga. 253; and the measurement should be accurate; Stone v. State, 12 Tex. App. 219; Bouldin v. State, 8 Tex. App. 332; though it need not be immediate, the question of time going to the weight of the evidence, not to its competency; People v. McCurdy, 68 Cal. 576, 10 Pac. 207.

The identification of such tracks is a matter of common observation, which does not require expert testimony; Murphy v. People, 63 N. Y. 590; Young v. State, 68 Ala. 569; State v. Morris, 84 N. C. 756; and only the peculiarity of the tracks and the facts of identification may be proved, but not the opinion of the witness whether they were made by the defendant; Clough v. State, 7 Neb. 320; Hodge v. State, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; but a witness has been permitted to prove the measurement of the tracks and their exact correspondence with the shoe of the defendant; McLain v. State, 30 Tex. App. 482, 17 S. W. 1092, 28 Am. St. Rep. 934; the examination and the comparison need not be made in the presence of the defendant; State v. Morris, 84 N. C. 756; nor can he be compelled to put his foot in the track to make evidence against himself; Day v. State, 63 Ga. 667; but where he was compelled to do so the evidence was admitted; State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; and tracks have been voluntarily made by the accused before the jury for comparison with those proved; Gregory v. State, 80 Ga. 269, 7 S. E. 222. Comparison of the shoes with the footmarks should be made before the former are put in the marks; 1 Lew. C. C. 116; and where this was not done the evidence on the subject was rejected; *id.*

Such evidence, even if established beyond doubt, is liable, as in all cases of circumstantial evidence, to be the subject of fabrication, or erroneous inference; see the case of Mayenc, Gabriel 403, where the shoes of another person were put on by one committing a crime; and the celebrated case of Thornton, fully reported in Wills, Circ. Ev. 286, where an *alibi* was successfully proved after apparently conclusive circumstantial evidence, including footprints.

Proof may be made by horse-tracks corresponding with those made by a horse of defendant; Goldsmith v. State, 32 Tex. Cr. R. 112, 22 S. W. 405; or that shoes taken from such horse fitted the tracks; Campbell v. State, 23 Ala. 44; and when the prisoner had reversed the shoes of his horse after reaching the house, to give the impression that two persons had been there, the artifice led to his detection by the discovery of recent nail-marks in the horse's hoof; Spooner's Case, 2 Chand. Am. Cr. Tr.; but horse-tracks alone are not sufficient to convict; State v. Melick, 65 Ia. 614, 22 N. W. 895; and see Bouldin v. State, 8 Tex. App. 332.

For a full discussion of the subject, see Wills, Circ. Ev. 194. See EVIDENCE; INCRIMINATION.

FOR. In place of or in front of. Ready v. Sommer, 37 Wis. 265. Because or on account of; by reason of; as agent for; in behalf of. Strong v. Ins. Co., 31 N. Y. 103,

88 Am. Dec. 242; see AGENT. Used in connection with a period it means "during," where publication is required for at least thirty days, one publication thirty days before the sale would not be a compliance. Lawson v. Gibson, 18 Neb. 139. And see Craig's Adm'x v. Fox, 16 Ohio 563; Whitaker v. Beach, 12 Kan. 493. It may, if necessary, be inserted in a statute by judicial construction; King v. Kelly, 25 Minn. 522.

In a contract it implies a condition precedent; Hob. 41; 5 M. & S. 187. See also 12 Mod. 455.

In French Law. A tribunal. *Le for intérieur*, the interior forum; the tribunal of conscience. Poth. Obl. pt. 1, c. 11, art. 3.

FOR ACCOUNT OF. A phrase used in an order, draft, or memorandum to designate the person against whom, or account against which, the thing or sum is to be charged.

FOR AT LEAST. As applied to a number of days required for notice this phrase includes either the first or last day, but not both. Stroud v. Water Co., 56 N. J. L. 422, 28 Atl. 578. See TIME.

FOR COLLECTION. See INDORSEMENT.

FOR DEPOSIT TO THE CREDIT OF. See INDORSEMENT.

FOR GOOD CAUSE. A statute authorizing a continuance "for good cause" in the absence of a party is satisfied by proof of the illness of plaintiff in another state, and the ignorance of his attorney of the names of the witnesses and the details of the case. Tynan v. Walker, 35 Cal. 636, 95 Am. Dec. 152.

FOR THAT. In Pleading. Words used to introduce the allegations of a declaration. "For that" is a positive allegation; "For that whereas" is a recital. Hamm. N. P. 9.

FOR THAT WHEREAS. Introductory words in pleading. See Hamm. N. P. 9. These words are used in the introduction of the statement of the plaintiff's case as a recital in the declaration in all actions except trespass, in which there being no recital the expression was "For that." 1 Burr. Inst. Cler. 170.

FOR THE ACCOUNT. A stock exchange term. A broker having an order to buy or sell may contract for the specific amount of stock ordered to be bought or sold, or may include such order with other orders, or in quantities to suit his convenience. Clews v. Jamieson, 182 U. S. 487, 21 Sup. Ct. 845, 45 L. Ed. 1183, citing Dos Passos, St. Bro. 276.

FOR USE. Words used to describe a suit, judgment, or decree in which the nominal plaintiff sues for the benefit or advantage of another. This is necessary in some cases where an assignee is obliged to sue in the name of the assignor. The style of the suit is "for (or to the) use of A. *v.* B."

Loans *for use* are distinguished from loans *for consumption;* the former being those in which the article bailed is to be used and returned and the latter those in which it may be consumed and returned in kind.

FOR WHOM IT MAY CONCERN. A general clause in a policy of insurance, intended to apply to all persons who have any insurable interest. 1 Phill. Ins. 152. This phrase, or some similar one, must be inserted, to give any one but the party named as the insured rights under the policy. See 1 B. & P. 316, 345; 2 Maule & S. 485; Davis v. Boardman, 12 Mass. 80.

FORAGE. Hay and straw for horses, particularly in the army. Jac.

FORAGIUM. Straw when the corn is threshed out. Cowell.

FORAKER ACT. A name usually given to the act of congress of April 12, 1900, 31 Stat. L. 77, c. 191, which provided civil government for Porto Rico. See a synopsis of it by Harlan, J., in Downes v. Bidwell, 182 U. S. 244, 390, 21 Sup. Ct. 770, 45 L. Ed. 1088. See PORTO RICO.

FORANEUS. One from without; a foreigner; a stranger. Calv. Lex.

FORATHE. One who can take oath for another who is accused of one of the lesser crimes. Manw. For. Laws 3; Cowell.

FORBALCA. In Old Records. A forebalk; a balk (that is, an unplowed piece of ground) lying forward or next the highway. Cowell.

FORBARRE. To deprive one of a thing forever. Cowell.

FORBATUDUS. The aggressor slain in combat. Jac.

FORBEARANCE. A delay in enforcing rights. The act by which a creditor waits for the payment of a debt due him by the debtor after it has become due. It is sufficient consideration to support assumpsit.

An agreement to forbear bringing a suit for a debt due, although for an indefinite time, and even although it cannot be construed to be an agreement for a perpetual forbearance, if followed by actual forbearance for a reasonable time, is a good consideration for a promise; Howe v. Taggart, 133 Mass. 287.

See ASSUMPSIT; CONSIDERATION.

FORCE. Restraining power; validity; binding effect.

A law may be said to be in force when it is not repealed, or, more loosely, when it can be carried into practical effect. An agreement is in force when the parties to it may be compelled to act, or are acting, under its terms and stipulations.

Strength applied. Active power. Power put in motion.

Actual force is where strength is actually applied or the means of applying it are at hand. Thus, if one break open a gate by violence, it is lawful to oppose force to force.

See 2 Salk. 641; 8 Term 78, 357. See BATTERY.

Implied force is that which is implied by law from the commission of an unlawful act. Every trespass *quare clausum fregit* is committed with implied force. Co. Litt. 57 *b*, 161 *b*, 162 *a*; 1 Saund. 81, 140, n. 4; 5 Term 361; Bac. Abr. *Trespass;* 3 Wils. 18; Fitzh. N. B. 890; 5 B. & P. 365, 454.

Mere nonfeasance cannot be considered as force, generally; 2 Saund. 47; Co. Litt. 161.

If a person with force break a door or gate for an illegal purpose, it is lawful to oppose force to force; and if one enter the close of another *vi et armis*, he may be expelled immediately, without a previous request; for there is no time to make a request; 2 Salk. 641; 8 Term 78, 357. When it is necessary to rely upon actual force in pleading, as in the case of a forcible entry, the words "*manu forti*," or "with a strong hand," should be adopted; 8 Term 357; Com. v. Shattuck, 4 Cush. (Mass.) 141. But in other cases the words "*vi et armis*," or "with force and arms," are sufficient. See those titles.

Municipal officers seizing private property under an order condemning it for a street, are not guilty of forcible trespass if they use no more force than necessary, even though the owner be present forbidding them; State v. Lyle, 100 N. C. 497, 6 S. E. 379.

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now unnecessary in declarations, to denote that the act complained of was done with violence. 2 Chitty, Pl. 846, 850; 2 Steph. Com. 364. See FORCE; VI ET ARMIS; TRESPASS.

FORCE AND FEAR, called also "*vi metuque*," means that any contract or act extorted under the pressure of force (*vis*) or under the influence of fear (*metus*) is voidable on that ground, provided, of course, that the force or the fear was such as influenced the party. Brown.

FORCE MAJEURE (Fr.). Superior or irresistible force. Emerig. Tr. des Ass. c. 12. See VIS MAJOR.

FORCED HEIRS. In Louisiana. Those persons whom the testator or donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. La. Civ. Code. As to the portion of the estate they are entitled to, see LEGITIME. The causes for which forced heirs may be deprived of this right must be stated in the testament and also established by proof by the other heirs; *id.*

FORCED OUT. Where a license to a corporation was to cease if the licensor was "forced out of the company," and one who had acquired all the stock, except that held by the licensor, procured from the company an assignment of all its property, and induced it to cease doing business, it was held that the licensor was "forced out of the company." Havana Press Drill Co. v. Ashurst, 148 Ill. 115, 35 N. E. 873.

FORCED SALE. A sale made at the time and in the manner prescribed by law, in virtue of execution issued on a judgment already rendered by a court of competent jurisdiction; a sale made under the process of the court, and in the mode prescribed by law. Sampson v. Williamson, 6 Tex. 110, 55 Am. Dec. 762.

A forced sale is a sale against the consent of the owner. The term should not be deemed to embrace a sale under power in a mortgage. Patterson v. Taylor, 15 Fla. 336.

FORCES. The military and naval resources of a country.

FORCHEAPUM. Pre-emption. Blount.

FORCIBLE ENTRY OR DETAINER. A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law. Comyns, Dig.; Woodf. Landl. & Ten. 973; 2 Bish. Cr. L. 489.

Such an entry as is made with strong hand, with unusual weapons, and unusual number of servants or attendants, or with menace of life or limb; an entry which only amounts in law to a trespass is not within statutes relating thereto. Smith v. Reeder, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172.

To make an entry forcible, there must be such acts of violence, or such threats, menaces, or gestures, as may give reason to apprehend personal injury or danger in standing in defence of the possession. But the force made use of must be more than is implied in any mere trespass; 8 Term 357; Com. v. Dudley, 10 Mass. 409; Pennsylvania v. Robison, 1 Add. (Pa.) 14; Tayl. Landl. & Ten. § 786.

Driving the tenant from the premises by deadly weapons and an array of numbers is a forcible entry; State v. Smith, 100 N. C. 466, 6 S. E. 84. But it is sufficient that it was made against the will of the individual when in peaceable possession, without actual force; Oakes v. Aldridge, 46 Mo. App. 11; Meriwether v. Howe, 48 Mo. App. 148; Wylie v. Waddell, 52 Mo. App. 226.

Proceedings in case of a forcible entry or detainer are regulated by the statutes of the several states, and relate to a restitution of the property, if the individual who complains has been dispossessed, as well as to the punishment of the offender for a breach of the public peace. And the plea of ownership is no justification for the party complained of; for no man may enter even upon his own lands in any other than a peaceable manner. Nor will he be excused if he entered to make a distress or to enforce a lawful claim, nor if possession was ultimately obtained by entreaty; Woodf. L. & T. 741, n.; Langdon v. Potter, 3 Mass. 215; State v. Johnson, 18 N.

C. 324; 8 Term 361; but, *contra*, it has been held, that an intruder in quiet possession of land may be forcibly expelled by the owner; Smith v. Reeder, 21 Or. 541, 28 Pac. 890, 15 L. R. A. 172; Canavan v. Gray, 64 Cal. 5, 27 Pac. 788. If the owner is guilty of a breach and trespass on the person of the intruder in taking possession of his land, he is liable for that, but his possession is lawful, and an action of trespass *quare clausum* is not maintainable against him; Overdeer v. Lewis, 1 W. & S. (Pa.) 90, 37 Am. Dec. 440; Rich v. Keyser, 54 Pa. 86. This follows the English doctrine as expressed by Parke, B., that, where a breach of the peace has been committed by a freeholder who, in order to get possession of his land, assaults a person wrongfully holding possession of it, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and in an action brought against him, it is a sufficient justification that the tenant was in possession against the will of the owner; 14 M. & W. 437. See 4 Am. Law Rev. 429. A lessee never in possession cannot maintain unlawful detainer against the lessor, either at common law or statute; Long v. Noe, 49 Mo. App. 19. A change of possession pending a suit for forcible entry and detainer does not affect the right of recovery; Daggitt v. Mensch, 141 Ill. 395, 31 N. E. 153.

Upon an indictment for this offence at common law, the entry must appear to have been accompanied by a public breach of the peace; and, upon a conviction for either a forcible entry or detainer, the court will award restitution of the premises in the same manner as a judge in a civil court, under a statutory proceeding, is authorized to do upon a verdict rendered before him; 1 Ld. Raym. 512; 8 Term 360; Cro. Jac. 151; Al. 50.

Neither title nor right of possession is at issue, or can be made an issue, in an action of forcible entry and detainer; Sheehy v. Flaherty, 8 Mont. 365, 20 Pac. 687.

FORDA. In Old Records. A ford or shallow, made by damming or penning up the water. Cowell.

FORDAL (Sax.). A butt or headband. A piece.

FORDANNO. A first assailant. Spel. Gloss.

FORDIKA. In Old Records. Grass or herbage growing on the edge or bank of dykes or ditches. Cowell.

FORE (Sax.). Before. (Fr.) Out. Kelham.

FORE-MATRON. In a jury of women this word corresponds to the foreman of a jury. She was sworn in separately; 8 Carr. & P. 264.

FORE-OATH. Before the Norman Conquest, an oath required of the complainant in the first instance (in the absence of manifest facts) as a security against frivolous suits. Pollock, 1 Sel. Essays Anglo-Amer. Leg. Hist. 93.

FORECLOSE. To shut out; to bar. Used of the process of destroying an equity of redemption. 1 Washb. R. P. 589; Dan. Ch. Pr. 1204; Coote, Mortg. 511; Lansing v. Goelet, 9 Cow. (N. Y.) 382.

FORECLOSURE. A proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever.

The modern significance of the term, as applied to mortgages, is that of a sale under a judgment of foreclosure, and not the judgment itself; Sichler v. Look, 93 Cal. 600, 29 Pac. 220.

This takes place when the mortgagor has forfeited his estate by non-payment of the money due on the mortgage at the time appointed, but still retains the equity of redemption; in such case, the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or, in default thereof, to be forever closed or barred from any right of redemption.

In some cases, however, the mortgagee obtains a decree for a sale of the land under the direction of an officer of the court, in which case the proceeds are applied to the discharge of incumbrances, according to their priority. See Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 100; Palmer's Adm'rs v. Mead, 7 Conn. 152; Gilman v. Hidden, 5 N. H. 30; Anonymous, 2 N. C. 482; Higgins v. West, 5 Ohio 554; Quint v. Little, 4 Greenl. (Me.) 495; 1 Washb. R. P. 589; Dan. Ch. Pr. 1204.

In an action to foreclose a mortgage, there is no occasion for an entry for breach of condition; Cook v. Bartholomew; 60 Conn. 24, 22 Atl. 444, 13 L. R. A. 452. Where, before beginning suit to foreclose for default in paying interest, the defaulted interest was paid and accepted, such acceptance is a waiver of any claim of forfeiture on account of the default; Smalley v. Ranken, 85 Ia. 612, 52 N. W. 507.

Strict Foreclosure. When the property is of less value than the mortgage debt and the mortgagee is willing to take it for his debt, the court may decree a strict foreclosure, unless there are other encumbrancers, purchasers of the equity of redemption or creditors to object; Farrell v. Parlier, 50 Ill. 274; Flagg v. Walker, 113 U. S. 659, 5 Sup. Ct. 697, 28 L. Ed. 1072; if the mortgagor is insolvent and there are no other encumbrancers; Hollis v. Smith, 9 Ill. App. 109. See note in 19 L. Ed. 354; 20 L. R. A. 370. Such a decree must find the amount due and allow time for payment and redemption; it cannot be final in the first instance; Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. Ed. 354.

Strict foreclosure is usually by a bill in equity praying the foreclosure, by which the court, through a master, ascertains the amount due upon the mortgage and then decrees that unless the owner of the equity of

redemption shall within a prescribed time pay that sum and redeem the property, he shall be forever barred; 4 Kent 180; 2 Washb. R. P. 248. It has been spoken of as a harsh remedy; Bolles v. Duff, 43 N. Y. 469.

It can only be resorted to under peculiar circumstances; Jefferson v. Coleman, 110 Ind. 515, 11 N. E. 465. It would not generally be allowed without the mortgagor's consent; Caufman v. Sayre, 2 B. Mon. (Ky.) 202. It exists in Maryland; Dorsey v. Dorsey, 30 Md. 522, 96 Am. Dec. 617; Wisconsin; Kimball v. Darling, 32 Wis. 675; and New Jersey; Parker v. Child, 25 N. J. Eq. 41; it is said to be unusual in North Carolina; Green v. Crockett, 22 N. C. 390. It is held that the mortgagor's equity of redemption can only be barred by his own agreement, by estoppel, or by judicial sale; Appeal of Winton, 87 Pa. 77. That it is not recognized as a practice, see Browne v. Browne, 17 Fla. 607, 35 Am. Rep. 96; Gamut v. Gregg, 37 Ia. 573; Davis v. Holmes, 55 Mo. 349; First Nat. Bank v. Min. Co., 8 Mont. 32, 19 Pac. 403; Kyger v. Ryley, 2 Neb. 20; in some of these states the subject is regulated by code. In Massachusetts the practice is usually by way of entry in possession, or by writ of entry, or under the powers contained in the mortgage. Usually a considerable period is allowed for redemption. In Maine there is proceeding by writ of entry and the mortgagor has three years for redemption.

A strict foreclosure will not be granted to cut off the right of a second mortgagee where he was not a party; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370; but the decree may direct that, unless within a prescribed time he shall notify the purchaser of his intention to redeem, he shall be barred; Moulton v. Cornish, 138 N. Y. 133, 33 N. E. 842, 20 L. R. A. 370.

See Horr v. Herrington, 22 Okl. 590, 98 Pac. 443, 20 L. R. A. (N. S.) 47 and note, 132 Am. St. Rep. 648.

As to the subject generally, and also as to Railway Foreclosure, see MORTGAGE.

FOREGIFT. A premium paid by a lessee for his lease, separate and distinguished from the rent. A payment in advance.

FOREGOERS. Royal purveyors. 26 Edw. III. c. 5.

FOREHAND RENT. In English Law. A species of rent which is a premium given by the tenant at the time of taking the lease, as on the renewal of leases by ecclesiastical corporations, which is considered in the nature of an improved rent. 3 Atk. Ch. 473; Crabb, R. P. § 155.

FOREIGN. That which belongs to another country; that which is strange. Spratt v. Spratt, 1 Pet. (U. S.) 343, 7 L. Ed. 171.

Every nation is foreign to all the rest; and the several states of the American Union are foreign to each other with respect to their municipal laws; Byrne v. Holt, 2 Wash. C. C. 282, Fed. Cas. No. 2,272; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Packard v. Hill, 2 Wend. (N. Y.) 411; Kean v. Rice, 12 S. & R. (Pa.) 203; Taylor v. Bank, 7 T. B. Monr. (Ky.) 585; Taylor's Adm'r v. Bank, 5 Leigh (Va.) 471; Inhabitants of Kaynham v. Inhabitants of Canton, 3 Pick. (Mass.) 293; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; Negus v. Simpson, 99 Mass. 388.

But the reciprocal relations between the national government and the several states are not considered as foreign, but domestic; Hinde v. Vattier, 5 Pet. (U. S.) 398, 8 L. Ed. 168; Leland v. Wilkinson, 6 Pet. (U. S.) 317, 8 L. Ed. 412; Owings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246; Young v. Bank, 4 Cra. (U. S.) 384, 2 L. Ed. 655; Chesapeake & O. Canal Co. v. R. Co., 4 Gill & J. (Md.) 1, 63.

FOREIGN ANSWER. An answer not triable in the county where it is made. Stat. 15 Hen. VI. c. 5; Blount.

FOREIGN APPOSER. An officer in the exchequer who examines the sheriff's *estreats*, comparing them with the records, and apposeth (interrogates) the sheriff what he says to each particular sum therein. Coke, 4th Inst. 107; Blount; Cowell, *Foreigne*. The word is written *opposer*, *opposeth*, by Lord Coke; and this signification corresponds very well to the meaning given by Blount, of examiner (interrogator) of the sheriff's accounts.

FOREIGN ASSIGNMENT. An assignment made in a foreign country or in another state. 2 Kent 405. See ASSIGNMENT.

FOREIGN ATTACHMENT. A process by virtue of which the property of an absent and non-resident debtor is seized for the purpose of compelling an appearance, and, in default of that, to pay the claim of the plaintiff. See ATTACHMENT.

FOREIGN BILL OF EXCHANGE. A bill drawn in one country and made payable in another.

A bill drawn in one state by a resident thereof upon a resident of another state and payable there is a foreign bill; Ocean National Bank v. Williams, 102 Mass. 141; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450; Knickerbocker Life Ins Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

See BILL OF EXCHANGE.

FOREIGN BOUGHT AND SOLD. A custom in London, which, being found prejudicial to sellers of cattle in Smithfield, was abolished. Wharton.

FOREIGN CHARITY. One created or endowed to be administered in a state or country foreign to that of the domicil of the benefactor.

A bequest by a testator in one state establishing a charitable use to be administered by a corporation created in another state, all

the trustees (thirteen in number) except two being non-residents of the state of domicil of the testator, is a foreign charity. The court of chancery of New Jersey will not administer such a charity, but when it is valid by the law of both states, and the trustees have the legal capacity to carry out the charity, the court will order its payment to them, leaving it to the courts of the other state to see to its administration; Taylor's Ex'rs v. Trustees of Bryn Mawr College, 34 N. J. Eq. 101. Such is the general rule; Boyle on Char. 134; Perry, Tr. § 741; Tudor, Char. Tr. 259; Hill, Trust. 468; Sto. Eq. Jur. § 1184; 19 Beav. 597. See CHARITABLE USE.

FOREIGN COINS. Coins issued by the authority of a foreign government.

There were formerly several acts of Congress passed which rendered certain foreign gold and silver coins a legal tender in payment of debts upon certain prescribed conditions as to the fineness and weight, but by the act of Feb. 21, 1857, it was provided: That all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts, are repealed; but it shall be the duty of the director of the mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof.

The value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and be proclaimed by the secretary of the treasury; R. S. § 3564; Collector v. Richards, 23 Wall. (U. S.) 246, 23 L. Ed. 95.

The value of foreign coins as ascertained by the estimate of the director of the mint and proclaimed by the secretary of the treasury is conclusive upon custom-house officers and importers; Hadden v. Merritt, 115 U. S. 25, 5 Sup. Ct. 1169, 29 L. Ed. 333.

FOREIGN COMMERCE. "Commerce which in some sense is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extra-territorial. The phrase can never be applied to transactions wholly internal." . . . "Nor . . . because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase foreign commerce." Veazie v. Moor, 14 How. (U. S.) 568, 573, 14 L. Ed. 545.

FOREIGN CORPORATION. One created by or under the laws of any other state or government.

A corporation is a person in most senses and for most purposes of legal administration, and for the purposes of determining the jurisdiction of the federal courts it is a citizen, but it is not such in the sense that a natural person is one, and hence for most purposes corporations are "foreign" as between the states. As to whether they are *citizens* or *persons*, see those titles.

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law, and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty;" Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; Rece v. Newport News Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572. It may contract in other states within the scope of its own powers and subject to the laws of the *lex loci contractus* or the *lex loci solutionis*, as the case may be, as natural persons may contract where they do not reside. "And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers, in a sovereignty in which it does not reside, provided such contracts are permissible by the law of the place?" Bank of Kentucky v. Bank, 1 Pars. Eq. Cas. (Pa.) 180, 225. See Bard v. Poole, 12 N. Y. 495; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109. In the absence of proof, the validity of such contracts is presumed; Boulware v. Davis, 90 Ala. 207, 8 South. 84, 9 L. R. A. 601; Wood Hydraulic Hose Min. Co. v. King, 45 Ga. 34; New York Floating Derrick Co. v. Oil Co., 3 Duer (N. Y.) 648. Unless expressly forbidden to do so a corporation may acquire rights of contract and property in a foreign jurisdiction; Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236; private corporations will be permitted to transact in other states the business authorized by the state of their creation; State v. Water Co., 61 Kan. 547, 60 Pac. 337; subject to any limitations imposed by express legislation; Chicago Title & Trust Co. v. Bashford, 120 Wis. 281, 97 N. W. 940; American Waterworks Co. v. Trust Co., 73 Fed. 956, 20 C. C. A. 133; or to the laws and policy of the state in which it does business; Hyde v. Scott, 75 Misc. 487, 133 N. Y. Supp. 904.

"Every power, however, which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without their sanction, express or implied;" Taney, C. J., in Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 588, 10 L. Ed. 274; any other exercise of power by it rests absolutely upon the doctrine of comity; *id.*; State v. Packing Co., 110 La. 180, 34 South. 368, 98 Am. St. Rep. 459; State v. Telephone & Telegraph Co., 114 Tenn. 194, 86 S. W. 390; Chapman v. Cash Register Co., 32 Tex. Civ. App. 76, 73 S. W. 969; In re Willmer's Estate, 153 App. Div. 804, 138 N. Y. Supp. 649; Model Heating Co. v. Magarity, 1 Boyce (Del.) 240, 75 Atl. 614; and is subject to the laws and regula-

tions, process and remedial jurisdiction of the state of business or temporary domicil; Clark v. R. Co., 81 Me. 477, 17 Atl. 497; Austin v. R. Co., 25 N. J. L. 381; Riddle v. R. Co., 39 Fed. 290; Attorney General v. Min. Co., 99 Mass. 148, 96 Am. Dec. 717; People v. R. R. of New Jersey, 48 Barb. (N. Y.) 478; this comity stops short of permission to exercise any powers in excess either of the powers of domestic corporations of the same class; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Clarke v. Banking Co. of Georgia, 50 Fed. 338, 15 L. R. A. 683; 33 Am. & Eng. Corp. Cas. 15, 16; or of the powers authorized by its own charter; Talmadge v. Transp. Co., 3 Head. (Tenn.) 337; Diamond Match Co. v. Reg. of Deeds, 51 Mich. 145, 16 N. W. 314. Whatever limitations a state statute may impose upon a foreign corporation's liberty of contracting, whatever its discriminations, they become conditions of the permission to do business in the state and such conditions were accepted with the permit; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552, affirming Morse v. City of Westport, 136 Mo. 282, 37 S. W. 932. So a telegraph company incorporated in Maryland, whose operations were by its charter limited to that state was refused, by the Delaware courts, a mandamus to compel a telephone company to furnish to it a telephone in aid of its business in Delaware; Baltimore & O. Telegraph Co. of Baltimore City v. Telegraph & Telephone Co., 7 Houst. (Del.) 269, 31 Atl. 714.

Foreign corporations are sometimes by the legislation of a state made domestic corporations for certain purposes, as for jurisdiction; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; James v. R. Co., 46 Fed. 47; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518; and to determine when this is so is sometimes a matter of great difficulty; 6 Thomp. Corp. § 7891; but where, by the concurrent action of two states, a railroad company is chartered or consolidated for police and jurisdictional purposes, it is as a whole treated as a domestic corporation of each state; *id.;* Ohio & M. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. Ed. 130; Burger v. R. Co., 22 Fed. 561; Central Trust Co. v. R. Co., 41 Fed. 551; State v. R. Co., 18 Md. 193; Sprague v. R. Co., 5 R. I. 233; Baltimore & O. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. Ed. 354; State v. R. Co., 25 Neb. 156, 41 N. W. 125, 2 L. R. A. 564; State v. R. Co., 25 Neb. 164, 41 N. W. 127. A state may impose such terms for the admission of foreign corporations as it may deem best; Cyclone Min. Co. v. Baker L. & P. Co., 165 Fed. 996; or may exclude them, and this power extends to a single one already within its jurisdiction, if the act does not deprive it of property without due process of law, and the mere right to extend its business into a state is not property in this sense; National Council v. State Council, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132. Such statutes do not constitute a contract between the state and such foreign corporation which is impaired by subsequent legislation; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569. They do not avoid the contracts made in the state by unregistered foreign corporations, but merely suspend civil remedies in that state; suit may be brought in another state; Allen v. Allegheny Co., 196 U. S. 458, 25 Sup. Ct. 311, 49 L. Ed. 551. The right of a state to prevent foreign corporations from continuing to do business within its borders is a correlative of the right to exclude them therefrom, and as this power is plenary, the state, so long as no contract is impaired, may exercise it in consideration of acts done in another jurisdiction; Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645; Cable v. U. S. Life Ins. Co., 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188.

The right of federal control of interstate commerce results in certain restraints upon the power of the states to regulate and tax foreign corporations so far as their business is held to be foreign or interstate commerce within the meaning of the federal constitution. The only limitation, however, on the powers of a state to exclude or exact conditions from a foreign corporation arises when the corporation is in the employ of the federal government; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; or its business is strictly commerce, interstate or foreign; Pembina Consol. Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Butler Bros. Shoe Co. v. Rubber Co., 156 Fed. 1, 84 C. C. A. 167. If empowered to engage in interstate commerce by its own state, it may carry on interstate commerce in every state in the Union; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336. And corporations possess the same rights as citizens with respect to freedom from state regulation of interstate commerce; La Moine Lumber & Trading Co. v. Kesterson, 171 Fed. 980; and a state law requiring a foreign corporation to file a copy of its charter and pay a small fee as a condition of doing business in the state does not interfere unlawfully with interstate commerce; Diamond Glue Co. v. U. S. Glue Co., 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328. Such commerce receives the same protection when carried on by corporations or by in-

dividuals; Gloucester Ferry Co. v. Pennsylvania, 141 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; and includes transportation; Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. (U. S.) 232, 21 L. Ed. 146; Bowman v. Ry. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; telegraph lines; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1383, 32 L. Ed. 311 (which are also subject to federal regulation under acts of congress authorizing their location under certain conditions, on post roads; U. S. Rev. Stat. § 1977; Pensacola Telegraph Co. v. Telegraph Co., 96 U. S. 11, 24 L. Ed. 708; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067); the sale of merchandise by a corporation of one state whether made without the state or by commercial travellers, to a resident of another; Ware v. Shoe Co., 92 Ala. 145, 9 South. 136; Gunn v. Mach. Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; the sale of patented or copyrighted articles or books; Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932; Grover & Baker Sewing Mach. Co. v. Butler, 53 Ind. 454, 21 Am. Rep. 200; the right to vend them anywhere within the United States being secured by the constitution and patent and copyright laws; Const. U. S. art. 1, § 8; U. S. R. S. § 4884; but insurance is not commerce (*q. v.*), and corporations engaged in that business may be regulated; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357 (followed, after full consideration, in New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495, 34 Sup. Ct. 167, 58 L. Ed. ——); State v. Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271; Goldsmith v. Ins. Co., 62 Ga. 379; and business cannot be carried on in a state by a foreign corporation which has not complied with all the conditions imposed by the state as a prerequisite to doing business within its limits; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; Conn. Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, 30 L. Ed. 342; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

Subject to these constitutional limitations, the states may in their discretion, impose conditions upon foreign corporations, as essential to enable them to do business; Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. Ed. 394; they may discriminate between them and domestic corporations by a tax upon the privilege of doing business in the state, and, if it be considered good policy, make that discrimination so burdensome as to amount to exclusion; Ducat v. City of Chicago, 48 Ill. 172, 95 Am. Dec. 529; and the federal constitution does not secure them against inequality of taxation either as to system or rates as compared with domestic corporations; Com. v. R. Co., 129 Pa. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Singer Mfg. Co. v. Wright, 33 Fed. 121; but such tax was held contrary to the state constitution; San Francisco v. Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425; though "it is clear that it violates no principle of the federal constitution as the supreme court of California seem to suppose;" 6 Thomp. Corp. § 7877, n. 3; and another state court has said that the state cannot impose upon foreign and domestic corporations taxes differing in principle; per Beasley, C. J., Erie R. Co. v. State, 31 N. J. L. 531, 86 Am. Dec. 226; but this reasoning has been characterized as a *dictum;* 6 Thomp. Corp. § 8090, as the corporation in question being engaged in interstate commerce was exempt from discrimination on that ground. The provisions of state constitutions securing uniformity and equality of taxation have been held not violated by a specific tax on gross receipts of a *foreign* corporation on business within the state; Pacific Exp. Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; or upon such corporations as a class; Germania Life Ins. Co. v. Com., 85 Pa. 513, cited with approval in the last case.

The state power of *taxation* of such corporations is subject to certain restrictions in addition to those already stated, but as a general rule the property of the corporation owned or used within the state is alone the proper subject of taxation. The power has been sustained as to franchises; Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. Ed. 897; Provident Inst. for Savings v. Massachusetts, 6 Wall. (U. S.) 611, 18 L. Ed. 907; even of an interstate corporation acting under U. S. R. S. § 5263; Western Union Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; Attorney General v. Telegraph Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; as to tangible property within the state even if employed in interstate commerce; Union Pac. R. Co. v. Peniston, 18 Wall. (U. S.) 5, 21 L. Ed. 787; Minot v. R. Co., 18 Wall. (U. S.) 206, 21 L. Ed. 888; Western Union Telegraph Co. v. Texas, 105 U. S. 460, 26 L. Ed. 1067; Western Union Telegraph Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; and with respect to the *situs* for this purpose, personal property may be separated from its owner; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; in which the principle was applied to rolling stock (*q. v.*), of which as a general rule the *situs* is the domicil of the corporation; Appeal Tax Court of Baltimore City v. Ry. Co., 50 Md. 417; Pacific R. Co. v. Cass County, 53 Mo. 18; but subject to exceptions growing out of its char-

acter and use; City of Dubuque v. R. Co., 39 Ia. 56; Kennedy v. R. Co., 62 Ill. 395. See 6 Thomp. Corp. § 8097, and note 3. Where a corporation was registered in South Africa, but did its real business in London, it was held liable to taxation in England on its entire income; De Beers Consol. Mines, Ltd., v. Howe [1906] A. C. 455.

This power does not reach the capital of a company domiciled without the state, though a tax on a proportion of it has been sustained as a license; Riley v. Tel. Co., 47 Ind. 511; and so has a tax called an excise, on capital of a corporation having its domicil within and its business without the state; Attorney General v. Mining Co., 99 Mass. 148, 96 Am. Dec. 717; or a franchise tax assessed according to legislative discretion; People v. Trust Co., 96 N. Y. 387; measured by the capital found to be employed within the state; People v. Davenport, 91 N. Y. 574; People v. Com'rs of Taxes, 104 N. Y. 240, 10 N. E. 437; which is justified on the theory that part of the capital is employed within the state; People v. Wemple, 129 N. Y. 558, 29 N. E. 812. See TAXATION.

Independently of the power of taxation, foreign corporations may be excluded from doing business in other states, or, if permitted to do it, are subject to such terms and conditions as the legislature may see fit to impose; Attorney General v. Min. Co., 99 Mass. 148, 96 Am. Dec. 717; Western Union Telegraph Co. v. Mayer, 28 Ohio St. 521; Farmers' & Merchants' Ins. Co. v. Harrah, 47 Ind. 236; Home Ins. Co. v. Davis, 29 Mich. 238; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. Ed. 357. Such conditions may include: Restrictions upon the right of eminent domain (*q. v.*); payment of license fees; Pembina Consol. Silver Min. & Mill. Co. v. Com. of Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; provisions that any restriction imposed by the home state of the foreign corporation shall also be imposed upon corporations of that state in the domestic state; People v. Fire Ass'n of Philadelphia, 92 N. Y. 311, 44 Am. Rep. 380; Home Ins. Co. v. Swigert, 104 Ill. 653; such provisions when, as is usual, they are in the form of a license or tax are not objectionable on the ground of inequality; State v. Ins. Co., 115 Ind. 257, 17 N. E. 574; Blackmer v. Ins. Co., 115 Ind. 596, 17 N. E. 583; Phœnix Ins. Co. of New York v. Welch, 29 Kan. 672. So statutes are upheld requiring such corporations to file their charter, etc.; Hammer v. Min. & Mill. Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; or their agents to file evidence of their authority; Morgan & Co. v. White, 101 Ind. 413; or to keep a known place of business, and a resident agent; or to appoint an attorney for service of process in suits against the company; Utley v. Min. Co., 4 Colo. 369; in default of which contracts are voidable; Semple v. Bank, 5 Sawy. 88, Fed. Cas. No. 12,659; Bank of British Columbia v. Page, 6 Or. 431; New England Mtg. Sec. Co. v. Ingram, 91 Ala. 337, 9 South. 140; and all such statutes are self-enforcing; *id.*

When by constitution or statute such corporations are restricted from *doing business* within the state, in default of compliance with the provisions thereof, the decisions are not uniform as to what amounts to a violation of the prohibition. The question usually arises in one of two cases, either where it is sought to serve process on a corporation or to tax its property. It may also arise in penal actions against the corporation or its agent for doing business without complying with the statute. It seems to be established by the weight of authority that single transactions do not constitute such doing business as is contemplated by the statute; 6 Thomp. Corp. § 7936, where many cases are collected, holding valid acts done in states where there are statutes of the class mentioned; see *infra.*

Most of the statutes of this class prescribe penalties, either by *qui tam* action or indictment, upon agents for violations of them, and it is held that such a state statute making it a misdemeanor for a person in the state to procure insurance for a resident there from an insurance company not incorporated under its laws, and which had not filed the bond required by the laws of the state relative to insurance, is not a regulation of commerce, and does not conflict with the constitution of the United States; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. Such an act was held not to apply to the owner of property who merely obtained insurance on his own property; Com. v. Biddle, 139 Pa. 605, 21 Atl. 134, 11 L. R. A. 561. A foreign corporation which is barred from a state court for failure to obey the laws of that state as a prerequisite cannot sue on its contract in a federal court; Cyclone Min. Co. v. Power Co., 165 Fed. 996; nor can it foreclose a mortgage upon land in the state; Chattanooga Nat. Bldg. & Loan Ass'n v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; nor can it recover upon a bond conditioned for the faithful discharge of the duty of an agent appointed to conduct business in the state; McCanna & Fraser Co. v. Surety Co., 74 Fed. 597; Mutual Ben. Life Ins. Co. v. Bales, 92 Pa. 352; U. S. Life Ins. Co. v. Adams, 7 Biss. 30, Fed. Cas. No. 16,792; *contra,* Penn. Mut. Life Ins. Co. v. Bradley, 21 N. Y. Supp. 876; Manhattan Ins. Co. v. Ellis, 32 Ohio St. 388; but it was held that a foreign corporation which had failed to register under the Delaware act could nevertheless enforce a contract in a Delaware court against one who retained the benefits of the contract, the act being silent on this point, and this is said to be the "better doctrine"; Model Heating Co. v. Magarity, 1

Boyce (Del.) 240, 75 Atl. 614. A South Dakota act forbidding resort to its courts to a foreign corporation that has not registered is valid under the police power, even though the transaction in question related to interstate commerce; Sioux Remedy Co. v. Cope, 28 S. D. 397, 133 N. W. 683, refusing to follow Sioux Remedy Co. v. Lindgren, 27 S. D. 123, 130 N. W. 49. Such corporation may sue on a cause of action under a federal statute having no relation to its doing business in the state contrary to law; Vitagraph Co. of America v. Optiscope Co., 157 Fed. 699. The agent of a foreign corporation which has not filed its statement under this act, is presumed to know of his incapacity and becomes personally liable to one with whom he dealt on account of such corporation, and this responsibility is in addition to the statutory penalty for acting as the agent of a foreign corporation without complying with the provisions of the act; Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552.

Efforts have been made to take away the jurisdiction which federal courts may exercise in controversies between a foreign corporation and a citizen of the state, and to substitute the exclusive jurisdiction of the state courts. Any direct enactments forbidding removal would be declared unconstitutional; and an agreement made not to exercise this right of removal is void; Chicago, M. & St. P. Ry. Co. v. Becker, 32 Fed. 849; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208. A valid corporation of any state has the absolute right to institute and maintain in the federal courts, and to remove to those courts, its suits in every other state, in cases prescribed by the acts of congress; Home Ins. Co. v. Morse, 87 U. S. 445, 22 L. Ed. 365; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915. "Every law of a state which attempts to destroy these rights, or to burden their exercise, is violative of the constitution of the United States and void;" Butler Bros. Shoe Co. v. U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167.

When restrictive state statutes exist, contracts made in violation of them are treated in some states as voidable at the election of the other party; Hyde v. Goodnow, 3 N. Y. 266; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33; Washington County Mut. Ins. Co. v. Dawes, 6 Gray (Mass.) 376; Haverhill Ins. Co. v. Prescott, 42 N. H. 547, 80 Am. Dec. 123; Beecher v. Mill Co., 45 Mich. 103, 7 N. W. 695; except as against a *bona fide* holder of negotiable paper for value and without notice; Williams v. Pheney, 8 Gray (Mass.) 206; or it is held that the remedy is suspended until the statute is complied with; Daly v. Ins. Co., 64 Ind. 1; Singer Mfg. Co. v. Brown, 64 Ind. 548; or that they are only void when the statute expressly so provides, as held in an able opinion by Bartholomew, J., in Washburn Mill Co. v. Bartlett, 3 N. D. 138, 54 N. W. 544; Connecticut River Mut. Fire Ins. Co. v. Way, 62 N. H. 622; American Loan & Trust Co. v. R. Co., 37 Fed. 242; Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; or not void when the statute provides a penalty; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. Ed. 317; Pangborn v. Westlake, 36 Ia. 546; Toledo Tie & Lumber Co. v. Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925; Sherwood v. Alvis, 83 Ala. 115, 3 South. 307, 3 Am. St. Rep. 695 (but see Farrior v. Security Co., 88 Ala. 275, 7 South. 200, Mullens v. Mtg. Co., 88 Ala. 280, 7 South. 201, and Christian v. Land & Mtg. Co., 89 Ala. 198, 7 South. 427). In other states it is held that the contract cannot be enforced; Thome v. Ins. Co., 80 Pa. 15, 21 Am. Rep. 89; Ætna Ins. Co. v. Harvey, 11 Wis. 394; Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; but the corporation cannot set up its own non-compliance with a statute to avoid its own contract; Lasher v. Stimson, 145 Pa. 30, 23 Atl. 552; Hartford Live Stock Ins. Co. v. Matthews, 102 Mass. 221; Watertown Fire Ins. Co. v. Rust, 141 Ill. 85, 30 N. E. 772; Behler v. Ins. Co., 68 Ind. 347; Pennypacker v. Ins. Co., 80 Ia. 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395; Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187. Such contracts may be validated by the legislature, by subsequent act; U. S. Mortgage Co. v. Gross, 93 Ill. 483. The rule avoiding them as against public policy is not to be extended; L. R. 19 Eq. 465. Whether compliance with such statutes is presumed or must be averred and proved is a point on which the decisions differ; it is held that there is such presumption in Railway Co. v. Fire Ass'n, 55 Ark. 163, 18 S. W. 43; White River Lumber Co. v. Imp. Ass'n, 55 Ark. 625, 18 S. W. 1055; American Ins. Co. v. Cutler, 36 Mich. 261; American Ins. Co. v. Smith, 73 Mo. 368; Sprague v. Lumber Co., 106 Ind. 242, 6 N. E. 335; and an analogous case is Fry v. Bennett, 28 N. Y. 324. On the other hand, it has been frequently held that compliance must be averred and proved; Christian v. Land & Mtg. Co., 89 Ala. 198, 7 South. 427; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; but this view is said to be illogical and unsound; 31 Am. L. Rev. 19; 6 Thomp. Corp. § 7965, citing as conclusive the analogous case in which failure of a liquor dealer to have a license is held to be a good defence to an action for liquor sold; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759; although no one would think of averring and proving his license. With much reason, therefore, it was held that such averment is not necessary, and nothing short of a distinct averment of non-compliance will make proof to the contrary necessary; White River Lumber Co. v. Imp. Ass'n, 55 Ark. 625, 18 S. W. 1055.

The question of the power of a foreign corporation to take hold and transmit title to land is one of public policy, and no gen-

eral rule can be formulated from the decisions and statutes which must (as in most matters affecting land titles) be referred to with reference to a particular state. Enabling statutes will be found in many states, either general, or where such legislation is permissible, for special cases. It can at least be suggested that in the absence of any such legislation, or of express decisions, serious doubt will arise as to the power. The conclusion is reached by Judge Thompson that in the absence of prohibitory local law, there is much authority that, if authorized to do so in the state of their creation, corporations may hold land in other states; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; New Hampshire Land Co. v. Tilton, 19 Fed. 73; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; unless forbidden to do so either by the public policy of the state; United States Trust Co. of New York v. Lee, 73 Ill. 142, 24 Am. Rep. 236; or its statute law; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634, where the subject is considered at length by Paxson, J., with respect to general enabling laws and proceedings by the state in such cases; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382; Hickory Farm Oil Co. v. R. Co., 32 Fed. 22.

It is sometimes held that the power exists for business purposes, as an office; Baltimore & P. Steamboat Co. v. McCutcheon, 13 Pa. 13; Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; and it has been held that a Connecticut company having no business there could operate as a land company in New Hampshire; New Hampshire Land Co. v. Tilton, 19 Fed. 73; *contra*, Carroll v. City of East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; the tendency of American legislation is to permit the holding of land by foreign corporations, for business but not for speculation; 6 Thomp. Corp. § 7917. The right of such corporation to take and hold title to real estate cannot be questioned in ejectment by it against a former managing director; Seymour v. Gold Mines, 153 U. S. 523, 14 Sup. Ct. 847, 38 L. Ed. 807. See ALIEN.

The power of acquiring land has been held to exist until forbidden; American & F. Christian Union v. Yount, 101 U. S. 352, 25 L. Ed. 888; Blodgett v. Zinc Co., 120 Fed. 893, 58 C. C. A. 79; and as against every one except the state when proceeding for a forfeiture; Runyan v. Coster, 14 Pet. 122, 10 L. Ed. 382; Baker v. Neff, 73 Ind. 68; Alexander v. Tolleston Club of Chicago, 110 Ill. 65; Union Nat. Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188. Of such proceedings it is said that the only one in this country is that in Pennsylvania cited *infra;* 6 Thomp. Corp. § 7918.

Land may generally be taken by devise; Thompson v. Swoope, 24 Pa. 474; University v. Tucker, 31 W. Va. 621, 8 S. E. 410; but only by corporations having charter power so to take; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650; Starkweather v. Bible Soc., 72 Ill. 50, 22 Am. Rep. 133. Foreign corporations have usually the power to acquire land by foreclosure of mortgages; National Trust Co. v. Murphy, 30 N. J. Eq. 408; Farmers' Loan & Trust Co. v. McKinney, 6 McLean 1, Fed. Cas. No. 4,667; American Mut. Life Ins. Co. v. Owen, 15 Gray (Mass.) 491; and in such cases the state only and not the mortgagor can set up a want of power; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Pancoast v. Ins. Co., 79 Ind. 172.

In all cases involving the right of foreign corporations to hold lands the *lex rei sitæ* governs; Sto. Confl. L. § 428; Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650. See ESCHEAT.

Whenever a foreign corporation has the power to make a contract in a state or country it may enforce it or recover damages for a breach in like manner as persons may do in like case; 2 Ld. Raym. 1535; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; New Jersey Protection & Lombard Bank v. Thorp, 6 Cow. (N. Y.) 46; Connecticut Mut. Life Ins. Co. v. Cross, 18 Wis. 109; British American Land Co. v. Ames, 6 Metc. (Mass.) 391; Day v. Bank, 13 Vt. 97; Savage Mfg. Co. v. Armstrong, 17 Me. 34, 35 Am. Dec. 227. From these and many other cases it is clearly a principle long and well settled that, unless prohibited by local statutory law, a corporation of one state may sue in another by its corporate title. Such prohibitory legislation exists in some states as already sufficiently shown; *supra*. When it does not exist this right of action extends to all cases and causes of action as to which a remedy exists in favor of persons or domestic corporations; 6 Thomp. Corp. § 7978; and see *id.* §§ 7380–8. An action by such corporation for libel has been sustained; Jewelers' Mercantile Agency v. Douglass, 35 Ill. App. 627.

In such actions when, as in most jurisdictions, it is unnecessary to aver or prove the corporate existence in suits by or against corporations (see 6 Thomp. Corp. § 7658), or at least only to make very formal allegation of it (*id.* § 7661); the same rule applies to foreign corporations; *id.* § 7984; Paine v. R. Co., 31 Ind. 283; Smith v. Machine Co., 26 Ohio St. 562; nor, as has been held, in the absence of a statute either expressly or by authoritative construction requiring it, need there be an averment of compliance with statutory pre-requisites for doing business; American Button Hole & O. S. S. M. Co. v. Moore, 2 Dak. 280, 8 N. W. 131; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360; Nichels v. Saving Ass'n, 93 Va. 380, 25 S. E. 8; the ground of dispensing with the averment of compliance with such statutes is the pre-

sumption of legality and compliance with local law, discussed, *supra*.

Apart from this question, which only affects the right of action upon contracts made within the state, the foreign corporation has, as to all other matters, the same rights and remedies as other non-residents; Utley v. Mining Co., 4 Colo. 369; Smith v. Little, 67 Ind. 549. It may foreclose a mortgage even when by statute disqualified from acquiring real estate; Leasure v. Ins. Co., 91 Pa. 491; Northwestern Mut. Life Ins. Co. v. Brown, 36 Minn. 108, 31 N. W. 54; *contra*, Christian v. Mortgage Co., 89 Ala. 198, 7 South. 427; and purchase at the execution sale; Elston v. Piggott, 94 Ind. 14; or maintain an action on an insurance policy; Tabor v. Mfg. Co., 11 Colo. 419, 18 Pac. 537; or for a tax wrongfully paid; Powder River Cattle Co. v. Com'rs of Custer County, 9 Mont. 145, 22 Pac. 383. Where a foreign corporation, by the law of its domicil, continues to exist after the expiration of its charter for the purpose of suing on debts accrued before such expiration, it may also sue in such case in New York; O'Reilly, Skelly & Fogarty Co. v. Greene, 17 Misc. 302, 40 N. Y. Supp. 360.

In suits against foreign corporations the question of jurisdiction is of first importance, and it is the general rule that a corporation, like a natural person, cannot be sued *in personam* in a state within whose limits it has never been found; 6 Thomp. Corp. § 7988. This conclusion springs naturally from the principle that a "corporation being the creation of local law, can have no legal existence beyond the limits of the sovereignty where created;" Paul v. Virginia, 8 Wall. (U. S.) 181, 19 L. Ed. 357; but this rule is subject to exceptions growing out of the theory that, under certain circumstances, such corporations will be held in law to have acquired a domicil within a state, at least so far as to subject them to suit.

A non-resident corporation, whose objection to the jurisdiction on the ground of insufficient service is overruled, and which then by order of court pleads to the merits, does not lose its rights of objection; but it does submit to the jurisdiction if it sets up a counterclaim, even though in the nature of recoupment; Merchants' Heat & Light Co. v. J. B. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

In England in spite of *dicta* to the contrary; L. R. 7 Q. B. 293; 1 Ex. Div. 237; there was said to be no case prior to 1885 holding foreign corporations suable in that country; 54 L. J. Q. B. Div. 527. The necessities of the case resulted in a rule authorized by statute providing for acquiring jurisdiction over a foreign corporation carrying on business in England by service on a "head officer" in charge of its business there; and the court of appeal sustained the jurisdiction so acquired; 58 L. J. Q. B. Div. 508; 33 Ch. Div. 446. See 5 H. L. Cas. 416.

In the United States the exceptions to the general rule first stated are thus classified by Thompson: (1) Where a corporation had established a permanent agency in the state or country; (2) when it is agreed with the state that process may be served in it; (3) when it is agreed with the opposite party that an action may be brought against it to enforce a contract against it in a state or country other than its domicil; 6 Thomp. Corp. § 7988. These exceptions were rendered necessary to meet the case of corporations in recent years doing business so extensively outside of the domicil of their creation, and particularly of what are known as "tramp corporations," purposely organized in another state to do business in their own and evade its laws; besides, trading corporations being equally migratory with individuals, the reason originally assigned for want of jurisdiction had ceased to exist; *id.* § 7989. Accordingly it may be considered that corporations may acquire business domicils in other states and countries, and, wherever they do so, they may be sued without the aid of local statute law; *id.* In most, if not all of the states, however, statutes exist requiring foreign corporations to appoint an agent for process as a condition of doing business in the state, and so, also, by local statutes, jurisdiction is affirmatively assumed. See National Bank of Commerce v. Huntington, 129 Mass. 444; McNichol v. Reporting Agency, 74 Mo. 457; March v. R. Co., 40 N. H. 548, 77 Am. Dec. 732; City Fire Ins. Co. v. Carrugi, 41 Ga. 660; Iron Age Pub. Co. v. Telegraph Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758; Camden Rolling Mill Co. v. Iron Co., 32 N. J. L. 15; U. S. v. Telephone Co., 29 Fed. 17; Tuchband v. R. Co., 115 N. Y. 437, 22 N. E. 360. The principles upon which the jurisdiction rests are that it must appear in the record that the corporation was engaged in business in the state, and that the person upon whom service was made represented the company *there* in the business; and while the certificate of service is *prima facie* evidence of the latter fact, it is open to contradiction when the record is offered in evidence in another state; St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

With respect to what constitutes a valid service on a foreign corporation, the subject is generally regulated by statutes which must be consulted with reference to any given case, and reference may be made to 6 Thomp. Corp. Ch. 198, where the decisions are collected as to service on different classes of officers and agents. The decisions of the U. S. Supreme Court established the rule that jurisdiction cannot be acquired by service upon an officer casually within the state for purposes not connected with the business of the corporation; Lafayette Ins. Co. v. French, 18 How. (U. S.) 404, 15 L. Ed. 451; St. Clair

v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608; In re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517. The same view is supported by the weight of authority in the state courts; Phillips v. Library Co., 141 Pa. 462, 21 Atl. 640, 23 Am. St. Rep. 304; Schmidlapp v. Ins. Co., 71 Ga. 246; State v. Dist. Court of Ramsey County, 26 Minn. 233, 2 N. W. 698; Midland Pac. R. Co. v. McDermid, 91 Ill. 170; Camden Rolling Mill Co. v. Iron Co., 32 N. J. L. 15; Dallas v. R. Co., 2 MacArthur (D. C.) 146; Galveston City R. Co. v. Hook, 40 Ill. App. 547; Alderson, Jud. Writs and Proc. 219; Murfree, For. Corp. 210; *contra*, Pope v. Mfg. Co., 87 N. Y. 137; Shickle H. & H. Iron Co. v. Const. Co., 61 Mich. 226, 28 N. W. 77, 1 Am. St. Rep. 571; Gravely v. Ice Mach. Co., 47 La. Ann. 389, 16 South. 866; but in two of these states the federal courts have refused to follow the ruling of the state court; Good Hope Co. v. Fencing Co., 22 Fed. 635; Clews v. Iron Co., 44 Fed. 31; U. S. Graphite Co. v. Graphite Co., 68 Fed. 442.

Cases in which the corporation has been held to be "doing business" under such statute are: Writing a policy of insurance upon property within the state although the contract was executed elsewhere; Stanhilber v. Ins. Co., 76 Wis. 285, 45 N. W. 221; keeping an office for a combination of two railroads where negotiation for settlement of the claim had been conducted by the agent upon whom process could be served; St. Louis S. W. Ry. Co. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. ——. A foreign insurance company, which has been doing business in a state through its agents, does not cease to do it when it withdraws its agents and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force and the premiums thereon are paid by the policy-holders to an agent in the state where the policy-holders reside; Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; or where its agents are there, under its authority, adjusting the losses covered by their policies; Pennsylvania Lumberman's Mut. Fire Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810. In some cases an isolated transaction constitutes doing business, as where a foreign corporation sold some machinery through an order taken and filled by its local agent and a note was given for the purchase price; Deere Plow Co. v. Wyland, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304. The practical difficulty of determining whether a single transaction evidences a purpose to engage in business permanently is one of fact purely, and is properly for the jury; Oakland Sugar Mill Co. v. Wolf Co., 118 Fed. 239, 55 C. C. A. 93. It was said that doing business implied corporate continuity of conduct such as might be evidenced by the investment of capital there, that the maintenance of an office for the transaction of its business and those incidental circumstances which attest a corporate intent to avail itself of the privilege of carrying on the business; Penn Collieries Co. v. McKeever, 183 N. Y. 98, 75 N. E. 935, 2 L. R. A. (N. S.) 127.

A corporation doing business in a state and protected by its power may be compelled to produce before a tribunal of the state material evidence in its custody and control although for the time outside the limits of the state; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; affirming In re Consolidated Rendering Co., 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1069.

Cases in which the transaction in question was held not to be "doing business" within the statute are most of those in which there is a single isolated act; Ladd Metals Co. v. Mining Co., 152 Fed. 1008; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; such as the purchase of railroad securities by a foreign trust company and taking a mortgage to secure them; Gilchrist v. Helena, H. S. & S. R. Co., 47 Fed. 593; but do not include an application for insurance and receiving the money therefor where the application is sent direct to the foreign office; Fulton v. Acc. Ass'n, 172 Pa. 117, 33 Atl. 324; Clay Fire & M. Ins. Co. v. Mfg. Co., 31 Mich. 346; Columbia Fire Ins. Co. v. Kinyon, 37 N. J. L. 33; or through a broker who deals with the company through another broker; Romaine v. Ins. Co., 55 Fed. 751; but these cases have been criticised; 4 Thomp. Corp. § 7937, n. 2; but the weight of authority is said to be in favor of the validity of the policy where it is written out and returned from the home office and transmitted by an agent who has not complied with the statutes of the foreign state; Lamb v. Bowser, 7 Biss. 315, Fed. Cas. No. 8,008; *id.*, 7 Biss. 372, Fed. Cas. No. 8,009. So it was held not doing business (for service) where a steamship company sold tickets through an agent who had the company's name on his office door and received a commission on his sales and a contribution on account of office rent; Goepfert v. Compagnie Générale Transatlantique, 156 Fed. 196; nor where there was the mere renting of an office for collecting news and soliciting contracts for advertisements when the orders were sent outside of the state and filled there; American Contractor Pub. Co. v. Michael Nocenti Co., 139 N. Y. Supp. 853; nor where the corporation sends its products into a state through a commission merchant doing business there; Brookford Mills v. Baldwin, 154 App. Div. 553, 139 N. Y. Supp. 195; nor where it merely collected debts in a state; Ichenhauser Co. v. Landrum's Assignee, 153 Ky. 316, 155 S. W. 738; nor where the com-

pany has no office in a state, but employs a soliciting agent who sends the orders to the home office where they are filled by direct shipment to the buyer; Saxony Mills v. Wagner, 94 Miss. 233, 47 South. 899, 23 L. R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199; where there is merely an office and an agent to solicit freight and passenger traffic; Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; nor where there was no office except for the registration of stock transfers but the company kept a bank account and its directors met there, as permitted by its laws; Honeyman v. Iron Co., 133 Fed. 96.

The service was held sufficient where an insurance company with outstanding policies collected premiums and adjusted losses and the service was made upon a doctor sent to investigate a loss; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782. Where a corporation is not doing business in a state, service on its president, when temporarily within its jurisdiction, is not sufficient service; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517; and the residence of an officer of a corporation in a state is not sufficient; he must be there officially representing the corporation in its business; Conley v. Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113. The residence of an attorney, appointed to accept service for a foreign corporation, fixes the residence of the corporation; Lemon v. Glass Co., 199 Fed. 927; the appointment of a statutory agent is irrevocable, except by the appointment of a new one; Gibson v. Ins. Co., 144 Mass. 81, 10 N. E. 729; and continues as long as any liability remains against the corporation arising out of business done by it under the registration; Brown-Ketcham Iron Works v. Swift Co. (Ind.) 100 N. E. 584; although irrevocable in form it may be revocable on withdrawal from the state as to matters not connected with business transacted in the state or with its residents; Hunter v. Ins. Co., 218 U. S. 573, 31 Sup. Ct. 127, 54 L. Ed. 1155, 30 L. R. A. (N. S.) 686; but a few disconnected transactions, by a foreign corporation after its withdrawal, do not constitute doing business in the state so as to preclude its revocation of a power of attorney to a state officer to accept process; *id.* The termination of business dealings in the state need not *ipso facto* terminate the statutory agent's authority to receive service. In the absence of express provisions, however, such authority should not easily be implied. The company has submitted to the jurisdiction of the courts in return for the privilege of doing business in the state; when it voluntarily withdraws, the presumption would be that it has withdrawn for all purposes. A common class of statutes, however, provides for the designation of special agents, frequently state officers other than the officers or business agents of the company, to receive service, and under these statutes some courts have held that jurisdiction over the company remains in respect to all liabilities incurred by the company while in the state; Collier v. Life Ass'n, 119 Fed. 617; Davis v. Coal Co., 129 Fed. 149; Groel v. Electric Co., 69 N. J. Eq. 397, 60 Atl. 822; *contra*, Swann v. Life Ass'n, 100 Fed. 922; Friedman v. Empire Ins. Co., 101 Fed. 535. See also Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987. Where a foreign corporation had been doing business in a state and there contracted a liability, but had withdrawn from the state before suit was brought, it was held that service could be had in that state in the mode prescribed by its laws; McCord Lumber Co. v. Doyle, 97 Fed. 22, 38 C. C. A. 34.

In some states, under acts requiring registering of an agent, registering after the transaction but before suit is good, since the acts only affect the remedy and do not avoid the contract; Augur Steel Axle Co. v. Whittier, 117 Mass. 451; Security Savings & Loan Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753.

Foreign corporations, it is said, cannot be logically dealt with as non-residents within the meaning of attachment laws, where they have become domesticated so far as to be liable to actions *in personam;* Farnsworth v. R. Co., 29 Mo. 75; Martin v. R. Co., 7 Bush (Ky.) 116. Formerly a foreign attachment could not be issued in courts of the United States; Pollard v. Dwight, 4 Cra. (U. S.) 421, 2 L. Ed. 666; Nazro v. Cragin, 3 Dill. 474, Fed. Cas. No. 10,062; Ex parte Des Moines & M. R. Co., 103 U. S. 794, 26 L. Ed. 461; but in 1872 the federal courts were authorized to adopt the state laws in force relative to attachments; U. S. R. S. § 915; and the federal courts now apply state statutes relating to attachments to foreign corporations; Rainey v. Maas, 51 Fed. 580. Such corporations may also be summoned as garnishees whenever they would be liable for the debt attached, or by residence or agency are amenable to process; Libbey v. Hodgdon, 9 N. H. 394; Fithian v. R. Co., 31 Pa. 114; Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; Knox v. Ins. Co., 9 Conn. 430, 25 Am. Dec. 33; or when they do business in the state and have a managing agent there; Rainey v. Maas, 51 Fed. 580.

It has been held that the dissolution of a corporation dissolves a foreign attachment against it, on the ground that to compel an appearance was the primary object of the process; Farmers' & Mechanics' Bank v. Little, 8 W. & S. (Pa.) 207, 42 Am. Dec. 293; but the soundness of this case has been doubted on the ground that, jurisdiction having attached to the *res*, it continues for the real object of the suit—satisfaction of the

demand; 6 Thomp. Corp. § 8062; and this view is supported by another case which holds that comity does not interfere with it; City Ins. Co. of Providence v. Bank, 68 Ill. 348. But it was held that a state statute providing that corporations shall continue to exist for a certain period after the time fixed for dissolution, for the purpose of prosecuting and defending suits, and that no body of persons acting as a corporation shall set up want of legal organization as a defence to a suit against them as a corporation, does not control or affect foreign corporations merely doing business in the state; and a suit against such a corporation abates upon its dissolution, so that, if a judgment be thereafter entered against it, the same is void; Marion Phosphate Co. v. Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252. See DISSOLUTION OF CORPORATIONS.

A corporation may subject itself to the jurisdiction of a foreign state by contract with a private person; 60 L. T. N. S. 924; or with the state; New England Mortgage Security Co. v. Ingram, 91 Ala. 337, 9 South. 140.

Foreign corporations are sometimes held not liable to suit, except *ex contractu* upon domestic contracts; Bawknight v. Ins. Co., 55 Ga. 194; or for torts committed within the state; Robinson v. Navigation Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; Central R. & Banking Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339; Gray v. Pulley Works, 16 Fed. 436; Austin v. R. Co., 25 N. J. L. 381; unless the statutory jurisdiction extends to any cause of action; Palmer v. Ins. Co., 84 N. Y. 63; Myer v. Ins. Co., 40 Md. 595; Brauser v. Ins. Co., 21 Wis. 506; nor are they liable to suits by non-residents on foreign contracts; Sawyer v. Ins. Co., 46 Vt. 697; *contra*, Johnston v. Ins. Co., 132 Mass. 432.

A state court may take possession of the assets of an insolvent foreign corporation within its limits and distribute them or their proceeds among creditors, but it cannot discriminate in favor of its own creditors against citizens of other states; Blake v. McClung, 176 U. S. 62, 20 Sup. Ct. 307, 44 L. Ed. 371. But the United States circuit court has no inherent power, as a court of equity, at the suit of domestic shareholders, to dissolve an English mining company, owning and operating a mine in the United States, and to wind up its business operations; nor has it any such power under the act of parliament known as the "Companies Act, 1862;" Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776.

A corporation, by doing business in another state and becoming liable to suit there, both in state and federal courts, does not lose its right to claim, for the purposes of federal jurisdiction, a citizenship in the state by which it was created; Murfr. For. Corp. 236. When sued in a foreign state it may remove the cause to a federal court; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643; Wilkinson v. R. Co., 22 Fed. 353. But it is otherwise if the effect of the legislation under which it enters the foreign state be to confer corporate privileges upon it in that state. In such case the company is a citizen of both states; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5, 26 L. Ed. 643.

See LEX LOCI CONTRACTUS; EMINENT DOMAIN; GARNISHMENT; POLICE POWER; TAXATION; UNITED STATES COURTS; MERGER.

FOREIGN COUNTY. Another county. It may be in the same kingdom, it will still be foreign. See Blount, *Foreign.*

FOREIGN COURT. The circuit court of the United States is not a foreign court relatively to the court of chancery of New Jersey; 19 Am. L. Reg. N. S. 426.

FOREIGN CREDITOR. One who is resident in a state or country foreign to that of the domicil of the debtor or the *situs* of his property.

FOREIGN DECREE. See FOREIGN JUDGMENT.

FOREIGN DIVORCE. One obtained in a state or country other than that in which the marriage was solemnized and the parties, or at least the one against whom the proceeding is taken, are domiciled. See DIVORCE.

FOREIGN DOMICIL. See DOMICIL.

FOREIGN DOMINION. *In English Law.* A country, at one time subject to a foreign prince; which, by conquest or cession, has become a part of the dominion of the British Crown. 5 B. & S. 290.

FOREIGN ENLISTMENT ACT. The statute 59 Geo. III. c. 69, for preventing British citizens from enlisting as sailors or soldiers in the service of a foreign power. 4 Steph. Com. 226. See NEUTRALITY.

FOREIGN EXCHANGE. Drafts drawn on a foreign state or county. See BILL OF EXCHANGE.

FOREIGN FACTOR. One who resides in a country foreign to that of his principal. See FACTOR.

FOREIGN FISHING. Oil, manufactured from whales caught by the crew of an American vessel, is not the product of foreign fishing within the purview of the revenue laws of the United States, though it has since been owned and brought into port by persons in the foreign service. U. S. v. Burdett, 2 Sumn. 336, Fed. Cas. No. 14,684.

FOREIGN-GOING SHIP. In the English Merchant Shipping Act, any ship employed in trading between some place or places in the United Kingdom, and other places specified in said act outside the limits of the kingdom.

FOREIGN JUDGMENT. A judgment of a foreign tribunal.

It is a general rule that foreign judgments are admitted as conclusive evidence of all matters directly involved in the case decided, where the same question is brought up incidentally. 1 Greenl. Ev. 547, and note; Betts v. Bagley, 12 Pick. (Mass.) 572. Such judgments and decrees *in rem*, whether relating to immovable property or movables within the jurisdiction of the foreign court, are binding everywhere; L. R. 4 H. L. 414; [1897] 1 Q. B. 55; [1896] 2 Q. B. 455. This rule applies to admiralty proceedings *in rem* founded on actual possession of the subject-matter, and garnishment proceeding in a like case.

It seems to be the better opinion that judgments *in personam* regular on their face, which are sought to be enforced in another country, are conclusive evidence, subject to a re-examination, in the courts where the new action is brought, only for irregularity, fraud, or lack of jurisdiction as to the cause or parties; 1 Greenl. Ev. § 546; Westl. Priv. Int. Law 372; Story, Confl. Laws § 607; 2 Swanst. 325; Dougl. 6, n.; 3 Sim. 458; 6 Q. B. 288; Kittredge v. Emerson, 15 N. H. 227; Folger v. Ins. Co., 99 Mass. 273, 96 Am. Dec. 747; Pearce v. Olney, 20 Conn. 544; Rogers v. Gwinn, 21 Ia. 58; but see Sanford v. Sanford, 28 Conn. 28; Bicknell v. Field, 8 Paige, Ch. (N. Y.) 440; Christmas v. Russell, 5 Wall. (U. S.) 290, 18 L. Ed. 475. It was formerly held that they were *prima facie* evidence merely. See 2 H. Bla. 410; Dougl. 1, 6; 3 Maule & S. 20; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; State of Indiana v. Helmer, 21 Ia. 370; Pawling v. Wilson, 13 Johns. (N. Y.) 192; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158. But this theory has been entirely overthrown, the doctrine of their conclusive character having been settled in England in L. R. 6 Q. B. 179. It is also fully recognized in this country; Lazier v. Westcott, 26 N. Y. 148, 82 Am. Dec. 404; Konitzky v. Meyer, 49 N. Y. 571; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; and see Hilton v. Guyot, *infra*.

The subject of the conclusiveness of foreign judgments has been treated with much diversity of opinion in the English courts. That they are *prima facie* evidence to sustain an action is clear according to all the authorities, but whether conclusive, and if not so in all cases, what defences may be admitted, was for a long time not definitely settled by the English courts. The cases were very fully reviewed by Judge Redfield with this result: "So that now it may be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive, in its force and operation, with that implied by any domestic judgment. But there is still a very essential and important distinction between the two. Domestic judgments rest upon the conclusive force of the record, which is absolutely unimpeachable. Foreign judgments are mere matters *in pais*, to be proved the same as an arbitration and award, or an account stated; to be established, as matter of fact before the jury; and by consequence subject to any contradiction or impeachment which might be urged against any other matter resting upon oral proof. Hence any fraud which entered into the concoction of the judgment itself is proper to be adduced, as an answer to the same; but no fraud which occurred and was known to the opposite party, before the rendition of such foreign judgment, and which might, therefore, have been brought to the notice of the foreign court, can be urged in defence of it. It is proper to add, that while the English courts thus recognize the general force and validity of foreign judgments, it has been done under such limitations and qualifications that great latitude still remains for breaking the force of, and virtually disregarding such foreign judgments as proceed upon an obvious misapprehension of the principles governing the case; or where they are produced by partiality or favoritism, or corruption, or where upon their face they appear to be at variance with the instinctive principles of universal justice. But these are rare exceptions." Sto. Confl. Laws, Redfield's ed. § 618 *a*–618 *k*. And the same conclusion from the English cases is reached in 35 Am. L. Reg. N. S. 277.

An English writer on the subject attributes the vacillation of the courts of that country to the fact that two doctrines have been discussed as the basis of the conclusive effect given to a foreign judgment. The earlier theory was that of comity, which, as defined by Blackburn, J., in opposing the doctrine, is that "it is an admitted principle of the law of nations, that a state is bound to enforce within its territories the judgment of a foreign tribunal;" L. R. 6 Q. B. 139. This doctrine was supported by Lords Nottingham, Ellenborough, Kenyon, Cockburn, and Brougham, and Chief Baron Pigot, Sir G. Jessel, and Sir R. Phillimore; 2 Swanst. 326, n.; 4 Campb. 28; 4 M. & S. 141; 7 Term 681; 30 L. J. C. P. 177; 2 Cl. & F. 470; Ir. Rep. 1 C. L. 471; 50 L. J. P. 30; L. R. 4 P. C. 144. Of the objections raised the most important was said to be uncertainty; Piggott, For. Judg. 6. See Sto. Confl. Laws § 598. The other theory, termed that of obligation, is that when a competent court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be sustained. This was first enunciated by Parke, B., in 1845; 9 M. & W. 810; 14 L. J. Ex. 145; it was approved in 1870 by Blackburn and Mellor,

JJ.; L. R. 6 Q. B. 139; and by the same judges and Lush and Hannen, JJ.; *id.* 155.

Both ideas are involved in what the English writer last cited terms the theory of obligation and comity, which is in substance this: A legal obligation arises in the state where the judgment was rendered, accompanied by a correlative sanction under which the obligation may be made effective so long as the defendant is within the jurisdiction of the foreign court; but when, by his absence from that jurisdiction, the remedy is no longer available, the obligation will, in another state or country, be clothed by comity with an auxiliary sanction to replace the correlative sanction which it has lost; Piggott, For. Judg. 18.

The foreign court must have had jurisdiction, and when the defendant was not a subject of or resident in the country in which the judgment was obtained, so that there existed nothing imposing on him any duty to obey it, the judgment cannot be enforced in an English court; L. R. 6 Q. B. 155; 67 L. T. 767. But the conclusiveness of a judgment when there was jurisdiction is illustrated by a decision that a mistake of English law as to an English contract, apparent on the face of the proceedings, was not ground of defence to a foreign judgment; L. R. 6 Q. B. 139.

In this country the subject was elaborately discussed in Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, in the argument and opinions of which are collected all the authorities. In that case it was held that "when an action is brought in a court of this country, by a citizen of a foreign country, against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect;" Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

In the opinion of the court, Mr. Justice Gray reviews the American and English cases, and examines in detail existing laws and usages of civilized nations, and reaches the conclusion that "where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."

But the court go further and rest the decision upon the principle of reciprocity, adopting and applying the rule that "judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim."

Accordingly, it was held that, such being the practice of the French courts, with regard to American judgments, the judgment recovered in France, which was the cause of action, was not conclusive, but subject to review upon its merits.

Chief Justice Fuller delivered a dissenting opinion in which concurred Harlan, Brewer, and Jackson, JJ., taking the ground that the question was not one of comity, but to be determined upon the broad principle of public policy that there should be an end of litigation, and that this applied equally to foreign and domestic judgments.

The principles of this decision were at the same term applied to a Canadian judgment which was held conclusive inasmuch as the pleadings showed a submission to the jurisdiction of a competent court. Mere averments that the judgment was "irregular and void," and that there was "no jurisdiction or authority on the part of the court to enter such a judgment upon the facts and the pleadings" are but averments of legal conclusions and so insufficient to impeach the judgment; and it was held that, in answer to an action upon a foreign judgment the specific facts must be given upon which it is supposed to be irregular and void or based upon fraud. If rendered upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by whose laws a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, it is conclusive between the parties in an action brought upon it in this country, as to all matters pleaded and which might have been tried; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

Foreign adjudications as respects torts are not binding; Whart. Confl. L. § 793, 827; and a judgment in Germany for infringement of trade-mark cannot be set up in the United States; Hohner v. Gratz, 50 Fed. 369. See TRADE-MARK.

Foreign judgments may be evidenced by *exemplifications* certified under the great seal of the state or country where the judgment is recorded, or under the seal of the court where the judgment remains; 1 Greenl. Ev. § 501; by *a copy* proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated; Union Bank of Georgetown v. Crittenden, 2 Cra. 238, Fed. Cas. No. 14,354; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; Vandervoort v. Smith, 2 Cai. (N. Y.) 155; Gardere v. Ins. Co., 7 Johns. (N. Y.) 514; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Calhoun v. Ross, 60 Ill. App. 309. The acts of foreign tribunals which are recognized by the law of nations, such as courts of admiralty and the like, are sufficiently authenticated by copies under the seal of the tribunal; Yeaton v. Fry, 5 Cra. (U. S.) 335, 3 L. Ed. 117; Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168. The record of a judgment of a foreign court, not of record and of inferior territorial jurisdiction, is not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction; Kopperl v. Nagy, 37 Ill. App. 23. See Edwards v. Jones, 113 N. C. 453, 18 S. E. 500.

The various states are considered as foreign to each other, with respect to this subject; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670.

The constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; Const. Art. IV. § 1. By the act of May 26, 1790, the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken. By the act of March 27, 1804, all records and exemplifications of office books, which are or may be kept in any public office of any state, not appertaining to a court, shall be proved or admitted in any other court or office in any other state, by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept, or of the governor, the secretary of state, the chancellor, or the keeper of the great seal of the state, that the said attestation is in due form and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the presiding justice is duly commissioned and qualified; or, if the said certificate be given by the governor, the secretary of state, the chancellor, or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken; and the provisions of both acts shall extend to the records, etc., of the territories; U. S. R. S. § 906.

The object of this clause was to prevent judgments from being disregarded in other states; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; it relates only to the validity and force of judgments rendered in one state when proved in another; Claflin v. McDermott, 12 Fed. 375. It does not change the nature of a judgment; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177; but places judgments rendered in another state on a different footing from what are known at common law as foreign judgments; Gibbons v. Livingston, 6 N. J. L. 236. The clause makes the record evidence but does not affect the jurisdiction either of the court in which the judgment is rendered or of that in which it is offered in evidence. The judgment of a foreign state differs only from a foreign judgment in not being re-examinable for fraud in obtaining them, if the court had jurisdiction; Wisconsin v. Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 32 L. Ed. 239; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740, 109 Am. St. Rep. 249. A judgment rendered in another state is to be regarded as a domestic judgment; Eastern Townships Bank v. Beebe & Co., 53 Vt. 177, 38 Am. Rep. 665; but it is not on the footing of a domestic judgment so far as to be enforced by execution, but the manner of their enforcement is left to the state in which they are sued on, pleaded, or offered in evidence. When pleaded and proved they are conclusive, and if their enforcement is denied it amounts to the denial of a right secured by the constitution of the United States; Huntington v. Attrill,

146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068. The constitution and the rule of comity include only judgments in civil actions, not in criminal prosecutions; Com. v. Green, 17 Mass. 515; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; Arkansas v. Bowen, 3 App. D. C. 537; Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823. This distinction makes it necessary to examine critically the judgment which it is sought to enforce in another state, if based upon a statute, and to determine whether or not it is penal. Whether a law is penal in the international sense depends upon whether its object is to punish a public offense, or to afford a private remedy against a wrong done; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. Thus, in an action brought upon a judgment recovered by the state of Wisconsin in her own courts against a Louisiana corporation for fines imposed by the statutes of Wisconsin for failure to make an annual statement or for making a false statement, it was held that the rule did not apply to a judgment for such pecuniary penalty; Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239. A suit by the United States for the statutory penalty provided by the safety appliance act is a prosecution for a criminal offence; Atchison, T. & S. F. Ry. Co. v. U. S., 172 Fed. 194, 96 C. C. A. 646, 27 L. R. A. (N. S.) 756. A government proceeding *in rem* to enforce a forfeiture for a violation of the revenue law, though in civil form, is a criminal prosecution; Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; and under an act providing that for a violation of the immigration laws the offender shall forfeit the sum of $1,000, to be recovered by the United States or by any person who shall first bring his action therefor, the prosecution was held criminal; Lees v. U. S., 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

The judgment of a state court has the same validity and effect in any other state as it has in the state where it was rendered; Mayhew v. Thatcher, 6 Wheat. (U. S.) 129, 5 L. Ed. 223; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; First Nat. Bank of Danville v. Cunningham, 48 Fed. 510. The judicial proceedings within the act are only such as have been rendered by a competent court, with full jurisdiction; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; S. Dwight Eaton Co. v. Kelly, 45 Ill. App. 533; Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; Darcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; it may be a superior court of record or an inferior tribunal; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281; Pelton v. Platner, 13 Ohio 209, 42 Am. Dec. 197; including a judgment of a justice of the peace; Menken v. Brinkley, 94 Tenn. 721, 31 S. W. 92. A judgment may be attacked on the ground of a want of jurisdiction; Miller, Const. U. S. 632; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; thus a judgment against a defendant who was not served with proper process, and who did not appear, would be entitled to no credit in another state; D'Arcy v. Ketchum, 11 How. (U. S.) 165, 13 L. Ed. 648; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; but facts establishing the want of jurisdiction must be shown; Fitchett v. Blows, 74 Fed. 51, 20 C. C. A. 286. Credit is not to be given to judgments of another state if they were wanting in due process of law; Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345. A judgment of a foreign state, against several defendants jointly, in an action in which one of them was not served with process, cannot be enforced against one of such defendants who in the foreign action was served with process; Watson v. Steinau, 19 R. I. 218, 33 Atl. 4, 61 Am. St. Rep. 768. See Pritchett v. Clark, 4 Harr. (Del.) 281; *id.*, 3 Harr. (Del.) 241, 517.

Not only must the foreign court have had jurisdiction of the person, but it must appear that the judgment there rendered was responsive to the issues tendered by the pleadings; so held where the defendant had appeared and answered, but took no part in the trial; but if the party was present at the trial, it will be presumed that necessary amendments to conform the pleadings to the evidence were made; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

Where the court had jurisdiction of the parties and of the subject-matter, fraud in obtaining the judgment may be set up as a defence; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; White v. Reid, 70 Hun 197, 24 N. Y. Supp. 290; Ball v. Warrington, 108 Fed. 472, 47 C. C. A. 447; it must be fraud in procuring the judgment; Payne v. O'Shea, 84 Mo. 129; or it will constitute a ground of collateral attack; *id.*; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; but fraud cannot be pleaded as a ground of attack in one federal court, upon a judgment obtained in another; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054.

Proceedings will lie in equity to enjoin the enforcement of a judgment obtained by fraud in a foreign state; Payne v. O'Shea,

84 Mo. 129; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905, 115 Am. St. Rep. 747. If the court of the foreign state had jurisdiction over the parties, its judgment cannot be impeached, even if it went upon a misapprehension of its own law; Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039, where a construction of the constitutional provision by Marshall, C. J., in Hampton v. McConnel, 3 Wheat. (U. S.) 234, 4 L. Ed. 378, is affirmed and the supposed qualification of it in Wisconsin v. Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, is declared to be a *dictum*.

The constitution does not give to a judgment all the attributes to which it was entitled in the state where it was rendered; Brengle v. McClellan, 7 Gill & J. (Md.) 434; but if duly certified, it is admissible in evidence in any state; Whitwell v. Barbier, 7 Cal. 54; Parke v. Williams, *id.* 247; a state may give a judgment rendered in another state any effect it may think proper, always provided it does not derogate from the legal effect conferred upon it by the constitution and the laws of congress in this behalf; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88. In case, however, full faith and credit is not given to the judgment of another state, any judgment thereon will be erroneous; Green v. Van Buskirk, 7 Wall. (U. S.) 139, 19 L. Ed. 109. If a state court refuses to give full faith and credit to a decision of a federal court, it raises a federal question and the supreme court has jurisdiction; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179. When the court rendering the judgment has jurisdiction, its judgment is final as to the merits; Christmas v. Russell, 5 Wall. (U. S.) 302, 18 L. Ed. 475; Ingram v. Drinkard, 14 Tex. 352; Bank of U. S. v. Bank of Baltimore, 7 Gill (Md.) 430; Memphis & C. R. Co. v. Hoechner, 67 Fed. 459, 14 C. C. A. 469; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; but no greater effect can be given to a judgment than it had in the state where it was rendered; Board of Public Works v. College, 17 Wall. (U. S.) 529, 21 L. Ed. 687; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254.

The judgment must be given the same faith and credit as is given to domestic judgments; Levin v. Gladstein, 142 N. C. 482, 55 S. E. 371, 32 L. R. A. (N. S.) 905, 115 Am. St. Rep. 747. If a judgment or decree is enforcible in the state where it is rendered, it is enforcible in any other state; Caldwell v. Carrington, 9 Pet. (U. S.) 86, 9 L. Ed. 60; but the constitutional provision does not give validity to a void judgment or decree; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Mitchell v. Lenox, 14 Pet. (U. S.) 49, 10 L. Ed. 349; Rodgers v. Ins. Co., 148 N. Y. 34, 42 N. E. 515. It does not impose on any state the duty of following the decision of another state as to the construction of the statutes of the latter; Wiggins' Ferry Co. v. R. Co., 3 McCrary 609, 11 Fed. 381; Miller v. Miller, 18 Hun (N. Y.) 507; nor enforcing within its territory the law of another state.

A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force when sued on in another state as a judgment in an adversary proceeding; Hazel v. Jacobs, 78 N. J. L. 459, 75 Atl. 903, 27 L. R. A. (N. S.) 1066, 20 Ann. Cas. 260; an action thereon can only be defeated by want of jurisdiction by fraud in procuring the judgment, or defences based on matter arising after the judgment was rendered; any defence to the original cause of action is conclusively negatived by the judgment; but the sufficiency of the warrant may be inquired into and is to be determined from the evidence of the law of the state of its entry; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306. Where a judgment is revived by *scire facias*, without service on or appearance by the defendant, the plaintiff cannot recover thereon in another state where the defendant resides, after the statute of limitations has run against the original judgment; such revival is either a new proceeding substituted for an action of debt, and hence invalid without service, or a continuation of the original action, and therefore barred; Owens v. Henry, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Betts v. Johnson, 68 Vt. 549, 35 Atl. 489. And in an action on such judgment the statute of the forum governs and not that of the place where the judgment was rendered; Beer v. Simpson, 65 Hun 17, 19 N. Y. Supp. 578.

A judgment removing the disability of infancy is not conclusive upon the courts of another state, so as to make effective an infant's conveyance of land there; Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; so where the question relates to the transfer of real property in the second state; Polson v. Stewart, 167 Mass. 211, 45 N. E. 737, 36 L. R. A. 771, 57 Am. St. Rep. 452. Where a decree for alimony in a foreign state is such that it can afterwards be altered and is not a final decree, a New York court is not bound by it; Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. In Sistare v. Sistare, 80 Conn. 1, 66 Atl. 772, 125 Am. St. Rep. 102, the court refused to enforce a New York decree for alimony; but this was reversed in the United States supreme court upon the ground that if the judgment was enforceable in New York it must be given effect in another state, although the procedure to enforce it might differ; Sistare v. Sistare, 218 U. S. 1, 30 Sup. Ct. 682, 54 L. Ed. 905, 28 L. R. A. (N. S.) 1068, 20 Ann. Cas. 1061.

Refusal by a state court to allow a receiver appointed in another state to maintain an ac-

tion does not deny full faith and credit; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839, following Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380.

A judgment *in personam* against a corporation, obtained in a federal court of a sister state, is conclusive on the merits of the case in the courts of every other state when made the basis of an action; Chicago & A. Bridge Co. v. Packing & Provision Co., 46 Fed. 584.

U. S. R. S. § 905, applies to records, etc., of a sister state; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; the District of Columbia; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; a territory; Gibson v. Ins. Co., 144 Mass. 81, 10 N. E. 729; and the Indian courts in the Indian Territory; Standley v. Roberts, 59 Fed. 836, 8 C. C. A. 305. A state court must give full faith and credit to the judgment of a federal court; Crescent City Live Stock Co. v. Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614. There is no decision as to a case in which something more than "full faith and credit" has been given, but there are *dicta* that no more can be given; Tilt v. Kelsey, 207 U. S. 57, 28 Sup. Ct. 1, 52 L. Ed. 95. While the supreme court, in its original jurisdiction, takes judicial notice of the laws of the several states, yet while acting under its appellate jurisdiction, whatever was matter of fact (proof of the laws of a foreign state) in the court whose judgment is under review is matter of fact there; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Chicago & A. R. Co. v. Ferry Co., 119 U. S. 622, 7 Sup. Ct. 398, 30 L. Ed. 519.

The full faith and credit clause of the constitution does not extend to judgments of foreign states or nations, and unless there is a treaty relative thereto the supreme court has no jurisdiction to review the judgment of a state court on the ground that it failed to give full faith and credit to a judgment of a foreign court; Ætna Life Ins. Co. v. Tremblay, 223 U. S. 185, 32 Sup. Ct. 309, 56 L. Ed. 398.

The provisions of the act of congress relating to the authentication of records and judicial proceedings must be complied with in order to secure the admission of the exemplification as evidence in a suit upon the judgment in another state; it is not necessary that such exemplification should be used in pleading or in a statement of claim or affidavit of defence; Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805. As to pleading, see 27 Cent. L. J. 400; 26 Abb. N. C. 315, note.

R. S. § 905, provides that acts of the legislature of any state, etc., shall be authenticated by the seal thereof affixed thereto, and the judicial proceedings of the courts of any state, etc., by the attestation of the clerk, and the seal, if any, of the court annexed, with a certificate of the judge, chief justice or presiding magistrate that the attestation is in due form, and shall then have such faith and credit "as they have by law or usage in the courts of the state from which they are taken."

See Story, Confl. Laws; Freeman; Black, Judgt. 596; Dalloz, *Étranger;* Piggott, Foreign Judgments; 4 L. Mag. & Rev. 417; CONFLICT OF LAWS; JUDGMENT; FOREIGN LAW; FOREIGN CORPORATION; DIVORCE.

FOREIGN JURISDICTION. The exercise by one government, within the territory of another, of powers acquired by it in any manner whatsoever, whether by treaty, grant, usage, sufferance, or otherwise.

A jurisdiction other than that of the forum.

FOREIGN JURY. One drawn from a county other than that in which issue is joined. See JURY.

FOREIGN KINGDOM. One under the dominion of a foreign prince. King v. Parks, 19 Johns. (N. Y.) 375.

FOREIGN LANGUAGE. When in an action of slander the words complained of were spoken in German a declaration setting forth the words in English is not sufficient; the words must be stated in the foreign language as spoken, with an averment of the signification in English, and that they were understood by those who heard them; Wormouth v. Cramer, 3 Wend. (N. Y.) 394, 20 Am. Dec. 706. See also Cro. Eliz. 496, 865; SLANDER.

When a will was made and proved in French and in the probate it was translated into English, but, as it appeared, falsely, held that the court might determine according to what the translation ought to be; 1 P. Wms. 526.

FOREIGN LAW. The laws of a foreign country.

The courts do not take judicial notice of foreign laws; and they must, therefore, be proved as matters of fact; 4 Mood. Parl. Cas. 21; Armendiaz v. De La Serna, 40 Tex. 291; Territt v. Woodruff, 19 Vt. 182; Chouteau v. Pierre, 9 Mo. 3; Patterson v. Carrell, 60 Ind. 128; Champion v. Wilson, 64 Ga. 184; Legg v. Legg, 8 Mass. 99; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Phillips v. Gregg, 10 Watts (Pa.) 158, 36 Am. Dec. 158; Dakin v. Pomeroy, 9 Gill (Md.) 1; and pleaded; Crosby v. R. Co., 158 Fed. 144; *written laws*, by the text, or a collection printed by authority, or a copy certified by a proper officer, or, in their absence, perhaps, by the opinion of experts as secondary evidence; Story, Confl. Laws § 641; 1 Greenl. Ev. § 486; Ennis v. Smith, 14 How. (U. S.) 426, 14 L. Ed. 472; 8 Ad. & E. 208; Lincoln v. Battele, 6 Wend. (N. Y.) 475; Inge v. Murphy, 10 Ala. 885; Burton v. Anderson, 1 Tex. 93; Clarke v. Bank, 10 Ark. 516, 52 Am. Dec. 248; they may be construed with the aid of text-books as well as of experts; The Pawa-

shick, 2 Low. 142, Fed. Cas. No. 10,851; where experts are called, the sanction of an oath is said to be required; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Dyer v. Smith, 12 Conn. 384. See State v. Rood, 12 Vt. 396; Story, Confl. Laws § 641; 1 Greenl. Ev. § 488, note. As to the manner of proving *unwritten* laws of foreign countries, the decisions show a divergence of opinion; the rule, as laid down by Lowell, J., in the case of The Pashawick, 2 Low. 142, Fed. Cas. No. 10,851 where the reasoning of Lord Stowell, in Dalrymple v. Dalrymple, 2 Hagg. Consist. 54, is cited with approval, is, that the unwritten law of *England* may be proved in the United States courts not by experts only, but also by text-writers of authority, and by the printed reports of adjudged cases; Whart. Ev. § 300. But mere citations of English statutes and authorities cannot be accepted as proving English laws; Dickerson v. Matheson, 50 Fed. 73. But in respect to the laws of other foreign countries, where a system obtains wholly different from our own, the rigid proof by the testimony of experts alone should be insisted on. See 11 Cl. & F. 85; 1 Wall. Jr. C. C. 47; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 507; as to who can prove such laws; Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207; Kenny v. Clarkson, 1 Johns. (N. Y.) 395, 3 Am. Dec. 336; Isabella v. Pecot, 2 La. Ann. 391. It need not be a lawyer; Milwaukee & St. P. Ry. Co. v. Smith, 74 Ill. 197; Pickard v. Bailey, 26 N. H. 152; Liverpool & Great Western Steam Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; 8 C. B. 812. The United States courts take judicial notice of the laws of every state; Breed v. R. Co., 35 Fed. 642; whether depending upon statutes or upon judicial opinions and without plea or proof; Lamar v. Micou, 114 U. S. 223, 5 Sup. Ct. 857, 29 L. Ed. 94; but the decisions of the various state courts are not harmonious on this point as far as regards the laws of each other. In Tennessee; Hobbs v. R. Co., 9 Heisk. (Tenn.) 873; and Rhode Island; Paine v. Ins. Co., 11 R. I. 411; the courts will take judicial notice of the laws of sister states; in Illinois, of the jurisdiction of courts in other states; Rae v. Hulbert, 17 Ill. 577; and the supreme court has decided that where a state recognizes acts done in pursuance of the laws of another state, the courts of the first state should take judicial cognizance of such laws so far as may be necessary to judge of the acts alleged to be done under them; Carpenter v. Dexter, 8 Wall. (U. S.) 513, 19 L. Ed. 426. Where a statute of another state has been properly brought to the notice of the court, it will in all future cases take notice of that statute and presume the law of the foreign state to be the same until some change is shown; Graham v. Williams, 21 La. Ann. 594; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229. In Pennsylvania it has been held that the courts should take notice of the local laws of a sister state in the same manner as the supreme court of the United States would do on a writ of error to a judgment; Ohio v. Hinchman, 27 Pa. 479; but see, *contra*, Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; 20 Am. L. Reg. N. S. 385. A copy of the authorized statute-book is recognized as proof of a foreign law; Mullen v. Morris, 2 Pa. 85; and the construction of those statutes may be proved either by the reports of cases, or by one familiar therewith; Bollinger v. Gallagher, 163 Pa. 245, 29 Atl. 751, 43 Am. St. Rep. 791.

In 19 Harv. L. R. 401, it is said that, in the absence of proof as to what the law of a foreign state or country is, the court, when it takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, will presume that the law of the foreign state is the same (exclusive of statutory changes) as that of the law of the forum. For instance, where both states are composed of territory formerly belonging to one or more of the thirteen original colonies; see McAnally v. O'Neal, 56 Ala. 299 (raising the presumption with respect to Georgia); Gluck v. Cox, 75 Ala. 310 (raising the presumption with respect to Mississippi); Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Norris v. Harris, 15 Cal. 226. That the common law prevails in England, see Stokes v. Macken, 62 Barb. (N. Y.) 145; in the provinces of Canada; Dempster v. Stephen, 63 Ill. App. 126 (in Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143, the court refused to raise the presumption that the common law of England prevailed in the province of New Brunswick); and in all that part of the territory of the United States east of the Mississippi, excepting Louisiana and Florida. As to Texas, Florida and Louisiana, judicial notice is taken that the fundamental law there is the civil law; Equitable Bldg. & Loan Ass'n v. King, 48 Fla. 252, 37 South. 181; Sloan v. Torry, 78 Mo. 623; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Simms v. Express Co., 38 Ga. 129. So with regard to Mexico, France and other foreign countries; Aslanian v. Dostumian, 174 Mass. 328, 54 N. E. 845, 47 L. R. A. 495, 75 Am. St. Rep. 348 (Asiatic Turkey); Savage v. O'Neil, 44 N. Y. 298 (Russia); Thompson v. Ketchum, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332 (Jamaica).

But there are cases in which the law of the forum, even though statutory, is always applied in the absence of proof of the foreign law; Burgess v. Tel. Co., 92 Tex. 125, 46 S. W. 794, 71 Am. St. Rep. 833; Pauska v. Daus, 31 Tex. 67; Mexican Cent. Ry. Co. v. Glover, 107 Fed. 356, 46 C. C. A. 334.

It is said that in Missouri a presumption can be raised only as to states whose territory prior to their becoming members of the Union was subject to the law of England; Silver v. Ry. Co., 21 Mo. App. 5 (denying

any presumption with respect to Illinois); Barhydt v. Alexander, 59 Mo. App. 188 (with respect to Iowa); Searles v. Lum, 81 Mo. App. 607 (admitting it with respect to Mississippi).

Where the law of Brazil was the same fundamental system as prevailed in Louisiana, the Louisiana statutory law was applied; Kuenzi v. Elvers, 14 La. Ann. 391, 74 Am. Dec. 434. The cases are collected in Cherry v. Sprague, 67 L. R. A. 41, where cases are also found in which California, under the same fundamental system as a foreign country, applied its own statutory law. In Cavallaro v. Ry. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94, where the fundamental systems of law in California and the foreign state were different, a presumption was refused and the law of the forum was applied.

There is no general presumption that the law of Cuba is the same as the common law. In two common-law countries the law may be presumed to be the same, but a statute of one would not be presumed to be the statute of the other; Cuba R. Co. v. Crosby, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40. A remedy under a foreign law where it is perfectly apparent that complete justice cannot be done, and where it is plain that an equitable result can be accomplished only by the courts of the jurisdiction where the corporation was created, could not be enforced in the New York courts; Marshall v. Sherman, 148 N. Y. 9, 42 N. E. 419, 34 L. R. A. 757, 51 Am. St. Rep. 654.

Foreign unwritten laws, customs, and usages may be proved, and are ordinarily proved, by parol evidence; and when such evidence is objected to on the ground that the law in question is a written law, the party objecting must show that fact; Dougherty v. Snyder, 15 S. & R. (Pa.) 87, 16 Am. Dec. 520; Newsom v. Adams, 2 La. 154, 22 Am. Dec. 126.

The manner of proof varies according to circumstances. As a general rule, the best testimony or proof is required; for no proof will be received which presupposes better testimony attainable by the party who offers it. When the best testimony cannot be obtained, secondary evidence will be received; Church v. Hubbart, 2 Cra. (U. S.) 237, 2 L. Ed. 249. A foreign law must be proved like any other fact, and in the absence of such proof it will be presumed that the common law prevails, in the foreign jurisdiction; Roll v. Mining Co., 52 Mo. App. 60.

Exemplified or sworn copies of written laws and other public documents must, as a general thing, be produced when they can be procured; but should they be refused by the competent authorities, then inferior proof may be admitted; *id.*

When our own government has promulgated a foreign law or ordinance of a public nature as authentic, that is held sufficient evidence of its existence; Talbot v. Seeman, 1 Cra. (U. S.) 38, 2 L. Ed. 15; Thompson v. Musser, 1 Dall. (Pa.) 462, 1 L. Ed. 222; Kean v. Rice, 12 S. & R. (Pa.) 203.

The usual modes of authenticating them are by an exemplification under the great seal of a state, or by a copy proved by oath to be a true copy, or by a certificate of an officer authorized by law, which must itself be duly authenticated; Church v. Hubbart, 2 Cra. (U. S.) 238, 2 L. Ed. 249; Jones v. Maffet, 5 S. & R. (Pa.) 523; Seton v. Ins. Co., 2 Wash. C. C. 175, Fed. Cas. No. 12,675; Zimmerman v. Helser, 32 Md. 274; Bowles v. Eddy, 33 Ark. 645; McDeed v. McDeed, 67 Ill. 545.

Witnesses in Cuba examined under a commission touching the execution of a will testified, in general terms, that it was executed according to the law of that country; and, it not appearing from the testimony that there was any written law upon the subject, the proof was held sufficient; In re Roberts' Will, 8 Paige, Ch. (N. Y.) 446.

A defendant pleaded infancy in an action upon a contract governed by the law of Jamaica: held that the law was to be proven as a matter of fact, and that the burden lay upon him to show it; Thompson v. Ketchum, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332.

Proof of such unwritten law is usually made by the testimony of witnesses learned in the law and competent to state it correctly under oath; Seton v. Delaware Ins. Co., 2 Wash. C. C. 175, Fed. Cas. No. 12,675; Dougherty v. Snyder, 15 S. & R. (Pa.) 84, 16 Am. Dec. 520; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 520; 2 Hagg. Adm. App. 15–144; Mowry v. Chase, 100 Mass. 79.

In England, certificates of persons in high authority have been allowed as evidence in such cases; 3 Hagg. Eccl. 767, 769.

The public seal of a foreign sovereign or state affixed to a writing purporting to be a written edict, or law, or judgment, is of itself the highest evidence, and no further proof is required of such public seal; Church v. Hubbart, 2 Cra. (U. S.) 238, 2 L. Ed. 249; Griswold v. Pitcairn, 2 Conn. 85; U. S. v. Johns, 4 Dall. (Pa.) 413, Fed. Cas. No. 15,481, 1 L. Ed. 888; 4 Dall. 413; 9 Mod. 66.

But the seal of a foreign court is not, in general, evidence without further proof, and must, therefore, be established by competent testimony; Delafield v. Hand, 3 Johns. (N. Y.) 310; De Sobry v. Laistre, 2 H. & J. (Md.) 193, 3 Am. Dec. 535; 4 Cow. (N. Y.) 526, note; 3 East 221.

By the act of May 26, 1790, it is provided "that the acts of the legislatures of the several states shall be authenticated by having the seal of their respective states affixed thereto;" R. S. § 905. See RECORD. It may here be observed that the rules prescribed by acts of congress do not exclude every other mode of authentication, and that the courts may admit proof of the acts of the

legislatures of the several states, although not authenticated under the acts of congress. Accordingly, a printed volume, purporting on its face to contain the laws of a sister state, is admissible as *prima facie* evidence to prove the statute law of that state; Young v. Bank, 4 Cra. (U. S.) 384, 2 L. Ed. 655; Kean v. Rice, 12 S. & R. (Pa.) 203; Cochran v. Ward, 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581, 51 Am. St. Rep. 229; Falls v. Loan & Building Co., 97 Ala. 417, 13 South. 25, 24 L. R. A. 174, 38 Am. St. Rep. 194; Leach v. Linde, 70 Hun 145, 24 N. Y. Supp. 176; Williams v. Williams, 53 Mo. App. 617; *contra*, State v. Twitty, 9 N. C. 441, 11 Am. Dec. 779; Bailey v. McDowell, 2 Harr. (Del.) 34; Packard v. Hill, 2 Wend. (N. Y.) 411; Phillips v. Murphy, 2 La. Ann. 654; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. By act of Aug. 8, 1846, a standard copy of the laws and treaties of the United States is fixed, and made competent evidence in all courts without further proof or authentication. R. S. § 908.

Foreign laws have, as such, no extra-territorial force, but have an effect by comity; Sto. Const. § 1305. In the absence of pleading and proof to the contrary, the laws of another state are presumed to be like those of the state in which the action is brought; Haggin v. Haggin, 35 Neb. 375, 53 N. W. 209; Scrooggin v. McClelland, 37 Neb. 644, 56 N. W. 208, 22 L. R. A. 110, 40 Am. St. Rep. 520; Mortimer v. Marder, 93 Cal. 172, 28 Pac. 814; Bollinger v. Gallagher, 144 Pa. 205, 22 Atl. 815; In re Hamilton's Will, 76 Hun 200, 27 N. Y. Supp. 813. See Coghlan v. R. Co., 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; Sandidge v. Hunt, 40 La. Ann. 766, 5 South. 55; Bagwell v. McTighe, 85 Tenn. 616, 4 S. W. 46. While a state court is bound to take judicial cognizance of the principles of common law as it prevails in other states, this is not true of the statutes of such states; Sandidge v. Hunt, 40 La. Ann. 766, 5 South. 55; Thorn v. Weatherly, 50 Ark. 237, 7 S. W. 33; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Templeton v. Brown, 86 Tenn. 50, 5 S. W. 441; Ligget v. Himle, 38 Minn. 421, 38 N. W. 201. But see Ufford v. Spaulding, 156 Mass. 65, 30 N. E. 360. Until the fact is shown, they will be assumed to be the same as those of the *forum;* Harper v. Hampton, 1 Harr. & J. (Md.) 687. See 5 Cl. & F. 14; 3 H. L. C. 19; LEX FORI.

A person claiming title under a foreign corporation is chargeable with knowledge of its chartered powers and restrictions; Hoyt v. Thompson's Ex'r, 19 N. Y. 207.

The effect of foreign laws when proved is properly referable to the court; the object of the proof of foreign laws is to enable the court to instruct the jury what is, in point of law, the result from foreign laws to be applied to the matters in controversy before them. The court are, therefore, to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of those laws, the court are to judge of their applicability to the matter in issue; Story, Confl. Laws § 638; Greenl. Ev. 486; De Sobry v. De Laistre, 2 Harr. & J. (Md.) 193, 3 Am. Dec. 535; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179,

Where foreign statutes (here Mexican) are the basis of a claim in the United States circuit court, parol evidence of an expert is admissible upon the construction thereof upon any matter of reasonable doubt, notwithstanding they are in evidence by a certified copy and an agreed translation; Slater v. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900. Statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law which he deduces from these very statutes and opinions; Finney v. Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. Ed. 839. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525. But it is held that the testimony of lawyers of a foreign country that certain proven acts, documents and records had the effect of creating complainant a corporation under the laws of such country is sufficient *prima facie* to establish the corporate character of complainant. The court will not undertake to construe the statutory law of such country for itself to determine if such testimony is incorrect; Badische Anilin & Soda Fabrik v. A. Kliptein & Co., 125 Fed. 543.

See CONFLICT OF LAWS; JUDICIAL NOTICE; PRECEDENT; LEX FORI.

FOREIGN MATTER. Matter which must be tried in another county. Blount. Matter done or to be tried in another county. Cowell.

FOREIGN MINISTER. An ambassador or envoy from a foreign country. See AMBASSADOR.

FOREIGN MONEY. By Act Aug. 27, 1894, the director of the mint estimates quarterly "the values of the standard coins in circulation of the various nations," and, thereafter, quarterly beginning on the 1st day of January, etc., the secretary of the treasury proclaims the same; the values so proclaimed are followed in estimating the value of imports.

FOREIGN OFFICE. The department of state through which the British sovereign communicates with foreign powers.

FOREIGN PLEA. See PLEA.

FOREIGN PORT. A port or place which is wholly without the United States. King v. Parks, 19 Johns. (N. Y.) 375; The Eliza, 2 Gall. 4, 7, Fed. Cas. No. 4,346; The Adventure,

1 Brock. 235, Fed. Cas. No. 93. A port without the jurisdiction of the court; 1 Dods. 201; 6 Exch. 886. The ports of the several states are foreign to each other so far as regards the authority of masters to pledge the credit of their vessels for supplies; The Lulu, 10 Wall. (U. S.) 192, 19 L. Ed. 906; Selden v. Hendrickson, 1 Brock. 396, Fed. Cas. No. 12,639; Negus v. Simpson, 99 Mass. 388. Practically, the definition has become, for most purposes of maritime law, a port at such distance as to make communication with the owners of the ship *very* inconvenient or almost impossible. See 1 Pars. Mar. Law 142, n.; DOMESTIC PORT; PORT.

FOREIGN SERVICE. *Servitium forinsecum.* See FORINSECUS.

FOREIGN STATE. A foreign nation or country. The states are considered as foreign to each other with respect to those subjects which are controlled by their municipal law. See FOREIGN JUDGMENT; EXTRADITION; FUGITIVE FROM JUSTICE; FOREIGN LAW; FOREIGN BILL OF EXCHANGE.

FOREIGN TRADE. The exportation and importation of commodities to or from foreign countries, as distinguished in the United States from interstate or coastwise trade. See U. S. v. Patten, 1 Holmes 421, Fed. Cas. No. 16,007; FOREIGN COMMERCE.

FOREIGN TROOPS. The grant of permission to foreign troops to cross any part of the United States has been frequently considered by the federal executive. In 1790, Washington, having advised on the subject with Adams, Jefferson and Hamilton, on the advice of the first against the inclination of the last two, declined to allow the passage of British troops through United States territory from Detroit to the Mississippi, presumably because the only purpose of such movement would be an attack upon Spanish possessions on the Mississippi, with which country we were at peace.

In 1862 permission was given by Secretary Seward to the British government to land troops at Portland for transport to Canada because the St. Lawrence was closed by ice. Pursuant to action by the senate of Maine, the governor of that state applied to Secretary Seward for information on the subject. In a communication dated January 17, 1862, from Seward to Governor Washburn, the facts were set forth and the propriety of the original order was argued at length, but it concluded that if the state of Maine would feel aggrieved the directions in question would be cheerfully modified. This letter is quoted at length in 2 Moore's Int. L. Dig. 390.

In 1875 permission was granted to Canada by the United States to transport "through its territory certain supplies designed for the use of . . . Canadian mounted police force," but whether any permission was asked from the governor of the state does not appear.

The request of the French government to the state department for permission to send French seamen to the Chicago World's Fair to guard the French exhibit in 1893 was referred to the governor of Illinois for his consent by Secretary Foster.

The request of the London Artillery Company to enter the United States in uniform with arms, to pass through New York and other states, was referred by Secretary Bayard to the governors of those states. See 2 Moore's Int. L. Dig. 395, 397.

In Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264, Brown, J., said (*obiter*): "While no act of congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the president as commander in chief of the military and naval forces of the United States."

The application for leave must be made by the representative at Washington of the foreign power. The grant of passage implies a waiver of all jurisdiction over the troops during their passage; Tucker v. Alexandroff, 183 U. S. 432, 22 Sup. Ct. 195, 46 L. Ed. 264.

The cases are considered in 2 Moore, Int. L. Dig. 390, and in Tucker v. Alexandroff, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264.

FOREIGN VESSEL. A vessel owned by residents in or sailing under the flag of a foreign nation. It does not mean a vessel in which foreigners domiciled in the United States have an interest; The Sally, 1 Gal. 58, Fed. Cas. No. 12,257. An omission in the registry and enrollment of an American vessel does not make her foreign, but, at best, only deprives her of her American privileges. Fox v. Paine, Crabbe 271, Fed. Cas. No. 5,014. See FLAG. The patent laws were not intended to apply to and govern a vessel of a foreign, friendly nation; Brown v. Duchesne, 19 How. (U. S.) 183, 15 L. Ed. 595.

FOREIGN VOYAGE. A voyage whose termination is within a foreign country. 3 Kent 177. The length of the voyage has no effect in determining its character, but only the place of destination; 1 Stor. 1; U. S. v. Rogers, 3 Sumn. 342, Fed. Cas. No. 16,189.

FOREIGN WATERS. By U. S. R. S. § 4370, tugboats towing in whole or in part in foreign waters are exempt from a penalty therein imposed on foreign tugboats for towing vessels of the United States.

Where the treaty between the United States and Great Britain of June 15, 1846, fixed the boundary between the two countries in the strait of San Juan de Fuca by a line following the middle of the strait, but also secured to each nation a right of free navigation over all the waters of the strait, all the waters north of the boundary line

were held to be "foreign waters," within the meaning of said section; The Pilot, 50 Fed. 437, 1 C. C. A. 523; reversing The Pilot, 48 Fed. 319.

FOREIGNER. One who is not a citizen. Cowell.

In the Old English Law, it seems to have been used of every one not an inhabitant of a city, at least with reference to that city; 1 H. Bla. 213. See Cowell, *Foreigne*.

In the United States, any one who was born in some other country than the United States, and who owes allegiance to some foreign state or country. Spratt v. Spratt, 1 Pet. (U. S.) 343, 349, 7 L. Ed. 171. An alien. See ALIEN; CITIZEN; NATURALIZATION.

FOREJUDGE. To deprive a man of the thing in question by sentence of court.

Among foreign writers, says Blount, forejudge is to banish, to expel. In this latter sense the word is also used in English law of an attorney who has been expelled from court for misconduct. Cowell; Cunningham, Law Dict.

FOREMAN. The presiding member of a grand or petit jury. See GRAND JURY; JURY.

FORENSIC. See FORENSIS.

FORENSIC MEDICINE. See MEDICAL JURISPRUDENCE.

FORENSIS. Forensic. Belonging to court. *Forensis homo*, a man engaged in causes. A pleader; an advocate. Vicat, Voc. Jur.; Calvinus, Lex.

FORESCHOKE. Forsaken; especially with reference to lands abandoned by the tenant. *Termes de la Ley;* Cowell.

FORESHORE. That part of the land immediately in front of the shore; the part of it which is between high and low water marks, and alternately covered with water and left dry by the flux and reflux of the tides. It is indicated by the middle line between the highest and lowest tides (spring and neap). This term is usually used in England. The foreshore is *prima facie* the property of the crown, but it may belong to an individual if he can show a grant from the crown, or a user from which such grant can be inferred. The public may walk over it to reach the sea for the purposes of navigation, or fishery, but not for amusement or bathing or for gathering seaweed or stones. The public may navigate over it at high tide and anchor (but may not place moorings) and may fish; see [1904] 2 Ch. 313; [1909] 2 Ch. 709; [1899] 2 Ch. p. 709; [1897] 2 Q. B. 318; Odgers, C. L. 13. Public meetings cannot be held there; 72 J. P. 318. See SEA-SHORE.

FOREST. A certain territory of wooded ground and fruitful pastures, privileged for wild beasts and fowls of forest, chase, and warren, to rest and abide in the safe protection of the prince for his ~ incely delight a pleasure, having a peculiar court and officers. Man. For. Laws, cap. 1, num. 1; *Termes de la Ley;* 1 Bla. Com. 289.

A royal hunting-ground which lost its peculiar character with the extinction of its courts or when the franchise passed into the hands of a subject. Spelman, Gloss.; Cowell; Man. For. Laws, cap. 1; 2 Bla. Com. 83; 1 Steph. Com. 665.

FOREST COURTS. Courts instituted for the government of the king's forest in different parts of the kingdom, and for the punishment of all injuries done to the king's deer or *venison*, to the *vert* or greensward, and to the *covert* in which the deer were lodged. They comprised the courts of attachments or woodmote, of regard, of swanimote, and of justice-seat (which several titles see); but since the revolution of 1688 these courts, it is said, have gone into absolute desuetude. 3 Steph. Com. 439; 2 Bla. Com. 71. But see 8 Q. B. 981, where a mandamus to the verderers of a royal forest was refused, on the ground that the court of the Chief Justice in Eyre had power to compel the verderers to permit the exercise of the rights sought to be enforced.

FOREST LAW. The old law relating to the forest, under which the most horrid tyrannies were exercised, in the confiscation of lands for the royal forests. Hallam's Const. Hist. ch. 8.

The privilege of reserving the forest for the use of the sovereign alone was instituted by the Saxon kings, who, however, occasionally conferred it upon a subject by special license. Under the Norman kings the national property became a royal demesne. The document called *Constitutiones Cnuti de Foresta*, attributed to Cnute, is a forgery. The law which it contains is the early Anglo-Norman law of William I. Brunner, Sources of English Law, 2 Sel. Essays in Anglo-Amer. L. H. 18. Forest laws were made absolutely at the king's will. Mrs. J. R. Green, 1 *id.* 113. There were four chiefs of the forest (*primarii*) who administered justice; under these were four *mediocres* who undertook the care of the venison and vert; and who in turn superintended two *tithing-men* whose duties were to care for the vert and venison by night and who, if slaves, became free on being appointed to this office. Complaints against the *mediocres* and the *tithing-men* were heard by the *primarii* and by them disposed of, and complaints against the *primarii* were dealt with by the king himself; Hallam, Anc. Laws and Inst. sec. 10. If a freeman used violence towards a primarius of the forest, he lost his freedom and his goods; if a villein, he lost his right hand; and for a repetition of the offence by either, he forfeited his life. Offences against the vert were dealt with leniently as compared with those against the venison, and there was also a difference in the penalties imposed for killing a royal beast and a beast of the forest; thus for killing the latter, a freeman was fined, while for the former he lost his liberty. A difference was also recognized according to the rank of the offender, as, if a bishop, abbot, or baron killed a royal beast he was subject to a fine, at the pleasure of the king, while for the same offence a slave lost his life. Certain animals are enumerated in this document for the killing of which no penalty was attached, and the wild boar is especially mentioned as never having been held to be an animal of venison; *id.* sec. 27.

Under the Confessor these laws were not enforced with the rigidity of Cnute, the penalties for trespass were moderate, and the administration of the

forest law did not seem to be a subject of complaint from any class of people, but William the Conqueror soon altered this condition of affairs. The hunting of wild beasts of the forest being his chief pastime he immediately claimed absolute and exclusive right to all forests then existing, and allowed no one to enter without his license; he extended those already existing by laying waste (afforestation) whole towns and villages; and he devastated vast tracts in Hampshire and Yorkshire to form the new forest, "denuding the land of both God and man to make of it a home for wild beasts." Lappenburg, England, under the Anglo-Norman Kings 214. Sometimes he drove out the people and sometimes permitted them to remain under severe laws. The Conqueror appointed new judges of the forests to supersede the former judges and keepers; he created the office of chief justice of the forest and the verderers subordinate to the chief justice, who could convict offenders and send them before the chief justice, but who had no power to punish such offenders. The verderers sat at Swanimote and all within the limits of the forest were bound to attend this court thrice a year, and to serve on inquests and juries when required. The *agistators*, the *forestarii*, and the *regarders* were also appointed by the Normans as officers of the forest, but without judicial powers. The highest penalty enforced for offences in the forest during the reign of William I. seems to have been the loss of a limb or the eyes of the offender, and this was enforced and fines were imposed for the most trivial offences; Sax. Chronicles.

These abuses were continued until about the year 1215, the most extensive afforestations having been made under Richard I. and John. In the 47th and 48th clauses of the great charter certain provisions are found relating to the forest, but although the belief that John issued a charter distinct from these clauses is very ancient, it is erroneous; the document given in Matthieu Paris under the name, being the forest charter of Henry III. with an altered salutation. Stubbs' Charters 338. In the great charter the heavy burden of attending the forest courts is remitted and this provision was conferred in the *charta de foresta*, and thus the exact analogy established by Henry II. between the courts of the shire and those of the forest was abolished. The *charta de foresta* disafforested the lands appropriated by Richard and John and all those seized by Henry II. which had operated to the injury of the land-owners and outside of the royal demesne; it greatly mitigated the punishment for destroying game, and provided that for that offence no man should lose life or limb, and that his punishment shall be limited to a fine or imprisonment for a year and a day; the following curious provision occurs in cap. ii.: "Whatsoever archbishop, bishop, earl, or baron coming to us at our commandment, passing by our forest, it shall be lawful for him to take and kill one or two of our deer by view of our forester, if he be present; or else he shall cause him to blow a horn for him, that he seem not to steal our deer; and likewise they shall do returning from us," and this clause is still unrepealed. By reason of "the cruel and insupportable hardships which those forest laws created for the subject," says Blackstone, "we find the immunities of *charta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of Magna Charta itself"; 2 Com. 416.

After this charter was issued, the forest laws not being enforced fell gradually into desuetude, until Charles I. attempted to revive them in order to replenish his exchequer, and the forest court of justice seat fined certain persons heavily for alleged encroachments on the ancient boundaries of the forest, although the right to such land was fortified by several centuries of possession. This was one of the first grievances on which the long parliament acted, and since the passing of the act "certainty of forests"; 16 Car. I. c. 16, where it was declared that all land should be held disafforested where no justice seat, swanimote, or court of attachment had been holden for sixty years next before the first year of the reign of Charles I., the laws of the forest have practically ceased, and by acts 14 and 15 Vict. c. 43, 16 and 17 Vict. c. 42, and 19 and 20 Vict. c. 32, many of the royal forests have been disafforested on the plea of public necessity. See Hallam, Hist. Eng. Const.; Stubbs' Charters; Inderwick, King's Peace; Turner, Select Pleas of the Forest; 1 Holdsw. Hist. E. L. 340; Encycl. Laws of England; Manwood, Forest Laws; Stubbs, Const. Hist. Charter of Forest; CHARTA DE FORESTA; FOREST COURTS.

In 1851, the greater part of the control of the forests was given to the commissioner of woods, forests and land revenues.

FORESTAGIUM. A tribute payable to the king's foresters. Cowell.

FORESTALL. To intercept or obstruct a passenger on the king's highway. Cowell; Blount. To beset the way of a tenant so as to prevent his coming on the premises. 3 Bla. Com. 170. To intercept a deer on his way to the forest before he can regain it. Cowell. See FORESTALLING THE MARKET.

FORESTALLER. One who commits the offence of forestalling. Used, also, to denote the crime itself; namely, the obstruction of the highway, or hindering a tenant from coming to his land. 3 Bla. Com. 170. Stopping a deer before he regains the forest. Cowell.

FORESTALLING THE MARKET. Buying victuals on their way to the market before they reach it, with the intent to sell again at a higher price. Cowell; Blount; 4 Bla. Com. 158. Every device or practice, by act, conspiracy, words, or news, to enhance the price of victuals or other provisions; Co. 3d Inst. 196; 1 Russ. Cri. 169; 4 Bla. Com. 158. See 13 Viner, Abr. 430; 1 East 132; 3 M. & S. 67. At common law, as well as by stat. 5 & 6 Edw. VI. c. 14, this was an indictable offence against public trade, but since the stat. 7 & 8 Vict. c. 24, the practice of forestalling is no longer illegal. See ENGROSS.

In the United States forestalling the market takes the form of "corners" or of "trusts," which are attempts by one person or a conspiracy or combination of persons to monopolize an article of trade or commerce, or to control or regulate, or to restrict its manufacture or production in such a manner as to enhance the price; Wright v. Crabbs, 78 Ind. 487; Arnot v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190. See RESTRAINT OF TRADE.

FORESTARIUS. A forester. An officer who takes care of the woods and forests. *De forestario apponendo*, a writ which lay to appoint a forester to prevent further commission of waste when a tenant in dower had committed waste. Bracton 316; Du Cange.

FORESTER. A sworn officer of the *forest*, appointed by the king's letters patent to walk the forest, watching both the vert and the venison, attaching and presenting all trespassers against them within their own bailiwick or walk. These letters patent were generally granted during good behavior; but sometimes they held the office in fee. Blount; Cowell.

FORFANG. A taking beforehand. A taking provisions from any one in fairs or markets before the king's purveyors are served with necessaries for his majesty. Blount; Cowell.

FORFEIT. To lose as the penalty of some misdeed or negligence. The word includes not merely the idea of losing, but also of having the property transferred to another without the consent of the owner and wrongdoer.

Lost by omission or negligence or misconduct. Nolander v. Burns, 48 Minn. 13, 50 N. W. 1016.

This is the essential meaning of the word, whether it be that an offender is to forfeit a sum of money, or an estate is to be forfeited to a former owner for a breach of condition, or to the king for some crime. Cowell says that *forfeiture* is general and *confiscation* a particular forfeiture to the king's exchequer. The modern distinction, however, *seems* to refer rather to a difference between forfeiture as relating to acts of the owner and confiscation as relating to acts of the government; Clark v. Ins. Co., 1 Sto. 134, Fed. Cas. No. 2,832; Ocean Ins. Co. v. Polleys, 13 Pet. (U. S.) 157, 10 L. Ed. 105; Fontaine v. Ins. Co., 11 Johns. (N. Y.) 293. Confiscation is more generally used of an appropriation of an enemy's property; forfeiture, or the taking possession of property to which the owner, who may be a citizen, has lost title through violation of laws. See 1 Kent 67; Clark v. Ins. Co., 1 Sto. 134, Fed. Cas. No. 2,832.

A provision in an agreement, that for its breach the party shall "forfeit" a fixed sum, implies a penalty, not liquidated damages; Salters v. Ralph, 15 Abb. Pr. (N. Y.) 273; Richards v. Edick, 17 Barb. (N. Y.) 260; a contract to forfeit and pay a specified sum in default of performance is an agreement for liquidated damages; Nilson v. Jonesboro, 57 Ark. 168, 20 S. W. 1093; even where under the contract a bond is given as an earnest of good faith; *id.*

FORFEITABLE. Subject to forfeiture; as a franchise for misuser or non-user, or lands or property for crime.

FORFEITURE. A punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense for the wrong which he alone or the public together with himself, hath sustained. 2 Bla. Com. 267. A sum of money to be paid by way of penalty for a crime. Maclin v. Wilson, 21 Ala. 672; Anglea v. Com., 10 Gratt. (Va.) 700.

Forfeiture by alienation. By the English law, estates less than a fee may be forfeited to the party entitled to the residuary interest by a breach of duty in the owner of the particular estate; as if a tenant for his own life aliens by feoffments or fine for the life of another, or in tail, or in fee, or by recovery; there being estates, which either must or may last longer than his own, the creating them is not only beyond his power, but is a forfeiture of his own particular estate; 2 Bla. Com. 274; 1 Co. 14 *b*. But no forfeiture resulted from alienation of a fee tail by the particular tenant, the alienee holding the estate during the life of the tenant in tail, at whose death it went to the heir in tail. This was called a discontinuance of the estate tail. 3 Bla. Com. 171. See DISCONTINUANCE OF ESTATES.

In this country such forfeitures are almost unknown, and the more just principle prevails that the conveyance by the tenant operates only on the interest which he possessed, and does not affect the remainderman or reversioner; 4 Kent 81, 424; McMillan's Lessee v. Robbins, 5 Ohio 30; Stevens v. Winship, 1 Pick. (Mass.) 318, 11 Am. Dec. 178; Redfern v. Middleton's Ex'rs, Rice (S. C.) 459; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; French v. Rollins, 21 Me. 372. See, also, Stearn, Real Act. 11; 2 Sharsw. Bla. Com. 121, n.; Wms. R. P. 25; 1 Washb. R. P. 92, 197.

Forfeiture for crimes. Under the constitution and laws of the United States, Const. art. 3, § 3; Act of April 30, 1790, § 24, forfeiture for crimes is nearly abolished. And when it occurs the state recovers only the title which the owner had. See, also, Dalr. Feuds, p. 145; Fost. Cr. Law 95; 1 Washb. R. P. 92; Story, Const. 1296; Owens v. Owens, 100 N. C. 240, 6 S. E. 794.

Forfeiture for treason. The constitution of the United States, art. 3, § 2, provides that no attainder of treason shall work forfeiture except during the life of the person attainted. The Confiscation Act provided that only the life estate of the convicted person can be condemned and sold; Bigelow v. Forrest, 9 Wall. (U. S.) 350, 19 L. Ed. 696; Day v. Micou, 18 Wall. (U. S.) 156, 21 L. Ed. 860. It was merely an exercise of the war power; Miller v. U. S., 11 Wall. (U. S.) 304, 20 L. Ed. 135; and did not apply to the confiscation of enemies' property; The Confiscation Cases, 1 Woods 221, Fed. Cas. No. 3,097.

Forfeiture by non-performance of conditions. An estate may be forfeited by a breach or non-performance of a condition annexed to the estate, either expressed in the deed at its original creation, or implied by law, from a principle of natural reason; 2 Bla. Com. 281; Littleton § 361; 1 Prest. Est. 478; Tud. Lead. Cas. 794; Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; Andrews v. Senter, 32 Me. 394; Bowen v. Bowen, 18 Conn. 535; Stafford v. Walker, 12 S. & R. (Pa.) 190; Drown v. Ingels, 3 Wash. 424, 28 Pac. 759. Such forfeiture may be waived by acts of the person entitled to take advantage of the breach; Chalker v. Chalker, 1 Conn. 79, 6 Am. Dec. 206; Jackson v. Crysler, 1 Johns. Cas. (N. Y.) 126; 1 Washb. R. P. 454; Hukill v. Myers, 36 W. Va. 639, 15 S. E. 151. In order to authorize a claim to forfeiture of valuable property on account of violation of a condition, proceedings to enforce must be had at once; Huston v. Bybee, 17 Or. 140, 20 Pac. 51, 2 L. R. A. 568;

U. S. v. R. Co., 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452.

Equity will not lend its aid to enforce a forfeiture because of a breach of condition subsequent in a deed, although the aid is sought upon the special ground of removing a cloud on the title; Douglas v. Life Ins. Co., 127 Ill. 101, 20 N. E. 51; nor will it concern itself to make up the loss of interest to one who refused the principal in the hope that he could enforce, upon purely technical grounds, a forfeiture of lands sold and all payments made thereon, under the terms of a harsh and unconscionable contract; Cheney v. Bilby, 74 Fed. 52, 20 C. C. A. 291. But where a covenant to build, in a lease, has been broken by the lessee, a court of bankruptcy acting as a court of equity may declare a forfeiture; Lindeke v. Realty Co., 146 Fed. 630, 77 C. C. A. 56; and equity will not prevent forfeiture if the lessee has been at fault; Kann v. King, 204 U. S. 43, 27 Sup. Ct. 213, 51 L. Ed. 360. But equity will relieve against a forfeiture where it would be unconscionable to enforce it; Maginnis v. Ice Co., 112 Wis. 385, 88 N. W. 300, 69 L. R. A. 833; and if there is some rule by which damages for the failure to perform a condition can be accurately measured in money; Gordon v. Richardson, 185 Mass. 492, 70 N. E. 1027, 69 L. R. A. 867; Dunklee v. Adams, 20 Vt. 415, 50 Am. Dec. 44; it is a question for the discretion of the court; 22 Ont. Rep. 1. Equity may relieve against forfeitures but not enforce them; South Carolina & G. R. Co. v. R. Co., 107 Ga. 164, 33 S. E. 36; Pittsburg & C. R. Co. v. R. Co., 76 Pa. 481.

Forfeiture by waste. Waste is a cause of forfeiture. 2 Bla. Com. 283; Co. 2d Inst. 299; 1 Washb. R. P. 118.

Forfeiture of property and rights cannot be adjudged by legislative acts, and confiscation without a judicial hearing after due notice would be void as not being due process of law; Walker v. McLoud, 204 U. S. 302, 27 Sup. Ct. 293, 51 L. Ed. 495. Nor can a party by his misconduct so forfeit a right that it may be taken from him without judicial proceedings, in which the forfeiture shall be declared in due form; Cooley, Const. Law 450; Griffin v. Mixon, 38 Miss. 434. Where no express power of removal is conferred upon the executive, he cannot declare an office forfeited for misbehavior; the forfeit must be declared by judicial proceedings; Page v. Hardin, 8 B. Monr. (Ky.) 648; State v. Pritchard, 36 N. J. L. 101.

Forfeiture of wages. A provision in a contract for service to the effect that the wages of an employé shall be forfeited for neglect or misconduct which brings damage to a company, should be strictly construed as against the company; Chicago City Ry. Co. v. Blanchard, 35 Ill. App. 481. Where, after being discharged, a railroad employé sues for wages, claiming to have been hired by the month, and this being admitted by the company, which sets up the defence that he was dismissed for cause, it is error to instruct the jury that they may find for the plaintiff if they believe from the evidence that he was hired by the month; Evans v. Ry. Co., 16 Mo. App. 522, reconciled in White v. R. Co., 20 Mo. App. 564.

Forfeiture of vessel. R. S. U. S. § 5283, provides for the forfeiture of every vessel which, within the limits of the United States, is fitted out and armed, or attempted to be so, to be employed in the service of any foreign prince, state, or people, to commit hostilities against the subjects, citizens, or property of a prince, state, or people with which the United States are at peace. *Held*, that under this section no forfeiture can be claimed of a vessel which is only employed to transport arms and munitions of war to a vessel fitting out to pursue the forbidden warlike enterprises; The Robert and Minnie, 47 Fed. 84; United States v. Trumbull, 48 Fed. 99; The Itata, 49 Fed. 646.

Forfeiture of charter. A corporation may be dissolved by a forfeiture of its charter for the non-user or misuser of its franchises; Boston Glass Mfg. v. Langdon, 24 Pick. (Mass.) 52, 35 Am. Dec. 292; State v. Jockey Club, 200 Mo. 34, 92 S. W. 182, 98 S. W. 539, New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936. It is only for the violation of an express provision of the organic law under which a corporation derives its powers or privileges, or for such a misuse or nonuse of them as results in a substantial failure to fulfil the purpose of its organization, that a forfeiture of a franchise will be decreed; Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; State v. Bridge Co., 91 Ia. 517, 60 N. W. 121; State v. Farmers' College, 32 Ohio St. 487; Harris v. R. Co., 51 Miss. 602; Chicago City Ry. Co. v. People, 73 Ill. 541; State v. Bank, 5 Ark. 595, 41 Am. Dec. 109; State v. Société, 9 Mo. App. 114; State v. Water Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391.

Accidental negligence or abuse of power will not warrant a forfeiture; there must be some plain abuse of its powers or neglect to exercise its franchises, and the acts of misuse or non-use must be wilful and repeated; Harris v. R. Co., 51 Miss. 602; State v. Turnpike Co. (Tenn.) 17 S. W. 128. Thus long-continued neglect on the part of a turnpike company to repair its road is cause of forfeiture; State v. Turnpike Co., 8 R. I. 182; *id.*, 8 R. I. 521, 94 Am. Dec. 123. So of a bridge company, if it neglect for a long time to rebuild a bridge which has been carried away by a flood; People v. Turnpike Road, 23 Wend. (N. Y.) 254; and deliberate attempts to evade the insurance law of a state in one of its most important provisions; International Fraternal Alliance v. State, 86 Md. 550, 39 Atl. 512, 40 L. R. A. 187; or wilful disregard of an act requiring the corporation

to pay in the capital stock within two years after incorporation; People v. Stone & Cement Co., 131 N. Y. 140, 29 N. E. 947, 15 L. R. A. 240; or failure to make an annual report required by statute; *id.;* or charging illegal rates for furnishing water; State v. Waterworks Co., 107 La. 1, 31 South. 395, affirmed, New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 22 Sup. Ct. 691, 46 L. Ed. 936; or holding lands contrary to the law; Com. v. R. Co., 132 Pa. 591, 19 Atl. 291, 7 L. R. A. 634. Neglect to have corporate property listed for taxation was held not sufficient ground for forfeiture; North & South Rolling Stock Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462.

A forfeiture must be judicially declared; La Grange & M. R. Co. v. Rainey, 7 Cold. (Tenn.) 420; In re Brooklyn, W. & N. Ry. Co., 72 N. Y. 245; Wicks v. Monihan, 130 N. Y. 232, 29 N. E. 139, 14 L. R. A. 243. A forfeiture can be enforced by *scire facias* or a *quo warranto* only at the suit of the government which created the corporation; State v. Coal Co., 46 Md. 1; Com. v. Small, 26 Pa. 31; Elizabethtown Gas Light Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; Bass v. Navigation & Water-Power Co., 111 N. C. 439, 14 S. E. 402, 19 L. R. A. 247. But not at the suit of an individual; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. (Mass.) 344; Frost v. Coal Co., 24 How. (U. S.) 278, 16 L. Ed. 637; Williams v. Ry. Co., 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201. The state may waive a cause of forfeiture; People v. President & Directors of Manhattan Co., 9 Wend. (N. Y.) 351; State v. Morris, 73 Tex. 435, 11 S. W. 392; and it will not interfere, if the unauthorized acts of a corporation affect merely stockholders and creditors who have an adequate legal remedy; State v. Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

Equity has no jurisdiction in the matter; Moraw. Priv. Corp. 10, 40; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; State v. Merchants' Ins. & Trust Co., 8 Humph. (Tenn.) 253. But where there was a franchise to construct a street railway in a specified time, and in case of failure the franchise to be forfeited, the right was lost without suit, there having been a failure; Oakland R. Co. v. R. Co., 45 Cal. 365, 13 Am. Rep. 181.

Forfeiture for contesting a will. It is not against public policy for a will to provide that any contestant shall forfeit his interest under the will; In re Hite's Estate, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. As to what amounts to such contest, resulting in forfeiture, the rule seems to be that, where the legatee seeks to thwart the testator's expressed wishes, it is a contest; In re Hite's Estate, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993. Disputes over construction of wills are not contests; Black v. Herring, 79 Md. 146, 28 Atl. 1063; Woodward v. James, 44 Hun (N. Y.) 95; Ir. L. R. 11 Eq. 409; nor where the legatee appears by attorney and cross-examines witnesses at the probate of a will; In re Bratt, 10 Misc. 491, 32 N. Y. Supp. 168. But if the legatee deny the ownership of the testator, there is contest and forfeiture; Smithsonian Inst. v. Meech, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793; or if one legatee advise and aid another in a contest; Donegan v. Wade, 70 Ala. 501. An infant is not responsible for proceedings by a guardian *ad litem;* Bryant v. Thompson, 59 Hun 545, 14 N. Y. Supp. 28; *id.*, 128 N. Y. 426, 28 N. E. 522, 13 L. R. A. 745. See Chew's Appeal, 45 Pa. 228, holding that such clauses are to be construed strictly and when merely denouncing such contests and making no gift over, they are considered as only *in terrorem.*

FORFEITURE OF A BOND. A failure to perform the condition on which the obligee was to be excused from the penalty in the bond. Courts of equity and of law in modern practice will relieve from the forfeiture of a bond; and, upon proper cause shown, criminal courts will, in general, relieve from the forfeiture of a recognizance to appear. See Respublica v. Cobbet, 3 Yeates (Pa.) 93; Stegars v. State, 2 Blackf. (Ind.) 104; Elliott v. Armstrong, 2 Blackf. (Ind.) 200.

FORFEITURE OF MARRIAGE. A penalty incurred by a ward in chivalry when he or she married contrary to the wishes of his or her guardian in chivalry.

The latter, who was the ward's lord, had an interest in controlling the marriage of his female wards, and he could exact a price for his consent; and at length it became customary to sell the marriage of wards of both sexes; 2 Bla. Com. 70.

When a male ward refused an equal match provided by his guardian, he was obliged, on coming of age, to pay him the value of the marriage,—that is, as much as he had been *bona fide* offered for it, or, if the guardian chose, as much as a jury would assess, taking into consideration all the real and personal property of the ward; and the guardian could claim this value although he might have made no tender of the marriage; Co. Litt. 82 *a;* Co. 2d Inst. 92; 5 Co. 126 *b;* 6 *id.* 70 *b.*

When a male ward between the age of fourteen and twenty-one refused to accept an offer of an equal match (one without disparagement), and during that period formed an alliance elsewhere without his guardian's permission, he incurred forfeiture of marriage,—that is, he became liable to pay double the value of the marriage. Co. Litt. 78 *b,* 82 *b.*

FORFEITURE OF SILK. **In English Law.** When the importation of silk was prohibited it was customary at each term of the Ex-

chequer to proclaim a forfeiture of such as was suffered to lie in the docks.

FORGAVEL. A small rent reserved in money; a quit-rent. Sometimes written *forgabulum.*

FORGE. To fabricate by false imitation; especially, in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit. People v. Mitchell, 92 Cal. 590, 28 Pac. 597, 788. See State v. McKenzie, 42 Me. 392.

FORGERY. The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability. 2 Bish. Cr. Law § 523; Smith v. State, 29 Fla. 408, 10 South. 894.

The fraudulent making and alteration of a writing to the prejudice of another man's right. 4 Bla. Com. 247. The essence of forgery consists in making an instrument appear to be that which it is not; L. R. 1 C. C. R. 200.

Bishop, 2 Cr. Law § 523, n., has collected nine definitions of forgery, and remarks that the books abound in definitions. Coke says the term is "taken metaphorically from the smith, who beateth upon his anvil and forgeth what fashion and shape he will." Co. 3d Inst. 169.

A person may commit forgery by fraudulently making, over his own signature, a paper writing which, if genuine, would possess legal efficacy, and might operate to the prejudice of another's rights; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760. One may have authority to sign the name of another to an instrument for the payment of money in a stated amount, or for a legal purpose, and yet commit a forgery by signing for a larger amount, or for an illegal purpose with intent to defraud; Claiborne v. State, 51 Ark. 88, 9 S. W. 851.

A clerk in the telegraph office who sent to a bookmaker a telegram offering to bet on a certain horse, which purported to be sent before the race, and to be signed by a person who had authorized him to telegraph bets in his name, but which was in fact sent after the clerk knew that the horse had won the race, was held guilty of forgery under a statute against procuring money by virtue of any forged or altered instrument. Lord Russell, C. J., and Vaughan Williams, J., doubted as to the statute, but not that it was forgery at common law; [1896] 1 Q. B. 309.

The making of a whole written instrument in the name of another with a fraudulent intent is undoubtedly a sufficient making; although otherwise where one executes a promissory note as *agent* for a principal from whom he has no authority; Mann v. People, 15 Hun 155; but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of the instrument, whereby a new operation is given to it, will amount to a forgery; State v. Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689; L. R. 1 C. C. R. 200; and this, although it be afterwards executed by a person ignorant of the deceit; 2 East, Pl. Cr. 855.

The fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, will also be a forgery; Powell v. Com., 11 Gratt. (Va.) 822; Pennsylvania v. Misner, Add. (Pa.) 44. For example, it is forgery in an individual who is requested to draw a will for a sick person in a particular way, instead of doing so, to insert legacies of his own head, and then procure the signature of such sick person to the paper without revealing to him the legacies thus fraudulently inserted; F. Moore 759; Co. 3d Inst. 170; 1 Hawk. Pl. Cr. c. 70, s. 2; 2 Russ. Cr. 318; Bacon, Abr. *Forgery* (A); so held of one who was employed to draw a will and fraudulently omitted a legacy; 1 Hawk. Pl. Cr. c. 70, § 6; 3 Chitty, Cr. L. 1038. One was held not to be guilty of forgery, who in writing a promissory note for an illiterate person to execute, inserts therein an amount larger than directed; Wells v. State, 89 Ga. 788, 15 S. E. 679.

It has been intimated by Lord Ellenborough that a party who makes a copy of a receipt and adds to such copy material words not in the original, and then offers it in evidence on the ground that the original has been lost, may be prosecuted for forgery; 5 Esp. 100.

It is a sufficient making where, in the writing, the party assumes the name and character of a person in existence; 2 Russ. Cri. 327. But the adoption of a false *description* and *addition* where a false name is not assumed and there is no person answering the description, is not a forgery; 1 Russ. & R. 405.

Making an instrument in a fictitious name, or the name of a non-existing person, is as much a forgery as making it in the name of an existing person; 2 Russ. Cri. 328; Brewer v. State, 32 Tex. Cr. R. 74, 22 S. W. 41, 40 Am. St. Rep. 760; Lascelles v. State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; and although a man may make the instrument in his own name, if he represent it as the instrument of another of the same name, when in fact there is no such person, it will be a forgery in the name of a non-existing person; 2 Leach 775; 2 East, Pl. Cr. 963; U. S. v. Turner, 7 Pet. (U. S.) 132, 8 L. Ed. 633; (See State v. Bauman, 52 Ia. 68, 2 N. W. 956.) But the correctness of this decision has been doubted; Rosc. Cr. Ev. 384. One who, with intent to forge the check of "R. & M.," signs the name "A. E. R. & Co." thereto, believing it to be the true name of the firm, is not guilty of forgery; People v. Elliott, 90 Cal. 586, 27 Pac. 433.

The offence may be complete without a publication of the forged instrument; 2 East, Pl. Cr. 855.

The presumption is that a drawee bank knows the signature of its own customers; Neal v. Coburn, 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495; First Nat. Bank of Danvers v. Bank, 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450. But this presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or mistake of fact under which the payment was made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer, and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or to induce him to pay the check without the usual security against fraud; *id.;* Ford v. Bank, 74 S. C. 180, 54 S. E. 204, 10 L. R. A. (N. S.) 63, 114 Am. St. Rep. 986, 7 Ann. Cas. 744.

Where the payee cut a note signed by three school trustees from an order blank for school supplies and transferred such note to another instrument for the payment of money, held that the alteration being made with criminal intent, it was forgery; State v. Mitton, 37 Mont. 366, 96 Pac. 926, 127 Am. St. Rep. 732.

With regard to the thing forged, it may be observed that it has been holden to be forgery at common law fraudulently to falsify or falsely make records and other matters of a public nature; 1 Rolle, Abr. 65, 68; a parish register; 1 Hawk. Pl. Cr. c. 70; a letter in the name of a magistrate, or of the governor of a gaol directing the discharge of a prisoner; 6 C. & P. 129; Mood. 379; the making a false municipal certificate with intent to defraud is forgery, notwithstanding the city has not power to issue such certificates; State v. Eades, 68 Mo. 150, 30 Am. Rep. 780; the alteration of a document to prevent the discovery of an embezzlement; 11 Crim. L. Mag. 47.

With regard to private writings, forgery may be committed of any writing which, if genuine, would operate to the foundation of another man's liability or the evidence of his right; 3 Greenl. Ev. § 103; Com. v. Ward, 2 Mass. 397; Butler v. Com., 12 S. & R. (Pa.) 237, 14 Am. Dec. 679; State v. Smith, 8 Yerg. (Tenn.) 150; as, a check; Hendrick v. Com., 5 Leigh (Va.) 707; an assignment of a legal claim; an indorsement of a promissory note; Powell v. Com., 11 Gratt. (Va.) 822; State v. Carragin, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561; writing the name of the payee falsely and fraudulently on the back of a treasury warrant payable to order; U. S. v. Jolly, 37 Fed. 108; a receipt or acquittance; Com. v. Ladd, 15 Mass. 526; an acceptance of a bill of exchange, or an order for the delivery of goods; 8 C. & P. 629; Com. v. Ayer, 3 Cush. (Mass.) 150; Hendricks v. State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Reddick v. State, 31 Tex. Cr. R. 587, 21 S. W. 684; or an order for money; Gibson v. State, 79 Ga. 344, 5 S. E. 76; a deposition to be used in court; State v. Kimball, 50 Me. 409; a private act of parliament; 4 How. St. Tr. 951; a copy of any instrument to be used in evidence in the place of a real or supposed original; State v. Smith, 8 Yerg. (Tenn.) 150; false entries in the books of a mercantile house, but not necessarily so in every case; Biles v. Com., 32 Pa. 529, 75 Am. Dec. 568; State v. Young, 46 N. H. 266, 88 Am. Dec. 212; a letter of recommendation of a person as a man of property and pecuniary responsibility; 2 Greenl. Ev. § 365; People v. Abeel, 182 N. Y. 415, 75 N. E. 307, 1 L. R. A. (N. S.) 730, 3 Ann. Cas. 287; a false testimonial to character; Templ. & M. 207; 1 Den. Cr. Cas. 492; Dearsl. 285; a railway pass; 2 C. & K. 604; a railroad-ticket; Com. v. Ray, 3 Gray (Mass.) 441; a certified bill of costs; Luttrell v. State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760; or of a contract which, if genuine, would be void as against public policy; People v. Munroe, 100 Cal. 664, 35 Pac. 326, 24 L. R. A. 33, 38 Am. St. Rep. 323. Forgery may be of a printed or engraved as well as of a written instrument; Com. v. Ray, 3 Gray (Mass.) 441; Henshaw v. Foster, 9 Pick. (Mass.) 312; Benson v. McMahon, 127 U. S. 457, 8 Sup. Ct. 1240, 32 L. Ed. 234; but falsely to subscribe a person's name to a recommendation of a medicine is not forgery; Miller v. Rittinger, 2 Pear. (Pa.) 351; nor to alter a lease by interlineations in order to conform it to the purpose of parties; Pauli v. Com., 89 Pa. 432; nor is the private memorandum-book of a public officer, not required to be kept by law, the subject of forgery; Downing v. Brown, 3 Colo. 571; nor the changing the date of tax receipts which still show on their face that they were given for the taxes of the year previous; Cox v. State, 66 Miss. 14, 5 South. 618; a forgery must be of some document or writing; therefore, the printing an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; 1 Dearsl. & B. 460; Clark, Cr. L. 295.

Knowingly to utter a false letter by which the sentiments, character, prospects, interests, etc., of the person whose utterance the writing purports to be are misrepresented, whereby the writer induced a woman to promise to marry him, was held to be forgery, though not injurious to the person whose name was forged; People v. Abeel, 182 N. Y. 415, 75 N. E. 307, 1 L. R. A. (N. S.) 730, 3 Ann. Cas. 287.

The seal of a corporation is a "character" within the meaning of the New Jersey Crimes Act (relating to forgery) and the forgery of such seal is a crime thereunder; U. S. v. Andem, 158 Fed. 996.

The intent must be to defraud another; Cedar Rapids Ins. Co. v. Butler, 83 Ia. 128,

48 N. W. 1026; McDonald v. State, 83 Ala. 46, 3 South. 305; but it is not requisite that any one should have been injured; it is sufficient that the instrument forged might have proved prejudicial; Arnold v. Cost, 3 Gill & J. (Md.) 220, 22 Am. Dec. 302; U. S. v. Moses, 4 Wash. C. C. 726, Fed. Cas. No. 15,825; Crawford v. State, 31 Tex. Cr. R. 51, 19 S. W. 766; it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from the person's ordinary caution, it would not be likely to impose upon him; and although the object was general to defraud whoever might take the instrument, and the intention of the defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the contemplation of the prisoner; Russ. & R. 291; State v. Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; State v. Gryder, 44 La. Ann. 962, 11 South. 573, 32 Am. St. Rep. 358. See Russ. Cri. b. 4, c. 32, s. 3; 2 East, Pl. Cr. 853; 1 Leach 367; Rosc. Cr. Ev. 400; Clark, Cr. L. 300.

Most, and perhaps all, of the states have passed laws making certain acts to be forgery with the result, upon the whole, of enlarging the meaning of the term, and the national legislature has also enacted several on this subject; but these statutes do not take away the character of the offence as a misdemeanor at common law, but only provide additional punishment in the cases particularly enumerated in the statutes; Com. v. Ayer, 3 Cush. (Mass.) 150; Com. v. Ray, 3 Gray (Mass.) 441.

It has been held that the crime of uttering forged commercial paper is included in the common-law definition of the word "forgery" as used in a treaty, and that a prisoner charged with it should be surrendered, although under the law of the other treaty power that crime is known as "fraud" by means of forgery, and "forgery" is only falsification of public documents; In re Adutt, 55 Fed. 376.

The act of offering for sale and selling a forged instrument is a sufficient representation as to its genuineness; State v. Calkins, 73 Ia. 128, 34 N. W. 777.

When separate instruments are forged on the same date and as part of the same general transaction, the forgery of each constitutes a separate offense; U. S. v. Carpenter, 151 Fed. 214, 81 C. C. A. 194, 9 L. R. A. (N. S.) 1043, 10 Ann. Cas. 509; Barton v. State, 23 Wis. 587.

Although counts for forgery and uttering a forged instrument may be joined in the same indictment, a conviction cannot be had on both; State v. Carragin, 210 Mo. 351, 109 S. W. 553, 16 L. R. A. (N. S.) 561.

See Hawk. Pl. Cr. b. 1, cc. 51, 70; 3 Chitty, Cr. L. 1022; 2 Russ. Cr. b. 4, c. 32; 2 Bish. Cr. L. c. 22; 2 Bish. Cr. Proc. § 398; 1 Whart. Cr. L. c. 9; COUNTERFEIT; UTTERING; CHECK; INDORSEMENT.

FORHERDA. In Old English Law. A headland, or foreland. Cowell.

FORI DISPUTATIONES. In Civil Law. Arguments in court. Disputations or arguments before a court. Eminent citizens and statesmen often debated in the forum, and their answers to questions put were gradually adopted by the courts and incorporated into the body of the Roman law under this name. 1 Kent 530; Vicat, Voc. Jur. verb. *Disputatio.*

FORINSECUS (Lat.), **FORINSIC.** Outward; on the outside; without; foreign; belonging to another manor. *Silio forinsecus,* the outward ridge or furrow. *Servitium forinsecum,* the payment of aid, scutage, and other *extraordinary* military services. *Forinsecum manerium,* the manor, or that part of it which lies outside the bars or town and is not included within the liberties of it. Cowell; Blount; Cunningham, Law Dict.; Jacob, *Foreign Service;* 1 Reeve, Hist. Eng. Law 273.

Forinsec service was the service due to the crown upon land; service due between grantor and grantee was termed *intrinsic.* 2 Holdsw. Hist. E. L. 158. See 1 Poll. & Maitl. 217.

FORIS (Lat.). Out at the doors, out of door; abroad; without. Harp. Lat. Dict.

FORIS FAMILIATION. The separation of a child from the father's family. Bell; Toml.

One who is no longer an heir of the parent was termed *forisfamiliatus.* Du Cange; Spelman, Gloss.; Cowell. Similar in some degree to the modern practice of advancement.

FORISBANITUS. Banished. Mat. Par. 1245.

FORISFACERE (Lat.). To forfeit. To lose on account of crime. It may be applied not only to estates, but to a variety of other things, in precisely the popular sense of the word forfeit. Spelman, Gloss.; Du Cange.

To confiscate. Du Cange; Spelman, Gloss.

To commit an offence; to do a wrong. To do something beyond or outside of (*foris*) what is right (*extra rationem*). Du Cange. To do a thing against or without law. Co. Litt. 59 *a.*

To disclaim. Du Cange.

FORISFACTUM (Lat.). Forfeited. *Bona forisfacta,* forfeited goods; 1 Bla. Com. 299. A crime. Du Cange; Spelman, Gloss.

FORISFACTURA (Lat.). A crime or offence through which property is forfeited. Leg. Edw. Conf. c. 32.

A fine or punishment in money.

Forfeiture. The loss of property or life in consequence of crime. Spelman, Gloss.

Forisfactura plena. A forfeiture of all of a man's property. Things which were forfeited. Du Cange; Spelman. Gloss.

FORISFACTUS (Lat.). A criminal. One who has forfeited his life by commission of a capital offence. Spelman, Gloss.; Du Cange. *Si quispiam forisfactus poposcerit regis misericordiam, etc.* (if any criminal shall have asked pardon of the king, etc.). Leg. Edw. Conf. c. 18.

Forisfactus servus. A slave who has been a free man but has forfeited his freedom by crime. Leg. Athelstan, c. 3; Du Cange.

FORISFAMILIATED, FORISFAMILIATUS. **In Old English Law.** Portioned off. A son was *forisfamiliated* when he had a portion of his father's estate assigned to him during his father's life, in lieu of his share of the inheritance, when it was done at his request and he assented to the assignment. The word etymologically denotes *put out of the family* (*foris familiam ponere*, from which is *forisfamiliare;* Glanv. l. 7, c. 3) mancipated. 1 Reeve, Hist. Eng. L. 110; Bract, fol. 64.

FORISJUDICATIO (Lat.). **In Old English Law.** Forejudger. A forejudgment. A judgment of court whereby a man is put out of possession of a thing. Co. Litt. 100 *b;* Cunningham, Law Dict.

FORISJUDICATUS (Lat.). Forejudged; sent from court; banished. Deprived of a thing by judgment of court. Bracton, 250 *b;* Co. Litt. 100 *b;* Du Cange.

FORISJURARE (Lat.). To forswear; to abjure; to abandon. *Forisjurare parentilam.* To remove oneself from parental authority. The person who did this lost his rights as heir. Du Cange; Leg. Hen. I. c. 88.

Provinciam forisjurare. To forswear the country, Spelman, Gloss.; Leg. Edw. Conf. c. 6.

FORJUDGE. See FOREJUDGE.

FORJURER (L. Fr.). **In Old English Law.** To abjure; to forswear. *Forjurer royalme,* to abjure the realm. Britt. cc. 1, 16.

FORLER-LAND. Land in the diocese of Hereford, which had a peculiar custom attached to it, but which has been long since disused, although the name is retained. Butl. Surv. 56.

"Some of the peculiar customs of Hereford are recently published, as that 'the reeve of the borough may have been directly accountable to the king,' while 'in most cases the king's farmer was the sheriff of the shire.' Maitl. Domesd. Book and Beyond 209. So also, 'at Hereford the reeve's consent was necessary when a burgage was to be sold, and he took a third of the price.' When a burgess died the king got his horse and arms (these Hereford burgesses were fighting men); if he had no horse, then ten shillings 'or his land with the houses.' Any one who was too poor to do his service might abandon his tenement to the reeve without having to pay for it. Such an entry as this seems to tell us that the services were no trivial return for the tenements;" *id.* 199.

FORM. The model of an instrument or legal proceeding, containing the substance and the principal terms, to be used in accordance with the laws.

The legal order or method of legal proceedings or construction of legal instruments.

Form is usually put in contradistinction to substance. For example, by the operation of the statute of 27 Eliz. c. 5, s. 1, all merely formal defects in pleading, except in dilatory pleas, are aided on general demurrer. The difference between matter of form and matter of substance, in general, under this statute, as laid down by Lord Hobart, C. J., is that "*that* without which *the right* doth sufficiently appear to the court is *form;*" but that any defect "by reason whereof the *right appears not*" is a defect in substance; Hob. 233. A distinction somewhat more definite is that if the *matter* pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but that if the fault is in the manner of alleging it, the defect is formal; Dougl. 683.

For example, the omission of a consideration in a declaration in assumpsit, or of the performance of a condition precedent, when such condition exists, of a conversion of property of the plaintiff, in trover, of knowledge in the defendant, in an action for mischief done by his dog, of malice, in an action for malicious prosecution, and the like, are all defects in *substance.* On the other hand, duplicity, a negative pregnant, argumentative pleading, a special plea, amounting to the general issue, omission of a day, when time is immaterial, of a place, in transitory actions, and the like, are only faults in form; Bacon, Abr. *Pleas,* etc. (N 5, 6); Comyns, Dig. *Pleader* (Q 7); 10 Co. 95 *a;* 2 Stra. 694; Gould, Pl. c. 9, § 18; 1 Bla. Com. 142.

At the same time that fastidious objections against trifling errors of form, arising from mere clerical mistakes, are not encouraged or sanctioned by the courts, it has been justly observed that "infinite mischief has been produced by the facility of the courts in overlooking matters of form; it encourages carelessness, and places ignorance too much upon a footing with knowledge amongst those who practise the drawing of pleadings;" 1 B. & P. 59; Comm. v. Emery, 2 Binn. (Pa.) 434.

FORMA. Form; the prescribed or established form or method of legal proceedings; applied to obsolete actions "which are frequently mere establishments, *Forma et figura judicii,*" the form and shape of judicial action. 3 Bla. Com. 271.

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMALITIES. Customary behavior, dress, or ceremony; ceremonial. Cent. Dict.

In England. Robes worn by the magistrates of a city or corporation, etc., on solemn occasions. Encyc. Lond.

FORMALITY. The conditions which must be observed in making contracts, and the words which the law gives to be used in order to render them valid; it also signifies the conditions which the law requires to make regular proceedings.

FORMATA. Canonical letters. Spelman.

FORMATA BREVIA. See BREVIA FORMATA.

FORMED ACTION. An action for which a form of words is provided which must be exactly followed. 10 Mod. 140.

FORMEDON. An ancient writ provided by stat. Westm. 2 (13 Edw. I.) c. 1, for him

who hath right to lands or tenements by virtue of a gift in tail. Stearn, Real Act. 322; Andr. Steph. Pl. 66.

It is a writ in the nature of a writ of right, and is the highest remedy which a tenant in tail can have. Co. Litt. 316.

This writ lay for those interested in an estate-tail who were liable to be defeated of their right by a discontinuance of the estate-tail, who were not entitled to a writ of right absolute, since none but those who claimed in fee-simple were entitled to this; Fitzh. N. B. 255. It is called *formedon* because the plaintiff in it claimed *per formam doni.*

It is of three sorts: See the following titles. Abolished by stat. 3 & 4 Will. IV. c. 27.

FORMEDON IN DESCENDER. Lies where a gift is made in tail and the tenant in tail aliens the lands or is disseised of them and dies, for the heir in tail to recover them, against the actual tenant of the freehold; Fitzh. N. B. 211; Littleton § 595.

If the demandant claims the inheritance as an estate-tail which ought to come to him by descent, from some ancestor to whom it was first given, his remedy is by a writ of *formedon in descender;* Stearn, Real Act. 322. It must have been brought within twenty years from the death of the ancestor who was disseised; 21 Jac. I. c. 16; 3 Brod. & B. 217; 2 Sharsw. Bla. Com. 193, n.

FORMEDON IN THE REMAINDER. Lies where lands are given to one for life or in tail with remainder to another in fee or in tail, and he who had the particular estate dies without issue, and a stranger intrudes upon him in remainder and keeps him out of possession. Fitzh. N. B. 211; Littleton § 597; 3 Bla. Com. 293.

FORMEDON IN THE REVERTER. Lies where there is a gift in tail, and afterwards, by the death of the donee or his heirs without issue of his body, the reversion falls in upon the donor, his heirs or assigns.

In this case the demandant must suggest the gift, his own right as derived from the donor, and the failure of heirs of the donee; 3 Bla. Com. 293; Stearn, Real Act. 323; Fitzh. N. B. 212; Littleton § 597.

FORMER ACQUITTAL. See AUTREFOIS ACQUIT.

FORMER JEOPARDY. See JEOPARDY.

FORMER RECOVERY. A recovery in a former action. The term former adjudication is sometimes, though infrequently, used.

It is a general rule that in a real or personal action a judgment unreversed, whether it be by confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or a like nature, for the same cause; Bacon, Abr. *Pleas* (I 12, n. 2); 6 Co. 7; Hob. 4, 5.

There are two exceptions to this general rule. *First,* in the case of mutual dealings between the parties, when the defendant omits to set off his counter-demand, he may recover in a cross action. *Second,* when the defendant in ejectment neglects to bring forward his title, he may avail himself of a new suit; Le Guen v. Gouverneur, 1 Johns. Cas. (N. Y.) 492, 502, 510, 1 Am. Dec. 121. It is evident that in these cases the cause of the second action is not the same as that of the first, and, therefore, a former recovery cannot be pleaded. In real actions, one is not a bar to an action of a higher nature; 6 Co. 7. See Kent v. Kent, 2 Mass. 338; RES JUDICATA.

FORMER TRIAL. Testimony given on a former trial may be given in evidence from the judge's notes or from notes of any other person who will swear to their accuracy, or by any person who will swear to its having been given; 3 Taunt. 262, per Mansfield, C. J.; so of any witness who will swear from his memory to its having been given; Johnson v. Powers, 40 Vt. 611. A justice of the peace may testify as to evidence given before him on a former trial; McGeoch v. Carlson, 96 Wis. 138, 71 N. W. 116. To impeach a witness by showing that he testified differently at a former trial one who had heard him testify is competent; McRorie v. Monroe, 203 N. Y. 426, 96 N. E. 724, Ann. Cas. 1913B, 94. It is no objection that the legally appointed stenographer could give better evidence; State v. McDonald, 65 Me. 466. See DEPOSITIONS.

FORMIDO PERICULI (Lat.). Fear of danger. 1 Kent, Com. 23.

FORMS OF ACTION. This term comprehends the various classes of personal action at common law, viz.: trespass, case, trover, detinue, replevin, covenant, debt, assumpsit, *scire facias,* and revivor, as well as the nearly obsolete actions of account and annuity, and the modern action of mandamus. They are now abolished in England by the Judicature Acts of 1873 and 1875, and in many of the states of the United States, where a uniform course of proceeding under codes of procedure has taken their place. But the principles regulating the distinctions between the common-law actions are still found applicable even where the technical forms are abolished.

FORMULA. In common-law practice, a set form of words used in judicial proceedings. In the civil law, an action. Calvin; Black.

FORMULÆ. In Roman Law. Directions sent by the magistrate to the judge for the dispositions of cases, with respect to which the *legis actiones* (established actions, or, more accurately according to English legal idiom, forms of action) were inadequate. Sand. Just. Introd. lxviii.

The introduction of the *formulæ* marked a distinct change in the Roman system

of civil process, and they were in turn succeeded by an equally radical change. These periods have been designated as three great epochs. First, was the system of the *legis actiones*, defined as "certain hard, sharply defined forms which a rude civilization prescribed for all proceedings." These, as civilization advanced, were necessarily replaced by more convenient forms of action, and were finally practically suppressed. The new system of *formulæ* was a very flexible form of organizing the proceedings adopted by the prætors, by which they were "enabled to give a means enforcing every right which the more enlarged views of an advancing civilization pronounced to be founded on equity." The prætors (in the provinces, præfects) sat as magistrates. From them the directions were sent to the judge in formal shape for each case; and the different forms in which these directions were given were expressed by the *formulæ*. They were binding on the judge, but no form was binding on the magistrate, who could avail himself "of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him," and so "vary the *formula*, so as to render substantial justice." "These *formulæ* (which were preserved and collected), so flexible in their general character, yet couched in terms always precise and simple, furnish one of many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the prætors principally introduced their great legal changes."

The *formula* ordinarily consisted of these three parts:

The *demonstratio* or statement of the fact or facts which the plaintiff alleges as the ground of his case.

The *intentio*, the really important part of the *formula*, a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff if true.

The *condemnatio*, the direction to condemn or absolve according to the true circumstances of the case. In three actions, —to divide a family inheritance, or property held in common, or settle boundaries, the judge was required to adjudicate. This was termed the *adjudicatio*. In these actions, therefore, the parts of the *formula* would be four—*demonstratio*, *intentio*, *adjudicatio*, and *condemnatio*, in case, as might happen, the judge should order a payment in money by some of the parties to equalize the division; the *condemnatio*, under this system, being always pecuniary.

This system finally gave place to that which prevailed in the third period of the Roman system, "that of the *extraordinaria judicia*, by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just, in as direct and speedy a manner as it found possible." See a clear and satisfactory statement of the Roman system of civil process during these three periods; Sand. Just. Introd. lxi. See also Mackeld. Rom. Law § 204.

FORMULARIES. A collection of the forms of proceedings among the Franks and other early European nations. Co. Litt. Butler's note, 77.

FORNAGIUM. The fee taken by a lord of his tenants bound to bake in his common oven, for liberty to use their own. Cowell; Moz. & W.

FORNICATION. Unlawful carnal knowledge by an unmarried person of another, whether the latter be married or unmarried.

Fornication is distinguished from adultery by the fact that the guilty person is not married. Four cases of unlawful intercourse may arise: where both parties are married; where the man only is married; where the woman only is married; where neither is married. In the first case such intercourse must be adultery; in the second case the crime is fornication only on the part of the woman, but adultery on the part of the man; in the third case it is adultery in the woman, and fornication (by statute in some states, adultery) in the man; in the last case it is fornication only in both parties.

It is criminal intercourse between unmarried persons; Territory v. Whitcomb, 1 Mont. 359, 25 Am. Rep. 740; Neil v. State, 117 Ga. 14, 43 S. E. 435; or it is held to be intercourse between a married or unmarried man and an unmarried woman; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21.

Simple incontinence is not punishable at common law; Com. v. Jones, 2 Gratt. (Va.) 555; simple fornication, without issue born, is not an indictable offence; Smith v. Minor, 1 N. J. L. 16; State v. Rahl, 33 Tex. 76; in the District of Columbia; Pollard v. Lyon, 91 U. S. 225, 23 L. Ed. 308; merely getting an unmarried woman with child is not indictable; but living in notorious fornication is; Lumpkins v. Justice, 1 Ind. 557.

In some states it is indictable by statute; State v. Way, 6 Vt. 311; 2 Tayl. C. 165; Com. v. Jones, 2 Gratt. (Va.) 555; and where it is there may be a conviction for this offence on an indictment for adultery; State v. Cowell, 26 N. C. 231; 1 Bish. Crim. L. 795. In Pennsylvania it is a misdemeanor for which an indictment lies, and is also a constituent of incest, adultery, seduction under promise of marriage, and rape; Com. v. Arner, 149 Pa. 35, 24 Atl. 83.

FORNIX (Lat. a vault or arch). A brothel,—so-called because formerly situated in underground vaults. Fornication. *Fornix et cætera.* Fornication and the rest; fornication and bastardy (*qq. v.*).

FORO. **In Spanish Law.** The place where tribunals hear and determine causes,—*exercendarum litium locus.* This word, according to Varo, is derived from *ferendo*, and is so called because all lawsuits have reference to things that are vendible, which presupposes the administration of justice to take place in the markets.

FORPRISE. An exception; reservation; excepted; reserved. Anciently, a term of frequent use in leases and conveyances. Cowell; Blount.

In another sense, the word is taken for any exaction. Cunningham, Law Dict.

FORSCHET. A strip of land lying next to the highway. Cowell.

FORSPEAKER. An attorney or advocate. One who speaks for another. Blount.

FORSTAL. An intercepting or stopping in the highway. See FORESTALL.

To be quit of amerciaments and cattle arrested within your land.

See FORESTALLER; FORESTALL.

FORSWEAR. To swear to a falsehood.

This word has not the same meaning as perjury. It does not, *ex vi termini*, signify a false swearing before an officer or court having authority to administer an oath, on an issue. A man may be forsworn by making a false oath before an incompetent tribunal, as well as before a lawful court. Hence, to say that a man is forsworn will or will not be slander, as the circumstances show that the oath was or was not taken before a lawful authority; Heard, Lib. & S. §§ 16, 34; Cro. Car. 378; Bacon, Abr. *Slander* (B, 3); Cro. Eliz. 609; Fisher v. Chandler, 1 Johns. (N. Y.) 505; Niven v. Munn, 13 Johns. (N. Y.) 48; Chapman v. Smith, 13 Johns. (N. Y.) 80.

FORT. Something more than a mere military camp, post, or station; it implies a fortification or a place protected from attack by some such means as a moat, wall, or parapet. U. S. v. Tichenor, 12 Fed. 424.

FORTALICE, or FORTELACE. A fortress or place of strength which anciently did not pass without a special grant. 11 Hen. VII. c. 18. They were originally built for the defence of the country, either against foreign invasions, or civil commotions; and were anciently held to be *inter regalia*, corresponding with the Roman *res publicæ*, such as navigable rivers, ports, ferries, and the like, but they now pass with the lands in every charter; Ersk. Pr. 165.

FORTAXED. Wrongly or extortionately taxed.

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required; Downman v. Chinn, 2 Wash. (Va.) 189; Hill v. Manser, 11 Gratt. (Va.) 522; Clary v. Haines, 61 Ga. 520; Aycock v. Austin, 87 Ga. 566, 13 S. E. 582.

The measure of damages for breach of a forthcoming bond would be the value of the property at the time the bond was given, provided that value did not exceed the amount of the execution, debt, interest, and costs; Whelchel v. Duckett, 91 Ga. 132, 16 S. E. 643. See BOND.

FORTHWITH. As soon as by reasonable exertion, confined to the object, it may be accomplished. (Approved in Dickerman v. Trust Co., 176 U. S. 193, 20 Sup. Ct. 311, 44 L. Ed. 423.) This is the import of the term; it varies, of course, with every particular case; 4 Tyrwh. 837; Edwards v. Ins. Co., 75 Pa. 378. See Scammon v. Ins. Co., 101 Ill. 621; 11 H. L. Cas. 337; Bennett v. Ins. Co., 67 N. Y. 274; Pennsylvania R. Co. v. Reichert, 58 Md. 261; Meriden Silver Plate Co. v. Flory, 44 Ohio St. 437, 7 N. E. 753. It is not as promptly as immediately; in some cases it might mean within a reasonable time; 7 Dowl. 789.

When a defendant is ordered to plead forthwith, he must plead within twenty-four hours; Wharton. In other matters of practice, the word has come to have the same meaning; 2 Edw. 328; Dickerman v. Trust Co., 176 U. S. 193, 20 Sup. Ct. 311, 44 L. Ed. 423. A demand for an account forthwith is not the same in substance and effect as a demand for an account within 15 days; Green v. Kelley, 64 Vt. 309, 24 Atl. 133. Where a verdict was returned between noon and one p. m. on Saturday, while the justice was hearing other cases, an entry of judgment on the verdict on Monday was sufficient under a statute requiring it to be rendered "forthwith"; Sorenson v. Swensen, 55 Minn. 58, 56 N. W. 350, 43 Am. St. Rep. 472. Where a chattel mortgage must "be forthwith deposited" to affect subsequent *bona fide* purchasers, the filing more than three months after execution was notice to purchasers who took title after the filing; Vickers v. Carnahan, 4 Tex. Civ. App. 305, 23 S. W. 338. A statute providing that an order to revive an action may be made forthwith, means at the first term after plaintiff's death; Horsley v. Asher's Heirs, 94 Ky. 314, 22 S. W. 434. When an insurance policy required notice of loss to be given forthwith, it was sufficient twelve days after the fire when no harm was caused by delay; Capitol Ins. Co. v. Wallace, 50 Kan. 453, 31 Pac. 1070.

FORTIA (Lat.). A word of art, signifying the furnishing a weapon of force to do the fact, and by force whereof the fact was committed, and he that furnished it was not present when the act was done. Co. 2d Inst. 182.

The general meaning of the word is an unlawful force. Spelman, Gloss.; Du Cange. *Fortia frisca.* Fresh force (*q. v.*).

FORTILITY. **In Old English Law.** A fortified place; a castle; a bulwark. Cowell; 11 Hen. VII. c. 18.

FORTIOR (Lat.). Stronger. A term applied in the law of evidence to that species of presumption, arising from facts shown in evidence, which is strong enough to shift the burden of proof to the opposite party. Burr. Circ. Ev. 64.

FORTIORI. See A FORTIORI.

FORTIS (Lat.). Strong. *Fortis et sana*, strong and sound; staunch and strong; as a vessel. Townsh. Pl. 227.

FORTUIT (Fr.). Accidental; casual; fortuitous. *Cas fortuit*, a fortuitous event. *Fortuitment*, accidentally; by chance.

FORTUITOUS. Depending on or happening by chance; casual; not designed; adventitious. **In Civil Law.** Resulting from unavoidable causes.

FORTUITOUS COLLISION. An accidental collision.

FORTUITOUS EVENT. **In Civil Law.** That which happens by a cause which cannot be resisted.

That which neither of the parties has occasioned or could prevent. *Lois des Bât.* pt. 2, c. 2. An unforeseen event which cannot be prevented. Dict. de Jurisp. *Cas fortuit.*

There is a difference between a fortuitous event, or inevitable accident, and irresistible force. By the former, commonly called the act of God, is meant any accident produced by physical causes which are irresistible; such as a loss by lightning or storms, by the perils of the seas, by inundations and earthquakes, or by sudden death or illness. By the latter is meant such an interposition of human agency as is, from its nature and power, absolutely uncontrollable. Of this nature are losses occasioned by the inroads of a hostile army, or by public enemies. Story, Bailm. § 25; *Lois des Bât.* pt. 2, c. 2, § 1.

Fortuitous events are fortunate or unfortunate. The accident of finding a treasure is a fortuitous event of the first class. *Lois des Bât.* pt. 2, c. 2, § 2.

Involuntary obligations may arise in consequence of fortuitous events. For example, when to save a vessel from shipwreck, it is necessary to throw goods overboard, the loss must be borne in common; there arises, in this case, between the owners of the vessel and of the goods remaining on board, an obligation to bear proportionately the loss which has been sustained. *Lois des Bât.* pt. 2, c. 2, § 2. See ACT OF GOD.

FORTUNA (Lat.). Fortune; also treasure-trove. Jac.; Moz. & W.

FORTUNE-TELLER. One who pretends to be able to reveal future events; one who pretends to the knowledge of futurity.

It was a practice during the Middle Ages, and is still far from dying out, though laws for its suppression have been passed; in England, Stat. 39 Eliz. Ch. 4; in Delaware, Code of 1852, amended 1893; see State v. Durham, 5 Pennewill, 105, 58 Atl. 1024.

FORTUNIUM. **In Old English Law.** A tournament or fighting with spears, and an appeal to fortune therein.

FORTY-DAYS-COURT. The court of attachments (*q. v.*) in the forests.

FORUM. **At Common Law.** A place. A place of jurisdiction. The place where a remedy is sought. Jurisdiction. A court of justice.

Forum actus. The forum of the place where an act was done.

Forum conscientiæ. The conscience.

Forum contentiosum. A court. 3 Bla. Com. 211.

Forum contractus. Place of making a contract. 2 Kent 463.

Forum domesticum. A domestic court. 1 W. Blackst. 82.

Forum domicilii. Place of domicil. 2 Kent 463.

Forum ecclesiasticum. An ecclesiastical court.

Forum ligeantiæ rei. The forum of the allegiance of the defendant.

Forum originis. The forum of birth.

Forum regium. The court of the king. Stat. Westm. 2, c. 43.

Forum rei. This expression is used alternatively for the forum of the defendant's domicil, in which case it is the genitive of *reus*, or the forum of the thing in controversy, when it is the genitive of *res*.

Forum rei gestæ. Place of transaction. 2 Kent 463.

Forum rei sitæ. The place where the thing is situated.

The tribunal which has authority to decide respecting something in dispute, located within its jurisdiction: therefore, if the matter in controversy is land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all matters of right and title on which it professes to decide, in relation to such property. And the same principle applies to all other cases of proceedings *in rem*, where the subject is movable property, within the jurisdiction of the court pronouncing judgment. Story, Confl. Laws §§ 532, 545, 551, 591, 592; Kaimes, Eq. b. 3, c. 8, § 4; 1 Greenl. Ev. § 541.

Forum seculare. A secular court.

In Roman Law. The paved open space in cities, particularly in Rome, where were held the solemn business assemblies of the people, the markets, the exchange (whence *cedere foro*, to retire from 'change, equivalent to "to become bankrupt"), and where the magistrates sat to transact the business of their office. It corresponded to the ἀγορά of the Greeks. Dion. Hal. l. 3, p. 200. It came afterwards to mean any place where causes were tried, *locus exercendarum litium.* Isidor. l. 18, Orig. A court of justice.

The obligation and the right of a person to have his case decided by a particular court.

It is often synonymous with that signification of *judicium* which corresponds to our word court, in

the sense of jurisdiction: *e. g., foro interdicere,* l. 1, § 13, D. 1, 12; C. 9, § 4, D. 48, 19; *fori præscriptio,* l. 7, pr. D. 2, 8; l. 1, C. 3, 24; *forum rei accusator sequitur,* l. 5, pr. C. 3, 13. In this sense the *forum* of a person means both the obligation and the right of that person to have his cause decided by a particular court. 5 Glück, Pand. 237. What court should have cognizance of the cause depends, in general, upon the person of the defendant, or upon the person of some one connected with the defendant.

Jurisdictions depending upon the person of the defendant. By modern writers upon the Roman law, this sort of jurisdiction is distinguished as that of common right, *forum commune,* and that of special privilege, *forum privilegiatum.*

(*A.*) *Forum commune.* The jurisdiction of common right was either general, *forum generale,* or special, *forum speciale.*

(*a.*) *Forum generale.* General jurisdiction was of two kinds, the *forum originis,* which was that of the birthplace of the party, and the *forum domicilii,* that of his domicil. The *forum originis* was either *commune* or *proprium.* The former was that legal *status* which all free-born subjects of the empire, wherever residing, had at Rome when they were found there and had not the *jus revocandi domum* (*i. e.,* the right of one absent from his domicil of transferring to the *forum domicilii* a suit instituted against him in the place of his temporary sojourn). L. 2, §§ 3, 4, 5, D. 5, 1; l. 28, § 4, D. 4, 6; 3 Glück, Pand. 188. After the privilege of Roman citizenship was conferred by Caracalla upon all free-born subjects of the empire, the city of Rome was considered the common home of all, *communis omnium patria,* and every citizen, no matter where his domicil, could, unless protected by special privilege, be sued at Rome while there present. Noodt, Com. ad Dig. 5, 1 p. 153; Hofacker, Pr. Jur. Civ. § 4221. The *forum originis proprium,* or *forum originis speciale,* was the court of that place of which at the time of the party's birth his father was a citizen, though that might possibly be neither his own birthplace nor the actual domicil of his father. Except in particular places, as Delphi and Pontus, where the nativity of the mother conferred the privilege of citizenship upon her son, the birthplace of the father only was regarded. L. 1, § 2, D. 50, 1. The case of the *nullius filius* was also an exception. Such a person having no known father derived his *forum originis* from the birthplace of his mother. L. 9, D. 50, 1.

Adoption might confer a twofold citizenship, that of the natural and that of the adoptive father; l. 7, C. 8, 48; but the latter was lost by emancipation; L. 16, D. 50, 1. In general, the birthplace of the father alone fixed the *forum originis* of the son. Amaya, Com. ad Tit. Cod. *de incolis,* n. 21, *seq.* 99. The *forum originis* was unchangeable, and continued although the party had established his domicil in another place: consequently, he could always be sued in the courts of that jurisdiction whenever he was there present; 6 Glück, Pand. p. 260.

Forum domicilii. The place of the domicil exercised the greatest influence over the rights of the party. (See DOMICIL.) In general, one was subject to the laws and courts of his domicil alone, unless specially privileged. L. 29, D. 50, 1. This legal status, *forum domicilii,* was *universal,* in the sense that all suits of whatever nature, real or personal, petitory or possessory, might be instituted in the courts of the defendant's domicil even when the thing in dispute was not situated within the jurisdiction of such court, and the defendant was not present at such place at the commencement of the suit; 6 Glück, Pand. 287 *et seq.* It seems, however, that as regarded *real* actions the *forum domicilii* was concurrent with the *forum rei sitæ; id.* 290, and, in general, was concurrent with *special* jurisdictions of all kinds; although in some exceptional cases the law conferred exclusive cognizance upon a *special* jurisdiction, *forum speciale.* In cases of concurrence the plaintiff had his election of the jurisdiction.

In another sense the *forum domicilii* was *personal,* as it did not necessarily descend to the heir of defendant. See jurisdiction *ex persona alterius,* at the end of this article.

Forum speciale, particular jurisdiction. These were very numerous. The more important are: (1.) *Forum continentiæ causarum.* Sometimes two or more actions or disputed questions are so connected that they cannot advantageously be tried *separately,* although in strictness they belong to different jurisdictions. In such cases the modern civil law permits them to be determined in a single court, although such court would be incompetent in regard to a portion of them taken singly. This beneficial rule did not exist in the Roman law, though formerly supposed to be derived thence. See 11 Glück, Pand. § 750, and cases there cited. (2.) *Forum contractus,* the court having cognizance of the action on a contract. If the place of performance was ascertained by the contract, the court of that place had exclusive jurisdiction of actions founded thereon; 6 Glück, Pand. 296. If the place of performance was uncertain, the court of the place where the contract was made might have jurisdiction, provided the defendant at the time of the institution of the suit was either present at that place or had attachable property there. *Id.* 298.

(3.) *Forum delicti, forum deprehensionis,* is the jurisdiction of the person of a criminal, and may be the court of the place where the offence was committed, or that of the place where the criminal was arrested. The latter jurisdiction, *forum deprehensionis,* extended at most only to the preliminary examination of the person arrested; and even this was abolished by Justinian, Nov. lxix. c. 1, cxxxiv. c. 5, on the ground that the examination as well as the punishment should take place on the spot where the crime was committed; 6 Glück, Pand. § 517.

(4.) *Forum rei sitæ* is the jurisdiction of the court of that place where is situated the thing which is the object of the action. Such court had jurisdiction over all actions affecting the possession of the thing, and over all petitory actions *in rem* against the possessor in that character, and all such actions *in personam* so far as they were brought for the recovery of the thing itself. But such court had not jurisdiction of purely personal actions. *Id.* § 519.

Forum arresti is a jurisdiction unknown to the Roman law, but of frequent occurrence in the modern civil law. It is that over persons or things detained by a judicial order, and corresponds in some degree to the *attachment* of our practice. *Id.* § 519.

Forum gestæ administrationis, the jurisdiction over the accounts and administration of guardians, agents, and all persons appointed to manage the affairs of third parties. The court which appointed such *administrator,* or wherein the cause was pending in which such appointment was made, or within whose territorial limits the business of the administration was transacted, had exclusive jurisdiction over all suits arising out of his acts or brought for the purpose of compelling him to account, or brought by him to recover compensation for his outlays; L. 1, C. 3, 21; 6 Glück, Pand. § 521.

Privileged jurisdictions, *forum privilegiatum.* In general, the privileged jurisdiction of a person held the same rank as the *forum domicilii,* and, like that, did not supplant the particular jurisdictions above named save in certain exceptional cases. The privilege was general in its nature, and applied to all cases not specially excepted, but it only arose when the person possessing it was sued by another; for he could not assert it when he was the plaintiff, the rule being, *actor sequitur forum rei,* the plaintiff must resort to the jurisdiction of the defendant. It was in general limited to *personal* actions; all *real* actions brought against the defendant in the character of possessor or the thing in dispute followed the *forum speciale.* The privilege embraced the wife of the privileged person and his children so long as they were under his *potestas.* And lastly, when a *forum privilegiatum* purely personal conflicted with the *forum speciale,* the former must yield; 6 Glück, Pand. 339-341. To these rules some exceptions occur, which will be mentioned below.

Privileged persons were: 1. *Personæ miserabiles,* who were persons under the special protection of the law on account of some incapacity of age, sex, mind, or condition. These were entitled, *whether as plaintiffs or defendants,* to carry their causes directly before the emperor, and, passing over the inferior courts, to demand a hearing before his supreme tribunal, whenever they had valid grounds for doubting the impartiality or fearing the procrastination of the inferior courts, or for dreading the influence of a powerful adversary; 6 Glück, Pand. § 522. On the other hand, if their adversary, on any pretext whatever, had himself passed by the inferior courts and applied directly to the supreme tribunal, they were not bound to appear there if this would be disadvantageous to them, but in order to avoid the increase of costs and other inconveniences, might decline answering except before their *forum domicilii.* The *personæ miserabiles* thus privileged were minor orphans, widows, whether rich or poor, persons afflicted by chronic disease or other forms of illness (*diuturno morbo fatigati et debiles*), which included paralytics, epileptics, the deaf, the dumb, and the blind, etc., persons impoverished by calamity or otherwise distressed, and the poor when their adversary was rich and powerful, *præsertim cum alicujus potentiam perhorrescant.* This privilege was, however, not available, when both parties were *personæ miserabiles;* when it had been waived either expressly or tacitly; when the party had become *persona miserabilis* since the institution of the action,—except always the case of reasonable suspicion in regard to the impartiality of the judge; when the party had become *persona miserabilis* through his own crime or fraud; when the cause was trivial, or belonged to the class of unconditionally privileged cases having an exclusive *forum;* and when the cause of action was a right acquired from a *persona non miserabilis.* 6 Glück, Pand. § 522.

Clerici, the clergy. The privilege of clerical persons to be impleaded only in the episcopal courts commenced under the Christian emperors. Justinian enlarged the jurisdiction of these courts, not only by giving them exclusive cognizance of affairs and offences purely ecclesiastical, but also by constituting them the ordinary primary courts for the trial of suits brought against the clergy even for temporal causes of action. Nov. 83, Nov. 123, cap. 8, 21, 22, 23. The causes of action cognizable in the *forum ecclesiasticum* were—1. *causæ ecclesiasticæ mero tales,* purely ecclesiastical, *i. e.,* those pertaining to doctrine, church services, and ceremonies, and right to membership; those relating to the synodical assemblies and church discipline; those relating to offices and dignities and to the election, ordination, translation, and deposition of pastors and other office-bearers of the church, and especially those relating to the validity of marriages and to divorce; or, 2. *causæ ecclesiasticæ mixtæ,* mixed causes, *i. e.,* disputes in regard to church lands, tithes, and other revenues, their management and disbursement, and legacies to pious uses, in regard to the boundaries of ecclesiastical jurisdictions, in regard to patronage and advowsons, in regard to burials and to consecrated places, as graveyards, convents, etc., and, lastly, in regard to offences against the canons of the church, as simony, etc. But the privilege here treated of was the *personal* privilege of the clergy when defendant in a suit to have the cause tried before the episcopal court: when plaintiff, the rule *actor sequitur forum rei* prevailed. All persons employed in the church service in an official capacity, even though not in holy orders, were thus privileged. But the privilege did not embrace *real* actions, nor personal actions brought to recover the possession of a thing: these must be instituted in the *forum rei sitæ.* The jurisdiction extended to all personal actions, criminal as well as civil; although in criminal actions the ecclesiastical courts had no authority to inflict corporeal or capital punishment, being restricted to the canonical judgments of deprivation, degradation, excommunication, etc. 6 Glück, Pand. § 523.

Academici. In the modern civil law the officers and students of the universities are privileged to be sued before the university courts. This species of privilege was unknown to the Roman law. See 6 Glück, Pand. § 524.

Milites. Soldiers had special military courts as well in civil as criminal cases. In civil matters, however, the *forum militare* had preference only over the courts of the place where the soldier defendant was stationed; as he did not forfeit his domicil by absence on military duty, he might always be sued for debt in the ordinary *forum domicilii,* provided he had left there a *procurator* to transact his business for him, or had property there which might be proceeded against. L. 3, C. 2, 51; l. 6, *eodem;* l. 4, C. 7, 53. Besides this, the privilege of the *forum militare* did not extend to such soldiers as carried on a trade or profession in addition to their military service and were sued in a case growing out of such trade, although in other respects they were subject to the military tribunal. L. 7, C. 3, 13. If after an action had been commenced the defendant became a soldier, the privilege did not attach, but the suit must be concluded before the court which had acquired jurisdiction of it. The *forum militare* had cognizance of *personal* actions only. Actions arising out of *real* rights could be instituted only in the *forum rei sitæ.* In the Roman law, ordinary crimes of soldiers were cognizable in the *forum delicti.* The modern civil law is otherwise. 6 Glück, Pand. 418, 421.

There are many classes of persons who are privileged in respect to jurisdiction under the modern civil law who were not so privileged by the Roman law. Such are officers of the court of the sovereign, including ministers of state and councillors, ambassadors, noblemen, etc. These do not require extended notice.

Jurisdiction ex persona alterius. A person might be entitled to be sued in a particular court on grounds depending upon the person of another. Such were—1. *The Wife,* who, if the marriage had been legally contracted, acquired the *forum* of her husband; l. 65, D. 5, 1; l. ult. D. 50, 1; l. 19, D. 2, 1; and retained it until her second marriage; l. 22, § 1, D. 50, 1; or change of domicil; § 93, Voet. Com. ad Pand. D. 5, 1. 2. *Servants,* who possessed the jurisdiction of their master as regarded the *forum domicilii,* and also the *forum privilegiatum,* so far at least as the privilege was that of the class to which such master belonged and was not purely personal, Glück, Pand. § 510 *b.* 3. *The hæres,* who in many cases retained the jurisdiction of his testator. When sued in the character of heir in respect to causes of action upon which suit had been commenced before the testator's death, he must submit to the *forum* which had acquired cognizance of the suit; Ll. 30, 34, D. 5, 1. When the cause of action accrued, but the action was not commenced, in the lifetime of the testator, the heir must submit to *special jurisdictions* to which the testator would have been subjected, as the *forum contractus* or *gestæ administrationis,* especially if personally present or possessing property within such jurisdiction; L. 19, D. 5, 1. But it is even now disputed whether in such case he was bound to submit to the general jurisdiction, *forum domicilii,* or the privileged jurisdiction, *forum privilegiatum,* of his testator; though the weight of the authorities is on the side of the negative; Glück, Pand. § 560 *b.* If the cause of action arose after the death of the testator, as in the case of the *querela inofficiosi testamenti,* of partition, of suits to recover a legacy or to enforce a testamentary trust, the heir must be pursued in his own jurisdiction, *i. e.,* the *forum domicilii* or *forum rei sitæ;* 6 Glück, Pand. 252, and authorities there cited. And, *a fortiori,* if the action against the heir was not in that character, but merely in the capacity of possessor of the thing in dispute, the suit must be brought before the *forum* to which he was himself subject; *id.* p. 251.

FORUTH. A long slip of ground. Cowell.

FORWARDING MERCHANT. A person who receives and forwards goods, taking upon himself the expenses of transportation, for which he receives a compensation from

the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight.

Such a one is not deemed a common carrier, but a mere warehouseman or agent; Roberts v. Turner, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; Platt v. Hibbard, 7 Cow. (N. Y.) 497; see Christenson v. Exp. Co., 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; 2 Wheel. Abr. 142; nor is he an insurer; Hooper v. Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211. He is required to use only ordinary diligence in sending the property by responsible persons; Northern R. Co. v. R. Co., 6 Allen (Mass.) 254; Stannard v. Prince, 64 N. Y. 300. See Story, Bailm. § 502; Brown v. Denison, 2 Wend. (N. Y.) 594; COMMON CARRIERS.

FOSSA (Lat.). **In English Law.** A ditch full of water, where formerly women who had committed a felony were drowned; the grave. Cowell. See FURCA ET FOSSA.

FOSSAGE, FOSSAGIUM. In Old English Law. A composition paid in lieu of the duty of cleaning out and repairing the moat surrounding a fortified town. A tax paid for that work.

FOSSATORUM OPERATIO (Lat.). The service of laboring done by the inhabitants and adjoining tenants, for repair and maintenance of the ditches round a city or town. A contribution in lieu of such work, called *fossagium*, was sometimes paid. Kennett; Cowell.

FOSSATUM. A canal; a moat; a place inclosed by a ditch; a trench.

FOSSELUM. A small ditch. Cowell.

FOSSEWAY, or FOSSE. One of the four great roads of England built by the Romans; so called from the ditch on each side. Trevisa describes it thus: "The first and gretest of the foure weyes is called *fosse*, and stretches oute of the southe into the north, and begynneth from the corner of Cornewaile, and passeth forth by Devenshyre by Somersete, and forth besides Tetbury, upon Cotteswold, besides Coventre, unto Leyster, and so forth, by wylde pleynes towards Newerke, and endeth at Lincoln" (Polychron l. 1, c. xiv.). Wharton. Watling-Street is the best known of them, reaching from Dover to London and to Anglesey in Wales.

FOSTER-LAND. Land given for finding food for any person, as for monks in a monastery. Cowell.

FOSTER-LEAN (Sax.). A nuptial gift; the jointure for the maintenance of a wife. Toml.

FOSTERING. An ancient custom in Ireland, in which persons put away their children to fosterers. Fostering was held to be a stronger alliance than blood, and the foster children participated in the fortunes of their foster fathers. Hallam's Const. Hist. ch. 18; Moz. & W.

FOUND. A person is said to be found within a state when actually present therein, but as applied to a corporation it is necessary that it is doing business in such state through an officer or agent or by statutory authority in such manner as to render it liable then to suit and to constructive or substituted service of process. See Romaine v. Ins. Co., 55 Fed. 751; FOREIGN CORPORATION; SERVICE; NON EST INVENTUS.

FOUNDATION. The establishment of a charity. That upon which a charity is founded and by which it is supported.

This word, in the English law, is taken in two senses, *fundatio incipiens*, and *fundatio perficiens*. As to its political capacity, an act of incorporation is metaphorically called its foundation; but as to its dotation, the first gift of revenues is called the foundation. 10 Co. 23 *a*.

FOUNDER. One who endows an institution. One who makes a gift of revenues to a corporation. 10 Co. 33; 1 Bla. Com. 481.

In England, the king is said to be the founder of all civil corporations; and where there is an act of incorporation, he is called the general founder, and he who endows is called the perficient founder. 1 Bla. Com. 481.

FOUNDERS' SHARES. In English Company Law. Shares issued to the founders of (or vendors to) a public company as a part of the consideration for the business, or concession, etc., taken over, and not forming a part of, the ordinary capital. As a rule, such shares only participate in profits after the payment of a fixed minimum dividend on paid-up capital. Encyc. Dict.

FOUNDEROSUS. Out of repair. Cro. Car. 366.

FOUNDLING. A new-born child abandoned by its parents, who are unknown.

The settlement of such a child is in the place where found. *Foundling hospitals* are charitable institutions which exist in many countries for the care of such children. In England they are regulated by stat. 13 Geo. II. c. 29.

FOUR (Fr.). An oven; kiln; bakehouse. *Four banal* (*banal* of a manner; common), an oven owned by the proprietor of the estate, to which the tenants were obliged to bring their bread for baking. Also the proprietary right to maintain such an oven.

FOUR CORNERS. The four corners of an instrument means that which is contained on the face of it (without any aid from the knowledge of the circumstances under which it was made). This is said to be within its four corners, because every deed is still supposed to be written on one entire skin, and so to have but four corners. Wharton.

FOUR SEAS. The seas surrounding England. These were divided into the Western,

including the Scotch and Irish; The Northern, or North Sea; The Eastern, being the German Ocean; The Southern, being the British Channel. Selden, Mare Clausum, lib. 2, c. 1.

Within the four seas means within the jurisdiction of England; 4 Co. 125; Co. 2d Inst. 252. See LIMITATION.

FOURCHER (Fr. to fork), or FOURCH. In English Law. A method of delaying an action formerly practised by defendants.

When an action was brought against two, who, being jointly concerned, were not bound to answer till both appeared, and they agreed not to appear both in one day, and the appearance of one excused the other's default, who had a day given him to appear with the other: the defaulter, on the day appointed, appeared; but the first then made default: in this manner they *forked* each other, and practised this for delay. See Co. 2d Inst. 250; Booth, Real Act. 16; 3 Holdsw. Hist. E. L. 470, 512.

FOURTEENTH AMENDMENT. The Fourteenth Amendment of the constitution of the United States became a part of the organic law July 28, 1868, and its importance entitles it to special mention.

The resolution of congress proposing the amendment was adopted June 16, 1866, 14 St. L. 358. On July 20, 1868, Secretary Seward issued a proclamation reciting the ratification of the amendment by twenty-nine states, of which two had by legislative action attempted to withdraw such ratification (which attempted withdrawal was declared to be of doubtful and uncertain effect), and declaring the ratification of the amendment if the withdrawing resolutions were of no effect. 15 St. L. 706. On July 21, 1868, a concurrent resolution was adopted by congress, reciting the ratification by the twenty-nine states (making no mention of the efforts at withdrawal by two states, which were included in those enumerated) and declaring the amendment to be a part of the constitution and directing its promulgation as such. Accordingly, July 28, 1868, Secretary Seward issued a second proclamation, reciting the resolution of congress and the proceedings of the state legislatures in detail, with dates, and certifying the adoption of the amendment. 15 St. L. 708.

Scope of the Amendment. Summarizing the several sections of the amendment in order, the first is that of the most general application, and which has mainly engaged the attention of the courts. It creates or at least recognizes for the first time a citizenship of the United States, as distinct from that of the states (see CITIZEN); forbids the making or enforcement by any state of any law abridging the privileges and immunities of citizens of the United States (see PRIVILEGES AND IMMUNITIES); and secures all "persons" against any state action which is either deprivation of life, liberty, or property without due process of law or denial of the equal protection of the laws (see DUE PROCESS OF LAW; EQUAL PROTECTION OF THE LAWS; LIBERTY; PROPERTY; PERSON).

The last clause secures against state action one of the most comprehensive guaranties of the fundamental rights which, in the Vth Amendment as construed by the courts, was secured against action by the federal government.

The other sections are of special application and concern themselves with the results of the civil war.

Section 2 provides for the apportionment of representatives among the states according to population, with the proviso that if any state shall abridge the right to vote "except for participation in rebellion, or other crime," the basis of representation shall be reduced. The question of the bearing of this provision upon the constitutional or statutory qualifications of voters so designed as to discriminate in fact, though not in terms, against any particular class of voters, has not been judicially settled.

It has been decided that this section does not amend Art. II of the constitution, under which the state legislatures have exclusive power to prescribe the manner of appointing electors of president and vice president, and a state law providing for their election by districts is valid; McPherson v. Blacker, 146 U. S. 1, 13 Sup. Ct. 3, 36 L. Ed. 869, affirming 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. Rep. 587.

Section 3 provides for the exclusion from certain federal and state offices of persons who, having taken the oath to support the constitution of the United States, had engaged in insurrection or rebellion, or given aid and comfort to the enemies thereof. This disability is made removable by congress by a two-thirds vote of each house. Whether the creation of this disability was a bar to other punishment was argued in the case of Jefferson Davis, Chase 1, Fed. Cas. No. 3,-621a. The judges differed in opinion, the circuit justice, Chase, being of opinion that the provision of the XIVth Amendment did operate as a bar, and the district judge, Underwood, that it did not. The question was accordingly certified to the Supreme Court, but the matter was not considered there, the indictments having been dismissed after the general amnesty proclamation of December, 1868. So, as the report of the case, *supra*, concluded, "the certificate [of disagreement] rests among the records of the Supreme Court, undisturbed by a single motion for either a hearing or a dismissal." *Id.*

This provision is not self-executing; Griffin's Case, Chase 364, Fed. Cas. No. 5,815; Rothermel v. Meyerle, 136 Pa. 250, 20 Atl. 583, 9 L. R. A. 366; Com. v. Deinno, 20 Pa. Co. Ct. 371. The disability did not operate

at once to vacate offices and render official acts void; In re Griffin, Chase 364, 25 Tex. Supp. 623, Fed. Cas. No. 5,815; but was intended to operate by legislation; *id.;* Powell v. Boon & Booth, 43 Ala. 469. It disqualified any person who held office under the Confederate government as a county attorney; In re Tate, 63 N. C. 308; or a sheriff; Worthy v. Barrett, 63 N. C. 199. The result of the early decision of Chief Justice Chase was the enactment of the legislation known as the enforcement acts. See CIVIL RIGHTS.

Section 4 provides for the validity of the public debt, including that incurred for pensions, and prohibits the assumption or payment by the United States or any state of "any debt or obligation incurred in aid of insurrection or rebellion or any claim for the loss or emancipation of any slave," all such debts or claims being expressly declared void.

A contract to pay in Confederate money is void as being payment of a debt in aid of rebellion; Smith v. Nelson, 34 Tex. 516; but one made in a state in insurrection, if not in aid of rebellion, is valid; Hale v. Wilkinson, 21 Grat. (Va.) 75. That a debt was incurred in violation of this provision, or on any consideration forbidden by the constitution of the United States, is not a matter of judicial notice, but must be pleaded and proved; Keith v. Clark, 97 U. S. 454, 24 L. Ed. 1071.

Section 5 gives power to congress to enforce the amendment by appropriate legislation.

General Principles of Construction. Though the language of the proclamations might suggest some questions respecting the validity of the ratification (Guthrie, XIVth Amdt. 1, note), that question was not afterwards seriously raised in cases before the supreme court involving its construction and it has been uniformly treated as duly incorporated into the constitution; Miller, Const. 655. The adoption of this amendment undoubtedly resulted in broadening the sphere of the federal government and greatly enlarging the jurisdiction of the federal courts. Guthrie, XIVth Amdt.; 1 Burgess, Pol. Sc. & Const. L. 225; 1 Hare, Am. Const. L. 747. Fortunately the supreme court entered upon the duty of defining its limitations and construing its provisions in a spirit of marked judicial impartiality.

The amendment was first authoritatively construed within five years after its adoption, in the Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; and a long line of subsequent cases have served to establish well-settled rules of decision which, although, in some cases, modifying expressions contained in the opinion in the first case, have not departed from its essential principles.

It was judicially recognized that the purpose of the amendment, together with the XIIIth and XVth, was to secure to the colored race in the South the benefit of the freedom accorded to them; Slaughter-House Cases, 16 Wall. (U. S.) 71, 21 L. Ed. 394; Cooley, Const. Lim. 498; in other words to establish the citizenship of the negro; Strauder v. West Virginia, 100 U. S. 303, 26 L. Ed. 664; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Frasher v. State, 3 Tex. App. 263, 30 Am. Rep. 131. By force of it negroes born in the United States are entitled to vote and are protected by the act of May 31, 1870, R. S. § 2004; U. S. v. Canter, 2 Bond 389, Fed. Cas. No. 14,719.

Nevertheless, it was held that it did not follow that "no one else but the negro can share in this protection," but, "if other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply;" Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394; In re Virginia, 100 U. S. 339, 25 L. Ed. 667; Holden v. Hardy, 169 U. S. 366, 382, 385, 18 Sup. Ct. 383, 42 L. Ed. 780; U. S. v. Wong Kim Ark, 169 U. S. 649, 676, 18 Sup. Ct. 456, 42 L. Ed. 890. It is a restriction on the states as distinguished from the restrictions on the federal government in the Vth Amendment; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; Le Grand v. U. S., 12 Fed. 581; Santa Clara County v. R. Co., 18 Fed. 385. It is prohibitory on the states only, but the legislation authorized to be enacted by congress for enforcing it is not *direct* legislation on matters respecting which the states are prohibited from making or enforcing certain laws, or doing certain acts, but it is *corrective* legislation, such as may be necessary or proper for counteracting and reducing the effect of such laws or acts; U. S. v. Stanley, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; see also Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429. In these cases, known as the Civil Rights Cases, sections 1 and 2 of the Civil Rights Act, intended to secure to all persons equal facilities, etc., in inns, public conveyances, theatres, etc., and prescribing penalties for violations, were declared unconstitutional, as direct legislation; *id.* The XIVth and XVth Amendments operate solely on state action and not on individual action; Hodges v. U. S., 203 U. S. 1, 27 Sup. Ct. 6, 51 L. Ed. 65. But indictments were sustained against state officers or persons charged with a duty in the selection of jurors, under section 4 of the act, providing that no person, otherwise qualified, shall be disqualified by race, color, etc.; In re Virginia, 100 U. S. 339, 25 L. Ed. 667. If, however, the states do not conform their legislation to the amendment congress has authority to enforce it by appropriate legislation; U. S. v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290.

The amendment "adds nothing to the rights of one person as against another. It simply furnishes an additional guaranty against any encroachment by the states, upon the fundamental rights which belong to every citizen

as a member of society." This principle controls both clauses, being applied to that securing due process of law and repeated with respect to equal protection of the laws; U. S. v. Cruikshank, 92 U. S. 542, 554, 23 L. Ed. 588. The United States has not conferred the right of suffrage on any one; *id.;* Minor v. Happersett, 21 Wall. (U. S.) 162, 178, 22 L. Ed. 627. The duty of protecting all citizens in the enjoyment of the fundamental rights mentioned in the amendment "was originally assumed by the states; and it still remains there. It does not add to the privileges and immunities of citizens, but only protects those which they already have; Minor v. Happersett, 21 Wall. (U. S.) 162, 22 L. Ed. 627.

The power of congress to protect rights secured by the XIVth Amendment may be grouped in three classes: (1) Denial by state legislation, or hostile acts of state officers, of rights secured by the amendment; (2) congressional interference, regardless of fault on the part of the state, by plenary legislation creating direct rights within the state, to protect a right which is only an immunity to be exempt from invidious discrimination at the hands of the state, and which can never bring any right into being, or authorize any action of congress, unless the state first makes such wrongful discrimination; (3) legislation by congress which confused rights dependent upon the constitution or laws with rights secured only by state laws, entwining them without distinction in the grasp of a statute whose provisions were incapable of separation, thus vitiating the enactment because broader than the power conferred; U. S. v. Powell, 151 Fed. 649.

The "amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty and property rests primarily with the states and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure;" In re Kemmler, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, citing U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, and Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

The only obligation resting on the United States is to see that the states do not deny the right. This the amendment guarantees, but no more; U. S. v. Cruikshank, 92 U. S. 542, 555, 23 L. Ed. 588; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; In re Converse, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796; Morley v. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; McNulty v. California, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; Marchant v. R. Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. The continuous and systematic administration of a state law or municipal ordinance which so operates as to violate the amendment will be corrected. Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Arrowsmith v. Harmoning, 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. Ed. 243; Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Williams v. Mississippi, 170 U. S. 213, 18 Sup. Ct. 583, 42 L. Ed. 1012. It is applicable not only to the state but to all of its instrumentalities and agencies and to the executive and legislative bodies of its cities and counties; In re Virginia, 100 U. S. 339, 25 L. Ed. 667; Ho Ah Kow v. Nunan, 5 Sawy. 552, Fed. Cas. No. 6,546; In re Tiburcio Parrott, 6 Sawy. 349, 1 Fed. 481. It limits the exercise of all the powers of the state which can touch the individual or his property; County of San Mateo v. R. Co., 13 Fed. 722, 8 Sawy. 238; and applies in the case of a law of which the apparent purpose is to make extortion possible and which interferes with the power of congress to regulate intercourse with foreign nations; Chy Lung v. Freeman, 92 U. S. 275, 23 L. Ed. 550.

It was not the intention of the XIVth Amendment to subvert the general and special taxing systems of the states; it affords the same protection against arbitrary state legislation as is afforded by the Vth Amendment against legislation by congress; Detroit v. Parker, 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 917; Tonawanda v. Tyon, 181 U. S. 389, 21 Sup. Ct. 609, 45 L. Ed. 908, where it was said that it was not intended to hold otherwise in Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443; see DUE PROCESS OF LAW. Its prohibitions were not intended to prevent the state from adjusting its system of taxation in all proper and reasonable ways, or from imposing different taxes on different trades, etc.; Armour Packing Co. v. Lacy, 200 U. S. 226, 26 Sup. Ct. 232, 50 L. Ed. 451, where it was held that a license tax on a meat packing house doing both interstate and domestic business applied to the latter only and was not open to review. "It is important for this court to avoid extracting, from the very general language of the XIVth Amendment, a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which it is safe to say that no one then supposed would be disturbed;" Louisville & N. R. Co. v. Pav. Co., 197 U. S. 430, 25 Sup. Ct. 466, 49 L. Ed. 819. Nor was it designed to compel the states to adopt an ironclad rule of equality to prevent classification for taxation; Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. Ed. 744.

"Exact wisdom and nice adaptation of remedies are not required by the XIVth Amendment nor the crudeness nor the impolicy nor even the injustice of state laws redressed by

it." Heath & Milligan Mfg. Co. v. Worst, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236. Its prohibitions are not confined to state action through the legislative, executive or judicial authority, but relate to all instrumentalities through which the state acts; Raymond v. Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757.

In an action properly instituted against a state officer, the XIth Amendment is not a barrier to a judicial inquiry whether the XIVth Amendment has been disregarded by state enactments; the constitution and the amendments are one instrument; Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. Ed. 584 (a bill for an injunction to test the validity of a Nebraska act regulating railroads and the defense was set up that it was in effect a suit against the state).

The constitutional guaranty of a republican form of government to each of the states, however, must be enforced by the political department of the government and cannot be availed of in connection with the XIVth Amendment to obtain a revision by the supreme court of the judgment of the highest court of the state in the case of a contested election of governor and lieutenant governor; Taylor v. Beckham, 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187.

A state is not prohibited by the XIVth Amendment from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject matter, amount, or penalties of their respective judgments; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989.

The mere fact that state legislation is unjust or will result in hardship is not necessarily fatal to it; Mobile County v. Kimball, 102 U. S. 691, 26 L. Ed. 238; Missouri P. Ry. Co. v. Humes, 115 U. S. 512, 520, 6 Sup. Ct. 110, 29 L. Ed. 463; New York & N. E. R. Co. v. Bristol, 151 U. S. 566, 570, 14 Sup. Ct. 437, 38 L. Ed. 269; nor will the federal courts determine the mere question of its expediency; Mobile County v. Kimball, 102 U. S. 691, 704, 26 L. Ed. 238. The sole question to be considered is that of power and not of wisdom; Ex parte McCardle, 7 Wall. (U. S.) 506, 514, 19 L. Ed. 264; Doyle v. Ins. Co., 94 U. S. 535, 541, 24 L. Ed. 148; Soon Hing v. Crowley, 113 U. S. 703, 710, 5 Sup. Ct. 730, 28 L. Ed. 1145; Missouri P. Ry. Co. v. Humes, 115 U. S. 512, 520, 6 Sup. Ct. 110, 29 L. Ed. 463; Mugler v. Kansas, 123 U. S. 623, 661, 8 Sup. Ct. 273, 31 L. Ed. 205; Maynard v. Hill, 125 U. S. 190, 204, 8 Sup. Ct. 723, 31 L. Ed. 654; Minnesota v. Barber, 136 U. S. 313, 319, 10 Sup. Ct. 862, 34 L. Ed. 455; Angle v. R. Co., 151 U. S. 1, 18, 14 Sup. Ct. 240, 38 L. Ed. 55.

As in the Slaughter-House Cases, a difference of opinion as to the scope of the amendment was emphasized by a division of the court into five and four; its purpose and scope was, in the later case of Barbier v. Connolly, declared by Mr. Justice Field, without dissent, in terms having no relation to the race question which had furnished the immediate occasion for its adoption. It was there said that the prohibitions upon state action in the last two clauses of section 1 were undoubtedly intended to prevent the "arbitrary deprivation of life or liberty or arbitrary spoliation of property"; to secure "equal protection and security" under like circumstances in the enjoyment of their personal and civil rights, "the right" to "pursue happiness and acquire and enjoy property," like access to the courts "for protection of persons and property, the prevention and redress of wrongs, and the enforcement of contracts"; that all should be alike exempt from any special impediment to pursuits, or unusual burdens or different punishment. But neither this nor any other amendment was designed to interfere with the police power of the state "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity." Barbier v. Connolly, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923; Butchers' Union Slaughter-House & Live Stock Landing Co. v. Slaughter-House Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169.

In construing the amendment the supreme court has generally refrained from attempting to define the scope of its various provisions except so far as required for the decision of the case in hand, and has adopted by preference the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 104, 24 L. Ed. 616; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

Though securing to the African race the rights of citizenship, it has been doubted whether this amendment adds to those the guaranties contained in the state constitutions any protection to individual rights. It does, however, by making a principle of state constitutional law a part of the United States constitution, make the United States supreme court the final arbiter of alleged violations of those rights; Cooley, Const. Lim. (4th ed.) 361. An accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the XIVth Amendment to any race; Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338, 50 L. Ed. 497. The guaranty of personal rights in the amendment is not confined to citizens, but secures them to every person within the jurisdiction of a state; Fraser v. McConway & Torley Co., 82 Fed. 257; Steed v. Harvey, 18 Utah 367, 54 Pac. 1011, 72 Am. St. Rep. 789.

FOUTGELD. See FOOTGELD.

FOWLS OF WARREN. Such fowls as are preserved under the game-laws in warrens. According to Manwood, these are partridges and pheasants. According to Coke, they are either *campestres*, as partridges, rails, and quails, *sylvestres*, as woodcocks and pheasants, or *aquatiles*, as mallards and herons. Co. Litt. 233. See FREE WARREN.

FOX'S LIBEL ACT. An act passed in England in 1792, which provided that in prosecutions for libel, the jury might give a general verdict of guilty or not guilty upon the whole matter put at issue upon the indictment, and should not be required by the court to find the defendant guilty merely upon proof of the publication of the alleged libel, in the sense ascribed to it in the indictment.

FRACTION OF A DAY. A portion of a day. The dividing a day.

Generally, the law does not allow the fraction of a day, and the day on which an act is done must therefore be either entirely included or excluded; 2 Bla. Com. 141; Raym. 84; State v. Town of Winter Park, 25 Fla. 371, 5 South. 818; President, etc., Portland Bank v. Bank, 11 Mass. 204; Duffy v. Ogden, 64 Pa. 240; In re Welman, 20 Vt. 653, Fed. Cas. No. 17,407; and, therefore, judgments entered on the same day are regarded as entered at the same time, and create liens equal in point of priority; Rockhill v. Hanna, 4 McLean 555, Fed. Cas. No. 11,980; Mechanics' Bank v. Gorman, 8 W. & S. (Pa.) 304; but this is merely a legal fiction, which does not apply where it is necessary to distinguish between the two parts of a day; 3 Burr. 1344; 11 H. L. Cas. 411; and, therefore, it has been said that there is no such general rule of law, but that common sense and common justice sustain the propriety of considering fractions of a day whenever it will promote the purposes of substantial justice; First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. Ed. 766; Grosvenor v. Magill, 37 Ill. 239; Tufts v. Carradine, 3 La. Ann. 430; thus, the bankrupt act of 1841 was repealed by the act of March 3, 1843, which was not signed by the president till the evening of that day; proceedings in bankruptcy begun on the morning of that day were held to have been begun before the passage of the act; Louisville v. Bank, 104 U. S. 475, 26 L. Ed. 775, citing with approval In re Richardson, 2 Sto. 571, Fed. Cas. No. 11,777; tobacco stamped, sold, and removed in the morning of March 3, 1875, was not considered subject to an increased tax-rate imposed by the act of that date, which was not signed by the president until a later hour of that day; Burgess v. Salmon, 97 U. S. 381, 24 L. Ed. 1104, approved in Louisville v. Bank, 104 U. S. 477, 26 L. Ed. 775; where a township voted aid bonds on the morning of an election day in Illinois, at which a constitutional provision was adopted forbidding the issuing of such bonds, the court found as a fact that the township vote was had before the adoption of the constitution, and, therefore, sustained the validity of the bonds; Louisville v. Bank, 104 U. S. 469, 26 L. Ed. 775. But it was held in Re Welman, Fed. Cas. No. 17,407; Wood v. Fort, 42 Ala. 641; that an act is in force all of the day in which it was approved; and in New York that an act is not in force until the day after its approval; In re Foley, 8 Misc. 57, 28 N. Y. Supp. 608.

Although the law does not generally consider fractions of a day, yet when substantial justice requires it, courts may ascertain the precise time when a statute is approved or an act done; Taylor v. Brown, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. Ed. 313. In U. S. v. Norton, 97 U. S. 170, 24 L. Ed. 907, following Lapeyre v. U. S., 17 Wall. (U. S.) 191, 21 L. Ed. 606, the court held that the president's proclamation of June 13, 1865, removing restrictions upon trade, etc., took effect as of the beginning of that day and refused to consider the fraction of a day. In computing the time for the performance of official duties, each fraction of a day is to be considered as a full day.

The doctrine applies chiefly, if not entirely, to judicial and other public proceedings, and not to transactions of parties whose priority of right becomes a question of fact; Maynard v. Esher, 17 Pa. 222. Thus judgments entered on the same day have equality of lien; In re Boyers' Estate, 51 Pa. 432, 91 Am. Dec. 129; so of liens; Appeal of Hendrickson, 24 Pa. 363; but a mortgage recorded on the same day as the entry of a judgment, but earlier in the day, has priority; First Nat. Bank v. Burkhardt, 100 U. S. 689, 25 L. Ed. 766, citing Follett v. Hall, 16 Ohio 111, 47 Am. Dec. 365. Service of a declaration on the same day as filing, but earlier in the day, is good; Rusk v. Van Benschoten, 1 How. Pr. (N. Y.) 149. See FROM; AGE; TIME; DAY; INFANT; MAJORITY.

FRACTITIUM. Arable land. Toml.

FRACTURA NAVIUM. Breaking up of ships or wreck of shipping at sea. Very like *naufrage (q. v.)*.

FRAIS DE JUSTICE. Costs incurred incidentally to the action. See 1 Troplong, 135, n. 122; 4 Low. C. 77. *Frais d'un procès.* Costs of a suit.

FRAIS JUSQU'À BORD (Fr.). In French Commercial Law. Expenses up to the time that goods are actually shipped on board of a vessel, including such items as packing, porterage, or cartage, commissions, etc. Bartels v. Redfield, 16 Fed. 336. A shipment on which the seller pays the *frais jusqu'à bord*, would correspond to a sale of the goods "free on board" *(q. v.)*

FRANC. A French coin, of the value of about twenty cents.

FRANC ALEU. In French Law. An absolutely free inheritance. Allodial lands.

Land freely and absolutely owned, not held. 2 Holdsw. Hist. E. L. 66; Vinogradoff, Engl. Soc. 236. It is said that, generally, the word denotes an inheritance free from seignorial rights, though held subject to the sovereign. Dumoulin, *Cout. de Par.* § 1; Guyot, Rép. Univ.; 3 Kent 498, n.; 8 Low. C. 95.

FRANC TENANCIER. In French Law. A freeholder.

FRANCE. A republic of Europe. The National Assembly, February 17, 1871, declared itself the depositary of sovereign power, and in August elected M. Thiers president. The law of February 25, 1875, with a second law voted soon after and a third on July 16, 1876, and with modifications voted in 1879 and 1884, forms the present constitution. The executive is a president who appoints the ministry. The legislative department is vested in a national assembly, composed of a senate, elected by an electoral college, tracing back to universal suffrage, for nine years, and a chamber of deputies, elected by universal suffrage for a term of four years. The president is elected for seven years by the senate and chamber of deputies. He initiates legislation concurrently with the two houses and makes all civil and military appointments. All his acts must be countersigned by a minister, and he cannot declare war without the previous consent of the two chambers. With the consent of the senate he may dissolve the chamber of deputies, but in such an event there must be a new election held within three months. The ministry is chiefly chosen from the two chambers. They can sit in both chambers and address them, but cannot vote unless they are members of the house. See Poincaré, How France is Governed; COURTS OF FRANCE.

FRANCHILANUS. A freeman. Chart. Hen. IV. A free tenant. Spel. Gloss.

FRANCHISE. A special privilege conferred by government on individuals, and which does not belong to the citizens of the country generally by common right. Ang. & A. Corp. § 4; Abbott v. Refining Co., 4 Neb. 416, 420.

A certain privilege conferred by grant from government and vested in individuals. 3 Kent 458.

A royal privilege or branch of the king's prerogative subsisting in the hands of a subject. Finch 1. 164; 2 Bla. Com. 37; 3 Cruise, Dig. 278; Bank of Augusta v. Earle, 13 Pet. (U. S.) 595, 10 L. Ed. 274; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

Maitland (Domesday and Beyond 43) finds in the history of early English tenures a universality of oppressive services which literally made life a burden to the average land-holder, considers the first use of the terms "liberty" and "franchise" to be an expression of the relief of the possessor from some part of this burden. He says: "Lastly in our thirteenth century we learn that privileges and exceptional immunities are 'liberties' and 'franchises.' What is our definition of a liberty, a franchise? A portion of royal power in the hands of a subject. In Henry III.'s day we do not say that the Earl of Chester is a freer man, more of a *liber homo*, than is the Earl of Gloucester, but we do say that he has more, greater, higher liberties."

The right or privilege of being a corporation, and of doing such things, and such things only, as are authorized by the corporation's charter. Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492.

"The word franchise is generally used to designate a right or privilege conferred by law. What is called 'the franchise of forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed is a franchise." Horton, C. J., in State v. Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166.

It is a privilege emanating from the sovereign power of the state, owing its existence to a grant or, as at common law, to prescription, which presupposes a grant, and vested in individuals or a body politic something not belonging to the citizen of common right. Hazelton Boiler Co. v. Boiler Co., 137 Ill. 231, 28 N. E. 248.

Commenting on Blackstone's definition, Thompson says: "It has been well observed that, under our American systems of government and laws, this definition is not strictly correct; since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit as well as of individual advantage." 4 Thomp. Corp. § 5335.

There are two franchises, distinct in their nature, and yet governed by substantially the same rules as to grant and exercise, which may be enjoyed by a corporation. One is the franchise of being or existing as a corporation, that is, possessing a unity and continuity of existence, though composed of an aggregate of changing members; the other is the exercise of rights, like the right of eminent domain or the partial appropriation of public property by exclusive use, as in ferries. Either of these franchises is a branch of sovereignty. 1 Bouv. Inst. 1690; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965.

"Franchise" means the right of a corporation to exist as such, which right does not partake of the incidents of property, and it also means the right of an existing corporation to carry on a particular enterprise, which right is property; Blackrock Copper Min. & Mill. Co. v. Tingey, 34 Utah 369. 98

Pac. 180, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

"Corporate franchises are legal estates vested in the corporation itself as soon as it is *in esse*. They are not mere naked powers granted to the corporation, but powers coupled with an interest which vest in the corporation, upon the possession of its franchise, and whatever may be thought of the corporators, it cannot be denied that the corporation itself has a legal interest in such franchise." Society for Savings v. Coite, 6 Wall. (U. S.) 594, 606, 18 L. Ed. 897.

A franchise to be a corporation, however, is distinct from a franchise to maintain and operate a railway; the latter may be mortgaged, without the former, and pass to a purchaser at foreclosure sale; Memphis & L. R. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. Ed. 837.

The grant of letters patent for an invention is said to be a franchise; (1891) 2 Q. B. 263; and so is a charter of incorporation from the state; State v. Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385.

To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant; State v. Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Dike v. State, 38 Minn. 366, 38 N. W. 95.

In a case already cited it is said that a franchise, or the right to be and act as an artificial body, is vested *in the individuals* who compose the corporation, and not in the corporation itself; Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492. "But this," it is said, "is an imperfect statement of the true conclusion,—which is, that a *primary franchise*, that is to say, *the franchise of being a corporation*, vests in the individuals who compose the corporation; while those *secondary franchises* which are *vendible* by the corporation, necessarily, and for that reason alone, must be deemed to vest in the corporation. However, judicial theory is so confused on the subject, that proceedings by information in the nature of a *quo warranto*, to vacate the franchises of corporations, are sometimes brought against the individuals who compose the corporation, and sometimes against the corporation itself." 4 Thomp. Corp. § 5337.

Franchises are only grantable by the sovereign power, and in the U. S. they are usually held by corporations created for the purpose, and can be held only under legislative grant; In re Fay, 15 Pick. (Mass.) 243; Chicago City Ry. Co. v. People, 73 Ill. 541; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. Ed. 274; People v. Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; and may be accompanied with such conditions as its legislature may judge most befitting to its interest and policy; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164.

Where a corporation is created with power to use the streets of a city, upon the consent of the city, and by ordinance such consent is granted, the grant is a license and not a franchise; City of Chicago v. Tel. Co., 230 Ill. 157, 82 N. E. 607, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109; so of a telephone company; Dakota Cent. Tel. Co. v. City of Huron, 165 Fed. 226.

A franchise to lay pipes and conduits or erect poles and supply the inhabitants of a city with artificial light is an incorporeal hereditament—is real estate in the nature of an easement, pertaining to the streets of a city in which it is exercisable. It is inseparably annexed to the soil and has a local situation only in the place where the right is actually exercised; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

That franchises requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies, constitute a property fixed and immovable in its character, like realty, is, in contemplation of law, real property—an easement appurtenant to the streets is held in People v. O'Brien, 111 N. Y. 46, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; City of Chicago v. Baer, 41 Ill. 306; Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

The state is presumed to grant corporate franchises in the public interest, and to intend that they shall be exercised through the proper officers and agencies of the corporation, and does not contemplate that corporate powers will be delegated to others. Any conduct which destroys their functions, or maims or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchise, is contrary to a sound public policy; McCutcheon v. Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

Persons or corporations enjoying public franchises and engaged in a public employment owe a duty to the public; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; or to individuals who, in compliance with established customs or rules, make demands upon them for the beneficial use of the privileges and advantages due to the public by reason of the aid so given by public authority; Coy v. Gas Co., 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535, where the failure of a natural gas company to supply gas to a consumer was held to be a tort as well as a breach of contract.

The grant of a franchise by the legislature

is a contract and cannot be resumed by the state or its benefits impaired or diminished without the consent of the parties; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 519, 4 L. Ed. 629; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; 3 Kent Com. 458; it is within the protection of that clause of the United States constitution which forbids the states from impairing the obligation of contracts; Union Bank of Tennessee v. State, 9 Yerg. (Tenn.) 490; Oliver v. R. Co., 30 Ark. 128; St. Louis, I. M. & S. Ry. v. Loftin, *id.* 693; but this does not apply to mere personal privileges to members of a corporation, such as the exemption of a servant of such body from militia duty, or serving on juries, etc.; Neely v. State, 4 Lea (Tenn.) 316; such an exemption was held in this case unconstitutional; *contra*, Johnson v. State, 88 Ala. 176, 7 South. 253, where such an exemption was held part of the franchise granted to the corporation; and it may become a vested right which cannot be taken away by subsequent legislation; Ex parte Goodin, 67 Mo. 637 (overruling In re Powell, 5 Mo. App. 220). Franchises (of public service corporations) are property; Willcox v. Gas Co., 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034. See IMPAIRING THE OBLIGATION OF CONTRACTS.

By the constitution or laws of many states, charters can only be granted subject to amendment or repeal. As to the power of the legislature in such cases, see Mayor, etc., of Worcester v. Norwich, 109 Mass. 103; Railroad Com'rs v. R. Co., 63 Me. 269, 18 Am. Rep. 208; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; Hamilton Gas Light Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; but municipal franchises are entirely under the control of the legislature; Cooley, Const. Lim. 336; Baltimore & S. R. Co. v. Nesbit, 10 How. (U. S.) 402, 13 L. Ed. 469; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Georgia R. & Banking Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377.

The grant of a franchise is construed strictly and in case of doubt most favorably to the public; Oregon R. & Nav. Co. v. R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; Talcott Mountain Turnpike Co. v. Marshall, 11 Conn. 185; Rockland Water Co. v. Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388; Bartram v. R. Co., 25 Cal. 283; East Line & R. R. R. Co. v. Cushing, 69 Tex. 306, 6 S. W. 834; Justices of Inferior Court of Pike County v. Plank-Road Co., 9 Ga. 475; Indianapolis Cable St. R. Co. v. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539; and in the absence of doubt the obvious meaning of the words is to be followed; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Birmingham & Pratt M. St. R. Co. v. St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615; such a grant is not held to be exclusive unless from its nature a presumption arises that it was so intended; Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 11 Pet. (U. S.) 420, 9 L. Ed. 773; Dyer v. Bridge Co., 2 Port. (Ala.) 296, 27 Am. Dec. 655; White River Turnpike Co. v. R. Co., 21 Vt. 590; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 40, 42 Am. Dec. 716; *id.* 17 Conn. 454, 44 Am. Dec. 556; Mohawk Bridge Co. v. R. Co., 6 Paige (N. Y.) 554; nor is a proviso to be so interpreted as to defeat the grant; Whitaker v. Canal Co., 87 Pa. 34.

Franchises are held subject to the exercise of the right of eminent domain.

See EMINENT DOMAIN; FERRY.

They are also said to be liable for the debts of the owner; 2 Washb. R. P. 24; but it is the general rule that they cannot be levied upon and sold under execution without authority or statute; New Orleans, S. F. & L. R. R. Co. v. Delamore, 34 La. Ann. 1225; Arthur v. Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719; Baxter v. Turnpike Co., 10 Lea (Tenn.) 488; though it may be otherwise provided by statute; Philadelphia & B. C. R. Co. v. Company's Appeal, 70 Pa. 355. See McNeal Pipe & Foundry Co. v. Howland, 111 N. C. 615, 16 S. E. 857, 20 L. R. A. 743; Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199. See as to levy on franchises, 4 Am. & Eng. Corp. Cas. 138; 15 Am. Dec. 595, note.

As a general rule franchises cannot be sold or assigned without the consent of the legislature; Moraw. Priv. Corp. 930; Youngman v. R. Co., 65 Pa. 278; Randolph v. Larned, 27 N. J. Eq. 557; Chollette v. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. Legislative consent to the transfer is not alone sufficient. There must be a release from the obligations of the company to the public; Chollette v. R. Co., 26 Neb. 159, 41 N. W. 1106, 4 L. R. A. 135. The primary franchise to be a corporation, and such others as involve the performance of public duties are inalienable; Com. v. Smith, 10 Allen (Mass.) 448, 459, 87 Am. Dec. 672; Pierce v. Emery, 32 N. H. 484; Appeal of Stewart, 56 Pa. 413; State v. Coal Co., 46 Md. 1; Pearce v. R. Co., 21 How. (U. S.) 441, 16 L. Ed. 184; Pullan v. R. Co., 4 Biss. 35, Fed. Cas. No. 11,461; International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; 11 C. B. 775; Naglee v. R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. Rep. 308; Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950.

The secondary franchises of a quasi-public corporation cannot be aliened without legislative authority; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55; 6 H. L. Cas. 113; Atlantic & P. Telegraph Co. v. Ry. Co., 1 Fed. 745, 1 McCrary 541; Central Branch U. P. R. Co. v. Telegraph Co., 3 Fed. 417; Western Union Telegraph Co. v. Ry. Co., 3 Fed. 423, 430. The same principles apply to a mortgage or lease of a franchise, see cases cited, and also, Black v. Canal Co., 24 N. J. Eq. 455; Middlesex R. Co. v. R. Co., 115

Mass. 347; Thomas v. R. Co., 101 U. S. 71, 25 L. Ed. 950. The power to sell includes the power to mortgage; Willamette Woolen Mfg. Co. v. Bank, 119 U. S. 191, 7 Sup. Ct. 137, 30 L. Ed. 384.

The franchises which pass by a judicial sale of a railroad and franchises are those which are essential to the operation of the corporation but do not include such special privileges as an exemption from taxation; Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860. A corporation having public duties cannot transfer a portion of them; Board of Com'rs of Tippecanoe Co. v. R. Co., 50 Ind. 85; but the attempt to divide the franchise only concerns the public and cannot be objected to by a rival company; Oakland R. Co. v. R. Co., 45 Cal. 365, 13 Am. Rep. 181. An irrigation company may make a valid conveyance of all its property and right of way; State v. Canal Co., 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365.

A state has power to tax the franchises of a corporation at a different rate from tangible property in the state, so far as the United States constitution is concerned; Coulter v. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615.

See, generally, as to the sale of franchises, 4 Thomp. Corp. ch. cxvi.; as to their constitutional protection see the IMPAIRING OF OBLIGATION OF CONTRACTS; as to their control and regulation by the state, see POLICE POWER; as to the regulation of tolls and charges, see RATES; and as to their taxation, see that title.

The remedy for a non-user or misuser of a franchise by a corporation duly created and organized is by *quo warranto* or *scire facias*, which titles see. A court of equity will not in such case interfere or declare the franchise to be forfeited; Attorney General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; but see 4 Thomp. Corp. § 4538. Where a franchise is asserted in a proceeding to claim a right under it, its existence may be denied by way of defence; Zanesville v. Gas-Light Co., 47 Ohio St. 1, 23 N. E. 55. But a franchise set up by a corporation in defence, if it is in *de facto* possession of it, cannot be disputed except by a person or corporation who in the proceeding claims a better title; Weaverville & Minersville Wagon Road Co. v. Trinity County, 64 Cal. 69, 28 Pac. 496. See also as to *quo warranto* for misuser, People v. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 48; and as to compulsory exercise of franchises, Rushville v. Gas Co., 132 Ind. 575, 28 N. E. 853, 15 L. R. A. 321.

See FORFEITURE; DISSOLUTION; MANDAMUS.

In a popular sense, franchise is used synonymously with right or privilege; as, the elective franchise.

FRANCIGENA. Born in France. A designation formerly given to aliens in England.

FRANCUS. Free; a freeman; a Frank. Spel. Glos.

Francus bancus. Free bench (*q. v.*).

Francus homo. A freeman.

Francus plegius. Frank pledge (*q. v.*).

Francus tenens. A freeholder. See ESTATE OF FREEHOLD.

FRANK. In Old English Law. Free. Usually employed in compounds, as *frank-bank*, free bench (*q. v.*).

To send letters and other mail matter free of postage. See FRANKING PRIVILEGE.

FRANK-CHASE. A liberty or right of free chase. Cowell.

FRANK-FEE. Lands not held in ancient demesne. Called "lands pleadable at common law." Reg. Orig. 12, 14; Fitzh. N. B. 161; *Termes de la Ley.*

That which a man holds to himself and his heirs and not by such service as is required in ancient demesne, according to the custom of the manor. The opposite of copyhold. Cowell. A fine had in the king's court might convert demesne-lands into frank-fee; 2 Bla. Com. 368.

FRANK-FERME. Lands or tenements where the nature of the *fee* is changed by *feoffment* from knight's service to yearly service and whence no homage but such as is contained in the feoffment may be demanded. Britton, c. 66, n. 3; Cowell; 2 Bla. Com. 80.

FRANK-FOLD. The right of the lord to fold his tenant's sheep for manuring the land. *Termes de la Ley;* Cowell; Keilw. 198. See FOLDAGE.

FRANK-LAW. An obsolete expression signifying the rights and privileges of a citizen, and seeming to correspond to our term "civil rights."

FRANK-MARRIAGE. A species of estate-tail where the donee had married one of kin (as daughter or cousin) to the donor and held the estate subject to the implied condition that the estate was to descend to the issue of such marriage. On birth of issue, as in other cases of estate-tail before the statute *De donis*, the birth of issue was regarded as a condition performed, and the estate thereupon became alienable by the donee; 1 Cruise, Dig. 71; 1 Washb. R. P. 67.

The estate is said to be in frank-marriage because given in consideration of marriage and free from services for three generations of descendants; Blount; Cowell. See, also, 2 Bla. Com. 115; 1 Steph. Com. 232.

FRANK-PLEDGE. A pledge or surety for freemen. *Termes de la Ley.* Also called FRITHBORH.

The bond or pledge which the inhabitants of a tithing entered into for each one of

their number that he should be forthcoming to answer every violation of law. Each boy, on reaching the age of fourteen, was obliged to find some such pledge, *or be committed to prison;* Blount; Cowell; 1 Bla. Com. 114. See VIEW OF FRANK PLEDGE; TITHING; VILL.

It was in force in Pennsylvania; Meyers, Immigr. of Quakers.

FRANK-TENEMENT. A freehold. See LIBERUM TENEMENTUM.

FRANKALMOIN, FRANKALMOIGNE. A species of ancient tenure, in England, whereby a religious corporation, aggregate or sole, holds its lands of the donor, in consideration of the religious services it performs. The tenant holds in "free alms." It came to mean a gift to a religious person or body. 3 Holdsw. Hist. E. L. 27.

The services rendered being divine, the tenants are not bound to take an oath of fealty to a superior lord. A tenant in frankalmoigne is not only exempt from all temporal service, but the lord of whom he holds is also bound to acquit him of every service and fruit of tenure which the lord paramount may demand of the land held by this tenure. The services to be performed are either spiritual, as prayers to God, or temporal, as the distribution of alms to the poor. Of this latter class is the office of the queen's almoner, which is usually bestowed upon the Archbishop of York, with the title of Lord High Almoner. The spiritual services which were due before the Reformation are described by Littleton § 135; since that time they have been regulated by the liturgy or Book of Common Prayer of the Church of England; Co. 2d Inst. 502; Co. Litt. 93, 494 *a*. Hargr. ed. note (b); 2 Bla. Com. 101.

After Edward I. this tenure became of diminishing importance, due to the statutes of mortmain and *quia emptores;* the former prevented indiscriminate gifts of land to the religious; the latter forbade subinfeudation. 3 Holdsw. Hist. E. L. 29.

In the United States religious corporations hold land by the same tenure as other corporations and persons; some states by statute limit the quantity which they may hold.

FRANKING PRIVILEGE. The privilege of sending certain matter through the public mails without payment therefor.

It was first claimed by the house of commons in 1660, and was confirmed by statute in 1764. On the establishment of the penny postage in 1840 it was abolished. See 1 Bla. Com. 323; 2 Steph. Com. 632.

It was formerly enjoyed by various officers of the federal government, including members of both houses of congress, theoretically for the public good.

By the act of January 31, 1873, the franking privilege was abolished from and after July 1, 1873, and the act of March 3, 1873, repealed all laws permitting the transmission by mail of any free matter whatever. The act of March 3, 1875, s. 5, permits members of congress to send free public documents and acts; a qualified exercise of the privilege has been extended to certain officials, where public convenience seemed to require it. By act of March 3, 1877, it is made lawful to transmit through the mail free of postage, any letters, packages, or other matters relating exclusively to the business of the United States, provided that every such letter or package bears over the words "Official Business," an endorsement showing the name of the department or bureau from whence transmitted. This provision was extended by act of March 3, 1879, to all officers of the government and made applicable to all official mail matter. By the act of January 12, 1895, members of congress are entitled to send through the mails free, under their frank, any mail matter to any government official or to any person, correspondence not exceeding one ounce in weight, upon official or departmental business. They may also frank the Congressional Record or any part thereof. U. S. R. S. 1 Supp. 70. By act of April 28, 1904, the vice president and members, members-elect, delegates and delegates-elect may send free any mail matter to any government official, or to any person correspondence not exceeding four ounces in weight, upon official or departmental business. By act of June 26, 1906, lending the privilege to any committee or organization is forbidden.

FRANKLEYN (spelled, also, *Francling* and *Franklin*). A freeman; a freeholder; a gentleman; *francus homo.* Blount; Cowell.

FRASSETUM. A wood or wood ground where ash trees grow. Co. Litt. 4 b.

FRATER (Lat.). Brother.

Frater consanguineus. A brother born from the same father, though the mother *may* be different.

Frater nutricius. A bastard brother.

Frater uterinus. A brother who has the same mother but not the same father. Blount; 2 Bla. Com. 232.

Fratres conjurati. Sworn brothers or companions for the defence of their sovereign or for other purposes. Hoved. 445.

Fratres pyes. Certain friars who were accustomed to wear white and black garments. Walsingham 124. See BROTHER.

FRATERIA. A fraternity, brotherhood, or society of religious persons, who were mutually bound to pray for the good health and life, etc., of their living brethren, and the souls of those that were dead. Cowell.

FRATERNAL ASSOCIATIONS. See ASSOCIATIONS.

FRATERNIA. A fraternity or brotherhood.

FRATERNITY. A body of men associated for business, pleasure, or social intercourse, by some common tie, either natural, as of the like business, interest or character, or formal, as for religious or social purposes.

"Some people of a place united together, in respect of a mystery and business, into a company." 1 Salk. 193.

FRATRIAGE. A younger brother's inheritance.

FRATRICIDE. One who has killed a brother or sister; also the killing of a brother or sister. Black, L. Dict

FRAUD. An endeavor to alter rights, by deception touching motives, or by circumvention not touching motives. Bigelow, Fraud 5.

Fraud is sometimes used as a term synonymous with *covin*, *collusion*, and *deceit*, but improperly so. *Covin* is a secret contrivance between two or more persons to defraud and prejudice another of his rights. *Collusion* is an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. *Deceit* is a fraudulent contrivance by words or acts to deceive a third person, who, relying thereupon, without carelessness or neglect of his own, sustains damages thereby. Co. Litt. 357 *b*; Bacon, Abr. *Fraud*.

Actual or positive *fraud* includes cases of the intentional and successful employment of any cunning, deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186.

For instance, the misrepresentation by word or deed of material facts, by which one exercising reasonable discretion and confidence is misled to his injury, whether the misrepresentation was known to be false, or only not known to be true, or even if made altogether innocently; the suppression of material facts which one party is legally or equitably bound to disclose to another; all cases of unconscientious advantage in bargains obtained by imposition, circumvention, surprise, and undue influence over persons in general, and especially over those who are, by reason of age, infirmity, idiocy, lunacy, drunkenness, coverture, or other incapacity, unable to take due care of and protect their own rights and interests; bargains of such an unconscionable nature and of such gross inequality as naturally lead to the presumption of fraud, imposition, or undue influence, when the decree of the court can place the parties *in statu quo;* cases of surprise and sudden action, without due deliberation, of which one party takes advantage; cases of the fraudulent suppression or destruction of deeds and other instruments, in violation of, or injury to, the rights of others; fraudulent awards with intent to do injustice; fraudulent and illusory appointments and revocations under powers; fraudulent prevention of acts to be done for the benefit of others under false statements or false promises; frauds in relation to trusts of a secret or special nature; frauds in verdicts, judgments, decrees, and other judicial proceedings; frauds in the confusion of boundaries of estates and matters of partition and dower; frauds in the administration of charities; and frauds upon creditors and other persons standing upon a like equity, are cases of actual fraud. 1 Story, Eq. Jur. c. 6.

Legal or *constructive fraud* includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.

Thus, for instance, contracts against some general public policy or fixed artificial policy of the law; cases arising from some peculiar confidential or fiduciary relation between the parties, where advantage is taken of that relation by the person in whom the trust or confidence is reposed, or by third persons; agreements and other acts of parties which operate virtually to delay, defraud, and deceive creditors; purchases of property, with full notice of the legal or equitable title of other persons to the same property (the purchaser becoming, by construction, *particeps criminis* with the fraudulent grantor); and voluntary conveyances of real estate, as affecting the title of subsequent purchasers; 1 Story, Eq. Jur. c. 7. See Bisph. Eq. 205.

According to the civilians, *positive* fraud consists in doing one's self, or causing another to do, such things as induce the opposite party into error, or retain him there. The intention to deceive, which is the characteristic of fraud, is here present. Fraud is also divided into that which has induced the contract, *dolus dans causam contractui*, and incidental or accidental fraud. The former is that which has been the cause or determining motive of the contract, that without which the party defrauded would not have contracted, when the artifices practised by one of the parties have been such that it is evident that without them the other would not have contracted. *Incidental* or *accidental* fraud is that by which a person, otherwise determined to contract, is deceived on some accessories or incidents of the contract,—for example, as to the quality of the object of the contract, or its price,—so that he has made a bad bargain. Accidental fraud does not, according to the civilians, avoid the contract, but simply subjects the party to damages. It is otherwise where the fraud has been the determining cause of the contract, *qui causam dedit contractui:* in that case the contract is void. Toullier, Dr. Civ. Fr. liv. 3, t. 3, c. 2, n. § 5, n. 86, *et seq.*

What constitutes fraud. 1. It must be such an appropriation as is not permitted by law. 2. It must be with knowledge that the property is another's, and with design to deprive him of it. 3. It is not in itself a crime, for want of a criminal intent; though it may become such in cases provided by law. See Poll. Contr. 534.

Fraud, in its ordinary application to cases of contracts, includes any trick or artifice employed by one person to induce another to fall into or to detain him in an error, so that he may make an agreement contrary to his interest; and it may consist in misrepresenting or concealing material facts, and may be effected by words or by actions.

See Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another, or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term; Barnard v. Iron Co., 85 Tenn. 139, 2 S. W. 21. It must relate to facts then existing or which had previously existed; Adams v. Schiffer, 11 Colo. 15, 17 Pac. 21, 7 Am. St. Rep. 202; Gray v. Mfg. Co., 127 Ill. 187, 19 N. E. 874. If a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statements with knowledge of its falsity; Hexter v. Bast, 125 Pa. 52, 17 Atl. 252, 11 Am. St. Rep. 874; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769; Middleton v. Jerdee, 73 Wis. 39, 42 N. W. 629; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802, 13 Am. St. Rep. 425; Swayne v. Waldo, 73 Ia. 749, 33 N. W. 78, 5 Am. St. Rep. 712.

While on the one hand, the courts have aimed to repress the practice of fraud, on the other, they have required that before relieving a party from a contract on the ground of fraud, it should be made to appear that on entering into such contract he exercised a due degree of caution. *Vigilantibus, non dormientibus, subveniunt leges.* A misrepresentation as to a fact the truth or falsehood of which the other party has an opportunity of ascertaining, or the concealment of a matter which a person of ordinary sense, vigilance, or skill might discover, does not in law constitute fraud. See Andrus v. Smelting Co., 130 U. S. 648, 9 Sup. Ct. 645, 32 L. Ed. 1054. The party must not be indolent; 49 Ind. 427. Misrepresentation as to the legal effect of an agreement does not avoid it as against a party whom such misrepresentation has induced to enter into it, —every man being presumed to know the legal effect of an instrument which he signs or of an act which he performs; Ans. Contr. 154. But see Labbe v. Corbett, 69 Tex. 503, 6 S. W. 808. See MISREPRESENTATION.

An intention to violate entertained at the time of entering into a contract, but not afterward carried into effect, does not vitiate the contract; per Tindal, C. J., 2 Scott 588; 4 B. & C. 506; per Parke, B., 4 M. & W. 115, 122; but making a promise as an inducement to a contract, with no intention of performing it, constitutes a fraud for which the contract may be rescinded; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382, 12 Am. St. Rep. 29; Albitz v. Ry. Co., 40 Minn. 476, 42 N. W. 394; Mutual Reserve Life Ins. Co. v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; but see Murray v. Smith, 42 Ill. App. 548. When one person misrepresents or conceals a material fact which is peculiarly within his own knowledge, or, if it is also within the reach of the other party, as a device to induce him to refrain from inquiry, and it is shown that the concealment or other deception was practised with respect to the particular transaction, such transaction will be void on the ground of fraud; 6 Cl. & F. 232; per Tindal, C. J., 3 M. & G. 446, 450. See Emmons v. Moore, 85 Ill. 304; Young v. Hughes, 32 N. J. Eq. 372; 12 Ves. 78. And even the concealment of a matter which may disable a party from performing the contract is a fraud; 9 B. & C. 387.

Misrepresentations must be fraudulently and intentionally made, or so recklessly as to be equivalent to fraud; Pittsburgh Life & Trust Co. v. Ins. Co., 148 Fed. 674, 78 C. C. A. 408; there must be moral turpitude or recklessness and carelessness; Furnas v. Friday, 102 Ind. 129, 1 N. E. 296. It is held that there must be an intent to deceive; Jolliffe v. Collins, 21 Mo. 338; Summers v. Ins. Co., 90 Mo. App. 691; but in Bishop v. Seal, 87 Mo. App. 256, it was held that actual intent is not a necessary element; and in Texas Cotton Products Co. v. Denny Bros. (Tex.) 78 S. W. 557, that intent is not a necessary element, if the misrepresentation was of a character calculated to deceive. In Michigan it is held that a misrepresentation, though made innocently and without intent to mislead, gives a right of action if the other party was misled; Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497.

If the misrepresentation is made without knowledge of the transaction, but it is represented to be within the party's knowledge, it is a fraud; Upchurch v. Mizell, 50 Fla. 456, 40 South. 29; so if it was of a fact within the party's means of knowledge and he had, in fact, no knowledge; Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108. If there was no intent to deceive, and the party derived no benefit, he is not liable; Jalass v. Young, 3 Pa. Super. Ct. 422.

Equitable doctrine of fraud. It is sometimes inaccurately said that such and such transactions amount to fraud in equity, though not in law; according to the popular notion that the law allows or overlooks certain kinds of fraud which the more conscientious rules of equity condemn and punish. But, properly speaking, fraud in all its shapes is as odious in law as in equity. The difference is that, as the law courts are constituted, and as it has been found in centuries of experience that it is convenient they should be constituted, they cannot deal with fraud otherwise than to punish it by the infliction of damages. All those manifold varieties of fraud against which specific relief, of a preventive or remedial sort, is required for the purposes of substantial justice, are the subjects of equity and not of law *jurisdiction.*

What constitutes a case of fraud in the view of courts of equity, it would be difficult to specify. It is, indeed, part of the equity doctrine of fraud not to define it, not to lay down any rule as to the nature of it, lest the craft of men should find ways of committing fraud which might escape the limits of such a rule or definition. "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." Per Hardwicke, C., in 3 Atk. 278. It includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. "It may be stated as a general rule that fraud consists in anything which is calculated to deceive, whether it be a single act or combination of circumstances, whether it be by suppression of the truth or suggestion of what is false; whether it be by direct falsehood, or by *innuendo*, by speech or by silence, by word of mouth or by a look or a gesture. Fraud of this kind may be defined to be any artifice by which a person is deceived to his disadvantage." Bisph. Eq. § 206.

It is said by Lord Hardwicke, 2 Ves. Ch. 155, that in equity fraud may be presumed from circumstances, but in law it must be proved. His meaning is, unquestionably, no more than this: that courts of equity will grant relief upon the ground of fraud established by a degree of presumptive evidence which courts of law would not deem sufficient proof for their purposes; that a higher degree, not a different kind, of proof may be required by courts of law to make out what they will act upon as fraud. Both tribunals accept presumptive or circumstantial proof, if of sufficient force. Circumstances of mere suspicion, leading to no certain results, will not, in either, be held sufficient to establish fraud.

The equity doctrine of fraud extends, for certain purposes, to the violation of that class of so-called imperfect obligations which are binding on conscience, but which human laws do not and cannot ordinarily undertake to enforce: as in a large variety of cases of contracts which courts of equity do not set aside, but at the same time refuse to lend their aid to enforce; 2 Kent 39; Parker v. Grant, 1 Johns. Ch. (N. Y.) 630; 1 Ball & B. 250. The proposition that "fraud must be proved and not assumed," is to be understood as affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, either positive or circumstantial. Fraud may be inferred from facts calculated to establish it; per Black, C. J., in Kaine v. Weigley, 22 Pa. 179; Jones v. Lewis, 148 Pa. 234, 23 Atl. 985; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1.

The following classification of frauds as a head of equity jurisdiction is given by Lord Hardwicke in Chesterfield v. Janssen, 2 Ves. Ch. 125; 1 Atk. 301; 1 Lead. Cas. Eq. 428.

1. Fraud, or *dolus malus*, may be actual, arising from facts and circumstances of imposition. 2. It may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses and not under delusion would make, on the one hand, and no honest or fair man would accept, on the other. 3. It may be inferred from the circumstances and condition of the parties: for it is as much against conscience to take advantage of a man's weakness or necessity as of his ignorance. 4. It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons.

Effect of. Fraud, both at law and in equity, when sufficiently proved and ascertained, avoids a contract *ab initio*, whether the fraud be intended to operate against one of the contracting parties, or against third parties, or against the public; Ans. Contr. 162; 1 W. Blackst. 465; Dougl. 450; 3 Burr. 1909; 3 V. & B. 42; 1 Sch. & L. 209; see Feltz v. Walker, 49 Conn. 98; but the injured party may elect to allow the transaction to stand; L. R. 2 H. L. 246; Lindsley v. Ferguson, 49 N. Y. 626; Wood v. Goff's Curator, 7 Bush (Ky.) 63.

The fraud of an agent by a misrepresentation which is embodied in the contract to which his agency relates, avoids the contract. But the party committing the fraud cannot in any case himself avoid the contract on the ground of the fraud; Chitty, Contr. 590, and cases cited. The party injured may lose the right to avoid the contract by *laches;* Hathaway v. Noble, 55 N. H. 508. But no delay will constitute *laches* except that occurring after the discovery of the fraud; 11 Cl. & F. 714; Michoud v. Girod, 4 How. (U. S.) 561, 11 L. Ed. 1076; Humphreys v. Mattoon, 43 Ia. 556; Martin v. Martin, 35 Ala. 560; Kraus v. Thompson, 30 Minn. 64, 14 N. W. 266, 44 Am. Rep. 182. The injured party must repudiate the transaction *in toto*, if at all; he may not adopt it in part and repudiate it in part; Farmers' Bank v. Groves, 12 How. (U. S.) 51, 13 L. Ed. 889; 25 Beav. 594.

As to frauds in contracts and dealings the common law subjects the wrong-doer, in several instances, to an action on the case, such as actions for fraud and deceit in contracts on an express or implied warranty of title or soundness, etc. But fraud gives no action in any case without damage; 3 Term 56; and in matters of contract it is merely a defence; it cannot in any case constitute a new contract; 7 Ves. 211; Abbott v. Mackinley, 2 Miles (Pa.) 229. It is essentially *ad hominem;* 4 Term 337.

A person cannot recover for fraudulent representations where he did not rely upon them, but relied upon information from other sources and upon his own judgment; Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315; White v. Smith, 39 Kan. 752, 18 Pac. 931; Lucas v. Crippen, 76 Ia. 507, 41 N. W. 205; Moses v. Katzenberger, 84 Ala. 95, 4 South. 237; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. Fraud must be clearly proved and it is proper so to instruct the jury; Jones v. Lewis, 148 Pa. 234, 23 Atl. 985. There is no error in charging that fraud is never presumed, and must be shown by satisfactory proof; Walker v. Collins, 59 Fed. 70, 8 C. C. A. 1.

A contracting party, who has been the victim of fraud, may either (1) apply to the court to have the contract cancelled, or (2) elect to confirm the contract and demand its completion or damages for non-completion, or (3) bring an action for damages for deceit, and this even after he has lost his right to avoid the transaction by delaying too long.

It is no defense to say that the plaintiff could have found out the truth; [1881] 20 Ch. D. 1; or that he was only partly induced by the falsehood; 1 L. R. 4 H. L. 79.

In Criminal Law. Without the express provision of any statute, all deceitful practices in defrauding or endeavoring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence; Co. Litt. 3 *b;* Dy. 295; Hawk. Pl. Cr. c. 71.

In considering fraud in its *criminal* aspect, it is often difficult to determine whether facts in evidence constitute a fraud, or amount to a felony. It seems now to be agreed that if the *property* obtained, whether by means of a false token or a false pretence, be parted with absolutely by the owner, it is a fraud; but if the *possession* only be parted with, and that possession be obtained by fraud, it will be felony; Bacon, Abr. *Fraud;* 2 Leach 1066; 2 East, Pl. Cr. c. 673.

Of those gross frauds or cheats which, as being "levelled against the public justice of the kingdom," are punishable by indictment or information at the common law; 2 East, Pl. Cr. c. 18, § 4, p. 821; the following are examples: Uttering a fictitious bank bill; Com. v. Boynton, 2 Mass. 77; selling unwholesome provisions; 4 Bla. Com. 162; *mala praxis* of a physician; 1 Ld. Raym. 213; rendering false accounts, and other frauds, by persons in official situations; Rex v. Bembridge, cited 2 East 136; 5 Mod. 179; 2 Campb. 269; 3 Chitty, Cr. Law 666; fabrication of news tending to the public injury; Stark. Lib. 546; and per Scroggs, C. J., Rex v. Harris, Guildhall, 1680; cheats by means of false weights and measures; 2 East, Pl. Cr. c. 18, § 3, p. 820; and generally, the fraudulent obtaining the property of another by any deceitful or illegal practice or token (short of felony) which affects or may affect the public; 2 East, Pl. Cr. c. 18, § 2, p. 818; as with the common cases of obtaining property by false pretences. See DECEIT; MISREPRESENTATION.

FRAUD ORDER. A name given to orders issued by the post-master general, under R. S. §§ 3929, 4041, for preventing the use of the mails as an agency for conducting schemes for obtaining money or property by means of false or fraudulent pretences, etc. They are not restricted to schemes which lack all the elements of legitimate business, but the statute applies "when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons by means of false representations to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually sold;" Harris v. Rosenberger, 145 Fed. 449, 16 C. C. A. 225, 13 L. R. A. (N. S.) 762.

The fraud order is issued to the post-master of the office through which the person affected by it receives his mail. It forbids the post-master to pay any postal money order to the specified person, and instructs the post-master to return all letters to the senders if practicable, or if not, to the dead letter office, stamped in either case with the word "fraudulent." The method of testing the validity of the fraud order is to apply to the federal court for an injunction to restrain the post-master from executing it. The decision of the postmaster-general is not the exercise of a judicial function; if he exceeds his jurisdiction, the party injured may have relief in equity; Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. Ed. ——.

Fraud orders have been sustained in the case of persons claiming by advertisement to be distillers, but being in fact mere middlemen and falsely advertising whisky as of a certain age; Harris v. Rosenberger, 145 Fed. 449, 16 C. C. A. 225, 13 L. R. A. (N. S.) 762; in selling a medicine whose ingredients and curative properties were grossly misrepresented; Missouri Drug Co. v. Wyman, 129 Fed. 623; the advertisement of a sale of instructions and materials for making artificial flowers which falsely represented that steady employment would be given to the purchasers in making and selling the same; Fairfield Floral Co. v. Bradbury, 89 Fed. 393; but where the advertisement was that of a corporation assuming to heal disease through the influence of the mind, it was held that the effectiveness of such treatment was a mere matter of opinion and not within the statutes, which were intended to cover cases of fraud in fact only; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90.

FRAUDARE. In Civil Law. To cheat; defraud; deceive.

FRAUDS, STATUTE OF. The name commonly given to the statute 29 Car. II. c. 3, entitled "An Act for the Prevention of Frauds and Perjuries."

Sections 1–3 provide that all interest in real estate created by livery of seisin only, or by parol, and not put in writing, and signed by the parties, or their agents authorized by writing, shall have the effect of leases or estates at will only, except leases not exceeding three years.

Section 4 provides that no action shall be brought to charge any executor or administrator upon any special promise to answer damages personally, or to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, or any interest therein or upon any agreement that is not to be performed within one year; unless the agreement or some memorandum or note thereof shall be in writing, signed by the party to be charged, or his agent.

Section 17 invalidates the sale of any goods, wares and merchandises for the price of ten pounds sterling or upwards, except the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing be made and signed by the parties to be charged or their agents.

These are the most important sections; other sections provide additional solemnities in cases of wills; new liabilities imposed in respect of real estate held in trust; the disposition of estates *pur auter vie;* the entry and effect of judgments and executions.

The statute introduced into the law a distinction between *written* parol and *oral* parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. Those matters are the following: Conveyances, leases, and surrenders of interests in lands; declarations of trusts of interest in lands; special promises by executors or administrators to answer damages out of their own estate; special promises to answer for the debt, default, or miscarriage of another; agreements made upon consideration of marriage; contracts for the sale of lands, tenements, or hereditaments, or any interest in or concerning them; agreements not to be performed within the space of one year from the making thereof; contracts for the sale of goods, wares, and merchandise for the price of ten pounds sterling or upwards. All these matters must be, by the statute, put in writing, signed by the party to be charged, or his attorney.

As to the acceptance of bills of exchange, see ACCEPTANCE.

A sale by parol of standing timber to be immediately cut, is good; In re Benjamin, 140 Fed. 320; Robbins v. Farwell, 193 Pa. 37, 44 Atl. 260; but not if it would require three or four years to work it up; White v. Fitts, 102 Me. 240, 66 Atl. 533, 15 L. R. A. (N. S.) 313, 120 Am. St. Rep. 483. A note or memorandum of a sale of real estate is sufficient, though the party did not deliver, but retained it; Lowther v. Potter, 197 Fed. 196.

Where possession is relied upon as part performance, it must be notorious, exclusive, continuous, and in pursuance of the contract; Baldwin v. Baldwin, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957. The statutory period commences with the date of the agreement and not from the time for commencement of performance; Chase v. Hinkley, 126 Wis. 75, 105 N. W. 230, 2 L. R. A. (N. S.) 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328. An oral agreement to pay back at the purchaser's option the money advanced on a sale of realty and assume the contract is void; Esslinger v. Pascoe, 129 Iowa, 86, 105 N. W. 362, 3 L. R. A. (N. S.) 147. Where the purchaser orally agrees to pay the owner's debts as part of the consideration, he cannot interpose the statute if the contract has been so far performed that he has received the property; Ackley v. Parmenter, 98 N. Y. 425, 50 Am. Rep. 693; Satterfield v. Kindley, 144 N. C. 455, 57 S. E. 145, 15 L. R. A. (N. S.) 399, 12 Ann. Cas. 1098. A contemporary promise of one person to pay where the benefit inures to another is a promise to answer for the default of another; when it appears that the credit is not given in the first instance wholly to the person who promises to pay for goods to be delivered to another, then the undertaking is collateral, but if the credit is given direct, then no writing is necessary; Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Hardman v. Bradley, 85 Ill. 162; Johnson v. Bank, 60 W. Va. 320, 55 S. E. 394, 9 Ann. Cas. 893. As a general rule contracts required to be in writing cannot be modified by parol; Nonamaker v. Amos, 73 Ohio St. 163, 76 N. E. 949; 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708, 4 Ann. Cas. 179; *contra*, Marsh v. Bellew, 45 Wis. 38; Stearns v. Hall, 9 Cush. (Mass.) 31. An authorization by one to another to purchase stock for him from a third person is not within the statute; Wiger v. Carr, 131 Wis. 584, 111 N. W. 657, 11 L. R. A. (N. S.) 650, 11 Ann. Cas. 998. A delivery and acceptance of any part of the goods or chattels subsequent to the oral agreement will take the case out of the statute.

A written and signed offer, which is accepted, either in writing or orally, constitutes a sufficient memorandum of contract under the statute of frauds; In re Pettingill & Co., 137 Fed. 143.

A parol submission of matters involving the title to real estate is invalid under the statute; Hewitt v. R. Co., 57 N. J. Eq. 511, 42 Atl. 325; Wilmington Water Power Co. v. Evans, 166 Ill. 548.

As to contracts of indemnity to a third person see INDEMNITY; 42 Am. St. Rep. 186, n.; as to contracts to be performed within a year see Warner v. R. Co., 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495.

In regard to contracts for the sale of goods, wares, and merchandise, the payment of earnest-money, or the acceptance and receipt of part of the goods, etc., dispenses with the written memorandum. See EARNEST; SALE.

The substance of the statute, as regards the provisions above referred to, has been re-enacted in almost all the states; and in many of them, other points coming within the same general policy, but not embodied in the original English statute, have been made the subject of more recent enactments: as, for instance, the requirement of writing to hold a party upon a representation as to the character, credit, etc., of a third person, which was provided in England by 9 Geo. IV. cap. 14, § 6, commonly called Lord Tenterden's Act. For the legislation of the different states see Browne, Statute of Frauds.

See LEASE; SURETY; PERFORMANCE; ACCEPTANCE; GOODS, WARES AND MERCHANDISE. Throop, Val. of Verb. Agr.; Reed; Wood; Browne, Stat. Frauds.

For the date and authorship of the statute, see 134 Law Times 511; 26 Harv. L. Rev. 329.

FRAUDULENT CONVEYANCE. A conveyance, the object, tendency, or effect of which is to defraud another, or the intent of which is to avoid some duty or debt due by or incumbent on the party making it. 2 Kent 440; 4 *id.* 462; and if fraudulent as to any provision therein, is void *in toto* as against creditors; Webb v. Ingham, 29 W. Va. 389, 1 S. E. 816.

Fraudulent conveyances received early attention; and the statutes of 13 Eliz. c. 5, and 27 Eliz. c. 4, made perpetual by 29 Eliz. c. 18, declared all conveyances made with intent to defraud creditors, etc., to be void. By a liberal construction, it has become the settled English law that a voluntary conveyance shall be deemed fraudulent against a subsequent purchaser even with notice; 9 East 59; 2 Bla. Com. 296; Roberts, Fraud. Conv. 2, 3; 17 Ad. & El. N. R. 723.

Voluntary conveyances are not so construed in the United States, however, where the subsequent purchaser has notice, especially if there be a *good* consideration; Wait, Fraud. Convey. 97; Beal v. Warren, 2 Gray (Mass.) 447.

These statutes have been generally adopted as the foundation of all the state statutes upon this subject; 4 Kent 462.

The mere fact of indebtedness alone will not render a voluntary conveyance void, if the grantor has property amply sufficient remaining to pay his creditor; Terry v. O'Neal, 71 Tex. 592, 9 S. W. 673; Joiner v. Van Alstyne, 22 Neb. 172, 34 N. W. 366.

A voluntary settlement, all debts being paid and the settlor retaining a reasonable income, is not fraudulent as against subsequent creditors of the settlor; [1900] 2 Q. B. 508.

In the case of ante-nuptial settlements, the consideration of marriage supports only such limitations as can be justly inferred to have been purchased on behalf of the party claiming such limitation, so that such party was not taking as a volunteer; 1 Atk. 265; 6 H. & N. 849; 5 Ch. Div. 619; [1891] A. C. 264. The voluntary settlement by a husband upon his wife, when this can be done without impairing existing claims of creditors, and without intent to defraud, is valid as against subsequent creditors; Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908; Schreyer v. Scott, 134 U. S. 405, 10 Sup. Ct. 579, 33 L. Ed. 955. The conveyance must be founded on good consideration and made with a *bona fide* intent; if defective in either of these particulars, although good as between the parties, it is void as to creditors; Smith v. Muirheid, 34 N. J. Eq. 4; Glenn v. Randall, 2 Md. Ch. 220.

The statute of 27 Eliz., unlike the statute of 13 Eliz., is limited to conveyances of real property; Boice v. Conover, 54 N. J. Eq. 531, 35 Atl. 402; Garrison v. Brice, 48 N. C. 85; Bohn v. Headley, 17 Harr. & J. (Md.) 257; *contra*, on the ground that the statute is only declaratory of the common law and the common law applies to personal property, for which reason it may be interpreted as defining the nature and effect of fraudulent conveyances generally; Gibson v. Love, 4 Fla. 217; Harper v. Scott, 12 Ga. 125; Avery v. Wilson, 47 S. C. 78, 25 S. E. 286.

A voluntary gift for charitable purposes is not to be treated as "covinous," within the meaning of 27 Eliz. c. 4, and is not avoided by a subsequent conveyance for value; [1892] App. Cas. 412.

When a mortgage is given to one person for the purpose of securing debts due to himself and others, with intent on the part of the mortgagor to defraud other creditors, it is valid as to an innocent beneficiary whose debt is an honest one, although the mortgagee himself is a party to the fraud; Morris v. Lindauer, 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510.

Voluntary conveyances by a debtor who is financially embarrassed are *prima facie* fraudulent as to existing creditors, and where a conveyance is made *mala fide*, and the fraud is participated in by both parties thereto, it cannot be upheld in derogation of the claims of creditors, existing or subsequent; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Driggs & Co.'s Bank v. Norwood, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; Neal v. Foster, 36 Fed. 29. But although such conveyance is void as regards purchasers and creditors, it is valid as between the parties; Reichart v. Castator, 5 Binn. (Pa.) 109, 6 Am. Dec. 402; Sherk v. Endress, 3 W. & S. (Pa.)

255; Worth v. Northam, 26 N. C. 102; Clapp v. Tirrell, 20 Pick. (Mass.) 247; Burgett's Lessee v. Burgett, 1 Ohio 469, 13 Am. Dec. 634; Hendricks v. Mount, 5 N. J. L. 738, 8 Am. Dec. 623; Osborne v. Moss, 7 Johns. (N. Y.) 161, 5 Am. Dec. 252; 1 W. Bla. 262; Romans v. Maddux, 77 Ia. 203, 41 N. W. 763. An offence within 13 Eliz. c. 5, § 3, is also indictable; 6 Cox, Cr. Cas. 31.

This subject is fully treated in a note to Twyne's case, 1 Sm. Lead. Cas. (continued in 18 Am. L. Reg. N. S. 137), and in Bump; May, Fraud. Conv. See BADGES OF FRAUD.

FRAUS (Lat.). Fraud. The term of the civil law was, however, *dolus (q. v.)*. It has been said that *fraus* was distinguished from *dolus* and had a more extended meaning. Calv. Lex.

FRAUS DANS LOCUM CONTRACTUI. A misrepresentation or concealment of some fact that is material to the contract, and had the truth regarding which been known the contract would not have been made as made, is called a "fraud *dans locum contractui*," i. e. a fraud occasioning the contract, or giving place or occasion for the contract.

FRAUS LEGIS (Lat.). Fraud of law. **In Civil Law.** The institution of legal proceedings for a fraudulent purpose. See IN FRAUDUM LEGIS.

FRAXINETUM. **In Old English Law.** A wood of ashtrees; a place where ashtrees grow. Co. Litt. 4 *b*; Shep. Touchst. 95.

FRAY. See AFFRAY.

FRECTUM. Freight. *Quoad frectum navium suarum*, as to the freight of his vessels. Blount.

FREDSTOLE, FREEDSTOLE. The seat of peace, a name given to a seat or chair near the altar, to which all fled who sought to obtain the privilege of sanctuary. Encyc. Dict. A sanctuary. Gib. Cod.

FREDUM. A fine paid for obtaining pardon when the peace had been broken. Spelman, Gloss.; Blount. A sum paid the magistrate for protection against the right of revenge. 1 Robertson, Charles V., App. note xxiii.

Freda was a Frankish term answering to the Saxon "wites." Maitl. Domesday Book and Beyond 278.

FREDWIT, or FREDWITE. A liberty to hold courts and take up the fines for beating and wounding. Jacob, Law Dict.

FREE. Not bound to servitude. At liberty to act as one pleases. This word is put in opposition to slave. U. S. Const. art. 1, § 2. Used in distinction from being bound as an apprentice.

The Declaration of Independence asserts that all men are born free; and in this sense the term is usually supposed to mean all mankind; though this seems to be doubted in Scott v. Sanford, 19 How. (U. S.) 393, 15 L. Ed. 691.

Certain: as, *free* services. These were also more honorable.

Confined to the person possessing, instead of being held in common; as, *free fishery*.

FREE ALMS. See FRANK-ALMOIN.

FREE BENCH. The right of the widow of a copyholder to a provision out of his lands. Bracton, lib. 4, tr. 6, cap. 13, num. 2; Fitzh. N. B. 150; Plowd. 411; Jenks, Mod. Land C. 76.

Dower in copyhold lands. 2 Bla. Com. 129. The quantity varied in different sections of England; Co. Litt. 110 *b*; L. R. 16 Eq. 592; incontinency was a cause of forfeiture, except, in the west of England, on the performance of a ridiculous ceremony of coming into the court of the manor, riding backwards on a black ram, etc.; see Jacob, Law Dict.; Cowell; Blount.

FREE BORD. An allowance of land outside the fence which may be claimed by the owner. An allowance, in some places, of two and a half feet wide outside the boundary or enclosure. Blount; Cowell.

FREE BOROUGHMEN. Such great men as did not engage like the frank-pledge men for their decennier. Jac. L. Dict. See FRIBURGUS.

FREE CHAPEL. A chapel founded by the king and exempted from the jurisdiction of the ordinary. It may be one founded or endowed by a private person under a grant from the king; Cowell; *Termes de la Ley*.

FREE COURSE. Having the wind from a favorable quarter. To prevent collision of vessels, it is the duty of the vessel having the wind free to give way to a vessel beating up to windward and tacking; 3 Hagg. Adm. 215. At sea, such vessel meeting another close-hauled must give way, if necessary to prevent the danger of collision; 3 C. & P. 528. See 2 W. Rob. 225.

FREE ENTRY, INGRESS AND EGRESS. The right to go upon land from time to time as required to assert any right, as to take emblements.

FREE FISHERY. See FISHERY.

FREE FOLD. See FOLDAGE; FRANK-FOLD.

FREE MEN. Before the Norman Conquest, a free man might be a man of small estate dependent on a lord. Every man, not himself a lord, was bound to have a lord or be treated as unworthy of a free man's right. Among free men there was a difference in their estimation for *Wergild*. See LIBER HOMO.

FREE ON BOARD. A phrase applied to the sale of goods which denotes that the seller has contracted for their delivery on the vessel, cars, etc., without cost to the buyer

for packing, portage, cartage, and the like. See FRAIS JUSQU'À BORD; F. O. B.

In such a contract the seller is under no obligation to act until the buyer names the ship to which the delivery is to be made; Dwight v. Eckert, 117 Pa. 508, 12 Atl. 32. Abbreviated in common use to f. o. b.

FREE PLEDGE. See FRANKPLEDGE.

FREE SERVICES. Such as it was not unbecoming the character of a soldier or freeman to perform; as, to serve under his lord in the wars, to pay a sum of money, and the like. 2 Bla. Com. 62; 1 Washb. R. P. 25.

FREE SHIPS. Neutral ships. *"Free ships make free goods"* is a phrase often used in treaties to denote that the goods on board neutral ships shall be free from confiscation even though belonging to an enemy; Wheat. Int. L. 507; 1 Kent 126. "It was first recognized by Holland in the seventeenth century as against the prevailing rule of the 'Consolato del Mare' (see CODE), by which the ownership of property determined its liability to capture." The doctrine was recognized, except as to goods contraband of war, in the Declaration of Paris (1856), *q. v.* This declaration, while a great step in favor of neutrals, does not free neutral commerce from the belligerent right of search for the purpose of ascertaining the true character of a ship sailing under a neutral flag, and for contraband goods. While the United States was not a party to the Declaration of Paris, yet during the civil war, its second and third articles, relating to this subject, were adhered to by both parties, as also during the war with Spain in 1898. See FLAG; NEUTRALITY; DECLARATION OF PARIS.

FREE SOCAGE. Tenure in free socage is a tenure by certain and honorable services which yet are not military. 1 Spence, Eq. Jur. 52; Dalrymple, Feuds, c. 2, § 1; 1 Washb. R. P. 25; called, also, free and common socage. See SOCAGE.

FREE SOCMEN. Tenants in free socage. 2 Bla. Com. 79.

FREE TENURE. Freehold tenure.

FREE WARREN. A franchise for the preserving and custody of beasts and fowls of warren. 2 Bla. Com. 39, 417; Co. Litt. 233. This franchise gave the grantee sole right of killing, so far as his warren extended, on condition of excluding other persons. 2 Bla. Com. 39.

FREEDMAN. **In Roman Law.** A person who had been released from a state of servitude. See LIBERTINE.

The term is frequently applied to the emancipated slaves in the southern states. By the fourteenth amendment of the constitution, citizenship was conferred upon them; Cooley, Const. Lim. 361. See Slaughter-House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394. The fifteenth amendment protects the elective franchise of freedmen and others of African descent; and this was the object of its adoption; Cooley, Const. Lim. 752.

FREEDOM. The condition of one to whom the law attributes the single individual right of personal liberty, limited only, in the domestic relations, by powers of control which are associated with duties of protection. See APPRENTICE; MARRIED WOMEN; PARENT AND CHILD; GUARDIAN; MASTER AND SERVANT.

This right becomes subject to judicial determination when the law requires the public custody of the person as the means of vindicating the rights of others. The security of the liberty of the individual and of the rights of others is graduated by the intrinsic equity of the law, in purpose and application. The means of protecting this liberty of the individual without hazarding the freedom of others must be sought in the provisions of the remedial and penal law.

Independently of forfeiture of personal liberty under such laws and of its limitations in the domestic relations, freedom, in this sense, is a *status* which is invariable under all legal systems. It is the subject of judicial determination when a condition incompatible with the possession of personal liberty is alleged against one who claims freedom as his *status*. A community wherein law should be recognized, and wherein nevertheless, this status should not be enjoyed by any private person, is inconceivable; and, wherever its possession is thus controverted, the judicial question arises of the personal extent of the law which attributes liberty to free persons. The law may attribute it to every natural person, and thereby preclude the recognition of any condition inconsistent with its possession. This universal extent of the law of free condition will operate in the international as well as in the internal private law of the state. In most European countries the right of one, under the law of a foreign country, to control the person of another who by such law had been his slave or bondman is not recognized under that international rule for the allowance of the effect of a foreign law which is called *comity*, because the law of those countries attributes personal liberty as a right to every natural person. 1 Hurd, Law of Freedom §§ 116, 300.

In other countries the power of the master under a foreign law is recognized in specified cases by a statute or treaty, while an otherwise universal attribution of personal liberty precludes every other recognition of a condition of bondage. On this principle, in some of the United States, an obligation to render personal service or labor, and the corresponding right of the person to whom it is due, existing under the law of other states, were not enforced except in cases of

claim within art. 4, sec. 2, ¶ 3 of the constitution of the United States; Com. v. Aves, 18 Pick. (Mass.) 193; Lemmon v. People, 20 N. Y. 562.

Legal rights are the effects of civil society. No legal condition is the reservation of a state of nature anterior to civil society. Freedom, as here understood, is the effect of law, not a pre-existing natural element. It is, therefore, not necessarily attributed to all persons within any one jurisdiction. But personal liberty, even though not attributed universally, may be juridically regarded as a right accordant with the nature of man in society; and the effect of this doctrine will appear in a legal presumption in favor of free condition, which will throw the burden of proof always on him who denies it. This presumption obtained in the law of Rome (XII Tab. T. vi. 5; Dig. lib. 40, tit. 5, l. 53; lib. 43, tit. 29, s. 3, l. 9; lib. 50, tit. 17, ll. 20, 22) even when slavery was derived from the *jus gentium*, or that law which was found to be received by the general reason of mankind; 1 Hurd, Law of Freedom § 157.

In English law, this presumption in favor of liberty has always been recognized, not only in the penal and remedial law, but in applying the law of condition, at a time when involuntary servitude was lawful; Fortesque, cc. 42, 47; Co. Litt. fol. 124 *b;* Wood, Inst. c. 1, § 5. In the slave-holding states, a presumption against the freedom of persons of negro descent arose or was declared by statute; Cooper, Justin. 485; Bell v. Dozier, 12 N. C. 336; Macon & W. R. Co. v. Holt, 8 Ga. 157. In interpreting manumission clauses in wills, the rule differed in the states according to their prevailing policy; Cobb, Slav. 298.

The condition of a private person who is legally secured in the enjoyment of those rights of action, in social relations, which might be equally enjoyed by all private persons.

The condition of one who may exercise his natural powers as he wills is not known in jurisprudence, except as the characteristic of those who hold the supreme power of the state. The freedom which one may have by his individual strength resembles this power in kind, and is no part of legal freedom. The legal right of one person involves correlative obligations on others. All persons must be restricted by those obligations which are essential to the freedom of others; 2 Harr. Cond. La. 208; but these are not inconsistent with the possession of rights which may be enjoyed equally by all. Such obligations constitute a condition opposed to freedom only as things which mutually suppose and require each other. Where the law imposes obligations incompatible with the possession of such rights as might be equally enjoyed by all, a condition arises which is contrary to freedom, see BONDAGE, and the condition of those who hold the rights correlative to such obligations becomes superior to freedom, as above defined, or is merged in the superiority of a class or caste. The rights and obligations of all cannot be alike; men must stand towards each other in unlike relations, since the actions of all cannot be the same. In the possession of relative rights they must be unequal. But individual (absolute) rights, which exist in relations towards the community in general, and capacity for relative rights in domestic relations, may be attributed to all in the same circumstances of natural condition. It is in the possession of these rights and this capacity that this freedom exists. As thus defined, it comprehends freedom in the narrower sense, as the greater includes the less; and when attributed to all who enjoy freedom in the narrower sense, as at the present day in the greater part of Europe and formerly in the free states of the Union, the latter is not distinguished as a distinct condition. But some who enjoy personal liberty might yet be so restricted in the acquisition and use of property, so unprotected in person and limited in the exercise of relative rights, that their condition would be freedom in the narrower sense only. During the middle ages, in Europe, it was possible to discriminate the existing free conditions as thus different; and the restrictions formerly imposed on free colored persons in the slave-holding states of the Union created a similar distinction between their freedom and that which, in all the states, was attributed to all persons of white race.

Freedom, in either sense, is a condition which may exist anywhere, under the civil power; but its permanency will depend on the guarantees by which it is defended. These are of infinite variety. In connection with a high degree of guarantee against irresponsible sovereign power, freedom, in the larger sense above described, may be called *civil freedom*, from the fact that such guarantee becomes the public law of the state. Such freedom acquires specific character from the particular law of some one country, and becomes the topic of legal science in the juridical application of the guarantees by which the several rights incident to it are maintained. This constitutes a large portion of the jurisprudence of modern states, and embraces, particularly in England and America, the public or constitutional law. The bills of rights in American constitutions, with their great original, Magna Charta, are the written evidences of the most fundamental of these guarantees. The provisions of the constitution of the United States which have this character operate against powers held by the national government, but not against those reserved to the states; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672; Sedgw. Const. 597. It has been judicially declared that a person "held to service or labor in one state under the laws thereof escaping

into another" is not protected by any of these provisions, but may be delivered up, by national authority, to a claimant, for removal from the state in which he is found, in any method congress may direct, and that any one claimed as such fugitive may be seized and removed from such state by private claimant, without regard either to the laws of such state or the acts of congress; Bank of Augusta v. Earle, 13 Pet. (U. S.) 597, 10 L. Ed. 274.

The other guarantees of freedom in either sense are considered under the titles Evidence; Arrest; Bail; Trial; Habeas Corpus; De Homine Replegiando.

Irresponsible superiority, whether of one or of many, is necessarily antagonistic to freedom in others. Yet freedom rests on law, and law on the supreme power of some state. The possession of this power involves a liberty of action; but its possession by a body of persons, each one of whom must submit to the will of the majority, is not in itself a guarantee of the freedom of any one individual among them. Still, the more equally this power is distributed among those who are thus individually subject, the more their individual liberty of action in the exercise of this power approximates to a legal right,—though one beyond any incident to civil freedom as above defined,—and its possession may be said to constitute political freedom, so far as that may be ascribed to private persons which is more properly ascribed to communities. In proportion as this right is extended to the individual members of a community, it becomes a guarantee of civil freedom, by making a delegation of the power of the whole body to a representative government possible and even necessary, which government may be limited in its action by customary or written law. Thus, the political liberties of private persons and their civil freedom become intimately connected; though political and civil freedom are not necessarily coexistent. 1 Sharsw. Bla. Com. 6, n., 127, n.

Political freedom is to be studied in the public law of constitutional states and in England and America, particularly in those provisions in the bills of rights which affect the subject more in his relations towards the government than in his relations towards other private persons. See Liberty. The terms freedom and liberty are words differing in origin (German and Latin); but they are, in use, too nearly synonymous to be distinguished in legal definition. See Liberty; Lieber, Civ. Lib. etc. 37, n.

FREEDOM OF THE CITY. **In English Law.** Immunity from county jurisdiction, and the privilege of corporate taxation and self-government held under a charter from the crown. This freedom is enjoyed of right, subject to the provision of the charter, and is often conferred as an honor on princes and other distinguished individuals. The freedom of a city carries the parliamentary franchise. Encyc. Dict. The rights and privileges possessed by the burgesses or freemen of a municipal corporation under the old English law; now of little importance, and conferred chiefly as a mark of honor. See 11 Chic. L. J. 357.

The phrase has no place in American law, and as frequently used in addresses of welcome made to organizations visiting an American city, particularly by mayors, has no meaning whatever except as an expression of good will.

The form of the grant made by the city of New York to Andrew Hamilton of Philadelphia is quoted at large in 13 Law Notes 150.

FREEDOM OF CONTRACT. See Liberty of Contract.

FREEDOM OF THE PRESS. See Liberty of the Press.

FREEDOM OF SPEECH. See Liberty of Speech.

FREEHOLD. See Estate of Freehold.

FREEHOLD IN LAW. A freehold which has descended to a man, upon which he may enter at pleasure, but which he has not entered on. *Termes de la Ley.*

FREEHOLD LAND SOCIETIES. Societies in England designed for the purpose of enabling mechanics, artisans, and other working-men to purchase at the least possible price a piece of freehold land of a sufficient yearly value to entitle the owner to the elective franchise for the county in which the land is situated. Wharton.

FREEHOLDER. The owner of a freehold estate. Such a man must have been anciently a freeman; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. See 1 Washb. R. P. 29, 45. One who owns land in fee or for life, or for some indeterminate period. The estate may be equitable or legal. State v. Ragland, 75 N. C. 13. Boards of freeholders exist in New Jersey. It is the designation of the governing board of a county.

FREEMAN. One who is not a slave. One born free or made so.

In Old English Law. A freeholder, as distinguished from a villein.

An inhabitant of a city. Stat. 1 Hen. VI. c. 11, 3 Steph. Com. 196.

In Vermont (Acts 1903, p. 3) mention is made of freemen's meetings.

FREEMAN'S ROLL. A list of persons admitted as burgesses or freemen for the purposes of the rights reserved by the Municipal Corporation Act. 5 & 6 Will. IV. c. 76. Distinguished from the Burgess Roll; 3 Steph. Com. 197. The term was used, in early

colonial history, of some of the American colonies.

FREIGHT. In Maritime Law. The sum agreed on for the hire of a ship, entirely or in part, for the carriage of goods from one port to another. 13 East 300. All rewards or compensation paid for the use of ships. Giles v. The Cynthia, 1 Pet. Adm. 206, Fed. Cas. No. 5,424; 2 B. & P. 321; Sansom v. Ball, 4 Dall. (U. S.) 459, 1 L. Ed. 908; Cheriot v. Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437; Chitty, Com. L. 407. The price to be paid for the actual transportation of goods by sea from one place to another. Hagar v. Donaldson, 154 Pa. 242; The Norman Prince, 185 Fed. 169.

It is an inherent element in a contract of affreightment that a vessel shall enter on the voyage named and begin the carriage of the goods shipped, or, as it is technically called, "break ground," before a claim for freight can arise, unless the shipper of the goods, the vessel remaining ready to enter on the voyage, undertakes to reclaim the goods. The circumstances under which the contract was entered into continuing the same, so far as respects the vessel, the shipper cannot reclaim the goods without paying the full freight; The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747; The Norman Prince, *supra*.

The amount of freight is usually fixed by the agreement of the parties; and if there is no agreement, the amount is to be ascertained by the usage of the trade and the circumstances and reason of the case; 3 Kent 173. See RATES. When the merchant hires the whole ship for the entire voyage, he must pay the freight though he does not fully lade the ship; Chitty, Com. L. 407; Heckscher v. McCrea, 24 Wend. (N. Y.) 304; he is, of course, only bound to pay in proportion to the goods he puts on board, when he does not agree to provide a full cargo. If the merchant agrees to furnish a return cargo, and he furnishes none, and lets the ship return in ballast, he must make compensation to the amount of the agreed freight; Giles v. The Cynthia, 1 Pet. Adm. 207, Fed. Cas. No. 5,424; 2 Vern. 210. See L. R. 6 Q. B. 528; DEAD FREIGHT.

The general rule is that the *delivery* of the goods at the place of destination, in fulfilment of the agreement of the charter-party or bill of lading, is required, to entitle the master or owner of the vessel to freight; Frith v. Barker, 2 Johns. (N. Y.) 327; China Mut. Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Thibault v. Russell, 5 Harr. (Del.) 293; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177. If prepaid, it may be recovered back on a failure to make delivery unless expressly provided otherwise in the contract; Burn Line v. U. S. & A. S. S. Co., 162 Fed. 298, 89 C. C. A. 278.

An *interruption* of the regular course of the voyage, happening without the fault of the owner, does not deprive him of his freight if the ship afterwards proceeds with the cargo to the place of destination, as in the case of capture and recapture; 3 C. Rob. 101; 3 Kent 223; but where a voyage is broken up by reason of the inexcusable delay of the ship, resulting in damage to the shippers, he need not pay the freight; Hoadley v. The Lizzie, 39 Fed. 44. In case of the blockade of, or the interdiction of, commerce with the port to which the cargo is destined, and the return of the goods to the owner, no freight will be due; Scott v. Libby, 2 Johns. (N. Y.) 336, 3 Am. Dec. 431; 10 East 526; but see Morgan v. Ins. Co., 4 Dall. (U. S.) 455, 1 L. Ed. 907.

A shipowner, who is prevented from performing the voyage by a wrongful act of the charterer, is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it; The Gazelle, 128 U. S. 474, 9 Sup. Ct. 139, 32 L. Ed. 496.

When the ship is forced into a port short of her destination, and cannot finish the voyage, if the owner of the goods will not allow the master a reasonable time to repair, or to proceed in another ship, the master will be entitled to the whole freight; and if, after giving his consent, the master refuses to go on, he is not entitled to freight. See DEVIATION.

When the merchant *accepts* of the goods at an intermediate port, it is the general rule that freight is to be paid according to the proportion of the voyage performed; and the law will imply such contract; Bork v. Norton, 2 McLean 423, Fed. Cas. No. 1,659; Robinson v. Ins. Co., 2 Johns. (N. Y.) 323. The acceptance must be voluntary, and not one forced upon the owner by any illegal or violent proceedings, as from it the law implies a contract that freight *pro rata parte itineris* shall be accepted and paid; 2 Burr. 883; Gray v. Waln, 2 S. & R. (Pa.) 229, 7 Am. Dec. 642; Caze v. Baltimore Ins. Co., 7 Cra. (U. S.) 358, 3 L. Ed. 370; Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; 3 Kent 182; Com. Dig. *Merchant* (E 3), note, pl. 43.

If the master refuse to repair his vessel and send on the goods, or to procure other vessels for that purpose and the owner of the goods then receives them, such an acceptance will not be such a voluntary one as to make him liable for freight *pro rata;* Welch v. Hicks, 6 Cow. (N. Y.) 504, 16 Am. Dec. 443; Atlantic Mut. Ins. Co. v. Bird, 2 Bosw. (N. Y.) 195; and where the port designated in the charter-party was unsafe, the master was held justified in discharging part of his cargo at another port in order to be able to proceed with the rest to the point designated; [1896] 1 Q. B. 586; L. R. 6 P. D. 68.

When the ship has *performed* the whole

voyage, and has brought only a part of her cargo to the place of destination, there is a difference between a general ship and a ship chartered for a specific sum for the whole voyage. In the former case, the freight is to be paid for the goods which may be delivered at their place of destination; in the latter, it has been questioned whether the freight could be apportioned; and it seems that in such case a partial performance is not sufficient, and that a special payment cannot be claimed except in special cases; Post v. Robertson, 1 Johns. (N. Y.) 24; 2 Campb. 466. Proof that a vessel received the number of cases of oil stated in the bills of lading, that none were stolen during the voyage, and that all on board were delivered alongside by her tackles into lighters, entitles her to freight on all shown by the bills of lading, though there may have been a shortage when the oil reached its destination; Steamship Den of Ogil Co. v. Standard Oil Co., 189 Fed. 1020. Where a cargo owner is allowed, as damages against a vessel, for loss of cargo, its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss; Carolina Portland Cement Co. v. Anderson, 186 Fed. 145, 108 C. C. A. 257.

If goods are *laden* on board, the shipper is not entitled to their return and to have them relanded without paying the expenses of unloading and the whole freight and surrendering the bill of lading or indemnifying the master against any loss or damage he may sustain by reason of the non-delivery of the bill; Bartlett v. Carnley, 6 Duer (N. Y.) 194. In general, the master has a lien on the goods, and need not part with them until the freight is paid; Brittan v. Barnaby, 21 How. (U. S.) 527, 16 L. Ed. 177; and when the regulations of the revenue require them to be landed in a public warehouse, the master may enter them in his own name and preserve the lien; Abb. Ship. pt. 3, ch. 3, § 11. His right to retain the goods may, however, be waived either by an express agreement at the time of making the original contract, or by his subsequent agreement or consent. The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight; The Ira B. Ellems, 48 Fed. 591. See LIEN; MARITIME LIEN; AVERAGE.

If freight be *paid in advance* and the goods are not conveyed and delivered according to the contract, it can, in all cases, in the absence of an agreement to the contrary, be recovered back by the shipper; Phelps v. Williamson, 5 Sandf. (N. Y.) 578.

The captor of an enemy's vessel is entitled to freight from the owner of the goods if he perform the voyage and carries the goods to the port of original destination; 1 Kent 131; but in such cases the doctrine of freight *pro rata* is entirely rejected; 4 Rob. Rep. 278; 5 *id.* 67; 6 *id.* 269.

See COMMON CARRIERS; HARTER ACT; SHIP; SEAWORTHY; IMPAIRING THE OBLIGATION OF CONTRACTS; RATES; INTER-STATE COMMERCE COMMISSION.

FREIGHTER. He to whom a ship or vessel has been hired, and who loads her under his contract. He who loads a general ship. 3 Kent 173; 3 Pardessus, n. 704.

The freighter is entitled to the enjoyment of the vessel according to contract, and the vessel hired is the only one that he is bound to take; there can, therefore, be no substitution without his consent. When the vessel has been chartered only in part, the freighter is only entitled to the space he has contracted for; and in case of his occupying more room or putting on board a greater weight, he must pay freight on the principles mentioned under the article of FREIGHT.

The freighter hiring a vessel is required to use the vessel agreeably to the provisions of the charter-party, or, in the absence of any such provisions, according to the usages of trade; he cannot load the vessel with merchandise which would render it liable to condemnation for violating the laws of a foreign state; Smith v. Elder, 3 Johns. (N. Y.) 105. He is also required to return the vessel as soon as the time for which he chartered her has expired, and to pay the freight.

FRENCH LANGUAGE. See LANGUAGE.

FRENCH SPOLIATION CLAIMS. On January 20, 1885 (23 Stat. L. 283), congress authorized all citizens of the United States or their legal representatives, to present to the court of claims valid claims which they had against France for spoliations of property on the high seas prior to 1801. These spoliations were committed by French war vessels and privateers in pursuance of governmental orders, inspired by alleged violations of the treaty of 1778 by the United States, and extended from about 1796 to 1801. The United States authorized retaliatory measures in 1798. Napoleon having succeeded to the Directory, made a treaty with the United States by which the respective pretensions of the two nations were abandoned. The claimants insisted that this proceeding was a trading off of their claims against France for a national consideration, and that their own government became liable therefor.

In making appropriations, congress did not intend to determine conclusively what persons were entitled thereto; the payments were for the next of kin of the original sufferers; the person receiving the appropriation and filing an account is held to have submitted to such court the question of who were entitled to the money; Buchanan v. Patterson, 190 U. S. 353.

Under the act of March 3, 1891, the payments were by way of gratuity and grace, and went to the next of kin, excluding creditors, etc. Next of kin were those living at the date of the act, to be determined by the statute of distribution of the respective state of the domicil of the original sufferer; Buchanan v. Patterson, 190 U. S. 353, 23 Sup. Ct. 764, 47 L. Ed. 1093.

French spoliation cases rest upon the just and equitable principles of international law and are not matters of strict legal right; The Hiram, 24 Ct. Cl. 31. The actual loss is all that the claimant is entitled to; transactions of parties as owners, insurers, etc., cannot be considered; *id.*

The act of Congress (March 3, 1891) provides that claims shall be awarded to the next of kin; Rutledge v. Tunno, 63 S. C. 205, 41 S. E. 308; Healey v. Cole, 95 Me. 272, 49 Atl. 1065; to be distributed under the statute of distributions of the domicil of the original sufferer at the time of his death; *id.*

A probate court can appoint an administrator for the sole purpose of collecting these claims, though the fund will not be liable for the debts of the intestate, but will go to the particular persons; Sargent v. Sargent, 168 Mass. 420, 47 N. E. 121. An administrator c. t. a. collecting such claim does not deprive the next of kin of their interest; In re Warren, 105 App. Div. 582, 94 N. Y. Supp. 286.

See NEXT OF KIN.

FRENDLESMAN (Sax.). An outlaw. So called because of his outlawry he was denied all help of friends after certain days. Cowell; Blount.

FRENDWITE. A fine exacted from him who harbored an outlawed friend. Cowell; Cunningham. A quittance for *for. fang* (exemption from the penalty of taking provisions before the king's purveyors had taken enough for the king's necessities). Cowell.

FREOBORGH. A free-surety or free-pledge. Spelman, Gloss. See FRANK-PLEDGE.

FREQUENT. To visit often; to resort to often or habitually. Green v. State, 109 Ind. 175.

FRESH DISSEISIN. Such disseisin as a man may seek to defeat of himself, and by his own power, without the help of the king or judges. There was no limit set to the time within which this might be done. It is set in one case as a disseisin committed within fifteen days. Bracton, lib. 4, cap. 5. In another case it was held a fresh disseisin when committed within a year. Britton, cap. 32, 43, 65.

FRESH FINE. A fine levied within a year. Stat. Westm. 2 (13 Edw. I.), cap. 45.

FRESH FORCE. Force done within forty days. Fitzh. N. B. 7; Old N. B. 4. The heir or reversioner in a case of disseisin by *fresh force* was allowed a remedy in chancery by bill before the mayor. Cowell.

The Assize of Fresh Force has recently been elucidated by the investigations of W. C. Bolland; see Selden Society's Year Books Series, Vol. VIII, Introd. xxxvi; 1 Poll. & Maitl. 628.

FRESH SUIT. Where a man robbed follows the robber with all diligence, apprehends and convicts him of felony by verdict, even if it requires a year, it is called *fresh suit*, and the party shall have his goods again. The same term was applied to other cases; Cowell; 1 Bla. Com. 297.

FRESHET. A flood or overflowing of a river by means of rains or melted snow; an inundation. Stover v. Ins. Co., 3 Phila. (Pa.) 42.

FRETTUM. Freight. Moz. & W.

FRETUM. A strait. *Fretum Brittanicum*, the strait between Dover and Calais.

FRIAR. A member of an order of religious persons, of whom there were four principal branches: 1. Minors, Grey Friars, or Franciscans. 2. Augustines. 3. Dominicans, or Black Friars. 4. White Friars, or Carmelites. Cowell; Whart.; Moz. & W.

FRIBURGH. (Also, Frithborg, Frithborgh, Friborg, Froborg, and Freoburgh.) (Sax.) A kind of frank-pledge whereby the principal men were bound for themselves and servants. Fleta, lib. 1, cap. 47. Cowell says it is the same as frank-pledge.

FRIBUSCULUM. In Civil Law. A slight dissension between husband and wife, which produced a momentary separation, without any intention to dissolve the marriage,—in which it differed from a divorce. Pothier, Pand. lib. 50, s. 106; Vicat. Voc. Jur. This amounted to a separation in our law. See SEPARATION.

FRIEND OF THE COURT. See AMICUS CURIÆ.

FRIENDLESS MAN. An outlaw. Cowell.

FRIENDLY SOCIETIES. Associations for the purpose of affording relief to the members and their families in case of sickness or death. They are governed by numerous acts of parliament, and were first authorized in 1793.

FRIENDLY SUIT. A suit brought by a creditor in chancery against an executor or administrator, being really a suit by the executor or administrator, in the name of a creditor against himself, in order to compel the creditors to take an equal distribution of the assets. 2 Wms. Ex. 1915. See AMICABLE ACTION; CASE STATED.

FRIGHT. See MENTAL SUFFERING.

FRIGIDITY. Impotence.

FRILING, or FREOLING. A freeman born. Jac. L. Dict.; Spel. Gloss.

FRISCUS. Fresh uncultivated ground. Mon. Angl. tit. 2, p. 56. Fresh, not salt. Reg. Orig. 97. Recent or new.

FRITHBORGH. See FRIBURGH.

FRITHBOTE. A satisfaction or fine for a breach of the peace. See FREDUM.

FRITHBREACH. The breaking of the peace. Cowell.

FRITHGEAR. The year of jubilee or of meeting for peace and friendship. Jac. L. D.

FRITHGILD. A guild hall. A company or fraternity for the maintenance of peace and security; a fine for breach of the peace. Jac. L. Dict.

FRITHMAN. A member of a company or fraternity. Blount.

FRITHSOCNE. Surety of defence. Jurisdiction of the peace. The franchise of preserving the peace. Cowell.

FRITHSOKE, or FRITHSOKEN. The right to take a view of frank-pledge. Fleta. See FRITHSOCNE, which seems to be interchangeable. Cowell.

FRIVOLOUS. An answer or plea is frivolous which controverts no material allegation in the complaint, and which is manifestly insufficient. Under the English common-law amendment act, and by the codes of some of the states, the court is authorized to strike out such a plea, so that the plaintiff can obtain judgment without awaiting the regular call of the cause; Lefferts v. Snedfiker, 1 Abb. Pr. (N. Y.) 41; New Jersey Zinc Co. v. Blood, 8 Abb. Pr. (N. Y.) 149; Brown v. Jenison, 3 Sandf. (N. Y.) 732; Dobson v. Hallowell, 53 Minn. 98, 54 N. W. 939; Lerdall v. Ins. Co., 51 Wis. 430, 8 N. W. 280. See Hubber Co. v. McAllester, 1 Misc. 483, 21 N. Y. Supp. 767.

An answer cannot be stricken out on the ground that it is frivolous, where an extended argument or illustration is required to demonstrate its frailty; Deuel v. Sanford, 67 How. Prac. (N. Y.) 354; Exchange Fire Ins. Co. of New York City v. Norris, 74 Hun 527, 26 N. Y. Supp. 823. A pleading interposed for delay is frivolous, but a pleading is not frivolous because vague; Farmers' & Millers' Bank v. Sawyer, 7 Wis. 383; Kelly v. Barnett, 16 How. Pr. (N. Y.) 135; Yerkes v. Crum, 2 N. D. 72, 49 N. W. 422.

Frivolous is not synonymous with irrelevant; Fasnacht v. Stehn, 5 Abb. Pr. N. S. (N. Y.) 338, 343; *id.*, 53 Barb. (N. Y.) 650.

FRODMORTEL, or FREOMORTEL. An immunity for committing manslaughter. Mon. Angl. t. 1. 173.

FROM. The legal effect of this word has been a fruitful subject of judicial discussion resulting in a great diversity of construction of the word as used with respect to both time and place. Many attempts have been made to lay down a general rule to determine whether it was to be treated as inclusive or exclusive of a *terminus a quo*, whether of time or place. Very long ago a critical writer, after reviewing the cases up to that date, undertook to formulate such a rule thus: From, as well in strict grammatical sense, as in the ordinary import thereof, when referring to a certain point as a *terminus a quo*, always excludes that point; though in vulgar acceptation it were capable of being taken indifferently, either inclusively or exclusively, yet in law it has obtained a certain fixed import and is always taken as exclusive of the *terminus a quo*. Powell, Powers 449. This conclusion states a rule applied in the majority of cases, and it was said that the prepositions "from," "until," "between," generally exclude the day to which they relate, but the general rule will yield to the intent of parties; Kendall v. Kingsley, 120 Mass. 94. But the rule has not been unvarying, and many courts have not hesitated to follow the views of Lord Mansfield, in Cowp. 714 (overruling his own decision of three years before, *id.* 189), that it is either exclusive or inclusive according to context and subject-matter, and the court will construe it to effectuate the intent of parties and not to destroy it.

As to time, after an examination of authorities, Washington, J., laid down what he considered the settled principles to be deduced from them: (1) When time is computed *from* an act done, the day of its performance is included; (2) when the words are from the date, if a present interest is to commence, the day is included, if it is a terminus from which to impute time the day is excluded; Pearpoint v. Graham, 4 Wash. C. C. 240, Fed. Cas. No. 10,877; where the latter principle was applied to a lease, as it was also in Lord Raym. 84; and to a bond; Lysle v. Williams, 15 S. & R. (Pa.) 135; and the first proposition has been laid down with reference to the words "from and after the passage of this act;" Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; U. S. v. Williams, 1 Paine 261, Fed. Cas. No. 16,723; U. S. v. Arnold, 1 Gall. 348, Fed. Cas. No. 14,469; *contra*, Lorent v. Ins. Co., 1 Nott. & McC. (S. C.) 505. See U. S. v. Heth, 3 Cra. (U. S.) 399, 2 L. Ed. 479. From is generally held a word of exclusion; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Oatman v. Walker, 33 Me. 67; Ordway v. Remington, 12 R. I. 319, 34 Am. Rep. 646; Atkins v. Sleeper, 7 Allen (Mass.) 487. But a promise made November 1st, 1811, and sued November 1st, 1817, was held barred by statute of limitation; Presbrey v. Williams, 15 Mass. 193. In many cases it is held to be either exclusive or inclusive according to the intention of the parties; Deyo v. Bleakley, 24 Barb. (N. Y.) 9; Houser v. Reynolds, 2 N. C. 114, 1 Am. Dec. 551. Where an act was to be done in a

given number of days *from the time of the contract*, the day on which the contract was made was included; Brown v. Buzan, 24 Ind. 194; but if the contract merely says in so many days it means so many days from the day of date, and that is excluded; Blake v. Crowninshield, 9 N. H. 304. A fire policy *from one given date to another* includes the last day; whether the first is included was not decided; L. R. 5 Exch. 296. In most cases when something is required to be done in a given time from the day on which an event has happened, that day is excluded, as in case of proving claims against the estate of a decedent or insolvent; Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; enrolling deeds, after execution; Seawell v. Williams, 5 Hayw. (Tenn.) 283; appeal from arbitrators, afterward; Browne v. Browne, 3 S. & R. (Pa.) 496; issuing a *scire facias* to revive a judgment, after entry; Appeal of Green, 6 W. & S. (Pa.) 327; the time an execution runs, after its date; Homan v. Liswell, 6 Cow. (N. Y.) 659; redemption from execution sale; *id.* 518; allowing appeal from a justice; Ex parte Dean, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521. The principle is thus well expressed. When time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, that day is excluded and the last day included; Sheets v. Selden, 2 Wall. (U. S.) 177, 17 L. Ed. 822. But it was held that in considering the question of barring a writ of error, the day of the decree is included; Chiles v. Smith's Heirs, 13 B. Monr. (Ky.) 460.

From the expiration of a policy means from the expiration of the time from which the policy was effected and not the time at which the risk is terminated by alienation; Sullivan v. Ins. Co., 2 Mass. 318. Six months *from testator's death* allowed a legatee to give security not to marry, are exclusive of that day; 15 Ves. 248. Where an annuity is given, and *from and after the payment thereof* and subject thereto, the principal over, the gift over is subject to make up deficiency of income; *aliter* if the gift over were from and after the annuitant's death, merely; L. R. 2 Ch. App. 644, reversing L. R. 4 Eq. 58. *From time to time*, as applied to the payment of expenses or damages caused by building a railroad; L. R. 5 Ex. 6; or the appointment, by a married woman, of rents and profits; 1 Ves. Jr. 189 and note; 3 Bro. C. C. 340; 12 Ves. 501; do not require periodical payments or appointments, nor restrain the party from a sweeping discharge or disposition of the whole subject-matter at once. From time to time is not sufficient in a bail bond which under the statute should stipulate for appearance from term to term; Forbes v. State (Tex.) 25 S. W. 1072. *From day to day*, in reference to adjournments, usually means to the next day but, under a statute authorizing the adjournment of a sale from day to day, a sale is good if made by adjournment to a day, certain, which did not immediately succeed the first; Burns v. Lyon, 4 Watts (Pa.) 363. *From henceforth* in a lease means from the delivery; 5 Co. 1; so also does one from March 25th last past (the execution being March 25th); 4 B. & C. 272; or one from an impossible date (as February 30th), or no date, but if it has a sensible date, the word date in other parts of it means date, not delivery; 4 B. & C. 908. Where authority is given to commissioners to build a bridge and *then and from thenceforth*, the county to be liable, means only after the bridge is built; 16 East 305.

Whenever they are used with respect to places it is said that "from," "to," and "at" are taken inclusively according to the subject-matter; Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428 (fixing the terminus of a railroad under an act of congress). *From an object to an object* in a deed excludes the terminus referred to; Bonney v. Morrill, 52 Me. 252; State v. Bushey, 84 Me. 459, 24 Atl. 940. *From place to place* means from one place in a town to another in the same town; Com. v. Inhabitants of Cambridge, 7 Mass. 158; Com. v. Waters, 11 Gray (Mass.) 81. *From a street* means from any part of it according to circumstances; City of Pittsburg v. Cluley, 74 Pa. 259. *From a town* is not always and indeed is seldom exclusive of the place named; it generally means from some indefinite place within that town; Chesapeake & O. Canal Co. v. Key, 3 Cra. C. C. 599, 606, Fed. Cas. No. 2,649. Authority in a railroad charter to construct a railroad *from a city* to another point gives power to construct the road from any point within the city; Hazlehurst v. Freeman, 52 Ga. 244; Appeal of Western Pennsylvania R. Co., 99 Pa. 155; Tennessee & A. R. Co. v. Adams, 3 Head (Tenn.) 596; *contra* North-Eastern R. Co. v. Payne, 8 Rich. L. (S. C.) 177. And see Farmers' Turnpike Road v. Coventry, 10 Johns. (N. Y.) 389, where in a similar case "to" was construed "into;" and Mohawk Bridge Co. v. R. Co., 6 Paige Ch. (N. Y.) 554, where, "at or near" was held equivalent to "within." But *from a town* to another in an indictment for transportation of liquor does not charge it as done within the town; State v. Bushey, 84 Me. 459, 24 Atl. 940. To construe reasonably the expression a road *from a village* to a creek within the same village, in a statute, requires that it be taken inclusively; Smith v. Helmer, 7 Barb. (N. Y.) 416. Sailing *from a port* means out of it; U. S. v. La Coste, 2 Mass. 129, Fed. Cas. No. 15,548.

Descent *from a parent* cannot be construed to mean through a parent, it must be immediate, from the person designated; Gardner v. Collins, 2 Pet. (U. S.) 58, 86, 7 L. Ed. 347; Case v. Wildridge, 4 Ind. 51; but the words *from the part of the father* in-

clude a descent, either immediately from the father or from any person in the line of the father; Shippen v. Izard, 1 S. & R. (Pa.) 222.

The words to be paid for in *from six to eight weeks* have no definite meaning and it was properly left to the jury to say if the suit was brought prematurely; L. R. 9 C. P. 20. *From the loading* in a marine policy ordinarily means that the risk is covered after the goods are on board, but this meaning may be qualified by any words in the policy indicating a different intention; 16 East 240; L. R. 7 Q. B. 580, 702. A contract to deliver *from one to three thousand bushels* gives the seller an option to deliver any quantity he chooses within the limits named; Small v. Quincy, 4 Greenl. (Me.) 497. Appraisers living from one to one and a half miles away, in a fairly well settled community, are *prima facie from the neighborhood;* State v. Jungling, 116 Mo. 162, 22 S. W. 688.

FRONT. Ordinarily, as applied to a lot or tract of land, that part of it which abuts on, or gives access from, it to a highway whether natural or artificial. But sometimes as in a covenant to keep up sidewalks, the front of a corner lot may mean the side; City of Des Moines v. Dorr, 31 Ia. 89.

When the contract of sale calls for a store fifty-six feet *front and rear* and the deed describes the lot as nineteen feet wide, there being visible monuments,—side walls,—the latter control, and front and rear will be taken as the depth of the lot, though the natural meaning would be the width; McWhorter v. McMahan, 10 Paige (N. Y.) 386.

A covenant not to open or put out a door to the *front of the street* means a door giving access to the street and not close upon it, and the covenant is broken if the door be eight feet back of the actual front; Dowl. & Ry. 556, 563.

The words *front to the river* (in French and Spanish deeds, *face au fleuve*, or *frente al rio*), used in describing part of a plantation, *prima facie* designate a riparian estate, unless, taken in such sense, they have an incongruous or absurd result; Morgan v. Livingston, 6 Mart. O. S. (La.) 19, 224, in which the meaning of this expression was learnedly and elaborately defined. It is otherwise as to a sale of part of a tract when at the time of sale the vendor owned another part between that sold and the river; in the last case the words are descriptive of the situation of the property; Cambre v. Kohn, 8 Mart. N. S. (La.) 572.

And the words *front of the levee* (*fronte à la levee*) when there was land outside of the levee susceptible of ownership does not signify a boundary on the river; Livingston v. Heerman, 9 Mart. O. S. (La.) 656, 719.

FRONT FOOT. As used in an act providing that property shall be assessed in proportion to the "front foot" has been held synonymous with "abutting foot." Moberly v. Hogan, 131 Mo. 19, 32 S. W. 1014. See ASSESSMENT.

FRONT OF AN ACRE. An expression which "has no proper application to a line, and has not a natural or generally acknowledged and received sense. It is too vague to determine the length of the front line of a lot as a basis for a decree for specific performance;" Crockett v. Green, 3 Del. Ch. 466.

FRONTAGE, FRONTAGER. **In English Law.** A frontager is a person owning or occupying land which abuts on a highway, river, sea-shore, or the like. The term is generally used with reference to the liability of frontagers on streets to contribute towards the expense of paving, draining, or other works on the highway carried out by a local authority, in proportion to the frontage of their respective tenements. Public Health Act, 11 & 12 Vict. c. 63. There is no liability at common law binding a frontager on the sea to maintain a sea-wall on his land; 1 Q. B. D. 225.

The corresponding American term is abutter *(q. v.)*. See ASSESSMENT; FORESHORE.

FROSTA-THING. See GULA-THING.

FROZEN SNAKE. A term used to impute ingratitude and held libelous, the court taking judicial notice of its meaning without an innuendo. 12 Ad. & El. 624.

FRUCTUARIUS (Lat.). One entitled to the use of profits, fruits, and yearly increase of a thing. A lessee; a fermor. Bracton, 241; Vicat, Voc. Jur.

Sometimes, as applied to a slave, he of whom any one has the usufruct. Vicat, Voc. Jur.

FRUCTUS (Lat.). The right of using the increase of fruits: equivalent to usufruct.

That which results or springs from a thing: as, rents, interest, freight from a ship, etc.

All the natural return, increase, or addition which is added by nature or by the skill of man, including all the organic products of things. Vicat, Voc. Jur.; 1 Mackeldey, Civil Law § 154.

FRUCTUS CIVILES (Lat. civil fruits). All revenues and recompenses which, though not *fruits* properly speaking, are recognized as such by the law. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex.

FRUCTUS INDUSTRIALES (Lat.). Those products which are obtained by the labor and cultivation of the occupant: as, corn or peaches; 1 Kauffmann, Mackeld. § 154, n.; Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Townsend v. Hargraves, 118 Mass. 325. Emblements are such in the common law; 2 Steph. Com. 258; Vicat, Voc. Jur.

Fruits and vegetables produced by cultivation, as distinguished from the products of

perennials; such as trees, bushes, etc., which are *fructus naturales*. Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36, 16 L. R. A. 103, 32 Am. St Rep. 571.

FRUCTUS LEGIS. The fruit of the law, *i. e.* execution.

FRUCTUS NATURALES (Lat.). Those products which are produced by the powers of nature alone: as wool, metals, milk, the young of animals, and the fruit of trees and other perennial plants. 1 Kauffmann, Mackeld. § 154; Calvinus, Lex. See FRUCTUS INDUSTRIALES.

FRUCTUS PENDENTES (Lat.). The fruits united with the thing which produces them. These form a part of the principal thing; 1 Kauffmann, Mackeld. § 154. Sometimes called *fructus stantes*, standing fruits.

FRUCTUS REI ALIENAE. Fruits taken from another's estate; the fruits of another's property.

FRUCTUS SEPARATI. In Civil Law. Separate fruits, the fruits of a thing when they are separated from it. Dig. 7, 4, 13.

FRUGES (Lat.). Anything produced from vines, underwood, chalk-pits, stone-quarries. Dig. 50. 16. 77.

Grains and leguminous vegetables. In a more restricted sense, an esculent growing in pods. Calvinus, Lex.

FRUIT. The produce of a tree or plant which contains the seed or is used for food.

This term, in legal acceptation, is not confined to the produce of those trees which, in popular language, are called fruit trees, but applies also to the produce of oak, elm, and walnut trees. It denotes the produce not only of orchard, but of timber trees. 5 B. & C. 847. It has a wide meaning as including profits of all sorts.

FRUIT, FALLEN. The produce of any possession detached therefrom, and capable of being enjoyed by itself. Thus a next presentation, when a vacancy has occurred, is a fruit fallen from the advowson. Whart.

FRUITS OF CRIME. Material objects acquired by means and in consequence of the commission of crime, and sometimes the subject-matter of the crime. Burr. Circ. Ev. 445; Benth. Jud. Ev. 31.

FRUMENTUM. In Civil Law. Grain. That which grows in an ear. Dig. 50.

FRUMGYLD. The first payment made to the kindred of a slain person in recompense for his murder. Blount; *Termes de la Ley;* Leg. Edmundi, cap. ult.

FRUMSTOL (Sax.). A chief seat or mansion-house. Cowell. An original or paternal dwelling. Anct. Inst. Eng.

FRUSCA TERRA. In Old Records. Uncultivated and desert ground. 2 Mon. Angl. 327; Cowell.

FRUSSURA. Plowing; a breaking. Cowell.

FRUSTRUM TERRÆ. A piece or parcel of land lying by itself. Co. Litt. 5 *b*.

FRUTECTUM, FRUTETTUM, or FRUTICETUM. A place where shrubs or herbs grow. Jac.; Blount; Spel. Gloss.

FRUTOS. In Spanish Law. Fruits; products; profits; grains. White, New Recop. b. 1, tit. 7, c. 5, § 2.

FRYMITH, FYNMITH. In English Law. The affording harbor and entertainment to any one. Anc. Inst. Eng.

FRYTH (Sax.). In Old English Law. A plain between woods. Co. Litt. 5 *b*. An arm of the sea, or a strait between two lands. Cowell.

FUAGE, FOCAGE. Hearth-money. A tax laid upon each fireplace or hearth. 1 Bla. Com. 324; Spelman, Gloss. A shilling for every hearth, levied by the Black Prince in his dukedom of Aquitaine.

FUER. To fly. It may be by bodily flight, or by non-appearance when summoned to appear in a court of justice, which is flight in the interpretation of the law. Cowell; Toml.; Whart.

FUERO. In Spanish Law. Compilations or general codes of law.

The usages and customs which, in the course of time, had acquired the force of unwritten law.

Letters of privilege and exemption from payment of certain taxes, etc.

Charters granted to cities or towns on condition of their paying certain dues to the owner of the land of which they had enjoyment.

Acts of donation granted by some lord or proprietor in favor of individuals, churches, or monasteries.

Ordinances passed by magistrates in relation to the dues, fines, etc., payable by the members of a community.

Letters emanating from the king or some superior lord, containing the ordinances and laws for the government of cities and towns, etc.

This term has many and very various meanings, as is shown above, and is sometimes used in other significations beside those here given. See, also, Schmidt, Span. Law 64; Escriche, Dict. Razz. *Fuero.*

Fuero de Castilla. The body of laws and customs which formerly governed the Castilians.

Fuero de Correos y Caminos. A special tribunal taking cognizance of all matters relating to the post-office and roads.

Fuero de Guerra. A special tribunal taking cognizance of all matters in relation to persons serving in the army.

Fuero Juzgo. The code of laws established by the Visigoths for the government of

Spain, many of whose provisions are still in force. See the analysis of this work in Schmidt's Span. Law 30.

Fuero de Marina (called, also, *Jurisdiccion de Marina*). A special tribunal taking cognizance of all matters relating to the navy and to the persons employed therein.

Fuero Municipal. The body of laws granted to a city or town for its government and the administration of justice.

Fuero Real. A code of laws promulgated by Alonzo el Sabio in 1255, and intended as an introduction to the larger and more comprehensive code called *Las Siete Partidas*, published eight years afterwards. For an analysis of this code, see Schmidt, Span. Law 67.

Fuero Viejo. The title of a compilation of Spanish Law, published about A. D. 992. Schm. Civil Law, introd. 65.

FUGA CATALLORUM. **In Old English Law.** A drove of cattle. Fleta; Blount.

FUGACIA. A chase. Cowell; Blount.

FUGAM FECIT (Lat. he fled). **In Old English Law.** A phrase in an inquisition, signifying that a person fled for treason or felony. The effect of this is to make the party forfeit his goods absolutely, and the profits of his lands until he has been pardoned or acquitted.

FUGATOR. **In English Law.** A privilege to hunt. Blount.

A driver. *Fugatores carrucarum*, drivers of wagons. Fleta, lib. 2, c. 78.

FUGITIVE FROM JUSTICE. One who, having committed a crime, flees from the jurisdiction within which it was committed, to escape punishment.

In the absence of direct evidence on the question of flight, if it appear from the indictment or affidavit produced that the crime charged is atrocious in its nature, was recently committed, and the prosecution promptly instituted, the unexplained presence of the accused in another state immediately after the commission of the crime ought perhaps to be regarded as *prima facie* evidence of flight, sufficient, at least, to warrant an order of arrest. The order of surrender is not required, by the act of congress, to be made at the same time with the order of arrest, and time, therefore, can be taken, in doubtful cases, after the accused is arrested and secured, to hear proofs to establish or rebut such *prima facie* evidence; 6 Am. Jur. 226; 7 Bost. Law Rep. 386.

One convicted of a crime, who when called for sentence is found in another state, is a fugitive from justice; Hughes v. Pflanz, 138 Fed. 980, 71 C. C. A. 234.

The accused person may be arrested to await a demand; Ex parte Cubreth, 49 Cal. 436; but he cannot be surrendered before a formal demand is made; Botts v. Williams, 17 B. Monr. (Ky.) 687. But if he be so surrendered and returned to the state from which the requisition came, this is not a ground of discharge then; In re Dow, 18 Pa. 39.

The surrender of the accused must be made to an agent of the executive authority of the demanding state, duly appointed to receive the fugitive.

The proceedings of the executive authorities are subject to be reviewed on *habeas corpus* by the judicial power, and if found void the prisoner may be discharged; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; In re Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; Ex parte Thornton, 9 Tex. 635; Ex parte White, 49 Cal. 434; Kingsbury's Case, 106 Mass. 223; People v. Brady, 56 N. Y. 182; In re Cook, 49 Fed. 833. But the courts have no jurisdiction to compel the executive to comply with a requisition; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717; Ex parte Manchester, 5 Cal. 237. Nor have the federal courts such jurisdiction; Kentucky v. Dennison, 24 How. (U. S.) 66, 16 L. Ed. 717. Nor will the court on *habeas corpus* try the validity of the indictment under which he is charged; Ex parte Pearce, 32 Tex. Cr. R. 301, 23 S. W. 15.

See EXTRADITION.

FUGITIVE'S GOODS. Under the old English Law, where a man fled for felony, and escaped, his own goods were not forfeited as *bona fugitivorum* until it was found by proceedings of record (*e. g.* before the coroner in the case of death) that he fled for the felony. Foxley's Case, 5 Co. 109 *a*. See FUGAM FECIT; WAIFS.

FUGITIVE SLAVE. One who, held in bondage, flees from his master's power.

Prior to the adoption of the constitution of the United States, the duty of surrendering slaves fleeing beyond the jurisdiction of the state or colony where they were held to service was not regarded as a perfect obligation, though, on the ground of inter-state comity, they were frequently surrendered to the master. Instances of such surrender or permission to reclaim occur in the history of the colonies as early as 1685; Hurd, Hab. Corp. 592. As slavery disappeared in some states, the difficulty of recovering in them slaves fleeing from those where it remained was greatly increased, and on some occasions reclamations became quite impracticable. The subject engaged the attention of the convention of 1787; and, at the instance of members from slaveholding states, a provision was inserted in the constitution for the surrender of such persons escaping from the state where they owed service, into another, which provision was considered a valuable accession to the security of that species of property; 4 Elliott Debates 487, 492; 5 *id.* 176, 286.

This provision is contained in art. iv. sec. 2 of the constitution, and is as follows:

"No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Congress, conceiving it to be the duty of the federal government to provide by law, with adequate sanctions, for the execution of the duty thus enjoined by the constitution, by the act of February 12, 1793, and again by the amendatory and supplementary act of September 18, 1850, regulated the

mode of arrest, trial, and surrender of such fugitives. Some of the states have, also, at times passed acts relating to the subject; but it has been decided by the supreme court of the United States that the power of legislation in the matter was vested exclusively in congress, and that all state legislation inconsistent with the laws of congress was unconstitutional and void; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; Thornton's Case, 11 Ill. 332.

These acts of congress were held to be constitutional and valid in all their provisions; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; Wright v. Deacon, 5 S. & R. (Pa.) 62; Glen v. Hodges, 9 Johns. (N. Y.) 67; In re Martin, 2 Paine, 348, Fed. Cas. No. 9,154; In re Sims, 7 Cush. (Mass.) 285; Ex parte Robinson, 6 McLean, 355, Fed. Cas. No. 11,935.

The 3d and 4th sections of act of 1793, 1 Stat. L. 302, authorized the arrest of a slave by the owner, his agent or attorney, and on proof before a United States judge or a magistrate, a certificate of ownership should be given and would be a warrant for removal. Under the act of 1850, 9 Stat. L. 462, the marshals of the United States were required to arrest such slaves.

The act of 1850, and the 3d and 4th sections of the act of 1793 were repealed by the act of June 28, 1864, 13 Stat. at L. 200. For some decisions as to the question of the interference between the acts of 1793 and 1850, see Miller v. McQuerry, 5 McLean, 469, Fed. Cas. No. 9,583; Norris v. Crocker, 13 How. (U. S.) 429, 14 L. Ed. 210.

In the practical application of the provisions of the acts of 1793 and 1850 for the reclamation of fugitive slaves, it was held that the owner was clothed with authority in every state of the Union to seize and recapture his slave wherever he could do it without any breach of the peace or illegal violence; Prigg v. Pennsylvania, 16 Pet. (U. S.) 608, 10 L. Ed. 1060; that he might arrest him on Sunday, in the night-time, or in the house of another if no breach of the peace was committed; Johnson v. Tompkins, Baldw. 577, Fed. Cas. No. 7,416; that if the arrest was by agent of the owner, he must be authorized by written power of attorney executed and authenticated as required by the act; Weimer v. Sloane, 6 McLean, 259, Fed. Cas. No. 17,363; and if his authority was demanded it should be shown: Driskill v. Parrish, 3 McLean, 631, Fed. Cas. No. 4,089; but he was not required to exhibit it to every one who might mingle in the crowd which obstructed him; Giltner v. Gorham, 4 McLean 402, Fed. Cas. No. 5,453; that, if resisted by force in making the arrest, the owner might use sufficient force to overcome the unlawful resistance offered without being guilty of the offence of riot; 3 Am. L. J. 258; Van Metre v. Mitchell, 7 Pa. L. J. 115; that whilst the examination was pending before the magistrate who had jurisdiction of the case, the person arrested was in custody of the law and might be imprisoned for safekeeping; In re Martin, 2 Paine, 348, Fed. Cas. No. 9,154; Worthington v. Preston, 4 Wash. C. C. 461, Fed. Cas. No. 18,055; Ex parte Robinson, 6 McLean 355, Fed. Cas. No. 11,935; that the act of Sept. 18, 1850, did not operate as a suspension of the writ of *habeas corpus;* 5 Op. Attys. Genl. 254; but that that writ could not be used by state officers to defeat the jurisdiction acquired by the federal authorities in such cases; In re Sims, 7 Cush. (Mass.) 285; Norris v. Newton, 5 McLean 92, Fed. Cas. No. 10,307; Charge to Grand Jury, 1 Blatchf. 635; Fed. Cas. No. 18,261; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169.

The provisions of the constitution and laws above cited were held to extend only to cases where persons held to service or labor *in one state or territory* by the laws thereof *escaped into another.* Hence, if the owner voluntarily took his slave into such other state or territory, and the slave left him there or refused to return, he could not institute proceedings under those laws for his recovery; Ex parte Simmons, 4 Wash. C. C. 396, Fed. Cas. No. 12,863; Kauffman v. Oliver, 10 Pa. 517; Strader v. Graham, 10 How. (U. S.) 82, 13 L. Ed. 337. And children, born in a state where slavery prevailed, of a negro woman who was a fugitive slave, were not fugitive slaves or slaves who had *escaped* from service in another state, within the meaning of the constitution and acts of congress; Fields v. Walker, 23 Ala. 155.

Since the adoption of the thirteenth amendment of the U. S. constitution, the above is entirely obsolete and possesses only an historical interest.

FULL. Complete; entire; detailed.

FULL AGE. See AGE; INFANT.

FULL ANSWER. One which meets all the legal requirements.

FULL BLOOD. Whole blood; generally used to denote brothers and sisters who descend from the same father and mother.

FULL CONFIDENCE. Under a bequest to the wife of testator "absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the words full confidence do not constitute a trust, but are merely an expression of the testator's wishes and belief, as distinguished from a direction amounting to an obligation; 8 Ch. D. 540.

FULL COURT. A court in banc with all the judges on the bench who are qualified to sit. It is not unusual for counsel in a case of great public importance, in the absence of one or more of the judges to ask for a postponement of a trial or argument in order that the cause may be heard and determined by a full court and not by a mere quorum. The granting of such an application is not a matter of right, but, in a case which appears to the court to justify it, the course proposed will generally be taken. Such applications are not unusual in the United States Supreme Court, in cases involving grave constitutional questions, and in the state courts in cases involving the life of a party or some grave public question. Sometimes where a case has been decided by a majority of a quorum, but a minority of the whole number of judges, a motion for a rehearing by the full court is allowed.

Formerly in England the expression was used when other judges sat with the judge who regularly held the court. Thus the Full Court of Appeal in Chancery consisted of the Lord Chancellor and Lords Justices sitting together. The Full Court in Divorce and Matrimonial Causes consisted of the Judge Ordinary and at least two other members of the court. These arrangements are, nominally at least, superseded under the Judicature Acts.

FULL DEFENCE. See DEFENCE.

FULL FAITH AND CREDIT. A phrase used in the constitution of the United States, which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. See FOREIGN JUDGMENTS.

FULL LIFE. Life in fact and in law.

FULL POWERS. A document issued by the government of a state empowering its dip-

lomatic agent to conduct special business with a foreign government.

FULL PROOF. In Civil Law. Proof of two witnesses, or a public instrument. Halifax, Civil Law b. 3, c. 9, nn. 25, 30; 3 Bla. Com. 370.

Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt. Kane v. Ins. Co., 38 N. J. L. 450, 20 Am. Rep. 409. See PLENA PROBATIO.

FULL RIGHT. The union of a good title with actual possession.

FULL WAGES. The seventh article of the Laws of Oleron provides: That if a mariner be taken sick on the voyage, he ought to be put on shore, and care should be taken of him at the expense of the ship; when the vessel is ready to sail, she is not to wait for him; but, still he is to be entitled to his full wages if he recover; and if he does not, his wife, or next of kin, is to have them; deducting only such charges as the master has been at for him. The phrase full wages means the same wages which he would have been entitled to had he lived and served out the whole voyage of the vessel. Sims v. Jackson, 1 Wash. C. C. 414, Fed. Cas. No. 12,890; 2 H. Bla. 606, note.

FULLUM AQUÆ. A fleam, or stream of water. Blount.

FUMAGE, FUAGE, or FOUAGE. A tax paid to the sovereign for every house that had a chimney. It is probable that the hearth-money imposed by 13 & 14 Car. II. c. 10, took its origin hence. This hearth-money was declared a great oppression, and abolished by 1 W. & M. Stat. 1, c. 10, but a tax was afterwards laid upon houses, except cottages, and upon all windows, by 1 Wm. III. c. 18. The window duty was repealed by 14 & 15 Vict. c. 36. Whart. See HEARTH MONEY.

FUNCTION. The occupation of an office: by the performance of its duties, the officer is said to fill his function. Dig. 32. 65. 1.

FUNCTIONARY. One who is in office or in some public employment.

FUNCTUS OFFICIO (Lat.). A term applied to something which once has had life and power, but which has become of no virtue whatsoever.

For example, a warrant of attorney on which a judgment has been entered is *functus officio*, and a second judgment cannot be entered by virtue of its authority. When arbitrators cannot agree and choose an umpire, they are said to be *functi officio*. Wats. Arb. 94. If a bill of exchange be sent to the drawee, and he passes it to the credit of the holder, it is *functus officio*, and cannot be further negotiated; Savage v. Merle, 5 Pick. (Mass.) 85. When an agent has completed the business with which he was intrusted, his agency is *functus officio*.

FUND. "Merely a name for a collection or an appropriation of money. It may be nothing but a designation of one branch of the accounts of the state; or of a certain amount of money, when collected to be applied to a particular purpose. It may have no property and represent no investments; and what are called its revenues may include all the moneys appropriated or directed to be paid to it, or for its benefit, or that of the objects it represents." People v. R. Co., 34 Barb. (N. Y.) 135. See Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358; 7 H. L. Cas. 273; Miller v. Bradish, 69 Ia. 278, 28 N. W. 594.

FUNDAMENTAL. This word is applied to those laws which are the foundation of society. Those laws by which the exercise of power is restrained and regulated are fundamental. The constitution of the United States is the fundamental law of the land. See Wolffius, Inst. Nat. § 984.

FUNDAMUS. We found. One of the words by which a corporation was created in England. 1 Bl. Comm. 473; 3 Steph. Comm. 173. See CORPORATION.

FUNDATIO (Lat.). A founding.

FUNDATOR. A founder *(q. v.)*.

FUNDI PATRIMONIALES. Lands of inheritance.

FUNDI PUBLICI. Public lands.

FUNDING SYSTEM. The practice of borrowing money to defray the expenses of government.

In the early history of the system it was usual to set apart the revenue from some particular tax as a *fund* to the principal and interest of the loan. The earliest record of the funding system is found in the history of Venice. In the year 1171, during a war between the republic and the Byzantine emperor Manual Commenas, a Venetian fleet ravaged the eastern coasts, but, being detained by negotiations at Chios, suffered severely from the plague. The remnant of the expedition, returning, took with it the frightful pestilence, which ravaged Venice and produced a popular commotion in which the doge was killed. To carry on the war, the new doge, Sebastian Giani, ordered a forced loan. Every citizen was obliged to contribute one-hundreth of his property, and he was to be paid by the state five per cent. interest, the revenues being mortgaged to secure the faithful performance of the contract. To manage the business, commissioners were appointed, called the Chamber of Loans, which after the lapse of centuries grew into the Bank of Venice. Florence and other Italian republics practised the system; and it afterwards became general in Europe. Its object is to provide large sums of money for the immediate

exigencies of the state, which it would be impossible to raise by direct taxation.

In England the funding system was inaugurated in the reign of William III. The Bank of England, like the Bank of Venice and the Bank of St. George at Genoa, grew out of it. In order to make it easy to procure money to carry on the war with France, the government proposed to raise a loan, for which, as usual, certain revenues were to be set aside, and the subscribers were to be made a corporation, with exclusive banking privileges. The loan was rapidly subscribed for, and the Bank of England was the corporation which it brought into existence. It was formerly the practice in England to borrow money for fixed periods; and these loans were called terminable annuities. Of late years, however, the practice is different,—loans being payable only at the option of the government; these are termed interminable annuities. The rate of interest on the earlier loans was generally fixed at three and a half per cent. and sold at such a rate below par as to conform to the state of the money-market. It is estimated that two-fifths of the entire debt of England consists of this excess over the amount of money actually received for it. The object of such a plan was to promote speculation and attract capitalists; and it is still pursued in France.

Afterwards, however, the government receded from this policy, and, by borrowing at high rates, were enabled, when the rate of interest declined, by offering to pay off the loan, to reduce the interest materially. The national debt of England consists of many different loans, all of which are included in the term *funds*. Of these, the largest in amount and importance are the "three per cent. consolidated annuities," or consols, as they are commonly called. They originated in 1751, when an act was passed consolidating several separate three per cent. loans into one general stock, the dividends of which are payable on the 5th of January and 5th of July at the Bank of England. The bank being the fiscal agent of the government, pays the interest on most of the funds, and also keeps the transfer-books. When stock is sold, it is transferred on the books at the bank to the new purchaser, and the interest is paid to those parties in whose names the stock is registered, at the closing of the books a short time previous to the dividend-day. Stock is bought and sold at the stock exchange generally through brokers. Time sales, when the seller is not the actual possessor of the stock, are illegal, but common. They are usually made deliverable on certain fixed days, called accounting-days; and such transactions are called "for account," to distinguish them from the ordinary sales and purchases for cash. Stock-jobbers are persons who act as middlemen between sellers and purchasers. They usually fix a price at which they will sell and buy, so that sellers and purchasers can always find a market for stock, or can purchase it in such quantities as they may desire, without delay or inconvenience.

In America the funding system has been fully developed. The general government, as well as those of all the states, have found it necessary to anticipate their revenue for the promotion of public works and other purposes. The many magnificent works of internal improvement which have added so much to the wealth of the country were mainly constructed with money borrowed by the states. The canals of New York, and many railroads in the western states, owe their existence to the system.

The funding system enables the government to raise money in exigencies, and to spread over many years the taxation which would press too severely on one. It affords a ready method of investing money on good security, and it tends to identify the interest of the state and the people. But it is open to many objections,—the principal of which is that it induces statesmen to countenance expensive and oftentimes questionable projects who would not dare to carry out their plans were they forced to provide the means from direct taxation. McCulloch, Dict. of Comm.; Sewell, Banking.

FUNDITORES. Pioneers. Jac. L. Dict.

FUNDS. Cash on hand: as, A B is in funds to pay my bill on him. Stocks: as, A B has one thousand dollars in the funds. By public funds is understood the taxes, customs, etc., appropriated by the government for the discharge of its obligations.

In England "The Funds" are synonymous with "Government Funds," or "Public Funds;" 7 H. L. C. 280; and generally mean funded securities guaranteed by the English government; 27 L. J. Ch. 448; but do not include foreign bonds guaranteed by England; 2 Coll. 324; nor bank stock; 7 H. L. C. 273.

FUNDUS (Lat.). Land. A portion of territory belonging to a person. A farm. Lands, including houses; 4 Co. 87; Co. Litt. 5 *a*; 3 Bla. Com. 209.

FUNERAL EXPENSES. Money expended in procuring the interment of a corpse.

The person who orders the funeral is responsible personally for the expenses, and if the estate of the deceased should be insolvent, he must lose the amount. But if there are assets sufficient to pay these expenses, the executor or administrator is bound, upon an implied assumpsit, to pay them; 1 Campb. 298; Gregory v. Hooker's Adm'r, 8 N. C. 394, 9 Am. Dec. 646; 13 Viner, Abr. 563; O'Donnell v. Slack, 123 Cal. 285, 55 Pac. 906, 43 L. R. A. 388; Huhna v. Theller, 35 Misc. 296, 71 N. Y. Supp. 752.

Frequent questions arise as to the amount which is to be allowed to the executor or administrator for such expenses. It is exceedingly difficult to gather any certain rule

from the numerous cases which have been decided upon this subject. Courts have taken into consideration the circumstances of each case, the rank in life of the decedent, whether his estate was insolvent or not, and when the executors have acted with common prudence or in obedience to the will, their expenses have been allowed. In a case where the testator directed that his remains should be buried at a church thirty miles distant from the place of his death, the sum of sixty pounds sterling was allowed; 3 Atk. 119. In another case, under peculiar circumstances, six hundred pounds were allowed; Chanc. Prec. 29. Where the intestate left a considerable estate, and no children, $258.75 was allowed, the greater part of which had been expended in erecting a tombstone over a vault in which the body was interred; Appeal of McGlinsey, 14 S. & R. (Pa.) 64. A sum of $127 for burial expenses is not unreasonable where deceased left an estate worth $800; Kittle v. Huntley, 67 Hun 617, 22 N. Y. Supp. 519.

In an estate of $2,800, the sum of $700 for a burial lot and monument was held excessive; In re Erlacher, 3 Redf. Sur. (N. Y.) 9; so was $490 for a casket and box for an infant whose estate was under $7,000; In re Kiernan, 38 Misc. 394, 77 N. Y. Supp. 924; and so $329 out of an estate of $500, for funeral expenses; In re Primmer's Estate, 49 Misc. 413, 99 N. Y. Supp. 830; and $810, out of an estate of $1,167 of a domestic servant; Estate of Cullen, 8 Pa. Super. Ct. 494; and $455 for funeral expenses out of an estate of less than $5,000; Foley v. Brocksmit, 119 Ia. 457, 93 N. W. 344, 60 L. R. A. 571, 97 Am. St. Rep. 324; but not $31 for carriages where the estate was $2,400; In re Osburn's Estate, 36 Or. 8, 58 Pac. 521. The expense of a gravestone comes under the head of funeral expenses; Van Emon v. Superior Court, 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258; Owens v. Bloomer, 14 Hun (N. Y.) 296; In re Howard's Estate, 3 Misc. 170, 23 N. Y. Supp. 836; Pease v. Christman, 158 Ind. 642, 64 N. E. 90.

Funeral expenses usually have priority in the order of payment of debts.

A husband is liable for the funeral expenses of his wife; 1 H. Bla. 90; 12 C. B. N. S. 344; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124, 1 Ann. Cas. 169. In some cases it is held that when he has paid them the husband is not entitled to reimbursement out of the wife's separate estate; Smyley v. Reese, 53 Ala. 89, 25 Am. Rep. 598; Appeal of Staples, 52 Conn. 425; In re Weringer's Estate, 100 Cal. 345, 34 Pac. 825; *contra*, 33 Ch. Div. 575; 6 Madd. 90; McCue v. Garvey, 14 Hun (N. Y.) 562; McClellan v. Filson, 44 Ohio St. 184, 5 N. E. 861, 58 Am. Rep. 814; (where the wife's executor paid them); Pache v. Oppenheim, 93 App. Div. 221, 87 N. Y. Supp. 704; Nashville Trust Co. v. Carr (Tenn.) 62 S. W. 204. The rule is not affected by the fact that the wife was separated by her fault from the husband; Seybold v. Morgan, 43 Ill. App. 39; or that she bequeathed money to another person who assisted in managing the funeral; Sears v. Giddey, 41 Mich. 590, 2 N. W. 917, 32 Am. Rep. 168.

A son-in-law is not liable to pay the funeral expenses of his mother-in-law; Kraan's Estate, 31 Pa. Co. Ct. R. 93. They are chargeable to the succession in Louisiana; Succession of McNeely, 50 La. Ann. 823, 24 South. 338. If a third party incurs a debt, the estate is not liable; Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124, 1 Ann. Cas. 169. See 2 Wms. Exec. 166, n.; 3 *id.* 275, n.; 2 Bla. Com. 508; 3 Atk. 249; Bacon, Abr. *Executors*, etc. (L 4); Viner, Abr. *Funeral Expenses.*

See, generally, 27 Am. St. Rep. 732, n.; Wilson v. Staats, 33 N. J. Eq. 524–529; DEAD BODY.

FUNGIBLE. A term applicable to things that are consumed by the use, as wine, oil, etc., the loan of which is subject to certain rules, and governed by the contract called *mutuum.* See Schmidt, Civ. Law of Spain and Mexico 145; Story, Bailm.

FUNGIBLE THINGS. When the subject of the obligation is a thing of a given class, the thing is said to be fungible; i. e., the delivery of any object which answers to the *generic* description will satisfy the obligation. Campbell's, Austin, 61.

FUR (Lat.). A thief. One who stole without using force, as distinguished from a robber. See FURTUM.

FUR. Skins valuable chiefly on account of the fur. Skins is a term appropriated to those valuable chiefly for the skin. The word hides is inapplicable to fur skins. Astor v. Ins. Co., 7 Cow. (N. Y.) 202, 214.

FUR MANIFESTUS (Lat.). **In the Civil Law.** A manifest thief. A thief who is taken in the very act of stealing.

FURANDI ANIMUS. An intention of stealing.

FURCA. A fork. A gallows or gibbet. Bract. fol. 56.

FURCA ET FLAGELLUM (Lat. gallows and whip). The meanest of servile tenures, where the bondman was at the disposal of the lord for life and limb. Cowell.

FURCA ET FOSSA (Lat. gallows and pit). A jurisdiction of punishing felons,—the men by hanging, the woman by drowning. Skene; Spelman, Gloss.; Cowell.

FURIGELDUM. A mulct paid for theft. Jac. L. Dict.

FURIOSITY. Madness by which the judgment is prevented from being applied to the ordinary purposes of life. Bell. It is distinguished from fatuity or idiotcy. Toml.

FURIOSUS (Lat.). An insane man; a madman; a lunatic.

In general, such a man can make no contract, because he has no capacity or will; *Furiosus nullum negotium gerere potest, quia non intelligit quod agit.* Inst. 3. 20. 8. Indeed, he is considered so incapable of exercising a will, that the law treats him as if he were absent; *Furiosi nulla voluntas est.* Dig. L. 17, 40. *Furiosus absentis loco est.* Dig. L. 17, 124. See INSANE; NON COMPOS MENTIS.

FURLINGUS (Lat.). A furlong, or a furrow one-eighth part of a mile long. Co. Litt. 5 *b*.

FURLONG. A measure of length, being forty poles, or one-eighth of a mile.

FURLOUGH. A permission given in the army and navy to an officer or private to absent himself for a limited time.

FURNAGE (from *furnus*, an oven). A sum of money paid to the lord by the tenants, who were bound by their tenure to bake at the lord's oven, for the privilege of baking elsewhere. The word is also used to signify the gain or profit taken and received for baking.

FURNITURE. Personal chattels in the use of a family.

"The word relates, ordinarily, to movable personal chattels. It is very general, both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kind according to the purpose which they are intended to subserve; yet being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some one of those purposes, they pertain to such places respectively, and collectively constitute the *furniture* thereof;" Fore v. Hibbard, 63 Ala. 410.

The expression household furniture must be understood to mean those vessels, utensils, or goods, which, not becoming fixtures, are designed chiefly for use in the family, as instruments of the household and for conducting and managing household affairs. It does not include a trunk nor a cabinet intended for keeping jewelry, etc.; Towns v. Pratt, 33 N. H. 345, 66 Am. Dec. 726.

It is held that by the term household furniture in a will, all personal chattels will pass which may contribute to the use or convenience of the householder or the ornament of the house: as, plate, linen, china (both useful and ornamental), and pictures; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329; 1 S. & S. 189; 2 Will. Ex. 752; Jarm. Wills 712, n.; Marquam v. Sengfelder, 24 Or. 2, 32 Pac. 676; Endicott v. Endicott, 41 N. J. Eq. 93, 3 Atl. 157; bronzes, statuary, and pictures; Endicott v. Endicott, 41 N. J. Eq. 93, 3 Atl. 157; but a watch will not; Gooch v. Gooch, 33 Me. 535; nor will books; 3 Ves. 311; or furniture of a school-room in a boarding school kept by a teacher; Appeal of Hoopes, 60 Pa. 220, 100 Am. Dec. 562; or silver plate used in a hotel; Dayton v. Tillou, 1 Rob. (N. Y.) 21. A sewing machine and piano were held exempt from attachment as "household furniture"; Von Storch v. Winslow, 13 R. I. 23, 43 Am. Rep. 10; but a doubt was expressed as to the piano, and as to that it was held *contra* in Dunlap v. Edgerton, 30 Vt. 224; Tanner v. Billings, 18 Wis. 163, 86 Am. Dec. 755.

FURNITURE OF A SHIP. This term includes everything with which a ship requires to be furnished or equipped to make her seaworthy; it comprehends all articles furnished by ship-chandlers, which are almost innumerable. Weaver v. S. G. Owens, 1 Wall. Jr. 369, Fed. Cas. No. 17,310.

FURNIVAL'S INN. A place in Holborn, in London, which was formerly an Inn of Chancery. 1 Steph. Com. 19, n. See INNS OF COURT.

FURST AND FONDONG. Time to advise or take counsel. Jac. L. Dict.

FURTA. A right or privilege derived from the king as supreme lord of a state to try, condemn, and execute *thieves* and felons within certain bounds or districts of an honour, manor, etc. Cowell seems to be doubtful whether this word should not read *furca*, which means directly a gallows. Cowell; Holthouse, L. Dict.

FURTHER ADVANCE. A second or subsequent loan of money to a mortgagor by a mortgagee, either upon the same security as the original loan was advanced upon, or an additional security. Equity considers the arrears of interest on mortgage security converted into principal, by agreement between the parties, as a further advance. Whart.

FURTHER ASSURANCE. See COVENANT FOR FURTHER ASSURANCE.

FURTHER CONSIDERATION. It frequently happens that a decree in Chancery directs accounts and inquiries to be taken before the chief clerk. The hearing of any question arising out of such inquiries is called a hearing on further consideration. Hunt. Eq. Rules Sup. Ct. xl. 10.

FURTHER DIRECTIONS. When accounts in Chancery were taken before Masters, a hearing after a master had made his report in pursuance of the directions of the decree was called a hearing on further directions. This stage of suit is now called a hearing on further consideration. Hunt. Eq. See 2 Dan. Ch. Pr. (5th ed.) 1233, n.

FURTHER HEARING. Hearing at another time.

Prisoners are frequently committed for further hearing, either when there is not sufficient evidence for a final commitment, or because the magistrate has not time, at the moment, to hear the whole of the evidence. The magistrate is required by law, and by every principle of humanity, to hear the prisoner as soon as possible after a commitment for further hearing; and if he neglects to do so within a reasonable time, he becomes a trespasser; 10 B. & C. 28; 5 M. & R. 53. Fifteen days was held an unreasonable time, unless under special circumstances; 4 C. & P. 134; Com. v. Ross, 6 S. & R. (Pa.) 427.

In Massachusetts, magistrates may, by statute, adjourn the case for ten days; Gen. Stat. c. 170, § 17. It is the practice in England to commit for three days, and then from three days to three days; 1 Chitty, Cr. Law 74.

FURTHER MAINTENANCE OF ACTION, PLEA TO. A plea grounded upon some fact or facts which have arisen since the commencement of the suit, and which the defendant puts forward for the purpose of showing that the plaintiff should not further maintain his action. Brown.

FURTIVE. *In Old English Law.* Stealthily; by stealth. Fleta, lib. 1, c. 38, 3.

FURTUM (Lat.). Theft. The fraudulent appropriation to one's self of the property of another, with an intention to commit theft, without the consent of the owner. Fleta, l. 1, c. 36; Bract. 150; Co. 3d Inst. 107.

The thing which has been stolen. Bract. 151.

FURTUM CONCEPTUM (Lat.). The theft which was disclosed when, upon searching any one in the presence of witnesses in due form, the thing stolen is found. Detected theft is perhaps, the nearest concise translation of the phrase, though not quite exact. Vicat, Voc. Jur.

FURTUM GRAVE (Lat.). Aggravated theft. Formerly there were three classes of this theft: *first*, by landed men; *second*, by a trustee or one holding property under a trust; *third*, theft of the *majora animalia* (larger animals), including children. Bell, Dict.

FURTUM MANIFESTUM (Lat.). Open theft. Theft where a thief is caught with the property in his possession. Bract. 150 *b*.

FURTUM OBLATUM (Lat.). The theft committed when stolen property is given to any one so as not to be found in the thief's possession. The crime of receiving stolen property. Calvinus, Lex.

FUSTIGATIO. *In English Law.* A beating with sticks or club; one of the ancient kinds of punishment of malefactors. Bract. fol. 104 *b*, lib. 3, tr. 1, c. 6.

FUSTIS. *In Old English Law.* A staff used in making livery of seisin. Bract. fol. 40.

FUTHWITE, or FITHWITE. A fine for fighting or breaking the peace. Cowell; Cun. L. Dict.

FUTURE ACQUIRED PROPERTY. Mortgages, especially of railroad companies are frequently made in terms to cover after-acquired property; such as rolling stock, etc. Such mortgages are valid; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; Pierce v. Emery, 32 N. H. 484; Shaw v. Bill, 95 U. S. 10, 24 L. Ed. 333; L. R. 16 Eq. 383. This may include future net earnings; Dunham v. Isett, 15 Ia. 284; the proceeds to be received from the sale of surplus lands; L. R. 2 Ch. 201; a ditch or flume in process of construction, which was held to cover all improvements and fixtures thereafter to be put on the line thereof; De Arguello v. Greer, 26 Cal. 620; rolling stock, etc.; Philadelphia, W. & B. R. Co. v. Woelpper, 64 Pa. 366, 3 Am. Rep. 596; Benjamin v. R. Co., 49 Barb. (N. Y.) 441. Future calls of assessments on stock cannot be mortgaged; L. R. 10 Eq. 681; but calls already made can be; *id.*

Locomotives bought under a conditional sale, reserving title in the vendor, pass under an after-acquired clause to a mortgagee of the railroad, subject to the vendor's rights; Contracting & Building Co. of Kentucky v. Trust Co., 108 Fed. 1, 47 C. C. A. 143.

A power in a Kentucky hotel company's charter to mortgage "all its property" does not sustain a mortgage covering after-acquired personal property; In re New Galt House Co., 199 Fed. 533, following Kentucky cases, but the authorities are *contra;* In re Medina Quarry Co., 179 Fed. 929; Trust Co. of America v. City of Rhinelander, 182 Fed. 64; Zartman v. Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

By statutes in most of the states a will speaks as of the death of the testator and ordinarily passes property acquired after its date. See SALE; EXPECTANCY; MORTGAGE.

FUTURE ADVANCES. See MORTGAGE.

FUTURE ESTATE. An estate which is to commence in possession in the future *(in futuro).* It includes remainders, reversions, and estates limited to commence *in futuro* without a particular estate to support them, which last are not good at common law except in the case of terms for years. See 2 Bla. Com. 165. In New York law it has been defined "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination by lapse of time, or otherwise, of a precedent estate created at the same time," thus excluding reversions, which cannot be said to be *created* at the same time, because they are a remnant of the original estate remaining in the grantor; 11 N. Y. Rev. Stat. 3d ed. 9, § 10. See, also, How.

St. Mich. § 5526; Gen. St. Minn. 1878, c. 45, § 10; L'Etourneau v. Henquenet, 89 Mich. 428, 50 N. W. 1077, 28 Am. St. Rep. 310.

FUTURE USES. See CONTINGENT USES.

FUTURES. This term has grown out of those purely speculative transactions, in which there is a nominal contract of sale for future delivery, but where in fact none is ever intended or executed. The nominal seller does not have or expect to have the stock or merchandise he purports to sell, nor does the nominal buyer expect to receive it or pay the price. Instead of that, a percentage or "margin" is paid, which is increased or diminished as the market rates go down or up and accounted for to the buyer. This is simple speculation and gambling; mere wagering on prices within a given time. King v. Quidnick Co., 14 R. I. 138. See GAMING.

FUTURI (Lat.). Those who are to be. Part of the commencement of old deeds. "*Sciant præsentes et futuri, quod ego, talis, dedi et concessi,*" etc. (Let all men now living and to come know that I, A B, have, etc.). Bract. 34 *b*.

FYGTWITE. One of the fines incurred for homicide. See FIGHTWITE.

FYKE. A bow-net for catching fish. Pub. St. Mass. 1882, p. 129. Fyke nets are prohibited in Pennsylvania by Act of 1901.

FYNDERINGA (Sax.). An offence or trespass for which the fine or compensation was reserved to the king's pleasure. Leges Hen. I. c. 10. Its nature is not known. Spelman reads *fynderinga*, and interprets it *treasure trove;* but Cowell reads *fyrderinga*, and interprets it a joining of the king's *fird* or host, a neglect to do which was punished by a fine called *firdwite*. See Spelman, Gloss. Du Cange agrees with Cowell.

FYRD, or FYRDUNG. The military array or land force of the whole country. Contribution to the fyrd was one of the imposts forming the *trinoda necessitas*. Whart.

FYRDWITE. A fine for neglect of military duty. If the lord did not respond to the king's call for the quota of *milites* which he was required to send, he must pay the fine for each man short. The man was bound to the lord, not to the king. Maitl. Domesd. Book and Beyond 159, 161. See FYRTHWITE.

FYRTHWITE, or FRIDWITE. A mulct paid by one who deserted the army. Cowell; Cun. L. Dict. Doubtless these words and Fyrdwite *(q. v.)* were different forms of the same thing.

G

G. The seventh letter of the alphabet. In Law French it is often used at the beginning of words for the English W, as in *gage* for *wage*, *garranty* for *warranty*, *gast* for *waste*.

GABEL (Lat. *vectigal*). A tax, imposition, or duty. This word is said to have the same signification that *gabelle* formerly had in France. Cunningham, Dict. But this seems to be an error; for gabelle signified in that country, previous to its revolution, a duty upon salt. Merlin, *Rép.* Coke says that *gabel* or *gavel*, *gablum*, *gabellum*, *gabelletum*, *galbelletum*, and *gavilletum*, signify a rent, duty, or service yielded or done to the king or any other lord. Co. Litt. 142 *a*. See GAVEL.

GABELLA. A tax or duty on personalty. Cowell; Spel. Gloss.

GABLATORES. Those who paid gabel.

GABLUM (spelled, also, *gabulum*, *gabula*). The gable-end of a building. Kennett, Paroch. Antiq. p. 201; Cowell.

A tax. Du Cange.

See GAFOL.

GABULUS DENARIORUM. Money rent. Seld. Tit. 321.

GADSDEN PURCHASE. A term commonly applied to the territory acquired by the United States from Mexico by treaty of December 30, 1853, known as the Gadsden Treaty. It extended the southern boundary of Arizona south of the Gila river, and extended the southern boundary of New Mexico, adding extensively to those territories. The treaty gave the United States freedom of transit for mails, merchandise and troops across the Isthmus of Tehauntepec, and abrogated Art. XI of the treaty of Guadalupe Hidalgo, which bound the United States to prevent incursions of Indians from the United States into Mexico and to restore Mexican prisoners captured by such Indians. The boundary line between Mexico and the United States was marked by joint commissioners in 1855 and 1891. The report of the second commission was published in 1899.

GAFOL (spelled, also, *gabella*, *gavel*), Rent; tax; interest of money. Rent or customary performance of agricultural services. 3 Holdsw. Hist. E. L. 224.

Gafol gild. Payment of such rent, etc. *Gafol land* was land liable to tribute or tax; Cowell; or land rented; Saxon Dict. See Taylor, Hist. of Gavelkind pp. 26, 1021; Anc. Laws & Inst. of Eng.; Maitl. Domesd. 44.

GAGE, GAGER (Law Lat. *vadium*). Personal property placed by a debtor in possession of his creditor as a security for the payment of his debt; a pawn or pledge *(q. v.)*. Granv. lib. 10, c. 6; Britton c. 27.

There was also a gage of land, which, in mediæval English law, was characterized by delivery of immediate possession to the gagee, who was then as in modern times a creditor who took the gage as a security. There were two forms, the *usufruct gage* and the *property gage*. The former included the *vadium vivum* and the *vadium mortuum*.

The property gage involved the feature of forfeiture, either (1) where the gagee received possession at once, but not proprietorship until default, and (2) where he acquired immediate proprietorship, terminable, however, upon payment of the debt by a certain day. In each case forfeiture followed default without reference to the relative values of the land and the debt.

The modern idea of a gage of land as a security for a debt, with possession in the debtor, was a development of the period after the Norman Conquest, in which there was so rapid a growth in English law of the tendency to foster the creation of credits and facilities for the use of all kinds of property as security for loans and debts. This change of the point of view was *pari passu* with the development of the more numerous and effective forms of actions and executions. The gage of property, whether real or personal, became the creation of a mere security by mortgage, pledge, or other lien. As to the historical development of the gage of land, see two papers by H. D. Haseltine in 17 Harv. L. Rev. 549, 18 *id.* 36 (3 Sel. Essays Anglo-Amer. L. H. 661).

To pledge; to wage. Webster Dict.

Gager is used both as noun and verb: e. g. *gager del ley*, wager of law; Jacobs; *gager ley*, to wage law; Britton c. 27; *gager deliverance*, to put in sureties to deliver cattle distrained; *Termes de la Ley;* Kitchen, fol. 145; Fitzh. N. B. fol. 67, 74.

Estates in gage are those held in *vadio* or pledge; *vivum vadium* is a vifgage or living pledge; a mortgage is *mortuum vadium*, a *dead-gage* or pledge; for, whatsoever profit it yields, it redeems not itself, unless the whole amount secured is paid at the appointed time. Cowell.

GAGER DELIVERANCE. One who had distrained and was sued, but had delivered the cattle distrained, was obliged not only to avow the distress but also to furnish pledge or surety to deliver them, or, as it was called, *gager deliverance*, literally, to deposit or undertake for the discharge. See Fitz. N. B. 67; Kelham, Dict.

GAGER DEL LEY. Wager of law *(q. v.)*. See GAGE.

GAINAGE. Wainage, or the draught-oxen, horses, wain, plough, and furniture for carrying on the work of tillage. Also, the land tilled itself, or the profit arising from it. Old N. B. fol. 117.

GAINER. To obtain by husbandry. *Gainure.* Tillage. *Gainery.* Tillage or the profit therefrom or from the beasts used in it. *Gainé, gaignent (que),* who plough or till. Kelham; Stat. Westm. 1, cc. 16, 17.

GAINOR. One who occupies or cultivates arable land; a sokeman *(q. v)*. Old N. B. 12.

GALE. The payment of a rent or annuity. GABEL.

GALLON. A liquid measure, containing two hundred and thirty-one cubic inches, or four quarts. The *imperial* gallon contains about 277 and the ale gallon 282 cubic inches.

GALLOWS. A structure on which to hang criminals condemned to death. In the thirteenth century there was in certain cases power given to him who caught a thief with stolen goods upon him, to hang him, and it is said that "the manorial gallows was a common object of the country." 1 Poll. & Maitl. 564. See INFANGENETHEF; UTFANGENETHEF.

GAMACTA. A stroke or blow. Spel. Gloss.

GAMALIS. A child born in lawful wedlock; also one born to betrothed but unmarried parents. Spel. Gloss.

GAMBLE. To engage in unlawful play. To play games for stakes or bet in them. It is the most apt word in the language to express these ideas; Bennett v. State, 2 Yerg. (Tenn.) 472.

A *gambler* is one who follows or practices games of chance or skill with the expectation and purpose of thereby winning money or other property. Buckley v. O'Niel, 113 Mass. 193, 18 Am. Rep. 466. A *common gambler* is one who furnishes facilities for gambling, or keeps or exhibits a gambling table, establishment, device, or apparatus. People v. Sponsler, 1 Dak. 291, 46 N. W. 459, citing cases. A *gambling policy* is a life-insurance policy taken out by one who has no insurable interest in the life of the assured. See INSURABLE INTEREST. A *gambling device* is any contrivance or apparatus by which it is determined who is the winner or loser in a chance or contest on which money or value is staked or risked; Portis v. State, 27 Ark. 362; State v. Grimes, 49 Minn. 443, 52 N. W. 42; and the courts look to the substance of the game and not to the name merely; Smith v. State, 17 Tex. 191. The words "or other device" in an anti-gambling statute are not too loose and vague to be the basis of an indictment; U. S. v. Speeden, 1 Cra. C. C. 535, Fed. Cas. No. 16,366; *contra;* State v. Mann, 2 Or. 238. The term does not include implements used also for innocent amusement, as a pack of cards; State v. Hardin, 1 Kan. 474; nor is a horse-race a gambling device; State v. Lemon, 46 Mo. 375; nor the "game of cards commonly called poker"; State v. Mann, 2 Or. 238, where it was said that a device must be something tangible, and a game is not that but merely the result of using the device; but this ruling is criticized by Deady, J., in In re Lee Tong, 18 Fed. 253, with which also should be examined State v. Gitt Lee, 6 Or. 428. See 2 Whart. Cr. L. § 1465; GAMING; LOTTERY; FUTURES; STOCK; WAGER.

GAMBLING CONTRACTS. See WAGER.

GAME. Birds and beasts of a wild nature, obtained by fowling and hunting. Bacon, Abr. See Coolidge v. Choate, 11 Metc. (Mass.) 79.

As applied to animals it is to be understood in its ordinary sense, in the absence of statutory definition; Gunn v. State, 89 Ga. 341, 15 S. E. 458.

A contest. Playing golf alone on Sunday is not playing the game of golf; [1908] E. D. C. 43 (So. African).

GAME LAWS. Laws regulating the killing or taking of birds, and beasts, as game. The English game laws are founded on the idea of restricting the right of taking game to certain privileged classes, generally landholders, and are said to be directly descended from the old forest laws. The doctrine as laid down by Blackstone that the sole right of hunting and killing game was at common law vested in the crown has been controverted by Prof. Christian who clearly demonstrated that the owner of the soil, or the lessee or occupier, if no reservation was made in the lease, possessed the exclusive right to such game restriction. In 1831 the English law was so modified as to enable any one to obtain a certificate or license to kill game on payment of a fee.

The laws relating to game in the United States were generally, if not universally, framed with reference to protecting the game from indiscriminate and unreasonable havoc, leaving all persons free to take game under certain restrictions as to the season of the year and the means of capture. But the more recent acts have provided other restrictions, such as requiring licenses, etc.

As the most effective means of enforcing such statutes, most of them prohibit all persons, including licensed dealers, under penalty, from buying or selling or even having in possession or control any game purchased within a certain period after the commencement of the close season. The enforcement of these penalties has been fruitful of much litigation.

A statute forbidding any one to kill, sell, or have in possession woodcock, etc., between specified days has been held not to apply to such *lawfully* taken in another state; Com. v. Hall, 128 Mass. 410, 35 Am. Rep. 387; Roth v. State, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566 (followed in State v. Rodman, 58 Minn. 393, 59 N. W. 1099); Com. v. Wilkinson, 139 Pa. 298, 21 Atl. 14; *contra* as to game *unlawfully* taken in another state; 35 Am. Rep. 390, note; State v. Saunders, 19 Kan. 127, 27 Am. Rep. 98; L. R. 2 C. P. Div. 553; People v. O'Neil, 71 Mich. 325, 39 N. W. 1; it has been held not to be an offence to expose live birds for sale under

a statute prohibiting the killing or having possession of certain birds after the same are killed; People v. Fishbough, 134 N. Y. 393, 31 N. E. 983, reversing 58 Hun 404, 12 N. Y. Supp. 24; and the mere possession of game during the closed season does not constitute an offence if it were killed during the open season; State v. Bucknam, 88 Me. 385, 34 Atl. 170, 51 Am. St. Rep. 406; but a statute which *forbids* the sale or having in possession for the purpose of sale, of such game during the close season, is constitutional and a valid exercise of the police power, even if it were killed out of the state; In re Deininger, 108 Fed. 623.

A state may forbid those in rightful possession of game taken within the state from selling it; Ex parte Blardone, 55 Tex. Cr. R. 189, 115 S. W. 838, 116 S. W. 1199, 21 L. R. A. (N. S.) 607; American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; Ex parte Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177; State v. Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314; State v. Heger, 194 Mo. 707, 93 S. W. 252; or may make it an offence to have in possession, for the purpose of transportation beyond the state, birds which have been lawfully killed within the state; Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793. Such legislation is not an unconstitutional interference with interstate commerce; *id.;* New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Organ v. State, 56 Ark. 267, 19 S. W. 840. An act declaring it unlawful in a non-resident to hunt or fish at any season of the year was held unconstitutional as denying the equal protection of the law to the non-resident land owner which was afforded to the resident land owner; State v. Mallory, 73 Ark. 236, 89 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852. The Lacey Act provides that all bodies of foreign game birds, the importation of which is prohibited, or of any game birds transported into any state, shall be subject therein to the operation of its laws; People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. (N. S.) 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353; New York v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Roth v. State, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566; a statute forbidding the possession of game in the close season extends to game in cold storage; State v. Judy, 7 Mo. App. 524; one forbidding the sale of trout applies to trout artificially propagated; Com. v. Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439. A statute forbidding the transportation of game includes deer in a private park; Dieterich v. Fargo, 119 App. Div. 315, 104 N. Y. Supp. 334.

An act prohibiting the taking of game by aliens and forbidding their possession of a gun or rifle is not obnoxious to the XIVth Amendment or the treaty with Italy; Com. v. Patsone, 231 Pa. 46, 79 Atl. 928, affirmed in Supreme Court of United States, 232 U. S. 138, 34 Sup. Ct. 281, 58 L. Ed. —— (January, 1914).

See, generally, Austin, Farm and Game Law; and, for the English game laws at the end of the 18th century, Jacob, Law Dict.

GAMING. A contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance, and that one shall be the loser and the other the winner. Gaming is not an offence *eo nomine;* Harkey v. State (Tex.) 25 S. W. 423.

When considered in itself, and without regard to the end proposed by the players, there is nothing in it contrary to natural equity, and the contract will be considered as a reciprocal gift, which the parties make of the thing played for, under certain conditions.

There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last. See State v. Gupton, 30 N. C. 271. The decisions as to what constitutes gaming have not been uniform; but under the statutes making it a penal offence, it may be defined as a staking on chance where chance is the controlling factor; In re Lee Tong, 18 Fed. 253; that betting on a horse race is so, see Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726; Tatman v. Strader, 23 Ill. 439; Cheesum v. State, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; Wade v. Deming, 9 Ind. 35; Shrophire v. Glascock, 4 Mo. 536, 31 Am. Dec. 189; Garrison v. McGregor, 51 Ill. 473; *contra,* State v. Rorie, 23 Ark. 726; State v. Hayden, 31 Mo. 35; Com. v. Shelton, 8 Gratt. (Va.) 592; that a billiard table is a gaming table; People v. Harrison, 28 How. Pr. (N. Y.) 247; State v. Bishel, 39 Ia. 42; *contra,* State v. Hope, 15 Ind. 474; Blewett v. State, 34 Miss. 606. Baseball is a game of skill within the criminal offence of betting on such a game; Mace v. State, 58 Ark. 79, 22 S. W. 1108. The following are additional examples of illegal gaming: cock fighting and betting thereon; Com. v. Tilton, 8 Metc. (Mass.) 232; Bagley v. State, 1 Humph. (Tenn.) 486; the game of "equality;" U. S. v. Speeden, 1 Cra. C. C. 535, Fed. Cas. No. 16,366; a "gift enterprise;" Bell v. State, 5 Sneed (Tenn.) 507; Eubanks v. State, 3 Heisk. (Tenn.) 488; "keno;" Miller v. State, 48 Ala. 122; City of New Orleans v. Miller, 7 La. Ann. 651; "loto;" Lowry v. State, 1 Mo. 722; betting on "pool;" State v. Jackson, 39 Mo. 420; State v. Sanders, 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913; a ten-pin alley; Spaight v. State, 29 Ala. 32; *contra,* State v. King, 113 N. C. 631,

18 S. E. 169; see State v. Hall, 32 N. J. L. 158; stock-clock; State v. Grimes, 49 Minn. 443, 52 N. W. 42; crap; Bell v. State, 32 Tex. Cr. R. 187, 22 S. W. 687; playing pool, billiards or ten pins; Hopkins v. State, 122 Ga. 583, 50 S. E. 351, 69 L. R. A. 117, 2 Ann. Cas. 617; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; throwing dice or playing any game of hazard, to determine who shall pay for liquor or other article bought; Com. v. Taylor, 14 Gray (Mass.) 26; Com. v. Gourdier, 14 Gray (Mass.) 390; or throwing dice for money; Parmer v. State, 91 Ga. 152, 16 S. E. 937; one who keeps tables on which "poker" is played, but is not directly interested in the game, is not guilty of gaming under the Virginia code; Nuckolls v. Com., 32 Gratt. (Va.) 884; merely betting at "faro" is not carrying on the game; Ex parte Ah Yem, 53 Cal. 246; the law against any game cannot be evaded by changing the name of the game; Smith v. State, 17 Tex. 191; athletic contests, when not conducted brutally, even when played for a stake, have been held lawful; 2 Whar. Cr. L. § 1465; betting upon a foot race is gaming within the meaning of a statute; Jones v. Cavanaugh, 149 Mass. 124, 21 N. E. 306; pin pool has been held not to be a gambling game; State v. Quaid, 43 La. Ann. 1076, 10 South. 183, 26 Am. St. Rep. 207.

The mere fact that the loser of the game paid the charges thereon is held to constitute gaming; Hamilton v. State, 75 Ind. 586; State v. Miller, 53 Ia. 154, 4 N. W. 900; State v. Leighton, 23 N. H. 167; Ward v. State, 17 Ohio St. 32; *contra*, State v. Quaid, 43 La. Ann. 1076, 10 South. 183, 26 Am. St. Rep. 207; Breninger v. Treasurer of Town of Belvidere, 44 N. J. L. 350; People v. Forbes, 52 Hun 30, 4 N. Y. Supp. 757. See State v. Sanders, 86 Ark. 353, 111 S. W. 454, 19 L. R. A. (N. S.) 913.

In general, at common law, all games are lawful, unless some fraud has been practised or such games are contrary to public policy. Each of the parties to the contract must have a right to the money or thing played for. He must have given his full and free consent, and not have been entrapped by fraud. There must be equality in the play. The play must be conducted fairly. But, even when all these rules have been observed, the courts will not countenance gaming by giving too easy a remedy for the recovery of money won at play; Bacon, Abr. It has been held that money lost at a game of "five-up" may be recovered; Shinn v. Wimberly (Miss.) 12 South. 333. See also Crooks v. McMahon, 48 Mo. App. 48; Smith v. Ray, 89 Ga. 838, 16 S. E. 90.

But when fraud has been practised the contract is void; and in some cases, when the party has been guilty of cheating, by playing with false dice, cards, and the like, he may be indicted at common law; 1 Russ. Cr. 406.

Statutes have been passed in perhaps all the states forbidding gaming for money at certain games, and prohibiting the recovery of money lost at such games; and equity will not lend its aid in a gambling transaction either to the winner to compel payment of his unpaid accounts or to the loser who has paid his losses to enable him to recover them back, whether the loser pays his losses in cash or in negotiable securities; Albertson v. Laughlin, 173 Pa. 525, 34 Atl. 216, 51 Am. St. Rep. 777.

An act subjecting a building used for gambling to a judgment of an informer for money lost there at play is not a taking without due process of law; Marvin v. Trout, 199 U. S. 212, 26 Sup. Ct. 31, 50 L. Ed. 157, affirming 70 Ohio St. 437, 72 N. E. 1161; Trout v. Marvin, 62 Ohio St. 132, 56 N. E. 655. Nor is an act authorizing the seizure and destruction of gambling devices; J. B. Mullen & Co. v. Mosley, 13 Idaho 457, 90 Pac. 986; Frost v. People, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; Collins v. Lean, 68 Cal. 284, 9 Pac. 173; People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; Kite v. People, 32 Colo. 5, 74 Pac. 886; State v. Soucie's Hotel, 95 Me. 518, 50 Atl. 709. It is said "the legislature may determine when that which is property shall cease to be such, if kept against law"; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. Rep. 1004, 2 Ann. Cas. 933; 12 L. R. A. (N. S.) 394, note.

Statutes which forbid or regulate places of amusement that may be resorted to for the purpose of gaming or which forbid altogether the keeping of instruments made use of for unlawful games, are within the police power of the legislature; Cooley, Const. Lim. 749. See Com. v. Colton, 8 Gray (Mass.) 488; State v. Hay, 29 Me. 457.

The uncorroborated testimony of an accomplice is sufficient to warrant a conviction of gaming; Grant v. State, 89 Ga. 393, 15 S. E. 488.

Option contracts on grain, etc., or stock, which are intended to be settled by payment of differences, are invalid; Pearce v. Foote, 113 Ill. 228, 55 Am. Rep. 414; as are option contracts to sell or buy at a future time any grain, etc.; Schneider v. Turner, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164. These cases were held not to apply to a contract for future delivery where there was no evidence that delivery was not contemplated, and where a settlement by payment of differences only was intended; Clews v. Jamieson, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. Ed. 1183; to the same effect; Clement v. U. S., 149 Fed. 317, 79 C. C. A. 243; In re A. B. Baxter & Co., 152 Fed. 137, 81 C. C. A. 359. Such a contract, legitimate on its face, cannot be held void as a wagering contract because one of the parties understood it to be so. The proof must show that such understand-

ing was mutual; In re A. B. Baxter & Co., 152 Fed. 137, 81 C. C. A. 359. Where the issue was as to whether a sale of commodities on margin was a gambling contract, the buyer may testify as to his intention not to receive delivery; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Waite v. Frank, 14 S. D. 626, 86 N. W. 645.

See GAMING HOUSES; WAGER; HORSE RACE; PRIZE FIGHT; BUCKET SHOP; JOCKEY CLUBS.

GAMING CONTRACTS. See WAGER; FUTURES.

GAMING HOUSES. Houses kept for the purpose of permitting persons to gamble for money or other valuable thing. They are nuisances in the eyes of the law, being detrimental to the public, as they promote cheating and other corrupt practices; 1 Russ. Cr. 299; Rosc. Cr. Ev. 663; People v. Jackson, 3 Den. (N. Y.) 101, 45 Am. Dec. 449. See Haring v. State, 51 N. J. L. 386, 17 Atl. 1079; *id.*, 53 N. J. L. 664, 23 Atl. 581; State v. Eaton, 85 Me. 237, 27 Atl. 126; State v. Mosby, 53 Mo. App. 571.

In an indictment under a statute prohibiting gaming houses, the special facts making such a house a nuisance must be averred; Whar. Cr. Law § 1466; Whar. Cr. Pl. and Pr. §§ 154, 230; U. S. v. Ringgold, 5 Cra. 378, Fed. Cas. No. 16,167. The proprietor of a gaming establishment cannot take advantage of a statute enabling a person losing money at a game of chance to recover it back; Brown v. Thompson, 14 Bush (Ky.) 538, 29 Am. Rep. 416.

They are sometimes prosecuted as disorderly houses *(q. v.)*

GANANCIAL. **In Spanish Law.** Property held in community.

The property of which it is formed belongs in common to the two consorts, and, on the dissolution of the marriage, is divisible between them in equal shares. It is confined to their future acquisitions *durante el matrimonio*, and the *frutos* or rents and profits of the other property. See 1 Burge, Confl. Laws 418; Aso & M. Inst. b. 1, t. 7, c. 5, § 1.

All that which is increased or multiplied during marriage. By multiplied is understood all that is increased by onerous cause or title, and not that which is acquired by a lucrative one; Cutter v. Waddingham, 22 Mo. 254. See Cartwright v. Cartwright, 18 Tex. 634; COMMUNITY.

GANANCIAS. **In Spanish Law.** Gains or profits from the employment of ganancial property. White, N. Rec. b. 1, tit. 7, c. 5.

GANG-WEEK. In England, the time when the bounds of the parish are lustrated or gone over by the parish officers—Rogation week. Lond. Encyc.

GANGIATORI. Officers in ancient times whose duty it was to examine weights and measures. Skene.

GANTELOPE. A military punishment, in which the criminal running between the ranks receives a lash from each man. Lond. Encyc. This was called "running the gauntlett," the word itself being pronounced "gauntlett."

GAOL. (This word, sometimes written *jail*, is said to be derived from the Spanish *jaulu*, a cage (derived from *caula*), in French *gêole*, gaol. 1 M. & G. 222, note *a.*) A place for the confinement of persons arrested for debt or for crime and held in the custody of the sheriff. Webst. Dict.

A prison or building designated by law or used by the sheriff for the confinement or detention of those whose persons are judicially ordered to be kept in custody. See Day v. Brett, 6 Johns. (N. Y.) 22; 14 Viner, Abr. 9; Bacon, Abr.; Dane, Abr. Index; 4 Com. Dig. 619. It may be used also for the confinement of witnesses; and, in general, now there is no distinction between a jail and a prison, except that the latter belongs to a greater extent of country; thus, we say a state's prison or penitentiary and a county jail. Originally, a jail seems to have been a place where persons were confined to await further proceedings—*e. g.* debtors till they paid their debts, witnesses and accused persons till a certain trial came on, etc.—as opposed to prison, which was for confinement, as punishment. See 2 Poll. & Maitl. 514, 518. A gaol is an inhabited dwellinghouse, and a house within the statutes against arson; 2 W. Bla. 682; 2 East, Pl. Cr. 1020; People v. Cotteral, 18 Johns. (N. Y.) 115; Stevens v. Com., 4 Leigh. (Va.) 683. See PENITENTIARY; PRISON.

GAOL-DELIVERY. **In English Law.** To insure the trial, within a certain time, of all prisoners, a patent, in the nature of a letter, was issued from the king to certain persons, appointing them his justices and authorizing them to deliver his gaols. 3 Bla. Com. 60; 4 *id.* 269. This was the humblest of the temporary judicial commissions so frequent in the fourteenth century; 1 Poll. & Maitl. 179; but so few men were kept in prison, that the work was regarded as easy work which might be entrusted to knights of the shire; 2 *id.* 642. See GENERAL GAOL DELIVERY; OYER AND TERMINER.

GAOL LIBERTIES, GAOL LIMITS. A space marked out by limits, which is considered as a part of the prison, and within which prisoners are allowed to go at large on giving security to return. Owing to the rigor of the law which allowed *capias*, or attachment of the person, as the first process against a debtor, statutes were from time to time passed enlarging the gaol liberties, in order to mitigate the hardships of imprisonment: thus, the whole city of Boston was held the "gaol liberties" of its county gaol. And so with a large part of New York City. Act of March 18, 1830. The prisoner, while

within the limits, is considered as within the walls of the prison; Peters v. Henry, 6 Johns. (N. Y.) 121, 5 Am. Dec. 196.

GAOLER. The keeper of a gaol or prison; one who has the legal custody of the place where prisoners are kept.

It is his duty to keep the prisoners in safe custody, and for this purpose he may use all necessary force; 1 Hale, Pl. Cr. 601; and a prisoner who assaults him in endeavoring to break gaol may be lawfully killed by him; 1 Russ. Cr. Sharsw. ed. 860, 895. But any oppression of a prisoner, under a pretended necessity, will be punished; for the prisoner, whether he be a debtor or a criminal, is entitled to the protection of the laws from oppression. He was indictable if by oppression he induced a prisoner to accuse another; 4 Bla. Com. 128; but this statute was repealed by 4 Geo. IV. c. 64, s. 1 *id.* note. He is also indictable for suffering an escape *(q. v.)*, or for extortion; 1 Russ. Cr. Sharsw. ed. 208.

When a county court delivers persons convicted by it of murder to a gaoler for safekeeping till brought back for execution, the governor has no authority to countermand a subsequent order of that court requiring the gaoler to deliver them up, nor will the fact that a writ of error and supersedeas had been awarded each of the prisoners by the supreme court justify the gaoler in refusing to deliver up the prisoners on the order of the court that committed them; but the fact that a court having jurisdiction has granted the prisoners a writ of habeas corpus will justify such a refusal; Cardoza v. Epps (Va.) 23 S. E. 296.

GARAGE. A garage is not a stable within a building restriction in a deed dated in 1899; Riverbank Improvement Co. v. Bancroft, 209 Mass. 217, 95 N. E. 216, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450.

GARANDA, or GARANTIA. A warranty. Spel. Gloss.

GARANTIE. In French law, this word corresponds to warranty or covenants for title in English law. In the case of a sale this *garantie* includes two things: (1) Peaceful possession of the thing sold; and (2) absence of undisclosed defects (défauts cachés). Brown.

GARAUNTOR. In Old English Law. A warrantor or vouchee, who is obliged by his warranty (*garauntie*) to warrant (*garaunter*) the title of the warrantee (*garaunte*), that is, to defend him in his seisin, and if he do not defend, and the tenant be ousted, to give him land of equal value. Britt. c. 75.

GARBLE. In English statutes, to sort or cull out the good from the bad in spices, drugs, etc. Cowell.

A *garbler of spices* was anciently in London an officer to inspect drugs and spices, with power to enter and search any shop or warehouse and garble and clean the goods or direct it to be done. Stat. 6 Anne, c. 16; Mozl. & Whit.

GARDE, or GARDIA (*Garder*, to watch). Wardship; custody; care. The judgment. The wardship of a city. Kelham.

GARDEN. A piece of ground appropriated to raising plants and flowers.

A garden is a parcel of a house, and passes with it; 2 Co. 32; Plowd. 171; Co. Litt. 5 *b*, 56 *a*, *b*; Wood, Landl. and Ten. 309. But see F. Moore 24; Bac. Abr. *Grants*, I. See CURTILAGE.

GARDIANUS. A guardian; defender; protector.

A warden. *Gardianus ecclesiæ*, a churchwarden. *Gardianus quinque portuum*, warden of the Cinque Ports *(q. v.)*. In feudal law, *gardio*. Spelman, Gloss.

GARDIEN. A constable; a keeper; a guardian. Kelham.

GARNESTURA. In Old English Law. Victuals, arms, and other implements of war, necessary for the defence of a town. Mat. Par. 1250. See GARNISTURA.

GARNISH. In English Law. Money paid by a prisoner to his fellow-prisoners on his entrance into prison.

To warn. To garnish the heir is to warn the heir. Obsolete.

GARNISHEE. In Practice. A person who has money or property in his possession belonging to a defendant, which money or property has been attached in his hands, with notice to him of such attachment; he is so called because he has had warning or notice of the attachment.

From the time of the notice of the attachment, the garnishee is bound to keep the money or property in his hands, to answer the plaintiff's claim, until the attachment is dissolved or he is otherwise discharged. See Serg. Att. 88; Wade, Att. 331; Drake, Att.; Comyns., Dig. *Attachment*, E.

See GARNISHMENT.

GARNISHMENT. A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause. Cowell.

Now generally used of the process of attaching money or goods due a defendant in the hands of a third party. The person in whose hands such effects are attached is the *garnishee*, because he is *garnished*, or warned, not to deliver them to the defendant, but to answer the plaintiff's suit. The use of the form "garnishee" as a verb is a prevalent corruption in this country.

It is attachment in the hands of a third person, and so is a species of seizure by notice; Beamer v. Winter, 41 Kan. 297, 21 Pac. 251; *id.*, 41 Kan. 596, 21 Pac. 1078.

For example, when a writ of attachment issues against a debtor, in order to secure to

the plaintiff a claim due by a third person to such debtor, it is served on such third person, which notice or service is a garnishment, and he is called the garnishee.

There are garnishees also in the action of detinue. They are persons against whom process is awarded, at the prayer of the defendant, to warn them to come in and interplead with the plaintiff; but in detinue, the defendant cannot have a *sci. fa.* to garnish a third person unless he confess the possession of the chattel or thing demanded. And when the garnishee comes in, he cannot vary or depart from the allegation of the defendant in his prayer of garnishment. The plaintiff does not declare *de novo* against the garnishee; but the garnishee, if he appears in due time, may have oyer of the original declaration to which he pleads.

See Brooks, Abr. *Detinue.*

The process of garnishment is directly founded upon the writ of attachment as by custom of London, as to the history and character of which see ATTACHMENT.

This writ reached the effects of the defendant in the hands of third persons. Its effect is simply to arrest the payment of a debt due the defendant, to him, and to compel its payment to the plaintiff, or else to reach personal property in the hands of a third person. It is known in England and in most of the states of the United States as *garnishment,* or the garnishee process; but in some, as the trustee process and factorizing, with the same characteristics. As affects the garnishees, it is in reality a suit by the defendant in the plaintiff's name; Moore v. Stainton, 22 Ala. 831; Tunstall v. Worthington, Hempst. 662, Fed. Cas. No. 14,239.

Garnishment is an effectual attachment of the defendant's effects in the garnishee's hands; Kennedy v. Brent, 6 Cra. (U. S.) 187, 3 L. Ed. 194; Blaisdell v. Ladd, 14 N. H. 129; Tillinghast's Ex'rs v. Johnson, 5 Ala. 514; Bryan v. Lashley, 13 Smedes & M. (Miss.) 284; Hacker v. Stevens, 4 McLean 535, Fed. Cas. No. 5,887; Beamer v. Winter, 41 Kan. 297, 21 Pac. 251; *id.*, 41 Kan. 596, 21 Pac. 1078. It is essentially a legal remedy; and through it equities cannot be settled between the defendant and the garnishee; Harris v. Miller, 71 Ala. 26; Hoyt v. Swift, 13 Vt. 129, 37 Am. Dec. 586; Webster v. Steele, 75 Ill. 544; Perry v. Thornton, 7 R. I. 15; Massachusetts Nat. Bank v. Bullock, 120 Mass. 86; Sheedy v. Bank, 62 Mo. 17, 21 Am. Rep. 407. The plaintiff, through it, acquires no greater rights against the garnishee than the defendant has, except in cases of fraud; and he can hold the garnishee only so long as he has, in the attachment suit, a right to enforce his claim against the defendant; Price v. Higgins, 1 Litt. (Ky.) 274; Harris v. Ins. Co., 35 Conn. 310; Waldron v. Wilcox, 13 R. I. 518; Richardson v. Lester, 83 Ill. 55. No judgment can be rendered against the garnishee until judgment against the defendant shall have been recovered; Housmans v. Heilbron, 23 Ga. 186; Washburn v. Mining Co., 41 Vt. 50.

The basis of a garnishee's liability is either an indebtedness to the defendant, or the possession of personal property of the defendant capable of being seized and sold under execution: Maine Fire & Marine Ins. Co. v. Weeks, 7 Mass. 438; Rundlet v. Jordan, 3 Greenl. (Me.) 47; Haven v. Wentworth, 2 N. H. 93; Hutchins v. Hawley, 9 Vt. 295; Walke v. McGehee, 11 Ala. 273. And to be a subject of garnishment, the claim must be one for which the principal defendant can maintain an action at law, if due at the time or to become due thereafter; Farwell v. Chambers, 62 Mich. 316, 28 N. W. 859; Edney v. Willis, 23 Neb. 56, 36 N. W. 300. The existence of such indebtedness, or the possession of such property, must be shown affirmatively, either by the garnishee's answer or by evidence *aliunde;* Porter v. Stevens, 9 Cush. (Mass.) 530; Lomerson v. Huffman, 25 N. J. L. 625; Cameron v. Boyle, 2 G. Greene (Ia.) 154; Hunt v. Coon, 9 Ind. 537; Reagan v. R. R., 21 Mo. 30. The demand of the defendant against the garnishee, which will justify a judgment in favor of the plaintiff against the garnishee, must be such as would sustain an action of debt, or *indebitatus assumpsit;* Hall v. Magee, 27 Ala. 414.

A non-resident of the state in which the attachment is obtained cannot be held as garnishee, unless he have in that state property of the defendant's in his hands, or be bound to pay the defendant money, or to deliver him goods, at some particular place in that state; Nye v. Liscombe, 21 Pick. (Mass.) 263; Jones v. Winchester, 6 N. H. 497; Baxter v. Vincent, 6 Vt. 614; Miller v. Hooe, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Cronin v. Foster, 13 R. I. 196. A debt may be attached in any state where the debtor can be found if the law of the forum authorize attachments; Harvey v. Ry. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

The right to garnish debts due to non-residents payable in a foreign jurisdiction has given rise to much conflict in state courts. The question turns on the doctrine that a debt has a *situs* and the difference of opinion is as to where it is. Some courts hold that it is at the domicil of the creditor of the garnishment; Nat. Bank of Wilmington & Brandywine v. Furtick, 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99; Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181; High v. Padrosa, 119 Ga. 649, 46 S. E. 859; Glower v. Varnish Co., 120 Ga. 983, 48 S. E. 355; Central of Georgia Ry. Co. v. Brinson, 109 Ga. 354, 34 S. E. 597, 77 Am. St. Rep. 382; Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715. In the decisions to this effect it is sometimes admitted that "this fiction always yields to laws for attaching the property of a non-resident, because such laws necessarily assume that the property has a *situs* distinct from the owner's domicil"; Wyeth Hardware & Mfg. Co.

v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626. In other cases it is held that statutes and the custom of London may, and often do, for the purpose of garnishment give the debt a *situs* at the domicil of the debtor; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144; King v. Cross, 175 U. S. 396, 20 Sup. Ct. 131, 44 L. Ed. 211; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 275; Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975. Though generally the *situs* of a debt is constructively with the creditor, it is within the competence of the sovereign of the residence of the debtor to pass laws subjecting the debt to seizure within its territory; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364. See also Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636; Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; Newland v. Reilly, 85 Mich. 151, 48 N. W. 544. In many of the cases cited, neither debtor nor creditor residing in the state where it was sought to attach, the question whether the *situs* was with the debtor or creditor was considered immaterial; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Douglass v. Ins. Co., 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; Louisville & N. R. Co. v. Dooley, 78 Ala. 524; and in the cases supporting the doctrine that the debt follows the person of the creditor, the decision is usually rested not upon that doctrine (which is merely referred to as a general principle), but upon some other proposition, although the rule has been distinctly adopted and applied; Missouri Pac. Ry. Co. v. Sharitt, 43 Kan. 375, 23 Pac. 430, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143. In Chicago, R. I. & P. Ry. Co. v. Sturm, 174 U. S. 710, 17 Sup. Ct. 797, 43 L. Ed. 1144, already cited, it is said: "The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do this he must go to the domicil of his debtor, and can only do it under the laws and procedure in force there. This is a legal necessity and considerations of *situs* are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and he only, has something in his hands. That something is a *res* and gives character to the action as known in the nature of a proceeding *in rem*," citing Mooney v. Mfg. Co., 72 Fed. 32, 18 C. C. A. 421.

It was held that a debt expressly payable at the domicil of the creditor was not subject to attachment at the domicil of the debtor; Drake v. Ry. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; Bullard v. Chaffee, 61 Neb. 83, 84 N. W. 604, 51 L. R. A. 715; that a debt is subject to garnishment at the domicil of the debtor, if it be not payable elsewhere; Walker v. Fairbanks, 55 Mo. App. 478; but this qualification was repudiated in Wyeth Hardware & Mfg. Co. v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626. Some cases hold, where both debtor and creditor are nonresidents, that to give jurisdiction to garnish the debt it must be expressly payable in the state of the garnishment, or at least contracted there and payable there by legal implication; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364; Green v. Bank, 25 Conn. 452; McKinney v. Mills, 80 Minn. 478, 83 N. W. 452, 81 Am. St. Rep. 278; Bush v. Nance, 61 Miss. 237; Sawyer v. Thompson, 24 N. H. 510; Lancaster v. Spotswood, 41 Misc. 19, 83 N. Y. Supp. 572; Balk v. Harris, 124 N. C. 467, 32 S. E. 799, 45 L. R. A. 258, 70 Am. St. Rep. 606, reversed in Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084. In that case the principle was established that a debt may be garnished in a state in which neither debtor nor creditor resides if personal jurisdiction may be acquired over the debtor, and it was not necessary that the debt should have been contracted in or expressly payable in that state; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; Wyeth Hardware & Mfg. Co. v. Lang, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626; Baltimore & O. R. Co. v. Allen, 58 W. Va. 389, 52 S. E. 465, 112 Am. St. Rep. 975, 3 L. R. A. (N. S.) 608, and note, which see as to this and the following:

A debt due from a foreign corporation to a non-resident, served constructively only, is subject to garnishment in a state in which such corporation does business, even though the debt be not payable in that state, and did not arise out of business transacted therein; Mooney v. Mfg. Co., 72 Fed. 32, 18 C. C. A. 421; National Fire Ins. Co. v. Ming, 7 Ariz. 6, 60 Pac. 720; German Bank v. Ins. Co., 83 Ia. 491, 50 N. W. 53, 32 Am. St. Rep. 316; Pittsburg, C., C. & St. L. Ry. Co. v. Bartels, 108 Ky. 216, 56 S. W. 152; Howland v. Ry. Co., 134 Mo. 474, 36 S. W. 29; National Fire Ins. Co. of Hartford v. Chambers, 53 N. J. Eq. 468, 32 Atl. 663; and so also where the garnishee, though originally incorporated elsewhere, was also incorporated within the state in which the garnishment proceeding was instituted; Georgia & A. Ry. v. Stollenwerck, 122 Ala. 539, 25 South. 258; Wabash R. Co. v. Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889.

On the other hand, it was held that the jurisdiction of the courts of a state in which a foreign corporation is doing business is lim-

ited, so far as debts due from the corporation to a non-resident not personally within the jurisdiction are concerned, to those which arise out of business transacted within the state, or which are payable within the state; Central Trust Co. of New York v. R. Co., 68 Fed. 685; Reimers v. Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364; Everett v. Ins. Co., 4 Colo. App. 509, 36 Pac. 616; National Bank of Wilmington and Brandywine v. Ins. Co., 2 Marv. (Del.) 35, 42 Atl. 479, 44 L. R. A. 115, 69 Am. St. Rep. 99; Swedish-American Nat. Bank of Minneapolis v. Bleecker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283, 71 Am. St. Rep. 492; Strause v. Ins. Co., 126 N. C. 223, 35 S. E. 471, 48 L. R A. 452; Allen v. Cigar Stores Co., 39 Misc. 500, 80 N. Y. Supp. 401; Morawetz v. Ins. Office, 96 Wis. 175, 71 N. W. 109, 65 Am. St. Rep. 43.

An act declaring that the *situs* of a debt shall, for the purposes of attachment and garnishment, be at the residence of the garnishee, is not unconstitutional, as an attempt to pass an act having an extra-territorial effect; Harvey v. Thompson, 128 Ga. 147, 57 S. E. 104, 9 L. R. A. (N. S.) 765, 119 Am. St. Rep. 373; *contra*, Louisville & N. R. Co. v. Nash, 118 Ala. 483, 23 South. 825, 41 L. R. A. 331, 72 Am. St. Rep. 181.

Ordinarily all persons or corporations who may be sued may also be summoned as garnishees. Neither the national nor state government can be subjected to garnishment; Buchanan v. Alexander, 4 How. (U. S.) 20, 11 L. Ed. 857; nor counties; Ward v Hartford County, 12 Conn. 404; Dollar v. Commission Co., 78 Miss. 274, 28 South. 876 (the courts have jurisdiction, but must sustain an objection); nor, on the weight of authority, municipal corporations; Merwin v. City of Chicago, 45 Ill. 133, 92 Am. Dec. 204; Hawthorn v. City of St. Louis, 11 Mo. 59, 47 Am. Dec. 141; Bank of Southwestern Ga. v. Americus, 92 Ga. 361, 17 S. E. 287; Leake v. Lacey, 95 Ga. 747, 22 S. E. 655, 51 Am. St. Rep. 112; Baird v. Rogers, 95 Tenn. 492, 32 S. W. 630; Van Cott v. Pratt, 11 Utah 209, 39 Pac. 827; Porter & Blair Hardware Co. v. Perdue, 105 Ala. 293, 16 South. 713, 53 Am. St. Rep. 124; Fast v. Wolf, 38 Ill. App. 27; First Nat. Bank of Ottawa v. City of Ottawa, 43 Kan. 294, 23 Pac. 485; *contra*, City of Newark v. Funk, 15 Ohio St. 462.

On the same principle no person deriving his authority from the law, and obliged to execute it according to the rules of the law, can be charged as garnishee in respect of any money or property held by him in virtue of that authority; Brooks v. Cook, 8 Mass. 246. Hence it has been held that an administrator cannot, in respect of moneys in his hand as such, be charged as garnishee of a creditor of his intestate; Waite v. Osborne, 11 Me. 185; Marvel v. Houston, 2 Harr. (Del.) 349; Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, *id.* 188; though he may be, by a proper tribunal, adjudged and ordered to pay a certain sum to such creditor; Marble v. Marble, 5 N. H. 374; Fitchett v. Dolbee, 3 Harr. (Del.) 267; Curling & Robertson v. Hyde, 10 Mo. 374; Harrington v. La Rocque, 13 Or. 344, 10 Pac. 498; *contra*, Thorn v. Woodruff, 5 Ark. 55; Fowler v. McClelland, *id.* 188; nor is an executor chargeable as garnishee in respect of a legacy bequeathed by his testator; Barnes v. Treat, 7 Mass. 271; Winchell v. Allen, 1 Conn. 385; Beckwith v. Baxter, 3 N. H. 67; Shewell v. Keen, 2 Whart. (Pa.) 332, 30 Am. Dec. 266; nor a guardian; Gassett v. Grout, 4 Metc. (Mass.) 486. Nor is a sheriff subject to garnishment in respect of money collected by him under process; Wilder v. Bailey, 3 Mass. 289; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Jones v. Jones, 1 Bland (Md.) 443, 18 Am. Dec. 327; Blair v. Cantey, 2 Speer (S. C.) 34, 42 Am. Dec. 360; Zurcher v. Magee, 2 Ala. 253; Snell v. Allen, 1 Swan. (Tenn.) 208; Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414; or where it was taken from a prisoner; Robinson v. Howard, 7 Cush. (Mass.) 257; Richardson v. Anderson, 4 Wils. (Tex. Ct. App.) 286, 18 S. W. 195; Morris v. Penniman, 14 Gray (Mass.) 220, 74 Am. Dec. 675; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; Dahms v. Sears, 13 Or. 47, 11 Pac. 891; Halker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. Rep. 524; Commercial Exchange Bank v. McLeod, 65 Ia. 665, 19 N. W. 329, 22 N. W. 919, 54 Am. Rep. 36; Hill v. Hatch, 99 Tenn. 39, 41 S. W. 349, 63 Am. St. Rep. 822; this is not so, however, in some states if taken *bona fide* and without trickery; Ex parte Hurn, 92 Ala. 102, 9 South. 515, 13 L. R. A. 120, 25 Am. St. Rep. 23; Oppenheimer v. Marr, 31 Neb. 811, 48 N. W. 818, 28 Am. St. Rep. 539; Closson v. Morrison, 47 N. H. 482, 93 Am. Dec. 459; but where plaintiff in execution paid to the sheriff $1,000 as the value of the debtor's homestead interest, and the land was sold under execution, the money in the sheriff's hands was subject to garnishment at the instance of the other judgment creditors; Self v. Schoenfeld, 60 Ill. App. 65; money taken from a person without his consent by a sheriff acting as trespasser in so doing, and delivered by him to a third person claiming title thereto, is not subject of garnishment in the hands of the sheriff or to the third parties as the property of the person from whom it was taken; Wooding v. Bank, 11 Wash. 527, 40 Pac. 223. Nor is an officer of a court in respect of money in his hands officially; Ross v. Clarke, 1 Dall. (U. S.) 354, 1 L. Ed. 173; Drane v. McGavock, 7 Humphr. (Tenn.) 132; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Bowden v. Schatzell, Bail. Eq. (S. C.) 360, 23 Am. Dec. 170; Allen v. Gerard, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. Rep. 816; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; Pace v. Smith, 57 Tex. 555; though some cases per-

mit it after the final disposition of the fund; Wilbur v. Flannery, 60 Vt. 581, 15 Atl. 203; Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331; Boylan v. Hines, 62 W. Va. 486, 59 S. E. 503, 13 L. R. A. (N. S.) 757, 125 Am. St. Rep. 983; Gaither v. Ballew, 49 N. C. 488, 69 Am. Dec. 763; Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588 (*contra*, Mattingly v. Grimes, 48 Md. 102); Fearing v. Shafner, 62 Miss. 791; Smith v. People, 93 Ill. App. 135; Willard v. Decatur, 59 N. H. 137; or after the liability is changed from an official to a personal one; Reid v. Walsh (Tex.) 63 S. W. 940; Weaver v. Davis, 47 Ill. 235; *contra*, B. F. Sturtevant Co. v. Bohn Sash & Door Co., 57 Neb. 671, 78 N. W. 265; In re Cunningham, Fed. Cas. No. 3,478. See 13 L. R. A. 757, n. Nor is a trustee of an insolvent, nor an assignee of a bankrupt; Oliver v. Smith, 5 Mass. 183; Farmers' Bank of Delaware v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226 (but the interest of a party in the proceeds of a partition sale may be attached in the hands of the trustee to make the sale; Fenton v. Fisher, 106 Pa. 418). When a trust is created by a third party and the trustee is vested with discretion as to term, amount or manner of payments, he cannot be charged as garnishee; Richards v. R. Co., 44 N. H. 127. A government disbursing officer is not subject to garnishment; Chealy v. Brewer, 7 Mass. 259; Bulkley v. Eckert, 3 Pa. 368, 45 Am. Dec. 650; Divine v. Harvie, 7 T. B. Monr. (Ky.) 439, 18 Am. Dec. 194; Bank of Tennessee v. Dibrell, 3 Sneed (Tenn.) 379; Buchanan v. Alexander, 4 How. (U. S.) 20, 11 L. Ed. 857; nor a receiver; Field v. Jones, 11 Ga. 413; Glenn v. Gill, 2 Md. 1; Taylor v. Gillean, 23 Tex. 508; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Columbian Book Co. v. De Golyer, 115 Mass. 69; Bagby v. R. Co., 86 Pa. 291; nor a United States marshal; Clarke v. Shaw, 28 Fed. 356; nor a board of levee commissioners; McBain v. Rodgers (Miss.) 29 South. 91. A trespasser in possession of another's money or goods cannot be charged as garnishee of the owner; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

The defendant in an action of tort cannot be garnished before the recovery of final judgment; Gamble v. Banking Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276. When the wages of a fisherman are to be paid within thirty days after the arrival of the vessel in port, they are liable to garnishment within the thirty days; Telles v. Lynde, 47 Fed. 912.

A debt due to one partner cannot be attached by a creditor of the firm; Commercial Nat. Bank v. Kirkwood, 184 Ill. 139, 56 N. E. 405; Siegel, Cooper & Co. v. Schueck, 167 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309; Ford v. Dock Co., 50 Mich. 358, 15 N. W. 509; *contra*, Pearce v. Shorter, 50 Ala. 318; Stevens v. Perry, 113 Mass. 380. The garnishment of an agent is insufficient as a garnishment of the principal; Provenchere v. Reifess, 62 Mo. App. 50; but an attorney may be summoned as garnishee of his client in some cases; Mann v. Buford, 3 Ala. 312, 37 Am. Dec. 691; Hancock v. Colyer, 99 Mass. 187, 96 Am. Dec. 730; Ayer v. Brown, 77 Me. 195; White v. Bird, 20 La. Ann. 188, 96 Am. Dec. 393; Narramore v. Clark, 63 N. H. 166.

A debt not due may be attached in the hands of the garnishee, but he cannot be required to pay the same until it becomes due; Sayward v. Drew, 6 Greenl. (Me.) 263; Steuart v. West, 1 Harr. & J. (Md.) 536; Peace v. Jones, 7 N. C. 256; Branch Bank at Mobile v. Poe, 1 Ala. 396; Dunnegan v. Byers, 17 Ark. 492.

Money which by state statute is exempt from attachment as a benefit or insurance, does not remain so after it has reached the beneficiary; Recor v. Bank, 142 Mich. 479, 106 N. W. 82, 5 L. R. A. (N. S.) 472, 7 Ann. Cas. 754; Bull v. Case, 165 N. Y. 578, 59 N. E. 301; Ettenson v. Schwartz, 38 Misc. 669, 78 N. Y. Supp. 231 (after which the statute was changed to cover such cases); Hathorn v. Robinson, 96 Me. 33, 51 Atl. 236; Martin v. Martin, 187 Ill. 200, 58 N. E. 230; *contra*, Emmert v. Schmidt, 65 Kan. 31, 68 Pac. 1072; Coleman v. McGrew, 71 Neb. 801, 99 N. W. 663; and after the death of the beneficiary it is subject to garnishment for his debts; Meyer v. Supreme Lodge Knights and Ladies of Honor, 72 Mo. App. 350. So it is held that under R. S. § 4747, pension money is exempt only "while in the course of transmission to the pensioner"; McIntosh v. Aubrey, 185 U. S. 122, 22 Sup. Ct. 561, 46 L. Ed. 834; State v. Building Ass'n, 44 N. J. L. 376; Price v. Society for Savings, 64 Conn. 362, 30 Atl. 139, 42 Am. St. Rep. 198; *contra*, Reiff v. Mack, 160 Pa. 265, 28 Atl. 699, 40 Am. St. Rep. 720; Crow v. Brown, 81 Ia. 344, 46 N. W. 993, 11 L. R. A. 110, 25 Am. St. Rep. 501 (overruling previous decisions); Bullard v. Goodno, 73 Vt. 88, 50 Atl. 544; and the exemption has been extended to cover the fund when changed in form or invested; Holmes v. Tallada, 125 Pa. 133, 17 Atl. 238, 3 L. R. A. 219, 11 Am. St. Rep. 880; Falkenburg v. Johnson, 102 Ky. 543, 44 S. W. 80, 80 Am. St. Rep. 369; Hissem v. Johnson, 27 W. Va. 644, 55 Am. Rep. 327. See 5 L. R. A. (N. S.) 472 note.

In most of the states, the garnishee responds to the proceedings against him by a sworn answer to interrogatories propounded to him; which in some states is held to be conclusive as to his liability, but generally may be controverted and disproved, though in the absence of contradictory evidence always taken to be true. In order to charge the garnishee upon his answer alone, there must be in it a clear admission of a debt due to, or the possession of money or other attachable property of, the defendant; Bridges v. North, 22 Ga. 52; Harney v. Ellis, 11

Smedes & M. (Miss.) 348; Davis v. Pawlette, 3 Wis. 300, 62 Am. Dec. 690; Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405; Ellicott v. Smith, 2 Cra. (U. S.) 543, Fed. Cas. No. 4,387; Lomerson v. Huffman, 25 N. J. L. 625; Hunt v. Coon, 9 Ind. 537.

Any rights of the garnishee under existing contracts with the principal debtor, he is entitled to have the benefit of, as against the attaching creditor; North Chicago Rolling Mill Co. v. Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565. No judgment can be rendered against a garnishee unless one is obtained against the principal defendant; Merchant v. Howland, 46 Ill. App. 458. It is competent for garnishees to represent in their own defence the rights of a third party to whom they are in law liable; Milwaukee & N. Ry. Co. v. Locomotive Works, 121 U. S. 430, 7 Sup. Ct. 1094, 30 L. Ed. 995. A garnishee has the right to set up any defence against attachment process which he could have done against the debtor in the principal action; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707. If his debt to the defendant be barred by the statute of limitation, he may take advantage of the statute; Hinkle v. Currin, 2 Humphr. (Tenn.) 137; Myers v. Baltzell, 37 Pa. 491; McDermott v. Donegan, 44 Mo. 85; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; Sauer v. Town of Nevadaville, 14 Colo. 54, 23 Pac. 87. He may set up a failure of consideration; Sheldon v. Simonds, Wright (Ohio) 724; Mathis v. Clark, 2 Mill, Const. (S. C.) 456, 12 Am. Dec. 688; Moser v. Mayberry, 7 Watts (Pa.) 12; and may plead a set-off against the defendant; Swamscot Mach. Co. v. Patridge, 25 N. H. 369; Strong v. Mitchell, 19 Vt. 644.

If by a court having jurisdiction a judgment be rendered against a garnishee, and he satisfy the same under execution, it is a full defence to an action by the defendant against him for the property or debt in respect of which he was charged as garnishee; though the judgment may have been irregular, and reversible on error; Atcheson v. Smith, 3 B. Monr. (Ky.) 502; Lomerson v. Hoffman, 24 N. J. L. 674; Houston v. Walcott, 1 Ia. 86; Foster v. Walker, 2 Ala. 180; Spring v. Ayer, 23 Vt. 516; Riddle v. Etting 32 Pa. 412.

An attachment plaintiff may be sued for a malicious attachment; the action will be governed by the principles of the common law applicable to actions for malicious prosecution; Jerman v. Stewart, 12 Fed. 266; Young v. Gregory, 3 Call (Va.) 446, 2 Am. Dec. 556; Lindsay v. Larned, 17 Mass. 190; McCullough v. Grishobber, 4 W. & S. (Pa.) 201; Tomlinson v. Warner, 9 Ohio 103; Smith v. Story, 4 Humphr. (Tenn.) 169; Wiley v. Traiwick, 14 Tex. 662; McKellar v. Couch, 34 Ala. 336; Noonan v. Orton, 30 Wis. 356.

Where a law authorizing garnishment under which proceedings were commenced, was repealed, without a saving clause, pending proceedings were thereby quashed; Wooding v. Bonk, 11 Wash. 527, 40 Pac. 223.

GARNISTURA. In Old English Law. Garniture; whatever is necessary for the fortification of a city or camp, or for the ornament of a thing. 8 Rymer 328; Du Cange; Cowell; Blount. See GARNESTURA.

GARROTE. A mode of capital punishment practised in Spain and Portugal formerly by a simple strangulation. The victim, usually in a sitting posture, is fastened by an iron collar to an upright post, and a knob, operated by a screw or lever, dislocates the spinal column, or a small blade severs the spinal cord at the base of the brain. Cent. Dict.; Encyc. Dict.

GARSUMMUNE. In Old English Law. An amercement or fine. Cowell. See GRESSUME; GERSOMA; GERSUMA.

GARTH. In English Law. A yard; a homestead in the north of England. Cowell. A dam or wear. *Id.*

GAS. An aeriform fluid, used for illuminating purposes and for fuel.

From a legal point of view it is to be considered with respect to the companies by which it is usually furnished, their *status* and obligations as affected by the nature of the business; and also whether the gas furnished by them is manufactured or natural.

Nature of the business. The business is not an ordinary one in which any person may engage as of common right, but a franchise of a public nature which, in the absence of constitutional restriction, may be granted by the legislature; New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gaslight Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; Grand Rapids E. L. & P. Co. v. Gas Co., 33 Fed. 659; City of Newport v. Light Co., 84 Ky. 166. A grant of the right to lay pipes is valid, but it is a franchise to be strictly construed, and is void if the conditions are not complied with; City of Newport v. Light Co., 84 Ky. 166. Such a company cannot sell, lease, or assign its corporate privileges without consent of the legislature; Brunswick Gaslight Co. v. Light Co., 85 Me. 532, 27 Atl. 525, 35 Am. St. Rep. 385.

They are not, however, always treated as strictly public corporations, but in some cases such a company is said to be simply "a private manufacturing corporation which furnishes gas to individuals as agreed. This of itself does not make it a public corporation;" In re New York Cent. & H. R. R. Co. v. Gaslight Co., 63 N. Y. 326. A company furnishing gas to a municipality under contract is not performing such public service as to exempt it from ordinary taxation; New as to Light Co. v. City of Newport (Ky.) 20 S. W. 434.

A gas company having power to manufacture and sell gas has an implied power to make all contracts necessary to that end; St. Louis Gaslight Co. v. St. Louis, 86 Mo. 495.

Natural Gas. The gas obtained from wells in coal and oil regions, and used for lighting and heating. In *nature and character*, such gas has been termed "a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with more careful consideration of the principles involved than of the mere decisions. . . . Water and oil, and still more strongly, gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *ferœ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain;' (per Agnew, C. J. in Brown v. Vandergrift, 80 Pa. 147). They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his." Per Mitchell, J., in Westmoreland, etc., N. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731.

Under a lease of land for the sole purpose of drilling and operating for oil and gas, the lessee's right in the surface of the land is in the nature of an easement of entry and examination, with a right of possession where the particular place of operation is selected, and the easement of ingress and egress, transportation and storage; *id.*

Whether the words "other valuable volatile substance" in a lease when they were used with petroleum, rock, or carbon oil, will include gas is a question for a jury, as the words have no settled meaning; Ford v. Buchanan, 111 Pa. 31, 2 Atl. 339. The words oil and gas in a lease have been held not synonymous; Truby v. Palmer (Pa.) 6 Atl. 74; it is a fuel; Citizens' Gas & Min. Co. v. Town of Elwood, 114 Ind. 338, 16 N. E. 624; but it has been held that a company incorporated for supplying heat cannot also furnish natural gas; Emerson v. Com., 108 Pa. 126.

Natural gas is as much an *article of commerce* as any other product of the earth; State v. Oil, Gas & Min. Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193. A state statute prohibiting the waste of natural gas and oil is not unconstitutional as depriving the owner of his property without due process of law; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729, affirming Ohio Oil Co. v. State, 150 Ind. 698, 50 N. E. 1125. See LAND.

The business of transporting and furnishing natural gas is a *public use*, and the right of eminent domain may be constitutionally granted to companies engaged in it; 5 Cent. Rep. (Pa.) 564; the business is transportation of freight; Carothers v. Philadelphia Co., 118 Pa. 468, 12 Atl. 314. Because of the public nature of the business taxation may be authorized for supplying it to municipal corporations; Fellows v. Walker, 39 Fed. 651; and any unreasonable restraint upon the business is against public policy; People v. Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319. It was held that under the Pennsylvania general incorporation act of 1874, under which companies for the manufacture and supply of gas were formed, natural gas companies could not be incorporated; Emerson v. Com., 108 Pa. 111; Sterling's Appeal, 111 Pa. 35, 2 Atl. 105, 56 Am. Rep. 246. Consequently a general law was passed providing for such companies under which, when lawfully incorporated, they may exercise the right of eminent domain, and the grant of the power is constitutional; State v. Oil, Gas & Min. Co., 120 Ind. 581, 22 N. E. 778, 6 L. R. A. 579; Bloomfield & R. Natural Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437; McDevitt v. Gas Co., 160 Pa. 367, 28 Atl. 948; and the use of city streets for that purpose imposes no additional servitude; *id.* In Pennsylvania, the courts of common pleas may hear and determine controversies between natural gas companies and municipalities as to the manner of laying their pipes; Appeal of City of Pittsburgh, 115 Pa. 4, 7 Atl. 778.

A right to take natural gas from land under the Pennsylvania act of Apr. 7, 1870, P. L. 58, is not land held in fee, subject to be sold under a special *fi. fa* against an insolvent corporation; Greensburg Fuel Co. v. Gas Co., 162 Pa. 78, 29 Atl. 274. The lessee for oil and gas, having drilled a well and tapped the gas-bearing strata (the only one in the land), has both the possession of the gas and the right to it, and the owner will be enjoined from drilling; Westmoreland N. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. A lessee for oil only who took from the well both oil and gas was held not accountable to the lessor for the gas, which is, like air and water, the subject only of qualified property by occupancy; Wood County Petroleum Co. v. Transportation Co., 28 W. Va. 210, 57 Am. Rep. 659. From the nature of the gas, a lease of well-rights is necessarily exclusive so far as concerns the leased premises themselves; *id.*; Westmoreland Nat. Gas Co. v. De Witt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731. A person who has a natural gas well on his premises has the right to explode nitro-glycerine

therein for the purpose of increasing the flow, although such explosion may have the effect to draw gas from the land of another; Greenfield Gas Co. v. Gas Co., 131 Ind. 599, 31 N. E. 61. An act prohibiting the transportation of natural gas in pipes to points outside a state is invalid as interfering with inter-state commerce; West v. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193.

The rights and liabilities of gas companies are, in the main, the same, whether they are engaged in the business of supplying artificial or natural gas.

Municipal lighting. The business is usually carried on by companies acting either under a legislative or municipal franchise or contract, or directly by the municipality under express legislative authority or implied power.

As to the implied power of a municipality to light its streets, etc., see ELECTRIC LIGHT COMPANIES.

A municipal corporation having power to light its own streets, and erect and maintain gas works has implied power to contract with others to do so; City of Newport v. Light Co., 84 Ky. 166. A municipal council exceeds its power, in granting an exclusive privilege; Cincinnati Gaslight & Coke Co. v. Avondale, 43 Ohio St. 257, 1 N. E. 527; at least, without legislative authority; 3 Cent. Rep. (Pa.) 921. The authority to lay mains and pipes in streets and provide gas does not give an exclusive right to the use of the streets for that purpose; Hamilton Gaslight & Coke Co. v. City of Hamilton, 21 Ohio L. J. 94.

A city engaged in making and selling gas is *quoad hoc* a private corporation, not legislating but making contracts which bind it as a natural person, and cannot be impaired by the legislature; Western Sav. Fund Society of Philadelphia v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730.

The grant of an exclusive privilege is a contract none the less because the business requires supervision by public authority, and such grant does not restrict the power of regulation by the state; New Orleans Gaslight Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516. A grant by a city, under legislative authority, of an exclusive privilege for a term of years of supplying the city with gas, does not prevent the city from erecting its own gas works under a state law giving it power to do so; Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; the grant of an exclusive privilege with an option to the city to buy the plant does not bind the city to maintain it when the sale of the plant is refused, but the city must elect whether it will purchase at the price fixed by referees before they are chosen, and until the city does so agree it is not a breach of contract for the company to refuse to join in selecting referees; Montgomery Gaslight Co. v. City Council, 87 Ala. 245, 6 South. 113, 4 L. R. A. 616. Under a grant for a term of years of the exclusive privilege for this purpose, the right to use the streets for light other than gas is not implied and must be authorized; City of Newport v. Light Co., 89 Ky. 454, 12 S. W. 1040, 11 Ky. L. Rep. 840. In this case it was held that the city had power to contract with another person for electric lighting, and pay for both gas and electricity, but it could not dispense with the gas company's gas without liability for breach of contract. When an exclusive privilege of lighting the city and using the streets was given by the city to one company for a term of years, in consideration of low rates to citizens, it did not estop the municipal corporation from subscribing to the stock of a new gas company seeking to introduce gas; Memphis v. Dean, 8 Wall. (U. S.) 64, 19 L. Ed. 326. As to municipal authority to light streets, see Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487, note; ELECTRIC LIGHT.

The use of highways. The right to lay gas pipes in public highways can in general be granted only by the legislature. Such is the established rule both in England and in this country; 16 Q. B. 1012; 2 El. & El. 650; Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242; State v. Coke Co., 18 Ohio St. 262. In a city it may be granted by the municipal or local authorities when empowered by the legislature to do so; Norwich Gaslight Co. v. Gas Co., 25 Conn. 19; People v. Bowen, 30 Barb. (N. Y.) 24; in Massachusetts it was said to be not clear whether the city could act without authority from the state; per Gray, J., in City of Boston v. Richardson, 13 Allen (Mass.) 160; but in Michigan it was held to be essentially a matter of local control; People v. Gaslight Co., 38 Mich. 154. The city may forbid opening the streets within certain periods as a regulation, but a prohibition of digging up the street to introduce gas on the opposite side of it is an unreasonable exercise of authority; Com'rs of Northern Liberties v. Gas Co., 12 Pa. 318. In rural highways the laying of gas pipes is held to impose a new servitude not contemplated in the condemnation; Bloomfield & R. Natural Gas Light Co. v. Calkins, 62 N. Y. 386; Mills, Em. Dom. § 55; McDevitt v. Gas Co., 160 Pa. 367, 28 Atl. 948; but in city streets it does not; *id.* See 12 Am. & Eng. Corp. Cas. 334; EMINENT DOMAIN; HIGHWAY; STREET.

Obligation to supply gas. The difference of opinion as to the public character of gas companies necessarily results in contradictory decisions as to whether the companies are under a public duty to supply gas on request. They are usually held to be subject to the duty of furnishing gas upon reasonable terms to any one who applies for it, especially if the franchise is exclusive; Gaslight Co. of

Baltimore v. Colliday, 25 Md. 1; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; and the rule also applies where it is not; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; companies may be compelled to do so by mandamus; People v. Gaslight Co., 45 Barb. (N. Y.) 136. On the other hand it has been held that they are under no public duty to supply gas; McCune v. Gas Co., 30 Conn. 521, 79 Am. Dec. 278; 20 U. C. Q. B. 233; Com. v. Gaslight Co., 12 Allen (Mass.) 75; L. R. 15 Eq. 157; Paterson Gaslight Co. v. Brady, 27 N. J. L. 245, 72 Am. Dec. 360. The last case was put solely on the lack of precedent and is practically overruled; Dayton v. Quigley, 29 N. J. Eq. 77. See Portland Natural Gas & Oil Co. v. State, 34 N. E. 818.

The right to regulate rates has been applied to gas works; Zanesville v. Gaslight Co., 47 Ohio St. 1, 23 N. E. 55. But the right is not arbitrary, even where given to a municipality by the legislature; the right to charge reasonable rates is part of the contract of the company with the state, and this reasonableness is a matter for judicial determination; Capital City Gas Co. v. Des Moines, 72 Fed. 818. See RATES.

A gas company need not leave a gas meter in the house of a citizen who is using electric light, furnished by another company, so that in case of accident to the electric light he may use the gas; Fleming v. Light Co., 100 Ala. 657, 13 South. 618.

Rules and Regulations. In the conduct of their business such companies may make and enforce rules and regulations if fair and reasonable. Regulations have been held to be reasonable, requiring a deposit; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479; Williams v. Gas Co., 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266; and that a written application should be signed; Shepherd v. Gaslight Co., 11 Wis. 234; but such an application cannot be made to embrace an agreement to be bound by illegal rules and regulations; Shepherd v. Gaslight Co., 15 Wis. 318, 82 Am. Dec. 679. Regulations may be enforced respecting the care and treatment of meters; Foster v. Gas Works, 12 Phila. (Pa.) 511; but it has been held that visits must be made at stated times and with notice; Shepard v. Gaslight Co., 6 Wis. 539, 70 Am. Dec. 479. Regulations held unreasonable or oppressive, and therefore non-enforcible, are that after the admission of gas the pipes may not be opened without a permit under penalty of treble damage; *id.;* that meters be placed upon main pipes of apartment buildings instead of smaller pipes of individual occupants; Young v. City of Boston, 104 Mass. 95; that rents should be payable half yearly in advance with penalty twenty days after default enforcible by cutting off the attachment until payment of the arrears and additional half year in advance; Dayton v. Quigley, 29 N. J. Eq. 77.

The right to cut off the supply. The company or the municipality has, as a general rule, the right to cut off the supply of gas if the bill for supplying it is not paid within a limited period. Such a provision by ordinance is a reasonable regulation; Com. v. Philadelphia, 132 Pa. 288, 19 Atl. 136; and furnishing gas without objection on account of former indebtedness is not a waiver of the right to shut off the gas for such prior indebtedness; People v. Gaslight Co., 45 Barb. (N. Y.) 136; but the right has been held not to extend to indebtedness of a former occupant of the premises; Morey v. Gaslight Co., 38 N. Y. Super. Ct. 185; L. R. 4 C. P. D. 410; Cox v. Gaslight Co., 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503. Even when the company has the right by statute to cut off the supply for nonpayment of regular charges it does not extend to charges for special service: 20 U. C. Q. B. 233; nor can the supply be cut off from one house for non-payment for another supplied under a different contract; Gaslight Co. of Baltimore v. Colliday, 25 Md. 1; 7 Grant, U. C. 112; and even when the contract authorizes refusal to continue a supply in case of default in payment for "any premises" of the owner it will apply only to future defaults; Lloyd v. Gaslight Co., 1 Mackey (D. C.) 331. Whenever there is a controversy as to the indebtedness the consumer may have an injunction; Sickles v. Gaslight Co., 66 How. Pr. (N. Y.) 314; *contra*, Cox v. Gaslight Co., 199 Mass. 324, 85 N. E. 180, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, where the remedy was held to be by mandamus. As to the measure of damages see that title. See also WATER.

Liability for negligence. Gas companies and others using or generating gas, artificial or natural, are subject to the general principle that one who uses a force which he cannot control is liable for the consequences, and where it may be controlled by due care and scientific knowledge and appliances he who receives the profit must bear the responsibility; 3 C. B. 1; they are liable for negligence which must involve the omission of something required by, or the doing of something forbidden by, reasonable care; Hutchinson v. Gaslight Co., 122 Mass. 219; 2 Fost. & F. 437; what is such care is not capable of exact definition but must vary with and conform to the exigencies of the situation; Holly v. Gaslight Co., 8 Gray (Mass.) 123, 69 Am. Dec. 233; Smith v. Gaslight Co., 129 Mass. 318; the obligation is increased by the dangerous character of the force under control; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; Butcher v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626; Fuchs v. City of St. Louis, 133 Mo. 168, 31 S. W. 115, 34 S. W. 508, 34 L. R. A. 118; and it extends to the company's agents and servants; Louisville Gas Co. v. Gutenkuntz, 82 Ky. 432; Butcher

v. Gas Co., 12 R. I. 149, 34 Am. Rep. 626. The company is liable for such consequences as were natural and probable and, in view of the nature of the agency, ought to have been foreseen; Oil City Gas Co. v. Robinson, 99 Pa. 1; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; Hunt v. Gaslight Co., 8 Allen (Mass.) 169, 85 Am. Dec. 697; Emerson v. Gaslight Co., 3 Allen (Mass.) 410. See CAUSA PROXIMA NON REMOTA; Taylor v. Baldwin, 78 Cal. 517, 21 Pac. 124; Lannen v. Gaslight Co., 44 N. Y. 459.

Where the municipality is held liable in damages for an injury resulting from the negligence of a gas company in failing to keep in repair its apparatus located under the sidewalk, the company is liable over to the municipality; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712.

The company is bound to exercise reasonable care in the location, structure, and repair of its pipes to prevent escape of gas so as to become dangerous to life or property; L. R. 7 Exch. 96; Smith v. Light Co., 129 Mass. 318; Mississinewa Mining Co. v. Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203; whether by reason of explosion or inhalation; Schmeer v. Gas Co., 65 Hun 378, 20 N. Y. Supp. 168; it must also provide with the like care for the inspection of pipes and repairing leaks; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; 4 Fost. & F. 324; and the discovery of such leaks; Consolidated Gas Co. of Baltimore City v. Crocker, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; Lewis v. Boston Gas Co., 165 Mass. 411, 43 N. E. 178; Evans v. Gas Co., 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651, 51 Am. St. Rep. 681; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653; and the safe condition of its apparatus authorized to be placed under the streets; Washington Gaslight Co. v. Dist. of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712. The failure to use such care makes the company jointly liable with one who seeks for the leak with a lighted match, for the results of an explosion; Pine Bluff Water & Light Co. v. McCain, 62 Ark. 118, 34 S. W. 549. The mere fact that the gas was exploded by a lighted match will not relieve the company whose negligence caused the leak; Koelsch v. Philadelphia Co., 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653. It is not contributory negligence to search for a gas leak with a lighted match; Pine Bluff Water & Light Co. v. Schneider, 62 Ark. 109, 34 S. W. 547, 33 L. R. A. 366; or a candle; Schmeer v. Gas Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. A city as a manufacturer and distributor of gas is liable for negligence of its officers, and its agents are bound to the exercise of due care in like manner as those of a private corporation; Kibele v. City of Philadelphia, 105 Pa. 41; but not unless there is negligence; Strawbridge v. City of Philadelphia, 13 Phila. (Pa.) 173.

Where the gas company is authorized by the legislature the public may not recover damages, but it will be liable to a private person; People v. Gaslight Co., 64 Barb. (N. Y.) 55; *id.*, 6 Lans. (N. Y.) 467. A gas company before turning on gas into an apartment house must use reasonable precautions to ascertain that the pipes in the building are in such condition that it will not flow out into the apartments of tenants, who have not applied for it, to their injury; per Peckham, J., in Schmeer v. Gaslight Co., 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653. For an elaborate note on the liability for negligence in the escape and explosion of gas, see Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695, 35 N. E. 1059, 29 L. R. A. 337; 16 Alb. L. J. 466. See also NEGLIGENCE. As to gas as a nuisance, see that title.

Remedies. An *injunction* will be granted to restrain a company from improperly cutting off the supply on the ground of irreparable injury; Sickles v. Gaslight Co., 64 How. Pr. (N. Y.) 33; L. R. 28 Ch. D. 138; a private owner cannot ask for an injunction against acts of companies in laying pipes until a request to the municipal authorities to do it and their refusal; Kenney v. Gas Co., 142 Mass. 417, 8 N. E. 138; and one company will not be restrained at suit of another; Jersey City Gaslight Co. v. Gas Co., 40 N. J. Eq. 427, 2 Atl. 922. When the gas becomes a nuisance by defective pipes, the municipality may abate it and will not be restrained, but when it is not a nuisance a bill for injunction will not be sustained at suit of the municipality; 5 Cent. Rep. (Pa.) 669.

Mandamus. Will lie to compel a supply of gas either artificial; People v. Gaslight Co., 45 Barb. (N. Y.) 137; or natural; Portland Natural Gas & Oil Co. v. State, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639.

A claim that gas is of poor quality is no *defence* to an action for the supply of it; 32 Gas J. 5; but it may be shown that the gas was put out by air passing through the tubes, the contract being to pay for gas only, and the meter not being conclusive; Healey v. Bauer, 65 Hun 621, 19 N. Y. Supp. 988. An action will not lie against a gas company by a consumer for the failure of the company to give him a supply of gas of the amount and purity required by law; [1896] 1 Q. B. 592.

Connecting a rubber pipe with gas mains and taking off the gas therefrom is *larceny;* 1 Cr. Cas. Res. 172; Woods v. People, 222 Ill. 293, 78 N. E. 607, 7 L. R. A. (N. S.) 520, 113 Am. St. Rep. 415, 6 Ann. Cas. 736.

As to pipes in the ground, whether real or personal, see 12 Am. & Eng. Corp. Cas. 334; and as to gas fixtures, see FIXTURES.

GASTALDERS. A temporary governor of the country. Blount. A steward or bailiff. Spel. Gloss.

GASTEL (L. Fr.). Wastel; wastelbread; the finest kind of wheat bread. Britt. c. 30; Kelham.

GASTINE (L. Fr.). Waste or uncultivated ground. Britt. c. 57.

GATE (Sax. *geat*), at the end of names of places, signifies way or path. Cunningham, Law Dict.

In the words *beast-gate* and *cattle-gate*, it means a right of pasture: these rights are local to Suffolk and Yorkshire respectively; they are considered as corporeal hereditaments, for which ejectment will lie; 2 Stra. 1084, 1 Term 137; and are entirely distinct from right of common. The right is sometimes connected with the duty of repairing the *gates* of the pasture: and perhaps the name comes from this.

GAUGER. An officer appointed to examine all tuns, pipes, hogsheads, barrels, and tierces of wine, oil, and other liquids, and to give them a mark of allowance, as containing lawful measure.

GAUGETUM. A guage or guaging; a measure of the contents of any vessel. Cowell.

GAVEL. In Old English Law. Tribute; toll; custom; yearly revenue, of which there were formerly various kinds. Jacob, Law Dict.; Taylor, Hist. Gavelkind, 26, 102. See GABEL.

GAVELBRED. In English Law. Rent reserved in bread, corn, or provision; rent payable in kind. Cowell.

GAVELET. An obsolete writ, a kind of *cessavit (q. v.)*, used in Kent. Cowell.

A custom in Kent which practically amounted to a forfeiture of land held in gavelkind. Hazeltine, 3 Sel. Essays in Anglo-Amer. L. H. 661.

GAVELGELD (Sax. *gavel*, rent, *geld*, payment). That which yields annual profit or toll. The tribute or toll itself. 3 Mon. Angl. 155; Cowell; Du Cange, *Gavelgida.*

GAVELHERTE. A customary service of ploughing. Du Cange.

GAVELKIND (Gafolcund; Gaful-gecynd. Vinogradoff, Engl. Soc.). The tenure by which almost all lands in England were held prior to the Conquest, and which is still preserved in Kent.

All the sons of a tenant of gavelkind lands take equally, or their heirs male and female by representation. The wife of such tenant is dowable of one-half the lands. The husband of such tenant has curtesy, whether issue be born or not, but only of one-half while without issue. Such lands do not escheat, except for treason or want of heirs. The heir of such lands may sell at fifteen years old, but must himself give livery. The rule as to division among brothers in default of sons is the same as among the sons. Digb. R. P. 46. The youngest son took the hearth. Vinogradoff, Engl. Soc. 92.

Coke derives *gavelkind* from "gave all kinde;" for this custom gave to all the sons alike; 1 Co. Litt. 140 *a;* Lambard, from *gavel*, rent,—that is, land of the kind that pays rent or customary husbandry work, in distinction from lands held by knight service. Perambulations of Kent, 1656, p. 585.

There have been many suggested derivations of gavelkind. The true derivation connects it with the old English *gafol*, or *gavel*, which means rent or customary performance of agricultural services. The tenant was called *gavelman*, and *gavelkind*, a compound of gavel and gekynde (kind, quality), meant land of the kind which yielded rent, as distinguished from knight service land held by free military tenure. No doubt in earlier days it denoted land held by this particular tenure, but later it came to be used as the name for the custom by which lands in Kent are, in the absence of proof to the contrary, presumed to be affected, and sometimes in later law to express the fact that lands, in Kent or elsewhere, were divided between male heirs on the death of the ancestor. 3 Holdsw. Hist. E. L. 224. See Robinson, Gavelkind.

See Encyc. Brit.; Blount; 1 Bla. Com. 74; 2 *id.* 84; 4 *id.* 408; 1 Poll. & Maitl. 165; 2 *id.* 269, 416.

GAVELLER. An officer of the English crown, who had the management of the mines and quarries in the Forest of Dean and Hundred of St. Briavels, subject, in some respects, to the control of commissioners of woods and forests. He granted gales to free miners in their proper order, accepted surrenders of gales, and kept the registers required by the acts. There was a deputy-gaveller who appears to have exercised most of the gaveller's functions. Sweet.

GAVELMAN. A tenant who is liable to tribute. Somner, Gavelkind, p. 33; Blount. Gavelingmen were tenants who paid a reserved rent, besides customary service. Cowell.

GAVELMED. A customary service of mowing meadow-land or cutting grass *(consuetudo falcandi)*. Somner, Gavelkind, App.; Blount.

GAVELREP. In Old English Law. Bedreap or bidreap; the duty of reaping at the bid or command of the lord. Somner, Gavelkind 19, 21; Cowell.

GAVELSESTER. A certain measure of rent-ale. Cowell.

GAVELWERK (called also *Gavelweek*). A customary service, either *manuopera*, by the person of the tenant, or *carropera*, by his

carts or carriages. Phillips, Purveyance; Somner, Gavelkind 24; Du Cange.

GAZETTE. The official publication of the British government, also called the *London Gazette*. It is evidence of acts of state, and of everything done by the crown in a political capacity. Orders of adjudication in bankruptcy are required to be published therein, and a copy of the *Gazette* containing such publication is conclusive evidence of the fact, and of the date thereof. Moz. & W.

GEARY ACT. See CHINESE.

GEBOCIAN (from Sax. *boc*). To convey *boc land*,—the grantor being said to *gebocian* the grantee of the land; 1 Reeves, Hist. Eng. Law 21.

See Du Cange, *Liber;* BOCLAND; FOLCLAND.

GEBUR (Sax.). A boor. His services varied in different places—to work for his lord two or more days a week; to pay gafols in money, barley, etc.; to pay hearth money, etc. He was a tenant with a house and a yard land or virgate or two oxen. Maitl. Domesday and Beyond 37.

GEBURSCIR. Neighborhood or adjoining district. Cowell.

GEBURUS. In Old English Law. A country neighbor; an inhabitant of the same gaburscript, or village. Cowell.

GELD (from Sax. *gildan;* Law Lat. *geldum*). A payment, tax, tribute. Laws of Hen. I. c. 2; Charta Edredi Regis apud Ingulfum, c. 81; Mon. Ang. t. 1, pp. 52, 211, 379; t. 2, p. 161; Du Cange; Blount.

A land tax of so much per hide or carucate. Maitl. Domesday Book 120.

The compensation for a crime.

We find geld added to the word denoting the offence, or the thing injured or destroyed, and the compound taking the meaning of compensation for that offence or the value of that thing. Capitulare 3, anno 813, cc. 23, 25; Carl Magn. So, *wergeld*, the compensation for killing a man, or his value; *orfgeld* the value of cattle; *angeld*, the value of a single thing; *octogeld*, the value eight times over, etc. Du Cange, *Geldum*.

GELDABILIS. In Old English Law. Taxable.

GELDABLE. Liable to be taxed. 1 Poll. & Maitl. 552; Kelham.

GEMOT (*gemote*, or *mote;* Sax., from *gemeltand*, to meet or assemble; L. Lat. *gemotum*). An assembly; a mote or moot, meeting or public assembly.

There were various kinds: as, the *witenagemot*, or meeting of the wise men; the *folcgemot*, or *folc-moot*, the general assembly of the people; the *shire-gemot* or *shiremoot* or county court; the *burghmoot*, or borough court; the *hundred-moot*, or hundred court; the *hali-gemot*, or court-baron; the *halimote*, a convention of citizens in their public hall; the *holy-mote*, or holy court; the *swanimote*, or forest court; the *ward-mote*, or ward court; Cunningham, Law Dict. And see the several titles.

GENEALOGY. The summary history or table of a family, showing how the persons there named are connected together.

It is founded on the idea of a lineage or family. Persons descended from the common father constitute a family. Under the idea of degrees is noted the nearness or remoteness of relationship in which one person stands with respect to another. A series of several persons, descended from a common progenitor, is called a *line*. Children stand to each other in the relation either of full blood or half-blood, according as they are descended from the same parents or have only one parent in common. For illustrating descent and relationship, genealogical tables are constructed, the order of which depends on the end in view. In tables the object of which is to show all the individuals embraced in a family, it is usual to begin with the oldest progenitor, and to put all the persons of the male and female sex in descending, and then in collateral, lines. Other tables exhibit the ancestors of a particular person in ascending lines both on the father's and the mother's side. In this way four, eight, sixteen, thirty-two, etc., ancestors are exhibited, doubling at every degree. Some tables are constructed in the form of a tree, after the model of canonical law (*arbor consanguinitatis*), with the progenitor beneath, for the root or stem. See CONSANGUINITY.

GENEARCH. The head of the family.

GENEATH. In Saxon Law. A villein, or agricultural tenant *(villanus villicus);* a hind, or farmer *(fimarius rusticus)*. Spel. Gloss.

GENER (Lat.). A son-in-law.

GENERAL APPEARANCE. See APPEARANCE.

GENERAL APPRAISERS, COURT OF. See COURT OF APPRAISERS OF THE UNITED STATES.

GENERAL ASSEMBLY. A name given in some of the states to the senate and house of representatives, which compose the legislative body.

GENERAL ASSIGNMENT. An assignment of all one's property for the benefit of his creditors; it necessarily includes an assignee who shall by the terms of the instrument, or as an inference from those terms, take as a trustee for the creditors. Tompkins v. Bank, 18 N. Y. Supp. 234. See ASSIGNMENT.

GENERAL AVERAGE. A loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred, for the joint benefit of a ship and cargo. Louisville Underwriters v. Pence, 93 Ky. 96, 19 S. W. 10, 40 Am. St. Rep. 176.

A general average clause in a bill of lading, that if the shipowner shall have exercised due diligence to make his ship seaworthy and properly manned, etc. (see Harter Act), the cargo shall contribute in general average with the shipowner, even if the loss result from negligence in navigation, is valid. Under the same circumstances, the cargo owners are entitled to contribution from the shipowner for

sacrifices of cargo for the common benefit of ship, cargo and freight subsequent to stranding; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969.

The essence is that extraordinary sacrifices made and expenses incurred for the common benefit are to be borne proportionately by all interested; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, goes no further than to decide that while the Harter Act relieved the shipowner from liability for his servant's negligence, it did not of its own force entitle him to share in a general average rendered necessary by such negligence; The Jason, 225 U. S. 54, 32 Sup. Ct. 560, 56 L. Ed. 969.

See AVERAGE; HARTER ACT.

GENERAL BOARD OF THE NAVY. It consists of the Admiral of the Navy, the Aids for Operations and for Material, the Chief Intelligence Officer, the President of the War College, and such additional officers as the Secretary of the Navy may designate. It was established under General Order March 13, 1900. It is a general advisory board to the Secretary of the Navy as to the preparation, maintenance and distribution of the fleet, plans of campaign, number and types of vessels, etc., number and ranks of officers and number and ratings of enlisted men, etc.

GENERAL CHALLENGE. A challenge for cause to a particular juror, upon a ground which disqualifies him from serving in any case. Cal. Pen. Code § 1071.

GENERAL CHARACTER. The general character is the estimation in which a person is held in the community where he has resided, and, ordinarily, the members of that community are the only proper witnesses to testify as to such character. Accordingly a witness who goes to the place of the former residence of a party to learn his character will not be allowed to testify as to the result of his inquiries. Douglass v. Tousey, 2 Wend. (N. Y.) 354, 20 Am. Dec. 616. See CHARACTER.

GENERAL CHARGE. The charge or instruction of the court to the jury upon the case, as a whole, or upon its general features and characteristics. See CHARGE.

GENERAL CIRCULATION. That of a general newspaper only, as distinguished from one of a special or limited character; 1 Lack. Leg. N. (Pa.) 114.

GENERAL COUNCIL. A council of bishops, of the Roman Catholic Church, from different parts of the world.

A name sometimes applied to the British parliament.

GENERAL COURT. The Massachusetts legislature is so called.

GENERAL CREDIT. The character of a witness as one generally worthy of credit. There is a distinction between this and particular credit, which may be affected by proof of particular facts relating to the particular action; Bemis v. Kyle, 5 Abb. Pr. N. S. (N. Y.) 232.

GENERAL CUSTOM. See CUSTOM.

GENERAL DAMAGES. See DAMAGES.

GENERAL DEMURRER. See DEMURRER.

GENERAL DENIAL. See DENIAL; PLEA; TRAVERSE.

GENERAL DEPOSIT. As to money in a bank, it means one to be returned to the depositor in a like sum, but not the same money which was deposited. Mutual Accident Ass'n of the Northwest v. Jacobs, 43 Ill. App. 340; Talladega Ins. Co. v. Landers, 43 Ala. 138. See DEPOSIT; SPECIAL DEPOSIT.

GENERAL ELECTION. An election of officers of the general government, either federal or state, as distinguished from an election of local officers.

One held to choose an officer after the expiration of the full term of the former officer, as distinguished from one held to fill a vacancy occurring before the expiration of the full term for which the incumbent was elected. Kenfield v. Irwin, 52 Cal. 164.

GENERAL FUND. A phrase used in some states as a collective designation of all the assets of the state available for the support of the state government and for defraying the ordinary appropriations of the legislature. It is so used in New York; People v. Board of Sup'rs, 27 Barb. (N. Y.) 575, 588; and also in Delaware in the messages of the governor and other state papers to distinguish such funds as are available in the hands of the state treasurer for general purposes from assets of a special character, such as the school fund.

GENERAL GAOL DELIVERY. **In English Law.** One of the four commissions issued to judges holding the assizes, which empowers them to try and deliverance make of every prisoner who shall be in the gaol when the judges arrive at the circuit town, whether an indictment has been preferred at any previous assize or not.

It was anciently the course to issue special writs of gaol delivery for each prisoner, which were called writs *de bono et malo;* but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. 4 Steph. Com. 333; 2 Hawk. Pl. Cr. 14, 28.

Under this authority it was necessary that the gaol be cleared and delivered of all prisoners in it, whenever or before whomever indicted or for whatever crime. Such deliverance took place when the person is either acquitted, convicted, or sentenced to punishment. Bract. 110. See COURTS OF OYER AND TERMINER AND GENERAL GAOL DELIVERY; GAOL DELIVERY; ASSIZE.

GENERAL IMPARLANCE. **In Pleading.** One granted upon a prayer in which the defendant reserves to himself no exceptions.

GENERAL ISSUE. **In Pleading.** A plea which denies or traverses at once the whole indictment or declaration, without offering any special matter to evade it.

It is called the general issue because, by importing an absolute and general denial of what is alleged in the indictment or declaration, it amounts at once to an issue. 2 Bla. Com. 305. In the early manner of pleading, the general issue was seldom used except where the party meant wholly to deny the charges alleged against him. When he intended to excuse or palliate the charge, a special plea was used to set forth the particular facts. See 2 Poll. & Maitl. 617. But now, since special pleading is generally abolished, the same result is secured by requiring the defendant to file notice of special matters of defence which he intends to set up at the trial, or obliging him to use a form of answer adapted to the plaintiff's declaration, the method varying in different systems of pleading. Under the English Judicature Acts, the general issue is no longer admissible in ordinary civil actions, except where expressly sanctioned by statute.

In criminal cases the general issue is, not guilty. In civil cases the general issues are almost as various as the forms of action: in assumpsit, the general issue is *non assumpsit;* in debt, *nil debet;* in detinue, *non detinet;* in trespass, *non culpabilis* (not guilty); in replevin, *non cepit*, etc. Steph. Pl. 232.

GENERAL LAND-OFFICE. A bureau in the United States government which has the charge of matters relating to the public lands.

It was established by the act of April 25, 1812. It was reorganized by act of July 4, 1836. It was originally a bureau of the treasury department, but was transferred in 1859 to the department of the interior. The statutes on the subject are comprised in U. S. Rev. Stat. §§ 446–461. The head of it is the commissioner of the general land-office. He has charge (under the secretary of the interior) of surveying and selling public lands, matters pertaining to private claims of lands, and issuing patents for lands granted by the United States. By act of April 28, 1904, he has all the powers vested formerly in the court of private land claims in the approval of surveys.

GENERAL LAWS. Laws which apply to and operate uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to themselves in the matters covered by the laws. Binney, Restrictions upon Local and Special Legislation. Quoted in Com. v. State Treasurer, 29 Pa. Co. Ct. R. 578.

Statutes which relate to persons and things as a class. Wheeler v. Philadelphia, 77 Pa. 348. Laws that are framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. Van Riper v. Parsons, 40 N. J. L. 123, 29 Am. Rep. 210.

The later constitutions of many of the states place restrictions upon the legislature as to passing special laws in certain cases. In some states there is a provision that general laws only may be passed, in cases where such can be made applicable. Provisions requiring all laws of a general nature to be uniform in their operation do not prohibit the passage of laws applicable to cities of a certain class having not less than a certain number of inhabitants, although there be but one city in the state of that class; Welker v. Potter, 18 Ohio St. 85; Cooley, Const. Lim. 156. See Brooks v. Hyde, 37 Cal. 366.

The wisdom of these constitutional provisions has been the subject of grave doubt. See Cooley, Const. Lim. 156, n.

When thus used, the term "general" has a twofold meaning. With reference to the subject-matter of the statute, it is synonymous with "public" and opposed to "private"; Brooks v. Hyde, 37 Cal. 366; Yellow River Imp. Co. v. Arnold, 46 Wis. 218, 49 N. W. 971; Dwarris, Stat. 629; Sedgw. Stat. L. 30; but with reference to the extent of territory over which it is to operate, it is opposed to "local," and means that the statute to which it applies operates throughout the whole of the territory subject to the legislative jurisdiction; 4 Co. 75 *a;* 1 Bla. Com. 85; People v. Cooper, 83 Ill. 585; King v. State, 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210; Clark v. City of Janesville, 10 Wis. 180. Further, when used in antithesis to "special" it means relating to all of a class instead of to men only of that class; People v. Wright, 70 Ill. 398; Hymes v. Aydelott, 26 Ind. 431; Porter v. Thomson, 22 Ia. 391; Wheeler v. Philadelphia, 77 Pa. 348; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 440.

When the constitution forbids the passing of special or local laws in specified cases, it is within the discretion of the legislature to decide whether a subject not named in the constitution is a proper subject for general legislation; the fact that a special law is passed in relation thereto is evidence that it was thought that a general law would not serve; and in such a case clear evidence of mistake is required to invalidate the enactment; People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66; Kelly v. State, 92 Ind. 236; Richman v. Sup'rs Muscatine County, 77 Ia. 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. Rep. 308.

In deciding whether or not a given law is general, the purpose of the act and the

objects on which it operates must be looked to. If these objects possess sufficient characteristics peculiar to themselves and the purpose of the legislation is germane thereto, they will be considered as a separate class, and legislation affecting them will be general; Long Branch v. Sloane, 49 N. J. L. 356, 8 Atl. 101; Consumers' Gas Trust Co. v. Harless, 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505; Ripley v. Evans, 87 Mich. 217, 49 N. W. 504; Coal Run Coal Co. v. Finlen, 124 Ill. 666, 17 N. E. 11; Demoville & Co. v. Davidson County, 87 Tenn. 214, 10 S. W. 353; but if the distinctive characteristics of the class have no relation to that purpose of the legislature, or if objects which would appropriately belong to the same class have been excluded, the classification is faulty, and the law not general; Lorentz v. Alexander, 87 Ga. 444, 13 S. E. 632; City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; City of Topeka v. Gillett, 32 Kan. 431, 4 Pac. 800; Inhabitants of Lodi Tp. v. State, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56; State v. Boyd, 19 Nev. 43, 5 Pac. 735; Edmonds v. Herbrandson, 2 N. Dak. 270, 50 N. W. 970, 14 L. R. A. 725; Davis v. Clark, 106 Pa. 377. The effect, not the form of the law, determines its character; McAunich v. R. Co., 20 Ia. 338; State v. Tolle, 71 Mo. 645; Dempsey v. Newark, 53 N. J. L. 4, 20 Atl. 886, 10 L. R. A. 700; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; Commonwealth v. Patton, 88 Pa. 258.

See LEGISLATIVE POWER; STATUTE.

GENERAL OCCUPANT. The man who could first enter upon lands held *pur autre vie*, after the death of the tenant for life, living the *cestui que vie*. At common law he held the lands by right for the remainder of the term; but this is now altered by statute, in England, the term going to the executors if not devised; 29 Car. II. c. 3; 14 Geo. II. c. 20; 2 Bla. Com. 258. This has been followed by some states; 1 Md. Code 666, s. 220, art. 93; in some states the term goes to heirs, if undevised; Mass. Gen. Stat. c. 91, § 1.

GENERAL ORDERS. Orders or rules of court, entered for the guidance of practitioners and the general regulation of procedure, or in some branch of its general jurisdiction; as opposed to a rule or an order made in a particular case. The rules of court.

GENERAL OWNER. The general owner of a thing is one who has the primary title to it; as distinguished from a *special* owner, who has a special interest in the same thing, amounting to a qualified ownership, such, for example, as a bailee lien.

One who has both the right of property and of possession.

GENERAL PARTNERSHIP. See PARTNERSHIP.

GENERAL PROPERTY. The right and property in a thing enjoyed by the general owner (*q. v.*).

GENERAL RELIEF. In a bill in equity, after praying such relief as is deemed proper, it is usual to add a prayer for general relief. The new supreme court equity rule 25 (33 Sup. Ct. xxv) does not require such prayer.

GENERAL RESTRAINT OF TRADE. A contract which forbids the party to it from engaging in a particular business without limitation either of time or locality. Such contracts are void. 2 Add. Cont., Abb. & Wood ed. 737.

One which forbids the person to employ his talents, industry, or capital in any undertaking within the limits of the state or country. Holbrook v. Waters, 9 How. Pr. (N. Y.) 337. See RESTRAINT OF TRADE; GOOD WILL.

GENERAL RETURN DAY. In any court the day for the return of all process, such as writs of summons, subpœna, etc., issued returnable to a particular term of the court. See RETURN OF WRITS.

GENERAL RULES. Standing orders of a court for the regulation of its practice. See GENERAL ORDERS.

GENERAL SESSIONS. See COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.

GENERAL SHIP. One which is employed by the charterer or owner on a particular voyage, and is hired by a number of persons, unconnected with each other, to convey their respective goods to the place of destination. A ship advertised for general receipt of goods to be carried on a particular voyage. The advertisement should state the name of the ship and master, the general character of the ship, the time of sailing, and the proposed voyages. See 1 Pars. Mar. Law 130; Abb. Shipp. 123.

The shippers in a general ship generally contract with the master; but in law the owners and the masters are separately bound to the performance of the contract, it being considered as made with the owners as well as with the master; Abb. Shipp. 319.

GENERAL SPECIAL IMPARLANCE. In Pleading. One in which the defendant reserves to himself "all advantages and exceptions whatsoever." 2 Chitty, Pl. 408. See IMPARLANCE.

GENERAL STATUTE. See GENERAL LAWS.

GENERAL TAIL. See FEE-TAIL.

GENERAL TENANCY. A tenancy which is not fixed and made certain, as to its duration, by agreement of the parties. Brown's Adm'rs v. Bragg, 22 Ind. 122.

GENERAL TERM. A phrase used in some jurisdictions to designate the regular

session of a court, for the trial and decision of causes, as distinguished from a special term, for the hearing of motions or arguments, or the despatch of routine or formal business, or the trial of a special list or class of causes or a particular case. It is also sometimes used to designate a sitting of the court in banc.

GENERAL TRAVERSE. See TRAVERSE.

GENERAL VERDICT. See VERDICT.

GENERAL WARRANT. A process which used to issue from the state secretary's office, to take up (without naming any person in particular) the author, printer, and publisher of such obscene and seditious libels as were particularly specified in it. The practice of issuing such warrants was common in early English history, but it received its death blow from Lord Camden, in the time of Wilkes. The latter was arrested and his private papers taken possession of under such a warrant, on a charge of seditious libel in publishing No. 45 of the North Briton. He recovered heavy damages against Lord Halifax who issued the warrant. Pratt, C. J., declared the practice to be "totally subversive of the liberty of the subject," and with the unanimous concurrence of the other judges condemned this dangerous and unconstitutional practice. See May, Const. Hist. of England; 5 Co. 91; 2 Wils. 151, 275; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; Sailly v. Smith, 11 Johns. (N. Y.) 500; Cooley, Const. Lim. 369. Such warrants were declared illegal and void for uncertainty by a vote of the house of commons. Com. Jour. 22, April, 1766; Whart. Law Dict.

A writ of assistance.

The issuing of these was one of the causes of the American Revolution. They were a species of general warrant, being directed to "all and singular justices, sheriffs, constables and all other officers and subjects," empowering them to enter and search any house for uncustomed goods, and to command all to assist them. These writs were perpetual, there being no return to them. They were not executed, owing to the eloquent argument of Otis before the supreme court of Massachusetts against their legality. See Tudor, Life of Otis 66; Story, Const. 1901.

GENERAL WARRANTY. See COVENANT OF WARRANTY; WARRANTY.

GENERAL WORDS. Such words of a descriptive character as are used in conveyances in order to convey, not only the specific property described, but also all kinds of easements, privileges, and appurtenances which may possibly belong to the property conveyed. Such words are in general unnecessary; but are properly used when there are any easements or privileges reputed to belong to the property not legally appurtenant to it.

Such words are rendered unnecessary by the English conveyancing act of 1881, under which they are presumed to be included.

See, as to the effect of such words in deeds, 4 M. & S. 423; in a will; 1 P. Wms. 302; in a lease; 2 Moo. 592; in a release; 3 Mod. 277; in a covenant; 3 Moo. 703; in a statute; 1 Bla. Com. 88; 2 Co. 46.

See INTERPRETATION.

GENERATION. A simple succession of living beings in natural descent; the age or period between one succession and another. It is not equivalent to degree. McMillan v. School Committee, 107 N. C. 609, 12 S. E. 330, 10 L. R. A. 823.

GENS (Lat.). **In Roman Law.** A union of families, who bore the same name, who were of an ingenuous (free) birth, *ingenui*, none of whose ancestors had been a slave, and who had suffered no *capitis diminutio* (reduction from a superior to an inferior condition), of which there were three degrees, *maxima*, *media*, *minima*. The first was the reduction of a free man to the condition of a slave, and was undergone by those who refused or neglected to be registered at the census, who had been condemned to ignominious punishments, who refused to perform military service, or who had been taken prisoners by the enemy, though those of the last class, on recovering their liberty, could be reinstated in their rights of citizenship. The second degree consisted in the reduction of a citizen to the condition of an alien (*Latinus* or *peregrinus*), and involved in the case of a *Latinus*, the loss of the right of legal marriage, but not of acquiring property, and in the case of the *peregrinus*, the loss of both. The third degree consisted in the change of condition of a *pater familias* into that of a *filius familias*, either by adoption or by legitimation.

Gentiles sunt, qui inter se eodem nomine sunt; qui ab ingenuis oriundi sunt; quorum majorum nemo servitutem servivit: qui capite non sunt deminuti. This definition is given by Cicero (Topic 6), after Scævola, the pontifex. But, notwithstanding this high authority, the question as to the organization of the *gens* is involved in great obscurity and doubt. The definition of Festus is still more vague and unsatisfactory. He says, "*Gentilis dicitur et ex eodem genere ortus, et is, qui simili nomine appellatur, ut ait Cincius: Gentiles mihi sunt, qui meo nomine appellantur.*" *Gens* and *genus* are convertible terms; and Cicero defines the latter word, "*Genus autem est quod sui similes communione quadam, species autem differentes, duas aut plures complectitur partes.*" *De Oratore*, 1, 42. The *genus* is that which comprehends two or more particulars, similar to one another by having something in common, but differing in species. From this it may fairly be concluded that the *gens* or race comprises several families, always of ingenuous birth, resembling each other by their origin, general name,—*nomen*,—and common sacrifices or sacred rites,—*sacra gentilitia* (*sui similes communione quadam*),—but differing from each other by a *particular* name,—*cognomen* and *agnatio* (*species autem differentes*). It would seem, however, from the litigation

between the Claudii and Marcellii in relation to the inheritance of the son of a freedman, reported by Cicero, that the deceased, whose succession was in controversy, belonging to the gens Claudia, for the foundation of their claim was the gentile rights,—*gente;* and the Marcellii (plebeians belonging to the same gens) supported their pretensions on the ground that he was the son of their freedman. This fact has been thought by some writers to contradict that part of the definition of Scævola and Cicero where they say, *quorum majorum nemo servitutem servivit.* And Niebuhr, in a note to his history, concludes that the definition is erroneous: he says, "The claim of the patrician Claudii is at variance with the definition in the Topics, which excludes the posterity of freedmen from the character of gentiles: probably the decision was against the Claudii, and this might be the ground on which Cicero denied the title of gentiles to the descendants of freedmen. I conceive in so doing he must have been mistaken. We know from Cicero himself (*de Leg.* 11, 22) that no bodies or ashes were allowed to be placed in the common sepulchre unless they belonged to such as shared in the *gens* and its sacred rites; and several freedmen have been admitted into the sepulchre of the Scipios." But in another place he says, "The division into houses was so essential to the patrician order that the appropriate ancient term to designate that order was a circumlocution,—the *patrician gentes;* but the instance just mentioned shows beyond the reach of a doubt that such a gens did not consist of patricians alone. The Claudian contained the Marcellii, who were plebeians, equal to the Appii in the splendor of the honors they attained to, and incomparably more useful to the commonwealth; such plebeian families must evidently have arisen from marriages of disparagement, contracted before there was any right of intermarriage between the orders. But the Claudian house had also a very large number of insignificant persons who bore its name,—such as the M. Claudius who disputed the freedom of Virginia; nay, according to an opinion of earlier times, as the very case in Cicero proves, it contained the freedmen and their descendants. Thus, among the Gaels, the clan of the Campbells was formed by the nobles and their vassals: if we apply the Roman phrase to them, the former *had* the clan, the latter only belonged to it." It is obvious that, if what is said in the concluding part of the passage last quoted be correct, the definition of Scævola and Cicero is perfectly consistent with the theory of Niebuhr himself; for the definition, of course, refers to the original stock of the gens, and not to such as might be attached to it or stand in a certain legal relation towards it. In Smith's Dictionary of Greek and Roman Antiquities, edited by that accomplished classical scholar, Professor Anthon, the same distinction is intimated, though not fully developed, as follows: "But it must be observed, though the descendants of freedmen might have no claim as gentiles, the members of the gens might, as such, have claims against them; and in this sense the descendants of freedmen might be gentiles." This article by George Long is much quoted and contains references to the principal German authorities, and it may be consulted with profit. Hugo, in his history of the Roman Law, vol. 1, p. 83, says, "Those who bore the same name belonged all to the same *gens:* they were gentiles with regard to each other. Consequently, as the freedmen took the name of their former master, they adhered to his *gens,* or, in other words, stood in the relation of *gentiles* to him and his male descendants. Livy refers in express terms to the *gens* of an enfranchised slave (b. 39, 19), *"Teceniæ Hispalæ . . . gentis enupsio;"* and the right of inheritance of the son of a freedman was conferred on the ground of civil relationship,—*gente.* But there must necessarily have been a great difference between those who were born in the *gens* and those who had only entered it by adoption, and their descendants; that is to say, between those who formed the original stock of the *gens,* who were all of patrician origin, and those who had entered the family by their own enfranchisement or that of their ancestors. The former alone were entitled to the rights of the *gentiles;* and perhaps the appellation itself was confined to them, while the latter were called *gentilitii,* to designate those against whom the *gentiles* had certain rights to exercise."

In a lecture of Niebuhr on the Roman Gentes, vol. 1, p. 70, he says, "Such an association, consisting of a number of families, from which a person may withdraw, but into which he cannot be admitted at all, or only by being adopted by the whole association, is a *gens.* It must not be confounded with the *family,* the members of which are descended from a common ancestor; for the patronymic names of the *gentes* are nothing but symbols, and are derived from heroes." Arnold gives the following exposition of the subject: "The people of Rome were divided into the three tribes of the Ramnenses, Titienses, and Luceres, and each of these tribes was divided into ten curiæ; it would be more correct to say that the union of ten curiæ formed the tribe. For the state grew out of the junction of certain original elements; and these were neither the tribes, nor even the curiæ, but the gentes or houses which made up the curiæ. The first element of the whole system was the *gens,* or house, a union of several families who were bound together by the joint performance of certain religious rites. Actually, where a system of houses has existed within historical memory, the several families who composed a house were not necessarily related to one another; they were not really cousins more or less distant, all descended from a common ancestor. But there is no reason to doubt that in the original idea of a house the bond of union between its several families was truly sameness of blood; such was likely to be the earliest acknowledged tie, although afterwards, as names are apt to outlive their meaning, an artificial bond may have succeeded to the natural one, and a house, instead of consisting of families of real relations, was made up sometimes of families of strangers, whom it was proposed to bind together by a fictitious tie, in the hope that law and custom and religion might together rival the force of nature." 1 Arnold, Hist. 31.

Maine, in his chapter on the origin of property, selects the village community of India as a type of "an organized patriarchal society and an assemblage of co-proprietors" which "ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the law of persons would lead us to entertain respecting the original condition of property;" Anc. L. 252. After describing it somewhat fully he says: The type with which it should be compared is evidently not the Roman family, but the Roman *gens* or house. The *gens* was also a group on the model of a family; it was the family extended by a variety of fictions of which the exact nature was lost in antiquity. In historical times, its leading characteristics were the very two which Elphinstone remarks in the village community. There was always the assumption of a common origin, an assumption sometimes notoriously at variance with fact; and, to repeat the historian's words, "if a family became extinct, its share returned to the common stock." In old Roman Law, unclaimed inheritances escheated to the gentiles. It is further suspected by all who have examined their history that the communities, like the gentes, have been very generally adulterated by the admission of strangers, but the exact mode of absorption cannot now be ascertained; *id.* 256. Another writer considers that the *gens* "was something very nearly identical with a Celtic clan, the identity or similarity of name being always supposed to have arisen from relationship, and not from similarity of occupation, as in the case of the Smiths, Taylors, Lorimers, etc., of modern Europe. There was this peculiarity, however, about the gens which did not belong to the clan—viz., that it was possible for an individual born in it to cease to belong to it by *capitis diminutio,* or by adoption (by a family not of the same *gens*), or adrogation as it was called when the person adopted was *sui juris.*" Int. Cyc.

A recognized authority on the civil law refers to the obscurity of this subject in treating of successions. Under the twelve tables there were recog-

nized only (1) *sui heredes;* (2) *agnati;* (3) *gentiles,* and in default of the latter the inheritance lapsed to the state. The prætors called the *cognati* for the first time to the succession, "probably because" says Sandars (Inst. 290), "at the time of the prætor's legislation there were few families that could boast a descent so pure and accurately known as to satisfy the requisite of *gentilitas.*" He also says in the same connection: "The subject of *gentilitas* is too obscure, and repays investigation too little, to permit us to enter into it here. Probably the original notion of *gentiles* was that of members of some pure uncorrupted patrician stock, though not necessarily of the same descent, but bearing the same name, and having the same *sacra.* Probably, also, freedmen and clients of *gentiles* were in some degree, considered as themselves *gentiles;* probably if their property was not claimed by their patron it went to the members of his *gens,* but they had not any claim on the property of any other *gentiles.* We know also that there were plebeian *gentes,* formed probably by the marriage of a patrician with a plebeian before the *plebs* received the *connubium.* Members of plebeian *gentes* would, we may suppose, have the rights of *gentilitas* towards other members of the same plebeian *gens,* and it would seem that they had them towards the members of the patrician *gens,* from which they were an offset; Cic. *de Orat.* 1. 39. Of the mode in which the *gentiles* took the inheritance, we know nothing of, nor at how late a period of history the *gentes* were still really in existence. Gaius (iii. 17), treats the subject as one of mere antiquarian interest." In his introduction to the Institutes, Sandars gives generally his understanding of the nature of the *gens.* The body of Roman citizens was composed of two distinct divisions, the *populus* and the *plebs.* The former consisted of three tribes, each of ten *curiæ,* and each *curiæ* was divided into ten *decuriæ.* For the latter another name was *gens,* "and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens,* and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A small body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies, presided over the whole body, and was charged with the functions of executive government."

The gentiles inherited from each other in the absence of agnates.

GENS DE JUSTICE. In French Law. Officers of a court.

GENTLEMAN. In English Law. A person of superior birth.

According to Coke, he is one who bears coat-armor, the grant of which adds gentility to a man's family. The eldest son had no exclusive claim to the degree; for, according to Littleton, "every son is as great a gentleman as the eldest." Co. 2d Inst. 667. Sir Thomas Smith, quoted by Blackstone, 1 Com. 406, says, "As for gentlemen, they are made good cheap in this kingdom; for whosoever studies the laws of the realm, who studies in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labor, and will bear the port, charge, and countenance of a gentleman, shall be called master, and be taken for a gentleman." In the United States, this word is unknown to the law. See Pothier, Proc. Crim. sec. 1, App. § 3; 1 C. P. D. 60; 1 Ch. Div. 577; 3 H. & N. 382.

GENTLEWOMAN. An addition formerly appropriate in England to the state or degree of a woman. Co. 2d Inst. 667.

GENTOO LAW. See HINDU LAW.

GENUINE. Not false, fictitious, simulated, spurious, counterfeit. Baldwin v. Van Deusen, 37 N. Y. 492.

GEORGIA. The name of one of the original thirteen states of the United States of America.

It was called after George II., king of Great Britain, under whose reign it was colonized.

George II. granted a charter, dated June 9, 1732, to a company consisting of General James Oglethorpe, Lord Percival, and nineteen others, who planted a colony, in 1733, on the bank of the Savannah river, a short distance from its mouth.

The corporation thus created was authorized, for twenty-one years, to erect courts of judicature for all civil and criminal causes, and to appoint a governor, judges, and other magistrates. The territory was to be held, as of the manor of Hampton Court in Middlesex, in free and common socage, and not *in capite.*

This charter was to expire by its own limitation in 1753; and under it the colony was governed by trustees, who, on December 19, 1751, in anticipation of the expiration of the charter, offered to surrender it up to the crown. The offer was accepted and on June 23, 1752, the trustees closed their accounts, made their last grant, and affixed the seal to the deed of surrender, and the colony became a royal province, of which the first governor was appointed August 6, and landed October 29, 1754; the colony having in the meantime been governed by the Board of Trade and Plantations.

A state constitution was adopted in 1777, another in 1789, and a third in 1798, which, with some amendments, remained in force until the civil war. The state seceded January 19, 1861, and was readmitted to the Union under act of congress approved July 15, 1870.

The present constitution, as revised, compiled, and amended, was adopted by a convention at Atlanta and ratified by a vote of the people on 5th December, 1877; amended, 1893.

Paragraph 1, sec. 1, article VII, amended so as to provide pensions for widows of ex-Confederate soldiers, who were married prior to 1870.

August 17, 1911, paragraph 1, sec. 1, article VII, amended so as to provide a uniform system of common schools.

GEREFA. Reeve, which see.

GERMAN. Whole or entire, as respects genealogy or descent: thus "brother-german" denotes one who is brother both by the father's and mother's side; "cousin-german," those in the first and nearest degree, *i. e.* children of brothers or sisters. Tech. Dict.; 4 M. & G. 56.

GERMANY. An Empire of Europe composed of twenty-six states. The constitution is dated April 16, 1871. It includes all the German states in "an eternal union," under the supervisory power of the King of Prussia as the Deutscher Kaiser (the German Emperor). The legislative power is vested in two bodies, the bundesrath, or federal council, and the reichstag. The members of the bundesrath are annually appointed by the several states. The members of the reichstag are elected by ballot by universal suffrage for a period of five years, and may be prorogued for a period not to exceed nine-

ty days, or it may be dissolved by the emperor. In case of dissolution new elections take place within sixty days and the new session must be opened within ninety days. All imperial laws must receive the votes of the majority of both bodies, and have the assent of the emperor. The bundesrath can declare war, make peace, enter into treaties with foreign nations and appoint and receive ambassadors, but if the territory of the empire is attacked, the emperor does not require the consent of the bundesrath to declare war, but can act independently. In connection with the chancellor the bundesrath also exercises some executive functions, through committees which are substantially boards of administration and consultation.

The Code Napoléon was until later years the common law in many parts of Germany, and the Prussian code of Frederick the Great in other parts. In 1850 a new penal code was promulgated; in 1862 a partial codification was effected; and in 1869 a code of commercial law was enacted which was valid for the North German Confederation. Since 1870 there has been a universal criminal code for the whole empire and a common judicature was established in 1879. For later codes, see CODE.

GERONTOCOMI. **In Civil Law.** Officers appointed to manage hospitals for poor old persons. Clef des Lois Rom. *Administrateurs.*

GERSUMA (Sax.). Expense; reward; compensation; wealth; especially, the consideration or fine of a contract: e. g. *et pro hac concessione dedit nobis prædictus Jordanus* 100 *sol. sterling de gersuma.* Old charter, cited Somner, Gavelkind, 177; Tabul. Reg. Ch. 377; 3 Mon. Ang. 720; 3 *id.* 126. It is also used for a fine or compensation for an offence. 2 Mon. Ang. 973.

GESTATION, UTERO-GESTATION. **In Medical Jurisprudence.** The time during which a female, who has conceived, carries the embryo or fœtus in her uterus.

This directly involves *the duration of pregnancy*, questions concerning which most frequently arise in cases of contested legitimacy. The descent of property and peerage may be made entirely dependent upon the settlement of this question, as to which see PREGNANCY.

There are some women to whom it is peculiar always to have the normal time of delivery anticipated by two or three weeks. Montgomery, Preg. 264. So, also, there are many cases establishing the fact that the usual period is sometimes exceeded by one, two, or more weeks, the limits of which it is difficult or impossible to determine. Coke seems inclined to adopt a peremptory rule that forty weeks is the longest time allowed by law for gestation. Co. Litt. 123 *b*. But although the law of some countries prescribes the time from conception within which the child must be born to be legitimate, that of England and America fixes no precise limit, but admits the possibility of the birth's occurring previous or subsequent to the usual time.

A conviction will not be disturbed because the child was born within a shorter time after the alleged intercourse than the ordinary period of gestation; Peterson v. People, 74 Ill. App. 178. It is proper to charge the jury that they must be satisfied that the defendant had sexual intercourse with the complainant within the period in which, in the ordinary course of nature, the child could be begotten; Sonnenberg v. State, 124 Wis. 124, 102 N. W. 233.

The following are cases in which this question will be found discussed: 3 Bro. C. C. 349; Gardner Peerage case, Le Marchant Report; Cro. Jac. 686; 7 Hazard, Reg. of Penn. 363; 2 Wh. & Stillé, Med. Jur. § 4; 2 Witth. & Beck. Med. Jur. 264. See PREGNANCY; FŒTUS; VIABILITY.

GESTIO (Lat.). **In Civil Law.** The doing or management of a thing. *Negotiorum gestio*, the doing voluntarily without authority business of another. L. 20, C. *de neg. gest.* *Gestio negotiorum*, one who so interferes with business of another without authority. *Gestio pro hærede*, behavior as heir; such conduct on the part of the heir as indicates acceptance of the inheritance and makes him liable for ancestor's debts universally: *e. g.* an entry upon, or assigning, or letting any of the heritable property, releasing any of the heritable property, releasing any of the debtors of the estate, or meddling with the title-deeds or heirship movables, etc. Erskine, Inst. 3. 8. 82 *et seq.*; Stair, Inst. 3. 6. 1.

GEWRITE. **In Saxon Law.** Deeds of charters; writings. 1 Reeve, Hist. Eng. Law, 10.

GIFT. A voluntary conveyance or transfer of property; that is, one not founded on the consideration of money or blood.

A voluntary, immediate and absolute transfer of property without consideration. Lewis' Estate, 139 Pa. 640, 22 Atl. 635.

As used by the old text writers, it signified a distinct species of deed, applicable to the creation of an estate tail; while a feoffment was strictly confined to the creation of a fee-simple estate. This use is almost obsolete; Wharton. It has been said that the word denotes rather the motive of the conveyance; so that a feoffment or grant may be called a gift when gratuitous. A gift is of the same nature as a settlement; neither denotes a form of assurance, but the nature of the transaction. Watk. Conv. 199. The operative words of this conveyance are *do*, or *dedi—I give*, or *I have given*. The maker of this instrument is called the donor, and he to whom it is made, the donee, and the entail is the gift or donation, the issue taking *per forman doni*. 2 Bla. Com. 316;

Littleton 59; Shepp. Touchst. c. 11; 2 Poll. & Maitl. 12, 81, 211.

Gifts inter vivos are gifts made from one or more persons, without any prospect of immediate death, to one or more others. *Gifts mortis causa* are gifts made in prospect of death.

Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect; 2 Kent 439; no further act of the parties is needed to give them effect; Robson v. Jones, 3 Del. Ch. 62. Delivery is essential. Without actual possession, the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. There may be repentance (the *locus pœnitentiæ*) as long as the gift is incomplete in the mode of making it; 1 Pars. Contr. 245; Pearson v. Pearson, 7 Johns. (N. Y.) 26; but see Poullain v. Poullain, 79 Ga. 11, 4 S. E. 81, where it was held that a *donatio inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery, and that it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattels has been changed.

Under a gift, a person "may take a benefit to accrue at a future day—it may be at the donor's death; but this can be only through the instrumentality of a trust created either in a third person or in the donor. The effect is to divest at once the former property of the donor in the thing given. Such a gift is no more immediate than in the ordinary case." Robson v. Jones, 3 Del. Ch. 62.

The subject of the gift must be certain; and there must be the mutual consent and concurrent will of both parties. There must be an intention on the part of the donor to make a gift; Thornt. Gifts & Adv. § 70, and expressions of it are admissible as part of the *res gestæ;* 1 Wils. Ch. 212; In re Ward, 2 Redf. (N. Y.) 251; Booth v. Cornell, 2 Redf. (N. Y.) 261; Stevens v. Stevens, 2 Redf. (N. Y.) 265; Williams v. Guile, 117 N. Y. 343, 22 N. E. 1071, 6 L. R. A. 366; and also declarations of the donor prior to the gift; Smith v. Maine, 25 Barb. (N. Y.) 33; if followed up by proof of delivery; Larimore v. Wells, 29 Ohio St. 13; and subsequent to the gift to support it; Blalock v. Miland, 87 Ga. 573, 13 S. E. 551; Scott v. Bank, 140 Mass. 157, 2 N. E. 925; but not to disapprove it; Baxter v. Knowles, 12 Allen (Mass.) 114. See Thornt. Gift § 222. Acceptance is also necessary; Peirce v. Burroughs, 58 N. H. 302; Nickerson v. Nickerson, 28 Md. 327; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; and this is true under both the common and civil law; De Levillain v. Evans, 39 Cal. 120. It must be in the lifetime of the donor; Eskridge v. Farrar, 34 La. Ann. 709; but it is presumed if the gift is of value; Thouvenin v. Rodrigues, 24 Tex. 468; Love v. Francis, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290. Delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it; something sufficient to work an immediate change in the dominion of the property; Gartside v. Pahlman, 45 Mo. App. 160. The donor must part not only with the possession, but with the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed; 1 Swanst. 436; Picot v. Sanderson, 12 N. C. 309. Delivery first and gift afterwards of a chattel capable of delivery, is as effectual as gift first and delivery afterwards; 64 Law T. 645. The presumption of a resulting trust in favor of the donor arises where a conveyance has been made, without consideration, to one of an estate or other property which has been purchased with the money of another; but this presumption is rebutted where the purchase may fairly be deemed to be made for another from motives of natural love and affection; Appeal of Roberts, 85 Pa. 84; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115. Knowledge by the donee that the gift has been made is not necessary; L. R. 2 Ch. Div. 104. The gift is complete when the legal title has actually vested in the donee; 108 E. C. L. R. 435; and in cases of gifts by husband to wife, or parent to child living at home, the necessity for an actual change of possession does not exist; Appeal of Crawford, 61 Pa. 52, 100 Am. Dec. 609.

A chose in action not negotiable and negotiable paper not endorsed may be the subject of a gift, and a delivery which vests in the donee the equitable title is sufficient without a complete transfer of the legal title; First Nat. Bank of Richmond v. Holland, 99 Va. 495, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500; Grover v. Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319. Where a father gives money deposited in bank to his infant son, the gift will not be defeated by the failure of the father to deliver to the son the pass book evidencing the gift, the father as natural guardian being the proper custodian of such book during the infancy of the son; Beaver v. Beaver, 62 Hun 194, 16 N. Y. Supp. 476, 746. The instances here given are merely illustrative of the cases on the subject of the necessity of delivery, the number of which is almost without limit.

The mere deposit by one in trust for another does not establish an irrevocable trust. It is a tentative trust, revocable at will, until the depositor dies or completes the gift during his lifetime; In re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900, reversing *id.*, 89 App. Div. 368, 85 N. Y. Supp. 928. It is a question of the depositor's intent; In re Barefield, 177 N. Y.

387, 69 N. E. 732, 101 Am. St. Rep. 814; Cleveland v. Bank, 182 Mass. 110, 65 N. E. 27; Estate of Smith, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; Rombo v. Pile, 220 Pa. 235, 69 Atl. 807. See 14 Yale L. J. 315; Brady, Bank Deposits.

The declaration of the depositor may make the trust valid; Merigan v. McGonigle, 205 Pa. 321, 54 Atl. 994. The retention of the pass book by the depositor does not rebut the idea of a trust; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Estate of Gaffney, 146 Pa. 49, 23 Atl. 163; Robertson v. McCarty, 54 App. Div. 103, 66 N. Y. Supp. 327. But the delivery of the pass book will render the trust irrevocable; In re Totten, 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900. Notice to the beneficiary may create a trust; but absence of notice does not establish conclusively that there was no trust; Bath Sav. Inst. v. Hathorn, 88 Me. 122, 33 Atl. 836, 32 L. R. A. 377, 51 Am. St. Rep. 382; Gerrish v. Sav. Inst., 128 Mass. 159, 35 Am. Rep. 365.

It is held that where the intent was that the beneficiary should take only at the death of the depositor, the fund passed at his death to the depositor's estate; Coolidge v. Knight, 194 Mass. 546, 80 N. E. 620, 120 Am. St. Rep. 573. A deposit cannot be made which will be revocable, but will take effect as a trust after death; Appeal of Main, 73 Conn. 638, 48 Atl. 965; Whalen v. Milholland, 89 Md. 199, 43 Atl. 45, 44 L. R. A. 208, as a testamentary act can be done only under the statute of wills. But see 179 N. Y. 112, 71 N. E. 748, 70 L. R. A. 711, 1 Ann. Cas. 900, *supra*. One who makes a deposit in trust for a fictitious person does not lose control of his money; Garvey v. Clifford, 114 App. Div. 193, 99 N. Y. Supp. 555; Nicklas v. Parker, 69 N. J. Eq. 743, 61 Atl. 267.

During the lifetime of the depositor, the bank may allow him to draw out the fund; Pennsylvania Title & Trust Co. v. Meyer, 201 Pa. 299, 50 Atl. 998; Sayre v. Weil, 94 Ala. 466, 10 South. 421; the beneficiary cannot compel the bank to pay him during the depositor's lifetime; Hemmerich v. Union Inst., 144 App. Div. 413, 129 N. Y. Supp. 267.

A gift is effectual only after the intention to make it has been accompanied by delivery of possession or some equivalent act; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.

Where one made large deposits in a bank as nominally trustee for another, but only for his own convenience and intending to retain his ownership, no title passed to the cestui que trust; it is a question of intention; Rambo v. Pile, 220 Pa. 235, 69 Atl. 807. What was intended as a gift, but is imperfect, cannot be made effectual by construing it as a declaration of trust; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641, following L. R. 18 Eq. 11. If a trust is intended, it will be equally effectual whether the donor transfers the title to a trustee, or declare himself such; Smith's Estate, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.

Where a savings bank depositor has lost his book, gives an order upon the bank and delivers it to the donee with words indicating a gift, this is a valid gift, at least if the order has been accepted by the bank; Candee v. Savings Bank, 81 Conn. 372, 71 Atl. 551, 22 L. R. A. (N. S.) 568. Where the deposit was in the donee's name, but subject to donor's order, and the donor told the donee he meant to give him the money: the pass book was given to the donee, but taken back by the donor for safe keeping, and the donor gave the donee a writing certifying that the money was for him, and the donor never exercised ownership over the fund, it was held a valid gift; Eastman v. Savings Bank, 136 Mass. 208.

A written assignment of certificates of shares of stock without delivery is not sufficient to constitute a valid gift, especially where the donor retained control of the shares and collected dividends thereon for four years; Allen-West Commission Co. v. Grumbles, 129 Fed. 287, 63 C. C. A. 401.

For a full discussion of the subject, see Thornt. Gifts & Adv. ch. ix., where the cases are collected; 15 Am. L. Reg. N. S. 701, n.; 15 Va. L. J. 737; 32 Cent. L. J. 11. As to what circumstances will dispense with actual physical delivery, see 9 *id.* 639; 26 Am. L. Reg. 587; Law Q. Rev. 446; see also DONATIO MORTIS CAUSA, with respect to delivery, the requisites of which in the two classes of gifts are the same; Thornt. Gifts § 130; Murdock v. McDowell, 1 Nott & McC. (S. C.) 237, 9 Am. Dec. 684; Brinckerhoff v. Lawrence, 2 Sandf. Ch. (N. Y.) 400. "*Gifts inter vivos* and gifts *causa mortis* differ in nothing, except that the latter are made in expectation of death, become effectual only upon the death of the donor, and may be revoked. Otherwise, the same principles apply to each." Dresser v. Dresser, 46 Me. 48; Robson v. Jones, 3 Del. Ch. 51; Shackleford v. Brown, 89 Mo. 546, 1 S. W. 390; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Meriwether v. Morrison, 78 Ky. 572; Conser v. Snowden, 54 Md. 175, 39 Am. Rep. 368. A parol gift of land is valid when possession is taken and valuable improvements are made thereunder; Wootters v. Hale, 83 Tex. 563, 19 S. W. 134.

The presumption is that a gift by a child to its parents is valid, and to set it aside the court must be satisfied that it was not a voluntary act of the child; Towson v. Moore, 173 U. S. 17, 19 Sup. Ct. 332, 43 L. Ed. 597.

When the gift is perfect it is then irrevocable, unless it is prejudicial to creditors or the donor was under a legal incapacity or was circumvented by fraud; except in case of *donatio mortis causa (q. v.)*, as to which one of the distinguishing characteristics is that it is revocable during the donor's life.

If a man, intending to give a jewel to an-

other, say to him, *Here I give you my ring with the ruby in it*, etc., and with his own hand delivers it to the party, this will be a good gift notwithstanding the ring bear any other jewel, being delivered by the party himself to the person to whom given; Bacon, Max. 87. See Van Slooten v. Wheeler, 66 Hun 632, 21 N. Y. Supp. 336.

Where a father bought a ticket in a lottery, which he declared he gave to his infant daughter E., and wrote her name upon it, and after the ticket had drawn a prize he declared that he had given the ticket to his child E, and that the prize money was hers, this was held sufficient for a jury to infer all the formality requisite to a valid gift, and that the title in the money was complete and vested in E. See Grangiac v. Arden, 10 Johns. (N. Y.) 293. Where notes are endorsed by the owner, placed in a pocketbook, and the packet marked with the name of the donees, a delivery to one of the donees is sufficient, though he at once returns the packet to the donor to keep for the present; Brandon v. Dawson, 51 Mo. App. 237.

A certificate of deposit may be the subject of gift, and, when endorsed and delivered for such purpose, the gift is perfect and cannot be revoked by the donor before the money is collected; Wheeler v. Glasgow, 97 Ala. 700, 11 South. 758. A written assignment, under seal, of money in the hands of a third person, delivered to the assignee, constitutes a valid gift and acceptance of the money; Matson v. Abbey, 141 N. Y. 179, 36 N. E. 11.

See, generally, Thornton, Gifts; DONATIO INTER VIVOS; DONATIO MORTIS CAUSA; DONATIO.

GIFT ENTERPRISE. A scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme; the phrase has attained such a notoriety as to justify courts in taking judicial notice of what is meant and understood; Lohman v. State, 81 Ind. 17; Meserve v. Andrews, 106 Mass. 422. See LOTTERY.

GILD. See GUILD.

GILDA MERCATORIA (L. Lat.). A mercantile meeting.

If the king once grants to a set of men to have *gilda mercatoria*, mercantile meeting assembly, this is alone sufficient to incorporate and establish them forever. 1 Bla. Com. 473. A company of merchants incorporated. Stat. Will. Reg. Scot. c. 35; Leg. Burgorum Scot. c. 99; Spelman, Gloss.; 8 Co. 125 *a*; 2 Ld. Raym. 1134.

They were widely spread trade organizations which appeared in England soon after the Conquest. They supervised trade and labor, prices, hours of labor, etc., and punished dishonest workmanship and short weights and measures. They were closely identified with the town and its government, but it is not probable (though maintained by certain writers) that the grant of *gilda mercatoria* to a borough was a grant of corporateness. See Carr, 3 Sel. Essays, Anglo-Amer. Leg. Hist. 177.

See GUILD.

GILDO. **In Saxon Law.** Members of a *gild* or decennary. Oftener spelled *congildo*. Du Cange; Spelman, Gloss. *Geldum*.

GILL. A measure of capacity, equal to one-fourth of a pint. See MEASURE.

GIRANTEM. An Italian word which signifies the drawer. It is derived from *girare*, to draw, in the same manner as the English verb to murder is transformed into *murdrare* in our old indictments. Hall, Mar. Loans 183, n.

GIRTH. A girth, or yard, is a measure of length. The word is of Saxon origin, taken from the circumference of the human body. Girth is contracted from *girdeth*, and signifies as much as girdle. See ELL.

GIRTH AND SANCTUARY. **In Scotch Law.** A refuge or place of safety given to those who had slain a man in heat of passion *(chaude medley)* and unpremeditatedly. Abolished at the Reformation. 1 Hume 235; 1 Ross, Lect. 331.

GIST (sometimes, also, spelled *git*).

In Pleading. The essential ground or object of the action in point of law, without which there would be no cause of action. Gould, Pl. c. 4, § 12; 19 Vt. 102. The cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, without which there is not a cause of action. First Nat. Bank of Flora v. Burkett, 101 Ill. 394, 40 Am. Rep. 209. In stating the gist of the action, everything must be averred which is necessary to be proved at the trial. The moving cause of the plaintiff's bringing the action, and the matter for which he recovers the principal satisfaction, is frequently entirely collateral to the gist of the action. Thus, where a father sues the defendant for a trespass for the seduction of his daughter, the gist of the action is the trespass and the loss of his daughter's services; but the collateral cause is the injury done to his feelings, for which the principal damages are given. See 1 Viner, Abr. 598; Tayl. Ev. 334; Bac., Abr. *Pleas*, B.; Doctr. Plac. 85; DAMAGES.

GIVE. A term used in deeds of conveyance. At common law, it implied a covenant for quiet enjoyment; 2 Hill. R. P. 366. So in Kentucky; 1 Pirtle, Dig. 211. In Maryland it is doubtful; Deakins v. Hollis, 7 G. & J. 311. In Ohio, in conveyance of freehold, it implies warranty for the grantor's life; 2 Hill. R. P. 366. In Maine it implies a covenant; Webber v. Webber, 6 Greenl. (Me.) 127. In New York it does not, by statute. See Kinney v. Watts, 14 Wend. (N. Y.) 38. It

does not imply a covenant in North Carolina; Rickets v. Dickens, 5 N. C. 343, 4 Am. Dec. 555; nor in England, by statute 8 & 9 Vict. c. 106, § 4. See COVENANT; GIFT.

The word give, in a statute providing that no person shall give away any intoxicating liquors, etc., does not apply to giving such liquor at private dwellings, etc., unless given to a habitual drunkard, or unless such dwelling, etc., becomes a place of public resort. O'Neil v. Vermont, 144 U. S. 323, 12 Sup. Ct. 693, 36 L. Ed. 450. See LIQUOR LAWS.

GIVER. He who makes a gift. By his gift, the giver always impliedly agrees with the donee that he will not revoke the gift.

GIVING IN PAYMENT. In Louisiana. A term which signifies that a debtor, instead of paying a debt he owes in money, satisfies his creditor by giving in payment a movable or immovable. See DATION EN PAIEMENT.

GIVING TIME. An agreement by which a creditor gives his debtor a delay or time in paying his debt beyond that contained in the original agreement. When other persons are responsible to him, either as drawer, indorser, or surety, if such time be given without the consent of the latter, it discharges them from responsibility to him; and the same effect follows if time is given to one of the joint makers of a note; 2 Dan. Neg. Inst. 299. See SURETYSHIP; GUARANTY.

GLADIUS (Lat. a sword). In old Latin authors, and in the Norman laws, this word was used to signify supreme jurisdiction: *jus gladii.*

GLEANING. The act of gathering such grain in a field where it grew, as may have been left by the reapers after the sheaves were gathered.

There is a custom in England, it is said, by which the poor are allowed to enter and glean upon another's land after harvest, without being guilty of a trespass; 3 Bla. Com. 212. But it has been decided that the community are not entitled to claim this privilege as a right; 1 H. Bla. 51. In the United States, it is believed, no such right exists. It seems to have existed in some parts of France. Merlin, *Rép. Glanage.* As to whether gleaning would or would not amount to larceny, see Wood. Landl. & T. 242; 2 Russ. Cr. 99. The Jewish law may be found in Leviticus xix, 9, 10. See Ruth ii, 2, 3; Isaiah xxii, 6.

GLEBE. The land which belongs to a church. The dowry of the church. *Gleba est terra qua consistit dos ecclesiæ.* Town of Pawlet v. Clark, 9 Cra. (U. S.) 329, 3 L. Ed. 735.

In Civil Law. The soil of an inheritance. There were serfs of the glebe, called *glebæ addicti.* Code 11. 47. 7, 21; Nov. 54, c. 1.

GLOSS (Lat. *glossa*). Interpretation; comment; explanation; remark intended to illustrate a subject,—especially the text of an author. See Webster, Dict.

In Civil Law. *Glossæ*, or *glossemata*, were words which needed explanation. Calvinus, Lex. The explanations of such words. Calvinus, Lex. Especially used of the short comments or explanations of the text of the Roman Law, made during the twelfth century by the teachers at the schools of Bologna, etc., who were hence called *glossators*, of which glosses Accursius made a compilation which possesses great authority, called *glossa ordinaria.* These glosses were at first written between the lines of the text *(glossæ interlineares)*, afterwards, on the margin, close by and partly under the text *(glossæ marginales).* Cush. Intr. to Rom. Law 130.

GLOSSATOR. A commentator or annotator of the Roman law. One of the authors of the Gloss.

GLOUCESTER, STATUTE OF. An English statute, 6 Edw. I., c. 1, A. D. 1278; so called because it was passed at Gloucester. It was the first statute giving to a successful plaintiff "the costs of his writ purchased." There were other statutes made at Gloucester which do not bear this name. See stat. 2 Rich. II.; COSTS.

GO. To issue, as applied to the process of a court. 1 W. Bla. 50; 5 Mod. 421; 18 C. B. 35. Not frequent in modern use.

To be discharged from attendance at court. See GO WITHOUT DAY.

In a statute of descents, *to go to* is to vest in.

GO BAIL. To become surety in a bail bond.

GO TO PROTEST. Of negotiable paper, to be protested for non-payment or non-acceptance.

GO WITHOUT DAY. Words used to denote that a party is dismissed the court. He is said to go without day, because there is no day appointed for him to appear again, or because the suit is discontinued.

GOAT, GOTE (Law Lat. *gota;* Germ. *gote*). A canal or sluice for the passage of water. Charter of Roger, Duke de Basingham, *anno* 1220, *in Tabularis S. Bertini;* Du Cange.

A ditch, sluice, or gutter. Cowell, *Gote;* stat. 23 Hen. VIII. c. 5. An engine for draining waters out of the land into the sea, erected and built with doors and perculesses of timber, stone, or brick,—invented first in Lower Germany. Callis, Sewers 66.

GOD AND MY COUNTRY. When a prisoner is arraigned, he is asked, How will you be tried? he answers, *By God and my country.* This practice arose when the prisoner had the right to choose the mode of trial, namely, by ordeal or by jury, and then he elected by *God* or by *his country*, that is, by ordeal or by jury. It is probable that originally it was *By God* or *my country;* for the

question asked supposes an option in the prisoner, and the answer is meant to assert his innocence by declining neither sort of trial. 1 Chitty, Cr. Law 416; Barring. Stat. 73, note. See ORDEAL; WAGER OF BATTLE.

GOD BOTE. An ecclesiastical or church fine imposed upon an offender for crimes and offences committed against God.

GOD'S PENNY. In Old English Law. Money given to bind a bargain; earnest money. So called because such money was anciently given to God,—that is, to the church and the poor.

"All over western Europe the earnest becomes known as the God's penny or Holy Ghost's penny (*denarius Dei*). Sometimes we find that it is to be expended in the purchase of tapers for the patron saint of the town, or in works of mercy. Thus the contract is put under divine protection. In the law merchant as stated by Fleta we seem to see God's penny yet afraid, if we may so speak, to proclaim itself as what it really is, namely, a sufficient vestment for a contract of sale. A few years later Edward I. took the step that remained to be taken, and by his *Carta Mercatoria*, in words which seem to have come from the south of Europe, proclaimed that among merchants the God's penny binds the contract of sale so that neither party may resile from it. At a later day this new rule passed from the law merchant into the common law." 2 Poll. & Maitl. 207. See DENARIUS DEI; EARNEST; 2 Holdsw. Hist. E. L. 492.

GOING. A term applied to sheep. The "going" of 105 sheep with his master's flock in a contract with a shepherd meant that the sheep should be pasture fed; Rex v. Inhabitants of Macton, 3 B. & Ad. 543.

GOING CONCERN. Some enterprise which is being carried on as a whole, and with some particular object in view. Oliver v. Lansing, 59 Neb. 219, 80 N. W. 829.

The term, when applied to a corporation, means that it continues to transact its ordinary business. The mere fact that a corporation is insolvent does not dissolve it and make the directors mere trustees of its assets, if it is still a going concern; White, Potter & Paige Mfg. Co. v. Importing Co., 30 Fed. 864. It means, as applied to a corporation, one which "is still prosecuting its business with the prospect and expectation of continuing to do so, even though its assets are insufficient to pay its debts;" Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

The "going value" is that which results from having an established business as a going concern; Cedar Rapids Water Co. v. City of Cedar Rapids, 118 Ia. 234, 91 N. W. 1081, where, in deciding whether water rates fixed by ordinance were confiscatory, the *going value* was not to be considered as a distinct element of the value of the plant.

GOING FREE. Used of a vessel when she has a fair wind and her yards braced in; The Queen Elizabeth, 100 Fed. 874.

GOING OFF LARGE. Having the wind free on either tack and properly termed a "vessel off large"; that is free to take a course to either side, proceed straight forward or return to the point from which she started; Ward v. The Fashion, Fed. Cas. No. 17,155. It differs technically from "going before the wind" which means that the wind is free, comes from the stern and the yards are braced square across, whereas going off large is when the wind blows from a point abaft the beam or from the quarter; Hall v. The Buffalo, Fed. Cas. No. 5,927.

GOING WITNESS. One who is going out of the jurisdiction of the court, although only into a state or country under the same general sovereignty: as, for example, if he is going from one to another of the United States, or, in Great Britain, from England to Scotland. 2 Dick. Ch. 454. See DEPOSITION; WITNESS.

GOLD. Contracts expressly stipulating for payment in gold and silver dollars can only be satisfied by the payment of coined dollars; Bronson v. Rodes, 7 Wall. (U. S.) 229, 19 L. Ed. 141; where it was said: "A contract to pay a certain number of dollars in gold or silver coins is nothing else than an agreement to deliver a certain weight of standard gold to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight." This case was followed in Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740; Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973. In the last case it was said: "This court has held that parties may contract for the payment of an obligation in gold, or any other money or commodity, and it must then be paid in the medium contracted for." It has been pointed out in Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593, note, that the rule in Bronson v. Rodes has not been affected in any way by the Legal Tender Cases in 12 Wall. (U. S.) 457, 20 L. Ed. 287. In Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. Ed. 460, where a note in dollars was made payable *in specie*, it was held that the designated number of dollars must be paid in so many gold or silver dollars of the coinage of the United States, reversing the supreme court of Iowa, which had held that a tender of greenbacks or United States legal tender notes was sufficient.

In Gregory v. Morris, 96 U. S. 619, 24 L. Ed. 740, the party was entitled to recover a certain amount in gold coin; it was held that where the party, with the approbation of the court, takes judgment which might be discharged in currency, it should be entered for a sum in currency equivalent to the specified amount of that coin as bullion. A decision of a state court, which holds a tender of legal tender notes as valid in the payment of a contract payable only in specie, will be reviewed by the supreme court of the United States; Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. Ed. 460. The doctrine of the latter court is therefore binding upon all the state courts.

A contract to pay a certain number of dollars in gold; Hittson v. Davenport, 4 Colo. 169; a draft for a certain number of gold dollars; Chrysler v. Renois, 43 N. Y. 209; a note payable "in gold or silver;" Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 66; a ground rent payable in "gold or silver lawful money of the United States;" Rankin v. Demott, 61 Pa. 263; are all enforceable according to their terms. A ground rent payable in "gold or silver money of the United States" must be paid in coin or its equivalent; Rankin v. Demott, 61 Pa. 263. In this case Agnew, J., said that the distinction taken in the earlier Pennsylvania cases between contracts for a specific article and contracts for lawful money (coin or currency) had become unimportant since the decision in Bronson v. Rodes. In such cases it is held that payment in currency is to be computed upon the value of gold at the time of payment; Hittson v. Davenport, 4 Colo. 169. Where rent was payable "in current money of the State of New York equal in value to money of Great Britain," it was held that if payment was made in legal tender notes, the amount paid must equal the value of the stipulated amount of coin; Stranaghan v. Youmans, 65 Barb. (N. Y.) 392.

Where an act authorized a city to issue negotiable bonds, it was held to authorize the issue of bonds payable in gold coin; Judson v. City of Bessemer, 87 Ala. 240, 6 South. 267, 4 L. R. A. 742; so of bonds "payable in gold coin of the present standard weight and fineness;" Moore v. Walla Walla, 60 Fed. 961. To the same effect, Pollard v. City of Pleasant Hill, 3 Dill. 195, Fed. Cas. No. 11,253; but, *contra*, of levee bonds which were issued payable "in gold coin," under an act which authorized the levee board to borrow money and issue its bonds therefor; Woodruff v. State, 66 Miss. 298, 6 South. 235. But this judgment was reversed by the supreme court of the United States (Woodruff v. Mississippi, 162 U. S. 291, 16 Sup. Ct. 820, 40 L. Ed. 973), which held: That the inquiry as to the medium in which the bonds were payable raised a federal question and that the bonds were legally solvable in the money of the United States, whatever its description, and not in any particular kind of money, and that they were not void because of a want of power to issue them. Field, J., concurring, said that no transaction of commerce or business, etc., that is not immoral in its character, and which is not in its manifest purpose detrimental to society, can be declared invalid because made payable in gold coin or currency when that is established or recognized by the government.

An injunction will not lie to restrain the issue of municipal bonds payable "in gold or lawful money of the United States, at the option of the holder;" Heilbron v. City of Cuthbert, 96 Ga. 312, 23 S. E. 206. But where a statute authorized the issue of bonds payable "in gold coin or lawful money of the United States," an issue of bonds payable in gold coin of the United States of the present standard of weight and fineness was held invalid; Skinner v. Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512.

In the absence of stipulation in the contract, a right to demand payment in coin will not be implied, although it appear that payment in coin was the only method of payment recognized by law when the contract was entered into and that the parties no doubt expected that payment would be made in coin; Maryland v. R. Co., 22 Wall. (U. S.) 105, 22 L. Ed. 713. So when the consideration in a note was a loan of gold and silver and there was no stipulation to pay in such money; Curiac v. Abadie, 25 Cal. 502.

An insurance company in an action against an agent who had collected premiums in gold; Independent Ins. Co. v. Thomas, 104 Mass. 192; and a hotel guest in an action against an innkeeper to recover for gold coin left at the inn for safe keeping; Kellogg v. Sweeney, 46 N. Y. 291, 7 Am. Rep. 333; are entitled to judgment in gold coin. In an action against an express company for failure to deliver gold coin which it received for transportation, judgment was entered in currency notes for the amount of the gold coin with the premium on gold added with interest from the date of demand; Cushing v. Wells, Fargo & Co., 98 Mass. 550. Where a person deposited both coin and treasury notes in a bank in 1861, it was held that the bank need not pay him in coin unless there was an express agreement to that effect; Thompson v. Riggs, 5 Wall. (U. S.) 663, 18 L. Ed. 704.

See LEGAL TENDER; MONEY.

GOLD CERTIFICATES. Issued by the secretary of the treasury, in denominations of not less than $10, against deposits of gold coin in sums of not less than $20. They are receivable for all public dues, may be reissued and when held by a national bank may be taken as part of its reserve. Act of March 2, 1911.

GOLDSMITH'S NOTES. In English Law. Banker's notes: so called because the trades of banker and goldsmith were originally joined. Chitty, Bills 423.

GOOD AND LAWFUL MEN. Those qualified to serve on juries; that is, those of full age, citizens, not infamous or *non compos mentis;* and they must be resident in the county where the venue is laid. Bacon, Abr. *Juries* (A); Cro. Eliz. 654; Co. 3d Inst. 30; 2 Rolle 82; Cam. & N. 38.

GOOD AND VALID. Legally firm: *e. g.* a good title. Adequate; responsible; *e. g.* his security is good for the amount of the debt. Webst. A note satisfies a warranty of it as a "good" note if the makers are able to pay it, and liable to do so on proper legal diligence being used against them; Hammond v. Chamberlin, 26 Vt. 406.

GOOD BEHAVIOR. Conduct authorized by law. Surety of good behavior may be demanded from any person who is justly suspected, upon sufficient grounds, of intending to commit a crime or misdemeanor. Surety for good behavior is somewhat similar to surety of the peace, but the recognizance is more easily forfeited, and it ought to be demanded with greater caution; Com. v. Davies, 1 Binn. (Pa.) 98; 14 Viner, Abr. 21; Dane, Abr. As to what is a breach of good behavior, see State v. Bell, 2 Mart. N. S. (La.) 683; Hawk. Pl. Cr. b. 1, c. 61, s. 6; 1 Chitty, Pr. 676.

See SURETY OF THE PEACE.

A judge holding office for life also holds it during good behavior, *dum se bene gesserit.*

GOOD CONSIDERATION. See CONSIDERATION.

GOOD FAITH. An honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. Wood v. Conrad, 2 S. D. 334, 50 N. W. 95. See Winters v. Haines, 84 Ill. 588; Rawson v. Fox, 65 Ill. 200; Thornton v. Bledsoe, 46 Ala. 73; Bronner v. Loomis, 17 Hun (N. Y.) 442.

That honesty of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser, holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. Canal Bank v. Hudson, 111 U. S. 80, 4 Sup. Ct. 303, 28 L. Ed. 354.

Good faith, in a statute regulating chattel mortgages, and declaring unrecorded mortgages to be invalid as against purchasers and mortgagees in good faith, means such as parted with something of value, or otherwise altered their position irretrievably, on the strength of the apparent ownership, and without notice. Good faith in this connection means actual reliance upon the ownership of the vendor or mortgagor, because without notice of the incumbrance; National Bank of the Metropolis v. Sprague, 21 N. J. Eq. 536.

Good faith is presumed in favor of the holder of negotiable paper; Dresser v. Construction Co., 93 U. S. 94, 23 L. Ed. 815; Collins v. Gilbert, 94 U. S. 754, 24 L. Ed. 170; Marfield v. Douglass, 3 N. Y. Super. Ct. 360; it is a presumption of law; Jones v. Simpson, 116 U. S. 609, 6 Sup. Ct. 538, 29 L. Ed. 742; and outweighs a presumption of payment; Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; and such holder takes the paper free from any infirmity in its origin except such as make it void for illegality of consideration or want of capacity in the maker; Bowditch v. Ins. Co., 141 Mass. 296, 4 N. E. 798, 55 Am. Rep. 474; Cromwell v. County of Sac, 96 U. S. 51, 24 L. Ed. 681. While the presumption of law is sufficient in the absence of evidence, if the good faith of a party is put in issue by his adversary, he has a right to give affirmative evidence of it; Macon County v. Shores, 97 U. S. 272, 24 L. Ed. 889; as, where his ownership of negotiable paper is put in issue, he may prove he became the owner in good faith; Ralls County v. Douglass, 105 U. S. 728, 26 L. Ed. 957. A person to whom the want of good faith is imputed in a statement shown to have been made by him may be asked if he believed this statement to be correct; Rawls v. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280. After proof of circumstances relied on as showing want of good faith by putting a person on inquiry, he may explain them by showing the reasons why he did not pursue the inquiry; Seybel v. Bank, 54 N. Y. 288, 13 Am. Rep. 583; and after stating the explanation received upon inquiry he may testify that he was satisfied with it; Jennings v. Conboy, 73 N. Y. 236. Where the knowledge of the third person is in issue proof of general reputation is sometimes competent as tending to show reasonable ground of belief or suspicion; Barrett v. Western, 66 Barb. (N. Y.) 205. Good faith is not disproved by a forgotten conversation; Kenyon v. See, 29 Hun (N. Y.) 214.

One who has purchased for value and without notice, or his transferee, is termed a holder in good faith; McClure v. Oxford Tp., 94 U. S. 432, 24 L. Ed. 129.

A holder of a negotiable instrument in due course must have taken it in good faith. Neg. Instr. Act, § 52.

GOOD MORAL CHARACTER. The naturalization laws require that in order to be admitted to citizenship the applicant must, during his residence in the United States since his declaration of intention, have "behaved as a man of good moral character"; U. S. R. S. § 2165. What is a good moral character may vary in some respects in different times and places, but "it would seem that whatever is forbidden by the law of the land ought to be considered for the time being immoral within the purview of this statute;" In re Spenser, 5 Sawy. 195, Fed. Cas. No. 13,234. Accordingly, a person who commits perjury is not a man of good moral character, and is therefore not entitled to naturalization; *id.* But a distinction is drawn between acts which are *mala in se* and those which are *mala prohibita;* and it is said that a single act of the former grade is sufficient to establish immoral character, but only habitual acts of the latter character; *id.* It has been held that an alien who lives in a state of polygamy or believes that it may be rightfully practised in defiance of the laws to the contrary, is not a person of good moral character entitled to naturalization; Ex parte Douglass, cited in 2 Bright. Fed. Dig. 25, from 5 West. Jur. 171.

Under the English excise laws it was held that the mere fact that a man lived in a state of concubinage was not such an absence of good character as would justify his conviction under the excise law for making and using a certificate of good character knowing it to be false; 16 C. B. N. S. 584. "Good or bad character does not depend on what a man knows of himself; it means his general reputation in the estimation of his neighbors; . . . the fact of a man's living with a woman without marrying her may possibly admit of some palliating circumstances;" *id.*

As to what is good moral character under the Pennsylvania license law, it was held by Sulzberger, J., that the act "is not to be understood as setting up the highest ethical character. It means good moral character as it is used among men in the ordinary business of life, not that high type which ought to form the ideal of every virtuous person." Donoghue's License, 5 Pa. Super. Ct. 1 (on appeal).

GOOD ORDER AND CONDITION. "The general statement in a bill of lading that goods have been shipped in 'good order and condition' amounts to an admission by the shipowner that, so far as he and his agents had the opportunity of judging, the goods were so shipped"; Carver, Carr. by Sea, sec. 73.

GOOD REPUTE. An expression synonymous with and meaning only "of good reputation." State v. Wheeler, 108 Mo. 658, 665, 18 S. W. 924.

GOOD TITLE. Such a title as a court of chancery would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an action of ejectment by any claimant. 6 Exch. 873. See Gillespie v. Broas, 23 Barb. (N. Y.) 370. One that would be accepted by a reasonably prudent man; Justice v. Button, 89 Neb. 367, 131 N. W. 736, 38 L. R. A. (N. S.) 1; a marketable title; Fagan v. Hook, 134 Ia. 381, 105 N. W. 155, 111 N. W. 981; Moore v. Williams, 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844.

GOOD WILL. The benefit which arises from the establishment of a particular trade or occupation. The advantage or benefit which is acquired by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities, or prejudices. Story, Partn. § 99. See 16 Am. Jur. 87; 22 Beav. 84; Elliot's Appeal, 60 Pa. 161; 5 Russ. 29; Vonderbank v. Schmidt, 44 La. Ann. 264, 10 South. 616, 15 L. R. A. 462, 32 Am. St. Rep. 336.

The advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and repute of his predecessor. Knoedler v. Boussod, 47 Fed. 465.

"The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a marketable value, whether the business is that of a professional man or of any other person. But it is plain that good will has no meaning except in connection with a continuing business; it may have no value except in connection with a particular house, and it may be so inseparably connected with it as to pass with it, under a will, or deed, without being specially mentioned." Lindl. Partn., Wentworth's ed. 440.

"The good will . . . is nothing more than the probability that the old customers will resort to the old place." Per Eldon, C., in 17 Ves. 335; but this is said to be too narrow a definition by Wood, V. C., who said that the term meant every advantage . . . that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the late business. Johns. (Eng. Ch.) 174; and similar views were expressed in 2 Madd. 198. Many definitions are collected in People v. Roberts, 159 N. Y. 70, 80, 53 N. E. 685, 45 L. R. A. 126, by Vann, J., who concludes: "Good will embraces at least two elements, the advantage of continuing an established business in its old place, and of continuing it under the old style or name. While it is not necessarily local, it is usually to a great extent, and must, of necessity, be an incident to a place, an established business or a name known to the trade." In that case the good will of a foreign corporation engaged in business in New York was held to be taxable as capital employed in that state.

The point of the opinion of Lord Eldon in the case above cited, so much referred to, was that there is no implied covenant or promise on the part of the vendor or assignor of the good will of a business, not to set up the same trade, in opposition to the purchaser, in the neighborhood; accordingly an injunction to prevent him from doing so was refused; 17 Ves. 335. Since this case, the English decisions, after passing through a period of vacillation, seemed recently to have established the implied contract of one who simply sells the business and good will upon a much more substantial basis. It was held by Lord Romilly in Labouchere v. Dawson that an outgoing partner may not solicit the old cus-

tomers privately by letter or by a travelling agent if he has sold the good will to his former partners. This went upon the principle that a grantor may not derogate from his grant. This was considered to have gone beyond any previous case and was overruled in Pearson v. Pearson, 27 Ch. D. 145, where Cotton, L. J., said: "It is admitted that a person who has sold the good will of his business may set up a similar business next door and say that he is the person that carried on the old business, yet such proceedings manifestly tend to prevent the old customers going to the old place." See 74 L. T. 343. Between the rendering of these judgments Jessel, M. R., had enjoined the solicitation of old customers but not the dealing with them; 14 Ch. D. 603; in that case good will is defined as "the formation of that connection which has made the value of the thing that the late firm sold," and is frequently the only thing saleable. This definition was quoted with approval by Lord Herschell in Trego v. Hunt, *infra*. Another decision of Jessel, M. R., restraining a former partner from dealing with old customers was reversed by the court of appeal, but the order in this case, restraining the solicitation, was not appealed from; the court said that "to enjoin a man against dealing with people whom he has not solicited is not only to enjoin him, but to enjoin them, for it prevents them from having the liberty which anybody in the country might have of dealing with whom they like;" 15 Ch. D. 306. But the court of appeal, affirming the same judge, held that on the compulsory sale of a good will in bankruptcy proceedings, the bankrupt would not be restrained from solicitation; 19 Ch. Div. 355; and this distinction has been characterized as inconsistent; 9 Harv. L. Rev. 480. All the decisions based upon Labouchere v. Dawson were overturned by the case in 27 Ch. D. 145, which was followed by 44 Ch. D. 616. But in Trego v. Hunt, [1896] App. Cas. 7, reversing [1895] 1 Ch. 462, the later decisions were overruled and the doctrine of Labouchere v. Dawson, was approved. There the good will remained with the old concern and the outgoing partner who had sold it to his former partner employed a clerk in the firm to keep the names and addresses of the firm's customers so that he might solicit their business on his own account. This the house of lords restrained him from doing. Lord MacNaghten designated the good will as "the very sap and life of the business, without which the business would yield little or no fruit," the result "of the reputation and connection of the firm which may have been built up by years of honest work or gained by lavish expenditure of money."

The vendor or retiring partner "may not sell the custom and steal away the customers. It is not an honest thing to pocket the price and then to recapture the subject of sale, to decoy it away or call it back before the purchaser has had time to attach it to himself and make it his very own." But "he may do everything that a stranger in the ordinary course of business would be in a position to do. He may set up where he will. He may push his wares as much as he pleases." In the same case it was said by Lord Davy, "that the idea of good will and what is comprised in the sale of business has silently been developed and grown since the days of Lord Eldon."

In Curl v. Webster, [1904] 1 Ch. 685, the rule of Trego v. Hunt was applied to all persons previously customers of the old business, even including those who without solicitation became customers of the vendor.

A brief but careful review of the fluctuations of the English cases concludes that without special covenants the measure of protection resulting from the sale of the good will is merely to prevent the vendor from *soliciting* his former customers, whether they have of their own accord become customers of the new competing firm or not, but he may deal with the old customers or set up a similar business next door, so long as he does not represent it to be the same business as the old one; 25 Can. L. T. & Rev. 484.

The question is frequently raised whether a covenant not to engage in the same business is violated by the covenantor's accepting employment from a rival in business of the covenantee. The test is found in the nature of the employment; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868; and in most cases such employment is held to be a breach, particularly when it is as manager, or in such capacity as will result in a substantial interference; Wilson v. Delaney, 137 Ia. 636, 113 N. W. 842; Boutelle v. Smith, 116 Mass. 111; Jefferson v. Market & Co., 112 Ga. 498, 37 S. E. 758; American Ice Co. v. Meckel, 109 App. Div. 93, 95 N. Y. Supp. 1060; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; 14 Ont. L. Rep. 685; and such an agreement was broken by engaging in business as trustee; Geiger v. Cawley, 146 Mich. 550, 109 N. W. 1064; and the court will see to it that the contract is complied with (as is said in varied terms in many cases) not only in letter but in spirit; Kramer v. Old, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; Siegel v. Marcus, 18 N. D. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769, and note. In the comparatively few cases where the employment has been held not to be a breach, it has been because the employment has been of such minor or unimportant character as not to occasion mischief; Grimm v. Warner, 45 Ia. 106; Battershell v. Bauer, 91 Ill. App. 181; or where the agreement was construed as only forbidding the engaging in a rival business as principal; Tabor v. Blake, 61 N. H. 83; or for profit as distinguished from salary; Haley Grocery Co. v. Haley, 8 Wash.

75, 35 Pac. 595; Eastern Express Co. v. Meserve, 60 N. H. 198.

In this country the expressions of the courts as to what is the precise effect of a sale of good will, without restrictive covenants, vary as much as might be expected from the indefinable nature of the subject. The opinion of Lord Eldon has been, in the main, very closely followed, though often criticised in both countries. Such a sale has been said to carry with it only the probability that the business will continue in the future as in the past; Bell v. Ellis, 33 Cal. 620; or the favor which the management has won from the public and the probability that the customers will continue their patronage; Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526; and commend it to others; Myers v. Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. It has been said that it amounts to nothing more than the right to succeed to the business and carry it on as a successor to the old concern; 33 Am. L. Reg. N. S. 217; and a federal court terms it "those advantages which may inure to the purchaser from holding himself out to the public as succeeding to an enterprise which has been identified in the past with the name and the repute of his predecessors;" Knoedler v. Boussod, 47 Fed. 467, affirmed Knoedler v. Glaenzer, 55 Fed. 895, 5 C. C. A. 305, 20 L. R. A. 733. The principle of Labouchere v. Dawson that the vendor would not be permitted to solicit trade from the customers of the old business may seem to be maintained in this country in cases prior to the English decisions; Palmer v. Graham, 1 Pars. Eq. Cas. (Pa.) 476; Angier v. Webber, 14 Allen (Mass.) 211, 92 Am. Dec. 748; Burckhardt v. Burckhardt, 36 Ohio St. 261; and in some later cases it was so held upon the ground that there was an implied contract not to solicit, or that by so doing the value of the thing sold was impaired; Foss v. Roby, 195 Mass. 292, 81 N. E. 199, 10 L. R. A. (N. S.) 1200, 11 Ann. Cas. 571; Townsend v. Hurst, 37 Miss. 679; Ranft v. Reimers, 200 Ill. 386, 65 N. E. 720, 60 L. R. A. 291; Zanturjian v. Boornazian, 25 R. I. 151, 55 Atl. 199; but other courts have held that the vendor is not barred from soliciting his old customers; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Cottrell v. Mfg. Co., 54 Conn. 122, 6 Atl. 791; Close v. Flesher, 8 Misc. 299, 28 N. Y. Supp. 737. The rule against canvassing old customers applies in cases of partners; Althen v. Vreeland (N. J.) 36 Atl. 479; *contra;* Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; but not in case of a sale for benefit of creditors; Iowa Seed Co. v. Dorr, 70 Ia. 481, 30 N. W. 866, 59 Am. Rep. 446; or where the firm is dissolved by death and at a sale forced by the administrator of the deceased partner the good will is sold as part of the assets; Hutchinson v. Nay, 187 Mass. 262, 72 N. E. 974, 68 L. R. A. 186, 105 Am. St. Rep. 390; nor has the vendor the right to hold himself out as the successor of the old firm or as continuing its business; Appeal of Hall, 60 Pa. 458, 100 Am. Dec. 584; Dwight v. Hamilton, 113 Mass. 175; Knoedler v. Boussod, 47 Fed. 465; affirmed, Knoedler v. Glaenzer, 55 Fed. 895, 5 C. C. A. 305, 20 L. R. A. 733; Smith v. Gibbs, 44 N. H. 335; 3 L. T. N. S. 447; 11 *id.* 299; but, in the absence of express contract to the contrary, he may set up a similar business; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; Washburn v. Dosch, 68 Wis. 436, 32 N. W. 551, 60 Am. Rep. 873; Bassett v. Percival, 5 Allen (Mass.) 345; White v. Trowbridge, 216 Pa. 11, 64 Atl. 862; Jackson v. Byrnes, 103 Tenn. 698, 54 S. W. 984; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149; Rupp v. Over, 3 Brewst. (Pa.) 133; Moreau v. Edwards, 2 Tenn. Ch. 347 (but in this case there was no conveyance of the good will in terms).

Competition may, however, be prohibited without express covenant, if from the nature of the business an agreement to refrain from it is naturally implied; Wentzel v. Barbin, 189 Pa. 502, 42 Atl. 44; as in the sale of his practice by a physician; Dwight v. Hamilton, 113 Mass. 175; or engaging in competition would necessarily derogate from the grant; Gordon v. Knott, 199 Mass. 173, 85 N. E. 184, 19 L. R. A. (N. S.) 762; as to establish a newspaper of the same name; Lawrence v. Printing Co., 90 Fed. 24; or if there was an agreement not to do anything in conflict with the transfer; Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80. The vendor may bind himself not to engage in the same business within a limited time or distance, by express covenant, which, if reasonable, is valid. See RESTRAINT OF TRADE.

The question has been much discussed whether good will is an incident of the business, of the premises, or of the person. It has been held in the case of a stand in a public market to be personal and not local; Succession of Journe, 21 La. Ann. 391; 25 L. J. N. S. 194; but it is said to be the general rule that the good will is an incident of the premises; Appeal of Elliot, 60 Pa. 161; Mitchell v. Read, 84 N. Y. 556; Bergamini v. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216; and a devise of real estate, on which a business is located, and its stock and equipment passed the good will as an incident; Bradbury v. Wells, 138 Ia. 673, 115 N. W. 880, 16 L. R. A. (N. S.) 240; or, at least, the good will of a newspaper is not to be treated as of value apart from the plant and ownership of the business itself; Seabrook v. Grimes, 107 Md. 410, 68 Atl. 883, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400; but where a widow carried on the business of a licensed victualler on leased premises and assigned

all her goods, stock in trade, etc., without mentioning the good will, in trust prior to her second marriage, the good will passed by the assignment as an incident to the stock and license, and not to the husband with the premises; 6 Beav. 269. It is said that good will is only an incident, as connected with a going concern, of business having locality or name, and is not susceptible of being disposed of independently; Metropolitan Nat. Bank v. Despatch Co., 149 U. S. 436, 13 Sup. Ct. 944, 37 L. Ed. 799. See Metropolitan Nat. Bank v. Despatch Co., 36 Fed. 722. So in [1901] A. C. 217, holding that the statutory phrase "property locally outside of the United Kingdom" may include good will, after premising that the term is difficult to define, the court said that it is property that has no independent existence, "it must be attached to a business" and "the attribute of locality" is involved in it.

To this variety of expressions may be added the decision of a federal court that good will is property and may have an independent value without reference to tangible property or locality, and stock of a corporation may be issued for it; Washburn v. Wall Paper Co., 81 Fed. 17, 26 C. C. A. 312; and in New York it was held that the good will of a business may be sold where no material "plant" is involved in the transaction; Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573; or where the calling is one which is followed without a business plant; Wood v. Whitehead Bros. Co., 165 N. Y. 545, 59 N. E. 357.

As between partners, it has been held that the good will of a partnership trade survives; 5 Ves. 539; but this appears to be doubtful; 15 Ves. 227; and is not in accord with modern authorities; 27 Beav. 446. A distinction in this respect has been suggested between commercial and professional partnerships; 3 Madd. 79; 2 De G. & J. 626; but see 14 Am. L. Reg. N. S. 10, where the distinction is said to be untenable. It has been held that the firm name constitutes a part of the good will of a partnership; 6 Hare 325; *contra*, Howe v. Searing, 19 How Pr. (N. Y.) 14. Where a partner sells out his share in a going concern, he is presumed to include the good will; Johns. (Eng. Ch.) 174; certainly so where he acquiesces in the retention of the old place of business, and its future conduct by the other partners under the old name; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; and he cannot use the firm name in a business of like character carried on by him in the vicinity; Brass & Iron Works Co. v. Payne, 50 Ohio St. 115, 33 N. E. 88, 19 L. R. A. 82; or a name so similar to that of the first as to mislead and draw off business; Myers v. Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811. When a partnership is dissolved by death, bankruptcy, or otherwise, the good will is an asset of the firm, and should be sold and the proceeds distributed among the partners; 15 Ves. 218; Holden's Adm'rs v. McMakin, 1 Pars. Eq. Cas. (Pa.) 270. In such case the sale of the good will may include the right to use the old firm name which is inseparable from it and part of the assets; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 43 N. E. 325, 31 L. R. A. 657; though in New York it had been earlier decided otherwise; Mason v. Dawson, 15 Misc. 595, 37 N. Y. Supp. 90; but in this case the question did not arise in a precisely similar manner. On the death of a partner the good will does not go to the survivor, unless by express agreement; 22 Beav. 84; 26 L. J. N. S. 391. It has been held, however, that on the dissolution of a partnership by the death of one of its members, the surviving partners may carry on the same line of business, at the same place, without liability to account to the legal representative of the deceased partner for the good will of the firm, in the absence of their own agreement to the contrary; Lobeck v. Hardware Co., 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795. And where on the death of a partner the business was sold to a corporation organized to carry it on, there remained nothing to be accounted for to the estate of the deceased partner, the good will passing with the property under the sale; Didlake v. Roden Grocery, 160 Ala. 484, 49 South. 384, 22 L. R. A. (N. S.) 907, 18 Ann. Cas. 430. The dissolution of the firm during the life time of all the partners gives each of them the right to use the firm name; 34 Beav. 566; *contra*, Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379; 35 Am. Rep. 546 note.

The good will of a trade or business is a valuable right of property; Senter v. Davis, 38 Cal. 450; 10 Exch. 147; Howard v. Taylor, 90 Ala. 244, 8 South. 36; 2 Ves. & B. 218; 16 Harv. L. R. 135; it is an asset of the business; Wallingford v. Burr, 17 Neb. 137, 22 N. W. 350; or of a partnership; 27 Beav. 456; or of a corporation; Washburn v. Paper Co., 81 Fed. 17, 26 C. C. A. 312; or of a decedent; Succession of Journe, 21 La. Ann. 391; but it does not include the use of the name of a deceased person, though the good will of the business is an asset to be accounted for; In re Randell's Estate, 2 Cow. Surr. 29, 8 N. Y. Supp. 652. It may be bequeathed by will; 27 Beav. 446. It may be sold like other personal property; see 3 Mer. 452; 1 J. & W. 589; 2 B. & Ad. 341; McFarland v. Stewart, 2 Watts (Pa.) 111, 26 Am. Dec. 109; 1 S. & S. 74; Carruthers & Murray v. McMurray, 75 Ia. 173, 39 N. W. 255; Appeal of Musselman, 62 Pa. 81, 1 Am. Rep. 382.

The good will of a liquor business is an asset to be sold with fixtures and the unexpired term of the lease; Aschenbach v.

Carey, 224 Pa. 303, 73 Atl. 435. The right to use a name on a medicine may be assigned to an outgoing partner or to a successor in business, as an incident to its good will; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. In the United States the subject of good will has in the original technical sense less relative prominence than in England, but the subject has developed very great importance in connection with the use of trademarks and trade names, which titles see.

A good will may be mortgaged, assigned, or taken in execution, in connection with the business; *id.;* 39 L. J. Ch. N. S. 79; and passes under a general description in a mortgage of a newspaper plant; Vinall v. Hendricks, 33 Ind. App. 413, 71 N. E. 682, or a lease; Lane v. Smythe, 46 N. J. Eq. 443, 19 Atl. 199; or a conditional sale of one; Boon v. Moss, 70 N. Y. 465; but not if dependent on the ability and skill of the proprietor; 25 Ch. D. 472; Slack v. Suddoth, 102 Tenn. 375, 52 S. W. 180, 45 L. R. A. 589, 73 Am. St. Rep. 881; or not necessarily connected with the establishment itself; MacMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099.

The good will passes under a general assignment for the benefit of creditors, though not specifically mentioned; Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353, 77 N. E. 841, 5 L. R. A. (N. S.) 1077; Iowa Seed Co. v. Dorr, 70 Ia. 481, 30 N. W. 866, 59 Am. Rep. 446; Wilmer v. Thomas, 74 Md. 485, 22 Atl. 403, 13 L. R. A. 380; Hegeman v. Hegeman, 8 Daly (N. Y.) 1; Bank of Tomah v. Warren, 94 Wis. 151, 68 N. W. 549; but although the good will passed, the members of the assigning firm could afterwards use trademarks consisting of words and pictures, to such limited extent as not to impair the good will of the business in the hands of the receiver; Fish Bros. Wagon Co. v. Wagon Works, 82 Wis. 546, 52 N. W. 595, 16 L. R. A. 453, 33 Am. St. Rep. 72. The vendor of a business and good will who stipulates against carrying on the business in the same place, may be enjoined from doing so as the agent of another; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; but individual stockholders are not bound by a contract for the sale of the good will of a corporation, although as agents of the latter they sold the business; Hall's Safe Co. v. Safe Co., 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182. The purchaser who finds there is no good will is without remedy unless he can show fraudulent representation or suppression of fact by the vendor; Johnson v. Friedhoff, 7 Misc. Rep. 484, 27 N. Y. Supp. 982.

The purchaser of a good will and firm name is entitled to receive letters and telegrams addressed to it and to the advantage of business propositions from customers of the old firm contained in them; J. G. Mattingly Co. v. Mattingly, 96 Ky. 430, 27 S. W. 985.

The measure of damages for the breach of a contract of sale of good will is the loss suffered by the vendee, not the profits made by the vendor; Gregory v. Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70.

English courts have adopted an arbitrary rule of limiting the value of good will to one year's purchase of the net annual profits, calculated on an average of three years; 28 Beav. 453; or that three years' net profits represents the value of good will; 75 L. T. Rep. 371; but it was said that American courts had not adopted it; Von Au v. Magenheimer, 115 App. Div. 84, 100 N. Y. Supp. 659, where an attempt was made to prescribe a rule for ascertaining the value of a good will by multiplying the average annual net profits for a suitable number of years with reference to the business. It would seem, however, difficult to deal with the question of value, where it arises, otherwise than to leave it to be determined as other matters of fact. See 20 Harv. L. Rev. 235. In estimating its value it is proper to consider the continued use of the firm name as an element; Moore v. Rawson, 199 Mass. 493, 85 N. E. 586.

See, generally, 14 Am. L. Reg. N. S. 1, 329, 649, 713; 33 *id.* 216; 30 Cent. L. J. 155; 34 Sol. J. 294; Lindl. Partn. Wentworth's ed. 440–9; Allan, Law of Goodwill.

GOODS. **In Contracts.** The term goods is not so wide as chattels, for it applies to inanimate objects, and does not include animals or chattels real, as a lease for years of house or land, which chattels does include. Co. Litt. 118; 1 Russ. 376.

Goods will not include fixtures; 4 J. B. Moore 73; a subscription for stock; Webb v. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. Rep. 396; or teams and wagons, notes and accounts due; Van Patten v. Leonard, 55 Ia. 520, 8 N. W. 334. In a more limited sense, goods is used for articles of merchandise; 2 Bla. Com. 389. It has been held in Massachusetts that promissory notes were within the term goods in the Statute of Frauds; Baldwin v. Williams, 3 Metc. 365; but see Whittemore v. Gibbs, 24 N. H. 484; so stock or shares of an incorporated company; Tisdale v. Harris, 20 Pick. (Mass.) 9; Colvin v. Williams, 3 H. & J. (Md.) 38, 5 Am. Dec. 417; North v. Forest, 15 Conn. 400; so, in some cases, bank notes and coin; Citizens' Bank v. Steamboat Co., 2 Sto. 52, Fed. Cas. No. 2,730; U. S. v. Moulton, 5 Mas. 537, Fed. Cas. No. 15,827; Rogers v. Morton, 12 Wend. (N. Y.) 486. The word "goods" is always used to designate wares, commodities, and personal chattels; the word effects is the equivalent of the word movables; Appeal of Vandergrift, 83 Pa. 126.

In Wills. In wills goods is *nomen generalissimum*, and, if there is nothing to limit it, will comprehend all the personal estate of the testator, as stocks, bonds, notes, mon-

ey, plate, furniture, etc.; 1 Atk. 180; 1 P. Wms. 267; 1 Bro. C. C. 128; 4 Russ. 370; Wms. Ex. 1014; 1 Rop. Leg. 250; but in general it will be limited by the context of the will; see 2 Belt, Suppl. Ves. 287; 1 Ves. 63; Jackson v. Vanderspreigle's Ex'r, 2 Dall. (U. S.) 142, 1 L. Ed. 118; Sugd. Vend. 493. See 1 Jarm. Wills 751; and the titles BIENS; CHATTELS; FURNITURE.

GOODS AND CHATTELS. **In Contracts.** A term which includes not only personal property in possession, but choses in action and chattels real, as a lease for years of house or land, or emblements. 12 Co. 1; 1 Atk. 182; Co. Litt. 118; 1 Russ. 376; see Kirkland v. Brune, 31 Gratt. (Va.) 131; it includes railroad ties; Russell v. Ry. Co., 39 Minn. 145, 39 N. W. 302.

A merchant's stock in trade is "goods and chattels permanently located," provided such goods and chattels are taxable in the city or county where they are so located; Hopkins v. Baker, 78 Md. 363, 28 Atl. 284, 22 L. R. A. 477.

In Criminal Law. Choses in action, as bank notes, mortgage deeds, and money, do not fall within the technical definition of "goods and chattels." And if described in an indictment as goods and chattels, these words may be rejected as surplusage; Eastman v. Com., 4 Gray (Mass.) 416; State v. Calvin, 22 N. J. Law 207; 3 Cox, Cr. Cas. 460; 1 Den. Cr. Cas. 450; 1 Dearsl. & B. 426; 1 Leach 241, 4th ed. 468. See U. S. v. Moulton, 5 Mas. (U. S.) 537, Fed. Cas. No. 15,827.

In Wills. If unrestrained, these words will pass all personal property; Wms. Ex. 1014 Am. notes. See 1 Jarm. Wills 751; Add. Contr. 31, 201, 912; Beach, Wills 470.

GOODS SOLD AND DELIVERED. A phrase used to designate the action of assumpsit brought when the sale and delivery of goods furnish the cause.

A sale, delivery, and the value of the goods must be proved. See ASSUMPSIT.

GOODS, WARES, AND MERCHANDISE. A phrase used in the Statute of Frauds. Fixtures do not come within it; 1 Cr. M. & R. 275. Growing crops of potatoes, corn, turnips, and other annual crops, are within it; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb. Sales §§ 4, 5; Craddock v. Riddlesbarger, 2 Dana (Ky.) 206; Stambaugh v. Yeates, 2 Rawle (Pa.) 161; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R. P. 3. A contract for the sale of apples, peaches, and blackberries which might be raised during certain years, are chattels personal and not within the statute; Smock v. Smock, 37 Mo. App. 56. Promissory notes and shares in an incorporated company, and, in some cases, money and bank-notes, have been held within it; see 2 Pars. Contr. 330; and so have a bond and mortgage; Greenwood v. Law, 55 N. J. L. 168, 26 Atl. 134, 19 L. R. A. 688; Bernhardt v. Walls, 29 Mo. App. 206. Within the meaning of the tariff laws "goods, wares and merchandise" do not include a quantity of waste material; Shaw v. Dix, 72 Fed. 166. Fruit, imported into this country, which decays on the voyage, was held not goods, wares and merchandise; Lawder v. Stone, 187 U. S. 281, 23 Sup. Ct. 79, 47 L. Ed. 178; the term "merchandise" as used in the revised statutes of the United States includes goods, wares, and chattels of every description capable of being imported; R. S. § 2766. See Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656.

The cases which have considered that the rule for distinguishing goods, wares and merchandise from work and labor under the 17th section of statute of frauds have been grouped under three rules, under one of which usually any case may be classified. The English rule was that, if the transaction results in the sale of a chattel, the contract is within the statute. The New York rule is that, if the subject matter was in existence at the time of the contract, the transaction is within the statute, otherwise not; and the Massachusetts rule is that, if the article be such as the manufacturer makes in the ordinary course of his business, the contract is within the statute, otherwise not.

The English rule was applied in 1 B. & S. 272, in which a set of artificial teeth manufactured by a dentist was declared to be merchandise. The New York rule was laid down in Crookshank v. Burrell, 18 Johns. (N. Y.) 58, 9 Am. Dec. 187, and Parsons v. Loucks, 48 N. Y. 17, 8 Am. Rep. 517. The Massachusetts rule was laid down in Mixer v. Howarth, 21 Pick. (Mass.) 205, 32 Am. Dec. 256.

A more recent test has been laid down in some cases to the effect that, if the article when manufactured is fit for the general market, it is merchandise; otherwise, if it is of such peculiar construction as to be of value only to the particular person ordering it; Puget Sound Mach. Depot v. Rigby, 13 Wash. 264, 43 Pac. 39; Orman v. Hagar, 3 N. Mex. 568, 9 Pac. 363; Pratt v. Miller, 109 Mo. 78, 18 S. W. 965, 32 Am. St. Rep. 656.

GORGE. A defile between hills or mountains, that is a narrow throat or outlet from a region of country. Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241.

GOUT. **In Medical Jurisprudence.** A nutritional disorder associated with an excessive formation of uric acid, and characterized by attacks of acute inflammation of the joints, by the gradual deposit of urate of sodium in and about the joints, and by the occurrence of irregular constitutional symptoms. Osler, Practice of Med.

In case of insurance on lives, when there is warranty of health, it seems that a man

subject to the gout is capable of being insured, if he has no sickness at the time to make it an unequal contract; 2 Park, Ins. 650.

GOVERNMENT (Lat. *gubernaculum*, a rudder. The Romans compared the state to a vessel, and applied the term *gubernator*, helmsman, to the leader or actual ruler of a state. From the Latin, this word has passed into most of the modern European languages). That institution or aggregate of institutions by which a state makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming a state.

We understand, in modern political science, by *state*, in its widest sense, an independent society, acknowledging no superior, and by the term *government*, that institution or aggregate of institutions by which that society makes and carries out those rules of action which are necessary to enable men to live in a social state, or which are imposed upon the people forming that society by those who possess the power or authority of prescribing them. Government is the aggregate of authorities which rule a society. By *administration*, again, we understand in modern times, and especially in more or less free countries, the aggregate of those persons in whose hands the reins of government are for the time-being (the chief ministers or heads of departments). But the terms state, government, and administration are not always used in their strictness. The government of a state being its most prominent feature, which is most readily perceived, government has frequently been used for state; and the publicists of the last century almost always used the term government, or form of government, when they discussed the different political societies or states. On the other hand, government is often used, to this day, for administration, in the sense in which it has been explained. We shall give in this article a classification of all governments and political societies which have existed and exist to this day.

Governments, or the authorities of societies, are, like societies themselves, grown institutions. See INSTITUTION.

They are never actually created by agreement or compact. Even where portions of government are formed by agreement, as, for instance, when a certain family is called to rule over a country, the contracting parties must previously be conscious of having authority to do so. As society originates with the family, so does authority or government. Nowhere do men exist without authority among them, even though it were but in its mere incipiency. Men are forced into this state of things by the fundamental law that with them, and with them alone of all mammals, the period of dependence of the young upon its parents outlasts by many years the period of lactation; so that, during this period of post-lactational dependence, time and opportunity are given for the development of affection and the habit of obedience on the one hand, and of affection and authority on the other, as well as of mutual dependence. The family is a society, and expands into clusters of families, into tribes and larger societies, collecting into communities, always carrying the habit and necessity of authority and mutual support along with them. As men advance, the great and pervading law of mutual dependence shows itself more and more clearly, and acts more and more intensely. Man is eminently a social being, not only as to an instinctive love of aggregation, not only as to material necessity and security, but also as to mental and affectional development, and not only as to a given number of existing beings, or what we will call as to *extent*, but also as to *descent* of generation after generation, or, as we may call it, transmission. Society, and its government along with it, are continuous. Government exists and continues among men, and laws have authority for generations which neither made them nor had any direct representation in making them, because the necessity of government—necessary according to the nature of social man and to his wants—is a continuous necessity. But the family is not only the institution from which once, at a distant period, society, authority, government arose. The family increases in importance, distinctness, and intensity of action as man advances, and continues to develop authority, obedience, affection, and social adhesiveness, and thus acts with reference to the state as the feeder acts with reference to the canal; the state originates daily anew in the family.

Although man is an eminently social being, he is also individual, morally, intellectually, and physically; and though his individuality may endure even beyond this life, he is compelled, by his physical condition, to appropriate and to produce, and thus to imprint his individuality upon the material world around, to create property. But man is not only an appropriating and producing, he is also an exchanging being. He always exchanges and always intercommunicates. This constant intertwining of man's individualism and socialism creates mutual claims of protection, rights, the necessity of rules, of laws: in one word, as individuals and as natural members of society, men produce and require government. No society, no cluster of men, no individuals banded together even for a temporary purpose, can exist without some sort of government instantly springing up. Government is natural to men and characteristic. No animals have a government; no authority exists among them; instinct and physical submission alone exist among them. Man alone has laws which ought to be obeyed but may be disobeyed. Expansion, accumulation, development, progress, relapses, disintegration, violence, error, superstition, the necessity of intercommunication, wealth and poverty, peculiar disposition, temperament, configuration of the country, traditional types, pride and avarice, knowledge and ignorance, sagacity of individuals, taste, activity and sluggishness, noble or criminal bias, position, both geographical and chronological,—all that affects numbers of men affects their governments, and an endless variety of governments and political societies has been the consequence; but, whatever form of government may present itself to us, the fundamental idea, however rudely conceived, is always the protection of society and its members, security of property and person, the administration of justice therefor, and the united efforts of society to furnish the means to authority to carry out its objects,—contribution, which, viewed as imposed by authority, is taxation. Those bands of robbers which occasionally have risen in disintegrating societies, as in India, and who merely robbed and devastated, avowing that they did not mean to administer justice or protect the people, form no exception, although the extent of their soldiery and the periodicity of their raids caused them to be called governments. What little of government continued to exist was still the remnant of the communal government of the oppressed hamlets; while the robbers themselves could not exist without a government among themselves.

Aristotle classified governments according to the seat of supreme power, and he has been generally followed down to very recent times. Accordingly, we had Monarchy, that government in which the supreme power is vested in one man, to which was added, at a later period, the idea of hereditariness. Aristocracy, the government in which the supreme power is vested in the ἄριστοι, which does not mean, in this case, the *best*, but the excelling ones, the prominent, *i. e.* by property and influence. Privilege is its characteristic. Its corresponding degenerate government is the Oligarchy (from ὀλίγος, little, few), that government in which supreme power is exercised by a few privileged ones, who generally have arrogated the power. Democracy, that government in which supreme power is vested in the people at large. Equality is one of its char-

acteristics. Its degenerate correspondent is the Ochlocracy (from ὄχλος, the rabble), for which at present the barbarous term mobocracy is frequently used.

But this classification was insufficient even at the time of Aristotle, when, for instance, theocracies existed; nor is the seat of supreme power the only characteristic, nor, in all respects, by any means the chief characteristic. A royal government, for instance, may be less absolute than a republican government. In order to group together the governments and political societies which have existed and are still existing, with philosophical discrimination, we must pay attention to the chief-power-holder (whether he be one or whether there are many), to the pervading spirit of the administration or wielding of the power, to the characteristics of the society or the influencing interests of the same, to the limitation or entirety of public power, to the peculiar relations of the citizen to the state. Indeed, every principle, relation, or condition characteristically influencing or shaping society or government in particular may furnish us with a proper division. We propose, then, the following

Grouping of Political Societies and Governments.

I. According to the supreme power-holder or the placing of supreme power, whether really or nominally so.

The power-holder may be one, a few, many, or all; and we have, accordingly:

A. Principalities, that is, states the rulers of which are set apart from the ruled, or inherently differ from the ruled, as in the case of the theocracy.
  1. Monarchy.
    a. Patriarchy.
    b. Chieftain government (as our Indians).
    c. Sacerdotal monarchy (as the States of the Church; former sovereign bishoprics).
    d. Kingdom, or Principality proper.
    e. Theocracy (Jehovah was the chief magistrate of the Israelitic state).
  2. Dyarchy. It exists in Siam, and existed occasionally in the Roman empire; not in Sparta, because Sparta was a republic, although her two hereditary generals were called kings.

B. Republic.
  1. Aristocracy.
    a. Aristocracy proper.
      aa. Aristocracies which are democracies within the body of aristocrats (as former Polish government).
      bb. Organic internal government (as Venice formerly).
    b. Oligarchy.
    c. Sacerdotal republic, or Hierarchy.
    d. Plutocracy; if, indeed, we adopt this term from antiquity for a government in which it is the principle that the possessors of great wealth constitute the body of aristocrats.
  2. Democracy.
    a. Democracy proper.
    b. Ochlocracy (Mob-rule), mob meaning unorganized multitude.

II. According to the unity of public power, or its division and limitation.

A. Unrestricted power, or absolutism.
  1. According to the form of government.
    a. Absolute monarchy, or despotism.
    b. Absolute aristocracy (Venice); absolute sacerdotal aristocracy, etc. etc. etc.
    c. Absolute democracy (the government of the Agora or market democracy).
  2. According to the organization of the administration.
    a. Centralized absolutism. Centralism, called bureaucracy when carried on by writing: at least, bureaucracy has very rarely existed, if ever, without centralism.
    b. Provincial (satraps, pashas, pro-consuls).

B. According to divisions of public power.
  1. Governments in which the three great functions of public power are separate, viz., the legislative, executive, judiciary. If a distinct term contradistinguished to centralism be wanted, we might call these co-operative governments.
  2. Governments in which these branches are not strictly separate, as, for instance, in our government, but which are nevertheless not centralized governments; as Republican Rome, Athens, and several modern kingdoms.

C. Institutional government.
  1. Institutional government comprehending the whole, or constitutional government.
    a. Deputative government.
    b. Representative government.
      aa. Bicameral.
      bb. Unicameral.
  2. Local self-government. See V. We do not believe that any substantial self-government can exist without an institutional character and subordinate self-governments. It can exist only under an institutional government (see Lieber's Civil Liberty and Self-Government, under "Institution").

D. Whether the state is the substantive or the means, or whether the principle of socialism or individualism preponderates.
  1. Socialism, that state of society in which the socialist principle prevails, or in which government considers itself the substantive; the ancient states absorbing the individual or making citizenship the highest phase of humanity; absolutism of Louis XIV. Indeed, all modern absolutism is socialistic.
  2. Individualism, that system in which the state remains acknowledged a means, and the individual the substantive; where primary claims, that is, rights, are felt to exist, for the obtaining and protection of which the government is established,—the government, or even society, which must not attempt to absorb the individual. The individual is immortal, and will be of another world; the state is neither.

III. According to the descent or transfer of supreme power.

A. Hereditary governments.
  Monarchies.
  Aristocracies.
  Hierarchies, etc.

B. Elective.
  Monarchies.
  Aristocracies.
  Hierarchies.

C. Hereditary—elective—governments, the rulers of which are chosen from a certain family or tribe.

D. Governments in which the chief magistrate or monarch has the right to appoint the successor; as occasionally the Roman emperors, the Chinese, the Russian, in theory, Bonaparte when consul for life.

IV. According to the origin of supreme power, real or theoretical.

A. According to the primordial character of power.
  1. Based on *jus divinum.*
    a. Monarchies.
    b. Communism, which rests its claims on a *jus divinum* or extra-political claim of society.
    c. Democracies, when proclaiming that the people, because the people, can do what they list, even against the law; as the Athenians once declared it, and Napoleon III. when he desired to be elected president a second time against the constitution.
  2. Based on the sovereignty of the people.
    a. Establishing an institutional government, as with us.

b. Establishing absolutism (the Bonaparte sovereignty).

B. Delegated power.

1. Chartered governments.
   a. Chartered city governments.
   b. Chartered companies, as the reform great East India Company.
   c. Proprietary governments.
2. Vice-Royalties; as Egypt, and, formerly, Algiers.
3. Colonial government with constitution and high amount of self-government,—a government of great importance in modern history.

V. Constitutions. (To avoid too many sub-divisions, this subject has been treated here separately. See II.)

Constitutions, the fundamental laws on which governments rest, and which determine the relation in which the citizen stands to the government, as well as each portion of the government to the whole, and which therefore give feature to the political society, may be:

A. As to their origin.

1. Accumulative: as the constitutions of England or Republican Rome.
2. Enacted constitutions (generally, but not philosophically, called written constitutions).
   a. Octroyed constitutions (as the French, by Louis XVIII.).
   b. Enacted by the people, as our constitutions. ["We the people charter governments; formerly governments chartered the liberties of the people."]
3. Pacts between two parties, contracts, as Magna Charta, and most charters in the Middle Ages. The medieval rule was that as much freedom was enjoyed as it was possible to conquer,—*expugnare* in the true sense.

B. As to extent or uniformity.

1. Broadcast over the land. We may call them national constitutions, popular constitutions, constitutions for the whole state.
2. Special charters. Chartered, accumulated and varying franchises, medieval character.

(See article Constitution in the Encyclopædia Americana.)

VI. As to the extent and comprehension of the chief government.

A. Military governments.

1. Commercial government; one of the first in Asia, and that into which Asiatic society relapses, as the only remaining element, when barbarous conquerors destroy all bonds which can be torn by them.
2. Tribal government.
   a. Stationary.
   b. Nomadic. We mention the nomadic government under the tribal government, because no other government has been nomadic, except the patriarchal government, which indeed is the incipiency of the tribal government.
3. City government (that is, city-states; as all free states of antiquity, and as the Hanseatic governments in modern times).
4. Government of the Medieval Orders extending over portions of societies far apart; as the Templars, Teutonic Knights, Knights of St. John, Political societies without necessary territory, although they had always landed property.
5. National states; that is, populous political societies spreading over an extensive and cohesive territory beyond the limits of a city.

B. Confederacies.

1. As to admission of members, or extension.
   a. Closed, as the Amphictyonic council, Germany.
   b. Open, as ours.
2. As to the federal character, or the character of the members, as states.
   a. Leagues.
      aa. Tribal confederacies; frequently observed in Asia; generally of a loose character.
      bb. City leagues; as the Hanseatic League, the Lombard League.
      cc. Congress of deputies, voting by states and according to instruction; as the Netherlands republic and our Articles of Confederation, Germanic Confederation.
      dd. Present "state system of Europe" (with constant congresses, if we may call this "system," a federative government in its incipiency.)
   b. Confederacies proper, with national congress.
      aa. With *ecclesiæ* or democratic congress (Achæan League).
      bb. With representative national congress, as ours.

C. Mere agglomerations of one ruler.

1. As the early Asiatic monarchies, or Turkey.
2. Several crowns on one head; as Austria, Sweden, Denmark.

VII. As to the construction of society, the title of property and allegiance.

A. As to the classes of society.

1. Castes, hereditarily dividing the whole population, according to occupations and privileges. India, ancient Egypt.
2. Special castes.
   a. Government with privileged classes or caste; nobility.
   b. Government with degraded or oppressed caste; slavery.
   c. Governments founded on equality of citizens (the uniform tendency of modern civilization).

B. As to property and production.

1. Communism.
2. Individualism.

C. As to allegiance.

1. Plain, direct; as in unitary governments.
2. Varied; as in national confederacies.
3. Graduated or *encapsulated;* as in the feudal system, or as in the case with the serf.

D. Governments are occasionally called according to the prevailing interest or classes; as
Military states; for instance, Prussia under Frederick II.
Maritime state.
Commercial.
Agricultural.
Manufacturing.
Ecclesiastical, etc.

VIII. According to simplicity or complexity, as in all other spheres, we have—

A. Simple governments (formerly called *pure;* as pure democracy).

B. Complex governments, formerly called mixed. All organism is complex.

See STATE; FEDERAL GOVERNMENT; EXECUTIVE POWER; JUDICIAL POWER; LEGISLATIVE POWER; UNITED STATES OF AMERICA.

GOVERNOR. See EXECUTIVE POWER.

GRACE, DAYS OF. See DAYS OF GRACE.

GRADE. Used in reference to streets: (1) The line of the street's inclination from the horizontal; (2) a part of a street inclined from the horizontal. Cent. Dict. That is, it sometimes signifies the line established to guide future construction, and at other times, the street wrought to the line; Little Rock v. Ry. Co., 56 Ark. 28, 19 S. W. 17.

Grades of crime, in legal parlance, are always spoken of and understood as higher or lower in grade, or degree, according to

the measure of punishment attached and meted out on conviction, and the consequences resulting to the party convicted; People v. Rawson, 61 Barb. (N. Y.) 619.

As to military grade, see RANK.

GRADE CROSSING. A place where one highway crosses another: in particular, a place where a railroad is crossed at grade by a public or private road, or by another railroad. The term is most frequently used with reference to the crossing of a public highway by a railroad.

At such a crossing it is the duty of the railroad company to construct and maintain safe and proper crossings; and it is liable for all injuries resulting from a failure to perform this duty; Louisville, N. A. & C. Ry. Co. v. Smith, 91 Ind. 119; Farley v. R. Co., 42 Ia. 234; Paducah & E. R. Co. v. Com., 80 Ky. 147; State v. R. Co., 36 Ohio St. 436; Pittsburg, F. W. & C. Ry. Co. v. Dunn, 56 Pa. 280; but the most numerous class of cases relating to grade crossings, arises from accidents to persons who are using the crossing, caused by the operation of trains thereon.

The rule that the roadbed and track of a railroad company are its private property, and that one who gets thereon does so at his own peril, does not apply to a highway crossing; Florida Cent. & R. R. Co. v. Williams, 37 Fla. 406, 20 South. 558. At such a place the company hold its roadbed, subject to the right of the public to cross it; and that circumstance creates mutual rights and obligations. Both parties must use ordinary care in the exercise of their own rights. Theoretically, the rights of the company and a person who intends to cross are equal; practically, the more onerous duty of avoiding danger rests upon the latter, on account of the difficulty in stopping a train in rapid motion. But this fact, on the other hand, imposes upon the railroad company the duty of using every practicable agency consistent with the operation of its trains, to give due warning of their approach; Rockford, R. I. & St. L. R. Co. v. Hillmer, 72 Ill. 235; Western & A. R. Co. v. King, 70 Ga. 261; Indianapolis & V. R. R. Co. v. McLin, 82 Ind. 435; Louisville, C. & L. R. Co. v. Goetz, 79 Ky. 442, 42 Am. Rep. 227; Baltimore & O. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; Weber v. R. Co., 58 N. Y. 451; Kay v. R. Co., 65 Pa. 269, 3 Am. Rep. 628. Thus, the whistle must be sounded on approaching a crossing; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Reeves v. R. Co., 30 Pa. 454, 72 Am. Dec. 713; Baltimore & O. R. Co. v. Owings, 65 Md. 502, 5 Atl. 329; and the better view is that watchmen should be stationed at every much-used crossing; Grank Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. But this rule is not uniformly held; and some courts have decided that the railroad company, unless required by statute, is under no obligation to give warning; Brown v. R. Co., 22 Minn. 165; Favor v. R. Corp., 114 Mass. 350, 19 Am. Rep. 364. This duty is now, however, generally prescribed by statute; and a failure to discharge it is in such a case always evidence of negligence, though not conclusive; Barber v. R. Co., 34 S. C. 444, 13 S. E. 630; Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. 116; Augusta & S. R. Co. v. McElmurry, 24 Ga. 75; Hanlon v. R Co., 129 Mass. 310; Funston v. Ry. Co., 61 Ia. 452, 16 N. W. 518; Atlanta & W. P. R. v. Wyly, 65 Ga. 120; Lewis v. R. Co., 123 N. Y. 496, 26 N. E. 357; Nash v. R. Co., 125 N. Y. 715, 26 N. E. 266; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581; Clark v. R. Co., 64 N. H. 323, 10 Atl. 676.

The railroad company is not alone bound to the exercise of care in approaching a crossing. A traveller who intends to cross is also bound to use ordinary prudence, by which is to be understood such as is fairly commensurate with the risk. He must therefore, look for an approaching train, if he has a fair view of the track; and if his view is obstructed, he must also listen. If he does not do so, and is injured, he cannot recover; but if he does, and is nevertheless injured by the negligence of the company, the latter is liable to him; Wabash, St. L. & P. Ry. Co. v. Wallace, 110 Ill. 114; Lang v. Holiday Creek R. & Coal Min. Co., 49 Ia. 469; Murray v. R. Co., 31 La. Ann. 490; Cincinnati, H. & I. Ry. Co. v. Duncan, 143 Ind. 524, 42 N. E. 37; Frech v. R. Co., 39 Md. 574; Wright v. R. Co., 129 Mass. 440; Carney v. Ry. Co., 46 Minn. 220, 48 N. W. 912; Pennsylvania R. Co. v. Righter, 42 N. J. L. 180; Haas v. Ry. Co., 41 Wis. 44. It is not necessary to leave to the jury whether a prudent man would look and listen before attempting to cross a railroad track. It is the duty of the court to declare that a failure to do so is negligence; Pyle v. Clark, 75 Fed. 644; it is a conclusion of law; St. Louis, I. M. & S. Ry. Co. v. Martin, 61 Ark. 549, 33 S. W. 1070; Baltimore & O. R. Co. v. Talmage, 15 Ind. App. 203, 43 N. E. 1019; Philadelphia & R. R. Co. v. Peebles, 67 Fed. 591, 14 C. C. A. 555; Horn v. R. Co., 54 Fed. 301, 4 C. C. A. 346.

One approaching a grade crossing must look and listen; this rule is elementary; Northern Pac. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; he must exercise all his faculties of sight and hearing at such short distance as will be effectual; Chicago Great Western R. Co. v. Smith, 141 Fed. 930, 73 C. C. A. 164.

One, who, on approaching a double-track railroad, looked to the north, and seeing no train, concentrated his attention on a switch-

engine on the nearer track for a minute and a half, and then, without looking again to the north, started across and was struck by a train coming from that direction on the further track, was held guilty of negligence; Pyle v. Clark, 75 Fed. 644. See Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Baltimore & Potomac R. Co. v. Carrington, 3 App. D. C. 101; New York, N. H. & H. R. Co. v. Blessing, 67 Fed. 277, 14 C. C. A. 394. It is held negligence for a traveller, after waiting for a train to pass on the near track, to start across behind it without waiting until it had passed far enough to enable him to see a train approaching from the opposite direction on another track; Stowell v. Erie R. Co., 98 Fed. 520, 39 C. C. A. 145; Delaware & H. Co. v. Flannelly, 172 Fed. 328, 97 C. C. A. 112; Fletcher v. R. Co., 149 Mass. 127, 21 N. E. 302, 3 L. R. A. 743; Marty v. R. Co., 38 Minn. 108, 35 N. W. 670; Morrow v. R. Co., 146 N. C. 14, 59 S. E. 158; Hughes v. Canal Co., 176 Pa. 254, 35 Atl. 190; Wallenburg v. R. Co., 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135 and note. It is held in Pennsylvania that a traveller is required to *stop*, look, and listen for an approaching train; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Pennsylvania R. Co. v. Fortney, 90 Pa. 323; Philadelphia & Reading R. Co. v. Boyer, 97 Pa. 91; Reading & Columbia R. Co. v. Ritchie, 102 Pa. 425. But this rule does not prevail in other courts, and it has been said that without relaxing the rule just stated, "yet when the facts are not clear and simple, and where the existence of contributory negligence depends upon inferences to be drawn from the evidence, the question must go to the jury for decision;" Davidson v. R. Co., 179 Pa. 227, 36 Atl. 291. In Pennsylvania, if the view of the track is obstructed, a traveler should get down from his vehicle and go forward to a point where he can see; Pennsylvania R. Co. v. Beale, 73 Pa. 504, 13 Am. Rep. 753; Central R. Co. v. Feller, 84 Pa. 226; Kinter v. R. Co., 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795; Mankewicz v. R. Co., 214 Pa. 386, 63 Atl. 604; Bistider v. R. Co., 224 Pa. 615, 73 Atl. 940. But in other jurisdictions no such duty is imposed upon the traveler; Louisville & N. R. Co. v. Bryant, 141 Ala. 292, 37 South. 370; Vance v. R. Co., 9 Cal. App. 20, 98 Pac. 41; Indianapolis & G. Rapid Transit Co. v. Haines, 33 Ind. App. 64, 69 N. E. 187; Kelly v. R. Co., 88 Mo. 534; Hinkle v. R. Co., 109 N. C. 472, 13 S. E. 884, 26 Am. St. Rep. 581.

There are three well-recognized exceptions to the rule which requires a traveller to look and listen for approaching trains. These are thus classified in Ormsbee v. R. Co., 14 R. I. 102, 51 Am. Rep. 354: (1) When the view of the track is obstructed, and hence the injured party, not being able to see, is obliged to act upon his judgment at the time; Baltimore & O. R. Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; L. R. 3 C. P. 368; 3 App. Cas. 1155; Webb v. R. Co., 57 Me. 117; Craig v. R. Co., 118 Mass. 431; Pennsylvania R. Co. v. Ogier, 35 Pa. 60, 78 Am. Dec. 322; (2) where the injured person is a passenger going to, or alighting from, a train, under the implied invitation and assurance of the company that he may cross the track in safety; Wheelock v. R. Co., 105 Mass. 203; Klein v. Jewett, 26 N. J. Eq. 474; Brassell v. R. Co., 84 N. Y. 241; and (3) when the direct act of some agent of the company has put the person off his guard and induced him to cross the track without precautions; *e. g.* when the flagman beckons to him to cross; Spencer v. R. Co., 29 Ia. 55; Sweeny v. R. Co., 10 Allen (Mass.) 368, 87 Am. Dec. 644; Newson v. R. Co., 29 N. Y. 383. To these may be added cases where the traveller (as might happen to a stranger on a dark night) is ignorant of the nearness of the railroad, and when the driver of a horse, which becomes suddenly frightened, is obliged to choose between the risk of an upset or a collision. See Patterson, Ry. Acc. L. §§ 173–183, where the cases on the subject of contributory negligence at grade-crossings are collected.

Where there are permanent obstructions to sight that would make danger invisible, and a transient noise that would make it inaudible, it is held negligence to go forward at once from a place of safety to a place of possible danger, without waiting for hearing to become effective; Central R. Co. of New Jersey v. Smalley, 61 N. J. L. 277, 39 Atl. 695. But the duty to stop before crossing has not been held to arise except where there are casual noises or temporary obstructions to the view; Merkle v. R. Co., 49 N. J. L. 473, 9 Atl. 680; Keyley v. R. Co., 64 N. J. L. 355, 45 Atl. 811; Dickinson v. R. Co., 81 N. J. L. 464, 81 Atl. 104, 37 L. R. A. (N. S.) 150. It is negligence per se to attempt to cross tracks hidden by the smoke of a passing train, without waiting for a clear view; Hovenden v. R. Co., 180 Pa. 244, 36 Atl. 731; Heaney v. R. Co., 112 N. Y. 122, 19 N. E. 422; West Jersey R. Co. v. Ewan, 55 N. J. L. 574, 27 Atl. 1064.

It is also the general rule outside of Pennsylvania, that if the company maintains safety-gates at a crossing, which are closed at the approach of a train, a traveller who sees them standing open has the right to act upon the implied invitation to cross; and may do so without looking and listening; Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. (U. S.) 270, 20 L. Ed. 571; Hinckley v. R. Co., 120 Mass. 257; Abbett v. Ry. Co., 30 Minn. 482, 16 N. W. 266; Bunting v. R. Co., 14 Nev. 351; Cohen v. R. Co., 14 Nev. 376; Kellogg v. R. Co., 79 N. Y. 72; Marietta & C. R. Co. v. Picksley, 24 Ohio St. 654; Eilert v. R. Co., 48 Wis. 606, 4 N.

W. 769. But it is held that failure to give the usual signals does not exempt traveller from looking and listening; Cooper v. R. Co., 140 N. C. 209, 52 S. E. 932, 3 L. R. A. (N. S.) 391 and note, 6 Ann. Cas. 71; Schofield v. Ry. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; or a failure to give proper and statutory signals; Rodrian v. R. Co., 125 N. Y. 526, 26 N. E. 741; Johnson's Adm'r v. Ry. Co., 91 Va. 171, 21 S. E. 238; *contra*, Turner v. Ft. Worth & D. C. Ry. Co. (Tex.) 30 S. W. 253; Cahill v. Ry. Co., 92 Ky. 345, 18 S. W. 2. The signal of a flagman to cross will not relieve one from the duty to look and listen before driving upon a railroad crossing; Union Pac. R. Co. v. Rosewater, 157 Fed. 168, 84 C. C. A. 616, 15 L. R. A. (N. S.) 803, 13 Ann. Cas. 851; Lake Shore & M. S. Ry. Co. v. Frantz, 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; Berry v. R. Co., 48 N. J. L. 141, 4 Atl. 303; Ellis v. R. R., 169 Mass. 600, 48 N. E. 839. But other cases hold that one may rely wholly upon the invitation of the flagman or the open gate; Louisville & N. R. Co. v. Webb, 90 Ala. 185, 8 South. 518, 11 L. R. A. 674; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill. 586, 25 N. E. 664, 29 N. E. 184.

The fact that one's sight or hearing is defective does not exonerate him from the exercise of due care, but rather raises the standard to be observed by him. The employés of the company have a right to presume that his sight and hearing are normal; and he must observe all the added precautions necessary to make him as safe as if his faculties were normal. If he does not, he is guilty of contributory negligence; Laicher v. R. Co., 28 La. Ann. 320; Purl v. Ry. Co., 72 Mo. 168; Cogswell v. R. Co., 6 Or. 417. Nor will deafness; Smith's Adm'r v. Ry. Co., 146 Ky. 568, 142 S. W. 1047, 41 L. R. A. (N. S.) 193; Williams v. Ry. Co., 139 Ia. 552, 117 N. W. 956; Birmingham Ry. & El. Co. v. Bowers, 110 Ala. 328, 20 South. 345; Mitchell v. Ry. Co., 153 N. C. 116, 68 S. E. 1059; Schmidt v. Ry. Co., 191 Mo. 215, 90 S. W. 136, 3 L. R. A. (N. S.) 196; Hall v. Ry. Co., 168 Mass. 461, 47 N. E. 124. See Smith's Adm'r v. Ry. Co., 41 L. R. A. (N. S.) 193 note; nor haste and mental preoccupation; Riedel v. Traction Co., 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123.

Generally the duty to look before crossing a railroad track is not discharged by looking only once. It is a continuing duty; Wallenburg v. Ry. Co., 37 L. R. A. (N. S.) 135 n., citing Kelsay v. Ry. Co., 129 Mo. 362, 30 S. W. 339; Gangawer v. R. Co., 168 Pa. 265, 32 Atl. 21; Walsh v. R. Co., 222 Pa. 162, 70 Atl. 1088; Southern Ry. Co. v. Jones, 106 Va. 412, 56 S. E. 155; which must be observed until danger is passed; Griffie v. Ry. Co., 80 Ark. 186, 96 S. W. 750; Doherty v. Ry. Co., 118 Mich. 209, 76 N. W. 377, 80 N. W. 36; unless there are exculpatory circumstances; St. Louis, I. M. & S. Ry. Co. v. Hitt, 76 Ark. 224, 88 S. W. 911; Stevens v. Ry. Co., 67 Mo. App. 356.

That the team of the person crossing is beyond the control of the driver is held an excuse for his failure to look and listen and if necessary to stop; Sarles v. Ry. Co., 138 Wis. 498, 120 N. W. 232, 21 L. R. A. (N. S.) 415, 16 Ann. Cas. 952; Southern Ry. Co. v. Hobbs, 151 Ala. 335, 43 South. 844. He is not necessarily negligent because he did not look at the most advantageous point; Wallenburg v. Ry. Co., 86 Neb. 642, 126 N. W. 289, 37 L. R. A. (N. S.) 135.

As to the power of the states to require railroad companies to change, alter, or abolish grade crossings, see 4 Thomp. Corp. § 5505; POLICE POWER. As to signals at crossings; Welsch v. R. Co., 72 Mo. 451, 37 Am. Rep. 443; as to care at crossings; Louisville, etc., R. R. Co. v. Com., 13 Bush. (Ky.) 388, 26 Am. Rep. 207.

In the absence of evidence to the contrary, there is a presumption that one who was killed while crossing a railroad track at night stopped, looked and listened before crossing; Baltimore & P. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262.

See RAILROAD; NEGLIGENCE.

GRADUATE. One who has taken a degree in a college or university. It is said to be a word of elastic meaning, involving infinite variety in the methods and standards of graduation which may be adopted; State v. Ins. Co., 40 La. Ann. 463, 4 South. 504.

GRADUS (Lat. a step). A measure of space. Vicat, Voc. Jur. A degree of relationship (*distantia cognatorum*). Heineccius, Elem. Jur. Civ. § 153; Bract. fol. 134, 374; Fleta, lib. 6, c. 2, § 1, lib. 4, c. 17, § 4.

A step or degree generally; e. g. *gradus honorum*, degrees of honor. Vicat, Voc. Jur. A pulpit; a year; a generation. Du Cange.

A port; any place where a vessel can be brought to land. Du Cange.

GRAFFER (Fr. *greffier*, a clerk, or prothonotary). A notary or scrivener. See stat. 5 Hen. VIII. c. 1.

GRAFFIO. A baron, inferior to a count. 1 Marten, Anced. Collect. 13. A fiscal judge. An advocate. Gregor. Turon, l. 1, *de Mirac.* c. 33; Spelman, Gloss.; Cowell. For various derivations, see Du Cange.

GRAFFIUM. A register; a lieger-book or cartulary of deeds and evidences. 1 Annal. Eccles. Menevensio, apud Angl. Sax. 653.

GRAFT. **In Equity.** A term used to designate the right of a mortgagee in premises to which the mortgagor at the time of making the mortgage had an imperfect title, but afterwards obtained a good title. In this case the new title is considered a *graft* into the old stock, enuring to the benefit of the

mortgagee, and arising in consideration of the former title; 1 Ball & B. 40, 46, 57; 1 Pow. Mort. 190. See Porter v. Hill, 9 Mass. 34. "It is well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterward acquired by the mortgagor will feed the mortgage and enure to the benefit of the mortgagee." 1 Pingree, Mort. § 304; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449; Sherman v. McCarthy, 57 Cal. 507; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693. And this is so where the title was in the government when the mortgage was made and a patent afterwards issued to the mortgagor; 1 Pingree, Mort. § 304; Spiess v. Neuberg, 71 Wis. 279, 37 N. W. 417, 5 Am. St. Rep. 211. See Hughes v. U. S., 4 Wall. (U. S.) 232, 18 L. Ed. 303; French v. Spencer, 21 How. (U. S.) 228, 16 L. Ed. 97. But it is the prevailing doctrine that in the absence of statutory enactment there must be a covenant of warranty or something tantamount to it, to give this effect to the mortgage; Gray v. Franks, 86 Mich. 382, 49 N. W. 130; Howze v. Dew, 90 Ala. 178, 7 South. 239, 24 Am. St. Rep. 783; Kline v. Ragland, 47 Ark. 111, 14 S. W. 474. See 1 Pingree, Mort. §§ 696–706. The purchase of a paramount title by a purchaser from the mortgagor does not inure to the benefit of the mortgagee; *id.* § 1012; and in some cases the mortgagee may be estopped to assert the after-acquired title of the mortgagor against an innocent purchaser; *id.;* Calder v. Chapman, 52 Pa. 359, 91 Am. Dec. 163. The same principle has obtained by legislative enactment in Louisiana. If a person contracting an obligation towards another, says the Civil Code, art. 3271, grants a mortgage on property of which he is not then the owner, this mortgage shall be valid if the debtor should ever require the ownership of the property, by whatever right. This principle is also adopted by statute in other states, as Arkansas; Mansf. Dig. § 642; and California; Civ. Code § 2930. See MORTGAGE.

GRAIN. The twenty-fourth part of a pennyweight.

For scientific purposes the grain only is used, and sets of weights are constructed in decimal progression, from ten thousand grains to one-hundreth of a grain.

Wheat, rye, barley, or Indian corn sown in the ground. It may include millet and oats; Holland v. State, 34 Ga. 455; Smith v. Clayton, 29 N. J. L. 357; flaxseed; Hewitt v. Ins. Co., 55 Ia. 323, 7 N. W. 596, 39 Am. Rep. 174; peas; State v. Williams, 2 Strobh. (S. C.) 474; sugar cane seed; Holland v. State, 34 Ga. 455. A statute requiring all persons who deal in grain on commission to secure a license and give a bond for the protection of the public is valid; State v. Edwards, 94 Minn. 225, 102 N. W. 697, 69 L. R. A. 667; State v. Brass, 2 N. D. 482, 52 N. W. 408; American Live Stock Com. Co. v. Live Stock Exchange, 143 Ill. 210, 32 N. E. 274, 18 L. R. A. 190, 36 Am. St. Rep. 385; State v. Board of Trade, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260.

See AWAY-GOING CROP; EMBLEMENTS; CONFUSION OF GOODS.

GRAINAGE. **In English Law.** The name of an ancient duty collected in London, consisting of one-twentieth part of the salt imported into that city.

GRAMME. The French unit of weight. The gramme is the weight of a cubic centimetre of distilled water at the temperature of 4° C. It is equal to 15.4341 grains troy, or 5.6481 drachms avoirdupois.

GRAND ASSIZE. A method of trial, instituted by Henry II., by way of alternative offered to the choice of the tenant or defendant in a writ of right, instead of trial by battel. For this purpose a writ *de magna assiza eligenda* issued to choose four knights from the county and twelve from the vicinage. If some or all of the sixteen differed or were ignorant of the facts, more were summoned until there were twelve who could agree on a verdict. 1 Holdsw. Hist. E. L. 150. Abolished in 1834. The latest case is in 1 Bingh. N. C. 597; 5 *id.* 161.

"It is abundantly clear that, whatever may have been the practice at a later time, the grand assize was a body of twelve, not of sixteen, knights; in other words, the four electors took no part in the verdict." 2 Poll. & Maitl. 618, n. 3.

Although the jury were theoretically to speak only about matter of fact, the principle was long latent and tacit. "The recognitors in a grand assize were called upon to say whether the demandant had greater right than the tenant, and in so doing they had an opportunity of giving effect of law. . . . We must not suppose that in such a case they followed the ruling of the justices;" *id.* 627.

The assize of novel disseisin, the requirement of a royal writ to compel a man to answer for his free tenement, and the grand assize, are said to have been fashioned at the same time to uphold three principles founded upon the idea of the sacredness of a freehold and intended to assure the royal protection of possession. "No one is to be disseised of his free tenement unjustly and without a judgment, . . . (nor) even by a judgment unless he has been summoned to answer by a royal writ; no one is to be forced to defend his seisin of a free tenement by battel. The ordinance that instituted the grand assize was a one-sided measure, a protection of possessors. The claimant had to offer battel; the possessor, if he pleased, might refuse battel and put himself upon the grand assize;" 1 *id.* 126. As to its place in the history of possessory action, see 2 *id.* 62.

Its date was probably during the first years of Henry II, but it is uncertain. Mrs. J. R. Green, in 1 Sel. Essays in Anglo-Amer. L. H. 125.

GRAND BILL OF SALE. **In English Law.** The name of an instrument used for the transfer of a ship while she is at sea. Thuret v. Jenkins, 7 Mart. O. S. (La.) 318, 12 Am. Dec. 508; 3 Kent 133.

GRAND CAPE. **In English Law.** A writ judicial which lieth when a man has brought a *præcipe quod reddat*, of a thing that toucheth plea of lands, and the tenant makes

default on the day given him in the writ original, then this writ shall go for the king, to take the land into the king's hands, and if he comes not at the day given him by the *grand cape*, he has lost his lands. Old N. B. fol. 161, 162; Regist. Judic. fol. 2 *b*; Brac. lib. 5, tr. 3, cap. 1, nu. 4, 5, 6. So called because its Latin form began with the word *cape*, "take thou," and because it had more words than the *petit cape*, or because *petit cape* summons to answer for default only. *Petit cape* issues after appearance to the original writ, *grand magnum cape* before. These writs have long been abolished. In Glanvill's day three successive summons preceded the *cape*. See 2 Poll. & Maitl. 590.

GRAND COUTUMIER. Two collections of laws bore this title. One, also called the Coutumier of France, is a collection of the customs, usages, and forms of practice which had been used from time immemorial in France; the other, called the Coutumier de Normandie (which indeed, with some alterations, made a part of the former), was composed, about 14 Henry III. (1229), and is a collection of the Norman laws, not as they stood at the conquest of England, but some time afterwards, and contains many provisions probably borrowed from the old English or Saxon laws. Hale, Hist. Com. Law c. 6. The work was reprinted in 1881 with notes by William L. De Gruchy. The Channel Islands are still for the most part governed by the ducal customs of Normandy; 1 Steph. Com. 61.

GRAND DAYS. In English Practice. Those days in the term which are solemnly kept in the inns of court and chancery, viz.: Candlemas-day in Hilary Term, Ascension-day in Easter Term, St. John the Baptist's day in Trinity Term, and All Saints' day in Michælmas Term, which are *dies non juridici*, or no days in court, and are set apart for festivity. Jacob, Law Dic.

All this is now altered: the grand days, which are different for each term of court, are those days in each term in which a more splendid dinner than ordinary is provided in the hall. Moz. & W.

GRAND DISTRESS (Lat. *magna districtio*). An ancient kind of distress, more extensive than the writs of *grand* and *petit cape*, extending to all the goods and chattels of the party distrained within the county. T. L.; Cowell. The writ lay in real actions, and was so called on account of its quality and great extent. It lay in two cases, either when the tenant or defendant was attached, and did not appear, but made default; or when the tenant or defendant had once appeared, and afterwards made default. Fleta lib. 2, c. 69; Cowell; Holthouse.

GRAND JURY. A body of men, consisting at common law of not less than twelve nor more than twenty-four, respectively returned by the sheriff of every county to every session of the peace, oyer and terminer and general gaol delivery, to whom indictments are preferred. 4 Bla. Com. 302; 1 Chitty, Cr. Law 310, 311; 1 Jur. Soc. Papers; English v. State, 31 Fla. 340, 356, 12 South. 689.

There is reason to believe that this institution existed among the Saxons; Crabb, Eng. Law 35. By the constitution of Clarendon, enacted 10 Hen. II. (A. D. 1164), it is provided that "if such men were suspected whom none wished or dared to accuse, the sheriff, being thereto required by the bishop, should swear twelve men of the neighborhood, or village, to declare the truth" respecting such supposed crime, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries, if this institution did not exist before, or reorganized them if they already existed; 1 Spence, Eq. Jur. 63. But a later work (passing over the question of the relation of the old Frankish inquest to the initiation of criminal proceedings by presentment by indictment) says of the accusing jury of the time of Henry II: "The ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 2 Poll. & Maitl. 639; 1 *id.* 130; 2 *id.* 644; and the conclusion reached is, "a great deal yet remained to be done before that process of indictment by a 'grand jury' and trial by a 'petty jury' with which we are all familiar would have been established. The details of this process will never be known until large piles of records have been systematically perused. This task we must leave for the historian of the fourteenth century. Apparently the change was intimately connected with the discontinuance of those cumbrous old eyres which brought 'the whole county' and every hundred and vill in it before the eyes of the justices;" 2 *id.* 646.

Organization. Where the common law prevails, unmodified by statutory or constitutional provisions, the law requires that twenty-four citizens shall be summoned to attend as grand jurors; but in practice not more than twenty-three are sworn, because of the inconvenience which might arise of having twelve, who are sufficient to find a true bill, opposed to another twelve who might be against it; 2 Hale, Pl. Cr. 161; 1 Bish. Cr. Proc. 854; 6 Ad. & El. 236; People v. King, 2 Caines (N. Y.) 98. There is no distinction between the qualification of grand and petit jurors; State v. Williams, 35 S. C. 344, 14 S. E. 819.

The number is a matter of local regulation, and while in the main the common-law system has been continued, there is in this country a growing disposition to reduce the number of jurors by statute where it was practicable, and by constitutional provision where that was held to be necessary. It is beyond the present purpose to state in detail all the changes, or to do more than to indicate the existence of a prevailing tendency to simplify the proceedings, which, however, is coupled with a great respect for the grand jury as one of the common-law institutions protected by constitutional guaranty.

The question has been much discussed whether in states having constitutional provisions for indictment by a grand jury, a legislative change in the number required

to find an indictment at common law is permissible. In several states this question has been answered in the negative where the constitutional provision specified "indictment by grand jury;" at least so far as to forbid a change making less than twelve sufficient to find an indictment; State v. Barker, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50; Donald v. State, 31 Fla. 255, 12 South. 695; English v. State, 31 Fla. 340, 12 South. 689; Brucker v. State, 16 Wis. 334. See Thurman v. State, 25 Ga. 220. But the provision of the federal constitution securing the "due process of law" does not prevent the states from varying the common-law rule as to a grand jury; Hausenfluck v. Com., 85 Va. 702, 8 S. E. 683; Parker v. People, 13 Colo. 155, 21 Pac. 1120, 4 L. R. A. 803; or even from dispensing with it; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. Where the state constitution prescribes a number it is obligatory; Ex parte Reynolds, 35 Tex. Cr. R. 437, 34 S. W. 120, 60 Am. St. Rep. 54; but where the grand jury consisted of less than the required number but as many jurors concurred as were necessary to find an indictment it was sufficient; State v. Belvel, 89 Ia. 405, 56 N. W. 545, 27 L. R. A. 846; and where the requisite number do concur, the fact that the panel was not full, either by reason of the discharge, or improper excusing of one or more members, or any like cause, does not invalidate an indictment; Drake v. State, 25 Tex. App. 293, 7 S. W. 868; Jackson v. State, 25 Tex. App. 314, 7 S. W. 872; State v. Billings, 77 Ia. 417, 42 N. W. 456; U. S. v. Belvin, 46 Fed. 381; Williams v. State, 69 Ga. 11; State v. Ward, 60 Vt. 142, 14 Atl. 187; Beasley v. People, 89 Ill. 571; State v. Fee, 19 Wis. 563; Blevins v. State, 68 Ala. 92. A discharge of a juror is presumed to be proper; Wallis v. State, 54 Ark. 611, 16 S. W. 821; State v. Wingate, 4 Ind. 193; but if improper and void, it does not affect the legal organization; Smith v. State, 19 Tex. App. 95. It will be presumed that a grand jury was legally organized; State v. Dilworth, 34 La. Ann. 216; Wilson v. People, 3 Colo. 325; and where the court has power to fill up the panel it will be presumed to have been rightly done; Burrell v. State, 129 Ind. 290, 28 N. E. 699. It has been held that when, on calling the grand jury, some of them fail to appear, the court may orally direct the sheriff to fill the vacancy without issuing a precept; State v. Miller, 53 Ia. 84, 4 N. W. 838; *id.*, 53 Ia. 154, 4 N. W. 900; in other states a new *venire facias* is necessary; Pouch v. State, 63 Ala. 163; State v. Chase, 20 N. J. L. 218. The power to excuse grand jurors confers upon the court, by implication, the power to fill the vacancy; Burrell v. State, 129 Ind. 290, 28 N. E. 699. If more are present than the statute permits the indictment is bad; Box v. State, 34 Miss. 614; U. S. v. Reynolds, 1 Utah, 226; Downs v. Com., 92 Ky. 605, 18 S. W. 526; Com. v. Salter, 2 Pears. (Pa.) 461; Com. v. Leisenring, 2 Pears. (Pa.) 466. A constitutional provision fixing the number of the panel and prescribing how many must concur is held to be self-executing; Sanders v. Com. (Ky.) 18 S. W. 528; State v. Ah Jim, 9 Mont. 167, 23 Pac. 76.

The number of grand jurors varies in different states, as also the number or proportion required for concurrence. In Utah fifteen grand jurors were held sufficient; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244; and see People v. Green, 1 Utah 11. When twenty-three were provided for, the provision was held to be directory merely; Com. v. Wood, 2 Cush. (Mass.) 149.

Objections. An objection must be properly made as to time and manner; In re Wilson, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513; Com. v. Windish, 176 Pa. 167, 34 Atl. 1019; State v. Scarborough, 55 Md. 345; Young v. State, 6 Ohio, 435; State v. Pate, 67 Mo. 488; 2 Ad. & El. 236; 1 Nev. & P. 187. A person summoned to testify before the grand jury *de facto* cannot question its organization; Ex parte Haymond, 91 Cal. 545, 27 Pac. 859. An objection to the competency of a grand juror must be raised before the general issue; State v. Easter, 30 Ohio St. 542, 27 Am. Rep. 478; Whart. Cr. Pl. 350. It has been held that an objection comes too late after the jury has been empanelled and sworn; Com. v. Smith, 9 Mass. 110; People v. Jewett, 3 Wend. (N. Y.) 314; but on this point the authorities are conflicting; see *contra*, State v. Davis, 12 R. I. 492, 34 Am. Rep. 704, n. The proper method of taking objection to the organization of a grand jury is by plea in abatement; Falk v. Reese, 19 Ala. 240; Henning v. State, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; Brown v. State, 13 Ark. 96; and not by demurrer; Collier v. State, 2 Stew. (Ala.) 388; Fisher v. U. S., 1 Okl. 252, 31 Pac. 195; or motion to quash; State v. Haywood, 73 N. C. 437; Johnson v. Ins. Co., 3 Wyo. 140, 6 Pac. 729; or motion in arrest of judgment; State v. Pile, 5 Ala. 72; or collaterally on *habeas corpus;* Ex parte Warris, 28 Fla. 371, 9 South. 718; State v. Noyes, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, 41 Am. St. Rep. 45. A plea in abatement must specify the objection with particularity; State v. Holcomb, 86 Mo. 371; Tilley v. Commonwealth, 89 Va. 136, 15 S. E. 526; Newman v. State, 14 Wis. 394; Brennan v. People, 15 Ill. 511; State v. Skinner, 34 Kan. 256, 8 Pac. 420; Baldwin v. State, 12 Neb. 61, 10 N. W. 463. If a method of objection is prescribed by a statute, it must be followed strictly; People v. Hooghkirk, 96 N. Y. 149; Boulo v. State, 51 Ala. 18; Johnson v. State, 33 Tex. 570; Williams v. State, 86 Ind. 400.

Federal courts may, on their own motion, enforce other objections to grand jurors than those prescribed by state statute; U. S. v. Jones, 69 Fed. 973.

See an elaborate note upon the organization of grand jury in which are collected the cases relating to defects of every kind in the summoning, organization, and proceedings of grand jury; 27 L. R. A. 776; and one on the qualification of grand jurors; 28 *id.* 195; as to the number of grand jurors necessary or proper to act and the constitutional and statutory provisions relating thereto in states which have changed the common-law rule, see 27 *id.* 846; and as to the number necessary to concur in finding an indictment; 28 *id.* 33.

Proceedings. Being called into the jury-box, they are usually permitted to select a foreman, whom the court appoints; but the court may exercise the right to nominate one for them.

The foreman then takes the following oath or affirmation, namely: "You, A. B., as foreman of this inquest for the body of the ——, of ——, do swear (or affirm) that you will diligently inquire, and true presentment make of all such articles matters, and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the commonwealth's counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred, or malice; nor shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God." It will be perceived that this oath contains the substance of the duties of the grand jury. The foreman having been sworn or affirmed, the other grand jurors are sworn or affirmed according to this formula: "You and each of you do swear (or affirm) that the same oath (or affirmation) which your foreman has taken on his part, you and every one of you shall well and truly observe on your part." In Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Brown, J., quoted from the grand juror's oath as given in 8 How. St. Tr. 759. He refers to the words *"as of all other matters and things as shall come to your knowledge touching these present services,"* etc., as showing the competency of the grand jury to act solely on its own volition. It was there held that the grand jury might proceed either upon their own knowledge or upon the examination of witnesses without a previous presentment or formal indictment being submitted to them. It was also held that the examination of a witness before a grand jury is a "proceeding" within the meaning of the proviso of the general appropriation act of 1903, that no person shall be prosecuted on account of anything which he may testify in any proceeding under the anti-trust law. The authorities are collected at large in the opinion and arguments.

One may be compelled to answer questions before a grand jury though there be no specific charge pending; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558.

In Massachusetts it is not necessary to show that those affirming had conscientious scruples about taking the oath; Com. v. Fisher, 7 Gray (Mass.) 492; Com. v. Smith, 9 Mass. 107; but in New Jersey it was originally held that it would be necessary to show this or the indictment would be invalid; State v. Rockafellow, 6 N. J. L. 332; but since then by the N. J. Crim. Code § 53, it is provided that objection to the indictment for form or substance shall be by demurrer or motion to quash before the jury are sworn in and not after, and an objection to affirmance not made as so provided will not avail.

On being sworn or affirmed, and having received the charge of the court, the grand jury are organized, and may proceed to transact the business which may be laid before them; 2 Burr. 1088; Bacon, Abr. *Juries*, A. See Pierce v. State, 12 Tex. 210. The grand jury constitute a regular body until discharged by the court, or by operation of law, as where they cannot continue, by virtue of an act of assembly, beyond a certain day. But although they have been formally discharged by the court, if they have not separated, they may be called back and fresh bills be submitted to them; 9 C. & P. 43. When properly organized, in some states, it meets and adjourns upon its own motion, and it may lawfully proceed in the performance of its duties whether the court is in session or not, until the final adjournment of the court; Nealon v. People, 39 Ill. App. 481. In other states it is always discharged from time to time by the court, to which it reports at each session. The grand juries in the federal courts usually meet and adjourn on their own motion.

A charge to the grand jury delivered by Mr. Justice Field in the district of California is reported in 2 Sawy. 667, Fed. Cas. No. 18,255. The duties and functions of the grand jury are admirably stated and particularly the difference between those of grand jurors of the state courts and of the national courts; those of the state courts having very great inquisitorial powers conferred upon them by statute; those of the United States courts having no general authority of an inquisitorial character.

The absence of such a power in the federal statutes is attributed to the fact that the examination of books and accounts of the officers of the federal government is provided for by law or by executive regulation, and when upon such examination, an unsatisfactory condition is found the matter is brought before the grand jury by the proper authority.

Justice Field considers that the phrase in the oath discriminating subjects of inquiry which shall "otherwise come to your knowledge touching the present service" authorizes them to act upon their own knowledge or observations or evidence before them but not upon mere rumor or reports.

The jurisdiction of the grand jury is coextensive with that of the court for which they inquire, both as to the offences triable there and the territory over which such court has jurisdiction.

The mode of doing business. The foreman acts as president, and the jury usually appoint one of their number to perform the duties of secretary. No records are to be kept of the acts of the grand jury, except for their own use, because their proceedings are to be secret. Bills of indictment against offenders are then supplied by the attorney-general, or other officer representing government. See Shattuck v. State, 11 Ind. 473; U. S. v. Reed, 2 Blatchf. 435, Fed. Cas. No. 16,134. On these bills are indorsed the names of the witnesses by whose testimony they are supported. The jury are also required to make true presentment of all such matters as have otherwise come to their knowledge. These presentments, which are

technically so called, are, in practice, usually made at the close of the session of the grand jury, and include offences of which they had personal knowledge: they should name the authors of the offences, with a view to indictment. The witnesses in support of a bill are to be examined in all cases under oath, even when members of the jury itself testify,—as they may do.

When the number required by law concur in finding a true bill, the foreman must write on the back of the indictment, "A true bill," sign his name as foreman, and date the time of finding. On the contrary, where there is not sufficient evidence to authorize the finding of the bill, the jury return that they are ignorant whether the person accused committed the offence charged in the bill, which is expressed by the foreman indorsing on the bill, "Ignoramus," "Not a true bill," or similar words, signing his name as before, and dating the indorsement. The grand jury cannot find a bill, true for part, and false for part; 1 Russ. Cr., Sharsw. ed. 430.

A grand jury cannot indict without a previous prosecution before a magistrate; except in offences of public notoriety, such as are within their own knowledge, or are given them in charge by the court, or are sent to them by the prosecuting officer of the commonwealth; Whart. Cr. Pl. & Pr. § 338; McCullough v. Com., 67 Pa. 30.

As to the witnesses, and the power of the jury over them. The jury examine all the witnesses in support of the bill, or enough of them to satisfy themselves of the propriety of putting the accused on trial, but none in favor of the accused. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. It is decided that when a witness, duly summoned, appears before the grand jury, but refuses to be sworn, and behaves in a disrespectful manner towards the jury, they may lawfully require the officer in attendance upon them to take the witness before the court, in order to obtain its aid and direction in the matter; Heard v. Pierce, 8 Cush. (Mass.) 338, 54 Am. Dec. 757; State v. Blocker, 14 Ala. 450. Such a refusal, it seems, is considered a contempt; State v. Blocker, 14 Ala. 450; the disobedience of this order of the court constituting the contempt; Wyatt v. People, 17 Colo. 252, 28 Pac. 961; but the governor of a state is exempt from the powers of *subpœna*, and this immunity extends to his official subordinates; Appeal of Hartranft, 85 Pa. 433, 27 Am. Rep. 667. A person having knowledge of a crime has the right to go before the grand jury, and disclose his knowledge, without being summoned; State v. Stewart, 45 La. Ann. 1164, 14 South. 143.

As to the competency of evidence before grand jury see 28 L. R. A. 318, note; and as to the sufficiency of evidence to sustain indictment; 28 L. R. A. 324, note; as to improper influence or interference with a grand jury; 28 L. R. A. 367, note.

Of the secrecy to be observed. This extends to the vote given in any case, to the evidence delivered by witnesses, and to the communications of the jurors to each other. The disclosure of these facts, unless under the sanction of law, would render the imprudent juror who should make them public liable to punishment. Giving intelligence to a defendant that a bill has been found against him, to enable him to escape, is so obviously wrong that no one can for a moment doubt its being criminal. The grand juror who should be guilty of this offence might, upon conviction, be fined and imprisoned. One who stealthily listens to a grand jury while in the performance of their duties commits the offence of eavesdropping; State v. Pennington, 3 Head (Tenn.) 299, 75 Am. Dec. 771. The duration of the secrecy depends upon the particular circumstances of each case; Tindle v. Nichols, 20 Mo. 326. In a case, for example, where a witness swears to a fact in open court, on the trial, directly in opposition to what he swore before the grand jury, there can be no doubt that the injunction of secrecy, as far as regards this evidence, would be at an end, and the grand jurors might be sworn to testify what this witness swore to in the grand jury's room, in order that the witness might be prosecuted for perjury; 3 Russ. Cr., Sharsw. ed. 520; Low's Case, 4 Me. 439, 16 Am. Dec. 271; 1 Bish. Cr. Proc. 857; Com. v. Scowden, 92 Ky. 120, 17 S. W. 205; Izer v. State, 77 Md. 110, 26 Atl. 282; Com. v. Hill, 11 Cush. (Mass.) 137. A member of the grand jury may testify as to how the jury acquired knowledge of an alleged offence; Com. v. Green, 126 Pa. 531, 17 Atl. 878, 12 Am. St. Rep. 894; Com. v. McComb, 157 Pa. 611, 27 Atl. 794; but see *contra*, Imlay v. Rogers, 7 N. J. Law 347; 1 C. & K. 519. It has been held that the foreman of a grand jury may be called as a witness concerning an admission of gaming made by defendant when testifying before the grand jury concerning another offence, since the statute enjoining secrecy as to proceedings before the grand jury is intended only for the protection of the jurors and of the public; People v. Reggel, 8 Utah 21, 28 Pac. 955.

Grand jurors are held competent witnesses as to matters disclosed to them in the course of their duty as such; U. S. v. Charles, 2 Cra. C. C. 76, Fed. Cas. No. 14,786; Gordon v. Com., 92 Pa. 220, 37 Am. Rep. 672; to impeach a witness who testified differently before the grand jury; Com. v. Mead, 12 Gray (Mass.) 167, 71 Am. Dec. 741.

The minutes of what took place before the grand jury may be disclosed but not to show that the indictment was found upon insufficient evidence or no evidence, as that ques-

tion is not open to review; Beavers v. Henkel, 194 U. S. 76, 24 Sup. Ct. 605, 48 L. Ed. 882.

A grand jury may without hearing witnesses return a second indictment against a person for the same offence charged in the first one for the purpose of correcting a formal description; Nordlinger v. U. S., 24 App. D. C. 406, 70 L. R. A. 227; Byers v. State, 63 Md. 207; Whiting v. State, 48 Ohio St. 220, 27 N. E. 96; Creek v. State, 24 Ind. 151.

Self-incriminating statements before a grand jury were admitted at the trial; Wisdom v. State, 42 Tex. Cr. R. 579, 61 S. W. 926; but this decision was based on the ground that a grand juror might testify to them without violating his secrets, which is said to be apparently well settled but not conclusive of the issue in that case; 15 Harv. L. Rev. 308.

A grand juror may be punished for contempt for disclosing testimony produced before it; In re Atwell, 140 Fed. 368; In re Summerhayes, 70 Fed. 769.

A grand juror is not competent to testify in a civil case as to the statements of a witness before the grand jury; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138. It is not error to reject evidence of grand jurors disclosing testimony given before the grand jury; Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688. Statements of the prosecuting officer as to what occurred in the grand jury room are inadmissible; State v. Johnson, 115 Mo. 480, 22 S. W. 463. The fact that a stenographer, at the request of the prosecuting attorney, attended before the grand jury and took the testimony of the witnesses, is, upon the weight of authority, no ground for quashing the indictment; Courtney v. State, 5 Ind. App. 356, 32 N. E. 335; State v. Bates, 148 Ind. 610, 48 N. E. 2; State v. Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444; U. S. v. Simmons, 46 Fed. 65; *contra*, State v. Bowman, 90 Me. 363, 38 Atl. 331, 60 Am. St. Rep. 266; the presence of the state's attorney while inquiry is being made by the grand jury is not objectionable; Shoop v. People, 45 Ill. App. 110; but the presence of a private prosecutor is ground for reversal of a judgment of conviction; Wilson v. State, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664.

The grand jury can be discharged only by order of the court or the final adjournment of the term; Jones v. U. S., 162 Fed. 417, 89 C. C. A. 303. In the absence of an order of the court the grand jury may meet and adjourn while in existence whether the court is in session or not; *id.* Neither the improper discharge of a grand juror nor the absence of one or more will invalidate an indictment if the number required to find one are present; *id.* The provisions of the grand jurors' oath to make diligent inquiry and presentment, not to present for envy, hatred or malice, and to leave no one unpresented for fear, favor or affection are mandatory, but the requirement to keep the nation's counsel, his fellows' and his own secret is not so; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253. If after the presentment an indictment has been found and made public and the accused has been apprehended and the grand jury finally discharged, the grand jurors are no longer bound to keep their proceedings secret; Atwell v. U. S., 162 Fed. 97, 89 C. C. A. 97, 17 L. R. A. (N. S.) 1049, 15 Ann. Cas. 253; reversing In re Atwell, 140 Fed. 368.

The privilege given by the fifth amendment to the constitution, that no person shall be compelled in any criminal case to be a witness against himself, extends to a proceeding before a grand jury; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

That provision has no application to criminal procedure in the Cherokee Nation whose powers of self-government antedated the constitution; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

The fifth amendment is satisfied by one inquiry and adjudication, and an indictment found by the proper grand jury should be accepted anywhere within the United States as at least *prima facie* evidence of probable cause and sufficient basis for removal from the district where the person arrested is found to the district where the indictment was found; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

The place where such inquiry must be had, and the decision of the grand jury obtained, is the locality in which by the constitution and laws the final trial must be had; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882.

The disqualification of grand jurors does not destroy jurisdiction if it otherwise exists and an indictment though voidable is not void, and objections taken seasonably in the trial must be corrected by writ of error and not habeas corpus; Keizo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125.

See INDICTMENT; PRESENTMENT; CHARGE; INFORMATION; INCRIMINATION.

GRAND LARCENY. By the English law simple larceny was divided into grand and petit: the former was committed by the stealing of property exceeding twelve pence in value; the latter, when the property was of the value of twelve pence or under; Stat. West. 1 (3 Edw. I.), c. 15. This distinction was abolished in England by 7 & 8 Geo. IV. c. 29, and is recognized in only a few of the states. Grand larceny was a capital offence, but clergyable unless attended with certain aggravations. Petty larceny was punishable with whipping, "or some such corporal punishment less than death;" and, being a felony, it was subject to forfeiture, whether up-

on conviction or flight. See 1 Bish. Cr. L. § 679; LARCENY.

GRAND REMONSTRANCE. A constitutional document passed by the British House of Commons in November, 1641. It was in the nature of an appeal to the country, setting forth political grievances. It consisted of a preamble of 20 clauses and the body of the remonstrance with 206 clauses, each of which was voted separately. Its first remedial measure was against papists; its second demanded that all illegal grievances and exactions should be presented and punished at the sessions and assizes and that judges and justices should be sworn to the due execution of the Petition of Rights and other laws. The third was a series of precautions to prevent the employment of evil councillors. See Taswell-Langmead, Engl. Const. Hist. 464; Forsher, Grand Remonstrance. The text will be found in History for Ready Reference, II, 833.

GRAND SERJEANTY. See SERJEANTY.

GRANDCHILDREN. The children of one's children. Sometimes these may take bequests in a will to children; in general they cannot claim; 6 Co. 16. The term grandchildren has been held to include great-grandchildren; 2 Eden 194; *contra*, Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 488, 505; Hone v. Van Schaick, 3 N. Y. 538.

GRANDFATHER. The father of one's father or mother. The father's father is called the paternal grandfather; the mother's father is the maternal grandfather.

GRANDFATHER CLAUSE. A clause introduced into several of the constitutions of the southern states, limited the right to vote to those who can read and write any article of the constitution of the United States, and have worked or been regularly employed in some lawful employment for the greater part of the year next preceding the time they offer to register unless prevented from labor or ability to read or write by physical disability, or who own property assessed at three hundred dollars upon which the taxes have been paid; but those who have served in the army or navy of the United States or in the Confederate States in time of war, their lawful descendants in every degree, and persons of good character who understand the duties and obligations of citizenship under a republican form of government were relieved from the operation of this law. In 1902 nine-tenths of the negroes of Alabama were thereby disqualified. In Giles v. Harris, 189 U. S. 475, 23 Sup. Ct. 639, 47 L. Ed. 909, a negro filed a bill in equity praying that the defendant board of registry be required to enroll his name and those of other negroes on the voting list and that certain sections of the constitution of Alabama be declared void as contrary to the XIVth and XVth amendments to the federal constitution. The bill was dismissed on the ground that equity has no jurisdiction over political matters; Brewer, Brown, and Harlan, JJ., dissenting.

GRANDMOTHER. The mother of one's father or mother. The father's mother is called the paternal grandmother; the mother's mother is the maternal grandmother.

GRANGE. A farm furnished with barns, granaries, stables, and all conveniences for husbandry. Co. Litt. 5 a.

A combination, society, or association of farmers for the promotion of the interests of agriculture, by abolishing the restraints and burdens imposed on it by railway and other companies, and by getting rid of the system of middlemen or agents between the producer and the consumer. Encyc. Dic.

The members of such associations are called grangers, from which was derived the name, applied to certain leading cases, of Granger Cases, which see.

GRANGER CASES. A name applied to six cases decided by the supreme court of the United States in 1876, which are reported in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik v. Ry. Co., 94 U. S. 165, 24 L. Ed. 97; Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona & St. Peter R. Co. v. Blake, 94 U. S. 180, 24 L. Ed. 99; those most frequently cited being Munn v. Illinois, and C., B. & Q. R. Co. v. Iowa. They are so called because they arose out of an agitation commenced by the grangers which resulted in the enactment of statutes for the regulation of the tolls and charges of common carriers, warehousemen, and the proprietors of elevators. The enforcement of these acts was resisted and their constitutionality questioned. The supreme court affirmed the common-law doctrine that private property appropriated by the owner to a public use is thereby subjected to public regulation. They also held that the right of regulation was not restrained by the prohibition of the fourteenth amendment of the federal constitution against the taking by the states of private property without due process of law. A text writer, who was at that time a member of the court, says of these cases: "But these decisions left undecided the question how far this legislative power of regulation belonged to the States, and how far it was in the congress of the United States"; Miller, Const. U. S. 397.

As to what are public uses see EMINENT DOMAIN.

GRANT. A generic term applicable to all transfers of real property. 3 Washb. R. P. 181, 353.

A transfer by deed of that which cannot be passed by livery. Wms. R. P. 147, 149.

An act evidenced by letters patent under

the great seal, granting something from the king to a subject. Cruise, Dig. tit. 33, 34.

A technical term made use of in deeds of conveyance of lands to import a transfer. 3 Washb. R. P. 378; Harlowe v. Hudgins, 84 Tex. 107, 19 S. W. 364, 31 Am. St. Rep. 21.

"This word is taken largely where anything is granted or passed from one (the grantor) to another (the grantee). And in this sense it doth comprehend feoffment, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also. . . . And so some grants are of the land or soil itself; and some are of some profit to be taken out of, or from the soil, as rent, common, etc.; and some are of goods and chattels; and some are of other things, as authorities, elections, etc."; Shepp. Touchst. 228.

The term grant was anciently and in strictness of usage applied to denote the conveyance of incorporeal rights, and it is the appropriate word for that purpose. Such rights are said to lie in grant, and not in livery; for, existing only in idea, in contemplation of law, they cannot be transferred by livery of possession. Of course at common law, a conveyance in writing was necessary; hence they were said to lie in grant, and to pass by the delivery of the deed. By the act of 8 & 9 Vict. c. 106, § 2, and also by statute in some states, as New York, Maine, and Massachusetts, all corporeal hereditaments are said to lie in grant as well as in livery. See Sandford v. Travers, 40 N. Y. 140; Bates v. Foster, 59 Me. 160, 8 Am. Rep. 406. Grant is now therefore both sufficient, and technically proper, as a word of conveyance of a freehold estate, and in the largest sense the term comprehends everything that is granted or passed from one to another, and is now applied to every species of property. But although the proper technical word, its employment is not absolutely necessary, and it has been held that other words indicating an intention to grant will answer the purpose; Wms. R. P. 6th Am. ed. 201; 5 B. & C. 101. As to the effect of the word grant in conveyances and how far any covenant is implied therefrom, see COVENANT.

Grant was one of the usual words in a feoffment; and a grant differed but little from a feoffment except in the subject-matter; for the operative words used in grants are *dedi et concessi*, "have given and granted." But the simple deed of grant has superseded the ancient feoffment, leases, and releases which were used to convey freehold estates in possession. See, generally, 1 Dav. Conv. 73; 2 *id.* 76.

The word is also applied in the case of copyholds to indicate the acceptance by the lord of a person as tenant. It is termed an *ordinary grant* when the tenant is admitted in pursuance of a surrender by the preceding tenant; and *voluntary grant* when the land is in possession of the lord discharged from all rights of any tenant, or as it is termed "in hand;" in that case the lord regrants the land to the new tenant to be holden by copy of court roll.

A *grant of personalty* is a method of transferring personal property, distinguished from a gift, which is always gratuitous, by being founded upon some consideration or equivalent. Such grants are divided as to their subject-matter into grants of chattels real, which includes leases, assignments, and surrenders of leases, and grants of chattels personal, which consist of transfer of the right and possession of them whereby one renounces and the other acquires all title and interest therein. 2 Sharsw. Bla. Com. 440, and see also *id*, notes 1, 2, and 3. Such a grant may be by parol; 3 M. & S. 7; but they are usually by assignment or bill of sale in writing. The proper legal designation of such a grant is an "assignment" or bargain or sale; 2 Steph. Com. 102.

Office grant applies to conveyances made by some officer of the law to effect certain purposes where the owner is either unwilling or unable to execute the requisite deeds to pass the title.

Among the modes of conveyance included under office grant are levies and sales to satisfy execution creditors, sales by order or decree of a court of chancery, sales by order or license of court, sales for non-payment of taxes and the like. See Blackw. Tax Title, *passim;* 3 Washb. R. P. 208.

Private grant is a grant by the deed of a private person. See DEED.

Public grant is the mode and act of creating a title in an individual to lands which had previously belonged to the government.

The public lands of the United States and of the various states have been to a great extent conveyed by deeds or patents issued in virtue of general laws; but many specific grants have also been made, and were the usual method of transfer during the colonial period. See 3 Washb. R. P. 181; Johnson v. McIntosh, 8 Wheat. (U. S.) 543, 5 L. Ed. 681; Worcester v. Georgia, 6 Pet. (U. S.) 548, 8 L. Ed. 483. Nothing passes by implication; New York v. Tax Com'rs, 199 U. S. 37, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381. See LAND GRANT.

Uninterrupted possession of land for a period of twenty years or upward, has been often held to raise a presumption of a grant from the state; Tubbs v. Lynch, 4 Harr. (Del.) 521; Doe v. Roe, 20 Ga. 467, 65 Am. Dec. 633; Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. Ed. 477; Scales v. Cockrill, 3 Head (Tenn.) 432; Von Rosenberg v. Haynes, 85 Tex. 357, 20 S. W. 143; Brown v. Oldham, 123 Mo. 621, 27 S. W. 409.

By the word grant, in a treaty, is meant not only a formal grant, but any concession,

warrant, order, or permission to survey, possess, or settle, whether written or parol, express, or presumed from possession. Such a grant may be made by law, as well as by patent pursuant to a law; Strother v. Lucas, 12 Pet. (U. S.) 410, 9 L. Ed. 1137. See 9 Ad. & E. 532; Dudley v. Sumner, 5 Mass. 472; TREATY.

The term grant is also applied to the creation or transfer by the government of such rights as pensions, patents, charters, and franchises. See Chit. Prerog. 384; and also these several titles.

The word grant is also sometimes used with reference to the allowance of probate, and the issue of letters testamentary, and of administration, as to which see the several titles relating thereto.

GRANT AND DEMISE. In a lease for years these words create an implied warranty of title and a covenant for quiet enjoyment; Stott v. Rutherford, 92 U. S. 107, 23 L. Ed. 486. See COVENANT.

GRANT, BARGAIN AND SELL. Words used in instruments of conveyance of real estate. See CONSTRUCTION. From these words, in many states, is implied a covenant of seisin. See COVENANT.

GRANTEE. He to whom a grant is made.

GRANTOR. He by whom a grant is made.

GRANTZ. *In Old English Law.* Grandees or noblemen. Jac. L. Dict.

GRASS WEEK. Rogation week. A term anciently used in the inns of court and chancery.

GRASSHEARTH. *In Old English Law.* The name of an ancient customary service of tenants' doing one day's work for their landlord.

GRASSUM. See GRESSOME.

GRATIFICATION. A reward given voluntarily for some service or benefit rendered, without being requested so to do, either expressly or by implication.

GRATIS (Lat.). Without reward or consideration.

When a bailee undertakes to perform some act or work *gratis*, he is answerable for his gross negligence if any loss should be sustained in consequence of it; but a distinction exists between non-feasance and misfeasance,—between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it: in the latter case he is responsible, while in the former he would not, in general, be bound to perform his contract; Thorne v. Deas, 4 Johns. (N. Y.) 84; 5 Term 143; 2 Ld. Raym. 913.

An appearance gratis is one entered without service of process.

GRATIS DICTUM (Lat.). A saying not required; a statement voluntarily made without necessity.

Mere naked assertions, though known to be false, are not the ground of action, as between vendor and vendee. Thus it is not actionable for a vendor of real estate to affirm falsely to the vendee that his estate is worth so much, that he gave so much for it, etc. But fraudulent misrepresentations of particulars in relation to the estate, inducing the buyer to forbear inquiries he would otherwise have made, are not *gratis dicta;* Medbury v. Watson, 6 Metc. (Mass.) 246, 39 Am. Dec. 726.

GRATUITOUS. Without valuable or legal consideration. A term applied to deeds of conveyance.

In Old English Law. Voluntary; without force, fear, or favor. Bract. fols. 11, 17.

GRATUITOUS BAILMENT. See BAILMENT.

GRATUITOUS CONTRACT. *In Civil Law.* One the object of which is the benefit of the person with whom it is made, without any profit, received or promised, as a consideration for it: as, for example, a gift. It is sometimes called a contract of beneficence. It is the result of a classification of contracts, in relation to the motive for making them, under which they are termed either gratuitous or onerous. A contract is onerous when a party is required by its terms or nature to do or give something as a consideration. Howe, Studies in the Civil Law 107.

GRATUITOUS DEED. One made without consideration. 2 Steph. Com. 47.

GRATUITY. See BONUS; BOUNTY.

GRAVAMEN (Lat.). The grievance complained of; the substantial cause of the action. See Greenl. Ev. § 66. The part of a charge which weighs most heavily against the accused. In England, the word is specially applied to grievance complained of by the clergy to the archbishop and bishops in convocation. Phill. Eccl. 1944.

GRAVATIO. An accusation or impeachment. Leg. Ethel. c. 19.

GRAVE. A place where a dead body is interred.

The violation of the grave, by taking up the dead body, or stealing the coffin or grave clothes, is a misdemeanor at common law; 1 Russ. Cr. 414; In re Wong Yung Quy, 6 Sawy. 442, 2 Fed. 624; and has been made the subject of statutory enactment in some of the states. See 2 Bish. Cr. L. § 1188; Dearsl. & B. 169; Com. v. Slack, 19 Pick. (Mass.) 304; State v. McClure, 4 Blackf. (Ind.) 328; DEAD BODY.

When a body has once been buried, no one has the right to remove it without the

consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority; Weld v. Walker, 130 Mass. 423, 39 Am. Rep. 465; Wynkoop v. Wynkoop, 42 Pa. 293, 82 Am. Dec. 506.

A singular case, illustrative of this subject, occurred in Louisiana. A son, who inherited a large estate from his mother, buried her with all her jewels, worth two thousand dollars: he then made a sale of all he inherited from his mother for thirty thousand dollars. After this, a thief broke the grave and stole the jewels, which, after his conviction, were left with the clerk of the court, to be delivered to the owner. The son claimed them, and so did the purchaser of the inheritance: it was held that the jewels, although buried with the mother, belonged to the son, and that they passed to the purchaser by a sale of the whole inheritance; Ternant v. Boudreau, 6 Rob. (La.) 488. See 23 Ir. L. T. 405; CEMETERY; DEAD BODY; EXHUMATION.

GRAVIS. Grievous; great. *Ad grave damnum*, to the grievous damage. 11 Coke 40.

GRAVIUS. A graf; a chief magistrate or officer. A term derived from the more ancient "*grafio*" and used in combination with various other words as an official title in Germany; as Margravius, Rheingravius, Landgravius, etc. Spel. Gloss.

GRAY'S INN. See INNS OF COURT.

GREAT ASSIZE. An edict of Henry II. of unknown date but probably issued during the first years of his reign. It related to the trial of causes. Green, 1 Sel. Essays in Anglo-Amer. L. H. 125. See GRAND ASSIZE.

GREAT BRITAIN. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

GREAT CHARTER. See MAGNA CARTA.

GREAT LAKES. A name commonly used to designate the five great lakes, viz., Superior, Michigan, Huron, Ontario, and Erie.

The open waters of the Great Lakes are "high seas" within the meaning of the Revised Statutes; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. It had been held otherwise in Ex parte Byers, 32 Fed. 406. The common-law doctrine, as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

See ADMIRALTY; LAKE.

GREAT LAW, THE, or "The Body of Laws of the Province of Pennsylvania and Territories thereunto belonging, Past at an Assembly held at Chester, *alias* Upland, the 7th day of the tenth month, called December, 1682."

This was the first code of laws established in Pennsylvania, and is justly celebrated for the provision in its first chapter for liberty of conscience. See Linn's Charter and Laws of Pennsylvania (Harrisburg, 1879), pp. 107, 478, etc.

GREAT ROLL. See PIPE ROLL.

GREAT SEAL. A seal by virtue of which a great part of the royal authority in England, is exercised. The appointment of the lord high chancellor, or lord keeper, is made by the delivery of the great seal into his custody. There is one great seal for all public acts of state which concern the United Kingdom. The seal of the United States, or of a state, used in the execution of commissions and other public documents is usually termed the great seal of the United States, or of the state, as the case may be.

GREAT TITHES. In Ecclesiastical Law. The more valuable tithes: as, corn, hay, and wood. 3 Burn, Eccl. Law 680, 681; 3 Steph. Com. 127. See TITHE.

GREE. Satisfaction for an offence committed or injury done. Cowell.

GREECE. A kingdom of Europe. A constitutional monarchy which exists under a constitution framed by a national assembly elected in December, 1863, and adopted October 29, 1864. It is hereditary in the male line, or failing that, in the female line. The king, whose title is King of the Hellenes (by decision of the Conference of London, 1863), was elected by National Assembly in March, 1863. He was the second son of the king of Denmark. The legislative power is vested in the Boulé, now consisting of members elected by manhood suffrage for a term of four years. There must be an attendance of at least one-half of the members to give legality to the proceedings, and no bill can become law without the consent of an absolute majority of members. The assembly has no power to alter the constitution itself. The executive power is vested in the king and a responsible ministry, who are *ex officio* members of the Boulé.

The supreme court of justice is called, as in ancient Athens, the Areopagus.

GREEN CLOTH. An English board or court of justice, composed of the lord steward and inferior officers, and held in the royal household; so named from the cloth upon the board at which it was held. Cowell.

GREEN SILVER. A feudal custom in the manor of Writtel, in Essex, where every tenant whose front door opens to Greenbury shall pay a half-penny yearly to the lord, by the name of "green silver" or "rent." Cowell.

GREEN WAX. In English Law. The name of the estreats of fines, issues, and amercements in the exchequer, delivered to the sheriff under the seal of that court, which is made with green wax. Cowell.

GREENBACK. This term is the ordinary name popularly applied to some United States treasury issues, and is not applied to any other species of money; Hickey v. State, 23 Ind. 21; but this term alone is not a proper denomination for these notes; Wesley v. State, 61 Ala. 282. See LEGAL TENDER.

GREENHEW. **In Forest Law.** The same as vert *(q. v.)*. *Termes de la Ley.*

GREFFE. The register of the court of a fief. Jenks, 1 Sel. Essays Anglo-Amer. L. H. 43.

GREFFIERS. **In French Law.** Registrars, or clerks of the courts. They are officials attached to the courts to assist the judges in keeping the minutes, writing out judgments, orders, and other decisions given by the tribunals, and deliver copies thereof to the applicants.

GREGORIAN CODE. See CODE.

GREGORIAN EPOCH. The time from which the Gregorian calendar or computation dates; i. e. from the year 1582.

GREMIO. **In Spanish Law.** The union of merchants, artisans, laborers, or other persons who follow the same pursuits and are governed by the same regulations. The word *guild*, in English, has nearly the same signification.

GREMIUM (Lat.). Bosom. Ainsworth, Dict. *De gremio mittere*, to send from their bosom; used of one sent by an ecclesiastical corporation or body. *A latere mittere*, to send from his side, or one sent by an individual: as, a legate sent by the pope. Du Cange. In English law, an inheritance is said to be *in gremio legis*, in the bosom or under the protection of the law, when it is in abeyance. See IN NUBIBUS.

GRENVILLE ACT. The statute 10 Geo. III. c. 16, by which the jurisdiction over parliamentary election petitions was transferred from the whole house of commons to select committees. Repealed by 9 Geo. IV. c. 22.

GRESSOME (variously spelled *Gressame, Grossome;* Scotch, *grassum*). A fine due from a copyholder on the death of his lord. Plowd. fol. 271, 285; 1 Stra. 654. Cowell derives it from *gersum.*

In Scotland. *Grassum* is a fine paid for the making or renewing of a lease. Paterson.

GRETNA GREEN. A farmsteading near the village of Springfield, Dumfriesshire, Scotland, eight miles northwest of Carlisle. Cent. Dict. The name was afterward applied to the village which became notorious for the celebration of irregular marriages. By the law of Scotland nothing was required to constitute a marriage but the mutual declaration of the parties in the presence of witnesses—a ceremony which could be performed instantly, and it was immaterial whether or not the parties were minors. These conditions afforded an easy method of evading the Marriage Act, 26 Geo. II. c. 33, which required the publication of banns or a license. By act 19 & 20 Vict. c. 96, § 1, no irregular marriage in Scotland is now valid unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage.

GREVA. In old records. The seashore, sand, or beach. 2 Mon. Angl. 625; Cowell.

GREVE. A word of power or authority. Cowell.

GRIEVED. Aggrieved. 3 East 22.

GRITH. Peace; protection. *Termes de la Ley.*

GRITHBRECH (Sax. *grith*, peace, and *brych*, breaking). Breach of the king's peace, as opposed to *frithbrech*, a breach of the nation's peace with other nations. Leges Hen. I. c. 36; Chart. Willielm. Conq. Eccles. S. Pauli in Hist. ejusd. fol. 90.

GRITHSTOLE. A place of sanctuary. Cowell.

GROCER. **In Old English Law.** A merchant or trader who engrossed all vendible merchandise; an engrosser *(q. v.)*. St. 37 Edw. III. c. 5.

GROCERIES. Articles of provision; the wares of a grocer; general supplies for table and household use.

Shovels, pails, and buckets have been held not to be groceries, although usually kept in a country grocery shop; Gay v. Southworth, 113 Mass. 335. It is a question of fact whether wines and liquors are groceries; Niagara Fire Ins. Co. v. De Graff, 12 Mich. 135. A grocery has been held to be an "offensive trade or calling" within a prohibition of use of a dwelling-house; Dorr v. Harrahan, 101 Mass. 531, 3 Am. Rep. 398. Groceries kept as part of the stock, by a merchant, are not "provisions found on hand for family use," within the meaning of an exemption law; State v. Conner, 73 Mo. 575. See PROVISIONS.

GROOM OF THE STOLE. In England an officer of the royal household who has charge of the king's wardrobe.

GROOM PORTER. An officer belonging to the royal household. Jacob.

GROSS. Absolute, entire. A thing in gross exists in its own right, and not as an appendage to another thing. See IN GROSS.

GROSS AVERAGE. That kind of average which falls on the ship, cargo, and freight, and is distinguished from particular average. See AVERAGE.

GROSS EARNINGS. Earnings of a railroad company while performing work incident to transportation, and reasonably with-

in its corporate power, including the amount received from its equipment (steam shovels, work trains, etc.), but not from the sale of old equipment and surplus supplies and from the repair of cars, were so considered; State v. Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426.

GROSS NEGLIGENCE. The omission of that care which even inattentive and thoughtless men never fail to take of their own property. Jones, Bailm.; Neal v. Gillett, 23 Conn. 437; 3 Hurlst. & C. 337.

Such as evidences wilfulness; such a gross want of care and regard for the right of others as to justify the presumption of wilfulness or wantonness. 2 Thomp. Neg. 1264, § 52; such as implies a disregard of consequences or a willingness to inflict injury. Deering, Neg. § 29; Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

Lata culpa, or, as the Roman lawyers most accurately called it, *dolo proxima*, is, in practice, considered as equivalent to *dolus*, or fraud itself. It must not be confounded, however, with fraud; for it may exist consistently with good faith and honesty of intention, according to common-law authorities; 32 Vt. 652; Shearm. & Red. Neg. § 3; Webb, Poll. Torts 538, n.

The distinction between degrees of negligence is not very sharply drawn in the later cases. See BAILMENT; NEGLIGENCE.

The intentional failure to perform a manifest duty, in reckless disregard of the consequences as affecting the life or property of another; a thoughtless disregard of consequences without the exertion of any effort to avoid them. McDonald v. Ry. Co. (Tex.) 21 S. W. 775; Schindler v. Ry. Co., 87 Mich. 400, 49 N. W. 670. It has been held to have no legal significance which imports other than a want of due care; Stringer v. R. Co., 99 Ala. 397, 13 South. 80.

GROSS RECEIPTS. See TAX.

GROSS WEIGHT. The total weight of goods or merchandise, with the chests, bags, and the like, from which are to be deducted tare and tret.

GROSSE AVENTURE, CONTRAT À LA. (Fr.). In French Marine Law. The contract of bottomry. Ord. Mar. liv. 3, tit. 5.

GROSSEMENT (L. Fr.). Largely; greatly. *Grossement enciente* or *ensient*. Big with child; in the last stage of pregnancy. Plowd. 76.

GROSSOME. In Old English Law. A fine paid for a lease. Corrupted from *gersum*. Plowd. fol. 270, 285; Cowell.

GROUND. Land; soil; earth. See LAND. It may include an improved town lot; Ferree v. School Dist., 76 Pa. 378.

GROUND ANNUAL. In Scotch Law. An annual rent of two kinds; *first*, the feu-duties payable to the lords of erection and their successors; *second*, the rents reserved for building-lots in a city, where *sub-feus* are prohibited. This rent is in the nature of a perpetual annuity. Bell, Dict.; Erskine, Inst. 11. 3. 52.

GROUND LANDLORD. The grantor of an estate on which a ground-rent is reserved.

GROUND OF ACTION. The foundation, basis, or data, upon which a cause of action rests. See CAUSE OF ACTION.

GROUND RENT. A rent reserved to himself and his heirs, by the grantor of land in fee-simple, out of the land conveyed. See Kenege v. Elliott, 9 Watts. (Pa.) 262; Bosler v. Kuhn, 8 W. & S. (Pa.) 185.

In Pennsylvania it is real estate; Cobb v. Biddle, 14 Pa. 444. See Hirst's Estate, 147 Pa. 319, 23 Atl. 455. The interest of the owner of the rent is an estate altogether distinct and of a very different nature from that which the owner of the land has in the land itself. Each is the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee; Irwin v. Bank, 1 Pa. 349; Taylor v. Taylor, 47 Md. 300. So, the owner of the rent is not liable for any part of the taxes assessed upon the owner of the land out of which the rent issues; Philadelphia Library Co. v. Ingham, 1 Whart. (Pa.) 72. Being real estate, it is bound by a judgment, and may be mortgaged like other real estate. It is a rent-service; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337.

A ground-rent, being a rent-service, is, of course, subject to all the incidents of such a rent. Thus, it is distrainable of *common right*, that is, by the common law; Co. Litt. 142 *a;* Kenege v. Elliott, 9 Watts (Pa.) 262. So, also, it may be apportioned; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Myers v. Silljacks, 58 Md. 323. And this sometimes takes place by operation of law, as when the owner of the rent purchases part of the land; in which case the rent is apportioned, and extinguished *pro tanto;* Littleton 222. And the reason of the extinguishment is that a *rent-service* is given as a return for the possession of the land. Thus, upon the enjoyment of the lands depends the obligation to pay the rent; and if the owner of the rent purchases part of the land, the tenant, no longer enjoying that portion, is not liable to pay rent for it, and so much of the rent as issued out of that portion is, consequently, extinguished. See 2 Bla. Com. 41; St. Mary's Church v. Miles, 1 Whart. (Pa.) 235; Ingersoll v. Sergeant, *id.* 352.

At law, the legal ownership of these two estates—that in the rent and that in the land out of which it issues—can coexist only while they are held by different persons or

in different rights; for the moment they unite in one person in the same right, the rent is merged and extinguished; Phillips v. Bonsall, 2 Binn. (Pa.) 142; Penington v. Coats, 6 Whart. (Pa.) 283. But if the one estate or interest be legal and the other equitable, there is no merger; Penington v. Coats, 6 Whart. (Pa.) 283. In equity, however, this doctrine of merger is subject to very great qualification. A merger is not favored in equity; and the doctrine there is that although in some cases, where the legal estates unite in the same person in the same right, a merger will take place *against* the intention of the party whose interests are united (see Helmbold v. Man, 4 Whart. (Pa.) 421, and cases there cited), yet, as a general rule, the *intention*, actual or presumed, of such party will govern; and where no intention is expressed, if it appears most for his advantage that a merger should not take place, such will be presumed to have been his intention; and that it is only in cases where it is perfectly indifferent to the party thus interested that, in equity, a merger occurs; Dougherty v. Jack, 5 Watts (Pa.) 457, 30 Am. Dec. 335; Helmbold v. Man, 4 Whart. (Pa.) 421; Richards v. Ayres, 1 W. & S. (Pa.) 487.

A ground-rent being a freehold estate, created by deed and perpetual by the terms of its creation, no mere lapse of time without demand of payment raises, at common law, a presumption that the estate has been released; Trustees of St. Mary's Church v. Miles, 1 Whart. (Pa.) 229. But this is otherwise in Pennsylvania now, by act of April 27, 1855, sec. 7, P. L. 369, whereby a presumption of a release or extinguishment is created where no payment, claim, or demand is made for the rent, nor any declaration or acknowledgment of its existence made by the owner of the premises subject to the rent, for twenty-one years. This applies to the estate in the rent, and comprehends the future payments. And this act makes no exception in behalf of persons under disability when the title accrues, nor of persons taking as heirs at law or distributees; where a life tenant in ground rent released the same absolutely, as against the remainderman the limitation commenced to run from the date on which the first payment thereafter became due and unpaid, rather than at the death of the life tenant; Wallace v. Church, 152 Pa. 258, 25 Atl. 520. It has been held that this act, affecting the remedy merely, is not unconstitutional as impairing the obligation of a contract; Biddle v. Hooven, 120 Pa. 221, 13 Atl. 927; Clay v. Iseminger, 190 Pa. 580, 42 Atl. 1039, affirmed in Wilson v. Iseminger, 185 U. S. 55, 22 Sup. Ct. 573, 46 L. Ed. 804. Independently of this act of assembly, *arrearages* of rent which had fallen due twenty years before commencement of suit might be presumed to have been paid; Trustees of St. Mary's Church v. Miles, 1 Whart. (Pa.) 229. These *arrearages* are a lien upon the land out of which the rent issues; but, as a general rule, the lien is discharged by a judicial sale of the land, and attaches to the fund raised by the sale. See Bantleon v. Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430; Sands v. Smith, 3 W. & S. (Pa.) 9; Buck v. Fisher, 4 Whart. (Pa.) 516; Catlin v. Robinson, 2 Watts (Pa.) 378; Irwin v. Bank, 1 Pa. 349.

Ground rents in Pennsylvania were formerly made irredeemable, usually after the lapse of a certain period after their creation. But now the creation of such is forbidden by act of 22 April, 1850. But this does not prohibit the reservation of ground-rents redeemable only on the death of a person in whom a life interest in the rents is vested; Skelley's Appeal, 11 W. N. Cas. (Pa.) 11. The act of April 15, 1869, providing for the extinguishment of irredeemable ground-rents, theretofore created, by legal proceedings instituted by the owner of the land, without the consent of the owner of the ground-rent, was declared unconstitutional; Palairet's Appeal, 67 Pa. 479, 5 Am. Rep. 450.

As ground-rent deeds are usually drawn, the owner of the rent has three remedies for the recovery of the arrearages, viz., by action (of debt or covenant; but debt is now seldom employed), distress, and (for want of sufficient distress) the right to re-enter and hold the land as of the grantor's former estate.

As used in a 99-year lease renewable forever, it includes not only the rents but includes the reversion; Camp v. Boyd, 229 U. S. 530, 33 Sup. Ct. 785, 57 L. Ed. 1317.

See 2 Am. L. Reg. 577; 3 *id.* 65; Cadw. Gr. Rents; Mitch. R. P.

GROUNDAGE. The consideration paid for standing a ship in a port. Jacob, L. Dict.

GROWING CROPS. Growing crops raised by the cultivation of man, are in certain cases personal chattels, and in others, part of the realty. A crop is to be considered as growing from the time the seed is put in the ground, at which time the seed is no longer a chattel, but becomes part of the realty, and passes with a sale of it; Wilkinson v. Ketler, 69 Ala. 435. If planted by the owner of the land, they are a part of the realty, but may by sale become personal chattels, if they are fit for harvest, and the sale contemplates their being cut and carried off, and not a right in the vendee to enter and cultivate. So even with trees; Claflin v. Carpenter, 4 Metc. (Mass.) 580, 38 Am. Dec. 381; 9 B. & C. 561; Olmstead v. Niles, 7 N. H. 522; 11 Co. 50. The distinction has been made that growing crops of grain and annual productions raised by cultivation and the industry of man are personal chattels; while trees, fruit, or grass and other natural products of the earth are parcel of the land; Green v. Armstrong, 1

Den. (N. Y.) 550. Matured apples are held personalty; Doty v. R. Co., 136 Mo. App. 254, 116 S. W. 1126. But if the owner in fee conveys land before the crop is severed, the crop passes with the land as appertaining to it; Powell v. Rich, 41 Ill. 466; Backinstoss v. Stahler's Adm'rs, 33 Pa. 254, 75 Am. Dec. 592; Bludworth v. Hunter, 9 Rob. (La.) 256; and the same rule applies to foreclosure sales; Lane v. King, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; Bittinger v. Baker, 29 Pa. 68, 70 Am. Dec. 154; Sherman v. Willet, 42 N. Y. 150. But before the foreclosure sale is confirmed, the purchaser has no title, with right to possession in the crops growing on the land at the time of sale, that will entitle him to maintain replevin therefor after they have been severed by the person in possession; Woehler v. Endter, 46 Wis. 301, 1 N. W. 329, 50 N. W. 1099. Though growing crops, unless reserved, pass under a conveyance of the land; Carpenter v. Carpenter, 154 Mich. 100, 117 N. W. 598; In re Andersen's Estate, 83 Neb. 8, 118 N. W. 1108, 131 Am. St. Rep. 613, 17 Ann. Cas. 941; they are subject to levy and sale the same as other personal property; Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699. If a tenant, who holds for a certain time, plant annual crops, or even trees in a nursery for the purposes of transplantation and sale, they are personal chattels when fit for harvest; Miller v. Baker, 1 Metc. (Mass.) 27; Whitmarsh v. Walker, 1 Metc. (Mass.) 313; 4 Taunt. 316. If planted by a tenant for an uncertain period, they are regarded, whether mature or not, in many respects as personal property, but liable to become part of the realty if the tenant voluntarily abandons or forfeits possession of the premises; 5 Co. 116 *a;* Debow v. Colfax, 10 N. J. L. 128; Co. Litt. 55; Whipple v. Foot, 2 Johns. (N. Y.) 418, 421, note, 3 Am. Dec. 442. See Craddock v. Riddlesbarger, 2 Dana (Ky.) 206; Stambaugh v. Yeates, 2 Rawle (Pa.) 161; 1 Washb. R. P. 3.

See as to validity and effect of mortgages on crops planted and unplanted, MORTGAGE.

Between the lessor of lands and his lessee on shares, growing crops are personal property, and they may be sold by parol as against a subsequent grantee, especially where the latter has notice of such sale; Nuernberger v. Von Der Heidt, 39 Ill. App. 404. The grantor of farm lands may reserve the growing crops by oral agreement; Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

A successful plaintiff in ejectment is entitled to a standing crop; Hartshorne v. Ingels, 23 Okl. 535, 101 Pac. 1045, 23 L. R. A. (N. S.) 531; Craig v. Watson, 68 Ga. 115; Cox v. Hamilton, 69 N. C. 30; Carlisle v. Killebrew, 89 Ala. 329, 6 South. 756, 6 L. R. A. 617; but not where he has recovered rent for the current year; Gardner v. Kersey, 39 Ga. 664, 99 Am. Dec. 484.

The measure of damages for the destruction of a crop planted, but not yet up, is the rental value of the land and the cost of the seed and labor; but when the crop is somewhat matured, so that the product can be fairly determined, the value thereof when destroyed is the measure of damages; Ohio & Mississippi Ry. Co. v. Nuetzel, 43 Ill. App. 108. Where a crop is lost through the wrongful act of another, the measure of damages is the market value of the crop less the cost of producing, harvesting, and marketing it; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Gulf, C. & S. F. Ry. Co. v. Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546.

See AWAY-GOING CROPS; EMBLEMENTS; WAY-GOING CROPS.

GROWTH HALFPENNY. A rate paid in some places for the tithe of every fat beast, ox, or other unfruitful cattle. Clayt. 92.

GRUARII. The principal officers of a forest. Cowell.

GUADALUPE HIDALGO, TREATY OF. A treaty between the United States and Mexico, terminating the Mexican War, dated February 2, 1848. It was communicated by the president to the senate on February 23, 1848, and having been amended by the senate and ratified, it was afterwards ratified by the Mexican congress, both houses of which were required to concur. It was somewhat modified by the treaty with Mexico of 1853, by which a large territory was acquired from Mexico. See GADSDEN PURCHASE.

GUADIA. A pledge; a custom. Spel. Gloss; Calv. Lex.

GUAM. The largest and most populous of the Ladrone Islands. It was occupied by the Spaniards in 1688, was captured by the United States steamship Charleston in June, 1898, and was ceded to the United States by the treaty of Paris, December 10, 1898. It is governed by a "Naval Governor," an officer of the United States navy who is commandant of the naval station. It has a court of appeal and courts of first instance.

GUARANTEE. He to whom a guaranty is made. Also, to make oneself responsible for the obligation of another.

The guarantee is entitled to receive payment, in the first place, from the debtor, and, secondly, from the guarantor. He must be careful not to give time, beyond that stipulated in the original agreement, to the debtor, without the consent of the guarantor. The guarantee should, at the instance of the guarantor, bring an action against the principal for the recovery of the debt; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Cope v. Smith, 8 S. & R. (Pa.) 116, 11 Am. Dec. 582; 2 Bro. C. C. 579, 582. But the mere omission of the guarantee to sue the principal debtor will not, in general, discharge the guarantor; Cope v. Smith, 8 S. &

R. (Pa.) 112, 11 Am. Dec. 582. See GUARANTY.

GUARANTOR. He who makes a guaranty.

GUARANTY. An undertaking to answer for another's liability, and collateral thereto. A collateral undertaking to pay the debt of another in case he does not pay it. Shaw, C. J., Dole v. Young, 24 Pick. (Mass.) 252.

A provision to answer for the payment of some debt, or the performance of some duty in the case of the failure of some person who, in the first instance, is liable for such payment or performance; Gallagher v. Nichols, 60 N. Y. 438; Bayl. Sur. & Guar. 2.

A promise to answer for the debt, default, or miscarriage of another person. First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94. See Gridley v. Capen, 72 Ill. 13.

It is distinguished from suretyship in being a secondary, while suretyship is a primary, obligation; or, as sometimes defined, guaranty is an undertaking that the debtor shall pay; suretyship, that the debt shall be paid. Or again, a contract of suretyship creates a liability for the performance of the act in question at the proper time, while the contract of guaranty creates a liability for the ability of the debtor to perform the act; Bayl. Sur. & Guar. 3. Guaranty is an engagement to pay on a debtor's insolvency, if due diligence be used to obtain payment. Reigart v. White, 52 Pa. 440. But if the principal debtor is insolvent, the creditor need not pursue him before suing the guarantor; National Bank of Chester County v. Thomas, 220 Pa. 360, 69 Atl. 813.

The undertaking is essentially in the alternative. A guarantor cannot be sued as a promisor, as the surety may; his contract must be specially set forth. A guarantor warrants the solvency of the promisor, which an indorser does not; President, etc., of the Oxford Bank v. Haynes, 8 Pick. (Mass.) 423, 19 Am. Dec. 334.

The distinction between suretyship and guaranty has been thus expressed: A surety is usually bound with his principal by the same instrument, executed at the same time, and on the same consideration. He is an original promisor and debtor from the beginning, and is held, ordinarily, to know every default of his principal. Usually, he will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby. On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often supported on a separate consideration from that supporting the contract of the principal. The original contract of his principal is not his contract, and he is not bound to take notice of its non-performance. He is often discharged by the mere indulgence of the creditor to the principal, and is usually not liable unless notified of the default of the principal. Brandt, Sur. & Guar. § 1. See also, Markland Min. & Mfg. Co. v. Kimmel, 87 Ind. 560; White's Adm'r v. Life Ass'n, 63 Ala. 419, 35 Am. Rep. 45; Chatham Nat. Bank v. Pratt, 135 N. Y. 423, 32 N. E. 236. A written guaranty which fails to show on its face the person to whom the guaranty is made is void; Marston v. French, 17 N. Y. Supp. 509; and where a contract contains no guaranty, parol evidence of one is inadmissible; Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18, 36 L. Ed. 880.

At common law, a guaranty could be made by parol; but by the Statute of Frauds, 29 Car. II. c. 3, re-enacted almost in terms in the several states, it is provided that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." While, under this statute "no action shall be brought" on a contract not in writing, etc., yet such a contract may be enforced by a court against an attorney, by summary proceedings; 1 Cr. & J. 374.

"Any special promise" in the act does not apply to promises implied in law; Brandt, Sur. & Guar. § 53.

The following classes of promises have been held not within the statute, and valid though made by parol.

First, where there is a liability pre-existent to the new promise.

1. Where the principal debtor is discharged by the new promise being made; Gleason v. Briggs, 28 Vt. 135; Walker v. Penniman, 8 Gray (Mass.) 233; 1 Q. B. 933; Skelton v. Brewster, 8 Johns. (N. Y.) 376; Browne, Stat. Fr. §§ 166, 193; and an entry of such discharge in the creditor's books is sufficient proof; Corbett v. Cochran, 3 Hill (S. C.) 41, 30 Am. Dec. 348. This may be done by agreement to that effect; Wood v. Corcoran, 1 Allen (Mass.) 405; by novation, by substitution, or by discharge under final process; 1 B. & Ald. 297; Blankenship & Co. v. Tillman (Tex.) 18 S. W. 646; but mere forbearance, or an agreement to forbear pressing the claim, is not enough; 1 Sm. L. Cas. 387; Harrington v. Rich, 6 Vt. 666.

2. Where the principal obligation is void or not enforceable when the new promise is made, and this is contemplated by the parties. But if not so contemplated, then the new promise is void; Burge, Surety 10; 1 Burr. 373. But see, on this point, Nabb v. Koontz, 17 Md. 283; Nelson v. Dubois, 13

Johns. (N. Y.) 175; Connerat v. Goldsmith, 6 Ga. 14.

3. So where the promise does not refer to the particular debt, or where this is unascertained; 1 Wils. 305.

In these three classes the principal obligation ceases to exist after the new promise is made.

4. Where the promisor undertakes for his own debt. But the mere fact that he is indebted will not suffice, unless his promise refers to that debt; nor is it sufficient if he subsequently becomes indebted on his own account, if not indebted when he promises, or if it is then contingent; Suydam v. Westfall, 4 Hill (N. Y.) 211. See Morris v. Gaines, 82 Tex. 255, 17 S. W. 538. The provision of the statute does not apply whenever the main purpose of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, although it may be in form a promise to pay the debt of another; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. So, if the vendee of land promise to pay the purchase-money on a debt due by the vendor; Morris v. Gaines, 82 Tex. 255, 17 S. W. 538.

5. Where the new promise is in consideration of property placed by the debtor in the promisor's hands; Alger v. Scoville, 1 Gray (Mass.) 391; Maxwell v. Haynes, 41 Me. 559; Meyer v. Hartman, 72 Ill. 442. And where the new promise is made in a transaction which is in substance a sale to the promisor; Brandt, Sur. & Guar. § 65.

6. Where the promise does not relate to the promisor's property, but to that of the debtor in the hands of the promisor.

7. Where the promise is made to the debtor, not the creditor; because this is not the debt of "another" than the promisee; Alger v. Scoville, 1 Gray (Mass.) 391; 11 Ad. & E. 438.

8. Where the creditor surrenders a lien against the debtor or on his property, which the promisor acquires or is benefited by; Fell, Guar. c. 2; Brandt, Sur. & Guar. §§ 63, 64; 2 B. & Ald. 613; Mallory v. Gillett, 21 N. Y. 412; but not so where the surrender of the lien does not benefit the promisor; Nelson v. Boynton, 3 Metc. (Mass.) 396, 37 Am. Dec. 148; Mallory v. Gillett, 21 N. Y. 412.

In the five last classes, the principal debt may still subsist concurrently with the new promise, and the creditor will have a double remedy; but the fulfillment of the new promise will discharge the principal debt, because he can have but one satisfaction. The repeated dicta, that if the principal debt subsists, the promise is collateral and within the statute, are not sustainable; Cross v. Richardson, 30 Vt. 641. But the general doctrine now is that the transaction must amount to a purchase, the engagement for the debt being the consideration therefor, in whole or in part; Alger v. Scoville, 1 Gray (Mass.) 391.

Where one owes a debt to another, and promises to pay his debt to a creditor of such other party, the promise is not within the statute; Dearborn v. Parks, 5 Greenl. (Me.) 81, 17 Am. Dec. 206; 3 B. & C. 842.

Second, if the new promise is for a liability then first incurred, it is original, if exclusive credit is given to the promisor; Chambers v. Robbins, 28 Conn. 544; Browne, Stat. Fr. § 195. Whether exclusive credit is so given is a question of fact for the jury; Brooke v. Waring, 7 Gill (Md.) 7. Merely charging the debtor on a book-account is not conclusive.

Whether promises merely to indemnify come within the statute is not wholly settled; Browne, Stat. Fr. § 158; Brandt, Sur. & Guar. §§ 59, 61. In many cases they are held to be original promises, and not within the statute; Chapin v. Merrill, 4 Wend. (N. Y.) 657. But few of the cases, however, have been decided solely on this ground, most of them falling within the classes of original promises before specified. On principle, such contracts seem within the statute if there is a liability on the part of any third person to the promisee. If not, these promises would be original under class seven, above. Where the indemnity is against the promisor's own default, he is already liable without his promise to indemnify; and to make the promise collateral would make the statute a covert fraud; 10 Ad. & E. 453; Alger v. Scoville, 1 Gray (Mass.) 391; Harrison v. Sawtel, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337; Jones v. Shorter, 1 Ga. 294, 44 Am. Dec. 649; Dunn v. West, 5 B. Monr. (Ky.) 382; Beaman's Adm'r v. Russell, 20 Vt. 205, 49 Am. Dec. 775; Holmes v. Knights, 10 N. H. 175; Stocking v. Sage, 1 Conn. 519; Linscott v. Fernald, 5 Me. 504. The weight of American authority is said to be in favor of applying the statute to cases of indemnity; Brandt, Sur. & Guar. § 59, n. When the promise to indemnify is in fact a promise to pay the debt of another it is within the statute. See Mallory v. Gillett, 21 N. Y. 412. A promise to indemnify another against loss in becoming surety on a replevin bond is within the statute; Easter v. White, 12 Ohio St. 219. So on a bond for stay of execution; Nugent v. Wolfe, 111 Pa. 471, 4 Atl. 15, 56 Am. Rep. 291. But a promise to indemnify one if he will become bail in a criminal case has been held not within the statute; 4 B. & S. 414.

A verbal promise to save certain parties harmless from all loss by promisees as sureties on account of a bond signed at promisor's request is valid; Hawes v. Murphy, 191 Mass. 469, 78 N. E. 109; and so where a mortgagee agreed verbally to indemnify a purchaser of part of the mortgaged property against judgment liens; Peterson v. Creason, 47 Or. 69, 81 Pac. 574; a verbal promise

by an attorney to sureties on an appellee's bond to protect them; Esch v. White, 76 Minn. 220, 78 N. W. 1114; but an oral promise to reimburse plaintiff as surety on the bond of another for any loss resulting therefrom, was held to be within the statute; Craft v. Lott, 87 Miss. 590, 40 South. 462, 6 Ann. Cas. 670. An oral promise to indemnify another for becoming surety on the bond of a third, is not within the statute; Hartley v. Sandford, 66 N. J. L. 40, 48 Atl. 1009. A parol promise by a surety on a sheriff's bond to indemnify a co-surety against any loss, is within the statute; Wolverton v. Davis, 85 Va. 64, 6 S. E. 619, 17 Am. St. Rep. 56; but a verbal agreement by the principal that he would save harmless the sureties from liability on his bond, is valid as an original undertaking; Barth v. Graf, 101 Wis. 27, 76 N. W. 1100.

A contract of insurance is not within the statute; Mattingly v. Ins. Co., 120 Ky. 768, 83 S. W. 577.

Third, guaranties may be given for liabilities thereafter to be incurred, and will attach when the liability actually accrues. In this class the promise will be original, and not within the statute, if credit is given to the promisor exclusively; 2 Term 80. See Pomeroy v. Patterson, 40 Ill. App. 275. But where the future obligation is contingent merely, the new promise is held not within the statute, on the ground that there is no principal liability when the collateral one is incurred; Browne, Stat. Fr. § 196. But this doctrine is questionable if the agreement distinctly contemplates the contingency; Carville v. Crane, 5 Hill (N. Y.) 483, 40 Am. Dec. 364. An offer to guarantee must be accepted within a reasonable time; but no notice of acceptance is required if property has been delivered under the guaranty; Paige v. Parker, 8 Gray (Mass.) 211; Farmers' & Mechanics' Bank v. Kercheval, 2 Mich. 511; Doud v. Bank, 54 Fed. 846, 4 C. C. A. 607; Davis v. Wells, 104 U. S. 159, 26 L. Ed. 686.

"A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract;" Davis Sewing Mach. Co. v. Richards, 115 U. S. 524, 6 Sup. Ct. 173, 29 L. Ed. 480. See 34 Am. L. Reg. & Rev. 257.

The agreement of a *del credere* agent to pay for goods sold by him is not within the statute; Sherwood v. Stone, 14 N. Y. 267.

The form of the writing is not material; it may consist of one or more writings (provided they refer to each other on their face: Wiley v. Robert, 27 Mo. 388; but see Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 14 L. Ed. 493); in such case it is enough if one be signed; 11 East 142. A minute of a vote of a corporation is sufficient; Tufts v. Mining Co., 14 Allen (Mass.) 407.

There is a conflict of authority as to whether the consideration need appear in the writing. It was finally settled in England that it must; 4 B. & Ald. 595; but this is now changed by statute 19 & 20 Vict. The cases are reviewed in Brandt, Sur. & Guar. § 82. A seal imports a consideration; *id.* As to the signature of the party to be charged, a seal alone is generally held sufficient; Stra. 764; so is a mark; Barnard v. Heydrick, 49 Barb. (N. Y.) 62; 2 M. & S. 286; and a signature by the initials only; 1 Den. 471; Sanborn v. Flagler, 9 Allen (Mass.) 474; and a signature on a telegram; Dunning & Smith v. Roberts, 35 Barb. (N. Y.) 463. The signature need not be at the foot of the writing; 2 M. & W. 653.

Guaranty may be made for the tort, as well as the contract of another, and then comes under the term miscarriage in the statute; 2 B. & Ald. 613; Turner v. Hubbell, 2 Day (Conn.) 457, 2 Am. Dec. 115; 1 Wils. 305; Stone v. Hooker, 9 Cow. (N. Y.) 154; Avery v. Halsey, 14 Pick. (Mass.) 174.

All guaranties need a consideration to support them. A guaranty of the payment of a negotiable promissory note, written by a third person upon a note before its delivery, need express no consideration, even where the law requires the consideration of the guaranty to be expressed in writing; but the consideration which the note upon its face implies to have passed between the original parties is sufficient; Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743. Forbearance to sue is good consideration; Browne, Stat. Fr. § 190; Sage v. Wilcox, 6 Conn. 81; 27 L. J. Exch. 120; Sanders v. Barlow, 21 Fed. 836; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279. Where the guaranty is contemporaneous with the principal obligation, it shares the consideration of the latter; Leonard v. Vredenburgh, 8 Johns. (N. Y.) 29, 5 Am. Dec. 317; Rabaud v. De Wolf, 1 Paine 580, Fed. Cas. No. 11,519; Townsley v. Sumrall, 2 Pet. (U. S.) 170, 7 L. Ed. 386; Simons v. Steele, 36 N. H. 73.

A guaranty may be for a single act, or may be continuous. The cases are conflicting, as the question is purely one of the intention of the particular contract; Brandt, Sur. & Guar. 156. The tendency in this country is

said to be against construing guaranties as continuing, unless the intention of the parties is so clear as not to admit of a reasonable doubt; Bayl. Sur. & Guar. 7, citing Birdsall v. Heacock, 32 Ohio St. 177, 30 Am. Rep. 572; Lent v. Padleford, 2 Am. Lead. Cas. 141; Whitney v. Groot, 24 Wend. (N. Y.) 82; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. If the object be to give a standing credit to be used from time to time, either indefinitely or for a fixed period, the liability is continuing; Sherburne v. Paper Co., 40 Ill. App. 383; Conduitt v. Ryan, 3 Ind. App. 1, 29 N. E. 160; but if no time is fixed and nothing indicates the continuance of the obligation, the presumption is in favor of a limited liability as to time; Crist v. Burlingame, 62 Barb. (N. Y.) 351. A guaranty of any bills of account for goods sold another to a certain amount is a continuing guaranty; Sherburne v. Paper Co., 40 Ill. App. 383. A sealed continuing guaranty is revoked by the death of the guarantor; Slagle & Co. v. Forney's Ex'rs, 22 W. N. C. (Pa.) 457.

A continuing guaranty (so far as it is a mere offer) is revoked as to future action by the death of the guarantor; 5 Q. B. D. 42.

The authorities are not agreed as to the negotiability of a guaranty. It is held that a guaranty which is a separate and distinct instrument is not negotiable separately; Ekel v. Snevily, 3 W. & S. (Pa.) 272, 38 Am. Dec. 758; Sandford v. Norton, 14 Vt. 233; Irish v. Cutter, 31 Me. 536; Gallagher v. White, 31 Barb. (N. Y.) 92; True v. Fuller, 21 Pick. (Mass.) 140. The right of the acceptor of a bill, to the benefit of a guaranty given to him, is not transferable to a holder of the bill, unless it was given for the purpose of being exhibited to other parties; 3 Ch. App. 756. But if a guaranty is on a negotiable note, it is negotiable with the note; and if the note is to bearer, the guaranty has been held to be negotiable in itself; Ketchell v. Burns, 24 Wend. (N. Y.) 456; Smith v. Dickinson, 6 Humphr. (Tenn.) 261, 44 Am. Dec. 306. But an equitable interest passes by transfer, and the assignee may sue in the name of the assignor; Reed v. Garvin, 12 S. & R. 100; Partridge v. Davis, 20 Vt. 506. It has been held that no suit can be maintained upon a guaranty except by the person with whom it was made; McDoal v. Yoemans, 8 Watts (Pa.) 361; but it has also been held that a guaranty of a note may be sued on by any person who advances money on it, but that it is not negotiable unless made upon the note the payment of which it guarantees; McLaren v. Watson's Ex'rs, 26 Wend. (N. Y.) 425, 37 Am. Dec. 260.

It is held that a guaranty is not enforceable by others than those to whom it is directed; Bleeker v. Hyde, 3 McLean 279, Fed. Cas. No. 1,537; Mellen v. Whipple, 1 Gray (Mass.) 317; Blymire v. Boistle, 6 Watts (Pa.) 182, 31 Am. Dec. 458; although they advance goods thereon; Grant v. Naylor, 4 Cra. (U. S.) 224, 2 L. Ed. 603.

In one case it was held that the guarantor was not bound where the guaranty was addressed to two and acted on by one of them only; Smith v. Montgomery, 3 Tex. 199. It was held, also, that the guaranty was not enforceable by the survivor of two to whom it was addressed, for causes occurring since the decease of the other; 7 Term 254.

In the case of promissory notes, a distinction has sometimes been made between a guaranty of payment and a guaranty of collectibility; the latter requiring that the holder shall diligently prosecute the principal debtor without avail; Day v. Elmore, 4 Wis. 190; Clark v. Merriam, 25 Conn. 576; Van Derveer v. Wright, 6 Barb. (N. Y.) 547; Blanchard v. Wood, 26 Me. 358; Crane v. Wheeler, 48 Minn. 207, 50 N. W. 1033.

It has in some cases been held that an indorsement in blank on a promissory note by a stranger to the note was *prima facie* a guaranty; Donovan v. Griswold, 37 Ill. App. 616. By Neg. Inst. Act §§ 63, 64, all such signers are liable as indorsers. A second acceptance on a bill of exchange may amount to a guaranty; 2 Camp. 447.

A corporation (unless by statutory authority) cannot guarantee a liability unless it is created in the ordinary course of its business; Ward v. Joslin, 105 Fed. 224, 44 C. C. A. 456, affirmed 186 U. S. 142, 22 Sup. Ct. 807, 46 L. Ed. 1093. Where a corporation by the unanimous consent of its stockholders guaranteed the debt of another corporation such guaranty was subject to the claims of its creditors; In re Prospect Worsted Mills, 126 Fed. 1011. A lumber corporation has no power to bind itself as a guarantor for the performance of a building contract; In re Smith Lumber Co., 132 Fed. 620; *contra*, Central Lumber Co. v. Kelter, 201 Ill. 503, 66 N. E. 543. A corporation may guarantee dividends on its stock; Wisconsin Lumber Co. v. Tel. Co., 127 Ia. 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387. Guarantees of payment of bonds taken by a trust company in the ordinary course of business are not *ultra vires;* Broadway Nat. Bank v. Baker, 176 Mass. 294, 57 N. E. 603; but it is *ultra vires* for a manufacturing corporation to guarantee the payment of rent although it was given to induce the lessee to become a customer; Koehler & Co. v. Reinheimer, 26 App. Div. 1, 49 N. Y. Supp. 755. In Aaronson v. Brewing Co., 26 Misc. 655, 56 N. Y. Supp. 387, it was held that a brewing company can guarantee the performance of a lease of one of its customers; to the same effect, Winterfield v. Brewing Co., 96 Wis. 239, 71 N. W. 101. A corporation, unless organized for the express purpose of becoming surety for others, has no power to do so unless the contract is to its manifest advantage; Monarch Co. v. Bank, 105 Ky. 430, 49 S. W.

317, 88 Am. St. Rep. 310. A brewing company may become liable as surety on a license bond which it executed to induce the licensee to buy liquor from it; Horst v. Lewis, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460.

A guarantor is discharged by a material alteration in the contract without his consent; Brandt, Sur. & Guar. § 378; Page v. Krekey, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; Manning, C. & Co. v. Alger, 85 Ia. 617, 52 N. W. 542. Modification of a contract made by the contractor and the owner will not release the guarantor, if they are such as are permitted by the terms of the contract; Miller v. Eccles, 155 Pa. 36, 25 Atl. 776. See SURETYSHIP.

The guarantor may also be discharged by the neglect of the creditor in pursuing the principal debtor. The same strictness as to demand and notice is not necessary to charge a guarantor as is required to charge an indorser; but in the case of a guarantied note the demand on the maker must be made in a reasonable time, and if he is solvent at the time of the maturity of the note, and remains so for such reasonable time afterwards, the guarantor does not become liable for his subsequent insolvency; 2 H. Bla. 612; Talbot v. Gay, 18 Pick. (Mass.) 534. Notice of nonpayment must also be given to the guarantor; Greene v. Dodge, 2 Ohio 430; but where the name of the guarantor of a promissory note does not appear on the note, such notice is not necessary unless damage is sustained thereby, and in such case the guarantor is discharged only to the extent of such damage; Reynolds v. Douglass, 12 Pet. (U. S.) 497, 9 L. Ed. 1171. One who guarantees that another will pay promptly for goods to be purchased is not liable where the purchaser becomes insolvent after the guaranty is given, and the seller gives the guarantor no notice of the purchaser's failure to pay; Taussig v. Reid, 145 Ill. 488, 32 N. E. 918, 36 Am. St. Rep. 504. A presentment for payment is not necessary in order to charge one who guarantees the due payment of a bill or note; 5 M. & G. 559. It is not necessary that an action should be brought against the principal debtor; Douglass v. Reynolds, 7 Pet. 113, 8 L. Ed. 626. See, also, Isett v. Hoge, 2 Watts (Pa.) 128; Backus v. Shipherd, 11 Wend. (N. Y.) 629.

From the close connection of guaranty with suretyship, it is convenient to consider many of the principles common to both under the head of suretyship, which article see.

Where an innocent person acts upon a guaranty, the execution of which was procured by misrepresentation, the burden devolves upon the guarantor to show that he was free from negligence; the rule in such cases being the same with respect to the execution of guaranties as to that of negotiable instruments; Page v. Krekey, 63 Hun 629, 17 N. Y. Supp. 764.

Whether a guaranty is absolute or special is a question of fact; Donovan v. Griswold, 37 Ill. App. 616.

Where the guaranty of a written contract is executed on the same paper, notice of acceptance by the person for whose benefit it is made, is unnecessary; Bechtold v. Lyon, 130 Ind. 194, 29 N. E. 912. See SURETYSHIP.

It is not within the general scope of a partner's authority to give guaranties in the name of the firm; Wood's Byles, Bills 48; Osborne v. Thompson, 35 Minn. 229, 28 N. W. 260. And an officer of a company cannot bind it as surety or guarantor; Culver v. Real Estate Co., 91 Pa. 367.

See SURETYSHIP.

GUARANTY FUND. Acts subjecting banks to assessments for a depositors' guaranty fund to be applied to the payment of depositors of an insolvent bank. The Oklahoma acts provide an assessment of five per cent upon each bank's average daily deposits, to be levied by the state banking board, and applied to the payment of depositors of any failed bank if its cash is not immediately available to pay its depositors in full. If the fund be not sufficient, an additional assessment must be levied. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. These acts were held valid as within the police power and as not depriving banks of their property without due process of law, or denying them the equal protection of the laws, or impairing the obligation of their charter contracts; Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487, affirming *id.*, 22 Okl. 48, 97 Pac. 590; *id.*, 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341, refusing a rehearing.

In Shallenberger v. Bank, 219 U. S. 114, 31 Sup. Ct. 189, 55 L. Ed. 117, a Nebraska act, creating a like fund and prohibiting banking except by corporations formed under the act, was held valid. A Kansas act was sustained in Assaria State Bank v. Dolley, 219 U. S. 121, 31 Sup. Ct. 189, 55 L. Ed. 123, and was held valid as against national banks in Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. 707.

GUARDAGE. The condition of one who is under a guardian. A state of wardship.

GUARDIAN AD LITEM. A guardian appointed to represent the ward in legal proceedings to which he is a party defendant.

The appointment of such is incident to the power of every court to try a case; Bullard v. Spoor, 2 Cow. (N. Y.) 430; and the power is then confined to the particular case at bar; Co. Litt. 89, n. 16. His duty is to manage the interest of the infant when sued. In criminal cases no guardian is appointed: the court acts as guardian; Reeve, Dom. Rel. 318; Field, Inf. 163. A guardian *ad litem* cannot be appointed till the infant has been brought before the court in some of the

modes prescribed by law; Hodges v. Wise, 16 Ala. 509; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164. See Allsmiller v. Freutchenicht, 86 Ky. 198, 5 S. W. 746. Such guardian cannot waive service of process; Robbins v. Robbins, 2 Ind. 74; and his powers are not limited to defence, objection, and opposition merely, but he may file a cross bill to protect the infant's interest involved in the litigation, and appeal from a decree dismissing the same; Sprague v. Beamer, 45 Ill. App. 17. The writ and declaration in actions at law against infants are to be made out as in ordinary cases. In English practice where the defendant neglects to appear, or appears otherwise than by guardian, the plaintiff may apply for and obtain a summons calling on him to appear by guardian within a given time; otherwise the plaintiff may be at liberty to proceed as in other cases, having had a nominal guardian assigned to the infant; Macphers. Inf. 359. A like rule prevails in New York and other states; Van Deusen v. Brower, 6 Cow. (N. Y.) 50; Clarke v. Gilmanton, 12 N. H. 515. Schoul. Dom. Rel. 596.

The omission to appoint a guardian *ad litem* does not render the judgment void, but only voidable; Austin v. Trustees, 8 Metc. (Mass.) 196, 41 Am. Dec. 497. See Delashmutt v. Parrent, 39 Kan. 548, 18 Pac. 712. It will be presumed, where the chancellor received the answer of a person as guardian *ad litem*, that he was regularly appointed, although it does not appear of record; Stevenson v. Kurtz, 98 Mich. 493, 57 N. W. 580. See Robertson v. Robertson, 2 Swan (Tenn.) 197. It is held to be error to decree the sale of a decedent's property on the petition of the representatives, without the previous appointment of a guardian *ad litem* for the infant heirs; Craig v. McGehee, 16 Ala. 41. Where the general guardian petitions for a sale of his ward's lands, the court must appoint a guardian *ad litem;* Wyatt v. Mansfield's Heirs, 18 B. Monr. (Ky.) 779; King v. Collins, 21 Ala. 363; McAllister v. Moye, 30 Miss. 258; Sturges v. Longworth, 1 Ohio St. 544; but this is not necessary where the application is for leave to invest money of the ward in land; Callaway v. Bridges, 79 Ga. 753, 4 S. E. 687.

It seems that a guardian *ad litem* can elect whether to come into hotch-pot; Andrews v. Hall, 15 Ala. 85. An appearance of the minor in court is not necessary for the appointment of a guardian to manage his interest in the suit; 11 E. L. & Eq. 156. If an infant comes of age pending the suit, he can assert his rights at once for himself, and if he does not he cannot generally complain of the acts of his guardian *ad litem;* Mitchell v. Berry, 1 Metc. (Ky.) 602; Marshall v. Wing, 50 Me. 62.

The appointment of a guardian *ad litem* is valid, although the infant has not been regularly served with process, but has only accepted service thereof; Cates v. Pickett, 97 N. C. 21, 1 S. E. 763. The rule that a next friend or guardian *ad litem* cannot by admissions or stipulation, surrender the rights of the infant, does not prevent a guardian *ad litem* or *prochein ami* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved; Kingsbury v. Buckner, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047. A married woman cannot be a guardian *ad litem* or next friend; 34 Ch. D. 435.

GUARDIAN AND WARD. One who legally has the care and management of the person, or the estate, or both, of a child during his minority. Reeve, Dom. Rel. 311.

Guardian has been held to be synonymous with "next friend"; U. S. Mut. Acc. Ass'n v. Weller, 30 Fla. 210, 11 South. 786.

A person having the control of the property of a minor without that of his person is known in the civil law, as well as in some of the states, by the name of curator. 1 Leç. él. du Droit Civ. Rom. 241. The guardian of the person is called "tutor." Tiff. Pers. & Dom. Rel. 295.

Guardian by chancery. This guardianship, although unknown at the common law, is well established in practice now. It grew up in the time of William III., and had its foundation in the royal prerogative of the king as *parens patriæ*. 2 Fonbl. Eq. 246. This power the sovereign is presumed to have delegated to the chancellor; 10 Ves. 63; 2 P. Wms. 118; Reeve, Dom. Rel. 317. By virtue of it, the chancellor appoints a guardian where there is none, and exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead; Co. Litt. 89; 1 P. Wms. 703; 2 Kent 227. But only, it is said, where the minor has property; Tiffany, Dom. Rel. 300; 2 Russ. 1, 20.

The English Judicature Act of 1873 assigns the wardship of infants and the care of infants' estates to the Chancery Division of the High Court of Justice. Whart. Lex.

An infant with property becomes a ward of court (1) if an action is commenced in his name; (2) if an order is made on petition or summons for the appointment of a guardian; (3) if an order is made in like manner for maintenance; (4) if a fund belonging to an infant is paid into court under the acts for the relief of trustees; Brett, L. Cas. Mod. Eq. 95. See 1 Sharsw. Bla. Com. 462 note 8.

This power resides in courts of equity; In re Andrews, 1 Johns. Ch. (N. Y.) 99; Ex parte Crumb, 2 Johns. Ch. (N. Y.) 439; Board of Children's Guardians v. Shutter, 139 Ind. 268, 34 N. E. 665, 31 L. R. A. 740; but more commonly by statute in probate or surrogate courts; 2 Kent 226; Sessions v. Kell, 30 Miss. 458; Ex parte Dawson, 3 Bradf. Surr. (N. Y.) 133.

Guardian by nature is the father, and, on his death, the mother; 2 Kent 220; Fields v. Law, 2 Root (Conn.) 320; Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568; Freto v. Brown, 4 Mass. 675.

This guardianship, by the common law, extends only to the person, and the subject of it is the heir apparent, and not the other children,—not even the daughter when there are no sons; for they are but presumptive heirs only, since their right may be defeated by the birth of a son after their father's decease. But as all the children male and female equally inherit with us, this guardianship extends to all the children, as an inherent right in their parents during their minority; 2 Kent 220. In default of both parents, the natural guardian is the grandfather or grandmother, or next of kin; Lamar v. Micou, 114 U. S. 218, 5 Sup. Ct. 857, 29 L. Ed. 94; In re Benton, 92 Ia. 202, 60 N. W. 614, 54 Am. St. Rep. 546.

The mother of a bastard child is its natural guardian; Dalton v. State, 6 Blackf. (Ind.) 357; Wright v. Wright, 2 Mass. 109; but not by the common law; Reeve, Dom. Rel. 314, note. The power of a natural guardian over the person of his ward is perhaps better explained by reference to the relation of parent and child. See DOMICIL. It is well settled that the court of chancery may, for just cause, interpose and control the authority and discretion of the parent in the education and care of his child; People v. Mercein, 8 Paige, Ch. (N. Y.) 47; 10 Ves. 52.

A guardian by nature is not entitled to the control of his ward's personal property; Alston v. Alston, 34 Ala. 15; Nelson v. Goree's Adm'r, 34 Ala. 565; 1 P. Wms. 285; Kline v. Beebe, 6 Conn. 494; Hyde v. Stone, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; Miles v. Boyden, 3 Pick. (Mass.) 213; Perry v. Carmichael, 95 Ill. 519; unless by statute. See McCarty v. Rountree, 19 Mo. 345; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64. The father must support his ward; Harring v. Coles, 2 Bradf. Surr. (N. Y.) 349. But where his means are limited, the court will grant an allowance out of his child's estate; *id.*, 1 Bro. C. C. 387. But the mother, if guardian, is not obliged to support her child if it has sufficient estate of its own; nor is she entitled, like the father, when guardian, to its services, unless she is compelled to maintain it. But where the mother, who is guardian of her son, engages board for him, she incurs liability personally and not as guardian; McNabb v. Clipp, 5 Ind. App. 204, 31 N. E. 858.

A father as guardian by nature has no right to the real or personal estate of his child; that right, whenever he has it, must be as a guardian in socage, or by some statutory provision; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

Guardian by nurture. This guardianship belonged to the father, then to the mother. The subject of it extended to the younger children, not the heirs apparent. In this country it does not exist, or, rather, it is merged in the higher and more durable guardianship by nature, because all the children are heirs, and, therefore, the subject of that guardianship; 2 Kent 221; Reeve, Dom. Rel. 315; Perkins v. Dyer, 6 Ga. 401. It extended to the person only; Kline v. Beebe, 6 Conn. 494; 40 E. L. & Eq. 109; and terminated at the age of fourteen; 1 Bla. Com. 461.

Guardian in socage. This guardianship arose when socage lands descended to an infant under fourteen years of age; at which period it ceased if another guardian was appointed, otherwise it continued; Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66. The person entitled to it by common law was the next of kin, who could not by any possibility inherit the estate; 1 Bla. Com. 461. If the lands descended from a paternal relative, the mother or next of kin on her part was the guardian; if from a maternal relative the father, or next of kin on his part was; Combs v. Jackson, 2 Wend. (N. Y.) 153, 19 Am. Dec. 568. Although recognized in New York, it was never common in the United States; Byrne v. Van Hoesen, 5 Johns. (N. Y.) 66; because, by the statutes of descents generally in force in this country, those who are next of kin may eventually inherit. Wherever it has been recognized, it has been in a form differing materially from its character at common law; Fonda v. Van Horne, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77. Such guardian was also guardian of the person of his ward as well as his real estate; Co. Litt. 87, 89. Although it did not arise unless the infant was seized of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate. See Hargrave's note 67 to Co. Litt. This guardian could lease his ward's estate and maintain ejectment against a disseisor in his own name; 2 Bacon, Abr. 683. A guardian in socage cannot be removed from office, but the ward may supersede him at the age of fourteen, by a guardian of his own choice; Co. Litt. 89. In New York guardians in socage have neither common law nor statutory right to control the personal estate of the wards; Foley v. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 20 L. R. A. 620, 34 Am. St. Rep. 456.

There was anciently a guardianship by chivalry at the common law, where lands came to an infant by descent which were holden by knight-service; Co. Litt. 88, 11, note. That tenure being abolished by statute Car. II., the guardianship has ceased to exist in England; it has never had any existence in the United States.

Guardians by statute are of two kinds: *first*, those appointed by deed or will; *second*, those appointed by court in pursuance of some statute.

Testamentary guardians are appointed by

the deed or last will of the father; Huson v. Green, 88 Ga. 722, 16 S. E. 255; and they supersede the claims of all other guardians, and have control of the person and the real and personal estate of the child till he arrives at full age.

This power of appointment was given to the father by the stat. 12 Car. II. c. 24, which has been pretty extensively adopted in this country, though in some states the appointment is limited to will. Under it, the father might thus dispose of his children, born and unborn; 7 Ves. 315; but not of his grandchildren; Jackson v. Woods, 5 Johns. (N. Y.) 278. Nor does it matter whether the father is a minor or not; 2 Kent 225. It continues during the minority of a male ward, both as to his estate and person, notwithstanding his marriage; Reeve, Dom. Rel. 328; 2 Kent 224; In re Whitaker, 4 Johns. Ch. (N. Y.) 380. There seems to be some doubt as to whether marriage would determine it over a female ward; 2 Kent 224. It is more reasonable that it should, inasmuch as the husband acquires in law a right to the control of his wife's person. But it would seem that a person marrying a testamentary guardian is not entitled to the money of the ward; Holmes v. Field, 12 Ill. 431. In England and most of the United States a mother cannot appoint a testamentary guardian, nor can a putative father, nor a person *in loco parentis;* 1 Bla. Com. 462, n.; but by statute in Illinois she may make an appointment, if the father has not done so, provided she be not remarried after his death; 2 Kent 225. In New York, the consent of the mother is required to a testamentary appointment by the father; Schoul. Dom. Rel. 400. A man cannot by law appoint his son testamentary guardian for the children of the latter; Grimsley v. Grimsley, 79 Ga. 397, 5 S. E. 760.

Guardians appointed by court. The greater number of guardians among us, by far, are those appointed by court, in conformity with statutes which regulate their powers and duties. In the absence of special provisions, their rights and duties are governed by the general law on the subject of guardian and ward.

Appointment of guardians. All guardians of infants specially appointed must be appointed by the infant's parent; or by the infant himself; or by a court of competent jurisdiction.

After the age of fourteen, the ward is entitled to choose a guardian, at common law, and generally by statute; Reeve, Dom. Rel. 320; Kelly v. Smith, 15 Ala. 687; Sessions v. Kell, 30 Miss. 458; 11 Jur. 114. His choice is subject, however, to the rejection of the court for good reason, when he is entitled to choose again; Inferior Court v. Cherry, 14 Ga. 594. So guardianship by the sole appointment of the infant cannot now be said to exist. If the court appoint one before the age of choice, the infant may appear and choose one at that age, without any notice to the guardian appointed; Sessions v. Kell, 30 Miss. 458; Kelly v. Smith, 15 Ala. 687; Bryce v. Wynn, 50 Ga. 332; Appeal of Adams, 38 Conn. 304. But if none be chosen, then the old one acts. It seems that in Indiana the old one can be removed only for cause shown; in which case, of course, he is entitled to notice; Dibble v. Dibble, 8 Ind. 307. As to the method of appointment by the minor see 1 Sharsw. Bla. Com. 462.

A probate, surrogate, or county court has no power to appoint, unless the minor resides in the same county; Brown v. Lynch, 2 Bradf. Surr. (N. Y.) 214; Grier v. McLendon, 7 Ga. 362; Munson v. Newson, 9 Tex. 109; Dorman v. Ogbourne, 16 Ala. 759; De Jarnett v. Harper, 45 Mo. App. 415; but where the ward is a nonresident, guardianship is frequently recognized for the collection and preservation of his estate in the jurisdiction, and in such cases, the court where the property is situated will appoint a guardian, the existence of the property determining the jurisdiction; Clarke v. Cordis, 4 Allen (Mass.) 466; 27 E. L. & Eq. 249. Persons residing out of the jurisdiction will not usually be appointed guardians; but this rule is not invariable, except by statute; Schoul. Dom. Rel. 419.

It has been a subject of doubt whether a married woman may be a guardian; while there are cases which sustain their acts while acting as guardians, clear precedents for their actual appointment are wanting. See 2 Dougl. 433. It has been held, however, that a married woman may be co-guardian with a man, though her sole appointment is improper; L. R. 1 Ch. 387. See Farrer v. Clark, 29 Miss. 195; Kettletas v. Gardner, 1 Paige (N. Y.) 488; Ex parte Maxwell, 19 Ind. 88. A single woman by her marriage loses her guardianship, it would seem; but she may be reappointed; 2 Kent 225; 2 Dougl. 433. It seems probable that recent statutes relating to the rights of married women will modify these cases. Where there is a valid guardianship unrevoked, the appointment of another is void; Thomas v. Burrus, 23 Miss. 550, 57 Am. Dec. 154.

The court has jurisdiction to interfere with and remove the guardian of a child who has no property, on proof that it is for the welfare of the child that the guardian should be removed; [1893] 1 Ch. 143.

Powers and liabilities of guardians. The relation of a guardian to his ward is that of a trustee in equity, and bailee at law; Swan v. Dent, 2 Md. Ch. 111. It is a trust which he cannot assign; 1 Pars. Contr. 116. He will not be allowed to reap any benefit from his ward's estate; 2 Com. 230; except for his legal compensation or commission; but must account for all profits, which the ward may elect to take or charge interest on the capital used by him; Kyle v. Barnett, 17 Ala. 306; he cannot purchase lands

belonging to him; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. He can invest the money of his ward in real estate only by order of court; Sherry v. Sansberry, 3 Ind. 320; Davis v. Harris, 13 Smedes & M. (Miss.) 9; Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229; Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82; Belding v. Willard, 56 Fed. 699. And he cannot convert real estate into personalty without a similar order; Field, Inf. 109; Taylor v. Galloway, 1 Ohio 232, 13 Am. Dec. 605; Jackson v. Todd, 25 N. J. L. 121; 2 Kent 230. The law does not favor the conversion of the real estate of minors; Appeal of Davis, 14 Pa. 372; but if it be clearly to the interest of a minor that his real estate be sold, the court will award an order of sale, notwithstanding that in the event of his death during minority, the proceeds would go to other parties than those to whom the land would have descended had it not been converted; Drayton's Estate, 6 Phila. (Pa.) 157. The rule is different in England; there land converted into money, or money into land, retains its character of land or money, as the case may be, during the nonage of the minor; 6 Ves. 6.

He may lease the land of his ward; Richardson v. Noyes, 2 Mass. 56, 3 Am. Dec. 24; but if the lease extends beyond the minority of the ward, the latter may avoid it on coming of age; Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 561; Jones v. Ward, 10 Yerg. (Tenn.) 160; Snook v. Sutton, 10 N. J. L. 133. He may sell his ward's personalty without order of court; Woodward v. Donally, 27 Ala. 198; Maclay v. Society, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528; and dispose of and manage it as he pleases; Ellis v. Proprietors, 2 Pick. (Mass.) 243. He is required to put the money out at interest, or show that he was unable to do this; Davis v. Harris, 13 Smedes & M. (Miss.) 9; Fay v. Howe, 1 Pick. (Mass.) 527; Appeal of Lukens, 7 W. & S. (Pa.) 48; 13 E. L. & Eq. 140; Jacobia v. Terry, 92 Mich. 275, 52 N. W. 629; Steyer v. Morris, 39 Ill. App. 382. And in the absence of evidence to the contrary, it will be presumed that a guardian might have kept funds of his ward at interest; Steyer v. Morris, 39 Ill. App. 382. If he spends more than the net income of the estate in the maintenance and education of the ward without permission of the court, he may be held liable for the principal thus consumed; Frelick v. Turner, 26 Miss. 393; Tharington v. Tharington, 99 N. C. 118, 5 S. E. 414.

If he erects buildings on his ward's estate out of his own money, without order of court, he will not be allowed any compensation; Hassard v. Rowe, 11 Barb. (N. Y.) 22; Gearhart v. Jordan, 11 Pa. 326; Austin v. Lamar, 23 Miss. 189; Gerber v. Bauerline, 17 Or. 115, 19 Pac. 849. He is not chargeable with the services of his wards if for their own benefit he requires them to work for him; Armstrong's Heirs v. Walkup, 12 Gratt. (Va.) 608. A married woman guardian can convey the real estate of her ward without her husband joining; 2 Dougl. 433. On marriage of a female minor in Mississippi, her husband, although a minor, is entitled to receive her estate from her guardian; Wood v. Henderson, 2 How. (Miss.) 893; A guardian who deposited the moneys of his ward, as guardian, in a bank that was solvent, with his sureties, was held not liable for loss upon the failure of the bank; In re Law's Estate, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103.

Joint guardians may sue together on account of any joint transaction founded on their relation to the ward, even after the relation ceases; Sherman v. Akins, 4 Pick. (Mass.) 283; see Blake v. Pegram, 101 Mass. 592; and where one guardian consents to his co-guardian's misapplication of funds, he is liable; Appeal of Clark, 18 Pa. 175. Guardians like other trustees—executors and administrators excepted—may portion out the management of the property to suit their respective taste and qualifications, while neither parts irrevocably with the control of the whole; and in such case each is chargeable with no more than what he received, unless unwarrantable negligence in superintending the others' acts can be shown; Appeal of Jones, 8 W. & S. (Pa.) 143, 42 Am. Dec. 282; and the discharge of one who has received no part of the estate relieves him from liability; Hocker v. Wood's Ex'r, 33 Pa. 466.

Contracts between guardian and ward immediately after the latter has attained his majority are unfavorably regarded by the courts, and will be set aside where they redound to the profit of the guardian; Bisp. Eq. 234; Say's Ex'rs v. Barnes, 4 S. & R. (Pa.) 114, 8 Am. Dec. 679; McClellan v. Kennedy, 8 Md. 230; Sullivan v. Blackwell, 28 Miss. 737; Wright v. Arnold, 14 B. Monr. (Ky.) 638, 61 Am. Dec. 172; Gale v. Wells, 12 Barb. (N. Y.) 84. Neither is he allowed to purchase at the sale of his ward's property; Patton v. Thompson, 55 N. C. 285; Lefevre v. Laraway, 22 Barb. (N. Y.) 167; Hindman v. O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. But the better opinion is that such sale is not void, but voidable only; Wyman v. Hooper, 2 Gray (Mass.) 141; Mann v. McDonald, 10 Humphr. (Tenn.) 275. He is not allowed, without permission of court under some statute authority, to remove his ward's property out of the state; Cook v. Wimberly, 24 Ala. 486; Welch v. Baxter, 45 La. Ann. 1062, 13 South. 629. He cannot release a debt due his ward; Forbes's Heirs v. Mitchell, 1 J. J. Marsh. (Ky.) 441; Horine v. Horine, 11 Mo. 649; although he may submit a claim to arbitration; Goleman v. Turner, 14 Smedes & M. (Miss.) 118; Weston v. Stuart, 11 Me. 326; Bean v. Farnam, 6 Pick. (Mass.) 269; but he cannot do so when he is interested ad-

versely to them in the subject-matter of the arbitration; Fortune v. Killebrew, 86 Tex. 172, 23 S. W. 976. He may collect or compromise and release debts due to the ward, subject to the liability to be called to account for his acts; MacLay v. Society, 152 U. S. 499, 14 Sup. Ct. 678, 38 L. Ed. 528. He cannot by his own contract bind the person or estate of his ward; Jones v. Brewer, 1 Pick. (Mass.) 314; nor avoid a beneficial contract made by his ward; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Co. Litt. 17 *b*, 89 *a*. He becomes liable for negligence for failure to sue on a note due his ward's estate until the parties thereto are insolvent; Coggins v. Flythe, 113 N. C. 102, 18 S. E. 96. During the existence of the relation of guardian and ward, the latter is under the subjection of the former who stands *in loco parentis*.

He is entitled to the care and custody of the person of his ward; Ward v. Roper, 7 Humphr. (Tenn.) 111; Ex parte Bartlett, 4 Bradf. Surr. (N. Y.) 221; even against parents; L. R. 8 Q. B. 153; but latterly it is held that the wishes and best interests of the child will be consulted; Garner v. Gordon, 41 Ind. 92; In re Heather Children, 50 Mich. 261, 15 N. W. 487. If a female ward marry, the guardianship terminates both as to her person and property. It has been thought to continue over her property if she marries a minor. If a male ward marries, the guardianship continues as to his estate, though it has been said to be otherwise as to his person. If he marries a female minor, it is said that his guardian will also be entitled to her property; Reeve, Dom. Rel. 328; 2 Kent 226.

A guardian may change the residence of his ward from one county to another in the same state. But it seems that the new county may appoint another guardian; Ex parte Bartlett, 4 Bradf. Surr. (N. Y.) 221. Whether he has the right to remove his ward into a foreign jurisdiction has been a disputed question; Field, Inf. 114. In England, a guardian, being a parent, can change the child's domicil; 10 Cl. & F. 42; otherwise probably if the guardian be not a parent; Tiffany, Dom. Rel. 317. A natural guardian may change the domicil of his ward; In re Benton, 92 Ia. 202, 60 N. W. 614, 54 Am. St. Rep. 546. So held of a paternal grandfather, as guardian; *id.* Guardians who are not natural guardians can change the municipal domicil of a ward, in the same state; Tiff. Dom. Rel. 317; but not to another state; Wilkins' Guardian, 146 Pa. 585, 23 Atl. 325; Lamar v. Micou, 112 U. S. 472, 5 Sup. Ct. 221, 28 L. Ed. 751; but see White v. Howard, 52 Barb. (N. Y.) 294; In re Afflick's Estate, 3 MacArth. (D. C.) 95. By the common law, his authority both over the person and property of his ward was strictly local; Morrell v. Dickey, 1 Johns. Ch. (N. Y.) 156; Bell v. Suddeth, 2 Smedes & M. (Miss.) 532. And this is the view maintained in most of the states. See Story, Confl. Laws § 540. But see, on this question, Wood v. Wood, 5 Paige Ch. 596, 28 Am. Dec. 451; Dupree v. Perry, 18 Ala. 34; Cooke v. Beale, 33 N. C. 36; 3 Mer. 67; Holyoke v. Haskins, 5 Pick. (Mass.) 20, 16 Am. Dec. 372; DOMICIL.

The court of chancery may interfere to prevent a guardian from attempting an important change in the religious impressions of a ward if upon examination such change seems dangerous and improper; 8 D. M. & G. 760. See Brett, L. Cas. Mod. Eq. 90.

A guardian in one state cannot maintain an action in another for any claim in which his ward is interested; Cox v. Williamson, 11 Ala. 343; see Rogers v. McLean, 31 Barb. (N. Y.) 304; Grist v. Forehand, 36 Miss. 69; Potter v. Hiscox, 30 Conn. 508; Story, Confl. Laws § 499; a guardian appointed in one state has no authority in another, except by comity, but the modern tendency is to support the authority of the guardian appointed in the domicil; Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585; L. R. 2 Eq. 704. He cannot waive the rights of his ward,—not even by neglect or omission; 2 Vern. 368; Cartwright v. Wise, 14 Ill. 417. No guardian, except a father, is bound to maintain his ward at his own expense. But it is his duty to maintain and educate the ward, in a suitable manner from the income of the ward's estate; Preble v. Longfellow, 48 Me. 279, 77 Am. Dec. 227; Roscoe v. McDonald, 101 Mich. 313, 59 N. W. 603. It is discretionary with a court whether to allow a father anything out of his child's estate for his education and maintenance; Reeve, Dom. Rel. 324; Haase v. Roehrscheid, 6 Ind. 66. When the relation of guardian and ward ceases, the latter is entitled to have an account of the administration of his estate of the former.

Rights and liabilities of wards. A ward owes obedience to his guardian, which a court will aid the guardian in enforcing; 3 Atk. 721. While under the care of a guardian, a ward can make no contract whatever, binding upon him, except for necessaries. The general rule is that the ward's contracts are voidable; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; yet there are some contracts so clearly prejudicial that they have been held absolutely void: such as contracts of suretyship; Maples v. Wightman, 4 Conn. 376, 10 Am. Dec. 149.

A ward cannot marry without the consent of his or her guardian; Reeve, Dom. Rel. 327. And any one marrying or aiding in the marriage of a ward without such consent is guilty of contempt of court; 2 P. Wms. 562; 3 *id.* 116; but this whole doctrine is peculiar to the laws of England and has no application in the United States; Schoul. Dom. Rel. 517.

Infants are liable for their torts in the same manner as persons of full age; Bullock v. Babcock, 3 Wend. (N. Y.) 391; Fitts v.

Hall, 9 N. H. 441. A ward is entitled to his own earnings; 1 Bouvier, Inst. 349. He attains his majority the day before the twenty-first anniversary of his birthday. See AGE. He can sue in court only by his guardian or *prochein ami;* 4 Bla. Com. 464. He could not bring an action at law against his guardian, but might file a bill in equity calling him to account; 3 P. Wms. 119; Minter v. Clark, 92 Tenn. 459, 22 S. W. 73. Minors who are kept occupied by their tutor, to teach them habits of industry, cannot exact compensation of him; Hollingsworth's Heirs, 45 La. Ann. 134, 12 South. 12. By the practice in chancery, he was allowed one year to examine the accounts of his guardian after coming of age; In re Van Horne, 7 Paige (N. Y.) 46. See Taylor v. Hill, 86 Wis. 99, 56 N. W. 738. The statute of limitations will not run against him during the guardianship; Alston v. Alston, 34 Ala. 15. But see LIMITATIONS.

Sale of infant's lands. It is probable that the English court of chancery did not have the inherent original power to order the sale of minors' lands; 2 Ves. 23; 1 Moll. 525. But, with the acquiescence of parliament, it claims and exercises that right for the purpose of maintaining and educating the ward. This power is not conceded as belonging to our courts of chancery in this country by virtue of their equity jurisdiction, nor to our probate courts as custodians of minors; Rogers v. Dill, 6 Hill (N. Y.) 415; 2 Kent 229 *a.* It must be derived from some statute authority; Woodward v. Donally, 27 Ala. 198; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 154, 11 Am. Dec. 441; Ellis v. Merrimack Bridge, 2 Pick. (Mass.) 243. There being no inherent authority in a guardian by virtue of his office to convey lands of his wards, a deed by him will not, in the absence of evidence of showing his authority, convey any title; House v. Brent, 69 Tex. 27, 7 S. W. 65.

It has been a much-disputed question whether an infant's lands can be sold by special act of the legislature. On the ground that the state is the supreme guardian of infants, this power of the legislature has been sustained where the object was the education and support of the infant; McComb v. Gilkey, 29 Miss. 146; Mason v. Wait, 5 Ill. 127; Cochran v. Van Surlay, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; Doe v. Douglass, 8 Blackf. (Ind.) 10, 44 Am. Dec. 732; Rice v. Parkman, 16 Mass. 326. See Hoyt v. Sprague, 103 U. S. 613, 26 L. Ed. 585; Thomas v. Pullis, 56 Mo. 211. So it has been sustained where the sale was merely advantageous to his interest; Dorsey v. Gilbert, 11 Gill & J. (Md.) 87; Estep v. Hutchman, 14 S. & R. (Pa.) 435. There has been some opposition on the ground that it is an encroachment on the judiciary; 4 N. H. 565, 574; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430. Such sales have been sustained where the object was to liquidate the ancestor's debts; Kibby v. Chitwood's Adm'r, 4 T. B. Monr. (Ky.) 95, 16 Am. Dec. 143. This has been considered questionable in the extreme; Jones' Heirs v. Perry, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *contra,* Davenport v. Young, 16 Ill. 548, 63 Am. Dec. 320. It has also been exercised in the case of idiots and lunatics, and sustained on the same reasons as in the case of infants; Davison v. Johonnot, 7 Metc. (Mass.) 388, 41 Am. Dec. 448.

A ward's title to land passes by his guardian's deed therefor, and not by the confirmation of the sale by the court; Scarf v. Aldrich, 97 Cal. 360, 32 Pac. 324, 33 Am. St. Rep. 190.

By statute, there are also guardians for the insane and for spendthrifts; Sternbergh v. Schoolcraft, 2 Barb. (N. Y.) 153; Alexander v. Alexander, 8 Ala. 796; Raymond v. Wyman, 18 Me. 385; McCrillis v. Bartlett, 8 N. H. 569; Mason v. Mason, 19 Pick. (Mass.) 506. This guardian is sometimes designated as the committee; Schoul. Dom. Rel. 389. A guardian to a lunatic cannot be appointed till after a writ *de lunatico inquirendo;* Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266. An order removing a guardian is equivalent to an order to pay over the money in his hands to his successor; Finney v. State, 9 Mo. 227. In some states the court is authorized to revoke for non-residence of the guardian; *id.* See HABITUAL DRUNKARD.

GUARDIAN OF THE SPIRITUALITIES. The person to whom the spiritual jurisdiction of any diocese is committed during the vacancy of the see.

GUARDIAN OF THE TEMPORALITIES. The person to whose custody a vacant see or abbey was committed by the crown.

GUARDIAN, or WARDEN, OF THE CINQUE PORTS. See CINQUE PORTS.

GUARDIANSHIP. The power or protective authority given by law, and imposed on an individual who is free and in the enjoyment of his rights, over one whose weakness on account of his age renders him unable to protect himself.

GUARENTIGIO. In Spanish Law. A term applicable to the contract or writing by which courts of justice are empowered to execute and carry into effect a contract in the same manner as if it were decreed by the court after the usual legal formalities. This clause, though formerly inserted in contracts of sale, etc., stipulating the payment of a sum of money, is at present usually omitted, as courts of justice ordinarily compel the parties to execute all contracts made, by authentic acts, that is, acts passed before a notary, in the presence of two witnesses.

GUARNIMENTUM. In Old European Law. A provision of necessary things. Spel. Gloss.

GUASTALD. One who had the custody of the royal mansions. (Also *Gastaldus.*)

GUERRA, GUERRE. War. Spel. Gloss.

GUERRILLA TROOPS (Span. *guerra*, war; *guerrilla*, a little war). Self-constituted bodies of armed men in times of war, who form no integral part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war, chiefly by raids, extortion, destruction, and massacre. Lieber, Guerr. Part. 18. See Halleck, Int. Law 386; Wools. Int. Law 299.

Partisan, free-corps, and guerrilla are terms resembling each other considerably in signification; and, indeed, partisan and guerrilla are frequently used in the same sense. See Halleck, Int. Law 386.

Partisan corps and free-corps both denote bodies detached from the main army; but the former term refers to the action of the troop, the latter to the composition. The partisan leader commands a corps whose object is to injure the enemy by action separate from that of his own main army; the partisan acts chiefly upon the enemy's lines of connection and communication, and outside of or beyond the lines of operation of his own army, in the rear and on the flanks of the enemy. But he is part and parcel of the army, and, as such, considered entitled to the privileges of the law of war so long as he does not transgress it. Free-corps, on the other hand, are troops not belonging to the regular army, consisting of volunteers generally raised by individuals authorized to do so by the government, used for petty war, and not incorporated with the *ordre de bataille*. The men composing these corps are entitled to the benefit of the laws of war, under the same limitations as the partisan corps.

Guerrilla-men, when captured in fair fight and open warfare, should be treated as the regular partisan is, until special crimes, such as murder, or the killing of prisoners, or the sacking of places, are proved against them.

In drawing up the Convention Concerning the Laws and Customs of War on Land, adopted at The Hague in 1899, much difficulty was experienced in securing an agreement upon the status to be attributed to militia and corps of volunteers. It was agreed that such guerrilla troops should come under the laws applying to the regular army, provided they be commanded by a person responsible for his subordinates, wear a distinctive emblem recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war. Even the population of an invaded territory, which as a body takes up arms on the approach of the enemy, must be regarded as belligerents, provided they carry arms openly and observe the laws and customs of war. II Opp. 70–72.

GUESSING CONTEST. See LOTTERY.

GUEST. A traveller who stays at an inn or tavern with the consent of the keeper. Bacon, Abr. *Inns*, C 5; 8 Co. 32; Story, Bailm. § 477.

A traveller or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment. De Lapp v. Van Closter, 136 Mo. App. 475, 118 S. W. 120. It is not now deemed essential that a person should have come from a distance to constitute him a guest; Curtis v. Murphy, 63 Wis. 6, 22 N. W. 825, 53 Am. Rep. 242; Walling v. Potter, 35 Conn. 183.

And if, after taking lodgings at an inn, he leaves his horse there and goes elsewhere to lodge, he is still to be considered a guest; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; but not if he merely leaves goods for keeping which the landlord receives no compensation; 1 Salk. 388; 3 Ld. Raym. 866; Cro. Jac. 188. And where one leaves his horse with an innkeeper with no intention of stopping at the inn himself, he is not a guest of the inn, and the liability of the landlord is simply that of an ordinary bailee for hire; Ingallsbee v. Wood, 33 N. Y. 577, 88 Am. Dec. 409. The length of time a man is at an inn makes no difference, whether he stays a day, a week, or a month, or longer, or only for temporary refreshments, so always that, though not strictly *transiens*, he retains his character as a traveller; 5 Term 273; McDonald v. Edgerton, 5 Barb. (N. Y.) 560. But if a person comes upon a special contract to board at an inn, he is not, in the sense of the law, a guest, but a boarder; Bacon, Abr. *Inns*, C 5; Story, Bailm. § 477; Wand. Inns 64; but this is a question of fact to be determined by a jury; Magee v. Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199. The payment of a stipulated sum per week does not of itself change the relation of a party from that of a guest to that of a lodger; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Magee v. Improvement Co., 98 Cal. 678, 33 Pac. 772, 35 Am. St. Rep. 199. The relation exists where one who keeps a house for the entertainment of all who choose to visit it, extends a general invitation to the public to become guests, although the house is situated on enclosed grounds; Fay v. Improvement Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. See BAILEE; INNKEEPER; BOARDER.

GUEST-TAKER. See AGISTER.

GUESTLING. See BROTHERHOOD AND GUESTLING, COURT OF.

GUET. In French Law. Watch. Ord. Mar. liv. 4, tit. 6.

GUIDAGE. In English Law. A reward for safe conduct, through a strange land or unknown country. Cowell. The office of

guiding of travellers through dangerous or unknown ways. 2 Inst. 526.

GUIDON DE LA MER. The name of a treatise on maritime law, written in Rouen in Normandy in 1671, as is supposed. It was received on the continent of Europe almost as equal in authority to one of the ancient codes of maritime law. The author of this work is unknown. This tract or treatise is contained in the "*Collection de Lois maritimes*," by J. M. Pardessus, vol. 2, p. 371 *et seq.*

GUILD, GILD. A brotherhood or company governed by certain rules and orders made among themselves by king's license; a corporation, especially for purposes of commerce; so called because on entering the *guild* the members pay an assessment or tax *(gild)* towards defraying its charges. T. L.; Du Cange. A guild held generally more or less property in common,—often a hall, called a *guild-hall*, for the purposes of the association. The name of *guild* was not, however confined to mercantile companies, but was applied also to religious, municipal, and other corporations. A mercantile meeting of a guild was called a *guild merchant.*

A fridborg *(q. v.)*, that is, among the Saxons, mutual pledges of ten families for each other to the king. Spelman. See 3 Steph. Com. 31; Turner's Hist. Ang. Sax. v. iii. p. 98.

The earliest corporations in Scotland were not for trading but to perpetuate some public service; and they took their rise from Papal bulls, royal charters, etc., or frequently such charter was presumed; Ersk. Pr. 311. "Gilds came into unconscious existence through a process of evolution, and were then acknowledged by the law." It is incorrect to say that there could be no gild without the king's license. They were incorporated and after incorporation supervised by the mayor, bailiffs, and common council of municipalities. Eaton, Report of Amer. B. A. (1902) 340.

See Toulmin Smith, English Gilds.

GUILD HALL (Law Lat. *gildhalla*, variously spelled *ghildhalla, guihalla, guihaula;* from Sax. *gild*, payment, company, and *halla*, hall). A place in which are exposed goods for sale. Charter of Count of Flanders; Hist. Guinensi, 202, 203; Du Cange. The hall of a guild or corporation. Du Cange; Spelman: *e. g., Gildhalla Teutonicorum.* The chief hall of the city of London, where the mayor and commonalty hold their meetings. The hall of the merchants of the Hanseatic League in London, otherwise called the "Stilyard." Cowell.

GUILD MERCHANT. An association of traders within a town in England, and in some cases living outside its precincts, for the better management of trade. It sometimes arbitrated upon mercantile disputes. Only its members could trade freely within the town; 1 Holdsw. Hist. E. L. 310. See Gross, Gild Merchant; Lambert, Gild Life; English Gilds (Early English Text Society). See GILDA MERCATORIA; article in Encycl. Br. by Charles Gross.

GUILD RENTS. Rents payable to the crown by any guild, or such as formerly belonged to religious guilds, and came to the crown on the dissolution of the monasteries. Toml.

GUILDHALL SITTINGS. The sittings held in the Guildhall of the city of London for city of London cases.

GUILLOTINE. An apparatus for beheading criminals with a single blow, used in some countries, as France and Greece, for capital punishment. A form of it was in use in the middle ages, but, being improved by Dr. Guillotin at the time of the French Revolution, it received its present name. Cent. Dict.

GUILT. That which renders criminal and liable to punishment.

That disposition to violate the law, which has manifested itself by some act already done. The opposite of innocence. See Ruth-erf. Inst. b. 1, c. 18, s. 10.

In general, every one is presumed innocent until guilt has been proved; but in some cases the presumption of guilt overthrows that of innocence; as, for example, where a party destroys evidence to which the opposite party is entitled. The spoliation of papers material to show the neutral character of a vessel furnishes strong presumption against the neutrality of the ship; The Pizarro, 2 Wheat. (U. S.) 227, 4 L. Ed. 226.

GUILTY. The state or condition of a person who has committed a crime, misdemeanor, or offence.

This word implies a malicious intent, and can only be applied to something universally allowed to be a crime. Cowp. 275.

In Pleading. A plea by which a defendant who is charged with a crime, misdemeanor, or tort admits or confesses it. In criminal proceedings, when the accused is arraigned, the clerk asks him, "How say you, A. B., are you guilty or not guilty?" His answer, which is given *ore tenus*, is called his plea; and when he admits the charge in the indictment, he answers or pleads *guilty;* otherwise, *not guilty.* See CULPRIT; ARRAIGNMENT.

A plea of guilty in a capital case should not be received unless the court is satisfied that "it is made by a person of complete intelligence, freely and voluntarily, and with a full understanding of the nature and effect of the plea and of the facts upon which it is founded"; Green v. Com., 12 Allen (Mass.) 155; in Henning v. People, 40 Mich. 733, a judgment was affirmed when it appeared that the trial judge had had repeated interviews with the prisoner's counsel and friends and made full inquiry and considered that the

plea was made with every circumstance of fairness and deliberation. The subject is regulated by statute in Michigan and in Texas. In Coleman v. State, 35 Tex. Cr. R. 404, 33 S. W. 1083, where the record stated that the defendant had pleaded guilty after being by the court fully warned of the consequences of such plea, the appellate court held that it did not sufficiently appear that the prisoner was considered sane by the court, or that he was uninfluenced by any fear, or by any persuasion or any hope of pardon, and that these matters should have been presented to the court and the findings made a part of the record. So also where the judgment recited that the defendant "had been duly and legally warned by the court, in open court, of the legal consequences" of such plea; Sanders v. State, 18 Tex. App. 372. See 22 L. R. A. (N. S.) 465. In State v. Johnson, 21 Okl. 40, 96 Pac. 26, 22 L. R. A. (N. S.) 463, it was held that accepting such a plea without cautioning the prisoner as to the gravity of his admission, or taking evidence as to the gravity of the crime, is not according to the forms of law.

GUINEA. A coin issued by the English mint during the time of Wm. IV. These coins were called in. The word now means only the sum of £1, 1s.

GULA-THING. A collection of Scandinavian customs in force in the southern part of Norway. The *Frosta-thing* was in force in the more northerly division of Dronheim. They are said to help to an understanding of the law prevailing in the northern part of England, where the Danish influence was strongest. 2 Holdsw. Hist. E. L. 23.

GULE OF AUGUST. The first of August, being the day of *St. Peter ad Vincula.* T. L.

GULES. The heraldic name of the color usually called "red." The word is derived from the Arabic word "gule," a rose, and was probably introduced by the Crusaders. Gules is denoted in engravings by numerous perpendicular lines. Heralds who blazoned by planets and jewels called it "Mars" and "ruby;" Wharton.

GWABR MERCHED. Maid's fee. An old English phrase signifying a customary fine payable to lords of some manors on marriage of tenant's daughter, or otherwise on her incontinence. Cowell, *Marchet.*

GWALSTOW. A place of execution. Cowell.

GYLTWITE, or GUILTWIT (Sax.). Compensation for fraud or trespass. Grant of King Edgar, anno 964; Cowell.

H

H. The eighth letter of the alphabet.

HABE, or HAVE (Lat.). Sometimes used in the titles of the codes of Theodosius and Justinian for *Ave* (hail). Calv. Lex.; Spel. Gloss.

HABEAS CORPORA JURATORUM (Lat. that you have the bodies). In English Practice. A writ issued out of the common pleas, commanding the sheriff to compel the appearance of a jury in a cause between the parties. It answered the same purpose as a *distringas juratores* in the king's bench. See 3 Bla. Com. 354. It is abolished by the Common-law Procedure Act.

HABEAS CORPUS (Lat. that you have the body). A writ directed to the person detaining another and commanding him to produce the body of the prisoner at a certain time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf.

This is the most famous writ in the law; and, having for many centuries been employed to remove illegal restraint upon personal liberty, no matter by what power imposed, it is often called the great writ of liberty. It takes its name from the characteristic words it contained when the process and records of the English courts were written in Latin:

Præcipimus tibi quod CORPUS *A B in custodia vestra detentum, ut dicitur, una cum causa captionis et detentionis suæ, quocunque nomine idem A B censeatur in eadem,* HABEAS *coram nobis apud Westm. &c. ad subjiciendum et recipiendum ea quæ curia nostra de eo ad tunc et ibidem ordinari contigerit in hac parte, etc.*

There were several other writs which contained the words *habeas corpus;* but they were distinguished from this and from one another by the specific terms declaring the object of the writ, which terms are still retained in the nomenclature of writs: as, *habeas corpus ad respondendum, ad testificandum, ad satisfaciendum, ad prosequendum,* and *ad faciendum et recipiendum, ad deliberandum et recipiendum.*

This writ was in like manner designated as *habeas corpus ad subjiciendum et recipiendum;* but, having acquired in public esteem a marked importance by reason of the nobler uses to which it has been devoted, it has so far appropriated the generic term to itself that it is now, by way of eminence, commonly called The Writ of Habeas Corpus.

The date of its origin cannot now be ascertained. Traces of its existence are found in the Year Book 48 Ed. III. 22; and it appears to have been familiar to, and well understood by, the judges in the reign of Henry VI. The ancient writ of *de odio et atia* and *de homine replegiando* furnished a remedy in particular cases. In its early history it appears to have been used as a means of relief from private restraint. The earliest precedents where it was used *against the crown* are in the reign of Henry VII. Afterwards the use of it became more frequent, and in the time of Charles I. it was held an admitted constitutional remedy; Hurd, Hab. Corp. 145; Church, Hab. Corp. 3. In writing of procedure in the thirteenth century the work which throws so much new light upon the early history of English law, says: "Those famous words *habeas corpus* are making their way into divers writs, but for any habitual use of them for the purpose of investigating the cause of imprisonment we must wait until a later time." There is also a reference to what is termed the use of *habeas corpus* as "at one time a part of the ordinary mesne process in a personal action," also referred to as "the Bractonian process which inserts a *habeas corpus* between attachment and distress," which (*habeas corpus*) a little later seems to disappear. No other allusion is made to the subject; 2 Poll. & Maitl. 584, 591.

W. W. Howe (Studies in the Civil Law 54) who is as earnest in tracing the fountains of English law to a Roman source, as the writers last quoted are indisposed to do so, says on the subject: "The presence in the Pandects of every important doctrine of *habeas corpus* is an interesting fact, and suggests that the proceeding probably came to England, as it did to Spain, from the Roman law. There is no evidence, so far as I have been able to discover, that the process was of British or Teutonic origin. It is fully described in the forty-third book of the Pandects. The first text is the line from the 'Perpetual Edicts,' *'ait prætor: quem liberum dolo malo retines, exhibeas.'* 'The prætor declares: produce the freeman whom you unlawfully detain.' The writ was called the interdict or order *'de homine libero exhibendo.'* After quoting this article of the Edict, the compilers of the Pandects introduced the commentary of Ulpian to the extent of perhaps two pages of a modern law book, and the leading rules which he derives from the text are law, I believe, to-day in England and America. Thus he says: 'This writ is devised for the preservation of liberty to the end that no one shall detain a free person. The word freeman includes every freeman, infant or adult, male or female, one or many, whether *sui juris,* or under the power of another. For we only consider this: Is the person free? He who does not know that a freeman is detained in his house is not in bad faith; but as soon as he is advised of the fact he becomes in bad faith. The prætor says *exhibeas* (produce, exhibit). To exhibit a person is to produce him publicly, so that he can be seen and handled. This writ may be applied for by any person; for no one is forbidden to act in favor of liberty.' And to this commentary of Ulpian the compilers also add some extracts from Venuleius, who, among other things says: 'A person ought not to be detained in bad faith for any time; and so no delay should be granted to the person who thus detains him.' In other words, a writ of *habeas corpus* should be returnable and heard instanter. It seems certain that this writ might have been applied for in Britain during the four centuries of Roman occupation, at least when not suspended by a condition of martial law; and after the restoration of the Christian Church in the seventh century, and the occupation of judicial positions by bishops and other learned clerics, familiar with such procedure, it is not unreasonable to assume that it was revived and took its place in English law."

After the use of the writ became more common, abuses crept into the practice, which in some measure impaired the usefulness of the writ. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and third were issued before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody; 3 Bla. Com. 135.

Greater promptitude in its execution was required to render the writ efficacious. The subject was accordingly brought forward in parliament in 1668, and renewed from time to time until 1679, when the celebrated Habeas Corpus Act of 31 Car. II. was passed. This act has been made the theme of the highest praise and congratulation by British authors, and is even said to have "extinguished all the resources of oppression." Hurd, Hab. Corp. 93; Church, Hab. Corp. 37.

As the act is limited to cases of commitments for "criminal or supposed criminal matters," every other species of restraint of personal liberty was left to the ordinary remedy at common law; but, doubts being entertained as to the extent of the jurisdiction

of the judge to inquire into the truth of the return to the writ in such cases an attempt was made, in 1757, in the house of lords, to render the jurisdiction more remedial. It was opposed by Lord Mansfield as unnecessary, and failed, for the time, of success. It was subsequently renewed, however; and the act of 56 Geo. III. c. 100 supplies, in England, all the needed legislation in cases not embraced by the act of 31 Car. II.; Hurd, Hab. Corp.

The English colonists in America regarded the privilege of the writ as one of the "dearest birthrights of Britons;" and sufficient indications exist that it was frequently resorted to. The denial of it in Massachusetts by Judge Dudley in 1689 to Rev. John Wise, imprisoned for resisting the collection of an oppressive and illegal tax, was made the subject of a civil action against the judge, and was, moreover, denounced, as one of the grievances of the people, in a pamphlet published in 1689 on the authority of "the gentlemen, merchants, and inhabitants of Boston and the county adjacent." In New York in 1707 it served to effect the release of the Presbyterian ministers Makemie and Hampton from an illegal warrant of arrest issued by the governor, Cornbury, for preaching the gospel without license. In New Jersey in 1710 the assembly denounced one of the judges for refusing the writ to Thomas Gordon, which, they said, was the "undoubted right and great privilege of the subject." In South Carolina in 1692 the assembly adopted the act of 31 Car. II. This act was extended to Virginia by Queen Anne early in her reign, while in the assembly of Maryland in 1725 the benefit of its provisions was claimed, independent of royal favor, as the "birthright of the inhabitants." The refusal of parliament in 1774 to extend the law of *habeas corpus* to Canada was denounced by the continental congress in September of that year as oppressive, and was subsequently recounted in the Declaration of Independence as one of the manifestations on the part of the British government of tyranny over the colonies; Hurd, Hab. Corp. 109.

It is provided in art. i. sec. 9, § 2 of the constitution of the United States that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." Similar provisions are found in the constitutions of most of the states.

In 1861, Taney, C. J., decided in the United States circuit court of Maryland, that congress alone possessed the power under the constitution to suspend the writ; Ex parte Merryman, Taney 246, 9 Am. L. Reg. 524, Fed. Cas. No. 9,487; this view was also taken by other courts; In re Kemp, 16 Wis. 360; People v. Gaul, 44 Barb. (N. Y.) 98; Griffin v. Wilcox, 21 Ind. 370; *contra*, Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761. In the beginning of the Civil War President Lincoln suspended the privilege of the writ of *habeas corpus* on his own authority, and without the sanction of an act of congress. He was supported in his opinion of his right to suspend by some of the legal writers of the time, notably by Horace Binney of Philadelphia, and by Reverdy Johnson of Maryland (2 Moore's Rebellion Record, Docs., p. 185). For the opinions of Senators Browning, Trumbull, Sherman, Howe and Fessenden, see Congressional Globe, pp. 188, 337, 393, 453. For the history of this controversy see 3 Political Science Quarterly 454; 5 Am. Lawyer 169; see 3 Rhodes, Hist. U. S. 438. The privilege of the writ is, however, necessarily suspended whenever martial law is declared in force; for martial law suspends all civil process. A prisoner of war, therefore, or one held by military arrest under the law martial, is not a subject for the *habeas corpus* writ; 1 Bish. Cr. L. § 63. See MARTIAL LAW. Nor is a prisoner in the military or naval service whose offence is properly cognizable before a court martial; Johnson v. Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914. Congress, by act of March 3, 1863, 12 Stat. L. 755, authorized the president to suspend the privilege of the writ throughout the whole or any part of the United States, whenever in his judgment the public safety might require it, during the rebellion. Under the provisions of this act, a partial suspension took place, but it was held that the suspension of the privilege of the writ does not suspend the writ itself. The writ issues as a matter of course; and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it; Ex parte Milligan, 4 Wall. (U. S.) 2, 18 L. Ed. 281. Nor does the suspension of the writ legalize a wrongful arrest and imprisonment; it deprives the person thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability for damages, nor from criminal prosecution; Griffin v. Wilcox, 21 Ind. 372; *contra*, McCall v. McDowell, Deady 233, Fed. Cas. No. 8,673; 1 Bishop, New Cr. L. § 64.

The power has never been exercised by the legislature of any of the states, except that of Massachusetts, which, on the occasion of "Shay's Rebellion," suspended the privilege of the writ from November, 1786, to July, 1787. And in the Confederate States, the privilege was suspended during the war; In re Cain, 60 N. C. 525; State v. Sparks, 27 Tex. 705. See note on Suspension of the Writ, 45 L. R. A. 832.

Congress has prescribed the jurisdiction of the federal courts under the writ; but, never having particularly prescribed the mode of procedure, they have substantially followed in that respect the rules of the common law.

In most of the states statutes have been passed, not only providing what courts or officers may issue the writ, but, to a considerable extent, regulating the practice under it; yet in all of them the proceeding retains its old distinctive feature and merit,—that of a summary appeal for immediate deliverance from illegal imprisonment.

There is a discretion to be exercised in issuing the writ, even when there is power, as it involves a conflict of laws which it is desirable to avoid; Ex parte Rearick, 118 Fed. 928; and no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of cause or person, or some matter rendering the proceeding void; Keizo v. Henry, 211 U. S. 146, 29 Sup. Ct. 41, 53 L. Ed. 125; but it can and should be issued and made ef-

fective when another court has acted without jurisdiction; In re Turner, 119 Fed. 231.

A proceeding in habeas corpus is a civil and not a criminal proceeding, and as final orders of the circuit or district courts in such proceedings can only be reviewed by appeal, the final order of the supreme court of the Phillippine Islands in *habeas corpus* is governed by the same rule and can be reviewed only by appeal and not by writ of error; Fisher v. Baker, 203 U. S. 174, 27 Sup. Ct. 135, 51 L. Ed. 142, 7 Ann. Cas. 1018; so in People v. Dewey, 23 Misc. 267, 50 N. Y. Supp. 1013, it was said to be a civil proceeding; and in State v. Huegin, 110 Wis. 189, 85 N. W. 1046, 62 L. R. A. 700, it is termed a suit in the nature of a civil action. It has, however, been said that it is, strictly speaking, neither a civil nor criminal action, but a summary remedy having for its sole object to restore liberty to one illegally held in custody; Simmons v. Coal Co., 117 Ga. 305, 43 S. E. 780, 61 L. R. A. 739. Though it is a writ of right, it does not issue as a matter of course, but only upon such allegations as, if true, would authorize the discharge of the person in custody; *id.* The issue of the writ may be regulated by statute, provided the constitutional right to it is not infringed; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831; if there is another appropriate remedy the writ will not be issued until application has been made for the proper relief; In re Dykes, 13 Okl. 339, 74 Pac. 506.

The purpose of the writ is to determine whether the person seeking the benefit of it is illegally restrained of his liberty; In re Moyer, 35 Colo. 159, 85 Pac. 190, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189. It is a common-law and not an equitable remedy; Sumner v. Sumner, 117 Ga. 229, 43 S. E. 485. Its only office, except when used in ancillary proceedings, is to test the right to personal liberty; State v. Whitcher, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968.

It is an appropriate proceeding for determining whether one held under an extradition warrant is a fugitive from justice, and he should be discharged if he shows by competent evidence, overcoming the presumption of a properly issued warrant, that he is not a fugitive from the demanding state; Illinois v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121.

Jurisdiction of state courts. The states, being in all respects, except as to the powers delegated in the federal constitution, sovereign political communities, are limited, as to their judicial power, only by that instrument; and they, accordingly, at will, create, apportion, and limit the jurisdiction of their respective courts over the writ of *habeas corpus*, as well as other legal process, subject only to such constitutional restriction; Church, Hab. Corp. 67.

The restrictions in the federal constitution on this subject are necessarily implied from the express grants of judicial power therein to the federal courts in certain cases specified in art. iii. sec. 2, and in which the decision of the supreme court of the United States is paramount over all other courts and conclusive upon the parties.

Jurisdiction of the federal courts. This is prescribed by several acts of congress. By section 14 of the Judiciary Act of September 24, 1789, the general power to issue the writ is granted to the federal courts and also to a justice or judge, to inquire into the cause of commitment; but not where a prisoner in gaol otherwise than under authority of the United States or required to testify.

By section 7 of the Act of March 2, 1833, the jurisdiction of the justices and judges is extended to "all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority or law for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof." The federal courts may grant the writ to inquire into the cause of restraint of any person in jail under the authority of a state in violation of the constitution or of a law or treaty of the United States, and may discharge a prisoner under indictment in a state court when he is found to be so restrained; Ex parte Glenn, 111 Fed. 257; or a prisoner held in contempt without a hearing for an offence not committed in the presence of the court; Ex parte Stricker, 109 Fed. 145; or where a sentence is imposed which neither the statute nor the verdict authorizes; In re Burns, 113 Fed. 987; but except in cases of peculiar urgency they will not discharge the prisoner in advance of a final hearing of his cause in the courts of the state, and even after such final determination in those courts will generally leave the petitioner to his remedy by writ of error from this court; Whitten v. Tomlinson, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406. See also New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80. This decision was rendered necessary by the practice of using the writ as a means to take an appeal from state tribunals to the supreme court of the United States to delay the trial or execution of criminals; the evil of it is set forth by Seymour D. Thompson in 30 Am. L. Rev. 289, 290.

An act of August 29, 1842, extends the privilege of the writ to cases of aliens committed or confined under federal law for acts done under color of the law, authority, etc., of any foreign power.

Section 3 of an Act of July 20, 1790, provided that refractory seamen in certain cases shall not be discharged on *habeas corpus* or otherwise.

By an act of February 6, 1867, the defendant in actual custody under state process, whose case has been removed to the federal court, may have a writ of *habeas corpus*

cum causa to remove him to its custody; R. S. § 642.

By act of May 3, 1885, an appeal may be taken from the judgment of the United States circuit courts in *habeas corpus* cases to the supreme court. Since the passage of this act it has been generally held that the supreme court will not issue the writ where it may be done as well in the proper Circuit Court, unless there are special circumstances making action by the supreme court expedient or necessary; Ex parte Mirzan, 119 U. S. 584, 7 Sup. Ct. 341, 30 L. Ed. 513; In re Huntington, 137 U. S. 63, 11 Sup. Ct. 4, 34 L. Ed. 567. The writ will not be issued when it appears by the petition that the question has already been decided against the petitioner by another judge in the same court; In re Simmons, 45 Fed. 241. In cases where the right of appeal seems inadequate by reason of its delay, the court may hold the person entitled to the writ as a means of speedy determination of the question; Ex parte Kieffer, 40 Fed. 399. In Clark v. Pennsylvania, 128 U. S. 395, 9 Sup. Ct. 113, 32 L. Ed. 487, a judge of the supreme court refused to grant the writ in chambers to the captain of a steamer committed under the laws of Pennsylvania for selling liquor on the steamer without license on the ground that the federal question if any could be raised by writ of error.

Federal courts cannot grant the writ upon a petition that the person is held under the *capias* of a state court issued upon a judgment that has been vacated; In re Shaner, 39 Fed. 869. A district court cannot, by issuing a writ, declare a judgment of a state criminal court a nullity where such court had full jurisdiction over the crime; Ex parte Ulrich, 43 Fed. 661. But the writ can be issued to test the question as to the arrest and imprisonment of a supposed fugitive from justice on the charge of a different offence from that for which he was extradited; In re Fitton, 45 Fed. 471. See also In re Cross, 43 Fed. 517. In general the writ may be issued by federal courts in every case where a party is restrained of his liberty without due process of law in the territorial jurisdiction of such courts; Ex parte Farley, 40 Fed. 66; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. The granting of the writ is within the discretion of the court and will not be reversed unless an abuse thereof be shown; U. S. v. Ronan, 33 Fed. 117. But where the petitioner had been convicted on the indictment of a grand jury impanelled by a court without authority, it was held that the writ became a writ of right and the court having power to issue it could not exercise discretion against issuing it; Ex parte Farley, 40 Fed. 66. A medical director in the navy notified by the secretary of the navy that he was under arrest and should confine himself to the city of Washington is not under such restraint as to sustain the writ; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277.

The writ does not issue as a matter of course from the federal courts and the petition must show a *prima facie* right thereto; In re Haskell, 52 Fed. 795; In re King, 51 Fed. 434; In re Jordan, 49 Fed. 238. And only in rare cases will federal courts discharge prisoners held under process of state courts; In re Huse, 79 Fed. 305, 25 C. C. A. 1; In re Krug, 79 Fed. 308.

The federal court may discharge a prisoner who is held for an act made criminal by the state in violation of the rights secured by the United States constitution; In re Davenport, 102 Fed. 540; but they will not discharge a prisoner convicted in a state court except in cases of emergency, but will leave him his writ of error; In re Stone, 120 Fed. 101; and except under extraordinary circumstances, a federal court will not issue the writ for the release of a prisoner held under process issued by a state court in a civil case, on the ground that such court was without jurisdiction in the particular suit where it has jurisdiction over such suits in general; Mackenzie v. Barrett, 144 Fed. 954, 76 C. C. A. 8.

The writ will not issue unless the court under whose warrant the accused is held is without jurisdiction, and mere objections that the indictment is too vague in general and does not sufficiently inform him of the offence charged, will not be considered; In re Lewis, 114 Fed. 963.

But if a party is imprisoned by the sentence of a court, judge or magistrate, which is void for want of authority, as for being under an unconstitutional and void law; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. Ed. 216; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; or when there was no authority in the person causing the arrest to make it; Ex parte Lange, 18 Wall. (U. S.) 163, 21 L. Ed. 872; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Randolph, 2 Brock. 447, Fed. Cas. No. 11,558; In re Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; then there is ground for discharge under *habeas corpus*.

In contempt cases, *habeas corpus* is not issued for one adjudged in contempt, as he may have a writ of error; Perry v. Pernet, 165 Ind. 67, 74 N. E. 609, 6 Ann. Cas. 533; In re Stidger, 37 Colo. 407, 86 Pac. 219; to obtain release the judgment and the sentence must be a mere nullity; Michaelson v. Beemer, 72 Neb. 761, 101 N. W. 1007, 9 Ann. Cas. 1181; where there is entire want of jurisdiction to issue the process for imprisonment, *habeas corpus* is the proper remedy and the person need not resort to an appeal; In re Gribben, 5 Okl. 379, 47 Pac. 1074; but it can-

not be used to review the proceeding in contempt, though it is proper in order to secure the discharge of one not a party and therefore not subject to the jurisdiction of the court; In re Reese, 107 Fed. 942, 47 C. C. A. 87.

The supreme court issues the writ by virtue of its appellate jurisdiction; Ex parte Bollman, 4 Cra. (U. S.) 75, 2 L. Ed. 554; Ex parte Hung Hang, 108 U. S. 552, 2 Sup. Ct. 863, 27 L. Ed. 811; and it will not grant it at the instance of the subject of a foreign government to obtain the custody of a minor child detained by a citizen of one of the states; for that would be the exercise of original jurisdiction; Ex parte Barry, 2 How. (U. S.) 65, 11 L. Ed. 181. An appeal lies to the supreme court from a final order of the supreme court of the Territory of New Mexico ordering a writ of *habeas corpus* to be discharged; Gonzales v. Cunningham, 164 U. S. 612, 17 Sup. Ct. 182, 41 L. Ed. 572.

It will grant it on the application of one committed for trial in the circuit court on a criminal charge; Ex parte Bollman, 4 Cra. (U. S.) 75, 2 L. Ed. 554; U. S. v. Hamilton, 3 Dall. (U. S.) 17, 1 L. Ed. 490; and where the petitioner is committed on an insufficient warrant; Ex parte Burford, 3 Cra. (U. S.) 448, 2 L. Ed. 495; and where he is detained by the marshal on a *capias ad satisfaciendum* after the return day of the writ; Ex parte Watkins, 7 Pet. (U. S.) 568, 8 L. Ed. 786; also for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under or by color of the authority of the United States, and all persons who are in custody in violation of the constitution or laws of the United States; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 33 L. Ed. 405. An alien immigrant may have a writ to test the lawfulness of his restraint from landing by a federal office; Nishimura Ekin v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146.

None of the courts of the United States have authority to grant the writ for the purpose of inquiring into the cause of commitment, where the prisoner is imprisoned under process issued from the state courts, excepting where he is denied, or cannot enforce, in the judicial tribunals of the state, any right secured to him by any law providing for the equal civil rights of citizens of the United States; R. S. § 641; Texas v. Gaines, 2 Woods 342, Fed. Cas. No. 13,847. It was refused by the supreme court where the party for whose benefit the application was made had been convicted in a state court of levying war against the state; Ex parte Dorr, 3 How. (U. S.) 103, 11 L. Ed. 514. Federal courts will proceed with great caution upon applications for writ of *habeas corpus* in behalf of a person imprisoned under process of the state courts, and, when practicable, will investigate the questions raised before issuing the writ; In re Jordan, 49 Fed. 238. See also paper by Seymour D. Thompson on the abuse and too rigorous use of the writ of *habeas corpus* by the federal judges; 6 Rep. Am. Bar. Assoc. 243.

It was refused by the circuit court where the petitioner, a secretary attached to the Spanish legation, was confined under criminal process issued under the authority of the state of Pennsylvania; Ex parte Cabrera, 1 Wash. C. C. 232, Fed. Cas. No. 2,278; also where the petitioner, a British seaman, was arrested under the authority of an act of the legislature of the state of South Carolina, which was held to conflict with the constitution of the United States; Ex parte Elkison, 2 Wheel. Cr. Cas. 56, Fed. Cas. No. 4,366; and where the only question involved was the identity of a state prisoner, and no diversity of citizenship was involved; Ex parte Moebus, 148 Fed. 39; or the prisoner is regularly under indictment in the state court; Ex parte Glenn, 103 Fed. 947.

It will be granted, however, where the imprisonment, although by a state officer, is under or by color of the authority of the United States, as where the prisoner was arrested under a governor's warrant as a fugitive from justice of another state, requisition having been regularly made; Ex parte Smith, 3 McLean 121, Fed. Cas. No. 12,968; or where extradited under a treaty with a foreign country upon the charge of a certain offence for which he was afterwards tried and acquitted, and immediately thereafter he was arrested under a charge entirely separate and distinct from the former one; In re Reinitz, 39 Fed. 204, 4 L. R. A. 236. It will also be granted where United States marshals or their deputies are arrested by state authority for using force or threats in executing process of the federal courts; U. S. v. Fullhart, 47 Fed. 802; but see In re Marsh, 51 Fed. 277. Federal judges should grant writs to persons imprisoned for any act done in pursuance of a law of the United States; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

The power of the federal courts to issue the writ is confined to cases in which the prisoner is in custody under or by order of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution, or of a law or treaty of the United States, or being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or where it is

necessary to bring the prisoner into court to testify; R. S. § 753.

The circumstances under which the writ will be issued are stated and the authorities collected in Ex parte Collins, 149 Fed. 573.

Proper use of the writ. The true use of the writ is to cause a legal inquiry into the cause of imprisonment, and to procure the release of the prisoner where that is found to be illegal.

The writ cannot be made use of to perform the function of a writ of error or an appeal; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Felts v. Murphy, 201 U. S. 123, 26 Sup. Ct. 366, 50 L. Ed. 689; Welty v. Ward, 164 Ind. 457, 73 N. E. 889, 3 Ann. Cas. 556; Ex parte Powers, 129 Fed. 985; In re Dowd, 133 Fed. 747; Ex parte Mitchell, 104 Mo. 121, 16 S. W. 118, 24 Am. St. Rep. 324; Ex parte McMinn, 110 Fed. 954; In re Langston, 55 Neb. 310, 75 N. W. 828; In re Ammon, 132 Fed. 714; In re Wyman, 132 Fed. 708; Ex parte Collins, 149 Fed. 573; Storti v. Massachusetts, 183 U. S. 138, 22 Sup. Ct. 72, 46 L. Ed. 120; In re McKenzie, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. Ed. 657; not even to test the constitutionality of the law under which the imprisonment was imposed under a *mittimus* issued on final judgment of a court of competent jurisdiction; People v. Jonas, 173 Ill. 316, 50 N. E. 1051; and a federal court will not interfere by issuing the writ so long as the remedy by writ of error from the supreme court to the highest state court is not exhausted; Ex parte Chadwick, 159 Fed. 576; Minnesota v. Brundage, 180 U. S. 499, 21 Sup. Ct. 455, 45 L. Ed. 639; Riggins v. U. S., 199 U. S. 547, 26 Sup. Ct. 147, 50 L. Ed. 303; but where the case is one of which the public interest demands a speedy determination and the ends of justice will be promoted thereby, the supreme court may proceed to final judgment on appeal from the order of the circuit court denying the relief; Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161; and while the federal court to which the application is made will usually leave the petitioner to the ordinary course of proceedings, there are exceptional cases in which the federal court or judge may sometimes interfere, such for instance as cases "involving the authority and power of the general government or the obligations of this country to or its relations with foreign nations"; Urquhart v. Brown, 205 U. S. 179, 27 Sup. Ct. 459, 51 L. Ed. 760. The writ only challenges the jurisdiction or power to commit, and may not be invoked merely to review; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622. Where the state court has jurisdiction of the crime under a statute not repugnant to the Constitution or a treaty or law thereunder, *habeas corpus* cannot be made a means of review; Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399.

The rule that the writ cannot be used as a writ of error applies to extradition proceedings and if the committing magistrate had jurisdiction and there was competent evidence, his decision may not be reviewed; Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274.

If the imprisonment be claimed by virtue of legal process, the validity and present force of such process are the only subjects of investigation; Bennac v. People, 4 Barb. (N. Y.) 31; State v. Buzine, 4 Harr. (Del.) 575.

But such process cannot, in this proceeding, be invalidated by errors which only render it irregular. The defects, to entitle the prisoner to be discharged, must be such as to render the process void; for the writ of *habeas corpus* is not, and cannot perform the office of, a writ of error; Walbridge v. Hall, 3 Vt. 114; Cox v. White, 2 La. 422; People v. Cavanagh, 2 Park. Cr. Cas. (N. Y.) 650; People v. Nevins, 1 Hill (N. Y.) 154; 4 C. & P. 415; Ex parte Shaw, 7 Ohio St. 81, 70 Am. Dec. 55; In re Pikulik, 81 Wis. 158, 51 N. W. 261; Ex parte Bowen, 25 Fla. 214, 6 South. 65; Davis v. Beason, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; In re Schneider, 118 U. S. 162, 13 Sup. Ct. 572, 37 L. Ed. 406; In re Swan, 150 U. S. 637; 14 Sup. Ct. 225, 37 L. Ed. 1207; In re King, 51 Fed. 434; In re Copenhaver, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; but will only be issued if applied for to relieve from imprisonment under the order or sentence of some inferior federal court, when such court has acted without jurisdiction, or has exceeded its jurisdiction, and its order is for that reason void; In re Boyd, 49 Fed. 48, 1 C. C. A. 156, 4 U. S. App. 73. It may be issued when the petitioner is under arrest but at large on bail; Mackenzie v. Barrett, 141 Fed. 964, 73 C. C. A. 280, 5 Ann. Cas. 551.

Although the writ of *habeas corpus* does not lie for the determination of mere errors where a conviction has been had and the commitment thereunder is in due form, yet if the court had no jurisdiction of the offence charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which under the law constitutes no crime, the judgment is void and the prisoner should be discharged; In re Kowalsky, 73 Cal. 120, 14 Pac. 399; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888; In re Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; In re Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118; Ex parte Kitchen, 19 Nev. 178, 18 Pac. 886; Daniels v. Towers, 79 Ga. 785, 7 S. E. 120.

It cannot be used to oust another competent and acting jurisdiction, or to divert or defeat the course of justice therein; Peltier v. Pennington, 14 N. J. L. 312; Ex parte Gilchrist, 4 McCord (S. C.) 233; Com. v. Lecky, 1 Watts (Pa.) 66, 26 Am. Dec. 37; In re Sims, 7 Cush. (Mass.) 285; Ex parte Bushnell, 8 Ohio St. 599; In re Duncan, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219. It was not intended by congress that the feder-

al courts should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the states through their own tribunals; In re Wood, 140 U. S. 278, 11 Sup. Ct. 738, 35 L. Ed. 505; McElvaine v. Brush, 142 U. S. 155, 12 Sup. Ct. 156, 35 L. Ed. 971.

The only ground on which a court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void; In re Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; Wight v. Nicholson, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; Ex parte Nielsen, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

The writ is also employed to recover the custody of a person where the applicant has a legal right thereto: as, the husband for his wife, the parent for his child, the guardian for his ward, and the master for his apprentice; Green v. Campbell, 35 W. Va. 698, 14 S. E. 212, 29 Am. St. Rep. 843; Ex parte Chin King, 35 Fed. 354; [1892] App. Cas. 326. But in such cases, as the just object of the proceeding is rather to remove illegal restraint than to enforce specifically the claims of private custody, the alleged prisoner, if an adult of sound mind, is generally permitted to go at large; if an infant of sufficient age and discretion, it is usually permitted to elect in whose custody it will remain, provided that it does not elect an injurious or improper custody; and if of tender years, without such discretion, the court determines its custody according to what the true interests and welfare of the child may at the time require; Hurd, Hab. Corp. 450.

Application for the writ. This may be made by the prisoner, or by any one on his behalf, where for any reason he is unable to make it. It is usually made by petition in writing, verified by affidavit, stating that the petitioner is unlawfully detained, etc., and, where the imprisonment is under legal process, a copy thereof, if attainable, should be presented with the petition; for where the prisoner is under sentence on conviction for crime, or in execution on civil process, or committed for treason or felony plainly expressed in the warrant, he is not, in most of the states, entitled to the writ; Hurd, Hab. Corp. 209; Church, Hab. Corp. 91. The application must set forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what authority, if known; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154. If it appears from the petition itself that the applicant for the writ is not entitled thereto, the writ need not be awarded; Ex parte Terry, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; In re Haskell, 52 Fed. 795.

Where, with ample opportunity to do so, an accused did not apply for the writ of *habeas corpus* until after the jury had been sworn and his trial begun in a state court, the federal court will not interpose at that stage of the cause; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40, 36 L. Ed. 934.

The writ may be issued to determine the right to the custody of an infant as between parents who are living apart; In re Barry, 42 Fed. 113. A mere stranger or volunteer, in no way entitled to the custody of or responsible for the welfare of an infant, nor invited by the infant or its parents or guardian to do so, has no right to a writ; In re Pool, 2 MacArth. (D. C.) 583, 29 Am. Rep. 628; Brown v. Robertson, 76 S. C. 151, 56 S. E. 786, 9 L. R. A. (N. S.) 1173 and note; King's Case, 161 Mass. 46, 36 N. E. 685, collecting cases. An appeal generally lies from a judgment on the application for the writ where the custody of an infant is involved; People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; Bleakley v. Smart, 74 Kan. 476, 87 Pac. 76, 11 Ann. Cas. 125 (where mandamus was granted to compel hearing for a new trial); *contra*, Matthews v. Hobbs, 51 Ala. 210. It has been held that if there be no statute, a judgment in habeas corpus is neither reviewable or *res judicata;* Skinner v. Sedgbeer, 8 Kan. App. 624, 56 Pac. 136; *contra*, State v. Smith, 65 Wis. 93, 26 N. W. 258; see 20 Harv. L. Rev. 237.

The return. The person to whom the writ is directed is required to produce the body of the prisoner forthwith before the court or officer therein named, and to show the cause of the caption and detention; 5 Term 89; In re Nicholls, 5 N. J. L. 545. The return must specify the true cause of the detention; and the party imprisoned may deny any of the facts set forth in the return, or may allege other facts that may be material in the case, so that the facts may be ascertained and the matter disposed of as law and justice require; In re Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154. No evidence is necessary to support the return, as it imports verity until impeached; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620.

If the writ be returned without the body, the return must show that the prisoner is not in the possession, custody, or power of the party making the return, or that the prisoner cannot, without serious danger to his life, be produced; and any evasion on this point will be dealt with summarily by attachment; 5 Term 89; In re Stacy, 10 Johns. (N. Y.) 328; State v. Philpot, 1 Dudl. (Ga.) 46; U. S. v. Davis, 5 Cra. C. C. 622, Fed. Cas. No. 14,926.

Where the detention is claimed under legal process, a copy of it is attached to the return. Where the detention is under a claim of private custody, all the facts relied on to justify the restraint are set forth in the return.

The hearing. The questions arising upon the return or otherwise in the proceeding, whether of fact or of law, are determined by the court or judge, and not by a jury; Hurd, Hab. Corp. 299.

The evidence on the hearing is such as is allowed in other summary proceedings in which the strictness exacted on the trial in civil actions or criminal prosecutions is somewhat relaxed, the practice sometimes permitting affidavits to be read where there has been no opportunity for cross-examination; but the introduction of such evidence rests in the sound discretion of the court; Archb. Cr. Pl. & Pr. 204; State v. Lyon, 1 N. J. L. 403; In re Heyward, 1 Sandf. (N. Y.) 701; 20 How. S. Tr. 1376; 1 Burr's Trial 97. The court is not concluded by the finding of a committing magistrate, but may go behind his order of commitment, and by certiorari look into the evidence before him; In re Martin, 5 Blatchf. 303, Fed. Cas. No. 9,151; Gosline v. Place, 32 Pa. 520; See U. S. v. Don On, 49 Fed. 569.

Pending the hearing the court may commit the prisoner for safe-keeping from day to day, until the decision of the case; In re Kaine, 14 How. (U. S.) 134, 14 L. Ed. 345; Bac. Abr. *Habeas Corpus* (B 13); 5 Mod. 22.

If the imprisonment be illegal, it is the duty of the court to discharge the prisoner from that imprisonment; but if the court or officer hearing the *habeas corpus* be invested with the powers of an examining and committing magistrate in the particular case, and the evidence taken before the court, or regularly certified to it in the *habeas corpus* proceeding, so far implicate the prisoner in the commission of crime as to justify his being held for trial, it is usual for the court, in default of bail, to commit him as upon an original examination; 3 East 157; Ex parte Bennett, 2 Cra. (C. C.) 612, Fed. Cas. No. 1,311. Where a prisoner is held under a valid sentence and commitment, the illegality of a second sentence will not be inquired into on *habeas corpus* till the term under the first sentence has expired; Ex parte Ryan, 17 Nev. 139, 28 Pac. 1040.

If the prisoner is not discharged or committed *de novo*, he must be remanded, or, in a proper case, let to bail; and all offences are bailable prior to the conviction of the offender, except "capital offences when the proof is evident or presumption great;" Hurd, Hab. Corp. 430.

Recommitment after discharge. The act of 31 Car. II. prohibited, under the penalty of five hundred pounds, the reimprisoning for the same offence of any person set at large on *habeas corpus*, except by the legal order and process of such court wherein such prisoner was bound by recognizance to appear, or other court having jurisdiction of the cause. Somewhat similar provisions are found in the statutes of many of the states. But these provisions are not held to prevent the subsequent arrest of the prisoner on other and more perfect process, although relating to the same criminal act; Ex parte Milburn, 9 Pet. (U. S.) 704, 9 L. Ed. 280; Byrd v. State, 2 Miss. 163.

See "The Story of the Habeas Corpus" by Edward Jenks in 18 L. Q. Rev. 64 (2 Sel. Essays in Anglo-Amer. L. H. 531).

HABEAS CORPUS ACTS. See HABEAS CORPUS.

HABEAS CORPUS AD DELIBERANDUM ET RECIPIENDUM (Lat.). A writ which is issued to remove, for trial, a person confined in one county to the county or place where the offence of which he is accused was committed. Bac. Abr. *Habeas Corpus*, A; 1 Chitty, Cr. L. 132. Thus, it has been granted to remove a person in custody for contempt to take his trial for perjury in another county; 1 Tyrwh. 185.

HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM (Lat.). A writ usually issued in civil cases to remove an action from an inferior court, where the defendant is sued and imprisoned, to some superior court which has jurisdiction over the matter, in order that the cause may be determined there. This writ is commonly called *habeas corpus cum causa*, because it commands the judges of the inferior court to return the day and cause of the caption and detainer of the prisoner; Bac. Abr. *Habeas Corpus*, A; 3 Bla. Com. 130; Tidd, Pr. 296.

This writ may also be issued at the instance of the bail of the defendant, to bring him up to be surrendered in their discharge, whether he is in custody on a civil suit or on a criminal accusation; Tidd, Pr. 298; 1 Chitty, Cr. L. 132.

HABEAS CORPUS AD PROSEQUENDUM (Lat.). A writ which issues when it is necessary to remove a prisoner in order to *prosecute* in the proper jurisdiction wherein the fact was committed. 3 Bla. Com. 130.

HABEAS CORPUS AD RESPONDENDUM (Lat.). A writ which is usually employed in civil cases to remove a person out of the custody of one court into that of another, in order that he may be sued and answer the action in the latter. 2 Mod. 198; 3 Bla. Com. 129; Tidd. Pr. 300.

This writ lies also to bring up a person in confinement to answer a criminal charge: thus, the court issued it to the warden of the fleet, to take the body of the prisoner confined there before a magistrate to be examined respecting a charge of felony or misdemeanor; 5 B. & Ald. 730.

But it was refused to bring up the body of a prisoner under sentence for a felony, for the purpose of having him tried for a previous felony.

HABEAS CORPUS AD SATISFACIENDUM (Lat.). A writ which is issued to

bring a prisoner from the prison of one court into that of another, in order to charge him in execution upon a judgment of the last court. 3 Bla. Com. 130; Tidd, Pr. 301.

HABEAS CORPUS AD SUBJICIENDUM. See HABEAS CORPUS.

HABEAS CORPUS AD TESTIFICANDUM (Lat.). A writ which lies to bring up a prisoner detained in any jail or prison, to give evidence before any court of competent jurisdiction. Tidd, Pr. 739; 3 Bla. Com. 130; State v. Kennedy, 20 Ia. 372; Ex parte Marmaduke, 91 Mo. 250, 4 S. W. 91, 60 Am. Rep. 250.

The allowance of this writ resting in the discretion of the court, it will be refused if the application appear to be in bad faith or a *mere contrivance;* 3 Burr. 1440.

It was refused to bring up a prisoner of war; 2 Dougl. 419; or a prisoner in custody for high treason; Peake, Add. Cas. 21.

It would of course be refused where it appear from the application that the prisoner was under sentence for crime which rendered him incompetent as a witness.

The application for the writ is made upon affidavit, stating the nature of the suit and the materiality of the testimony, together with the general circumstances of restraint which render the writ necessary; Cowp. 672; 2 Cow. & H. Notes to Phill. Ev. 658.

HABEAS CORPUS CUM CAUSA. See HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

HABENDUM (Lat.). The clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by grantee. 3 Washb. R. P. 436.

It commences with the words "to have and to hold," *habendum et tenendum.* It is not an essential part of a deed, but serves to qualify, define, or control it; Co. Litt. 6 *a*, 299; 4 Kent 468; Sumner v. Williams, 8 Mass. 162, 174, 5 Am. Dec. 83; and may be rejected if clearly repugnant to the rest of the deed; Shepp. Touchst. 102. See 3 Washb. R. P. 436; 4 Kent 468; 4 Greenl. Cruise, Dig. 273; Elph. Deeds 217.

HABENTES HOMINES (Lat.). Rich men. Du Cange.

HABENTIA. Wealth; Riches. Mon. Ang. t. 1. 100.

HABERE (Lat.). To have. It is said to designate the right, while *tenere* (to hold) signifies the possession, and *possidere* (to possess) includes both. Calv. Lex.

HABERE FACIAS POSSESSIONEM (Lat.). A writ of execution in the action of ejectment; originally to recover possession of a chattel interest in real estate.

The sheriff is commanded by this writ that, without delay, he cause the plaintiff to have possession of the land in dispute which is therein described. A *fi. fa.* or *ca. sa.* for costs may be included in the writ. The duty of the sheriff in the execution and return of that part of the writ is the same as on a common *fi. fa.* or *ca. sa.* The sheriff is to execute this writ by delivering a full and actual possession of the premises to the plaintiff. For this purpose, he may break an outer or inner door of the house; and, should he be violently opposed, he may raise the *posse comitatus;* 5 Co. 91 *b;* 1 Leon. 145.

The name of this writ is abbreviated *hab. fac. poss.* See 10 Viner, Abr. 14; Tidd, Pr. 1081; 2 Arch. Pr. 58; 3 Bla. Com. 412.

HABERE FACIAS SEISINAM (Lat.). The name of a writ of execution, used in most real actions, by which the sheriff is directed that he cause the demandant to have seisin of the lands which he has recovered. It lay to recover possession of the freehold, while to recover a chattel interest in real estate the *habere facias possessionem* was the appropriate writ. It was practically abolished in England by the Common Law Procedure Acts of 1852 and 1860, but is still known in some of the states in connection with the action of dower.

This writ may be taken out at any time within a year and a day after judgment. It is to be executed nearly in the same manner as the writ of *habere facias possessionem,* and for this purpose the officer may break open the outer door of a house to deliver seisin to the demandant; 5 Co. 91 *b;* Com. Dig. *Execution,* E. The name of this writ is abbreviated *hab. fac. seis.*

HABERE FACIAS VISUM (Lat.). **In Practice.** The name of a writ which lay when a view is to be taken of lands and tenements. Fitzh. N. B. Index, *View.*

HABERE LICERE. See SALE.

HABETO TIBI RES TUAS. In Civil Law. Have or take thy property to thyself. A phrase used in connection with the Roman law of divorce. Calv. Lex. Where a marriage in one of their modes, by which the wife passed *in manum viri,* was dissolved by divorce, the husband had to restore the *dos,* as in case of the wife's death, unless her misconduct was the cause; Sand. Just. 152.

HABILIS (Lat.). Fit; suitable. 1 Sharsw. Bla. Com. 436. Active; useful (of a servant). Du Cange. Proved; authentic (of Book of Saints). Du Cange. Fixed; stable (of authority of the king). Du Cange.

HABIT. A disposition or condition of the body or mind acquired by custom or a frequent repetition of the same act. See Sikes v. Allen, 2 Mart. N. S. (La.) 622; Ludwick v. Com., 18 Pa. 172; Com. v. Whitney, 5 Gray (Mass.) 85. The customary conduct, to pursue which one has acquired a tendency, from frequent repetition of the same acts. Knick-

erbocker Life Ins. Co. v. Foley, 105 U. S. 350, 26 L. Ed. 1055.

The *habit of dealing* has always an important bearing upon the construction of commercial contracts. A ratification will be inferred from the *mere habit of dealing* between the parties: as if a broker has been accustomed to settle losses on policies in a particular manner, without any objection being made, or with the silent approbation of his principal, and he should afterwards settle other policies in the same manner, to which no objection should be made within a reasonable time, a just presumption would arise of an implied ratification: for, if the principal did not agree to such settlement, he should have declared his dissent. See USAGE.

The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110.

HABIT AND REPUTE. Applied in Scotch law to a general understanding and belief of something's having happened: *e. g.* marriage may be constituted by *habit and repute;* Bell. Dict.

HABITABLE REPAIR. Such a state of repair that leased premises may be occupied, not only with safety, but with reasonable comfort. 2 Mood. & R. 186.

HABITANCY. See INHABITANT.

HABITANT. A resident; an inhabitant *(q. v.).* A native of Canada of French descent, particularly of the peasant or farming class; a tenant who kept hearth and home on the seigniory.

HABITATION. In Civil Law. The right of a person to live in the house of another without prejudice to the property.

It differed from a usufruct in this, that the usufructuary might apply the house to any purpose,—as of a store or manufactory; whereas the party having the right of habitation could only use it for the residence of himself and family; 1 Bro. Civ. Law 184; Domat, l. 1, t. 11, s. 2, n. 7.

In Estate. A dwelling-house; a home stall. 2 Bla. Com. 4; 4 *id.* 220.

HABITUAL CRIMINALS ACT. The stat. 32 & 33 Vict. c. 99. Its object was to give the police greater control over convicted criminals at large, and to provide for the registration of criminals. Now repealed and other provisions substituted for it, by the Prevention of Crime Act, 34 & 35 Vict. c. 112. Moz. & W.

Statutes providing for increased penalties for crimes committed by habitual criminals or prior offenders are not contrary to the United States constitution prohibiting *ex post facto* laws; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; State v. Dowden, 137 Ia. 573, 115 N. W. 211; State of Iowa v. Jones, 128 Fed. 626. They do not deny equal protection of the law; People v. Coleman, 145 Cal. 609, 79 Pac. 283; nor impose cruel and unusual punishment; McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; nor place the accused in jeopardy a second time; Herndon v. Com., 105 Ky. 197, 48 S. W. 989, 88 Am. St. Rep. 303; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922.

As to the effect of a pardon for the first offense, see PARDON.

HABITUAL DRUNKARD. A person given to inebriety or the excessive use of intoxicating drink, who has lost the power or the will, by frequent indulgence, to control his appetite for it. Ludwick v. Com., 18 Pa. 172; Com. v. Whitney, 5 Gray (Mass.) 85. One who has the habit of indulging in intoxicating drinks so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. Magahay v. Magahay, 35 Mich. 210. Within the meaning of the divorce laws, one who has a fixed habit of frequently getting drunk; Page v. Page, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054. The custom or habit of getting drunk; the constant indulgence in such stimulants as wine, brandy, and whisky, whereby intoxication is produced; not the ordinary use, but the habitual use of them; the habit should be actual and confirmed, but need not be continuous, or even of daily occurrence; Williams v. Goss, 43 La. Ann. 868, 9 South. 750. If there is a fixed habit of drinking to excess, so as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is habitual intemperance; Mahone v. Mahone, 19 Cal. 626, 81 Am. Dec. 91; but see Wheeler v. Wheeler, 53 Ia. 511, 5 N. W. 689, 36 Am. Rep. 240.

Habitual drunkenness of a husband has been held not to entitle the wife to a divorce; L. R. 1 P. & M. 46; *contra*, 1 Bish. Mar. Div. & Sep. 1781. And in many of the states statutory provisions make such conduct ground for divorce. The fact that a man has had delirium tremens once does not prove, as a matter of law, that he is habitually intemperate, so as to contradict his representation to the contrary; Northwestern Mut. Life Ins. Co. v. Bank, 122 U. S. 501, 7 Sup. Ct. 1221, 30 L. Ed. 1100.

By the laws of some states, such persons are classed with idiots, lunatics, etc., in regard to the care of property; and in some, they are liable to punishment. See Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; U. S. v. Forbes, Crabbe 558, Fed. Cas. No. 15,129; In re Guardianship of Wetmore, 6 Wash. 271, 33 Pac. 615.

While a woman is under guardianship as an habitual drunkard, she is conclusively presumed to be incapable of conducting her af-

fairs; she cannot transact any business, make a valid deed or bond, waive the notice of protest on a bill, or waive the provisions of her husband's will and elect to take dower, or do anything which involves the exercise of judgment or discrimination; Philadelphia Trust, Safe and Deposit Ins. Co. v. Allison, 108 Me. 326, 80 Atl. 833, 39 L. R. A. (N. S.) 39; see Cockrill v. Cockrill, 79 Fed. 143; L'Amoureaux v. Crosby, 2 Paige, Ch. (N. Y.) 422; Penhallow v. Kimball, 61 N. H. 596.

See Rogers, Drinks, etc.; DRUNKENNESS; DELIRIUM TREMENS; INTOXICATION.

HABITUALLY. Customarily; by frequent practice or use. It does not mean entirely or exclusively; Stanton v. French, 91 Cal. 274, 27 Pac. 657, 25 Am. St. Rep. 174.

HABLE. A seaport; a harbor; a naval station. Stat. 27 Hen. VI. c. 3.

HACIENDA. **In Spanish Law.** A generic term, applicable to the mass of the property belonging to a state, and the administration of the same. Also a private estate or plantation.

As a science, it is defined by Dr. Jose Canga Argüells, in his "Diccionario de Hacienda," to be that part of civil economy which teaches how to aggrandize a nation by the useful employment of its wealth.

A royal estate. Newman & B. Dict.

HACKNEY CARRIAGES. Carriages plying for hire in the street. The driver is liable for negligently losing baggage; 2 C. 13, 877; Masterson v. Short, 33 How. Pr. (N. Y.) 481. They are usually regulated in large cities by statute or ordinance; 17 & 18 Vict. c. 86; Com. v. Matthews, 122 Mass. 60. See HIGHWAYS; RAILROADS.

HADBOTE. **In English Law.** A recompense or amends made for violence offered to a person in holy orders. Jacob.

HADD. A boundary or limit. A statutory punishment defined by law, and not arbitrary. In Hindu law. Moz. & W.

HADERUNGA. Respect or distinction of persons. Jacob.

HADGONEL. A tax or mulct. Jacob.

HAEC EST CONVENTIO (Lat.). This is an agreement. Words with which agreements anciently commenced. Yearb. H. 6 Edw. II. 191.

HAEC EST FINALIS CONCORDIA (L. Lat.). This is the final agreement. The words with which the foot of a fine commenced. 2 Bl. Com. 351.

HÆREDA. The name, under the Gothic constitutions, of the hundred court *(q. v.)*. 3 Bla. Com. 35; 3 Steph. Com. 281, 282, n. *(q.)*.

HÆREDE ABDUCTO. An ancient writ that lay for the lord, who, having by right the wardship of his tenant under age, could not obtain access to his person, by reason of the ward having been carried away by another person. Old. Nat. Brev. 93; Cowell.

HÆREDE DELIBERANDO ALTERI QUI HABET CUSTODIAM TERRÆ. An ancient writ, directed to the sheriff, requiring him to command one who had taken away an heir under age, being his ward, to deliver him to the person whose ward he was by reason of his land. Reg. Orig. 161.

HÆREDE RAPTO. An ancient writ that lay for the ravishment of the lord's ward. Reg. Orig. 163.

HÆREDES. Heirs. Plural of *Hæres*, which see, together with titles immediately following it.

HÆREDIPETA (Law Lat.). The next heir to lands. Du Cange. And who seeks to be made heir *(qui cupit hæreditatem)*. Du Cange.

HÆREDITAS (Lat. from *hæres*). **In Civil Law.** *"Nihil aliud est hæreditas, quam successio in universum jus quod defunctus habuit."* *Inheritance* is nothing else than succession to every right which the deceased possessed. Dig. 50. 17; 50. 16; 5. 2; Mack. C. L. § 605; Bracton 62 *b*. The theory was that, though the physical person of the deceased had perished, his legal personality survived and descended unimpaired on his heirs in whom his legal identity was continued.

See HÆRES.

In Old English Law. An estate transmissible by descent; an inheritance. Marten, Anecd. Collect. t. 3, p. 269; Co. Litt. 9.

HÆREDITAS DAMNOSA. A burdensome inheritance. See DAMNOSA HÆREDITAS.

HÆREDITAS JACENS (Lat.). **In Civil Law.** A prostrate inheritance. The inheritance left to a voluntary heir was so called so long as he had not manifested, either expressly or by silence, his acceptance or refusal of the inheritance, which, by a fiction of law, was said to sustain the person *(sustinere personam)* of the deceased, and not of the heir. Mack. C. L. § 685 *a*. An estate with no heir or legatee to take. Code, 10. 10., 1; Howe, Stud. Civ. L. 68.

In English Law. An estate in abeyance; that is, after the ancestor's death and before assumption of the heir. Co. Litt. 342 *b*. An inheritance without legal owner, and therefore open to the first occupant. 2 Bla. Com. 259.

The Roman conception of the term is unknown to the common law. John C. Gray, Nature, etc., of Law 59, 298, where the subject is treated.

HÆREDITAS LUCTUOSA. The succession of parents to the estate of deceased children. 4 Kent 397. It was called a mournful inheritance because out of the ordinary and natural course of mortality. It was sometimes termed *tristis successio*.

HÆRES. In Roman Law. One who succeeds to the rights and occupies the place of a deceased person, being appointed by the will of the decedent. It is to be observed that the Roman *hæres* had not the slightest resemblance to the English *heir*. He corresponded in character and duties almost exactly with the *executor* under the English law.

The institution of the *hæres* was the essential characteristic of a *testament:* if this was not done, the instrument was called a *codicillus*. Mack. C. L. §§ 632, 650.

Who might not be instituted. Certain persons were not permitted to be instituted in this capacity; such as, persons not Roman citizens, slaves of such persons, persons not in being at the death of the testator, and corporations, unless especially privileged. Also, the emperor could not be made *hæres* with the condition that he should prosecute a suit of the testator against a subject. Nor could a second husband or wife be instituted *hæres* to a greater portion of the estate than was left to that child of the first marriage which received least by the will. So, a widow who married before the expiration of her year of mourning could not institute her second husband as *hæres* to more than a third of her estate. And a man who had legitimate children could not institute as *hæredes* a concubine and her children to more than a twelfth of his estate, nor the mother alone to more than one-twenty-fourth; Mack. C. L. § 651.

The institution of the *hæres* might be *absolute* or *conditional*. But the condition, to be valid, must be *suspensive* (condition precedent, see CONDITION), *possible*, and *lawful*. If, however, this rule was infringed, certain conditions, as the *resolutive* (condition subsequent, see CONDITION), the *impossible*, and the *immoral* or *indecent*, were held nugatory, while others invalidated the appointment of the *hæres*,—as the *preposterous* and *captatory*, *i. e.* the appointment of a *hæres* on condition that the appointee should, in turn, institute the testator or some other person *hæres* in his testament. In regard to limitations of time, they must, to be valid, commence *ex die incerto*. A condition that A should become *hæres* after a *certain* day, or that he should be *hæres* up to a day whether *certain* or *uncertain*, was nugatory. The testator might assign his reasons for the institution of a particular *hæres*, but a mistake in the facts upon which those reasons were based did not, in general, affect the validity of the appointment. The institution might be accompanied with a direction that the *hæres* should apply the inheritance either wholly or in part to a specified purpose, which he was bound to comply with in case he accepted the inheritance, unless it was physically impossible to do so, or unless the *hæres* himself was the only person affected by such directions. The *hæres* might be instituted either *simply*, without any interest in the estate, or with a fixed share therein, or with regard to some particular thing; Mack. C. L. § 653. It was customary, in order to provide against a failure to accept on the part of the direct *hæres*, to substitute one or more *hæredes* to him. This substitution might be made in various forms; but the result was the same in all,—that if the first of the direct *hæredes* failed to accept the inheritance, whether from indisposition, permanent incapacity, or from dying before the testator, the substitute stood in his stead. There might be several degrees of substitutes, each ready to act in case of the failure of all the preceding; and the rule was *substitutus substituto est substitutus instituto:* which meant that on a failure of all the intermediate substitutes, the lowest in rank succeeded to the position of the instituted *hæres*. This was called *substitutio vulgaris*. There was another, the *substitutio pupillaris*, which was nothing more than the appointment, by the testator, of a *hæres* to a minor child under his authority,—which appointment was good in case the child died after the testator, and still a minor. It was, in fact, making a testament for such minor—an act which he could not perform for himself. Mack. C. L. § 668.

Persons entitled to the inheritance. Though, generally speaking, the testator might institute as *hæres* any person whatever not within the exceptions above mentioned, yet his relatives, within certain limits, were considered as peculiarly entitled to the office, and if he instituted any one else they could not be entirely excluded, but were admitted to a share of the inheritance, which share, called *portio legitima*, or *pars legitima*, was fixed by law. The rules in regard to the persons entitled to this share of the estate, and its amount, are very intricate, and too voluminous to be introduced here. They may be found in Mackeldey, §§ 654-657. Among those entitled to the *pars legitima*, the immediate ascendants and descendants of the testator were peculiarly distinguished in this, that they must be mentioned in the testament, either by being formally instituted as *hæredes*, or by being formally excluded, while the other relatives so entitled might receive their shares as a legacy, or in any other way, without being formally instituted. From this necessity of mentioning this class of relatives, they were called *successores necessarii*.

Acquisition of the inheritance. Except in the case of a slave of the testator (*hæres necessarius*), or a person under his authority (*potestas*) at his death (*hæres suus et necessarius*), the institution of a person as *hæres* did not oblige him to accept the office. A formal acceptance was requisite in the case of all other persons than the two classes just mentioned, whence such persons were called *hæredes voluntarii*, and in opposition to the *sui hæredes*, *extranei hæredes*. This acceptance might be *express* (*aditio hæreditatis*), or *tacit*, *i. e.* by performing some act in relation to the inheritance which admitted of no other construction than that the person named as *hæres* intended to accept the office. The refusal of the office, if express, was called *repudiatio;* if tacit, through the neglect of the *hæres* to make use of his rights within a suitable period, it was called *omissio hæreditatis*. The acceptance could not be coupled with a condition; and a refusal was final and irrevocable; Mack. C. L. §§ 681-683.

Rights and liabilities of the hæres. The fundamental idea of the office is that as regards the estate the *hæres* and the testator form but a single person. Hence it follows that the private estate of the *hæres* and the estate of the testator are united (*confusio bonorum defuncti et hæredis*); the *hæres* acquires all rights of property, and becomes liable to all demands, except those purely personal, to which the testator was entitled and subject, and is, consequently, responsible for all the debts of the deceased, even if the estate left by the latter is not sufficient to pay them. He must, moreover, recognize as binding upon him all acts of the testator relating to the estate. He is bound to obey the directions of the will, especially to perform the trusts and pay the legacies imposed upon him, yet this only so far as the residue of the estate, after liquidating the debts, enables him to do so.

These were the strict rules of the law; but two modes, the *spatium deliberandi* and the *beneficium inventarii*, were in course of time contrived for relieving the *hæres* from the risk of loss by an acceptance of the office.

The *spatium deliberandi* was a period of delay granted to the *hæres*, upon application to the magistrate, in order that he might investigate the condition of the estate before deciding whether to accept or reject the office. If the *hæres* was pressed by the other *hæredes*, or by the creditors of the estate, to decide whether to accept or reject the office he must decide immediately, or apply for the *spatium deliberandi*, which when allowed by the emperor continued for a year, and when by a judge, for nine months, from the day of its allowance. If the *hæres* had not decided at the expiration of this period, he was held to have accepted. If he was not pressed to a decision by the other *hæredes* or by the creditors, he was allowed a year

from the day he was notified of the inheritance having been conferred upon him, to deliberate whether to accept or not. If, after deliberating for the allotted period, he should accept the inheritance, he became responsible for the debts of the testator, without regard to whether the estate was sufficient or not to pay them.

The *beneficium inventarii* was an extension to all *hæredes* of the privilege belonging to soldiers not to be responsible for the debts beyond the assets. This privilege to the *hæres* was conditional upon his commencing an inventory within thirty days and completing it within sixty from the time he became notified of his appointment. The inventory must be prepared in the presence of a notary, and must be signed by the *hæres*, with a declaration that it included the whole estate, etc., to which fact he might be obliged to make oath. He then became liable only to the extent of the assets. He was allowed, before paying the debts, to deduct the expenses of the funeral, of establishing the testament, and of making the inventory. He could not be forced to pay debts or legacies during the preparation of the inventory, and afterwards he paid the claimants in full in the order in which they presented themselves, and when the assets were exhausted could not be required to pay any more. His own claims against the estate might be paid first, and his debts to the estate were part of the assets. If he neglected to prepare the inventory within the legal period, he forfeited the privileges of it; which also was the case if he applied for the *spatium deliberandi;* so that he must choose between the two.

The creditors and legatees of the testator were allowed the *beneficium separationis*, by which, when the *hæres* was deeply in debt, and, by reason of the *confusio bonorum defuncti et hæredis*, they were in danger of losing their claims, they were permitted to have a separation of the assets from the private estate of the *hæres*. Application for this privilege must have been made within five years from the acceptance of the inheritance; but it would not be granted if the creditors of the testator had in any way recognized the *hæres* as their debtor. If it was granted, they were in general restricted to the assets for payment of their claims, and the private estate of the *hæres* was discharged. If the assets were not exhausted in satisfying the creditors and legatees of the testator, the creditors of *hæres* might come in upon the balance; but these latter were not entitled to the *beneficium separationis*.

The *hæres* might transmit the inheritance by will; but, in general, he could not do so till after acceptance. To this, however, there were numerous exceptions.

The *remedies of the hæres* are too intimatly connected with the general system of Roman jurisprudence to be capable of a brief explanation. See Mack. C. L. §§ 692, 693; Dig. 5. 3; Cod. 3. 31; Gaius, iv. § 144, etc.; Maine, Anc. Law.

Cohæredes. When several *hæredes* have accepted a joint inheritance, each *ipso jure* becomes entitled to a proportional share in the assets, and liable to a proportional share of the debts, though the testator may, if he choose, direct otherwise, and they may also agree otherwise among themselves; but in both these cases the creditors are not affected, and may pursue each *hæres* to the extent of his legal share of liability, and no further.

One of the *cohæredes* has a right to compel a partition of the assets and liabilities, subject, however, to an agreement among themselves, or a direction by the testator, that the inheritance shall remain undivided for a time; Mack. C. L. §§ 694, 695.

HÆRES ASTRARIUS. In Old English Law. An heir in actual possession of the house of his ancestor. Bract. 85, 267 *b*.

HÆRES DE FACTO. An heir, made so by reason of the disseisin or other wrongful act of his ancestor. An heir in fact in contradistinction to an heir *de jure*.

HÆRES EX ASSE. In Civil Law. Sole heir. In inheritances and other money matters where a division was made, the *as* (a unit) with its parts, was used to designate the portions, thus: *Hæres ex asse*, heir to the whole; *hæres ex semisse*, heir to one-half; *hæres ex dodrante*, heir to three-fourths; and so, *hæres ex besse, triente, quadrante, sextante*, etc. Calvinus, *s. v.* As.

HÆRES EXTRANEUS (Lat.). In Civil Law. An extraneous or foreign heir, that is one who is not a child or slave of the testator. Those only could be extraneous heirs who had a capacity of accepting the inheritance both at the time of making the will and at the death of the testator. Halifax, Anal. b. 11, c. 6, § 38.

HÆRES FACTUS (Lat.). An heir appointed by will. This expression is applicable in the Roman law and systems founded on it, but not in the English common law; Moz. & W.

HÆRES FIDEI-COMMISSARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES FIDUCIARIUS (Lat.). See FIDEI COMMISSUM.

HÆRES LEGITIMUS (Lat.). A lawful heir, being a legitimate child of parents who were married.

HÆRES NATUS (Lat.). An heir who is such by birth or descent. This is the only form of heirship recognized in the English law; Wms. R. P., 6th Am. ed. 96.

HÆRES NECESSARIUS (Lat.). In Civil Law. A necessary heir, *i. e.* a slave instituted heir. He was so-called because whether he wished it or not, on the death of the testator he became instantly free and necessarily heir. A person suspecting that he was insolvent usually made a slave his heir so that his goods would be sold, if that were necessary, in the name of this heir and not as those of the testator. Inst. 2, 19. 1; *id.* 1. 6. 1; Sand. Introd. § 76.

HÆRES PROXIMUS (Lat.). The child or descendant of the deceased. Dalr. Feud. 110.

HÆRES RECTUS (Lat.). In Old English Law. A right heir. Fleta, l. 6, c. 1, § 11.

HÆRES REMOTIOR (Lat.). A more remote heir. A kinsman, not a child or descendant.

HÆRES SUUS. In Civil Law. One's own heir; the natural heir of the decedent; his lineal descendants. Persons who were in the power of the testator but became *sui juris* at his death. Inst. 2. 13; *id.* 3. 1. 4. 5.

HÆRES SUUS ET NECESSARIUS. In Civil Law. An heir by relationship and necessity. The descendants of an ancestor in direct line were so-called, *sui*, denoting the

relationship, and *necessarii*, the necessity of law which made them heirs without their election, and whether the ancestor died testate or intestate. Halifax, Anal. b. 11, c. 6, § 38; Mack. Civ. L. § 681; Inst. 2. 19. 2.

HÆRETARE. To give a right of inheritance or make a donation hereditary to the grantee and his heirs. Cowell.

HÆRETICO COMBURENDO. See DE HÆRETICO COMBURENDO.

HAFNE. A haven or port. Cowell.

HAFNE COURTS (*hafne*, Dan. a haven, or port). Haven courts; courts anciently held in certain ports in England. Spelman, Gloss.

HAG. A division of a coppice or wood on which timber was cut annually by the proprietor. Ersk. Pr. 222.

HAGA. A house in a city or borough. Jacob.

HAGIA. A hedge. Mon. Angl. tome 2, 273.

HAGNE. A little hand-gun. Stat. 33 Hen. VIII. c. 6.

HAGNEBUT. A hand-gun larger than the hagne. Stat. 2 & 3 Edw. VI. c. 14; 4 & 5 P. & M. c. 2.

HAGUE TRIBUNAL. The Court of Arbitration established by the Hague Peace Conference of 1899. The object of the establishment was to facilitate the immediate recourse to arbitration for the settlement of international differences by providing a permanent court, "accessible at all times, and acting, in default of agreement to the contrary between the parties, in accordance with the rules of procedure inserted in the present convention." The court is given jurisdiction over all arbitration cases, provided the parties do not agree to institute a special tribunal. Each power signing the Convention selects four persons of known competency in questions of international law and of the highest moral reputation. These persons form the members of the court, and their names are inscribed upon a list which is notified to the contracting powers. When a case to be arbitrated arises between two of the signatory powers, the arbitrators must be chosen from the above mentioned list, each party appointing two arbitrators who together choose an umpire. An international Bureau was likewise established to serve as a registry for the court and to be the channel of communications relative to the meetings of the court. The court, although called "permanent," is really so only in the fact that there is a permanent list of members from among whom the arbitrators in a given case are selected. At the Second Hague Conference of 1907, apart from minor changes made in the court, it was provided that, of the two arbitrators appointed by each of the parties, only one should be a national of the appointing state. This was done with the object of securing a more impartial tribunal. 1 Scott, 274–318, 423–464.

HAIA. A hedge. An enclosed park. Cowell.

HAIEBOTE. A permission to take thorns, etc., to repair hedges. Blount.

HAILL. Whole. All and haill are common words in Scotch conveyances. 1 Bell, App. Cas. 499.

HAIMSUCKEN. See HAMESUCKEN.

HAIR. A capillary outgrowth from the skin. It has been held not to include the bristles of animals; Von Stade v. Arthur, 13 Blatchf. 251, Fed. Cas. No. 16,998.

HAKH. Truth; the true God; a just or legal prescriptive right or claim; a perquisite claimable under established usage by village officers. Wilson, Gloss. Ind.

HAKHDAR. The holder of a right. Moz. & W. See HAKH.

HALAKAR. The realization of the revenue. Wilson, Gloss. Ind.; Moz. & W.

HALF-BLOOD. A term denoting the degree of relationship which exists between those who have one parent only in common.

By the English common law, one related to an intestate of the half-blood only could never inherit, upon the presumption that he is not of the blood of the original purchaser; but this rule has been greatly modified by the 3 & 4 Will. IV. c. 106.

In this country, the common-law principle on this subject may be considered as not ordinarily in force, though in many states some distinction is still preserved between the whole and the half-blood; 4 Kent 403, n.; Butler v. King, 2 Yerg. (Tenn.) 115; Lawson v. Perdriaux, 1 M'Cord (S. C.) 456; Danner v. Shissler, 31 Pa. 289; Dane, Abr. Index; Reeves, Descents, *passim;* 2 Washb. R. P. 411.

HALF-BROTHER, HALF-SISTER. Persons who have the same father, but different mothers; or the same mother, but different fathers.

HALF-CENT. A copper coin of the United States, of the value of one two-hundredth part of a dollar, or five mills, and of the weight of ninety-four grains. The first half-cents were issued in 1793, the last in 1857.

HALF-DEFENCE. See DEFENCE.

HALF-DIME. A silver coin of the United States, of the value of five cents, or the one-twentieth part of a dollar.

It weighed nineteen grains and two-tenths of a grain,—equal to four-hundredths of an ounce troy,—and was of the fineness of nine hundred thousandths; nine hundred parts being pure silver, and one hundred parts copper. The fineness of the coin was prescribed by the 8th section of the general

mint law, passed Jan. 18, 1837. The weight of the coin was fixed by the 1st section of the act of Feb. 21, 1853. The second section of this last-cited act directed that silver coins issued in conformity to that act shall be a legal tender in payment of debts for all sums not exceeding five dollars. This provision applies to the half-dollar and all silver coins below that denomination. The first coinage of half-dimes was in 1793. A few half "dismes," with a likeness of Mrs. Washington, the wife of the president, upon the obverse of the coin, were issued in 1792; but they were not of the regular coinage.

By act of 9 June, 1879, silver coin of smaller denominations than one dollar shall be a legal tender in all sums not exceeding ten dollars. The coining of the half-dime was abolished by act of 12 Feb. 1873. Its place was supplied by a five-cent piece composed of three-fourths copper and one-fourth nickel, of the weight of seventy-seven and sixteen-hundredths grains troy. The "minor coins," viz., the five, three, two, and one cent pieces, are a legal tender for any amount not exceeding twenty-five cents in any one payment.

HALF-DOLLAR. A silver coin of the United States, of half the value of the dollar or unit, and containing one hundred and eighty-five grains and ten-sixteenth parts of a grain of pure, or two hundred and eight grains of standard, silver. Act of April 2, 1792. Under the provisions of this law, the fineness of the silver coins of the United States was 892.4 thousandths of pure silver.

The weight and fineness of the silver coins were somewhat changed by the act of Jan. 18, 1837; the weight of the half-dollar being by this act fixed at two hundred and six and one-quarter grains, and the fineness at nine hundred thousandths; conforming, in respect to fineness with the coinage of France and most other nations.

The weight of the half-dollar was reduced by the provisions of the act of February 21, 1853, to one hundred and ninety-two grains.

The half-dollars coined under the acts of 1792 and 1837 (as above) were a legal tender at their nominal value in payment of debts to any amount. Those coined since the act of February 21, 1853, were, under it a legal tender in payment of debts for all sums not exceeding five dollars. Sec. 2. The silver coins struck in the year 1853, under this last-cited act, may be distinguished from the others of that year by the arrow-heads on the right and left of the date of the piece. In 1854, and subsequent years, the arrow-heads are omitted.

By the act of 12 Feb. 1873, the weight of the half-dollar shall be twelve and one-half grams (192.9 grains), and by act of June 9, 1879, it is a legal tender for sums not exceeding ten dollars. The same act enables the holder of any silver coins of a smaller denomination than one dollar, to exchange them in sums of twenty dollars, or any multiple thereof, at the U. S. Treasury, for lawful money of the United States.

HALF-EAGLE. A gold coin of the United States, of the value of five dollars.

The weight of the piece is 129 grains (act June 28, 1834; Act Feb. 12, 1873) of standard fineness, namely, nine hundred thousandths of pure gold, and one hundred of alloy of silver and copper: "provided that the silver do not exceed one-half of the whole alloy." Act of Jan. 18, 1837. For the proportion of alloy in gold coins of the United States since 1853, see EAGLE.

For all sums whatever the half-eagle was a legal tender of payment of five dollars. It is now a legal tender to any amount, when not below the standard weight, and then in proportion to its actual weight. Act of February 12, 1873.

HALF ENDEAL or HALFEN DEAL. A moiety or half of a thing.

HALF-KINEG. *In Saxon Law.* Half-King. A title accorded to aldermen of all England. Crabb. Eng. L. 28; Spel. Glos.

HALF-MARK. A noble; six shillings, eight pence.

HALF-PROOF. *In Civil Law.* That which is insufficient as the foundation of a sentence or decree, although in itself entitled to some credit. Vicat, *Probatio.*

HALF-SEAL. A seal used in the English chancery for the sealing of commissions to delegates appointed upon any appeal, either in ecclesiastical or marine causes. 8 Eliz. c. 3.

HALF-TONGUE. A jury half of one *tongue* or nationality and half of another. Vide Jacob, Law Dict. *De medietate linguæ.*

HALF-YEAR. In the computation of time a half year consists of one hundred and eighty-two days. Cro. Jac. 166; Co. Litt. 135 *b.*

HALI. A man employed in ploughing. Wilson, Gloss. Ind.; Moz. & W.

HALIMAS. *In English Law.* The feast of all-Saints, on November 1. One of the cross-quarters of the year was computed from Halimas to Candlemas. Whart.

HALIMOTE. A court baron *(q. v.).* It was sometimes used to designate a convention of citizens in their public hall and was also called folkmote and hallmote. The word halimote rather signifies the lord's court or a court baron held in a manor in which the differences between the tenants were determined. Cunn. L. Dict.; Cowell.

"Furthermore," it is said, "it seems to have been a common practice for a wealthy abbey to keep a court, known as a *halimote*, on each of its manors, while in addition to these manorial courts it kept a central court,

a *libera curia* for all its greater freehold tenants. And we may now and again meet with courts which are distinctly called courts of honors. The rule then was not merely this, that the lord of a manor may hold a court for the manor; but rather this, that a lord may hold a court for his tenants." 1 Poll. & Maitl. 573.

HALIWORKFOLK. Holy work folk. Persons who held lands of which the tenure was the service of defending or repairing some church or monument. Cowell.

HALL. A public building used either for the meetings of corporations, courts, or employed to some public uses: as, the city hall, the town hall. Formerly this word denoted the chief mansion or habitation.

HALL-MARK. An official stamp affixed by the goldsmiths upon articles made of gold or silver as an evidence of genuineness, and hence used to signify any mark of genuineness. "The power of free alienation is the 'hall-mark' of a fee-simple absolute." Rand. Em. Dom. § 206.

HALLAGE. A toll or license fee on goods vended in a hall. Jac. L. Dict.; 6 Co. 62.

A toll due to the lord of a market or fair, on commodities vended in the common hall. Cowell.

HALLAZCO. **In Spanish Law.** The finding and taking possession of something which previously had no owner, and which thus becomes the property of the first occupant. Las Partidas, 3. 5. 28, 5. 48. 49, 5. 20. 50.

HALLMOOT. See HALIMOTE.

HALLUCINATION. **In Medical Jurisprudence.** The perception by any of the senses of an object which has no existence. The conscious recognition of a sensation of sight, hearing, feeling, taste, or smell which is not due to any impulse received by the perceptive apparatus from without, but arises within the perceptive apparatus itself. A false *perception* in contradistinction to a *delusion* or false belief. Wood, Am. Text-Book of Med.

An error, a blunder, a mistake, a fallacy; and when used in describing the condition of a person, does not necessarily carry an imputation of insanity. Foster's Ex'rs v. Dickerson, 64 Vt. 233, 24 Atl. 253.

An instance is given of a temporary hallucination in the celebrated Ben Jonson, the poet. He told a friend of his that he had spent many a night in looking at his great toe, about which he had seen Turks and Tartars, Romans and Carthaginians, fight in his imagination. 1 Collin. Lun. 34. If, instead of being temporary, this affection of his mind had been permanent, he would doubtless have been considered insane. See, on the subject of spectral illusions, Hibber, Alderson, and Farrar's Essays; Scott on Demonology, etc.; 3 Bostock, Physiology 91, 161; 1 Esquirol, *Maladies Mentales* 159. See INSANITY.

HALYWERCFOLK. Those who held by the service of guarding and repairing a church or sepulchre, and were excused from feudal services. Hist. Dunelm. apud Whartoni Ang. Sax. pt. 1, p. 749. Especially in the county of Durham, those who held by service of defending the corpse of St. Cuthbert. Jacob, Law Dict.

HAM. A place of dwelling; a homeclose; a little narrow meadow. Blount. A house or little village. Cowell.

HAMA. A hook; an engine with which a house on fire is pulled down. Yel. 60. A piece of land.

HAMBLING, or HAMELING. Expeditation *(q. v.)*.

HAMEL, HAMELETA, or HAMLETA. A hamlet.

HAMESUCKEN. This term was formerly used in England instead of the modern term *burglary;* 4 Bla. Com. 223. See HAMSOCKEN.

But in Hale's Pleas of the Crown it is said, "The common genus of offences that comes under the name of *hamesucken* is that which is usually called house-breaking; which sometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony; so that house-breaking of this kind is of two natures." 1 Hale, Pl. Cr. 547; Com. v. Hope, 22 Pick. (Mass.) 4.

HAMFARE. This word by some is said to signify the freedom of a man's house; but Cowell seems to think that it signifies the breach of peace in a house. Holthouse.

HAMLET. A small village; a part or member of a vill. It is the diminutive of *ham*, a village. Cowell.

HAMMA. A close joining to a house; a croft; a little meadow. Cowell.

HAMMER. Used in connection with auction sales; as *to bring or come to the hammer*, to sell or be sold at auction. Cent. Dict.

HAMSOCN (Saxon from *ham*, house, *sockne*, liberty, immunity). The word is variously spelled *hamsoca, hamsocna, haimsuken, hamesaken.* Vinogradoff (Engl. Soc. 111) gives it as *hamsocn.* The right of security and privacy in a man's house. Du Cange. The breach of this privilege by a forcible entry of a house is breach of the peace; Anc. Laws & Inst. of Eng. Gloss.; Du Cange; Bracton, lib. 3, tr. 2, c. 2, § 3. The right to entertain jurisdiction of the offence. Spelman; Du Cange. Immunity from punishment for such offence, *id.*; Fleta, lib. 1, c. 47, § 18. An insult offered in one's own house *(insultus factus in domo).* Brompton, p. 957; Du Cange.

Among the Anglo-Saxons it was breaking into a house; perhaps the time of the day was not an element. See 3 Holdsw. Hist. E. L. 293; 2 Poll. & Maitl. 492.

HANAPER. A hamper or basket in which were kept the writs of the court of chancery

relating to the business of a subject, and their returns; 5 & 6 Vict. c. 113; 10 Ric. II. c. 1; equivalent to the Roman *fiscus*. According to Spelman, the fees accruing on writs, etc., were there kept; Du Cange; 3 Bla. Com. 49. The office where it was kept was called the *Hanaper office*. It survives in Ireland.

HAND. A measure of length, four inches long: used in ascertaining the height of horses.

In legal parlance, handwriting or written signature, as "witness my hand," etc. Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; 10 Mod. 103.

HAND-BILL. A written or printed notice displayed to inform those concerned of something to be done.

HAND-BOROW (from hand, and Saxon *borow*, a pledge). Nine of a decennary or friborg *(q. v.)* were so called, being inferior to the tenth or *head borow*,—a *decenna* or *friborga* being ten freemen or *frankpledges*, who were mutually sureties for each other to the king for any damage. Du Cange, *Friborg*, *Head-borow*.

HANDCUFFS. See FETTERS.

HAND DOWN. To announce or file an opinion in a cause. Used originally and properly of the opinions of appellate courts transmitted to the court below; but in later usage the term is employed more generally, but inaccurately, with reference to any decision by a court upon a case or point reserved for consideration.

HAND-FASTING. Betrothment.

HAND-GRITH. Peace or protection given by the king with his own hand; used in the laws of Henry I. Tomlin; Cowell; Moz. & W.; Stat. Hen. I. c. 13.

HAND-HABENDE. **In Saxon Law.** One having a thing in his hand; that is, a thief found having the stolen goods in his possession,—*latro manifestus* of the civil law. See Laws of Hen. I. c. 59; Laws of Athelstane § 6; Fleta, lib. 1, c. 38, § 1; Britton p. 72; Du Cange, *Handhabenda*.

Jurisdiction to try such thief. *Id.*

See BACK-BERENDE.

HAND MONEY. Earnest *(q. v.)* when it is in cash.

HANDSALE. Anciently, among all the northern nations, shaking of hands was held necessary to bind a bargain,—a custom still retained in verbal contracts: a sale thus made was called *handsale*, *venditio per mutuam manuum complexionem*. In process of time the same word was used to signify the price or earnest which was given immediately after the shaking of hands, or instead thereof. In some parts of the country it is usual to speak of hand-money as the part of the consideration paid or to be paid at the execution of a contract of sale. See 2 Bla. Com. 448; Heineccius, *de Antiquo Jure Germanico*, lib. 2, § 335; Toullier, liv. 3, t. 3, c. 2, n. 33; EARNEST.

HANDSEL. Earnest; handsale *(q. v.)*.

HANDWRITING. Anything written by a person. The manner in which a person writes, including the formation of the characters, the separation of the words, and other features distinguishing the written matter, as a mechanical result, from the writing of other persons.

That branch of the law of evidence which treats of handwriting is largely concerned with the determination of the genuineness or falsity of signatures. As to what constitutes a writing, generally, see that title, and, as to writing as required by the statutes of wills, see WILL.

With respect to proof of handwriting, a signature by a person unable to write, or, as it has been held, by one who can write, may be by mark, which is proved as the handwriting would be in case of a written signature. See MARK. The law of evidence as to handwriting applies also where it is in a disguised hand; 4 Esp. 117; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Lyon v. Lyman, 9 Conn. 55; or when a cipher is used; Com. v. Nefus, 135 Mass. 533.

One's own testimony is not the best evidence on this subject, and the writer need not be called; 2 Camp. 508; Ainsworth v. Greenlee, 8 N. C. 190; Lefferts v. State, 49 N. J. L. 26, 6 Atl. 521. See Cheritree v. Roggen, 67 Barb. (N. Y.) 124. Whether it is evidence at all is a question confused by the general disqualification of parties who were naturally in most cases those to whom the question would arise, and it has been of late assumed by many writers that since the statutes allowing parties to be witnesses they may be such, for this as well as any other purpose. See Hess v. State, 5 Ohio 5, 22 Am. Dec. 767; with note citing cases.

The handwriting of attesting witnesses to an instrument more than thirty years old need not be proved; Stark, Ev. Sharsw. ed. 521; so also of unattested documents taken from proper depositaries; 7 East 279; Goodwin v. Jack, 62 Me. 414. The extrajudicial admissions of a party as to his handwriting are evidence to prove the same, though not of a very satisfactory nature; Whart. Ev. 705.

The rule in Steph. Dig. Evid. art. 31, was adopted in Redding v. Redding's Estate, 69 Vt. 500, 38 Atl. 230, as follows: One is deemed to be acquainted with the handwriting of another person when (1) he has seen him write, though but once and then only his name; or (2) when he has received letters or other documents purporting to be written by that person in answer to letters or other documents written by the witness or under his authority and addressed to him;

or (3) when he has seen letters or other documents purporting to be that person's handwriting, and has afterward personally communicated with him concerning their contents, or has acted upon them as his, he knowing thereof and acquiescing therein; or (4) when the witness has so adopted them into business transactions as to induce a reasonable presumption and belief of their genuineness; or (5) when, in the ordinary course of business, documents purporting to be written or signed by that person have been habitually submitted to the witness.

That it is enough if the witness has seen the party write only once, see Pepper v. Barnett, 22 Gratt. (Va.) 405; Rideout v. Newton, 17 N. H. 71; Com. v. Nefus, 135 Mass. 533; McNair v. Com., 26 Pa. 388; Massey v. Bank, 104 Ill. 327; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Worth v. McConnell, 42 Mich. 473, 4 N. W. 198; 8 C. & P. 380. But it is held that "it is not enough that he (the witness) had seen the person write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship"; U. S. v. Crow, 1 Bond 51, Fed. Cas. No. 14,895; People v. Corey, 148 N. Y. 476, 42 N. E. 1066.

Any person who has seen one write and has acquired a standard in his own mind of the general character of the writing is competent to testify as to his belief of the genuineness of a writing; Succession of Morvant, 45 La. Ann. 207, 12 South. 349. Merely seeing the party write his surname once was held insufficient to warrant testifying to the full signature; 2 Stark. 164; but seeing the surname written several times was sufficient; Mood. & M. 39. See Brachmann v. Hall, 1 Disney (Ohio) 539; Smith v. Walton, 8 Gill (Md.) 77. It is sufficient although the witness never saw the person write before the date of the paper in question; Keith v. Lothrop, 10 Cush. (Mass.) 453; or although he had not seen him write for many years before the trial; Edelen v. Gough, 8 Gill (Md.) 87 (three years); Maslin v. Thomas, 8 Gill (Md.) 18 (six years); 8 Scott 384 (ten years); 25 How. St. Tr. 71 (nineteen years); Willson v. Betts, 4 Denio (N. Y.) 201 (sixty-three years); but not that he has seen writing that is done with reference to his testifying at the trial either at or before it; Reese v. Reese, 90 Pa. 89, 35 Am. Rep. 634; Whitmore v. Corey, 16 N. J. L. 267; with this exception the circumstances under which the witness has seen the party write affect his credit, not his competency; Jones, Ev. § 559; Hammond v. Varian, 54 N. Y. 398; McNair v. Com., 26 Pa. 388; Com. v. Nefus, 135 Mass. 533. Where the witness had seen an alleged testator write twice thirty-two years before, when the witness was then ten years old, and once twenty-three years before trial, he was undoubtedly within the rule. It is not possible to fix any arbitrary limit of time within which the witness must have seen the writing done; much must always depend on his intelligence, his habit of observation of such matters, the apparent strength and confidence of his memory, etc., which must be passed upon in the first instance by the trial judge; Wilson v. Van Leer, 127 Pa. 371, 17 Atl. 1097, 14 Am. St. Rep. 854.

As to the second method it is not necessary that the witness has seen the party write, as such personal acquaintance may be acquired by having seen papers purporting to be genuine and which have been acknowledged to be such by the writer; Berg v. Peterson, 49 Minn. 420, 52 N. W. 37; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536; Hammond v. Varian, 54 N. Y. 398; Cabarga v. Seeger, 17 Pa. 514; Pierce v. De Long, 45 Ill. App. 462; but this is not always sufficient; McKeone v. Barnes, 108 Mass. 344. The witness is qualified, as such, by knowledge derived from correspondence, including letters received from a person in answer to those written and addressed to him; Chaffee v. Taylor, 3 Allen (Mass.) 598; Pearson v. McDaniel, 62 Ga. 100; McKonkey v. Gaylord, 46 N. C. 94; Thomas v. State, 103 Ind. 419, 2 N. E. 808; Southern Exp. Co. v. Thornton, 41 Miss. 216; Violet v. Rose, 39 Neb. 660, 58 N. W. 216; Campbell v. Iron Co., 83 Ala. 351, 3 South. 369; Clark v. Freeman, 25 Pa. 133; Empire Mfg. Co. of Grand Rapids v. Stuart, 46 Mich. 482, 9 N. W. 527; Cunningham v. Bank, 21 Wend. (N. Y.) 557; 5 A. & E. 740; but the mere receipt of letters is insufficient to prove that they were written by the person purporting to sign them; White Sewing Mach. Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109; there must be a ratification or recognition; Cunningham v. Bank, 21 Wend. (N. Y.) 557; Nunes v. Perry, 113 Mass. 274; Guyette v. Town of Bolton, 46 Vt. 228; Putnam v. Wadley, 40 Ill. 346; Sartor v. Bolinger, 59 Tex. 411; *contra*, 2 C. & K. 744; 2 C. & P. 21; but such knowledge may be gained in the ordinary course of business, as by seeing documents written by the person; Cody v. Conly, 27 Gratt. (Va.) 313; Armstrong v. Fargo, 8 Hun (N. Y.) 175; Ennor v. Hodson, 28 Ill. App. 445; and only seeing letters addressed to strangers purporting to be those of the person in question; Nunes v. Perry, 113 Mass. 275; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318. Such knowledge may be that of a clerk who sees correspondence or documents; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417; President, etc., of Amherst Bank v. Root, 2 Metc. (Mass.) 522; 5 C. & P. 213; Reyburn v. Belotti, 10 Mo. 597; a clerk in a bank; Snell v. Bray, 56 Wis. 156, 14 N. W. 14; Johnson v. State, 35 Ala. 370; a servant who has taken his master's letters to the post; 5 A. & E. 740; or a public officer who has seen many official documents filed in his office, signed by a justice, may prove his sig-

nature; Sill v. Reese, 47 Cal. 294; President, etc., of Amherst Bank v. Root, 2 Metc. (Mass.) 522; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417. The weight of the testimony will depend on the means of knowledge; U. S. v. Gleason, 37 Fed. 331. The witness must have an opinion; Fash v. Blake, 38 Ill. 363; and may give it if the handwriting is disguised; Com. v. Webster, 5 Cush. (Mass.) 301, 51 Am. Dec. 711; Burnham v. Ayer, 36 N. H. 182; but positive knowledge or certainty is not necessary; 8 Ves. 474; Egan v. Murray, 80 Ia. 180, 45 N. W. 563; Magee v. Osborn, 32 N. Y. 669; State v. Minton, 116 Mo. 605, 22 S. W. 808; he need not swear to belief, an opinion is sufficient; Clark v. Freeman, 25 Pa. 133; Fash v. Blake, 38 Ill. 363. A witness has been permitted to testify that the signature was like the writing of the party whose signature it is alleged to be; 4 Esp. 37. An opinion of a witness cannot be based in part upon knowledge of and familiarity with the legal attainments, the style and composition of the alleged writer of the instrument in question; Throckmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663.

The witness in such cases need not be an expert; Moons' Adm'r v. Crowder, 72 Ala. 79; Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536; or familiar with the person's handwriting generally if he is so with the signature; Com. v. Williams, 105 Mass. 62; as, *e. g.* he may prove the signature of a firm, when unacquainted with the handwriting of any partner; where he testifies that in his opinion, the handwriting was the same as that of many notes he had presented to the firm, and which had been paid by them; Gordon v. Price, 32 N. C. 385.

A signature upon an ancient writing may be proved by a witness who has become familiar with it by the inspection of other authentic ancient documents on which the same signature appeared; McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978, 7 L. R. A. (N. S.) 433, 7 Ann. Cas. 693; Sill v. Reese, 47 Cal. 294; U. S. v. Ortiz, 176 U. S. 422, 20 Sup. Ct. 466, 44 L. Ed. 529; Sweigart v. Richards, 8 Pa. 436. If a witness says that he knows a party's handwriting, he is *prima facie* competent to testify with respect to it and, if not cross-examined, his knowledge is taken to be admitted; Whittier v. Gould, 8 Watts (Pa.) 485; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Goodhue v. Bartlett, 5 McLean 186, Fed. Cas. No. 5,538; *contra*, Pate v. People, 3 Gilman (Ill.) 644; McCracken v. West, 17 Ohio 16; he may be cross-examined as to the extent of his knowledge; Herrick v. Swomley, 56 Md. 439; which goes to the weight of his testimony; Moons' Adm'r v. Crowder, 72 Ala. 79. But if want of knowledge appear; Guyette v. Town of Bolton, 46 Vt. 228; Arthur v. Arthur, 38 Kan. 691, 17 Pac. 187; Allen v. State, 3 Humph. (Tenn.) 367; or his testimony is insufficient; Mapes v. Leal's Heirs, 27 Tex. 345; Cook v. Smith, 30 N. J. L. 387; 3 V. & B. 172; it may be rejected. But see Krise v. Neason, 66 Pa. 253. A witness may testify as to handwriting who cannot read or write himself; Foye v. Patch, 132 Mass. 105.

A witness may be asked if he would act upon the signature which he testifies to as genuine; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; *contra*, Bank of Com. v. Mudgett, 44 N. Y. 514; his knowledge cannot be tested by irrelevant papers; Bacon v. Williams, 13 Gray (Mass.) 525; 11 A. & E. 322; Rose v. Nat. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258; Massey v. Bank, 104 Ill. 327; Bank of Com. v. Mudgett, 44 N. Y. 514. But see 2 M. & R. 536; Page v. Homans, 14 Me. 478; Kirksey v. Kirksey, 41 Ala. 626; 1 Whart. Ev. § 10. But he may refresh his memory by reference to papers from which his knowledge is derived; Nat. Bank of Chester County v. Armstrong, 66 Md. 113, 6 Atl. 584, 59 Am. Rep. 156; McNair v. Com., 26 Pa. 388; Redfords v. Peggy, 6 Rand. (Va.) 316.

The third method of proving handwriting is what is termed comparison. It is defined to be a mode of deducing evidence of the authenticity of a written instrument, by showing the likeness of the handwriting to that of another instrument proved to be that of the party whom it is sought to establish as the author of the instrument in question. 1 Greenl. Ev. § 578.

Another much cited definition is "when other witnesses have proved the paper to be the handwriting of a party, and then the witness on the stand is desired to take the two papers in hand, compare them, and say whether or not they rae the same handwriting; the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write nor held any correspondence with him;" Com. v. Smith, 6 S. & R. (Pa.) 571.

But more briefly, though with great precision, Starkie says: "By comparison is meant a comparison by the juxtaposition of two writings in order, by such comparison, to ascertain whether both were written by the same person." Stark. Ev. Metc. ed. pt. 4, 654.

Scarcely any title of the law, certainly none in the law of evidence, has given rise to more discussion in England and in this country and the "confusion, obscurity, and contradiction" which is to be observed in the cases quite justifies the criticism of Woodward, J., in Travis v. Brown, 43 Pa. 9, 82 Am. Dec. 540, that much of the difficulty of the subject has arisen from the failure of judges to observe the essential rule "that terms be first correctly defined and then always used in the defined sense." A very pregnant cause of the confusion was the failure to preserve the distinction between comparison properly defined and the use of

admittedly genuine signatures merely to enable a witness to refresh the memory as to his ideal standard formed by previous knowledge of the handwriting of the person whose signature was in issue. The latter process is in no sense a proper application of the term comparison as understood in the law of evidence, though often so used by judges. It is true, as said by Patteson, J., in Doe v. Suckermore, 5 A. & E. 703 (and repeated in almost the same words by Judge Woodward in the case just cited), that all evidence of handwriting, except in the single instance where the witness saw the document written, is in its nature, comparison of hands. It is the belief which the witness entertains, upon comparing the writing in question with the exemplar in his mind derived from some previous knowledge. This language aptly expresses the idea which was in the mind of its author, but it has been quoted time and again by judges who apparently did not have clearly in mind the distinction which it was intended to emphasize and has contributed, perhaps, not a little to the continued misuse of the word comparison in this connection. Where a witness testifies from the comparison (used in what might be termed the colloquial sense referred to by Justice Patteson) of the writing in question with a mental standard derived from previous knowledge of the handwriting, he is simply stating his opinion, not in the sense of opinion evidence, but based upon his own knowledge. When a witness examines the writing in question and, placing it in juxtaposition with other writings proved to be genuine, having no previous knowledge, and testifies to his belief from the similitude, or want of it, it is properly and technically, evidence by comparison of hands. This distinction is stated in some very early cases; Peake, N. P. 20; 21 How. St. Tr. 810; Rex v. Tanyd, cited McNally, Ev. 409. It is in this latter technical sense that the phrase comparison of hands is here used and the cases properly relating to the subject apply to the two questions: (1) whether such comparison may be made by the jury, genuine writings, otherwise irrelevant, being admitted for that purpose; (2) whether it may be made by expert witnesses and their conclusions proved for the information of the jury.

Such evidence was admissible in the Roman law; 1 Whart. Ev. § 711, citing De Prob. de Lit. Comp. L. 20, c. iv. 21; Nov. 49, cap. 2; and also under the Code Napoleon, by three sworn experts appointed by the court, or agreed upon, and the writings must be executed before a notary or admitted; Gen. Code Proc. pt. 1, l. 2, tit. 10, s. 200.

At common law the genuineness of a contested writing could not be proved by comparison, by a witness, of such writing with other writings acknowledged to be genuine; 7 C. & P. 548, 595; 5 A. & E. 703. It was otherwise in the ecclesiastical courts; *id.*; 1 Phil. 78. See 2 Addams 53, 79, 91; 1 *id.* 162, 214, 216. If, however, a paper admitted to contain the handwriting of the party is in evidence for some other purpose, the signature or paper in question may be compared with it by the jury with or without the aid of experts; Tucker v. Kellogg, 8 Utah 11, 28 Pac. 870; State v. McBride, 30 Utah 422, 85 Pac. 440, 7 L. R. A. (N. S.) 557, 8 Ann. Cas. 1030; Second Nat. Bank of Reading v. Wentzel, 151 Pa. 142, 24 Atl. 1087; Ratliff v. Ratliff, 131 N. C. 425, 42 S. E. 887, 63 L. R. A. 963.

Ancient writings could be proved by comparison; 14 East 327, n. a; 10 Cl. & F. 193; 2 H. L. Cas. 534, 557. The right of the jury to make comparisons, though denied by Lord Kenyon when the jurors were illiterate; Peake, N. P. C. 20; was allowed by him when the jury were considered competent; *id.* 27; and it was afterwards fully established; 1 Cr. & J. 47; 4 C. & P. 267. Comparison by experts, after some fluctuation, it was settled could not be made; 5 C. & P. 196; 5 A. & E. 703.

It had required infinite discussion to settle the rule of these cases. Something called comparison was known in very early cases; 10 How. St. Tr. 312; 12 *id.* 183, 306; 12 Mod. 72; but at this period the terms comparison of hand and similitude of hands were used to describe every method of the proof of writing except by one who had seen the document written. It is therefore necessary that the cases should be critically reviewed with reference to the varied meaning with which these terms were employed at different periods. This work has been very well done by Professor John H. Wigmore in 30 Am. L. Rev. 481. The conclusion reached is thus stated: "(1) That the classes of witnesses who may testify to handwriting have increased in number by successive enlargements; (2) that the whole meaning of 'comparison of hands' has changed; (3) that the mere process of juxtaposition *coram judicio*, whether for witness or for the jury, was historically orthodox and unquestionable; and (4) that the opposite fates, at common law, of juxtaposition by experts and juxtaposition by jury—exclusion for the former but sanction (limited) for the latter—were due simply to the fact that the former had never been attempted till the 1800s and was merely prevented from coming into existence, while the latter had always existed and was thus able to survive the attempts on its life." The entire article should be referred to in any examination of this subject, as, on the whole, throwing new light upon it from a point of view not elsewhere so well treated. It may be added that the historical development of the English rule has not lost its importance by reason of its being superseded in England by statute. It is of primary importance in considering the decisions in those

American jurisdictions which adhere to the old rule, and scarcely less so in properly estimating those in the jurisdictions which have abandoned it. See *infra*.

The question was set at rest in England by 17 & 18 Vict. c. 125, s. 27, authorizing comparison with a writing proved to the satisfaction of the judge to be genuine to be made by witnesses, and such writings to be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute. Under this act the jury may make comparison with papers relevant or not; 1 F. & F. 270; 2 *id.* 24; 4 *id.* 490. The court must determine the genuineness of the document offered for comparison and its decision is appealable; 30 L. T. 223.

The rule of the English courts (prior to this statute) forbidding the admission of documents irrelevant to the matter in issue for the sole purpose of comparison is known as the English rule, and is so referred to by American courts, including those which have and those which have not adopted it.

The objections to permitting comparison of the disputed paper with others conceded to be genuine but admitted for the sole purpose of comparison, which led to the adoption of the English rule, have been thus summarized: "First, that the writings offered for the purpose of comparison with the documents in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice. Secondly, that the specimens might not be fairly selected. Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison." Best, Ev. § 238.

The rule was followed, generally, by the federal courts. It was specifically adopted by the supreme court; Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; Williams v. Conger, 125 U. S. 397, 8 Sup. Ct. 933, 31 L. Ed. 778; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; Strother v. Lucas, 6 Pet. (U. S.) 763, 8 L. Ed. 573. In the circuit and district court while the rule of the supreme court was generally followed; Green v. Terwilliger, 56 Fed. 384; there is opportunity for some variation, growing out of the frequent necessity in those courts for the administration of local law. Comparison was allowed by both jury and experts in U. S. v. Chamberlain, 12 Blatchf. 390, Fed. Cas. No. 14,778; U. S. v. Molloy, 31 Fed. 19; U. S. v. Pendergast, 32 Fed. 198; *contra*, U. S. v. Jones, 10 Fed. 469. No comparison was permitted by experts in Murati v. Luciani, 1 Baldw. 49, Fed. Cas. No. 9,936; U. S. v. Craig, 4 Wash. C. C. 729, Fed. Cas. No. 14,-883; but it was allowed by the jury with papers otherwise in evidence; Turner v. Hand, 3 Wall. Jr. 88, 115, Fed. Cas. No. 14,257; and with papers offered for comparison, merely; Smith v. Fenner, 1 Gall. 170, Fed. Cas. No. 13,046. In the fourth circuit the supreme court rule was directly followed; U. S. v. McMillan, 29 Fed. 247.

The Act of Congress of Feb. 26, 1913, provides that "where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court or officer conducting such proceeding, to prove or disprove such genuineness."

Many of the state courts have also followed the old English rule, and while permitting comparison by the jury, with papers in evidence in the case, they exclude irrelevant papers; Gibson v. Furniture Co., 96 Ala. 357, 11 South. 365; Miller v. Jones, 32 Ark. 337; Goodale v. West, 5 Cal. 340; Bevan v. Bank, 142 Ill. 302, 31 N. E. 679 (*contra*, Northfield Farmers' Tp. Mut. Fire Ins. Co. v. Sweet, 46 Ill. App. 598; see Frank v. Taubman, 31 Ill. App. 592; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393); Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412 (with or without expert testimony); Wilson v. Barnard, 10 Ga. App. 98, 72 S. E. 943; Brin v. Gale (Tex.) 135 S. W. 1133; Hawkins v. Grimes, 13 B. Monr. (Ky.) 257 (see also Fee v. Taylor, 83 Ky. 259); Herrick v. Swomley, 56 Md. 439 (a genuine and disputed signature on the same page are not subject to comparison by the jury; Williams v. Drexel, 14 Md. 566); Worth v. McConnell, 42 Mich. 473, 4 N. W. 198; People v. Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578 (but in a later case irrelevant papers were admitted which had been shown to the party, denying the signature in dispute, on cross-examination; the court expressly stating that the case was different; Dietz v. Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220); Davis v. Fredericks, 3 Mont. 262; Staab v. Jaramillo, 3 N. M. 33, 1 Pac. 170; Territory v. O'Hara, 1 N. D. 30, 44 N. W. 1003; Kinney v. Flynn, 2 R. I. 319; Clay v. Alderson's Adm'r, 10 W. Va. 49; Collins v. Ball, Hutchings & Co., 82 Tex. 259, 17 S. W. 614, 27 Am. St. Rep. 877; but papers otherwise in the case must be admitted or proved to be genuine; State v. Henderson, 29 W. Va. 147, 1 S. E. 225.

It is held that irrelevant papers are not admissible for comparison except when conceded by the opposite party to be genuine, or when he is estopped to deny the genuineness, or when for any reason, not collateral, issue can be raised; Cochrane v. Elevator Co., 20 N. D. 169, 127 N. W. 725.

In some if not all of the states in which the subject is now regulated by statute the prior decisions were in support of this rule; McCafferty v. Heritage, 5 Houst. (Del.) 220; First Nat. Bank of Omaha v. Lierman, 5 Neb. 247 (see Grand Island Banking Co. v. Shoemaker, 31 Neb. 124, 47 N. W. 696); Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; Peck v. Callaghan, 95 N. Y. 73; Clark v. Rhodes, 2 Heisk. (Tenn.) 206; Wright v. Hessey, 3 Baxt. (Tenn.) 42 (but where no objection was interposed signatures admitted to be genuine were given to the jury for comparison; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559); Hazleton v. Bank, 32 Wis. 34.

In some states the decisions indicate a tendency to allow comparison by the jury and experts where the genuineness is not denied or is conceded or the party is estopped to deny it. In Missouri earlier decisions excluded irrelevant papers but permitted comparison both by jury and experts with papers otherwise in the case; Dow's Ex'r v. Spenny's Ex'r, 29 Mo. 386; Springer v. Hall, 83 Mo. 693, 53 Am. Rep. 598; and later ones permitted it with other papers as to which no collateral issue could be raised, as if the genuineness was proved or the party was estopped to deny it or if they belonged to the witness who was acquainted with the handwriting in dispute; Lachance v. Loeblein, 15 Mo. App. 460; State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506 (and see Rose v. Bank, 91 Mo. 399, 3 S. W. 876, 60 Am. Rep. 258); and in North Carolina comparison by the jury was not permitted even with papers in the case; Pope v. Askew, 23 N. C. 16, 35 Am. Dec. 729; Otey v. Hoyt, 48 N. C. 407; Fuller v. Fox, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27; but it has been allowed by experts with papers admitted to be genuine and otherwise in evidence; Yates v. Yates, 76 N. C. 142; and see State v. De Graff, 113 N. C. 688, 18 S. E. 507.

In Indiana the decisions are conflicting but comparisons are allowed, in most cases both by jury and experts, if the paper is genuine, otherwise by experts alone; Chance v. Road Co., 32 Ind. 472. The later cases allowed comparison by experts as well as by the jury; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877.

In many states comparison is permitted with genuine documents, without respect to relevancy; and usually when it is allowed at all it may be made by experts as well as by the jury.

There has, however, been some indisposition to permit experts to make the comparison. It has been permitted by the jury and experts; Lyon v. Lyman, 9 Conn. 55; State v. Zimmerman, 47 Kan. 242, 27 Pac. 999; Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317; Morrison v. Porter, 35 Minn. 425, 29 N. W. 54, 59 Am. Rep. 331; Koons v. State, 36 Ohio St. 195; Tucker v. Kellogg, 8 Utah 11, 28 Pac. 870; in some cases it has been allowed by the jury; Page v. Homans, 14 Me. 482; Com. v. Andrews, 143 Mass. 23, 8 N. E. 643; Gifford v. Ford, 5 Vt. 532; Carter v. Jackson, 58 N. H. 156; and in others by experts; Woodman v. Dana, 52 Me. 9; Demerritt v. Randall, 116 Mass. 331; Wilson v. Beauchamp, 50 Miss. 24; State v. Hastings, 53 N. H. 452; State v. Clark, 54 N. H. 456 (after much fluctuation); Hanriot v. Sherwood, 82 Va. 1; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; but it was not permitted with a press copy of a disputed writing, though *semble* that the original might have been used; Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381. The signatures used for comparison must be genuine; Tyler v. Todd, 36 Conn. 218.

In Pennsylvania and South Carolina until the act passed in the former state, *infra*, the decisions were substantially in accord. When there was conflicting direct evidence, only the jury might make comparison with papers duly proved; Farmers' Bank of Lancaster v. Whitehill, 10 S. & R. (Pa.) 110; Rockey's Estate, 155 Pa. 453, 26 Atl. 656; Robertson v. Millar, 1 McMull. (S. C.) 120; Richardson v. Johnson, 3 Brev. (S. C.) 51. The evidence of genuineness of a paper offered for comparison must be conclusive; Cohen v. Teller, 93 Pa. 123; and comparison could only be made by witnesses acquainted with the party's writing; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. 318. In criminal cases expert testimony is allowed; Pennsylvania act of 1860, March 31, § 55, P. L. 284.

A statute of Pennsylvania (1895, May 15, P. L. 69), codifying the law on this subject, enacts, (1) That the opinion of those acquainted with the handwriting of the supposed writer, and of experts, shall be deemed relevant; (2) That experts may compare the disputed writing with others admitted or proved to the judge's satisfaction to be genuine; (3) That experts may be required by counsel to state in full the ground of their opinions; (4) That the question shall still be one entirely for the jury; and (5) That the act shall apply to all courts and all persons having authority to receive evidence.

In several states, including some in which the courts had adhered to the English rule, the question has been settled by statute permitting the comparison of handwriting. Among the states which have legislated upon the subject are California, Delaware, Georgia, Iowa, Louisiana, Nebraska, New Jersey, New York, Tennessee, Wisconsin, and Pennsylvania as above stated. The most common form of such statutes is to authorize comparison of a disputed writing with any writing proved to the court to be genuine, to be made by a witness and to permit the submission of such writings and evidence of witnesses respecting the same, to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. The tendency

in the United States is in the direction of the rule established under these statutes. It is not within the present purpose to state all the decisions or to indicate the exact condition of the law in the several states.

Under a statute providing that "evidence respecting the handwriting may also be given by comparison, made by a witness skilled in such matters, or the jury, with writings admitted or treated as genuine, by the party against whom the evidence is offered" papers not otherwise competent are admissible for the purpose of enabling the jury to make a comparison; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118; Green v. Terwilliger, 56 Fed. 384.

Prior to the statute of 17 and 18 Vict. already cited, the English rule as to comparison was subject to certain exceptions which have been said to be as well settled as the rule itself; Bradley, J., in Moore v. U. S., 91 U. S. 270, 23 L. Ed. 346; one of these was the admission of ancient writings; see *supra;* the other is that if a paper admitted to be in the handwriting of the person in question is in evidence for some other purpose in the cause, the signature in question may be compared with it by the jury. This is a settled rule of the American courts, including those which adhere to the English rule against comparison as well as those which, either under statute or decision, admit it; *id;* Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470; State v. De Graff, 113 N. C. 688, 18 S. E. 507; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877; Rogers v. Tyley, 144 Ill. 652, 32 N. E. 393; Johnston Harvester Co. v. Miller, 72 Mich. 265, 40 N. W. 429, 16 Am. St. Rep. 536; State v. Farrington, 90 Ia. 673, 57 N. W. 606; Green v. Terwilliger, 56 Fed. 384; Williams v. Conger, 125 U. S. 397, 414, 8 Sup. Ct. 933, 31 L. Ed. 778; Hickory v. U. S. 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

A writing specially prepared for the purpose of comparison is inadmissible on a question of genuineness; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. A party cannot himself write specimens for the instruction of witnesses; Whart. Ev. § 715; nor can he make test writings to be used for a comparison of hands; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170.

In England, by statute, a person whose handwriting is in dispute, may be called upon by the judge to write in his presence, and such writing may be compared with the writing in question; Whart. Ev. § 706. See 4 F. & F. 490; Chandler v. Le Barron, 45 Me. 534, *contra*, Smith v. King, 62 Conn. 515, 26 Atl. 1059.

On cross-examination, other writings not in the case may be shown to the witness, and he may be asked whether they are in the handwriting of the party in question; if so declared by the witness, they may be shown not to be genuine and given to the jury for comparison; Whart. Ev. § 710; see 11 Ad. & E. 322.

Experts may be permitted to testify as to whether handwriting is natural or feigned; Burkholder's Ex'r v. Plank, 69 Pa. 225; Demerritt v. Randall, 116 Mass. 331; Jones v. Finch, 37 Miss. 461, 75 Am. Dec. 73; as to the nature of the ink used; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; whether the whole of an instrument was written by the same person, at the same time, and with the same pen and ink; Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; President, etc., of Quinsigamond Bank v. Hobbs, 11 Gray (Mass.) 250; Mallory v. Ins. Co., 90 Mich. 112, 51 N. W. 188; whether the figures in a check have been altered; Nelson v. Johnson, 18 Ind. 329; see Hunt v. Lawless, 7 Abb. N. Cas. (N. Y.) 113; Pearson & Co. v. McDaniel, 62 Ga. 100; Williams v. State, 61 Ala. 33; State v. Miller, 47 Wis. 530, 3 N. W. 31; Tome v. R. Co., 39 Md. 36, 17 Am. Rep. 540.

An expert witness need not be a professional; Benedict v. Flanigan, 18 S. C. 506, 44 Am. Rep. 583; a merchant and dealer in commercial paper is by his vocation qualified to some extent to testify as to the genuineness of a signature to a note; Edmonston v. Henry, 45 Mo. App. 346. But the value of expert testimony as to handwriting, is to be determined by his opportunity and circumstances. If an illiterate man seldom brought by his business into familiarity with handwriting, his opinion is entitled to much less weight than if educated and accustomed to correspondence, and seeing people write; U. S. v. Gleason, 37 Fed. 331.

The jury are not bound by expert evidence further than it accords with their own opinions or than they think it is to be credited; U. S. v. Molloy, 31 Fed. 19; proof of a genuine signature to a document whose authenticity is denied casts upon the opposite party the burden of showing that the writing above the signature was forged; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093.

On a question of the genuineness of the signatures of makers of an accommodation note, testimony of an expert that the ordinary handwriting of the nominal payee, as shown in letters, was such as to convince him that the payee could not successfully imitate the handwriting of one of the witnesses as easily as that of one of the makers of the note, though possibly irrelevant, is unimportant and its admission is not ground for reversal; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

Where two signatures are exactly alike, it is evidence that one was produced from the other, or both from a third; Stitzel v. Miller, 250 Ill. 72, 95 N. E. 53, 34 L. R. A. (N. S.) 1004, Ann. Cas. 1912B, 412.

In In re Corcoran's Will, 145 App. Div. 129, 129 N. Y. Supp. 165, it was held that expert evidence of an ordinary mark signature is inadmissible.

Forgeries of handwriting, and paper and ink to imitate various degrees of age, are so skilfully made, that examination and comparison, even by so-called experts, in the way heretofore usual in courts of justice, are often inadequate and misleading. A scientific use of the microscope, photography, and chemical agents, will generally prove a much surer means of discovering truth. See Dr. Frazer's Manual of the Study of Documents. See Hogan, on Disputed Handwriting; 16 Am. L. Rev. 569; 17 *id.* 21; 15 Can. L. J. 149, 181; 29 Sol. J. 584; 18 Am. L. Reg. 273; 21 *id.* 425, 489; 6 Am. St. Rep. 177, note; 9 Am. St. Rep. 29, note; 27 Am. L. Reg. 273; EXPERT; OPINION.

HANGING. Death by the halter, or the suspending of a criminal, condemned to suffer death, by the neck, until life is extinct. A mode of capital punishment.

In Old English Law. Pending; as hanging the process. Co. Litt. 13a, 266a. Remaining undetermined. 1 Show. 77.

HANGED, DRAWN AND QUARTERED. A method of executing traitors in England, said to have been introduced in 1241. The traitor was carried on a sled, or hurdle to the gallows (formerly dragged there tied to the tail of a horse); hanged till half dead and then cut down; his entrails cut out and burnt; his head cut off and his body to be divided into quarters, which, with his head, were hung in some public place. In practice the executioner usually cut out the heart and held it up to view. See Andrews, Old Time Punishments. See CRIMES; CAPITAL PUNISHMENT; EXECUTION; 1 Eng. Rep. 87.

HANGING IN CHAINS. An ancient English practice of hanging a murderer, after execution, upon a gibbet, in chains, near the place where the murder was committed. Its legality was declared by acts in 1751 and 1828. Abolished in 1834.

HANGMAN. An executioner. The name usually given to a man employed by the sheriff to put a man to death, according to law, in pursuance of a judgment of a competent court and lawful warrant.

HANGWITE (from Saxon *hangian*, to hang, and *wite*, fine). A fine, in Saxon law, for illegal hanging of a thief, or for allowing him to escape. Immunity from such fine. Du Cange.

HANIG. Some customary labor to be performed. Holthouse.

HANSE. A commercial confederacy for the good ordering and protection of the commerce of its members. An imposition upon merchandise. Du Cange, *Hansa*. *Hansa* is a German term, meaning society *(societas)*, Jacob; and *Hanse* is an old Gothic word, *id.*

HANSEATIC LEAGUE. A number of towns in Europe which joined in a league for mutual protection of commerce as early as the twelfth century.

Associated action and partial union between certain North German towns can be traced to the 13th century. In 1241 Lübeck and Hamburg agreed to safeguard the passage between the Baltic and North Sea. During the following century, the Saxon towns were joining to protect their common interests; and town confederacies both in North and South Germany became considerable. The formation was more economic than political. The expansion of trade extended from lower Rhine to Flanders and to England. In the 13th century Lübeck was the center of this movement. The merchants of Cologne at one period possessed a gild-hall in London and formed a "Hansa" with the right of admitting other German merchants.

The years 1356 to 1377 mark the zenith of the league's power. In 1380 Lübeck declared that "whatever touches one town touches all." But the facts are said hardly to have warranted the declaration, and in the next century it became less and less true. Lübeck's headship was accepted in 1418. The governing body (Hansetage) met there. The league gradually declined till, in 1669, the last general assembly was held and Lübeck, Hamburg and Bremen were left alone to preserve the name and small inheritance of the "Hansa" which, in Germany's political disunion, had upheld the honor of her commerce. Their buildings were sold—at London in 1852 and Antwerp in 1863. See Encycl. Br.

Hamburg and Bremen were incorporated into the German Zoll-Verein in 1888, and Lübeck some years previously, and are now, in substance, free cities or states constituting part of the German Empire. See Zimmern, The Hansa Towns. See CODE.

HANSGRAVE. The head officer of a company or corporation.

HANTELODE (German *hant*, a bond, and load, laid.). An arrest. Du Cange; Toml.; Holthouse.

HAP. To catch. Thus "hap the rent," "hap the deep-poll," were formerly used. Tech. Dict.

HAPPINESS. The "pursuit of happiness," as used in the Declaration of Independence is said to be the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase one's prosperity, or develop one's faculties, so as to give to one his highest enjoyment. Butchers' Union, S. H. & L. S. L. Co. v. Crescent City Co., 111 U. S. 757, 4 Sup. Ct. 652, 28 L. Ed. 585.

HARBINGER. An officer of the king's household. Toml.

HARBOR (Sax. *here-berga*, station for an army). A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven. It is public property.

Harbor is to be distinguished from "port," which has a reference to the delivery of cargo. See 7 M. & G. 870; Martin v. Hilton, 9 Metc. (Mass.) 371; 2 B. & Ald. 460. Thus, we have the "said *harbor*, basin, and docks of the *port* of Hull." 2 B. & Ald. 60. But they are generally used as synonymous. Webster, Dict.

In the United States the control of harbors and regulation of dock lines and the like is exercised by the states, although under the power to regulate commerce the federal government annually expends large sums of money in the improvement of navigation in harbors and other navigable waters.

A state may enact police regulations for the conduct of shipping in any of its harbors; Vanderbilt v. Adams, 7 Cow. (N. Y.) 351; Cooley, Const. Lim. 730; and congress has full power to make regulations on the same subject; Cooley v. Board of Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996; Barnaby v. State, 21 Ind. 450; Pacific Mail S. S. Co. v. Joliffe, 2 Wall. (U. S.) 450, 17 L. Ed. 805; Cisco v. Roberts, 36 N. Y. 292. A statute passed for the protection of a harbor, which forbids the removal of stone, gravel, and sand from the beach, is constitutional; Com. v. Tewksbury, 11 Metc. (Mass.) 55; and the United States has the authority to make a contract for the removal of rock from a harbor; Benner v. Dredging Co., 134 N. Y. 156, 31 N. E. 328, 17 L. R. A. 220, 30 Am. St. Rep. 649.

New harbor lines may be established without further legislative authority, and such establishment is a practical discontinuance of the old lines; Farist Steel Co. v. City of Bridgeport, 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590. The state board of harbor commissioners has power to establish harbor lines in front of towns; State v. Board of Com'rs, 4 Wash. 6, 29 Pac. 938; and an act which provides for the disestablishment of such lines is contrary to the state constitution and void; Wilson v. Board of Com'rs, 13 Wash. 65, 42 Pac. 524; such an act on the part of such commissioners does not deprive a riparian owner of the right of access to his land, but merely determines the line to which he may fill without encroaching on public rights; Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459. The mere establishment of general harbor lines by such commissioners is not of itself an injury or a taking of the property and cannot be enjoined; Prosser v. R. Co., 152 U. S. 59, 14 Sup. Ct. 528, 38 L. Ed. 352. The authority to make improvements in harbors implies the power to employ all necessary means thereto; Bateman v. Colgan, 111 Cal. 580, 44 Pac. 238.

In England, as well as Scotland, the right to erect and hold ports and havens is vested in the crown; though a subject may have such right by charter, grant, or prescription, but in all cases charged with the right of the public to use it. In England such grantee is bound to repair, but in Scotland only to the extent of the dues received.

The insufficiency of the common-law power led to an extended course of legislation for the control of ports and harbors, through what is known in Great Britain as the *harbor authority*, which is vested in commissioners or bodies corporate or otherwise. Such bodies are charged with the duty of general supervision of the construction, extension, improvement, and lighting of the harbor and collection of dues therefrom. The general consolidation act of 10 Vict. c. 271, defined these duties and powers in detail as did the general act of 24 & 25 Vict. c. 47, supplemented by various local acts.

In Torts. To receive clandestinely or without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same. Van Metre v. Mitchell, 2 Wall. Jr. 317, Fed. Cas. No. 16,865. For example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly; Poll. Torts 275; Wood v. Gale, 10 N. H. 247, 34 Am. Dec. 150; Eells v. People, 4 Scam. (Ill.) 498.

It may be aptly used to describe the furnishing of shelter, lodging, or food clandestinely or with concealment, and under certain circumstances, may be equally applicable to those acts divested of any accompanying secrecy; U. S. v. Grant, 55 Fed. 415.

The harboring of such persons will subject the harborer to an action for the injury; but, in order to put him completely in the wrong, a demand should be made for their restoration, for in cases where the harborer has not committed any other wrong than merely receiving the plaintiff's wife, child, or apprentice, he may be under no obligation to return them without a demand; 1 Chit. Pr. 564; Dark v. Marsh, 4 N. C. 228; Jones v. Van Zandt, 5 How. (U. S.) 215, 227, 12 L. Ed. 122. See ENTICE.

HARD CASES. A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law. Hard cases must not make bad equity any more than bad law; Moore v. Pierson, 6 Ia. 279, 71 Am. Dec. 409.

HARD LABOR. In those states where the penitentiary system has been adopted, convicts who are to be imprisoned, as part of their punishment, are sentenced to perform *hard labor*. This labor is not greater than many freemen perform voluntarily, and the quantity required to be performed is not

at all unreasonable. In the penitentiaries of Pennsylvania it consists in being employed in weaving, shoemaking, and such like employment.

Hard labor is not of itself a cruel or unusual punishment; Durham v. State, 89 Tenn. 723, 18 S. W. 74; Pervear v. Massachusetts, 5 Wall. (U. S.) 476, 18 L. Ed. 608; O'Neil v. Com., 165 Mass. 446, 43 N. E. 183. It was held unauthorized where imposed to enforce the payment of a fine; Ex parte Arras, 78 Cal. 304, 20 Pac. 683; and unconstitutional where imposed for carrying a deadly weapon; State v. Williams, 40 S. C. 373, 19 S. E. 5.

Hard labor was first introduced in English prisons in 1706. By the Prison Act of 1865, it is divided into two classes, one for males above sixteen years old the other for males below that age and females; Moz. & W.

See PUNISHMENT.

HARDSHIP. See HARD CASES.

HARIOT. The same as heriot *(q. v.)*. Cowell; *Termes de la Ley*. Sometimes spelled Harriott; Wms. Seis. 203.

HARMONIZE. Though not strictly synonymous with the word "reconcile," it is not improperly used by a court in instructing the jury that it is their duty to "harmonize" conflicting evidence if possible. Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265.

HARNESS. The defensive armor of a soldier or knight. All warlike instruments. Hovend. 725. In modern poetical sense a suit of armor. The term is sometimes used to denote the trappings of a war-horse.

Harness was the early name for body armor of all kinds. Modern writers have tried to discriminate between harness as the armor of the eleventh, twelfth, and thirteenth centuries, and armor as confined to the plate suits of the fourteenth and fifteenth centuries; but armor is the modern English word for defensive garments of all sorts, and *harness* in this sense, is a poetical archaism. Cent. Dict.

The tackle or furniture of a ship.

HARO, HARRON. An outcry, or hue and cry, after felons and malefactors. Cowell. The original of the *clamour de haro* comes from the Normans. Moz. & W.

HART. A stag or male deer of the forest five years old complete.

HARTER ACT. A name commonly applied to the act of congress of February 13, 1893. It provides (§ 1) that agreements in a bill of lading relieving the owner, etc., of a vessel sailing between the United States and foreign ports, from liability for negligence or fault in proper loading, storage, custody, care, or delivery of merchandise, are void; (§ 2) that no bill of lading shall contain any agreement whereby the obligations of the owner to exercise due diligence, properly equip, man, provision and outfit a vessel and make it seaworthy, and whereby the obligations of the master, etc., carefully to handle, store, care for and deliver the cargo, are in any way lessened, weakened or avoided; (§ 3) that if the owner shall exercise due diligence to make such vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owners, etc., shall be liable for loss resulting from faults or errors in navigation or management, nor for losses arising from dangers of the sea, acts of God, or public enemies, or the inherent defect of the thing carried, or insufficiency of package, or seizure under legal process, or any act or omission of the shipper of the goods, or from saving or attempting to save life at sea, or deviation in rendering such service.

The act was the outgrowth of attempts made in recent years to limit as far as possible the liability of the vessel and her owners, by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage and negligence in navigation, and other forms of liability which have been held by the courts of England if not of this country to be valid as contracts even when they exempted the ship from the consequences of her own negligence. As decisions were made by the courts from time to time holding the vessel for non-excepted liabilities, new clauses were inserted in the bills of lading to meet these decisions until the common law responsibilities of carriers by sea had been frittered away to such an extent that several of the leading commercial associations both in this country and in England had suggested amendments to the maritime law in line with those embodied in the Harter Act; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

Before the passage of the Harter Act, it was the settled law that in the absence of special contract there was a warranty upon the part of the ship-owner that the ship was seaworthy at the beginning of the voyage. The warranty was absolute and did not depend upon the knowledge of the owner or the diligence of his efforts to provide a seaworthy vessel; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; after its passage the act became the rule for cases within its terms; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. The act applies only to questions arising between the vessel and shippers of cargo on board of her, and does not apply to cases of damage to cargo on another vessel; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; The Viola, 59 Fed. 632; *id.*, 60 Fed. 296; The Berkshire, 59 Fed. 1007. It does not apply to stowage; The Palmas, 108 Fed. 87, 47 C. C. A. 220, nor to passengers' claims for loss of baggage; The Rosedale, 88 Fed. 324; The Kensington, 88 Fed. 331; nor to claims for personal injuries; Moses v. Packet Co., 88 Fed. 329; but it is intended to re-

lieve the shipowner who has done all that he can do to start off a well-fitted expedition, from liability for damages caused by faults or errors of his shipment after his ship has gone below the horizon and away from his personal observation; Bened. Adm. (4th ed.) 174. See SHIP; VESSEL.

HASP AND STAPLE. A mode of entry in Scotland by which a bailee declared a person heir on evidence brought before himself, at the same time delivering the property over to him by the *hasp and staple* of the door, which was the symbol of possession. Bell; Ersk. Pr. 433.

HASPA. In Old English Law. A name anciently given to the hasp of a door, which was often used in giving livery of seisin of premises which included a house. Spelman.

HASTA (Lat.). A spear which in Roman law was the sign of an auction sale. *Hasta subjicere*, to put under the spear, like the modern phrase put under the hammer signified put up at auction. Calv. Lex.

In feudal law it was the symbol of the investiture of a fee. Lib. Feud. 2, 2.

HAT MONEY. Primage: a small duty paid to the captain and mariners of a ship.

HAUBER. A great baron or lord. Spel. Gloss.

HAUGH, or HOUGH. Low-lying rich lands, lands which are occasionally overflowed. Encyc. Dict.

HAUL. In an indictment for larceny this word is a sufficient substitute for carry, in the statutory phrase steal, take and carry away, being in the sense used equivalent to it. Spittorff v. State, 108 Ind. 171, 8 N. E. 911.

HAUR. In the laws of William the Conqueror, hatred. Toml.

HAUSTUS (Lat. from *haurire*, to draw). **In Civil Law.** The right of drawing water, and the right of way to the place of drawing. L. 1, D. *de Servit. Præd. Rustic.;* Fleta, l. 4, c. 27, § 9.

HAUT CHEMIN (L. Fr.). Highway. Yearb. M. 4 Hen. VI. 4.

HAUT ESTRET (L. Fr.). High street; highway. Yearb. P. 11 Hen. VI. 2.

HAUTHONER. A man armed with a coat of mail. Jac. L. Dict.

HAVE. See HABENDUM; HABE.

HAVEN. A place calculated for the reception of ships, and so situated, in regard to the surrounding land, that the vessel may ride at anchor in it in safety. Hale, *de Port. Mar.* c. 2; Chitty, Com. Law 2; 15 East 304, 305. See CREEK; PORT; HARBOR; ARM OF THE SEA.

HAW. A small parcel of land so called in Kent; houses. Cowell.

HAWAII. A territory of the United States. It consists of a group of islands in the Pacific Ocean about one thousand five hundred miles from the western coast of California. A republic was proclaimed and a new constitution promulgated July 4, 1894, succeeding a provisional government formed in January, 1893. By this constitution the president of the republic was empowered to "make a treaty of political or commercial union with the United States." A treaty of annexation was concluded at Washington, June 16, 1897. Congress, by joint resolution approved July 7, 1898, accepted the cession of Hawaii and incorporated it with the Union. "An act to provide a government for the territory of Hawaii" was passed April 30, 1900, and went into effect June 14, 1900. It provided that the laws of Hawaii, not inconsistent with the constitution and laws of the United States, or the provisions of the act, should remain in force, subject to repeal or amendment.

The territory forms a part of the ninth federal circuit. It is a federal district with two district judges. The territorial courts are a supreme court with three judges, circuit courts in five judicial districts, and district courts.

As to the laws governing Hawaii, it is enough to refer to the organic act of April 30, 1900, to ascertain the body of private rights governing that territory; Kawananakoa v. Polyblank, 205 U. S. 354, 27 Sup. Ct. 526, 51 L. Ed. 834.

HAWBERK or HAWBERT. A shirt of mail. Moz. & W. See FIEF D'HAUBERK.

HAWKER. An itinerant or travelling trader, who carries goods about in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. Superadded to this, though perhaps not essential, is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish; Com. v. Ober, 12 Cush. (Mass.) 495. To prevent imposition, hawkers are generally required to take out licenses, under regulations established by the local laws of the states. See City of Duluth v. Krupp, 46 Minn. 435, 49 N. W. 235; and these laws have generally been held to be constitutional; Borough of Warren v. Geer, 117 Pa. 207, 11 Atl. 415; Seymour v. State, 51 Ala. 52; City of Huntington v. Cheesbro, 57 Ind. 74; PEDDLER. One who goes about a village carrying samples and taking orders for a non-resident firm is not a hawker or peddler; Village of Cerro Gordo v. Raw-

lings, 135 Ill. 36, 25 N. E. 1006. It is termed *Hawking*. See Graffty v. City of Rushville, 107 Ind. 505, 8 N. E. 609, 57 Am. Rep. 128.

HAYBOTE (from *haye*, hedge, and *bote*, compensation). Hedgebote: one of the estovers allowed a tenant for life or for years; namely, material to repair hedges or fences, or to make necessary farming utensils. 2 Bla. Com. 35; 1 Washb. R. P. 99.

HAYWARD (from *haye*, hedge, and *ward*, keeping). **In Old English Law.** An officer appointed in the lord's court to keep a common herd of cattle of a town: so called because he was to see that they did not break or injure the hedges of inclosed grounds. His duty was also to impound trespassing cattle, and to guard against pound-breaches. Kitch. 46; Cowell.

HAZAR-ZAMIN. A bail or surety for the personal attendance of another. Moz. & W.

HAZARD. An unlawful game of dice. *Hazardor*. One who plays at it. Jac. L. Dict.

HAZARDOUS. Risky; perilous; involving hazard or special danger. See next title.

HAZARDOUS CONTRACT. A contract in which the performance of that which is one of its objects depends on an uncertain event. La. Civ. Code, art. 1769. See MARITIME LOAN.

In a fire insurance policy, the terms "hazardous," "extra hazardous," "specially hazardous," and "not hazardous," are well understood technical terms, having distinct meanings. A policy covering only goods "hazardous" and "not hazardous" cannot be made to cover goods or merchandise "extra hazardous" or "specially hazardous;" Pindar v. Ins. Co., 38 N. Y. 364.

On the other hand, it has been held that "hazardous" and "extra hazardous" are terms having no technical meaning, but are to be taken in their popular sense of dangerous and extra dangerous; Russell v. Ins. Co., 50 Minn. 409, 52 N. W. 906. See RISKS AND PERILS.

HE. Properly a pronoun of the masculine gender, but usually construed in statutes to include both sexes and corporations. Where in a written instrument, a person, whose name was designated by an initial is referred to as "he," it is not conclusive that such person is a man, but the contrary may be shown by parol; Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802. See HIS.

HEAD. The principal source of a stream. Webst. Dict. The head of a creek will be taken to mean the head of its longest branch, unless there be forcible evidence of common reputation to the contrary; Davis v. Bryant, 2 Bibb (Ky.) 112.

The principal person or chief of any organization, corporation, or firm.

HEAD OF A FAMILY. Householder, one who provides for a family. Bowne v. Witt, 19 Wend. (N. Y.) 476. There must be the relation of father and child, or husband and wife; Bachman v. Crawford, 3 Humph. (Tenn.) 216, 39 Am. Dec. 163; Sallee v. Waters, 17 Ala. 486; *contra*, Wade v. Jones, 20 Mo. 75, 61 Am. Dec. 584; Marsh v. Lazenby, 41 Ga. 153. Where a husband and wife reside together, he is the "head of the family"; Yarborough v. State, 86 Ga. 397, 12 S. E. 650. The father being dead, the mother is the head of the family; Burrell Tp. v. Pittsburg Guardians of Poor, 62 Pa. 475, 1 Am. Rep. 441. See Inhabitants of Dedham v. Inhabitants of Natick, 16 Mass. 135; Lathrop v. Bldg. Ass'n, 45 Ga. 483. See FAMILY; HOMESTEAD.

HEAD-LAND. **In Old English Law.** A narrow piece of unploughed land left at the end of a ploughed field for the turning of the plough. Called, also, *butt*. Kennett, Paroch. Antiq. 587; 2 Leon. 70, case 93; 1 Litt. 13.

HEAD MONEY. A name popularly applied to a tax on aliens landing in the United States under U. S. Rev. Stat. 1 Supp. 370. Such tax by a state is unconstitutional; Henderson v. New York, 92 U. S. 259, 23 L. Ed. 543; but as a federal regulation of commerce it is valid; Edye v. Robertson, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. The act of March 3, 1903, fixed the tax at two dollars for each immigrant. See IMMIGRATION.

HEAD-NOTE. The syllabus of a reported case.

HEAD-PENCE. An exaction of 40*d*. or more, collected by the sheriff of Northumberland from the people of that county twice in every seven years, without account to the king. Abolished by 23 Hen. VI. c. 6, in 1444. Cowell.

HEAD-SILVER. A name sometimes given to a Common Fine *(q. v.)*. By a payment of a certain sum of money to the lord, litigants might try their suits nearer home. Blount.

HEADBOROUGH. **In English Law.** An officer who was formerly the chief officer in a borough, who is now subordinate to the constable. Originally the chief of the tithing, or frank pledge. St. Armand, Leg. Power of Eng. 88. See DECENNARY.

HEAFODWEARD. A service rendered by a thane or a geneath or villein, the precise nature of which is unknown. Anc. Eng. Inst.

HEALGEMOTE. Halimote *(q. v.)*.

HEALSFANG (from Germ. *hals*, neck, *fangen*, to catch). A sort of pillory, by which the head of the culprit was caught between two boards, as feet are caught in a pair of stocks.

"The fine which every man would have to pay in commutation of this punishment,

had it been in use,"—for it was very early disused, no mention of it occurring in the laws of the Saxon kings. Anc. Laws & Inst. of Eng. Gloss; Spelman, Gloss.

HEALTH. Freedom from pain or sickness; the most perfect state of animal life. It may be defined as the natural agreement and concordant disposition of the parts of the living body.

By the act of March 3, 1879, R. S. Suppl. 480, enforced by subsequent acts, a National Board of Health was established, to consist of seven members appointed by the president, and of four members detailed from the departments, whose duties shall be to obtain information upon all matters affecting the public health, to advise the heads of departments and state executives, to make necessary investigations at any places in the United States, or at foreign ports, and to make rules guarding against the introduction of contagious diseases into the country, and their spread from state to state. See Dunwoody v. U. S., 143 U. S. 578, 12 Sup. Ct. 465, 36 L. Ed. 269.

By act of May 29, 1884, the bureau of animal industry was established, having for its object the protection of cattle from contagious diseases, etc. By act of Feb. 2, 1903, the suppression of contagious diseases of cattle and other live stock was transferred from the treasury department to the department of agriculture (bureau of animal industry).

A state board of health is a tribunal constituted by law, having the authority conferred on it by law and no other authority. The legislature may provide for the punishment of acts in resistance to or in violation of the authority conferred upon such subordinate tribunal or board. When such boards duly adopt rules or by-laws by virtue of legislative authority such rules and by-laws, within the respective jurisdiction have the force and effect of a law of the legislature, and like an ordinance or by-law of a municipal corporation they may be said to be in force by the authority of the state; Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64, 80 Am. St. Rep. 195; Com. v. Sisson, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630; Com. v. Pear, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765. To invest such a body with authority over public health is not an unusual nor unreasonable or arbitrary requirement; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765 (compulsory vaccination).

A statute prescribing punishment for violation of a regulation of a state board of health is not unconstitutional on the theory that legislative power to create crimes is thereby delegated to such board; Pierce v. Doolittle, 130 Ia. 333, 106 N. W. 751, 6 L. R. A. (N. S.) 143. See a note in 6 L. R. A. (N. S.) 143.

County boards of health are held to be corporate bodies invested by statute with functions of a public nature to be exercised for the public benefit. They are not liable in an action for tort for damages in the performance of an official duty; Forbes v. Board of Health, 28 Fla. 26, 9 South. 862, 13 L. R. A. 549. They are not liable for mere errors of judgment; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Seavey v. Preble, 64 Me. 120; Whidden v. Cheever, 69 N. H. 142, 44 Atl. 908, 76 Am. St. Rep. 154; Campagnie Francaise De Navigation v. Board of Health, 51 La. Ann. 645, 25 South. 591, 56 L. R. A. 795, 72 Am. St. Rep. 458; Rohn v. Osmun, 143 Mich. 68, 106 N. W. 697, 5 L. R. A. (N. S.) 635. But for the acts done in excess of their authority they can be held liable; People v. Board of Health, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 181, 37 Am. St. Rep. 522; Lowe v. Conroy, 120 Wis. 151, 97 N. W. 942, 66 L. R. A. 907, 102 Am. St. Rep. 983, 1 Ann. Cas. 341; Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; Hersey v. Chaplin, 162 Mass. 176, 38 N. E. 442.

Public policy requires that health officers be undisturbed in the exercise of their powers, unless clearly transcending their authority; Hart v. Mayor, etc., 3 Paige (N. Y.) 218; 1 Dill. § 369; but in so acting such officers must not interfere with the natural right of individuals; State v. Speyer, 67 Vt. 502; the people "shall be secure in their persons and homes from unreasonable searches and seizures"; Eddy v. Board of Health, 10 Phila. (Pa.) 94; Butterfoss v. State, 40 N. J. Eq. 325. See In re Smith, 146 N. Y. 68, 40 N. E. 497, 28 L. R. A. 820, 48 Am. St. Rep. 769, which case, overruling *id.*, 84 Hun 465, 32 N. Y. Supp. 317, held that health officers may not quarantine persons refusing to be vaccinated when small-pox is imminent. A court of chancery can only interfere with the trustees of a sanitary district where such trustees have acted in violation of the law or in a fraudulent manner; Johnson v. Sanitary Dist., 58 Ill. App. 306.

Where the action of a board of health is fraudulent, clearly oppressive or grossly abusive, equity may intervene and exercise its inherent power to prevent such abuse.

An injunction was granted to restrain the board of health of San Francisco from inoculating the Chinese residents with bubonic plague serum; Wong Wai v. Williamson, 103 Fed. 1; from removing tenants and closing up houses, where it was not justified by the actual existence of a contagious disease; Eddy v. Board of Health, 10 Phila. (Pa.) 94; from using property as a hospital for the care of a person afflicted with leprosy; Baltimore City v. Improvement Co., 87 Md. 352, 39 Atl. 1087, 40 L. R. A. 494, 67 Am. St. Rep. 344; from sending to an unsanitary pest house one who suffered from a form of leprosy which is very slightly contagious, where quarantine in her own home could be made a complete protection for the public; Kirk

v. Board of Health, 83 S. C. 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188.

It is the duty of a landowner so to keep his property that no menace to the public health shall come therefrom. A city may fill up low-lying lands and recover the cost thereof; Charleston v. Werner, 38 S. C. 488, 17 S. E. 33, 37 Am. St. Rep. 776; City of Rochester v. Simpson, 134 N. Y. 414, 31 N. E. 871; Nickerson v. Boston, 131 Mass. 306; Bowles v. Aberdeen, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709. The health department may prohibit the owner of tenement buildings unfit for habitation and dangerous to health from renting them; Health Dept. v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641. A statute requiring the installation of water-closets in tenement houses in place of sinks was sustained; Tenement House Dept. v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439, affirmed without opinion in 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328. Health authorities may order persons to abate nuisances created by filthy hog pens; Board of Health of Raritan Tp. v. Henzler (N. J.) 41 Atl. 228; and may order owners of property on streets having sewers to connect therewith; Harrington v. Board of Aldermen, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305.

A state board of health may forbid a municipality to discharge sewage into a stream which is a source of water supply; Miles City v. State Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589; the city can have no prescriptive right to pollute such a stream; Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335; Owens v. City of Lancaster, 182 Pa. 257, 37 Atl. 858; Miles City v. Board of Health, 39 Mont. 405, 102 Pac. 696, 25 L. R. A. (N. S.) 589.

A city is not bound to make a chemical analysis of the water of free public wells for the purpose of ascertaining whether it is wholesome; Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592.

The regulation and maintenance of tenement lodging and boarding houses is a proper subject of legislative regulation for the benefit of the public health, but the degree of regulation permissible varies greatly according to circumstances; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061. While health authorities have the power to abate nuisances, the owner has usually the right to do so in his own way; Eckhardt v. City of Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204, affirmed in *id.*, 156 N. Y. 658, 50 N. E. 1116; Philadelphia v. Trust Co., 132 Pa. 224, 18 Atl. 1114; Durgin v. Minot, 203 Mass. 26, 89 N. E. 144, 24 L. R. A. (N. S.) 241, 133 Am. St. Rep. 276. And property not in itself a nuisance may not be destroyed unless such destruction is necessary to protect the public; Shepard v. People, 40 Mich. 487; Health Dep't of City of New York v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641.

Offences against the provisions of the health laws are generally punished by fine and imprisonment. They are offences against public health, punishable by the common law by fine and imprisonment; such, for example, as selling unwholesome provisions. 4 Bla. Com. 162; 2 East, Pl. Cr. 822; 6 *id.* 133; 3 Maule & S. 10.

Mandamus will issue to compel a board of health to award compensation to one whose property it has occupied or destroyed to prevent the spread of contagious disease, when such board of health has refused so to do; Safford v. Board of Health, 110 Mich. 81, 67 N. W. 1094, 33 L. R. A. 300, 64 Am. St. Rep. 332.

Injuries to the health of particular individuals are, in general, remedied by an action on the case, or perhaps, in some instances, for breach of contract, and may be also by abatement, in some cases of nuisance. See NUISANCE; ABATEMENT; QUARANTINE; CONTAGIOUS DISEASES; VACCINATION.

As to the exercise of discretionary powers by boards of health, see LEGISLATIVE POWER; POLICE POWER; FOOD AND DRUG ACTS.

HEALTH OFFICER. The name of an officer invested with power to enforce the health laws. The powers and duties of health officers are regulated by local laws.

HEALTHY. Free from disease or bodily ailment or from a state of the system susceptible or liable to disease or bodily ailment. Bell v. Jeffreys, 35 N. C. 357.

HEARING. The trial of a chancery suit. Akerly v. Vilas, 24 Wis. 165, 1 Am. Rep. 166; Galpin v. Critchlow, 112 Mass. 339, 17 Am. Rep. 176.

The hearing in the English Chancery was conducted as follows. When the cause is called on in court, the pleadings on each side are opened in a brief manner to the court by the junior counsel for the plaintiff; after which the plaintiff's leading counsel states the plaintiff's case and the points in issue, and submits to the court his arguments upon them. Then the depositions (if any) of the plaintiff's witnesses, and such parts of the defendant's answer as support the plaintiff's case, are read by the plaintiff's counsel; after which the rest of the plaintiff's counsel address the court. Then the same course of proceedings is observed on the other side, excepting that no part of the defendant's answer can be read in his favor if it be replied to. The leading counsel for the plaintiff is then heard in reply; after which the court pronounces the decree. 14 Viner, Abr. 233; Com. Dig. *Chancery*, (T 1, 2, 3); Daniell, Chanc. Pract.

In Criminal Law. The examination of a prisoner charged with a crime or misdemeanor, and of the witnesses for the accused. See EXAMINATION.

HEARSAY EVIDENCE. That kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part on the veraci-

ty and competency of some other person. 1 Phill. Ev. 185.

Hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge; this species of testimony supposes some better which might be adduced in a particular case and its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that it is inadmissible; Hopt v. Utah, 110 U. S. 581, 4 Sup. Ct. 202, 28 L. Ed. 262; Queen v. Hepburn, 7 Cra. (U. S.) 295, 3 L. Ed. 348.

The term applies to written as well as oral matter; but the writing or words are not necessarily hearsay, because those of a person not under oath. Thus, *information* on which one has acted; 2 B. & Ad. 845; Coleman v. Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253; the *conversation* of a person suspected of insanity; 2 Ad. & E. 3; see Myers v. Knobe, 51 Kan. 720, 33 Pac. 602; Ellis v. State, 33 Tex. Cr. R. 86, 24 S. W. 894; *replies* to inquiries; 8 Bing. 320; Phelps v. Foot, 1 Conn. 387; Johns v. Johns, 29 Ga. 718; *general reputation;* Stallings v. State, 33 Ala. 425; Sanscrainte v. Torongo, 87 Mich. 69, 49 N. W. 497; *expressions of feeling;* 8 Bing. 376; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Laughlin v. State, 18 Ohio 99, 51 Am. Dec. 444; Bacon v. Inhabitants of Charlton, 7 Cush. (Mass.) 581; Looper v. Bell, 1 Head (Tenn.) 373; *general repute* in the family, in questions of pedigree; 2 C. & K. 701; Jackson v. Browner, 18 Johns. (N. Y.) 37; Chapman v. Chapman, 2 Conn. 347, 7 Am. Dec. 277; Anderson v. Parker, 6 Cal. 197; Waldron v. Tuttle, 4 N. H. 371; Jewell v. Jewell, 1 How. (U. S.) 231, 11 L. Ed. 108; Butrick v. Tilton, 155 Mass. 461, 29 N. E. 1088; Town of Londonderry v. Town of Andover, 28 Vt. 416; (see 1 De G. & Sm. 51, for a discussion as to pedigree by Knight-Bruce, V. C.); see DECLARATION; EVIDENCE; *entries* made by third persons in the discharge of official duties; 4 Q. B. 132; and see Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Welsh v. Barrett, 15 Mass. 380; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Farmers' Bank of Lancaster v. Whitehill, 16 S. & R. (Pa.) 89; Herring v. Levy, 4 Mart. N. S. (La.) 383; New Haven County Bank v. Mitchell, 15 Conn. 206; *entries* in the party's shopbook; Ingraham v. Bockius, 9 S. & R. (Pa.) 285, 11 Am. Dec. 730; Prince v. Smith, 4 Mass. 455; Pelzer v. Cranston, 2 McCord (S. C.) 328; Wilson v. Wilson, 6 N. J. L. 95; Farner v. Turner, 1 Ia. 53; 1 Greenl. Ev. § 119; or *other books* kept in the regular course of business; 10 Ad. & E. 598; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Welsh v. Barrett, 15 Mass. 380; Halliday v. Martinet, 20 Johns. (N. Y.) 168, 11 Am. Dec. 262; *indorsements* of partial payments; Whitney v. Bigelow, 4 Pick. (Mass.) 110; Roseboom v. Billington, 17 Johns. (N. Y.) 182; Gibson v. Peebles, 2 McCord (S. C.) 418; declarations as to *boundaries;* Clement v. Packer, 125 U. S. 321, 8 Sup. Ct. 907, 31 L. Ed. 721; have been held admissible as original evidence under the circumstances, and for particular purposes. As to a person's testifying to his own age, see AGE.

As a general rule, hearsay reports of a transaction, whether oral or written, are not admissible as evidence; 1 Greenl. Ev. § 124; Gatling v. Newell, 9 Ind. 572; Ibbitson v. Brown, 5 Ia. 532; State v. Maitremme, 14 La. Ann. 830; Persons' Adm'rs v. Burdick, 6 Wis. 63; Gross v. Moore, 68 Hun 412, 22 N. Y. Supp. 1019; Brown v. Prude, 97 Ala. 639, 11 South. 838; Atchison, T. & S. F. R. Co. v. Parker, 55 Fed. 595, 5 C. C. A. 220; Forman v. Com., 86 Ky. 605, 6 S. W. 579. The rule applies to evidence given under oath in a cause between other litigating parties; 3 Term 77; Queen v. Hepburn, 7 Cra. (U. S.) 290, 3 L. Ed. 348.

At one time in England it was held on the authority of Luttarell v. Reynell, 1 Mod. 282, that hearsay evidence of a witness' previous declarations might be admitted to confirm his testimony by showing that he "was constant to himself"; but this theory of confirming a sworn statement by declarations not under oath was abandoned in England; Buller, J., in 3 Doug. 242; and (except in a few cases which followed the earlier English case) repudiated in the United States; Stark. Ev. Sharsw. ed. 253, n. 2; 12 Am. L. Reg. 1, where the cases are collected.

Matters relating to public interest, as, for example, a claim to a ferry or highway, may be proved by hearsay testimony; 6 M. & W. 234; 1 M. & S. 679; Noyes v. Ward, 19 Conn. 250; but the matter in controversy must be of public interest; 2 B. & Ad. 245; Pennsylvania Coal Co. v. Canal Co., 29 Barb. (N. Y.) 593; the declarations must be those of persons supposed to be dead; 11 Price 162; 1 C. & K. 58; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; and must have been made before controversy arose; 13 Ves. 514. See Fry v. Currie, 103 N. C. 203, 9 S. E. 393. The rule extends to deeds, leases, and other private documents; 10 B. & C. 17; maps; 2 Moore & P. 525; Noyes v. Ward, 19 Conn. 250; and verdicts; 10 Ad. & E. 151; 7 C. & P. 181. Testimony based on daily market reports from a commercial center comes from a public authentic source and is not hearsay; International & G. N. Ry. Co. v. Pasture Co., 5 Tex. Civ. App. 186.

Ancient documents purporting to be a part of the *res gestæ* are also admissible, although the parties to the suit are not bound; 5 Price 312; Tolman v. Emerson, 4 Pick. (Mass.) 160. See 2 C. & P. 440; Jackson v. Welden, 3 Johns. Cas. (N. Y.) 283; Carroll v. Norwood, 1 H. & J. (Md.) 174; Willson

v. Betts, 4 Denio (N. Y.) 201. So also declarations which form part of the *res gestæ*, which explain and give character to what was done at the time are not liable to the objection that they are hearsay; Stark. Ev. Sharwood's ed. 53, note 1, 89, note 1, where the cases illustrating this branch of the subject are collected and classified by the American editor.

When two persons not speaking a common language voluntarily agree on a third to interpret between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, and such communication to the interpreter is not hearsay, and the party to whom it is made may testify to it; Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274; Johnson v. R. Co., 51 Ia. 25, 50 N. W. 543; the weight only of such being affected thereby and not its competency; Com. v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

Declarations, incompetent as hearsay, are not rendered admissible because they may tend to corroborate other testimony; Holt v. Johnson, 129 N. C. 138, 39 S. E. 796.

A statement by a physician to plaintiff that it would be necessary to amputate his hand was hearsay and inadmissible; Louisville & N. R. Co. v. Smith, 84 S. W. 755, 27 Ky. L. Rep. 257. In an action against a railway company for wrongful death of a son, a statement made by him to his mother that he would support his parents as long as he lived was held not hearsay; Atchison, T. & S. F. Ry. Co. v. Van Belle, 26 Tex. Civ. App. 511, 64 S. W. 397. In condemnation proceedings, evidence offered by the owner as to offers made to him to purchase the property was rightly excluded; Sharp v. U. S., 191 U. S. 341, 24 Sup. Ct. 114, 48 L. Ed. 211.

See DECLARATION; DYING DECLARATIONS; EVIDENCE; PEDIGREE; RES GESTÆ.

HEARTH-MONEY. A tax, granted by 13 & 14 Car. II. c. 10, abolished 1 Will. & Mary, St. 1, c. 10, of two shillings on every hearth or stove in England and Wales. Jacob, Law Dict. Commonly called *chimney-money*. *Id.*

HEARTH-SILVER. A sort of *modus* for tithes, viz.: a prescription for cutting down and using for fuel the tithe of wood. 2 Burn, Eccl. Law 304.

HEAT OF PASSION. This does not mean passion or anger which comes from an old grudge, or no immediate cause or provocation; but passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. State v. Seaton, 106 Mo. 198, 17 S. W. 169.

It is not inconsistent with intelligent action, with consciousness of what one is doing and of the responsibilities therefor; Duthey v. State, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032. One who in possession of a sound mind commits a criminal act under the impulse of passion or revenge, though it may temporarily control his will or dethrone his reason, cannot be shielded from the consequences of his act; Williams v. State, 50 Ark. 517, 9 S. W. 5; Com. v. Renzo, 216 Pa. 147, 65 Atl. 30. Such a state of mind does not constitute insanity; Sanders v. State, 94 Ind. 147. See INSANITY; MURDER; COOLING TIME.

HEBBERMAN. An unlawful fisher in the Thames below London bridge; so called because they generally fished at *ebbing tide* or *water*. 4 Hen. VII. c. 15; Jacob, Law Dict.

HEBBERTHEF. The privilege of having goods of a thief and trial of him within such a liberty. Cartular, S. Edmundi MS. 163; Cowell.

HEBBING-WEARS. A device for catching fish in ebbing water. Stat. 23 Hen. VIII. c. 5.

HEBDOMAD. A week; a space of seven days.

HEBDOMADIUS. A week's man; a canon, or prebendary in a cathedral church, who has the care of the choir and the officers belonging to it, for his own week. Cowell.

HEBOTE. The king's edict commanding his subjects into the field.

HECCAGIUM. Rent paid to the lord for liberty to use engines called hecks. Toml.

HEDA. A small haven, wharf, or landing-place.

HEDAGIUM (Sax. *heda*, *hitha*, port). A toll or custom paid at the *hith* or wharf, for landing goods, etc., from which an exemption was granted by the king to some particular persons and societies. Cartular. Abbatiæ de Redinges; Cowell.

HEDGE-BOTE. Wood used for repairing hedges or fences. 2 Bla. Com. 35; Livingston v. Ten Broeck, 16 Johns. (N. Y.) 15, 8 Am. Dec. 287; HAYBOTE.

HEDGE-PRIEST. A hedge-parson; specifically, in Ireland, formerly, a priest who has been admitted to orders directly from a hedge-school, without preparation in theological studies at a regular college. Cent. Dict.

HEDGING. A means by which collectors and exporters of grain or other products, and manufacturers, who make contracts in advance for the sale of their goods, secure themselves against the fluctuations of the market by counter contracts for the purchase or sale of an equal quantity of the product or of the material of manufacture. Board of Trade of City of Chicago v. Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031.

HEGEMONY. The leadership of one among several independent confederate states.

HEGIRA. The epoch or account of time used by the Arabians and the Turks, who begin the Mohammedan era and computation from the day that Mahomet was compelled to escape from Mecca to Medina which happened on the night of Thursday, July 15th, A. D. 622, under the reign of the Emperor Heraclius. Townsend, Dict. Dates; Wilson, Gloss. The era begins July 16th. The word is sometimes spelled Hejira but the former is the ordinary usage. It is derived from *hijrah*, in one form or another, an oriental term denoting flight, departure.

HEIFER. A young cow which has not had a calf. A beast of this kind two years and a half old was held to be improperly described in the indictment as a cow; 2 East, Pl. Cr. 616; 1 Leach 105.

HEIR. He who is born or begotten in lawful wedlock, and upon whom the law casts the estate in lands, tenements, or hereditaments immediately upon the death of his ancestor. Thus, the word does not strictly apply to personal estate. Wms. Per. Pr.

Ordinarily used to designate those persons who answer this description at the death of the testator. In its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy. 2 Bla. Com. 201; Rawson v. Rawson, 52 Ill. 62; Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Dukes v. Faulk, 37 S. C. 255, 16 S. E. 122, 34 Am. St. Rep. 745.

The term heir has a very different signification at common law from what it has in those states and countries which have adopted the civil law. In the latter, the term applies to all persons who are called to the succession, whether by the act of the party or by operation of law. The person who is created universal successor by a will is called the testamentary heir; and the next of kin by blood is, in cases of intestacy, called the heir-at-law, or heir by intestacy. The executor of the common law is in many respects not unlike the testamentary heir of the civil law. Again, the administrator in many respects corresponds with the heir by intestacy. By the common law, executors—unless expressly authorized by the will—and administrators have no right except to the personal estate of the deceased; whereas the heir by the civil law is authorized to administer both the personal and real estate. 1 Brown, Civ. Law 344. See HÆRES.

No person is heir of a living person. A person occupying a relation which may be that of heirship is, however, called heir apparent or heir presumptive; 2 Bla. Com. 208; and the word heir may be used in a contract to designate the representative of a living person; Lockwood v. Jesup, 9 Conn. 272. A monster cannot be heir; Co. Litt. 7 *b;* nor at common law could a bastard; 2 Kent 208. See BASTARD; DESCENT AND DISTRIBUTION.

In the word heirs is comprehended heirs of heirs *in infinitum;* Co. Litt. 7 *b*, 9 *a;* Wood, Inst. 69. The words "heir" and "heirs" are interchangeable, and embrace all legally entitled to partake of the inheritance; Stokes v. Van Wyck, 83 Va. 724, 3 S. E. 387.

According to many authorities, heir may be *nomen collectivum*, as well in a deed as in a will, and operate in both in the same manner as the word heirs; 1 Rolle, Abr. 253; Ambl. 453; Cro. Eliz. 313; 1 Burr. 38. But see 2 Prest. Est. 9, 10. In wills, in order to effectuate the intention of the testator, the word heirs is sometimes construed to mean the next of kin; 1 Jac. & W. 388; Reen v. Wagner, 51 N. J. Eq. 1, 26 Atl. 467; and statutory next of kin; 41 L. T. Rep. N. S. 209; Tyson v. Tyson, 9 N. C. 472; the word "heir" can be construed as "distributees" or "representatives"; Eby's Appeal, 84 Pa. 245; and children; Ambl. 273; Lott v. Thompson, 36 S. C. 38, 15 S. E. 278; Baxter v. Winn, 87 Ga. 239, 13 S. E. 634; Franklin v. Franklin, 91 Tenn. 119, 18 S. W. 61; Barton v. Tuttle, 62 N. H. 558; Underwood v. Robbins, 117 Ind. 308, 20 N. E. 230; it can be construed to mean "heirs of his body"; Benson v. Linthicum, 75 Md. 144, 23 Atl. 133; and grandchildren; Woodruff v. Pleasants, 81 Va. 40.

When heir is used in a policy of life insurance or a benefit certificate, or in the constitution or by-laws of a benefit society, it is usually construed to mean all persons designated as distributees under intestate statutes; Estate of Comly, 136 Pa. 153, 20 Atl. 397; Kendall v. Gleason, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509; Tompkins v. Levy & Bro., 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 31; Lee v. Baird, 132 N. C. 755, 44 S. E. 605; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456. The widow is usually held to be included; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456; Knights Templars & Masonic Mut. Aid Ass'n v. Greene, 79 Fed. 461; Hanson v. Relief Ass'n, 59 Minn. 123, 60 N. W. 1091; Northwestern Masonic Aid Ass'n of Chicago v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Lyons v. Yerex, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452; Alexander v. Aid Ass'n, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161; Mullen v. Reed, 64 Conn. 240, 29 Atl. 478, 24 L. R. A. 664, 42 Am. St. Rep. 174.

She is an heir of her deceased husband only in a special and limited sense and not in the general sense in which that term is usually understood; Reynolds v. Stockton, 140 U. S. 270, 11 Sup. Ct. 773, 35 L. Ed. 464. Her right to share in a policy payable to "legal heirs" was denied where the insured left a child; Phillips v. Carpenter, 79 Ia. 600, 44 N. W. 898; and where a statute gave her half of her husband's personal estate as statutory dower; Johnson v. Knights of Honor, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732.

On the death of a wife during the life of her husband, where insurance was to be paid to her, her heirs and assigns, he was held one of her heirs; U. B. Mut. Aid Society v. Miller, 107 Pa. 162. A divorced wife was held not one of the heirs of a member of a

beneficiary society; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

See EXPECTANCY; SHELLEY'S CASE, RULE IN.

In Civil Law. He who succeeds to the rights and occupies the place of a deceased person. See the following titles, and HÆRES.

HEIR APPARENT. One who has an indefeasible right to the inheritance, provided he outlive the ancestor. 2 Bla. Com. 208.

HEIR AT LAW. He who, after his ancestor dies intestate, has a right to all lands, tenements, and herditaments which belonged to him or of which he was seised. The same as heir general.

In its general definition heir at law is not limited to children; it may be and is often used, in cases where there are no children; it includes parents, brothers, sisters, etc.; Boman v. Boman, 49 Fed. 329, 1 C. C. A. 274, 7 U. S. App. 63.

HEIRS, BENEFICIARY. In Civil Law. Those who have accepted the succession under the benefit of an inventory regularly made. La. Civ. Code, art. 879. If the heir apprehend that the succession will be burdened with debts beyond its value, he accepts with benefit of inventory, and in that case he is responsible only for the value of the succession.

HEIR, COLLATERAL. One who is not of the direct line of the deceased, but comes from a collateral line: as, a brother, sister, an uncle and aunt, a nephew, niece, or cousin, of the deceased.

HEIR, CONVENTIONAL. In Civil Law. One who takes a succession by virtue of a contract—for example, a marriage contract—which entitles the heir to the succession.

HEIR, FORCED. One who cannot be disinherited. See FORCED HEIRS.

HEIR, GENERAL. Heir at common law.

HEIR, IRREGULAR. In Louisiana. One who is neither testamentary nor legal heir, and who has been established by law to take the succession. See La. Civ. Code, art. 874. When the deceased has left neither lawful descendants, nor ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the state; *id.* art. 911. This is called an irregular succession.

HEIR, LEGAL. In Civil Law. A legal heir is one who is of the same blood as the deceased and who takes the succession by force of law. This is different from a testamentary or conventional heir, who takes the succession in virtue of the disposition of man. See La. Civ. Code, art. 873, 875; Dict. de Jurisp. *Héritier Légitime.* There are three classes of legal heirs, to wit: the children and other lawful descendants, the fathers and mothers and other lawful ascendants, and the collateral kindred. La. Civ. Code, art. 883. See Howe, Stud. Civ. L. 229.

HEIRLOOM. Chattels which, contrary to the nature of chattels, descend to the heir along with the inheritance, and do not pass to the executor.

This word seems to be compounded of *heir,* and *loom,* that is, a frame, viz. to weave in. Some derive the word loom from the Saxon *loma,* or *geloma,* which signifies utensils or vessels generally. However, this may be, the word *loom,* by time, is drawn to a more general signification than it bore at the first, comprehending all implements of household, as tables, presses, cupboards, bedsteads, wainscots, and which, by the custom of some countries, having belonged to a house, are never inventoried after the decease of the owner as chattels, but accrue to the heir with the house itself. Minshew; 2 Poll. & Maitl. 361.

Charters, deeds, and other evidences of the title of the land, together with the box or chest in which they are contained, the keys of a house, and fish in a fish-pond, are heirlooms. Co. Litt. 3 *a,* 185 *b;* 7 Co. 17 *b,* Cro. Eliz. 372; Brooke, Abr. *Charters,* pl. 13; 2 Bla. Com. 427; 14 Viner, Abr. 291.

Diamonds bequeathed to one "as head of the family" and directed "to be deemed heirlooms in the family" are held in trust for the legatee and his successors; 23 W. R. 592; chattels bequeathed upon trust to permit the same to go and be enjoyed by the person possessed of the title, in the nature of heirlooms, vest absolutely in the first taker; 23 Ch. D. 158; and to the testator's nephew to go to and be held as heirlooms by him and his eldest son on his decease, is held to create an executory trust with a life interest in the first taker; L. R. 6 Eq. 540. An election, by one who takes heirlooms under a deed of trust, to take under a will did not operate as a forfeiture of the heirlooms as the interest in them was unassignable; 31 Ch. D. 466.

There appear to be no cases of strict heirlooms in this country; but see Haven v. Haven, 181 Mass. 573, 64 N. E. 410.

HEIR PRESUMPTIVE. One, who, in the present circumstances, would be entitled to the inheritance, but whose rights may be defeated by the contingency of some nearer heir being born. 2 Bla. Com. 208. In Louisiana, the presumptive heir is he who is the nearest relation of the deceased capable of inheriting. This quality is given to him before the decease of the person from whom he is to inherit, as well as after the opening of the succession, until he has accepted or renounced it; La. Civ. Code, art. 876.

HEIR, TESTAMENTARY. In Civil Law. One who is constituted heir by testament executed in the form prescribed by law. He is so called to distinguish him from the legal heirs, who are called to the succession by the law; and from conventional heirs, who are so constituted by a contract *inter vivos.* See HÆRES FACTUS; DEVISEE.

HEIR, UNCONDITIONAL. In Louisiana. One who inherits without any reservation, or without making an inventory, whether the

acceptance be express or tacit. La. Civ. Code, art. 878.

HEIRESS. A female heir to a person having an estate of inheritance. When there are more than one, they are called *co-heiresses*, or *co-heirs*.

HEIRSHIP MOVABLES. In Scotch Law. The movables which go to the heir, and not to the executor, that the land may not go to the heir completely dismantled, such as the best of furniture, horses, cows, etc., but not fungibles. Hope, Minor Pr. 538; Erskine, Inst. 3. 8. 13–17; Bell, Dict.

HELD. Used, in reference to the decision of a court, in the same sense as decided.

HELL. The name given to a place under the exchequer chamber, where the king's debtors were confined. Rich. Dict.

HELM. A tiller; the handle or wheel of a ship; a defensive covering for the head; a helmet; thatch or straw.

HELOWE-WALL. The end-wall covering and defending the rest of the building. Paroch. Antiq. 573.

HELSING. A Saxon brass coin, of the value of an English half-penny.

HEMOLDBORH, or HELMELBORCH. A title to possession. The admission of this old Norse term into the laws of the Conqueror is difficult to be accounted for; it is not found in any Anglo-Saxon law extant. Whart.

HENCHMAN. A footman; one who holds himself at the bidding of another. It has come to mean here a political follower; used in a rather bad sense.

HENEDPENNY. A customary payment of money instead of hens at Christmas. Cowell.

HENFARE. A fine for flight on account of murder. Domesday.

HENGEN. A prison for persons condemned to hard labor. Anc. Inst. Eng.

HENGHEN *(ergastulum).* In Saxon Law. A prison, or house of correction. Anc. Laws & Inst. of Engl. Gloss.

HENGWYTE. In Old English Law. An acquittance from a fine for hanging a thief. Fleta, lib. 1, c. 47, § 817. See HANGWITE.

HEORDFESTE. The master of a family; from the Saxon *hearth faest*, fixed to the house or hearth. Moz. & W.

HEORDPENNY. Peter-pence. Cowell.

HEORDWERCK. In Saxon Law. The service of herdsmen, done at the will of their lord.

HEPBURN ACT. The name commonly given to an act of Congress, June 29, 1906, amending §§ 1, 6, 14, 15, 16 and 20 of the Interstate Commerce Act, Feb. 4, 1887, and adding §§ 16a and 24 thereto. See INTERSTATE COMMERCE COMMISSION.

HEPTARCHY. The name of the kingdom or government established by the Saxons in Britain: so called because it was composed of *seven* kingdoms, namely, Kent, Essex, Sussex, Wessex, East Anglia, Mercia, and Northumberland.

HER. In an indictment for rape the use of this word is sufficient to show that the person alluded to is a female; Warner v. State, 54 Ark. 660, 17 S. W. 6; but it has been held that in a written instrument the use of the pronoun "his" to designate a person therein named is not conclusive that such person is a male, and parol evidence will be admitted to show that such person is a female; Berniaud v. Beecher, 71 Cal. 38, 11 Pac. 802.

HERALD (from French *héraut*). An officer whose business it is to register genealogies, adjust ensigns armorial, regulate funerals and coronations, and, anciently, to carry messages between princes and proclaim war and peace.

In England, there are three chief heralds, called Kings of Arms, of whom *Garter* is the principal, instituted by Henry V., whose office is to attend the knights of the Garter at their solemnities, and to marshal the funerals of the nobility. The next is *Clarencieux*, instituted by Edward IV, so called from the duke of Clarence, and whose proper office is to arrange the funerals of all the lesser nobility, knights, and squires on the south side of Trent. The third *Norroy* (*north roy*), who has the like office on the north side of Trent. There are, also, six inferior heralds, who were created to attend dukes or great lords in their military expeditions. The office, however, has grown much into disuse,—so much falsity and confusion having crept into their records that they are no longer received in evidence in any court of justice. This difficulty was attempted to be remedied by a standing order of the house of lords, which requires *Garter* to deliver to that house an exact pedigree of each peer and his family on the day of his first admission; 3 Bla. Com. 105; Encyc. Brit.

See HERALDS' COLLEGE.

HERALDRY. (1) The science of heralds; (2) an old and obsolete abuse of buying and selling precedence in the paper of causes for hearing. 2 North's Life of Lord-Keeper Guilford, 2d ed. 86.

HERALDS' COLLEGE. In 1483 the heralds in England were collected into a College of Arms by Richard III. The Earl Marshal of England was chief of the college, and under him were three Kings of Arms (styled Garter, Clarencieux, Norroy), six heralds at arms (styled of York, Lancaster, Chester, Windsor, Richmond, and Somerset), and four pursuivants (styled Bluemantle, Rouge Croix, Rouge Dragon, and Portcullis). This organization still continues. Encyc. Brit. Their first residence was in Pulteney's Inn and until the present site was granted by Queen Mary (1554); the house being rebuilt, as it now stands, after the Great Fire. See HERALD.

HERBAGE. **In English Law.** An easement which consists in the right to pasture cattle on another's ground. A right to herbage does not include a right to cut grass, or dig potatoes, or pick apples; Simpson v. Coe, 4 N. H. 303.

HERBAGIUM ANTERIUS. The first cutting of hay or grass, as distinguished from the aftermath. Paroch. Antiq. 459.

HERBERGAGIUM. Lodgings to receive guests in the way of hospitality. Cowell.

HERBERGARE. To harbor; to entertain.

HERBERGATUS. Spent in an inn. Cowell.

HERBERY, or HERBURY. An inn. Cowell.

HERCE, or HERCIA. A harrow. Fleta, lib. 2, c. 77.

HERCIARE. To harrow. 4 Inst. 270.

HERCIATURE. **In Old English Law.** Harrowing; work with a harrow. Fleta, lib. 2, c. 82, § 2.

HERCISCUNDA. **In Civil Law.** To be divided. *Familia herciscunda*, an inheritance to be divided. *Actio familiæ herciscundæ*, an action for dividing an inheritance. *Erciscunda* is more commonly used in the civil law. Dig. 10, 2; Inst. 3 28, 4.

HERD-WERCH. Customary uncertain services as herdsmen, shepherds, etc. Anno 1166, Regist. Ecclesiæ Christi Cant. MS.; Cowell.

HEREAFTER. Used as an adverb, it does not necessarily refer to unlimited time; it is not a synonym for "forever." It rather indicates the direction in time merely to which the context refers, and is limited by it. Dobbins v. Cragin, 50 N. J. Eq. 640, 23 Atl. 172.

HEREBANNUM. Calling out the army by proclamation. A fine paid by freemen for not attending the army. A tax for the support of the army. Du Cange.

HEREBOTE. The king's edict commanding his subjects into the field. Cowell.

HEREDAD. **In Spanish Law.** A portion of land that is cultivated. Formerly it meant a farm, *haciendo de campo*, real estate.

HEREDAD YACENTE (From Lat. "*hæreditas jacens*," *q. v.*). **In Spanish Law.** An inheritance not yet entered upon or appropriated. White, New Recop. *b.* 2, tit. 19, c. 2, § 8.

HEREDERO. **In Spanish Law.** Heir; he who, by legal or testamentary disposition, succeeds to the property of a deceased person. "*Hæres censeatur cum defuncto una eademque persona.*" Las Partidas, 7. 9. 13.

HEREDITAGIUM. **In Sicilian and Neapolitan Law.** That which is held by hereditary right; the same *hereditamentum (hereditament)* in English Law. Spel. Gloss.

HEREDITAMENTS. Things capable of being inherited, be it corporeal or incorporeal, real, personal, or mixed, and including not only lands and everything thereon, but also heir-looms, and certain furniture which, by custom, may descend to the heir together with the land. Co. Litt. 5 *b*; 2 Bla. Com. 17; Chal. R. P. 43; Oskaloosa Water Co. v. City of Oskaloosa, 84 Ia. 407, 51 N. W. 18, 15 L. R. A. 296. By this term such things are denoted as may be the subject-matter of inheritance, but not the inheritance itself; it cannot, therefore, by its own intrinsic force, enlarge an estate *prima facie* a life estate, into a fee; 2 B. & P. 251; 8 Term 503.

HEREDITARY. That which is the subject of inheritance.

HEREDITARY RIGHT TO THE CROWN. The crown of England, by the positive constitution of the kingdom, has ever been descendible, and so continues, in a course peculiar to itself, yet subject to limitation by parliament; but, notwithstanding such limitation, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited. 1 Bla. Com. c. 3.

HEREFARE (Sax.). A going into or with an army; a going out to war *(profectio militaris)*; an expedition. Cowell; Spel. Gloss.

HEREGEAT. A heriot *(q. v.)*.

HEREGELD. A tribute or a tax levied for the maintenance of an army. Moz. & W.; Spel. Gloss.

HERENACH. An arch-deacon. Cowell.

HERES. See HÆRES.

HERESLITA, HERESSA, HERESSIZ. A hired soldier who departs without license. 4 Inst. 128.

HERESY. An offence which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed. What in old times used to be adjudged heresy was left to the determination of the ecclesiastical judge; and the statute 2 Hen. 4, c. 15, defines heretics as teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church. Various laws have been passed before and after the reformation explaining wholly or partially what is meant by heresy. Heresy is now subject only to ecclesiastical correction, by virtue of Stat. 29 Car. 2, c. 9; 4 Bla. Com. 44; 4 Steph. Com. 203. See EXCOMMUNICATION; ECCLESIASTICAL COURTS.

Since 1577 no person could be indicted in England for heresy, but it is said to be theoretically possible that one guilty of heresy may be excommunicated and imprisoned for six months by an ecclesiastical court; 1 Holdsw. Hist. E. L. 386. See EXCOMMUNICATION.

HERETOCH. A general, leader, or commander, also a baron of the realm. Du Fresne.

HERETOFORE. Time past in distinction from time present and time future. Andrews v. Thayer, 40 Conn. 156.

HERETUM. In Old Records. A court or yard for drawing up guards or military retinue. Cowell; Jac. L. Dict.

HERGE. In Saxon Law. Offenders who joined in a body of more than thirty-five to commit depredation.

HERIOT. In English Law. A customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land. If a man fell before his lord in battle, no heriot was demanded; 1 Poll. & Maitl. 293. It was the arms of the thegn, the stock of the peasant and the return to the lord of the capital he had advanced to the tenant. 3 Holdsw. Hist. E. L. 51. See a late case in 1 C. B. 402.

Heriot service is such as is due upon a special reservation in the grant or lease of lands, and therefore amounts to little more than a mere rent. Heriot custom arises upon no special reservation whatsoever, but depends merely upon immemorial usage and custom. See 2 Bla. Com. 97, 422; Comyns, Dig. *Copyhold* (K 18); Bacon, Abr.; 2 Saund.; 1 Vern. 441. It was claimed as late as [1907] 1 Ch. 366. See 23 L. Q. R. 251.

HERISCHILD. A species of English military service.

HERISCHULDÆ. A fine for disobedience to proclamation of warfare. Skene.

HERISCINDIUM. A division of household goods. Blount.

HERISLIT. Laying down of arms. Blount. Desertion from the army. Spel. Gloss.

HERISTALL. A castle; the station of an army; the place where a camp is pitched. Spel. Gloss.

HERITABLE. See INHERITANCE.

HERITABLE OBLIGATION. One whose rights and duties descend to the heir, so far as the heir accepts the succession. Howe, Stud. Civ. L. 133.

HERITABLE SECURITY. Security constituted by heritable property. Encyc. Dict.

HERITAGE. In Civil Law. Every species of immovable which can be the subject of property: such as lands, houses, orchards, woods, marshes, ponds, etc., in whatever mode they may have been acquired, either by descent or purchase. 3 Toullier 472. See Co. Litt. s. 731.

HERMANDAD (called also, *Santa Hermandad*). **In Spanish Law.** A fraternity formed among different towns and villages to prevent the commission of crimes, and to prevent the abuses and vexations to which they were subjected by men in power.

To carry into effect the object of this association, each village and town elected two *alcaldes*,—one by the nobility and the other by the community at large. These had under their order inferior officers, formed into companies, called *cuadrilleros*. Their duty was to arrest delinquents and bring them before the *alcaldes*, when they were tried substantially in the ordinary form. This tribunal, established during the anarchy prevailing in feudal times, continued to maintain its organization in Spain for centuries; and various laws determining its jurisdiction and mode of proceeding were enacted by Ferdinand and Isabella and subsequent monarchs. Nov. Recop. tit. 35, b. 12. § 7. The abuses introduced in the exercise of the functions of the tribunals caused their abolition, and the *santas hermandades* of Ciudad Rodrigo, Talavera, and Toledo, the last remnants of these anomalous jurisdictions, were abolished by the law of the 7th May, 1835.

HERMAPHRODITES. Persons who have in the sexual organs the appearance of both sexes. They are adjudged to belong to that sex which prevails in them; Co., Litt. 2. 7; Domat, Lois Civ. liv. 1, t. 2, s. 1, n. 9.

The sexual characteristics in the human species are widely separated, and the two sexes are very rarely united in the same individual; there are a few cases on record, however, in which both ovaries and testicles were present. In one there were two ovaries, a rudimentary uterus, and a single testicle containing spermatozoa. Am. Text Book of Gynæcology. Cases of malformation are occasionally found, in which it is very difficult to decide to which sex the person belongs. In 2 Taylor, Med.-Leg. Jurispr. 80, is a report of a case of a wife who was divorced as "being an hermaphrodite with more of the male than female development." She was ordered to put on the clothes of a man.

See 2 Med. Exam. 314; 1 Briand, Med. Leg. c. 2, art. 2, § 2, n. 2; Guy Med. Jur. 42, 47; 1 Beck, Med. Jur. 11th ed. 164 *et seq.*; Wharton & S. Med. Jur. § 408 *et seq.*

HERMENEUTICS (Greek, ἑρμηνεύω, to interpret). The art and science, or body of rules, of truthful interpretation. It has been used chiefly by theologians; but Zachariæ, in "An Essay on General Legal Hermeneutics" (Versuch einer allg. Hermeneütik des Rechts), and Dr. Lieber, in his work on Legal and Political Hermeneutics, also make use of it. See INTERPRETATION; CONSTRUCTION.

HERMER. A great lord. Jacob.

HERMOGENIAN CODE. See CODE.

HERNESIUM, or HERNASIUM. Household goods; implements of trade or husbandry; the rigging or tackle of a ship. Cowell.

HEROUDES. Heralds. Du Cange.

HERPEX. A harrow. Spel. Gloss.

HERPICATIO. In Old English Law. A day's work with a harrow. Spel. Gloss.

HERRING SILVER. A composition in money for the custom of supplying herrings for a religious house. Whart.

HERSHIP. The crime, in Scotland, of carrying off cattle by force; it is described as "the masterful driving off of cattle from a proprietor's grounds." Bell.

HERUS. A master. *Servus facit ut herus det*, the servant does (the work), in order that the master may give (him the wages agreed on). *Herus dat ut servus faciat*, the master gives (or agrees to give, the wages), in consideration of, or with a view to, the servant's doing (the work). 2 Bla. Com. 445.

HESIA. An easement. Du Cange.

HEST CORN. Corn or grain given or devoted to religious persons or purposes. Cowell; 2 Mon. Ang. 367 *b*.

HESTA. A capon or young cockerel.

HIDAGE. In Old English Law. A tax levied, in emergencies, on every *hide* of *land;* the exemption from such tax. Bract. lib. 2, c. 56. It was payable sometimes in money, sometimes in ships or military equipments; *e. g.* in the year 994, when the Danes landed in England, every three hundred hides furnished a ship to king Ethelred, and every eight hides one pack and one saddle. Jacob, Law Dict. See HIDE.

HIDALGO (spelled, also, *Hijodalgo*). **In Spanish Law.** He who, by blood and lineage, belongs to a distinguished family, or is noble by descent. Las Partidas 2. 12. 3.

HIDE (from Sax. *hyden*, to cover; so, Lat. *tectum*, from *tegere*). **In Old English Law.** Originally a building with a roof; a house; a tenement.

As much land as might be ploughed with one plough. The amount was probably determined by usage of the locality; some make it sixty, others eighty, others ninety-six, others one hundred or one hundred and twenty, acres. Co. Litt. 5; 1 Plowd. 167; Shepp. Touchst. 93; Du Cange.

A hide was anciently employed as a unit of taxation. 1 Poll. & Maitl. 347, such tax being called *hidegild*.

As much land as was necessary to support a *hide*, or mansion-house. Co. Litt. 69 *a;* Spelman, Gloss.; Du Cange, *Hida;* 1 Introd. to Domesday 145.

The unit of superficial measure, at the time of the Domesday survey, usually found in the southern counties, while *carucate* or *ploughland* prevailed in the northern counties. Although these words had various customary values in different parts of the country, there is a good deal of evidence that, at the Conquest, there was a tendency to a mean or normal value of 120 acres for hide divided into four *virgates* or *yardlands*. The *carucate* was normally of the same acreage as *hide*, but divided into eight *bovates* or oxgangs, implying the land which eight oxen (*caruca*) could till in a year. Pollock, English Manor 144.

There is much doubt as to what it was; it may have been 30 acres or thereabouts or 120 acres or thereabouts; Maitland, Domesday and Beyond 357, where the opinion is expressed that in Anglo-Saxon times it was 120 acres.

HIDE AND GAIN. In English Law. A term anciently applied to arable land. Co. Litt. 85 *b*.

HIDE LANDS. Lands appertaining to a *hide*, or mansion. See HIDE.

HIDEL. A place of protection; a sanctuary. St. 1 Hen. VII. cc. 5, 6; Cowell.

HIDGILD, or HIDEGILD. A sum of money paid by a villein or servant to save himself from whipping. Fleta, l. 1, c. 47, § 20.

HIERARCHY. Originally, government by a body of priests. Stubbs, Const. Hist. § 376. Now, the body of officers in any church or ecclesiastical institution, considered as forming an ascending series of ranks or degrees of power and authority, with the correlative subjection, each to the one next above.

HIGH BAILIFF. An officer attached to an English county court. His duties are to attend the court when sitting; to serve summons; and to execute orders, warrants, writs, etc. Stats. 9 & 10 Vict. c. 95, § 33; Poll. C. C. Pr. 16. He also had similar duties under the bankruptcy jurisdiction of the county courts. Bankruptcy Rules 1870, 58.

HIGH COMMISSION COURT. See COURT OF HIGH COMMISSION.

HIGH CONSTABLE. See CONSTABLE.

HIGH COURT OF ADMIRALTY. See ADMIRALTY.

HIGH COURT OF CHANCERY. See CHANCERY.

HIGH COURT OF DELEGATES. In English Law. See COURT OF DELEGATES.

HIGH COURT OF JUSTICE. See COURTS OF ENGLAND; JUDICATURE ACTS.

HIGH COURT OF JUSTICIARY. See COURTS OF SCOTLAND.

HIGH COURT OF PARLIAMENT. The English Parliament, as composed of the house of peers and house of commons.

The house of lords sitting in its judicial capacity. See PARLIAMENT; COURTS OF ENGLAND; HOUSE OF LORDS.

HIGH CRIMES AND MISDEMEANORS. The constitution of the United States provides that the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment, for treason, bribery, and other high crimes and misdemeanors. This does not apply to sena-

tors and members of congress, but does to United States circuit and district judges; Blount's Trial 102; Peck's Trial; 10 Law Trials; Chase's Trial; 11 *id.* See State v. Knapp, 6 Conn. 417, 16 Am. Dec. 68. See IMPEACHMENT.

HIGH SEAS. The uninclosed waters of the ocean, and also those waters on the sea-coast which are without the boundaries of low-water mark. U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; U. S. v. Grush, 5 Mas. C. C. 290, Fed. Cas. No. 15,268; 1 Bla. Com. 110; Bened. Adm.; 2 Hagg. Adm. 398.

Enclosed water on the sea coast and without the boundaries of low water mark. U. S. v. Imp. Co., 173 Fed. 426. The terms "high sea" and "main sea" are synonymous; *id.*

The act of congress of April 30, 1790, s. 8, enacts that if any person shall commit upon the *high seas*, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder, etc., which if committed within the body of a county would, by the laws of the United States, be punishable with death, every such offender, being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought. See U. S. v. McGill, 4 Dall. (U. S.) 426, 1 L. Ed. 894; U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16,738; U. S. v. Smith, 1 Mas. 147, Fed. Cas. No. 16,337; U. S. v. Seagrist, 4 Blatchf. 420, Fed. Cas. No. 16,245.

It was held in Ex parte Byers, 32 Fed. 406, that the Great Lakes are not high seas, and that these words have been employed from time immemorial to designate the ocean below low-water mark, and have rarely if ever been applied to interior or land-locked waters of any kind; but the supreme court of the United States has held otherwise, saying that this term is also applicable to the open, unenclosed waters of the Great Lakes; U. S. v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. See FAUCES TERRÆ; GREAT LAKES.

HIGH TREASON. *In English Law.* Treason against the king, in contradistinction from petit treason, which is the treason of a servant towards his master, a wife towards her husband, a secular or religious man towards his prelate. See PETIT TREASON; TREASON.

HIGH-WATER MARK. That part of the shore of the sea to which the waves ordinarily reach when the tide is at its highest. Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Com. v. Charlestown, 1 Pick. (Mass.) 180, 11 Am. Dec. 161; Arnold v. Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; 1 Russ. Cr. 107; 2 East, Pl. Cr. 803.

Wherever the presence of the water is so common as to mark on the soil a character, in respect to vegetation, distinct from that of the banks; it does not include low lands which, though subject to periodical overflow, are valuable for agricultural purposes. Carpenter v. Hennepin County, 56 Minn. 513, 58 N. W. 295. See FORESHORE; SEA-SHORE; TIDE.

HIGHWAY. A passage, road, or street which every citizen (person) has a right to use. 3 Kent 432; Respublica v. Arnold, 3 Yeates (Pa.) 421.

The term *highway* is the generic name for all kinds of public ways, whether they be carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers; 6 Mod. 255; Ang. Highw. c. 1; 3 Kent 432. A *cul de sac* may be a highway; 11 East 375, note; 18 Q. B. 870; Danforth v. Durell, 8 Allen (Mass.) 242; People v. Kingman, 24 N. Y. 559 (overruling Holdane v. Cold Spring, 23 Barb. [N. Y.] 103); Sheaff v. People, 87 Ill. 189, 29 Am. Rep. 49; Fields v. Colby, 102 Mich. 449, 60 N. W. 1048 (but against the presumption that it is such is the fact "that it leads nowhere"; [1905] 2 Ch. 188); an alley would not be; Face v. City of Ionia, 90 Mich. 104, 51 N. W. 184.

A public right of way over a highway is not an *easement*, for there is no dominant tenement, and the public are incapable of taking a grant from any one; Odgers, C. L. 24. A private right of way is wholly distinct from a public right of way; it can be exercised only by the occupier of the dominant tenement and his family. See EASEMENT.

Highways are created either by legislative authority or by dedication.

First, by legislative authority. In England, the laying out of highways is regulated by act of parliament; in this country, by general statutes, differing in different states. In England, the uniform practice is to provide a compensation to the owner of the land taken for highways. In the act authorizing the taking, in the United States, such a provision must be made, or the act will be void under the clause in the federal and in the several state constitutions that private property shall not be taken for public use without just compensation. The amount of such compensation may be determined either by a jury or by commissioners, as shall be prescribed by law; 1 Bla. Com. 139; Highw. 233; 8 Price 535; McMasters v. Com., 3 Watts (Pa.) 292; Williams v. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Ford v. R. Co., 14 Wis. 609, 80 Am. Dec. 791. In case the statute makes no provision for indemnity for land to be taken, an injunction may be obtained to prevent the taking; Beekman v. R. Co., 3 Paige Ch. (N. Y.) 45, 22 Am. Dec. 679; Gardner v. Newburgh, 2 Johns. Ch. (N.

Y.) 162, 7 Am. Dec. 526; Cushman v. Smith, 34 Me. 247; see Kern v. Isgrigg, 132 Ind. 4, 31 N. E. 455; or an action at law may be maintained after the damage has been committed; Crittenden v. Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Denslow v. New Haven & N. Co., 16 Conn. 98, and cases cited above. See EMINENT DOMAIN.

Second, by dedication, which title see.

The owner of the land over which it passes retains the fee and all rights of property not incompatible with the public enjoyment, such as the right to the herbage, the trees and fruit growing thereon, or minerals below, and may work a mine, sink a drain or cellar, or carry water in pipes beneath it, or sell the soil if it be done without injury to the highway; 4 Viner, Abr. 502; Com. Dig. *Chemin* (A 2); Makepeace v. Worden, 1 N. H. 16; U. S. v. Harris, 1 Sumn. 21, Fed. Cas. No. 15,315; McDonald v. Lindall, 3 Rawle (Pa.) 495; Harris v. Elliott, 10 Pet. (U. S.) 25, 9 L. Ed. 333; Higgins v. Reynolds, 31 N. Y. 151; Holden v. Shattuck, 34 Vt. 336, 80 Am. Dec. 684; Woodruff v. Neal, 28 Conn. 165; Farnsworth v. Rockland, 83 Me. 508, 22 Atl. 394; Page v. Belvin, 88 Va. 985, 14 S. E. 843; Bradley v. Pharr, 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; [1893] 1 Q. B. 142; Ellsworth v. Lord, 40 Minn. 337, 42 N. W. 389; Chelsea Dye House Co. v. Com., 164 Mass. 350, 41 N. E. 649; but see Kane v. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; Challiss v. R. Co., 45 Kan. 398, 25 Pac. 894. The title to a spring within the right of way of a turnpike company is in the owner, who may use the water as he pleases, and the turnpike company has no right in such spring; Upper Ten Mile Plank Road Co. v. Braden, 172 Pa. 460, 33 Atl. 562, 51 Am. St. Rep. 759. The owner may maintain ejectment for encroachments on the highway or an assize if disseized of it; 3 Kent 432; Adams, Eject. 19; Cooper v. Smith, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658; Peck v. Smith, 1 Conn. 135, 6 Am. Dec. 216; 2 Sm. Lead. Cas. 141; Thomas v. Hunt, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; or trespass against one who builds on it; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; or who digs up and removes the soil; Gidney v. Earl, 12 Wend. (N. Y.) 98; [1893] 1 Q. B. 142; or cuts down trees growing thereon; Makepeace v. Worden, 1 N. H. 16; or damages them in putting up telephone wires; 2 Can. S. C. R. 276; Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 24 L. R. A. 724, 46 Am. St. Rep. 578; or who stops upon it for the purpose of using abusive or insulting language; Adams v. Rivers, 11 Barb. (N. Y.) 390. No one can stand on a highway and shoot at pheasants flying over; 4 E. & B. 860; see [1908] 2 ch. 168. A landowner has the right to the lateral support of the soil in the adjoining street, and a city is liable for any damage occasioned by removing this lateral support in grading the street; Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743; and must furnish lateral support to the highway; Village of Haverstraw v. Eckerson, 192 N. Y. 54, 84 N. E. 578, 20 L. R. A. (N. S.) 287. He may recover for the destruction of trees resulting from leaking gas pipes; 39 Am. L. Rev. 616. A steam railroad used for the purposes of transporting persons and property upon a highway is an additional servitude for which an abutting owner is entitled to compensation; Trustees of Presbyterian Society v. R. Co., 3 Hill (N. Y.) 567; Starr v. R. Co., 24 N. J. L. 592; Donnaher v. State, 8 Smedes & M. (Miss.) 649; Grand Rapids & I. R. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 444, 16 Am. Rep. 624; Inhabitants of Springfield v. R. Co., 4 Cush. (Mass.) 63; and so with any railroad which carries both passengers and freight, irrespective of the method of propulsion; Carli v. Transfer Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290. See Southern Pac. R. Co. v. Reed, 41 Cal. 256; Indianapolis, B. & W. Ry. Co. v. Smith, 52 Ind. 428; Cox v. R. Co., 48 Ind. 178; Theobold v. Ry. Co., 66 Miss. 279, 6 South. 230, 4 L. R. A. 735, 14 Am. St. Rep. 564; Kucheman v. Ry. Co., 46 Ia. 366; Grand Rapids & I. R. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212. As to a railway for passengers only the question depends upon the character and extent of the use, and not upon the motive power; Newell v. Ry. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Briggs v. R. Co., 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316; Williams v. Ry. Co., 41 Fed. 556; Nichols v. Ry. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371; People v. Kerr, 27 N. Y. 188; Moses v. R. Co., 21 Ill. 516; but when such a road seriously interferes with the rights of an abutting owner, it is held an additional servitude. This rule applies to an elevated railroad, which is considered an obstruction to the easement of air and light and the easement of access; Story v. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Mahady v. R. Co., 91 N. Y. 148, 43 Am. Rep. 661; Avery v. R. Co., 106 N. Y. 147, 12 N. E. 619; Cohen v. Cleveland, 43 Ohio St. 190, 1 N. E. 589; and to any railroad which causes changes of grade in the street; Ford v. R. Co., 59 Cal. 290; Drake v. R. Co., 7 Barb. (N. Y.) 508; Harmon v. Omaha, 17 Neb. 548, 23 N. W. 503, 52 Am. Rep. 420; City of Elgin v. Eaton, 83 Ill. 535, 25 Am. Rep. 412; Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 325, 56 Am. Rep. 109; McCarthy v. St. Paul, 22 Minn. 527; Burr v. Leicester, 121 Mass. 241; Columbus v. Woolen Mills, 33 Ind. 435; but only in states which so provide by their constitutions or by statutes; Callender v. Marsh, 1 Pick. (Mass.) 418; Snyder v. Rock-

port, 6 Ind. 237; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Simmons v. Camden, 26 Ark. 276, 7 Am. Rep. 620. Where the horse is the motive power of a passenger railway on a street or highway, and the grade is unchanged, no new servitude is imposed; Eichels v. Ry. Co., 78 Ind. 261, 41 Am. Rep. 561; an electric railway is held to come within this rule; Collins v. Traction Co., 5 Dist. Rep. (Pa.) 18; Simmons v. Toledo City, 8 Ohio Cir. Ct. 535; Pennsylvania R. v. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; Cumberland Telegraph & Telephone Co. v. Ry. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 236; Elliott v. R. Co., 32 Conn. 579; Hiss v. Ry. Co., 52 Md. 242, 36 Am. Rep. 371; Hobart v. R. Co., 27 Wis. 194, 9 Am. Rep. 461; Detroit City Ry. v. Mills, 85 Mich. 634, 48 N. W. 1007; Lockhart v. Craig St. Ry. Co., 139 Pa. 419, 21 Atl. 26; and a cable road; Lorie v. Ry. Co., 32 Fed. 270; In re Third R. Co., 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124, reversing In re Third Ave. R. Co., 56 Hun 537, 9 N. Y. Supp. 833; *contra*, People v. Newton, 48 Hun 477, 1 N. Y. Supp. 197; the erection of poles and stringing of wires by a telephone company is not an additional servitude; Cater v. Telephone Co., 60 Minn. 539, 63 N. W. 111, 28 L. R. A. 310, 51 Am. St. Rep. 543; Hobbs v. Telephone & Telegraph Co., 147 Ala. 393, 41 South. 1003, 7 L. R. A. (N. S.) 87, 11 Ann. Cas. 461; (*contra*, Pacific Postal Tel. Cable Co. v. Irvine, 49 Fed. 113); nor by an electric light company; Johnson v. Electric Co., 54 Hun 469, 7 N. Y. Supp. 716. But the occupation of a country road by an electric light company constitutes an additional servitude; Palmer v. Electric Co., 6 App. Div. 12, 39 N. Y. Supp. 522; or by a telegraph company; Eels v. Telephone & Telegraph Co., 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; or by an electric railway company; Pennsylvania R. R. v. Pass. Ry., 167 Pa. 62, 31 Atl. 468, 27 L. R. A. 766, 46 Am. St. Rep. 659; or a gas company; Bloomfield & R. Natural Gaslight Co. v. Calkins, 62 N. Y. 386. See POLES; WIRES. As to other uses of city streets and compensation to abutters for damages resulting therefrom, see EMINENT DOMAIN.

The owners on the opposite sides *prima facie* own respectively to the centre line of the street; Cox v. Freedley, 33 Pa. 124, 75 Am. Dec. 584; Edsall v. Howell, 86 Hun 424, 33 N. Y. Supp. 892; Hinchman v. R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252. And a grant of land "by," or "on," or "along" a highway carries, by presumption, the fee to the centre line, if the grantor own so far, though this presumption may be rebutted by words showing an intention to exclude the highway, such as, "by the side of," "by the margin of," or other equivalent expressions; Bucknam v. Bucknam, 12 Me. 463; Stiles v. Curtis, 4 Day (Conn.) 328; In re Reed, 13 N. H. 381; Parker v. Framingham, 8 Metc. (Mass.) 266; Hughes v. R. Co., 2 R. I. 508; English v. Brennan, 60 N. Y. 609; Union Burial Ground Society v. Robinson, 5 Whart. (Pa.) 18. But, while in most of the states this is the rule, there are exceptions as, in Kansas and Nebraska, where the fee of highways is vested in the county; Challiss v. R. Co., 45 Kan. 398, 25 Pac. 894; Lindsay v. Omaha, 30 Neb. 512, 46 N. W. 627, 27 Am. St. Rep. 415; and in New York City where by act of 1813 the fee is vested in the municipality in trust for the public; People v. Kerr, 27 N. Y. 188; In re Ninth Ave. & Fifteenth St., 45 N. Y. 732; Washington Cemetery v. R. Co., 68 N. Y. 593; Kane v. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640; and in Illinois, in the municipality in trust for the public; Gebhardt v. Reeves, 75 Ill. 301; Board of Trustees of Illinois & Michigan Canal v. Haven, 11 Ill. 554; Indianapolis, B. & W. R. Co. v. Hartley, 67 Ill. 439, 16 Am. Rep. 624; and it is held that even where the abutting owner does not own the fee in the highway, he has special rights therein not enjoyed by the public, as those of light, air, and access; In re New York Elevated R. Co., 36 Hun (N. Y.) 427; Rigney v. City of Chicago, 102 Ill. 64; Grafton v. R. Co., 21 Fed. 309; St. Paul & P. R. Co. v. Schurmeir, 7 Wall. (U. S.) 272, 19 L. Ed. 74; City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; McCaffrey v. Smith, 41 Hun (N. Y.) 117; Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103; Town of Rensselaer v. Leopold, 106 Ind. 29, 5 N. E. 761. Where the fee of a highway is in the adjoining owner, it reverts to him upon a discontinuance, vacation, or abandonment; Van Amringe v. Barnett, 8 Bosw. (N. Y.) 372; Ott v. Kreiter, 110 Pa. 370, 1 Atl. 724; Dunham v. Williams, 36 Barb. (N. Y.) 136; Harris v. Elliott, 10 Pet. (U. S.) 26, 9 L. Ed. 333; Atchison, T. & S. F. R. Co. v. Patch, 28 Kan. 470. But in Illinois it is held that such land reverts to the original owner and not to the abutter who acquires title after the establishment of the way; Gebhardt v. Reeves, 75 Ill. 301.

In England, the inhabitants of the several parishes were at common law bound to repair all highways lying within them; 5 Burr. 2700; 56 J. P. 517. The care of highways is now largely regulated by statute; see 3 Steph. Com. 83.

The liability to repair is here determined by statute, and, in most of the states, devolves upon the towns, or other local municipalities; Morey v. Newfane, 8 Barb. (N. Y.) 645; Loker v. Inhabitants of Brookline, 13 Pick. (Mass.) 343; Township of Plymouth v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867; Fowler v. Strawberry Hill, 74 Ia. 644, 38 N. W. 521. The liability being thus created, its measure is likewise to be ascertained by statute, the criterion being, generally, safety and convenience for travel, having reference to the natural characteristics

of the road and the public needs; Ang. Highw. § 259; Hull v. Richmond, 2 W. & M. 337, Fed. Cas. No. 6,861; Rice v. Montpelier, 19 Vt. 470; Coggswell v. Inhabitants of Lexington, 4 Cush. (Mass.) 307; Fitz v. City of Boston, 4 Cush. (Mass.) 365; Cobb v. Standish, 14 Me. 198. For neglect to repair, the parish in England, and in this country the town or body chargeable, is indictable as for a nuisance; 2 Wms. Saund. 158, n. 4; State v. Canterbury, 28 N. H. 195; Ang. Highw. § 275; and, in many states, is made liable, by statute, to an action on the case for damages in favor of any person who may have suffered special injury by reason of such neglect; Providence v. Clapp, 17 How. (U. S.) 161, 15 L. Ed. 72; Bacon v. Boston, 3 Cush. (Mass.) 174; Erie v. Schwingle, 22 Pa. 384, 60 Am. Dec. 87; Verrill v. Minot, 31 Me. 299; Clark v. Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; Klein v. City of Dallas, 71 Tex. 280, 8 S. W. 90. But to make a county liable, the defect in the highway must have been the sole cause of the injury; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427. Contributory negligence defeats recovery for injuries caused by a defective highway; Laney v. Chesterfield County, 29 S. C. 140, 7 S. E. 56; Shonhoff v. R. Co., 97 Mo 151, 10 S. W. 618; Phillips v. Ritchie County, 31 W. Va. 477, 7 S. E. 427.

The duty of repair may, in this country, rest on an individual to the exclusion of the town; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; or on a corporation who, in pursuance of their charter, built a road, and levy tolls for the expense of maintaining it; Goshen & Sharon Turnpike Co. v. Sears, 7 Conn. 86.

See TURNPIKE.

One who, knowing of a defect in a street or highway, uses it, is not, as matter of law, guilty of negligence, if, in the exercise of sound judgment, it may be deemed that with ordinary care and prudence the street may be used with safety; Mosheuvee v. District of Columbia, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170; whether due care was used is a question for the jury; Mahoney v. R. Co., 104 Mass. 73; the same rule applies as to knowledge of snow and ice; Dewire v. Bailey, 131 Mass. 169, 41 Am. Rep. 219; and as to a tenant of a building using a common stairway; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295. In New York the same rule prevails although the burden of showing due care is on the plaintiff; Pomfrey v. Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Weston v. Troy, 139 N. Y. 281, 34 N. E. 780.

The right of the public to pass extends over the entire highway; Cro. Eliz. 446; therefore telegraph poles were held a nuisance; 3 F. & F. 73.

Any act or obstruction which incommodes or impedes the lawful use of a highway by the public, except such as arises by necessity from unloading wagons, putting up buildings, etc., is a common-law nuisance; 4 Steph. Com. 294; 1 Hawk. Pl. Cr. c. 76; People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Com. v. Dicken, 145 Pa. 453, 22 Atl. 1043; City & County of San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Williams v. Hardin, 46 Ill. App. 67. A fruit stand on a city street is an obstruction; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117. The drawing large crowds before a shop window; Com. v. Passmore, 1 S. & R. (Pa.) 219; the stopping teams or vehicles for such a time or at such a place as unreasonably to interfere with public travel; 3 Campb. 226; Turner v. Holtzman, 54 Md. 148, 39 Am. Rep. 361; Branahan v. Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457; State v. Edens, 85 N. C. 522 (but a reasonable necessity will justify a temporary obstruction; Jochem v. Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178); collecting a noisy and disorderly crowd by music or speaking; Barker v. Com., 19 Pa. 412; State v. White, 64 N. H. 48, 5 Atl. 828; conducting an execution sale on the street; Com. v. Milliman, 13 S. & R. (Pa.) 403; are nuisances and may be abated by any one whose passage is thereby obstructed; 3 Steph. Com. 5; 5 Co. 101; Inhabitants of Arundel v. McCulloch, 10 Mass. 70; Williams v. Fink, 18 Wis. 265; or the person causing or maintaining the same may be indicted; 1 Hawk. Pl. Cr. c. 76; Thomp. Highw. 305; 2 Saund. 158, note; Renwick v. Morris, 7 Hill (N. Y.) 575; Com. v. King, 13 Metc. (Mass.) 115; or may be sued for damages in an action on the case by any one specially injured thereby; Co. Litt. 56 *a*; Hughes v. Heiser, 1 Binn. (Pa.) 463, 2 Am. Dec. 459; Pierce v. Dart, 7 Cow. (N. Y.) 609; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Milarkey v. Foster, 6 Or. 378, 25 Am. Rep. 531; Clark v. Lake, 1 Scam. (Ill.) 229; Osborn v. Ferry Co., 53 Barb. (N. Y.) 629; Martin v. Bliss, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; and equity will take jurisdiction of a civil action to abate and enjoin the maintenance of an obstruction to a highway which is a public nuisance; Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255. At common law the public have no right to pasture cattle on the highways; 2 H. Bla. 527; Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121; Harrison v. Brown, 5 Wis. 27.

The legislature has power to authorize certain obstructions which would otherwise be a public nuisance, such as the laying of railroad tracks or bridging of streams or constructing sewers, etc., or laying gas and water pipes; Com. v. R. Co., 14 Gray (Mass.) 93; Milburn v. City of Cedar Rapids, 12 Ia. 246; Randle v. R. Co., 65 Mo. 325; Williams v. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Arimond v. Canal Co., 31 Wis. 316; Lee v. Iron

Co., 57 Me. 481, 2 Am. Rep. 59; Attorney General v. Booming Co., 34 Mich. 462; People v. Ferry Co., 68 N. Y. 71. See STREETS.

It is the duty of travellers upon highways, for the purpose of avoiding collision and accident, to observe due care in accommodating themselves to each other. To observe this purpose, it is the rule in England, that, in meeting, each party shall bear or keep to the left; and in this country, to the right; 2 Steph. N. P. 984; Story, Bailm. § 599; Thomp. Highw. 384; 2 Dowl. & R. 255; Norris v. Saxton, 158 Mass. 46, 32 N. E. 954. This rule, however, may and ought to be varied, where its observance would defeat its purpose; 8 C. & P. 103; Parker v. Adams, 12 Metc. (Mass.) 415, 46 Am. Dec. 694; Beach v. Parmeter, 23 Pa. 196. The rule does not apply to equestrians and foot-passengers; Dudley v. Bolles, 24 Wend. (N. Y.) 465; Washburn v. Tracy, 2 D. Chipm. (Vt.) 128, 15 Am. Dec. 661; 8 C. & P. 373, 691; Mooney v. Bookbinding Co., 2 Misc. 238, 21 N. Y. Supp. 957; but it has been held to apply to bicyclists; Com. v. Forrest, 170 Pa. 40, 32 Atl. 652, 29 L. R. A. 365. It is another rule that travellers shall drive only at a moderate rate of speed, furious driving on a thronged thoroughfare being an indictable offence at common law; Stokes v. Saltonstall, 13 Pet. (U. S.) 181, 10 L. Ed. 115; 8 C. & P. 694. In case of injury by reason of the non-observance of these rules or of other negligence, as by the use of unsuitable carriages or harness, or horses imperfectly trained, the injured party is entitled to recover his damages in an action on the case against the culpable party, unless the injury be in part attributable to his own neglect; Fales v. Dearborn, 1 Pick. (Mass.) 345; 11 East 60; O'Neil v. East Windsor, 63 Conn. 150, 27 Atl. 237; Dean v. New Milford Tp., 5 W. & S. (Pa.) 545; 5 C. & P. 379; Rathbun v. Payne, 19 Wend. (N. Y.) 399. The legislature has complete power to regulate the highways in a state, and may prescribe what vehicles may be used on them with a view to the safety of the passengers over them and the preservation of the roads; State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305; it may regulate the improvement for the public good of highways, whether on land or by water, subject to the right of congress to interpose when such highways are the means of interstate and foreign commerce; Huse v. Glover, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487. See Thompson; Pope, Highw.; Elliott, Roads & Streets; Booth, Street Ry.

If a highway be impassable, from being out of repair or otherwise, the public have a right to go on the adjoining ground, even when sown with grain and enclosed with a fence; but they must do no unnecessary damage; Cro. Car. 366; Campbell v. Race, 7 Cush. (Mass.) 408, 54 Am. Dec. 128; Williams v. Safford, 7 Barb. (N. Y.) 309. This right, however, is only temporary and gives the public no permanent right; State v. Northumberland, 44 N. H. 628. Where the abutting owner fenced a highway through open country, he became, in such case, liable for repairs; 1 Rolle, Abr. 390.

See AIR; BICYCLE; BRIDGE; TURNPIKE; RAILROAD; CANAL; FERRY; GRADE CROSSING; RIVER; SIDEWALK; CUL DE SAC; STREET; WAY; NEGLIGENCE; NAVIGABLE WATERS.

HIGHWAYS, ROYAL. There were four royal highways in Yorkshire, three by land and one by water, where the king claimed all forfeitures. Maitl. Domesd. Book and Beyond 87.

HIGLER. *In English Law.* A person who carries from door to door, and sells by retail, small articles of provisions, and the like.

HIGUELA. *In Spanish Law.* The written acknowledgment given by each of the heirs of a deceased person, showing the effects he has received from the succession.

HIIS TESTIBUS. Words formerly used in deeds, signifying *these being witness.* They have been disused since Henry VIII. Co. Litt.; Cowell.

HILARY RULES. Common-law rules of practice drawn up by the judges of the superior courts at Westminster under an act of parliament (1834) and laid before parliament. They may be found in 11 Law Mag. & Quart. Review 263 (1834).

HILARY TERM. *In English Law.* A term of court, beginning on the 11th and ending on the 31st of January in each year. Superseded (1875) by Hilary Sittings, which begin January 11th and end on the Wednesday before Easter. See TERM.

HINDENI HOMINES. A society of men in the Saxon times. Toml.

HINDER AND DELAY. A phrase used to signify an act amounting to an attempt to defraud rather than a successful fraud. To put some obstacle in the path of, or interpose some time unjustifiably, before a creditor can realize what is owed out of his debtor's property. Burnham v. Brennan, 42 N. Y. Super. Ct. 63. The question of fraudulent intent is one of fact; Burr v. Clement, 9 Col. 8, 9 Pac. 633. The word "hinder" is not synonymous with "delay"; Crow v. Beardsley, 68 Mo. 435.

HINDU LAW. The system of native law prevailing among the Gentoos, and administered by the government of British India.

It is not the law of India or of any defined region. It is the law of castes, class, orders and even families which the Hindus carry about with them. 17 L. Q. R. 209.

In all the arrangements for the administration of justice in India, made by the British government and the East India Company, the principle of reserving to the native inhabitants the continuance of their own laws and usages within certain limits has been uniformly recognized. The laws of the

Hindus and Mohammedans have thus been brought into notice in England, and are occasionally referred to by writers on English and American law. The native works upon these subjects are very numerous. The chief English republications of the Hindu law are, Colebrooke's Digest of Hindu Law, London 1801; Sir Wm. Jones's Institutes of Hindu Law, London, 1797. For a fuller account of the Hindu Law, and of the original Digests and Commentaries, see Morley's Law of India, London, 1858, and Macnaghten's Principles of Hindu and Mohammedan Law, London, 1860. The principal English republications of the Mohammedan Law are Hamilton's Hedaya, London, 1791; Baillie's Digest, Calcutta, 1805; *Précis de Jurisprudencé mussulmane selon le Rite malikite,* Paris, 1848; and the treatises on Succession and Inheritance translated by Sir William Jones. See, also, Norton's Cases on Hindu Law of Inheritance; Rattigan, Hindu Law. An approved outline of both systems is Macnaghten's Principles of Hindu and Mohammedan Law; also contained in the "Principles and Precedents" of the same law previously published by the same author.

See Bryce, Extension of Law in 1 Sel. Essays in Anglo-Amer. Leg. Hist. 597; Ilbert, Government of India; Sir W. Markby (1906); Mulla, Principles of Hindu Law.

HINE, or HIND. A servant, or one of the family, but more properly a servant at husbandry; and he that oversees the rest is called the *master hine.* Cowell; Moz. & W.

HINE-FARE. The loss or departure of a servant from his master. Domesd.

HINEGELD. A ransom for an offence committed by a servant. Cowell.

HIPOTECA. In Spanish Law. A mortgage of real property. Johnson, Civ. Law of Spain, 156 [149]; White, New Recop. b. 2, tit. 7.

HIRE. A bailment in which compensation is to be given for the use of a thing, or for labor and services about it. 2 Kent 456; Story, Bailm. § 359. The divisions of this species of contract are denoted by Latin names.

Locatio operis faciendi is the hire of labor and work to be done or care and attention to be bestowed on the goods let by the hirer, for a compensation.

Locatio operis mercium vehendarum is the hire of the carriage of goods from one place to another, for a compensation. Jones, Bailm. 85, 86, 90, 103, 118; 2 Kent 456.

Locatio rei or *locatio conductio rei* is the bailment of a thing to be used by the hirer for a compensation to be paid by him.

This contract is voluntary, and founded in consent; it involves mutual and reciprocal obligations; and it is for mutual benefit. In some respects it bears a strong resemblance to the contract of sale; the principal difference between them being that in cases of sale the owner parts with the whole proprietary interest in the thing, and in cases of hire the owner parts with possession only for a temporary purpose. In a sale, the thing itself is the object of the contract; in hiring, the use of the thing is its object; Vinnius, lib. 3, tit. 25, *in pr.;* Pothier, *Louage,* nn. 2–4; Jones, Bailm. 86; Story, Bailm. § 371.

Hiring a servant for a fixed sum per week, with no fixed period of duration, may be terminated by either party at any time without notice; Warden v. Hinds, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529 and note; so if the contract is for a fixed sum per year; Martin v. Ins. Co., 148 N. Y. 117, 42 N. E. 416; Weidman v. Cigar Stores Co., 223 Pa. 160, 72 Atl. 377, 132 Am. St. Rep. 727 *(dictum);* Edwards v. R. Co., 121 N. C. 490, 28 S. E. 137; and per month; Kosloski v. Kelly, 122 Wis. 665, 100 N. W. 1037; The Pokanoket, 156 Fed. 241, 84 C. C. A. 49. Other cases hold that the hiring, in such case, is for the full period; Douglass v. Ins. Co., 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822; Horn v. Land Ass'n, 22 Minn. 233; Bascom v. Shillito, 37 Ohio St. 431. So much per week or per month imports a contract for a week or a month; Beach v. Mullin, 34 N. J. L. 343. Where a salary was to be paid "in equal quarterly payments," it was held to be for a year; Kirk v. Hartman, 63 Pa. 97; so where there was a weekly compensation but the employee was to have a percentage "at the end of the year"; Babcock & Wilcox Co. v. Moore, 62 Md. 161. An offer of $1,000 a year, duly accepted, imports a contract for a year; Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387; so does a contract with a solicitor for a fixed sum per annum; 4 H. L. Cas. 624. It was held in Maynard v. Corset Co., 200 Mass. 1, 85 N. E. 877, that "salary" usually imports permanence. See MASTER AND SERVANT; BAILMENT.

HIREMAN. A subject. Du Cange.

HIRST, or HURST. In Old English Law. A wood. Domesd.; Co. Litt. 4 *b.*

HIS. A demise by A to B for the term of "his" natural life may enure as a demise either for the life of A or that of B according to circumstances; 2 Nev. and M. 838.

In a policy of insurance the word "his" instead of "their" as descriptive of the property of the assured, does not render the policy void, if the assured has an insurable interest, although the interest may be qualified or defeasible or even an equitable interest; Strong v. Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Hough v. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; but where the policy expressly requires that a statement be made whether the insured owns the sole interest in the premises, the use of the word "his" instead of "their" amounts to a misrepresentation, if the insured is not the sole owner; Mers v. Ins. Co., 68 Mo. 127. See REPRESENTATION.

The ninth clause of the thirty-ninth section of the bankruptcy act does not apply to an accommodation indorser of negotiable paper whose indorsement is in no way connected with the business of the indorser, as such paper is not "his" commercial paper

within the meaning of said clause; In re Clemens, 2 Dill. 533, Fed. Cas. No. 2,877.

HIS EXCELLENCY. A title given by the constitution of Massachusetts to the governor of that commonwealth. Mass. Const. part 2, c. 2, s. 1, art. 1. This title is customarily given to the governors of the other states, whether or not it be the official designation in their constitutions and laws; also to ambassadors.

HIS HONOR. A title given by the constitution of Massachusetts to the lieutenant governor of that commonwealth. Mass. Const. part 2, c. 2, s. 2, art. 1. It is also customarily given to some inferior magistrates, as the mayor of a city.

HISSA. A lot or portion; a share of revenue or rent. Wilson's Gloss. Ind.

HIWISC. According to Maitland (Domesday Book 359), a household.

HLAFORDSWICE (Sax. *hlaford*, lord, literally bread-giver, and *wice*). **In Old English Law.** Betraying one's lord; treason. Crabb, Hist. Eng. Law 59, 301.

HLASOCNE. The benefit of the law. Du Cange; Toml.

HLOTH (Sax.). An unlawful company. Moz. and W.

HLOTHBOTE (Sax. *hloth*, company, and *bote*, compensation). **In Old English Law.** Fine for presence at an illegal assembly. Du Cange, *Hlotbota*.

HOCK-TUESDAY MONEY. A duty given to the landlord, that his tenants and bondmen might solemnize the day on which the English mastered the Danes, being the second Tuesday after Easter week. Cowell.

HODGE-PODGE ACT. A name given to a legislative act which embraces many subjects. Such acts, besides being evident proofs of the ignorance of the makers of them, or of their want of good faith, are calculated to create a confusion which is highly prejudicial to the interests of justice. Instances of this legislation are everywhere to be found. See Barrington, Stat. 449. In many states bills, except general appropriation bills, can contain but one subject, which must be expressed in the title.

HOG. This word may include a sow; Shubrick v. State, 2 S. C. 21; a pig; Lavender v. State, 60 Ala. 60; Washington v. State, 58 Ala. 355; and may refer to dead as well as a living animal; Whitson v. Culbertson, 7 Ind. 195; Hunt v. State, 55 Ala. 140; Reed v. State, 16 Fla. 564; and it is synonymous with swine; Rivers v. State, 10 Tex. App. 177.

HOGA. **In Old English Law.** A hill or mountain. Domesday.

HOGHENHYNE (from Sax. *hogh*, house, and *hine*, servant). Third night servant. Among the Saxons, a stranger guest was, the first night of his stay, called *uncuth*, or unknown; the second, *gust*, guest; the third, *hoghenhyne;* and the entertainer was responsible for his acts as for those of his own servant. Bract. 124 *b;* Du Cange, *Agenhine;* Spelman, Gloss. *Homehine.*

HOGSHEAD. A liquid measure, containing half a pipe; the fourth part of a tun, or sixty-three gallons.

HOKE DAY (Heck Day). A day of feasting or mirth kept formerly in England on the second or third Tuesday after Easter; Cent. Dict.; or, as a recent writer concludes, the first Sunday after Easter; 28 L. Q. Rev. 283, where it is suggested that it was originally the great spring festival of the pre-Roman British.

HOLD. A technical word in a deed introducing with "to have" the clause which expresses the tenure by which the grantee is to have the land. The clause which commences with these words is called the *tenendum*. See TENENDUM; HABENDUM.

For the distinction between the power to hold and the power to purchase, see Leazure v. Hillegas, 7 S. & R. (Pa.) 313; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. Ed. 382.

To decide, to adjudge, to decree: as, the court in that case *held* that the husband was not liable for the contract of the wife, made without his express or implied authority.

To bind under a contract: as, the obligor is *held* and firmly bound.

In the constitution of the United States it is provided that no person *held* to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on the claim of the party to whom such service or labor may be due. Art. iv. sec. ii. § 3. The main purpose of this provision in the constitution no longer exists, through the abolition of slavery; but it includes apprentices; Boaler v. Cummines, 1 Am. L. Reg. 654, Fed. Cas. No. 1,584. See FUGITIVE SLAVE; PEONAGE.

HOLD PLEAS. To hear or try causes. 3 Bla. Com. 35, 298.

HOLDER. The holder of a bill of exchange is the person who is legally in the possession of it, either by indorsement or delivery, or both, and entitled to receive payment either from the drawee or acceptor, and is considered as an assignee. Ludlow v. Bingham, 4 Dall. (U. S.) 53, 1 L. Ed. 736. And one who indorses a promissory note for collection, as an agent, will be considered the holder for the purpose of transmitting notices; Smedes v. Bank, 20 Johns. (N. Y.) 372; Bowling v. Harrison, 16 How. (U. S.) 248, 12 L. Ed. 425. No one but the holder can maintain an action on a bill of exchange; Byles, Bills 2. See BILL OF EXCHANGE.

HOLDER FOR VALUE IN DUE COURSE. See BONA FIDE HOLDER FOR VALUE.

HOLDING COMPANY. A corporation organized to hold the stock of another or other corporations. Such companies become legally possible by virtue of the legislation, which is said to exist in nearly all the states, which authorizes a corporation to hold and own the capital stock of other corporations.

Edgar H. Farrar (Am. B. Ass'n [1911] 241) said: "The most vicious of all the provisions in the statutes above enumerated is that authorizing one corporation to own and vote stock in another. This provision is the mother of the holding company and the trust. . . . Before these statutes were passed, the courts of the country had held with great unanimity that it is against public policy for one corporation to hold and vote stock in another, and the general ground of the doctrine is that such stockholding tends to restrain trade and to foster monopoly. That this doctrine is true has been demonstrated by the fact that most of the great trusts have clothed themselves in the form of holding companies." He points out a Utah statute of 1907 under which a Utah railroad company could acquire and control the stock of all transportation companies by land, river, lake, or sea, in the United States, all terminal docks, etc., and all express companies, etc., except the stock of a competing railroad situated within the state of Utah.

It is probably more usual to find a corporation adding to its own business the control, by such stock ownership, of other corporations. The legal principles involved appear to be the same. There are instances of unincorporated associations acting as holding companies: *e. g.*, the Mackey companies controlling cable companies; see 1 Cook, Corp. 952. In Massachusetts a practice obtains of vesting corporate stocks in a body of trustees, who hold the stock and manage the corporations for the parties in interest. See TRUST ESTATES AS BUSINESS CORPORATIONS.

When a corporation asserts that it has power to hold stock in another corporation, the burden rests on it to show whence such power is derived; Mannington v. Ry. Co., 183 Fed. 133.

In U. S. v. Knight Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, where a New Jersey corporation controlled a majority of the manufacturers of sugar in the United States, and acquired a practical monopoly of the business, it was held that the business had no direct relation to commerce between the states and that the monopoly acquired by the corporation could not be suppressed under the Sherman act.

The acquisition by a corporation of a controlling interest in the stock of corporations owning or controlling and operating all the street railway lines in parts of the city of New York, underground, elevated and surface, is an unlawful monopoly and in violation of the stock corporation act of the state; Burrows v. Interborough Metropolitan Co., 156 Fed. 389 (C. C., S. D. of N. Y.).

Where a New Jersey holding company held more than nine-tenths of the stock of the Northern Pacific R. Co. and more than three-fourths of the stock of the Great Northern R. Co., operating competing lines of railroad, and issued its shares of stock to the depositing stockholders, it was held that the constituent companies became one consolidated corporation by the name of the holding company, the principal, if not the sole, object of which was to prevent competition between the constituent companies, that this was an illegal combination to restrain interstate commerce within the Sherman act, that on a bill by the Attorney General of the United States, the holding company would be enjoined from voting such stock and from exercising any action whatever over the acts of the railroad companies, and that the railroad companies would be enjoined from paying dividends to the holding corporation on any of their stock held by it; Northern Securities Co. v. U. S., 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. The purchase by the Union Pacific R. Co. of forty-six per cent. of the stock of the Southern Pacific R. Co., with the resulting control of the latter by the former, is in restraint of trade and will be dissolved; U. S. v. R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124.

Where the stock of two railroad companies is held by a holding company, it may be sufficient to bring them within the interstate commerce act where the joint work performed by both of them will do so; U. S. v. Stock Yard, 226 U. S. 286, 33 Sup. Ct. 83, 57 L. Ed. 226.

A Massachusetts statute forbids railroad companies from holding, directly or indirectly, the stock of any other corporation; see Attorney General v. R. Co., 198 Mass. 413, 84 N. E. 737; while in Connecticut one railroad company may buy a majority of the stock of another and in some cases condemn the minority holdings.

Where an insurance company acquired a majority of the stock of a trust company, and the latter acquired a majority of the stock of the former, it was held illegal upon a bill by a dissenting stockholder of the insurance company; Robotham v. Ins. Co., 64 N. J. Eq. 673, 53 Atl. 842.

A New Jersey corporation, with power to do so, may buy stock in another company and guarantee and agree to pay dividends on outstanding prior stock of the latter corporation; Windmuller v. Distilling Co., 186 N. Y. 572, 79 N. E. 1119; and may legally acquire a majority of the stock of street railways in different cities in Tennessee, if it does not create an unlawful restraint of trade; Clark v. Ry. Co., 123 Tenn. 232, 130 S. W. 751.

Where one railroad holds a small minority

interest in another, no more than two-thirteenths, it is not an unlawful combination; State v. Missouri Ry. Co., 241 Mo. 1, 144 S. W. 863; but in Central R. Co. v. Collins, 40 Ga. 582, one railroad company was enjoined from purchasing a minority interest in a competing line.

The ownership of stock in a coal producing company by a railroad company does not cause it, as the owner of such stock, to have a legal interest in the commodity manufactured by the producing company; U. S. v. Delaware & H. Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

A corporation owning all the stock of another corporation may take the profits of the latter without a declaration of a formal dividend, if other parties are not prejudiced; Central of Georgia Ry. Co. v. Trust Co., 135 Ga. 472, 69 S. E. 708.

A corporation organized in Delaware by residents of Pennsylvania, to own stock of and finance Pennsylvania corporations, having the same officers and substantially the same stockholders, and which maintains its office and holds directors' meetings, etc., in Pennsylvania, was held to be doing business in Pennsylvania and bound to register there under the statute; Colonial Trust Co. v. Brick Works, 172 Fed. 310, 97 C. C. A. 144.

Shares of stock in an elevator company owned by a railroad company do not become subject to the general mortgage of the latter; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; but it is held that stock belonging to a railroad passes to its receiver when foreclosure of a mortgage is begun, and becomes subject thereto; Herring v. R. Co., 105 N. Y. 340, 12 N. E. 763.

The subject is fully treated in Cook, Corporations. See VOTING TRUSTS; RESTRAINT OF TRADE.

HOLDING OVER. The act of keeping possession by the tenant, without the consent of the landlord, of premises which the latter, or those under whom he claims, had leased to the former, after the term has expired.

When a proper notice has been given, this injury is remedied by ejectment, or, under local regulations, by summary proceedings. See Lesley v. Randolph, 4 Rawle (Pa.) 123; 2 Bla. Com. 150; 3 *id.* 210; Woodf. L. & T. 788. A tenant enters on another term by holding over, notwithstanding his inability to move on the day the term ended; Haynes v. Aldrich, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636; Cavanaugh v. Clinch, 88 Ga. 610, 15 S. E. 673. If a lessee for years holds over, the landowner has the legal option to treat him as a trespasser or as a tenant for another year; Scott v. Beecher, 91 Mich. 590, 52 N. W. 20; Voss v. King, 38 W. Va. 607, 18 S. E. 762; Hall Steam Power Co. v. Printing Press & Mfg. Co., 8 Misc. 430, 28 N. Y. Supp. 662. And the law presumes this holding to be upon the terms of the original demise; Voss v. King, 38 W. Va. 607, 18 S. E. 762. See Haeussler v. Paper-Box Co., 49 Mo. App. 631; LANDLORD AND TENANT; FORCIBLE ENTRY AND DETAINER.

The term is also applied to the retaining possession of a public office by an incumbent, after his term has expired, which is not always unlawful, as such action is sometimes authorized by statute or common law, to prevent an interregnum.

HOLIDAY. A religious festival; a day set apart for commemorating some important event in history; a day for exemption from labor. Webster, Dict. (Webster applies *holyday* especially to a religious, *holiday* to a secular festival.) In England they are either by act of legislation, or by ancient usage, and are now regulated by the Bank Holiday Act of 1871, extended by the act 38 Vict. c. 13. Fasts and thanksgiving days are also occasionally appointed by the crown. See Wharton, Dict.; 2 Burn. Eccl. Law 308.

In the dark ages, the church repressed the blood-feuds during certain seasons. These were "holy days" (holidays) in which the avenger of blood could not challenge the accused to battle. Jenks, Hist. E. L. 157.

In the United States there are no established holidays of a religious character having a legal status without legislation, and the lack of precision in the earlier statutes on the subject has given rise to much confusion and a great variety of definition. It has been said that a legal holiday is, *ex vi termini, dies non juridicus;* Lampe v. Manning, 38 Wis. 673; but this case does not warrant so broad a statement; 29 Am. L. Reg. 139. One thing which seems to be absolutely settled is that a legal holiday does not have the legal relations of Sunday, which was clothed with the idea of sanctity and is in its very nature *dies non juridicus.* Legal holidays are, however, merely the creation of statute law, and the lack of uniformity in the statutes of the several states makes the term itself very difficult of exact definition. The various definitions of the term holiday are collected in an article on the subject in 29 Am. L. Reg. 137, the writer of which thus states the conclusion reached after a critical examination of them: "Legal holidays as distinguished from the first day of the week are those days which are set apart by statute or by executive authority for fasting and prayer, or those given over to religious observance and amusements, or for political, moral or social, duties or anniversaries, or merely for popular recreation and amusement under such penalties and prohibitions alone as are expressed in positive legislative enactments."

The earlier statutes had for their object, mainly, the regulation of commercial paper falling due on days which were by general consent observed as holidays. Under such statutes it is simply provided that such paper payable upon the day named shall be due

and payable on the day before or the day after. The difference in the statute law of several states as to this point is stated *infra*. As in the statutes, the day is specified and they are construed with exactness, there is little in the way of decision on this subject. It has been held that usage at a bank known to the parties to a note is sufficient to make a holiday such as to change the day for demanding payment, at least so far as to authorize a tender by the endorser on the following day; President of City Bank v. Cutter, 3 Pick. (Mass.) 414. In most of the states it is the rule, and such is the general commercial usage, to allow only two days of grace where the third would fall on a holiday, and to authorize demand of payment and protest on the day next preceding it. The question when a note falling due on a legal holiday which happens to be Sunday is legally payable is to be determined as in the case of any other note falling due on Sunday. This is so by general usage without special provision by statute. In New Jersey a note falling due on the 30th of May, Decoration Day, when Sunday, cannot be presented and protested for nonpayment until the following Tuesday; Hagerty v. Engle, 43 N. J. L. 299. Where paper is drawn without grace, payment may not be demanded until the next day; Commercial Bank of Kentucky v. Varnum, 49 N. Y. 269; as in the case with respect to Sunday; Salter v. Burt, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530; Avery v. Stewart, 2 Conn. 69, 7 Am. Dec. 240.

The rule of commercial paper as affected by holidays has been applied for the sake of uniformity to other maturing contracts; Siegbert v. Stiles, 39 Wis. 533. In some states, as California, the Dakotas, Idaho, and Massachusetts, the statutes extend the time for the performance of all contracts, except works of charity or necessity, to the next following day; but in Kentucky it was held that there being nothing in the statute prohibiting business transactions on a holiday, the performance of a contract was required according to its terms; National Mut. Ben. Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900; and this, it has been said, is the reasonable and logical view, the doctrine of the Wisconsin case being probably founded upon the confusion of holidays with Sundays; 29 Am. L. Reg. 153.

The Uniform Negotiable Instruments Act (see NEGOTIABLE INSTRUMENTS for the states in which it is in force) provides that when the day or the last day for doing any act required or permitted to be done "falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day"; sec. 194.

Judicial proceedings are usually invalid on holidays, and in most of the state statutes such proceedings are expressly prohibited, but a mere statutory provision requiring that public offices be closed does not prevent the sitting of courts or the discharge of judicial duties by judges; People v. Kearney, 47 Hun (N. Y.) 129; which are valid unless prohibited by a statute; Russ v. Gilbert, 19 Fla. 54.

The following acts have been held valid when wholly or partially done upon a holiday; a sheriff's sale; Crabtree v. Whiteselle, 65 Tex. 111; a criminal examination on which a commitment was based; Hamilton v. People, 29 Mich. 175; giving a case to the jury in a trial for murder; State v. Sorenson, 32 Minn. 118, 19 N. W. 738; or trying a murder case; Pender v. State, 12 Tex. App. 496; the conclusion of such trial and the conviction of the prisoner; State v. Moore, 104 N. C. 743, 10 S. E. 183; Pfister v. State, 84 Ala. 432, 4 South. 395; entering a judgment by a justice of the peace; Bear v. Youngman, 19 Mo. App. 41; Elrod v. Lumber Co., 92 Tenn. 476, 22 S. W. 2; commencing a criminal trial; Dunlap v. State, 9 Tex. App. 179, 35 Am. Rep. 736; hearing a civil case; Houston, E. & W. T. Ry. Co. v. Harding, 63 Tex. 162; service of process; Nichols v. Kelsey, 20 Abb. N. C. (N. Y.) 14; People v. Board of Sup'rs, 50 Hun 105, 3 N. Y. Supp. 751; notice of days of election; Whitney v. Blackburn, 17 Or. 564, 21 Pac. 874, 11 Am. St. Rep. 857; return of process; Kinney v. Emery, 37 N. J. Eq. 339; McEvoy v. Trustees of School Dist., 38 N. J. Eq. 420, which see as to legal proceedings, and see also Gould v. Spencer, 5 Paige (N. Y.) 541; service of a statement for a new trial; Reclamation Dist. No. 535 of Sacramento County v. Hamilton, 112 Cal. 603, 44 Pac. 1074; service of an order for payment of money; In re Bornemann, 6 App. Div. 524, 39 N. Y. Supp. 686; a judgment by confession; Bradley v. Claudon, 45 Ill. App. 326; and the entry of an appeal; Worthington v. Hobensack, 8 Pa. Co. Ct. 65. In Pennsylvania the supreme court hears arguments on a legal holiday; Payne v. Fresco, 17 W. N. C. (Pa.) 502. Memorial day is not *dies non;* Morel v. Stearns, 75 N. Y. Supp. 1082, 37 Misc. 486.

The following acts have been held invalid: the appointment of justices to hear the disclosure of an insolvent debtor; Poor v. Beatty, 78 Me. 580, 7 Atl. 541; entering judgment by default; Bierce v. Smith, 2 Abb. Pr. (N. Y.) 411; entering a judgment where the statute prescribed that the day should be for all purposes whatever considered as the first day of the week; Spiedel Grocery Co. v. Armstrong, 8 Ohio C. C. 489, 4 O. C. D. 498.

With respect to ministerial acts the question may arise whether attendance of the officer and the performance of the duty is required, and this is to be settled entirely by the language of the statute. With respect to the validity of such acts performed on a holiday, unless expressly made void by statute, the general rule is that an officer may act. This is held even where the stat-

ute expressly prohibits the transaction of judicial business, so an order of attachment past due is ministerial business, and may be issued where such a statute exists; Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, 20 L. R. A. 313, 38 Am. St. Rep. 742. Acts which have been held ministerial are taking a judgment; In re Worthington, 7 Biss. 455, Fed. Cas. No. 18,051; the entry of a judgment on a warrant of attorney; Paine v. Fesco, 1 Pa. Co. Ct. Rep. 562; a sale for taxes; Hadley v. Musselman, 104 Ind. 459, 3 N. E. 122; the issuing of a summons by a justice of the peace; Smith v. Ihling, 47 Mich. 614, 11 N. W. 408; but where the statute prohibits judicial business a trial and judgment would not be valid; Lampe v. Manning, 38 Wis. 673; and it has been held that a sheriff's sale was not void because made on a holiday and, if confirmed, the title would not be endangered, but that it was not a proper day and that, upon exception, the sale would have been set aside; Rice v. Gable, 1 Pa. Co. Ct. Rep. 567.

For loading or unloading ships in maritime commerce, in the absence of any statute to the contrary or established general usage, the annual fast day in Massachusetts must be considered as an ordinary working day; The Tangier, 1 Cliff, 383, Fed. Cas. No. 13,743.

In the absence of statutory requisitions it was held that a school should be allowed the legal holidays without deduction of salary to the teachers; School Dist. No. 4 v. Gage, 39 Mich. 484, 33 Am. Rep. 421.

The taking of an acknowledgment or deposition is usually held valid if performed upon a legal holiday, as being not a judicial act but private business; Rogers v. Brooks, 30 Ark. 612; Green v. Walker, 73 Wis. 548, 41 N. W. 534; Slater v. Schack, 41 Minn. 269, 43 N. W. 7. Under a statute excluding from computation of time for serving papers Sunday, a holiday, or Saturday, which is made a half-holiday, is excluded; Fries v. Coar, 19 Abb. N. C. 267.

An act making Saturday afternoon a legal half-holiday so far as regards the transaction of business in the public offices does not apply to proceedings by a municipal common council, and an ordinance passed on Saturday afternoon is valid; Mueller v. Egg Harbor City, 55 N. J. L. 245, 26 Atl. 89.

Acts designating holidays for the presentment and payment of commercial paper constitute them such for that purpose only; State v. Atkinson, 139 Ind. 426, 39 N. E. 51. Such an act does not apply to other business transactions; Nat. Mut. Benefit Ass'n v. Miller, 85 Ky. 88, 2 S. W. 900. An act providing that a holiday shall be considered the same as Sunday, and an act forbidding the holding of courts on Sunday, and one forbidding service of process on February 22d do not invalidate a sale on that day under a power in a deed of trust; Stewart v. Brown, 112 Mo. 171, 20 S. W. 451.

Under a statute providing that no court shall be open or transact any business on any legal holiday, unless it be to instruct or discharge a jury, or receive a verdict and render judgment thereon, an assignment for the benefit of creditors was not avoided by the fact that the assignee's bond was approved by a court commissioner on a legal holiday, though that be considered a judicial act; Spaulding & Bro. v. Bernhard, 76 Wis. 368, 44 N. W. 643, 7 L. R. A. 423, 20 Am. St. Rep. 75. Under a rule of reference fixing Decoration Day as the day for choosing arbitrators, the defendant could not be required to attend on a legal holiday and the proceedings were void; Doles v. Powell, 9 Pa. Co. Ct. Rep. 207.

See, generally, a very full note and collection of statutes and authorities; 29 Am. L. Reg. N. S. 137; Merchants Nat. Bank v. Jaffray, 36 Neb. 218, 54 N. W. 258, 19 L. R. A. 316; 4 Am. & Eng. Corp. Cas. 347; 7 So. L. Rev. 697.

HOLLAND. A constitutional monarchy. The crown is hereditary in the male line, or, failing male heirs, in the female line. The sovereign has the sole executive authority. He establishes ministerial departments under responsible ministers, and shares the legislative power with the first and second chambers of the parliament which constitute the States-General and sits at The Hague. The first chamber has fifty members, chosen by the provincial states for nine years. The members of the second chamber are chosen for four years in electoral districts, by male voters over twenty-three years of age, possessing a certain taxable qualification. The highest court of justice is the High Council at The Hague. There are five other courts of justice in five different cities; and courts in each arrondissement and cantonal judges. The constitution was formed in 1815 and revised in 1848 and 1887. Encycl. Br.

HOLOGRAFO. In Spanish Law. Olographi. A term applicable to the paper, document, disposition, and more particularly to the last will of a person, which in order to be valid must be wholly written, signed, and dated by the testator. "*Holographum, apud Testum, appellatur testamentum, quod totum manu testatoris scriptum est et subsignatum.*"

HOLOGRAPH. What is written with one's own hand. A term which signifies that an instrument is wholly written by the party. See La. Civ. Code, art. 1581; Code Civ. 970; 5 Toullier, n. 357; 1 Stu. Low. C. 327. See WILL.

HOLY GHOST'S PENNY. See GOD'S PENNY.

HOLY ORDERS. In Ecclesiastical Law. The orders or dignities of the church. Those

within holy orders are archbishops, bishops, priests, and deacons. The form of ordination in England must be according to the form in the Book of Common Prayer. Besides these orders, the church of Rome had five others, viz.: subdeacons, acolytes, exorcists, readers, and ostiaries. 2 Burn, Eccl. Law 39.

HOMAGE (anciently *hominium*, from *homo*). A mere acknowledgment of tenure made by a tenant by knight-service upon investiture, in the following form:

The tenant in fee or fee-tail that holds by homage shall kneel upon both his knees, ungirded, and the lord shall sit and hold both the hands of his tenant between his hands, and the tenant shall say, "I become your man *(homo)* from this day forward of life, and member, of earthly honor, and to you shall be faithful and true, and shall bear to you faith for the lands that I claim to hold of you, saving that faith that I owe to our lord the king;" and then the lord so sitting shall kiss him. The kiss is indispensable (except sometimes in the case of a woman. Du Cange). After this the oath of fealty (*q. v.*) is taken; but this may be taken by the steward, homage only to the lord. *Termes de la Ley.* This species of homage was called *homagium planum* or *simplex*, 1 Bla. Com. 367, to distinguish it from *homagium ligium*, or liege homage, which included fealty and the services incident. Du Cange; Spelman, Gloss.

Liege homage was that homage in which allegiance was sworn without any reservation, and was, therefore, due only to the sovereign; and, as it came in time to be exacted without any actual holding from him, it sunk into the oath of allegiance. *Termes de la Ley.*

The obligation of homage is mutual, binding the lord to protection of the vassal, as well as the vassal to fidelity. Fleta, lib. 3, c. 16.

See FEALTY.

HOMAGE ANCESTRAL. Homage was so called where time out of mind a man and his ancestors had held by homage; and in this case the lord who had received the homage was bound to acquit the tenant of all services to superior lords, and, if vouched, to warrant his title. If the tenant by homage ancestral aliened in fee, his alienee held by homage, but not by homage ancestral. *Termes de la Ley;* 2 Bla. Com. 300.

HOMAGE JURY. The jury of a lord's court, or court baron: so called because generally composed of those who owed homage to the lord, or the *pares curiæ*. Kitchen; 2 Bla. Com. 54, 366.

HOMAGER. One that is bound to do homage to another. Jacob, Law Dict.

HOMAGIO RESPECTUANDO. A writ to the escheator commanding him to deliver seisin of land to the heir of full age, notwithstanding his homage not done which ought to be performed before the heir had livery, except there fall out some reasonable cause to hinder him. *Termes de la Ley.*

HOMAGIUM LIGIUM. See HOMAGE.

HOMAGIUM PLANUM. See HOMAGE.

HOMAGIUM REDDERE. The renunciation of homage, as when a vassal made a final declaration of defying his lord, of which there was a set form and method prescribed by the feudal law. Jac. L. Dict.

HOMBRE BUENO. **In Spanish Law.** The ordinary judge of a district.

Arbitrators chosen by litigants to determine their differences.

Persons competent to give testimony in a cause. L. 1. t. 8, b. 2, *Fuero Real.*

HOME. That place or country in which one in fact resides with the intention of residence, or in which he has so resided, and with regard to which he retains either residence or the intention of residence. Dicey, Confl. L. 81.

"'Home' and 'domicil' do not correspond, yet 'home' is the fundamental idea of 'domicil.' The law takes the conception of 'home,' and moulding it by means of certain fictions and technical rules to suit its own requirements, calls it 'domicil.' Or perhaps this may be best expressed by slightly altering Westlake's statement, 'Domicil is, then, the legal conception of residence,' etc., and saying, 'Domicil is, then, the legal conception of home.' 'Domicil' expresses the legal relation existing between a person and the place where he has, in contemplation of law, his permanent home." Jac. Dom. c. 3, § 72.

A person having a dwelling-house in each of two towns of the state may have his home in one town for the purposes of taxation, although he spends the greater portion of the year in the other, and is there on the first of May; Thayer v. City of Boston, 124 Mass. 132, 26 Am. Rep. 650. In this case domicil for taxation and home are treated as synonymous. The principal place of abode of a man and his family, when it is only a temporary abode, is not his home in the sense here required; Thayer v. City of Boston, 124 Mass. 147, 26 Am. Rep. 650.

Dwelling-place, or home, means some permanent abode or residence, with intention to remain; and it is not synonymous with domicil, as used in international law, but has a more restricted meaning; Inhabitants of Jefferson v. Washington, 19 Me. 293.

They do not, necessarily, continue until another is acquired; it may be abandoned, and the individual cease to have any home; *id.* One who abandons his home or dwelling-house, with or without design of acquiring one elsewhere, has no home by construction, in the place abandoned; *id.* This case was disapproved and it was held that the town

domicil, not being used in a statute (under construction) to indicate a particular status as to habitation can only be used properly as synonymous with the town residence, dwelling-place, or home; Inhabitants of Warren v. Thomaston, 43 Me. 406, 69 Am. Dec. 69.

The maxim that "a man's house is his castle" does not protect a man's house as his property or imply that, as such, he has a right to defend it by extreme means. The sense in which the house has a peculiar immunity is that it is sacred for the protection of the man's person. A trespass upon his property is not a justification for killing the trespasser. It is a man's house, barred and inclosing his person, that is his castle. The lot of ground on which it stands has no such sanctity. When a man opens his door and puts himself partly outside of it, he relinquishes the protection which, remaining within and behind closed doors, it would have afforded him. Com. v. McWilliams, 21 Pa. Dist. R. 1131.

See DOMICIL; HOMESTEAD; FAMILY.

HOME PORT. Any port within a state in which the owner of a ship resides.

The question as to what constitutes a foreign port has usually arisen respecting the claims of material-men for supplies furnished to the master, and in this respect it has been held that the home port of a vessel does not necessarily imply the limits of the state in which her owner resides; The Merino, 9 Wheat. (U. S.) 401, 6 L. Ed. 118; *contra*, The William and Emmeline, 1 Blatchf. & H. 66, Fed. Cas. No. 17,687, where Charleston, S. C., was held a foreign port in respect to New York.

In England by the Mercantile Law Amendment Act it is provided that every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Stark, and the islands adjacent to any one of them, being part of the dominions of Her Majesty, shall be deemed a home port; 19 & 20 Vict. c. 97. See BOTTOMRY; PORT.

HOMESTALL. The mansion-house.

HOMESTEAD. The home place—the place where the home is. It is the home—the house and the adjoining land—where the head of the family dwells—the home farm. Hoitt v. Webb, 36 N. H. 166.

The place of a home or house; that part of a man's landed property which is about and contiguous to his dwelling-house; the land, or town, or city lot, upon which the family residence is situated. McKenzie v. Murphy, 24 Ark. 158; McCrosky v. Walker, 55 Ark. 303, 18 S. W. 169; Linn County Bank v. Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309.

The term necessarily includes the idea of a residence; Stanley v. Greenwood, 24 Tex. 224, 76 Am. Dec. 106. It must be the owner's place of residence—the place where he lives; Philleo v. Smalley, 23 Tex. 502.

The homestead laws of various states are constitutional or statutory provisions for the exemption of a certain amount or value of real estate occupied by a debtor as his homestead from a forced sale for the payment of his debts. In some cases restraints are placed upon the alienation by the owner of his property, and in some cases the exempt property, upon the death of the owner, descends to the widow and minor children, free from liability for his debts. They are of a comparatively recent origin; Barney v. Leeds, 51 N. H. 261; but are now said to exist in all but seven states; Thomp. Hom. & Ex. Their policy has been eulogized in many decided cases. See Cook v. McChristian, 4 Cal. 26; Charless v. Lamberson, 1 Ia. 439, 63 Am. Dec. 457; Franklin v. Coffee, 18 Tex. 415, 70 Am. Dec. 292; Thomp. Hom. & Ex. § 1.

Homestead acts have generally received a liberal construction; Campbell v. Adair, 45 Miss. 182; Mills v. Grant's Estate, 36 Vt. 271; Buxton v. Dearborn, 46 N. H. 43; *contra*, Fuselier v. Buckner, 28 La. Ann. 594; Olson v. Nelson, 3 Minn. 53 (Gil. 22). They cannot be considered as in derogation of the common law, inasmuch as, at common law, real estate was not liable to execution for the payment of debts; Thomp. Hom. & Ex. § 4; Lindley v. Davis, 7 Mont. 206, 14 Pac. 717; but see Ward v. Huhn, 16 Minn. 161 (Gil. 142); Beecher v. Baldy, 7 Mich. 501; Helfenstein & Gore v. Cave, 3 Ia. 287. Exemption laws giving a right to a homestead are for protection of the citizens of the state only; Prater v. Prater, 87 Tenn. 78, 9 S. W. 361, 10 Am. St. Rep. 623.

In some states there is a money limit put to the homestead; in others a limit of the quantity of land exempted. The value, under the statute, is the value at the time the homestead is designated; Iken v. Olenick, 42 Tex. 199; *contra*, Estate of Delaney, 37 Cal. 180. The courts cannot exempt money instead of land; Beecher v. Baldy, 7 Mich. 500; but see Estate of Delaney, 37 Cal. 180, where it was held that if the homestead exceeded the constitutional limit of value, and enough of it could not be separated and subjected to execution to reduce the value to that limit, the property would be sold and the constitutional amount set apart to the debtor. But where it can be separated, it will be, although it is within the same enclosure and used in connection with the dwelling for the use of the family; Herdman v. Cooper, 39 Ill. App. 330. In Casebolt v. Donaldson, 67 Mo. 308, it was held that the law confers a homestead right only in land and not in the proceeds of the sale of land.

The owner of an undivided interest in land is not entitled to a homestead exemption

therein; Avans v. Everett, 3 Lea (Tenn.) 76; Greig v. Eastin, 30 La. Ann. 1130; McGrath v. Sinclair, 55 Miss. 89; Watson v. McKinnon, 73 Tex. 210, 11 S. W. 197; so where land is held by the parties as partners; Commercial & Sav. Bank v. Corbett, 5 Sawy. 543, Fed. Cas. No. 3,058. A learned author gives as the conclusive test of a homestead—"that the *form*, *physical characteristics*, and *geography* of the premises must be such as, when taken in connection with their *use* by the owner, and their *value* when the statute creates a limit as to value, will convey notice to persons of ordinary prudence who deal with him that they are his homestead." Thomp. Hom. & Ex. § 104, citing Houston & G. N. R. Co. v. Winter, 44 Tex. 597, as sustaining this doctrine.

"The courts have generally held that the mere fact that the debtor carries on his business upon his homestead premises or rents out a portion thereof, as in case of one who keeps a country tavern; Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 561; or uses the lower part of his dwelling for business purposes; Orr v. Shraft, 22 Mich. 260; or who, living in town, keeps boarders and lodgers; Goldman v. Clark, 1 Nev. 607; or one who lets rooms in his dwelling to tenants; Mercier v. Chace, 11 Allen (Mass.) 194; or who rents out part for a store and uses another part for a printing office; Kelly v. Baker, 10 Minn. 154; (Gil. 124); does not deprive it of its homestead character." Thomp. Hom. & Ex. § 120; nor does he, where he leases the greater part of his house to be used as a boarding-house, he retaining several rooms in which he and his family lived; Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404. A building may not be used exclusively as a residence and yet retain the character of a homestead; Palmer v. Hawes, 80 Wis. 474, 50 N. W. 341. A store; Hubbell v. Canady, 58 Ill. 425; or mill; Greeley v. Scott, 2 Woods 657, Fed. Cas. No. 5,746 (*per* Bradley, J.); situated on the homestead lot; a smithshop separated from it by a highway; West River Bank v. Gale, 42 Vt. 27; a brewery in which the debtor lives with his family; In re Tertelling, 2 Dill. 339, Fed. Cas. No. 13,842; a lawyer's office in a separate block; Pryor v. Stone, 19 Tex. 371, 70 Am. Dec. 341; and a garden adjoining the dwelling; Arendt v. Mace, 76 Cal. 315, 18 Pac. 376, 9 Am. St. Rep. 207; a business block, partly a residence; De Ford v. Painter, 3 Okl. 80, 41 Pac. 96, 30 L. R. A. 722; part store-room and part dwelling; Corey v. Schuster, 44 Neb. 269, 62 N. W. 470; have been included within the rule. A house built in the business part of the town and used principally as a store-building, though the owner sleeps in a small back room and takes his meals elsewhere, is not a homestead; Garrett v. Jones, 95 Ala. 96, 10 South. 702. And in Iowa a building occupied at once for a dwelling and for business purposes may be divided horizontally and the business part sold in execution; Rhodes v. McCormack, 4 Ia. 368, 68 Am. Dec. 663; but see, *contra*, Thomp. Hom. & Ex. § 134, n.; Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244; "and in other states a homestead cannot be reserved in tenements and separate buildings occupied by tenements, although upon the enclosure whereon is situated the debtor's dwelling;" Thomp. Hom. & Ex. § 120; Hoitt v. Webb, 36 N. H. 158; Gregg v. Bostwick, 33 Cal. 220, 91 Am. Dec. 637; Casselman v. Packard, 16 Wis. 114, 82 Am. Dec. 710. Nor can a person have two homesteads at the same time; Wheeler v. Smith, 62 Mich. 373, 28 N. W. 907; Waggle v. Worthy, 74 Cal. 266, 15 Pac. 831, 5 Am. St. Rep. 440; Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177. Where land was occupied by a tenant at the time of levy and execution, the levy is not void as on a homestead because the owner intended at some future time to occupy it as a house; Evans v. Calman, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606.

The homestead laws are not to be taken only to save a mere shelter for the debtor and his family, but to give him the full enjoyment of the entire lot of ground exempted, to be used either in the cultivation of it, or in the erection and use of buildings on it, either for his own business or for deriving income in the way of rent; Stevens v. Hollingsworth, 74 Ill. 206; and the homestead right may be conveyed separately from the fee; Lorimer v. Marshall, 44 Ill. App. 645.

There is a conflict of decision as to whether a tract of land detached from the one on which the homestead dwelling-house is built, but used by the debtor in connection with it, is exempt. The opinion supported by the weight of authority is that it is not; Thomp. Hom. & Ex. § 145; Reynolds v. Hull, 36 Ia. 394; Kresin v. Mau, 15 Minn. 116 (Gil. 87); Adams v. Jenkins, 16 Gray (Mass.) 146; Bunker v. Locke, 15 Wis. 635; Linn County Bank v. Hopkins, 47 Kan. 580, 28 Pac. 606, 27 Am. St. Rep. 309; McCrosky v. Walker, 55 Ark. 303, 18 S. W. 169; Dicus v. Hall, 83 Ala. 159, 3 South. 239; *contra*, Mayho v. Cotton, 69 N. C. 289; Williams v. Willis, 84 Tex. 398, 19 S. W. 683; Perkins v. Quigley, 62 Mo. 498; Acker v. Trueland, 56 Miss. 30. A homestead may be designated in an undivided interest in lands; Merchants' Nat. Bank v. Kopplin, 1 Kan. App. 599, 42 Pac. 263; but not in partnership real estate; Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N. W. 334, 58 Am. St. Rep. 490; or by a cotenant in lands held in common; Rosenthal v. Bank, 110 Cal. 198, 42 Pac. 640; or by a remainderman, though after the estate vests in possession it may be held as a homestead against a judgment creditor; Stern v. Lee, 115 N. C. 426, 20 S. E. 736, 26 L. R. A. 814. It may be claimed in lands situated in different counties; Springer v. Colwell, 116 N. C. 520, 21 S. E. 301.

A homestead law, so far as it attempts to withdraw from the reach of creditors property which would have been within their reach under the laws in force at the time the debt was contracted, is unconstitutional; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; reversing 44 Ga. 353; Hannum v. McInturf, 6 Baxt. (Tenn.) 225.

Provisions exist in most of the states forbidding the alienation of the property designated as a homestead, except when the deed is joined in by the wife; Myers v. Evans, 81 Tex. 317, 16 S. W. 1060; Simpson v. Houston, 97 N. C. 344, 2 S. E. 651, 2 Am. St. Rep. 297. In others the payment of purchase money can be secured by a mortgage; so may the payment of purchase money and money borrowed for improvements on the property. Where the existence of a homestead is made to depend upon a selection by the debtor, the latter may alien the property at any time prior to such selection, by the usual formalities; People v. Plumsted, 2 Mich. 465. The purchaser in good faith of a homestead succeeds to the debtor's rights and will be protected against his creditors; Shackleford v. Todhunter, 4 Ill. App. 271. A homestead right is not forfeited by a conveyance of land with the intent to defraud creditors; Dortch v. Benton, 98 N. C. 190, 3 S. E. 638, 2 Am. St. Rep. 331; Snapp v. Snapp, 87 Ky. 554, 9 S. W. 705; Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Wood v. Timmerman, 29 S. C. 175, 7 S. E. 74.

Homesteads may be designated by one of three ways: 1, By a public notice of record; 2, by visible occupancy and use; 3, by the actual setting apart of the homestead under the direction of a court of justice; Thomp. Hom. & Ex. § 230. Statutory provisions, if they exist, must be followed. In the absence of a statutory provision, filing a declaration of intention to designate a certain property as a homestead has no legal effect; Cook v. McChristian, 4 Cal. 23. The right to a homestead existing at the time the statute is passed is not affected by a declaration under the statute; Hebert v. Mayer, 47 La. Ann. 563, 17 South. 131.

As to construction of declarations and what is sufficient, see Dunlop v. Blacker, 93 Ga. 819, 21 S. E. 135; In re Ogburn's Estate, 105 Cal. 95, 38 Pac. 498. A declaration enures to the benefit of the wife whether she knows of it or not; Security Loan & Trust Co. v. Kauffman, 108 Cal. 214, 41 Pac. 467; and a wife may make a declaration; Mutual Benefit Bldg. Ass'n v. Tanner, 96 Ga. 338, 23 S. E. 403. As to the designation of a homestead by occupancy, "it may be laid down as the prevalent doctrine that actual residence by the *head of the family* prior to the contraction of the debt, etc., he occupying it as a home and with the intention of dedicating it to the uses of a residence for his family, will be sufficient to impress upon the premises so occupied the character of a homestead." Thomp. Hom. & Ex. § 260. This designation will be sufficient to preserve the homestead character for the benefit of the widow and minor children; Johnston v. Turner, 29 Ark. 280. In order to give the character of a homestead, the purchase must always be with the intent of present, and not simply future, occupancy; Swenson v. Kiehl, 21 Kan. 533; Van Ratcliff v. Call, 72 Tex. 491, 10 S. W. 578; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24. And temporary absence of the owner will not divest him of the right to the same; Deering & Co. v. Beard, 48 Kan. 16, 28 Pac. 981; Robinson v. Swearingen, 55 Ark. 55, 17 S. W. 365. Actual occupancy is necessary; Givans v. Dewey, 47 Ia. 414; Wilson v. Swasey (Tex.) 20 S. W. 48; Tillar v. Bass, 57 Ark. 179, 21 S. W. 34; Turner v. Turner, 107 Ala. 465, 18 South. 210, 54 Am. St. Rep. 110. But one occupying a house with persons whom he is under no obligation to support, is not a householder within the homestead act; Holnback v. Wilson, 159 Ill. 148, 42 N. E. 169. When one occupies a homestead but has a fixed intention of occupying and holding other lands as such and is prevented by death, the latter will be treated as his homestead; Ross v. Porter, 72 Miss. 361, 16 South. 906.

Of the debts for which a homestead is liable, the first is taxes; Crine v. Johns, 96 Ga. 220, 22 S. E. 913. An assessment for municipal improvements is not a "tax" within the provision of a state constitution permitting a homestead to be subjected to a forced sale for taxes; Higgins v. Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770, overruling Lufkin v. City of Galveston, 58 Tex. 549. This view is said to be supported by an almost unbroken line of decisions; 4 Ballard's Ann. of R. P. § 346; 3 *id.* § 720. A homestead may be sold on a judgment for alimony; Mahoney v. Mahoney, 59 Minn. 347, 61 N. W. 334.

Homesteads have also been held liable to an equitable lien for materials furnished for their improvement; Ross v. Perry, 105 Ala. 533, 16 South. 915; to prior liens on the land; Aldrich v. Boice, 56 Kan. 170, 42 Pac. 695; or contracts existing when the statute is enacted; Dunagan v. Webster, 93 Ga. 540, 21 S. E. 65; Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348. When the statute makes it liable to debts existing at the time of its purchase this includes renewal of prior notes; Robinson v. Leach, 67 Vt. 128, 31 Atl. 32, 27 L. R. A. 303, 48 Am. St. Rep. 807.

When the exemption does not apply to a debt contracted for the purchase of the homestead, it has been held that the homestead cannot be sold to pay money borrowed from a third person to pay off that debt; Loftis v. Loftis, 94 Tenn. 232, 28 S. W. 1091; Eyster v. Hatheway, 50 Ill. 521, 99 Am. Dec. 537; Dreese v. Myers, 52 Kan. 126, 34 Pac. 349, 39 Am. St. Rep. 336; *contra*, Coleman's

Adm'r v. Parrott (Ky.) 32 S. W. 679. There is however, a conflict of authority on this point from which it is said to be impossible to extract any consistent rule. See Thomp. Hom. & Ex. §§ 338–347; Waples, Hom. & Ex. 337–346; 99 Am. Dec. 574, note.

Money due on an insurance policy upon homestead property is not subject to garnishment; Chase v. Swayne, 88 Tex. 218, 30 S. W. 1049, 53 Am. St. Rep. 742; Reynolds v. Haines, 83 Ia. 342, 49 N. W. 851, 13 L. R. A. 719, 32 Am. St. Rep. 311; Houghton v. Lee, 50 Cal. 101; Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204; Probst v. Scott, 31 Ark. 652; Bernheim v. Davitt (Ky.) 5 S. W. 193.

The increase in value of a homestead set apart to a widow and child above the limit of the statute does not constitute assets for further administration of the decedent's estate where the statute makes the homestead the absolute property of those to whom it is set apart; In re Bedford's Estate, 34 Utah 24, 95 Pac. 518, 16 L. R. A. (N. S.) 728, 16 Ann. Cas. 118; and this is in accordance with the weight of authority in the case of homesteads in a decedent's estate, though in the lifetime of the husband a re-valuation would seem generally to be allowed. See 44 L. R. A. 400, note, where the earlier cases are collected and 16 L. R. A. (N. S.) 728, note, which contains the later ones.

The right of exemption is lost by the unequivocal abandonment of the homestead by the owner, with the intention of no longer treating it as his place of residence; Thomp. Hom. & Ex. § 263, citing Archibald v. Jacobs, 69 Tex. 248, 6 S. W. 177; Waples, Hom. & Ex. 558. A lease of land for more than a year, and a residence elsewhere, was held to forfeit the homestead; Boyle v. Shulman, 59 Ala. 566; also the owner's removal from the state; Jackson v. Du Bose, 87 Ga. 761, 13 S. E. 916; Lee v. Moseley, 101 N. C. 311, 7 S. E. 874, 2 L. R. A. 106. The building situated on the homestead loses its exemption from seizure and sale upon being segregated from the homestead property; Curtis v. Des Jardins, 55 Ark. 126, 17 S. W. 709.

To establish an abandonment there must be a removal with the intention of not returning; Corey v. Schuster, 44 Neb. 269, 62 N. W. 470; but when removal for a temporary purpose is permitted by statute, it must be for a fixed and temporary purpose or for a temporary reason; Moore v. Smead, 89 Wis. 558, 62 N. W. 426. To leave a homestead farm and move in town to become a merchant, intending to return "if he quit business," was an abandonment; Wolf v. Hawkins, 60 Ark. 262, 29 S. W. 892. See also Lehman, Durr & Co. v. Bryan, 67 Ala. 558; Smith v. Bunn, 75 Mo. 559. Leaving a tenant at will in possession is not abandonment; Derickson v. Gilespie (Ky.) 32 S. W. 1084; nor temporary absence with intention to reoccupy; Robson v. Hough, 56 Ark. 621, 20 S. W. 523; nor mere removal with or without intention of returning; Donaldson v. Lamprey, 29 Minn. 20, 11 N. W. 119; nor is storing goods in the house and sleeping in it at times, the wife being insane.

In California, to constitute abandonment of homestead requires a declaration to that effect, signed, acknowledged and recorded. Mere removal without intention of returning is held not sufficient; Tipton v. Martin, 71 Cal. 325, 12 Pac. 244; nor letting it to a tenant at will with an option to purchase at a price named, and leaving to earn a livelihood with intention to return; Boot v. Brewster, 75 Ia. 631, 36 N. W. 649, 9 Am. St. Rep. 515; nor, upon its destruction by fire, application to another for aid in rebuilding, saying that if it was refused he must abandon it, is a finding of abandonment justified; Stewart v. Rhoades, 39 Minn. 193, 39 N. W. 141. An abandonment does not relate back so as to give validity to a void prior sale of the homestead under an execution; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133.

It has been held that the homestead may be abandoned by a husband's conveyance and the removal to another place against the desire of the wife; Marler v. Handy, 88 Tex. 421, 31 S. W. 636; Guiod v. Guiod, 14 Cal. 507, 76 Am. Dec. 440; Thomp. Hom. & Ex. § 276; *contra*, Sharp v. Mortgage Co., 95 Ga. 415, 22 S. E. 633. See ABANDONMENT.

When the homestead character has once attached, it may persist for the benefit of a single individual, who is the sole surviving member of the family; Weaver v. Bank, 76 Kan. 540, 94 Pac. 273, 16 L. R. A. (N. S.) 110, 123 Am. St. Rep. 155; Burns v. Keas, 21 Ia. 257; Stults v. Sale, 92 Ky. 5, 17 S. W. 148, 13 L. R. A. 743, 36 Am. St. Rep. 575; Silloway v. Brown, 12 Allen (Mass.) 30; Kimbrel v. Willis, 97 Ill. 494; Stanley v. Snyder, 43 Ark. 429; Beckmann v. Meyer, 75 Mo. 333; Blum v. Gaines, 57 Tex. 119; but that it does not continue where the family has ceased to occupy the original homestead and a single individual only is in possession is held by other courts; Santa Cruz Bank v. Cooper, 56 Cal. 339; Cooper v. Cooper, 24 Ohio St. 488; Fullerton v. Sherrill, 114 Ia. 511, 87 N. W. 419; Hill v. Franklin, 54 Miss. 632. A valid decree of divorce, where there are no children, terminates the homestead rights; Brady v. Kreuger, 8 S. D. 464, 66 N. W. 1083, 59 Am. St. Rep. 771; Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479; Burns v. Lewis, 86 Ga. 591, 13 S. E. 123; Arp v. Jacobs, 3 Wyo. 489, 27 Pac. 800. Where the wife secured the divorce, the custody of the children, and a lump sum as alimony, she was held to lose her homestead rights in property remaining in the possession of her husband; Barkman v. Barkman, 209 Ill. 269, 70 N. E. 652; but the husband in such a case was held not to lose his right of homestead exemption, as he

was still liable for the support of his children; Biffle v. Pullam, 114 Mo. 50, 21 S. W. 450; Hall v. Fields, 81 Tex. 553, 17 S. W. 82.

A deed or mortgage of a homestead must be the joint conveyance of the husband and wife; Van Sandt v. Alvis, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25; Seiffert & Wiese Lumber Co. v. Hartwell, 94 Ia. 576, 63 N. W. 333, 58 Am. St. Rep. 413. A mere release of dower by the wife is not sufficient; Bank of Harrison v. Gibson, 60 Ark. 269, 30 S. W. 39; nor an execution by the husband under a power of attorney from the wife; Wallace v. Ins. Co., 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288. And a conveyance by the claimant to his or her wife or husband, not subscribed or acknowledged by the latter is a nullity; Anderson v. Smith, 159 Ill. 93, 42 N. E. 306. Even when the wife is insane, a conveyance by the husband is void; Thompson v. Security Co., 110 Ala. 400, 18 South. 315, 55 Am. St. Rep. 29; Alexander v. Vennum, 61 Ia. 160, 16 N. W. 80; Whitlock v. Gosson, 35 Neb. 829, 53 N. W. 980; and so also where the wife is living apart from her husband; Herron v. Knapp, Stout & Co. Company, 72 Wis. 553, 40 N. W. 149; Bradford v. Trust Co., 47 Kan. 587, 28 Pac. 702; Johnston v. Turner, 29 Ark. 280; Castlebury v. Maynard, 95 N. C. 281. See 65 Am. Dec. 481, note.

This right of exemption depends upon the construction of statutes in various states. The decisions are, therefore, far from harmonious.

Every person who is the head of a family, or is over 21 years of age and is a citizen, or has declared his intention to become such, also soldiers, seamen, and members of the marine corps, including officers, who have served in the rebellion for ninety days, and remained loyal to the government, may take up a quarter section or less of unappropriated public lands, as a homestead; U. S. R. S. § 2289 *et seq.*

The subject has been fully treated in Judge Thompson's work frequently cited above. See also 36 Am. Rep. 728, note; 10 Am. L. Reg. N. S. 1, 137; French v. Tumlin, 10 Am. Law Reg. (N. S.) 641, Fed. Cas. No. 5,104 (by Judge Dillon). See FAMILY; EXEMPTION; MANOR; MANSION.

HOMICIDE (Lat. *homo*, a man, *cedere*, to kill). The killing any human creature. 4 Bla. Com. 177.

Excusable homicide is that which takes place under such circumstances of accident or necessity that the party cannot strictly be said to have committed the act wilfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide.

Felonious homicide is that committed wilfully under such circumstances as to render it punishable.

Justifiable homicide is that committed with full intent, but under such circumstances of duty as to render the act one proper to be performed.

According to Blackstone, 4 Com. 177, homicide is the killing of any human creature. This is the most extensive sense of this word, in which the intention is not considered. But in a more limited sense, it is always understood that the killing is by human agency; and Hawkins defines it to be the killing of a man by a man. 1 Hawk. Pl. Cr. c. 8, § 2. See Dalloz, Dict.; Com. v. Webster, 5 Cush. (Mass.) 303, 52 Am. Dec. 711. Homicide may perhaps be described to be the destruction of the life of one human being, either by himself or by the act, procurement, or culpable omission of another. When the death has been intentionally caused by the deceased himself, the offender is called *felo de se;* when it is caused by another, it is justifiable, excusable, or felonious homicide.

The distinction between justifiable and excusable homicide is that in the former the killing takes place without any manner of fault on the part of the slayer; in the latter there is some slight fault, or at any rate the absence of any duty rendering the act a proper one to be performed, although the blame is so slight as not to render the party punishable. The distinction is very frequently disregarded, and would seem to be of little practical utility; See 2 Bish. Cr. Law § 617. But between justifiable or excusable and felonious homicide the distinction, it will be evident, is of great importance. 1 East, Pl. Cr. 260, gives the following example: "If a person driving a carriage happen to kill another, if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be *murder;* if he might have seen the danger, but did not look before him, it will be *manslaughter;* but if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death and excusable homicide." See 4 Bla. Com. 176; Rosc. Cr. Ev. 580; Cl. Cr. L. 131.

There must be a person in actual existence; 6 C. & P. 349; 7 *id.* 814, 850; 9 *id.* 25; Johnson v. State (Tex.) 24 S. W. 285; but the destruction of human life at any period after birth is homicide, however near it may be to extinction from any other cause; 2 C. & K. 784; 2 Bish. Cr. Law § 632; but a child in the act of being born would not be included; 5 C. & P. 539; and the death must have occurred within a year and a day from the time the injury was received; State v. Orrell, 12 N. C. 139, 17 Am. Dec. 563; People v. Kelly, 6 Cal. 210; Edmondson v. State, 41 Tex. 496; State v. Mayfield, 66 Mo. 125; Com. v. Macloon, 101 Mass. 6, 100 Am. Dec. 89. It is not necessary that the injury inflicted was the sole cause of the death, provided it contributed mediately or immedi-

ately in a degree sufficient for the law's notice; State v. Matthews, 38 La. Ann. 795; 2 Bish. Cr. Law §§ 637, 638; State v. Smith, 10 Nev. 106. A person illegally arrested may use such force as is necessary to regain his liberty, and should there be reasonable ground to believe that the officer making the arrest intends shooting the prisoner to prevent his escape, such prisoner may shoot the officer in self-defence; Miers v. State, 34 Tex. Cr. R. 161, 29 S. W. 1074, 53 Am. St. Rep. 705. So where one is assaulted and there is reasonable ground for him to fear loss of his life, or great bodily harm, he is not obliged to retreat nor consider whether he may so act in safety, but he is entitled to stand his ground and meet any attack made upon him with a deadly weapon, even if in so doing he cause the death of his assailant; Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962, 39 L. Ed. 1086; Page v. State, 141 Ind. 236, 40 N. E. 745.

Where malice and intent are elements of murder in the second degree, a person is not as a matter of law guilty of that crime because he sets a spring gun from which a homicide results; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, 15 Ann. Cas. 584, where the defendant had placed the spring gun in his locked trunk, having warned the deceased of its presence there. She, having a right to enter his room, procured the key, unlocked the trunk and was killed. The owner of a shop might be justified in case of the death of a burglar for having placed a spring gun on his premises; State v. Moore, 31 Conn. 479, 83 Am. Dec. 159.

The person killed, to constitute the homicide felonious, must have been entitled to his existence. Thus, a soldier of the enemy in time of war has no right to his life, but may be killed. A criminal sentenced to be hanged has no right to his life; but no person can take it but the authorized officer, in the prescribed manner. Where a soldier, in the regular army, to prevent an escape, shot at a fleeing prisoner and killed a bystander, it was held that he acted in the supposed discharge of his duty and was not guilty of manslaughter; U. S. v. Lipsett, 156 Fed. 65.

The elements of felonious homicide under the United States laws are to be determined by the principles of common law; U. S. v. Lewis, 111 Fed. 630.

See MURDER; MANSLAUGHTER; SELF-DEFENCE; ADEQUATE CAUSE; PROVOCATION; MICHIE, HOMICIDE.

HOMINE CAPTO IN WITHERNAM. See DE HOMINE CAPTO IN WITHERNAM.

HOMINE ELIGENDO (Lat.). **In English Law.** A writ directed to a corporation, requiring the members to make choice of a new man, to keep the one part of a seal appointed for statutes merchant. Tech. Dict. Reg. Orig.

HOMINE REPLEGIANDO. See DE HOMINE REPLEGIANDO.

HOMINES (Lat.). **In Feudal Law.** Men; feudatory tenants who claimed a privilege of having their causes, etc., tried only in their lord's court. Paroch. Antiq. 15.

HOMINES LIGII. In Feudal Law. Liege men; feudal tenants or vassals, especially those who held immediately of the sovereign. 1 Bla. Com. 367.

HOMIPLAGIUM. In Old English Law. The maiming of a man. Blount.

HOMMES DE FIEF (Fr.). **In Feudal Law.** Men of the fief; feudal tenants; the peers of the lord's court. Montesq., *Esprit des Lois*, liv. 28, c. 27.

HOMMES FEODAUX (Fr.). **In Feudal Law.** Feudal tenants; the same with *hommes de fief* (*q. v.*). Montesq., *Esprit des Lois*, liv. 28, c. 36.

HOMO (Lat.). A human being, whether male or female. Co. 2d Inst. 45.

In Feudal Law. A vassal; one who, having received a feud, is bound to do homage and military service for his land; variously called *vassalus*, *vassus*, *miles*, *cliens*, *feodalis*, *tenens per servitium militare*, sometimes *baro*, and most frequently *leudes*. Spelman, Gloss. *Homo* is sometimes also used for a tenant by socage, and sometimes for any dependent. A *homo* claimed the privilege of having his cause and person tried only in the court of his lord. Kennett, Paroch. Antiq. 152.

Homo chartularius. A slave manumitted by charter. *Homo commendatus.* In feudal law. One who surrendered himself into the power of another for the sake of protection or support. See COMMENDATION. *Homo ecclesiasticus.* A church vassal; one who was bound to serve a church, especially to do service of an agricultural character. Spel. Gloss. *Homo exercitalis.* A man of the army (exercitus); a soldier. *Homo-feodalis.* A vassal or tenant; one who held a fee (*feodum*), or part of a fee. Spel. Gloss. *Homo fiscalis*, or *fiscalinus.* A servant or vassal belonging to the treasury or fiscus. *Homo francus.* In old English law. A freeman. A Frenchman. *Homo ingenuus.* A free man. A free and lawful man. A yeoman. *Homo liber.* A freeman. *Homo ligius.* A liege man; a subject; a king's vassal. The vassal of a subject. *Homo novus.* In feudal law. A new tenant or vassal; one who was invested with a new fee. Spel. Gloss. *Homo pertinens.* In feudal law. A feudal bondman or vassal, one who belonged to the soil (*qui glebæ adscribitur*). *Homo regius.* A king's vassal. *Homo Romanus.* A Roman. An appellation given to the old inhabitants of Gaul and other Roman provinces, and retained in the law of the barbarous nations. Spel. Gloss. *Homo trium litterarum.* A man of three letters; that is the three letters, "f," "u," "r," composing the Latin word *fur* meaning "thief."

HOMOLOGACION. In Spanish Law. The tacit consent and approval, inferred by law from the omission of the parties, for the space of ten days, to complain of the sentences of arbitrators, appointment of syndics, or assignees, of insolvents, settlements of successions, etc. Also, the approval given by the judge of certain acts and agreements for

the purpose of rendering them more binding and executory. Escriche.

HOMOLOGATION. **In Civil Law.** Approbation; confirmation by a court of justice; a judgment which orders the execution of some act: as, the approbation of an award and ordering execution on the same. Merlin, Répert.; La. Civ. Code; Dig. 4. 8; 7 Toullier, n. 224. See L. R. 3 App. Cas. 1026. To homologate is to say the like, *similiter dicere.* Viales' Syndics v. Gardenier, 9 Mart. O. S. (La.) 324.

A judgment homologating, as far as not opposed, the account of distribution of a syndic, is *res judicata*, except as to opponents, whether the account was correct or not; Searcy v. Creditors, 46 La. Ann. 376, 14 South. 910.

HOND HABEND. See HAND HABEND.

HONOR. **In English Law.** See HONOUR.

In Common Law. To accept a bill of exchange; to pay a bill accepted, or a promissory note, on the day it becomes due. 7 Taunt. 164.

HONORABLE. A title of distinction or respect.

In England it is given to the younger sons of earls, to the children of viscounts and barons, to persons occupying official places of trust and honor, and to the house of commons as a body, and to members of the Executive Councils in India and the colonies. In the United States it is usually given to persons who hold or have held positions of importance under the national or state government.

HONORARIUM. Something given in gratitude for services rendered.

A voluntary donation in consideration of services which admit of no compensation in money; in particular to advocates at law, deemed to practice for honor or influence and not for fees. McDonald v. Napier, 14 Ga. 89.

It is so far of the nature of a gift that it cannot be sued for; Mooney v. Lloyd, 5 S. & R. (Pa.) 412; 1 Chitty, Bailm. 38; 3 Bla. Com. 28. Of this character are in England, the professional fees of barristers and of physicians. The same rule once prevailed in Pennsylvania, but was afterwards rejected; Balsbaugh v. Frazer, 19 Pa. 95; and now prevails in New Jersey; Seeley v. Crane, 15 N. J. L. 35; and to some extent in the federal courts, as applied to counsel in the special sense of the term; Weeks, Atty. 548; Law v. Ewell, 2 Cra. C. C. 144, Fed. Cas. No. 8,127. In many states the contrary rule has been expressly laid down; Adams v. Stevens, 26 Wend. (N. Y.) 452 (a full discussion by Walworth, C.); Thurston v. Percival, 1 Pick. (Mass.) 415. The payment of the fees of English solicitors, attorneys, and proctors is provided for by statute and rules of court. See Weeks, Atty. 536. See 3 Sharsw. Bla. Com. 28.

HONORARY CANONS. Those without emolument. 3 & 4 Vict. c. 113, § 23.

HONORARY FEUDS. Titles of nobility which were not of a divisible nature, but could only be inherited by the eldest son in exclusion of the rest. 2 Bla. Com. 56; Wright, Tenures 32.

HONORARY SERVICES. Services by which lands in grand serjeantry were held: such as, to hold the king's banner, or to hold his head in the ship which carried him from Dover to Whitsand, etc. 2 Sharsw. Bla. Com. 73, and note.

HONOUR. The seignory of a lord paramount. 2 Bla. Com. 91. In Domesday Book, the complex of landed property and rights combined in one person and perpetuated as a unit after the original holder has given place to others. Later, great fiefs created for well-known men; also the capital manor of a locality. Vinogradoff, Engl. Soc. 348.

HOO. A hill. Co. Litt. 5 *b*.

HOPCON. A valley. Cowell.

HOPE. A valley. Co. Litt. 5 *b*.

HORA AURORÆ. The morning bell.

HORÆ JUDICIÆ (Lat.). Hours judicial, or those in which judges sit in court. In Fortesque's time, these were from 8 to 11 A. M., and the courts of law were not open in the afternoon. Co. Litt. 135 *a*; Co. 2d Inst. 246; Fortesque 51, p. 120, note.

HORDERA. A treasurer. Du Cange.

HORDERIUM. A hoard, treasury, or repository. Cowell.

HORN TENURE. Tenure by winding a horn on approach of an enemy, called tenure by *cornage.* If lands were held by this tenure of the king, it was grand serjeanty; if of a private person, knight-service. Many anciently so held their lands towards the Picts' Wall. Co. Litt. § 156; Camd. Britan. 609.

HORNBOOK. A book containing the first principles of any science or branch of knowledge; a primer, so called because the material was horn.

Horn book law. The elementary or rudimentary law, colloquially so called.

HORNGELD. A forest tax paid for horned beasts, also an acquittance thereof, which was granted by the king unto such as he thought good. Cowell; Toml.

HORREUM. A place for keeping grain, a storehouse. Calvinus, Lex.; Bract. fol. 48.

HORS DE SON FEE (Fr. out of his fee). **In Old English Law.** A plea to an action brought by one who claimed to be lord for rent-services as issuing out of his land, by which the defendant asserted that the land

in question was out of the fee of the demandant. 9 Co. 30; 2 Mod. 104.

HORS WEALH. **In Old English Law.** The wealh, or Briton who had the care of the king's horses.

HORS WEARD. **In Old English Law.** A service or *corvée*, consisting in watching the horses of the lord. Anc. Inst. Eng.

HORSE. Until a horse has attained the age of four years he is called a colt. 1 Russ. & R. 416. This word is sometimes used as a generic name for all animals of the horse kind; Taylor v. State, 44 Ga. 263; State v. Dunnavant, 3 Brev. (S. C.) 9, 5 Am. Dec. 530. See Yelv. 67 *a;* Miller v. Hahn, 84 N. C. 226. It is also used to include every description of the male, as gelding or stallion, in contradistinction to the female; Owens v. State, 38 Tex. 555. In a statute giving a remedy against railroad companies for injuries to horses and cattle, it includes mules; Toledo, Wabash & W. Ry. Co. v. Cole, 50 Ill. 184. The exemption of a horse from execution has been held to include whatever is essential to his enjoyment, as shoes and saddle; Dearborn v. Phillips, 21 Tex. 449; and it may include an ass or a jackass; Richardson v. Duncan, 2 Heisk. (Tenn.) 222; Ohio & M. R. Co. v. Brubaker, 47 Ill. 463; but not a stallion not kept for farm work; Robert v. Adams, 38 Cal. 383, 99 Am. Dec. 413.

HORSE GUARDS. The name applied to the public office in Whitehall appropriated to the departments under the general-commanding-in-chief. The term is also used conventionally to signify the military authorities at the head of army affairs, in contradistinction to the civil chief, the secretary of state for war.

HORSE RACE. Any race in which any horse, mare, or gelding is run or made to run in competition with any other horse, mare, or gelding or against time, for any prize of what nature or kind soever, or for any bet or wager made or to be made in respect to any such horse, mare, or gelding or the riders thereof, and at which more than twenty persons are present. Stat. 42 & 43 Vict. c. 18, s. 1.

The first statute regarding horse-racing was passed in 1664, entitled an act against deceitful, disorderly, and excessive gaming; but this act being found insufficient to prevent the abuses at which it was directed, the statute 9 Anne, c. 14, was passed in 1710, reciting that all mortgages and instruments, where the consideration was money won by gaming or betting, or the repayment of money lent at such gaming and betting, should be void; and that the loser of ten pounds or upward on such gaming or betting might, within three months, sue and recover back treble the value of his losses; and that any person winning ten pounds or upwards might be indicted and, on conviction, forfeit five times the value so won, and if won by cheating, the winner should be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury. This act, being only directed to races at which betting of ten pounds or over was indulged, increased the number at which the limit was below that amount to such an extent that it was found necessary to restrict still further the practice, and in 1740 and 1745 the acts 13 Geo. II. c. 19 and 18 Geo. II. c. 34 went into effect. The latter, as an encouragement to breeders, legalized those races at which the stakes amounted to fifty pounds, and also made a distinction between matches and races. So much of the acts 16 Car. II. c. 7 and 9 Anne, c. 14 as rendered void any note, bill or mortgage given for a gambling contract was repealed during the reign of William IV. and they were amended so as to make such instruments not void, but given for an illegal consideration; 5 & 6 Will. IV. c. 41. This statute is still in force. The acts 3 & 4 Vict. c. 5 and 8 & 9 Vict. c, 109 repealed the former acts of 16 Car. II. c. 7, and all of 9 Anne, c. 14 that had not already been altered by 5 & 6 Will. IV. c. 41. The act 17 & 18 Vict. c. 38 was supplementary to 8 & 9 Vict. c. 109, as were also 37 Vict. c. 15 and 42 & 43 Vict. c. 18, and 55 Vict. c. 9.

Contributions or subscriptions towards any plate, prize, or sum of money to be awarded to the winner of any lawful horse race are not unlawful and do not constitute a wager; [1895] 1 Q. B. 698; but a match between two horses, for a sum of money contributed by their respective owners, although legal, is a void contract within the statute 8 & 9 Vict. c. 109; and money in the hands of a stakeholder or loser cannot be recovered by the winner in an action at law; 1 C. P. D. 573; and see 2 Ex. D. 442 (overruling 5 C. B. 831); 5 App. Cas. 342 approving 2 Ex. D. 442.

The stakeholder is bound to retain the money in his hands until it is clearly decided which party is entitled to it; 2 M. & W. 369; but he is merely a stakeholder, and has no right to the stakes until he actually receives them in his hands; 5 C. & P. 147. Where the race has not been, and cannot be, run, the position of the stakeholder is that of a debtor to each party for the amount contributed by each, and a specific demand of the stake from him is unnecessary; but where there is a possibility that the race may still be run and decided, each party must make a specific demand of his stake from the stakeholder before he can recover from him; 28 L. J. Q. B. 126. In a lawful horse race, the payment of entrance money to the stakeholder constitutes a legal contract, and such money cannot be recovered back unless there is a mutual rescission of the contract; 2 M. & W. 369. As to the recovery back of money paid to a stakeholder pending the result of an illegal contest, it may be recovered before the contest takes place, but not afterwards; 8 B. & C. 226; Deaver v. Bennett, 29 Neb. 812, 46 N. W. 161, 26 Am. St. Rep. 415; but the former case, although regarded as an authority; [1895] 1 Q. B. 698; Wise v. Rose, 110 Cal. 159, 42 Pac. 569; has been doubted; 14 M. & W. 712; and held irreconcilable with the statute; 9 Ir. C. L. R. 13. In Diggs v. Higgs, 2 Ex. D. 442, the court say "what legal right there may be to recover back money paid under such a contract, the statute leaves it untouched." In the United States it is held that the depositor may revoke the stakeholder's authority to pay over the stakes and bring an action against him for its re-

covery; Corson v. Neatheny, 9 Col. 212, 11 Pac. 82; and if, after the receipt of such notice, the stakeholder pay over the money to the winner, he is liable to the depositor; Wise v. Rose, 110 Cal. 159, 42 Pac. 569.

If the owner of a horse entered for a race is aware of its disqualification he may recover his money back before the race, but not afterwards; 2 C. & P. 608.

Money expended by one part owner of a race horse for the common benefit of another owner and himself, with the understanding that the owners are to share alike in the winnings of such horse, is recoverable (from the second owner), to the amount of one-half the sum expended where the horse loses the race; 26 L. J. C. P. 181.

In this country the decisions as to whether horse racing constitutes gaming within the statutes are not uniform. It has been held, to be gaming or a gambling device; Redman v. State, 33 Ala. 428; State v. Rorie, 23 Ark. 726; Corson v. Neatheny, 9 Cal. 214, 11 Pac. 82; Cheesum v. State, 8 Blackf. (Ind.) 332, 44 Am. Dec. 771; Cain v. McHarry, 2 Bush (Ky.) 263; Dyer v. Benson, 69 Ga. 609; Van Valkenburgh v. Torrey, 7 Cow. (N. Y.) 252; Mosher v. Griffin, 51 Ill. 184, 99 Am. Dec. 541; Wade v. Deming, 9 Ind. 35; Grace v. McElroy, 1 Allen (Mass.) 563; People v. Weithoff, 51 Mich. 212, 16 N. W. 442, 47 Am. Rep. 557; Wilkinson v. Tousley, 16 Minn. 299 (Gil. 263), 10 Am. Rep. 139; State v. Hayden, 31 Mo. 35; Haywood v. Sheldon, 13 Johns. (N. Y.) 88; State v. Catchings, 43 Tex. 654; Ellis v. Beale, 18 Me. 337, 36 Am. Dec. 726; *contra*, Com. v. Shelton, 8 Gratt. (Va.) 592; State v. Lemon, 46 Mo. 375.

Racing a horse on or along a public road, though no bet has been offered on the result of such race, has been held an indictable offence; State v. Fidler, 7 Humph. (Tenn.) 502; and the fact that a charter has been granted for a race-course will not authorize betting thereon; Cain v. McHarry, 2 Bush (Ky.) 263. In many of the states, however, the times at, and seasons in, which horse racing may be indulged are regulated by statutes which tax and license the racing associations. The trotting for a purse or premium contributed or subscribed by other persons is not trotting for a wager; Ballard v. Brown, 67 Vt. 586, 32 Atl. 485; People v. Fallon, 152 N. Y. 12, 46 N. E. 296, 37 L. R. A. 227, 57 Am. St. Rep. 492; Harris v. White, 81 N. Y. 532; Delier v. Agricultural Society, 57 Ia. 481, 10 N. W. 872; Misner v. Knapp, 13 Or. 135, 9 Pac. 65, 57 Am. Rep. 6; Porter v. Day, 71 Wis. 296, 37 N. W. 259; Alvord v. Smith, 63 Ind. 58; but see Dudley v. Jockey Club, 14 Misc. 58, 35 N. Y. Supp. 245; Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774; Bronson Agricultural & Breeders' Ass'n v. Ramsdell, 24 Mich. 441.

Pools on horse races are games within the statute against gaming; People v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557; Swigart v. People, 154 Ill. 284, 40 N. E. 432; *contra*, James v. State, 63 Md. 242; and the rule applies to pools sold in one state on a race to be run in another; Williams v. State, 92 Tenn. 275, 21 S. W. 662; Lacey v. Palmer, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822, 57 Am. St. Rep. 795; but not where only the orders for bets were taken and transmitted by telegraph, as it was held that the actual betting was done out of the state; Lescallett v. Com., 89 Va. 878, 17 S. E. 546.

The general rule against betting on horse races applies to all betting wherever done; State v. Lovell, 39 N. J. L. 463; and all pooling schemes are within the statute; Com. v. Simonds, 79 Ky. 618; but in some states betting or pool-selling with reference to races run on a licensed track are excepted from the statutory prohibition; State v. Posey, 1 Humph. (Tenn.) 384; State v. Fidler, 7 Humph. (Tenn.) 501; State v. Blackburn, 2 Coldw. (Tenn.) 235; Huff v. State, 2 Swan (Tenn.) 279; but not otherwise; Williams v. State, 92 Tenn. 275, 21 S. W. 662.

The regulation of horse racing falls under the police power; the right to license may be delegated to a commission; and an act regulating it is not invalid because trotting races are excepted; State Racing Commission v. Agricultural Ass'n, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905. This case contains much horse and horse racing history. The same act was sustained in Grainger v. Jockey Club, 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997. A delegation of the supervision of horse racing to a commission was upheld in State v. Williams, 160 Mo. 333, 60 S. W. 1077. See also Grannan v. Racing Ass'n, 153 N. Y. 449, 47 N. E. 896. An act prohibiting horse racing during the winter months or on any track more than three times a year, etc., is valid; State v. Roby, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. Rep. 174. An act penalizing betting by machines or other contrivances was held to include "Paris" Mutual; Com. v. Simonds, 79 Ky. 618. Book making on a horse race is a gambling device within a statute; Miller v. U. S., 6 App. D. C. 6.

One who keeps a room as a resort for persons who bet on horse races is guilty of keeping a disorderly house; Haring v. State, 53 N. J. L. 664, 23 Atl. 581; so where one maintains a partly enclosed place for the purpose of making books and selling pools; Swigart v. People, 154 Ill. 284, 40 N. E. 432.

Blackboards, sheets, manifold books, and policy slips for placing bets on horse races are gambling devices; Com. v. Adams, 160 Mass. 310, 35 N. E. 851; State v. Shaw, 39 Minn. 153, 39 N. W. 305; *contra*, People v. Weithoff, 93 Mich. 631, 53 N. W. 784, 32 Am. St. Rep. 532.

Although the business of pool selling is illegal, the crime of embezzlement may be

committed by the agent who receives the money, in appropriating it to his own use; State v. Shadd, 80 Mo. 358.

Money lent for the purpose of betting on a gambling device cannot be recovered; Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624; nor can a note given for money lent for such a purpose; Cutler v. Welsh, 43 N. H. 497; and see Lanahan v. Pattison, 1 Flip. 410, Fed. Cas. No. 8,036. In the District of Columbia, it is held that the Statute 9 Anne, c. 14, s. 1, *supra*, is still in force and that all notes given for gambling contracts are void, even in the hands of a *bona fide* purchaser; Lulley v. Morgan, 21 D. C. 88; *contra*, Bozeman v. Allen, 48 Ala. 512. A check given to enter a horse for a horse race is given for an illegal purpose and there can be no recovery thereon; Comly v. Hillegass, 94 Pa. 132, 39 Am. Rep. 774. A promissory note given for an interest in a race horse is not void; Biegler v. Trust Co., 62 Ill. App. 560.

A jockey, under a contract to perform his services in "a good and workmanlike manner," need possess and exercise only a reasonable degree of skill, knowledge and ability as such; Middendorf v. Schreiber, 150 Mo. App. 530, 131 S. W. 122.

See GAMING; LOTTERY; WAGER; STAKEHOLDER; BETTING.

HORTUS (Lat.). **In the Civil Law.** A garden. Dig. 32, 91, 5.

HOSPITAL. An institution for the reception and care of sick, wounded, infirm, or aged persons; generally incorporated, and then of the class of corporations called "eleemosynary" or "charitable." See CHARITABLE USES.

As to the liability of a hospital in tort, see CHARITABLE CORPORATIONS. As to hospital records as evidence, see PHYSICIAN.

HOSPITALLERS. The knights of a religious order, so called because they built a hospital at Jerusalem, wherein pilgrims were received. All their lands and goods in England were given to the sovereign by 32 Hen. VIII. c. 34. Cowell.

HOSPITATOR (Lat.). A host or entertainer.

Hospitator communis. An innkeeper. 8 Co. 32.

Hospitator magnus. The marshal of a camp.

HOSPITIA. Inns. *Hospitia communia*, common inns. Reg. Orig. 105.

Hospitia curiæ, inns of the court. *Hospitia cancellariæ*, inns of chancery. Crabb, Eng. Law 428; 4 Reeve, Hist. Eng. Law 102.

HOSPITICIDE. One who kills his guest or host.

HOSPITIUM. An inn; a household.

HOSPODAR. A Turkish governor in Moldavia or Wallachia.

HOSTAGE. A person delivered into the possession of a public enemy in the time of war, as a security for the performance of a contract entered into between the belligerents.

Hostages were frequently given as a security for the payment of a ransom-bill; and if they died their death did not discharge the contract; 3 Burr. 1734; 1 Kent 106; Dane, Abr. Index.

HOSTELER. An innkeeper. Now applied, under the form ostler, to those who look to a guests's horses. Cowell.

HOSTELAGIUM. In English Law. A right reserved to the lords to be lodged and entertained in the houses of their tenants.

HOSTES. Enemies. *Hostes humani generis*, enemies of the human race; *i. e.* pirates.

HOSTIÆ. In Old Records. The hostbread, or consecrated wafer, in the eucharist. Cowell.

HOSTILARIA, HOSPITALARIA. A place or room in religious houses used for the reception of guests and strangers.

HOSTILE. When applied to the possession of an occupant of real estate holding adversely it is not to be construed as showing ill-will, or that he is an enemy of the person holding the legal title; but it means an occupant who holds and is in possession as owner, and therefore against all other claimants of the land. Ballard v. Hansen, 33 Neb. 861, 51 N. W. 295.

HOSTILE EMBARGO. One laid upon the vessels of an actual or prospective enemy. See EMBARGO.

HOSTILE WITNESS. A witness who manifests so much hostility or prejudice under examination in chief that the party who has called him, or his representative, is allowed to cross-examine him, *i. e.* to treat him as though he had been called by the opposite party. Whart. See WITNESS.

HOSTILITY. A state of open enmity; open war. Wolff, *Droit de la Nat.* § 1119.

Permanent hostility exists when the individual is a citizen or subject of the government at war.

Temporary hostility exists when the individual happens to be domiciliated or resident in the country of one of the belligerents; in this latter case the individual may throw off the national character he has thus acquired by residence, when he puts himself in motion, *bona fide*, to quit the country *sine animo revertendi;* 3 C. Rob. 12; The Friendschaft, 3 Wheat. (U. S.) 14, 4 L. Ed. 322. See ENEMY; DOMICIL.

HOT WATER ORDEAL. See ORDEAL.

HOTCHPOT (spelled, also, *hodgepodge, hotch-potch*). The blending and mixing of property belonging to different persons in order to divide it equally. 2 Bla. Com. 190.

The bringing together all the personal estate of the deceased, with the advancements he has made to his children, in order that the same may be divided agreeably to the provisions of the statute for the distribution of intestates' estates.

By hotchpot is meant "that the estate of the ancestor is to be considered as a common fund out of which each child is to draw at the death an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to its situation at the time of the gift." McCaw v. Bleevit, 2 McCord Ch. (S. C.) 90, 104. See McLure v. Steele, 14 Rich. Eq. (S. C.) 105.

In bringing an advancement into hotchpot, the donee is not required to account for the profits of the thing given: for example, he is not required to bring into hotchpot the produce of negroes, nor the interest of money. The property must be accounted for at its value when given; Beckwith v. Butler, 1 Wash. (Va.) 224; Richardson v. Sinkler, 2 Des. (S. C.) 127; Hudson v. Hudson's Ex'r, 3 Rand. (Va.) 117; Williams v. Stonestreet, *id.* 559. See ADVANCEMENT.

HOTEL. Under the Raines law of 1896, a building was not a legal hotel unless it had six rooms furnished as bedrooms with independent access by door from the hall, exclusive of rooms occupied by the family and servants of the proprietor; In re McMonagle, 41 Misc. Rep. 407, 84 N. Y. Supp. 1068; In re Brewster, 85 App. Div. 235, 83 N. Y. Supp. 564. In 1897 this law was amended so as to require ten bedrooms; In re Clement, 117 App. Div. 5, 102 N. Y. Supp. 37. See INNKEEPER; BOARDER; GUEST; TAVERN; INN.

HOUGH. A valley. Co. Litt. 5 *b*.

HOUR. The twenty-fourth part of a natural day; the space of sixty minutes of time. Co. Litt. 135.

HOURS OF SERVICE ACT. See EIGHT HOUR LAW.

HOUSAGE. A fee paid by a carrier for housing goods. Toml.

HOUSE. A place for the habitation and dwelling of man.

A collection of persons; an institution; a commercial firm; a family.

In a grant or demise of a house, the curtilage and garden will pass, even without the words "with the appurtenances" being added; Cro. Eliz. 89; 3 Leon. 214; 1 Plowd. 171; 2 Wms. Saund. 401, n. 2; Rogers v. Smith, 4 Pa. 93; Brown v. Turner, 113 Mo. 27, 20 S. W. 660. In a grant or demise of a house with the appurtenances, no more will pass although other lands have been occupied with the house; 1 P. Wms. 603; Cro. Jac. 526; 2 Co. 32; Co. Litt. 5 *d*, 36 *a*, *b*; 2 Wms. Saund. 401, n. 2.

If a house, originally entire, be divided into several apartments, with an outer door to each apartment, and no communication with each other subsists, in such case the several apartments are considered as distinct houses; 6 Mod. 214; Woodf. L. & T. 178.

A church is a "house" within a statute prescribing a street line for houses; L. R. 15 Eq. 159; a smoke house is a house; Irvin v. State, 37 Tex. 412; but a theatre is not a house; 14 M. & W. 181.

As to what the term includes in cases of arson and burglary, see ARSON; BURGLARY; DWELLING-HOUSE; FLAT; APARTMENT. See also, ARREST.

HOUSE-BOTE. An allowance of necessary timber out of the landlord's woods for the repairing and support of a house or tenement. This belongs of common right to any lessee for years or for life. House-bote is said to be of two kinds, *estoverium ædificandi et ardendi*. Co. Litt. 41 *b*.

HOUSE-DUTY. A tax on inhabited houses imposed by 14 and 15 Vict. c. 36, in lieu of window-duty, which was abolished.

HOUSE OF COMMONS. One of the constituent houses of the British parliament.

It is composed of the representatives elected by the people, as distinguished from the house of lords, which is composed chiefly of the nobility. It consists of six hundred and seventy members; four hundred and ninety-five from England and Wales, seventy-two from Scotland, and one hundred and three from Ireland. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF CORRECTION. A place for the imprisonment of those who have committed crimes of lesser magnitude.

HOUSE OF ILL-FAME. A house resorted to for the purpose of prostitution and lewdness. State v. Evans, 27 N. C. 603.

A disorderly house need not be a dwelling house. "However lexicographers may define the word 'house,' it is clear the legislature has used it as generic, and has applied it to nearly all kinds of buildings;" State v. Powers, 36 Conn. 77. A flat boat, floating on a river, with a cabin on it, with men and women eating, sleeping, and living on it, may be such; State v. Mullen, 35 Ia. 199; so also a tent, of which it has been said, "such structures are more apt to become disorderly nuisances than houses of brick or stone, owing to the facility with which noises made within could be heard from without;" Killman v. State, 2 Tex. App. 222, 28 Am. Rep. 432. So it has been held of one room of a steamship, though the latter is not an inn; Com. v. Bulman, 118 Mass. 456, 19 Am. Rep. 469. It may be a single room; State v. Garity, 46 N. H. 61.

Keeping a house of ill-fame is an offence at common law; Com. v. Harrington, 3 Pick. (Mass.) 26; 1 Russ. Cr. 322; 1 Bish. Cr. L. 1082. Such a house is a common nuisance; 1 Russ. Cr. 199; one who assists in establishing such is guilty of a misdemeanor; Ross v. Com., 2 B. Monr. (Ky.) 417; so of a lessor with knowledge; Com. v. Harrington, 3 Pick. (Mass.) 26. So the letting of a house to a woman of ill-fame, knowing her to be such, with the intent that it shall be used for purposes of prostitution, is an indictable offence at common law; Com. v. Moore, 11 Cush. (Mass.) 600. And it is no defence that the landlord did not know the character of the tenant; Price v. State, 96 Ala. 1, 11 South. 128. Exemplary damages may be awarded against one permitting such house to be kept upon his premises; Besso v. Southworth, 71 Tex. 765, 10 S. W. 523, 10 Am. St. Rep. 814. If a lodger lets her room for the purpose of indiscriminate prostitution, she is guilty of keeping a house of ill-fame, as much as if she were the proprietor of the whole house; 2 Raym. 1197; State v. Smith, 15 R. I. 24, 22 Atl. 1119. A married woman who lives apart from her husband may be indicted alone, and punished, for keeping a house of ill-fame; Com. v. Lewis, 1 Metc. (Mass.) 151. The house need not be kept for lucre, to constitute the offence; State v. Bailey, 21 N. H. 345; Com. v. Ashley, 2 Gray (Mass.) 357; State v. Nixon, 18 Vt. 70, 46 Am. Dec. 135; See Smith v. State, 6 Gill (Md.) 425; Abrahams v. State, 4 Ia. 541; Ross v. Com. 2 B. Monr. (Ky.) 417.

It is not necessary, in order to sustain a charge of keeping such a house, that the indecency, disorder, or misconduct should be patent from the outside; L. R. 1 C. C. R. 21; and it has been said evidence of its general reputation as a house of ill-fame is admissible; State v. Toombs, 79 Ia. 742, 45 N. W. 300; Graeter v. State, 105 Ind. 271, 4 N. E. 461; People v. Lock Wing, 61 Cal. 380; 20 Ont. 489; *contra*, State v. Foley, 45 N. H. 466; Com. v. Stewart, 1 S. & R. (Pa.) 342; People v. Mauch, 24 How. Pr. (N. Y.) 276; U. S. v. Jourdine, 4 Cra. C. C. 338, Fed. Cas. No. 15,499; State v. Lyon, 39 Ia. 379; State v. Boardman, 64 Me. 523; but evidence of the reputation of the women frequenting the house and the character of their conversation and acts in and about it is admissible; *id.*; Com. v. Kimball, 7 Gray (Mass.) 328. The reputation of the house and its visitors is sufficient proof; King v. State, 17 Fla. 183; A single act of lewdness by defendant will not make it a house of prostitution; People v. Gastro, 75 Mich. 127, 42 N. W. 937; nor is it a crime to let rooms to prostitutes for quiet and decent occupation, or to permit a house to be visited by disreputable people for proper and innocent purposes; State v. Smith, 15 R. I. 24, 22 Atl. 1119. Wharton says: "It has been ruled, though on questionable authority, that the 'ill-fame,' or bad repute, may be proved"; 2 Whart. Cr. L. 10th ed. § 1452; but the doubt cast by this language on the cases referred to is not warranted by the cases, a long list of which, in addition to those above cited, may be found in a note to the section quoted. And indeed the same author in another work says: "On indictments, however, for keeping *houses of ill-fame*, when such is the statutory term describing the offence, the ill-fame or bad reputation of the house may be put in evidence. The bad reputation of the visitors is, in any view, competent evidence. But of a *disorderly house* the reputation is inadmissible, being secondary evidence of disorder, which is susceptible of immediate proof;" Whart. Cr. Ev. 9th ed. § 261. On indictment for keeping a house of ill-fame the reputation of the house as such must be proved; Cadwell v. State, 17 Conn. 467; State v. Blakesley, 38 Conn. 523; but it must be "ill-repute in the vicinity. . . . Rumors at a distance do not make up reputation"; People v. Pinkerton, 79 Mich. 110, 44 N. W. 180. But the reputation where admitted at all must be connected in time with the person who is now the proprietor; Sara v. State, 22 Tex. App. 639, 3 S. W. 339. It is not necessary to prove who frequents the house; it is enough to show that unknown persons were there behaving as charged; 1 Term 748. Contracts of lease of such a house, or to furnish goods for the purposes of the business, if made with knowledge of the use intended, are illegal and void; L. R. 1 Eq. 626. See BAWDY HOUSE; BROTHEL; DISORDERLY HOUSE.

HOUSE OF LORDS. One of the constituent houses of the English parliament. See PARLIAMENT; HIGH COURT OF PARLIAMENT.

HOUSE OF REFUGE. A prison for juvenile delinquents. See 55 Am. Rep. 456.

HOUSE OF REPRESENTATIVES. The name given to the more numerous branch of the federal congress, and of the legislatures of the states of the United States.

The constitution of the United States, art. I. s. 2, § 1, provides that the "house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." No person can be a representative until he shall have attained the age of twenty-five and has been seven years a citizen of the United States, and unless he is at the time of his election an inhabitant of the state in which he is chosen; U. S. Const. art. I. sec. 2, § 2. A representative cannot hold any office under the United States; art. I. s. 6, § 2; nor can any religious test be required of him; art. VI. § 3; nor is any property qualification imposed upon him. Representatives are apportioned (Amend. XIV. sec. 2) among the several

states according to their respective numbers, excluding Indians not taxed; with a proviso, that, if the right to vote for state or U. S. officers is denied to any male inhabitants of a state, of 21 years of age and citizens of the United States, except for participation in rebellion or other crime, the representation in such state shall be proportionately reduced. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; U. S. Const. art. I. sec. 1. A reapportionment among the states is made every tenth year. Under the act of Aug. 8, 1911, the number was increased to 435, including one representative each from Arizona and New Mexico, not at that time admitted as states. The house of representatives has the exclusive right of originating bills for raising revenues, but the senate may concur with amendments, U. S. Const. I. sec. 7; Story on Const. 571. See CONGRESS; QUORUM; SPEAKER; MAJORITY; MONEY BILLS; APPORTIONMENT.

HOUSEBREAKING. The breaking and entering the dwelling house of another by night or by day, with intent to commit some felony within the same, whether such felonious intent is executed or not. Housebreaking by night is burglary. Cl. Cr. L. 237.

This crime is of a local character, and the evidence respecting the place must correspond with the allegation in the indictment. An indictment for housebreaking must allege the ownership of the house; State v. Hupp, 31 W. Va. 355, 6 S. E. 919. See BURGLARY; BREAKING.

HOUSEHOLD. Those who dwell under the same roof and constitute a family. Webst. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family; Woodward v. Murray, 18 Johns. (N. Y.) 402.

Belonging to the house and family; domestic. Webster, Dict.

HOUSEHOLD FURNITURE. By this expression, in wills, all personal chattels will pass that may contribute to the use or convenience of the household or the ornament of the house: as, plate, linen, china, both useful and ornamental, and pictures. 2 Wms. Exec. 1185. But goods or plate in the hands of testator in the way of his trade will not pass, nor books, nor wines; 1 Jarm. Wills 591, 596; 2 Will. Ex. 1017; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329.

But books and wines have been held, on the other hand, to pass in a bequest, where the testator had made them part of the household furniture by his use of them; 1 Robt. 21; see 2 Am. L. Reg. N. S. 489; Gooch v. Gooch, 33 Me. 535; Appeal of Hoopes, 60 Pa. 220, 100 Am. Dec. 562; and so has plate; 29 Beav. 573; bronzes, statuary, pictures; Richardson v. Hall, 124 Mass. 228. See FIXTURES; FURNITURE.

HOUSEHOLD GOODS. In a will this expression will pass everything of a permanent nature (that is, articles of household which are not consumed in their enjoyment) that were used or purchased, or otherwise acquired by the testator, for his house, but not goods in the way of his trade. Plate will pass by this term, but not articles of consumption found in the house, as malt, hops, or victuals, nor guns and pistols, if used in hunting or sport, and not for defence of house. A clock in the house, if not fixed to it, will pass; 1 Jarm. Wills 589; 2 Will. Exec. 464. See Carnagy v. Woodcock, 2 Munf. (Va.) 234, 5 Am. Dec. 470; Gooch v. Gooch, 33 Me. 535.

HOUSEHOLD STUFF. Words sometimes used in a will. Plate will pass under the term; 2 Freem. 64; but not apparel, books, cattle, victuals, and choses in action, which do not fall within the natural meaning of the word, unless there be an intention manifest that they should pass; 15 Ves. 319. Goods, as seven hundred beds in possession of testator for purposes of trade, do not pass under the term "utensils of household stuff;" 2 P. Wms. 302. In general, "household stuff" will pass all articles which may be used for the convenience of the house; Swinb. Wills 484. See FIXTURES; HOUSEHOLD FURNITURE.

HOUSEHOLDER. Master or chief of a family; one who keeps house with his family. Webst. But a man who has absconded from the state, and left his wife and children remaining together as a family, was for their benefit held to be a householder; Woodward v. Murray, 18 Johns. (N. Y.) 402; Bowne v. Witt, 19 Wend. (N. Y.) 475.

A keeper of a tavern or boarding-house, or a master or mistress of a dwelling-house; Hutchinson v. Chamberlin, 11 N. Y. Leg. Obs. 248. A person having and providing for a household. The character is not lost by a temporary cessation from housekeeping; Griffin v. Sutherland, 14 Barb. (N. Y.) 456. For purposes of bail, one who rents and occupies part of a building as an office has been held a householder; Somerset & Worcester Sav. Bank v. Huyck, 33 How. Pr. (N. Y.) 323. See Aaron v. State, 37 Ala. 106; 1 Q. B. 72.

HOUSEKEEPER. One who occupies a house.

A person who, under a lease, occupies every room in the house except one, which is reserved for his landlord, who pays all the taxes, is not a housekeeper; 1 Chitty, Bail. 502. Nor is a person a housekeeper who takes a house which he afterwards underlets to another, whom the landlord refuses to accept as his tenant: in this case

the undertenant paid the taxes, and let to the tenant the first floor of the house, and the rent was paid for the whole house to the tenant, who paid it to the landlord; *id.* note.

In order to make the party a housekeeper, he must be in actual possession of the house; 1 Chitty, Bail. 288; and must occupy a whole house. See 1 B. & C. 178; 3 Petersd. Abr. 103, note; Parmele's Case, 2 Mart. O. S. (La.) 313. See HOUSEHOLDER.

HOWE. **In Old English Law.** A hill. Co. Litt. 5 *b*.

HOY. A small vessel usually rigged as a sloop, and employed in conveying passengers and goods from place to place on the sea coast. Webster.

HOYMAN. The master or captain of a hoy. He is a common carrier. Story, Bailm. 496.

HUDE-GELD. **In Old English Law.** A compensation for an assault (*transgressio illata*) upon a trespassing servant (*servus*). Supposed to be a mistake or misprint in Fleta for *hinegeld*. Fleta, lib. 1, c. 47, § 20. Cowell.

Also, the price of one's skin, or the money paid by a servant to save himself from a whipping. Du Cange.

HUE AND CRY. A pursuit of one who had committed felony, by the highway.

The meaning of hue is said to be *shout*, from the Saxon *huer;* but this word also means *to foot*, and it may be reasonably questioned whether the term may not be *up foot and cry*, in other words, run and cry after the felon. We have a mention of hue and cry as early as Edward I.; and by the Statute of Winchester, 13 Edw. 1., "immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and county to county, by horsemen and footmen, to the seaside. The constable (the person being described, etc.) is to call upon the parishioners to assist him in the pursuit in his precinct; and to give notice to the next constable, who is to do the same as the first, etc. If the county will not answer the bodies of the offenders, the whole hundred shall be answerable for the robberies there committed, etc." A person engaged in the hue and cry apprehending a felon was, on the felon's conviction, entitled to forty pounds, on a certificate of the judge or justice before whom there was conviction, as well as to the felon's horse, furniture, arms, money, and other goods taken with him, subject to the rights of other persons therein; Wood, Inst. 370. See 2 Hale, Pl. Cr. 100.

The person who has lost his property must raise the hue and cry. All who refused to assist were liable. When the owner found his property he could seize and claim it. The person in whose possession it was found must either give it and pay a fine or appear before the court. If the property was found by the following of the hue and cry, he could claim it at once; 2 Holdsw. Hist. E. L. 99.

From the fourteenth to the seventeenth centuries summons and warrants took the place of hue and cry, which practically fell into disuse.

Where one ran from his place of business to join the hue and cry and shot the fugitive, his conviction was reversed; People v. Lillard, 18 Cal. App. 343, 123 Pac. 221.

HUEBRA. **In Spanish Law.** An acre of land, or as much as can be ploughed in a day by two oxen. 2 White, Recop. 49.

HUISSERIUM. A ship used to transport horses. Also termed "*uffer*." Tomlin.

HUISSIER. An usher of the court. An officer who serves process.

In France, an officer of this name performs many of the duties of an English sheriff or constable. In Canada there may be many huissiers in each county, whose acts are independent of each other, while there can be but one sheriff, who is presumed cognizant of the acts of his subordinates. The French huissier certifies his process; the Canadian merely serves what is put into his hands.

HULKA. A hulk, or small vessel. Cowell.

HULKS. A place of punishment for convicts in England, abandoned with the reform in the punishment of convicts which began in England about 1840.

HULL. In a statute requiring ships of a certain size to carry lights, etc., it includes the forecastle deck. The Europe, 190 Fed. 475, 111 C. C. A. 307.

HULLUS. A hill. Cowell; 2 Mon. Angl. 292.

HUNDRED. **In English Law.** A division of a county, which some make to have originally consisted of one hundred hides of land, others of ten *tithings*, or one hundred free families. See Regan v. R. Co., 60 Conn. 124, 22 Atl. 503, 25 Am. St. Rep. 306.

It differed in size in different parts of England; 1 Steph. Com. 122. In many cases, when an offence is committed within a hundred, the inhabitants are liable to make good the damage if they do not produce the offender. See 12 East 244.

This system was probably introduced by Alfred (though mentioned in the Pœnitentiæ of Egbert, where it seems to be the addition of a later age), being borrowed from the continent, where it was known to the Franks, under the name *centena*, in the sixth century. See Charlemagne Capit. l. 3, c. 10; 1 Poll. & Maitl. 543.

"The hundred, and the principle that the hundred community is a judicial body, outlived the storms of the folk-wanderings, the political creations of Clovis, the reforms of Charlemagne, the dissolution of the Frankish Empire, the dissolution of the county system." Sohm, Die Fränkische Reichs- und Gerichtsverfassung I. 541.

It had a court attached to it, called the hundred court, or hundred lagh, like a court baron, except in its larger territorial jurisdiction. It was governed by the hundredary (*hundredarius*); 9 Co. 25. Hundred-penny was a tax collected from the hundred by its lord or by the sheriff. Hundred-fetena signified the dwellers in the hundred; Charta Edg. Reg. Mon. Angl. to. 1, p. 16. In Delaware the subdivisions of a county are called hundreds. They correspond to towns in New

England, townships in Pennsylvania, parishes in Louisiana, and the like.

HUNDRED COURT. An inferior court, long obsolete, and practically abolished by the County Courts Act of 1867, sec. 28, whose jurisdiction extended to the whole territory embraced in a hundred. They were courts not of record; the freeholders were the judges; they were held before the stewart of the manor as register; and they resembled courts baron in all respects except in their territorial jurisdiction; 3 Bla. Com. 34, 35.

There is no doubt that this was the primary court. Pollock, 1 Sel. Essays in Anglo-Amer. Leg. Hist. 91; it was the first well known judicial institution in the history of England. James C. Carter, The Law, etc. See 14 L. Q. R. 292.

HUNDRED-FECTA. The performance of suit and service at the hundred courts.

HUNDRED-FETENA. Dwellers or inhabitants of a hundred.

HUNDRED GEMOTE. An assembly among the Saxons of the freeholders of a hundred.

It met twelve times in the year, originally; though subsequently its meetings became less frequent.

It had an extensive jurisdiction, both civil and criminal, and was the predecessor of the county court and sheriff's tourn, and possessed very similar powers; Spelman, Gloss. *Hundredum;* 1 Reeve, Hist. Eng. Law 7.

HUNDRED LAGH (Sax.). Liability to attend the hundred court. Spelman, Gloss. See Cowell; Blount.

HUNDRED-PENNY. The *hundred-feh*, or tax collected by the sheriff or lord of a hundred.

HUNDRED ROLLS. Rolls embodying the result of investigations made by the commissioners in 1274 as to usurpations of the royal rights. 1 Holdsw. Hist. E. L. 48.

HUNDREDARIUS, HUNDREDARY. The chief officer of a hundred. Cowell.

HUNDREDES EALDOR, or HUNDREDEDES MAN. The presiding officer in the hundred-court. Anc. Inst. Eng.

HUNDREDORS. The inhabitants of a hundred, who, by several statutes, are held to be liable, in the cases therein specified, to make good the loss sustained by persons within the hundred by robbery or other violence, therein also specified. The principal of these statutes are 13 Edw. I. st. 2, c. 1, s. 4; 28 Edw. III. c. 11; 27 Eliz. c. 13; 29 Car. II. c. 7; 8 Geo. II. c. 16; 22 Geo. II. c. 24.

Persons serving on juries, or fit to be empanelled thereon, dwelling within the hundred where the land in question lies. 35 Hen. VIII. c. 6. And some such were necessarily on every panel till the 4 & 5 Anne, c. 16. 4 Steph. Com. 370. One that had the jurisdiction of the hundred. The bailiff of the hundred. Jacob, L. Dict.

HUNG. Sometimes applied to a jury which fails to agree upon a verdict. Anderson, L. Dict.

HUNGER. The desire to eat. Hunger is no excuse for larceny; 1 Hale, Pl. Cr. 54; 4 Bla. Com. 31. As to death from hunger, see DEATH.

HUNTING. The act of pursuing and taking wild animals; the chase.

The chase gives a kind of title by occupancy by which the hunter acquires a right or property in the game which he captures. In the United States the right of hunting was formerly limited only so far as to exclude hunters from committing injuries to private property or to the public—as, by shooting on public roads—or from trespassing. But see GAME LAWS. See FERÆ NATURÆ; OCCUPANCY.

HURDLE. In English Law. A species of sledge, used to draw traitors to execution.

HURST, HYRST, HERST, or HIRST. A wood or grove of trees. Co. Litt. 4 *b*.

HUSBAND AND WIFE. The parties to the marriage relation.

Mutual and Marital Relations. The liabilities, rights and duties of the husband and wife, both with respect to each other, and as to third persons, necessarily depend largely upon the legal conception of the relation existing between them which at the time obtains within the jurisdiction in which they have their domicil. This conception, as will appear *infra*, has greatly changed in modern times. At common law, the identity of the wife was practically merged in that of the husband, while under modern statutes both the right of individual initiative and action is conferred upon married women to a very large extent. Under the Roman law the power of the husband over the wife was even more absolute than under the English common law, and the wife's identity was entirely merged in that of the husband, who could correct and chastise or sell, and even kill her, though the sale was, in fact, of her labor and not of her person; see Sohm, Inst. sec. 93; Bryce, Stud. Hist. & Jur. 787; but his power in Roman law to kill the wife has been doubted; Hunter, Rom. L. 224. Notwithstanding the greater freedom given to married women under modern statutes, as above stated, the separation of the individuality of the husband and wife is rather with respect to property rights than personal relations. As to the latter, the merging of the identity of the wife in that of the husband is still recognized to a large extent. This is well illustrated by a case in which under a statute, a person losing money by

gambling was permitted to sue for it, and if he failed to do so within three months "any other person" might sue for treble the amount; it was held that the identity of the loser's wife was so merged in that of the husband that she was not comprehended in the phrase "any other person"; Spiller v. Close, 110 Me. 302, 86 Atl. 173. The personal and exclusive rights of a husband with regard to his wife's person are invaded by a criminal conversation with her, and such an act, even when the wife consents, is an assault; Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754. Case as well as trespass *vi et armis* will lie; *id.*

Under the common law he was bound to furnish his wife with a home; it was his right to choose and establish the domicil; Hair v. Hair, 10 Rich. Eq. (S. C.) 163; and it was her duty to follow the husband to it; Boyce v. Boyce, 23 N. J. Eq. 337; Colvin v. Reed, 55 Pa. 375; Powell v. Powell, 29 Vt. 148; 4 Ves. Jr. 798; and this control by the husband of the matrimonial domicil goes to such an extent that an ante-nuptial agreement of the husband to live in a certain state is not enforceable; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268; and since the domicil of the husband is the matrimonial domicil, it is unaffected by a change of residence of the wife; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Scholes v. Iron Works Co., 44 Ia. 190; Porterfield v. Augusta, 67 Me. 556.

A wife deserted by her husband may acquire a separate domicil which, in a suit by her for alienation of affections, gives jurisdiction because of diversity of citizenship; Gordon v. Yost, 140 Fed. 79; and see 19 Harv. L. Rev. 381. See DOMICIL.

A wife is entitled to a home suitable with respect to the circumstances and condition of her husband, over which she shall be permitted to preside as mistress, and she does not forfeit her right to maintenance by refusing to live in the home with and under the control of the husband's mother; Brewer v. Brewer, 79 Neb. 726, 113 N. W. 161, 13 L. R. A. (N. S.) 222; or by refusing to live as a boarder in the home of his family; Edwards v. Edwards, 69 N. J. Eq. 522, 61 Atl. 531; Powell v. Powell, 29 Vt. 148; Albee v. Albee, 141 Ill. 550, 31 N. E. 153; and a similar rule was applied to permit the husband to refuse to be subjected to insults from the wife's family; Cutler v. Cutler, 2 Brewst. (Pa.) 511. In addition to furnishing a home the husband is required to supply, to and for his wife, necessaries and conveniences which his fortune and his rank enable him to do, and which her situation require; 1 Hurl. & N. 641; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; but this did not include such luxuries as, according to her fancies, she deemed necessaries; Thill v. Pohlman, 76 Ia. 638, 41 N. W. 385. His obligation to support his wife is based upon the policy of the law and not on his contractual relations; 196 U. S. 68.

A wife has a right to relief against a conveyance or transfer made or contemplated by her husband in fraud of her support and maintenance which is generally recognized by the courts; Fahey v. Fahey, 43 Colo. 354, 96 Pac. 251; 18 L. R. A. (N. S.) 1147, and note with cases.

The husband is not liable for necessaries furnished to a wife after desertion without cause; Board of Sup'rs of Monroe Co. v. Budlong, 51 Barb. (N. Y.) 493; or where the husband has abandoned her for just cause; Sawyer v. Richards, 65 N. H. 185, 23 Atl. 150; Billing v. Pilcher, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *contra*, Button v. Weaver, 87 App. Div. 224, 84 N. Y. Supp. 388; Hatch v. Leonard, 165 N. Y. 435, 59 N. E. 270; 6 Mod. 171; but see 19 Q. B. D. 379. Even where the common law disabilities of the wife, during coverture, have been removed, she cannot, either before or after divorce, maintain an action to recover damages from the husband for his failure to supply her with necessaries or for any other act or failure of duty arising out of the marital relation; Decker v. Kedly, 148 Fed. 681, 79 C. C. A. 305.

He was required to fulfil toward her his marital promise of fidelity, and could, therefore, have no carnal connection with any other woman without a violation of his obligations. She is under obligation to be faithful in chastity to her marriage vow; See DIVORCE; ADULTERY; CRIM. CON.

As he was bound to govern his house properly, he was liable for its misgovernment, and he could be punished for keeping a disorderly house, even where his wife had the principal agency. See BAWDY HOUSE; DISORDERLY HOUSE; HOUSE OF ILL-FAME. He was liable for his wife's debts incurred before coverture; 1 P. Wms. 462, 469; Barnes v. Underwood, 47 N. Y. 351; Cole v. Shurtleff, 41 Vt. 311, 98 Am. Dec. 587; Platner v. Patchin, 19 Wis. 333; Howes v. Marshall, 13 Mass. 384; Bryan v. Doolittle, 38 Ga. 255; Hetrick v. Hetrick, 13 Ind. 44; Morrow v. Whitesides' Ex'r, 10 B. Mon. (Ky.) 411; Hawthorne v. Beckwith, 89 Va. 786, 17 S. E. 241; provided they were recovered from him during their joint lives; *id.*; and this rule applies where the husband was an infant; Roach v. Quick, 9 Wend. (N. Y.) 238; Butler v. Breck, 7 Metc. (Mass.) 164, 39 Am. Dec. 768; Cole v. Seeley, 25 Vt. 220, 60 Am. Dec. 258; and, generally, for such as were contracted by her after coverture, for necessaries, or by his authority, express or implied, and for her funeral expenses; 12 C. B. 344; 1 H. Bla. 90; Cunningham v. Reardon, 98 Mass. 538, 96 Am. Dec. 670; Sears v. Giddey, 41 Mich. 596, 2 N. W. 917, 32 Am. Rep. 168. See DEAD BODY; FUNERAL EXPENSES.

Rights, Duties and Liabilities of the Husband. Where a tradesman attempts to establish a joint liability against the husband and wife and fails to do so, he cannot then be permitted to charge against the husband a separate liability as contracting from his wife as agent; [1903] 1 K. B. 64, where it is clearly held that the mere fact of two persons living together as man and wife does not of itself hold out the wife to the tradesman as authorized to incur debts on the husband's behalf for ordinary household expenses; 6 App. Cas. 24; 15 C. B. (N. S.) 628. The liability of the husband for debts incurred by his wife, depends upon the law of principal and agent, and further, that the relation has been established, it seems to be necessary to determine in each case; 19 L. Q. R. 122. See an article on the "Changes in the Law of Husband and Wife in England," by Alfred Fellows, 22 L. Q. R. 64.

The husband is head of the family and as such had the right to establish himself wherever he pleased, and in this he could not be controlled by his wife; Angier v. Angier, 63 Pa. 450; Hunt v. Hunt, 29 N. J. Eq. 96; Kennedy v. Kennedy, 87 Ill. 250. Although he be a drunkard and the wife support the family, he still continues the head of it and his admission as to the adverse occupation of land concludes her right after his death; Com. v. Wood, 97 Mass. 225; Davels v. Collins, 43 Fed. 31. As head of the family he has the general common-law right to regulate it and exercise general control over it; Lawrence v. Lawrence, 3 Paige (N. Y.) 267; Shaw v. Shaw, 17 Conn. 189; L. R. 2 P. & D. 31; he has also the right to fix the family name; Linton v. Bank, 10 Fed. 894; and to the custody and control of the children. See PARENT AND CHILD.

Though, under a modern statute, the wife may, with her husband's consent, conduct a business on her own account, she may not compete with him against his consent, if he is willing and able to support her; Root v. Root, 164 Mich. 638, 130 N. W. 194, 32 L. R. A. (N. S.) 837, Ann. Cas. 1912B, 740. He was entitled to all her earnings; 2 Man. & G. 172; Russell v. Brooks, 7 Pick. (Mass.) 65; McDavid v. Adams, 77 Ill. 155; Prescott v. Brown, 23 Me. 305, 39 Am. Dec. 623; Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179; Yopst v. Yopst, 51 Ind. 61; Turtle v. Muncy, 2 J. J. Marsh. (Ky.) 82; Armstrong v. Armstrong, 32 Miss. 279; Skillman v. Skillman, 15 N. J. Eq. 478, 82 Am. Dec. 279; Bucher v. Ream, 68 Pa. 421; Reynolds v. Robinson, 64 N. Y. 589; and formerly he might use such gentle force to restrain her of her liberty as might seem necessary; 2 Kent 181; but this is now otherwise; 1 Q. B. D. 671; although it has been held that he may restrain her from committing a crime; Richards v. Richards, 1 Grant, Cas. (Pa.) 389; or from interfering with the exercise of his parental control over his children; Gorman v. State, 42 Tex. 221. He also is said to have had the right moderately to chastise her; 1 Bla. Com. 445; State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78; but this is no longer recognized, and any chastisement inflicted on the wife renders him guilty of assault and battery; Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383; Perry v. Perry, 2 Paige (N. Y.) 501; [1891] 1 Q. B. 671; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Poor v. Poor, 8 N. H. 307, 29 Am. Dec. 664; and excessive cruelty or frequent repetition of slight abuses is in many states a ground of divorce. See DIVORCE; CRUELTY.

He was liable for her torts; Com. v. Munsey, 112 Mass. 287; 5 Car. & P. 484; Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907, 37 Am. St. Rep. 374; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149; Fowler v. Chichester, 26 Ohio St. 9; Ball v. Bennett, 21 Ind. 427, 83 Am. Dec. 356; Hinds v. Jones, 48 Me. 348; Dailey v. Houston, 58 Mo. 361; Carleton v. Haywood, 49 N. H. 314; Jackson v. Kirby, 37 Vt. 448; Brazil v. Moran, 8 Minn. 236 (Gil. 205), 83 Am. Dec. 772; Morgan v. Kennedy, 62 Minn. 348, 64 N. W. 912, 30 L. R. A. 521, 54 Am. St. Rep. 647. But he should not be joined for trespass committed by her in the management of her separate estate; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521.

At common law a wife was liable for her torts; Hall v. White, 27 Conn. 488; but her legal incapacity made it necessary to join her husband as a defendant; 17 C. B. N. S. 744; and as a consequence his property was liable for execution, as originally was his person; 2 Rolle 53; but this liability ceased at the death of the wife because it arose solely because of her incapacity; see 21 Harv. L. Rev. 631.

Where a former act provided that, where the husband and wife were jointly sued for the tort of the wife, execution should first be levied against the wife's property, and a later statute repealed it, and provided that the wife might be sued as if she were sole, it was held that the statute abolished, by implication, the common-law liability of the husband for the torts of his wife; Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009.

The husband's liabilities for his wife's torts is not removed by the modern married women's acts; Kellar v. James, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003, and note, which concludes that the weight of authority is that the statutes do abrogate the liability, so far as concerns torts connected with the wife's separate property; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521; and the common law liability of the husband for a tort committed out of his presence is held to be repealed by implication by the married women's acts; Schuler v. Henry, 42 Colo. 367, 94 Pac. 360, 14 L. R. A. (N. S.) 1009. The common-law

liability of the husband for her wrongs still obtains in England and when he and she are sued for her libel, he cannot plead payment into court and she deny liability; [1904] 1 K. B. 292.

The husband was also liable for her crimes, if committed in his presence, except treason and murder where they were jointly liable; Davis v. State, 15 Ohio 72, 45 Am. Dec. 559; Bibb v. State, 94 Ala. 31, 10 South. 506, 33 Am. St. Rep. 88; State v. Kelly, 74 Ia. 589, 38 N. W. 503; Com. v. Dewitt, 10 Mass. 154; Mangam v. Peck, 111 N. Y. 401, 18 N. E. 617. The liability of the husband for crimes grew out of the original idea of the subjection and dependence of the wife. It was a rule of the common law that a married woman who committed a criminal offence in the presence of her husband is presumed to act under his coercion and is therefore exempt from responsibility; unless it is of a very aggravated character, she is presumed to act by his coercion, and, unless the contrary is proved, she is irresponsible. Under other circumstances she is liable, criminally, as if she were a *feme sole*. See COERCION; DURESS; WILL.

A husband is not entitled to alimony. The latter is based upon the common-law requirement, to which the husband was subject, of providing his wife with necessaries, and there is no reciprocal obligation on her; Tootle, Hosea & Co. v. Coldwell, 30 Kan. 132, 1 Pac. 329. In some states there are statutes providing that alimony, or an allowance out of the wife's estate, in the nature of alimony, may be granted the husband. In Kansas alimony was denied the husband because no authority could be found to authorize it; Tootle, Hosea & Co. v. Coldwell, 30 Kan. 132, 1 Pac. 329; Greene v. Greene, 49 Neb. 546, 68 N. W. 947, 34 L. R. A. 110, 59 Am. St. Rep. 560. See ALIMONY; 55 Alb. L. J. 15.

THE POSITION AND RIGHTS OF THE WIFE. *At Common Law.* Her property rights were put by the marriage very much under the control of the husband. He could manage his own affairs in his own way, buy and sell all kinds of personal property, without her control, and he might buy any real estate he might deem proper; but, as the wife acquired a right in the latter, he could not sell it, discharged of her dower, except by her consent, expressed in the manner prescribed by the laws of the state where such lands lay. Her *personal* property in possession was vested in him, and he could dispose of it as if he had acquired it; this arose from the principle that they were considered one person in law; 2 Bla. Com. 433; Jaffrey v. McGough, 83 Ala. 202, 3 South. 594; and he was entitled to all her property in action, provided he reduced it to possession during her life; 2 Bla. Com. 434. If the wife died before the claims were collected, the husband received them as her administrator, in which case, after payment of her debts, the surplus belonged to him absolutely. He was also entitled to her *chattels real*, but these vested in him not absolutely, but *sub modo:* as, in the case of a lease for years, the husband was entitled to receive the rents and profits of it, and could, if he pleased, sell, surrender, or dispose of it during the coverture, and it was liable to be taken in execution for his debts; and, if he survived her, it was to all intents and purposes his own. In case his wife survived him, it was considered as if it had never been transferred from her, and it belonged to her alone. In his wife's freehold estate he had a life estate during the joint lives of himself and wife; and when he had a child by her who could inherit, he had an estate by the curtesy. See CURTESY. She was entitled, on his death, to dower in all the real estate of which he was seised at any time during coverture. See DOWER.

At common law a married woman could not bind herself by contract, express or implied, by parol or under seal, even for necessaries, nor, though living apart from her husband, could she make a binding contract except for necessaries or for the benefit of her separate estate; Farrand v. Beshoar, 9 Col. 291, 12 Pac. 196; and a contract made by her being invalid would be no consideration for a subsequent promise during widowhood; Condon v. Barr, 49 N. J. L. 53, 6 Atl. 614. Her husband might be bound by her acts as his agent, duly authorized; 4 Man. & G. 253; but where payment to her was pleaded, her authority must be stated; 2 *id.* 173. By her own act her authority could not be enlarged; Bank of America v. Banks, 101 U. S. 240, 25 L. Ed. 850; and she could not execute a conveyance, even in release of dower, otherwise than by joining with her husband in a deed to a third person; Tompkins v. Fonda, 4 Paige (N. Y.) 448. No promise of a wife could at common law be enforced against her unless she had a separate estate, and then not by a personal decree but only by treating it as an appointment out of such estate; Condon v. Barr, 49 N. J. L. 53, 6 Atl. 614; and then only for her or its benefit; Stowell & Heinz v. Grider, 48 Ark. 220, 2 S. W. 786; and no implied promise could be raised against her; Southworth v. Kimball, 58 Vt. 337, 2 Atl. 120.

In the absence of an enabling act the contracts of a married woman are cognizable only in equity, and cannot be enforced at law, except as affected by the so-called Married Women's Acts; Mueller v. Wiese, 95 Wis. 381, 70 N. W. 485. The right to contract conferred by these acts has been held to give her not a general contractual capacity, but only ability to make such contracts as have direct relation to the improvement of her separate property; Reed v. Buys, 44 Mich. 80, 6 N. W. 111; and her property must not merely be incidentally benefited, but there must be a direct relation between it

and the contract; Russel v. Bank, 39 Mich. 671, 33 Am. Rep. 444. Such is the general construction of such statutes destroying the common-law rights of the husband in his wife's property; Canal Bank v. Partee, 99 U. S. 325, 25 L. Ed. 390; Huyler's Ex'rs v. Atwood, 26 N. J. Eq. 504; State v. Dredden, 1 Marvel (Del.) 522, 41 Atl. 925; that, as a general rule, her contracts are binding when necessary or convenient to the use and enjoyment of her separate estate; Todd v. Lee, 15 Wis. 365, 380.

The power of a married woman to make a valid contract, though she has no separate estate, was upheld in Harrington v. Lowe, 73 Kan. 11, 84 Pac. 570, 4 L. R. A. (N. S.) 547, and note, in which the cases are collected and the conclusion reached that the weight of authority is that statutes which confer the right on married women to contract with respect to their separate estates, do not confer the right to contract generally. A paper indorsed to enable her husband to raise money does not charge her property; Levi v. Earl, 30 Ohio St. 147, where there is an exhaustive examination of the subject. For extreme cases, see Deering v. Boyle, 8 Kan. 525, 12 Am. Rep. 480; Wicks v. Mitchell, 9 Kan. 80; Metropolitan Bank of St. Louis v. Taylor, 62 Mo. 338. See a full discussion of the effect of these statutes conferring contractual power upon a married woman; Stew. H. & W. §§ 369, 378 *a*.

Where a married woman performs her part of a contract, she may enforce performance against the other party, though she could not have been compelled to perform her part of the agreement; Sanguinett v. Webster, 127 Mo. 32, 29 S. W. 698; and if she made a contract, not enforceable against her, to purchase real estate and fail to pay for the same, it may be sold for the unpaid purchase money; Blanz v. Bain, 95 Tenn. 87, 31 S. W. 159. In some states provision is made for a conveyance of land by a married woman, abandoned by her husband, under permission of court or otherwise; and under such statute it has been held that, having conveyed without compliance with the statute, she may not rescind the deed long afterwards, on account of coverture, without returning the consideration; Gray v. Shaw, 30 S. W. 402, 17 Ky. L. Rep. 61.

The common-law disabilities of a married woman could not be avoided by any false representations with respect to her capacity, and no estoppel would be raised thereby; Keen v. Coleman, 39 Pa. 299, 80 Am. Dec. 524; Bodine v. Killeen, 53 N. Y. 96; Lowell v. Daniels, 2 Gray (Mass.) 161, 61 Am. Dec. 448; but in the management of her separate property she would be answerable for the frauds of her agent, within the scope of his agency, though she were ignorant of it; Baum v. Muller, 47 N. Y. 577. The disabilities of a married woman are her personal privilege, and must be pleaded; Hubert v. Fera, 99 Mass. 199, 96 Am. Dec. 732. See COVERTURE. And no one but the husband can object to a suit against him by the wife, so that a judgment against a firm of which he is a member is good if he do not himself raise the defence; Freiler v. Kear, 126 Pa. 470, 17 Atl. 668, 906, 3 L. R. A. 839. Her common-law disability is not removed by the so-called married woman's acts which operate only to give her such capacity as is expressed in them; McFerran v. Kinney, 22 Mo. App. 554; Norton v. Meader, 4 Sawy. 604, Fed. Cas. No. 10,351; Canal Bank v. Partee, 99 U. S. 325, 25 L. Ed. 390; Stephenson v. Osborne, 41 Miss. 125, 90 Am. Dec. 358; Avery v. Doane, 1 Biss. 64, Fed. Cas. No. 673; and where such statutes authorize her to contract as though single, she is bound by estoppel arising from her misrepresentation or concealment; Towles v. Fisher, 77 N. C. 437; Godfrey v. Thornton, 46 Wis. 677, 1 N. W. 362; or by the acts of her husband; Hockett v. Bailey, 86 Ill. 74; Upshaw v. Gibson, 53 Miss. 344. Where such estoppel operates, it is only in respect to her personal estate; Wood v. Terry, 30 Ark. 393; but the weight of authority is against sustaining estoppel against her; 2 L. R. A. 345, n., where are collected cases of common-law disabilities of a married woman and estoppel against her. The rigor of the common-law disabilities of a married woman and the merger of her individual and property rights in her husband gave rise to certain equitable remedies against her husband, intended to secure at least a portion of her property to the use of herself and her children. As to the character and extent of these rights, see *Wife's Equity, subtit. infra.*

As a general rule, a contract made between parties who subsequently intermarry is, both at law and in equity, extinguished by the marriage; 1 Bla. Com. 442; but when articles are entered into or a settlement is executed whereby the wife is to have a certain provision in lieu of her fortune, the husband becomes virtually a purchaser of her fortune, and she becomes entitled to her provision, though there may be no intervention of trustees, and equity will enforce the contract; 2 Ves. Sen. 675; Husbands, on Married Women 125; MARRIAGE SETTLEMENT.

At common law a married woman was personally liable jointly with her husband for her torts unless committed under the coercion of her husband; Appeal of Franklin's Adm'r, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583; Southworth v. Kimball, 58 Vt. 337, 2 Atl. 120. The death of the wife terminated the liability of the husband, but if the husband died the wife might be sued alone; Appeal of Franklin's Adm'r, 115 Pa. 534, 6 Atl. 70, 2 Am. St. Rep. 583.

It has been remarked that "the main idea which governs the law of husband and wife is not that of a 'unity of person,' but that

of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property;" 1 Poll. & Maitl. 468. The difficulties arising from the common-law doctrine of a married woman's incapacity, and her practical non-existence as a legal person, resulted in a qualified recognition by courts of equity of the individuality and existence of a married woman as such. This, however, was only granted in cases where she had what was termed a separate estate. This gave rise to two great doctrines of the law, the separate use and restraint on anticipation.

In Equity. The latter was an invention of the court of equity and an exception to the general law of inalienability of property. It was justified as the most satisfactory method of giving property to a married woman so that it should not be practically given to her husband, to prevent which the "condition was allowed to be imposed restraining her from anticipating her income and thus fettering the free alienation of her property;" Jessel, M. R., in 11 Ch. D. 644. By the Conveyancing Act, 1881, the court was authorized, where it appeared to be for the benefit of a married woman, by judgment or order with her consent, to bind her interest in any property, notwithstanding that she was restrained from anticipation; 44 & 45 Vict. c. 41, §§ 39, 40. This was held to be not "a general power of removing the restraint upon anticipation, but only a power to make binding a particular disposition of property by a married woman if it be for her benefit;" 52 L. J. Ch. 928. See as to this doctrine, Brett, L. Cas. Mod. Eq. 104. The separate use was also originally a creation of the court of chancery, but in recent years it has been adopted in statutes with the effect of abolishing the common-law marital rights of the husband, to the same extent that they were avoided by a trust, in equity, to her sole and separate use.

The separate property of a *feme covert* as to which equity considers her as a *feme sole*, is that property alone which is settled to her sole and separate use by some will, writing, or deed of settlement with a power expressly or impliedly given her of managing it without the concurrence of her husband; Hebron v. Colchester, 5 Day (Conn.) 174. This estate may be created by any form of settlement, written or oral (as to personalty), by deed or will, to her directly or in trust for her; or, it may be by *antenuptial agreement* (*q. v.*). It may be settled by the husband; Williams v. Williams, 68 Ala. 405; herself; L. R. 16 Eq. 29; or a stranger; Charles v. Coker, 2 S. C. 122, 129, 133. The one essential ingredient required for its creation is a sufficient indication of an intention to bar or exclude the marital rights; Vail v. Vail, 49 Conn. 52; Buck v. Wroten, 24 Gratt. (Va.) 250; of the husband contemplated by the settlement; 1 Beav. 1. No particular form of words is required, but any which sufficiently indicate this intention will be sufficient. For a great variety of phrases which have been judicially passed upon as sufficient or insufficient, see Stew. H. & W. § 200. Where a wife purchases land in her own name and with her own money it will be presumed to be her separate property; Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677.

To an ordinary equitable estate of a married woman the marital rights of the husband attach; Banks v. Green, 35 Ark. 84, 88; but the effort to mitigate the severity of the common-law doctrine gave rise to the equitable creations of the *wife's equity* (*q. v.*) and the *equitable separate estate;* 1 Bro. C. C. 16; White v. Gouldin's Ex'rs, 27 Gratt. (Va.) 491, 507; 1 L. Cas. Eq. 481; 2 Perry, Trusts, § 625.

The Wife's Equity. What is termed the wife's equity is her right, whenever the husband cannot obtain possession of her estate without the aid of a court of equity, to have settled upon her and her children out of it a suitable provision, for herself and her children; Shelf. Marr. & D. 605.

In consideration of the obligation assumed by the contract of marriage, the husband acquires an interest in the property of his wife which is enforceable at common law by an action, and therefore he may alien the property to which he is so entitled, *jure mariti*, or in case of bankruptcy or insolvency it would vest in his assignee, and the wife and children be left destitute, whatever her fortune might be. It was to remedy this evil that the courts of equity devised a method of making provision for the wife, known as the *wife's equity*. The principle upon which courts of equity act is, that he who seeks the aid of equity must do equity; and that will be withheld until an adequate settlement has been made; 1 P. Wms. 459.

Where the property is equitable and not recoverable at law, it cannot be obtained without making a settlement upon a wife and children, if one be required by her; 2 P. Wms. 639; and where, though the property be legal in its nature, it becomes from collateral circumstances the subject of a suit in equity, the wife's right to a settlement will attach; 5 My. & C. 97. See Tucker v. Andrews, 13 Me. 124; Rees v. Waters, 9 Watts (Pa.) 90; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464; Helms v. Franciscus, 2 Bland, Ch. (Md.) 545, 20 Am. Dec. 402.

The wife's equity to a settlement is binding not only upon the husband, but upon his assignee, under the bankrupt or insolvent laws; 3 Ves. 607; Haviland v. Myers, 6 Johns. Ch. (N. Y.) 25; Gassett v. Grout, 4 Metc. (Mass.) 486; Duvall v. Bank, 4 Gill & J. (Md.) 283, 23 Am. Dec. 558; Elliott v. Waring, 5 T. B. Monr. (Ky.) 338, 17 Am. Dec. 69; Andrews v. Jones, 10 Ala. 401;

Bell v. Bell, 1 Ga. 637. And even where the husband assigned the wife's equitable right for a valuable consideration, the assignee was considered liable; 4 Ves. 19. When the property of the husband is settled upon his wife and children, the settlement will be valid against subsequent creditors if at the time of the settlement being made he was not indebted; Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; Picquet v. Swan, 4 Mas. 443, Fed. Cas. No. 11,133; Wells v. Treadwell, 28 Miss. 717; Riley v. Riley, 25 Conn. 154; but if he was then indebted it will be void as to the creditors existing at the time of the settlement; Reade v. Livingston, 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; Albert v. Winn, 5 Md. 68; Kinnard v. Daniel, 13 B. Monr. (Ky.) 496; Sexton v. Wheaton, 8 Wheat. (U. S.) 229, 5 L. Ed. 603; unless in cases where the husband received a fair consideration in value for the thing settled, so as to repel the presumption of fraud; 10 Ves. 139; Hale v. Plummer, 6 Ind. 121; Andrews v. Andrews, 28 Ala. 432; Bullard v. Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292.

The general rule is that one-half of the wife's property shall be settled upon her; 2 Atk. 423. But it is in the discretion of the court to give her an adequate settlement for herself and children; Kenny v. Udall, 5 Johns. Ch. (N. Y.) 464; Ex parte Beresford, 1 Des. (S. C.) 263; Helms v. Franciscus, 2 Bland, Ch. (Md.) 546, 20 Am. Dec. 402; Bowling v. Winslow's Adm'r, 5 B. Monr. (Ky.) 31; Howard v. Napier, 3 Ga. 193; 9 S. & S. 597.

Whenever the wife insists upon her equity, the right will be extended to her children; but the right is strictly personal to the wife, and her children cannot insist upon it after her death; 1 J. & W. 472; Howard v. Moffatt, 2 Johns. Ch. (N. Y.) 206; Andrews v. Jones, 10 Ala. 401.

The wife's equity will be barred by an adequate settlement having been made upon her; 2 Ves. Ch. 675; by living in adultery apart from her husband; 4 Ves. Ch. 146; but a female ward of court, married without its consent, will not be barred although she should be living in adultery; 1 Ves. & B. Ch. 302.

In Lady Elibank v. Montolieu, 1 Wh. & Tud. L. Cas. 486, on a bill of a married woman for a distributive share as next of kin, a decree was made for a settlement on her and her children; and Lord Loughborough treated it as a case of equity to a settlement.

Her Separate Estate. In England a married woman's capacity to dispose of property of whatever kind settled to her separate use, by deed or will, is absolute, unless she be expressly restrained by the settlement; and, generally speaking, it is bound by her contracts, written or verbal; 3 Bro. C. C. 347. But it was contended by Chancellor Kent that this was not always so held, and that the English cases were too contradictory to afford a safe guide, and he held (practically the converse of the English rule) that she could exercise only such power, to be exercised in such manner as was prescribed by the instrument creating the estate; Trustees of Methodist Episcopal Church v. Jaques, 3 Johns. Ch. (N. Y.) 77. But this decision was reversed; Jaques v. Trustees, 17 Johns. (N. Y.) 548, 8 Am. Dec. 447, in which the English doctrine substantially was adopted.

The course of subsequent New York decisions is neither clear nor consistent, but may, probably, on the whole, be considered as following the last cited case with a qualification that the married woman is not to be charged unless her intention to charge her separate estate is sufficiently indicated in the contract or implied from some benefit to be derived by her separate estate from the consideration. See Yale v. Dederer, 18 N. Y. 265, 72 Am. Dec. 503; *id.*, 22 N. Y. 451, 78 Am. Dec. 216; Manhattan Brass & Mfg. Co. v. Thompson, 58 N. Y. 80; Second Nat. Bank v. Miller, 63 N. Y. 639; Conlin v. Cantrell, 64 N. Y. 217; Yale v. Dederer, 68 N. Y. 329.

Most of the states adopt, in the main, the English doctrine of power to charge the separate estate, but many jurisdictions follow what is known as the American doctrine—that a married woman, as to her separate estate, is *feme sole* in so far as the instrument has expressly conferred on her the power to act as such, and that she is confined to the particular mode of disposition prescribed in the instrument, if any, and the estate is not liable for her contracts, bonds, and notes, unless the instrument expressly declares that it shall be charged. It was first established in South Carolina and adhered to as above stated, by Chancellor Kent. See Lancaster v. Dolan, 1 Rawle (Pa.) 231, 18 Am. Dec. 625; Walker v. Coover, 65 Pa. 430; Metcalf v. Cook, 2 R. I. 355; Litton v. Baldwin, 8 Humph. (Tenn.) 209, 47 Am. Dec. 605; Pippen v. Wesson, 74 N. C. 442; Armstrong v. Stovall, 26 Miss. 275. See Kelly, Cont. M. W. 259, n. 5, and a critical annotation by the same author; 23 Am. L. Reg. N. S. 321; Stew. H. & W. § 203.

An instrument creating such an estate is excepted from the rule which makes void clauses in restraint of alienation, provided only that the rule against perpetuities is not violated; *id.* § 204.

Under Statutes. Superimposed upon this complex combination of common-law disability and equitable protection for separate estate, there is now, both in England and in the United States, a mass of statute law, as to most of which a classification to be relied on is impossible. The course of legislation in the United States has been such as almost entirely to remove the common-law disabilities of a married woman, and to secure to her the management and control of her own property with power to contract concerning

it, and also largely to increase both her individual rights and liabilities. It has been said that the protection and the disability of marriage have been linked together, and the wife when deprived of the one has been released from the other; Cullers v. James, 66 Tex. 494, 1 S. W. 314; but this broad statement does not seem to express the rule of construction generally adopted; see *supra*. The first tendency of the married woman's acts was to emancipate her property both from control and from any liability for obligations naturally springing from the marriage relation. In this country, however, there has been lately a strong current in the direction of creating and enforcing liability for such debts against both husband and wife.

In all the states and the District of Columbia the real property of a married woman remains her separate property, generally free from the control or interference of her husband or liability for his debts; and in most of the states her personal property is equally so.

As to the statutory liability of a married woman and her property for necessaries and family expenses and also for her own torts, see *infra*. The separate property of a married woman is not liable in most states for the debts of the husband, nor bound by judgment or execution against him.

English legislation has been much more according to a definite plan, commencing with 20 & 21 Vict. c. 85, which enabled a married woman deserted by or judicially separated from her husband to obtain orders of protection against his creditors. The acts of 1870, and 1874 secured to married women several specific property rights, but these acts were repealed and supplied by the act of 1882, under which a married woman could acquire and hold separate property in her own name, and sue and be sued severally, the husband, however, remaining liable for her torts. The purpose of this act was thus stated by Wills, J., to be, not destructive of the "doctrine of the common law by which there was what has been called a unity of person between husband and wife, but to confer in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another." 14 Q. B. Div. 835. This act is still the married woman's property law of England. The act of 56 & 57 Vict. c. 63, provided that contracts of married women should be deemed as being entered into with respect to and binding her separate property then or thereafter acquired, being limited in its scope. The act of 7 Edw. VII, c. 18, made no general change, but authorized dispositions of trust estates by married women, as if sole, and made provision as to the settlement of married women's property.

For provisions of the English statute in detail, see an interesting comparison between English and American legislation on the subject, 22 Am. L. Reg. N. S. 761; Brett, L. Cas. Mod. Eq. 96; 1 Brett, Com. ch. 18, at the end of which may be found a list of the English statutes to that date; 7 So. L. Rev. 68; 11 Cent. L. J. 41; 27 *id.* 279.

While the legislation of England and the United States with respect to married women has been mainly in the direction of giving to her property interests such a legal status as had been secured to her in equity in spite of her common law footing, there has, at the same time, been secured to her in both countries, by judicial action, emancipation of the person to the extent of practically abrogating the common-law rule on that subject.

The effect of this modern legislation is to create what has been termed a statutory separate estate, which is not to be confused with the equitable separate estate; Stew. H. & W. § 217; the two may exist side by side; Musson v. Trigg, 51 Miss. 172. The word property in these acts has been held to include money; Mitchell v. Mitchell, 35 Miss. 108; choses in action *ex contractu;* Vreeland v. Schoonmaker, 16 N. J. Eq. 512; Williams v. Lord, 75 Va. 390; and *ex delicto;* Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Leonard v. Pope, 27 Mich. 145; Laughlin v. Eaton, 54 Me. 156; Gibson v. Gibson, 43 Wis. 23, 28 Am. Rep. 527; corporeal and incorporeal interests; Smilie v. Siler's Adm'r, 35 Ala. 88; animate and inanimate; Gans v. Williams, 62 Ala. 41 (but not mere contingent interest; L. R. 6 Eq. 210); a mining interest in a lead; Cheuvete v. Mason, 4 G. Greene (Ia.) 231. In England married woman's property does not include a general power of appointment under a deed or will of which she is donee; 17 Q. B. Div. 521. Most of the acts define the mode of acquisition of property which shall be affected by it, and such specification excludes all others; 2 Bish. M. W. § 17. The most common methods of acquisition are, purchase, gift or grant, devise, bequest, descent, distribution, exchange, increase, trade or service, contract, and tort; Stew. H. & W. §§ 223–230, where the cases, as to each, are collected.

Earnings of the wife made by her in carrying on a business, such as keeping a boarding house, and used to pay for stock in a building association, belong to her, and the stock is her separate estate; Wenger v. Wenger, 34 Pa. Co. Ct. 93.

Where a husband employs his wife and pays her wages otherwise payable to some other employé, she cannot be deprived of the money or of her property in which she has invested it; Woodruff v. Clark & Apgar, 42 N. J. L. 198; Savage v. O'Neil, 44 N. Y. 298; Henderson v. Warmack, 27 Miss. 830.

A grant or devise to a married woman and her husband as tenants by entireties, is not

abrogated by the married women's property acts even where they provide that she shall hold real estate as if sole; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64; Phelps v. Simons, 159 Mass. 415, 34 N. E. 657, 38 Am. St. Rep. 430; Chambers v. Chambers, 92 Tenn. 707, 23 S. W. 67; Noblitt v. Beebe, 23 Or. 4, 35 Pac. 248; Georgia, C. & N. Ry. Co. v. Scott, 38 S. C. 34, 16 S. E. 185, 839; Appeal of Robinson, 88 Me. 17, 33 Atl. 652, 30 L. R. A. 331, 51 Am. St. Rep. 367; *contra*, Clark v. Clark, 56 N. H. 105; but a married woman may, under those acts, without joining her husband, sue for and recover land conveyed to her and him in fee; Bains v. Bullock, 129 Mo. 117, 31 S. W. 342; and the husband is not exclusively entitled to the use and benefit of lands held in entirety or as joint tenant with his wife; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762. In England, since the married women's property act, a conveyance to both creates the same estate as if they were not married; L. R. 39 Ch. D. 148; 1 Brett, Com. 62. In some states a conveyance to a married woman and her husband is unaffected by these statutes, either because tenancy by entireties and joint tenancy have not been adopted; Whittlesey v. Fuller, 11 Conn. 337; or not recognized by the courts; Wilson v. Fleming, 13 Ohio 68; Hoffman v. Stigers, 28 Ia. 302; or are abolished by statute; Oglesby v. Bingham, 69 Miss. 795, 13 South. 852. Where a married woman was a tenant by entirety it has been held that a divorce changed it into a tenancy in common; Enyeart v. Kepler, 118 Ind. 36, 20 N. E. 539, 10 Am. St. Rep. 94; Kirkwood v. Domnau, 80 Tex. 645, 16 S. W. 428, 26 Am. St. Rep. 770; Harrer v. Wallner, 80 Ill. 197; Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805, 36 Am. St. Rep. 120; Russell v. Russell, 122 Mo. 235, 26 S. W. 677, 43 Am. St. Rep. 581. See In re Bramberry's Estate, 156 Pa. 628, 27 Atl. 405, 22 L. R. A. 594, 36 Am. St. Rep. 64; Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762.

In most of the states the deed of a married woman is ineffectual to pass a title, unless when her husband is a party; and generally a separate acknowledgment and private examination of the wife is required; and if signed by her alone without her husband it is absolutely void; Overseers of Poor v. Overseers of the Poor, 112 Pa. 99, 3 Atl. 862; Franklin v. Mill Co., 88 Ala. 318, 6 South. 685; and so by statute is a mortgage; Cook v. Walling, 117 Ind. 9, 19 N. E. 532, 2 L. R. A. 769, 10 Am. St. Rep. 17. The deed of a married woman without the separate examination will pass neither her interest nor that of the husband; Rust v. Goff, 94 Mo. 511, 7 S. W. 418. Where her acknowledgment is not made in compliance with the statute she is presumed to have acted under the coercion of her husband; Hepburn v. Dubois, 12 Pet. (U. S.) 345, 9 L. Ed. 1111; Rust v. Goff, 94 Mo. 511, 7 S. W. 418.

In Indiana the deed of a married woman to which her husband is not joined gives color of title; Wright v. Kleyla, 104 Ind. 223, 4 N. E. 16. If the deed of a married woman be void by reason of a defective acknowledgment, it may be ratified by her after her husband's death; Jourdan v. Jourdan, 9 S. & R. (Pa.) 268, 11 Am. Dec. 724.

A deed purporting to be an absolute conveyance of lands of a married woman will not be construed as a release of dower because her husband's name appears first therein; Lake Erie & W. R. Co. v. Whitham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. Rep. 355. The common-law disability, with respect to conveyances of real property, still exists in so far as it has not been swept away by express legislative enactments; Dean v. Ry. Co., 119 N. Y. 540, 23 N. E. 1054. Where a married woman, at the time an infant, had executed a note and a mortgage intended to convey her separate estate, the mortgage being void, because not executed in accordance with the statutes, she was not estopped to assert the invalidity of the mortgage, by representations at the time of its execution that she was twenty-one years of age; Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 323, 25 S. E. 975.

Mere silence by a married woman who knows her conveyance to be void does not estop her from asserting it; Coats v. Gordon, 144 Ind. 19, 41 N. E. 1044, 42 N. E. 1025; but in that state it is held that by statute a married woman may be bound by an estoppel *in pais;* Le Coil v. Armstrong-Landon-Hunt Co., 140 Ind. 256, 39 N. E. 922. The wife joining her husband in conveyances of his land is not bound by his covenants in the deed and is not estopped to assert a paramount lien in favor of herself; Curry v. Mtg. Co., 107 Ala. 429, 18 South. 328, 54 Am. St. Rep. 105.

Where the husband leased his wife's lands for a year with a privilege of four years more, the receipt of a share of the farm products reserved did not estop her from asserting that the lease was void, because not assented to in writing by her; Williams v. Mershon, 57 N. J. L. 242, 30 Atl. 619.

Where a married woman is unable to convey her separate estate without a deed in which her husband is joined, she cannot make a valid deed to him of such property; Trawick v. Davis, 85 Ala. 342, 5 South. 83.

Such was the case at common law and in like manner a deed from the husband directly to the wife was a nullity; Coates v. Gerlach, 44 Pa. 43; Fletcher v. Mansur, 5 Ind. 267; and a husband and wife could not separate their interests in common property by a

partition deed; Frissell v. Rozier, 19 Mo. 448. There could not be a gift of chattels *inter vivos* from the husband to the wife; 15 Beav. 529; but later this doctrine was modified in England and it was held that it was merely a question of evidence and that the husband might be a trustee for his wife; 34 Beav. 623; and after the wife's separate personality began to be recognized by statute, the courts held gifts to her from the husband effectual; Dean v. Ry. Co., 119 N. Y. 540, 23 N. E. 1054; Cottrell v. Spiess, 23 Mo. App. 35. In equity both deeds; Appeal of Bedell, 87 Pa. 510; and gifts; Reed v. Reed, 52 N. Y. 651; 9 Ont. App. Rep. 374; Fourth Ecclesiastical Soc. in Middletown v. Mather, 15 Conn. 587; were upheld wherever the rights of creditors were not affected; see *supra*. As to the effect of gifts and conveyances by the husband to the wife, see Barnum v. Le Master, 110 Tenn. 638, 75 S. W. 1045, 69 L. R. A. 353, and note, where the cases are collected at large. That case held that marriage is a valuable consideration and that the conveyance of land to the wife was good.

A gift of personal property from the husband to the wife must be clearly proved, even under modern statutes, and the evidence must be clear of his intention to divest himself of all ownership and control of the property given, and the common-law rule that ornaments and wearing apparel given to the wife by the husband during coverture remained his personal property was held not to be abrogated by the married woman's act or any statute; Farrow v. Farrow, 72 N. J. Eq. 421, 65 Atl. 1009, 11 L. R. A. (N. S.) 389, 129 Am. St. Rep. 714, 16 Ann. Cas. 507; Tllexan v. Wilson, 43 Me. 186; but in other states the right of the wife to her paraphernalia is treated as absolute; State v. Pitts, 12 S. C. 180, 32 Am. Rep. 508; McCormick v. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6.

Gifts by a wife to a husband are to be closely scrutinized, but if fairly made and free from coercion and undue influence they ought to be sustained; Farmer's Ex'r v. Farmer, 39 N. J. Eq. 216. The evidence must be clear and unequivocal, and the intention free from doubt; Brooks v. Fowler, 82 Ga. 329, 9 S. E. 1089; Johnson v. Jouchert, 124 Ind. 105, 24 N. E. 580, 8 L. R. A. 795. A conveyance by the husband directly to the wife creates in her an equitable estate, but is inoperative to pass a legal title; and he is left a trustee for her; Snediker v. Boylesston, 83 Ala. 408, 4 South. 33; Smith v. Seiberling, 35 Fed. 677; Miller v. Miller, 17 Or. 423, 21 Pac. 938. He may settle property upon his wife if it does not impair the claims of existing creditors and is not intended as a cover for future schemes of fraud; Bean v. Patterson, 122 U. S. 496, 7 Sup. Ct. 1298, 30 L. Ed. 1126.

A voluntary gift of personal property by a husband to another, although depriving his wife of her right to a share therein, cannot be set aside as a fraud against her; Hall v. Hall, 109 Va. 117, 63 S. E. 420, 21 L. R. A. (N. S.) 533; Robertson v. Robertson, 147 Ala. 311, 40 South. 104, 3 L. R. A. (N. S.) 774, and note, 10 Ann. Cas. 1051.

Threats of prosecution and imprisonment against her husband constitute duress sufficient to make void the deed or contract of a married woman; Central Bank of Frederick v. Copeland, 18 Md. 305, 81 Am. Dec. 597; First Nat. Bank of Nevada v. Bryan, 62 Ia. 42, 17 N. W. 165; Miller v. Lumber Co., 98 Mich. 163, 57 N. W. 101, 39 Am. St. Rep. 524; City Nat. Bank of Dayton v. Kusworm, 88 Wis. 188, 59 N. W. 564, 26 L. R. A. 48, 43 Am. St. Rep. 880; 62 L. T. (N. S.) 376.

Generally it is held that a married woman cannot become a partner with her husband, even under statutes which would authorize her to enter into partnership with any one else; Fairlee v. Bloomingdale, 67 How. Pr. (N. Y.) 292; Miller v. Marx, 65 Tex. 131; Montgomery v. Sprankle, 31 Ind. 113; Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654; Board of Trade of City of Seattle v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919; *contra*, In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824; Schlapback v. Long, 90 Ala. 525, 8 South. 113; Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593 (see as to conflicting New York cases 16 L. R. A. 526, note); nor ordinarily with any one else; De Graum v. Jones, 23 Fla. 83, 6 South. 925; Bradstreet v. Baer, 41 Md. 19; if she have no separate estate Dunifer v. Jecko, 87 Mo. 282. If, without capacity to become a partner, she does so, the property remains hers and the husband cannot assign it; Howard v. Stephens, 52 Miss. 239; nor can his creditors; Duress v. Horneffer, 15 Wis. 195; Danforth v. Woods, 11 Paige (N. Y.) 9. Where her partnership is a nullity the other partner may be sued alone; Carey v. Burruss, 20 W. Va. 571, 43 Am. Rep. 790. Where her husband borrows her separate property and uses it in a firm, she is the creditor of the firm; Huffman v. Copeland, 86 Ind. 224; Fox v. Johnson, 4 Del. Ch. 580; and her debt is provable in bankruptcy; Danforth v. Woods, 11 Paige (N. Y.) 9. If a married woman carries on a business under the assumed name of a partnership she may be sued in that name, and cannot plead her coverture; Le Grand v. Bank, 81 Ala. 123, 1 South. 460, 60 Am. Rep. 140; nor can her co-partners deny her capacity to sue alone for a dissolution; Bitter v. Rathman, 61 N. Y. 512. As to married women as partners, see, generally, 2 L. R. A. 343, note; 32 Cent. L. J. 128; 31 Am. St. Rep. 934, note; and as to partnerships between husband and wife, see 16 L. R. A. 526, note; 35 Cent. L. J. 328; 24 Am. L. Reg. 659.

See PARTNERSHIP.

The capacity of a married woman to become surety or guarantor will depend upon the construction of the statute, and the questions most frequently arise with respect to efforts to become surety for the husband. In some states this is expressly forbidden, and the prohibition has been held to prevent her from mortgaging her real estate to one who is surety for her husband or co-surety with him; McNeil v. Davis, 105 Ala. 657, 17 South. 101.

In others, it has been held that the power, not being expressly given, is not possessed, as it is not required for the complete enjoyment of the separate estate; Bank of Commerce, Ltd. v. Baldwin, 14 Idaho, 75, 93 Pac. 504, 17 L. R. A. (N. S.) 676 and not on her power to become surety for one, other than her husband.

In other states she may bind her separate estate as surety for her husband; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; Watts v. Gantt, 42 Neb. 869, 61 N. W. 104; and where she makes a valid contract as surety she is entitled to all the rights of a surety; Filler v. Tyler, 91 Va. 458, 22 S. E. 235.

An assignment by a married woman of her separate estate to pay a note in which she has been joined with her husband for his debt has been held void; Livingston v. Shingler, 30 S. C. 159, 8 S. E. 842. Mortgages by a wife of her separate estate for the husband's benefit have been held null and void; Lippincott v. Mitchell, 94 U. S. 767, 24 L. Ed. 315; Goodjoin v. Vaughn, 32 S. C. 499, 11 S. E. 351; *contra*, Kaiser v. Stickney, 3 MacArthur (D. C.) 118; Brodnax v. Ins. Co., 128 U. S. 236, 9 Sup. Ct. 61, 32 L. Ed. 445; Wells v. Foster, 64 N. H. 585, 15 Atl. 216; Hagenbuch v. Phillips, 112 Pa. 284, 3 Atl. 788.

A woman cannot after discoverture ratify by a new promise a debt for which she was not originally liable; Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 29 Ky. L. Rep. 1248, 7 L. R. A. (N. S.) 1053, and note where the cases are reviewed.

The right of the wife to sue the husband on a note executed to her by him has been upheld in Mathewson v. Mathewson, 79 Conn. 23, 63 Atl. 285, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027, and note, where the cases are collected, showing much variance in the view taken of the effect of the state statutes.

With respect to the right of the wife to sue the husband for a personal tort, the courts are not so divided, but have generally agreed that the various statutes will not give the right by implication, but that it must be expressly conferred; Strom v. Strom, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 Am. St. Rep. 387, and note, which reaches the conclusion from the cases as here stated.

While, at common law, a debt due by either husband or wife to the other was cancelled by marriage; Farley v. Farley, 91 Ky. 497, 16 S. W. 129; Fox v. Johnson, 4 Del. Ch. 580; under the modern statutes it is generally held that marriage does not extinguish such a debt; Flenner v. Flenner, 29 Ind. 564; Barton v. Barton, 32 Md. 214; Clark v. Clark, 49 Ill. App. 163; Power v. Lester, 23 N. Y. 527; and this was carried to the extent of permitting notes made by a man to his intended wife to be enforced against his estate; MacKeown v. Lacey, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683, 16 Ann. Cas. 220, and note giving other cases. So a wife was allowed to prove, against her husband's estate in bankruptcy, money deposited with him; 2 Nat. B. Reg. 556; and there is an unreported decision by Judge Strong in the circuit court for the district of Delaware to the same effect.

A married woman has been held authorized to dispose of community property to supply the necessary wants of herself and children; Forbes v. Moore, 32 Tex. 195.

A personal judgment against a married woman at common law was void; Weil v. Simmons, 66 Mo. 617; Griffith v. Clarke, 18 Md. 457; White v. Mfg. Co., 29 W. Va. 385, 1 S. E. 572, 6 Am. St. Rep. 650; Green v. Page, 80 Ky. 368; if rendered by default it is in some jurisdictions held absolutely void; Shryock v. Buckman, 121 Pa. 248, 15 Atl. 480, 1 L. R. A. 533; Corrigan v. Bell, 73 Mo. 53; Parsons v. Spencer, 83 Ky. 305; Gambette v. Brock, 41 Cal. 78; Mallett v. Parham, 52 Miss. 921; in others merely voidable; 8 B. & C. 421; Mashburn v. Gouge, 61 Ga. 512; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Wilson v. Coolidge, 42 Mich. 112, 3 N. W. 285; Burk v. Hill, 55 Ind. 419; and she is not estopped by a failure to plead coverture; Parsons v. Spencer, 83 Ky. 305. In the absence of fraud a consent decree is binding on a married woman; Winter v. Montgomery, 79 Ala. 481; Truesdail v. McCormick, 126 Mo. 39, 28 S. W. 885; and a judgment might be obtained against her for a debt contracted *dum sola;* Roosevelt v. Dale, 2 Cow. (N. Y.) 581; Evans v. Lipscomb, 28 Ga. 71; 4 East 521; Travis v. Willis, 55 Miss. 557. Generally provision is made for such suits in the married woman's acts, and in some the husband and wife must be sued jointly, and in others, judgment may be recovered against her separately to bind her separate estate.

In some states the husband and wife are equally liable for expenses and children's education, and a married woman is liable for necessaries for herself and her children; in others such a debt is enforceable against her property after execution against the husband unsatisfied, while in others a judgment for necessaries against the husband may be enforced against the separate property of the wife, and in some jurisdictions for expenses incurred in the improvement of her separate property. See Stims. Am. St. L. § 6410 (c).

In many states there are statutory provisions authorizing the assumption of liability by a married woman for the family expenses; and in others, such liability has been held to arise under the statutes without her express consent; such expenses are made a charge upon the property of the husband and wife, or either of them, either jointly or severally. This is held to be a personal liability and not merely a property charge; Farrar & Wheeler v. Emery, 52 Ia. 725, 3 N. W. 50; Hayden v. Rogers, 22 Ill. App. 557; but her property may be pursued without obtaining a personal judgment against her; Frost v. Parker, 65 Ia. 180, 21 N. W. 507; and her liability is not dependent upon consent; Black v. Sippy, 15 Or. 574, 16 Pac. 418. Within these statutes family expenses include whatever is actually used in the family; Fitzgerald v. McCarty, 55 Ia. 702, 8 N. W. 646; rent of a house; Illingworth v. Burley, 33 Ill. App. 394; medical attendance; Blachley v. Laba, 63 Ia. 22, 18 N. W. 658, 50 Am. Rep. 724; whether necessary or not; Schrader v. Hoover, 80 Ia. 243, 45 N. W. 734; the servants' wages; Von Platen v. Krueger, 11 Ill. App. 627; a piano; Smedley v. Felt, 41 Ia. 588; an organ; Frost v. Parker, 65 Ia. 180, 21 N. W. 507; a cook stove and crockery; Finn v. Rose, 12 Ia. 565; the husband's clothing; Hudson v. King, 23 Ill. App. 118; jewelry purchased by the husband and presented to the wife; Marquardt v. Flaugher, 60 Ia. 148, 14 N. W. 214. The wife has been held not liable for money borrowed by the husband for household supplies; Davis v. Ritchey, 55 Ia. 719, 8 N. W. 669; a reaping machine; McCormick v. Muth, 49 Ia. 536; a breaking plough; Russell v. Long, 52 Ia. 250, 3 N. W. 75; a light farm wagon occasionally used by the family to ride to church and other places; Dunn v. Pickard, 24 Ill. App. 423; payments for the care of an insane husband; Delaware County v. McDonald, 46 Ia. 170.

Where the separate estate of the wife is made liable for necessaries by statute she must be a party to the suit to enforce payment; Gabriel v. Mullen, 30 Mo. App. 464. In Alabama a constitutional provision is not violated by a statute making the separate estate of the wife liable for necessaries; Bender v. Meyer & Co., 55 Ala. 576; see 2 Bish. Mar. W. § 610. In suits under such statute the existence of the separate estate must be alleged; Gabriel v. Mullen, 30 Mo. App. 464; Pippin v. Jones & Co., 52 Ala. 161. The separate estate of a married woman is liable for medical service to herself and children but not to children of her husband by a former marriage, though all live together; May v. Smith, 48 Ala. 485.

A married woman and her separate property are liable for her torts in many states, and in others, if not under her husband's coercion. When so committed they are jointly liable in some states, and in others a judgment against the husband for the wife's tort must be first enforced against her separate property. See Stims. Am. Stat. L. § 6414. See as to liability for torts, Blakeslee v. Tyler, 55 Conn. 397, 11 Atl. 855; State v. Kelly, 74 Ia. 589, 38 N. W. 503; State v. Houston, 29 S. C. 108, 6 S. E. 943; U. S. v. Terry, 42 Fed. 317; Prentiss v. Paisley, 25 Fla. 927, 7 South. 56, 7 L. R. A. 640; Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Burt v. McBain, 29 Mich. 260; Zeliff v. Jennings, 61 Tex. 458, 471. Such is also the tendency with respect to fraud, in view of the statutes authorizing married women to transact business independently; Troxell v. Silverthorn, 45 N. J. Eq. 330, 12 Atl. 614, 19 Atl. 622. In some jurisdictions the husband must be joined in an action for the tort of the wife unless it is in relation to her separate property; Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354. See 7 L. R. A. 640, n.

As to a married woman's liability connected with the use of premises owned by her there is a difference of opinion. Where the husband and wife resided on the premises she could not be convicted of keeping a gambling house; Bell v. State, 92 Ga. 49, 18 S. E. 186; but under similar circumstances the husband was held liable for violation of liquor laws; Com. v. Carroll, 124 Mass. 30; Com. v. Pratt, 126 Mass. 462; and for keeping a brothel; Com. v. Wood, 97 Mass. 225. In one case the wife was held liable for injuries resulting from harboring a vicious dog belonging to her husband; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521, *contra*, Strouse v. Leipf, 101 Ala. 433, 14 South. 667, 23 L. R. A. 622, 46 Am. St. Rep. 122. In other cases they have been held jointly liable; Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187; and it was a question for the jury of the ownership of the animal; McLaughlin v. Kemp, 152 Mass. 7, 25 N. E. 18. Where a married woman set fire to a house owned by her and let to a tenant, the husband was not liable; Lansing v. Holdridge, 58 How. Pr. (N. Y.) 449; and where the husband and wife were domiciled on premises which were the separate property of the latter, he was held not to be in control of the premises so as to be responsible for injury to a stranger resulting from carelessly leaving a pit uncovered; Rowe v. Smith, 45 N. Y. 230. The husband was also held not liable for torts committed on his wife's premises in Austin v. Cox, 118 Mass. 58, and Baumier v. Antiau, 65 Mich. 31, 31 N. W. 888.

With respect to the property and rights of the husband the relation of the wife to it appears not to be changed by the insanity of the husband; L. R. 5 Q. B. 51; she may bind the estate of the husband for necessaries; 1 DeG. J. & S. 465; Pearl v. McDowell, 3 J. J. Marsh. (Ky.) 658, 20 Am.

Dec. 199; but not for the payment of debts generally; Sawyer v. Cutting, 23 Vt. 486; Alexander v. Miller, Reed & Co., 16 Pa. 215; nor can she sue for a debt due to him; 7 Dowl. P. C. 22.

A married woman is frequently held to have certain rights growing out of the insanity of her husband, as, to be regarded as the head of the family and to control the domicil of the husband; Robinson v. Frost, 54 Vt. 105, 41 Am. Rep. 835; Forbes v. Moore, 32 Tex. 195; to receive income belonging to him; 2 McN. & G. 134. In such case it has also been held that the wife is entitled to act with respect to her separate property as if her husband were civilly dead; Gustin v. Carpenter, 51 Vt. 585; Andover v. Merrimack County, 37 N. H. 437. The husband's insanity does not affect her right to bar her dower by joining in a deed with her husband which by reason of his insanity is invalid; Rannells v. Isgrigg, 99 Mo. 19, 12 S. W. 343; Brothers v. Bank, 84 Wis. 381, 54 N. W. 786, 36 Am. St. Rep. 932; Leggate v. Clark, 111 Mass. 308; but in some states, as Delaware, this contingency is provided for by statute; 14 Del. Laws, ch. 78.

The estate of a married woman is primarily liable for her funeral expenses, and where her husband pays them, he may recover them from her executor; Morrissey v. Mulhern, 168 Mass. 412, 47 N. E. 407. See FUNERAL EXPENSES.

It is a general rule which has come down from the earliest times and still prevails in almost all the states that the wife is not a competent witness against her husband in a criminal case; State v. Woodrow, 58 W. Va. 527, 52 S. E. 545, 2 L. R. A. (N. S.) 862, and note, 112 Am. St. Rep. 1001, 6 Ann. Cas. 180. See WITNESS.

A married woman can acquire rights of a political character: these rights stand on the general principles of the law of nations; Shanks v. Dupont, 3 Pet. (U. S.) 242, 7 L. Ed. 666. See WOMAN.

As to the citizenship of married women, the effect of marriage upon the *status* of a woman as an alien, or her expatriation, see ALIEN; CITIZEN; NATURALIZATION. See an annotation on the subject in 22 L. R. A. 148.

As to the effect of ante-nuptial agreements, see that title. See RESTITUTION OF CONJUGAL RIGHTS; DIVORCE; DOWER; FEME SOLE TRADER; ALIMONY; COVERTURE; ENTICE; ELOPEMENT.

HUSBAND OF A SHIP. See SHIP'S HUSBAND.

HUSBANDMAN. See FARMER.

HUSBRECE. Housebreaking; burglary.

HUSCARLE. A menial servant. Domesd.

HUSFASTNE. He that holdeth house and land. *Termes de la Ley;* Cowell.

HUSGABLUM. House rent or house tax. Toml.

HUSH MONEY. A colloquial expression to designate a bribe to hinder information; pay to secure silence. See BLACKMAIL.

HUSTINGS. In English Law. The name of a court held before the lord mayor and aldermen of London: it was the principal and supreme court of that city. See Co. 2d Inst. 327; St. Armand, Hist. Essay on the Legisl. Power of England 75.

A 'house-thing' as distinct from a 'thing' or court held in a borough in the open air. Maitl. Domesd. Book and Beyond 211.

The place of meeting to choose a member of parliament.

The term is used in Canadian as well as English law. Formerly the manner of conducting an election in Canada and England for a member of the legislative body was substantially as follows. Upon warrant from the proper officer, a writ issued from the clerk of the crown in chancery, directed to the sheriff, registrar, or other returning officer of the electoral division. He thereupon issued and posted in public places a proclamation appointing a day, place, and hour for his holding an election, and also fixing a day when a poll would be opened, if one were demanded and granted. The first day was called nomination day. On this day he proceeded to the hustings, which were in the open air and accessible to all the voters, proclaimed the purpose of the election, and called upon the electors present to name the person they required to represent them. The electors then made a show of hands, which might result in an election, or a poll might be demanded by a candidate or by any elector. On such demand, a poll was opened in each township, ward, or parish of the election district, at the places prescribed by statute. Now, however, by statute 35 & 36 Vict. c. 33, the votes are given by ballot in accordance with certain fixed rules.

It is also applied to a local court in Virginia. Va. Code, 1887, § 3072; Smith v. Com., 6 Gratt. (Va.) 696.

HUTESIUM ET CLAMOR. Hue and cry (*q. v.*).

HYDROMETER. An instrument for measuring the density of fluids: being immersed in fluids, as in water, brine, beer, brandy, etc., it determines the proportion of their density, or their specific gravity, and thence their quality. See Act of Congr. Jan. 12, 1825, 3 Story, Laws 1976.

HYPNOTISM. Artificial catalepsy; induced somnambulism; a method of artificially inducing sleep; artificial somnambulism.

The following summary of the physical manifestations accompanying hypnotism, is given in the International Cyclopædia:

"This is a term invented by the late Mr. Braid, of Manchester, to designate certain phenomena of the nervous system which in many respects resemble

those which are induced by animal magnetism, but which clearly arise from the physical and psychical condition of the patient, and not from any emanation proceeding from others. The following are the directions of Mr. Braid, for inducing the phenomena, and especially the peculiar sleep-like condition of hypnotism. Take a silver lancet-case, or other, bright object, and hold it between the fingers of the left hand, about a foot from the eyes of the person experimented on, in such a position above the forehead as to produce the greatest strain on the eyes compatible with a steady fixed stare at the object. The patient must be directed to rivet his mind on the object at which he is gazing. His pupils will first contract, but soon dilate considerably; and if they are well dilated, the first and second fingers of the operator's right hand, extended and a little separated, are carried from the object towards the eyes; the eyelids will most probably close with a vibratory motion. After 10 or 15 seconds have elapsed, it will be found that the patient retains his arms and legs in any position in which the operator places them. It will also be found that all the special senses, excepting sight, are at first extremely exalted, as also are the muscular sense, and the sensibility of heat and cold; but after a time the exaltation of function is followed by a state of depression far greater than the torpor of natural sleep. The patient is now thoroughly hypnotized. The rigidity of the muscles and the profound torpor of the nervous system may be instantly removed and an opposite condition induced by directing a current of air against the muscles which we wish to render limber, or the organ we wish to excite to action; and then by mere repose the senses will speedily regain their original condition. If a current of air directed against the face is not sufficient to arouse the patient, pressure and friction should be applied to the eyelids, and the arm or leg sharply struck with an open hand.

"From the careful analysis of a large number of experiments Mr. Braid is led to the conclusion that by a continual fixation of the mental and visual eye upon an object, with absolute repose of body and general quietude, a feeling of stupor supervenes, which renders the patient liable to be readily affected in the manner already described."

Many of the minor operations of surgery have been performed on patients in the hypnotized state without pain, and hypnotism has been successfully employed as a therapeutic agent in numerous nervous and hysterical disorders in which no organic changes in the nervous system are demonstrable. Treatment by hypnotic influence has been shown to be a very dubious procedure and one capable of eventually doing more harm than good.

A committee of the British Medical Association made a report to the annual meeting in 1892, in the course of which they say:

"Test experiments which have been carried out by members of the committee have shown that this condition is attended by mental and physical phenomena, and that these differ widely in different cases.

"Among the mental phenomena are altered consciousness, temporary limitation of the will power, increased receptivity of suggestion from without, sometimes to the extent of producing passing delusions, illusions, and hallucinations, an exalted condition of the attention and post-hypnotic suggestions.

"Among the physical phenomena are vascular changes (such as flushings of the face and altered pulse rate), deepening of the respirations, increased frequency of deglutition, slight muscular tremors, inability to control suggested movements, altered muscular sense, anæsthesia, modified power of muscular contraction, catalepsy, and rigidity, often intense. It must, however, be understood that all these mental and physical phenomena are rarely present in any one case. The committee takes this opportunity of pointing out that the term hypnotism is somewhat misleading, inasmuch as sleep, as ordinarily understood, is not necessarily present. The committee are of opinion that, as a therapeutic agent, hypnotism is frequently effective in relieving pain, procuring sleep, and alleviating many functional ailments. As to its permanent efficacy in the treatment of drunkenness, the evidence before the committee is encouraging, but not conclusive."

The Encyclopedia Brit. title *"Hypnotism"* by W. McDougal treats the "dangers of hypnotism" as follows:

"Like all powerful agencies, chloroform or morphia, dynamite or strong electric currents, hypnotic suggestion can only be safely used by those who have special knowledge and experience, and, like them, is liable to abuse. There is little doubt that, if a subject is repeatedly hypnotized and made to entertain all kinds of absurd delusions and to carry out very frequently post-hypnotic suggestions, he may be liable to some ill-defined harm; also, that an unprincipled hypnotizer might secure an undue influence over a naturally weak subject.

"But there is no ground for the belief that hypnotic treatment, applied with good intentions and reasonable care and judgment, does or can produce deleterious effects, such as weakening of the will or liability to fall spontaneously into hypnosis. All physicians of large experience in hypnotic practice are in agreement in respect to this point. But some difference of opinion exists as to the possibility of deliberately inducing a subject to commit improper or criminal actions during hypnosis or by post-hypnotic suggestion. There is, however, no doubt that subjects retain even in deep hypnosis a very considerable power of resistance to any suggestion that is repugnant to their moral nature; and it has been shown that, on some cases in which a subject in hypnosis is made to perform some ostensibly criminal action, such as firing an unloaded pistol at a bystander or putting poison in a cup for him to drink, he is aware, however obscurely, of the unreal nature of the situation. Nevertheless it must be admitted that a person lacking in moral sentiments might be induced to commit actions from which in the normal state he would abstain, if only from fear of punishment; and it is probable that a skillful and evil-intentioned operator could in some cases so deceive a well-disposed subject as to lead him into wrong-doing. The proper precaution against such dangers is legislative regulation of the practice of hypnotism such as is already enforced in some countries." See also Tuckey, Hypnotism and Suggestion (1907); Bramwell, Hypnotism (1906), with bibliography; Moll, Hypnotism; Forel, Hypnotism (from the German).

Dr. Grashey, of Munich, thus defined hypnotic influence and suggestion.

"Suggestion means to suggest to somebody a certain thought, to persuade him that a certain idea transferred is his own. Suggestions play a great role in the intellectual life of men, and especially in education. Children have no independent judgment and rapidly adopt the thoughts suggested to them by their parents, teachers, and friends. But suggestive effect is due not merely to words, but also to example. A person can be suggested to go to sleep. Such a sleep, induced by suggestion, is called hypnosis, and the inducement of hypnosis is called hypnotism. The person who hypnotizes another is called a hypnotizer. Hypnosis, or sleep induced by suggestion, has the peculiarity that the subject remains in mental rapport with the hypnotizer, who can suggest or transfer thoughts to the hypnotized person, and then the latter can offer less resistance than in a wakeful state. Hypnosis has also the peculiarity that it can be produced easier and easier as the operation is repeated . . . According to my conception the grown man can be held devoid of his free will irresponsible then only when the action is exclusively or predominantly the product of abnormal or diseased factors, abnormal or diseased illusions, abnormal or diseased feelings, disposition, and will impulses . . . If, however, as it is generally assured, the suggestibility increases with every new production of hypnosis, the will power, as against the will of the hypnotizer, decreases by degrees, and the interference with the

freedom of the subject will increase as well as the restriction of the power of will . . . And thus we see a hpynotizer attain finally such power over his subject that a single word, a single look, may put him to sleep . . . Not only in regard to the time of going to sleep, of the beginning of hypnosis, is the person hypnotized dependent upon the hypnotizer, but also in regard to thoughts and feelings. A thought which is slightly opposed during the first condition of hypnosis in a less decree than in the normal condition will meet with less opposition as the hypnotizing progress is continued; sentiments and dispositions which were but slightly indicated during the first operation will grow, become stronger and more intense as the process is repeated.

"Again a hypnotizer who has gained a certain power over an individual by a repetition of hypnotic procedures can suggest successfully a thought or a sentiment which in the commencement would hardly have been received, and thus the hypnotized individual falls into a condition of subserviency in ideas and sentiments at the cost of his own freedom of will;" 14 Med. Leg. J. 159-162.

The principal legal interest in the subject of hypnotism arises out of the question, whether, and if so to what extent, crime may be induced by hypnotic suggestion, or the will of the hypnotic subject sufficiently controlled to enable the hypnotizer to obtain the unconscious execution of papers such as wills or promises to pay money, without knowledge or consciousness on the part of the subject. Though the existence of this force cannot be questioned, it has been the subject of extended discussion, much of which is unprofitable and often based upon newspaper reports of legal proceedings which have proved to be entirely untrustworthy. The sensational character of much that has been written on the subject, even in influential legal journals, has tended to obscure the questions which really require consideration both by courts and by the legislature. These questions are carefully considered in an article on Hypnotism and the Law in 13 Med. Leg. J. 47, one on the same subject, 95 L. T. 500, and another on Hypnotism in the Criminal Courts, 13 Med. Leg. J. 351. The first article is based mainly on the answers received from leading scientists to four questions as follows: (1) Can crime be committed by the hyponotizer, the subject being the unconscious and innocent agent and instrument? (2) If the subject is unconscious, and even unwilling, has the hypnotizer such power and domination over the hypnotized as would control action to the extent of the commission of a crime? (3) Is it certain or possible to remove by hypnotic suggestion from the mind of the subject all memory of acts or occurrences which happen in the hypnotic state? (4) Would it be possible for a hypnotizer so to control a hypnotized subject as, for example, to make him sign (*a*) a will in the presence of third persons, declare it to be his will, and request them to sign their names as witnesses, without subsequent consciousness of the occurrence; (*b*) or a note of hand or a check?

The answers to these questions show a very decided difference of opinion among American scientific men who have given special attention to the subject, and the same difference appears to exist in a marked degree in European thought. It is impossible as yet to state any satisfactory conclusion from this diversity of opinion, and there has as yet been no recognition of the subject by the courts, notwithstanding the amount of discussion in the press,—much of it thoughtless and unprofitable,—of cases popularly, though erroneously supposed to touch the question of the procurement of crime by hypnotic suggestion. In spite of this difference, however, and leaving the questions above quoted to be answered by further investigations, so far as they may be, there is a practical question much mooted as to the necessity or propriety of any recognition of hypnotism by the law and of its legal regulation, at least to the extent of forbidding public exhibitions of it, or its use except by those skilled in the science to which it may be a legitimate adjunct; and even as to whether its use by physicians and surgeons may not be a proper subject of legal regulation. Another question raised is whether hypnotism is a justifiable inquisitorial agent. Such use of it is said to be permitted under the law of Holland; 95 L. T. 500; and it is quite possible that in countries accustomed to the inquisitorial character of investigations of crime, as in continental Europe, it may be thought proper. It may be assumed that it would be so entirely foreign to American and English ideas as to be unlikely to receive serious consideration in either country.

The consensus of medical opinion would seem to be in favor of regulation. The committee of the British Medical Association, in the report above quoted, stated that they had "satisfied themselves of the genuineness of the hypnotic state," and that dangers may arise in its use "from want of knowledge, carelessness, or intentional abuse, or from too continuous repetition of suggestions in unsuitable cases." And the conclusion was that, when used for therapeutic purposes, it should be confined to qualified medical men, and under no circumstances employed for female patients except in the presence of a relative or a person of their own sex. The report also expressed strong disapproval of public exhibitions of hypnotic phenomena, and a hope that some legal restrictions may be put upon them; 11 Med. Leg. J. 73. A report of a similar committee of the American Medico-Legal Society suggested the legal questions involved in the subject of Hypnotism and evoked a general discussion which may be found in 8 Med. Leg. J. 263, 353; 13 *id.* 47, 351. These references are valuable only to direct the inquirer to the variety and contrariety of opinion upon the subject. One of the best considered discussions from a legal point of view will be found in the paper on the forensic

aspect of hypnotism in 3 Am. Lawy. 534, in which the writer, after carefully considering the cases with which hypnotism has been connected in the popular mind, reaches the conclusion that it has no place in the law. He contends that the person hypnotized cannot be compelled to commit an act which is repugnant and offensive to his sense of morality or, as in case of signing a will, opposed to his instinct of self-preservation, although, under its influence, he may do many things inconsistent with his reason. This writer further considers that the mind of the patient while in a hypnotic state is clear as to what he is doing and his acts are performed in pursuance merely of a desire to please the hypnotizer. The restriction of its use to physicians is disapproved on the ground that, as a class, medical practitioners are not more familiar with its use than are any other class of scientists, and it would be unsafe for the legislature to assume the existence of a monopoly of virtue among medical men.

A very decided inclination towards the views thus summarized will be found among legal minds directed to the subject, as also a very weighty, if not the preponderance of, scientific opinion. The view that the commission of crime cannot be procured by hypnotic suggestion unless in the case of a person whose moral character is such that he might do the act in a normal state, will be found well reasoned and stated in a paper on Hypnotism and Crime; 13 Med. Leg. J. 240, to which reference may be made for authorities and opinions of great value. Dr. Cocke, an investigator of recognized authority, concludes that there are few cases in which the hypnotized subject will not refuse to do a wrong act or to submit to a wrong, no matter if it be suggested; 18 Crim. L. Mag. 100.

Considering the vast amount of discussion which this subject has evoked, it is surprising to find upon how slight a basis of actual legal proceedings it rests. Cases seriously discussed are found upon examination to have no connection with the subject.

Two cases in Europe have been much commented on in connection with hypnotism. The first of these, the Bompard case, excited such wide attention that the main facts of it are generally understood and the details of it were much confused by the theatrical accessories to the trial in the French courts. The effort was made to show that a murder was the result of hypnotic suggestion, and it is believed to be the general impression of those who have examined the case that that was, to a greater or less extent, an element in the crime. The character of the trial, however, greatly lessens its value as a factor in reaching conclusions either valuable or accurate. There was also so wide a difference of opinion among the experts that it has been very truly remarked: "This trial does not, therefore, clear the air of the difficulties of the medico-legal inquiry, whether crime can be committed by the suggestion of the hypnotizer, of which the subject is the innocent and also unconscious actor;" *id.* 353. For report of the case see Annales d'Hygiène Publique et de Mèdecine Légale, III Serie, tome V. (Paris 1881) p. 214; Jurid. Rev. Jan. 1890; see also Int. Cyc. N. Y. 1893, p. 763. Considerable research has failed to discover any other case involving the direct question.

The Czynski case, at Munich, seems to be the only authentic one in which a conviction of hypnotism was really secured. The prisoner was charged with having had recourse to hypnotic suggestions in order to win the affections of a woman of high social position and to obtain her consent to live with him in illicit intercourse, and, subsequently, after he had subjected her to his will, to inveigle her into a false marriage performed by a friend of the prisoner who personated a priest. The accused had given public exhibitions of his hypnotic powers in Dresden and claimed to be able to treat maladies by touching with his hands the parts of the body affected while the patient was in a hypnotized state. His arrest and trial in 1894 created a profound sensation throughout Europe. He was convicted and sentenced to three years' imprisonment. For a full report of the trial, see 14 Med. Leg. J. 150.

The Kansas case of State v. Gray was reported and extensively commented upon by the newspaper press and some influential legal journals (51 Alb. L. J. 87 and 3 Am. Lawy. 3) as having turned upon the ground of hypnotic influence, but this was clearly a misrepresentation, the actual decision being that one who aids, abets, counsels, or assists in the commission of a crime is equally guilty as one who actually commits the same; 55 Kan. 135, 39 Pac. 1050. One of the journals cited *supra* in a subsequent issue corrected its error as to the facts of that case and published a letter from the trial judges which states that, "The question of hypnotism was never raised, never insisted upon, either in the evidence, the arguments, or the instructions," and "the only reference, either direct or remote, during the whole trial that was made to the question of hypnotism," was the remark of counsel for the defence to the jury that "we might almost say that Gray possessed a hypnotic power over McDonald." McDonald as principal and Gray as accessory, being charged with murder, upon a severance, the latter was tried first and convicted and afterwards the former was acquitted on the ground of self-defense; 3 Am. Lawy. 45; 13 Med. Leg. J. 51.

The case of Hayward, tried at Minneapolis for the murder of Katherine Ging, and afterwards hanged, and the case at Eau Claire, Wisconsin, in which a young man named Pickens was charged with hypno-

tizing two young girls, have both been shown to have no connection with hypnotism; 18 Crim. L. Mag. 100. The facts of both cases may be found in 13 Med. Leg. J. 241.

In a California case of a woman on trial for murder, in whose behalf it was alleged that she was hypnotized by her husband, it was held that evidence that she was told by her husband to commit the act does not tend to show that she was hypnotized, and does not render admissible evidence of the effect of hypnotism on persons subject to its influence; People v. Worthington, 105 Cal. 166, 38 Pac. 689.

Notwithstanding the drift of opinion indicated above there are writers of authority on medico-legal subjects who think differently. In discussing the possibility of rape committed upon a person in the hypnotic state, a late work, after alluding to the lack of attention given to hypnotism in England and America, continues: "Like other theories and investigations received at first with ridicule, hypnotism has been placed on a sure scientific basis, thanks to the labor of Charcot and his successors. It has found a place in French, Austrian, and Hungarian law, and must, sooner or later, creep into the Anglo-Saxon. The great French experts in legal medicine, so far as we know, without an exception (Tardieu, Devergie. Brouardel, Vibert, Tourdes, Tourette) recognize the possibility that the will may be entirely abolished under hypnotic influence." It is further asserted that the crime mentioned is not frequent, but that it undoubtedly exists in a small number of authentic cases. See 2 Witth. & Beck. Med. Jur. 452, where these cases are narrated, and the authorities given. It will be found that they are all open to the criticism and doubt which affect the question of rape on a sleeping woman, and which are inherent in the nature of the crime. While finding no recently recorded case of the violation of a woman during hypnotic sleep, Taylor (2 Med. Leg. Jurispr. 115) is of opinion that "there can be no reasonable doubt about the possibility of such an occurrence."

In addition to the authorities herein cited see also 2 Ham. Leg. Med. 212; Tourette, *Hypnotisme au Point de Vue Médico-Légal; Étude Méd. Lég. sur les Attentats au Mœurs;* N. Y. Med. J., Jan. 26, 1895; Gould, Illustr. Dict. Med. *swb. v.;* Contemp. Rev. Oct. 1890, "Hypnotism and Crime"; Moll, Hypnotism; Dessoir, *Bibliographie des modernen Hypnotismus;* 11 Y. L. J. 173; Taylor, Med. Leg. Jurispr. (with bibliography in vol. 2).

HYPOBOLUM (Lat.). **In Civil Law.** The bequest or legacy given by the husband to his wife, above her dowry. Tech. Dict.

HYPOTHEC. Used in Canada. See HYPOTHÈQUE.

HYPOTHECATION. A right which a creditor has over a thing belonging to another, and which consists in a power to cause it to be sold, in order to be paid his claim out of the proceeds.

There are two species of hypothecation, one called pledge, *pignus*, and the other properly denominated hypothecation. Pledge is that species of hypothecation which is contracted by the delivery by the debtor to the creditor of the thing hypothecated. Hypothecation, properly so called, is that which is contracted without delivery of the thing hypothecated; 2 Bell, Com. 25.

In the common law, cases of hypothecation, in the strict sense of the civil law, that is of a pledge of a chattel without possession by the pledgee, are scarcely to be found; cases of bottomry bonds and claims for seamen's wages against ships are the nearest approach to it; but these are liens and privileges, rather than hypothecations; Story, Bailm. § 288. It seems that chattels not in existence, though they cannot be pledged, can be hypothecated, so that the lien will attach as soon as the chattel has been produced; Macomber v. Parker, 14 Pick. (Mass.) 497.

In Scotland *hypothec* is the landlord's right, independently of any stipulation, over the crop and stocking of his tenant, giving the landlord a security over the crop of each year for the rent of that year; Bell.

Conventional hypothecations are those which arise by agreement of the parties. Dig. 20. 1. 5.

General hypothecations are those by which the debtor hypothecates to his creditors all his estate which he has or may have.

Legal hypothecations are those which arise without any contract therefor between the parties, expressed or implied.

Special hypothecations are hypothecations of a particular estate.

Tacit hypothecations are such as the law gives in certain cases, without the consent of the parties, to secure the creditor. They are a species of legal hypothecation.

Thus, the public treasury has a lien over the property of public debtors; Code 8. 15. 1. The landlord has a lien on the goods in the house leased, for the payment of his rent; Dig. 20. 2. 2; Code 8. 15. 7. The builder has a lien, for his bill, on the house he has built; Dig. 20. 1. The pupil has a lien on the property of the curator for the balance of his account; Dig. 46. 6. 22; Code 5. 37. 20. There is hypothecation of the goods of a testator for the security of the legacy; Code 6. 43. 1.

See, generally, Pothier, de l'Hyp.; Pothier, Mar. Contr. 145, n. 26; Merlin, Répert.; 2 Brown, Civ. Law 195; Abbott, Shipping; Parsons, Mar. Law; Taylor v. Hudgins, 42 Tex. 244; Whitney v. Peay, 24 Ark. 27.

HYPOTHÈQUE. In French Law. Hypothecation; the right acquired by the creditor over the immovable property which has been assigned to him by his debtor as security for

his debt, although he be not placed in possession of it.

It thus corresponds to the mortgage of real property in English law, and is a real charge, following the property into whosesoever hands it comes. It may be *légale*, as in the case of the charge which the state has over the lands of its accountants, or which a married woman has over those of her husband; *judiciaire*, when it is the result of a judgment of a court of justice; and *conventionelle*, when it is the result of an agreement of the parties; Brown.

HYPOTHETICAL QUESTION. A question put to an expert witness containing a recital of facts assumed to have been proved or proof of which is offered in the case, and requiring the opinion of the witness thereon.

It must present fairly the state of facts which the counsel claims to have proved or which the testimony of the witnesses tends to prove; People v. Augsbury, 97 N. Y. 501; Veneman v. Jones, 118 Ind. 42, 20 N. E. 644, 10 Am. St. Rep. 100; State v. Hanley, 34 Minn. 430, 26 N. W. 397; Poole v. Dean, 152 Mass. 589, 26 N. E. 406; Hathaway's Adm'r v. Ins. Co., 48 Vt. 335; Southern Bell Telephone & Telegraph Co. v. Jordan, 87 Ga. 69, 13 S. E. 202; In re Will of Norman, 72 Ia. 84, 33 N. W. 374; Woolner v. Spalding, 65 Miss. 204, 3 South. 583; Baker v. State, 30 Fla. 41, 11 South. 492; State v. Anderson, 10 Or. 448; McFall v. Smith, 32 Ill. App. 463; Tingley v. Cowgill, 48 Mo. 291; Kerr v. Lunsford, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668; Baltimore & L. T. Co. v. Cassell, 66 Md. 419, 7 Atl. 805, 59 Am. Rep. 175; Gulf, C. & S. F. R. Co. v. Compton, 75 Tex. 667, 13 S. W. 667; Prentis v. Bates, 88 Mich. 567, 50 N. W. 637; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; and such state of facts must be relevant to the issue; Fairchild v. Bascomb, 35 Vt. 398; Williams v. Brown, 28 Ohio St. 547; Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; North American Acc. Ass'n v. Woodson, 64 Fed. 689, 12 C. C. A. 392. The question must contain all the facts proved when it was put; Baer v. Koch, 2 Misc. 335, 21 N. Y. Supp. 974; Mammerberg v. R. Co., 62 Mo. App. 563; and the witness will not be allowed to answer a question which excludes from his consideration testimony which is essential to the formation of an intelligent opinion concerning the matter; Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47; but the authorities as to this point are conflicting, as it has been held that a question should not be rejected because it does not include all the facts in the case; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Appeal of Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; unless it thereby fails to present the case fairly; Appeal of Barber, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90.

Where there is any evidence, a hypothetical question can be based upon it regardless of the preponderance of evidence on the fact; Catlin v. Ins. Co., 83 Ill. App. 40; Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096; and the question may be asked where the hypothesis is based on facts supported by evidence though it does not include all the facts in evidence; Allison v. Parkinson, 108 Ia. 154, 78 N. W. 845; Cole v. Coal Co., 159 N. Y. 59, 53 N. E. 670; Swensen v. Bender, 114 Fed. 1, 51 C. C. A. 627; People v. Durrant, 116 Cal. 179, 48 Pac. 75; it need not embrace all the evidence but may be based on any facts within the range of the evidence; People v. Hill, 116 Cal. 562, 48 Pac. 711; or on an assumption of facts which the testimony tends to prove; Medill v. Snyder, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307.

A question put to an expert witness calling for his opinion may refer him to the testimony in the case if he has heard it, instead of stating the facts which the answer tends to prove, but in such a case the witness must assume the testimony to be true; Jones v. Ry. Co., 43 Minn. 279, 45 N. W. 444; Frankfort v. Ry. Co., 12 Misc. 13, 33 N. Y. Supp. 36; and it has been held that he may not base his opinion on the testimony but must confine himself to the hypothetical statement; Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696. The witness may not assume for himself from the testimony the facts on which he bases his opinion without informing the jury what he supposes the facts to be; Connelly v. Ry. Co., 60 Hun 495, 15 N. Y. Supp. 176; he may, include as a basis of his opinion, facts known to be true as well as those stated in the question; Ft. Worth & D. C. Ry. Co. v. Thompson, 75 Tex. 501, 12 S. W. 742; Tebo v. City of Augusta, 90 Wis. 405, 63 N. W. 1045.

The truth of the facts assumed by the question is, in doubtful cases, a question for the jury, and if they find that the assumed facts are not proved, they should disregard the opinions based on such hypothetical questions, and the court will so instruct them; People v. Foley, 64 Mich. 148, 31 N. W. 94; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; but the court is not required to submit the matter to the jury unless there is some substantial evidence tending to establish the hypothesis; Nave v. Tucker, 70 Ind. 15. If there is no testimony in the case tending to prove the facts assumed in the question, it is improper; the facts must be proved or proof of them must be offered; Turnbull v. Richardson, 69 Mich. 400, 37 N. W. 499; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Muldowney v. R. Co., 39 Ia. 615; Reber v. Herring, 115 Pa. 599, 8 Atl. 830; Williams v. Brown, 28 Ohio St. 547; Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482, 53 Am. Rep. 305; Woolner v. Spalding, 65 Miss. 204, 3 South. 583; Haish v. Payson, 107 Ill. 365.

The length of the question is to be regulated, largely, by the discretion of the trial judge; Forsyth v. Doolittle, 120 U. S. 73, 7 Sup. Ct. 408, 30 L. Ed. 586; it has been held an error to permit it to be so long and complicated as to confuse the witness or baffle his memory; People v. Brown, 53 Mich. 531, 19 N. W. 172; Haish v. Payson, 107 Ill. 365; but to obviate this difficulty the court may require the question to be reduced to writing; Jones v. Portland, 88 Mich. 598, 50 N. W. 731, 16 L. R. A. 437. If unfair and misleading, hypothetical cases assumed in framing questions are to be considered in determining whether or not a fair trial has been had; McFall v. Smith, 32 Ill. App. 463; but it cannot be expected that the interrogatory will include the proofs or theory of the adversary, since this would require a party to assume the truth of that which he generally denies; Goodwin v. State, 96 Ind. 550. Hypothetical questions cannot be asked of an ordinary observer; State v. Klinger, 46 Mo. 224; Russell v. State, 53 Miss. 367; Appeal of Dunham, 27 Conn. 192. And, as to this, a professional man, in a matter of which he has not made special study is doubtless regarded as an ordinary observer.

See EXPERT; OPINION; EVIDENCE.

HYSTEROTOMY. The cæsarian operation.

HYTHE. A port, wharf, or small haven used for the purpose of embarking or landing merchandise. Blount.

I

I. O. U. A memorandum of debt in use among merchants and others. It is not a promissory note, as it contains no direct promise to pay; 4 C. & P. 324; 1 Mann. & G. 46; but if words are superadded to the acknowledgment from which an intention to accompany it with an engagement to pay may be gathered, it will be construed as a promissory note; 1 Dan. Neg. Inst. 33; if it contains an agreement that it is to be paid on a given day it is a promissory note; Byles, Bills 19. It is evidence of an account stated but not of money lent; 16 M. & W. 449. A due bill has been held to be a promissory note; Finney v. Shirley, 7 Mo. 42; McGowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Harrow v. Dugan, 6 Dana (Ky.) 341. A due bill to bearer without specifying the date of payment is a promissory note payable immediately; Sackett v. Spencer, 29 Barb. (N. Y.) 180. An I. O. U. not addressed to any one will be evidence for the plaintiff if produced by him; 16 M. & W. 449; 1 M. & G. 46. It is evidence of an account stated with the addressee; L. R. 1 C. P. 297; or, if not addressed, then to the person producing it; 10 L. J. Q. B. 43. It imports a promise to pay; Buck v. Hurst, L. R. 1 C. P. 297.

IBIDEM (Lat.). The same. The same book or place. The same subject.

ICE. Ice formed in a stream not navigable is part of the realty, and belongs to the owner of the bed of the stream, who has a right to prevent its removal; State v. Pottmeyer, 33 Ind. 402, 5 Am. Rep. 224; Mill River Woolen Mfg. Co. v. Smith, 34 Conn. 462; Allen v. Weber, 80 Wis. 531, 50 N. W. 514, 14 L. R. A. 361, 27 Am. St. Rep. 51; Washington Ice Co. v. Shortall, 101 Ill. 46, 40 Am. Rep. 196; but see, *contra*, Higgins v. Kusterer, 41 Mich. 318, 2 N. W. 13, 32 Am. Rep. 160, where it is said that the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and therefore a sale of ice already formed, as a distinct commodity, should be held a sale of personalty whether in the water or out of the water. See, also, 32 Am. Rep. 160, note; 32 Am. L. Reg. 166. Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank; Marsh v. McNider, 88 Ia. 390, 55 N. W. 469, 20 L. R. A. 333, 45 Am. St. Rep. 240; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive; Briggs v. Ice Co., 11 Misc. 197, 32 N. Y. Supp. 95. The right of taking ice either for use or sale from a pond which is a public water, is a public right which may be exercised by any citizen who can obtain access to the pond without trespassing on the lands of other persons, or unreasonably interfering with their rights; Inhabitants of West Roxbury v. Stoddard, 7 Allen (Mass.) 158; Hittinger v. Eames, 121 Mass. 539; Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330.

This right is personal; to take a large amount for commercial purposes is an unreasonable exercise of it; Sanborn v. Ice Co., 82 Minn. 43, 84 N. W. 641, 51 L. R. A. 829, 83 Am. St. Rep. 401.

A landowner cannot cut ice for sale from a pond situated on his land, where its removal works an actual injury to one having a pondage right therein; Howe v. Andrews, 62 Conn. 398, 26 Atl. 394; but the owner of land abutting on a millpond may take ice from the pond if it does not interfere with the use of the mill; Eidemiller Ice Co. v. Guthrie, 42 Neb. 238, 60 N. W. 717, 28 L. R. A. 581. Ice in an ice-house is a subject of larceny, but before being gathered it is not, being part of the pond or river; Ward v. People, 3 Hill (N. Y.) 395; Ward v. People, 6 Hill (N. Y.) 144. See Bish. N. Cr. L. § 765, n. 2.

The legislature may forbid the taking of ice from a stream the title to which is in the public in favor of a public use for skating, etc.; Board of Park Com'rs of Des Moines v. Ice Co., 130 Ia. 603, 105 N. W. 203, 3 L. R. A. (N. S.) 1103, 8 Ann. Cas. 28.

See, generally, as to ice and the property therein, 32 Am. L. Reg. N. S. 66; 27 *id.* 231, 240; 30 Cent. L. J. 6; 37 *id.* 357; 3 Alb. L. J. 386; 48 *id.* 504.

As to ice on sidewalks, see SIDEWALK; STREET.

ICENI. The ancient name for the people of Suffolk, Norfolk, Cambridgeshire, Huntingdonshire. Cowell.

ICONA. A figure or representation of a thing. Du Cange.

ICTUS. In Old English Law. A stroke or blow from a club or stone; a bruise, contusion, or swelling produced by such blow, as distinguished from "*plaga*" (a wound). Fleta, lib. 1, c. 41, 3.

ICTUS ORBIS (Lat.). **In Medical Jurisprudence.** A maim, a bruise, or swelling; any hurt without cutting the skin.

When the skin is cut, the injury is called a wound. Bracton, lib. 2, tr. 2, c. 5 and 24.

Ictus is often used by medical authors in the sense of *percussus*. It is applied to the pulsation of the arteries, to any external lesion of the body produced by violence; also, to the wound inflicted by a scorpion or venomous reptile. *Orbis* is used in the sense of circle, circuit, rotundity. It is applied,

also, to the eyeballs: *oculi dicuntur orbes.* Castelli, Lex. Med.

ID EST (Lat.). That is. Commonly abbreviated *i. e.*

IDAHO. One of the states of the United States.

It was a part of the Louisiana purchase but was included in the portion affected by the joint occupation of the United States and Great Britain under the treaty of 1818 which was terminated in 1846. It was a part of the Oregon territory organized under act of August 14, 1848, and afterwards of the territory of Washington organized under act of March 2, 1853; it was organized as a separate territory under its present name by act of March 3, 1863. It then included Montana and part of Wyoming, which were afterward separately organized, and the present boundaries of Idaho were settled by act of July 25, 1868, setting apart Wyoming as a territory. Under a constitution adopted August 6, and ratified November 2, 1889, it was admitted as a state July 3, 1890; U. S. Rev. Stat. 1. Supp. 754. In 1911, amendments provided for the initiative, referendum and recall.

IDEM (Lat.). The same. According to Lord Coke, "*idem*" has two significations, *idem syllabis seu verbis* (the same in syllables or words), and *idem re et sensu* (the same in substance and in sense). 10 Coke 124 *a*.

IDEM PER IDEM. The same for the same. An illustration of a kind that really adds no additional element to the consideration of the question.

IDEM SONANS (Lat.). Having the same sound.

In indictments and pleadings, when a name which it is material to state is wrongly spelled, yet if it be *idem sonans* with that proved, it is sufficient. The following have been held to be *idem sonans*, Segrave for Seagrave; 2 Stra. 889; Whyneard for Winyard; Russ. & R. 412; Benedetto for Beneditto; 2 Taunt. 401; Keen for Keene; Thach. Cr. Cas. 67; Deadema for Diadema; State v. Patterson, 24 N. C. 346, 38 Am. Dec. 699; Hutson for Hudson; Cato v. Hutson, 7 Mo. 142; Coonrad for Conrad; Carpenter v. State, 8 Mo. 291; Gibney for Giboney; Fleming v. Giboney, 81 Tex. 422, 17 S. W. 13; Allen for Allain; Guertin v. Mombleau, 144 Ill. 32, 33 N. E. 49; Emerly for Emley; Galveston, H. & S. A. R. Co. v. Daniels, 1 Tex. Civ. App. 695, 20 S. W. 955; Johnston for Johnson; Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 31 Pac. 1057, 34 Am. St. Rep. 129; Busse for Bosse; Ogden v. Bosse, 86 Tex. 336, 24 S. W. 798; Chambles for Chambless; Ward v. State, 28 Ala. 53; Conly for Conolly; Fletcher v. Conly, 2 G. Greene (Ia.) 88; Usrey for Usury; Gresham v. Walker, 10 Ala. 370; Faust for Foust; Faust v. U. S., 163 U. S. 452, 16 Sup. Ct. 1112, 41 L. Ed. 224; Bubb for Bobb; Myer v. Fegaly, 39 Pa. 429, 80 Am. Dec. 534; Heckman for Hackman; Appeal of Bergman, 88 Pa. 120; Shaffer for Shafer; Rowe v. Palmer, 29 Kan. 337; Woolley for Wolley; Power v. Woolley, 21 Ark. 462; Penryn for Pennyrine; Elliott v. Knott, 14 Md. 121, 74 Am. Dec. 519; Barbra for Barbara; State v. Haist, 52 Kan. 35, 34 Pac. 453; Isreal B. for Israel B.; Boren v. State, 32 Tex. Cr. R. 637, 25 S. W. 775; Alwin for Alvin; Jockisch v. Hardtke, 50 Ill. App. 202; Helmer for Hillmer; Cline v. State, 34 Tex. Cr. R. 415, 31 S. W. 175; July for Julia; Dickson v. State, 34 Tex. Cr. R. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694; Elliott for Ellett; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Chegawgequay for Chegawgoquay; Brown v. Quinland, 75 Mich. 289, 42 N. W. 940; Keoliher, Kelliher, Kellier, Keolhier, Kelhier, are held sufficient for Kealiher; Millett v. Blake, 81 Me. 531, 18 Atl. 293, 10 Am. St. Rep. 275; Luckenbough for Luckenbach; Schee v. La Grange, 78 Ia. 101, 42 N. W. 616; Rooks for Rux; Rooks v. State, 83 Ala. 79, 3 South. 720; Tasso for Dasso; Napa State Hospital v. Dasso, 153 Cal. 698, 96 Pac. 355, 18 L. R. A. (N. S.) 643, 15 Ann. Cas. 910; Wadkins for Watkins; Bennett v. State, 62 Ark. 516, 36 S. W. 947; Gittings for Giddans; Woody v. State, 113 Ga. 927, 39 S. E. 297.

The rule seems to be that if names may be sounded alike without doing violence to the power of letters found in the various orthography, the variance is immaterial; Wilks v. State, 27 Tex. App. 381, 11 S. W. 415; 1 Whart. Cr. L. 309; 1 Bish. Cr. Proc. § 688. Whether or not the names are *idem sonantia* was held a question for the jury, where the name was laid Darius C (pronounced in Dorset dialect D'rius) and it was in fact Trius; 2 Den. Cr. Cas. 231; 3 Russ. Cr. Sharsw. ed. 317. See Kirk v. Suttle, 6 Ala. 679; Com. v. Brigham, 147 Mass. 414, 18 N. E. 167.

In the following cases the variances there mentioned were declared to be fatal; McCarn for McCann; Russ. & R. 351; Shakspeare for Shakepear; 10 East 83; Calver for Calvert and Day for Dax; 2 Cr. & M. 189; Moores for Mohr; State v. Mohr, 55 Mo. App. 325; Mulette for Merlette; Merlette v. State, 100 Ala. 42, 14 South. 562; Siemson for Simonson; Simonson v. Dolan, 114 Mo. 176, 21 S. W. 510; Bart for Bartholomew; Curtis v. Marrs, 29 Ill. 508; Comyns for Cummins; Cruikshank v. Comyns, 24 Ill. 602; Grautis for Gerardus; Mann v. Carley, 4 Cow. (N. Y.) 148; Henry for Harry; Garrison v. People, 21 Ill. 535; Jeffery for Jeffries; Marshall v. Jeffries, 1 Hempst. 299, Fed. Cas. No. 9,128a.

The same principle applies to words as well as names, and a verdict is not vitiated by misspelling if the words are *idem sonans*, as mrder for murder, turn for term, too for two; but a verdict for damages was void when given for *impunitive* damages, or when a burglar was found guilty of *bergellery*, or where the defendant was found *guity* instead of guilty, there being no such words as the

last three in English; Shaw v. State, 2 Tex. App. 487; Haney v. State, 2 Tex. App. 504; Keeller v. State, 4 Tex. App. 527; Dillon v. Rogers, 36 Tex. 152.

See, generally, 3 Chitty, Pr. 231, 232; 6 M. & S. 45; Tibbets v. Kiah, 2 N. H. 557; Com. v. Gillespie, 7 S. & R. (Pa.) 479, 10 Am. Dec. 475; Petrie v. Woodworth, 3 Cai. (N. Y.) 219; Gordon v. Holiday, 1 Wash. C. C. 285, Fed. Cas. No. 5,610; Mann v. Carley, 4 Cow. (N. Y.) 148; 3 Stark. Ev. § 1678; Gonzalia v. Bartelsman, 143 Ill. 634, 32 N. E. 532; 24 Alb. L. J. 444; 27 Am. St. Rep. 785, note; 13 L. R. A. 541, note; Harris, Identification, Ch. III.

IDENTIFICATION. "Evidence of personal identity which is inconsistent with other evidence in the case" should be considered "with scrupulous care and caution;" Tisdale v. Ins. Co., Fed. Cas. No. 14,059. Where the witness has seen the person but once, and that several years before, his uncorroborated testimony would be insufficient; Reid v. Reid, 17 N. J. Eq. 101; and the identification of an adult person whom the witness had not seen since the former was a child would be entitled to but little weight; In re Jew Wong Loy, 91 Fed. 240.

Identification might be satisfactory, though the witness should not be able to describe the person's features; De Witt v. Barley, 13 Barb. (N. Y.) 550; it would be strengthened if the witness could select the person's photograph from a number; Com. v. Connors, 156 Pa. 147, 27 Atl. 366. A witness may identify a person by his voice; Com. v. Hayes, 138 Mass. 185; Pilcher v. U. S., 113 Fed. 248, 51 C. C. A. 205. If the speaker were unseen and the acquaintance slight, the evidence would be weak; Ramsay v. Ryerson, 40 Fed. 739. The voice may have been heard on the telephone; Lord Electric Co. v. Morrill, 178 Mass. 304, 59 N. E. 807; such evidence was received where the witness did not know the person till afterwards; People v. Strollo, 191 N. Y. 42, 83 N. E. 573. In the Tichborne Case, Cockburn, C. J., charged that the identification of an adult son by a parent who had not seen him since childhood was much less satisfactory than that of persons who had brought him up. In Lee Sing Far v. U. S., 94 Fed. 834, 35 C. C. A. 327, it was held to be improbable, though not impossible, that a Chinese could identify his daughter of fifteen years of age whom he had not seen since she was two or three years old. See Moore, Facts, 1365.

As to the effect of variation in names with respect to records as notice, see Ætna Life Ins. Co. v. Hesser, 77 Ia. 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297; Johnson v. Hess, 126 Ind. 298, 25 N. E. 445, 9 L. R. A. 471; Crouse v. Murphy, 140 Pa. 335, 21 Atl. 358, 12 L. R. A. 58, 23 Am. St. Rep. 232. And as to names in a record index, see 14 L. R. A. 393, note.

As to the identification of criminals, see ANTHROPOMETRY.

IDENTITATE NOMINIS (Lat.). **In English Law.** The name of a writ which lay for a person taken upon a capias or exigent, and committed to prison, for another man of the same name: this writ directs the sheriff to inquire whether he be the person against whom the action was brought, and if not, then to discharge him; Fitzh. N. B. 267. In practice, a party in this condition would be relieved by *habeas corpus*.

IDENTITY. Sameness. Identity of persons is a phrase applied especially to those cases in which the issue before the jury is, whether a man be the same person with one previously convicted or attainted. 4 Bla. Com. 396; 4 Steph. Com. 468.

In cases of larceny the question of the identity of property is for the jury and a verdict will be set aside where the court said in the charge that one of the stolen "bills was positively identified;" Hill v. State, 17 Wis. 675, 86 Am. Dec. 736.

The question of identity of a prisoner as well as of property may arise. In a case of larceny of a hog the question of identity both of prisoner and hog was submitted to the jury; Kelly v. State, 1 Tex. App. 628; and evidence of a confession given by a fellow-prisoner of the accused (who had conversed with him through soil pipes in the gaol) that he recognized him by his voice was allowed to go to the jury on the question of identity; Brown v. Com., 76 Pa. 319.

Generally a witness may be permitted to identify an accused solely from having heard his voice; Com. v. Kelly, 186 Mass. 403, 71 N. E. 807; Deal v. State, 140 Ind. 354, 39 N. E. 930; State v. Herbert, 63 Kan. 516, 66 Pac. 235; Mack v. State, 54 Fla. 55, 44 South. 706, 13 L. R. A. (N. S.) 373, 14 Ann. Cas. 78.

As to the modes of identifying different kinds of personal property, see Harris, Identification, Ch. XIII. And as to the different kinds of evidence resorted to for proving the identity of a prisoner, see *id.* Ch. IV.

As to the identity between an alien immigrant and the accused, descriptive matter in the report of the captain of the ship to the immigration officers, corresponding closely with other evidence relating to him, was allowed to go to the jury; McInerney v. U. S., 143 Fed. 729, 74 C. C. A. 655.

In cases of larceny, trover, and replevin, the things in question must be identified; 4 Bla. Com. 396. So, too, the identity of articles taken or injured must be proved in all indictments where taking property is the gist of the offence, and in actions of tort for damage to specific property. See State v. Vines, 34 La. Ann. 1082. Many other cases occur in which identity must be proved in regard either to persons or things. One case in which such questions arise under chattel

mortgages, in which this identification need be such only as would enable identification by a third person aided by inquiry, and not such as would enable a stranger to select it; Jones, Chat. Mortg. § 54; Smith v. McLean, 24 Ia. 323; Tindall v. Wasson, 74 Ind. 495; Connally v. Spragins, 66 Ala. 258; Lawrence v. Evarts, 7 Ohio St. 194; Goulding v. Swett, 13 Gray (Mass.) 517. The question is sometimes one of great practical difficulty, as in case of the death of strangers, reappearance after a long absence, and the like. See Ryan, Med. Jur. 301; 1 Beck, Med. Jur. 509; 8 C. & P. 677; Clark v. Pearson, 53 Ga. 496; 1 Hagg. Cons. 180; Shelf. Marr. & D. 226; Best, Pres. App. Case 4; Clark v. Robinson, 88 Ill. 498; Wills, Circ. Ev. 143; 4 Bla. Com. 396; 4 Steph. Com. 468; Harris, Identif.

Identity of the name of a grantor or grantee is *prima facie* evidence of identity of the person; Rupert v. Penner, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824; and a conveyance by a grantee of the same name as the holder of the title is presumably sufficient; Gilman v. Sheets, 78 Ia. 499, 43 N. W. 299; even where the names are not identical in spelling, as Savery and Savory; Smith v. Gillum, 80 Tex. 120, 15 S. W. 794; Fink v. Ry. Co., 8 N. Y. Supp. 327. See IDEM SONANS. These cases apply a general principle, that a presumption of identity of persons arises from identity of name, and the former is recognized as *prima facie* evidence of the latter in a great variety of cases; Stebbins v. Duncan, 108 U. S. 47, 2 Sup. Ct. 313, 27 L. Ed. 641; Long v. McDow, 87 Mo. 197; State v. McGuire, *id.* 642; 4 Q. B. 626; Hatcher v. Rocheleau, 18 N. Y. 86; Ward v. Dougherty, 75 Cal. 240, 17 Pac. 193, 7 Am. St. Rep. 151; Campbell v. Wallace, 46 Mich. 320, 9 N. W. 432; Grindle v. Stone, 78 Me. 176, 3 Atl. 183; Bogue v. Bigelow, 29 Vt. 179; Wilson v. Holt, 83 Ala. 528, 3 South. 321, 3 Am. St. Rep. 768; Robertson v. Du Bose, 76 Tex. 1, 13 S. W. 300; *contra*, 9 M. & W. 75; Robards v. Wolfe, 1 Dana (Ky.) 155; Kinney v. Flynn, 2 R. I. 319; Ellsworth v. Moore, 5 Ia. 486; Mooers v. Bunker, 29 N. H. 420. But it has been held that it is a question for the jury to determine the identity of a grantor with the former grantee; Carleton v. Townsend, 28 Cal. 221; or whether a person pleading former conviction is the same party; State v. Robinson, 39 Me. 154; or a person bearing the name of a deceased is one of his heirs; Freeman v. Loftis, 51 N. C. 528. The identity of a family name and initials raises no presumption of identity; Bennett v. Libhart, 27 Mich. 489. As between father and son of the same name it is presumed that the former is intended if there is no distinguishing mark; Padgett v. Lawrence, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; Graves v. Colwell, 90 Ill. 612; 1 Stark. 106; State v. Vittum, 9 N. H. 519.

IDEO (Lat.). Therefore. Calv. Lex.

IDEO CONSIDERATUM EST. Therefore it is considered. See CONSIDERATUM EST PER CURIAM.

IDEOT. An old form for idiot (*q. v.*).

IDES (Lat.). **In Civil Law.** A day in the month from which the computation of days was made.

The divisions of months adopted among the Romans were as follows: The calends occurred on the first day of every month, and were distinguished by adding the name of the month: as, *calendæ Januarii*, the first of January. The *nones* occurred on the fifth of each month, with the exception of March, July, October, and May, in which months they occurred on the seventh. The *ides* occurred always on the ninth day after the *nones*, thus dividing the month equally. In fact the *ides* would seem to have been the primal division, occurring in the middle of the month, nearly. Other days than the three designated were indicated by the number of days which would elapse before the next succeeding point of division. Thus, the second of April is the *quarto nonas Aprilis;* the second of March, the *sexto nonas Martii;* the eighth of March, *octavius idus Martii;* the eighth of April, *sextus idus Aprilis;* the sixteenth of March, *decimus septimus calendas Aprilis.*

This system is still used in some chanceries in Europe; and we therefore give the following

Table of the Calends, Nones, and Ides.

	Jan., Aug. Dec., 31 days.	March, May, July, Oct., 31 days.	April, June, Sept. Nov., 30 days.	Feb. 28, bissextile, 29 days.
1	Calendæ	Calendæ	Calendæ	Calendæ
2	4	6	4	4
3	3	5	3	3
4	Prid. Non.	4	Prid. Non.	Prid. Non.
5	Nonæ	3	Nonæ	Nonæ
6	8	Prid. Non.	8	8
7	7	Nonæ	7	7
8	6	8	6	6
9	5	7	5	5
10	4	6	4	4
11	3	5	3	3
12	Prid. Idus	4	Prid. Idus	Prid. Idus
13	Idus	3	Idus	Idus
14	19	Prid. Idus	18	16
15	18	Idus	17	15
16	17	17	16	14
17	16	16	15	13
18	15	15	14	12
19	14	14	13	11
20	13	13	12	10
21	12	12	11	9
22	11	11	10	8
23	10	10	9	7
24	9	9	8	6[1]
25	8	8	7	5
26	7	7	6	4
27	6	6	5	3
28	5	5	4	Prid. Cal.
29	4	4	3	
30	3	3	Prid. Cal.	
31	Prid. Cal.	Prid. Cal.		

[1] If February is bissextile, *Sexto Calendas* (6 Cal.) is counted twice, viz., for the 24th and 25th of the month. Hence the word *bissextile.*

IDIOCHIRA (from Gr. *ἴδιος*, private, and *χείρ*, hand). **In Civil Law.** An instrument privately executed, as distinguished from one publicly executed. Vicat, Voc. Jur.

IDIOCY. In Medical Jurisprudence. Mental deficiency of varying grades down to extreme stupidity resulting from imperfect de-

velopment or disease of the nervous centers either *prenatal* or occurring before the evolution of the mental faculties in childhood. Brush in *Cyclopædia of Diseases of Children.* A condition of defective brain-development. See 3 Witth. & Beck. Med. Jur. 364 *et seq.;* 2 Ham. Leg. Med. 80 *et seq.*

It always implies some defect or disease of the brain, which is generally smaller than the standard size and irregular in its shape and proportions. Hydrocephalus is an occasional cause of idiocy. The senses are very imperfect at best, and one or more are often entirely wanting. None can articulate more than a few words; while many utter only cries or muttered sounds. Some make known their wants by signs or sounds which are intelligible to those who have charge of them. The head, the features, the expression, the movements,—all convey the idea of extreme mental deficiency. The reflective faculties are entirely wanting, whereby they are utterly incapable of any effort of reasoning. The perceptive faculties exist in a very limited degree, and hence they are rendered capable of being improved somewhat by education, and redeemed, in some measure, from their brutish condition. They have been led into habits of propriety and decency, have been taught some of the elements of learning, and have learned some of the coarser industrial occupations. The moral sentiments, such as self-esteem, love of approbation, veneration, benevolence, are not unfrequently manifested; while some propensities, such as cunning, destructiveness, sexual impulse, are particularly active.

In some parts of Europe a form of idiocy prevails endemically, called cretinism. It is associated with disease or defective development of other organs besides the head. Cretins are short in stature, their limbs are attenuated, the belly tumid, and the neck thick. The muscular system is feeble, and their voluntary movements restrained and undecided. The power of language is very imperfect, if not entirely wanting. In the least degraded forms of this disease the perceptive powers may be somewhat developed, and the individual may evince some talent at music or construction. In Switzerland they make parts of watches. Cretinism like idiocy is frequently congenital, and its causation is very obscure.

Absence of the internal secretion of the thyroid gland is a common cause of the so-called sporadic cretinism which exists the world over.

Both idiocy and cretinism exhibit various degrees of mental deficiency, but they never approximate to any description of men supposed to be rational, nor can any amount of education efface the chasm which separates them from their better-endowed fellow-men. The older law-writers, whose observation of mental manifestations was not very profound, thought it necessary to have some test of idiocy; and accordingly, Fitzherbert says, if he have sufficient understanding to know and understand his letters, and to read by teaching or information, he is not an idiot. Natura Brevium 583. Again, he says, a man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. The inference was, no doubt, that such a man is responsible for his criminal acts. At the present day, such an idea would not be entertained for a moment, nor are we aware of any case on record of an idiot suffering capital punishment. See INSANITY; DEMENTIA; IMBECILITY.

IDIOT. A person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. Shelf. Lun. 2; 3 Witth. & Beck. Med. Jur. 371.

It is an imbecility or sterility of mind, and not a perversion of the understanding; Chitty, Med. Jur. 327, 345; 1 Rus. Cr. 6; Bacon, Abr. *Idiot* (A); Brooke, Abr.; Co. Litt. 246, 247; 4 Co. 126; 1 Bla. Com. 302; Tayl. Med. Jur. 688. When a man cannot count or number twenty, nor tell his father's or mother's name, nor how old he is, having been frequently told of it, it is a fair presumption that he is devoid of understanding; Fitzh. N. B. 233. See 1 Dow, P. Cas. N. S. 392; 3 Bligh. N. S. 1. Persons born deaf, dumb, and blind were presumed to be idiots; for, the senses being the only inlets of knowledge, and these, the most important of them, being closed, all ideas and associations belonging to them are totally excluded from their minds; Co. Litt. 42; Shelf. Lun. 3. See State v. Howard, 118 Mo. 127, 24 S. W. 41. But this is a mere presumption, which, like most others, may be rebutted; and doubtless a person born deaf, dumb, and blind, who could be taught to read and write, would not be considered an idiot. Remarkable instances of such are found in the persons of Laura Bridgman and Helen Keller who have been taught how to converse, and even to write. See Locke, Hum. Und. b. 2, c. 11, §§ 12, 13; Ayliffe, Pand. 234; 4 Comyns, Dig. 610; 8 *id.* 644. See DEAF AND DUMB; DEAF, DUMB AND BLIND; IDIOCY.

Idiots are incapable of committing crimes, or entering into contracts. They cannot, of course, make a will; but they may acquire property by descent.

IDIOTA. **In the Civil Law.** An unlearned, illiterate, or simple person. Calv. Lex. A private man; one not in office.

In Common Law. An idiot or fool.

IDIOTA INQUIRENDO WRIT DE. This is the name of an old writ which directs the sheriff to enquire whether a man be an idiot or not. The inquisition is to be made by a jury of twelve men. Fitzh. N. B. 232.

IDONEUM SE FACERE. IDONEARE SE. To purge one's self by oath of a crime of which one is accused.

IDONEUS (Lat.). Sufficient; fit; adequate. He is said to be *idoneus homo* who hath these three things, honesty, knowledge, and civility; and if an officer, etc., be not *idoneus*, he may be discharged; 8 Co. 41. If a clerk presented to a living is not *persona idonea*, which includes ability in learning, honesty of conversation, etc., the bishop may refuse him. And to a *quare impedit* brought thereon, "*in literatura minus sufficiens* is a good plea, without setting forth the particular kind of learning;" 5 Co. 58; 6 *id.* 49 *b;* Co. 2d Inst. 631; Wood. Inst. 32.

So of things: *idonea quantitas;* Calvinus, Lex.; *idonea paries*, a wall sufficient or able to bear the weight.

In Civil Law. Rich; solvent; *e. g. idoneus tutor, idoneus debitor.* Calvinus, Lex.

IGLISE (L. Fr.). A church. Kelham. Another form of "*église.*"

IGNIS JUDICIUM (Lat.). **In Old English Law.** The judicial trial by fire.

IGNITEGIUM. The curfew *(q. v.)*. Cowell.

IGNOMINY. Public disgrace; infamy; reproach; dishonor. Ignominy is the opposite of esteem. Wolff § 145. See Brown v. Kingsley, 38 Ia. 220.

IGNORAMUS (Lat. we are ignorant or uninformed). The word which is written on a bill by a grand jury when they find that there is not sufficient evidence to authorize their finding it a true bill. They are said to ignore the bill, which is also said to be *thrown out*. The proceedings being now in English, the grand jury indorse on the bill, *Not found*, *No bill*, or, *No true bill*. 4 Bla. Com. 305.

IGNORANCE. The lack of knowledge.

Ignorance is distinguishable from error. Ignorance is want of knowledge; error is the nonconformity or opposition of ideas to the truth. Considered as a motive of actions, ignorance differs but little from error. They are generally found together, and what is said of one is said of both.

Essential ignorance is ignorance in relation to some essential circumstance so intimately connected with the matter in question, and which so influences the parties that it induces them to act in the business; Pothier, Vente, nn. 3, 4; 2 Kent 367.

Non-essential or accidental ignorance is that which has not of itself any necessary connection with the business in question, and which is not the true consideration for entering into the contract.

Ignorance of fact is the want of knowledge as to the fact in question; as if a man marry a married woman, supposing her unmarried; Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685.

It is not yet fully settled, at least in this country, whether a person who does a criminal act, supposing it to be lawful through ignorance of fact, can properly be convicted; 12 Am. L. Rev. 469. Such a conviction was held proper; Com. v. Thompson, 11 Allen (Mass.) 23, 87 Am. Dec. 685 (where a man was convicted of adultery, in innocently marrying a woman whose husband was living); Thompson v. Thompson, 114 Mass. 566; State v. Hartfiel, 24 Wis. 60; Beckham v. Nacke, 56 Mo. 546; *contra*, Stern v. State, 53 Ga. 229, 21 Am. Rep. 266; Brown v. State, 24 Ind. 113; Crabtree v. State, 30 Ohio St. 382. The doctrine was adhered to in a later Massachusetts case, where a belief that the husband was dead was held no defence in a prosecution for bigamy; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 28 L. R. A. 318, 47 Am. St. Rep. 468. The opposite conclusion was reached in England by nine out of fourteen judges; 23 Q. B. D. 168; so in Foord (So. Afr.) 190.

The Massachusetts court took issue directly with the English case. Mr. Bishop severely criticises the Massachusetts doctrine and, reviewing the authorities, strongly approved the English rule; 1 Bish. N. Cr. L. § 303 *a*, note. Nevertheless, it is generally well established that ignorance of facts is a defence, where a knowledge of certain facts is essential to an offence, but no defence where a statute makes an act indictable, irrespective of guilty knowledge. Thus there can be no conviction of murder, larceny, or burglary, without proof of the intention, *mens rea*, to commit these crimes; but where selling liquor to minors is by statute indictable, the mistaken belief that the vendee is of full age, is no defence; Com. v. Gould, 158 Mass. 499, 33 N. E. 656; see 1 Whar. Cr. L. § 88; 2 *id.* § 1704; State v. Meyer (Tex.) 23 S. W. 427; State v. Baer, 37 W. Va. 1, 16 S. E. 368; In re Carlson's License, 127 Pa. 330, 18 Atl. 8; but see Ross v. State, 116 Ind. 495, 19 N. E. 451; People v. Welch, 71 Mich. 548, 39 N. W. 747, 1 L. R. A. 385. Nor is it any defence that the party selling intoxicating liquor did not know that it was intoxicating; State v. Moulton, 52 Kan. 69, 34 Pac. 412; King v. State, 66 Miss. 502, 6 South. 188; Haynes v. State, 118 Tenn. 709, 105 S. W. 251, 13 L. R. A. (N. S.) 559, 121 Am. St. Rep. 1055, 12 Ann. Cas. 470; Cox v. Thompson, 96 Tex. 468, 73 S. W. 950.

Ignorance of a fact extrinsic and not essential to a contract, but which, if known, might have influenced the actions of a party to the contract, is not such a mistake as will authorize equitable relief; Cleaveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100, 33 L. Ed. 384. Nor is ignorance of facts a sufficient ground for equitable relief, if it appear that the requisite knowledge might have been obtained by reasonable diligence; U. S. v. Ames, 99 U. S. 35, 47, 25 L. Ed. 295.

See Brett, L. Cas. Mod. Eq. 84; MISTAKE.

Ignorance of the laws of a foreign government, or of another state, is ignorance of fact; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353, where there will be found a discussion of the difference between ignorance of law and ignorance of fact. See also *Clef des Lois Rom. Fait.*

Ignorance of law consists of the want of knowledge of those laws which it is our duty to understand, and which every man is presumed to know.

The principle that ignorance of the law is no defence *(ignorantia legis neminem excusat)* is generally recognized. It was a maxim of the Roman law, in which this case was put, to illustrate the distinction between ignorance of law and fact:—If the heir is ignorant of the death of his ancestor, he is ignorant of a fact; but if, being aware of his death, and of his own relationship, he is, nevertheless, ignorant that certain rights have thereby become vested in himself, he is ignorant of the law; D. 22, 6. 1. See 1 Spence, Eq. Jur. 632. The English rule is

that every man is presumed to know the law, subject to certain qualifications with respect to questions of doubtful construction, practice, and the like; Broom, Leg. Max. 8th Am. ed. 254; 6 Cl. & Fin. 911; 11 Exch. 840. The court will only relieve against a payment of money under mistake of law, if there be some equitable ground which renders it inequitable that the party who received the money should retain it; 3 Ch. D. 351. This case is said to "contain probably the best statement . . . of the principles upon which the courts proceed in relieving or declining to relieve on the ground of mistake of law;" Brett, L. Cas. Mod. Eq. 80. The case itself proceeded upon the ground that an erroneous construction of an instrument was a mistake of law, and it was so held in several cases; L. R. 14 Eq. 85; 6 H. L. Cas. 798, 811; but for a *dictum, contra*, see L. R. 6 H. L. 223, 234; and see also 42 Ch. D. 98; [1893] 1 Ch. 101, 111. The same general rule is recognized by American courts. Tiglao v. Insular Government, 215 U. S. 410, 30 Sup. Ct. 129, 54 L. Ed. 257; though earlier cases indicate hesitation on the part of the courts before it was definitely settled. It was said in an early case that whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity; Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353; and that when one makes a promise as an "expression of an opinion of what he should be obliged to allow, rather than of what he was willing to allow, and being under a mistake of his right, he is not bound by it;" Levy v. Bank, 1 Binn. (Pa.) 27, 37. But it may be considered as well established that money paid with full knowledge of all the facts and circumstances cannot be recovered back upon the ground that the party supposed he was bound in law to pay it, when in truth he was not; Real Estate Saving Institution v. Linder, 74 Pa. 371; Hollingsworth v. Stone, 90 Ind. 244; Arnold v. Banking Co., 50 Ga. 304 (practically overruling Collier v. Perkerson, 31 Ga. 117; Eaton v. Eaton, 35 N. J. L. 290; Mutual Savings Institution v. Enslin, 46 Mo. 200; Gross v. Parrott, 16 Cal. 143; Johnson v. McGinness, 1 Or. 292; *contra*, City of Covington v. Powell, 2 Metc. (Ky.) 226; and a person cannot be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts; Shotwell v. Murray, 1 Johns. Ch. (N. Y.) 512, 516. See 1 V. & B. 23, 30; Osburn v. Throckmorton, 90 Va. 311, 18 S. E. 285; Gefken v. Graef, 77 Ga. 340. Ignorance of one's legal right does not take a case out of the rule of equitable estoppel where one encourages a purchaser to take land from one having a color of title when otherwise he would be entitled to interpose an equitable bar to the latter's legal title; Butts v. Cuthbertson, 6 Ga. 166.

It has been said that whatever rule may prevail elsewhere, in the equity courts of the U. S., there is no relief from a mistake of law alone; Allen v. Galloway, 30 Fed. 466; Upton v. Tribilcock, 91 U. S. 50, 51, 23 L. Ed. 203; Lamborn v. Dickinson County, 97 U. S. 185, 24 L. Ed. 926; U. S. v. Ames, 99 U. S. 46, 25 L. Ed. 295; Utermehle v. Norment, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520. But there is to be found by careful reading of the Federal cases the same disposition apparent in English cases, to avoid the establishment of an inflexible rule which shall preclude relief if there be any other circumstances or any feature of the case itself to warrant it. In Hunt v. Ennis, 2 Mas. 244, Fed. Cas. No. 6,889, Hunt v. Rousmanier's Adm'rs, 8 Wheat. (U. S.) 174, 5 L. Ed. 589, and Hunt v. Rhodes, 1 Pet. (U. S.) 1, 7 L. Ed. 27, the United States supreme court said, where an instrument is executed by the parties, which contains a mistake of the draughtsman either of fact or law it may be reformed, but not when it was executed in the form agreed upon under a misapprehension of the law as to its nature or effect; that a mistake of law is not a ground for reforming a deed and the exceptions are both few and peculiar, but it was not the intention to lay down a rule that there might not be relief against a plain mistake arising from ignorance of law; and in a later case the court quoted this expression with approval and also the declaration from 1 Sto. Eq. Jur. Redf. ed. § 138 *e*, that established misapprehension of the law does afford a basis for relief resting on discretion and to be exercised only in flagrant and unquestionable cases; Snell v. Ins. Co., 98 U. S. 85, 91, 25 L. Ed. 52.

In some cases the laches of the other party affects the liability of one who promises under a mistake of law, as, when one, through a mistake of the law, as an endorser of a bill of exchange, acknowledges himself under an obligation which the law will not impose on him, as payment after failure of the holder to give seasonable notice of protest for non-acceptance, he shall not be bound thereby; Warder v. Tucker, 7 Mass. 452, 5 Am. Dec. 62. See also 2 J. & W. 263; 3 B. & C. 280; the operation of the rule is adjusted to the equitable conditions existing as between the parties. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508; Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Evans v. Gale, 17 N. H. 573, 43 Am. Dec. 614; Stewart v. Crosby, 50 Me. 130; but where money is paid under a mistake, which there was no ground to claim

in conscience, the party may recover it back;" 1 Term 285; 15 Am. Rep. 171, 184, note.

"The maxim *ignorantia legis neminem excusat* is not universally applicable, but only when damages have been inflicted or crimes committed. It is true that the law will not permit the excuse of ignorance of the law to be pleaded for the purpose of exempting persons from damages for breach of contract, or from punishment for crimes committed by them, but on other occasions and for other purposes, it is evident that the fact that such ignorance existed will sometimes be recognized so as to affect a judicial decision;" Brock v. Weiss, 44 N. J. L. 244; "there is no maxim which says that for all intents and purposes a person must be taken to know the legal consequences of his acts;" L. R. 3 Q. B. 639; "it would be too much to impute knowledge of this rule of equity" (the doctrine of election); Westbury, Ld. Ch., in Spread v. Morgan, 11 H. L. Cas. 602.

According to Lord Westbury in Cooper v. Phibbs, L. R. 2 H. L. 170, the word *jus* in the maxim *ignorantia juris haud excusat* is used in the sense of "general law, the law of the country," not in the sense of "a private right." The true meaning of that maxim is that parties cannot excuse themselves from liability from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequences of their acts, and especially where difficult questions of law, or of the practice of the court are involved; Lord FitzGerald, Seaton v. Seaton, in L. R. 13 Ap. Cas. 78.

"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." 2 C. B. 719, per Maule, J. The maxim is said to be "a slovenly way of stating the truth that ignorance of the law is not in general an excuse." Pollock, First Book of Jurispr. 160.

Ignorance was held no defence in the case of a woman convicted of illegal voting, who set up a defence that she believed she had a legal right to vote; U. S. v. Anthony, 11 Blatch. 200, Fed. Cas. No. 14,459; Hamilton v. People, 57 Barb. (N. Y.) 625; so in an indictment for adultery, where defendant erroneously believed she had been legally divorced; State v. Goodenow, 65 Me. 30; so in the conviction of a man for polygamy, who, knowing that his wife was living, married again in Utah, and set up the Mormon doctrine as a defence; Reynolds v. U. S., 98 U. S. 145, 25 L. Ed. 244. It was held not a defence that the defendant believed that, by reason of the absence of the first wife, the marriage was void and that he was released from it, as that was a mistake of law; Medrano v. State, 32 Tex. Cr. Rep. 214, 22 S. W. 684, 40 Am. St. Rep. 775.

If a man marries a woman he believes to be single, it is not adultery if she has a husband living; State v. Audette, 81 Vt. 400, 70 Atl. 833, 18 L. R. A. (N. S.) 527, 130 Am. St. Rep. 1061.

Belief that a minor was an adult is no defense; Cox v. Thompson, 96 Tex. 468, 73 S. W. 950; but it was held to be a defense in the case of a minor playing billiards; Stern v. State, 53 Ga. 229, 21 Am. Rep. 266.

A Jew may be indicted under a state law, for working on Sunday; Com. v. Has, 122 Mass. 40; so where one shoots another through criminal negligence, his ignorance of the law can form no basis for acquittal; People v. Kilvington, 4 Cal. Unrep. Cas. 512, 36 Pac. 13.

An elector's ignorance of a law disqualifying a candidate at an election does not make his vote a nullity; he must have knowledge both of the law and the fact which constitutes the disqualification; People v. Clute, 50 N. Y. 463, 10 Am. Rep. 508; L. R. 3 Q. B. 629.

A statute takes effect even in localities so remote as to render any knowledge of its existence impossible; Rhodes v. Sargent, 17 Cal. App. 58, 118 Pac. 727, citing Matthews v. Zane, 7 Wheat. (U. S.) 179, 5 L. Ed. 425.

Involuntary ignorance is that which does not proceed from choice, and which cannot be overcome by the use of any means of knowledge known to a person and within his power: as, the ignorance of a law which has not yet been promulgated.

Voluntary ignorance exists when a party might, by taking reasonable pains, have acquired the necessary knowledge. For example, every man might acquire a knowledge of the laws which have been promulgated; Doctor & Stud. 1, 46; Plowd. 343.

See, generally, 3 Smith, L. Cas. 9th Am. ed. 1712; Terry, Pr. Ang. Am. L. §§ 252–5; Broom, Leg. Max. 8th Am. ed. 253 (where there will be found a discussion of the subject); Eden, Inf. 7; Bisph. Eq. 187; Merlin, Répert.; Savigny, Droit Rom. App. VIII. 387; Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166, 12 Am. L. Rev. 471; 4 So. L. J. N. S. 153; 10 Am. Dec. 323; MISTAKE.

IGNORANTIO ELENCHI. An overlooking of the adversary's counter position in an argument.

IGNORE. To be ignorant of. Webster, Dict. To pass over as if not in existence. A grand jury is said to ignore a bill when they do not find the evidence such as to induce them to make a presentment. Brande.

IKBAL. Acceptance (of a bond, etc.). Wilson's Gloss. Ind.

IKBAL DAWA. Confession of judgment. Wilson's Gloss. Ind.

IKRAH. Compulsion; especially constraint exercised by one person over anoth-

er to do an illegal act, or to act contrary to his inclination. Wilson's Gloss. Ind.

IKRAR. Agreement, assent, or ratification. Wilson's Gloss. Ind.

IKRAR NAMA. A deed of assent and acknowledgment. Wilson's Gloss. Ind.

ILL. In Old Pleading. Bad; defective in law; null; naught; the opposite of good or valid.

ILL-FAME. A technical expression, which not only means bad character as generally understood, but applies to every person, whatever may be his conduct and character in life, who visits bawdy-houses, gaming-houses, and other places which are of ill-fame. Brockway v. People, 2 Hill (N. Y.) 558; Jennings v. Com., 17 Pick. (Mass.) 80; 1 Hagg. Eccl. 720, 767; 2 Greenl. Ev. § 44.

The common interpretation of the term "house of ill-fame" is as a mere synonym for "bawdy-house," having no reference to the fame of the place. See DISORDERLY HOUSE; HOUSE OF ILL-FAME.

ILLATA ET INVECTA. Things brought into the house for use by the tenants were so called, and were liable to the *jus hypothecæ* of Roman law, just as they are to the landlord's right of distress at common law.

ILLEGAL. Contrary to law; unlawful.

ILLEGAL CONDITIONS. All conditions that are impossible, or contrary to law, immoral, or repugnant to the nature of the transaction. See CONDITION.

ILLEGAL CONSIDERATION. See CONSIDERATION.

ILLEGAL CONTRACT. See CONSIDERATION; CONTRACT; UNLAWFUL AGREEMENT; VOID; VOIDABLE.

ILLEGAL TRADE. That which is carried on in violation of law, municipal or international. See ILLICIT.

ILLEGALITY. That which is contrary to the principles of law, as contradistinguished from mere rules of procedure. It denotes a complete defect in the proceedings. Ex parte Scwartz, 2 Tex. App. 74; State v. Conover, 7 N. J. L. 203.

ILLEGITIMACY. The *status* of a child born of parents not legally married at the time of birth. In certain states and countries, a subsequent marriage of the parents legitimatizes their children born before marriage. See LEGITIMIZATION.

ILLEGITIMATE. That which is contrary to law; it is usually applied to children born out of lawful wedlock. 25 Alb. L. J. 131. He may be made legitimate by parliament for all purposes; 4 Inst. 36. Under the English Workmen's Compensation Act he may be a dependent of his parent and *vice versa*. See BASTARD; LEGITIMACY.

ILLEVIABLE. A debt or duty that cannot or ought not to be levied. *Nihil* set upon a debt is a mark for *illeviable*.

ILLICENCIATUS. In Old English Law. Without license. Fleta, lib. 3, c. 5. 12.

ILLICIT. What is unlawful; what is forbidden by the law.

This word is frequently used in policies of insurance, where the assured warrants against illicit trade. By illicit trade is understood that "which is made unlawful by the laws of the country to which the object is bound." It is distinguished from "contraband trade," though sometimes used interchangeably with it. 1 Pars. Mar. Ins. 614. The assured, having entered into this warranty, is required to do no act which will expose the vessel to be legally condemned; Dismukes v. Musgrove, 2 La. 337, 338. See INSURANCE; WARRANTY.

ILLICITE. Unlawfully.

This word has a technical meaning, and is requisite in an indictment where the act charged is unlawful: as, in the case of a riot; 2 Hawk. Pl. Cr. 25, § 96.

ILLICITUM COLLEGIUM. An unlawful corporation.

ILLINOIS. One of the states of the United States, being the twenty-eighth admitted to the Union.

Civil government was organized under the jurisdiction of the United States, by the ordinance of the Continental Congress, in 1787, the present state being then a part of the northwestern territory. In 1800 that territory was divided, and a territorial government was created in the Indiana territory, including this present state. In 1809 the territory of Illinois was created, and continued under the same ordinance and the laws of the Indiana territory. For a fuller statement of the territorial history, see OHIO.

In 1818 Illinois formed a constitution and was admitted into the Union. A second constitution went into operation April 1, 1848; and a third August 8, 1870. In 1913, an amendment provided for woman suffrage.

ILLITERATE. Unacquainted with letters.

When an ignorant man, unable to read, signs a deed or agreement, or makes his mark instead of a signature, and he alleges and can prove that it was falsely read to him, he is not bound by it, in consequence of the fraud. And the same effect would result if the deed or agreement were falsely read to a blind man who could have read it before he lost his sight, or to a foreigner who did not understand the language. For a plea of "laymen and unlettered," see Bauer v. Roth, 4 Rawle (Pa.) 85, 94, 95.

To induce an illiterate man, by false representations and false reading, to sign a note for a greater amount than that agreed on, is indictable as a cheat; Hill v. State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441. See, generally, 2 Nel. Abr. 946; 2 Co. 3; 11 *id.* 28; F. Moore 148; 2 Bish. Cr. L. § 156.

ILLNESS. Pregnancy may create an illness within the meaning of 11 & 12 Vict. c.

42, § 17, so as to give the presiding judge discretionary power to admit in evidence upon a criminal trial the deposition of a witness, duly taken, who, owing to pregnancy is proved to be unable to travel; 3 Q. B. D. 426.

ILLOCABLE. Not capable of being let out or hired.

ILLUD (Lat.). That.

ILLUSION. A term loosely applied to both delusions and hallucinations, but more frequently to the latter *(q. v.)*. By some it is restricted to the perception of objects in characters which they do not possess.

The patient is deceived by the false appearance of things, and his reason is not sufficiently active and powerful to correct the error; and this last particular is what distinguishes the sane from the insane. Illusions are not unfrequent in a state of health, but reason corrects the errors and dissipates them. A square tower seen from a distance may appear round, but on approaching it the error is corrected. A distant mountain may be taken for a cloud, but as we approach we discover the truth. To a person in the cabin of a vessel under sail, the shore appears to move; but reflection and a closer examination soon destroy this illusion. An insane individual is mistaken in the qualities, connections, and causes of the impressions he actually receives, and he forms wrong judgments as to his internal and external sensations; and his reason does not correct the error; 1 Beck. Med. Jur. 538; Tayl. Med. Jur. 683; Esquirol, *Maladies Mentales*, prém. partie, iii, tome 1, p. 202; *Dict. des Sciences Médicales, Hallucination*, tome 20, p. 64. See HALLUCINATION; INSANITY.

ILLUSORY APPOINTMENT. Such an appointment or disposition of property under a power as is merely nominal and not substantial.

Illusory appointments are void in equity; Sugd. Pow. 489; 1 Vern. 67; 1 Term 438, note; 4 Ves. 785. The rule at common law was, to require some allotment, however small, to each person, where the power was given to appoint to and among several persons; but the rule in equity requires a real substantial portion to each, a mere nominal allotment being deemed fraudulent and illusive; 4 Kent 342; Lines v. Darden, 5 Fla. 52; Lippincott v. Ridgway, 10 N. J. Eq. 164; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232; Degman v. Degman, 98 Ky. 717, 34 S. W. 523. The doctrine was repudiated in Cowles v. Brown, 4 Call (Va.) 477; Graeff v. De Turk, 44 Pa. 527.

In England equity jurisdiction on this point was ended by the statute 1 Wm. IV. c. 46, which declares that no appointment shall be impeached in equity, on the ground that it was unsubstantial, illusory, or nominal; but the entire exclusion of any object of a power not in terms exclusive was illegal, notwithstanding that act, until 1874, when a statute was passed, providing that, under a power to appoint among certain persons, appointments may be made excluding one or more objects of the power; Moz. & W. Dict.

IMAGINE. In English Law. In cases of treason the law makes it a crime to imagine the death of the king. In order to complete the offence, there must, however, be an overt act,—the terms *compassing* and *imagining* being synonymous. It has been justly remarked that the words to compass and imagine are too vague for a statute whose penalty affects the life of a subject. Barrington, Stat. 243. See FICTION.

IMBARGO. Obsolete for embargo *(q. v.)*.

IMBASING OF MONEY. Mixing the species with an alloy below the standard of sterling, which the king by his prerogative may do. Toml.

IMBECILITY. In Medical Jurisprudence. A form of mental disease consisting in mental deficiency, either congenital or resulting from an obstacle to the development of the faculties supervening in infancy. Idiocy.

Generally, it is manifested both in the intellectual and moral faculties; but occasionally it is limited to the latter, the former being but little, if at all, below the ordinary standard. Hence it is distinguished into intellectual and moral. In the former there are seldom any of the repulsive features of idiocy, the head, face, limbs, and movements, being scarcely distinguishable, at first sight, from those of the race at large. The senses are not manifestly deficient nor the power of articulation; though the use of language may be very limited. The perceptive faculties exhibit some activity; and thus the more obvious qualities of things are observed and remembered. Simple industrial operations are well performed, and, generally, whatever requires but little intelligence is readily accomplished. For any process of reasoning, or any general observation or abstract ideas, imbeciles are totally incompetent. Of law, justice, morality, property, they have but a very imperfect notion. Some of the affective faculties are usually active, particularly those which lead to evil habits, thieving, incendiarism, drunkenness, homicide, assaults on women.

The kind of mental defect here mentioned is universal in imbecility, but it exists in different degrees in different individuals, some being hardly distinguishable, at first sight, from ordinary men of feeble endowments, while others encroach upon the ill-defined line which separates them from idiocy; Tayl. Jur. 689.

The various grades of imbecility, however interesting in a philosophical point of view, are not very closely considered by courts. They are governed in criminal cases solely by their tests of responsibility, and in civil cases by the amount of capacity in connection with the act in question, or the abstract question of soundness or unsoundness.

Touching the question of responsibility, the law makes no distinction between imbecility and insanity. See 1 C. & K. 129.

In civil cases, the effect of imbecility is differently estimated. In cases involving the validity of the contracts of imbecile persons, courts have declined to gauge the measure of their intellects, the only question with them being one of soundness or unsoundness, and "no distinction being made between important and common affairs, large or small property;" 4 Dane, Abr. 561. See Jackson v. King, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354. Courts of equity, also, have declined to invalidate the contracts of imbeciles, except on the ground of fraud; 1 Story, Eq. Jur. § 238. Of late years, however, courts have been governed by other con-

siderations. If the contract were for necessaries, or showed no mark of fraud or unfair advantage, or if the other party, acting in good faith and ignorant of the other's mental infirmity, cannot be put *in statu quo*, the contract has been held to be valid; Chitty, Contr. 112; Story, Contr. § 27; Poll. Contr. 88; 4 Exch. 17.

The same principles have governed the courts in cases involving the validity of the marriage contract. If suitable to the condition and circumstances of the party, and manifestly tending to his benefit, it has been confirmed, notwithstanding a considerable degree of incompetency. If, on the other hand, it has been procured by improper influences, manifestly for the advantage of the other party, it has been invalidated; 1 Hagg. 355; Ray, Med. Jur. 100. The law has always shown more favor to the wills of imbeciles than to their contracts. "If a man be of a mean understanding, neither of the wise sort nor of the foolish, but indifferent, as it were, betwixt a wise man and a fool,—yea, though he rather inclined to the foolish sort, so that for his dull capacity he might worthily be called *grossum caput*, a dull pate, or a dunce,—such a one is not prohibited to make a testament;" Swinb. Wills, part 2, s. 4. Whether the testament be established or not, depends upon the circumstances of the case; and the English ecclesiastical courts have always assumed a great deal of liberty in their construction of these circumstances. The general principle is that if the will exhibits a wise and prudent disposition of property, and is unquestionably the will of the testator, and not another's, it should be established, in the face of no inconsiderable deficiency; 1 Hagg. 384. Very different views prevailed in a celebrated case in New York, Stewart's Ex'r v. Lispenard, 26 Wend. (N. Y.) 256. The mental capacity must be equal to the act; and if that fact be established, and no unfair advantage have been taken of the mental deficiency, the will, the marriage, the contract, or whatever it may be, is held to be valid.

The term moral imbecility is applied to a class of persons who, without any considerable, or even appreciable, deficiency of intellect, seem to have never been endowed with the higher moral sentiments. They are unable to appreciate fully the distinctions of right and wrong, and, according to their several opportunities and tastes, they indulge in mischief as if by an instinct of their nature. To vice and crime they have an irresistible proclivity, though able to discourse on the beauties of virtue and the claims of moral obligation. While young, many of them manifest a cruel and quarrelsome disposition, which leads them to torture brutes and bully their companions. They set all law and admonition at defiance, and become a pest and a terror to the neighborhood. It is worthy of notice, because the fact throws much light on the nature of this condition, that a very large proportion of this class of persons labor under some organic defect. They are scrofulous, rickety, or epileptic, or, if not obviously suffering from such diseases themselves, they are born of parents who did. Their progenitors may have been insane, or eccentric, or highly nervous, and this morbid peculiarity has become, unquestionably, by hereditary transmission, the efficient cause of the moral defect under consideration. Thus lamentably constituted, wanting in one of the essential elements of moral responsibility, they are certainly not fit objects of punishment; for though they may recognize the distinctions of right and wrong in the abstract, yet they have been denied by nature those faculties which prompt men more happily endowed to pursue the one and avoid the other. In practice, however, they have been regarded with no favor by the courts; Ray, Med. Jur. 112. See INSANITY; DEMENTIA.

IMBLADARE. To plant or sow grain. Bract. fol. 176 *b*.

IMBRACERY. See EMBRACERY.

IMBROCUS. A gutter; a brook; a water passage. Cowell.

IMMATERIAL. Unnecessary or non-essential; impertinent (*q. v.*); indecisive.

IMMATERIAL AVERMENT. A statement of unnecessary particulars in connection with, and as descriptive of, what is material. Gould, Pl. c. 3, § 186. Such averments must, however, be proved as laid, it is said; Dougl. 665; though not if they may be struck out without striking out at the same time the cause of action, and when there is no variance; Gould, Pl. c. 3, § 188. See 1 Chitty, Pl. 282.

IMMATERIAL ISSUE. An issue taken upon some collateral matter, the decision of which will not settle the question in dispute between the parties in action. For example, if, in an action of debt on bond, conditioned for the payment of ten dollars and fifty cents at a certain day, the defendant pleads the payment of ten dollars according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon the payment, it is manifest that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled to maintain his action, or not; for, in an action for the penalty of a bond, conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and the question of payment of a part is a question quite beside the legal merits; Hob. 113; 5 Taunt. 386; Cro. Jac. 585; 2 Wms. Saund. 319 *b*. A repleader will be ordered when an immaterial issue is reached, either before or after verdict; 2 Wms. Saund. 319 *b*, note;

1 Rolle, Abr. 86; Cro. Jac. 585. See RE-PLEADER.

IMMEDIATE. *As to time.* Present; without delay or postponement. Strictly it implies *not deferred by any lapse of time*, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case. This word and immediately (*q. v.*) are of no very definite signification and are much dependent on the context. In legal proceedings they do not impart the exclusion of any interval of time; Howell v. Gaddis, 31 N. J. L. 313. As to immediate delivery, see Neldon v. Smith, 36 N. J. L. 148. "Immediate" notice may be construed as meaning "reasonable notice;" McFarland v. Acc. Ass'n, 124 Mo. 204, 27 S. W. 436.

As to place, etc. Not separated by any intervening space, cause, right, object, or relation. See 7 Mann. & G. 493; Trask v. Ins. Co., 29 Pa. 198, 72 Am. Dec. 622; Richardson v. End, 43 Wis. 316; Hepler v. State, *id.* 479; IMMEDIATELY; FORTHWITH.

As to descent. Judge Story says it may be mediate or immediate with respect to the estate or right, or with respect to the pedigree or degrees of consanguinity; Levy v. McCartee, 6 Pet. (U. S.) 112, 8 L. Ed. 334.

IMMEDIATELY. The words "forthwith" and "immediately" have the same meaning. They are stronger than the expression "within a reasonable time," and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case; 4 Q. B. Div. 471.

IMMEMORIAL POSSESSION. In Louisiana. Possession of which no man living has seen the beginning, and the existence of which he has learned from his elders. Orleans Nav. Co. v. Mayor, 2 Mart. (O. S. La.) 214, 3 Toullier p. 410; Poth. *Contr. de Société*, n. 244.

IMMEMORIAL USAGE. Prescription; custom which has existed so long that the memory of man runneth not to the contrary. See PRESCRIPTION.

IMMEUBLES. In French Law. Immovables. They derive their character as such (1) from their own nature as lands, etc.; (2) from their destination, as animals or implements furnished to a tenant by his landlord; and (3) by the object to which they are annexed.

IMMIGRATION LAWS. The act of March 3, 1903, was comprehensive and superseded almost entirely the previous legislation, and that act was in turn superseded by the act of February 20, 1907. It provided for a tax of four dollars for every alien entering the United States, which is to go into an "Immigrant Fund" to defray the expense of regulating immigration, etc. This tax is a lien upon the vessel or other means of carriage. It is not levied upon aliens who shall enter after an uninterrupted residence of at least one year immediately preceding such entering in Canada, Cuba, Newfoundland or Mexico, nor upon otherwise admissible residents of any United States possession, nor aliens in transit, nor aliens passing from one part of the United States to another through foreign contiguous territory.

Among the classes excluded are idiots, imbeciles, epileptics, feeble minded, and insane persons who have been insane within five years previous or who have had two or more attacks of insanity at any time previously, paupers and those likely to become a public charge, professional beggars, those afflicted with tuberculosis or with a loathsome or dangerous contagious disease, mentally or physically defective persons, such defect being of a nature which may affect their ability to earn a living, those convicted of a felony or other crime or misdemeanor involving moral turpitude or admitting that they had committed the same, persons admitting their belief in polygamy, anarchists, prostitutes or women or girls coming here for the purpose of prostitution or any other immoral purpose, those supported in whole or in part by the proceeds of prostitution, those who procure or attempt to bring in prostitutes or women for such purposes, contract laborers, persons who within a year have been deported as having been induced to migrate as above, those whose ticket or passage is paid for by money of another or who are assisted to come here, children under sixteen unaccompanied by one or both parents, at the discretion of the Secretary, but not persons convicted of an offense purely political, not involving moral turpitude, nor aliens passing through the country to foreign contiguous territory, nor skilled labor if such kind unemployed cannot be found in this country. Contract labor does not include professional actors, artists, lecturers, singers, ministers, professors and those belonging to any recognized learned profession, or personal or domestic servants. Section 3 applies to the importation of aliens for prostitution, etc. Section 4 provides that no corporation, etc., shall prepay the transportation or in any other way assist in the importation of contract laborers unless belonging to the above excepted classes. By section 6, encouraging immigration by advertising abroad with promise of employment is forbidden. Masters of vessels bringing in aliens are required to furnish to the immigration officer full lists of alien passengers. Amended March 26, 1910.

See ALIEN; CHINESE; DEPORTATION.

But where a Chinese person claimed citizenship and had been arbitrarily denied such a hearing as the exclusion acts demand, it was held that a writ of *habeas corpus* should be granted by the federal courts; Chin Yow

v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. See LEGISLATIVE POWER.

IMMISCERE (Lat.). **In Civil Law.** To put or let into, as a beam into a wall. Calv. Lex.

In Old English Law. To turn cattle out on a common. Fleta, lib. 4, c. 20, § 7.

IMMOBILIS (Lat.). Immovable. *Immobilia*, or *res immobiles*, immovables *(q. v.)*.

IMMORAL CONSIDERATION. One contrary to good morals, and therefore invalid. Contracts based upon an immoral consideration are generally void; Poll. Con. 286. An agreement in consideration of future illicit cohabitation between the parties; 3 Burr. 1568; 1 B. & P. 340; an agreement for the value of libelous and immoral pictures; 4 Esp. 97; or for printing a libel; 2 Stark. 107; or for an immoral wager; Chitty, Contr. 156; cannot, therefore, be enforced. For whatever arises from an immoral or illegal consideration is void; *quid turpi ex causa promissum est non valet;* Inst. 3. 20. 24.

It is a general rule that whenever an agreement appears to be illegal, immoral, or against public policy, a court of justice leaves the parties where it finds them; when the agreement has been executed, the court will not rescind it; when executory, the court will not help the execution; Roll v. Raguet, 4 Ohio 419, 22 Am. Dec. 759; Jackson v. Babcock, 4 Johns. (N. Y.) 419. See CONSIDERATION.

IMMORALITY. That which is *contra bonos mores.*

In England, it is not punishable, in some cases, at the common law, on account of the ecclesiastical jurisdictions: *e. g.* adultery. But except in cases belonging to the ecclesiastical courts, the court of king's bench is the *custos morum*, and may punish *delicta contra bonos mores;* 3 Burr. 1438; 1 W. Blackst. 94.

IMMOVABLES. **In Civil Law.** Property which, from its nature, destination, or the object to which it is applied, cannot move itself or be removed. Pothier, *des Choses*, § 1; *Clef des Lois Rom. Immeubles.*

IMMUNITY. An exemption from serving in an office, or performing duties which the law generally requires other citizens to perform. See Dig. lib. 50. t. 6; 1 Chitty, Cr. Law 821; Ward v. Morris, 4 H. & M'H. (Md.) 341. See INCRIMINATION.

IMPAIRING THE OBLIGATION OF CONTRACTS. By article First, Section 10, Clause 1, of the Constitution of the United States "No state shall pass . . . any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

There has been much discussion as to the reasons which led the Convention of 1787 to insert this clause in the constitution. They seem to have intended that it should prevent the states from passing stay laws and bankrupt laws (Bradley, J., Union Pac. R. Co. v. U. S., 99 U. S. 745, 25 L. Ed. 496), and other acts which would interfere with private contracts or engagements previously formed. Stay laws to prevent the collection of debts had been passed in many of the states, especially in the South. In the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, Chief Justice Marshall said that he thought it more than possible that the convention had not intended by the clause to preserve the integrity of the charters of corporations. But in Pennsylvania the legislature had revoked the charter of the College of Philadelphia and virtually confiscated its property by taking it away from its trustees and giving it to another set of trustees who were of the political party which controlled the legislature. The same legislature had annulled the charter of the Bank of North America to which it was hostile, and would have succeeded in wrecking it, if the bank had not had another charter from congress, and soon after obtained one from the state of Delaware. These acts of spoliation alarmed all men of property, and James Wilson, a Pennsylvania member of the convention, who had been interested in both the bank and the college, was most active in procuring the adoption of the clause. Fisher's "Pennsylvania: Colony and Commonwealth" 375, 383; Fisher's "Evolution of the Constitution" 262; Shirley's "Dartmouth College Case" 213, 220; Alfred Russell's Address before Grafton and Coos Bar Association of New Hampshire, 1895 (reprinted Am. Law Rev. vol. 30, p. 321).

This article of the constitution forbids only the states to pass laws impairing the obligation of contracts, and there is no express provision prohibiting congress from passing such laws. It would seem, moreover, as some have argued, that there is an implied power in congress to pass such laws, for we find in the constitution a number of general prohibitions in which both congress and the states are prohibited from passing bills of attainder and *ex post facto* laws. The omission of the prohibition in one case and the expression of it in the other might seem to imply that the power to pass laws impairing the obligation of contracts remained in congress; and congress is expressly given power to pass bankrupt laws which impair the obligation of contracts between debtors and creditors; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; and with respect to this provision the argument *expressio unius est exclusio alterius* may also be invoked as against a similar limitation of the power of congress. So under the decisions of the supreme court, congress may issue notes as legal tender in satisfaction of antecedently contracted debts. But the general exercise of such a power by congress has been said to be contrary to the first principles of the social compact and to every

principle of sound legislation; Federalist No. 44. Bradley, J., in a dissenting opinion in the Sinking-Fund Cases (Union Pac. R. Co. v. U. S.) 99 U. S. 746, 25 L. Ed. 496, took the same view of the origin of this provision, and said further that it fully explained the fact that no such inhibition was laid upon the national legislature, and he was further of opinion that the absence of such inhibition furnished no ground of argument in favor of the proposition that congress can pass arbitrary and despotic laws with regard to contracts any more than with regard to any other subject-matter of legislation.

As to the power of congress to impair the obligation of a contract, see Hepburn v. Griswold, 8 Wall. (U. S.) 603, 622, 19 L. Ed. 513; Knox v. Lee, 12 Wall. (U. S.) 457, 20 L. Ed. 287 (and specially Clarkson N. Potter, *arguendo* at p. 501, and Strong, J., at p. 547); Juilliard v. Greenman, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204.

The provision of the constitution is, however, not applicable to laws enacted by the states before the first Wednesday in March, 1789; Owings v. Speed, 5 Wheat. (U. S.) 420, 5 L. Ed. 124.

Contracts are made subject to the exercise of the rightful authority of the government and no obligation of a contract can defeat lawful government authority; Louisville & N. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671, where a contract to issue passes to a person for life could not be enforced after the passage of an act of congress forbidding the issue of passes by any common carrier engaged in interstate commerce. An act of congress rendering contracts in regard to interstate commerce invalid does not infringe the constitutional liberty of the citizen to make contracts; and an act otherwise constitutional is not unconstitutional under the Vth Amendment, as taking private property without compensation because it invalidates contracts between individuals which conflict with the public policy declared in the act; *id.*

In the application of this constitutional prohibition there is an exception to the general rule that the United States supreme court will accept the construction placed by a state court upon its own constitution, when the question of contract or no contract is presented in the construction of a state statute; in such case there is imposed upon the United States supreme court the duty of exercising an independent judgment upon the question whether there is a contract, though it will lean towards the interpretation of the state court; Stearns v. Minnesota, 179 U. S. 223, 232, 21 Sup. Ct. 73, 45 L. Ed. 162; Great Southern Fire Proof Hotel Co. v. Jones, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778.

Where there is no contract protected by the impairment clause, whether a statutory exemption has been repealed by a subsequent statute is a question of state law in which the decisions of the highest court of the state are binding; and it is only where an irrepealable contract exists that it is the duty of the federal court to decide for itself whether a subsequent act impairs the obligation of such contract; Wicomico County v. Bancroft, 203 U. S. 112, 27 Sup. Ct. 21, 51 L. Ed. 112, where it was held that a proviso in a state statute, taxing all property of railroads, that no irrepealable contract of exemption shall be affected, must be construed as expressing the legislative intent to repeal all exemptions not protected by binding contracts beyond legislative control.

Where the highest court of a state decided that bonds were invalid and the decision is in conformity with prior decisions, the bonds are not protected, having been illegally issued; Zane v. Hamilton County, 189 U. S. 370, 23 Sup. Ct. 538, 47 L. Ed. 858.

Contracts made after a law is passed are made subject to it; Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 Sup. Ct. 409, 57 L. Ed. 707; Chicago, B. & Q. R. Co. v. Cram, 228 U. S. 70, 33 Sup. Ct. 437, 57 L. Ed. 734.

All contracts, whether executed or executory, express or implied, are within the prohibition; New Jersey v. Wilson, 7 Cra. (U. S.) 164, 3 L. Ed. 303; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; State Tax on Foreign-Held Bonds, 15 Wall. (U. S.) 300, 21 L. Ed. 179; and also judgments founded upon contracts; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Warren v. Stoddart, 105 U. S. 228, 26 L. Ed. 1117; Ralls County v. U. S., 105 U. S. 733, 26 L. Ed. 957.

A violation of the prohibition may be by city ordinance; Cumberland Telephone & Telegraph Co. v. City of Memphis, 198 Fed. 956, citing New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 21 Sup. Ct. 575, 45 L. Ed. 788; or any action of a municipality exercising delegated legislative power; Grand Trunk W. R. Co. v. City of South Bend, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633; or to the action of any state instrumentality exercising such delegated authority as a railroad commission; Grand Trunk Western R. Co. v. R. R. Commission, 221 U. S. 400, 31 Sup. Ct. 537, 55 L. Ed. 786; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; to land grants of a state; McGehee v. Mathis, 4 Wall. (U. S.) 143, 18 L. Ed. 314; or by state legislature; Terret v. Taylor, 9 Cra. (U. S.) 43, 3 L. Ed. 650; Pawlet v. Clark, 9 Cra. (U. S.) 292, 3 L. Ed. 735; Franklin County Grammar School v. Bailey, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405; to a law which is in its nature a contract under which absolute rights have vested; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162.

A state law annulling private conveyances

is also within the prohibition, as are laws repealing grants and corporate franchises; Bailey v. Mayor, etc., of City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Lowry v. Francis, 2 Yerg. (Tenn.) 534; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 656, 4 L. Ed. 629.

A state constitution is not a contract, the obligation of which the state is prohibited by the federal constitution from impairing; Church v. Kelsey, 121 U. S. 282, 7 Sup. Ct. 897, 30 L. Ed. 960; nor is a judgment for a tort; Louisiana v. New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Freeland v. Williams, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193. But the prohibition applies to state constitutions as well as to the laws of a state; Mississippi & M. R. Co. v. McClure, 10 Wall. (U. S.) 511, 19 L. Ed. 997; New Orleans Gaslight Co. v. Light & Heat Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Boyd v. U. S., 116 U. S. 631, 6 Sup. Ct. 524, 29 L. Ed. 746; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. Ed. 447; Fisk v. Jefferson, 116 U. S. 131, 6 Sup. Ct. 329, 29 L. Ed. 587.

Contracts to which a state is a party are within the protection of this constitutional prohibition; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162; and a provision in a charter of a toll bridge company that it shall not be lawful for any person to erect another bridge within a specified distance of the bridge authorized by said charter constitutes a contract which binds the state not to authorize the construction of such other bridge; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137. A contract between a state and a party, whereby he is to perform certain duties for a specified period for a stipulated compensation, is within the protection of the constitution; Hall v. Wisconsin, 103 U. S. 5, 26 L. Ed. 302. It being held that where a state descends from the plane of its sovereignty, it is regarded, *pro hac vice*, as a private person itself and is bound accordingly.

A state is bound by its grants of franchises and exclusive privileges, such as the privilege of supplying a municipality with water; New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; or gas; New Orleans Gas Co. v. Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510. A state is bound by the issue of bonds and coupons under the terms of an act which provided that such coupons should be receivable for taxes, etc., and a subsequent act which forbids the receipt of these coupons for taxes is a violation of the contract and void as against coupon-holders; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; Royall v. Virginia, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735.

A state, when it borrows money and promises to pay it with interest, cannot, by its own ordinance, relieve itself from performing to the letter all that it has expressly promised to its creditors; Murray v. Charleston, 96 U. S. 433, 24 L. Ed. 760. But with regard to grants, this clause of the constitution was not intended to control the exercise of the ordinary functions of government. It was not intended to apply to public property, to the discharge of public duties, to the exercise or possession of public rights, or to any changes or qualifications in these which the legislature of a state may at any time deem expedient; Knoup v. Bank, 1 Ohio St. 603, 609; Bank of Toledo v. Bond, *id.* 657; President, etc., of Michigan State Bank v. Hastings, 1 Dougl. (Mich.) 225, 41 Am. Dec. 549; Town of East Hartford v. Bridge Co., 17 Conn. 79.

The prohibition does not apply to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of making the contract; Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. Ed. 157, citing Wood v. Brady, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91.

The constitutional guaranty applies only to legislation subsequent to the contract and not to a state law in force at its inception; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491; Powell v. City of Madison, 107 Ind. 106, 8 N. E. 31; if valid when made, under the constitution and laws of the state, as then declared by its highest court, it cannot subsequently be impaired by any legislative or judicial action. The supreme court has jurisdiction only when the legislation was subsequent and effect has been given to it by the judgment sought to be reviewed; Louisiana v. New Orleans, 215 U. S. 170, 30 Sup. Ct. 40, 54 L. Ed. 144. This was the principle settled by the much discussed case of Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520, affirmed and enforced in Havemeyer v. Iowa County, 3 Wall. (U. S.) 294, 18 L. Ed. 38, where it was said that "the rule was established upon the most careful consideration."

What has come to be known as the doctrine of that case was first declared by Taney, C. J., in Ohio Life Ins. & Trust Co. v. Debolt, 16 How. (U. S.) 416, 14 L. Ed. 997: "The sound and the true rule is that, if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government and administered in its courts of justice its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."

That case was decided in 1853. In 1864, the case of Gelpcke v. Dubuque, which presented the precise situation described by Taney, C. J., was decided. Municipal bonds

had been issued in aid of railroads under acts which had been declared constitutional in seven decisions of the state supreme court, on the faith of which the bonds were purchased; a later decision of the same court overruled the previous ones and declared the act unconstitutional, and, upon a case originating in a federal court, the supreme court declined to follow the Iowa decision and the bonds were held valid, upon the ground that a contrary decision would impair the obligation of the contract; Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 17 L. Ed. 520.

This decision, the subject of much discussion both in the courts and by legal writers, has not been construed to have the effect of treating a judicial decision in the state court as "law" within the constitutional inhibition. The doctrine of the case applies only where the state decision, which is considered as impairing the obligation of the contract, is based on the construction of a statute or a determination as to its constitutionality; Ray v. Gas Co., 138 Pa. 591, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; Boyd v. Alabama, 94 U. S. 645, 24 L. Ed. 302; Ralls County v. Douglass, 105 U. S. 728, 26 L. Ed. 957; Hill v. Hite, 85 Fed. 268, 29 C. C. A. 549, and note. The distinction is thus stated: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decisions is, to all intents and purposes, *the same in its effect on contracts as an amendment of the law by means of a legislative enactment;*" Douglass v. County of Pike, 101 U. S. 677, 25 L. Ed. 968.

Again in Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, it was said: "In order to come within the provision of the constitution . . . not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only." This case decided that the supreme court would not review on writ of error the decision of a state court on the form of acknowledgment of a married woman's deed of real estate under the code of that state, which was a re-enactment of the Virginia code. The case clearly expounds what had become well-settled principles, which have been frequently repeated, and it was restated in National Mutual Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823.

The judgment of a state court declaring a contract invalid does not impair the obligation of the contract, unless such judgment gives effect to some provision of the state constitution, or some act which is claimed by the unsuccessful party to impair the obligation of the contract in question; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059. In such cases, the supreme court of the United States does not accept as conclusive the judgment of the state court as to the non-impairment of the contract; Wright v. Nagle, 101 U. S. 791, 25 L. Ed. 921; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. Ed. 922.

Where the supreme court of the state had affirmed the constitutional validity of a legislative act to authorize contracts for services to the public, and a contract had been entered into and services performed, the contractor was entitled to receive his compensation notwithstanding a subsequent decision that the act was unconstitutional; Thomas v. State, 76 Ohio St. 341, 81 N. E. 437, 10 L. R. A. (N. S.) 1112, 118 Am. St. Rep. 884. The decision is based largely on Douglas v. Pike County, 101 U. S. 677, 25 L. Ed. 968; which in Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, is said to have been based upon the doctrine that in actions originating in the federal courts the United States supreme court will, or at least, may adhere to the earlier decisions of the state court and refuse to adopt later ones when contracts have been entered into before the change and relying upon the former.

It is sometimes said that the doctrine thus apparently settled was departed from in what were known as the Elevated Railway Cases of New York, which came before the supreme court in Muhlker v. R. Co., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872; and a subsequent case in which the Muhlker Case seemed to be modified, Sauer v. New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176.

A careful examination of these cases, however, seems to lead to the conclusion that the court has not intended to alter or seriously modify the effect of the Laidley Case, but that where the court apparently treated the decision of the state court as impairing the obligation of the contract, it did, in fact, treat the last decision of the court of last resort as a construction of the statute, which made that, and not the decision itself, an impairment of the contract. This view is confirmed by the language of McKenna, J., who delivered the opinion of the court in the Muhlker Case, where in his preliminary statement, he says, "the case is therefore presented to us as to the effect of the deed . . . as constituting a contract, and the effect of the act of 1892 as an impairment of that contract." In the Sauer Case, Moody, J., who delivered the opinion of the court, said that "when the court of appeals has once interpreted the contract existing between the land-owner and the city, that interpretation becomes a part of the contract upon which one acquiring land may rely; and that any subsequent change of it to his injury impairs the obligation of the contract." Presumably, as the question before

the court was whether the statute had impaired the obligation of the contract, he must be understood as meaning any subsequent *change by statute as interpreted* by the court. But it is not left to inference what was actually meant by the court, since Justice Moody expressly states the question as a complaint, "that *the law* which authorized the construction of the viaduct, *as interpreted by the court of appeals* of New York impaired the obligation of the contract." This view of the effect of the Muhlker and Sauer Cases, as not to be considered as in any way conflicting with the Laidley Case, is also the conclusion reached in an instructive note on the subject in 23 L. R. A. (N. S.) 500.

The supreme court has quite uniformly in other cases, as in the Laidley Case, refused to allow a writ of error to the state court, to reverse its decision, as impairing the obligation of a contract, on the general ground that the decision was not the "law" of the state, within the constitutional prohibition; Mississippi & M. R. Co. v. Rock, 4 Wall. (U. S.) 177, 18 L. Ed. 381; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91; Bacon v. Texas, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. Ed. 363. In most if not all of the cases cited, the ground of dismissing the writ of error was that the decision did not of itself give jurisdiction, but only its construction of a state statute, as was also the case in Consumers' Co. v. Hatch, 224 U. S. 148, 32 Sup. Ct. 465, 56 L. Ed. 703. This construction of the term "laws" agrees with that of Story, J., in Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865, where he was considering the meaning of the term in section 34 of the Judiciary Act. In a dissenting opinion in Kuhn v. Coal Co., 215 U. S. 349, 371, 30 Sup. Ct. 140, 54 L. Ed. 228, Holmes, J., says: "Whether Swift v. Tyson can be reconciled with Gelpcke v. Dubuque, I do not care to inquire. I assume both cases to represent settled doctrines, whether reconciled or not."

Numerous decisions confirm the view above expressed as to the precise effect of the rule of Gelpcke v. Dubuque, as understood by the supreme court, but only a few can be here referred to. It was said that the impairment clause cannot be invoked against what is merely a change of decision in the state court, but only by reason of a statute enacted subsequently to the alleged contract which has been upheld or effect given to it by the state court; National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 24 Sup. Ct. 532, 48 L. Ed. 823. It is "definitely settled that the contract can only be impaired . . . by some subsequent statute of the state which has been upheld or effect given it by the state court." McCullough v. Virginia, 172 U. S. 102, 116, 19 Sup. Ct. 134, 43 L. Ed. 382, citing the prior cases. "If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law," there is no federal case of impairment of contract; *id.*

"In order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative, or executive boards or officers, or the doings of corporations or individuals;" New Orleans Water Works Co. v. Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607, per Gray, J., quoted with approval in Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 22 Sup. Ct. 26, 46 L. Ed. 86.

The law, as declared by a decision of the supreme court, when not a construction of a statute, does not enter into contracts made thereafter, and the subsequent reversal of the decision does not, therefore, impair the obligation of contracts; Lehigh Water Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91. See 2 Hare, Am. Const. L. 726.

"The constitutional inhibition applies only to the legislative enactments of the state and not to judicial decisions or the acts of state tribunals, or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired." Hanford v. Davies, 163 U. S. 273, 16 Sup. Ct. 1051, 41 L. Ed. 157; nor is there federal jurisdiction on this ground when the validity of the statute, under which the contract was made, is admitted and the only question is as to its construction by the state court; Central Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, both of which cases are approved in Weber v. Rogan, 188 U. S. 10, 23 Sup. Ct. 263, 47 L. Ed. 363.

There has been much discussion of the doctrine of Gelpcke v. Dubuque, of which a considerable part has been based upon an assumed inconsistency in the decisions of the United States supreme court in its treatment of the decisions of the state courts. This has led to difference of opinion as to the principle upon which the case was based. It is believed, however, that most, if not all, of this supposed inconsistency disappears under careful analysis of the decisions of the supreme court here cited. For general discussions of the subject, see White, "Gelpcke v.

Dubuque"; J. B. Thayer in 4 Harv. L. Rev. 311, and in 2 Cas. Cons. L. 1547; 14 Am. L. Rev. 211; 23 *id.* 190; 9 *id.* 381; 8 Harv. L. Rev. 328; Wambaugh, Study of Cases 78, 315; W. F. Dodd in 4 Ill. L. Rev. 155, 327; 5 L. R. A. (N. S.) 860; 12 L. R. A. (N. S.) 1081.

One of the first applications of the doctrine of the impairment of contracts was to the charter of a corporation in the Dartmouth College Case; 4 Wheat. 518, 4 L. Ed. 629; which held that the charter was a contract the obligation of which could not afterwards be impaired by the legislature without the corporation's consent. Since then charters of incorporation which are granted for the private benefit or purposes of the corporation have always been held to be contracts between the legislature and the corporation, having for their consideration or liability the duties which the corporation assumes by accepting them; Cooley, Const. Lim. 279; Moraw. Priv. Corp. 1044; Hare, Am. Const. L. 421, 527; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; and the doctrine is settled that charters of private corporations were within the constitutional guaranty; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; Providence Bank v. Billings, 4 Pet. (U. S.) 514, 7 L. Ed. 939; Piqua Branch of State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977.

To guard against the danger which the growth of great corporations, under the protection of this principle, has developed, the new constitutions of many of the states forbid the granting of corporate powers except subject to amendment and repeal. Provisions of this sort have become so general that the effect of the doctrine that a state cannot pass an act impairing the obligation of a contract has been largely modified. The decisions of the supreme court of the United States have also worked further modifications. The first was in the famous Charles River Bridge Case in 1837, 11 Pet. (U. S.) 420, 9 L. Ed. 773, where the court held that when the legislature had chartered a bridge company with the right to take tolls there was no implied contract that they would not charter another company to build a bridge alongside of the first which would in effect destroy the profits of the first by competition. The next modification was in the Granger Cases in 1876; 94 U. S. 113 to 187, 24 L. Ed. 77 to 97; which held that the regulation by the legislature of the rates to be charged by railroads and elevators was not an impairment of the obligation of a contract. See also Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176. This doctrine having been carried to great lengths in allowing the legislature to regulate the rates to be charged, the supreme court has now modified the doctrine by declaring that the power to regulate is not a power to destroy, and that a legislature, under the pretence of regulating fares and freights, cannot require a railroad to carry persons and property without profit; Covington & L. Turnpike Road Co. v. Sandford, 164 U. S. 578, 593, 17 Sup. Ct. 198, 41 L. Ed. 560.

In most if not all of the states there is, when a charter of incorporation is granted, a reserved power, either in the constitution or charter, to revoke, alter or repeal, and there has been much controversy and contrariety of decision as to how far this saves a legislative amendment from conflict with the impairment clause as applied to corporations under the Dartmouth College Case and those following it. While the reserved power to amend charters is subject to reasonable limitation, it includes any amendment which does not defeat or substantially impair the object of the grant or vested rights; Berea College v. Kentucky, 211 U. S. 45, 29 Sup. Ct. 33, 53 L. Ed. 81; Polk v. Life Ass'n, 207 U. S. 310, 28 Sup. Ct. 65, 52 L. Ed. 222; Wright v. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832. Provisions of a general law of a state for the creation of a new corporation on the reorganization of a railroad by a purchaser at a foreclosure sale, do not constitute a contract within the impairment clause; Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. Ed. 598, where it was said that the question was concluded by People v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498.

On the general subject of the power of the legislature under its right reserved to alter, amend, and repeal, see Worcester v. R. Co., 109 Mass. 103; Prentiss v. County Com'rs, 63 Me. 569; Rodemacher v. R. Co., 41 Ia. 297, 20 Am. Rep. 592; Gardner v. Ins. Co., 9 R. I. 194, 11 Am. Rep. 238; Cooley, Const. Lim. 279, note; Moraw. Priv. Corp. 1093; Hamilton Gas Light & Coke Co. v. Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Wheeling & B. Bridge Co. v. Bridge Co., 138 U. S. 287, 11 Sup. Ct. 301, 34 L. Ed. 967.

In general, only contracts are embraced in this provision which respect property or some object of value and confer rights which can be asserted in a court of justice. Debts are not property. A non-resident creditor of a state cannot be said to be, by virtue of a debt which it owes him, a holder of property within its limits; Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.

The following acts have been held void as impairing the obligation of a contract: The insolvent act of 1812 of Pennsylvania, so far as it attempted to discharge the contract; Farmers' & M. Bank v. Smith, 6 Wheat. (U. S.) 131, 5 L. Ed. 224; the insolvent law of Indiana affecting debts to citizens of other states; Cook v. Moffat, 5 How. (U. S.) 295, 12 L. Ed. 159; the act of Mary-

land of 1841 taxing stockholders in banks impaired the obligation in the act of 1821 organizing banks; Gordon v. Tax Court, 3 How. (U. S.) 133, 11 L. Ed. 529; the act of Ohio of 1851, taxing the state bank; Piqua Branch of State Bank v. Knoop, 16 How. (U. S.) 369, 14 L. Ed. 977; general tax law of North Carolina as applied to a railroad whose charter exempted it from taxation; Wilmington & W. R. v. Reid, 13 Wall. (U. S.) 264, 20 L. Ed. 568; the same in South Carolina; Humphrey v. Pegues, 16 Wall. (U. S.) 244, 21 L. Ed. 326; the same in New Jersey; New Jersey v. Yard, 95 U. S. 104, 24 L. Ed. 352; the same in Illinois as applied to the charter of a university; Northwestern University v. Illinois, 99 U. S. 309, 25 L. Ed. 387; the same in Louisiana applied to the charter of an asylum; St. Anna's Asylum v. New Orleans, 105 U. S. 362, 26 L. Ed. 1128; the act of Illinois of 1841 restricting mortgage sales impaired the obligation of a mortgage contract; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; the acts of Arkansas withholding assets of state banks from creditors impaired contracts with creditors; Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. Ed. 705; the act of New York of 1855 authorizing a bridge to be built impaired the obligation in a charter to another company; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; the act of Georgia of 1868 exempting property from execution impaired the obligation of a prior judgment; White v. Hart, 13 Wall. (U. S.) 646, 20 L. Ed. 685; the same in Georgia; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; the same in North Carolina; Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; the act of Virginia of 1876 as to the deduction of taxes from coupons on state bonds impaired the obligation to the state bondholders under the funding act of 1871; Hartman v. Greenhow, 102 U. S. 672, 26 L. Ed. 271; the ordinance of New Orleans of 1881 authorizing a light company to furnish New Orleans with gas impaired the obligation to another company under another act; Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472; so in Kentucky; Louisville Gas Co. v. Gas Co., 115 U. S. 683, 6 Sup. Ct. 265, 29 L. Ed. 510; the action of a city council, under statutory authority given to it to contract with street railway companies as to the use of streets and the length of time which the franchise was to continue; Cleveland Electric Ry. Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; an act providing that no execution sale shall be made unless the property brings two-thirds of its valuation according to the opinion of three householders; McCracken v. Hayward, 2 How. (U. S.) 608, 11 L. Ed. 397; the increase of assessment in a fraternal benefit association contrary to the condition of the application; Wright v. Knights of Maccabees, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838; or to a provision of the constitution of the association; Dowdall v. Mut. Ben. Ass'n, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417; a legislative act which postpones an existing valid mortgage lien and makes a subsequently created lien superior to it; National Bank of Commerce v. Jones, 18 Okl. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310 and note, 11 Ann. Cas. 1041, where the cases on this point are collected. The new lien created was one in favor of a livery stable keeper upon animals in his charge. In the note, which collects many authorities, the conclusion is reached that upon the weight of authority the lien for feeding and caring for domestic animals is not superior to a lien created by a valid prior recorded mortgage, though the mortgagee may be estopped by consent to the proceedings by which the other lien is obtained. A few cases are cited in the note which hold the agister's lien superior; and for specific cases on the subject which are very numerous the note cited may be referred to.

The adjudication of a federal court establishing a contract exempting from taxation, although based upon the judgment of a state court, is equally effectual as *res judicata* between the parties as though the federal court had reached its conclusion as upon an original question; and where the state law, under which taxes were levied, has been declared in a federal court to be unconstitutional, because impairing a contract which exempted from all taxation, the question is *res judicata*, as to the right to levy the tax under such law in any other year, although it may have been established by the highest court of that state that an adjudication concerning taxes for one year cannot be pleaded as an estoppel in a suit involving taxes in other years; Deposit Bank v. Frankfort, 191 U. S. 499, 24 Sup. Ct. 154, 48 L. Ed. 276.

A dedication of land as a common for the use and benefit of a town forever as shown on a plan and the acceptance thereof, and the sale of lots under the plan constitutes a contract, the obligation of which is protected by the contract laws of the federal constitution; City of Cincinnati v. R. Co., 223 U. S. 390, 32 Sup. Ct. 267, 56 L. Ed. 481.

Although a state law may impose different liabilities on foreign corporations and domestic ones, a statute providing that foreign corporations pay a fee based on their capital stock for the privilege of entering the state, constitutes a contract, and a subsequent statute imposing higher annual license fees on foreign corporations than on domestic corporations is void; nor can it be justified under the power to alter, amend and repeal; American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 27 Sup. Ct. 198, 51 L. Ed. 393, 9 Ann. Cas. 978. A Canadian statute (as to life insurance) impairing the obligation of a

contract will not be enforced in this country under comity; Simmelink v. Independent Order of Foresters, 71 Misc. 535, 130 N. Y. Supp. 803.

Acts held not to impair the obligation of a contract are a state law authorizing prohibition of sale of liquor on Sunday which did not violate the contract of the license to sell during the year; State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; a state statute establishing method of fixing water rates did not impair the contract of a water company with municipality under a previous ordinance fixing different rates; Murray v. City of Pocatello, 226 U. S. 318, 33 Sup. Ct. 107, 57 L. Ed. 239 (but a state statute changing the mode of fixing the charges of a water company where the contract provided a mode of changing the charges from time to time impairs the obligation of contract; City of Pocatello v. Murray, 173 Fed. 382); a state statute requiring transfers of corporation stock to be registered in the office of the secretary of state (and it is valid as against purchasers of stock prior to the act); Henley v. Myers, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

The Oklahoma bank guaranty act does not impair the obligation of a contract; Noble State Bank v. Haskell, 22 Okl. 48, 97 Pac. 590, affirmed in 219 U. S. 575, 31 Sup. Ct. 299, 55 L. Ed. 341 (see GUARANTY FUND); nor does an act forbidding extensions of life insurance business; Boswell v. Ins. Co., 193 N. Y. 465; nor one authorizing a change of the plan of business from the assessment plan to the legal reserve, flat insurance plan of old line insurance; Wright v. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; nor acts requiring railroads to fence their tracks; People v. R. Co., 235 Ill. 374, 85 N. E. 606, 18 L. R. A. (N. S.) 915.

Where a railroad has a contract with a city, exempting it from municipal taxation, and a new state constitution is adopted, providing for the taxation of all corporate franchises, such railroad by consolidation with another road is brought within the new constitution and cannot claim the exemption; Yazoo & M. V. R. Co. v. City of Vicksburg, 209 U. S. 358, 28 Sup. Ct. 510, 52 L. Ed. 833.

The erection of a viaduct upon a street was held to be a legitimate street improvement equivalent to a change of grade, and the owner of land abutting on the street was not entitled to damages for the impairment of access to his land and the lessening of the circulation of light and air over it; Sauer v. City of New York, 206 U. S. 536, 27 Sup. Ct. 686, 51 L. Ed. 1176 (see discussion of this case *supra*).

The contract exemption from taxation granted to the University of the South by its charter to continue so long as the land so exempted belongs to that institution is not impaired by taxing by legislative enactment the interests of the lessees of such land; Jetton v. University, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. The admission of an attorney is not a contract and an act prohibiting practice without taking the test oath is not invalid as impairing the obligation of a contract, though it was held *ex post facto* and void; In re Baxter, Fed. Cas. No. 1118.

Grants of exclusive privileges by state governments are subject to the exercise of the right of eminent domain by the state. The legislature has full authority to exercise an unlimited power as to the management, employment, and use of the eminent domain of the state, and to make all provisions necessary to the exercise of this right or power, but no authority whatever to give it away or take it out of the people directly or indirectly; Enfield Toll Bridge Co. v. R. Co., 17 Conn. 61, 42 Am. Dec. 716; Boston Water Power Co. v. R. R. Corp., 23 Pick. (Mass.) 360; Armington v. Town of Barnet, 15 Vt. 745, 40 Am. Dec. 705; Barber v. Andover, 8 N. H. 398; Tait's Ex'r v. Central Lunatic Asylum, 84 Va. 271. See EMINENT DOMAIN; FRANCHISES.

The power of one legislature to exempt altogether from taxation certain lands or property, and in this way to bind subsequent legislatures and take from the people one of their sovereign rights, may, where a consideration has been given, be considered now as distinctly settled by the supreme court of the United States, though not without remonstrance on the part of state courts; and the abandonment of this taxing power is not to be presumed where the deliberate purpose of the state does not appear; Capen v. Glover, 4 Mass. 305; Brewster v. Hough, 10 N. H. 138; Gordon v. Baltimore, 5 Gill (Md.) 231; Herrick v. Randolph, 13 Vt. 525; Debolt v. Ins. Co., 1 Ohio St. 563; New Jersey v. Wilson, 7 Cra. (U. S.) 164, 3 L. Ed. 303; Parker v. Redfield, 10 Conn. 495; Home of the Friendless v. Rouse, 8 Wall. (U. S.) 430, 19 L. Ed. 495; Pacific R. Co. v. Maguire, 20 Wall. (U. S.) 36, 22 L. Ed. 282. See New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121; Louisville Water Co. v. Clark, 143 U. S. 1, 12 Sup. Ct. 346, 36 L. Ed. 55; Yazoo & M. V. R. Co. v. Board of Levee Com'rs, 37 Fed. 24; State v. Butler, 86 Tenn. 614, 8 S. W. 586. The grant of the power of taxation by the legislature to a municipal corporation is not a contract, but is subject to revocation, modification, and control by the legislature; Williamson v. New Jersey, 130 U. S. 189, 9 Sup. Ct. 453, 32 L. Ed. 915.

In relation to marriage and divorce, it is now settled that this clause does not operate. The obligation of the marriage contract is created by the public law, subject to the public will, and to that of the parties; Maguire v. Maguire, 7 Dana (Ky.) 181; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723, 31

L. Ed. 654; 1 Bish. Mar. & D. § 9. The prevailing doctrine seems to be that the legislature has complete control of the subject of granting divorces, unless restrained by the constitution of the state; but in a majority of the states the constitutions contain this prohibition; Cooley, Const. Lim. 133; and there the jurisdiction in matter of divorce is confined exclusively to the judicial tribunals, under the limitations prescribed by law; 2 Kent 106. But where the legislature has power to act, its reasons cannot be inquired into; marriage is not a contract but a *status;* the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land; Starr v. Pease, 8 Conn. 541; Cooley, Const. Lim. 112.

In relation to bankruptcy and insolvency, the constitution, art. 1, § 8, cl. 4, gives to congress the power of making a bankrupt law. But it seems to be settled that this power is not exclusive; because the several states may also make distinct bankrupt laws, —though they have generally been called *insolvency* laws,—which will only be superseded when congress chooses to exercise its power by passing a bankruptcy law; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106. See *supra.*

A law does not impair the obligation of a contract if neither party is relieved thereby from performing anything which he obligated himself to do, otherwise the obligation is impaired whether the absolution of the party from performance is affected directly and expressly or indirectly; State v. Krahmer, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157, where a statute was held valid providing that a lien upon land by the holder of a tax certificate should ripen into a fee simple title upon the expiration of the time for redemption without notice of the expiration of the time of redemption to be given which had been required within a specified time under a prior statute.

There is a broad distinction taken as to the obligation of a contract and the remedy upon it. The abolition of all remedies by a law operating *in præsenti* is, of course, an impairing of the obligation of the contract. But it is admitted that the legislature may vary the nature and extent of remedies, as well as the times and modes in which these remedies may be pursued, and bar suits not brought within such times as may be prescribed. A reasonable time within which rights are to be enforced must be given by laws which bar certain suits; Call v. Hagger, 8 Mass. 430; Blackford v. Peltier, 1 Blackf. (Ind.) 36: Beal v. Nason, 14 Me. 344; Griffin v. McKenzie, 7 Ga. 163, 50 Am. Dec. 389; West Feliciana R. Co. v. Stockett, 13 Smedes & M. (Miss.) 395; Pearce's Heirs v. Patton, 7 B. Monr. (Ky.) 162, 45 Am. Dec. 61; Duvoll v. Wilson, 9 Barb. (N. Y.) 489.

The meaning of obligation is important with regard to the distinction taken between the laws existing at the time the contract is entered into and those which are enacted afterwards. The former are said to have been in contemplation of the parties, and so far entered into their contract. The latter are said to impair, provided they affect the contract at all. See cases *infra.*

The term "obligation of the contract" includes the means which are legally afforded for its enforcement; Louisiana v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; both the remedy and the validity of the contract are within the constitutional guaranty; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. Ed. 357; Seaine v. Inhabitants of Belleville, 39 N. J. L. 526; Davis v. Rupe, 114 Ind. 588, 17 N. E. 163; Smith v. Morse, 2 Cal. 524; Walker v. Whitehead, 43 Ga. 538. The remedies are essential parts of the contract and such as exist at the time the debt is incurred must be preserved in substance; Rees v. City of Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72; and a repeal or change of remedies which does this is valid; Harrison v. Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, where the cases are collected; but any subsequent law which so affects the remedy as substantially to impair and lessen the value of the contract is void; Edwards v. Kearzey, 96 U. S. 595, 607, 24 L. Ed. 793, quoted in Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. This includes all cases where the substitution of a different remedy is of one in substance more difficult, more burdensome, or uncertain than that which is repealed; one which appreciably lessens the value of the contract; City of Cleveland v. U. S., 166 Fed. 677, 93 C. C. A. 274. See an extended note on the remedy as part of the obligation of the contract, 1 L. R. A. 356.

The remedy may be altered or modified, or a new remedy provided, though possibly less convenient or speedy, and the remedy may be changed from equity to law; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423; Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; Penrose v. Canal Co., 56 Pa. 46, 93 Am. Dec. 778; and if the modification or substitute leaves a sufficient remedy, or otherwise provides a sufficient one it will be valid; Memphis v. U. S., 97 U. S. 293, 24 L. Ed. 920; Savings Inst. v. Makin, 23 Me. 360; In re Trustees of New York Protestant Episcopal Public School, 31 N. Y. 574. A reasonable change in the mode of enforcement is not a violation of the obligation of the contract; Mason v. Haile, 12

Wheat. (U. S.) 370, 6 L. Ed. 660; Richardson v. Akin, 87 Ill. 141; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103. A statute may change the remedy if it enlarges it; Waggoner v. Flack, 188 U. S. 595, 23 Sup. Ct. 345, 47 L. Ed. 609; and one providing for the condemnation of minority shares of stock in corporations where the majority of shares are held by another railroad corporation, if public interest demands, impairs neither the contract rights of one corporation under a lease to the other, or those of the stockholders; Offield v. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. Ed. 231.

Methods of procedure in actions on contract, that do not affect substantially rights of the parties, are within the control of the state, and the obligation of a stockholder's contract is not impaired within the meaning of the constitution by substituting, for individual actions for statutory liability, a suit in equity by the receiver of the insolvent corporation; Henley v. Myers, 215 U. S. 373 30 Sup. Ct. 148, 54 L. Ed. 240, affirming 76 Kan. 736, 93 Pac. 168, 173, 17 L. R. A. (N. S.) 779; Miners' & Merchants' Bank v. Snyder, 100 Md. 57, 59 Atl. 707, 68 L. R. A. 312, 108 Am. St. Rep. 390.

In becoming a stockholder of a corporation one does not acquire as against the state any vested right in a particular mode of procedure for the enforcement of liability, but it is assumed that parties make their contracts with reference to the existence of the power in the state to regulate such procedure; Henley v. Myers, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. Ed. 240.

There is a broad distinction between laws impairing the obligation of contracts and those giving a more efficient remedy, as where, in lieu of a right of creditors to enforce a liability against individual stockholders, it was provided that it should be enforced by a receiver in the interest of all creditors; Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163, where it was said that a state statute changing the remedy does not impair the contract if it gives a more efficacious one; or does not impair it so materially as to affect the creditor's rights, citing Pittsburg Steel Co. v. Equitable Society, 226 U. S. 455, 33 Sup. Ct. 167, 57 L. Ed. 297; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304.

Prior to these decisions, acts making such changes in the remedy had, in several cases, been held unconstitutional, as to creditors whose rights accrued prior to the change of remedy; Evans v. Nellis, 101 Fed. 920; Webster v. Bowers, 104 Fed. 627; Harrison v. Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Pusey & Jones Co. v. Love, 6 Pennewill (Del.) 80, 66 Atl. 1013, 11 L. R. A. (N. S.) 953, 130 Am. St. Rep. 144; Woodworth v. Bowles, 61 Kan. 569, 60 Pac. 331; Converse v. Bank, 79 Conn. 603, 65 Atl. 1065, reversed in 212 U. S. 567, 29 Sup. Ct. 691, 53 L. Ed. 654.

If there are two remedies, a change in one does not affect the contract; Watts v. Everett, 47 Ia. 269; Heyward v. Judd, 4 Minn. 483 (Gil. 375); and while the statute may change the remedies before judgment, it may not alter those after judgment, if the change materially affects rights under the contract; Read v. Bank, 23 Me. 318; Oliver v. McClure, 28 Ark. 555; Lockett v. Usry, 28 Ga. 345. So the statute may prescribe a remedy, if there is none, or provide a new one as good as that taken away; Longfellow v. Patrick, 25 Me. 18; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; In re Trustees of New York Protestant Episcopal Public School, 31 N. Y. 574. The test is whether the change diminishes or destroys the remedy by postponing the enforcement of the contract or lessening the efficiency of the remedy; Louisiana v. New Orleans, 102 U. S. 203, 26 L. Ed. 132; or by burdening the proceedings with new and unreasonable restrictions or conditions, or by anything that amounts to a deprivation of the remedy; The Binghamton Bridge, 3 Wall. (U. S.) 51, 18 L. Ed. 137; Western Sav. Fund Soc. of Philadelphia v. City of Philadelphia, 31 Pa. 175, 72 Am. Dec. 730; but if the ordinary and regular course of justice continues to operate upon the contract with the preservation of existing remedies, in substance, the obligation is not impaired; Holmes v. Lansing, 3 Johns. Cas. (N. Y.) 73.

The statute giving the remedy may be repealed, if passed subsequent to the contract; Young v. Territory, 1 Or. 213; or laws may be passed providing for more efficient enforcement of the contract; Bryson v. McCreary, 102 Ind. 1, 1 N. E. 55; Merchants' Ins. Co. v. Hill, 86 Mo. 466. Any state statute which impairs the obligation of the contract will be treated by the courts which enforce it as null and void, and the remedies will be applied without respect to it; Louisiana v. Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; any impairment is fatal and the degree is immaterial; Walker v. Whitehead, 16 Wall. (U. S.) 314, 21 L. Ed. 357. See extended notes on the effect of legislation as to the remedy in 1 L. R. A. 356 and 4 L. R. A. 348.

Changes which have been held not to impair the contract are, in the remedy on a judgment; Livingston v. Moore, 7 Pet. (U. S.) 469, 8 L. Ed. 751; Grosvenor v. Chesley, 48 Me. 369; the enforcement of forfeiture of a charter; Danley v. Bank, 15 Ark. 16; Klaus v. City of Green Bay, 34 Wis. 628; Van Rensselaer v. Snyder, 13 N. Y. 299; lessening the period of publication of notice in foreclosure proceedings; Webb v. Moore, 25 Ind. 4; extending time for advertisement of mortgage sales; Starkweather v. Hawes, 10 Wis. 126; lessening the force of a penalty

in a bond; Wood v. Kennedy, 19 Ind. 68; Potter v. Sturdivant, 4 Greenl. (Me.) 154; repealing usury laws, taking away that defense under existing contracts; Ewell v. Daggs, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682; providing that service of process may be made on any officer or agent of a corporation; Cairo & F. R. Co. v. Hecht, 95 U. S. 168, 24 L. Ed. 423; abolishing imprisonment for debt as a remedy for breach of contract; Penniman's Case, 103 U. S. 714, 26 L. Ed. 602; invalidating technically defective mortgages; Gross v. Mortgage Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. Ed. 795; or conveyances by *femes covert*; Randall v. Krieger, 23 Wall. (U. S.) 137, 23 L. Ed. 124; granting new trials; League v. De Young, 11 How. (U. S.) 202, 13 L. Ed. 657; reducing the period of limitation for bringing suits, if it leaves a reasonable period for suits for breaches of existing contracts; St. Louis v. Knapp, S. & Co., 104 U. S. 660, 26 L. Ed. 883; requiring the recording of existing mortgages, if it allow a reasonable time before the act takes effect; Vance v. Vance, 108 U. S. 514, 2 Sup. Ct. 854, 27 L. Ed. 808; providing for the re-organization of an insolvent corporation and binding creditors with notice who do not dissent; Gilfillan v. Canal Co., 109 U. S. 401, 3 Sup. Ct. 304, 27 L. Ed. 977.

An act is invalid which, after a contract is made, changes the measure of damages to be recovered for a breach; Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495; also, which imposes as a condition precedent to enforcing a right that the plaintiff shall prove that he never aided the rebellion against the United States; Pierce v. Carskadon, 16 Wall. (U. S.) 234, 21 L. Ed. 276. So is an act which, after a judgment has been enrolled, materially increases the debtor's exemption; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212; and an act which, after the execution of a mortgage, increases the period of redemption after foreclosure; Howard v. Bugbee, 24 How. (U. S.) 461, 16 L. Ed. 753; and an act which forbids a sale on the foreclosure of a mortgage at which less than two-thirds of the appraised value of the mortgage premises is realized; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143.

Stay laws which abridge the remedy are not valid as against existing contracts, but those which affect the remedy and not the right are valid; Aycock v. Martin, 37 Ga. 124, 92 Am. Dec. 56; Coffman v. Bank, 40 Miss. 29, 90 Am. Dec. 311; Jacobs v. Smallwood, 63 N. C. 112, Fed. Cas. No. 7,163; Breitenbach v. Bush, 44 Pa. 313, 84 Am. Dec. 442. So also statutes of limitation, if not retroactive, do not impair the obligation, and an act may be passed reducing the time, if a reasonable time continues; Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Wheeler v. Jackson, 137 U. S. 245, 11 Sup. Ct. 76, 34 L. Ed. 659; MacFarland v. Jackson, 137 U. S. 258, note, 11 Sup. Ct. 79, 34 L. Ed. 664. McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304; but if the change is unreasonable it will not be valid; Pereles v. Watertown, 6 Biss. 79, Fed. Cas. No. 10,980; Robinson v. Magee, 9 Cal. 81, 70 Am. Dec. 638; Osborn v. Jaines, 17 Wis. 574; unless the remedy remains substantially; Von Baumbach v. Bade, 9 Wis. 560, 76 Am. Dec. 283; so exemption laws, if reasonable and not materially affecting the remedy, are valid; but otherwise they impair the obligation of prior contracts; Von Hoffman v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Edwards v. Kearzey, 96 U. S. 595, 24 L. Ed. 793; Morse v. Goold, 11 N. Y. 281, 62 Am. Dec. 103; Hardeman v. Downer, 39 Ga. 425; Hawthorne v. Calef, 2 Wall. (U. S.) 23, 17 L. Ed. 776; *contra*, Rockwell v. Hubbell's Adm'rs, 2 Doug. (Mich.) 197, 45 Am. Dec. 246, 5 Am. L. Reg. N. S. 82.

An insolvent law is valid as to discharges from future debt when both debtor and creditor reside in the same state, but not if the creditor is a citizen of a different state, or if the law releases the debtor from prior debts; Ogden v. Saunders, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. Ed. 531; Betts v. Bagley, 12 Pick. (Mass.) 572; Boardman v. De Forest, 5 Conn. 1; Post v. Riley, 18 Johns. (N. Y.) 54; Donnelly v. Corbett, 7 N. Y. 500. Those are said to be valid which are in the nature of a *cessio bonorum*, leaving the debt still existing, or which provide for the discharge of the debt, but refer only to subsequent contracts, or which merely modify or affect the remedy, as by exempting the person from arrest, but still leave means of enforcing. But a law exempting the person from arrest and the goods from attachment on mesne process or execution would be void, as against the constitution of the United States; Planters' Bank v. Sharp, 6 How. (U. S.) 328, 12 L. Ed. 447; Kimberly v. Ely, 6 Pick. (Mass.) 440; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Smith v. Parsons, 1 Ohio, 236, 13 Am. Dec. 608; the rights of antecedent creditors are protected by the constitution; Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. The state insolvent laws in practice operate in favor of the citizens of the particular state only, as to other citizens of the same state, and not against citizens of other states, unless they have assented to the relief or discharge of the debtor expressly, or by some equivalent act, as by becoming a party to the process against him under the law, taking a dividend, and the like; Van Reimsdyk v. Kane, 1 Gall. 371, Fed. Cas. No. 16,871; Hinkley v. Marean, 3 Mas. 88, Fed. Cas. No. 6,523; Baker v. Wheaton, 5 Mass. 509, 4 Am. Dec. 71; Pugh v. Bussel, 2 Blackf. (Ind.) 366; but

the mere circumstance that the contract is made payable in the state where the insolvent law exists will not render such contract subject to be discharged under the law; Baldwin v. Hale, 1 Wall. (U. S.) 223, 17 L. Ed. 531; Baldwin v. Bank, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Gilman v. Lockwood, 4 Wall. (U. S.) 409, 18 L. Ed. 432.

Some states refuse to aid a citizen of another state in enforcing a debt against a citizen of their own state, when the debt was discharged by their insolvent law. In such cases the creditor must resort to the court of the United States within the state; Babcock v. Weston, 1 Gall. 168, Fed. Cas. No. 703; Braynard v. Marshall, 8 Pick. (Mass.) 194; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Woodhull v. Wagner, Baldw. 296, Fed. Cas. No. 17,975; Browne v. Stackpole, 9 N. H. 478. See INSOLVENT LAWS.

Exemption from *arrest* affects only the remedy, while exemption from attachment of the property, or a subjection of it to a stay law or appraisement law, impairs the obligation of the contract. Such a statute can only be enforced as to contracts made subsequently to the law; Bronson v. Kinzie, 1 How. (U. S.) 311, 11 L. Ed. 143; Green v. Biddle, 8 Wheat. (U. S.) 1, 75, 5 L. Ed. 547; Beers v. Haughton, 9 Pet. (U. S.) 359, 9 L. Ed. 145; U. S. v. Quincy, 4 Wall. (U. S.) 535, 18 L. Ed. 403; Tennessee v. Sneed, 96 U. S. 69, 24 L. Ed. 610; but a law abolishing distress for rent has been held to be applicable to cases in force at its passage; Conkey v. Hart, 14 N. Y. 22. With regard to exemption from arrest the supreme court holds that in modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right; Penniman's Case, 103 U. S. 720, 26 L. Ed. 602. See McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304. Whatever belongs, merely, to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of a contract; Hill v. Ins. Co., 134 U. S. 515, 10 Sup. Ct. 589, 33 L. Ed. 994.

It is admitted that a state may make partial exemptions of property, as of furniture, food, apparel, or even a homestead; Quackenbush v. Danks, 1 Denio (N. Y.) 128; Danks v. Quackenbush, 1 N. Y. 129; Bronson v. Newberry, 2 Dough. (Mich.) 38; Evans v. Montgomery, 4 W. & S. (Pa.) 218; Tarpley v. Hamer, 9 Smedes & M. (Miss.) 310. A homestead exemption may be made applicable to previously existing contracts; Ladd v. Adams, 66 N. C. 164; *contra*, Homestead Cases, 22 Gratt. (Va.) 266, 12 Am. Rep. 507; Hannum v. McInturf, 6 Baxt. (Tenn.) 225. But a law preventing all legal remedy upon a contract would be void; State v. Bank, 1 S. C. 63; Gunn v. Barry, 15 Wall. (U. S.) 610, 21 L. Ed. 212. An act providing that dower or right of dower shall not be subject to seizure or execution for the husband's debts during his lifetime, cannot affect the rights of creditors whose claims arose before the passage of the act; Patton v. Asheville, 109 N. C. 685, 14 S. E. 92. See Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751.

Nothing in the constitution prevents a state from passing a valid statute, to divest rights which have been vested by law in an individual, provided it does not impair the obligation of a contract; Calder v. Bull, 3 Dall. (U. S.) 386, 1 L. Ed. 648; Watson v. Mercer, 8 Pet. (U. S.) 89, 8 L. Ed. 876; Grinder v. Nelson, 9 Gill (Md.) 299, 52 Am. Dec. 694; Wilson v. Hardesty, 1 Md. Ch. Dec. 66. See In re Copenhaver, 54 Fed. 660; Shreveport v. Cole, 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589. This inhibition in the constitution is wholly prospective, and the states may legislate as to contracts thereafter made as they see fit; Edwards v. Kearzey, 96 U. S. 603, 24 L. Ed. 793; Denny v. Bennett, 128 U. S. 489, 9 Sup. Ct. 134, 32 L. Ed. 491; Lehigh Water Co. v. Borough of Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. Ed. 1059; Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773.

The law of place acts upon a contract, and governs its construction, validity, and obligation, but constitutes no part of it. The law explains the stipulations of parties, but never supersedes or varies them.

This is very different from supposing that every law is applicable to the subject-matter, as statutes of limitation and insolvency, or enters into and becomes a part of the contract. This can neither be drawn from the terms of the contract, nor presumed to be contemplated by the parties.

The weight of authority is that this clause of the constitution, like that which relates to the regulation of commerce by congress, does not limit the power of a state to enact general police regulations for the preservation of public health and morals; Phalen v. Virginia, 8 How. (U. S.) 163, 12 L. Ed. 1030; Hirn v. State, 1 Ohio St. 15; Baker v. Boston, 12 Pick. (Mass.) 194, 22 Am. Dec. 421; Vanderbilt v. Adams, 7 Cow. (N. Y.) 349; Coates v. New York, 7 Cow. (N. Y.) 585; Thorpe v. R. Co., 27 Vt. 149, 62 Am. Dec. 625; Platte & D. C. & M. Co. v. Dowell, 17 Colo. 376, 30 Pac. 68. See Freleigh v. State, 8 Mo. 607; State v. Sterling, *id.* 697; State v. Phalen, 3 Harr. (Del.) 442; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed. 648. See, generally, Hare, Am. Const. L. 768; Rawle, Const.; Dane, Abr. Index; Com. v. Canal Co., 150 Pa. 245, 24 Atl. 599; Commercial Bank of Natchez v. Chambers, 8 Smedes & M. (Miss.) 9; Hughes & Sloan, 8 Ark. 150; Ponder v. Graham, 4 Fla. 23; Buffalo E. S. R. Co. v. R. Co., 111 N. Y. 132, 19 N.

E. 63, 2 L. R. A. 284; Scribner v. Fisher, 2 Gray (Mass.) 43; Stanley v. Stanley, 26 Me. 191; New Orleans v. Water Works Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Shirley, Dartmouth College Case; Cooley, Const. Lim. 279; RATES; GROUND RENT; INSOLVENCY; POLICE POWER; FOURTEENTH AMENDMENT.

IMPALARE. To impound. Du Cange.

IMPANEL. To write the names of jurors on a *panel (q. v.)*, which is a schedule or list, in England, of parchment: this is done by the sheriff, or other officer lawfully authorized.

In American practice, the word is used of a jury drawn for trial of a particular cause by the clerk, as well as of the general list of jurors returned by the sheriff. Grah. Pr. 275. See 1 Archb. Pr. 365; 3 Bla. Com. 354; Porter v. People, 7 How. Pr. (N. Y.) 441. Strictly speaking and at common law, juries are impanelled when the jurymen are selected and ready to be sworn; Clough v. U. S., 55 Fed. 928.

IMPARCATUS. Imprisoned. Spell. Gloss.

IMPARLANCE (from Fr. *parler*, to speak). Time given by the court to either party to answer the pleading of his opponent: as, either to plead, reply, rejoin, etc.

It is said to be nothing else but the continuance of the cause till a further day; Bacon, Abr. *Pleas* (C). In this sense imparlances are no longer allowed in English practice; Andr. Steph. Pl. 162.

Time to plead. This is the common signification of the word; 2 Wms. Saund. 1, n. 2; 2 Show. 310; Barnes 346. In this sense imparlances are not recognized in American law, the common practice being for the defendant to enter an appearance, when the cause stands continued, until a fixed time has elapsed within which he may file his plea. In the act of congress of May 19, 1828, § 2, the word imparlance was originally used for "stay of execution," but the latter phrase has been substituted for it; Rev. Stat. § 988. See CONTINUANCE.

A general imparlance is the entry of a general prayer and allowance of time to plead till the next term, without reserving to the defendant the benefit of any exception; so that after such an imparlance the defendant cannot object to the jurisdiction of the court, or plead any matter in abatement. This kind of imparlance is always from one term to another.

A general special imparlance contains a saving of all exceptions whatsoever, so that the defendant after this may plead not only in abatement, but he may also plead a plea which affects the jurisdiction of the court, as privilege. He cannot, however, plead a tender, and that he was always ready to pay, because by craving time he admits that he is not ready, and so falsifies his plea; Tidd, Pr. 418.

A special imparlance reserves to the defendant all exception to the writ, bill, or count; and therefore after it the defendant may plead in abatement, though not to the jurisdiction of the court.

See Comyns, Dig. *Abatement* (I) 19, 20, 21, *Pleader* (D); 1 Chitty, Pl. 420; 1 Sell. Pr. 265; Bacon, Abr. *Pleas* (C).

IMPARSONEE. A clergyman who by induction *(q. v.)* is in possession of a benefice. He is then termed *persona impersonata*—a parson imparsonee. 1 Bla. Com. 391; Co. Litt. 300.

IMPARTIALLY. See FAITHFULLY.

IMPEACHMENT. A written accusation usually by the house of representatives of a state or of the United States to the senate of the state or of the United States against an officer.

The United States constitution declares that the house of representatives shall have the sole power of impeachment; art. 1, s. 2, cl. 5; and that the senate shall have the sole power to try all impeachments; art. 1, s. 3, cl. 6.

The persons liable to impeachment are the president, vice-president, and all civil officers of the United States; art. 2, s. 4. A question arose upon an impeachment before the senate, in 1799, whether a senator was a civil officer of the United States within the purview of this section of the constitution; and it was decided by the senate, by a vote of fourteen against eleven, that he was not; Senate Jour. Jan. 10, 1799; Story, Const. § 791; Rawle, Const. 213; Von Holst Const. Hist. 160. See UNITED STATES COURTS.

The offences for which a guilty officer may be impeached are treason, bribery, and other high crimes and misdemeanors; art. 2, s. 4. The constitution defines the crime of treason; art. 3, s. 3. Recourse must be had to the common law for a definition of bribery. Not having particularly mentioned what is to be understood by "other high crimes and misdemeanors," resort, it is presumed, must be had to parliamentary practice and the common law in order to ascertain what they are; Story, Const. § 795. It is said that impeachment may be brought to bear on any offense against the constitution or the laws which is deserving of punishment in this manner or is of such a character as to render the officer unfit to hold his office. It is primarily directed against official misconduct, and is not restricted to political crimes alone. The decision rests really with the senate; Black, Const. L. 121. The guilt of the accused must be established beyond a reasonable doubt; State v. Hastings, 37 Neb. 96, 55 N. W. 774.

The mode of proceeding in the institution and trial of impeachments is as follows: When a person who may be legally impeach-

ed has been guilty, or is supposed to have been guilty, of some malversation in office, a resolution is generally brought forward by a member of the house of representatives, either to accuse the party, or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges and recommend that he be impeached. When the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment against him will be exhibited in due time and made good before the senate, and to demand that the senate take order for the appearance of the party to answer to the impeachment. The house then agree upon the articles of impeachment, and they are presented to the senate by a committee appointed by the house to prosecute the impeachment. The senate then issues process, summoning the party to appear at a given day before them, to answer to the articles. The process is served by the sergeant-at-arms of the senate, and a return is made of it to the senate under oath. On the return-day of the process, the senate resolves itself into a court of impeachment, and the senators are sworn to do justice according to the constitution and laws. The person impeached is called to answer, and either appears or does not appear. If he does not appear, his default is recorded, and the senate may proceed *ex parte*. If he does appear, either by himself or attorney, the parties are required to form an issue, and a time is then assigned for the trial. The final decision is given by yeas and nays; but no person can be convicted without the concurrence of two-thirds of the members present; Const. art. 1, s. 2, cl. 6. See "Chase's Trial," and "Trial of Judge Peck;" also proceedings against Judge Humphreys, June 26, 1862, Congress. Globe, pt. 4, 3d sess., 32d Congress, pp. 2942–2953; and Trial of President Johnson, March 5, 1868, Congress. Globe, pt. 5, supplement, 40th Congress, 2d sess.; Lecture by Prof. Theo. W. Dwight, before Columbia Coll. Law School, 6 Am. Law Reg. 257; Article by Judge Lawrence, of Ohio, same volume, p. 641.

When the president is tried, the chief justice presides. The judgment, in cases of impeachment, does not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. Disqualification, as a punishment, is discretionary with the senate; Black, Const. L. 122. The party impeached remains liable to trial and punishment according to law. See UNITED STATES COURTS.

Proceedings on impeachments under the state constitutions are somewhat similar.

As to the impeachment of a judge, see JUDGE.

In England, the articles of impeachment are a kind of indictment found by the house of commons, and tried by the house of lords. It has always been settled that a peer could be impeached for any crime. There has been none since (1806) 29 St. Tr. 549. It was formerly believed that a commoner could only be impeached for high misdemeanors, not for capital offences; 4 Bla. Com. 260; but it seems now settled they may be impeached for high treason; May's Parl. Prac. Ch. 23. Impeachments have been very rare in England in modern times.

In Evidence. An allegation, supported by proof, that a witness who has been examined is unworthy of credit.

Every witness is liable to be impeached as to his reputation for truth and veracity; and, if his general character is good, he is presumed at all times to be ready to support it; Baker v. Robinson, 49 Ill. 299. See McDaniel v. State, 97 Ala. 14, 12 South. 241.

Negative evidence is admissible to establish a good reputation; People v. Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718, 22 L. R. A. (N. S.) 650, 12 Ann. Cas. 745; Day v. Ross, 154 Mass. 13, 27 N. E. 676. See CHARACTER; REPUTATION.

It is not admissible to impeach a defendant's testimony by showing that at a former trial for a like offence, he raised a similar issue and was contradicted; Com. v. Lannan, 155 Mass. 168, 29 N. E. 467. An accused person who testifies in his own behalf, is subject to impeachment, as other witnesses, by evidence of previous contradictory statements; Com. v. Racco, 225 Pa. 113, 73 Atl. 1067, 133 Am. St. Rep. 872; Peck v. State, 86 Tenn. 259, 6 S. W. 389. A witness cannot be impeached by the contradiction of immaterial statements; Jones v. Lumber Co., 58 Ark. 125, 23 S. W. 679; nor can he be as to collateral and irrelevant matter on which he was cross-examined; Garman v. State, 66 Miss. 196, 5 South. 385; People v. Dye, 75 Cal. 108, 16 Pac. 537; Kuhns v. Ry. Co., 76 Ia. 67, 40 N. W. 92; Atchison, T. & S. F. R. Co. v. Townsend, 39 Kan. 115, 17 Pac. 804; Gulf, C. & S. F. Ry. Co. v. Coon, 69 Tex. 730, 7 S. W. 492; Alger v. Castle, 61 Vt. 53, 17 Atl. 727; State v. Goodwin, 32 W. Va. 177, 9 S. E. 85.

On cross examination an accused person may be questioned as to other offenses in order to impeach his credibility; State v. Manuel (La.) 63 South. 174. Statements out of court inconsistent with those made by a witness in court are admissible to impeach him, where the proper foundation has been laid; Leahey v. Ry. Co., 97 Mo. 165, 10 S. W. 58, 10 Am. St. Rep. 300; Milligan & Co. v. Butcher, 23 Neb. 683, 37 N. W. 596; State v. Barrett, 40 Minn. 65, 77, 41 N. W. 459, 463; State v. Porter, 74 Ia. 623, 38 N. W. 514; Howard v. State, 25 Tex.

App. 686, 8 S. W. 929. See CROSS-EXAMINATION.

See ARTICLES OF IMPEACHMENT.

One who has called a witness and is surprised by his adverse testimony may, in the discretion of the trial court, be allowed to cross-examine him and show that he had previously made statements contrary to his testimony; Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958, 6 L. R. A. (N. S.) 727, 8 Ann. Cas. 1024. See DISCREDIT; EVIDENCE; WITNESS.

IMPEACHMENT OF WASTE. A restraint from committing waste upon lands or tenements; or, a demand of compensation for waste done by a tenant who has but a particular estate in the land granted, and, therefore, no right to commit waste.

All tenants for life or any less estate are liable to be impeached for waste, unless they hold *without impeachment of waste;* in the latter case they may commit waste without being questioned, or any demand for compensation for the waste done; 11 Co. 82. See WASTE.

Wanton acts of waste will be restrained; 2 Vern. 738; or will be the ground of recovery of damages in England under the Judicature Acts. These are usually called *equitable waste.*

IMPECHIARE. To impeach, accuse, or prosecute for felony or treason. Cowell.

IMPEDIATUS. Disabled from mischief by expeditation *(q. v.).* Cowell.

IMPEDIENS. One who hinders; the defendant or deforciant in a fine. Cowell.

IMPEDIMENTO. **In Spanish Law.** A prohibition to contract marriage, established by law between certain persons.

The disabilities arising from this clause are twofold, viz.:—

Impedimento Dirimente. Such disabilities as render the marriage null, although contracted with the usual legal solemnities. The disabilities arising from this source are enumerated in the following Latin verses (Esriche, Dict. 833):

"Error, conditio, votum, cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Si sis affinis, si forte coire nequibis,
Si parochi et duplicis desit præsentia testis,
Raptave sit mulier, nec parti reddita tutæ,
Hæc facienda vetant connubia, facta retractant."

Among these impediments, some are *absolute,* other *relative.* The former cannot be cured, and render the marriage radically null; others may be removed by previous dispensation.

In Spain, marriage is regarded in the twofold aspect of a civil and a religious contract. Hence the disabilities are of two kinds, viz.: those created by the local law and those imposed by the church.

In the earlier ages of the church, the emperors prohibited certain marriages: thus, Theodosius the Great forbade marriages between cousins-german; Justinian, between spiritual relations; Valentinian, Valens, Theodosius, and Arcadius, between persons of different religions.

The Catholic church adopted and extended the disabilities thus created, and by the third canon at the twenty-fourth session of the Council of Trent, the church reserved to itself the power of dispensation. As the Council of Trent did not determine, being divided, who had the power of granting dispensation, it is accorded in Italy to the pope, and in France and Spain, with few exceptions, to the bishops. The dispositions of the Council of Trent being in force in Spain (see Schmidt, Civ. Law of Spain, p. 6, note *a*), the ecclesiastical authority is alone invested with this power in Spain.

For the cases in which it may be granted, see Schmidt, Civ. Law c. 2, s. 14.

Impedimento, Impediente, or *Prohibitivo.*—Such disabilities as impede the contracting of a marriage, but do not annul it when contracted.

IMPEDIMENTS. Legal hindrances to making contracts. Some of these impediments are minority, want of reason, coverture, and the like. See CONTRACT; INCAPACITY.

In Civil Law. Bars to marriage.

Absolute impediments are those which prevent the person subject to them from marrying at all, without either the nullity of marriage or its being punishable.

Dirimant impediments are those which render a marriage void: as, where one of the contracting parties is already married to another person.

Prohibitive impediments are those which do not render the marriage null, but subject the parties to a punishment.

Relative impediments are those which regard only certain persons with regard to each other: as, the marriage of a brother to a sister.

See IMPEDIMENTO.

IMPENSÆ (Lat.). **In Civil Law.** Expense; outlay. Divided into *necessariæ,* for necessity, *utiles,* for use, and *voluptuariæ,* for luxury; Dig. 79. 6. 14; Voc. Jur.

IMPERATIVE. Mandatory as opposed to directory, as used of a statute *(q. v.).*

IMPERATOR. Emperor. The title of the Emperor in Rome and used also for the Kings of England in charters before the conquest. 1 Bla. Com. 242.

IMPERFECT OBLIGATIONS. Those which are not, in view of the law, of binding force.

IMPERFECT RIGHTS. See RIGHTS.

IMPERFECT TRUST. An executory trust *(q. v.).*

IMPERIUM. The right to command, which includes the right to employ the force of the state to enforce the laws: this is one of the principal attributes of the power of the executive. 1 Toullier, n. 58.

IMPERSONALITAS. Impersonality. An expression used where no particular person is referred to, as where the words *ut dicitur* are used. Co. Litt. 352 *b.*

IMPERTINENT (Lat. *in,* not, *pertinens,* pertaining or relating to).

In Pleading. IN EQUITY. A term applied to matters introduced into a bill, answer, or other proceeding in a suit which are not properly before the court for decision at that particular stage of the suit. Spencer v. Van

Duzen, 1 Paige Ch. (N. Y.) 555; Barbee v. Inman, 5 Blackf. (Ind.) 439; Wells v. Ry. Co., 15 Fed. 561. Impertinent matter is not necessarily scandalous; but all scandalous matter is impertinent.

The rule against admitting impertinent matter is designed to prevent oppression, not to become oppressive; 1 T. & R. 489; 6 Beav. 444; Tucker v. R. Co., 21 N. H. 38. No matter is to be deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted; Mechanics' Bank v. Levy, 3 Paige Ch. (N. Y.) 606; 12 Beav. 44; 10 Sim. 345.

A pleading may be referred to a master to have impertinent matter expugned at the cost of the offending party; Story, Eq. Pl. § 266; Langdon v. Pickering, 19 Me. 214; Mason v. Mason, 4 Hen. & M. (Va.) 414; Camden & A. R. Co. v. Stewart, 19 N. J. Eq. 343; but a bill may not be after the defendant has answered; Coop. Eq. Pl. 19. In England, the practice of excepting to bills, answers, and other proceedings for impertinence has been abolished.

The new United States Supreme Court equity rule 21 (33 Sup. Ct. xxiv) forbids exceptions for scandal or impertinence, but the court may, upon motion or its own initiative, strike out such.

Such matter is not put in issue by general plea, need not be proven at the trial, and cannot be proven against defendant's objection. The court has power to strike out impertinent matter, but this power is sparingly exercised and should not be encouraged. There is no reported case in Pennsylvania in which matter was stricken out of a declaration on the mere ground of impertinency; Astrich v. Ins. Co., 13 Pa. Dist. R. 350. See SCANDALOUS MATTER.

AT LAW. A term applied to matter not necessary to constitute the cause of action or ground of defence. Tucker v. Randall, 2 Mass. 283.

It constitutes surplusage, which see.

In Practice. A term applied to evidence of facts which do not belong to the matter in question. That which is immaterial is, in general, impertinent, and that which is material is not, in general, impertinent. 1 McC. & Y. 337. Impertinent matter in the interrogatories to witnesses or their answers, in equity, will be expugned after reference to a master at the cost of the offending party; 2 Y. & C. 445.

IMPESCARE. To impeach or accuse. *Impescatus*, impeached. Jac.; Blount.

IMPETITIO VASTI. Impeachment of waste, which title see.

IMPETRATION. The obtaining any thing by prayer or petition. In the ancient English statutes it signifies a pre-obtaining of church benefices in England from the church of Rome which belonged to the gift of the king or other lay patrons.

IMPIER. Umpire *(q. v.)*.

IMPIERMENT. Impairing or prejudicing. Jac. L. Dict.

IMPIGNORATA. Pledged; given in pledge *(pignori data)*; mortgaged. A term applied in Bracton to land. Fol. 20.

IMPIGNORATION. The act of pawning or pledging.

IMPLACITARE (Lat.). To implead; to sue.

IMPLEAD. To sue or prosecute by due course of law. Bell v. Bell, 9 Watts (Pa.) 47.

IMPLEMENTS (Lat. *impleo*, to fill). Such things as are used or *employed* for a trade, or furniture of a house. Coolidge v. Choate, 11 Metc. (Mass.) 82.

Whatever may supply wants: particularly applied to tools, utensils, vessels, instruments of labor: as, the *implements* of trade or of husbandry. Webster, Dict.; Meyer v. Meyer, 23 Ia. 359, 92 Am. Dec. 432; Smith v. Gibbs, 6 Gray (Mass.) 298; or a music teacher's piano; Amend v. Murphy, 69 Ill. 338. The word does not include horses or other animals; Coolidge v. Choate, 11 Metc. (Mass.) 79; Wallace v. Collins, 5 Ark. 41, 39 Am. Dec. 359; Enscoe v. Dunn, 44 Conn. 93, 26 Am. Rep. 430.

IMPLICATA (Lat.). Small adventures for which the freight contracted for is to be received although the cargo may be lost. Targa, c. 34; Emerigon, Mar. Loans § 5.

IMPLICATION. An inference of something not directly declared, but arising from what is admitted or expressed.

It may be founded upon either of two grounds: It may arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression; or upon the form of the gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else . . . which is a consequence necessarily resulting from that direction; Lord Westbury, in 11 H. L. Cas. 143. In order to prevent a will from failing of effect altogether, a gift will be implied if there be anything to designate the person to take; Thomas v. Thomas, 1 Rawle (Pa.) 112. It is but another term for meaning and intention apparent in the writing on judicial inspection; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233, cited in Lake Michigan Car Ferry Transp. Co. v. Crosby, 107 Fed. 724; North Point Consol. Irr. Co. v. Canal Co., 14 Utah 164, 46 Pac. 824.

See CONTRACT; DEED; EASEMENT; INTERPRETATION; WAY; WILL.

IMPLIED. This word is used in law as contrasted with "express;" *i. e.*, where the

intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties. See IMPLICATION.

IMPLIED ABROGATION. See ABROGATION.

IMPLIED ASSUMPSIT. See ASSUMPSIT.

IMPLIED COLOR. See COLOR.

IMPLIED CONSENT. See CONSENT.

IMPLIED CONSIDERATION. One that is implied by law, or presumed to exist, in contradistinction to an expressed consideration. See CONSIDERATION.

IMPLIED CONTRACT. See CONTRACT.

IMPLIED COVENANT. See COVENANT.

IMPLIED MALICE. See MALICE.

IMPLIED TRUST. See TRUST.

IMPLIED USES. See RESULTING USE; USE.

IMPLIED WARRANTY. The use of this term was condemned by Lord Abinger in Chanter v. Hopkins, 4 M. & W. 404, and it has been omitted from the English Bill of Sales Act.

See CAVEAT EMPTOR; SALE; WARRANTY.

IMPORTATION. The act of bringing goods and merchandise into the United States from a foreign country. U. S. v. Vowell, 5 Cra. (U. S.) 368, 3 L. Ed. 128; Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; 2 M. & G. 155. See IMPORTS.

IMPORTED. This word, in general, has the same meaning in the tariff laws that its etymology shows, *in porto*, to carry in. To "import" is to bear or carry into. An "imported" article is one brought or carried into a country from abroad. The Conqueror, 49 Fed. 99. See IMPORTS.

IMPORTS. Goods or other property imported or brought into the country from foreign territory. Story, Const. § 949. See U. S. Const. art. 1, § 8; 1, § 10; Smith v. Turner, 7 How. (U. S.) 477, 12 L. Ed. 703; Marriott v. Brune, 9 How. (U. S.) 619, 13 L. Ed. 282; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538.

In a constitutional sense they embrace only goods brought from a foreign country and do not include merchandise shipped from one state to another; American Exp. Co. v. Iowa, 196 U. S. 146, 25 Sup. Ct. 182, 49 L. Ed. 417.

It may be noted that although the word "imports" as used in the federal constitution applies only to goods brought into the United States from a foreign country, and not to such as are transported from one state to another; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382 (where Miller, J., discusses the subject at large, and the same distinction is emphatically asserted by White, J., in American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538, and was recognized by Day, J., in New York v. Wells, 208 U. S. 14, 28 Sup. Ct. 193, 52 L. Ed. 370); yet in many cases the term has been incidentally used by that court with reference to goods transported into one state from another; see Thurlow v. Massachusetts, 5 How. (U. S.) 504, 12 L. Ed. 256; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Bowman v. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49; Austin v. Tennessee, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224; Williams v. Walsh, 222 U. S. 415, 32 Sup. Ct. 137, 56 L. Ed. 253.

To prevent the mischievous interference of the several states with the national commerce, the constitution of the United States, art. 1, § 10, provides as follows: "No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress;" Story, Const. § 1616. Under this section it has been held that a state law imposing a license tax on importers of foreign liquors was unconstitutional; the importer by the payment of the duty purchases the right to dispose of his merchandise as well as to bring it into the country; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; but the provision against taxing imports by the states does not extend to articles brought from another state, but only to articles imported from foreign countries; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538. Imports from foreign countries are not subject to state taxation while remaining in the original cases in the hands of the importer, unbroken and unsold; Brown v. Maryland, 12 Wheat. (U. S.) 419, 6 L. Ed. 678; People v. Barker, 155 N. Y. 330, 49 N. E. 940; Gerdan v. Davis, 67 N. J. L. 88, 50 Atl. 586; State v. Board of Assessors, 46 La. Ann. 145, 15 South. 10, 49 Am. St. Rep. 318; In re Doane, 197 Ill. 376, 64 N. E. 377; and while they are in that condition the state cannot impose any tax upon them, as the right to sell without restriction is a necessary incident of the right to import without restriction; Low v. Austin, 13 Wall. (U. S.) 29, 20 L. Ed. 517; Oberteuffer v. Robertson, 116 U. S. 517, 6 Sup. Ct. 462, 29 L. Ed. 706. See Thurlow v. Massachusetts, 5 How. (U. S.) 504,

12 L. Ed. 256; Smith v. Turner, 7 How. (U. S.) 283, 12 L. Ed. 702; Cooley v. Board of Wardens, 12 How. (U. S.) 299, 13 L. Ed. 996; New York v. Miln, 11 Pet. (U. S.) 102, 9 L. Ed. 648.

After the cases, boxes or bales in which the goods are shipped are opened and the separate packages contained therein offered for sale, they cease to be "imported articles"; Wynne v. Wright, 18 N. C. 19; and become subject to local taxation; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165; after the sale by the importer they lose their distinctive character as imports and are taxable in the hands of the buyer; Pervear v. Massachusetts, 5 Wall. (U. S.) 479, 18 L. Ed. 608; Waring v. Mobile, 8 Wall. (U. S.) 110, 19 L. Ed. 342.

The original packages of imported goods which cannot be so taxed are the boxes, cases or bales in which the goods are shipped, and not the smaller packages therein contained, although the latter are the packages in which the goods were put up by the manufacturer; May v. New Orleans, 178 U. S. 496, 20 Sup. Ct. 976, 44 L. Ed. 1165. A tax on auction sales of imported goods in the original packages is invalid; Cook v. Pennsylvania, 97 U. S. 566, 24 L. Ed. 1015. So a tax on the uncollected price of imported goods was invalid; Gelpi v. Schenck, 48 La. Ann. 1535, 21 South. 115; as is a state law imposing a tax on the tonnage of vessels entering her ports; Inman S. S. Co. v. Tinker, 94 U. S. 238, 24 L. Ed. 118. But a state tax on the gross receipts of a railroad company, where freights are received partly from another state, is not a tax on imports; Woodruff v. Parham, 8 Wall. (U. S.) 123, 19 L. Ed. 382; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284, 21 L. Ed. 164.

An importation is not complete, within the revenue laws, until a voluntary arrival within some port of entry; Arnold v. U. S., 9 Cra. (U. S.) 104, 3 L. Ed. 671; Meredith v. U. S., 13 Pet. (U. S.) 486, 10 L. Ed. 258; The Mary, 1 Gall. 206, Fed. Cas. No. 9,183; but see Perots v. U. S., 1 Pet. C. C. 256, Fed. Cas. No. 10,993; and the duties accrue at the time of such arrival; U. S. v. Dodge, 1 Deady 124, Fed. Cas. No. 14,973; but the importation, as between the importer and the government, is not complete as long as the goods remain in the custody of the officers of the customs, and until delivered to the importer, they are subject to any duties on imports which congress may see fit to impose; U. S. v. Benzon, 2 Cliff. 512, Fed. Cas. No. 14,577.

See ORIGINAL PACKAGE.

Free human beings are not imports or exports within the meaning of the United States constitution. The words refer only to property. Persons are not the subject of commerce and do not fall within the reasoning founded upon the construction of the power given to Congress to regulate commerce, and of the prohibition on the states against imposing a duty on imported goods; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 2 Sup. Ct. 87, 27 L. Ed. 383; but in the Passenger Cases, 7 How. (U. S.) 283, 412, 12 L. Ed. 702, it was held "that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise"; and the "head tax" statutes of New York and Massachusetts were held unconstitutional (so far as appears from the opinions there being no "opinion of the court") as repugnant both to the commerce clause and that prohibiting the laying of import duties by the states. It is the settled construction of the commerce clause that interstate commerce includes the "movement of persons as well as of property"; Hoke v. U. S., 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906; and the reasoning by which that conclusion is supported would seem to apply equally well to the constitutional safeguards of foreign commerce. Yachts are not imports. See TONNAGE.

IMPORTUNITY. Urgent solicitation, with troublesome frequency and pertinacity.

Wills and devises are sometimes set aside in consequence of the importunity of those who have procured them. Whenever the importunity is such as to deprive the testator of the freedom of his will, the will becomes fraudulent and void; Dane, Abr. c. 127, a. 14, s. 5, 6, 7; 2 Phill. Eccl. 551.

IMPOSITIONS. Imposts, taxes, or contributions. See Harvard College v. City of Boston, 104 Mass. 470.

IMPOSSIBILITY. A thing which under the law or according to the due course of nature cannot be done or performed.

Impossibility of performance is an important head of the law of contract, and the questions arising as to its effect may be affected by the classification to which the impossibility is assigned, the time at which it arises, and whether it affects the promise or the consideration for it.

There may be an impossibility *of fact*, existing in the nature of things, or arising out of the circumstances of the case or a legal impossibility created *by law*.

Of the first kind there may be a contradiction in the contract resulting from promises *inconsistent* with each other when made. There may also be a *physical* impossibility as when the thing contracted for is against the course of nature. Of the latter class examples are suggested of an agreement "to make two spheres of the same substance, but one twice the size of the other of which the greater should fall twice as fast as the smaller when they were both dropped from a height; or to construct a perpetual motion;" the former having been considered an elementary fact before Galileo's experiment and

the latter being still attempted. Wald, Poll. Contr. 350.

A physical impossibility may be either *absolute*, which means impossible in any case, as if one should contract to reach the moon; or *relative*, as to make a payment to one who is dead. Of this kind is what is termed *practical* impossibility, as when a ship is so injured that it cannot be repaired except at an excessive or unreasonable cost; in this case it is treated as a total loss, being physically but not practically possible to repair. Certain accidents occurring from death, tempests, and the like are characterized by the phrase "impossibility arising by the act of God" *(q. v.)*.

A contract or condition, the performance of which is made impossible by a rule of law, is termed a *legal* impossibility; as if one should give a bond to secure a simple contract with a collateral agreement that there should be no merger of the contract debt. A *logical* impossibility exists when the agreement is inconsistent with the nature of the transaction, as where a gift is made to one expressly for his own benefit with a condition that he immediately transfer it to a third person.

The impossibility may exist at the time of making the agreement, in which case it is said to be *original;* or it may be caused by matter arising *ex post facto*, as where the party to be benefited dies after the contract to be executed though before the performance. Such *subsequent* impossibility may be caused by the act of the party making the promise or the party to be benefited, or of a stranger, as a public enemy *(q. v.)*, or by the act of God *(q. v.)*.

An agreement to perform an impossibility whether in law or in fact is void; Wald, Poll. Contr. 352; Leake, Contr. 358; Harr. Contr. 34, 174. See L. R. 5 C. P. 577; Board of Com'rs of Mahoning County v. Young, 59 Fed. 96, 8 C. C. A. 27. There may, however, be the liability in damages for the breach of an unqualified undertaking to perform an impossibility; Chicago, M. & St. P. R. Co. v. Hoyt, 149 U. S. 1, 13 Sup. Ct. 779, 37 L. Ed. 625; the real question in such a case is the existence of the liability; 2 Q. B. 680; it is a question of construction, whether the language of the contract is to be treated as not applying to a situation which renders its literal performance impossible; Harriman, Contr. 176. A contract to perform a notorious impossibility known to the parties to be such at the time of making the contract is void; 15 M. & W. 253; L. R. 6 Q. B. 124; L. R. 5 C. P. 577; if the impossibility has arisen after the making of the contract, although without any fault of the covenantor, he is not discharged from liability under it; Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; an impossibility is no defence if occasioned by the act of a stranger; 2 Ld. Raym. 1164; 2 El. & Bl. 688; or of alien enemies; Aleyn 26.

It is held to be an excuse when caused by the non-continuance either of the subject-matter of the contract or of the conditions essential to its performance; Stewart v. Stone, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215; Buffalo & L. Land Co. v. Improvement Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951.

Certain contracts are construed as containing an implied exception of impossible events, and even general words in the contract will not be held to apply to the possibility of the particular contingency which afterwards happened; Leake, Contr. 702; L. R. 4 Q. B. 185; Walker v. Tucker, 70 Ill. 527; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415.

Where, in an action of breach of promise of marriage, a plea that consummation had become impossible by reason of bodily disease endangering the life of the defendant, was held by four judges to three in the exchequer chamber to be no defence, the court of the queen's bench having been equally divided; El. Bl. & El. 748, 29 L. J. Q. B. 45; but of this case it is said that "it is so much against the tendency of the latter cases that it is of little or no authority beyond the point actually decided;" Wald, Poll. Contr. 378; and in an American case upon analogous facts the court approved the criticism upon the English case and refused to follow it.

Where the contract is for personal services, there is an implied condition that the parties should be alive to perform them; Blakely v. Sousa, 197 Pa. 305, 47 Atl. 286, 80 Am. St. Rep. 821. Likewise where a party becomes, without his own fault, incapable of fulfilling the contract in his lifetime; Dickey v. Linscott, 20 Me. 453, 37 Am. Dec. 66; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7; Green v. Gilbert, 21 Wis. 395. Impossibility may arise by the default of either party. Default of promisor is breach of the contract; default of promisee discharges promisor and may be treated as breach; U. S. v. Peck, 102 U. S. 64, 26 L. Ed. 46. Where the existence of a contract is made to depend on a future contingent event assigned by the will of the parties, then the subsequent impossibility of the same discharges the contract. Unexpected difficulty or inconvenience short of impossibility is no excuse; U. S. v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284; Harlow v. Borough of Homestead, 194 Pa. 57, 45 Atl. 87; Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654.

The cases upon this subject are necessarily of infinite variety, as is natural where the question is so largely one of construction. To examine them in detail would be impossible within the scope of this title, but they

will be found collected and classified in the various works on contracts.

See CONTRACT; UNLAWFUL AGREEMENT; CONDITION; PERFORMANCE; ACT OF GOD.

IMPOSSIBLE CONTRACT. One which the law will not hold binding upon the parties because of the natural or legal impossibility of the performance by one party of that which is the consideration for the promise of the other. 7 Wait, Act. & D. 124. See IMPOSSIBILITY.

IMPOSTS. Taxes, duties, or impositions. A duty on imported goods or merchandise. Federalist, no. 30; Elliott, Deb. 289; Story, Const. § 949; Cooley, Tax. 3.

The Constitution of the United States gives congress power "to lay and collect taxes, duties, excises, and imposts," and prohibits the states from laying "any imposts or duties on exports or imports" without the consent of congress; U. S. Const. art. 1, § 8, n. 1; art. 1, § 10, n. 2. The words "duties, excises, and imposts" are used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, business transactions, vocations, occupations, and the like; Thomas v. U. S., 192 U. S. 363, 24 Sup. Ct. 305, 48 L. Ed. 481.

See Bacon, Abr. *Smuggling;* Co. 2d Inst. 62; Pacific Ins. Co. v. Soule, 7 Wall. (U. S.) 433, 19 L. Ed. 95; Worsley v. Second Municipality of New Orleans, 9 Rob. (La.) 324, 41 Am. Dec. 333.

See TAX; IMPORTS; EXCISE.

IMPOTENCE. In Medical Jurisprudence. Inability on the part of the male organ of copulation to perform its proper function. Impotence applies only to disorders affecting the function of the organ of copulation, while *sterility* applies only to lack of fertility in the reproductive elements of either sex. Dennis, System of Surgery.

Impotence may be considered as incurable, curable, accidental, or temporary. Absolute or incurable impotence is that for which there is no known relief, principally originating in some malformation or defect of the genital organs. Its existence or nonexistence is not to be determined by mere anatomical appearances, and the mere fact of age alone is never sufficient to imply absence of the procreative power; 2 Witth. & Beck. 396. It may also be the result of infirmity rather than of age or deformity, as the effect of vicious habits; *id.* 398. As a general rule, diseases which do not affect the brain or spinal cord, and which are not attended with great debility, do not on the part of the male prevent intercourse. In acute febrile diseases temporary impotence is, beyond question, the rule; but the power is rapidly regained, on convalescence. Mumps is occasionally followed by impotence. Habits of drunkenness and the abuse of drugs may act in a similar manner. Emotion is an exceedingly common cause of temporary impotence. Deformity or defects of development in the organs, as well as disease of such organs, are likewise cause of impotence. 2 Taylor, Med. Leg. Jurispr. 1.

Ability to procreate is not the test; it is enough if the parties are able to have sexual intercourse; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Devanbagh v. Devanbagh, 5 Paige, Ch. (N. Y.) 554, 28 Am. Dec. 443; 3 Phill. Ecc. 325; and impotency arising after the marriage does not avoid it; 30 L. J. Prob. Mat. & Adm. 73. Unless otherwise by statute, impotence renders a marriage voidable, not void; L. R. 1 Ex. 246; Anonymous, 24 N. J. Eq. 19.

It has been held that, in a divorce case, an examination may be ordered of a defendant alleged to be impotent; Atchison, T. & S. F. R. Co. v. Thul, 29 Kan. 466, 474, 44 Am. Rep. 659. See also 19 Cent. L. J. 144, and 2 Bish. M. & D. § 590.

Impotence is a statutory ground of divorce in most states, and in some courts it is held that jurisdiction of suits for nullity, is impliedly conferred with jurisdiction in divorce; Tiffany, Pers. & Dom. Rel. 39. See Le Barron v. Le Barron, 35 Vt. 365; J. G. v. H. G., 33 Md. 401, 3 Am. Rep. 183. Where this defect existed at the time of the marriage and was incurable, by the ecclesiastical law and the law of several of the American states, the marriage may be declared void *ab initio;* Com. Dig. *Baron and Femme* (C 3); Bacon, Abr. *Marriage, etc.* (E 3); 1 Bla. Com. 440; 1 Beck, Med. Jur. 67; Code, 5. 17. 10; Devanbagh v. Devanbagh, 5 Paige, Ch. (N. Y.) 554, 28 Am. Dec. 443; Bascomb v. Bascomb, 25 N. H. 267; but see Burtis v. Burtis, Hopk. Ch. (N. Y.) 557, 14 Am. Dec. 563. Impotency arising from idiocy intervening after the marriage is no ground for divorce in Vermont; Norton v. Norton, 2 Aik. 188. See Merlin, Rep. *impuissance.* But it seems the party naturally impotent cannot allege that fact for the purpose of obtaining a divorce; 3 Phill. Eccl. 147. See 2 Phill. Eccl. 10; 3 *id.* 325; 1 Chitty, Med. Jur. 377; Bish. Marr. & D.; 1 Bla. Com. 440; 1 Hagg. 725. See, as to the signs of impotence, 1 Briand, Méd. Leg. c. 2, art. 2, § 2, n. 1; *Dictionnaire des Sciences medicales,* art. *Impuissance;* and generally, Trebuchet, *Jur. de la Méd.* 100; 1 State Tr. 315; 8 *id.* App. no. 1, p. 23; 3 Phill. 147; 1 Hagg. Eccl. 523; Foderé, Méd. Lég. § 237.

See STERILITY.

IMPOTENTIAM, PROPERTY PROPTER. A qualified property, which may subsist in animals *feræ naturæ,* on account of their inability, as where hawks, herons, or other birds build in a person's trees, or coneys, etc., make their nests or burrows in a person's land, and have young there, such person has a qualified property in them till they can

fly or run away, and then such property expires. 2 Steph. Com. 7th ed. 8.

IMPOUND. To place in a pound goods or cattle distrained or astray. 3 Bla. Com. 12; Newhouse v. Hatch, 126 Mass. 364. See ANIMAL.

Also, to retain in the custody of the law. A suspicious instrument produced at a trial is said to be impounded, when it is ordered by the court to be retained, in case criminal proceedings should be taken.

IMPRESCRIPTIBILITY. The state of being incapable of prescription.

A property which is held in trust is imprescriptible: that is, the trustee cannot acquire a title to it by prescription; nor can the borrower of a thing get a right to it by any lapse of time, unless he claims an adverse right to it during the time required by law.

IMPRESCRIPTIBLE RIGHTS. Such as a person may use or not, at pleasure, since they cannot be lost to him by the claims of another founded on prescription.

IMPRESSION. A case involving a new state of facts or a question yet undetermined and therefore without precedent is usually termed a "case of first impression."

IMPRESSMENT. The arresting and retaining mariners for the king's service. 1 Bla. Com. 420; 3 Steph. Com. 594.

It was "the mode formerly resorted to of manning the British navy. The practice had not only the sanction of custom, but the force of law, for many acts of parliament, from the reign of Philip and Mary to that of George III., had been passed to regulate the system of impressment. Impressment consisted in seizing by force, for service in the royal navy, seamen, river-watermen, and at times landsmen, when state emergencies rendered them necessary. An armed party of reliable men, commanded by officers, usually proceeded to such houses in the seaport towns as were supposed to be the resort of the seafaring population, laid violent hands on all eligible men and conveyed them forcibly to the ships of war in the harbor. As it was not in the nature of sailors to yield without a struggle, many terrible fights took place between the press-gangs and their intended victims—combats in which lives were often lost. In point of justice there is little, if anything, to be said for impressment, which had not even the merit of an impartial selection from the whole available population;" Int. Cyc.

IMPREST MONEY. Money paid on enlisting or impressing soldiers or sailors.

In Old English Law. Money given out for a certain purpose to be afterwards accounted for. Money advanced by the crown to be employed for its own purpose in connection with the government, as in the case of secret service money. See Man. Exch. Pr. 17; 13 Eliz. c. 4; 6 Price 424 *a*. See PRESS-GANG.

IMPRETIABILIS (Lat.). Beyond price; invaluable.

IMPRIMATUR (Lat.). A license or allowance to one to print.

At one time, before a book could be printed in England, it was requisite that a permission should be obtained; that permission was called an *imprimatur*. In some countries where the press is liable to censorship, an *imprimatur* is required.

IMPRIMERE. To impress or press; to imprint or print.

IMPRIMERY. In some of the ancient English statutes this word is used to signify a printing office; the art of printing; a print or impression.

IMPRIMIS (Lat.). In the first place. It is commonly used to denote the first clause in an instrument, especially in wills, *item* being used to denote the subsequent clauses. This is also its classical and literal meaning. Ainsworth, Dict. See Fleta, lib. 2, c. 54. *Imprimitus* and *imprimum* also occur. Du Cange; Prec. Ch. 430; Cases *temp.* Talb. 110; 6 Madd. 31; Magna Cart. 9 Hen. III.; 2 Anc. Laws & Inst. of Eng. The use of *imprimis* does not import a precedence of the bequest to which it is prefixed; Everett v. Carr, 59 Me. 325; 1 Rop. Leg. 426.

IMPRISON. To confine; to put in prison; to detain in custody.

IMPRISONMENT. The restraint of a man's liberty.

The restraint of a person contrary to his will. Co. 2d Inst. 589; U. S. v. Benner, Baldw. 239, Fed. Cas. No. 14,568; Johnson v. Tompkins, Baldw. 600, Fed. Cas. No. 7,416.

It may be in a place made use of for purposes of imprisonment generally, or in one used only on the particular occasion, or by words and an array of force, without bolts or bars, in any locality whatever; Pike v. Hanson, 9 N. H. 491; Smith v. State, 7 Humphr. (Tenn.) 43; Webb, Poll. Torts 259; 7 Q. B. 742; but it cannot be applied to the detention of a youth in a reform school; State v. Brown, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, 36 Am. St. Rep. 651. A forcible detention in the street, or the touching of a person by a peace-officer by way of arrest, are also imprisonments; Bac. Abr. *Trespass* (D 3); Lawson v. Buzines, 3 Harr. (Del.) 416. See Smith v. State, 7 Humphr. (Tenn.) 43; Coman v. Storm, 26 How. Pr. (N. Y.) 84. It is not necessary to touch the person, but it is enough if he is within the power of the officer and submits; Mowry v. Chase, 100 Mass. 79. Forcibly taking a person in an omnibus across a city; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000; or where a person is constantly guarded by detectives so that he is at no time free to come and go as he pleases, but his movements are at all times subject to the control and direction of those who have him in charge; Fotheringham v. Express Co., 36 Fed. 252, 1 L. R. A. 474; constitute imprisonment. It has been decided that lifting up a person in his chair and carrying him out of the room in which he was sitting with others, and excluding him from the room, was not an imprison-

ment; 1 Chitty, Pr. 48; and the merely giving charge of a person to a peace-officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party, to avoid it, next day attend at a police court; 1 C. & P. 153; and if, in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a bail bond, such submission to the process will not constitute an arrest; 6 B. & C. 528; D. & R. 233. No other warrant is necessary for the detention of a prisoner than a certified copy of the judgment against him; In re Brown, 32 Cal. 48; or of the precept on which the arrest was made; Atherton v. Gilmore, 9 N. H. 185.

Where there is a constitutional provision that there shall be no imprisonment for debt except in cases of fraud, fraud must be found by a jury and judgment entered in conformity therewith, in order to warrant such imprisonment; Ledford v. Emerson, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362. An act authorizing imprisonment of one who obtains food and lodging without paying therefor is not an unconstitutional imprisonment for debt; In re Milecke, 52 Wash. 312, 100 Pac. 743, 21 L. R. A. (N. S.) 259, 132 Am. St. Rep. 968; Ex parte King, 102 Ala. 182, 15 South. 524; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L. R. A. 656; nor for contempt for wilful refusal to obey an order to pay suit money and temporary alimony pending a divorce suit; Ex parte Davis, 101 Tex. 607, 111 S. W. 394, 17 L. R. A. (N. S.) 1140; Daly v. Daly, 80 Conn. 609, 69 Atl. 1021; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625; Bronk v. State, 43 Fla. 461, 31 South. 248, 99 Am. St. Rep. 119. But *contra* of a statute providing for the imprisonment of one who after receiving advances commits a breach of contract for farm labor; Ex parte Hollman, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105. See PEONAGE.

See FALSE IMPRISONMENT; ARREST; INFAMY; FELONY; ACCUMULATIVE SENTENCES; POOR DEBTORS.

IMPRISTI. Followers; partisans; adherents; supporters. Those who take the part of or side with another in attack or defence.

IMPROPER. Not suitable; unfit; not suited to the character, time, and place. Chadbourne v. Newcastle, 48 N. H. 196.

IMPROPER FEUD. "Under the title of improper or derivative feuds were comprised all such as do not fall within the other descriptions; such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable service, or upon a rent, in lieu of military services; such as were in themselves, alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud." 1 Bla. Com. 58. See FEUDUM.

IMPROPER NAVIGATION. The navigation of a ship without due care and skill. It includes anything wrongly done with a ship, or any part of it, in the course of the voyage. L. R. 6 C. P. 563.

IMPROPRIATION. The act of employing the revenues of a church living to one's own use: it is also a parsonage or ecclesiastical living in the hands of a layman, or which descends by inheritance. Techn. Dict.

The transfer to a layman of a benefice to which the cure of souls is annexed with an obligation to provide with a performance of the spiritual duties attached to the benefice is said to be nearly the same as an appropriation. Holth. Before the Reformation the terms were used without a very clear distinction, and appropriations by spiritual persons and incorporation were termed impropriation. Later the use of the latter word was restricted by Spelman and others to appropriation by laymen. Moz. & W.

The distinction is thus clearly stated: The practice of *impropriation* differs from the somewhat similar but more ancient usage of *appropriation*, inasmuch as the latter supposes the revenues of the appropriated benefice to be transferred to ecclesiastical or quasi-ecclesiastical persons or bodies, as to a certain dignitary in a convent, a college, a hospital; while impropriation applies that the temporalities of the benefice are enjoyed by a layman; the name, according to Spelman, being given in consequence of their thus being *improperly* applied, diverted from their legitimate use. The practice of impropriation, and still more that of appropriation, as in the case of monasteries, etc., and other religious houses, prevailed extensively in England before the Reformation; and on the suppression of the monasteries, all such rights were (by 27 Henry VIII. c. 28, and 31 Henry VIII. c. 13) vested in the crown, and were by the crown freely transferred to laymen, to whose heirs have thus descended, not only the right to the tithes, but also in many cases the entire property of rectories. The spiritual duties of such rectories are discharged by a clergyman, who is called a vicar, and who receives a certain portion of the emoluments of the living, generally consisting of a part of the glebe-land of the parsonage, together with what are called the "small tithes" of the parish. Int. Cyc.

The word impropriation is said to be derived from *in proprietatem*, because the living is held as a lay property. Phill. Ecc. L. 275.

An *impropriate* rector was the term applied to a lay rector as opposed to a spiritual rector; and tithes in the hands of a lay owner were called *impropriate* tithes, as those in the hands of a spiritual owner were termed *appropriate* tithes.

See 1 Bla. Com. 384; 2 Steph. Com. 678; Brown, Dict.; APPROPRIATION.

IMPROVE. To cultivate; to reclaim. Clark v. Phelps, 4 Cow. (N. Y.) 190.

"Improved" land may mean simply land "occupied;" it is not a precise technical word; Bond v. Fay, 8 Allen (Mass.) 213; it includes ground appropriated for a railroad; Road in Lancaster City, 68 Pa. 396.

Land on which there are three dwelling-houses, besides suitable farm buildings, which has been farmed for the last twenty years, and from which, in the last eighteen years, there has been received $12,000 in

rents, besides a share of the landlord in the growing crops, is not "unimproved real estate," as that phrase is used in a will; Murphy v. Taylor, 173 Pa. 320, 33 Atl. 1041; and the fact that the property was bought by the testator for the purpose of being cut into city lots, and sold as such, does not render it "unimproved" land; *id.*

IMPROVEMENT. An amelioration in the condition of real or personal property effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes. It includes repairs or addition to buildings, and the erection of fences, barns, etc.; Appeal of Schenley, 70 Pa. 98; French v. New York, 16 How. Pr. (N. Y.) 220; Wimberly v. Mayberry, 94 Ala. 240, 10 South. 157, 14 L. R. A. 305; Fay v. Fay, 1 Cush. (Mass.) 93; Hartford & N. Y. Steamboat Co. v. City, 78 N. Y. 1; Nicoll v. Burke, *id.* 581; or a windmill; Phelps & Bigelow Windmill Co. v. Baker, 49 Kan. 434, 30 Pac. 472.

As between the rightful owner of lands and an occupant who in good faith has put on improvements, the land *with its improvements* belongs to the rightful owner of the land, without compensation for the increased value at common law; Green v. Biddle, 8 Wheat. (U. S.) 1, 5 L. Ed. 547; McCoy v. Grandy, 3 Ohio St. 463; Frear v. Hardenbergh, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356; Albee v. May, 2 Paine 74, Fed. Cas. No. 134; Stewart v. Matheny, 66 Miss. 21, 5 South. 387, 14 Am. St. Rep. 538; Mull v. Graham, 7 Ind. App. 561, 35 N. E. 134; though the rule may be otherwise in equity; 3 Atk. 134; Humphreys v. Holtsinger, 3 Sneed (Tenn.) 228; Nelson v. Allen, 1 Yerg. (Tenn.) 360; Murray v. Gouverneur, 2 Johns. Cas. (N. Y.) 441, 1 Am. Dec. 177; Searl v. School Dist. No. 2, 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; see Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; and by statute in some of the states; Baggot v. Fleming, 10 Cush. (Mass.) 451; Withington v. Corey, 2 N. H. 115; Strong v. Hunt, 20 Vt. 614; Lamar v. Minter, 13 Ala. 31; Lombard v. Ruggles, 9 Greenl. (Me.) 62; Davis' Lessee v. Powell, 13 Ohio 308; Bryant v. Hambrick, 9 Ga. 133; Roberts' Heirs v. Long, 12 B. Monr. (Ky.) 195; Jewell v. Truhn, 38 Minn. 433, 38 N. W. 106; Van Bibber v. Williamson, 37 Fed. 756; and their value may be offset to an action for mesne profits at common law; Hylton v. Brown, 2 Wash. C. C. 165, Fed. Cas. No. 6,983; Jackson v. Loomis, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Dowd v. Faucett, 15 N. C. 95; Bright v. Boyd, 1 Sto. 478, Fed. Cas. No. 1,875. A life tenant is not entitled to payment for improvements made by him without the consent of the remaindermen; Appeal of Datesman, 127 Pa. 348, 17 Atl. 1086, 1100; Van Bibber v. Williamson, 37 Fed. 756; Smalley v. Isaacson, 40 Minn. 450, 42 N. W. 352. In determining the right to recover for improvements placed on land, ordinary repairs necessary for the enjoyment of the object sold cannot be classed as improvements; McKenzie v. Bacon, 41 La. Ann. 6, 5 South. 640.

As to dower in improvements, see DOWER, and as to improvement in Patent Law, see PATENT.

As to improvements of streets and assessments therefor, see ASSESSMENT.

IMPROVIDENCE. Such want of care and foresight in the management of property as would be likely to render it less valuable and impair the interests of those who may be or become entitled to it. Such is the construction of the word in a statute excluding one found incompetent by reason of improvidence, to perform the duties of an administrator; Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 45. See also Emerson v. Bowers, 14 N. Y. 449; Freeman v. Kellogg, 4 Redf. (N. Y.) 218.

IMPUBES (Lat.). **In Civil Law.** One who is more than seven years old, or out of infancy, and who has not attained the age of puberty; that is, if a boy, till he has attained his full age of fourteen years, and if a girl, her full age of twelve years. Domat, *Liv. Prél.* t. 2, s. 2, n. 8.

IMPUNITY. Freedom or safety from punishment. The phrase *impunitive damages* was said to be unintelligible; Dillon v. Rogers, 36 Tex. 153.

IMPUTATIO. In Civil Law. Legal liability.

IMPUTATION OF PAYMENT. In Civil Law. The application of a payment made by a debtor to his creditor.

The rules covering this subject are thus stated, substantially, in Howe, Studies in the Civil Law, 156:

1. The *debtor* may apply his payment as he pleases, with the exception that in case of a debt carrying interest it must be first applied to discharging the interest.

2. If the debtor makes no application, the *creditor* may apply the funds by informing the debtor at the time of payment.

3. The *law* imputes in the neglect of the parties to do so, and it will be made by the law in favor of the debtor. It directs that imputation which would have been best for the debtor at the time of payment. Hence it applies the funds to obligations most burdensome to the debtor: *e. g.* to a debt which is not disputed, rather than to one that is; to a debt that is due rather than to one that is not; to one on which the debtor may be arrested, rather than to one on which he cannot; to a debt for which the debtor has given sureties, rather than to one which he owes singly; to a debt for which the debtor is principal obligor, rather

than one of which he is merely surety; to a mortgage rather than to an unsecured debt, and to a debt which would render the debtor insolvent if unpaid, rather than to any less important one.

4. Of debts of equal grade, if there be no imputation by the parties, the application will be to that of the longest standing.

5. To debts of the same date, and in other respects equal, the application will be *pro rata.*

6. As to debts bearing interest, the imputation is to interest before principal.

When the creditor is to pay himself out of a fund realized,—for example, from the sale of property pledged,—he should apply the money to the debt secured by the pledge, rather than to some other; to interest before principal; to the debt of the highest rank, rather than to those of lower rank; and if there are several of equal rank then *pro rata.*

Some of these rules have been followed in England and America, some decisions following the exact language of the Roman law. See 1 Sto. Eq. Jur. 13th ed. § 459; but see APPROPRIATION OF PAYMENTS.

In Louisiana the preceding civil law rules are in force. The statutory enactment, Civ. Code, art. 2159, is a translation of the Code Napoléon, art. 1253–1256, slightly altered. See Pothier, Obl. n. 528, by Evans, and notes. Payment is imputed first to the discharge of interest; Hynson v. Maddens, 1 Mart. N. S. (La.) 571; Estebene v. Estebene, 5 La. Ann. 738. But if the interest was not binding, being usurious, the payment must go to the principal; Hynes v. Cobb, 2 La. Ann. 363; Compton's Ex'rs v. Compton, 5 La. Ann. 616. The law applies a payment to the most burdensome debt; Hanse & Hepp v. Ins. Co., 10 La. 1, 29 Am. Dec. 456; Pargoud v. Griffings' Adm'r, 10 La. 357; Louisiana State Bank v. Barrow, 2 La. Ann. 405; McElrath v. Dupuy, 2 La. Ann. 520. A creditor's receipt is an irrevocable imputation, except in cases of surprise or fraud; Bloodworth v. Jacobs, 2 La. Ann. 24; Adams v. Bank, 3 La. Ann. 351. See APPROPRIATION OF PAYMENTS.

IMPUTED NEGLIGENCE. See NEGLIGENCE.

IN. A preposition which is used in real estate law to designate title, seisin, or possession, or when one is said to be "in by lease of his lessor." It may be as an abbreviation of invested or intitled, or of in possession.

IN ACTION. A thing is said to be *in action* when it is not in possession, and for its recovery, the possessor unwilling, an action is necessary. 2 Bla. Com. 396. See CHOSE IN ACTION.

IN ADVERSUM. Where a decree is obtained against one who resists, it is termed "a decree not by consent but *in adversum.*" Jenkins v. Eldredge, 3 Sto. C. C. 318, Fed. Cas. No. 7,267.

IN ÆQUA MANU. In equal hand. Fleta, l. 3, c. 14, § 2.

IN ÆQUALI JURE (Lat.). In equal right. See MAXIMS.

IN ÆQUALI MANU. In equal hand; held indifferently between two parties.

Where an instrument was deposited by the parties to it, in the hands of a third person, to hold it under certain conditions or stipulations it was said to be held *in æquali manu.* Reg. Orig. 28.

IN ALIENO SOLO. On another's land. 2 Steph. Com. 20.

IN ALIO LOCO. See CEPIT IN ALIO LOCO.

IN AMBIGUO. In doubt.

IN APERTA LUCE. In open daylight; in the day-time. 9 Co. 65 *b.*

IN APICIBUS JURIS. Among the subtleties or extreme doctrines of the law. 1 Kames, Eq. 190.

IN ARBITRIUM JUDICIS. At the pleasure of the judge.

IN ARCTA ET SALVA CUSTODIA. In close and safe custody. 3 Bla. Com. 415.

IN ARTICULO. In a moment; immediately. C. 1, 34, 2.

IN ARTICULO MORTIS. At the point of death.

IN AUTRE, or AUTER, DROIT (L. Fr.). In another's right. As representing another. An executor, administrator, or trustee sues *in autre droit.* See ESTATE PUR AUTRE VIE.

IN BANCO. In banc (*q. v.*).

IN BLANK. Without restriction. Applied to indorsements on promissory notes where no indorsee is named. See INDORSEMENT.

IN BONIS. Among the goods, or property; in actual possession. Inst. 4, 2, 2. *In bonis defuncti,* among the goods of the deceased.

IN CAMERA. A case is said to be heard *in camera* when the doors of the court are closed and only persons concerned in the case are admitted. This is done when the facts are such as to make a private hearing expedient, as in some divorce cases. The term belongs rather to the English practice in which the power to grant private hearings in certain cases is established, though there has been a difference of opinion as to its exact limitations. The term is not much used in the United States. See OPEN COURT.

IN CAPITA (Lat.). To or by the heads or polls. Thus, where persons succeed to estates *in capita,* they take each an equal share; so, where a challenge to a jury is *in capita,* it is to the polls, or to the jurors individually, as opposed to a challenge to the array. 3 Bla.

Com. 361. *Per capita* is more commonly used in the former instance.

IN CAPITE (Lat.). In chief. A tenant *in capite* was one who held directly of the crown, 2 Bla. Com. 60, whether by knight's service or socage. Chal. R. P. 5. But tenure *in capite* was of two kinds, general and special; the first from the king (*caput regni*), the second from a lord (*caput feudi*). A holding of an honor in the king's lands, but not immediately of him, was yet a holding *in capite;* Kitch. 127; Dy. 44; Fitzh. N. B. 5. Abolished by 12 Car. II. c. 24.

IN CASU PROVISO. In a (or the) case provided. *In tali casu editum et provisum,* in such case made and provided. Touch. Pl. 164, 165.

IN CHIEF. Principal; primary; directly obtained. A term applied to the evidence obtained from a witness upon his examination in court by the party producing him, in relation to the matter in issue at the trial. The examination so conducted for this purpose.

Evidence or examination *in chief* is to be distinguished from evidence given on *cross*-examination and from evidence given upon the *voir dire.*

Evidence *in chief* should be confined to such matters as the pleadings and the opening warrant; and a departure from this rule will be sometimes highly inconvenient, if not fatal. Suppose, for example, that two assaults have been committed, one in January and the other in February, and the plaintiff prove his cause of action to have been the assault in January; he cannot abandon that, and afterwards prove another committed in February, unless the pleadings and openings extend to both; 1 Campb. 473. See, also, 6 C. & P. 73; 1 Mood. & R. 282.

This matter, however, is one of practice; and a great variety of rules exist in the different states of the United States, the leading object, however, being in all cases the same,—to prevent the plaintiff from introducing in evidence a different case from the one which he had prepared the defendant to expect from the pleadings.

IN COMMENDAM. See COMMENDAM.

IN COMMUNI. In common. Fleta, lib. 3, c. 4, § 2.

IN CONSIDERATIONE EJUS. In his sight or view. 12 Mod. 95.

IN CONSIDERATIONE INDE. In consideration thereof. 3 Salk. 64, pl. 5.

IN CONSIDERATIONE LEGIS. In consideration or contemplation of law; in abeyance. Dyer 102 *b.*

IN CONSIDERATIONE PRÆMISSORUM. In consideration of the premises. 1 Strange 535.

IN CONSIMILI CASU. See CONSIMILI CASU.

IN CONTINENTI. Immediately; without any interval or intermission. Dig. 44, 5, 1. Sometimes written in one word, "*incontinenti.*"

IN CONTUMACIAM. See EXTRADITION.

IN CORPORE. In body or substance; in a material thing or object.

IN CRASTINO. On the morrow. *In crastino Animarum,* on the morrow of All Souls. 1 Bla. Com. 342.

IN CUJUS REI TESTIMONIUM. In testimony whereof; *q. v.*

IN CUSTODIA LEGIS (Lat.). In the custody of the law. In general, when things are *in custodia legis,* they cannot be distrained, nor otherwise interfered with by a private person, or by another officer acting under authority of a different court or jurisdiction; Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470; Taylor v. Carryl, 20 How. (U. S.) 583, 15 L. Ed. 1028, and cases cited; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. See CUSTODIA LEGIS.

IN DELICTO. In fault. See IN PARI DELICTO.

IN DIEM. For a day; for the space of a day. Calv. Lex.

IN DOMINICO. In demesne. *In dominico suo ut de feodo,* in his demesne as of fee.

IN DORSO. On the back, from which come indorse, indorsement. 2 Bla. Com. 468. *In dorso recordi,* on the back of the record. 5 Co. 45.

IN DUBIO. In doubt; either in a condition of uncertainty, or in a doubtful case.

IN DUPLO. In double. *Damna in duplo,* double damages. Fleta, 4. 10. 1.

IN EADEM CAUSA. In the same state or condition. Calv. Lex.

IN EMULATIONEM VICINI. In hatred or envy of a neighbor. Where an act is done or action brought, solely to hurt or distress another, it is said to be *in emulationem vicini.* 1 Kames, Eq. 56.

IN EQUITY. In a court of chancery in contra-distinction to a court of law; within the contemplation or purview of equity jurisprudence; according to the doctrine of equity.

IN ESSE (Lat.). In being. In existence. An event which may happen is *in posse;* when it has happened, it is *in esse.* The term is often used of liens or estates. A child in its mother's womb is, for some purposes, regarded as *in esse;* Hone v. Van Schaick, 3 Barb. Ch. (N. Y.) 488.

IN EST DE JURE (Lat.). It is implied of right or by law.

IN EVIDENCE. The proofs in a cause which have been offered and admitted are said to be in evidence.

IN EXCAMBIA. In exchange. The technical and formal words in an old deed of exchange.

IN EXECUTION AND PURSUANCE OF. Words used to express the fact that the instrument is intended to carry into effect some other instrument, as in case of a deed in execution of a power. They are said to be synonymous with "to effect the object of;" U. S. v. Nunnemacher, 7 Biss. 129, Fed. Cas. No. 15,903.

IN EXITU. In issue. *De materia in exitu*, of the matter in issue. 12 Mod. 372.

IN EXTENSO. Fully; at length; a copy of a document made *verbatim*.

IN EXTREMIS (Lat.). At the very end. In the last moments; on the point of death.

IN FACIE CURIÆ. In the face of the court. Dyer 28.

IN FACIE ECCLESIÆ (Lat.). In the face or presence of the church. A marriage is said to be made *in facie ecclesiæ* when made in a consecrated church or chapel, or by a clerk in orders elsewhere; and one of these two things is necessary to a marriage in England in order to the wife's having dower, unless there be a dispensation or license; 1 Bish. Mar. Div. & Sep. 404. But see 6 & 7 Will. IV. c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 72. It was anciently the practice to marry at the church door, and there make a verbal assignment of dower. These verbal assignments, to prevent fraud, were necessarily held valid only when made *in facie et ad ostium ecclesiæ*. See 2 Bla. Com. 103; Taylor, Gloss.

IN FACIENDO (Lat.). In doing. Story, Eq. Jur. § 1308.

IN FACT. Words used in pleading to introduce an amount of fact,—as "the said plaintiff (or defendant) further in fact saith,"—indicating that what follows is a statement of acts of parties as distinguished from a legal conclusion or intendment. The latter in equity pleading, when it may frequently be proper, after a statement of the facts on which the conclusion rests, begins,—"and the defendant is advised that, etc." When pleadings were in Latin the words *in facto* were used, thus *in facto dicit*, he, in fact, says. See 1 Salk. 22 Pl. 1.

IN FAVOREM LIBERTATIS (Lat.). In favor of liberty.

IN FAVOREM VITÆ (Lat.). In favor of life.

IN FEODO. In fee. Bract. f. 207; Fleta, l. 2, c. 64, § 15. *Seisitus in feodo*, seised in fee. *Id.* 8. 7. 1.

IN FIERI (Lat.). In process of completion. A thing is said to rest *in fieri* when it is not yet complete: *e. g.* the records of a court were anciently held to be *in fieri*, or incomplete, till they were recorded on parchment, but now till the giving of judgment, after which they can be amended only during the same term. 2 B. & Ad. 791; 3 Bla. Com. 407. It is also used of contracts.

IN FINE (Lat. at the end). A term used with a citation to denote that it is at the end of the section, chapter, book, law, or paragraph.

IN FORMA PAUPERIS (Lat.). In the character or form of a poor man.

When a person is so poor that he cannot bear the charges of suing at law or in equity, upon making oath that he is not worth five pounds, and bringing a certificate from a counsellor at law that he believes him to have a just cause, he is permitted to sue *in forma pauperis*, in the manner of a pauper; that is, he is allowed to have original writs and subpœnas gratis, and counsel assigned him without fee; 3 Bla. Com. 400. See Williams v. Wilkins, 3 Johns. Ch. (N. Y.) 65; Brown v. Story, 1 Paige, Ch. (N. Y.) 588; Bolton v. Gardner, 3 Paige, Ch. (N. Y.) 273; Richardson v. Richardson, 5 Paige, Ch. (N. Y.) 58; 2 Moll. 475. This applies (Act of July 20, 1892) to the circuit court, but not to an appeal to the circuit court of appeals; Taylor v. Express Co., 164 Fed. 616, 90 C. C. A. 526; nor to the supreme court; Bradford v. R. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. Ed. 178.

See PAUPER.

IN FORO. In the forum *(q. v.)*; before the tribunal or court.

IN FORO CONSCIENTIÆ (Lat.). Before the tribunal of conscience; conscientiously. The term is applied to moral obligations as distinct from the obligations which the law enforces. In the sale of property, for example, the concealment of facts by the vendee which may enhance the price is wrong *in foro conscientiæ*, but there is no legal obligation on the part of the vendee to disclose them, and the contract will be good if not vitiated by fraud; Pothier, Vent. part 2, c. 2, n. 233; 2 Wheat. (U. S.) 185, note c.

IN FORO CONTENTIOSO. In the tribunal or forum of litigation.

IN FORO ECCLESIASTICO. In an ecclesiastical forum, tribunal, or court. Fleta, l. 2, c. 57, § 14. Early in the reign of Henry III., the Episcopal constitutions were published, forbidding all ecclesiastics to appear as advocates *in foro sæculari*, nor did they long continue to act as judges there, not caring to take the oath of office which was found necessary. 1 Bla. Com. 20.

IN FORO SÆCULARI. In a secular court. See last title; 1 Bla. Com. 20; Fleta 2. 57. 14.

IN FRAUDEM CREDITORUM (Lat.). In fraud of creditors or with an intent to defraud them. Inst. 1. 6. 3.

IN FRAUDEM LEGIS (Lat.). In fraud of the law; contrary to law. Taylor, Gloss. Using process of law for a fraudulent purpose.

If a person gets an affidavit of service of declaration in ejectment, and thereupon gets judgment and turns the tenant out, when he has no manner of title in a house, he is liable as a felon, for he used the process of law *in fraudem legis;* 1 Ld. Raym. 276; Sid. 254.

An act done *in fraudem legis* cannot give a right of action in the courts of the country whose laws are evaded; Mumford v. Hallett, 1 Johns. (N. Y.) 433.

IN FULL. Complete, or without abbreviation, *e. g.* a copy of a paper. Of the entire amount due, as used in a receipt for money.

IN FULL LIFE. Neither physically nor civilly dead. The term life alone has also been taken in the same sense, as including natural and civil life: *e. g.* a lease made to a person *during life* is determined by a civil death, but if *during natural life* it would be otherwise. 2 Co. 48. It is a translation of the French phrase *en plein vie.* Law Fr. & L. Lat. Dict.

IN FUTURO. At a future time. The alternative expressions are *in præsenti* and *in esse.* 2 Bla. Com. 166, 175.

IN GENERALI PASSAGIO (L. Lat.). In the general passage; *passagium* being a journey, or, more properly, a voyage, and especially when used alone or with the adjectives *magnum, generale,* etc.,—the journey to Jerusalem of a crusader, especially of a king. 36 Hen. III.; 3 Prynne, Collect. 767; Du Cange.

In generali passagio was an excuse for non-appearance in a suit, which put off the hearing *sine die;* but *in simplici peregrinatione* or *passagio—i. e.* being absent on a private pilgrimage to the Holy Land—put off the hearing for a shorter time. Bracton 338.

IN GENERE (Lat.). In kind; of the same kind. Things which when bailed may be restored *in genere,* as distinguished from those which must be returned *in specie,* or specifically, are called *fungibles.* Kaufman's Mackeldey, Civ. Law § 148, note.

Heineccius, Elem. Jur. Civ. § 619, defines *genus* as what the philosophers call *species,* viz.: a kind. See Dig. 12. 1. 2. 1. See LOAN FOR CONSUMPTION.

IN GREMIO LEGIS (Lat.). In the bosom of the law. This is a figurative expression, by which is meant that the subject is under the protection of the law: as, where the title to land is in abeyance. See GREMIUM; IN NUBIBUS; ABEYANCE.

IN GROSS. At large; not appurtenant or appendant, but annexed to a man's person: *e. g.* common granted to a man and his heirs by deed is common in gross; or common in gross may be claimed by prescriptive right. 2 Bla. Com. 34. See EASEMENT.

IN HAC PARTE. In this behalf; on this part or side.

IN HOC. In this.

IN IISDEM TERMINIS, IN IISDEM VERBIS. In the same terms. 9 East 487.

IN INDIVIDUO. In the distinct individual, specific, or identical form. Sto. Bailm. § 97.

IN INFINITUM. Indefinitely; imports to infinity.

IN INITIALIBUS (Lat.). In Scotch Law. In the preliminaries. Before a witness is examined as to the cause in which he is to testify, he must deny bearing malice or ill-will, being instructed what to say, or having been bribed, and these matters are called *initialia testimonii,* and the examination on them is said to be *in initialibus:* it is similar to our *voir dire.* Bell, Dict. *Initialia Testimonii;* Erskine, Inst. p. 451; Halkerston, Tech. Terms.

IN INITIO. At the beginning; in the beginning, as *in initio legis,* at the outset of the suit. Bract. f. 400.

IN INTEGRUM (Lat.). The original condition. See RESTITUTIO IN INTEGRUM. Vicat, Voc. Jur. *integer.*

IN INVITUM (Lat.). Unwillingly. Taylor, Gloss. Against an unwilling party (or one who has not given his consent); by operation of law. Wharton, Dict.

IN IPSIS FAUCIBUS. In the very throat. A vessel just entering a port is said to be *in ipsis faucibus portæ.*

IN ITINERE (Lat.). On a journey; on the way. Justices *in itinere* were justices in eyre, who went on circuit through the kingdom for the purpose of hearing causes. 3 Bla. Com. 351; Spelman, Gloss. *In itinere* is used in the law of lien, and is there equivalent to *in transitu;* that is, not yet delivered to vendee.

IN JUDGMENT. In a court of justice.

A case is said to be in judgment when it has proceeded so far as that the successful party is entitled to judgment.

In a judgment seat; Lord Hale was characterized "one of the greatest and best men who ever sat in judgment." 1 East 306.

IN JUDICIO (Lat.). In or by a judicial proceeding; in court. *In judicio non creditur nisi juratis,* in judicial proceedings no one is believed unless on oath. Cro. Car. 64. See Bracton, fol. 98 *b,* 106, 287 *b.*

In Civil Law. The proceedings before a prætor, from the bringing the action till issue joined, were said to be *in jure;* but after issue joined, when the cause came before the *judex*, the proceedings were said to be *in judicio.* See JUDEX.

IN JURE (Lat. in law). **In Civil Law.** A phrase which denotes the proceedings in a cause before the prætor, up to the time when it is laid before a *judex;* that is, till issue joined *(litis contestatio);* also, the proceedings in causes tried throughout by the prætor *(cognitiones extraordinariæ).* Vicat, Voc. Jur. *Jus.*

In English Law. In law; rightfully; in right; thus, *in jure, non remota causa, sed proxima, spectatur.*

IN JURE ALTERIUS. In another's right. Hale, Anal. § 26.

IN JURE PROPRIO. In one's right. Hale, Anal. § 26.

IN JUS VOCARE. To call, cite, or summon to court. Inst. 4, 16, 3; Calv. Lex. *In jus vocando*, summoning to court. 3 Bla. Com. 279.

IN KIND. Of the same class, description, or kind of property, as a deposit, mandate, or loan which is said to be returnable in kind where the terms and character of the transaction do not require the return of the identical money, security, or thing, but only its equivalent in amount or kind. See IN GENERE.

IN LAW. In contemplation of law; implied by law; subsisting by force of law. See IN FACT.

IN LECTO MORTALI. On a deathbed. Fleta, 5, 28, 12.

IN LIBERAM ELEMOSINAM. In free alms. Land given for a charitable motive was said to be so given. See FRANKALMOIN.

IN LIMINE (Lat.). In or at the beginning. This phrase is frequently used: as, the courts are anxious to check crimes *in limine.*

IN LITEM (Lat.). For a suit; to the suit. Greenl. Ev. § 348.

IN LOCO. In place; in lieu; instead; in the place or stead. Townsh. Pl. 38.

IN LOCO PARENTIS (Lat.). In the place of a parent: as, the master stands towards his apprentice *in loco parentis.* See APPRENTICESHIP; GUARDIAN.

IN MAJOREM CAUTELAM. For greater security. 1 Stra. 105.

IN MALAM PARTEM. In a bad sense; so as to wear an evil appearance.

IN MEDIAS RES (Lat.). In the middle of things; into the heart of the subject, without preface or introduction.

IN MEDIO. Intermediate.

IN MERCY. To be in mercy is to be at the discretion of the king, lord, or judge in punishing any offence not directly censured by the law. Thus, to be in the *grievous mercy* of the king is to be in hazard of a great penalty; 11 Hen. VI. c. 6. So, where the plaintiff failed in his suit, he and his pledges were in the mercy of the lord, *pro falso clamore suo.* This is retained nominally on the record; 3 Bla. Com. 376. So the defendant is in mercy if he fail in his defence; *id.* 398. See MERCY; Cunningham.

IN MISERICORDIA (Lat. in mercy). The entry on the record where a party was in mercy was, *Ideo in misericordia*, etc. The phrase was used because the punishment in such cases ought to be moderate. See Magna Cart. c. 14; Bracton, lib. 4, tr. 5, c. 6. Sometimes *misericordia* means the being quit of all amercements *(q. v.).*

IN MITIORI SENSU (Lat. in a milder acceptation).

A phrase denoting a rule of construction formerly adopted in slander suits, the object of which was to construe phrases, if possible, so that they would not support an action. Ingenuity was continually exercised to devise or discover a meaning which by some remote possibility the speaker might have intended; and some ludicrous examples of this ingenuity may be found. To say of a man who was making his livelihood by buying and selling merchandise, "He is a base, broken rascal; he has broken twice, and I'll make him break a third time," was gravely asserted not to be actionable,—"ne poet dar porter action, car poet estre intend de *burstness de belly.*" Latch 114. And to call a man a thief was declared to be no slander for this reason: "perhaps the speaker might mean he had stolen a lady's heart."

The rule now is to construe words agreeably to the meaning usually attached to them. It was long, however, before this rule, rational as it is, and supported by every legal analogy, prevailed in actions for words, and before the favorite doctrine of construing words in their mildest sense, in direct opposition to the finding of the jury, was finally abandoned by the courts. "For some inscrutable reason," said Gibson, J., "the earlier English judges discouraged the action of slander by all sorts of evasions, such as the doctrine of *mitiori sensu*, and by requiring the slanderous charge to have been uttered with the technical precision of an indictment. But, as this discouragement of the remedy by process of law was found inversely to encourage the remedy by battery, it has been gradually falling into disrepute, inasmuch that the precedents in Croke's Reports are beginning to be considered apocryphal." Bash v. Sommer, 20 Pa. 162; Walton v. Singleton, 7 S. & R. (Pa.) 451, 10 Am. Dec. 472; Wilson v. Hogg, 1 N. & McC. (S. C.) 217; Walker v. Winn, 8 Mass. 248; Hoyle v. Young, 1 Wash. (Va.) 152, 1 Am. Dec. 446; Heard, Lib. & Sl. § 162.

IN MODUM ASSISÆ. In the manner or form of an assize. Bract. fol. 183 *b. In modum juratæ*, in manner of a jury. *Id.* fol. 181 *b.*

IN MORA (Lat.). In delay; in default. In the civil law a borrower *in mora* is one who fails to return the thing borrowed at the proper time; Sto. Bailm. § 254. In Scotch law a creditor is *in mora* who has failed in respect to the diligence required in levying an attachment on the property of the debtor. Bell, Dict.

IN MORTUA MANU (Lat. in a dead hand). Property owned by religious societies was said to be held *in mortua manu*, or in mortmain, since religious men were *civiliter mortui*. 1 Bla. Com. 479; Taylor, Gloss.

IN NOMINE DEI, AMEN. In the name of God, Amen. A phrase, anciently used in wills and many other instruments, the translation of which is often used in wills at the present day, but chiefly by ignorant draughtsmen or testators.

IN NOTIS. In the notes.

IN NUBIBUS (Lat.). In the clouds; in abeyance; in custody of law. *In nubibus, in mare, in terra vel, in custodia legis:* in the air, sea, or earth, or in the custody of the law. Taylor, Gloss. In case of abeyance, the inheritance is figuratively said to rest *in nubibus*, or *in gremio legis: e. g.* in case of a grant of life estate to A, and afterwards to heirs of Richard, Richard in this case, being alive, has no heirs until his death, and, consequently, the inheritance is considered as resting *in nubibus*, or in the clouds, till the death of A, when the contingent remainder either vests or is lost and the inheritance goes over. See 2 Sharsw. Bla. Com. 107, n.; 1 Co. 137; ABEYANCE.

IN NULLIUS BONIS. Among the goods or property of no person; belonging to no person, as treasure-trove and wreck were anciently considered.

IN NULLO EST ERRATUM (Lat.). A plea to errors assigned on proceedings in error, by which the defendant in error affirms there is no error in the record. As to the effect of such plea, see Whiting v. Cochran, 9 Mass. 532; 1 Burr. 410. It is a general rule that the plea *in nullo est erratum* confesses the fact assigned for error; Dane, Abr. Index; but not a matter assigned contrary to the record; Moody v. Vreeland, 7 Wend. (N. Y.) 55; Bacon, Abr. *Error* (G).

IN ODIUM SPOLIATORIS (Lat.). In hatred of a despoiler. All things are presumed against a despoiler or wrongdoer: *in odium spoliatoris omnia præsumuntur.* See MAXIMS.

If a man wrongfully opened a bundle of papers, sealed and left in his hands, so that he may have altered them or abstracted some, all presumptions will be taken against him in settling an account depending on the papers; 1 Vern. 452; the same rule is applied if one withhold evidence bearing on the case; 18 Jur. 703; or an agreement with which he is charged; 9 Cl. & F. 775. See at large 1 Sm. L. Cas. 9th Am. ed. 638; Br. Leg. Max. 8th Am. ed. 938; SPOLIATION.

IN OMNIBUS. In all things; on all points. "A case parallel *in omnibus*," 10 Mod. 104. A modern phrase to the same effect is "on all fours" *(q. v.)*.

IN PACATO SOLO. In a country which is at peace.

IN PACE DEI ET REGIS. In the peace of God and the king. Fleta 1, c. 31, § 6. Formal words in old appeals of murder.

IN PAIS. This phrase, as applied to a legal transaction, primarily means that it has taken place without legal formalities or proceedings. Thus a widow was said to make a request *in pais* for her dower when she simply applied to the heir without issuing a writ; Co. Litt. 32 *b*. So conveyances are divided into those by matter of record and those by matter *in pais*. In some cases, however, "matters *in pais*" are opposed not only to "matters of record," but also to "matters in writing," *i. e.* deeds, as where estoppel by matter *in pais; id.* 352 *a;* 4 Kent 260. See ESTOPPEL.

IN PAPER. In English Practice. A term used of a record until its final enrolment on the parchment record. 3 Bla. Com. 406; 10 Mod. 88; 2 Lilly, Abr. 322.

IN PARI CAUSA (Lat.). In an equal cause. It is a rule that when two persons have equal rights in relation to a particular thing, the party in possession is considered as having the better right: *in pari causa possessor potior est.* Dig. 50, 17, 128; 1 Bouvier, Inst. n. 952. See MAXIMS; PRESUMPTION.

IN PARI DELICTO (Lat.). In equal fault; equal in guilt. Neither courts of law nor of equity will interpose to grant relief to the parties, when an illegal agreement has been made and both parties stand *in pari delicto.* The law leaves them where it finds them, according to the maxim, *in pari delicto potior est conditio defendentis* (or, *possidentis*). Setter v. Alvey, 15 Kan. 157. See MAXIMS; DELICTUM.

IN PARI MATERIA (Lat.). Upon the same matter or subject. Statutes *in pari materia* are to be construed together; Union Soc. v. Bank, 7 Conn. 456.

IN PATIENDO. In suffering, permitting, or allowing.

IN PECTORE JUDICIS. In the breast of the judge. Latch 180. A term applied to a judgment.

IN PEJOREM PARTEM. In the worst part; on the worst side. Latch 159.

IN PERPETUAM REI MEMORIAM (Lat.). For the perpetual memory or remembrance of a thing. Gilbert, For. Rom. 118.

IN PERPETUUM REI TESTIMONIUM. In perpetual testimony of a matter; for the purpose of declaring and settling a thing forever. 1 Bla. Com. 86.

IN PERSON. A party, plaintiff or defendant, who sues out a writ or other process, or

appears to conduct his case in court himself, instead of through a solicitor or counsel, is said to act and appear in person. Any suitor but one suing *in forma pauperis* may do this.

IN PERSONAM (Lat.). A remedy where the proceedings are against the person, in contradistinction to those which are against specific things, or *in rem (q. v.)*. See EQUITY.

IN PIOS USUS. For pious uses; for religious purposes. 2 Bla. Com. 505.

IN PLENO COMITATU. In full county court. 3 Bla. Com. 36.

IN PLENO LUMINE. In public; in common knowledge; in the light of day.

IN PLENO VITA. In full life. Yearb. P. 18 Hen. VI. 2.

IN POSSE (Lat.). In possibility; not in actual existence; used in contradistinction to *in esse*.

IN POTESTATE PARENTIS. In the power of a parent. Inst. 1, 8, pr.; *id.* 1, 9; 2 Bla. Com. 498.

IN PRÆMISSORUM FIDEM. In confirmation or attestation of the premises. A notarial phrase.

IN PRÆSENTI (Lat.). At the present time: used in opposition to *in futuro*. A marriage contracted *per verba de præsenti* is good: as, I take Paul to be my husband, is a good marriage; but words *de futuro* would not be sufficient, unless the ceremony was followed by consummation. Succession of Prevost, 4 La. Ann. 347; Hantz v. Sealy, 6 Binn. (Pa.) 405.

IN PRENDER (L. Fr.). In taking. Such incorporeal hereditaments as a party entitled to them was to take for himself were said to be *in prender*. Such was a right of common. 2 Steph. Com. 15.

IN PRIMIS. In the foremost place. A term used in argument. Usually written *imprimis (q. v.)*.

IN PRINCIPIO (Lat.). At the beginning. This is frequently used in citations: as, Bacon, Abr. *Legacies, in pr.*

IN PROMPTU. In readiness; at hand. Usually written *impromptu*.

IN PROPRIA PERSONA (Lat.). In his own person; himself: as, the defendant appeared *in propria persona;* the plaintiff argued the cause *in propria persona*. Sometimes abbreviated on the printed court lists, P. P.

IN RE (Lat.). In the matter: as, *in re* A B, in the matter of A B. In the headings of legal reports these words are used more especially to designate proceedings in bankruptcy or insolvency, or the winding up of estates or companies.

IN REBUS (Lat.). In things, cases, or matters.

IN REM (Lat.). A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*.

Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property as forfeited in the admiralty or the English exchequer, or as prize, but also suits against property to enforce a lien or privilege in the admiralty courts, and suits to obtain the sentence, judgment, or decree of other courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like. 1 Greenl. Ev. §§ 625, 541; 2 Bish. Mar. Div. & Sep. 14, 24.

Courts of admiralty enforce the performance of a contract, when its performance is secured by a maritime lien or privilege, by seizing into their custody the very subject of hypothecation. In these suits, generally, the parties are not personally bound, and the proceedings are confined to the thing *in specie;* Brown, Civ. & Adm. Law 98. See Bened. Ad. 270, 362; The Jerusalem, 2 Gall. 200, Fed. Cas. No. 7,293; 3 Term 269.

There are cases, however, where the remedy is either *in personam* or *in rem*. Seamen, for example, may proceed against the ship or freight for their wages, and this is the most expeditious mode; or they may proceed against the master or owners; 4 Burr. 1944; 2 Bro. Civ. & Adm. Law, 396. See, generally, 1 Phill. Ev. 254; 1 Stark. Ev. 228; Dane, Abr.; Bened. Adm. 503. No action *in rem* lies for damages incurred by loss of life; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727. A contract for launching a vessel carried some distance up the beach by a storm, is a maritime contract, for which the vessel is liable *in rem;* The Ella, 48 Fed. 569. See ADMIRALTY; BOTTOMRY; LIEN.

IN RENDER. A thing in a manor is said to lie *in render* when it must be rendered or given by the tenant, *e. g.* rent; to lie *in prender*, when it may be taken by the lord or his officer when it chance. West, Symbol. pt. 2, *Fines*, § 126.

IN RERUM NATURA (Lat.). In the nature (or order) of things; in existence. Not *in rerum natura* is a dilatory plea, importing that the plaintiff is a fictitious person.

In Civil Law. A broader term than *in rebus humanis: e. g.* before quickening, an infant is *in rerum natura*, but not *in rebus humanis;* after quickening, he is *in rebus humanis* as well as *in rerum natura*. Calvinus, Lex.

IN SCRINIO JUDICIS. In the writing-case of the judge; among the judge's papers. "That is a thing that rests *in scrinio judicis*, and does not appear in the body of the decree." Hardr. 51.

IN SEPARALI. In several; in severalty. Fleta 2, c. 54, 20.

IN SIMILI MATERIA. Dealing with the same or a kindred subject-matter.

IN SIMPLICI PEREGRINATIONE. In simple pilgrimage. Bract. fol. 338. A phrase in the old law of essoins. See IN GENERALI PASSAGIO.

IN SOLIDUM, IN SOLIDO (Lat.). In Civil Law. For the whole; as a whole. An obligation or contract is said to be *in solido* or *in solidum* when each is liable for the whole, but so that a payment by one is payment for all: *i. e.* it is a joint and several contract. 1 W. Bla. 388.

Possession is said to be *in solidum* when it is exclusive. "*Duo in solidum precario habere non magis possunt quam duo in solidum vi possidere aut clam; nam neque justæ neque injustæ possessiones duæ concurrere possunt.*" Savigny, lib. 3, § 11. The phrase is commonly used in Louisiana.

IN SOLO. On the soil or ground. *In solo alieno*, on another's ground. *In solo proprio*, on one's ground. 2 Steph. Com. 20.

IN SPECIE (Lat.). In the same form: *e. g.* a ship is said to no longer exist *in specie* when she no longer exists *as a ship*, but as a mere *congeries* of planks. 8 B. & C. 561; Arnould, Ins. 1012. To decree a thing *in specie* is to decree the performance of that thing *specifically*.

IN STATU QUO (Lat.). In the same situation as, in the same condition as (before).

IN STIRPES. In the law of descent, according to roots or stocks; by representation as distinguished from succession *per capita*. More commonly written *per stirpes (q. v.)*.

IN TANTUM. In so much; so much; so far; so greatly. Reg. Orig. 97, 106.

IN TERMINIS TERMINANTIBUS. In terms of determination; exactly in point. 11 Co. 40 *b*. In express or determinate terms. 1 Leon. 93.

IN TERROREM (Lat.). By way of threat, terror, or warning. For example, when a legacy is given to a person upon condition not to dispute the validity or the dispositions in wills and testaments, the conditions are not, in general, obligatory, but only *in terrorem:* if, therefore, there exist *probabilis causa litiganda*, the nonobservance of the conditions will not be a forfeiture. 1 Hill, Abr. 253; 3 P. Wms. 344; 1 Atk. 404. But when the acquiescence of the legatee appears to be a material ingredient in the gift, the bequest is only so long as the legatee shall refrain from disturbing the will; 2 P. Wms. 52; 2 Ventr. 352. See DURESS.

IN TERROREM POPULI (Lat. to the terror of the people). A technical phrase necessary in indictments for riots. 4 C. & P. 373.

Lord Holt has given a distinction between those indictments in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consists in going about armed, etc., without committing any act, the words are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is *committed*, the words are useless; 11 Mod. 116; Com. v. Runnels, 10 Mass. 518, 6 Am. Dec. 148.

IN TESTIMONIUM. In witness or in evidence whereof. The first words of the attestation clause of certain legal instruments. See IN WITNESS WHEREOF.

IN TOTIDEM VERBIS (Lat.). In just so many words: as, the legislature has declared this to be a crime *in totidem verbis*.

IN TOTO (Lat.). In the whole; wholly; completely: as, the award is void *in toto*. In the whole the part is contained; *in toto et pars continetur*. Dig. 50. 17. 123.

IN TRAJECTU. In the passage over; on the voyage over. 3 C. Rob. Adm. 338.

IN TRANSITU (Lat.). During the transit, or removal from one place to another. See STOPPAGE IN TRANSITU.

IN UTROQUE JURE. In both laws; *i. e.*, the civil and canon law.

IN VACUO (Lat. in what is empty). Without concomitants or coherence. Whart.

IN VADIO (Lat.). In pledge; in gage.

IN VENTRE SA MERE (L. F.). In his mother's womb. It is written indifferently, in this form, or *en ventre sa mere (q. v.)*. See POSTHUMOUS CHILD; CURTESY; DOWER; INFANT; INJUNCTION.

IN VINCULIS. In chains; in actual custody. Gilb. For. Rom. 97.

Applied also, figuratively, to the condition of a person who is compelled to submit to terms which oppression and his necessities impose on him. 1 Story, Eq. Jur. § 302.

IN VIRIDI OBSERVANTIA. Present to the minds of men, and in full force and operation.

IN WITNESS WHEREOF. These words, which, when conveyancing was in the Latin language, were *in cujus rei testimonium*, are the initial words of the concluding clause in deeds: "In witness whereof the said parties have hereunto set their hands," etc. See IN TESTIMONIUM.

INADEQUATE PRICE. A term applied to indicate the want of a sufficient consideration for a thing sold, or such a price as, under ordinary circumstances, would be considered insufficient.

Inadequacy of price is generally connect-

ed with fraud, gross misrepresentations, or an intentional concealment of defects in the thing sold. In these cases it is clear that the vendor cannot compel the buyer to fulfil the contract; L. R. 12 Eq. 320; Willson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; McFerran v. Taylor, 3 Cra. (U. S.) 270, 2 L. Ed. 436; Randle v. Harris, 6 Yerg. (Tenn.) 508; Sampson v. Swift, 11 Vt. 315; Hubbard v. Coolidge, 1 Metc. (Mass.) 93; Chick v. Trevett, 20 Me. 462, 37 Am. Dec. 68.

In general, however, inadequacy of price is not sufficient ground to avoid an executed contract, particularly when the property has been sold by auction; 3 Bro. C. C. 228; Lee v. Kirby, 104 Mass. 420; if there is no fraud and the parties deal at arm's length, upon their independent judgment, it will be held good; Judge v. Wilkins, 19 Ala. 765; Nash v. Lull, 102 Mass. 60, 3 Am. Rep. 435; Williams v. Jensen, 75 Mo. 681. But if an uncertain consideration, as a life annuity, be given for an estate, and the contract be executory, equity, it seems, will enter into the adequacy of the consideration; 7 Bro. P. C. 184. See Sugd. Vend. 189; 1 B. & B. 165; McCants v. Bee, 1 McCord, Ch. (S. C.) 383, 16 Am. Dec. 610; Butler v. Haskell, 4 Des. Ch. (S. C.) 651; Powers v. Mayo, 97 Mass. 180. And if the price be so grossly inadequate and given under such circumstances as to afford a necessary presumption of fraud or imposition, a court of equity will grant relief; Robinson v. Schly, 6 Ga. 515; Simonton v. Bacon, 49 Miss. 582; Waller v. Cralle, 8 B. Monr. (Ky.) 11; Stewart v. State, 2 Harr. & G. (Md.) 114; Bedel v. Loomis, 11 N. H. 9; Follett v. Rose, 3 McLean 332, Fed. Cas. No. 4,900; Hoyt v. Inst. for Savings, 110 Ill. 390; Gainer v. Russ, 20 Fla. 157; Herron v. Herron, 71 Ia. 428, 32 N. W. 407; French v. Allen, 50 Me. 438; Griffith v. Godey, 113 U. S. 89, 5 Sup. Ct. 383, 28 L. Ed. 934; Story, Eq. Jur. § 244; Leake, Contr. 1150. As to cases of sales of their interests by heirs and reversioners for inadequate price, see CATCHING BARGAIN; EXPECTANCY.

See CONSIDERATION; POST OBIT; MACEDONIAN DECREE; JUDICIAL SALE.

INADMISSIBLE. What cannot be received. Parol evidence, for example, is ordinarily inadmissible to contradict a written agreement.

INÆDIFICATIO (Lat.). **In Civil Law.** Building on another's land with one's own materials, or on one's own land with another's materials. L. 7, §§ 10, 18, D. *de Acquis. Rer. Domin.;* Heineccius, Elem. Jur. Civ. § 363. The word is especially used of a private person's building so as to encroach upon the public land. Calvinus, Lex. The right of possession of the materials yields to the right to what is on the soil. *Id.* See ACCRETION.

INALIENABLE. A word denoting the condition of those things the property in which cannot be lawfully transferred from one person to another. Public highways and rivers are inalienable. There are also many rights which are inalienable, as the rights of liberty or of speech.

INAUGURATION. A word applied by the Romans to the ceremony of dedicating a temple, or raising a man to the priesthood, after the *augurs* had been consulted.

It was afterwards applied to the *installation* of emperors, kings, and prelates, in imitation of the ceremonies of the Romans when they entered the temple of the augurs. It is applied in the United States to the installation of the chief magistrate of the republic, and of the governors of the several states.

INBLAURA. Profit or product of the ground. Cowell.

INBOROW. A forecourt or gate-house. A certain barony was inborow and outborow between England and Scotland. Cowell.

INCAPACITY. The want of a quality legally to do, give, transmit, or receive something.

In general, the incapacity ceases with the cause which produces it. If the idiot should obtain his senses, or the married woman's husband die, their incapacity would be at an end.

INCASTELLARE. To make a building serve the purpose of a castle. Jacob.

INCENDIARY (Lat. *incendium*, a kindling). One who maliciously and wilfully sets another person's building on fire; one guilty of the crime of arson. See ARSON; BURNING.

INCEPTION. The commencement; the beginning. In making a will, for example, the writing is its inception. 3 Co. 31 *b;* Plowd. 343.

INCERTÆ PERSONÆ. Uncertain persons, as posthumous heirs, a corporation, the poor, a juristic person, or persons who cannot be ascertained until after the execution of a will. Sohm. Inst. Rom. L. 104, 458.

INCEST. The carnal copulation of a man and a woman related to each other in any of the degrees within which marriage is prohibited by law. 1 Bish. Marr. & D. 112, 376, 442. It involves the assent of both parties; De Groat v. People, 39 Mich. 124; but it is held that it may exist as to the man although without the consent of the woman; State v. Chambers, 87 Ia. 1, 53 N. W. 1090, 43 Am. St. Rep. 349; People v. Gleason, 99 Cal. 359, 33 Pac. 1111, 37 Am. St. Rep. 56. It is punished by fine and imprisonment, under the laws of most, if not all, of the states, but seems not at common law to be an indictable offence; 4 Bla. Com. 64; State v. Keesler, 78 N. C.

469. See Simon v. State, 31 Tex. Cr. R. 186, 20 S. W. 399, 716, 37 Am. St. Rep. 802; 18 So. Afr. 360.

Preparations for an attempted incestuous marriage have been held not indictable; People v. Murray, 14 Cal. 159. A man indicted for rape may be convicted of incest; Com. v. Goodhue, 2 Metc. (Mass.) 193; 1 Bish. Cr. Proc. § 419. See Dane, Abr. Index; State v. Roswell, 6 Conn. 446; Cook v. State, 11 Ga. 53, 56 Am. Dec. 410; People v. Harriden, 1 Park. Cr. (N. Y.) 344. See State v. Jarvis, 20 Or. 437, 26 Pac. 302, 23 Am. St. Rep. 141. And as to whether the crime is rape or incest may be left to the jury; People v. Skutt, 96 Mich. 449, 56 N. W. 11. Proof of a single commission of the offence is sufficient for conviction; Mathis v. Com. (Ky.) 13 S. W. 360.

INCESTUOSI. Those offspring incestuously begotten. Mack. Rom. L. § 143.

INCH (Lat. *uncia*). A measure of length, containing one-twelfth part of a foot; originally supposed equal to three grains of barley laid end to end.

INCHOATE. That which is not yet completed or finished. Contracts are considered inchoate until they are executed by all the parties. During the husband's life, a wife has an inchoate right of dower; 2 Bla. Com. 130; so with the right of an unborn child to take by descent; Marsellis v. Thalhimer, 2 Paige, Ch. (N. Y.) 35, 21 Am. Dec. 66; and a covenant which purports to be tripartite, and is executed by only two of the parties, is incomplete, and no one is bound by it; Emery v. Neighbour, 7 N. J. L. 142, 11 Am. Dec. 541. See Locus Pœnitentiæ.

INCIDENT. This term is used both substantively and adjectively of a thing which, either usually or naturally and inseparably depends upon, appertains to, or follows another that is more worthy. For example, rent is usually incident to a reversion. 1 Hill. R. P. 243; while the right of alienation is necessarily incident to a fee-simple at common law, and cannot be separated by a grant; 1 Washb. R. P. 54. So a court baron is inseparably incident to a manor, in England; Co. Litt. 151. All nominate contracts and all estates known to common law, have certain incidents which they draw with them and which it is not necessary to reserve in words. So the costs incurred in a legal proceeding are said to be incidental thereto. See Jacob, Law Dict.

INCIPITUR (Lat. it is begun). The commencement of the entry on the roll on signing judgment, etc. The custom is no longer necessary in England, and was unknown here. But see 3 Steph. Com. 566, n.

INCLOSURE. The extinction of common rights in fields and waste lands. 1 Steph. Com. 655.

The separation and appropriation of land by means of a fence, hedge, etc., together with such fence or hedge. Taylor v. Welbey, 36 Wis. 44; Porter v. Aldrich, 39 Vt. 331; Gundy v. State, 63 Ind. 530; Pope v. Hanmer, 8 Hun (N. Y.) 269; where, in a will, the executors were directed to inclose with an iron fence meeting-house grounds, schoolhouse grounds, and burial ground, it was held that the intention was clear to inclose each of the grounds on all sides; Appeal of Hall, 112 Pa. 52, 3 Atl. 783.

A paper or letter inclosed with another in an envelope.

INCLOSURE ACTS. English statutes regulating the subject of inclosure. The most notable was that of 1801.

INCLOSURE COMMISSION ACT, 1845. The statute 8 and 9 Vict. c. 118, establishing a board of commissioners for England and Wales and empowering them, on the application of persons interested to the amount of one-third of the value of the land, and provided the consent of persons interested to the amount of two-thirds of the land and of the lord of the manor (in case the land be waste of a manor) be ultimately obtained, to inquire into the case and to report to parliament as to the expediency of making the inclosure. 1 Steph. Com. 655.

INCLUDE (Lat. *in claudere* to shut in, keep within). In a legacy of "one hundred dollars including money trusteed" at a bank, it was held that the word "including" extended only to a gift of one hundred dollars; Brainard v. Darling, 132 Mass. 218; but in a bequest of a sum of money inclusive of a note of the legatee, it was held that the note was included in the legacy; Pepper's Estate, 154 Pa. 340, 25 Atl. 1063.

INCLUSIVE. Comprehended in computation. In computing time, as ten days from a particular time, the last day is generally to be included and the first excluded. See Exclusive; Time; Estate of Pepper, 154 Pa. 340, 25 Atl. 1063, as to its use in a legacy.

INCOME. The gain which proceeds from property, labor, or business. It is applied particularly to individuals. The income of the state or government is usually called revenue. The word is sometimes considered synonymous with "profits," the gain as between receipts and payments; People v. Board of Supervisors, 4 Hill (N. Y.) 23; "rent, and profits," "income," and "net income" of the estate are equivalent expressions; Andrews v. Boyd, 5 Greenl. (Me.) 203; it may mean "money" or the expectation of receiving money; U. S. v. Schillinger, 14 Blatch. 71, Fed. Cas. No. 16,228; Gray v. Darlington, 15 Wall. (U. S.) 63, 21 L. Ed. 45; and a note is ground for expecting income, and in the sense of a statute taxing incomes the amount thereof is to be returned

when paid; Portland Co. v. U. S., 15 Wall. (U. S.) 1, 21 L. Ed. 113. See Simpson v. Moore, 30 Barb. (N. Y.) 637. In the ordinary commercial sense "income" especially when connected with the word "rent," may mean clear or net income. "Produce" or "product" as a substituted word may relieve a will from obscurity; Appeal of Thompson, 100 Pa. 481. In a gift of the income, etc., of shares of stock, it is not synonymous with increase, and while it will include dividends from the stock, will not embrace the sum by which the stock has increased; Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461. As to when dividends are to be considered as income, see 31 A. & E. Corp. Cas. 386, n.; DIVIDEND.

It has been held that a devise of the income of land is in effect the same as a devise of the land itself; Reed v. Reed, 9 Mass. 372; Monarque v. Monarque, 80 N. Y. 320; Cooper v. Pogue, 92 Pa. 254, 37 Am. Rep. 681; Sampson v. Randall, 72 Me. 109; and a gift of the income of a fund is a gift of the fund; Earl v. Grim, 1 Johns. Ch. (N. Y.) 494; Huston v. Read, 32 N. J. Eq. 591; and of the income of property is a gift of the property; Bristol v. Bristol, 53 Conn. 259, 5 Atl. 687; Appeal of Sproul, 105 Pa. 441; 2 Rop. Leg. 371.

INCOME TAX. See TAX.

INCOMMUNICATION. **In Spanish Law.** The condition of a prisoner who is not permitted to see or to speak with any person visiting him during his confinement.

INCOMPATIBILITY. Incapability of existing or being exercised together.

Thus the relations of landlord and of tenant cannot exist in one man at the same time in reference to the same land. Two offices may be incompatible either from their nature or by statutory provisions. See U. S. Const. art. 6, § 3, n. 5, art. 1, § 6, n. 2; Com. v. Sheriff & Keeper of Jail, 4 S. & R. (Pa.) 277; People v. Green, 46 How. Pr. (N. Y.) 170; State v. Buttz, 9 S. C. 179; OFFICE.

Incompatibility is ordinarily not a ground for divorce; Trowbridge v. Carlin, 12 La. Ann. 882; Pinkney v. Pinkney, 4 G. Greene (Ia.) 324; though in some states it is. See DIVORCE.

INCOMPETENCY. Lack of ability or fitness to discharge the required duty.

Judges and jurors are said to be incompetent from having an interest in the subject-matter. See JUDGE; JURY.

In Evidence. A witness may be at common law incompetent on account of a want of understanding, a defect of religious belief, a conviction of certain crimes, infamy of character, or interest; 1 Phill. Ev. 15. The last ground of incompetency is removed to a considerable degree in most states; and the second is greatly limited in modern practice. See WITNESS.

INCONCLUSIVE. Not finally decisive. Inconclusive presumptions are capable of being overcome by opposing proof.

INCONSULTO. **In the Civil Law.** Unadvisedly; unintentionally. Dig. 28, 4, 1.

INCONTINENCE. Impudicity; indulgence in unlawful carnal connection.

INCORPORATED LAW SOCIETY. A society of attorneys and solicitors whose function it is to carry out the acts of parliament and orders of court with reference to articled clerks; to keep an alphabetical roll of solicitors; to issue certificates to persons duly admitted and enrolled, and to exercise a general control over the conduct of solicitors in practice, and to bring cases of misconduct before the judges. 3 Steph. Com. 217. See SOLICITORS.

INCORPORATION. The act of creating a corporation; that which is incorporated. A legal or political body formed by the union of individuals under certain conditions, rules, and laws, and having certain privileges and partial or perpetual succession. See CORPORATION.

INCORPORATION BY REFERENCE. The bringing into one document in legal effect, of the contents of another by referring to the latter in such manner as to adopt it.

INCORPOREAL CHATTELS. The incorporeal rights or interests growing out of personal property, such as copyrights and patent rights, stocks and personal annuities. Boreel v. City of New York, 2 Sandf. (N. Y.) 552, 559; 2 Steph. Com. 9.

INCORPOREAL HEREDITAMENT. Anything, the subject of property, which is inheritable and not tangible or visible. 2 Woodd. Lect. 4. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. 2 Bla. Com. 20; Walker v. Daly, 80 Wis. 222, 49 N. W. 812; 1 Washb. R. P. 10; Chal. R. P. 47; Wyatt v. Irrigation Co., 18 Colo. 298, 33 Pac. 144, 36 Am. St. Rep. 280.

Their existence is merely in idea and abstract contemplation, though their effects and profits may be frequently the object of the bodily senses; Co. Litt. 9 *a;* Pothier, *Traité des Choses* § 2. According to Blackstone, there are ten kinds of incorporeal hereditaments: viz. advowsons, tithes, commons, ways, offices, dignities, franchises, corodies, annuities, and rents. 2 Com. 20. In the United States there are no advowsons, tithes, dignities, nor corodies, commons are rare, offices rare or unknown, and annuities have no necessary connection with land. 3 Kent 402, 454. And there are other incorporeal hereditaments not included in this list, as remainders and reversions dependent on a particular estate of freehold, easements of

light, air, etc., and equities of redemption; 1 Washb. R. P. *11.

Incorporeal hereditaments were said *to be in grant;* corporeal, *in livery;* since a simple deed or grant would pass the former, of which livery was impossible, while livery was necessary to a transfer of the latter. But this distinction is now done away with, even in England. See 8 & 9 Vict. c. 106, § 2; 1 Washb. R. P. 10; Will. R. P. 279, 364, 370.

See ABANDONMENT.

INCORPOREAL PROPERTY. In Civil Law. That which consists in legal right merely. The same as choses in action at common law.

INCORRIGIBLE. Incapable of being corrected, amended, or improved.

Under the statute 17 Geo. II. c. 5, incorrigible rogues were subjected to two years' imprisonment in the house of correction, and for escaping from confinement therein were made felons and liable to transportation for seven years. A similar breach and escape by a vagabond or rogue constituted him an incorrigible rogue; 4 Bla. Com. 169.

INCORRUPTIBLE. That which cannot be affected by immoral or debasing influences, such as bribery or the hope of gain or advancement.

INCREASE. That which grows out of land or is produced by the cultivation of it. De Blane v. Lynch, 23 Tex. 27. The word is frequently used in connection with the young of domestic animals; the increase of a flock. See ACCESSION.

INCREASE, COSTS OF. See COSTS DE INCREMENTO.

INCRIMINATION. The Vth Amendment of the United States constitution provides that no person "shall be compelled in any criminal case to be witness against himself." A witness may refuse to furnish evidence which will incriminate himself; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110. That the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself was held in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; U. S. v. Wong Quong Wong, 94 Fed. 832. Schedules filed in bankruptcy proceedings are within the operation of U. S. R. S. § 860, forbidding the admission in any criminal proceeding of any pleading of a party or discovery or evidence obtained from a party by means of a judicial proceeding; Johnson v. U. S., 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194. Prescriptions of druggists are not within that class of private papers shielded from inspection for the purpose of obtaining evidence against the druggist; State v. Davis, 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.

Forcibly taking shoes from an accused person for the purpose of comparison with footprints; State v. Fuller, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; seizing private papers of a defendant found in the execution of a search warrant; Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, affirming People v. Adams, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; the use of an envelope containing pictures as evidence to show that the conduct of an accused in respect to such articles was incriminating; State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227; seizing lottery tickets and lottery paraphernalia under a search warrant; Com. v. Dana, 2 Metc. (Mass.) 329; or jugs and bottles at the time of making an arrest for the illegal sale of intoxicating liquors; State v. O'Connor, 3 Kan. App. 594, 43 Pac. 859; do not violate the constitutional protection against self-incrimination. The accused may not be compelled to furnish the evidence, but, if he or his belongings are searched by another, although without authority, the evidence may be used against him; Duren v. City of Thomasville, 125 Ga. 1, 53 S. E. 814; State v. Burroughs, 72 Me. 479; Com. v. Henderson, 140 Mass. 303, 5 N. E. 832.

In extradition proceedings, the evidence of the party charged as to his identity cannot be admitted, being incriminatory; Ex parte La Mantia, 206 Fed. 330.

The Vth Amendment does not apply where the criminality is taken away, as in the anti-trust law, which secures a person from prosecution or penalty or forfeiture on account of any transaction concerning which he may testify; Hale v. Henkel, 201 U. S. 43, 66, 26 Sup. Ct. 370, 50 L. Ed. 652. A pardon takes away the privilege of refusing, though not accepted; U. S. v. Burdick, 211 Fed. 492.

Self-incrimination does not apply to a witness subpœnaed to produce corporate books; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Dreier v. U. S., 221 U. S. 394, 31 Sup. Ct. 550, 55 L. Ed. 784. Even though he wrote or signed them; the early English cases (1 W. Bl. 37; 7 St. Tr. N. S. 979) were not followed.

The mere statement by an officer of a corporation, who has been directed to turn its books over to a receiver, that he has been indicted for an offense connected with the management of the corporation, and that the contents of the books may tend to incriminate him, is not sufficient to excuse him from obeying the order of the court; Manning v. Securities Co., 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725; Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120.

Where the corporate misconduct involves also the claimant's misconduct (as well as that of the corporation), or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own and to that extent his privilege protects him from producing them; Wigmore, Ev. § 2259; Ex parte Chapman, 153 Fed. 371; and see Blum v. State, 94 Md. 375, 51 Atl. 26, 56 L. R. A. 322; In re Kanter, 117 Fed. 356; but where the president of a banking corporation was indicted for receiving a deposit with knowledge that he and the corporation were insolvent, and with intent to embezzle, the district attorney and another were permitted to examine the books of the corporation then in the hands of a receiver to secure evidence for the prosecution of the president for embezzlement; McElree v. Darlington, 187 Pa. 593, 41 Atl. 456, 67 Am. St. Rep. 592. To the same effect State v. Strait, 94 Minn. 384, 102 N. W. 913.

The purpose of the act of February 25, 1903, granting to witnesses in investigations of violations of the Sherman act immunity against prosecution for matters testified to, was to obtain evidence that otherwise could not be obtained; the act was not intended as a gratuity to crime and is to be construed, as far as possible, as coterminous with the privilege of the person concerned; Virtue v. Mfg. Co., 227 U. S. 13, 33 Sup. Ct. 202, 57 L. Ed. 393.

There is a clear distinction between an amnesty under the statute and the constitutional protection (Vth Amendment) of a party from being compelled in a criminal case to be a witness against himself; Heike v. U. S., 227 U. S. 142, 33 Sup. Ct. 226, 57 L. Ed. 450.

See CRIMINATE; PRODUCTION OF DOCUMENTS.

Exemption from compulsory self-incrimination did not form part of the law of the land prior to the separation of the colonies from the mother country, nor is it one of the fundamental rights, immunities and privileges of citizens of the United States or an element of due process of law within the meaning of the constitution or the XIVth Amendment; Twining v. New Jersey, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97, affirming State v. Twining, 73 N. J. L. 683, 67 Atl. 1073, 1135.

See CONSTITUTION.

INCULPATE. To accuse of crime; to impute guilt to; to bring or expose to blame; to censure. Webster.

INCUMBENT. In Ecclesiastical Law. A clerk resident on his benefice with cure. In common parlance, it signifies one who is in possession of an office: as, the present incumbent. One does not become the incumbent of an office, until legally authorized to discharge its duties, by receiving his commission and taking the official oath; State v. McCollister, 11 Ohio 46.

INCUMBRANCE. Any right to, or interest in, land which may subsist in third persons, to the diminution of the value of the estate of the tenant, but consistently with the passing of the fee. 2 Greenl. Ev. § 242; Prescott v. Trueman, 4 Mass. 629, 3 Am. Dec. 246; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432.

"Every right to or interest in the land which may subsist in third persons to the diminution of the land, but consistent with the passing of the fee by the conveyance." Rawle, Cov. for Title, § 25, approved in Batley v. Foerderer, 162 Pa. 466, 29 Atl. 868.

Incumbrance, when used in reference to real estate, includes every right to or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the owner thereof; Westerlund v. Mining Co., 203 Fed. 599, 121 C. C. A. 627, citing this work. The following are incumbrances: An ordinary lease; Clark v. Fisher, 54 Kan. 403, 38 Pac. 493; an attachment; Thatcher v. Valentine, 22 Colo. 201, 43 Pac. 1031; the lien of a judgment; Willsie v. Ranch Co., 7 S. D. 114, 63 N. W. 546; taxes and municipal claims; In re Gerry, 112 Fed. 958; an execution sale subject to redemption; Post v. Campau, 42 Mich. 94, 3 N. W. 272; a restriction on the use of land for a brewery or blacksmith shop; Batley v. Foerderer, 162 Pa. 460, 29 Atl. 868; an easement for a party wall; Westerlund v. Min. Co., 203 Fed. 606, 121 C. C. A. 627; Mackey v. Harmon, 34 Minn. 168, 24 N. W. 702; an inchoate right of dower; Bigelow v. Hubbard, 97 Mass. 195; a private right of way, Harlow v. Thomas, 15 Pick. (Mass.) 66; a railroad right of way; Barlow v. McKinley, 24 Ia. 69; an attachment; Batley v. Foerderer, 162 Pa. 466, 29 Atl. 870; a right of removal of timber from land; Cathcart v. Bowman, 5 Pa. 317; a reservation of minerals; Adams v. Henderson, 168 U. S. 573, 18 Sup. Ct. 179, 42 L. Ed. 584; Adams v. Reed, 11 Utah 480, 40 Pac. 720.

A public highway; Kellogg v. Ingersoll, 2 Mass. 97; Prichard v. Atkinson, 3 N. H. 335; Hubbard v. Norton, 10 Conn. 431; Butler v. Gale, 27 Vt. 739; Copeland v. McAdory, 100 Ala. 553, 13 South. 545; Schmisseur v. Penn, 47 Ill. App. 278 (but see Scribner v. Holmes, 16 Ind. 142; Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85; Moore v. Johnston, 87 Ala. 220, 6 South. 50; Harrison v. R. Co., 91 Ia. 114, 58 N. W. 1081; even though it has been practically abandoned by the public years before; Howell v. Northampton R. Co., 211 Pa. 284, 60 Atl. 793; a private right of way; Harlow v. Thomas, 15 Pick. (Mass.) 68; Mitchell v. Warner, 5 Conn. 497; an easement which is open, visible, and well known; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; a claim of dower; Prescott v. Trueman, 4 Mass. 630, 3 Am. Dec. 246; Thrasher v.

Pinckard's Heirs, 23 Ala. 616; though inchoate only; Porter v. Noyes, 2 Greenl. (Me.) 22, 11 Am. Dec. 30; Shearer v. Ranger, 22 Pick. (Mass.) 447; an outstanding mortgage; Bean v. Mayo, 5 Greenl. (Me.) 94; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667 (other than one which the covenantee is bound to pay; Watts v. Welman, 2 N. H. 458; Wyman v. Ballard, 12 Mass. 304; Funk v. Voneida, 11 S. & R. [Pa.] 109, 14 Am. Dec. 617; Stewart v. Drake, 9 N. J. L. 139; see Olney v. Ins. Co., 88 Mich. 94, 50 N. W. 100, 13 L. R. A. 684, 26 Am. St. Rep. 281); a liability under the tax laws; Hutchins v. Moody, 30 Vt. 655; Long v. Moler, 5 Ohio St. 271; Mitchell v. Pillsbury, 5 Wis. 407; see Tibbetts v. Leeson, 148 Mass. 102, 18 N. E. 679 (but no tax or assessment can exist so as to be an incumbrance, until the amount is ascertained or determined; Harper v. Dowdney, 113 N. Y. 644, 21 N. E. 63); an attachment resting upon land; Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Johnson v. Collins, 116 Mass. 392; a condition, the non-performance of which by the grantee may work a forfeiture of the estate; Jenks v. Ward, 4 Metc. (Mass.) 412; restriction as to the kind of building which may be erected on land; Doctor v. Darling, 68 Hun 70, 22 N. Y. Supp. 594; a mechanic's lien; Redmon v. Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830; have been held incumbrances within the meaning of the covenant against incumbrances, contained in conveyances. The term does not include a condition on which an estate is held; Estabrook v. Smith, 6 Gray (Mass.) 572, 66 Am. Dec. 443.

A restriction against wooden structures, but which were prohibited by law, is not an incumbrance; Batley v. Foerderer, 162 Pa. 466, 29 Atl. 868.

The vendor of real estate is bound in England to disclose incumbrances, and to deliver to the purchaser the instruments by which they were created, or on which the defects arise; and the neglect of this is to be considered fraud; Sudg. Vend. 6; 1 Ves. Sen. 96. See Kauffelt v. Bower, 7 S. & R. (Pa.) 73, 10 Am. Dec. 428.

The interest on incumbrances is to be kept down by the tenant for life; 1 Washb. R. P. 95, 257, 573; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318; Lessee of McMillan v. Robbins, 5 Ohio 28; to the extent of rents accruing; 31 E. L. & Eq. 345; Tudor, Lead. Cas. 60; and for any sum paid beyond that he becomes a creditor of the estate; Warley v. Warley, Bail. Eq. (S. C.) 397.

When the whole incumbrance is removed by a single payment, the share of the tenant for life is the present worth of an annuity for the life of the tenant equal to the annual amount of the interest which he would be obliged to pay; 1 Washb. R. P. 96, 573. The rule applies to estates held in dower; Estabrook v. Hapgood, 10 Mass. 315; Bell v. New York, 10 Paige, Ch. (N. Y.) 71; House v. House, 10 Paige, Ch. (N. Y.) 158; Abercrombie v. Riddle, 3 Md. Ch. Dec. 324; in curtesy; 1 Washb. R. P. 142; in tail only in special cases; 1 Washb. R. P. 80; Tudor, Lead. Cas. 613; 3 P. Wms. 229. See COVENANT AGAINST INCUMBRANCES.

INCUR. To have liabilities cast upon one by act or operation of law, as distinguished from contract, where the party acts affirmatively. Crandall v. Bryan, 15 How. Pr. (N. Y.) 56.

INDEBITATUS ASSUMPSIT (Lat.). That species of the action of assumpsit in which the plaintiff alleges, in his declaration, first a debt, and then a promise in consideration of the debt to pay the amount to the plaintiff.

It is so called from the words in which the promise is laid in the Latin form, translated in the modern form, *being indebted he promised.* The promise so laid is generally an implied one only. See Steph. Pl. 318; 4 Co. 92 *b*. This form of action is brought to recover in damages the amount of the debt or demand; upon the trial the jury will, according to evidence, give verdict for whole or part of that sum; 3 Bla. Com. 155; Selw. N. P. 68.

Indebitatus assumpsit is in this distinguished from *debt* and *covenant*, which proceed directly for the debt, damages being given only for the detention of the debt. Debt lies on contracts by specialty as well as by parol, while *indebitatus assumpsit* lies only on parol contracts, whether express or implied; Bro. Act. at Law 317.

For the history of this form of action, see 3 Reeve, Hist. Com. Law; 2 Com. Contr. 549; 3 Bla. Com. 154; J. B. Ames, 2 Harv. L. Rev. 1, 53, 377. See ASSUMPSIT.

INDEBITI SOLUTIO (Lat.). In Civil Law. The payment to one of what is not due to him. If the payment was made by mistake, the civilians recovered it back by an action called *condictio indebiti;* with us, such money may be recovered by an action of *assumpsit.*

INDEBTEDNESS. The state of being in debt, without regard to the ability or inability of the party to pay the same. See 1 Story, Eq. Jur. 343; 2 Hill, Abr. 421.

But in order to create an indebtedness there must be an actual liability at the time, either to pay then or at a future time. If, for example, a person were to enter and become surety for another, who enters into a rule of reference, he does not thereby become a debtor to the opposite party until the rendition of the judgment on the award; Fales v. Thompson, 1 Mass. 134. As to indebtedness of a municipality, see MUNICIPAL CORPORATIONS.

INDECENCY. An act against good behavior and a just delicacy. Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632.

The law, in general, will repress indecency as being contrary to good morals; but, when the public good requires it, the mere indecency of disclosures does not suffice to exclude them from being given in evidence; Tayl. Ev. 816.

The following are examples of indecency: the exposure by a man of his naked person on a balcony, to public view, or bathing in public; 2 Campb. 89; Knowles v. State, 3 Day (Conn.) 103; State v. Roper, 18 N. C. 208; State v. Millard, 18 Vt. 574, 46 Am. Dec. 170; Van Houten v. State, 46 N. J. L. 16, 50 Am. Rep. 397; or in the house of another in the presence of a young girl; Com. v. Wardell, 128 Mass. 52, 35 Am. Rep. 357; or the exhibition of bawdy pictures; 2 Chitty, Cr. Law 42; Com. v. Sharpless, 2 S. & R. (Pa.) 91, 7 Am. Dec. 632. This indecency is punishable by indictment. See Brooks v. State, 2 Yerg. (Tenn.) 482; Grisham v. State, *id.* 589; Com. v. Catlin, 1 Mass. 8; 1 Russ. Cr. 302; 4 Bla. Com. 65, n.; Burn, Just. *Lewdness.* And an ordinance making such exposure an offence without reference to the intent which accompanies the act, is a valid exercise of police power; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6.

INDECENT ASSAULT. See ASSAULT.

INDECENT EXHIBITION. Any exhibition *contra bonos mores*, as the taking a dead body for the purpose of dissection or public exhibition. 2 T. R. 734.

INDECENT EXPOSURE. It must be in a public place; Com. v. Hardin, 2 Ky. L. R. 59; if accidental, it is not an offence; City of Grand Rapids v. Bateman, 93 Mich. 135, 53 N. W. 6; nor is exposure to one woman in a field near a highway; Morris v. State, 109 Ga. 351, 34 S. E. 577. See EXPOSURE OF PERSON; INDECENCY.

INDECENT LIBERTIES. See ASSAULT.

INDECENT PUBLICATIONS. Statutes forbidding the keeping, exhibiting, or sale of indecent books or pictures, and providing for their destruction, if seized, are within the police power of a state, and are constitutional. Cooley, Const. Lim. 748. See OBSCENITY; MAIL.

INDECIMABLE. Not tithable.

INDEFEASIBLE. That which cannot be defeated or undone. This epithet is usually applied to an estate or right which cannot be defeated. "A perfect title." Douglass v. Lewis, 131 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53.

INDEFENSUS (Lat.). One sued or impleaded who refuses or has nothing to answer.

INDEFINITE FAILURE OF ISSUE. See FAILURE OF ISSUE.

INDEFINITE NUMBER. A number which may be increased or diminished at pleasure.

When a corporation is composed of an indefinite number of persons, any number of them consisting of a majority of those present may do any act, unless it be otherwise regulated by the charter or by-laws.

INDEFINITE PAYMENT. That which a debtor who owes several debts to a creditor makes without making an appropriation: in that case the creditor has a right to make such appropriation.

INDEMNIFY. To secure or save harmless against loss or damage, of a specified character, which may happen in the future.

To compensate or reimburse one for a loss previously incurred; L. R. 14 Eq. 479. See Weller v. Eames, 15 Minn. 467 (Gil. 376), 2 Am. Rep. 150.

To indemnify is said to be synonymous with "to save harmless." Brentnal v. Holmes, 1 Root (Conn.) 292, 1 Am. Dec. 44.

Indemnification is the act of indemnifying or making good a loss. *Indemnificatus*, indemnified. *Indemnis* (formerly *indempnis*), without damage; harmless. *Indemnitor*, one who enters into a contract of indemnity for the benefit of another; *indemnitee*, one who is to be benefited by such a contract.

INDEMNITY. That which is given to a person to prevent his suffering damage. Peck v. Wakely, 2 McCord (S. C.) 279.

It is a rule established in all just governments that when private property is required for public use, indemnity shall be given by the public to the owner. See EMINENT DOMAIN.

Contracts made for the purpose of indemnifying a person for doing an act for which he could be indicted, or to compensate a public officer for doing an act which is forbidden by law, or for omitting to do one which the law commands, are absolutely void. But when the agreement with an officer was not to induce him to neglect his duty, but to test a legal right, as to indemnify him for not executing a writ of execution, it was held to be good; 1 Bouvier, Inst. n. 780.

In general, a mere promise of indemnity to a third person is not within the statute of frauds; [1894] 2 Q. B. 885, 19 L. R. Eq. 198; George v. Hoskins (Ky.) 30 S. W. 406; Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000; and this rule applies to a promise to indemnify the surety on a liquor-dealer's bond; Smith v. Delaney, 64 Conn. 264, 29 Atl. 496, 42 Am. St. Rep. 181; to a contract of agency, by which the agent agrees to be responsible for the nonpayment of debts which may thereafter become due by others; 69 L. T. N. S. 354; to a promise to indemnify one if he will indorse K.'s notes, so that K. can have them dis-

counted; Jones v. Bacon, 145 N. Y. 446, 40 N. E. 216; and to a verbal promise of A to B to indemnify him if he will become surety for C for a debt of the latter to D; Minick v. Huff, 41 Neb. 516, 59 N. W. 795. But it is held in Illinois, that a guarantee of indemnity to a surety is within the statute; Waterman v. Pesseter, 45 Ill. App. 155. See GUARANTY; SURETYSHIP; INSURANCE.

INDEMNITY LANDS. Those lands which are, by the grant in aid of a railroad, allowed to be selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection. Barney v. R. Co., 117 U. S. 232, 6 Sup. Ct. 654, 29 L. Ed. 858; Wisconsin C. R. Co. v. Price County, 133 U. S. 513, 10 Sup. Ct. 341, 33 L. Ed. 687.

Title to indemnity lands does not vest in a railroad company until they are actually selected and the selection approved by the secretary of the interior; U. S. v. R. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766.

INDENT. To cut in the shape of teeth.

Deeds of *indenture* were anciently written on the same parchment or paper as many times as there were parties to the instrument, the word *chirographum* being written between, and then the several copies cut apart in a *zigzag or notched line* (whence the name), part of the word *chirographum (q. v.)* being on either side of it; and each party kept a copy. The later practice was to cut the top or side of the deed in a waving or notched line; 2 Bla. Com. 295.

To bind by indentures; to apprentice: as, to indent a young man to a shoemaker. Webster, Dict.

In American Law. An indented certificate issued by the government of the United States at the close of the revolution for the principal or interest of the public debt. Ramsay, Hamilton, Webster; Eliot, Funding System 35; U. S. v. Irwin, 5 McLean 178, Fed. Cas. No. 15,445; Acts of April 30, 1790, sess. 2, c. 9, § 14, and of March 3, 1825, sess. 2, c. 65, § 17. The word is no longer in use in this sense.

INDENTURE. A formal written instrument made between two or more persons in different interests, as opposed to a deed poll, which is one made by a single person, or by several having similar interests.

Its name comes from a practice of *indenting* or scalloping such an instrument on the top or side in a waving line. This is not necessary in England at the present day, by stat. 8 & 9 Vic. c. 106, § 5, but was in Lord Coke's time, when no words of indenture would supply its place; 5 Co. 20. In this country it is a mere formal act, not necessary to the deed's being an indenture. See Bac. Abr. *Leases, etc.* (E 2); Com. Dig. *Fait* (C, and note *d*); Littleton, § 370; Co. Litt. 143 *b*, 229 *a*; Cruise, Dig. t. 32, c. 1, s. 24; 2 Bla. Com. 294; 1 Steph. Com. 447.

For the method used, see INDENT; DEED POLL.

The form now in use, "this indenture, made between A. and B.," was used as early as Edward III. 3 Holdsw. Hist. E. L. 193.

INDENTURE OF A FINE. Indentures made and engrossed at the chirographer's office and delivered to the cognizor and the cognizee, usually beginning with the words: "*Hæc est finalis concordia.*" And then reciting the whole proceedings at length. 2 Bla. Com. 351.

INDEPENDENCE. A state of perfect irresponsibility to any superior. The United States are free and independent of all earthly power.

Independence may be divided into *political* and *natural* independence. By the former is to be understood that we have contracted no ties except those which flow from the three great natural rights of safety, liberty, and property. The latter consists in the power of being able to enjoy a permanent well-being, whatever may be the disposition of those from whom we call ourselves independent. In that sense a nation may be independent with regard to most people, but not independent of the whole world. See DECLARATION OF INDEPENDENCE.

Questions as to the power of municipalities to appropriate money for the celebration of the anniversary of the Declaration of Independence have arisen. It has been held that no such power exists; Hodges v. City of Buffalo, 2 Denio (N. Y.) 110; Hood v. Lynn, 1 Allen (Mass.) 103.

INDEPENDENT CONTRACTOR. One who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work. Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, 17 Am. St. Rep. 925.

The term is also defined to denote one who has the right to select, employ, and control the action of the workmen; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Gay v. Kohlsaat, 80 Ill. App. 185; one who is subject to his employer as to the results of his work only; Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.) 367.

A still broader definition has been given as follows: "Where a person is employed to perform a certain kind of work, in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion, without any restriction as to its exercise, and no limitation as to the authority conferred in respect to the same, and no provision is especially made

as to the time in which the work is to be done, or as to the payment for the services rendered, and the compensation is dependent upon the value thereof, such person does not occupy the relation of servant under the control of the master, but is an independent contractor." Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

Any one who follows a recognized independent calling has been held to be an independent contractor; as a slater; McCarthy v. Second Parish in Town of Portland, 71 Me. 318, 36 Am. Rep. 320; an architect; De Ford v. State, 30 Md. 179; a horse trainer; Arasmith v. Temple, 11 Ill. App. 39; a manufacturer of shingles; Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703; a builder; Robinson v. Webb, 11 Bush (Ky.) 464; a licensed public carman; McMullen v. Hoyt, 2 Daly (N. Y.) 271; a drayman; De Forrest v. Wright, 2 Mich. 368; a drover; 12 Ad. & El. 737; a plumber; Meany v. Abbott, 6 Phila. (Pa.) 256; and a stevedore; The Rheola, 19 Fed. 926; Hass v. S. S. Co., 88 Pa. 269, 32 Am. Rep. 462; 6 L. R. C. P. 24; Burke v. De Castro, 11 Hun (N. Y.) 354; Riley v. S. S. Co., 29 La. Ann. 791, 29 Am. Rep. 249; and the mode of payment and the fact that materials are furnished by the employer have been held to have but little weight in determining whether the employé is an independent contractor or not; Fuller v. Bank, 15 Fed. 875; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581. The rule is that where a person is under the entire direction and control of another he is to be considered his servant, no matter who pays him; 5 B. & C. 560. The test to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation representing the will of his employer only as to the result of his work and not as to the means by which it was accomplished; Hexamer v. Webb, 101 N. Y. 385, 4 N. E. 755, 54 Am. Rep. 703.

In cases of an independent contract, the employer is not responsible; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Young v. R. Co., 30 Barb. (N. Y.) 229; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Kepperly v. Ramsden, 83 Ill. 354; Rome & D. R. Co. v. Chasteen, 88 Ala. 591, 7 South. 94; Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329, 56 Am. Rep. 117; Gallagher v. Exposition Ass'n, 28 La. Ann. 943; 7 H. & N. 826; 2 C. P. Div. 369; Bailey v. R. Co., 57 Vt. 252, 52 Am. Rep. 129; Hitte v. R. Co., 19 Neb. 620, 28 N. W. 284; New Orleans & N. E. R. Co. v. Reese, 61 Miss. 581; Pierce v. O'Keefe, 11 Wis. 180. In 1 Bos. & P. 404, the rule was laid down that not only was the employer liable for the negligence of a contractor, but for that of a servant of a sub-contractor. This decision was followed in some of the earlier English and American cases, but the weight of authority in both countries has overruled it, the question of its authority having been decisively settled in each country, in what have become leading cases; 4 Exch. 244; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743. But see 6 H. & N. 488, and Chicago v. Robbins, 2 Black (U. S.) 418, 17 L. Ed. 298, with the criticism of these cases in Bibb's Adm'r v. R. Co., 87 Va. 711, 14 S. E. 163.

A like rule governs the question of the liability of the employer and the contractor for the negligence and torts of the sub-contractor or his servants; 7 H. & N. 826; 11 C. B. 867; 2 C. P. Div. 369; Wray v. Evans, 80 Pa. 102; Slater v. Mersereau, 64 N. Y. 138.

If he undertakes to provide the material, he is liable for an injury caused by his failure to provide it; Gilbert v. Beach, 5 Bosw. (N. Y.) 447; and generally, he is liable if the contract reserves to him such a power of supervision or control of the work as will destroy the free agency of the contractor, whether the supervision be exercised by himself or by persons designated by him; Vogel v. City of New York, 92 N. Y. 10, 44 Am. Rep. 349; Hughes v. Ry. Co., 39 Ohio St. 466; Edmundson v. R. Co., 111 Pa. 316, 2 Atl. 404; Harper v. City of Milwaukee, 30 Wis. 365; City of Chicago v. Dermody, 61 Ill. 431; Camp v. Church Wardens of Church of St. Louis, 7 La. Ann. 321; City of Denver v. Rhodes, 9 Colo. 554, 13 Pac. 729; but not if the power of supervision reserved is not such as to interfere with the discretion of the contractor in the manner of executing the work, but is confined to seeing that the intended result is produced; Nevins v. City of Peoria, 41 Ill. 502, 89 Am. Dec. 392; Vincennes Water Supply Co. v. White, 124 Ind. 376, 24 N. E. 747. The exact rule as to supervision is said to be that the employer, through its chief engineer, may reserve the right to criticise the work but not to control it; Bibb's Adm'r v. R. Co., 87 Va. 711, 14 S. E. 163.

The employer will be held liable if the injurious act complained of was contemplated by the contract; Whitney v. Clifford, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703; St. Louis & C. Ry. Co. v. Drennan, 26 Ill. App. 263; or if the contract work is necessarily dangerous or harmful; Mayor, etc., of Birmingham v. McCary, 84 Ala. 469, 4 South. 630; Circleville v. Neuding, 41 Ohio St. 465; Wilson v. City of Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Haniford v. Kansas City, 103 Mo. 172, 15 S. W. 753; 3 L. R. H. L. 330. Where a man orders work to be done, upon which injurious consequences must be expected to arise, he is bound to see to the doing of that which is necessary to prevent the mischief and cannot relieve himself by employing some one else; 1 Q. B. Div. 321.

Where the employé of an independent contractor was, under contract of a tenant, cleaning the windows of a building flush on the street, and having no safety appliances, though the work was inherently dangerous, and he fell to the street and injured a passer-by, it was held that he must be regarded as the servant of the tenant and that the tenant was liable, regardless of the employment by an independent contractor; Doll & Sons v. Ribetti, 203 Fed. 593, 121 C. C. A. 621, following 1 Q. B. D. 321, *supra*. In such case the occupier of the building cannot discharge himself by employing an independent contractor; Poll. Torts 477. When a person is engaged in work, in the ordinary doing of which a nuisance occurs, he is liable for any injury to third persons for negligence, though the work may be done by a contractor; Water Co. v. Ware, 16 Wall. (U. S.) 566, 21 L. Ed. 485.

A general contractor, having control for the purpose of erecting buildings for the owner of a property, cannot relieve himself from liability for a dangerous situation, though created by the independent contractor; Wilson v. Hibbert, 194 Fed. 838, 114 C. C. A. 542.

The independent contractor rule was applied in Deyo v. R. Co., 94 App. Div. 578, 88 N. Y. Supp. 487, where defendant owning a park engaged a company to exhibit fireworks. Defendant was held not liable to a spectator who was injured by a rocket negligently discharged by a workman under control of the contractor company. One who invites others to come upon his premises must use due care to render them safe, and cannot avoid this duty under cover of an independent contractor; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421. Where the work is of a dangerous nature, one is bound not only to due care in selecting a contractor, but also to see that due precautions are taken. The liability of the owner is based upon failure to keep his premises reasonably safe, and not to the negligence of the contractor; Thompson v. R. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323. Compare Sebeck v. Plattdeutsche Volkfest Verein, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512.

When work is *per se* dangerous and the employer does not stipulate that the contractor shall use proper precautions to avoid injury to others, the employer is liable; Matheny v. Wolffs, 2 Duv. (Ky.) 137; Sulzbacher v. Dickie, 6 Daly (N. Y.) 469; or when the work contracted for becomes or occasions a public nuisance, unless it be due solely to the negligence of the contractor; Wood v. School Dist., 44 Ia. 27; Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; Kepperly v. Ramsden, 83 Ill. 354; Edmundson v. R. Co., 111 Pa. 316, 2 Atl. 404; Conners v. Hennessey, 112 Mass. 96; or when the contractor is incompetent; Cuff v. R. Co., 35 N. J. L. 17, 10 Am. Rep. 205; and that the employer was ignorant of such incompetency will not excuse him; *id.*; but see Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451. But it was held that when the defendants employed a carpenter and bridge builder of experience to build a bridge, it was not enough for the plaintiff to show that the work was unskilfully done; it must appear that the defendants were guilty of negligence in selecting him; that they either knew, or with proper diligence ought to have known, his incompetency; Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 185, 191, 36 Am. Rep. 662.

The general rule is that the employer is only liable in three cases: 1. Where the act of the contractor is one which if done by the employer would be done at his peril. 2. Where the contractor is employed to execute certain work which the employer is under a statutory duty to perform. 3. Where the work which the contractor is employed to do is unlawful or a public nuisance; Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052, 33 Am. St. Rep. 692. For a general rule of non-liability for acts of independent contractor, see King v. R. Co., 66 N. Y. 181, 23 Am. Rep. 37. In other cases the employer is not liable; Conners v. Hennessey, 112 Mass. 96.

In Covington & C. Bridge Co. v. Steinbrock, 61 Ohio St. 215, 55 N. E. 618, 76 Am. St. Rep. 375, through negligence of an independent contractor employed to tear down a building partly destroyed by fire, the wall fell, damaging plaintiff's building, and the defendant was held liable though he used due care in selecting his contractor. He was held negligent on the broad principle that one cannot escape liability for an injury that might have been anticipated as a probable consequence if reasonable care were omitted. This case is criticised in 14 H. L. R. 62, as partially abrogating the independent contractor rule in Ohio. Some cases establish a rule holding the employer in a contract for labor on a highway as an insurer, owing a duty to the public; Hill v. Tottenham, 106 L. T. R. 127; Penny v. Wimbledon Council [1899] 2 Q. B. 72; Halliday v. Telephone Co. [1899] 2 Q. B. 392; The Snark [1899] P. D. 74. This line of cases is approved by 14 Harv. L. R. 63, as an exception to the general rule, but the writer thinks that the weight of authority in this country is in favor of the independent contractor rule and against the Ohio case.

After acceptance of the contract work, the employer will be liable for an injury caused by a defect in it; Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224; Bast v. Leonard, 15 Minn. 304 (Gil. 235); Chartiers Val. Gas Co. v. Lynch, 118 Pa. 362, 12 Atl. 435; Vogel v. New York, 92 N. Y. 10, 44 Am.

Rep. 349; Fanjoy v. Seales, 29 Cal. 243; Cunningham v. R. Co., 51 Tex. 503, 32 Am. Rep. 632; Kansas Cent. Ry. Co. v. Fitzsimmons, 18 Kan. 34; and, if ratified by him, for the tortious acts of the contractor; Coomes v. Houghton, 102 Mass. 211; Parker v. R. Co., 81 Ga. 387, 8 S. E. 871.

As to the liability of a municipal corporation, it has been held that such a corporation cannot rid itself of responsibility for the acts of an independent contractor; King v. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; as he is acting under the authority of the district or city council, and without such authority, he would be a trespasser on the streets; 74 L. T. Rep. 69; and notwithstanding the nature of the work to be performed, it is the duty of the municipality to see that the streets are in a safe condition for travel; Kemper v. City of Louisville, 14 Bush (Ky.) 87; Mayor, etc., of City of Savannah v. Waldner, 49 Ga. 316; Mayor, etc., of Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395; Grant v. City of Brooklyn, 41 Barb. (N. Y.) 381; Schweickhardt v. City of St. Louis, 2 Mo. App. 571; Mayor, etc., of Memphis v. Lasser, 9 Humph. (Tenn.) 760; *contra*, Painter v. Mayor, etc., 46 Pa. 213; or, as it is held in England, so to construct its sewers as not to injure the gas mains or other underground conveniences, and the municipality was held liable even when there was an independent contractor for the injury caused by an explosion in a private house because of an escape of gas from a main broken by the negligence of the contractor; [1896] 1 Q. B. 335.

And this rule is to be applied even though the contractor has stipulated that he will be responsible for all damages that may be caused in the execution of the work; Inhabitants of Veazie v. R. Co., 49 Me. 119; Smith v. City of St. Joseph, 42 Mo. App. 392; Pettengill v. City of Yonkers, 116 N. Y. 558, 22 N. E. 1095, 15 Am. St. Rep. 442; McAllister v. City of Albany, 18 Or. 426, 23 Pac. 845; *contra*, Osborn v. Ferry Co., 53 Barb. (N. Y.) 629. It has been held that where there is a statutory requirement that the contract be given to the lowest bidder, the municipality was not liable; James v. City of San Francisco, 6 Cal. 528, 65 Am. Dec. 526.

See MASTER AND SERVANT; MUNICIPAL CORPORATION; NEGLIGENCE.

INDEPENDENT PROMISES. Those made in a contract upon which one party has a right of action against the other for any injury sustained by him by reason of a breach of the covenants or promises in his favor, and where an allegation of non-performance of his covenant by the plaintiff is no defence to such action.

When the performance of one depends or is conditional on the prior performance of the other, the agreements or covenants are said to be dependent. McCrelish v. Churchman, 4 Rawle (Pa.) 26; Tompkins v. Elliot, 5 Wend. (N. Y.) 496. Where performance of each is dependent or conditional upon performance of the other, they are mutually dependent.

Where there are promises on both sides in an agreement,—executory considerations,—it always becomes a question whether one party is bound to perform his before the opposite party shall be required to perform those on his side. When the agreements are dependent, neither party is bound actually to perform his part of the agreement to entitle him to an action for a breach by the other; it is enough that he was able to perform his part and offered to do so; Hammond v. Gilmore's Adm'r, 14 Conn. 479; Moore v. Hopkins, 15 La. Ann. 675.

Where the consideration is executory, technically speaking, the promise and not the performance is the consideration, and hence the obligation of one may be independent of the performance of the other. Upon examination and proper construction of mutual promises, it may appear "that the obligation of the one promise is made expressly or impliedly conditional upon the due performance of the other; and then the performance of the promise, constituting the executory consideration, is a condition precedent to the liability to perform the other promise; in the latter case the mutual promises are called dependent, and in the former they are called independent." Leake, Cont. 344.

In Jones v. Barkley, 2 Dougl. 684, Lord Mansfield thus classified mutual promises: "There are three kinds of covenants. 1. Such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenants. 3. There is also a third sort of covenants, which are mutual conditions to be performed at the same time; and, in these, if one party was ready, and offered, to perform his part, and the other neglected, or refused, to perform his, he who was ready and offered has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act." In this case, it was clearly laid down that the criterion by which it is determined whether promises are dependent or not, is the intention of the parties, and this is to be determined from the whole contract; *id.*; Adams v. Williams, 2 W. & S. (Pa.) 227; Philadelphia, W. & B. R. Co. v. Howard, 13

How. (U. S.) 307, 14 L. Ed. 157; 29 L. J. C. P. 253; or as Lord Kenyon aptly says, "It must depend on the good sense of the case;" 6 Term 570. The rule is stated in Loud v. Water Co., 153 U. S. 564, 576, 14 Sup. Ct. 928, 38 L. Ed. 822. "The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. If the language is clear and unambiguous it must be taken according to its plain meaning as expressive of the intention of the parties, and, under settled principles of judicial decision, should not be controlled by the supposed inconvenience or hardship that may follow such construction. If the parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one shall be a condition precedent to the performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract." The intention is to be discovered from the order of time in which the acts are to be done, rather than from the construction of the agreement or the arrangement of the words; Goodwin v. Lynn, 4 Wash. C. C. 714, Fed. Cas. No. 5,553; Speake v. Sheppard, 6 Harr. & J. (Md.) 85. See also Howland v. Leach, 11 Pick. (Mass.) 151; Knight v. Worsted Co., 2 Cush. (Mass.) 287; Leonard v. Dyer, 26 Conn. 176, 68 Am. Dec. 382; Cadwell v. Blake, 6 Gray (Mass.) 407.

It is said that the dependency may be expressed or implied, as the condition is expressed or implied, and that the doctrine of implied dependency was introduced by Lord Mansfield, in Kingston v. Preston, cited in 2 Dougl. 684, before which, if there was no expressed dependency, a breach by one party was no defence to an action by the other and only gave him a cross-action; Harr. Cont. 153.

What is meant by implied dependency may be stated: From the definition of dependency it is clear that the term is used to describe certain conditions which necessarily belong only to bilateral contracts. As these conditions must originate in the intention of contracting parties, if expressed in the contract, they are governed by the law of conditions generally. In the absence of precise expression, the law imputes an intention, which creates an implied condition. The principles which regulate these conditions constitute the law of implied dependency and they are peculiar to the subject; Langd. Sum. Cont. 134.

The question of dependency is so much a matter of intention that there is much truth in the remark "that arbitrary rules are useless"; Harr. Cont. 153. Nevertheless certain rules of construction have been generally agreed upon and applied in the interpretation of contracts, with respect to this subject.

A note to Pordage v. Cole, 1 Wms. Saund. 319, termed by Pollock (Contracts 386) "the classic on the subject," gives the five rules of Mr. Serjeant Williams which are most referred to (Langd. Sel. Cas. Cont. 641, n. 5). These rules are adopted, in a different order, in Leake, Cont. 345, and substantially the same general principles have been grouped in four rules; 1 Bouv. Inst. 701; Platt, Cov. 80. These classifications are extremely interesting as affording a good illustration of what is practically an early codification of the principles governing an important branch of the law of contract, and, while the first is accessible, their repetition here is proper, as they must necessarily be referred to in connection with the brief statement which present limitations permit, of the rules of construction generally accepted.

The rules of Mr. Serjeant Williams are: 1. If a day be appointed for payment of money or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration or the money or other act. 2. But when a day is appointed for the payment of money, etc., and the day is to happen after the thing which is the consideration of the money, etc., is to be performed, no action can be maintained for the money, etc., before performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant without averring performance in the declaration. 4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 5. Where two acts are to be done at the same time, as, where A covenants to convey an estate to B on such a day, and, in consideration thereof B covenants to A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all classes of sale. 1 Wms. Saund. 320 *b*

The rules referred to as given by Bouvier (Inst 701) are: When the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.

Where the act of one party must necessarily precede any act of the other, as where one agrees to manufacture an article from materials to be furnished by the other, or to pay for goods on delivery, or to pay money on demand, the covenants are independent, and one act is a condition precedent to the other.

When mutual covenants go only to a part of the consideration on both sides, and when a breach may be paid for in damages, the defendant has a remedy on his covenant, and is not allowed to plead it as a condition precedent.

When a day is appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement is to pay the money before the doing of the thing, yet an action may be brought

for the money before the performance; because the agreement is positive that the money shall be paid on that day, and the presumption is that the party intended to rely on his remedy and not on a previous performance.

Benjamin also lays down five rules based on those of Williams, but not following them in detail. The first combines rules 1 and 2; the second, third, and fourth are rules 3, 4, and 5 respectively; and the fifth is a brief statement, substantially, of the rule of intention of Lord Mansfield in Jones v. Barkley, which it is said "remains unchanged"; Benj. Sales § 561. For these rules of Benjamin see *id.* § 562.

Dependent promises can only exist as part of the same contract, but more than one contract may be included in one instrument; Harr. Contr. 159; Langd. Sum. Contr. § 115. So, on the other hand, each of two mutual promises may be contained in a separate instrument, each complete in itself and neither making any reference to the other. In such case, it has been said, there is no doubt that each forms a separate unilateral contract; *id.* § 117.

To be dependent, a simultaneous performance must have been intended; 8 Term 366; Sheeren v. Moses, 84 Ill. 448; Kane v. Hood, 13 Pick. (Mass.) 281; it is not sufficient that the performance of each promise was intended to be within the same period; 11 H. L. Cas. 337. They must be capable of performance at the same time and place, and involve an exchange of rights; Langd. Sum. Cont. § 133; but if a time is fixed for the performance of one, and not the other, they are dependent; *id.;* 4 H. & N. 500.

All the stipulations of a contract should be considered in determining the question of dependency, which may be general,—as to the whole consideration on each side,—or, it may exist only as to two distinct promises. Thus a contract may be partly bilateral and partly unilateral and as to the former part, the promises may be dependent.

A unilateral contract, from its nature, can contain only independent promises.

The conditions which must exist to render implied dependency possible are thus enumerated: "1st. The subject of implied dependency must be a covenant or a promise, as distinguished from a debt. 2dly. The subject of dependency and the thing upon which it depends must be of the same nature, *i. e.* they must both be covenants or both be promises. 3dly. The covenants or the promises must be mutual. 4thly. They must each be a part of the same contract; and it does not follow that they are so because they are made at the same time, or are contained in the same instrument. 5thly. If in writing, they must each be contained in the same instrument, or in different instruments which refer to each other. 6thly. The contract which contains the covenants or the promises must be wholly bilateral, or else it must clearly appear that the covenants or promises in question were given and received in payment for each other. 7thly. The performance of each of the covenants or promises must, it seems, be equally certain in legal contemplation;" Langd. Sum. Cont. § 120.

When the mutual contracts go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other, but where a covenant goes only to a part of the consideration, it is not a condition precedent, but an action lies for the breach of it; Howland v. Leach, 11 Pick. (Mass.) 151; 1 Wms. Saund. 320 *e*, rules 3 & 4; 29 L. J. Ex. 73. Professor Langdell goes further and insists that two promises are not mutually dependent unless the performance of one is full payment for the performance of the other; Sum. Contr. §§ 133, 136; but Professor Harriman considers this "theory of equivalency," though "most ingeniously developed," as not "based on satisfactory authority"; Contr. 158. This difference of opinion between these able writers on the subject is itself sufficient to show that the point is not definitely settled. Possibly the lack of precise authority upon this single point of a subject, of which the substantial principles have been settled for more than a century, might be considered as fairly indicating that it is more interesting than material,—rather theoretical than practical. See [1894] App. Cas. 266. It should, perhaps, rather be said that differences of opinion (of which another on a very practical point is noted *infra*) between these two writers who have, more than any others, philosophically examined the subject, indicate that the generalizations of Mr. Serjeant Saunders, while containing the essential principles, are to be applied only with some modification to modern conditions. It is therefore essential that the student or practitioner in dealing with particular cases should include in his researches both the ancient learning and the modern investigations which have illuminated the topic. To these it is hoped that this title may furnish a reference,—it is manifestly possible to do little more, in the way of critical examination and comparison of cases.

Where a day is appointed for payment of money or doing any act, and such day must or may happen before the thing which is the consideration of the payment or performance of the other act, is to be made or done, the promises are independent; 1 Wms. Saund. 320 *b*, rule 1; Betts v. Perine, 14 Wend. (N. Y.) 219; Seers v. Fowler, 2 Johns. (N. Y.) 272; Couch v. Ingersoll, 2 Pick. (Mass.) 300; a distinction has been drawn, however, as to whether the time of the latter payment or performance is fixed entirely by reference to the former, and when it is so, the first is a condition precedent; Northrup v. Northrup, 6 Cow. (N. Y.) 296; otherwise, if it is to be determined without reference to the other; 10 A. & E. 50.

It is the second of Serjeant Williams' rules, and the view is supported by Leake (Cont. 346), that if the day appointed is to happen after the act or payment, the promises are dependent; the cases cited being 18 C. B. 673 and 25 L. J. C. P. 254. The view that the last promise to be performed is dependent,—the other not,—is supported by Langdell (Sum. of Contr. § 122), on the authority of Grant v. Johnson, 5 N. Y. 247, which is put directly upon that rule. But Harriman (Contr. 154) dissents from this view and considers the authority relied upon by Langdell as "unsound in its reasoning," and he subjects it to severe criticism, as the result of what he terms the "peculiar and erroneous doctrine" of the New York courts. In this connection it is to be observed also that the rule thus questioned is not included in the fundamental rules of construction set forth in Bouvier's Institutes.

If two acts are to be done at the same time the promises are mutually dependent; 1 Wms. Saund. 320 *e*, rule 5; 9 Q. B. 164; but each must be capable of performance concurrently, *i. e.* in a moment of time; the object of both must be an exchange of property or right; and it must be between the immediate parties to the contract and capable of being performed at the same place; Langd. Sum. Cont. § 69; Northrup v. Northrup, 6 Cow. (N. Y.) 296.

In case of contracts for payment of purchase money of land by instalments it is said that the promises to pay those instalments which become due before the date set for the delivery of the deed are absolute and independent, and in no way affected by a failure to deliver the deed at the time specified. But where the deed is to be delivered *simultaneously* with the payment of the last instalment, then on payment of the previous instalments the tender of the deed and the tender of the last instalment become mutual concurrent conditions; Kane v. Hood, 13 Pick. (Mass.) 281; Sheeren v. Moses, 84 Ill. 448.

Where a contract is made for the sale of goods to be delivered in instalments each to be paid for on delivery, it was held that the promises were dependent, and the failure to deliver one instalment as stipulated released the other party from the obligation to accept future deliveries; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366. In this case the supreme court reviewed the English cases and considered the doctrine of Hoare v. Rennie, 5 H. & N. 19, as better supported by English authority than Simpson v. Crippin, L. R. 8 Q. B. 14, and Brandt v. Lawrence, 1 Q. B. Div. 344; the case relied upon to establish this view was Bowes v. Shand, 2 App. Cas. 455, and it was considered as not contravened by Mersey Co. v. Naylor, 9 App. Cas. 434, which was followed in the House of Lords in [1909] A. C. 118, as was also Freeth v. Burr, L. R. 5 C. P. 213, both said to be on broader lines than Pordage v. Cole, 1 Wms. Saund. 319. See, also, Hill v. Blake, 97 N. Y. 216; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Shinn v. Bodine, 60 Pa. 182, 100 Am. Dec. 560; *contra*, Winchester v. Newton, 2 Allen (Mass.) 492; 25 Am. L. Reg. N. S. 59; 21 *id.* 398, n.

INDETERMINATE. That which is uncertain, or not particularly designated; as, if I sell you one hundred bushels of wheat, without stating what wheat. See CONTRACT.

INDETERMINATE SENTENCES. See SENTENCE.

INDIAN. The name of the aboriginal inhabitants of America.

In general, Indians had no political rights in the United States; they could not vote at the general elections for officers, nor hold office. In New York they were considered as citizens, and not as aliens, owing allegiance to the government and entitled to its protection; Jackson v. Goodell, 20 Johns. (N. Y.) 188. The Cherokee nation in Georgia was a distinct community; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 L. Ed. 483. See Lee v. Glover, 8 Cow. (N. Y.) 189; Danforth v. Wear, 9 Wheat. (U. S.) 673, 6 L. Ed. 188; Dana v. Dana, 14 Johns. (N. Y.) 181; Jackson v. King, 18 Johns. (N. Y.) 506. The title of the Indians to land was that of occupation merely, but could be divested only by purchase or conquest; Gillespie v. Cunningham, 2 Humph. (Tenn.) 19; Stockton v. Williams, 1 Dougl. (Mich.) 546; Godfrey v. Beardsley, 2 McClean 412, Fed. Cas. No. 5,497; Johnson v. McIntosh, 8 Wheat. (U. S.) 571, 5 L. Ed. 681; 2 Washb. R. P. 521; 3 Kent 378.

By act of March 3, 1871, no Indian nation or tribe within the United States shall be recognized as an independent nation with whom it may contract by treaty, but prior treaties are not to be thereby impaired.

By act of March 3, 1885, any Indian committing certain crimes within any territory, and within or without an Indian reservation, is subject to the laws of the territory, and shall be tried in the same manner and be subject to the same penalties as other persons charged with the same crimes; and if such offence be committed within a reservation in a state, he shall be subject to the same laws, etc., as if it were committed within the exclusive jurisdiction of the United States. This act was held constitutional in U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See U. S. v. Thomas, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276; U. S. v. King, 81 Fed. 625. The United States courts have jurisdiction of crimes committed by Indians within a reservation; U. S. v. Celestine, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195.

The crime of murder committed by one

Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States; Talton v. Mayes, 163 U. S. 376, 16 Sup. Ct. 986, 41 L. Ed. 196.

The indictment, the venue of the trial, and the jury on the prosecution of an Indian for murder committed in a territory are to be according to the territorial laws; In re Gon-shay-ee, 130 U. S. 343, 9 Sup. Ct. 542, 32 L. Ed. 973.

The act of February 8, 1887, provides for the allotment of lands to Indians in severalty. By it Indians receiving allotments thereby have the benefit of, and are subject to, the laws both civil and criminal of the state or territory in which they reside; In re Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848. Every Indian born in the United States to whom an allotment shall have been made by this act, or under any law or treaty, and any Indian born within the United States who has voluntarily taken up his residence therein apart from any Indian tribe and adopted the habits of civilized life, is made a citizen of the United States, without impairing his right to tribal property.

Under the act of April 26, 1906, Indians are not permitted to alienate or encumber allotted lands within twenty-five years. The leasing of their lands, other than homesteads for more than one year, may be made under rules prescribed by the secretary of the interior; in case of the inability of a full-blood Indian owning a homestead to work or farm the same, the secretary may authorize the leasing of it; Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Authority is given to all persons of lawful age and sound mind to dispose of their property by will, but they may not disinherit parent, spouse or children of full-blood Indian unless with the approval of a judge of a United States court in the territory or by the United States commissioner; *id.;* though such heirs have been admitted to full citizenship; *id.;* Cherokee Nation v. Hitchcock, 187 U. S. 294, 23 Sup. Ct. 115, 47 L. Ed. 183; U. S. v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532.

The United States has supervision over the right of full-blood Indians to dispose of their lands by will and to require their conveyances of inherited lands to be approved by a court; Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738. Controversies over allotments while the same are held in trust by the United States are not primarily cognizable in any court; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566.

Prior to the act of August 15, 1894, the authority to determine the rights of claimants to allotments was vested in the secretary of the interior; Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 408, 24 Sup. Ct. 676, 48 L. Ed. 1039. That act provided that all Indians entitled to allotments may prosecute or defend any action in relation thereto in the circuit court of the United States. The judgment in favor of any claimant to an allotment has the same effect, when properly certified to the secretary of the interior, as if such allotment had been allowed and approved by him; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566. This act was amended February 6, 1901, the amendment expressly requiring that in such proceedings the United States should be defendant; McKay v. Kalyton, 204 U. S. 458, 27 Sup. Ct. 346, 51 L. Ed. 566.

An Indian woman who marries a citizen of the United States, voluntarily resides apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides; Hatch v. Ferguson, 57 Fed. 959; in a few states, marriages between white persons and Indians are forbidden by statute; Tiff. Pers. & Dom. Rel. 26. See CITIZENS; INDIAN TRIBE.

INDIAN DEPREDATIONS ACTS. As early as May 19, 1796, an act was passed by congress, providing an eventual indemnification to citizens of the United States for depredations committed by Indians in taking or destroying their property; 1 St. L. 472. Other acts of a similar character were passed from time to time. By the act of March 3, 1891, congress conferred on the court of claims jurisdiction of claims for property taken and destroyed by Indians.

INDIAN TERRITORY. Formerly one of the territories of the United States. It was bounded on the north by the state of Kansas, on the east by the states of Arkansas and Missouri, on the south by the state of Texas, and on the west and north by the territory of Oklahoma. It comprised the Indian reservations of the Quapaw Agency and of the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles, the five civilized tribes. See OKLAHOMA.

INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

Such a tribe, situated within the boundaries of a state, and exercising the powers of government and sovereignty, under the national government, is deemed politically a state,—that is, a distinct political society, capable of self-government; but it is not deemed a foreign state in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupilage; and its relation to the United States resembles that of a ward to a guardian; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25; Jackson v. Goodell, 20 Johns. (N. Y.) 193; 3 Kent 308; Story, Const. § 1096; U. S. v. Kagama,

118 U. S. 384, 6 Sup. Ct. 1109, 30 L. Ed. 228; Wall v. Williamson, 8 Ala. 48.

The obligation of the United States to protect Indians' use of land is of honor, not of law; they are wards and congress can make any change in the disposition of their lands which it deems best; Conley v. Ballinger, 216 U. S. 84, 30 Sup. Ct. 224, 54 L. Ed. 393.

"They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided;" U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. See Lowe v. Kansas, 163 U. S. 84, 16 Sup. Ct. 1031, 41 L. Ed. 78. Their local self-government is subject to the supreme legislative authority of the United States; Cherokee Nation v. R. Co., 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295.

The United States has power to pass such laws as may be necessary to their full protection and to punish all offences committed against them or by them within their reservation; U. S. v. Thomas, 151 U. S. 577, 14 Sup. Ct. 426, 38 L. Ed. 276. No state can, either by its constitution or other legislation, withdraw the Indians within its limits from the operation of the laws of congress regulating trade with them; notwithstanding any rights it may confer on them as electors or citizens; U. S. v. Holliday, 3 Wall. (U. S.) 407, 18 L. Ed. 182; The Kansas Indians, 5 Wall. (U. S.) 737, 18 L. Ed. 667; The New York Indians, 5 Wall. (U. S.) 761, 18 L. Ed. 708. See State v. Campbell, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169; nor can it authorize leases of Indian lands; Buffalo, R. & P. Ry. Co. v. Lavery, 75 Hun 396, 27 N. Y. Supp. 443.

The Pueblo Indians of New Mexico are not an Indian tribe within the meaning of the acts of congress; U. S. v. Joseph, 94 U. S. 614, 24 L. Ed. 295. The Indians residing in Maine, whose tribal organizations have ceased to exist, are not "Indian tribes," within the treaty-making power of the federal government; State v. Newell, 84 Me. 465, 24 Atl. 943. The policy of congress is to vest in the courts of the Cherokee nation jurisdiction of all controversies between Indians, or in which a member of the nation is the only party; In re Mayfield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635. See INDIAN.

By act of March 3, 1893, congress inaugurated the policy of terminating the tribal existence and government of the Indians and allotting their lands in severalty. Agreements were negotiated by the Dawes commission with each of the tribes designed to carry out the objects indicated. The agreement with the Seminoles was made in 1897, with the Creeks in 1901 and 1902, with the Choctaws and Chickasaws in 1898 and in 1902, and with the Cherokees in the latter year; Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248.

When Oklahoma was admitted into the Union, Nov. 16, 1907, the then existing tribal governments of the Five Civilized Tribes were continued in full force.

See Tiger v. Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738.

Congress may prohibit the introduction of liquor in to the Indian country; U. S. v. Sutton, 215 U. S. 291, 30 Sup. Ct. 116, 54 L. Ed. 200.

Treaties or agreements of the United States with Indian tribes are to be construed in the sense in which they would naturally be understood by the Indians; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49.

INDIANA. The name of one of the states of the United States.

This state was admitted into the Union by virtue of a resolution of congress, approved December 11, 1816.

The boundaries of the state are defined, and the state has concurrent jurisdiction with the state of Kentucky on the Ohio river, and with the state of Illinois on the Wabash. As to the soil, the southern boundary of Indiana is low-water mark on the Ohio river.

The first constitution of the state was adopted in the year 1816, and has since been superseded by the present constitution, which was adopted in the year 1851. Amendments were adopted in 1881. In 1907, an amendment gave the general assembly power to prescribe qualifications for admission to practice law.

INDICARE. In the Civil Law. To show or discover. To fix or tell the price of a thing. Calv. Lex.

INDICATIF. An abolished writ by which a prosecution was in some cases removed from a court-christian to the Queen's Bench. Encyc. Lon.

INDICATION. In the Law of Evidence. A sign or token; a fact pointing to some inference or conclusion. Bur. Circ. Ev. 251, 263.

INDICATIVE EVIDENCE. This is not evidence so called, but the mere suggestion of evidence proper, which may possibly be secured if the suggestion is followed up. Brown.

INDICAVIT. A writ or prohibition that lay for a patron of a church where the clergyman presented by him to a benefice is made defendant in an action of tithes commenced in the ecclesiastical court of another clergyman, where the tithes in question extended to the fourth part of the benefice; for in this case the suit belonged to the king's court (*i. e.* the common law court) by the Stat. Westm. 2, c. 5. Cowell. The person sued might also avail himself of this writ. Toml.

INDICIA (Lat.). Signs; marks. Conjectures which result from circumstances not absolutely certain and necessary, but merely probable, and which may turn out not to be true, though they have the appearance of truth.

The term is much used in the civil law in a sense nearly or entirely synonymous with circumstantial evidence. It denotes facts which give rise to inferences, rather than the inferences themselves. However numerous *indicia* may be, they only show that a thing may be, not that it has been. An *indicium* can have effect only when a connection is essentially necessary with the principal. Effects are known by their causes, but only when the effects can arise only from the causes to which they are attributed. When several causes may have produced one and the same effect, it is, therefore, unreasonable to attribute it to any particular one of such causes.

The term is much used in common law of signs or marks of identity: for example, in replevin it is said that property must have *indicia*, or ear-marks, by which to distinguish it from other property of the same kind. So it is much used in the phrase "*indicia* of crime," in a sense similar to that of the civil law.

INDICTABLE. Capable of being indicted; liable to be indicted; as, an *indictable* offender.

That forms a subject or ground of indictment; as, an indictable offence. Encyc. Dict.

INDICTED. Having had an indictment found against him.

INDICTEE. One who is indicted. See INDITEE.

INDICTION. The space of fifteen years. It was used in dating at Rome and in England. The institution of indiction dates from the time of Constantine I., Sept. 1, or, according to some authorities, Sept. 15, 312; but the first instance of the use is mentioned in the Theodosian Code, under the reign of Constantius II. The papal court adopted computation by indictions about 800, the commencement of the first indiction being referred to Jan. 1, 313. The first year was reckoned the first of the first indiction, and so on till the fifteen years afterwards. The sixteenth year was the first year of the second indiction; the thirty-first year was the first year of the third indiction, etc.

INDICTMENT. A written accusation against one or more persons of a crime or misdemeanor, presented to, and preferred upon oath or affirmation by, a grand jury legally convoked. 4 Bla. Com. 299; Co. Litt. 126; 2 Hale, Pl. Cr. 152.

An accusation at the suit of the crown, found to be true by the oaths of a grand jury *(q. v.)*.

A written accusation of a crime presented upon oath by a grand jury.

The word is said to be derived from the old French word *inditer*, which signifies *to indicate, to show, or point out*. Its object is to indicate the offence charged against the accused. Rey, *des Inst. l'Angl.* tome 2, p. 347.

A presentment and indictment differ; 2 Inst. 739. A presentment is properly that which the grand jurors find and present to the court from their own knowledge or observation. Every indictment which is found by the grand jurors is presented by them to the court; and therefore every indictment is a presentment, but not every presentment is an indictment; Com. v. Keefe, 9 Gray (Mass.) 291; Story, Const. § 1784. An indictment is required under United States laws for capital or otherwise infamous crimes, but an information is authorized in many states; Beavers v. Henkel, 194 U. S. 73, 24 Sup. Ct. 605, 48 L. Ed. 882, where it is said that an indictment is *prima facie* evidence of probable cause. See the requirements of an indictment in Pettibone v. U. S., 148 U. S. 204, 13 Sup. Ct. 542, 37 L. Ed. 419.

The essential requisites of a valid indictment are,—*first*, that the indictment be presented to some court having jurisdiction of the offence stated therein; and the indictment must allege specifically that the crime was committed within its jurisdiction; McCoy v. State, 22 Neb. 418, 35 N. W. 202; Orr v. State, 25 Tex. App. 453, 8 S. W. 644; Smith v. State, 25 Tex. App. 454, 8 S. W. 645; State v. Hobbs, 37 W. Va. 812, 17 S. E. 380; *second*, that it appear to have been found by the grand jury of the proper county or district; *third*, that the indictment be found a true bill, and signed by the foreman of the grand jury; *fourth*, that it be framed with sufficient certainty; for this purpose the charge must contain a certain description of the crime or misdemeanor of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation; 2 Hale, Pl. Cr. 167; Stewart v. Com., 4 S. & R. (Pa.) 194; 4 Bla. Com. 301; Brown v. State, 26 Tex. App. 540, 10 S. W. 112; it should set out the material facts charged against the accused; State v. O'Flaherty, 7 Nev. 153; Pettibone v. U. S., 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419; the ultimate facts and not the evidence; Brown v. U. S., 143 Fed. 60, 74 C. C. A. 214; but need not specify the statute on which founded; Crabb v. State, 88 Ga. 584, 15 S. E. 455. An indictment may charge a statutory offence in the language of the statute without greater particularity when, by that means, all that is essential to constitute the offence is stated fully and directly, without uncertainty or ambiguity; State v. Light, 17 Or. 358, 21 Pac. 132; State v. Howe, 100 N. C. 449, 5 S. E. 671; State v. Holmes, 40 La.

Ann. 170, 3 South. 564; *fifth*, the indictment must be in the English language. But if any document in a foreign language, as a libel, be necessarily introduced, it should be set out in the original tongue, and then translated, showing its application; 6 Term 162.

Each count is, as it were, a separate indictment; Selvester v. U. S., 170 U. S. 262, 18 Sup. Ct. 580, 42 L. Ed. 1029. Intent must be averred if a part of the offence; U. S. v. Clark, 125 Fed. 92.

The formal requisites are:

First, the *venue*, which at common law should always be laid in the county where the offence has been committed, although the charge be in its nature transitory, as a battery; Hawk. Pl. Cr. b. 2, c. 25, s. 35. See People v. Scott, 74 Cal. 94, 15 Pac. 384. The venue is stated in the margin thus: "City and county of ———, to wit."

Second, the *presentment*, which must be in the present tense, and is usually expressed by the following formula: "The grand inquest of the commonwealth of ———, inquiring for the city and county aforesaid, upon their oaths and affirmations present." See, as to the venue, Graham v. State, 1 Ark. 171; Hite v. State, 9 Yerg. (Tenn.) 357; Turns v. Com., 6 Metc. (Mass.) 225; People v. Wong Wang, 92 Cal. 277, 28 Pac. 270.

Third, the *name and addition of the defendant;* but in case an error has been made in this respect, it is cured by the plea of the defendant; Bac. Abr. *Misnomer* (B), *Indictment* (G 2); 2 Hale, Pl. Cr. 175; 1 Chitty, Pr. 202; Russ. & R. 489. Where the defendant's name is stated differently in different parts of the indictment, it is fatally defective; Kinney v. State, 21 Tex. App. 348, 17 S. W. 423; or where it fails to state his given name, or aver that it is not known, a plea of misnomer in abatement should be sustained; Turner v. People, 40 Ill. App. 17; Pancho v. State, 25 Tex. App. 402, 8 S. W. 476; or where it gives a wrong name; Lewis v. State, 90 Ga. 95, 15 S. E. 697. See IDEM SONANS.

Fourth, the *names of third persons*, when they must be necessarily mentioned in the indictment, should be stated with certainty to a common intent, so as sufficiently to inform the defendant who are his accusers. When, however, the names of third persons cannot be ascertained, it is sufficient, in some cases, to state "a certain person or persons to the jurors aforesaid unknown." 2 East, Pl. Cr. 651, 781; 2 Hale, Pl. Cr. 181; 8 C. & P. 773.

Fifth, the *time* when the offence was committed should, in general, be stated to be on a specific year and day. In some offences, as in perjury, the day must be precisely stated; U. S. v. Bowman, 2 Wash. C. C. 328, Fed. Cas. No. 14,631; but although it is necessary that a day certain should be laid in the indictment, yet, in general, the prosecutor may give evidence of an offence committed on any other day previous to the finding of the indictment; Jacobs v. Com., 5 S. & R. (Pa.) 316. See 1 Chitty, Cr. Law 217, 224; Com. v. Alfred, 4 Dana (Ky.) 496; Vowells v. Com., 84 Ky. 52; Com. v. Le Clair, 147 Mass. 539, 18 N. E. 428; Crass v. State, 30 Tex. App. 480, 17 S. W. 1096; People v. Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377. It is not material, except where time is of the essence of the offence, to charge in an indictment the true day on which an offence was committed, or to prove the day as charged; State v. Swaim, 97 N. C. 462, 2 S. E. 68. In the absence of a statute abrogating the common-law rule, there is no doubt that an indictment charging the commission of an offence at an impossible date, is fatally defective; as, for instance, charging the commission of the crime on a certain day in the year, 18903, notwithstanding the fact that there was a statutory provision that no indictment should be deemed invalid for stating imperfectly the time when the offence was committed; Terrell v. State, 165 Ind. 443, 75 N. E. 884, 2 L. R. A. (N. S.) 251, 112 Am. St. Rep. 244, 6 Ann. Cas. 851. As to averments of time and place in an indictment for homicide, see note 3 L. R. A. (N. S.) 1019.

Sixth, the *offence should be properly described.* This is done by stating the substantial circumstances necessary to show the nature of the crime, and next, the formal allegations and terms of art required by law. Steph. Cr. Proc. 156. An omission of matter of substance in an indictment is not aided or cured by verdict; U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516. An indictment charging a crime "on or about" a certain date is not defective, these words being surplusage, the real date being that specifically charged; State v. McCarthy, 44 La. Ann. 323, 10 South. 673.

As to the substantial circumstances. The whole of the facts of the case necessary to make it appear judicially to the court that the indictors have gone upon sufficient premises should be set forth; but there should be no unnecessary matter, nor anything which on its face makes the indictment repugnant, inconsistent, or absurd. And if there is no necessary ambiguity, the court is not bound, it has been observed, to create one by reading the indictment in the only way which will make it unintelligible. It is a clear principle that the language of an indictment must be construed by the rules of pleading, and not by the common interpretation of ordinary language; for nothing indeed differs more widely in construction than the same matter when viewed by the rules of pleading and when construed by the language of ordinary life; 16 Q. B. 846; 2 Hale, Pl. Cr. 183; Bac. Abr. *Indictment* (G 1); Com. Dig. *Indictment* (G 3). Averments of

matters not material or necessary ingredients in the offence charged may be rejected as surplusage; State v. Kern, 51 N. J. L. 259, 17 Atl. 114. An indictment is not insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. All indictments ought to charge a man with a particular offence, and not with being an offender in general: to this rule there are some exceptions, as indictments against a common barrator, a common scold, and a keeper of a common bawdy-house; such persons may be indicted by these general words; 1 Chitty, Cr. Law 230, and the authorities there cited. The offence must not be stated in the disjunctive, so as to leave it uncertain on what it is intended to rely as an accusation: as, that the defendant erected *or* caused to be erected a nuisance; Com. v. Grey, 2 Gray (Mass.) 501, 61 Am. Dec. 476; 6 D. & R. 143; 2 Rolle, Abr. 31.

There are certain terms of art used, so appropriated by the law to express the precise idea which it entertains of the offence, that no other terms, however synonymous they may seem, are capable of filling the same office: such, for example, as traitorously *(q. v.)*, in treason; feloniously *(q. v.)*, in felony; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; State v. Bryan, 112 N. C. 848, 16 S. E. 909; State v. Hang Tong, 115 Mo. 389, 22 S. W. 381; burglariously *(q. v.)*, in burglary; maim *(q. v.)*, in mayhem, etc.

Seventh, the conclusion of the indictment should conform to the provision of the constitution of the state on the subject, where there is such provision; as in Pennsylvania; Const. art. 5, s. 11, which provides that all "prosecutions shall be carried on in the name and by the authority of the commonwealth of Pennsylvania, and conclude *against the peace and dignity of the same*"; see State v. McClung, 35 W. Va. 280, 13 S. E. 654; it is not necessary that each count should so conclude; Stebbins v. State, 31 Tex. Cr. R. 294, 20 S. W. 552. As to the necessity and propriety of having several counts in an indictment, see 1 Chitty, Cr. Law 248; Steph. Cr. Proc. 153; COUNT; as to joinder of several offences in the same indictment, see 1 Chitty, Cr. Law 253; Archb. Cr. Pl. 60; in one count, see 9 L. R. A. 182, note. A count in an indictment may refer to allegations in other counts to avoid repetition; People v. Graves, 5 Park. Cr. R. (N. Y.) 134; People v. Danihy, 63 Hun 579, 18 N. Y. Supp. 467; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. Several defendants may, in some cases, be joined in the same indictment; Archb. Cr. Pl. 59; as where one is charged with assault with intent to kill, and another as accessory before the fact; State v. Lang, 65 N. H. 284, 23 Atl. 432; Com. v. Devine, 155 Mass. 224, 29 N. E. 515.

At common law an indictment cannot be amended by the court. It was said by Lord Mansfield in Rex v. Wilkes: "Indictments are found upon the oaths of a jury, and ought only to be amended by themselves;" 4 Burr. 2527. The rule has been continuously adhered to; Hawk. P. C. b. 2, c. 25, § 97; Stark. Cr. Pl. 287; Whart. Cr. Pl. & Pr. § 90; Com. v. Drew, 3 Cush. (Mass.) 279; State v. Sexton, 10 N. C. 184, 14 Am. Dec. 584. "It is a well-settled rule of law that the statute respecting amendments does not extend to indictment;" Shaw, C. J., in Com. v. Child, 13 Pick. (Mass.) 200; and "an amendment cannot be allowed even with the consent of the prisoner"; Com. v. Mahar, 16 Pick. (Mass.) 120; People v. Campbell, 4 Park. Cr. R. (N. Y.) 387. The caption, however, may be amended, being, as it is said, no part of the indictment itself; State v. Williams, 2 McCord (S. C.) 301; State v. Society, 42 N. J. L. 504; Allen v. State, 5 Wis. 337.

In England the rule forbidding an amendment of an indictment has been changed by stat. 14 and 15 Vict. c. 100. In this country the subject does not rest on the common law, but there is also to be considered the constitutional guaranty to an accused of a trial, "on a presentment or indictment by a grand jury." It was settled by the United States supreme court that in the federal courts an indictment cannot be amended by the court, both by reason of the common-law rule and the constitutional provision; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849. The question whether the rule could be changed by statute was not actually involved, but it would seem to be settled in the negative by the reasoning of the opinion in that case. The question had been considered in some state courts, and it has been held that without amendment of the state constitution, the legislature may authorize amendment of indictments by the court, not changing the offence; Miller v. State, 53 Miss. 403; in other cases it was held that the legislature might dispense with or regulate matter of form; Brown v. People, 29 Mich. 232; State v. O'Flaherty, 7 Nev. 157; but they could not "dispense with such allegations as are essential to reasonable particularity and certainty in the description of the offence; McLaughin v. State, 45 Ind. 338.

It is said by Bishop that "if a statute should authorize a material amendment to be made in an indictment for an offence which, by the constitution of the state was punishable only by indictment, the statutory direction would be a nullity." Bish. Cr. Proc., 2d ed. § 97; 26 Am. L. Reg. N. S. 446.

An indictment may be quashed at common law for such deficiency in body or caption as will make a judgment given on it against the defendant erroneous, but it is

a matter of discretion; Bac. Abr. *Indictment*, K; 1 Chitty, Cr. Law 298; Archb. Cr. Pl. 66.

After verdict in a criminal case, it will be presumed that those facts without proof of which the verdict could not have been found were proved, though they are not distinctly alleged in the indictment; provided it contains terms sufficiently general to comprehend them in reasonable intendment; 2 C. & K. 868; 1 Tayl. Ev. § 73; Steph. Cr. Proc. 171. After verdict, defective averments in the second indictment may be cured by reference to sufficient averments in the first count; 2 Den. Cr. Cas. 340. A single good count in an indictment is sufficient to sustain a verdict of guilty and judgment thereon; Mead v. State, 53 N. J. L. 601, 23 Atl. 264; Hornsby v. State, 94 Ala. 55, 10 South. 522.

It is not error to join distinct offences in one indictment, in separate counts, against the same person; Ingraham v. U. S., 155 U. S. 434, 15 Sup. Ct. 148, 39 L. Ed. 213.

In an indictment for a statutory offence, while it is doubtless true that it is not always sufficient to use simply the language of the statute in describing the offence, yet, if such language is, according to the natural import of the words, fully descriptive of the offence, then it ordinarily is sufficient; Potter v. U. S., 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214. The general rule is that the offence can be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense; Armour Packing Co. v. U. S., 209 U. S. 84, 28 Sup. Ct. 428, 52 L. Ed. 681.

The fact that a grand jury has ignored an indictment is not a bar to the subsequent finding of a true bill for the same offence; U. S. v. Martin, 50 Fed. 918. The finding of an indictment must appear from the order book of the court in which defendant was indicted; if it does not so appear, a verdict against him will be set aside; Simmons v. Com., 89 Va. 156, 15 S. E. 386; Goodson v. State, 29 Fla. 511, 10 South. 738, 30 Am. St. Rep. 135. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" used his initials instead of his full Christian name, is not ground for quashing the indictment; Zimmerman v. State, 4 Ind. App. 583, 31 N. E. 550; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329. One cannot be convicted of a higher degree of offence than that charged in the indictment; McCollough v. State, 132 Ind. 427, 31 N. E. 1116; but there may be a conviction of a lesser offence; Brown v. State, 31 Fla. 207, 12 South. 640.

U. S. R. S. § 1235, provides that no indictment shall be deemed insufficient, nor the trial or judgment thereon be affected, by reason of any defect in matter of form only, which shall not tend to the prejudice of the defendant.

See AD TUNC ET IBIDEM; INFAMOUS CRIME; INFORMATION; GRAND JURY; AGAINST THE WILL; RECITAL.

INDICTOR. He who causes another to be indicted. The latter is sometimes called the indictee.

INDIFFERENT. To have no bias or partiality. Mitchell v. Kirtland, 7 Conn. 229. A juror, an arbitrator, and a witness ought to be indifferent; and when they are not so they may be challenged. See Fitch v. Smith, 9 Conn. 42.

INDIGENA, INDIGENÆ. A native; born or bred in the same country or town. Ainsw. A subject born, or naturalized by act of parliament. Opposed to *alienigena*. Rymer, to. 15, p. 37; Co. Litt. 8 *a*; U. S. v. Wong Kim Ark, 169 U. S. 662, 18 Sup. Ct. 456, 42 L. Ed. 890.

INDIGENT. One who is destitute of property or means of comfortable sustenance; one who is needy or poor. Juneau County v. Wood County, 109 Wis. 330, 85 N. W. 387.

The term was designated for the benefit of the laboring population which is only self-supporting while employed, and is applied to those who were afforded a temporary support from the county for a special time; People v. Supervisors, 121 N. Y. 345, 24 N. E. 830. See DEPENDENT.

INDIGENT INSANE. Those who have no income over and above what is sufficient to support those who may be legally dependent on them. In re Hybart, 119 N. C. 359, 25 S. E. 963.

INDIRECT EVIDENCE. Evidence which does not prove the fact in question, but one from which it may be presumed.

Inferential evidence as to the truth of a disputed fact, not by testimony of any witness to the fact, but by collateral circumstances ascertained by competent means. 1 Stark. Ev. 15; Wills, Circ. Ev. 24; Best, Ev. 21, § 27, note; 1 Greenl. Ev. § 13.

INDITEE (L. Fr.). **In Old English Law.** A person indicted. 9 Coke.

INDIVIDUUM (Lat.). **In the Civil Law.** That cannot be divided. Calv. Lex.

INDIVISIBLE. That cannot be separated.

The effect of the breach of a contract depends in a large degree upon whether it is to be regarded as indivisible or divisible; *i. e.* whether it forms a whole, the performance of every part of which is a condition precedent to bind the other party or is composed of several independent parts, the performance of any one of which will bind the other party *pro tanto*. This question is one of construction, and depends on the circumstances of each case; and the only test is whether the whole quantity of the things

concerned, or the sum of the acts to be done, is of the essence of the contract. It depends, therefore, in the last resort, simply upon the intention of the parties; Broumel v. Rayner, 68 Md. 47, 11 Atl. 833; Wooten v. Walters, 110 N. C. 251, 14 S. E. 734, 736. See 9 Q. B. D. 648; Gill v. Lumber Co., 151 Pa. 534, 25 Atl. 120; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366; Barrie v. Earle, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; King Philip Mills v. Slater, 12 R. I. 82, 34 Am. Rep. 603; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304.

When a consideration is entire and indivisible, and it is against law, the contract is void *in toto;* Woodruff v. Hinman, 11 Vt. 592, 34 Am. Dec. 712; Frazier v. Thompson, 2 W. & S. (Pa.) 235. When the consideration is divisible, and part of it is illegal, the contract is void only *pro tanto.* In such case, it has been said, the connection between the different contracts is physical, not legal. See, generally, Harr. Contr. 132; Gelpcke v. Dubuque, 1 Wall. (U. S.) 220, 17 L. Ed. 530.

To ascertain whether a contract is divisible or indivisible is to ascertain whether it may or may not be *enforced in part,* or *paid in part,* without the consent of the other party. See ENTIRETY; INDEPENDENT PROMISES.

INDIVISUM (Lat.). That which two or more persons hold in common without partition; undivided.

INDORSE. To write on the back. Bills of exchange and promissory notes are indorsed by a party's writing his name on the back. See INDORSEMENT. Writs in Massachusetts are indorsed in some cases by a person's writing his name on the back, in which case he becomes liable to pay the costs of the suit.

INDORSEE. The person or party to whom a bill of exchange is indorsed, or transferred by indorsement. See INDORSEMENT.

INDORSEE IN DUE COURSE. An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer.

INDORSEMENT. That which is written on the back of an instrument in writing and which has relation to it.

Writing one's name on the back of a promissory note or other negotiable instrument. Partridge v. Davis, 20 Vt. 499.

Written on the back of an original instrument, or on an "allonge" attached thereto, if there be not sufficient space on the original paper. Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17; Crutchfield v. Easton, 13 Ala. 337; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, 79 Am. St. Rep. 515. It need not appear that it was physically impossible to indorse on the instrument; it may be on another paper when necessity or convenience requires it; Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720.

An indorsement is generally made primarily for the purpose of transferring the rights of the holder of the instrument to some other person. It has, however, various results, such as rendering the indorser liable in certain events; and hence an indorsement is sometimes made merely for the purpose of additional security. This is called an accommodation indorsement when done without consideration.

It was said by Chief Justice Gibson that "the contract of indorsement is not an independent one, but a parasite which, like the chameleon, takes the hue of the thing with which it is connected. Attached to commercial paper, it becomes a commercial contract operating as a contingent guaranty of payment and a transfer of the title where the paper is negotiable; attached to any other *chose* in action, it becomes an equitable assignment of the beneficial interest without recourse to the assignor"; Patterson v. Poindexter, 6 W. & S. (Pa.) 227, 234, 40 Am. Dec. 554, quoted with approval in National Union Bank v. Shearer, 225 Pa. 470, 480, 74 Atl. 351, 17 Ann. Cas. 664.

A blank indorsement is one in which the name of the indorser only is written upon the instrument. It is commonly made by writing the name of the indorser on the back; Folwell v. Beaver, 13 S. & R. (Pa.) 315; but a writing across the face may answer the same purpose; Folger v. Chase, 18 Pick. (Mass.) 63; 16 East 12. Its effect is to make the instrument thereafter payable to bearer; Byles, Bills *151; Neg. Instr. Act § 131. If an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery. *id.* § 129.

The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. *id.* § 130.

A conditional indorsement is one made subject to some condition without the performance of which the instrument will not be or remain valid. 4 Taunt. 30. A bill may be indorsed conditionally, so to impose on the drawee who afterwards accepts a liability to pay the bill to the indorsee or his transferees in a particluar event only; Byles, Bills *150. An indorsement on a note, making it payable on a contingency does not affect its negotiability; Tappan v. Ely, 15 Wend. (N. Y.) 362.

But the person required to pay the instrument may disregard the condition and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. Neg. Instr. Act § 136.

An indorsement in full, or a *special indorsement*, is one in which mention is made of the name of the indorsee. Chitty, Bills 170. The omission of the words "or order" is not material, for the indorsee takes it with all its incidents, including its negotiable quality; Byles, Bills *151. The omission of the words "or order" in a special indorsement will not restrain the negotiability of a bill; 2 Burr. 1216; 1 Stra. 557.

A qualified indorsement is one which restrains or limits, or qualifies, or enlarges the liability of the indorser, in any manner different from what the law generally imports as his true liability, deducible from the nature of the instrument. Chitty, Bills 261; 7 Taunt. 160. The words commonly used are *sans recours*, without recourse; Upham v. Prince, 12 Mass. 14. An indorsement without recourse, or at the indorsee's "own risk," will not expose the indorser to any liability; Lawrence v. Dobyns, 30 Mo. 196; Cady v. Shepard, 12 Wis. 639; Fitchburg Bank v. Greenwood, 2 Allen (Mass.) 434; Craft v. Fleming, 46 Pa. 140. But such an indorsement warrants the genuineness of all prior signatures; Dumont v. Williamson, 18 Ohio St. 516, 98 Am. Dec. 186; that the indorser has title to the note; Mays v. Callison, 6 Leigh (Va.) 230; that the note is valid between the original parties, and not illegal or without consideration; Blethen v. Lovering, 58 Me. 437; Challiss v. McCrum, 22 Kan. 157, 31 Am. Rep. 181; and that the parties were competent to contract; *id.* The assignment without recourse leaves the assignor liable as vendor; Bevan v. Fitzsimmons, 40 Ill. App. 108.

It does not render the note non-negotiable; Page v. Ford (Or.) 131 Pac. 1013; Neg. Instr. Act § 135.

A restrictive indorsement is one which restrains the negotiability of the instrument to a particular person or for a particular purpose; Hermann v. Bank, 1 Rob. (La.) 222. Such are "Pay A. B. or order, for my use," or "for my account," or "only." Neg. Instr. Act §§ 132, 133, 134.

By the law merchant, bills and notes payable to order can be transferred only by indorsement; Russell v. Swan, 16 Mass. 314; Humphreyville v. Culver, 73 Ill. 485; Habersham v. Lehman, 63 Ga. 380; Central Trust Co. v. Bank, 101 U. S. 68, 25 L. Ed. 876; Osgood's Adm'rs v. Artt, 17 Fed. 575; Sto. Prom. N. § 120; Hatch v. Barrett, 34 Kan. 223, 8 Pac. 129. Indorsement is not complete before delivery of the note; Dann v. Norris, 24 Conn. 333; Spencer v. Carstarphen, 15 Colo. 445, 24 Pac. 882.

Delivery means transfer of possession, either actual or constructive, from one person to another. Neg. Instr. Act § 124. Hence the word *indorsee* in a declaration on a bill imports a delivery; Wood's Byles, Bills § 153.

An instrument promising to pay a sum certain with interest, as per annexed coupons, reciting that note and coupons were secured by mortgage, was negotiable; but an indorsement, "for value received, we hereby assign and transfer the within bond, together with all our interest in, and rights under the same, without recourse," was not a commercial indorsement, but a mere assignment passing an equitable interest subject to the defences of the makers, and the negotiability of the instrument was thereby destroyed, and the subsequent indorsement of the transferee did not make him liable for payment in the absence of any independent contract; De Hass v. Roberts, 59 Fed. 853.

When, by such an assignment, the legal title is left in the payee, the equitable interest merely passing to the transferee, it necessarily follows that the negotiable character of the instrument is destroyed; Aniba v. Yeomans, 39 Mich. 171. And a subsequent indorsement by the transferee does not, in the absence of a special contract, render him liable; Dan. Neg. Inst. 666; Gray v. Donahoe, 4 Watts (Pa.) 400; Citizens' Nat. Bank v. Piollet, 126 Pa. 194, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860. The indorsement of a non-negotiable note without proof of a special contract to become responsible means nothing and creates no liability; Fear v. Dunlap, 1 G. Greene (Ia.) 334; Dan. Neg. Inst. 709. See also Graham v. Wilson, 6 Kan. 489; Story v. Lamb, 52 Mich. 525, 18 N. W. 248; First Nat. Bank of Trenton v. Gay, 71 Mo. 627. The person making such indorsement guaranties the note to be genuine, and that it is what it purports to be; nothing more. He does not guaranty its payment, although he might do this by independent contract expressed in the contract or otherwise; Fear v. Dunlap, 1 G. Greene (Ia.) 334.

The effect of the indorsement of a negotiable promissory note or bill of exchange is to transfer the property in the note to the person mentioned in the indorsement when it is made in full; Brown v. McWhite, 30 S. C. 356, 9 S. E. 277; or, when made in blank, to any person to whose possession it may lawfully come thereafter even by mere delivery, so that the possessor may sue upon it in his own name at law, as well as if he had been named as the payee; Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639; Seabury v. Hungerford, 2 Hill (N. Y.) 80; Everett v. Tidball, 34 Neb. 803, 52 N. W. 816; Howland v. Bates, 1 Misc. 91, 20 N. Y. Supp. 373; Jones v. Shapera, 57 Fed. 457, 6 C. C. A. 423.

Any person who has possession of the instrument is presumed to be the legal *bona fide* owner for value, until the contrary is shown; Palmer v. Marshall, 60 Ill. 289.

The payee of a note can restrain its negotiability, but a subsequent indorser can

revive its negotiable quality; Holmes v. Hooper, 1 Bay (S. C.) 160.

The parties are presumed to stand to each other in the relations in which their names appear. Where the holder has knowledge, the facts may be shown as between him and the other parties; Whitehouse v. Hanson, 42 N. H. 9.

An indorsement on the last day of grace is good; Crosby v. Grant, 36 N. H. 273; *contra*, Pine v. Smith, 11 Gray (Mass.) 38. An indorsement is presumed to be of the same date as the instrument; Snyder v. Oatman, 16 Ind. 265; Stewart v. Smith, 28 Ill. 397; or at least to have been made before maturity; Blum v. Loggins, 53 Tex. 136; Collins v. Gilbert, 94 U. S. 753, 24 L. Ed. 170.

An indorsement may be made before the bill or note itself, and so render the indorser liable to all subsequent parties; Byles, Bills *167; Durham v. Clogg, 30 Md. 284. A blank indorsement upon a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit; if a promissory note is afterwards written on the paper, the indorser cannot object; Dougl. 496; Violett v. Patton, 5 Cra. (U. S.) 142, 3 L. Ed. 61; but if the holder had notice of any fraud he cannot fill in the blanks; 3 Q. B. D. 643.

When the indorsement is made before the note becomes due, the indorsee and all subsequent holders are entitled to recover the face of the note against the maker, without any right on his part to offset claims which he may have against the payee; or, as it is frequently stated, the indorsee takes it free of all equities between the antecedent parties of which he had no notice; 8 M. & W. 504; Savings Bank of New Haven v. Bates, 8 Conn. 505; Thompson v. Gibson, 1 Mart. N. S. (La.) 150; Swift v. Tyson, 16 Pet. (U. S.) 1, 10 L. Ed. 865. The indorser of a promissory note before maturity without recourse is responsible thereon if the note is fraudulent, fictitious, or forged; Palmer v. Courtney, 32 Neb. 773, 49 N. W. 754.

An indorsement admits the signatures and capacity of every prior party; Byles, Bills *155.

The blank indorsement of a non-negotiable bill has been held to operate as the drawing of a bill payable to bearer; 33 L. J. Q. B. 209. The indorsement of a non-negotiable note by a payee operates to assign the payee's rights to the indorser, who takes the former's place; Gorman v. Ketchum, 33 Wis. 427.

After a bill is due, the indorsee takes it on the credit of the indorser and subject to all equities; 4 M. & G. 101; as was said by Lord Ellenborough, "it comes disgraced to the indorsee;" 1 Campb. 19. But the maker can only set up such defences as are connected with the note, not those arising out of an independent transaction; Arnot v. Woodburn, 35 Mo. 99; 3 H. & N. 891; such as set-off as against the holder; Way v. Lamb, 15 Ia. 79; 10 Exch. 572. It is otherwise as to a check, which may be transferred by indorsement after it is payable; Byles, Bills *171; but taking a check six days old is a circumstance from which the jury may infer fraud; 9 B. & C. 388. A note payable on demand is not to be taken as overdue without some evidence of demand of payment and refusal; 4 B. & C. 327; although it is several years old and no interest has been paid on it; Byles, Bills *171; a promissory note payable on demand is intended to be a continuing security; 9 M. & W. 15; but it has been held to be overdue and dishonored after a reasonable time; Carll v. Brown, 2 Mich. 401; so after three months; Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461; (but see Herrick v. Woolverton, 42 Barb. [N. Y.] 50); after ten months; Morey v. Wakefield, 41 Vt. 24, 98 Am. Dec. 562.

A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such, but when it has been paid in part, it may be indorsed as to the residue; Frank v. Kaigler, 36 Tex. 305.

Indorsers, also, unless the indorsement be qualified, become liable to pay the amount demanded by the instrument upon the failure of the principal, the *maker* of a *note*, or the *acceptor* of a *bill*, upon due notification of such failure, to any subsequent indorsee who can legally claim to hold through the particular indorser; Story, Bills § 224.

The indorsement of a draft to a fictitious indorsee is usually treated as making it payable to bearer; see FICTITIOUS PAYEE; Phillips v. Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596; Neg. Instr. Act § 9; but not unless the maker knows the payee to be fictitious and actually intends the paper to be made payable to a fictitious person; Chism v. Bank, 96 Tenn. 641, 36 S. W. 387, 32 L. R. A. 778, 54 Am. St. Rep. 863; Shipman v. Bank, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; Armstrong v. Bank, 46 Ohio St. 512, 22 N. E. 866, 6 L. R. A. 625, 15 Am. St. Rep. 655; *contra*, Kohn v. Watkins, 26 Kan. 691, 40 Am. Rep. 336.

In most of the cases a person not a party to the instrument who writes his name on the back of it before delivery is in many states considered an original promisor; Malbon v. Southard, 36 Me. 147; White v. Howland, 9 Mass. 314, 6 Am. Dec. 71; Baker v. Block, 30 Mo. 225; Carr's Ex'x v. Rowland, 14 Tex. 275; Sylvester v. Downer, 20 Vt. 355, 49 Am. Dec. 786; and in Pennsylvania it was held that such irregular indorser was not liable to the payee; Schafer v. Bank, 59 Pa. 144, 98 Am. Dec. 323. By Neg. Instr. Act § 156, it is provided that: Where a person, not otherwise a party to an instrument, places

thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties; if it is payable to the order of maker or drawer or to bearer, then he is liable to all parties subsequent to the maker or drawer; if he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

One who takes a note from its maker or payee is chargeable with knowledge that the indorsement of a third party thereon was for accommodation, and in a case of a corporation, such an act is *ultra vires;* Brill Co. v. Ry. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525.

A plaintiff, in suing the first indorsee may omit to state in his declaration all the indorsements but the first indorsement in blank, and aver that the first blank indorser indorsed directly to himself; in such case all the intervening indorsements must be struck out; Byles, Bills *155; Merz v. Kaiser, 20 La. Ann. 377.

An indorsement by an officer of a corporation, where the fact appears on the instrument, does not render him individually liable; State Nat. Bank v. Singer, 39 La. Ann. 813, 2 South. 599.

An indorsement by one of several executors will not transfer the property; 2 C. & K. 37; Smith v. Whiting, 9 Mass. 334; *contra*, in case of administrators; Sanders v. Blain's Adm'r; 6 J. J. Marsh. (Ky.) 446, 22 Am. Dec. 86; and see Wheeler v. Wheeler, 9 Cow. (N. Y.) 34. An executor cannot complete his testator's indorsement by delivering the instrument, which has already been signed by the testator; Wood's Byles, Bills 58; 1 Exch. 32.

The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out and all indorsers subsequent to him are thereby relieved from liability on the indorsement; Neg. Instr. Act § 147.

By the general law merchant, the indorser of a negotiable instrument is bound instantly, and may be sued after maturity, upon demand and notice of non-payment. But by the statutes of some of the states the maker must first be sued and his property subjected; Watson v. Hahn, 1 Colo. 385; Mason v. Burton, 54 Ill. 349; Booth v. Storrs, 54 Ill. 472; Harrison v. Pike, 48 Miss. 46.

The effect of acceptance upon a bill is to remove the acceptor to the head of the list as principal, while the drawer takes his place as first indorser.

A course of decisions with respect to restrictive indorsement has given rise to much discussion, resulting in so general a change in clearing-house rules as to amount to a revolution in banking methods.

The litigation arising from the relations between a bank, its depositor, and the indorsee of a check or draft commences with the early English case of Price v. Neal, followed in England and this country, in which it was held by Lord Mansfield that if the drawee pays a bill which he afterwards finds to be forged, he has no recourse against an innocent indorser; 3 Burr. 1354; nor has a bank which paid a forged check; Taunt. 76; Levy v. Bank, 1 Binn. (Pa.) 27. See also Bank of U. S. v. Bank, 10 Wheat. (U. S.) 333, 6 L. Ed. 334; U. S. Nat. Bank v. Bank, 59 Hun 495, 13 N. Y. Supp. 411. The precise principle on which the doctrine of Price v. Neal was founded, has been a subject of varying opinion and the different theories concerning it, as also a voluminous citation of the cases, will be found in an article by Professor J. B. Ames in 4 Harv. L. Rev. 297. An extended review and discussion of the cases will also be found in Keener, Quasi-Cont. 154. While it is true that a bank pays a forged check at its own peril, if the depositor be free from negligence; Shipman v. Bank, 126 N. Y. 319, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821; it was held that no title passed through a forged indorsement, and hence payment by a bank made on the faith of it may be recovered from an indorsee even if *bona fide* for value; Canal Bank v. Bank, 1 Hill (N. Y.) 290.

A later decision had a very far-reaching effect with respect to the effect of restrictive indorsements. What has been characterized as "the doctrine, newly announced by the courts," has been thus stated: "Where a draft is indorsed to a bank *for collection* or *for account* of the indorser, the form of indorsement carries notice to the bank of payment that the bank to whom the paper is thus indorsed is a mere agent of the indorser to collect, having no proprietary interest in the paper; hence if the paper turns out to be forged (*i. e.* raised in amount, or payee's indorsement forged), the agent bank's own indorsement is not a guaranty of genuineness, and it is under no liability to repay the amount collected, after it has paid the same over to its principal." 13 Banking L. J. 75.

The first case was National Park Bank v. Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612, and this, it was said at a convention of bankers, "proved a revelation to many of us, and pointed out the great danger which lurked in checks and other paper having restrictive indorsements," and the second case, National City Bank of Brooklyn v. Westcott, 118 N. Y. 468, 23 N. E. 900, 16 Am. St. Rep. 771, was said "to have opened the eyes of banks, heretofore unacquainted with the decision (of the Seaboard Bank Case), to the real status of liability in case of restrictive indorsement;" address of S. G. Nelson, 13 Bkg. L. J. 445. The same doctrine was followed in other cases, so that it is fully established in New York and some

other states and in the federal circuit court; Wells, Fargo & Co. v. U. S., 45 Fed. 337; U. S. v. Bank, 70 Fed. 232; Mechanics' Bank v. Packing Co., 70 Mo. 643; Germania Bank of Minneapolis v. Boutell, 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519; Northwestern Nat. Bank v. Bank, 107 Mo. 402, 17 S. W. 982, 15 L. R. A. 102; and the basic principle of these decisions was already approved by the United States supreme court, which held that "the words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds." Sweeney v. Easter, 1 Wall. (U. S.) 166, 173, 17 L. Ed. 681; which was followed in a case of indorsement "for collection"; Commercial Nat. Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; and as to an indorsement "for account," it was said, "It does not purport to transfer the title of the paper, or the ownership of the money when received;" White v. Bank, 102 U. S. 658, 26 L. Ed. 250. In one state the contrary view has been taken and the bank of deposit of a draft with a forged indorsement, although a mere "indorsee for collection," was held liable to refund to its correspondent bank which had paid the money; Rhodes v. Jenkins, 18 Colo. 49, 31 Pac. 491, 36 Am. St. Rep. 263. See Onondaga County Sav. Bank v. U. S., 64 Fed. 703, 12 C. C. A. 407.

The result of the decisions cited was the general adoption of a rule by most of the clearing-house associations, substantially like that of New York, excluding, from the exchanges, paper having a qualified or restricted indorsement, such as "for collection" or "for account of," unless the same was guaranteed. In Chicago such paper was absolutely excluded. The result has been to make the question, what is a restrictive indorsement, one of vital importance and the judicial opinion is not uniform. The following have been held to be restrictive: "for collection;" Sweeny v. Easter, 1 Wall. (U. S.) 166, 173, 17 L. Ed. 681; People's Bank of Baltimore v. Keech, 26 Md. 521, 90 Am. Dec. 118; "for account;" White v. Bank, 102 U. S. 658, 26 L. Ed. 250; "for my use;" Wilson v. Holmes, 5 Mass. 543, 4 Am. Dec. 75; "credit my account;" Lee v. Bank, 1 Bond. 387, Fed. Cas. No. 8,186; "Pay to P. or order only;" Power v. Finnie, 4 Call (Va.) 411; "for deposit;" Beal v. Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291 (*contra*, National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50); "for deposit to the credit of;" Freeman v. Bank, 87 Ga. 45, 13 S. E. 160; *contra* (by a divided court), Ditch v. Bank, 79 Md. 192, 29 Atl. 72, 138, 23 L. R. A. 164, 47 Am. St. Rep. 375; but while the presumption is that it is restrictive, the bank may show by extrinsic evidence that it was not so, either by reason of a special agreement; Beal v. Somerville, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291; or because the proceeds were passed to the depositor's credit and subject to check before collection; Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108, 14 S. E. 891.

Where a bank to which a forged check was sent for collection credited the person sending it with the amount, without actually remitting the money, it could, on discovering the forgery, charge back the amount; Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 South. 440, 49 Am. St. Rep. 17. See articles critically reviewing the cases, in the latter of which the conclusion is reached that an indorsement *for deposit* is restrictive; 13 Banking L. J. 361, 429; and see also Norton, Bills & N. 123; Daniel, Neg. Instr. §§ 636, 637, 698.

The indorsement or assignment of an instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. Neg. Instr. Act § 138.

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquired, in addition, the right to have the indorsement of the transferor. Neg. Instr. Act § 123.

See GUARANTY; BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABILITY.

In Criminal Law. An entry made upon the back of a writ or warrant.

When a warrant for the arrest of a person charged with a crime has been issued by a justice of the peace of one county, which is to be executed in another county, it is necessary, in some states, that it should be indorsed by a justice of the county where it is to be executed: this indorsement is called backing.

INDORSER. The person who makes an indorsement.

By section 154, a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. Neg. Instr. Act § 154.

The indorser of a bill of exchange, or other negotiable paper, by his indorsement undertakes to be responsible to the holder for the amount of the bill or note, if the latter shall make a legal demand from the payer, and, in default of payment, give proper notice thereof to the indorser. But the indorser may make his indorsement conditional, which will operate as a transfer of

the bill if the condition be performed; or he may make it qualified, so that he shall not be responsible on non-payment by the payer; Chitty, Bills 179, 180.

To make an indorser liable on his indorsement to parties subsequent to his own indorsee, the instrument must be commercial paper; for the indorsement of a bond or single bill will not, *per se*, create a responsibility; Folwell v. Beaver, 13 S. & R. (Pa.) 311. See Story, Bills 202; Evans v. Gee, 11 Pet. (U. S.) 80, 9 L. Ed. 639.

When there are several indorsers, the first in point of time is generally, but not always, first responsible; there may be circumstances which will cast the responsibility, in the first place, as between them, on a subsequent indorsee; Chalmers v. McMurdo, 5 Munf. (Va.) 252, 7 Am. Dec. 684; Rhinehart v. Schall, 69 Md. 352, 16 Atl. 126; Sweet v. Woodin, 72 Mich. 393, 40 N. W. 471.

The fact that an indorsee, when he puts his name on a draft, did not think it would render him liable as an indorser, will not relieve him; First Nat. Bank v. Crabtree, 86 Ia. 731, 52 N. W. 559. Where the owner and holder of a promissory note after maturity sells and indorses the note, signing his name after that of the original payee, he is an indorser and not a joint maker; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106.

INDUCEMENT. In Contracts. The benefit which the promisor is to receive from a contract is the inducement for making it.

In Criminal Law. The motive. Confessions are sometimes made by criminals under the influence of promises or threats. When these promises or threats are made by persons in authority, the confessions cannot be received in evidence. See CONFESSION.

In Pleading. The statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Such matter as is not introductory to, or necessary to elucidate the substance or gist of, the declaration, plea, etc., nor collaterally applicable to it, is surplusage.

An inducement is, in general, more a matter of convenience than of necessity, since the same matter may be stated in the body of the declaration; but by its use confusion of statement is avoided; 1 Chitty, Pl. 259.

But in many cases it is necessary to lay a foundation for the action by a statement, by way of inducement, of the extraneous or collateral circumstances which give rise to the plaintiff's claim. For instance, in an action for a nuisance to property in the possession of the plaintiff, the circumstances of his being possessed of the property should be stated as inducement, or by way of introduction to the mention of the nuisance; 1 Chitty, Pl. 292; Steph. Pl. 257.

When a formal traverse is adopted, it should be introduced with an inducement, to show that the matter contained in the traverse is material; 1 Chitty, Pl. 38. See TRAVERSE; INNUENDO; COLLOQUIUM.

In an indictment there is a distinction between the allegation of facts constituting the offence, and those which must be averred by way of inducement. In the former case, the circumstances must be set out with particularity; in the latter, a more general allegation is allowed. An "inducement to an offence does not require so much certainty." Com. Dig. *Indictment* (G 5). In an indictment for an escape, "*debito modo commissus*" is enough, without showing by what authority; and even "*commissus*" is sufficient; 1 Ventr. 170. So, in an indictment for disobedience to an order of justices for payment of a church-rate, an averment, by way of inducement, that a rate was duly made as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient; 1 Den. Cr. Cas. 222.

INDUCIÆ (Lat.). **In Civil Law.** A truce; cessation from hostilities for a time agreed upon. Also, such agreement itself. Calv. Lex. So in international law; Grotius, *de Jure Bell.* lib. 3, c. 2, § 11; Huber, *Jur. Civit.* p. 743, § 22.

In Old Practice. A delay or indulgence allowed by law. Calvinus, Lex.; Du Cange; Bract. fol. 352 *b*; Fleta, lib. 4, c. 5, § 8. See Bell. Dict.; Burton, Law of Scotl. 561. So used in old maritime law; *e. g.* an *inducia* of twenty days after safe arrival of vessels was allowed in case of bottomry bond, to raise the principal and interest; Locceivus, *de Jure Marit.* lib. 2, c. 6, § 11.

INDUCIÆ LEGALES (Lat.). **In Scotch Law.** The days between the citation of the defendant and the day of appearance; the days between the teste day and day of return of the writ.

INDUCTIO. In the Civil Law. Obliteration, by drawing the pen or *stylus* over the writing. Dig. 28, 4; Calv. Lex.

INDUCTION. In Ecclesiastical Law. The giving a clerk, instituted to a benefice, the actual possession of its temporalities, in the nature of livery of seisin. Ayliffe, Parerg. 299.

INDULGENCE. Forbearance *(q. v.)*; delay in enforcing a legal right.

INDULTO. In Spanish Law. The condonation or remission of the punishment imposed on a criminal for his offence. L. 1, t. 32, pt. 7. This power is exclusively vested in the king.

The right of exercising this power has been often contested, chiefly as impolitic for

the reason set forth in the following Latin verses:

"Plus sæpe nocet patientia regis
Quam rigor: ille nocet paucis; hæc incitat omnes,
Dum se ferre suos sperant impune reatus."

INDUSTRIAL AND PROVIDENT SOCIETIES. Societies formed in England for carrying on any labor, trade, or handicraft, whether wholesale or retail, including the buying and selling of land, and also (but subject to certain restrictions) the business of banking (I. and P. Soc. Act, 1876, 6). Such a society (which must consist of seven persons at least) when registered under the act becomes a body corporate with limited liability, and with the word "limited" as the last word in its name (*id.* 7, 11), and is regulated by rules providing for the amount of the shares, the holding of meetings, the mode in which the profits are to be applied, etc.; *id.* 9.

INDUSTRIAM, PER (Lat.). A qualified property in animals *feræ naturæ* may be acquired *per industriam, i. e.* by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power that they cannot escape and use their natural liberty. 2 Steph. Com. 5.

INEBRIATE. See HABITUAL DRUNKARD.

INEBRIETY. See DIPSOMANIA; DRUNKENNESS.

INELIGIBILITY. The incapacity to be lawfully elected; disqualification to hold an office if elected or appointed to it. State v. Murray, 28 Wis. 99, 9 Am. Rep. 489.

This incapacity arises from various causes; and a person may be incapable of being elected to one office who may be elected to another: the incapacity may also be perpetual or temporary.

Among perpetual inabilities may be reckoned, the inability of a citizen born in a foreign country to be elected president of the United States.

Among the temporary inabilities may be mentioned, the holding of an office declared by law to be incompatible with the one sought; the non-payment of the taxes required by law; the want of certain property qualifications required by the constitution; the want of age, or being too old.

As to the effect on an election of the candidate having the highest number of votes being ineligible, see ELECTION. See also ELIGIBILITY.

INE, CODE OF. A code of the West Saxons dating from 688 to 695. Adopted by Alford, probably with alterations. Seebohm, Tribal Customs, 386.

INEVITABLE ACCIDENT. A term used in the civil law, nearly synonymous with *fortuitous event.* Neal v. Saunderson, 2 Smedes & M. (Miss.) 572, 41 Am. Dec. 609.

Any accident which cannot be foreseen and prevented. Though used as synonymous with *act of God (q. v.),* it would seem to have a wider meaning, the *act of God* being any cause which operates without aid or interference from man; 4 Dougl. 287, 290, per Lord Mansfield; McArthur v. Sears, 21 Wend. (N. Y.) 198; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. In Story on Bailments § 489, the two phrases are treated as synonymous, but in a later edition, the editor, Judge Bennett, notes the distinction just mentioned and considers the phrase inevitable accident one of wider significance. See Hays v. Kennedy, 41 Pa. 379, 80 Am. Dec. 627, where this and similar expressions are discussed and distinguished; Webb, Poll. Torts 160.

Inevitable accident is a relative term and must be construed not absolutely but reasonably with regard to the circumstances of each particular case, and where having reference to a marine collision, it may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and maritime skill; The Morning Light, 2 Wall. (U. S.) 560, 17 Wall. 862; 2 E. L. & E. 559. With reference to this subject Chief Justice Drake said that inevitable accident occurs only when the disaster happens from natural causes, without negligence or fault on either side; and when both parties have endeavored, by every means in their power, with due care and caution, and with a proper display of nautical skill, to prevent the occurrence of the accident; Sampson v. U. S., 12 Ct. Cl. 491; Union S. S. Co. v. Steamship Co., 24 How. (U. S.) 307, 16 L. Ed. 699.

Where a rat made a hole in a box where water was collected in an upper room, so that the water trickled out and flowed on the plaintiff's goods in a lower room; L. R. 6 Ex. 217; where pipes were laid down with plugs, properly made, to prevent the pipes bursting, and a severe frost prevented the plugs from acting and the pipes burst and flooded the plaintiff's cellar; 11 Ex. 781; where a horse took fright without any default in the driver or any known propensity in the animal, and the plaintiff was injured; 3 Esp. 533; where a horse, travelling on the highway, became suddenly frightened at the smell of blood; Jackson v. Town of Belleview, 30 Wis. 257; where a horse, being suddenly frightened by a passing vehicle, became unmanageable and injured the plaintiff's horse; 1 Bingh. 13; where a mill dam, properly built, was swept away by a freshet of unprecedented violence; Livingston v. Adams, 8 Cow. (N. Y.) 175; it was held that no action would lie; otherwise when the falling of the tide caused a vessel to strand, as this could have been foreseen; Bohannan v. Hammond, 42 Cal. 227. A bailee is exempt from liability for loss of the consigned goods arising from inevitable accident; he may,

however, enlarge his liability by contract; Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093. See ACT OF GOD.

INFALISTATUS. **In Old English Law.** Exposed upon the sands, or seashore. A species of punishment mentioned in Hengham. Cowell.

INFAMIA (Lat.). Infamy; ignominy or disgrace.

By *infamia juris* is meant infamy established by law as the consequence of crime; *infamia facti* is where the party is supposed to be guilty of such crime, but it had not been judicially proved. Com. v. Green, 17 Mass. 515, 541.

INFAMIS (Lat.). **In Roman Law.** One who, in consequence of the application of a general rule, and not by virtue of an arbitrary decision of the censors, lost his political rights but preserved his civil rights. Savigny, Droit Rom. § 79.

INFAMOUS CRIME. A crime which works infamy in one who has committed it.

The fifth amendment of the constitution of the United States declares that, with certain exceptions not here material, "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." A similar provision is contained in many of the state constitutions, although in some later ones there is a tendency to abridge the common-law strictness of requiring indictment by a grand jury.

It is settled that the provision of the federal constitution above quoted restricts only the United States so that a state may authorize an offence—capital or infamous—to be prosecuted by information; State v. Jackson, 21 La. Ann. 574; this rule of construction has been uniformly applied to the general restrictions contained in the first eight amendments; Barron v. Baltimore, 7 Pet. (U. S.) 243, 8 L. Ed. 672; Murphy v. People, 2 Cow. (N. Y.) 815; Pom. Const. L. §§ 231–8.

Under the fifth amendment of the United States constitution, a person charged with murder, committed in Oklahoma Territory prior to statehood, must be prosecuted by indictment; Reed v. State, 2 Okl. Cr. App. 589, 103 Pac. 1042; Hayes v. State, 3 Okl. Cr. App. 1, 103 Pac. 1061; but an indictment is not required even in cases of common-law felonies under a state constitutional provision that no one shall be deprived of his liberty except by the laws of the land, and the legislature may authorize prosecutions by an information; State v. Stimpson, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639.

It was said by Mr. Justice Miller, "There has been great difficulty in deciding what was meant a hundred years ago by the phrase infamous crime, which is used in this constitutional amendment. That difficulty is not diminished by the fact of the obscurity of the language itself as construed by what is known of the laws and usages of our ancestors at that time, in connection with the fact that both state and federal legislation in regard to crime may have made that infamous since, which would not have been so considered then;" Miller, Const. U. S. 504. The question was not authoritatively decided by the supreme court until 1885, when in Ex parte Wilson the theory that the true test is the nature of the crime, as understood at common law, was distinctly negatived, and it was said by Mr. Justice Gray for the court: "When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial except on the accusation of a grand jury;" and the fifth amendment, declaring in what cases a grand jury should be necessary, practically affirmed the rule of the common law. This was that informations were not allowed for capital crimes nor for any felony, *i. e.* an offence which caused a forfeiture; 4 Bla. Com. 94, 95, 310; thus the requirement of an indictment depended upon the consequences of the convict, and it was concluded that the constitutional substitution of the words "a capital or otherwise infamous crime" for capital crimes or felonies, "manifestly had in view that rule of the common law, rather than the rule on the very different question of the competency of witnesses. The leading word capital describing the crime by its punishment only, the associated words or otherwise infamous crime must, by an elementary rule of construction, include crimes subject to any infamous punishment, even if they should be held to include also crimes infamous in their nature, independently of the punishment affixed to them."

Having determined that the character of the punishment was to be the criterion applied in such cases, the court discussed the question what punishment would be considered infamous, and carefully confining the decision to the requirements of the case, continued thus: "Deciding nothing beyond what is required by the facts of the case before us, our judgment is that a crime, punishable by imprisonment for a term of years at hard labor, is an infamous crime, within the meaning of the Fifth Amendment of the constitution." Ex parte Wilson, 114 U. S. 417, 418, 5 Sup. Ct. 935, 29 L. Ed. 89; U. S. v. Petit, 114 U. S. 429 note, 5 Sup. Ct. 1190, 29 L. Ed. 93.

This decision was followed by a number of others which adhered to the same doctrine and decided that imprisonment in a state prison or a penitentiary with or without hard labor was an infamous punishment; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Parkin-

son v. U. S., 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835; In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409.

Before this decision there had been a tendency on the part of the courts towards the doctrine that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment.

Prior to the independence of the United States there were understood to be two kinds of infamy,—one based upon the opinion of the people respecting the mode of punishment, and the other having relation to the future credibility of the offender; Eden, Penal L. ch. 75. Because the legal bearing of the subject was mainly if not entirely with respect to the settlement of rules determining what crimes would disqualify the perpetrator from testifying. Accordingly the classification of crimes other than treason or felony, which were held to be infamous, were naturally those the commission of which would tend to cast discredit upon the veracity of the criminal,—denominated generally by the term *crimen falsi*. The manifest purpose of the constitutional provision under consideration was the incorporation into fundamental law of one of the great guarantees of liberty. "A mere reference to the history and adoption of this provision into the federal constitution is sufficient to show that it was not a question of competency or incompetency to testify that the framers of our government were considering, but rather in consequences to the liberty of the individual in securing him against accusation and trial for crimes of great magnitude, without the previous interposition of a grand jury;" Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

As was said by Shaw, C. J., in an opinion quoted with approval in Ex parte Wilson, *supra*, "The state prison for any term of time is now by law substituted for all the ignominious punishment formerly in use; and, unless this is infamous, then there is now no infamous punishment other than capital."

It is said in a case subsequent to that in which the supreme court settled the principle, under the laws of the United States, an infamous crime is one for which the statutes authorized the courts to award an infamous punishment. Its character as being infamous does not depend on whether the punishment ultimately awarded is an infamous one, but whether it is in the power of the courts to award an infamous punishment, or whether the accused is in danger of being subjected to an infamous punishment; Ex parte McClusky, 40 Fed. 71; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

The authoritative settlement of this question by the supreme court renders it unnecessary to refer to the earlier decisions of the federal courts, which in some cases supported a different view. Many of them are referred to in the opinion of the supreme court, and the theories on which they are based are expressly disapproved. In some of the state courts the same conclusion was reached; Gudger v. Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; State v. Reeves, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

It has also been held that a crime to the conviction and punishment of which congress has superadded a disqualification to hold office, is thereby made infamous; U. S. v. Waddell, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89. The course of decisions cited renders the cases as to particular crimes of little value, but of those held to be infamous under the principle stated are, larceny; U. S. v. Fuller, 3 N. M. (Johns.) 367, 9 Pac. 597; Ex parte McClusky, 40 Fed. 71; assault with intent to kill; Ex parte Brown, 40 Fed. 81; selling liquors without paying a revenue tax; U. S. v. Johannesen, 35 Fed. 411; In re Mills, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; refusing to register voters; U. S. v. Cobb, 43 Fed. 570; counterfeiting United States securities; Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89; embezzlement and making false entries by an officer of a national bank; U. S. v. De Walt, 128 U. S. 393, 9 Sup. Ct. 111, 32 L. Ed. 485; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; In re Claasen, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. Ed. 409. When a state authorizes prosecution by information, one accused of grand larceny before its admission as a state cannot be so prosecuted; State v. Kingsly, 10 Mont. 537, 26 Pac. 1066. See INFAMY; INDICTMENT; INFORMATION.

INFAMY. That state which is produced by the conviction of crime and the loss of honor, which renders the infamous person incompetent as a witness, or juror.

The loss of character or position which results from conviction of certain crimes, and which formerly involved disqualification as a witness and juror.

When a man was convicted of an offence inconsistent with the common principles of honesty and humanity, the law considered his oath of no weight, and excluded his testimony as of too doubtful and suspicious a nature to be admitted in a court of justice to deprive another of life, liberty, or property; Bull. N. P. 291; County of Schuylkill v. Copley, 67 Pa. 386, 5 Am. Rep. 441; U. S. v.

Brockius, 3 Wash. C. C. 99, Fed. Cas. No. 14,652.

To affect the credibility of a witness it may be shown that he has been convicted of felony; Clifford v. Fire-Proofing Co., 232 Ill. 150, 83 N. E. 448; but mere rumor of accusation of crime cannot be a basis for his impeachment; Sheppard v. State, 56 Tex. Cr. R. 604, 120 S. W. 446. One convicted of felony but not sentenced is a competent witness, although several days have passed since conviction and no motion for a new trial has been filed; Rice v. State, 50 Tex. Cr. R. 648, 100 S. W. 771.

The statutory abolition of this disqualification, see *infra*, has rendered the subject obsolete in England; Stark. Ev. (Sharsw. ed.) 118; and equally so in the United States as a question of evidence, but the constitutional guarantee against conviction of an infamous crime, otherwise than by indictment, has to a considerable extent involved the discussion of the common-law definition of such crimes. As to this branch of the subject, see INFAMOUS CRIME.

The crimes which at common law rendered a person incompetent were treason; 5 Mod. 16, 74; felony; Co. Litt. 6; 1 T. Raym. 369; larceny; Taylor v. State, 62 Ala. 164; even petit larceny at common law; 5 Mod. 75; Sylvester v. State, 71 Ala. 17; Burns v. Campbell, *id.* 271; but not if reduced to a misdemeanor; Barbour v. Com., 80 Va. 287; Welsh v. State, 3 Tex. App. 114; receiving stolen goods; Rohan v. Sawin, 5 Cush. (Mass.) 287; see Clee v. Seaman, 21 Mich. 290; all offences founded in fraud, and which come within the general notion of the *crimen falsi* of the Roman law; Leach 496; as perjury and forgery; Co. Litt. 6; Fost. 209; Poage v. State, 3 Ohio St. 229; piracy; 2 Rolle, Abr. 886; swindling, cheating; Fost. 209; barratry; 2 Salk. 690; conspiracy; 1 Leach 442; subornation of perjury; 2 G. & B. 145; suppression of testimony by bribery or by a conspiracy to procure the absence of a witness, or other conspiracy to accuse one of a crime and barratry; 1 Leach 442; bribing a witness to absent himself from a trial in order to get rid of his evidence; Fost. 208. From the decisions, Greenleaf deduces the rule "that the *crimen falsi* of the common law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud;" 1 Greenl. Ev. § 373.

But the attempt to procure the absence of a witness, not amounting to a conspiracy; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; keeping a gaming house; 1 R. & M. N. P. 270; a bawdy house; Deer v. State, 14 Mo. 348; adultery; Little v. Gibson, 39 N. H. 505; maliciously obstructing railroad cars; Com. v. Dame, 8 Cush. (Mass.) 384; deceits in false weights, etc.; 1 Greenl. Ev. § 373; false pretences; Fisher v. Ins. Co., 33 Fed. 544; Ritter v. Press Co., 68 Mo. 458; embezzlement under some conditions of the law; Schuylkill County v. Copley, 67 Pa. 386, 5 Am. Rep. 441; conspiracy to cheat and defraud creditors; Bickel's Ex'r v. Fasig's Adm'r, 33 Pa. 463; were held not infamous. The test has been said to be "whether or not the crime shows such depravity or such a disposition to pervert public justice in the courts as creates a violent presumption against the truthfulness of the offered witness,—the difficulty being in the application of this test." 1 Bish. New Cr. L. 974. By statute in England and in most of the states, the disqualification of infamy is removed, but a conviction may usually be proved to affect credibility; Com. v. Gorham, 99 Mass. 420; Donohue v. People, 56 N. Y. 208; Curtis v. Cochran, 50 N. H. 242. But the difference in statutory regulations is such as to preclude general statement and to require reference to the local law in particular cases.

In Alabama one convicted of an infamous crime cannot execute the office of executor, administrator, or guardian, and conviction extinguishes all private trusts not susceptible of delegation, and also disqualifies him from holding office or voting; Bibb v. State, 83 Ala. 84, 3 South. 711. Other disabilities have been created by statute in other states. See Barker v. People, 3 Cow. (N. Y.) 686, 15 Am. Dec. 322.

As the law was administered prior to the statutory removal of the disability to testify, it was the crime not the punishment which rendered the offender unworthy of belief; 1 Phill. Ev. 25; but that is not now recognized as the true test by which to determine what, in the sense of the American constitutional law, is an *infamous crime*. See that title.

In order to incapacitate the party the judgment must have been pronounced by a court of competent jurisdiction; 2 Stark. 183; 1 Sid. 51. The disqualification came only from the final judgment of the court; Bull. N. P. 392; State v. D'Amery, 48 Me. 327; Blaufus v. People, 69 N. Y. 107, 25 Am. Rep. 148; and not from the crime; State v. Free, 1 McMull. (S. C.) 494; or mere conviction, or the infamous nature of the punishment; 1 Bish. New Cr. L. § 975. The proof of the crime was by the record of conviction; Com. v. Quin, 5 Gray (Mass.) 478.

It has been held that a conviction of an infamous crime in another country, or another of the United States, does not render the witness incompetent on the ground of infamy; Com. v. Green, 17 Mass. 515; State v. Landrum, 127 Mo. App. 653, 106 S. W. 1111; *contra*, State v. Candler, 170 N. C. 393; though this doctrine appears to be at variance with the opinions entertained by foreign jurists, who maintain that the state or condition of a person in the place of his domicil accompanies him everywhere; Story,

Confl. Laws § 620, and the authorities there cited; Fœlix, *Traité de Droit Intern. Privé* 31; Merlin, Répert. *Loi*, 6, n. 6. In some states such a record has the same effect as a domestic one; State v. Foley, 15 Nev. 64, 37 Am. Rep. 458; Chase v. Blodgett, 10 N. H. 22; in some it is admitted only on the question of credibility; Com. v. Knapp, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; and again it has been held that the full faith and credit, required to be given to records of other states, does not extend to enforcing in one state personal disabilities imposed upon a person convicted of crime in another state; Sims v. Sims, 75 N. Y. 466; reversing Sims v. Sims, 12 Hun (N. Y.) 231; and expressly disapproving Chase v. Blodgett, 10 N. H. 24 and State v. Candler, 10 N. C. 393. The question is to be determined by the law of the forum, and therefore the record should set forth a copy of the indictment; 9 Wis. 140. In some states the record is rejected altogether; Campbell v. State, 23 Ala. 44. See State v. Ridgely, 2 Harr. & McH. (Md.) 120, 1 Am. Dec. 372; State v. Harston, 63 N. C. 294.

The competency of such a witness was restored by pardon; U. S. v. Rutherford, 2 Cra. C. C. 528, Fed. Cas. No. 16,210; State v. Blaisdell, 33 N. H. 388; Yarborough v. State, 41 Ala. 405; unless the disability is annexed to the conviction, by statute; Foreman v. Baldwin, 24 Ill. 298; whether granted before sentence; Cummings v. Missouri, 4 Wall. (U. S.) 332, 18 L. Ed. 356; or after it has been complied with; Hoffman v. Coster, 2 Whart. (Pa.) 453. See Boyd v. U. S., 142 U. S. 450, 12 Sup. Ct. 292, 35 L. Ed. 1077; Martin v. State, 21 Tex. App. 1, 17 S. W. 430. But the completion of the sentence does not remove the disability; U. S. v. Brown, 4 Cra. C. C. 607, Fed. Cas. No. 14,661; State v. Benoit, 16 La. Ann. 273; *contra*, State v. Connor, 7 La. Ann. 379. A pardon does remove it even if it contains a clause declaring that it is intended to relieve from imprisonment and not from legal disabilities incident to conviction, such clause being held repugnant; People v. Pease, 3 Johns. Cas. (N. Y.) 333; but after a pardon the conviction is admissible to affect credibility; Baum v. Clause, 5 Hill (N. Y.) 196; Curtis v. Cochran, 50 N. H. 242.

The judgment for an infamous crime, even for perjury, did not preclude the party from making an affidavit with a view to his own defence; 2 Stra. 1148; 1 Greenl. Ev. § 374. He might, for instance, make an affidavit in relation to the irregularity of a judgment in a cause in which he was a party; for otherwise he would be without a remedy. But the rule was confined to defence; and he could not, at common law, be heard upon oath as complainant; 2 Salk. 461. When the witness became incompetent from infamy of character, the effect was the same as if he were dead; if he had attested any instrument as a witness, previous to his conviction, evidence might be given of his handwriting; 2 Stra. 833; Stark. Ev. pt. 2, § 193, pt. 4, p. 723.

A person infamous cannot be a juror, if indeed the disqualification of infamy does not extend to more crimes in jurors than in witnesses; 1 Bish. New Cr. L. § 977; 1 Co. Litt. 6 *b*.

See INFAMOUS CRIME; CRIMEN FALSI.

INFANGTHEF, INFANGENETHEF. The right of the lord of the manor to sit in judgment on the thief caught on his own land.

The jurisdictional powers granted in the charters of the thirteenth century frequently included this right, which extended to the hanging of the thief so caught, and, for this purpose, the manorial gallows was erected on the land of the lord. The privilege of *utfangenethef*, more rarely given, conferred the right of hanging the thief, wherever caught, if he had upon his person the stolen goods, and if he were prosecuted by the loser of the goods; 1 Poll. & Maitl. 564; Holdsw. Hist. E. L. 11.

INFANS. In the Civil Law. A child under the age of seven years; so called "*quasi impos fandi*" (as not having the faculty of speech). Cod. Theodos. 8, 18, 8.

INFANT. One who is not of full age. In England and this country one under the age of twenty-one years. Co. Litt. 171. Under the common law full age was attained at twenty-one, and under the civil law at twenty-five; 1 Bla. Com. 463. This period is arbitrary and is fixed by statute. In the United States the common-law period has been generally adopted. In Louisiana and Texas the age of majority was twenty-one years as well under the early Spanish laws as under the common law; Means v. Robinson, 7 Tex. 502.

But he is reputed to be twenty-one years old, or of full age, the first instant of the last day of the twenty-first year next before the anniversary of his birth; because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended. Savigny, *Dr. Rom.* § 182; Wells v. Wells, 6 Ind. 447. Accordingly, a man is held entitled to vote on the day before the twenty-first anniversary of his birth; State v. Clarke, 3 Harring. (Del.) 557; Hamlin v. Stevenson, 4 Dana (Ky.) 597. See AGE.

If, for example, a person were born at any hour of the first day of January, 1810 (even a few minutes before twelve o'clock of the night of that day), he would be of full age at the first instant of the thirty-first of December, 1830, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours, and minutes, because there is in this case no fraction of a day; 1 Sid. 162; 1 Kebl. 589; 1 Salk. 44, 625; Raym. 1094; 1 Bla. Com. 463, 464;

1 Lilly, Reg. 57; Comyns, Dig. *Enfant* (A); Savigny, Dr. Rom. §§ 383, 384; 2 Kent 233. See AGE; FRACTION OF A DAY.

A curious case occurred in England of a young lady who was born after the house-clock had struck while the parish clock was striking, and before St. Paul's had begun to strike, twelve, on the night of the fourth and fifth of January, 1805; the question was whether she was born on the fourth or fifth of January. Coventry gives it as his opinion that she was born on the fourth because the house-clock does not regulate anything but domestic affairs, that the parochial clock is much better evidence, and that a metropolitan clock ought to be received with "implicit acquiescence." Coventry, Ev. 182. It is conceived that this can only be *prima facie;* because if the facts were otherwise, and the parochial and metropolitan clocks should both have been wrong, they would undoubtedly have had no effect in ascertaining the age of the child.

The sex makes no difference at common law; a woman is, therefore, an infant until she has attained the age of twenty-one years; Co. Litt. 161. It is otherwise, however, in some of the United States; Stevenson v. Westfall, 18 Ill. 209; Develin v. Riggsbee, 4 Ind. 464. In Idaho, act 1864, females come of age at the age of eighteen. The same rule exists in Vermont, Ohio, Illinois, Iowa, Minnesota, Kansas, Nebraska, Maryland, Missouri, Arkansas, California, Colorado, Oregon, Nevada, and Washington; see 2 Kent 233 note; Stevenson v. Westfall, 18 Ill. 209; Dent v. Cock, 65 Ga. 400; Sparhawk v. Buell's Adm'r, 9 Vt. 41; Cogel v. Raph, 24 Minn. 194; Parker v. Starr, 21 Neb. 680, 33 N. W. 424; Jackson v. Allen, 4 Colo. 263.

Before arriving at full age, an infant may do many acts. A *male* at fourteen is of discretion, and may consent to marry; and at that age he may disagree to and annul a marriage he may before that time have contracted; he may then choose a guardian, and if his discretion be proved, may, at common law, make a will of his personal estate; he may act as executor at the age of seventeen years; he may incur a liability in equity if he actually represented himself to be of full age and the party dealing with him was misled; Pollock, Contr. 81; he cannot be adjudicated a bankrupt in the absence of an express representation to the creditor that he was of full age; *id.* 82.

On arriving at full age men are *sui juris* for all private purposes and also may vote and hold office except in cases especially otherwise provided for by law. See AGE.

A *female* at seven may be betrothed or given in marriage; at nine she is entitled to dower; at twelve she may consent or disagree to marriage; and, at common law, at seventeen she may act as executrix. At full age they may exercise all rights which belong to their sex. At common law the age of puberty was as above stated, fourteen for males and twelve for females, and this was taken from the civil law; Inst. 1. 22; Bla. Com. 436. While this may have been fixed in the civil law with due regard to natural development in the climate where that law had its origin, the fact that it is not so in countries governed by the common law is recognized by statutes in many states changing the age of consent to marriage.

Considerable changes of the common law have taken place in many of the states. In New York and several other states an infant is now deemed competent to be an executor; in Pennsylvania, Massachusetts, and other states, if an infant is named as executor in the will, administration with the will annexed will be granted during his minority, unless there shall be another executor who shall except, when the minor on arriving at full age may be admitted as joint executor; Tyler, Inf. & Cov. 133.

As the services of an infant are held in law to belong to his parent, it is the general rule that the infant cannot recover damages for their loss by reason of personal injury during minority; Clark Mile-End Spool Cotton Co. v. Shaffery, 58 N. J. L. 229, 33 Atl. 284; Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386; Comer v. Lumber Co., 59 W. Va. 688, 53 S. E. 906, 8 Ann. Cas. 1105, 6 L. R. A. (N. S.) 552, and note, where the cases are collected at large. But where a child has been abandoned by his father at the age of nine years, he is emancipated and the father has lost the right to his services and earnings; Swift & Co. v. Johnson, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; hence in a statutory action for a son's death for the sole benefit of the father, he could recover only nominal damages.

As a general rule the law of the domicil of birth determines the age of majority; 2 Kent 233, where are also stated some qualifications of the rule. See DOMICIL.

In general, an infant is not bound by his contracts, unless to supply him necessaries; Bacon, Abr. *Infancy, etc.* (I 3); 9 Viner, Abr. 391; 1 Comyns, Contr. 150, 151; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; but see Vasse v. Smith, 6 Cra. (U. S.) 226, 3 L. Ed. 207; Horner v. Thwing, 3 Pick. (Mass.) 492; Vance v. Woid, 1 N. & McC. (S. C.) 197, 9 Am. Dec. 683; or unless, by some legislative provision, he is empowered to enter into a contract; as, with the consent of his parent or guardian, to put himself apprentice, or enlist in the service of the United States; Com. v. Murray, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; McDonald v. Montague, 30 Vt. 357; but a contract of enlistment is not voidable like other contracts of an infant; In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644. See ENLISTMENT. A dwelling-house is not within the definition of necessaries, so as to render an infant liable on a contract for its erection; Allen v. Lardner, 78 Hun 603, 29 N. Y. Supp. 213.

At common law, contracts for articles other than necessaries made by an infant, after full age might be ratified by him, and would then become in all respects binding. In England Lord Tenterden's Act,

9 Geo. IV. c. 14, § 5, required the ratification to be in writing. But now by the Infants' Relief Act, 1874, 37 & 38 Vict. c. 62, "All contracts entered into by infants for the repayment of money lent, or to be lent, or for goods supplied, or to be supplied (other than contracts for necessaries), and all accounts stated shall be absolutely void," and "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

Contracts made with him are merely voidable; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; and may be enforced or avoided by him on his coming of age; Vaughan v. Parr, 20 Ark. 600; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Phipps v. Phipps, 39 Kan. 495, 18 Pac. 707; but must be avoided within a reasonable time; Mustard v. Wohlford's Heirs, 15 Gratt. (Va.) 329, 76 Am. Dec. 209; Palmer v. Miller, 25 Barb. (N. Y.) 399; Dolph v. Hand, 156 Pa. 91, 27 Atl. 114, 36 Am. St. Rep. 25. See Mette v. Feltgen, 148 Ill. 357, 36 N. E. 81. But to this general rule there may be an exception in case of contracts for necessaries; because these are for his benefit. See NECESSARIES. Elrod v. Myers, 2 Head (Tenn.) 33; Sinklear v. Emert, 18 Ill. 63; Wilhelm v. Hardman, 13 Md. 140; New Hampshire Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Sams v. Stockton, 14 B. Monr. (Ky.) 232; but an infant is not liable upon a bill of exchange at the suit of an indorsee of the bill, although it was accepted for the price of necessaries; [1891] 1 Q. B. 413; bills and notes of an infant, whether negotiable or not, are voidable; Fant v. Cathcart, 8 Ala. 725; State v. Plaisted, 43 N. H. 413; Boody v. McKenney, 23 Me. 517. The privilege of avoiding a contract on account of infancy is strictly personal to the infant, and no one can take advantage of it but himself; Voorhees v. Wait, 15 N. J. L. 343; Smith v. Reid, 51 N. C. 494; Campbell v. Wilson, 23 Tex. 252, 76 Am. Dec. 67; Jones v. Butler, 30 Barb. (N. Y.) 641; Alsworth v. Cordtz, 31 Miss. 32; Hooper v. Payne, 94 Ala. 223, 10 South. 431. See Baldwin v. Rosier, 48 Fed. 810. When the contract has been performed, and it is such as he would be compellable by law to perform, it will bind him; Co. Litt. 172 *a*. And all the acts of an infant which do not touch his interest, but take effect from an authority which he has been trusted to execute, are binding; 3 Burr. 1794; Fonbl. Eq. b. 1, c. 2, § 5, note *c*. The contracts of an infant, when not intrinsically illegal, are voidable, not void, and may be ratified by him upon arriving at maturity; Kendrick v. Neisz, 17 Colo. 506, 30 Pac. 245; Holmes v. Rice, 45 Mich. 142, 7 N. W. 772; but not during his minority; Lansing v. R. Co., 126 Mich. 663, 86 N. W. 147, 86 Am. St. Rep. 567; *contra*, Stafford v. Roof, 9 Cow. (N. Y.) 626.

He may still avoid the contract even if he has spent the consideration; New York Building Loan Banking Co. v. Fisher, 23 App. Div. 363, 48 N. Y. Supp. 152; Price v. Furman, 27 Vt. 268, 65 Am. Dec. 194; Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314; Walsh v. Young, 110 Mass. 396; *contra*, Johnson v. Ins. Co., 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473; L. R. 24 Q. B. 166; but if he still has the consideration in specie he must return it as a prerequisite to a disaffirmance; Dickerson v. Gordon, 52 Hun 614, 5 N. Y. Supp. 310; Harvey v. Briggs, 68 Miss. 60, 8 South. 274, 10 L. R. A. 62; Craig v. Van Bebber, 100 Mo. 584, 13 S. W. 906, 18 Am. St. Rep. 569; or, if he has received consideration for a release, it may be credited by the jury as against recovery, if he sues before his majority; Worthy v. Oil Mill, 77 S. C. 69, 57 S. E. 634, 11 L. R. A. (N. S.) 690, 12 Ann. Cas. 688, and note. The other party need not be placed *in statu quo;* Dube v. Beaudry, 150 Mass. 448, 23 N. E. 222, 6 L. R. A. 146, 15 Am. St. Rep. 228; Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678. An infant has been enjoined from breach of contract; Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. Supp. 458; [1892] 3 Ch. 502; but these decisions have been criticized as indefensible 20 Harv. L. Rev. 64. The title to chattels purchased by an infant passes to him and his repudiation of the contract does not revest it in the vendor; Lamkin & Foster v. Le Doux, 101 Me. 581, 64 Atl. 1048, 8 L. R. A. (N. S.) 104, and note.

The contract cannot be avoided by an adult with whom the infant deals; Gates v. Davenport, 29 Barb. (N. Y.) 160; Johnson v. Rockwell, 12 Ind. 76; Warwick v. Cooper, 5 Sneed (Tenn.) 659; Monaghan v. Ins. Co., 53 Mich. 238, 18 N. W. 797; Patterson v. Lippincott, 47 N. J. L. 457, 1 Atl. 506, 54 Am. Rep. 178; Towle v. Dresser, 73 Me. 252; or by a third person in a collateral proceeding; Doane v. Covel, 56 Me. 527; Beardsley v. Hotchkiss, 96 N. Y. 201; Winchester v. Thayer, 129 Mass. 129. See Thaw v. Ritchie, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. Ed. 531.

The doctrine of estoppel is inapplicable to infants; Brown v. McCune, 5 Sand. (N. Y.) 228; Lackman v. Wood, 25 Cal. 147; Sewell v. Sewell, 92 Ky. 500, 18 S. W. 162, 36 Am. St. Rep. 606. Even where an infant fraudulently represented himself as being of full age, he was not estopped from setting up a defence of infancy to a contract entered into under the fraudulent representation; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Wieland v. Kobick, 110 Ill. 16, 51 Am.

Rep. 676; Alvey v. Reed, 115 Ind. 148, 17 N. E. 265, 7 Am. St. Rep. 418; Millsaps v. Estes, 137 N. C. 535, 50 S. E. 227, 70 L. R. A. 170, 107 Am. St. Rep. 496; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532; Conrad v. Lane, 26 Minn. 389, 4 N. W. 695, 37 Am. Rep. 412 and note; Alt v. Graff, 65 Minn. 191, 68 N. W. 9; Whitcomb v. Joslyn, 51 Vt. 79, 31 Am. Rep. 678; Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N. C. 329, 25 S. E. 975; Tobin v. Spann, 85 Ark. 556, 109 S. W. 534, 16 L. R. A. (N. S.) 672; Sims v. Everhardt, 102 U. S. 313, 26 L. Ed. 87.

The rule that an infant is not liable in tort for misrepresentation in obtaining a contract which he afterwards repudiates is generally stated to have been laid down in Johnson v. Pye, 1 Sid. 258, 1 Keb. 905, 914, 1 Lev. 169, in only one of which reports is the decision to that effect, and the contrary is stated by high early authorities; Com. Dig. Actions on the case for deceit, A. 10; Bac. Abr. Infancy I. 3. But the doctrine seems to be established in England; 9 Exch. 422 (where Johnson v. Pye was recognized as authority); 1 B. & S. 836; 12 C. B. (N. S.) 272; 18 Ch. D. 109. In this country there was early a disposition to repudiate the rule; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Walker v. Davis, 1 Gray (Mass.) 506 (the authority of which cases, however, was not controlling in Slayton v. Barry, 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510); Fitts v. Hall, 9 N. H. 441, where Parker, C. J., in a much discussed opinion, expressly disregarded Johnson v. Pye, as does Judge Cowen in Wallace v. Morss, 5 Hill (N. Y.) 391, and Judge Daly in Eckstein v. Frank, 1 Daly (N. Y.) 335 (the latter disapproving an intermediate case in Brown v. McClune, 5 Sandf. [N. Y.] 224), followed in Schunemann v. Paradise, 46 How. Pr. (N. Y.) 426; and the infant was held liable for fraud though a contract obtained by him was void; Gaunt v. Taylor, 60 Hun 586, 15 N. Y. Supp. 589. To the same effect are Yeager v. Knight, 60 Miss. 730; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; Neff v. Landis, 110 Pa. 204, 1 Atl. 177; Hughes v. Gallans, 10 Phila. 618; New York Bldg. Loan Banking Co. v. Fisher, 20 Misc. 242, 45 N. Y. Supp. 795.

In equity a false representation as to his age estops an infant from pleading his infancy; Charles v. Hastedt, 51 N. J. Eq. 171, 26 Atl. 564; Ferguson v. Bobo, 54 Miss. 121; Commander v. Brazil, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; Ingram v. Ison, 80 S. W. 787, 26 Ky. L. Rep. 48; but not the mere failure to tell his age; Baker v. Stone, 136 Mass. 405; Davidson v. Young, 38 Ill. 145. Under the Spanish law, governing contracts made and acts done in Louisiana and Texas before the introduction of the common law, if a minor represented himself to be of age and from his person appeared to be so, any contract with him was valid; Means v. Robinson, 7 Tex. 502, 513; *contra*, Kilgore v. Jordan, 17 Tex. 341. An infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase money; Henry v. Root, 33 N. Y. 526; Utermehle v. McGreal, 1 App. D. C. 359; but see Morse v. Ely, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690.

A conveyance of land by a minor without consideration is void; Robinson v. Coulter, 90 Tenn. 705, 18 S. W. 250, 25 Am. St. Rep. 708. The deed of an infant is held not void but voidable only; Vallandingham v. Johnson, 85 Ky. 288, 3 S. W. 173; and so is a mortgage; Skinner v. Maxwell, 66 N. C. 45; State v. Plaisted, 43 N. H. 413; Monumental Bldg. Ass'n No. 2 v. Herman, 33 Md. 128; but the deed may be ratified after reaching his majority, either expressly or impliedly; Darraugh v. Blackford, 84 Va. 509, 5 S. E. 542; but see Hill v. Nelms, 86 Ala. 442, 5 South. 796; Hoffert v. Miller, 86 Ky. 572, 6 S. W. 447; and not before; Sims v. Everhardt, 102 U. S. 300, 26 L. Ed. 87.

A ward of chancery who married without consent was imprisoned for contempt; [1909] 2 Ch. 260. The filing of a bill against an infant or paying into court funds settled upon an infant constitutes him a ward of chancery; 3 K. & G. 213.

An infant may disaffirm a marriage settlement executed by her, after the disability of infancy and coverture is removed; Smith v. Smith's Ex'r, 107 Va. 112, 57 S. E. 577, 122 Am. St. Rep. 831, 12 Ann. Cas. 857, 12 L. R. A. (N. S.) 1185, where the English and American authorities are collected in the opinion and note.

It is frequently held that an infant is not competent to appoint an agent; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Ware v. Cartledge, 24 Ala. 622, 60 Am. Dec. 489; Robbins v. Mount, 27 N. Y. Super. Ct. 553; Trueblood v. Trueblood, 8 Ind. 195, 65 Am. Dec. 756; Turner v. Bondalier, 31 Mo. App. 582; Burns v. Smith, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268; Poston v. Williams, 99 Mo. App. 513, 73 S. W. 1099; 16 M. & W. 778; to buy beer for him; State v. Field, 139 Mo. App. 20, 119 S. W. 499; nor can he execute a power of attorney; 2 Edm. Sel. Cas. 132; Glass v. Glass, 76 Ala. 368; Pickler v. State, 18 Ind. 266 (where it is said it would be "probably void"); nor can he legally appoint an attorney to appear for and defend him in an action; Fuller v. Smith, 49 Vt. 253; but on the other hand there are cases which hold that he can create an agency, at least so far that acts done under it are not void but voidable; Coursolle v. Weyerhauser, 69 Minn. 328, 72 N. W. 697; Hardy

v. Waters, 38 Me. 450. An infant may be an agent and his agency may be created by parol; Talbot v. Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; or a trustee; Des Moines Ins. Co. v. McIntire, 99 Ia. 50, 68 N. W. 565. A service by one as deputy sheriff is good; Irving v. Edrington, 41 La. Ann. 671, 6 South. 177; State v. Toland, 36 S. C. 515, 15 S. E. 599; *contra*, Gilson v. Kuenert, 15 S. D. 291, 89 N. W. 472; or he may be a notary; U. S. v. Bixby, 9 Fed. 78; or an appraiser; White v. Land Co., 82 S. W. 571, 26 Ky. L. Rep. 775; *id.*, 83 S. W. 628, 26 Ky. L. Rep. 1235; or clerk of a militia company; In re Dewey, 11 Pick. (Mass.) 265; or a deputy clerk to take acknowledgments; Talbott's Devisees v. Hooser, 75 Ky. 408.

The property of an infant is not liable to a mechanic's lien for material purchased by him during infancy; Bloomer v. Nolan, 36 Neb. 51, 53 N. W. 1039, 38 Am. St. Rep. 690. When avoiding an executory contract relating to his personal property, he need not refund the money received, where he has squandered it; Petrie v. Williams, 68 Hun 589, 23 N. Y. Supp. 237.

The protection which the law gives an infant is to operate as a shield to him, to protect him from improvident contracts, but not as a sword to do injury to others; Clark v. Tate, 7 Mont. 171, 14 Pac. 761. An infant is, therefore, responsible for his torts, as for slander, trespass, and the like; Conklin v. Thompson, 29 Barb. (N. Y.) 218; Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429; Wheeler & Wilson Mfg. Co. v. Jacobs, 2 Misc. 236, 21 N. Y. Supp. 1006; but he cannot be made responsible in an action *ex delicto*, where the cause arose on a contract; Penrose v. Curren, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; Andrews v. Woodmansee, 15 Wend. (N. Y.) 233; Fitts v. Hall, 9 N. H. 441; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177; Wallace v. Morss, 5 Hill (N. Y.) 391; Lowery v. Cate, 108 Tenn. 54, 64 S. W. 1068, 57 L. R. A. 673, 91 Am. St. Rep. 744; 38 Am. L. Rev. 371, where the cases are collected. But see Vasse v. Smith, 6 Cra. (U. S.) 226, 3 L. Ed. 207; Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105; Peigne v. Sutcliffe, 4 McCord (S. C.) 387, 17 Am. Dec. 756. It is well settled that an infant bailee of a horse is liable in an action *ex delicto* for every tortious wilful act causing injury or death to the horse, the same as though he were an adult; Campbell v. Stakes, 2 Wend. (N. Y.) 137, 19 Am. Dec. 561; Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; Field, Inf. 32.

With regard to the responsibility of infants for crimes, the rule is that no infant within the age of seven years can be guilty of felony or be punished for any capital offence; for within that age an infant is, by presumption of law, *doli incapax* and cannot be endowed with any discretion; and against this presumption no averment shall be received. 1 Hale, Pl. Cr. 25–29. The law assumes that this legal incapacity ceases when the infant attains the age of fourteen years; *id.*; but subjects this assumption to the effect of proof; State v. Learnard, 41 Vt. 585. Between the age of seven and fourteen years an infant is deemed *prima facie* to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem:* malice supplies the want of mature years; 1 Russ. Cri. 2, 3; Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Nickleson, 45 La. Ann. 1172, 14 South. 134; and the question whether such a child is capable of committing an assault with intent to murder, is for the jury; McCormack v. State, 102 Ala. 156, 15 South. 438. See State v. Milholland, 89 Ia. 5, 56 N. W. 403; 1 Bishop, N. Cr. L. § 368. The reports abound with cases where clear evidence of criminal consciousness was shown, and of very marked atrocity, from the age of nine years and upward; 1 Russ. Cr. 2–6; 1 Hale, Pl. Cr. 25–29. See DISCRETION. See also 36 L. R. A. 196, note, for English and American authorities on criminal capacity of children with respect to different crimes.

The Court of Chancery has a general jurisdiction over the persons and property of infants which is, in this country, usually vested in a court specially designated by statute. This equitable care and oversight is very wide; U. S. v. Morse, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. Ed. 1123, 21 Ann. Cas. 782; and is exercised over them as infants without regard to property, and whether or not they are wards of court; [1892] 2 Ch. 496; and has been exercised in the removal of a guardian appointed by the mother after the father's death, for the welfare of the child; *id.*; or excluding the father from guardianship, if an improper person; 2 Bligh (N. S.) 124; or removing a guardian however appointed; Cowls v. Cowls, 3 Gilman (Ill.) 435, 44 Am. Dec. 708; Miner v. Miner, 11 Ill. 43; or providing that the child shall be brought up in the father's religion, even if the mother's is different; L. R. 6 Ch. 544; or changing the religion in which he was to be brought up, from that of the father, on the application of the child who was a ward of the court aged thirteen; [1907] 2 Ch. 557, C. A.; the paramount duty of the court being to consult the welfare of the child as above religious distinctions and parental wishes; 8 De G. M. & G. 760, 771; [1893] 1 Ch. 143, 148.

The income of a trust fund for the benefit of an infant may be applied to his maintenance or education with the consent of other interested persons; Pitts v. Trust Co., 21 R. I. 544, 45 Atl. 553, 48 L. R. A. 783, 79 Am. St. Rep. 821; 5 Ves. 195; 11 *id.* 604; where there is no other provision practicable; 1 Cr. & Ph. 317; and this may be without, or in opposition to, provisions of the will; 1 Madd. 253; 5 Ves. 195.

Infant defendants are not properly before

the court when not served with summons, and there is no appointment of a guardian *ad litem* to represent them; Carrigan v. Drake, 36 S. C. 354, 15 S. E. 339. Where infant defendants have no special or separate defence, no separate answer is necessary, but joinder in the general answer of defendants is sufficient; Western Lumber Co. v. Phillips, 94 Cal. 54, 29 Pac. 328. See GUARDIAN AD LITEM.

Not only does the state exercise oversight and control over the person and property of infants, but the constitutional guarantees of personal liberty, trial by jury and the like, including those secured by the fourteenth amendment of the federal constitution are generally held not impaired by statutes providing for investigation or care of infants either as delinquents or in the absence or default of natural guardians. Such decisions have been rendered in cases of the commitment of delinquent children to reformatory institutions; Ex parte Crouse, 4 Whart. (Pa.) 9; Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92; Reynolds v. Howe, 51 Conn. 472; Rule v. Geddes, 23 App. D. C. 31; Ex parte Ah Peen, 51 Cal. 280; State v. Children's Home Society, 10 N. D. 493, 88 N. W. 273; Wilkison v. Board of Children's Guardians, 158 Ind. 1, 62 N. E. 481; Roth v. House of Refuge, 31 Md. 329; Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wis. 328, 22 Am. Rep. 702; but when the commitment is penal in its nature and not merely reformatory or for care, education, etc., it has been held that there must be some sort of trial and conviction; State v. Ray, 63 N. H. 406, 56 Am. Rep. 529; People v. Turner, 55 Ill. 280, 8 Am. Rep. 645 (though a statute providing less summary proceedings was held constitutional; In re Ferrier, 103 Ill. 367, 43 Am. Rep. 10; County of McLean v. Humphreys, 104 Ill. 378).

If a parent or guardian deems the commitment to be an infringement of his rights, he has his remedy by a proper proceeding; In re Sharp, 15 Idaho 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886, where the general subject is discussed in the opinion and a note classifying the cases.

The commitment of a destitute child to a charitable institution at the public expense is not a criminal proceeding, and on being satisfied that the parents have reformed and become able to care for the child, the power of the chancery court to intervene and restore to them the custody of the child is limited only by the necessities of the case, having due regard to the welfare of the infant; In re Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699.

As to the rights of counsel respecting an infant's suit, see ATTORNEY; as to infant's right of action for death of parent, see DEATH; as to custody of infants in divorce proceedings, see DIVORCE; as to enlistment of infants, see ENLISTMENT.

And see generally as to the liability of an infant who misrepresents his age, 8 Y. L. J. 235; 16 *id.* 56, where the cases are collected. See CHILD; AGE; EN VENTRE SA MÈRE; BASTARD; ADOPTION; ELECTION OF RIGHTS AND REMEDIES; RELIGIOUS EDUCATION; DISCRETION.

INFANTICIDE. In Medical Jurisprudence. The murder of a new-born infant. It is thus distinguishable from abortion and *fœticide*, which are limited to the destruction of the life of the *fœtus in utero*.

The crime of infanticide can be committed only after the child is wholly born; 5 C. & P. 329; 6 *id.* 349. But the destruction of a child *en ventre sa mère* is a high misdemeanor; 1 Bla. Com. 129. See 2 C. & K. 784; 7 C. & P. 850.

This question involves an inquiry, *first*, into the signs of maturity, the data for which are—the length and weight of the fœtus, the relative position of the centre of its body, the proportional development of its several parts as compared with each other, especially of the head as compared with the rest of the body, the degree of growth of the hair and nails, the condition of the skin, the presence or absence of the *membrana pupillaris*, and in the male the descent or non-descent of the testicles; Dean, Med. Jur. 140; Tayl. Med. Jur. 534.

Second, was it born alive? The second point presents an inquiry of great interest both to the legal and medical professions and to the community at large. In the absence of all direct proof, what organic facts proclaim the existence of life subsequent to birth? These facts are derived principally from the circulatory and respiratory systems. From the former the proofs are gathered—from the *character of the blood*, that which is purely fœtal being wholly dark, like venous blood, and forming coagula much less firm and solid than that which has been subjected to the process of respiration. *From the condition of the heart and blood-vessels.* The circulation anterior and subsequent to birth must necessarily be entirely different. That anterior, by means of the fœtal openings,—the *foramen ovale*, the *ductus arteriosus*, and the *ductus venosus*,—is enabled to perform its circuit without sending the entire mass of the blood to the lungs for the purpose of oxygenation. When the extra-uterine life commences, and the double circulation is established, these openings usually close; so that their closure is considered probable evidence of life subsequent to birth; 1 Beck, Med. Jur. 478; Dean, Med. Jur. 142. *From the difference in the distribution* of the blood in the different organs of the body. The two organs in which this difference is most perceptible are the liver and the lungs,—especially the latter. The circulation of the whole mass of the blood through the lungs distends and fills them with blood, so that their relative weight will be nearly doubled, and any incision into them will be followed by a free effusion.

From the respiratory system proofs of life subsequent to birth are derived. *From the thorax:* its size, capacity, and arch are increased by respiration. *From the lungs:* they are increased in size and volume, are projected forward, become rounded and obtuse, of a pinkish-red hue, and their density is inversely as their volume; Dean, Med. Jur. 149 *et seq.* The fact of the specific gravity of the lungs being diminished in proportion to their diminution in density gives rise to a celebrated test,—the hydrostatic,—the relative weight of the lungs with water; 1 Beck, Med. Jur. 459 *et seq.* The rule is, that lungs which have not respired are specifically heavier than water, and if placed within it will

sink to the bottom of the vessel. If they have respired, their increase in volume and decrease in density render them specifically lighter than water, and when placed within it they will float. There are several objections to the sufficiency of this test; for example lungs which have never respired may become so distended with putrefactive gases as to float, and, on the other hand, lungs which have respired may be the seat of congestion or inflammation which would cause them to sink; but it is fairly entitled to its due weight in the settlement of this question; Dean, Med. Jur. 154 *et seq.* *From the state of the diaphragm:* prior to respiration it is found high up in the thorax. The act of expanding the lungs enlarges and arches the thorax, and, by necessary consequence, the diaphragm descends.

The fact of life at birth being established, the next inquiry is, how long did the child survive? The proofs here are derived from three sources. *The fœtal openings,* their partial or complete closure. The more perfect the closure, the longer the time. *The series of changes* in the umbilical cord. These are—1, the *withering* of the cord; 2, its *desiccation* or *drying,* and, 3, its *separation* or *dropping off,*—occurring usually four or five days after birth; 4, *cicatrization of the umbilicus,*—occurring usually from ten to twelve days after birth. *The changes in the skin,* in the process of exfoliation of the epidermis, which commences on the abdomen, and extends thence successively to the chest, groin, axillæ, interscapular space, limbs, and, finally, to the hands and feet.

As to the modes by which the life of the child may have been destroyed. The criminal modes most commonly resorted to are—1, suffocation; 2, drowning; 3, cold and exposure; 4, starvation; 5, wounds, fractures, and injuries of various kinds; a mode not unfrequently resorted to is the introduction of sharp-pointed instruments in different parts of the body; also, luxation and fracture of the neck, accomplished by forcibly twisting the head of the child, or pulling it backwards; 6, strangulation; 7, poisoning; 8, intentional neglect to tie the umbilical cord; and, 9, causing the child to inhale air deprived of its oxygen, or gases positively deleterious. All these modes of destroying life, together with the natural or accidental ones, will be found fully discussed by the writers on medical jurisprudence. 1 Beck, Med. Jur. 509; Dean, Med. Jur. 179; Ryan, Med. Jur. 137; Dr. Cummins, Proof of Infanticide Considered; Storer & Heard, Criminal Abortion; Brown, Infanticide; Toulmouche, *Études sur Infanticide.*

INFEOFFMENT. The act or instrument of feoffment. In Scotland it is synonymous with *saisine,* meaning the instrument of possession: formerly it was synonymous with investiture. Bell, Dict.

INFERENCE. A conclusion drawn by reason from premises established by proof.

A deduction or conclusion from facts or propositions known to be true. Gates v. Hughes, 44 Wis. 336.

When the facts are submitted to the court, the judges draw the inference; when they are to be ascertained by a jury, the jury must do so. The witness is not permitted, as a general rule, to draw an inference and testify that to the court or jury. It is his duty to state the facts simply as they occurred. Inferences differ from presumptions

INFERIOR COURTS. An inferior court is a court of special and limited jurisdiction; it must appear on the face of its proceedings that it has jurisdiction, and that the parties were subjected to its jurisdiction by proper process, or its proceedings will be void. Cooley, Const. Lim. 508. Another distinction between superior and inferior courts is: in the latter case, a want of jurisdiction may be shown even in opposition to the recitals contained in the record; *id.* 509; citing Sheldon v. Wright, 5 N. Y. 497; Sears v. Terry, 26 Conn. 273; this is the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts, which must be passed upon by the courts themselves, and in respect to which the decision of the court once rendered, if there was any evidence whatever on which to base it, must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions; Cooley, Const. Lim. 509, citing 1 B. & B. 432; Freem. Judg. § 523; Wanzer v. Howland, 10 Wis. 16.

INFICIATIO (Lat.). **In Civil Law.** Denial. Denial of fact alleged by plaintiff,—especially, a denial of debt or deposit. Voc. Jur. Utr.; Calvinus, Lex.

INFIDEL. One who does not believe in the existence of a God who will reward or punish in this world or that which is to come. Willes 550. One who professes no religion that can bind his conscience to speak the truth. 1 Greenl. Ev. § 368. One who does not recognize the inspiration or obligation of the Holy Scriptures, or generally recognized features of the Christian religion. Gibson v. Ins. Co., 37 N. Y. 580.

This term has been very indefinitely applied. Under the name of infidel, Lord Coke comprises Jews and heathens; Co. 2d Inst. 506; Co. 3d Inst. 165; and Hawkins includes among infidels such as do not believe either in the Old or New Testament; Hawk. Pl. Cr. b. 2, c. 46, s. 148.

The objection to the competency of witnesses who have no religious belief is removed in England and in most of the United States by statutory enactments; 1 Whart. Ev. § 395.

It has been held that at common law it is only requisite that the witness should believe in the existence of a God who will punish and reward according to desert; 1 Atk. 21; Butts v. Swartwood, 2 Cow. (N. Y.) 431; Wakefield v. Ross, 5 Mas. 18, Fed. Cas. No. 17,050; Arnold v. Estate of Arnold, 13 Vt. 362; Blair v. Seaver, 26 Pa. 274; that it is sufficient if the punishment is to be in this world; Shaw v. Moore, 49 N. C. 25; *contra,* Atwood v. Welton, 7 Conn. 66. And see People v. McGarren, 17 Wend. (N. Y.) 460; Cubbison v. McCreary, 2 W. & S. (Pa.) 262; Brock v. Milligan, 10 Ohio 121. A witness's belief is to be presumed till the contrary appear; Donnelly v. State, 26 N. J. L. 463; *id.,* 26 N. J. L. 601; and his disbelief must be shown by declarations made previously, and cannot be inquired into by ex-

amination of the witness himself; 1 Greenl. Ev. § 370, n.; Scott v. Hooper, 14 Vt. 535.

INFIHT (Sax.). An assault upon an inhabitant of same dwelling. Gloss. Anc. Inst. & Laws of Eng.

INFIRM. Weak, feeble.

When a witness is infirm to an extent likely to destroy his life, or to prevent his attendance at the trial, his testimony *de bene esse* may be taken at any age. 1 P. Wms. 117. See WITNESS.

INFIRMATIVE. Weakening. Webster, Dict. Tending to weaken or render infirm; disprobabilizing. 3 Benth. Jud. Ev. 13, 14. Exculpatory is used by some authors as synonymous. See Wills, Circ. Ev. 120; Best, Pres. § 217.

INFLUENCE. Most frequently used in connection with "undue," and refers to persuasion, machination, or constraint of will presented or exerted to procure a disposition of property, by gift, conveyance, or will. Anderson, L. Dict.

INFORMALITY. Want of customary or legal form.

INFORMATION. **In French Law.** The act or instrument which contains the depositions of witnesses against the accused. Pothier, Proc. Civ. sect. 2, art. 5.

In Practice. A complaint or accusation exhibited against a person for some criminal offence. 4 Bla. Com. 308.

An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. 1 Bish. Cr. Proc. § 141.

It differs in no respect from an indictment in its form and substance, except that it is filed at the mere discretion of the proper law officer of the government, *ex officio*, without the intervention of a grand jury; 4 Bla. Com. 308. The process has not been formally put in motion by congress for misdemeanors, but is common in civil prosecutions for penalties and forfeitures; 3 Story, Const. 659. The information is usually made upon knowledge given by some other person than the officer called the relator. "It comes from the common law without the aid of statutes; 5 Mod. 459; it is a concurrent remedy with indictment for all misdemeanors except misprision of treason, but not permissible in any felony." Bish. Cr. Pr. § 14; Com. v. Inhabitants of Waterborough, 5 Mass. 257; Com. v. Barrett, 9 Leigh (Va.) 665.

As to the power of a legislature to dispense with indictment, see INFAMOUS CRIME.

A state law which permits the prosecution of felonies by information does not violate the United States Constitution; Bolln v. Nebraska, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; and a legislature may modify or entirely abolish the constitutional provisions regarding the grand jury; State v. Guglielmo, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976.

Under United States laws, informations are resorted to for illegal exportation of goods; U. S. v. Mann, 1 Gall. 3, Fed. Cas. No. 15,717; in cases of smuggling; U. S. v. Lyman, 1 Mas. 482, Fed. Cas. No. 15,647; and a libel for seizure is in the nature of an information; Sawyer v. Steele, 3 Wash. C. C. 464, Fed. Cas. No. 12,406; The Samuel, 1 Wheat. (U. S.) 9, 4 L. Ed. 23. The provisions of the United States constitution which provide that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment, etc., of a grand jury, have been held to apply only to the proceedings in the federal courts; Whart. Cr. Pl. & Pr. 88; Noles v. State, 24 Ala. 672; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

An information is sufficiently formal if it follows the words of the statute; The Emily, 9 Wheat. (U. S.) 381, 6 L. Ed. 116; Whiting v. State, 14 Conn. 487, 36 Am. Dec. 499; but enough must appear to show whether it is found under the statute or at common law; Knowles v. State, 3 Day (Conn.) 103. It must, however, allege the offence with sufficient fulness and accuracy; Whitney v. State, 10 Ind. 404; and must show all the facts demanding a forfeiture, as in a penal action, when it is to recover a penalty; Com. v. Messenger, 4 Mass. 462; Merriam v. Langdon, 10 Conn. 461.

An information cannot be made on "information and belief" unless the facts are stated showing the source of information and the grounds of belief; People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, 10 L. R. A. (N. S.) 159, 9 Ann. Cas. 972.

Where it is for a first offence, the fact need not be stated; Kilbourn v. State, 9 Conn. 560; otherwise, where it is for a second or subsequent offence for which an additional penalty is provided; Wilde v. Com., 2 Metc. (Mass.) 408. It need not show that there has been a preliminary examination or a waiver thereof; State v. Geer, 48 Kan. 752, 30 Pac. 236. It cannot be amended by adding charges; Com. v. Rodes, 1 Dana (Ky.) 595; *contra*, that it can be amended before trial; State v. Rowley, 12 Conn. 101; State v. Weare, 38 N. H. 314; 1 Salk. 471. By the common law a mistake in an information may be amended at any time; State v. White, 64 Vt. 372, 24 Atl. 250. The information charging a statutory offence cannot be amended after verdict so as to include another offence found by the jury; Turner v. Dickerman, 88 Mich. 359, 50 N. W. 310. It must be signed by the officer before filing; State v. Nulf, 15 Kan. 404; but not necessarily in Texas; Rasberry v. State, 1 Tex. App. 664; and must conclude with "against the peace and dignity of the state;" Wood v. State, 27 Tex. App. 538, 11 S. W. 525. In

England, a verification was not required; but it is usually otherwise by statute in America; Baramore v. State, 4 Ind. 524; District of Columbia v. Herlihy, 1 McArth. (D. C.) 466.

A part of the defendants may be acquitted and a part convicted; State v. Taylor, 1 Root (Conn.) 226; and a conviction may be of the whole or a part of the offence charged; Hill v. Davis, 4 Mass. 137. In some states it is a proceeding by the state officer, filed at his own discretion; State v. Dover, 9 N. H. 468; Levy v. State, 6 Ind. 281; in others, leave of court may be granted to any relator to use the state officer's name, upon cause shown; Camman v. Min. Co., 12 N. J. L. 84; Respublica v. Griffiths, 2 Dall. (U. S.) 112, 1 L. Ed. 311; Cleary v. Deliesseline, 1 McCord (S. C.) 35; State v. Deliesseline, *id.* 52. See State v. Terrebone, 45 La. Ann. 25, 12 South. 315. In England, the right to make an information was in the attorney-general, who acted without the interference of the court; 3 Burr. 2089. In former times the officer proceeded upon any application, as of course; 4 Term 285; but by an act passed in 1692, it was provided that leave of court must be first obtained and security entered; see 2 Term 190. It is said to be doubtful whether leave of court is necessary in this country; 1 Bish. Cr. Pr. § 144. A prosecuting officer may, on his own motion, present a bill to the grand jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion; State v. Bowman, 43 S. C. 108, 20 S. E. 1010. It is sufficient for the district attorney to be present in court when the accused first appears and there to ratify the information filed by his deputy in his absence; State v. Guglielmo, 46 Or. 250, 79 Pac. 577, 80 Pac. 103, 69 L. R. A. 466, 7 Ann. Cas. 976.

See INDICTMENT; GRAND JURY; INFAMOUS CRIME.

INFORMATION AND BELIEF. Said to be the proper words for an averment in a bill in equity; see Elliott & Hatch Book-Typewriter Co. v. Fisher, 109 Fed. 330. See AFFIDAVIT.

INFORMATION IN THE NATURE OF A QUO WARRANTO. A proceeding against the usurper of a franchise or office. See QUO WARRANTO.

INFORMATION OF INTRUSION. A proceeding instituted by the state prosecuting officer against intruders upon the public domain. See Com. v. Andre's Heirs, 3 Pick. (Mass.) 224; Com. v. Hite, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

INFORMATUS NON SUM (Lat. I am not informed). A formal answer made in court or put upon record by an attorney when he has nothing to say in defence of his client. Styles, Reg. 372.

INFORMER. A person who informs or prefers an accusation against another, whom he suspects of the violation of some penal statute.

When the informer is entitled to the penalty or part of the penalty, upon the conviction of an offender, he is or is not at common law a competent witness, according as the statute creating the penalty has or has not made him so; 1 Phill. Ev. 97; Ros. Cr. Ev. 107; Com. v. Frost, 5 Mass. 57; 1 Saund. 262, c. See U. S. v. Murphy, 16 Pet. (U. S.) 213, 10 L. Ed. 937; 4 East 180. The court is not bound to instruct the jury that the testimony of such a witness is to be received with great caution and distrust, since the credibility of witnesses is for the jury, and counsel are permitted to argue the question to them; State v. Hoxsie, 15 R. I. 1, 22 Atl. 1059, 2 Am. St. Rep. 838.

INFORTIATUM (Lat.). **In Civil Law.** The second part of the Digest or Pandects of Justinian. See DIGEST.

This part, which commences with the third title of the twenty-fourth book and ends with the thirty-eighth book, was thus called because it was the middle part, which, it was said, was supported and fortified by the two others. Some have supposed that this name was given to it because it treats of successions, substitutions, and other important matters, and, being more used than the others, produced greater fees to the lawyers.

INFRA (Lat.). Below, under, beneath, underneath. The opposite of *supra*, above. Thus, we say, *primo gradu est*—supra, *pater, mater*, infra, *filius, filia:* in the first degree of kindred in the ascending line, above is the father and the mother, below, in the descending line, son and daughter. Inst. 3. 6. 1.

In another sense, this word signifies *within:* as, *infra corpus civitatis*, within the body of the country; *infra præsidia*, within the guards. So of time, *during: infra furorem*, during the madness. This use is not classical. The sole instance of the word in this sense in the Code, *infra anni spatium*, Code, b. 5, tit. 9, § 2, is corrected to *intra anni spatium*, in the edition of the Corpus Jur. Civ. of 1833 at Leipsic. The use of *infra* for *intra* seems to have sprung up among the barbarians after the fall of the Roman empire.

INFRA ÆTATEM (Lat.). Within or under age.

INFRA ANNUM LUCTUS (Lat.). Within the year of grief or mourning. 1 Bla. Com. 457; Cod. 5. 9. 2. But *intra anni spatium* is the phrase used in the passage in the Code referred to. See Corp. Jur. Civ. 1833, Leipsic. *Intra tempus luctus* occurs in Novella 22, c. 40. This *year* was at first ten months, afterwards twelve. 1 Beck, Med. Jur. 612. See ANNUS LUCTUS.

INFRA BRACHIA (Lat.). Within her arms. Used of a husband *de jure* as well as

de facto. Co. 2d Inst. 317. Also, *inter brachia.* Bracton, fol. 148 *b.* It was in this sense that a woman could only have an appeal for murder of her husband *inter brachia sua.* Woman's Lawyer, pp. 332, 335.

INFRA CORPUS COMITATUS (Lat.). Within the body of the county.

The common-law courts have jurisdiction *infra corpus comitatus:* the admiralty, on the contrary, has no such jurisdiction, unless, indeed, the tide-water may extend within such county. Waring v. Clarke, 5 How. (U. S.) 441, 451, 12 L. Ed. 226. See ADMIRALTY; FAUCES TERRÆ.

INFRA DIGNITATEM CURIÆ (Lat.). Below the dignity of the court. Example: in equity a demurrer will lie to a bill on the ground of the triviality of the matter in dispute, as being below the dignity of the court. See Smets v. Williams, 4 Paige, Ch. (N. Y.) 364. See MAXIMS *(de minimis non curat lex).*

INFRA HOSPITIUM (Lat.). Within the inn. When once a traveller's baggage comes *infra hospitium,* that is, in the care and under the charge of the innkeeper, it is at his risk. See GUEST; INNKEEPER.

INFRA PRÆSIDIA (Lat. within the walls). A term used in relation to prizes, to signify that they have been brought completely in the power of the captors; that is, within the towns, camps, ports, or fleet of the captors. Formerly the rule was, and perhaps still in some countries is, that the act of bringing a prize *infra præsidia* changed the property; but the rule now established is that there must be a sentence of condemnation to effect this purpose. 1 C. Rob. 134; 1 Kent 104; Chitty, Law of Nat. 98; Abbott, Shipp. 14; Hugo, Droit Romain § 90.

INFRACTION (Lat. *infrango,* to break in upon). The breach of a law or agreement; the violation of a compact. In the French law this is the generic expression to designate all actions which are punishable by the Code of France.

INFRINGEMENT. A word used to denote the act of trespassing upon the incorporeal right secured by a patent or copyright. Any person who, without legal permission, shall make, use, or sell to another to be used, the thing which is the subject-matter of any existing patent, is guilty of an infringement, for which damages may be recovered at law by an action on the case, or which may be remedied by a bill in equity for an injunction and an account.

The manufacture, sale, or use of an invention protected by letters patent, within the area and time described therein by a person not duly authorized to do so. Rob. Pat. § 890.

Infringement is a mixed question of law and fact; California Artificial Stone Paving Co. v. Molitor, 113 U. S. 609, 5 Sup. Ct. 618, 28 L. Ed. 1106. Whether a device is an infringement is determined by the claims of the patent, and not by the actual invention; Meissner v. Manuf'g Co., 9 Blatchf. 363, 5 Fish. 285, Fed. Cas. No. 9,397. There is no infringement unless the invention can be practised completely by following the specifications. An infringement is a copy made after, and agreeing with, the principle laid down in the patent; and if the patent does not fully describe everything essential to the thing patented, no infringement will take place by the fresh invention of processes which the patentee has not communicated to the public; Page v. Ferry, 1 Fish. 298, Fed. Cas. No. 10,662. Where the same advantages are gained by substantially the same means, there is infringement; Wallicks v. Cantrell, 12 Fed. 790. The test is whether the defendant uses anything which the plaintiff has invented; Crompton v. Knowles, 7 Fed. 199.

However different, apparently, the arrangements and combinations of a machine may be from the machine of the patentee, it may in reality embody his invention, and be as much an infringement as if it were a servile copy of his machine. If the machine complained of involves substantial identity with the one patented, it is an infringement. If the invention of the patentee be a machine, it is infringed by a machine which incorporates, in its structure and operation, the substance of the invention,—that is, an arrangement which performs the same service, or produces the same effect, in the same way, or substantially the same way; Sickels v. Borden, 3 Blatchf. 535, Fed. Cas. No. 12,832. A device may be an infringement though it be itself a new invention; Zeun v. Kaldenberg, 16 Fed. 539. To obtain the same result by the same mode of operation constitutes infringement; Shaver v. Mfg. Co., 30 Fed. 68; and so where there is a mere formal change; Strobridge v. Landers, 11 Fed. 880; or variations in size, form, and degree; Asmus v. Alden, 27 Fed. 684; Lull v. Clark, 13 *id.* 456.

An invention limited to certain forms is infringed only by the use of those forms; Toepfer v. Goetz, 31 Fed. 913.

Where the same result is accomplished, the same function performed, and the mode of operation is the same, a mere difference in the location of parts will not avoid infringement; 42 O. G. 297.

An improvement may be an infringement; Brainard v. Cramme, 12 Fed. 621. An improvement and its original are separate inventions, and the inventor of one infringes by the use of the other; Royer v. Coupe, 29 Fed. 358; American Bell Telephone Co. v. Dolbear, 15 Fed. 448. It is, however, presumed that use under one patent does not infringe another; Smith v. Woodruff, 1 MacArthur (D. C.) 459; and the grant of a second patent is *prima facie* evidence that the

inventions are different, and that the later patented invention is not an infringement of the former; La Baw v. Hawkins, 1 Bann. & A. 428, Fed. Cas. No. 7,960; American Pin Co. v. Oakville Co., 3 Blatchf. 190, Fed. Cas. No. 313.

To experiment with a patented article for scientific purposes, or for curiosity, or amusement, is said not to constitute infringement; Poppenhusen v. Falke, 4 Blatchf. 493, Fed. Cas. No. 11,279, but this cannot be invariably true. To make and exhibit a device at a fair, but not for use or sale, is not an infringement; Standard Measuring Mach. Co. v. League, 15 Fed. 390; nor is mere exposure for sale; 4 A. & E. 251; nor advertising an invention; 19 O. G. 727; but the latter is strong evidence of infringement; 19 O. G. 727. To make an article for sale abroad is an infringement; Ketchum Harvester Co. v. Harvester Co., 8 Fed. 586.

An infringement may be committed by repairing as well as making the invention, if it involves reconstruction either in whole or in part; Goodyear Dental Vulcanite Co. v. Preterre, 3 Bann. & A. 471, Fed. Cas. No. 5,596. To make a part with intent to use it, or to sell it to be used, in connection with the other parts of the invention, is infringement; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437.

One who makes and sells one element of a patented combination with the intention and for the purpose of bringing about its use in such a combination, is guilty of infringement; Thomson-Houston Electric Co. v. Brass Co., 80 Fed. 712, 26 C. C. A. 107; but not where the article made by the alleged infringer was not separately patented and was of a perishable nature (sheets of toilet paper); *id.* It has been held that replacing broken or worn-out parts is not necessarily infringement; Shickle, Harrison & Howard Iron Co. v. Car Coupler Co., 77 Fed. 739, 23 C. C. A. 433; Thomson-Houston Electric Co. v. Specialty Co., 75 Fed. 1009, 22 C. C. A. 1. See Heaton-Peninsular Button-Fastener Co. v. Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728, citing many cases.

No act of making, use, or sale can be an infringement of a patented invention unless it is performed during the life of the patent; Marsh v. Nichols, Shepard & Co., 128 U. S. 605, 9 Sup. Ct. 168, 32 L. Ed. 538; Rein v. Clayton, 37 Fed. 354, 3 L. R. A. 78; see Kirk v. U. S., 163 U. S. 55, 16 Sup. Ct. 911, 41 L. Ed. 66. An infringement may be committed by the use, after the patent issues, of a device constructed before the creation of the monopoly, notwithstanding the good faith of its purchaser or maker and his belief that it will never be protected by a patent; 3 Rob. Pat. § 907; Lyon v. Donaldson, 34 Fed. 789.

One who buys a patented article of manufacture from one authorized to sell it at the place where it is sold, becomes possessed of an absolute property in it, unrestricted in time or place; Keeler v. Folding Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848, whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers was not decided in the case. A licensee of a patent for Michigan sold pipes to be laid in Connecticut, where he had no patent right; it was held that he was not liable for infringement; Hobbie v. Jennison, 149 U. S. 355, 13 Sup. Ct. 879, 37 L. Ed. 766; see Adams v. Burks, 17 Wall. (U. S.) 453, 21 L. Ed. 700.

A re-issue is not infringed by an act committed before the surrender of the original patent; 2 Rob. Pat. § 696. A re-issue with a broader claim is not infringed by the use of devices made before the original patent, though they are covered by the new claim; Ives v. Axle Co., 11 Fed. 510, 20 Blatchf. 333. A device which does not infringe the original cannot infringe the re-issue, if the scope of the original is measured by its description and not by its claims alone; Cammeyer v. Newton, 4 Bann. & A. 159, Fed. Cas. No. 2,344.

A patent for a combination of old elements is not infringed by using less than all the elements, where the two combinations are not the same in operation; Faurot v. Hawes, 3 Fed. 456. A claim for a combination of three elements is not infringed by the use of two only, though the third is useless, for the patentee must stand by his claim; Cooldige v. McCone, 1 Bann. & A. 78, Fed. Cas. No. 3,186. A combination is not infringed where one essential element is omitted and another is substituted accomplishing the same result in a different way; Schmidt v. Freese, 12 Fed. 563.

A patent for a manufacture is infringed in whatever way the article is made; Celluloid Mfg. Co. v. American Zylonite Co., 30 Fed. 437; Badische Anilin & Soda Fabrik v. Mfg. Co., 3 Bann. & A. 235, Fed. Cas. No. 721.

Where a product is patented as the result of a certain process it is infringed only when made by that process; Cochrane v. Soda Fabrik, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433.

A patent for a composition of matter is infringed if the new element does the same thing as the one for which it is substituted, though otherwise it is different; Woodward v. Morrison, 5 Fish. 357, Fed. Cas. No. 18,008. A composition of matter is not infringed, if elements are substituted producing different results; Smith v. Murray, 27 Fed. 69.

One is not liable in damages as an infringer if the patentee put his invention on the market not marked patented (with date), unless he had notice of the patent; Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426; Coupe v. Royer, 155 U. S. 584, 15 Sup. Ct. 199, 39 L. Ed. 263.

The burden is on the complainant to prove actual or constructive notice; Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426.

Speaking in a general sense, it is doubtless true that the test of infringement in respect to the claims of a design-patent is the same as in respect to a patent for an art, machine, manufacture, or composition of matter; but it is not essential to the identity of the design that it should be the same to the eye of an expert. If in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same; if the resemblance is such as to deceive such an observer and sufficient to induce him to purchase, one supposing it to be the other, the one patented is infringed by the other; Miller v. Smith, 5 Fed. 359; Gorham Mfg. Co. v. White, 14 Wall. (U. S.) 511, 20 L. Ed. 731.

In granting letters patent to authors and inventors for the exclusive right to their respective writings and discoveries, the United States reserves no right to publish such writings or use such inventions; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786.

The United States is liable, under its contract, for the use of a patented article, but it is not liable in tort; U. S. v. Mfg. Co., 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530. While it has no right to use a patented device, yet no suit will lie against it without its consent; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; jurisdiction to recover royalties or compensation under a contract is in the court of claims; U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442. It is doubtful whether a government official who uses an invention solely for the benefit of the government can be sued for infringement, and whether the case is not one solely for the court of claims; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786. Where an officer of the United States uses, in his official capacity, a patented device made and used by the United States, the patentee is not entitled to an injunction, and cannot recover profits, if the only profit is a saving to the United States; but such officers, although acting under its orders, are personally liable to be sued for their own infringement of a patent; Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; see Kirk v. U. S., 163 U. S. 49, 16 Sup. Ct. 911, 41 L. Ed. 66. A city is liable for an infringement by its officers for its benefit; Munson v. City of New York, 3 Fed. 338, 5 Bann. & A. 486.

The managing officers of corporations have been, in some cases, joined as defendants in cases involving the infringement of patents; Iowa Barb-Steel Wire Co. v. Wire Co., 30 Fed. 123; Nichols v. Pearce, 7 Blatchf. 5, Fed. Cas. No. 10,246; *contra*, Matthews & Willard Mfg. Co. v. Lamp Co., 73 Fed. 212; but in Glucose Sugar Refining Co. v. Preserving Co., 135 Fed. 540, Adams, D. J., after considering and citing many authorities, concludes that the weight of authority, and especially of the more recent cases, as well as reason, is against the joinder of officers of a corporation in ordinary cases. He admits that there is much contrariety of opinion. This case was followed in American Bank Protection Co. v. Protection Co., 181 Fed. 350, even where the directors had signed indemnity agreements to purchasers of infringing articles. In Whiting Safety Catch Co. v. Wheeled Scraper Co., 148 Fed. 396, the joinder was sustained because the individual defendant owned all the corporate stock, directed its affairs, and conspired with it to commit the infringement.

See PATENTS; COPYRIGHT; TRADE-MARKS; UNITED STATES COURTS.

INFUSION. **In Medical Jurisprudence.** A pharmaceutical operation, which consists in pouring a hot or cold fluid upon a substance whose medical properties it is desired to extract. The product of this operation. An infusion differs from a decoction in that the latter is produced by boiling the drug.

Although *infusion* differs from *decoction*, they are said to be *ejusdem generis;* and in the case of an indictment which charged the prisoner with giving a decoction, and the evidence was that he had given an infusion, the difference was held to be immaterial; 3 Campb. 74.

INGENIUM (Lat. of middle ages). A net or hook. Du Cange; hence, probably, the meaning given by Spelman of artifice, fraud *(engin).* A machine, Spelman, Gloss., especially for warlike purposes; also, for navigation of a ship. Du Cange.

INGENUI (Lat.). **In Civil Law.** Those freemen who were born free. Vicat, Vocab.

They were a class of freemen, distinguished from those who, born slaves, had afterwards legally obtained their freedom: the latter were called, at various periods, sometimes *liberti*, sometimes *libertini*. An unjust or illegal servitude did not prevent a man from being *ingenuus*.

INGRESS, EGRESS, AND REGRESS. These words are frequently used in leases to express the right of the lessee to enter, go from, and return to the lands in question.

INGRESSU (Lat.). An ancient writ of entry, by which the plaintiff or complainant sought an entry into his lands. Abolished in 1833. Tech. Dict.

INGROSSING. The act of copying from a rough draft a writing in order that it may be executed: as ingrossing a deed.

INHABITANT. One who has his domicil in a place; one who has an actual fixed residence in a place. As used in the federal jurisdiction act of 1789, it means citizen. Shaw

v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

A mere intention to remove to a place will not make a man an inhabitant of such place, although, as a sign of such intention, he may have sent his wife and children to reside there; 1 Ashm. 126. Nor will his intention to quit his residence, unless consummated, deprive him of his right as an inhabitant; Barnet's Case, 1 Dall. (Pa.) 153, 1 L. Ed. 77; Lyle v. Foreman, 1 Dall. (Pa.) 480, 1 L. Ed. 232. See 14 Viner, Abr. 420; 6 Ad. & E. 153.

"The words 'inhabitant,' 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an inhabitant, resident, or citizen at the place where he has his domicil or home;" Cooley, Const. Lim. 755; Munroe v. Williams, 37 S. C. 81, 16 S. E. 535, 19 L. R. A. 665. But the terms "resident" and "inhabitant" have also been held not synonymous, the latter implying a more fixed and permanent abode than the former, and importing privileges and duties to which a mere resident would not be subject; Board of Sup'rs of Tazewell County v. Davenport, 40 Ill. 197; Bartlett v. Mayor, etc., 5 Sandf. (N. Y.) 44; Isham v. Gibbons, 1 Bradf. (N. Y.) 69; Lee v. City of Boston, 2 Gray (Mass.) 484; State v. Ross, 23 N. J. L. 517. Where a question was to be submitted to the "inhabitants" of a municipality it has been held to mean legal voters; Walnut v. Wade, 103 U. S. 683, 26 L. Ed. 526. When relating to municipal rights, powers, or duties, the word inhabitant is almost universally used as signifying precisely the same as domiciled; Borland v. City of Boston, 132 Mass. 98, 42 Am. Rep. 424.

Property conveyed to the inhabitants of a town as a body politic and corporate vests in the town as a corporation; Town of Newmarket v. Smart, 45 N. H. 87. See ALIEN; CITIZEN; DOMICIL; NATURALIZATION; HOME.

INHERENT POWER. An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another.

INHERITABLE BLOOD. Blood of an ancestor which, while it makes the person in whose veins it flows a relative, will also give him the legal rights of inheritance incident to that relationship. See 2 Bla. Com. 254, 255. Descendants can derive no title through a person whose blood is not inheritable. Such, in England, are persons attainted and aliens. But attainder is not known in this country. See 4 Kent 413, 424; 1 Hill. R. P. 148; 2 *id.* 190.

INHERITANCE. A perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. Dig. 50. 16. 24. The term is applied to lands.

It includes all the methods by which a child or relation takes property from another at his death, except by devise, and includes as well succession as descent; as applied to personal property, it can mean nothing else than to signify succession; Horner v. Webster, 33 N. J. L. 413.

The property which is inherited is called an inheritance.

The term inheritance includes not only lands and tenements which have been acquired by descent, but every fee-simple or fee-tail which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it; Littleton § 9. This would now be called an *estate* of inheritance; 1 Steph. Com. 231. See ESTATES.

In Civil Law. The succession to all the rights of the deceased. It is of two kinds: that which arises by testament, when the testator gives his succession to a particular person; and that which arises by operation of law, which is called succession *ab intestat.* Heineccius, Lec. El. §§ 484, 485.

INHERITANCE ACT. The English statute of 3 & 4 Will. IV. c. 106, regulating the law of inheritance. 2 Chitty, Stat. 575; 2 Bla. Com. 37; 1 Steph. Com. 388.

INHERITANCE TAX. See TAX.

INHIBITION. In Civil Law. A prohibition which the law makes or a judge ordains to an individual. Halifax, Anal. p. 126.

In English Law. The name of a writ which forbids a judge from further proceeding in a cause depending before him: it is in the nature of a prohibition. *Termes de la Ley;* Fitzh. N. B. 39. Also a writ issuing out of a higher court christian to a lower and inferior, upon an appeal; 2 Burn, Ec. L. 339. In the government of the Protestant Episcopal church, a bishop can inhibit a clergyman of his diocese from performing clerical functions.

INITIAL (from Lat. *initium,* beginning). Beginning; placed at the beginning. Webster. Thus, the initials of a man's name are the first letters of his name: as, G. W. for George Washington. Initials are no part of a name; Monroe Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. Ed. 72. A middle name or initial is not recognized by law; Milk v. Christie & Todd, 1 Hill (N. Y.) 102; Bratton v. Seymour, 4 Watts (Pa.) 329; Allen v. Taylor, 26 Vt. 599; King v. Hutchins, 28 N. H. 561; McKay v. Speak, 8 Tex. 376; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; Johnson v. Day, 2 N. Dak. 295, 50 N. W. 701; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771. But see Com. v. Perkins, 1 Pick. (Mass.) 388; but the first initial is, and a variance therein is fatal to an indictment; English v. State, 30 Tex. App. 470, 18 S. W. 94. In an indictment for forgery, an instrument signed "T. Tupper" was averred to have been made

with intent to defraud Tristam Tupper, and it was held good; State v. Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257. Signing of initials is good signing within the Statute of Frauds; 12 J. B. Moore 219; 2 Mood. & R. 221; Add. Contr. 46, n.; Palmer v. Stephens, 1 Den. (N. Y.) 471. When in a will the legatee is described by the initials of his name only, parol evidence may be given to prove his identity; 3 Ves. 148. The fact that the foreman of the grand jury in signing his name to the indorsement of "a true bill" on the indictment, used only the initials of, instead of his full Christian name, is not ground for quashing the indictment; Zimmerman v. State, 4 Ind. App. 583, 31 N. E. 550. As to the use of an initial in a ballot, see ELECTION. See NAME.

INITIATE. Commenced.

A husband was, in feudal law, said to be tenant by the curtesy *initiate* when a child who might inherit was born to his wife, because he then first had an inchoate right as tenant by the curtesy, and did homage to the lord as one of the *pares curtis;* whence *curtesy.* This right became consummated on the death of the wife before the husband. See 2 Bla. Com. 127; 1 Steph. Com. 247.

INITIATE TENANT BY CURTESY. A husband becomes tenant by curtesy initiate in his wife's estate of inheritance upon the birth of issue capable of inheriting the same. The husband's estate by curtesy is not said to be consummate till the death of the wife. 2 Bla. Com. 127, 128; 1 Steph. Com. 365, 366

INITIATIVE. In French Law. The name given to the important prerogative conferred by the *charte constitutionnelle*, art. 16, on the king to propose, through his ministers, projects of laws. 1 Toullier, n. 39. See VETO.

INITIATIVE, REFERENDUM, AND RECALL. *Initiative* is the right of a specified number of the electorate to unite in proposing laws to the legislative body, which, after due consideration, must submit the same to the vote of the people for their approval or disapproval.

Referendum is the referring of legislative acts to the electorate for their final acceptance or rejection.

At the end of 1911, the initiative and referendum were in force in 209 cities in 25 states, and were a part of the fundamental law, for state purposes, in 11 states: Maine, Missouri, South Dakota, Arkansas, Oklahoma, California, Colorado, Arizona, Montana, Oregon, and Washington. In 1912 Idaho, Wyoming, and Nebraska adopted these measures.

Recall is provision for the retirement of an elected officer, by a vote of the electorate. In 1911 the right to recall was provided in Idaho, Montana, North and South Dakota, Washington, Wisconsin, Wyoming, and California. Like provisions were adopted in 1912 in Ohio, Arizona, and Nebraska. In Illinois, certain questions of public policy are submitted to an election. In Iowa, Michigan, and Massachusetts the recall exists in connection with the commission form of city governments. So, also, in Parkersburg, West Virginia. California and Arizona provide for the recall of judges.

An initiative and referendum amendment to the state constitution was held not repugnant to the national constitution guaranteeing to every state a republican form of government; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; nor does that provision of the federal constitution prohibit a direct vote of the voters of a subdivision of a state in strictly local affairs; In re Pfahler, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911. Whether the initiative and referendum provisions in the constitution of Oregon so alter the form of its government as to make it no longer republican, according to Article IV, § 4 of the United States constitution, is a purely political question as to which the courts have no jurisdiction; Pacific States Telephone & Telegraph Co. v. Oregon, 223 U. S. 118, 32 Sup. Ct. 224, 56 L. Ed. 377, dismissing writ of error to the judgment in 53 Or. 162, 99 Pac. 427; to the same effect, Kiernan v. Portland, 223 U. S. 151, 32 Sup. Ct. 231, 56 L. Ed. 386.

See Referendum in America by Dr. E. P. Oberholtzer.

The report of a special committee of the American Bar Association on the Recall of Judges (Rome G. Brown, Chairman) to the 1913 meeting, contains much information on that subject. The practice was adopted in Oregon in 1908; in California in 1911; in Colorado in 1912 (and also a provision for the recall of judicial decisions as to the constitutionality of statutes and of certain city charters); Arizona in 1912; Nevada in 1912. In Kansas and Minnesota a vote will be taken in 1914. In Arkansas a constitutional amendment was adopted in 1912, but was held to have been improperly submitted. The report gives an extensive bibliography on Judicial Recall.

INJUNCTION. A prohibitory writ, issued by the authority and generally under the seal of a court of equity, to restrain one or more of the defendants or parties or *quasi* parties to a suit or proceeding in equity, from doing, or from permitting his servants or others who are under his control to do, an act which is deemed to be inequitable so far as regards the rights of some other party or parties to such suit or proceedings in equity. Eden, Inj. c. 1; Kerr, Inj. 9; Jeremy, Eq. Jur. b. 3, c. 2, § 1; Story, Eq. Jur. § 861; Will. Eq. Jur. 341; 2 Green, Ch. 136; 1 Madd. 126.

The writ of injunction may be regarded as the correlation of the writ of mandamus, the one enjoining the performance of an un-

lawful act, the other requiring the performance of a lawful or neglected act; Beach, Inj. § 9.

Under the present practice in England, injunction is not by writ, but the order of the court has the same effect.

The interdict of the Roman law resembles, in many respects, our injunction. It was used in three distinct but cognate senses. 1. It was applied to signify the edicts made by the prætor, declaratory of his intention to give a remedy in certain cases, chiefly to preserve or to restore possession; this interdict was called edictal: *edictale, quod prætorii edictis proponitur, ut sciant omnes ea forma posse implorari.* 2. It was used to signify his order or decree, applying the remedy in the given case before him, and was then called decretal: *decretale, quod prætor re nata implorantibus decrevit.* It is this which bears a strong resemblance to the injunction of a court of equity. 3. It was used, in the last place, to signify the very remedy sought in the suit commenced under the prætor's edict; and thus it became the denomination of the action itself. Livingston on the Batture case; 2 Story, Eq. Jur. § 865.

Mandatory injunctions command the defendant to do a particular thing. *Preventive*, commands him to refrain from an act. The former are resorted to rarely and are seldom allowed before a final hearing; Corning v. Nail Factory, 40 N. Y. 191; Audenried v. R. Co., 68 Pa. 370, 8 Am. Rep. 195; 10 Ves. 192; 20 Am. Dec. 389, note; Bailey v. Schnitzius, 45 N. J. Eq. 178, 13 Atl. 247, 16 Atl. 680. They are not granted except to prevent a failure of justice and then only when the right is clearly established; Buettgenbach v. Gerbig, 2 Neb. (unof.) 889, 90 N. W. 654; Budd v. Camden Horse R. Co., 63 N. J. Eq. 804, 52 Atl. 1130, affirming 61 N. J. Eq. 543, 48 Atl. 1028; nor where there is unreasonable delay in the application; MacKintyre v. Jones, 9 Pa. Super. Ct. 543.

Preliminary or *interlocutory injunctions* are used to restrain the party enjoined from doing or continuing to do the wrong complained of, either temporarily or during the continuance of the suit or proceeding in equity in which such injunction is granted, and before the rights of the parties have been settled by the decree of the court in such suit or proceeding. The sole object of a preliminary injunction is to preserve the *status quo* until the merits can be heard. The *status quo* is the last actual peaceable uncontested *status* which preceded the pending controversy, and a wrongdoer cannot shelter himself behind a sudden or recently changed *status*, though made before the chancellor's hand actually reached him; Fredericks v. Huber, 180 Pa. 572, 37 Atl. 90. See RESTRAINING ORDER.

Final or *perpetual injunctions* are awarded, or directed to be issued, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated and disposed of by the order or decree of the court; 2 Freem. Ch. 106; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; Kruson v. Kruson, 1 Bibb (Ky.) 184; Kerr, Inj. *12.

In England, injunctions were divided into common injunctions and special injunctions; Eden, Inj. 178, n.; Will. Eq. Jur. 342. The common injunction was obtained of course when the defendant in the suit in equity was in default for not entering his appearance, or for not putting in his answer to the complainant's bill within the times prescribed by the practice of the court; Story, Eq. Jur. § 892; 18 Ves. 523; Jeremy, Eq. Jur. Special injunctions were founded upon the oath of the complainant, or other evidence of the truth of the charges contained in his bill of complaint. They were obtained upon a special application, and usually upon notice of such application given to the party whose proceedings were sought to be enjoined; Story, Eq. Jur. § 892; Jeremy, Eq. Jur. 339; 18 Ves. 522.

In the federal courts and in the equity courts of most of the states the English practice of granting the common injunction has been discontinued or superseded, either by statute or by rules of the courts; the preliminary injunctions are, therefore, all special injunctions in the courts of this country where such English practice has been superseded.

When used. The injunction is used in a great variety of cases, of which cases the following are some of the most common: to stay proceedings at law by the party enjoined; Albritton v. Bird, R. M. Charlt. (Ga.) 93; Lyles v. Halton, 6 Gill & J. (Md.) 122; Bell v. Cunningham, 1 Sumn. 89, Fed. Cas. No. 1,246; Gridley v. Wynant, 23 How. (U. S.) 500, 16 L. Ed. 411; Monson v. Lawrence, 27 Conn. 579; Frith v. Roe, 23 Ga. 139; to restrain the transfer of stocks, of promissory notes, bills of exchange, and other evidences of debt; Story, Eq. Jur. §§ 906, 955; 2 Vern. 122; Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; Jones v. Edwards, 57 N. C. 257; Burns v. Weesner, 134 Ind. 442, 34 N. E. 10; to restrain the transfer of the title to property; Morris Canal & Banking Co. v. Mayor, etc., 12 N. J. Eq. 252; Gayle v. Fattle, 14 Md. 69; Stringham v. Brown, 7 Ia. 33; Conant v. Warren, 6 Gray (Mass.) 562; Lee v. Simpson, 37 Fed. 12, 2 L. R. A. 659; or the parting with the possession of such property; 3 V. & B. 168; Oneieda Mfg. Society v. Lawrence, 4 Cow. (N. Y.) 440; to restrain the party enjoined from setting up an unequitable defence in a suit at law; Mitf. Eq. Pl. 134; to restrain the collection of illegal taxes; St. Louis &

S. F. R. Co. v. Apperson, 97 Mo. 300, 10 S. W. 478; Norman, etc., v. Boaz, 85 Ky. 557, 4 S. W. 316; Clee v. Sanders, 74 Mich. 692, 42 N. W. 154; or taxes imposed in contravention of the United States constitution; In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; to restrain the infringement of a patent; Atwill v. Ferrett, 2 Blatchf. 39, Fed. Cas. No. 640; Sullivan v. Redfield, 1 Paine 441, Fed. Cas. No. 13,597; Schneider v. Glass Co., 36 Fed. 582; or a copyright, or the pirating of trade-marks; 17 Ves. 424; Schneider v. Williams, 44 N. J. Eq. 391, 14 Atl. 812; Smail v. Sanders, 118 Ind. 105, 20 N. E. 296; Brown Chemical Co. v. Stearns & Co., 37 Fed. 360; to restrain a party from passing off his goods as those of another by means of simulating his labels, packages, etc.; Lawrence Mfg. Co. v. Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; to prevent the removal of property; Trustees of Davidson College v. Chambers' Ex'rs, 56 N. C. 253; or the evidences of title to property, or the evidences of indebtedness, out of the jurisdiction of the court; to restrain the committing of waste; 4 Kent 161; Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148; Parsons v. Hughes, 12 Md. 1. Cowles v. Shaw, 2 Ia. 496; Thomas v. James, 32 Ala. 723; to prevent the creation or the continuance of a private nuisance; Hill v. Sayles, 12 Cush. (Mass.) 454; Cunningham v. Rice, 28 Ga. 30; Weimer v. Lowery, 11 Cal. 104; Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Ulbricht v. Water Co., 86 Ala. 587, 6 South. 78, 4 L. R. A. 572, 11 Am. St. Rep. 72; Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686; or of a public nuisance particularly noxious to the party asking for the injunction; Mitf. Eq. Pl. 124; City of New York v. Mapes, 6 Johns. Ch. (N. Y.) 46; Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433; to restrain illegal acts of municipal officers; Pope v. Inhabitants of Halifax, 12 Cush. (Mass.) 410; Baldwin v. City of Buffalo, 29 Barb. (N. Y.) 396; Lumsden v. City of Milwaukee, 8 Wis. 485; Briggs v. Borden, 71 Mich. 87, 38 N. W. 712; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; to prevent a purpresture; Langsdale v. Bonton, 12 Ind. 467; to restrain the breach of a covenant or agreement; 1 D. M. & G. 619; Singer Sewing-Mach. Co. v. Embroidery Co., 1 Holmes 258, Fed. Cas. No. 12,904, see *infra;* to restrain the publication of a libel; [1891] 2 Ch. 269; Grand Rapids School Furniture Co. v. Furniture Co., 92 Mich. 558, 52 N. W. 1009, 16 L. R. A. 721, 31 Am. St. Rep. 611; [1892] 1 Ch. 571; but see [1891] 2 Ch. 294; to restrain the alienation of property pending a suit for specific performance; 3 D. J. & S. 63; to restrain the disclosure of confidential communications, papers, and secrets; Kerr, Inj. § 436; Bisph. Eq. 427; Little v. Gallus, 4 App. Div. 569, 38 N. Y. Supp. 487; 9 Hare 255; to restrain the publication of unpublished manuscripts, letters, etc.; 4 H. L. C. 867; 2 Mer. 437; to restrain members of a firm from doing acts inconsistent with the partnership articles, etc.; 12 Beav. 414; to restrain waste, even though the title be in litigation; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116; to restrain the cutting of timber on land the title to which is in dispute; Wood v. Braxton, 54 Fed. 1005; to restrain the construction of a permanent tunnel through a lot; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; or a continuous trespass, where a party claims a right of way over the land, the use of which if permitted will ripen into an easement; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; see Warren Mills v. Seed Co., 65 Miss. 391, 4 South. 298, 7 Am. St. Rep. 671; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Ellis v. Wren, 84 Ky. 254, 1 S. W. 440; to restrain trespass, leaving the question of title to be settled by a suit at law; Cheesman v. Shreve, 37 Fed. 36; to restrain a railway from entering and taking possession of land without first having acquired the right to do so; Lake Erie & W. R. Co. v. Michener, 117 Ind. 465, 20 N. E. 254; Kansas City, St. J. & C. B. R. Co. v. R. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; to restrain intimidation of workmen by labor unions; Cœur D'Alene Consolidated & Mining Co. v. Miner's Union, 51 Fed. 260, 19 L. R. A. 382 (see LABOR); to restrain a boycott; Casey v. Typographical Union, 45 Fed. 135, 12 L. R. A. 193; to restrain Sunday base ball games; McMillan v. Kuehnle, 76 N. J. Eq. 256, 73 Atl. 1054 (which was put on the ground of nuisance, as the court had no jurisdiction to enforce, by injunction, the Sunday laws); to restrain a defaulting or insolvent executor or administrator from getting in assets; Kerr, Inj. § 451; 1 Will. Exec. 275; to restrain a trustee from the misuse of his powers; 1 Hare 146; to protect certain liens, as that of an equitable mortgagee, or of a solicitor upon his client's papers; 7 D. M. & G. 288; to restrain companies from doing illegal acts, either as against the public or third parties, or the members thereof; 13 Beav. 45; to restrain the unlawful diversion of water; Heilbron v. Canal Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183; Dayton v. Drainage Com'rs, 128 Ill. 271, 21 N. E. 198; or the pollution of a stream; Barrett v. Cemetery Ass'n, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. Rep. 168; or the flowage of land by a water company, unless the award is paid; Wilmington Water-Power Co. v. Evans, 166 Ill. 548, 46 N. E. 1083; to restrain the erection of a house across a public alley; Cohen v. Bank, 81 Ga. 723, 7 S. E. 811. It lies to prevent a threatened breach of trust in the diversion of corporate funds by illegal

payment out of its capital or profits; Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; at the suit of a private person to prevent the publication of his picture (but not where the person is of public reputation); Corliss v. E. W. Walker Co., 64 Fed. 280, 31 L. R. A. 283; but not to restrain the publication of a biography of the complainant or of a member of his family: Corliss v. E. W. Walker Co., 57 Fed. 434; but it will lie to enjoin the publication of a picture of a deceased member of complainant's family, where the respondent had not observed the conditions under which he obtained it; Corliss v. E. W. Walker Co., 57 Fed. 434. See PRIVACY.

Equity will enjoin the construction of a street railway over a part of a turnpike road, the fee of which is owned by the complainant; Philadelphia & Trenton R. Co. v. R. Co., 6 Pa. D. R. 269; at the suit of a wife, whose title is not disputed, will enjoin her husband's creditors from selling her property for payment of his debts; Smith v. Eline, 18 Pa. C. C. R. 560; and will enjoin a hardware store situated in a populous district from keeping and selling dynamite, and from overloading its building with a stock of hardware, when it thereby becomes a menace to passers-by; McDonough v. Roat, 8 Kulp (Pa.) 433.

An injunction will be granted to restrain a company in voluntary liquidation from distributing its assets among its shareholders without providing for future liabilities under a lease; 32 Ch. D. 41; to restrain a husband from going to his wife's house settled to her separate use, in a case where proceedings are pending between them for divorce or a judicial separation, and they are living apart; 24 Ch. 346; to enjoin a husband from dealing with his property where alimony is claimed; [1893] P. 284; [1896] P. 36, but see [1896] P. 35; against trades unionists who maliciously induce employer's contractees to break their contracts; [1893] 1 Q. B. 715; for maliciously inducing an employer to dismiss his employés; [1895] 2 Q. B. 21; against picketing; [1896] 1 Ch. 811; to restrain the publication of notes of a lecture where the audience was limited and were admitted by ticket; 28 Ch. D. 374; to restrain the publication of any valuable information, *e. g.* of prices communicated to a limited public for a limited purpose; [1896] 1 Q. B. 147; to restrain the sale of a volume of letters; 2 Atk. 341; to restrain the publication of confidential information obtained during service; 19 Q. B. D. 629; such as drawings; [1892] 2 Ch. 518; advertisements; [1893] 1 Ch. 218; to restrain the vendor of a good will from soliciting his former customers; [1896] App. Cas. 7; or a photographer who had taken a likeness of a lady in order to supply her with copies for money, from selling or exhibiting copies; 40 Ch. D. 345; or to prevent a fraudulent transfer or removal from the jurisdiction of a debtor's property, in aid of an execution; People v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 20 L. R. A. 446.

An injunction will not be granted, as a rule, to take property out of the possession of one party and put it into that of another whose title has not been established at law; Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368; Roy v. Moore, 85 Conn. 159, 82 Atl. 233; Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371 (but record evidence of title is not absolutely necessary to sustain a bill to enjoin an ejectment; Michie v. Ellair, 54 Mich. 518, 20 N. W. 564; and if the plaintiff's title is the better one in respect to possession, an injunction will issue; Dosoris Pond Co. v. Campbell, 25 App. Div. 179, 50 N. Y. Supp. 819; *id.*, 164 N. Y. 596, 58 N. E. 1087); nor where both the possession of realty and the right of possession are in doubt; Stone v. Snell, 4 Neb. (Unof.) 430, 94 N. W. 525; nor where the title to personal property is the sole question in dispute; Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478; nor to restrain a defendant in a case pending for the infringement of letters patent, from issuing circulars alleging that the plaintiff's patent in suit is invalid; Baltimore Car-Wheel Co. v. Bemis, 29 Fed. 95; Kidd v. Horry, 28 Fed. 773; (*contra*, Emack v. Kane, 34 Fed. 46; Bell v. Mfg. Co., 65 Ga. 452; and it lies in England by statute; 14 Ch. Div. 763; Kidd v. Horry, 28 Fed. 774; L. R. 7 Eq. 488); nor to restrain a patentee who has begun, and is proceeding with, a suit on his patent, from notifying a manufacturer's customers, in a courteous way, that he intends to enforce his rights; New York Filter Co. v. Schwarzwalder, 58 Fed. 577; nor to restrain defendant from falsely representing that a patentee's invention is an infringement of his, and thus deterring purchasers; Whitehead v. Kitson, 119 Mass. 484.

It is necessary to the obtaining an injunction, as to other equitable relief, that there should be no plain, adequate, and complete remedy at law; Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79; Thomas v. Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; Pusey v. Wright, 31 Pa. 387; Thomas v. James, 32 Ala. 723; Coe v. Mfg. Co., 37 N. H. 254; Franklin Telegraph Co. v Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; where there is adequate remedy at law one will not be granted; Harding v. Hawkins, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; Northern Pac. R. Co. v. Cannon, 49 Fed. 517; Wardens St. Peter's Episcopal Church v. Town of Washington, 109 N. C. 21, 13 S. E. 700; Wolf River Lumber Co. v. Boom Co., 83 Wis. 426, 53 N. W. 678; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616. An injunction will not be

granted while the rights between the parties are undetermined, except in cases where material and irreparable injury will be done; Spring v. Strauss, 3 Bosw. (N. Y.) 607; Bell v. Purvis, 15 Md. 22; Burnett v. Whitesides, 13 Cal. 156; Branch Turnpike Co. v. Board of Sup'rs, *id.* 190; Reed v. Jones, 6 Wis. 680; Watrous v. Rodgers, 16 Tex. 410; Patterson v. McCamant, 28 Mo. 210; Cohen v. L'Engle, 24 Fla. 542, 5 South. 235; but where it is irreparable and of a nature which cannot be compensated, and where there will be no adequate remedy, an injunction will be granted; Webber v. Gage, 39 N. H. 182; Pope v. Inhabitants of Halifax, 12 Cush. (Mass.) 410; Cunningham v. R. Co., 27 Ga. 499; U. S. v. Parrott, 1 McAll. 271, Fed. Cas. No. 15,998; Wood v. Braxton, 54 Fed. 1005; Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427. A preliminary injunction against the infringement of a patent will not be granted in case of doubt as to the infringement; Norton Door Check & Spring Co. v. Hall, 37 Fed. 691; where defendant confessedly intends to regain possession of certain premises by force, such act being punishable as a breach of the peace, he will not be restrained by injunction; Latham v. R. Co., 45 Fed. 721.

The owner of a dwelling-house, called for 60 years "Ashford Lodge," is not entitled to an injunction restraining the proprietor of an adjoining house known as "Ashford Villa" for 40 years from changing its name to "Ashford Lodge"; 10 Ch. D. 294. An injunction will not lie to prevent a club from carrying out the decision of the members when acting under their rules, unless it be shown that the rules are contrary to natural justice, or that what has been done is contrary to the rules, or that there has been bad faith in a decision; 5 Eq. 63; 13 Ch. D. 346; 17 Ch. D. 615. A member of an incorporated club has a standing in equity for an injunction to restrain the club from carrying out its declared purpose of committing an act which, if found to be criminal, will imperil the charter of the club; Klein v. Livingston Club, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717.

Where there was a conspiracy to prevent workmen by intimidation or persuasion from entering into or continuing in the plaintiff's employment, an injunction was granted to restrain the maintenance of a patrol of two men in front of the plaintiff's premises, placed there in furtherance of such conspiracy; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; but a corporation is not entitled to an injunction against persons or organizations on the ground that they have conspired to injure it by compelling its members to leave it; Silver State Council No. 1 of American Order of Steam Engineers v. Rhodes, 7 Colo. App. 211, 43 Pac. 451. See BOYCOTT.

Where a city had power to build waterworks, the fact that by so doing it would violate contract rights of an existing water company does not give an individual property owner the right to enjoin the city on the ground that his taxes would be increased thereby; Moore v. City of Walla Walla, 60 Fed. 961.

Equity will not enjoin a municipal corporation in the exercise of its lawful powers, unless the proposed act is *ultra vires* and would work irreparable injury; Murphy v. East Portland, 42 Fed. 308; but a resident taxpayer and real estate owner is entitled to bring a suit to enjoin the execution of a municipal contract illegally awarded, whatever may be alleged to be his ulterior purpose; Mazet v. City of Pittsburgh, 137 Pa. 561, 20 Atl. 693.

An injunction against a newspaper to restrain it from copying literary matter from another newspaper will not be refused because such is the practice of newspapers; [1892] 3 Ch. 489, where the cases are collected.

In England, equity, in special cases of contracts for personal services, will restrain the violation of the contract, whenever the legal remedy of damages would be inadequate and the contract is of such a kind that its *negative* specific enforcement is possible. This rule was at first applied to contracts which were in form expressly negative, but has since been extended to affirmative contracts which imply negative stipulations; Pom. Eq. Jur. § 1343; L. R. 16 Eq. 149; Western Union Telegraph Co. v. R. Co., 1 McCra. 558, 3 Fed. 423; Western Union Telegraph Co. v. R. Co., 1 McCra. 565, 3 Fed. 430; Singer Sewing Mach. Co. v. Embroidery Co., 1 Holmes 253, Fed. Cas. No. 12,904. But where there was a contract for personal service containing a stipulation by the employed that he will "act exclusively for" his employer, the employed will not be restrained by injunction from entering the employ of another person in the absence of a negative covenant in the contract, express or implied, which is clear and definite; 75 L. T. Rep. 526; Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348.

An injunction will not be granted to enforce a part of a bilateral contract where it cannot specifically enforce the whole; Welty v. Jacobs, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98, 49 N. E. 723; unless the terms of the agreement are distinct and independent; 6 Sim. 333; 1 De G., M. & G. 604.

An injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel specific performance, and wherever a contract is one of a class which will be specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement; Welty v. Jacobs, 171 Ill. 624,

49 N. E. 723, 40 L. R. A. 98. The breach of a negative promise will be enjoined whenever the contract is one of which the court would decree specific performance, if by such decree its observance by the party refusing to perform could be practically enforced; Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381.

In this class of cases it is considered proper to interfere directly by preventing a breach which the person has bound himself not to make; L. R. 43 Ch. Div. 165; 1 De G. M., & G. 604. If the negative remedy of injunction will oblige the defendant either to carry out his contract or to lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627.

Usually, in view of the peculiar personal relations which result from a contract of service, it would be inexpedient from the standpoint of public policy, to attempt to enforce such a contract specifically. It is held to be an invasion of one's natural liberty to compel him to work for another. One who is placed under such constraint is in a condition of involuntary servitude; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414. But where the promised service is of a special, unique, or unusual and extraordinary or intellectual character which gives it peculiar value, the loss of which can not be reasonably compensated in damages in an action at law, an injunction will be granted where there is an express negative covenant; Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627; Duff v. Russell, 14 N. Y. Supp. 134, affirmed 133 N. Y. 678, 31 N. E. 622; [1894] 1 Q. B. 125; 1 De G., M. & G. 604; but there must be a clear and definite negative covenant; Gossard Co. v. Crosby, 132 Ia. 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115, and note; or, if one is to be implied, which is quite possible, it must be so definite that the court can see exactly the limit of the injunction that it is to grant; 75 L. T. N. S. 528, following [1891] 2 Ch. 428, where it was held that from a contract by an agent to act exclusively for his employer, a negative covenant not to do business for other employers could not be implied. In the Iowa case above cited, it is said: "The better and greater weight of the authorities tends to these conclusions: 1. That equity will not undertake to decree specific performance of contracts for personal service. 2. In the absence of an express negative covenant, equity will not aid the enforcement of these contracts by injunction. 3. Even when there is an express negative covenant, injunction will not be granted save in exceptional cases where by reason of the peculiar or extraordinary character of the promised service, a violation of the agreement will cause injury to the other party for which an action at law will afford no adequate remedy."

An injunction will be granted where the remedy at law, though there be one, is inadequate: To protect an innocent purchaser of the stock and good-will of a business by enjoining the sale thereof by the sheriff, where the damages recoverable would be only for the value of the stock, without compensation for the loss of business; North v. Peters, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936; to prevent the illegal sale of a church-pew under an attachment, upon the ground that it would be an outrage to the owners' religious feelings; Deutsch v. Stone, 27 Weekly Law Bull. (Ohio) 20; to prevent the illegal issue of corporate bonds; Denny v. Denny, 113 Ind. 22, 14 N. E. 593; Watson v. Sutherland, 5 Wall. (U. S.) 74, 18 L. Ed. 580; to prevent the destruction of ornamental trees on the plaintiff's grounds; Shipley v. Ritter, 7 Md. 408, 61 Am. Dec. 371; to restrain the cutting off of the supply of natural gas furnished under a contract; Graves v. Gas Co., 83 Ia. 714, 50 N. W. 283; where the redress at law would be inadequate by reason of the defendant's insolvency; Saltus v. Belford Co., 133 N. Y. 499, 31 N. E. 518. An injunction will be granted to enjoin a public nuisance if it be continuous and peculiarly injures the plaintiff or his property; Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024; or where a criminal prosecution is threatened, under color of an invalid statute, for the purpose of compelling the relinquishment of a property right; Central Trust Co. v. R. Co., 80 Fed. 218.

An injunction will *not be granted* on the application of a private person, to protect purely public rights; Springer v. Walters, 139 Ill. 419, 28 N. E. 761; nor, except in a great emergency, to interfere with public improvements; Mut. Life Ins. Co. v. Everett, 40 N. J. Eq. 350, 3 Atl. 126; nor to restrain the abuse of a public trust, unless the complainant can show some peculiar interest therein; Chicago v. Building Ass'n, 102 Ill. 379, 40 Am. Rep. 598; nor to compel the lessees of an opera house to allow the plaintiff to use the house under a contract therefor, where the effect would be to compel the lessee to break a contract with an innocent third party; Foster v. Ballenberg, 43 Fed. 821; nor to prevent the maintenance of a nuisance on a highway where it could be abated by indictment; Inhabitants of the Township of Raritan v. R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

As a general rule equity has no jurisdiction to enjoin criminal prosecutions; Minneapolis Brewing Co. v. McGillivray, 104 Fed. 258; Fitts v. McGhee, 172 U. S. 516, 19 Sup.

Ct. 269, 43 L. Ed. 535; Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; Portis v. Fall, 34 Ark. 375; Paulk v. City of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, 69 Am. St. Rep. 128; State v. Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857, 3 L. R. A. (N. S.) 461. So enforcement of contempt proceedings will not be enjoined; Sanders v. Metcalf, 1 Tenn. Ch. 419; Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 471; nor impeachment of city officers, where the power to impeach is given by charter; State v. Judges of Civil Dist. Court, 35 La. Ann. 1075.

There are cases, however, which form an exception to the general rule, in which it has been held that criminal acts may be restrained by injunction. In In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402, Field, J., says: "In many cases proceedings criminal in their character, taken by individuals or organized bodies of men, tending, if carried out to despoil one of his property or other rights, may be enjoined by a court of equity." This is on the ground that the action sought to be enjoined is in the nature of a fraudulent use or an abuse of legal proceedings where the rights of the applicant for an injunction are clear, and the proceedings are obviously nothing but a circuitous method of depriving him of his property, or where municipal authorities are in fact attacking the vested property rights of individuals or corporations; Georgia Ry. & Elec. Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296, where it was held that as a clear right was being invaded under an invalid ordinance, an injunction, might be granted, not against the proceeding altogether but against the excessive multiplicity of prosecutions. And injunctions were granted where a city attempted unlawfully to destroy a railroad franchise which it had no right to revoke, by means of a *quasi* criminal ordinance; Port of Mobile v. R. Co., 84 Ala. 115, 4 South. 106, 5 Am. St. Rep. 342; also where a city sought, by threatening arrest and prosecution of its employees, to prevent a railroad company from fencing a strip of land forming a part of its right of way but which it was sought to claim as a street; Georgia R. & Banking Co. v. Atlanta, 118 Ga. 486, 45 S. E. 256; and city officials were enjoined from closing a club house under an invalid ordinance which declared that every place where liquor was sold was a nuisance; Canon City v. Manning, 43 Colo. 144, 95 Pac. 537, 17 L. R. A. (N. S.) 272. But an injunction was refused against a county attorney for prosecuting salesmen for the sale of alcohol to druggists for use as a drug, on the ground that such sales were not in violation of the law, and that it was a question for the criminal court; Greiner-Kelley Drug Co. v. Truett, 97 Tex. 377, 79 S. W. 4.

So an injunction is sometimes granted to prevent an illegal action which is also a crime. The indictment is a punitive and not a preventive remedy and therefore does not oust the jurisdiction of equity; State v. Maury, 2 Del. Ch. 141; or it may be granted against acts which are indictable when they make a continuing injury to property or business; Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443. This comparatively recent development of equity jurisdiction is now comparatively well settled. Its efficiency has been in preventing the evils of strikes. See Judge Taft's Address, Report of Amer. Bar Ass'n, 1895, p. 265; 6 L. R. Eq. 551; Cœur d'Alene Consolidated & Min. Co. v. Miners' Union, 51 Fed. 260, 19 L. R. A. 382; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387; Farmers' Loan & Trust Co. v. R. Co., 60 Fed. 803; Arthur v. Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; U. S. v. Agler, 62 Fed. 824; Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; 33 Am. L. Reg. (N. S.) 609.

An injunction has also been granted to restrain a prize fight; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407; 35 Am. L. Reg. (N. S.) 100; an injunction will lie to restrain railroad employees from acts of violence and intimidation and from enforcing rules of labor unions resulting in irremediable injury to the company and the public, such as those requiring an arbitrary strike without cause; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746, 19 L. R. A. 395. And also to restrain a railroad company and its employees from refusing to interchange interstate commerce, freight, and traffic facilities with a connecting line of railway; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 19 L. R. A. 387.

An injunction will be granted to restrain one from inducing a breach of a contract of employment; Employing Printers' Club v. Doctor Blosser Co., 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137, 2 Ann. Cas. 694; Flaccus v. Smith, 199 Pa. 133, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; [1903] 2 K. B. 545; Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817, 11 L. R. A. (N. S.) 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332, where it is said, "No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights"; and in [1902] 2 K. B. 86, in discussing the rights of a labor union to induce the plaintiff's employers to break their contract of apprenticeship with him, it

is said: "The plaintiffs have a cause of action against the defendants, unless the court is satisfied when they interfered with the contractual right of the plaintiff, the defendants had a sufficient justification for their interference. I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man of whose contract he has procured a breach on the ground that he acted on a wrong understanding of his own rights, or without malice or *bona fide*, or in the best interests of himself, nor even that he acted as an altruist, seeking the good of another and careless of his own advantage."

So a malicious interference with an existing contract will be restrained; American Law Book Co. v. Edward Thompson Co., 41 Misc. 396, 84 N. Y. Supp. 225; or an attempt to induce a breach of a contract for the exclusive sale of a certain article within a certain territory; New York Phonograph Co. v. Jones, 123 Fed. 197; or one for the sale of manufactured articles under certain restrictions either as to the price on a re-sale or as to the manner of their use; Dr. Miles Medical Co. v. Goldthwaite, 133 Fed. 794.

But it has been held that, where defendants maliciously and by slanderous representations induced their son to break an engagement of marriage with the plaintiff, the plaintiff had no right of action against the defendants; Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. Rep. 252.

The granting of an injunction is not limited to a case where damages could not be recovered in an action at law; Schuyler v. Curtis, 15 N. Y. Supp. 787; but as a general rule it will not be granted where the party may be compensated in damages; Lewis v. Lumber Co., 99 N. C. 11, 5 S. E. 19.

In England and here this writ was formerly used as the means of enforcing their decisions, orders, and decrees. But subsequent statutes have in most cases given to courts of equity the power of enforcing their decrees by the ordinary process of execution against the property of the party; so that an injunction to enforce the performance of a decree is now seldom necessary. See DECREE; WRIT OF ASSISTANCE.

Injunctions may be used to restrain the commencement or the continuance of proceedings in foreign courts, upon the same principles upon which they are used to restrain proceedings at law in courts of the same state or country where such injunction is granted, the jurisdiction in this class of cases, however, being purely *in personam;* 3 Myl. & K. 104; Story, Eq. Jur. § 899; High, Inj. § 103; Bisph. Eq. 424. But a state court will not grant an injunction to stay proceedings at law previously commenced in a federal court. But it is otherwise when the state court has first acquired jurisdiction; Home Ins. Co. v. Howell, 24 N. J. Eq. 238; Akerly v. Vilas, 15 Wis. 401; Knowlton v. Steamship Co., 53 N. Y. 76. Nor will a federal court grant an injunction to stay proceedings at law previously commenced in a state court, except where such injunction may be authorized by any law relating to proceedings in bankruptcy; Dial v. Reynolds, 96 U. S. 340, 24 L. Ed. 644; such suit being prohibited by U. S. R. S. § 720. As to what suits to enjoin state officers are suits against the *state*, see STATE.

And upon the ground of comity, as well as from principles of public policy, the equity courts of one state will not grant an injunction to stay proceedings previously commenced in a court of a sister state, where the courts of such sister state have the power to afford the party applying for the injunction the equitable relief to which he is entitled; Harris v. Pullman, 84 Ill. 20, 25 Am. Rep. 416; the power exists but could not be exercised where the court of law has concurrent jurisdiction and first assumed it, unless there be some special equity; Bank of Bellows Falls v. R. Co., 28 Vt. 470; but in a proper case, the equity courts of one state can restrain persons within their jurisdiction from the prosecution of suits in another state; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Bigelow v. Smelting Co., 74 N. J. Eq. 457, 71 Atl. 153.

A very strong case should be made out to warrant a court of equity in interfering with a judgment at law; Hines v. Beers, 76 Ga. 9; Whitehill v. Butler, 51 Ark. 341, 11 S. W. 477; but it will enjoin a judgment at law if the matters set up in the bill, as a ground of relief, constitute equities unavailable as a defence in the action at law; Johnson v. Christian, 128 U. S. 374, 9 Sup. Ct. 87, 32 L. Ed. 412; no injunction against proceedings at law will issue where the plaintiff has a good defence at law; Cruickshank v. Bidwell, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377; Clark v. Reeder, 40 Fed. 513. An injunction will lie to restrain a multiplicity of suits; Blindell v. Hagan, 54 Fed. 40. See MULTIPLICITY.

Established principles of equity jurisdiction are: (1) That one may not be enjoined from doing lawful acts to protect and enforce his rights of property or of person, unless his acts to that effect are clearly shown to be done unnecessarily, not for the purpose of preserving and enforcing his rights, but maliciously to vex, annoy and injure another; and (2) that where the injury to the applicant, if the preliminary injunction is refused, will be probably greater than the injury to the opponent if it is granted, it should be issued; while if the contrary is the probable result the application for it should be denied; Kryptok Co. v. Lens Co., 190 Fed. 767, 111 C. C. A. 495, 39 L. R. A. (N. S.) 1, citing Russell v. Farley, 105 U. S. 433, 26 L. Ed.

1060; Shubert v. Woodward, 167 Fed. 47, 92 C. C. A. 509; Blount v. Societe, 53 Fed. 98, 3 C. C. A. 455.

An injunction bill is usually sworn to by the complainant, or is verified by the oath of some other person who is cognizant of the facts and charges contained in such bill, so far at least as relates to the allegations in the bill upon which the application for the preliminary injunction is based. And an order allowing such injunction is thereupon obtained by a special application, either with or without notice to the party enjoined and with or without security to such party, as the law or the rules and practice of the court may have prescribed in particular classes of cases; Perry v. Parker, 1 W. & M. 280, Fed. Cas. No. 11,010. Unless a preliminary injunction is to be applied for, a bill ordinarily need not be sworn to.

Equity rule 73 (U. S. S. C., 33 Sup. Ct. xxxix) provides that no temporary restraining order shall be made unless upon affidavit or a verified bill.

The bill must disclose a primary equity in aid of which this secondary remedy is asked; Washington v. Emery, 57 N. C. 29; Smith v. Lard, 28 Ga. 585; Pittman v. Robicheau, 14 La. Ann. 108.

Where the plaintiff has slept on his rights and allowed the alleged wrong to exist for a long time, he is not entitled to an injunction; Morris v. Edwards, 62 Tex. 205; as where the plaintiff had permitted the completion of the building which he sought to enjoin; Orne v. Fridenberg, 143 Pa. 487, 22 Atl. 832, 24 Am. St. Rep. 567; and where the plaintiff who was the owner of land bounded by a highway, permitted a railway to be built on the highway; Planet Property & Financial Co. v. Ry. Co., 115 Mo. 613, 22 S. W. 616. But it is otherwise where the plaintiff seeks the aid of an injunction for the protection of his legal rights, there being laches, but nothing to constitute an estoppel; Syracuse Solar Salt Co. v. R. Co., 67 Hun 153, 22 N. Y. Supp. 321. But delay in bringing suit is not a defence if it appear that matters still remain *in statu quo;* 2 Sim. N. S. 78. An injunction in a patent case will not be granted where, by reason of the plaintiff's delay, the defendant would be subjected to special hardship; Ney Mfg. Co. v. Drill Co., 56 Fed. 152; nor where the plaintiff has been guilty of misrepresentations as to his goods covered by a trademark; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53. An injunction will not be granted when the plaintiff's right is doubtful; Babcock & Wilcox Co. v. Exposition Co., 54 Fed. 214; Preston v. Smith, 26 Fed. 884; nor, it has been held, where the right on which it is claimed is, as a matter of law, unsettled; Citizens' Coach Co. v. R. Co., 29 N. J. Eq. 299; Delaware, Lackawanna & W. R. Co. v. Transit Co., 43 N. J. Eq. 71, 10 Atl. 490.

Formerly the plaintiff could not obtain relief by injunction until his rights had been settled at law; Gardner v. Newburgh, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; but this doctrine is not now maintained.

Injunctions are not granted where complainant's rights are not clear, and where an injury more or less irreparable is not likely to result unless defendants are enjoined; Delaware, L. & W. R. Co. v. Transit Co., 45 N. J. Eq. 50, 17 Atl. 146, 6 L. R. A. 855.

An injunction is ordinarily preventive, and will not be granted to correct a wrong already done or restore to a party rights of which he has been deprived; Com'rs of Highways v. Deboe, 43 Ill. App. 25; East Saginaw St. Ry. v. Wildman, 58 Mich. 286, 25 N. W. 193.

There must be at least a reasonable probability of injury to the plaintiff in order to justify an injunction; Genet v. Canal Co. & Co., 122 N. Y. 505, 25 N. E. 922; Lorenz v. Waldron, 96 Cal. 243, 31 Pac. 54; a mere threat of injury is not ordinarily a sufficient ground; Bond v. Wool, 107 N. C. 139, 12 S. E. 281; Johnson Railroad Signal Co. v. Signal Co., 55 Fed. 487, 5 C. C. A. 204. There must be a well-grounded apprehension of immediate injury; Potter v. Street Ry., 83 Mich. 285, 47 N. W. 217, 10 L. R. A. 176; Ruge v. Fish Co., 25 Fla. 656, 6 South. 489; Sherman v. Clark, 4 Nev. 142, 97 Am. Dec. 516. It is not necessary to prove that a wrong has actually been committed; where rights had been infringed, and the party has good reason to believe they will be infringed, an injunction will issue; Poppenhusen v. Comb Co., 4 Blatch. 184, Fed. Cas. No. 11,281. A bill will lie for an injunction, if a patent right has been admitted, upon the well-grounded proof of an intention to violate the right; Woodworth v. Stone, 3 Story, 749, Fed. Cas. No. 18,021. A bill in equity will lie for an injunction to prevent an anticipated infringement of a patent, no infringement having actually occurred: Sherman v. Nutt, 35 Fed. 149; where there was no proof of actual sales, but the defendant had exhibited his lamps at a fair, and distributed circulars to the public and otherwise advertised his lamps for sale, it was held that if sales had not actually been made, such a wrong was threatened, and that was sufficient to call for an injunction; White v. Heath, 10 Fed. 291. Where the defendant had formerly been engaged in infringing, the mere fact that since the commencement of the suit he had ceased to do so and did not threaten to renew his sales, is not an answer to an application for a preliminary injunction to restrain the continuance or renewal of such

infringement; Potter v. Crowell, 3 Fish. Pat. Cas. 112, Fed. Cas. No. 11,323.

An injunction writ should contain upon its face sufficient to inform the party enjoined of what he is restrained from doing or from permitting to be done by those who are under his control, without the necessity of his resorting to the complainant's bill; Summers v. Farish, 10 Cal. 347.

Where a preliminary injunction is needed, the complainant's bill should contain a proper prayer for such process; Walker v. Devereau, 4 Paige Ch. (N. Y.) 229; Sullivan v. Judah, *id.* 444; 3 Sim. 273. Damages for breach of covenant may be decreed in conjunction with relief by injunction; Stoffiet v. Stoffiet, 160 Pa. 529, 28 Atl. 857. A court of equity may impose any terms in its discretion as a condition of granting or continuing an injunction; Myers v. Block, 120 U. S. 206, 7 Sup. Ct. 525, 30 L. Ed. 642.

The remedy of the party injured by the violation of an injunction by the party enjoined is by an application to the court to punish the party enjoined for contempt in disobeying the process of the court; People v. McKane, 78 Hun 154, 28 N. Y. Supp. 981; Lake Erie & W. Ry. Co. v. Bailey, 61 Fed. 494.

To render a person amenable to an injunction, it is neither necessary that he be a party to the suit or served with a copy of it, so long as he appears to have had actual notice; Ex parte Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; and a stranger with notice or knowledge of its terms, is bound thereby, and may be punished for contempt for violating its provision; State v. Lavery, 31 Or. 77, 49 Pac. 852; Garrigan v. U. S., 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966.

Where trustees of a friendly society who had been enjoined from distributing certain funds, resigned, and their successors, with notice of the injunction, proceeded to make the forbidden distribution, both sets of trustees were held to be in contempt and were committed; 51 L. J. Ch. 414. See 66 L. T. Ch. D. 267.

Where the complainant in an injunction case after its issue contracted with the defendant in reference to the subject matter in a way inconsistent with the injunction, such contract would relieve from contempt for violating it; Howard v. Durand, 36 Ga. 346, 91 Am. Dec. 767; Com. v. Ward, 5 Pa. Co. Ct. 479; James v. Mayrant, Harp. Eq. (S. C.) 180; Rodgers v. Nowill, 17 Jur. 111; Kempson v. Kempson, 61 N. J. Eq. 303, 48 Atl. 244; but a mere acquiescence in the violation of the injunction was held insufficient; Bond v. Pennsylvania Co., 126 Fed. 749, 61 C. C. A. 355; and a mere offer by an agent of the complainant to purchase an article which the defendant is enjoined from selling in order to ascertain whether the injunction is being violated, is not such an invitation to violate it as to relieve from the contempt; Ex parte Cash, 50 Tex. Cr. R. 623, 99 S. W. 1118, 9 L. R. A. (N. S.) 304, 123 Am. St. Rep. 865. The mere consent or solicitation of one party to the violation of the injunction by the other will not justify it, but there must be some action by the court; Bowers v. Von Schmidt, 87 Fed. 293. See CONTEMPT.

Lord Cairns' Act (21 & 22 Vict. c. 27, § 2) conferred upon the Court of Chancery jurisdiction to award damages in lieu of an injunction. It enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction * * * against the commission or continuance of any wrongful act * * * it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction." "Such jurisdiction ought not to be exercised except under very exceptional circumstances. I will not attempt to specify them or lay down rules for the exercise of judicial discretion. It is sufficient to refer by way of example to trivial and occasional nuisances; cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these and in all others where an action for damages is really an adequate remedy—as where the acts complained of are already finished—an injunction can be properly refused"; Per Lindley, L. J., in [1895] 1 Ch. 287, 316.

In this country there has been no legislation by Congress except as to one class of cases, and the federal courts of equity have no inherent power to ascertain the damages sustained by reason of tortious acts unattended with profits to the wrong doer. It was said, in relation to this subject, that it required an act of parliament to change the law in England, and the only modification to be found in the federal law is with respect to the infringement of patents which has been effected by direct act of congress. R. S. § 4921; Corbin v. Taussig, 137 Fed. 151.

In some cases in the state courts damages have been settled as an incident to injunctive relief "under special circumstances"; Reese v. Wright, 98 Md. 272, 56 Atl. 976; or the right to an account for past damages as an incident to the injunction suit to restrain a continuing trespass; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448; Roberts v. Vest, 126 Ala. 355, 28 South. 412; or damages for past injury in a suit to restrain further detention of land; Busby v. Mitchell, 29 S. C. 447, 7 S. E. 618; and in

one case past damages for a nuisance were held recoverable under a practice act in an injunction suit; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335. But it was held that damages for past overflows of land, the right to recover which was complete at the time of filing the bill and which could be enforced in a single action at law, could not be recovered in a suit to enjoin future overflows; Stephenson v. Morgan, 64 N. J. Eq. 219, 53 Atl. 677; and where the suit was to enjoin a trespass, the judgment could only cover such damages as had accrued and not permanent ones; Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282; and in one state it was held that where the Court of Chancery, prior to the adoption of the constitution, had jurisdiction in a case independently of any statute, the legislature could not confer jurisdiction to adjudicate damages as incident to an injunction against a trespass; McMillan v. Wiley, 45 Fla. 487, 33 South. 993.

A remainderman or reversioner in a suit to enjoin waste may, to avoid multiplicity of actions, have damages as at law; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; Corbin v. Taussig, *supra*. But as a rule damages are not recoverable in equity; see Pom. Eq. Jur. §§ 112, 178.

In many jurisdictions in a suit for injunction it is held that affirmative relief may be given to the defendant as well as an injunction relating to the same matter; Sternberg v. Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 39 L. R. A. 762, 67 Am. St. Rep. 494; Collinsville Granite Co. v. Phillips, 123 Ga. 830, 51 S. E. 666; Smith v. Richardson, 1 Utah, 245.

Equity will restrain the commission of injuries outside of its territorial jurisdiction, by a decree *in personam*, where it has acquired jurisdiction over the defendant. Such are suits for the specific performance of contracts, for the enforcement of trusts, for relief on the ground of fraud, for settling partnership accounts; Pom. Eq. Jur. § 1318. Penn v. Lord Baltimore, 1 Ves. Sen. 144; Brown v. Desmond, 100 Mass. 267; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89; Tardy v. Morgan, 3 McLean, 358, Fed. Cas. No. 13,752; Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. 204; and where a resident of another state having no property in the state of the forum is a plaintiff in an action at law, he is so far amenable to the jurisdiction of the courts of that state that an injunction bill may be entertained against him; Chalmers v. Hack, 19 Me. 124; a defendant may be enjoined from committing waste upon property situated abroad; Marshall v. Turnbull, 32 Fed. 124. But where the suit is strictly local, the subject-matter is specific property, and the relief such that, if granted, it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the place where the subject-matter is situated, as a suit to abate a nuisance; Pom. Eq. Jur. § 1318; Miss. & Mo. R. R. Co. v. Ward, 2 Black (U. S.) 485, 17 L. Ed. 311.

An injunction may issue to restrain a party over whom the court has jurisdiction from bringing a suit in a foreign state which would result in oppression; Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178. The rule has been applied to a divorce suit; Kempson v. Kempson, 63 N. J. Eq. 783, 52 Atl. 360, 625, 58 L. R. A. 484, 92 Am. St. Rep. 682; to a patent suit where suits in another jurisdiction were enjoined until the pending cause should be decided; Commercial Acetylene Co. v. Lighting Co., 159 Fed. 935, 87 C. C. A. 206; and to a suit for the administration of a trust fund, where the fund and all the contesting creditors were within the state; O'Connor v. Root, 130 Ia. 553, 107 N. W. 608; also to a case where the foreign jurisdiction was sought in order to evade the laws of the domicil; Sandage v. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Miller v. Gittings, 85 Md. 601, 37 Atl. 372, 37 L. R. A. 654, 60 Am. St. Rep. 352; and to a case in which insolvency proceedings were pending and a creditor sought to prosecute attachment proceedings in another state; Hazen v. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; and where a party had accepted a legacy under a will and threatened proceedings in another state attacking the will; Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20; or where a party had recognized the validity of an assessment for creditors and was about to seek a preference over other creditors by proceedings in another state; Kendall v. Coke Co., 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688; also where the foreign suit involved the same cause of action and was intended to reach practically the same result; Webster v. Ins. Co., 62 Misc. 345, 115 N. Y. Supp. 892; United Cigarette Mach. Co. v. Wright, 156 Fed. 244. Where the court could not enforce its decree, no injunction will be granted; Hawley v. Bank, 134 Ill. App. 96; American School-Furniture Co. v. J. M. Sauder Co., 106 Fed. 731. See a full note in 25 L. R. A. (N. S.) 267; and see Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 51 L. Ed. 1065.

Where equity has issued a writ of *ne exeat*, it may enjoin a suit in another state for false imprisonment under the writ; Gooding v. Reid, Murdock & Co., 177 Fed. 684, 101 C. C. A. 310.

In the Judicial Code of March 3, 1911, 36 Stat. 1087, it is provided in section 264 that injunctions may be granted by any justice of the supreme court or any judge of a district court in cases in which they might be granted by such courts respectively. But ap-

plications for an injunction or restraining order in a cause pending in the circuit to which he is allotted shall not be heard by a justice of the supreme court elsewhere than within such circuit unless it is otherwise stipulated in writing by the parties. Section 265 provides that no injunction shall be granted by any federal court to stay proceedings in any state court except in cases where it is authorized in bankruptcy proceedings; and (by section 266) no interlocutory injunction suspending or restraining the enforcement of a state law, by restraining the action of a state officer in its enforcement, shall be granted upon the ground of the unconstitutionality of such statute, except upon application presented to a justice of the supreme court or to a circuit or district judge and it must be heard and determined by three judges of whom at least one shall be a supreme court or circuit judge; and an appeal may be taken from the order made in such case direct to the supreme court. Section 263 authorizes the granting of a restraining order upon notice of motion for an injunction where there appears to be danger of irreparable injury by reason of delay.

The equity rules (No. 73, 33 Sup. Ct. xxxix) provide that no preliminary injunction shall be granted without notice, nor shall any temporary restraining order unless it clearly appears that immediate and irreparable loss or damage will result before the matter can be heard on notice in which case a temporary restraining order may be granted without notice, but there must be a hearing in not more than ten days with precedence of all other matters not of the same character. The opposite party may move to dissolve the temporary restraining order on two days notice and the matter shall be heard as expeditiously as possible. Rule 74 provides that on appeal from a final decree granting or dissolving an injunction, the justice or judge allowing the same may suspend, modify or restore the injunction during the pendency of the appeal upon such terms as he may consider proper; and an injunction, when granted, independent of a statute, will usually not be modified or dissolved except by the judge who granted it; Klein v. Fleetford, 35 Fed. 98. It is provided in section 36 of the Judicial Code that all injunctions in a state court in cases afterwards removed to a federal court, remain in full force until dissolved or modified.

As to injunctions in particular cases, see the title of the particular subject to which the remedy is to be applied; and as to injunctions against enforcing an illegal contract, see full note in 48 L. R. A. 842.

INJURIA ABSQUE DAMNO (Lat.). Wrong without damage. Wrong done without damage or loss will not sustain an action. The following cases illustrate this principle: 1 Ld. Raym. 940, 948; 2 B. & P. 86; 5 Co. 72; 9 *id.* 113; Bull. N. P. 120.

INJURIOUS WORDS. In Louisiana. Slander, or libellous words.

INJURY (Lat. *in*, negative, *jus*, a right). A wrong or tort; cited in Woodruff v. Min. Co., 18 Fed. 753, 781.

Any legal wrong which will give a cause of action to the one whose rights, person or property are injured thereby. Penn. R. Co. v. Merchant, 119 Pa. 561, 13 Atl. 690, 4 Am. St. Rep. 659 (as used in Pa. Constitution).

Absolute injuries are injuries to those rights which a person possesses as being a member of society.

Private injuries are infringements of the private or civil rights belonging to individuals considered as individuals.

Public injuries are breaches and violations of rights and duties which affect the whole community as a community.

Injuries to personal property are the unlawful taking and detention thereof from the owner; and other injuries are some damage affecting the same while in the claimant's possession or that of a third person, or injuries to his reversionary interests.

Injuries to real property are ousters, trespasses, nuisances, waste, subtraction of rent, disturbances of right of way, and the like.

Relative injuries are injuries to those rights which a person possesses in relation to the person who is immediately affected by the wrongful act done.

It is obvious that the divisions overlap each other, and that the same act may be, for example, a relative, a private, and a public injury at once. For many injuries of this character the offender may be obliged to suffer punishment for the public wrong and to recompense the sufferer for the particular loss which he has sustained. The distinction is more commonly marked by the use of the terms *civil injuries* to denote private injuries, and of *crimes, misdemeanors*, etc., to denote the public injury done: though not always; as, for example, in case of a public nuisance which may be also a private nuisance.

Injuries arise in three ways: *first*, by nonfeasance, or the not doing what was a legal obligation, or duty, or contract, to perform; *second*, misfeasance, or the performance in an improper manner of an act which it was either the party's duty or his contract to perform; *third*, malfeasance, or the unjust performance of some act which the party had no right or which he had contracted not to do.

The remedies are different as the injury affects private individuals or the public.

When the injuries affect a private right and a private individual, although often also affecting the public, there are three descriptions of remedies: *first*, the preventive, such as defence, resistance, recaption, abatement of nuisance, surety of the peace, injunction, etc.; *second*, remedies for compensation, which may be by arbitration, suit, action, or summary proceedings before a justice of the

peace; *third*, proceedings for punishment, as by indictment, or summary proceedings before a justice. *When the injury is such as to affect the public*, it becomes a crime, misdemeanor, or offence, and the party may be punished by indictment, or summary conviction for the public injury, and by civil action at the suit of the party for the private wrong. But in cases of felony the remedy by action for the private injury is generally *suspended* until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime; and in cases of homicide the remedy is *merged* in the felony; 1 Chitty, Pr. 10; Ayliffe, Pand. 592.

There are many injuries for which the law affords no remedy. In general, it interferes only when there has been a visible physical injury inflicted, while it leaves almost totally unprotected the whole class of the most malignant mental injuries and sufferings, unless in a few cases where, by a fiction, it supposes some pecuniary loss, and sometimes affords compensation to wounded feelings. A parent, for example, cannot sue, in that character, for an injury inflicted on his child, and when his own domestic happiness has been destroyed, unless the fact will sustain the allegation that the daughter was the servant of her father, and that by reason of such seduction he lost the benefit of her services; but the proof of loss of service has reference only to the form of the remedy. And when the action is sustained in point of form, damages may be given not only for the loss of service, but also for all that the plaintiff can feel from the nature of the injury; Phelin v. Kenderdine, 20 Pa. 354; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599, 38 Am. Rep. 768. Another instance may be mentioned. A party cannot recover damages for *verbal* slander in many cases: as, when the facts published are true; for the defendant would justify, and the party injured must fail. Nor will the law punish *criminally* the author of *verbal* slander imputing even the most infamous crimes, unless done with intent to extort a chattel, money, or valuable thing. The law presumes, perhaps unnaturally enough, that a man is incapable of being alarmed or affected by such injuries to his feelings. See 1 Bish. Cr. L. § 591.

The true and sufficient reason for these rules would seem to be the uncertain character of the injury inflicted, the impossibility of compensation, and the danger, supposing a pecuniary compensation to be attempted, that injustice would be done under the excitement of the case. The sound principle, as the experience of the law amply indicates, is to inflict a punishment for crime, but not put up for sale, by the agency of a court of justice, those wounded feelings which would constitute the ground of the action.

The rule as indicated above has its limitations, however, in particular cases; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303. Thus, it has been held that, when bodily pain is caused, mental pain follows necessarily, and the sufferer is entitled to damages for the mental pain as well as for the bodily; Lawrence v. R. Co., 29 Conn. 390; Fairchild v. Stage Co., 13 Cal. 599; Pennsylvania & O. Canal Co. v. Graham, 63 Pa. 290, 3 Am. Rep. 549; Ford v. Jones, 62 Barb. (N. Y.) 484; but damages for the mental suffering of one person, on account of physical injury to another, are too remote to be given by court or jury; 2 C. & P. 292.

There is a material distinction between damages and injury. Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word injury denotes the illegal act, the term damages means the sum recoverable as amends for the wrong; City of North Vernon v. Voegler, 103 Ind. 319, 2 N. E. 821.

In Civil Law. A delict committed in contempt or outrage of any one, whereby his body, his dignity, or his reputation is maliciously injured. Voet, *Com. ad Pand.* 47, t. 10, n. 1.

A *real injury* is inflicted by any act by which a person's honor or dignity is affected: as, striking one with a cane, or even aiming a blow without striking; spitting in one's face; assuming a coat of arms, or any other mark of distinction proper to another, etc. The composing and publishing defamatory libels may be reckoned of this kind; Erskine, Pr. 4. 4. 45.

A *verbal injury*, when directed against a private person, consists in the uttering contumelious words, which tend to injure his reputation by making him little or ridiculous. Where the offensive words are uttered in the heat of a dispute and spoken to the person's face, the law does not presume any malicious intention in the utterer, whose resentment generally subsides with his passion; and yet even in that case the truth of the injurious words seldom absolves entirely from punishment. Where the injurious expressions have a tendency to blacken one's moral reputation or fix some particular guilt upon him, and are deliberately repeated in different companies, or handed about in whispers to confidants, the crime then becomes slander, agreeably to the distinction of the Roman law; Dig. 15, § 12 *de Injur.*

INLAGARE, INLEGIARE. To restore to protection of law. Opposed to *utlagare*. Bract. lib. 3, tr. 2, c. 14, § 1; Du Cange.

INLAGATION. Restoration to the protection of law.

INLAGH. A man who is under the protection of the law, and not outlawed. Cowell.

INLAND. Within the same country. The demesne reserved for the use of the lord. Cowell. Inland, or domestic, navigation is that carried on in the interior of the country, and does not include that upon the great lakes; Moore v. Transp. Co., 24 How. (U. S.) 1, 16 L. Ed. 674; The Cotton Plant, 10 Wall. (U. S.) 577, 19 L. Ed. 983. As to what are inland bills of exchange, see BILLS OF EXCHANGE.

INMATE. One who dwells in a part of another's house, the latter dwelling at the same time in the said house. Kitch. 45 *b*; Com. Dig. *Justices of the Peace* (B 85); 1 B. & C. 578; 2 M. & R. 227; 2 Russ. Cr. 937; 1 M. & G. 83; Johnson v. Santa Clara County, 28 Cal. 545. See LODGER.

INN. A house where a traveller is furnished with everything he has occasion for while on his way. Bac. Abr. *Inns* (B); 3 B. & Ald. 283; Kisten v. Hildebrand, 9 B. Monr. (Ky.) 72, 48 Am. Dec. 416. A public house of entertainment for all who choose to visit it. Wintermute v. Clarke, 5 Sandf. (N. Y.) 247; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Foster v. State, 84 Ala. 451, 4 South. 833. A coffee-house or a mere eating-house is not an inn. To constitute an inn there must be some provision for the essential needs of a traveller upon his journey, namely, lodging as well as food; 13 Rep. 299, citing People v. Jones, 54 Barb. (N. Y.) 316. See INNKEEPER.

INNAVIGABLE. A term applied in foreign insurance law to a vessel not navigable, through irremediable misfortune by a peril of the sea. The ship is relatively innavigable when it will require almost as much time and expense to repair her as to build a new one. Targa, 238, 256; Emerigon, to. 1, 577, 591; 3 Kent 323, n.

INNER BARRISTER. See BARRISTER.

INNER TEMPLE. See INNS OF COURT.

INNINGS. Lands gained from the sea by draining. Cunningham, Law Dict.; Callis, Sewers 38.

INNKEEPER. The keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. Bac. Abr. *Inns*, etc.; Story, Bailm. § 475. Any one who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them, their horses and attendants, is an innkeeper. Edw. Bailm. § 450; even though the house is situated on enclosed grounds; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198. But one who entertains strangers occasionally, although he may receive compensation for it, is not an innkeeper; State v. Matthews, 19 N. C. 424; Bonner v. Welborn, 7 Ga. 296; 1 Morr. 184. See GUEST; BOARDER. It is not necessary that he should furnish accommodations for horses and carriages; 3 B. & Ald. 283; the keeper of a tavern; *id.*; and of a hotel; 2 Chitty 484; is an innkeeper. So is one who keeps a hotel on what is called the European plan, furnishing lodging to guests, and keeping an eating-house where they may purchase meals at their option; Krohn v. Sweeney, 2 Daly (N. Y.) 200. But the keeper of a mere restaurant is not an innkeeper if he only furnishes meals to his guests; Carpenter v. Taylor, 1 Hilt. (N. Y.) 193. Nor is the keeper of a coffee-house, nor of a boarding house, nor lodging-house; 8 Co. 32; 2 E. & B. 144; Hall v. Pike, 100 Mass. 495; Jalie v. Cardinal, 35 Wis. 118. One who receives lodgers and boards them under a special contract for a limited time, or who lets rooms to guests by the day or week, and does not furnish them entertainment, is not an innkeeper; Cromwell v. Stephens, 2 Daly (N. Y.) 15. See Moore v. Development Co., 87 Cal. 483, 26 Pac. 92, 22 Am. St. Rep. 265. Where the plaintiff attended a ball given by an innkeeper, stabled his horse at the inn, drank and paid for liquors, and paid for his ticket of admission to the ball, it was held that the relationship of innkeeper and guest did not exist; Fitch v. Casler, 17 Hun (N. Y.) 126. Where one boarded with his family at a hotel in New York, paying a specified amount for his rooms, and an additional amount for board if he took his meals regularly, and if not, paying for whatever he ordered at the restaurant attached to the hotel, it was held that the innkeeper was liable for personal property stolen from the plaintiff's room; Hancock v. Rand, 17 Hun (N. Y.) 279 (criticized in 20 Alb. L. J. 64, citing many cases); and see Lusk v. Belote, 22 Minn. 468. Where one merely leaves his horse with an innkeeper, the relation of innkeeper and guest does not exist; Healey v. Gray, 68 Me. 489, 28 Am. Rep. 80; so where he leaves goods at the inn without indicating any intention to become a guest; Toub v. Schmidt, 60 Hun 409, 15 N. Y. Supp. 616; so when a guest paid his bill and left the inn, having deposited money with a clerk, to be kept till his return; Whitemore v. Haroldson, 2 Lea (Tenn.) 312. It terminates when the guest delivers his baggage to a porter to be checked for safe keeping, the porter having no authority to receive it, and pays his bill, and in his absence the baggage is stolen; Glenn v. Jackson, 93 Ala. 342, 9 South. 259, 12 L. R. A. 382.

The business of an innkeeper at common law is of a *quasi* public character invested with many privileges and burdened with many responsibilities; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. They are not insurers of the safety of their guests. They are bound only to reasonable care. They

are not liable for acts of their servants beyond the scope of their employment; Clancy v. Barker, 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653 (citing 47 L. J. C. P. 598; Weeks v. McNulty, 101 Tenn. 499, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; Stanley v. Bircher's Ex'r, 78 Mo. 245, 248; Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148), Thayer, C. J., dissented upon the ground that the relation of an innkeeper to his guest is practically like that of a common carrier to a passenger, citing Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682. He must protect a guest against third persons; *a fortiori*, he must protect him from injuries from his servants, and since the servants are provided, among other things for the purpose of protecting guests, every injury inflicted upon the guest by the servant, either intentionally or negligently, is a breach of his duty of protection and renders the innkeeper liable to the guest; Clancy v. Barker, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682; Curran v. Olson, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517; *contra*, Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 554. In Rommel v. Schambacher, 120 Pa. 579, 11 Atl. 779, 6 Am. St. Rep. 732, the same rule was applied where the assault (a practical joke) was by the plaintiff's drunken companion in a saloon, but in full view of the defendant. He is bound to take in and receive all travellers and wayfaring persons, and to entertain them, if he can accommodate them, for a reasonable compensation; Wand. Inns, 46; 3 B. & Ald. 285; 4 Exch. 367. See Willis v. McMahan, 89 Cal. 156, 26 Pac. 649. For a refusal to do so he is liable civilly and criminally; 7 C. & P. 213. While he must accept all proper persons if he has room, he need not assign a guest to any particular apartment; but a room once assigned to a guest is his until he gives it up, subject to the right of access of the innkeeper at all reasonable times and for all reasonable purposes; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969. If all rooms are full he need not receive guests; [1902] 1 K. B. 696.

It is no defence that the traveller did not tender the price of his entertainment, or that the guest was travelling on Sunday, or that the innkeeper had gone to bed, or that the guest refused to tell his name, otherwise if the guest was drunk, or was behaving in an improper manner; Com. v. Naylor, 34 Pa. 86; 7 C. & P. 213. He may enforce reasonable rules to prevent immorality, drunkenness or other offensive conduct, inconsistent with the proprieties of life; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 127 Am. St. Rep. 969, 21 L. R. A. (N. S.) 860. The innkeeper may demand prepayment; 9 Co. 87. He may not exclude persons from entering the inn and going into the public room on lawful business; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209.

He must guard their goods with proper diligence. It has been held that he is liable only for the goods which are brought within the inn; 8 Co. 32; Scheffer v. Corson, 5 S. D. 233, 58 N. W. 555. A delivery of the goods into the personal custody of the innkeeper is not, however, necessary in order to make him responsible; for, although he may not know anything of such goods, he is bound to pay for them if they are stolen or carried away, even by an unknown person; Dig. 4, 9, 1; 3 B. & Ald. 283; 1 Sm. L. C. 47; Washburn v. Jones, 14 Barb. (N. Y.) 193; 8 Co. 32; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240; Labold v. Hotel Co., 54 Mo. App. 567; Quinton v. Courtney, 2 N. C. 41; Houser v. Tully, 62 Pa. 92, 1 Am. Rep. 390. Thus, when a guest's luggage was, at his suggestion, taken to the commercial room, 8 B. & C. 9; and when a lady's reticule with money in it was left for a few minutes on a bed in her room; 2 B. & Ad. 803; the innkeeper was held liable; and if he receive the guest, the custody of the goods may be considered as an accessory to the principal contract, and the money paid for the apartments as extending to the care of the box and portmanteau; Jones, Bailm. 94; 1 Bla. Com. 430; 2 Kent 458. The particular responsibility of an innkeeper does not extend to goods lost or stolen from a room occupied by a guest for a purpose of business distinct from his accommodation as guest, such as the exhibition of samples of merchandise; Fisher v. Kelsey, 121 U. S. 383, 13 Sup. Ct. 929, 30 L. Ed. 930. The liability of an innkeeper is the same in character and extent with that of a common carrier; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Manning v. Wells, 9 Humphr. (Tenn.) 746, 51 Am. Dec. 688; Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303; 8 B. & C. 9; Norcross v. Norcross, 53 Me. 163; Thickstun v. Howard, 8 Blackf. (Ind.) 535.

He is an insurer of a guests's goods; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 21 L. R. A. (N. S.) 860, 127 Am. St. Rep. 969; he owes the duty of safely keeping the property of his guests; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. Even where the plaintiff's horse and wagon containing goods of value were destroyed in the night by fire, the cause of which was unknown it was held that the innkeeper was liable; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; *contra*, Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127, n. See 6 L. R. A. 483,

n. It is held that he is *prima facie* liable for the loss of goods; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576; Watt v. Kilbury, 53 Wash. 446, 102 Pac. 403.

His liability does not cease as soon as the guest has paid his bill and left; the guest has a reasonable time to remove his baggage; Kaplan v. Titus, 64 Misc. 81, 117 N. Y. Supp. 944. An innkeeper is liable for a valise delivered to the hotel porter at leaving; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576. He is liable for baggage entrusted by a guest to a hotel porter sent to a railroad station to solicit guests; Coskery v. Nagle, 83 Ga. 696, 10 S. E. 491, 6 L. R. A. 483, 20 Am. St. Rep. 333; but not if he changes his mind and does not go to the hotel; Tulane Hotel Co. v. Holohan, 112 Tenn. 214, 79 S. W. 113, 105 Am. St. Rep. 930, 2 Ann. Cas. 345; or merely goes there, receives a telegram and leaves without registering; L. R. 12 Q. B. Div. 27.

He is responsible for the acts of his domestics and servants, as well as for the acts of his other guests, if the goods are stolen or lost; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; McDonald v. Edgerton, 5 Barb. (N. Y.) 560; Labold v. Hotel Co., 54 Mo. App. 567; but he is not responsible for any tort or injury done by his servants or others to the person of his guest, without his own co-operation or consent; 8 Co. 32. But it has been held that he is liable to a female guest for a servant's unjustifiable acts in the course of his employment in forcing his way into her room while she was in scant attire, accusing her of immoral conduct and ordering her to leave the hotel; De Wolf v. Ford, 193 N. Y. 397, 86 N. E. 527, 127 Am. St. Rep. 969, 21 L. R. A. (N. S.) 860; he must exercise reasonable care that neither he nor his servants shall by uncivil, harsh, or cruel treatment, destroy the comfort or peace of the guest; *id.*

The innkeeper will be excused whenever the loss has occurred through the fault of the guest, the act of God, or of the public enemy; 4 M. & S. 306; Hadley v. Upshaw, 27 Tex. 547, 86 Am. Dec. 654; Elcox v. Hill, 98 U. S. 218, 25 L. Ed. 103. An omission on the part of the guest to lock his door will not necessarily prevent his recovery; 6 H. & N. 265; Classen v. Leopold, 2 Sweeny (N. Y.) 705. Where a guest was given a room temporarily and in his absence his baggage was placed in the hall, the innkeeper was held liable for its loss; [1891] 2 Q. B. 11. When the guest misleads the innkeeper as to the value of a package and thus throws him off his guard, it has been held that he cannot recover; Edw. Bailm. § 466. See Bendetson v. French, 46 N. Y. 266. The failure of a guest to inform an innkeeper that his valise placed in the cloak or baggage room, contains valuables, is not negligence; Bowell v. De Wald, 2 Ind. App. 303, 28 N. E. 430, 50 Am. St. Rep. 240; guest may retain personal custody of necessary wearing apparel and jewelry worn daily, for which the innkeeper becomes liable; Fay v. Imp. Co., 93 Cal. 253, 26 Pac. 1099, 28 Pac. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; a guest may recover for the loss of goods brought into the inn in the usual manner; Epps v. Hinds, 27 Miss. 657, 61 Am. Dec. 528; Sasseen v. Clark, 37 Ga. 242.

An innkeeper may make reasonable regulations as to the manner in which he will receive and keep goods; Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 114, 24 Am. Dec. 129. He must furnish reasonable accommodations. See 8 M. & W. 269. When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safekeeping of such property; Labold v. Hotel Co., 54 Mo. App. 567.

The innkeeper is entitled to a just compensation for his care and trouble in taking care of his guest and his property; and, to enable him to obtain this, the law invests him with some peculiar privileges, giving him a lien upon the goods brought into the inn by the guest, and, it has been said, upon the person of his guest (*contra*, 3 M. & W. 248), for his compensation; 3 B. & Ald. 287; see Mowers v. Fethers, 61 N. Y. 34, 19 Am. Rep. 244; Dunlap v. Thorne, 1 Rich. (S. C.) 213; McDaniels v. Robinson, 26 Vt. 335, 62 Am. Dec. 574; 3 M. & W. 248; Cook v. Kane, 13 Or. 482, 11 Pac. 226, 57 Am. Rep. 28; and this though the goods belong to a third person, if the innkeeper was ignorant of the fact; Schoul., Bailm. 326; 12 Q. B. 197; Young v. Kimball, 23 Pa. 193; Fox v. McGregor, 11 Barb. (N. Y.) 41; Covington v. Newberger, 99 N. C. 523, 6 S. E. 205; Manning v. Hollenbeck, 27 Wis. 202; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568; a lien was also held to attach upon the goods of the wife; 25 Q. B. Div. 491. Sewing machines were sent by his principal to a commercial traveller while he was at an inn, to be used in the course of business for sale to customers in the neighborhood. The innkeeper had express notice that they were the property of the employer but he received them as the baggage of the traveller, who left the inn without paying his bill; held that the innkeeper had a lien on the goods for the amount of the bill; [1895] 2 Q. B. 501. The court below considered that the question of knowledge was immaterial, because "the goods in question were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the inn-

keeper would consequently be bound to receive into his inn and to take care of while they were there."

At common law this lien could be enforced only by legal proceedings, and not by a sale; Fox v. McGregor, 11 Barb. (N. Y.) 41; Edw. Bailm. § 476. This has been changed in New York by statute. As to detaining the horse of a guest, see Peet v. McGraw, 25 Wend. (N. Y.) 654; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471. The landlord may also bring an action for the recovery of his compensation. Where an innkeeper owes his guest for labor more than the guest owes for board, he has no lien; Hanlin v. Walters, 3 Colo. App. 519, 34 Pac. 686. An innkeeper's lien does not attach to goods in possession of one who is received as a boarder, and not as a guest or traveller; Singer Mfg. Co. v. Miller, 52 Minn. 516, 55 N. W. 56, 21 L. R. A. 229, 38 Am. St. Rep. 568.

An innkeeper in a town through which lines of stages pass has no right to exclude the driver of one of these lines from his yard and the common public rooms where travellers are usually placed, who comes there at proper hours, and in a proper manner, to solicit passengers for his coach and without doing any injury to the innkeeper; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209.

The common-law liability of innkeepers has been changed in England and in most of the states by statute which provides that the innkeeper shall not be liable for money, etc., if he provides a safe for safe-keeping, and duly notifies his guests thereof. If due notice is not given, the common-law liability remains; Holstein v. Phillips, 146 N. C. 366, 59 S. E. 1037, 14 L. R. A. (N. S.) 475, 14 Ann. Cas. 323; L. R. 2 Ex. Div. 463. If, under the statute, the guest delivers the articles to the innkeeper, the latter's liability is not affected by the statute.

Where a trunk filled with goods for sale was left by an expressman on the sidewalk in the usual place in front of the inn and the expressman's check was given to the clerk, the innkeeper was held not liable; Becker v. Haynes, 29 Fed. 441; so of a stock of jewelry left with an attendant in the coat room; Elcox v. Hill, 98 U. S. 218, 25 L. Ed. 103; and of a package containing a gold locket of the value of $221 handed to the clerk without any information as to its contents; Horton v. Arcade Co., 114 Mo. App. 357, 89 S. W. 363.

Under the New York statute an innkeeper was held not liable for $50 stolen from under the guest's pillow while asleep; but was liable for a valuable watch; Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728; see also Becker v. Warner, 90 Hun 187, 35 N. Y. Supp. 739; and for a gold watch and silver forks and a silver soup ladle stolen from a guest's trunk; Briggs v. Todd, 28 Misc. 208, 59 N. Y. Supp. 23. But in Rains v. Maxwell House Co., 112 Tenn. 219, 79 S. W. 114, 64 L. R. A. 470, 2 Ann. Cas. 488, the statute was held to apply to a watch. Money necessary for travelling expenses ($90) and a watch were held not within the statute; Maltby v. Chapman, 25 Md. 310. If the innkeeper is shown to have been negligent he is liable to the full value of the goods; [1891] 2 Q. B. 11; otherwise under the English statute, only for their value up to £30.

The act does not apply where a guest had packed her goods to leave the hotel and delivered them to the hotel porter sent to receive them; Rockhill v. Hotel Co., 237 Ill. 98, 86 N. E. 740, 22 L. R. A. (N. S.) 576; nor where the loss of goods is due to the negligence of the innkeeper's servant; *id.*

It has been held that a hotelkeeper, in whose safe a boarder deposits money for safe-keeping, is no more than a bailee, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of proof of want of ordinary care in employing him; Taylor v. Downey, 104 Mich. 532, 62 N. W. 716, 29 L. R. A. 92, 53 Am. St. Rep. 472. See Beale, Innkeepers.

INNOCENCE. The absence of guilt. See PRESUMPTION.

An act authorizing one alleging that he had been unjustly convicted of crime to present a claim for damages to the state board of claims was passed in New York in 1905. See Roberts v. State, 160 N. Y. 217, 54 N. E. 678.

Provisions for the compensation of innocent persons who have been imprisoned exist in many European states, including Germany, Hungary, Austria, France, Denmark, Sweden, Norway, Portugal and Spain and in Mexico. See 3 Journ. Cr. L. & Criminology 684.

INNOCENT AGENT. One who does the forbidden thing, moved thereto by another person, yet incurs no legal guilt, because either not endowed with sufficient mental capacity or not acquainted with the necessary facts. Bish. Cr. L. § 310; Smith v. State, 21 Tex. App. 107, 17 S. W. 552.

INNOCENT CONVEYANCES. **In English Law.** A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture: these are conveyances by lease and release, bargain and sale, and a covenant to stand seised by a tenant for life. 1 Chitty, Pr. 243.

INNOMINATE CONTRACTS. **In Civil Law.** Contracts which have no particular names, as permutation and transaction. Inst. 2. 10. 13. There are many innominate contracts; but the Roman lawyers reduced them to four classes, namely, *do ut des*, *do ut facias*, *facio ut des*, and *facio ut facias*. Dig. 2. 14. 7. 2.

INNONIA. In Old English Law. A close or inclosure (*clausum inclausura*). Spel. Gloss.

INNOTESCIMUS (Lat.). In English Law. An epithet used for letters patent, which are always of a charter of feoffment, or some other instrument not of record, concluding with the words *Innotescimus per præsentes*, etc. Tech. Dict.

INNOVATION. In Scotch Law. The exchange of one obligation for another, so that the second shall come in the place of the first. Bell, Dict. Also the earlier use for NOVATION.

INNOXIARE. To purge one of a fault and declare him innocent. Toml.

INNS OF CHANCERY. See INNS OF COURT.

INNS OF COURT. Voluntary noncorporate legal societies seated in London having their origin about the end of the 13th and the beginning of the 14th century. Encyc. Brit. They consist of the Inns of Court and Chancery.

The four principal Inns of Court are the Inner Temple, Middle Temple, Lincoln's Inn, and Gray's Inn.

To each of the four Inns of Court certain Inns of Chancery were attached. To the Inner Temple, Clifford's Inn, Lyon's Inn and Clements' Inn; to the Middle Temple, the Strand Inn, New Inn and a third of which the name even is forgotten; to Lincoln's Inn, Thavie's Inn (Thavy) and Furnival's Inn; and to Gray's Inn, Staple Inn and Barnard's Inn. In these dwelt the clerks of the chancery who prepared the original writs issuing out of chancery, and also the younger apprentices who acquired some elementary knowledge of civil procedure by copying those writs. Many students entered an Inn of Chancery and passed from there to an Inn of Court. In Hale's time this custom had become obsolete. These Inns of Chancery gradually fell into the hands of solicitors and now have ceased to exist. See [1902] 1 Ch. 774; Odg. C. L. 1424. See 17 L. Q. R. 7, citing [1902] 2 Ch. 511.

There were formerly two (if not three) Serjeant's Inns, whose membership was confined to the Serjeants and Judges of the Superior Courts of Westminster. They no longer exist. See SERJEANTS-AT-LAW.

Of the origin of the Inns of Court Inderwick says: "The fixture of a certain court for the trial of civil causes in London also encouraged the calling or profession of advocacy, and led to the institution of the Inns of Court, where students of the law could congregate as at a University, hear lectures on the Roman law and the laws of their country, and prepare themselves for their future duties." King's Peace 91. Each inn is self-governing, and quite distinct from all others, all, however, possessing equal privileges; but latterly they have joined in imposing certain educational tests for the admission of students. It is entirely in the discretion of an inn of court to admit any particular person as a member. One who desires to enter must have passed an examination at some University in the British Dominion, approved by the Council of Legal Education, or some other examination required by the Consolidated Regulations of the four Inns.

No person can be called to the bar, and therefore no person can become a judge, unless he is a member of an Inn of Court. The Benchers of the four Inns are said to have the power to disbar barristers of their Inn; but see BARRISTER. As to the exercise of such power, see COUNCIL OF THE BAR. The Inns are not subject to the jurisdiction of the courts, but only to the control of the judges as visitors. See L. R. 18 Eq. 127.

The Benchers and Readers of the Inns were those who have publicly lectured in their Inn. They governed their Inn, under a Treasurer or Pensioner. From the Readers, the Serjeants-at-Law were usually appointed. Below them came the Utter-Barristers. The remaining or junior members were Inner-Barristers. 2 Holdsw. Hist. E. L. 423.

See Leaming, Phila. Lawy. in London Courts; Odgers, C. L.; 2 Holdsw. Hist. E. L.; [1900] 2 Ch. 511 (as to Clifford's Inn); BENCHERS; BARRISTERS; Bellot, Exclusion of Attorneys from Inns of Court in 26 L. Q. R. 37, and Jurisdiction of the Inns of Court over Inns of Chancery in 26 L. Q. R. 384; L. R. 18 Eq. 127; Bellot, Inner & Middle Temple, with bibliography.

INNUENDO (Lat. *innuere*, to nod at, to hint at; meaning. The word was used when pleadings were in Latin, and has been translated by "meaning").

In Pleading. A clause in the declaration, indictment, or other pleading containing an averment which is explanatory of some preceding word or statement.

An averment of the meaning of alleged libellous words. Collins v. Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636. The defamatory meaning which the plaintiff sets on words complained of, in an action for libel; its office is to show how they came to have that defamatory meaning and how they relate to him. Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

It derives its name from the leading word by which it was always introduced when pleadings were in Latin. It is mostly used in actions of slander, and is then said to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Stark. Sland. 431.

It is the office of an innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they come to have that meaning, and also to show how they relate to the plaintiff, whenever that is not clear on the face of them; Odg. Lib. & Sl. *100. See COLLOQUIUM. It may be used to point to the plaintiff as the person intended

in the defendant's statement. It may show that a general imputation of crime is intended to apply to the plaintiff; Heard, Sland. § 226; 1 H. L. Cas. 637; Nestle v. Van Slyck, 2 Hill (N. Y.) 282; but it cannot be allowed to give a new sense to words where there is no such charge; 8 Q. B. 825. See Glatz v. Thein, 47 Minn. 278, 50 N. W. 127.

Where a defamatory meaning is apparent on the face of the libel itself, no innuendo is necessary, though often inserted; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119; Republican Pub. Co. v. Miner, 3 Cal. App. 568, 34 Pac. 485; where the words *prima facie* are not actionable, an innuendo is essential to the action; Odg. Lib. & Sl. *99.

Its office is to deduce inferences from premises already stated, not to state the premises themselves. An innuendo is not an issuable averment. Facts extrinsic to the article and essential to the identification of the article with the person complaining cannot be embodied in an innuendo; Duvivier v. French, 104 Fed. 278, 43 C. C. A. 529, per Grosscup, C. J., citing McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60.

It may point to the injurious and actionable meaning, where the words complained of are susceptible of two meanings; 8 Q. B. 841; and generally explain the preceding matter; 12 Ad. & E. 317; but cannot enlarge and point the effect of language beyond its natural and common meaning in its usual acceptation; Heard, Sland. § 219; Newell, Def. Sland. & L. 619, 620; 9 Ad. & E. 282; Commonwealth v. Snelling, 15 Pick. (Mass.) 335; Viedt v. Newspaper Co., 19 D. C. 534; unless connected with the proper introductory averments; 1 C. B. 728; Ryan v. Madden, 12 Vt. 51; Maxwell v. Allison, 11 S. & R. (Pa.) 343; Van Vechten v. Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339. These introductory averments need not be in the same count; 2 Wils. 114; Bloss v. Tobey, 2 Pick. (Mass.) 329. Where the language of an alleged libel was ambiguous, the innuendoes averring the meaning plaintiff claimed should be attached to the words complained of, are proper; Barnard v. Pub. Co., 63 Hun 626, 17 N. Y. Supp. 573.

For the innuendo in case of an ironical libel, see 7 Dowl. 210; 4 M. & W. 446.

If not warranted by preceding allegations, it may be rejected as superfluous; Heard, Sland. § 225; but only where it is bad and useless,—not where it is good but unsupported by evidence, even though the words would be actionable without an innuendo; Newell, Def. Sland. & L. 629; 3 H. L. Cas. 395; 1 Ad. & E. 558; 4 B. & C. 655; Cro. Eliz. 609. See Turton v. New York Recorder, 3 Misc. 314, 22 N. Y. Supp. 766.

In the case of words not *per se* actionable, the innuendo must be pleaded and proved; Unterberger v. Scharff, 51 Mo. App. 102.

See LIBEL.

INOFFICIOSUM (Lat.). **In Civil Law.** Inofficious; contrary to natural duty or affection. Used of a will of a parent which disinherited a child without just cause, or of that of a child which disinherited a parent, and which could be contested by *querela inofficiosi testamenti;* designated by Blackstone as remarkable on the ground "that the testator had lost the use of his reason;" 1 Com. 447; 2 *id.* 502; 2 Steph. Com. 589; Dig. 2. 5. 3, 13; Paulus, lib. 4, tit. 5, § 1. Even a brother or sister could set aside such a testament if the person actually instituted heir was *turpis* or infamous. The old writ *de rationabili parte bonorum,* in the English law, resembled in some respects the *querela inofficiosi testamenti;* but there is nothing which corresponds to it in the English law at the present day; Moz. & W.

INOFFICIOUS TESTAMENT. **In Civil Law.** A testament contrary to the natural duty of the parent, because it totally disinherited the child, without expressly giving the reason therefor. See preceding title.

INOFICIOCIDAD. **In Spanish Law.** Every thing done contrary to a duty or obligation assumed, as well as in opposition to the piety and affection dictated by nature: *inofficiosum dicitur id omne quod contra pietatis officium factum est.* The term applies especially to testaments, donations, dower, etc., which may be either revoked or reduced when they affect injuriously the rights of creditors or heirs.

INOPS CONSILII (Lat.). Destitute of or without counsel. In the construction of wills a greater latitude is sometimes given, because the testator is supposed to have been *inops consilii.*

INORDINATUS. An intestate.

INPENY and OUTPENY. Money which by the custom of some manors is paid by an incoming and an outgoing tenant. Spelm.; Holth.

INQUEST. A body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the *grand inquest.*

The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition.

The most familiar use of the word is to designate the inquiry by a coroner *(q. v.)* into the causes of death, whether sudden, violent, or in prison. To justify an inquest it is not necessary that a death should be both sudden and violent; either is sufficient; Lancaster County v. Dern, 2 Grant (Pa.) 262. The authority to hold an inquest extends to bodies brought into the county; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59

Am. Rep. 483; and when a person died in one county and was buried in another it was held that the inquest should be held by the coroner of the latter. After the verdict is returned the duty is completed and a second inquest cannot be held unless the first is quashed by a competent court; 3 El. & El. 137. No inquest can be held in any case except upon view of the body; this is jurisdictional and can be waived by no one; 3 B. & A. 260; if buried it may be exhumed, but must be reburied; 2 Hawk. P. C. 77. A *post-mortem* examination may be ordered; Allegheny County v. Watt, 3 Pa. 462; but it should not be made before the jury have viewed the body; 1 Witth. & Beck. Med. Jur. 336; nor should it be in the presence of the jury, but they are to be instructed by the testimony of the physicians designated to make it; People v. Fitzgerald, 105 N. Y. 146, 11 N. E. 378, 59 Am. Rep. 483.

See DEAD BODY.

In holding an inquest the coroner acts judicially; Com. v. Hawkins, 3 Gray (Mass.) 463; People v. Devine, 44 Cal. 452; Boisliniere v. Board of County Com'rs, 32 Mo. 375. No person is entitled by reason of being suspected of causing the death, to be present, or to have counsel, or cross-examine the witnesses or produce others; 2 Hawk. P. C. 77; Crisfield v. Perine, 81 N. Y. 622, affirmed 15 Hun 200. The coroner may select and summon the jurors of inquest and fine any who are absent for non-attendance; Ex parte McAnnully, T. U. P. Charlt. (Ga.) 310; they must be sworn; 3 B. & A. 260; and this must appear in the certificate or be proved *aliunde;* People v. White, 22 Wend. (N. Y.) 167; they are the sole arbiters of the facts; but the coroner may instruct them in the law; *id.;* and compel the attendance of witnesses, for which purpose he has common-law powers; Com. v. Taylor, 11 Phila. (Pa.) 387.

After hearing the evidence the jury should retire to deliberate upon their verdict, without the presence of the coroner, and, when agreed upon, it should be put in writing and is final, and the inquisition should be signed by the coroner and jury; 6 C. & P. 179, 602; the jury may sign by marks; State v. Evans, 27 La. Ann. 297; and if several bear the same Christian and surname they need not be distinguished in the caption by abode or otherwise; 7 C. & P. 538.

The effect of the inquisition is to authorize the arrest and commitment of the person charged by it, and upon his arrest he may make his own statement and have it returned with the inquisition, but he cannot be discharged until his case is passed upon by the grand jury; People v. Collins, 20 How. Pr. (N. Y.) 111; except of course after hearing by a judge upon *habeas corpus.*

The testimony of a witness, not charged with crime, given at the inquest may be used against him, if afterwards accused; he must claim his privilege if he wishes to protect himself; Williams v. Com., 29 Pa. 102; Clough v. State, 7 Neb. 320; but if at the time of inquest he is in custody on suspicion, he cannot be examined as a mere witness, but only as an accused party in the same manner as if brought before a committing magistrate; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; the doctrine that silence gives consent does not apply to a coroner's inquest; People v. Willett, 92 N. Y. 29. These rules were settled by the New York court of appeals as the result of a series of cases; Hendrickson v. People, 10 N. Y. 13, 61 Am. Dec. 721; People v. McMahon, 15 N. Y. 384; Teachout v. People, 41 N. Y. 7; People v. Mondon, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; People v. McGloin, 91 N. Y. 241.

Where the accused testifies voluntarily at the coroner's inquest, his evidence may be used against him on his subsequent trial for murder; Reg. v. Wiggins, 10 Cox C. C. 562. But testimony given by persons suspected of crime cannot be regarded as voluntary, so as to be admissible upon a subsequent trial, if, because of the temper of the community, their refusal to answer questions would almost certainly have resulted in their immediate arrest; Tuttle v. People, 33 Colo. 243, 79 Pac. 1035, 70 L. R. A. 33, 3 Ann. Cas. 513. For admissibility, on a trial for murder of testimony of accused at coroner's inquest, see note 70 L. R. A. 33.

Preventing a coroner from holding an inquest over a dead body, when it is required by law, is indictable; 13 Q. B. D. 331. Where the captain of a man-of-war, mistaking his legal duty, had prevented the coroner from holding an inquest on the body of a man hanged on his ship, the court, granting an information, refused to proceed also against his boatswain, who had participated in the transaction under his order; Andr. 231; but, adds Bishop, "an information is in a measure discretionary with the court, and perhaps on an indictment the boatswain would have been deemed liable;" 1 Bish. N. Cr. L. § 688 (3).

In Massachusetts there is now no coroner, but an inquest is held in such cases by a justice of certain designated courts, after an examination by regular medical examiners and a report that the death was caused by violence, or without such report upon the direction of the prosecuting officer. See CORONER; CONFESSION; ADMISSION.

INQUEST OF OFFICE. An inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii,* or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. It is done by a jury of no determinate

number,—either twelve, or more, or less; 3 Bla. Com. 258; Finch, Law 323. An inquest of office was bound to find for the king upon the direction of the court. The reason given is that an inquest concluded no man of his right, but only gave the king an opportunity to enter, so that he could have his right tried; 3 Bla. Com. 260; 4 Steph. Com. 61; F. Moore 730; 3 Hen. VII. 10; 2 Hen. IV. 5. An inquest of office was also called, simply, "office."

INQUEST OF SHERIFFS. An inquest which directs a general inquiry as to the methods in which the sheriffs had been conducting the local government of the country (1170). 1 Holdsw. H. E. L. 21.

INQUIRY, WRIT OF. A writ sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the *venue* is laid, and commands him to inquire, by a jury of twelve men, concerning the amount of damages. The sheriff thereupon tries the cause in his sheriff's court, and some amount must always be returned to the court. But the return of the inquest merely informs the court, which may, if it choose, in all cases assess damages and thereupon give final judgment. 2 Archb. Pr., Waterman ed. 952; 3 Bla. Com. 398; 3 Chitty, Stat. 495, 497.

INQUISITION. **In Practice.** An examination of certain facts by a jury impanelled by the sheriff for the purpose. The instrument of writing on which their decision is made is also called an inquisition. The sheriff or coroner, and the jury who make the inquisition, are called the inquest.

An inquisition on an untimely death, if omitted by the coroner, may in England be taken by justices of gaol delivery and oyer and terminer, or of the peace; but it must be done publicly and openly; otherwise it will be quashed. Inquisitions either of the coroner or of the other jurisdictions are traversable; 1 Burr. 18.

INQUISITOR. A designation of sheriffs, coroners *super visum corporis*, and the like, who have power to inquire into certain matters.

In Ecclesiastical Law. The name of an officer who is authorized to inquire into heresies, and the like, and to punish them. A judge.

INROLMENT, ENROLMENT (Law Lat. *irrotulatio*). The act of putting upon a roll.

Formerly, the record of a suit was kept on skins of parchment, which, best to preserve them, were kept upon a roll or in the form of a roll; what was written upon them was called the inrolment. After, when such records came to be kept in books, the making up of the record retained the old name of inrolment. Thus, in equity, the *inrolment* of a decree is the recording of it, and will prevent the rehearing of the cause, except on appeal or by bill of review. The decree may be enrolled immediately after it has been passed and entered, unless a *caveat* has been entered; 2 Freem. 179; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199. And before signing and inrolment, a decree cannot be pleaded in bar of a suit, though it can be insisted on by way of answer; 2 Ves. 577; Davoue v. Fanning, 4 Johns. Ch. (N. Y.) 199. See Saunders, Ord. in Ch. *Inrolment.*

Transcribing upon the records of a court deeds, etc., according to the statutes on the subject. See 1 Chitty, Stat. 425, 426; 2 *id.* 69, 76–78; 3 *id.* 1497. Placing on file or record generally; as annuities, attorneys, etc.

INSANE PERSON. See INSANITY.

INSANITY. **In Medical Jurisprudence.** The prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual in health.

Insanity is such a deprivation of reason that the subject is no longer capable of understanding and acting with discretion in the ordinary affairs of life. Snyder v. Snyder, 142 Ill. 60, 31 N. E. 303.

Legal insanity, which exonerates from crime or incapacitates from civil action, is a mental deficiency with reference to the particular act in question and not a general incapacity. It is the latter only as the result of judicial ascertainment that a person is *non compos mentis*, by inquisition in lunacy, or similar statutory proceeding, and this only results in a general civil disability and not, *proprio vigore*, in immunity from punishment for crime.

It results that there can be no general definition of legal insanity. It is a state or condition which must be noted with reference to each class of actions to which it is applied.

In criminal law it "is any defect, weakness, or disease of the mind rendering it incapable of entertaining, or preventing its entertaining in the particular instance, the criminal intent which constitutes one of the elements in every crime." 1 Bish. New Cr. L. § 381.

As a cause of civil incapacity it is such defect or weakness as prevents rational assent to a contract or due consideration of the facts properly and naturally entering into the testamentary disposition of one's estate. It is a want of due proportion in quality or quantity, or both,—between the mental capacity and power and the particular act, civil or criminal, as to which the inquiry arises.

The legal and the medical ideas of insanity are essentially different, and the difference is one of substance. The failure to keep it in mind has been the fruitful cause of confusion in trials involving the question of mental capacity for crime or contract, and has tended to render valueless and often absurd the testimony of witnesses called as experts. Many of these have testified without any conception of the real nature and definition of the insanity, which alone could have relation to the case.

The distinction between the medical and the legal idea of insanity has, perhaps, not been better stated than by Ray, who is quoted by Ordronaux, and again by Witthaus & Becker: "*Insanity in medicine* has to do with a prolonged departure of the individual from his natural mental state arising from bodily disease." "*Insanity in law* covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act." 1 Whitth. & Beck. Med. Jur. 181; U. S. v. Faulkner, 35 Fed. 730.

Of late years this word has been used to designate all mental impairments and deficiencies formerly embraced in the terms *lunacy, idiocy,* and *unsoundness of mind.* Even to the middle of the last century the law recognized only two classes of persons requiring its protection on the score of mental disorder, viz.: *lunatics* and *idiots.* The former were supposed to embrace all who had lost the reason which they once possessed and their disorder was called *dementia accidentalis;* the latter, those who had never possessed any reason, and this deficiency was called *dementia naturalis.* Lunatics were supposed to be much influenced by the moon; and another prevalent notion respecting them was that in a very large proportion there occurred *lucid intervals,* when reason shone out, for a while, from behind the cloud that obscured it, with its natural brightness. It may be remarked, in passing, that lucid intervals are far less common than they were once supposed to be, and that the restoration is not so complete as the descriptions of the older writers would lead us to infer. In modern practice, the term lucid interval signifies merely a remission of the disease, an abatement of the violence of the morbid action, a period of comparative calm; and the proof of its occurrence is generally drawn from the character of the act in question. It is hardly necessary to say that this is an unjustifiable use of the term, which should be confined to the genuine lucid interval that does occasionally occur.

It began to be found at last that a large class of persons required the protection of the law, who were not idiots, because they had reason once, nor lunatics in the ordinary signification of the term, because they were not violent, exhibited no very notable derangement of reason, were independent of lunar influences, and had no lucid intervals. Their mental impairment consisted in a loss of intellectual power, of interest in their usual pursuits, of the ability to comprehend their relations to persons and things. A new term—*unsoundness of mind*—was therefore introduced to meet this exigency; but it has never been very clearly defined.

The law has never held that *all* lunatics and idiots are absolved from all responsibility for their civil or criminal acts. This consequence was attributed only to the severest grades of these affections,—to lunatics who have no more understanding than a brute, and to idiots who cannot "number twenty pence nor tell how old they are." Theoretically the law has changed but little, even to the present day; but practically it exhibits considerable improvement: that is, while the general doctrine remains unchanged, it is qualified, in one way or another, by the courts, so as to produce less practical injustice.

Insanity implies the presence of disease or congenital defect in the brain, and though it may be accompanied by disease in other organs, yet the cerebral affection is always supposed to be primary and predominant. It is to be borne in mind, however, that bodily diseases may be accompanied, in some stage of their progress, by mental disorder which may affect the legal relations of the patient.

To give a definition of insanity not congenital, or, in other words, to indicate its essential element, the present state of our knowledge does not permit. Most of the attempts to define insanity are sententious descriptions of the disease, rather than proper definitions. For all practical purposes, however, a definition is unnecessary, because the real question at issue always is, not what constitutes insanity in general, but wherein consists the insanity of this or that individual. Neither sanity nor insanity can be regarded as an entity to be handled and described, but rather as a condition to be considered in reference to other conditions. Men vary in the character of their mental manifestations, insomuch that conduct and conversation perfectly proper and natural in one might in another, differently constituted, be indicative of insanity. In determining, therefore, the mental condition of a person, he must not be judged by any arbitrary standard of sanity or insanity, nor compared with other persons unquestionably sane or insane. He can properly be compared only with himself. When a person, without any adequate cause, adopts notions he once regarded as absurd, or indulges in conduct opposed to all his former habits and principles, or changes completely his ordinary temper, manners, and disposition,—the man of plain practical sense indulging in speculative theories and projects, the miser becoming a spendthrift and the spendthrift a miser, the staid, quiet, unobtrusive citizen becoming noisy, restless, and boisterous, the gay and joyous becoming dull and disconsolate even to the verge of despair, the careful, cautious man of business plunging into hazardous schemes of speculation, the discreet and pious becoming shamefully reckless and profligate,—no stronger proof of insanity can be had. And yet not one of these traits, in and by itself alone, disconnected from the natural traits of character, could be regarded as conclusive proof of insanity. In accordance with this fact, the principle has been laid down, with the sanction of the highest legal and medical authority, that it is the prolonged departure, without any adequate cause, from the states of feeling and modes of thinking usual to the individual when in health, which is the essential feature of insanity. Gooch, Lond. Quart. Rev. xliii. 355; Combe, Ment. Derang. 196; Meidway v. Croft, 3 Curt. Eccl. 671.

Insanity produced by alcoholism is of two kinds: Delirium tremens, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink, and called "settled insanity," to distinguish it from "temporary insanity," or drunkenness, directly resulting from drink; Evers v. State, 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L. R. A. 421, 37 Am. St. Rep. 811. See DRUNKENNESS.

Criminal Responsibility. There is a concurrence in the law of civilized countries in absolving persons mentally unsound from criminal responsibility. In France, Germany, and Austria the rule is in substance that if a person is unconscious of the nature of his

act, or his will is affected or the character of the act is not perceived, there is no crime; 1 Witth. & Beck. Med. Jur. 181; Krafft-Ebing, *Ger. Psycho-Path.*

That insanity, in some of its forms, annuls all criminal responsibility, and, in the same or other forms, disqualifies its subject from the performance of certain civil acts, is a well-established doctrine of the common law. In the application of this principle there has prevailed, for many years, the utmost diversity of opinion. The law as expounded by Hale, who divided insanity into partial insanity as to certain subjects, partial as to degree, and total insanity, was that partial insanity was not sufficient to excuse a person in the committing of any capital offence; 1 Hale, P. C. 30; and his doctrine was received without question until the beginning of the present century; 8 How. St. Tr. 322; 16 *id.* 764; 19 *id.* 947.

This ancient doctrine received its first serious shock in Hadfield's case, 27 *id.* 1281, 1311, in which Erskine, for the defence, admitted the language used by Coke and Hale as to requiring deprivation of memory and understanding to absolve from crime, but contended that, if taken literally, the words would apply to idiocy alone. He insisted that "of all the cases that have filled Westminster Hall with complicated considerations, the insane persons have not only had the most perfect knowledge and recollection of all the relations in which they stood towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness; and that delusion of which the criminal act in question was the immediate unqualified offspring, was the kind of insanity which should rightly exempt from punishment." These views prevailed and Lord Kenyon held that the prisoner was deranged immediately prior to the act and that it was unlikely that he had meanwhile recovered, though, strictly speaking, proof might be required of his condition at the very moment of the shooting; accordingly the prisoner was acquitted with the approbation of the court. Subsequently, in Bellingham's case, 1 Collinson, Lun. 636; Shelf. Lun. 462, Lord Mansfield held that it must be proved that the prisoner was incapable of judging between right and wrong; that at the time of the act he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse crime. Similar language was used in Parker's case, Collin. Lun. 477; Higginson's case, 1 C. & K. 129; Stokes' case, 3 C. & K. 185, and so for about a generation the law of England was practically as settled by Hadfield's and Bellingham's cases, though there were occasional variations from it. The special feature of the law of that period was that, to make a person responsible for crime, there must be a knowledge of right and wrong in the abstract. But the tendency of the cases was towards the modification of the test, so as to make the knowledge of right and wrong refer solely to the act in question; 5 C. & P. 168; 9 *id.* 525; 1 Cox, Cr. Cas. 80; 3 *id.* 275. This was pronounced to be the law by the English judges, in their answer to the questions propounded to them by the House of Lords on the occasion of the McNaghten trial, 10 Cl. & F. 200, where it was said by Tindal, C. J., for himself and the other judges: "To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature or quality of the act he was doing; or, if he did know it, that he was not aware he was doing what was wrong." Most of the English cases will be found in 1 Russ. Cr., Shars. ed. 14, and in the notes will be found a collection of American cases.

The test laid down in McNaghten's case has been generally applied in England and this country. In the former it has been definitely recognized as the law, and in the latter it has been generally adopted, though with frequent variations, as will appear *infra.*

As to the answers of the judges, Sir J. F. Stephen (3 Hist. Cr. L. 154) has stated his opinion that their authority is questionable, adding that he "knows that some of the most distinguished judges on the bench have been of the same opinion"; he also observes that they "leave untouched the most difficult questions connected with the subject." It appears that, since that case, neither the Court for Crown Cases Reserved nor any other English court in banc has delivered a considered written opinion on the subject.

In Coleman's case, in New York, Davis, J., charged the jury that the "test of the responsibility for criminal acts, when insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time and with respect to the act which is the subject of inquiry." He left it to the jury to determine "whether or not at the time the accused committed the act she knew what she was doing, and knew that in shooting him she was doing a wrongful act." 1 N. Y. Cr. Rep. 1. With variations of expression this is the prevailing doctrine of the American courts; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 590, 21 L. Ed. 236; People v. Pico, 62 Cal. 50; State v. Windsor, 5 Harring. (Del.) 512; State v. Danby, 1 Houst. Cr. Cas. (Del.) 166; State v. West, *id.* 371; Humphreys v. State, 45 Ga. 190; Westmoreland v. State, *id.* 225; State v. Lawrence, 57 Me. 574; State v. Mahn, 25 Kan. 182; U. S. v. Faulkner, 35

Fed. 730; Com. v. Heath, 11 Gray (Mass.) 303; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; People v. Finley, 38 Mich. 482; State v. Shippey, 10 Minn. 223 (Gil. 178), 88 Am. Dec. 70; State v. Erb, 74 Mo. 199; State v. Kotovsky, 74 Mo. 247; Hawe v. State, 11 Neb. 537, 10 N. W. 452, 38 Am. Rep. 375; State v. Spencer, 21 N. J. L. 196; State v. Brandon, 53 N. C. 463; Thomas v. State, 40 Tex. 60; Dove v. State, 3 Heisk. (Tenn.) 348; Dunn v. People, 109 Ill. 635; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; Com. v. Winnemore, 1 Brewst. (Pa.) 356; Com. v. Mosler, 4 Pa. 264; U. S. v. Shults, 6 McLean, 121, Fed. Cas. No. 16,286; Walker v. People, 88 N. Y. 86; Loeffner v. State, 10 Ohio St. 599. In many of the cases it is difficult to distinguish with certainty between what the court intends for a statement of the law and what is rather in the nature of practical suggestions addressed to the jury. In a New Hampshire case it was held that no one of the circumstances ordinarily relied upon is, as a matter of law, a test of mental disease, but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury; State v. Pike, 49 N. H. 399, 6 Am. Rep. 533; and the same doctrine has been followed in other states; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Bradley v. State, 31 Ind. 492; Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634. Very similar were the remarks addressed to the jury by the Lord Justice Clerk in a Scotch Justiciary case: "The question is one of fact, that matter of fact being whether when he committed this crime the prisoner was of an unsound mind. The counsel for the crown very properly said that this was entirely for you. It is not a question of medical science, neither is it one of legal definition, although both may materially assist you. It is a question for your common and practical sense." 3 Couper 16.

It was said that mental unsoundness, to render one free from criminal liability, must be such on the particular subject out of which the acts charged as an offence are claimed to have sprung, as to render him incapable of discerning the wrong of committing the same; U. S. v. Faulkner, 35 Fed. 730; Kearney v. People, 11 Colo. 258, 17 Pac. 782. Occasionally the court has thought it sufficient for the jury to consider whether the prisoner was sane or insane,—of sound memory and discretion, or otherwise; see State v. Cory, State v. Prescott, in Ray, Med. Jur. 55. The capacity to distinguish between right and wrong has been held not to be a safe test in all cases; State v. Felter, 25 Ia. 67, per Dillon, C. J.; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. Ed. 236. See also Brown v. Com., 78 Pa. 122. In Whart. & St. Med. Jur. § 120, this test is said to be generally satisfactory, but not to cover all cases. An instruction has been sustained, where there was a defence of insanity, that the defendant was not responsible unless he was conscious of his act at the time it was committed; People v. Clendennin, 91 Cal. 35, 27 Pac. 418.

The definition of insanity, in the trial of a case involving that issue, is for the court; Whart. & St. Med. Jur. § 112; see 1 F. & F. 87; and it has entire discretion as to the method of disposing of a suggestion that the prisoner is so insane as to render him unable to make a rational defence; U. S. v. Chisholm, 149 Fed. 284.

It is not error to instruct that insanity is a defence sometimes resorted to in default of other defences, and, while it is to be justly weighed, it is to be reckoned with; People v. Allender, 117 Cal. 81, 48 Pac. 1014.

It is proper to refuse to charge that if the defendant at the time of the act was affected with a mental disease that impaired his will and rendered him likely at any time to commit such an act, he must be acquitted; People v. Barthleman, 120 Cal. 7, 52 Pac. 112. Where the accused killed his wife during an attack of epilepsy, it is not error to charge that if he was insane up to the time of the act and was sane afterwards and remained sane until the present time they should find that he was sane when he committed the act; Taylor v. U. S., 7 App. D. C. 27; Snell v. U. S., 16 App. D. C. 501.

The defence of insanity is a legal defence and an instruction that it is viewed with disfavor is error; State v. Barry, 11 N. D. 428, 92 N. W. 809. Where the accused had been twice adjudged insane and committed to an asylum, but was discharged therefrom nearly two years before the act, there was no presumption of insanity; State v. Austin, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778.

The law of self-defence is applicable alike to the insane and the sane and the two defences are consistent and either one, if sustained, would justify a verdict of "not guilty"; State v. Wade, 161 Mo. 441, 61 S. W. 800.

In homicide, where there was evidence to support the request, the court should have charged that defendant was not guilty if he was laboring under such a defect of mind and reason as not to know the nature and quality of the acts he was doing, and was incapable of forming a criminal intent; that if the jury were not convinced beyond a reasonable doubt that, on the night of the shooting, defendant was of sound mind and discretion, and was capable of forming a criminal intent, they should acquit; that it was incumbent upon the prosecution to prove beyond a reasonable doubt the criminal intent with which the fatal shot was fired, and defendant's mental capacity for forming an intent to commit the alleged crime; and that

if the jury could not say that they had a moral certainty that, on the night of the shooting, defendant's mind and discretion were sufficient for him to form a rational intent to kill, his guilt had not been established; People v. Muste, 137 Mich. 216, 100 N. W. 455.

The rule already stated as to partial insanity applies equally to delusions, which as has been stated were first brought within the law of mental irresponsibility for crime by Hadfield's case, *supra*. In McNaghten's case, *supra*, the question as to delusions was answered thus: "That if a person was acting under an insane delusion, and was in other respects sane, he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. That is to say, that the acts of the criminal should be judged as if he had really been in the circumstances he imagined himself to be in. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take his life, and he kills him, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted an injury upon him in character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." In the Guiteau case, the jury were charged by Cox, J., on this subject, as follows: "An insane delusion is never the result of reasoning and reflection. It is not generated by them and it cannot be dispelled by them. . . . Whenever convictions are founded on evidence, on comparison of facts and opinions and arguments, they are not insane delusions. The insane delusion does not relate to mere sentiments or theories, or abstract questions of law, politics, or religion. All these are the subject of opinions, which are beliefs founded on reasoning and reflection. These opinions are often absurd in the extreme, and result from naturally weak or ill-trained reasoning powers, hasty conclusions from insufficient data, ignorance of men and things, credulous dispositions, fraudulent imposture, and often from perverted moral sentiments. But still, they are opinions, founded upon some kind of evidence, and liable to be changed by better external evidence or sounder reasoning. But they are not insane delusions;" Guiteau's Case, 10 Fed. 161. Following this opinion it was said that: "An insane delusion is an incorrigible belief, not the result of reasoning in the existence of facts which are either impossible absolutely or impossible under the circumstances of the individual." State v. Lewis, 20 Nev. 333, 22 Pac. 241.

It is a logical result of the nature of delusion and its legal relations as shown by these definitions that it will be of no avail as a defence unless, if true, the facts supposed to exist would have excused the crime; *id.*; Thurman v. State, 32 Neb. 224, 49 N. W. 338; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Smith v. State, 55 Ark. 259, 18 S. W. 237. This rule is well illustrated by a case in which it was held that an instruction that "defendant would not be responsible if he killed deceased under an insane delusion that deceased was trying to marry defendant's mother, and that this delusion caused the killing," was properly refused; Bolling v. State, 54 Ark. 588, 16 S. W. 658.

In order that delusion may be a defence it must be connected with the crime, and if a person has an insane delusion upon any one subject, but commits a crime not connected therewith, he is equally guilty as if he were in all respects sane; State v. Gut, 13 Minn. 341 (Gil. 315); Bovard v. State, 30 Miss. 600; State v. Huting, 21 Mo. 464. "A man whose mind squints, unless impelled to crime by this very mental obliquity, is as much amenable to punishment as one whose eye squints." Gibson, C. J., in Com. v. Mosler, 4 Pa. 264. See also Alison, Cr. L. 647; Ray, Insan. 106, 135, 227; 3 Couper 357; State v. Simms, 71 Mo. 538; 1 Bish. N. Cr. L. 394.

"Where a defendant is acting under an insane delusion as to circumstances which, if true, would relieve the act from responsibility, such delusion is a defence;" Whart. & St. Med. Jur. § 125; but such delusions must involve an honest mistake as to the object to which the crime is directed; *id.* § 127; 3 F. & F. 839. The term delusion as applied to insanity, does not mean a mere mistake of fact, or being induced by false evidence to believe that a fact exists which does not exist; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738.

A disposition to multiply the tests, so as to recognize essential facts in the nature of insanity, has been manifested in this country to a much greater extent than in England.

The existence of an irresistible impulse to commit a crime has been recognized in the law; Steph. Cr. L. 91; and medical authorities are generally in agreement that, as it is put by Bishop, "the mental and physical machine may slip the control of its owner; and so a man may be conscious of what he is doing, and of its criminal character and consequences, while yet he is impelled to it by a power to him irresistible." 1 New Cr. L. 387; 3 Witth. & Beck. 270, 275; 1 Beck, Med. Jur., 10th ed. 723; Ray, Insan., 3d ed. §§ 17, 18, 22. But the writer last quoted adds: "Whether or not such is truly so must, in the nature of things, be a pure question of fact, it cannot be of law."

In England the courts have refused to recognize this ground of exemption from responsibility and limit the test to ability

to distinguish between right and wrong; Clarke, Cr. L. 56; 1 Bish. N. Cr. L. § 387; 3 C. & K. 185; 1 F. & F. 666; 3 Cox, C. C. 275.

The American cases are very difficult to classify with reference to this test, as indeed they are on most branches of the subject, nor is such the present purpose; all that is possible being, by reference to a selection of the cases, to illustrate the progress of the law and the direction in which, but not, critically, the precise extent to which, changes have been made since Lord Hale's time, keeping pace with the growth of scientific knowledge.

A full understanding of the scope of the doctrine now under consideration involves the further subject of power of resistance, which enters largely into this class of cases and is also more particularly referred to, *infra*.

In Roger's case, 7 Metc. (Mass.) 500, 41 Am. Dec. 458, the jury were directed to consider, in addition to the test of right and wrong, whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; and this case has been much relied on in American courts; Ray, Med. Jur. 58.

In Freth's case, 3 Phila. (Pa.) 105, Judge Ludlow charged: "If the prisoner was actuated by an irresistible inclination to kill, and was utterly unable to control his will, or subjugate his intellect, and was *not* actuated by anger, jealousy, revenge, and kindred evil passions, he is entitled to an acquittal," etc.

In the leading case of State v. Harrison it was said by Brannon, J.: "This irresistible-impulse theory test has been only recently presented, and while it is supported by plausible arguments, it is rather refined, and introduces what seems to me a useless element of distinction for a test, and is misleading to juries, and fraught with great danger to human life, so much so that even its advocates have warningly said it should be very cautiously applied and only in the clearest cases. What is this irresistible impulse? How shall we of the courts and juries know it? Does it exist when manifested in one single instance, as in the present case, or must it be shown to be habitual, or, at least, to have evinced itself in more than a single instance? . . . I admit the existence of irresistible impulse and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override judgment and obliterate the sense of right as to the acts done, and deprives the accused of power to choose between them;" 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

For other cases in which irresistible impulse is regarded as a defence, see Stevens v. State, 31 Ind. 485, 99 Am. Dec. 634; Blackburn v. State, 23 Ohio St. 146; Mutual Life Ins. Co. v. Terry, 15 Wall. (U. S.) 580, 21 L. Ed. 236; but it is held that no impulse, however irresistible, is a defence, where there is a knowledge as to the particular act between right and wrong; State v. Brandon, 53 N. C. 463; State v. Miller, 111 Mo. 542, 20 S. W. 243; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; People v. Clendennin, 91 Cal. 35, 27 Pac. 418; Thomas v. State, 71 Miss. 345, 15 South. 237; Patterson v. State, 86 Ga. 70, 12 S. E. 174; Wilcox v. State, 94 Tenn. 106, 28 S. W. 312; Tayl. Med. Jur. 720; and that it was a crime morally, and punishable by the laws of the country; State v. Alexander, 30 S. C. 74, 8 S. E. 440, 14 Am. St. Rep. 879; Williams v. State, 50 Ark. 511, 9 S. W. 5.

As a perfectly natural outgrowth of the doctrine of irresistible impulse, there is to be found in the American cases a tendency more noticeable in late years, to add an additional qualification to the right and wrong test. These cases hold, not merely that the accused, to be considered accountable, must be able to distinguish between right and wrong with respect to the act in question, but must have sufficient mental power to control his impulses.

As the theory of irresistible impulses owes much of its development to the courts of Pennsylvania, so also has this correlative doctrine of the necessity of power to control it received great attention in that state. In Mosler's case, 4 Pa. 264, Gibson, C. J., said: "His insanity must be so great as entirely to destroy his perception of right and wrong; and it is not until that perception is thus destroyed that he ceases to be responsible. It must amount to delusion or hallucination, controlling his will and making the commission of the act, in his apprehension, a duty of overruling necessity. The law is, that, whether the insanity be general or partial, the degree of it must be so great as to have controlled the will of its subject, and to have taken from him the freedom of moral action." And this language is repeated in Ortwein's case, 76 Pa. 414, 18 Am. Rep. 420, by Agnew, C. J., who declares it to be the law of the state. The essential relation of power to such cases is thus put, in Haskell's case, 2 Brewst. (Pa.) 491, by Brewster, J.: "A review of all the authorities I have been able to examine satisfies me that the true test in all these cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? In these cases has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate? If he possess this power over his imagination he will be able to expel all delu-

sive images, and the like control over his will would subdue all homicidal and other monomania. . . . I use the word power with reference to that control which humanity can expect from humanity."

Other cases supporting this view are, Smith v. Com., 1 Duv. (Ky.) 224; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458.

Other cases seem to hold that one mentally disordered, though knowing right and wrong, and that the act is forbidden and punishable, is criminally responsible whether he has power over his conduct or not; Walker v. People, 26 Hun (N. Y.) 67; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; People v. Carpenter, 102 N. Y. 238, 6 N. E. 584; Anderson v. State, 42 Ga. 9; Brinkley v. State, 58 Ga. 296; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; State v. Murray, 11 Or. 413, 5 Pac. 55; State v. Scott, 41 Minn. 365, 43 N. W. 62; State v. Pratt, Houst. Cr. Cas. (Del.) 249; State v. Pagels, 92 Mo. 300, 4 S. W. 931. Though a crime is committed through lack of sufficient will power to control the conduct, and under an irresistible and uncontrollable impulse, the offender is responsible for the act; State v. Miller, 111 Mo. 542, 20 S. W. 243. In discussing this class of cases Bishop considers that a doctrine that "our law punishes any man for what he does under a necessity which it is impossible for him to resist," would be an "unprecedented horror." He assumes that the cases which appear to hold it are to be explained upon the theory that the judges do not believe in the existence of an irresistible or uncontrollable impulse. He himself does not assume to know whether as a fact there is, but as the experts assert it, he deems it to be the duty of a judge, where there is evidence tending to support the theory, to submit it to the jury and cast the responsibility upon them. 1 Bish. N. Cr. L. § 383 *b*, 387.

To this remarkable diversity of views may be attributed, in some measure, no doubt, the actual diversity of results. To any one who has followed with some attention the course of criminal justice in trials where insanity has been pleaded in defence, it is obvious that, if some have been properly convicted, others have just as improperly been acquitted. It must be admitted, however, that the verdict in such cases is often determined less by the instructions of the court than by the views and feelings of the jury and the testimony of experts.

The defence of irresistible impulse has been the subject of legislation in some states, as in New York and Michigan, where by statute a morbid propensity, or uncontrollable impulse to commit a crime, in the mind of one who is conscious of the nature of the act or that it is wrong, or to be incapable of such knowledge, is no defence. See N. Y. Pen. Code § 21; Mich. Pen. Code §§ 19, 20.

What is sometimes called moral insanity, as distinguished from mental unsoundness, is not a defence to a charge of crime; Whart. & St. Med. Jur. §§ 164, 174; Tayl. Med. Jur. 677; 6 Jur. 201; 4 Cox, C. C. 149; Com. v. Heath, 11 Gray (Mass.) 303; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; People v. McDonell, 47 Cal. 134; People v. Kerrigan, 73 Cal. 222, 14 Pac. 849; Guiteau's Case, 10 Fed. 161; State v. Potts, 100 N. C. 457, 6 S. E. 657; People v. Wood, 126 N. Y. 269, 27 N. E. 362; Flanagan v. People, 52 N. Y. 469, 11 Am. Rep. 731; but see Smith v. Com., 1 Duv. (Ky.) 224; Scott v. Com., 4 Metc. (Ky.) 227, 83 Am. Dec. 461; Andersen v. State, 43 Conn. 514, 21 Am. Rep. 669; St. Louis Mut. Life Ins. Co. v. Graves, 6 Bush (Ky.) 268. See also Mann, Med. Jur. of Insan. 66, 120, 135. Nor, however violent and unnatural, will it defeat a will unless it is the emanation of a delusion; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

Morbid religious feelings may be of such a character as to amount to partial insanity, which, though sometimes the basis of delusions affecting criminal cases, is more frequently met with in connection with the subject of undue influence. In a case in which it was alleged that a testator was insane on the subject of spiritualism, it was held that, as an abstract proposition, a belief in spiritualism, though a person may be a monomaniac on that subject or any other form of religion, does not prove insanity; Connor v. Stanley, 72 Cal. 556, 14 Pac. 306, 1 Am. St. Rep. 84; Chafin Will Case, 32 Wis. 557; Will of Smith, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; Turner v. Hand, 3 Wall. Jr. 88, Fed. Cas. No. 14,257; nor belief in the transmigration of souls; Bonard's Will, 16 Abb. Pr. N. S. (N. Y.) 128.

Insanity is not necessarily established by mere eccentricity of mind, manifesting itself in absurd opinions or extravagancies of dress and manners; Lee's Heirs v. Lee's Ex'rs, 4 McCord (S. C.) 183, 17 Am. Dec. 722; or an irritable temper and an excitable disposition; Willis v. People, 32 N. Y. 715; or depression coupled with a monomania or delusion that, by the lands wearing out and buildings going to ruin, starvation and the poorhouse were threatened; Gillespie v. Shuliherrier, 50 N. C. 157. Insanity produced by continued dissipation is a good defence; State v. Harrigan, 9 Houst. (Del.) 369, 31 Atl. 1052; *mania à potu* is a species of insanity; State v. Dillahunt, 3 Harr. (Del.) 551; and so is *delirium tremens;* People v. O'Connell, 62 How. Pr. (N. Y.) 436; Maconnehey v. State, 5 Ohio St. 77; Kelley v. State, 31 Tex. Cr. R. 216, 20 S. W. 357; but it must be shown to exist at the time the act is perpetrated, not antecedently,

State v. Sewell, 48 N. C. 245. As to drunkenness in its varied forms, see that title.

If the accused was wanting in self-governing power, whether caused by insanity, gross intoxication or other controlling influences other than depravity or wickedness of heart, then his mind was not fully conscious of its own purposes and he was not guilty of murder in the first degree; Com. v. Van Horn, 188 Pa. 143, 41 Atl. 469. Where a defendant was insane from drugs, the court must charge thereon, though a charge on the general issue of insanity is given; Burton v. State, 46 Tex. Cr. R. 493, 81 S. W. 742. If the accused had sufficient mind to know right from wrong and to understand the nature and quality of the act, he was sane in law; Eckert v. State, 114 Wis. 160, 89 N. W. 826; if he did not possess the power to avoid the wrong and do the right, he was irresponsible; People v. Barthleman, 120 Cal. 7, 52 Pac. 112; Abbott v. Com., 107 Ky. 624, 55 S. W. 196; Jolly v. Com., 110 Ky. 190, 61 S. W. 49, 22 Ky. Law Rep. 1622.

Suicide is not conclusive evidence of insanity, but is admissible to show the absence of a sound and disposing mind; Pettitt's Ex'rs v. Pettitt, 4 Humph. (Tenn.) 191. Epilepsy alone does not establish insanity which will excuse crime; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228; and in its milder forms, causing temporary fits of insanity, the *prima facie* presumption is in favor of mental soundness; Corbit v. Smith, 7 Ia. 60, 71 Am. Dec. 431. See 3 Witth. & Beck. Med. Jur. 319. Proof that insanity was hereditary is admissible; Shaeffer v. State, 61 Ark. 241, 32 S. W. 679; but that alone is insufficient when the other evidence clearly shows that defendant knew that he was committing a wrong; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Snow v. Benton, 28 Ill. 306.

An insane person cannot be legally charged with a criminal intent; State v. Brown, 36 Utah 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545. Where it is admitted that a defendant in a murder case is neither an idiot nor an insane person, it is not competent to prove that he is weakminded; Rogers v. State, 128 Ga. 67, 57 S. E. 227, 10 L. R. A. (N. S.) 999, 119 Am. St. Rep. 364.

In reply to a defence of want of criminal capacity, proof was admitted that defendant had sometimes feigned insanity; Naanes v. State, 143 Ind. 299, 42 N. E. 609. But insanity cannot be proved by reputation; Walker v. State, 102 Ind. 502, 1 N. E. 856; State v. Coley, 114 N. C. 879, 19 S. E. 705.

See Hypnotism; Kleptomania.

The effect of the plea of insanity has sometimes been controlled by the instructions of the court in regard to the burden of proof and the requisite amount.

In many of the American states, there has been a tendency towards a relaxation of the rule settled in England, and which formerly prevailed in almost all the states, to treat a plea of insanity as being strictly one in confession and avoidance which must be proved by the defendant either beyond a reasonable doubt or, as was said in many American cases, by a preponderance of evidence. See Burden of Proof.

The English rule was thus stated in McNaghten's case: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction;" 10 Cl. & F. 200; and it is the settled law of England; 3 C. & K. 188; 4 Cox, C. C. 149; 3 *id.* 155.

As to whether such proof must be by a preponderance of evidence or beyond a reasonable doubt, the language of the English judges is not entirely free from ambiguity.

In many of the American cases the English rule is adhered to; State v. Spencer, 21 N. J. L. 202, followed in Genz v. State, 59 N. J. L. 488, 37 Atl. 69, 59 Am. St. Rep. 619; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420; Com. v. Gerade, 145 Pa. 289, 22 Atl. 464, 27 Am. St. Rep. 689; State v. Brandon, 53 N. C. 463; Kriel v. Com., 5 Bush. (Ky.) 362; Moore v. Com., 92 Ky. 630, 18 S. W. 833; Lovegrove v. State, 31 Tex. Cr. R. 491, 21 S. W. 191; Boswell v. State, 63 Ala. 307, 35 Am. Rep. 20; Maxwell v. State, 89 Ala. 150, 7 South. 824; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193 (where the subject is discussed at large); Bolling v. State, 54 Ark. 588, 16 S. W. 658; People v. Bawden, 90 Cal. 195, 27 Pac. 204; State v. De Rance, 34 La. Ann. 186, 44 Am. Rep. 426; State v. Clements, 47 La. Ann. 1088, 17 South. 502; State v. Lawrence, 57 Me. 574; Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458; State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Pagels, 92 Mo. 310, 4 S. W. 931; Bond v. State, 23 Ohio St. 349; State v. Bundy, 24 S. C. 439, 58 Am. Rep. 263; Baccigalupo v. Com., 33 Gratt. (Va.) 807, 36 Am. Rep. 795; State v. Strauder, 11 W. Va. 747, 27 Am. Rep. 606. See 36 Am. Rep. 467, n.

The terms of this rule cannot be better stated than in Com. v. Drum, 58 Pa. 9: "Where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground." This language was quoted with strong approval in Ortwein v. Com., 76 Pa. 414, 425, 18 Am. Rep. 420. In a much later Pennsylvania case it was said that "the burden of proof of insanity was with the defence from the beginning, and that it never shifted." Com. v. Heidler, 191 Pa. 375, 43 Atl. 211.

Many of the cases above cited rest upon the idea that the issue is to be determined in each case by a preponderance of evidence, so that an effort to deduce from them a well established rule, supported by the weight of authority, as to whether the test is to be considered a preponderance of evidence or the establishment of the defence beyond a reasonable doubt, is subject to the same ambiguity that attaches to the language of the English judges. In addition to this question which arises upon the cases which put the burden of the defence upon the accused many courts have held that when evidence of insanity is introduced by the defendant, the burden of proving his criminal capacity is cast upon the prosecution (and most of the cases go to the extent of including this as one of the elements of the crime which must be proved beyond a reasonable doubt); U. S. v. Faulkner, 35 Fed. 730; Guiteau's Case, 10 Fed. 161, and note; Hodge v. State, 26 Fla. 11, 7 South. 593; Brown v. State, 40 Fla. 459, 25 South. 63; State v. Johnson, 40 Conn. 136; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. Rep. 408; State v. Nixon, 32 Kan. 205, 4 Pac. 159; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162 (but where the evidence is insufficient to raise a reasonable doubt, it does not shift the burden of proof to the prosecution; Snider v. State, 56 Neb. 309, 76 N. W. 574); State v. Pressler, 16 Wyo. 214, 92 Pac. 806, 15 Ann. Cas. 93; Territory v. McNabb, 16 N. M. 625, 120 Pac. 907; Cunningham v. State, 56 Miss. 269, 21 Am. Rep. 360; State v. Bartlett, 43 N. H. 224, 80 Am. Dec. 154; Brotherton v. People, 75 N. Y. 159; Walker v. People of N. Y., 88 N. Y. 81; King v. State, 91 Tenn. 617, 20 S. W. 169; Revoir v. State, 82 Wis. 295, 52 N. W. 84; and the supreme court of the United States has accepted this latter doctrine; Davis v. U. S., 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; where it was held that the jury, to convict, must be "able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In a later case, Battle v. U. S., 209 U. S. 38, 28 Sup. Ct. 422, 52 L. Ed. 670, where the defence of insanity was interposed, the same court said: "The judge instructed the jury that the burden of proof was on the government to prove that fact beyond a reasonable doubt, and he was not called upon to go further. Until evidence is given on the other side, the burden of proof is satisfied by a presumption arising from the fact that most men are sane. In this case there was the merest shadow of evidence that the defendant was not of sound mind. The jury were told to consider all the evidence, including the bearing of the prisoner and the manner of his own testimony, and the evidence relied upon by him was stated. In the circumstances he could ask no more."

In a criminal case the burden is on the defendant to prove by a preponderance of evidence the defence of insanity; People v. Suesser, 142 Cal. 354, 75 Pac. 1093; State v. Scott, 49 La. Ann. 253, 21 South. 271, 36 L. R. A. 721; State v. Robbins, 109 Ia. 650, 80 N. W. 1061; People v. Willard, 150 Cal. 543, 89 Pac. 124; Fults v. State, 50 Tex. Cr. R. 502, 98 S. W. 1057; Thomas v. State, 55 Tex. Cr. R. 293, 116 S. W. 600; State v. Hancock, 151 N. C. 699, 66 S. E. 137; Pribble v. People, 49 Colo. 210, 112 Pac. 220; though he need not prove it beyond a reasonable doubt; Burt v. State, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; Adair v. State, Okl. Cr. 284, 118 Pac. 416; but only to the satisfaction of the jury; State v. Porter, 213 Mo. 43, 111 S. W. 529, 127 Am. St. Rep. 589; and when that is done the burden is shifted; Hobbs v. State, 8 Ga. App. 53, 68 S. E. 515; but if not established by the state's evidence, defendant must prove it by direct evidence to the satisfaction of the jury; State v. Cole, 2 Pennewill (Del.) 344, 45 Atl. 391; or at least so as to raise a reasonable doubt; Johnson v. State, 57 Fla. 18, 49 South. 40. The burden of the defence of temporary insanity is on the defendant; State v. Hand, 1 Marv. (Del.) 545, 41 Atl. 192; or of incapacity produced by *delirium tremens* at the very time of the act; State v. Kavanaugh, 4 Pennewill (Del.) 131, 53 Atl. 335.

Where the defence is insanity, until the defendant furnishes evidence thereon sufficient to raise a reasonable doubt, the prosecution may rest on the legal presumption that men are sane; State v. Wetter, 11 Idaho 433, 83 Pac. 341; and the mere fact of the commission of the crime is not sufficient to overcome this presumption; Davis v. State, 44 Fla. 32, 32 South. 822.

The rule that a person adjudged insane continues so until the contrary is shown, applies only to insanity of a nature liable to be permanent; Hempton v. State, 111 Wis. 127, 86 N. W. 596.

As to the rule on the subject, applied by the class of cases last referred to, see BURDEN OF PROOF. The cases of the former class, which put the burden on the defendant, as has already been suggested, in very many instances hold that a preponderance of proof only is required; and in some states the later cases show a virtual abandonment of the rule formerly adhered to by them. As for example in Massachusetts as will appear by the review of cases in that state in Davis v. U. S., 160 U. S. 481, 483, 16 Sup. Ct. 353, 40 L. Ed. 499. It results that it is not practicable to state what might be designated as a prevailing American rule. The subject is very fully discussed by Mr. Justice Har-

lan in the case last cited. The cases holding different views of the subject will be found collected in the opinion and argument in that case and also in 14 Am. L. Reg. N. S. 25; 16 *id.* 449; Cl. Cr. L. 58; Mann, Med. Jur. of Insan. ch. iii.; Witth. & Beck. 508. And see memorandum on plea of insanity, State v. Baber, 11 Mo. App. 586.

A statute imposing upon the accused the burden of proving the defence of insanity is constitutional; McGhee v. State (Ala.), 59 South. 573.

In England, under 46 & 47 Vict. c. 38, relating to the trial of lunatics, the jury returns a verdict that the prisoner is "guilty, but insane at the time," whereupon the court records the verdict and orders the prisoner to be imprisoned during the pleasure of the Crown. Under 39 & 40 Geo. III. c. 94, the verdict was "not guilty, on the ground of insanity."

In some states in this country, where the verdict is an acquittal by reason of insanity, the fact must be so returned by the jury, and in such case the court are required to direct the confinement of the prisoner in an insane asylum.

A statute is not unconstitutional which provides that one acquitted of murder on the ground of insanity may be committed to the state lunatic asylum till he becomes sane. The fact of sanity is not established by the fact that he is placed on trial, if, under the statute, an insane person may be tried if he is competent to understand the proceeding and make his defense. His right to *habeas corpus*, after committal, to establish his sanity, satisfies his constitutional right to a hearing. The state may summarily deprive him of his liberty, under the police power, though no appeal is allowed from the order of acquittal. These questions were decided in People v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322, *id.*, 196 N. Y. 525, 89 N. E. 1109, 25 L. R. A. (N. S.) 946. See also People v. Baker, 59 Misc. 359, 110 N. Y. Supp. 848. In subsequent *habeas corpus* proceedings the burden is on the petitioner to prove recovery of reason; People v. Lamb (the Thaw case) 118 N. Y. Supp. 389; so also in State v. Snell, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191; and he is not denied the protection of the law in such case; Petition of Dowdell, 169 Mass. 387, 47 N. E. 1033, 61 Am. St. Rep. 290; Petition of Le Donne, 173 Mass. 550, 54 N. E. 244. A committal of such person until the further order of the court is not void for uncertainty; and is no deprivation of due process of law; In re Brown, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540, where there is a full note on the confinement of one acquitted of crime by reason of insanity.

The insanity of one acquitted of murder on that ground is presumed to continue until the contrary is shown; State v. Snell, *supra;* and the court may thereupon commit him to an asylum until he is proved sane; People v. Baker, *supra;* and so a court may stay an execution on the ground of insanity until a prisoner recovers; Ex parte State, *ex rel.* Atty. Gen., 150 Ala. 489, 43 South. 490, 10 L. R. A. (N. S.) 1129, 124 Am. St. Rep. 79.

A jury cannot disregard an overwhelming mass of evidence of insanity on the part of the accused and convict him on a legal presumption of sanity; State v. Brown, 36 Utah 46, 142 Pac. 641, 24 L. R. A. (N. S.) 545.

Side by side with this doctrine of the criminal law which makes persons, who from a medical point of view are considered insane, responsible for their criminal acts is another equally well authorized, viz.: that a kind and degree of insanity which would not excuse a person for a criminal act may render him legally incompetent for the management of himself or his affairs; Bellingham's case, 5 C. & P. 168. This implies that the mind of an insane person acts more clearly and deliberately, and with a sounder view of its relations to others, when about to commit a great crime than when buying or selling a piece of property. It is scarcely necessary to add that no ground for this distinction can be found in our knowledge of mental disease. On the contrary, we know that the same person who destroys his neighbor, under the delusion that he has been disturbing his peace or defaming his character, may, at the very time, dispose of his property with as correct an estimate of its value and as clear an insight into the consequences of the act as he ever had. If a person is incompetent to manage property, it is because he has lost some portion of his mental power; and this fact cannot be justly ignored in deciding upon his responsibility for criminal acts. Insanity once admitted, it is within the reach of no mortal comprehension to know exactly how far it may have affected the quality of his acts. To say that, possibly, it may have had no effect at all, is not enough: it should be proved by the party who affirms it. See Maudsley, Responsibility in Mental Disease 111.

By the French penal code there can be no crime nor offence if the accused were in a state of madness at the time of the act. Art. 64. The same provision was introduced into Livingston's Code and into the Revised Statutes of New York, vol. 2, § 697. The law of Arkansas provides that a lunatic or insane person without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged; Rev. Stat. 236. In New York, however, in spite of this clear and positive provision of law, the courts have always acted upon the doctrines of the common law, and instructed the jury respecting the tests of that kind of insanity which annuls criminal responsibility; Freeman v. People, 4 Den. (N. Y.) 27, 47 Am. Dec. 216. In this case, the court declared that the insanity mentioned in the statute means only insanity in reference to the criminal act, and therefore its qualities must be defined.

Civil Incapacity. The general principle governing the civil incapacity of a person of an unsound mind is that any civil act is invalid if the actor was at the time laboring under such mental defect as to render him incapable of performing the act in question, rationally and without detriment to any person affected thereby.

The rule as to *contracts* is that insanity is such a defect as precludes rational assent, with respect to the nature of the contract, whether marriage, partnership, sale, or the like.

A judicial ascertainment of the insanity of a person is said to deprive him of contractual capacity, as a matter of law, and subsequent contracts are void; 4 Co. 123 *b;* Bac. Abr. *Idiots and Lunatics* (F.); Carter v. Beckwith, 128 N. Y. 312, 28 N. E. 582; Leonard v. Leonard, 14 Pick. (Mass.) 280; Imhoff v. Witmer's Adm'r, 31 Pa. 243; but when no conservator was appointed and there was no appearance of incapacity, a purchase was held valid; McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610. See also 5 B. & C. 170; Sawyer v. Lufkin, 56 Me. 308; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430.

Such incapacity is not retroactive; Knox v. Knox, 30 S. C. 377, 9 S. E. 353; prior acts are not void but voidable; Jackson v. Gumaer, 2 Cow. (N. Y.) 552; but the condition is conclusively presumed to continue, after the finding, until it is superseded; In re Otis, 101 N. Y. 580, 5 N. E. 571; People v. Tax Com'rs, 100 N. Y. 215, 3 N. E. 85; but see McCleary v. Barcalow, 6 Ohio Cir. Ct. Rep. 481; Reese v. Reese, 89 Ga. 645, 15 S. E. 846. A deed or mortgage executed by such person during the period of lunacy, as found, is voidable, the presumption being against validity, but subject to be overcome by proof of sanity; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386; and see Mott v. Mott, 49 N. J. Eq. 192, 22 Atl. 997; 1 Gr. Ev. § 556. The fact that one who assigns a leasehold interest is found to be a lunatic a few months later is only *prima facie* evidence of his incompetency at the time of his assignment; Sbarbero v. Miller, 72 N. J. Eq. 248, 65 Atl. 472.

The *marriage* of a person insane is void; Inhabitants of Middleborough v. Inhabitants of Rochester, 12 Mass. 363; Gathings v. Williams, 27 N. C. 487, 44 Am. Dec. 49; Powell v. Powell, 18 Kan. 371, 26 Am. Rep. 774; Wightman v. Wightman, 4 Johns. Ch. (N. Y.) 343; L. R. 1 P. & D. 335; Waymire v. Jetmore, 22 Ohio St. 271; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164. A marriage contracted while one party was insane from *delirium tremens* was held void; Clement v. Mattison, 3 Rich. (S. C.) 93; but mere weakness of mind not amounting to derangement is not sufficient; Rawdon v. Rawdon, 28 Ala. 565; Crump v. Morgan, 38 N. C. 91, 40 Am. Dec. 447; and for that merely, or intoxication, a court has no power to declare a marriage null and void; Elzey v. Elzey, 1 Houst. (Del.) 308. The same degree of mental capacity which enables a person to make a valid deed or will is sufficient to enable him to marry; Inhabitants of Atkinson v. Inhabitants of Medford, 46 Me. 510. It was held that a marriage celebrated by a person while insane might be affirmed upon recovery without a new solemnization; Cole v. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275.

Other civil contracts made by insane persons are voidable, not void; Turner v. Rusk, 53 Md. 65; George v. R. Co., 34 Ark. 613; McClain v. Davis, 77 Ind. 419; Van Patton v. Beals, 46 Ia. 62; Ingraham v. Baldwin, 9 N. Y. 45; Broadwater v. Darne, 10 Mo. 277; Ordron, Jud. Asp. Insan. ch. 6.

With respect to contracts, persons *non compos mentis* and infants are said to be parallel, both in law and reason; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71. A power of attorney made by an insane person is absolutely void; Dexter v. Hall, 15 Wall. (U. S.) 9, 21 L. Ed. 73; and a contract executory on both sides cannot be enforced against an insane person; Ewell, L. Cas. Disab. 525, where the cases are collected.

The test of legal capacity to contract, it was said, is that the party is capable of recollecting the property he is about to dispose of, the manner of distributing it, and the object of his bounty; the particular act being attended with the consent of his will and understanding; Miller v. Rutledge, 82 Va. 863, 1 S. E. 202.

Pollock enumerates three different theories as to contracts by insane persons which "have, at different times, been entertained in English courts and supported by respectable authority;" Poll. Cont. 87. These theories, with some of the authorities cited in support of them, are substantially as follows: 1. That it is no ground, whatever, for avoiding a contract; Co. Litt. 2 *b;* 4 Co. 123 *b;* Bract. fol. 100 *a*, 165 *b*. As to this it is characterized as a frivolous technicality and doubtful whether it was really supported by the authorities Coke had before him; Poll. Cont. 89. 2. If one who contracts is too drunk or insane to know what he is about, his agreement is void for want of the consenting mind, but if his mind is only so confused or weak that he may know what he is about, but not fully understand the terms and effect, and this is known to the other party, the contract will be voidable at his option. The first division of this class would be simply void for want of consent; 2 Stra. 1104; 3 Campb. 33; Reinskopf v. Rogge, 37 Ind. 207; Burke v. Allen, 29 N. H. 106, 61 Am. Dec. 642; the second would come under the head of fraud; Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Wilson v. Oldham, 12 B. Monr. (Ky.) 55; Caulkins v. Fry, 35 Conn. 170. 3. The doctrine which has prevailed as already stated that all contracts by insane persons are voidable, not void, see *supra.*

In some courts what has been termed the Massachusetts doctrine prevails that contracts of insane persons are voidable without any reference to the knowledge of the other party; Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; in others what is termed the English doctrine (because supported by more recent English authorities) that they are voidable if the other party knows of the insanity; Stockmeyer v. Tobin, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. Ed. 123; Martinez v. Moll, 46 Fed. 724; (under La. Civ. Code); [1892] 1 Q. B. 599; Lancaster County Nat. Bank v. Moore, 78 Pa. 407, 21 Am. Rep. 24; and reasonable ground for knowledge is equivalent thereto; Lincoln v. Buckmaster, 32 Vt. 652; and there is still a third doctrine supported by some courts that if the other party was ignorant and the contract reasonable and not capable of rescission, so that the parties could be restored to their original position, the contract will be sustained; Matthiessen & Weichers Refining Co. v. McMahon's Adm'r, 38 N. J. L. 536; Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202, 97 Am. Dec. 592; Northwest-

ern Mut. Fire Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185; Riggs v. Tract Society, 84 N. Y. 330; Alexander v. Haskins, 68 Ia. 73, 25 N. W. 935; Appeal of Kneedler, 92 Pa. 428.

The cases last cited rest upon Molton v. Camroux, 2 Ex. 487; 4 *id.* 17, which is considered the cornerstone of the law as to contracts with insane persons; Poll. Cont. 92; Leake, Cont. 248; but has been recently characterized as containing "loose statements" which have given rise to "an anomalous doctrine;" Harr. Cont. 235.

Whatever may be said of it, the case undoubtedly settled the law that such a contract was voidable and not void, and this was confirmed inferentially by a later case which held that such a contract might be ratified after the disability had passed; L. R. 8 Ex. 132.

It is generally considered that contracts for *necessaries* for an insane person are binding, if suited to their condition in life; 5 B. & C. 170; Richardson v. Strong, 35 N. C. 106, 55 Am. Dec. 430; Pearl v. M'Dowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Maddox v. Simmons, 31 Ga. 512; Skidmore v. Romaine, 2 Bradf. Sur. (N. Y.) 122; Crowther v. Rowlandson, 27 Cal. 376; Fitzgerald v. Reed, 9 Smedes & M. (Miss.) 94; and this rule has been extended to other things which were reasonable and proper; Kendall v. May, 10 Allen (Mass.) 59; but if the other party has knowledge of the insanity the nature of the liability is rather quasi-contractual; 44 Ch. D. 94; Sawyer v. Lufkin, 56 Me. 308; Keener, Quasi-Cont. 20. This liability is not removed by the appointment of a committee, where necessaries are furnished in good faith and the committee has failed to provide them; Barnes v. Hathaway, 66 Barb. (N. Y.) 452; Stannard v. Burns' Adm'r, 63 Vt. 244, 22 Atl. 460.

Statutes making the estates of insane persons liable for their maintenance in state institutions are valid; Kaiser v. State, 80 Kan. 364, 102 Pac. 454, 24 L. R. A. (N. S.) 295.

The fact that a husband causes his wife to be placed in an insane asylum is not evidence of his refusal to support her, nor of consent to her absence outside the home, rendering him liable for her support; Richardson v. Stuesser, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, 4 Ann. Cas. 784.

Deeds executed by persons of unsound mind are absolutely void; Wilkinson v. Wilkinson, 129 Ala. 279, 30 South. 578; Riggs v. Tract Society, 95 N. Y. 503; Ballew v. Clark, 24 N. C. 23; Bensell v. Chancellor, 5 Whart. (Pa.) 371, 34 Am. Dec. 561; 3 Witth. & Beck. Med. Jur. 386. In other cases it has been held that such a deed is voidable only; Arnold v. Iron Works, 1 Gray (Mass.) 434; Somers v. Pumphrey, 24 Ind. 231; Cates v. Woodson, 2 Dana (Ky.) 452. Other cases again hold that want of perfect soundness of mind does not affect the conveyance if there is still capacity for fully comprehending the import of the act; Miller v. Craig, 36 Ill. 109; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; Odell v. Buck, 21 Wend. (N. Y.) 142; Rippy v. Gant, 39 N. C. 443. See Smith v. Elliott's Adm'r, 1 Patt. & H. (Va.) 307; 1 Pingr. Mortg. § 349.

An action cannot be dismissed because it is brought by an insane person in his own name, unless the statute so provides; Wiesmann v. Donald, 125 Wis. 600, 104 N. W. 916, 2 L. R. A. (N. S.) 961.

As to testamentary capacity as affected by insanity, see WILL; DEMENTIA; UNDUE INFLUENCE.

In most states the statutes of limitation do not run against a person insane, nor does adverse possession ripen into title while the person out of possession is insane; Clarity v. Sheridan, 91 Ia. 304, 59 N. W. 52; but a plaintiff's claim is not affected by the insanity of the defendant's ancestor after the statute had begun to run; Asbury v. Fair, 111 N. C. 251, 16 S. E. 467. The time of sanity required in order to allow the statute to begin to run is such as will enable the party to examine his affairs and institute an action, and is for the jury; Clark's Executor v. Trail's Adm'rs, 1 Metc. (Ky.) 35.

Insanity is not a defence in an action of tort; but damages are compensatory and not punitive; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Lassone v. R. R., 66 N. H. 345, 24 Atl. 902, 17 L. R. A. 525; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; Meyer v. Ry. Co., 54 Fed. 116, 4 C. C. A. 221.

A master of a vessel cannot excuse himself for negligently causing its destruction by showing that the orders which were given by him while temporarily insane caused such destruction; Williams v. Hays, 143 N. Y. 442, 38 N. E. 449, 26 L. R. A. 153, 42 Am. St. Rep. 743; but it is a complete defence in an action for words spoken slanderously about the plaintiff that they were uttered under an insane delusion of their truth; Irvine v. Gibson, 117 Ky. 306, 77 S. W. 1106, 111 Am. St. Rep. 251, 4 Ann. Cas. 569; and where a visitor falls through a hole in the floor of a building owned by a lunatic and left unguarded by him, there is no cause of action; Ward v. Rogers, 51 Misc. 299, 100 N. Y. Supp. 1058.

As to lucid intervals and the competency of insane persons as witnesses, see LUCID INTERVALS.

As to the proper question to a medical expert witness, see MEDICAL EVIDENCE.

See BURDEN OF PROOF; APOPLEXY; DELIRIUM FEBRILE; DELIRIUM TREMENS; DEMENTIA; DRUNKENNESS; HYPNOTISM; IDIOCY; ILLUSION; IMBECILITY; KLEPTOMANIA; LUCID INTERVALS; MANIA; PARANOIA; PUERPERAL MANIA; PYROMANIA; SOMNAMBULISM; SUICIDE; TESTAMENTARY CAPACITY; INTERDICTION.

INSCRIPTION. In Civil Law. An engagement which a person who makes a solemn accusation of a crime against another

enters into that he will suffer the same punishment, if he has accused the other falsely, which would have been inflicted upon him had he been guilty. Code, 9. 1. 10; 9. 2. 16 and 17.

In Evidence. Something written or engraved.

Inscriptions upon tombstones and other proper places, as rings, and the like, are held to be evidence of pedigree; Bull. N. P. 233; 10 East 120; 13 Ves. 145. But their value as evidence depends largely on the authority under which they were made, and the length of time between their establishment and the events they commemorate; Clark v. Cassidy, 62 Ga. 407; Wanita Woolen Mills v. Rollins, 75 Miss. 253, 22 South. 819; Shotwell v. Harrison, 22 Mich. 415; Fondren v. Durfeé, 39 Miss. 326; Terwilliger v. Industrial Benefit Ass'n, 83 Hun 323, 31 N. Y. Supp. 938; 1 Greenl. Ev. § 106. See DECLARATION; HEARSAY EVIDENCE.

INSCRIPTIONES (Lat.). The name given by the old English law to any written instrument by which anything was granted. Blount.

INSENSIBLE. In Pleading. That which is unintelligible is said to be insensible. Steph. Pl. 378.

INSIDIATORES VIARUM (Lat.). Persons who lie in wait in order to commit some felony or other misdemeanor.

INSIMUL COMPUTASSENT (Lat.). They had accounted together. See ASSUMPSIT.

INSINUACION. In Spanish Law. The presentation of a public document to a competent judge, in order to obtain his approbation and sanction of the same, and thereby giving it judicial authenticity.

"*Insinuatio est ejus quod traditur sive agitur coram quocumque judice in scripturam redactio.*"

This formality is requisite to the validity of certain donations *inter vivos*. Escriche, voc. *Insinuacion.*

INSINUATION. In Civil Law. The transcription of an act on the public registers, like our recording of deeds. It was not necessary in any other alienation but that appropriated to the purpose of donation. Inst. 2. 7. 2; Pothier, *Traité des Donations, Entre Vifs*, sec. 2, art. 3, § 3; 8 Toullier, n. 198.

INSINUATION OF A WILL. In Civil Law. The first production of it; or, leaving it in the hands of the register in order to its probate. 21 Hen. VIII. c. 5; Jacob, Law Dict.

INSOLVENCY. The condition of a person who is insolvent *(q. v.)*. Inability to pay one's debts.

Bankruptcy, which is one species or phase of insolvency, denotes the condition of a trader or merchant who is unable to pay his debts in the course of business; 2 Bell, Com. 162; 1 M. & S. 338; Herrick v. Borst, 4 Hill (N. Y.) 650; Thompson v. Thompson, 4 Cush. (Mass.) 134. Insolvency, then, as distinguished from strict bankruptcy, is the condition or status of one who is unable to pay his debts; and insolvent laws are distinguished from strict bankruptcy laws by the following characteristics:

Bankruptcy laws apply only to traders or merchants; insolvent laws, to those who are *not* traders or merchants. Bankrupt laws discharge absolutely the debt of the honest debtor; Ogden v. Saunders, 12 Wheat. (U. S.) 230, 6 L. Ed. 606; Le Roy v. Crowninshield, 2 Mas. 161, Fed. Cas. No. 8,269; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; 4 B. & Ald. 654; Baldw. 296. Insolvent laws discharge the person of the debtor from arrest and imprisonment, but leave the future acquisitions of the debtor still liable to the creditor; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Pollitt v. Parsons, 2 H. & J. (Md.) 61. Both laws contemplate an equal, fair, and honest division of the debtor's present effects among his creditors *pro rata*. A bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law; per Marshall, C. J., Sturges v. Crowninshield, 4 Wheat. (U. S.) 195, 4 L. Ed. 529. And insolvent laws quite coextensive with the English bankrupt system have not been infrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same between bankruptcies and insolvencies; 3 Sto. Const. 11; Bish. Insolv. Debt. 4.

Under the United States constitution the power to pass a bankrupt law is vested in congress, and this is held to include power to pass an act which provides for voluntary bankruptcy, or, strictly speaking, an insolvent law. So in the absence of congressional action, the states have passed laws which, though called insolvent laws, were in fact bankrupt laws, and their right to do so has been sustained, such laws being held valid; see BANKRUPT; except as limited by the prohibition against impairing the obligation of contracts, which title see; see also Cook v. Moffat, 5 How. (U. S.) 295, 12 L. Ed. 159; Hall v. Boardman, 14 N. H. 38; Savoye v. Marsh, 10 Metc. (Mass.) 594, 43 Am. Dec. 451. Stone v. Tibbetts, 26 Me. 110; Towne v. Smith, 1 Woodb. & M. 115, Fed. Cas. No. 14,115; Larrabee v. Talbott, 5 Gill (Md.) 437, 46 Am. Dec. 637; Baldwin v. Hale, 1 Wall. (U. S.) 229, 17 L. Ed. 531; Cooley, Const. Lim. 360; Miller, Const. U. S. 616.

U. S. Bankruptcy Act of 1898 supersedes all state insolvent laws from the date of its passage; Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529, 70 Am. St. Rep. 258.

So far as the jurisdiction of the state extends, its insolvent laws may have all the essential operation of a bankrupt law, not being limited to a mere discharge of the person of the debtor on surrendering his effects. And a creditor out of a state who voluntarily makes himself a party and accepts a dividend, is bound by his own act, and is deemed to have waived his ex-territorial immunity and right; Sturges v. Crowninshield, 4 Wheat. (U. S.) 122, 4 L. Ed. 529; Braynard v. Marshall, 8 Pick. (Mass.) 194; Norton v. Cook, 9 Conn. 314, 23 Am. Dec. 342; Pugh v. Bussel, 2 Blackf. (Ind.) 394; Browne v. Stackpole, 9 N. H. 478. See 4 B. & Ald. 654;

Van Hook v. Whitlock, 26 Wend. (N. Y.) 43, 37 Am. Dec. 246; Scribner v. Fisher, 2 Gray (Mass.) 43; Beer v. Hooper, 32 Miss. 246.

The effect of a discharge upon non-resident creditors is examined in 6 Harv. L. Rev. 349, containing a very complete list of cases, to that date and concluding that it is the generally accepted doctrine that, in such case, a discharge will be of no effect (even in the courts of the state where the discharge is granted) against a non-resident, unless he becomes a party by voluntary appearance or personal service. The correctness of this conclusion, though it is admitted as established, is seriously challenged on grounds of expediency which are stated at large.

Where a discharge under a state insolvency law is obtained, it does not discharge the debt of a non-resident creditor who refuses to prove its claim in such proceedings; Bergner & Engel Brewing Co. v. Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251.

Insolvency may of course be simple or notorious. Simple insolvency is attended by no badge of notoriety. Notorious or legal insolvency, with which the law has to do, is designated by some public act or legal proceeding. This is the situation of a person who has done some notorious act to divest himself of all his property: as, making an assignment, applying for relief, or having been proceeded against *in invitum* under bankrupt or insolvent laws; Bish. Insolv. Debt. 3, n.; Thelusson v. Smith, 2 Wheat. (U. S.) 396, 4 L. Ed. 271; 7 Toullier, n. 45; Domat, liv. 4, tit. 5, nn. 1, 2; 2 Bell, Com. 165.

It is with regard to the latter that the *insolvency laws* (so called) are operative. They are generally statutory provisions by which the property of the debtor is surrendered for his debts; and upon this condition, and the assent of a certain proportion of his creditors, he is discharged from all further liabilities; Bartlet v. Prince, 9 Mass. 431; Otis v. Warren, 16 Mass. 53; 2 Kent 321; Ingr. Insolv. 9. This legal insolvency may exist without actual inability to pay one's debts when the debtor's estate is finally settled and wound up. (See definition). Insolvency, according to some of the state statutes, may be of two kinds, voluntary and involuntary. The latter is called the proceeding against the creditor *in invitum*. Voluntary insolvency, which is the more common, is the case in which the debtor institutes the proceedings, and is desirous of availing himself of the insolvent laws, and petitions for that purpose.

Involuntary insolvency is where the proceedings are instituted by the creditors *in invitum*, and so the debtor forced into insolvency. The circumstances entitling either debtor or creditors to invoke the aid of the insolvent law are in a measure peculiar to each state. But their general characteristics are as follows:

Proceedings by creditors may usually be taken for fraudulent concealment, conveyance, or collusive attachment, of property; by petition in the designated tribunal, on notice to the debtor; possession of the property is taken by an officer of the courts, usually after proof of the allegations, and a meeting of creditors is called for the choice of an assignee by a vote of creditors, having relation both to number and amount. The assignee becomes practically the owner, in trust, with power to wind up the estate; he acts under the general direction of the court, calling meetings of creditors when required. The right to a discharge varies in different states, in some being conditioned upon payment of a certain percentage or the assent of the majority of creditors or upon more stringent conditions in case of subsequent insolvency. The statutes vary as to the grounds of refusing a discharge for fraud, as in cases of paying or securing debts within a certain time before the application, or when the debtor is insolvent, or has reasonable cause to believe himself so. As to all these details the state statutes should be referred to.

As to American and English bankrupt law proper, see BANKRUPT LAWS; BANKRUPT.

The English act 34 Geo. III. ch. 69, was called an insolvent debtor's act; but the first insolvency act properly so called was passed in 1826. The act of 7 & 8 Vict. cap. 70, called "an act for facilitating arrangements between *debtor* and *creditor*," is properly an insolvency law. This provided for the discharge of a non-trading debtor if he had a certain concurrence from his creditors. This was one-third, both in value and number, to the initiatory steps. To the discharge, a proportional consent at an initiatory meeting, and, finally, the consent of three-eighths in both number and value, or nine-tenths in value of creditors to the sum of twenty pounds and upwards.

Many of the states have laws for the distribution of insolvent estates, and also laws for the relief of poor debtors. These are not properly called insolvent laws in the sense in which we have used the words,—though the latter relieve the debtor's body from restraint upon a surrender of his goods and estate, and leave his future acquisitions still liable. See POOR DEBTORS.

INSOLVENT (Lat. *in*, privative, *solvo*, to pay). The condition of a person who is unable to pay his debts. 2 Bla. Com. 285, 471; Brouwer v. Harbeck, 9 N. Y. 589.

One who is unable to pay his debts as they fall due in the usual course of trade or business. 2 Kent 389; 1 M. & S. 338; Lee v. Kilburn, 3 Gray (Mass.) 600; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 20 L. R. A. 138, 38 Am. St. Rep. 592; although his assets in value exceed the amount of his liability; In re Ramazzina, 110 Cal. 488, 42 Pac. 970; or the embarrassment is only temporary; Langham v. Lanier, 7 Tex. Civ. App. 4, 26 S. W. 255; but it is held that mere inability to pay debts promptly as they mature is not conclusive; Mensing v. Atchison (Tex.) 26 S. W. 509; that one who has sufficient property subject to legal process to satisfy all legal demands is not insolvent; Smith v. Collins, 94 Ala. 394, 10

South. 334; and that a person who suspended business because of difficulties arising out of the commencement of an action was not necessarily an insolvent; American Waterworks Co. of New Jersey v. Venner, 18 N. Y. Supp. 379.

One who is unable to pay commercial paper in the due course of business is insolvent; Warren v. Nat. Bank, 10 Blatchf. 493, Fed. Cas. No. 17,202; Clarke v. Mott (Cal.) 33 Pac. 884.

A corporation is insolvent when its assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it from conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue; Corey v. Wadsworth, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

A bank is insolvent when the cash value of its assets realizable in a reasonable time is not equal to its liabilities exclusive of stock liabilities; Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022. An allegation that a corporation cannot pay its current obligations as they mature is sufficient for insolvency proceedings in equity; American Can Co. v. Preserving Co., 171 Fed. 540.

The clearing house rules, making members responsible for clearances of outside banks, for which they engage to clear, for one day after notice of the termination of their agreement, require payment of checks of such outside bank though known to be insolvent; and a contract for a deposit by the latter of cash and notes as indemnity for such clearances is valid, and the payments are not within a statute forbidding payments by an insolvent corporation made with intent to prefer creditors, and the money and securities held under the aforesaid contract are applicable to the amount of the checks so paid; O'Brien v. Grant, 146 N. Y. 163, 40 N. E. 871, 28 L. R. A. 361.

An insolvent building association may make an assessment on stock of a borrowing member to cover losses, and thereby equalize the members, so that they may go out on an equal footing at the closing up of the association; Wohlford v. Sav. Ass'n, 140 Ind. 662, 40 N. E. 694, 29 L. R. A. 177.

INSPECTION (Lat. *inspicere*, to look into). The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Quoted in Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 356, 18 Sup. Ct. 862, 43 L. Ed. 191.

The decision of the inspectors is not final; the object of the law is to protect the community from fraud, and to preserve the character of the merchandise abroad; Clintsman v. Northrop, 8 Cow. (N. Y.) 45. See Griswold v. Ins. Co., 1 Johns. (N. Y.) 205; Hancock v. Sturges, 13 Johns. (N. Y.) 331; Seaman v. Patten, 2 Cai. (N. Y.) 312. Quantity is as legitimate a subject of inspection as quality; State v. Ins. Co., 40 La. Ann. 465, 4 South. 504.

In Practice. Examination. As to the right to inspect public records, see RECORDS.

INSPECTION LAWS. The right in the states to enact inspection laws, quarantine and health laws is undoubted and is recognized in the constitution; Story, Const. 515; Cooley, Const. Lim. 730. These may be carried to the extent of ordering the destruction of private property, when infected with disease or otherwise dangerous; *id.*; Thurlow v. Massachusetts, 5 How. (U. S.) 632, 12 L. Ed. 256.

The object of such laws is "to improve the quality of articles produced by the labor of the country; to fit them for exportation, or it may be for domestic use"; Gibbons v. Ogden, 9 Wheat. (U. S.) 203, 6 L. Ed. 23; to protect the community from frauds and impositions, and, as to articles designed for exportation, to preserve our reputation in foreign markets; Clintsman v. Northrop, 8 Cow. (N. Y.) 46.

Whenever inspection laws act on the subject before it becomes an article of commerce, they are confessedly valid; and also when, although operating on articles in interstate commerce, they provide for inspection under the police power of a state in the interest of public health etc.; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Patapsco Guano Co. v. Board of Agriculture, 171 U. S. 345, 18 Sup. Ct. 862, 43 L. Ed. 191; so as to oleomargarine inspection; Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; so as to a statute regulating the sale of commercial fertilizers for the protection of the public; Steiner v. Ray, 84 Ala. 93, 4 South. 172, 5 Am. St. Rep. 332; Vanmeter v. Spurrier, 94 Ky. 22, 21 S. W. 337. A Virginia act for the inspection of flour was held invalid because it required the inspection of flour from other states when it was not required from the native product; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638; a statute for the inspection of fertilizers was held not applicable where the sale and delivery were without the state; Martin v. Guano Co., 77 Ga. 257.

An inspection law (hides) affecting interstate commerce, is not, for that reason, invalid unless it is in conflict with an act of congress, or is an attempt to regulate interstate commerce; New Mexico v. R. Co., 203 U. S. 38, 27 Sup. Ct. 1, 51 L. Ed. 78. Congress has not enacted any legislation destroying the right of a state to provide for the inspection of cattle and prohibiting the bringing in of diseased cattle not inspected and pass-

ed as healthy either by state or national officials; Asbell v. Kansas, 209 U. S. 251, 28 Sup. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101.

A state may declare that certain articles shall not be sold within its limits without inspection, and charge the cost of the inspection on those offering the article for sale; Patapsco Guano Co. v. Board of Agriculture, 52 Fed. 690. The question of the constitutionality of an inspection law affecting interstate commerce depends not only upon whether the excess proceeds of the tax may be used for other purposes, but whether they are actually so used; Foote v. Maryland, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. ——. If it has a real relation to the protection of the people and is reasonable, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by congress pursuant to its constitutional authority; Savage v. Jones, 225 U. S. 501, 32 Sup. Ct. 790, 56 L. Ed. 1182. *Prima facie* the charge is reasonable; Red "C." Oil Mfg. Co. v. Board, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240.

A state cannot, under the guise of exerting its police powers, or of enacting inspection laws, make discrimination against the products and industries of some of the states in favor of the products and industries of its own or of other states; Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. 213, 34 L. Ed. 862; Voight v. Wright, 141 U. S. 62, 11 Sup. Ct. 855, 35 L. Ed. 638.

See POLICE POWER; COMMERCE; LICENSE.

INSPECTOR. The name given to certain officers whose duties are to examine and inspect things over which they have jurisdiction: as, inspector of bark, one who is by law authorized to examine bark for exportation, and to approve or disapprove of its quality. Inspectors of customs are officers appointed by the general government.

INSPEXIMUS (Lat.). We have seen. A word sometimes used in letters patent, reciting a grant, *inspeximus* such former grant, and so reciting it verbatim: it then grants such further privileges as are thought convenient. 5 Co. 54.

Inspeximus charters appear to have originated in 11 Henry III, when he announced to all religious and other persons who wished to enjoy their liberties that they must renew their charters under the king's new seal. A renewal tax was levied.

It was not until the time of Edward I that such charters became common; in the 13th year of his reign their various forms were prescribed by parliament. An inspeximus is nothing more than a royal acknowledgment of having seen some diplomas granted by the king, or one of his predecessors, which he confirms under the great seal, etc.; A. M. Eaton in 1902 Am. Bar Ass'n Rep. 310. They were also called charters of confirmation.

INSTALLATION, INSTALMENT. The act by which an officer is put in public possession of the place he is to fill. The president of the United States, or a governor, is installed into office, by being sworn agreeably to the constitution and laws.

INSTALMENT. A part of a debt due by contract, and agreed to be paid at a time different from that fixed for the payment of the other part. For example, if I engage to pay you one thousand dollars, in two payments, one on the first day of January and the other on the first day of July, each of these payments or obligations to pay will be an instalment.

In such case, each instalment is a separate debt so far that it may be tendered at any time, or the first may be sued for although the other shall not be due; 3 Dane, Abr. 493, 494; 1 Esp. 129; 1 Maule & S. 706.

Successive actions may be brought for instalments as they fall due; but all sums due when an action is begun must be included in it; Puckett v. Annuity Ass'n, 134 Mo. App. 501, 114 S. W. 1039. See SALES; PERFORMANCE; INDEPENDENT PROMISES.

INSTANCE. Literally, standing on, hence, urging, solicitation. Webster, Dict.

In Civil and French Law. In general, all sorts of actions and judicial demands. Dig. 44, 7, 58.

In Ecclesiastical Law. Causes of *instance* are those proceeded in at the solicitation of some party, as opposed to causes of office, which run in the name of the judge. Halif. Anal. p. 122.

INSTANCE COURT. In English Law. That branch of the admiralty court which had the jurisdiction of all matters except those relating to prizes.

The term is sometimes used in American law for purposes of explanation, but has no proper application to admiralty courts in the United States, where the powers of both instance and prize courts are conferred without any distinction; Glass v. The Betsy, 3 Dall. (U. S.) 6, 1 L. Ed. 485; The Emulous, 1 Gall. 563, Fed. Cas. No. 4,479; 3 Kent 355, 378. See ADMIRALTY.

INSTANCIA. In Spanish Law. The institution and prosecution of a suit from its inception until definitive judgment. The first instance, "*primera instancia*," is the prosecution of the suit before the judge competent to take cognizance of it at its inception: the second instance, "*secunda instancia*," is the exercise of the same action before the court of appellate jurisdiction; and the third instance, "*tercera instancia*," is the prosecution of the same suit, either by an application of revision before the appellate tribunal that has already decided the cause, or be-

fore some higher tribunal, having jurisdiction of the same.

All civil suits must be tried and decided, in the first instance, within three years; and *all criminal*, within two years.

As a general rule, three instances are admitted in all civil and criminal cases. Art. 285, Const. 1812.

INSTANTER (Lat.). Immediately; presently. This term, it is said, means that the act to which it applies shall be done within twenty-four hours; but a doubt has been suggested by whom is the account of the hours to be kept, and whether the term instanter as applied to the subject-matter may not be more properly taken to mean "before the rising of the court," when the act is to be done in court, or "before the shutting of the office the same night," when the act is to be done there; 6 East 587; Tidd, Pr., 3d ed. 508, n.; 3 Chitty, Pr. 112. See 3 Burr. 1809; Co. Litt. 157.

INSTANTLY. Immediately; directly; without delay; at once. The word is a frequent occurrence in indictments for murder where the death is charged as having been the immediate result of a wound or blow inflicted. Where the killing has been alleged to have been caused by a battery it is necessary to allege an assault and to specify the time when the mortal stroke was given and the time of the death; the allegation that he "instantly did die" is insufficient; Lester v. State, 9 Mo. 666; as was an indictment which described the assault and then charges that of the mortal wound inflicted by defendant the deceased "did instantly die;" State v. Lakey, 65 Mo. 217; otherwise had the averment been that the deceased "did then and there instantly die"; State v. Steeley, 65 Mo. 218, 27 Am. Rep. 271. 8 Dowl. 157; 11 Ad. & El. 127; 3 Per & Dav. 52.

INSTAR (Lat.). Like; resembling; equivalent: as, *instar dentium*, like teeth; *instar omnium*, equivalent to all.

INSTIGATION. The act by which one incites another to do something, as, to injure a third person, or to commit some crime or misdemeanor, to commence a suit, or to prosecute a criminal. See ACCOMPLICE.

INSTITOR (Lat.). **In Civil Law.** A clerk in a store; an agent.

He was so called because he watched over the business with which he was charged; and it is immaterial whether he was employed in making a sale in a store, or whether charged with any other business. *Institor appellatus est ex eo, quod negotio gerendo instet; nec multum facit tabernæ sit præpositus, an cuilibet alii negotiationi;* Dig. lib. 14, tit. 3, 1, 3. Mr. Bell says that the charge given to a clerk to manage a store or shop is called institorial power; 1 Bell, Com. 479, 5th ed.; Erskine, Inst. 3. 3. 46; 1 Stair, Inst. by Brodie, b. 1, tit. 11, §§ 12, 18, 19; Story, Ag. § 8.

INSTITUTE. In Scotch Law. The person first called in the tailzie; the rest, or the heirs of tailzie, are called substitutes; Erskine Pr. 3. 8. 8. See TAILZIE, HEIR OF; SUBSTITUTES.

In Civil Law. One who is appointed heir by testament, and is required to give the estate devised to another person, who is called the substitute.

To name or to make an heir by testament; Dig. 28. 5. 65. To make an accusation; to commence an action.

INSTITUTES. Elements of jurisprudence; text-books containing the principles of law made the foundation of legal studies.

The word was first used by the civilians to designate those books prepared for the student and supposed to embrace the fundamental legal principles arranged in an orderly manner. Two books of Institutes were known to the civil lawyers of antiquity,—Gaius and Justinian.

I. COKE'S INSTITUTES. Four volumes of commentaries upon various parts of the English law.

Sir Edward Coke wrote four volumes of Institutes, as he was pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive commentary upon an excellent little treatise of tenures, compiled by Judge Littleton in the reign of Edw. IV. This comment is a rich mine of valuable common-law learning, collected and heaped together from the ancient reports and year-books, but greatly defective in method. The second volume is a comment on many old acts of parliament, without any systematic order; the third, a more methodical treatise on the pleas of the crown; and the fourth, an account of the several species of courts. These Institutes are usually cited thus: the first volume as Co. Litt., or 1 Inst.; the second, third, and fourth as, 2, 3, or 4 Inst., without any author's name. 1 Bla. Com. 72.

II. GAIUS'S INSTITUTES. A tractate upon the Roman law, ascribed to Caius or Gaius.

Of the personal history of this jurist nothing is known. Even the spelling of his name is matter of controversy, and he is known by no other title than Gaius, or Caius. He is believed to have lived in the reign of Marcus Aurelius. The history of Gaius's Institutes is remarkable. In 1816, Niebuhr was sent to Rome by the king of Prussia. On his way thither, he spent two days in the cathedral library of Verona, and at this time discovered these Institutes, which had been lost to the jurists of the middle ages. In 1817, the Royal Academy of Berlin charged Goeschen, Bekker, and Hollweg with the duty of transcribing the discovered manuscript. In 1819, Goeschen gave the first com-

pleted edition, as far as the manuscript could be deciphered, to his fellow-jurists. It created an unusual sensation, and became a fruitful source of comment. It formed a new era in the study of Roman law. It gave the modern jurist the signal advantage of studying the source of the Institutes of Justinian. It is believed by the best modern scholars that Gaius was the first original tractate of the kind, not being compiled from former publications. The language of Gaius is clear, terse, and technical,—evidently written by a master of law and a master of the Latin tongue. The Institutes were unquestionably *practical*. There is no attempt at criticism or philosophical discussion: the disciple of Sabinus is content to teach law as he finds it. Its arrangement is solid and logical, and Justinian follows it with an almost servile imitation.

The best editions of Gaius are Goeschen's 2d ed., Berlin, 1824, in which the text was again collated by Bluhme, and the 3d ed. of Goeschen, Berlin, 1842, edited by Lachman from a critical revision by Goeschen which had been interrupted by his death. Gneist's edition (1857) is a recension of all the German editions prior to that date. In France, Gaius attracted equal attention, and we have three editions and translations: Boulet, Paris, 1827; Demangeat, 1866; and Pellat, 1870.

In 1859, Francesco Lisi, a learned Italian scholar, published, at Bologna, a new edition of the first book of Gaius, with an Italian translation *en régard*. The edition is accompanied and enriched by many valuable notes, printed in both Latin and Italian.

See also Abdy & Walker; S. F. Harris; Muirhead; T. L. Mears, Gaius, Poste's translation, 1890.

III. JUSTINIAN'S INSTITUTES are an abridgment of the Code and Digest, composed by order of that emperor and under his guidance, with an intention to give a summary knowledge of the law to those persons not versed in it, and particularly to students. Inst. Proem. § 3.

The lawyers employed to compile it were Tribonian, Theophilus, and Dorotheus. The work was first published on the 21st of November, 533, and received the sanction of statute law by order of the emperor. They are divided into four books: each book is divided into titles, and each title into separate paragraphs or sections, preceded by an introductory part. The first part is called *principium*, because it is the commencement of the title; those which follow are numbered, and called paragraphs. The work treats of the rights of persons, of things, and of actions. The first book treats of persons; the second, third, and the first five titles of the fourth book, of things; and the remainder of the fourth book, of actions. The method of citing the Institutes should be understood, and is now commonly by giving the number of the book, title, and section, thus: Inst. I. 2. 5.—thereby indicating book I. title 2, section 5. Where it is intended to indicate the first paragraph, or principium, thus: Inst. B. I. 2. pr. Frequently the citation is simply I. or J. I. 2. 5. A second mode of citation is thus: § 5, Inst. or I. I. 2.—meaning book I, title 2, paragraph 5. A third method of citation, and one in universal use with the older jurists, was by giving the name of the title and the first words of the paragraph referred to, thus: § senatusconsultum est I de jure nat. gen. et civil.—which means, as before, Inst. B. I. tit. 2, § 5. See 1 Colquhoun, s. 61.

The first printed edition of the Institutes is that of Schoyffer, fol. 1468. The last critical German edition is that of Schrader, 4to, Berlin, 1832. This work of Schrader is the most learned and most elaborate commentary on the text of Justinian in any language, and was intended to form a part of the Berlin Corpus Juris. It is impossible in this brief article to name all the commentaries on these Institutes, which in all ages have commanded the study and admiration of jurists. More than one hundred and fifty years ago one Homberg printed a tract De Multitudine nimia Commentatorum in Institutiones Juris. But we must refer the reader to the best recent French and English editions. Ortolan's Institutes de l'Empereur Justinien avec le texte, la traduction en régard, et les explications sous chaque paragraphe, Paris, 3 vols., 8th Ed. 1870; Sohm's Institutes by Ledlie, 1892. This is, by common consent of scholars, regarded as the best historical edition of the Institutes ever published. Du Caurroy's Institutes de Justinien traduites et expliquées par A. M. Du Caurroy, Paris, 1851, 8th ed. 2 vols. 8vo. The Institutes of Justinian: with English Introduction, Translation, and Notes, by Thomas Collet Sandars, M. A. London, 1853, 8vo; 9th Ed. 1898, 1910. This work has been prepared expressly for beginners, and is founded mainly upon Ortolan, with a liberal use of LaGrange, Du Caurroy, Warnkoenig, and Puchta, as well as Harris and Cooper. The English edition of Harris, and the American one of Cooper, have ceased to attract attention. See J. B. Moyle's Institutiones Justiniani.

The most authoritative German treatises on the Pandects are the following: Windscheid, Dr. B., 3d ed., Dusseldorff, 1875; 2 vols.; Vangerow, Dr. K. A., 7th ed., Marburg, 1869; Brintz, Dr. A. B., 2d ed., Erlangen, 1879; Ihering, Dr. R., Jena, 1881. Incomparably the most philosophical exposition of the Roman system of jurisprudence is Savigny's Gesch. des röm. Rechts, coupled with his System des heut. röm. Rechts, the latter published in Berlin in 1840. Of both, French translations have been published by Guenoux. See also Sandars' Justinian, with an introduction by William G. Hammond (1876),

and Abdy and Walker's translation of the Institutes (1876), and T. L. Mears.

IV. THEOPHILUS' INSTITUTES. A paraphrase of Justinian, made, it is believed, soon after A. D. 533.

It is generally supposed that in A. D. 534, 535, and 536, Theophilus read his commentary in Greek to his pupils in the law school of Constantinople. He is conjectured to have died some time in A. D. 536. This paraphrase maintained itself as a manual of law until the eighth or tenth century. This text was used in the time of Hexabiblos of Harmenipulus, the last of the Greek jurists. It is also conjectured that Theophilus was not the editor of his own paraphrase, but that it was drawn up by some of his pupils after his explanations and lectures, inasmuch as it contains certain barbarous phrases, and the texts of the manuscripts vary greatly from each other.

It has, however, always been somewhat in use, and jurists consider that its study aids the text of the Institutes; and Cujas and Hugo have both praised it. The first edition was that of Zuichem, fol., Basle, 1531; the best edition is that of Reitz, 2 vols. 4to, 1751, Haag. There is a German translation by Wüsterman, 1823, 2 vols. 8vo; and a French translation by Mons. Ilrégier, Paris, 1847, 8vo, whose edition is prefaced by a learned and valuable introduction and dissertation. Consult Mortreuil, *Hist. Du Droit Byzan.*, Paris, 1843; Smith, Dict. Biog. London, 1849, 3 vols. 8vo; 1 Kent 533; *Profession d'Avocat*, tom. ii. n. 536, page 95; Introd. *á l'Etude du Droit Romaine*, p. 124; *Dict. de Jurisp.*; Merlin, *Répert.*; *Encyclopédie de d'Alembert.*

INSTITUTION (Lat. *instituere*, to form, to establish).

In Civil Law. The appointment of an heir; the act by which a testator nominates one or more persons to succeed him in all his rights active and passive. Halifax, Anal. 39; Pothier, *Tr. des Donations testamentaires*, c. 2, s. 1, § 1; La. Civ. Code, 1598; Dig. 28. 5; 1, 1; 28. 6. 1, 2, § 4.

In Ecclesiastical Law. To become a parson or vicar, four things are necessary, viz.: holy orders, presentation, institution, induction. Institution is a kind of investiture of the spiritual part of the benefice; for by institution the care of the souls of the parish is committed to the charge of the clerk,—previous to which the oath against simony and of allegiance and supremacy are to be taken. By institution the benefice is full: so that there can be no fresh presentation (except the patron be the king), and the clerk may enter on parsonage-house and glebe and take the tithes; but he cannot grant or let them, or bring an action for them, till induction. See 1 Bla. Com. 389; 1 Burn, Eccl. Law 169.

In Political Law. A law, rite, or ceremony enjoined by authority as a permanent rule of conduct or of government: as, the Institutions of Lycurgus. Webster, Dict. An organized society, established either by law or the authority of individuals, for promoting any object, public or social. A private school or college may, by curtesy, be called an institution; but in legal parlance it implies foundation by law, by enactment or prescription; one may open and keep a private school, but cannot properly be said to institute it; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103.

In Practice. The commencement of an action: as, A B has instituted a suit against C D to recover damages for trespass.

INSTRUCTIONS. Orders given by a principal to his agent in relation to the business of his agency.

The agent is bound to obey the instructions he has received; and when he neglects so to do he is responsible for the consequences, unless he is justified by matter of necessity; Dusar v. Perit, 4 Binn. (Pa.) 361; 1 Liverm. Ag. 368. See AGENT.

In Practice. The statement of a cause of action given by a client to his attorney, and which, where such is the practice, are sent to his pleader to put into legal form of a declaration. Warren, Law Stud. 284.

Instructions to counsel are their indemnity for any aspersions they may make on the opposite party; but attorneys who have a just regard to their own reputation will be cautious, even under instructions, not to make any unnecessary attack upon a party or witness. For such unjustifiable conduct the counsel will be held responsible. Eunom. Dial. 2, § 43, p. 132. For a form of instructions, see 3 Chitty, Pr. 117, 120, n.

Also the written or oral address of the presiding judge, in jury trials, delivered usually at the close of the arguments of counsel to the jury, informing them of the law applicable to the cause at trial, and their duties thereunder. A. & E. Encyc.

An omission to give instructions is not assignable as error where no request was made therefor in the court below; State v. Jackson, 112 N. C. 851, 17 S. E. 149; Bailey v. State, 26 Tex. App. 706, 9 S. W. 270; Duncombe v. Powers, 75 Ia. 185, 39 N. W. 261; Stuckslager v. Neel, 123 Pa. 53, 16 Atl. 94; State v. Johnson, 37 Minn. 493, 35 N. W. 373; People v. Fice, 97 Cal. 459, 32 Pac. 531; and errors or inaccuracies in charging the jury cannot be considered on appeal unless duly excepted to on the trial; State v. Hair, 37 Minn. 351, 34 N. W. 893; Georgia Pac. R. Co. v. West, 66 Miss. 310, 6 South. 207; Paddleford v. Cook, 74 Ia. 433, 38 N. W. 137; Frauenthal v. Bridgeman, 50 Ark. 348, 7 S. W. 388; Schroeder v. Rinehard, 25 Neb. 75, 40 N. W. 593; Chemical Co. of Canton v. Johnson, 101 N. C. 223, 7 S. E. 770, 775; a

refusal to give instructions not excepted to cannot be complained of on appeal; Burns v. People, 126 Ill. 282, 18 N. E. 550. Where a charge correctly states the law of the case, a judgment will not be reversed because the charge was abstract; Bonner v. State, 97 Ala. 47, 12 South. 408; State v. King, 111 Mo. 576, 20 S. W. 299; but an instruction is wrong which states hypothetically facts as to which there is no evidence; Jackson v. State, 88 Ga. 784, 15 S. E. 677; State v. Brackett, 45 La. Ann. 46, 12 South. 129. It is not error to recall a jury and charge them again at their request; Caston v. State, 31 Tex. Cr. R. 304, 20 S. W. 585. The improper admission of evidence is cured by an instruction not to consider the evidence so admitted; Shepard v. Ry. Co., 77 Ia. 54, 41 N. W. 564; Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Dismukes v. State, 83 Ala. 287, 3 South. 671. Refusal to give correct instructions is not error if the court has already given them on the same point; Bener v. Edgington, 76 Ia. 105, 40 N. W. 117; People v. Madden, 76 Cal. 521, 18 Pac. 402; Beck v. State, 76 Ga. 452; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 394, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; Va. Midland R. Co. v. White, 84 Va. 498, 5 S. E. 573, 10 Am. St. Rep. 874; or where given in different words; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; Anthony v. R. Co., 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

The principles governing the subject of peremptory instructions were clearly stated by Harlan, J., in Travelers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305:

"It is well settled that if, at the close of the plaintiff's evidence, the court refuses to give a peremptory instruction for the defendant, such refusal cannot be assigned for error if the defendant does not stand upon the case made by the plaintiff, but introduces evidence in support of his defence" (citing Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; Union Pac. R. Co. v. Callaghan, 161 U. S. 91, 16 Sup. Ct. 493, 40 L. Ed. 628). "But the failure of the defendant, at the close of the plaintiff's evidence, to ask a peremptory instruction will not, of itself, preclude such a motion at the close of the whole evidence." Travelers' Ins. Co. v. Randolph, 78 Fed. 759, 24 C. C. A. 305.

"A mere scintilla of evidence in favor of one party does not entitle him of right to go to the jury" (citing Schuylkill & D. Imp. & R. Co. v. Munson, 14 Wall. [U. S.] 442, 448, 20 L. Ed. 867). Nor can it "be withdrawn from the consideration of the jury simply because, in the judgment of the court, there is a preponderance of evidence in favor of the party asking a peremptory instruction. If the facts are entirely undisputed or uncontradicted, or if, upon any issue dependent upon facts, there is no evidence whatever in favor of one party, or, what is the same thing, if the evidence is so slight as to justify the court in regarding the proof as substantially all one way, then the court may direct a verdict according to its view of the law arising upon such a case. If a verdict is rendered contrary to the evidence, the remedy of the losing party is a motion for a new trial." 78 Fed. 759, 24 C. C. A. 305.

The conclusions were thus stated:

"That there must be something more than a scintilla of evidence supporting the case of the party upon whom the burden of proof rests, to require the submission of the case to the jury; that where there is a real conflict of evidence on a question of fact, whatever may be the opinion of the judge who tries the case as to the value of that evidence, he must leave the consideration of it for the decision of the jury; that where there are material and substantial facts which, if credited by the jury, would in law justify a verdict in favor of one party, it is not error for the trial judge to refuse a peremptory instruction to the jury; that it is not a 'proper standard to settle for a peremptory instruction that the court, after weighing the evidence in the case, would, upon motion for a new trial, set aside the verdict,' and that the court 'may, and often should, set aside a verdict, when clearly against the weight of the evidence, where it would not be justified in directing a verdict'; that, upon reason and authority, 'there is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence, and that obligation which the court has to withdraw a case from the jury, or direct a verdict for insufficiency of evidence'; and that 'in the latter case it must be so insufficient in fact as to be insufficient in law.'" 78 Fed. 760, 24 C. C. A. 305 (citing Mt. Adams & E. P. Inclined R. Co. v. Lowery, 74 Fed. 463, 20 C. C. A. 596).

In French Law. The means used and formality employed to prepare a case for trial. It is generally applied to criminal cases, and is then called criminal instruction; it is then defined the acts and proceedings which tend to prove positively a crime or delict, in order to inflict on the guilty person the punishment which he deserves.

INSTRUMENT. A document or writing which gives formal expression to a legal act or agreement, for the purpose of creating, securing, modifying, or terminating a right; a writing executed and delivered as the evidence of an act or agreement.

The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters or memoranda. The agreement and the instrument in which it is contained are very different things,—the latter being only evidence of the existence of the former. The instrument or form of the contract may be valid, but a contract itself may be void on account of fraud. See Ayliffe, Parerg. 305; Dun. Adm. Pr. 220. A forthcoming bond is an "instrument for the payment of money." Coe v. Straus, 11 Wis. 72. A bank check payable in confederate currency was held not "an instrument payable in money" under the Alabama Code in relation to commercial paper; Bank of Mobile v. Brown, 42 Ala. 108.

A statute requiring "any instrument of writing" sued on to be filed, does not apply to a contract signed by both parties and deposited with a third person for safe keeping, it applies only to obligations executed only by the party sued; Bowling v. Hax, 55 Mo. 446.

INSTRUMENT OF SASINE. An instrument in Scotland by which the delivery of "sasine" (*i. e.* seisin) is attested. Moz. & W.

INSTRUMENTA (Lat.). That kind of evidence which consists of writings not under seal: as, court-rolls, accounts, and the like. 3 Co. Litt., Thomas ed. 487.

INSUFFICIENCY. In Chancery Practice. After filing of defendant's answer, the plaintiff has six weeks in which to file exceptions to it for *insufficiency*,—which is the fault of not replying specifically to specific charges in the bill. Smith, Ch. Pr. 344; Mitf. Eq. Pl. 376, note. Sanders, Ord. in Ch., Index; Beach, Mod. Eq. Pr. 413.

Under the Judicature Act, 1875, order xxxi., rules 6, 9, 10, interrogatories are to be answered by affidavit, and if the party interrogated answers insufficiently, the party interrogating may apply to the court for an order requiring him to answer further. Moz. & W.

INSULA (Lat. island). A house not connected with other houses, but separated by a surrounding space of ground. Calvinus, Lex.

INSULAR POSSESSIONS. See PHILIPPINES; PORTO RICO; TERRITORY.

INSUPER. Moreover; over and above. An old exchequer term, applied to a charge made *upon* a person in his account. Blount.

INSURABLE INTEREST. Such an interest in a subject of insurance as will entitle the person possessing it to obtain insurance.

It is essential to the contract of insurance, as distinguished from a wager, that the assured should have a legally recognizable interest in the insured subject, the pecuniary value of which may be appreciated and computed or valued. An earlier examination of the subject, as connected with life insurance, results in the conclusion from the authorities, that at common law that contract was not one of indemnity, and wagering policies were not unlawful, and therefore that logically, in such policies, an insurable interest should not be required, but that the American courts adopted what has been termed a rule of American common law that all wagers were void on grounds of public policy and, therefore, that there must be an insurable interest; 35 Am. L. Reg. N. S. 65. This rule, it was said, obtains in all the states except New Jersey and Rhode Island; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576; Mowry v. Home Life Ins. Co., 9 R. I. 354; and see Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496.

Absence of an insurable interest is always a defense for the insurer even though there is an incontestible clause; Bromleys' Adm'r v. Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685.

The case of Godsall v. Boldero, 9 East 72, was so generally cited and relied on in the American cases that it is not easy to estimate the influence of that case before it was overruled by Dalby v. I. & L. L. Assurance Company, 15 C. B. 365. It is of special interest to note that the New Jersey case in which the court expressly refused to follow Godsall v. Boldero, was decided about the time of the case which overruled it, but before it was reported in the United States. See also 2 Sm. L. Cas., 9th Am. ed. 1530, where both the English cases mentioned are reported, and the authorities in both countries are collected, the conclusion of the American editors being, that as to fire, marine, and life insurance there must be some interest in the insurer. See also Biddle, Ins. § 184, where it is said that wagering policies were not void in England at common law. See WAGER.

Where the subject-matter is property, as in fire and marine insurance, the question whether there is an insurable interest is generally free from difficulty and the rule established by the decisions is comparatively simple. It is not requisite that the insured party should have an absolute property in the insured subject, or that the subject or interest should be one that can be exclusively possessed or be transferable by delivery or assignment. Insurable interest involves neither legal nor equitable title; Carter v. Ins. Co., 12 Ia. 287; Pedrick v. Fisher, 1 Sprague 565, Fed. Cas. No. 10,900. The subject or interest must, however, be such that it may be destroyed, lost, damaged, diminished, or intercepted by the risks insured against. The interests usually insured are those of the owner in any species of property, of mortgagor, mortgagee, holder of bottomry or respondentia bond, of an agent, consignee, lessee, factor, carrier, bailee, or party having a lien or entitled to a rent or income, or being liable to a loss depending upon certain conditions or contingencies, or having the certainty or probability of a profit or pecuniary benefit depending on the insured subject; 1 Phill. Ins. c. 3; 11 E. L. & Eq. 2; 48 *id.* 292; Cobb v. Ins. Co., 6 Gray (Mass.) 192; Allen v. Ins. Co., 2 Md. 111; Rohrbach v. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Home Protection of North Ala. v. Caldwell Bros., 85 Ala. 607, 5 South. 338; California Ins. Co. v. Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730. Property subject to a deed of trust is encumbered under a provision against a chattel mortgage, and the insured has not unconditional and sole ownership; Hunt v. Fire Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381. See Clymer Opera Co. v. Fire Ins. Co., 238 Pa. 137, 85 Atl. 1111.

It was formerly held that the interest in property insured must exist when the insurance was effected, and also at the time of the loss; Howard v. Ins. Co., 3 Den. (N. Y.) 301; Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466: Folsom v. Ins. Co., 38 Me. 414; Biddle, Ins. § 157. This is not now the rule;

Arnould, Ins. 59; and in a case in which the insurance was upon a cargo, "on account of whom it may concern," the author just cited is approvingly quoted by Mr. Justice Swayne to the effect that, "it is now clearly established that an insurable interest, subsisting during the risk and at the time of loss, is sufficient, and the assured need not also allege or prove that he was interested at the time of effecting the policy," and he adds, "This is consistent with reason and justice, and is supported by analogies of the law in other cases." Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Sun Ins. Office of London v. Merz, 64 N. J. L. 301, 45 Atl. 785, 52 L. R. A. 330.

It has been held that there is an insurable interest in an attaching creditor; 86 Me. 518; a purchaser in possession under a contract of sale; Dupuy v. Ins. Co., 63 Fed. 680; Quinn v. Parke & Lacy Machinery Co., 5 Wash. 276, 31 Pac. 866; Carpenter v. Ins. Co., 135 N. Y. 298, 31 N. E. 1015; 21 Can. S. C. R. 288; a person admitted as a partner, though the consideration was unpaid; Hanover Fire Ins. Co. v. Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; a husband, in personal property in the name of his wife; *id.;* a commission merchant in goods consigned to him; Putnam v. Ins. Co., 5 Metc. (Mass.) 386; persons liable by contract, statute, or common law for the safe keeping of property; Savage v. Ins. Co., 36 N. Y. 655; carriers; Chase v. Ins. Co., 12 Barb. (N. Y.) 595; railroad companies; Monadnock R. Co. v. Ins. Co., 113 Mass. 77; warehousemen; Pelzer Mfg. Co. v. Office, 36 S. C. 213, 15 S. E. 562; a pipeline company in oil in its tanks; Western & A. Pipe Lines v. Ins. Co., 145 Pa. 347, 22 Atl. 665, 27 Am. St. Rep. 703; a sheriff in goods levied on; White v. Madison, 26 N. Y. 117; Warren v. Ins. Co., 31 Ia. 464, 7 Am. Rep. 160; one liable as indorser of a mortgage note; Williams v. Ins. Co., 107 Mass. 377, 9 Am. Rep. 41; or a trustee liable for the safe-keeping of property; Howard Fire Ins. Co. v. Chase, 5 Wall. (U. S.) 509, 18 L. Ed. 524; or who gives bond for its delivery; Fireman's Ins. Co. v. Powell, 13 B. Mon. (Ky.) 311; one in possession for life under a parol agreement to pay repairs, taxes, and insurance; Berry v. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; a carpenter or builder erecting or repairing a building, to be paid for on completion; Protection Ins. Co. v. Hall, 15 B. Mon. (Ky.) 411; a vendor of land before payment in full; Wood v. North Western Ins. Co., 46 N. Y. 421; (but not one paid in full who has not conveyed; 2 N. S. W. L. R. 239); a lessor; Ely v. Ely, 80 Ill. 532; a tenant; *id.;* or subtenant; Georgia Home Ins. Co. v. Jones, 49 Miss. 80; (but not a tenant of glebe land after death of the lessor; 20 U. C. C. P. 170); a tenant by the curtesy; Harris v. Ins. Co., 50 Pa. 341; a simple contract creditor of the estate of a deceased person in lands of the latter, though subject to dower and homestead rights; Creed v. Sun Fire Office of London, 101 Ala. 522, 14 South. 323, 23 L. R. A. 177, 46 Am. St. Rep. 134; a mechanic's lien holder; Stout v. Ins. Co., 12 Ia. 371, 79 Am. Dec. 539; the successful bidder at an execution sale; Ætna Ins. Co. v. Miers, 5 Sneed (Tenn.) 139; the owner of lands, on buildings in process of erection; Foley v. Ins. Co., 71 Hun 369, 24 N. Y. Supp. 1131; the grantee of property conveyed in fraud of creditors; German Ins. Co. of Freeport v. Hyman, 34 Neb. 704, 52 N. W. 401; a grantee of property, although the conveyance may be subsequently declared fraudulent on petition of creditors before the loss occurred; Steinmeyer v. Steinmeyer, 64 S. C. 413, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809; one holding property in trust; Cross v. Ins. Co., 132 N. Y. 133, 30 N. E. 390; or who has an equitable interest; Swift v. Ins. Co., 18 Vt. 305; a mortgagee, to the extent of his mortgage interest; Fox v. Ins. Co., 52 Me. 333; Holbrook v. Ins. Co., 1 Curt. C. C. 193, Fed. Cas. No. 6,589; and a mortgagor, on his interest in the same building; Traders' Ins. Co. v. Robert, 9 Wend. (N. Y.) 405; Strong v. Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; but the interests are independent and insurance by the mortgagor cannot be claimed by the mortgagee; McDonald v. Black's Adm'r, 20 Ohio 185, 55 Am. Dec. 448; where the mortgagor insures and makes the loss payable to the mortgagee, as his interest may appear, the company is estopped to deny the insurable interest; Appleton Iron Co. v. Assurance Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100; a mortgagor who conveys subject to the mortgage, has an insurable interest in the real estate, being liable to the mortgagee for any deficiency; Hanover Fire Ins. Co. v. Bohn, 48 Neb. 743, 67 N. W. 774, 58 Am. St. Rep. 719. A partner may have an insurable interest in a building erected by the partnership on land of the other partner; Converse v. Ins. Co., 10 Cush. (Mass.) 37; and an agent in control may insure the property in his own name; Roberts v. Ins. Co., 165 Pa. 55, 30 Atl. 450, 44 Am. St. Rep. 642; a master of a ship on his right to primage on freight; Pedrick v. Fisher, 1 Sprague 565, Fed. Cas. No. 10,900; or a half-owner of property in possession, may, if so authorized by the other owners, insure all the property in his own name; Hebner v. Ins. Co., 55 Ill. App. 275.

A partnership has been held to have no insurable interest in household furniture and wearing apparel of one of the partners; Georgia Home Ins. Co. v. Hall, 94 Ga. 630, 21 S. E. 828; so also an administratrix in real estate of the intestate; Bradford v. Ins. Co., 8 Abb. Pr. (N. Y.) 261, note; a charterer, who advances on the personal credit of the owner, who must pay, without regard to the issue of the voyage; Lee v. Barreda, 16 Md. 190; a stockholder as an individual

in the property of the corporation; Philips v. Ins. Co., 20 Ohio 174. It was held that an interest in the profit to be derived by the insured from the adventure of laying an Atlantic cable was insurable; though the insured was a shareholder in the company and would derive his profits from dividends; L. R. 2 Exch. 139.

Life Insurance. The insurable interest in life insurance rests upon a different basis from that on property. It has been said "that while in fire and marine insurance it is the interest and not the thing that is insured, in life insurance it is the thing and not the interest;" 35 Am. L. Reg. N. S. 79.

With regard to the nature and amount of interest necessary for a policy of life insurance, no definite general principle seems yet to have been established, though the classes of insurable interests have been increasing. Every person has an insurable interest in his own life; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Campbell v. Life Ins. Co., 98 Mass. 381; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; 1 Moo. & Rob. 481. It has been a much mooted question whether the beneficiary must have an interest. It has been held in many cases that a person may insure his own life and pay the premiums, for a beneficiary designated by him; Campbell v. Ins. Co., 98 Mass. 381; Gambs v. Life Ins. Co., 50 Mo. 44; Olmsted v. Keyes, 85 N. Y. 593; and there are *dicta* to this effect, frequently referred to, of Sharswood, J., American & Health Ins. Co. v. Robertshaw, 26 Pa. 189, and Paxson, J., in Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192. To the contrary are Gilbert v. Moose's Adm'rs, 104 Pa. 74, 49 Am. Rep. 570; Watson v. Mut. Life Ass'n, 21 Fed. 698; and see Mutual Benefit Ass'n v. Hoyt, 46 Mich. 473, 9 N. W. 497, and a *dictum* in Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287. If the beneficiary pays the premiums, it is generally held that he must have an interest; Goldbaum v. Leon, 79 Tex. 638, 15 S. W. 564; Amick v. Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Riner v. Riner, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693. See Biddle, Ins. § 194; 35 Am. L. Reg. N. S. 79, where the authorities are collected.

It was held that when the policy is caused by the assured to be issued to another, the effect is the same as if issued to the applicant and assigned to the other, and an insurable interest is not required; Classey v. Ins. Co., 84 Hun 350, 32 N. Y. Supp. 335. A member of a beneficial association may change the beneficiary according to the rule and substitute a new one without regard to insurable interest; 22 Wash. L. R. 329; and where the policy was for the benefit of the insured unless he sustained a fatal accident, and in that case to a nephew, the latter contingency having happened, the nephew was not required to show an insurable interest; American Employers' Liability Ins. Co. v. Barr, 68 Fed. 873, 16 C. C. A. 51.

The interest required to support an insurance on the life of another has been found by the courts difficult to define, and indeed as was said they "have left it very much undefined;" Mowry v. Ins. Co., 9 R. I. 346. Many attempts to formulate a definition have been made, but they are similar mainly in their vagueness and generality. One of those most quoted was that of Chief Justice Shaw, in Loomis v. Ins. Co., 6 Gray (Mass.) 396: "It must appear that the insured has some interest in the life of the *cestui que vie;* that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantages in life will be impaired so that the real purpose is not a wager, but to secure such advantage, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. . . . We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in that of a parent, not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals and the force of natural affection between near kindred, operating often more efficaciously than those of positive law." This was quoted with approval in Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, and in the opinion, Bradley, J., added some observations not more definite: "Precisely what interest is necessary in order to take a policy out of the category of a mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. . . . Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. . . . The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest." In the same court, later, Field, J., in Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924, says: "It may be stated generally, however, to be such an interest arising from the relations

of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. . . . But in all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." The last quotation was approved in Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

Notwithstanding the high authority both of these judges and the courts for which they were speaking, their utterances have been characterized as *dicta*, and such they are technically, but they undoubtedly fairly represent the views of those courts and all others who recognize that the interest may be based upon kinship and need not be pecuniary. Any effort to extract a more precise definition from the American cases is likely to end in the conclusion of another able judge, who said: "The question, what is such an interest in the life of another as will support a contract of insurance upon the life, is one to which a complete and satisfactory answer, resting upon sound principles, can hardly yet be said to have been given;" Hoar, J., in Forbes v. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360.

In England a pecuniary interest is required and must be proved; [1892] 1 Q. B. 864; with the possible exception that it is presumed in case of a wife who insures the life of her husband; Peake, Add. Cas. 70. The American courts take a less restricted view as shown by the definitions quoted, but no certain rule can be stated and the cases must be referred to, to ascertain whether any given relationship has been held sufficient.

A creditor may always insure the life of the debtor; Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620; Rittler v. Smith, 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844; Mace v. Life Ass'n, 101 N. C. 122, 7 S. E. 674; and in such case it has been termed a contract of indemnity, differing from other life insurance; Sharswood, J., in 4 Big. L. & Ac. Cas. 458; but this would be only as to the creditor; 15 C. B. 365; Goldbaum v. Leon, 79 Tex. 638, 15 S. W. 564; Crotty v. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566; and it is said that there is no further interest after the payment of the debt; *id.;* Ulrich v. Reinoehl, 143 Pa. 238, 22 Atl. 862, 13 L. R. A. 433, 24 Am. St. Rep. 534; but the question of interest is determined at the time of insurance and not of loss; see *infra;* Biddle, Ins. § 189. When the debtor pays the premiums, and assigns the policy as collateral security, the policy is in trust for him, and he is entitled to have it delivered up to him on payment; L. R. 5 Ch. App. 32; but it is otherwise if the creditor pays the premiums and there is no agreement for redemption; 2 De G. & J. 582; Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479.

In cases other than these of creditors it may be said, in the language of Mr. Justice Bradley, that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; Bevin v. Ins. Co., 23 Conn. 244; Valton v. Assurance Society, 22 Barb. (N. Y.) 9; McKee v. Ins. Co., 28 Mo. 383, 75 Am. Dec. 129; 28 E. L. & Eq. 312; Metropolitan Life Ins. Co. v. O'Brien, 92 Mich. 584, 52 N. W. 1012.

It has been held that there was an insurable interest in a tenant, in the life of the landlord who had a life estate; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; or of one partner in the life of another; Valton v. Assurance Co., 20 N. Y. 32; whose interest was not fully paid for; Connecticut Mut. Life Ins. Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800; Bevin v. Ins. Co., 23 Conn. 244; Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. L. 576.

When an adequate interest exists at the time of the insurance, it is immaterial if there occur before death a diminution or entire cessation of it; Sides v. Ins. Co., 16 Fed. 650; Rawls v. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; and see note by J. D. Brannan on the last case in 16 Am. L. Reg. N. S. 399. But see Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466.

On the subject of relationship there is little but confusion. It is said to be only of importance as tending to give rise to a reasonable expectation of pecuniary benefit from the continuance of the life of the insured; May, Ins. § 107; Bliss, Ins. § 31; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; Rombach v. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239; or when there is a legal claim on the insured for support or service; *id.;* Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328; Keystone Mut. Benefit Ass'n v. Norris, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572. The interest has been held to exist in the case of a wife in the life of her husband; Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; McKee v. Ins. Co., 28 Mo. 383, 75 Am. Dec. 129 (but see Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328); Thompson v. Ins. Co., 46 N. Y. 674 (and see criticism of this case in 25 Am. L. Rev. 185 and 35 Am. L. Reg. N. S. 171); Wallace v.

Ins. Co., 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S) 478 (which he cannot after divorce compel her to relinquish); and the husband in the life of the wife; Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 5 Am. Rep. 535; Currier v. Ins. Co., 57 Vt. 496, 52 Am. Rep. 134; the marriage gives an interest; Keystone Mut. Benefit Ass'n v. Norris, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572; Holabird v. Ins. Co., 2 Dill. 166, Fed. Cas. No. 6,587; and before marriage a *feme sole* has an interest in the life of her betrothed; Chisholm v. Ins. Co., 52 Mo. 213, 14 Am. Rep. 414; and so, *semble*, in Pennsylvania; Appeal of Corson, 113 Pa. 438, 6 Atl. 213, 57 Am. Rep. 479. As to other relations, it has been held that a son has an interest (on different grounds) in the life of his father; Appeal of Plymouth Mfg. Co., *81 Pa. 154; Guardian Mut. Life Ins. Co. of New York v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; but not merely as son; *id.;* Continental Life Ins. Co. v. Volger, 89 Ind. 572, 46 Am. Rep. 185 (*contra*, Tucker v. Ins. Co., 50 Hun 50, 4 N. Y. Supp. 505); a father, in that of a minor son; Mitchell v. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; or an adult son; Reserve Mut. Ins. Co. v. Kane, 81 Pa. 154, 22 Am. Rep. 741; Central Nat. Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370; Loomis v. Ins. Co., 6 Gray (Mass.) 396; Grattan v. Ins. Co., 15 Hun (N. Y.) 74 (*contra*, in England, 1 Ch. D. 419); and the interest exists when relationship is by adoption; Hodge v. Ellis, 76 Ga. 272; as where the relation of father is assumed; Carpenter v. Ins. Co., 161 Pa. 9, 28 Atl. 943, 23 L. R. A. 571, 41 Am. St. Rep. 880; but a stepson has no interest in the life of his stepfather; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; nor a son-in-law in the life of the mother-in-law; Stambaugh v. Blake, 22 W. N. C. (Pa.) 407. A grandmother has an interest in the life of a grandchild; Burke v. Ins. Co., 155 Pa. 295, 26 Atl. 445; an old woman who lived with her daughter and the father-in-law of the latter, who had promised to keep her for life had an interest in his life; 16 Ins. L. J. 682. There is much difference of opinion as to brother and sister, but it is said that the relationship, without more, does not give an interest; Biddle, Ins. § 193; Lewis v. Ins. Co., 39 Conn. 100; Ætna Life Ins. Co. v. France, 94 U. S. 561, 24 L. Ed. 287; however, it has been held that a policy will stand if there is dependence, or indebtedness; Keystone Mut. Ass'n v. Beaverson, 16 W. N. C. (Pa.) 188; see Goodwin v. Ins. Co., 73 N. Y. 480; [1892] 1 Q. B. 864; the last being the case of a stepsister. No interest exists in case of uncle or aunt and nephew or niece; Riner v. Riner, 166 Pa. 617, 31 Atl. 347, 45 Am. St. Rep. 693; Singleton v. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321; but an aunt who stands in *loco parentis* to a nephew has an insurable interest in his life; Weber v. Ins. Co., 172 Pa. 111, 33 Atl. 712. One who was merely the "protector of the deceased whenever he stood in need of protection" has no insurable interest in his life; [1899] A. C. 604.

An insurance procured by a religious society, supported largely by voluntary contributions, on the life of one of its members, is void; Trinity College v. Ins. Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291. In the absence of any insurable interest, the law will presume that the policy was taken out for the purpose of a wager or speculation; United Brethren Mut. Aid Soc. v. McDonald, 122 Pa. 324, 15 Atl. 439, 1 L. R. A. 238, 9 Am. St. Rep. 111; and wagering contracts in life insurance are not valid; Crotty v. Ins. Co., 144 U. S. 621, 12 Sup. Ct. 749, 36 L. Ed. 566.

The amount of insurable interest is the value of the insured subject as agreed by the policy, or its market value, or the pecuniary loss to which the assured is liable by the risks insured against, though the insured subject—for example, life or health—has not a market value; Mead v. Ins. Co., 7 N. Y. 530; 2 Pars. Mar. Law, c. 2, sec. 2.

In insurance cases generally an interest must be averred and some proof thereof be made; Biddle, Ins. § 197, and cases cited; but on fire policies if the application or policy shows an interest, it is generally sufficient, *prima facie; id.;* and so it was held on a life policy; Lewis v. Ins. Co., 39 Conn. 100; and the fact that the policy was made payable to plaintiff made a *prima facie* case; Parks v. Ins. Co., 26 Mo. App. 511. The facts showing interest are to be determined by the jury; Mitchell v. Ins. Co., 32 Ia. 421; Guardian Mut. Life Ins. Co. of New York v. Hogan, 80 Ill. 37, 22 Am. Rep. 180; Shaak v. Meily, 26 W. N. C. (Pa.) 569.

The weight of authority is that a policy of life insurance may be assigned to one who has no insurable interest; Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, where all the cases are given in the brief of counsel. A policy of life insurance is not avoided by a cessation of insurable interest; *id.;* distinguishing Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251, and Warnock v. Davis, 104 U. S. 775, 26 L. Ed. 924.

See, generally, articles by Erskine Hazard Dickson, 35 Am. L. Reg. N. S. 65, 161.

INSURANCE. A contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.

"An agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the contract of the risk), promises to make a certain payment of money upon the destruction or

injury of something in which the other party has an interest." Com. v. Wetherbee, 105 Mass. 149, 160.

An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage, to a certain property named in the policy, by reason of certain perils to which it may be exposed. Dover Glass-Works Co. v. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264.

"In fire insurance and marine insurance the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the time and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract;" Com. v. Wetherbee, 105 Mass. 160; Masonic Association v. Taylor, 2 S. D. 324, 15 N. W. 93; Physicians Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50.

Any one *sui juris* and capable of contracting generally may be insured, but insurance has been held not to be a necessary for which an infant might contract and be held liable against his option on coming of age; N. H. Mut. Fire Ins. Co. v. Noyes, 32 N. H. 345; Monaghan v. Ins. Co., 53 Mich. 238, 18 N. W. 797. In recent years, contracts of insurance by married women have been generally held valid, usually under statutes; McQuitty v. Ins. Co., 15 R. I. 573, 10 Atl. 635; Queen Ins. Co. v. Young, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419, 4 Am. Rep. 328.

Any one otherwise capable of contracting may become an insurer, and formerly the business was largely conducted by partnerships, but, with the exception of risks taken at Lloyds *(q. v.)* and some other large partnerships, the business is now conducted, mainly, by *insurance companies (q. v.)*, though, in England, quasi corporations organized under the Joint Stock Companies Acts insure under the authority of letters patent securing limited liability. See JOINT STOCK COMPANY.

The *insurer* is sometimes called the *underwriter*, and the *insured*, the *assured*. The agreed consideration is called the *premium;* the written contract, a *policy;* the events insured against, *risks or perils;* and the subject, right, or interest to be protected, the *insurable interest*. See these several titles. As to *insured* and *assured*, see Connecticut Mutual Life Ins. Co. v. Luchs, 108 U. S. 504, 2 Sup. Ct. 949, 27 L. Ed. 800.

The policy is usually issued upon the *application (q. v.)* of the insured in writing, which contains the statement of facts entering into and forming a part of the contract.

It is reasonable to stipulate in a fire insurance policy that, if any statements made by the applicant are untrue, the policy shall be void; Deming Inv. Co. v. Ins. Co., 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

A renewal reinstates the original contract with all its terms and also incorporates into it the new terms expressed in the renewal application and representations contained therein become part of the contract; Metropolitan Life Ins. Co. v. McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

It is not a false representation for a pregnant woman to state she is in sound bodily health, and she is not required to inform the company of her pregnancy; Merriman v. Grand Lodge, 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124.

See REPRESENTATION; WARRANTY.

Whether facts concealed or misstated in an application are material is a question for the jury; State Ins. Co. of Des Moines v. Du Bois, 7 Colo. App. 214, 44 Pac. 756.

The happening of the event insured against and the consequent damage to the subject-matter, is termed the *loss (q. v.)*.

Where the insurance is on property, an alienation will terminate the contract unless the insurance be transferred with the consent of the underwriter. See ASSIGNMENT. An alienation of part of the property or diminution of the interest of the insured will not, in the absence of an express condition, avoid the policy; Pennsylvania Fire Ins. Co. v. Dougherty, 102 Pa. 568; Ætna Fire Ins. Co. v. Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Sides v. Ins. Co., 16 Fed. 650; Gordon v. Ins. Co., 2 Pick. (Mass.) 249; Tiefenthal v. Ins. Co., 53 Mich. 306, 19 N. W. 9; 14 U. C. Q. B. 342; 25 Beav. 444; and the sale of a part does not avoid a policy forbidding merely "sale or transfer;" Quarrier v. Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582; Blackwell v. Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 14 L. R. A. 431, 29 Am. St. Rep. 574.

There is usually a clause, varying in exact terms, forbidding *any change* in title or possession, and, in such case, the sale of an undivided half interest is within its meaning and avoids the policy; McEwan v. Ins. Co., 1 Mich. N. P. 118; but a distinction has been taken between a sale of an interest in property and a sale of the property, and the assignment by a new partner to his firm of his insured property as firm assets was not a forfeiture; Scanlon v. Union Fire Ins. Co., 4 Biss. 511, Fed. Cas. No. 12,436; Savage v. Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741. Clauses against alienation are conditions precedent; Lett v. Ins. Co., 125 N. Y. 82, 25

N. E. 1088; Home Ins. Co. of New York v. Bethel, 42 Ill. App. 475; and the question usually is whether there is a sale outright or by reason of something in the nature of a defeasance, either in law or by contract, the insured has not wholly parted with the property. As to such cases it is difficult, if not impossible, to lay down any general rule, and each case must be governed by the application of the general principles of the law of contracts and conditions to the particular form of the policy and the facts of the case. If there is, in fact, a total alienation, the opinion or motives of the parties in respect to it are not material; Langdon v. Fire Ins. Ass'n, 22 Minn. 193. A conveyance upon a condition to be performed before title vests will not avoid; Tittemore v. Ins. Co., 20 Vt. 546; so where the owner of an equity of redemption sells with a stipulation for payment of the mortgage by the purchaser and is compelled to take back the title for non-performance; Worthington v. Bearse, 12 Allen (Mass.) 382, 90 Am. Dec. 152; or where, for other reasons, the sale is not carried out and there is a reconveyance before loss; Power v. Ins. Co., 19 La. 28, 36 Am. Dec. 665; but see Davidson v. Ins. Co., 71 Ia. 532, 32 N. W. 514, 60 Am. Rep. 818.

An executory contract to convey the insured property with a consideration fully paid, but no transfer of title or possession, is not a change in interest, title or possession within the meaning of a forfeiture clause; Garner v. Ins. Co., 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459; nor is the filing of a voluntary petition in bankruptcy where the fire occurs before the appointment of the receiver or trustee; Gordon v. Ins. Co., 120 La. 441, 45 South. 384, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 14 Ann. Cas. 886. Such conditions will apply to a mortgagee although there is a slip attached to the policy making the loss payable to him; Brecht v. Ins. Co., 160 Fed. 399, 87 C. C. A. 351, 18 L. R. A. (N. S.) 197; where property is insured in a trade name, a change in the personnel of the partners avoids the policy; American Steam Laundry Co. v. Ins. Co., 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442; although the trade name is continued by the new owners; *id.* Void means voidable and the insurer must with reasonable promptness notify the assured of its intention to avoid the policy and tender the unearned premium which it has received; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

Policies of insurance also usually contain conditions for forfeiture in case of incumbrance without notice, or in case the property be "levied upon or taken into possession or custody," and such conditions are valid; Dover Glass-Works Co. v. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264. Where the property insured is subject to deeds of trust and there is a condition in the policy against a chattel mortgage, it was held that they were one and the same thing; Hunt v. Ins. Co., 196 U. S. 47, 25 Sup. Ct. 179, 49 L. Ed. 381. A breach renders the policy void; *id.;* Gray v. Assur. Co., 82 Hun 380, 31 N. Y. Supp. 237; and the question whether the execution of a mortgage increased the risk is immaterial; Milwaukee Mechanics' Ins. Co. v. Niewedde, 12 Ind. App. 145, 39 N. E. 757; breach of any promissory warranty avoids the policy irrespective of its materiality; McKenzie v. Ins. Co., 112 Cal. 548, 44 Pac. 922; nor does it matter that the loss was not produced or contributed to by the breach; Cogswell v. Chubb, 1 App. Div. 93, 36 N. Y. Supp. 1076. A judgment recovered *in invitum* is not within such condition; Gerling v. Ins. Co., 39 W. Va. 689, 20 S. E. 691; but a confession of judgment is; Hench v. Ins. Co., 122 Pa. 128, 15 Atl. 671, 9 Am. St. Rep. 74; and an agreement by one heir to pay the other heirs, in instalments, for property taken under a will; Renninger v. Ins. Co., 168 Pa. 350, 31 Atl. 1083. A technical seizure where the possession is unchanged is not an avoidance; Caraher v. Ins. Co., 63 Hun 82, 17 N. Y. Supp. 858; Smith v. Ins. Co., 89 Pa. 287; 5 Ont. App. 605. A provision for forfeiture for the levy of an execution relates to personalty and not to land; Colt v. Fire Ins. Co., 54 N. Y. 595; Hammel v. Ins. Co., 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

Under these conditions, a breach as to part of the insured property, which is not destroyed or injured, may not avoid the policy as to another part unaffected by the breach. Thus it was held that a recovery, under a live-stock policy, for a cow killed would not be prevented by the existence of incumbrances, in violation of a covenant in the policy, where the property actually lost was not encumbered; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459. Such contract is severable and any breach of the condition would avoid only as to such property as was covered by the incumbrance; Schuster v. Ins. Co., 102 N. Y. 260, 6 N. E. 406; Perry v. Ins. Co., 11 Fed. 478; 46 U. C. Q. B. 334; 10 Ont. 236; Hartford Fire Ins. Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115. The same principle applies to the defence that the property insured was sold and conveyed; if the contract is severable, a breach as to one part does not operate as a defence with respect to property not included; Phenix Ins. Co. v. Grimes, 33 Neb. 340, 50 N. W. 168.

In insurance on manufacturing establishments it is usual to stipulate for avoidance if operations should cease without the consent of the insurer, and such provision is valid and is violated though a watchman was employed and the risk not increased; Dover Glass Works Co. v. Ins. Co., 1 Marv.

(Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; and the same is true of all conditions which are warranties. As to the distinction between *representation* and *warranty* and the law as to both, see those titles; and as to increase of risk, see RISKS AND PERILS.

Insurance on buildings or their contents is usually upon condition that if the former is suffered to be vacant or unoccupied, the policy will be void. In such case the forfeiture does not depend upon the insured's knowledge of the fact of vacancy; Schuermann v. Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377; and a purchaser of the house and assignee of the policy is bound by the condition; Ranspach v. Ins. Co., 109 Mich. 699, 67 N. W. 967. Temporary absence of a tenant will not work a forfeiture; Huber v. Assur. Co., 92 Hun 223, 36 N. Y. Supp. 873; Burlington Ins. Co. v. Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; nor will merely sleeping in the house occasionally and daily visits of the owner's wife to get provisions prevent forfeiture; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; or visits twice a day by an employé; Stapleton v. Ins. Co., 16 Misc. 483, 38 N. Y. Supp. 973. The insurer cannot establish a forfeiture without proving that the premises were unoccupied for any purpose; Pabst Brewing Co. v. Ins. Co., 2 Mo. App. 934. Buildings are vacant where the occupant has moved his family because of sickness with the intention of returning, and although he himself returns nearly every day; Knowlton v. Ins. Co., 100 Me. 481, 62 Atl. 289, 2 L. R. A. (N. S.) 517; so of the removal of a tenant, although the insured owner has no notice of such removal; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 76 N. E. 977, 3 L. R. A. (N. S.) 966, 117 Am. St. Rep. 382, 9 Ann. Cas. 91.

Keeping on hand certain articles is usually prohibited, either specifically or as a class. The breach of a condition against keeping inflammable substances does not prevent recovery, when the use of the particular substance was a necessary and usual incident of the subject insured; Maril v. Ins. Co., 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102; as the use of gasoline, in a silverplating business, one day's supply only being brought in at once; Fraim v. Ins. Co., 170 Pa. 151, 32 Atl. 613, 50 Am. St. Rep. 753; or keeping an inflammable substance for sale as was customary where there was a clause, written in ink on the policy, containing the words "merchandise such as is usually kept in a country store;" Yoch v. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; Faust v. Ins. Co., 91 Wis. 158, 64 N. W. 883, 30 L. R. A. 783, 51 Am. St. Rep. 876; Mascott v. Ins. Co., 68 Vt. 253, 35 Atl. 75.

The use of a gasoline torch by a painter will not avoid the policy, where the work has continued for less than the fifteen days allowed for repairs; Garrebrant v. Ins. Co., 75 N. J. L. 577, 67 Atl. 90, 12 L. R. A. (N. S.) 443; but the storing of seed cotton by a tenant, against a provision in the policy, even without the knowledge of the insured, will avoid it; Edwards v. Ins. Co., 128 Ga. 353, 57 S. E. 707, 12 L. R. A. (N. S.) 484, 119 Am. St. Rep. 385, 10 Ann. Cas. 1036; a temporary increase of hazard, which ceases before the loss, will not prevent recovery; Sumter Tobacco Warehouse Co. v. Assurance Co., 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780. Where a typewritten rider stipulated for insurance on such articles as are usually kept in a painter's shop, it prevailed against a printed condition against keeping benzine on the premises; Mascott v. Ins. Co., 68 Vt. 253, 35 Atl. 75.

As to hazardous and extra-hazardous risks, generally, see RISKS AND PERILS.

Iron Safe Clause. In order to promote the accurate adjustment of the loss, there is usually included in policies of insurance, on such property as a stock of merchandise, what is known as the "iron safe clause," which, in one form or another, provides that the books of the insured showing all business transactions, and the last inventory of the business, shall be kept in a fireproof safe at night and when the store is not opened for business. Such a clause is an express promissory warranty; Farmers' Fire Ins. Co. v. Bates, 60 Ill. App. 39; Home Ins. Co. of New Orleans v. Cary, 31 S. W. 321; but a substantial compliance only is required; Royal Ins. Co. v. Brown, 36 S. W. 591. Keeping the books in the safe at night, does not mean from sunrise to sunset, but from the close of business of the day according to custom; Jones v. Ins. Co., 38 Fed. 19; and where according to custom the door was locked but customers could get in by knocking, and the clerk who was in the store writing up books was absent for a short time when the fire occurred, the store was "opened for business" and the policy was not void; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034. But where the insurance was on a stock of liquor in a saloon, it did not excuse the violation of the iron safe clause that the same books were kept for a hotel and the saloon, the latter being opened night and day except Sunday, and the books being needed for constant settlements with the guests in the hotel; Southern Ins. Co. v. Parker, 61 Ark. 207, 32 S. W. 507 (distinguishing the last two cases). The clause was held not to have been violated by failure to keep a blotter, containing the record of the sales of the day before, locked in the safe; Brown v. Ins. Co., 89 Tex. 590, 35 S. W. 1060 (reversing Palatine Ins. Co. v. Brown, 34 S. W. 462); where a cash sales book covering twenty-one days before the sale was inadvertently left out of the safe and burned, and the books were kept in a primitive manner but showed purchases and

credit sales, some cash sales, and an inventory, taken shortly before the fire, it was held that a finding of compliance with the policy was warranted; Western Assur. Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; in another case it was said not to be an excuse for violation that through oversight the books were not put in the safe the night before the fire; Goldman v. Ins. Co., 48 La. Ann. 223, 19 South. 132.

Where the bookkeeper, fearing the safe would not stand, took out the books to remove them to a safe place, and some of them fell and were burned, it was held that the covenant was not broken unless he was negligent; East Texas Fire Ins. Co. v. Harris, 7 Tex. Civ. App. 647, 25 S. W. 720.

Where the application showed in answer to inquiry that the books were kept in a dwelling at night a breach of the condition was not enforced; Sprott v. Ins. Ass'n, 53 Ark. 215, 13 S. W. 799.

The insurer must prove that the fire occurred at a time mentioned in the stipulation; Allemania Fire Ins. Co. v. Fred, 11 Tex. Civ. App. 311, 32 S. W. 243.

The character of the safe is not warranted; Sneed v. Assurance Co., 73 Miss. 279, 18 South. 928; and it is sufficient if it be one of a kind ordinarily known as fireproof; Knoxville Fire Ins. Co. v. Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

The stipulation in such a clause, that a set of books should be kept, including a record of all business transactions, does not require a book known as a "cash book," or any particular system of bookkeeping; Liverpool & L. & G. Ins. Co. v. Ellington, 94 Ga. 785, 21 S. E. 1006. The lost inventory of the business, within this clause, means the lost inventory of the goods insured; Manchester Fire Ins. Co. v. Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722. The clause is complied with, by an inventory made, and books kept from the date of the policy, but an invoice is not an inventory; Home Ins. Co. of New York v. Bank, 71 Miss. 608, 15 South. 932. The question whether there was reasonable time between the issue of the policy and the fire to make an inventory is for the jury unless the evidence is undisputed; Allen v. Ins. Co., 106 Mich. 204, 64 N. W. 15. Where the inventory was shown to the adjuster after the fire, and afterwards lost, there was a performance of the condition; Pelican Ins. Co. v. Wilkerson, 53 Ark. 353, 13 S. W. 1103. But where the books do not furnish the necessary data, to verify the accounts rendered, the policy is avoided; *id.* The clause is not complied with where only unitemized bills are kept; Coggins v. Ins. Co., 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924; a requirement to keep a set of books which clearly and plainly represent a complete record of the business is a promissory warranty; Ætna Ins. Co. v. Johnson, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. (N. S.) 667, 9 Ann. Cas. 461; and where the balances from an old set of books were carried forward into a new set and the old ones were exposed to fire and lost, there is not a compliance with the requirements of the clause; Ætna Ins. Co. v. Mount, 90 Miss. 642, 44 South. 162, 45 South. 835, 15 L. R. A. (N. S.) 471.

Formal policy not required. Though a policy is the usual instrument by which insurance is effected, it is not necessary; First Baptist Church v. Ins. Co., 19 N. Y. 305; New England Fire & Marine Ins. Co. v. Robinson, 25 Ind. 536; Succession of Hearing, 26 La. Ann. 326; and it may be evidenced by a memorandum or note; Goodall v. Ins. Co., 25 N. H. 169; 76 L. T. N. S. 228; State Fire & Marine Ins. Co. v. Porter, 3 Grant (Pa.) 123; or a letter; Connecticut Fire Ins. Co. v. Bennett, 1 Ohio N. P. 71; 14 L. C. Jur. 219. Where the correspondence was held sufficient to create a valid contract for a policy of fire insurance, it was held that, after the property had been destroyed by fire, the insured was entitled to a decree for the amount agreed to be insured, less premium; Eames v. Ins. Co., 94 U. S. 621, 24 L. Ed. 298. In the absence of a statute forbidding it, it may be verbal; Henning v. Ins. Co., 2 Dill. 26, Fed. Cas. No. 6,366; Hamilton v. Ins. Co., 5 Pa. 339 (though this had been questioned; Smith v. Odlin, 4 Yeates [Pa.] 468); Hartford Fire Ins. Co. v. Farrish, 73 Ill. 166; Relief Fire Ins. Co. v. Shaw, 94 U. S. 574, 24 L. Ed. 291; Croft v. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902; Amazon Ins. Co. v. Wall, 31 Ohio St. 633, 27 Am. Rep. 533; overruling Cockerill v. Ins. Co., 16 Ohio, 148; Potter v. Ins. Co., 63 Fed. 382; and when made without specifying any date for the insurance to take effect, commences immediately; *id.* A usage to show a parol contract was inadmissible; 14 Ins. L. J. (Mass.) 427. In Canada it was held that to recover at law, on a contract of insurance by a corporation, there must be a sealed policy, but on a parol contract the plaintiff may sue for a breach to deliver a policy, or proceed in equity; 16 U. C. Q. B. 477. The agreement to pay a premium is sufficient to support a verbal contract; Fitton v. Ins. Ass'n, 20 Fed. 766. See generally as to verbal contracts, Biddle, Ins. § 138, where the subject is treated historically.

An offer by a newspaper in each issue to pay a sum named to the heirs of one accidentally dying within twenty-four hours from the last issue, provided that the printed slip containing the offer should be found on the person of the deceased, is a contract of insurance; Com. v. Philadelphia Inquirer, 15 Pa. C. C. R. 463.

Binding Receipt. The usual practice is for the agent, upon the payment of the premium, to issue what is termed a *binding receipt*, which is, in effect, an executory contract to issue a policy if the risk is accepted

by the company, and, meanwhile, the insurance is in force. Such contracts are valid and will be enforced at law and in equity; Gold v. Ins. Co., 73 Cal. 216, 14 Pac. 786; Sandford v. Ins. Co., 11 Paige 547; and a charter provision requiring "all policies or contracts" to be signed by certain officers has been held not to apply to such agreements; Baile v. Ins. Co., 73 Mo. 371; Franklin F. Ins. Co. v. Colt, 20 Wall. (U. S.) 560, 22 L. Ed. 423; First Baptist Church v. Ins. Co., 19 N. Y. 305; Amazon Ins. Co. v. Wall, 31 Ohio St. 633, 27 Am. Rep. 533.

Where an insurance company delivers a binding slip on certain property, a complete temporary contract of insurance exists; Smith & Wallace Co. v. Ins. Co., 68 N. J. L. 674, 54 Atl. 458; so where such slip accompanies a new agreement; Belt v. Ins. Co., 163 N. Y. 555, 57 N. E. 1104, and the company is estopped from denying the authority of its agent issuing the binding slip where there is no notice to the applicant of any limitation of authority; Starr v. Ins. Co., 41 Wash. 228, 83 Pac. 116; Schlesinger v. Ins. Co., 37 App. Div. 531, 56 N. Y. Supp. 37. The question whether the binder was considered by both parties to be temporary insurance is for the jury; Underwood v. Ins. Co., 66 App. Div. 531, 73 N. Y. Supp. 251. A memorandum on the books of the company, made by the agent and assented to by the applicant, is a sufficient binder; Queen Ins. Co. of America v. Laundry Co., 7 Ga. App. 787, 68 S. E. 310. It need not even state the premium to be paid by the insured; Jacobs v. Ins. Co., 148 Ill. App. 325. It becomes ineffective on delivery of policy to the insured; Goodhue v. Ins. Co., 184 Mass. 41, 67 N. E. 645; but there is no temporary insurance where the company declines the risk; Mohrstadt v. Ins. Co., 115 Fed. 81, 52 C. C. A. 675.

See AGREEMENT FOR INSURANCE.

Adjustment. Where a loss occurs, the ascertainment of the amount due upon the policy is termed *adjustment* (*q. v.*). Notice of the loss must be given in accordance with the terms of the condition, which is precedent to recovery; Central City Ins. Co. v. Oates, 86 Ala. 558, 6 South. 83, 11 Am. St. Rep. 67; L. R. 20 Ir. 93; Patrick v. Ins. Co., 43 N. H. 621, 80 Am. Dec. 197. This is distinct from *proof of loss* (*q. v.*), which must be also made as stipulated, or, in default of express provision, in a reasonable time; Springfield Fire & Marine Ins. Co. v. Brown, 128 Pa. 392, 18 Atl. 396. See Loss.

More Than One Policy. Other insurance may be taken on the same property without restriction unless there be such in the contract; Agricultural Ins. Co. v. Bemiller, 70 Md. 400, 17 Atl. 380; 14 Q. L. R. 293; Mowry v. Ins. Co., 9 R. I. 346; and no notice is required unless so stipulated; Murray v. Ins. Co., 2 Wash. C. C. 186, Fed. Cas. No. 9,961; but when the insurance is on property, only one indemnity can be collected, and there is a right of contribution among insurers; Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553; Clarke v. Assur. Co., 146 Pa. 561, 23 Atl. 248, 15 L. R. A. 127, 28 Am. St. Rep. 821; but it is usual to stipulate that each insurer, if there are more than one, shall be liable only *pro rata;* Barnes v. Ins. Co., 9 Fed. 813.

Where there are thirty insurers and the loss is less than the total amount insured, the holder of the policy is not limited in his recovery to the proportionate share of each insurer, but may recover for the whole loss, leaving to him his remedy against his associates; Sumner v. Piza, 91 Fed. 677; where there is a promise by the insured to take out insurance to the value of eighty per cent. of the property and he fails to do so, although the loss is less than the amount of insurance, he is regarded as an insurer for the difference between the amount actually insured and the eighty per cent; and he must sustain the loss of this proportion; Stephenson v. Ins. Co., 116 Wis. 277, 93 N. W. 19; Farmers' Feed Co. of New Jersey v. Ins. Co., 173 N. Y. 241, 65 N. E. 1105. It is usual to require notice to the company when other insurance is placed upon the property in other companies; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213. An agreement that several insurers are to be liable *pro rata* and that a single suit shall be brought, which shall be decisive as against all, is valid; New Jersey & Pennsylvania Concentrating Works v. Ackermann, 6 App. Div. 540, 39 N. Y. Supp. 585.

As to excessive insurance on the same property, see DOUBLE INSURANCE.

Time Limit for Suit. It is usual in policies to have a time limit requiring an action to be brought within a designated period of the loss. Such condition is precedent to a recovery; Becket v. Imp. Co., 67 Ia. 338, 25 N. W. 271; 14 L. C. Jur. 256; and will apply in a forum other than that of the domicil of the insurer; Fullam v. Ins. Co., 7 Gray (Mass.) 61, 66 Am. Dec. 462. In some courts the time of the limitation is held to be computed from the date of the event which causes the loss; Johnson v. Ins. Co., 91 Ill. 92, 33 Am. Rep. 47; Steel v. Ins. Co., 47 Fed. 863; Chambers v. Ins. Co., 51 Conn. 17, 50 Am. Rep. 1; 19 Nov. Scot. Rep. 372; 18 Ont. 355; in others, from the time the loss was payable; Cooper v. Benefit Ass'n, 132 N. Y. 334, 30 N. E. 833, 16 L. R. A. 138, 28 Am. St. Rep. 581; Case v. Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48; Matt v. Aid Ass'n, 81 Iowa, 135, 46 N. W. 857, 25 Am. St. Rep. 483; Spare v. Ins. Co., 17 Fed. 568.

The parties may agree to a reasonable time within which suit may be brought; six months is reasonable. It begins to run from the date of the fire, although there may be a provision making the loss payable sixty days after proofs have been received by the

company; Appel v. Ins. Co., 76 Ohio St. 52, 80 N. E. 955, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821.

Limiting Jurisdiction of Courts. Efforts have been made both by contract and by statute to limit the right of suit on a policy to a particular jurisdiction; such provisions in a policy or by law have been held illegal; Nute v. Ins. Co., 6 Gray (Mass.) 174; Amesbury v. Ins. Co., *id.* 596; Reichard v. Ins. Co., 31 Mo. 518; May, Ins. § 490. Statutes which attempt thus to limit the jurisdiction are strictly construed, and as they generally provide that, after a loss, the directors shall meet and adjust the loss, and if it is not paid in a given time, suit may be brought in a particular court, the limitation is in many states confined to the exact case mentioned, and it is only where the amount has been so determined that it takes effect; Nevins v. Ins. Co., 25 N. H. 22; Martin v. Ins. Co., 53 Me. 419; Arnet v. Ins. Co., 22 Wis. 516; Boynton v. Ins. Co., 4 Metc. (Mass.) 212; Indiana Mut. Fire Ins. Co. v. Routledge, 7 Ind. 25; but in other cases the limitation has been enforced without reference to such previous ascertainment of the loss; Dutton v. Ins. Co., 17 Vt. 369. See May, Ins. § 491.

Specifying the Law of the Contract. So, with respect to the effort to provide in the policy that the law of a certain state should determine its construction, where life policies have been issued in a state other than the same state of the company, it has been held that they are governed by statutory provisions in the state of the insured, although the policies stipulated that the contract was to be governed by the law of the same state.

A provision in a policy limiting recovery in cases of suicide is ineffectual as against a state statute declaring suicide to be no defense to an action; Whitfield v. Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 897.

See Lex Loci; Foreign Corporations; as to the rights and remedies of and against insurance companies in countries or states other than those of their domicil, and the effect of non-compliance with statutes regulating the manner of doing business.

The business of life insurance is not commerce; a state statute regulating insurance contracts between its residents and foreign corporations, is not invalid as a regulation of interstate commerce; Cravens v. Ins. Co., 148 Mo. 583, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628, affirmed in 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116; State v. Ins. Co., 71 Neb. 320, 99 N. W. 36, 100 N. W. 405, 102 N. W. 1022, 106 N. W. 767; Fisher v. Ins. Co., 136 N. C. 217, 48 S. E. 667; N. Y. Life Ins. Co. v. Deer Lodge County, 43 Mont. 243, 115 Pac. 911, affirmed 231 U. S. 595, 34 Sup. Ct. 274, 58 L. Ed. ——, following Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

Subrogation. An insurer is entitled to subrogation (*q. v.*) in cases where such right would attach under the general principles applying to that subject; as, when payment is made for loss or damage to goods in transit, there is a subrogation to the rights of the owner against the carrier; Houston Direct Nav. Co. v. Ins. Co. (Tex.) 31 S. W. 560; Over v. R. Co., 63 Fed. 34; Stoughton v. Gas Co., 165 Pa. 428, 30 Atl. 1001; Southard v. R. Co., 60 Minn. 382, 62 N. W. 442, 619. And, on payment by the insurer of a loss which he was not legally bound to pay, he has a right of action against one through whose negligence the property was destroyed; Ry. Co. v. Fire Ass'n, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; he becomes entitled *pro tanto*, and should join the owner as plaintiff in an action for negligent burning; Wunderlich v. Ry. Co., 93 Wis. 132, 66 N. W. 1144. So, an insurer of title who paid off liens prior to a mortgage, as to which the mortgagee was indemnified by bond of the mortgagor, was subrogated to the right of action of the latter on the bond; St. Paul Title Ins. & Trust Co. v. Johnson, 64 Minn. 492, 67 N. W. 543.

Since a policy of fire insurance is a contract of indemnity, the insurer is entitled to recover from the insured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the insured against third parties which have been renounced by him, and to which, but for that renunciation, the insurer would have a right to be subrogated; [1896] 2 Q. B. 377.

Expected profits may be insured, as crops, against hail and frost or other risks, even before they are sown, but the profits must be insured as such; 3 N. & M. 819; Putnam v. Ins. Co., 5 Metc. (Mass.) 391; Loomis v. Shaw, 2 Johns. Cas. (N. Y.) 36; Niblo v. Ins. Co., 1 Sandf. (N. Y.) 551; or the future profits of one to whom the insured has advanced money to pursue an enterprise; Morrell v. Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92; Miller v. Ins. Co., 2 E. D. Sm. (N. Y.) 268; or a portion of the cargo of a ship expected to arrive, even if the insured has no property in such cargo, but has only purchased, for a specified sum, the right to take such goods for a further specified sum; French v. Ins. Co., 16 Pick. (Mass.) 397; but even if the insured has an ownership in the property, if he becomes insolvent before the arrival of the cargo and the goods are intercepted by the vendor, by right of stoppage *in transitu*, there can be no recovery on the policy; 10 B. & C. 99.

As to reinsurance, see that title.

The several forms of insurance contracts are classified mainly with reference to the character of the perils insured against. See *infra*.

Life Insurance. The insurance of the life of a person is a contract by which the

insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.

An agreement by the insurer to pay to the insured or his nominee a specified sum of money, either on the death of a designated life, or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. Biddle, Ins. § 2. Bunyon's definition varies little, as does that of Park, but the latter elaborates the consideration which is described as "a certain sum proportioned to the age, health, profession, and other circumstances of the person whose life is the object of insurance." Park, Ins. ch. xxii. In a leading case it was said by Parke, B., to be "a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and when once fixed, it is constant and invariable;" 15 C. B. 365.

A mutual contract by which the insurer, on the one hand, comes under an obligation to pay a certain sum of money upon the death of the insured, who, on the other hand, becomes bound to pay certain sums, either annually or otherwise, in the name of premiums, and these obligations are counterparts of one another. 3 Can. S. C., 4th ser. 1078.

The person whose life is insured is frequently termed the "life."

The sum to be paid in case of loss depends entirely upon the stipulation in the policy, and not at all upon the amount of the pecuniary interest in the life; Bevin v. Ins. Co., 23 Conn. 244.

There must be an *insurable interest* (*q. v.*).

A large proportion of life insurance is now effected through the medium of beneficial associations (*q. v.*); they are generally formed under state incorporation laws and are subject to their own rules and regulations so far as they are consistent with the general or statutory law of the state. The benefits and advantages conferred by these associations are held to be insurance, and subject to regulation by the insurance laws of the state; State v. Nichols, 78 Ia. 747, 41 N. W. 4; Goodman v. Lodge No. 7, 67 Md. 117, 9 Atl. 13, 13 Atl. 627. While the rules and regulations enter into and become a part of the contract of insurance, the usage of the association will not bind courts in construing the contract, if the latter be clear and unambiguous; and words having a fixed meaning, either general or technical, will be interpreted according to that meaning as in other cases; Wiggin v. Knights of Pythias, 31 Fed. 122.

Some of the conditions of policies of life insurance are peculiar to this class of insurance. Among the most important of these are those relating to self-destruction and insanity. The risk in life insurance is the death of the insured proceeding from causes other than his voluntary act; Supreme Commandery of the Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

See SUICIDE.

Entering the military service is also usually stipulated against, but death at the hands of a roving band of thieves and robbers, while engaged as an engineer in building a bridge, under the direction of a military commander, is not within such a stipulation; Welts v. Life Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518; but even an involuntary entrance will defeat a recovery; Dillard v. Ins. Co., 44 Ga. 119, 9 Am. Rep. 167.

The receipt of the premium by the insurer, after a known violation of the condition against residence abroad, is a waiver of the right to a forfeiture; Bevin v. Ins. Co., 23 Conn. 244; whether the knowledge be actual or constructive; L. R. 11 Eq. 197. Where a condition against absence from home beyond a stipulated time is violated, the insured will be excused if he be detained by reason of illness occurring within the time specified; Baldwin v. Ins. Co., 3 Bosw. (N. Y.) 530; but not where the illness occurs after the limits of the stipulation; Nightingale v. Ins. Co., 5 R. I. 38. Where the contract restricts the insured to the settled limits of the United States, it covers all regions within the boundaries of the country, whether inhabited or not; Casler v. Ins. Co., 22 N. Y. 427; and a permission to travel by sea in "a first rate vessel" will cover any mode of travel whether by cabin or steerage; Taylor v. Ins. Co., 13 Gray (Mass.) 434.

Equity cannot cancel a life insurance policy for fraud, if brought after death; Mutual Life Ins. Co. v. Griesa, 156 Fed. 398; but if brought before the death, it does not abate on the death of the insured; Mutual Life Ins. Co. v. Blair, 130 Fed. 971.

Where the insured commits murder, and thereafter assigns a policy on his life and is executed for his crime, his beneficiaries cannot recover on the policy; Burt v. Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216; death by legal execution for crime is not a risk contemplated by the policy; Northwestern Mut. Life Ins. Co. v. McCue, 223 U. S. 234, 32 Sup. Ct. 220, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57; Collins v. Ins. Co., 30 Pa. Co. Ct. R. 257, citing many cases; so where the assignee of a policy causes the death of the assured by felonious means; Mutual Life

Ins. Co. v. Armstrong, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; where the assignee of a beneficiary has murdered the assured, a constructive trust is established for the heirs of the assured; Schmidt v. Life Ass'n, 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323. Where the insured is convicted and executed for a crime of which he is in fact innocent, insurance on his life is likewise unrecoverable; Burt v. Ins. Co., 105 Fed. 419, 44 C. C. A. 548. But recovery can be had for death of the insured, slain by the husband with whose wife insured was committing adultery; Supreme Lodge K. P. v. Crenshaw, 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

The weight of decision has been in favor of the view, that the contract of *life insurance* between citizens of different states is not dissolved, but only suspended, by a war between the states; Hamilton v. Ins. Co., 9 Blatchf. 234, Fed. Cas. No. 5,986; Semmes v. Ins. Co., 13 Wall. (U. S.) 159, 20 L. Ed. 490; but, *contra*, New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 L. Ed. 789.

Tontine. A system of insurance which under various forms is based upon the idea of a loan or investment of property for the benefit of a number of persons, the income at first being divided among all and the shares of members who die passing not to their own legal representatives but to increase the interest of the surviving member, until, at last, after the number of members has gradually diminished by successive deaths, the last survivor takes the whole income, or, if such be the terms agreed upon, the whole principal. The system took its name from Lorenzo Tonti, an Italian of the seventeenth century, who first conceived the idea and put it in practice. Merlin, *Repert.*; Dalloz, Dict.; Schriber v. Rapp, 5 Watts (Pa.) 351, 30 Am. Dec. 327.

A policy of this character was the subject of litigation in the Massachusetts Supreme Court in a case in which the system is illustrated. It was to continue ten years if the insured should so long live, but in case of his death before that time, the dividends would not inure to the benefit of his estate, but be held by the company for the benefit of other policy holders and forfeited by him. The estate of the deceased received only the amount of the policy, which, however, would be forfeited for non-payment of premiums during the tontine term; policies of this character are kept in classes of ten, fifteen, or twenty years, called respectively the tontine periods, and accounts are kept with the funds of each class to ascertain the amount due upon each policy at the expiration of its tontine term, at which time the surplus profits are apportioned equitably among such policies as complete the term; Pierce v. Assurance Society, 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. Under such an insurance the failure of the company to place all dividends accruing upon a policy in a reserve fund in accordance with the terms of the policy did not excuse the non-performance of his contract by the insured, and a suit by such policy holder for an accounting by the company cannot be maintained on the ground of the failure to keep and invest the fund accruing from the dividends separately; Bogardus v. Ins. Co., 101 N. Y. 328, 4 N. E. 522. No trust relation exists between the company and the insured but it is simply one of contract measured by the terms of the policy; Cohen v. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Hencken v. Ins. Co., 98 N. Y. 627, affirming 11 Daly (N. Y.) 282. The situation of the parties is that of debtor and creditor merely, the amount of the debt being determined by the equitable apportionment to be made by the corporation through its officers; Pierce v. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433. The apportionment of the fund is not absolutely conclusive upon the policy holders. It is *prima facie* right, but may be shown to be based on erroneous principles; *id.*

The holder of a policy who has the option at the expiration of the tontine period to withdraw his share of the surplus is entitled to the inspection of books and papers, and a rule of court authorizing such inspection will be granted in order that he may intelligently exercise his options; Ellinger v. Assur. Soc., 132 Wis. 259, 111 N. W. 567, 11 L. R. A. (N. S.) 1089.

Fire Insurance. A contract by which the insurer, in consideration of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain to a certain amount, in his property mentioned in the policy, by fire during the time agreed upon.

Fire insurance is said to be in effect a contract of indemnity against loss or damage suffered by an owner or person having an interest in the property insured. Donnell v. Donnell, 86 Me. 518, 30 Atl. 67.

The principles applying to the subject are, in general, those governing marine policies and other kinds of insurance of property against the various perils which attend its use and ownership, and therefore the point to be mainly considered, as applied to fire insurance alone, is the exact definition of the peril insured against. With respect to the nature of the contract as an indemnity, the necessity of an interest in the property, the policy and the application, the effect of warranties and representations, respectively, and the loss and its adjustment, reference should be had to the discussion of the subject generally, *supra*, and in the various titles referred to.

It has frequently been said that to recover under a fire policy there must be an actual fire or ignition, and that it is not suf-

ficient that there has been an injurious increase of heat which caused damage to the insured property, while nothing had taken fire which ought not to be on fire. The authority usually relied upon, for this general statement, is the early and leading case of Austin v. Drewe, 6 Taunt. 436, but this case has been much criticised; see Scripture v. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; 1 Bennett, Fire Ins. Cas. 104; Case v. Ins. Co., 13 Ill. 676; May, Ins. § 402.

There can be no recovery for damage by smoke from a lighted lamp when there is no ignition outside of the lamp; Fitzgerald v. Ins. Co., 30 Misc. 72, 62 N. Y. Supp. 824; or if the smoke proceeded from a fire "out of place," it is no defense that it originated in a fire in the place intended for it; Collins v. Ins. Co., 9 Pa. Super. Ct. 576; and a furnace fire built of unsuitable material, which becomes uncontrollable and develops extraordinary and excessive heat, so as to char woodwork and furniture and generally injure personal property, is a hostile fire, although there is no ignition; O'Connor v. Ins. Co., 140 Wis. 388, 122 N. W. 1038, 1122, 25 L. R. A. (N. S.) 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118. Damage to the interior of a boiler resulting from over-heating and absence of water in the boiler is not covered by a fire policy; American Towing Co. of Baltimore v. Ins. Co., 74 Md. 25, 21 Atl. 553.

A fire in a theatre, caused by the excessive heating of its walls by a fire outside, was held to be covered by the policy; Sohier v. Ins. Co., 11 Allen (Mass.) 336; and when a building is blown up by gunpowder to prevent the spreading of fire, the insurer against fire is liable if, but for being blown up, it would have been burned; City Fire Ins. Co. v. Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Greenwald v. Ins. Co., 3 Phila. (Pa.) 323; Miller v. Ins. Co., 41 Ill. App. 395; L. R. 3 Exch. 71. These cases are distinguished from explosion, which is not fire, within a fire policy, when it occurs some distance off; 19 C. B. N. S. 126; Caballero v. Ins. Co., 15 La. Ann. 217; even though it was caused by fire; *id.;* and when the explosion is within the building, there must be ignition to bring it within the fire insurance; St. John v. Ins. Co., 11 N. Y. 516; but damage from fire caused by explosion on the premises is covered; Scripture v. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw v. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; (unless it is expressly excepted; Greenwald v. Ins. Co., 3 Phila. [Pa.] 323); so also if the damage is from explosion caused by fire, as where a steamboat was burned as the result of an explosion of gunpowder; Waters v. Ins. Co., 11 Pet. (U. S.) 213, 9 L. Ed. 691; or when coals were thrown out of the stove; Daws v. Ins. Co., 127 Mass. 346, 34 Am. Rep. 384. In this case the policy contained the provision that "if a building shall fall, except as the result of a fire," the insurance should cease; and this was held to apply to inherent defects in the building. And when, under a similar policy "against fire originating in any case," there occurred an explosion and loss, it was held immaterial whether the fire resulted in combustion or explosion; Renshaw v. Ins. Co., 33 Mo. App. 394.

Although a fire is raging in an adjacent building and at the time of the expiration of the policy a loss is inevitable, yet if, in fact, no fire has broken out at such expiration, there can be no recovery; Rochester German Ins. Co. v. Peasler Co., 120 Ky. 752, 87 S. W. 1115, 27 Ky. L. Rep. 1155, 1 L. R. A. (N. S.) 364, 9 Ann. Cas. 324.

A loss by reason of fire started by an explosion caused by a fire coming in contact with escaping gas was not within a policy which excepted loss by reason of or resulting from any explosion whatever; 2 Ins. L. J. 190. When damages by explosion are excepted unless caused by fire, the insurer is held liable only for the result of fire and not of the explosion which caused it; L. R. 3 Exch. 71; or by one caused by fire in its course; *id.; contra*, Washburn v. Ins. Co., 2 Fed. 633; Transatlantic Fire Ins. Co. of Hamburg v. Dorsey, 56 Md. 70, 40 Am. Rep. 403.

Though a fire policy provides that there shall be no recovery for loss caused by earthquakes, the insured can recover for damage from a fire originally caused by an earthquake; Williamsburgh City Fire Ins. Co. v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

A fire in a chimney, caused by accidental ignition of soot, or smoke issuing from such fire, is within a policy covering all loss or damage by fire to all goods contained in the building; Way v. Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. Rep. 379. So also a loss by spontaneous combustion was held to be within a fire policy; 9 L. C. Q. B. 448; but see a criticism of this case in Providence Washington Ins. Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314. Where a policy insures against explosion and accident and there was an exception of explosion or loss caused by the burning of the building, a destruction of the property by an explosion caused by raising a cloud of starch dust in an endeavor to extinguish flames was held a fire loss and not within the policy; American Steam Boiler Ins. Co. v. Refining Co., 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572.

Fire insurance does not cover damage by lightning without combustion; Andrews v. Ins. Co., 37 Me. 256; Kenniston v. Ins. Co., 14 N. H. 341, 40 Am. Dec. 192; even when the policy covers "fire, by lightning;" Babcock v. Ins. Co., 4 N. Y. 326. It is quite usual to add to a fire policy what is known as a "lightning clause," which covers loss from that cause with or without

fire; but a company authorized to take fire risks is not thereby authorized to insure against lightning; Andrews v. Ins. Co., 37 Me. 256. A policy of insurance against lightning was held to cover destruction by tornado when the former accompanied the latter; Spensley v. Ins. Co., 54 Wis. 433, 11 N. W. 894.

Under a lightning clause attached to a fire policy, on horses "contained in" a barn, the insurer was held liable for a brood mare pasturing in a field. The policy against loss by lightning was said to be a contract of insurance of a peculiar kind, which must be construed in a reasonable, common-sense view, and so as not to reduce the contract to an absurdity; Haws v. Fire Ass'n, 114 Pa. 431, 7 Atl. 159; in this case the insurance was on horses alone, and, on that ground, they were distinguished in a later case, in which the policy embraced also property kept in a barn, other than live stock, and the company was held not liable for a horse killed by lightning while in pasture; Haws v. Ins. Co., 130 Pa. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52.

Where an insurance policy excepts loss caused directly or indirectly by fire it is an accident, and not a fire, policy, and the complaint must show that the loss was not caused directly or indirectly by fire; Western Refrigerator Co. v. Ins. & Sec. Co., 51 Fed. 155.

When the insurance was against loss by "fire or storm," it did not cover damage by a freshet caused by melting snow with prevailing south winds and rain; Stover v. Ins. Co., 3 Phila. (Pa.) 38.

The exception of "loss by fire occasioned by mobs or riots," does not extend to a loss from the burning of a bridge by military authorities in time of war; Harris v. Ins. Co., 50 Pa. 341; of the risks of this class, usurped power is not an ordinary mob but a rebellious one or one having political purpose; 2 Wilson 363; it is "rebellion conducted by authority;" Lord Mansfield in Langdale v. Mason, 2 Marsh. Ins. 792; but it is not necessary that the destruction be commanded by a superior officer; Barton v. Ins. Co. of New York, 42 Mo. 156, 97 Am. Dec. 329; insurrection is "a seditious rising against the government, a rebellion, a revolt;" Spruill v. Life Ins. Co., 46 N. C. 126; and a riot is "where three or more persons actually do an unlawful act, either with or without a common cause . . . the intention with which the parties assemble, or at least act, being unlawful;" *id.;* but in another case it was held that the destruction of property in a riot is within the exception even if the rioters assembled originally for a lawful purpose; Dupin v. Ins. Co., 5 La. Ann. 482.

The exemption of loss "by explosion of any kind, by means of invasion," etc., means by explosion *and* invasion, etc., not explosion *caused by* invasion; Smiley v. Ins. Co., 14 W. Va. 33.

See Civil Commotion; Insurrection; Invasion; Mob; Riot; Usurped Power.

Losses caused by the effort made to prevent the destruction of property by fire must be borne by the insurers and not by the insured; Agnew v. Ins. Co., 3 Phila. (Pa.) 193; as by water; Lewis v. Ins. Co., 10 Gray (Mass.) 159; or theft; Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96, 75 Am. Dec. 638; Witherell v. Ins. Co., 49 Me. 200; Newmark v. Fire & Life Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; unless expressly excluded; Fernandez v. Ins. Co., 17 La. Ann. 131; or removal when required by due diligence, according to the circumstances; Brady v. Ins. Co., 11 Mich. 425; Case v. Fire Ins. Co., 13 Ill. 676; (but see Hillier v. Ins. Co., 3 Pa. 470, 45 Am. Dec. 656); or falling of walls after an interval or a day; 7 Sc. Sess. Cas., 1st ser. 52; but the fire must be the proximate cause; Nave v. Ins. Co., 37 Mo. 429, 90 Am. Dec. 394. See Lewis v. Ins. Co., 10 Gray (Mass.) 159.

Insurance against fire covers a loss by the negligence of the insured not amounting to fraud; Cumberland Val. Mut. Protection Co. v. Douglas, 58 Pa. 419, 98 Am. Dec. 298. The contract of fire insurance is to be construed with reference to the laws of the state in which the property is situated and the policy issued; King Brick Mfg. Co. v. Ins. Co., 164 Mass. 291, 41 N. E. 277; Perry v. Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

An insane person cannot be held, in setting fire to his property, to have had such a fraudulent or wrongful design as to defeat the insurance thereon, though his estate may afterwards be called upon to respond for the act; D'Autremont v. Fire Ass'n, 65 Hun 475, 20 N. Y. Supp. 344; Bindell v. Ins. Co., 128 Ky. 389, 108 S. W. 325, 17 L. R. A. (N. S.) 189, 129 Am. St. Rep. 303.

Marine Insurance. A contract of indemnity by which one party, for a stipulated premium, undertakes to indemnify the other, to the extent of the amount insured, against all perils of the sea, or certain enumerated perils, to which his ship, cargo, and freight, or some of them, may be exposed during a certain voyage or fixed period of time.

A contract of indemnity (not perfect but approximate; 1 H. L. Cas. 287; 4 App. Cas. 755); against all losses accruing to the subject-matter of the policy from certain perils during the adventure. This subject-matter need not be strictly a property in the ship, goods, or freight; 2 B. & P. N. R. 269; L. R. 7 Q. B. 302; any reasonable expectation of pecuniary profit from the preservation of the subject-matter is insurable as a marine risk; as, where the joint owners of a vessel and cargo engaged in a joint adventure have a lien for their several interests and for advancements, each part-owner had an insurable interest in the joint venture; Interna-

tional Marine Ins. Co. v. Winsmore, 124 Pa. 61, 16 Atl. 516.

The insured must have a lawful interest at the time of the loss. See INSURABLE INTEREST.

The contract is one recognized by the general law and usage of nations, and therefore either native or alien may be insured. It was settled in England after much judicial discussion (and some temporary legislation) that the insurance of enemy's property is illegal; 13 Ves. 64; see 3 Kent 254. The same rule was recognized by continental jurists; *id.* 255; Val. Com. li. 32; and in this country; Griswold v. Waddington, 16 Johns. (N. Y.) 438, where the subject was extensively discussed, and it is said that "it may be considered the established law of this country;" 3 Kent 256. Such contracts, made before the outbreak of war, are annulled by it; Snow, Lect. Int. L. 101.

Insurance by British underwriters of a foreign subject's treasure which is later captured by the foreign government of the insured, though war is afterwards declared between the two governments, is valid even though the seizure is made in contemplation of war and in order to support the war; [1902] A. C. 484, affirming [1901] 2 K. B. 419; [1900] 2 Q. B. 339; so where the treasure belongs to a British subject insured by British underwriters but situated in a foreign hostile country; [1901] 2 K. B. 849.

It may also be in favor of A, or whom it may concern, but those general words will only apply to a person with an interest in the subject and who was in the contemplation of the contract; Bauduy v. Ins. Co., 2 Wash. C. C. 391, Fed. Cas. No. 1,112; Hooper v. Robinson, 98 U. S. 528, 25 L. Ed. 219; Duncan v. Ins. Co., 129 N. Y. 237, 29 N. E. 76; if such person has authorized or adopted it; Sanders v. Ins. Co., 44 N. H. 238. The intention of the insurer need not have fastened upon the very person, who seeks to take the benefit; an intention covers a person who takes such relation to the insurer as brings him within the clauses of the policy; Duncan v. Ins. Co., 129 N. Y. 237, 29 N. E. 76. See Haynes v. Rowe, 40 Me. 181. The insurance "on advances" is distinct from the ship itself; Providence Washington Ins. Co. v. Bowring, 50 Fed. 613, 1 C. C. A. 583, 1 U. S. App. 183.

As to who may be insurers in a marine policy there is no special rule.

An insurance on a ship named makes the latter a part of the contract and no other can be substituted, but a cargo may be changed from one ship to another; 3 Kent 257; and the master may be changed; Walden v. Ins. Co., 12 Johns. (N. Y.) 138. An insurance on the ship includes everything appurtenant to it; Boulay-Paty iii. 379; 1 Term 611, note. An insurance on goods need not name the ship, but may be "on any ship or ships;" Emer. i. 173; 2 H. Bla. 343.

Marine policies in England and this country usually contain the words "lost or not lost," and in such case they cover losses already accrued as well as future ones; Commercial Ins. Co. v. Hallock, 27 N. J. L. 645, 72 Am. Dec. 379. It is so without the words in other foreign countries; Roccus, *de Ass.* n. 51; 3 Kent 259; and it was said by Story, J., that "it would be so without reference to the words"; Hammond v. Allen, 2 Summ. 397, Fed. Cas. No. 6,000.

The most perfect good faith is required in this contract with respect to representations, warranties, and concealment, as to all of which see the several titles.

The insured is required both to pay the premium, and to represent fully and fairly all the circumstances relating to his subject-matter of the insurance, which may influence the determination of the underwriters in undertaking the risk or estimating the premium. A concealment of such facts amounts to a fraud, which avoids the contract; 3 Kent 282.

Where a policy covers a loss by perils of the sea or other perils, the insured may recover for a loss occasioned by the negligence of the master or crew or other persons employed by him; Copeland v. Ins. Co., 2 Metc. (Mass.) 432; General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351, 14 L. Ed. 452; L. R. 4 C. P. 117; Phœnix Ins. Co. v. Transp. Co., 117 U. S. 323, 6 Sup. Ct. 1176, 29 L. Ed. 873.

Perils and Loss. Insurance on goods carried on deck of an inland river steamer, according to custom, and lost, may be recovered; [1904] 1 K. B. 252; but there can be no recovery for loss occurring as a result of pushing through dangerous ice by the master of the vessel; Standard Marine Ins. Co. v. Transp. Co., 133 Fed. 636, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

As to the perils insured against generally, see PERILS OF THE SEA; RISKS AND PERILS; and as to the different kinds of marine policies, see POLICY, Loss.

If, before the termination of the adventure, the assured has parted with all interest in the subject-matter of the insurance, he cannot recover on any loss subsequent to his transfer of the property; L. R. 7 Q. B. 302; and the insurer can take nothing by subrogation but the rights of the assured; Hall v. R. Co., 13 Wall. (U. S.) 367, 20 L. Ed. 594; The Potomac, 105 U. S. 630, 26 L. Ed. 1194; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527.

Sue and Labor Clause. This clause, common to all marine policies, protects the assured in times of danger and allows him to incur expenses for repairs or salvage up to the value of the property saved without affecting his rights under the policy. See 22 L. Q. R. 406.

England codified marine insurance in 1906.

Accident Insurance. That form of insurance which provides for specified payments in case of an accident resulting in bodily injury or death, as distinguished from *casualty insurance*, which is a term applied to insurance against loss or damage to property occasioned by accident. Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529. A foreign corporation, although an accident insurance company, has been held authorized to issue "horse or vehicle policies," "elevator policies," "general liability policies," and "outside liability policies;" *id.*

Accident insurance is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition. In case of doubt the construction should be liberal in favor of the insured; Healey v. Acc. Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637.

Accident policies have been held to cover death from shock and physical strain resulting from being run away with in a covered carriage, where there was no mark of physical injury nor contact with any physical object; McGlinchey v. Casualty Co., 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190; and see [1896] 2 Q. B. 248; suicide by an insane man; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740; death from drowning; 5 H. & N. 211; s. c., on appeal, 6 *id.* 839; falling into the water in a fit; 22 L. T. N. S. 820; 6 Q. B. Div. 42; death from inhaling illuminating gas; Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; Fidelity & Casualty Co. of N. Y. v. Waterman, 59 Ill. App. 297; Pickett v. Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618; U. S. Mut. Acc. Ass'n v. Newman, 84 Va. 52, 3 S. E. 805; by taking poison; Healey v. Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 22 Am. St. Rep. 637; or an overdose of medicine; Penfold v. Ins. Co., 85 N. Y. 319, 39 Am. Rep. 660; Northwestern Mutual Life Ins. Co. v. Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; death caused by a piece of beefsteak passing into the windpipe while eating; American Accident Co. v. Reigart, 94 Ky. 547, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374; death from blood-poisoning, caused by the bite of a mosquito (although poison was expressly excepted); Omberg v. Accident Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413; falling into the water as the result of a wound; Mallory v. Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; falling on a railroad track in a fit and being run over; 7 Q. B. Div. 216; being struck by the handle of a pitchfork while making hay and having peritonitis as a result of it; North American Life & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; spraining the back while lifting a heavy weight; 1 F. & F. 505; being attacked and killed by a highwayman; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; accidental shooting by a deputy sheriff who did not know at whom he was shooting and did not intend to kill the assured (there being an exception of death from design either of the insured or another person); Utter v. Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; hernia resulting from an accidental fall (although the policy excluded hernia); 17 C. B. N. S. 122; rupture of a blood-vessel sustained while exercising with Indian clubs; McCarthy v. Ins. Co., 8 Biss. 362, Fed. Cas. No. 8,682; falling from the cars while walking during sleep; Scheiderer v. Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

Stepping out of a railway carriage when it has come to a full stop at a station and slipping off the iron step, thereby sustaining injuries, is a railway accident; 10 Exch. 45; death caused by blood poisoning resulting from an accidental cut is within the provision of external violence and accidental means; Central Accident Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155; or from an accidental abrasion of the skin followed by bacterial infection; Cary v. Ins. Co., 127 Wis. 67, 106 N. W. 1055, 115 Am. St. Rep. 997, 9 Ann. Cas. 484; Jones v. Casualty Co., 140 N. C. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843; *contra*, where there is an exemption of liability for death resulting from poisoning; McGlother v. Accident Co., 89 Fed. 685, 32 C. C. A. 318; Hill v. Ins. Co., 22 Hun (N. Y.) 187; and so where blood poisoning results from a wound in the hand caused by assaulting another; Fidelity & Casualty Co. of New York v. Stacey's Ex'rs, 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955; and death by accidental asphyxiation under an exemption from liability for death caused by gas or vapor; Travelers' Ins. Co. v. Ayers, 217 Ill. 391, 75 N. E. 506, 2 L. R. A. (N. S.) 168; but there may be a recovery for periostitis caused by pressure on the bones of the hand during sleep; Ætna Life Ins. Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262, 1 L. R. A. (N. S.) 422, 112 Am. St. Rep. 232, 6 Ann. Cas. 551.

It has been strongly contended that such cases as those enumerated were not within the ordinary accident policy because there was no extraordinary injury according to the ordinary meaning of the term, but, in reply to this in a leading case of drowning, the court said: "That argument if carried to its extreme length would apply to every case where death was immediate;" 6 H. & N. 839; and in a case of death from the inhalation of gas, the court said: "We think it a sufficient answer that the gas in the at-

mosphere as an extraordinary cause was a violent agency in the sense that it worked on the intestate so as to cause his death; that death is the result of accident or is unnatural, imports the extraordinary and violent agency of the cause;" Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758. The view which these courts considered untenable was, however, taken by the Supreme Court of Pennsylvania on a policy exactly similar. The court said: "The object of the company is to insure bodily injuries produced in a certain manner specified, that is, caused by external, violent, and accidental means; not injuries caused by any one of these means, but by all of them combined;" Pollock v. Acc. Ass'n, 102 Pa. 230, 48 Am. Rep. 204; but this language seems to be a *dictum*, because there was a condition in the policy excepting death or injury caused by the taking of poison, and the point of the case was that an involuntary taking of poison by mistake was within the exception; but in a New York case of death from inhaling gas there was also a proviso excepting death caused by inhaling gas, and the court construed it "to mean a voluntary and intelligent act by the assured and not an involuntary and unconscious act;" Paul v. Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758. This case and the Pennsylvania case are therefore in direct opposition on the construction of the condition, and the former was decided after consideration of and with express dissent from the latter.

An exception that if the insured should die by his own hand, sane or insane, the policy should be void, "covers all conscious acts of the insured by which death by his own hand is compassed, whether he was at the time sane or insane, if the act was done for the purpose of self-destruction, it matters not that the insured had no conception of the wrong involved in its performance;" Streeter v. Acc. Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882. In this case it was held that whether a fall six weeks before the insured shot himself was the cause of the killing was too conjectural to be submitted to the jury as a direct cause of the suicide. See CAUSA PROXIMA.

It has been held that death was not the result of accident within the meaning of the policy where it was occasioned by epilepsy; Tennant v. Ins. Co., 31 Fed. 322; sunstroke; 3 El. & El. 478; rupture caused by jumping from a train where nothing unforeseen happened from the time the insured left the platform to the time he alighted on the ground; Southard v. Assur. Co., 34 Conn. 574, Fed. Cas. No. 13,182; United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

Where the insured was assassinated, there could be no recovery under a policy which excepted death or injury inflicted by design of himself or another; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; Hutchcraft's Ex'r v. Ins. Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; but where the death was the result of an accident, the fact that the negligence of the assured may have contributed to it is no defence in the absence of an express stipulation in the policy to that effect; Schneider v. Ins. Co., 24 Wis. 28, 1 Am. Rep. 157; Providence Life Ins. & Inv. Co. of Chicago v. Martin, 32 Md. 310; Champlin v. Assur. Co., 6 Lans. (N. Y.) 71.

Accident policies usually cover the risk incident to a specific occupation, a substantial change of which will, if it increase the risk, render the policy void. Such a stipulation is held to mean engaging in another employment as a usual business; Provident Life Ins. Co. v. Fennell, 49 Ill. 180; but it was not such a change for a school teacher while disengaged to be employed in building operations; *id.*; or for one to engage in pitching hay while visiting his grandfather; North American Life & Accident Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; or for a locomotive engineer to climb over the tender to apply the brakes on a car; Providence Life Ins. Co. & Investment Co. of Chicago v. Martin, 32 Md. 310. In all such cases the question what is a substantial change of occupation is to be left to the jury; Stone's Adm'rs v. Casualty Co., 34 N. J. L. 371.

The expression "voluntary exposure to unnecessary danger," used in stating the exceptions to the liability of an insurance company upon an accident policy, refers only to dangers of a real and substantial character which the insured recognized, but to which he, nevertheless, purposely and consciously exposed himself, intending at the same time to assume all the risks of the situation. Voluntary riding upon the platform of a rapidly moving railroad car is not, of itself and as a matter of law, a voluntary exposure to unnecessary danger and presents a question of fact for the jury. Where an accident insurance policy exempts the insurer from liability for injuries received while violating rules of a corporation, the question is for the jury as to whether the insured knew of a rule of the corporation which he is alleged to have violated, and the court should charge that in order to bind insured, it must be one which the corporation enforced or used reasonable effort to enforce; Travellers' Ins. Co. v. Randolph, 78 Fed. 754, 24 C. C. A. 305; opinion by Harlan, J., considering all the cases at length; and see 7 Am. L. Rev. 590, where the question whether death from freezing while climbing Mount Blanc was or was not a voluntary exposure to unnecessary danger was discussed with reference to a

case in which the point was raised but not settled, the suit being compromised.

In an exception prohibiting exposure to obvious or unnecessary danger and requiring diligence on the part of the assured, there can be no recovery where death was caused by being struck by a railroad train while running along the tracks in front of it in the night-time for the purpose of getting on a train approaching in an opposite direction on a parallel track; Tuttle v. Ins. Co., 134 Mass. 175, 45 Am. Rep. 316; nor where it was caused by falling from the platform of a railroad car between eleven and twelve o'clock at night when the train was in motion; Sawtelle v. Pass. Assur. Co., 15 Blatchf. 216, Fed. Cas. No. 12,392; or from unnecessarily passing on a dark and rainy night over a trestle known to be dangerous with two packages in his hands, although it was the usual route home of the assured and many others; Travelers' Ins. Co. v. Jones, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; or where a shop hand of a railway company went on the platform when the train was in motion to leave the train when it should stop to cross over by a switch to another track (the exception not being applicable to the exposure of railway employés in the performance of their duty); Hull v. Acc. Ass'n, 41 Minn. 231, 42 N. W. 936; but where the insured by a voluntary act exposed himself to a hidden danger, the existence of which he had no reason to suspect, and thereby lost his life, his death was caused by accident and the company is liable; Burkhard v. Ins. Co., 102 Pa. 262, 48 Am. Rep. 205; a clause prohibiting voluntary exposure to unnecessary danger does not prohibit one from walking or being on a railway bridge or road-bed; Traders' & Travelers' Acc. Co. v. Wagley, 74 Fed. 457, 20 C. C. A. 588; Lehman v. Indemnity Co., 7 App. Div. 424, 39 N. Y. Supp. 912; see also where a passenger is overcome by the heat of the car, or nausea, and goes upon the platform; Marx v. Ins. Co., 39 Fed. 321; or getting from the platform at a depot upon the cars while in motion at a rate of speed less than that of a man walking; Schneider v. Ins. Co., 24 Wis. 28; going to the rescue of a shipwrecked crew, although the policy prohibited the insured from engaging in the business of wrecking; Tucker v. Ins. Co., 50 Hun 50, 4 N. Y. Supp. 505. Playing indoor baseball is not a voluntary exposure to danger; Hunt v. Accident Ass'n, 146 Mich. 521, 109 N. W. 1042, 9 L. R. A. (N. S.) 938, 119 Am. St. Rep. 655, 10 Ann. Cas. 449.

The exception against death or injury happening while the insured was intoxicated, or in consequence thereof, prevents a recovery, without reference to the question whether the condition was the cause of the injury or not; Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530; Shader v. Assur. Co., 66 N. Y. 441, 23 Am. Rep. 65; as, where the deceased, being under the influence of liquor, was killed by a pistol shot while dining with a friend; *id.* To be under the influence of intoxicating liquor within the meaning of such exception means to have drunk enough to disturb the action of the mental and physical faculties so that they are no longer in their normal condition; *id.;* the expression is equivalent to "intoxicated"; Standard Life & Accident Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530.

Where the death was caused by inadvertently taking an overdose of opium which had been prescribed by a physician, it was held within the exception of any death caused wholly or in part by medical treatment for disease; Bayless v. Travelers' Ins. Co., 14 Blatchf. 143, Fed. Cas. No. 1,138.

The question frequently arises what is total disability for which the policy entitles the insured to claim indemnity. In an English case in which this question was much discussed, it was held that a solicitor who had sprained his ankle while riding on horseback and was under the care of a surgeon for six weeks, unable to leave the house or transact business which could not be attended to in the house, but could write letters, read law, and the like while lying on a couch, was not totally disabled; 5 H. & N. 546. This judgment was affirmed in Exchequer Chamber. The provision in this and similar cases is usually for a weekly allowance in case of accident causing any bodily injury of so serious a nature as wholly to disable the insured from following his business. Under such a clause total disability to labor must be shown; Rhodes v. Ins. Co., 5 Lans. (N. Y.) 71; by it is meant disability from doing substantially all kinds of the plaintiff's accustomed labor to some extent, and that the assured must be deprived of the power to do to any extent substantially all the kinds of his usual labor; 8 Am. Law Reg. N. S. 233; where the provision was for total disability there could be no recovery if the assured were able to do some parts of the accustomed work pertaining to his business or, if totally disabled in his own pursuit, he should be able to engage in some other; Lyon v. Assur. Co., 46 Ia. 631.

Where the provision was that the injured must be "wholly disabled to prevent him from the prosecution of any and every kind of business pertaining to his occupation," it was held error to instruct the jury that the defendant was to pay the amount agreed, if by the accident the plaintiff had been disabled in any way from prosecuting the business in which he was engaged, and that the plaintiff was entitled to recover for such time as he was "rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent;" Saveland v. Fidelity & Casualty Co., 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863.

It has been held that the meaning of the word accident, as used in a policy, is for the jury, as it is also to determine whether there was exposure to unnecessary danger; Travelers' Preferred Acc. Ass'n v. Stone, 50 Ill. App. 222; or whether the total loss of three fingers and a part of another on the same hand, destruction of the thumb, and a cutting of the hand is a loss of the hand causing "immediate, continuous, and total disability" within the meaning of that clause in an accident insurance policy; Lord v. Acc. Ass'n, 89 Wis. 19, 61 N. W. 293, 26 L. R. A. 741, 46 Am. St. Rep. 815; and see Sneck v. Ins. Co., 88 Hun 94, 34 N. Y. Supp. 545, where the plaintiff's hand was cut off a short distance above the knuckles, leaving nearly the whole palm and part of the second joint of the thumb, and it was held to be a loss of the entire hand within the meaning of the policy; overruling Sneck v. Ins. Co., 81 Hun 331, 30 N. Y. Supp. 881. See REPRESENTATION; ACT OF GOD.

A provision in a policy that the medical adviser of the insurer may examine the body of the insured or attend any *post mortem* examination which may be held, only authorizes examination of the body unburied and does not warrant exhumation and autopsy, nor does an exception of injuries of which there is no visible mark; Wehle v. Acc. Ass'n, 11 Misc. 36, 31 N. Y. Supp. 865.

See, generally, Cook, L. & Acc. Ins.; Niblack, Mut. Ben. & Acc. Insurance.

Casualty Insurance. A contract by which a person is indemnified against loss or damage to property, occasioned by accident. The term is thus applied in contradistinction to *accident* insurance by the Massachusetts Supreme Court, in Employers' Liability Assur. Corp. v. Merrill, 155 Mass. 404, 29 N. E. 529. The question was whether a foreign company licensed to do business in the state, but by statute restricted to one kind or class of business, was authorized to issue policies covering special classes of accidents, involving bodily injury and death. In this connection the court said: "The distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed, it has been with reference to boilers, plate glass, and perhaps to domestic animals and injuries to property by street cars, and is known as 'casualty insurance.'"

The distinction is founded in reason and the terminology is well adapted to the subject. Its precision is in sharp contrast to the vagueness and want of definiteness which characterize the references of text writers and judges to the various forms of insurance which have come into use with the increase in number of perils to life and property.

Among the perils covered by this kind of insurance are included: the loss of horses and cattle, theft of valuables, breakage of plate glass, loss by tornadoes or force of the elements, explosion or bursting of boilers, etc. These policies usually stipulate certain exceptions against which they will not insure, as fire and lightning; but such a policy was held to cover a loss by flood; Hey v. Indemnity Co., 181 Pa. 220, 37 Atl. 402, 59 Am. St. Rep. 644. An exception against loss caused by leakage resulting from earthquakes or cyclones will cover leakage caused by a wind storm which resembles a tornado more than a cyclone; Maryland Casualty Co. v. Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308.

A carrier may lawfully insure against liability for loss of goods occasioned by the negligence of a servant; Minneapolis, St. P. & S. S. M. R. Co. v. Ins. Co., 64 Minn. 61, 66 N. W. 132; in such a case the liability of the insured becomes fixed on the happening of the accident, although the amount is contingent, to the extent that the amount which the insured may be adjudged to pay has not yet been ascertained; American Casualty Ins. Company's Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

A policy against loss or damage to property, and loss of life or injury to employés of the insured or other persons, payable to the insured for the benefit of such persons or their legal representatives, is a contract of indemnity, and a person who is injured by such explosion cannot sue the insurer; Embler v. Ins. Co., 8 App. Div. 186, 40 N. Y. Supp. 450.

In a policy on live stock the insurer is estopped to deny that the sum named in the policy is the insurable value of the horse; Illinois Live Stock Ins. Co. v. Koehler, 58 Ill. App. 557. Where the policy covering "two horses" was cancelled as to one, the insured may show that it was cancelled as to a mare covered by the policy; Pfeifer v. Ins. Co., 62 Minn. 536, 64 N. W. 1018. The provision for notice to the insurer by telegram, of the sickness of an animal, did not require such notice of a sickness which lasted only ten minutes and did not recur for seven weeks; Kells v. Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541. Where the insured had given notes for the horse, and in his contract for purchase stipulated that in case of the death of the animal within a certain time the vendor should take the insurance and give up the notes, it was not a breach of the stipulation in the policy that the vendee "is the sole, absolute, and unconditional owner;" *id.* The insurer is not bound by the consent of his agent to kill the horse insured, although suffering from an incurable disease; Tripp v. Live-Stock Ins. Co., 91 Ia. 278, 59 N. W. 1.

Where plate glass was insured and the insurer, exercising his option, employed a

person with whom he had a contract for that purpose to replace it (the policy providing that the insured should when necessary remove any woodwork, gas fixtures, or other obstruction), the negligent removal of gas pipes by the contractor and a resulting explosion causing a breakage of the new glass, did not render the insurer liable; McCauley v. Casualty Co., 16 Misc. 574, 38 N. Y. Supp. 773.

Credit Insurance. A contract by which the insured is indemnified against loss by the failure of his customers to pay for goods sold to them. It is insurance against *excess* loss by the insured, *i. e.* against a loss which is in excess of a specified percentage of gross sales. It usually limits the losses insured against to a fixed amount by reason of sales to any one person, and limits the sales, covered by the policy, to customers having at least a specified minimum commercial rating by a specified commercial agency. It usually provides for an initial loss to be borne by the insured.

The insured is frequently termed the "indemnified," and so referred to in the policy. Such contract is not a contract of suretyship, but a policy of insurance; Tebbets v. Guarantee Co., 73 Fed. 95, 19 C. C. A. 281; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; Mercantile Credit & Guaranty Co. v. Littleford Bros., 18 Ohio Cir. Ct. 889; and to be construed most strongly against the insurer; *id.*

It is like any other insurance contract and is governed largely by the same rules; Wadsworth v. Jewelers Co., 132 N. Y. 540, 29 N. E. 1104; Claflin v. Credit Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528. The agent who solicits it is within the purview of a statute making him the agent of the insurer; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.

There is a distinction between this loss and other kinds of insurance with respect to the value of the policy, which has been thus stated: The loss provable on a policy of insurance is ordinarily the reserve value of the policy, or the amount sufficient to re-insure the holder in a solvent company for the same amount, to be paid upon a loss happening on the same conditions and within the same time. Credit insurance is peculiar; there does not appear to be any reserve value to the policies, nor are there any general tables to show the rate of re-insurance, nor any other solvent company in which re-insurance could be obtained. When no losses occurred it may be assumed that the premium is a fair price for the risk, and the loss may be taken to be a proportionate part of the premium. When actual losses have been sustained after the insolvency and before the proof, these losses may be accepted as evidence of the value of the policy; Duryee v. Credit Co. (N. J.) 32 Atl. 690.

Under a policy of indemnity to the insured, to the extent of $10,000, against losses in excess of one-fourth of one per cent. of their annual sales, twelve per cent. additional to be deducted from the total gross losses, the claim not to exceed $7,500, by any one firm, where there was a loss with one firm of $20,000, the total gross loss from which deductions were to be made was $7,500, and the balance was the indemnity to be paid; Rice v. Ins. Co., 164 Mass. 285, 41 N. E. 276.

A policy of credit insurance was terminated by the insolvency of the insured, and the deduction to be made before the "excess" was ascertained was calculated on the amount of sales made up to the time of insolvency and not on the amount stipulated for the term of the policy; 25 Ins. L. J. 842.

A provision in such a policy that amounts realized from other security or indemnity shall be deducted before the adjustment of a loss, does not entitle the insurer to deduct the proceeds of a policy in another company which provides that it shall not cover losses insured by the first company, but shall only attach when that company's policy is exhausted; American Credit Indemnity Co. v. Wood, 73 Fed. 81, 19 C. C. A. 264. One who is the agent of the insurer for the purpose of soliciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that if the customer is not rated in Dun's and is rated in Bradstreet's, the latter shall be binding on the insurer; Shakman v. Credit Co., 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920; and to vary details of the policy as to credit rating; *id.*

Employer's Liability Insurance. A contract by which the company agrees to reimburse an employer for any loss occasioned by his liability for damages to an employé, injured in his service.

The liability of the insurer becomes fixed on the happening of the accident or casualty, even though the amount of such liability is contingent, to the extent that the amount which the insured may be adjudged to pay has not been ascertained; American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

Under a policy of insurance against damage for which the insured may be liable under an employer's liability act (*q. v.*) where the workman has recovered damages for injuries in a common-law action, and not under the statute, the insurer will not be liable to reimburse the amount so recovered; 16 Can. S. C., 4th ser. 212; but where the policy contained a clause agreeing to indemnify the insured against damages sustained by the employé while engaged in operations con-

nected with the business of iron work, it was held to cover injuries received by reason of the construction of a building for the use of such business; Hoven v. Assur. Corp., 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

There is no obligation on the part of the insurer which can become the subject of garnishment in proceedings by an employé to enforce a judgment against the insured; Allen v. Ins. Co., 145 Fed. 881, 76 C. C. A. 265, 7 L. R. A. (N. S.) 958.

A policy which provides that the employer shall not settle with an employé without the consent of the insurer, who was to assume control of litigation, is a contract of indemnity against liability, and payment by the employer of a judgment recovered against him is not a condition precedent to the insurer's liability; *id.;* and a person who is injured cannot sue the insurer; Embler v. Ins. Co., 8 App. Div. 186, 40 N. Y. Supp. 450. But where the insurer was prohibited from suing until after judgment against him, in which case an action might be brought within thirty days after such judgment, it was held that the contract was not one of indemnity merely, so that an action would lie after judgment was recovered against the employer, though it was paid by him, such payment not being a condition precedent to recovery; Anoka Lumber Co. v. Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; nor is a discharge of liabilities by the insured, under a clause in the policy promising to pay "all damages with which the insured may be legally charged," such a contract being not one of indemnity alone, but also a contract to pay liabilities; American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305. When the insured was required to give immediate notice to the insurer upon the occurrence of an accident and notice of any claim on account of it, the notice under the condition is not required until an accident happens and the employer has received notice of a claim made on account thereof; Anoka Lumber Co. v. Casualty Co., 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689.

Such a policy is in no sense a contract between the insurer and the employé, and any sum paid by the company to the employer on account of the death of an employé, whose widow had a right of action, is not an asset of the estate of the deceased; Hawkins v. McCalla, 95 Ga. 192, 22 S. E. 141.

It is generally provided in such policies that the insurer shall have control of the defence of any suits against the employer on claims covered by the insurance, and such a condition is strictly enforced; 15 Can. L. T. 86.

Fidelity Insurance. A contract to indemnify the insured against loss by reason of the default or dishonesty of the employé.

Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation; Mechanics' Savings Bank & Trust Co. v. Guarantee Co., 68 Fed. 459.

All conditions in the policy must be complied with as in other cases of insurance, and where one of them is the prosecution of the person whose action is insured against, before he can recover, against the insurer, it was held, by an equally divided court, that the insured must conform to this condition even if he thereby became liable to an action for damages; 9 Ins. L. J. 160.

A statement in the application as to the frequency of measures usually taken by the employer to secure the fidelity of the employed is a warranty the breach of which will defeat recovery; 28 Scot. L. Rep. 394; but in an application for insurance, declarations of the integrity of a clerk, in answer to questions which manifestly relate to the course of business of the employer, are mere representations and not warranties; 7 Exch. 744. Where the bond provides that answers made to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they are "knowingly false;" Mechanics' Savings Bank & Trust Co. v. Guarantee Co., 68 Fed. 459; and if such answers involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed; Supreme Council Catholic Knights of America v. Casualty Co., 63 Fed. 48, 11 C. C. A. 96.

A representation that the person whose integrity is insured "has never been in arrears or default of his accounts" covers any which may have occurred prior to the time when he entered the service of the insured; 30 U. C. C. P. 360. To charge an embezzling employé with interest on the money embezzled converts the embezzlement into a debt and the insurer is not liable therefor; Milwaukee Theater Co. v. Casualty Co., 92 Wis. 412, 66 N. W. 360.

Leaving money temporarily in an insecurely locked room when there were various means of safe-keeping available, was held a violation of a guarantee of "diligent and faithful performance of his duty," for which an insurer was liable; 6 Leg. N. (Can.) 311; 16 Can. L. J. 334. So allowing a customer to make an overdraft on a bank was held negligence in the bank's agent who permitted it, the agent and the customer being together involved in brokerage transactions; 7 *Revue Légale* 57; s. c. 14 L. C. Jur. 186.

Where the employer retains the employé in his service after he knows of the latter's dishonesty, and without notice to and as-

sent of the insurer, he cannot recover; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261, 64 Am. St. Rep. 475; but this rule will not apply to mere breaches of duty or contract obligation, not involving dishonesty of the servant or fraud and concealment on the part of the master; *id.*

A bank cannot recover for loss occurring after it has been informed that its teller is engaged in speculation and where it has not so notified the insurer, or not made any investigation; Guarantee Co. of N. A. v. Trust Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253; the employer is not bound to use diligence to discover dishonesty, but where, in the exercise of reasonable and ordinary care, he could not have failed to infer dishonesty, he may properly be charged with knowledge of such fact; National Bank of Asheville v. Casualty Co., 89 Fed. 819, 32 C. C. A. 355; and if a bank's cashier leaves without notice, taking $5,000 of its money, and the president, with knowledge of the facts, but without disclosure to the company, renews the cashier's bond and pays the premium, there can be no recovery on the bond; *id.*

The employé is bound to reimburse the insurer for the loss sustained through him; Fidelity & Casualty Co. of N. Y. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 30 L. R. A. 586, 56 Am. St. Rep. 464; but, upon the payment of a loss, the insurer is subrogated to the rights of the employer in the prosecution of dishonest employés; London Guar., etc., Co. v. Geddes, 22 Fed. 639. And a stipulation between the insurer and the employé that the evidence of payment by the insurer to the employer should be conclusive evidence against the employé as to the fact and extent of his liability to indemnify the insurer, is void as against public policy; *id.*

Where the indemnity was for one year, and it was provided that a claim under the bond or any renewal thereof should embrace only acts during its currency, it was held that each renewal was a separate contract, and the discovery, during the term of the renewal of theft committed during the running of the bond under a previous renewal, would not make the company liable therefor, when the discovery was too late to hold the insurer under the bond on the renewal in force when the thefts were committed; De Jernette v. Casualty Co., 98 Ky. 558, 33 S. W. 828; and when it was provided that any claim under the bond should cover only defaults committed during its currency, and within twelve months prior to its discovery, it was held that it did not cover a default committed more than twelve months prior to such discovery which would have occurred within the year but for the falsification of the books within the year preceding; Fidelity & Casualty Co. v. Bank, 71 Fed. 116, 17 C. C. A. 641; reversing Consolidation Nat. Bank of Philadelphia v. Casualty Co., 67 Fed. 874.

In American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644, on this subject, it was held (1) Where a policy stipulates for a notification of the dishonesty of the employé as soon as practicable after the occurrence of the act, and the evidence as to when the dishonesty was discovered was conflicting, the question what is a reasonable time is for the jury. (2) It is not necessary to give notice of suspicions of dishonesty. (3) The fact that the insured corporation has passed into the hands of a receiver will not absolve the insurer from liability. (4) Where proof of loss under the bond is set forth with reasonable plainness and in a manner which a person of ordinary intelligence cannot fail to understand, a failure to explicitly aver that a loss has been caused is immaterial. (5) The fact that one member of a corporation was cognizant of an employé's dishonesty, and that fraudulent collusion existed between them, cannot make the corporation responsible for a false certificate of character issued by him without the knowledge of other directors; American Surety Co. v. Pauly, 72 Fed. 470, 18 C. C. A. 644.

Guaranty Insurance. This term has sometimes been used to express indiscriminately the classes of insurance herein entitled Credit, Fidelity, and Title Insurance. The latter designations are conceived to be better adapted to the subject-matter, and their employment is not only the better usage but undoubtedly leads to a clearer understanding of the varied subject-matter now involved in the law of insurance.

The expression "Guaranty Insurance" has, however, an extended use in England and Canada, and is there used to designate insurance of the integrity of employés, the phrase "policy of guaranty" being in frequent use by the courts; 7 Jur. N. S. 1109; 30 U. C. C. P. 360; 16 Can. L. J. 334; 14 L. C. Jur. 186.

The term is also used in a few English cases involving the guaranty of merchants against losses in business from the bankruptcy, insolvency, or assignment with preference of their customers; 7 H. & N. 5.

In an American case of a date long prior to the use of these modern forms of insurance, an action of debt was sustained upon a policy of insurance guaranteeing to the bearer the payment of a note, and it was held that there was authority to issue such a policy under charter powers such as were at that time conferred upon insurance companies generally, and it was also held that the policy passed by delivery; Ellicott v. Ins. Co., 8 G. & J. (Md.) 166.

Title Insurance. A contract to indemnify the owner or mortgagee of real estate from loss by reason of defective titles, liens, or incumbrances.

Answers to questions in applications for such policies are held to amount to a warranty and the question of materiality can-

not be raised; Stensgaard v. Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

Where a title insurance company undertook to defend the interest of insured in the premises against a lien, it was bound to protect him through all stages of the proceeding to enforce the lien, as well after as before judgment therein, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and if, after giving such notice, the company defended the proceeding, but thereafter abandoned the defence, it was necessary for it to give insured another such notice; Quigley v. Trust Co., 64 Minn. 149, 66 N. W. 364.

Where an insurer agrees to indemnify a mortgagee against loss not exceeding $2,200 by reason of incumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the $2,200; Quigley v. Trust Co., 60 Minn. 275, 62 N. W. 287.

Under a title insurance policy, the fact that the conveyancing was done, not by the insurer but by the conveyancer of the insured, was held no defence, and the right of the insurer to do conveyancing, draw deeds, write wills, or the like, was denied, and their action in assuming such right, unwarranted by their charter, was declared to be a usurpation on the commonwealth; Gauler v. Trust Co., 9 Pa. C. C. R. 634.

In cases of defective title, or an incumbrance requiring removal, the insured would be entitled, in an action on the policy, to recover the costs and expenses incurred in curing the defect or removing the incumbrance; but in case of total loss of title the value of the property lost is the measure of damages, and where the insured had been compelled to pay more than the amount of the policy to get a good title, judgment was entered for that sum; *id.*

When the title was insured under a policy to the mortgagee and the latter bought in the property at a foreclosure sale, the purchase did not cancel the mortgage so as to annul the policy, but the insurer was liable to redeem the property from a sale under prior mechanic's liens; Minnesota Title Ins. & Trust Co. v. Drexel, 70 Fed. 194, 17 C. C. A. 56.

See LIEN; MORTGAGE; TITLE; WARRANTY.

Insurance against Birth of Issue. A form of insurance common in England by which the heir presumptive protects his interest against either the birth of an heir apparent or the attainment of majority, or to a particular age by an existing heir apparent. It is also and more commonly practised by tenants for life under settlements, who are entitled to reversions in fee simple subject to estates tail in their own issue by a particular marriage, and who, by this method, are enabled to mortgage their estates without burdening their life interests with premiums on life insurance. In this form of insurance the principal elements to consider are the age and the health of the party and the age at which women will cease to bear children. See Jac. Ch. 585, 586; 4 Hare 124; 5 De G. & S. 226; 10 Beav. 463; 19 *id.* 565.

INSURANCE AGENT. An agent for effecting insurance may be such by appointment or the recognition of his acts done as such; 2 Phill. Ins. § 1848; Perkins v. Ins. Co., 4 Cow. (N. Y.) 645. He may be agent for either of the parties to the policy, or for distinct purposes for both; People v. Imlay, 20 Barb. (N. Y.) 68.

An insurance agent's powers may be more or less extensive according to the express or implied stipulations and understandings between him and his principals. They may be for filling up and issuing policies signed in blank by his principals, for transmitting applications to his principals filled up by himself, as their agent or that of the applicant, for receiving and transmitting premiums, for adjusting and settling losses, or granting liberties and making new stipulations, or for any one or more of these purposes; First Baptist Church v. Ins. Co., 19 N. Y. 305; Bouton v. Ins. Co., 25 Conn. 542; Camphill v. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Augusta Insurance & Banking Co. of Georgia v. Abbott, 12 Md. 348; Howard Fire Ins. Co. v. Bruner, 23 Pa. 50; New York Union Mut. Ins. Co. v. Johnson, *id.* 72; East Texas Fire Ins. Co. v. Brown, 82 Tex. 631, 18 S. W. 713; Hahn v. Assurance Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709.

It is reasonable for insurance companies to insert in their policies conditions that their agents shall not have authority to alter the expressed terms of the policies; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; or to waive any stipulation therein unless endorsed on or added to the policy; Gish v. Ins. Co., 16 Okla. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826. An agent cannot act so as to bind his company beyond the scope of his authority; Deming Inv. Co. v. Ins. Co., 16 Okla. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; *contra*, Hancock Mut. Life Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795, where it was held the agent could waive a condition before delivery. A present contract of insurance is not affected by signing an application and the statement of an agent that he would take care of it and get a policy; Whitman v. Ins. Co., 128 Wis. 124, 107 N. W. 291, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25.

A *general* agent is one who represents the insurer in the conduct of the business generally in a particular place or territory. The powers of the general agent are thus stated by Dwight, Com., in Pitney v. Ins. Co., 65

N. Y. 6: "It is clear that a person authorized to accept risks, to agree upon and settle the terms of insurance, and carry them into effect by issuing and renewing policies, must be regarded as the general agent of the company. (Post v. Ins. Co., 43 Barb. [N. Y.] 351.) The possession of blank policies and renewal receipts, signed by the president and secretary, is evidence of a general agency. (Carroll v. Ins. Co., 40 Barb. [N. Y.] 292.) The power of such an agent of a stock company is plenary as to the amount and nature of the risk, the rate of premium, and generally as to the terms and conditions, and he may make such memoranda and indorsements, modifying the general provisions of the policy, and even inconsistent therewith, as in his discretion seems proper, before the policy is delivered, and in some cases even afterward. (May, Ins. 129.) He may also insert, by memorandum or indorsement, a description of the property inconsistent with the description of the same contained in the application, and such change will be effectual to protect the insured, although the policy itself provides that all conditions named in the application are to be fully complied with and that the application shall be a part of the policy, and a warranty on the part of the insured. (May, Ins. 129; Gloucester Mfg. Co. v. Ins. Co., 5 Gray [Mass.] 497, 66 Am. Dec. 376.)"

An agent holding a commission from an insurance company authorizing him to take risks generally, without placing any limitation thereon, either as to the kinds of risks or as to the territory within which they may be, is a general agent; and the fact that the policy provides that, in any matter relating to the insurance, no person shall be deemed the agent of the company unless authorized in writing, and that the agent's commission states that he shall be subject to the rules of the company, and to such instructions as may be given him from time to time, do not impose on one dealing with the agent a duty to ascertain his authority to issue a policy on a risk extrahazardous and located in a place other than the town in which is situated the agent's office; German Fire Ins. Co. v. Tile Co., 15 Ind. App. 623, 43 N. E. 41.

The resident agent of an insurance company having general authority to issue policies and renewals, fix rates and accept risks, collect premiums and cancel insurance, and perform all the duties of a recording agent, is a general agent for the locality; Hartford Fire Ins. Co. v. Orr, 56 Ill. App. 629. If the agent acts as such for both the company and the insured the contract may be avoided by either party who, at the time of the contract, did not know of such business agency for the other party or had, not knowing the facts, ratified it; British-American Assur. Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147.

When an insurance agent solicited business in an adjoining state, assumed to act with full authority, received the premium and issued the policy, he may be considered as a general agent and not a special agent without authority to make the contract; Hahn v. Guardian Assur. Co., 23 Or. 576, 32 Pac. 683, 37 Am. St. Rep. 709.

It has been held in a federal case that before the execution of a policy, the power and authority of a local and soliciting agent are co-extensive with the business intrusted to his care, and his positive knowledge as to material facts and his acts and declarations within the scope of his employment are obligatory on his principal, unless restricted by limitations well known to the other party at the time of the transaction; West End Hotel & Land Co. v. Ins. Co., 74 Fed. 114.

The powers of agents were extensively discussed by the Kansas supreme court: "The bulk of the fire insurance business of the state is done by eastern companies, who are represented here by agents." "It is a matter of no small moment therefore that the exact measure and limit of the powers of these agents be understood. All the assured knows about the company is generally through the agent. All the information as to the powers of, and limitations upon, the agent is received from him. Practically, the agent is the principal in the making of the contract. It seems to us therefore that the rule may be properly thus laid down that an agent authorized to issue policies of insurance and consummate the contract binds his principal by every act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business which is not known by the insured to be beyond the authority granted to the agent;" German Ins. Co. v. Gray, 43 Kan. 497, 23 Pac. 637, 8 L. R. A. 70, 19 Am. St. Rep. 150; and it was held in that case that an insurance company might, through its agents, by a parol contract, waive provisions stated in the policy with reference to the manner of altering or waiving its terms and conditions; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; the court, in considering the question whether an agent of a company might change by parol the conditions of a policy wherein it was provided that it could only be done upon the consent of the company written thereon, held that a written bargain is of no higher legal degree than a parol one. "Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it;" American Central Ins. Co. v. McLanathan, 11 Kan. 533.

"Where insurance companies deal with the community through a local agency, persons having transactions with the company are

entitled to assume, in the absence of knowledge as to the agent's authority, that the acts and declarations of the agent are valid as if they proceeded directly from the company;" Hardwick v. Ins. Co., 20 Or. 547, 26 Pac. 840.

An attempted restriction upon the power of the officer or agents, acting within the scope of their general authority, to waive provisions of the policy, unless such waiver is written upon the policy itself, is ineffectual; Dick v. Ins. Co., 92 Wis. 46, 65 N. W. 742.

A provision in the application or in the policy making the person procuring the application the agent of the insured and not of the company, cannot change the legal status of such person as agent of the company or the law of agency if he is in fact the agent of the company; Coles v. Ins. Co., 41 W. Va. 261, 23 S. E. 733.

A broker was held to be the agent of the company where he solicited applications which were sent by him to the agent, by whom policies were sent to the broker and the premiums were charged to the broker; in such case the finding by the jury that the broker was the duly authorized agent of the company within the meaning of the provisions in the policy requiring payments of the premiums to the company or its duly authorized agent within a certain time, will not be disturbed; Estes v. Ins. Co., 67 N. H. 462, 33 Atl. 515. In the absence of direct proof of the broker's authority to act for the insurer or insured he may establish his agency by showing that the act relied on was within the scope of his authority; American Fire Ins. Co. v. Brooks, 83 Md. 22, 34 Atl. 373. Where insurance is procured through a broker, though at his solicitation, he is the agent of the insured and his acts will not bind the company, but when his employment extends only to the procurement of the policy he ceases to be an agent of the insured on the execution and delivery; *id.*

A broker owes no duty of care or skill to the underwriter when he is acting on the instructions of his principal; 11 Com. Cas. 107.

A broker employed by a firm of insurance agents to solicit business on commission, having a desk in their office, is not such an agent as that notice to him by a policy holder is notice to the firm; Arff v. Ins. Co., 2 N. Y. Supp. 188, 49 Hun, 610; and one is a mere broker who only represented the company in a single transaction and whose name did not appear on the policy, though he may have told the insurer that he represented the company, collected the premiums, and delivered the policy; Gude v. Ins. Co., 53 Minn. 220, 54 N. W. 1117.

An agent has no power to delegate his authority so as to impose a liability on the company; 15 Can. L. T. 49; Dwelling House Ins. Co. v. Snyder, 59 N. J. L. 18, 34 Atl. 931. But an insurance company is bound by the acts of a clerk of its agent in accepting risks and issuing policies against the same in the performance of his duties, and one dealing with the clerk, as such, is not bound to inquire into his authority as to those matters; *id.* An agent's solicitor who took applications on which policies were issued has been held the agent of the company in effecting such insurance; McGonigle v. Ins. Co., 168 Pa. 1, 31 Atl. 868.

It has been held that a general agent (appointed by contract in this case) had power to waive cash payments of premiums and extend credit; Pythian Life Ass'n v. Preston, 47 Neb. 374, 66 N. W. 445; American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305; to receive notice of loss; Germania Fire Ins. Co. v. Stewart, 13 Ind. App. 627, 42 N. E. 286; waive proofs of loss; Bolan v. Fire Ass'n, 2 Mo. App. Rep. 1375; Loeb v. Ins. Co., 99 Mo. 50, 12 S. W. 374; *contra*, Ermentrout v. Ins. Co., 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481. An agent who has power to adjust losses may by parol waive formal proofs of loss; McGuire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300. He cannot waive the iron safe clause, when that authority is expressly withheld from him by the policy; Roberts, Willis & Taylor Co. v. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955. He can insure goods subject to chattel mortgage by indorsement on, or annexation to, the policy, though it is forbidden in the printed conditions; McGuire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300. Local agents cannot bind the company by consenting to vacancies; McLeary v. Ins. Co. (Tex.) 32 S. W. 583; or that insurance on a risk, not usually taken by the company should take effect from the application (nor will it matter that a special agent, having no power to contract, was present and approved); O'Brien v. Ins. Co., 108 Cal. 227, 41 Pac. 298.

An agent, during the continuance of his agency, may at any time, even after loss, correct a policy issued by him by inserting the property included in the contract but omitted by mistake from the policy; Taylor v. Ins. Co., 98 Ia. 521, 67 N. W. 577, 60 Am. St. Rep. 210. The agent of a company, whose authority has been revoked by the execution by it of an assignment for the benefit of creditors, has thereafter no authority to cancel policies and pay rebates or to set off rebates against a claim by the assignee for premiums collected; Franzen v. Zimmer, 90 Hun 103, 35 N. Y. Supp. 612. The agent is liable for failure to cancel policy when directed to do so; London Assur. Corp. v. Russell, 1 Pa. Super. Ct. 320; and when directed to cancel or reinsure a risk cannot reinsure in another company for which he is agent without its

assent; Empire State Ins. Co. v. Ins. Co., 138 N. Y. 446, 34 N. E. 200.

Notice to an agent of matters within his commission is such to the company; 1 E. L. & Eq. 140; Capitol Ins. Co. v. Bank, 50 Kan. 449, 31 Pac. 1069; Bergeron v. Banking Co., 111 N. C. 45, 15 S. E. 883; Forward v. Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

The insurer has been held bound or estopped by the knowledge or action of or notice to the agent in the following cases: By his knowledge of foreclosure proceedings; Dick v. Ins. Co., 92 Wis. 46, 65 N. W. 742; of the existence of a mortgage, and his attaching a clause making the loss payable to the mortgagee; Georgia Home Ins. Co. v. Stein, 72 Miss. 943, 18 South. 414; of a chattel mortgage; Robbins v. Ins. Co., 149 N. Y. 477, 44 N. E. 159; of incumbrance; German Ins. Co. v. Everett (Tex.) 36 S. W. 125; McDonald v. Fire Ass'n, 93 Wis. 348, 67 N. W. 719; Mcguire v. Ins. Co., 7 App. Div. 575, 40 N. Y. Supp. 300; where the agent is informed as to incumbrances and fills out the application, describing the property as not incumbered; Coles v. Ins. Co., 41 W. Va. 261, 23 S. E. 733; Perry v. Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; where the agent, having power to issue and cancel policies, allowed a policy to remain in force after notice of an incumbrance; Phœnix Assur. Co. of London v. Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810; where the application stated that no other company had refused to insure, and the agent had notice to the contrary; *id.*; where the agent incorrectly stated the title of the insured, after being correctly informed thereof; State Ins. Co. of Des Moines v. Du Bois, 7 Colo. App. 214, 44 Pac. 756; where the agent was acquainted with premises of the insured and could have made an accurate description through his knowledge of them, the company is estopped to avoid its obligation by showing a mis-description of the property; Hartford Fire Ins. Co. v. Moore, 13 Tex. Civ. App. 644, 36 S. W. 146. Where the insured makes true answers to the questions in an application, the validity of the insurance is not affected by the falsity of the answers inserted by the agent; Robinson v. Ins. Co., 1 App. Div. 269, 37 N. Y. Supp. 146; Bernard v. Ins. Ass'n, 17 Misc. 115, 39 N. Y. Supp. 356; Smith v. Ins. Co., 173 Pa. 16, 33 Atl. 567. In such case he will be regarded as the agent of the company, and not of the applicant and his knowledge of the falsity of the answer will be imputed to the company; Clubb v. Acc. Co., 97 Ga. 502, 25 S. E. 333. The company is not estopped by the agent's knowledge when that is acquired by him by virtue of his relation as attorney for the insured in a transaction with which the company was not connected; Union Nat. Bank v. Ins. Co., 71 Fed. 473, 18 C. C. A. 203; or when the knowledge of the agent is acquired after the issuance of the policy; Taylor v. Ins. Co., 98 Ia. 521, 67 N. W. 577, 60 Am. St. Rep. 210; West End Hotel & Land Co. v. Ins. Co., 74 Fed. 114. Or where the notice was to one of a firm of insurance agents, another member of which issued the policy in suit and was given several months before the policy was applied for; Queen Ins. Co. of America v. May (Tex.) 35 S. W. 829; and it was held that when the policy provided that no agent could stipulate for a modification of its provisions not brought to the knowledge of his principal officer, knowledge of the general superintendent that material statements in the application were false was not knowledge of the company; Ward v. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

An agent's knowledge of the state of title is notice to the company; Clymer Opera Co. v. Ins. Co., 238 Pa. 137, 85 Atl. 1111; *contra*, Northern Assur. Co. v. Bldg. Ass'n, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Gish v. Ins. Co., 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; but the company is not estopped by the knowledge of its agents where the insured is a party to a deception in an answer in the application; Mudge v. Supreme Court, 149 Mich. 467, 112 N. W. 1130, 119 Am. St. Rep. 686, 14 L. R. A. (N. S.) 279. Where the agent prepares the application from former applications and tells the applicant that it is all right, the company is estopped from the defence of falsity of the answers; Roe v. Ins. Ass'n, 137 Ia. 696, 115 N. W. 500.

Mere notice to an agent by insured that he would not pay the premium does not terminate the policy; Taylor v. Assur. Soc., 134 Fed. 932.

See, generally, an extended discussion and collection of cases on the authority of insurance agents, 34 Am. L. Reg. N. S. 654; WARRANTY.

INSURANCE COMPANY. A company which issues policies of insurance,—an incorporated company, and either a stock company, a mutual one, or a mixture of the two. In a stock company, the members or stockholders pay in a certain capital which is liable for the contracts of the company. In a mutual company, the members are themselves the parties insured; in other words, all the members contribute premiums to the fund, which is liable for indemnity to each member for loss, according to the terms of the contract. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.

There are in some states companies formed upon the plan combining a stock capital with

mutual insurance and issuing both bonds of mutual insurance and stock policies based upon the capital.

In New York it has been held that, under the statutes then in force regulating the formation of insurance companies and their organization, they could not be organized upon this plan so as to accept premium notes from some customers and cash premiums from others and assess the premium notes to pay losses in either branch of the business; Hart v. Achilles, 28 Barb. (N. Y.) 576. See also White v. Haight, 16 N. Y. 310.

Beneficial societies are sometimes held to be insurance companies within the meaning of the statutes regulating such companies; Berry v. Indemnity Co., 46 Fed. 439; and see State v. Benevolent Society, 72 Mo. 146; Com. v. Wetherbee, 105 Mass. 149; State v. Critchett, 37 Minn. 13, 32 N. W. 787; Golden Rule v. People, 118 Ill. 492, 9 N. E. 342. Where the main purpose of an order is that of life insurance, and insurance against sickness and disability, whatever purposes it may have, it is amenable to the laws of that state relating to insurance companies; it therefore must comply with the requirements of the statutes of that state (if the order is organized under the laws of another state), as to foreign insurance companies, before it can do business in that state; State v. Nichols, 78 Ia. 747, 41 N. W. 4. But in Wisconsin an association incorporated for the purpose of fraternal benevolent insurance upon the cooperative or assessment plan was a charitable and benevolent order within the meaning of the statute which, in line with the defined policy of the state, was exempted from the general laws relating to life insurance; State v. Whitmore, 75 Wis. 332, 43 N. W. 1133. In Pennsylvania a foreign mutual aid association of the same character was held not liable for violation of the laws regulating insurance companies; Com. v. Mutual Aid Ass'n, 94 Pa. 481; and the same association was held not to be a mutual insurance company in Ohio, the state of its incorporation; State v. Mutual Ass'n, 26 Ohio St. 19; so in many other states such associations are held not to be insurance companies within the purview of the general insurance laws of the state; State v. Ass'n, 35 Kan. 51, 9 Pac. 956; Sherman v. Com., 82 Ky. 102; State v. Aid Ass'n, 59 Ia. 125, 12 N. W. 782; Commercial League Ass'n of America v. People, 90 Ill. 166; Supreme Council of Order of Chosen Friends v. Fairman, 62 How. Pr. (N. Y.) 386; Elsey v. Relief Ass'n, 142 Mass. 224, 7 N. E. 844; Barbaro v. Occidental Grove, 4 Mo. App. 429; Rensenhouse v. Seeley, 72 Mich. 603, 40 N. W. 765; State v. Investment Co., 48 Minn. 110, 50 N. W. 1028. In Pennsylvania it was explicitly decided that an association organized not to do business for profit or gain but to aid pecuniarily the widows, orphans, heirs, and devisees of its members, is not an insurance company; Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810.

A physicians' defense company which contracts to pay the expenses of defending physicians against civil malpractice suits is an insurance company; Physicians' Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50; Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396; *contra*, Vredenburgh v. Defense Co., 126 Ill. App. 509; State v. Laylin, 73 Ohio St. 90, 76 N. E. 567.

A state has power to prohibit foreign insurance companies from doing business within its limits. It may impose such conditions as it pleases; Swing v. Lumber Co., 205 U. S. 275, 27 Sup. Ct. 497, 51 L. Ed. 799; Whitfield v. Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578, 51 L. Ed. 895; Carroll v. Ins. Co., 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246.

Membership in a mutual company does not necessarily imply liability to assessment; Given v. Rettew, 162 Pa. 638, 29 Atl. 703. A surplus of such a company belongs equitably to the policy holders in the proportion in which they contributed to it and the directorate has no option to declare dividends; U. S. Life Ins. Co. v. Spinks, 96 S. W. 889, 29 Ky. L. Rep. 960, 13 L. R. A. (N. S.) 1053; *contra*, Greeff v. Assurance Society, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659.

Dividends of a mutual life company returned to policy holders are not income and are not taxable as such; Mutual Benefit Life Ins. Co. v. Herold, 198 Fed. 199; Fuller v. Ins. Co., 70 Conn. 647, 41 Atl. 4; L. R. 14 A. C. 381.

See INSURANCE.

INSURANCE POLICY. See POLICY.

INSURED. A person whose life or property interest is covered by a policy of insurance. See INSURANCE.

INSURER. The underwriter in a policy of insurance; the party agreeing to make compensation to the other. Sometimes, applied improperly to denote the party insured. See INSURANCE.

INSURGENTS. Rebels contending in arms against the government of their country who have not been recognized by other countries as belligerents. Insurgents have no standing in international law until recognized as belligerents. When recognized as belligerents the rules relating to contraband and other rules of war apply to them, but until so recognized their acts are merely the acts of individuals which may be piracy or any other crime according to the circumstances. The United States and other countries have statutes regulating dealings with insurgents in other countries and filibustering expeditions, as they are called, and expeditions to supply insurgents with arms

and ammunition are forbidden; Snow, Lect. Int. Law 132.

In general insurgents have no belligerent rights. Their war vessels are not received in foreign ports, they cannot establish blockades which third powers will respect, and they must not interfere with the commerce of other nations. In the older books on international law they were usually treated as pirates. Their hostilities are never regarded as legal war. As late as 1885 in The Ambrose Light, 25 Fed. 408, this subject was discussed and the authorities fully reviewed, and it was held that the liability of a vessel to seizure as piratical, turned wholly on the question whether the insurgents had obtained any previous recognition of belligerent rights, either from their own or any other government. The court only refrained from entering a decree of forfeiture of the vessel, as a pirate, because of an implied recognition of the insurgents as belligerents, contained in a letter of the secretary of state of the date of the seizure. In recent years, however, a certain amount of recognition has been accorded to insurgents. In 1894, when insurgents were bombarding Rio Janeiro, Admiral Benham took the position that American merchant vessels, moving about the harbor and discharging cargoes, did so at their own risk. But any attempt on the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted. Of this official action it has been said: "This establishment of this point, which seemed to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action afloat, for insurgents;" Snow, Lect. Int. L. 25.

In U. S. v. Trumbull, 48 Fed. 99, it was held that insurgents may purchase arms in the United States without violating U. S. R. S. § 5283, provided the arms are not designed to constitute any part of the furnishings or fittings of the vessel which carries them. This case was a prosecution in connection with the Itata which was also libelled for forfeiture by the United States. There was much discussion as to the meaning of the word "people" as used in the statute. It had been previously said to be one of the denominations of a foreign power; U. S. v. Quincy, 6 Pet. (U. S.) 467, 8 L. Ed. 458; and that a vessel could not be said to be in the service of a foreign people, etc., unless they had received recognition as belligerents; The Carondelet, 37 Fed. 800; the case of The Salvador, L. R. 3 C. P. 218, cited to the contrary, is distinguishable as resting on the broader provisions of the English foreign enlistment act; but in the Itata case the question was not raised by the facts, and it was simply held that the neutrality laws did not cover the case of a vessel which receives arms and munitions of war, in this country, with intent to carry them to a party of insurgents in a foreign country, but not with intent that they shall constitute any part of the fittings or furnishings of the vessel herself; and that she could not be condemned as piratical on the ground that she is in the employ of an insurgent party which has not been recognized by our government as having belligerent rights; The Itata, 56 Fed. 505, 5 C. C. A. 608. See also U. S. v. Weed, 5 Wall. (U. S.) 62, 18 L. Ed. 531; The Watchful, 6 Wall. (U. S.) 91, 18 L. Ed. 763; Snow, Lect. Int. L. 135.

In The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 987, the vessel was seized for a violation of U. S. R. S. § 5283, and was released by the district court upon the ground, *inter alia*, that the libel did not show that the vessel was fitted out and armed with intent that it should "be employed in the service of a foreign prince or state, or of any colony, district, or people with whom the United States are at peace." The libel was amended so as to read "in the service of a certain people, to wit, certain people then engaged in armed resistance to the government of the King of Spain, in the island of Cuba." The district court held that the word "people" was used in an individual and personal sense and not as an organized and recognized political power in any way corresponding to a state, prince, colony, or district. The supreme court reversed the decree, holding that the vessel had been improvidently released, and that the word "people" in the statute covers any insurgent or insurrectionary body conducting hostilities, although its belligerency has not been recognized; and although the political department of the government had not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, it had recognized the existence of insurrectionary warfare, and the case sharply illustrated the distinction between recognition of belligerency, and of a condition of political revolt. See BELLIGERENCY.

INSURRECTION. A rebellion of citizens or subjects of a country or state against its government.

Any open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a character as to defy, for the time being, the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed and not of sufficient magnitude to make success possible; In re Charge to Grand Jury, 62 Fed. 828.

As to the distinctions involved in the different words used to express organized resistance to governmental authority, see REBELLION.

The constitution of the United States, art. 1, § 8, gives power to congress "to provide for calling forth the militia to execute the

laws of the Union, suppress insurrections, and repel invasions."

Whenever the United States shall be invaded, or be in imminent danger of invasion, from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state, or states, most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion, and to issue his orders, for that purpose, to such officer or officers of the militia as he shall think proper. And in case of an insurrection in any state against the government thereof, it shall be lawful for the president of the United States, on application of the legislature of such state, or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states, as may be applied for, as he may judge sufficient to suppress such insurrection; U. S. R. S. pp. 287, 1029.

Whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by this act, it shall be lawful for the president of the United States to call forth the militia of such state, or of any other state or states, as may be necessary to suppress such combinations, and to cause the laws to be duly executed; and the use of militia so to be called forth may be continued, if necessary, until the expiration of thirty days after the commencement of the next session of congress.

Whenever it may be necessary, in the judgment of the president, to use the military force hereby directed to be called forth, the president shall forthwith, by proclamation, command such insurgents to disperse, and retire peaceably to their respective abodes, within a limited time; U. S. R. S. § 5300.

The president may declare by proclamation whenever the inhabitants of any state or part thereof are found by him to be in a state of insurrection, that such inhabitants are in a state of insurrection against the United States and thereupon all commercial intercourse between them and the citizens of the United States shall be unlawful and shall cease so long as such condition of hostility continues, and all goods and chattels, wares and merchandise coming from such state or section into other parts of the United States or proceeding from other parts of the United States to such state or section together with the vessel or vehicle conveying the same shall be forfeited to the United States; but commercial intercourse may, in the discretion of the president, be permitted and licensed with loyal persons residing in such insurrectionary section, so far as to supply such persons with necessaries; U. S. R. S. §§ 5300–5304.

Capital cases for insurrection by a citizen of the United States against the government of any foreign countries having treaties with the United States may be tried before the minister of the United States in such country; *id.* § 4090. See INSURGENTS.

INTAKERS. In English Law. The name given to receivers of goods stolen in Scotland, who take them to England. 9 Hen. V. c. 27.

INTEGER (Lat.). Whole; untouched. *Res integra* means a question which is new and undecided. 2 Kent 177.

INTEMPERATE. If the habit is to drink to intoxication whenever occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established, and it is not necessary that this custom should be an everyday rule; Tatum v. State, 63 Ala. 152. See Mullinix v. People, 76 Ill. 213. See HABITUAL DRUNKARD; DRUNKENNESS.

INTENDANT. One who has the charge, management, or direction of some office, department, or public business.

INTENDED TO BE RECORDED. This phrase is frequently used in conveyancing, in deeds which recite other deeds which have not been recorded. In Pennsylvania, it has been construed to be a covenant, on the part of the grantor, to procure the deed to be recorded in a reasonable time; Penn. v. Preston, 2 Rawle (Pa.) 14.

INTENDENTE. In Spanish Law. The immediate agent of the minister of finance, or the chief and principal director of the different branches of the revenue, appointed in the various departments in each of the provinces of the Spanish monarchy. See Escriche, *Intendente.*

INTENDMENT OF LAW. The true meaning, the correct understanding, or intention, of the law; a presumption or inference made by the courts. Co. Litt. 78.

It is an intendment of law that every man is innocent until he is proved to be guilty; see PRESUMPTION OF INNOCENCE; that every one will act for his own advantage; that every officer acts in his office with fidelity; that the children of a married woman, born during the coverture, are the children of the husband. See BASTARDY. Many things are intended after verdict, in order to support a judgment; but intendment cannot supply the want of certainty in a charge in an indictment for a crime; 5 Cro. 121. See Com. Dig. *Pleader* (C 25), (S 31); Dane, Abr. Index; 14 Viner, Abr. 449; Westcott v. Garrison, 6 N. J. L. 132.

INTENT. See COMMON INTENT; INTENTION.

INTENTIO (Lat.). **In Civil law.** The formal complaint or claim of a plaintiff before the prætor. *"Reus exceptionem velut intentionem implet:" id est, reus in exceptione actor est.* The defendant makes up his plea as if it were a declaration; *i. e.* the defendant is plaintiff in the plea.

In Old English Law. A count or declaration in a real action *(narratio).* Bracton, lib. 4, tr. 2, c. 2; Fleta, lib. 4, c. 7; Du Cange.

INTENTION, INTENT. A design, resolve, or determination of the mind.

In Criminal Law. To render an act criminal, a wrongful intent must exist; 7 C. & P. 428; U. S. v. Pearce, 2 McLean 14, Fed. Cas. No. 16,020; State v. Berkshire, 2 Ind. 207; State v. Bartlett, 30 Me. 132; Smith v. Kinne, 19 Vt. 564; State v. Voight, 90 N. C. 741. And with this must be combined a wrongful act; as mere intent is not punishable; 9 Co. 81 *a;* 2 C. & P. 414; Com. v. Morse, 2 Mass. 138; Ross v. Com., 2 B. Monr. (Ky.) 417;

Torrey v. Field, 10 Vt. 353; U. S. v. Riddle, 5 Cra. (U. S.) 311, 3 L. Ed. 110; but see R. & R. 308; 1 Lew. Cr. Cas. 42; and generally, perhaps always, the intent and act must concur in point of time; 1 Bish. Cr. L. § 207; Cl. Cr. L. 45, 238, 265; but a wrongful intent may render criminal an act otherwise innocent; 1 C. & K. 600; Com. v. Hersey, 2 Allen (Mass.) 181; 1 East, Pl. Cr. 255; Ransom v. State, 22 Conn. 153.

In considering whether a defendant charged with doing a criminal act did it with criminal intent, his prior and accompanying acts are all to be considered, and the rule in civil cases as to the existence of a fraudulent intent may be invoked; State v. Musick, 101 Mo. 260, 14 S. W. 212.

Where a transaction on its face is as consistent with honesty as with fraud, it will be presumed that the intent was lawful; State v. Gritzner, 134 Mo. 512, 36 S. W. 39.

Courts must judge the intent a man has in doing an act by the means he employs and the thing to be accomplished. If they all be lawful, courts cannot impute malice or unlawful motives to the actor; Barton v. Rogers, 21 Idaho, 609, 123 Pac. 478, 40 L. R. A. (N. S.) 681.

Generally, where any wrongful act is committed, the law will infer conclusively that it was intentionally committed; Hill v. Com., 2 Gratt. (Va.) 594; Taylor v. State, 4 Ga. 14; Com. v. Hersey, 2 Allen (Mass.) 179; as the intent to take life may b einferred from the character of the assault, the use of a deadly weapon and the attendant circumstances; Jackson v. State, 94 Ala. 85, 10 South. 509; Winn v. State, 82 Wis. 571, 52 N. W. 775; and also that the natural, necessary, and even probable consequences were intended; 5 C. & P. 538; People v. Herrick, 13 Wend. (N. Y.) 87; Com. v. Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Hill v. Com., 2 Gratt. (Va.) 594; State v. Fuller, 1 Bay (S. C.) 245, 1 Am. Dec. 610; West v. State, 9 Humphr. (Tenn.) 66.

Generally speaking, when a statute makes an act indictable, irrespective of guilty knowledge, ignorance of fact is no defence; Com. v. Wentworth, 118 Mass. 441; L. R. 2 C. C. 154; Beckham v. Nacke, 56 Mo. 546; see Halsted v. State, 41 N. J. L. 552, 32 Am. Rep. 247; *contra*, Farrell v. State, 32 Ohio St. 456, 30 Am. Rep. 614, where the subject is fully treated. See IGNORANCE.

Intent is in a certain sense essential to the commission of a crime and in some classes of cases it is necessary to show moral turpitude; but there is a class of cases where purposely doing a thing prohibited by statute may amount to an offence though the act does not involve moral wrong, for instance where shippers pay a rate under the honest belief that it is the lawful rate when it is not; Armour Packing Co. v. U. S., 209 U. S. 85, 28 Sup. Ct. 428, 52 L. Ed. 681; a mistake of law as to the right to ship under the contract after the change of rate is unavailing; *id.*

When by the common law, or by the provision of a statute, a particular intention is essential to an offence, or a criminal act is attempted but not accomplished, and the evil intent only can be punished, it is necessary to allege the intent with distinctness and precision, and to support the allegations with proof. On the other hand, if the offence does not rest merely in tendency, or in an attempt to do a certain act with a wicked purpose, but consists in doing an unlawful or criminal act, the evil intention will be presumed, and need not be alleged, or, if alleged, it is a mere formal averment, which need not be proved; Com. v. Hersey, 2 Allen (Mass.) 180; 6 East 474; Com. v. Webster, 5 Cush. (Mass.) 306, 52 Am. Dec. 711; State v. Smith, 93 N. C. 516.

This proof may be of external and visible acts and conduct from which the jury may infer the fact; 8 Co. 146; or it may be by proof of an act committed, as, in case of burglary with intent to steal, proof of burglary and stealing is conclusive; 5 C. & P. 510; 2 Mood. & R. 40. When a man intending one wrong fails, and accidentally commits another, he will, except where the particular intent is a substantive part of the crime, be held to have intended the act he did commit; People v. Enoch, 13 Wend. (N. Y.) 159, 27 Am. Dec. 197; Com. v. Call, 21 Pick. (Mass.) 515; U. S. v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196; 1 C. & K. 746.

Where intent is a material ingredient of the crime it is necessary to be averred, but it may always be averred in general terms; Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; 153 U. S. 608, 14 Sup. Ct. 939, 38 L. Ed. 839.

As to when a party can prove his intent under various circumstances, see note in 23 L. R. A. (N. S.) 367.

As to the distinction between intention and motive, see Pollock's First Book of Jurispr. 144, where he defines intention as the wish or desire accompanying an act and having regard not only to the act itself, but to the consequences to be produced; and as including will, but including much more than is commonly understood by will.

As to "motive," external or internal, he points out that external motive is a particular inducement to a course of action, but that motive can also mean internal motive, the general moral quality or disposition of the agent which is a constant element as compared with particular inducements, and gives weight in his deliberation to this or that inducement. The effect of general moral quality or disposition in the process of deliberation or choice is for many purposes more important than the average or objective value of things reputed desirable; this he deems to be the meaning of motive according to the best modern authors.

In Contracts. An intention to enter into the contracts is necessary: hence the person must have sufficient mind to enable him to intend.

In Wills. The intention of the testator governs unless the thing to be done be opposed to some unbending rule of law; 6 Cruise, Dig. 295; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322. This intention is to be gathered from the instrument, and from every part of it; 3 Ves. 105; Brown v. Bartlett, 58 N. H. 511; Hinton v. Milburn's Ex'rs, 23 W. Va. 166; Metcalf v. First Parish in Framingham, 128 Mass. 374; Banks v. Jones, 60 Ala. 605; Mather v. Mather, 103 Ill. 607; and from a later clause in preference to an earlier; Woodbury v. Woodbury, 74 Me. 413; Murfitt v. Jessop, 94 Ill. 158; Hemphill v. Moody, 62 Ala. 510.

See INTERPRETATION; CONSTRUCTION; STATUTES; WILLS.

INTENTIONE. A writ that lay against him who entered into lands after the death of a tenant in dower, or for life, etc., and held out to him in reversion or remainder. Fitz. N. B. 203.

INTER ALIA (Lat.). Among other things: as, "the said premises, which, *inter alia*, Titius granted to Caius."

INTER ALIOS (Lat.). Between other parties, who are strangers to the proceeding in question.

INTER APICES JURIS. See APEX JURIS.

INTER CÆTEROS. Among others; in a general clause; not by name (*nominatim*). A term applied in the civil law to clauses of disinheritance in a will. Inst. 2, 13, 1; *id.* 2, 13, 3.

INTER CANEM ET LUPUM (Lat. between the dog and the wolf). The twilight; because then the dog seeks his rest, and the wolf his prey. Co. 3d Inst. 63.

INTER PARTES (Lat. between the parties). A phrase signifying an agreement professing in the outset, and before any stipulations are introduced, to be made between such and such persons: as, for example, "This indenture, made the —— day of ——, 1848, between A B of the one part, and C D of the other." It is true that every contract is in one sense *inter partes*, because to be valid there must be two parties at least; but the technical sense of this expression is as above mentioned; Addison, Contr. 9.

This being a solemn declaration, the effect of such introduction is to make all the covenants comprised in a deed to be covenants between the parties and none others: so that should a stipulation be found in the body of a deed by which "the said A B covenants with E F to pay him one hundred dollars," the words "with E F" are inoperative, unless they have been used to denote for whose benefit the stipulation may have been made, being in direct contradiction with what was previously declared, and C D alone can sue for the non-payment; it being a maxim that where two opposite intentions are expressed in a contract, the first in order shall prevail; 7 M. & W. 63. But this rule does not apply to simple contracts *inter partes;* 2 D. & R. 277.

When there are more than two sides to a contract *inter partes*, for example, a deed, as, when it is made between A B of the first part, C D of the second, and E F of the third, there is no objection to one covenanting with another in exclusion of the third. See 5 Co. 182; 4 Q. B. 207.

INTER SE, INTER SESE (Lat.). Among themselves. Story, Partn. § 405.

INTER-STATE LAW. See EXTRADITION; FUGITIVE FROM JUSTICE; COMMERCE; INTERSTATE COMMERCE COMMISSION.

INTER VIVOS (Lat.). Between living persons; as a gift *inter vivos*, which is a gift made by one living person to another. It is a rule that a fee cannot pass by grant or transfer *inter vivos*, without appropriate words of inheritance. 2 Pres. Est. 64. See DONATIO MORTIS CAUSA; GIFTS.

INTERCALARE. In the Civil Law. To introduce or insert among or between others; to introduce a day or month into the calendar; to intercalate. Dig. 50, 16, 98, pr.

INTERCEDERE. In the Civil Law. To become bound for another's debt.

INTERCHANGEABLY. By way of exchange or interchange. This term properly denotes the method of signing deeds, leases, contracts, etc., executed in duplicate, where each party signs the copy he delivers to the others.

INTERCOMMON. To enjoy a right of common mutually with the inhabitants of a contiguous town, vill, or manor. When the commons of two adjacent manors join, and the inhabitants of both have immemorially fed their cattle promiscuously on each other's common, this is called *intercommoning.* 2 Bla. Com. 33; *Termes de la Ley.*

INTERDICT. In Civil Law. The formula according to which the prætor ordered or forbade anything to be done in a cause concerning true or *quasi* possession until it should be decided definitely who had a right to it. But in modern civil law it is an extraordinary action, by which a summary decision is had in questions of possession or *quasi* possession. Heineccius, Elem. Jur. Civ. § 1287. Interdicts are either prohibitory, restitutory, or exhibitory; the first being a prohibition, the second a decree for restoring possession lost by force, the third a decree for the exhibiting of accounts, etc.; *id.* 1290; Howe, Stud. Civ. L. 252; Dig. 4, 15, 2. It is said by the writers of the Institutes that

some (including Gaius) thought that from the true etymology of the word *interdict*, it should be applied only to prohibitory orders, and that those which were restitutory or exhibitory were properly *decreta*, but that "the usage has obtained of calling them all interdicts as they are pronounced between two parties, *inter duos dicuntur*;" *id.* Interdicts were decided by the prætor without the intervention of a *judex*, differing in this from actions (*actiones*).

According to Isidorus, however, the derivation is from *quod interim dicitur*. See Voc. Jur. Utr.; Sand. Just. 489; Mackeldey, Civ. Law §§ 258–64. In the formulary procedure the interdict was preliminary and conservative, and afterwards made final or not according to the result of the litigation. After the disappearance of this procedure "no doubt the remedies remained by the forms of action which succeeded. Some of the most important of these were really injunctions, either prohibitory or mandatory." Howe, Stud. Civ. L. 253. Like an injunction, the interdict was merely personal in its effects; and it had also another similarity to it, by being temporary or perpetual. Dig. 43. 1. 1, 3, 4. This similitude prompts the suggestion by the author last quoted, that "it is easy to perceive how they may have been adopted from the Roman and Canon law into the equity practice of England, and thence into that of America;" Howe, Stud. Civ. L. 254. See Story, Eq. Jur. § 865; Halifax, Anal. ch. 6. See INJUNCTION.

In Ecclesiastical Law. An ecclesiastical censure, by which divine services are prohibited either to particular persons or particular places. These tyrannical edicts, issued by ecclesiastical powers, have been abolished in England since the reformation, and were never known in the United States. See 2 Burn, Eccl. Law 340. Baptism was allowed during an interdict; but the eucharist was denied, except in the article of death, and burial in consecrated ground was denied, unless without sacred offices. For the ancient form of an interdict, see Tomlin's L. Dict. *h. t.*

INTERDICTION. A prohibition of commercial intercourse between the citizens or subjects of the country enacting or proclaiming it and some other specified country or port.

By act of March 1, 1809, congress interdicted commercial intercourse between the United States and Great Britain, and in a case arising under this act, the United States supreme court held that the term interdiction means an entire cessation, for the time being, of all trade whatever.

It has been held in England and in this country that interdiction of commerce with the port of destination is not a loss within a policy of marine insurance; 11 East 22; Smith v. Ins. Co., 6 Wheat. (U. S.) 176, 5 L. Ed. 235; Andrews v. Ins. Co., 3 Mas. 6, Fed. Cas. No. 374; *contra*, 9 East 283; Olivera v. Ins. Co., 3 Wheat. (U. S.) 183, 4 L. Ed. 365; Thompson v. Read, 12 S. & R. (Pa.) 440; Simonds v. Ins. Co., 1 Wash. C. C. 382, 4 Dall. 417, Fed. Cas. No. 12,875. See 3 Kent 293.

In Civil Law. A judicial decree, by which a person is deprived of the *exercise* of his civil rights.

The condition of the party who labors under this incapacity.

There can be no voluntary interdiction, as erroneously stated by some writers: the *status* of every person is regulated by the law, and can in no case be affected by contract.

Interdiction is the civil law proceeding by which, as by inquisition in lunacy (*q. v.*) under English and American law, a person is found to be incapable of the management of himself and his estate. It is devised for the special protection of the rights and persons of those who are unable to administer them themselves, and although the person interdicted is not permitted to *exercise* his legal rights, he is by no means deprived of their *enjoyment*. These rights are exercised for his benefit by a *curator*, who is held to a strict accountability, and the fidelity of whose administration is secured, in most cases, by a bond of security, and always by a tacit mortgage on all his property.

By the law of the *twelve tables*, *prodigals* alone could be interdicted. Curators were appointed for those afflicted with mental aberration, idiocy, or incurable diseases, *qui perpetuo morbo laborant*; but no decree of interdiction was pronounced against them. By the modern civil law, prodigality and profligacy are not sufficient reasons for interdiction; but whenever a person is prostrated, either by *mental* or *physical* disease, to such a degree as to be permanently disabled from administering his estate, he may be interdicted.

A decree of interdiction can be pronounced only by the court having jurisdiction of the domicil of the person to be affected. The causes assigned are imbecility, insanity, and madness.

The application may be by any relative, or wife or husband; or, in case of madness, the public law officer *must* apply, or in case of imbecility or insanity he *may* do so. The proceeding is by petition; the acts relied on are stated in writing; and the opinion of the family council is taken, the petitioners not participating. The judgment must be given at a public sitting, and, pending the proceedings, temporary administration may be provided for. Even if the application is rejected, the person against whom the proceedings are taken may be forbidden to go to law, compromise, borrow, receive payment of capital or give discharges, conveyances, or mortgages without advice of counsel appointed by the same judgment.

An appeal is provided, and there may be another examination. The decree must be duly served and recorded, and posted in the tribunal of birth. From the day of judgment all acts are void, and it may have a retroactive effect, by which previous acts are annulled.

After death a person's sanity can only be attacked if he has been interdicted, unless

the insanity result from the act questioned.

A guardian or curator is appointed, as in case of minors, to which it is by statute assimilated; the husband for his wife, as of right; the wife may be appointed for her husband, in which case the family council regulate the manner of administration.

No one is compelled to act as guardian for more than ten years. The income must be used primarily to better the condition of the interdicted person. If his child marry, the family council fix the dowry. Interdiction ceases with the causes which made it necessary, and it may be withdrawn by proceedings similar to those by which it was obtained.

Such are substantially the rules on the subject of interdiction found in the law of Louisiana and the French Code. They are substantially the same in all the modern codes having the civil law for their basis.

In Louisiana it has been held that mental weakness is not sufficient unless interdiction be necessary for protection of person or property; Interdiction of Watson, 31 La. Ann. 757; the motives of the party applying should be fully investigated; Francke v. His Wife, 29 La. Ann. 302; trial by jury cannot be demanded and judgment may be at chambers; In re Ross, 38 La. Ann. 523; a non-resident cannot be interdicted; Interdiction of Dumas, 32 La. Ann. 679; testimony of experts does not control the court and is of little weight when they had seen defendant only once; Interdiction of Watson, 31 La. Ann. 757; and opinions of non-experts are of little weight; they should state facts; Eloi v. Eloi, 36 La. Ann. 563; costs of proceeding to interdict a wife, include fees of her lawyers, and are a debt of the community; Breaux v. Francke, 30 La. Ann. 336.

A judge may in the exercise of a sound legal discretion, without a special statutory authority, exclude relations from a family meeting to recommend a curator, and he is not restricted to a narrow construction of the term "conflicting interest" in the statute disqualifying persons, having such an interest, for participating in the family meeting; Interdiction of Bothick, 44 La. Ann. 1037, 11 South. 712. In the selection of a curator the family meeting is not limited to applicants, nor to persons suggested by relations of the interdict; *id.*

In Scotch Law. A legal restraint laid upon persons liable to be imposed upon, though having, to some extent, the exercise of reason, to prevent them from signing any deed affecting heritage, to their own prejudice, without the consent of their curators or interdictors. It is nearly superseded in practice by voluntary trusts. In cases where a trust cannot be obtained, the law relating to unconscionable bargains and to facility and circumvention is usually sufficient protection.

INTERDICTION OF FIRE AND WATER. Banishment by an order forbidding all persons to supply the person banished with fire or water, they being considered the two necessaries of life.

INTERDICTUM SALVIANUM (Lat). **In Roman Law.** The Salvian interdict. A process which lay for the owner of a farm to obtain possession of the goods from his tenant who had pledged them to him for the rent of the land. Inst. 4, 15, 3.

INTERESSE (Lat.). Interest. The interest of money; also an interest in lands.

INTERESSE TERMINI (Lat.). An interest in the term. The demise of a term in land does not vest any estate in the lessee, but gives him a mere right of entry on the land, which right is called his interest in the term, or *interesse termini.* See Co. Litt. 46; 2 Bla. Com. 144; 10 Viner, Abr. 348; Dane, Abr. Index; 1 Washb. R. P.

A lessee for years who has never obtained *seisin,* was, unless he entered and took actual possession, deemed to have no estate, but merely a contractual *interesse termini.* This entry is still essential to the recovery of the land in *specie;* Jenks, Mod. Land L., 77, 344. If the lessee dies before entry, his executors can enter; Co. Litt. 46 *b.*

INTEREST (Lat. it concerns; it is of advantage).

In Contracts. The right of property which a man has in a thing. See INSURABLE INTEREST.

On Debts. The compensation which is paid by the borrower of money to the lender for its use, and, generally, by a debtor to his creditor in recompense for his detention of the debt.

The compensation allowed by law or fixed by the parties to a contract for the use or forbearance or detention of money. Fisher v. Hoover, 3 Tex. Civ. App. 81, 21 S. W. 930.

A consideration paid for the use of money or for forbearance in demanding it when due. Maryland Casualty Co. v. Power Co., 157 Fed. 514, 85 C. C. A. 106.

Legal interest is the rate of interest established by the law of the country, which will prevail in the absence of express stipulation; *conventional* interest is a certain rate agreed upon by the parties. Fowler v. Smith, 2 Cal. 568.

Interest is a matter of local regulation and the decisions of state courts are binding on the courts of the United States; Bond v. John V. Farwell Co., 172 Fed. 58, 96 C. C. A. 546; where a judgment is rendered prior to the passage of an act reducing the rate of interest, it draws interest only at the reduced rate after the act takes effect; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64.

It has been said that at common law interest was not allowed; it can be secured only by statute; Pacific Coast S. S. Co. v.

U. S., 33 Ct. Cl. 36; Sanderson v. Read, 75 Ill. App. 190. On the other hand, a party liable for a principal sum is liable for interest; it is an incident of the debt; Tidball v. Bank, 100 Va. 741, 42 S. E. 867.

Who is bound to pay interest. The party to a contract who has expressly or impliedly undertaken to pay interest is, of course, bound to do so.

Executors; Adams v. Spalding, 12 Conn. 350; Findlay v. Smith, 7 S. & R. (Pa.) 264; *administrators;* Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Crowder v. Shackelford, 35 Miss. 321; *assignees of bankrupts or insolvents;* In re Dyott's Estate, 2 W. & S. (Pa.) 557; but see Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *guardians;* Royston v. Royston, 29 Ga. 82; *and trustees;* Fay v. Howe, 1 Pick. (Mass.) 528; Dennis v. Dennis, 15 Md. 75; Royston v. Royston, 29 Ga. 82; Dickinson v. Owen, 11 Cal. 71; who have kept money an unreasonable length of time; Boynton v. Dyer, 18 Pick. (Mass.) 1; Royston v. Royston, 29 Ga. 82; and have made or might have made it productive; Gwynn v. Dorsey, 4 Gill & J. (Md.) 453; Stearns v. Brown, 1 Pick. (Mass.) 530; Lockhart v. Horn, 3 Woods, 542, Fed. Cas. No. 8,446; Bourne v. Maybin, 3 Woods, 724, Fed. Cas. No. 1,700; are chargeable with interest. Where a litigant claiming money as his own, was permitted to collect and retain it, subject only to the order of the court should it afterwards be decided he was not entitled to it, he is chargeable with interest; Kenton Ins. Co. v. Bank, 93 Ky. 129, 19 S. W. 185. When a loan is negotiated, the retention of a portion of it for an unreasonable time entitles the borrower to a rebate of interest; Dodge v. Tulleys, 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501.

Who are entitled to receive interest. The lender upon an express or implied contract for interest. Executors, administrators, etc., are in some cases allowed interest for advances made by them on account of the estates under their charge; Jennison v. Hapgood, 10 Pick. (Mass.) 77. The rule has been extended to trustees; Dilworth's Lessee v. Sinderling, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; and compound interest, even, allowed; Barrell v. Joy, 16 Mass. 228.

On what claims allowed. When the debtor expressly undertakes to pay interest, he or his personal representatives having assets are bound to pay it. But if a party has accepted the principal, it has been determined that he cannot recover interest in a separate action; Tillotson v. Preston, 3 Johns. (N. Y.) 229. See Williams v. Craig, 1 Dall. (U. S.) 315, 1 L. Ed. 153; Blodgett v. Gardiner, 45 Me. 542; Candee v. Webster, 9 Ohio St. 452.

On contracts where, from the course of dealings between the parties, a promise to pay is implied; 3 Brown, Ch. 436; Wood v. Hickok, 2 Wend. (N. Y.) 501; Parker's Heirs v. Parker's Adm'r, 33 Ala. 459; Veiths v. Hagge, 8 Ia. 163. *On account stated* or other liquidated sum, whenever the debtor knows precisely what he is to pay and when he is to pay it; 2 Burr. 1085; 2 Cox 219; McMahon v. R. Co., 20 N. Y. 463; Kellenberger v. Foresman, 13 Ind. 475; Milton v. Blackshear, 8 Fla. 161; Henderson Cotton Mfg. Co. v. Machine Shops, 86 Ky. 668, 7 S. W. 142. But interest is not due for unliquidated damages, or on a running account where the items are all on one side, unless otherwise agreed upon; Van Beuren v. Van Gaasbeck, 4 Cow. (N. Y.) 496; Catlin v. Aiken, 5 Vt. 177; Shewel v. Givan, 2 Blackf. (Ind.) 313; Harrison v. Handley, 1 Bibb (Ky.) 443; Watkins v. Wassell, 20 Ark. 410; Nichols v. Ry. Co., 7 Utah 510, 27 Pac. 693; see Palmer v. Murray, 8 Mont. 312, 21 Pac. 126; but when the damages are to be assessed on the principle of compensation, and with reference to a definite standard, the jury may give additional damages in the nature of interest. This, however, is not strictly interest, but compensation for delay, measured by the rate of interest; Richards v. Gas Co., 130 Pa. 37, 18 Atl. 600. *On the arrears of an annuity* secured by a specialty; 3 Atk. 579; Addams v. Heffernan, 9 Watts (Pa.) 530; or given in lieu of dower; Elliott v. Beeson, 1 Harr. (Del.) 106; Smyser v. Smyser, 3 W. & S. (Pa.) 437. *On bills and notes* if payable at a future day certain, after due; 3 D. & B. 70; Rollman v. Baker, 5 Humphr. (Tenn.) 406; Joyner v. Turner, 19 Ark. 690; Ayres v. Hayes, 13 Mo. 252; Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092; if payable on demand, after a demand made; 5 Ves. 133; Nelson v. Cartmel's Adm'r, 6 Dana (Ky.) 7; Pate v. Gray, 1 Hempst. 155, Fed. Cas. No. 10,794a; Maxcy v. Knight, 18 Ala. 300; In re Estate of King, 94 Mich. 411, 54 N. W. 178. See Pullen v. Chase, 4 Ark. 210; Henry v. Roe & Burnside, 83 Tex. 446, 18 S. W. 806. But see Packer v. Roberts, 40 Ill. App. 613, where interest on a note due on demand was held to run from its date. Where the terms of a promissory note are that it shall be payable by instalments, and on the failure of any instalment the whole is to become due, interest on the whole becomes payable from the first default; 4 Esp. 147. Where, by the terms of a bond or a promissory note, interest is to be paid annually, and the principal at a distant day, the interest may be recovered before the principal is due; Sparks v. Garrigues, 1 Binn. (Pa.) 165; Greenleaf v. Kellogg, 2 Mass. 568. An accepted draft bears interest from the time of delivery, when no time of payment is stated therein; Clark v. Loan Ass'n, 65 Hun 625, 20 N. Y. Supp. 363.

When not stipulated for by contract or authorized by statute, interest is allowed by the courts as damages for the detention

of money or property; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336.

On a deposit by a purchaser, which he is entitled to recover back, paid either to a principal or an auctioneer; Sugd. Vend. 327; 5 Taunt. 625. But see 4 Taunt. 334. *For goods sold and delivered*, after the customary or stipulated term of credit has expired; 2 B. & P. 337; Knox v. Jones, 2 Dall. (Pa.) 193, 1 L. Ed. 345; Bispham v. Pollock, 1 McLean 411, Fed. Cas. No. 1,442; McIlvaine v. Wilkins, 12 N. H. 474; Parke v. Foster, 26 Ga. 465, 71 Am. Dec. 221; Veiths v. Hagge, 8 Ia. 163.

Where goods are sold on a definite term of credit, interest runs from the date when the account becomes due, unless there are deductions or discounts to be adjusted; Harding, Whitman & Co. v. Knitting Mills, 142 Fed. 228; and so, where a tradesman regularly charges interest on an open account and the purchaser makes no objection thereto, an agreement to pay interest will be inferred; [1901] 2 Ch. 548.

On judgment debts; 2 Ves. 162. In a judgment on *sci. fa.* the interest is calculated on the old judgment and the new judgment entered for a lump sum; Berryhill v. Wells, 5 Binn. (Pa.) 61; Gwinn v. Whitaker's Adm'x, 1 H. & J. (Md.) 754; Sayre v. Austin, 3 Wend. (N. Y.) 496; Verree v. Hughes, 11 N. J. L. 91; Benjamin v. Bartlett, 3 Mo. 86; Marshall v. Dudley, 4 J. J. Marsh. (Ky.) 244. *On judgments affirmed* in a higher court; 4 Burr. 2128; 2 Campb. 428, n. See Lord v. City of New York, 3 Hill (N. Y.) 426; Nashua & L. R. Corp. v. R. Corp., 61 Fed. 237, 9 C. C. A. 468. In an accounting for profits made by selling an article contrary to contract, interest should be allowed; Fowle v. Park, 48 Fed. 789; also on the amount found as damages for breach of contract; Gulf, C. & S. F. Ry. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716. *On money obtained by fraud*, or where it has been wrongfully detained; Reid v. Glass Factory, 3 Cow. (N. Y.) 426. *On money paid by mistake*, or recovered on a *void* execution; Winslow v. Hathaway, 1 Pick. (Mass.) 212; King v. Diehl, 9 S. & R. (Pa.) 409; Ricketson v. Wright, 3 Sumn. 336, Fed. Cas. No. 11,805; Leach v. Vining, 64 Hun 632, 18 N. Y. Supp. 822; see Gould v. Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501. *On money lent* or laid out for another's use; 2 W. Bla. 761; Rapelie v. Emory, 1 Dall. (Pa.) 349, 1 L. Ed. 170; Upshaw v. Upshaw, 2 Hen. & M. (Va.) 381, 3 Am. Dec. 632; People v. Gasherie, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185; Fowler v. Shearer, 7 Mass. 14; Chamberlain v. Smith's Adm'rs, 1 Mo. 718. *On money had and received* after demand; Porter v. Nash, 1 Ala. 452; Hawkins v. Johnson, 4 Blackf. (Ind.) 21; Hackleman v. Moat, *id.* 164. On the *value of an animal* in an action for causing its death; St. Louis I. M. & S. Ry. v. Biggs, 50 Ark. 169, 6 S. W. 724; Township of Plymouth v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867. *On purchase-money* which has lain dead, where the vendor cannot make a title; Sugd. Vend. 327. *On purchase-money* remaining in purchaser's hands to pay off incumbrances; 1 Sch. & L. 134. On *taxes* wrongfully collected; County of Galveston v. Gas Co., 72 Tex. 509, 10 S. W. 583. See Boott Cotton Mills v. City of Lowell, 159 Mass. 383, 34 N. E. 367. *Rent in arrear* due by covenant bears interest, unless under special circumstances, which may be recovered in action; Obermyer v. Nichols, 6 Binn. (Pa.) 159, 6 Am. Dec. 439. See West v. Weyer, 46 Ohio St. 66, 18 N. E. 537, 15 Am. St. Rep. 552; but no distress can be made for such interest; Bantleon v. Smith, 2 Binn. (Pa.) 146, 4 Am. Dec. 430. Interest cannot, however, be recovered for arrears of rent payable in wheat; Van Rensselaer's Ex'rs v. Platner's Adm'rs, 1 Johns. (N. Y.) 276. See Graham v. Woodson, 2 Call. (Va.) 249; Cooke v. Wise, 3 Hen. & M. (Va.) 463.

Interest cannot be recovered as damages for the detention of the principal, after the principal sum has been paid; Stewart v. Barnes, 153 U. S. 456, 14 Sup. Ct. 849, 38 L. Ed. 781. Where interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld; U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112. Interest allowed for non-payment of a judgment is in the nature of statutory damages; Morley v. R. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925.

On legacies. On specific legacies it has been held that interest is to be calculated from the date of the death of the testator; 2 Ves. Sen. 563; Shobe's Ex'rs v. Carr, 3 Munf. (Va.) 10; so on a gift of a fund in trust to pay the income to a sister for life; In re Hilyard's Estate, 5 W. & S. (Pa.) 30.

A *general* legacy, when the time of payment is *not* named by the testator, is not payable till the end of one year after testator's death, at which time the interest commences to run; 1 Sch. & L. 10; Eyre v. Golding, 5 Binn. (Pa.) 475; Wood v. Hammond, 16 R. I. 98, 17 Atl. 324, 18 Atl. 198; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; and this is so whether the will has been proved during the year or not; Ogden v. Pattee, 149 Mass. 82, 21 N. E. 227, 14 Am. St. Rep. 401. Where only the interest is given, no payment will be due till the end of the second year; 7 Ves. 89. As a general rule pecuniary legacies do not bear interest till they are payable (one year after testator's death); Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523.

Where a general legacy is given, and the time of payment is named by the testator, interest is not allowed before the arrival

of the appointed period of payment, and that notwithstanding the legacies are vested; Prec. in Ch. 337. But when that period arrives, the legatee will be entitled although the legacy be charged upon a dry reversion; 2 Atk. 108. See, also, 1 Cox, Ch. 133. When the executor can pay a legacy without any possible inconvenience to the estate, it has been held that interest begins to run at once; Van Rensselaer v. Van Rensselaer, 113 N. Y. 207, 21 N. E. 75. When a legacy is given payable at a future day with interest, and the legatee dies before it becomes payable, the arrears of the interest up to the time of his death must be paid to his personal representatives; McClel. 141. And a bequest of a sum to be paid annually for life bears interest from the death of testator; Eyre v. Golding, 5 Binn. (Pa.) 475; Flickwir's Estate, 26 W. N. C. (Pa.) 374; and so also for a legacy of income for the support and maintenance of the legatee: Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523; especially is this so when the legacy is to be paid by the executors transferring to the trustees for the legatee interest-bearing securities belonging to the testator's estate; *id.*

Where the legatee is a child of the testator, or one towards whom he has placed himself *in loco parentis*, the legacy bears interest from the testator's death, whether it be particular or residuary, vested but payable at a future time, or contingent if the child have no maintenance. In that case the court will do what in common presumption the father would have done—provide necessaries for the child; 2 P. Wms. 31; 1 Dick. Ch. 310; 2 Brown, Ch. 59; Davison v. Rake, 44 N. J. Eq. 506, 16 Atl. 227. In case of a child *en ventre sa mère* at the time of the father's death, interest is allowed only from its *birth;* 2 Cox, Ch. 425. Where maintenance or interest is given by the will, and the rate specified, the legatee will not, in general, be entitled to claim more than the maintenance or rate specified; 3 Atk. 697, 716; 3 Ves. 286, n. And see further, as to interest in cases of legacies to children; 15 Ves. 363; 4 Madd. 275; 1 P. Wms. 783; 3 V. & B. 183.

Interest is not allowed by way of maintenance to any other person than the legitimate children of the testator; 3 Ves. 10; 4 *id.* 1; unless the testator has put himself *in loco parentis;* 1 Sch. & L. 5, 6. A wife; 15 Ves. 301; a niece; 3 Ves. 10; a grandchild; 1 Cox, Ch. 133; are, therefore, not entitled to interest by way of maintenance. See 2 Wms. Exec. 743. Nor is a legitimate child entitled to such interest if he have a maintenance, although it may be less than the amount of the interest of the legacy; 1 Sch. & L. 5; 3 Ves. 17. But see In re Bostwick, 4 Johns. Ch. (N. Y.) 103; 2 Roper, Leg. 202; Appeal of Townsend, 106 Pa. 268, 51 Am. Rep. 523, cited above.

Where an intention, though not expressed, is fairly inferable from the will, interest will be allowed; 1 Swanst. 561, n.

Interest is not allowed for maintenance, although given by immediate bequest for maintenance, if the parent of the legatee, who is under moral obligation to provide for him, be of sufficient ability: so that the interest will accumulate for the child's benefit until the principal becomes payable; 3 Atk. 399; 1 Brown, Ch. 386; 3 *id.* 60, 416. But to this rule there are some exceptions; 3 Ves. 730; 4 Brown, Ch. 223; 4 Madd. 275, 289.

Where a fund, particular or residuary, is given upon a contingency, the intermediate interest undisposed of—that is to say, the intermediate interest between the testator's death, if there be no previous legatee for life, or, if there be, between the death of the previous taker and the happening of the contingency—will sink into the residue for the benefit of the next of kin, or executor of the testator, if not bequeathed by him; but if not disposed of, for the benefit of his residuary legatee; 1 Brown, Ch. 57; 2 Atk. 329.

Where a legacy is given by immediate bequest, whether such legacy be particular or residuary, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place, yet, as the legacy was payable at the end of the year after the testator's death, the legatee's representatives, and not the legatee over, will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy; 1 P. Wms. 501; 5 Ves. 335, 522.

Where a residue is given, so as to be vested, but not payable at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under age, or upon the happening of the contingency, then the legatee's representatives in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life or until the happening of the contingency; 2 P. Wms. 419; 1 Brown, Ch. 81, 335; 3 Mer. 335.

Where a residue of personal estate is given, generally, to one for life with remainder over, and no mention is made by the testator respecting the interest, nor any intention to the contrary to be collected from the will, the rule appears to be settled that the person taking for life is entitled to interest from the death of the testator, on such part of the residue bearing interest as is not necessary for the payment of debts. And it is immaterial whether the residue is only giv-

en generally, or directed to be laid out, with all convenient speed, in funds or securities, or to be laid out in lands. See 6 Ves. 520; 9 *id.* 89, 549, 553. Interest, in case of a remainder in an estate in money, does not run until the death of the life tenant; McCook v. Harp, 81 Ga. 229, 7 S. E. 174.

But where a residue is directed to be laid out in land, to be settled on one for life, with the remainder over, and the testator directs the interest to accumulate in the mean time until the money is laid out in land, or otherwise invested on security, the accumulation shall cease at the end of one year from the testator's death, and from that period the tenant for life shall be entitled to the interest; 6 Ves. 520; 2 S. & S. 396. Where a gift is made of the residue of the testator's estate to one person for life, and the principal is given over to another one at the death of the life tenant, the legatee is entitled to interest from the testator's death; Davison v. Rake, 44 N. J. Eq. 506, 16 Atl. 227.

Where no time of payment is mentioned by the testator, annuities are considered as commencing from the death of the testator; and, consequently, the first payment will be due at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period; Eyre v. Golding, 5 Binn. (Pa.) 475. See Saunderson v. Stearns, 6 Mass. 37; 1 Hare & W. Lead. Cas. 356.

How much interest is to be allowed. As to time. In actions for money had and received, interest is allowed from the date of service of the writ; Hunt v. Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; McIlvaine v. Wilkins, 12 N. H. 474. See U. S. v. Curtis, 100 U. S. 119, 25 L. Ed. 571. On debts payable on demand, interest is payable only from the demand; Hunt v. Nevers, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; Wells v. Abernethy, 5 Conn. 222; Pope v. Barrett, 1 Mas. 117, Fed. Cas. No. 11,273. The words "with interest for the same" carry interest from date; 1 Stark. 452, 507; Horn v. Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617. Interest upon a *quantum meruit* for services rendered, does not begin to run until a demand is made; Farr v. Semple, 81 Wis. 230, 51 N. W. 319. It is allowed on the amount found as damages for breach of contract, from the date they accrued; Gulf, Colorado & S. F. Ry. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716. Interest coupons bear interest from maturity of the coupons; Town of Solon v. Bank, 114 N. Y. 122, 21 N. E. 168; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261.

See COUPONS.

Interest on a dividend declared by a receiver should be allowed from the time it was declared and ought to have been paid; Armstrong v. Bank, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747. Interest runs on liability of shareholders to creditors of a national bank from the time it goes into liquidation; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864.

Interest may be computed from the commencement of an action for the balance due on a general account and the enforcement of lien; North v. La Flesh, 73 Wis. 520, 41 N. W. 633; Tootle v. Wells, 39 Kan. 452, 18 Pac. 692.

The general rule is that interest is not payable until the principal is due, unless the parties contract otherwise; Hutchins v. Dixon, 11 Md. 32. On a note payable on or before three years after date with interest at 8 per cent. per annum, the interest is to be paid at maturity; Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092; Tanner v. Investment Co., 12 Fed. 646; Koehring v. Muemminghoff, 61 Mo. 403, 21 Am. Rep. 402; *contra*, Cook v. Wiles, 42 Mich. 439, 4 N. W. 169, where the interest was held to be payable each year.

The mere circumstance of war existing between two nations is not a sufficient reason for abating interest on debts due by the subjects of one belligerent to another; American Ins. Co. v. Canten, 1 Pet. (U. S.) 524, 7 L. Ed. 242; Paul v. Christie, 4 H. & McH. (Md.) 161. But a prohibition of all intercourse with an enemy during war furnishes a sound reason for the abatement of interest until the return of peace; Hoare v. Allen, 2 Dall. (Pa.) 102, 1 L. Ed. 307; Foxcraft v. Nagle, 2 Dall. (Pa.) 132, 1 L. Ed. 319; Denniston v. Imbrie, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; Sims v. Willing, 8 S. & R. (Pa.) 1103; Bean v. Chapman, 62 Ala. 58. See *infra*.

A debt barred by the statute of limitations and revived by an acknowledgment bears interest for the whole time; Williams v. Finney, 16 Vt. 297.

As to the allowance of simple and compound interest. Interest upon interest is not allowed, except in special cases; 1 Eq. Cas. Abr. 287; Birchard v. Knapp's Estate, 31 Vt. 679; Stokely v. Thompson, 34 Pa. 210; and the uniform current of decisions is against it, as being a hard, oppressive exaction, and tending to usury; Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 14, 7 Am. Dec. 471; Kennon v. Dickins, 1 N. C. 522, 2 Am. Dec. 642; Wheelock v. Moulton, 13 Vt. 430; Levens v. Briggs, 21 Or. 333, 28 Pac. 15, 14 L. R. A. 188; but interest on interest may be allowed if agreed upon after the interest becomes due; Barbour v. Tompkins, 31 W. Va. 410, 7 S. E. 1; Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265; Sanford v. Lundquist, 80 Neb. 414, 118 N. W. 129; though both interest on the principal and on the interest are computed at the maximum rate allowed by law; *id.*

By the civil law, interest could not be demanded beyond the principal sum, and pay-

ments exceeding that amount were applied to the extinguishment of the principal; Ridley's Views of the Civil, etc., Law 84.

Where a partner has overdrawn the partnership funds, and refuses, when called upon to account, to disclose the profits, recourse would be had to compound interest as a substitute for the profits he might reasonably be supposed to have made; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 213.

When executors, administrators, or trustees convert the trust-money to their own use, or employ it in business or trade, or fail to invest, they have been charged with compound interest; Fay v. Howe, 1 Pick. (Mass.) 528; Schieffelin v. Stewart, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507. Nothing but very culpable conduct will justify the compounding of interest against an administrator; Alvis v. Oglesby, 87 Tenn. 172, 10 S. W. 313; Cranson v. Wilsey, 71 Mich. 356, 39 N. W. 9. Interest cannot ordinarily be compounded against a guardian; In re Ward's Estate, 73 Mich. 220, 41 N. W. 431; Peelle v. State, 118 Ind. 512, 21 N. E. 288; but it may be in some cases; Latham v. Wilcox, 99 N. C. 367, 6 S. E. 711.

In actions for negligence, interest cannot be allowed by the jury as such, but they may, in computing their verdict, consider the lapse of time since the cause of action arose; Plymouth Tp. v. Graver, 125 Pa. 24, 17 Atl. 249, 11 Am. St. Rep. 867. The question of allowances of interest on damages for tort is for the jury. They should not be directed to allow it; Brent v. Thornton, 106 Fed. 35, 45 C. C. A. 214. Interest may be recovered for the wrongful conversion of personal property, computed from the time of the conversion; Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606.

In an action to recover the annual interest due on a promissory note, interest will be allowed on each year's interest until paid; Greenleaf v. Kellogg, 2 Mass. 568; Catlin v. Lyman, 16 Vt. 45; Talliaferro's Ex'rs v. King's Adm'r, 9 Dana (Ky.) 331, 35 Am. Dec. 140; Gibbes v. Chisolm, 2 N. & McC. (S. C.) 38, 10 Am. Dec. 560; Bledsoe v. Nixon, 69 N. C. 89, 12 Am. Rep. 642; Cramer v. Lepper, 26 Ohio St. 59, 20 Am. Rep. 756; Calhoun v. Marshall, 61 Ga. 275, 34 Am. Rep. 101; *contra*, Hastings v. Wiswall, 8 Mass. 455; Ferry v. Ferry, 2 Cush. (Mass.) 92; Sparks v. Garrigues, 1 Binn. (Pa.) 152, 165; Young v. Hill, 67 N. Y. 162, 23 Am. Rep. 99.

A note which provides for a rate of interest, but omits to provide for the rate of interest after maturity, draws the legal rate; Brewster v. Wakefield. 22 How. (U. S.) 118, 16 L. Ed. 301; Holden v. Trust Co., 100 U. S. 72, 25 L. Ed. 567; Burns v. Anderson, 68 Ind. 202, 34 Am. Rep. 250; 42 L. J. Rep. N. S. 666; Holbrook v. Sims, 39 Minn. 122, 39 N. W. 74, 140; Everett v. Dilley, 39 Kan. 73, 17 Pac. 661; Ferris v. Hard, 135 N. Y. 354, 32 N. E. 129; but a different view has been held; Brannon v. Hursell, 112 Mass. 63; Mayor & Aldermen of Jersey City v. O'Callaghan, 41 N. J. L. 349. See, as to charging compound interest, Barrow v. Rhinelander, 1 Johns. Ch. (N. Y.) 550; Sparks v. Garrigues, 1 Binn. (Pa.) 165; Brown v. Brent, 1 Hen. & M. (Pa.) 4; Lewis's Ex'r v. Bacon's Legatee, 3 Hen. & M. (Va.) 89; 1 Viner, Abr. 457, *Interest* (C).; Com. Dig. *Chancery* (3 S 3); 1 Hare & W. Lead. Cas. 371. An infant's contract to pay interest on interest after it has accrued will be binding upon him when the contract is for his benefit; 1 Eq. Cas. Abr. 286; 1 Atk. 489; 3 *id.* 613. The including in a note payable a year after date with a certain rate of interest, until paid, of a year's interest, is not compounding interest; Foard v. Grinter's Ex'rs (Ky.) 18 S. W. 1034. As to interest on interest coupons, see *infra*.

As limited by the penalty of a bond. It is a general rule that the penalty of a bond limits the amount of the recovery; 2 Term 388. But in some cases the interest is recoverable beyond the amount of the penalty; U. S. v. Gurney, 4 Cra. (U. S.) 333, 2 L. Ed. 638; Fake v. Eddy's Ex'r, 15 Wend. (N. Y.) 76; Lewis v. Dwight, 10 Conn. 95; Bank of U. S. v. Magill, Paine, 661, Fed. Cas. No. 929; Potter v. Webb, 6 Greenl. (Me.) 14; Judge of Probate v. Heydock, 8 N. H. 491. The recovery depends on principles of law, and not on the arbitrary discretion of a jury; Smedes v. Hooghtaling, 3 Caines (N. Y.) 49, 2 Am. Dec. 250.

The exceptions are—where the bond is to account for moneys to be received; 2 Term 388; where the plaintiff is kept out of his money by writs of error; 2 Burr. 1094; or delayed by injunction; 1 Vern. 349; 16 Viner, Abr. 303; if the recovery of the debt be delayed by the obligor; 6 Ves. 92; 1 Vern. 349; if extraordinary emoluments are derived from holding the money; 2 Bro. P. C. 251; or the bond is taken only as a collateral security; 2 Bro. P. C. 333; or the action be on a judgment recovered on a bond; 1 East 436. See, also, Carter v. Carter, 4 Day (Conn.) 30, 4 Am. Dec. 177; Smedes v. Hooghtaling, 3 Caines (N. Y.) 49, 2 Am. Dec. 250; Harris v. Clap, 1 Mass. 308, 2 Am. Dec. 27; Com. Dig. *Chancery* (3 S 2); Viner, Abr. *Interest* (E).

But these exceptions do not obtain in the administration of the debtor's assets where his other creditors might be injured by allowing the bond to be rated beyond the penalty; 5 Ves. 329. See Viner, Abr. *Interest* (C 5).

Interest may be added to the amount of recovery on a bond although the total sum exceeds the penalty thereof; American Surety Co. v. Surety Co., 81 Conn. 252, 70 Atl. 584, 19 L. R. A. (N. S.) 83.

Upon a bond given to appear in a United States court to answer to an indictment, no interest can be recovered; U. S. v. Broadhead, 127 U. S. 212, 8 Sup. Ct. 1191, 32 L. Ed. 147.

As to the allowance of foreign interest. The rate of interest of the place of performance is to be allowed, where such place is specified; De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343; Scofield v. Day, 20 Johns. (N. Y.) 102; Braynard v. Marshall, 8 Pick. (Mass.) 194; Hawley v. Sloo, 12 La. Ann. 815; Thomas v. Beckman, 1 B. Monr. (Ky.) 29; Archer v. Dunn, 2 W. & S. (Pa.) 327; Austin v. Imus, 23 Vt. 286; Vinson v. Platt, 21 Ga. 135; Whitlock v. Castro, 22 Tex. 108; Davis v. Coleman, 29 N. C. 424; 5 C. & F. 1; otherwise, of the place of making the contract; 11 Ves. 314; Winthrop v. Carleton, 12 Mass. 4; Ingraham v. Arnold, 1 J. J. Marsh. (Ky.) 406; Arrington v. Gee, 27 N. C. 590; Fanning v. Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; Lapice v. Smith, 13 La. 91, 33 Am. Dec. 555; Smith v. Mead, 3 Conn. 253, 8 Am. Dec. 183; Hill v. George, 5 Tex. 87; Wheeler v. Pope, *id.* 262. But the rate of interest of either place may be reserved; and this provision will govern, if an honest transaction and not a cover for usury; Mullen v. Morris, 2 Pa. 85; Peck v. Mayo, 14 Vt. 33, 39 Am. Dec. 205; Depau v. Humphreys, 8 Mart. N. S. (La.) 1; Van Schaick v. Edwards, 2 Johns. Cas. (N. Y.) 355; De Wolf v. Johnson, 10 Wheat. (U. S.) 367, 6 L. Ed. 343. Coupons, after their maturity, bear interest at the rate fixed by the law of the place where they are payable, where there is no stipulation as to the rate after maturity; Cairo v. Zane, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; Scotland County v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261. See also Dicey, Confl. L., Moore's ed. 616, 625.

How computed. In casting interest on notes, bonds, etc., upon which partial payments have been made, every payment is to be first applied to keep down the interest; but the interest is never allowed to form a part of the principal so as to carry interest; Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Meredith v. Banks, 6 N. J. L. 108; Anonymous, 3 N. C. 17; Dean v. Williams, 17 Mass. 417; Treat v. Stanton, 14 Conn. 445; Woodward v. Jewell, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478.

When a partial payment exceeds the amount of interest due when it is made, it is correct to compute the interest to the time of the first payment, add it to the principal, subtract the payment, cast interest on the remainder to the time of the second payment, add it to the remainder, and subtract the second payment, and in like manner from one payment to another, until the time of judgment; Perl. Int. 168; Fay v. Bradley, 1 Pick. (Mass.) 194; Lightfoot v. Price, 4 Hen. & M. (Va.) 431; Com. v. Vanderslice, 8 S. & R. (Pa.) 458; Smith v. Shaw, 2 Wash. (C. C.) 167, Fed. Cas. No. 13,107. See Williams v. Houghtaling, 3 Cow. (N. Y.) 86. The same rule applies to judgments; Hodgdon v. Hodgdon, 2 N. H. 169; Com. v. Vanderslice, 8 S. & R. (Pa.) 452.

Where a partial payment is made *before* the debt is due, it cannot be apportioned part to the debt and part to the interest. As, if there be a bond for one hundred dollars, payable in one year, and at the expiration of six months fifty dollars be paid in, this payment shall not be apportioned part to the principal and part to the interest, but at the end of the year, interest shall be charged on the whole sum, and the obligor shall receive credit for the interest of fifty dollars for six months; Tracy v. Wikoff, 1 Dall. (Pa.) 124, 1 L. Ed. 65.

A secured creditor of a bankrupt, selling his securities after the filing of the petition, must apply the proceeds, other than interest and dividends accrued since the filing, first to pay the debt with interest to date of petition, and not first to pay interest accrued since the petition. Interest and dividends accrued after the filing can be applied to interest on the debt accrued after the filing. This is also the English rule; Sexton v. Dreyfus, 219 U. S. 339, 31 Sup. Ct. 256, 55 L. Ed. 244.

When interest will be barred. When the money due is tendered to the person entitled to it, and he refuses to receive it, the interest ceases; 3 Campb. 296; Loomis v. Knox, 60 Conn. 343, 22 Atl. 771; Riley v. McNamara, 83 Tex. 11, 18 S. W. 141. See Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818. A tender by a junior mortgagee to a senior mortgagee of the amount due on the senior mortgage, with accrued costs of foreclosure, does not, unless kept good, prevent the running of interest; Nelson v. Loder, 132 N. Y. 288, 30 N. E. 369.

Where the plaintiff was absent in foreign parts beyond seas, evidence of that fact may be given in evidence to the jury on the plea of payment, in order to extinguish the interest during such absence; McCall v. Turner, 1 Call. (Va.) 133; Blake's Ex'rs v. Quash's Ex'rs, 3 McCord (S. C.) 340; Borland v. Sharp, 1 Root (Conn.) 178. But see Schaeffer's Estate, 9 S. & R. (Pa.) 263.

Whenever the law prohibits the payment of the principal, interest during the prohibition is not demandable; Hoare v. Allen, 2 Dall. (Pa.) 102, 1 L. Ed. 307; Foxcraft v. Nagle, 2 Dall. (Pa.) 132, 1 L. Ed. 319; Crawford v. Willing, 4 Dall. (Pa.) 286, 1 L. Ed. 836. Where payment has been prevented by war, interest cannot be recovered; Selden v. Preston, 11 Bush (Ky.) 191. See *supra*.

If the plaintiff has accepted the principal, he cannot recover the interest in a separate action; 1 Esp. 110; Tillotson v. Preston, 3

Johns. (N. Y.) 229. See Kellogg v. Richards, 14 Wend. 116.

For or against Government or State. Interest is not to be awarded against a sovereign government, unless its consent has been manifested by an act of its legislature or by a lawful contract of its executive officers; U. S. v. North Carolina, 136 U. S. 211, 10 Sup. Ct. 920, 34 L. Ed. 336. The U. S. is not liable to pay interest or claims against it, in the absence of express statutory provision therefor; U. S. v. Bayard, 127 U. S. 251, 8 Sup. Ct. 1156, 32 L. Ed. 159; Wightman v. U. S., 23 Ct. Cl. 144; U. S. v. Verdier, 164 U. S. 213, 17 Sup. Ct. 42, 41 L. Ed. 407; but this does not apply to subordinate governmental agencies (The National Home); National Volunteer Home v. Parrish, 229 U. S. 494, 33 Sup. Ct. 944, 57 L. Ed. 1296; interest must be allowed to the United States under U. S. R. S. § 966; *id.* A city is not liable for interest on its loans, after maturity, if it has provided funds to pay them; Friend v. City of Pittsburgh, 131 Pa. 305, 18 Atl. 1060, 6 L. R. A. 636, 17 Am. St. Rep. 811.

A general interest statute cannot be applied as against a county, and in an action to recover taxes wrongfully exacted, interest cannot be recovered; Jackson County Com'rs v. Kaul, 77 Kan. 715, 96 Pac. 45, 17 L. R. A. (N. S.) 552.

For exceeding the legal rates of interest the penalty is variously fixed by the different states. See USURY.

In Practice. Concern; advantage; benefit. Such a relation to the matter in issue as creates a liability to pecuniary gain or loss from the event of the suit. Inhabitants of Northampton v. Smith, 11 Metc. (Mass.) 395, 396.

When used as a criterion of the proper parties to a suit it means interest in the object, not interest in the subject-matter; Penn v. Bahnson, 89 Va. 253, 15 S. E. 586.

A person may be disqualified to act as a judge, juror, or witness in a cause by reason of an interest in the subject-matter in dispute. As to the disqualifying interest of judges, see JUDGE; as to the disqualifying interest of jurors, see CHALLENGE.

The old rule that interest disqualifies a witness has been abolished here and in England by statute. The only question now is one of credibility with the jury. A few cases may be given for historical reasons.

An interest disqualifying a witness must be *legal*, as contradistinguished from mere prejudice or bias arising from relationship, friendship, or any of the numerous motives by which a witness may be supposed to be influenced; 2 Hawk. Pl. Cr. 46, s. 25; must be *present;* Gilkinson v. The Scotland, 14 La. Ann. 417; Paxton v. Paxton, 38 W. Va. 616, 18 S. E. 765; must be *certain, vested,* and not uncertain and contingent; 2 P. Wms. 287; Ely v. Forward, 7 Mass. 25; Edwards v. McKinnon, 25 Ga. 337; Millett v. Parker, 2 Metc. (Ky.) 608; Dundas v. Muhlenberg's Ex'rs, 35 Pa. 351; must be an interest in the *event* of the cause, or the verdict must be lawful evidence *for or against him* in another suit, or the record must be an instrument of evidence for or against him; Bass v. Peevey, 22 Tex. 295; Van Nuys v. Terhune, 3 Johns. Cas. (N. Y.) 83. But an interest in the *question* does not disqualify the witness; People v. Howell, 4 Johns. (N. Y.) 302; Miles v. O'Hara, 1 S. & R. (Pa.) 32; Baring v. Reeder, 1 Hen. & M. (Va.) 165, 168; or the fact that he has a case of the same kind pending; Warren v. McGill, 103 Cal. 153, 37 Pac. 144.

An attorney will under most circumstances be permitted to testify in behalf of his client; but the courts do not look with favor upon the practice; Follansbee v. Walker, 72 Pa. 229, 13 Am. Rep. 671. See Mealer v. State, 32 Tex. Cr. R. 102, 22 S. W. 142. Probably the test would lie in his withdrawal from the case.

The magnitude of the interest is altogether immaterial; a liability for costs is sufficient; 5 Term 174; Butler v. Warren, 11 Johns. (N. Y.) 57.

Interest will not disqualify a person as a witness if he has an equal interest on both sides; 7 Term. 480; Wright v. Nichols, 1 Bibb (Ky.) 298; Cushman v. Loker, 2 Mass. 108; Cameron v. Paul, 6 Pa. 322; Hidell v. Dwinell, 89 Ga. 532, 16 S. E. 79.

INTEREST, MARITIME. See MARITIME INTEREST.

INTEREST OR NO INTEREST. A provision in a policy of insurance, which imports that the policy is to be good though the insured have no insurable interest in the subject-matter. This constitutes a *wager policy*, which is bad by statute 19 Geo. II. c. 37, and generally, from the policy of the law; 2 Par. Mar. Law 89, note. See INSURABLE INTEREST; POLICY.

INTERFERENCE. See PATENTS.

INTERIM (Lat.). In the mean time; meanwhile. An assignee *ad interim* is one appointed between the time of bankruptcy and appointment of the regular assignee. 2 Bell, Com. 355.

INTERIM CURATOR. A person appointed by justices of the peace to take care of the property of a felon convict until the appointment by the Crown of an administrator or administrators for the same purpose. Moz. & W.

INTERIM ORDER. An order to take effect provisionally, or until further directions. The expression is used especially with reference to orders given pending an appeal. Usually, *ad interim.*

INTERLAQUEARE. In Old Practice. To link together, or interchangeably. Writs

were called *interlaqueata* where several were issued against several parties residing in different counties, each party being summoned by a separate writ to warrant the tenant, together with the other warrantors. Fleta, lib. 5, c. 4, § 2.

INTERLINEATION. Writing between two lines.

Interlineations are made either *before* or *after* the execution of an instrument. Those made before should be noted previously to its execution; those made after are made either by the party in whose favor they are, or by strangers.

When made by the party himself, whether the interlineation be material or immaterial, they render the deed void; Cutts v. U. S., 1 Gall. 71, Fed. Cas. No. 3,522; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; unless made with the consent of the opposite party. See 11 Co. 27 *a;* Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Jackson v. Malin, 15 Johns. (N. Y.) 293; President and Directors of Cumberland Bank v. Hall, 6 N. J. L. 215. But see Wicke's Lessee v. Caulk, 5 H. & J. (Md.) 41; McMicken v. Beauchamp, 2 La. 290; 4 Bingh. 123; Arrison v. Harmstead, 2 Pa. 191. See Express Pub. Co. v. Aldine Press, 126 Pa. 347, 17 Atl. 608.

When the interlineation is made by a stranger to an instrument in the hands of the promisee, though without his knowledge, if it be immaterial, it will not vitiate the instrument, but if it be material, it will, in general, avoid it; 11 Co. 27 *a;* L. R. 10 Ex. 330; see Murray v. Peterson, 6 Wash. 418, 33 Pac. 969; otherwise if the instrument be not then in the possession of a party; 6 East 309. If made while in the possession of an agent of the promisee, it avoids the instrument; L. R. 10 Ex. 330; *contra,* Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232. The insertion of the words "or order" without the consent of the maker constitutes a material alteration which avoids the note; Taylor v. Moore (Tex.) 20 S. W. 53. An interlineation made in a bond, after its execution, by an agent of the obligee, without authority, will not invalidate it, but is only an act of spoliation; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 313.

The decisions vary as to the effect of interlineations, when an instrument is put in evidence. In a late case the rule is stated thus: If the interlineation is in itself suspicious, as, if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words; or if it is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith, and before execution; Cox v. Palmer, 3 Fed. 16. See Zimmerman v. Camp, 155 Pa. 152, 25 Atl. 1086. Where interlineations in a deed are in the handwriting of the officer who attested it officially, the presumption is that they were made at or before the execution of the instrument; Bedgood v. McLain, 89 Ga. 793, 15 S. E. 670; but it has been held that an alteration appearing on the face of a deed is presumed to have been made after its execution, and the burden is upon the party presenting it to explain the alteration; Sisson v. Pearson, 44 Ill. App. 81.

If an instrument appears to have been altered, it is incumbent on the party offering it to explain its appearance. Generally speaking, if nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument; but if there is ground of suspicion, the law presumes nothing, but leaves the questions of the time when, the person by whom, and the intent with which it was done, to the jury, upon proofs to be adduced by the party offering the instrument; 1 Greenl. Ev. § 564; Stillwell v. Patton, 108 Mo. 352, 18 S. W. 1075; Martin v. Kline, 157 Pa. 473, 27 Atl. 753; Houston v. Jordan, 82 Tex. 352, 18 S. W. 702. See De Long v. Soucie, 45 Ill. App. 234. In cases of negotiable instruments, the holder is held to clearer proof than in cases of deeds; 2 Dan. Neg. Instr. § 1417. See Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467, 4 L. R. A. 196, 12 Am. St. Rep. 754. In a carefully considered case, Beaman's Adm'rs v. Russell, 20 Vt. 205, 49 Am. Dec. 775, the court adopt what it calls the old common-law rule that an alteration of an instrument, if nothing appear to the contrary, should be presumed to have been made at the time of the execution. So, also, 1 Shepl. 386; Rankin v. Blackwell, 2 Johns. Cas. (N. Y.) 198; *contra,* Hills v. Barnes, 11 N. H. 395; Cochran v. Nebeker, 48 Ind. 459. It has been held, when a place of payment was inserted, that it was a question for the jury, but that it lay on the plaintiff to account for the alteration, etc.; 6 C. & P. 273; Davis v. Carlisle, 6 Ala. 707; such an insertion after delivery is a material alteration; Winter v. Pool, 100 Ala. 503, 14 South. 411; Gwin v. Anderson, 91 Ga. 827, 18 S. E. 43. But in Hayden v. Goodnow, 39 Conn. 164, it was held that the burden of proof of accounting for an alteration is not necessarily on the party producing the instrument. See Sisson v. Pearson, 44 Ill. App. 81.

In Neil v. Case, 25 Kan. 510, 37 Am. Rep. 259, it was held that a negotiable note offered

in evidence, bearing on its face an apparent material alteration, is admissible in evidence, and the question as to the time of alteration is for the jury. The court said: If there is neither extrinsic nor intrinsic evidence as to when the alteration was made, it is to be presumed that it was made before or at the time of the execution. Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the note to go to the jury without some explanation, etc. This title is fully treated in a note in 37 Am. Rep. 260. As to alteration of negotiable instruments, see 7 Harv. Law Rev. 1. See ALTERATION; ERASURE.

INTERLOCUTOR. Properly means a judgment or judicial order pronounced in the course of a suit, which does not finally determine the cause. But in Scotch practice, the term is extended to the judgments of the Court of Session or the Lord Ordinary, which exhaust the point at issue, and which if not appealed against will have the effect of finally deciding the case. Bell; Moz. & W.

INTERLOCUTORY. Something which is done between the commencement and the end of a suit or action which decides some point or matter, which, however, is not a final decision of the matter in issue: as, interlocutory judgments, or decrees, or orders. The term seems to have originated with Lord Ellesmere; 1 Holdsw. Hist. E. L. 213.

See DECREE; JUDGMENT; ORDER; INJUNCTION.

INTERLOPERS. Persons who interrupt the trade of a company of merchants, by pursuing the same business with them in the same place, without lawful authority.

INTERNAL REVENUE. See REVENUE; TAXATION.

INTERNATIONAL ARBITRATION. Arbitration may be defined in the words of the First Hague Conference as "the settlement of differences between states by judges of their own choice, and on the basis of respect for law." Arbitration thus differs from mediation, which is an interposition by a third party in the endeavor to reconcile opposing claims. On the other hand, arbitration differs from a judicial decision rendered by a court imposed upon the parties, as in the case of municipal courts in relation to the citizens of the state. It is essential to arbitration that the judges of the dispute in question be freely chosen by the parties, and that the parties shall have obligated themselves to accept the decision rendered. At the First Hague Conference, which met in 1899, a Permanent Court of Arbitration was established. This court is permanent only in the sense that it is composed of a list of judges, nominated by the signatory powers, from among whom the arbitrators in each individual case are to be selected by the parties to the dispute. See HAGUE TRIBUNAL.

At the Second Hague Conference, which met in 1907, a *voeu* was expressed calling the attention of the powers to the advisability of adopting an annexed Draft Convention for the Establishment of a Court of Arbitral Justice. This court, in the words of the Convention, is to be "freely and easily accessible, composed of judges representing the various judicial systems of the world, and capable of insuring continuity in arbitral jurisprudence." It is to consist of judges and deputy judges chosen for a period of twelve years. The difficulty of reaching an agreement as to the method of selecting the judges and the constitution of the court prevented the establishment of the court. Inasmuch as the judges are to form a permanent staff, the court is to that extent judicial rather than arbitral in character.

While a decision based upon the principles of law is generally desired by the parties to a dispute, it is not inconsistent with the arbitration that the arbitrator should compromise conflicting claims which it is impossible otherwise to adjust, provided, however, that the powers of the arbitrator have not been limited by the parties to a strictly legal decision.

Arbitration was not unknown among the ancients, and many instances of its application occurred between the city-states of Greece; for example, in the time of Solon five Spartans were chosen to arbitrate between Athens and Megara as to the possession of the island of Salamis. II Philipson, 127–165. While the refusal of Imperial Rome to recognize other nations as on a footing of equality made impossible the existence of arbitration between Rome and other states, it frequently happened that Rome intervened as arbitrator between her more or less subject nations.

In the Middle Ages the position of dominance held by the Holy Roman Empire among the states of Europe likewise militated against a system of arbitration, though there are instances in which the Emperor arbitrated between feudal lords. Moreover, the exercise by the papacy of spiritual dominion over the states of the Christian world made it possible for the Pope to exercise the rôle of mediator or arbitrator between Christian princes. The upheaval brought about by the religious wars of the 16th and 17th centuries caused the practice of arbitration to become practically obsolete, but in the closing years of the 18th century the practice was revived under the influence of the United States.

There are two general classes of arbitration treaties; those entered into for the settlement, by arbitration, of a specific dispute which has arisen between two nations, and those which are entered into with the object

of submitting to arbitration disputes which may arise in the future. The former are called *Special Arbitration Treaties* or *Compromis;* the latter are called *General Arbitration Treaties.* Since the First Hague Conference General Arbitration Treaties have been universally adopted. These treaties usually provide for the settlement of all disputes of a legal nature with the exception of differences which affect the vital interests, the independence or the honor of the two contracting parties. An early case of an agreement to arbitrate future disputes is to be found in the Treaty of Guadalupe Hidalgo entered into between the United States and Mexico on February 2, 1848. Under this treaty the two nations agreed to "endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves, using, for this end, mutual representations and pacific negotiations." In case of failure, a resort shall not be had to reprisals or hostility of any kind "until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

The first arbitral agreement entered into by the United States was that with Great Britain under the Treaty of 1794, commonly called the Jay Treaty, which provided for three mixed commissions. One commission met in 1798 to determine what was the St. Croix River contemplated by the Treaty of Peace of 1783 as the boundary of the two countries. Another commission met in Philadelphia in 1797 to determine the compensation due British subjects in consequence of impediments which certain states of the United States had, in violation of the provisions of the Treaty of Peace, interposed to the collection of debts by British creditors. No decision was reached and the claims were afterwards adjusted by the Treaty of January 8, 1802. The third commission, which finished its report in 1804, passed upon claims of citizens of the United States arising from losses and damages sustained "by reason of irregular or illegal captures or condemnations of their vessels and other property" during the war between Great Britain and France; and also upon claims of British subjects for losses sustained from captures made within the territorial waters of the United States or by French privateers armed within the United States.

The Treaty of Ghent, December 24, 1814, provided for three arbitral commissions. One related to the ownership of certain islands in Passamaquoddy Bay. The award divided ownership, assigning the larger number to Great Britain. The second commission undertook to decide the boundary line from the source of the River St. Croix to the St. Lawrence River. No decision was rendered, and the question was referred to the arbitration of the King of the Netherlands in 1827. His award, however, was not satisfactory, and the matter was finally settled by the Webster-Ashburton Treaty of 1842. The third commission, which undertook to determine the northeastern boundary through the Great Lakes, likewise failed to reach an agreement, and the question was finally settled by the Treaty of 1842.

After the Treaty of Ghent a controversy arose as to the compensation due to citizens of the United States for slaves who were in the territory in possession of the British at the time of the treaty. By the Convention of October 20, 1818, the question was referred to the arbitration of the Emperor of Russia, who rendered an award in favor of the United States without, however, fixing the amount of the indemnity, which was decided by a mixed commission under the Convention of July 12, 1822.

On February 8, 1853, there was a convention at London for a general settlement of all claims pending between the United States and Great Britain. On July 1, 1863, a convention was concluded between the two countries to determine the compensation due to the Hudson's Bay Company and the Puget's Sound Agricultural Company on claims for damages, as well as for the transfer to the United States of all their property and rights in territory acknowledged by the Treaty of 1846 to be under the sovereignty of the United States. The commission rendered an award of $650,000 in favor of the British claimants.

The Treaty of Washington of May 8, 1871, provided for four distinct arbitrations, the principal of which was that held at Geneva with the object of settling the claims brought by the United States against Great Britain for losses and damages sustained by the depredations of the Alabama and other Confederate cruisers fitted out and armed in British ports.

The arbitrators declined to recognize the claims of the United States for the indemnity for the loss in the transfer of the American merchant marine to the British flag; for enhanced payment of marine insurance; for expenses incurred in pursuit of the Confederate cruisers; and for the prolongation of the war and the increased expenditures for the suppression of the rebellion. But they awarded, in compensation for the direct loss growing out of the destruction of vessels and their cargoes, the sum of $15,500,000. The arbitral commission sat from December 15, 1871, to September 14, 1872.

The dispute as to the San Juan water boundary was referred to the German Emperor, who, on October 21, 1872, made an award in favor of the United States. Claims of British subjects against the United States, and of citizens of the United States against Great Britain (excepting the Alabama claims) arising out of injuries during the Civil War, were referred to a mixed commission appointed by the United States, Great Britain and Spain.

The fourth arbitration under the Treaty of Washington was to determine the compensation due to Great Britain for privileges accorded by that treaty to the United States in connection with the fisheries along the northeastern coast of Canada. The arbitral commission rendered an award in 1877 in favor of Great Britain to the amount of $5,500,000.

Under the Treaty of February 29, 1892, the United States and Great Britain submitted certain questions relating to the protection of the fur seals in Behring Sea to a tribunal of arbitration which sat in Paris. An award was rendered denying the ownership of the United States of seals outside of its maritime jurisdiction, but recognizing the necessity of imposing restrictions upon the killing of seals on the high seas. Claims of British subjects for the seizure and detention of their vessels engaged in the seal fisheries of Behring Sea were settled by a mixed commission appointed in 1896.

In 1903 a joint commission was appointed to determine the boundary between Alaska and the Dominion of Canada, and an award was rendered in the same year largely in favor of the United States. In 1909 a special agreement was signed submitting to arbitration questions relating to the proper interpretation of the fishery rights granted to United States citizens by the Treaty of 1818. See FISHERIES ARBITRATION.

The arbitrations between the United States and Great Britain have been, on the whole,

more important than those held with other foreign countries. A brief reference to the more important cases between the United States and countries other than Great Britain and the date of the special agreement referring the question to arbitration is here given.

Brazil: March 14, 1870,—Claim for indemnity for loss of the whaling ship "Canada" and its cargo through interference of Brazilian officials in 1856.

Chile: November 10, 1858,—Claim growing out of the seizure of the American brig "Macedonia" by the Chilean navy was referred to the arbitration of the King of Belgium. August 7, 1892,—Mutual claims arising out of the Chilean wars of 1879–82 and 1890–91 were referred to a mixed commission. December 1, 1909,—Claim brought by the Alsop Company against the Chilean government.

China: May 24, 1884,—Indemnity to American citizens for disputes of a fishery in Chinese territory.

Colombia: September 10, 1857; February 10, 1864, —Rights under the Treaty with New Granada of 1846. August 17, 1874,—Indemnity for capture and use by insurgents of steamer "Montijo."

Costa Rica: July 2, 1860,—Indemnity to American citizens for injuries and losses sustained by acts of Costa Rican authorities.

Denmark: December 6, 1888,—Claim arising from seizure of vessels belonging to an American firm.

Dominican Republic: 1897,—Claim arising from seizure by Dominican authorities of toll bridge owned by American citizen. 1903,—Two arbitrations between the Dominican government and American firms.

Ecuador: November 25, 1862,—Mutual claims of citizens for losses arising from governmental acts. February 28, 1893,—Indemnity for arrest of American citizen charged with complicity in the revolution of 1884.

France: January 15, 1880,—Claims of French citizens for injury to persons and property during the American Civil War and claims of American citizens for like injuries during the Franco-Prussian War.

Germany: November 7, 1899,—Samoan claims arising from military operations of Great Britain and the United States against Apia in 1899.

Guatemala: February 23, 1900,—Indemnity due American citizen for breach of contract and damages to property caused by authorities of Guatemala.

Haiti: May 24, 1884,—Personal claims arising from governmental action of Haiti against American citizens upon charges of piracy and traffic in slaves. January 25, 1885,—Indemnity for damages sustained by American citizens during riots at Port-au-Prince. May 24, 1888,—Indemnity for arrest and imprisonment of United States citizen in 1884. October 18, 1899,—Indemnity for seizure and sale of property belonging to American citizen.

Mexico: April 11, 1839,—Indemnity to American citizens for losses suffered during revolutions. July 4, 1868,—Mutual claims arising since 1848. March 2, 1897,—Personal injuries sustained by American citizens at the hands of Mexican agents in 1892. May 22, 1902,—Agreement reached referring to the Permanent Court of Arbitration at the Hague the claims advanced by the United States on behalf of the Roman Catholic Church in California against Mexico in regard to a permanent fund for mission purposes, known as the "Pious Fund of the Californias," donated by Spanish and Mexican subjects prior to the acquisition of California by the United States. June 24, 1910,—Ownership of a tract of land situated on the Rio Grande near El Paso, Texas.

Nicaragua: March 22, 1900,—Indemnity for seizure and detention of certain launches belonging to American citizens.

Paraguay: February 4, 1859,—Indemnity for confiscation of property of United States and Paraguay Navigation Company composed of American citizens.

Peru: December 20, 1862,—Indemnity for capture and confiscation of two American ships. January 12, 1863,—Mutual claims. December 4, 1868,—Mutual claims. May 17, 1898,—Indemnity for arrest and detention of American citizen during revolution of 1885.

Portugal: February 26, 1851,—Indemnity for destruction of American vessel by French fleet in Portuguese waters in 1814. June 13, 1891,—Indemnity for rescission of railway concession held by American and British citizens in Portuguese East Africa under grant from the Portuguese Government.

Russia: September 8, 1900,—Indemnity for seizure of American fishing vessels in Behring Sea by Russian cruisers.

Salvador: May 4, 1864,—Indemnity to American citizen for seizure of property. December 19, 1901,—Claims of American company arising from withdrawal of concessions made by government of Salvador.

Siam: 1897,—Indemnity for attack by Siamese soldiers upon United States vice-consul at Siam. July 26, 1897,—Indemnity to American citizen for seizure and sale of personal property.

Spain: October 27, 1795,—Claims for illegal captures of American vessels by Spanish subjects. 1870,—Indemnity for seizure of American steamer by Spanish authorities. February 12, 1871,—Claims of American citizens growing out of insurrection in Cuba. February 28, 1885,—Indemnity for seizure and detention of American vessel.

Venezuela: April 25, 1866; December 5, 1885,—Mutual long-standing claims of a varied character. January 19, 1892,—Indemnity for seizure of American ships by Venezuelan government. February 17, 1903,—Pecuniary claims of American citizens. May 7, 1903,—Question of the preferential right of Great Britain, Germany and Italy to payment of obligations due from Venezuela prior to similar payment to other powers. February 13, 1909,—Claim of Orinoco Steamship Company against Venezuela brought in 1903 but not satisfactorily decided.

See Darby, *International Tribunals;* Mérignhac, *Traité théorique et pratique de l'arbitrage international.*

INTERNATIONAL LAW. *Nature and Sources.* International law is the law governing the relations between states. It is sometimes called *Public International Law* to distinguish it from *Private International Law* or, as the latter should more properly be called, the *Conflict of Laws (q. v.).* Private international law is the law which is applied when citizens of different nations are parties to a suit or other legal proceeding. Since it does not involve nations themselves, but only their citizens, it has no claim to the name "international." See PRIVATE INTERNATIONAL LAW.

International law was not altogether unknown among the ancients, and many instances occur of its application by the Greek city-states, and by the Italian tribal states before the establishment of the Roman Empire; but the development of international law into the definite and well-recognized state in which it exists today did not begin until modern times.

In 1625 Hugo van Groot, better known as Grotius, published his treatise entitled *De jure belli ac pacis,* which marks an era in the growth of international law. Grotius bases his system, first, upon the law of nature, and secondly, upon the customs in existence between nations. He first deduces from the law of nature the principles which should properly govern the conduct of states,

and he thus establishes *a priori* certain rules of international law. But since the law of nature is illustrated in the practices which are universally observed by mankind, Grotius found it possible to establish the rules of international law by arguing *a posteriori* from the customs of nations. His system has, therefore, a double foundation.

After Grotius, certain writers, led by Pufendorf, built up a system of international law based chiefly upon the law of nature, while another school, the Positivists, laid stress upon the positive character of international law as evidenced by the customs actually in existence between nations. Between these two schools there developed later a third school called the Grotian school, which takes account both of the law of nature as the basis of international law, and of the customs of nations as the embodiment of a positive system. The standpoint of the Grotian school has found greater favor among the Latin states of the continent of Europe, while the Positivist school is represented by English, American and German writers, though in each case with notable exceptions.

As a positive science international law may be defined as the collection of those generally accepted rules of conduct which nations consider so far binding upon themselves in their relations with one another as to lead them actually to abide by them in their general practice. Much discussion has attended the question as to how far these rules can properly lay claim to the title of "law." The Austinian school, which restricts law to the category of commands imposed by a political superior upon a political inferior, refuses to recognize the so-called international law as anything more than international morality, since it lacks the elements of law-giver, command, and sanction. On the other hand, the school of historical jurisprudence, of which Savigny may be regarded as the founder, taking law as the expression of the common will of a political community, maintains that international law possesses the character of true law inasmuch as it consists of rules adopted by the common consent of nations and enforced largely by the moral sanction of public opinion. Lord Russell of Killowen, in an address before the American Bar Association in 1896, considered Austin's definition as applying rather to the later development of arbitrary power than to that body of customary law which, in earlier stages of society, precedes law strictly so called, and which is made up of rules and customs which are laws in every real sense of the word, as, for example, the law merchant. And he continued: "In stages later still, as government becomes more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority and acquire more and more the character of customary law founded on consent."

Since international law is a body of rules actually accepted by nations as regulating their mutual relations, it follows that the test of the existence of a given rule is to be found in the consent of nations to abide by that rule. Now this consent is evidenced chiefly by the usages and customs of nations, which form therefore the principal source of international law. To ascertain what these usages and customs are it has been common to turn to the writings of publicists and to the decisions of state courts. The Habana, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

But while usage is the older and original source of international law, treaties are a later source of increasing importance. Until recently these treaties generally had their international effect only when the rule contained in them came to be gradually adopted by other nations and thus became part of the customary law, as, for example, the Declaration of Paris of 1856; but with the establishment of The Hague Conferences there have come into existence conventions of a law-making character, in that they are signed and ratified by the nations as a body.

State Sovereignty and Its Corollaries. The subjects of international law are sovereign states. The fundamental principles recognized by international law are that these states are independent each of the others in all that regards their domestic affairs, that they possess certain territory over which they have complete jurisdiction, and that they are all legally equal. Under these three principles it will be found convenient to group the chief rules of international law.

As a consequence of the sovereignty and independence of the states which form the family of nations, each state has a right to enter into such treaties and alliances with other states as it may find necessary or convenient. In order to maintain their independence the states of Europe have found it necessary from time to time to enter into alliances by which they have sought to maintain a balance of power. These alliances are an expression of the danger to the independence of states which might arise if any one of them should acquire a position of dominance. This necessity of maintaining a balance of power has led to the practice of intervention (*q. v.*) by which states have at times interfered in the affairs of other states. Intervention is ultimately based upon the principle of self-preservation, as the first law of international relations as of nature.

The principle of the equality of states is illustrated in the whole history of international relations from the time of the Treaty of Westphalia in 1648. Switzerland and

Belgium, for example, have been recognized as having equal rights with Great Britain and Russia. But, while this legal equality is recognized, there is no denial of the fact that certain of the Great Powers have exercised a predominating influence in international relations.

Over the territory within their boundaries as well as over the persons residing in that territory, states have complete jurisdiction. State territory may be acquired in several ways: by discovery followed by occupation; by military conquest followed by subjugation; by prescription; and by accretion. It is recognized that a maritime belt, traditionally measured by a marine league from the shore, is part of the territory of the state which it surrounds. See TERRITORIAL WATERS. When the boundary between two states is marked by a river, the river takes on an international character, and apart from special cases determined by treaty, the mid-channel of the river constitutes the dividing line between the two countries. A river is likewise recognized as being international in character when it flows through two or more countries, though this is for purposes of commerce and does not exclude the jurisdiction of each state over that portion of the river within its domains. See RIVERS. Moreover, when a narrow body of water forms a passage way between two portions of the open sea or between the open sea and a bay or gulf open to the commerce of the world, the canal or strait assumes an international character and is open to the commerce of the world, subject to the purely administrative restrictions or tolls imposed by the power controlling the canal or strait.

After many struggles between maritime powers with conflicting interests, the open sea has come to be regarded as insusceptible of appropriation by any single state and as possessing, therefore, a purely international character. No state can exercise jurisdiction over the vessels of another state sailing the high seas, nor assume any exclusive right of fishing in certain waters not within the three-mile belt. See SEA.

The jurisdiction of a state over the persons residing within its domains gives rise to rules of international law when such persons happen to be citizens of another state. For many years it was held that a man could not, of his own accord, throw off his allegiance to one country and adopt the citizenship of another. While the United States courts recognized this principle, the Executive Department made constant efforts to obtain from European powers an acknowledgment of the right of Expatriation (*q. v.*), and in 1868 Congress passed an act in which the right was declared to be a "natural and inherent" one, but many foreign governments still exact military service of persons who, being born within their jurisdiction, have become the naturalized citizens of another state. See NATIONALITY; NATURALIZATION.

It has now become the general practice of nations to deliver up fugitive criminals which escape from one state and take refuge in another. This practice of extradition is still based upon treaties between individual nations defining the precise crimes for the commission of which a fugitive will be delivered up. See EXTRADITION; ASYLUM; FUGITIVE FROM JUSTICE.

The needs of international intercourse have given rise to a class of diplomatic agents (*q. v.*) whose position has now come to be definite in character. These agents are not only the channel of communication between the government which sends them and the government to which they are sent, but they are also the personal representatives of their government at the foreign court. See AMBASSADOR; MINISTER; CHARGÉ D'AFFAIRES.

Treaties are the contracts entered into by states for the purpose of creating special relations between them. Good faith in the observance of these treaties has come to be a recognized principle of international law. When a difficulty arises as to their meaning, practically the same rules of interpretation are applied as those of municipal law in the case of contracts between individuals. See TREATY.

It is inevitable that disputes should arise between nations. International law recognizes three ways in which these disputes may be settled,—by amicable methods, by forcible methods falling short of war, and by war. When negotiations between the foreign offices of the two states have failed to settle a dispute it is not uncommon for the states to have recourse to arbitration. The practice of arbitration has come to be more and more general during the past one hundred years, and it is significant of the growth of international law, both in definiteness and in comprehension, that nations have been willing to submit questions of the highest importance to a decision based upon its principles. The Hague Tribunal (*q. v.*) represents a permanent court for the settlement, by arbitration, of disputes between nations. See INTERNATIONAL ARBITRATION.

When friendly negotiations between states have failed to settle a dispute between two states, international law recognizes that a third state may offer its good offices and mediation. Special rules were laid down at The Hague Conference of 1907 defining the conditions of such mediation. See MEDIATION.

Apart from these amicable methods of settling international disputes, there are certain measures, such as retorsion (*q. v.*), reprisals (*q. v.*), embargo (*q. v.*), and pacific blockade (*q. v.*), by which one state endeav-

ors to exercise compulsion over another state without having recourse to actual war.

War is the status of armed conflict between two or more states. However improper a means of settling international disputes it may be from the standpoint of morality and justice, it is recognized by international law as a legal means of coercing an alleged offender. In the course of centuries certain rules have developed defining the rights of the belligerent parties and the limits within which armed forces may be employed, as well as the relations between belligerent powers and third parties not involved in the war.

At the First Hague Conference a Convention concerning the Laws and Customs of War on Land was adopted in which definite rules are laid down concerning the qualifications of belligerents, prisoners of war, the sick and wounded, the means of injuring the enemy, sieges and bombardments, spies, flags of truce, capitulations, armistices, military authority over the territory of the hostile state, and the internment of belligerents and the care of the wounded in neutral countries. A convention was also adopted providing for the adaptation of the principles of the Geneva Convention to maritime war. At the Second Hague Peace Conference, held in 1907, other conventions were adopted dealing with the commencement of hostilities, the status of enemy merchant-ships at the outbreak of hostilities, the conversion of merchant-ships into war-ships, the laying of automatic submarine contact mines, bombardment by naval forces in time of war, restrictions on the exercise of the right of capture in maritime war, and the establishment of an International Prize Court. Besides these conventions certain declarations were adopted prohibiting the discharge of projectiles, etc., from balloons, the use of asphyxiating gases, and the use of bullets with a hard envelope. See WAR.

In recognizing that the state of war confers certain rights and imposes certain restrictions upon the belligerent parties, international law at the same time recognizes the existence of new rules governing the relations between the belligerents and other states not parties to the conflict. The principle upon which these rules are based is that the successful prosecution of war makes it necessary for the belligerents to impose certain restrictions, such as the establishment of blockades (*q. v.*) and the prohibition of traffic in contraband (*q. v.*), upon the intercourse between neutral states and the enemy. These restrictions are imposed in virtue of the rights of belligerents as against neutrals. On the other hand, if third parties wish to remain neutral in a contest between two or more states, it is incumbent upon them to abstain absolutely from all participation in the conflict. This abstention imposes both active and passive duties. The passive duties are fulfilled if the nation refrains, in its corporate capacity, from giving either direct or indirect assistance to either belligerent. The active duties require the neutral state to prevent any use of its territory for the purposes of either belligerent, whether such use be made by the belligerents themselves or by citizens of the neutral state in the interest of the belligerents.

But there are limits to the extent to which belligerents may interfere with the intercourse of neutral states with the enemy. These limits mark what may be called the rights of neutrals. For a detailed statement of the rights and duties of belligerents and neutrals, see NEUTRALITY.

It has been suggested within recent years that certain rules of international law need to be modified when applied to the states of the American Continent. These modified rules may be said to constitute American International Law. On January 4, 1909, the First Pan American Scientific Congress held "that on this Continent there are problems *sui generis* or of a distinctly American character and that the states of this hemisphere, by means of agreements more or less general, have regulated matters which are of sole concern to them, or which, if of universal interest, have not yet been susceptible of universal agreement—thus incorporating in international law principles of American origin."

The codification of international law has been much discussed within recent years. The idea was first suggested by Bentham, whose fondness for ideal codes, not based upon the facts of international and national life, is well known. In 1863, at the request of President Lincoln, a code of the laws of war was drawn up by Francis Lieber for the use of the Federal armies, a large portion of which is embodied in the Convention concerning the Laws and Customs of War on Land, adopted by the Second Hague Conference. More elaborate and comprehensive codes are those of Bluntschli, published in 1868, of David Dudley Field, published in 1872, and of Pasquale Fiore, published in 1890. The conventions of the two Hague Conferences, together with the Declaration of London (*q. v.*), represent an attempt to codify international law upon certain specific heads. How far codification can be successfully carried has been much discussed. Certain parts of international law are still in an undeveloped state, and it might perhaps be unwise to define rules which may soon be outgrown. Besides, it is clear, from the obstinate position taken by the powers at the Hague Conferences, that they are not yet ready for an agreement which will be in conflict with principles which they have long considered essential to their welfare and prosperity. While it is generally rec-

ognized by nations that the principles of international law should, in point of justice and morality, come up to the standard of the municipal law of individual states, at the same time the conflicting commercial interests of the Great Powers, and the increasingly intense national spirit manifested by them, make it difficult for them to reach an agreement upon any subject in which national interests are intimately involved. For a critical bibliography of the principal writers on international law, see 1 Opp. 83–103; also Hershey, Essentials of Int. Pub. Law 86–91.

International law is said by Sir F. Pollock to be a true branch of law notwithstanding all that may be said about its want of sovereign power and a tribunal. Its doctrines are founded on legal, not simply on ethical, ideas. They are not merely prevalent opinions as to what is really right and proper, but something as closely analogous to civil laws as the nature of the case will admit. They have been discussed by the methods appropriate to jurisprudence and not by those of moral philosophy. They appeal not to the general feelings of moral rightness, but to precedents, to treaties and to the opinion of specialists. They assume the existence among statesmen and publicists of a sense of legal as distinguished from moral obligation in the affairs of nations. Oxford Lectures 18. See also Westlake, Intern. Law.

INTERNMENT. Used of foreign troops of a belligerent coming into neutral territory. Hague Treaty, 1907. See TROOPS, FOREIGN.

INTERNUNCIO. A Papal minister of the second order, accredited to minor states where there is no nuncio (*q. v.*).

INTERPELLATE. To address with a question, especially when formal and public; originally used with respect to proceedings in the French legislature; used in reference to questions by the court to counsel during an argument.

INTERPLEADER. A proceeding in the action of detinue, by which the defendant states the fact that the thing sued for is in his hands, and that it is claimed by a third person, and that whether such person or the plaintiff is entitled to it is unknown to the defendant, and thereupon the defendant prays that a process of garnishment may be issued to compel such third person so claiming to become defendant in his stead. 3 Reeve, Hist. Eng. Law, c. 23; Mitf. Eq. Pl. 141; Story, Eq. Jur. § 800. Interpleader is allowed to avoid inconvenience; for two parties claiming adversely to each other cannot be entitled to the same thing; Brooke, Abr. *Interpleader* 4; hence the rule which requires the defendant to allege that different parties demand the same thing.

If two persons sue the same person in detinue for the thing, and both actions are depending in the same court at the same time, the defendant may plead that fact, produce the thing (*e. g.* a deed or charter) in court, and aver his readiness to deliver it to either as the court shall adjudge, and thereupon pray that they may interplead. In such a case it has been settled that the plaintiff whose writ bears the earliest teste has the right to begin the interpleading, and the other will be compelled to answer; Brooke, Abr. *Interpleader*, 2.

Under the Pennsylvania practice, when goods levied upon by the sheriff are claimed by a third party, the sheriff takes a rule of interpleader on the parties, upon which, when made absolute, a feigned issue is framed, and the title to the goods is tested. The goods, pending the proceedings, remain in the custody of the defendant upon the execution of a forthcoming bond.

See 10 L. R. A. (N. S.) 748, note; BILL OF INTERPLEADER.

INTERPOLATION. **In Civil Law.** The act by which, in consequence of an agreement, the party bound declares that he will not be bound beyond a certain time. Wolff, Inst. Nat. § 752.

In the case of a lease from year to year, or to continue as long as both parties please, a notice given by one of them to the other of a determination to put an end to the contract would bear the name of interpolation.

INTERPRETATION. The discovery and representation of the true meaning of any signs used to convey ideas. Lieber, Leg. and Pol. Hermeneutics.

The "true meaning" of any signs is that meaning which those who used them were desirous of expressing. A person adopting or sanctioning them "uses" them as well as their immediate author. Both parties to an agreement equally make use of the signs declaratory of that agreement, though one only is the originator, and the other may be entirely passive. The most common signs used to convey ideas are words. When there is a contradiction in signs intended to agree, resort must be had to construction,—that is, the drawing of conclusions from the given signs, respecting ideas which they do not express. Interpretation is the art of finding out what the author intended to convey; construction is resorted to in comparing two different writings or statutes. Construction is usually confounded with interpretation; but in common use, is generally employed in a sense that is properly covered by both when each is used in a sense strictly and technically correct; Cooley, Const. Lim. 70. Quoting this passage, it is said in U. S. v. Keitel, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230, that while, abstractly, there may be a difference between the two words, yet in "common usage" they have "the same significance." A distinction between the two, first made in the Legal and Political Hermeneu-

tics, has been adopted by Greenleaf and other American and European jurists. Hermeneutics includes both.

Close interpretation (*interpretatio restricta*) is adopted if just reasons, connected with the formation and character of the text, induce us to take the words in their narrowest meaning. This species of interpretation has generally been called literal, but the term is inadmissible. Lieber, Herm. 66.

Extensive interpretation (*interpretatio extensiva*, called, also, *liberal interpretation*) adopts a more comprehensive signification of the word.

Extravagant interpretation (*interpretatio excedens*) is that which substitutes a meaning evidently beyond the true one: it is, therefore, not genuine interpretation.

Free or unrestricted interpretation (*interpretatio soluta*) proceeds simply on the general principles of interpretation in good faith, not bound by any specific or superior principle.

Limited or restricted interpretation (*interpretatio limitata*) is when we are influenced by other principles than the strictly hermeneutic ones. Ernesti, *Institutio Interpretis.*

Predestined interpretation (*interpretatio predestinata*) takes place if the interpreter, laboring under a strong bias of mind, makes the text subservient to his preconceived views or desires. This includes artful interpretation (*interpretatio vafer*), by which the interpreter seeks to give a meaning to the text other than the one he knows to have been intended.

The civilians divide interpretation into:—

Authentic (*interpretatio authentica*), which proceeds from the author himself; *i. e.* of a law, by the legislature.

Usual (*interpretatio usualis*), when the interpretation is on the ground of usage.

Doctrinal (*interpretatio doctrinalis*), when made agreeably to rules of science. Doctrinal interpretation is subdivided into extensive, restrictive, and declaratory: extensive, whenever the reason of a proposition has a broader sense than its terms, and it is consequently applied to a case which had not been explained; restrictive, when the expressions have a greater latitude than the reasons; and declaratory, when the reasons and terms agree, but it is necessary to settle the meaning of some term or terms to make the sense complete. See Holland, Jurispr. 344.

There can be no sound interpretation without good faith and common sense. The object of all interpretation and construction is to ascertain the intention of the authors, even so far as to control the literal signification of the words; for *verba ita sunt intelligenda ut res magis valeat quam pereat.* Words are, therefore, to be taken as those who used them intended, which must be presumed to be in their popular and ordinary signification; unless there is some good reason for supposing otherwise, as where technical terms are used; Gibbons v. Ogden, 9 Wheat. (U. S.) 188, 6 L. Ed. 23; Green v. Weller, 32 Miss. 678; Settle v. Van Evrea, 49 N. Y. 281; Weill v. Kenfield, 54 Cal. 111; *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* When words have two senses, of which one only is agreeable to the law, that one must prevail; Cowp. 714; Washington & I. R. Co. v. Nav. Co., 160 U. S. 77, 16 Sup. Ct. 231, 40 L. Ed. 346; when they are inconsistent with the evident intention, they will be rejected; 2 Atk. 32; when words are inadvertently omitted, and the meaning is obvious, they will be supplied by inference from the context, see Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933; a superfluous negative may be omitted when the meaning is apparent; Waters Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453. When language is susceptible of two meanings, one of which would work a forfeiture, while the other would not, the latter must prevail; Jacobs v. Spalding, 71 Wis. 177, 36 N. W. 608.

In Constitutions. The object of construction is to give effect to the intent of the people in adopting it; this intent is to be found in the instrument itself; Miller, Const. U. S. 100; People v. Purdy, 2 Hill (N. Y.) 35. The whole is to be examined with a view to arriving at the true intention of each part; it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law; if different portions should seem to conflict, the courts should harmonize them, if practicable, and should lean in favor of a construction which will render every word operative, rather than one which may make some idle and nugatory; Wheeling Gas Co. v. City of Wheeling, 8 W. Va. 320; Ogden v. Strong, 2 Paine 584, Fed. Cas. No. 10,460. It must be presumed that words have been employed in their natural and ordinary meaning; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 188, 6 L. Ed. 23; as understood when the instrument was framed; Scott v. Sandford, 19 How. (U. S.) 393, 15 L. Ed. 691; technical words are presumed to have been employed in their technical sense. Where two provisions of a constitution are irreconcilably repugnant, that which is last in order of time and local position will prevail; Quick v. Whitewater Township, 7 Ind. 570.

It is to be borne in mind that in the construction of the federal and state constitutions a different and indeed an opposite rule is applied. The former, being the framework of a government of delegated powers, is subject to the general rule that a power

to be lawfully exercised under an act of congress must be either expressly conferred or necessarily implied from some power granted. On the other hand, the state constitutions are not grants of power, but limitations on the residuum of absolute sovereign power which remains after subtracting that portion of it surrendered to the federal government. Accordingly, in construing a state constitution to ascertain whether a legislative act is valid, the only questions are whether that which it directs or authorizes is forbidden or whether it is included in the powers vested in the federal government.

The first resort is to the natural signification of the words in their order and grammatical arrangement; if they embody a definite meaning which involves no absurdity and no contradiction between different parts of the same instrument, there is no room for construction. This rule is said to apply to contracts, statutes and constitutions; Newell v. People, 7 N. Y. 9; Lake County v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060. See Manthey v. Vincent, 145 Mich. 327, 108 N. W. 667. If there is an ambiguity, the whole instrument is to be examined in order to determine the meaning of any part; State v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201.

When a constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one by the performance of the other; Field v. People, 2 Scam. (3 Ill.) 79, 83; Parks v. West, 102 Tex. 11, 111 S. W. 726.

The object for which a constitutional grant of power was given will have great influence in the construction; Gibbons v. Ogden, 9 Wheat. (U. S.) 1, 6 L. Ed. 23.

The safest rule is to look to the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporaneous history; and to give to each word just such force, consistent with its legitimate meaning, as will fairly secure and attain the ends proposed; Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 10 L. Ed. 1060; the subject or context and the intention of the framers in inserting a word in the federal constitution are all to be considered; McCulloch v. Maryland, 4 Wheat. (U. S.) 316, 4 L. Ed. 579; the mischief to be prevented, as disclosed in the history of the country, will be considered; Craig v. Missouri, 4 Pet. (U. S.) 410, 7 L. Ed. 903. Every word must have due force and appropriate meaning; Holmes v. Jennison, 14 Pet. (U. S.) 540, 614, 10 L. Ed. 579; but the same words have not necessarily the same meaning when found in different parts of the same instrument; their meaning is controlled by the context; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25.

As aids to construction, the courts may refer to historical circumstances attending the framing and adoption of the constitution and the consequences attendant upon one construction or the other; Pollock v. Trust Co. (income tax cases) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; they may look to the history of the times; *id.* Interpretation must be in the light of the common law; U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; a clause stricken from the draft may be referred to as an aid in the construction of the remaining clauses; Fletcher v. Peck, 6 Cra. (U. S.) 87, 3 L. Ed. 162.

Provisions of the constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth; Gompers v. U. S., 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. ——.

An act passed just after a constitution is adopted is a contemporary interpretation of the latter, entitled to much weight; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137.

See CONSTITUTIONALITY.

In Statutes. Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction; Lake County v. Rollins, 130 U. S. 671, 9 Sup. Ct. 651, 32 L. Ed. 1060. Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. They should be so construed, if practicable, that one section will not destroy another, but explain and support it; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152.

"Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice.* In Bacon's Abridgement, Statutes 1, 5; Puffendorf, Book 5, chapter 12; Rutherford, 422, 527; and in Smith's Commentaries, 814, many cases were mentioned where it was held that matters embraced in the general words of the statutes, nevertheless were not within the statutes, because it could not have been the intention of the lawmakers that they should be included. They were taken out of the statutes by an equitable construction. . . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle,

as frequently quoted in this manner: *'Æquitas est correctio legis generaliter latæ qua parti deficit.'"* Riggs v. Palmer, 115 N. Y. 506, 510, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, opinion by Earl, J.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt.'" U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278, quoted in Church of Holy Trinity v. U. S., 143 U. S. 461, 12 Sup. Ct. 511, 36 L. Ed. 226.

The objects and purposes of a statute and the conditions of the enactment must be borne in mind so as to effectuate, rather than to destroy, the spirit of the intent. The purpose of the copyright statute is not so much to protect the thing as to protect the right of reproduction, and the statute should be construed in the character of the property to be protected; American Tobacco Co. v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72, 52 L. Ed. 208, 12 Ann. Cas. 595.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter;" Jacobson v. Massachusetts, 197 U. S. 39, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765, citing U. S. v. Kirby, 7 Wall. (U. S.) 482, 19 L. Ed. 278; Lau Ow Bew v. U. S., 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340.

"It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times courts of law have been continuously obliged, in endeavoring to carry out loyally the intentions of parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are. Learned volumes have been written on this single subject." Lord Loreburn, L. C., in Nairn v. University of St. Andrews [1909] L. R. 147, A. C.

"No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or a fragment of a chapter, of a body of law;" Ilbert, Legisl. Meth. & Forms 254.

Reference may be had to the title of an act; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

In construing a tariff act, when it is claimed that the commercial use of a word differs from its ordinary significance, in order that the former may prevail over the latter it must appear that the commercial designation is the result of established usage which was definite, uniform, and general at the time of the passage of the act; Sonn v. Magone, 159 U. S. 418, 16 Sup. Ct. 67, 40 L. Ed. 203.

Statutes, if penal, are to be strictly, and if remedial, liberally construed; Bish. Writ. L. 193; Dwarris, Stat. 246; that penal statutes should be strictly construed, see U. S. v. R. Co., 222 U. S. 8, 32 Sup. Ct. 6, 56 L. Ed. 68; but the rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the legislature; U. S. v. Hartwell, 6 Wall. (U. S.) 386, 18 L. Ed. 830. The apparent object of the legislature is to be sought for as disclosed by the act itself, the preamble in some cases, similar statutes relating to the same subject, the consideration of the mischiefs of the old law, and perhaps some other circumstances; Wilberforce, Stat. Law 99; and the court must be controlled by the power manifested by the act and not by the motive which initiated it; Berryman v. Board of Trustees, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225; but the known policy of congress in regard to the subject will be considered; Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110. Such statutes are to be reasonably construed with a view to effecting their purpose; U. S. v. R. Co., 212 U. S. 509, 29 Sup. Ct. 313, 53 L. Ed. 629.

All statutes are to be construed with reference to the provisions of the common law, and provisions in derogation of the common law are held strictly; Durham v. State, 117 Ind. 477, 19 N. E. 327; Brown v. Fifield, 4 Mich. 322; Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629. But statutes in derogation of

the common law are not to be construed so strictly as to defeat the obvious intention of congress; Johnson v. Southern Pacific Co., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. Statutes extending the jurisdiction of the court of claims will be strictly construed; Blackfeather v. U. S., 190 U. S. 368, 23 Sup. Ct. 772, 47 L. Ed. 1099.

Acts of incorporation and those granting franchises and special benefits to corporations are to be construed strictly; nothing passes by implication; Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 544, 9 L. Ed. 773; Bank of Pennsylvania v. Com., 19 Pa. 144; so of a municipal grant to an electric railway; Cleveland Electric Ry. Co. v. Ry. Co., 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

A provision of a statute copied from that of another state is construed upon the interpretation placed upon the statute by such other state; Norfolk & W. Ry. Co. v. Cheatwood's Adm'x, 103 Va. 356, 49 S. E. 489; James v. Appel, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. Ed. 377; Mann v. Carter, 74 N. H. 345, 68 Atl. 130, 15 L. R. A. (N. S.) 150; but this does not necessarily include subsequent variations of construction by such courts; Cathcart v. Robinson, 5 Pet. (U. S.) 280, 8 L. Ed. 120; when lower federal courts and the highest court of a foreign country construe like acts, the failure of congress to remedy that part of the act may be regarded as an acquiescence by congress in such judicial construction; White-Smith Music Pub. Co. v. Apollo Co., 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628.

An amended act is to be construed as if it had read from the beginning as it does with the amendment added to it; Black, Interpr. 357. The old act, so far as re-enacted, stands from its original date and the new stands from the date of the amendment. All of the old which is omitted in the new is repealed; *id.* 358.

A re-enacted statute receives the same interpretation as the former act; Copper Queen Consol. Min. Co. v. Board of Equalization, 206 U. S. 474, 27 Sup. Ct. 695, 51 L. Ed. 1143. When congress in enacting revised statutes adopts language that has been construed by the courts, they adopt that construction; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609.

When two sections of the revised statutes taken together are not free from ambiguity and cannot be harmoniously applied, recourse must be had to legislation prior to the revised statutes from which those sections were drawn; Merchants' Nat. Bank of Baltimore v. U. S., 214 U. S. 33, 29 Sup. Ct. 593, 53 L. Ed. 899. In a general code a later section does not nullify an earlier one; Iglehart v. Iglehart, 204 U. S. 478, 27 Sup. Ct. 329, 51 L. Ed. 575; in the case of a codifying statute, the first step should be to interpret the language; and appeal to earlier decisions can only be made upon some special ground; [1891] L. R. 145, A. C. In the U. S. Revised Statutes, the change of arrangement from earlier statutes will not be regarded as changing their scope and purpose, unless an intent to change the prior law is clearly expressed; Anderson v. S. S. Co., 225 U. S. 187, 32 Sup. Ct. 626, 56 L. Ed. 1047.

Language in a statute which has a well known meaning, sanctioned by decisions, is presumed to be used in that sense; Kepner v. U. S., 195 U. S. 100, 124, 24 Sup. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655. The presence of a provision in one part of a statute and its absence in another is an argument against reading it as implied where omitted; U. S. v. R. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361.

To change the phraseology creates a presumption of a change in intent; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; words defined in a prior statute will be understood in the same sense in substitute statutes unless the contrary appears; Purtell v. Coal & Iron Co., 256 Ill. 110, 99 N. E. 899, 43 L. R. A. (N. S.) 193.

When several acts relate to the same subject matter, a subsequent act may be considered upon the interpretation of prior legislation; Tiger v. Inv. Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Swigart v. Baker, 229 U. S. 187, 33 Sup. Ct. 645, 57 L. Ed. 1143.

Where one statute relates to a subject generally and another deals with it more specifically, if they cannot be harmonized, the specific statute should control; Stadler v. Helena, 46 Mont. 128, 127 Pac. 454; Gardner v. School Dist., 34 Okl. 716, 126 Pac. 1018; usually a general intent in an act controls a particular intent. Where there is an earlier special and a later general statute (which is broad enough to include the former), the general will not be taken to repeal the special, unless the repeal is express or there is a manifest inconsistency; Rodgers v. U. S., 185 U. S. 83, 22 Sup. Ct. 582, 46 L. Ed. 816. But there will be a repeal where a later statute is a complete revision of the subject to which a former statute applied; U. S. v. Ranlett, 172 U. S. 133, 19 Sup. Ct. 114, 43 L. Ed. 393.

The rule known as the *ejusdem generis* rule (see that title) does not overrule all other rules. When the particular words exhaust the genus, general words must refer to words outside of those particularized; U. S. v. Mescall, 215 U. S. 26, 30 Sup. Ct. 19, 54 L. Ed. 77, following National Bank of Commerce v. Ripley, 161 Mo. 126, 61 S. W. 587; Gillock v. People, 171 Ill. 307, 49 N. E. 712; Winters v. Duluth, 82 Minn. 127, 84 N. W. 788.

Contemporaneous construction by a department of government is a rule of interpretation, but not an absolute one; it does not

preclude inquiry as to its original correctness; Houghton v. Payne, 194 U. S. 88, 24 Sup. Ct. 596, 48 L. Ed. 888; so of a tariff act; Komada & Co. v. U. S., 215 U. S. 392, 30 Sup. Ct. 136, 54 L. Ed. 249; courts will be guided by the construction adopted by officers appointed to enforce an act; Deming v. McClaughry, 113 Fed. 640, 51 C. C. A. 349; in case of doubt, the interpretation of the proper department has great weight; Allemania Fire Ins. Co. of Pittsburg v. Ins. Co., 209 U. S. 327, 28 Sup. Ct. 544, 52 L. Ed. 815, 14 Ann. Cas. 948; any continued executive construction will be adopted; Solomon v. Commissioners of Cartersville, 41 Ga. 157; Wright v. Forrestal, 65 Wis. 341, 27 N. W. 52; but it must be long continued; Mackall v. Casilear, 137 U. S. 562, 11 Sup. Ct. 178, 34 L. Ed. 776.

Debates in congress are not appropriate sources of information as to the meaning of a statute, but reports of legislative committees may be referred to in order to throw light on its intent; Binns v. U. S., 194 U. S. 486, 24 Sup. Ct. 816, 48 L. Ed. 1087, approving Briggs v. U. S., 143 U. S. 357, 12 Sup. Ct. 391, 36 L. Ed. 180; recourse cannot be had to discussions in Parliament which precede the passing of an act; [1906] 2 K. B. 716. Such resort was had in Edger v. Board of Com'rs, 70 Ind. 331; and in Blake v. Bank, 23 Wall. (U. S.) 307, 23 L. Ed. 119, a badly expressed and apparently contradictory revenue act was interpreted by reference to the journals of congress, where it appeared that the peculiar phraseology was the result of an amendment made without due reference to the language in the original bill. The statements of individual members cannot be referred to; 3 Q. B. D. 707; Leese v. Clark, 20 Cal. 387; County of Cumberland v. Boyd, 113 Pa. 52, 4 Atl. 346.

Such debates may show the conditions existing at the time the legislation was enacted; Standard Oil Co. v. U. S., 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. In case of ambiguity, resort may be had to the report of the senate committee where the provision originated, which can be a guide to a true interpretation; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 29 Sup. Ct. 671, 53 L. Ed. 1013, following Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. Resort may be had to the history of the times when the act was passed, but cannot be had to the speeches of members when it was adopted; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007. But it was held by Lord Bramwell, 8 App. Cas. 501, that the courts cannot look at the history of an act, but only at its language. It was, however, said by Halsbury, L. C., that "it is quite legitimate to refer to the history" of a period "to understand what was the subject matter with which the legislature was then dealing"; [1896] A. C. 504. A court may place itself in the position of the authors of the words to be interpreted at the time they were written; [1906] 2 K. B. 716.

The duty of the court in construing a statute which is reasonably susceptible of two constructions to adopt that which saves its constitutionality, includes the duty of avoiding a construction which raises grave and doubtful constitutional questions, if it can be avoided; U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836.

Prof. Roscoe Pound (1912 Tenn. Bar Ass'n) quotes Prof. John C. Gray as "putting the matter very well thus: 'A fundamental misconception prevails and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the legislature really was. But when the legislature has had a real intention, one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that the judge had to do with the statute, interpretation of the statutes, instead of being one of the most difficult of a judge's duties would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind had the point been present.'"

The change of conditions as well as of the meaning of words in their ordinary use frequently creates difficulties in the application of statutes which in England led to the passage in 1889 of the General Interpretation Act, intended to cover the whole subject of statutory interpretation. A synopsis of its provisions, together with an instructive collation of words having a marked difference in their ordinary and judicial meaning, will be found in Ordronaux, Const. Leg. c. xi. In this country the subject has not been so comprehensively treated, but there will usually be found in the general statutes of each state a chapter defining the meaning of certain words as used in the statutes.

As to acts declaring the meaning of a prior act, see STATUTE.

In Contracts. There must always be reference to the surrounding circumstances and the object the parties intended to accomplish; New York, C. & St. L. Ry. Co. v. R. Co., 116 Ind. 60, 18 N. E. 182; Illges v. Dexter, 77 Ga. 36; Words may be understood in a technical or peculiar sense when such meaning has been stamped upon them by the usage of the trade or place in which the con-

tract occurs. When words are manifestly inconsistent with the declared purpose and object of the contract, they may be rejected; 2 Atk. 32. When words are omitted so as to defeat the effect of the contract, they will be supplied by the obvious sense and inference from the context. When words admit of two senses, that which gives effect to the design of the parties is preferred to that which destroys it; Add. Contr. 45; Cowp. 714.

Impossible things cannot be required. The subject-matter and nature of the context, or its objects, causes, effects, consequences, or precedents, or the situation of the parties, must often be consulted in order to arrive at their intention, as when words have, when literally construed, either no meaning at all or a very absurd one. The whole of an instrument must be viewed together and not each part taken separately; and effect must be given to every part, if possible; Lindley v. Groff, 37 Minn. 338, 34 N. W. 26. Assistance must be sought from the more near before proceeding to the remote. When one part is totally repugnant to the rest, it will be stricken out; but if it is only explanatory, it will operate as a limitation. As to the interpretation of a deed where the granting and habendum clauses are repugnant, see 12 L. R. A. (N. S.) note, 956. Reference to the *lex loci* or the usage of a particular place or trade is frequently necessary in order to explain the meaning; 2 B. & P. 164; 3 Stark. Ev. 1036; Gracy v. Bailee, 16 S. & R. (Pa.) 126. A court should read a written contract according to the obvious intention of the parties, in spite of clerical errors or omissions which can be corrected by perusing the whole instrument; Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; Chrisman v. Ins. Co., 16 Or. 283, 18 Pac. 466.

Words, however general, may be limited to the subject-matter in connection with which they are used; general words may be restricted to the same general genus as the words which preceded them; and where for many years words have received a judicial construction, it is reasonable to suppose that the parties so used them, and the courts would resort to such sense in reaching the meaning of the parties; 12 App. Cas. 484.

The enumeration of certain powers in respect to particular subjects in a written instrument is a negation of all other analogous powers with respect to the same subject-matter; Tucker v. Alexandroff, 183 U. S. 437, 22 Sup. Ct. 195, 46 L. Ed. 264.

When the language of the contract is ambiguous, the interpretation of it by the parties is entitled to great, if not controlling, influence; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Old Colony Trust Co. v. Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410 (a municipality); as shown by subsequent acts; New York v. Board of Tax Com'rs, 199 U. S. 1, 25 Sup. Ct. 705, 50 L. Ed. 65, 4 Ann. Cas. 381; before any controversy has arisen; Fitzgerald v. Bank, 114 Fed. 474, 52 C. C. A. 276; even if at variance with the literal meaning of the contract; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. Ed. 526. Such construction is of more importance than the absolute meaning of the phraseology; Smith v. Crane, 169 Mo. App. 695, 154 S. W. 857; and will be accepted as the proper one; McMillin v. Titus, 222 Pa. 500, 72 Atl. 240; but it is said that this rule does not apply if the contract is free from ambiguity; Sternbergh v. Brock, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877; In re Myers' Estate, 238 Pa. 195, 86 Atl. 89; Russell v. Young, 94 Fed. 45, 36 C. C. A. 71; in such case it cannot be affected by voluntary payments by one party to the other, through mistake, clearly not required by its terms and not demanded by the other party; Sharp v. Behr, 117 Fed. 864.

In Central R. R. Co. v. Jersey City, 209 U. S. 480, 28 Sup. Ct. 592, 52 L. Ed. 896, the interpretation placed by the court upon even a compact between two states, was said to have "the very powerful sanction of the conduct of the parties and of the existing condition of things."

Where a seller agreed to deliver a large quantity of cement "in car load lots f. o. b.," and it had uniformly provided the cars, it was held that this was a practical construction of the contract imposing that duty on the seller; Davis v. Cement Co., 134 Fed. 274 affirmed 142 Fed. 74, 73 C. C. A. 388.

In case of doubt, a party will be held to that meaning which he knew the other party believed the words to bear, if this can be done without making a new contract; Brent v. Chas. H. Lilly Co., 174 Fed. 877.

Words spoken cannot vary the terms of a written agreement; they may overthrow it. Words spoken at the time of the making of a written agreement are merged in the writing; 5 Co. 26; 2 B. & C. 634; parties cannot testify as to their intention or the meaning of a written contract; Gardt v. Brown, 113 Ill. 475, 55 Am. Rep. 434.

No representation, promise or agreement made, or opinion expressed in previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the just interpretation of the contract, in the absence of some artifice which concealed its terms and prevented the complainant from reading it; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532, per Sanborn, C. J. But where a writing is ambiguous or there are repugnant clauses, it is proper to consider all the negotiations leading to the contract, the subject-matter, the purpose to be effect-

ed, the consideration passing between the parties and all the surrounding circumstances when the contract was made; McMillin v. Titus, 222 Pa. 500, 72 Atl. 240; and prior negotiations, though merged in the contract, may be resorted to to determine whether the parties intended stipulations for delay as a penalty or liquidated damages; U. S. v. Bethlehem Steel Co., 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731.

Where there is a latent ambiguity which arises only in the application and does not appear upon the face of the instrument, it may be supplied by other proof; *ambiguitas verborum latens verificatione suppletur;* McDermott v. Ins. Co., 3 S. & R. (Pa.) 609.

Usages of the trade or place of making the contract are presumed to be incorporated, unless a contrary stipulation occurs. See LEX LOCI.

The rule that an agreement is to be construed most strongly against the party benefited can only be applied in doubtful cases; Hannibal & St. Joseph R. Co. v. Packet Co., 125 U. S. 260, 8 Sup. Ct. 874, 31 L. Ed. 731; and when other rules of interpretation fail; Patterson v. Gage, 11 Colo. 50, 16 Pac. 560. The more the text partakes of a solemn compact, the stricter should be its construction.

Jessel, M. R., in 6 Ch. D. 270, said: "The meaning of a contract must be ascertained according to the ordinary and proper rules of construction. If we can thus find out its meaning we do not want the maxim [that construction is more strongly against the one who used the words]. If we cannot find out its meaning, then the instrument is void and in that case it may be said to be construed in favor of the grantor, for the grant is annulled." If the intent of a contract cannot be ascertained, it will be held void for uncertainty; Gould v. Gunn (Ia.) 140 N. W. 380.

General expressions used in a contract are controlled by the special provisions therein. When there are two repugnant clauses in a deed, which cannot stand together, the first prevails. With a will the reverse is the case. In all instruments the written part controls the printed, if the two are inconsistent; Hutt v. Zimmer, 78 Hun 23, 28 N. Y. Supp. 1014; Schenck v. Saunders, 13 Gray (Mass.) 37; Union Pac. R. Co. v. Graddy, 25 Neb. 849, 41 N. W. 809; Mansfield Machine Works v. Common Council of Lowell, 62 Mich. 546, 29 N. W. 105; Thornton v. R. Co., 84 Ala. 109, 4 South. 197, 5 Am. St. Rep. 337; Thomas v. Taggart, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845; Georgia Home Ins. Co. v. Jacobs, 56 Tex. 366; a special manuscript addition to a general printed form must govern if there is a repugnancy between them; Moore v. Lichtenberger, 26 Pa. Super. Ct. 268; when a contract is embodied in several instruments, its true meaning is to be ascertained from a consideration of all the instruments and their effect upon each other; Howard v. R. Co., 24 Fla. 560, 5 South. 356; Smith v. Theobald, 86 Ky. 141, 5 S. W. 394; Phelps & Bigelow Windmill Co. v. Piercy, 41 Kan. 763, 21 Pac. 793.

If part of a contract is good, and part, being in restraint of trade, is bad, the former may stand; U. S. Consol. Seeded Raisin Co. v. Griffin & Skelley Co., 126 Fed. 364, 61 C. C. A. 334. Different contracts made between the same parties on the same date as to the same matter were construed together in Stadler v. Power Co., 139 Fed. 305, 71 C. C. A. 435.

Dictionaries are not to be taken as authoritative exponents of the meaning of words in an act, but words should be taken in their ordinary sense, and we are therefore sent for instruction to these books (Johnson and Webster); 16 Q. B. D. 641.

A sealed contract to pay a debt whenever, in the debtor's opinion, his circumstances would enable him to do so, is not enforceable; Nelson v. Von Bonnhorst, 29 Pa. 352; but a contract to pay when able is generally held to impose an obligation; Denney v. Wheelwright, 60 Miss. 733; some cases consider it a contract to pay within a reasonable time; Nunez v. Dautel, 19 Wall. (U. S.) 562, 22 L. Ed. 161; Noland v. Bull, 24 Or. 479, 33 Pac. 983; De Wolfe v. French, 51 Me. 420; or to pay at once; Kincaid v. Higgins, 1 Bibb (Ky.) 396. When the debtor has once become able to pay, the right of action vests, though later he becomes unable to pay; Denney v. Wheelwright, 60 Miss. 733.

Where no period is fixed, either party may ordinarily withdraw on reasonable notice; Kenderdine Hydro Carbon Fuel Co. v. Plumb, 182 Pa. 463, 38 Atl. 480; so in contracts of hiring or partnership; L. R. 7 H. L. 550. But a contract between a telegraph company and a railroad company for a railroad telegraph line and service along its right of way was held perpetual in its obligation; Western Union Telegraph Co. v. Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968, following L. R. 7 H. L. 550; Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776, which was a contract between a manufacturing company and a telegraph company for a private wire to New York. These cases went upon the ground that the inherent nature of the contract showed that it must have continuing effect, unless, by its terms one or either party could terminate it.

In addition to the above rules, there are many presumptions of law relating to agreements, such as, that the parties to a simple contract intend to bind their personal representatives; that where several parties contract without words of severalty, they are presumed to bind themselves jointly; that every grant carries with it whatever is nec-

essary to its enjoyment; when no time is mentioned, a reasonable time is meant; and other presumptions arising out of the nature of the case.

It is the duty of the court to interpret all written instruments; see Middlesex Turnpike Corporation v. Swan, 10 Mass. 384, 6 Am. Dec. 139; Levy v. Gadsky, 3 Cra. (U. S.) 180, 2 L. Ed. 404; Hassett v. McArdle, 7 Misc. 710, 28 N. Y. Supp. 48; Fidelity Title & Trust Co. v. Gas Co., 150 Pa. 8, 24 Atl. 339; written evidence; McCoy v. Lightner, 2 Watts (Pa.) 347; and foreign laws; Duffie v. Black, 1 Pa. 388; and where the terms of a parol agreement are shown without any conflict of evidence; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Elliott v. Wanamaker, 155 Pa. 67, 25 Atl. 826; or where a contract is contained in letters, no matter how voluminous they may be; Cincinnati Punch & Shear Co. v. Thompson, 80 Kan. 467, 102 Pac. 848.

Whether a written contract, to be performed in case a consolidation was effected between two corporations, is limited to one resulting from then pending negotiations, or whether it referred to a consolidation under a renewal of negotiations a year later, extrinsic evidence of the circumstances and the acts and declarations of the parties is admissible, and where that is conflicting, the construction of the contract is for the jury; Donner v. Alford, 136 Fed. 750, 69 C. C. A. 402.

Contracts are to be construed liberally in favor of the public, when the subject-matter concerns the interests of the public; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843.

See CONSTRUCTION; IN MITIORI SENSU; RECITAL; TITLE; NONSENSE; ET CÆTERA; FROM; PREAMBLE; Beal, Cardinal Rules of Interpretation; Black, Interpretation.

INTERPRETATION CLAUSE. A clause frequently inserted in Acts of Parliament, declaring the sense in which certain words used therein are to be understood.

INTERPRETER. One employed to make a translation.

An interpreter should be sworn before he translates the testimony of a witness; In re Norberg, 4 Mass. 81.

A person employed between an attorney and a client to act as interpreter is considered merely as the organ between them, and is not bound to testify as to what he has acquired in those confidential communications; Andrews v. Solomon, Pet. C. C. 356, Fed. Cas. No. 378; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699.

Communications made to an interpreter are not hearsay when he translates and communicates what has been said to him, and the party to whom it is made may testify to it; Miller v. Lathrop, 50 Minn. 91, 52 N. W. 274. Conversations carried on through an interpreter may be shown by either party thereto or a third person who hears it, its weight only and not its competency being affected thereby; Com. v. Vose, 157 Mass. 393, 32 N. E. 355, 17 L. R. A. 813.

INTERREGNUM (Lat.). The period, in case of an established government, which elapses between the death of a sovereign and the accession of another. The vacancy which occurs when there is no government. See CORONATION.

INTERROGATOIRE. In French Law. An act, or instrument, which contains the interrogatories made by the judge to the person accused, on the facts which are the object of the accusation, and the answers of the accused. Pothier, Proc. Crim. s. 4, art. 2, § 1.

INTERROGATORIES. Material and pertinent questions in writing, to necessary points, exhibited for the examination of witnesses or persons who are to give testimony in the cause.

They are either original and direct on the part of him who produces the witnesses, or cross and counter, on behalf of the adverse party, to examine witnesses produced on the other side. Either party, plaintiff or defendant, may exhibit original or cross interrogatories.

The form which interrogatories assume is as various as the minds of the persons who propound them. They should be as distinct as possible, and capable of a definite answer; and they should leave no loop-holes for evasion to an unwilling witness. Care must be observed to put no leading questions in original interrogatories, for these always lead to inconvenience; and for scandal or impertinence interrogatories will, under certain circumstances, be suppressed. See Willis, Int. *passim;* Gresl. Eq. Ev. pt. 1, c. 3, s. 1; Viner, Abr.; Daniell, Ch. Pr.

INTERRUPTION. The effect of some act or circumstance which stops the course of a prescription or act of limitations. 3 Bligh, N. S. 444; 4 M. & W. 497.

Civil interruption is that which takes place by some judicial act.

Natural interruption is an interruption in fact. Tyler v. Wilkinson, 4 Mas. 404, Fed. Cas. No. 14,312; 2 Y. & J. 285. See EASEMENTS; LIMITATIONS; PRESCRIPTION.

INTERSECTION. The point of intersection of two roads is the point where their middle lines intersect. Pittsburg v. Cluley, 74 Pa. 259.

INTERSTATE COMMERCE. See COMMERCE.

INTERSTATE COMMERCE COMMISSION. A commission of five persons appointed by the president under the act of February 4, 1887, to carry out the purpose

of the act. It sits usually in Washington, but can hold sittings at such other places as it may choose. By act of June 29, 1906, it was increased to seven members with terms of seven years. "It is not a court; it is a special tribunal continually engaged in an administrative and semi-judicial capacity in investigating railroad rates and practices"; Colorado Fuel & Iron Co. v. S. P. Co., 6 I. C. C. Rep. 508. Except the rulings of the Supreme Court and the directions of the district court in the particular case, it does not feel itself bound to follow all the decisions of the federal courts; 1 Drinker, Interst. Com. Act, § 262.

The functions of the Commission are to hear complaints as to violations of the Interstate Commerce Act and also to investigate of its own motion any violations which may come to its notice. It may not of itself institute criminal proceedings, but may and frequently does recommend such to the attorney general's department.

Since 1906, it has power not merely to find that a violation of the act has been caused, and to award damages to the injured party, but to prescribe a reasonable rate or regulation for that found to be improper. It may also prescribe joint through routes between connecting carriers, with through rates applicable thereto.

In actions before the Commission to recover damages for violations of the act, the statute of limitations is two years from the accrual of the cause of action. This period begins to run when the freight was payable and not when it was actually paid; Arkansas Fertilizer Co. v. U. S., 193 Fed. 667.

A letter to the Commission, setting out the facts and praying relief, is, however, sufficient to toll the running of the statute; Louisville & N. R. Co. v. Dickerson, 191 Fed. 705, 112 C. C. A. 295.

The Commission has exclusive jurisdiction to question the reasonableness or legality of a tariff rate or regulation, filed in the manner prescribed by section 6 of the act. Until the Commission has declared such a rate illegal, no court, state or federal, has power to dispute its validity. Nor can the parties themselves contract for a different rate.

Practice before the Commission is informal compared with that in the courts. The Commission has no power to enforce its own orders, but the provision in the act by which the disobedience of a lawful order of the Commission subjects the offender to a fine of $5,000 for each day's continuance, makes such orders effective. This provision does not apply to orders for the payment of damages, as to which, under its constitutional right, the carrier may insist on a jury trial in the district court.

The usual method of contesting the validity of its orders is by application for an injunction to the proper district court, with appeal to the Supreme Court in the manner provided by the act.

The Constitution of the United States, Art. I, Sec. 8, gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The Interstate Commerce Act was passed on February 4, and took effect on April 5, 1887. It was amended March 2, 1889, February 10, 1891, and February 8, 1895; supplementary acts were passed February 11, 1893, March 2, 1893, Feb. 19, 1903, June 29, 1906, April 13, 1908, June 18, 1910, and October 22, 1913.

It applies to all carriers engaged in the transportation of oil or other commodity, except water and natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone and cable companies (whether wire or wireless) engaged in sending messages from one state, territory, or district of the United States to any other state, territory, or district, or to any foreign country, and to any carrier engaged in the transportation of passengers and property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory or the District of Columbia, or from one place in a territory to another place in the same territory, or from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country.

It does not apply to the transportation of persons or property, etc., wholly within a state and not to or from a foreign country. It also extends to bridges and ferries used in connection with any railroad and to express and sleeping car companies. It declares that all charges for services rendered in connection therewith shall be reasonable and just and prohibits all unjust and unreasonable charges.

The charging of any greater or less compensation for any service rendered any shipper or person than is charged or collected from another for a like and contemporaneous service, etc., is declared to be unlawful.

The act provides that if any carrier shall fail to install and operate switch connections, and furnish cars to the best of its ability, without discrimination, the Commission may, on complaint filed, make an order directing the carrier to comply with the act.

Free passes and transportation prohibited except in certain specified cases.

It forbids the giving any undue or unreasonable preference to one person, etc., or locality over another person or place, or to one description of traffic over another, and prohibits the carrier from subjecting any shipper, locality, or traffic to any undue or unreasonable prejudice or disadvantage. It imposes a duty to afford reasonable, proper, and equal facilities to connecting carriers, for the interchange of business, without discrimination.

It prohibits charging any greater compensation in the aggregate for the transportation of persons or of like kind of property for a shorter than is charged for a longer distance over the same line in the same direction, the shorter being included within the longer distance, except by authority of the Commission.

It prohibits railroad companies transporting any article or commodity other than timber, which it may own, in whole or in part, or in which it has any interest, except such commodities as may be necessary and intended for its own use in its business as a common carrier.

It prohibits any agreement between carriers for the pooling of freights of competing railroads or for dividing their joint earnings.

It provides that the carriers shall print schedules of their rates, duly classified, and file copies with

the Commission and post copies in all their stations and offices for public inspection. These must specify terminal charges and any rules affecting the rates. These rates can only be advanced thirty days after public notice and an amendment of the schedules accordingly; nor can they be reduced except after three days' similar notice and the like amendment. Copies of all agreements between two or more carriers for making a line of through transportation are also required to be filed with the Commission. If joint tariffs of rates are provided for, copies of these tariffs must be filed with the Commission. Such publicity is to be given to these joint tariffs as the Commission may direct. This section contains the same requirement as to thirty days' notice of any advance and three days' notice of any reduction in the joint rates, as is prescribed respecting the rates of the individual carrier.

It is the duty of carrier to furnish written statement of rate on request and to keep posted name of agent to whom application for rate may be made.

It prohibits any scheme between carriers to prevent the continuous transportation of property without change of cars. No breaking of bulk, etc., unless necessary, shall be considered as breaking the continuous passage.

It provides that any carrier committing a breach of this act shall be liable in damages to the person injured, including a counsel fee to be taxed as costs.

Any person aggrieved may complain before the Commission or bring suit in a federal court having jurisdiction, for damages. In the latter cases the court may compel all officers, etc., to appear and testify and to produce the books of the company; but no evidence which they may give shall be used against them in any criminal proceeding.

Any carrier, or, if a corporation, any officer, etc., thereof, guilty of an infraction of the act, shall be guilty of a misdemeanor, and subject to a fine of not to exceed $5,000, or if the offence is an unlawful discrimination in rates, to imprisonment for not to exceed two years, or both in the discretion of the court. False billing, classification etc., of goods is made a misdemeanor, whether by the carrier or its officer, or by the shipper, and so is the act of inducing a common carrier to discriminate unjustly.

It creates the Commission, who have authority, by sec. 12 to inquire into the management of the business of common carriers and to enforce the act; they may institute proceedings for that purpose and for the punishment of violations of the act; they may require the production of all necessary books, contracts, etc.

The Commission has power to establish through routes and joint rates, shipper to have right to designate route; it is unlawful for carriers to disclose information as to shipments. The Commission is empowered to determine maximum allowances to shippers for transportation services and to determine if any party is entitled to an award of damages.

Any person, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization or State Railroad Commission may complain before the Commission of any infraction of the act, and the Commission itself may institute any inquiry on its own motion.

If the Commission find that the act has been contravened, it shall notify the carrier thereof.

If any carrier refuses to obey an order of the Commission, the latter or any party interested may apply to the federal court where such carrier has its principal office. Such court shall hear the case speedily, without formal pleadings; the findings of fact of the Commission shall be *prima facie* evidence of the matter therein stated. If it appear that any lawful order of the Commission has been disobeyed, the court shall enjoin further disobedience thereof. If the matter in dispute is $2,000 or more, either party may appeal to the Supreme Court.

Common carriers are required to make annual reports to the Commission, and the latter may prescribe a uniform system of keeping accounts.

The act expressly excepts the carriage of property free, or at reduced rates, for the United States, state, or municipal governments, or for charitable purposes, or to and from expositions, etc., or the free carriage of destitute persons transported by charitable societies; or the issuance of mileage, excursion, or commutation passenger tickets; or giving reduced rates to ministers of religion; or to certain indigent persons; or the exchange of passes between the officers of railroad companies for their officers and employés.

The initial carrier is liable for damage to the holder of a bill of lading in spite of a contract to the contrary, but the initial carrier has recourse to the carrier responsible.

The provisions of the act are declared to be in addition to all remedies by common law or by statute.

By the act of March 2, 1889, the United States courts are given jurisdiction to issue writs of peremptory mandamus commanding the movement of interstate traffic or the furnishing of cars and other transportation facilities.

Under the Hepburn Act (1906) the Commission may require the carrier to furnish cars and shipping facilities; it may determine, on hearing, what are reasonable rates and enforce them (but not order an increase); it may fix through routes and rates and compel connecting lines to enter into through traffic agreements; but only where the public interest appears to require it.

The primary purpose of the act is to regulate the interstate business of carriers, and the secondary purpose (for which the Commission was established) was to enforce the regulations of the act. This power is not extended by any amendatory acts to mere investigations in regard to annual reports of carriers or of the Commission, or for the purpose of recommending legislation. *Quœre*, whether Congress has power to compel testimony in regard to subjects which do not concern direct breaches of law, and whether it can delegate such power; Harriman v. Commission, 211 U. S. 407, 29 Sup. Ct. 115, 53 L. Ed. 253.

The Commission has no powers except those conferred by Congress; it cannot allow special privileges or relieve hardships, nor prevent anticipated violations of the act, except as therein provided. It will not assume an advisory jurisdiction. It cannot compel a carrier to stop reckless expenditure, nor award damages for defective service, nor require a carrier to adopt a particular form of ticket or bill of lading; 1 Drinker, Interst. Com. Act.

The Act of 1910 created the Commerce Court with jurisdiction to enjoin, set aside or suspend in whole or in part any order of the Interstate Commerce Commission. The proceedings of this court may be reviewed by the Supreme Court.

By Act of Oct. 22, 1913, the commerce court was abolished (from and after Dec. 31, 1913) and its jurisdiction was transferred to the district court. Cases must be heard by three judges (one at least to be a circuit judge) and at least two judges must concur. An appeal lies direct to the Supreme Court from any order granting or denying an interlocutory injunction. Such appeal must be taken in thirty days. An appeal from a final order must be taken in sixty days.

The Elkins Act of Feb. 19, 1903, provides that a carrier corporation is liable to conviction as well as its officers, agents, etc., for willful failure to file and observe tariffs. Discriminations and concessions from tariff charges are forbidden. Rates filed, published or participated in are conclusively deemed the legal rates, as against the car-

rier. For the acceptance of a rebate the person or firm so accepting shall, in addition to any penalty, forfeit to the United States, three times the amount of money so received and three times the value of any other consideration accepted. The Interstate Commerce Commission will enjoin discrimination and departure from tariff rates through a federal court sitting in equity having jurisdiction and the district attorney must prosecute such proceedings.

The Expedition Act of Feb. 11, 1903, provides for the expediting of causes arising under the Commerce Act, when the cause is of general public importance, by giving it precedence over others.

The Commission is made a body corporate, with legal capacity to be a party plaintiff or defendant in the federal courts, by reason of the provision in the act that it "shall have an official seal, which shall be judicially noticed," and that making it lawful for it to apply by petition for the enforcement of its orders; Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940.

The Commission has exclusive original jurisdiction to determine whether a regulation or a practice affecting rates or matters sought to be regulated by the act is unjust or unreasonable, unjustly discriminatory, preferential or prejudicial, and this although the regulation or practice complained of has ceased; Mitchell C. & C. Co. v. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472.

The object of the Commerce Act is to compel the establishment of reasonable rates and their universal application. A guarantee to a shipper of a particular train is a discrimination, if not open to all; Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501.

The orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order regular on its face may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against the taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power; Int. Com. Com. v. R. Co., 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308, citing Int. Com. Com. v. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; Southern Pac. Co. v. Commission, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283; Int. Com. Com. v. R. Co., 216 U. S. 538, 30 Sup. Ct. 417, 54 L. Ed. 608.

Subject to the two leading prohibitions that their charges shall not be unreasonable or unjust, and that they shall not unjustly discriminate, so as to give undue preference to persons or traffic similarly circumstanced, the act leaves common carriers as they were at common law, free to make special contracts, to classify their traffic, to adjust and apportion their rates, and generally, to manage their important interests upon the same principles which are regarded as sound in other pursuits; Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935; Union Pac. R. Co. v. Grain Co., 222 U. S. 215, 32 Sup. Ct. 39, 56 L. Ed. 171. The act was not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination. It is not all discriminations that are prohibited, but only those that are unjust and unreasonable; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699, affirming 43 Fed. 37. The act is not to be construed so as to abridge or take away the common-law right of the carrier to make contracts and adopt proper business methods, further than its terms and recognized purposes require; a railroad company may lawfully charge low rates on coal in the summer months, if its rates are equal to all persons; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

Interpretation. The act was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so whether persons or places suffer; Interstate Commerce Commission v. Ry. Co., 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 959. The words "railway" and "railroad" are completely synonymous; West End Improvement Club v. Ry. & Bridge Co., 17 I. C. C. 239, 244. Section 15 is the dominating and controlling expression of the real object and meaning of the act. It makes of the Commission a special expert body to deal with rates, and not to supplant the courts; Joynes v. R. Co., 17 I. C. C. 361, 369. Carriers are left free to initiate their own rates, rules and regulations; Traer v. R. Co., 14 I. C. C. 165, 169.

The provisions of the Hepburn Act, as amended by the Carmack Amendment, and the Elkins Act forbidding carriers to evade the collection or payment of fixed tariff rates are not intended to extend the jurisdiction in matters outside of its province as a common carrier, nor are they intended to limit and prescribe the use which shall be made of the rates which the carrier puts into

effect; California Commercial Ass'n v. Wells-Fargo & Co., 14 I. C. C. 422, 428.

The law stands for what it means from the date when it takes effect and not from the date when it is construed by the Commission. Ordinarily the date of the announcement by the Commission of its interpretation of a particular provision is therefore of little real importance; Liberty Mills v. R. Co., 23 I. C. C. 182, 185.

The act does not apply to the carriage of property by rail or otherwise wholly within a state; Ex parte Koehler, 30 Fed. 867; when the carrier issues no bills of lading to points beyond its line, receives no freight on through bills of lading, and has no arrangement with other roads for a conventional division of charges or a common management; Interstate Commerce Commission v. R. Co., 77 Fed. 942; but if a railroad company, whose line is entirely within one state, issues through bills of lading to points in other states, it is within the act; In re Annapolis, W. & B. R. Co., 1 I. C. Rep. 315. Receivers of railroad companies are common carriers and subject to the act; Independent Refiners' Ass'n of Titusville, Pa., v. R. Co., 6 I. C. Rep. 379. The appointment of a receiver of a part of an interstate road lying within a state does not interfere with interstate commerce; McKinney v. Gas Co., 206 Fed. 772. A carrier subject to the act cannot, by leasing its road, free itself from liability for practices illegal under the act, nor after the termination of the lease escape liability for damages for injuries sustained during the lease; Independent Refiners' Ass'n of Titusville, Pa., v. R. Co., 6 I. C. Rep. 378.

The act does not come within the constitutional prohibition as to impairing the obligation of contracts, although its effect may be to prevent the literal enforcement of pre-existing contracts; Kentucky & I. Bridge Co. v. R. Co., 2 I. C. Rep. 102; *id.*, 2 I. C. C. R. 162; 45 Am. & Eng. R. Cas. (Mont.) 234.

The mere circumstance that there is in a given case a preference does not, of itself, show that such preference is unreasonable; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 685 (C. C. of A.); *id.*, 74 Fed. 715, 21 C. C. A. 51.

One of the most satisfactory tests of the reasonableness of the rates of one carrier is a comparison with the rates of other carriers operating in the same territory under the same general conditions; Chamber of Commerce of City of Milwaukee v. R. Co., 15 I. C. C. 460, 466. The rates in different directions on the same line between the same points need not be identical; Wilburine Oil Works v. R. Co., 18 I. C. C. 548. Each case must be decided upon its own merits, and in arriving at a conclusion in respect to the rates here involved, the decisions in another case against carriers operating in a different territory under essentially dissimilar circumstances and conditions affords no proper criterion therefor; Chicago Lumber & Coal Co. v. R. Co., 16 I. C. C. 323, 328.

Evidence that the rates on a certain commodity are higher in certain cases than certain other rates, and that they produce a large revenue to the carrier, does not make a *prima facie* case that they are unreasonable. The reasonableness must be determined by an examination of the whole subject; Howell v. R. Co., 2 I. C. Rep. 162. The fact that a road earns little more than operating expenses is not to be overlooked in fixing rates, but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return on investments and profits; New Orleans Cotton Exchange v. R. Co., 2 I. C. Rep. 289.

The relative fairness of a rate is not determined alone by its being low. Low rates to one place may not be just if still lower rates are given to another place; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137. The legitimate interests of carrying companies, as well as of traders and shippers, should be considered in determining the lawfulness of rates under the act. Ocean competition may constitute a dissimilar condition, and conditions which exist beyond the seaboard of the United States can be legitimately regarded for the purpose of justifying a difference in rates charged by railroads between import and domestic traffic; Texas & P. R. Co. v. Interstate Commerce Commission, 5 I. C. Rep. 405; *id.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; City of Spokane v. R. Co., 15 I. C. C. 376.

Trade centres are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributive centres; and carriers may give the smaller places rates as favorable as the larger ones; when the rates are impartial in themselves as between large and small towns, the fact that one large centre may have an advantage over another in the business of the small places does not make out a case of undue preference. Impartial rates are not rendered illegal by their effect upon the business of localities; Martin v. R. Co., 2 I. C. Rep. 32; that rates should be fixed in inverse proportion to the natural advantages of competing towns with the view of equalizing "commercial conditions" is at variance with justice; Eau Claire Board of Trade v. R. Co., 4 I. C. Rep. 65; Freight Bureau of Cincinnati v. R. Co., 7 *id.* 180. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination; Milwaukee Chamber of Commerce v. R. Co., 2 I. C. Rep. 393.

A railroad company is under special obli-

gation to give reasonable rates for its local business. It may accept business from other carriers on through rates which, when divided between them, will give to any one of them for its division less than its own local rates; Lippman & Co. v. R. Co., 2 I. C. Rep. 414.

Through transportation over connecting lines is favored by the act, and the rate is correctly adjusted upon the distance through, and not upon the shorter distances over, the several lines; Coxe Brothers & Co. v. R. Co., 3 I. C. Rep. 460. While the question of distance is important in establishing rates, it is not an absolute and unconditional right from which a departure may not be justified by other considerations. The public benefits, the greater volume of business warranting lower rates to all, and the force of competition may furnish reasons that outweigh a claim of right founded merely on geographical considerations; Imperial Coal Co. v. R. Co., 2 I. C. Rep. 436. See McMorran v. R. Co., *id.* 604.

When rates are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them; McMorran v. R. Co., 2 I. C. Rep. 604. At any hearing involving a rate increased after Jan. 1, 1910, or sought to be increased after this act, the burden of proving that the increase is just and reasonable is on the carrier.

In determining rates on a short local line, where the cost of service is great, owing to steep grades, sparse population, and light traffic, such circumstances should have much controlling weight. This rule was applied where a road existing under such conditions was charged with unjust rates in transporting oil, as compared with the cost of piping it to the same point; Rice, Robinson & Witherop v. R. Co., 2 I. C. Rep. 298.

Ordinarily there is no better measure of railroad service in carrying goods than distance, though it is not always controlling. And where the rates for carrying freight from a certain territory over one road are considerably greater than the rates charged by another road from neighboring territory to the same place, the higher rates will be held excessive; James & Abbott v. R. Co., 2 I. C. Rep. 609. Greater compensation in the aggregate for the shorter, than for the longer, haul over a direct line is unlawful; Cordele Machine Shop v. R. Co., 6 I. C. Rep. 361.

Mileage, while a circumstance to be considered with the conditions in fixing rates, is by no means controlling or the most important; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 656 (C. C., M. D. of Tenn.).

A through rate is not necessarily reasonable because it does not exceed the aggregate of two reasonable local rates; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151.

There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce normal and reasonable rates, to retain business on its line, and where corresponding reductions at points not affected, or less affected, by such competition, might be unreasonable. But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of the competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it accepts the legal obligation that its service shall be impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar; Manufacturers & Jobbers' Union of Mankato v. R. Co., 3 I. C. Rep. 115. Where there has been a consolidation of competing lines that have formerly served the same territory in competitive traffic to the same market, the consolidated lines cannot deprive the public of fair competition, nor give oppressive discrimination with a view to its own interest; Rice, Robinson & Witherop v. R. Co., 3 I. C. Rep. 162.

In fixing reasonable rates on such articles as food products, the operating expenses, bonded debt, fixed charges, dividends on the stock and other necessary expenses are all to be considered, but the claim that any particular rate is to be measured by these as a fixed standard, below which the rate cannot lawfully be reduced, is subject to some qualifications, one of which is that these obligations must be actual and in good faith; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289; nor, on the other hand, can these rates be so limited that the shipper may, in all cases, realize actual cost of production; In re Alleged Excessive Freight Rates & Charges on Food Products, 3 I. C. Rep. 93; *id.*, 4 I. C. C. R. 48; in the carriage of great staples which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable; *id.*

The fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line; Boards of Trade Union v. R. Co., 1 I. C. Rep. 608.

A carrier cannot give a railroad company a lower rate on the same commodity than it gives to others; Interstate Commerce Commission v. R. Co., 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107, Ann. Cas. 1914A, 504.

Ordinarily no adequate reason exists for a difference in rates for a solid carload of one kind of freight from one consignor and

a like carload from the same point to the same destination consisting of freight from more than one consignor to one consignee, etc., and such difference is not justified by the difference in the cost of handling; Thurber v. R. Co., 2 I. C. Rep. 742.

The carrier cannot look beyond the transportation to the ownership of the shipment as the basis for determining the applicability of its rates, and the rules of the official classifications, providing that carriers should collect a greater compensation for carload shipments when made by forwarding agents of different shippers, were unjustly discriminatory and unreasonable; Interstate Commerce Commission v. R. Co., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448.

The expense of carrying fruit, etc., from Jersey City, the railroad terminal, to New York, may be added to the rate charged to the latter place; Truck Farmers' Ass'n v. R. Co., 6 I. C. Rep. 295. As to the effect of free cartage at terminals, see Interstate Commerce Commission v. R. Co., 167 U. S. 633, 17 Sup. Ct. 986, 42 L. Ed. 306.

Party-rate tickets are not commutation tickets, and when party rates are lower than the fare for single passengers they are illegal; Pittsburgh, C. & St. L. R. Co. v. R. Co., 2 I. C. Rep. 729. A sale of mileage tickets to commercial travellers, and a refusal to sell to other passengers except at a higher rate, is unjust discrimination within the act; and the fact that the former release the carrier from liability, or that they may influence business in favor of the road, does not justify such discrimination; Larrison v. R. Co., 1 I. C. Rep. 369. The placing of passenger tickets in the hands of ticket brokers to be disposed of at reduced rates, under the pretence of paying a commission, is a violation of the act; In re Passenger Tariffs & Rate Wars, 2 I. C. Rep. 340. A passenger rate war in which rates are repeatedly reduced by carriers without filing tariffs or reducing intermediate rates, is unlawful; *id.;* granting free transportation to city officials is unjust discrimination within the act; Harvey v. R. Co., 3 I. C. Rep. 793.

Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" for not less than ten persons, at two cents a mile, which is less than the established rate for single passengers, where such tickets are offered to the public generally; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699. See In re Passenger Tariffs, 2 I. C. Rep. 445, where the Commission held that party rates and passenger carload rates lower than for single passengers are illegal.

The provision that nothing in the act shall apply "to the issuance of mileage passenger tickets" applies only to the issuing of such tickets; the terms upon which they are issued must be in accordance with the general provisions of the act; Larrison v. R. Co., 1 I. C. Rep. 369.

If a reduction in passenger rates be made between competing points, the rates must also be reduced between intermediate points; In re Passenger Tariffs & Rate Wars, 2 I. C. Rep. 340.

The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those to a longer haul to a point where competition prevails, obnoxious to the act, against a greater charge for a shorter than for longer haul under substantially similar circumstances; Int. Com. Com. v. R. Co., 190 U. S. 273, 23 Sup. Ct. 687, 47 L. Ed. 1047.

Section 4, as amended June 18, 1910, makes it unlawful to charge any greater compensation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, but in special instances on application to the Commission the same may be allowed.

The fact that a railroad company makes an unreasonably low rate does not authorize a rival, extending between the same points, to make greater charges for the shorter haul to intermediate points than it does to the terminal; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137.

Where a road makes the same charge to one point that it does to another which is only from a third to two-thirds of the same distance, the charge to the shorter point is presumptively illegal; In re Chicago, St. P. & K. C. R. Co., 2 I. C. Rep. 137. Actual water competition of controlling force relating to traffic important in amount, may justify a lower charge for a longer distance than for a shorter distance included therein; Lehmann, Higginson & Co. v. R. Co., 3 I. C. Rep. 80; but disturbance of rates, secret or open, will not; In re Alleged Violations of the Fourth Section, 7 I. C. Rep. 61; nor will competition between markets or between carriers subject to the act; Brewer & Hanleiter v. R. Co., 7 I. C. Rep. 224; nor possible water competition; San Bernardino Board of Trade v. R. Co., 3 I. C. Rep. 138. Water competition must be such that the freight would go to its destination by water, if the lower rate were not given; James & Mayer Buggy Co. v. R. Co., 3 I. C. Rep. 682; *id.*, 4 I. C. C. R. 744.

When rail rates are advanced with the disappearance of water competition, no inference adverse to the railroad can be drawn, but when the old rates had been maintained for several years after such disappearance, there is a presumption, if the rates are raised, that the advance is made for other reasons; Int. Com. Com. v. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

On the ground that "through failure of crops" the people of long distance localities

were without necessary food for themselves and animals, a temporary order was made in In re Application of Fremont, E. & M. V. R. Co., 6 I. C. Rep. 293, authorizing a carrier to charge less for a longer distance than they were authorized to charge for a shorter distance. And the need of additional facilities for passengers travelling to Chicago during the World's Fair was considered a ground for the same relief; In re Petition of Cincinnati, H. & D. R. Co., 6 I. C. Rep. 323.

Under section 4, as amended June 18, 1910, the Commission has power to make an order (such as the one there involved) permitting a lower rate for the longer haul, but only on terms stated in the order, establishing zones for the intermediate points and relative percentages upon which proportionate zones should be based; Intermountain Rate Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. —.

An intermediate local rate should never exceed the through rate plus the local rate back to the intermediate place; Martin v. R. Co., 2 I. C. Rep. 1.

The classification of freight is expressly recognized by the act; Thurber v. R. Co., 2 I. C. Rep. 742. But in classifying freights the carrier must respect the interests of the shipper on the basis of relative equality and justice; Thurber v. R. Co., 2 I. C. Rep. 742. Common carriers should be held responsible for the correctness of the weight and classification of freight received. The publication of a commodity rate takes the commodity upon which such rate applies out of the classification, so that all shipments of that commodity moving from and to points between which such commodity rate is in effect must be charged for on the basis of the commodity rate and carload minimum. In allowing carload rates, the carrier may properly stipulate for a minimum carload, the more approved method being to charge a given rate per 100 pounds for any excess, rather than to allow the shipper to load as much as he chooses in the car at a stated rate per car; Leonard v. R. Co., 3 I. C. C. 241.

A carload rate and minimum weight specified in a lawful tariff hold out a definite offer to the shipping public to move merchandise on those terms and Commissioner Harlan stated, in Kaye & Carter Lumber Co. v. R. Co., 17 I. C. C. 209, 211, that there should be a rule in all tariffs to the effect that when a carrier, for its own convenience, supplies a larger car than the one ordered, it will do so on the basis of the published rate and minimum weight applicable to the length of car so ordered by the shipper, in all cases where the shipment actually moved could have been loaded into the car ordered. In one case, the Commission held that, even though the shipper had not ordered a car of a particular size, the carrier could collect freight only on the actual weight, the car furnished being larger than required for the shipment tendered; Peerless Agencies Co. v. R. Co., 17 I. C. C. 218.

Lower rates on carload lots than on less quantities are not unlawful; but if the difference be so wide as to destroy competition between large and small dealers, especially upon articles that are of general and necessary use, and that furnish a large volume of business, the act is violated; Thurber v. R. Co., 2 I. C. Rep. 742.

When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which applies to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers; Brownell v. R. Co., 4 I. C. Rep. 285.

It is the duty of a carrier to equip its road with suitable cars for its traffic and to furnish them alike to all who have occasion for their use; Rice, Robinson & Witherop v. R. Co., 3 I. C. Rep. 162. The public must be justly and equally served in furnishing cars; if in a time of special pressure, some one must wait, regular customers of the road are not entitled to preference; Riddle, Dean & Co. v. R. Co., 1 I. C. Rep. 787.

As a general rule, in the movement of passengers and freight, passengers get a preference, then live stock, perishable goods and common freight receive preference in the order named. This rule is of no avail in time of an emergency.

Railroad companies are not required to furnish competing connecting carriers with equal facilities, for the interchange of traffic, when this involves the use of its tracks by such carriers; it may permit such use by one carrier to the exclusion of others; Little Rock & M. R. Co. v. R. Co., 59 Fed. 400; nor is the clause violated by receiving and forwarding without prepayment of freight or car mileage, cars of other companies, containing goods coming from one locality and under like circumstances, refusing goods from a different locality; Oregon Short-Line & U. N. R. Co. v. R. Co., 61 Fed. 158, 9 C. C. A. 409.

A state constitution prohibiting discrimination in charges and facilities does not require a company to make provision for joint business with a new line crossing it, similar to those already made with a rival line at another near point; Atchison, T. & S. F. R. Co. v. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. Ed. 291; but railroad companies may be required to furnish facilities, and prevented from abandoning, stations already established; State v. R. Co., 37 Conn. 153; New Haven & N. R. Co. v. Hamersley, 104 U. S. 1, 26 L. Ed. 629; R. R. Commissioners v. R. Co., 63 Me. 269, 18 Am. Rep. 208; Commonwealth

v. R. Co., 103 Mass. 254, 4 Am. Rep. 555; State v. R. Co., 19 Neb. 476, 27 N. W. 434.

The power of the Commission to regulate accessorial facilities is held to be confined to mere regulation, and cannot be used to invade rights of property by entering the domain of deprivation, construction, and reconstruction of properties to carry out the proposed regulations; Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 74 Fed. 803, 21 C. C. A. 103.

A carrier is not justified in refusing less desirable freights because more money can be made by using its cars in carrying another kind; Riddle, Dean & Co. v. R. Co., 1 I. C. Rep. 787.

In an action for unjust discrimination in freight charges, under sec. 2, it is sufficient to set out the rates charged plaintiff and another shipper, and the circumstances and conditions under which plaintiff's shipment was made, with an allegation that the smaller charges made the other shipper were for like services, under substantially the same circumstances and conditions, without setting out such circumstances and conditions; Kinnavey v. R. Ass'n, 81 Fed. 802.

It is the duty of a carrier of live stock to provide proper facilities for receiving and discharging live stock free from all charges except the regular transportation charges; and it cannot receive and discharge such live stock at a depot, access to which must be purchased; Keith v. R. Co., 1 I. C. Rep. 601.

Carriers may properly refuse refrigeration on less than carload shipments or may require twenty-four hours' advance notice by shippers of the need of refrigerator cars; they may also charge for refrigeration on cars iced by them and not loaded by the shipper; Asparagus Growers' Ass'n v. R. Co., 17 I. C. C. 423.

In enacting the Hepburn act, amending § 20 of the act to regulate commerce, Congress recognized the essential distinctions between property accounts and operating accounts, and between capital and earnings and while prior to that time the practice of different carriers varied, uniformity in regard to the keeping of accounts was essential in the future for proper supervision and regulation; Kansas City Ry. Co. v. U. S., 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. ——.

The Hepburn act, requiring pipe line companies to become common carriers and subject to the act is not unconstitutional; Pipe Line Cases, 234 U. S. 548, 34 Sup. Ct. 956, 58 L. Ed. ——.

The Act of 1887, and its amendment (Act of 1906), do not apply to street railway companies operating lines between cities in different states; Omaha & C. B. St. R. Co. v. Commission, 179 Fed. 243, affirmed Omaha & C. B. St. R. Co. v. Interst. Com. Com'n, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385.

Demurrage. A carrier has the right to establish and maintain demurrage regulations under which a reasonable charge will accrue for detention of cars beyond a reasonable period. One of the primary reasons for demurrage is to release equipment and again place it in the transportation service, and also to enable all of its patrons to use its tracks and terminals; Peale, Peacock & Kerr v. R. Co., 18 I. C. C. 25, 35.

Under the statute shippers are not to be put in a position of subserviency to common carriers, and are not required to ask for rates, but are entitled to equal and open rates at all times; In re Tariffs of the Transcontinental Lines, 2 I. C. Rep. 203; but a tariff of rates of which schedules have been filed by a carrier with the Commission and also with its freight agents is in force and operative although the copies thereof may not have been posted at the carrier's depot as required by the act; Texas & P. R. Co. v. Oil Mill, 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562.

Complaints, though brought by an individual, may challenge the entire schedule of rates to competing points; Daniels v. R. Co., 6 I. C. Rep. 458.

The Commission can rehear a particular case and amend its original order therein, although the federal court may have refused to enforce such original order; Page v. R. Co., 6 I. C. Rep. 548.

In proceedings before the Commission, all offending carriers need not be made parties defendant, but the case may proceed only against the carrier whose lines the complainant uses; Page v. R. Co., 6 I. C. Rep. 548.

The right asserted by a petitioner in the federal court under the act arises and is claimed under a law of the United States which relates to a subject over which congress has exclusive control; and this is sufficient to sustain the jurisdiction; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289. A state court has no jurisdiction; Copp v. R. Co., 43 La. Ann. 511, 9 South. 441, 12 L. R. A. 725, 26 Am. St. Rep. 198.

It is not necessary that a person making a complaint before the Commission should have a pecuniary interest in the violation of the statute complained of; it is sufficient if a responsible party complains of a matter which amounts to a public grievance; Boston & A. R. R. Co. v. R. Co., 1 I. C. Rep. 571; Milk Producers' Protective Ass'n v. R. Co., 7 I. C. Rep. 92.

It is not proper for railroad companies to withhold the larger part of their evidence from the Commission, and first adduce it in the federal court in proceedings by the Commission to enforce its order; the purposes of the act call for a full inquiry by the Commission in the first instance; Cincinnati, New Orleans & T. P. R. Co. v. Interstate Commerce Commission, 5 I. C. Rep. 391; *id.*,

162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. It is not necessary to file with a petition for the enforcement of an order of the Commission the transcript of the evidence taken before it, under the provision of the statute making the findings of the fact of the Commission *prima facie* evidence of the matter stated, but either party may use as evidence any competent testimony taken before the Commission; Interstate Commerce Commission v. R. Co., 5 I. C. Rep. 131; *id.*, 64 Fed. 981. Where the Commission applies for an injunction to restrain a railroad company from disobeying an order of the Commission, a preliminary injunction will not be granted when the company's answer denies the facts upon which the order was based; Interstate Commerce Commission v. R. Co., 49 Fed. 177. A preliminary injunction will not be granted where the question involved is a new one; or where the injury to the defendant is likely to be greater than the benefit to the plaintiff; Shinkle, Wilson & Kreis Co. v. R. Co., 62 Fed. 690; *id.*, 5 I. C. Rep. 287. An action against the carrier for a violation of the act in making unlawful discriminations may be maintained in the name of the United States by the district attorney; U. S. v. R. Co., 5 I. C. Rep. 106 (U. S. C. C., D. of Kans.).

Under the 5th amendment to the constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," a person under examination by a grand jury, in an investigation into certain alleged violations of the act and its amendments, is not obliged to answer questions where he states that his answers might tend to criminate him; although section 860 of the Revised Statutes provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceedings. The object of this constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110.

The provision in the act of February 11, 1893, "that no person shall be excused from attending and testifying or from producing books, etc., before the" Commission, on the ground that the testimony may tend to criminate him or subject him to a penalty or forfeiture; but that no such person shall be prosecuted or subjected to any penalty or forfeiture on account of any matter concerning which he may testify or produce such evidence, affords absolute immunity against prosecution and deprives the witness of his constitutional right to refuse to answer; Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; *id.*, 5 I. C. Rep. 369. This act is said to have been passed in view of the decision in Counselman v. Hitchcock, *supra;* see Brown v. Walker, *supra.*

By the act of June 30, 1906, *supra*, immunity shall extend only to a natural person testifying or producing documentary evidence.

See INCRIMINATION; PRODUCTION OF BOOK; GRAND JURY.

The Commodities Clause. (1906.) This clause, as construed in U. S. v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836, prohibits an interstate carrier from transporting in such commerce articles or commodities under the following circumstances and conditions: 1. Where the commodity has been manufactured, mined or produced by a carrier under its authority, and, at the time of transportation, the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; 2. Where the carrier owns the article or commodity to be transported in whole or in part; 3. Where the carrier has, at the time of transportation, an interest, direct or indirect, in a legal or equitable sense, in the commodity, not including commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

As a result of this decision the coal railroad companies have organized coal companies to take over their coal lands. See COMMODITIES CLAUSE; HOLDING COMPANIES.

The act of February 4, 1887, is not inconsistent with the act of July 2, 1890. "To protect trade and commerce against unlawful restraints and monopolies;" U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

So far as congress adopted the language of the English Traffic Act, it is to be presumed that it had in mind the construction given by the English courts to the adopted language; and intended to incorporate it into the statute; Interstate Commerce Commission v. R. Co., 145 U. S. 263, 12 Sup. Ct. 844, 36 L. Ed. 699.

By act of March 1, 1913, the Commission is directed to make an inventory and appraisement of all the property of common carriers.

See CONSTITUTION OF UNITED STATES; COMMON CARRIERS; TAXATION; SAFETY APPLIANCE ACT; COMMERCE; JURISDICTION.

INTERSTATE RENDITION. See FUGITIVE FROM JUSTICE.

INTERVENING DAMAGES. Damages suffered by an appellee from delay caused by the appeal. Peasely v. Buckminster, 1 Tyler (Vt.) 267.

INTERVENOR. One not originally a party who, by leave of the court, interposes in a suit and becomes a party thereto to protect a right or interest in the subject-matter.

A person who intervenes in a suit, either

on his own behalf or on the behalf of the public. See INTERVENTION.

INTERVENTION (Lat. *intervenio*, to come between or among). The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings.

Persons who are not parties to a suit cannot in general file a petition therein for a stay of proceedings or any other cause; the remedy is by original bill. Exceptions are: where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like; creditors are allowed to prove debts and persons belonging to a class on whose behalf the suit is brought are regarded as *quasi* parties and, of course, may have a standing in court; per Bradley, J., in Anderson v. R. Co., 2 Woods 628, Fed. Cas. No. 358. Third persons may be driven to intervene for their rights in equity if those rights are to be affected, and if at the hearing the court would be compelled to notice their absence and order the case to stand over until they were brought in; Carter v. City of New Orleans, 19 Fed. 659. See 1 Dan. Ch. Pr. 287; Story, Eq. Pl. § 220. It is not necessary to the right of intervention, in order to participate in a trust fund in the custody of the law, that the intervenor should first obtain judgment at law or should have any lien upon the fund. Intervention will be granted, after a foreclosure decree against a railroad company, to unsecured noteholders who pray to have their debts established as equitable liens upon the property and funds of the company paramount to the lien of the mortgage; Farmers' Loan & Trust Co. v. R. Co., 21 Fed. 264. A holder of railroad bonds secured by a mortgage under foreclosure has an interest in the amount of the trustee's compensation, which entitles him to intervene and to contest it and to appeal from an adverse decision; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559. Where a part of a canal was sold and the fund brought into court, it was held that the contractor who built the canal could intervene for the protection of his rights either upon the fund or against the purchaser; French v. Gapen, 105 U. S. 509, 26 L. Ed. 951. Bondholders in a foreclosure suit brought by the trustee of the mortgage are *quasi* parties and may be heard for the protection of their interests; Fidelity Trust & Safety-Vault Co. v. R. Co., 53 Fed. 850.

If one who is a necessary party to a case in a state court is wrongfully excluded and denied leave to file a proper cross bill and answer and to present a motion for removal to the federal court, he will be treated by the latter court as if a party; Hack v. R. Co., 23 Fed. 356. The case of Iowa Homestead Co. v. R. Co., 8 Fed. 97, was based on special facts.

Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustees for the bondholders named in the land grant mortgages of the company, and the bill charged that the officers of the company were squandering its property, and the purpose of the suit was the preservation and administration of the assets of the company, and a decree *pro confesso* had been entered and a receiver appointed, individual stockholders were not permitted to intervene and file a cross bill on a general charge of fraud and collusion on the part of the receiver and erroneous judgment on the part of the court in making the order referred to. In such a suit, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings or to interpose obstacles to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. Rival creditors by proceedings before the master may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object of the suit, to obtain an administration of the company's assets and property. Persons will not be allowed to intervene as general defendants unless they show that they have an interest in the results as stockholders, and are also able to show fraud and collusion between the plaintiff in the suit and the officers of the company; per Bradley, J., in Forbes v. R. Co., 2 Wood, 323, Fed. Cas. No. 4,926. In Skiddy v. R. Co., 3 Hughes, 320, Fed. Cas. No. 12,922, the Amsterdam Bondholders' Committee, representing a very large number of bonds, filed a petition setting out the grounds for disapproving their trustees' management of the foreclosure suit, and praying intervention, but leave to intervene was denied; Clyde v. R. Co., 55 Fed. 448.

Where the holder of a large amount of bonds, on which foreclosure proceedings were pending, asked leave to intervene, and it appeared that the mortgage trustee was already a party and there was no allegation that it was not acting properly for the interests of all bondholders, leave to intervene was refused (even for the mere purpose of requiring notice to such bondholder of successive steps in the proceedings), on the ground of excessive inconvenience in the administration of the cause; Dallas, J., in the Reading Railroad foreclosure, U. S. C. C., E. D. of Pa.

The practice in respect of intervention in ordinary railroad foreclosure cases probably differs somewhat in different circuits, and varies considerably in different cases. The

question of the right to intervene by members of a class already represented on the record appears to be rather a matter of discretion, in view of what is deemed best for the due conduct of the cause. Probably the right to be heard will not ordinarily be refused in any case.

There would seem to be a distinction between the intervention of parties for the purpose of sharing in a fund and the intervention of parties in the course of the administration of a railroad property, during receivership. In the latter class of cases, it would appear, from the authorities, that unless good cause be shown for the intervention of new members of a class already represented on the record, they will not be allowed to come in, upon the ground stated by Dallas, C. J., in the Reading foreclosure,—the excessive inconvenience in the administration of the cause.

In a suit to foreclose a railroad mortgage, certain persons prayed leave to intervene, alleging that the defendant company was made up by an illegal consolidation of three other companies, of one of which they were stockholders, that they never consented to the consolidation and were not bound by it nor by the mortgage, that the original company had no officers to defend for them, and that the consolidated company declined to set up the defence which they desired to make; leave to intervene was refused as there was no charge of fraud or collusion, and the proper remedy was by an independent suit; Central Trust Co. v. R. Co., 48 Fed. 14.

A purchaser at a foreclosure sale may be admitted as a party to the record and allowed to appeal; Blossom v. R. Co., 1 Wall. (U. S.) 655, 17 L. Ed. 673; upon failure to ask leave to come in, the court should compel him to become a party of record; Fitzgerald v. Evans, 49 Fed. 426, 1 C. C. A. 307. The purchaser at a foreclosure sale under a junior mortgage who takes subject to a prior mortgage, will be made a party to proceedings to foreclose such prior mortgage; Farmers' Loan & Trust Co. v. R. Co., 44 Fed. 115. Parties given leave to intervene in an equity suit after a decree *pro confesso*, have a right of appeal from a decree affecting their rights, and the supreme court will enforce this right by a *mandamus;* Ex parte Jordan, 94 U. S. 248, 24 L. Ed. 123. See Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559.

When a creditor's bill in equity is properly removed from a state court to a federal court on the ground of diverse citizenship, the jurisdiction of the latter is not ousted by admitting in the circuit court as co-plaintiffs other creditors who are citizens of the same state as the defendants; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329.

A court of the United States sitting as a court of law, has an equitable power over its own process to prevent abuse, oppression and injustice; which power may be invoked by a stranger to the litigation as incident to the jurisdiction already vested, and without regard to his own citizenship; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379, 31 L. Ed. 374.

When property in the possession of a third person claiming ownership, is attached on mesne process issuing out of the United States circuit court, as the property of a defendant and citizen of the same state as the person claiming it, such person may seek redress in the circuit court by ancillary proceedings; as, for instance, if the original proceeding is in equity, by a petition *pro interesse suo*, or by ancillary bill, or by summary motion, according to circumstances; or, if it is at common law, by a summary motion or by a proceeding in the nature of an interpleader; or, if proceedings authorized by statutes of the state afford an adequate remedy, by adopting them as part of the practice of the court; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145. Where, in equity, an execution is issued and a levy and sale made of certain lands, a third party claiming to be the real owner cannot intervene for the purpose of moving to set aside the execution when there is no privity of estate between him and the defendant in the execution; Ex parte Mensing, 55 Fed. 17.

On a creditors' bill, judgment creditors who choose to intervene may share ratably with complainants in the proceeds of a sale of the property, even if some do not intervene until after the decree of sale; George v. Ry. Co., 44 Fed. 117. The practice of permitting judgment creditors to come in and make themselves parties to a creditors' bill is well settled; Myers v. Fenn, 5 Wall. (U. S.) 205, 18 L. Ed. 604.

Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, equity may allow a stockholder to become a party defendant for the protection of his own interest and that of such other stockholders as may join him in the defence; Bronson v. R. Co., 2 Wall. (U. S.) 283, 17 L. Ed. 725. Where any fraud has been perpetrated by the directors of a company by which the interests of the stockholders are affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud; Bayliss v. Ry. Co., 8 Biss. 193, Fed. Cas. No. 1,140.

The state can intervene in proceedings to

foreclose a railroad mortgage only where it is entitled as a bond or lien holder to share in the proceeds of a sale, or where public interests are at stake which are seriously threatened by the proposed disposition of the property. An intervening petition filed by a state in railroad foreclosure proceedings alleging that bonds and the mortgage securing them were void, and that the railroad company, by collusion and neglect to defend, was about to allow judgment to go against it by default, that the company in consideration of large land grants from the state had agreed to maintain low rates of transportation, which, by foreclosure, would be increased, gives no right of intervention, especially where neither the charter of the company nor any subsquent legislation showed any such contract as the one alleged; State v. Trust Co., 81 Tex. 530, 17 S. W. 60. Permission will not be granted to a state to intervene for the stay of the sale of a railroad under foreclosure proceedings; Anderson v. R. Co., 2 Woods 628, Fed. Cas. No. 358.

In a controversy between two states in relation to the boundary line between them, the attorney-general of the United States may appear on behalf of the United States and adduce evidence, though he does not thereby become a party in the technical sense of the word, and no judgment will be entered for or against the United States; Florida v. Georgia, 17 How. (U. S.) 478, 15 L. Ed. 181.

A petition to intervene need not be as formal as a bill of complaint, yet it should exhibit all the material facts relied on, embodying so much of the record in the original suit as is essential, and proceedings taken therein which would fortify the right of the intervener should be incorporated in the petition by amendment, and if this is not done, such proceedings cannot be noticed on a demurrer to the petition; Empire Distilling Co. v. McNulta, 77 Fed. 700, 23 C. C. A. 415.

In bills brought on behalf of a class, an intervening member of the class will ordinarily be joined as a plaintiff and this will not generally deprive the court of jurisdiction; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329. If there should be any danger that it would, he may be joined as a defendant or, if he intends to act in hostility to the original complainant, the court may make him a defendant; 1 Fost. Fed. Prac. § 201; Brown v. Steamship Co., 5 Blatchf. 525, Fed. Cas. No. 2,025; Forbes v. R. Co., 2 Woods 323, Fed. Cas. No. 4,926.

A person claiming a right to share in a fund or claiming a right to property in the hands of a receiver is generally allowed to intervene *pro interesse suo;* 1 Fost. Fed. Pr. § 201.

One who, in an action at law, has been denied the right to intervene, because of his status, cannot afterwards maintain a bill in equity in the same court to enjoin the proceedings and to be permitted to intervene; McDonald v. Seligman, 81 Fed. 753. But where leave to intervene in an equity case is asked and refused, it is not a determination of the merits, but the petitioner is at full liberty to assert his rights in any other appropriate form of proceedings; Credits Commutation Co. v. U. S., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782.

In a treaty relating to the administration by consuls of estates of foreigners dying in a state, "intervene in the possession and administration of the deceased" means that the consul may "temporarily possess the estate for the purpose of protecting it before it comes under the jurisdiction of the laws of the country, or protect the interest of his national in an administration instituted otherwise than by him"; Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453.

Under Codes. There are provisions in the codes of several of the states, which appear to have been originally adopted from Louisiana, permitting any person who has an interest in any matter in litigation to intervene by rule of court. This interest must be of such a direct and important character that the intervenor will either gain or lose by the direct effect of the judgment; the interest must be that created by a claim in suit or a lien upon the property, or some part thereof, in suit, or a claim to or lien upon the property or some part thereof which is the subject of litigation; Horn v. Water Co., 13 Cal. 62, 73 Am. Dec. 569, per Field, J. See Smith v. Gale, 144 U. S. 518, 12 Sup. Ct. 674, 36 L. Ed. 521.

In Patent Law. Where a third party asked to be made a party defendant, alleging that it was the manufacturer of machines claimed to infringe; that the defendant was its vendee; that it desired to settle the question as to whether or not the machines did infringe, both the complainant and the third party being non-residents, the petitioner was allowed to become a party defendant; Curran v. Car Co., 32 Fed. 835. So of the owner of cars, in a patent suit brought against the user; Standard Oil Co. v. Southern Pac. Co., 54 Fed. 521, 4 C. C. A. 491.

In Admiralty. Any person may intervene in a suit *in rem* for his interest and he may do so notwithstanding the *res* has been delivered to a claimant on a stipulation in a certain sum to abide by and perform the decree, the stipulation as far as it goes standing for the *res;* The Oregon, 45 Fed. 62. An administrator may intervene in a suit *in rem* to recover the damages allowed by a law of the state for the death of his intestate, caused by the wrongful act or omission of the person in charge of the *res;* The S. S. Oregon, 42 Fed. 78. When a vessel libelled by a material man has been taken possession of by the court, other material

men may intervene by libel praying warrants of arrest in order to retain the property in case security be given for its release; The Julia, 57 Fed. 233. See Admiralty Rule 43.

In International Law. Intervention is the interference of one state in the affairs of another state or states, without the consent of the foreign state. It is essentially a violation of the right belonging to every nation to be sovereign within its own borders and to be independent of foreign control in the administration of its home affairs and in the conduct of its foreign policy. There are, however, certain circumstances which are recognized in international law as justifying intervention. The two forms of intervention best recognized in international law are intervention in the interest of self-protection and intervention in the interest of the balance of power. The fundamental right of a state to preserve its own existence has often been alleged in justification of the violation of the territory of a foreign state, whether for the sake of anticipating an attack on the part of that state or for the sake of preventing such state from being made the basis of operations by a third party. The necessity of maintaining a balance of power between the great powers, and even between the lesser ones, has frequently been alleged in justification of an attack by one or more states upon a third state which, by its aggressive policy and its military preparations, threatens the existence or independence of other states. Intervention has sometimes been exercised in the interests of humanity, when the subjects of a foreign state were being subjected to such treatment as to call forth a protest from the civilized world. Such an intervention took place in 1827 when Great Britain, France and Russia intervened in the war between Greece and Turkey, because of the general horror created by the cruelties committed in the war. Moreover, intervention would be justified in punishment of a state which had deliberately violated the recognized rules of international law.

The United States, being outside the circle of the great European powers, has felt that it could maintain a position of isolation with regard to the questions of European diplomacy. Under the Monroe Doctrine (*q. v.*) the United States has rather taken an attitude of preventing intervention on the part of the European powers in the affairs of the Central and South American states, than felt called upon itself to intervene. As early as 1782 John Adams expressed his conviction that it should be the rule of the colonies not to meddle in the affairs of Europe. In his Farewell Address of 1796, Washington stated clearly the policy of the new republic. "It must be unwise in us," he said, "to implicate ourselves by artificial ties in the ordinary vicissitudes of her [Europe's] politics, or the ordinary combinations and collisions of her friendships or enmities. Our detached and distant situation invites and enables us to pursue a different course." The same principles were enunciated by Jefferson, Madison, Monroe, J. Q. Adams, and succeeding Presidents and Secretaries of State. The acts of the United States have been in accordance with her avowed policy. Efforts were made in 1793 by French agents to force the United States to take sides with France against Great Britain, but Washington steadily refused to be influenced by them. In the wars between Spain and her American colonies, the United States maintained an attitude of neutrality and non-intervention. Again in 1822–27, when efforts were made to have the United States intervene between Greece and Turkey, the government refused to take action. Similar efforts were made by Hungarian patriots in 1848, but were alike without success.

The most striking instance of direct intervention on the part of the United States is in connection with the island of Cuba. For many years conditions upon that neighboring island had been a source of great annoyance to the United States, both because of the general horror created by the character of the more or less continuous warfare between the island and Spain, as well as because of the obligation imposed upon the United States of preventing its territory from being made the starting point of hostile expeditions against the Spanish government of that island. The joint resolution of April 20, 1898, which was accepted by Spain as practically amounting to a declaration of war, states that in view of the "abhorrent conditions which have existed for more than three years in the island of Cuba" the United States felt that it was its duty to demand that Spain relinquish its authority over the island of Cuba. The President was in consequence authorized to use the land and naval forces of the United States to carry out the resolution. At the same time the United States distinctly disclaimed any disposition or intention to exercise sovereignty over the island. For further cases of political intervention see MONROE DOCTRINE.

Intervention is said to be non-political in character when a government does not forcibly interfere in the affairs of another state, but merely enters into diplomatic negotiations with the government of that state for the purpose of making it reverse its conduct in the treatment of subjects of the first state which happened to be transiently or permanently resident in the second state. This form of intervention is resorted to to protect citizens of the state against wrong or injustice in a foreign state, whether as a result of the positive action of the foreign government or of its omission to extend due protection to the alien. The general rule is that a government will not intervene in favor of its citizens until they have had recourse to the ordinary tribunals of the for-

eign country and have been refused justice. For intervention by a state to collect debts owed to its citizens by a foreign state, see CALVO DOCTRINE; DRAGO DOCTRINE. A nation ordinarily will not intervene in matters of business between its citizens and a foreign country. It will, however, interpose its good offices for the alleviation of the punishment of its citizens who are convicted of political offences in a foreign country. Likewise it will endeavor to secure full protection for its citizens who go as foreign missionaries to pagan countries. This does not mean that the United States would assume a protectorship of Christian communities in such countries. On several occasions resolutions have been offered in the United States congress protesting against the cruel treatment of Jews in certain foreign countries. See Moore, VI, §§ 897–926.

The doctrine has been thus spoken of by a distinguished writer, "Historicus": "Its essence is illegality and its justification is its success."

In Civil Law. The act by which a third party becomes a party in a suit pending between other persons.

The intervention is made either to be joined to the plaintiff, and to claim the same thing he does, or some other thing connected with it; or to join the defendant, and with him to oppose the claim of the plaintiff, which it is his interest to defeat. Pothier, Proc. Civ. 1ère part, ch. 2, s. 6, § 3.

In English Ecclesiastical Law. The proceeding of a third person, who, not being originally a party to the suit or proceeding, but claiming an interest in the subject-matter in dispute, in order the better to protect such interest, interposes his claim. 2 Chitty, Pr. 492; 2 Hagg. Cons. 137; 3 Phill. Eccl. 586; Dunlop, Adm. Pr. 74. The intervenor may come in at any stage of the cause, and even after judgment, if an appeal can be allowed on such judgment; 2 Hagg. Cons. 137.

Intervention is allowed in certain cases, especially in suits for divorce and nullity of marriage, by 23 & 24 Vict. c. 144, and 36 & 37 Vict. c. 31, where it is usual for the queen's proctor to intervene, where collusion is suspected.

Intervention in the possession and administration of the property of an alien dying in the United States, as used in a treaty, is defined in Rocca v. Thompson, 223 U. S. 317, 32 Sup. Ct. 207, 56 L. Ed. 453, quoting from this title at length.

See AMICUS CURIÆ; EXECUTORS AND ADMINISTRATORS.

INTESTABILIS. A witness incompetent to testify. Calv. Lex.

INTESTABLE. One who cannot lawfully make a testament.

An infant, an insane person, or one civilly dead, cannot make a will, for want of capacity or understanding; a married woman cannot make such a will without some special authority, because she is under the power of her husband. They are all intestable.

INTESTACY. The state or condition of dying without a will.

See Gross, Mediæval Law of Intestacy, 3 Sel. Essays in Anglo-Amer. L. H. 723 (18 Harv. L. Rev. 120).

INTESTATE. Without a will. A person who dies, having made no will, or one which is defective in form. In that case, he is said to die intestate, and his estate descends to his heirs at law or next of kin. See Kohny v. Dunbar, 21 Idaho 258, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492.

This term comes from the Latin *intestatus*. Formerly, it was used in France indiscriminately with *de-confesse;* that is, without confession. It was regarded as a crime, on account of the omission of the deceased person to give something to the church, and was punished by privation of burial in consecrated ground. This omission, according to Fournel, *Hist. des Avocats*, vol. 1, p. 116, could be repaired by making an ampliative testament in the name of the deceased. See Vely, tom. 6, page 145; Henrion de Pansey, *Autorité judiciaire* 129, and note. See DESCENT AND DISTRIBUTION; WILL.

The Roman horror of intestacy was equalled or surpassed among early Englishmen, the reason being the danger to the intestate's soul if he died without having assigned a fitting part of his estate to pious uses. Pollock's note to Maine's Anc. L. 230.

INTESTATE SUCCESSION. A succession is called *intestate* when the deceased has left no will, or when his will has been revoked, or annulled as irregular. Therefore the heirs to whom a succession has fallen by the effects of the law only are called "heirs *ab intestato*." Civil Code La. art. 1096.

INTESTATO. **In the Civil Law.** Intestate; without a will. Calv. Lex.

INTESTATUS. **In the Civil and Old English Law.** An intestate. One who dies without a will. Dig. 50, 17, 7.

INTIMACY. As generally applied to persons, it is understood to mean a proper, friendly relation of the parties, but it is frequently used to convey the idea of an improper relation; an intimacy at least disreputable and degrading. Collins v. Pub. Co., 152 Pa. 187, 25 Atl. 546, 34 Am. St. Rep. 636. See McCarty v. Coffin, 157 Mass. 478, 32 N. E. 649.

INTIMATION. **In Civil Law.** The name of any judicial act by which a notice of a legal proceeding is given to some one; but it is more usually understood to mean the notice or summons which an appellant causes to be given to the opposite party, that the

sentence will be reviewed by the superior judge.

INTIMIDATION. The act of intimidating or making fearful; the state of being intimidated.

In Old English Law. By the stat. 38 and 39 Vict. c. 86, 7, every person commits a misdemeanor, who wrongfully uses violence to, or intimidates, any other person, or his wife or children, with a view to compel him to abstain from doing, or to do, any act which he has a legal right to do or abstain from doing. See DURESS.

INTIMIDATION OF VOTERS. Statutes have been enacted in some states to punish the intimidation of voters. Under an early Pennsylvania act, it was held that to constitute the offence of intimidation of voters, there must be a preconceived intention for the purpose of intimidating the officers or interrupting the election; Respublica v. Gibbs, 3 Yeates (Pa.) 429.

INTOL AND UTTOL. Toll or custom paid for things imported, or exported, or brought in and sold out. Tom.; Calv. Lex.

INTOXICATING DRINKS. See LIQUOR LAWS.

INTOXICATION. See DRUNKENNESS.

INTRASTATE COMMERCE. See COMMERCE; INTERSTATE COMMERCE COMMISSION.

INTRA VIRES. An act is said to be *intra vires* ("within the power") of a person or corporation when it is within the scope of his or its powers or authority. It is the opposite of *ultra vires* (*q. v.*).

INTRINSECUM SERVITIUM. Common and ordinary duties with the lord's court. Kenn. Glos. See FORINSEC.

INTRINSIC. The intrinsic value of a thing is its true, inherent, and essential value, not depending upon accident, place, or person, but the same everywhere and to every one. Bank of State of North Carolina v. Ford, 27 N. C. 698.

INTRODUCTION. That part of a writing in which are detailed those facts which elucidate the subject.

INTROMISSION. Dealing with stocks, goods, or cash of a principal coming into the hands of his agent, to be accounted for by the agent to his principal. 29 Eng. Law & Eq. 391. See AGENT.

INTRONISATION. In French Ecclesiastical Law. The installation of a bishop in his episcopal see. *Clef des Lois Rom.;* André.

INTRUDER. One who, on the death of the ancestor, enters on the land, unlawfully, before the heir can enter.

INTRUSION. The entry of a stranger after the determination of a particular estate of freehold, before the entry of him in reversion or remainder.

This entry and interposition of the stranger differs from an abatement in this, that an abatement is always to the prejudice of an heir or immediate devisee; an intrusion is always to the prejudice of him in remainder or reversion. 3 Bla. Com. 169; Fitzh. N. B. 203; Archb. Civ. Pl. 12; Dane, Abr. Index; 3 Steph. Com. 443.

The name of a writ brought by the owner of a fee simple, etc., against an intruder. New Nat. Brev. 453. Abolished by 3 & 4 Will. IV. c. 57.

INUNDATION. The overflow of waters by coming out of their bed.

Inundations may arise from three causes: from public necessity, as in defence of a place it may be necessary to dam the current of a stream, which will cause an inundation to the upper lands; they may be occasioned by an invincible force, as by the accidental fall of a rock in the stream, or by a natural flood or freshet; or they may result from the erection of works on the stream. In the first case, the injury caused by the inundation is to be compensated as other injuries done in war; in the second, as there was no fault of any one, the loss is to be borne by the unfortunate owner of the estate; in the last, when the riparian proprietor is injured by such works as alter the level of the water where it enters or where it leaves the property on which they are erected, the person injured may recover damages for the injury thus caused to his property by the inundation; 9 Co. 59; 1 B. & Ald. 258; Sumner v. Tileston, 7 Pick. (Mass.) 198; Bailey v. City of New York, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; Tillotson v. Smith, 32 N. H. 90, 64 Am. Dec. 355; Merritt v. Parker, 1 N. J. L. 460; Williams v. Gale, 3 H. & J. (Md.) 231; Ohio & M. R. Co. v. Nuetzel, 43 Ill. App. 108. See DAM; BACKWATER; IRRIGATION; WATERS; WATER COURSE.

INURE. To take effect; to result. See ENURE.

INUREMENT. Use; user; service to the use or benefit of a person; Dickerson v. Colgrove, 100 U. S. 583, 25 L. Ed. 618.

INVADIARE. To mortgage lands. Toml.

INVADIATIO (L. Lat.). A pledge or mortgage.

INVADIATUS. One who is under pledge; one who has had sureties or pledges given for him. Spel. Glos.

INVADING A JUDGE. Assaulting a judge. Patterson.

INVALID. Not valid; of no binding force.

INVASION. The entry of a country by a public enemy, making war. See INSURRECTION.

INVASIONES. The inquisition of serjeanties and knights' fees. Cowell; Calv. Lex.

INVECTA ET ILLATA (Lat.). **In Civil Law.** Things carried and brought in. Things brought into a building hired *(œdes)*, or into a hired estate in the city *(prædium urbanum)*, which are held by a tacit mortgage for the rent. Voc. Jur. Utr.; Domat, Civ. Law.

INVENTIO. In the Civil Law. Finding; one of the modes of acquiring title to property by occupancy. Heinecc. lib. 2, tit. 1, 350.

In Old English Law. A thing found; as goods, or treasure-trove. Cowell. The plural, "inventiones," is also used.

INVENTION. See PATENT.

INVENTIONES. A word used in some ancient English charters to signify *treasure-trove*.

INVENTOR. One who contrives or produces a thing which did not before exist. One who makes an invention. The word is generally used to denote the author of such contrivances as are by law patentable. See PATENT.

INVENTORY. A list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons. A conservatory act, which is made to ascertain the situation of an intestate's estate, the estate of an insolvent, and the like, for the purpose of securing it to those entitled to it.

When the inventory is made of goods and estates assigned or conveyed in trust, it must include all the property conveyed. It is *prima facie* evidence of the value as against the administrator; In re Childs, 5 Misc. 560, 26 N. Y. Supp. 721; In re Mullon, 74 Hun 358, 26 N. Y. Supp. 683.

In case of intestate estates, it is required to contain only the personal property, or that to which the administrator is entitled. The claims due to the estate ought to be separated; those which are desperate or bad ought to be so returned. The articles ought to be set down separately, as already mentioned, and separately valued. It is not the duty of an administrator to inventory property which was conveyed by his intestate in fraud of creditors; Gardner v. Gardner, 17 R. I. 751, 24 Atl. 785. The duty of having an appraisal and inventory made of a testator's estate, rests on the executor and not on the adult legatees; In re Curry's Will, 19 N. Y. Supp. 728. An item inserted in the inventory by mistake may be stricken out after it is sworn to; In re Payne, 78 Hun 292, 28 N. Y. Supp. 911.

The inventory is to be made in the presence of at least two of the creditors of the deceased, or legatees, or next of kin, or of two honest persons. The appraisers must sign it, and make oath or affirmation that the appraisement is just to the best of their knowledge. See, generally, 14 Vin. Abr. 465; Bac. Abr. *Executors, etc.* (E 11); Ayl. Par. 305; Com. Dig. *Administration* (B 7); 2 Add. Eccl. 319; Shoul. Ex. & Ad. 230; 2 Bla. Com. 514; Com. v. Bryan, 8 S. & R. (Pa.) 128.

INVEST (Lat. *investire*, to clothe). To put in possession of a field upon taking the oath of fealty or fidelity to the prince or superior lord. Also, to lay out capital in some permanent form so as to produce an income.

The term would hardly apply to an active capital employed in banking; People v. Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. It would cover the loaning of money; Shoemaker v. Smith, 37 Ind. 122. Whenever a sum is represented by anything but money, it is invested; People v. Commissioners of Taxes, 23 N. Y. 242.

INVESTITURE. The act of giving possession of lands by actual seisin. The ceremonial introduction to some office of dignity.

When livery of seisin was made to a person by the common law, he was invested with the whole fee; this the foreign feudists, and sometimes our own law-writers, call investiture; but generally speaking, it is termed by the common-law writers the seisin of the fee. 2 Bla. Com. 209, 313; Fearne, Rem. 223, n. (z).

By the canon law, investiture was made *per baculum et annulum*, by the ring and crosier, which were regarded as symbols of the episcopal jurisdiction. Ecclesiastical and secular fiefs were governed by the same rule in this respect,—that previously to investiture neither a bishop, abbot, nor lay lord could take possession of a fief conferred upon him by the prince.

Pope Gregory VI. first disputed the right of sovereigns to give investiture of ecclesiastical fiefs, A. D. 1045; but Pope Gregory VII. carried on the dispute with much more vigor, A. D. 1073. He excommunicated the emperor Henry IV. The popes Victor III., Urban II., and Paul II. continued the contest. This dispute, it is said, cost Christendom sixty-three battles, and the lives of many millions of men. De Pradt.

INVESTIVE FACT. The fact by means of which a right comes into existence; *e. g.* a grant of a monopoly, the death of one's ancestor. Holland, Jur. 151.

INVESTMENT. A sum of money left for safekeeping, subject to order, and payable not in the specific money deposited, but in an equal sum; it may or may not bear interest, according to the agreement. In re Law's Estate, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; State v. McFetridge, 84 Wis. 473, 54 N. W. 11, 998, 20 L. R. A. 223.

As to investment of trust funds, see TRUSTEE.

INVIOLABILITY. That which is not to be violated. The persons of ambassadors are inviolable. See AMBASSADOR; TELEGRAM.

INVITO. Against, or without the assent or consent; unwilling.

INVITO DEBITORE. Against the will of the debtor.

INVITO DOMINO (Lat.). **In Criminal Law.** Without the consent of the owner. In order to constitute larceny, the property stolen must be taken *invito domino;* this is the very essence of the crime. Cases of considerable difficulty arise when the owner has, for the purpose of detecting thieves, by himself or his agents, delivered the property taken, as to whether they are larcenies or not: the distinction seems to be this, that when the owner procures the property to be taken, it is not larceny; and when he merely leaves it in the power of the defendant to execute his original purpose of taking it, in the latter case it will be considered as taken *invito domino;* 2 Russ. Cr. 66, 105; 2 East, Pl. Cr. 666; Bac. Abr. *Felony* (C); 2 B. & P. 508. See LARCENY.

INVOICE. An account of goods or merchandise sent by merchants to their correspondents at home or abroad, in which the marks of each package, with other particulars, are set forth. Marsh. Ins. 408; Dane, Abr. Index. An invoice ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc.; 1 Pard. n. 248. See Graham v. Ins. Co., 2 Wash. C. C. 113, Fed. Cas. No. 5,674; Field v. Moulson, 2 Wash. C. C. 155, Fed. Cas. No. 4,770. Invoice carries no necessary implication of ownership, but accompanies goods consigned to a factor for sale, as well as in the case of a purchaser; Rolker v. Ins. Co., 4 Abb. App. Dec. (N. Y.) 76. See BILL OF LADING. *Invoice Price.* The prime cost, or invoice of the cost. Le Roy v. Ins. Co., 7 Johns. (N. Y.) 343.

An invoice is not evidence of a sale; it is a mere statement of the nature, quantity and cost or price of the things invoiced and is as appropriate to a bailment as to a sale; Dows v. Bank, 91 U. S. 618, 23 L. Ed. 214; In re Smith & Nixon Piano Co., 149 Fed. 113, 79 C. C. A. 53.

INVOLUNTARY. An involuntary act is that which is performed with constraint (*q. v.*), or with repugnance, or without the will to do it. An action is involuntary which is performed under duress. Wolffius, Inst. § 5.

INVOLUNTARY MANSLAUGHTER. See MANSLAUGHTER; HOMICIDE.

INVOLUNTARY SERVITUDE. These words, used in the 13th amendment of the United States constitution, have a larger meaning than slavery; Bailey v. Alabama, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191. See SLAVERY; PEONAGE; 11 Col. L. Rev. 363.

I. O. U. See at beginning of letter I.

IOWA (an Indian word denoting "*the place or final resting place*"). The name of one of the states of the United States, being the sixteenth admitted to the Union.

This state was admitted to the Union by an act of congress approved December 28, 1846.

IPSISSIMIS VERBIS (Lat.). In the identical words: opposed to *substantially.* Townsend v. Jemison, 7 How. (U. S.) 719, 12 L. Ed. 880; Summons v. State, 5 Ohio St. 346.

IPSO FACTO (Lat.). By the fact itself. By the mere fact. A proceeding *ipso facto* void is one which has not *prima facie* validity, but is void *ab initio.*

IPSO JURE (Lat.). By the operation of law. By mere law.

IPSWICH, DOMESDAY OF. The earliest extant record of any borough court with elective officers sitting regularly and administering a customary law of the sea. Black Book of Admiralty, Vol. II. It was abolished by 5 & 6 Will. IV. c. 76. Its twelve "capital portmen" were elected from the most fit, wealthy and discreet of the judges.

IRĀDE. A decree of the Sultan.

IRELAND. See UNITED KINGDOM OF GREAT BRITAIN AND IRELAND.

IRON SAFE CLAUSE. See INSURANCE.

IRRECUSABLE. A term used to indicate a certain class of contractual obligations recognized by the law which are imposed upon a person without his consent and without regard to any act of his own. They are distinguished from recusable obligations which are the result of a voluntary act on the part of a person on whom they are imposed by law. A clear example of an irrecusable obligation is the obligation imposed on every man not to strike another without some lawful excuse. A recusable obligation is based upon some act of a person bound, which is a condition precedent to the genesis of the obligation. These terms were first suggested by Prof. Wigmore in 8 Harv. Law Rev. 200. See Harr. Contr. 6, where this classification is very fully discussed. See CONTRACTUAL OBLIGATION.

IRREGULARITY. The doing or not doing that in the conduct of a suit at law, which, conformably with the practice of the court, ought or ought not to be done. Doe v. Harter, 2 Ind. 252. The term is usually applied to such informality as does not render invalid the act done; thus an irregular distress for rent due is not illegal *ab initio.*

A party entitled to complain of irregularity should except to it previously to taking

any step by him in the cause; Lofft 323, 333; because the taking of any such step is a waiver of any irregularity; 1 B. & P. 342. See ABATEMENT.

The court will, on motion, set aside proceedings for irregularity. On setting aside a judgment and execution for irregularity, they have power to impose terms on the defendant, and will restrain him from bringing an action of trespass, unless a strong case of damage appears. 1 Chitty, Bail. 133, n. And see Baldw. 246.

IRRELEVANCY. The quality or state of being inapplicable or impertinent to a fact or argument.

Irrelevancy, in an answer, consists in statements which are not material to the decision of the case; such as do not form or tender any material issue. People v. McCumber, 18 N. Y. 315, 321, 72 Am. Dec. 515.

IRRELEVANT EVIDENCE. That which does not support the issue, and which, of course, must be excluded. See EVIDENCE.

IRREMOVABILITY. The status of a pauper in England, who cannot be legally removed from the parish or union in which he is receiving relief, notwithstanding that he has not acquired a settlement there. Thus a pauper who has resided in a parish during the whole of the preceding year is irremovable. Stat. 28 and 29 Vict. c. 79, § 8.

IRREPARABLE INJURY. As a ground for injunction, it is that which cannot be repaired, retrieved, put back again, atoned for. Indian River Steamboat Co. v. Trans. Co., 28 Fla. 387, 10 South. 480, 29 Am. St. Rep. 258; it does not necessarily mean that the injury is beyond the possibility of compensation in damages, nor that it must be very great; Newell v. Sass, 142 Ill. 104, 31 N. E. 176. See INJUNCTION.

IRREPLEVIABLE. That cannot be replevied or delivered on sureties. Spelled, also, irreplevisable. Co. Litt. 145; 13 Edw. I. c. 2.

IRRESISTIBLE FORCE. A term applied to such an interposition of human agency as is, from its nature and power, absolutely uncontrollable; as, the inroads of a hostile army. Story, Bailm. § 25; *Lois des Batim.* pt. 2, c. 2, § 1. See INEVITABLE ACCIDENT.

IRRESISTIBLE IMPULSE. See INSANITY.

IRREVOCABLE. Which cannot be revoked or recalled. A power of attorney in which the attorney has an interest granted for consideration is irrevocable. See WILL; POWER OF ATTORNEY.

IRRIGATION. The operation of watering lands or causing water to flow over lands by artificial means for agricultural purposes.

"The word *irrigation*, in its primary sense, means a sprinkling or watering; but the best lexicographers give it an agricultural or *special* signification, thus: 'The watering of lands by drains or channels' (Worcester); 'The operation of causing water to flow over lands for nourishing plants' (Webster). The term irrigation as used in Colorado, in the constitution and statutes and judicial opinions, in view of the climate and soil, is in its *special* sense, to wit: 'The application of water to lands for the raising of agricultural crops and other products of the soil.'" Platte Water Co. v. Irrigation Co., 12 Colo. 529, 21 Pac. 711.

At common law the right of the riparian proprietor to divert the water of a stream for the purposes of irrigation was well recognized, and it was described as an artificial use of the water and not a natural use like taking the water for drinking, domestic purposes, and watering cattle, which would allow the use of all the water in the stream. A riparian owner could use for domestic purposes and watering cattle as much of the water of the stream as he chose, and if he found it necessary, take all the water in the stream, but in using the water for irrigation he was allowed to take only a reasonable amount of it and could not diminish the flow of the stream, so as to cause loss to other riparian owners; Gould, Waters 217; Kinney, Irrig. § 66; Tolle v. Correth, 31 Tex. 362, 98 Am. Dec. 543 and note; Fleming v. Davis, 37 Tex. 173; Tyler v. Wilkinson, 4 Mas. 400, Fed. Cas. No. 14,312; Ingraham v. Hutchinson, 2 Conn. 584.

This doctrine of the common law was sufficient for any irrigation that had been found necessary in England or in the United States east of the Mississippi River. But in what was once known as the Great American Desert and is now called the Arid Region west of the Mississippi, "there has grown up or evolved out of the necessities of the people and the exigencies of the communities interested, a great body of law, custom, regulation, and judicial interpretation. These statutes in general form the principle of prior appropriation as wrought out by the earlier miners, and embodied in federal law, and then by the states and territories, being steadily sustained by the courts, with a few exceptions, as the common law of an arid region such as ours. The development of the beneficial use of water has of course modified the practice of prior appropriations to a first or prior *pro rata* share of the natural waters, when taken from bed or source for industrial purposes;" Senate Report on Irrigation, 1890.

After the discovery of gold in California had brought great numbers of people to that region, the miners developed a sort of code of their own, called the Mining Customs, which in 1851 were recognized by the legislature of California and made a part of the law of the state. By these customs a

new principle in water rights was developed, called the Law of Priority of Appropriation, by which the person who first uses the water of a stream is by virtue of priority of occupation entitled to hold the same, and may use all the water in the stream for the purpose of carrying on his mining operations; Kinney, Irrig. § 104; Geertson v. Barrack, 3 Idaho, 344, 29 Pac. 42. This doctrine beginning in the Mining Customs and sanctioned by the legislature of California and the supreme court of that state, was afterwards approved by the supreme court of the United States, and congress not only passed acts which sanctioned the doctrine as regarded mines, but extended it to all other beneficial uses or purposes for which water may be essential, as irrigation for the purposes of argiculture and horticulture and to milling, manufacturing, and municipal purposes, in the Arid Region.

The rights of a riparian owner to the use of the water flowing by his land are not the same in the arid states of the west as they are in the eastern states. These rights have been altered by many of the western states by their conditions and laws because of the totally different circumstances in which their inhabitants are placed; Clark v. Nash, 198 U. S. 361, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

In order to make an appropriation of water valid under the Arid Region doctrine, there must be a *bona fide* intention to use the water for some beneficial purpose; Davis v. Gale, 32 Cal. 33, 91 Am. Dec. 554; Woolman v. Garringer, 1 Mont. 543; Dick v. Caldwell, 14 Nev. 167; Munroe v. Ivie, 2 Utah 535; Ft. Morgan Land & Canal Co. v. Ditch Co., 18 Colo. 1, 30 Pac. 1032, 36 Am. St. Rep. 259. The intention to appropriate must be shown by the work and labor usual in such enterprises to accomplish the end. If there is no actual intention to appropriate the water for a beneficial purpose, or if there is unnecessary delay in the completion of the works for the appropriation of the water, a subsequent appropriator who diverts and applies the water for a beneficial purpose has the superior right; Ball v. Kehl, 87 Cal. 505, 25 Pac. 679; Feliz v. Los Angeles, 58 Cal. 80; Basey v. Gallagher, 20 Wall. (U. S.) 682, 22 L. Ed. 452; Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 240. A ditch or canal company may appropriate or divert water and then sell it to other persons, provided the water is all applied to beneficial purposes by the persons to whom it is sold; Combs v. Ditch Co., 17 Colo. 146, 28 Pac. 966, 31 Am. St. Rep. 275. It is also necessary to the validity of an appropriation that the water be used continuously. If allowed to run to waste for any length of time it will be treated as abandoned and open for a fresh appropriation. But water once lawfully appropriated is not lost by a change in its use; Hill v. Smith, 27 Cal. 476; Sims v. Smith, 7 Cal. 148, 68 Am. Dec. 233.

All persons in the Arid Region competent to hold lands have also the right to appropriate water; Lobdell v. Hall, 3 Nev. 507; Quigley v. Birdseye, 11 Mont. 439, 28 Pac. 741. But under the Arid Region doctrine an appropriator need not necessarily be a riparian owner of land. The right to appropriate is not an incident of the soil, but is simply a possessory right acquired by valid appropriation; Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 13, 25 Am. St. Rep. 245; Bloom v. West, 3 Colo. App. 212, 32 Pac. 846; Barnes v. Sabron, 10 Nev. 217; Basey v. Gallagher, 20 Wall. (U. S.) 670, 22 L. Ed. 452; Broder v. Min. Co., 101 U. S. 276, 25 L. Ed. 790; Titcomb v. Kirk, 51 Cal. 288; Kinney, Irrig. § 156.

A provision that no land shall be included in an irrigation district, except such as may be benefited by the system of irrigation used in that district, means that the land must be such that it may be substantially benefited. It is not sufficient that such irrigation creates an opportunity thereafter to use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it has produced in reasonable quantities, and with ordinary certainty, without the aid of irrigation; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369.

In order to make an appropriation valid there must be sufficient notice to the public of the intention to appropriate; and the notice may be in any form which gives the name of the appropriator and a description of the stream and of the purposes for which the water is to be taken; Osgood v. Min. Co., 56 Cal. 571.

In Krall v. U. S., 79 Fed. 241, 24 C. C. A. 543, it was held that the previous establishment of a government reservation below the point of appropriation does not affect the right, except so far as the waters of the stream have been previously appropriated for the use of such reservation. But Gilbert, J., dissented on the authority of Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761, which held that a homestead entryman on land over which the waters of a creek flowed had the right to the natural flow of the water as against a subsequent appropriation.

The rights of an appropriator of water for irrigating purposes are not interfered with by a subsequent appropriation for mining purposes at a point further up the stream, unless the use for the latter purpose impairs the value of the water for the purpose of irrigation; Wyatt v. Irr. Co., 1 Colo. App. 480, 29 Pac. 906; but the mine user is liable to the lower user for injury to the land by debris discharged from the mill; Montana Co. v. Gehring, 75 Fed. 384, 21 C. C. A. 414.

The liability of an irrigation company for failing to supply a certain volume of water to the holders of water rights, according to contract, cannot be determined on the theory that the company is a common carrier; Wyatt v. Irrigation Co., 1 Colo. App. 480, 29 Pac. 906.

Although in the Arid Region the doctrine of appropriation generally prevails, the old common-law doctrine of the reasonable use of water by a riparian owner for irrigation is not entirely abolished in all the jurisdictions. In some states the common-law doctrine has been entirely abolished, but in others it exists side by side with the doctrine of appropriation, and is applied usually in the case of riparian owners who, making no claim to an appropriation, wish to use some of the waters of a stream for irrigation; Kinney, Irrig. 273.

By statute in many of the arid and semi-arid states the construction of reservoirs is directly encouraged, and the federal government has constructed numerous reservoirs. Early customs required merely the taking of the water and its application to a beneficial use. Early legislation required the posting of an official notice at the point of reversion and the recording of the same with the county clerk. Now a state engineer has general supervision over the waters of the state. No appropriation can be made except under a permit issued by him, and the applicant must file a map. The states are divided into irrigation divisions embracing the entire branch of a given stream. Each division is divided into districts for administrative purposes. They generally embrace some particular tributary of the main stream. The states in the exercise of their police power have assumed the entire control of the distribution. The amount of water to which an appropriator is entitled, and the order in which he shall be served are governed by the courts and the boards. The measurement of water is one of the most complicated subjects, since modern science has not yet satisfactorily solved the problem. From the nature of the business of transporting water many ditch companies have been formed; they rarely have competition, and in order that their rates may not be confiscatory, it is generally provided that they shall be fixed by some governing board to insure reasonableness.

The magnitude of many irrigation enterprises places them beyond the ability of individuals as well as of the average corporation, and this led to the adoption in California in 1887 of what is known as the Wright Act, which has been followed in several of the other states. Its purpose is the organization of irrigation districts; as such it is a public corporation organized for the purpose of constructing and operating improvements that are for the public welfare; its officers are public officials; Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. By the United States Reclamation Act of June 17, 1902, irrigation was greatly aided; it provided that all money received from the sale of public land in the arid and semi-arid states, except Texas, should be used in the construction of irrigation works.

In developing irrigation projects in connection with which there is a considerable proportion of land in private ownership, it has been found necessary to provide some means of dealing with the private owners as a body; the secretary of the interior has therefore required that the settlers who will ultimately receive water from the projected system shall form an incorporated association. Hence laws have been passed in several of the states providing for the incorporation of water users' associations; Col. Sessions 1905; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

For the rights of priority to take water from natural streams, see Colorado Acts, 1881, and Wyoming Acts, 1891, which have furnished the basis of the two systems generally followed.

See Mills, Irrigation Manual.

On a bill filed by Kansas to restrain Colorado and certain corporations organized under its laws from diverting the waters of the Arkansas river for the irrigation of lands in Colorado, thereby preventing the customary flow of its waters into and through Kansas (to which a demurrer was filed), it was held that it would not be unreasonable to enforce against Colorado its own local rule as to the use of flowing water for irrigation, yet as it did not appear that the detriment to Kansas, while substantial, was so great as to make the appropriation by Colorado an inequitable apportionment between the two states, the bill was dismissed, without prejudice to the right of Kansas to begin new proceedings whenever it shall appear that the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two states; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

See, generally, Black's Pomeroy on Waters; Hall; Kinney, Irrig.; 5 Special Consular Reports, 1891; Gould, Waters § 217; Lux v. Haggin, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674; Senate Report on Irrigation, 1890, where all the acts in the irrigation states are set forth, together with a digest of reported cases; Mills, Constitutional Annotations § 510, where the cases and constitutional provisions are collected; WATERS.

IRROTULATIO (Law Lat.). An inrolling; a record. 2 Rymer, Foed. 673; Du Cange; Law Fr. & Lat. Dict.; Bracton, fol. 293; Fleta, lib. 2, c. 65, § 11.

ISLAND. A piece of land surrounded by water.

When new islands arise in the open sea, they belong to the first occupant; but when they are newly formed so near the shore as to be within the boundary of some state, they belong to that state.

Islands which arise in rivers when in the middle of the stream belong in equal parts to the riparian proprietors. When they arise mostly on one side, they belong to the riparian owners up to the middle of the stream.

The owner in fee of the bed of a river or other submerged land is the owner of any bar, island, or dry land which may be subsequently formed thereon; St. Louis v. Rutz, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941.

Where an island springs up in a navigable river, and by accretion to the shores of the island and the mainland, they are united, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land; Cooley v. Golden, 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

If an island springs up in a navigable stream it belongs to the sovereign, and not to the owner of the land on either of the banks of the stream; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; if there be an accretion to plaintiff's land which gradually extends to the island, the owner of the land would acquire the island with the accretions; *id.* A mussel bed over which the water flows at every tide is not an island, but should be denominated flats; King v. Young, 76 Me. 76, 49 Am. Rep. 596. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes.

An island that arises in the bed of a stream usually first presents itself as a sand bar; Cox v. Arnold, 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Glassell v. Hansen, 135 Cal. 547, 67 Pac. 964; Holman v. Hodges, 112 Ia. 714, 84 N. W. 950, 58 L. R. A. 673, 84 Am. St. Rep. 367; a bar, before it will support vegetation of any kind, may become valuable for fishing, hunting, as a shooting park, for the harvest of ice, for pumping sand, etc. If further deposits of alluvion upon it would make it more valuable, the law of accretion should still apply; Fowler v. Wood, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534.

See ACCESSION; ACCRETION; BOUNDARY.

ISSINT (Norm. Fr. thus, so). A term formerly used to introduce a statement that special matter already pleaded amounts to a denial.

In actions founded on deeds, the defendant may, instead of pleading *non est factum* in the common form, allege any special matter which admits the execution of the writing in question, but which, nevertheless, shows that it is not in law his deed, and may conclude with, "and so it is not his deed;" as, that the writing was delivered to A B as an escrow, to be delivered over on certain conditions, which have not been complied with, "and *so* it is not his act," or that at the time of making the writing the defendant was a feme covert, "and *so* it is not her act;" Bac. Abr. *Pleas* (H 3), (I 2); Gould, Pl. § 64.

An example of this form of plea, which is sometimes called the special general issue, occurs in Bauer v. Roth, 4 Rawle (Pa.) 83.

ISSUABLE. **In Practice.** Leading or tending to an issue. An issuable plea is one upon which the plaintiff can take issue and proceed to trial.

ISSUABLE TERMS. Hilary and Trinity Terms were so called from the making up of the issues, during those terms, for the assizes, that they might be tried by the judges, who generally went on circuit to try such issues after these two terms. But for town causes all four terms were issuable. 3 Bla. Com. 350; 1 Tidd, Pr. 121. Since the Judicature Acts of 1873 and 1875 this distinction has become obsolete.

ISSUE. **In Realty Law.** Descendants. All persons who have descended from a common ancestor. 3 Ves. Ch. 257; 19 *id.* 547; 1 Roper, Leg. 90.

In a will it may be held to have a more restricted meaning, to carry out the testator's intention; 7 Ves. Ch. 522; 1 Roper, Leg. 90. 2 Wills. Exec. 386, n.; but it has been held that a devise to "issue" means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself without resort to extrinsic evidence; Flora v. Anderson, 67 Fed. 182. See Bac. Abr. *Curtesy* (D), *Legatee.*

If the term be used in the sense of heirs, that is, as comprehending a class to take by inheritance, it is to be interpreted as a term of limitation, and brings the case within the Rule in Shelley's case; and this is the interpretation that *prima facie* will be given it; Robins v. Quinliven, 79 Pa. 333. It means, *prima facie*, "heirs of the body"; Stayman v. Paxson, 221 Pa. 446, 70 Atl. 803; but if the context indicate a different intention, it will be sustained as a word of purchase; 2 Wms. R. P. 603. In a deed it is always taken as a word of purchase; Taylor v. Taylor, 63 Pa. 483, 3 Am. Rep. 565; 4 Term R. 299; 2 Ves. Sr. 681; 2 Wms. R. P. 604.

In Pleading. A single, certain, and material point, deduced by the pleadings of the parties, which is affirmed on the one side and denied on the other.

The entry of the pleadings. 1 Chitty, Pl. 630.

Several connected matters of fact may go to make up the point in issue.

An actual issue is one formed in an action brought in the regular manner, for the purpose of trying a question of right between the parties.

A collateral issue is one framed upon some matter not directly in the line of the pleadings; as, for example, upon the identity of one who pleads diversity in bar of execution. 4 Bla. Com. 396.

A common issue is that which is formed upon the plea of *non est factum* to an action of covenant broken.

This is so called because it denies the deed only, and not the breach, and does not put the whole declaration in issue, and because there is no general issue to this form of action. 1 Chitty, Pl. 482; Gould, Pl. c. 6, pt. 1, § 7.

An issue in fact is one in which the truth of some fact is affirmed or denied.

In general, it consists of a direct affirmative allegation on one side and a direct negative on the other. Co. Litt. 126 *a;* Bac. Abr. *Pleas* (G 1); 2 W. Bla. 1312; Simonton v. Winter, 5 Pet. (U. S.) 149, 8 L. Ed. 75. But an affirmative allegation which completely excludes the truth of the preceding may be sufficient; 1 Wils. 6. Thus, the general issue in a *writ of right* (called the mise) is formed by two affirmatives; the demandant claiming a greater right than the tenant, and the tenant a greater than the demandant. 3 Bla. Com. 195, 305. And in an action of dower the count merely demands the third part of [ ] acres of land, etc., as the dower of the demandant of the endowment of A B, heretofore the husband, etc., and the general issue is that A B was not seised of such estate, etc., and that he could not endow the demandant thereof, etc.; which mode of denial, being argumentative, would not, in general, be allowed. 2 Saund. 329.

A feigned issue is one formed in a fictitious action, under direction of the court, for the purpose of trying before a jury some question of fact.

Such issues are generally ordered by a court of equity, to ascertain the truth of a disputed fact. They are also frequently used in courts of law, by the consent of the parties, to determine some disputed rights without the formality of pleading; and by this practice much time and expense are saved in the decision of a cause; 3 Bla. Com. 452. Suppose, for example, it is desirable to settle a question of the validity of a will in a court of equity.

For this purpose an action is brought, in which the plaintiff by a fiction declares that he laid a wager for a sum of money with the defendant, for example, that a certain paper is the last will and testament of A, then avers it is his will, and therefore demands the money; the defendant admits the wager, but avers that it is not the will of A; and thereupon that issue is joined, which is directed out of chancery, to be tried; and thus the verdict of the jurors at law determines the fact in the court of equity. A feigned issue is also formed for trial by a jury in certain interpleader proceedings; as in proceedings to test the title to goods levied upon by the sheriff and claimed by a third party.

The name is a misnomer, inasmuch as the *issue* itself is upon a real, material point in question between the parties, and the circumstances only are fictitious. It is a contempt of the court in which the action is brought to bring such an action, except under the direction of some court; 4 Term 402.

A formal issue is one which is framed according to the rules required by law, in an artificial and proper manner.

A general issue is one which denies in direct terms the whole declaration: as, for example, where the defendant pleads *nil debet* (that he owes the plaintiff nothing), or *nul* disseisin (no disseisin committed). 3 Greenl. Ev. § 9; Steph. Pl. 220; 3 Bla. Com. 305. See GENERAL ISSUE.

An immaterial issue is one formed on some immaterial matter, which, though found by the verdict, will not determine the merits of the cause, and will leave the court at a loss how to give judgment. 2 Wms. Saund. 319, n. 6. See IMMATERIAL ISSUE.

An informal issue is one which arises when a material allegation is traversed in an improper or inartificial manner. Bac. Abr. *Pleas* (G 2), (N 5); 2 Wms. Saund. 319 *a*, n. 7. The defect is cured by verdict, by the statute 32 Hen. VIII. c. 30.

A material issue is one properly formed on some material point which will, when decided, settle the question between the parties.

A special issue is one formed by the defendant's selecting any one substantial point and resting the weight of his cause upon that. It is contrasted with the general issue. Comyns, Dig. *Pleader* (R 1, 2).

ISSUE ROLL. **In English Law.** The name of a record which contained an entry of issue as soon as it was found. It was abolished by the rules of Hilary Term, 1834. Moz. & W. Dict.

ISSUES. **In English Law.** The goods and profits of the lands of a defendant against whom a writ of *distringas* or *distress infinite* has been issued, taken by virtue of such writ, are called *issues*. 3 Bla. Com. 280; 1 Chitty, Crim. Law 351.

ISSUES ON SHERIFFS. Fines and amercements inflicted on sheriffs for neglects and defaults, levied out of the issues and profits of their lands. Toml.

ISTIMRAR. Continuance; perpetuity; especially a farm or lease granted in perpetuity by government or a zemindar *(q. v.)*. Wilson's Gloss. Ind.

ISTIMRARDAR. The holder of a perpetual lease. Moz. & W.

ITA EST (Lat.). So it is.

Among the civilians, when a notary dies, leaving his register, an officer who is authorized to make official copies of his nota-

rial acts writes, instead of the deceased notary's name, which is required when he is living, *ita est*.

ITA QUOD (Lat.). The name or condition in a submission, which is usually introduced by these words, "so as the award be made of and upon the premises," which, from the first words, is called the *ita quod*.

When the submission is with an *ita quod*, the arbitrator must make an award of all matters submitted to him of which he had notice, or the award will be entirely void; Cro. Jac. 200; 2 Vern. Ch. 109; Rolle, Abr. *Arbitrament* (L, 9).

ITALY. A constitutional monarchy of Europe in which the executive power belongs exclusively to the sovereign. He is irresponsible. He appoints his ministers, who are responsible. The signature of one of them is necessary to the validity of royal decrees. The king shares the legislative power with the parliament, which consists of two chambers, the senate and the chamber of deputies. The senate consists of princes of the blood and an unlimited number of senators over forty years of age who are qualified under twenty-one different categories, for instance, having held high office, attained celebrity in science, literature, etc., and are nominated by the king for life. Their number now exceeds three hundred. It is the highest court of justice in the trial of political offences and the impeachment of ministers. The chamber of deputies consists of five hundred and eight members, who are elected for five years in single-member constituencies by manhood suffrage with certain educational and property tests.

The judiciary system is modeled on that of France (see COURTS OF FRANCE) with Courts of Cassation in five principal cities, twenty appeal court districts, and one hundred and sixty tribunal districts etc. In thirteen principal towns there are *Pretóri* having exclusive penal jurisdiction. Encycl. Br.

ITEM (Lat.). Also; likewise; in like manner; again; a second time. These are the various meanings of this Latin adverb.

It is used to introduce a new paragraph, or chapter, or division; also to denote a particular in an account. It is used when any article or clause is added to a former, as if there were here a new beginning. Du Cange. Hence the rule that a clause in a will introduced by *item* shall not influence or be influenced by what precedes or follows, if it be sensible, taken independently; 1 Salk. 239; or if there is no plain intent that it should be taken in connection, in which cases it may be construed conjunctively, in the sense of *and*, or *also*, in such a manner as to connect sentences. If, therefore, a testator bequeath a legacy to Peter, payable out of a particular fund or charged upon a particular estate, *item* a legacy to James, James's legacy as well as Peter's will be a charge upon the same property; 1 Bro. C. C. 482; Cro. Car. 368.

ITER (Lat.). **In Civil Law.** A way; a right of way belonging as a servitude to an estate in the country (*prædium rusticum*). The right of way was of three kinds: 1, *iter*, a right to walk, or ride on horseback, or in a litter; 2, *actus*, a right to drive a beast or vehicle; 3, *via*, a full right of way, comprising right to walk or ride, or drive beast or carriage. Heineccius, Elem. Jur. Civ. § 408. Or, as some think, they were distinguished by the width of the objects which could be rightfully carried over the way; *e. g. via*, 8 feet; *actus*, 4 feet, etc. Mackeldey, Civ. Law § 290; Bracton 232; 4 Bell, H. L. 390.

In Old English Law. A journey, especially a circuit made by a justice in eyre, or itinerant justice, to try causes according to his own mission. Du Cange; Bracton, lib. 3, c. 11; Britton, c. 2; Cowell. See EYRE.

ITINERANT. Wandering; travelling; those who make circuits. See EYRE.

J

JACENS. In abeyance. Toml.

JACENS HÆREDITAS. See HÆREDITAS JACENS.

JACET IN ORE. It lies in the mouth. Fleta, lib. 5, c. 5, § 49.

JACOBUS. A gold coin an inch and three-eighths in diameter, in value about twenty-five shillings, so called from James I., in whose reign it was first coined.

It was also called *broad*, *laurel*, and *broad-piece*. Its value is sometimes put at twenty-four shillings, but Macaulay speaks of a salary of eight thousand Jacobuses as equivalent to ten thousand pounds sterling. Hist. Eng. ch. xv. A cut of this coin showing both sides will be found in the Century Dictionary, *sub v. broad*.

JACTITATION. Boasting of something which is challenged by another. Moz. & W.

The word is used principally with reference to *jactitation of marriage*, which title see. In Louisiana, it is the name used as an action for slander of title to land.

Jactitation of right to a seat in a church appears to be the boasting by a man that he has a right or title to a pew or sitting in a church to which he has legally no title.

Jactitation of tithes is the boasting by a man that he is entitled to certain tithes, to which he has legally no title. See Rog. Ecc. L. 487.

JACTITATION OF MARRIAGE. In English Ecclesiastical Law. The untruthful boasting by an individual that he or she has married another, from which it may happen that they will acquire the reputation of being married to each other. 3 Bla. Com. 93. It was held that the boasting must be malicious as well as false; 2 Hagg. 220, 280.

The ecclesiastical courts formerly might in such cases entertain a libel by the party injured, and on proof of the facts enjoin the wrong-doer to perpetual silence, and, as a punishment, make him pay the costs; 3 Bla. Com. 93; 2 Hagg. Cons. 423, 285; 2 Chitty, Pr. 459.

The jurisdiction of such a suit would now be in the Probate, Divorce, and Matrimonial Division, but the remedy is now rarely resorted to, as, in general, since Lord Hardwicke's act (1766), there is sufficient certainty in the forms of legal marriage in England to prevent any one being in ignorance whether he or she is really married or not—a reproach which, however, was often made against the law of Scotland. The Scotch suit of a declarator of putting to silence, which is equivalent to jactitation of marriage, is often resorted to, a notorious instance of its use being that in the Yelverton marriage case; 1 Sc. Sess. Cas. 3d ser. 161.

JACTURA (Lat. *jaceo*, to throw). A jettison *(q. v.)*.

JACTUS (Lat.). A throwing goods overboard to lighten or save the vessel, in which case the goods so sacrificed are a proper subject for general average. Dig. 14. 2, *de lege Rhodia de jactu;* 1 Pardessus, *Collec. des Lois marit.* 104; Kuricke, *Inst. Marit. Hanseat.* tit. 8; 1 Par. Mar. Law 288.

JACTUS LAPILLI (Lat. the throwing down of a stone). In Civil Law. A method of preventing the acquisition of title by prescription by interrupting the possession. The real owner of land on which another was building, and thereby acquiring title by usucapion *(q. v.)*, could challenge the intrusion and interrupt the prescription by throwing down a stone from the building before witnesses called upon to note the transaction.

JAIL. See GAOL; PRISON.

JAMMUNDLING, JAMUNDILINGI. Freemen who delivered themselves and property to the protection of a more powerful person, in order to avoid military service and other burdens. Spelman, Gloss. Also, a species of serfs among the Germans. Du Cange. The same as *commendati*.

JANITOR. A person employed to take charge of rooms or buildings, to see that they are kept clean and in order, to lock and unlock them, and generally to care for them. Fagan v. City of New York, 84 N. Y. 352. See FLAT.

Formerly, a door-keeper, Fleta, lib. 2, c. 24.

JAPAN. An empire of Asia, consisting of four islands lying in the Pacific Ocean east of China, Korea, and Siberia. The government is a monarchy administered by an emperor, and what may be termed a cabinet and privy council. The constitution was promulgated in 1889. There is an imperial parliament consisting of two houses.

The house of peers consists of princes and marquises (hereditary); counts, viscounts and barons elected by their respective orders in the maximum ratio of one to every five; men of education or distinguished service nominated by the emperor; and representatives of the highest tax payers, elected one for each election district by their own class. The lower house is elected by the people, partly by incorporated cities, and partly by the forty-three election districts. A general election for the upper house occurs every seven years, and for the lower house every four years. The great council or cabinet consists of ten members, the nine ministers who are heads of departments and the minister president of state who presides over them. These constitute the cabinet.

Between them and the crown is a small body of men known as the "Elder Statesmen," survivors of those who raised Japan to her present high position among nations. There is also a council of a variable number of distinguished men, who debate and advise upon matters referred to them by the crown.

For an extended review of the "Administration of Justice in Japan," see a series of articles by Professor John H. Wigmore, 36 Am. L. Reg. N. S. 437, 491, 571, 628.

JEOFAILE (L. Fr.). I have failed; I am in error.

Certain statutes are called statutes of amendments and jeofailes, because, where a pleader perceives any slip in the form of his proceedings, and acknowledges the error (jeofaile), he is at liberty, by those statutes, to amend it. The amendment, however, is seldom made; but the benefit is attained by the court's overlooking the exception; 3 Bla. Com. 407; 1 Saund. 228, n. 1; Doct. Pl. 297; Dane, Abr. These statutes do not apply to indictments.

JEOPARDY. The situation of a prisoner when a trial jury is sworn and impanelled to try his case upon a valid indictment, and such jury has been charged with his deliverance. State v. McKee, 1 Bail. (S. C.) 655, 21 Am. Dec. 499; Weinzorpflin v. State, 7 Blackf. (Ind.) 191; McFadden v. Com., 23 Pa. 12, 62 Am. Dec. 308.

It is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him. Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757.

This is the sense in which the term is used in the United States constitution: "no person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U. S. Const. art. V. Amend., and in the statutes or constitutions of most if not all of the states.

As commonly used it must be distinguished from former acquittal and former conviction. Obviously it includes the rules governed by those two terms, but there may be a former jeopardy without a previous acquittal or conviction, and this was intended by the court in Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757, where it was said: "The plea of former jeopardy stands on narrower, more technical, and less substantial grounds. It alleges only that there might have been a conviction or acquittal if the judge trying the case had not made a mistake of law, which prevented a verdict." It might be said that former jeopardy is the genus. See 10 Va. L. Reg. 410, and note.

This provision in the constitution of the United States binds only the United States; Fox v. Ohio, 5 How. (U. S.) 410, 12 L. Ed. 213; State v. Shirer, 20 S. C. 392; 1 Bish. N. Cr. L. § 981. At one time it was not uniformly so considered, and it was held *contra*, Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; State v. Moor, Walker (Miss.) 134, 12 Am. Dec. 541. This was the same fluctuation of judicial opinion as to the effect of the early constitutional amendments which affected other questions. See EMINENT DOMAIN. In this country this rule depends in most cases on constitutional provisions. In England it is said to be one of the universal maxims of the common law; 4 Bla. Com. 335; and Stephen in repeating the expression adds in a note that although Blackstone uses the term "jeopardy of his life," it is not confined to capital offences, and extends to misdemeanors; 4 Steph. Com. 384; 3 B. & C. 502. In a leading case where the question was considered whether the rule applied when a jury had been discharged for want of agreement it was held that the court had authority in its discretion to discharge the jury in such a case, and that such action did not operate as an acquittal. This is also the prevailing opinion in this country. See *infra*. In the English case referred to, it was said by Cockburn, C. J., that in considering the question of the right to discharge a jury in such case they were not dealing with one of those principles which lie at the foundation of the law, but with a matter of practice, which has fluctuated at various times, and "even at the present day may perhaps be considered as not finally settled;" L. R. 1 Q. B. 289. This would seem to be a more reasonable construction of the language of Lord Cockburn than that sometimes put upon it. See 1 Bish. N. Cr. L. § 982. That which he characterized as a mere matter of practice was not the existence of the doctrine of jeopardy, but whether it was applicable.

The constitutional provision, which refers to "*life or limb*," properly interpreted, extends only to treason and felonies, but it has usually been extended to misdemeanors; 1 Bish. Cr. L. § 990; McCauley v. State, 26 Ala. 135; but not to proceedings for the recovery of penalties, nor to applications for sureties of the peace; 1 Bish. Cr. L. § 990.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; Cooley, Const. Lim., 4th ed. 404; approved in O'Brian v. Com., 9 Bush (Ky.) 333, 15 Am. Rep. 715; Ex parte Fenton, 77 Cal. 183, 19 Pac. 267.

The discharge of a competent jury before rendering verdict without defendant's consent, express or implied, or without sufficient cause, operates as an acquittal; Ex parte Ulrich, 42 Fed. 587; People v. Warden of City Prison, 202 N. Y. 138, 95 N. E. 729; Com.

v. Hart, 149 Mass. 7, 20 N. E. 310; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; State v. Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136; People v. Taylor, 117 Mich. 583, 76 N. W. 158; Jones v. State, 97 Ala. 77, 12 South. 274, 38 Am. St. Rep. 150; State v. Frisbie, 8 Okl. Cr. 406, 127 Pac. 1091.

The serious illness or insanity of the defendant, the illness, insanity, or death of the judge or a juror, engaged in the trial, the death of a juror's mother, misconduct of a juror, and upon judicial inquiry a finding that a juror is prejudiced, have been held to create a sufficient cause for the withdrawal of a juror and a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; Fails v. State, 60 Fla. 8, 53 South. 612, Ann. Cas. 1912B, 1146; State v. Hansford, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; People v. Sharp, 163 Mich. 79, 127 N. W. 758; Hedger v. State, 144 Wis. 279, 128 N. W. 80.

The absence of a witness for the state is not sufficient, unless by consent of the accused, and his consent is not established by the mere fact that, being without counsel, he does not object to a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; nor does a prisoner's failure to object to the discharge of the jury operate as a consent to it; Ex parte Glenn, 111 Fed. 257; but where no express consent was given and the accused allowed a new trial and made no objection to the discharge until after verdict therein, he will be considered as consenting and plea of former jeopardy is bad; Morgan v. State, 3 Sneed (Tenn.) 475. A jury may be discharged from rendering a verdict whenever the court is of the opinion that there is a manifest necessity for the act, or that the needs of public justice would otherwise be defeated, or is satisfied that the jurors are unable to reach an agreement, and the same will be no bar to a second trial; Dreyer v. Illinois, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. Ed. 79; State v. Whitson, 111 N. C. 695, 16 S. E. 332; Com. v. Cody, 165 Mass. 133, 42 N. E. 575; State v. Barnes, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; People v. Horn, 70 Cal. 17, 11 Pac. 470; there are statutory provisions to the same effect: N. Y. Code Cr. Pr. § 430; Ala. Acts 1907, § 7314; Kan. Cr. Code § 208; Ohio R. S. § 7313; and Idaho R. S. § 7905.

Trial of the accused with his consent by a jury of more or less members than is legally required amounts to a nullity and on a new trial the plea of former jeopardy is bad; Cancemi v. People, 18 N. Y. 129; State v. Hudkins, 35 W. Va. 250, 13 S. E. 367.

Where, by statute, the state, with the permission of the presiding judge, is allowed an appeal it may take the same after a verdict of acquittal, upon the ground that it is a matter of procedure and that jeopardy has not yet attached; State v. Lee, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202.

The discharge of a competent jury without defendant's consent, express or implied, without sufficient cause, operates as an acquittal; People v. Gardner, 62 Mich. 307, 29 N. W. 19; People v. Curtis, 76 Cal. 57, 17 Pac. 941; Gunter v. State, 83 Ala. 96, 3 South. 600.

But where the indictment was good and the judgment erroneously arrested, the verdict was held to be a bar; State v. Norvell, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458.

After a jury has been impanelled and sworn in a criminal case, the trial cannot stop short of a verdict without the defendant's consent except for imperative reasons, such as the illness of a juror, the judge, or the defendant, the absence of a juror, or a disagreement. The absence of a witness for the state is not sufficient unless by consent of the accused, and his consent is not established by the mere fact that, being without counsel, he does not object to a postponement; State v. Richardson, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238. The discharge of a jury on the last day of the term after they have for five days failed to agree upon a verdict, made against the objection of the defendant, bars another trial for the same offence; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757; *contra*, State v. Whitson, 111 N. C. 695, 16 S. E. 332; Ex parte Brown, 102 Ala. 179, 15 South. 602.

Where one of the jurors is discharged because of the death of his mother, and the court declared a mistrial, a plea of former jeopardy is not good; Stocks v. State, 91 Ga. 831, 18 S. E. 847.

An order of an examining magistrate, either committing or discharging the accused, is not a bar to a second hearing on the same charge; Ex parte Robinson, 108 Ala. 161, 18 South. 729.

Where a jury in a criminal case is discharged during the trial and the defendant subsequently put on trial before another jury, he is not twice put in jeopardy within the meaning of the fifth amendment to the United States Constitution; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; and in a later case it is said that a jury may be discharged from giving any verdict, whenever the court is of opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may also order a trial before another jury, and a defendant is not thereby twice put in jeopardy; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146. This case is quite in accord with an English decision made upon much consideration; L. R. 1 Q. B. 289; and Bishop, as the result of a very extended examination and citation of

authorities, concludes: "But in England and Ireland, at present, and in most of our states, when a reasonable time for discussion and reflection has been given the jury, and they have in open court declared themselves unable to agree, and the judge is satisfied of the truth of the declaration, they may be discharged and the prisoner held to be tried anew. And this doctrine is applied as well in felony as in misdemeanor." Bish. Cr. L. § 1033. See JURY.

It has been held that the accused was not in jeopardy, and may be again put upon trial, if the court had no jurisdiction of the cause; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; or one of its members is related to the prisoner and under a statute the conviction is void; People v. Connor, 142 N. Y. 130, 36 N. E. 807; or if the indictment was so defective that no valid judgment could be rendered upon it; Black v. State, 36 Ga. 447, 91 Am. Dec. 772; Shoener v. Pennsylvania, 207 U. S. 188, 28 Sup. Ct. 110, 52 L. Ed. 163, affirming Com. v. Shoener, 216 Pa. 71, 64 Atl. 890; Com. v. Bakeman, 105 Mass. 53; or if by any overruling necessity the jury are discharged without a verdict; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; State v. Hansford, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; State v. Wiseman, 68 N. C. 203; or if the term of the court comes to an end before the trial is finished; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; or the jury are discharged with the consent of the defendant, express or implied; Com. v. Stowell, 9 Metc. (Mass.) 572; or where the jury has been discharged, upon ascertainment that a prejudice exists within that body; In re Ascher, 130 Mich. 540, 90 N. W. 418, 57 L. R. A. 806; Com. v. McCormick, 130 Mass. 61, 39 Am. Dec. 423; or if after verdict against the accused it has been set aside on his motion for a new trial or on writ of error, or the judgment thereon has been arrested; People v. Casborus, 13 Johns. (N. Y.) 351; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469, n.; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Whitson, 111 N. C. 695, 16 S. E. 332; People v. Schmidt, 64 Cal. 260, 30 Pac. 814; Lovett v. State, 33 Fla. 389, 14 South, 837, n.; or where there is any irregularity of verdict which will compel a reversal upon the application of the accused; Gunter v. State, 83 Ala. 96, 3 South. 600; People v. Carty, 77 Cal. 213, 19 Pac. 490; or where there was a variance and the verdict was set aside; Leath v. Com., 32 Gratt. (Va.) 876.

See Cooley, Const. Lim., 4th ed. 404; Von Holst, Const. L. 260; Story, Const. § 1787.

Where a prisoner during his trial fled the jurisdiction, and the jury was discharged, he was never in jeopardy; People v. Higgins, 59 Cal. 357.

If the judgment of conviction be reversed on the prisoner's own appeal, it is not a bar; U. S. v. Ball, 163 U. S. 662, 16 Sup. Ct. Rep. 1192, 41 L. Ed. 300. The constitutional provision was never intended to, and properly construed does not, cover the case of a judgment which has been annulled at the request of the accused; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773; In re Somers, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700; Waller v. State, 104 Ga. 505, 30 S. E. 835; State v. Billings, 140 Mo. 205, 41 S. W. 778; Com. v. Murphy, 174 Mass. 369, 54 N. E. 860, 48 L. R. A. 393, 75 Am. St. Rep. 353.

The constitutional guaranty is against two trials for the same offence, and the decisions as to what constitutes identity of the offences are not uniform. They are collected in 1 N. Cr. L. § 1048, by Bishop, who lays down the following rules as sustained by just principle: "They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offence differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contain more of criminal charge than the other, but upon it there could be a conviction for what was embraced in the other, the offences, though of different names, are, within our constitutional guaranty, the same." The author considers the test to be, "whether if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be;" *id.* § 1052.

Where the accused kept a gambling room for a continuous period of time and two indictments were found against him, covering different periods of that time, it was held that a conviction on one indictment was a bar to a prosecution on the other; Cawein v. Com., 110 Ky. 273, 61 S. W. 275; *contra*, Com. v. Connors, 116 Mass. 35; People v. Sinell, 131 N. Y. 571, 30 N. E. 47.

Where the greater offence includes a lesser one, a verdict on an indictment for the lesser offence only is a bar to a trial on an indictment for the greater offence, and the same principle applies if the jury are out

in the first case when the second is called; Com. v. Arner, 149 Pa. 35, 24 Atl. 83.

There is some difference of opinion, however, in the application of this rule in homicide cases. If a prisoner is put on trial for murder and convicted of manslaughter and that verdict is set aside on defendant's application for a new trial or on his appeal, he cannot again be tried for murder; State v. Tweedy, 11 Ia. 350; Barnett v. People, 54 Ill. 325; State v. Dunn, 41 La. Ann. 610, 6 South. 176; Huntington v. Superior Court, 5 Cal. App. 288, 90 Pac. 141. On this principle it has been held that if a prisoner has been indicted for murder, convicted of murder in the second degree, and afterwards granted a new trial on his own motion, he cannot, on the second trial, be convicted of a higher crime than murder in the second degree; State v. Belden, 33 Wis. 121, 14 Am. Rep. 748, n.; State v. Kattlemann, 35 Mo. 105; State v. Helm, 92 Ia. 540, 61 N. W. 246; Golding v. State, 31 Fla. 262, 12 South. 525; Sylvester v. State, 72 Ala. 201 (see People v. Gordon, 99 Cal. 227, 33 Pac. 901); *contra*, State v. Behimer, 20 Ohio St. 572; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469, n; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773.

But when a conviction for the lesser crime is reversed upon the voluntary appeal of the accused, he thereby waives the acquittal upon the higher charge and, upon the conviction being set aside, is placed in the same position as if no trial had been had; Trono v. U. S., 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292, 4 Ann. Cas. 773; State v. Ash, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; State v. Kessler, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911; Bohanan v. State, 18 Neb. 57, 24 N. W. 390, 53 Am. Rep. 791; State v. Behimer, 20 Ohio St. 572; State v. Bradley, 67 Vt. 465, 32 Atl. 238; State v. Gillis, 73 S. C. 318, 53 S. E. 487, 5 L. R. A. (N. S.) 571, 114 Am. St. Rep. 95, 6 Ann. Cas. 993; State v. Matthews, 142 N. C. 621, 55 S. E. 342; In re Somers, 31 Nev. 531, 103 Pac. 1073, 24 L. R. A. (N. S.) 504, 135 Am. St. Rep. 700. In a number of states there are constitutional or statutory provisions to the same effect: N. Y. Code Cr. Pr. sec. 464; Okla. Stat., 1893; Va. Acts, 1877-8; Kan. Cr. Code, secs. 273, 274; Ga. Civil Code, 1895; Ind. 2 R. S., 1876; Mo. Const., 1875, and possibly others.

The contrary line of decisions is based on the theory that the accused's request for a correction of the verdict is only for so much of it as convicts him of guilt and not for that which acquits him, the waiver being construed to extend to the precise portion as to which relief is sought; Com. v. Deitrick, 221 Pa. 7, 70 Atl. 275; West v. State, 55 Fla. 200, 46 South. 93; Texas, Code of Crim. Pr. 1895.

A conviction of felonious assault at a time when the victim is still alive is no bar to a subsequent prosecution for murder in case he dies; Com. v. Ramunno, 219 Pa. 204, 68 Atl. 184, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818; so in case of assault and battery with intent to kill; Com. v. Ramunno, 219 Pa. 204, 68 Atl. 184, 14 L. R. A. (N. S.) 209, 123 Am. St. Rep. 653, 12 Ann. Cas. 818; Diaz v. U. S., 223 U. S. 442, 32 Sup. Ct. 250, 56 L. Ed. 500, Ann. Cas. 1913C, 1138; Com. v. Roby, 12 Pick. (Mass.) 496.

A distinction has been made in some cases based upon the theory that the two lower grades of homicide do not bear the same relation to the offence charged. Manslaughter is clearly a different crime from that charged, and a conviction of that offence is therefore an acquittal of the graver one. But it has been said that the division of murder into two degrees does not make two offences and the same rule should not apply; People v. Keefer, 65 Cal. 232, 3 Pac. 818; State v. Bradley, 67 Vt. 465, 32 Atl. 238. Indeed the whole theory is that, when the defendant obtains a reversal, the conviction of the lesser crime is an acquittal of the graver one, so that another trial would be within the prohibition against putting the accused twice in jeopardy; State v. Behimer, 20 Ohio St. 572; State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Veatch v. State, 60 Ind. 291; Com. v. Arnold, 83 Ky. 1, 4 Am. St. Rep. 114; State v. Kring, 11 Mo. App. 92. But it is said that "the weight of authority is that securing a new trial only operates to set aside conviction and not the verdict so far as it operates as an acquittal;" 1 McClain, Cr. L. § 390; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; Jones v. State, 13 Tex. 168, 62 Am. Dec. 550. If it is an acquittal *pro tanto* nothing less than constitutional amendment can remove the effect of the general provision as to jeopardy; Kring v. Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506. In some state constitutions, as those of Arkansas, Colorado, Georgia, and Missouri, the usual declaration securing a person from being put twice in jeopardy is modified by a further provision that if the jury disagree, or if the judgment be arrested after verdict or reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Statutes which provide for a severer punishment when a criminal is convicted of a second or third offence are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The doctrine is that the subsequent punishment is not imposed for the first offence, but for persistence in crime; In re Ross, 2 Pick. (Mass.) 165; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am.

Rep. 184; Ingalls v. State, 48 Wis. 647, 4 N. W. 785; People v. Stanley, 47 Cal. 113, 17 Am. Rep. 401; Moore v. Missouri, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301, affirming State v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; McDonald v. Massachusetts, 180 U. S. 311, 21 Sup. Ct. 389, 45 L. Ed. 542; People v. Coleman, 145 Cal. 609, 79 Pac. 283; so as to habitual criminals; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922. See HABITUAL CRIMINAL.

The question of former jeopardy cannot be passed upon by the supreme court on *habeas corpus* proceedings, but is a proper plea in bar, to be tried by the lower court; Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063.

Whether an offence is one against the laws of the state or against the United States, and whether the same act may be an offence against both, punishable by each, without infringing upon the constitutional guaranty against being twice put in jeopardy for the same offence, are questions which a state court of original jurisdiction is competent to decide in the first instance, and the proper time to invoke the jurisdiction of the Supreme Court of the United States is after the highest state court has passed upon the question adversely to the accused; New York v. Eno, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. Ed. 80.

One acquitted by a military court of competent jurisdiction of the crime of homicide as defined by the penal code of the Philippine Islands cannot be tried a second time in a civil court of those islands for the same offence; Grafton v. U. S., 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640.

Where two distinct offences grew out of the same transaction, a person is not twice in jeopardy by a sentence of an army court-martial imposing both fine and imprisonment, even if the penalty is fine or imprisonment in the alternative; Carter v. McClaughry, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236.

See NON BIS IN IDEM; AUTREFOIS ACQUIT; JURY.

The word is used in the act establishing and regulating the post office department (3 Story Laws 1992) in the sense of *peril, danger;* see U. S. v. Wilson, Baldwin 93, Fed. Cas. No. 16,730.

JERGUER. In English Law. An officer of the custom-house, who oversees the waiters. Techn. Dict.

JET. In French Law. Jettison (*q. v.*).

JETTISON, JETSAM. The casting out of a vessel, from necessity, a part of the lading. The thing so cast out.

It differs from flotsam in this, that in the latter the goods float, while in the former they sink, and remain under water. It differs also from ligan.

The jettison must be made for sufficient cause, and not for groundless timidity; Brauer v. Campania Navigacion La Flecha, 66 Fed. 776, 14 C. C. A. 88; The Hugo, 57 Fed. 403. It must be made in a case of extremity, when the ship is in danger of perishing by the fury of a storm, or is laboring upon rocks or shallows, or is closely pursued by pirates or enemies.

If the residue of the cargo be saved by such sacrifice, the property saved is bound to pay a proportion of the loss. In ascertaining such average loss, the goods lost and saved are both to be valued at the price they would have brought at the place of delivery on the ship's arrival there, freight, duties, and other charges being deducted; Marsh. Ins. 246; 3 Kent 185; Park. Ins. 123; Pothier, *Charte-partie*, n. 108; Boulay-Paty, *Dr. Com.* tit. 13; Pardessus, *Dr. Com.* n. 734; The Nimrod, 1 Ware 9, Fed. Cas. No. 10,267. The owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share from the vessel on an adjustment of the average, which may be enforced by a proceeding *in venue* in the admiralty; Dupont de Nemours & Co. v. Vance, 19 How. (U. S.) 162, 15 L. Ed. 584; 2 Pars. Marit. Law, 373. See Abbott; Kay, Shipping; AVERAGE; ADJUSTMENT; DERELICT.

JEU DE BOURSE. In French Law. A kind of gambling or speculation, which consists of sales and purchases which bind neither of the parties to deliver the things which are the object of the sale, and which are settled by paying the difference in the value of the things sold between the day of the sale and that appointed for delivery of such things. 1 Pardessus, *Droit Com.* n. 162.

JEWEL. A precious stone; a gem; a personal ornament, consisting more or less of precious stones. An ornament intended to be worn on the person.

The precise meaning of the word was discussed by Shaw, C. J., in Com. v. Stephens, 14 Pick. (Mass.) 370. He said: "The question is whether plain gold earrings and knobs, without any precious stone, pearl, or other gem set in them, constitute jewelry." "*Jewelry* is not found in any English dictionary, and is probably an Americanism. It is defined in Webster to be jewels in general. He defines 'jewel' to be 'an ornament worn by ladies,' 'a pendant in the ear.' It is manifest, however, that these are put by way of instances, and not intended as strict definitions. The term '*bijou*,' which seems to be nearly analogous to it in the French language, is defined to be 'a little work of ornament, valuable (*precieux*) for its workmanship or by its material. *Cette femme a des beaux bijoux.' Dict. de l'Acad.* The counsel on both sides cited passages of Scripture to show, on the one side, that the translators of the common version included ornaments of

gold under the name of jewels, and on the other, to show that by a distinct enumeration they excluded them. These instances do little more than show that, though the argument founded on them is at first view plausible, it would be entirely unsafe to rely upon it as a ground of legal construction. Nor can much more reliance be placed upon lexicographers; they are necessarily confined, in a considerable degree, to generalities, and cannot ordinarily go into minute and very accurate distinctions. On the best consideration we have been able to give the subject, we are satisfied that the legislature, in the use of the word 'jewelry,' intended to employ it as a generic term, of the largest import, including all articles under the genus. Without attempting to define the term used in the statute, we are all of opinion that earrings and ear-knobs are included under the term jewelry, as it was used in the statute."

The meaning of the word is most frequently drawn into question in cases involving the construction of statutes limiting the liability of innkeepers for money, jewelry, or valuables not deposited in the safe. In such a case it was said, "The watch, and pen and pencil case are certainly valuables, and perhaps might be called jewels, but I think should be considered a part of the traveller's personal clothing or apparel. Gile v. Libby, 36 Barb. (N. Y.) 70; Ramaley v. Leland, 43 N. Y. 539, 3 Am. Rep. 728; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271; but under a similar statute specifying money, jewelry, and articles of gold and silver manufacture, a gold watch was held to be included as an article of gold manufacture; Stewart v. Parsons, 24 Wis. 241.

The meaning of the word is also frequently involved in cases arising under the tariff laws, which usually contain also the term "imitation jewelry." In such a case Lacombe, J., said: "The word jewelry is generally used as including articles of personal adornment, and the word further imports that the articles are of value in the community where they are used. . . . The articles of value used for personal adornment in our civilization are, and for centuries have been, the precious metals gold and silver, to which, I think, platina is now generally added, and what are known as the precious stones, the diamond, sapphire, ruby, etc." "There is such a thing as imitation jewelry. . . . If by a pleasing combination of appropriate materials, by an attractive arrangement of parts, an article is produced bearing a general resemblance to real jewelry ornaments, and suitable for similar uses, it may fairly be called imitation jewelry." Robbins v. Robertson, 33 Fed. 709.

Where a jeweller claimed an exemption as tools of a debtor, of those which he himself worked with on watches as well as of those which his apprentice worked with on jewelry, and it being found by the jury that the principal business was that of jeweller, both were held to be exempt. The court said that the circumstance that he was also engaged in the business of repairing watches did not make him a watchmaker in distinction to a jeweller; . . . "this is rather part of the employment of a jeweller, as exercised in this country, than a distinct and separate occupation by himself." Howard v. Williams, 2 Pick. (Mass.) 80.

Family jewels constitute one of the kinds of personal property for the unlawful detention of which the remedy at law is considered inadequate and equitable relief is sustained; Ad. Eq., 8th ed. 91.

They are also included in paraphernalia, and "even the jewels of a peeress have been held such;" 2 Bla. Com. 436.

Jewels of the wife, though given by her husband's will to her for life, were decreed to her absolutely, as her paraphernalia (*q. v.*), as against creditors who sought to have them sold to pay debts charged on real estate in aid of the testator's personal estate; 1 Bro. C. C. *576.

JEWS. The name given to the descendants of the patriarch Abraham.

The Jews were exceedingly oppressed during the middle ages throughout Christendom. In France, a Jew was a serf, and his person and goods belonged to the baron on whose demesnes he lived. He could not change his domicile without permission of the baron, who could pursue him as a fugitive even on the domains of the king. Like an article of commerce, he might be lent or hired for a time, or mortgaged. If he became a Christian, his conversion was considered a larceny of the lord, and his property and goods were confiscated. They were allowed to utter their prayers only in a low voice and without chanting. They were not allowed to appear in public without some badge or mark of distinction. Christians were forbidden to employ Jews of either sex as domestics, physicians, or surgeons. Admission to the bar was forbidden to Jews. They were obliged to appear in court in person when they demanded justice for a wrong done them; and it was deemed disgraceful to an advocate to undertake the cause of a Jew. If a Jew appeared in court against a Christian, he was obliged to swear by the ten names of God and invoke a thousand imprecations against himself if he spoke not the truth. Sexual intercourse between a Christian man and a Jewess was deemed a crime against nature, and was punishable with death by burning. *Quia est rem habere cum cane, rem habere a Christiano cum Judæa quæ* CANIS *reputatur; sic comburi debet;* 1 Fournel, *Hist. des Avocats,* 108, 110. See Merlin, Répert. *Juifs.*

Under the Roman law the Jews were the subject of severe restrictive laws and were classed in the enactments of the Christian emperors with apostates, heretics, and heathens; Mack. Rom. L. § 152. Marriage with them was forbidden; *id.* § 555; and a Jew could not be the tutor of a Christian; *id.* § 616.

In the fifth book of the Decretals it is provided that if a Jew have a servant that desireth to be a Christian, the Jew shall be compelled to sell him to a Christian for twelve-pence; that it shall not be lawful for them to take any Christian to be their servant; that they may repair their old synagogues, but not build new; that it shall not be lawful for them to open their doors or windows on Good Friday; that their wives shall neither have Christian

nurses, nor themselves be nurses to Christian women; that they wear different apparel from the Christians, whereby they may be known, etc. See Ridley's View of the Civ. and Eccl. Law, part 1, chap. 5, sect. 7; Madox, Hist. of Exch.

In England, the Jew could have nothing that was his own, for whatever he acquired he acquired not for himself but for the king; Bract. f. 386 *b*. For about a century and a half they were important elements in English history, as their greatest privilege was to be allowed to do things that were forbidden to Christians, notably, to take interest on money. This money-lending business required some governmental regulation, the king having a deep interest in it, for what was potentially owed to the Jew was owed to the king, and this matter could hardly be left to the English tribunals as they would do but scant justice to the Jew, and therefore but scant justice to the king who stood behind the Jew. In 1194, an edict was issued about the Jewish loans. In every town in which the Jews lived an office was established for the registration of their deeds. All loans and payments of loans were to be made under the eye of certain officers, some of them Christians, some of them Jews, and a copy or part of every deed was to be deposited in an ark or chest under official custody. A few years later a department of the royal exchequer—the exchequer of the Jews—was organized for the supervision of this business. At its head were a few "Justices of the Jews." This exchequer was, like the great exchequer, both a financial bureau and a judicial tribunal. It managed all the king's transactions—and there were many—with the Jews, saw to the exaction of tallages, reliefs, escheats, and forfeitures, and also acted judicially, not merely as between king and Jew, but also as between king and gentile, when, as often happened, the king had for some cause or another seized into his hand the debts due to one of his Jews by Christian debtors. Also it heard and determined all manner of disputes between Jew and Christian. 1 Pol. & M. 451.

This system could not work well; it oppressed both Jew and Englishman, and from the middle of the thirteenth century the king was compelled to rob them of their privileges, to forbid them to hold lands, and some efforts were made to induce them to give up their profession of usury, as was also done in France and elsewhere during the same period, but the fact is, that they were so heavily taxed by the sovereigns or governments of Christendom, and at the same time debarred from almost every other trade or occupation—partly by special decrees, partly by the vulgar prejudice—that they could not afford to prosecute ordinary vocations. In 1253 the Jews—no longer able to withstand the constant hardships to which they were subjected in person and property—begged of their own accord to be allowed to leave the country. Richard of Cornwall, however, persuaded them to stay. Ultimately, in 1290 A. D., they were driven from the shores of England, pursued by the execrations of the infuriated rabble, and leaving in the hands of the king all their property, debts, obligations, and mortgages, they emigrated for the most part to France and Germany.

Practically, the only disabilities to which Jews are now subject in England are, incompetence to fill certain high offices in the state (*e. g.* that of lord chancellor, lord chancellor of Ireland, lord lieutenant of Ireland, any office in the ecclesiastical court, or any position at the universities, colleges or schools), and inability to present to an ecclesiastical benefice attached to an office in her majesty's gift. 3 Steph. Com. 83. The present Chief Justice of England is a Jew.

JOB. The whole of a thing which is to be done. In this sense it is employed in the Civil Code of Louisiana, art. 2727: "To build by plot, or to work by the job," says that article, "is to undertake a building for a certain stipulated price." See Duranton, *du Contr. de Louage*, liv. 3, t. 8, nn. 248, 263; Pothier, *Contr. de Louage*, nn. 392, 394. See DEVIATION.

JOBBER. **In Commercial Law.** One who buys and sells articles in bulk and resells them to dealers. Stock-jobbers are those who buy and sell stocks for others. This term is also applied to those who speculate in stocks on their own account.

JOCALIA (Lat.). Jewels (*q. v.*). This term was formerly more properly applied to those ornaments which women, although married, call their own. When these *jocalia* are not suitable to her degree, they are assets for the payment of debts; 1 Rolle, Abr. 911.

JOCKEY CLUB. An association of persons for the purpose of regulating all matters connected with horse racing.

Such a club is a private and not a quasi-public corporation, and may refuse to allow certain persons to enter horses for its races; Corrigan v. Jockey Club, 2 Misc. 512, 22 N. Y. Supp. 394. A grant by the state to such a corporation to make and register bets and sell pools on the result of its races is not a grant of state aid, but is merely a removal of the statutory prohibition against the exercise of a right existing at common law; *id.*

JOHN DOE. A fictitious name frequently used to indicate a person for the purpose of argument or illustration, or in the course of enforcing a fiction in the law. See BILL OF MIDDLESEX; RICHARD ROE.

JOINDER. **In Pleading.** Union; concurrence.

Of Actions. IN CIVIL CASES. The union of two or more causes of action in the same declaration.

At common law, to allow a joinder, the form of actions must be such that the same plea may be pleaded and the same judgment given on all the counts of the declaration, or, the counts being of the same nature, that the same judgment may be given on all; 2 Saund. 177 *c*; Com. Dig. *Actions* (G); Secor v. Sturgis, 16 N. Y. 548; Lamphier v. R. Co., 33 N. H. 495. And all the causes of action must have accrued to the plaintiff or against the defendant; Coussy v. Vivant, 12 La. Ann. 44; in the same right, though it may have been by different titles. Thus, a plaintiff cannot join a demand in his own right to one as representative of another person, or against the defendant himself to one against him in a representative capacity; 2 Viner, Abr. 62; Bacon, Abr. *Action in General* (C); Lucas v. R. Co., 21 Barb. (N. Y.) 245; Whitney v. Fairbanks, 54 Fed. 985. Nor can a cause of action in tort and in contract be joined; Hannahs v. Hammond, 19 N. Y. Supp. 883; nor a tort with a claim

for money had and received; Teem v. Town of Ellijay, 89 Ga. 154, 15 S. E. 33.

In *real actions* there can be but one count.

In *mixed actions* joinder occurs, though but infrequently; 8 Co. 876; Cro. Eliz. 290.

In *personal actions* joinder is frequent.

By statutes, in many of the states, joinder of actions is allowed and required to a greater extent than at common law.

In Criminal Cases. Different offences of the same general nature may be joined in the same indictment; Johnson v. State, 29 Ala. 62, 65 Am. Dec. 383; Sarah v. State, 28 Miss. 267, 61 Am. Dec. 544; Bailey v. State, 4 Ohio St. 440; U. S. v. O'Callahan, 6 McLean 596, Fed. Cas. No. 15,910; People v. Hulbut, 4 Denio (N. Y.) 133, 47 Am. Dec. 244; Baker v. State, 4 Ark. 56; Benson v. Com., 158 Mass. 164, 33 N. E. 384; Burrell v State, 25 Neb. 581, 41 N. W. 399; and it is no cause of arrest of judgment that they have been so joined; 29 E. L. & Eq. 536; State v. Fowler, 28 N. H. 184; Stephen v. State, 11 Ga. 225; U. S. v. Stetson, 3 W. & M. 164, Fed. Cas. No. 16,390; but not in the same count; Kenney v. State, 5 R. I. 385; State v. Bridges, 24 Mo. 353; Greenlow v State, 4 Humphr. (Tenn.) 25; see 9 L. R. A. 182, note; and an indictment may be quashed, in the discretion of the court, where the counts are joined in such manner as will confound the evidence; State v. Jackson, 17 Mo. 544, 59 Am. Dec. 281.

No court, it is said, will, however, permit a prisoner to be tried upon one indictment for two distinct and separate crimes; Steph. Cr. Proc. 154; State v. Fowler, 28 N. H. 184. See Withers v. Com., 5 S. & R. (Pa.) 59; Com. v. Hills, 10 Cush. (Mass.) 530.

Where, out of precaution to meet every aspect of a single offence, an indictment charges distinct crimes, and no attempt is made to convict accused of disconnected offences, the state will not be compelled to elect on which he shall be tried; Butler v. State, 91 Ala. 87, 9 South. 191. Three separate offences, but not more, against the provisions of U. S. R. S. § 5480, prohibiting the use of the mails with intent to defraud, when committed within the same six calendar months, may be joined, and when so joined there is to be a single sentence for all, but this does not prevent other indictments for other offences under the same statute committed within the same six calendar months; In re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174.

In Demurrer. The answer made to a demurrer. Co. Litt. 71 *b*. The act of making such answer is merely a matter of form, but must be made within a reasonable time; Thompson v. Goudelock, 10 Rich. (S. C.) 49.

Of Issue. The act by which the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it. For example, when one party denies the fact pleaded by his antagonist, who has tendered the issue thus, "And this he prays may be inquired of by the country," or, "and of this he puts himself upon the country," the party denying the fact may immediately subjoin, "And the said A B does the like;" when the issue is said to be joined.

Of Parties. In Civil Cases. In Equity. All parties materially interested in the subject of a suit in equity should be made parties, however numerous; Mitf. Eq. Plead. 144; Mechanics' Bank v. Seton, 1 Pet. (U. S.) 299, 7 L. Ed. 152; Northern Indiana R. Co. v. R. Co., 5 McLean 444, Fed. Cas. No. 10,321; Hussey v. Dole, 24 Me. 20; Crocker v. Higgins, 7 Conn. 342; Oliver v. Palmer, 11 Gill & J. (Md.) 426; Vanhorn v. Duckworth, 42 N. C. 261; either as plaintiffs or defendants, so that there may be a complete decree which shall bind them all; Christian v. R. Co., 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589; Gregory v. Stetson, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792. But, where the parties are very numerous, and sue in the same right, a portion may in some cases appear for all in the same situation; 16 Ves. 321; New-London Bank v. Lee, 11 Conn. 112, 27 Am. Dec. 713; Dennis v. Kennedy, 19 Barb. (N. Y.) 517. See Hills v. Putnam, 152 Mass. 123, 25 N. E. 40.

Mere possible or contingent interest does not render its possessor a necessary party; Kerr v. Watts, 6 Wheat. (U. S.) 550, 5 L. Ed. 328; Townsend v. Auger, 3 Conn. 354; Reid v. Vanderheyden, 5 Cow. (N. Y.) 719. Contingent remaindermen are not necessary parties to a suit to set aside the deed creating the remainder; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; nor a residuary legatee to a bill filed by a legatee or creditor to assert a claim against the estate of a testator; Melick v. Melick, 17 N. J. Eq. 156.

There need be no connection but community of interest; Brooks v. Harrison, 2 Ala. 209. It is not indispensable that all the parties to a suit should have an interest in all the matters contained in the suit, but it will be sufficient if each party has an interest in same material matters in the suit, and they are connected with the others; Brown v. Safe Deposit Co., 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468.

A court of equity, even after final hearing on the merits and on appeal to the court of last resort, will compel the joinder of necessary parties; O'Fallon v. Clopton, 89 Mo. 284, 1 S. W. 302.

Plaintiffs. All persons having a unity of interest in the subject-matter; Alston v. Jones, 3 Barb. Ch. (N. Y.) 397; Brooks v. Harrison, 2 Ala. 209; and in the object to be attained; Gartside v. Gartside, 113 Mo. 348, 20 S. W. 669; Bosher v. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879; who are entitled to relief; Wilkins v. Judge, 14

Ala. 135; may join as plaintiffs. The rights claimed must not arise under different contracts; Yeaton v. Lenox, 8 Pet. (U. S.) 123, 8 L. Ed. 889; Finley v. Harrison, 5 J. J. Marsh. (Ky.) 154; or be vested in the same person in different capacities; May v. Smith, 45 N. C. 196, 59 Am. Dec. 594. And see Edmeston v. Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454; Ingraham v. Dunnell, 5 Metc. (Mass.) 118. Persons representing antagonistic interests cannot be joined as complainants; Smith v. Smith, 102 Ala. 516, 14 South. 765.

Assignor and *assignee.* The assignor of a contract for the sale of lands should be joined in a suit by the assignee for specific performance; Voorhees v. De Myer, 3 Sandf. Ch. (N. Y.) 614; and the assignor of part of his interest in a patent in a suit by assignee for violation; Morgan v. Tipton, 3 McLean 350, Fed. Cas. No. 9,809.

But he should not be joined where he has parted with all his legal and beneficial interest; Miller v. Whittier, 32 Me. 203; Moor v. Veazie, 32 Me. 343, 52 Am. Dec. 655; Leacock v. Hall, 13 B. Monr. (Ky.) 210. The assignee of a mere chose in action may sue in his own name, in equity; Barribeau v. Brant, 17 How. (U. S.) 43, 15 L. Ed. 34; Cottrell v. Giltner, 5 Wis. 270.

Corporations. Two or more may join if their interest is joint; 8 Ves. 706. A corporation may join with its individual members to establish an exemption on their behalf; 3 Anstr. 738. Corporations themselves are indispensable parties to a bill which affects their corporate rights or liabilities; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577.

Husband and *wife* must join where the husband asserts an interest in behalf of his wife; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; as, for a legacy; Schuyler v. Hoyle, 5 Johns. Ch. (N. Y.) 196; or for property devised or descended to her during coverture; Griffith v. Coleman, 5 J. J. Marsh. (Ky.) 600; or where he applies for an injunction to restrain a suit at law against both, affecting her interest; Green v. Hicks, 1 Barb. Ch. (N. Y.) 313. Where a widow sues to set aside a deed executed by herself and husband on the ground that it was procured by fraud, the administrator of the husband is not a necessary party; Keenan v. Keenan, 58 Hun 605, 12 N. Y. Supp. 747.

Under modern statutes for the enlargement of the rights and remedies of married women, it is in many cases unnecessary to join the husband in suits to which he was formerly a necessary party. See MARRIED WOMAN.

Idiots and *lunatics* may be joined or not in bills by their committees, at the election of the committee, to set aside acts done by them whilst under imbecility; Ortley v. Messere, 7 Johns. Ch. (N. Y.) 139. They must be joined in suits brought for the partition of real estate; Gorham v. Gorham, 3 Barb. Ch. (N. Y.) 24. In England it seems to be the custom to join; 2 Vern. 678. See Story, Eq. Pl. § 64; Story, Eq. Jur. § 1336.

Infants. Several may join in the same bill for an account of the rents and profits of their estate; Townshend v. Duncan, 2 Bland. (Md.) 68.

Trustee and *cestui que trust* should, it is held, join in a bill to recover the trust fund; Jennings' Ex'rs v. Davis, 5 Dana (Ky.) 128; but need not to foreclose a mortgage; Heirs of Pugh v. Currie, 5 Ala. 447; nor to redeem one made by the trustee; Boyden v. Partridge, 2 Gray (Mass.) 190. And see Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Hitchcock's Heirs v. Bank, 7 Ala. 386.

An *appeal* may be prosecuted by one party to the record, as against another, without joining other parties who are in no way interested in the controversy; Postal Telegraph Cable Co. v. Vane, 80 Fed. 961, 26 C. C. A. 342.

DEFENDANTS. In general, all persons interested in the subject-matter of a suit who cannot be made plaintiffs should be made defendants. They may claim under different rights if they possess an interest centering in the point in issue; Fellows v. Fellows, 4 Cow. (N. Y.) 682, 15 Am. Dec. 412. In order to obtain the rescission of a contract of sale, all of the parties interested in the property involved must be brought before the court; Constant v. Lehman, 52 Kan. 227, 34 Pac. 745.

Bills for discovery need not contain all the parties interested as defendants; Trescot v. Smyth, 1 McCord, Ch. (S. C.) 301; and a person may be joined merely as defendant in such bill; Bank of Mobile v. Huggins, 3 Ala. 214. A person should not be joined as a party to such bill who may be called as a witness on trial; Yates v. Monroe, 13 Ill. 212.

Assignor and *assignee.* An assignor who retains even the slightest interest in the subject-matter must be made a party; Bruen v. Crane, 2 N. J. Eq. 347; Ward v. Van Bokkelen, 2 Paige (N. Y.) 289; Montague v. Lobdell, 11 Cush. (Mass.) 111; as a covenantee in a suit by a remote assignee; Wickliffe v. Clay, 1 Dana (Ky.) 585; or an assignee in insolvency, who must be made a party; Movan v. Hays, 1 Johns. Ch. (N. Y.) 339; or the original plaintiff in a creditor's bill by the assignee of a judgment; Cooper v. Gunn, 4 B. Monr. (Ky.) 594.

A fraudulent assignee need not be joined in a bill by a creditor to obtain satisfaction out of a fund so transferred; Edmeston v. Lyde, 1 Paige (N. Y.) 637, 19 Am. Dec. 454. The assignee of a judgment must be a party in a suit to stay proceedings; Mumford v. Sprague, 11 Paige (N. Y.) 438.

Corporations and *associations.* A corpora-

tion charged with a duty should be joined with the trustees it has appointed, in a suit for a breach; Tibballs v. Bidwell, 1 Gray (Mass.) 399; Lawyer v. Cipperly, 7 Paige (N. Y.) 281. Where the legal title is in part of the members of an association, no others need be joined; Martin v. Dryden, 1 Gilm. (Ill.) 187. The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark; Armstrong v. Soap Works, 53 Fed. 124. But see INFRINGEMENT. When discovery is sought, the officer from whom the information is to be obtained should be made a co-defendant with the corporation; Virginia & A. Min. & Mfg. Co. v. Hale & Co., 93 Ala. 542, 9 South. 256.

Officers and agents may be made parties merely for discovery; Many v. Iron Co., 9 Paige (N. Y.) 188.

Creditors who have repudiated an assignment and pursued their remedy at law are properly made parties to a bill brought by the others against the trustee for an account and the enforcement of the trust; Geisse v. Beall, 3 Wis. 367. So, when judgments are impeached and sought to be set aside for fraud, the plaintiffs therein are indispensable parties to the bill; May v. Barnard, 20 Ala. 200. To a bill brought against an assignee by a creditor claiming the final balance, the preferred creditors need not be made parties; Page v. Olcott, 28 Vt. 465. See, also, Secombe v. Steele, 20 How. (U. S.) 94, 15 L. Ed. 833; Stevenson v. Austin, 3 Metc. (Mass.) 474; Smith v. Wyckoff, 11 Paige (N. Y.) 49.

Debtors must in some cases be joined with the executor in a suit by a creditor; though not ordinarily; Story, Eq. Pl. § 227; Long v. Majestre, 1 Johns. Ch. (N. Y.) 305. Where there are several debtors, all must be joined; Trescot v. Smyth, 1 McCord, Ch. (S. C.) 301; unless utterly irresponsible; Williams v. Hubbard, 1 Mich. 446. Judgment debtors must in some cases be joined in suits between the creditor and assignees or mortgagees; Scudder v. Voorhis, 5 Sandf. (N. Y.) 271. In an action by judgment creditors for the appointment of a receiver, to take charge of property belonging to their debtor, the payees of unpaid purchase-money notes given for such property are necessary parties; Wheeler v. Biggs (Miss.) 12 South. 596.

Executors and *administrators* should be made parties to a bill to dissolve a partnership; Burchard v. Boyce, 21 Ga. 6; to a bill against heirs to discover assets; Harrow v. Farrow's Heirs, 7 B. Monr. (Ky.) 127, 45 Am. Dec. 60; to a bill by creditors to subject lands fraudulently conveyed by the testator, their debtor, to the satisfaction of their debt; Coates v. Day, 9 Mo. 304. See, also, Drummond v. Hardaway, 21 Ga. 433; Mayo v. Tomkies, 6 Munf. (Va.) 520.

Foreclosure suits. All persons having an interest, legal or equitable, existing at the commencement of a suit to foreclose mortgaged premises, must be made parties, or they will not be bound; Tiedem. Eq. Jur. § 441; Ensworth v. Lambert, 4 Johns. Ch. (N. Y.) 605; Huggins v. Hall, 10 Ala. 283; Matcalm v. Smith, 6 McLean, 416, Fed. Cas. No. 9,272; Hall v. Hall, 11 Tex. 526; including the mortgagor within a year after the sale of his interest by the sheriff; Hallock v. Smith, 4 Johns. Ch. (N. Y.) 649; and his heirs and personal representative after his death; Worthington v. Lee, 2 Bland (Md.) 684. But bond-holders for whose benefit a mortgage has been made by a corporation to a trustee need not be made parties; Shaw v. R. Co., 5 Gray (Mass.) 162; Jones, Corp. Bonds & Mortg. § 398. A person claiming adversely to mortgagor and mortgagee cannot be made a defendant to such suit; Banks v. Walker, 3 Barb. Ch. (N. Y.) 438.

Heirs, distributees, and *devisees.* All the heirs should be made parties to a bill respecting the real estate of the testator; Mersereau v. Ryerss, 3 N. Y. 261; Kennedy's Heirs & Ex'rs v. Kennedy's Heirs, 2 Ala. 571; Duncan v. Wickliffe, 4 Scam. (Ill.) 452; although the testator was one of several mortgagees of the vendee, and the bill be brought to enforce the vendor's lien; Thornton v. Knox's Ex'r, 6 B. Monr. (Ky.) 74; but need not to a bill affecting personalty; Galphin v. McKinney, 1 McCord, Ch. (S. C.) 280. Where, in a suit to set aside a deed for fraud, one of the heirs did not join as plaintiff, he may be made a party defendant, even if he should elect to affirm the deed; Billings v. Mann, 156 Mass. 203, 30 N. E. 1136. All the devisees are necessary parties to a bill to set aside the will; Vancleave v. Beam, 2 Dana (Ky.) 155; or to enjoin executors from selling lands belonging to the testator's estate; Lee v. Marshall's Devisees, 2 T. B. Monr. (Ky.) 30. All the distributees are necessary parties to a bill for distribution; Hawkins' Adm'r v. Craig, 1 B. Monr. (Ky.) 27; to a bill by the widow of the intestate against the administrator to recover her share of the estate; Chinn v. Caldwell, 4 Bibb (Ky.) 543; and to a bill against an administrator to charge the estate with an annual payment to preserve the residue; Cabeen v. Gordon, 1 Hill, Ch. (S. C.) 51. See, also, Smith v. Wyckoff, 11 Paige (N. Y.) 49; Slaughter v. Froman, 2 T. B. Monr. (Ky.) 95. A bill cannot be filed against the heirs and devisees jointly for satisfaction of a debt of the deceased; Schermerhorn v. Barhydt, 9 Paige (N. Y.) 28.

Idiots and *lunatics* should be joined with their committees when their interests conflict and must be settled in the suit; Brasher's Ex'rs v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242; Teal v. Woodworth, 3 Paige (N. Y.) 470.

Partners must, in general, be all joined in a bill for dissolution of the partnership, but need not if without the jurisdiction; Lind.

Part. 460; Wickliffe v. Eve, 17 How. (U. S.) 468, 15 L. Ed. 163; Towle v. Pierce, 12 Metc. (Mass.) 329, 46 Am. Dec. 679.

Assignees of insolvent partners must be joined; Pearce v. Norton, 10 Me. 255.

Dormant partners need not be joined when not known in the transaction on which the bill is founded; Goble v. Gale, 7 Blackf. (Ind.) 218, 41 Am. Dec. 219.

Principal and *agent* should be joined if there be a charge of fraud in which the agent participated; Veazie v. Williams, 3 Sto. 611, Fed. Cas. No. 16,907; and the agent should be joined where he binds himself individually; McAlexander v. Lee, 3 A. K. Marsh. (Ky.) 484.

Trustee and *cestui que trust.* If a trustee has parted with the trust fund, the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with him at the election of the complainant; Bailey v. Inglee, 2 Paige (N. Y.) 278. Where a claimant against the estate of a deceased person seeks to follow the assets into the hands of a trustee, it is not necessary to make the beneficiaries parties; 45 Ch. Div. 444.

On a proceeding in equity for the appointment of trustees under a mortgage, where two of the three trustees have died, and there is no provision in the mortgage for filling the vacancies, the mortgagor and the surviving trustee are necessary parties; In re Inhabitants of Anson, 85 Me. 79, 26 Atl. 996.

The trustees under a settlement of real estate, against whom a trust or power given to them to sell the estate is to be enforced, are necessary parties to a suit for that purpose; 39 E. L. & Eq. 76. See, Phipps v. Tarpley, 24 Miss. 597; McRea v. Bank, 19 How. (U. S.) 376, 15 L. Ed. 688; Jamison v. Chesnut, 8 Md. 34.

At Law. *In actions ex contractu.* All who have a joint legal interest or are jointly entitled must join in an action on a contract, even though it be in terms several, or be entered into by one in behalf of all; 1 Saund. 153; Archb. Civ. Pl. 58; Sweigart v. Berk, 8 S. & R. (Pa.) 308; Allen v. Dunn, 15 Me. 295, 33 Am. Dec. 614; Loomis v. Brown, 16 Barb. (N. Y.) 325; as, where the consideration moves from several jointly; 2 Wms. Saund. 116 *a;* 4 M. & W. 295; or was taken from a joint fund; Ludlow v. Hurd, 19 Johns. (N. Y.) 218.

Some contracts may be considered as either joint or several, and in such case all may join, or each may sue separately; but part cannot join leaving the others to sue separately.

In an action for a breach of a joint contract made by several, all the contracting parties should be made defendants; 1 Saund. 158, n.; even though one or more be bankrupt or insolvent; 2 Maule & S. 33; but see 1 Wils. 89; or an infant; but not if the contract be utterly void as to him; 3 Taunt. 307; Hartness v. Thompson, 5 Johns. (N. Y.) 160, Jackson v. Woods, *id.* 280; Woodward v. Newhall, 1 Pick. (Mass.) 500.

On a joint and several contract, each may be sued separately, or all together; Minor v. Bank, 1 Pet. (U. S.) 73, 7 L. Ed. 47; Van Tine v. Crane, 1 Wend. (N. Y.) 524.

A corporation is a necessary party to a suit brought by its stockholders to enforce its rights; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815.

Executors and *administrators* must bring their actions in the joint names of all; Crosw. Ex. & Adm. § 636; 5 Scott, N. R. 728; 1 Saund. 291 *g;* Cole v. Smalley, 25 N. J. L. 374; even though some are infants; Broom, Part. 104.

All the executors who have proved the will are to be joined as defendants in an action on the testator's contract; 1 Cr. M. & R. 74. But an executor *de son tort* is not to be joined with the rightful executor. And the executors are not to be joined with other persons who were joint contractors with the deceased; Colson v. Thompson, 2 Wheat. (U. S.) 344, 4 L. Ed. 253; Hench v. Metzer, 6 S. & R. (Pa.) 272; Humphreys v. Crane, 5 Cal. 173.

Administrators are to be joined, like executors; Com. Dig. *Administrators* (B 12). Foreign executors and administrators are not recognized as such, in general; Brookshire v. Dubose, 55 N. C. 276; Kirkpatrick v. Taylor, 10 Rich. (S. C.) 393; Slauter v. Chenowith, 7 Ind. 211.

Husband and *wife* must join to recover rent due the wife before coverture on her lease while sole; Co. Litt. 55 *b;* Cro. Eliz. 700; on the lease by both of lands in which she has a life estate, where the covenant runs to both; Jacques v. Short, 20 Barb. (N. Y.) 269; but on a covenant generally to both, the husband may sue alone; 1 B. & C. 443; in all actions in implied promises to the wife acting *in autre droit;* Com. Dig. *Baron & F.* (V); 9 M. & W. 694; Mitchell v. Wright, 4 Tex. 283; as to suit on a bond to both, see Steward v. Chance, 3 N. J. L. 827; on a contract running with land of which they are joint assignees; Cro. Car. 503; in general, to recover any of the wife's choses in action where the cause of action would survive to her; 1 Chitty, Pl. 17; 1 M. & S. 180; Morse v. Earl, 13 Wend. (N. Y.) 271; Newell v. Newton, 10 Pick. (Mass.) 270; Fuller v. R. Co., 21 Conn. 557; Bodgett v. Ebbing, 24 Miss. 245.

They may join at the husband's election in suit on a covenant to repair, when they become joint grantees of a reversion; Cro. Jac. 399; to recover the value of the wife's choses in action; Edwards v. Sheridan, 24 Conn. 165; 2 M. & S. 396, n.; in case of joinder the action survives to her; 6 M. & W. 426; in case of an express promise to the

wife, or to both where she is the meritorious cause of action; Cro. Jac. 77, 205; Smith v. Johnson, 5 Harring. (Del.) 57; Milton v. Haden, 32 Ala. 30, 70 Am. Dec. 523.

They must, in general, be joined in actions on contracts entered into by the wife *dum sola;* 2 Term. 480; Angel v. Felton, 8 Johns. (N. Y.) 149; Williams v. Coward, 1 Grant, Cas. (Pa.) 21; Smith v. Johnson, 5 Harring. (Del.) 57; where the cause of action accrues against the wife *in autre droit;* Cro. Car. 518. They may be joined when the husband promises anew to pay the debt of the wife contracted *dum sola;* 7 Term 349; for rent or breaches of covenant on a joint lease to both for the wife's benefit; Broom, Part. 178. In an action on a contract against a husband and wife, a contract signed by the husband alone is insufficient to support a judgment against the wife; Murdock v. Wasson, 158 Pa. 295, 27 Atl. 944.

Joint tenants must join in debt or an avowry for rent; Broom, Part. 24; but one of several may make a separate demise, thus severing the tenancy; Bacon, Abr. *Joint Ten.* (H 2); 3 Campb. 190; and one may maintain ejectment against his cotenants; Woodf. Landl. & T. 789.

Partners must all join in suing third parties on partnership transactions; 2 Campb. 302; De Groot v. Darby, 7 Rich. (S. C.) 118; including only those who were such at the time the cause of action accrued; Broom, Part. 65; although one or more may have become insolvent; 2 Cr. & M. 318; but not joining the personal representative of a deceased partner; 9 B. & C. 538. See Campbell v. Pence, 118 Ind. 313; with a limitation to the actual parties to the instrument in case of specialties; 6 M. & S. 75; and including dormant partners or not, at the election of the ostensible partners; 4 B. & Ald. 437. See Clark v. Miller, 4 Wend. (N. Y.) 628; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311. A partner who has sold his interest to another partner is not a necessary party to an action for an accounting of the partnership affairs; Kilbourm v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005. Where one partner contracts in his name for the firm, he may sue alone, or all may join; 4 B. & Ad. 815; but alone if he was evidently dealt with as the sole party in interest; 1 M. & S. 249. Partners cannot sue or be sued in their copartnership name, but the individual names of its members must be set out; Lewis v. Cline (Miss.) 5 South. 112; Dunham v. Schindler, 17 Or. 256, 20 Pac. 326.

The surviving partners; 1 B. & Ald. 29, 522; Voorhis v. Baxter, 18 Barb. (N. Y.) 592; must all be joined as defendants in suits on partnership contracts; 1 East 30. And third parties are not bound to know the arrangements of partners amongst themselves; 4 M. & S. 482; 8 M. & W. 703, 710.

A partner need not be joined if he was not known as such at the time of making the contract and there was no indication of his being a partner; Lind. Part. 281; Hurlbut v. Post, 1 Bosw. (N. Y.) 28; Hicks v. Maness, 19 Ark. 701. And see PARTNERSHIP.

Tenants in common should join in an action on any joint contract; Comyns, Dig. *Abatement* (E 10).

Trustees must all join in bringing an action; Brinckerhoff v. Wemple, 1 Wend. (N. Y.) 470.

In actions ex delicto. Joint owners must, in general, join in an action for a tortious injury to their property; 1 Saund. 291 *g;* Pickering v. Pickering, 11 N. H. 141; in trover, for its conversion; 5 East 407; in replevin, to get possession; Smoot v. Wathen, 8 Mo. 522; McArthur v. Lane, 15 Me. 245; or in detinue, for its detention, or for injury to land; 3 Bingh. 455; Van Deusen v. Young, 29 Barb. (N. Y.) 9.

The grantor and grantee of land cannot join in a counter-claim for continuing trespasses on the land sold, since their rights of action are not joint; Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. 97.

For injury to the *person*, plaintiffs cannot, in general, join; 2 Wms. Saund. 117 *a;* Cro. Car. 512; Cro. Eliz. 472.

Partners may join for slanders; Lind. Part. 278; 8 C. & P. 708; for false representations; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; injuring the partnership. The joinder or non-joinder of a dormant partner constitutes no objection to the maintenance of a suit in any manner whatever; Smith v. Ayrault, 71 Mich. 475, 39 N. W. 724, 1 L. R. A. 311.

In a suit against joint contractors, one of whom is dead, the survivors only should be made parties, the administrator of the deceased partner not being necessary; Stevens v. Catlin, 44 Ill. App. 114.

An action for the infringement of letters patent may be brought jointly by all the parties who at the time of the infringement were the holders of the title; Whittemore v. Cutter, 1 Gall. 429, Fed. Cas. No. 17,600; Stein v. Goddard, 1 McAll. 82, Fed. Cas. No. 13,353.

In cases where several join in the commission of a tort, they may be joined in an action as defendants; 6 Taunt. 29; Hyslop v. Clarke, 14 Johns. (N. Y.) 462; as, in trover; 1 M. & S. 588; in trespass; 2 Wms. 117 *a;* for libel; Broom, Part. 249,—not for slander; Cro. Jac. 647; in trespass; 1 C. & M. 96.

Husband and *wife* must join in action for direct damages resulting from personal injury to the wife; Schoul. Husb. & W. 167; 3 Bla. Com. 140; Wright v. Leclaire, 4 G. Greene (Ia.) 420; see Fournet v. S. S. Co., 43 La. Ann. 1202, 11 South. 541; in detinue, for

the property which was the wife's before marriage; Armstrong v. Simonton's Adm'r, 6 N. C. 351; Robinson v. Woodford, 37 W. Va. 377, 16 S. E. 602; for injury to the wife's property before marriage; Hair v. Melvin, 47 N. C. 59; where the right of action accrues to the wife *in autre droit;* Com. Dig. *Baron & F.* (V); 2 B. & P. 407; and, generally, in all cases where the cause of action by law survives to the wife; 4 B. & Ald. 523; Newell v. Newton, 10 Pick. (Mass.) 470; Starbird v. Inhabitants of Frankfort, 35 Me. 89.

They may join for slander of the wife, if the words spoken are actionable *per se*, for the direct injury; 4 M. & W. 5; Williams v. Holdredge, 22 Barb. (N. Y.) 396; Johnson v. Dicken, 25 Mo. 580; Harper v. Pinkston, 112 N. C. 293, 17 S. E. 161 (but she may maintain an action in her own name; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822) and in ejectment for lands of the wife they may join; Broom, Part. 235; 1 Bulstr. 21. An action for permanent injury to community property must be brought by husband and wife jointly; Parke v. City of Seattle, 8 Wash. 78, 35 Pac. 594.

They *must* be joined as defendants for torts committed by the wife before marriage; Co. Litt. 351 *b;* Hawk v. Harman, 5 Binn. (Pa.) 43; or during coverture; Wagener v. Bill, 19 Barb. (N. Y.) 321; Henderson v. Wendler, 39 S. C. 555, 17 S. E. 851; or for libel or slander uttered by her; 5 C. & P. 484; and in an action for waste by the wife, before marriage, as administratrix; 2 Wms. Ex. 1441.

They may be joined in trespass for their joint act; 3 B. & Ald. 687; Roadcap v. Sipe, 6 Gratt. (Va.) 213.

Joint tenants and parceners, during the continuance of the joint estate, must join in all actions *ex delicto* relative thereto, as in trespass to their land, and in trover or replevin for their goods; 2 Bla. Com. 182, 188; Bacon, Abr. *Joint Ten.* (K); Shaver v. Brainard, 29 Barb. (N. Y.) 29. Joint tenants may join in an action for slander of the title to their estate; 3 Bingh. 455. They should be sued jointly, in trespass, trover, or case, for anything respecting the land held in common; Com. Dig. *Abatement* (F 6); 1 Wms. Saund. 291 *e.* Joint tenants should join in an avowry or cognizance for rent; 3 Salk. 207; or for taking cattle damage feasant; Bacon, Abr. *Joint Ten.* (K); or one joint tenant should avow in his own right, and as bailiff to the other; 3 Salk. 207. But a tenant in common cannot avow the taking of the cattle of a stranger upon the land damage feasant, without making himself bailiff or servant to his co-tenant; 2 H. Bla. 388; Bacon, Abr. *Replevin* (K).

Master and *servant*, where co-trespassers, should be joined though they be not equally culpable; 5 B. & C. 559. *Partners* may join for a joint injury in relation to the joint property; 3 C. & P. 196. They may be joined as defendants where property is taken by one of the firm for its benefit; 1 C. & M. 93; and where the firm makes fraudulent representations as to the credit of a third person, whereby the firm gets benefit; Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141. In an action against a corporation for a tort, the corporation and its servants by whose act the injury was done may be joined as defendants; Hussey v. R. Co., 98 N. C. 34, 3 S. E. 923, 2 Am. St. Rep. 312.

Tenants in common must join for a trespass upon the lands held in common; Littleton § 315; Sherman v. Ballow, 8 Cow. (N. Y.) 304; Rangely v. Spring, 28 Me. 136; or for taking away their common property; Cro. Eliz. 143; or for detaining it; Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309; or for a nuisance to their estate; Collins v. Ferris, 14 Johns. (N. Y.) 246.

IN CRIMINAL CASES. Two or more persons who have committed a crime may be jointly indicted therefor; In re Curran, 7 Gratt. (Va.) 619; U. S. v. O'Callahan, 6 McLean 596, Fed. Cas. No. 15,910. Bloomhuff v. State, 8 Blackf. (Ind.) 205; only where the offence is such that it may be committed by two jointly; State v. Roulstone, 3 Sneed (Tenn.) 107; and not where there are distinct and different offences; State v. Hall, 97 N. C. 474, 1 S. E. 683. A principal and accessory may be joined in one indictment; Com. v. Devine, 155 Mass. 224, 29 N. E. 515; State v. Lang, 65 N. H. 284, 23 Atl. 432.

They may have a separate trial, however, in the discretion of the court; Maton v. People, 15 Ill. 536; People v. Stockham, 1 Park. Cr. (N. Y.) 424; In re Curran, 7 Gratt. (Va.) 619; Com. v. Hills, 10 Cush. (Mass.) 530; State v. McLendon, 5 Strobh. (S. C.) 85; Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431; and in some states as a matter of right; People v. McIntyre, 1 Park. Cr. (N. Y.) 371.

See Dicey, Parties; Steph. Pl.; PARTIES; JOINT TORT FEASORS.

As to the effect of *Misjoinder* and *Nonjoinder*, and how and when advantage should be taken of either, see those titles.

JOINT. Joined together; united; shared by two or more. The term is used to express a common property interest enjoyed or a common liability incurred by two or more persons; as applied to real estate it involves the idea of survivorship. See JOINT TENANTS; ESTATE IN COMMON.

With respect to the ownership of choses in action, the term implies that the interest and right of action are united so that all the owners must be joined in a suit to enforce the obligation jointly held. See JOINT AND SEVERAL.

A joint liability on choses in action implies that though each person subject to it

is liable for the whole, they are all treated in law as together constituting one legal entity and must be sued together or a release to one will operate in favor of all. One who pays the debt is entitled to contribution (*q. v.*).

JOINT ACTION. An action brought by two or more as plaintiffs or against two or more as defendants. See JOINT AND SEVERAL; ACTIONS; JOINDER.

JOINT ADMINISTRATORS. See ADMINISTRATOR.

JOINT AND SEVERAL. A liability is said to be joint and several when the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Dicey, Parties 230. Where one is compelled to pay the whole debt or more than his proper share, he is entitled to contribution (*q. v.*). In case of the death of one his liability remains against his estate; Wms. Pers. Prop. 363. As a general rule all the contracts of partners are said to be joint and several. See PARTNERSHIP.

As to joint and several debtors, Lord Mansfield said in Rice v. Shute, 5 Burr. 2611, that "all contracts with partners were joint and several, and every partner was liable to pay the whole." But it was remarked by Spencer, C. J., that "it would be straining Lord Mansfield's opinion unreasonably to say, that he meant technically that all contracts with partners were joint and several, for, then, the non-joinder of any of the partners never could be pleaded in abatement, which all the court expressly decided. In equity they are joint and several; and so they were as regarded that suit, the defendant having neglected to avail himself of the objection in a legal manner. Surely it cannot be said that in a legal sense, when there are a plurality of debtors, that their contract is joint and several, when they have engaged jointly to pay the debt. Each debtor is bound for the whole, until the debt is paid; but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken severally to pay, separate suits may be brought against each; but when their undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy." Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227.

A defendant has no right to say that an action shall be several which a plaintiff elects to make joint; Louisville & N. R. Co. v. Ide, 114 U. S. 52, 5 Sup. Ct. 735, 29 L. Ed. 63. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way; Alabama G. S. R. Co. v. Thompson, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147.

Where several parties enter into a conspiracy to win the money of a third person by gambling or betting, each member of the conspiracy is jointly and severally liable to the person losing the money, under statutes allowing the recovery of money lost by gambling; Lear v. McMillen, 17 Ohio St. 464; McGrew v. Produce Exchange, 85 Tenn. 572, 4 S. W. 38, 4 Am. St. Rep. 771; Preston v. Hutchinson, 29 Vt. 144; although a partnership cannot, strictly speaking, exist for the conduct of an illegal business; Berns v. Shaw, 65 W. Va. 667, 64 S. E. 930, 23 L. R. A. (N. S.) 522, n. See JOINT TORTFEASORS.

JOINT AND SEVERAL BOND. A bond of two or more obligors, who bind themselves jointly and severally to the obligees, who can sue all the obligors jointly, or any one of them separately, for the whole amount, but cannot bring a joint action against part,—that is, treat it as joint as to some and several as to others.

JOINT BOND. The bond of two or more obligors, the action to enforce which must be joint against them all.

JOINT COMMITTEE. A committee composed of members of both houses of a legislature. See May, Parl. Pr.

JOINT CONTRACT. One in which the contractors are jointly bound to perform the promise or obligation therein contained, or entitled to receive the benefit of such promise or obligation.

It is a general rule that a joint contract survives, whatever may be the beneficial interests of the parties under it. When a partner, covenantor, or other person entitled, having a joint interest in a contract not running with the land, dies, the right to sue survives in the other partner, etc.; Morris' Lessee v. Vanderen, 1 Dall. (Pa.) 65, 1 L. Ed. 38; Wallace v. Fitzsimmons, 1 Dall. (Pa.) 248, 1 L. Ed. 122; Add. Contr. 9th ed. 239. And when the obligation or promise is to perform something jointly by the obligors or promisors, and one dies, the action must be brought against the survivor; Hamm. Partn. 156.

When all the parties interested in a joint contract die, the action must be brought by the executors or administrators of the last surviving obligee against the executors or administrators of the last surviving obligor; Add. Contr. 239. See CONTRACTS; PARTIES; CO-OBLIGOR.

JOINT DEBTORS. Two or more persons jointly liable for the same debt.

To sustain a suit against joint debtors, a joint and subsisting indebtedness must be shown; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; and by proceeding to judgment against one or more of joint

debtors the debt is merged in the judgment as to all; *id.*

Payment by one joint debtor who has been discharged in bankruptcy of a sum, less than is due on the joint debt, which the creditor accepts in satisfaction of the whole debt, is held to operate as such in favor of the other debtor; Ex parte Zeigler, 83 S. C. 78, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005.

JOINT DEBTORS' ACTS. Statutes enacted in many of the states, which provide that judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." The name is also given to statutes providing that where an action is instituted against two or more defendants upon an alleged joint liability, and some of them are served with process, but jurisdiction is not obtained over the others, the plaintiff may still proceed to trial against those who are before the court, and, if he recovers, may have judgment against all of the defendants whom he shows to be jointly liable. 1 Black, Judg. §§ 208, 235.

JOINT EXECUTORS. Those who are joined in the execution of a will. See EXECUTOR.

JOINT FIAT. A fiat which was formerly issued against two or more trading partners.

JOINT FINE. The fine which might be levied upon a whole vill.

JOINT HEIRS. Co-heirs.

JOINT INDICTMENT. One indictment brought against two or more offenders, charging the defendants jointly. It may be where there is a joint criminal act, without any regard to any particular personal default or defect of either of the defendants: thus, there may be a joint indictment against the joint keepers of a gaming-house; 1 Ventr. 302; 2 Hawk. Pl. Cr. 240.

JOINT LIVES. An expression used to designate the duration of an estate or right, limited or granted to two or more persons, to be enjoyed during the lives of both or all of them.

An annuity to two for their lives is payable until the death of one. Where the survivor is to be benefited, the conveyance or devise is usually expressed to be "to hold their joint lives and the life of the survivor."

JOINT OWNERSHIP. See JOINT.

JOINT RESOLUTION. A resolution adopted by both houses of congress or a legislature. When such a resolution has been approved by the president or passed with his approval, it has the effect of a law. 6 Op. Atty. Gen. 680.

The distinction between a joint resolution and a concurrent resolution of congress, is that the former requires the approval of the president while the latter does not. Rep. Sen. Jud. Com. Jan. 1897.

JOINT STOCK BANKS. In English Law. A species of *quasi corporations*, or companies regulated by deeds of settlement. See JOINT STOCK COMPANY.

JOINT STOCK COMPANY. An association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being commonly divided into shares of which each member possesses one or more, and which are transferable by the owner. Shelf. Jt. St. Co. 1.

A *quasi* partnership, invested by statutes in England and many of the states with some of the privileges of a corporation. See Pennsylvania v. Mining Co., 10 Wall. (U. S.) 556, 19 L. Ed. 998; L. R. 4 Eq. 695.

A partnership whereof the capital is divided, or agreed to be divided, into shares so as to be transferable without the express consent of the co-partners. Pars. Part. § 435.

Such associations are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. Incorporated companies are intermediate between corporations known to the common law and ordinary corporations and partake of the nature of both. 1 Lindl. Partn., 1st ed. 6.

They are to be distinguished from limited partnerships chiefly in that there is, in a joint stock company, no *dilectus personarum*, that is, no choice about admitting partners, the shares are transferable without involving a dissolution of the association, the assignee of shares becomes a partner by virtue of the transfer, and the rights and duties of the members are determined by articles of association, or in England by a deed of settlement; 1 Pars. Contr., 8th ed. 144.

Joint stock companies may be formed without regard to the statutes, and the promoters may choose to proceed solely upon their common-law rights and responsibilities; People v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665. They are not illegal; Howe v. Morse, 174 Mass. 491, 55 N. E. 213.

The relation of the stockholders to the company is settled by the articles of agreement. They contribute the capital, select the trustees and are entitled to a distributive share of the profits. They have no power to use the name of the company to interfere with its business, or to bind it in any manner. This power they have voluntarily

surrendered to the trustees; In re Oliver's Estate, 136 Pa. 43, 20 Atl. 527, 9 L. R. A. (N. S.) 421, 20 Am. St. Rep. 894; Spotswood v. Morris, 12 Idaho 360, 85 Pac. 1094, 6 L. R. A. (N. S.) 665; 2 H. L. Cas. 520.

Generally the number of shares is fixed by the charter, but it is sometimes provided that there shall not be less than a certain number nor more than a certain number. In such cases it is left for the company to determine the number within the limits prescribed; Somerset & K. R. Co. v. Cushing, 45 Me. 524; but where the charter fixes the amount of the capital stock, and provides that it may be increased from time to time at the pleasure of the corporation, the directors have no power to increase the amount of the stock, although the charter provides that all the corporate powers shall be vested in, and exercised by a board of directors, and such officers and agents as such board shall appoint; Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

In New York joint stock companies have all the attributes of a corporation except the right to have and use a common seal, and an action is properly brought for or against the president as such, and the judgment and execution against him bind the joint property of the association, but do not bind his own property; National Bank of Schuylerville v. Van Derwerker, 74 N. Y. 234; People v. Coleman, 5 N. Y. Supp. 394, 970, affirmed 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; but it has been held that the provisions in the New York statutes are merely local in their operation, and that the members may be sued in other states as partners; Boston & A. R. v. Pearson, 128 Mass. 445; Frost v. Walker, 60 Me. 468.

They may be served with summons in another state in the same manner that corporations are served; Adams Exp. Co. v. State, 55 Ohio St. 69, 44 N. E. 506; and on an issue as to whether an association was a joint stock company or a corporation, its classification by the statutes of New York, where it was created, has been held not conclusive; State v. Exp. Co., 1 Ohio, N. P. 238, 2 Ohio S. & C. P. Dec. 239. A joint stock company having some of the characteristics of a corporation and some of a partnership, including the right to a common seal, ownership of the property by the association, and the right to sue and be sued in the corporate name, was held to be a citizen of the state which created it, and when sued in another state to be entitled to a removal to the federal court irrespective of the citizenship of its individual members; Bushnell v. Park Bros. & Co., 46 Fed. 209; Maltz v. Express Co., 1 Flip. 611, Fed. Cas. No. 9,002; Fargo v. Ry. Co., 6 Fed. 787, 10 Biss. 273.

A limited partnership association created under statute, although it may be called a quasi corporation, and is declared by statute to be a citizen of the state, is not, like a corporation created under the laws of the state, to be deemed a citizen of that state within the meaning of the clause of the federal constitution which extends the judicial power of the United States to controversies between citizens of different states; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842, reversing Jones v. Hotel Co., 86 Fed. 370, 30 C. C. A. 108.

The effect of the clause of the constitution of Pennsylvania that the term *corporations* "shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations, but possessed by individuals or partnerships" was declared to be only to place joint stock companies under the restrictions imposed by that article upon corporations, and not to invest them with corporation attributes; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842. They are properly classified with corporations in a tax measure, such as the federal corporation tax; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496.

Such companies, formed to deal in real estate, do not create interests within the rule against perpetuities and do not put illegal restraints upon alienation; Howe v. Morse, 174 Mass. 491, 55 N. E. 213; see 13 Harv. L. R. 516.

At common law they are held not corporations but are to be sued as partners; B. & A. R. Co. v. Pearson, 128 Mass. 445; Lewis v. Tilton, 64 Ia. 220, 19 N. W. 911, 52 Am. Rep. 436. But in states where there are statutory provisions concerning them the indebtedness of joint stock companies will be charged *pro rata* to the solvent members; Cameron v. Bank (Tex.) 34 S. W. 178. An English joint stock company (in this case a fire insurance company) endowed by its deed of settlement with the following powers and faculties, 1. A distinctive artificial name by which it can make contracts. 2. A statutory authority to sue and be sued in the name of its officers as representing the association. 3. A statutory recognition of it as an entity distinct from its members by allowing them to sue it or be sued by it. 4. A provision for its perpetuity by transfer of its shares so as to secure succession of membership, was held to be a corporation in this country; Liverpool & L. Life & F. Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; Oliver v. R. Co., 100 Mass. 531; notwithstanding the acts of parliament declaring it should not be so considered, and the court held that such corporations, whether organized under the laws of a state of the Union or a foreign government, may be taxed by another state

for the privilege of conducting their corporate business therein.

When such a company is not organized under the statutes a suit brought by or against it should be in the name of all the partners or of one or more for the use of all; Pipe v. Bateman, 1 Ia. 369; McGreary v. Chandler, 58 Me. 537; and a defective certificate of organization will render all the parties liable to a common-law action as partners; Vanhorn v. Corcoran, 127 Pa. 255, 18 Atl. 16, 4 L. R. A. 386. A mere subscription for shares in an unincorporated joint stock company will not make the subscribers liable as partners to third persons dealing with the company; they must have intended to become members and share in the profits of the business, but an unexplained subscription is evidence of that fact; Hunnewell v. Canning Co., 53 Mo. App. 245.

It is an incumbent duty on the part of a joint stock company not to permit a transfer of stock until fully satisfied of the shareholder's authority to transfer; L. R. 9 Eq. 181; Iasigi v. R. Co., 129 Mass. 46; and as to the nature of shares in such an association see SHARES.

An authority conferred on the directors to make contracts and bargains, and to transact all matters requisite for the affairs of the company will not in general authorize the directors to draw bills; 19 L. J. Ex. 34; 20 L. J. Q. B. 160; but if the directors have authority to bind the company by bills, and they regularly accept, in the name of the company, a bill drawn on the company, every member is liable as a joint acceptor to any holder who is not also a member of the company; 19 L. J. Ex. 34; 5 E. & B. 1; so the acceptance of a bill by an agent who is also a member of the company binds him personally; 9 Exch. 154.

To a suit for a dissolution or winding up of the affairs of a joint stock company, all the shareholders, however numerous, must be parties; 1 Keen 24; and any member of the company may institute an action for its dissolution; Snyder v. Lindsey, 92 Hun 432, 36 N. Y. Supp. 1037. The fact that such a company has conducted business for twenty-three years without making dividends for its stockholders, is good ground for its dissolution at suit of one of them; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459. A society that cannot be incorporated because organized to resist the enforcement of laws cannot sue in the society name for the collection of a debt; Schuetzen Bund v. Agitations Verein, 44 Mich. 313, 6 N. W. 675, 38 Am. Rep. 270. See CORPORATION; DIRECTOR; STOCKHOLDER; PARTNERS; PARTNERSHIP.

JOINT TENANCY. Joint tenancy exists where there has been a limitation of the same estate, by deed, will or parol, to two or more persons without words of severance. Jenks, Modern Land Law 170. Joint tenants are said to have four unities, time, title, interest and possession; Bassler v. Rewodlinski, 130 Wis. 26, 109 N. W. 1032, 7 L. R. A. (N. S.) 701. The estate of both must arise under the same limitation; but under the statute of uses the necessity that the titles of all the joint tenants should commence at the same time is avoided.

Every kind of property, real and personal, may be so held; Freeman, Co-Ten. & Part. § 16.

If one convey his whole interest to a stranger it works a severance; but if he convey a less interest, it probably does not. The marriage of a female joint tenant is not a severance; nor is a subsequent lease for years by the husband and the other joint tenant, reserving rent jointly; [1897] 1 Ch. 134. Neither a devise by one joint tenant nor an encumbrance created by one joint tenant defeats the full right of the survivor.

If one of two joint tenants dies, the survivor becomes solely entitled to the estate; Co. Litt. 181 *a;* but not as against a grantee *inter vivos* of one of the joint tenants; nor against a judgment debt on which execution had been levied in the life time of the debtor.

Survivorship has been abolished, except as to trust estates, in many states; See Demb. Land Titles 27; it has never existed in Ohio, Kansas, Nebraska or Idaho; *id.* 198; nor in Connecticut; Washb. R. P.

The presumption is that all tenants holding jointly hold as tenants in common, unless a clear intention to the contrary be shown; Webster v. Vandeventer, 6 Gray (Mass.) 428; Parsons v. Boyd, 20 Ala. 112; Miles v. Fisher, 10 Ohio 1, 36 Am. Dec. 61; Bambaugh v. Bambaugh, 11 S. & R. (Pa.) 191; Purdy v. Purdy, 3 Md. Ch. Dec. 547; Allen v. Logan, 96 Mo. 591, 10 S. W. 149; Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1; Rowland v. Rowland, 93 N. C. 214. In some states this is by statute.

In some, words that would have created a joint tenancy now create a tenancy in common.

Where there is a devise to two or more by name without a clear intention to vest it in the survivor, it vests severally; Goldstein v. Hammell, 236 Pa. 305, 84 Atl. 772.

Joint tenants at common law have no right to compulsory partition; Co. Litt. 187 *a*. They convey to each other by Release, in which words of inheritance are unnecessary; *id.* 273 *b*. They must plead and be impleaded jointly; *id.* 180 *b*., 195 *b;* but in [1880] 16 Ch. D. 63, it was held that one might sue alone for cutting timber on the land.

See JUS ACCRESCENDI; SURVIVOR.

JOINT TORTFEASORS. Wrongdoers; two or more who commit a tort.

When several persons join in an offence

or injury, they may generally be sued jointly, or any number less than the whole may be sued, or each one may be sued separately; Williams v. Sheldon, 10 Wend. (N. Y.) 654. Each is liable for himself, because the entire damages sustained were occasioned by each, each sanctioning the acts of the others, so that by suing one alone, he is not charged beyond his just proportion. Any number less than the whole may be sued, because each is answerable for his companion's acts. Thus a joint action may be brought against several for an assault and battery, or for composing and publishing a libel; 2 Saund. 117 *a;* Bacon, Abr. *Actions in General* (C); Harris v. Huntington, 2 Tyl. (Vt.) 129, 4 Am. Dec. 728.

But to this rule that for a joint injury a joint action may be brought, there is an exception, namely, that no joint action can be maintained for a joint slander; this exception seems to proceed upon the ground that each man's slander is his own, and it cannot by any means be considered that of another. Although this exception appears to be fully established, yet it is difficult to see the reason of it; when one of several trespassers gives the blow, he is considered as acting for the others, and, if they acted jointly, they may be jointly sued; why not consider the speaker, when acting in concert with others, as the actor for the whole in uttering the words? The blow is no more that of the person who did not give it than the words are the words of him who only united with the other in an agreement that they should be spoken. In either case, upon principle, the maxim, *qui facit per alium facit per se*, ought to have its force. Such however, is not the law.

Where a person is injured by a joint tort and accepts satisfaction from one of the wrongdoers, he cannot sue the other; Spurr v. R. Co., 56 N. J. L. 346, 28 Atl. 582.

A railroad company may be sued jointly with the servant whose negligence caused the injury, although it was not independently at fault; Illinois Central Ry. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205.

A covenant not to sue one of two joint tortfeasors does not operate as a release of the other from liability; [1892] 2 Q. B. 511; nor does the dismissal of an action against one, with the execution, for a valuable consideration, of an agreement not to sue him, release the other; City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; nor does the fact that where property is jointly converted by two persons, and one of those converting accounts to the owner, who accepts part of the proceeds, remove the other's liability; Horseley v. Moss, 5 Tex. Civ. App. 341, 23 S. W. 1115.

Where two or more parties act, each for himself and independently of each other, in a manner which may be injurious to another, they cannot be held jointly liable for the acts of each other; Livesay v. Nat. Bank, 36 Colo. 526, 86 Pac. 102, 6 L. R. A. (N. S.) 598, 118 Am. St. Rep. 120; Blaisdell v. Stephens, 14 Nev. 17, 33 Am. Rep. 523; Forbes v. Marsh, 15 Conn. 384; Larkins v. Eckwurzel, 42 Ala. 322, 94 Am. Dec. 651; Miller v. Ditch Co., 87 Cal. 433, 25 Pac. 550, 22 Am. St. Rep. 254.

Where unlawful attachments were simultaneously sued out by different creditors acting through the same attorney and levied by the same officer on the same property at the same time, but so that one constituted a prior lien on the personalty, and the other a prior lien on the realty attached, the creditors were held not joint wrongdoers, since neither was interested in the success of the other, and their actions, though simultaneous, were not for a common purpose; Miller v. Beck, 108 Ia. 575, 79 N. W. 344. But it has been held that where several creditors sue out at different times separate writs of attachment against a common debtor and cause them to be simultaneously levied by the same officer, they will be regarded, the levy being wrongful, as joint wrongdoers, though they may have acted separately without concert; Sparkman v. Swift, 81 Ala. 231, 8 South. 160; Vose v. Woods, 26 Hun (N. Y.) 486. In Ellis v. Howard, 17 Vt. 330, it was held that where the attachments are levied at the same time, by the same officer, and upon the same property, there is prima facie a joint trespass.

If the plaintiff allege that the concurrent negligence of both defendants caused his injury, he may join them in one action. It depends on the averments of his complaint, and if the state court so decides, he may join them even though the liability of one is statutory and the other rests on the common law; Chicago, R. I. & P. R. Co. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090.

JOINT TRESPASSERS. Two or more who unite in committing a trespass. See JOINT TORTFEASORS.

JOINT TRUSTEES. Two or more persons who are intrusted with property for the benefit of one or more others. See TRUSTEE.

JOINTRESS, JOINTURESS. A woman who has an estate settled on her by her husband, to hold during her life, if she survive him. Co. Litt. 46.

JOINTURE. A competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit or possession, presently after the death of the husband, for the life of the wife at least.

Jointures are regulated by the statute of 27 Hen. VIII. c. 10, commonly called the statute of *uses*.

To make a good jointure, the following circumstances must concur, namely: It must take effect, in possession or profit, immediately from the death of the husband. It must be for the wife's life, or for some greater estate. It must be limited to the wife herself, and not to any other person in trust for her. It must be made in satisfaction for the wife's whole dower, and not of part of it only. The estate limited to the wife must be expressed or averred to be in satisfaction of her whole dower. It must be made before marriage. See Grogan v. Garrison, 27 Ohio St. 60, where it is said that it may also be made after marriage. A jointure attended with all these circumstances is binding on the widow, and is a complete bar to the claim of her dower; or, rather, it prevents its ever arising. See 4 Kent 55.

But there are other modes of limiting an estate to a wife, which, Lord Coke says, are good jointures within the statute, provided that the wife accepts them after the death of the husband. She may, however, reject them, and claim her dower; Cruise, Dig. tit. 7; 2 Bla. Com. 137. See DOWER. It is held that a jointure cannot be affected by a postnuptial agreement; McCaulley's Ex'rs v. McCaulley, 7 Houst. (Del.) 102, 30 Atl. 735.

Any reasonable provision which an adult person agrees to accept in lieu of dower, it is said, will amount to an equitable jointure, and although it may be wanting in the requisites of a legal jointure, in equity it will bar dower; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, 17 L. R. A. (N. S.) 866, 16 Ann. Cas. 700; Stilley v. Folger, 14 Ohio 610.

A widow may, by provisions of an antenuptial contract, waive her right to an allowance when the rights of minor children are not involved; Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63, 4 Ann. Cas. 801. If such a contract was intended by the parties to operate as an equitable jointure, it will be upheld as such; Mintier v. Mintier, 28 Ohio St. 307.

In its more enlarged sense, a jointure signifies a joint estate limited to both husband and wife. 2 Bla. Com. 137. See 14 Viner, Abr. 540; Washb. R. P.

See MARRIAGE SETTLEMENT.

JOUR (Fr.). Day. It is used in our old law-books: as, *tout jours*, forever. It is also frequently employed in the composition of words: as, *journal*, a day-book; *journeyman*, a man who works by the day; *journeys account.*

JOURNAL. **In Maritime Law.** The book kept on board of a ship or other vessel which contains an account of the ship's course, with a short history of every occurrence during the voyage. Another name for log-book. Chitty, Law of Nat. 199.

In Commercial Law. A book used among merchants, in which the contents of the waste-book are separated every month, and entered on the debtor and creditor side, for more convenient posting in the ledger.

In Legislation. An account of the proceedings of a legislative body.

In England, there is no written constitution to control the action of parliament and its act cannot, therefore, be questioned, and so the parliament roll is sufficient to prove the authenticity of an act; 1 Strange 446. The journals of parliament are not records and cannot weaken or control a statute, which is a record and to be tried only by itself; Hob. 110.

The constitution of the United States, art. 1, s. 5, directs that "each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy. See 2 Sto. Const., 5th ed. § 839.

The constitutions of the several states contain similar provisions.

On a reference to the journal of the federal house of representatives to ascertain whether a duly authenticated law was passed, the court is bound to assume that the journal speaks the truth, and cannot receive oral evidence to impeach its correctness; U. S. v. Ballin, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321; but the debates in congress may not be resorted to for the purpose of discovering the meaning of a statute; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

The journal of either house is evidence of the action of that house upon all matters before it; Root v. King, 7 Cow. (N. Y.) 613; Cowp. 17. It is a public record of which the courts may take judicial notice; 1 Greenl. Ev. § 482; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640; Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; South Ottawa v. Perkins, 94 U. S. 260, 24 L. Ed. 154; Koehler v. Hill, 60 Ia. 549, 14 N. W. 738, 15 N. W. 609; Wise v. Bigger, 79 Va. 280; Brown v. Nash, 1 Wyo. 85. Cooley, Const. Lim. 135; *contra*, Gnob v. Cushman, 45 Ill. 119; Board of Commissioners of Madison County v. Burford, 93 Ind. 383. If it should appear therefrom that any act did not receive the requisite vote, or that the act was not constitutionally adopted, the courts may adjudge the act void; Cooley, Const. Lim. 164. Failure to comply with certain constitutional provisions in the passage of an act can be shown only by the journals; Fullington v. Williams, 98 Ga. 807, 27 S. E. 183; and if the journal sufficiently shows on its face a substantial compliance with constitutional requirements, a mere clerical omission in the journals of either house will not vitiate an act; Price v. City of Moundsville, 43 W. Va. 523, 27 S. E. 218, 64 Am. St. Rep. 878. Where they are silent as to the observance of any constitutional requirement, it will not be presumed that such requirement was disregarded, and where they do not expressly show whether

the act was constitutionally passed it will be held valid unless there is an omission of some matter expressly required by the constitution to be entered therein; Ritchie v. Richards, 14 Utah 345, 47 Pac. 670.

Mere failure to record the passage of an act, in the absence of any affirmative record that it did not secure the concurrence of both houses, is not sufficient to show that the act was not passed, where the certificate of the presiding officer of each house shows that it was regularly passed; Territory v. O'Connor, 5 Dak. 397, 41 N. W. 746, 3 L. R. A. 355.

Where the constitution requires that the yeas and nays be entered on the journals, they are conclusive as against not only a printed statute published by law, but a duly enrolled act; Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487.

In determining whether an act was passed in accordance with a constitutional provision requiring the assent of two-thirds of the members, recourse may be had to the journals, if the certificate of the presiding officer fails to show by what vote the bill was passed; New York & L. I. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088.

The journals need not show that a bill was read by sections on its final passage, as required by the constitution, the presumption being that it was read. And where they affirmatively show non-compliance with an essential requirement to the enactment of a bill, or fail to show any essential step in the enactment which the constitution requires them to show, the enrolled bill as evidence of the law is overcome; State v. Hocker, 36 Fla. 358, 18 South. 767.

Where a bill, as approved, contains important clauses which the journals show were stricken out by the amendment in the houses, it is invalid; State v. Wendler, 94 Wis. 369, 68 N. W. 759.

The journals cannot be resorted to by the court for the purpose of inquiring into the motive which actuated the legislature or any member of it in enacting a law; Blaine County v. Heard, 5 Idaho 6, 45 Pac. 890.

The journals are inadmissible to show that parts of the bill, as passed by the houses, were omitted from the enrolled bill as signed by the presiding officers of the two houses and the governor, where all bills are required to be signed by the governor after having passed the legislative assembly; Harwood v. Wentworth, 4 Ariz. 378, 42 Pac. 1025.

An enrolled bill, on file in the office of the secretary of state, must be accepted without question by the courts as having been regularly enacted by the legislature, and is conclusive evidence of its existence and contents; State v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; State v. Young, 32 N. J. L. 29; Weeks v. Smith, 81 Me. 538, 18 Atl. 325; Hunt v. Wright, 70 Miss. 298, 11 South. 608; State v. Glenn, 18 Nev. 34, 1 Pac. 186; People v. Commissioners of Highways of Marlborough, 54 N. Y. 276, 13 Am. Rep. 581.

Every reasonable presumption is made in favor of the action of a legislative body; it will not be presumed from the mere silence of the journals that either house disregarded a constitutional requirement in the passage of an act, unless in cases where the constitution has required the journals to show the action that has been taken; McCulloch v. State, 11 Ind. 424; Miller v. State, 3 Ohio St. 475; and the presumption that a properly authenticated bill was passed is not overcome by the failure of the journals to show any fact which is not specifically required by the constitution to be entered therein; Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632.

Such a bill properly enrolled, signed, and approved cannot be impeached by reference to the journals of either house, to show that it was enacted in conformity to constitutional requirements; Lafferty v. Huffman, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203; Com. v. Hardin County Court, 99 Ky. 188, 35 S. W. 275. But other courts have considered it part of their duties to ascertain whether the legislature has complied with the constitutional provisions and hence have introduced the journals to see if those prerequisites, required by the constitution have been performed; State v. Wray, 109 Mo. 594, 19 S. W. 86; Hunt v. State, 22 Tex. App. 396, 3 S. W. 233; Callaghan v. Chipman, 59 Mich. 610, 26 N. W. 806; State v. Brown, 20 Fla. 407; even if proof is adduced that they were; State v. Green, 36 Fla. 154, 18 South. 334.

As to the conclusiveness of an enrolled bill, see Atchison, T. & S. F. Ry. Co. v. State, 28 Okl. 94, 113 Pac. 921, 40 L. R. A. (N. S.) 1.

See INTERPRETATION.

JOURNEY. Originally a day's travel. It is now applied to travel from place to place, without restriction of time. But when thus applied, it is employed to designate a travel which is without the ordinary habits, business, or duties of the person, to a distance from his home, and beyond the circle of his friends or acquaintances. Gholson v. State, 53 Ala. 521, 25 Am. Rep. 652.

JOURNEYS ACCOUNT. **In English Practice.** A new writ which the plaintiff was permitted to sue out within a reasonable time after the abatement, without his fault, of the first writ. This time was computed with reference to the number of days which the plaintiff must spend in *journeying* to reach the court: hence the name of *journeys account*, that is, journeys *accomptes* or *counted*. This writ was *quasi* a continuance of the first writ, and so related back to it as

to oust the defendant or tenant of his voucher, plea of *non-tenure, joint tenancy fully administered,* or any other plea arising upon matter happening after date of the first writ; Co. Litt. fol. 9 *b*.

This mode of proceeding has fallen into disuse, the practice now being to permit that writ to be quashed, and to sue out another. See *Termes de la Ley;* Bacon, Abr. *Abatement* (Q); 14 Viner, Abr. 558; 4 Com. Dig. 714; 7 M. & G. 762; Richards v. Ins. Co., 8 Cra. (U. S.) 84, 3 L. Ed. 496.

JOUST. See JUST.

JUBILACION. **In Spanish Law.** The right of a public officer to retire from office, retaining his title and his salary, either in whole or in part, after he has attained the age of fifty years and been in public service at least twenty years, whenever his infirmities prevent him from discharging the duties of his office.

JUDAISMUS (Lat.). The religion and rites of the Jews. Du Cange. A quarter set apart for residence of Jews. Du Cange. A usurious rate of interest. 1 Mon. Angl. 839; 2 *id.* 10, 665. An income anciently accruing to the king from the Jews. Blount.

JUDEX (Lat.). **In Old English Law.** A juror. Spelman, Gloss. A judge, in modern sense, especially—as opposed to *justiciarius, i. e.* a common-law judge—to denote an ecclesiastical judge. Bracton, fol. 401, 402.

In Roman Law. One who, either in his own right or by appointment of the magistrate for the special case, judged causes.

Thus, the *prætor* was formerly called *judex.* But, generally, prætors and magistrates who judge of their own right were distinguished from *judices,* who were private persons, appointed by the prætor, on application of the plaintiff, to try the cause, as soon as issue was joined, and furnished by him with instructions as to the legal principles involved. They were variously called *judices delegati,* or *pedanei,* or *speciales.* It has been said that they resembled in many respects jurors: thus, both are private persons, brought in at a certain stage of the proceedings, viz., issue joined, to try the cause, under instructions from the judge as to the law of the case. But civilians are not clear whether the *judices* had to decide the fact alone, or the law and fact. The *judex* resembles in many respects the *arbitrator,* or arbiter, the chief differences being, *first,* that the latter is appointed in cases of trust and confidence, the former in cases where the relations of the parties are governed by strict law (*in pactionibus strictis*); *second,* the latter has the whole control of cases, and decides according to equity and good conscience, the former by strict formulæ; *third,* that the latter may be a magistrate, the former must be a private person; *fourth,* that the award of the arbiter derives its force from the agreement of submission, while the decree of the *judex* has its sanction in the command of the prætor to try the cause; Calvinus, Lex.; 1 Spence, Eq. Jur. 210, note; Mackeldey, Civ. Law, Kaufmann ed. § 193, note.

It has been said that there was generally one judex, sometimes three,—in which case the decision of two, in the absence of the third, had no effect; Calvinus, Lex. But another careful writer says that "although there could never be more than one *judex,* there were sometimes several *arbitri,* but the *arbiter* was chosen from the same class as the *judex.*" Sand. Inst. Just. Introd. lxiii.

Down to the time of handing over the cause to the *judex,* that is, till issue joined, the proceedings were before the prætor, and were said to be *in jure;* after that before the *judex,* and were said to be *in judicio.* In all this we see the germ of the Anglo-Saxon system of judicature; 1 Spence, Eq. Jur. 67.

A judge who conducted the trial from beginning to end; *magistratus.* The practice of calling in *judices* was disused before Justinian's time: therefore, in the Code, Institutes, and Novels, *judex* means judge in its modern sense. Heineccius, Elem. Jur. Civ. § 1327.

The term *judex* is used with very different significations at different periods of Roman law. The distinctive features of the position of the *judex* belong to the earlier history of the Roman law.

A recent writer defines very clearly the functions of the *judex* at that period as distinguished from those of the magistrate: "In the earlier history of civil procedure in Rome, we find two sharply defined divisions,—the proceedings which were said to be *in jure,* and those which were *in judicio.* The former took place before the magistrate, who represented officially the judicial power of the State. This magistrate in this capacity decided, in the first instance, whether the claim of the complaining party was cognizable at all,—whether there was any form of procedure by which it could be enforced. If it was controverted, and there seemed to be any action that would fit the case, the *litis contestatio* was formed, by a solemn appeal addressed by each party to his witnesses, and the controversy was then referred to the *judex,* or in some cases to a body or college of *judices.* The *judices* were not magistrates, and did not represent the power of the State. They were, it would seem, more in theory like referees. They took up the issue which had been stated by the magistrate, heard the testimony, and pronounced the *sententia,* and this finding was afterwards enforced by the magistrate." Howe, Studies in Civ. L. 246.

This relates to the period during which the sharply defined distinction between proceedings *in jure* and those *in judicio* was strictly observed. If, for example, the dispute concerned property it was assigned temporarily to the possession of one party, who gave security for its restoration if required, and the *judex* simply decided which litigant was right; Morey, R. L. 18, 339. The growth of the proceeding by *formula* during the next period was doubtless largely due to its convenience as a method of conveying to the *judex* the instructions of the magistrate with respect to the case referred to him. The new proceeding tended very much to increase the flexibility of the law in its application to particular cases, as it has been said there was no tradition to fetter the formula of the *prætor.* In the old *litis contestatio* the issue was formulated in narrowly prescribed terms; in the new *formula* the terms used were informal and freely chosen by the magistrate. "The *formula* was thus well adapted as a means for directly submitting to the decisions of a *judex in judicio* any question, or complex of questions, which the *prætor* deemed actionable. The *prætor* himself was now in a position, while formulating the legal issue, to give the *judex* at the same time direct instructions in reference to the decision of such issue. For whether the judge condemned or acquitted depended now solely on the manner in which the *prætor* formulated the question in dispute." Sohm, Inst. Rom. L. 177. It was now for the first time that the *judex* became in effect an official, he ceased to be an independent private person bound only by the positive law, and his action was dominated by the limitations of the *prætor's* edict. Thus the latter became a dominating force in legal procedure, and the *judex* in some sense a subordinate official, and the result was "that the formulary procedure obliterated beyond recovery the clear sharp line which had hitherto severed *jus* and *judicium.*" This naturally resulted

from the fact that by the *formula* the *judex* was converted into an organ or instrument not only of the civil, but also of the *prætor*, made law, and the proceedings *in judicio* and those *in jure* were controlled by the same authority; *id.* 178, 220. In the last period of Roman procedure during the later empire the *prætor* lost his former power of directing the administration of the law, and when the edict came to be fixed by the will of the emperor the *prætor* and the *præses* were bound by it equally with the *judex* and in the same way that the latter had before been limited by their own edict. Its publication by the *prætor* was merely formal, and he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law. Thus the *judex* gradually became an official whose duty it was to assist the *prætor*, and, in the same way, the *prætor* became in reality an official whose duty it was to assist the emperor; *id.* 220.

For a long period senators alone were qualified to act as judges, and during that time any member of the senate could act, if justified, by mutual consent of the parties, or if they could not agree by law. There were also plebian judges called *centumviri* elected by the *comitia* constituting a *collegium* divided into sections and having special jurisdiction of citizenship and successions; their jurisdiction was exclusive where it existed. As to the duties of the *judex* see also Inst. 4. 17. 1-7; Sand. Introd. xii., xxi., lxi., lxxiv.; Sohm, Inst. Rom. L. §§ 34-37; PRÆTOR; RECUPERATORES; JUDICIUM; IN JURE.

Judex Ordinarius (Lat.). **In Civil Law.** A judge who had jurisdiction by his own right, not by another's appointment. Calvinus, Lex.; Vicat, Voc. Jur. Blackstone says that *judices ordinarii* decided only questions of fact, while questions of law were referred to the *centumviri;* but this would seem to be rather the definition of *judices selecti;* and not all questions of law were referred to the *centumviri*, but particular actions: *e. g. querela inofficiosi testamenti.* See 2 Bla. Com. 315; Vicat, Voc. Jur. Utr. *Centumviri.*

Judex Pedaneus. Inferior judges; deputy judges; "*petit* judges that try only trifling cases (so-called because they had only a low seat and no tribunal)." Harper's Lat. Dict.; Dig. 3. 1. 1. 6.

The name was given to the *judex* who was delegated to hear the whole cause. Their appointment is said to have been due, in the first instance, to the great increase in the volume of judicial business, which led the emperor Diocletian to authorize the provincial governors to refer cases of minor importance to them. They "were not *judices* in the old sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them. No other view of the character of these officers seems consistent with the autocratic spirit which permeated the whole imperial system;" Morey, Rom. L. 142.

"About the end of the third century, the *præsides provinciarum* were in the habit of proceeding *extra ordinem* in civil actions, *i. e.* they were in the habit of either giving judgment themselves or of delegating the whole cause to a deputy judge, a *judex pedaneus.* This deputy judge (who is also called *judex datus* or *judex delegatus*) is now in form as well as in substance an official who acts in lieu of the magistrate; he is not merely entrusted, like the old *judex privatus*, with the conduct of the proceedings *in judicio*, but is deputed—and this is the reason why no formula is used—to hear and determine the whole cause, including the proceedings *in jure.* Like the proceedings before the *præses* himself, the proceedings before this subordinate judge are *extra ordinem;*" Sohm, Inst. Rom. L. 222. It has been said with respect to these judges that the prætors and other great magistrates did not themselves decide the actions which arose between private individuals: these were submitted to judges chosen by the parties, and these judges were called *judices pedanei.* In choosing them, the plaintiff had the right to nominate, and the defendant to accept or reject those nominated; Heineccius, Antiq. lib. 4, tit. b. n. 40; 7 Touillier, n. 353. As to *judices pedanei*, generally, see Zimmern, Ges. Rom. Priv. § 18.

Judex Quæstionis. A magistrate who decided the law of a criminal case, when the *prætor* himself did not sit as a magistrate. Morey, Rom. L. 88.

The director of the criminal court under the presidency of the *prætor.* Harper's Lat. Dict.; Cic. Brut. 76, 264.

Judex Selectus. A select or selected *judex* or judge.

The judges in criminal suits selected by the *prætor.* Harper's Lat. Dict.; Cic. Verr. 2, 2, 13, § 32.

These *judices selecti* were used in criminal causes, and between them and modern *jurors* many points of resemblance have been noticed; 3 Bla. Com. 366. They were first returned by the *prætor*, then drawn by lot, subject to challenge; they were sworn and talesmen were struck. So many points of resemblance were thought to exist between them and the δικαοταί of the Greeks and our juries that the English institution has been thought to be derived from the former ones; *id.* note (n). But the root idea of both systems is sufficiently natural and logical to have been indigenous in both countries. See JURY.

JUDGE. A public officer lawfully appointed to decide litigated questions according to law.

An officer so named in his commission, who presides in some court.

In its most extensive sense the term includes all officers appointed to decide litigated questions while acting in that capacity, including justices of the peace, and even jurors, it is said, who are judges of the facts. Com. v. Dallas, 4 Dall. (U. S.) 229, 1 L. Ed. 812; Respublica v. Dallas, 3 Yeates (Pa.) 300. In ordinary legal use, however, the term is limited to the sense of the second of the definitions here given; People v. Wilson, 15 Ill. 388; unless it may be that the case of a justice or commissioner acting judicially is to be considered an extension of this meaning. See 3 Cush. (Mass.) 584.

It is not an unusual use of language in statutes to put the judge for the court, and to make provisions for him to execute that which can only be executed in court. In re United States, 194 U. S. 197, 24 Sup. Ct. 629, 48 L. Ed. 931.

By the common law every court, while engaged in the exercise of its lawful functions, has the authority to preserve order, decency, and silence in its presence, and may apprehend and punish the offender without examination or proof; but if the offence be com-

mitted out of court the party is entitled to notice and a hearing in his defence; People v. Turner, 1 Cal. 152; Redman v. State, 28 Ind. 205. A judge must be in court during a trial; see 10 Am. L. Rev. 50. See CONTEMPT.

An assault on a judge sitting in court is not only punishable as a contempt, but indictable, as a crime against public justice, and more aggravated than an ordinary assault, or even than an assault committed upon another person in a court; 2 Bish. N. Cr. L. § 250; this principle comes from the common law and was, as early as 25 Edw. 3, embodied in a statute, under which such an offence was punishable by the loss of the right hand, forfeiture of lands and goods, and perpetual imprisonment. In Neagle's Case, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, it was held that "an assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place." In this case the petitioner was a United States deputy marshal, appointed for the express purpose of guarding Mr. Justice Field against a threatened attack, which took place, and a killing by the deputy in such defence was held by the court to have been caused by a just apprehension that an attack would result in the death of the justice, and was justifiable and a judgment of the circuit court, discharging him from the custody of the sheriff, by whom he was held under process of the state court, was affirmed.

So any insult, disrespect, or insolence to a judge is punishable; 2 Bish. N. Cr. L. § 250. On this subject, it was said by Holroyd, J.: "In the case of an insult to (the judge) himself, it is not on his own account that he commits; for that is a consideration which should never enter his mind. . . . It is his duty to support the dignity of his station, and uphold the law, so that in his presence at least, it shall not be infringed." 4 B. & Ald. 329, 339.

Within this principle it was held to be a contempt to write a letter to a judge, libelling or abusing him in regard to one of his decisions; In re Pryor, 18 Kan. 72, 26 Am. Rep. 747; or when a judge of an inferior tribunal refuses obedience to process from a superior one; Patchin v. City of Brooklyn, 13 Wend. (N. Y.) 664; 1 Eng. L. & Eq. 516; Gorham v. Luckett, 6 B. Monr. (Ky.) 638; State v. Noel, T. U. P. Charlt. (Ga.) 43; Ex parte Carnochan, *id.* 315.

It has been held that abusing a judge out of court, with reference to expressions made by him on a trial, was a contempt; Com. v. Dandridge, 2 Va. Cas. 408; but in another case it was held that newspaper articles in regard to the conduct of a judge during a trial, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt; Ex parte Hickey, 4 Sm. & M. (Miss.) 751. In the federal courts, and in many states, the subject is regulated by statute; U. S. R. S. § 725; U. S. v. R. Co., 16 Fed. 853; Ex parte Robinson, 19 Wall. (U. S.) 505, 22 L. Ed. 205; People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528; In re Oldham, 89 N. C. 23, 45 Am. Rep. 673; Foster v. Com., 8 W. & S. (Pa.) 77; Cheadle v. State, 110 Ind. 301, 11 N. E. 426, 59 Am. Rep. 199. The question whether a contempt can be committed otherwise than in court cannot be said to be settled, but Bishop is of the opinion that the English and better American doctrines recognize such contempts, yet, under limitations easily defined; 2 Bish. N. Cr. L. § 258. In all such cases the offence is against the state, not the judge; *id.* § 269; Haight v. Lucia, 36 Wis. 355; Whittem v. State, 36 Ind. 196.

Bribery or attempting to bribe a judge was, at common law, a very grave offence. Indeed the earlier definitions of bribery seem to confine the offence to judicial officers; 4 Bla. Com. 139; 3 Inst. 145; and they were criticised for being too narrow. See 1 East 183; 4 Burr. 2494; 2 Bish. N. Cr. L. § 85, n. 1.

Upon the same ground are condemned sinister approaches, with intent to influence judges indirectly, though not amounting to bribery; *id.;* and on this subject it was said by Lord Cottenham: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought, more frequently than it is, to be treated, as what it really is, high contempt of court." 1 Macn. & G. 116, 122.

Judges are appointed or elected in a variety of ways in the United States. For the federal courts they are appointed by the president, by and with the consent of the senate; in some of the states they are appointed by the governor, the governor and senate, or by the legislature. The judges of the federal courts and of the courts of some of the states hold their offices during good behavior; of others, during good behavior, or until they shall attain a certain age; and of others, for a limited term of years. The federal judges must have the tenure of office during good behavior conferred upon them before they can be invested with any portion of the judicial power; Kentucky & I. Bridge Co. v. R. Co., 37 Fed. 567, 2 L. R. A. 289.

Impartiality is the first duty of a judge: if he has any (the slightest) interest in the cause, he is disqualified from sitting as a judge; *aliquis non debet esse judex in propria causa;* 8 Co. 118; Hill v. Wells, 6 Pick. (Mass.) 109; Gregory v. R. Co., 4 Ohio St. 675; Knight v. Hardeman, 17 Ga. 253; Sanborn v. Fellows, 22 N. H. 473; Hawley v. Baldwin, 19 Conn. 585; Howell v. Budd, 91

Cal. 342, 27 Pac. 747; Chase v. Weston, 75 Ia. 159, 39 N. W. 246; such as his relationship to the parties; People v. Connor, 142 N. Y. 130, 36 N. E. 807; even where such party is administrator only; Dennard v. Jordan, 14 Tex. Civ. App. 398, 37 S. W. 876 (but relationship to plaintiff's attorney will not disqualify him; Patton v. Collier, 13 Tex. Civ. App. 544, 38 S. W. 53). Either party may make the objection that the judge is of kin to one of them; Kelly v. Hocket, 10 Ind. 299; and it is for the judge to determine, in the exercise of sound judicial discretion, whether by reason of kinship, etc., it would be improper for him to hear a particular case; he cannot be compelled to vacate the bench by the affidavit of the litigant; Byram's Ex'rs v. Holliday, 84 Ky. 18. A pecuniary interest in the case on trial will incapacitate him from sitting in the cause, both by the common law and the statutes; Ochus v. Sheldon, 12 Fla. 138; Buckingham v. Davis, 9 Md. 324; Pearce v. Atwood, 13 Mass. 340; as where he is interested as a stockholder in a railroad corporation making an application for a commission to appraise land, his interest is such as to invalidate the report of the commissioners; Gregory v. R. Co., 4 Ohio St. 675; or was a member of a mutual benefit society; Texas-Sovereign Camp v. Hale, 56 Tex. Civ. App. 447, 120 S. W. 539; or where the judge's wife was a stockholder in a corporation which was a party; First Nat. Bank v. McGuire, 12 S. D. 226, 80 N. W. 1074, 47 L. R. A. 413, 76 Am. St. Rep. 598. Where a statute disqualified a judge by reason of relationship with either litigant within the sixth degree, this did not disqualify a judge because he and the plaintiff's attorney had married sisters; Zambetti v. Garton, 113 N. Y. Supp. 804; where the lord chancellor, who was a shareholder in a company in whose favor the vice-chancellor had made a decree, affirmed this decree, it was reversed on that ground; 3 H. L. Cas. 759; but it has been held that where the interest of the judge is merely that of a corporator in a municipal corporation, the legislature may provide that this shall constitute no disqualification when the corporation is a party, apparently on the ground that the interest is insignificant; Commonwealth v. Reed, 1 Gray (Mass.) 475. But it is doubtful whether even the legislature can go beyond this class of cases and abolish the rule stated in the maxim; Cooley, Const. Lim. 516.

Active political partisanship will not disqualify a judge to try a contested election case; Fulton v. Longshore, 156 Ala. 611, 46 South. 989, 19 L. R. A. (N. S.) 602.

If one of the judges is disqualified on this ground, a judgment rendered will be void, even though the proper number may have concurred in the result, which includes the interested judge; 6 Q. B. 753; or though the parties agree to waive objections to the jurisdictions; January v. State, 36 Tex. Cr. R. 488, 38 S. W. 179; Lee v. Mortgage Co., 51 Tex. Civ. App. 272, 115 S. W. 320; and see *infra*. The objection may be raised for the first time in the appellate court; Richardson v. Welcome, 6 Cush. (Mass.) 332; 2 H. L. Cas. 387; but in Iowa it was held that an objection to a judge of the court of original jurisdiction on the ground of interest must be made in that court; Ellsworth v. Moore, 5 Ia. 486.

In a suit on a collector's bond by the chosen freeholders of a county, one who was an inhabitant, a freeholder, and a taxpayer in the same county was incompetent to sit as judge; Peck v. Freeholders of Essex County, 21 N. J. L. 656. A judge is not disqualified to try a case because he has tried an action in trespass concerning the same property; Martyn v. Curtis, 68 Vt. 397, 35 Atl. 333.

The interest which disqualifies a judge of the supreme court so that a judge of the circuit court may sit in his stead must be immediate, certain, and dependent on the result of the case, and not remote, uncertain, or speculative; Trustees Internal Imp. Fund v. Bailey, 10 Fla. 213.

A bias which disqualifies a judge must be such as might cause him to act corruptly or with such oppression as to be equivalent to corruption, such as to make it improper that a man of integrity should hear the case; but the mere fact that a judge is unfriendly to personal injury suits does not disqualify him in such a case; McDonald's Adm'r v. Coal & Coke Co., 135 Ky. 624, 117 S. W. 349.

By statute a judge of the United States Court of Appeals is disqualified if he acted in the cause in the court below.

The general rule that it is irregular and improper for a judge to try any cause in which he has such an interest as would disqualify as a witness does not apply to orders purely formal in their character, and it is doubtful whether it would extend to a case in which no other judge could try and determine the cause. If the judge is deprived of authority to act, by statutory inhibition, the proceedings are void, otherwise voidable only, and therefore valid until avoided; Heydenfeldt v. Towns, 27 Ala. 423.

It is said to be discretionary with him whether he will sit in a cause in which he has been of counsel; Owings v. Gibson, 2 A. K. Marsh. (Ky.) 517; Denn v. Tatem, 1 N. J. L. 164. See Bank of North America v. Fitzsimons, 2 Binn. (Pa.) 454; Murphy v. Barlow, 5 Ind. 230; Cullen v. Drane, 82 Tex. 484, 18 S. W. 590. But the practice is to refuse to sit in such case. And in Reams v. Kearns, 5 Coldw. (Tenn.) 217, it was held that where the judge who rendered the judgment in the case had been counsel in it, the judgment was a nullity; Tampa Street R. & Power Co. v. R. Co., 30 Fla. 595, 11 South. 562, 17 L. R. A. 681. Such relation disqualifies; Stepp v. State, 53 Tex. Cr. R. 159, 109 S. W. 1093; but

it is held that it may be waived; Kerr v. Burns, 42 Colo. 285, 93 Pac. 1120; acquiescence gives consent; *id.* The question arose in Delaware at the time of the appointment of Bates, Chancellor, in 1865, whether he was legally disqualified from sitting in such cases, so as to bring them within the constitutional provision, giving jurisdiction to the chief justice in all cases in which the chancellor was interested. In view of the desire of the chancellor not to sit in cases in which he had been of counsel, the question was considered by him and Gilpin, C. J., and the conclusion reached that there was not a legal disqualification. This conclusion was communicated by the chancellor to the legislature with a suggestion that provision should be made for the appointment of a chancellor *ad litem* in such cases; MS. notes of Bates, Chancellor. Merely to have been counsel for one of the parties does not disqualify; Keller v. Riverton Water Co., 34 Pa. Super. Ct. 301.

A magistrate authorized to sign writs cannot sign them in his own case; Doolittle v. Clark, 47 Conn. 316.

Where there is no other tribunal that can act, the judge may hear the case; Freem. Judg. § 146; 5 H. L. C. 88; Stuart v. Mechanics' Bank, 19 Johns. (N. Y.) 501; *contra*, Washington Ins. Co. of City of New York v. Price, Hopk. Ch. (N. Y.) 2; Hall v. Thayer, 105 Mass. 221, 7 Am. Rep. 513. See Cooley, Const. Lim., 2d ed. 207, 506, 509; People v. Gies, 25 Mich. 83.

It is said that a judge who has a personal interest in a cause may hear it if counsel waive the objection. Parke, B., heard a case under such circumstances; Reedie v. L. & N. W. R. Co., 4 Ex. 244. It is said to be settled in England that he must sit if the case cannot be heard otherwise. Pollock, First Book of Jurispr. 265, citing Thellusson v. Rendlesham, 7 H. L. C. 429. Lord Coke heard the case of Sutton's Hospital, 10 Rep. *1a, though he was at the time one of its governors, and decided it in its favor.

It was held that the absence of a judge from the court-room for a considerable time during the arguments to the jury without the consent of the parties was reversible error; Waller v. People, 209 Ill. 284, 70 N. E. 682.

A judge is not competent as a witness in a cause trying before him, for this among other reasons, that he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another; 1 Greenl. Ev. § 364; Ross v. Buhler, 2 Mart. La. (N. S.) 312; Julian v. Gallen, 2 Cal. 358. See Com. Dig. *Courts* (B 4), (C 2), (E 1), (P 16), *Justices* (I 1, 2, 3); Bacon Abr. *Courts* (B); 1 Kent 291; CHARGE.

In the House of Lords Lord Chancellor Westbury abstained from taking part in the decision because he had been concerned in the case; Di Sora v. Phillipps, 10 H. L. C. 624.

While acting within the bounds of his jurisdiction, the judge is not responsible for any error of judgment or mistake of law; 12 Co. 23; Ross v. Rittenhouse, 2 Dall. (Pa.) 160, 1 L. Ed. 331; Reid v. Hood, 2 N. & M'C. (S. C.) 168, 10 Am. Dec. 582; Yates v. Lansing, 5 Johns. (N. Y.) 282; Ely v. Thompson, 3 A. K. Marsh. (Ky.) 76; Evans v. Foster, 1 N. H. 374; Stone v. Graves, 8 Mo. 148, 40 Am. Dec. 131; Morrison v. McDonald, 21 Me. 550; Hamilton v. Williams, 26 Ala. 527; unless, possibly, a mistake was induced by gross carelessness or ignorance partaking of a criminal quality; 12 Mod. 493. An action will not lie against a judge of a court of record for any act done by him in his judicial capacity; 6 B. & C. 611. An action of a judge, to be criminally or even civilly cognizable, must be wilful and corrupt; 1 W. Bla. 19; Dawning v. Herrick, 47 Me. 462; Hamilton v. Williams, 26 Ala. 527; Yates v. Lansing, 9 Johns. (N. Y.) 395; Lenox v. Grant, 8 Mo. 254.

It is a rule sometimes asserted to be absolute and sometimes only *prima facie* that a judicial officer has no protection against the consequences of an act not within his jurisdiction; Piper v. Pearson, 2 Gray (Mass.) 120, 61 Am. Dec. 438; Clarke v. May, 2 Gray (Mass.) 410, 61 Am. Dec. 470; Sullivan v. Jones, 2 Gray (Mass.) 570; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. Ed. 646. But a distinction has sometimes been suggested between acts in excess of jurisdiction and those outside of it. For the latter it has been said that a judge of a court of superior jurisdiction is not liable; Lord De Grey, C. J., in 2 W. Bla. 1141. Of this case it is said by a writer cited *infra*, who dissents from the doctrine: "It is true this rule is a mere *dictum*, and also that the decision has been since overruled; but this *dictum* has sometimes been referred to with approval in subsequent cases;" 15 Am. L. Rev. 440. And Field, J., in Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. Ed. 285, said that such a judge is not liable when he acts in excess of his jurisdiction, except for malice. This expression, like that of Lord De Grey, was *obiter*, inasmuch as the case sustained the jurisdiction which had been questioned. In Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80, this point was so decided, but the court drew a distinction between the case where the judge had acquired no jurisdiction at all, and the case where the act was merely in excess of jurisdiction after jurisdiction had been acquired. There the judge of the circuit court had imposed a re-sentence upon a prisoner, and he was accordingly imprisoned; the supreme court held the second sentence illegal, and discharged the prisoner. These cases and the doctrine asserted in them have been doubted and criticised by Arthur Biddle in 15 Am. L. Rev. 442 and note, where the authorities cited and relied

on are critically examined. More recently the distinction has been discussed by Bishop, who states the doctrine of distinction between excess and absence of jurisdiction with approval, and even goes further, considering that where the jurisdiction is a close one and it is decided by the judge or magistrate carefully and earnestly in favor of his jurisdiction, "in reason and not quite without support from authority," he should not "suffer, though another or even a higher court held the contrary"; 1 Bish. N. Cr. L. § 460; Bish. Non-Contr. § 783.

There is no distinction between a judge acting in court and acting judicially out of court, that is, in chambers; 3 Moore, P. C. 52. See Moffett v. Boydstun, 4 Kan. App. 406, 46 Pac. 24.

A judge cannot be held liable for delay in deciding a cause; but if it be wilful and corrupt, it is ground for impeachment; and mandamus will lie to compel him to perform his duty; Wyatt v. Arnot, 7 Cal. App. 221, 94 Pac. 86.

"A judge of a court not of record is not liable for any injury sustained which is the result of an honest error of judgment in a matter wherein the court has jurisdiction, and when the act done is not of a purely ministerial nature." The rule is thus stated in 15 Am. L. Rev. 444. See further an article in Ir. L. T. and Sol. J., Nov. 13, 1880; 6 Am. Dec. 303; Lange v. Benedict, 29 Am. Rep. 80, note; Stewart v. Cooley, 23 Am. Rep. 690, note. See CORAM NON JUDICE.

The subject of the liability of a judge to an action is fully considered in Taaffe v. Downes, 3 Moore, P. C. 41, and Yates v. Lansing, 5 Johns. (N. Y.) 283, both cited in Randall v. Brigham, 7 Wall. (U. S.) 523, *supra*.

One circuit judge has no power to review and revise the action of another circuit judge; Warren v. Simon, 16 S. C. 362; nor has a judge when without the state, power to grant an injunction; Price v. Bayless, 131 Ind. 437, 31 N. E. 88.

The acts of a judge *de facto* are not open to collateral attack; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, 35 L. Ed. 377.

A judge who acts corruptly may be impeached; Yates v. Lansing, 5 Johns. (N. Y.) 282; Com. v. Addison, 4 Dall. (U. S.) 225, 1 L. Ed. 810.

A judge is not bound, unless by statute, to file a memorandum of his decision, and, if filed, it is not a part of the record unless he makes it so; Phœnix Ins. Co. v. Carey, 80 Conn. 426, 68 Atl. 993.

When a lawyer becomes a judge, his right to act as an attorney is temporarily suspended; Perry v. Bush, 46 Fla. 242, 35 South. 225. He may appear for himself; Hegeman v. Johnson, 35 Barb. (N. Y.) 202. In some states circuit judges are permitted to practice in circuit courts other than their own; O'Hare v. R. Co., 139 Ill. 151, 28 N. E. 923; Morton v. R. Co., 81 Mich. 423, 46 N. W. 111.

A court cannot itself decide as to its power to act or to exist as a court; Hill v. Tarver, 130 Ala. 595, 30 South. 499; *contra*, Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066; State v. Banta, 122 La. 235, 47 South. 538.

An appellate court will not open a decree in a patent case for the introduction of newly discovered evidence because it had failed to "discover the notation of the mortgage in the abstract contained in the file wrapper and did not thereupon reverse the decree," it not having been called to the attention of the court by counsel; Moneyweight Scale Co. v. Scale Co., 199 Fed. 905, 118 C. C. A. 235.

It has been observed that a judge's function is to give a good legal reason for the conclusions of common sense. Lord Esher, quoted in 16 L. Q. R. 3, n.

Under the Act of Settlement in England (1701) it was provided that the judges should hold office during good behavior, subject to removal upon the addresses of both houses of parliament, and that their salaries should be ascertained and established.

See, generally, JUDICIAL POWER; JUDGE-MADE LAW; FALSE IMPRISONMENT; OPEN COURT; GOOD BEHAVIOR; INCOMPETENCY.

For a list of judges of the United States supreme court, see SUPREME COURT; also for a list of lord chancellors, see CHANCELLOR; and for a list of English judges, see L. R. 12 App. Cas.

Under the Roman law a judge, by whose act or default in deciding or conducting a lawsuit, a party to the suit was injured, was liable to an action for damages, the amount of which was left to the discretion of the judge. Such action was regarded as *quasi-delictual*, because it was available, not only in cases of deliberately unfair decisions, but also in cases of less serious errors committed by the judge, as overlooking the day fixed for trial or disregarding the rules of law concerning adjournment and the like (*imprudentia judicis*). In such a case he was termed *judex qui litem suam fecit* (who makes the suit his own). The action in question, however, could not be taken on the ground that the judgment was unjust in substance; Sohm, Inst. Rom. L. 330; Mack. Rom. L. § 506; Morey, Rom. L. 383. See JUDEX.

JUDGE ADVOCATE. An officer of a court-martial who is to discharge certain duties at the trial of offenders. His duties are to prosecute in the name of the United States; but he shall so far consider himself as counsel for the prisoner, after the prisoner shall have made his plea, as to object to leading questions to any of the witnesses or any question to the prisoner the answer to which might tend to criminate himself. He is, further, to swear the members of the

court before they proceed upon any trial, and may also administer oaths for purposes of military justice and other purposes of military administration; U. S. R. S. 2 Supp. 524.

JUDGE-ADVOCATE-GENERAL'S DEPARTMENT. It consists in the army of one judge advocate with the rank of brigadier general; two judge advocates with the rank of colonel; three with the rank of major, and for each geographical department or division of troops not provided with such, one acting judge advocate with the rank, etc., of captain, mounted. Act of Congress, February 2, 1901.

A similar officer was provided for the navy under the act of June 8, 1880, with the title of judge-advocate-general of the navy. He has the rank and pay of a captain in the navy, or colonel of the marine corps, as the case may be. His duties are to receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for examination of officers, for retirement and promotion, in the naval service, and such other duties as were theretofore performed by naval judge-advocates-general; U. S. R. S. 1 Supp. § 290; 2 *id.* § 500. The judge-advocate-general's department is now under the chief of staff. Act of February 14, 1903.

JUDGE-MADE LAW. A phrase used to indicate judicial decisions which construe away the meaning of statutes, or find meanings in them which the legislature never intended. It is sometimes used as meaning, simply, the law established by judicial precedent. Cooley, Const. Lim., 4th ed. 70, n. See Austin, Prov. of Jur. where the necessity of judicial legislation and its uses are discussed *in extenso*.

The expression judge-made law is undoubtedly more frequently used in the former sense, and as expressing a certain degree of opprobrium. It is, however, unavoidable that in the distribution of powers which is now recognized as a necessary element of civilized government, there should be found at times some uncertainty as to the line of demarcation between the legislative and judicial powers as well as between each of them and the executive. The necessity of what is called judge-made law in the proper sense, and the possibility of its existence in the other sense, arises from the power of construction which necessarily exists, and though salutary when properly exercised, is susceptible of abuse, and in such case, difficult, if not impossible, to remedy. Of this power of construction it has been said that it "is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the state. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice Pemberton, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the parliament in making law." Spencer v. State, 5 Ind. 41, 46. A writer thus characterizes that kind of judicial legislation which is necessary and proper under such a system as the common law: "Although it is considered necessary in all free states to keep the legislative, executive, and judicial powers for the most part separate, and all our American constitutions provide for this, yet it cannot be completely done. The judges, it is well known, actually make a great deal of law, and this judicial legislation cannot be avoided, and indeed much of the best work that we get in this line is done by them. But this they do as delegates of the sovereign people, as much as congress or the state legislatures;" Terry, Anglo-American Law 11.

Mr. Bishop earnestly contends that there is no judge-made law; he says that "law preceded writing, and no writing can be made comprehensive enough to include all law, and no blundering of the judge is so monstrous as denial of right to a suitor who is simply unable to find his case laid down in the statute law or in a previous decision." His view is that more errors are committed by failure to administer justice according to "the general principles of our jurisprudence and the collective conscience of mankind," for want of statute or precedent, than in all other ways. The common-law system was built up when there were few statutes and the judges derived "principles for their decisions from the known usages of the country and from what they found written by God in the breasts of men." Such, he considers, should be the action of judges now, and he assumes that they will always find principles on which to adjudicate any matter unprovided for by statutes or previous decisions. He argues that in view of "the ceaseless variety of changes in human affairs," while precedents are properly followed, yet, now, as in the earlier periods, they have not covered the entire ground, and it is absurd that questions of right or remedy should depend, not upon the abstract right or the convenience or propriety of a decision either way, but "solely on the accident, whether it arose in early times, received then an adjudication, and the adjudication found a reporter." 1 Bish. N. Cr. L. §§ 18, 19.

In a case for which he could find no precedent, Jessel, M. R., said: "I am afraid that, whatever I may call my decision, it will, in effect, be making law, which I never have any desire to do; but I cannot find that the point is covered by any decided case, or even appears to have been discussed in any decided case. The only satisfaction I

have in deciding the point is this, that it will in all probability be carried to a higher court, and it will be for that court to make the law, or, as we say, declare the law, and not for me." L. R. 13 Ch. Div. 798, 805.

It has been said that the phrase judicial legislation carries on its face the notion of judicial usurpation, and is habitually used by the courts as a term of reproach; but it is contended by the writer who admits this current use of the phrase, that, properly used, it means the growth of the law at the hand of the judges, and in that sense, so far from being an evil, "it is a desirable, and indeed a necessary, feature of our system." 5 Harv. L. Rev. 172. In the discussion of the subject the writer last cited considers that with respect to much that has been written on the subject of judicial legislation, the meaning cannot be fully understood without taking into consideration the different theories as to the nature of law. Those writers who accept the theory of Austin and Bentham are naturally found to use the terms judge-made law and judicial legislation as terms meriting contempt, and indeed Bentham so characterizes the whole common law. On the other hand, those writers who take the opposite view and maintain that the origin of law is not command but custom, not only eliminate from consideration the idea of judicial legislation, but go so far as to limit the function of the legislature itself in the effort "to assist society in getting rid of its old customs and forming new ones." Supporters of this view are James C. Carter, Rep. Am. Bar Ass'n, 1890, and Prof. Hammond, 1 Bla. Com., Hammond's ed. § 2. See James C. Carter's The Law, etc. The writer in the Harvard Law Review already cited discusses these conflicting views, giving preference to a third theory, intermediate between these two extremes, developed by Lawrence, Essay, Int. L., 2d ed. ch. i. The result is that, in what has been written on the subject of judicial legislation by the advocates of these various theories, there is less difference than is apparent on the surface, and that the process itself is recognized by all, though under different names. The importance of the subject is greatly enhanced in English law by the binding authority which is attributed to former decisions, and the reverence which is accorded to precedent. The conclusion reached is that judicial legislation is a necessary element in the development of the common law, but no precise rules can be laid down either as to the extent to which it should properly go, or how far a judge, in carrying on the process, may undertake to discard old doctrines and substitute new ones.

Lord Esher, M. R., has attempted to distinguish between "fundamental propositions of law" which might be changed only by parliament, and the "evidence of the existence of such a proposition," which was within the disposition of the court; 25 Q. B. Div. 57; but as it is very properly remarked, there is no test suggested to enable a court to make this discrimination.

"In substance the growth of the law is legislative, and this in a deeper sense than that what the courts declare to have been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." O. W. Holmes, Jr., The Common Law 35.

"I cannot understand how any person who has considered the subject can suppose that society could have possibly gone on if the judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by the judges has been far better made than that part which consists of statutes enacted by the legislature." Austin, note to Lect. V.

"No intelligent lawyer would at this day pretend that the decisions of the courts do not add to and alter the law. The courts themselves, in the course of the reasons given for those decisions, constantly and freely use language admitting that they do. . . . But English judges are bound to give their decisions in conformity with the settled general principles of English law, with any express legislation applicable to the matter in hand, and with the authority of their predecessors and their own former decisions. At the same time they are bound to find a decision for every case, however novel it may be; and that decision will be authority for other like cases, in future; therefore it is part of their duty to lay down new rules if required." Pollock's Notes to Maine's Anc. Law 46. See also Pollock, Expans. of C. L. 49; 20 L. Q. R. 406.

In the appendix to Lewis' Law of Perpetuity, in the Report of the Real Property Commissioners (1832), Lord Campbell, Chairman, it is said: "At an early period (18 Edw. I) an act, commonly called the statute *de donis conditionalibus*, created a direct perpetuity, by enabling parties to establish a perpetual and unalienable entail; and this continued until the ingenuity and good sense

of judges, without the aid of the legislature, and in opposition to a positive act of parliament, enabled tenants in tail to unfetter their estates, in favor of the free circulation of property."

"Judge-made law is subject to certain limitations. It cannot openly declare a new principle of law; it must always take the form of a deduction of some legal principle whereof the validity is admitted, or of some application or interpretation of some statutory enactment." Dicey, Law and Opinion in England 486.

See paper by A. H. F. Lefroy, 22 L. Q. Rev. 293, 416.

See JUDICIAL POWER; DICTUM; JUDICIAL DECISIONS; PRECEDENTS; LAW; FICTIONS.

JUDGE'S CERTIFICATE. In English Practice. The written statement of the judge who tried the cause that one of the parties is entitled to costs in the action. It is very important in some cases that these certificates should be obtained at the trial. See Tidd, Pr. 879; 3 Chitty, Pr. 458, 486; 3 Campb. 316; 5 B. & Ald. 796. A statement of the opinion of the court, signed by the judges, upon a question of law submitted to them by the chancellor for their decision.

JUDGE'S NOTES or MINUTES. Short statements noted by a judge on the trial of a cause, of what transpires in the course of the trial.

They usually contain a statement of the testimony of witnesses, of documents offered or admitted in evidence, of offers of evidence, and whether it has been received or rejected, and the like matters.

In general, judge's notes are not evidence of what transpired at a former trial, nor can they be read to prove what a deceased witness swore to on such former trial; for they are no part of the record, and he is not officially bound to make them. But in chancery, when a new trial is ordered of an issue sent out of chancery to a court of law, and it is suggested that some of the witnesses in the former trial are of an advanced age, an order may be made that, in the event of death or inability to attend, their testimony may be read from the judge's notes; 1 Greenl. Ev. § 166.

The employment of court stenographers has practically rendered it unnecessary for trial judges to take notes, at least with a view to a bill of exceptions.

JUDGMENT. In Practice. The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pr. 930; Truett v. Legg, 32 Md. 147; Siddall v. Jansen, 143 Ill. 537, 32 N. E. 384. It may be on the main question, or on all of the questions, if there are several; Tipton v. Tipton's Adm'r, 49 Ohio St. 364, 30 N. E. 826.

The decision or sentence of the law, given by the court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 Bla. Com. 395; Ætna Ins. Co. v. Swift, 12 Minn. 437 (Gil. 326). It is said to be the end of the law; Blystone v. Blystone, 51 Pa. 373. It affects only parties and privies; Maloney v. Finnegan, 40 Minn. 281, 41 N. W. 979; Caperton v. Hall, 83 Ala. 171, 3 South. 234; Savage v. McCorkle, 17 Or. 42, 21 Pac. 444; Johnson v. Powers, 139 U. S. 156, 11 Sup. Ct. 525, 35 L. Ed. 112.

The language of judgments, therefore, is not that "it is decreed," or "resolved," by the court; but "it is considered" (*consideratum est per curiam*) that the plaintiff recover his debt, damages, or possession, as the case may require, or that the defendant do go without day. This implies that the judgment is not so much the decision of the court, as the sentence of the law pronounced and decreed by the court, after due deliberation and inquiry.

Litigious contests present to the courts facts to appreciate, agreements to be construed, and points of law to be resolved. The judgment is the result of the full examination of all these.

In Tudor times and later judgment was used of things we call legislative, as well as of things judicial; Oxf. Dict. *s. v. Judgment;* Exodus, xxi, 1.

DEFINITIONS. The various forms of judgment are designated by the following terms:

Judgment of assets in futuro, is one against an executor or heir, who holds at the time no property on which it can operate. See QUANDO ACCIDERINT.

Judgment of cassetur breve or *billa* (that the writ or bill be quashed) is a judgment rendered in favor of a party pleading in abatement to a writ or action. Steph. Pl., Andr. ed. § 97.

Judgment by confession is a judgment entered for the plaintiff in case the defendant, instead of entering a plea, confesses the action, or at any time before trial confesses the action and withdraws his plea and other allegations.

Contradictory judgment is a judgment which has been given after the parties have been heard; either in support of their claims or in their defence. Cox's Ex'rs v. Thomas, 11 La. 366. It is used in Louisiana to distinguish such judgments from those rendered by default.

Judgment de melioribus damnis is a judgment entered at the election of the plaintiff for the highest amount where damages have been differently assessed against several defendants. See DE MELIORIBUS DAMNIS.

Judgment by default is a judgment rendered in consequence of the non-appearance of the defendant. The term is also applied to judgments entered under statutes or rules of court, for want of affidavit of defence,

plea, answer, and the like, or for failure to take some required step in the cause.

Judgment in error is a judgment rendered by a court of error on a record sent up from an inferior court.

Final judgment is one which puts an end to a suit.

As to *judgment in rem, inter partes,* or *in personam,* see those titles.

Interlocutory judgment is one given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit. 3 Bla. Com. 396.

Judgment on the merits is one rendered after argument and investigation, and when it is determined which party is in the right, as distinguished from a judgment rendered upon some preliminary or merely technical point, or by default, and without trial.

Judgment of nil capiat per breve or *per billam* is a judgment in favor of the defendant upon an issue raised upon a declaration or peremptory plea.

Judgment by nil dicit is one rendered against a defendant for want of a plea.

Judgment of nolle prosequi is a judgment entered against the plaintiff where after appearance and before judgment he says "he will not further prosecute his suit." Steph. Pl., Andr. ed. § 97.

Judgment of non obstante veredicto is a judgment rendered in favor of one party *without regard to the verdict* obtained by the other party.

Judgment of non pros. (non prosequitur) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time. See NON PROS.

Judgment of non suit, a judgment rendered against the plaintiff when he, on trial by jury, on being called or demanded, at the instance of the defendant, to be present while the jury give their verdict, fails to make an appearance. See NON-SUIT.

Judgment by non sum informatus is one which is rendered when, instead of entering a plea, the defendant's attorney says he is not informed of any answer to be given to the action. Steph. Pl., Andr. ed. § 97.

Judgment nunc pro tunc, is one entered on a day subsequent to the time at which it should have been entered, as of the latter date. See NUNC PRO TUNC.

Judgment pro retorno habendo is a judgment that the party have a return of the goods.

Judgment quando acciderint, is such a judgment against an executor or heir as binds only future assets. See QUANDO ACCIDERINT.

Judgment quod computet is a judgment in an action of account-render that the defendant do account.

Judgment quod partitio fiat is the interlocutory judgment in a writ of partition that partition be made.

Judgment quod partes replacitent is a judgment for repleader. See REPLEADER.

Judgment quod recuperet is a judgment in favor of the plaintiff (that he do recover) rendered when he has prevailed upon an issue in fact or an issue in law other than one arising on a dilatory plea. Steph. Pl., Andr. ed. § 97.

Judgment of respondeat ouster is a judgment given against the defendant after he has failed to establish a dilatory plea upon which an issue in law has been raised.

Judgment of retraxit is one given against the plaintiff where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit."

See these several titles where they are separately treated.

CLASSIFICATION. Judgments in civil causes, considered with respect to the method of obtaining them, may be thus classified.

1. When the result is obtained by the trial of an issue of fact. In this case the trial may involve questions both of law and fact, but the law is applied incidentally to the trial of the disputed facts, as in the admission or rejection of evidence, the conduct of the trial, and the instruction of the jury or, it may be, in the determination of the question whether the evidence is sufficient either in quality or quantity to be submitted to the jury. In these cases the law is admitted or applied to facts found by a jury or the court.

Judgments upon facts found are the following:

(1) Judgment of *nul tiel record (q. v.)* occurs when some pleading denies the existence of a record, and issue is joined thereon; the record being produced is compared by the court with the statement in the pleading which alleges it; and if they correspond, the party asserting its existence obtains judgment; if they do not correspond, the other party obtains judgment of *nul tiel record.*

(2) Judgment upon *verdict (q. v.)* is the most usual of the judgments upon facts found, and is for the party obtaining the verdict.

(3) Judgment *non obstante veredicto* is a judgment rendered in favor of the plaintiff *notwithstanding the verdict* for the defendant; this judgment is given upon motion (which can only be made by the plaintiff) when, upon an examination of the whole proceedings, it appears to the court that the defendant has shown himself to be in the wrong, and that the issue, though decided in his favor by the jury, is on a point which does not at all better his case; Smith, Act. 161. This is sometimes called a judgment upon confession, because it occurs after a pleading by defendant in confession and

avoidance and issue joined thereon, and verdict found for defendant, and then it appears that the pleading was bad in law and might have been demurred to on that ground. The plea being substantially bad in law, of course the verdict which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. Sometimes it may be expedient for the plaintiff to move for judgment *non obstante veredicto*, even though the verdict be in his favor; for, in a case like that described above, if he takes judgment *as upon the verdict* it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession;* Cro. Eliz. 778; 2 Rolle, Abr. 99. See, also, Cro. Eliz. 214; Rastell, Ent. 622; Pemberton v. Van Rensselaer, 1 Wend. (N. Y.) 307. See NON OBSTANTE VEREDICTO.

(4) A judgment of *repleader* is given when issue is joined on an immaterial point, or one on which the court cannot give a judgment which will determine the right. On the award of a repleader, the parties must recommence their pleadings at the point where the immaterial issue originated. See REPLEADER. This judgment is interlocutory, *quod partes replacitent.* See Bacon, Abr. *Pleas*, 4 (M); Coleson v. Blanton, 3 Hayw. (Tenn.) 159.

2. When the facts are admitted by the parties, leaving only issues of law to be determined, which are as follows:

(1) Judgment upon a *demurrer* against the party demurring concludes him, because by demurring, a party admits the facts alleged in the pleadings of his adversary, and relies on their insufficiency in law. See DEMURRER.

(2) It sometimes happens that though the adverse parties are agreed as to the facts, and only differ as to the law arising out of them, still these facts do not so clearly appear on the pleadings as to enable them to obtain the opinion of the court by way of *demurrer;* for on demurrer the court can look at nothing whatever except the pleadings. In such circumstances the statute 3 & 4 Will. IV. c. 42, § 25, which has been imitated in most of the states, allows them after issue joined, and on obtaining the consent of a single judge, to state the facts in a *special case* for the opinion of the court, and agree that a judgment shall be entered for the plaintiff or defendant by *confession* or *nolle prosequi* immediately after the decision of the case; and judgment is entered accordingly, called judgment on a case stated.

(3) Sometimes *at the trial* the parties find that they agree on the facts, and the only question is one of law. In such case a verdict *pro forma* is taken, which is a species of admission by the parties, and is *general*, where the jury find for the plaintiff generally, but subject to the opinion of the court on a *special case*, or *special*, where they state the facts as they find them, concluding that the opinion of the court shall decide in whose favor the verdict shall be, and that they assess the damages accordingly. The judgments in these cases are called respectively, judgment *on a general verdict subject to a special case*, and judgment *on a special verdict.* See CASE STATED; POINT RESERVED; VERDICT.

3. Besides these, a judgment may be based upon the admissions or confessions of one only of the parties.

(a) Such judgments when for defendant upon the admissions of the plaintiff are:

(1) Judgment of *nolle prosequi*, where, after appearance and before judgment, the plaintiff says he "will not further prosecute his suit."

(2) Judgment of *retraxit* is one where, after appearance and before judgment, the plaintiff enters upon the record that he "withdraws his suit," whereupon judgment is rendered against him. The difference between these is that a *retraxit* is a bar to any future action for the same cause; while a *nolle prosequi* is not, unless made after judgment; 7 Bingh. 716; 1 Wms. Saund. 207, n.

(3) A plaintiff sometimes, when he finds he has misconceived his action, obtains leave from the court to *discontinue*, on which there is a judgment against him and he has to pay costs; but he may commence a new action for the same cause.

(4) A *stet processus* is entered where it is agreed by leave of the court that all further proceedings shall be stayed: though in form a judgment for the defendant, it is generally, like discontinuance, in point of fact for the benefit of the plaintiff, and entered on his application, as, for instance, when the defendant has become insolvent, it does not carry costs; Smith, Act. 162.

(b) Judgments for the plaintiff upon facts admitted by the defendant are:

(1) Judgment by *cognovit actionem*, *cognovit* or confession, where, instead of entering a plea, the defendant chooses to acknowledge the rightfulness of the plaintiff's action.

(2) Judgment by confession *relicta verificatione*, where, after pleading and before trial, he both confesses the plaintiff's cause of action to be just and true and withdraws or abandons his plea or other allegations. Upon this, judgment is entered against him without proceeding to trial.

Analogous to this is the judgment confessed by warrant of attorney: this is an authority given by the debtor to an attorney named by the creditor, empowering him

to confess judgment either by *cognovit actionem, nil dicit,* or *non sum informatus.* This differs from a *cognovit* in that an action must be commenced before a *cognovit* can be given; 3 Dowl. 278, per Parke, B.; but not before the execution of a warrant of attorney. Judgments by *nil dicit* and *non sum informatus,* though they are in fact founded upon a tacit acknowledgment on the part of the defendant that he has no defence to the plaintiff's action, yet as they are commonly reckoned among the judgments by default, will be explained under that head.

4. A judgment is rendered on the default of a party, on two grounds: it is considered that the failure of the party to proceed is an admission that he, if plaintiff, has no just cause of action, or, if defendant, has no good defence; and it is intended as a penalty for his neglect; for which reason, when such judgment is set aside or opened at the instance of the defaulting party, the court generally require him to pay costs.

(a) Such judgments against the defendant are:

(1) Judgment *by default* is against the defendant when he has failed to appear after being served with the writ; to plead, after being ruled so to do, or, in Pennsylvania and some other states, to file an affidavit of defence within the prescribed time; or, generally, to take any step in the cause incumbent on him. The practice of permitting judgment to be entered by default for want of a sufficient affidavit of defence, when the cause of action is a record, or is sworn to, has become practically universal. Under it courts usually refuse a judgment in cases in which motion on the affidavits raises a doubtful question. When such decisions can be reviewed, an order refusing judgment will rarely be reversed; Ensign v. Kindred, 163 Pa. 638, 30 Atl. 274.

(2) Judgment by *non sum informatus* is a species of judgment by default, where, instead of entering a plea, the defendant's attorney says he is "not informed" of any answer to be given to the action.

(3) Judgment by *nil dicit* is rendered against the defendant where, after being ruled to plead, he neglects to do so within the time specified.

(b) Such judgments against the plaintiff are:

(1) Judgment of *non pros.* (from *non prosequitur*) is one given against the plaintiff for a neglect to take any of those steps which it is incumbent on him to take in due time.

A judgment by default is just as conclusive between the parties of whatever is essential to support it as one rendered after answer and contest; Last Chance Min. Co. v. Mining Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859.

(2) Judgment of *non suit* (from *non sequitur,* or *ne suit pas*) is where the plaintiff, after giving in his evidence, finds that it will not sustain his case, and therefore voluntarily makes default by absenting himself when he is called on to hear the verdict. The court give judgment against him for this default; but the proceeding is really for his benefit, because after a nonsuit he can institute another action for the same cause, which is not the case—except in ejectment, in some states—after a verdict and judgment against him.

Judgments are further classified with reference to the stage of the cause at the time they are rendered.

1. *Interlocutory* judgments are such as are given in the middle of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit. Any judgment leaving something to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory; Freem. Judg. § 12; 3 Bla. Com. 396. A judgment which is not final is called "interlocutory"; that is, an interlocutory judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties, or finally put the case out of court. Thus, a judgment or order passed upon any provisional or accessory claim or contention is, in general, merely interlocutory, although it may finally dispose of that particular matter; 1 Black, Judgm. 21.

Such is a judgment for the plaintiff upon a plea in abatement, which merely decides that the cause must proceed and the defendant put in a better plea. But, in the ordinary sense, interlocutory judgments are those incomplete judgments whereby the right of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained. This can only be the case where the plaintiff recovers; for judgment for the defendant is always complete as well as final. The interlocutory judgments of most common occurrence are where a demurrer has been determined for the plaintiff, or the defendant has made default, or has by *cognovit actionem* acknowledged the plaintiff's demand to be just. After interlocutory judgment in such case, the plaintiff must ordinarily take out a *writ of inquiry,* which is addressed to the sheriff, commanding him to summon a jury and assess the damages, and upon the return of the writ of inquiry final judgment may be entered for the amount ascertained by the jury. It is not always necessary to have a writ of inquiry upon interlocutory judgment; for it is said that "this is a mere inquest of office to inform the conscience of the court, who, if they please, may themselves assess the damages;" 3 Wils. 62, per Wilmot, C. J.; and accordingly, if the damages are matter of mere computation, as, for instance, interest upon a bill of exchange

or promissory note, it is usual for the court to refer it to the master or prothonotary, to ascertain what is due for principal, interest, and costs, whose report supersedes the necessity of a writ of inquiry; 1 H. Bla. 541; 4 Price 134. But in actions where a specific thing is sued for, as in actions of debt for a sum certain, the judgment upon demurrer, default, or confession is not interlocutory, but is absolutely complete and final in the first instance.

2. *Final judgments* are such as at once put an end to the action by determining the right and fixing the amount in dispute. Such are a judgment for defendant at any stage of the suit, a judgment for plaintiff after verdict, a judgment for a specific amount confessed upon warrant of attorney, and a judgment signed upon the return of a writ of inquiry, or upon the assessment of damages by the master or prothonotary. Judgment for plaintiff is final also in an action brought for a specific sum, as debt for a sum certain, although entered upon a demurrer or default, because here, the *amount* being ascertained at the outset, the only question at issue is that respecting the right, and when that is determined nothing remains to be done. The question what is a final judgment becomes material in many cases where there is a right of review on error or appeal as to final, but not as to interlocutory, judgments. The term final judgment has been variously defined. A judgment which puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. 3 Bla. Com. 398. A judgment which determines a particular cause and terminates all litigation on the same right. 1 Kent 316. A judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon; Snell v. Manufacturing Co., 24 Pick. (Mass.) 300; Foster v. Neilson, 2 Pet. (U. S.) 294, 7 L. Ed. 415; Forgay v. Conrad, 6 How. (U. S.) 201, 12 L. Ed. 404. A judgment is final which completely settles the rights of the parties. Brown v. Vancleave, 86 Ky. 381, 6 S. W. 25.

When by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject to review in the supreme court of the United States; Board of Com'rs of Tippecanoe County v. Lucas, 93 U. S. 108, 23 L. Ed. 822; but when the state court remands a cause for further proceedings in the lower court it is not a final judgment; McComb v. Knox County, 91 U. S. 1, 23 L. Ed. 185; Smith v. Adams, 130 U. S. 167; 9 Sup. Ct. 566, 32 L. Ed. 895; Rice v. Sanger, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403; Chicago & N. W. Ry. Co. v. Osborne, 146 U. S. 354, 13 Sup. Ct. 281, 36 L. Ed. 1002. See DECREE.

3. When an issue in *fact*, or an issue in *law* arising on a peremptory plea, is determined for the plaintiff, the judgment is "that the plaintiff do recover," etc., which is called a judgment *quod recuperet;* Steph. Pl. 126; Com. Dig. *Abatement* (I 14, I 15); 2 Archb. Pr. 3. When the issue in law arises on a dilatory plea, and is determined for the plaintiff, the judgment is only that the defendant "do answer over," called a judgment of *respondeat ouster*. In an action of *account*, judgment for the plaintiff is that the defendant "do account," *quod computet*. Of these, the last two, *quod computet* and *quod respondeat ouster*, are interlocutory only; the first, *quod recuperet*, is either final or interlocutory, according as the *quantum* of damages is or is not ascertained at the rendition of the judgment.

4. Judgment in error is either in affirmance of the former judgment; in recall of it for error in fact; in reversal of it for error in law; that the plaintiff be barred of his writ of error, where a plea of release of errors or of the statute of limitations is found for the defendant; or that there be a *venire facias de novo*, which is an award of a new trial; Smith, Act. 196. A *venire facias de novo* will always be awarded when the plaintiff's declaration contains a good cause of action, and judgment in his favor is reversed by the court of error; Little Schuylkill Nav. R. & Coal Co. v. Norton, 24 Pa. 470, 64 Am. Dec. 672. Frequently, however, when judgment is *reversed*, the court of error not merely overturns the decision of the court below, but will give such a judgment as the court below ought to have given; Smith, Act. 196; but see NON OBSTANTE VEREDICTO.

NATURE OF THE OBLIGATION. The question whether a judgment is a contract is an old one very much discussed, and in some cases it was held to be such, chiefly upon the authority of Blackstone, who rested his opinion as to the propriety of this classification upon the doctrine of the social compact. The relations of a judgment to the idea of a contract or a *quasi*-contract have received much attention, in connection with the more careful investigation and accurate understanding of that class of obligations known as *quasi*-contracts. Blackstone said, "Upon showing the judgment, once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt, and is bound to pay it;" 3 Bla. Com. 160. Of this expression it has been said, "This is certainly a very remarkable statement, and involves large assumptions in regard to 'an original contract of society' and its supposed binding force upon a judgment debtor of the nineteenth century;" Howe, Stud. Civ. L. 188. This early theory of an "original contract of society" has been long since abandoned, and after the time of Blackstone's Commentaries Lord Mansfield, in a carefully considered case, said, "A judgment is no contract, nor can it be considered in the light of a contract, as *judicium redditur in invitum;*"

3 Burr. 1545. The same view of the question was taken by the United States supreme court, which held that a judgment was not a "contract within the meaning of the constitutional prohibition against impairing the obligation of a contract;" Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. That court has, in two other important cases, discussed the question of the nature of a judgment and the obligation which is created by it, and in both cases it strongly dissents from the view of Blackstone and the earlier text-writers. In Lewis v. Shreveport, 108 U. S. 285, 2 Sup. Ct. 634, 27 L. Ed. 728, the court said: "A judgment for damages, estimated in money, is sometimes called, by text-writers, a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction, wanting the assent of the parties, into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed on the losing party, by a higher authority, against his will and protest. The prohibition of the federal constitution was intended to secure the observance of good faith, in the stipulation of parties, against state action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the prohibition." In this case it was held that the conversion of a statutory right to demand compensation for damages caused by a mob into a judgment does not make it a contract within the constitutional prohibition against impairing the obligation of a contract. In the more recent case of Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, in referring to the doctrine of Blackstone, with reference to a foreign judgment, the court held that the idea that such judgment imposed or created an obligation or duty was a remnant of an ancient fiction, and "while the theory in question would serve to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law; and it might be safer to adopt the maxim applied to foreign judgments by Chief Justice Weston, speaking for the supreme judicial court of Maine, *judicium redditur in invitum*, or as given by Lord Coke, *in præsumptione legis judicium redditur in invitum;* Jordan v. Robinson, 15 Me. 167; Co. Lit. 248 *b*." In New York it is held that a judgment is in no sense a contract or agreement; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; even a judgment founded upon a contract; McCoun v. R. Co., 50 N. Y. 176; and the same doctrine is asserted with great vigor in a later case; O'Brien v. Young, 95 *id.* 428; this is also the prevailing doctrine in other states; Larrabee v. Baldwin, 35 Cal. 155; Masterson v. Gibson, 56 Ala. 56; McDonald v. Dickson, 87 N. C. 404; Tyler's Ex'rs v. Winslow, 15 Ohio St. 364; Sprott v. Reid, 3 G. Greene (Ia.) 489, 56 Am. Dec. 549; Rae v. Hulbert, 17 Ill. 572; some cases are *contra;* Morse v. Toppan, 3 Gray (Mass.) 411; Sawyer v. Vilas, 19 Vt. 43; Taylor v. Root, 43 N. Y. 335. The last case alone was relied on as the authority for the proposition that a judgment is a contract by Harlan, J., dissenting, in Louisiana v. Mayor, *supra*, but the case so relied upon is in a collection omitted from the regular reports and is in direct contradiction to cases cited *supra*, in which the opposing doctrine is emphatically stated by the same court, one decided four and the other sixteen years later. See also Burnes v. Simpson, 9 Kan. 658. The later text books concur in supporting the statement already made as to the weight of authority. In one a judgment is said to be not under any circumstances a contract (1 Black, Judgt. § 10), and in another it is said that though a judgment is not a contract, it may be treated in some cases as a contract or as included in that term in certain statutes; 1 Freem. Judgt. § 4. Cases in which the contrary has been held will usually be found within this classification.

Leake (Contracts, 1911 Ed. 105) classifies a judgment as a contract of record.

The civil law conception of the judgment is said to be correctly represented by the Louisiana case of Gustine v. Bank, 10 Rob. La. 412, in which it was held that "a judgment does not create, add to, nor detract from, the indebtedness of a party; it only declares it to exist, fixes its amount, and secures to the suitor the means of enforcing payment, and it is therefore necessary to look to the obligation upon which the judgment is based and ascertain whether it has arisen from contract or *quasi*-contract, from a delict or *quasi*-delict, or merely from the operation of law; the obligation is simply enforced and increased or diminished by the decree of the court. "It is declared to exist; it is interpreted; it is applied; it is put in the way of enforcement by the judicial power of the state;" Howe, Stud. Civ. L. 190.

In an interesting criticism upon the terminology adopted by Prof. Keener, in his work on *quasi*-contracts, a writer in the Harvard Law Review objects very seriously to the use of the term *quasi*-contract as an expression of the obligation of a judgment, which he says is "founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties;" 10 Harv. L. Rev. 213.

REQUISITES AND VALIDITY. To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires.

A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it when there was no court held, or out of his district, or if he rendered a judgment before the cause was prepared for a hearing.

The judgment must confine itself to the question raised before the court, and cannot extend beyond it. For example, where the plaintiff sues for an injury committed on his lands by animals owned and kept carelessly by defendant, the judgment may be for damages, but it cannot command the defendant for the future to keep his cattle out of the plaintiff's land. That would be to usurp the power of the legislature. A judgment declares the rights which belong to the citizen, the law alone rules future actions. The law commands all men, it is the same for all because it is general; judgments are particular decisions, which apply only to particular persons, and bind no others; they vary like the circumstances on which they are founded.

"The validity of a judgment is to be determined by the laws in force when it is rendered, and is not affected by subsequent changes therein;" Anderson v. Hotel Co., 92 Va. 687, 24 S. E. 269. "A judgment is not void merely because it is not dated;" Reed v. Lane, 93 Ia. 83, 65 N. W. 380. Courts should not render judgments which cannot be enforced by any process known to the law; Johnson v. Malloy, 74 Cal. 430, 16 Pac. 228. "In an action at law the court cannot render a conditional judgment;" Coh v. Bright, 2 Mo. App. Rep'r 1191.

The jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of such court is always open to inquiry, and in this respect a court of another state is to be regarded as a foreign court; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92, 34 L. Ed. 670; and a judgment in a state court having jurisdiction of the subject-matter and the parties, is binding upon the parties thereto in a suit in another state between the same parties, where the subject-matter and the issues are the same as in the former suit; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640.

OPERATION AND EFFECTS. The judgment of a court of general jurisdiction is *presumed* to have been rendered in the due exercise of that jurisdiction over person and subject-matter, unless the contrary be shown; Calhoun v. Ross, 60 Ill. App. 309; and after twenty years the presumption of due notice to the parties becomes conclusive; Nickrans v. Wilk, 161 Ill. 76, 43 N. E. 741.

Final judgments are commonly said to *conclude* the parties; and this is true in general, but does not apply to judgments for defendant on *non suit*, as in case of *non suit*, by *nolle prosequi*, and the like, which are final judgments in one sense, because they put an end to all proceedings in the suit, but which nevertheless do not debar the plaintiff from instituting another suit for the same cause. With this qualification, the rule as to the effect of a judgment is as follows: The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive, between the same parties upon the same matter directly in question in another court. The judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment. Duchess of Kingston's Case, 20 Howell, St. Tr. 538; 2 Smith, L. C. 424; Harr. Cont. 295.

The rule above given relates to the effect of a judgment upon proceedings in another court; if the court is the same, of course the rule holds *a fortiori*. Moreover, all persons who are represented by the parties, and claim under them or in privity with them, are equally concluded by the proceedings. All privies whatever in estate, in blood, or in law, are, therefore, estopped from litigating that which is conclusive upon him with whom they are in privity; 1 Greenl. Ev. §§ 523, 536. A decree or judgment on a matter outside of the issue raised by the pleading is a nullity; Jones v. Davenport, 45 N. J. Eq. 77, 17 Atl. 570; and so is the judgment of a court which is without jurisdiction; In re Sawyer, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402.

A further rule as to the conclusiveness of judgments is sometimes stated thus: "A judgment of a court of competent jurisdiction cannot be impeached or set aside in any *collateral* proceeding except on the ground of fraud." See, generally, 1 Greenl. Ev. pt. 3, ch. 5; Derr v. Wilson, 84 Ky. 14; Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781; Hilton v. Bachman, 24 Neb. 490, 39 N. W. 419; Sachse v. Clingingsmith, 97 Mo. 406, 11 S. W. 69; Huling v. Improvement Co., 130 U. S. 565, 9 Sup. Ct. 603, 32 L. Ed. 1045. A judgment of a court having jurisdiction both of the subject-matter and the parties, however erroneous it may be, is a valid, binding, and conclusive judgment, as to the matter in controversy, upon the parties thereto and those claiming under them; Adams v. Franklin, 82 Ga. 168, 8 S. E. 44; Cheatham v. Whitman, 86 Ky. 614, 6 S. W. 595; Bateman v. Miller, 118 Ind. 345, 21 N. E. 292; Allan v. Hoffman, 83 Va. 129, 2 S. E. 602; McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

This does not prevent a judgment from being attacked *directly* by writ of error or

other proceeding in the nature of an appeal; and its validity may be impeached in other *direct* proceedings, as by motion to open or set it aside, and in contests between creditors in regard to the validity of their respective judgments; in this latter class of cases the court will sometimes award a feigned issue to try questions of fact affecting the validity of the judgment.

If the record of a judgment show that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other state; Com. v. Blood, 97 Mass. 538; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660. But this fact cannot be shown in contradiction of the recitals of the record; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Westervelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Wetherill v. Stillman, 65 Pa. 105; *contra*, Norwood v. Cobb, 24 Tex. 551; Thompson v. Whitman, 18 Wall. (U. S.) 457, 21 L. Ed. 897. See Cooley, Const. Lim., 2d ed. 27. Nor will it be presumed to be void because of the absence of the return of service on the summons; Ferguson's Adm'r v. Teel, 82 Va. 690. A judgment is not less conclusive because rendered by default; Harshman v. Knox County, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152; but a default judgment is void unless service has been had according to law; Davidson v. Clark, 7 Mont. 100, 14 Pac. 663; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576; Furgeson v. Jones, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; Railway Co. v. Ryan, 31 W. Va. 364, 6 S. E. 924, 13 Am. St. Rep. 865; and a money judgment against a non-resident defendant who is not personally served within the jurisdiction, and who does not voluntarily appear, is void; Scott v. Streepy, 73 Tex. 547, 11 S. W. 532; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429. In the leading case of Pennoyer v. Neff, it was held that a personal judgment is without any validity, if it be rendered by a state court in an action upon a money demand against a non-resident of the state, who was served by a publication of summons, but upon whom no personal service of process within the state was made and who did not appear; no title to property passes by a sale under an execution issued upon such a judgment; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Matters of defence arising since the judgment may be taken advantage of by a writ of *audita querela*, or, which is more usual, the court may afford summary relief on motion.

Although a judgment is vitiated by fraud it is not thereby rendered absolutely void; it is valid as between the parties to the fraud, and can be avoided only by a person injured by it; Webster v. Reid, Morr. (Ia.) 467; as where one holding a judgment against a railroad brought a suit to have another judgment, and a lease of the road to secure it, declared void for fraud, and obtained a decree accordingly, it was *held*, that the decree did not affect the validity of the judgment and the lease as between the parties thereto; Graham v. R. Co., 3 Wall. (U. S.) 704, 18 L. Ed. 247.

All the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounced them during the term at which they are rendered or entered of record, and may then be set aside, vacated, or modified by the court; Harris v. State, 24 Neb. 803, 40 N. W. 317; Henderson v. Coal & Coke Co., 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332; but after the term has ended, unless proceedings to correct the errors alleged have been taken before its close, they can only be corrected by writ of error or appeal, as may be allowed in a court which by law can reverse the decision; Brooks v. R. Co., 102 U. S. 107, 26 L. Ed. 91; St. Louis Public Schools v. Walker, 9 Wall. (U. S.) 603, 19 L. Ed. 650. To this rule there is an exception founded on the common-law writ of *coram nobis*, which brought before the court where the error was committed certain mistakes of fact not put in issue or passed upon by the court, such as the death of one of the parties when the judgment was rendered, coverture if a female party, infancy and failure to appoint a guardian, error in the process, or mistake of the clerk. But if the error was in the judgment itself, the writ did not lie. What was formerly done by this writ is now attained by motion and affidavits when necessary; Pickett v. Legerwood, 7 Pet. (U. S.) 147, 8 L. Ed. 638. See Fielden v. People, 128 Ill. 595, 21 N. E. 584; Seiler v. Bank, 86 Ky. 128, 5 S. W. 536. A judge has the power to amend a record at any time, so as to make it speak the truth; Brooks v. Stephens, 100 N. C. 297, 6 S. E. 81; Ex parte Henderson, 84 Ala. 36, 4 South. 284.

The general rule is that after the expiration of the term all final judgments, etc., pass beyond the control of the court unless steps be taken during the term to set aside, modify or correct them; Kingman v. Mfg. Co., 170 U. S. 675, 18 Sup. Ct. 786, 42 L. Ed. 1192; Tubman v. R. Co., 190 U. S. 38, 23 Sup. Ct. 777, 47 L. Ed. 946. But a judgment may always be reformed for the purpose of correcting computations in it after the term has ended; A. J. Woodruff & Co. v. U. S., 154 Fed. 861. A court may amend its record of a judgment at a subsequent term to prevent injustice through a mistake of the judge, or counsel, or the clerk, as by correcting the wording of an order of dismissal which did not conform to the motion on which it was based; Bernard v. Abel, 156 Fed. 649, 84 C. C. A. 361.

A court which has once rendered a judgment in favor of a defendant, dismissing the cause and discharging him from further attendance, cannot, after the end of the term, without notice to the defendant, set that judgment aside and render a new judgment against the defendant; such judgment is void and not entitled to credit in another state; Wetmore v. Karrick, 205 U. S. 141, 27 Sup. Ct. 434, 51 L. Ed. 745.

Equity will enjoin the enforcement of a judgment secured by perjury where the judgment debtor used diligence, but failed to discover the perjury in time to be available at the trial; Boring v. Ott, 138 Wis. 260, 119 N. W. 865, 19 L. R. A. (N. S.) 1080.

A joint judgment which is void as to one of the parties is void as to all; 6 Mackey 548. A judgment against several persons, one of whom dies before its rendition, is voidable as to all; Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

MERGER. The question how far the cause of action is merged in a judgment sometimes becomes very material, as affecting the right to sue on the former in another jurisdiction. "The judgment of a court of competent jurisdiction discharges the obligation which the action is brought to enforce. The judgment may operate either to merge the original obligation, in so far as judgment is rendered for the plaintiff; or to estop the plaintiff from subsequently setting up his original claim, in so far as judgment is rendered for the defendant." Harriman, Contr. 295.

The effect of the merger of the cause of action is often very serious; one having a right of action against two or more persons may, by recovering judgment against one of them, lose his remedy against the others. As where the plaintiff, in an action upon a joint contract obligation elected to enter judgment against one defendant, in default of plea or answer, the judgment was held a bar to a subsequent action against the other, the debt being merged in the judgment; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; O'Hanlon v. Scott, 89 Hun 44, 35 N. Y. Supp. 31; but the cause of action does not merge in a void judgment; McCadden v. Slauson, 96 Tenn. 586, 36 S. W. 378.

Where the cause of action has arisen in a foreign country, the plaintiff has the option to sue on a judgment obtained there, or ignoring the judgment to proceed upon the original cause of action, in both cases subject to certain exceptions, as where the judgment is to enforce a penalty or for a tort on which there is no action here; Lyman v. Brown, 2 Curt. C. C. 559, Fed. Cas. No. 8,627. This choice of remedy does not exist in the case of judgments in sister states; a cause of action in such case is merged and the remedy is confined to an action on the judgment; Freeman, Judgments § 241; Henderson v. Staniford, 105 Mass. 504, 7 Am. Rep. 551; Barnes & Drake v. Gibbs, 31 N. J. L. 317, 86 Am. Dec. 210; Barley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; *contra*, Beall's Adm'r v. Taylor's Adm'r, 2 Gratt. (Va.) 532, 44 Am. Dec. 398. The rule as stated is subject to the exception that there is no merger of the cause of action in the judgment unless the latter is general. Where the judgment was in a penal action, the action was held not to abate on the death of a party, because the judgment having been entered, the action thereafter had the attributes of a contract; Carr v. Rischer, 119 N. Y. 117, 23 N. E. 296.

It has been held that in an action of tort, the tort merges in the judgment, so as to allow an attachment as on the contract; Johnson v. Butler, 2 Ia. 535; although a tort cannot be set up as a counter-claim, the judgment upon it may, as constituting a contract; Taylor v. Root, *43 N. Y. 335; so it was held that a judgment so far extinguished the original debt that a set-off available in the suit on the debt by reason of a claim against an assignor of said debt was no longer available after judgment; Ault v. Zehering, 38 Ind. 429.

The doctrine of the merger of the cause of action is not carried to such extreme as to defeat the equities or just rights of the defendant or plaintiff. Thus it has been held with some frequency that it can be shown against a judgment that the same was obtained upon a debt which was provable against defendant in proceedings in insolvency, and being so provable was barred by the discharge in insolvency, and as the discharge barred the debt, it barred the judgment resting on the debt; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290.

Where the defendant was sued in Massachusetts, in debt on a judgment, he pleaded a discharge under the New York insolvency law, and it was held that the court would look behind the judgment and see whether under the facts giving rise to it, it was so discharged; Betts v. Bagley, 12 Pick. (Mass.) 572; and, on the other hand, a judgment apparently discharged by insolvency proceedings, but found to be based on notes executed before the passage of the insolvent law was held not affected by the latter, and enforceable; Wyman v. Mitchell, 1 Cow. (N. Y.) 316; so it was held that a judgment does not prevent a creditor from taking an attachment as a non-resident creditor; Owens v. Bowie, 2 Md. 457.

Though a judgment is to some purposes a merger of the original contract, and constitutes a new debt, yet when the essential rights of the parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the original contract was.

The principle of the cases last cited has been frequently enunciated. In Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290, Hurlbert, J., said that "a judgment, instead of being regarded strictly as a new debt, is sometimes held to be merely the old debt, in a new form, so as to prevent a technical merger from working injustice." In Betts v. Bagley, 12 Pick. (Mass.) 572, Shaw, C. J., said: "Although a judgment, to some purposes, is considered as a merger of the former, and as constituting a new cause of action, yet when the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining what the nature of such original cause of action was. Any other decision would carry the technical doctrine of merger to an inconvenient extent and cause it to work injustice."

FORM. The form of the judgment varies according to the nature of the action and the circumstances, such as default, verdict, etc., under which it is obtained. Anciently great particularity was required in the entries made upon the judgment roll; but now, even in the English practice, the drawing up the judgment roll is generally neglected, except in cases where it is absolutely necessary, as where it is desirable to give the proceedings in evidence on some future occasion; Smith, Act. 169. In this country the roll is rarely if ever drawn up, the simple entry on the trial list and docket, "judgment for plaintiff," or "judgment for defendant," being all that is generally considered necessary; and though the formal entries are in theory still required to constitute a complete record, yet if such record should subsequently be needed for any purpose, it may be made up after any length of time from the skeleton entries upon the docket and trial list. See Wilkins v. Anderson, 11 Pa. 399. When the record is thus drawn up in full, the ancient formalities must be observed, at least in a measure.

JUDGMENT ON VERDICT. A judgment on a verdict virtually overrules all demurrers to the declaration; Fleming Oil & Gas Co. v. Oil Co., 37 W. Va. 645, 17 S. E. 203. The form of such verdicts varies according to the action and frequently also with the character in which a party sues or is sued.

In *account*, judgment for the plaintiff is interlocutory in the first instance, that the defendant *do account, quod computet;* Kitchen v. Strawbridge, 4 Wash. C. C. 84, Fed. Cas. No. 7,854.

In *assumpsit*, judgment for the plaintiff is that he recover the damages assessed by the jury, and full costs of suit; 1 Chitty, Pl. 100. Judgment for the defendant is that he recover his costs. For the form, see Tidd, Pr. *Forms* 165.

In *case*, *trover*, and *trespass*, the judgment is the same in substance, and differs but slightly in form from that of assumpsit; 1 Chitty, Pl. 100, 147.

A judgment in trover passes title to the goods in question; Mitchell v. Shaw, 53 Mo. App. 652; Griel v. Pollak, 105 Ala. 249, 16 South. 704; but only where the value of the thing converted is included in the judgment; 5 H. & N. 288; and it is held that an unsatisfied judgment does not pass the property; L. R. 6 C. P. 584; Lovejoy v. Murray, 3 Wall. (U. S.) 1, 16, 18 L. Ed. 129; Pryor v. Cattle Co., 6 N. M. 44, 27 Pac. 327. In a somewhat analogous case it was held that a judgment for the value of horses lost to the owner by negligence of the defendant, of itself passes title to the horses to the defendant becoming liable for their value; St. Louis, A. & T. Ry. Co. v. McKinsey, 78 Tex. 298, 14 S. W. 645, 22 Am. St. Rep. 54. See Floyd v. Browne, 1 Rawle (Pa.) 121, 18 Am. Dec. 602. Where personal property had been sold and partly paid for, title being retained by the vendor, and he recovered in trover both the property and instalments due, on appeal it was directed that the judgment be discharged on payment within a time limited of purchase money, interest, and cost, otherwise the original judgment below to stand of full force; Morton v. Frick Co., 87 Ga. 230, 13 S. E. 463.

In *covenant*, judgment for the plaintiff is that he recover the amount of his damages as found which he has sustained by reason of the breach or breaches of the defendant's covenant, together with costs of suit; 1 Chitty, Pl. 116. Judgment for defendant is for costs.

In *debt*, judgment for the plaintiff is that he recover his debt, and in general nominal damages for the detention thereof; and in cases under the 8th & 9th Will. III. c. 11, for successive breaches of a bond conditioned for the performance of a covenant, it is also awarded that he have execution for such damages, and likewise full costs of suit; 1 Chitty, Pl. 108. But in some penal and other actions the plaintiff does not always recover costs; Esp. Pen. Act. 154; Hull, Costs 200; Bull. N. P. 333; Clark v. Dewey, 5 Johns. (N. Y.) 251. Judgment for defendant is generally for costs; but in certain penal actions neither party can recover costs; Clark v. Dewey, 5 Johns. (N. Y.) 251. See Tidd, Pr. *Forms* 176.

In *detinue*, judgment for the plaintiff is in the alternative that he recover the goods or the value thereof if he cannot have the goods themselves, with damages for the detention, and costs; 1 Chitty, Pl. 121, 122; Thompson v. Musser, 1 Dall. (Pa.) 458, 1 L. Ed. 222. See Tidd, Pr. *Forms* 187.

If judgment in any of the above personal actions is against the defendant in the character of *executor*, it confines the liability of the defendant for the debt or damages to the amount of assets of the testator in his hands, but leaves him personally liable

for costs. See the form, Tidd, Pr. *Forms* 168. If the executor defendant has pleaded *plene administravit*, judgment against him confines his liability to such amount of the assets as shall hereafter come to his hands. See the form, Tidd, Pr. *Forms* 174. A general judgment for costs against an administrator plaintiff is against the estate only.

A judgment against an executor or heir where the plea is false, to the defendant's own knowledge, may be a general judgment as if the recovery was for his own debt, but in other cases a judgment against an executor is generally special, to be levied of the goods or land of his testator; 7 Taunt. 580.

A judgment on a covenant of a *married woman* against her separate estate may be entered as a personal judgment against her; Williamson v. Cline, 40 W. Va. 194, 20 S. E. 917; such judgment must be entered in a special form; 14 Ch. D. 837; but the record need show no special fact fixing her liability; Jester v. Hunter, 2 Pa. Dist. R. 690.

In *dower*, judgment for demandant is interlocutory in the first instance with the award of a writ of *habere facias seisinam*, and inquiry of damages, on the return of which final judgment is rendered for the value of the land detained, as ascertained by the jury, from the death of the husband to the suing out of the inquisition, and costs of suit. See the form, 3 Chitty, Pl. 583.

In *ejectment*, judgment for plaintiff is final in the first instance, that he recover the term, together with the damages assessed by the jury, and the costs of suit, with award of the writ of *habere facias possessionem*, directing the sheriff to put him in possession. See the form, 3 Bla. Com. App. xii.; Tidd, Pr. *Forms* 188. A judgment in ejectment is conclusive as to title between the parties thereto, unless the jury find for the plaintiff less than the fee; McDowell v. Sutline, 78 Ga. 142, 2 S. E. 937. A consent verdict in ejectment is conclusive on the parties and their privies; *id.*

In *partition*, judgment for plaintiff is also interlocutory in the first instance; *quod partitio fiat* with award of the writ *de partitione facienda*, on the return of which final judgment is rendered,— "therefore it is considered that the partition aforesaid be held firm and effectual forever," *quod partitio facta firma et stabilis in perpetuam teneatur;* Co. Litt. 169. See the form, 2 Sell. Pr. 319, 2d ed. 222.

In *replevin*. If the replevin is in the *detinuit*, *i. e.* where the plaintiff declares that the chattels "were detained until replevied by the sheriff," judgment for plaintiff is that he recover the damages assessed by the jury for the taking and unjust detention, or for the detention only where the taking was justifiable, and also his costs; Easton v. Worthington, 5 S. & R. (Pa.) 130; Hamm. N. P. 488. If the replevin is in the *detinet*, *i. e.* where the plaintiff declares that the chattels taken are "yet detained," the jury in giving a verdict for plaintiff find, in addition to the above, the value of the chattels each separately; for the defendant will perhaps restore some, in which case the plaintiff is to recover the value of the remainder; Hamm. N. P. 489; Fitzh. N. B. 159 *b;* Easton v. Worthington, 5 S. & R. (Pa.) 130.

If the replevin be *abated*, the judgment is that the writ or plaint abate, and that the defendant, having avowed, have a return of the chattels.

If the plaintiff is *nonsuited*, the judgment for defendant, at common law, is that the chattels be restored to him, and that without his first assigning the object of the taking, because by abandoning his suit the plaintiff admits that he had no right to dispossess the defendant by prosecuting the replevin. The form of this judgment is simply "to have a return," *pro retorno habendo*, without adding the words "to hold irreplevisable;" Hamm. N. P. 490. For the form of judgments of *nonsuit* under the statutes 21 Hen. VIII. c. 19, and 17 Car. II. c. 7, see Hamm. N. P. 490; 2 Chitty, Pl. 161; 8 Wentw. Pl. 116; 5 S. & R. 132; 1 Saund. 195, n. 3; 2 *id.* 286, n. 5. In these cases the defendant has the option of taking his judgment *pro retorno habendo* at common law; Easton v. Worthington, 5 S. & R. (Pa.) 130, *supra;* 3 Term 349.

When the avowant succeeds upon the merits, the common-law judgment is that he "have return irreplevisable;" for it is apparent that he is by law entitled to keep possession of the goods; Wallace v. Elder, 5 S. & R. (Pa.) 145; Hamm. N. P. 493; 1 Chitty, Pl. 162. For the form of judgment in such case under the statutes last mentioned, see Hamm. N. P. 494.

AFTER VERDICT, the general form of judgment for plaintiff in actions on contracts sounding in damages, and in actions founded on *torts* unaccompanied with violence, is this: "Therefore it is considered that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges, by the court now here adjudged of increase to the said A B, with his assent; which said damages, costs, and charges in the whole amount to ——. And the said C D in mercy, etc." In *debt* for a sum certain, the general form is "—— that the said A B do recover against the said C D his said debt, and also —— for his damages which he has sustained, as well on occasion of detaining the said debt as for his costs and charges by him about his suit in this behalf expended, by the court now here adjudged to the said A B, and with his assent. And the said C D in mercy, etc." In actions founded on *torts* accompanied with violence, the form of judgments for

plaintiff is, "—— that the said A B do recover against the said C D his damages aforesaid, and also —— for his said costs and charges by the court now here adjudged of increase to the said A B, and with his consent; which said damages, costs, and charges in the whole amount to ——. And let the said C D be taken, etc."

Final judgment for the defendant is in these words: "Therefore it is considered that the said A B take nothing by his writ but that he be in mercy, etc. (*or* that he and his pledges to prosecute be in mercy, etc.), and that the said C D do go thereof without day, etc. And it is further considered ——." Then follows the award of costs and of execution therefor. See Tidd, Pr. *Forms* 189.

This is the general form of judgment for defendant, whether it arise upon interlocutory proceedings or upon verdict, and whatever be the form of action. This is sometimes called judgment of *nil capiat per breve* or *per billam;* Steph. Pl., Andr. ed. § 97.

The words "and the said —— in mercy, etc., or, as expressed in Latin, *quod sit in misericordia pro falso clamore suo*, were formerly an operative part of the judgment, it being an invariable rule of the common law that the party who lost his cause was punished by amercement for having unjustly asserted or resisted the claim. And on this account pledges of prosecution were required of the plaintiff before the return of the original, who were real and responsible persons and liable for these amercements. But afterwards the amercements ceased to be exacted,—perhaps because the payment of costs took their place,—and, this portion of the judgment becoming mere matter of form, the pledges returned were the fictitious names John Doe and Richard Roe. Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273.

The words "and let the said —— be taken," in Latin, *capiatur pro fine*, which occur above in the form of judgment in actions founded on torts accompanied with violence, were operative at common law, because formerly a defendant adjudged to have committed a civil injury with actual violence was obliged to pay a fine to the king for the breach of the peace implied in the act, and was liable to be arrested and imprisoned till the fine was paid. This was abolished by stat. 5 W. & M. c. 12; but the form was still retained in entering judgment against defendant in such actions. See Gould, Pl. §§ 38, 82; Bacon, Abr. *Fines, etc.* (C 1); 1 Ld. Raym. 273; Style 346.

These are called, respectively, judgments of *misericordia* and of *capiatur*.

Judgments in Other Cases. On a *plea in abatement*, either party may demur to the pleading of his adversary or they may join issue.

On *demurrer*, judgment for the plaintiff is that the defendant have another day to plead in chief, or, as it is commonly expressed, that he answer over; *quod respondeat ouster;* and judgment for defendant is that the writ be quashed; *quod cassetur billa* or *breve*. But if issue be joined, judgment for plaintiff is *quod recuperet*, that he recover his debt or damages, and not *quod respondeat;* judgment for defendant is the same as in the case of demurrer, that the writ be quashed. But the plaintiff may admit the validity of the plea in abatement, and may himself pray that his bill or writ may be quashed, *quod cassetur billa* or *breve*, in order that he may afterwards sue or exhibit a better one; Steph. Pl., Andr. ed. § 97; Lawes, Civ. Pl. See the form, Tidd, Pr. *Forms* 195. Judgment on demurrer in other cases, when for the plaintiff, is interlocutory in *assumpsit* and actions sounding in damages, and recites that the pleading to which exception was taken by defendant appears sufficient in law, and that the plaintiff ought, therefore, to recover; but the amount of damages being unknown, a court of inquiry is awarded to ascertain them. See the form, Tidd, Pr. *Forms* 181. In *debt* it is final in the first instance. See the form, *id.* p. 181. Judgment on demurrer when for the defendant is always final in the first instance, and is for costs only. See the form, *id.* 195.

Judgment by default, whether by *nil dicit* or *non sum informatus*, is in these words, in assumpsit or other actions for damages, after stating the default: "wherefore the said A B ought to recover against the said C D his damages on occasion of the premises; but because it is unknown to the court, etc., now hear what damages the said A B hath sustained by means of the premises, the sheriff is commanded, etc." Then follows the award of the writ of inquiry, on the return of which final judgment is signed. See the forms, Tidd, Pr. *Forms* 165. In debt for a sum certain, as on a bond for the payment of a sum of money, the judgment on default is final in the first instance, no writ of inquiry being necessary. See the form, *id.* 169.

Plaintiff cannot take a default where there is no declaration on file; Woodruff v. Matheney, 55 Ill. App. 350; and a default cannot be entered after defendant has interposed a plea in bar; Green v. Jones, 102 Ala. 303, 14 South. 630; but the mere filing of an answer will not prevent a judgment by default, there must also be a subsequent appearance by defendant to protect his rights; Lytle v. Custead, 4 Tex. Civ. App. 490, 23 S. W. 451.

It is error to enter judgment by default while a plea to part and a demurrer to the rest of the declaration are on file; Race v. Hall Ass'n, 50 Ill. App. 131; but the rendition of a judgment by default, where the petition states the facts sufficient to maintain the cause of action, is within the discretion

of the trial judge; In re Downs, 3 Ohio Dec. 56; and so is the opening of a judgment by default: St. Mary's Hospital v. Ben. Co., 60 Minn. 61, 61 N. W. 824; Jackson v. Brunor, 17 Misc. 339, 39 N. Y. Supp. 1080; where an answer failed to reach the court in time through the fault of the postmaster, it was held that a default should be set aside; Walrad v. Walrad, 55 Ill. App. 668.

Judgment by *cognovit actionem* is for the amount admitted to be due, with costs, as on a verdict. In Pennsylvania by statute, the plaintiff may take judgment for an amount admitted to be due and proceed to trial for the remainder of his claim.

Judgment of *non pros.* or *non suit* is final, and is for defendant's costs only, which is also the case with judgment on a *discontinuance* or *nolle prosequi.*

A court has inherent power to enter a judgment on the pleadings; Stratton's Independence v. Dines, 126 Fed. 968.

A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest; Last Chance Min. Co. v. Min. Co., 157 U. S. 692, 15 Sup. Ct. 733, 39 L. Ed. 859; 1 Freem. Judgt. § 330; Big. Esto. 77. So of a judgment on demurrer; Northern Pac. R. Co. v. Slaght, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738.

Some courts refuse to give effect to a judgment by consent as a judgment *in invitum*, and admit the judgment record only as evidence of the agreement reached by the parties; Jenkins v. Robertson, L. R. 1 H. L. 117, 122. The position is based on the theory that no matter upon which the court has not exercised its judicial mind by determining the respective rights of the litigants and pronouncing judgment accordingly can be considered *res judicata.* As a matter of definition, this proposition is scarcely open to question. But the parties have caused the court to place their deliberate agreement upon the record as a formal judgment; and except in case of mistake or fraud, it would seem that they should be estopped from later denying it, even though the strict principles of res judicata are not applicable; Kelly v. Town of Milan, 21 Fed. 842, 863. In fact the majority of jurisdictions disregard the argument of definition and hold the judgment binding upon the parties according to its terms; Nashville, C. & St. L. Ry. Co. v. U. S., 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971. The original cause of action is considered merged in the judgment, and to a later suit between the same parties on the same subject-matter a plea of *res judicata* is a complete defense. Where, however, the action is simply dismissed by the consent of the parties, there is not the same ground for the argument of estoppel; Lindsay v. Allen, 112 Tenn. 637, 82 S. W. 171. It states only that the parties have agreed to a dismissal and nothing more.

A judgment is conclusive as to all the *media concludendi* and it cannot be impaired either in or out of the state by showing that it was based on a mistake of law; Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039; but when the matter decided is not embraced within the issue, it avoids the judgment; Munday v. Vail, 34 N. J. L. 418, followed in Reynolds v. Stockton, 140 U. S. 268, 11 Sup. Ct. 773, 35 L. Ed. 464.

Matters of Practice. *Of docketing the judgment.* By the stat. 4 & 5 W. & M. c. 20, all final judgments are required to be regularly docketed: that is, an abstract of the judgment is to be entered in a book called the judgment-docket; 3 Bla. Com. 398. And in these states the same regulation prevails. See Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377, 5 Am. St. Rep. 872. Besides this, an index is required to be kept in England of judgments confessed upon warrant of attorney, and of certain other sorts of judgments; 3 Sharsw. Bla. Com. 396, n. In most of the states this index is required to include all judgments. The effect of docketing the judgment is to notify all interested persons, including purchasers or incumbrancers of land upon which the judgment is a lien, and subsequent judgment creditors, of the existence and amount of the judgment. Freem. Judg. § 343. Judgments only become liens from the time they are rendered, or notice thereof is filed in the register's office of the county where the property is situated; Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721. In Pennsylvania, the judgment index is for this purpose conclusive evidence of the amount of a judgment in favor of a purchaser of the land bound thereby, but not against him: if the amount indexed is less than the actual amount, the purchaser is not bound to go beyond the index; but if the amount indexed is too large, he may resort to the judgment-docket to correct the mistake; Appeal of Hance, 1 Pa. 408. A failure to index the abstract of a judgment is fatal to the lien; Nye v. Moody, 70 Tex. 434, 8 S. W. 606; Nye v. Gribble, 70 Tex. 458, 8 S. W. 608; Ætna Life Ins. Co. v. Hesser, 77 Ia. 381, 42 N. W. 325, 4 L. R. A. 122, 14 Am. St. Rep. 297.

Now, in England, judgments, in order to affect purchasers, mortgagees, and creditors, must be registered in the High Court, and renewed every five years. See 2 & 3 Vict. c. 11, s. 5.

Of the time of entering the judgment. After verdict a brief interval is allowed to elapse before signing judgment, in order to give the defeated party an opportunity to apply for a new trial, or to move in arrest of judgment, if he is so disposed. This interval, in England, is four days; Smith, Actions 150. In this country it is generally short; but, being regulated either by statute or by rules of court, it of course may vary in the different

states, and even in different courts of the same state.

Judgments are in their nature equal till they are reversed, in what court soever they are obtained; a judgment in a court of record by grant, is equal to a judgment in a court of record by prescription; and a judgment in a court of pie poudre is equal to a judgment in any of the superior courts. Eldon, L. C., in 3 Swanst. 575.

As to whether a judgment rendered in form against a defendant who died after service or appearance and before trial is void, or merely voidable, the authorities are irreconcilably in conflict; Moehlenpah v. Mayhew, 138 Wis. 564, 119 N. W. 826, citing note in 49 L. R. A. 153.

See ARREST OF JUDGMENT; ASSUMPSIT; ATTACHMENT; CONFLICT OF LAWS; COVENANT; DEBT; DECISION; DETINUE; EJECTMENT; CASE; DECREE; FOREIGN JUDGMENT; LIEN; MANDATE; REPLEVIN; TRESPASS; TROVER; RES JUDICATA; ESTOPPEL; CAUTIONARY JUDGMENT.

JUDGMENT BOOK. A book which is required to be kept by a clerk among the records of the court, for the entry of judgments. Code N. Y. § 279.

JUDGMENT CREDITOR. See CREDITOR, JUDGMENT.

JUDGMENT DEBT. See DEBT.

JUDGMENT IN PERSONAM. See JUDGMENT INTER PARTES; IN PERSONAM.

JUDGMENT IN REM. An adjudication pronounced upon the *status* of some particular subject-matter by a tribunal having competent authority for that purpose. 3 Sm. L. Cas., 9th Am. ed. 2015.

An adjudication against some person or thing, or upon the *status* of some subject-matter; which, wherever and whenever binding upon *any* person, is equally binding upon *all* persons. Bartero v. Bank, 10 Mo. App. 78.

The universal effect of a judgment *in rem* depends upon the principle that it is a solemn declaration, proceeding from an accredited quarter, concerning the *status* of the thing adjudicated upon; which very declaration operates accordingly upon *the status of the thing adjudicated upon*, and *ipso facto*, renders it such as it is thereby declared to be; 3 Sm. L. Cas., 9th Am. ed. 2015–16, 2032, 2043.

The most frequent cases of such judgment are found in the courts exercising jurisdiction of cases in admiralty. So also a foreign court in a case of divorce which is recognized as establishing the status of a person is a judgment *in rem*.

In Pennoyer v. Neff, the court said: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in this state, they are substantially proceedings *in rem* in the broader sense which we have mentioned." 95 U. S. 734, 24 L. Ed. 565. A judgment against a railway company in favor of an assignee of claims for labor performed for a subcontractor, which forecloses a statutory lien on the property of the company for debt, and orders a sale of the property, cannot be construed as a judgment *in personam;* Austin & N. W. R. Co. v. Rucker, 59 Tex. 587. See IN REM.

JUDGMENT INTER PARTES or IN PERSONAM. One which operates only upon those who have been duly made parties to the record and their privies, being against a person merely, and not settling the *status* of any person or thing. See 3 Sm. L. Cas., 9th Am. ed. 2016; JUDGMENT; JUDGMENT IN REM.

JUDGMENT NISI. A judgment entered on the return of the nisi prius record with the postea indorsed, which will become absolute according to the terms of the "postea" unless the court out of which the nisi prius record proceeded shall, within the first four days of the following term, otherwise order.

Under the compulsory arbitration law of Pennsylvania, on filing the award of the arbitrators, judgment nisi is to be entered, which judgment is to be valid as if it had been rendered on a verdict of a jury, unless an appeal is entered within the time required by law.

JUDGMENT NOTE. A promissory note given in the usual form, and containing, in addition, a power of attorney to appear and confess judgment for the sum therein named. On this account it is not negotiable; Sweeney v. Thickstun, 77 Pa. 131; but see Osborn v. Hawley, 19 Ohio 130.

It is negotiable by the Uniform Neg. Instr. Act. For a list of states in which that act is in force, see NEGOTIABLE INSTRUMENTS.

It usually contains a number of stipulations as to the time of confessing the judgment; Sherman v. Baddely, 11 Ill. 623; against appeal and other remedies for setting the judgment aside; see Frasier v. Frasier, 9 Johns. (N. Y.) 80; 2 Cowp. 465; Lake v. Cook, 15 Ill. 356; an attorney's commission for collection, waiver of exemption, and other conditions.

It does not authorize the confession of a judgment in favor of the original payee of the note after he had ceased to be the owner, even though he may have the note in his possession, and such judgment may be attacked collaterally without violating the full faith and credit clause of the federal constitution in an action in another state; Na-

tional Exchange Bank v. Wiley, 195 U. S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184.

JUDGMENT PAPER. In English Practice. An *incipitur* of the pleadings, written on plain paper, upon which the master will sign judgment. 1 Archb. Pr. 229, 306, 343.

JUDGMENT RECORD. In English Practice. A parchment roll on which are transcribed the whole proceedings in the cause, deposited and filed of record in the treasury of the court, after signing of judgment. 3 Steph. Com., 11th ed. 601. See JUDGMENT ROLL. In American practice, the record is signed, filed, and docketed by the clerk, all of which is necessary to suing out execution; Graham, Pr. 341.

JUDGMENT RECOVERED. A plea by a defendant that the plaintiff has already recovered that which he seeks to obtain by his action. This was formerly a species of sham plea, often put in for the purpose of delaying a plaintiff's action. M. & W.

JUDGMENT ROLL. In English Law. A record made of the issue roll (which see), which, after final judgment has been given in the cause, assumes this name. Steph. Pl., Andr. ed. § 97; 3 Chitty, Stat. 514; Freem. Judg. § 75. The Judicature Act of 1875 requires every judgment to be entered in a book by the proper officer. It has been abolished, as such, in New Jersey; Jennings v. Philadelphia & R. Co., 23 Fed. 571.

There is said to be hopeless confusion in the cases as to what constitutes the judgment roll. All the cases agree that the complaint, the summons and, most of them, the return on the summons, the affidavit for publication in case of constructive service, and papers of that sort; Terry v. Gibson, 23 Colo. App. 273, 128 Pac. 1129, citing many cases, and also 1 Gr. Evid. 511, and Freem. Judg. § 78.

JUDICARE. To judge; to decide or determine judicially; to give judgment or sentence.

JUDICATIO. In Civil Law. Judging; the pronouncing of sentence, after hearing a cause. Halifax, Civil Law b. 3, c. 8, no. 7.

JUDICATORES TERRARUM. Certain tenants in Chester, who were bound by their tenures to perform judicial functions. In case of an erroneous judgment being given by them, the party aggrieved might obtain a writ of error out of Chancery, directing them to reform it. They then had a month to consider of the matter. If they declined to reform their judgment, the matter came on writ of error before the king's bench; and if the court of king's bench held the judgment to be erroneous they forfeited £100 to the king by the custom. Jenk. Cent. (ii. 34), p. 71.

JUDICATURE. The state of those employed in the administration of justice; and in this sense it is nearly synonymous with judiciary. This term is also used to signify a tribunal; and sometimes it is employed to show the extent of jurisdiction: as, the judicature is upon writs of error, etc. Comyn, Dig. *Parliament* (L 1). And see Comyn, Dig. *Courts* (A).

JUDICATURE ACTS. The English acts under which the present system of courts was organized and is continued.

The statutes of 36 & 37 Vict. c. 66, and 38 & 39 Vict. c. 77, which went into force Nov. 1, 1875, with amendments in 1877, 40 & 41 Vict. c. 9, 1879, 42 & 43 Vict. c. 78, and 1881, 44 & 45 Vict. c. 68, made most important changes in the organization of, and methods of procedure in, the superior courts of England. See COURTS OF ENGLAND.

These acts provide for a concurrent administration of legal and equitable remedies, according to seven rules, which substantially provide that any one of the courts, included in the acts shall give the same equitable relief to any plaintiff or defendant claiming it as would formerly have been granted by chancery; equitable relief will be granted against third persons, not parties, who shall be brought in by notice; all equitable estates, titles, rights, duties, and liabilities will be taken notice of as in chancery; no proceeding shall be restrained by injunction, but every matter of equity on which an injunction might formerly have been obtained may be relied on by way of defence, and the courts may in any cause direct a stay of proceedings. Subject to these and certain other provisions of the act, effect shall be given to all legal claims and demands, and all estates, titles, rights, duties, obligations, and liabilities, existing by the common law, custom, or statute, as before the acts; the new courts shall grant, either absolutely or on terms, all such legal or equitable remedies as the parties may appear entitled to; so that all matters may be completely and finally determined, and multiplicity of legal proceedings avoided.

Eleven new rules of law are established, which will be found in the act of 1873, c. 66, § 25, amended by the act of 1875, c. 77, § 10, of the following nature; 1. In the administration of insolvent estates, the same rules shall prevail as may be in force under the law of bankruptcy; 2. No claim of a *cestui que trust* against his trustee, for property held on an express trust, shall be barred by any statute of limitations; 3. A tenant for life shall have no right to commit equitable waste, unless such right is expressly conferred by the instrument creating the estate; 4. There shall be no merger by operation of law only, of any estate, the beneficial interest in which would not be deemed merged in equity; 5. A mortgagor entitled for the time being to the possession of the profits of land, as to which the mortgagee shall have given no notice of his intention to take possession, may sue for such possession, or for the recovery of such profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made jointly with any other person; 6. Any absolute assignment of a chose in action, of which express notice in writing shall have been given to the debtor, shall pass the legal right thereto from the date of notice, and all remedies for the same, and the power to give a good discharge: provided, that if the debtor, etc., shall have had notice of any conflicting claims to such debt, he shall be entitled to call upon such claimants to interplead; 7. Stipulations as to time or otherwise, which would not have been deemed of the essence of the contract in equity, shall receive the same construction as formerly in equity; 8. A mandamus or an injunction may be granted, or a receiver appointed by an interlocutory order, which may be made either unconditionally or on terms; and an injunction may be granted to prevent threatened waste or trespass, whether the estates be legal or equitable, or whether the person against whom the injunction is sought

is or is not in possession under any claim of title, or does or does not claim a right to do the act sought to be restrained under color of title; 9. In proceedings arising from collisions at sea, where both ships are in fault, the rules hitherto in force in the court of admiralty shall prevail; 10. In questions relating to the custody of infants, the rules of equity shall prevail; 11. Generally, in all matters in which there is any conflict between the rules of common law and the rules of equity, the latter shall prevail.

By the act of 1891, c. 53, to settle doubts said to exist on the subject, it was enacted that the high court should be a prize court within the meaning of the Naval Prize Act of 1864, and the jurisdiction was assigned to the probate, divorce, and admiralty division of the court. An appeal was given only to the queen in council. By the same act the house of lords was authorized to call in the aid of assessors in admiralty cases.

The act of 1894, c. 16, was directed mainly to the restricting the right of appeal.

The division of the legal year into terms is abolished, so far as relates to the administration of justice, but where they are used as a measure for determining the time at or within which any act is required to be done, they may continue to be referred to. Numerous other regulations are established for the arrangement of business and course of procedure under the new system for which reference must be had to the acts. We will merely note that nothing is to affect the law relating to jury trials, and the existing forms of procedure are to be used as far as consistent with these acts. It was provided that nothing should affect the practice or procedure in—1. Criminal proceedings; 2. Proceedings on the crown side of the queen's bench division; 3. Proceedings on the revenue side of the exchequer division; 4. Proceedings for divorce and matrimonial causes. The Chancery Procedure Acts and the Common Law Procedure Acts remain in full force, except so far as impliedly or expressly repealed by the Judicature Acts. Many sections of the former Acts are repealed by subsequent legislation, all which may be found in Chitty's English Statutes, where the acts are published together as amended

See COURTS OF ENGLAND.

JUDICATURE ACTS (IRELAND). The act of 40 & 41 Vict. c. 57, which went into operation Jan. 1, 1878, established a supreme court of judicature in Ireland, under which acts and subsequent ones a system essentially similar in its constitution to that in England is in force. See COURTS OF IRELAND.

JUDICES. Judges. See JUDEX.

JUDICIAL ACT. See ACT.

JUDICIAL ADMISSIONS. Admissions of the party which appear of record in the proceedings of the court. See ADMISSIONS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. **In English Law.** A tribunal composed of members of the privy council, established in 1833. It consists of the Lord Chancellor, the six Lords of Appeal, if Privy Councillors, and such other members of the Privy Council as have held any high judicial office in the United Kingdom, India, or the colonies. It is the court of final appeal from the ecclesiastical courts, from the courts of India, the colonies, the Channel Islands and the Isle of Man. It is the ultimate court of appeal for 350 millions of persons, administering all the different systems of law of the countries under its appellate jurisdiction, and exercising a notable influence on the tenor and course of law in some of those jurisdictions, especially Indian law.

As to Australia, no appeal thereto lies from the supreme court in cases affecting the limits of the constitutional power of the Australian states, unless by special allowance of the supreme court. The South African constitution forbids an appeal except on special leave of the king in council.

See an article in 44 Am. L. Rev. 160; COURTS OF ENGLAND.

JUDICIAL CONVENTIONS. Agreements entered into in consequence of an order of court; as, for example, entering into a bond on taking out a writ of sequestration. Penniman v. Barrymore, 6 Mart. La. (N. S.) 494.

JUDICIAL DECISIONS. The opinions or determinations of the judges in causes before them. Hale, Hist. Cr. Law 68; 5 M. & S. 185. See DICTUM; JUDGE-MADE LAW; PRECEDENTS.

JUDICIAL DISCRETION. See DISCRETION.

JUDICIAL DOCUMENTS. The papers and proceedings which constitute or become part of the record of a litigation. They include the writs, pleadings, documentary proofs, verdicts, inquisitions, judgment, and decrees incident to a cause or judicial proceeding.

Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court, are judicial documents. A deposition after being received and filed as such is a judicial document and can only be proved as such, and is not admissible as a written statement or confession of deponent. It cannot be received in part and excluded in part; Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598.

Judicial documents are thus classified by Starkie: 1. Judgments, decrees, and verdicts. 2. Depositions, examinations, and inquisitions, taken in the course of a legal process. 3. Writs, warrants, pleadings, bills, and answers, etc., which are incident to judicial proceedings.

As to the admissibility and effect of such documents, see, generally, Stark. Ev., Sharsw. ed. [316].

JUDICIAL DUTY. Within the meaning of a constitution, such a duty as legitimately pertains to an officer in a department designated by the constitution as judicial. State v. Hathaway, 115 Mo. 36, 21 S. W. 1081.

JUDICIAL FUNCTION. The exercise of the judicial faculty or office.

The capacity to act in the specific way which appertains to the judicial power, as one of the powers of government.

The term is used to describe generally those modes of action which appertain to the ju-

diciary as a department of organized government, and through and by means of which it accomplishes its purposes and exercises its peculiar powers.

JUDICIAL LEGISLATION. See JUDGE-MADE LAW.

JUDICIAL LIABILITY. See JUDGE.

JUDICIAL MORTGAGE. In Louisiana. The lien resulting from judgments, whether these be rendered on contested cases, or by default, whether they be final or provisional, in favor of the person obtaining them.

JUDICIAL NOTICE. A term used to express the doctrine of the acceptance by a court for the purposes of the case, of the truth of certain notorious facts without requiring proof.

It is the process whereby proof by parol evidence is dispensed with, where the court is justified by general considerations in assuming the truth of a proposition without requiring evidence from the party setting it up. See Wigm. Ev. § 2565. This power is to be exercised with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt should be resolved promptly in the negative; Brown v. Piper, 91 U. S. 37, 41, 23 L. Ed. 200.

The classes of facts of which judicial notice will be taken are judicial, legislative, political, historical, geographical, commercial, scientific, and artistic, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs which rest entirely upon acknowledged notoriety for their claims to judicial recognition; Wade, Notice 1403.

If unacquainted with such fact, the court may refer to any person or any document or book of reference for its satisfaction in relation thereto; or may refuse to take judicial notice thereof unless and until the party calling upon it to take such notice produces any such document or book of reference; Steph. Ev. art. 59. It may inform itself from such sources as it deems best; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

Judicial notice is not conclusive. That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party upon whom the burden of proof ordinarily rests. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable; Wigm. Ev. § 2567. Judicial notice must be requested, as it is a dispensation from producing evidence; Wigm. Ev. § 2568. A court will not take judicial notice of a fact merely because it knows it; Lenahan v. People, 5 Thomp. & C. (N. Y.) 268.

Judicial notice will be taken of the following:

Laws, Domestic Statutes and Ordinances. Public acts within the state or territory in which the court is held; Parent v. Walmsly's Adm'r, 20 Ind. 82; Jones v. U. S., 137 U. S. 214, 11 Sup. Ct. 80, 34 L. Ed. 691; Wright v. Hawkins, 28 Tex. 452; People v. Mahaney, 13 Mich. 481; Inhabitants of Belmont v. Inhabitants of Morrill, 69 Me. 314; McDonald v. State, 80 Wis. 407, 50 N. W. 185; and of a law regulating within certain districts the right of fishing; Burnham v. Webster, 5 Mass. 266; the right of navigation; Hammond's Lessee v. Inloes, 4 Md. 138; the lumber trade; Pierce v. Kimball, 9 Greenl. (Me.) 54, 23 Am. Dec. 537; or the sale of liquor; Levy v. State, 6 Ind. 281; State v. Cooper, 101 N. C. 688, 8 S. E. 134; of the corporate existence and names of the counties of a state; Trammell v. Chambers County, 93 Ala. 388, 9 South. 815; of a private act when expressly recognized and amended by a public act; Lavalle v. People, 6 Ill. App. 157; of a long prevailing construction of a statute by executive officers; Bloxham v. R. Co., 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44; of acts incorporating railway companies by general provisions; Heaston v. R. Co., 16 Ind. 275, 79 Am. Dec. 430 (though not by general charter; Perry v. R. Co., 55 Ala. 413, 28 Am. Rep. 740; Atchison, T. & S. F. R. Co. v. Blackshire, 10 Kan. 477; *contra*, Wright v. Hawkins, 28 Tex. 452); of the public statutes of the several states (by a federal court); Merchants' Exch. Bank v. McGraw, 59 Fed. 972, 8 C. C. A. 420, 15 U. S. App. 332; of the statutes under which city improvements are made; Conlin v. Board of Supervisors, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17; but not of ordinances and regulations of local boards and councils; Case v. Mayor of Mobile, 30 Ala. 538; Moore v. Town of Jonesboro, 107 Ga. 704, 33 S. E. 435; Garvin v. Wells, 8 Ia. 286; Watt v. Jones, 60 Kan. 201, 56 Pac. 16; Field v. Malster, 88 Md. 691, 41 Atl. 1087; City of Winona v. Burke, 23 Minn. 254; Porter v. Waring, 69 N. Y. 250; Stittgen v. Rundle, 99 Wis. 78, 74 N. W. 536; that a city is duly incorporated; Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45.

A court takes judicial notice of its own action in the same cause; State v. Ulrich, 110 Mo. 350, 19 S. W. 656; or a state court of the decision of the supreme court of the United States settling the law of the same case; Alexander v. Gish (Ky.) 17 S. W. 287; of acts of congress; Dickenson v. Breeden, 30 Ill. 279; Papin v. Ryan, 32 Mo. 21; Wright v. Hawkins, 28 Tex. 452; Mims v. Swartz, 37 Tex. 13; of the rules and regulations of the principal departments of the government under express authority of an act of congress in which the public are interested; Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; of acts of the executive in relation to declaring a guano island to be within the jurisdiction of the United States; Jones v. U. S., 137 U. S. 224, 11 Sup. Ct. 80, 34 L. Ed. 691; but not of regulations of the land office; U. S. v. Bedgood, 49 Fed. 54. The low-

er courts of the United States and the supreme court, on appeal from their decisions, take judicial notice of the constitution and public laws of each of the states; Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. Ed. 751; Mills v. Green, 159 U. S. 657, 16 Sup. Ct. 132, 40 L. Ed. 293; of the laws of Pennsylvania existing prior to the constitution; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302, 6 U. S. App. 649.

Without special enactment, the law merchant, governing the transfer of commercial paper by indorsement, will be noticed by the courts, where such law has not been abrogated by statute; Reed v. Wilson, 41 N. J. L. 29; 12 Cl. & F. 787; as will the general usage and customs of merchants; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200 (if they are intelligible without extrinsic proof; 23 Beav. 370); military orders of a general character within the district in which the courts are held, when such orders affect judicial proceedings, and are issued by officers of recognized authority, will be noticed; New Orleans Canal & Banking Co. v. Templeton, 20 La. Ann. 141, 96 Am. Dec. 385.

Judicial notice will be taken of the laws of the United States by the state courts, as well as by the federal courts; Morris v. Davidson, 49 Ga. 361; Mims v. Swartz, 37 Tex. 13; and of the state laws by the federal courts, in cases arising under the laws of the various states; Liverpool & G. W. S. v. Ins. Co., 129 U. S. 397, 445, 9 Sup. Ct. 469, 32 L. Ed. 788; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; Barry v. Snowden, 106 Fed. 571; *contra* (as to local laws of the Indian Territory); Wilson v. Owens, 86 Fed. 571, 30 C. C. A. 257 (though, on a writ of error to a state supreme court, a federal court declines to notice the law of another state, as it cannot notice what the state court could not notice; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535); of the laws of another state by a state court, where an appeal may be made to a federal court on questions of federal law, such as the effect of a judgment in another state court; Shotwell v. Harrison, 22 Mich. 410; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806; Jarvis v. Robinson, 21 Wis. 523, 94 Am. Dec. 560; of the former laws of another sovereignty when they have to any extent become the law of the forum, by subdivision or amalgamation; as a printed statute book of Virginia judicially noticed as of a jurisdiction originally including Indiana; Henthorn v. Doe, 1 Blackf. (Ind.) 157; or the laws of Mexico, prior to the cession in 1848; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215; or the laws of the colony of Pennsylvania; Loree v. Abner, 57 Fed. 159, 6 C. C. A. 302; or the laws of England before the American Revolution; Liverpool & G. W. S. Co. v. Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

In states where the common law has been adopted, it will be presumed that the same law prevails in a foreign state, unless otherwise proved; Anderson v. Anderson, 23 Tex. 639; Robards v. Marley, 80 Ind. 185; Mobile & O. R. Co. v. Whitney, 39 Ala. 468; but courts will in general refuse to notice a common-law rule different from their own; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331.

Judicial notice will be taken of the laws of the sea when common to all maritime nations, so far as, in effect, international and common to all; Sears v. The Scotia, 14 Wall. (U. S.) 170, 20 L. Ed. 822; a Canadian statute regulating the navigation of Canadian waters; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *contra*, The Pawashick, 2 Lowell 142, Fed. Cas. No. 10,851 *(semble)*; that the civil law is the foundation of French jurisprudence; Barrielle v. Bettman, 199 Fed. 838.

But judicial notice will not be taken of the laws of other nations, as of Holland; 1 P. Wm. 429; of Turkey (they must be pleaded); Dainese v. Hale, 91 U. S. 13, 23 L. Ed. 190 (but the Spanish law will be noticed in so far as it affects our insular possessions; Ponce v. Roman Catholic Church, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. Ed. 1068); or by the courts of one state of the laws of another; 2 Freem. Judg. § 571.

Political Facts, International Affairs, Seals of State, etc. Judicial notice will be taken of the existence and titles of all the sovereign powers in the civilized world which are recognized by the government of the United States, of their respective flags and seals of state; The Santissima Trinidad, 7 Wheat. (U. S.) 335, 5 L. Ed. 454; L. R. 2 Ch. App. 585; the *status* of sovereigns; [1894] 1 Q. B. 149; of the law of nations; Sears v. The Scotia, 14 Wall. (U. S.) 170, 188, 20 L. Ed. 822; of foreign admiralty and maritime courts; Croudson v. Leonard, 4 Cra. (U. S.) 434, 2 L. Ed. 670; and their notaries public; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 333, 5 L. Ed. 628; of a treaty with a foreign government; Richter v. Reynolds, 59 Fed. 577, 8 C. C. A. 220, 17 U. S. App. 427; or with Indian tribes; Montgomery v. Deeley, 3 Wis. 709; of the date of the consummation of such treaties; Carson v. Smith, 5 Minn. 78 (Gil. 58), 77 Am. Dec. 539; of the laws and regulations of Mexico prior to the cession under the treaty of Guadalupe Hidalgo; U. S. v. Chaves, 159 U. S. 452, 16 Sup. Ct. 57, 40 L. Ed. 215.

A foreign state will or will not be recognized by the court according as it is or is not recognized by the executive department; In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. Judicial notice will be taken of the existence of war between Great Britain and a foreign state; 3 M. & S. 67. That the existence of war is a matter of judicial

determination, see [1902] A. C. 109; Dicey, Const. 509; 18 L. Q. R. 156.

Domestic Political Organization, Boundaries, Capitals, etc. Judicial notice will be taken of the boundaries of the several states and judicial districts; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the territorial extent and sovereignty exercised *de facto* by their own government; Jones v. U. S., 137 U. S. 214, 11 Sup. Ct. 80, 34 L. Ed. 691; that the districts into which the United States are divided for revenue purposes have defined geographical boundaries; U. S. v. Jackson, 104 U. S. 41, 26 L. Ed. 651; by a state court of the local political divisions of its own state into counties, cities and the like; Winnipiseogee Lake Co. v. Young, 40 N. H. 420; Goodwin v. Appleton, 22 Me. 453; of their relative positions, but not of their boundaries, further than as described in public statutes; Indianapolis & C. R. R. Co. v. Stephens, 28 Ind. 429; Gilbert v. Power & Mfg. Co., 19 Ia. 319.

Domestic Officials, Their Identity and Authority, and Genuineness of Official Documents. Judicial notice will be taken of the accession of the chief executive of the nation, and of their own state or territory, his powers and privileges; Lindsey v. Attorney General, 33 Miss. 508; State v. Williams, 5 Wis. 308, 68 Am. Dec. 65; State v. Boyd, 34 Neb. 435, 51 N. W. 969; and the genuineness of his signature; Jones v. Gale's Curatrix, 4 Mart. O. S. (La.) 635; the heads of departments and principal officers of state; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; and the public seal; Den v. Vreelandt, 7 N. J. L. 352, 11 Am. Dec. 551; Delafield v. Hand, 3 Johns. (N. Y.) 310; the election and resignation of a senator of the United States, or the appointment of a cabinet or foreign minister; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; marshals and sheriffs; Ingram v. State, 27 Ala. 17; Martin v. C. Aultman & Co., 80 Wis. 150, 49 N. W. 749; and the genuineness of their signatures; Wood v. Fitz, 10 Mart. O. S. (La.) 196; of the law regulating an officer's fee; Benson v. Christian, 129 Ind. 535, 29 N. E. 26 (but not their deputies; State Bank v. Curran, 10 Ark. 142); number of members of the legislature; State v. Mason, 155 Mo. 486, 55 S. W. 636; of the incumbency of the acting commissioner of patents; York & M. R. Co. v. Winans, 17 How. (U. S.) 31, 15 L. Ed. 27.

Official Acts, Elections, Census, Legislative Proceedings, etc. The supreme court, on appeal from the circuit court, takes judicial notice of the days of general public elections of members of the legislature, and of members of the constitutional convention of a state, as well as of the time of the commencement of its sitting, and the date when its acts take effect; Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293. Courts take judicial notice that primary elections are an essential part of our political system; State v. Hirsch, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170; of public proclamation of war and peace and special days of fast and thanksgiving; Sasscer v. Bank, 4 Md. 409; Wells v. R. Co., 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; see Cœur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260, 19 L. R. A. 382; of the public proclamations of pardon and amnesty; Jenkins v. Collard, 145 U. S. 546, 12 Sup. Ct. 868, 36 L. Ed. 812; of the sittings of congress and also of their own state and territorial legislatures and their established and usual course of proceeding, and the privileges of the members, but not the transactions on the journals; Armstrong v. U. S., 13 Wall. (U. S.) 154, 20 L. Ed. 614; Gnob v. Cushman, 45 Ill. 119; Auditor v. Haycraft, 14 Bush (Ky.) 284; *contra* (as to the journals); Moody v. State, 48 Ala. 115, 17 Am. Rep. 28; People v. Mahaney, 13 Mich. 481; Worcester Nat. Bank v. Cheney, 94 Ill. 430; State v. Cunningham, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561; and of the length of time ordinarily required to complete an enumeration of the inhabitants of a state; People v. Rice, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; and of the census; Sprague Cigar Co. & Wing Cigar Co. v. Cigar Co., 155 O. G. 1041 (U. S. Patent Office). The English courts have refused to take notice of journals of the house of commons; Hob. 109; but they take notice of the privileges of the house; 9 Ad. & E. 107; 3 P. & D. 330; and of its standing orders; L. R. 2 Eq. 364.

Judicial Proceedings, Officers and Rules of Courts. Of courts of general jurisdiction, their judges; Gilliland v. Adm'r of Sellers, 2 Ohio St. 223; Cincinnati, I., St. L. & C. Ry. Co. v. Grames, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; their seals, regular terms, rules, and maxims in the administration of justice and course of proceeding; Newell v. Newton, 10 Pick. (Mass.) 470; Lindsay v. Williams, 17 Ala. 229; the resignation of a circuit judge; Ex parte Peterson, 33 Ala. 74 (but not of attorneys of a district court not members of the supreme court bar; Clark v. Morrison, 5 Ariz. 349, 52 Pac. 985; and not as to whether a party is a citizen of the United States; State v. Ins. Co., 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138); that a person appearing as an attorney is regularly licensed, noticed; Ferris v. Bank, 158 Ill. 237, 41 N. E. 1118; that it is not infrequent in divorce proceedings for parties to agree on details of alimony; Whitney v. Elevator & Warehouse Co., 183 Fed. 678, 106 C. C. A. 28.

Records of Proceedings. A court is not bound to take notice of any legal proceedings other than those then before it, but courts often take notice of some part of a judicial proceeding without requiring formal evidence, for reasons of convenience, where

controversy is unlikely; see Wigm. Ev. § 2579; it will take judicial notice of its own records in a former case between the same parties.

Notorious Miscellaneous Facts, Geography, Commerce, Industry, History, Natural Science, etc. Courts will take judicial notice of the general geographical features of their own country, or state, and of their judicial district, as to the existence and location of its principal mountains, rivers, and cities; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; People v. Wood, 131 N. Y. 617, 30 N. E. 243; Linck v. City of Litchfield, 141 Ill. 469, 31 N. E. 123; Mutual Ben. Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; Com. v. King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; that Suffolk county is a county of Massachusetts; Com. v. Desmond, 103 Mass. 445; that phosphate is mined in some parts of Florida and is an article of transportation; State v. Seaboard Air Line Ry., 48 Fla. 114, 37 South. 652; that not all of the St. Clair river is in Michigan; Cummings v. Stone, 13 Mich. 70; that a road between two towns would be within a certain county; Steinmetz v. Turnpike Co., 57 Ind. 457; that the great grain fields of this country lie west of the Hudson river; Soper v. Tyler, 77 Conn. 104, 58 Atl. 699; that contracts were made generally, at a certain period, with reference to Confederate currency; Buford v. Tucker, 44 Ala. 89; but not of the depreciation of the currency during the war; Modawell v. Holmes, 40 Ala. 391; but, *contra*, that Confederate notes were currency in the South during the war, that they were but little depreciated at a certain time, and were never made legal tender by the Confederacy; Simmons v. Trumbo, 9 W. Va. 358; that marine insurance risks in November are greater than those in June; Barry v. Ins. Co., 62 Mich. 424, 29 N. W. 31; of any matter of public history, affecting the whole people, and also public matters affecting the government of the nation, or of their own particular state or district; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; but see Wright v. Hawkins, 28 Tex. 452; of the general facts of natural history; Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359; of Fremont's public acts in California in 1846 and 1847; De Celis v. U. S., 13 Ct. Cl. 117; of the abolition of slavery; Morgan v. Nelson, 43 Ala. 586; of the art of mensuration, as applied to railroad embankments; Scanlan v. Ry. Co. (Cal.) 55 Pac. 694; of legal weights and measures; 4 Term R. 314; and coin; U. S. v. Burns, 5 McLean 23, Fed. Cas. No. 14,691; of the character of the general circulating medium, and the public language in reference to it; Lampton v. Haggard, 37 B. Monr. (Ky.) 149; but not of the depreciation of currency during the civil war; Modawell v. Holmes, 40 Ala. 391; of the sea rules, if general and notorious; L. R. 3 P. C. 44; and the federal courts especially take judicial notice of the ports and waters of the United States, in which the tide ebbs and flows; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; that the Connecticut river at a certain place was not a navigable water under federal jurisdiction; Com. v. King, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; but not that certain lake navigation would be closed on April 1; Haines v. Gibson, 115 Mich. 131, 73 N. W. 126; that the ingenuity of man has failed to construct a locomotive engine which can be operated successfully and not permit the escape of sparks at times; Lake Erie & W. R. Co. v. Gossard, 14 Ind. App. 244, 42 N. E. 818; White v. R. Co., 90 App. Div. 356, 85 N. Y. Supp. 497; that railroad passenger trains are operated to carry passengers for hire; Cordran's Adm'x v. R. Co., 67 Fed. 522, 14 C. C. A. 506, 32 U. S. App. 182; that two railroads touching the same points are parallel and competing lines; Gulf, C. & S. F. R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; that telegraph lines are necessary to the operation of railroads; State v. R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; of the relation between the conductor and brakeman of a freight train; Mason v. R. Co., 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; of the authority of Pullman porters to assist passengers entering or leaving a train; Gannon v. R. Co., 141 Ia. 37, 117 N. W. 966; that passenger conductors must enter and leave their trains while in motion; Dailey v. Accident Ass'n, 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171; but not that fifty or fifty-five miles an hour is a dangerous rate of speed; Texas & N. O. R. Co. v. Langham (Tex.) 95 S. W. 686; that a box freight car in a state of rest at a highway crossing is not *per se* a frightful object to horses of ordinary gentleness; Gilbert v. Ry. Co., 51 Mich. 488, 16 N. W. 868, 47 Am. Rep. 592; of what a mileage book is; Southern Ry. Co. v. Rosenheim & Sons, 1 Ga. App. 770, 58 S. E. 81; that the attendants of a church are not limited to its members; McAlister v. Burgess, 161 Mass. 269, 37 N. E. 173, 24 L. R. A. 158; that many unincorporated church societies have been in existence; Alden v. St. Peter's Parish, 158 Ill. 631, 639, 42 N. E. 392, 30 L. R. A. 232; of the contents of the Bible and the general doctrines maintained by different religious sects; State v. District Board, 76 Wis. 177, 44 N. W. 967, 7 L. R. A. 330, 20 Am. St. Rep. 41; but see Sarahass v. Armstrong, 16 Kan. 192; Youngs v. Ransom, 31 Barb. (N. Y.) 49; that carrying on the business of a barber on Sunday is not necessary; State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555; that it is more dangerous to be on the running board of a street car than on a seat or the platform; Bridges v. Power Co., 86 Miss. 584, 38 South. 788, 4 Ann. Cas. 662; that coal oil is inflammable; State v. Hayes, 78 Mo. 307; and that it is a custom in Oklahoma to use it

for kindling fires; Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453 (but not that kerosene is a refined coal oil, or a refined earth oil; Bennett v. Ins. Co., 8 Daly [N. Y.] 471; nor that kerosene is a "burning fluid" or "chemical oil," as such words are used in a policy of insurance forbidding the use of such oil on the insured premises; Mark v. Ins. Co., 24 Hun [N. Y.] 565; nor that gin and turpentine are "inflammable liquids," within the meaning of the term as used in an insurance policy; Mosley v. Ins. Co., 55 Vt. 142); that leaks in gas pipes require immediate repair; City of Indianapolis v. Gas Trust Co., 140 Ind. 107, 39 N. E. 433, 27 L. R. A. 514, 49 Am. St. Rep. 183; that it is dangerous to smoke a pipe in a barn filled with straw; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; that tobacco in cigarette form is deleterious for smoking, being "inherently bad and bad only"; Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703; that its use in any form is uncleanly and its excessive use is injurious, and that any use by the young is so, and especially snuff; State v. Olson (N. D.) 144 N. W. 661; that tobacco and cigars sold by a tobacconist are not drugs and medicines (and testimony that they are may be excluded); Com. v. Marzynski, 149 Mass. 68, 21 N. E. 228.

That an undertaker's establishment in a residential district is objectionable; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765, 22 L. R. A. 182; that Texas cattle have some contagious or infectious disease communicable to other cattle; Grimes v. Eddy, 126 Mo. 168, 28 S. W. 756, 26 L. R. A. 638, 47 Am. St. Rep. 653; of the construction of an ordinary street car; Kleffmann v. R. Co., 104 App. Div. 416, 93 N. Y. Supp. 741; of the principle of operation of an ice-cream freezer; Brown v. Piper, 91 U. S. 43, 23 L. Ed. 200; that lithographing is an art requiring a high degree of skill and expense; Beck & Pauli Lithographing Co. v. Brewing Co., 25 Ind. App. 662, 665, 58 N. E. 859; that "peach-yellows" is a tree disease, of a baneful and contagious nature; State v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; that potatoes, sugar-beets, and turnips are not the spontaneous product of the soil; Meyers v. Menter, 63 Neb. 427, 88 N. W. 662; (but not of the natural appearance of oleomargarine; People v. Meyer, 44 App. Div. 1, 60 N. Y. Supp. 415; nor of the color of natural butter; People v. Hillman, 58 App. Div. 571, 69 N. Y. Supp. 66); that exposure to cold is likely to cause inflammatory rheumatism; Rosted v. Ry. Co., 76 Minn. 123, 127, 78 N. W. 971; that certain lowlands were overflowed by freshets; Kerns v. Perry (Tenn.) 48 S. W. 729; of the facts of natural history, that hair usually exists on parts of a sheep fleece; Lyon v. Marine, 55 Fed. 964, 5 C. C. A. 359; that labels of champagne, as ordinarily served from a cooler, are liable to disappear before the bottle is shown to the customer; Von Mumm v. Wittemann, 85 Fed. 966; that there are always taxes remaining unpaid; Mullen v. Sackett, 14 Wash. 100, 44 Pac. 136; that a patented article was known and in general use long before the issuance of the patent; Terhune v. Phillips, 99 U. S. 592, 25 L. Ed. 293; that telephones have become an ordinary medium of communication; Globe Printing Co. v. Stahl, 23 Mo. App. 451; that a brick wall, built three feet eight inches from certain windows and at least fifteen inches above them, is a detrimental obstruction of light and air; Ware v. Chew, 43 N. J. Eq. 493, 11 Atl. 746; that a fracture of the skull pressing upon the brain is a dangerous wound, which may cause death, but which does not necessarily and in all cases do so; McDaniel v. State, 76 Ala. 1; that a charge of unchastity will cause a virtuous woman of good name anguish and humiliation; Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249; that one-tenth of a grain of morphine, taken every four hours, could not have a poisonous effect; Laturen v. Drug Co., 93 N. Y. Supp. 1035; that electricity is dangerous, and so generally recognized; Warren v. Ry. Co., 141 Mich. 298, 104 N. W. 613; but not of the various methods of generating and transmitting or using it; City of Crawfordsville v. Braden, 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; that a glass of whisky, sold for ten cents, contains less than three gallons; State v. Blands, 101 Mo. App. 618, 74 S. W. 3; that vaccination is believed to be a safe and valuable means of preventing the spread of small pox, and that this belief is supported by high medical authority; Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; that the manufacture of wearing apparel in unsanitary apartments is likely to spread disease; State v. Hyman, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742; that woman's physical structure and the performance of maternal functions place her at a disadvantage; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; of a usage of universal prevalence; Munn v. Burch, 25 Ill. 35; Merchants' Mut. Ins. Co. v. Wilson, 2 Md. 217; of the increased cost of living; McCaddin v. McCaddin, 116 Md. 567, 82 Atl. 554; but not of local customs or usages; Hitesman v. State, 48 Ind. 473; Turner v. Fish, 28 Miss. 306; Lewis v. McClure, 8 Or. 274; of the peculiar nature of lotteries and the mode in which they are generally carried on; Salomon v. State, 28 Ala. 83; but not that playing "policy" is playing a game of chance; State v. Russell, 17 Mo. App. 16; that mere pasturage upon uninclosed Western lands is very slight evidence of possession; Whitney v. U. S., 167 U. S. 529, 547, 17 Sup. Ct. 857, 42 L. Ed. 263; that many buildings have been lately erected in Chicago under long term leases; Denegre v.

Walker, 114 Ill. App. 234; that a designated street in a city where the court presides is a public highway; Wheeler v. City of Detroit, 127 Mich. 329, 86 N. W. 822; that swamps and stagnant waters are the cause of malarial fever; Leovy v. U. S., 177 U. S. 636, 20 Sup. Ct. 797, 44 L. Ed. 914; Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

Times and Distances. Of the geographical position and distances of foreign countries in so far as the same may be fairly presumed to be within the knowledge of most persons of ordinary intelligence and education within the state or district in which the court is held; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the calendar; State v. Harris, 121 Mo. 445, 26 S. W. 558; of the coincidence of days of the week with those of the month; Brennan v. Vogt, 97 Ala. 647, 11 South. 893; First Nat. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794; of the ordinary limitation of a human life as to age; Kansas City M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; of the Carlisle Tables in estimating the probable length of life; Lincoln v. Power, 151 U. S. 436, 441, 14 Sup. Ct. 387, 38 L. Ed. 224; of the course of time of the heavenly bodies; People v. Cheekee, 61 Cal. 404; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; of the time of moon-rising; People v. Mayes, 113 Cal. 618, 45 Pac. 860; of things which must happen according to the laws of nature; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; that a crop of cotton named in a mortgage dated in January could not have been planted or been in existence at that time; Tomlinson v. Greenfield, 31 Ark. 557; of the average height of a man, and that his sitting height could not be four feet seven inches; Hunter v. R. Co., 116 N. Y. 615, 23 N. E. 9, 6 L. R. A. 246; of the distance between two towns; Blumenthal v. Meat Co., 12 Wash. 331, 41 Pac. 47; that the distance from Dubuque, Ia., to Asheville, N. C., exceeds 100 miles; Mutual Benefit Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; that two towns in the state were separated only by a river, and were mutually accessible across the ice; Siegbert v. Stiles, 39 Wis. 533; that a few hours will take a messenger from Terre Haute to Evansville; Ward v. Colyhan, 30 Ind. 395; that Calais is beyond the jurisdiction of the court; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

Meaning of Words—Intoxicating Liquors. Of the meaning of words in the vernacular language, but not of catchwords, technical, local, or slang expressions; Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (although formerly the local use of language was noticed; Rolle, Abr. *Court*, c. 6, 7; 12 Q. B. 624); of such ordinary abbreviations as by common use may be regarded as universally understood; as abbreviations of Christian names, and the like; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Moseley's Adm'r v. Mastin, 37 Ala. 216; Weaver v. McElhenon, 13 Mo. 89; Power v. Bowdle, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511; but not of those which are in any degree doubtful or difficult of interpretation; Ellis v. Park, 8 Tex. 205; of the well known application in a libellous sense of the "fable of the Frozen Snake"; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; of the meaning of "kindergarten"; Sinnott v. Colombet, 107 Cal. 187, 40 Pac. 329, 28 L. R. A. 594 (but not of the orthography or pronunciation of Polish names; State v. Johnson, 26 Minn. 316, 3 N. W. 982; nor of technical meanings; Martin v. Development Co., 41 Or. 448, 69 Pac. 216); of the meaning of "C. O. D."; U. S. Exp. Co. v. Keefer, 59 Ind. 263; State v. Intoxicating Liquors, 73 Me. 278; and of "f. o. b."; Vogt v. Schienebeck, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 756, 106 Am. St. Rep. 989, 2 Ann. Cas. 814; of what is meant by a "gift enterprise," upon the trial of one indicted for advertising such; Lohman v. State, 81 Ind. 15; that the words "drawing" and "Kentucky drawing" designate a game of chance; State v. Russell, 17 Mo. App. 16; of the public significance of "pool room"; State v. Maloney, 115 La. 498, 39 South. 539; that alcohol is, as a matter of law, an intoxicant, and such fact need not be proven in a prosecution for selling intoxicating liquors; Snider v. State, 81 Ga. 753, 7 S. E. 631, 12 Am. St. Rep. 350; that beer is a fermented liquor; State v. Effinger, 44 Mo. App. 81; Maier v. State, 2 Tex. Civ. App. 296, 21 S. W. 974; that lager beer is a malt liquor; Adler v. State, 55 Ala. 16; that beer is intoxicating; Peterson v. State, 63 Neb. 251, 88 N. W. 549 (*contra*, State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; except as defined by statute; Kerkow v. Bauer, 15 Neb. 150, 18 N. W. 27); that the following are intoxicating drinks: whisky; Schlicht v. State, 56 Ind. 173; Peterson v. State, 63 Neb. 251, 88 N. W. 549; a Manhattan cocktail; State v. Pigg, 78 Kan. 618, 97 Pac. 859, 19 L. R. A. (N. S.) 848, 130 Am. St. Rep. 387; a whisky cocktail and whisky; U. S. v. Ash, 75 Fed. 651; brandy; Fenton v. State, 100 Ind. 598; Rau v. People, 63 N. Y. 277; porter; Blatz v. Rohrbach, 116 N. Y. 450, 22 N. E. 1049, 6 L. R. A. 669; gin; Com. v. Peckham, 2 Gray (Mass.) 514; California brandy; State v. Tisdale, 54 Minn. 105, 55 N. W. 903; apple brandy; Thomas v. Com., 90 Va. 92, 17 S. E. 788; wine; Caldwell v. State, 43 Fla. 545, 30 South. 814; Hatfield v. Com., 120 Pa. 395, 14 Atl. 151; Italian "sour wine"; Starace v. Rossi, 69 Vt. 303, 37 Atl. 1109; gin and beer; Com. v. Peckham, 2 Gray (Mass.) 514; Hoagland v. Canfield, 160 Fed. 146 (but not home made blackberry wine; Loid v. State, 104 Ga. 726, 30 S. E. 949; nor rice beer; Bell v. State, 91 Ga. 227, 18 S. E. 288); that some men can drink more than others without becoming intoxicated; Com. v. Peckham, 2 Gray (Mass.) 514.

It has been said that the courts should exercise this power with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be solved promptly in the negative; per Swayne, J., in Brown v. Piper, 91 U. S. 43, 23 L. Ed. 200. In that case the court took judicial notice, in a patent case, of the principle of operation of an ice-cream freezer, and the subject of judicial notice was fully discussed.

JUDICIAL OFFICE. A term used in 34 & 35 Vict. c. 91, to define qualifications of additional members of the judicial committee of the Privy Council.

JUDICIAL POWER. The authority vested in the judges.

The authority exercised by that department of government which is charged with the declaration of what the law is and its construction so far as it is written law.

The power to construe and expound the law as distinguished from the legislative and executive functions.

The use of the term judicial power in sec. 2, Art. III. of the Constitution of the United States furnished an occasion to Mr. Justice Miller for a comment upon the difficulty of defining the term; he says, "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise. It is, indeed, very difficult to find any exact definition made to hand. It is not to be found in any of the old treatises, or any of the old English authorities or judicial decisions, for a very obvious reason. While in a general way it may be true that they had this division between legislative and judicial power, yet their legislature was, nevertheless, in the habit of exercising a very large part of the latter. The house of lords was often the court of appeals; and parliament was in the habit of passing bills of attainder as well as enacting convictions for treason and other crimes.

"Judicial power is, perhaps, better defined in some of the reports of our own courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently necessary to the determination of questions arising in that court than anywhere else. It is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Miller, Const. U. S. 314.

"But it has now long been settled in England that the interpretation of statute law belongs to the judiciary alone, and in this country they have claimed and obtained an equal control over the construction of constitutional provisions." Sedg. Const. L. 18.

"The power conferred upon courts in the strict sense of that term; courts that compose one of the great departments of the government; and not power in its judicial nature, or *quasi* judicial, invested from time to time in individuals, separately or collectively, for a particular purpose and limited time." Charge to Grand Jury, 1 Blatch. 635, Fed. Cas. No. 18,261; Gilbert v. Priest, 65 Barb. (N. Y.) 444, 448.

There can be no delegation of judicial power; Zonker v. Cowan, 84 Ind. 395; or of a judicial duty; McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Southern Oil Co. v. Wilson, 22 Tex. Civ. App. 534, 56 S. W. 429.

"Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law." Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

Nevertheless, leaving out of question the greater necessity of real definition and separation of the legislative and judicial power in American constitutional law there is a distinction between judicial power and political power which was fully recognized in English law, continues to be so in American law, and is entirely independent of the case growing out of the constitutional delimitation and separation of the three powers of government.

"The courts have made a distinction between political and judicial questions and uniformly decline to assume jurisdiction in cases which involve only the former. A political question is one over which the courts decline to take cognizance, in view of the line of demarkation between the judicial branch of the government on the one hand and the executive and legislative branches on the other. Such questions most generally arise when there is an attempt made to prevent the incumbents of either the legislative or executive departments of the government from the performance of some act which such incumbent claims the right to perform by virtue of his office, or to compel him to perform some act which he declines or refuses to perform; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567."

Courts have no authority to review the acts of co-ordinate departments of the state government within their respective spheres, but they have jurisdiction to determine whether any department has acted within its constitutional sphere; McCully v. State, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; and they may control the actions of officers and official boards, if they have been without any foundation in the facts before them and are capricious and arbitrary; 4 Burr. 2186; State v. Matthews, 77 S. C. 357, 57 S. E. 1099; Ex parte Virginia, 100 U. S. 339,

25 L. Ed. 676; City of Atlanta v. Wright, 119 Ga. 207, 45 S. E. 994; St. Louis v. Mfg. Co., 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474; but the power will be exercised with much circumspection and only in clear cases, and the courts must take care not to substitute their own discretion for that of the officers or board whose refusal to act is under consideration, and to interfere by mandamus only when the facts so clearly show the duty of the board or officer to act that there is really no room for the exercise of a reasonable discretion against the doing of the act, the performance of which the court is asked to require; State v. Matthews, 81 S. C. 414, 62 S. E. 695, 22 L. R. A. (N. S.) 735, 128 Am. St. Rep. 919, 16 Ann. Cas. 182. See 22 L. R. A. (N. S.) 735, note.

The rule is recognized definitely by the United States supreme court that the discretion of an executive officer will not be interfered with either by mandamus or injunction; U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167; Brown v. Hitchcock, 173 U. S. 473, 19 Sup. Ct. 485, 43 L. Ed. 772; National Life Ins. Co. v. Ins. Co., 209 U. S. 317, 28 Sup. Ct. 541, 52 L. Ed. 808, citing Bates & G. Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, and Moyer v. Peabody, 212 U. S. 78, 29 Sup. Ct. 235, 53 L. Ed. 410, where it was held that the existence of insurrection empowers the governor to suppress it by the national guard and to seize and imprison those resisting, and that he is the final judge of the necessity of such action; in such case public danger warrants the substitution of executive for judicial process and the ordinary rights of individuals must yield to what the executive deems the necessity of a critical moment. But courts must prevent deprivation of property by unlawful action of the executive department, though reluctant to interfere with it; Ballinger v. U. S., 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464.

An executive officer may be compelled by mandamus to perform a ministerial duty but when he has discretion it cannot be compelled; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346, where a mandamus to compel the governor to issue a commission was refused. As to the power to issue *mandamus* to executive officers, see EXECUTIVE POWER.

"When a decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive;" and "even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, though they may have the power and will occasionally exercise the right of so doing;" Bates & G. Co. v. Payne, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894. And the courts frequently sustain statutes which make the liberty of a citizen wholly dependent on the decision of facts by an executive officer without appeal; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. The supreme court of Massachusetts has also gone very far in sustaining the action of executive officers or boards exercising quasi judicial authority. The cases will be found collected with a number of federal cases in an article by Edmund M. Parker, on "Executive Judgments and Executive Legislation" in 20 Harv. L. Rev. 116.

The distinction between judicial and political questions was fully considered in Penn v. Lord Baltimore, 1 Ves. Sen. 444, and it was held by Lord Hardwicke, L. C., that while the dispute as to original boundaries between provinces was a political question to be determined by the king and council yet where the case arose under an agreement between the parties it was a judicial question.

In The Nabob of Carnatic v. East India Co. (1 Ves. Jr. 371) a plea that the defendant was invested with sovereign powers, and therefore not answerable with respect to the exercise of them in a court of justice, was overruled; but after the case came to hearing the bill was dismissed upon the ground that the case involved a treaty between persons acting as independent states, and the circumstance that the defendants were subjects merely with relation to England had nothing to do with the matter which was not a subject of private municipal jurisdiction; 2 *id.* 56.

The Cherokee nation was held to be a state but not a foreign state in the sense of the constitution, and therefore could not maintain an action against the state of Georgia in the courts of the United States; Cherokee Nation v. Georgia, 5 Pet. (U. S.) 1, 8 L. Ed. 25. In this case Chief Justice Marshall said that the propriety of interposition by the court to control the state legislature "savors too much of the exercise of political power to be within the province of the judicial department." Mr. Justice Thompson in a dissenting opinion which upheld the jurisdiction was careful to say, "I do not claim for this court the exercise of jurisdiction upon any matter properly falling under the denomination of political power." And again: "I do not claim as belonging to the judiciary the exercise of political power. That belongs to another branch of the government. The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief." Cherokee Nation v. Georgia, 5 Pet. (U. S.) 51, 75, 8 L. Ed. 25. See also New York v. Connecticut, 4 Dall. (U. S.) 4, 1 L. Ed. 715.

It was very earnestly discussed in one of the early cases concerning the boundary between two states, whether the jurisdiction in such cases, now so well established, was included in the judicial power as understood by the constitution of the United States, and it was held that although the constitution did not in terms extend the judicial power to all controversies between two or more states, yet it in terms excluded none, whatever might be their nature or object; Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. Ed. 1233. In this case the court recognized the distinction between political and civil controversies and held that the case in question was the latter because it depended first upon a fact, and second upon the question whether an agreement between the states was void or valid, both of these presenting not a political but a judicial controversy. And it was said that where there was submission by sovereigns or states of a controversy between them, from that moment the question ceased to be a political one but comes immediately within the judicial power for determination by a court.

In Marbury v. Madison, 1 Cra. (U. S.) 137, 2 L. Ed. 60, the question whether the commission of a public officer was improperly withheld from him was held to be a judicial and not a political question, but a mandamus to the secretary of state to deliver it was refused because the court had not original jurisdiction to issue it. But in Mississippi v. Johnson, 4 Wall. (U. S.) 475, 18 L. Ed. 437, an injunction to restrain the president from executing the reconstruction acts was refused on the ground that the bill presented a political and not a judicial question.

In Georgia v. Stanton, 6 Wall. (U. S.) 50, 71, 18 L. Ed. 721, it was said that the distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we need do no more than refer to some of the authorities on the subject. The suit invoked the power of the court to restrain the secretary of war and his subordinates from executing acts of congress which, it was alleged, would annul and abolish an existing state government. In refusing the injunction the court said that it could hardly be denied that the case called for the judgment of the court upon political questions and upon rights, not of persons or property, but of a political character. "For the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in judicial form, for the judgment of the court."

Among the questions which have been held to be judicial questions and within the powers of the courts to decide are: Whether an amendment to the constitution has been constitutionally adopted; Kadderly v. Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; even though a contrary declaration had been made by the political department of the state government; Gabbert v. Ry. Co., 171 Mo. 84, 70 S. W. 891; whether an apportionment of senators and representatives involved an abuse of legislative discretion by a defiance of the constitutional limitations thereon; Brooks v. State, 162 Ind. 568, 70 N. E. 980; whether license fees are a reasonable imposition under the police power; Margolies v. Atlantic City, 67 N. J. L. 82, 50 Atl. 367; whether legislation ostensibly under the police power is really such when the constitutionality of the act is assailed; Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525, affirming 74 Neb. 757, 105 N. W. 298, 7 L. R. A. (N. S.) 1079, 121 Am. St. Rep. 754; the validity of a plea of privilege set up by a member of the legislature in bar to an action for slander uttered on the floor of the House; Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; whether the use authorized by the legislature of a reservoir in connection with the water supply is or is not a public use; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277; whether a right has vested; Rice v. State, 7 Ind. 332; the power of laying out or altering streets vested in the mayor and aldermen; Parks v. Boston, 8 Pick. (Mass.) 218, 19 Am. Dec. 322; the power to hear and decide proceedings for the summary disposition of tenants, and a writ of prohibition was granted to restrain the recorder from proceeding in such case after his judicial powers had been transferred to the city judge; People v. Russel, 19 Abb. Pr. (N. Y.) 136; People v. Russel, 29 How. Pr. (N. Y.) 176; whether certain corporations shall be accepted as sole security; In re American Banking & Trust Co., 17 Pa. Co. Ct. R. 274; whether a tax is invalidated by failure of assessors to comply with the law; Plumer v. Board of Sup'rs, 46 Wis. 163, 50 N. W. 416 (but an act making tax bills *prima facie* evidence of the validity of the charge against the property was not an invasion of the judicial power; City of St. Joseph v. Farrell, 106 Mo. 437, 17 S. W. 497.)

What occupations are the proper subjects of the police power is a judicial question; Price v. People, 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306; and the legislative determination as to what is the proper exercise of that power is not final, but is subject to the supervision of the courts; Moeschen v. Tenement House Department of City of New York, 203 U. S. 583, 27 Sup. Ct. 781, 51 L. Ed. 328, affirming Tenement House Department of City of New

York v. Moeschen, 179 N. Y. 325, 72 N. E. 231, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439 (the tenement house case); but unless the court can see that a given police regulation has no just relation to the object which it purports to carry out or to the protection of the public health, safety, comfort, or morals, the decision of the legislature as to its necessity or reasonableness is conclusive; Odd Fellows' Cemetery Ass'n v. City of San Francisco, 140 Cal. 226, 73 Pac. 987.

On the other hand, among the cases which have been held to be within the exclusive jurisdiction of the political branches of the government and not reviewable by the courts are: What property shall be embraced within a tax district, and whether it shall be taxed for municipal purposes; Kettle v. City of Dallas, 35 Tex. Civ. App. 632, 80 S. W. 874; whether property is benefited by the construction of a sewer (in the absence of fraud); Prior v. Const. Co., 170 Mo. 439, 71 S. W. 205; the reasonableness of a municipal license tax upon the privilege of conducting a business; Woodall v. City of Lynchburg, 100 Va. 318, 40 S. E. 915; the reasonableness of a particular regulation of a useful business; Ex parte Whitwell, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; the amount and necessity of taxation; Street v. City of Columbus, 75 Miss. 822, 23 South. 773; the repeal of a charter which was expressly subject to repeal, unless in a case where the legislature should exercise its power in such a manner as to violate clearly the principles of natural justice; Lothrop v. Stedman, 42 Conn. 583, 13 Blatchf. 134, Fed. Cas. No. 8,519; the adjustment of a debt between a new county and the old one from which it had been carved out; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; the disposal of property belonging to the state; State v. Bryan, 50 Fla. 293, 39 South. 929; whether an appropriation shall or shall not be made; Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624; whether a system of classification adopted by the legislature is good or vicious; State v. Kolsem, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; the applicability of a general law to a particular case, and the necessity or propriety of a special law; Weston v. Ryan, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922; Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921.

It is within the province of the political department of the government to define the method of securing imperfect rights of property ceded to the United States after war, and the courts have no jurisdiction to enforce them except as authorized by congress; U. S. v. Sandoval, 167 U. S. 278, 17 Sup. Ct. 868, 42 L. Ed. 168; nor is it within the judicial power to make any declaration upon the question of the length of time required for the pacification of Cuba and when the United States troops shall be withdrawn; Neely v. Henkel, 180 U. S. 109, 21 Sup. Ct. 302, 45 L. Ed. 448; *id.* 180 U. S. 126, 21 Sup. Ct. 308, 45 L. Ed. 457; so in ascertaining the tribal and other relations of Indians, the courts generally follow the political departments; Farrell v. U. S., 110 Fed. 942, 49 C. C. A. 183.

If a statute is constitutional there is no power in the courts to consider whether it is in accordance with a reasonable or wise public policy; McGuire v. Ry. Co., 131 Ia. 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; Prison Association v. Ashby, 93 Va. 667, 25 S. E. 893; Rice v. Ionia Probate Judge, 141 Mich. 692, 105 N. W. 17; nor can the motives of the legislature be considered in a judicial proceeding; State v. R. Co., 166 Ind. 580, 77 N. E. 1077; nor the motives of the executive in issuing a warrant for the rendition of a prisoner; In re Moyer, 12 Idaho 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 Am. St. Rep. 214.

"If a contract is entered into in behalf of the government, and a contest should arise about the meaning of the contract, it belongs to the judiciary to decide what that contract was, and if the legislature decide that question, they invade the province of the judiciary;" Commonwealth v. Beaumarchais, 3 Call (Va.) 169, quoted in Bedford v. Shilling, 4 S. & R. (Pa.) 401, 8 Am. Dec. 718.

The determination of county boundaries in a suit by a county for taxes or by one county against another is not a question for judicial inquiry but a political one; Norfolk Southern Ry. Co. v. Washington County, 154 N. C. 333, 70 S. E. 634; Guadalupe County v. Wilson County, 58 Tex. 228; but under a statute passed subsequently to this case, the court exercised jurisdiction; Cameron's Heirs v. State, 95 Tex. 545, 68 S. W. 508; but would not do so as to surveys made before the enactment of the law; Rockwell County v. Kaufman County, 69 Tex. 172, 6 S. W. 431. In another state a question of boundaries between counties was held to be one not for commissions of either county, but for a court of chancery under a taxpayer's bill; Union Pacific R. Co. v. Carr, 1 Wyo. 96. If there is a statute, the method prescribed by it must be resorted to before recourse can be had to the courts; Parish of Caddo v. Parish of De Soto, 114 La. 366, 38 South. 273.

The separation of the three departments among which, in modern systems, the sovereign powers of government are distributed, and to some extent the difficulty involved in the effort to distribute those powers, are discussed in the title EXECUTIVE POWER, which, with the title LEGISLATIVE POWER, should be read and referred to in connection with the present title.

Separation of powers, though generally adopted, does not always rest upon a constitutional basis. Whether it does or does not do so affects very materially the judicial power with respect to its stability and independence. In England, not only the supreme legislative authority, but the power of deciding upon the constitutionality of its acts, is vested in parliament, there being no fundamental law in the nature of a written constitution to which that body must conform. The phrase English constitution is one of constant use, and there is, undoubtedly, a body of fundamental principles which are recognized as having been finally accepted as inviolable and which are grouped under that name. A recent writer says that it "is made up of certain views which have been read out of or read into English history and embodied in certain governmental acts,"—"it is in a large part a matter of theory and opinion," and "the substance of it may be summed up in one sentence: All the powers of government are in the hands of parliament." Macy, Eng. Const. 14, 16.

Practically modern opinion is undivided as to this omnipotence of parliament, and under no form of law can its action be restrained or reviewed. Such restraint as is imposed upon it is a moral one which exists only in the potency of certain principles which, in the United States, have been crystallized into constitutional safeguards, while in England they remain, as it were, in solution, affecting, however, and giving form and tone to the government and the body politic. The highest judicial power in England is subordinate to the legislative power, and bound to obey any law that parliament may pass, although it may, in the opinion of the court, be in conflict with the principles of Magna Carta, or the Petition of Rights. Taney, C. J., in Gordon v. U. S., 117 U. S. 699, appendix.

It is doubtless true that the parliament could, as a matter of law, abolish all courts and assume to itself the administration of justice, but even in that case there would still exist the judicial power now administered by courts, and it would be equally distinct as now from the legislative function, even if both were exercised by the same agency of government.

The French constitution of Sept. 3, 1791 (the first written constitution in Europe), recited that the judicial power cannot in any case be exercised by the legislative body or by the king, and that tribunals cannot interfere with the exercise of the legislative power nor suspend the execution of the laws, nor encroach upon administrative functions, nor cite any administrators to appear before them on account of their functions. This comprehensive limitation is attributed by a thoughtful writer on this subject to the French historical associations, which were hostile to any judicial competency to criticise legislation for unconstitutionalty. It is to this influence that the writer referred to attributes the different views on this subject which are found in the French constitution referred to and that of the United States. Coxe, Jud. Pow. 78. From a historical review on the subject the author last cited concludes that in France long before 1787 the French judicial power had been used to declare legislation to be void because contrary to the views of right entertained by the court; and that, by the further contrast to American views, the judicial power in question existed under an unwritten constitution and was expressly prohibited under a subsequent written constitution.

Under the Swiss constitution the federal government is organized to some extent upon the idea of the separation of powers; but as it has been observed, "the separation of powers is not very strictly observed between the federal assembly and the federal council, nor indeed . . . between the judicial authority and the political federal authorities;" Adams and Cunningham on the Swiss Confederation 48. The Swiss federal tribunal is bound by all laws passed by the federal assembly without qualification; which is not competent to decide whether the federal law be constitutional or unconstitutional; this is declared not to be a judicial question, nor is it such a question whether a constitution or a law of a canton contains anything contrary to the constitution of the confederation, such a question is extra-judicial and is decided by the federal assembly; Vincent, Swiss Government 34, 142. Another writer says that the Swiss federal court, although instituted in imitation of the American, differs from it in an essential point, while in the United States judicial power alone extends to declaring a law unconstitutional, under the Swiss constitution some points of cantonal law are reserved and the federal legislature is made the sole judge of its own powers and the authorized interpreter of the constitution; 1 Bryce, Am. Com. 254.

In Germany it is said that the law of a state must yield in case of conflict between it and constitutional law of the empire, and that the judicial tribunal must decide between them, but that it was uncertain whether such tribunal can decide upon a question of the constitutionality of a law of the empire; Coxe, Jud. Pow. 96.

In Canada it is said that the supreme court and the privy council in England have concurred in recognizing the rights of provincial courts to pass upon the constitutionality of the laws enacted by the provincial legislatures and the Dominion parliament; Doutre, Const. of Canada, preface.

For an extended historical commentary on previous systems of law, with respect to the limitations of judicial power in passing upon the validity or effect of legislation, see Coxe, Jud. Pow. pt. I.

The English doctrine of the absolute inviolability of a legislative act never did acquire a footing in this country. It was repudiated by James Otis nearly a quarter of a century before the framing of the American constitution. He contended before the superior court of judicature for the province of Massachusetts, that the validity of statutes must be determined by courts of justice. This doctrine afterwards became the principle of American constitutional law. Before 1787, the colonial courts refused to grant writs of assistance, on the ground that general writs of assistance were unconstitutional; Quincy (Mass.) 504; and see Bowman v. Middleton, 1 Bay (S. C.) 252, where an act passed by the colonial legislature was declared void; Den v. Singleton, Mart. (N. C.) 49. Judicial questions of a national character were, under the confederation, determined by a court; Articles of Confederation, Art. 9; and the framers of the constitution ordained and established a judiciary as a necessary department, and used in it the phrase *judicial power* as one well understood and not needing definition in the instrument itself; Federalist, Nos. 22, 28, 80, 81; 3 Elliott's Deb. 142, 143.

It is the settled law in this country that the judicial power extends to and includes the determination of the constitutionality and validity of legislative acts, although the propriety of this conclusion is still sometimes challenged. For a discussion of the subject, its history, and the authorities, see CONSTITUTIONAL.

But a court has no power to declare unconstitutional a duly enacted statute simply because it may seem to the court that such legislation does not conform to the general

theory upon which the government is founded; Reeves v. Corning, 51 Fed. 774.

The constitution declares that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." Art. 3, s. 1.

It has been remarked that the essential character of its judiciary is a distinct recognition by the constitution of the nationality of the federal government; Pom. Const. L. § 108.

By the constitutions of the several states, the judicial power is vested in such courts as are enumerated in each respectively.

A provision in a state constitution that the powers of government shall be divided into three distinct departments, each confided to separate persons, operates to forbid the exercise by a court or judge of a power not judicial; Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. And a constitutional grant of judicial authority is power to administer remedies for remedial rights; to render judicial decisions, so called, in actions or special proceedings to enforce the same; State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

Where a state constitution expressly provided that judges of the supreme court should not exercise non-judicial powers or powers of appointment, the maxim *expressio unius est exclusio alterius* was applied, and the power of appointment of local officers by judges of other courts was held valid, the exercise of such power having been according to the usage of the state; Com. v. Collier, 213 Pa. 138, 62 Atl. 567, 5 Ann. Cas. 92.

There is nothing in the constitution of the United States to forbid or prevent the legislature of a state from exercising judicial functions; Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; or from conferring judicial power on non-judicial bodies; Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658; but even in the absence of special limitations in the state constitutions, legislatures cannot exercise powers in their nature essentially judicial; Wynehamer v. People, 13 N. Y. 391. The different classes of power have been apportioned to different departments, and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others; Cooley, Const. Lim. 106. The legislative power cannot from its nature be assimilated to the judicial; the law is made by the one, and applied by the other; Merrill v. Sherburne, 1 N. H. 204, 8 Am. Dec. 52; Greenough v. Greenough, 11 Pa. 494, 51 Am. Dec. 567; Cincinnati, W. & Z. R. Co. v. Com'rs of Clinton County, 1 Ohio St. 81; Wynehamer v. People, 13 N. Y. 391; In re Ridgefield Park, 54 N. J. L. 288, 23 Atl. 674. In the oft-repeated phrase of Chief Justice Marshall, "the legislature makes, the executive executes, and the judiciary construes, the law." Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253.

Two capital distinctions have been noted between the judicial power in England and in the United States,—the first grows out of the existence in the latter country of a written constitution restricting the power of the legislature, from which springs the duty of the courts to declare invalid any act which is expressly prohibited by or which is not authorized by the constitution, either expressly or by implication. The other results from the power of construction imposed upon the American judge by the brevity of the constitution. Continuing the last thought, it is said:

"The words of that instrument are general, laying down a few large principles. The cases which will arise as to the construction of these general words cannot be foreseen until they arise. When they do arise the generality of the words leaves open to the interpreting judges a far wider field than is afforded by ordinary statutes, which, since they treat of one particular subject, contain enactments comparatively minute and precise. Hence, although the duty of a court is only to interpret, the considerations affecting interpretations are more numerous than in the case of ordinary statutes, more delicate, larger in their reach and scope. They sometimes need the exercise not merely of legal acumen and judicial fairness but of a comprehension of the nature and methods of government which one does not demand from the European judge who walks in the narrow path traced for him by ordinary statutes. It is therefore hardly an exaggeration to say that the American constitution, as it now stands, with the mass of fringing decisions which explain it, is a far more complete and finished instrument than it was when it came fire-new from the hands of the Convention. It is not merely their work but the work of the judges, and most of all one man, the great Chief Justice Marshall." Bryce, Am. Com. 248.

The American system of leaving constitutional questions to be settled by the courts is considered by the author last quoted to secure very great advantages over the theory which was advanced at the time of the formation of the federal government of subjecting the acts of the state legislature to the veto of congress. The result is, as he puts it, that "the court does not go to meet the question; it waits for the question to come to it. When the court acts, it acts at the instance of a party—sometimes the plaintiff or the defendant may be the national government or a state government, but far more frequently both are private persons, seeking to enforce or defend their private rights." He illustrates this by the fact that the doctrine of Fletcher v. Peck, 6 Cranch (U. S.) 87, 3 L. Ed. 162, that a repeal of a grant by the state to an individual impairs the obligation of the contract, was determined in an actior between individuals, the result being that the decision upon the validity of the action of the state is relieved from those opinions which might affect its determination, if the state

itself were a party; 1 Bryce, Am. Com. 252. A more far-reaching case which might be used as an illustration is the Dartmouth College Case, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, in which an action between an individual and a private corporation, resulted in placing upon the states a limitation of power second to few if any contained in their constitutions.

Under the American constitutional system, there is to be found no force more potent, effective, and far-reaching than this power of constitutional construction which is now unquestionably vested in the courts. Through it the judicial power, in a way, approaches much more nearly to the absolute ultimate authority of the English parliament than does the legislative power. It has also been said: "We proceed upon the theory that our constitution is written: and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the supreme court of the United States and in those of the highest courts in the various states. The study of the American constitution is in large part, from beginning to end, a study of judicial decisions." Macy, Eng. Const. 89.

Mr. Bryce considers it a weak point in the federal constitution that a decision of the supreme court may be obtained in reversal of a former one by the appointment of judges to fill vacancies favorable to such reversal, or in case there be no vacancy, by the joint action of congress and the executive in increasing the number of judges. Of the former method, he instances the Legal Tender Cases, 1 Am. Const. 264, 269, 297. This reference served to put in a very definite form the somewhat widespread impression that appointments of judges were made for the purpose of reversing the previous decision of the court. The possibility of such action in any case by the executive is so serious a contingency that this particular charge has been recently made the subject of critical examination by Senator Hoar, whose brother was then attorney general of the United States. His pamphlet is a valuable historical document, and shows by the dates that the appointments in question were made prior to the decision, and from the testimony of members of the cabinet, that they had been agreed upon long before, neither the president nor any member of the cabinet having any knowledge as to the probable decision; see 5 Am. Lawy. 4.

The fact that the suggestion of any motive in the appointment of judges has so rarely been made may be considered strong evidence that the danger alluded to is not a serious one. But even if it were, it is a danger necessarily incident to all human institutions. No system of checks and balances has ever been devised, and probably none ever will be, so perfect as to dispense with the need of integrity and good faith in the administration of government.

It may be noted here, as already stated under CONSTITUTIONAL, that Chief Justice Gibson (in a dissenting opinion), in Eakin v. Raub, 12 S. & R. (Pa.) 345 (1825), ably contended, after the decision in Marbury v. Madison, 1 Cra. (U. S.) 176, 2 L. Ed. 60, that a state court is bound to execute an act repugnant to the constitution of a particular state, but not one repugnant to the federal constitution; though in Norris v. Clymer, 2 Pa. 281, he said to counsel that he had modified his opinion on this subject.

It was said by another eminent judge that it is doubtful whether an act of the legislature can be deemed absolutely void; it is rather to be treated as voidable and this objection can only be raised by one affected by it and not by a stranger; Shaw, C. J., in In re Wellington, 16 Pick. (Mass.) 96, 26 Am. Dec. 631, quoted with approval in Cooley, Const. Lim. (7th Ed.) 232.

A state legislature cannot annul the judgments nor determine the jurisdiction of the courts of the United States; U. S. v. Peters, 5 Cra. (U. S.) 115, 3 L. Ed. 53; nor authoritatively declare what the law is or has been, but what it shall be; Ogden v. Blackledge, 2 Cra. (U. S.) 272, 2 L. Ed. 276.

Congress cannot interfere with or control state courts except in so far as the federal courts have appellate jurisdiction.

Congress cannot without the consent of the state constrain the state courts to entertain or act upon applications for naturalization; Rushworth v. Judges of Inferior Court, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761.

The judicial powers of the United States, first under the constitution as originally adopted, extended to cases "between a state and citizens of another state," but the very early case of Chisholm v. Georgia, 2 Dall. (U. S.) 419, 1 L. Ed. 440, in which the plaintiff as executor brought an action of *assumpsit* against the state, which was sustained by the court, resulted in the adoption of the 11th amendment. As a consequence it was held that cases past or present in which the state was a party were removed from the jurisdiction of the court; Hollingsworth v. Virginia, 3 Dall. (U. S.) 378, 1 L. Ed. 644; but the mere fact that a state may be interested does not oust the jurisdiction; Osborn v. Bank, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; in a comparatively late case the soundness of the opinion in the case of Chisholm v. Georgia was doubted, the suggestion being that the clause of the constitution giving jurisdiction in such cases was properly limited to cases

cognizable in the courts of a state or suits by a state against citizens of another state; Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842. The grant of judicial power in all cases in law and equity, etc., was held not to authorize a writ of error in the circuit court of the District of Columbia in a criminal case; U. S. v. More, 3 Cra. (U. S.) 159, 2 L. Ed. 397; but this provision is held generally to include criminal as well as civil proceedings, and the power so vested in the federal courts is independent of the judiciary of the states; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648.

In U. S. v. Smith, 4 N. J. L. 37, the action was to recover a penalty under the provisions of an act of congress. The question was raised by plea whether under the act jurisdiction would properly be given to a state court. A demurrer to the plea was overruled, and in a dissenting opinion Southard, J., discusses at length the question: What is the judicial power of the United States?

The distinctive features which characterize the three great departments of government are in the main easily recognized. There is little difficulty in determining whether a power is judicial or executive, and the questions arising with respect to those distinctions result not so much from inherent difficulty in the subject as from a tendency in modern constitutions and legislation to confuse the functions of the two departments in the classes of cases of which illustrations have been already cited. So it may be said that ordinarily there ought to be little difficulty in distinguishing legislative and judicial powers. Properly understood, the two functions are entirely different, and yet there are points of contact from which spring disputed cases, such, for example, as the regulation of procedure, the application of rules of evidence, the attempt to regulate judicial discretion, and many others. This may involve, on the one hand, an unconstitutional delegation of legislative power, or, on the other, the assumption by the legislature of some portion of the authority which belongs to the courts. The cases in which it is a question whether a certain power is legislative or judicial are mainly considered under the title of LEGISLATIVE POWER, to which reference should be made. As a reason why there is naturally found much debatable ground between the judiciary and the legislature, it has been suggested that:

"In most countries the courts have grown out of the legislature; or rather, the sovereign body, which, like parliament, was originally both a law and a legislature, has delivered over most of its judicial duties to other persons, while retaining some few to be still exercised by itself." 1 Bryce, Amer. Com. 235. The author just quoted enumerates the points in which America has followed the English practice. There are no separate administrative tribunals, but officials are sued or indicted in the regular courts; judges are secure in their tenure; judicial proceedings are recognized in law and not set aside by a statute within the competence of the legislature. He considers that America has improved on England in forbidding the legislature to exercise the powers of a criminal court, by acts of attainder, etc., and stands behind England in continuing to use a legislative body as a court of impeachment, the trial of disputed election cases by committees, and the disposition of public franchises, or the appropriation of private property, by legislative rather than judicial methods. Thus three pieces of ground debatable between the legislature and the judiciary, which all originally belonged to the legislature, and in America still do, have been in England made the subject of judicial power and method; *id.* 235. The judicial power extends to and includes only such acts as are in their nature judicial.

From its earliest history the United States supreme court has consistently declined to exercise any powers other than those which are strictly judicial; Muskrat v. U. S., 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246, citing Gordon v. U. S., 117 U. S. 697, appendix, where the subject was examined in the opinion by Taney, C. J.

An act of congress of 1792 devolved upon the circuit courts the duty of examining pension claims and certifying them to the secretary of war. In Hayburn's Case, 2 Dall. (U. S.) 409, 1 L. Ed. 436, the attorney general moved for a mandamus to compel the judges to proceed to hear the cases under the act, but the case was not decided, as the act was repealed. The reasons given by the circuit judges for refusing to perform the duties imposed upon them by the act are set forth in 2 Dall. 410, n. Under an act of 1793 the nature of the duties assigned to the judges were somewhat changed. This act came before the supreme court in U. S. v. Yale Todd. Both of these decisions are set forth in a note of Taney, C. J., in U. S. v. Ferreira, 13 How. (U. S.) 52, 14 L. Ed. 42, where it is said that the result of the opinions in these two cases is that the power thus conferred was not a judicial power, and therefore could not be exercised by the courts, and that as the act intended to confer the power on the court as a judicial function, it could not authorize the judges to exercise it out of court as commissioners, and this decision has ever since been regarded as constitutional law.

It is a settled principle of constitutional law that judges cannot be required to perform any other than judicial duties; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107, where the doctrine is stated emphatically in the language of Cooley, Const. Law 53, and many other cases are cited.

The general principle upon which is based

the want of power in the legislature to confer upon the judges any other than judicial duties "is that under the constitutional system of the United States and of the states, there is a clear and explicit separation of the duties of the government in the three departments which, it has been well said, are not merely equal, they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other." Wright v. Defrees, 8 Ind. 298.

It is held that the constitutional powers of the judges are defined by the provisions conferring upon them the judicial power, *eo nomine*, and as was said by Mr. Justice Field, in the supreme court of California: "In its own sphere of duties this court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by rendition of decisions;" Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; and the supreme court of Arkansas said of the constitutional right of the court, "The legislative department is incompetent to touch it;" Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751.

Congress cannot require the judiciary to exercise powers that are not judicial; Ex parte Riebeling, 70 Fed. 310 (to pass upon the value of the services of an informer in the case of seizure of smuggled goods); the opinion considered the matter historically and at length. It was followed by Judge McPherson in U. S. v. Queen, 105 Fed. 269.

Acts held valid as not conferring non-judicial powers are: Conferring on the court the power to establish towns; Morton v. Woodford, 99 Ky. 367, 35 S. W. 1112; to determine whether conditions prescribed by general law for the creation or enlargement of municipal bodies have been complied with; Forsythe v. City of Hammond, 68 Fed. 774; to inquire whether water rates fixed by municipalities and corporations operate to deprive the owner of appropriated water of his property without just compensation; San Diego Land & T. Co. v. City, 74 Fed. 79; authorizing a court on appeal from county commissioners to fix the salary of a county attorney; Rockwell v. County of Fillmore, 47 Minn. 219, 49 N. W. 690.

It is not a judicial function to exercise merely ministerial powers in relation to committing inebriates; Foreman v. Board, 64 Minn. 373, 67 N. W. 207; nor to entertain appeals from county commissioners upon the propriety of annexing territory to a city; Forsyth v. City of Hammond, 71 Fed. 443; to exercise over the business intercourse of common carriers control which ought to belong to themselves; State v. R. Co., 46 Neb. 682, 65 N. W. 766, 31 L. R. A. 47; to prevent the submission to the people of a constitutional amendment by injunction against the secretary of state; State v. Thorson, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582; to require the court to make appointments to fill political offices unconnected with the courts, as members of a municipal board of review; 27 W. L. Bul. 334; or health commission; 11 Am. L. Rec. 651 (in both of which last two cases the court refused to appoint); a collector of taxes; McLean County Precinct v. Bank, 81 Ky. 254; supervisors of election; Case of Supervisors of Election, 114 Mass. 247, 19 Am. Rep. 341; a bridge committee; State v. George, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; jury commissioners; State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243 (where it was considered that jury commissioners were not public officers but officers of the court); justices of the peace; Ex parte Bassitt, 90 Va. 679, 19 S. E. 453; park commissioners; Ross v. Board of Chosen Freeholders, 69 N. J. L. 291, 55 Atl. 310 (which decision reversed the supreme court and is severely criticized as not justified by the state constitution in 37 Am. L. Rev. 620).

But it has been held that judges may constitutionally be vested with power to appoint city commissioners, though that duty is administrative and not judicial; City of Terre Haute v. R. Co., 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189, where a long list is given of powers conferred upon judges not strictly of a judicial character. And in another state it is held that the power to exercise non-judicial functions does not make an act unconstitutional, as, though not compulsory, there is no valid objection to its due execution, if the court or judge chooses to perform the duty, since third persons cannot complain on the ground that the performance could not have been enforced; State v. Cincinnati, 52 Ohio St. 419, 451, 40 N. E. 508, 27 L. R. A. 737. So, though the court might have refused to perform a duty imposed by statute of levying a tax on lawyers, yet having done so and not claiming their privilege, the party assessed cannot raise this objection; State v. Gazlay, 5 Ohio 14. The legislature cannot constitute the court a board to try contested elections, that power not being essentially judicial; Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137; nor can a court be charged with the duty of purchasing land for the use of the county and executing a mortgage for the purchase money; Burgoyne v. Board, 5 Cal. 9; nor with the power of incorporating towns; People v. Town of Nevada, 6 Cal. 143; or assessment of taxes; Hardenburgh v. Kidd, 10 Cal. 402; or the valuation of property for taxation; Auditor of State v. R. Co., 6 Kan. 500, 7 Am. Rep. 575; City of Baltimore v. Bonaparte, 93 Md. 156, 48 Atl. 735; or fixing the salaries of court reporters; Smith v. Strother, 68 Cal. 194, 8 Pac. 852; or authorizing the marshall to levy and collect a municipal tax of which mandamus against a city has failed to secure payment; Rees v. City of Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72; Heine v.

Levee Commissioners, 19 Wall. (U. S.) 655, 22 L. Ed. 223; or the adjustment of state railway bonds by deciding which of two sections of an act shall take effect and be law; State v. Young, 29 Minn. 474, 9 N. W. 737; or passing upon the constitutionality of a legislative act or municipal ordinance as an abstract question; Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635.

In the La Abra Mining Company case it was held that the question whether an award by an international commission and an umpire under a convention between the United States and Mexico was obtained by fraud was one in its nature susceptible of judicial determination; La Abra Mining Co. v. U. S., 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223, where a demurrer had been interposed upon the main ground that the questions involved were of a diplomatic or political nature.

The court has jurisdiction to determine the constitutionality of an act apportioning the state into legislative districts; Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

But while the courts are not permitted to have non-judicial duties imposed upon them, so, on the other hand, are the other departments of the government forbidden to invade or usurp the judicial power. And this is held to extend to and include everything necessarily or even properly incident to the exercise of their jurisdiction.

The power to punish contempts is strictly judicial and cannot be abridged by the legislature; Hale v. State, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691; Wyatt v. People, 17 Col. 252, 29 Pac. 961; Little v. State, 90 Ind. 338, 46 Am. Rep. 224; Burke v. Territory, 2 Okl. 499, 37 Pac. 829; but reasonable regulations by the legislature touching the exercise of this power are binding; *id.;* but the power cannot be conferred upon an executive board; Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108; and an order directing a sheriff to commit a person to jail until he answers questions propounded to him by commissioners appointed to take his examination before trial is erroneous as an attempted delegation of judicial power in allowing the sheriff to determine what is compliance with the order; Fertilizer Co. v. Taylor, 112 N. C. 141, 17 S. E. 69.

The purpose of a judicial inquiry is to enforce the laws as they are at present. Legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter; Ross v. Oregon, 227 U. S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458. "The province of the courts is to decide what the law is or has been, and to determine its application to particular facts in the decision of causes; the province of the legislature is to declare what the law shall be in the future; and neither of these departments can lawfully invade the province of the other;" Ratcliffe v. Anderson, 31 Gratt. (Va.) 105, 107, 31 Am. Rep. 716, quoted in Shephard v. Wheeling, 30 W. Va. 479, 4 S. E. 635, where it was held that the abstract question of the constitutionality of an act or ordinance cannot be decided by a court.

When the state constitution confers the whole judicial power on specified courts and officers, no portion of it can be conferred on any officer not elective and not so specified; Chandler v. Nash, 5 Mich. 409; Shoultz v. McPheeters, 79 Ind. 373.

Legislation is not an interference with judicial functions, which regulates the rules of pleading; Whiting v. Townsend, 57 Cal. 515; or procedure; In re Probate Blanks, 71 N. H. 621, 52 Atl. 861; or affects the powers of individual judges as distinguished from the court itself; State v. Taylor, 68 N. J. L. 276, 53 Atl. 392; but the court may make reasonable rules as to the hearing of causes and they will prevail against a statute; Herndon v. Ins. Co., 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; though it cannot make a rule which deprives one of a right secured by law; Main v. Lynch, 54 Md. 658. As to the power of the courts to make rules, see In re Du Pont, 8 Del. Ch. 442, 68 Atl. 399. The court may change its own calendar and fix dates of trial; Merchants' National Bank v. Greenhood, 16 Mont. 395, 41 Pac. 250, 851; and a statute providing that the court must designate a day for hearing preferred causes was held unconstitutional as depriving the court of the right to hear such causes according to the circumstances of each particular case; Riglander v. Star Co., 98 App. Div. 101, 90 N. Y. Supp. 772; Jones v. Spear, 21 Vt. 426; so the power to appoint or remove a janitor of a court room belongs to the court; In re Janitor of Supreme Court, 35 Wis. 410.

The legislature cannot require judges to file opinions in writing; Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565; Vaughn v. Harp, 49 Ark. 160, 4 S. W. 751; Ex parte Griffiths, 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398, 10 Am. St. Rep. 107; Matter of Head Notes, 43 Mich. 641, 8 N. W. 552.

A statute prescribing causes for which a judgment may be set aside does not restrict the power of the court to set aside judgments for other causes than those mentioned; Nealis v. Dicks, 72 Ind. 374. Among the inherent powers of courts independent of legislative exactment is the power to prevent the enforcement against an accused person of a judgment obtained by duress; Maynard v. Mier, 85 Ind. 318.

The following acts are held unconstitutional assumptions of judicial power by the legislature: Vacating a final judgment; State v. R. Co., 71 Conn. 43, 40 Atl. 925;

Martin v. Land Co., 94 Va. 28, 26 S. E. 591; declaring what shall be conclusive evidence; People v. Rose, 207 Ill. 352, 69 N. E. 762; prescribing the manner in which courts shall discharge their judicial duties; Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; abridging or taking away the inherent power of courts to enforce their decrees and command respect for their processes; Anderson v. Forging Co., 34 Ind. App. 100, 72 N. E. 277; making a specification of weights in bills of lading conclusive evidence of correctness; Missouri, K. & T. Ry. Co. v. Simonson, 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248; declaring a tax deed or the recitals therein to be conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, etc.; Wilson v. Wood, 10 Okl. 279, 61 Pac. 1045; depriving a state Supreme Court of its revisory jurisdiction over all other state tribunals; Brown v. Kalamazoo Circuit Judge, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. Rep. 438; validating the levy of a tax which had been finally adjudicated to be invalid; Chicago & E. I. R. Co. v. People, 219 Ill. 408, 76 N. E. 571; authorizing the courts to set aside judgments and grant new trials after the term; Peerce v. Kitzmiller, 19 W. Va. 564; White v. Crump, *id.* 583; abridging the right of a court of chancery to pass upon questions of fact without a jury; Detroit Nat. Bank v. Blodgett, 115 Mich. 160, 73 N. W. 120, 885.

The following acts have been held to be constitutional: A federal act empowering the comptroller to appoint receivers for insolvent national banks (as not vesting in him a judicial power); Bushnell v. Leland, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; an act establishing rules of evidence which are not in conflict with the constitution; Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; prescribing rules of procedure or pleading; Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, 3 Ann. Cas. 677; regulating the procedure in contempt cases; Mahoney v. State, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276; regulating the exercise of the powers of a court for the punishment of constructive contempts; Drady v. Dist. Court, 126 Ia. 345, 102 N. W. 115; constituting facts which, according to the ordinary rules of human experience, tend to prove another fact, conclusive evidence of it; County Seat of Linn County, 15 Kan. 500; imposing indeterminate sentences; State v. Stephenson, 69 Kan. 405, 76 Pac. 905, 105 Am. St. Rep. 171, 2 Ann. Cas. 841; declaring the oath and examination of the mother of a bastard child to be presumptive evidence against the person accused of its paternity; State v. Rogers, 119 N. C. 793, 26 S. E. 142; discharging a motion for a new trial, if not acted upon by the court at the term; James v. Appel, 192 U. S. 129, 24 Sup. Ct. 222, 48 L. Ed. 377.

Where an act provided for filling vacancies in municipal offices by a person elected by the council to serve until "the next city election," it was held that a subsequent act providing that the words quoted should be construed to mean the election at which the voters would have elected the successor without respect to the vacancy, was an invasion of judicial power as seeking to compel the courts to construe the previous act in a way contrary to its letter and spirit; Com. v. Warwick, 172 Pa. 140, 33 Atl. 373. In this case, however, Mitchell, J., filed an able dissenting opinion in which he maintained that the judgment was an "unprecedented and unwarranted invasion by the judiciary of the legislative authority," that expository acts had been in use in Pennsylvania from colonial days, and that they were "a legislative formula never heretofore questioned." See also Titusville Iron Works v. Oil Co., 122 Pa. 627, 15 Atl. 917, 1 L. R. A. 361; where they are held to be a common form of legislative expression to which future effect must be given. In Lambertson v. Hogan, 2 Pa. 22, it was held that "explanatory acts must be construed as operating on future cases alone, except where they are designed to explain a doubtful statute."

Wherever a power is given to examine, hear, and punish, it is a judicial power, and they in whom it is reposed act as judges; Holt, C. J., 1 Salk. 200. In this case the censors of the College of Physicians under their charter fined and imprisoned a physician for administering unwholesome pills and noxious medicines, and it was held that certiorari would lie.

The phrase judicial power, as adopted in American constitutional law, includes the determination of questions of fact in equity cases. The term must be construed as vesting such power as the courts under the English and American system of jurisprudence always exercised in that class of actions, and it is not competent for the legislature to withdraw from the courts invested by the constitution with judicial power, as to matters in equity, the determination of questions in fact, as one of the established elements of that power; Callanan v. Judd, 23 Wis. 343, 349.

It frequently happens that the courts are concluded by the result of an inquiry, quasi-judicial in its character, which under some very general definitions, such as that of Lord Holt, supra, might be referred to the judicial power, but is required in this particular case and by the legislature or executive as a guide to their own action.

In cases where the existence of certain facts is necessary to be ascertained as a basis for determining whether it is wise to enact a statute, the ascertainment of the fact by the legislature will be considered conclusive, and its decision will not be reviewed by the courts in a collateral proceeding. As where

the establishment of a court depended upon the fact that the county had a population exceeding fifty thousand, the court refused to question the action of the legislature, although it appeared by the United States census that the population of the county was less than the required amount; Ex parte Renfrow, 112 Mo. 591, 20 S. W. 682; and where the legislature prohibited parents from procuring or consenting to the employment of a female child under the age of fourteen years as a dancer, the court would not review its decision that such legislation was necessary to protect the health and morals of children on the ground that the law infringed the rights of parents in some particular cases; People v. Ewer, 19 N. Y. Supp. 933.

Where a reapportionment of representatives based upon relative changes of population, was made by act of congress to take effect two years later, it was held to be a political and not a judicial question, and the courts could not give redress for any injustice resulting therefrom; State v. Boyd, 36 Neb. 181, 54 N. W. 252, 19 L. R. A. 227; with respect to apportionment of the state for legislative purposes, where the act of the legislature was in violation of the constitution of the state, the question of the validity of the statute is not a political one, but a judicial question; Parker v. State, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; State v. Cunningham, 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 145, 35 Am. St. Rep. 27.

The decision of congress recognizing a claim as an equitable obligation of the government and appropriating money for its payment can rarely be the subject of review by the courts; U. S. v. Realty Co., 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215.

A court or judge cannot be authorized to perform legislative duties; Smith v. Strother, 68 Cal. 194, 8 Pac. 852.

An act of the legislature provided that before any railway company should construct its roads in the streets of a city, the city authorities, or the superior court, or a judge thereof, on appeal, should approve the plan of construction. It was held that the power which the superior court or a judge thereof was required to exercise was legislative and not judicial, and therefore could not be exercised by them; Appeal of Norwalk St. Ry. Co., 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794. The case discusses the question fully.

An act authorizing the court or judge allowing a mandamus to direct the manner of serving it is not a delegation of legislative powers; State v. Express Co., 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225.

The act of July 25, 1882, authorizing judges and clerks of United States courts to issue subpœnas upon the application of the commissioner of pensions for the examination of witnesses concerning pension claims, is constitutional and under it the courts can compel witnesses to appear and testify on that subject; In re Gross, 78 Fed. 107. A statute authorizing judges to fix salaries of deputies or assistants employed by county officers is not unconstitutional as a delegation of legislative power to a judicial tribunal; Stone v. Wilson, 39 S. W. 49, 19 Ky. L. Rep. 126, overruling Com. v. Addams, 95 Ky. 588, 26 S. W. 581, 16 Ky. L. Rep. 135.

Questions frequently arise as to the validity of legislative acts requiring of executive officers duties quasi-judicial in their character, the propriety of which is challenged upon the ground that they impose judicial functions upon executive officers. Such are provisions of law authorizing the removal of subordinate officers, the constitution of boards for taxation, assessment, and the like. It is a well-settled principle that "judicial functions or duties can be conferred only upon courts and judicial officers;" State v. Noble, 118 Ind. 361, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; Van Slyke v. Fire Ins. Co., 39 Wis. 390, 20 Am. Rep. 50; People v. Hayne, 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211. But it has been held that there is no invasion of the judicial power in making state executive officers *ex officio* of a state board of taxation; Cleveland, C., C. & St. L. R. Co. v. Backus, 133 Ind. 513, 33 N. E. 421, 18 L. R. A. 729; Indianapolis & V. R. Co. v. Backus, 133 Ind. 609, 33 N. E. 443; or charging them with the duty of assessing property or serving on a board of equalization; Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437.

Power to summon and examine witnesses under oath conferred on an administrative officer is not a distinctive judicial power; Matter of Fenton, 58 Misc. 303, 109 N. Y. Supp. 321.

So it was held that the act, authorizing the establishment of a public park in the District of Columbia, and providing that in case of disagreement between the land owner and the park commissioners the appraisement should be submitted to the president, for his approval did not impose a judicial function upon the president whose duty was merely to decide whether the United States would have the land at the appraised value, and not to decide whether such value was reasonable as respects the property owner; Shoemaker v. U. S., 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; such an act merely makes the president the agent of congress to decide whether the proceedings shall be completed or abandoned; U. S. v. Cooper, 20 D. C. 104.

A constitutional provision prohibiting the legislature from creating other courts than those mentioned in the constitution does not prevent it from authorizing appeals to a

court from the decision of a license board; Thompson v. Koch, 98 Ky. 400, 33 S. W. 96; and where the judicial power was vested by the constitution in certain named courts, it was still competent for the legislature to provide for the removal of administrative officers in cities by the board of aldermen "sitting as a court," such power being held not strictly judicial; Gibbs v. Board, 99 Ky. 490, 36 S. W. 524.

The fact that the law confers on jury commissioners judicial powers in the selection of citizens for jury services does not involve a conflict with the fourteenth amendment of the constitution; Murray v. Louisiana, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87.

Judicial powers were not conferred on the governor by authorizing him to investigate charges of official misconduct of state officers with a view to their removal; McMaster v. Herald, 56 Kan. 231, 42 Pac. 697; or by an act authorizing him to remove any officer appointed by him; Cameron v. Parker, 2 Okl. 277, 38 Pac. 14; and the action of a governor in removing an officer under such act will not be reviewed by the courts; *id;* State v. Rost, 47 La. Ann. 53, 16 South. 776.

The power to remove city officers for cause is administrative, not judicial, and may therefore be conferred on a non-judicial body; State v. Common Council, 90 Wis. 612, 64 N. W. 304.

Questions of power between the judiciary and the executive have generally arisen upon applications for a mandamus to compel or an injunction to prevent action of an executive officer.

The question of power to issue a mandamus in such cases is discussed under the title EXECUTIVE POWER, and the authorities are there collected. A discussion of the subject, not strictly in a suit at law, but as the result of one, the participants in which were a judge and a quasi-judicial officer, may be referred to here.

In Gilcrist v. Collector of Charleston it was held that the circuit court has no power to issue a mandamus to a collector, commanding him to grant a clearance, and that all instructions from the executive which are not supported by law are illegal, and no inferior officer is bound to obey them; 1 Hall, Am. L. J. 429, Fed. Cas. No. 5,420. This decision was the subject of a letter from Cæsar A. Rodney, attorney general, to the president criticising the action of the court and challenging its jurisdiction; 1 Hall, Am. L. J. 433, Fed. Cas. No. 5,420. In reply to this letter Mr. Justice Johnson, who presided at the trial, made some remarks, in the course of which he says: "Jurisdiction in a case is one thing; the mode of exercising that jurisdiction is quite another;" the jurisdiction of the court must be derived from the constitution, and he expressly disclaims "any other origin of our jurisdiction, especially the unpopular grounds of prerogative and analogy to the king's bench."

In asserting the necessity of the recognition of the right of the courts to coerce an executive officer by a judicial order, he insists that such authority is necessarily involved in the use of the term *power* in the constitution: "The term judicial power conveys the idea both of exercising the faculty of judging and of applying physical force to give effect to a decision. The term power could with no propriety be applied, nor could the judiciary be denominated a department of government, without the means of enforcing its decrees. In a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed. The basis of individual security and the bond of union between the ruler and the citizen must ever be found in a judiciary sufficiently independent to disregard the will of power, and sufficiently energetic to secure to the citizen the full enjoyment of his rights. To establish such a one was evidently the object of the constitution." He contends that the establishment of a judiciary without power to enforce its decrees would have been to no purpose, and that where a jurisdiction is conferred and no forms prescribed for its exercise, there is an inherent power in the court to adopt a mode of proceeding adapted to the exigency of each case; 1 Hall, Am. L. J. 446, Fed. Cas. No. 5,420.

It has been a subject of controversy how far the decisions of the court of claims control the executive departments of the government of the United States in their action on similar cases. It was said by Richardson, C. J., that the decisions of the court of claims in general, not appealed from, are guides to the executive officers of the government, and furnish precedents for the executive departments in all like cases; Meigs v. U. S., 13 Wash. L. Rep. 122. This decision was thus criticised by Comptroller Lawrence: The court of claims undoubtedly had a right (1) to lay down law for itself, but it has no authority to lay down law (2) for the executive officers of the government, yet the opinion referred to assumes to do so. This is the necessary effect of the words employed by it, and whether so intended or not, it is their logical effect. For if the court of claims can prescribe not only its own duties and the rules and principles of law governing its own action, but also the same for accounting officers in the executive administration of the executive business of the government, it may for like reasons do the same for heads of executive departments and even the president himself; 6 Dec. First Comp. 238.

The federal courts will not interfere with the pension officers in the exercise of their

discretion; Gaines v. Thompson, 7 Wall. (U. S.) 347, 19 L. Ed. 62; Carrick v. Lamar, 116 U. S. 423, 6 Sup. Ct. 424, 29 L. Ed. 677.

Questions purely political or arising out of international relations the courts do not assume to determine, but leave them to what they term the political departments of the government and follow the decisions of the executive. Such a question is the recognition of independence or belligerency which is discussed at length under the title of EXECUTIVE POWER.

The power of the courts to enjoin executive officers rests upon the same principles as those applicable to a mandamus. It is the general rule that the official action of the executive department of the government or of the state cannot be controlled by a writ of injunction; Fleming v. Guthrie, 32 W. Va. 1, 9 S. E. 23, 3 L. R. A. 53, 25 Am. St. Rep. 792; Bates v. Taylor, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; Smith v. Myers, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375. The execution of orders of the president for removing intruders from government land will not be interfered with by injunction; Guthrie v. Hall, 1 Okl. 454, 34 Pac. 380.

An injunction may be obtained to protect a *de facto* officer whose title is disputed as well as that of one *de jure*, but it is not an appropriate means of determining a title to an office; In re Sawyer, 124 U. S. 210, 8 Sup. Ct. 482, 31 L. Ed. 402. In neither of these cases, however, is there involved any question of conflict between the executive and judicial power, inasmuch as the latter legitimately extends to and includes proceeding for the trial of title to office by *quo warranto*, which title see.

The power of staying the execution of a death sentence pending an appeal conferred by law on a court is not the granting of a reprieve within the meaning of a constitutional grant of executive power, but is a judicial power included in the separation of government into three independent departments; Parker v. State, 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859. See Butler v. State, 97 Ind. 373.

In State v. Doyle, 40 Wis. 175, 22 Am. Rep. 692, which was an application for a mandamus against the state officer seeking to require him to revoke the license of an insurance company, return was made pleading an injunction of the circuit court of the United States to restrain the Secretary of State from revoking the license, and it was held that "where a suit is prosecuted in a federal court by a private party against a state officer who has no personal interest or liability in the action, but is sued in his official capacity only, to affect a right of the state only, the state is the real defendant, within the prohibition of the 11th amendment to the federal constitution. A circuit court of the United States has therefore no jurisdiction of a suit by a foreign corporation to restrain a state officer from revoking (as required by the law of the state) a license granted the plaintiff corporation to do business in the state."

So also the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government and is to be regulated by treaty or by act of congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute or is required by the paramount law of the constitution to intervene; Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905. See ALIEN; CHINESE.

Of all the instances of what appears to an American legal mind the confusion of powers under the English system, none is more striking than the commingling of executive and judicial duties found in the office of the lord chancellor.

In commenting upon the alteration in his customary position by the powers of an administrative character conferred upon him by the Judicature Acts, a recent writer says, "It would appear, to the independent observer, that the tenure, the power of appointments, and the administrative duties of the chancellor, though necessarily pertinent to his high office, are inconsistent with his position as chief judge, co-equal and co-ordinate with the others, and that if the intention of the statute was to confer that position upon him, it was contrary to English usage, if not unconstitutional." Inderwick, King's Peace 232.

There has been much discussion as to whether the courts, in decisions dealing with labor strikes and public commotion arising out of them, have extended their jurisdiction beyond recognized principles. In this discussion the phrase "government by injunction" has been constantly used. The cases are cited under the titles: INJUNCTION; CONTEMPT; LABOR UNION; CONSPIRACY; COMBINATION; BOYCOTT; STRIKES; and do not require further discussion here. See also, 13 Law Quart. Rev. 347; 31 Am. L. Reg. N. S. 1, 782; 34 *id.* 576; 37 *id.* 1; 3 Va. L. Reg. 625; Rep. Am. Bar. Assn. 1894, p. 299; 29 Am. L. Rev. 282.

In impeachment proceedings, the legislature acts judicially; it was so held in sustaining the impeachment proceedings against Governor Sulzer at a special session, although they were not specified by the governor in his call.

See DELEGATION; EXECUTIVE POWER; LEGISLATIVE POWER; CONSTITUTIONAL; JUDGE-MADE LAW; JURISDICTION; JURY; JUDGE.

JUDICIAL PROCEEDINGS. A proceeding which takes place in or under the authority of a court of justice, or which relates in some

way to the administration of justice, or which legally ascertains any right or liability. Hereford v. People, 197 Ill. 222, 64 N. E. 310.

Conclusive presumptions are made in favor of judicial proceedings. Thus, it is an undoubted rule of pleading that nothing shall be intended to be out of the jurisdiction of a superior court but that which is so expressly alleged; 1 Saund. 74; 10 Q. B. 411, 455. So also, it is presumed, with respect to such writs as are actually issued by the superior courts at Westminster, that they are duly issued, and in a case in which the courts have jurisdiction, unless the contrary appears on the face of them; and all such writs will of themselves, and without any further allegation, protect all officers and others in their aid acting under them; and this, too, although they are on the face of them irregular, or even void in form; 6 Co. 54 *a*; 10 Q. B. 411, 455.

The rule is well settled that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. And this extends not merely to regular courts of justice, but to all inquiries before magistrates, referees, municipal, military, and ecclesiastical bodies; and they are only restrained by this rule, viz., that they shall be made in good faith to courts or tribunals having jurisdiction of the subject, and power to hear and decide the matter of complaint or accusation, and that they are not resorted to as a cloak for private malice. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry; Newell, Def. Lib. & Sland. 424; Heard, Lib. & S. § 101. The rule that no action will lie for words spoken or written in the course of any judicial proceeding has been acted upon from the earliest times. In 4 Co. 14 *b*, it was adjudged that if one exhibits articles to justices of the peace, "in this case the parties shall not have, for any matter contained in such articles, any action upon the case, for they had pursued the ordinary course of justice in such cases; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain, for fear of infinite vexation." And it has been decided that, though an affidavit made in a judicial proceeding is false, slanderous, and malicious, no action will lie against the party making it; 18 C. B. 126; 4 H. & N. 568.

The general rule is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications. This qualification of the rule runs through all the cases where the question is involved; Odg. Lib. & Sl. 188, n.; Heard, Lib. & S. § 104.

Statements made extra-judicially to a magistrate with a view to asking his advice are not a judicial proceeding; 3 B. & C. 24.

Official Records of the States. The constitution provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. This applies as well to the judgments and records of the courts of the several territories; Suesenbach v. Wagner, 41 Minn. 108, 42 N. W. 925. Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof. The term records includes all executive, judicial, legislative, and ministerial acts, constituting the public records of the state; Desty, Fed. Const. 203; White v. Burnley, 20 How. (U. S.) 250, 15 L. Ed. 886; Watrous' Heirs v. McGrew, 16 Tex. 509.

Legislative acts must be authenticated by the seal of the state; U. S. v. Johns, 4 Dall. (U. S.) 412, 1 L. Ed. 888.

As to the effect of judicial proceedings under this provision, see FOREIGN JUDGMENTS. As to records generally, see RECORDS.

See generally, JUDGE; JUDGE-MADE LAW; JUDICIAL DOCUMENTS; JUDICIAL POWER; JURY.

JUDICIAL SALE. A sale, by authority of some competent tribunal, by an officer authorized by law for the purpose. The term includes sales by sheriffs, marshals, masters, commissioners, or by trustees, executors, or administrators, where the latter sell under the decree of a court.

A sale, whether public or private, made by a receiver, pursuant to the direction or authority given by the court; In re Denison, 114 N. Y. 621, 21 N. E. 97.

It is premature and erroneous to decree a sale of property to satisfy incumbrances thereon before ascertaining the amounts and priorities of the liens binding such property; Bristol Iron & Steel Co. v. Caldwell, 95 Va. 47, 27 S. E. 838.

A decree confirming a master's sale, and declaring that the title be vested in the purchaser "upon the payment of the purchase money," vests no title in such purchaser until the purchase money is paid; Blair v. Blair (Tenn.) 41 S. W. 1078.

The officer who makes the sale conveys all

the rights of the defendant, and all other persons legally affected by the proceedings, in the property sold. Under such a sale there is no warranty, either express or implied, of the thing sold; The Monte Allegre, 9 Wheat. (U. S.) 616, 6 L. Ed. 174; Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456; Wright v. Tichenor, 104 Ind. 185, 3 N. E. 853. A sale of real estate does not conclude one not a party to those proceedings; and whatever title he had to the property so sold remains unaffected by the sale; United Lines Telegraph Co. v. Trust Co., 147 U. S. 431, 13 Sup. Ct. 396, 37 L. Ed. 231. Where the property sold under a decree is correctly represented by a plat, referred to in the advertisement and exhibited at the sale, which discloses an encroachment on a street, the purchaser cannot plead ignorance thereof; Carneal v. Lynch, 91 Va. 114, 20 S. E. 959, 50 Am. St. Rep. 819. A purchaser at a judicial sale, not made under compulsory process, can set up eviction of a paramount title as a defence in an action for the purchase money, but where land is sold in equity to pay the debts of an estate, and a judgment has to be rendered against the purchaser for the purchase money, he cannot enjoin its collection because of eviction; Latimer v. Wharton, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739.

The doctrine of *caveat emptor* applies to a sale under a decree foreclosing a mortgage, and the purchaser cannot rely upon statements made by the officer conducting the sale that he will get a title free from incumbrance; Norton v. Trust Co., 40 Neb. 394, 58 N. W. 953.

The purchaser of a leasehold interest at a sheriff's sale is charged with notice of the lease and subject to its covenants and conditions; Aderhold v. Supply Co., 158 Pa. 401, 28 Atl. 22; and a purchaser at such sale of an heir's interest is bound by notice given at the sale by decedent's heirs that the interest was subject in the purchaser's hands to the right, if any, of decedent's estate to charge the heir's indebtedness against his share; Donaldson's Estate, 158 Pa. 292, 27 Atl. 959. Where a conveyance from a life tenant is procured by fraud and the property sold under a judgment against a vendee, a purchaser at that sale with knowledge of the fraud can hold against the devisees in remainder; Fields v. Bush, 94 Ga. 664, 21 S. E. 827.

A decree homologating proceedings at a family meeting to sell a child's property will protect a purchaser in good faith; Dauterive v. Shaw, 47 La. Ann. 882, 17 South. 345. Equity will not relieve a purchaser from complying with the terms of sale because of a defect in the title, rendering the title unmarketable, of which the purchaser was cognizant; Stewart v. Devries, 81 Md. 525, 32 Atl. 285. Where land is sold under a condition not authorized by the decree of sale, the purchaser will not be compelled to take the title although his son signed the condition without apprehending its effect; Recor v. Blackburn, 71 Hun 54, 24 N. Y. Supp. 692. It is well settled that "the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of such mortgage." Sharpe v. Tatnall, 5 Del. Ch. 302; Elliott v. Wood, 53 Barb. (N. Y.) 285. See as to *bona fide* purchaser, Riley v. Martinelli, 97 Cal. 575, 32 Pac. 579, 21 L. R. A. 38, 33 Am. St. Rep. 209. When real estate is sold by the sheriff or marshal the sale is subject to the confirmation of the court, or it may be set aside. See McPherson v. Foster, 4 Wash. C. C. 45, Fed. Cas. No. 8,921; Bleeker v. Bond, 4 Wash. C. C. 322, Fed. Cas. No. 1,536.

An officer at a sale on execution conducted by himself cannot act as agent, with full discretionary powers of an absent person in the purchase of property, since the law casts on him the duty of fidelity to the execution debtor, and such purchase by the officer is void, and confers no title on his principal; Caswell v. Jones, 65 Vt. 457, 26 Atl. 529, 20 L. R. A. 503, 36 Am. St. Rep. 879.

Any statements made with a purpose to deter bidding may avoid the sale; Phelps v. Benson, 161 Pa. 418, 29 Atl. 86; Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67.

It is generally said to be a rule that mere inadequacy of price is not of itself sufficient ground for setting aside a judicial sale; Bethlehem Iron Co. v. Ry. Co., 49 N. J. Eq. 356, 23 Atl. 1077; Passmore v. Moore (Ky.) 22 S. W. 325; Dazet v. Landry, 21 Nev. 291, 30 Pac. 1064; Pewabic Min. Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; and that there must be shown in addition to inadequacy some fraud, accident, mistake, or other special circumstance to warrant rescission of the contract; Harman v. Copenhaver, 89 Va. 836, 17 S. E. 482. But the general rule as stated is not sustained without qualifications, since the inadequacy may be so gross as to shock the conscience of the court, as it is frequently expressed, and to be regarded as of itself sufficient ground for setting aside the sale; Connell v. Wilhelm, 36 W. Va. 598, 15 S. E. 245; as where land valued at $8,000, with incumbrances amounting to $2,700 was sold at $2,000; Johnson v. Avery, 56 Minn. 12, 57 N. W. 217; or where the same land brought at a subsequent sale $1,500; Johnson v. Avery, 60 Minn. 262, 62 N. W. 283, 51 Am. St. Rep. 529. Where the price is grossly inadequate, the court will be quick to seize upon any other circumstance impeaching the fairness of the transaction; Schroeder v. Young, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; or the least irregularity in the proceeding; Warder-Bushnell-Glesser Co. v. Allen, 63 Mo. App. 456. See as to in-

adequacy, Bean v. Hoffendorfer, 84 Ky. 685, 2 S. W. 556, 3 S. W. 138.

A sale of property as a whole may be confirmed if the decree that it be so sold is not objected to, and there is no offer of a better bid in case the bidding be reopened; Central Trust Co. v. R. Co., 60 Fed. 9. The objection that different parcels of real estate were sold together cannot be made by one who has suffered no injury therefrom; Parker v. Car-Wheel Co., 108 Ala. 140, 18 South. 938.

Combinations to prevent competitive bidding, and any conduct at the sale upon the part of interested parties which is fraudulent will make the sale void, as where there was an agreement between judgment creditors without knowledge of the debtor that one should refrain from bidding, in consideration of a promise to pay his judgment, made by the other, the sale was held void for fraud; Phelps v. Benson, 161 Pa. 418, 29 Atl. 86; and where a mortgagor publicly announced at the sale that she was a widow dependent upon the premises for support, that she intended to bid, and that she requested no one to bid against her, the sale was set aside; Herndon v. Gibson, 38 S. C. 357, 17 S. E. 145, 20 L. R. A. 545, 37 Am. St. Rep. 765. One intending to purchase commits fraud by paying another not to bid against him; Goble v. O'Connor, 43 Neb. 49, 61 N. W. 131; Saxton v. Seiberling, 48 Ohio St. 554, 29 N. E. 179; and on disclosure of the facts after sale, payment of purchase money, and conveyance, an administrator's sale may be set aside; Barnes v. Mays, 88 Ga. 696, 16 S. E. 67; to show such fraud evidence is admissible of the amount intended to be bid by the competitor who was hired not to bid; *id.;* but where the competitor is induced by an execution creditor under a secret agreement to refrain from bidding, it is incompetent for the creditor to show on a petition for subrogation that the property brought less than its market value; 24 Pittsb. Leg. J. 92. Where during an administrator's sale, one of the bidders arranged with the others for a consideration to stop bidding, and he thereby obtained the property for less than its market value, the sale was void; Ingalls v. Rowell, 149 Ill. 163, 36 N. E. 1016; but where there is an agreement between two persons to prevent bidding, and one of them purchases the land, the sale will not be set aside at the instance of the other on the ground that he was prevented from bidding by reason of inducement offered by the purchaser; Harrell v. Wilson, 108 N. C. 97, 12 S. E. 889. An agreement between five lien holders, any one of whom was financially unable to bid for himself, that one should bid on the property as trustee for them all, was not invalid as a combination to discourage bidding; Gulick v. Webb, 41 Neb. 706, 60 N. W. 13, 43 Am. St. Rep. 720.

Upon the refusal of a purchaser at a judicial sale to fulfil his contract, the property may be resold and such purchaser held liable for any deficiency in price arising upon the second sale; Stuart v. Gay, 127 U. S. 518, 8 Sup. Ct. 1279, 32 L. Ed. 191. But it has been held that to be held liable he must be served with a rule, awarded after the sale was reported, to show cause why he should not complete his purchase, or in default, the property to be resold; Stout v. Mercantile Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

See an elaborate and valuable note on the subject of injunctions against judicial sales in 30 L. R. A. 98–143; and a similar note upon the protection to purchasers and who is a *bona fide* purchaser, in 21 L. R. A. 33.

See, generally, Rorer, Judicial Sales; Tiedeman, Sales ch. 17; FRANCHISE; EXECUTION; MORTGAGE; SALE; TAX SALE; VOID. And see as to proceedings and conduct of sale, Newell v. Meyendorff, 9 Mont. 254, 23 Pac. 333, 8 L. R. A. 440, 18 Am. St. Rep. 738; 75 Am. Dec. 704, note; of franchise, 20 L. R. A. 737, note; of equity of redemption, 7 Can. L. J. 257; interest sold, 29 Am. St. Rep. 653, note.

JUDICIAL SEPARATION. See SEPARATION.

JUDICIAL WRITS. In English Practice. The capias and all other writs subsequent to the original writ not issuing out of chancery, but from the court to which the original was returnable.

Being grounded on what had passed in that court in consequence of the sheriff's return, they are called *judicial* writs, in contradistinction to the writs issued out of chancery, which were called *original* writs; 3 Bla. Com. 282.

JUDICIARY. The system of courts of justice in a country. The department of government charged or concerned with the administration of justice. The judges taken collectively; as, the liberties of the people are secured by a wise and independent judiciary. The term is in very current use in designating the method of selecting judges in a state or country,—as, an elective judiciary.

As an adjective: Of or pertaining to the administration of justice or the courts; judicial,—the judiciary act, the judiciary amendment, the judiciary question, etc. See COURT; JUDGE; 3 Story, Const. 5th ed. § 1576.

JUDICIARY ACT. The act of congress of Sept. 24, 1789, establishing the federal courts of the United States.

This act, of which the authorship is attributed to Oliver Ellsworth, long remained in force without substantial change, save in the extension of the system as required by the growth of the nation. Its provisions are embodied in the Revised Statutes.

This act, "considering the complex and highly artificial nature of the federal jurisdiction, is justly regarded as 'one of the most remarkable instances

of wise, sagacious, and thoroughly considered legislative enactments in the history of the law.'" Jones v. Foreman, 66 Ga. 371, 373.

"The wisdom and forethought with which it was drawn have been the admiration of succeeding generations. And so well was it done that it remains to the present day, with a few unimportant changes, the foundation of our system of judicature, and the law which confers, governs, controls, and limits the powers of all the federal courts, except the Supreme court, and which largely regulates the exercise of its powers." U. S. v. Holliday, 3 Wall. (U. S.) 407, 414, 18 L. Ed. 182.

Numerous amendments have been passed from time to time, the most important of which were the acts of March 3, 1875, and March 3, 1887, amended August 13, 1888. The act of March 3, 1891, created the circuit courts of appeals; and the system of federal courts was greatly changed by the new Judicial Code, enacted March 3, 1911, and in effect, on January 1, 1912. See UNITED STATES COURTS.

JUDICIUM. **In Roman Law.** The proceeding before a judge or judex (*q. v.*) to obtain his decision of the legal issue, presented as the result of the proceedings *in jure*. Sohm. Inst. Rom. L. § 34. See IN JUDICIO; IN JURE.

JUDICIUM CAPITALE. **In English Law.** Judgment of death; capital judgment. Fleta, lib. 1, c. 39, § 2. Called also "*judicium vitæ amissionis*," judgment of loss of life. *Id.* lib. 2, c. 1, § 5.

JUDICIUM DEI (Lat. the judgment or decision of God). **In Old English Law.** A term applied to trials by ordeal; for, in all trials of this sort, God was thought to interfere in favor of the innocent, and so decide the cause. Now abolished.

JUDICIUM PARIUM. **In English Law.** Judgment of the peers; judgment of one's peers; trial by jury. Magna Carta, c. 29. See JURY.

JUGE. **In French Law.** Judge. It is applied in strictness only to judges of the inferior courts. Members of the Cour d'Appel and of the Cour de Cassation are called Conseillers.

JUGE DE PAIX. **In French Law.** A justice of the peace. See COURTS OF FRANCE.

JUGE D'INSTRUCTION. **In French Law.** An officer subject to the *procureur-general*, who in cases of criminal offences receives the complaints of the parties injured, and who summons and examines witnesses upon oath, and after communication with the *procureur-general* draws up the forms of accusation. They have also the right, subject to the approval of the same superior officer, to admit the accused to bail. They are usually chosen from among the regular judges. By the act of December 8, 1897, changes of the most radical character were introduced. Under this law, within twenty-four hours of his arrest, an accused person must be conducted before the *procureur* who must require the *juge d'instruction* to question him immediately. In case of his refusal, absence, or other obstacle, the accused must be examined without delay by the official designated by the public minister. In default of examination within the time prescribed, the public prosecutor must order him to be set at liberty, and any person kept confined for more than twenty-four hours in the place of detention without examination, or without being brought before the public prosecutor shall be considered as arbitrarily detained, and all violations of this law by officials are to be prosecuted as outrages against liberty. At the examination the magistrate having verified the identity of the accused, is required to make known to him the facts charged against him and receive his declaration, first having warned him that he is free not to make any. Mention of this warning must be made in the procès-verbal. If the accusation is sustained, the magistrate shall inform the accused of his right to choose a counsel, and if he makes no choice, shall himself appoint one, if the accused demands it. Mention of this formality must be made in the procès-verbal. If the accused has been found outside of the arrondissement where the warrant was issued, and at a distance of more than ten myriameters (about 60 miles) from the principal place of the arrondissement, he is conducted before the public prosecutor of the one in which he was found and by him examined. The accused is not removed from this jurisdiction against his consent, and if when the inquiry is made of him, that is refused, information is sent to the officer who signed the warrant, with a statement of facts bearing on the identity of the person. The warning must be given to the accused at this examination that he is free not to make any declarations, and it must be mentioned in the procès-verbal. The *juge d'instruction* charged with the matter decides immediately upon the receipt of this message whether there is reason to order the transfer. In case of flagrant crime the *juge d'instruction* can proceed to examine him immediately if there is urgency resulting from the condition of a witness in danger of death, or the existence of indications likely to disappear, or even if he is taken away from the place. If the accused remains in custody, he can immediately have the first examination and communicate freely with his counsel. Provisions of the law of July 14, 1865, amending article 613 of the code of criminal instruction are abrogated in all that concerns places of detention subjected to the cell régime. There may be an interdiction of communication ordered by the *juge d'instruction* for ten days, which may be once only renewed for ten days more. In each case the interdiction of communication shall not apply to

the counsel of the accused. He must make known the name of his counsel, and whether detained or set free, cannot be examined unless with his express consent except in the presence of his counsel. The counsel can only act for him after having been authorized by the magistrate, and in case of refusal, a note should be made of the incident in the procès-verbal. The counsel should be summoned by letter at least twenty-four hours in advance. The counsel is entitled to be informed by the recorder of the inquiries to which the accused is to be subjected and of every order made by the judge. *Journal Officiel de la République Française*, Dec. 10, 1897.

JUICIO. In Spanish Law. A trial or suit. White, New Recop. b. 3, tit. 4, c. 1.

JUICIO DE APEO. In Spanish Law. The decree of a competent tribunal directing the determining and marking the boundaries of lands or estates.

JUICIO DE CONCURSO DE ACREEDORES. In Spanish Law. The decree obtained by a debtor against his creditors, or by the creditors against their debtor, for the payment of the amount due, according to the respective rank of each creditor, when the property of the debtor is insufficient to pay the whole of his liabilities.

JUMPING BAIL. A colloquial expression describing the act of the principal in a bail bond in violating the condition of the obligation by failing to do the thing stipulated, as, not appearing in court on a particular day to abide the event of a suit or the order of court, but instead, withdrawing or fleeing from the jurisdiction. Anderson's L. Dict.

JUNIOR. Younger. This has been held to be no part of a man's name, but an addition by use, and a convenient distinction between a father and son of the same name. People v. Collins, 7 Johns. (N. Y.) 549; Com. v. Perkins, 1 Pick. (Mass.) 388.

Any matter that distinguishes persons renders the addition of *junior* or *senior* unnecessary; 1 Mod. Ent. 35; Salk. 7. But if the father and son have both the same name, the father shall be *prima facie* intended, if *junior* be not added, or some other matter of distinction; Salk. 7; 6 Co. 20; 11 *id.* 39; Hob. 330. If father and son have the same name and addition, and the former sue the latter, the writ is abatable unless the son have the further addition of junior, or the younger. But if the father be the defendant and the son the plaintiff, there is no need of the further addition of *senior*, or the elder, to the name of the father; 2 Hawk. Pl. Cr. 187.

JUNIOR BARRISTER. A barrister under the rank of queen's counsel. Moz. & W. Also the junior of two counsel employed on the same side in a case. See BARRISTER.

JUNIPERUS SABINA (Lat.). In Medical Jurisprudence. A plant commonly called savin.

It is used for lawful purposes in medicine, but too frequently for the criminal purpose of producing abortion, generally endangering the life of the woman. It is usually administered in powder or oil. The dose of oil for lawful purposes, for a grown person, is from two to four drops. Parr, Med. Dict. *Sabina.* Foderé mentions a case where a large dose of powdered savin had been administered to an ignorant girl in the seventh month of her pregnancy, which had no effect on the fœtus. It, however, nearly took the life of the girl. Foderé, tome iv. p. 431. Given in sufficiently large doses, four or six grains, in the form of powder, it kills a dog in a few hours; and even its insertion into a wound has the same effect. 3 Orfila, *Traité des Poisons* 42. For a form of indictment for administering savin to a woman quick with child, see 3 Chit. Cr. L. 798. See 1 Beck, Med. Jur. 316.

JUNK-SHOP. A place where odds and ends are purchased and sold. City Council of Charleston v. Goldsmith, 12 Rich. (S. C.) 470. In this case it was said that "it is perfectly immaterial whether it is a large or a small shop," and a person was properly indicted and convicted for keeping such a house without license who bought from other shops, and also from persons bringing to his shop the articles which make a junk-shop. Where a tax was laid upon "stores" in which the stock never exceeds in value $2,000, the term was held to cover a store kept by a dealer in old iron and other metals, old glass, old rope, and old paper stock; Pitts v. City of Vicksburg, 72 Miss. 181, 16 South. 418.

Acts prohibiting the keeping of such shops without license and prescribing a fine for violation of the act are constitutional; Marmet v. State, 45 Ohio St. 63, 12 N. E. 463; although they impose different licenses upon dealers in general merchandise and those who sell specified articles; City of New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; but such a tax was held invalid when a municipal ordinance clearly showed that it was for revenue, an act for raising revenue not being an exercise of police power; Pitts v. Vicksburg, 72 Miss. 181, 16 South. 418.

See City of Grand Rapids v. Brandy, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472; PAWNBROKERS.

JURA. As to titles based on this word, see the corresponding titles under JUS.

JURA FISCALIA (Lat.). Rights of the exchequer. 3 Bla. Com. 45.

JURA IN RE (Lat.). In Civil Law. Rights in a thing, as opposed to rights to a thing (*jura ad rem*). Rights in a thing which are not lost upon loss of possession,

and which give a right to an action *in rem* against whoever has the possession. These rights are of four kinds: *dominium*, *hæreditas*, *servitus*, *pignus*. Heineccius, Elem. Jur. Civ. § 333. See JUS IN RE.

JURA PERSONARUM (Lat.). **In Civil Law.** Rights which belong to men in their different characters or relations, as father, apprentice, citizen, etc. 1 Sharsw. Bla. Com. 122, n.

JURA REGALIA (Lat.). Royal rights. 1 Bla. Com. 117, 119, 240; 3 *id.* 45.

JURAMENTÆ CORPORALES (Lat.). Corporal oaths, *q. v.*

JURAMENTUM CALUMNIÆ (Lat. oath of calumny). **In Civil and Canon Law.** An oath required of plaintiff and defendant, whether the parties themselves insist on it or not, that they are not influenced in seeking their right by malice, but believe their cause to be just. It was also required of the attorneys and procurators of the parties. Called, also, *jusjurandum* or *sacramentum calumniæ*. Calv. Lex.; Vicat, Voc. Jur. Utr.; Clerke, Pr. tit. 42.

JURAMENTUM JUDICIALE (Lat.). **In Civil Law.** An oath which the judge of his own accord, defers to either of the parties.

It is of two kinds: *first*, that which the judge defers for the decision of the cause, and which is understood by the general name *juramentum judiciale*, and is sometimes called suppletory oath, *juramentum suppletorium; second*, that which the judge defers in order to fix and determine the amount of the condemnation which he ought to pronounce, and which is called *juramentum in litem*. Pothier, Obl. p. 4, c. 3, s. 3, art. 3.

JURAT. In Practice. That part of an affidavit where the officer certifies that the same was "sworn" before him.

The jurat is usually in the following form, viz.: "Sworn and subscribed before me, on the —— day of ——, 1914. J. P., Justice of the Peace."

In some cases it has been held that it was essential that the officer should sign the jurat, and that it should contain his addition and official description; Jackson v. Stiles, 3 Cai. (N. Y.) 128. But see Chase v. Edwards, 2 Wend. (N. Y.) 283; Proff. Not; Hawkins v. State, 136 Ind. 630, 36 N. E. 419. A jurat being no part of an affidavit, a general demurrer to the sufficiency of the affidavit will not reach a failure to add to the name of the person who administered the oath his official designation; Smith v. Walker, 93 Ga. 252, 18 S. E. 830.

An officer in some English corporations, chiefly in certain towns in Kent and Sussex, whose duties are similar to those of aldermen in others; stat. 1 Edw. IV.; 2 & 3 Edw. VI. c. 30; 13 Edw. I. c. 26.

Officers in the island of Jersey, of whom there are twelve, members of the royal court, and elected for life; 1 Steph. Com., 11th ed. 103; L. R. 1 P. C. 94.

JURATA (Lat.). **In Old English Law.** A jury of twelve men sworn. Especially, a jury of the common law, as distinguished from *the assize*, or jury established or re-established by stat. Hen. II.

The *assize* was a body of jurors summoned to answer certain specific questions in accordance with a positive law that such questions should be answered in that way. But in time the ordinary method of proof came to be the jury to which the parties agreed to submit these preliminary or incidental questions. This new body, so summoned, is the *jurata* into which the *assize* is converted; "*assisa vertitur in juratam.*" 1 Holdsw. Hist. E. L. 151.

The *jurata*, or common-law jury, was a jury called in to try the cause, upon the prayer of the parties themselves, in cases where a jury was not given by statute Hen. II., and as the jury was not given under the statute of Henry II., the *writ of attaint* provided in that statute would not lie against a *jurata* for false verdict. It was common for the parties to a cause to request that the cause might be decided by the *assiza*, sitting as a *jurata*, in order to save trouble of summoning a new jury, in which case "*cadit assiza et vertitur in juratam*," and the cause is said to be decided *non in modum assizæ*, but *in modum juratæ*. 1 Reeve, Hist. Eng. Law 335, 336; Glanville, lib. 13, c. 20; Bracton, lib. 3, c. 30. But this distinction has been long obsolete.

Juratæ were divided into: *first*, *jurata dilatoria*, which inquires out offenders against the law, and presents their names, together with their offences, to the judge, and which is of two kinds, *major* and *minor*, according to the extent of its jurisdiction; *second*, *jurata judicaria*, which gives verdict as to the matter of fact in issue, and is of two kinds, *civilis*, in civil causes, and *criminalis*, in criminal causes. Du Cange.

A clause in nisi prius records called the *jury clause*, so named from the word *jurata*, with which its Latin form begins. This entry, *jurata ponitur in respectu*, is abolished. Com. Law Proc. Act, 1852, § 104; Whart. Law Lex.; 9 Co. 32; 59 Geo. III. c. 46; 4 Bla. Com. 342. Such trials were usually held in churches, in presence of bishops, priests, and secular judges, after three days fasting, confession, communion, etc. Du Cange.

A certificate placed at the bottom of an affidavit, declaring that the affiant has been sworn or affirmed to the truth of the facts therein alleged. Its usual form is, "Sworn (or affirmed) before me, the —— day of ——, 19—." A jurat.

JURE DIVINO (Lat.). By divine right. Divine Right is the name generally given to

the theory of government which holds monarchy to be the only legitimate form of government. The monarch and his legitimate heirs being, by divine right, entitled to the sovereignty, cannot forfeit that right by any misconduct, or any period of dispossession. But where the knowledge of the right heir is lost, the usurper, being in possession by the permission of God, is to be obeyed as the true heir. Sir Robert Filmer, the most distinguished exponent of the theory, died about 1650. See DIVINE RIGHT OF KINGS.

JURE PROPINQUITATIS (Lat.). By right of relationship. Co. Litt. 10 *b*.

JURE REPRESENTATIONIS (Lat.). By right of representation. See PER STIRPES. 2 Sharsw. Bla. Com. 219, n. 14, 224.

JURE UXORIS (Lat.). By right of a wife.

JURIDICAL. Relating to administration of justice, or office of a judge. Webster, Dict.

Regular; done in conformity to the laws of the country and the practice which is there observed.

JURIS CONSULTUS (Lat. skilled in the law). In Civil Law. A person who has such knowledge of the laws and customs which prevail in a state as to be able to advise, act, and to secure a person in his dealings. Cicero.

The early jurisconsults gave their opinions gratuitously, and were also employed in drawing up written documents. From Augustus to Adrian, only those allowed by the emperor could be jurisconsults; before and after those emperors, any could be jurisconsults who chose. If their opinion was unanimous, it had the force of law: if not, the prætor could follow which opinion he chose. Vicat, Voc. Jur. Utr.

There were two schools of jurisconsults at Rome, the Proculeians and Labinians. The latter were founded by Labeo, and were in favor of innovation; the former by Capito, and held to the received doctrines. Cushing, Int. Rom. Law. §§ 5, 6.

JURIS ET DE JURE (Lat.). Of right and by law. A presumption is said to be *juris et de jure* when it is conclusive, *i. e.* when no evidence will be admitted to rebut it, in contradistinction to a presumption, which is simply *juris*, *i. e.* rebuttable by evidence; 1 Greenl. Ev. § 15, note; Wills, Circ. Ev. 29; Best, Pres. 20, § 17; Best, Ev. 43.

JURIS ET SEISINÆ CONJUNCTIO (Lat.). The union of seisin, or possession, and the right of possession, forming a complete title. 2 Bla. Com. 311.

JURISDICTION (Lat. *jus*, law, *dicere*, to declare). The authority by which judicial officers take cognizance of and decide causes. State v. Wakefield, 60 Vt. 618, 15 Atl. 181. The power to hear and determine a cause. Parker v. Wallace, 3 Ohio 494; Grignon's Lessee v. Astor, 2 How. (U. S.) 338, 11 L. Ed. 283; Dahlgren v. County of Santa Cruz, 8 Cal. App. 622, 97 Pac. 681, where, after quoting this definition, the court adds: "And necessarily includes the power to decide it incorrectly as well as correctly;" and adds the following from People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536: "It does not relate to the rights of the parties as between themselves, but to the power of the court." In the California case, it was held that a gross error in the exercise of jurisdiction could not be annulled on *certiorari*.

The test of the jurisdiction of a court is whether or not it had power to enter upon the inquiry; not whether its conclusion in the course of it was right or wrong; Board of Com'rs of Lake County v. Platt, 79 Fed. 567, 25 C. C. A. 87.

The right of a judge to pronounce a sentence of the law, on a case or issue before him, acquired through due process of law. It includes power to enforce the execution of what is decreed. In re Ferguson, 9 Johns. (N. Y.) 239; Hopkins v. Com., 3 Metc. (Mass.) 460.

"The right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and third, the point decided upon must be, in substance and effect, within the issue;" Reynolds v. Stockton, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. Ed. 464.

"Jurisdiction is authority to decide the case either way." The Fair v. Specialty Co., 228 U. S. 22, 25, 33 Sup. Ct. 410, 57 L. Ed. 716.

Ancillary jurisdiction. Where one court of chancery entertains a bill in aid of a suit commenced in another chancery jurisdiction, both being designed to operate upon the same subject-matter or property right, but where the first suit is inadequate to give complete relief for want of territorial jurisdiction over the entire subject of litigation, the subsequent suits are said to be ancillary to the first. A familiar illustration is a bill to foreclose a mortgage on a railroad passing through two or more states, in which ancillary bills are filed in states other than that in which the first suit is brought, without regard to the citizenship of the parties.

Appellate jurisdiction is that given by appeal or writ of error from the judgment of another court.

Assistant jurisdiction is that afforded by a court of chancery in aid of a court of law: as, for example, by a bill of discovery, or for the perpetuation of testimony, and the like.

Auxiliary jurisdiction is another name given to this jurisdiction in aid of a court of law.

Jurisdiction of the cause is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists.

Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature.

Concurrent jurisdiction is that which is possessed over the same parties or subject-matter at the same time by two or more separate tribunals.

Consultative jurisdiction. Where one court aids another by giving an opinion on a matter which the latter has under consideration, the court which gives the opinion is said to exercise a consultative jurisdiction. 4 App. Cas. 30.

Criminal jurisdiction is that which exists for the punishment of crimes.

Exclusive jurisdiction is that which gives to one tribunal sole power to try the cause.

General jurisdiction is that which extends to a great variety of matters. General jurisdiction in law and equity is jurisdiction of every kind that a court can possess, of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties. Mussen v. Granite Works, 63 Hun 367, 18 N. Y. Supp. 267.

Limited jurisdiction (called, also, *special* and *inferior*) is that which extends only to certain specified causes.

Original jurisdiction is that bestowed upon a tribunal in the first instance.

Jurisdiction of the person is that obtained by the appearance of the defendant before the tribunal. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Territorial jurisdiction is the power of the tribunal considered with reference to the territory within which it is to be exercised. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Cooley speaks of "courts of general jurisdiction, by which is meant that their authority extends to a great variety of matters, while others are only of special and limited jurisdiction," that is, have authority extending only to certain specified cases; Const. Lim., 5th ed. 502. The inferior federal courts, though of limited jurisdiction, are not technically inferior courts; McCormick v. Sullivant, 10 Wheat. (U. S.) 192, 6 L. Ed. 300. There are courts which are competent to decide on their own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which it is rendered, whose record is absolute verity, which can be questioned only in an appellate court; other courts are so constituted that their judgments "can be looked through for the facts and evidence which are necessary to sustain them," whose decisions are not evidence of themselves to show jurisdiction and its lawful exercise; Grignon v. Astor, 2 How. (U. S.) 341, 11 L. Ed. 283.

The fundamental question of jurisdiction, first of the appellate court, and then of the court from which the record comes, presents itself on every writ of error and appeal and must be answered by the court whether propounded by counsel or not; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140.

Jurisdiction is given by the law; Clyde & R. Plank Road Co. v. Parker, 22 Barb. (N. Y.) 323; Baker v. Chisholm, 3 Tex. 157; and cannot be conferred by consent of the parties; Gamber v. Holben, 5 Mich. 331; Fields v. Walker, 23 Ala. 155; State v. Bonney, 34 Me. 223; Vose v. Morton, 4 Cush. (Mass.) 27, 50 Am. Dec. 750; Bell v. R. Co., 4 Smedes & M. (Miss.) 549; Huber v. Beck, 6 Ind. App. 47, 32 N. E. 1025; Hager v. Falk, 82 Wis. 644, 52 N. W. 432; Parkhurst v. Machine Co., 65 Hun 489, 20 N. Y. Supp. 395; St. Louis R. Co. v. Ry. Co., 52 Fed. 770; nor can silence or positive consent of parties confer on a federal court jurisdiction denied by statute; State of Indiana v. Tolleston Club, 53 Fed. 18. Where the jurisdiction of a court as to the subject-matter is limited, the consent of parties cannot enlarge it; Fleischman v. Walker, 91 Ill. 319. Where under a contract parties agree that in case of a breach one might be served with a writ in Scotland, the court refused to allow service on the defendant domiciled there; no agreement between individuals can empower a court to do an act which it is, by rules made under a statute, forbidden to do; [1896] 1 Q. B. 35. But a privilege defeating jurisdiction may be waived if the court has jurisdiction over the subject-matter; Raney v. McRae, 14 Ga. 589, 60 Am. Dec. 660; Campbell v. Wilson, 6 Tex. 379; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Boyers v. Elliott, 7 Humphr. (Tenn.) 209; Gracie v. Palmer, 8 Wheat. (U. S.) 699, 5 L. Ed. 719; see Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210; and parties may admit facts which show jurisdiction; Pittsburgh, C. & St. L. R. Co. v. Ramsey, 22 Wall. 322, 22 L. Ed. 823, where the files of the record were lost and the court thereupon presumed that they contained all necessary jurisdictional facts.

Jurisdiction given by the law of the sovereignty of the tribunal is held sufficient everywhere, at least as to all property within the sovereignty; The Globe, 2 Blatchf. 427, Fed. Cas. No. 5,483; Johnson v. Holley, 27 Mo. 594; and as to persons on whom process is actually and personally served within the territorial limits of jurisdiction, or who appear and by their pleadings admit jurisdiction; McMullen v. Guest, 6 Tex. 275; Barnes v. Harris, 4 N. Y. 375; Adams v. Lamar, 8 Ga. 83. See Wells v. Patton, 50 Kan. 732, 33 Pac. 15. But the appearance of a person on whom no personal service of process has been made, merely to object to the jurisdiction is not such an admission; Wright v. Boynton,

37 N. H. 9, 72 Am. Dec. 319; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88.

Jurisdiction must be either *of the subject-matter*, which is acquired by exercising powers conferred by law over property within the territorial limits of the sovereignty, or *of the person*, which is acquired by actual service of process or personal appearance of the defendant. The question as to the possession of the former is to be determined according to the law of the sovereignty; Dav. 407; of the latter, as a simple question of fact. See CONFLICT OF LAW; FOREIGN JUDGMENTS.

Jurisdiction in a personal action cannot be obtained by service on a defendant outside of the jurisdiction; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. The courts of one state have no jurisdiction over persons of other states unless found within their territorial limits; Galpin v. Page, 18 Wall. (U. S.) 367, 21 L. Ed. 959.

Jurisdiction *in rem* over a non-resident's property can be obtained by proceedings against it, of which notice should be given in order to give a binding effect to the proceedings; such notice may be actual or constructive; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; see Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295. Any judgment obtained in such proceedings has no effect beyond the property in question; no other property can be reached under it; nor can any suit be maintained on it, either in the same court or elsewhere; Cooper v. Reynolds, 10 Wall. (U. S.) 317, 19 L. Ed. 931.

Where the jurisdiction of a court is based upon the amount in controversy, some cases hold that the test is in the amount alleged in the pleadings to be due; Lord v. Goldberg, 81 Cal. 599, 22 Pac. 1126, 15 Am. St. Rep. 82; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635; but not if the amount is so alleged in bad faith; Fix v. Sissung, 83 Mich. 561, 47 N. W. 340, 21 Am. St. Rep. 616; it will be determined by the allegations of the complaint and not on *ex parte* affidavits; Holden v. Machinery Co., 82 Fed. 209. Where, on an appeal from a justice of the peace, it appears by testimony at the trial that the plaintiff's demand exceeded the statutory jurisdiction, there is no jurisdiction; Collins v. Collins, 37 Pa. 387. Where the amount in controversy appeared by the pleadings to be sufficient to give jurisdiction, but the jury found for a sum less than the jurisdictional amount, it was held that the court did not have jurisdiction; Louisville, N. A. & C. R. W. Co. v. Johnson, 67 Ind. 546; Darling v. Conklin, 42 Wis. 478; but it is also held that in such cases the judgment will stand, but without costs; Abbott v. Gatch, 13 Md. 314, 71 Am. Dec. 635. Where a defence is made to a part of a claim and the jury find for less than the full claim, the jurisdiction is not affected; Hardin v. Cass County, 42 Fed. 652.

"By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined;" Lee v. Watson, 1 Wall. (U. S.) 339, 17 L. Ed. 557. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; Gray v. Blanchard, 97 U. S. 565, 24 L. Ed. 1108. In actions sounding in damages, the damages claimed give jurisdiction; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; in cases impeaching the right to an office, the amount of the salary attached to the office is the criterion; Smith v. Adams, 130 U. S. 175, 9 Sup. Ct. 566, 32 L. Ed. 895; in ejectment the value of the land claimed determines the jurisdiction; Vicksburg, S. & P. R. Co. v. Smith, 135 U. S. 195, 10 Sup. Ct. 728, 34 L. Ed. 95; and so it is in a bill to set aside a fraudulent conveyance as a cloud on the title; Simon v. House, 46 Fed. 317.

In a tax case it is measured by the value of the right to be protected and not by the amount of the tax for a single year; Berryman v. Board of Trustees, 222 U. S. 334, 32 Sup. Ct. 147, 56 L. Ed. 225; and in a suit to enjoin a threatened or continued commission of certain acts, the amount in controversy is the value of the right which plaintiff seeks to protect; Board of Trade of City of Chicago v. Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28.

On the other hand, it has been held that in an action involving taxes, only one year's levy and not future taxes can be considered; Joint Dists. Nos. 70 and 98 v. School Dist. No. 11, 9 Kan. App. 883, 57 Pac. 1060. If only part of the claim is contested and it is thereby reduced below the jurisdictional amount, there is no jurisdiction; Citizens' Savings Bank v. Coffee Co., 91 S. W. 261, 28 Ky. L. Rep. 1200.

In all cases facts on which the jurisdiction of a federal court depends must in some form appear on the face of the record; its jurisdiction is limited, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear; Continental L. Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but when it is shown that the sum demanded is not the real matter in suit, the sum shown and not the sum demanded will prevail; Hilton v. Dickinson, 108 U. S. 174, 2 Sup. Ct. 424, 27 L. Ed. 688; the amount of damages laid in the declaration is not conclusive upon the question of jurisdiction; if the court find that the amount of damages stated in the declaration is colorable for the purpose of creating a case within the jurisdiction of the circuit court, the jurisdiction is defeated,

and it is the duty of the court to dismiss the proceedings; this may be shown by evidence or depositions taken in the cause; however done it should be upon due notice to the parties to be affected by the dismissal; Morris v. Gilmer, 129 U. S. 326, 9 Sup. Ct. 289, 32 L. Ed. 690. If this be made to appear "to the satisfaction of the circuit court at any time after suit has been brought," the court must dismiss the suit; Act of March 3, 1875 (18 Stat. L. 472). If, from plaintiff's evidence at the trial, the amount laid in the complaint appears to have been beyond reasonable expectation of recovery, the action should be dismissed; Holden v. Machinery Co., 82 Fed. 209. Fictitious claims cannot be added to give jurisdiction; Smith v. Ins. Co., 33 La. Ann. 1071. Costs and interest in the appellate courts are excluded; Hartsook's Adm'r v. Crawford's Adm'r, 85 Va. 413, 7 S. E. 538. In suing for personal property, damages for detention cannot be added; Graves v. Thompson, 35 Wash. 282, 77 Pac. 384. The jurisdictional amount may appear by affidavit after appeal taken; U. S. v. Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

A plea of set-off will not deprive the court of jurisdiction, though, if established, it would reduce the plaintiff's recovery below the jurisdictional amount; Odell v. Culbert, 9 W. & S. (Pa.) 66, 42 Am. Dec. 317; Lord v. Goldberg, 81 Cal. 599, 22 Pac. 1126, 15 Am. St. Rep. 82; and where a defendant sets up a recoupment, he thereby accepts the jurisdiction; Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488, where it is said that "there is some difference in the decisions as to when the defendant becomes so far an actor as to submit to the jurisdiction," and the cases are cited.

In a creditor's bill several judgments held by different creditors cannot be added to make up the jurisdictional amount in the circuit court; Hunt v. Bender, 154 U. S. 556, Appx., 14 Sup. Ct. 1163, 18 L. Ed. 915. But it is otherwise where several plaintiffs are interested collectively under a common title, the validity of which is before the court; New Orleans P. Ry. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. Ed. 66. A reasonable attorney's fee, stipulated by the parties in case of a suit, may be added to the debt to make up its jurisdictional amount; Rogers v. Riley, 80 Fed. 759. Where the judgment in the supreme court of a territory exceeded $5,000, the supreme court of the United States has jurisdiction though the judgment in the trial court was for a less sum, and the amount is reached by adding interest to that judgment; Benson Min. & Smelting Co. v. Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762. On the appeal it must be shown that the amount in controversy in the appellate court is sufficient; McCoy v. McCoy, 33 W. Va. 60, 10 S. E. 19; the plaintiff in error must show this fact; Wilson v. Blair, 119 U. S. 387, 7 Sup. Ct. 230, 30 L. Ed. 441.

A court of general jurisdiction is presumed to be acting within its jurisdiction till the contrary is shown; Brown, Jur. § 202; Wright v. Douglass, 10 Barb. (N. Y.) 97; Town of Huntington v. Town of Charlotte, 15 Vt. 46. A court of limited jurisdiction, or a court acting under special powers, has only the jurisdiction expressly delegated; State v. Metzger, 26 Mo. 65; Wight v. Warner, 1 Dougl. (Mich.) 384; and it must appear from the record that its acts are within its jurisdiction; Proctor v. State, 5 Harr. (Del.) 387; Green v. Wheeler, 1 Scam. (Ill.) 554; Bersch v. Schneider, 27 Mo. 101; Clyde & R. P. R. Co. v. Parker, 22 Barb. (N. Y.) 323; Sullivan v. Blackwell, 28 Miss. 737; Barrett v. Crane, 16 Vt. 246; Grignon v. Astor, 2 How. (U. S.) 319, 11 L. Ed. 283; see Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; unless the legislature, by general or special law, remove this necessity; Bush v. Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Small v. Hempstead, 7 Mo. 373; Kemp v. Kennedy, 1 Pet. C. C. 36, Fed. Cas. No. 7,686. See Bac. Abr. *Courts* (C, D).

The judgment of a court of another state is entitled to the presumption of validity; Gottlieb v. Grain Co., 181 N. Y. 563, 74 N. E. 1117; Dallas County v. Merrill, 77 Mo. 578; State v. Weber, 96 Minn. 422, 105 N. W. 490, 113 Am. St. Rep. 630; and when the record of proceedings in such a case does not show that every step essential to jurisdiction was duly taken, it must be presumed that the court proceeded to judgment only after acquiring jurisdiction; Smith v. Trust Co., 154 N. Y. 333, 48 N. E. 553; and the burden is on the defendant to show the nonexistence of jurisdictional facts; Russell v. Butler (Tex. Civ. App.) 47 S. W. 406; Gilchrist v. Oil Land Co., 21 W. Va. 115, 45 Am. Rep. 555.

Where one of two courts of concurrent jurisdiction has taken cognizance of a cause, the other will not entertain jurisdiction of the same cause; Brown, Jur. § 95; Gamble v. Warner, 16 Ohio 373; Henry v. Tupper, 27 Vt. 518; Conover v. New York, 25 Barb. (N. Y.) 513; Gould v. Hayes, 19 Ala. 438; Sharon v. Terry, 36 Fed. 337, 1 L. R. A. 572; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829; Powers v. City Council of Springfield, 116 Mass. 84.

The leading general principle as to concurrent jurisdiction is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout; Wells, Jurisd. § 156; Gould v. Hayes, 19 Ala. 438; Conover v. New York, 25 Barb. (N. Y.) 513. A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced; Ober v. Gallagher, 93 U. S.

199, 23 L. Ed. 829; Taylor v. City of Fort Wayne, 47 Ind. 274; where concurrent jurisdiction may be exercised by the federal and state authorities, the court which first takes jurisdiction can be interfered with by no other court, state or federal. It is a subversion of the judicial power to take a cause from a court having jurisdiction, before its final decision is given; Ex parte Robinson, 6 McLean 355, Fed. Cas. No. 11,935; Mail v. Maxwell, 107 Ill. 554. The supreme court and the common pleas have concurrent jurisdiction in matters of equity; and pending a bill in the common pleas, the supreme court will not entertain jurisdiction for the same cause; Cleveland, P. & A. R. Co. v. Erie, 1 Grant 212.

The jurisdiction of the court thus first exercising jurisdiction extends to the execution of the judgment rendered; Hawes v. Orr, 10 Bush (Ky.) 431. Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction; Anthony v. Dunlap, 8 Cal. 26; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and does not extend to all matters which may by possibility become involved with it; Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. Ed. 257; Putnam v. New Albany, 4 Biss. 368, Fed. Cas. No. 11,481.

When either a federal or state court of competent jurisdiction takes possession of or acquires jurisdiction over property, that property is as effectually withdrawn from the jurisdiction of the other court as though removed to the territory of another sovereignty; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379.

Where the first court, because of its limited jurisdiction or mode of proceeding, is not capable of determining the whole controversy, another court may take jurisdiction and accomplish it; Gould v. Hayes, 19 Ala. 438.

Where in a divorce case the court awarded the custody of the children to the mother, retaining jurisdiction for further order in that behalf, the court of another state, to which the mother removed and died, had jurisdiction to determine as to the custody of the children as between the father and the guardian appointed by the court of the other state, with whom the children had been left by the mother; Clarke v. Lyon, 82 Neb. 625, 118 N. W. 472, 20 L. R. A. (N. S.) 171.

At common law the rule is well established that the pendency of a prior suit *in personam* in a foreign court, between the same parties for the same cause of action, is no sufficient cause for stay or bar of a suit instituted in a local court. This rule obtains in regard to actions pending in another state; White v. Whitman, 1 Curtis, 494, Fed. Cas. No. 17,561; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; but see Ex parte Balch, 3 McLean 221, Fed. Cas. No. 790, where it was held that the pendency of a suit between the same parties and respecting the same subject-matter in another state, may be pleaded in abatement in the federal courts, but to make such plea effectual it must show that the court where suit is has jurisdiction.

It was held that the provision of the federal constitution giving to congress exclusive jurisdiction over lands purchased by consent of the state legislature does not oust the jurisdiction of state courts to try civil actions of tort, since congress has not provided for them; Madden v. Arnold, 22 App. Div. 240, 47 N. Y. Supp. 757. The court of appeals of that state held that jurisdiction of such actions unquestionably remained in the state in the absence of legislation by congress; Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017, 17 L. R. A. 720, 31 Am. St. Rep. 835; and the United States supreme court upheld the judgment on the ground that the federal jurisdiction had lapsed under the terms of the cession and declined to determine the other question; Palmer v. Barrett, 162 U. S. 399, 16 Sup. Ct. 837, 40 L. Ed. 1015.

In another class of cases it has been held that a jurisdiction executed by the state courts may be entirely ousted by the interposition of congress by a statute conferring on the federal courts exclusive jurisdiction. An action against a foreign consul may be so brought in the state court; Wilcox v. Luco, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. Rep. 305.

Any act of a tribunal beyond its jurisdiction is of no effect whatever; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Corwithe v. Griffing, 21 Barb. (N. Y.) 9; State v. Richmond, 26 N. H. 232; whether without its territorial jurisdiction; Ableman v. Booth, 21 How. (U. S.) 506, 16 L. Ed. 169; Cook v. Walker, 15 Ga. 457; or beyond its powers; Kenney v. Greer, 13 Ill. 432, 54 Am. Dec. 439; Barrett v. Crane, 16 Vt. 246.

When a court has jurisdiction of a *res* its judgment or decree may affect the property interest of its owner, though a non-resident over whom personal jurisdiction neither was nor could be acquired, and, conversely, the action of a court may operate on property beyond the jurisdiction if the owner has been personally subjected to it. Illustrations of this are numerous. A court of equity has the power to control the disposition of land situated in another jurisdiction or even a foreign country, if the person who has the

ownership or control is before the court; Corbett v. Nutt, 10 Wall. (U. S.) 464, 475, 19 L. Ed. 976; Watkins v. Holman, 16 Pet. (U. S.) 57, 10 L. Ed. 873; or to order the cancellation or discharge of a foreign mortgage; Williams v. Fitzhugh, 37 N. Y. 444; and in the famous case of Penn v. Lord Baltimore, 1 Ves. 444, the English court of chancery decreed specific performance of a contract made in England concerning the boundaries of the colonies of Delaware, Maryland and Pennsylvania.

Courts always refuse to send officers into other jurisdictions to abate nuisances or partition land; Mississippi & M. R. Co. v. Ward, 2 Black (U. S.) 485, 17 L. Ed. 311; Wimer v. Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126; the principle being that where the suit concerns specific property the *res* must be present within the jurisdiction, but the United States circuit court in Nevada granted an injunction to restrain a defendant from wrongfully diverting, in California, waters naturally flowing down a river having its source in that state and flowing into and through the state of Nevada, where complainant's lands were situated; Miller & Lux v. Rickey, 127 Fed. 573, where it was held on a plea to the jurisdiction that it was an action transitory in its nature and the court having jurisdiction of defendant's person had jurisdiction to try the same. See a criticism of this case in 17 Harv. L. Rev. 572. That the objection above stated as to proceeding *in rem* where the suit is in a jurisdiction in which the *res* is not situated applies with equal force to requiring the defendant to do any act in a foreign jurisdiction; inasmuch as the court cannot enforce its decree it should not make it. The general principle applies to the federal courts as well as to those of a state; Northern Indiana R. Co. v. R. Co., 15 How. (U. S.) 233, 14 L. Ed. 674. Decrees may sometimes be made indirectly affecting foreign lands, as by enjoining trespass in a foreign jurisdiction; Great Falls Mfg. Co. v. Worster, 23 N. H. 462; but for affirmative relief it is in accordance with public policy to send a party to a jurisdiction where the act must be done; Willey v. Decker, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939.

The question of the sufficiency of the service of a summons may be raised upon motion to quash the return supported by affidavits; Wall v. R. Co., 95 Fed. 398, 37 C. C. A. 129; or on a rule to set aside service of process; Park Bros. & Co. v. Boiler Works, 204 Pa. 453, 54 Atl. 334.

Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits; such illegality is waived only when, without having insisted upon it, he pleads in the first instance to the merits; Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. The filing of a general appearance is not a waiver of defendant's right to move to dismiss for want of jurisdiction, where that was based on diverse citizenship and the action was brought in the wrong district; Crown Cotton Mills v. Turner, 82 Fed. 337. But where the court had jurisdiction of the subject-matter and service was made in the jurisdiction, a defence on the merits after a motion to quash the service of summons had been overruled was held to waive the objection to the jurisdiction; Eddy v. La Fayette, 49 Fed. 807, 1 C. C. A. 441.

In Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, there is an expression by the court that under the acts of 1875 and 1888 the residences of the parties are jurisdictional and not the subject of waiver, but in Logan & Bryan v. Cable Co., 157 Fed. 570, it was said that this was *obiter* and that the decisions had never been harmonious as to the effect of that *dictum*.

While a non-resident defendant corporation may not lose its right of objecting to the jurisdiction of the court on the ground of insufficient service of process by pleading to the merits pursuant to order of the court after objections overruled, it does waive its objection and submits to the jurisdiction if it also sets up a counterclaim even though it be one arising wholly out of the transaction sued upon by plaintiff, and in the nature of recoupment rather than set-off; Merchants' Heat & Light Co. v. Clow & Sons, 204 U. S. 286, 27 Sup. Ct. 285, 51 L. Ed. 488.

It is held that the question must be raised before making any plea to the merits, if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person; Smith v. Curtis, 7 Cal. 584; Bohn v. Devlin, 28 Mo. 319; Brown v. Webber, 6 Cush. (Mass.) 560; Whyte v. Gibbes, 20 How. (U. S.) 541, 15 L. Ed. 1016; Perseverance Min. Co. v. Bisaner, 87 Ga. 193, 13 S. E. 461; Callender v. Gates, 45 Ill. App. 374; Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210. But one who invokes the jurisdiction of a court is estopped to deny it on appeal, though this rule does not apply to divorce cases; English v. English, 19 Pa. Super. Ct. 586.

Objection to jurisdiction may be taken by motion to dismiss; Collins v. Collins, 37 Pa. 387; Kinnaman v. Kinnaman, 71 Ind. 417; at common law, by a plea in abatement; Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579; Waterman v. Tuttle, 18 Ill. 292; Smith v. Elder, 3 Johns. (N. Y.) 105; it can be raised in the federal courts by a plea in abatement; Simon v. House, 46 Fed. 317; and under the codes, by demurrer, if the want of jurisdiction appear in the complaint; Works, Courts and Juris. 106; or if it be in a court of special jurisdiction, by demurrer, answer, or motion in arrest of judgment; *id.* 109.

Where the subject-matter is not within the jurisdiction, the court may dismiss the proceedings of its own motion; Gormly v. McIntosh, 22 Barb. (N. Y.) 271; Robertson v. State, 109 Ind. 79, 10 N. E. 582, 643; and a remedy may be had by a writ of prohibition; 3 Bla. Com. 12. See PROHIBITION.

If the objection is only to a defective service, it must be raised in the court below; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

Where the citizenship of the parties appears in the petition, defect of jurisdiction on that ground may be raised by demurrer, in the absence of a general appearance; Meyer v. Herrera, 41 Fed. 65.

It is rarely, if ever, too late to object to the jurisdiction of a court where the want of power to hear and determine appears on the face of the proceedings; per Bronson, J., Delafield v. Illinois, 2 Hill (N. Y.) 159. Thus, an appellant from chancery to the court of errors may avail himself in the latter court of an objection to the chancellor's jurisdiction, though it was not made before him, when the objection, if valid, is of such a kind that it could not have been obviated, had it been started at an earlier stage in the proceedings; *id.* The objection that the complainant has an adequate remedy at law when made for the first time in an appellate court is looked upon with supreme disfavor; Preteca v. Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326. See Foltz v. Ry. Co., 60 Fed. 316, 8 C. C. A. 635. And entering into a stipulation by defendant, for a trial before a master, is a waiver of the right to object to the jurisdiction in equity; Sanders v. Village of Riverside, 118 Fed. 720, 55 C. C. A. 240.

The judgment of a court of another state is always subject to impeachment for the want of jurisdiction, either as to subject-matter or parties.

Courts of general jurisdiction over the parties and the subject-matter of the cause are as a general rule competent to decide questions arising as to their jurisdiction and such decisions are not open to collateral attack; White, C. J., in Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; and generally courts of dernier resort are conclusive judges of their own jurisdiction; People v. Clark, 1 Park Cr. Cas. (N. Y.) 360; State v. Scott, 1 Bail. (S. C.) 294; but the power of a supreme court over inferior courts always exists (both in civil and criminal cases) where an inferior court acts beyond its jurisdiction or refuses to act within it and there is no other remedy; State v. Helms, 136 Wis. 432, 118 N. W. 158.

It has been generally held that a contract ousting the courts of jurisdiction over future controversies would be invalid; Chamberlain v. R. Co., 54 Conn. 472, 9 Atl. 244; Mentz v. Ins. Co., 79 Pa. 480, 21 Am. Rep. 80. The reason for this rule does not seem to be apparent and it has been termed obsolete. Indeed, the New York court of appeals has indicated its disapproval of the rule though bound by it under *stare decisis;* Delaware & H. Canal Co. v. Coal Co., 50 N. Y. 250.

It has been held in New York that a stipulation not to appeal to the court of appeals in an appealable case may be enforced; Townsend v. Stone Dressing Co., 15 N. Y. 587; if clear in its terms and leaving no doubt of the intention of the party to cut himself off from the right; Stedeker v. Bernard, 93 N. Y. 589; and a contract to refrain from a particular remedy to enforce an existing claim seems not to be against public policy which is not concerned with the option which every man has to sue or forbear to sue; Gitler v. Ins. Co., 124 App. Div. 273, 108 N. Y. Supp. 793.

While parties cannot confer jurisdiction by consent, if the jurisdictional facts are properly alleged and appear of record and the parties proceed to trial upon pleadings which go to the merits, the jurisdictional facts are not subsequently put in issue or seriously denied, the case will not be ordinarily dismissed for want of jurisdiction unless the proofs create a legal certainty that the controversy is not within the jurisdiction; William H. Perry Co. v. Klosters Aktie Bolag, 152 Fed. 967, 82 C. C. A. 321. It was held that individuals or corporations cannot create judicial tribunals for the final and conclusive settlement of controversies; Bauer v. Samson Lodge, 102 Ind. 269, 1 N. E. 571; but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant; 5 H. L. Cas. 811; 10 App. Cas. 229; but it has been held that a provision for submitting the whole question of liability to arbitrators as a condition precedent to a right of action is invalid; L. R. 1 Q. B. D. 563. But this case is said not to be in harmony with the other English authorities, though it follows the doctrine of Coleridge, J., in 8 Exch. 497, a case which was affirmed in 5 H. L. Cas. 811, but upon broader grounds. See 11 Harv. L. Rev. 239. In Massachusetts, the decisions appear to distinguish between agreements to arbitrate all disputes and those for the submission of the question of damages only, or questions of that kind which do not go to the root of the action; the former are invalid; the latter valid; see White v. R. Co., 135 Mass. 216; Hutchinson v. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558. In Maine, parties may, by agreement, impose conditions with respect to preliminary and collateral matters, such as do not go to the root of the action, but cannot be compelled, even by their own agreements, to refer the whole cause of action to arbitration, and thus oust the courts

of jurisdiction; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354. It is said that the rule that a general covenant to submit any differences is a nullity, is too well settled to be questioned; Delaware & H. Canal Co. v. Coal Co., 50 N. Y. 250. See Hohl v. Town of Westford, 33 Wis. 331. An agreement that the decision of an engineer, in case of any dispute, shall be obligatory, is binding; Monongahela Nav. Co. v. Fenlon, 4 W. & S. (Pa.) 205; Fox v. R. Co., 3 Wall. Jr. 243, Fed. Cas. No. 5,010; *contra*, Trott v. Ins. Co., 1 Cliff. 439, Fed. Cas. No. 14,189. The subject is treated in 11 Harv. L. Rev. 234.

Stipulations made in contracts by persons domiciled in the same state limiting the venue to a particular county have been held invalid as against public policy, and tending to oust the courts of their jurisdiction; Nute v. Ins. Co., 6 Gray (Mass.) 174; Healy v. Bldg. Ass'n, 17 Pa. Sup. Ct. 385; *contra*, Greve v. Ins. Co., 81 Hun 28, 30 N. Y. Supp. 668, where the court considered the theory of the preceding cases as worth little notice and this case was followed in Heslin v. Bldg. Ass'n, 28 Misc. 376, 59 N. Y. Supp. 572; but an annotator on the subject in 17 Yale L. J. 474, thinks the former view has the weight of authority.

A stipulation between persons domiciled in different states limiting the venue to one state was held void; Reichard v. Ins. Co., 31 Mo. 518; as were also agreements not to resort to the federal courts; Doyle v. Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Mutual Reserve Fund Life Ass'n v. Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

But a stipulation, between parties both domiciled in a foreign country, that all disputes arising on a contract should be referred to the courts of that country, although the contract was to be performed in the United States and Canada was held valid; Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404; and a provision in a contract between a foreign corporation and a resident of New York not to sue on a judgment against the defendant in any other court than those of Russia was held valid; Gitler v. Russian Co., 124 App. Div. 273, 108 N. Y. Supp. 793.

Other contracts limiting the right to sue as in some of the cases above cited on an existing cause of action are not invalid as on the ground that they oust jurisdiction; Montgomery v. Ins. Co., 108 Wis. 146, 84 N. W. 175. They may be held so on other grounds of public policy; Kilborn v. Field, 78 Pa. 194.

Stipulations in a policy of marine insurance, that any dispute in relation to loss shall be referred to referees; that no policy-holder shall maintain any claim thereon until he shall have offered to submit to such reference; and that in case any suit shall be begun without such offer, the claim shall be dismissed and the company exempted from liability under it, are void; Stephenson v. Ins. Co., 54 Me. 55, 70. A clause in an insurance policy providing for arbitration of any dispute as to loss, and that no action should be maintained till such arbitration was had, does not oust the jurisdiction of the courts; the condition is revocable, though its breach may subject the party to an action for a breach of it; Mentz v. Ins. Co., 79 Pa. 478, 21 Am. Rep. 80.

A by-law of a mutual fire insurance corporation, to which their policies are expressed to be subject, that any suit on a policy shall be brought in the courts where the company is established, is not binding on the assured; Nute v. Ins. Co., 6 Gray (Mass.) 174.

An agreement by a foreign insurance company, in conformity with a state statute, that if sued in a state court, it will not remove the suit to a federal court, is invalid; Home Ins. Co. v. Morse, 20 Wall. (U. S.) 445, 22 L. Ed. 365.

An Iowa statute which requires that every foreign corporation named in it shall, as a condition for obtaining a permit to transact business in Iowa, stipulate that it will not remove into the federal court certain suits which it would by the laws of the United States have a right to remove, is void because it makes the right to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915; the state might as well pass an act to deprive a citizen of another state of his right of removal. See INSURANCE.

Mutual benefit societies may prescribe regulations as to procedure in enforcing claims, and may require appeals to superior bodies before instituting suit, but they cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts; Bauer v. Samson Lodge, 102 Ind. 269, 1 N. E. 571.

An agreement by which the members of an association undertake to confer judicial powers, in respect to the common property, upon its officers, selected out of the association, as a tribunal having general authority to adjudicate upon alleged violations of the rules, and to decree a forfeiture of the rights, to such property, of the parties, is void. The court will not aid in enforcing the judgment of a tribunal sought to be created by private compact, except in case of submission to arbitration of specific matters of controversy; Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665.

The powers both of courts of equity and of law over their own process to prevent abuse, oppression, and injustice are inherent and equally extensive and efficient; as is also their power to protect their own jurisdiction and officers in the possession of prop-

erty that is in the custody of the law; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

If the subject of the bill creates jurisdiction, it cannot be defeated by matter set up in the answer; the plaintiff is master to decide what law he will rely upon; The Fair v. Specialty Co., 228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716 (except where the bill is based on diversity of citizenship, denied in the answer; *id.*).

When a prisoner after pleading guilty is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him; People v. Allen, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473.

Although in criminal cases the jurisdiction is confined to the *locus in quo* of the crime, there are cases in which, for a single criminal act, the perpetrator is liable to be tried in more than one jurisdiction. Such a case is presented where a continuous unlawful act is set on foot by a single impulse and operated by an unintermittent force, however long time it may occupy; Armour Packing Co. v. U. S., 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, affirmed 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681; and when such an act or series of acts runs through several jurisdictions, the offense is committed and cognizable in each; though complete in the jurisdiction where first committed, it may continue, be committed, and be punished in another jurisdiction; *id.*

As to the immunity of a sovereign from suit, see SOVEREIGN; STATE.

As to jurisdiction of a justice of the peace, see that title.

See UNITED STATES COURTS; EXECUTORS AND ADMINISTRATORS; THREE MILE LIMIT; HIGH SEAS; FOREIGN JUDGMENTS; EQUITY; COMMON LAW; ADMIRALTY; JUDGMENTS; JUDGE; JUDICIAL POWER; RECORDS.

JURISDICTION CLAUSE. That part of a bill in equity which is intended to give jurisdiction of the suit to the court, by a general averment that the acts complained of are contrary to equity and tend to the injury of the plaintiff, and that he has no remedy, or not a complete remedy, without the assistance of a court of equity, is called the *jurisdiction clause.* Mitf. Eq. Pl. 43.

This clause is unnecessary; for if the court appear from the bill to have jurisdiction, the bill will be sustained without this clause; and if the court have not jurisdiction, the bill will be dismissed though the clause may be inserted. Story, Eq. Pl. § 34.

JURISPRUDENCE. The science of the law. The practical science of giving a wise interpretation to the laws and making a just application of them to all cases as they arise.

The science of human law. And. Am. L. § 18.

By science, in the first definition, is understood that connection of truths which is founded on principles either evident in themselves or capable of demonstration,—a collection of truths of the same kind, arranged in methodical order. In the latter sense, it is the habit of judging the same questions in the same manner, and by this course of judgments forming precedents. 1 Ayliffe, Pand. 3. See Bentham, Austin, Amos, Markby, Heron, Phillimore, Lorimer, Salmond, Taylor, Lindley, on Jurisprudence.

Sir F. Pollock divides jurisprudence into: 1. *Positive* (which is practical, historical, comparative or analytical); 2. *Final* jurisprudence; and 3. *International* jurisprudence. General jurisprudence is hardly more than the collective result of comparative and analytical jurisprudence. Comparative jurisprudence deals with the groundwork and typical conceptions which are common to all legal systems, or to all that have made any considerable way towards completeness; and analytical jurisprudence with speculations as to such ideas as Duty, Intent, Ownership, Possession, etc. By Final Jurisprudence he designates the consideration of laws as they ought to be—ground which belongs perhaps more to the statesman than the lawyer. It assumes the shape of a Theory of Legislation, with special branches treating of the formal structure of laws, codification, legal procedure, etc. The general principles of legislation and government, which are put forward as claiming assent from all men in so far as they are rational and social beings, are said to be of natural obligation. The sum of them is called the law of nature, *droit naturel, Naturrecht.* The law which would in itself be best for a given nation in given circumstances is sometimes called by a certain school of writers, positive law. The sort of doctrine which embodies it may be called Ethical Jurisprudence (Oxford Lectures, The Methods of Jurisprudence).

As to a distinction between jurisprudence and law, see Holland Jurisprudence 5–12; Taylor, Jurisprudence 28.

JURIST. One versed in the science of the law. One skilled in the civil law. One skilled in the law of nations.

JURISTIC PERSON. The usual form of a juristic person and the only one (except the state) at common law, is a corporation. In Germany there are juristic persons (*Stiftungen*) which are not corporations and have no members. They consist of property devoted to charitable uses, the title to which is not vested in individuals or corporations. Juristic person may, perhaps, include *Fiscus* and *Hæreditas Jacens (q. v.);* Gray, Nature and Sources of Law 58.

It is called also *persona ficta,* and is defined sometimes as a corporation.

See Warner v. Beers, 23 Wend. (N. Y.) 103; 24 Harv. L. Rev. 17; 57 U. P. S. Rev. 131.

JUROR (Lat. *juro*, to swear). A man who is sworn or affirmed to serve on a jury.

Any person selected and summoned according to law to serve in that capacity, whether the jury has been actually impanelled and sworn or not. State v. McCrystol, 43 La. Ann. 907, 9 South. 922.

JURY (Lat. *jurata*, sworn). A body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them.

The term "jury," as used in the constitution, means twelve competent men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and elected by officers free from all bias in favor of or against either party; duly impanelled, and sworn to render a true verdict, according to the law and the evidence; State v. McClear, 11 Nev. 39.

In the trial by jury, the right of which is secured by the VIIth Amendment, both the court and the jury are essential factors; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879.

The best theory regards the jury system as having been derived from Normandy, where, as in the rest of France, it had existed since its establishment under the Carlovingian kings. It made its appearance in England soon after the Norman Conquest. No trace of it is to be found in Anglo-Saxon times, nor was it, as is often supposed, established by Magna Charta; 10 Harv. L. Rev. 150, by J. E. R. Stephens. The same writer finds the idea of unanimity re-established in the time of Edward IV., a majority verdict having previously sufficed; in the Year Books of 23 Edward III. is the first indication of the jury deciding on evidence produced before them in addition to their own knowledge. Early in the reign of Henry IV. evidence was required to be given at the bar of the court, and the modern practice or method of jury trials had its origin; *id.* 159.

Prof. J. B. Thayer finds the origin of the jury in the Frankish inquisition; it existed in Normandy and went thence to England in the eleventh century; 5 Harv. L. Rev. 249. The use of a jury both for civil and criminal cases is mentioned for the first time in English statute law in the Constitutions of Clarendon; *id.* 156.

The origin of trial by jury is said by another writer to be rather French than English, rather royal than popular, rather a livery of conquest than a badge of freedom. Originally juries were called in, not to hear, but to give, evidence. They were the neighbors of the parties and were presumed to know when they came into court the facts about which they were to testify. They were chosen by the sheriff to represent the neighborhood. The verdict was the sworn testimony of the countryside. By slow degrees the jury acquired a new character. Sometimes when the jurors knew nothing of the facts, witnesses who did know the facts would be called in to supply the requisite information. They became more and more dependent on the evidence given in their presence by those witnesses who were summoned by the parties. In the fifteenth century the change had taken place, though in yet later days a man who had been summoned as a juror and sought to escape on the ground that he already knew something of the facts, might be told that he had given a very good reason for his being placed in the jury box. It may well be said therefore that trial by jury, though it had its roots in the Frankish inquest, grew up on English soil; 1 Social England 255, 290. So also 1 Poll. & Maitl. 117-121.

Another writer finds its foundation in Norman institutions and its establishment by positive legislation in the time of Henry II. Lesser, Hist. of Jury Syst. 172.

In an interesting discussion of the "Administration of the Criminal Law," by W. H. Taft, 15 Yale L. J. 1 (1905), it is stated that since 1848 "the trial by jury in criminal cases was adopted in France, in Belgium, in Germany, in Norway and Sweden, in Spain, in Italy, and Russia, except in trials for political offences, and is now in use in those countries." He also considers that, although adopted in Porto Rico, it has been a failure there, and that its adoption in the Philippines would be unwise, adding that "it is by no means clear that in our own jurisprudence trial by jury in civil cases is an unmixed good." The inapplicability of the jury system and also of what are usually termed the constitutional guarantees (all of which except trial by jury were extended to them by President McKinley) to such a country is argued at some length and with vigor.

A common jury is one drawn in the usual and regular manner.

A grand jury is a body organized for certain preliminary purposes.

A jury de medietate linguæ is one composed half of aliens and half of denizens.

Such juries might formerly be claimed, both in civil and criminal cases, where the party claiming the privilege was an alien born, by virtue of 28 Edw. III. c. 13, and by an earlier statute, where one party was a foreign merchant; 27 Edw. III. c. 8. Such a jury was provided in criminal cases by a statute of Edward I. It was abolished by 33 Vict. c. 14. The right has been recognized in this country; Respublica v. Mesca, 1 Dall. (Pa.) 73, 1 L. Ed. 42; People v. McLean, 2 Johns. (N. Y.) 381; Richards v. Com., 11 Leigh (Va.) 690; *contra* U. S. v. McMahon, 4 Cra. C. C. 573, Fed. Cas. No. 15,699; State v. Antonio, 11 N. C. 200. It has been generally abolished by statute; Thomp. & Merr. Juries 19; excepting in Kentucky, where it still exists; *id.*

A petit or traverse jury is a jury who try the question in issue and pass finally upon the truth of the facts in dispute. The term jury is ordinarily applied to this body distinctively.

A special jury is one selected by the assistance of the parties.

This is granted in some cases upon motion and cause shown, under various local provisions. The method at common law was for the officer to return the names of forty-eight principal freeholders to the proper officer. The attorneys of the respective parties, being present, strike off each twelve names, and from the remaining twenty-four the jury is selected. A similar course is pursued in these states where such juries are allowed. See 3 Sharsw. Bla. Com. 357. The earliest rule of court on the subject was made in 8 Will. III.; 1 Salk. 405. It formerly was granted only in cases of special consequence or great difficulty; but later, a special jury has usually been granted in ordinary cases. In some states such a jury is of course; in New York, statutes provide for such only in cases of special importance or intricacy, as to which the court must decide.

A struck jury is a special jury. See Cook v. State, 24 N. J. L. 843.

Trial by jury is guaranteed by the constitution of the United States in all crim-

inal cases except upon impeachments, and in all suits at common law where the subject-matter of the controversy exceeds twenty dollars in value. The right to such a trial is also provided in many of our state constitutions. It has been held, however, not to be an infringement of this federal constitutional right, where a statute provides that in all criminal prosecutions the party accused, if he shall so elect, may be tried by the court instead of by a jury; Miller, Const. U. S. 494; Coleman v. Edwards, 5 Ohio St. 57; Ward v. People, 30 Mich. 116; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27. It was held that a jury trial may be waived when there is a positive legislative enactment giving the right to do so; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986. This clause of the constitution does not apply to state courts; Hare, Am. Const. L. 860; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; Edwards v. Elliott, 21 Wall. (U. S.) 557, 22 L. Ed. 487; Cooley, Const. Lim. 410; Williams v. Hert, 110 Fed. 166, where it was also held that when a state was admitted to the Union "on an equal footing with the original states in all respects whatsoever," no right of trial by jury in criminal cases is guaranteed, although it had been secured by the ordinance and acts of congress for the government of the territory out of which the state was created. The states may, therefore, in their own constitutions, dispense with trial by jury both in civil and criminal cases; Ordron. Const. Leg. 261; and cases *supra;* or provide that a jury shall consist of less than twelve; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; In re McKee, 19 Utah, 231, 57 Pac. 23; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989.

It does not apply to cases in the court of claims; McElrath v. U. S., 102 U. S. 426, 26 L. Ed. 189; nor to proceedings for disbarring an attorney; Re Wall, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552; nor for assessing damages; Raymond v. R. Co., 14 Blatchf. 133, Fed. Cas. No. 11,593; nor to equity cases in the federal courts; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; nor to cases where the right is antecedently and voluntarily relinquished; Bank of Columbia v. Okely, 4 Wheat. (U. S.) 235, 4 L. Ed. 559; nor does a like provision in a state constitution apply to any proceedings in which a jury was not required at common law; *e. g.*, a justice's court; Vaughn v. Scade, 30 Mo. 600; Knight v. Campbell, 62 Barb. (N. Y.) 16; nor to any court which exercised its functions without the aid of a jury prior to the adoption of a constitution; Thomps. & Merr. Juries 11; People v. Justices of Court of Special Sessions, 74 N. Y. 406.

The provisions of the United States constitution relating to trial by jury are as follows:

"The trial of all crimes except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." U. S. Const. art. 3, sec. 2, par. 3.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." Amdt. VI, U. S. Const.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." Amdt. VII, U. S. Const.

The first clause of the seventh amendment of the United States constitution in relation to trials by jury relates only to the federal courts; the states are left to regulate them in their own courts; Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. Ed. 487. The second clause, prohibiting federal courts from re-examining any fact tried by a jury otherwise than according to the common law, applies to the facts tried by jury in a cause in a state court; Justices v. U. S., 9 Wall. (U. S.) 274, 19 L. Ed. 658. Article 3, sec. 2, cl. 3, providing for jury trials of all crimes except impeachment does not apply to state courts; Eilenbecker v. District Court, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; nor does the prohibition of the fourteenth amendment against abridging the right of trial by jury in suits at common law; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; and the same is true of a provision in article 3 for the trial of all crimes in the state where committed; Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352.

The seventh amendment declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. The effect of this prohibits the United States courts from re-examining facts tried by a jury, except in the granting of a new trial by the court which tried the issue, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court for an error in law; Lincoln v. Power, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879. But such action by an appellate state court was held to be constitutional and not to infringe the right to due process of law or trial by jury; Gunn v. R. Co., 27 R. I. 320, 62 Atl. 118, 2 L. R. A. (N. S.) 362; *id.*, 27 R. I. 432, 63 Atl. 239, 2 L. R. A. (N. S.) 883.

The amendment secures unanimity in finding a verdict as an essential feature of trial

by jury in common law cases, and an act of congress cannot impart the power to change a constitutional rule, and cannot be treated as attempting to do so; Springville v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172.

The provision securing the right to jury trials applies to the District of Columbia; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. Ed. 223; and the provisions are applicable to it in both civil and criminal cases, but the right is not infringed by an act enlarging the jurisdiction of a justice of the peace in the District of Columbia to $300 and requiring every appellant from his judgment to give bond for the payment of final judgment on appeal; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. It has also been held to be secured in territories; Black v. Jackson, 177 U. S. 349, 20 Sup. Ct. 648, 44 L. Ed. 801; but was based upon the acts of congress relating to them; Webster v. Reid, 11 How. (U. S.) 437, 13 L. Ed. 761; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. But the right of trial by jury was not extended by the Constitution by its own force without legislation to the Philippines, since they are not incorporated into the United States by congressional action; Dorr v. U. S., 195 U. S. 138, 24 Sup. Ct. 808, 49 L. Ed. 128, 1 Ann. Cas. 697.

Under the fourteenth amendment a jury trial is guaranteed to municipal offenders sentenced to infamous punishment and a statute for the summary infliction of such punishment is unconstitutional; Jamison v. Wimbish, 130 Fed. 351; but the exercise of summary jurisdiction over such offences by magistrates has long been exercised; Green v. Superior Court, 78 Cal. 556, 21 Pac. 307, 541; Byers v. Com., 42 Pa. 89; and was so in Georgia when the amendment was adopted; Floyd v. Com'rs of Eatonton, 14 Ga. 354, 58 Am. Dec. 559. Accordingly, the decision of the federal court above cited has been very much criticized as not warranted by the supreme court cases and particularly the construction of the amendment in the Slaughter House Cases; 18 H. L. R. 136; as to the right to waive a trial by jury in criminal cases, it is thought by a writer in 21 H. L. R. 212, that the cases may be reconciled by careful analysis and the conclusions reached are that if the constitution prohibits a conviction except by verdict, the court alone cannot decide the case; State v. Holt, 90 N. C. 749, 47 Am. Rep. 544; and a statute allowing a waiver would be invalid; State v. Cottrill, 31 W. Va. 162, 6 S. E. 428; *contra*, State v. Griggs, 34 W. Va. 78, 11 S. E. 740; and this applies even in cases of minor offences; State v. Stewart, 89 N. C. 563. Under constitutions which provide only that the right of trial by jury shall remain inviolate, the statutes allowing a waiver are generally upheld; Edwards v. State, 45 N. J. L. 419; *contra*, Brimingstool v. People, 1 Mich. N. P. 260; even in felonies; Murphy v. State, 97 Ind. 579; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27; if there be no statute, however, the waiver cannot be allowed; Harris v. People, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; *contra*, Wren v. State, 70 Ala. 1. A statute providing that the issues of facts shall be tried by jury was construed to prohibit a waiver; In re McQuown, 19 Okl. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136.

A waiver of a jury by the defendant in an action for a penalty in a revenue case does not invalidate the judgment; Schick v. U. S., 195 U. S. 65, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585, where, however, the dissenting opinion of Harlan, J., should be examined.

A jury trial is not guaranteed by a state constitution providing for "due process of law"; Wynehamer v. People, 13 N. Y. 378; nor even by the provision for it in the fourteenth amendment; Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; nor does it abridge its privileges and immunities; *id.* "Due process of law" simply requires that there shall be a day in court, and the legislature may take away or change a remedy; People v. Board of Sup'rs, 70 N. Y. 228; but it has been held in some cases that the expression does guarantee a jury trial; Inhabitants of Saco v. Wentworth, 37 Me. 165, 58 Am. Dec. 786; State v. Ray, 63 N. H. 406, 56 Am. Rep. 529; Jones v. Robbins, 8 Gray (Mass.) 329; Hurtado v. People, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232.

An act providing for the trial of a contested election to a public office which deprives the party of a trial of disputed facts by jury is *not* unconstitutional; Ewing v. Filley, 43 Pa. 384.

In the Delaware constitution of 1897, provision is made for the trial of criminal offences against the election laws, by the court without a jury.

The number of jurors must be twelve; and it is held that the term jury in a constitution imports, *ex vi termini*, twelve men; People v. Justices, 74 N. Y. 406; Turns v. Com., 6 Metc. (Mass.) 231; Norval v. Rice, 2 Wis. 22; whose verdict is to be unanimous; Cruger v. R. Co., 12 N. Y. 190. See State v. McClear, 11 Nev. 39, *supra*.

Where a constitution preserves the right of trial by jury inviolate, the legislature cannot change the number of jurors in either civil or criminal cases; Thomp. & Merr. Juries 10; Henning v. R. Co., 35 Mo. 408; Allen v. State, 51 Ga. 264.

The question whether the common law requirement of twelve jurors may be changed has in recent years received much attention in the courts. There has been a growing tendency, at least, towards the serious consid-

eration of changes in the jury system as administered at common law and secured by the state and federal constitutions. See GRAND JURY. The decided weight of authority is that, where the right to trial by jury is secured by the constitution, the legislature cannot authorize a verdict by a less number than twelve; that the constitutional reservation implies a right to the concurrent judgment of that number, and any statute limiting it is unconstitutional and void; Opinion of Justices, 41 N. H. 550; Jacksonville, T. & K. W. R. Co. v. Adams, 33 Fla. 608, 15 South. 257, 24 L. R. A. 272; Bradford v. Territory, 1 Okl. 366, 34 Pac. 66; Bettge v. Territory, 17 Okl. 85, 87 Pac. 897; Cancemi v. People, 18 N. Y. 128; Harris v. State, 128 Ill. 585, 21 N. E. 563, 15 Am. St. Rep. 153; Carroll v. Byers, 4 Ariz. 158, 36 Pac. 499; and such, under the sixth amendment, must be the number of jurors, neither more nor less than twelve, that being the rule at common law; Thompson v. Utah, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061. Such is the meaning of "trial by jury" in the primary and usual sense of the term at common law in the American constitutions; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, where there is an extended historical discussion of the subject by Gray, J., and it was held further that by the seventh amendment after trial by jury, in either the federal or state court, the facts tried and decided cannot be re-examined in any court of the United States except upon a new trial granted by the federal court or when ordered by the appellate court for error in law. Accordingly one charged with crime cannot waive a jury trial by twelve jurors; Jennings v. State, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862.

While a person accused of an infamous crime, though not a felony, may waive the disqualification of jurors, or even their impartiality, such person cannot waive his right to a trial by a jury of twelve by consenting, after a legal jury had been impaneled and two had been excused, to continue the trial and abide by the verdict of the remaining ten; Dickinson v. U. S., 159 Fed. 801, 86 C. C. A. 625; Hill v. People, 16 Mich. 351; per Cooley, C. J.; *contra*, Com. v. Dailey, 12 Cush. (Mass.) 80, per Shaw, C. J.; a later case being criticized in the case first cited; but there need not be a jury of twelve in civil cases; City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947; Roach v. Blakey, 89 Va. 767, 17 S. E. 228; Kreuchi v. Dehler, 50 Ill. 176.

The constitutional right of a jury trial in criminal cases cannot be waived by one indicted for a felony so as to make valid a trial by eleven jurors; Territory v. Ortiz, 8 N. Mex. 154, 42 Pac. 87. This doctrine has been based upon various grounds. It was said in one case that the duty of the state to its citizens would prohibit a waiver of a full panel; Cancemi v. People, 18 N. Y. 128. Shaw, C. J., suggested that in some cases the defendant's chance of acquittal might be greater with eleven jurors than with twelve; and Cooley suggests the view that a jury of less than twelve is a tribunal unknown to the law, and would amount to a mere arbitration, which is not allowable; Const. Lim., 6th Ed. 391. Some courts held that there may be a valid waiver as to misdemeanors; State v. Worden, 46 Conn. 349, 33 Am. Rep. 27; State v. Albee, 61 N. H. 423, 60 Am. Rep. 325; State v. Alderton, 50 W. Va. 101, 40 S. E. 350; and others that the right was not secured with respect to minor or trivial offences; People v. Justices of Court, 74 N. Y. 406; Byers v. Com., 42 Pa. 89; or at least that a jury may be dispensed with in the first instance where there is a right of appeal with a jury; Jones v. Robbins, 8 Gray (Mass.) 329; City of Emporia v. Volmer, 12 Kan. 622.

Statutes conferring the right to waive are not in conflict with the constitution of the United States; Hallinger v. Davis, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986; or of the state; People v. Noll, 20 Cal. 164. It was held that in civil cases in Utah a jury of twelve was not required; Wolf Co. v. Brewing Co., 10 Utah 179, 37 Pac. 262; Mackey v. Enzensperger, 11 Utah 154, 39 Pac. 541; but see American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079, where it was held that litigants in common law actions in the courts of Utah while a territory had a right to trial by jury which involved unanimity of verdict, and this right could not be taken away by territorial legislation. As to unanimity of a verdict in a state court see *infra*.

There would seem to be no legal objection to permitting this change by constitutional provision, but even that, it has been held, will not sustain a statute providing that in certain contingencies, at the discretion of the trial court, a jury may consist of less than twelve men; McRae v. R. Co., 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750. In California, in civil cases and misdemeanors, the jury may consist of twelve or any number less than twelve upon which the parties may agree in open court. And the number of jurors may be limited in many states, including Colorado, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Dakota, Washington, and Wyoming. See 36 Cent. L. J. 437.

A statute changing the jury to nine in civil cases applies to pending cases; Roenfeldt v. Ry. Co., 180 Mo. 554, 79 S. W. 706, where the court said that "no one has a vested right to have his cause tried by any particular mode of procedure."

Statutes providing for compulsory reference have been held constitutional in many cases as not infringing the right to trial by jury; Copp v. Henniker, 55 N. H. 179, 20 Am.

Rep. 194; Edwardson v. Garnhart, 56 Mo. 81; Norton v. Rooker, 1 Pinney (Wis.) 195.

And the provision requiring the payment of costs before appeal was also held constitutional; McDonald v. Schell, 6 S. & R. (Pa.) 240; Emerick v. Harris, 1 Binney (Pa.) 416. The seventh amendment of the United States Constitution does not apply to the state courts; Edwards v. Elliott, 21 Wall. (U. S.) 532, 22 L. Ed. 487; Pearson v. Yewdall, 95 U. S. 294, 24 L. Ed. 436; with respect to the state constitutions where the right of trial by jury is secured, it continues inviolate with respect to all cases triable by jury before the constitution was adopted; Tribou v. Strawbridge, 7 Or. 156; Lee v. Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Mead v. Walker, 17 Wis. 190.

In New York where the action of account was before the constitution triable without a jury, under a colonial statute it has been held that long accounts in a counter-claim in an action on contract where the plaintiff's claim is disputed will not justify compulsory reference because the colonial practice only permitted set-off with plea of payment, and therefore the statute could not have been applicable to a counter-claim when the plaintiff's cause of action was disputed; Steck v. Iron Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67, and note collecting cases.

Unanimity in giving a verdict was not universal in the early days of the common law; at times eleven sufficed; in some cases a majority. Probably it was only in the second half of the fourteenth century that unanimity became an established principle; 5 Harv. L. Rev. 296, by Prof. J. B. Thayer. "The rule of unanimity of the jury was not fixed before the 14th century and it was probably never laid down in terms that juries must be unanimous. What was actually decided was that the verdict of fewer than 12 men would not suffice, and it became a fixed custom to have that number on the pettit jury." Pollock, Expans. of C. L. 95.

The requirement of unanimity of twelve jurors arose from the custom which taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offence; Forsyth, Trial by Jury 240. At common law, except as above stated, unanimity was essential to a verdict, so that it has been held that a conviction by eleven jurors, even where the accused waived a trial by twelve jurors, would be set aside; Cancemi v. People, 18 N. Y. 128. "Unanimity was one of the peculiar and essential features of trial by jury at common law;" American Pub. Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079, *supra;* but the court expressly said that the power of a state to change the rule as to unanimity was not before them, and cited Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232. Changes in this respect have been made in many states. In civil actions in California, Idaho, Louisiana, Nevada, Texas, and Washington, three-fourths may render a verdict; two-thirds in Montana in civil actions and crimes less than felonies, and five-sixths in Idaho, in all cases of misdemeanor. In Iowa the legislature may authorize a verdict by less than twelve in inferior courts.

Unanimity is still required in England. In a case before the Judicial Committee of the Privy Council, where a British subject was convicted of murder in Japan, the court being comprised of a British judge and five jurors, established under a British treaty, it was argued by Sir Frank Lockwood that the British government could not establish such a court with a jury of less than twelve, but the court held that the conviction was lawful. [1897] App. Cas. 719.

A modification of the jury system, much considered and quite generally adopted, is the provision authorizing the parties to waive a jury and elect to have the facts tried by the court. This course in civil cases is authorized in most of the states, as well as in the federal courts. It is provided for in the constitutions of Arkansas, California, Colorado, Florida, Maryland, Michigan, Minnesota, Nevada, New York, North Carolina, Pennsylvania, Vermont, Wisconsin, Washington, and West Virginia. By statute a like practice obtains in Illinois, Missouri, New Jersey, and Wyoming, and also by the bill of rights in Arizona and by statute in New Mexico. There can be a waiver in civil cases and in criminal cases not amounting to felony in Idaho, Montana, North Dakota, and California.

The general principle is, however, that in criminal cases, the accused can neither waive his right to a trial by a jury of twelve nor be deprived of it by the legislature; Cancemi v. People, 18 N. Y. 128; Allen v. State, 54 Ind. 461; State v. Carman, 63 Ia. 130, 18 N. W. 691, 50 Am. Rep. 741 (*contra*, State v. Kaufman, 51 Ia. 578, 2 N. W. 275, 33 Am. Rep. 148); State v. Davis, 66 Mo. 684, 27 Am. Rep. 387; Bell v. State, 44 Ala. 393; Williams v. State, 12 Ohio St. 622; Kleinschmidt v. Dunphy, 1 Mont. 118; Swart v. Kimball, 43 Mich. 443, 5 N. W. 635. Judge Cooley, after stating that less than twelve would not be a common-law jury, or such as the constitution guarantees, adds, "And the necessity of a full panel could not be waived—at least in case of felony—even by consent." Const. Lim., 4th ed. 395. It was held that where one juror was an alien the failure to challenge him was not a waiver of the objection, and on the refusal of the court to set aside the judgment, it would be reversed, on error; Hill v. People, 16 Mich. 356; *contra*, State v. Quarrel, 2 Bay (S. C.) 150, 1 Am. Dec. 637. One accused of crime cannot waive the absence of one juror; Jennings v. State, 134

Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862 and note.

On the trial of a misdemeanor, a full jury may be waived; Com. v. Dailey, 12 Cush. (Mass.) 80, per Shaw, C. J.; Tyra v. Com., 2 Metc. (Ky.) 1; U. S. v. Shaw, 59 Fed. 110; or where the penalty is only a fine; State v. Mansfield, 41 Mo. 470. A jury may be waived in all civil cases, without any statute; Roach v. Blakey, 89 Va. 767, 17 S. E. 228.

The fact that a court of chancery may summon a jury to try an issue of fact is not equivalent to the right of trial by jury under the seventh amendment of the constitution; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. And the constitutional right does not relate to suits over which equity exercised jurisdiction when the constitution was adopted; Davis v. Settle, 43 W. Va. 17, 26 S. E. 557; but the right cannot be defeated by giving equity jurisdiction over an action in which the right applies; *id.* It is not impaired by an act giving the appellate court authority to reverse for excessive damages; Smith v. Pub. Co., 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819. In that case it was held that the act which gives the supreme court "power in all cases to affirm, reverse, amend, or modify a judgment, order, or decree appealed from and to enter such judgment," etc., as it may deem proper and just, does not infringe upon the right of trial by jury and is constitutional; and in a later case, this decision was adhered to, and it was further held that where the supreme court had reversed a judgment, without awarding a new venire, it might subsequently amend the judgment of reversal by adding thereto a formal judgment in favor of defendant; Nugent v. Traction Co., 183 Pa. 142, 38 Atl. 587; Dalmas v. Kemble, 215 Pa. 410, 64 Atl. 559.

A state law authorizing a judgment n. o. v. on the whole record to be entered by an appellate court where a point requesting binding instructions has been reserved or declined is in conflict with the seventh amendment of the federal constitution; Slocum v. Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, where it was held that the circuit court of appeals in entering such a judgment under the state statute had acted improperly in not merely reversing the judgment with a *venire*. It is also held that a state statute providing that a new trial shall not be granted on account of the smallness of the damages is, if applicable to federal courts, a violation of the seventh amendment; Hughey v. Sullivan, 80 Fed. 72.

Several state courts have held that a reversal and entry of final judgment by the appellate court under state statute is not an infringement of trial by jury; Larkins v. R. Ass'n, 221 Ill. 428, 77 N. E. 678; Gunn v. R. Co., 26 R. I. 112, 58 Atl. 452; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; nor is the requirement of a *remittitur* by an appellate court; Burdict v. R. Co., 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; Texas & N. O. R. Co. v. Syfan, 91 Tex. 562, 44 S. W. 1064.

Qualifications. Jurors must possess the qualifications which may be prescribed by statute, must be free from any bias caused by relationship to the parties or interest in the matter in dispute, and in criminal cases must not have formed any opinion as to the guilt or innocence of the accused.

"1. They are to be good and lawful men. 2. Of sufficient freeholds, according to the provisions of several acts of parliament. 3. Not convict of any notorious crime. 4. Not to be of the kindred or alliance of any of the parties. 5. Not to be such as are prepossessed or prejudiced before they hear their evidence." Cond. Gen. 297.

At common law there was a freehold qualification, but to no certain amount; by 2 Hen. V. it was 40*s.*; Thomp. & Merr. Juries 20; Proffatt, Jury Trial § 115.

An alien may serve as a juror, that is, a foreigner intending to be naturalized; People v. Scott, 56 Mich. 154, 22 N. W. 274; *contra*, State v. Primrose, 3 Ala. 546, and see Proffatt, Jury Trial § 116. An atheist has been held to be disqualified; Shane v. Clarke, 3 Harr. & McH. (Md.) 101. Women could not serve as jurors at common law, except upon a jury to try an issue under a writ *de ventre inspiciendo (q. v.)*; 3 Bla. Com. 362. They are now qualified in some states.

Under U. S. R. S. § 5440, an official of the United States is disqualified as a juror by reason of his relations with the government although not a salaried officer; Crawford v. U. S., 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, where it was put upon the ground that bias disqualifies a juror, and it is implied in the relation between employer and employee and actual evidence thereof is unnecessary (a criminal case in a federal court).

Under the common law the master, servant, steward, counsellor, or attorney, of either party is not a competent juror and statutory provisions of qualifications not inconsistent with this rule do not abrogate it; *id.*; Block v. State, 100 Ind. 357.

It has been held that where one of the jurors was incompetent, as an alien, his presence vitiated the whole panel and the verdict; Shane v. Clarke, 3 Harr. & McH. (Md.) 101; unless waived by failure to challenge; State v. Pickett, 103 Ia. 714, 73 N. W. 346, 39 L. R. A. 302; 11 Harv. L. R. 545. The fact discovered after verdict that a juror who was not challenged was unable to understand the English language was held insufficient ground for granting a new trial; San Antonio & A. P. R. Co. v. Gray (Tex.) 66 S. W. 229; such ignorance of English language would not be a ground of challenge; In re Allison, 13 Colo. 525, 22 Pac. 820, 10 L. R. A. 790, 16

Am. St. Rep. 224; but the failure to challenge has been held to be a waiver of the right; 2 Moo. & Sc. 41; St. Louis & S. E. R. Co. v. Casner, 72 Ill. 384; but where the disqualification was not known until after the verdict, a new trial was granted as a matter of discretion; Woodward v. Dean, 113 Mass. 297; and as a matter of right; Shane v. Clarke, 3 Har. & McH. (Md.) 101.

An employee of a stockholder of a corporation is not disqualified by reason of his employment; Sansouver v. Dye Works, 28 R. I. 539, 68 Atl. 545; 13 N. Burns. 8. Business relations which disqualify one from acting as a juror are: Employer and employee; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 South. 360; even if the former is a corporation; Burnett v. R. Co., 16 Neb. 332, 20 N. W. 280; landlord and tenant; Hathaway v. Helmer, 25 Barb. (N. Y.) 29; *contra*, Arnold v. Fruit Co., 141 Cal. 738, 75 Pac. 326; partners; Stumm v. Hummel, 39 Ia. 478; master and servant; State v. Coella, 3 Wash. 99, 28 Pac. 28; attorney and client; 3 Bla. Com. 363; but not a client of the attorney in the suit; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; business relations with a party may disqualify in a particular case, though not from the relation generally; Laidlaw v. Sage, 2 App. Div. 374, 37 N. Y. Supp. 770; but not the mere relation of a debtor and creditor; Thompson v. Douglass, 35 W. Va. 337, 13 S. E. 1015.

Whether it is contempt of court for a master to discharge a workman because he was obliged to serve as a juror is discussed in an article quoted from the London Law Times in 36 Am. L. Rev. 596.

The federal constitution provides that in criminal trials the jury shall be taken "from the state and district where the crime shall have been committed." State constitutions usually confine the selection to the county or district, except where, in some states, a provision is made in case jurors cannot conveniently be found in the county. The right to a trial by a jury of the vicinage is an essential part of trial by jury.

In some states the qualifications of jurors are regulated by the constitution; *e. g.*, Florida requires them to be taken from the registered voters. Georgia requires that jurors shall be upright and intelligent persons. Subject to the constitutional provisions as to impairing the right of trial by jury, the legislature has power to define the qualifications of jurors. It may dispense with the freehold qualification required by common law; Kerwin v. People, 96 Ill. 206; Com. v. Dotsey, 103 Mass. 412; but see 20 Am. L. Reg. 436; Proffatt, Jury Trial § 115.

In some states conviction for certain high crimes disqualifies; some states require citizenship; others that jurors shall be selected from the qualified voters; others impose tests of integrity, or intelligence or education. Freehold or property tests are required in some states. That the jurors shall be over twenty-one years of age is probably a universal requirement; while in some states those past a certain age cannot serve; Proffatt, Jury Trial § 117.

In the federal courts the qualifications are the same as those relating to the highest courts of law in the respective states; U. S. R. S. § 800; but this does not require a minute adherence to the state practice; U. S. v. Collins, 1 Woods 499, Fed. Cas. No. 14,837, per Bradley, J. A statute confining the selection of jurors to white citizens is invalid under the fourteenth amendment; the right to serve on a jury is an incident of citizenship; Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567.

The intelligence and ability of a juror are matters within the sound discretion of the court, and it is sufficient if he knows the English language and can understand the testimony and the argument of counsel; State v. Casey, 44 La. Ann. 969, 11 South. 583. It rests with each state to prescribe such qualifications as it seems proper for jurymen, taking care only that no discrimination in respect to such service be made against any class of citizens solely because of their race; In re Shibuya Jugiro, 140 U. S. 291, 11 Sup. Ct. 770, 35 L. Ed. 510.

The passage of the Act of March 3, 1865, amended by Act June 8, 1872, R. S. § 819, granting peremptory challenges to the government in criminal cases, has not taken away the right to conditional or qualified challenges when permitted in the state and adopted by the federal court by rule or by special order; Sawyer v. U. S., 202 U. S. 150, 26 Sup. Ct. 575, 50 L. Ed. 972, 6 Ann. Cas. 269, where it was held not unreasonable to permit jurors to be required to stand aside at the foot of the panel, it appearing that neither the government nor the defendant had exhausted all their peremptory charges when the jury was empanelled.

The selection of jurors is to be made impartially; and elaborate provisions are made to secure this impartiality. In general, a sufficient number are selected, from among the qualified citizens of the county or district, by the sheriff, or a similar executive officer of the court, and, in case of his disqualification, by the coroner, or, in some cases, by still other designated persons. See ELISORS. From among these the requisite number is selected at the time of trial, to whom objection may be made by the parties.

Sir Matthew Hale says that the writ to return a jury issues to the sheriff who is entrusted to elect and return the jury without the nomination of either party. The jurors were to be such persons as for estate and quality were fit to serve on that employment. They were to be of the neighborhood of the fact to be inquired, or at least of the county. Cond. Gen.

At common law jurors were selected, usually, by the sheriff or coroner. It is done in this country in various ways; by judges of election; by town authorities or by various officials or special boards or commissions. Statutory provisions as to the time and mode of selecting jurors are said to be usually directory only and need not be strictly complied with; Thomp. & Merr. Juries 44; but this is not the case with all such requirements.

In the federal courts the panel of jurors is selected by the clerk of the court and a commissioner appointed by the court, who must be taken from the opposite political party to that to which the clerk belongs; the clerk and the commissioner place names in the jury box alternately without regard to party affiliations. Any judge may order the names to be drawn from the boxes used by the state authorities in selecting jurors in the highest court of the state; no person may serve as a petit juror more than once in a year.

A juror is not disqualified by having formed or expressed an opinion from newspaper accounts where he testified that he could try the case solely on the evidence and would be governed by it; Dimmick v. U. S., 121 Fed. 638, 57 C. C. A. 664; nor is one incompetent merely because he had formed and expressed an opinion as to the guilt or innocence of a person jointly indicted with the defendant; Griggs v. U. S., 158 Fed. 572, 85 C. C. A. 596; Weston v. Com., 111 Pa. 251, 2 Atl. 191; State v. Bill, 15 La. Ann. 114.

Erroneously overruling challenge for cause is harmless error where peremptory challenges are not exhausted; Green v. State, 40 Fla. 191, 23 South. 851; or where the jury did not serve and the jury was not complete without exhausting peremptory challenges; State v. Nicholls, 50 La. Ann. 699, 23 South. 980. See CHALLENGE.

Summoning improper jurors, whether biased or otherwise, is a contempt of court on the part of the officer who does it; Richards v. U. S., 126 Fed. 105, 61 C. C. A. 161; and a challenge to the array will lie in such case; *id.;* Harjo v. U. S., 1 Okl. Cr. R. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

Exemption. Usually public officials are exempt; and persons engaged in various classes of occupations are often exempt; thus in New York, clergymen, physicians, lawyers, professors, and teachers, persons engaged in certain kinds of manufacturing, canal officials, those employed on steam vessels, employés of railroad and telegraph companies, members of the militia and fire department, etc. Exemption is only during actual employment; State v. Willard, 79 N. C. 660; and the right of exemption is a personal privilege and usually not a ground of challenge; Moore v. Cass, 10 Kan. 288; Davison v. People, 90 Ill. 221; or a disqualification; Breeding v. State, 11 Tex. 257; State v. Forshner, 43 N. H. 89, 80 Am. Dec. 132.

The members of an association formed to aid in the prosecution of a particular class of offences, and those who are in sympathy with the association, and contribute money for the purposes of its organization, are not competent to sit as jurors on the trial of an indictment for an offence of the class for the prosecution of which the association is formed and the money contributed; State v. Moore, 48 La. Ann. 380, 19 South. 285. In a suit against a beneficial association, membership in the order does not disqualify a juror, but only membership of the lodge sued; Delaware Lodge No. 1, I. O. O. F., v. Allmon, 1 Pennewill (Del.) 160, 39 Atl. 1098.

Persons related within the prohibited degree to members of a mutual fire insurance company are incompetent to serve as jurors in an action against it; Moore v. Ins. Ass'n, 107 Ga. 199, 33 South. 65.

A juror was disqualified at common law by openly declaring his opinion that the party was guilty; 2 Hawk. Pl. C. ch. 43, § 27. Yet if such declaration was made from his knowledge of the case and not out of any ill-will to the party, it is no cause of challenge; 2 *id.* § 28.

Where a statute disqualifies persons related within certain degrees of affinity from serving as jurors on the trial of a cause to which their affinities are parties, husbands whose wives are second cousins are not affinities; Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549.

In Tennessee it has been held that a statute disqualifying from service, either on grand or petit juries, persons engaged in a conspiracy against law and order is not unconstitutional; Jenkins v. State, 99 Tenn. 569, 42 S. W. 263. In this case the statute in question was for the suppression of what are known as White Caps, and disqualified for jury duty all persons who had been guilty of any offence under the statute. So also a similar disqualification of all persons violating the act for the suppression of polygamy was held valid; Clawson v. U. S., 114 U. S. 477, 5 Sup. Ct. 949, 29 L. Ed. 179.

Swearing the jury. At common law it appears to have been the practice to swear each juryman as he is drawn and accepted; Joy, Conf. 220; State v. Potter, 18 Conn. 166. The present practice is to swear the entire jury after the panel is completed. Either practice is lawful; People v. Reynolds, 16 Cal. 128. It is not irregular to swear all the jurors when the court opens, to try all the issues that may be brought before them; Thomp. & Merr. Juries 318; People v. Albany Court of Common Pleas, 6 Wend. (N. Y.) 548. But this practice has been disapproved of in criminal cases on the ground

of the salutary effect both on the prisoner and the jury of the formality of administering an oath in the presence of the prisoner; Barney v. People, 22 Ill. 160. It is also considered the better practice in criminal cases to have the panel full before the oath is administered; Thomp. & Merr. Juries 319; O'Connor v. State, 9 Fla. 215.

The impanelling and final acceptance of a jury by a court is a judicial determination that the jurors are competent; and if any objection to the qualifications of a juror is known to a party before such determination, it cannot be raised afterwards, unless on exception to the overruling of a challenge; People v. Scott, 56 Mich. 154, 22 N. W. 274.

If, after a jury is sworn, a juror becomes incompetent, the entire jury should be discharged; but if a juror never was competent, a twelfth juror may be sworn in his place; State v. Ronk, 91 Minn. 419, 98 N. W. 334.

In 1 Cox C. C. 150, a juror became ill in the midst of the trial, the jury was then discharged, a new juror was drawn and the eleven jurors were resworn and the evidence recapitulated; so in De Berry v. State, 99 Tenn. 207, 42 S. W. 31, as to either a civil or criminal trial; to the same effect, State v. Davis, 31 W. Va. 390, 7 S. E. 24. If a sworn juror becomes ill before the panel is made up, a new juror may be selected; State v. Moncla, 39 La. Ann. 868, 2 South. 814. If a juror becomes insane pending a criminal trial, the court should declare a mistrial and proceed *de novo;* Dennis v. State, 96 Miss. 96, 50 South. 499, 25 L. R. A. (N. S.) 36.

The parties are entitled to fresh challenges against the entire new jury; Turner v. Territory, 15 Okl. 557, 82 Pac. 650; *contra*, State v. Hazledahl, 2 N. D. 524, 52 N. W. 315, 16 L. R. A. 150; State v. Nash, 46 La. Ann. 194, 14 South. 607. See note to Dennis v. State, 25 L. R. A. (N. S.) 36.

Influencing the jury. An attempt to influence a jury corruptly by promises, persuasions, entreaties, money, entertainments, and the like is a misdemeanor at common law; State v. Brown, 95 N. C. 685; 2 Bish. Cr. L. 384; Gibbs v. Dewey, 5 Cow. (N. Y.) 503. Arguments of counsel in open court at the trial of a cause are a legitimate use of influence and are not within this rule, but it would be a crime to take advantage of the opportunity afforded in order to influence the jurors corruptly; People v. Myers, 70 Cal. 582, 12 Pac. 719. Where an attempt to influence a jury, amounting to embracery, is made, it is immaterial whether they give any verdict or not, and if they give a verdict, it is no defence that it is a true one. This crime may be committed by a juror if he corruptly attempts to influence other jurors; Cl. Cr. L. 326; or if he by indirect practices gets himself sworn on the tales to serve on one side; 1 Litt. 573.

Misconduct of jurors. The giving of testimony by a juror to his associates in the jury room is misconduct; Richards v. State, 36 Neb. 17, 53 N. W. 1027; Ellis v. State, 33 Tex. Cr. R. 508, 27 S. W. 135; but in order to obtain a new trial on the ground of misconduct, injury to the party must be shown; Medler v. State, 26 Ind. 171; State v. Cross, 95 Ia. 629, 64 N. W. 614; Com. v. Roby, 12 Pick. (Mass.) 496; a new trial was granted because a juror stated in the jury room that the defendant had hit the prosecutor on the head with an ax-handle on a former occasion; Mann v. State, 47 Tex. Cr. R. 250, 83 S. W. 195; but probably the granting or denial of a motion for a new trial for misconduct of the jury is largely in the discretion of the court; People v. Johnson, 110 N. Y. 134, 17 N. E. 684; Com. v. White, 147 Mass. 76, 16 N. E. 707.

Where each of the jurors set down the term of imprisonment and divided the sum by twelve, but did not agree in advance to be bound by the result, the verdict could not be questioned; McAnally v. State (Tex.) 57 S. W. 832.

As to the effect of improper influence on, or misconduct of, the jury, see NEW TRIAL.

Separation during trial. At common law the jury was kept together until they had agreed upon their verdict. Even the right to adjourn a trial from day to day was doubted; 24 How. St. Tr. 414. At present jurors in civil cases are allowed to separate each day; and so in trials for misdemeanors, at the discretion of the court. In some cases also in trials for felony, even in capital cases. But in an able work the opinion is maintained that in cases of capital felonies the jury should not be allowed to separate, as they were not at common law; Thomp. & Merr. Juries 367; but absolute isolation is not required; they may be kept under the charge of a sworn officer who shall exercise a reasonable oversight; *id.* 370. The officer in charge must be sworn; 2 Hale, P. C. 296; although if he be a sheriff or constable and *ex officio* in charge of the jury, he need not be specially sworn; Meyer v. Foster, 16 Wis. 294.

The presence of a barber admitted to the jury room for the convenience of the jurors is not sufficient cause for setting aside the verdict; Com. v. Lombardi, 221 Pa. 31, 70 Atl. 122.

Where the jury is discharged by the court for having separated after being sworn, the trial is not a bar to a subsequent prosecution; State v. Costello, 11 La. Ann. 283; State v. Hall, 9 N. J. L. 256; People v. Reagle, 60 Barb. (N. Y.) 527; Hilbert v. Com., 51 S. W. 817, 21 Ky. L. Rep. 537; Com. v. Roby, 12 Pick. (Mass.) 496; but where the jury, finding one of their number disqualified, dispersed without the knowledge of the court, the defendant was held to have been

once in jeopardy and could not again be tried; Maden v. Emmons, 83 Ind. 331.

Affidavits of jurors will not be received to impeach a verdict; Thomp. & Merr. Juries 539, citing numerous cases; Croasdale v. Tantum, 6 Houst. (Del.) 218; People v. Azoff, 105 Cal. 632, 39 Pac. 59; Allison v. People, 45 Ill. 37. Nor will statements of third parties who derived their information from a member of the jury; Thomp. & Merr. Juries 547; Peterson v. Skjelver, 43 Neb. 663, 62 N. W. 43; State v. Schaefer, 116 Mo. 96, 22 S. W. 447.

The court may question the jury as to the grounds upon which they based their verdict, if there was more than one ground; Spoor v. Spooner, 12 Metc. (Mass.) 281. A juryman may be heard to show misconduct on the part of third parties; Ritchie v. Holbrooke, 7 S. & R. (Pa.) 458; and jurymen should report to the court any attempt to influence them; Allison v. People, 45 Ill. 37. But affidavits appear to be admissible to impeach the verdict, in Tennessee; Joyce v. State, 7 Baxt. (Tenn.) 273; and to a certain extent in Iowa; Wright v. Telegraph Co., 20 Ia. 195; and Kansas; Johnson v. Husband, 22 Kan. 277; and to show that a verdict was decided by lot; Fain v. Goodwin, 35 Ark. 109.

Testimony or affidavits of jurors as to what occurred in the jury room are generally excluded; Woodward v. Leavitt, 107 Mass. 453, 9 Am. Rep. 49, and this rule has been followed to the extent of excluding even evidence of improper conduct—as that a juror had made material statements from his own knowledge; St. Louis S. W. R. Co. v. Ricketts, 96 Tex. 68, 70 S. W. 315; Price's Ex'r v. Warren, 1 Hen. & M. (Va.) 385; Clum v. Smith, 5 Hill (N. Y.) 560; Boetge v. Landa, 22 Tex. 105; *contra*, State v. Burton, 65 Kan. 704, 70 Pac. 640.

The admission of affidavits of jurymen to the fact that they have not been influenced by newspaper articles is immaterial, if a motion for a new trial is rightly overruled on other grounds; Spreckels v. Brown, 212 U. S. 208, 29 Sup. Ct. 256, 53 L. Ed. 476.

Jurors are competent witnesses, in a proceeding in equity to remedy a mistake made by the foreman in announcing the verdict, to prove that the verdict read out in court was not their verdict, but the result of an oversight; Hamburg-Bremen Fire Ins. Co. v. Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

Proceedings apart from the jury. There is no settled rule that arguments as to the admissibility of evidence should be conducted apart from the jury in criminal cases; Mose v. State, 36 Ala. 211; *contra*, White v. State, 10 Tex. App. 381; it is in the discretion of the court, and no exception lies in either case; State v. Wood, 53 N. H. 484; State v. Moore, 104 N. C. 743, 10 S. E. 183; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421; Lewis v. State, 85 Miss. 35, 37 South. 497; Poole v. State, 45 Tex. Cr. R. 348, 76 S. W. 565; Driggers v. State, 38 Fla. 7, 20 South. 758. In deciding the question, the court may assign its reasons in the hearing of the jury; Patterson v. State, 86 Ga. 70, 12 S. E. 174. It was held that in a murder trial the jury may be required to retire during the argument of such questions; Kraner v. State, 61 Miss. 158; but in another such case it was held error for the court to exclude the jury during argument on the law by defendant's counsel; Patterson v. State (Tex.) 60 S. W. 557.

Where confessions are offered, the preliminary inquiry may be conducted in the presence of the jury or not, in the discretion of the judge; Lefevre v. State, 50 Ohio St. 584, 35 N. E. 52; State v. Kelly, 28 Or. 225, 42 Pac. 217, 52 Am. St. Rep. 777; such inquiry was held to be properly conducted in the presence of the jury in Holsenbake v. State, 45 Ga. 43; Shepherd v. State, 31 Neb. 389, 47 N. W. 1118; *contra*, Hall v. State, 65 Ga. 36; Carter v. State, 37 Tex. 362; and where after proper preliminary examination, they have been admitted, there is no room for question touching the propriety of conducting the examination in the presence of the jury, but it has been held that it must not be in the presence of the jury if the accused so request; Ellis v. State, 65 Miss. 44, 3 South. 188, 7 Am. St. Rep. 634.

Expert evidence. In respect of questions upon which men of ordinary observation and experience have some practical knowledge of their own, jurors are not dependent upon the opinions of experts even though they would be assisted by them, since they are expected to apply their own observation and experience of the affairs of life to the evidence in forming their conclusions; Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553; McGarrahan v. R. Co., 171 Mass. 211, 50 N. E. 610; State v. R. Co., 86 Me. 309, 29 Atl. 1086; Jamieson v. Oil Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Chicago, M. & St. P. R. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962, where many other cases are collected.

See EXPERTS.

Jurors taking notes. Jurors may not take notes of the testimony of witnesses to refresh their memories in consultation with their fellow jurors; Com. v. Wilson, 19 Pa. Dist. Ct. 48, where Wiltbank, J., an experienced trial judge, directed notes so taken to be surrendered and sealed and returned to the jurymen after the trial. The reason for this rule is said to be that "the jury should not be allowed to take evidence with them to their room except in their memory. It can make no difference whether the notes are written by a juror or by some one else. Jurors would be too apt to rely on what

might be imperfectly written and thus make the case turn on a part only of the facts;" Cheek v. State, 35 Ind. 492; Batterson v. State, 63 Ind. 531; Long v. State, 95 Ind. 481. Where a justice of the peace, at the request of the jury after they had retired, gave them without the consent of the parties his minutes of the trial, the judgment was reversed on *certiorari*, and this action was affirmed by the supreme court; Neil v. Abel, 24 Wend. (N. Y.) 185.

Where a juror on a trial for murder for three weeks openly took notes of the testimony, it was held that it did not as a matter of law require the setting aside of the verdict; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056; and in civil cases some courts permit counsel to request the jury to take notes of a particular fact or calculation, though they cannot be required to comply; Tift v. Towns, 63 Ga. 237; Indianapolis & St. L. R. Co. v. Miller, 71 Ill. 463; but generally note-taking by jurors is considered an improper practice, though it is allowed by statute in some states; U. S. v. Davis, 103 Fed. 457; Cowles v. Hayes, 71 N. C. 230; Thomas v. State, 90 Ga. 437, 16 S. E. 94.

Even in a murder trial the verdict will not be set aside if it does not affirmatively appear that neither the defendant nor his counsel had knowledge of it, as consent is in that case presumed from failure to object; State v. Robinson, 117 Mo. 649, 23 S. W. 1066.

Taking a view. Where a jury is called upon to assess the value of land, the impressions acquired by the jury after a view are competent evidence; Chicago, R. I. & P. Ry. Co. v. Farwell, 59 Neb. 544, 81 N. W. 440; Parks v. City of Boston, 15 Pick. (Mass.) 198; City of Springfield v. Dalby, 139 Ill. 34, 29 N. E. 860; Tully v. R. Co., 134 Mass. 499; though it has been held that the view is only effectual for the application of evidence given in court; Machader v. Williams, 54 Ohio St. 344, 43 N. E. 324; and it is stated that this restriction is imposed where the view is for any other purpose than the mere valuation of the land; Wright v. Carpenter, 49 Cal. 607; but this limitation upon the general rule has been considered to be without foundation; 13 Harv. L. R. 692.

In some cases, where a jury is authorized in a trial before a justice of the peace, it has been held to be no more than a body of referees and not a true jury trial, and therefore the case could be tried by another jury in the superior court; Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873.

The province of the jury is to determine the truth of the facts in dispute in civil cases, and the guilt or innocence of the person accused in criminal cases. Thorn. Jur. § 133. See CHARGE. If they go beyond their province, their verdict may be set aside; 4 Maule & S. 192; 3 B. & C. 357; 2 Price 282; Ex parte Baily, 2 Cow. (N. Y.) 479; Hall v. Huse, 10 Mass. 39.

The question whether the jury are judges of the law as well as of the fact, or whether it is the function of the court conclusively to instruct the jury upon the law, particularly in criminal cases, has been very much discussed from the earliest times and was the subject of critical examination by the United States supreme court; Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343. See *infra*.

Coke says: "As the jury may, as often as they think fit, find a general verdict, I therefore think it unquestionable that they so far may decide upon the law as well as fact, such a verdict naturally involving both. In this I have the authority of Littleton himself, who hereafter writes, 'that if the inquest will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally.'"

He further says in substance: "Questions of law generally and more properly belong to the judges. The immediate and direct right of declaring upon questions of law is entrusted to the judges; that in the jury is only incidental." Co. Litt. 156 *a*, n. (5).

Though the question had not, until more recently, been the subject of a direct decision of the United States supreme court, it had frequently arisen in England and America. In the former country, in the case of the Dean of St. Asaph, the court alluded to the admission by both parties of an ancient rule of the common law that the law should be determined by the court and the facts by the jury; but they differed as to what was law and what fact, it being contended on one side that the question of guilt in a libel case, after the fact of publication and truth of the innuendoes are found by the jury, was a question of law, and on the other side that the guilt of the defendant was a question of fact. This concurrence of views on the point in question "affords strong proof that, up to the period of our separation from England, the fundamental definition of trials by jury depended on the universal maxim, without an exception, *ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices.*"

The doctrine that a jury may disregard the law as declared by the court finds its principal, original support in Bushell's case, Vaughan 135, where the question was on habeas corpus whether jurors were liable to be fined and imprisoned for nonpayment of fine for having found a general verdict in opposition to the instructions of the court. Vaughan, C. J., held that because a general verdict of necessity resolves "both law and fact complicately and not the fact by itself," it could not be proved that the jurors did not proceed upon their view of the evidence.

This line of argument is implicitly relied upon by the advocates of the extreme right of the jury, but has been rightly characterized as narrow; though conclusive in the case to which it related; U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815; Hallam, Const. Hist. c. 13; Com. v. Anthes, 5 Gray (Mass.) 185. The line of argument in the English case, taken together with the criticisms upon it, well illustrate the difficulties of the subject which arise necessarily in every case which is submitted to a jury upon mixed questions of law and fact. However frankly it may be stated that the jury are bound by the views of the law delivered to them by the court, the obligation to accept those views is rather moral than susceptible of rigid practical enforcement. Early English cases supporting the doctrine that the jury are judges of the fact and not of the law are, 1 Plowd. 111; *id.* 233; 2 *id.* 493; 2 Stra. 766; Lord Hardwicke said: "The thing that governs greatly in this determination is, that the point of the law is not to be determined by juries; juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject, that these powers of the judge and the jury are kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." Cas. *temp.* Hardwicke 23. Foster, after stating the rule that the ascertainment of all the facts is the province of the jury, says: "For the construction the law putteth upon facts stated and agreed, or found by a jury is in this, as in all other cases, undoubtedly the proper province of the court." And he adds that in cases of difficulty, a special verdict is usually found, but where the law is clear, the jury, under the direction of the court as to the law, may and, if well advised, always will find a general verdict conformably to such direction; Fost. Cr. L., 3d ed. 255. To the same effect, it has been urged, is the settled current of English authority; Wynne's Eunomus, Dial. III. §§ 53, 523; 1 Steph. Hist. Cr. L. 551; 2 Hawk. P. C. c. 22, § 21; 3 Term 428; 4 Bing. 195; 8 C. & P. 94; *contra*, Vaughan 135; 4 B. & Ald. 145.

The question arose most frequently in England in connection with prosecutions for libel, and it was contended that Fox's Libel Act changed the common-law rule, but this was not the case. In a leading case arising under that act, it was held that it was for the judge to define the offence and then for the jury to say whether the publication under consideration was within that definition; 6 M. & W. 104 (see as to this case, Sparf v. U. S., 156 U. S. 97, 15 Sup. Ct. 273, 39 L. Ed. 343; U. S. v. Morris, 1 Curt. C. C. 55, Fed. Cas. No. 15,815); 2 Jur. 137. In the House of Lords the unanimous opinion of the judges was given by Tindal, C. J., in answer to a question whether, if a fine were received in evidence, it ought to be left to the jury to say whether it barred an action of *quare impedit*, that "the judge who tried the cause should state to the jury whether in point of law the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle *ad quæstionem juris non respondent juratores*." 4 Cl. & Fin. 445.

In state courts it has been held to be "a well-settled principle, lying at the foundation of jury trials, admitted and recognized ever since jury trial had been adopted as an established and settled mode of proceeding in courts of justice, that it was the proper province and duty of judges to consider and decide all questions of law, and the proper province and duty of the jury to decide all questions of fact;" Com. v. Anthes, 5 Gray (Mass.) 185; Pierce v. State, 13 N. H. 536; Hamilton v. People, 29 Mich. 173; People v. Anderson, 44 Cal. 65; State v. Burpee, 65 Vt. 1, 34, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775 (overruling State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90, and every case which followed it); Montee v. Com., 3 J. J. Marsh. (Ky.) 132. The citations include both civil and criminal cases. There undoubtedly exists a power in the jury to override the law as declared by the court and to make their action effective by an acquittal in a criminal case which cannot be set aside. This thought has received frequent expression from judges and courts of great authority. "The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law, as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts, I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based;" Duffy v. People, 26 N. Y. 588; see also People v. Finnegan, 1 Park. Cr. Cas. (N. Y.) 147. In Pennsylvania there has been, in some cases, a very strong expression of the idea that in criminal cases the juries are judges of the law as well as of the fact. This was very earnestly stated by Sharswood, C. J., who said that the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the bill of rights of Pennsylvania; Kane v. Com., 89 Pa. 522, 33 Am. Rep. 787; but this unqualified statement

is not sustained by the leading cases in that state. In Com. v. Sherry, reported in Whart. Hom. (App.) 481, Rogers, J., said: "You are, it is true, judges in a criminal case, in one sense, of both law and fact; for your verdict, as in civil cases, must pass on law and fact together. If you acquit, you interpose a final bar to a second prosecution, no matter how entirely your verdict may have been in opposition to the views expressed by the court. . . . It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal, to discharge a defendant from further prosecution, you have no moral power to do so against the law laid down by the court. . . . For your part, your duty is to receive the law, for the purposes of this trial, from the court. If an error injurious to the prisoner occurs, it will be rectified by the revision of the court in banc. But an error resulting from either a conviction or acquittal, against the law, can never be rectified. In the first case, an unnecessary stigma is affixed to the character of a man who was not guilty of the offence with which he is charged. In the second case, a serious injury is effected by the arbitrary and irremediable discharge of a guilty man. You will see from these considerations the great importance of the preservation, in criminal as well as in civil cases, of the maxim that the law belongs to the court and the facts to the jury."

Other expressions substantially to the same effect are: "If the evidence on these points fail the prisoner, the conclusion of his guilt will be irresistible, and it will be your duty to draw it;" Gibson, C. J., in Com. v. Harman, 4 Pa. 269.

"The court had an undoubted right to instruct the jury as to the law, and to warn them as they did against finding contrary to it. This is very different from telling them that they *must* find the defendant guilty, which is what is meant by a binding instruction in criminal cases;" Nicholson v. Com., 96 Pa. 503. In Com. v. McManus, 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89, it was held "that the statement by the court was the best evidence of the law within the reach of the jury, and that the jury should be guided by what the court said as to the law," and this, Paxson, C. J., speaking for the court, declared to be in harmony with the case in which is found the expression of Sharswood, C. J., *supra*.

In this case Mr. Justice Mitchell filed a vigorous concurring opinion in which he says: "Upon one point I would go further and put an end once for all to a doctrine that I regard as unsound in every point of view, historical, logical, or technical. . . . The jury are not judges of the law in any case, civil or criminal; neither at common law, nor under the constitution of Pennsylvania, is the determination of the law any part of their duty or their right. The notion is of modern growth and arises undoubtedly from a perversion of the history and results of the right to return a general verdict, especially in libel cases, which ended in Fox's Bill." He then considers the question historically, and on the authorities, and says that there is not a single respectable English authority for the doctrine, and that, against a "solid phalanx" of American authorities, there is but a single authority in its favor (State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90), which was by a divided bench (and which has been since overruled; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775, *supra*). He concludes that "the jury were never judges of the law in any case, civil or criminal, except as involved in the mixed determination of law and fact by a general verdict." In an annotation of the case in State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775, which overruled what is here characterized as practically the only authority in support of the doctrine, it is said: "The ghost of the doctrine that juries in criminal cases are to judge of the law as well as the facts would seem to be effectually laid by the above decision. . . . That solitary authority (State v. Croteau, 23 Vt. 14, 54 Am. Dec. 90), which has often been attacked and discredited, is now by the case above reported completely overruled."

In the federal courts, prior to the direct decision of the supreme court already referred to, the question had been frequently examined. The most elaborate discussion of the subject was by Mr. Justice Curtis, whose opinion is very much relied upon by the supreme court. His conclusion was "that when the constitution of the United States was founded, it was a settled rule of the common law that, in criminal as well as in civil cases, the court decided the law, and the jury the facts; and it cannot be doubted that this must have an important effect in determining what is meant by the constitution when it adopts a trial by jury." U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815. Mr. Justice Field said (charging a jury) in U. S. v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254: "There prevails a very general, but an erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the fact—that is, that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury." "It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury."

To the same effect are U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; U. S. v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16,164; Stettinius v. U. S., 5 Cra. C. C. 573, Fed. Cas. No. 13,387; U. S. v. Keller, 19 Fed. 633.

The authorities which have been sometimes relied upon to support the contrary view are Georgia v. Brailsford, 3 Dall. (U. S.) 1, 1 L. Ed. 483; 1 Burr's Trial 470; 2 *id.* 422; Whart. St. Tr. 48, 84; Chase's Trial App. 44. These authorities received a very critical examination both by Mr. Justice Curtis in U. S. v. Morris, 1 Curt. C. C. 23, Fed. Cas. No. 15,815, and by Mr. Justice Harlan, who delivered the opinion of the court in Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343; and in the dissenting opinion of Mr. Justice Gray (and except by the latter) they were not considered, when properly read, as sustaining the view in support of which they are usually cited. The opinion of Mr. Justice Harlan, last referred to, contains a full discussion of the subject, and in it will be found most of the authorities herein cited. It was held that where there was no evidence upon which the jury could properly find the defendant guilty of an offence included in it less than the one charged, it is not error to instruct them that they cannot return the verdict of any lesser offence. In support of the rule laid down in this decision, see also Cooley, Const. Lim. 323; 1 Greenl. Ev. § 49; Thomp. Tr. § 1016; and the valuable note by Dr. Wharton in 1 Cr. L. Mag. 51. By way of explanation of some of the expressions so much relied upon in support of a contrary view, Mr. Justice Harlan in his opinion referred to, *supra*, says: "The language of some judges and statesmen in the early history of the country, implying that the jury were entitled to disregard the law as expounded by the court, is, perhaps, to be explained by the fact that 'in many of the states the arbitrary temper of the colonial judges, holding office directly from the crown, had made the independence of the jury in law as well as in fact of much popular importance.' Whart. Cr. Pl. & Pr., 8th ed. § 806; Williams v. State, 32 Miss. 389, 396, 66 Am. Dec. 615."

The argument for the right of the jury to decide the law in criminal cases has been most recently fully presented in the dissenting opinion of Mr. Justice Gray, with whom concurred Mr. Justice Shiras, in Sparf v. U. S., *supra*. In this opinion, from a long and careful examination of the authorities, the conclusion is thus stated: "It is our deep and settled conviction, confirmed by a reexamination of the authorities under the responsibility of taking part in the consideration and decision of the capital case now before the court, that the jury, upon the general issue of guilty or not guilty in a criminal case, have the right, as well as the power, to decide, according to their own judgment and consciences, all questions, whether of law or of fact, involved in that issue." It may be noted that of three cases cited in this opinion as containing the ablest discussion of the subject on both sides, and taking the same view as that advocated by Mr. Justice Gray, two opinions, those of Chancellor Kent and Mr. Justice Thomas in favor of the right, were also dissenting opinions and that of Judge Hall, of Vermont, on the other side, the only one of the three which was an authority, has lately been overruled, as stated *supra*. The English authorities are very fully discussed, and much attention is given to cases which are claimed as authorities in favor of the views presented which have already been cited, *supra*, and of which those who argue against the right of the jury to decide the law, question either the authority or the application. The contention of this dissenting opinion is that the result of the English authorities is in favor of the ultimate right of the jury to decide the law, notwithstanding the instructions of the court, and that the earlier American authorities are to the same effect. It is admitted that in the later American cases, "the general tendency of decision in this country has been against the right of the jury, as well as in the courts of the several states, including many states where the right was once established, as in the circuit courts of the United States. The current has been so strong that in Massachusetts, where counsel are admitted to have the right to argue the law to the jury, it has yet been held that the jury have no right to decide it, and it has also been held, by a majority of the court, that the legislature could not constitutionally confer upon the jury the right to determine, against the instructions of the court, questions of law involved in the general issue in criminal cases; and in Georgia and in Louisiana, a general provision in the constitution of the state, declaring that 'in criminal cases the jury shall be judges of the law and fact,' has been held not to authorize them to decide the law against the instructions of the court. . . . But, upon the question of the true meaning and effect of the constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage." Sparf v. U. S., 156 U. S. 51, 168, 15 Sup. Ct. 273, 39 L. Ed. 343.

A statute which provided that the court should state its opinion to the jury upon all questions of law arising in the trial of a criminal case and submit to their consideration both the law and fact without any direction how to find their verdict did not make the jury judges of the law as well as of the facts, and it was their bounden duty to accept the law as stated by the court; State v. Gannon, 75 Conn. 206, 52 Atl. 727, where the cases are examined at length and the opin-

lons in Sparf v. U. S., 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343, *supra*, are referred to as covering the whole range of the controversy. The other cases cited in the Connecticut case in support of this view are Lord Mansfield, in 3 Term 428; Story, J., in U. S. v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; Shaw, C. J., in Com. v. Porter, 10 Metc. (Mass.) 263; Curtis, J., in U. S. v. Morris, 1 Curtis 23, Fed. Cas. No. 15,815; Selden, J., in Duffy v. People, 26 N. Y. 588; State v. Smith, 6 R. I. 33; Hamilton v. People, 29 Mich. 173; State v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145, 36 Am. St. Rep. 775.

Directing the verdict. The most frequent expression of the rule is that, where there is no evidence tending to prove the facts set up by the party who sustains the burden of proof, the court is bound, on request, to direct the jury to return a verdict for the opposite party; Charles v. Patch, 87 Mo. 462. On the other hand, where there is any evidence tending to prove such facts, the court cannot so direct the verdict, but must submit the evidence to the jury and leave it to them to determine whether it is sufficient to that end; Dow v. Chandler, 85 Mo. 247; Thomp. Tr. § 2245.

When the testimony is all in one direction, or when all the evidence for the plaintiff has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law; Boland v. R. Co., 36 Mo. 491; Vinton v. Schwab, 32 Vt. 612.

It is only where the evidence, with all fair and legitimate inferences, and viewed in the most favorable light, is insufficient to justify a verdict for the plaintiff, that the court may direct a verdict for the defendant; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Dwyer v. R. Co., 52 Fed. 87; Leiser v. Kieckhefer, 95 Wis. 4, 69 N. W. 979. A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way; Monroe v. Ins. Co., 52 Fed. 777, 3 C. C. A. 280. Where, from the testimony before the jury, different minds might draw different conclusions, it is error to direct a verdict; Eisenlord v. Clum, 67 Hun 518, 22 N. Y. Supp. 574; Des Jardins v. Boom Co., 95 Mich. 140, 54 N. W. 718. Where the right of recovery depends on questions of fact, there must be a submission to the jury; Heere v. Bank, 160 Pa. 314, 28 Atl. 688. A direction to find for the defendant was held proper, in an action against a railroad for interference with the plaintiff's business, where no evidence was offered showing the injury caused by such interference; Baird v. R. R., 154 Pa. 463, 25 Atl. 834. Where it is shown by an open statement of counsel for the plaintiff that the contract on which the suit is brought is void, the court may direct the jury to find a verdict for the defendant; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539. There can be no serious doubt but that the court can at any time direct the jury when the facts are undisputed, and that the jury should follow such direction; *id.*

A court may withdraw a case from a jury and direct a verdict where evidence is undisputed or is so conclusive that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it; Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Anderson County v. Beal, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; Randall v. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; though jurors are the recognized triors of the facts and cases are not lightly to be taken from them, particularly the question of negligence, and where the jury had reasonable ground to infer it, the question should be left to them; Marande v. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487.

For a clear statement of the doctrine of peremptory instructions, as laid down by Mr. Justice Harlan, see INSTRUCTIONS. See also CHARGE; VERDICT.

Coercion of juries. Any communication of the judge to the jury after they have retired except in open court is improper; Sargent v. Roberts, 1 Pick. (Mass.) 337, 11 Am. Dec. 185; Texas Midland R. Co. v. Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429, 20 Ann. Cas. 137; so if the judge entered the jury room, it is reversible error; State v. Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609, 16 Ann. Cas. 1133; Abbott v. Hockenberger, 31 Misc. 587, 65 N. Y. Supp. 566; Du Cate v. Brighton, 133 Wis. 628, 114 N. W. 103; or sends additional instructions without the consent of or notice to parties or counsel; Read v. City of Cambridge, 124 Mass. 567, 26 Am. Rep. 690; Quinn v. State, 130 Ind. 340, 30 N. E. 300; Fox v. Peninsular White Lead Works, 84 Mich. 676, 48 N. W. 203; in some cases a new trial was refused because no prejudice resulted, but the practice was disapproved; Galloway v. Corbitt, 52 Mich. 460, 18 N. W. 218; Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182; State v. Olds, 106 Ia. 110, 76 N. W. 644. Some cases hold that no consent will be implied but must be affirmatively shown; Taylor v. Betsford, 13 Johns. (N. Y.) 487; Jones v. Johnson, 61 Ind. 257; in other cases consent has been presumed; Henlow v. Leonard, 7 Johns. (N. Y.) 200. See a note on the subject generally, State v. Murphy, 17 L. R. A. (N. S.) 609.

Where the action of the trial judge and his remarks to the jury, when from time to

time they are brought before him stating their inability to agree, amounts to coercion, the verdict must be set aside; People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 41 L. R. A. 644, 66 Am. St. Rep. 564, where Parker, C. J., discusses the subject at large.

It is within the discretion of the trial judge to recall a jury for inquiry as to their difficulty and for further instructions if deemed advisable, but it is not permissible to inquire in what proportion they are divided, and any instructions in respect to their duty to agree should be carefully guarded, so as not to press that duty unduly upon the minority; Lake Erie & W. R. Co. v. Craig, 80 Fed. 496, 25 C. C. A. 585.

At common law the coercion of juries was both usual and proper; Proff. Jury Trials § 475; and they were kept together practically as prisoners until agreement; Thomp. & Mer. Juries § 310; but that custom no longer obtains; Physioc v. Shea, 75 Ga. 466; and it is settled law that the court may advise the jury to agree but should not threaten long confinement; Phœnix Ins. Co. v. Moog, 81 Ala. 335, 1 South. 108; Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Slater v. Mead, 53 How. Pr. (N. Y.) 57; State v. Grizzard, 89 N. C. 115; but it is not error for the judge to refer to the length of the term and add that he will give them plenty of time to consider and direct their proper accommodation; Osborne v. Wilkes, 108 N. C. 653, 13 S. E. 285. It is also held that any language used by the bailiff in charge tending to coercion will be a ground for a new trial; Cole v. Swan, 4 G. Greene (Iowa) 32; Obear v. Gray, 68 Ga. 182; but a mere jesting remark of the bailiff will not be sufficient to require a new trial, although taken seriously by some of the jury; Pope v. State, 36 Miss. 121; where it does not appear that any prejudice resulted; Darling v. R. Co., 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643, and note.

The removal of a case from the consideration of a jury, in criminal cases, can only take place by consent of the prisoner; 6 C. & P. 151; 5 Cox, Cr. Cas. 501; State v. Slack, 6 Ala. 676; or by some necessity; Wright v. State, 5 Ind. 290, 61 Am. Dec. 90; McCauley v. State, 26 Ala. 135; Poage v. State, 3 Ohio St. 239; Williams v. Com., 2 Gratt. (Va.) 570, 44 Am. Dec. 403; Reynolds v. State, 3 Ga. 60; so as to compel the prisoner to be tried again for the same offence; 4 Bla. Com. 360. But where such necessity exists as would make such a course highly conducive to purposes of justice; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; Com. v. Cook, 6 S. & R. (Pa.) 586, 9 Am. Dec. 465; 2 D. & B. 166; People v. Goodwin, 18 Johns. (N. Y.) 205, 9 Am. Dec. 203; Com. v. Fells, 9 Leigh (Va.) 620; 13 Q. B. 734; it may take place.

Where the state court has the right to discharge a jury for want of agreement, the result is a mistrial and the accused cannot on a subsequent trial interpose the plea of once in jeopardy; Keerl v. State of Montana, 213 U. S. 135, 29 Sup. Ct. 469, 53 L. Ed. 734, where the question was suggested but not decided whether the fourteenth amendment in itself forbids a state from putting one of its citizens in a second jeopardy.

In a criminal case, the court has power to withdraw a juror, but this action rests in the sound discretion of the court and is to be exercised only in very extraordinary and striking circumstances in order to prevent the failure of justice; State v. Lewis, 83 N. J. L. 161, 83 Atl. 692.

The question of necessity seems to be in the decision of the court which tries the case; State v. Updike, 4 Harr. (Del.) 581; Hurley v. State, 6 Ohio 399; People v. Green, 13 Wend. (N. Y.) 55; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165. But see 1 Cox, Cr. Cas. 210; 13 Q. B. 734; Wright v. State, 5 Ind. 292, 61 Am. Dec. 90. A distinction has been taken in some cases between felonies and misdemeanors in this regard; 3 D. & B. 115; U. S. v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15,204; State v. Honeycutt, 74 N. C. 391; but is of doubtful validity; People v. Goodwin, 18 Johns. (N. Y.) 187, 9 Am. Dec. 203; Com. v. Bowden, 9 Mass. 494; Com. v. Olds, 5 Litt. (Ky.) 137; McCauley v. State, 26 Ala. 135; Campbell v. State, 11 Ga. 353.

Among cases of necessity which have been held sufficient to warrant the discharge of a jury without releasing the prisoner are *sickness of the judge;* Nugent v. State, 4 Stew. & P. (Ala.) 72, 24 Am. Dec. 746; State v. Farrow, 8 Bax. (Tenn.) 571; or of his *wife;* State v. Tatman, 59 Ia. 471, 13 N. W. 632; *sickness;* Com. v. Clue, 3 Rawle (Pa.) 498; 2 Mood. & R. 249; 3 Crawf. & D. 212; 1 Thach. Cr. Cas. 1; Mixon v. State, 55 Ala. 129, 28 Am. Rep. 695; State v. Emery, 59 Vt. 84, 7 Atl. 129; or other *incapacity of a juror;* U. S. v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; People v. Damon, 13 Wend. (N. Y.) 351; Stone v. People, 3 Scam. (Ill.) 326; Poage v. State, 3 Ohio St. 239; Dilworth v. Com., 12 Gratt. (Va.) 689, 65 Am. Dec. 264; but see 8 B. & C. 417; 8 Ad. & E. 831; Barlow v. State, 2 Blackf. (Ind.) 114; Com. v. Jones, 1 Leigh (Va.) 599; State v. Hall, 9 N. J. L. 256; *death of a juror's wife;* Chamber of Commerce Bldg. Co. v. Klussman, 25 Oh. Cir. Ct. 728; *sickness of the prisoner;* 2 C. & P. 413; State v. Wiseman, 68 N. C. 203; Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; or the *death* or *insanity* of a *judge* or *juror;* People v. Webb, 38 Cal. 467; Bescher v. State, 32 Ind. 480; *expiration of a term of court;* State v. Moor, Walk. (Miss.) 134, 12 Am. Dec. 541; Lore v. State, 4 Ala. 173; State v. M'Lemore, 2 Hill (S. C.) 680; *inability of the jury to agree;* People v. Den-

ton, 2 Johns. Cas. (N. Y.) 275; Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452; Hurley v. State, 6 Ohio 399; U. S. v. Perez, 9 Wheat. (U. S.) 579, 6 L. Ed. 165; Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118; Pierce v. State, 67 Ind. 354; State v. Allen, 47 Conn. 121; State v. Blackman, 35 La. Ann. 483; State v. Washington, 90 N. C. 664; Kelly v. U. S., 27 Fed. 616; *contra*, Com. v. Cook, 6 S. & R. 577, 9 Am. Dec. 465 (a leading case, per Tilghman, C. J.); McCauley v. State, 26 Ala. 135; 3 Crawf. & D. 212; L. R. 1 Q. B. 289; Com. v. Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 1 L. R. A. 451, 6 Am. St. Rep. 757. But see Dye v. Com., 7 Gratt. (Va.) 662.

In Com. v. Clue, 3 Rawle (Pa.) 498, Gibson, C. J., held that mere inability to agree is not sufficient to justify discharge, nor the illness of two jurymen if it can be relieved by permitting them to have refreshments. In some states, statutes have provided for a discharge upon a disagreement; Lee v. State, 26 Ark. 260, 7 Am. Rep. 611; Crookham v. State, 5 W. Va. 510; Ex parte McLaughlin, 41 Cal. 211, 10 Am. Rep. 272.

After a jury has been sworn, but before the evidence has been begun, a juror may be discharged and another juror called, this being by consent of counsel for the accused; Catron v. State, 52 Neb. 389, 72 N. W. 354. Where, in a felony case, the greater part of the evidence had been heard and a juror was discharged for illness and another one substituted and the evidence was then heard *de novo*, it was held no ground for a new trial; State v. Davis, 31 W. Va. 390, 7 S. E. 24. If, in a felony case, a juror becomes incapacitated by illness, a mistrial should be declared and the case be tried *de novo;* West v. State, 42 Fla. 244, 28 South. 430.

Insufficiency of the evidence to convict; 2 Stra. 984; Andrews v. Hammond, 8 Blackf. (Ind.) 540; Klock v. People, 2 Park. Cr. Cas. (N. Y.) 676; U. S. v. Shoemaker, 2 McLean 114, Fed. Cas. No. 16,279; and sickness or other incapacity of a witness; 1 Crawf. & D. 151; 1 Mood. 186; are not sufficient necessities to warrant the discharge of a jury. See Com. v. Wade, 17 Pick. (Mass.) 399; U. S. v. Coolidge, 2 Gall. 364, Fed. Cas. No. 14,858; 2 Benn. & H. L. Cr. Cas. 337.

It is within the discretion of the trial judge to refuse to discharge the jury until they arrive at a verdict; Wilson v. Ry. Co., 2 Misc. 127, 20 N. Y. Supp. 852. A jury may be discharged from giving any verdict, whenever the court is of the opinion that there is a manifest necessity for the act, or that the ends of public justice would otherwise be defeated, and may even order a trial before another jury, and a defendant is not thereby twice put in jeopardy; Thompson v. U. S., 155 U. S. 271, 15 Sup. Ct. 73, 39 L. Ed. 146.

When a jury in a criminal case is discharged during the trial, and the defendant subsequently put on trial before another jury, he is not thereby twice put in jeopardy within the meaning of the fifth amendment to the United States constitution; Simmons v. U. S., 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968.

See JEOPARDY; WITHDRAWING A JUROR.

Duties and privileges of. Qualified persons may be compelled to serve as jurors under penalties prescribed by law. They are exempt from arrest in certain cases. See PRIVILEGE. They are liable to punishment for misconduct in some cases.

When improper questions are asked of a witness, by a juryman, and answered, if no objection is made or exception taken, no error is saved, and if inquiries are made by juryman with court's permission, failure of the court to interpose objections is not reversible error; State v. Crawford, 96 Minn. 95, 104 N. W. 768, 822, 1 L. R. A. (N. S.) 839; as a general rule, though the cases are few, questions of witnesses by jurors seem to be permitted; Chicago, M. & St. P. Ry. Co. v. Harper, 128 Ill. 384, 21 N. E. 561; Schaefer v. Ry. Co., 128 Mo. 64, 30 S. W. 331.

A frequent variation from the common-law jury system is to permit the jury to impose the punishment (this being formerly considered a matter for judicial discretion), or, as in some states, to divide the responsibility between the judge and jury; and such legislation is held constitutional; Rice v. State, 7 Ind. 332; State v. Hockett, 70 Ia. 442, 30 N. W. 742; 1 Bish. N. Cr. L. § 934.

In criminal cases, in Scotland, a jury consists of fifteen and a majority may convict. In Belgium, criminal and political charges and offences of the press are tried before a jury. Trial by jury has existed in Greece since 1834. In Sweden it exists in cases of offences of the press; and in Italy, in criminal cases, and a majority may convict. In Norway, it was established in 1887, and there also a majority may convict. In Russia, since 1864, all criminal cases involving severe penalties, except political offences, are tried by juries. Hawaii has a jury of twelve, both in civil and criminal cases, of whom nine may render a verdict. In South America, all the states have the jury system. In France, trial by jury exists in cases of felony, and it is provided in Germany, by the imperial code, in all criminal cases except treason, political crimes and offences of the press.

JURY BOX. A place set apart for the jury to sit in during the trial of a cause.

JURY LIST. A paper containing the names of jurors impanelled to try a cause, or it contains the names of all the jurors summoned to attend court.

JURYMAN. A juror; one who is impanelled on a jury. Webster, Dict.

JURY PROCESS. The writs for summoning a jury, viz.: in England, *venire juratores facias*, and *distringas juratores*, or *ha-*

beati corpora juratorum. These writs are now abolished, and jurors are summoned by precept. 1 Chitty, Archb. 344; Com. Law Proc. Act, 1852, § 104; 3 Chitty, Stat. 519.

JURY OF WOMEN. A jury of women is given in two cases; viz.: on writ *de ventre inspiciendo*, which was a writ directed to the sheriff, commanding him that, in the presence of twelve men and as many women, he cause examination to be made whether a woman therein named is with child or not, and if with child, then about what time it will be born, and that he certify the same.

The jury has to be one of "discreet women." The practice was to close the doors before the jury was impanelled. See 8 Carr. & P. 265, where a surgeon was sent out with the jury; on his return to the court he was sworn and made his report. The jury then retired and brought in a verdict.

It was granted in a case when a widow, whose husband had lands in fee-simple, marries again soon after her husband's death, and declares herself pregnant by her first husband, and, under that pretext, withholds the lands from the next heir; Cro. Eliz. 506; Fleta, lib. 1, c. 15. In that case, although the jury was made up of men and women, the examination was made by the latter; 1 Madd. Ch. 11; 2 P. Wms. 591. Such a writ was issued in the case of In re Blackburn, 14 L. J. N. S. Ch. 336. In New York it is said that an application was made for such a jury in the Rollwagen will case and denied upon the ground that "as the lady was not going to be hanged and did not herself solicit the investigation, there was no power to compel her to submit to it;" 10 Alb. L. J. 3. In the opinion of the court in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 11 Sup. Ct. 1000, 35 L. Ed. 734, the statement is made by Mr. Justice Gray that this writ has never been used in this country. The authorities cited in this title show that this statement is too broad both as to the use of the common-law writ and as to *physical examination*, which title see further as to that case.

Where pregnancy is pleaded by a condemned woman, in delay of execution, a jury of twelve discreet matrons was called from those in court, who were impanelled to try the fact and report to the court. They chose a fore-matron from their own number. On their returning a verdict of "*enceinte*," the execution was delayed until the birth, and in some cases the punishment was commuted to perpetual exile. When the criminal was merely *privement enceinte*, and not *quick* (see QUICKENING), there was no respite. See 2 Hale, Pl. Cr. 412; Taylor, Med. Jur., Bell's ed. 520; Archb. Cr. Pl. 187. The proceeding has been said to be obsolete, though it has been recognized in America and at a very recent date in England, in Reg. v. Webster, tried before Lord Denman at the Old Bailey in London in July, 1879. The plea of pregnancy was interposed before sentence, and immediately "a jury of matrons selected from a crowd of females in the gallery were impanelled" and sworn, and the inquisition was held forthwith before the judge. The result was a verdict that the prisoner was not quick with child and she was sentenced. The *verbatim* report of the proceedings may be found in 9 Cent. L. J. 94. In State v. Arden, 1 Bay (S. C.) 487, the plea was allowed and an inquisition held, but the prisoner was found not pregnant and sentenced to death. In Holeman v. State, 13 Ark. 105, the plea was overruled in a larceny case where a woman was convicted of a penitentiary offence. In the case of Mrs. Bathsheba Spooner, who was tried in Massachusetts in 1778 for the murder of her husband, she being under sentence of death, petitioned the governor and council for a respite on account of pregnancy. A writ *de ventre inspiciendo* was issued by the council to the sheriff directing him to summon a jury of two men midwives and twelve discreet and lawful matrons "to ascertain the truth of her plea." The verdict was that she "is not quick with child," and she was executed, but a *post mortem* examination proved that her assertion was true; 3 Harv. L. Rev. 44; 39 Alb. L. J. 326.

"While the cases are very rare, there is no evidence (or authority, it might be added) that a jury of women is not a part of the machinery of the law in those states in which the common law prevails." 12 A. & E. Encyc. of L. 331. Such a jury was impanelled in a criminal case in Chester county, Pa., June 27, 1689; 5 Haz. Pa. Reg. 158; Records of Upland Court now in the Pennsylvania Historical Society. See 48 Am. L. Rev. 280.

It may be safely affirmed that no woman who pleads pregnancy in delay of execution will in any common-law jurisdiction be sentenced to death without examination into the truth of the fact pleaded, and in the absence of other statutory provision, it is difficult to see how she could be deprived of this common-law right. It is undoubtedly true that the proceeding is antiquated and ill adapted to the purpose, and therefore the subject is well worthy of legislative attention. Doubtless the rarity of such legislation is due to the infrequency of capital trials of women. In one state at least the contingency is provided for. In New York it is provided by statute that if there is reasonable ground to believe that a female defendant sentenced to death is pregnant, a jury of six physicians shall be impanelled to inquire into the fact, and if it is found by the inquisition that she is "quick with child," the execution is to be suspended until the governor issues a warrant directing it, which he may do as soon as he is satisfied that

she is no longer "quick with child," or he may commute her punishment to imprisonment for life; N. Y. Code Crim. Proc. §§ 501–2. See DE VENTRE INSPICIENDO; REPRIEVE.

JURY WHEEL. A mechanical contrivance, usually a circular box revolving on a crank, in which the names of persons subject to jury duty are placed, by the officers, and at the times and places prescribed by law, and from which the proper number to constitute the jury panels for any particular term of court are drawn by lot.

JUS (Lat.). Law; right; equity. Story, Eq. Jur. § 1. In the Roman law the word had two distinct meanings. It was either a body of law, as the *jus honorarium*, or an individual right, as the *jus suffragii*. See Sohm, Inst. Rom. L. § 7, where this distinction is developed in the course of a discussion of fundamental conceptions. See Evans' pamphlet on Roman Law According to Livy. A third use of the word was in apposition to *judicium*, as to which see IN JUDICIO.

Jus is said to have the following meanings: a law court; a bond or tie; power, authority; right to do a thing; law, or a system of law; what is right and fair. The plural means either rights, or rules of law, ordinances, decisions, and so authority. Nettleship, Lexicog.

As to the distinction between *jus* and *lex*, see Lex.

See IN JURE; JUDEX; JUS AD REM.

JUS ABUTENDI (Lat.). The right to abuse. By this phrase is understood the right to abuse property, or having full dominion over property. 3 Toullier, n. 86. The right of destruction or consumption, and free disposition. Morey, Rom. L. 283. See DOMINIUM JUS UTENDI.

JUS ACCRESCENDI (Lat.). The right of survivorship. See SURVIVOR.

In Roman Law. The right of accretion. This exists in two cases: According to the general rule a person could not die partly testate and partly intestate, and if any part of the estate was unprovided for, either by the oversight of the testator or any of the heirs, it was ratably distributed among the heirs; Morey, Rom. L. 325; so if the same thing were left to two or more persons each took an equal share; if one of them should die before he had received the legacy, the share of the one so dying passed to the remaining joint legatee or legatees by this right; *id.* 334. It has been suggested that the germ of this right is to be found in the succession by necessity; Sohm, Inst. Rom. L. § 100.

See ESTATE IN JOINT TENANCY.

JUS ACTUS. **In Roman Law.** A rural servitude giving to a person a passage for carriages, or for cattle.

JUS AD REM (Lat.). **In Civil Law.** A right to a thing. It is generally treated as a right to property not in possession, as distinguished from *jus in re*, which implies the absolute dominion. In English law, this distinction is illustrated by Blackstone, by reference to ecclesiastical promotions, where, although the freehold passes to the person promoted, corporal possession is required to vest the property completely in the new proprietor, who acquires *jus ad rem*, an inchoate, or imperfect, right of nomination and institution, but not the *jus in re*, or complete and full right, unless by corporal possession; 2 Bla. Com. 312. The distinction expressed by these terms in the Roman law is analogous to the common-law distinction between the effect of a right of entry and that of actual entry, which in English real property law is expressed in the maxim *non jus, sed seisina, facit stipitem; id. Jus ad rem* is said to be merely an abridged expression for *jus ad rem acquirendam*, and it properly denotes the right to the acquisition of a thing. Austin, Jur. Lect. 14.

"On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages, on the analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give, or procure, or do, or do not do, something." Sand. Inst. Just. Introd. xlviii.

A right which belongs to a person only mediately and relatively, and has for its foundation an obligation incurred by a particular person.

The *jus in re*, by the effect of its very nature, is independent and absolute, and is exercised *per se ipsum*, by applying it to its object; but the *jus ad rem* is the faculty of demanding and obtaining the performance of some obligation by which another is bound to me *ad aliquid dandum vel faciendum, vel præstandum*. Thus, if I had the ownership of a horse, the usufruct of a flock of sheep, the right of habitation of a house, a right of way over your land, etc., my right in the horse, in the flock of sheep, in the house, or the land, belongs to me directly, and without any intermediary; it belongs to me absolutely and independently of any particular relation with another person; I am in direct and immediate relation with the thing itself which forms the object of my right without reference to any other relation. This constitutes a *jus in re*. If, on the other hand, the horse is lent to me by you, or if I have a claim against you for a thousand dollars, my right to the horse or to the sum of money exists only relatively, and can only be exercised through you; my relation to the object of the right is mediate, and is the result of the immediate relation of debtor and creditor existing between you and me. This is a *jus ad rem*. Every

jus in re, or real right, may be vindicated by the *actio in rem* against him who is in possession of the thing, or against any one who contests the right. It has been said that the words, *jus in re* of the civil law convey the same idea as thing in possession at common law. This is an error, arising from a confusion of ideas as to the distinctive characters of the two classes of rights. Nearly all the common-law writers seem to take it for granted that by the *jus in re* is understood the title or property in a thing in the possession of the owner; and that by the *jus ad rem* is meant the title or property in a thing not in the possession of the owner. But it is obvious that *possession* is not one of the elements constituting the *jus in re;* although possession is generally, but not always, one of the incidents of this right, yet the loss of possession does not exercise the slightest influence on the character of the right itself, unless it should continue for a sufficient length of time to destroy the right altogether by prescription. In many instances the *jus in re* is not accompanied by possession at all; the usuary is not entitled to the possession of the thing subject to his use; still, he has a *jus in re*. So with regard to the right of way, etc. See DOMINIUM.

A mortgage is considered by most writers as a *jus in re;* but it is clear that it is a *jus ad rem:* it is granted for the sole purpose of securing the payment of a debt or the fulfilment of some other personal obligation. In other words, it is an accessory to a principal obligation and corresponding right: it can have no separate and independent existence. The immovable on which I have a mortgage is not the object of the right, as in the case of the horse of which I am the owner, or the house of which I have the right of habitation, etc.: the true object of my right is the sum of money due to me, the payment of which I may enforce by obtaining a decree for the sale of the property mortgaged. 2 Marcadè 350.

The description of legal duties and rights as being *in rem* or *in personam* is usually said to be unauthorized by classical Latin usage; Roman lawyers spoke of "*actiones*," not "*jura*," as being *in rem* or *in personam*. But it should be remembered that in Roman usage "action" included what we now call "a right of action," any determinate claim to some form of legal redress. Action was the right of obtaining by process of law what is due, not the process itself. Hence the modern usage is not so wide apart from the Roman as it appears at first sight to be. Pollock, First Book of Jurispr. 92.

JUS ÆLIANUM. A body of laws upon the same plan as the *jus flavianum (q. v.)* though more complete. It was published about B. C. 200 by Sextus Ælius and consisted of three parts: (1) The law of the XII. Tables; (2) The interpretation of the same; (3) The description of the *legis actiones* or forms of procedure. Morey, Rom. L. 85.

JUS ÆSNECIÆ. The right of the eldest-born to inherit; primogeniture.

JUS ALBINATUS. The right of the king by confiscation or escheat to the property of a deceased foreigner unless he had a peculiar exemption. This prerogative was abolished in 1790. 1 Bla. Com. 372; 2 Steph. Com. 409, n. It was the *Droit d'Aubaine* of the French law, which title see.

JUS ANGARIÆ. See ANGARIA; ANGARY, RIGHT OF.

JUS ANGLORUM. The laws and customs of the West Saxons, in the time of the Heptarchy, by which the people were for a long time governed, and which were preferred before all others. Wharton.

JUS ÆQUUM. Equitable law. A term used by the Romans to express the adaptation of the law to the circumstances of the individual case as opposed to *jus strictum (q. v.)*.

JUS AQUÆDUCTUS (Lat.). **In Civil Law.** The name of a servitude which gives to the owner of land the right to bring down water through or from the land of another, either from its source or from any other place.

Its privilege may be limited as to the time when it may be exercised. If the source fails, the servitude ceases, but revives when the water returns. If the water rises in, or naturally flows through, the land, its proprietor cannot by any grant divert it so as to prevent it flowing to the land below; 2 Rolle, Abr. 140, l. 25; *Lois des Bât.* part 1, c. 3, s. 1, art. 1. But if it had been brought into his land by artificial means, it seems it would be strictly his property, and that it would be in his power to grant it; Dig. 8. 3. 1. 10; 3 Burge, Confl. Laws 417. See Washb. Easem.; RIVER; WATER-COURSE.

JUS AQUÆ HAUSTUS. **In Roman Law.** A rural servitude giving to a person a right of watering cattle on another's field, or of drawing water from another's well.

JUS BELLI. So much of international law as regulates the relations of nations to each other with respect to a state of war, including belligerency and neutrality, which several titles see.

The right of war so far as it concerns the treatment which may be properly accorded to an enemy. Grot. *De Bell. et Pac.* I. 1, § 3.

JUS BELLUM DICENDI. The right of making a declaration of war.

JUS CIVILE (Lat.). **In Roman Law.** The private law, in contradistinction to the public law, or *jus gentium*. 1 Savigny, *Dr. Rom.* c. 1, § 1.

The local law of the city of Rome.

It is said that the twelve tables marked the starting-point in the development of the Roman law so far as it can be historically authenticated, and that its development advanced steadily in uninterrupted progression until it culminated in the *corpus juris civilis* of Justinian; Sohm, Inst. Rom. L. § 10. It is, however, rather more accurate to say that the *culmination* of the Roman law, as a system, was not reached until the period of the development side by side of the *jus civile* and *jus gentium*. For an interesting discussion of the origin and growth of this

system, see Morey, Rom. L. 14, 24. See JUS GENTIUM.

JUS CIVITATIS. In Roman Law. The full franchise of citizenship comprising, on the one hand, public rights, including the right of holding office and the right of voting; and on the other hand private rights, including the right to hold and dispose of property, according to the forms of the civil law, and the right of marriage, and all domestic relations. Morey, Rom. L. 48.

The collection of laws which are to be observed among all the members of a nation. It is opposed to *jus gentium*, which is the law which regulates the affairs of nations among themselves. 2 Lepage, *El. du Dr.* c. 5, 1. It was very much what is understood in modern terminology by municipal law.

JUS CLOACÆ MITTENDÆ. In Civil Law. The name of a servitude which requires the party who is subject to it to permit his neighbor to conduct the waters which fall on his grounds over those of the servient estate.

JUS COMMUNE. The common law, applicable to all persons alike. The ordinary law, as opposed to *jus singulare (q. v.)*.

"The general law, as opposed to exceptional rules or privileges applicable only to a class." Pollock, First Book of Jurispr. 250.

JUS CORONÆ. The right of succession to the throne of Great Britain.

JUS CURIALITATIS ANGLIÆ. The right of curtesy. See CURTESY.

JUS DARE (Lat.). To enact or to make the law. *Jus dare* belongs to the legislature; *jus dicere*, to the judge.

JUS DELIBERANDI (Lat.). The right of deliberating, given to the heir, in those countries where the heir may have *benefit of inventory (q. v.)*, in which to consider whether he will accept or renounce the succession.

In Louisiana he is allowed ten days before he is required to make his election. La. Civ. Code art. 1028.

JUS DEVOLUTUM. A phrase formerly used in Scotch ecclesiastical law to designate the right which devolved on the presbytery to present a minister to a vacant parish or benefice, in case the patron should neglect to exercise his right within the time limited by law, by presenting within six months a properly qualified person. Int. Cyc.

JUS DICERE (Lat.). To declare the law. It is the province of the court *jus dicere*, to declare what the law is.

JUS DISPONENDI (Lat.). The right to dispose of a thing.

In a general sense it means the right of alienation, and is frequently applied in the case of a married woman with respect to her separate estate. In a special or limited sense, it is applied to the reservation by a vendor of chattels or the ultimate ownership of goods with the possession of which he has parted. It is said to be often a matter of great nicety to determine upon a contract of sale, whether or not the vendor's purpose or intention was to reserve a *jus disponendi*. Benj. Sales, Ch. VI. § 382. See SALE.

The reservation of this right is essential where the property in the thing sold is reserved as a security for deferred payments or purchase-money, and it is permitted in many cases in which it is not permissible at common law. The great increase in the number of transactions in which such reservation is customary, as car trusts, instalment sales, etc., makes the subject one of increased importance and interest.

JUS DISTRAHENDI. The right of sale of goods pledged in case of non-payment. See PLEDGE; DISTRESS.

JUS DIVIDENDI. The right of testamentary disposition of real estate.

JUS DUPLICATUM (Lat. double right). When a man has the possession as well as the property of anything, he is said to have a double right, *jus duplicatum*. Bracton, l. 4, tr. 4, c. 4; 2 Bla. Com. 199.

JUS EDICERE, JUS EDICENDI. The right to issue edicts. It belonged to all the higher magistrates, but special interest is attached to the prætorian edicts in connection with the history of Roman law. See PRÆTOR.

JUS EX NON SCRIPTO. Law constituted by custom or such usage as indicates the tacit consent of the community.

The definition of Ulpian was: *"Diuturna consuetudo pro jure et lege in his quæ non ex scripto descendunt, observari solet;"* D. 1, 3, 33. This is well, though freely, translated thus: "Whatever has existed for a long period of time, and is in harmony with the moral judgment of the community is regarded as having the force of law, and the judicial authority is bound to recognize it as such, even though it has never been expressed in a legal enactment." Morey, Rom. L. 223. The same author says with respect to such law: "It was also a maxim of the Romans, that not only can laws be established by custom; they can also be abrogated by custom—that is, by contrary usage. It is unnecessary to consider here the objections raised by some modern jurists, such as Austin, to this view of customary, or unwritten law. It is enough for our present purpose to say that this was the conception of the Roman jurists regarding the origin of a portion of the positive law, and a conception which has been adopted by the majority of modern civilians;" *id.* Another phrase by which this law was known was *jus moribus constitutum*. See LAW.

JUS FECIALE (Lat.). In Roman Law. Fecial law. It has been termed that branch of international law which had its foundation in the religious belief of different nations: such as the international law which now exists among the Christian people of Europe. Savigny, Dr. Rom. c. 2, § 11. But the earlier writers on the civil law gave to it more of a characterization as international law than is attributed to it by modern writers.

See FECIAL LAW; INTERNATIONAL LAW.

It related to rules and ceremonies or modes of procedure for declarations of war and ratifications of treaties of peace. The subject was entrusted to a college of priests, who were, however, the mere agents of the state. Hershey, Int. L. 43.

JUS FIDUCIARUM (Lat.). In Civil Law. A right to something held in trust. For this there was a remedy in conscience. 2 Bla. Com. 328. See FIDEI COMMISSUM.

JUS FLAVIANUM. A publication of the *legis actiones* or a practical manual of the procedure, including a list of *dies fasti (q. v.).*

Of this publication it is said: "The first step which led to the decline of the *legis actiones* was due to their publication. As long as the knowledge of legal forms was restricted to the patrician class, the people at large were helpless in their efforts to obtain an impartial administration of justice." Morey, Rom. L. 85. The author was Cnæus Flavius, who was a scribe or clerk of Appius Claudius. His publication was B. C. 304. It was followed about a century later by the *Jus Ælianum* (*q. v.*). See also Sohm, Inst. Rom. L. § 14, n. 2.

JUS FODIENDI. In Civil Law. The name of a rural servitude which permits digging on the land of another. Inst. 2, 3, 2; Dig. 8, 3, 1, 1. A similar right was recognized in early English law; Bract. 222.

JUS GENTIUM (Lat.). The law of nations. It has been said that although the Romans used these words in the sense we attach to *law of nations*, yet among them the sense was much more extended. Falck, Encyc. Jur. 102, n. 42. It has been termed a system made up by the early Roman lawyers of the common ingredients in the customs of the old Italian tribes, for the purpose of adjudicating questions arising in Rome between foreigners or natives and foreigners. Maine, Anc. Law 49.

The *jus gentium* is differently characterized by the later writers on the civil law from the meaning given to the phrase by the earlier writers who treated it, as more identical with the idea of modern international law than it is now considered to have been.

The distinction between the *jus gentium* and the *jus civile* is thus admirably expressed: "The *jus gentium*, on the other hand, came to be regarded as a universal law of all mankind, common to all nations, because resting on the nature of things and the general sense of equity which obtains among all men, the *'jus gentium quod apud omnes gentes perœque custoditur,'* a sort of natural law, exacting recognition everywhere in virtue of its inherent reasonableness. It would, however, be erroneous to suppose that the Romans attempted to introduce a code of nature such as the philosophers had devised. The *jus gentium* was, and never had been anything else but a portion of positive Roman law, which commercial usage of other sources of law, more especially the prætorian edict (*q. v.*), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few quite exceptional cases where they did so (as *e. g.* in the case of hypotheca), they did not fail to impress their institutions with a national Roman character. The antithesis between *jus civile* and *jus gentium* was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The *jus gentium* was that part of the private law of Rome which was essentially in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the seaboard of the Mediterranean. In other words, *jus gentium* was that portion of the positive law of Rome which appeared to the Romans themselves in the light of a *'ratio scripta,'* of a law which obtains among all nations and is common to all mankind." Sohm, Inst. Rom. L. § 13.

The Romans discovered, or thought they discovered, a common groundwork of legal institutions in the various commonwealths that became subject to Rome. What remained, after deducting local and technical peculiarities, was called by them the common law of nations, *jus gentium.* Pollock, Oxford Lectures 10.

The origin of the *jus gentium* was undoubtedly to be found in the adjustment of the Roman law to the relations existing between Roman citizens and foreigners, and between foreigners themselves. The growth of a different system was a not unnatural result of the administration of law in cases where both parties were not Roman citizens, by the foreign prætors, who were not bound by the strict rules of the *jus civile*, but from going about from place to place, and administering a kind of equitable jurisdiction in the settlement of disputes, they might not inaptly be termed peripatetic or itinerant arbitrators. The growth of a system of law administered by them alongside of the *jus civile* was not unlike the growth of the equity jurisprudence alongside of the common law. Then, too, the fact that these officers were constantly engaged in settling disputes, to which at least one party was a foreigner, naturally led to their becoming familiar with the principles of other systems of law, and in applying them to the case in hand, so far as they commended themselves to their sense of justice. The new system was afterwards extended to the whole non-citizen class. And while in the first instance it was treated as an entirely distinct system from the *jus civile*, it gradually supplanted the latter, and by a process which was originally the absorption of much of the *jus gentium* into the *jus civile*, it subsequently became recognized as a constituent part of Roman Law, and was gradually welded into a complete system of jurisprudence.

The confusion between *jus gentium* and international law is said to be entirely modern.

For a bibliography of this subject, see Hershey, Int. L. 54.

See Morey, Rom. L. 59–71; INTERNATIONAL LAW; JUS CIVILE; JUS NATURALE.

JUS GLADII (Lat. the right of the sword). Supreme jurisdiction. The right to absolve from or condemn a man to death.

JUS HABENDI (Lat.). The right to have a thing. The right to be put into actual possession of property to which one is entitled.

JUS HABENDI ET RETINENDI. The right to have and retain the offerings, tithes,

and profits of a parsonage or rectory. Toml.; Moz. & W.

JUS HÆREDITATIS. The right of succession as an heir, or of inheritance. See HEIR.

JUS HONORARIUM. In Civil Law. A name applied to the prætorian edicts and also to the edicts of the *curule ædiles*, when on certain occasions they were published. Inst. 1, 2, 7.

This system of law was simply the usual development of an expanding and elastic jurisprudence, which naturally resulted from the increase in Rome of population and power, and the greater complication of her civilization; Howe, Stud. Civ. L. 10; it was spoken of as having a distinct place by the side, and as the complement, of the *jus civile;* Sand. Introd. Inst. Just. xxi. It was a system of judge-made law *(q. v.)* in the proper sense. Its vigorous development was coincident with the formulary procedure, which was well adapted to give it scope and effect; Sohm, Introd. Rom. L. 178.

Its place and function in the Roman jurisprudence are thus described: "The prætorian law, being a law made by officials, '*jus honorarium*,' was opposed to the *jus civile*, *i. e.* law, in the strict and proper sense of the term, the law made by the people, developed by popular enactments and popular customs. Thus both the *jus civile* and the *jus honorarium* contained elements of *jus gentium*, but in the *jus honorarium*, the influence of the *jus gentium* predominated. The prætorian edict was, in the main, the instrument by means of which the free principles of *jus æquum* gained their victory over the older *jus strictum*. Though at first the edict may merely have served the purpose of giving fuller effect to the *jus civile*, and then of supplementing the *jus civile*, nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of reforming the civil law." *Id.* 54.

See JUDEX; PRÆTOR.

All magistrates of elevated rank possessed the power of legislating, "*jus edicendi*," with regard to such matters as fell within their jurisdiction, and the body of rules so established was termed *jus honorarium*. But as the *jus prætorium* forms so important a part of it, the term *jus honorarium* is often restricted to the *jus prætorium*.

JUS HONORUM. In Roman Law. The right of holding offices. See JUS SUFFRAGII.

JUS IMAGINIS. In Roman Law. The right of displaying the pictures and statues of one's ancestors, somewhat as in the English law of Heraldry, there is a right to the coat-of-arms.

JUS IMMUNITATIS. The law of exemption from the liability to hold public office.

JUS IN PERSONAM. A personal right. Considered by some writers as a more correct expression for *jus ad rem*, which see. According to the Roman law, property could not be transferred by mere agreement. The latter, even though in form a legal contract, had the effect only of expressing the intention of the parties and creating a personal right against the one making the agreement in a real right to the property itself. Morey, Rom. L. 307. See JUS AD REM.

JUS IN RE (Lat.). A right which belongs to a person, immediately and absolutely, in a thing, and which is the same against the whole world,—*idem erga omnes*. See JUS AD REM.

"The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable." Sand. Inst. Just. xlix. See JUS AD REM.

JUS IN RE ALIENA. An easement on servitude, or right in, or arising out of, the property of another.

JUS IN RE PROPRIA. The right of enjoyment which appertains to full and complete ownership of property. Frequently, by relation, the full ownership or property itself.

JUS INCOGNITUM (Lat.). An unknown law. This term is applied by the civilians to obsolete laws, which, as Bacon truly observes, are unjust; for the law to be just must give warning before it strikes. Bacon. Aph. 8, s. 1; Bowyer, Mod. Civ. Law 33. But until it has become obsolete no custom can prevail against it. See OBSOLETE.

JUS ITALICUM. In Roman Law. A right bestowed upon a community by which it acquired "the privileges of a colonia Italica (*i. e.* an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the *fundas Italicus*." Heisterbergk, *Name und Begriff des jus Italicum* (1885). Sohm, Inst. Rom. L. § 22, n. 2.

JUS ITINERIS. In Roman Law. A rural servitude giving to a person the right to pass over an adjoining field, on foot or horseback.

JUS LATII. The right or privilege conferred upon the various communities of Latium. This has been termed a "kind of qualified citizenship *(civitas sine suffragio)*, such as Rome had, in early times, granted to the inhabitants of Cære." Morey, Rom. L. 50. These rights originally included the rights of intermarriage and of commercial intercourse between Rome and the inhabitants of the Latin towns. The author last cited says: "The possession of these rights formed the essential feature of the early *jus Latii*, or *Latinitas*. In later times, however, the right which went under this name and which was bestowed upon the Latin colonies outside of Latium, included the *commercium*

only;" *id.* Sohm says that from the earliest times the members of the town communities of Latium who were the original Latins had the same private marriage law as the Romans. It was, in fact, their original law, and it was because they were allies governed by the same law that they enjoyed the *jus commercii* and the *jus connubii* of the Romans. They did not, of course, possess the public rights of a Roman until the powerful interest attaching to those rights resulted in the granting of Roman citizenship first to the Latin allies then to all the Italian communities; Sohm, Inst. Rom. L. § 22. There were two forms of the *jus latii, latium minus* which was the older and usual one, and the *latium majus*. In communities in the former, only officials acquired Roman *civitas*. In those which had the latter it was extended to the decuriones. See DECURIONES; *id.* § 22, n. 2. Another authority confines the two forms to magistrates and defines them thus: "The *latium majus* raising to the dignity of Roman citizens not only the magistrate himself, but also his wife and children; the *latium minus* raising to that dignity only the magistrate himself." Bro. L. Dict.

JUS LEGITIMUM (Lat.). **In Civil Law.** A legal right which might have been enforced by due course of law. 2 Bla. Com. 328.

JUS LIBERORUM. In Roman Law. The privilege conferred upon a woman who had three or four children. In order that she should be able to take all the property given her by will, she must have had this privilege conferred upon her. Sohm, Inst. Rom. L. § 86. In the time of Hadrian, a decree was made conferring upon a mother, as such, who, being an *ingenua*, had the *jus trium liberorum*, or being a *libertina*, the *jus quatuor liberorum*, a civil law right to succeed her intestate children; *id.* § 98.

Another author defines this privilege as one by which exemption was given from all troublesome offices. Brown, L. Dict.

JUS MERUM (Lat.). A simple or bare right; a right to property in land, without possession, or the right of possession.

JUS MORIBUS CONSTITUTUM. See JUS EX NON SCRIPTO.

JUS NATURALE. The name given to those rules of conduct which are universally binding upon men and which are sanctioned by the dictates of right reason, as opposed to rules of conduct prescribed and enforced by the sovereign power of the state which are called positive law, known to the Romans as *jus civile*, and in modern jurisprudence as municipal law.

The *jus naturale*, or law of nature, is simply the *jus gentium*, or law of nations, seen in the light of a peculiar theory. Maine, Anc. Law 52. Sir F. Pollock refers to this as "an unhappy term," which seems to be a mere external ornament borrowed from Greek philosophers in excess of zeal to make a show of philosophical culture, and inconsistent with the proper Roman use of *jus*. Oxford Lectures 7.

A much quoted definition of Ulpian was that which nature attaches to animals. Of this it has been said that it was peculiar, and the conception exercised little or no influence upon the judicial thought of Rome. Morey, Rom. L. 111, where also are collected many definitions of the Roman jurists.

Sandars considers the passage from Ulpian unfortunately borrowed by Justinian and thereby removed from the connection in which it was used, which was a subsidiary and divergent line of thought, and had nothing to do with the main theory. Accordingly "in considering what the Roman jurists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice." Sand. Inst. Just. 7.

The conception of the *jus naturale* came from the Stoics and has been termed "by far the most important addition to the system of Roman law, which the jurists introduced from Greek philosophy." Sand. Inst. Just. Introd. xxii. And Maine says of it that "the importance of this theory to mankind has been very much greater than its philosophical deficiencies would lead us to expect." Anc. L. 71.

While it is undoubtedly true that the highest conception of law is that natural law and positive law should be entirely harmonious, it is in the domain of international law that this conception more nearly approaches realization. The *jus gentium* was a system largely based upon the *jus naturale*, and it is due to that fact that the Roman system so largely formed the basis upon which Grotius commenced to build, the system which has developed into modern international law. It has been said that while he "rejected Ulpian's definition of the *jus naturale*, he accepted the idea of natural law expressed in the later *jus gentium* of the Romans as a body of principles based upon the common reason of mankind. It was therefore possible for him to extend the equitable principles already developed in the Roman *jus gentium* to the relations existing between sovereign states. States were looked upon as moral persons—subjects of the natural law, and as equal to each other in their moral rights and obligations." Morey, Rom. L. 208. See JUS GENTIUM; LAW OF NATURE; LAW.

JUS NON SACRUM. In Roman Law. That portion of the *jus publicum* which regulated the duties of magistrates.

Non-sacred law; that which dealt with the duties of civil magistrates, the preservation of public order, and the rights and duties of persons in their relation to the state. Morey, Rom. L. 223. It was analogous to that which would now be called the police power.

JUS NON SCRIPTUM. See JUS EX NON SCRIPTO.

JUS ONERIS FERENDI. An urban servitude in the Roman Law, the owner of which had the right of supporting and building upon the house wall of another.

JUS PAPIRIANUM. A collection of *leges regiæ* said to have been collected from the early periods of Roman history in the time of Romulus, Numa, and other kings.

They were a private compilation described as "fragments of a collection," which, "though clearly showing the religious spirit of the early law, are yet meagre and unsatisfactory." Morey, Rom. L. 25. Though a private collection, it is suggested that they received the name of royal laws merely because the regulations which they contained were placed under the immediate protection of the kings. They were concerned in the main with sacred matters, *i. e.* they were essentially of a religious and moral character, and bear clear testimony to the closeness of the original connection between law and religion; Sohm, Inst. Rom. L. § 11, n. 2. Ascribed to Sextus (or Caius) Papirius, who was supposed to have lived in the reign of Tarquinius Superbus; Hunter, Rom. L. 1.

JUS PASCENDI. In Roman Law. The rural servitude giving the right of pasturage on another's land.

JUS PATRONATUS (Lat.). In Ecclesiastical Law. A commission from the bishop, directed usually to his chancellor and others of competent learning, who are required to summon a jury, composed of six clergymen and six laymen, to inquire into and examine who is the rightful patron. 3 Bla. Com. 246.

JUS PERSONARUM (Lat.). The right of persons. See JURA PERSONARUM.

JUS PISCANDI. See JUS VENANDI ET PISCANDI.

JUS POSSESSIONIS. The simple right of possession which may exist independently of ownership.

"Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not be the owner. It is when the possessor is not the legal owner that it becomes important to consider to what rights he is entitled by virtue of his possession." Morey, Rom. L. 285. See JUS POSSIDENDI; POSSESSION.

JUS POSSIDENDI. The right of possessing, which is the legal consequence of ownership. It is to be distinguished from the *jus possessionis (q. v.)*, which is a right to possess which may exist without ownership.

JUS POSTLIMINII (Lat.). The right of the owner to claim property after its recapture from an enemy. See POSTLIMINY.

JUS PRÆTORIUM. A body of laws developed from the exercise of discretion by the prætors, as distinguished from the *leges* or positive law. See PRÆTOR.

JUS PRECARIUM (Lat.). In Civil Law. A right to a thing held for another, for which there was no remedy. 2 Bla. Com. 328.

JUS PRESENTATIONIS. The right of presentation.

JUS PRIVATUM. The municipal law of the Romans as distinguished from the *jus publicum*, which was the law of political conditions and of crimes (with that of criminal procedure). Campbell's Analysis of Austin, 143.

"The relations of power subsisting between persons and the world of things, or the equivalents of things, are the subject-matter of private law. Private law, in other words, has to do with the dominion of persons over things. Its pith is, therefore, contained in the law of property. The subject-matter of public law are the relations of power which subsist between persons and persons. Here, the power is ideal, in the sense that its object is the free-will of another, *i. e.* something invisible and outwardly intangible. Public law, then, has to do with the dominion of persons over persons. The rights of control with which such private law is concerned are reducible to a money value; the rights of control with which public law is concerned are not thus reducible. In private law, again, the subject of a right appears in his individual capacity, as commanding the world of material things. In public law, on the other hand, the subject of a right appears in his capacity as a member of a community which it is his part to serve in order that he may share in the benefits it confers. Finally, as against their object, the rights of private law merely confer a power, the rights of public law, on the other hand, impose, at the same time, a duty on the person to whom the right pertains. The distinction is clearly exemplified in the case of the right of ownership in a thing, on one side, and the right of a sovereign over his people on the other." Sohm, Inst. Rom. L. § 7.

JUS PROJICIENDI (Lat.). In Civil Law. The name of a servitude by which the owner of a building has a right of projecting a part of his building towards the adjoining house, without resting on the latter. It is extended merely over the ground. Dig. 50. 16. 242; 8. 2. 25; 8. 5. 8. 5.

JUS PROPRIETATIS. The right of property, as Blackstone phrases it: "the mere right of property without either possession or even the right of possession. This is frequently spoken of in our books under the name of mere right," *jus merum (q. v.)*; 2 Bla. Com. 197. See RIGHT OF PROPERTY.

JUS PROTEGENDI (Lat.). In Civil Law. The name of a servitude: it is a right by which a part of the roof or tiling of one house is made to extend over the adjoining house. Dig. 50. 16. 243. 1; 8. 2. 25; 8. 5. 8. 5.

JUS PROTIMESEOS. The right of pre-emption of a landlord in case the tenant wishes to dispose of his rights as a perpetual lessee. Sohm, Inst. Rom. L. § 57. *Pactum protimeseos* was the right of pre-emption to the seller; *i. e.* in case the buyer should sell, he must sell to the former seller. Hunter, Rom. L. 503.

JUS PROVINCIARUM. A franchise conferred upon provincials much more limited than that conferred upon the people of Italy.

It has been described as "equivalent to the *jus italicum* minus the freedom from land taxation which the latter right involved. In short, the provincials possessed no status as Roman citizens; and even their capacity of ownership in their own land was qualified by their tributary obligations to Rome. The civil incapacity of the provincials had reference, however, merely to their exclusion from the strictly legal rights sanctioned by the *jus civile.*" Morey, Rom. L. 55.

JUS PUBLICUM. See JUS PRIVATUM.

JUS QUÆSITUM (Lat.). A right to ask or recover: for example, in an obligation there is a binding of the obligor, and a *jus quæsitum* in the obligee. 1 Bell, Com. 323.

JUS QUIRITIUM. Quiritarian ownership, so called under the ancient *jus civile*, because, strictly speaking, there was recognized but this one form of ownership. It could be acquired only through the technical forms of civil law, and never by a foreigner. The strictness which was observed in this respect was due to the fact that this was the form of private ownership, which, under Roman law, was as developed from the general right of dominion and ownership by the state. To prevent hardships and injustice in the strict application of the rules of law, it was per-

mitted to the prætor to issue possessory interdicts to protect the possession of those who had not complied with all the technical conditions of ownership. In this way, legal sanction was given to the right of possession which amounted substantially to a right of property. This affords another illustration of the many points in which the Roman system presents a strict similarity to the English equity jurisprudence as long afterwards developed. Morey, Rom. L. 21, 74, 283; Sand. Inst. Just. Introd. xx.

JUS RECUPERANDI, INTRANDI, Etc. The right of recovering and entering upon land.

JUS RERUM (Lat.). The right of things. Its principal object is to ascertain how far a person can have a permanent dominion over things, and how that dominion is acquired.

JUS SACRUM. In Roman Law. That portion of the public law which was concerned with matters relating to public worship and including the regulation of sacrifices and the appointment of priests. There was a general division of the *jus publicum* into *jus sacrum* and *jus non sacrum (q. v.)*.

JUS SANGUINIS. The right of blood.

According to Roman and Germanic principles, nationality is based primarily upon descent (*jus sanguinis*). This is said to prevail in Germany, Austria, Hungary, Sweden and Switzerland; so also in the Napoleonic Code. Hershey, Int. L. 237.

See JUS SOLI.

JUS SCRIPTA. Written law. After stating that the Roman law was written and unwritten just as it was among the Greeks, Justinian adds: "The written part consists of laws, *plebiscita*, *senatus-consulta*, enactments of emperors, edicts of magistrates, and answers of jurisprudents." Sand. Inst. Just. 1, 2, 3. See JUS EX NON SCRIPTA.

JUS SINGULARE. A law which is an exception to the ordinary law. A special rule applicable to an individual case or class of cases. Where it benefits particular classes of persons, it is called privilege, in an objective sense; privilege in a subjective sense is a particular right conferred upon a definite person by *leges speciales*. See JUS COMMUNE.

JUS SOLI. The law of the place of one's birth as contrasted with *jus sanguinis*, the law of the place of one's descent or parentage. It is of feudal origin. Hershey, Int. L. 237.

JUS SPATIANDI. A right of way over land by the public by uses merely for the purposes of recreation and instruction. It is usually limited to the cases of highways, parks, and squares. The public were denied any right in the grounds containing the ancient druidical monuments at Stonehenge; Attorney-General v. Antrobus, [1905] 2 Ch. 188. See 19 Harv. L. Rev. 55. See Ducange, Glossarium, for a definition under the word *spatiare*.

JUS STILLICIDII VEL FLUMINIS RECIPIENDI. In Roman Law. An urban servitude giving the owner a right to project his roof over the land of another or to open a house drain upon it.

JUS STRICTUM (Lat.). A Latin phrase, which signifies law interpreted without any modification, and in its utmost rigor. See JUS ÆQUUM.

JUS SUFFRAGII. In Roman Law. The right of voting. This and the *jus honorum (q. v.)* were the public rights of the Roman citizen.

JUS TERTII. The right of a third person. This is set up by way of defence in many actions where it is sought to establish relations of landlord and tenant, or bailor and bailee, by a plea of setting up the *jus tertii*.

JUS TIGNI IMMITTENDI. In Roman Law. An urban servitude which gave the right of inserting a beam into the wall of another.

JUS TRIPERTITUM. A threefold right. The term is used by Justinian who says that the requisites of the Roman testament seem to have had a triple origin (*ut hoc jus tripertitum esse videatur*). Sand. Inst. Just. 2, 10, 3. "It is out of regard to this threefold derivation from the prætorian edict, from the civil law, and from the imperial constitutions, that Justinian speaks of the law of wills in his own days as *jus tripertitum*." Maine, Anc. L. 207.

JUS UTENDI (Lat.). The right to use property without destroying its substance. It is employed in contradistinction to the *jus abutendi*. 3 Toullier, n. 86.

JUS VENANDI ET PISCANDI. The right of hunting and fishing.

JUS VITÆ NECISQUE. In Roman Law. The right of life and death. Originally a father, or his *pater-familias* if he was himself in domestic subjection, could decide—not arbitrarily, but judicially—whether or not to rear his child; and while this right became subject to certain restrictions, yet when the child had grown up, the father, in the exercise of his domestic jurisdiction, might visit his son's misconduct, both in private and public life, with such punishment as he thought fit, even banishment, slavery, or death. In the early Empire these rights became relaxed, and they disappeared in the Justinian law. Muirhead, Roman Law, 28, 346, 417. See PATRIA POTESTAS.

JUST. This word is frequently used in legal phraseology in combination with other words, such as reasonable, equitable, convenient.

Where, as a foundation for an attachment, an affidavit was required that the plaintiff's claim is just, it is not sufficient if it does not state positively, but only inferentially, that his claim is just, and it does not amount to the same thing to say that the plaintiff "ought justly to recover the amount," or that "said several sums are justly due;" Robinson v. Burton, 5 Kan. 293.

In the English Traffic Act, in the phrase "just and reasonable," it was said to mean, to the advantage of the customer; 51 L. J. Q. B. 601.

Where conditions of traffic companies are to be just and reasonable, the reasonableness is a question of law, not of fact; 18 C. B. 805, 829.

It is a "just and reasonable" provision in by-laws to disqualify by reason of bankruptcy or notorious insolvency; 10 H. L. Cas. 404.

An agreement to pay what an individual (who was a taxing officer of the court of chancery) should say was a just and reasonable compensation for the services rendered by the complainant's solicitor in a suit commenced in that court, and settled before decree, obliges the party so agreeing to pay the bill of costs regularly taxed by the individual named in the agreement; Culley v. Hardenbergh, 1 Den. (N. Y.) 508. The terms "just and reasonable," as employed by the legislature in the Practice Act, obviously have reference to the rules of practice then existing by the common law, and contemplate no other or different terms than would be just and reasonable, as judged of by that practice; Empire Fire Ins. Co. v. Trust Co., 1 Ill. App. 391.

The words "just and fair" within the meaning of the New York statute, authorizing the imprisonment of a fraudulent debtor, were thus construed: "Where the debtor has procured from the creditor, at whose suit he is imprisoned, property by fraud, even if he has spent the proceeds in any way that would be unobjectionable, if they were his own, and if by loss or accident he is deprived of them, his proceedings are not just and fair, and where the debtor has combined or united with others to fraudulently obtain the property of the creditor, at whose suit he is imprisoned, even if such others got the proceeds of the fraud, and he kept none, his proeeedings are not 'just and fair' within the meaning of the statute," authorizing the examination of an imprisoned debtor, in proceedings for his discharge from imprisonment, if it appear that his proceedings have not been "just and fair" towards the creditor under whose judgment he is imprisoned; In re Roberts, 59 How. Pr. (N. Y.) 136; In re Finck, *id.* 145.

In the English Companies Act, 1862, it is "just and equitable" to wind up a company when the whole substratum of the business which was the object of the company had become strictly impossible; 1 Cox 213; 3 K. & J. 78; 20 Ch. Div. 169.

In the phrase a "just cause" for a court to do anything, the word just "does not add much weight, though it may add a little; it means some substantial reason must be shown;" Jessel, M. R., in 21 Ch. Div. 397.

To be "just and convenient" to appoint a receiver or grant an injunction or mandamus, respect must be given to what is just according to settled principles, as well as to what is convenient; 9 Ch. Div. 89.

"All my just debts" includes all debts; Wms. Ex. 1719; L. R. 4 H. L. 506. A direction to pay debts or just debts included a mortgage debt in exoneration of the property, but 30 and 31 Vict. c. 69, § 1, did away with that reasoning; 9 Ch. Div. 12, per Jessel, M. R. A direction to pay just debts did not include a note of the testator made before he was of age, and therefore voidable; Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28. See also Smith v. Porter, 1 Binn. (Pa.) 209; Culley v. Hardenbergh, 1 Den. (N. Y.) 508; Martin v. Gage, 9 N. Y. 398.

JUST BEFORE. "At the time when," was the construction of these words in a plea to justify the killing of a dog; Ir. C. L. 156.

JUST COMPENSATION. See EMINENT DOMAIN.

JUSTICE. The constant and perpetual disposition to render to every man his due. Justinian, Inst. b. 1, tit. 1; Co. 2d Inst. 56. The conformity of our actions and our will to the law. Toullier, *Droit Civ. Fr.* tit. prél. n. 5.

Commutative justice is that virtue whose object it is to render to every one what belongs to him, as nearly as may be, or that which governs contracts. To render commutative justice, the judge must make an equality between the parties, that no one may be a gainer by another's loss.

Distributive justice is that virtue whose object it is to distribute rewards and punishments to each one according to his merits, observing a just proportion by comparing one person or fact with another, so that neither equal persons have unequal things nor unequal persons things equal. Tr. Eq. 3; and Toullier's learned note, *Droit Civ. Fr.* tit. prél. n. 7, note.

In the most extensive sense of the word it differs little from virtue; for it includes within itself the whole circle of virtues. Yet the common distinction between them is, that that which considered positively and in itself is called virtue, when considered relatively and with respect to others, has the name of justice. But justice, being in itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought.

Toullier exposes the want of utility and exactness in this division of distributive and commutative justice, adopted in the *compendium* or abridgments of the ancient doctors, and prefers the divisions of *internal* and *external* justice,—the first being a conformity of our *will*, and the latter a conformity of our *actions*, to the law, their union making perfect justice. Exterior justice is the object of juris-

prudence; interior justice is the object of morality. *Droit Civ. Fr.* tit. prél. n. 6, 7.

According to the Frederician Code, part 1, book 1, tit. 2, s. 27, justice consists simply in letting every one enjoy the rights which he has acquired in virtue of the laws. And, as this definition includes all the other rules of right, there is properly but one single general rule of right, namely: *Give every one his own.*

Justice, in the language of Webster, "is the greatest interest of man on earth. It is the ligament which holds civilized nations together. Wherever her temple stands, and as long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and the progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is, and must be, as durable as the frame of human society."

In Norman French. Amenable to justice. Kelham, Dict.

In Feudal Law. Feudal jurisdiction, divided into high (*alta justitia*), and low (*simplex inferior justitia*), the former being a jurisdiction over matters of life and limb, the latter over smaller causes. Leg. Edw. Conf. c. 26; Du Cange. Sometimes high, low, and middle justice or jurisdiction were distinguished.

An assessment; Du Cange; also, a judicial fine. Du Cange.

At Common Law. A title given in England and America to judges of common-law courts, being a translation of *justitia*, which was anciently applied to common-law judges, while *judex* was applied to ecclesiastical judges and others; *e. g. judex fiscalis.* Leges Hen. I. §§ 24, 63; Anc. Laws & Inst. of Eng. Index; Co. Litt. 71 *b*.

The judges of the federal and state supreme courts are properly styled "justices."

"Justice of the High Court" is the title of judges of the High Court of Justice in the King's Bench and Probate, Divorce and Admiralty Divisions.

The term justice is also applied to the lowest judicial officers: *e. g.* a trial justice; a justice of the peace.

JUSTICE, DEPARTMENT OF. The act of September 24, 1789 (1 Stat. L. 92), organized the judicial business of the United States, made provision for an attorney-general, and charged him with the duty of prosecuting all suits in the supreme court in which the United States was in anywise interested, and of furnishing advice and opinions upon all questions of law when called upon to do so by the president or the heads of the other executive departments of the government. The federal constitution provides that "the executive power shall be vested in the President of the United States," and although it does not specify any subordinate ministerial or administrative officers, yet there is an inferential recognition of such officers in the provision that the president may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of his department, and in the provision for the appointment of certain inferior officers "by the heads of departments." The organization of these departments is by the constitution left to the congress, and it was for the purpose of providing for a department which should administer the legal branch of the government that the above act was passed; 6 Op. Att. Gen. 327.

The Department of Justice was reorganized by act of June 22, 1870. The attorney-general is the head of the department; provision was made for "an officer learned in the law to assist the attorney-general in the performance of his duties, called the solicitor-general." He assists the attorney-general in the performance of his general duties, and by special provision of law, in the case of a vacancy in the office of attorney-general or in his absence, exercises all of the duties of that officer. Except when the attorney-general otherwise directs, the solicitor-general conducts and argues all cases in the supreme court and in the court of claims in which the United States is interested; and when he so directs, any such case in any court of the United States may be conducted and argued by the solicitor-general, and in the same way the solicitor-general may be sent by the attorney-general to attend to the interests of the United States in any state court or elsewhere. Provision is also made for three officers learned in the law called assistant attorneys-general, who assist the attorney-general and solicitor-general in the performance of their duties. A fourth was provided by act of July 11, 1890. By the act of March 3, 1891, an additional assistant attorney-general was created for the purpose of defending the United States in suits brought in the court of claims under that act, for Indian depredations. Of these assistant attorneys-general, one is charged with the defence of the United States in suits brought against the government in the court of claims under its special and general jurisdiction. The solicitor-general and assistant attorneys-general are appointed by the president of the United States by and with the advice and consent of the senate, while the assistant attorneys are appointed by the attorney-general.

The act creating the Department of Justice also provided for a solicitor of the treasury, an assistant solicitor of the treasury, solicitor of internal revenue, a naval solicitor (abolished June 19, 1878), and an examiner of claims for the Department of

State, commonly called the solicitor of the Department of State. They are appointed by the president by and with the advice and consent of the senate, and exercise their functions under the supervision and control of the head of the Department of Justice, although they are assigned to duty in the respective departments for which they are appointed. There is also provided an assistant attorney-general for the Department of the Interior and for the Post Office Department, who likewise perform their duties under the general supervision and control of the attorney-general.

The opinions of the attorney-general are published officially and have authority the same in kind, if not in degree, with the decisions of courts of justice; 6 Op. Att. Gen. 333; but see PRECEDENT.

See EXECUTIVE POWER; CABINET.

JUSTICE, FLEEING FROM. In order to come within the exception of "fleeing from justice" in R. S. 1045, it is sufficient that there is a flight with the intention of avoiding prosecution whether a prosecution has or has not been begun. It is not necessary that there should be an intent to avoid the justice of the United States; it is enough that there is an intent to avoid the justice of the state which has jurisdiction over the same act; Streep v. U. S., 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365. See FUGITIVE FROM JUSTICE; EXTRADITION; RENDITION.

JUSTICE OF THE PEACE. A public officer invested with judicial powers for the purpose of preventing breaches of the peace and bringing to punishment those who have violated the laws.

A new class of officials was appointed in England in 1327 specially entrusted with the conservation of the peace. Later they were allowed to receive indictments and to send those indicted for trial to the justices of gaol delivery. In 1344 they were to hear and determine felonies and trespasses. In 1360 they were assigned to every county in England, one lord and three or four of the most worthy in the county, with some learned in the law, to keep the peace, to arrest and imprison offenders, to imprison and take surety of suspected persons and to hear and determine felonies and trespasses; and were, about this time, styled by their present name. The number varied. By one act they must be the most sufficient knights, esquires and gentlemen of the land; by another, residents in their counties. They were appointed by the crown. They were the permanent rulers of the county. More recently their administrative powers had been given to elective boards. They were subject to the control of the courts of common law by means of the prerogative writs; by certiorari, their decisions can be questioned, and by mandamus they can be ordered to hear a case falling within their jurisdiction. 1 Holdsw. Hist. E. L. 124.

To the 18th century they were called *justices of peace*. Pollock, King's Peace; Pollock Expan. of C. L. 101. They were the king's officers appointed to aid the performance of his office in their respective counties. *Id.*

In People *ex rel.* Burby v. Howland, it was held by the New York appellate division of the supreme court that the legislature could not abolish the office of justice of the peace; 17 App. Div. 165, 45 N. Y. Supp. 347, 55 Alb. L. J. 319. The court said: "The office of justice of the peace is one of the oldest known to the English law. Originally it was merely a peace office, with no civil jurisdiction, but from a time long antedating the constitution (of New York) it was an office with both civil and criminal jurisdiction. Its most important functions are those of conservators of the peace, and administrators of the criminal law. The statutes conferring the powers and duties of the office date so far back in the history of English law that they may be said to be common-law powers, adopted by us with the office and inseparable therefrom."

The office has existed in New York for two centuries, and is a constitutional office of great importance; People v. Howland, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838.

At common law justices of the peace have a double power in relation to the arrest of wrong-doers: when a felony or breach of the peace has been committed in their presence, they may personally arrest the offender, or command others to do so, and, in order to prevent the riotous consequences of a tumultuous assembly, they may command others to arrest affrayers when the affray has been committed in their presence. If a magistrate be not present when a crime is committed, before he can take a step to arrest the offender, an oath or affirmation must be made, by some person cognizant of the fact, that the offence has been committed, and that the person charged is the offender, or there is probable cause to believe that he has committed the offence.

Probably the most important function of justices of the peace, in the administration of criminal law, is their power of committing magistrates. This they have always, and in most states they have also jurisdiction, either sole or concurrent, with some criminal court of petty offences.

The constitution of the United States directs that "no warrants shall issue but upon probable cause, supported by oath or affirmation." Amendm. IV. After his arrest, the person charged is brought before the justice of the peace, and after hearing he is discharged, held to bail to answer to the complaint, or, for want of bail, committed to prison.

In some states it is held that where there are criminal courts of record in the county, justices of the peace have no trial jurisdiction in criminal causes, but can act only as committing magistrates; Jackson v. State, 33 Fla. 620, 15 South. 250; Baldwin & Co. v. Bond, 45 La. Ann. 1012, 13 South. 742.

In some of the United States, justices of the peace have jurisdiction in civil cases, given to them by local regulations. The jurisdiction is usually confined to actions

of contract, express or implied, replevin, and the like, where a small amount is involved. The limit ranges from $100 to $300, and usually torts and actions for unliquidated damages are not included. The local statutes must be consulted, but the statutes regulating the jurisdiction are sufficiently similar to make the citation of a few cases fairly illustrative of the principles generally applied.

Their civil jurisdiction did not exist by the common law, but depends upon the constitutional warrant or statutory enactment; Horton v. Elliott, 90 Ala. 480, 8 South. 103.

Where a justice has no jurisdiction the filing of an answer by defendant after the overruling of a motion to dismiss will not give him jurisdiction; Rogers v. Loop, 51 Ia. 41, 50 N. W. 224. Where the appointment was void the consent of parties cannot give jurisdiction to the justice; Crawford v. Saunders, 9 Tex. Civ. App. 225, 29 S. W. 102.

Where an action would lie in either contract or tort and suit is begun before a justice, in order to sustain the jurisdiction the action will be presumed to have been brought upon the contract; Schulhofer v. R. Co., 118 N. C. 1096, 24 S. E. 709.

Jurisdiction is sufficiently shown if it appears from the entire record of the proceeding; Sappington v. Lenz, 53 Mo. App. 44.

It is no objection to the jurisdiction that plaintiff remitted a part of his claim to bring it within the jurisdiction; Hunton v. Luce, 60 Ark. 146, 29 S. W. 151, 28 L. R. A. 221, 46 Am. St. Rep. 165; McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373; even where unliquidated damages are claimed. Where lumber was delivered by instalments and the total amount exceeded the jurisdiction, the claim could not be split up into separate actions for the different deliveries in order to bring it within the jurisdictional amount; McPhail v. Johnson, 109 N. C. 571, 13 S. E. 799.

Where a stipulated attorney's fee would increase the amount beyond the jurisdiction, the fee may be considered in estimating the amount in controversy; Waters v. Walker (Tex.) 17 S. W. 1085; even if the stipulation for the fee is void; Warder, Bushnell & Glessner Co. v. Raymond, 7 S. D. 451, 64 N. W. 525.

Justices of the peace have been held to have no jurisdiction in trespass for the negligent killing of an animal; Ripple v. Keast, 16 Pa. Co. Ct. R. 548; or negligently allowing a dangerous animal to go at large; Sisco v. Miller, 2 Lack. Leg. N. (Pa.) 143; or for injuries to a horse by a defective culvert; Freedom Tp. v. Snowden, 5 Pa. Dist. R. 73; or in a suit on a foreign judgment; Baldwin v. Coyle, 7 Houst. (Del.) 327, 32 Atl. 15; in an action on the case for nuisance; Heisey v. Witmer, 4 Pa. Dist. R. 290; or for consequential damages due to negligence; Thilow v. Traction Co., 4 Pa. Dist. R. 83. But the jurisdiction was sustained in an action for the destruction of fruit in baskets, run over and crushed by the wheels of defendant's wagon, consequential damages not being involved; Conner v. Reardon, 8 Houst. (Del.) 19, 31 Atl. 878; so also there was jurisdiction of an action for killing a horse by a railroad company because of a breach of contract to maintain cattle guards; Harrow v. R. Co., 38 W. Va. 711, 18 S. E. 926.

The jurisdiction in a garnishment proceeding does not depend upon the amount the garnishee may owe; Surine v. Bank, 59 Ill. App. 329; in an attachment the jurisdiction is determined by the amount in controversy, not the value of the property attached; Fly v. Grieb's Adm'r, 62 Ark. 209, 35 S. W. 214; Gramling v. Dickey, 118 N. C. 986, 24 S. E. 671.

A justice of the peace has no power to vacate a judgment unless it be one of default or non-suit; Langford v. City of Doniphan, 61 Mo. App. 288; nor to settle a bill of exceptions; Vlasek v. Wilson, 44 Neb. 10, 62 N. W. 245; for the purpose of preserving testimony on a hearing of a motion to discharge the attachment; Donaldson v. Fisher, 43 Neb. 260, 61 N. W. 609; nor to grant a nonsuit where a case is on trial before a jury; Gunn v. Wood, 99 Ga. 70, 24 S. E. 407.

The court of a justice of the peace has been held a court of record; Pressler v. Turner, 57 Ind. 56; Fox v. Hoyt, 12 Conn. 491, 31 Am. Dec. 760; for the reason that it is bound to keep a record of its proceedings and has power to fine and imprison; Hooker v. State, 7 Blackf. (Ind.) 272. But it has also been held *contra;* Snyder v. Wise, 10 Pa. 157; Searcy v. Hogan, Hempst. 20, Fed. Cas. No. 12,584a.

Justices of the peace are within the principle that judicial officers are not liable for damages for judicial acts, and only on ministerial acts in cases of intentional violation of law or gross negligence; Gannon v. Donn, 7 D. C. 264; Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982. It was held that he is not liable for rendering a judgment and issuing an order of sale in an action on which he had no jurisdiction, unless he knowingly acted outside of it; Anderson v. Roberts (Tex.) 35 S. W. 416; or unless he did not act in good faith; Thompson v. Jackson, 93 Ia. 376, 61 N. W. 1004, 27 L. R. A. 92.

The refusal of a justice to approve an appeal is a ministerial act, for which an action will lie against him if he acted corruptly or maliciously; Legates v. Lingo, 8 Houst. (Del.) 154, 32 Atl. 80.

If the action of a justice of the peace is strictly judicial and he has jurisdiction, he is not liable to a civil action, however, it may be as to criminal prosecution, though corruption is alleged; Tyler v. Alford, 38 Me. 530; Garfield v. Douglass, 22 Ill. 100,

74 Am. Dec. 137; Furr v. Moss, 52 N. C. 525; Kress v. State, 65 Ind. 106.

All the acts of a justice of the peace from the commencement to the close of a suit seem to be considered judicial, rather than ministerial, so far as concerns questions of his responsibility; 1 Bish. N. Cr. L. § 463, n. 3; Wertheimer v. Howard, 30 Mo. 420, 77 Am. Dec. 623; see State v. Dunnington, 12 Md. 340; but he is liable for exercising authority where he has none; Ely v. Thompson, 3 A. K. Marsh. (Ky.) 70; where he acts upon inadequate allegation, but has jurisdiction over the subject-matter, he is not liable; Stewart v. Hawley, 21 Wend. (N. Y.) 552.

As to the powers of justices of the peace, see 3 Ohio, L. J. 671; their jurisdiction; 16 Am. St. Rep. 919, n.; summary jurisdiction; 3 L. Mag. & Rev. (N. S.) 1007; liability; 15 Am. L. Rev. 492; 25 Am. Rep. 698–701, n.; authentication of judgment; 5 Am. L. Reg. 577; criminal examinations; 9 Alb. L. J. 17, 133; 11 *id.* 36. As to the administration of this jurisdiction before there were justices of the peace, see JUSTICES IN EYRE.

Police magistrates were substituted in Philadelphia by the constitution of 1873.

See, generally, Burn; Davis; Graydon, Justice; Bache, Justice of the Peace; Beard, Justice of the Peace (1904); Com. Dig.; 15 Viner, Abr. 3; Bacon, Abr.; AMENDS; COURTS OF ENGLAND.

JUSTICE SEAT. See COURT OF JUSTICE SEAT.

JUSTICES OF THE BENCH. Five justices—two clerks and three laymen—all of the king's household, selected by Henry II and ordered to hear all appeals of the kingdom and do justice and not to depart from the king's court. They took precedence of all other judges. J. R. Green, in 1 Sel. Essays in Anglo-Amer. L. H. 137.

JUSTICES' COURTS. Inferior tribunals, with limited jurisdiction, both civil and criminal. There are courts so called in the states of Massachusetts and New Hampshire, and probably other states.

JUSTICES IN EYRE. Certain judges established, if not first appointed, A. D. 1176, 22 Hen. II.

England was divided into certain circuits, and three justices in eyre—or justices itinerant, as they were sometimes called—were appointed to each district, and made the circuit of the kingdom once in seven years, for the purpose of trying causes. They were afterwards, when the judicial functions assumed greater importance, directed, by Magna Charta, c. 12, to be sent into every county once a year. The itinerant justices were sometimes more justices of assize or dower, or of general jail delivery, and the like.

Speaking of the 12th century it is said that "the visitation of the counties by itinerant justices has been becoming systematic." The holding of the assize on circuit was evidently committed to judges of great prominence. "From the early years of the reign (Henry II.) we hear of pleas held on circuit by Richard Lucy the chief justiciar, by Henry of Essex the constable, and by Thomas Becket the chancellor. . . . In 1176, to execute the assize of Northampton, eighteen justices were employed, and the country was divided into six circuits; in 1179, twenty-one justices were employed, and the country was divided into four circuits; indeed from 1176 onwards hardly a year went by without there being a visitation of some part of England. These itinerant justices seem to have been chiefly employed in hearing the pleas of the crown (for which purpose they were equipped with the power of obtaining accusations from the local juries), and in entertaining some or all of the new possessory actions. The court that they held was, as already said, *curia regis*, but it was not *capitalis curia regis*, and probably their powers were limited by the words of a temporary commission. They were not necessarily members of the central court, and they might be summoned before it to bear record of their doings; still it was usual that each party of justices should include some few members of the permanent tribunal." 1 Poll. & Maitl. 134.

These justices in eyre in the reign of Henry III. are thus described: "But we may distinguish the main types of these commissions. What seems treated as the humblest is the commission to deliver a jail. This . . . is done very frequently; generally it is done by some three or four knights of the shire, and thus long before the institution of justices of the peace, the country knights had been accustomed to do high criminal justice. In order to dispose of the possessory assizes of novel disseisin and mort d'ancestor, a vast number of commissions were issued in every year. Early in Henry's reign this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named and allowed to associate some knights with himself. Apparently a justice of assize had often to visit many towns or even villages in each county; he did not do all his work at the county town. It must have been heavy work, for these actions were extremely popular. In the second year of Edward's reign some two thousand commissions of assize were issued. Just at that time the practice seems to have been to divide England into four circuits and to send two justices of assize round each circuit; but a full history of the circuits would be intricate and wearisome. Above all the other commissions rank the commission for an *iter ad omnia placita*, or more briefly for an *iter*, or eyre. An eyre had come to be a long and laborious business. In the first place, if we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster will now have to appear before the justices in eyre at Cambridgeshire. There is no business before the bench at Westminster if an eyre has been proclaimed in all the counties. Then again the justices are provided with a long list of interrogatories (*capitula itineris*) which they are to address to local juries. Every hundred, every vill in the county must be represented before them. These interrogatories—their number increases as time goes on—ransack the memories of the jurors, and the local records for all that has happened in the shire since the last eyre took place some seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and amercements. Three or four of the permanent judges will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict churchmen, have to serve as justices in eyre. Probably it was thought expedient that some of the great freeholders of the country should be commissioned, in order that no man might say that his judges were not his peers.

An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years. Expedients are being adopted which in course of time will enable the justices of assize to preside in the country over the trial of actions which are pending before the benches; thus without the terrors of an eyre, the trial of civil actions can take place in the counties and jurors need no longer be ever journeying to Westminster from their remote homes. But these expedients belong for the most part to Edward's reign; under his father a jury wearily travelling from Yorkshire or Devonshire towards London must have been no very uncommon sight." 1 Poll. & Maitl. 179, 180, 181.

The general eyre practically ceased by the reign of Edward III.

See 3 Bla. Com. 58; Crabb, Eng. Law 103; Co. Litt. 293.

JUSTICES OF THE JEWS. See JEWS.

JUSTICES OF THE PAVILION (*justiciarii pavilionis*). Certain judges of a pye-pouder court, of a most transcendent jurisdiction, authorized by the bishop of Winchester, at a fair held at St. Giles Hills near that city, by virtue of letters-patent granted by Edw. IV. Prynne's Animadv. on Coke's 4th Inst. fol. 191.

JUSTICES OF THE QUORUM. See QUORUM.

JUSTICES OF TRAILBASTON. Justices appointed by Edward I. during his absence in the Scotch and French wars, about the year 1305. They were so styled, it is said, from *trailing* or drawing the *baston (q. v.)*, or staff of justice. They were a sort of justices in eyre, with large and summary powers. Their office was to make inquisition, throughout the kingdom, of all officers, and others, touching extortion, bribery, and such like grievances of intruders into other men's lands, barrators, robbers, breakers of the peace, and divers other offenders; Cowell; Toml.; Old. N. B. fol. 52; 12 Co. 25.

They are supposed to date from 1276. In Coke's time they had long ceased to exist. They were the connecting link between justices in eyre and justices of oyer and terminer. They enquired as to persons who disturb the peace, who maintain malefactors and who illtreat jurors. 1 Holdsw. H. E. L. 118.

JUSTICIABLE. Such a question or matter as may properly come before a tribunal for decision. A dispute as to the title to real estate is a justiciable question; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; see also Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

JUSTICIAR, JUSTICIER. In Old English Law. A judge or justice. Baker, fol. 118; Mon. Angl. One of several persons learned in the law, who sat in the *aula regis*, and formed a kind of court of appeal in cases of difficulty.

The chief justiciar *(capitalis justiciarius totius Angliæ)* was a special magistrate, who presided over the whole *curia regis*, who was the principal minister of state, the second man in the kingdom, and by virtue of his office, guardian of the realm in the king's absence. 3 Bla. Com. 37; Spelman, Gloss. 330; 2 Hawk. Pl. Cr. 6. The last who bore this title was Philip Basset, in the time of Hen. III. After 1234, the office fell into abeyance; Harcourt, Lord Steward 116. The powers of the office went to the chief justice of the King's Bench and the steward of the household. *Id.* 128.

See also 2 Sel. Essays in Anglo-Amer. L. H. 213.

JUSTICIARII ITINERANTES (Lat.). Justices in eyre (*q. v.*).

JUSTICIARII RESIDENTES (Lat.). Justices or judges who usually resided in Westminster: they were so called to distinguish them from justices in eyre. Co. Litt. 293.

JUSTICIARY. Another name for a judge. In Latin, he was called *justiciarius*, and in French, *justicier*. Not used. Bacon, Abr. *Courts* (A).

JUSTICIES (from verb *justiciare*, do you do justice to). In English Law. A special writ, in the nature of a commission, empowering a sheriff to hold plea in his county court of a cause which he could not take jurisdiction of without this writ: *e. g.* trespass *vi et armis* for any sum, and all personal actions above forty shillings. 1 Burn, Just. 449. So called from the Latin word *justicies*, used in the writ, which runs, "*præcipimus tibi quod justicies A B*," etc.; we command you to do A B right, etc. Bracton, lib. 4, tr. 6, c. 13; Kitch. 74; Fitzh. N. B. 117; 3 Bla. Com. 3, 6.

JUSTIFIABLE HOMICIDE. That which is committed with the intention to kill, or to do a grievous bodily injury, under circumstances which the law holds sufficient to exculpate the person who commits it. A judge who, in pursuance of his duty, pronounces sentence of death, is not guilty of homicide; for it is evident that, as the law prescribes the punishment of death for certain offences, it must protect those who are intrusted with its execution. A judge, therefore, who pronounces sentence of death, in a legal manner, on a legal indictment, legally brought before him, for a capital offence committed within his jurisdiction, after a lawful trial and conviction of the defendant, is guilty of no offence; 1 Hale, Pl. Cr. 496.

Magistrates, or other officers intrusted with the preservation of the public peace are justified in committing homicide, or giving orders which lead to it, if the excesses of a riotous assembly cannot be otherwise repressed; 4 Bla. Com. 178, 179. So a homicide is justifiable, when committed by an officer in defending a judge of the United States, engaged in the discharge of his ju-

dicial duties; In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

An officer intrusted with a legal warrant, criminal or civil, and lawfully commanded by a competent tribunal to execute it, will be justified in committing homicide, if in the course of advancing to discharge his duty he be brought into such perils that without doing so he cannot either save his life or discharge the duty which he is commanded by the warrant to perform. And when the warrant commands him to put a criminal to death, he is justified in obeying it; Cl. Cr. L. 134. See, State v. Rollins, 113 N. C. 722, 18 S. E. 394. In endeavoring to make an arrest an officer has the right to use all the force that is necessary to overcome all resistance, even to the taking of life; State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380.

A soldier on duty is justified in committing homicide, in obedience to the command of his officer, unless the command was something plainly unlawful.

A man may be justified in killing another to prevent the debauching of his wife; Futch v. State, 90 Ga. 472, 16 S. E. 102.

A private individual will, in many cases, be justified in committing homicide while acting in self-defence; Fields v. State, 134 Ind. 46, 32 N. E. 780; Lovett v. State, 30 Fla. 142, 11 South. 550, 17 L. R. A. 705; Keith v. State, 97 Ala. 32, 11 South. 914; Garello v. State, 31 Tex. Cr. R. 56, 20 S. W. 179. If a trespass on the person or property of another amounts to a felony, the killing of the trespasser will be justifiable, if necessary in order to prevent it; Crawford v. State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242. It is not true as a general proposition that one who is assaulted by another with a dangerous weapon is justified in taking the life of the party so assaulting him; State v. West, 45 La. Ann. 14, 12 South. 7. The same circumstances that will justify or excuse the homicide where the assault is upon one's self, will also excuse or justify the slayer if the killing is done in defence of his family or servant; Hathaway v. State, 32 Fla. 56, 13 South. 592. See DEFENCE.

An instruction to a jury requiring a justification of homicide to be established beyond a reasonable doubt is erroneous; People v. Hill, 65 Hun 420, 20 N. Y. Supp. 187.

To establish a case of justifiable homicide it must appear that the assault upon the prisoner was such as would lead a reasonable person to believe that his life was in peril; Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528.

See ARREST; HOMICIDE; JUSTIFICATION.

JUSTIFICATION. **In Pleading.** The allegation of matter of fact by the defendant, establishing his legal right to do the act complained of by the plaintiff.

Justification admits the doing of the act charged as a wrong, but alleges a right to do it on the part of the defendant, thus denying that it is a wrong. Excuse merely shows reasons why the defendant should not make good the injury which the plaintiff has suffered from some wrong done. See AVOWRY.

Justification is said to be the law's permission to injure others because of some countervailing benefit to society outweighing the harm done; 26 Harv. L. Rev. 741. The benefit may assume many forms, as prevention of crime, freedom of speech, free competition, or the free beneficial use of property by the owner, etc.; *id.*

It is said that all justifications will fall into one of two classes: 1. Where the objects sought for are so important that motive must be ignored; 2. Where the objects are not so important but that the presence of ill will may turn the scale; Munster v. Lamb, 11 Q. B. D. 588; McLaughlin v. Cowley, 127 Mass. 316.

Trespasses. *A warrant*, regular on its face, and issued by a court of competent jurisdiction, is a complete justification to the officer to whom it is directed for obeying its command, whether it be really valid or not. But where the warrant is absolutely void, or apparently irregular in an important respect, or where the act done is one which is beyond the power conferred by the warrant, it is no justification. See ARREST; TRESPASS. So, too, many acts, and even homicide committed in *self-defence*, or defence of wife, children, or servants, are justifiable; Archb. Cr. P. by Pom. 681, n.; see SELF-DEFENCE; DEFENCE; JUSTIFIABLE HOMICIDE; or in *preserving the public peace*; see ARREST; TRESPASS; or under a *license*, express or implied; Case v. De Goes, 3 Cai. (N. Y.) 261; Robson v. Jones, 2 Bail. (S. C.) 4; U. S. v. Gear, 3 McLean 571, Fed. Cas. No. 15,195; including entry on land to demand a debt, to remove chattels; Chambers v. Bedell, 2 W. & S. (Pa.) 225, 37 Am. Dec. 508; Richardson v. Anthony, 12 Vt. 273; to ask lodgings at an inn, the entry in such cases being peaceful; to exercise an incorporeal right; Hayward v. Pilgrim Society, 21 Pick. (Mass.) 272; or for *public service* in case of exigency, as pulling down houses to stop a fire; Year B. 13 Hen. VIII. 16 *b;* destroying the suburbs of a city in time of war; Year B. 8 Edw. IV. 35 *b;* entry on land to make fortifications or in *preservation* of the owner's rights of property; Sterling v. Peet, 14 Conn. 255; 4 D. & B. 110; Fiske v. Small, 25 Me. 453; King v. Kline, 6 Pa. 318; Almy v. Grinnell, 12 Metc. (Mass.) 53, 45 Am. Dec. 238.

Libel and slander may be justified in a civil action, in some cases, by proving the truth of the matter alleged, and generally by showing that the defendant had a right upon the particular occasion either to write and publish the writing or to utter the words: as, when slanderous words are found in a report of a committee of congress, or

in an indictment, or words of a slanderous nature are uttered in the course of debate in the legislature by a member, or at the bar by counsel when properly instructed by his client on the subject. Comyns, Dig. *Pleader.* See SLANDER.

Matter in justification must be specially pleaded, and cannot be given in evidence under the general issue. See LICENSE. A plea of justification to an action for slander, oral or written, should state the charge with the same degree of certainty and precision as is required in an indictment. The object of the plea is to give the plaintiff, who is in truth an accused person, the means of knowing what are the matters alleged against him. It must be direct and explicit. It must in every respect correspond with, and be as extensive as the charge in, the declaration.

The justification, however, will be complete if it covers the essence of the libel. But it must extend to every part which could by itself form a substantive ground of action. Where the slander consists in an imputation of crime, the plea of justification must contain the same degree of precision as is requisite in an indictment for the crime, and must be supported by the same proof that is required on the trial of such an indictment. It is a perfectly well-established rule that where the charge is general in its nature, yet the plea of justification must state specific instances of the misconduct imputed to the plaintiff. And, even for the purpose of avoiding prolixity, a plea of justification cannot make a general charge of criminality or misconduct, but must set out the specific facts in which the imputed offence consists, and with such certainty as to afford the plaintiff an opportunity of joining issue precisely upon their existence. Heard, Lib. & Sl. § 240. See LIBEL.

When established by evidence, it furnishes a complete bar to the action.

In Practice. The proceeding by which bail establish their ability to perform the undertaking of the bond or recognizance.

It must take place before an authorized magistrate; Jones v. Badger, 5 Binn. (Pa.) 461; Fenn v. Smith, 6 Johns. (N. Y.) 124; 13 Johns. (N. Y.) 422; and notice must, in general, be given by the party proposing the bail, to the opposite party, of the names of the bail and the intention to justify; Jaques v. Hemphill, 3 Harr. (Del.) 503. See Cade v. Young, 8 N. J. L. 369.

It is a common provision that bail must justify in double the amount of the recognizance if exceptions are taken; Louis v. Mitchell, 2 Hill (N. Y.) 379; otherwise, a justification in the amount of the recognizance is, in general, sufficient.

It must be made within a specified time, or the persons named cease to be bail; People v. Judges, 1 Cow. (N. Y.) 54. See Stockton v. Throgmorton, Baldw. 148, Fed. Cas. No. 13,463.

JUSTIFICATORS. A kind of compurgators, or those who, by oath, justified the innocence or oaths of others, as in the case of wages of law.

JUSTIFYING BAIL. **In Practice.** The production of bail in court, who there justify themselves against the exception of the plaintiff. See BAIL; JUSTIFICATION.

JUSTITIUM. **In Civil Law.** A suspension or intermission of the administration of justice in courts; vacation time. Calv. Lex.

JUSTS, or JOUSTS. Exercises between martial men and persons of honor, with spears, on horseback; different from tournaments, which were military exercises between many men in troops. 24 Hen. VIII. c. 13.

JUVENILE COURTS. Courts having special jurisdiction, of a paternal nature, over delinquent and neglected children.

The thought that the child who has begun to go wrong, who has broken a law or ordinance, is to be taken in hand by the state, not as an enemy, but as a protector, led to the principle which was first fully declared in the act under which the juvenile court in Chicago was opened July 1, 1899. Colorado soon followed, and since that time similar legislation has been adopted in over 30 states, as well as in Great Britain and Ireland, Canada and the Australian colonies. Juvenile court legislation has assumed two aspects: In New York and a few other jurisdictions, protection is accomplished by suspending sentence, or in the case of removal from the home, sending the child to a school instead of a jail. But in Illinois and in most jurisdictions, the designated age of criminal responsibility is advanced from the common law age of 7 to some higher age, as 17 or 18, and under most juvenile court acts a child under the designated age is to be proceeded against criminally only when, in the judgment of the judge presiding, the interest of the state and of the child requires this to be done; In re Powell, 6 Okl. Cr. 495, 120 Pac. 1022; State v. Reed, 123 La. 411, 49 South. 3.

Objection has been made that this is nevertheless a criminal proceeding and therefore the child is entitled to a trial by jury and to all the constitutional rights that hedge about a criminal. The act, according to Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92, is but an exercise by the state of its supreme power over the welfare of its children. But if the proceedings against the individual are criminal, his constitutional rights must be carefully safeguarded. Such penal acts are strictly construed; State v. Dunn, 53 Or. 304, 99 Pac. 278, 100 Pac. 258. For over two centuries the courts of chancery in England have exercised jurisdiction for the protec-

tion of the unfortunate child. The proposition that this court could not act unless the child had property is wholly unsupported by either principle or authority; [1892] 2 Chan. 496; [1909] 2 Ch. 260.

A juvenile court has jurisdiction of an offence by a child punishable by hard labor; State v. Reed, 123 La. 411, 49 South. 3. The jurisdiction to hear such cases is generally vested in an existing court having equity powers. In some cities, however, special courts have been provided. By Colorado Act of 1909, provision is made for hearings before masters in chancery to be appointed by a juvenile court judge and acting under his direction. The legislature cannot confer on circuit court commissioners powers with reference to juvenile offenders which require proceedings within the power of courts of record only; Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564, 7 Ann. Cas. 821.

See an article in 23 Harv. L. Rev. 104, by Julian Mack.

The legislature cannot confer on circuit court commissioners powers with reference to juvenile offenders which require proceedings within the power of courts of record only; Hunt v. Wayne Circuit Judges, 142 Mich. 93, 105 N. W. 531, 3 L. R. A. (N. S.) 564, 7 Ann. Cas. 821. A Pennsylvania statute designated the court of quarter sessions as a juvenile court; it was contended that the tribunal was an unconstitutional body and without jurisdiction, but it was held that "the court of quarter sessions is not simply a criminal court. The constitution recognizes it, but says nothing as to its jurisdiction. Its existence antedates our colonial times, and by the common law and statutes, both here and in England, it has for generations been a court of broad general police powers in no way connected with its criminal jurisdiction. . . . With its jurisdiction unrestricted by the constitution, it is for the legislature to declare what shall be exercised by it as a general police court, and, instead of creating a distinctly new court, the act of 1903 does nothing more than confer additional powers upon the old court and clearly define them. . . . It is a mere convenient designation of the court of quarter sessions to call it when caring for children a juvenile court, but no such court as an independent tribunal is created. It is still a court of quarter sessions before which the proceedings are conducted . . . and the records are still those of the court of quarter sessions;" Com. v. Fisher, 213 Pa. 48, 62 Atl. 198, 5 Ann. Cas. 92. An earlier act in that state had been held unconstitutional (1901) as creating a classification which offended against the provision forbidding the passage of any special law regulating practice and jurisdiction in judicial proceedings or granting to any individual any special privilege or immunity; Mansfield's Case, 22 Pa. Super. Ct. 224.

A Missouri act relating to neglected and delinquent children was upheld, though it provided a rule of procedure and punishment for such children which was not applicable to the same class of children in other counties, upon the ground that the conditions which prevail in thickly settled districts reasonably justified the distinction; Ex parte Loving, 178 Mo. 194, 77 S. W. 508.

JUVENILE OFFENDERS. See JUVENILE COURTS.

JUXTA CONVENTIONEM. According to the covenant. Fleta, lib. 4, c. 16, § 6.

JUXTA TENOREM SEQUENTEM. According to the tenor following. 2 Salk. 417. A phrase used in the old books when the very words themselves referred to were set forth. *Id.;* 1 Ld. Raym. 415.

JUZGADO. In Spanish Law. The collective number of judges that concur in a decree, and more particularly the tribunal having a single judge.

K

K. B. King's Bench. See COURTS OF ENGLAND.

K. C. King's Counsel. See BARRISTER.

KALENDÆ. Rural chapters or conventions of the rural deans and parochial clergy, formerly held on the calends of every month. Kenn. Paroch. Antiq. 604.

KALENDS. See IDES.

KANSAS. The name of one of the states of the United States of America.

The state was carved out of a portion of the Louisiana purchase, and a small portion of the territory ceded to the United States by Texas.

The territory of Kansas was organized by an act of congress, dated May 30, 1854.

The constitution was adopted at Wyandotte July 29, 1859, and Kansas was admitted into the Union as a state, by an act of the congress, approved, January 20, 1861. An amendment providing for woman suffrage was adopted in 1912.

"The body of the laws of England as they existed in the fourth year of the reign of James I. (1607) constitutes the common law of this state." Kansas Pac. Ry. Co. v. Nichols, 9 Kan. 252, 12 Am. Rep. 494.

KEELAGE. The right of demanding money for the bottom of ships resting in a port or harbor. The money so paid is also called *keelage*.

KEELS. This word is applied, in England, to vessels employed in the carriage of coals. Jacob, Law Dict.

KEEP. To heed; observe; regard; attend to.

When it is said that a certain man keeps a woman, the popular inference is, that the relation is one which involves illicit intercourse; Downing v. Wilson, 36 Ala. 717. See Barrett v. R. Co., 3 Allen (Mass.) 101; Cummings v. Riley, 52 N. H. 368. To keep a street in safe condition, means to have it so; to make and remake it so; City of Atlanta v. Buchanan, 76 Ga. 585. To keep premises in repair is to have them at all times in that condition; 1 B. & Ald. 585.

Keep down interest. To pay interest periodically as it becomes due, but the phrase does not extend to the payment of all arrears of interest which may have become due on any security from the time when the instrument was executed. 4 El. & Bl. 211.

KEEPER. To warrant the conviction of one as the keeper of a common gaming house, he need not be the proprietor or lessee; it is sufficient if he has the general superintendence. Stevens v. People, 67 Ill. 587.

KEEPER OF THE FOREST (called, also, the chief warden of the forest). An officer who had the principal government over all officers within the forest, and warned them to appear at the court of justice-seat on a summons from the lord chief-justice in eyre. Manw. For. Law, part 1, p. 156. See FOREST LAW.

KEEPER OF THE GREAT SEAL (lord keeper of the great seal). A judicial officer who is by virtue of his office a member of the privy council. Through his hands pass all charters, commissions, and grants of the crown, to be sealed with the *great seal*, which is under his keeping. The office was consolidated with that of lord chancellor by 5 Eliz. c. 18. Co. 4th Inst. 87; 1 Hale, Pl. Cr. 171, 174; 3 Bla. Com. 47.

At times the great seal is "put in commission"; *i. e.* is entrusted to one or more officials who act under a special commission from the crown. Such is the case when the lord chancellor is absent from the country; there was an instance in the last century between the resignation of the lord chancellor and the appointment of his successor.

See CANCELLARIUS; CHANCELLOR.

KEEPER OF THE KING'S CONSCIENCE. The lord high chancellor is the keeper of the king's conscience. Historically it relates to the fact that the king in early times referred to such official the duty of redressing wrongs. See CHANCELLOR.

KEEPER OF THE PRIVY SEAL. The officer through whose hands go all charters, pardons, etc., signed by the king before going to the great seal, and some which do not go there at all. He is of the privy council *virtute officii*. He was first called clerk of the privy seal, then guardian, then lord privy seal, which is his present designation. 12 Ric. II. c. 12; Rot. Parl. 11 Hen. IV.; Stat. 34 Hen. VIII. c. 4; 4 Inst. 55; 2 Bla. Com. 347. See PRIVY SEAL.

KEEPING. In an insurance policy a clause prohibiting the keeping or having benzine in insured premises, was held to be intended to prevent the permanent and habitual storage of the prohibited articles, and that taking it on the premises for the purpose of cleaning machinery was not within the prohibition; Mears v. Ins. Co., 92 Pa. 15, 37 Am. Rep. 647.

KEEPING BOOKS. Preserving an intelligent record of a merchant's or tradesman's affairs with such reasonable accuracy and care as may properly be expected from a man in that business. An intentional omission, or repeated omissions, evincing gross carelessness will vitiate; an accidental failure to make a proper entry will not; 16 Bankr. Reg. 152.

KEEPING OPEN. A statute prohibiting shops to be kept open on Sunday is violated where one allows general access to his shop for purposes of traffic, though the outer en-

trances are closed. Com. v. Harrison, 11 Gray (Mass.) 308; Lynch v. People, 16 Mich. 472.

KEEPING TERM. In English Law. A duty performed by students of law, consisting in eating a sufficient number of dinners in hall to make the term count for the purpose of being called to the bar. Moz. & W.

KEEPING THE PEACE. See SURETY OF THE PEACE.

KELP-SHORE. The land between high and low water mark. Stroud. Jud. Dict.

But when the conveyance, "with the kelp-shore" by the metes and bounds given, manifestly excluded the land between high and low water mark, it was held to be excluded, and parol proof could not be received of the intention to include it; 10 Ir. C. L. 150.

KENILWORTH, DICTUM OF. An award made by Henry III. and parliament in 1266 for the pacification of the kingdom.

KENNING TO THE TERCE. In Scotch Law. The ascertainment by a sheriff of the just proportion of the husband's lands which belongs to the widow in virtue of her *terce* or third. An assignment of dower by sheriff. Erskine, Inst. 11. 9. 50; Bell, Dict.

KENTLEDGE or KINTLEDGE. The permanent ballast of a ship. Ab. Sh. 6.

KENTUCKY. The name of one of the United States of America.

This state was formerly a part of Virginia, which by an act of its legislature, passed December 18, 1789, consented that the district of Kentucky within the jurisdiction of the said commonwealth, and according to its actual boundaries at the time of passing the act aforesaid, should be formed into a new state. By the act of congress of February, 1791, 1 Story, Laws 168, congress consented that, after the first day of June, 1792, the district of Kentucky should be formed into a new state, separate from and independent of the commonwealth of Virginia. And by the second section it is enacted, that upon the aforesaid first day of June, 1792, the said new state, by the name and style of the state of Kentucky, shall be received and admitted into this Union, as a new and entire member of the United States of America.

The present constitution of this state was adopted September 28, 1891. An act was passed in 1914 proposing an amendment allowing the employment of convict labor upon public roads and bridges.

KEROSENE. A rock or earth oil. Morse v. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

It is, in a commercial sense, a refined coal or earth oil, and is embraced within those terms as used in an insurance policy. Bennett v. Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501. It is not petroleum, but made from the latter by a process of a distillation and refinement. Bennett v. Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501.

A court will not take judicial notice that kerosene is an "inflammable fluid" within the meaning of an insurance policy, it must be proved as a fact; Wood v. Ins. Co., 46 N. Y. 421; nor that it comes under the words "burning fluid"; Mark v. Ins. Co., 24 Hun (N. Y.) 565. See Morse v. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

It is a question for the jury whether kerosene is a burning fluid or chemical oil; Mears v. Ins. Co., 92 Pa. 15, 37 Am. Rep. 647; or a drug; Carrigan v. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687; where the court, after quoting Webster's definition of a drug, as "any mineral substance used in chemical operations," declined to say as matter of law that benzine is not included in that term. See RISKS AND PERILS; OIL; NEGLIGENCE; MINES AND MINING; GAS.

KEY. An instrument made for closing and opening a lock.

The keys of a house are considered as real estate, and descend to the heir with the inheritance; 11 Co. 50 *b*; 30 E. L. & Eq. 598; but although they follow the inheritance, they are not fixtures, so far as that the taking of them is not larceny; Hoskins v. Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129; 5 Taunt. 518.

When the keys of a warehouse are delivered to a purchaser of goods locked up there, with a view of effecting a delivery of such goods, the delivery is complete. The doctrine of the civil law is the same; Dig. 41. 1. 9. 6; 18. 1. 74; Benj. Sales, 6th Am. ed. § 1043; 3 Term 464. See DONATIO MORTIS CAUSA; GIFT.

Keys are implements of housebreaking within statute 14 & 15 Vict. c. 19, § 1; for, though commonly used for lawful purposes they are capable of being employed for purposes of housebreaking; and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, with the intention of using them as implements of housebreaking; 3 C. & K. 250; and the statute was held to include skeleton, or any other kind of key used for purposes of housebreaking; *id.* Entering by a key left in the door locked on the outside is not housebreaking; 1 Swint. Jus. Cas. 433. See BURGLARY.

KEYAGE. A toll paid for loading and unloading merchandise at a quay or wharf.

KEYS. The twenty-four chief commoners in the Isle of Man who form the local legislature. 1 Steph. Com., 100.

KIDEL or KIDDLE. An open weir whereby fish are caught. 2 Inst. 38.

"Weirs (kidelli or gurgites) were the means usual in ancient times for appropriating and enjoying several fisheries in tidal waters." Lord Selborne, L. C., in 8 App. Cas. 144.

KIDNAPPING. The forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another. 4 Bla. Com. 219. At common law it is a misdemeanor; Comb. 10.

There is no wide difference in meaning between kidnapping, false imprisonment, and abduction. The better view seems to be that kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person to some other place; Archb. Cr. P. by Pom. 984; 2 Bish. Cr. L. § 750. See Ex parte Keil, 85 Cal. 309, 24 Pac. 742. It has been held that transportation to a foreign country is not necessary, though this conflicts with Blackstone's definition, *supra;* State v. Rollins, 8 N. H. 550. See 1 East, P. C. 429. The consent of a mature person of sound mind prevents any act from being kidnapping; otherwise as to a young child; a child of nine years has been held too young to render his consent available as a defence; Cl. Cr. L. 221; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518; Gravett v. State, 74 Ga. 191; U. S. v. Ancarola, 17 Blatchf. 423, 1 Fed. 676; but a female fourteen years of age is not kidnapped, if taken away with her consent for the purpose of marriage, and she actually marries; Cochran v. State, 91 Ga. 763, 18 S. E. 16; so, going away by previous arrangement with an unmarried woman who, becoming intoxicated, remained for some days, in illicit intercourse, and was then brought back at her request, was not kidnapping; Eberling v. State, 136 Ind. 117, 35 N. E. 1023. Physical force need not be applied, threats will suffice; Payson v. Macomber, 3 Allen (Mass.) 69; or fraudulently acquiring consent; People v. De Leon, 109 N. Y. 226, 16 N. E. 46, 4 Am. St. Rep. 444. The crime may be effected by means of menaces; Moody v. People, 20 Ill. 315; or by getting a man drunk; Hadden v. People, 25 N. Y. 373. Where the custody of a child is assigned to one of two divorced parents, and the other, or a third person employed for the purpose, carries it off, it is kidnapping; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 5 Allen (Mass.) 518. It was held that within the meaning of the statute against kidnapping, any place where a child has a right to be is its residence; Wallace v. State, 147 Ind. 621, 47 N. E. 13. In this case two children who were acrobats had been sent away from home for the purpose of giving exhibitions to raise money with which to relieve the necessities of the family. While absent from their parents they were decoyed away by defendant, who was indicted for kidnapping under the Indiana statute. The court held that they had not acquired a permanent residence, but they were at a place they had a right to be—to which they had been sent by their parents, engaged in the business for which they had been sent. "The purpose of the statute here under consideration certainly was not that a child might be kidnapped at its father's house, but not if it were on a visit at a friend's in a near or distant city. The evident purpose was rather to provide against the kidnapping of a person from any place where he has a right to be, whether that be the place of his 'temporary sojourn or permanent domicile.' A child may be kidnapped, not only from its domicile or the home of its parents, but likewise from a neighbor's house, from church or school, or hotel, from a hall of public entertainment, or, in fact, from any place where it has a right to be; and it is in that sense that the word 'residence' is here used." 17 N. Y. L. J. 842.

One who takes his child of tender years out of the state, with its consent and with the consent of the mother to whom its custody has been awarded in divorce proceedings, to prevent its presence at a criminal trial in which it had been subpœnaed as a witness, is not guilty of kidnapping; John v. State, 6 Wyo. 203, 44 Pac. 51. New York, Illinois, and other states have passed statutes on kidnapping. See ABDUCTION; 1 Russ. Cr. 962; Click v. State, 3 Tex. 282; Com. v. Blodgett, 12 Metc. (Mass.) 56; People v. De Leon, 47 Hun (N. Y.) 308; Com. v. Myers, 146 Pa. 24, 23 Atl. 164. Where defendant procured an adjudication that the person alleged to have been kidnapped was insane, and, without using force, publicly conveyed her to a lunatic asylum, though she was not insane at the time, he was not guilty of the offence of kidnapping; People v. Camp, 139 N. Y. 87, 34 N. E. 755.

The indictment must be found in the county in which the person was seized and not in one through which he was carried; State v. Whaley, 2 Harring. (Del.) 538.

It has been held, however, that the carrying away is not essential; State v. Rollins, 8 N. H. 550. The crime includes a false imprisonment; 2 Bish. Cr. Law § 671. See ABDUCTION.

It has been held that in order to rescue a kidnapped person his friends may use such force as will be necessary, and that where there is an attack upon the rescuers, a killing of the kidnapper in self-defence is excusable homicide; Delaney v. Com., 25 S. W. 830.

KILL (Dutch). Originally the bed of a river or creek, and by relation used to mean the stream itself. It is so used in Delaware and New York, but has been said to have no distinct legal signification. French v. Carhart, 1 N. Y. 96.

KIN. Legal relationship; properly relations by blood, but often including those by marriage. It has been held to include a son-in-law under a statute disqualifying a justice of the peace, in cases to which his kin were parties; Hibbard v. Odell, 16 Wis. 635; and a second cousin, of a mother under a statute disqualifying jurors in cases where persons of kin were parties; State v. Walton, 74 Mo. 271. See NEXT OF KIN.

KIND. The agreement that a collector of taxes was to receive his commission "in kind" means the same kind of funds in which the tax is collected; Wilson v. State, 51 Ark. 213, 10 S. W. 491.

Another kind quoted is not synonymous with another quality quoted; 3 Q. B. D. 341. In this case the reference was to seed. As to loans of property to be repaid "in kind," see IN KIND; LOAN FOR CONSUMPTION.

KINDRED. Relations by blood. 2 Jarm. Wills 643; Wetter v. Walker, 62 Ga. 144, quoting 2 Wms. Ex. 815. It is in some cases, however, used to include relations in law, as children by adoption in a statute; Power v. Hafley, 85 Ky. 671, 4 S. W. 683; but not a grandson adopted as a son, so as to make kindred include the adopting parent; Delano v. Bruerton, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698. It was held that as the word kindred in the statute of descents means lawful kindred, that term did not include the mother of a bastard, when the right accrued prior to the act enabling illegitimate children to inherit; Hughes v. Decker, 38 Me. 153. See Humphries v. Davis, 100 Ind. 280, 50 Am. Rep. 788; Wunderle v. Wunderle, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84. See BASTARD; DESCENT AND DISTRIBUTION.

The kindred of every one are divided into three principal classes. 1. His children, and their descendants. 2. His father, mother, and other ascendants. 3. His collateral relations; which include, in the first place, his brothers and sisters, and their descendants; and, secondly, his uncles, cousins, and other relations of either sex, who have not descended from a brother or sister of the deceased. All kindred, then, are descendants, ascendants, or collaterals. A husband or wife of the deceased, therefore, is not his or her kindred; 14 Ves. 372. See Wood. Inst. 50; Ayliffe, Parerg. 425; Dane, Abr.; Toullier, Ex. 382, 2 Sharsw. Bla. Com. 516, n.; Pothier, *Des Successions*, c. 1, art. 3.

KING. The ruler of a kingdom. See REGNAL YEARS; SOVEREIGN.

KING CAN DO NO WRONG. This maxim means that the king is not responsible legally for aught he may please to do, or for any omission. Aust. Jur. sect. VI. It does not mean that everything done by the government is just and lawful, but that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king; 2 Steph. Com., 11th. ed. 486.

The king could not be sued in his own court; it was therefore held that he must act through a servant; otherwise, in case of a wrongful act, the subject would have no remedy. But the theory that the king can do no wrong, and therefore cannot authorize a wrong, and that, if wrong is done, it is the act of his servant (see 2 B. & S. 257), is a later refinement; 3 Holdsw. Hist. E. L. 311.

This maxim has no place in the system of constitutional law of the United States, as applicable either to the government or any of its officers, or of the several states or any of their officers; Langford v. U. S., 101 U. S. 343, 25 L. Ed. 1010. Our government is not liable for the wrongful and unauthorized acts of its officers, however high their place, and though done under a mistaken zeal for the public good; Gibbons v. U. S., 8 Wall. (U. S.) 269, 19 L. Ed. 453. See Poindexter v. Greenhow, 114 U. S. 290, 5 Sup. Ct. 903, 962, 29 L. Ed. 185.

KING OF ARMS. See HERALD.

KING'S BENCH. See COURTS OF ENGLAND.

KING'S CHAMBER. A term applied to *fauces terræ (q. v.)*. See 1 Phill. Int. Law 239; Halleck, Int. Law 139.

KING'S or QUEEN'S COUNSEL. Barristers or serjeants who have been called within the bar and selected to be the king's counsel. They answer in some measure to the *advocati fisci*, or advocates of the revenue, among the Romans. They must not be employed against the crown without special leave, which was, however, always granted, at a cost of about nine pounds; 3 Sharsw. Bla. Com. 27, note.

See BARRISTER; SERJEANTS-AT-LAW.

KING'S EVIDENCE. An accomplice in a felony, who, on an implied promise of pardon if he fully and fairly discloses the truth, is admitted as evidence for the crown against his accomplices. 1 Phill. Ev. 81. A jury may, if they please, convict on the unsupported testimony of an accomplice; Tayl. Ev. 830; 4 Steph. Com. 398. On giving a full and fair confession of truth, the accomplice has a strong claim to a recommendation to mercy. He cannot be admitted to testify as king's evidence after judgment against him; 2 Russ. Cr. 956. In the United States, this is known as state's evidence. See ACCOMPLICE.

KING'S PEACE. See CONSERVATOR OF THE PEACE; PEACE.

KING'S REMEMBRANCER. See REMEMBRANCER.

KING'S SERJEANT. See SERJEANT.

KING'S SILVER. A fine or payment due to the king for leave to agree in order to levy a fine (*finalis concordia*). 2 Bla. Com. 350; Dy. 320, pl. 19; 1 Leon. 249, 250; 2 *id.* 56, 179, 233, 234; 5 Co. 39.

KING'S WIDOW. A widow of the king's principal tenant, who was obliged to take oath in chancery not to marry without the king's consent. Whart. Lex.

KINGDOM. A country where an officer called a king exercises the powers of government, whether the same be absolute or limted. Wolff. Inst. Nat. § 94. In some kingdoms, the executive officer may be a woman, who is called a queen.

KINSBOTE (from *kin*, and *bote*, a composition). In Saxon Law. A composition for killing a kinsman. Anc. Laws & Inst. of Eng. Index, *Bote*.

KINSMAN. A man of the same race or family; one related by blood. Webster.

KIRBY'S QUEST. An ancient record remaining with the remembrancer of the English exchequer; so called from being the inquest of John de Kirby, treasurer to Edward I.

KISSING THE BOOK. A ceremony used in taking the corporal oath, the object being, as the canonists say, to denote the assent of the witness to the oath in the form it is imposed. The witness kisses either the whole Bible, or some portion of it; or a cross in some countries. See the ceremony explained in Oughton's Ordo. tit. lxxx.; Consitt. on Courts, part 3, sect. 1, § 3; Junkin, Oath 173, 180; 2 Pothier, Obl., Evans ed. 234. In Pennsylvania, by act of 1895, the witness places his right hand on the Bible, but does not kiss it.

KLEPTOMANIA. Insanity in the form of an irresistible propensity to steal. Wharton. See Looney v. State, 10 Tex. App. 520, 38 Am. Rep. 646. A form of insanity which is said to manifest itself by a propensity to acts of theft. Tayl. Med. Jur., Bell's ed. 766. A weakening of the will power to such an extent as to leave the afflicted one powerless to control his impulse to appropriate the personal property of others. State v. McCullough, 114 Ia. 532, 87 N. W. 503, 55 L. R. A. 378, 89 Am. St. Rep. 382.

It is said to be often shown in cases of women, laboring under their peculiar diseases or of those far advanced in pregnancy. There have been instances of well-educated persons who have taken articles of no value and without apparent motive. If it appears that the accused was incompetent to know that the act was wrong, the facts may establish a plea of insanity; *id.*, quoting Tindal, C. J.

A sharp distinction is made between kleptomania and the tendency to steal so commonly observed in the well defined forms of insanity; the former is a defective mental characteristic approaching the confines of insanity on one subject alone, while the individual, on all other subjects, is perfectly sane. It differs from shoplifting in that the shoplifter steals for a purpose, and only those articles which are of value, while the kleptomaniac takes goods of any description, often of no use to herself and with no motive for their possession; 4 Am. Lawy. 533.

In determining the responsibility of such persons for their acts, the principal subjects to be considered are the absence of any real motive, the knowledge of previous acts of a similar character, the history of hereditary taint, and the presence of a neurotic condition; 3 Witth. & Beck. Med. Jur. 279.

Kleptomania is regarded as similar to homicidal insanity; Harris v. State, 18 Tex. App. 287; 1 Bish. N. Cr. L. § 388; and it has been held a valid defence; Harris v. State, 18 Tex. App. 287; but when it was rejected as a defence, the court would not disturb the verdict; Com. v. Fritch, 9 Pa. Co. Ct. Rep. 164.

As to irresistible impulse as a defence in criminal cases, see INSANITY.

A charge to a jury to apply the "right and wrong" test to the particular facts is a sufficient charge in a kleptomania case, since, if it is a disease depriving one of the sense of right and wrong as to theft, it met the test, and if it is merely an irresistible impulse to steal, it is no defence; Lowe v. State, 44 Tex. Cr. R. 224, 70 S. W. 206.

Taylor (1 Med. Jurispr. 820) points out that in most of the cases there has appeared: 1. A perfect consciousness of the act and of its illegality. 2. The article, though of trifling value, has still been of some use to the person (for instances, articles of female use, or on which money could be raised). 3. There has been act and precaution in endeavoring to conceal the theft. 4. Either a denial, when detected, or some evasive excuse. He adds that "it is now not recognized as a type of insanity by itself," and gives an instance of an acquittal of a kleptomaniac upon the ground that, though not insane, there was an absence of felonious intent.

In an English case, tried in 1875, a clergyman charged with stealing, had taken goods when the shopkeeper's back was turned and concealed them in his pocket. He at first denied taking them, then offered to pay for them, and then attempted to leave. At the trial there was medical evidence that he had suffered from brain disease, and had been quite deranged at times. The opinion of medical experts was that the accused did not know the nature or quality of the act he had committed, at the time he had committed it, and he was acquitted. Tayl. Med. Jur., Bell's ed. 767.

It approaches the confines of insanity, but while, as physicians, we might claim immunity, as jurists, we "can only believe that the best interests of society are subserved by holding the person responsible"; 3 Witth. & Becker, Med. Jurispr. 253.

KNACKER. One who slaughters useless or diseased animals or deals in such. Cent. Dict. A regular occupation in London and other large cities, regulated by act of parliament August 18, 1911.

KNAVE. A false, dishonest, or deceitful person. This signification of the word has arisen by a long perversion of its original meaning, which was merely servant or attendant.

To call a man a knave has been held to be actionable; 1 Rolle, Abr. 52; 1 Freem. 277; Harding v. Brooks, 5 Pick. (Mass.) 244.

KNEEL. To bend the knees in worship without resting on them is to kneel. 36 L. J. Ecc. 10.

KNIGHT. In English Law. The next personal dignity after the nobility.

In the administration of royal justice, much of the work was formerly done by the knights; as for the more solemn, ancient, and decisive processes. To swear to a question of possession, free and lawful men were required, but to give the final and conclusive verdict about a matter of right, knights were necessary. In administrative law, therefore, knights were liable to special burdens, but in no other respect did he differ from the mere free man; 1 Poll. & Maitl. 394.

Of knights there are several orders and degrees. The first in rank are knights of the Garter, instituted by Edward III. in 1344; next follows, a knight banneret; then come knights of the Bath instituted by Henry IV., and revived by George I.; and they were so called from a custom of bathing the night before their creation. The other orders are the Thistle, St. Patrick, St. Michael and St. George, the Star of India, and the Indian Empire. The last order are knights bachelors, who, though the lowest, are yet the most ancient, order of knighthood; for we find that King Alfred conferred this order upon his son Athelstan. 1 Bla. Com. 403. These are sometimes called knights of the chamber, being such as are made in time of peace, and so called because knighted in the king's chamber, and not in the field. Co. 2d Inst. 666. Knights were called *equites*, because they always served on horseback; *aurati*, from the gilt spurs they wore; and *milites*, because they formed the royal army, in virtue of their feudal tenures.

Knights have precedence next after baronets; the wife of a knight has the legal designation of *Dame*, for which *Lady* is usually substituted. Cent. Dict.

See BARONET.

KNIGHT-MARSHAL. See MARSHALSEA.

KNIGHT'S FEE was anciently so much of an inheritance in land as was sufficient to maintain a knight; and every man possessed of such an estate was obliged to be knighted, and attend the king in his wars, or pay a pecuniary sum in lieu thereof, called *escuage*. In the time of Henry II. the estate was estimated at twenty pounds a year; but Lord Coke, in his time, states it to be an estate of six hundred and eighty acres. Co. Litt. 69 *a*. See 1 Poll. & Maitl. 232.

KNIGHT'S SERVICE. Upon the Norman conquest, all the lands in England were divided into knight's fees, in number above sixty thousand; and for every knight's fee, a knight was bound to attend the king in his wars forty days in a year, in which space of time a campaign was generally finished. If a man only held half a knight's fee, he was only bound to attend twenty days; and so in proportion. But this personal service, in process of time, grew into pecuniary commutations, or aids; until at last, with the military part of the feudal system, it was abolished at the restoration, by the statute of 12 Car. II. c. 24. 1 Bla. Com. 410; 2 *id.* 62; Will. Real. Pr. 144; 1 Poll. & Maitl. 230.

KNOCKED DOWN. A phrase used with reference to an auction, when the auctioneer by the fall of his hammer, or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid, according to the terms of the sale. Sherwood v. Reade, 7 Hill (N. Y.) 439.

See AUCTION.

KNOW. To have knowledge; to possess information, instruction, or wisdom. State v. Ransberger, 106 Mo. 135, 17 S. W. 290.

"It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly if he be a reasonable being." Strong, J., in Shaw v. R. Co., 101 U. S. 557, 25 L. Ed. 892.

KNOW ALL MEN BY THESE PRESENTS. See PRESENTS.

KNOWINGLY. In a statute imposing a penalty upon any one who shall knowingly sell, supply, etc., actual personal knowledge. Verona Cent. Cheese Factory v. Murtaugh, 4 Lans. (N. Y.) 17. In an indictment, a charge that one willfully testified falsely, includes the assertion that he knowingly so testified; State v. Stein, 48 Minn. 466, 51 N. W. 474. The word "knowingly," or "well knowing," will supply the place of a positive averment, in an indictment or declaration, that the defendant knew the facts subsequently stated; if notice or knowledge be unnecessarily stated, the allegation may be rejected as surplusage. See Com. Dig. *Indictment* (G 6); Com. v. Kirby, 2 Cush. (Mass.) 577; 2 East 452; 1 Chitty, Pl. 367.

KNOWLEDGE. Information as to a fact. The act of knowing; clear perception of the truth; firm belief; information. Knowledge "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties." State v. Ransberger, 106 Mo. 135, 17 S. W. 290. Where in a charge in a homicide case the court used the expression "knowledge to explain," circumstances proven "tending to show that the defendant was connected with the homicide," it was held to be synonymous with "ability to explain"; Adams v. State, 28 Fla. 511, 10 South. 106.

"Knowledge is information and information knowledge." 1 Heming 1; 5 Esp. 53.

"Absolute knowledge can be had of but few things." Story v. Buffum, 8 Allen (Mass.) 35.

"In a legal sense it may be classified as positive and imputed—imputed, when the means of knowledge exist, known and accessible to the party, and capable of communicating positive information. When there is knowledge, notice, as legally and technically understood, becomes immaterial. It is only material when, in the absence of knowledge, it produces the same results. However closely actual notice may, in many instances, approximate knowledge and constructive notice may be its equivalent in effect, there may be actual notice without knowledge; and when constructive notice is made the test to determine priorities of right, it may fall far short of knowledge and be sufficient." Cleveland Woolen Mills v. Sibert, 81 Ala. 140, 1 South. 773.

Many acts are perfectly innocent when the party performing them is not aware of certain circumstances attending them; for example, a man may pass a counterfeit note, and be guiltless, if he did not know it was so; he may receive stolen goods, if he were not aware of the fact that they were stolen. In these and the like cases it is the guilty knowledge which makes the crime.

Such guilty knowledge is made by the statute a constituent part of the offence; and therefore it must be averred and proved as such. But it is in general true, and may be considered as a rule almost necessary to the restraint and punishment of crimes, that when a man does that which by the common law or by statute is unlawful, and in pursuing his criminal purpose does that which constitutes another and different offence, he shall be held responsible for all the legal consequences of such criminal act. When a man, without justifiable cause, intends to wound or maim another, and in doing it kills him, it is murder, though he had no intention to take life. It is true that in the commission of all crimes a guilty purpose, a criminal will and motive, are implied. But, in general, such bad motive or criminal will and purpose, that disposition of mind and heart which is designated by the generic and significant term "malice," is implied from the criminal act itself. But if a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act or concur in it, it is matter of defence, to be averred and proved on his part, if it does not arise out of the circumstances of the case adduced on the part of the prosecution. Per Shaw, C. J., in Com. v. Elwell, 2 Metc. (Mass.) 192, 35 Am. Dec. 398. Thus, it is not necessary, in an indictment against an unmarried man for adultery with a married woman, to aver that he knew, at the time when the offence was committed, that she was a married woman; nor is it necessary to prove such knowledge at the trial; Com. v. Elwell, 2 Metc. (Mass.) 190, 35 Am. Dec. 398.

See, as to the proof of guilty knowledge, 1 B. & H. Lead. Cr. Cas. 185–191. See INTENT; IGNORANCE. As to the doctrine of *imputed knowledge*, see NOTICE.

KNOWN HEIRS. In a statute relating to the sale of property of unknown heirs, it has been held to mean those persons who are known, and whose right to inherit, or the extent of whose right, to inherit, is dependent on the non-existence of other persons nearer or as near as the ancestor in the line of descent. People v. Ryder, 65 Hun 175, 19 N. Y. Supp. 977.

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